Principles, Definitions and Model Rules of European Private Law

Draft Common Frame of Reference (DCFR)

Prepared by the
Study Group on a European Civil Code
and the
Research Group on EC Private Law (Acquis Group)
Based in part on a revised version of the Principles of
European Contract Law

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General

1. DCFR and CFR distinguished. In this volume the Study Group on a European Civil Code (the 'Study Group') and the Research Group on Existing EC Private Law (the 'Acquis Group') present the revised and final academic Draft of a Common Frame of Reference (DCFR). It contains Principles, Definitions and Model Rules of European Private Law. Among other goals, its completion fulfils an obligation to the European Commission undertaken in 2005. The Commission´s Research Directorate-General funded part of the work. One purpose of the text is to serve as a draft for drawing up a 'political' Common Frame of Reference (CFR) which was first called for by the European Commission's 'Action Plan on A More Coherent European Contract Law' of January 2003.[1] As is explained more precisely below, the DCFR and the CFR must be clearly distinguished. The DCFR serves several other important purposes.

2. Revision of the interim outline edition. A year ago, the DCFR was published for the first time in an interim outline edition.[2] This edition is a revision in three main ways. First, the interim edition did not contain model rules in Book IV on loan contracts and contracts for donation, nor in Books VIII to X on acquisition and loss of ownership in goods, on proprietary security rights in movable assets, and on trusts. They have now been included. Secondly, one of the purposes of publishing an interim edition was to provide an opportunity for interested parties to comment on the draft and make suggestions for improvement. The public discussion of the interim outline edition prompted the research groups to revise at various places the text which had already been published. The research groups are grateful to all who have taken part in that critical evaluation, whether in publications, at conferences or in personal correspondence, and who have contributed to the improvement of the text. Naturally, not all the suggestions we received have been acted upon: some, for example, advocated solutions which had already been rejected after full discussion by the Study Group or the Acquis Group. But many suggestions for improvement have been gratefully adopted. Further revisions resulted from our own further reflections and discussions, the results of the research conducted by the evaluative teams in the network and the conclusions which we drew from

[1] COM (2003) final, OJ C 63/1 (referred to below as Action Plan).

[2] von Bar/Clive/Schulte-Nölke and Beale/Herre/Huet/Schlechtriem/Storme/Swann/Varul/Veneziano/Zoll, Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (Munich 2008).

the process of translating the first three Books into French.[3] That applies in particular to Books I-III, but is not confined to them. (For more details, see paras 26-33). Thirdly, this revised edition contains an additional self-contained section in which we set out four underlying principles underpinning the DCFR. This draws on the *Principes directeurs du droit Européen du contrat*, the subject-matter of an independent research project, which published its output in 2008.[4] The conclusions of the *economic impact group,* which analysed particular rules of the DCFR from an economic perspective, were also made available to us.

3. Paperback and hardcover editions of the final DCFR The European Commission received in December 2008 the material published here along with an explanatory and illustrative commentary on each model rule. The Commission has also received the extensive comparative legal material which has been gathered and digested in the past years. The entire work will be published in hardcover book form later in the year. At the same time we considered that the publication of a compact and inexpensive second paperback edition would help promote the wider dissemination and discussion of these texts**.** The complete edition is voluminous. It will invite study at one's desk at home or in the office, but it will be too bulky to pack into luggage taken to meetings or conferences. That is another reason for also publishing a second edition in outline form, essentially Articles only.

4. An academic, not a politically authorised text. It must be stressed that what we refer to today as the DCFR originates in an initiative of European legal scholars. It amounts to the compression into rule form of decades of independent research and co-operation by academics with expertise in private law, comparative law and European Community law. The independence of the two Groups and of all the contributors has been maintained and respected unreservedly at every stage of our labours. That in turn has made it possible to take on board many of the suggestions received in the course of a large number of meetings with stakeholders and other experts throughout the continent. The two Groups alone, however, bear responsibility for the content of this volume. In particular, it does not contain a single rule or definition or principle which has been approved or mandated by a politically legitimated body

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[3] By Professor Jacques Ghestin (Paris); published at http://www.fondation-droitcontinental.org/Documents/Traduc-vBar-livre%20I-II-III-%2008-2008.doc.

[4] Fauvarque-Cosson/Mazeaud and Wicker/Racine/Sautonie-Laguionie/Bujoli (eds.), Principes contractuels commun. Projet de cadre commun de référence (Paris 2008); Fauvarque-Cosson/Mazeaud and Tenenbaum, Terminologie contractuelle commune. Projet de cadre commun de référence (Paris 2008). These studies have also been published in English: European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules. Produced by Association Henri Capitant des Amis de la Culture Juridique Française and Société de Législation Comparée. Edited by Fauvarque-Cosson and Denis Mazeaud. Prepared by Racine, Sautonie-Laguionie, Tenenbaum and Wicker (Munich 2008).

at European or national level (save, of course, where it coincides with existing EU or national legislation). It may be that at a later point in time the DCFR will be carried over at least in part into a CFR, but that is a question for others to decide. This introduction merely sets out some considerations which might usefully be taken into account during the possible process of transformation.

5. About this Introduction. This introduction explains the purposes pursued in preparing the DCFR and outlines its contents, coverage and structure. It describes the amendments to the 2008 interim edition and elucidates the relationship between the DCFR and the publications which have already appeared or will appear in the course of the preparatory work. Finally, it sketches out how the DCFR might flow into the development of the CFR.

The purposes of the DCFR

6. A possible model for a political CFR. As already indicated, this DCFR is (among other things) a possible model for an actual or 'political' Common Frame of Reference (CFR). The DCFR presents a concrete text, hammered out in all its detail, to those who will be deciding questions relating to a CFR. A 'political' CFR would not necessarily, of course, have the same coverage and contents as this academic DCFR. The question of which functions the DCFR can perform in the development of the CFR is considered under paragraphs 59-74 of this introduction.

7. Legal science, research and education. However, the DCFR ought not to be regarded merely as a building block of a 'political' Common Frame of Reference. The DCFR will stand on its own and retain its significance whatever happens in relation to a CFR. The DCFR is an academic text. It sets out the results of a large European research project and invites evaluation from that perspective. The breadth of that scholarly endeavour will be apparent when the full edition is published. Independently of the fate of the CFR, it is hoped that the DCFR will promote knowledge of private law in the jurisdictions of the European Union. In particular it will help to show how much national private laws resemble one another and have provided mutual stimulus for development - and indeed how much those laws may be regarded as regional manifestations of an overall common European legacy. The function of the DCFR is thus separate from that of the CFR in that the former serves to sharpen awareness of the existence of a European private law and also (via the comparative notes that will appear in the full edition) to demonstrate the relatively small number of cases in which the different legal systems produce substantially different answers to common problems. The DCFR may

furnish the notion of a European private law with a new foundation which increases mutual understanding and promotes collective deliberation on private law in Europe.

8. A possible source of inspiration. The drafters of the DCFR nurture the hope that it will be seen also outside the academic world as a text from which inspiration can be gained for suitable solutions for private law questions. Shortly after their publication the Principles of European Contract Law (PECL)[5], which the DCFR (in its second and third Books) incorporates in a partly revised form (see paragraphs 49-53), received the attention of many higher courts in Europe and of numerous official bodies charged with preparing the modernisation of the relevant national law of contract. This development is set to continue in the context of the DCFR. It will have repercussions for reform projects within the European Union, at both national and Community law levels, and beyond the EU. If the content of the DCFR is convincing, it may contribute to a harmonious and informal Europeanisation of private law.

Contents of the DCFR

9. Principles, definitions and model rules. The DCFR contains 'principles, definitions and model rules'. The title of this book thus follows the scheme set out in the European Commission's communications (referred to below in paragraph 59) and in our contract with the Commission. The notion of 'definitions' is reasonably clear. The notions of 'principles' and 'model rules', however, appear to overlap and require some explanation.

10. Meaning of 'principles'. The European Commission's communications concerning the CFR do not elaborate on the concept of 'principles'. The word is susceptible to different

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[5] Ole Lando and Hugh Beale (eds.), Principles of European Contract Law Parts I and II. Prepared by the Commission on European Contract Law (The Hague 1999); Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (eds.), Principles of European Contract Law Part III (The Hague, London and Boston 2003). Translations are available in French (Principes du droit européen du contract. Version française préparée par Georges Rouhette, avec le concours de Isabelle de Lamberterie, Denis Tallon et Claude Witz, Droit privé comparé et europeéen, vol. 2, Paris 2003); German (Grundregeln des Europäischen Vertragsrechts, Teile I und II, Kommission für Europäisches Vertragsrecht. Deutsche Ausgabe von Christian von Bar und Reinhard Zimmermann, München 2002; Grundregeln des Europäischen Vertragsrechts Teil III, Kommission für Europäisches Vertragsrecht. Deutsche Ausgabe von Christian von Bar und Reinhard Zimmermann, München 2005); Italian (Commissione per il Diritto Europeo dei Contratti. Principi di Diritto Europeo dei Contratti, Parte I & II, Edizione italiana a cura di Carlo Castronovo, Milano 2001; Commissione per il Diritto Europeo dei Contratti. Principi di Diritto Europeo dei Contratti, Parte III. Edizione italiana a cura di Carlo Castronovo, Milano 2005) and Spanish (Principios de Derecho Contractual Europeo, Partes I y II. Edición española a cargo de Pilar Barres Bennloch, José Miguel Embid Irujo, Fernando Martínes Sanz, Madrid 2003). Matthias Storme translated the articles of Parts I-III into Dutch (Tijdschrift voor privaatrecht 2005, 1181-1241); M.-A. Zachariasiewicz and J. Bełdowski translated the PECL articles of Parts I and II (Kwartalnik Prawa Prywatnego 3/2004, 814-881) and J. Bełdowski and A. Kozioł the articles of Part III (Kwartalnik Prawa Prywatnego 3/2006, 847-859) into the Polish language, Christian Takoff Parts I-III (Targovsko pravo 1/2005, 15-85) into the Bulgarian language.

interpretations. It is sometimes used, in the present context, as a synonym for rules which do not have the force of law. This is how it appears to be used, for example, in the 'Principles' of European Contract Law (PECL), which referred to themselves in article 1:101(1) as 'Principles … intended to be applied as general *rules* of contract law in the European Union' (italics added). The word appears to be used in a similar sense in the Unidroit Principles of International Commercial Contracts.[6] In this sense the DCFR can be said to consist of principles and definitions. It is essentially of the same nature as those other instruments in relation to which the word 'principles' has become familiar. Alternatively, the word 'principles' might be reserved for those rules which are of a more general nature, such as those on freedom of contract or good faith. In this sense the DCFR's model rules could be said to include principles. However, in the following paragraphs we explore a third meaning.

11. Fundamental principles. The word 'principles' surfaces occasionally in the Commission communications mentioned already, but with the prefix 'fundamental' attached. That suggests that it may have been meant to denote essentially abstract basic values. The model rules of course build on such fundamental principles in any event, whether they are stated or not. There can be no doubt about their importance. Private law is one of those fields of law which are, or at least should be, based on and guided by deep-rooted principles. To some extent such fundamental principles are a matter of interpretation and debate. It is clear that the DCFR does not perceive private law, and in particular contract law, as merely the balancing of private law relations between equally strong natural and legal persons. But different readers may have different interpretations of, and views on, the extent to which the DCFR suggests the correction of market failures or contains elements of 'social justice' and protection for weaker parties.

12. The approach taken to fundamental principles in the Interim Outline Edition. In the Introduction to the Interim Outline Edition we asked readers to consider whether it would be useful to include in the DCFR a separate part containing a statement of basic principles and values underlying the model rules. We suggested that this part could possibly be formulated as recitals, i.e. an introductory list of reasons for the essential substance of the following text, or in a discursive preface. To give some idea of what a statement of underlying principles might look like, primarily in relation to contract law, some possible fundamental principles

[6] Unidroit Principles of International Commercial Contracts 2004 (Rome 2004), Preamble (Purpose of the Principles) paragraph (1): "These Principles set forth general rules for international commercial contracts".

were outlined.[7] The statement of principles in the Interim Outline Edition listed no fewer than fifteen items – justice; freedom; protection of human rights; economic welfare; solidarity and social responsibility; establishing an area of freedom, security and justice; promotion of the internal market; protection of consumers and others in need of protection; preservation of cultural and linguistic plurality; rationality; legal certainty; predictability; efficiency; protection of reasonable reliance; and the proper allocation of responsibility for the creation of risks.[8] These were not ranked in any order of priority. It was stressed that the principles would inevitably conflict with each other and that it was the function of the model rules to find an appropriate balance.[9] Feedback was mixed. Some commentators welcomed the express mention of non-mercantile values like human rights and solidarity and social responsibility. Others expressed doubts as to the practical value of such a large, diverse and non-prioritised list. There were powerful calls for full account to be taken of the work done on governing principles by the Association Henri Capitant and the Société de législation comparée[10] as part of the 'CoPECL Network of Excellence' working on the CFR project.[11] To that we now turn.

13. The approach taken by the *Principes directeurs*. The Association Henri Capitant and the Société de législation comparée[12] published their *Principes directeurs du droit européen du contrat* early in 2008. We will refer to these as the *Principes directeurs* to distinguish them from the principles we later discuss. The evaluative group charged with this project approached their task by distilling out the main principles underlying the Principles of European Contract Law, and comparing them with equivalent principles from a number of national systems and international and European instruments.[13] They identified three main principles – *liberté contractuelle, sécurité contractuelle et loyauté contractuelle* – contractual freedom, contractual security and contractual "loyalty" – each with sub-principles. The word "loyalty" is within quotation marks because it does not fully capture the French word *loyauté* in this context. The key elements are good faith, fairness and co-operation in the contractual relationship. *Loyauté* comprises a duty to act in conformity with the requirements of good

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[7] See IOE Introduction at paragraphs 23-36.
[8] See IOE Introduction at paragraphs 22 and 35.
[9] IOE Introduction paragraph 23.
[10] See note 4 above.
[11] Joint Network on European Private Law (CoPECL: Common Principles of European Contract Law), Network of Excellence under the 6th EU Framework Programme for Research and Technological Development, Priority 7 – FP6-2002-CITIZENS-3, Contract N° 513351 (co-ordinator: Prof. *Hans Schulte-Nölke*, Osnabrück).
[12] The *Principes* form part of the book cited in note 4 above.
[13] The national systems used were mainly the Dutch, English, French, German, Italian and Spanish. The international instruments used (in addition to the PECL) were mainly the UN Convention on Contracts for the International Sale of Goods (CISG), the Unidroit Principles on International Commercial Contracts (2004) and the draft European Code of Contract produced by the Academy of European Private Law based in Pavia.

faith and fair dealing, from the negotiation of the contract until all of its provisions have been given effect, a prohibition on using contractual rights and terms in a way which does not respect the objective that justified their inclusion in the contract and a duty to co-operate so far as necessary for the performance of the contractual obligations: it also requires a party not to act in contradiction of prior declarations or conduct on which the other party might have legitimately relied.[14] The principles and sub-principles were expressed in eleven draft Articles drafted in such a way as to be suitable for insertion in one block at the beginning of model rules. The approach adopted by the evaluative group is very attractive. The principles are expressed in an elegant, resonant and focussed way. They are backed up by persuasive analysis and discussion. However, we think that the approach, and to some extent the substance, has to be slightly different for the purposes of the DCFR. There are two reasons for this. First, the *Principes directeurs* relate only to contract law. For the purposes of the DCFR a statement of underlying principles has to be wide enough to cover also non-contractual obligations and aspects of property law. Secondly, it does not seem appropriate to incorporate the governing principles as a block of actual model rules at the beginning of the DCFR. They function at a different level. They are a distillation from the model rules and have a more descriptive function. They sometimes overlap and often conflict with each other. Almost all of the sub-principles, it is true, have direct counterparts in Articles of the DCFR but those Articles appear in, and are adapted to, particular contexts where they may be subject to qualifications and exceptions. It would weaken the DCFR to extract them and put them in one group at the beginning: it would clearly be undesirable to duplicate them. Moreover those Article are by no means the only ones which reflect and illustrate underlying principles. A discursive approach seems more appropriate for an introductory statement of principles of this type. This was the clear preference of the Compilation and Redaction Team and the Co-ordinating Committee of the Study Group when they discussed this matter in April and June 2008.

14. Lessons learned from the *Principes directeurs*. Nonetheless lessons can be learned from the *Principes directeurs*. The most important is that the many fundamental principles listed in the introduction to the Interim Outline Edition can be organised and presented in a more effective way. A small group of them (corresponding to some extent to those identified in the *Principes directeurs*) can be extracted and discussed at greater length. These are the principles which are all-pervasive within the DCFR. They can be detected by looking into the model

[14] Op. cit fn 4 above at p. 198.

rules. They are underlying principles. They furnished grounds for arguments about the merits of particular rules. The remaining principles mentioned in the introduction to the Interim Outline Edition are generally of a rather high political nature. They could be said to be overriding rather than underlying. Although some of them are strongly reflected in parts of the DCFR, they are primarily relevant to an assessment from the outside of the DCFR as a whole. Before commenting briefly on these two categories of principles we note only that another lesson to be learned from the *Principes directeurs* is that there are different ways of dealing with fundamental principles in an instrument like the DCFR. It will be for others to decide how if at all to deal with fundamental principles in an official CFR. One obvious technique would be to use recitals, but the form and content of these would depend on the form and content of the instrument. It would be premature to adopt that technique here.

15. Underlying principles. For the broader purposes of the DCFR we suggest that the underlying principles should be grouped under the headings of freedom, security, justice and efficiency (rather than *liberté contractuelle, sécurité contractuelle et loyauté contractuelle* as in the *Principes directeurs*). This does not mean that the principle of contractual "loyalty" is lost. To a large extent it is covered by the wider principle of justice, without which many of the rules in the DCFR cannot be satisfactorily explained. To some extent it is simply an aspect of contractual security viewed from the standpoint of the other party.[15] One party's contractual security is increased by the fact that the other is expected to co-operate and act in accordance with the requirements of good faith and fair dealing. Nothing is more detrimental to contractual security than a contractual partner who does not do so: a cheating and untrustworthy partner, and even an unco-operative partner, may be worse than no partner at all. The heading of efficiency is added because, although this is often an aspect of freedom (freedom from unnecessary impediments and costs), it cannot always be accommodated under one of the other headings. These four principles of freedom, security, justice and efficiency are developed and illustrated at length in the section on underlying principles which immediately precedes the model rules.

16. Overriding principles. Into the category of "overriding principles" of a high political nature we would place the protection of human rights, the promotion of solidarity and social responsibility, the preservation of cultural and linguistic diversity, the protection and promotion of welfare and the promotion of the internal market. Freedom, security, justice and efficiency also have a role to play as overriding principles. They have a double role: the two

[15] This overlap is recognised by the *Principes directeurs* themselves. See Article 0:201, alinea 2.

categories overlap. So they are briefly mentioned here too as well as being discussed at greater length later.

17. Protection of human rights. The DCFR itself recognises the overriding nature of this principle. One of the very first Articles provides that the model rules are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms.[16] However, this is an overriding principle which is also reflected quite strongly in the content of the model rules themselves, most notably in the rules on non-discrimination in Books II and III[17] and in many of the rules in Book VI on non-contractual liability arising out of damage caused to another.[18] These rules could also be seen, of course, as examples of rules which foster justice and preserve and promote security. Principles overlap as well as conflict.

18. Promotion of solidarity and social responsibility. The promotion of solidarity and social responsibility is generally regarded as primarily the function of public law (using, for example, criminal law, tax law and social welfare law) rather than private law. However, the promotion of solidarity and social responsibility is not absent from the private law rules in the DCFR. In the contractual context the word "solidarity" is often used to mean loyalty or security. It is of great importance to the DCFR. The principle of solidarity and social responsibility is also strongly reflected, for example, in the rules on benevolent intervention in another's affairs, which try to minimise disincentives to acting out of neighbourly solidarity.[19] It is also reflected in the rules on donation, which try to minimise disincentives to charitable giving (an expression of solidarity and social responsibility which was at one time all-important and is still extremely important).[20] Moreover some of the rules in Book VI on non-contractual liability for damage caused to another protect against types of behaviour which are harmful for society in general.[21] Many of these rules could also be regarded as examples of rules which promote security.

19. Preservation of cultural and linguistic diversity. Nothing could illustrate better the point that fundamental principles conflict than the juxtaposition of this item with the preceding one and the two following ones. In a pluralistic society like Europe it is manifest that the preservation of cultural and linguistic diversity is an all-important principle, vital to the very

[16] I.–1:102(2).
[17] See II.–2:101 to II.–2:105 and III.–1:105.
[18] See, in particular, VI.–2:201 (Personal injury and consequential loss); VI.–2:203 (Infringement of dignity, liberty and privacy) and VI.–2:206 (Loss upon infringement of property and lawful possession).
[19] Book V.
[20] Book IV, Part H.
[21] VI.–2:209; see also VI-3:202, VI-3:206 and VI.–5:103.

existence of the Union. But where a particular aspect of human life has not only a cultural content but also a strong functional content, this principle may conflict with the principles of solidarity, the protection and promotion of welfare and the promotion of the internal market. Private law is a prime example. Within the rules of the DCFR itself there are some reflections of the principle of respect for cultural and linguistic diversity.[22] However, the impetus for the DCFR in its present form and for its present purposes came from, on the one hand, recognition of cultural and linguistic diversity and, on the other, concerns about the harmful effects for the internal market (and consequently for the welfare of European citizens and businesses) of an excessive diversity of contract law systems. The CFR project is not an attempt to create a single law of the whole of Europe. Rather, the purpose of the CFR as a legislator's guide or toolbox is to enable the meaning of European legislation to be clear to people from diverse legal backgrounds. Moreover, existing cultural diversity was respected by the participation on an equal footing of lawyers from all European legal cultures in the preparation of the DCFR and by the serious attempt to reflect, as far as possible, all legal systems of the EU Member States in the Notes. This resulted in unity out of diversity, at a soft-law level. Linguistic diversity will be respected by ensuring that the DCFR is translated as soon as possible into as many European languages as possible.

20. Protection and promotion of welfare. The Interim Outline Edition referred to "economic welfare" but there is no reason to confine this principle to only one aspect of welfare. This principle embraces all or almost all the others. The whole purpose and raison d'être of the DCFR could be said to derive from this principle. If it does not help to promote the welfare of the citizens and businesses of Europe – however indirectly, however slowly, however slightly – it will have failed. Although all-embracing, this principle is too general to be useful on its own.

21. Promotion of the internal market. This principle is really a sub-head of the last. The most obvious way in which the welfare of the citizens and businesses of Europe can be promoted by the DCFR is by the promotion of the smooth functioning of the internal market. Whether this is just by improving the quality, and hence the accessibility and usability, of

[22] See e.g. II.–1:104(2) (potential applicability of local usages); II.–3:102(2)(c) and (3) (language used for communication when business is marketing to consumers); II.–9:109 (language to be used for communications relating to the contract); IV.A.–6:103(1)(e) (language for consumer guarantee document); IX.–3:310(1)(d) (language to be used for declaration to proposed European register of proprietary security); IX.–3:319(2) (language to be used for request to secured creditor for information about entry in register) and IX.–7:210(3) (language to be used for a type of notice by secured creditor).

present and future EU legislation or whether it is by the development of one or more optional instruments are political decisions.

22. Freedom, security, justice and efficiency. As underlying principles within the DCFR, these will be discussed and developed later. They also have a role to play as overriding principles for the purposes of assessment from the outside. The DCFR as a whole falls to be assessed very largely by the criterion of how well it embodies and balances these principles. At the level of overriding political principles, reference may also be made to the EU specific aims of establishing an area of freedom, security and justice and promoting the free movement of goods, persons, services and capital between the Member States. If the political will were there, the DCFR could make a contribution to the achievement of these aims.

23. Definitions. 'Definitions' have the function of suggestions for the development of a uniform European legal terminology. Some particularly important concepts are defined for these purposes at the outset in Book I. For other defined terms DCFR I.–1:108 provides that 'The definitions in the Annex apply for all the purposes of these rules unless the context otherwise requires.' This expressly incorporates the list of terminology in the Annex as part of the DCFR. This drafting technique, by which the definitions are set out in an appendage to the main text, was chosen in order to keep the first chapter short and to enable the list of terminology to be extended at any time without great editorial labour. The substance is partly distilled from the *acquis*, but predominantly derived from the model rules of the DCFR. If the definitions are essential for the model rules, it is also true that the model rules are essential for the definitions. There would be little value in a set of definitions which was internally incoherent. The definitions can be seen as components which can be used in the making of rules and sets of rules, but there is no point in having components which are incompatible with each other and cannot fit together. In contrast to a dictionary of terms assembled from disparate sources, the definitions in the Annex have been tested in the model rules and revised and refined as the model rules have developed. Ultimately, useful definitions cannot be composed without model rules and useful model rules can hardly be drafted without definitions.

24. Model rules. The greatest part of the DCFR consists of 'model rules'. The adjective 'model' indicates that the rules are not put forward as having any normative force but are soft law rules of the kind contained in the Principles of European Contract Law and similar publications. Whether particular rules might be used as a model for legislation, for example,

for the improvement of the internal coherence of the *acquis communautaire* is for others to decide.

25. Comments and notes. In the full edition the model rules will be supplemented by comments and notes. The comments will elucidate each rule, will often illustrate its application by means of examples, and will outline the critical policy considerations at stake. The notes will reflect the legal position in the national legal systems and, where relevant, the current Community law. International instruments such as the UN Convention on Contracts for the International Sale of Goods (CISG) and the Unidroit Principles of International Commercial Contracts 2004 are also mentioned where appropriate. How the notes were assembled is described in the section on the academic contributors and our funders.

Revision of the interim outline edition

26. Overview. This final edition of the DCFR deviates in a number of respects from the Interim Outline Edition of 2008. We referred earlier to the new Books that are included and to the statement of principles which underlie the model rules, now placed in a separate section between this introduction and the model rules. Here we mention some of the more detailed changes to the Articles published in the Interim Outline Edition. One general change has been the elimination of a number of redundant provisions. Another general change has been the expansion of the expression "goods and services" in a number of *acquis*-based provisions to include assets other than "goods" in the narrow sense of corporeal movables in which the word is defined in the DCFR. Finally, the catalogue of definitions has been revised and added to, with material which was misplaced there either expunged or, on occasion, upgraded to the model rules. Here we have frequently taken up points made in public discussion of the text. Although it would be excessive to give details of every drafting or editing change made since the publication of the Interim Outline Edition, a few of the more significant changes will now be mentioned.

27. Book I. The main changes here are the inclusion of some provisions taken from elsewhere in the Interim Outline Edition. Of particular note is I.–1:103 (Good faith and fair dealing). Paragraph (1) is a more developed version of a definition which formerly appeared only in the Annex of definitions. It is included here because of its importance. Paragraph (2), on inconsistent actings, has been inserted following a recommendation by the evaluative group formed by the Association Henri Capitant and the Société de Législation Comparée. The text of the former Annex 2 (Computation of time) has been integrated into Book I: see I.–1:110.

28. Book II. The definition of "contract" in II.–1:101(1) has been shortened. It now refers to "an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect." The definition formerly contained additional words designed to cater for the case where there was no subjective intention but an agreement was carved out of what the parties said or did. However, that point is sufficiently provided for by a later Article (II.–4:102) and does not need to be repeated here. There is a similar change in the definition of "juridical act" in II.–1:101(2). The earlier definition had been criticised by commentators on the ground that it did not make the element of intention necessary and was therefore too wide. Again, the point that intention may have to be objectively ascertained is sufficiently covered by a later Article (II.–4:302). A reference to the rules on good faith and fair dealing in II.–1:102 (Party autonomy) gave rise to confusion and has been deleted. The words "promise or undertaking" formerly in II.–1:103 (Binding effect) were criticised as unnecessary duplication. "Undertaking" alone is now used. A new paragraph (3) has been added to II.–1:106 (Form). This generalises a rule which originally appeared in the Chapter on donation. There are numerous changes in Chapter 3 in particular with regard to information duties, which reflect further work done by the Acquis Group and also react to many comments received. Of particular note is the provision on specific duties for businesses marketing to consumers (II.–3:102), where paragraph (1) has been reformulated in order to reflect the underlying acquis more closely. The provisions on sanctions for breach of information duties have been refined and a new Article (II.–3:501) on liability for damages for breach of a duty imposed by Chapter 3 has been included. The *contra proferentem* rule in II.–8:103 has been modified and expanded, following a suggestion by the evaluative group formed by the Association Henri Capitant and the Société de Législation Comparée.

29. Book III. A new generalised provision on tacit prolongation (III.–1:111) has been inserted, again following a suggestion by the evaluative group formed by the Association Henri Capitant and the Société de Législation Comparée. A new paragraph (3) has been inserted in III.–2:102 (Time of performance) on the recommendation of the Acquis Group and a new Article has been inserted (III.–3:205) to make it clear that when a supplier replaces a defective item the supplier has a right and an obligation to take back the replaced item. Some minor adjustments have been made to the rules on the effects of termination for non-performance of contractual obligations (Chapter 3, Section 5, Sub-section 3). New rules on interest in commercial contracts have been inserted on the recommendation of the Acquis Group (III.–3:710 and III.–3:711). In Chapter 5 the rule on the requirements for an assignment (III.–5:104) has been modified to bring it into line with the equivalent rule in the Book on the

transfer of ownership of corporeal movables and, for the same reason, a new Article has been added on the effects on an assignment of initial invalidity, subsequent avoidance, withdrawal, termination and revocation (III.–5:118). The rule on the effect of a contractual prohibition of assignment (III.–5:108) has been firmed up and part of it removed and generalised in a new rule on competition between an assignee and an assignor receiving the proceeds of performance (III.–5:122). Chapter 5 has been expanded by the inclusion of Articles on the substitution or addition of a new debtor in such a way that the original debtor is not discharged (Chapter 5, Section 2). A new Article has been added to enable a principal to take over the rights of an agent against a third party if the agent becomes insolvent (III.–5:401) and to give the third party, in such a case, an option to hold the principal liable for the agent's obligations under the contract ((III.–5:402). These rules will be particularly relevant in cases of so-called indirect representation where the agent contracts in the agent's own name. As a consequence of some of these changes Chapter 5 has been renamed "Change of parties". The Article on the requirements for set-off (III.–6:102) has been redrafted after it was drawn to our attention that there was a difference in substance between the English and French texts in PECL, and it has been expanded to make it clear that the rights being set off against each other must both be available for that purpose, and not for example frozen on the application of an arresting creditor. And, finally, two of the Articles on prescription (III.–7:302 and III.–7:303) have been slightly expanded partly to take account of developments in relation to mediation.

30. Book IV. The main change in Book IV has been the elimination of redundant or overlapping provisions, including some provisions which repeated the substance of rules already found in Books II or III. The presence of these redundant provisions had been rightly criticised by commentators on the Interim Outline Edition. Most of these provisions had a proper role to play in the self-standing PEL Books in order to complete the picture but are unnecessary in the DCFR. In a few cases, new or revised rules in earlier Books (e.g. on tacit prolongation and interpretation against the dominant party) enabled provisions in Book IV which were formerly necessary to be now deleted. A slight adjustment has been made in IV.A.–2:305 (Third party rights or claims in general) in order to bring the text into line with the agreed policy as expressed in the comments. Several changes have been made in the Chapter on mandate. These were made partly to make it more clear that the chapter applies not only to contracts for the conclusion of a contract for the principal but also to contracts, for example with estate agents or brokers of various kinds, for the negotiation or facilitation of a contract to be concluded by the principal and, given that scope, partly in the interests of more

precise terminology. For example, an estate agent with authority to negotiate but not conclude a contract for the principal is more accurately described as an "agent" than as a "representative", which was the word used in the Interim Outline Edition.

31. Books V-VII. Only minor drafting changes have been made in these Books.

32. Books VIII-X. Books VIII, IX and X were prepared in the same manner as the other books of the DCFR on the basis of deliberation in working teams, advisory councils and plenary meetings. However, for reasons primarily of time, the Compilation and Redaction Team was not able to give these books the same complete scrutiny as it was able to bestow on the others.

33. Definitions. Some helpful comments were received on the Annex of definitions. As a result, some definitions which had been inserted primarily as drafting aids rather than to elucidate the meaning of a term or concept have been deleted. This has sometimes meant using a few more words than before in some Articles. A few definitions have been changed in the interests of greater clarity or precision. A few terms which were defined only in the Annex in the Interim Outline Edition have now, because of their importance, been moved to the text of the model rules. The list of definitions still contains definitions taken from, or derived from, the model rules as well as some definitions which, because of their generality, do not have a natural home in any one model rule. This makes for a mixed list but the purpose is simply the convenience of the reader. Where a definition is taken or derived from an Article in the model rules a cross-reference to that Article has been added. Again this responds to a useful suggestion made by commentators.

The coverage of the DCFR

34. Wider coverage than PECL. The coverage of the PECL was already quite wide. They had rules not only on the formation, validity, interpretation and contents of contracts and, by analogy, other juridical acts, but also on the performance of obligations resulting from them and on the remedies for non-performance of such obligations. Indeed the later Chapters had many rules applying to private law rights and obligations in general – for example, rules on a plurality of parties, on the assignment of rights to performance, on set-off and on prescription. To this extent the Principles went well beyond the law on contracts as such. The DCFR continues this coverage but it goes further.

35. Specific contracts. The DCFR also covers (in Book IV) a series of model rules on so-called 'specific contracts' and the rights and obligations arising from them. For their field of

application these latter rules expand and make more specific the general provisions (in Books I-III), deviate from them where the context so requires, or address matters not covered by them.

36. Non-contractual obligations. The DCFR also covers other private law rights and obligations within its scope even if they do not arise from a contract. It covers, for example, those arising as the result of an unjustified enrichment, of damage caused to another and of benevolent intervention in another´s affairs. It also covers obligations which a person might have, for example, by virtue of being in possession of assets subject to proprietary security or by virtue of being a trustee. It thus embraces non-contractual obligations to a far greater extent than the PECL. It is noted below (paragraphs 44-46) that Book III contains some general rules which are applicable to all obligation within the scope of the DCFR, whether contractual or not. The advantage of this approach is that the rules in Book III can be taken for granted, or slightly modified where appropriate, in the later Books on non-contractual matters. The alternative would be an unacceptable amount of unnecessary repetition.

37. Matters of movable property law. The DCFR also covers some matters of movable property law, namely acquisition and loss of ownership, proprietary security, and trust law. They form the content of Books VIII, IX and X and are published here for the first time.

38. Matters excluded. DCFR I.–1:101(2) lists all matters which are excluded from its intended field of application. These are in particular: the status or legal capacity of natural persons, wills and succession, family relationships, negotiable instruments, employment relationships, immovable property law, company law, and the law of civil procedure and enforcement of claims.

39. Reasons for the approach adopted. The coverage of the DCFR is thus considerably broader than what the European Commission seems to have in mind for the coverage of the CFR (see paragraph 59 below). The ‘academic’ frame of reference is not subject to the constraints of the ‘political’ frame of reference. While the DCFR is linked to the CFR, it is conceived as an independent text. The research teams began in the tradition of the Commission on European Contract Law but with the aim of extending its coverage. When this work started there were no political discussions underway on the creation of a CFR of any kind, neither for contract law nor for any other part of the law. Our contract with the Research Directorate-General to receive funding under the sixth European Framework Programme on Research reflects this; it obliges us to address all the matters listed above. The relatively broad coverage of the DCFR may be seen as advantageous also from a political perspective. Only a

comprehensive DCFR creates a concrete basis for the discussion of the coverage of the political CFR and thereby allows for an informed decision of the responsible political institutions.

40. Contract law as part of private law. There are good reasons for including *more than* rules on general contract law in the DCFR. These general rules need to be tested to see whether or in what respect they have to be adjusted, amended and revised within the framework of the most important of the specific contracts. Nor can the DCFR contain only rules dealing with consumer contracts. The two Groups concur in the view that consumer law is not a self-standing area of private law. It consists of some deviations from the general principles of private law, but it is built on them and cannot be developed without them. And 'private law' for this purpose is not confined to the law on contract and contractual obligations. The correct dividing line between contract law (in this wide sense) and some other areas of law is in any event difficult to determine precisely.[23] The DCFR therefore approaches the whole of the law of obligations as an organic entity or unit. Some areas of property law with regard to movable property are dealt with for more or less identical reasons and because some aspects of property law are of great relevance to the good functioning of the internal market.

Structure and language of the DCFR model rules

41. Structure of the model rules. The structure of the model rules was discussed on many occasions by the Study Group and the joint Compilation and Redaction Team. It was accepted from an early stage that the whole text would be divided into Books and that each Book would be subdivided into Chapters, Sections, Sub-sections (where appropriate) and Articles. In addition the Book on specific contracts and the rights and obligations arising from them was to be divided, because of its size, into Parts, each dealing with a particular type of contract (e.g. Book IV.A: Sale). All of this was relatively uncontroversial.

42. Mode of numbering the model rules. The mode of numbering the model rules corresponds in its basic approach to the technique used in many of the newer European codifications. This too was chosen in order to enable necessary changes to be made later without more than minor editorial labour. Books are numbered by capitalised Roman numerals, i. e., Book I (General provisions), Book II (Contracts and other juridical acts), etc.

[23] See, in more detail, von Bar and Drobnig (eds.), The Interaction of Contract Law and Tort and Property Law in Europe (Munich 2004). This study was conducted on behalf of the European Commission.

Only one Book (Book IV (Specific contracts and rights and obligations arising from them)) is divided into Parts: Part A (Sale), Part B (Lease of goods), etc. Chapters, sections (and also sub-sections) are numbered using Arabic numerals, e.g. chapter 5, section 2, sub-section 4, etc. Articles are then numbered sequentially within each Book (or Part) using Arabic numerals. The first Arabic digit, preceding the colon, is the number of the relevant chapter. The digit immediately following the colon is the number of the relevant section of that chapter. The remaining digits give the number of the Article within the section; sub-sections do not affect the numbering. For example, III.–3:509 (Effect on obligations under the contract) is the ninth Article in section 5 (Termination) of the third chapter (Remedies for non-performance) of the third book (Obligations and corresponding rights). It was not possible, however, to devise a numbering system that would indicate every subdivision of the text without the system becoming too complicated to be workable. One cannot see from the numbering that III.–3:509 is the first Article within sub-section 3 (Effects of termination).

43. Ten books. To a large extent the allocation of the subject matter to the different Books was also uncontroversial. It was readily agreed that Book I should be a short and general guide for the reader on how to use the whole text – dealing, for example, with its intended scope of application, how it should be interpreted and developed and where to find definitions of key terms. The later Books, from Book IV on, also gave rise to little difficulty so far as structure was concerned. There was discussion about the best order, but eventually it was settled that this would be Specific contracts and rights and obligations arising from them (Book IV); Benevolent intervention in another´s affairs (Book V); Non-contractual liability arising out of damage caused to another (Book VI); Unjustified enrichment (Book VII); Acquisition and loss of ownership in movables (Book VIII); Proprietary security rights in movable assets (Book IX) and Trust (Book X). An important argument for putting the rules on specific contracts and their obligational effects in a Book of their own (subdivided into Parts) rather than in separate Books is that it would be easier in the future to add new Parts dealing with other specific contracts without affecting the numbering of later Books and their contents.

44 Books II and III. The difficult decisions concerned Books II and III. There was never much doubt that these Books should cover the material in the existing Principles of European Contract Law (PECL, see paragraph 8 above and paragraphs 49-53 below) – general rules on contracts and other juridical acts, and general rules on contractual and (in most cases) other obligations – but there was considerable difficulty in deciding how this material should be divided up between and within them, and what they should be called. It was only after

decisions were taken by the Co-ordinating Group on how the key terms ‘contract’ and ‘obligation’ would be used in the model rules, and after a special Structure Group was set up, that the way forward became clear. Book II would deal with contracts and other juridical acts (how they are formed, how they are interpreted, when they are invalid, how their content is determined and so on) while Book III would deal with obligations within the scope of the DCFR – both contractual and non-contractual – and corresponding rights.

45. Contracts and obligations. A feature of this division of material is a clear distinction between a contract seen as a type of agreement – a type of juridical act – and the legal relationship, usually involving reciprocal sets of obligations and rights, which results from it. Book II deals with contracts as juridical acts; Book III deals with the obligations and rights resulting from contracts seen as juridical acts, as well as with non-contractual obligations and rights. To this extent a structural division which in the PECL was only implicit is made explicit in the DCFR. Some commentators on the Interim Outline Edition called for a simpler structure more like that of the PECL, one which, at least in relation to contracts and contractual obligations, would follow a natural “chronological” order. However, it has to be noted that the DCFR does in fact follow such an order. It begins with the pre-contractual stage and then proceeds to formation, right of withdrawal, representation (i.e. how a contract can be concluded for a principal by a representative), grounds of invalidity, interpretation, contents and effects, performance, remedies for non-performance, plurality of debtors and creditors, change of parties, set-off and merger, and prescription. This is essentially the same order as is followed in the PECL. The only difference is that the DCFR inserts a break at the point where the rules cease to talk about contracts as agreements (formation, interpretation, invalidity, contents and effects etc.) and start to talk about the rights and obligations arising from them. At this point a new Book is begun and a new Chapter on obligations and corresponding rights in general is inserted. It is not an enormous change. It hardly affects the order or content of the model rules. And it is justified not only because there *is* a difference between a contract and the rights and obligations arising out of it, and it is an aid to clarity of thought to recognise this, but also because it is useful to have the opening Chapter of Book III as a home for some Articles which are otherwise difficult to place, such as those on conditional and time-limited rights and obligations. To eliminate the break between Books II and III would be a regrettable step backwards for which it is difficult to see any justification.

46. Contractual and non-contractual obligations. A further problem was how best to deal with contractual and non-contractual obligations within Book III. One technique which was tried was to deal first with contractual obligations and then to have a separate part on non-

contractual obligations. However, this proved cumbersome and unsatisfactory. It involved either unnecessary repetition or extensive and detailed cross-references to earlier Articles. Either way the text was unattractive and heavy for the reader to use. In the end it was found that the best technique was to frame the Articles in Book III so far as possible in general terms so that they could apply to both contractual and non-contractual obligations. Where a particular Article applied only to contractual obligations this could be clearly stated, see III.–1:101 ("This Book applies, except as otherwise provided, to all obligations within the scope of these rules, whether they are contractual or not…"). For example, the rules on termination can only apply to contractual obligations (see III.–3:501(1) (Scope and definition)); the same is true for III.–3:601 (Right to reduce price) (the restriction on the scope of application follows from the word "price") and III.–3:203 (When creditor need not allow debtor an opportunity to cure) paragraph (a), the wording of which limits its application to contractual obligations. It need hardly be added that if a CFR were to be confined to contracts and contractual obligations it would be a very easy matter to use the model rules in Book III for that purpose. Most of them would need no alteration.

47. Language. The DCFR is being published first in English. This has been the working language for all the Groups responsible for formulating the model rules. However, for a substantial portion of the Books (or, in the case of Book IV, its Parts), teams have already composed a large number of translations into other languages. These will be published successively, first in the PEL series (see paragraphs 54-56 below) and later separately for the DCFR. In the course of these translations the English formulation of the model rules has often itself been revised. In autumn 2008 the *Fondation pour le droit continental* (Paris) published a translation of the first three Books of the DCFR (in the version of the interim outline edition).[24] A Czech translation of the interim outline addition appeared shortly afterwards.[25] The research teams are intent on publishing the model rules of the DCFR as quickly and in as many languages as is possible. However, the English version is the only version of the DCFR which has been discussed and adopted by the responsible bodies of the participating groups and by the Compilation and Redaction Team.

48. Accessibility and intelligibility. In the preparation of the DCFR every attempt was made to achieve not only a clear and coherent structure, but also a plain and clear wording. Whether the model rules and definitions are seen as a tool for better lawmaking or as the

[24] By Professor Jacques Ghestin, see fn. 3 above.
[25] By a team led by Professor Přemysl Raban, published in Karlovarská Právní Revuei 2/2008, 1-222.

possible basis for one or more optional instruments it is important that they should be fit for their purpose. The terminology should be precise and should be used consistently. The word "contract" for example should be used in one sense, not three or more. The terminology should be as suitable as possible for use across a large number of translations. It should therefore try to avoid legalese and technicalities drawn from any one legal system. An attempt has been made to find, wherever possible, descriptive language which can be readily translated without carrying unwanted baggage with it. It is for this reason that words like "rescission", "tort" and "delict" have been avoided. The concepts used should be capable of fitting together coherently in model rules, whatever the content of those model rules. The text should be well-organised, accessible and readable. Being designed for the Europe of the 21st century, it should be expressed in gender neutral terms. It should be as simple as is consistent with the need to convey accurately the intended meaning. It should not contain irrational, redundant, or conflicting provisions. Whether the DCFR achieves these aims is for others to judge. Certainly, considerable efforts were made to try to achieve them.

How the DCFR relates to PECL, the SGECC PEL series, the Acquis and the Insurance Contract Group series

49. Based in part on the PECL. In Books II and III the DCFR contains many rules derived from the Principles of European Contract Law (PECL). These rules have been adopted with the express agreement of the Commission on European Contract Law, whose successor group is the Study Group. Tables of derivations and destinations will help the reader to trace PECL articles within the DCFR. However, the PECL could not simply be incorporated as they stood. Deviations were unavoidable in part due to the different purpose, structure and coverage of the DCFR and in part because the scope of the PECL needed to be broadened so as to embrace matters of consumer protection.

50. Deviations from PECL. A primary purpose of the DCFR is to try to develop clear and consistent concepts and terminology. In pursuit of this aim the Study Group gave much consideration to the most appropriate way of using terms like 'contract' and 'obligation', taking into account not only national systems, but also prevailing usage in European and international instruments dealing with private law topics. One reason for many of the drafting changes from the PECL is the clearer distinction now drawn (as noted above) between a contract (seen as a type of agreement or juridical act) and the relationship (usually consisting of reciprocal rights and obligations) to which it gives rise. This has a number of consequences throughout the text.

51. Examples. For example, under the DCFR it is not the contract which is performed. A contract is concluded; obligations are performed. Similarly, a contract is not terminated. It is the contractual relationship, or particular rights and obligations arising from it, which will be terminated. The new focus on rights and obligations in Book III also made possible the consistent use of 'creditor' and 'debtor' rather than terms like 'aggrieved party' and 'other party', which were commonly used in the PECL. The decision to use 'obligation' consistently as the counterpart of a right to performance also meant some drafting changes. The PECL sometimes used 'duty' in this sense and sometimes 'obligation'. The need for clear concepts and terminology also meant more frequent references than in the PECL to juridical acts other than contracts. A juridical act is defined in II.–1:101 as a statement or agreement which is intended to have legal effect as such. All legal systems have to deal with various types of juridical act other than contracts, but not all use such a term and not all have generalised rules. Examples of such juridical acts might be offers, acceptances, notices of termination, authorisations, guarantees, acts of assignment, unilateral promises and so on. The PECL dealt with these by an article (1:107) which applied the Principles to them 'with appropriate modifications'. However, this technique is a short-cut which should only be used with great care and only when the appropriate modifications will be slight and fairly obvious. In this instance what modifications would be appropriate was not always apparent. It was therefore decided, as far back as 2004, to deal separately with other juridical acts. Some commentators on the Interim Outline Edition have ascribed a significance to this modest functional decision which it certainly did not have in the eyes of the drafters.

52. Input from stakeholders. Other changes in PECL articles resulted from the input from stakeholders to the workshops held by the European Commission on selected topics. For example, the rules on representation were changed in several significant respects for this reason, as were the rules on pre-contractual statements forming part of a contract, the rules on variation by a court of contractual rights and obligations on a change of circumstances and the rules on so-called 'implied terms' of a contract. Sometimes even the process of preparing for stakeholder meetings which did not, in the end, take place led to proposals for changes in PECL which were eventually adopted. This was the case, for example, with the chapter on plurality of debtors and creditors, where academic criticism on one or two specific points also played a role.

53. Developments since the publication of the PECL. Finally, there were some specific articles or groups of articles from the PECL which, in the light of recent developments or further work and thought, seemed to merit improvement. For example, the PECL rules on

stipulations in favour of third parties, although a considerable achievement at the time, seemed in need of some expansion in the light of recent developments in national systems and international instruments. The detailed work which was done on the specific contracts in Book IV, and the rights and obligations resulting from them, sometimes suggested a need for some additions to, and changes in, the general rules in Books II and III. For example, it was found that it would be advantageous to have a general rule on 'mixed contracts' in Book II and a general rule on notifications of non-conformities in Book III. It was also found that the rules on 'cure' by a seller which were developed in the Part of Book IV on sale could usefully be generalised and placed in Book III. The work done on other later Books also sometimes fed back into Books II and III. For example, the work done on unjustified enrichment showed that rather more developed rules were needed on the restitutionary effects of terminated contractual relationships, while the work on the acquisition and loss of ownership in movables (and also on proprietary security rights in movable assets) fed back into the treatment of assignment in Book III. Although the general approach was to follow the PECL as much as possible there were, inevitably, a number of cases where it was found that small drafting changes could increase clarity or consistency. For example, the PECL sometimes used the word "claim" in the sense of a demand based on the assertion of a right and sometimes in the sense of a right to performance. The DCFR uses "claim" only in the first sense and uses a "right to performance" where this is what is meant. Again, the PECL referred sometimes to contract "terms" and sometimes to contract "clauses". The DCFR prefers "terms", which has the advantage of applying with equal facility to written and non-written contracts.

54. The PEL series. The Study Group began its work in 1998. From the outset it was envisaged that at the appropriate time its results would be presented in an integrated complete edition, but it was only gradually that its structure took shape (see paragraphs 41-46 above). As a first step the tasks in the component parts of the project had to be organised and deliberated. The results are being published in a separate series, the 'Principles of European Law' (PEL). To date six volumes have appeared. They cover sales,[26] leases,[27] services,[28]

[26] Principles of European Law. Study Group on a European Civil Code. Sales (PEL S). Prepared by Ewoud Hondius, Viola Heutger, Christoph Jeloschek, Hanna Sivesand, Aneta Wiewiorowska (Sellier, Bruylant, Staempfli, Oxford University Press 2008).

[27] Principles of European Law. Study Group on a European Civil Code. Lease of Goods (PEL LG). Prepared by Kåre Lilleholt, Anders Victorin†, Andreas Fötschl, Berte-Elen R. Konow, Andreas Meidell, Amund Bjøranger Tørum (Sellier, Bruylant, Staempfli, Oxford University Press 2007).

[28] Principles of European Law. Study Group on a European Civil Code. Service Contracts (PEL SC). Prepared by Maurits Barendrecht, Chris Jansen, Marco Loos, Andrea Pinna, Rui Cascão, Stéphanie van Gulijk (Sellier, Bruylant, Staempfli, Oxford University Press 2006).

commercial agency, franchise and distribution,[29] personal security contracts,[30] and benevolent interventions in another´s affairs.[31] Further books will follow (in 2009 and 2010) on the law regarding non-contractual liability arising out of damage caused to another, on unjustified enrichment law, on mandate contracts and contracts of donation, and all the subjects related to property law. The volumes published within the PEL series contain additional material which will not be reproduced in the full DCFR, namely the comparative introductions to the various Books, Parts and Chapters and the translations of the model rules published within the PEL series. The continuation of the PEL series will also enable the publication of the full edition of the DCFR independently of whether all gaps in the compilation and editing of the comparative legal material can actually be filled in time.

55. Deviations from the PEL series. In some cases, however, the model rules which the reader encounters in this DCFR deviate from their equivalent published in the PEL series. There are several reasons for such changes. First, in drafting a self-standing set of model rules for a given subject (such as e. g. service contracts) it proved necessary to have much more repetition of rules which were already part of the PECL. Such repetitions became superfluous in an integrated DCFR text which states these rules at a more general level (i.e. in Books II and III). The DCFR is therefore considerably shorter than it would have been had all PEL model rules been included as they stood.

56. Improvements. The second reason for changing some already published PEL model rules is that, at the stage of revising and editing for DCFR purposes, the Compilation and Redaction Team saw room for some improvements. After consulting the authors of the relevant PEL book, the CRT submitted the redrafted rules to the Study Group´s Co-ordinating Committee for approval, amendment or rejection. Resulting changes are in part limited to mere drafting, but occasionally go to substance. They are a consequence of the systematic revision of the model rules which commenced in 2006, the integration of ideas from others (including stakeholders) and the compilation of the list of terminology, which revealed some inconsistencies in the earlier texts. The DCFR in turn, in its full and final edition, reflects yet further refinements as compared with the interim outline edition.

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[29] Principles of European Law. Study Group on a European Civil Code. Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC). Prepared by Martijn W. Hesselink, Jacobien W. Rutgers, Odavia Bueno Díaz, Manola Scotton, Muriel Veldmann (Sellier, Bruylant, Staempfli, Oxford University Press 2006).

[30] Principles of European Law. Study Group on a European Civil Code. Personal Security (PEL Pers.Sec.). Prepared by Ulrich Drobnig (Sellier, Bruylant, Staempfli, Oxford University Press 2007).

[31] Principles of European Law. Study Group on a European Civil Code. Benevolent Intervention in Another´s Affairs (PEL Ben.Int.). Prepared by Christian von Bar (Sellier, Bruylant, Staempfli, Oxford University Press 2006).

57. The Acquis Principles (ACQP). The Research Group on the Existing EC Private Law, commonly called the Acquis Group, is also publishing its findings in a separate series.[32] The Acquis Principles are an attempt to present and structure the bulky and rather incoherent patchwork of EC private law in a way that should allow the current state of its development to be made clear and relevant legislation and case law to be found easily. This also permits identification of shared features, contradictions and gaps in the *acquis*. Thus, the ACQP may have a function for themselves, namely as a source for the drafting, transposition and interpretation of EC law. Within the process of elaborating the DCFR, the Acquis Group and its output contribute to the task of ensuring that the existing EC law is appropriately reflected. The ACQP are consequently one of the sources from which the Compilation and Redaction Team has drawn.

58. Principles of European Insurance Contract Law. The CoPECL network of researchers established under the sixth framework programme for research (see below: academic contributors and funders) also includes the 'Project Group Restatement of European Insurance Contract Law (Insurance Group)'. That body is expected to deliver its 'Principles of European Insurance Contract Law' to the European Commission contemporaneously with our submission of the DCFR.

How the DCFR may be used as preparatory work for the CFR

59. Announcements by the Commission. The European Commission´s 'Action Plan on A More Coherent European Contract Law' of January 2003[33] called for comments on three proposed measures: increasing the coherence of the *acquis communautaire*, the promotion of the elaboration of EU-wide standard contract terms,[34] and further examination of whether there is a need for a measure that is not limited to particular sectors, such as an 'optional instrument.' Its principal proposal for improvement was to develop a Common Frame of Reference (CFR) which could then be used by the Commission in reviewing the existing *acquis* and drafting new legislation.[35] In October 2004 the Commission published a further

[32] Principles of the Existing EC Contract Law (Acquis Principles). Volume Contract I – Pre-Contractual Obligations, Conclusion of Contract, Unfair Terms. Prepared by the Research Group on the Existing EC Private Law (Acquis Group) (Munich 2007); in print: Volume Contract II (Munich 2009), which includes general provisions, delivery of goods, package travel and payment services; further volumes on specific contracts and extra-contractual matters in preparation.
[33] See fn. 1 above.
[34] This aspect of the plan is not being taken forward. See Commission of the European Communities. First Progress Report on The Common Frame of Reference, COM (2005), 456 final, p. 10.
[35] Action Plan para. 72.

paper, 'European Contract Law and the revision of the acquis: the way forward'.[36] This proposed that the CFR should provide 'fundamental principles, definitions and model rules' which could assist in the improvement of the existing *acquis communautaire*, and which might form the basis of an optional instrument if it were decided to create one. Model rules would form the bulk of the CFR,[37] its main purpose being to serve as a kind of legislators´ guide or 'tool box'. This DCFR responds to these announcements by the Commission and contains proposals for the principles, definitions and model rules mentioned in them.

60. Purposes of the CFR. It remains to be seen what purposes the CFR may be called upon to serve. Some indication may be obtained from the expression 'principles, definitions and model rules' itself. Other indications can be obtained from the Commission´s papers on this subject. These, and their implications for the coverage of the DCFR, will now be explored.

61. Green Paper on the Review of the Consumer Acquis. The 'Way Forward' communication had announced that parallel to the preparation of the DCFR a review of eight consumer Directives[38] would be carried out. Members of the Acquis Group were involved in this review.[39] In 2007 the European Commission published a Green Paper on the review of the consumer acquis.[40] It asked questions at a number of different levels: for example, whether full harmonisation is desirable,[41] whether there should be a horizontal instrument,[42] (as to which see paragraph 62 below) and whether various additional matters should be dealt with by the Consumer Sales Directive.[43] It is possible that other Directives will also be revised, for example those relating to the provision of information to buyers of financial services. In the longer term, there may be proposals for further harmonisation measures in sectors where there still appears to be a need for consumer protection (e.g. contracts for services and for personal security) or where the differences between the laws of the Member States appear to cause difficulties for the internal market (e.g. insurance and security over movable property).

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[36] Communication from the Commission to the European Parliament and the Council, COM (2004) 651 final, 11 October 2004 (referred to as Way Forward).
[37] Way Forward para. 3.1.3, p. 11.
[38] Directives 85/577, 90/314, 93/13, 94/47, 97/7, 98/6; 98/27, 99/44. See Way Forward para. 2. 1. 1.
[39] See Schulte-Nölke/Twigg-Flesner/Ebers (eds), EC Consumer Law Compendium. The Consumer Acquis and its transposition in the Member States (Munich 2008).
[40] Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final of 8 February 2007 (http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf).
[41] Question A3, p. 15.
[42] Question A2, p. 14.
[43] Directive 1999/44/EC. See questions H1-M3, pp. 24-32.

62. Draft proposal for a Directive on consumer contractual rights. The Green Paper on the review of the consumer *acquis* has now been followed by the publication of a draft proposal for a 'horizontal' directive.[44] In its present form, however, and perhaps for reasons of timing, the latter does not make any explicit use of the DCFR. Whereas terminology and drafting style are rather different, there are nevertheless some characteristic similarities with regard to substance. For instance, both the DCFR and the draft horizontal directive propose general rules on pre-contractual information duties or withdrawal rights, which are different in detail but follow the same basic ideas. One such idea is that, in general, a right of withdrawal and the corresponding information duties should apply to all types of contracts negotiated away from business premises (the draft horizontal directive calls them "distance and off-premises contracts"), except under clearly defined circumstances, which can be easily proved. It will have to be seen what use will be made of the DCFR or a possible political CFR in later stages of the elaboration of the directive.

63. Improving the existing and future acquis: model rules. The DCFR is intended to help in this process of improving the existing *acquis* and in drafting any future EU legislation in the field of private law. By teasing out and stating clearly the principles that underlie the existing *acquis*, the DCFR can show how the existing Directives can be made more consistent and how various sectoral provisions might be given a wider application, so as to eliminate current gaps and overlaps – the 'horizontal approach' referred to in the draft proposal. (For instance the DCFR provides for general model rules on pre-contractual information duties and withdrawal rights, which are also the subject of the draft horizontal directive, though this, unlike the DCFR, mainly leaves it to the national laws to determine the consequences of any breach of information duties. The DCFR offers both the EC legislator and the national legislators a model set of sanctions for breach of information duties.) The DCFR also seeks to identify improvements in substance that might be considered. The research preparing the DCFR 'will aim to identify best solutions, taking into account national contract laws (both case law and established practice), the EC *acquis* and relevant international instruments, particularly the UN Convention on Contracts for the International Sale of Goods of 1980'.[45] The DCFR therefore provides recommendations, based on extensive comparative research and careful analysis, of what should be considered if legislators are minded to alter or add to EU legislation within the broad framework of existing basic assumptions. The DCFR does not

[44] Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614.
[45] Way Forward para. 3.1.3.

challenge these basic assumptions of the *acquis* (such as the efficacy of information duties or the value of the notion of the consumer as a basis for providing necessary protection) any more than shared propositions of national law. It would not have been appropriate for a group of academic lawyers in an exercise of this nature to do so: these are fundamental and politically sensitive questions which are not primarily of a legal nature. The DCFR simply makes proposals as to how, given the present policy assumptions, the relevant rules might with advantage be modified and made more coherent. In a very few cases it is proposed that, as has been done in some Member States, particular *acquis* rules applying to consumers should be applied more generally. We do not of course suggest that even those proposals should simply be adopted without further debate. They are no more than model rules from which the legislator and other interested parties may draw inspiration.

64. Improving the acquis: developing a coherent terminology. Directives frequently employ legal terminology and concepts which they do not define.[46] The classic example, seemingly referred to in the Commission´s papers, is the *Simone Leitner* case,[47] but there are many others. A CFR which provides definitions of these legal terms and concepts would be useful for questions of interpretation of this kind, particularly if it were adopted by the European institutions – for example, as a guide for legislative drafting.[48] It would be presumed that the word or concept contained in a Directive was used in the sense in which it is used in the CFR unless the Directive stated otherwise.[49] National legislators seeking to implement the Directive, and national courts faced with interpreting the implementing legislation, would be able to consult the CFR to see what was meant. Moreover, if comparative notes on the Articles are included, as they will be in the full version of the DCFR, the notes will often provide useful background information on how national laws currently deal with the relevant questions.

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[46] In the CFR workshops on the consumer *acquis*, texts providing definitions of concepts used or pre-supposed in the EU acquis were referred to as 'directly relevant' material. See Second Progress Report on the Common Frame of Reference, COM (2007) 447 final, p. 2.

[47] Case C-168/00 Simone Leitner v TUI Deutschland [2002] ECR I-2631. The ECJ had to decide whether the damages to which a consumer was entitled under the provisions of the Package Travel Directive must include compensation for non-economic loss suffered when the holiday was not as promised. This head of damages is recognised by many national laws, but was not recognised by Austrian law. The ECJ held that 'damage' in the Directive must be given an autonomous, 'European' legal meaning – and in this context 'damage' is to be interpreted as including non-economic loss.

[48] In the absence of any formal arrangement, legislators could achieve much the same result for individual legislative measures by stating in the recitals that the measure should be interpreted in accordance with the CFR.

[49] We note that the draft Directive on consumer rights (fn. 44 above) at present often adopts the words of the existing Directives, even where these are known not to be very clear. We hope that before the Directive is adopted, its drafting will be checked against the DCFR and brought into line with it, save where a different outcome is intended.

65. No functional terminology list without rules. As said before, it is impossible to draft a functional list of terminology without a set of model rules behind it, and vice versa. That in turn makes it desirable to consider a rather wide coverage of the CFR. For example, it would be very difficult to develop a list of key notions of the law on contract and contractual obligations (such as "conduct", "creditor", "damage", "indemnify", "loss", "negligence", "property" etc.), without a sufficient awareness of the fact that many of these notions also play a role in the area of non-contractual obligations.

66. Coverage of the CFR. The purposes to be served by the DCFR have a direct bearing on its coverage. As explained in paragraphs 34-39 above, the coverage of the DCFR goes well beyond the coverage of the CFR as contemplated by the Commission in its communications (whereas the European Parliament in several resolutions envisages for the CFR more or less the same coverage as this DCFR).[50] Today, the coverage of the CFR still seems to be an open question. How far should it reach if it is to be effective as a legislators´ guide or 'tool box'? How may this DCFR be used if it is decided that the coverage of the CFR will be narrower (or even much narrower) than the coverage of the DCFR? The following aspects would seem to be worthy of being taken into consideration when making the relevant political decisions.

67. Consumer law and e-commerce. It seems clear that the CFR must at any rate cover the fields of application of the existing Directives that are under review, and any others likely to be reviewed in the foreseeable future. Thus all consumer law and questions of e-commerce should be included, and probably all contracts and contractual relationships that are the subject of existing Directives affecting questions of private law, since these may also be reviewed at some stage.

68. Revision of the acquis and further harmonisation measures. Secondly, the CFR should cover any field in which revision of the *acquis* or further harmonisation measures is being considered. This includes both areas currently under review (e. g. sales, and also leasing which is discussed in the Green Paper on revision of the consumer *acquis*[51]) and also areas where harmonisation is being considered, even if there are no immediate proposals for new legislation. Thus contracts for services should be covered, and also security over movable property, where divergences of laws cause serious problems.

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[50] European Parliament, Resolution of 15 November 2001, OJ C 140E of 13 June 2002, p. 538; Resolution of 23 March 2006, OJ C 292E of 1 December 2006, p. 109; Resolution of 7 September 2007, OJ C 305E of 14 December 2006, p. 247; Resolution of 12 December 2007, Texts adopted, P6_TA(2007)0615; Resolution of 3 September 2008, Texts adopted, P6_TA(2008)0397.

[51] See fn 40 above.

69. Terms and concepts referred to in Directives. Thirdly, in order to provide the definitions that are wanted, the CFR must cover many terms and concepts that are referred to in Directives without being defined. In practice this includes almost all of the general law on contract and contractual obligations. There are so few topics that are not at some point referred to in the *acquis*, or at least presupposed by it, that it is simpler to include all of this general law than to work out what few topics can be omitted. It is not only contract law terminology in the strict sense which is referred to, however, and certainly not just contract law which is presupposed in EU instruments. For example, consumer Directives frequently presuppose rules on unjustified enrichment law; and Directives on pre-contractual information refer to or presuppose rules that in many systems are classified as rules of non-contractual liability for damage, i. e. delict or tort. It is thus useful to provide definitions of terms and model rules in these fields – not because they are likely to be subjected to regulation or harmonisation by European legislation in the foreseeable future, but because existing European legislation already builds on assumptions that the laws of the Member States have relevant rules and provide appropriate remedies. Whether they do so in ways that fit well with the European legislation, actual or proposed, is another matter. It is for the European institutions to decide what might be needed or might be useful. What seems clear is that it is not easy to identify in advance topics which will never be wanted.

70. When in doubt, topics should be included. There are good arguments for the view that in case of doubt, topics should be included. Excluding too many topics will result in the CFR being a fragmented patchwork, thus replicating a major fault in existing EU legislation on a larger scale. Nor can there be any harm in a broad CFR. It is not legislation, nor even a proposal for legislation. It merely provides language and definitions for use, when needed, in the closely targeted legislation that is, and will probably remain, characteristic of European Union private law.

71. Essential background information. There is a further way in which the CFR would be valuable as a legislators´ guide, and it has been prepared with a view to that possible purpose. If EU legislation is to fit harmoniously with the laws of the Member States, and in particular if it is neither to leave unintended gaps nor to be more invasive than is necessary, the legislator needs to have accurate information about the different laws in the various Member States. The national notes to be included in the full version of the DCFR will be very useful in this respect. They would, of course, have to be frequently updated if this purpose is to be served on a continuing basis.

72. Good faith as an example. The principle of good faith can serve as an example. In many laws the principle is accepted as fundamental, but it is not accorded the same recognition in the laws of all the Member States. In some systems it is not recognised as a general rule of direct application. It is true that such systems contain many particular rules which perform the same function as a requirement of good faith, in the sense that they are aimed at preventing the parties from acting in ways that are incompatible with good faith, but there is no *general* rule. So the European legislator cannot assume that whatever requirements it chooses to impose on consumer contracts in order to protect consumers will always be supplemented by a general requirement that the parties act in good faith. If it wants a general requirement to apply in the particular context, in all jurisdictions, the legislator will have to incorporate the requirement into the Directive in express words – as of course it did with the Directive on Unfair Terms in Consumer Contracts.[52] Alternatively, it will need to insert into the Directive specific provisions to achieve the results that in some jurisdictions would be reached by the application of the principle of good faith. To take another example, in drafting or revising a Directive dealing with pre-contractual information, legislators will want to know what they need to deal with and what is already covered adequately, and in a reasonably harmonious way, by the law of all Member States. Thus general principles on mistake, fraud and provision of incorrect information form essential background to the consumer *acquis* on pre-contractual information. In this sense, even a 'legislators' guide' needs statements of the common principles found in the different laws, and a note of the variations. It needs information about what is in the existing laws and what can be omitted from the *acquis* because, in one form or another, all Member States already have it.

73. Presupposed rules of national law. Further, a Directive normally presupposes the existence of certain rules in national law. For example, when a consumer exercises a right to withdraw from a contract, questions of liability in restitution are mainly left to national law. It may be argued that information about the law that is presupposed is more than 'essential background'. The Commission´s Second Progress Report describes it as 'directly relevant'.[53] Whatever the correct classification, this information is clearly important. Put simply, European legislators need to know what is a problem in terms of national laws and what is not. This is a further reason why the DCFR has a wide coverage and why the full DCFR will contain extensive notes, comparing the model rules to the various national laws.

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[52] Council Directive 93/13/EEC, art. 3(1).
[53] See fn. 46 above, p. 2.

74. DCFR not structured on an 'everything or nothing' basis. The DCFR is, so far as possible, structured in such a way that the political institutions, if they wish to proceed with an official Common Frame of Reference on the basis of some of its proposals, can sever certain parts of it and leave them to a later stage of deliberation or just to general discussion amongst academics. In other words, the DCFR is carefully not structured on an 'everything or nothing' basis. Perhaps not every detail can be cherry-picked intact, but in any event larger areas could be taken up without any need to accept the entirety. For example, the reader will soon see that the provisions of Book III are directly applicable to contractual rights and obligations; it is simply that they also apply to non-contractual rights and obligations. Were the Commission to decide that the CFR should deal only with the former, it would be a quick and simple task to adjust the draft to apply only to contractual rights and obligations. We would not advise this, for reasons explained earlier. It would create the appearance of a gulf between contractual and other obligations that does not in fact exist in the laws of Member States, and it would put the coherence of the structure at risk. But it could be done if required.[54]

Developments after this edition

75. Full version of the DCFR. The full version of the DCFR was submitted to the European Commission at the end of December 2008. It will soon be reproduced in book form as a larger publication. The outline and full editions will differ in that the latter will contain the comments and the comparative notes supplemented by an index and bibliographic tables.

76. Consumer credit contracts not covered. The DCFR does not contain any model rules on consumer credit law. This is the subject-matter of a Directive which was only adopted during the concluding phase of the work on the DCFR.[55] The DCFR could not be revised in time to take account of it.

77. Evaluating the DCFR. The research teams which combined their endeavours under the 6th Framework Programme for Research will have concluded their work with the publication of the DCFR. The network will continue to exist only until the end of April 2009. The discussion about the DCFR and about the CFR which will possibly develop from it will, however, go on. The researchers offer to be a part of that development and the

[54] We would strongly urge that if anything like this were done, the Comments should be re-written to explain that in most systems the rules apply also to non-contractual obligations.
[55] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Consumer Credit Contracts and abrogating Directive 87/102/EEC, OJ L 133/66 of 22 May 2008

implementation of new forms of cooperation between the various legal professional groups, but must point out that fresh funding would have to be found to make that possible.

78. CFR. The creation of a CFR is a question for the European Institutions. We suggest that they make decisions about the questions of legal policy which arise in this context only after consultation with the various groups involved. If desired, the researchers remain willing to participate.

79. Square brackets. The square brackets in Interim Outline Edition II.–9:404 (Meaning of "unfair" in contracts between a business and a consumer) remain. The question here is whether the control on unfair terms in a contract between a business and a consumer should apply (a) only to terms which have not been individually negotiated or (b) to any terms which have been supplied by the business. The practical consequences of keeping or removing the words "which has not been individually negotiated" would probably not be great in this context (given that most terms supplied by the business would in any event not be individually negotiated) but the question is a delicate one and better left to a political decision. The square brackets in Interim Outline Edition III.—5:108 (Assignability: effect of contractual prohibition) have been deleted as it proved possible to reach a decision in favour of a less complicated solution than that formerly presented in paragraph (5).

80. The CFR as the basis for an optional instrument. What has been said about the purposes of the CFR relates to its function as a legislators´ guide or toolbox. It is still unclear whether or not the CFR, or parts of it, might at a later stage be used as the basis for one or more optional instruments, i. e. as the basis for an additional set of legal rules which parties might choose to govern their mutual rights and obligations. In the view of the two Groups such an optional instrument would open attractive perspectives, not least for consumer transactions. A more detailed discussion of this issue, however, seems premature at this stage. It suffices to say that this DCFR is consciously drafted in a way that, given the political will, would allow progress to be made towards the creation of such an optional instrument.

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Christian von Bar, Hugh Beale, Eric Clive, Hans Schulte-Nölke

Academic contributors and funders

The pan-European teams

As indicated already, the DCFR is the result of more than 25 years´ collaboration of jurists from all jurisdictions of the present Member States within the European Union. It began in 1982 with the constitution of the Commission on European Contract Law (CECL) and was furthered by the establishment of the Study Group in 1998 and the Acquis Group in 2002. From 2005 the Study Group, Acquis Group and Insurance Contract Group formed the so-called 'drafting teams' of the CoPECL network. The following DCFR is the result of the work of the Study Group, Acquis Group and CECL.

The Study Group on a European Civil Code

The Study Group has had the benefit of Working (or Research) Teams – groups of younger legal scholars under the supervision of a senior member of the Group (a Team Leader). The Teams undertook the basic comparative legal research, developed the drafts for discussion and assembled the extensive material required for the notes. To each Working Team was allocated a consultative body – an Advisory Council. These bodies – deliberately kept small in the interests of efficiency – were formed from leading experts in the relevant field of law, who represented the major European legal systems. The proposals drafted by the Working Teams and critically scrutinised and improved in a series of meetings by the respective Advisory Council were submitted for discussion on a revolving basis to the actual decision-making body of the Study Group on a European Civil Code, the Co-ordinating Group. Until

June 2004 the Co-ordinating Group consisted of representatives from all the jurisdictions belonging to the EU immediately prior to its enlargement in Spring 2004 and in addition legal scholars from Estonia, Hungary, Norway, Poland, Slovenia and Switzerland. Representatives from the Czech Republic, Malta, Latvia, Lithuania and Slovakia joined us after the June 2004 meeting in Warsaw and representatives from Bulgaria and Romania after the December 2006 meeting in Lucerne. Besides its permanent members, other participants in the Co-ordinating Group with voting rights included all the Team Leaders and – when the relevant material was up for discussion – the members of the Advisory Council concerned. The results of the deliberations during the week-long sitting of the Co-ordinating Group were incorporated into the text of the Articles and the commentaries which returned to the agenda for the next meeting of the Co-ordinating Group (or the next but one depending on the work load of the Group and the Team affected). Each part of the project was the subject of debate on manifold occasions, some stretching over many years. Where a unanimous opinion could not be achieved, majority votes were taken.

Its Co-ordinating Group

The Study Group´s Co-ordinating Group has (or had) the following members: Professor *Guido Alpa* (Genoa/Rome, until May 2005), Professor *Christian von Bar* (Osnabrück, chairman), Professor *Maurits Barendrecht* (Tilburg, until May 2005), Professor *Hugh Beale* (Warwick), Dr. *Mircea-Dan Bob* (Cluj, since June 2007), Professor *Michael Joachim Bonell* (Rome), Professor *Mifsud G. Bonnici* (Valetta, since December 2004), Professor *Carlo Castronovo* (Milan), Professor *Eric Clive* (Edinburgh), Professor *Eugenia Dacoronia* (Athens), Professor *Ulrich Drobnig* (Hamburg), Professor *Bénédicte Fauvarque-Cosson* (Paris), Professor *Marcel Fontaine* (Louvain, until December 2003), Professor *Andreas Furrer* (Lucerne, since December 2003), Professor *Júlio Manuel Vieira Gomes* (Oporto), Professor *Viggo Hagstrøm* (Oslo, since June 2002), Supreme Court Judge *Torgny Håstad* (Stockholm), Professor *Johnny Herre* (Stockholm), Professor *Martijn Hesselink* (Amsterdam), Professor *Ewoud Hondius* (Utrecht, until May 2005), Professor *Jérôme Huet* (Paris), Professor *Giovanni Iudica* (Milan, since June 2004), Dr. *Monika Jurčova* (Trnava, since June 2006), Professor *Konstantinos Kerameus* (Athens), Professor *Ole Lando* (Copenhagen), Professor *Kåre Lilleholt* (Bergen/Oslo, since June 2003), Professor *Marco Loos* (Amsterdam); Professor *Brigitta Lurger* (Graz), Professor *Hector MacQueen* (Edinburgh), Professor *Ewan McKendrick* (Oxford), Professor *Valentinas Mikelenas* (Vilnius, since December 2004), Professor *Eoin O´Dell* (Dublin, until June 2006), Professor *Edgar du*

Perron (Amsterdam), Professor *Denis Philippe* (Louvain, since June 2004), Professor *Jerzy Rajski* (Warsaw), Professor *Christina Ramberg* (Gothenburg), Supreme Court Judge Professor *Encarna Roca y Trias* (Madrid/Barcelona), Professor *Peter Schlechtriem*† (Freiburg i. Br.), Professor *Martin Schmidt-Kessel* (Osnabrück, since December 2004), Professor *Jorge Sinde Monteiro* (Coimbra, until December 2004), Professor *Lena Sisula-Tulokas* (Helsinki), Professor *Sophie Stijns* (Leuven), Professor *Matthias Storme* (Leuven), Dr. *Stephen Swann* (Osnabrück), Professor *Christian Takoff* (Sofia, since June 2007), Professor *Luboš Tichý* (Prague, since June 2005), Professor *Verica Trstenjak* (Maribor, until December 2006), Professor *Vibe Ulfbeck* (Copenhagen, since June 2006), Professor *Paul Varul* (Tartu, since June 2003), Professor *Lajos Vékás* (Budapest), Professor *Anna Veneziano* (Teramo).

The Study Group´s Working Teams

Permanent working teams were based in various European universities and research institutions. The teams´ former and present 'junior members' conducted research into basically three main areas of private law: the law of specific contracts, the law of extra-contractual obligations, and property law. They sometimes stayed for one or two years only, but often considerably longer in order additionally to pursue their own research projects. The meetings of the Co-ordinating Group and of numerous Advisory Councils were organised from Osnabrück, in conjunction with the relevant host, by *Ina El Kobbia*.

The members of the Working Teams were: *Begoña Alfonso de la Riva, Georgios Arnokouros,* Dr. *Erwin Beysen, Christopher Bisping, Ole Böger, Michael Bosse, Manuel Braga,* Dr. *Odavia Bueno Díaz, Sandie Calme,* Dr. *Rui Cascăo, Cristiana Cicoria, Martine Costa, Inês Couto Guedes,* Dr. *John Dickie, Tobias Dierks,* Dr. *Evlalia Eleftheriadou,* Dr. *Wolfgang Faber, Silvia Fedrizzi,* Dr. *Francesca Fiorentini,* Dr. *Andreas Fötschl, Laetitia Franck,* Dr. *Caterina Gozzi, Alessio Greco, Lodewijk Gualthérie van Weezel, Stéphanie van Gulijk, Judith Hauck,* Dr. *Lars Haverkamp,* Dr. *Annamaria Herpai,* Dr. *Viola Heutger,* Dr. *Matthias Hünert,* Professor *Chris Jansen,* Dr. *Christoph Jeloschek, Menelaos Karpathakis,* Dr. *Stefan Kettler, Ina El Kobbia,* Dr. *Berte-Elen R. Konow, Rosalie Koolhoven, Caroline Lebon, Jacek Lehmann, Martin Lilja, Roland Lohnert, Birte Lorenzen,* Dr. *María Ángeles Martín Vida, Almudena de la Mata Muñoz, Pádraic McCannon,* Dr. *Mary-Rose McGuire, Paul McKane, José Carlos de Medeiros Nóbrega,* Dr. *Andreas Meidell, Philip Mielnicki, Anastasios Moraitis, Sandra Müller, Franz Nieper, Teresa Pereira,* Dr. *Andrea Pinna, Sandra Rohlfing,* Dr. *Jacobien W. Rutgers, Johan Sandstedt, Marta dos Santos Silva,* Dr. *Mårten Schultz, Manola Scotton*†*, Frank Seidel, Anna von Seht, Susan Singleton,* Dr. *Hanna Sivesand, Daniel*

Smith, Dr. *Malene Stein Poulsen, Dimitar Stoimenov*, Dr. *Stephen Swann, Ferenc Szilágyi*, Dr. *Amund Bjøranger Tørum, Pia Ulrich, Muriel Veldman, Carles Vendrell Cervantes, Ernest Weiker, Aneta Wiewiorowska, Bastian Willers*.

The Study Group´s Advisory Councils

The members of the Advisory Councils to the permanent working teams (who not infrequently served more than one team or performed other functions besides) were: Professor *Hugh Beale* (Warwick), Professor *John W. Blackie* (Strathclyde), Professor *Michael G. Bridge* (London), Professor *Angel Carrasco* (Toledo), Professor *Carlo Castronovo* (Milan), Professor *Eric Clive* (Edinburgh), Professor *Pierre Crocq* (Paris); Professor *Eugenia Dacoronia* (Athens), Professor *Bénédicte Fauvarque-Cosson* (Paris), Professor *Jacques Ghestin* (Paris), Professor *Júlio Manuel Vieira Gomes* (Oporto), Professor *Helmut Grothe* (Berlin), Supreme Court Judge *Torgny Håstad* (Stockholm), Professor *Johnny Herre* (Stockholm), Professor *Jérôme Huet* (Paris), Professor *Giovanni Iudica* (Milan), Dr. *Monika Jurčova* (Trnava), Professor *Jan Kleineman* (Stockholm), Professor *Irene Kull* (Tartu), Professor *Marco Loos* (Amsterdam), Professor *Denis Mazeaud* (Paris), Professor *Hector MacQueen* (Edinburgh), Professor *Ewan McKendrick* (Oxford), Professor *Graham Moffat* (Warwick), Professor *Andrea Nicolussi* (Milan), Professor *Eoin O´Dell* (Dublin), Professor *Guillermo Palao Moreno* (Valencia), Professor *Edgar du Perron* (Amsterdam), Professor *Maria A. L. Puelinckx-van Coene* (Antwerp), Professor *Philippe Rémy* (Poitiers), Professor *Peter Schlechtriem*† (Freiburg i. Br.), Professor *Martin Schmidt-Kessel* (Osnabrück), Dr. *Kristina Siig* (Arhus), Professor *Reinhard Steennot* (Ghent), Professor *Matthias Storme* (Leuven), Dr. *Stephen Swann* (Osnabrück), Professor *Luboš Tichý* (Prague), Professor *Stefano Troiano* (Verona), Professor *Antoni Vaquer Aloy* (Lleida), Professor *Anna Veneziano* (Teramo), Professor *Alain Verbeke* (Leuven and Tilburg), Professor *Anders Victorin*† (Stockholm), Professor *Sarah Worthington* (London).

The Acquis Group

The Acquis Group texts result from a drafting process which involved individual Drafting Teams, the Redaction Committee, the Terminology Group, and the Plenary Meeting. The Drafting Teams produced a first draft of rules with comments for their topic or area on the basis of a survey of existing EC law. The drafts were then passed on to the Redaction Committee and to the Terminology Group which formulated proposals for making the various drafts by different teams dovetail with each other, also with a view towards harmonising the

use of terminology and improving the language and consistency of drafts. All draft rules were debated several times at, and finally adopted by, Plenary Meetings of the Acquis Group, which convened twice a year. Several drafts which were adopted by Plenary Meetings (in particular those on pre-contractual information duties, unfair terms and withdrawal) were subsequently presented and discussed at CFR-Net Stakeholder Meetings. Their comments were considered within a second cycle of drafting and consolidation of the Acquis Principles.

The following members of the Acquis Group took part in the *Plenary Meetings:* Professor *Gianmaria Ajani* (Torino, speaker), Professor *Esther Arroyo i Amayuelas* (Barcelona), Professor *Carole Aubert de Vincelles* (Lyon), Dr. *Guillaume Busseuil* (Paris), Dr. *Simon Chardenoux* (Paris), Professor *Giuditta Cordero Moss* (Oslo), Professor *Gerhard Dannemann* (Berlin), Professor *Silvia Ferreri* (Torino), Professor *Lars Gorton* (Lund), Professor *Michele Graziadei* (Torino), Professor *Hans Christoph Grigoleit* (Regensburg), Professor *Luc Grynbaum* (Paris), Professor *Geraint Howells* (Manchester), Professor *Jan* Hurdik (Brno), Professor *Tsvetana Kamenova* (Sofia), Professor *Konstantinos Kerameus* (Athens), Professor *Stefan Leible* (Bayreuth), Professor *Eva Lindell-Frantz* (Lund), Dr. hab. *Piotr Machnikowski* (Wrocław), Professor *Ulrich Magnus* (Hamburg), Professor *Peter Møgelvang-Hansen* (Copenhagen), Professor *Susana Navas Navarro* (Barcelona), Dr. *Paolisa Nebbia* (Leicester), Professor *Anders* Ørgaard (Aalborg), Dr. *Barbara Pasa* (Torino), Professor *Thomas Pfeiffer* (Heidelberg), Professor *António Pinto Monteiro* (Coimbra), Professor *Jerzy Pisulinski* (Kraków), Professor *Elise Poillot* (Lyon), Professor *Judith Rochfeld* (Paris), Professor *Ewa Rott-Pietrzyk* (Katowice), Professor *Søren Sandfeld Jakobsen* (Copenhagen), Dr. *Markéta* Selucká (Brno), Professor *Hans Schulte-Nölke* (Osnabrück, co-ordinator), Professor *Reiner Schulze* (Münster), Professor *Carla Sieburgh* (Nijmegen), Dr. *Sophie Stalla-Bourdillon* (Florence), Professor *Matthias Storme* (Antwerp and Leuven), Professor *Gert* Straetmans (Antwerp)**,** Dr. hab. *Maciej Szpunar* (Katowice), Professor *Evelyne Terryn* (Leuven), Dr. *Christian Twigg-Flesner* (Hull), Professor *Antoni Vaquer Aloy* (Lleida), Professor *Thomas Wilhelmsson* (Helsinki), Professor *Fryderyk Zoll* (Kraków).

The members of the *Redaction Committee* were, besides the speaker (*Gianmaria Ajani*) and the co-ordinator *(Hans Schulte-Nölke)* of the Acquis Group, *Gerhard Dannemann* (chair), *Luc Grynbaum*, *Reiner Schulze*, *Matthias Storme*, *Christian Twigg-Flesner* and *Fryderyk Zoll*. The *Terminology Group* consisted of *Gerhard Dannemann* (Chair), *Silvia Ferreri* and *Michele Graziadei*.

Members of the individual Acquis Group Drafting Teams are: 'Contract I' (originally organised in the subteams Definition of Consumer and Business, Form, Good Faith, Pre-contractual Information Duties, Formation, Withdrawal, Non-negotiated Terms): *Esther Arroyo i Amayuelas*, *Christoph Grigoleit*, *Peter Møgelvang-Hansen*, *Barbara Pasa*, *Thomas Pfeiffer*, *Hans Schulte-Nölke*, *Reiner Schulze*, *Evelyne Terryn*, *Christian Twigg-Flesner*, *Antoni Vaquer Aloy*; 'Contract II' (responsible for Performance, Non-Performance, Remedies): *Carole Aubert de Vincelles*, *Piotr Machnikowski*, *Ulrich Magnus*, *Jerzy Pisulińlski*, *Judith Rochfeld*, *Ewa Rott-Pietrzyk*, *Reiner Schulze*, *Matthias Storme*, *Maciej Szpunar*, *Fryderyk Zoll*; 'E-Commerce': *Stefan Leible*, *Jerzy Pisulinski*, *Fryderyk Zoll;* 'Non-discrimination': *Stefan Leible*, *Susana Navas Navarro*, *Jerzy Pisulinski*, *Fryderyk Zoll*; 'Specific Performance': *Lars Gorton*, *Geraint Howells*. Numerous further colleagues supported the Plenary and the Drafting Teams or contributed to the Comments, among them Dr. *Christoph Busch*, Dr. *Martin Ebers*, Dr. *Krzysztof Korus*, Professor *Matthias Lehmann* and Dr. *Filip Wejman*.

The former Commission on European Contract Law

The members of the three consecutive commissions of the Commission on European Contract Law which met under the chairmanship of Professor *Ole Lando* (Copenhagen) from 1982 to 1999 were: Professor *Christian von Bar* (Osnabrück), Professor *Hugh Beale* (Warwick); Professor *Alberto Berchovitz* (Madrid), Professor *Brigitte Berlioz-Houin* (Paris), Professor *Massimo Bianca* (Rome), Professor *Michael Joachim Bonell* (Rome), Professor *Michael Bridge* (London), Professor *Carlo Castronovo* (Milan), Professor *Eric Clive* (Edinburgh), Professor *Isabel de Magalhães Collaço*† (Lisbon), Professor *Ulrich Drobnig* (Hamburg), Bâtonnier Dr. *André Elvinger* (Luxembourg), Maître *Marc Elvinger* (Luxembourg), Professor *Dimitri Evrigenis*† (Thessaloniki), Professor *Carlos Fereira di Almeida* (Lisbon), Professor Sir *Roy M. Goode* (Oxford), Professor *Arthur Hartkamp* (The Hague), Professor *Ewoud Hondius* (Utrecht), Professor *Guy Horsmans* (Louvain la Neuve), Professor *Roger Houin*† (Paris), Professor *Konstantinos Kerameus* (Athens), Professor *Bryan MacMahon* (Cork), Professor *Hector MacQueen* (Edinburgh), Professor *Willibald Posch* (Graz), Professor *André Prum* (Nancy), Professor *Jan Ramberg* (Stockholm), Professor *Georges Rouhette* (Clermont-Ferrand), Professor *Pablo Salvador Coderch* (Barcelona), Professor *Fernando Martinez Sanz* (Castellon), Professor *Matthias E. Storme* (Leuven), Professor *Denis Tallon* (Paris), Dr. *Frans J. A. van der Velden* (Utrecht), Dr. *J. A. Wade* (The Hague), Professor *William A. Wilson*†

(Edinburgh), Professor *Thomas Wilhelmsson* (Helsinki), Professor *Claude Witz* (Saarbrücken), Professor *Reinhard Zimmermann* (Regensburg).

The Compilation and Redaction Team

To co-ordinate between the Study and Acquis Groups, to integrate the PECL material revised for the purposes of the DCFR, and for revision and assimilation of the drafts from the sub-projects we established a "Compilation and Redaction Team" (CRT) at the beginning of 2006. The CRT members were Professors *Christian von Bar* (Osnabrück), *Hugh Beale* (Warwick), *Eric Clive* (Edinburgh), *Johnny Herre* (Stockholm), *Jérôme Huet* (Paris, until June 2007), *Peter Schlechtriem*† (Freiburg i.Br.), *Hans Schulte-Nölke* (Osnabrück), *Matthias Storme* (Leuven), *Stephen Swann* (Osnabrück), *Paul Varul* (Tartu), *Anna Veneziano* (Teramo) and *Fryderyk Zoll* (Cracow); it was chaired by *Eric Clive* and *Christian von Bar*. Professor *Clive* carried the main drafting and editorial burden at the later (CRT) stages; he is also the main drafter of the list of terminology in the Annex of the DCFR. Professor Gerhard Dannemann (Berlin), Chair of the Acquis Group's redaction committee, attended several of the later meetings of the CRT by invitation and made important drafting contributions.

Professor Clive was assisted by *Ashley Theunissen* (Edinburgh), Professor von Bar by *Daniel Smith* (Osnabrück). Over the course of several years *Johan Sandstedt* (Bergen) and *Daniel Smith* (Osnabrück) took care of the Master copy of the DCFR.

Funding

The DCFR is the result of years of work by many pan-European teams of jurists. They have been financed from diverse sources which cannot all be named here.[56] Before we came together with other teams in May 2005 to form the 'CoPECL Network of Excellence'[57] under the European Commission´s sixth framework programme for research, from which funds our research has since been supported, the members of the Study Group on a European Civil Code had the benefit of funding from national research councils. Among others the *Deutsche Forschungsgemeinschaft (DFG)* provided over several years the lion´s share of the financing

[56] A complete survey of the donors of the Study Group on a European Civil Code will be found in the opening pages of the most recent volume of Study Group´s "Principles of European Law (PEL)" series (as to which see para. 44 of the introduction). The donors of the Commission on European Contract Law are mentioned in the preface of both volumes of the Principles of European Contract Law.

[57] Joint Network on European Private Law (CoPECL: Common Principles of European Contract Law), Network of Excellence under the 6th EU Framework Programme for Research and Technological Development, Priority 7 – FP6-2002-CITIZENS-3, Contract N° 513351 (co-ordinator: Prof. *Hans Schulte-Nölke*, Osnabrück).

including the salaries of the Working Teams based in Germany and the direct travel costs for the meetings of the Co-ordinating Group and the numerous Advisory Councils. The work of the Dutch Working Teams was financed by the *Nederlandse Organisatie voor Wetenschappelijk Onderzoek (NWO).* Further personnel costs were met by the Flemish *Fonds voor Wetenschappelijk Onderzoek-Vlaanderen (FWO),* the Greek *Onassis-Foundation,* the Austrian *Fonds zur Förderung der wissenschaftlichen Forschung,* the Portuguese *Fundação Calouste Gulbenkian* and the *Norges forskningsråd* (the Research Council of Norway). The Acquis Group received substantial support from its preceding Training and Mobility Networks on 'Common Principles of European Private Law' (1997-2002) under the fourth EU Research Framework Programme[58] and on 'Uniform Terminology for European Private Law' (2002-2006) under the fifth Research Framework Programme.[59] We are extremely indebted to all who in this way have made our work possible.

[58] TMR (Training and Mobility) Network 'Common Principles of European Private Law' of the Universities of Barcelona, Berlin (Humboldt), Lyon III, Münster (co-ordinator of the Network: Professor *Reiner Schulze*), Nijmegen, Oxford and Turin. funded under the 4th EU Research Framework Programme 1997-2002.

[59] TMR (Training and Mobility) Network 'Uniform Terminology for European Private Law' of the Universities of Barcelona, Lyon III, Münster, Nijmegen, Oxford, Turin (co-ordinator of the Network: Professor *Gianmaria Ajani*), Warsaw, funded under the 5th EU Research Framework Programme 2002-2006.

Principles

The underlying principles of freedom, security, justice and efficiency

The four principles of freedom, security, justice and efficiency underlie the whole of the DCFR. Each has several aspects. Freedom is, for obvious reasons, comparatively more important in relation to contracts and unilateral undertakings and the obligations arising from them, but is not absent elsewhere. Security, justice and efficiency are equally important in all areas. The fact that four principles are identified does not mean that all have equal value. Efficiency is more mundane and less fundamental than the others. It is not at the same level but it is nonetheless important and has to be included. Law is a practical science. The idea of efficiency underlies a number of the model rules and they cannot be fully explained without reference to it.

At one level, freedom, security, and justice are ends in themselves. People have fought and died for them. Efficiency is less dramatic. In the context of private law, however, these values are best regarded not as ends in themselves but as means to other ends – the promotion of welfare, the empowering of people to pursue their legitimate aims and fulfil their potential.

In preparing the first part of this account of the role played by these underlying principles in the DCFR, we have drawn heavily on the *Principes directeurs du droit européen du contrat*[60] and we refer the reader to the analytical and comparative work done in their elaboration. However, we have had to take a slightly different approach for the purposes of the DCFR, which is not confined to traditional contract law.

It is characteristic of principles such as those discussed here that they conflict with each other. For example, on occasion, justice in a particular case may have to make way for legal security or efficiency, as happens under the rules of prescription. Sometimes, on the other hand, rules designed to promote security have to be balanced by considerations of justice, as happens under the rules in Books V and VI which allow for a reduction of liability on equitable grounds. Freedom, in particular freedom of contract, may be limited for the sake of an aspect of justice – for instance, to prevent some forms of discrimination or to prevent the abuse of a

[60] The *Principes directeurs* form the first part of Fauvarque-Cosson/Mazeaud and Wicker/Racine/Sautonie-Laguionie/Bujoli (eds.), Principes contractuels commun. Projet de cadre commun de référence (Paris 2008); p. 23-198.

dominant position. Principles can even conflict with themselves, depending on the standpoint from which a situation is viewed: freedom from discrimination restricts another's freedom to discriminate. One aspect of justice (e.g. equality of treatment) may conflict with another (e.g. protection of the weak). Therefore the principles can never be applied in a pure and rigid way.

The principles also overlap. As will be seen below, there are many examples of rules which can be explained on the basis of more than one principle. In particular, many of the rules which are designed to ensure genuine freedom of contract can also be explained in terms of contractual justice.

Freedom

General remarks

There are several aspects to freedom as an underlying principle in private law. Freedom can be protected by not laying down mandatory rules or other controls and by not imposing unnecessary restrictions of a formal or procedural nature on peoples' legal transactions. It can be promoted by enhancing the capabilities of people to do things. Both aspects are present throughout the DCFR. The first is illustrated by the general approach to party autonomy, particularly but not exclusively in the rules on contracts and contractual obligations. The assumption is that party autonomy should be respected unless there is a good reason to intervene. Often, of course, there is a good reason to intervene – for example, in order to ensure that a party can escape from a contract concluded in the absence of genuine freedom to contract. The assumption is also that formal and procedural hurdles should be kept to a minimum. The second aspect – enhancing capabilities – is also present throughout the DCFR. People are provided with default rules (including default rules for a wide variety of specific contracts) which make it easier and less costly for them to enter into well-regulated legal relationships. They are provided with efficient and flexible ways of transferring rights and goods, of securing rights to the performance of obligations and of managing their property. The promotion of freedom overlaps with the promotion of efficiency and some of these examples are discussed more fully below under that heading.

Contractual freedom

Freedom of contract the starting point. As a rule, natural and legal persons should be free to decide whether or not to contract and with whom to contract. They should also be free to

agree on the terms of their contract. This basic idea is recognised in the DCFR.[61] It is also expressed in the first article of the *Principes directeurs*.[62] In both cases the freedom is subject to any applicable mandatory rules. Parties should also be free to agree at any time to modify the terms of their contract or to put an end to their relationship. These ideas are also expressed in the DCFR[63] and in the *Principes directeurs*.[64] In normal situations there is no incompatibility between contractual freedom and justice. Indeed it has been claimed that, in some situations, freedom of contract, without more, leads to justice. If, for instance, the parties to a contract are fully informed and in an equal bargaining position when concluding it, the content of their agreement can be presumed to be in their interest and to be just as between themselves. "*Qui dit contractuel, dit juste*."[65] In normal situations there is also no incompatibility between contractual freedom and efficiency. In general terms it can be assumed that agreements made by parties who are both fully informed and of equal bargaining power will be profit-maximising in the sense of bringing gains to each party (the exact division of the gain is a distributive question of little concern to economic analysis.) The only caveat is that the agreement should not impose costs on third parties (externalities). This is why in most systems certain contracts which are likely to have detrimental effects on third persons are rendered void as a matter of public policy.

Limitations with regard to third parties. There is one principle in the section on contractual freedom in the *Principes directeurs* which is not expressly stated in the DCFR. It provides that "Parties can contract only for themselves, unless otherwise provided. A contract can produce an effect only in so far as it does not result in an infringement or unlawful modification of third party rights".[66] The DCFR does not contain explicit provisions at such a general level on the relation of contracts to third parties. It takes it as self-evident that parties can contract only for themselves, unless otherwise provided, and that contracts, as a rule,

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[61] II.–1:102(1). "Parties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules." It follows from the general rules on the formation of contracts that the parties can agree not to be contractually bound unless the contract is in a particular form. See II.–4:101. Also in the Book on Proprietary Security the principle of party autonomy is fully recognised in the freedom of the parties to regulate their mutual relationship at the predefault stage, IX.–5:101.

[62] Art. 0:101 of the *Principes directeurs*: "Each party is free to contract and to choose who will be the other party. The parties are free to determine the content of the contract and the rules of form which apply to it. Freedom of contract operates subject to compliance with mandatory rules".

[63] II.–1:103 (3). See also III.–1:108(1) "A right, obligation or contractual relationship may be varied or terminated by agreement at any time."

[64] Art. 0:103. The second paragraph of this Article adds that unilateral revocation is effective only in the case of contracts of indeterminate duration. The same idea is expressed in the DCFR in II.–1:103(1) read with III.–1:109(2) but there are some special rules for contracts for services (including mandate contracts).

[65] Alfred Fouillée, La science sociale contemporaine. Paris (Hachette) 1880, p. 410.

[66] Art. 0-102 (Respect for the freedom and rights of third parties).

regulate only the rights and obligations between the parties who conclude them. The DCFR merely spells out the exceptions, principally the rules on representation[67] and the rules on stipulations in favour of a third party.[68] So far as the attempted invasion of third party rights is concerned the DCFR takes the view that this will often be simply impossible to achieve by a contract, because of the content of other rules. The parties to a contract could not, for example, effectively deprive another person of his or her property by simply contracting to this effect. There is no need for a special rule to achieve that result. In so far as such invasions or infringements are possible they are dealt with partly by the rules on illegal contracts[69] and partly by the rules in Book VI on non-contractual liability for damage caused to another. An example of the latter is the inducement of a contract party to breach the contract. The DCFR qualifies such conduct as a ground for non-contractual liability under Book VI.[70] A rather different case is when the purpose of a contract is to disadvantage creditors, usually by putting property beyond their reach. Classical systems based on Roman law tried to respond to such contracts by the so called *actio pauliana*, which gave the affected creditor an action against the contract party holding the property in question. The DCFR does not contain explicit provisions on this issue. The reason is that – although an *actio pauliana* can be brought before the opening of insolvency proceedings – the issue is closely linked to insolvency law, with which the DCFR does not deal. But it would be possible to deal with fraudulent conveyances which aim at the disadvantage of creditors under the rules of Book VI.[71]

Contracts harmful to third persons and society in general. A ground on which a contract may be invalidated, even though it was freely agreed between two equal parties, is that it (or more often the performance of the obligation under it) would have a seriously harmful effect on third persons or society. Thus contracts which are illegal or contrary to public policy in this sense are invalid. (Within the framework of the EU a common example is contracts which infringe the competition articles of the Treaty.) The DCFR does not spell out when a contract is contrary to public policy in this sense, because that is a matter for law outside the scope of the DCFR – the law of competition or the criminal law of the Member State where the

[67] Book II, Chapter 6. Under these rules one party (the representative) can contract for another (the principal).
[68] See II.–9:301 to II.–9:303. The rules in Book III, Chapter 5 on change of parties (assignment and substitution of new debtor) and the rule in III.–5:401 on indirect representation (under which, when the representative has become insolvent, the principal and the third party may acquire rights against each other) can also be seen as exceptions to the rule that a contract can produce effects only for the contracting parties.
[69] II.–7:301 to II.–7:304. A contract to injure, or steal from, another person would, for example, be void. This topic is further explored in the following paragraph.
[70] VI.–2:211.
[71] Cf. in particular VI.–2:101 paragraph (3).

relevant performance takes place. However the fact that a contract might harm particular third persons or society at large is clearly a ground on which the legislator should consider invalidating it.

Interventions when consent defective. Even classical contract law recognises that it may not be just to enforce a contract if one party to it was in a weaker position, typically because when giving consent the party was not free or was misinformed. For example, a contract concluded as the result of mistake or fraud, or which was the result of duress or unfair exploitation, can be set aside by the aggrieved party. These grounds for invalidity are often explained in terms of justice but equally it can be said that they are designed to ensure that contractual freedom was genuine freedom; and in the DCFR, as in the laws of the Member States, they are grounds for the invalidity of a contract. Moreover, at least where the contract has been made only as the result of deliberate conduct by one party that infringed the other party's freedom or misled the other party, the right to set it aside should be inalienable, i.e. mandatory. The remedies given by the DCFR in cases of fraud and duress cannot be excluded or restricted.[72] In contrast, remedies provided in cases of mistake and similar cases which do not involve deliberate wrongdoing may be excluded or restricted.[73]

Restrictions on freedom to choose contracting party. While in general persons should remain free to contract or to refuse to contract with anyone else, this freedom may need to be qualified where it might result in unacceptable discrimination, for example discrimination on the grounds of gender, race or ethnic origin. Discrimination on those grounds is a particularly anti-social form of denying the contractual freedom, and indeed the human dignity, of the other party. EU law and the DCFR therefore prohibit these forms of discrimination and provide appropriate remedies.[74] The DCFR is drafted in such a way that it easily allows the addition of further grounds for discrimination, as they exist – for general contract law – in some Member States and as they may be enacted in EC law in the future.

Restrictions on freedom to withhold information at pre-contractual stage. Similarly, restrictions on the parties' freedom to contract as they choose may be justified even outside the classic cases of procedural unfairness such as mistake, fraud, duress and the exploitation of a party's circumstances to obtain an excessive advantage. A particular concern is to ensure that parties were fully informed. The classical grounds for invalidity on the grounds of

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[72] II.–7:215.

[73] II.–7:215. However, any attempt to exclude or restrict remedies for mistake will itself be subject to the controls over unfair terms that have not been negotiated. See II.–9:401 et seq.

[74] See, for the DCFR, II.–2:101 to II.–2:105 and III.–1:105.

mistake, which are reflected in the provisions of the DCFR mentioned above, were quite limited: for example, in many laws the mistake had to be as to the substance of the thing sold. This notion was developed when the goods or services which were to be supplied were usually very much simpler than they are today. In today's conditions parties often need much more information before it can be said that they were fully informed. Thus the law needs to deal not only with cases of inequality of information about the basic characteristics of the goods or services to be supplied but also as to other relevant circumstances. It may also need to go beyond the general contract law of some Member States and impose positive duties to give information to the uninformed party. In the DCFR, the classical defence of mistake has been supplemented by duties to give the other party the information which is essential to enable that party to make a properly informed decision. These rules apply particularly to consumer contracts, but the problem may arise also in contracts between businesses. Normally a business can be expected to make full enquiries before concluding a contract, but if good commercial practice dictates that certain information be provided by one of the parties, the other party is likely to assume that it has been provided. If in fact full information has not been provided, and as a result the party concludes a contract which would not have been concluded, or would have been concluded only on fundamentally different terms, the party has a remedy.

Information as to the terms of the contract. Modern law must also deal with lack of information as to the terms of the contract. The classical defences were developed at a time when most contracts were of a simple kind that the parties could understand readily. This too has changed, particularly with the development of longer-term (and therefore more complex) contracts and the use of standard terms. Standard terms are very useful but there is the risk that the parties may not be aware of their contents or may not fully understand them. Existing EC law addresses this problem and gives protection to consumers when the term in question is in a consumer contract and was not individually negotiated.[75] However, as the laws of many Member States recognise, the problem may occur also in contracts between businesses. Particularly when one party is a small business that lacks expertise or where the relevant term is contained in a standard form contract document prepared by the party seeking to rely on the term, the other party may not be aware of existence or extent of the term. The DCFR contains controls which deal with similar problems in contracts between businesses, though the controls are of a more restricted kind than for consumer contracts.

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[75] Directive on Unfair Terms in Consumer Contracts, 1993/13/EEC.

Correcting inequality of bargaining power. The classical grounds for avoidance deal with some simple cases of lack of bargaining power, for example when one party takes advantage of the other party's urgent needs and lack of choice to extort an unfairly high price for goods or services.[76] But modern conditions, and particularly the use of standard contract terms, lead to new forms of inequality that need to be addressed. A party who is offered a standard form contract and who knows what it contains and understands its meaning, and is unhappy with the terms offered, may find that it is impossible to get the other party, or any other possible contracting party, to offer better terms: the party may be told to "take it or leave it." Such problems are most common when a consumer is dealing with a business, but can also occur in contracts between businesses, particularly when one party is a small business that lacks bargaining power. The provisions on unfair terms are thus also based on notions of preserving freedom of contract, but – just as in the existing EC law – in a more extended sense than in classical law. The laws of some Member States apply these provisions to contracts of all types, not just to contracts between businesses and consumers. Again the DCFR takes a balanced view, suggesting a cautious extension beyond the existing *acquis*.

Minimum intervention. Even when some intervention can be justified on one of the grounds just mentioned, thought must be given to the form of intervention. Is the problem one that can be solved adequately by requiring one party to provide the other with information before the contract is made, with perhaps a right in the other party to withdraw from the contract if the information was not given? In general terms we are concerned, as explained above, to ensure that when parties conclude contracts they should be adequately informed. This suggests that if they were provided with the relevant information, they should be bound by the contract to which they agreed. But in some cases problems will persist even if consumers (for example) are 'informed', possibly because they will not be able to make effective use of the information. In such a case a mandatory rule giving the consumer certain minimum rights (for example, to withdraw from a timeshare contract, as such contracts are typically concluded without sufficient reflection) may be justified. In general terms, the interference with freedom of contract should be the minimum that will solve the problem while providing the other party (e.g. the business seller) with sufficient guidance to be able to arrange its affairs efficiently. Similarly with contract terms: it must be asked whether it is necessary to make a particular term mandatory or whether a flexible test such as 'fairness' would suffice to protect the weaker party. A fairness test may allow certain terms to be used providing these are clearly

[76] See the illustrations to II.–7:207.

brought home to the consumer or other party before the contract is made. The fairness test thus interferes less with the parties' freedom of contract than making a particular term mandatory would do. Usually it will be sufficient that a term is not binding on the aggrieved party if in the particular circumstances it is unfair. This leaves parties who are fully informed and dealing at arms' length free (when the term will normally be fair: see above) to arrange their affairs as they wish. However, sometimes it may be easier to have a simple rule rather than a standard that varies according to the circumstances of each case.

Non-contractual obligations

Emphasis on obligations rather than freedom. The purpose of the law on benevolent intervention in another's affairs, on non-contractual liability for damage caused to another and on unjustified enrichment is not to promote freedom but rather to limit it by imposing obligations. Here we see the principle of freedom being counteracted by the competing principles of security and justice.

Freedom respected so far as consistent with policy objectives. Nonetheless the underlying principle of freedom is recognised in that the model rules impose these non-contractual obligations only where that is clearly justified. So, a benevolent intervener has rights as such only if there was a reasonable ground for acting; and there will be no such ground if the intervener had a reasonable opportunity to discover the principal's wishes but failed to do so or if the intervener knew or could be expected to know that the intervention was against the principal's wishes.[77] To the maximum extent possible the principal's freedom of action and control is respected. In the rules on non-contractual liability for damage caused to another, the imposition of an obligation of reparation is carefully limited to cases where it is justified. It is this concern which explains why this Book does not simply adopt some sweeping statement to the effect that people are liable for damage they cause. Respect for freedom (not to mention security and justice viewed from the point of view of the person causing the damage) requires careful and detailed formulation of rules imposing liability. Again, in the law on unjustified enrichment the underlying principle is that people are free to hold what they have. An obligation to redress an enrichment is imposed only in carefully regulated circumstances. In particular, rules ensure that one person cannot force another to pay for an enrichment resulting from a disadvantage to which the first person has consented freely and without error.[78] That

[77] V.–1:101(2).
[78] VII.–2:101(1)(b).

would be an unwarranted infringement of freedom. Rules also ensure that those who are enriched by receiving a non-transferable benefit without their consent (such as receiving an unwanted service) are not compelled to reverse that enrichment by paying for its value, since this would in substance require the recipient of an enrichment to perform a bargain not voluntarily concluded. If they are liable at all, their liability is therefore not allowed to exceed any sum which they would have spent in any case in order to enjoy the benefit which they have unwittingly or unwillingly received.[79]

Property

Limited scope for party autonomy. The principle of party autonomy has to be considerably modified in property law. Because proprietary rights affect third parties generally, the parties to a transaction are not free to create their own basic rules as they wish. They cannot, for example, define for themselves basic concepts like "possession". Nor are they free to modify the basic rules on how ownership can be acquired, transferred or lost. Under the DCFR they cannot even agree to an effective contractual prohibition on alienation.[80] The free alienability of goods is important not only to the persons concerned but also to society at large. One type of freedom is restricted in order to promote another – and efficiency.

Recognition and enhancement of freedom in some respects. Within the essential limits just noted, the principle of party autonomy is reflected in Book VIII. It can be seen in the rule that the parties to a transfer of goods can generally determine by agreement the point in time when ownership passes,[81] and in the rule that the consequences of the production of new goods out of another's goods or of the combination or commingling of goods belonging to different persons can be regulated by party agreement.[82] The rules on proprietary security in Book IX can be seen as enhancing freedom (and efficiency) by opening up wide possibilities for the provision of non-possessory security, something which has not traditionally been possible in many legal systems. Similarly, the rules on trusts in Book X could enhance freedom by opening up possibilities for setting property aside for particular purposes (commercial, familial or charitable) in a flexible way which has been much used and much valued in some systems for a very long time and is gradually spreading to others.

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[79] VII.–5:102(2).
[80] VIII.–1:301.
[81] VIII.–2:103.
[82] VIII.–5–101(1).

Security

General remarks

The importance of the principle of security in private law can be understood by considering some of the ways in which the security of natural and legal persons in the normal conducting of their lives and affairs can be threatened. The most obvious way is by unlawful invasions of their rights and interests or indeed by any unwanted disturbance of the status quo. Security, particularly in forward planning, is also threatened by uncertainty of outcomes. This can be caused by inaccessible or confusing or badly drafted laws. It can also be caused by the unpredictability of others. Will they perform their obligations? Will they do so properly? Will they give good value or attempt to cut corners and get away with the minimum possible? Will they be uncooperative and difficult to work with? Will they be able to pay? Are there effective remedies if things go wrong?

Contractual security

The main ingredients. The Principes directeurs identify as the main ingredients in contractual security:

> (1) the obligatory force of contracts (but subject to the possibility of challenge where an unforeseeable change of circumstances gravely prejudices the utility of the contract for one of the parties);
>
> (2) the fact that each party has duties flowing from contractual loyalty (i.e. to behave in accordance with the requirements of good faith; to co-operate when that is necessary for performance of the obligations; not to act inconsistently with prior declarations or conduct on which the other party has relied);
>
> (3) the right to enforce performance of the contractual obligations in accordance with the terms of the contract;
>
> (4) the fact that third parties must respect the situation created by the contract and may rely on that situation; and
>
> (5) the approach of “favouring the contract” (faveur pour le contrat) (whereby, in questions relating to interpretation, invalidity or performance, an approach which

gives effect to the contract is preferred to one which does not, if the latter is harmful to the legitimate interests of one of the parties).[83]

Almost all of these ingredients of contractual security are clearly recognised and expressed in the DCFR. A most important further ingredient of contractual security is the availability of adequate remedies (in addition to enforcement of performance) for non-performance of the contractual obligations. This too is addressed by the DCFR and will be considered below immediately after the topic of enforcement of performance. Another ingredient of contractual security is the protection of reasonable reliance and expectations in situations not covered by the doctrine of contractual loyalty.

Third party respect and reliance. The only aspect of contractual security which is mentioned in the Principes directeurs but which does not appear explicitly in the DCFR is the fourth one - that third parties must respect the situation created by the contract and may rely on that situation. It was not thought necessary to provide for this as it is not precluded by any rule in the DCFR and, if understood in a reasonable way, seems to follow sufficiently from other rules and essential assumptions. One case of practical importance is where a person not being a party to a contract or an intended beneficiary of it nonetheless relies on the proper performance of a contractual obligation (e.g. a tenant's visitor claims damages from the landlord as the tenant could do under the contract, because the visitor falls down the stairs as a result of a broken handrail the landlord was obliged to repair under the contract). In the DCFR such cases fall under the rules on non-contractual liability of Book VI.

Protection of reasonable reliance and expectations. This is an aspect of security which appears in different parts of the DCFR. It first appears in relation to contract formation. It may happen that one party does not intend to undertake an obligation when that party's actions suggest to the other party that an obligation is being undertaken. A typical case is where an apparent offer is made by mistake. If the other party reasonably believed that the first party was undertaking the obligation as apparently stated, the other party's reliance will be protected in most legal systems. This may be achieved either by using the law on non-contractual liability for damage caused to another or, more simply, by holding the mistaken party to the outward appearance of what was said. The protection of reasonable reliance and expectations is a core aim of the DCFR, just as it was in PECL. Usually this protection is achieved by holding the mistaken party to the obligation which the other party reasonably

[83] See Arts 0:201 to 0:204.

assumed was being undertaken. Examples are the objective rules on interpretation[84], the restriction of avoidance for mistake to cases in which the non-mistaken party contributed to the mistake, should have known of it or shared it[85] and the rule that imposes on a business which has failed to comply with a pre-contractual information duty such obligations under a contract as the other party has reasonably expected as the consequence of the absence or incorrectness of the information.[86]

The principle of binding force. If the parties have concluded a contract freely and with adequate information, then the contract should normally be treated as binding on them unless they (again freely) agree to modification or termination or, where the contract is for an indefinite period, one has given the other notice of a wish to end the relationship.[87] These rules are set out clearly in the DCFR.[88] It also sets out rules on the termination of a contractual relationship in more detail. Examples are - besides the rules on termination for non-performance – the right to terminate by notice where that is provided for by the contract terms and the right to terminate where the contract is for an indefinite duration. In the latter case the party wishing to terminate must give a reasonable period of notice.[89] The principle of binding force (often expressed still by the Latin tag, *pacta sunt servanda*) was qualified classically only when without the fault of either party performance of the contractual obligations became impossible for reasons that could not have been foreseen. A more modern development is the right of withdrawal granted to consumers in certain situations. The reasons for this exception vary, but can be seen in the specific situations where such withdrawal rights exist. One example is the right to withdraw from contracts negotiated away from business premises (e.g. at the doorstep or at distance).[90] In such situations the consumer may have been taken by surprise or have been less attentive than he or she would have been in a shop. A further example is provided by some complex contracts (e.g. timeshare contracts)[91], where consumers may need an additional period for reflection. The right to withdraw gives the consumer who concluded a contract in such situations a 'cooling off period' for acquiring additional

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[84] See II.–8:101.
[85] See II.–7:201.
[86] See II.–3:107(3).
[87] The *Principes directeurs* state in Art 0-201 (Principle of binding force) paragraph (1): "A contract which is lawfully concluded has binding force between the parties". Article 0-103 (Freedom of the parties to modify or terminate the contract) provides that: "By their mutual agreement, the parties are free, at any moment, to terminate the contract or to modify it. Unilateral revocation is only effective in respect of contracts for an indefinite period."
[88] II.–1:103 read with III.–1:108 and III.–1:109.
[89] See III.–1:109.
[90] See II.–5:201.
[91] See II.–5:202.

information and for further consideration whether he or she wants to continue with the contract. For reasons of simplicity and legal certainty, withdrawal rights are granted to consumers, irrespective of whether they individually need protection, as a considerable number of consumers are considered to be typically in need of protection in such situations.

Exceptional change of circumstances. Many modern laws have recognised that in extreme circumstances it may be unjust to enforce the performance of contractual obligations that can literally still be performed according to the original contract terms if the circumstances in which the obligations were assumed were completely different to those in which they fall to be enforced. As noted above, this qualification is stated in general terms in the *Principes directeurs.*[92] It is also recognised in the DCFR but the parties remain free, if they wish, to exclude any possibility of adjustment without the consent of all the parties.[93]

Certainty or flexibility. A more general question is whether contractual security is better promoted by rigid rules or by rules which, by using open terms like "reasonable" or by other means, leave room for flexibility. The answer probably turns on the nature of the contract. In contracts for the purchase of certain commodities or types of incorporeal assets where prices fluctuate rapidly and where one deal is likely to be followed rapidly by another which relies on the first and so on within a short space of time, certainty is all important. Nobody wants a link in a chain of transactions to be broken by an appeal to some vague criterion. Certainty means security. However, in long term contracts for the provision of services of various kinds (including construction services), where the contractual relationship may last for years and where the background situation may change dramatically in the course of it, the reverse is true. Here true security comes from the knowledge that there are fair mechanisms in place to deal with changes in circumstances. It is for this reason that the default rules in the part of the DCFR on service contracts have special provisions on the giving of warnings of impending changes known to one party, on co-operation, on directions by the client and on variation of the contract.[94] The general rules on contractual and other obligations in Book III have to cater for all types of contract. So their provisions on changes of circumstances are much more restricted. However, even in the general rules it is arguable that it does more good than harm to build in a considerable measure of flexibility because open criteria will either be disapplied

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[92] Art. 0-201(3): "In the course of performance, the binding force of the contract can be called into question if an unforeseeable change in circumstances seriously compromises the usefulness of the contract for one of the parties."
[93] II.–1:102. See also III.–1:110(3)(c).
[94] See e.g. IV.C.–2:102, IV.C.–2:103, IV.C.–2:107, IV.C.–2:108, IV.C.–2:109, IV.C.–2:110.

by highly specific standard terms devised for fields of commercial activity where certainty is particularly important or will disapply themselves automatically in cases where they are inappropriate. The effects of terms such as "reasonable" and "fair dealing" depend entirely on the circumstances. Rigid rules (e.g. "within 5 days" instead of "within a reasonable time") would be liable to increase insecurity by applying in circumstances where they were totally unexpected and unsuitable.

Good faith and fair dealing. As the *Principes directeurs* recognise, one party's contractual security is enhanced by the other's duty to act in accordance with the requirements of good faith. However, the converse of that is that there may be some uncertainty and insecurity for the person who is required to act in accordance with good faith and fair dealing, which are rather open-ended concepts. Moreover, the role of good faith and fair dealing in the DCFR goes beyond the provision of contractual security. These concepts are therefore discussed later under the heading of justice.

Co-operation. Contractual security is also enhanced by the imposition of an obligation to co-operate. The *Principes directeurs* put it this way: "The parties are bound to cooperate with each other when this is necessary for the performance of their contract".[95] The DCFR provision goes a little further than the case where co-operation is *necessary*: the debtor and the creditor are obliged to co-operate with each other when and to the extent that this *can reasonably be expected* for the performance of the debtor's obligation.[96]

Inconsistent behaviour. A particular aspect of the protection of reasonable reliance and expectations is to prevent a party, on whose conduct another party has reasonably acted in reliance, from adopting an inconsistent position and thereby frustrating the reliance of the other party. This principle is often expressed in the Latin formula *venire contra factum proprium.* The *Principes directeurs* express it as follows: "No party shall act inconsistently with any prior statements made by the party or behaviour on the part of the party, upon which the other party may legitimately have relied." [97] The Interim Outline Edition of the DCFR did not contain an express rule of this nature; it was thought that it could be arrived at by applying the general principles of good faith and fair dealing. Inspired by the *Principes directeurs*, the

[95] Art. 0-303 (Duty to cooperate)
[96] III.–1:104.
[97] Art. 0-304 (Duty of consistency).

DCFR now incorporates an express provision which qualifies inconsistent behaviour as being contrary to good faith and fair dealing.[98]

Enforcement of performance. If one party fails to perform contractual obligations, the other should have an effective remedy. One of the main remedies under the DCFR is the right to enforce actual performance, whether the obligation which has not been performed is to pay money or is non-monetary, e.g. to do or to transfer something else. This basic idea is also expressed in the Principes directeurs.[99] The DCFR slightly modifies and supplements this principle by some exceptions as the right to enforce performance should not apply in various cases in which literal performance is impossible or would be inappropriate.[100] However, in a change from PECL,[101] under the DCFR the right to enforce performance is less of a "secondary" remedy, reflecting the underlying principle that obligations should be performed unless there are good reasons to the contrary.

Other remedies. In addition to the right to enforcement, the DCFR contains a full set of other remedies to protect the creditor in a contractual obligation: withholding of performance, termination, reduction of price and damages. The creditor faced with a non-performance which is not excused may normally exercise any of these remedies, and may use more than one remedy provided that the remedies sought are not incompatible.[102] If the non-performance is excused because of impossibility, the creditor may not enforce the obligation or claim damages, but the other remedies are available.[103] The remedy of termination provided in the DCFR is a powerful remedy which adds to the contractual security of the party faced with a fundamental non-performance by the other. The aggrieved party knows that if the expected counter-performance is not forthcoming it is possible to escape from the relationship and obtain what is wanted elsewhere. However the powerful nature of the remedy is also a threat to the other party's contractual security and, potentially at least, contrary to the idea of maintaining contractual relationships whenever possible. Termination will often leave the other party with a loss (for example, wasted costs incurred in preparing to perform; or loss caused by a change in the market). The creditor should not be entitled to use some minor non-performance, or a non-performance that can readily be put right, by the other as a justification

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[98] See I.–1:103 paragraph (2).
[99] Art. 0-202: "Each party can demand from the other party the performance of the other party's obligation as provided in the contract".
[100] See III.–3:301 and 3:302
[101] Compare PECL art 9:102, esp. (2)(d).
[102] III.–3:102.
[103] III.–3:101.

for termination. The rules governing termination therefore restrict termination to cases in which the creditor's interests will be seriously affected by the non-performance, while leaving the parties free to agree on termination in other circumstances.

Maintaining the contractual relationship. This aim, recognised in the Principes directeurs under the heading of faveur pour le contrat,[104] is also recognised in various provisions in the DCFR – for example those on interpretation,[105] and on the power of the court to adapt a contract which is affected by invalidity.[106] Also, the debtor's right to cure a non-conforming performance[107] can be seen as being aimed at the preservation of the contractual relationship, as this right may avoid the execution of remedies, including termination. The same aim underlies the provisions which supplement the parties' agreement when there are points which the parties appear to have overlooked. In a sense, many rules of contract law – for example, the remedies available for non-performance – are "default rules" that fill gaps in what the parties had agreed, thus helping to maintain an effective working relationship. But there are a number of rules dealing specifically with points which in some systems of law have led the courts to hold that there can be no obligation, even though it seems clear that the parties, despite the incompleteness of their agreement, wished to be bound. These include provisions on determination of the price and other terms.[108] Further, the DCFR provides a more general mechanism to supplement the agreement in order to make it workable when it is necessary to provide for a matter which the parties have not foreseen or provided for, thus "favouring the contract" and increasing contractual security.[109]

Other rules promoting security. The rules on personal security in Book IV.G obviously promote contractual security by giving the creditor an extra person from whom to seek performance if the debtor defaults. In a different way, the rules on prescription can be seen as promoting security by preventing disturbance of the status quo by the making of stale claims. This example shows that even in the area covered by the PECL the underlying principle of

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[104] Art. 0:204. **"**When the contract is subject to interpretation, or when its validity or performance is threatened, the effectiveness of the contract should be preferred if its destruction would harm the legitimate interests of one of the parties".

[105] See II.–8:106. "An interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not."

[106] See II.–7:203.

[107] III.–3:202 to III.–3:204.

[108] See II.–9:104 ff.

[109] II.–9:101. The relevant provisions of PECL were slightly less restrictive. They were changed in the light of representations by stakeholders.

security is not confined to contractual security for the creditor. Security is also important for the debtor.

Non-contractual obligations

Security a core aim and value in the law on non-contractual obligations. The protection and promotion of security is a core aim and value in the law on non-contractual obligations. These branches of the law can be regarded as supplementing contract law. Under contract law parties typically acquire assets. The protection of assets once acquired and the protection from infringement of innate rights of personality is not something which contract law is able to provide. That is the task of the law on non-contractual liability for damage (Book VI). A person who has parted with something without a legal basis, e.g. because the contract which prompted the performance is void, must be able to recover it. That is provided for in the law on unjustified enrichment (Book VII). In cases in which one party would have wanted action to be taken, in particular where help is rendered, but due to the pressure of circumstances or in a case of emergency it is not possible to obtain that party's consent, the situation has a resemblance to contract. But the security which would normally be provided for both parties by the conclusion of a contract for necessary services has to be provided by the rules on benevolent intervention in another's affairs (Book V).

Protection of the status quo: non-contractual liability arising out of damage caused to another. The notion of contract would be meaningless if it were not flanked by a notion of compensation for loss involuntarily sustained. Contracts are aimed at a voluntary change in relationships. That presupposes, however, a regime for the protection of the status quo against involuntary changes. The law on non-contractual liability for damage caused to another is thus directed at reinstating the person suffering such damage in the position that person would have been in had the damage not occurred.[110] It does not seek to punish anybody, neither does it aspire to enrich the injured party. Nor does it aim at a social redistribution of wealth or at integrating an individual in a community founded on the principle of social solidarity. Rather it is aimed at protection.

Protection of the person A particular concern of non-contractual liability law is the protection of the person. The individual stands at the focus of the legal system. A person's rights to physical wellbeing (health, physical integrity, freedom) are of fundamental importance, as are other personality rights, in particular that of dignity and with it protection

[110] VI.–6:101(1).

against discrimination and exposure. Injuries to the person give rise to non-economic loss besides eonomic loss; that also deserves compensation.

Protection of human rights. The non-contractual liability law of the DCFR has the function primarily (albeit not exclusively) of providing "horizontal" protection of human rights - that is to say, a protection not vis-à-vis the state, but in relation to fellow citizens and others subject to private law. This protection is provided in the first instance by the claim to reparation for loss suffered, but is not confined to that. Prevention of damage is better than making good the damage; hence Book VI confers on a person who would suffer it a right to prevent an impending damage**.**[111]

Protection of other rights and interests. Book VI contains specific provisions on various kinds of legally relevant damage (including loss upon infringement of property or lawful possession) which may give rise to liability. However, it is not confined to providing security in such listed cases. Loss or injury can, subject to certain controlling provisions, also be legally relevant damage for the purposes of Book VI if it results from a violation of a right otherwise conferred by the law or of an interest worthy of legal protection**.**[112]

Protection of security by the law on unjustified enrichment.. The rules on unjustified enrichment respect the binding force of contracts in that a valid contract between the parties will provide a justifying basis for an enrichment conferred by one party on the other within the terms of that contract.[113] The rules on unjustified enrichment buttress the protection of rights within private law by the principle that a wrongdoer is not permitted to profit from the exploitation of another's rights. A non-innocent use of another's assets as a rule creates an obligation to pay for the value of that use,[114] so helping to remove any incentive to make improper use of another's property. Protection of reasonable reliance and expectations as a value and aim is relevant to both the elements of the claim and the grounds of defence within the rules on unjustified enrichment. A person who confers an enrichment on another in circumstances where it is reasonable to expect a counter-benefit, or the return of the benefit if events do not turn out as expected, is protected by being entitled to a reversal of the enrichment if the agreement on which reliance was placed turns out not to be valid or if the mutually anticipated outcome does not occur.[115] Equally, the interests of the recipient of a

[111] VI.–1:102.
[112] VI.–2:101.
[113] VII.–2:101(1)(a).
[114] See in particular VII.–4:101(c) and VII.–5:102(1).
[115] Cf. VII.–2:101(4).

benefit are protected if the recipient relies on the apparent entitlement to the benefit received. Such protection is conferred by the defence of disenrichment, where the recipient disposes of the benefit in a bona fide assumption that there is a right to do so,[116] or by a defence, protecting faith in the market, where an acquirer has given value to a third party in good faith for the benefit received.[117]

Property

Security a core aim. Security is a paramount value in relation property law and pervades the whole of Book VIII. The rules in Chapter 6 on the protection of ownership and possession provide a particularly clear example. Indeed, in relation to the acquisition and loss of ownership in movables, certainty and predictability of outcome may sometimes be more important that the actual content of the rules. Different approaches, even fundamentally different approaches, can all lead to acceptable results. Again, however, different values have to be balanced against each other. Some methods of increasing security might, for example, inhibit easy transferability. And certainty has to be balanced against fairness, as can be seen very clearly in the rules in Book VIII on production, combination and commingling.[118] It almost goes without saying that security is also a core aim of the Book on proprietary security. The whole objective is to enable parties to provide and obtain security for the proper performance of obligations. The rules are comprehensive and cover all types of proprietary security over moveable assets, including retention of ownership devices. They aim at maximum certainty by recommending a registration system for the effectiveness of a proprietary security against third parties.[119] A large part of Book IX is concerned with the detailed regulation of this system. They provide effective remedies for creditors wishing to enforce their secuirty.[120]

Protection of reasonable reliance and expectations. This value is strongly reflected in Book VIII. It can be seen most obviously in the rules on good faith acquisition from a person who has no right or authority to transfer ownership[121] and in the rules on the acquisition of ownership by continuous possession.[122] In the Book on proprietary security this value is most

[116] VII.–6:101.
[117] VII.–6:102.
[118] VIII.–5–101 to VIII.–5–105.
[119] Chapter 3.
[120] Chapter 7.
[121] VIII.–3:101 and VIII.–3:102.
[122] VIII.–4:101 to 4:302.

obviously reflected in rules protecting the good faith acquisition of assets, or of security rights in assets, free from a prior security right.[123]

The provision of effective remedies. This is just as important as in contract law but the remedies are different. They are designed to enable ownership and possession to be protected.[124] So the owner is given a right to obtain or recover possession of the goods from any person exercising physical control over them.[125] The possessor of goods is also given protective remedies against those who interfere unlawfully with the possession.[126]

Protection of the status quo. This value lies behind some of the rules in Book VIII designed to protect possession, particularly those for the protection of "better possession".[127]

Justice

General remarks

Justice is an all-pervading principle within the DCFR. It can conflict with other principles, such as efficiency, but is not lightly to be displaced. Justice is hard to define, impossible to measure and subjective at the edges, but clear cases of injustice are universally recognised and universally abhorred.

As with the other principles discussed above, there are several aspects to justice in the present context. Within the DCFR, promoting justice can refer to: ensuring that like are treated alike; not allowing people to rely on their own unlawful, dishonest or unreasonable conduct; not allowing people to take undue advantage of the weakness, misfortune or kindness of others; not making grossly excessive demands; and holding people responsible for the consequences of their own actions or their own creation of risks. Justice can also refer to protective justice – where protection is afforded, sometimes in a generalised preventative way, to those in a weak or vulnerable position.

Contract

Treating like alike. The most obvious manifestation of this aspect of justice in the DCFR is in the rules against discrimination[128] but it is an implicit assumption behind most of the rules on

[123] IX.–2:108, IX.–2:109 and IX.–6:102.
[124] See Book VIII, Chapter 6.
[125] VIII.–6:101.
[126] VIII.–6:201 to VIII.–6:204.
[127] VIII.–6:301 and VIII.–6:302.

contracts and contractual obligations that parties should be treated equally by the law unless there is a good reason to the contrary. The big exception to the rule of equal treatment is that there are situations where businesses and consumers are not treated alike. This has been mentioned already and is discussed further below. The "equality" aspect of justice also surfaces in a rather different way in the notion that if both parties have obligations under a contract what goes for one party also goes for the other. This idea – sometimes called the principle of mutuality in contractual relations. – appears, for example, in the rule on the order of performance of reciprocal obligations: in the absence of any provision or indication to the contrary one party need not perform before the other.[129] It also appears in the rules on withholding performance until the other party performs[130] and in the rules allowing one party to terminate the relationship if there is a fundamental non-performance by the other,[131] although the primary explanation for these rules is the need to provide effective remedies to enhance contractual security. A further example of the "equality" aspect of justice can be seen in the rules on a plurality of debtors or creditors: the default rule is that as between themselves solidary debtors and creditors are liable or entitled in equal shares.[132]

Not allowing people to rely on their own unlawful, dishonest or unreasonable conduct. There are several examples of this aspect of justice in the DCFR provisions on contract law. A recurring and important idea is that parties are expected to act in accordance with good faith and fair dealing. For example, a party engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and is liable for loss caused by a breach of the duty.[133] For later stages in the relationship it is provided that :

> *A person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship.*[134]

A breach of this latter duty does not in itself give rise to a liability to pay damages but may prevent a party from exercising or relying on a right, remedy or defence. The *Principes directeurs* say that "Each party is bound to act in conformity with the requirements of good

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[128] II.–2:101 to II.–2:105 and III.–1:105.
[129] III.–2:104.
[130] III.–3:401.
[131] III.–3:502.
[132] III.–4:106 and III.–4:204.
[133] II.–3:301 (2) and (3).
[134] III.–1:103.

faith and fair dealing, from the negotiation of the contract until all of its provisions have been given effect".[135] They also have an additional provision on performance: "Every contract must be performed in good faith. The parties may avail themselves of the contractual rights and terms only in accordance with the objective that justified their inclusion in the contract."[136] Taken together, these provisions are slightly wider than those of the DCFR but whether there would be much difference in practical effect may be doubted.

There are many specific provisions in the DCFR which can be regarded as concretisations of the idea that people should not be allowed to rely on their own unlawful, dishonest or unreasonable conduct. An example is the rule that the debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps.[137] Another recurring example is in the requirements to give reasonable notice before certain steps are taken which would be harmful to the other party's interest. And there are several rules which allow a person to rely on an apparent situation only if that person is in good faith.[138] The rules on voidable contracts, even if their primary purpose is to ensure that a party can escape from a contract concluded in the absence of genuine freedom to contract, often have the incidental effect of preventing the other party from gaining an advantage from conduct such as fraud,[139] coercion or threats.[140]

No taking of undue advantage. This aspect overlaps with the last one. The most explicit recognition of this aspect of justice in contract law is the rule which allows a party, in carefully specified circumstances, to avoid a contract on the ground of unfair exploitation if the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, or was improvident, ignorant, inexperienced or lacking in bargaining skill. It is necessary that the other party knew or could reasonably be expected to have known of the vulnerability and exploited the first party's situation by taking an excessive benefit or grossly unfair advantage.[141] Again, it is clear that the rule also has the function of ensuring that the victim of the exploitation can escape from a contract concluded in the absence of genuine freedom to contract.

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[135] Art. 0-301 (General duty of good faith and fair dealing).
[136] Art. 0-302 (Performance in good faith)
[137] III.–3:705.
[138] See e.g. II.–6:103(3) (apparent authority of representative); II.–9:201(Effect of simulation) paragraph (2).
[139] II.–7:205.
[140] II.–7:206.
[141] II.–7:207.

No grossly excessive demands. This aspect of justice is reflected in a number of rules which qualify the binding effect of contracts. It is recognised in the rule which regards non-performance of an obligation as excused (so that performance cannot be enforced and damages cannot be recovered) if the non-performance is due to an impediment beyond the debtor's control and if the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences.[142] It lies behind the rule allowing contractual obligations to be varied or terminated by a court if they have become so onerous as a result of an exceptional change of circumstances that it would be "manifestly unjust to hold the debtor to the obligation".[143] It is the basis of the rule that performance of an obligation cannot be specifically enforced if it would be unreasonably burdensome or expensive.[144] And it appears in the rule that a stipulated payment for non-performance can be reduced to a reasonable amount where it is "grossly excessive" in the circumstances.[145] It is clear, however, that this aspect of justice has to be kept within strict limits. The emphasis is on "grossly", and the oft-repeated warning that principles conflict and have to be balanced against each other is particularly apposite here. There is nothing against people profiting from a good bargain or losing from a bad one. The DCFR does not have any general notion that contracts can be challenged on the ground of lesion. This is explicitly illustrated in the rule excluding the adequacy of the price from the unfairness test in the part of the DCFR dealing with unfair contract terms.[146]

Responsibility for consequences. This aspect is most prominent in Book VI on non-contractual liability arising out of damage caused to another but it also surfaces in Book III. For example, a person cannot resort to a remedy for non-performance of an obligation to the extent that that person has caused the non-performance.[147]

Protecting the vulnerable. Many of the qualifications on freedom of contract mentioned above can also be explained as rules designed to protect the vulnerable. Here we consider some other examples. Within the DCFR the main example of this aspect of justice is the special protection afforded to consumers. This appears prominently in the rules on marketing and pre-contractual duties in Book II, Chapter 3; on the right of withdrawal in Book II, Chapter 5; and on unfair contract terms in Book II, Chapter 9, Section 4. It also appears

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[142] III.–3:104.
[143] III.–1:110.
[144] III.–3:302.
[145] III.–3:710.
[146] II.–9:407(2). The exclusion applies only if the terms are drafted in plain and intelligible language.
[147] III.–3:101(3).

prominently in the parts of Book IV dealing with sale, the lease of goods and personal security.[148] Often the protection takes the form of recommending that, in a contract between a business and a consumer, it should not be possible for the parties to derogate from particular rules to the detriment of the consumer. Most of the consumer protection rules in the DCFR come from the *acquis.* They are, in substance if not in actual wording, part of EU law and of the laws of Member States and seem likely to remain so. The "consumer" is defined as "any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession".[149] Whether the notion of the consumer is necessarily the best way of identifying those in need of special protection is a question which has been raised and will no doubt be raised again. Some argue that small businesses or "non-repeat players" of any kind may be equally in need of protection. However this question may be answered in the future, the point remains that the protection of those in a weak or vulnerable position can be considered an aspect of the underlying principle of justice within the DCFR. Another example in the DCFR is that some of the rules on contracts for the provision of treatment services (medical and other) afford special protection to patients.[150] And yet other examples are the protections afforded to the debtor when a right to performance is assigned[151] and the protections afforded to non-professional providers of personal security.[152] Both are in an inherently exposed position. People presented with standard terms prepared by the other party are also in a vulnerable position in practice, whether or not they are consumers, and there are rules in the DCFR to protect them.[153] Of a rather similar nature is the rule that in cases of doubt an ambiguous term which has not been individually negotiated will be interpreted against the person who supplied it.[154]

Non-contractual obligations

General. Most of the rules on obligations and corresponding rights in Book III apply to non-contractual as well as contractual obligations. Many of the points made above for contractual obligations therefore apply equally to non-contractual obligations. Moreover, most of the aspects of justice mentioned above feature strongly in the rules in Books V to VII.

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[148] See e.g. (for sale) IV.A.–2:304, IV.A.–2:309, IV.A.–4:102, IV.A.–5:103, IV.A.–6:101 to IV.A.–6:106; (for the lease of goods) IV.B.–1:102 to IV.B.–1:104, IV.B.–3:105; IV.B.–6:102; and (for personal security) IV.G.–4:101 to IV.G.–4:107.
[149] I.–1:106(1).
[150] IV.C.–8:103; IV.C.–8:104; IV.C.–8:106; IV.C.–8:108; IV.C.–8:109(5); IV.C.–8:111.
[151] III.–5:118 and III.–5:119.
[152] See in particular IV.G.–4:101 to IV.G.–4:107.
[153] II.–9:103, II.–9:405 and II.–9:406.
[154] II.–8:103.

Not allowing people to gain an advantage from their own unlawful, dishonest or unreasonable conduct. An example of this aspect of justice in Book VI is the rule denying reparation (where to allow it would be contrary to public policy) for damage caused unintentionally by one criminal collaborator to another in the course of committing an offence.[155] It has already been noted that the law on unjustified enrichment recognises the principle that a wrongdoer is not permitted to profit from the exploitation of another's rights. A non-innocent use of another's assets as a rule creates an obligation to pay for the value of that use.[156] There are also several rules in the Book in unjustified enrichment from which a person can benefit only if in good faith.[157]

No taking of undue advantage. The rules on benevolent intervention reflect the idea that it would be unfair to allow a person who has been assisted in an emergency by the kindness of a stranger to take advantage of that kindness. The assisted person is therefore obliged to pay at least the necessary expenses incurred. This idea is also at the root of the law on unjustified enrichment. The rules on unjustified enrichment primarily give effect to a deep-rooted principle of justice that one person should not be permitted unfairly to profit at another's expense. Where one person, due to mistake, fraud or some equivalent reason, has conferred a benefit on another which would not have been conferred if the true circumstances had been known and the recipient has no countervailing reason to retain that benefit, other than that they have fortuitously received it, the recipient should not be permitted to retain the benefit to the prejudice of the person who was disadvantaged by conferring it.[158]

No grossly excessive demands. This aspect of justice is also found in Books V to VII. For example, it is at the root of rules which enable the normal entitlements of a benevolent intervener to be reduced in certain cases on grounds of fairness.[159] There are similar rules allowing for an equitable reduction in Book VI.[160] These reflect the fact that there may be a gross disproportion between the amount of blameworthiness and the amount of the damage caused: a very slight degree of negligence may cause enormous damage. This aspect of justice is also represented, as a countervailing consideration to the normal rules on liability, in the rules on unjustified enrichment. It is most relevant to the defence of disenrichment, where a

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[155] VI.–5:103.
[156] See in particular VII.–4:101(c) and VII.–5:102(1).
[157] See e.g. VII.–4:103, VII.–5:101(4), VII.–5:102(2), VII.–5:104(2), VII.–6:101(2) and VII.–6:102.
[158] VII.–1:101.
[159] V.–3:104. Paragraph (2) allows regard to be had to "whether the liability of the principal would be excessive".
[160] VI.–6:202.

person who has disposed of a benefit in good faith is protected.[161] It would be unfair in such circumstances to burden an innocent recipient, who no longer has the benefit received, with the expense of the claimant's mistake.

Responsibility for consequences. This aspect of justice features prominently in the rules of Book VI on non-contractual liability arising out of damage caused to another. It is the very basis of this branch of the law. Responsibility for damage caused does not rest on a contractual undertaking; it rests instead on intention, negligence or a special responsibility for the source of the damage. Everyone is entitled to rely on neighbours observing the law and behaving as can be expected from a reasonably careful person in the circumstances of the case. It is a requirement of fairness that an employer should be responsible for damage which an employee has caused in the course of the employment. For the same reason the keeper of a motor vehicle, the owner of premises and the producer of goods must all answer for the personal injuries and damage to property which are caused by their things. In the other direction, a person may be unable to recover reparation, if that person consented to the damage suffered or knowingly accepted the risk.[162] Similarly, reparation may be reduced if there was contributory fault on the part of the person suffering the damage.[163]

Protecting the vulnerable. Although the law on non-contractual liability aims at protection, it is framed by reference to types of damage and not by reference to the need for protection of particular groups. There are, however, some recognitions of this aspect of the principle of justice. One is indirect: in the definition of negligence reference is made to failure to come up to the standard of care provided by a statutory provision whose purpose is the protection of the injured person (the assumption being that the statute protects a vulnerable group of which the injured person is a member).[164] The others are more direct but operate in the other direction, by protecting the people in the categories concerned from full liability for damage caused where it would be unfair to expose them to such liability. Children under 7, young persons under 18 and mentally incompetent persons are all given some protection in this way.[165]

Property

[161] VII.–6:101.
[162] VI.–5:101.
[163] VI.–5:102.
[164] VI.–3:102.
[165] VI.–3:103 and VI.–301.

Certainty is so important in property law that there are fewer rules which rely overtly on justice than in the other branches of the law already discussed. However, the idea of treating like alike (specifically, treating all the creditors of the transferor alike) played an important part in the debates on the question of whether ownership should as a rule pass on the conclusion of the relevant contract (e.g. a contract for the sale of goods) or only on delivery of the goods or in accordance with another system.[166] Moreover the notion of good faith plays a crucial role in the rules of Book VIII which deal with the acquisition of goods. Chapter 3 deals with good faith acquisition from a person who is not the owner. The main objective of those rules is the promotion of security by favouring the status quo but they are heavily qualified by notions of justice. The acquirer will get ownership only if the acquisition was in good faith.[167] The position is the same in the rules on the acquisition of ownership by continuous possession.[168] Justice is also an important element in the rules on the consequences of production, combination or commingling. It is not enough to produce an answer to the question of who owns the resulting goods. The result must also be fair. Where, for example, one person acquires ownership by producing something out of material owned by another, a fair result is achieved by giving the person who loses ownership a right to payment of an amount equal to the value of the material at the moment of production, secured by a proprietary security right in the new goods.[169] This prevents the taking of an undue advantage at the expense of another. The only example of consumer protection in Book VIII is the rule on the ownership of unsolicited goods sent by a business to a consumer.[170] Justice lies behind many of the rules in Book IX on proprietary security and particularly the rules on priority[171] and enforcement.[172] In this context it means not only fairness as between the security provider and the secured creditor but also fairness between different secured creditors and indeed others having a proprietary right in the encumbered assets. The emphasis is on the protective aspect of justice and it is the security provider who often requires protection. There are provisions designed to afford particular protection to consumer security providers.[173]

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[166] For the outcome, see VIII.–2:101.
[167] VIII.–3:101. See also VIII.–3:101 on acquisition free of limited proprietary rights.
[168] VIII.–4:101.
[169] VIII.–5:201.
[170] VIII.–2:304.
[171] Chapter 4.
[172] Chapter 7.
[173] IX.–2:107, IX.–7:103(2), IX.–7:105(3), IX.–7:107, IX.–7:201(2), IX.–7:204, IX.–7:207(2).

Another aspect of justice is reflected in the rules on good faith acquisition of assets, or of security rights in assets, free from a prior security right.[174]

Efficiency

General remarks

The principle of efficiency lay behind many of the debates and decisions made in the course of preparing the DCFR. There are two overlapping aspects – efficiency for the purposes of the parties who might use the rules; and efficiency for wider public purposes.

Efficiency for the purposes of the parties

Minimal formal and procedural restrictions. The DCFR tries to keep formalities to a minimum. For example, neither writing nor any other formality is generally required for a contract or other juridical act.[175] There are exceptions for a few cases where protection seems to be specially required,[176] and it is recognised that in areas beyond the scope of the DCFR (such as conveyances of land or testaments) national laws may require writing or other formalities, but the general approach is informality. Where the parties to a transaction want writing or some formality for their own purposes they can stipulate for that. Another recurring example of this aspect of the principle of efficiency is that unnecessary procedural steps are kept to a minimum. Voidable contracts can be avoided by simple notice, without any need for court procedures.[177] Contractual relationships can be terminated in the same way if there has been a fundamental non-performance of the other party's obligations.[178] A right to performance can be assigned without the need for notification to the debtor.[179] The ownership of goods can be transferred without delivery.[180] Non-possessory proprietary security can be readily created. To be effective against third parties registration will often be necessary but, again, the formalities are kept to a minimum in the interests of efficiency.[181] The rules on set-off can be seen as based on the principle of efficiency. There is no reason for X to pay Y and then for Y to pay X, if the cross-payments can simply be set off against each other.[182] Again,

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[174] IX.–2:108, IX.–2:109 and IX.–6:102.
[175] II.–1:106.
[176] E.g. personal security provided by a consumer (IV.G.–4:104) and donations (IV.H.–2:101).
[177] II.–7:209.
[178] III.–3:507.
[179] III.–5:104(2).
[180] VIII.–2:101
[181] See Book IX generally.
[182] II.–6:102.

in the DCFR set-off is not limited to court proceedings and can be effected by simple notice.[183]

Minimal substantive restrictions. The absence of any need for consideration or *causa* for the conclusion of an effective contract,[184] the recognition that there can be binding unilateral undertakings[185] and the recognition that contracts can confer rights on third parties[186] all promote efficiency (and freedom!) by making it easier for parties to achieve the legal results they want in the way they want without the need to resort to legal devices or distortions.

Provision of efficient default rules. It is an aid to efficiency to provide extensive default rules for common types of contracts and common types of contractual problem. This is particularly useful for individuals and small businesses who do not have the same legal resources as big businesses. If matters which experience shows are likely to cause difficulty can be regulated in advance, in a fair and reasonable manner, that is much more efficient than having to litigate about them later. It is hoped that the content of the default rules will also promote efficiency. The DCFR does not take the view (occasionally heard but rarely supported and never adopted) that default rules should be so unreasonable that the parties are pushed to negotiate and think things out for themselves. In cases involving only the parties to a transaction, it tries to base the default rules on what the parties would probably have agreed but for the costs of trying to do so. Such rules should produce efficient outcomes since that is presumably what the parties would have wanted.

Efficiency for wider public purposes

General. The rules in the DCFR are in general intended to be such as will promote economic welfare; and this is a criterion against which any legislative intervention should be checked. The promotion of market efficiency could be a useful outcome of the CFR project as a whole but that is not the aspect with which we are here concerned. The question here is the extent to which market efficiency is reflected in and promoted by the model rules *within* the DCFR. It is a matter of regret that the condensed timescale for the preparation and evaluation of the DCFR did not allow the evaluative work of the Economic Impact Group within the CoPECL project to be taken into account in the formulation of the model rules from the earliest stages. However, that evaluative work will form a valuable part of the *corona* of evaluation which

[183] III.–6:105.
[184] II.–4:101.
[185] II.–1:103(2).
[186] II.–9:301 to II.–9:303.

will surround the DCFR and will be available to those taking the project further. What follows is a very brief note of a few areas in which it could be said that this aspect of efficiency is exemplified in the DCFR.

Information duties. Rules which might be said to promote market efficiency (at least when compared to some more traditional approaches) are those on information duties in Book II.[187] There is a public value in better-informed decision making across the board. Interferences with freedom of contract may be justified on the ground that they can serve to promote economic welfare if there is reason to think that because of some market failure (such as that caused by inequality of information) the agreement is less than fully efficient. Consumer protection rules, for example, can be seen not only as protective for the benefit of typically weaker parties but also as favourable to general welfare because they may lead to more competition and thus to a better functioning of markets. This holds true in particular for information duties, where consumers' lack of information about either the characteristics of the goods sold or the terms being offered leads to forms of market failure. Rules that, in relation to the making of a contract of a particular type or in a particular situation, require one party (typically a business) to provide the other (typically a consumer) with specified information about its nature, terms and effect, where such information is needed for a well-informed decision and is not otherwise readily available to that other party, can be justified as promoting efficiency in the relevant market. Indeed a legislator should consider whether this is the justification for the proposed intervention, or whether it is based on a protective notion that consumers simply should have the right in question. The answer to that question may influence the choice of the extent and form of intervention.

Remedies for non-performance. The Article on stipulated payments for non-performance[188] could be said to be more favourable to market efficiency than rules which regard penalty clauses as completely unenforceable.[189] Questions might be asked about the second paragraph of the Article which allows a stipulated payment to be reduced to a reasonable amount when it

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[187] II.–3:101 to II.–3:107. In De Geest and Kovac, "The Formation of Contracts in the DCFR – A law and Economics Perspective" (Unpublished) the authors cast doubt on the continued value of rights to avoid contracts on the basis of defects of consent and on the way in which the rules on invalidity for mistake etc are formulated in the DCFR.

[188] III.–3:710.

[189] See Schweizer, "Obligations and Remedies for non-Performance: Book III of the DCFR from an Economist's Perspective" http://www.wipol.uni-bonn.de/fileadmin/Fachbereich_Wirtschaft/Einrichtungen/Wirtschaftspolitik/Mitarbeiter/Prof._Dr._Urs_Schweizer/DCFRSchweizerRev.pdf; Ogus, "Measure of Damages, Expectation, Reliance and Opportunity Cost" (Unpublished) at pp 11-12.

is grossly excessive in relation to the loss resulting from the non-performance,[190] but here there are considerations of justice to weigh in the balance. The allowance of damages for pure economic loss seems to be preferable from the point of view of efficiency than the denial of such recovery, as happens under some systems.[191] It is difficult to see any justification for distinguishing between pure economic loss and loss caused by damage to property or injury to the person. The question of whether the other rules on damages are optimal from the point of view of general efficiency seems to be a matter of debate.[192]

Other rules. The rules on prescription in Book III, Chapter 7 are designed to promote efficiency by encouraging the prompt making of claims before evidence becomes stale and expensive to provide and by freeing assets which might otherwise be held against the possibility of old claims being made. The rules on withholding performance and terminating the contractual relationship in cases of anticipated non-performance[193] are designed to promote efficiency by not requiring the creditor to wait until non-performance actually happens. There are also rules which promote efficiency by discouraging the providing of unwanted performance.[194] The rules denying effect to contractual prohibitions on the alienation of assets are also designed to promote general efficiency by favouring the free circulation of goods and other assets.[195] A core aim of the rules in Book IX on proprietary security in movable assets is the facilitation of economic activity and economic welfare by enabling credit to be obtained on favourable terms against the provision of proprietary security.

Conclusion

There is one aspect of efficiency and security which deserves separate mention because it lay, consciously or subconsciously, behind many of the debates on the model rules and because it accounts for an overwhelming part of the actual shape and content of the DCFR. It is stability. People feel more secure with solutions which are familiar, tried, tested and traditional. Other things being more or less equal, such solutions also promote efficiency because there is no need to understand new rules and work out all their possible implications. A valuable store of knowledge and experience is not wasted. This aspect of security and efficiency seems to be

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[190] Ibid.
[191] Schweizer, cited above, at p.9.
[192] See e.g. the differing views of Schweizer and Ogus cited above.
[193] III.–3:401 and III.–3:504.
[194] See III.–3:301(2), IV.C.–2:111 and IV.D.–6:101.
[195] See III.–5:108 and VIII.–1:301.

particularly valued in the legal sphere. There is a story of a famous judge of a former era who addressed a large and distinguished audience for a full hour and then said at the end, with perfect sincerity, “I hope I have said nothing new.” We would not go quite so far. But we hope and believe that there is much in the DCFR which will indeed be perfectly familiar to private lawyers from every part of Europe. We hope that no lawyer from any part of Europe will see it as an alien product but that all will see it as growing out of a shared tradition and a shared legal culture. It is our great good fortune that that legal culture, thanks to the work of many legal thinkers from many countries over many centuries, is strongly imbued with the principles of freedom, security, justice and efficiency.

Christian von Bar, Hugh Beale, Eric Clive, Hans Schulte-Nölke

Table of Destinations[196]

An entry in this table indicates a model rule which addresses the same legal issue as that dealt with in the relevant article of the PECL. It does not imply that the corresponding model rule is in the same terms or to the same effect. Relocations of Model Rules since the publication of the Interim Outline Edition (IOE) are indicated in italics in square brackets. Reference should be made to the IOE to ascertain changes in wording.

	PECL	**DCFR Model Rules**
Chapter 1	1:101 (1) (2) (3) (4)	 I.–1:101(1) – – –
	1:102 (1) (2)	 II.–1:102(1) II.–1:102(2)
	1:103	–
	1:104	–
	1:105	II.–1:104(1), (2)
	1:106	I.–1:102(1), (3), (4)
	1:107	–
	1:201 (1) (2)	 II.–3:301(2); III.–1:103(1) III.–1:103(2)
	1:202	III.–1:104
	1:301 (1) (2) (3) (4) (5) (6)	 I.–1:108(1) (with the Annex) *[ex IOE I.–1:103(1) (with Annex 1: "Conduct")]* I.–1:108(1) (with the Annex) *[ex IOE I.–1:103(1) (with Annex 1: "Court")]* – I.–1:108(1) (with the Annex) *[ex IOE I.–1:103(1) (with Annex 1: "Non-performance")]*; III.–1:102(3) *[ex IOE III.–1:101]* – I.–1:106 *[ex IOE I.–1:105]*

[196] Compiled by *Daniel Smith* (Osnabrück) with assistance from Dr. *Stephen Swann* (Osnabrück).

	PECL	DCFR Model Rules
	1:302	I.–1:104 *[ex IOE I.–1:103(1) (with Annex 1: "Reasonable")]*
	1:303 (1) (2) (3) (4) (5) (6)	 I.–1:109(2) *[ex IOE II.–1:106(2)]* I.–1:109(3) *[ex IOE II.–1:106(3)]* I.–1:109(4) *[ex IOE II.–1:106(4)]* III.–3:106 I.–1:109(5) *[ex IOE II.–1:106(5)]* I.–1:109(1) *[ex IOE II.–1:106(1)]*
	1:304	I.–1:110 *[ex IOE I.–1:104 (with Annex 2)]*
	1:305	II.–1:105
Chapter 2	2:101 (1) (2)	 II.–4:101 II.–1:106(1) *[ex IOE II.–1:107]*
	2:102	II.–4:102
	2:103	II.–4:103
	2:104 (1) (2)	 II.–9:103(1) II.–9:103(3)(b)
	2:105	II.–4:104
	2:106	II.–4:105
	2:107	II.–1:103(2)
	2:201	II.–4:201
	2:202	II.–4:202(1)-(3)
	2:203	II.–4:203
	2:204	II.–4:204
	2:205	II.–4:205
	2:206	II.–4:206
	2:207	II.–4:207

	PECL	DCFR Model Rules
	2:208	II.–4:208
	2:209 (1) (2) (3)	 II.–4:209(1) II.–4:209(2) I.–1:108(1) (with the Annex) *[ex IOE I.–1:103(1) (with Annex 1: "Standard terms")]*
	2:210	II.–4:210
	2:211	II.–4:211
	2:301 (1) (2) (3)	 II.–3:301(1) II.–3:301(3) II.–3:301(4)
	2:302	II.–3:302(1), (4)
Chapter 3	3:101 (1) (2) (3)	 II.–6:101(1) – II.–6:101(3)
	3:102	–
	3:201 (1) (2) (3)	 II.–6:103(2) II.–6:104(2) II.–6:103(3)
	3:202	II.–6:105
	3:203	II.–6:108
	3:204 (1) (2)	 II.–6:107(1) II.–6:107(2), (3)
	3:205	II.–6:109
	3:206	II.–6:104(3)
	3:207	II.–6:111(1), (2)
	3:208	–
	3:209 (1) (2) (3)	 II.–6:112(1) II.–6:112(3) II.–6:112(4)
	3:301	II.–6:106

	PECL	DCFR Model Rules
	3:302	–
	3:303	–
	3:304	–
Chapter 4	4:101	II.–7:101(2)
	4:102	II.–7:102
	4:103	II.–7:201
	4:104	II.–7:202
	4:105	II.–7:203
	4:106	II.–7:204
	4:107	II.–7:205
	4:108	II.–7:206
	4:109	II.–7:207
	4:110 (1) (2)	 II.–9:403-9:405 *[ex IOE II.–9:404-9:406]*; II.–9:407(1) *[ex IOE II.–9:408(1)]*; II.–9:408 *[ex IOE II.–9:409]* II.–9:406(2) *[ex IOE II.–9:407(2)]*
	4:111	II.–7:208
	4:112	II.–7:209
	4:113 (1) (2)	 II.–7:210 –
	4:114	II.–7:211
	4:115	II.–7:212(2)
	4:116	II.–7:213
	4:117	II.–7:214
	4:118	II.–7:215
	4:119	II.–7:216
Chapter 5	5:101	II.–8:101

	5:102	II.–8:102(1)
	PECL	**DCFR Model Rules**
	5:103	II.–8:103(1)
	5:104	II.–8:104
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Table of Derivations

An entry in this table indicates an article of the PECL which addresses the same legal issue as that dealt with in the relevant model rule. It does not imply that the article of the PECL is in the same terms or to the same effect.

Relocations of Model Rules since the publication of the Interim Outline Edition (IOE) are indicated in italics in square brackets; newly inserted Articles or Paragraphs are pointed out by an asterisk. Reference should be made to the IOE to ascertain changes in wording.

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	III.–5:118*	–
	III.–5:119 *[ex IOE III.–5:118]* (1) (2) (3)*	 11:303(1), (4) 11:304 –
	III.–5:120 *[ex IOE III.–5:119]* (1) (2) (3)	 11:303(3) 11:303(1) 11:303(2)

	(4)	11:303(2)
	DCFR Model Rules	**PECL**
Book III	III.–5:121 *[ex IOE III.–5:120]* (1) (2)	 11:401(1) –
	III.–5:122* *[ex IOE III.–5:108(3)]*	11:203; 11:401(3), (4)
	III.–5:201*	–
	III.–5:202 (1) (a) *[ex IOE III.–5:201(1)]* (b)* (c)* (2)*	 12:101(1) – – –
	III.–5:203 (1) *[ex IOE III.–5:201(1)]* (2) *[ex IOE III.–5:201(2)]* (3)*	 12:101(1) 12:101(2) –
	III.–5:204* III.–5:205 (1) *[ex IOE III.–5:202(4)]* (2)* (3) *[ex IOE III.–5:202(1)]* (4) *[ex IOE III.–5:202(2)]* (5) *[ex IOE III.–5:202(3)]*	– 12:102(4) – 12:102(1) 12:102(2) 12:102(3)
	III.–5:206*	
	III.–5:207*	
	III.–5:208*	
	III.–5:209*	
	III.–5:301*	

	DCFR Model Rules	PECL
Book III	III.–5:302 (1) *[ex IOE III.–5:301(1)]* (2) *[ex IOE III.–5:301(1)]* (3) *[ex IOE III.–5:301(2)]*	 12:201(1), 1st sent. 12:201(1), 2nd sent. 12:201(2)
	III.–5:401*	–
	III.–5:402*	–
	III.–6:101 (1) (2)*	 – –
	III.–6:102 (a), (b) (c)*	 13:101 –
	III.–6:103	13:102
	III.–6:104	13:103
	III.–6:105	13:104
	III.–6:106	13:105
	III.–6:107	13:106
	III.–6:108	13:107
	III.–6:201	–
	III.–7:101	14:101
	III.–7:201	14:201
	III.–7:202	14:202
	III.–7:203	14:203
	III.–7:301	14:301
	III.–7:302 (1) (2) (3) (4)*	 14:302(1) 14:302(2) 14:302(3) –
	III.–7:303 (1) (2) (3)* (4)*	 14:303(1) 14:303(2) – –

	DCFR Model Rules	PECL
	III.–7:304	14:304
	III.–7:305	14:305
	III.–7:306	14:306
	III.–7:307	14:307
	III.–7:401	14:401
	III.–7:402	14:402
	III.–7:501	14:501
	III.–7:502	14:502
	III.–7:503	14:503
	III.–7:601	14:601

Model Rules

BOOK I

GENERAL PROVISIONS

I.–1:101: Intended field of application

(1) These rules are intended to be used primarily in relation to contracts and other juridical acts, contractual and non-contractual rights and obligations and related property matters.

(2) They are not intended to be used, or used without modification or supplementation, in relation to rights and obligations of a public law nature or, except where otherwise provided, in relation to:

(a) the status or legal capacity of natural persons;
(b) wills and succession;
(c) family relationships, including matrimonial and similar relationships;
(d) bills of exchange, cheques and promissory notes and other negotiable instruments;
(e) employment relationships;
(f) the ownership of, or rights in security over, immovable property;
(g) the creation, capacity, internal organisation, regulation or dissolution of companies and other bodies corporate or unincorporated;
(h) matters relating primarily to procedure or enforcement.

(3) Further restrictions on intended fields of application are contained in later Books.

COMMENTS

The model rules are the core part of this Draft Common Frame of Reference (DCFR). Underlying governing principles are discussed in the Introduction. Definitions are contained in various Articles and these, together with some definitions which are too general to have a natural home in any one Article, are set out in the Annex of definitions.

One of the main purposes of the DCFR is to act as an optional source of rules, concepts and terminology for those drafting legislative instruments and contracts. It is hoped that the rules may also prove useful to judges, arbiters, legal practitioners, researchers and law teachers.

Legislative acts and other instruments having binding force often have introductory provisions setting out their scope. However, the present rules have no binding force. They are there to be used and the way in which they may be used cannot be limited. So it would not be appropriate in this Article to state that the rules can be used only in certain areas and cannot be used in others. Nor would it be appropriate to set out in detail in this Article what is already set out in the table of contents. On the other hand, it is necessary to set out the main intended field of application and to indicate certain areas where the rules are not intended to be used, or used without modification or supplementation. This is done partly in this Article and partly in later Books.

Paragraph (1) sets out positively the intended field of application of the rules. They are intended to be used primarily in relation to contracts and other juridical acts, contractual and

non-contractual rights and obligations and related property matters. The main focus of the earlier books is on contract law but there are provisions in later Books on, for example, non-contractual liability for damage caused to another (which often functions as an alternative to contractual liability), obligations to reverse unjustified enrichments (which often arise when a contract is void or avoided) and the transfer of property in movables (which is of particular importance in relation to the law on sale).

Paragraph (2) lists certain matters in relation to which the rules are not intended to be used, or used without modification or supplementation. Paragraph (2) does not mean that particular rules or concepts or terms could not be used in relation to the listed matters. The use to be made of the rules depends entirely on those using them. The paragraph just serves as a warning that the rules have not, except in a few places, been drafted with the listed matters in mind. It may be anticipated, for example, that:

> (a) the rules on non-contractual rights and obligations would not necessarily be used, or used without restriction or modification, in relation to rights and obligations of a public law nature arising from a statute;
>
> (b) the rules on juridical acts would not be used in relation to marriage, where one would expect to find special rules on constitution, invalidity and termination;
>
> (c) the rules on representation would not necessarily be used in relation to the representation of those with mental incapacity, where special protections may be required, or in relation to the representatives of a deceased person, where special considerations apply,
>
> (d) the rules on obligations might be modified in their application to alimentary obligations where, for example, the resources of the debtor may affect the amount due, there may be limitations on the recovery of arrears and the ordinary rules on a plurality of debtors or creditors may be modified,
>
> (e) the rules on assignment would not be used in relation to the transfer of negotiable instruments,
>
> (f) the rules on contractual rights and obligations might be substantially modified or supplemented in relation to employment relationships,
>
> (g) the rules on contracts might be modified or supplemented in relation to contracts relating to the sale or lease of land, where special formalities and registration requirements may be required, and
>
> (h) the rules on juridical acts and representation would not be used in relation to the formation, running or dissolution of companies and other bodies corporate or unincorporate.

The list in paragraph (2) is not meant to function as an absolute exclusion. Indeed some matters within the list are dealt with incidentally in the following rules. For example, the rules on proprietary security refer to security over negotiable instruments and will sometimes apply to items which are temporarily attached to land or buildings and therefore technically immovable property. The list is indicative only. Moreover it is not meant to imply that there

are no other matters where the rules might require modification before being used for a particular purpose.

Paragraph (3) is just a pointer to the fact that later Books contain further restrictions on their intended fields of application.

I.–1:102: Interpretation and development

(1) These rules are to be interpreted and developed autonomously and in accordance with their objectives and the principles underlying them.

(2) They are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws.

(3) In their interpretation and development regard should be had to the need to promote:

(a) uniformity of application;
(b) good faith and fair dealing; and
(c) legal certainty.

(4) Issues within the scope of the rules but not expressly settled by them are so far as possible to be settled in accordance with the principles underlying them.

(5) Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict.

COMMENTS

This Article, like the rest of the rules, has no binding force. If legislators or contracting parties use provisions or terms from the rules in their own laws or contracts it will be the rules on the interpretation of those laws or contracts which apply. However, legislative drafters, judges, arbiters, commentators, legal researchers and others may have occasion to interpret the rules, or build upon them, and this Article is intended to provide guidance on an appropriate approach.

Paragraph (1) provides that the rules are to be interpreted and developed autonomously and in accordance with their objectives and the principles underlying them. The reference to autonomous interpretation is to emphasise that the rules form a coherent system and are to be interpreted in that context and not through the lenses of national private laws. The objectives and underlying principles can be derived not only from the introductory remarks preceding these model rules but also from the later articles and the comments on them. The rules are part of a draft common frame of reference. The benefits which might accrue from their use could be greatly reduced if they were to be interpreted in widely differing ways. This is one idea behind paragraph (1). Another idea is that those interpreting the rules are encouraged to adopt a liberal or purposive interpretation rather than a narrowly literal interpretation. This has a static and a dynamic aspect. The first envisages foreseeable situations which may occur today: the second, unforeseeable situations which may occur in the future. The words “are to be …developed” are important. They are addressed primarily to the courts and are intended to make it clear that judges can develop the principles and rules incrementally.

Paragraph (2) provides that the rules are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws. This broad formula is used because it is not possible to foresee what instruments or constitutional laws (European or national) might be relevant in the future. This provision serves as a reminder that such overriding laws may, for example, provide defences to liability not specifically mentioned in the rules. Human rights requirements may, of course, have a direct and powerful effect of their own right in relation to legislation or contracts which use the rules. In relation to contracts, the rules themselves provide later that a contract is of no

effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union.

Paragraph (3) exhorts those who may have to interpret and develop the rules to have regard to the need to promote uniformity of application, good faith and fair dealing, and legal certainty. The reference to uniformity of application reinforces the point made in the first paragraph of the Article. The need to promote uniformity of application may be met for example by looking at prevailing scholarly opinion on the meaning of the text and established trends in judicial application of the rules. The reference to good faith and fair dealing applies to the whole of the rules. It relates to the role of good faith and fair dealing in the interpretation and development of the rules – reflecting the fact that such ideas have played an important role in the development of many useful principles and rules in national private laws. Later Books contain specific references to good faith and fair dealing for other purposes – for example, the rule that parties must perform their obligations and exercise their rights in a way which is in accordance with good faith and fair dealing. The reference to legal certainty serves to some extent as a counterweight to the reference to good faith and fair dealing in relation to interpretation and development: it recognises that certainty is very important, particularly in relation to certain types of commercial contract.

Paragraph (4) recognises that this text is intended to be a dynamic instrument to be built on over the years. Inevitably, new problems will be identified where it does not provide a clear solution, even although the problems are within its general field of application. The point of this paragraph is to encourage those legislative drafters and contracting parties who are using this instrument to solve these new problems in a way which is consistent with the general principles underlying it. These principles, as we have just seen, include the need to promote good faith and fair dealing. The objective of paragraph (4) is to foster and encourage coherence in European private law. There is a similar provision in CISG art. 7(2).

Paragraph (5) is probably not strictly necessary because this would usually be the only reasonable way of dealing with a conflict between a general rule and a more special rule. In some legal traditions, however, legislative drafters have a tendency to insert expressions such as “Subject to paragraph…” or “unless otherwise provided” whenever there is the slightest risk of conflict. The provision is intended to make it unnecessary to encumber the text with such expressions.

This Article is derived from PECL art. 1:106(1), with some drafting changes and additions.

I.–1:103: Good faith and fair dealing

(1) The expression "good faith and fair dealing" refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.

(2) It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party's prior statements or conduct when the other party has reasonably relied on them to that other party's detriment.

COMMENTS

A. A standard of conduct

Many of the following model rules refer to good faith and fair dealing. It is therefore useful to define this composite expression at an early stage. It refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question. "Honesty" is not further defined and has its normal meaning. As the references in the later Articles are often to conduct which is *contrary* to good faith and fair dealing it will often be dishonesty (rather than honesty) which is at issue. Cheating is contrary to good faith and fair dealing. The reference to openness identifies another important characteristic of good faith and fair dealing. It denotes an element of transparency in a person's conduct. Consideration for the interests of the other party does not require that the other party's interests be preferred. Only a basic level of consideration will normally be required. A party to a legal relationship who is subject to a requirement to act in accordance with good faith and fair dealing could, however, be expected not to act out of pure malice. A person should, for instance, not be entitled to exercise a remedy if doing so is of no benefit to anyone and if the only purpose is to harm the other party. What consideration is required for the interests of the other party will depend on the circumstances, including the nature of the contract. In many commercial contracts the rights and obligations of the parties will be so carefully regulated that in the normal course of events considerations of good faith and fair dealing will remain entirely in the background.

The composite expression "good faith and fair dealing" is different from "good faith" on its own. This, unless otherwise qualified, refers to a subjective state of mind generally characterised by a lack of knowledge that an apparent situation is not the true situation. Legal rules sometimes use "good faith" in this subjective sense. For example, a certain result may follow only if a purchaser has acquired goods in good faith, without notice of third-party claims in the goods or documents. Or a representative may have authority to affect the legal relations of a principal (so-called "apparent authority") when the principal's conduct induces the third party in good faith to believe that the representative has such authority.

B. Inconsistent behaviour

A particular application of the principle of good faith and fair dealing is to prevent a party, on whose statement or conduct the other party has reasonably acted in reliance, from adopting an inconsistent position. This translates directly into a number of provisions in these rules, e.g. the rule that a revocation of an offer is ineffective if it was reasonable for the offeree to rely on the offer as being irrevocable, and the offeree has acted in reliance on the offer; the rules under which a party by statement or conduct may be precluded from asserting a merger clause or a no-oral-modification clause to the extent that the other party has reasonably relied on the

statement or conduct; the rule that an apparent authority of a representative which has been established by a principal's statements or conduct will bind the principal to the acts of the representative; and the rule that if a common intention of the parties as to the interpretation of a contract cannot be established, the contract is to be understood according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

The rule is, however, broader than any of these specific provisions. It is a general principle that a person who has induced another person to incur a change of position on the faith of an act should not be allowed to set up the invalidity of an act or another reason for its not being binding. See III.–1:103 (Good faith and fair dealing) paragraph (3) when read with the present Article.

Illustration
An importing firm asked its bank to collect on a negotiable instrument. The bank mistakenly reported to the customer that the money had been paid and paid the customer its value. When it was discovered that the amount had not been paid, the importer had irrevocably credited the amount to its foreign business partner. The bank is precluded from reclaiming the payment.

NOTES

1. See the Notes to III.–1:103 (Good faith and fair dealing).

I.–1:104: Reasonableness

Reasonableness is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices.

COMMENTS

Reasonableness is another concept which is frequently employed in the model rules. The present Article makes it clear that it is to be objectively ascertained. This was expressed in the Principles of European Contract Law (PECL art. 1:302) by saying that:

> "reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions involved should be taken into account."

The policy is the same under the present Article although it is expressed slightly differently, partly because the reference to fictitious parties is unnecessary and partly because in the present context the concept goes beyond contractual situations. It also seems undesirable to mix up good faith and reasonableness.

The concepts of good faith and fair dealing on the one hand and reasonableness on the other are different. Something can be contrary to good faith and fair dealing and yet be reasonable. For example, it would be contrary to good faith and fair dealing to allow the other party to believe, and to act on the belief to that party's prejudice, that a certain right would not be exercised and then to exercise that right. And yet the actual exercise of the right in itself, in the absence of the inconsistent conduct, might be perfectly reasonable. Conversely, something can be unreasonable and yet not be contrary to good faith and fair dealing. For example, a representative might explain that the policy of the principal was to insist on a very severe penalty clause being inserted in the terms of all contracts of a certain type. The representative might warn the other party expressly about the dangers of accepting the clause. The insertion of the clause might be unreasonable in the particular case but if it is openly discussed and if the other party accepts it freely it is not contrary to good faith and fair dealing.

NOTES

1. Few national systems appear to have an equivalent provision. The DUTCH CC art. 3:12 provides, however, that "in determining what reasonableness and equity require, reference must be made to generally accepted principles of law, to current judicial views in the Netherlands and to the particular societal and private interests involved".

I.–1:105: "Consumer" and "business"

(1) A "consumer" means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession.

(2) A "business" means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person's self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity.

(3) A person who is within both of the preceding paragraphs is regarded as falling exclusively within paragraph (1) in relation to a rule which would provide protection for that person if that person were a consumer, and otherwise as falling exclusively within paragraph (2).

COMMENTS

A. General

The definitions of consumer and business are modelled on common features to be found in EC directives in the field of consumer protection law, as well as in EC procedural law and EC legislation on conflict of laws. Paragraph (1) defines a consumer as: (1) a natural person; (2) who is acting for purposes which are outside his or her business, commercial or trade activity. Paragraph (2) provides an overarching definition of the concept of "business" whose function is to determine whether a consumer is protected vis-à-vis his or her counterpart by specific provisions of the DCFR such as information duties, e.g. II.–3:102 (Specific duties for businesses marketing goods or services to consumers) or a right of withdrawal, e.g. II.–5:201 (Contracts negotiated away from business premises). Finally, paragraph (3) contains a clarification with regard to "mixed purpose transactions", i.e. contracts that serve both a private and business purpose.

B. Consumer

Unlike the laws of some Member States which extend the scope of several consumer protection provisions to certain legal persons, the notion of consumer in the DCFR is limited to natural persons.

In order to be considered a consumer, a person must primarily act for "purposes which are not related to his or her trade, business or profession". Thus, contracts which are concluded for personal, family or household use are considered consumer transactions. The definition of consumer also covers cases where the consumer intends to make a profit, e.g. by later reselling the goods bought, unless this person does so on a regular basis. The criteria for distinguishing a casual resale from business activity are the frequency and the volume of such transactions.

Illustration 1
A occasionally buys books and after reading sells them in internet auctions. If the frequency and volume of such transactions are rather low, A is still considered a consumer.

While the laws of several Member States extend the scope of consumer protection rules also to businesspersons concluding atypical contracts, the DCFR does not provide for such extensions of the term "consumer".

As the definition used in the DCFR does not refer to self-employed activities but any "trade, business or profession", an employee concluding a contract with his or her employer is – unlike under GERMAN law – not considered as a consumer.

If a would-be consumer deliberately deceives the other party by pretending to act in a business capacity, the consumer protection rules do not apply as this person is acting in breach of the principle of good faith (*venire contra factum proprium*). In contrast, it is not entirely clear under EC law if consumer protection rules apply if the would-be consumer negligently creates the impression that he or she is acting in the course of a business. According to the ECJ's decision *Johann Gruber v. Bay Wa AG*, ECJ 20 January 2005, C-464/01, ECR 2005, I-439 a person cannot claim the protection of arts. 13 to 15 of the Brussels Convention if this person negligently has created the impression that he or she was acting in the course of a business (paras. 51 et seq.). However, in the field of substantive consumer protection law, this approach would undermine the purpose of mandatory consumer protection rules.

C. Business

A "business" is a person who is acting for purposes relating to this person's self-employed trade, work or profession. The business has to act on a somewhat regular basis and in a capacity for which it normally requires remuneration. However, it is not necessary that the business intends to make a profit in the course of this activity (see below). In addition, it is irrelevant if the activity is the one normally conducted by the business.

> *Illustration 2*
> A bookshop sells its old computers and office equipment to a private person. Consumer protection rules apply in favour of the buyer. It is irrelevant that the goods sold are not of the kind normally sold by the business.

The wording "irrespective of whether publicly or privately owned", clarifies that a public body can also qualify as a "business". Thus the DCFR provisions for business to consumer transactions also apply to private law contracts between consumers and public bodies.

A different question is whether public law contracts are also covered. According to I.–1:101 (Intended field of application) paragraph (2), the DCFR is not intended to be used, or used without modification or supplementation, in relation to rights and obligations of a public law nature. Thus it has to be decided on a case by case basis whether the DCFR rules apply also to public law contracts.

The DCFR furthermore clarifies that persons who do not intend to make a profit are included in the notion of business. The intention to make a profit relates to an internal business factor, which in some circumstances can be proven only with difficulty and which businesses can manipulate (for example by transferring profits within a corporate group). Such internal factors of the business should have no bearing on whether consumers are protected. In

addition, EC law supports the view that a profit motive is irrelevant as several directives relate to public bodies.

Conduct by a third party who is acting in the name or on behalf of a business is attributed to the business (see II.–6:105 (When representative's act affects principal's legal position)). A business therefore does not lose this quality by using a consumer as its agent or representative.

A consumer who uses a business intermediary, e.g. a commercial agent, broker or any other professional intermediary, for concluding contracts with other private persons will benefit from consumer protection rules in the internal relationship with the intermediary.

In contrast, the DCFR does not decide the question whether in such a case consumer protection rules are also applicable in the external relationship, i.e. between two private persons one of whom is represented by a business. There is good reason to argue that in such cases consumers need similar protection as in an ordinary business to consumer contract as the other party will benefit from the professional expertise of the business intermediary. However, the extension of consumer protection should not include person to person trading platforms, e.g. online market places, where the platform provider is not involved in the conclusion of the contract. Thus, it is left to the courts to establish clear criteria as to when the role of the intermediary is strong enough to justify the application of consumer protection rules.

D. Mixed purpose contracts

Paragraph (3) deals with the situation which may occasionally arise where there is an overlap between the definitions of "consumer" and "business". This can happen because there is, deliberately, no "primarily" in paragraph (2). A person who is buying a computer which is to be used primarily for personal purposes but to some small extent for business purposes is treated as a consumer for the purposes of any rule protecting consumer buyers. A person who is selling a computer which is used primarily for personal purposes but to some small extent for business purposes is treated as a business in relation to any rule protecting consumer buyers. The purpose is to give the buyer, if a consumer, the protections which would apply to a consumer dealing with a business. The buyer should not have to assess the extent to which the seller is acting for business purposes

NOTES

I. Overarching consumer definitions

1. Directives 93/13/EEC, 97/7/EC, 1999/44/EC, 2000/31/EC and 2002/65/EC define the term "consumer" as a natural person who is acting for purposes which are outside his "trade, business and/or profession". Slightly deviating from this definition Directive 85/577/EEC defines a consumer as "a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession" (art. 2). The same definition is used by Directive 87/102/EEC. Similarly, the Directive 2005/29/EC on unfair commercial practices defines the term "consumer" as "any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession".

According to Directive 98/6/EC a consumer is a "natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional capacity". The same definition is used in Directive 94/47/EC, although this directive does not use the term "consumer" but "purchaser".

2. Despite slight terminological deviations, all of the Directives mentioned share a common core, providing that a consumer is: (1) a natural person; (2) who is acting for purposes which are outside his or her business, commercial or trade activity. This approach is not only applied in most of EC consumer protection directives but also in European procedural law (arts. 13 to 15 of the Brussels Convention, now arts. 15 to 17 Brussels I Regulation (Regulation 44/2001/EC) and European rules on conflict of laws (Rome Convention art. 5). In contrast, under Directive 90/314/EEC, the term "consumer" also covers parties who conclude package travel contracts for business related purposes. The consumer notion has been interpreted rather narrowly by the European Court of Justice when dealing with the substantive acquis (see e.g. *Criminal proceedings v. Patrice Di Pinto*, ECJ 14 March 1991, C-361/89, ECR 1991, I-1189 and *Bayerische Hypotheken- und Wechselbank AG v. Edgard Dietzinger*, ECJ 17 March 1998, C-45/96, ECR 1998, I-1199, both dealing with the Doorstep Selling Directive).

3. Many Member States have harmonised the notion of consumer used in the various directives and established a definition in national law, which is equally applicable in various consumer protection acts. Such single and uniform notions of consumer can be found in AUSTRIA (ConsProtA § 1(1) no. 2 in conjunction with (2)), the CZECH REPUBLIC (CC art. 52(3)), DENMARK (Distance and Doorstep Selling Act § 3(1)), FINLAND (ConsProtA chap. 1 § 4), GERMANY (CC § 13), GREECE (ConsProtA art. 1(4) lit. (α)), ITALY (ConsC art. 3(1) lit. (a) and (b)), LATVIA (ConsProtA art. 1(1)(3)), MALTA (Consumer Affairs Act art. 2), the NETHERLANDS (CC art. 7:5(1)), POLAND (CC art. 22), SLOVENIA (ConsProtA art. 1(2)) and SPAIN (ConsProtA art. 3) and SWEDEN (Distance and Doorstep Selling Act § 2). In other Member States several overarching consumer definitions exist, e.g. BELGIUM (ConsProtA art. 1 no. 7; Trade Practices Act art. 2 no. 2), ESTONIA (ConsProtA § 2 no. 1; LOA § 34), LITHUANIA (CC art. 6.350(1)), PORTUGAL (ConsProtA art. 2(1); Doorstep Transactions Decree-Law art. 1(3)(a)), SLOVAKIA (Distance and Doorstep Selling Act § 1; CC § 52).

4. In contrast, CYPRUS, FRANCE, HUNGARY, IRELAND, LUXEMBOURG, and the UNITED KINGDOM do not know any legal definition of consumer overarching the directives. Rather they either define the consumer separately in every transposing act or abstain from such a definition in whole or in part. In FRANCE the term consumer is not defined in legislation at all, but case law has extended the definition given by the provisions on *démarchage* (ConsC art. L. 121-22). A consumer is a contracting party that enters into a contract that is not in direct relation with its professional activity (for unfair contract terms, Civ. I, 3 and 30 January 1996, Bull. Civ. I, no. 9 and 55, JCP 1996.II.22654, note *Leveneur*; D. 1996, 228, note *Paisant*). The French legislator meanwhile explicitly abstains from defining the term consumer, as in this way better account can be taken of different situations (cf. e.g. most recently, in transposition of the Consumer Sales Directive, the *Rapport au Président de la République relatif à l'ordonnance n° 2005-136 du 17 février 2005 relative à la garantie de la conformité du bien au contrat due par le vendeur au consommateur*, JO n° 41 du 18 février 2005, 2777).

5. In MALTA, any other class or category of persons whether natural or legal may, from time to time, be designated as "consumers" for all or for any of the purposes of the

Consumer Affairs Act by the Minister responsible for consumer affairs after consulting the Consumer Affairs Council.

6. Even if the term consumer is defined in different legal acts in the Member States, this does not necessarily mean that these definitions differ from each other in substance. On the contrary, it can be stated that in most Member States, in spite of the scattered rules in separate legislative acts, the definitions by and large accord, as they are orientated on Community law and the Community law for its own part exhibits a common core. Difficulties in applying consumer protection legislative acts do of course arise when a member state uses differing definitions of consumer and it is not clear whether one or the other is applicable in each individual case. Generally, however, this does not affect the proper transposition of the relevant directives, since those Member States go beyond the minimum level of protection. In HUNGARY, the notion of consumer is regulated differently in the CC, the Consumer Protection Act, the Government Decree on Doorstep Selling, the Hungarian Competition Act and the Business Advertising Activity Act, and it is often not clear which definition is applicable. However, the planned modifications of the Hungarian CC could clear up these ambiguities.

II. Extensions of the notion of consumer

7. Notion of the final addressee: In SPAIN it was an essential prerequisite that the consumer or user "acquires, uses or enjoys as final addressee some goods", and without "the aim of integrating them in production, transformation or commercialisation processes" (cf. Consumer Protection Act 1984 (*Ley 26/1984*) art. 1(2) and (3). These notions are omitted in the new definition set out by ConsProtA art. 3. A comparable notion still exists in GREECE, although with the difference that Greek law does not have any limitation for private purpose. According to ConsProtA art. 1(4)(a) a consumer is every "natural or legal person, to whom products or services on a market are aimed, and who makes use of such products and services, so long as the person is the end recipient." Also in HUNGARY the notion of end recipient is applied; according to ConsProtA art. 2 lit. (i) a "consumer transaction" is the supply of goods or the provision of services and, furthermore, the supply of free samples of goods directly to the consumer as final recipient (cf. the decision of the Hungarian Supreme Court, Legf. Bír. Kfv. III. 37.675/2003). The LUXEMBOURG ConsProtA uses the term final addressee (*consommateur final privé*) in some cases as well (e.g. art. 1-2 and art. 2 no. 20 in relation to the control of unfair terms), without defining what this term means.

8. The notion of "final addressee" in GREECE is wider than the term "consumer" established in the Directives, since it also includes atypical transactions which are not related to a further transfer. However, it is acknowledged that in practice such a broad definition of "consumer" can lead to difficulties in applying the law. Also the need for a teleological reduction is stressed in academic literature and the view is propounded that the regulations should not apply to every final addressee. Rather, in each case it should be verified that the relevant person or entity is in need of protection. In order to qualify as being in need of protection, the end consumer must not be acting within a business or commercial capacity in concluding the transactions in question.

9. Extension to businesspersons concluding atypical contracts: In FRANCE, according to well-established case-law, a consumer is a (natural or legal) person concluding contracts which are not directly related (*qui n'ont pas de rapport direct*) with his or her profession. The leading decision in this regard was that of the Cass.civ. of 28 April 1987 (Cass.civ. 28 April 1987, JCP 1987. II. 20893 Juris-classeur periodique). In the case under dispute an estate agency purchased for its business premises an alarm

system, which was not in good working order. A clause in the general conditions of business however declared that the buyer could not rescind the contract or claim damages. In the view of the Cass. civ. the French ConsC was nonetheless applicable, because the subject matter of the contract did not bear any direct relation to the substance of the business activity and because the technical expertise of an estate agency did not encompass the technology of alarm systems, by reason of which the buyer must be treated just as any other consumer. In later decisions the Cass. civ. has distanced itself from its wide interpretation and pointed out that the decisive criterion for the applicability of the ConsC is not the technical competence of the "professional", but rather whether the contract has a direct relation to the business activity (Cass.civ. 24 January 1995, D. 1995, Jur. 327-329). This case-law has been affirmed in numerous decisions (cf. Cass.civ. 23 November 1999, Juris-classeur, CCC 2000, commentaires, 25; Cass.civ. 23 February 1999, D. 1999, I.R., 82). Protection for businesses who conclude contracts outside of their usual field of business also exists in POLAND and LATVIA. This thinking underlies the LUXEMBOURG Consumer Sales Act; according to its art. 2 no. 2 a "*consommateur*" is "*une personne physique qui agit à des fins qui n'ont pas de rapport direct avec son activité professionnelle ou commerciale*". The practical relevance of this group of persons depends on the respective interpretation of the notion of "usual field of business". If this is limited to elementary core activities, then businesses will frequently profit from consumer protection rules. Conversely, if "usual field of business" comprises all transactions which are not completely atypical, businesses will rarely be considered consumers.

10. In the UNITED KINGDOM under the Unfair Contract Terms Act 1997 s. 12(1) businesses engaged in a transaction outside their normal business purposes can claim to be "dealing as consumer" since the decision in *R. & B. Customs Brokers Co. Ltd. v. United Dominions Trust Ltd.* [1988] 1 WLR 321. In this case, the plaintiff, a shipping brokerage, purchased a second-hand car for the personal and business use of the company's directors. Several similar purchases had been made before. The contract excluded liability for breach of certain statutory implied terms. According to the Unfair Contract Terms Act s. 6 (2)(b), where a business sells to a consumer, terms as to quality and fitness for purpose implied by statute (namely Sale of Goods Act 1979 ss. 13-15) cannot be excluded or restricted by reference to any contract term. Therefore, it was to be decided whether the buyer was "dealing as consumer". The CA held that no sufficient degree of regularity had been shown by the defendant so as to establish that the activity was an integral part of the plaintiff's business. Rather, the purchase was only incidental to the company's business activity. The plaintiff was therefore dealing as a consumer within the terms of the Unfair Contract Terms Act s. 12(1). Thus the defendant could not exclude liability for breach of the implied term. Whether this wide definition of consumer can be applied beyond the context of the Unfair Contract Terms Act for other consumer protection legal acts, is questionable however. Firstly it must be noted that the Unfair Contract Terms Act only partly serves the implementation of directive law (namely in relation to the Consumer Sales Directive) and the UK otherwise uses a notion of consumer which is closely orientated towards Community law. Secondly, the cited decision has in the meantime been placed in doubt, as in *Stevenson v. Rogers* the CA held that for the purposes of the Sale of Goods Act 1979 s. 14 any sale by a business is "in the course of a business" (*Stevenson v. Rogers* [1999] QB 1028). Thus a solicitor selling off a computer no longer needed in his or her office would, for this purpose, be selling the computer in the course of business.

11. In ITALY some courts similarly propounded the view, for a time, that a person should be protected as a consumer if the relevant transaction does not belong to his or her core business activities (CFI Roma, 20 October 1999, Giust.civ. 2000, I, 2117). The Cass. on the other hand rejected this view and established a narrow definition of consumer (Cass., 25 July 2001, No. 10127, I Contratti 2002, 338). This view is consistent with the case-law of the ECJ. The ECJ has construed the notion of consumer under Directive 85/577 narrowly in *Criminal proceedings v. Patrice Di Pinto*, ECJ 14 March 1991, C-361/89, ECR 1991, I-1189). The ECJ regarded the French notion of consumer as permissible; but at the same time highlighted that Community law does not "draw a distinction between normal acts and those which are exceptional in nature" (ibid., para 15). This view is also confirmed by the preparatory work for Directive 99/44: whereas the original proposal for Directive 99/44 of 18 June 1996 (COM(95), 520 final) regarded as consumer a person who "is acting for purposes which are not directly related to his trade, business or profession", the amended directive proposal (COM(98), 217 final) omitted the words "not directly".

12. Protection of certain legal persons: Under the above-mentioned Directives only natural persons are regarded as consumers. In the joined cases *Cape Snc. v. Idealservice Srl.* and *Idealservice MN RE Sas. v. OMAI Srl.* (ECJ 22 November 2001, C-541/99 and C-542/99, ECR 2001, I-9049, para 16) the ECJ expressly stated (concerning the consumer definition of art. 2 of the Directive 93/13/EEC) that Community law in this respect is not to be given a wider interpretation: "It is thus clear from the wording of art. 2 of the Directive that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision." A number of Member States follow this concept and expressly limit the scope of consumer protection provisions to natural persons: CYPRUS, GERMANY, ESTONIA, FINLAND, IRELAND, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, SLOVENIA and SWEDEN. In ITALY the Italian constitutional court clarified in its judgment of 22 November 2002 that an extension of protection to legal persons is not provided for in Italian constitutional law either (Corte Cost. 22 November 2002, no. 469, Giust.civ. 2003, 290 et seq.). In LATVIA, there has recently been a reform, so that from now on legal persons are excluded from the notion of consumer (Amendment of the Consumer Protection Act, which came into force on 11 November 2005). In the UNITED KINGDOM by contrast the law varies: whereas the case-law has declared that a company may "deal as a consumer" within the meaning of the Unfair Contract Terms Act, (e.g. *R. & B. Customs Brokers Co. Ltd. v. United Dominions Trust Ltd.* [1988] 1 WLR 321) in other consumer protection instruments only a natural person can be a consumer. Through the limitation to natural persons small and medium sized enterprises and charitable associations e.g. sporting associations or church parishes, are without protection. Thus there are norms in AUSTRIA, BELGIUM (cf. LPCC art. 1 no. 7, and Unfair Trade Practices Act art. 2 no. 2, by contrast, under Timeshare Act art. 2 no. 5), the CZECH REPUBLIC, DENMARK, FRANCE, GREECE, HUNGARY, SLOVAKIA (with some exceptions) and SPAIN, which treat legal persons as consumers, providing the purchase is for private use (or in Greece, Hungary and Spain the legal person is the final addressee). In FRANCE the Cass.civ. with its judgment of 15 March 2005 has clarified that the notion of "consumer" (*consommateur*) according to the ECJ decision in *Idealservice* cannot be carried over to legal persons, whereas on the other hand, the notion "*non-professionel*" (used in the context of the articles concerning unfair contract terms; see ConsC art. L. 132-1) can also be a legal person under French law (Cass.civ. 15 March 2005, No. de pourvoi: 02-13285 *Syndicat départemental de contrôle laitier de la Mayenne*). HUNGARY is

currently planning to limit the notion of consumer to natural persons. In PORTUGAL, it is unclear whether legal persons can be protected as "consumers", however, a draft of a new Consumer Code acknowledges that legal persons may, in certain circumstances, benefit from the protection conferred to consumers.

13. Protection of employees: A peculiarity of GERMAN law is that it generally regards an employed person who is also acting within his or her professional capacity as a "consumer". According to CC § 13 "consumers" are those persons who "enter into a transaction which can be attributed neither to their business nor their self-employed capacity". Accordingly, the German Federal Labour Court considered an employee to be a consumer (BAG 25 May 2005, NJW 2005, 3305). This does not however mean that all consumer laws in Germany can automatically be applied to the protection of the employee. Rather, case-law makes the following distinction: whereas standard business terms in contracts of employment are in principle subject to the controls of provisions which serve the transposition of the Directive 93/13/EEC (cf. the judgment of the BAG loc. cit.), an agreement concluded at the place of work to end an employer-employee relationship is not subject to the withdrawal provisions of doorstep sales. In the view of the Federal Labour Court such an agreement does not represent a doorstep selling situation within the meaning of CC § 312 (BAG 27 November 2003, NJW 2004, 2401). The right of withdrawal in doorstep selling situations is – according to the court – a consumer protection right related to the type of contract and encompasses only "particular forms of marketing". Accordingly, the right of withdrawal provided by law does not apply to contracts which are not a form of marketing, such as a contract of employment or contract to terminate employment. Therefore, the employee does not enjoy a right of withdrawal in these situations. Whether the European notion of consumer also includes employed persons is contentious in German literature (in favour thereof: *Faber*, ZEuP 1998, 854, 873 et seq.; against: *Mohr*, AcP 204 (2004), 660, 671).

14. Protection of founding activities: Whether a person who makes transactions in the course of preparing professional activity (founding activities) is likewise a "consumer", is not expressly regulated in the directives at issue. The ECJ decided in *Francesco Benincasa v. Dentalkit Srl.* (ECJ 3 July 1997, C-269/95, ECR 1997, I-3767) that art. 13 Brussels Convention (now Brussels I Regulation art. 15) is not applicable if a party has concluded a contract for future professional or business activity. In its reasoning the ECJ stated that "[t]he specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character" (para. 17). Thus, for Community law the predominant view is that also transactions which serve the founding of a business are generally not to be regarded as consumer contracts. This view is confirmed by Directive 2002/65/EC. In recital (29) of this Directive it is stated that "[t]his Directive is without prejudice to extension by member states, in accordance with Community law, of the protection provided by this Directive to non-profit organisations and persons making use of financial services in order to become entrepreneurs."

15. In most Member States the issue of founding activities is not addressed either in statute law or by case-law. AUSTRIA alone regulates the matter in a legislative Act. ConsProtA § 1(3) provides that transactions by which a natural person, prior to commencing a business, obtains the necessary goods or services do not qualify as business transactions. Founders of new businesses therefore enjoy the protection of consumer laws. In GERMANY, by contrast, courts have regarded founders of

businesses not as consumers, but as businesses (BGH 24 February 2005, NJW 2005, 1273-1275 on the Directive 93/13).

16. Under GERMAN case law there have been some cases where businesses try to circumvent the transaction being classified as a consumer sale. For instance, a contract clause in which the purchaser confirms that he is a trader was deemed irrelevant once the trader is aware that the buyer is a consumer (CFI Zeven 19 December 2002, DAR 2003, 379). However, in a case where a consumer claimed to be a trader because the seller did not wish to sell to consumers the buyer lost his consumer rights (BGH 22 December 2004, NJW 2005, 1045, see also *Halfmeier*, GPR 2005, 184 ff).

III. Overarching business definitions

17. Unlike for "consumer", EC law does not use a uniform term for the other party to a consumer contract. That party (the business) is variously described as "trader" (Directives 85/577/EEC; 98/6/EC; 2005/29/EC), "supplier" (Directives 93/13/EEC; 97/7/EC; 2002/65/EC), "seller" (Directives 93/13/EEC; 1999/44/EC), "vendor" (Directive 94/47/EC), "service provider" (Directive 2000/31/EC) or "creditor" (Directive 87/102/EEC). A common feature of these Directives, however, is that the business can be either a natural or a legal person who is acting for purposes relating to this person's self-employed trade, work or profession.

18. A series of Member States have introduced a uniform definition for the counterpart of the consumer, in particular AUSTRIA (ConsProtA § 1(2)), CZECH REPUBLIC (CC art. 52(2)), FINLAND (ConsProtA chap. 1 § 5), GERMANY (CC § 14), ITALY (ConsC art. 3(1)(c)), SPAIN (ConsProtA art. 4) and SLOVENIA (ConsProtA § 1(3)). LATVIA (ConsProtA art. 1(1) ss. 4-5) and LITHUANIA (ConsProtA art. 2(2) and (3)) define the terms "seller" and "service provider" generally for all kinds of consumer contracts. SLOVAKIA introduced general definitions for "seller" and "supplier" in ConsProtA § 2(1)(b) and (e). Other Member States by contrast, in particular FRANCE, abstain from express definitions, relying instead on their case law developing an overarching definition of business.

IV. Public bodies

19. Some Directives make explicitly clear that public bodies can also be "businesses". For example, Directive 2002/65/EC art. 2(c) defines as "supplier" "any natural or legal person, public or private". In the same line, Directive 93/13/EEC emphasises in its recital 14 that the Directive also applies to trades, businesses or professions of a public nature. Cf. e.g. the ENGLISH language version of the directive ("whether publicly owned or privately owned"), the GERMAN version ("*auch wenn diese dem öffentlich-rechtlichen Bereich zuzurechnen ist*") and the FRENCH version ("*activité professionnelle, qu´elle soit publique ou privée*"). Thus, Directive 93/13/EEC applies at least to private law contracts between consumers and public legal persons or bodies. Whether public law contracts are also covered by the Directive is less certain. However, considering the fact that the public/private divide is drawn differently in each Member State one should not leave it to the discretion of the national legislator whether a contractual clause classified as "public" under national law is subject to Directive 93/13/EEC or not.

20. A series of Member States have gone beyond the scope of application of Directive 93/13/EEC and Directive 2002/65/EC in providing expressly that "business" includes legal persons under public law. In AUSTRIA, legal persons under public law always qualify as businesses (ConsProtA § 1(2) sent. 2). In BELGIUM, the term "seller" (used in the Trade Practices Act for doorstep and distance selling and price indication) includes governmental institutions that pursue commercial, financial or industrial

activity and sell or offer for sale products or services. In CYPRUS, according to ConsProtA art. 2, the word "business" includes "a trade or profession and the activities of any government department or local or public authority", "courts" and "directors". GREEK law also emphasises in ConsProtA art. 1(3) that public sector suppliers qualify as "business". ITALIAN law includes (for sales contracts) under the definition of "seller" every natural or legal person of private and public law (ConsC art. 128(2)(b)). In SLOVENIA, a business is defined as a legal or natural person "regardless of its legal form or ownership" (ConsProtA art. 1(3)). In SPAIN the definition of "business" also covers both private and public activities (ConsProtA art. 4: "*actividad empresarial o profesional, ya sea pública o privada*"). Similarly in the UNITED KINGDOM in the context of transposing the Consumer Sales Directive it is clarified that "business" includes the profession and activity of any government department (including a Northern Ireland department) or local or public authority (Sale of Goods Act 1979 s. 61(1)(b)). In other Member States such as GERMANY it follows from the general definition of legal person that public bodies are also included.

V. Intention to make profit

21. Directive 93/13/EEC and Directive 2002/65/EC support the view that a profit motive is irrelevant, since both Directive explicitly include public bodies in their scope of application (cf. supra).

22. Some member states have regulated the issue whether the intention to make a profit has any bearing on the definition of the term "business". In AUSTRIA the notion of business is defined in ConsProtA § 1(2) as "every organisation on a continuing basis of independent economic activity", even if this organisation does not intend to make a profit. In GERMANY, the BGH clarified for consumer goods sales that the only relevant factors for qualifying as business are whether the seller offers products on the market against payment, normally over a certain period of time. The court stated expressly that it does not matter whether the seller pursues the business activity with the intention of making profit (cf. BGH 29 March 2006, NJW 2006, 2250). In GREECE, it is likewise recognised that non-profit making organisations or institutions as well as public corporations and local authorities can act as suppliers. In the NETHERLANDS and SWEDEN the notion business/corporation also includes those enterprises that have no profit motive.

23. The position is different, however, in FINLAND and SLOVENIA. According to FINLAND ConsProtA chap. 1 § 5 the trader has to act "in order to gain income or with another economic interest." According to SLOVENIAN ConsProtA § 1(3), a "trader" is defined as a legal or natural person, who is "engaged in a profitable activity" regardless of its legal form or ownership. In SPAIN the position has recently changed. While the term "retail trade" in Retail Trade Act art. 1(2) (*Ley 7/1996*), which initially transposed Directive 97/7/EC, was defined as "the activity professionally undertaken with a view to profit" (*ánimo de lucro*), the definition of "business" (*empresario*) in ConsProtA art. 4 has no such limitation.

VI. Use of intermediaries

24. Community law sometimes contains an extended definition of "business". Thus a "trader" in doorstep sales is also a person who is "acting in the name or on behalf of a trader" (Directive 85/577/EEC art. 2). In the same way Directive 2005/29/EC provides that "trader" is also anyone acting in the name of or on behalf of a trader". Also the first proposal for Directive 97/7/EC contained such a definition (COM(92) 11 final). However, the amended proposal of 7 October 1993 (COM(93) 396 final) refused an

express inclusion of auxiliary agents, without the reasons for that exclusion being apparent. Finally, according to art. 1(2) lit. (b) of the Directive 87/102/EEC a "creditor" is not only a person who grants credit in the course of a trade, business or profession, but also "a group of such persons". When a person is acting "in the name or on behalf of a trader" has not hitherto been clarified by the ECJ. In *Crailsheimer Volksbank eG v. Klaus Conrads, Frank Schulzke and Petra Schulzke-Lösche, Joachim Nitschke* (ECJ 25 November 2005, C-229/04, ECR 2005, I-9273) the Court of Justice did at least clarify that Directive 85/577/EEC "must be interpreted as meaning that when a third party intervenes in the name of or on behalf of a trader in the negotiation or conclusion of a contract, the application of the Directive cannot be made subject to the condition that the trader was or should have been aware that the contract was concluded in a doorstep-selling situation" (para. 45).

25. The issue addressed in Community law in some directives of whether a person acting in the name or on behalf of a trader is to be regarded as a business, is partly regulated in the member states generally for all or several consumer protecting acts. The BELGIAN Trade Practices Act refers to the term "seller" which is defined in art. 1(6) as "any other person, whether acting in its own name or on behalf of a third party". The CYPRIOT notion of "supplier" clarifies as well that the supplier acts "either personally or through his representative". The LATVIAN ConsProtA defines as a "seller" any natural or legal person who offers or sells goods to consumers by means of entrepreneurial activity, as well as a person who acts in the name of the seller or on his or her instruction.

26. In other legal systems this issue is not expressly regulated, but it does however follow from the general definition of consumer and the rules on agency that conduct by a third party is attributed to the business and that a business does not lose its character as such by engaging a representative who would be classed as a consumer (such as in particular for Austrian law, cf. OGH 5 August 2003, 7 Ob 155/03z, SZ 2003/88). By contrast the legal situation in GREECE and POLAND is unclear. In GREECE – in contrast to Directive 85/577/EEC – not any person acting in the name of and on behalf of a trader is viewed as a trader. The same applies for POLISH law. According to CC art. 43 the nature of the activity of the trader must be exercised in the "own name" of the person. This seems to be a narrower definition than the one provided in art. 2 of Directive 85/577/EEC. Furthermore, the issue of whether consumer protection laws apply if a private person is represented by a business is addressed differently. In AUSTRIA and GERMANY it generally depends on the identity of the contractual partner. A contract between two private persons does not therefore fall within the ambit of consumer protection provisions if it is brokered by a person acting in a business or professional capacity. By contrast in DENMARK, ITALY and PORTUGAL it is clarified that for timeshare contracts, if the vendor is not a professional, but the contract is concluded for the vendor by a professional, then it is regarded as a contract covered by the act as well.

VII. Mixed purpose transactions

27. For contracts that serve both a private and business purpose (e.g. the acquisition of a motor vehicle for a freelancer), the directives at issue contain no express rule, in contrast to Directive 85/374/EEC (see art. 9 lit. (b) ii: "used by the injured person mainly for his own private use or consumption"). The judgment of the ECJ in *Johann Gruber v. Bay Wa AG* (ECJ 20 January 2005, C-464/01, ECR 2005, I-439) has brought no clarification in this regard. The Court stressed in this decision that a person can invoke the special rules of jurisdiction of arts. 13-15 of the Brussels Convention (now Brussels I Regulation arts. 15-17) in respect of dual use contracts only if the

trade or professional purpose is so limited as to be negligible in the overall context of the transaction (para. 54). However, this decision related only to European procedural, not substantive law. One might nevertheless wonder whether the procedural notion of consumer can be useful for substantive consumer protection law. Whereas in procedural law terms it can be completely justified on grounds of legal certainty to give standing only in respect of contracts concluded entirely for use for private purposes, in substantive law terms it could be thoroughly justified in the interests of consumer protection to concentrate on the primary use purpose (cf. *Ebers*, in: Ajani/Ebers (eds), Uniform Terminology for European Contract Law, 115-126 = *Ebers*, ADC 2006, 229-238). Thus for the directives at issue it remains open how dual use cases are to be treated.

28. Member States found different solutions for classifying mixed transactions. The differentiation according to the criterion of the primary purpose is expressly stated in the DANISH, FINNISH and SWEDISH provisions. GERMAN courts also focus on the question of whether the private or business use is predominant (CA Naumburg 11 December 1997, NJW-RR 1998, 1351, on the applicability of the consumer credit act in relation to motor vehicle leasing). In ITALY, recent case-law tends towards the same direction, so that a small tobacconist was regarded as a consumer when concluding a contract for hire of a vehicle which was for both private and business use. However, it is not clear from this judgment whether the private use was predominant (Giudice di pace Civitanova Marche 4 December 2001, Arch.Giur.circolaz. 2002, 405). In AUSTRIA (ConsProtA § 1(1)) and BELGIUM (ConsProtA art. 1(7)) on the other hand only contracts concluded exclusively for private purposes are encompassed.

I.–1:106: "In writing" and similar expressions

(1) For the purposes of these rules, a statement is "in writing" if it is in textual form and in characters which are directly legible from paper or another tangible durable medium.

(2) "Textual form" means a text which is expressed in alphabetical or other intelligible characters by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form.

(3) "Durable medium" means any material on which information is stored so that it is accessible for future reference for a period of time adequate to the purposes of the information, and which allows the unchanged reproduction of this information.

COMMENTS

A. Purpose and general idea

Following the legal systems of the Member States, these rules adhere to the general principle of freedom of form. Thus, I.–1:109 (Notice) states that notices may be given by any means appropriate to the circumstances. Similarly, according to paragraph (1) of II.–1:106 (Form), a contract or other juridical act need not to be concluded, made or evidenced in writing nor is it subject to any other requirement as to form. These are general rules. Particular rules may require writing or some other formality.

Under the present rules there are four levels of form: (i) "textual form", (ii) "textual form on a durable medium", (iii) "in writing" and (iv) "signature". Levels (i) to (iii) are defined in the present Article. Level (iv) is defined in I.–1:107 ("Signature" and similar expressions). Apart from these four categories of formality, the rules do not impose any stricter levels of form (e.g. notarisation). However, the acquis communautaire does acknowledge the existence of such requirements in the laws of the Member States (cf. E-Commerce Directive 2000/31/EC recital 36 and art. 1(5)(d) 1st indent).

Form requirements may be imposed within these rules for several reasons. Information provided in textual form (or any higher level of form) rather than oral information enables the parties to ponder upon the legal consequences of e.g. entering into a contract. In addition, specific form requirements allow each party to reproduce and store a record of the transaction which may be useful for later reference or in order to be able to give evidence. A form requirement for a contract may also function as a warning to the parties, making them aware that a particular contract or transaction can have very significant effects on their economic position. In some cases, the existence of a text may also facilitate the subsequent control of a transaction by an interested party who is not party to the contract, e.g. for supervision, accounting or tax purposes.

B. In writing

For the purposes of these rules, "in writing" is defined in a very limited sense. In practical terms, it means text written or printed on paper. A signature is not required. It should be noted that this definition deviates from the definitions given in the Unidroit Principles (art. 1(11)) or in PECL (art. 1:301(6)), which also include electronic forms. The reason for such a narrow definition is that the present rules contain protective form provisions which necessitate more differentiation than the Unidroit Principles and PECL. In the acquis communautaire, a number of Directives – both regarding business to consumer and business to business transactions –

use the term “in writing” in a rather inconsistent way, sometimes holding the broader meaning, sometimes restricted to writing on paper. Paragraph (1) of the present Article aims to achieve a higher degree of consistency among the different form requirements by linking the definition of “in writing” with the other form requirements.

Thus, the definition of “in writing” combines elements from paragraphs (2) and (3) of the present Article: a statement is “in writing” if it is in “textual form” (paragraph (2)) and provided on paper or another “durable medium” (paragraph (3)). In addition, the statement has to be “in directly legible characters”.

A text is “in directly legible characters” if the characters can be read without any change or conversion. Reading may be visual (letters printed on paper or carved in stone) or tactile (Braille letters). Sound recordings are not ‘in writing’ because they are neither in textual form (paragraph (2)), nor directly legible. Also a DVD which stores text is “not directly legible”.

An email message is not in writing because it is not in characters which are directly legible from paper or another tangible durable medium. It may, when displayed, be in characters which are directly legible from a computer screen but that is a display medium and not a storage medium. (See the definition of “durable medium” below.)

C. Textual form

Paragraph (2) provides a definition of “textual form”. This term marks the lowest level of formality in these rules. In order to be considered as “textual form”, a statement must fulfil the following requirements.

> (i) It must be “expressed in alphabetical or other intelligible characters”. Alphabetical characters are letters (e.g. Roman, Cyrillic, Greek, Arabic). Other characters include e.g., Chinese or Japanese symbols, but may extend to any set of intelligible characters in which a message can be formed. Oral messages or purely graphical symbols, on the other hand, are not expressed in characters.
>
> (ii) It must be so expressed “by means of any support which permits reading”. The medium which is used for this support is irrelevant. Reading may be visual (paper, screen) or tactile (Braille letters).
>
> (iii) It must be so expressed by means of any support which permits “recording of the information contained in the text and its reproduction in tangible form.” “Textual form” (other than “durable medium”) does not require the information to be permanently available, but it must be made available in a way which allows the information to be recorded and reproduced in tangible form. In other words, the text must be made available in such a way that the addressee can read it on the spot and can easily record and store it. This applies e.g. to textual information presented on a website, if this can be downloaded (i.e. recorded) and then later accessed and printed out (i.e. reproduced in a tangible form).

In the DCFR “textual form” as such (without being combined with durable medium or signature) is only required in II.–3:105 (Formation by electronic means) paragraph (2) and II.–9:103 (Terms not individually negotiated) paragraph (2), which are both only applicable to

contracts to be concluded by electronic means. In practical terms, the requirement to make information available in textual form means that the information must at least be provided as text on a webpage in a way that it can be downloaded and recorded. It does not need to be provided on a durable medium in the sense of paragraph (3) of the present Article (which would be, for instance, a DVD or an email, cf. below under D.)

Illustration 1
Air Company X sells tickets on the internet, referring to standard terms which are available and can be downloaded from the same webpage. This is sufficient for the "textual form" requirement in II.–3:105 (Formation by electronic means).

Illustration 2
As above, but the website is designed in such a way that the "save page" function is disabled. X cannot successfully argue that customers could nevertheless have recorded the terms using a special screenshot program, because X has not used a support which permits recording and reproduction.

Another example of the use of "textual form" is IV.G.–4:104 (Form), which seeks to protect and warn a consumer who provides personal security. The provision stipulates that the contract of security must be in textual form and must be signed by the security provider. If the contract does not comply with these requirements, it is void. By using "textual form" instead of "in writing" the Article permits the contract to be concluded electronically with a form of electronic signature according to I.–1:107 ("Signature" and similar expressions).

D. Durable medium

Paragraph (3) contains a definition of the term "durable medium". The definition of "durable medium" is based on two elements: (a) durability, and (b) non-alterability by the sender. The term "durable medium" consequently covers e.g. floppy disks, CD-ROMs, DVDs and hard drives of personal computers or servers on which electronic mail is stored. In general, it excludes Internet sites, unless the information has been stored on the website for a sufficient period of time and cannot be altered by the person who has posted the information, as, for example, could be the case for auction postings on some online auction sites.

The term is lifted from several Directives, of which some contain a materially similar definition to the present Article (cf. Financial Services Distance Selling Directive 2002/65/EC art 2(f), Insurance Mediation Directive 2002/92/EC art. 2(12)).

In these rules, several provisions require information to be provided "in textual form on a durable medium" (cf. II.–3:106 (Clarity and form of information) paragraph (3), II.–5:104 (Adequate information on the right to withdraw), IV.A.–6:103 (Guarantee document)). In these cases the information must be provided in such a way that the addressee gains control over the durable medium which stores the information. Thus, the fulfilment of this information duty requires actively sending the information to the addressee in such a way that, in the end, the information reaches the addressee on a durable medium he or she has under control. A paper copy or DVD must therefore be physically sent to the addressee. Also, an email is automatically stored on the hard disk of a personal computer or on a remote server the addressee has under control. Thus, even an email which is not stored on the personal computer of the addressee but in an online email account the addressee can access, fulfils the requirement of information in textual form on a durable medium. In the case of an email, the

sender need not send the durable medium itself (as is the case with a DVD), because he or she initiates the creation of the durable medium in the addressee's sphere of control.

NOTES

1. Definitions of "writing" in national laws are often for a specific purpose but usually embrace at least some modern means of communicating or recording information. For example, the PORTUGUESE Voluntary Arbitration Act (Lei no. 31/86 of 29 August 1986), which requires a written form for contracts for arbitration, accepts telegrams, telex and "other means of communication of which there may be written proof" (art. 2). The position is similar under the GERMAN CCP § 1031; the SLOVENIAN CCP art. 461(3); and (for arbitration clauses) the BULGARIAN International Commercial Arbitration Act (art. 7(2)). These provisions all seem to be based on the UNCITRAL Model Law on Arbitration art. 7(2).
2. Other international provisions are narrower. The CISG art. 13 refers simply to telegrams and telexes. See also Opinion no. 1: Electronic Communications under CISG, 15 August 2003.
3. National statutes frequently require a document with a signature, either simply because they were passed before the electronic age or because the requirement of signed writing is thought to have a protective function, e.g. GERMAN CC § 126; GREEK CC art. 160; ESTONIAN GPCCA § 78(1), but see note 6 below; and the UK Consumer Credit Act 1974 s. 60 and the Law of Property (Miscellaneous Provisions) Act 1989 s. 2(3). For an analysis of which English statutes requiring writing or similar formalities may be satisfied by electronic messages, see *Reed*, Electronic Commerce. In SLOVENIAN law a "written" contract is a signed document. However, the law gives similar effect to any form of communication which can show an unchanged record of text and can be authenticated (LOA § 57). It is not uncommon to find that statutes requiring writing are interpreted or adapted in a way which now seems appropriate (e.g. in DENMARK, see *Gomard*, Almindelig kontraktsret, 171; in SWEDEN, see *Ramberg*, Allmän avtalsrätt[4], 127; in FINLAND, see *Hemmo*, Sopimusoikeuden oppikirja, 110; in PORTUGUAL, see Decree-Law no. 62/2203 of 3 April 2003; and in SLOVENIA see the Electronic Commerce and Signature Act (consolidated version from 9 September 2004) which provides the requirements for electronic documents and electronic signatures.
4. In BELGIAN law the definitions of "writing" and "signature" were broadened by the Acts of 20 October 2000 and 11 March 2003 to allow modern techniques of proof and recording (see CC arts. 1317, 1322 and 2281). Under FRENCH law, when a written document is required it can be established and recorded in an electronic form (CC arts. 1316-1 and 1316-4); also see CC art. 1108-1 alt. 1 and 2.
5. Under the SLOVAK CC § 40 a written juridical act is valid if signed by the acting person. The requirement of written form is satisfied if a juridical act is made by cable, telex, or electronic means which enable the contents of the act to be recorded and the person who performed it to be determined.
6. ESTONIAN law defines "writing" as a format requiring a handwritten signature (GPCCA § 78(1)). An electronic format (electronic signature required) is generally deemed to be equal to "writing" (GPCCA § 80(1)). However, the majority of the formal requirements in contract law require only a "format which can be reproduced in writing" (e.g. notice of termination of a lease (LOA § 325(1)). Also, if the format of

the transaction is agreed by the parties, the requirements provided by law for such format may be modified by the parties themselves (GPCCA § 77(2)).

7. For something to be "in writing" under BULGARIAN legal doctrine there must be a handwritten signature under the text of the document. There is no special statutory provision on this matter. This definition is broadened significantly by the already mentioned International Commercial Arbitration Act art. 7(2) and by Ccom art. 293(3), which requires only technical reproduction of the statement.

8. The HUNGARIAN civil law provides for the principle of freedom of form in relation to the formation of contracts (CC § 216(1)). Contracts concluded by exchange of letters, telegraphs, telexes and faxes are regarded as written contracts. According to a special statute, exchanges of declarations through certain durable media, especially documents signed with increased secure electronic signature (Ptké [Order with statutory force no. 11 of 1960 on the Entry into Force and Execution of the Civil Code as amended] § 38(2)) are also regarded as written. The Draft Civil Code of Hungary suggests a contract is to be regarded as written if it is signed by all the parties. This applies to an electronic document, too, at least if it is signed with a secure electronic signature, if the information can be reproduced without change and if the declaring person and the time of the declaration are identifiable. The Hungarian CCP (Act no. III of 1952 as amended) regulating documentary evidence defines some forms of special documents (§§ 195, 196), where paper-based as well as electronic documents are meant. As regards electronic documents and electronic signatures, Act no. XXXV of 2001 on Electronic Signatures approximates to Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures, and Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce) art. 9(2).

I.–1:107: "Signature" and similar expressions

(1) A reference to a person's signature includes a reference to that person's handwritten signature, electronic signature or advanced electronic signature, and references to anything being signed by a person are to be construed accordingly.

(2) A "handwritten signature" means the name of, or sign representing, a person written by that person's own hand for the purpose of authentication.

(3) An "electronic signature" means data in electronic form which are attached to or logically associated with other electronic data, and which serve as a method of authentication.

(4) An "advanced electronic signature" means an electronic signature which is:

(a) uniquely linked to the signatory;
(b) capable of identifying the signatory;
(c) created using means which can be maintained under the signatory's sole control; and
(d) linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.

(5) In this Article, "electronic" means relating to technology with electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

COMMENTS

A. Purpose and general idea

This Article provides a definition of the term "signature" and several sub-types of signatures. The provision opts for a "non-discriminatory approach" to electronic signatures by stating that a reference to a person's signature includes a handwritten, electronic or advanced electronic signature. Requirements of separate signatures can serve several purposes. Signatures are a useful tool for authentication. Moreover, signature requirements may be used as an instrument of consumer protection legislation, where they can assure that information is not slipped past the unsuspecting consumer. Examples in the DCFR are IV.E.–2:402 (Signed document available on request) and IV.G.–4:104 (Form).

Electronic signatures may serve the same purpose in electronic transactions. In an electronic environment, the potential for fraud is considerable, as the original of an electronic message is usually indistinguishable from a copy. Thus, the purpose of electronic signatures is to provide the technical means to identify the sender of an electronic message and to associate that person with the content of the message. In addition, this Article may serve as an interpretation guide, e.g. for authentication requirements stipulated in a contract.

B. Handwritten signature

Paragraph (2) defines the term "handwritten signature". As with an "advanced electronic signature" (defined in paragraph (4)(d) of the present Article), a handwritten signature must be placed in such a way that any subsequent change of the text is detectable. Thus, as a rule, the name must be placed under a text so close to its end that it is difficult to add something to the text.

C. Electronic and advanced electronic signature

The definition of “electronic signature” and “advanced electronic signature” are lifted from E-Signatures Directive 1999/93/EC art. 1(1) and (2). Although this Directive makes extensive use of the term “electronic”, it does not contain a definition of this term. Such a definition is provided in paragraph (5) of the present Article.

> *Illustration*
> A uses a so-called signature file which is attached to all email messages sent by A. It indicates A’s name, address, and telephone number. This provides information about A, but no authentication. So this is not an ‘electronic signature’, just as the use of stationery with a printed name and address cannot replace a handwritten signature.

D. Electronic

The definition of “electronic” in paragraph (5) is broadly modelled on Directive 1998/48/EC art. 1(2) yet follows the more concise wording of US Electronic Signatures in Global and National Commerce Act 2000 s. 106(2). According to Directive 1998/48/EC art. 1(2) the term “by electronic means” means that a service is sent initially and received at its destination “by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, radio, optical means or other electromagnetic means”. Certainly, some of the technologies referred to in Directive 1998/48/EC art. 1(2) and the cited US legislation, are not technically electronic (e.g. optical means). Consequently, the term “electronic” is not used in a narrow sense but as a descriptive term for a variety of current and future data transmission technologies.

I.–1:108: Definitions in Annex

(1) The definitions in the Annex apply for all the purposes of these rules unless the context otherwise requires.

(2) Where a word is defined, other grammatical forms of the word have a corresponding meaning.

COMMENTS

This Article introduces the list of definitions in the Annex. As one of the main functions of this instrument is to provide a source of terms and concepts, the list of definitions is more extensive than might be normal in a legislative instrument. As it is extensive, it was considered preferable to have it at the end in an Annex rather than at the beginning, so as not to interrupt the flow of the Articles.

The Annex contains two types of definition. In some cases the definitions in the Annex repeat definitions contained in the main text. It is hoped that it will be convenient for users to have all important definitions grouped together in the Annex in alphabetical order for ease of reference. Other definitions, of a type which do not require comments or national notes or which are too general to find a natural home in any one Article, are contained only in the Annex.

Paragraph (1) of this Article makes it clear that the definitions apply “unless the context otherwise requires”. There are two reasons for this provision. First, a particular provision now or in the future may disapply or modify a definition for its own purposes. An example is the special definition of “producer” in VI.–3:204 (Accountability for damage caused by defective products). Secondly, and more generally, meaning depends on context. Words are not to be interpreted in a mechanistic way. Some defined words may occasionally be used in a way other than the defined way. For example, “loss” is defined largely for the purposes of provisions relating to damages for loss, but the word is sometimes used in an ordinary sense as in “loss of the right to terminate” (III.–3:508). “Term” is defined as a provision (of a contract or other juridical act, of a law etc) but the context would override this meaning in expressions such as “short term” or “long term”.

Paragraph (2) means, for example, that if “invalid” is defined then “invalidity” has a corresponding meaning.

I.–1:109: Notice

(1) This Article applies in relation to the giving of notice for any purpose under these rules. "Notice" includes the communication of information or of a juridical act.

(2) The notice may be given by any means appropriate to the circumstances.

(3) The notice becomes effective when it reaches the addressee, unless it provides for a delayed effect.

(4) The notice reaches the addressee:

(a) when it is delivered to the addressee;

(b) when it is delivered to the addressee's place of business or, where there is no such place of business or the notice does not relate to a business matter, to the addressee's habitual residence;

(c) in the case of a notice transmitted by electronic means, when it can be accessed by the addressee; or

(d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could reasonably be expected to obtain access to it without undue delay.

(5) The notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.

(6) Any reference in these rules to a notice given by or to a person includes a notice given by or to an agent of that person who has authority to give or receive it.

(7) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the rule in paragraph (4)(c) or derogate from or vary its effects.

COMMENTS

A. Scope

The Article applies to the giving of a notice for any purpose of the rules. "Notice" is defined for this purpose as including the communication of information or of a juridical act. The juridical act could be, for example, a unilateral undertaking, an offer, an acceptance, a notice of withdrawal, revocation or termination, or a notice exercising an option.

B. The form of notices

Notices may be made in any form - orally, in writing, by fax or by electronic mail, for example - provided that the form of notice used is appropriate to the circumstances. It would not be consistent with good faith and fair dealing for a party to rely on, for instance, a purely casual remark made to the other party. For notices of major importance written form may be appropriate.

C. The receipt principle

The general rule adopted here is that a person cannot rely on a notice sent to another person unless and until the notice reaches that person. It is not normally necessary that the notice should actually have come to the addressee's attention provided that it has been delivered in the normal way, e.g. a letter placed in the letter box or a message sent to the fax machine. Similarly the risk of errors in the transmission of the notice is normally placed upon the sender. The principle of good faith and fair dealing means that a person cannot exercise a

right on the basis that a notice has not been received, or has not been received in time, if the person has deliberately evaded receiving it.

Illustration
A notice to extend a charterparty must be given to the owner's office, which is open round the clock, by 17.00 on April 1. The charterer telephones at 16.59. The owners are expecting the call but do not want the charter to be extended. Therefore they deliberately let the phone ring until after 17.00 has passed; they then answer it and say that the notice is too late. The notice is treated as having been given in time.

D. Default rules only

In accordance with the general rule that a specific provision will override a more general one, the rules in the Article apply only unless otherwise provided. Particular provisions in later Books may provide special rules for notices of certain types or given in certain circumstances. One important example of such special rules is III.–3:106 (Notices relating to non-performance) which provides that when one party to a contract gives a notice to the other because of the other's non-performance the risk of non-receipt falls on the defaulting party. This is an application, in this particular context, of what is known as the "dispatch principle".

E. When notice "reaches" addressee

This is regulated by paragraph (4). It will be noticed that the notice need not actually reach the addressee in person. Under sub-paragraph (b) it is regarded as reaching the addressee when delivered to the addressee's place of business or, if there is no such place of business or the notice relates to a personal matter, to the addressee's habitual residence. Sub-paragraph (c) covers the special case of notices transmitted by electronic means. Here the notice reaches the addressee when it can be accessed by the addressee. Sub-paragraph (d) covers other situations in which a notice could be regarded as having reached the addressee – such as, for example, leaving a message in a place which the addressee is known to check regularly.

F. Simultaneous withdrawal

A notice is not effective if at the same time, or earlier, the recipient gets a withdrawal or countermand of the notice.

G. Notices by or to agents

Paragraph (6) of the Article provides, for the avoidance of doubt, that any reference to a notice given by or sent to a person includes a reference to a notice given by or sent to an agent (who need not be a representative with power to bind the principal by a contract or other juridical act) with authority to give or receive it.

H. Electronic transmission

Paragraph (7) contains a special rule for messages transmitted by electronic means. In accordance with paragraph (4)(c) the normal rule is that the message reaches the addressee when it can be accessed by the addressee. Normally parties can contract out of the rules in this Article. However, for the protection of consumers, paragraph (7) makes it clear that in business-to-consumer relations this rule is mandatory in favour of the consumer. In other words the business cannot stipulate that an electronic message is to be deemed to reach the consumer before it can be accessed by the consumer.

NOTES

I. The general "receipt" principle

1. Although some systems, particularly the ENGLISH, IRISH and SCOTTISH laws, recognise special rules in relation to the postal acceptance of an offer (see *Zweigert and Kötz,* An Introduction to Comparative law[3], 358-359, and for Scotland, where the Scottish Law Commission has recommended a change in the law on the point, *McBryde*, Law of Contract in Scotland, §§ 6.114-6.118), under most systems notices in general must arrive if they are to be effective; and this applies even to notices given because of the other's default. Several systems assume that the basic principle is that actual knowledge is required, e.g. SPANISH CC art. 1262 and ITALIAN CC art. 1335, which states circumstances in which the recipient is deemed to have knowledge; ENGLISH law, see the case of *Car & Universal Finance Co. Ltd. v. Caldwell* [1965] 1 QB 525 (CA) (rescission for fraud); but in SCOTTISH law, see *MacLeod v. Kerr* 1965 SC 253 (actual notice required for rescission to take effect).

2. In FRENCH law discussion of the topic is restricted to formation of contracts. It appears that the matter is within the discretion of the judge (Cass.soc. 21 November 1966, JCP 67 II 15012; Cass.com. 6 March 1961, Bull.civ. III no. 123, p. 109), but the courts show some preference for the dispatch principle, notably (Cass.com 7 January 1981, Bull.civ. IV no. 14), which adopts it explicitly; see (*Bénabent*, Les obligations, no. 68). The receipt principle is adopted in art. 31 of the Projet de Reforme du Droit des Contrats published by the Ministry of Justice in July 2008. In LUXEMBOURG the receipt principle is favoured: (Cour 16 July 1896, Pas. 4, 209; Cour 27 March 1903, Pas. 6, 248). In BELGIUM courts and legal writers favour the receipt principle, (the Act of 20 October 2000 introduced this rule in the CC art. 2281), for most written notices. In ESTONIA, the receipt principle is generally applied (GPCCA § 69). In BULGARIA the receipt principle is also applicable, although the question is expressly regulated only in regard to offer and acceptance (LOA arts. 13 and 14)

3. In SPANISH law, as from the 2002 modification of the Civil and Commercial Codes, the knowledge principle now applies generally, to both civil and commercial contracts. However, the ignorance of the recipient may amount to knowledge when this is required by good faith (CC art. 1262; Ccom art. 54).

4. Under CISG art. 24 the receipt principle governs offers, acceptances and most other statements covered by Part II on formation of contracts.

5. In NORDIC law the receipt principle generally applies. However the dispatch principle governs certain notices given in order to prevent a contract arising, such as notices given under the Contract Acts § 4(2). In SLOVAKIA discussion of the topic is restricted to formation of contracts, CC § 45. A notice is effective against a person who is absent from the moment it reaches this person.

6. In AUSTRIA and GERMANY the receipt principle is recognised (see AUSTRIAN CC § 862a, GERMAN CC § 130); only then does a declaration of will produce its binding effect. The duration of the binding effect of the declaration of will depends on the circumstances (cf. AUSTRIAN CC § 862). In certain cases receipt is not necessary, e.g. in the case of a unilateral promise (AUSTRIAN CC § 860) or in the case of accepting an offer by performance (AUSTRIAN CC § 864(1)). Similarly, in SLOVENIAN law any statement of intention is effective when it reaches the addressee (LOA §§ 25(2) and 28(1)).

7. CZECH civil law does not contain a common provision on notices (except for CC § 43a(2) on conclusion of contracts), but it is undisputed that the receipt principle applies throughout, see Švestka/Jehlička/Škárová/Spáčil (-*Švestka*), OZ[10], 231, 305. Exceptions are conceivable only with regard to the good morals clause (CC § 3) or the principle of fair business dealing (Ccom art. 265), e.g. if a party intentionally avoids a notice of termination of a contractual relationship. The receipt principle is also generally followed in HUNGARY (Act no. IV of 1959 as amended; CC §§ 214(1), 199).

II. Actual knowledge not required

8. Many systems, though adopting the receipt principle, explicitly recognise that actual communication to the recipient is not necessary provided that the notice has been properly delivered to the recipient's address: e.g. ENGLISH law (dicta in *Holwell Securities Ltd. v. Hughes* [1974] 1 WLR 155 (CA); BELGIAN law (Cass. 25 May 1990, *Arr. Cass.* no. 561, *Pas*. 1990 I 1086; Cass. 19 June 1990, *Pas*. 1990 I 1182); GREEK law (A.P. 482/1956, NoB 5 (1957) 94; CA Athens 3347/1973, NoB 21 (1973) 1474-1475, 287/1998 EllDik 41 (2000) 536); and SCOTTISH law (*Burnley v. Alford* (1919) 2 SLT 123). Under ESTONIAN law, although actual knowledge is not necessary, it is generally required that the recipient has "received" the declaration, i.e. that it has arrived at the residence or seat of the recipient and the recipient has had a reasonable opportunity to consider it (GPCCA § 69(2)). What is a reasonable opportunity to consider depends on the time when the sender of the declaration, under normal circumstances, could presume that the recipient had received the declaration (Riigikohus tsiviilkollegium 19 December 2005, civil matter no. 3-2-1-156-05, p. 10). In SLOVAKIA notice need not actually reach the addressee in person. So the knowledge of the addressee is not legally relevant. (*Svoboda*, Komentár a súvisiace predpisy, p. 112). In NORDIC law a notice countermanding an earlier offer or acceptance is effective if it reaches the recipient before or at the same time as the offer or acceptance comes to the recipient's attention, see the Contract Acts § 7). The ESTONIAN GPCCA § 72 is to the same effect (see Riigikohus tsiviilkollegium 1 December 2005, civil matter no. 3-2-1-129-05, p. 37). The BULGARIAN doctrine unanimously supports the same rule, see *Kalajdjiev*, Law of Obligations, 79, 86. CZECH law does not require the recipient to have actual knowledge of the contents of the notice, it is sufficient that the notice reaches the recipient's sphere of control, see Švestka/Jehlička/Škárová/Spáčil (-*Švestka*), OZ[10], 231.

9. The ITALIAN CC art. 1335 provides that a notice will not be effective if, without fault on the part of the addressee, it was not possible for the addressee to learn of the notice; the burden of proof is on the addressee. Other systems which use the receipt principle also adopt the rule that the addressee cannot rely on non-receipt if it was the addressee's own fault (DUTCH CC art 3:37(3); PORTUGUESE CC art. 224) or if the addressee had deliberately prevented communication (ENGLISH law: *Car & Universal Finance Co. Ltd. v. Caldwell* [1965] 1 QB 525 (CA) or generally due to circumstances for which the recipient bears the risk (ESTONIAN GPCCA § 69(4)). Currently, the SPANISH system is similar to the principles laid down in the DUTCH and PORTUGUESE Codes (the addressee cannot rely on non-receipt if it was the addressee's own fault); see SPANISH CC art. 1262 II. In SCOTLAND, however, notice of rescission of a contract must reach the party at fault: *MacLeod v. Kerr* 1965 SC 253.

10. It should be noted, however, that many systems draw a distinction between a notice which will be binding on the recipient and a declaration such as a promise or offer

which will bind the sender. Such a declaration will be binding on the sender only when the recipient has actual knowledge of it (e.g. NORDIC law, Contract Acts § 7); ENGLISH law, *R. v. Clarke* (1927) 40 CLR 227 (HC of Australia).

11. In AUSTRIA this principle is – although not expressly stated – recognised and derived from CC § 862a (OGH EvBl 1995/43). The same holds true for GERMANY, see BGH 3 November 1976, BGHZ 67, 271, 275.

12. In HUNGARIAN law, in order to be effective, a written notice must be received by the other party (actual knowledge is not necessary) whereas in case of a statement which was made orally (among persons who are present) actual knowledge is required (CC § 214(1)). Statements which are not yet effective can be withdrawn. The notice of withdrawal must reach, or be made known to, the other party no later than the arrival of the withdrawn statement (CC § 214(2)).

I.–1:110: Computation of time

(1) The provisions of this Article apply in relation to the computation of time for any purpose under these rules.

(2) Subject to the following provisions of this Article:

(a) a period expressed in hours starts at the beginning of the first hour and ends with the expiry of the last hour of the period;

(b) a period expressed in days starts at the beginning of the first hour of the first day and ends with the expiry of the last hour of the last day of the period;

(c) a period expressed in weeks, months or years starts at the beginning of the first hour of the first day of the period, and ends with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs; with the qualification that if, in a period expressed in months or in years, the day on which the period should expire does not occur in the last month, it ends with the expiry of the last hour of the last day of that month;

(d) if a period includes part of a month, the month is considered to have thirty days for the purpose of calculating the length of the part.

(3) Where a period is to be calculated from a specified event or action, then:

(a) if the period is expressed in hours, the hour during which the event occurs or the action takes place is not considered to fall within the period in question; and

(b) if the period is expressed in days, weeks, months or years, the day during which the event occurs or the action takes place is not considered to fall within the period in question.

(4) Where a period is to be calculated from a specified time, then:

(a) if the period is expressed in hours, the first hour of the period is considered to begin at the specified time; and

(b) if the period is expressed in days, weeks, months or years, the day during which the specified time arrives is not considered to fall within the period in question.

(5) The periods concerned include Saturdays, Sundays and public holidays, save where these are expressly excepted or where the periods are expressed in working days.

(6) Where the last day of a period expressed otherwise than in hours is a Saturday, Sunday or public holiday at the place where a prescribed act is to be done, the period ends with the expiry of the last hour of the following working day. This provision does not apply to periods calculated retroactively from a given date or event.

(7) Any period of two days or more is regarded as including at least two working days.

(8) Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period is calculated from the date stated as the date of the document or, if no date is stated, from the moment the document reaches the addressee.

(9) In this Article:

(a) "public holiday" with reference to a member state, or part of a member state, of the European Union means any day designated as such for that state or part in a list published in the official journal; and

(b) "working days" means all days other than Saturdays, Sundays and public holidays.

COMMENTS

A. Introduction

The model rules have several provisions which set time limits for various purposes. The provisions on prescription are the most obvious example. Many rules also provide for a party to a contractual or other legal relationship to set time limits for something to be done. It is necessary to have some general rules on how time is computed. Such rules may also be useful as model rules which could be adopted or modified for legislative or contractual purposes.

B. Need for precision

It is important that the rules on the computation of periods of time should be sufficiently clear and precise so that those affected by rules such as those on prescription and those affected by periods of time set by another party to a contractual or other legal relationship may know where they stand. The rules set out in this Article attempt to provide such precision. They are default rules. They apply only unless otherwise provided in particular provisions, or by contracting parties in their contract, or by a person setting a period of time for some act to be done or reply to be received. Whether the default rules have been displaced will depend on the contents and interpretation of the act or instrument concerned. That in turn may be affected by usages or practices. In certain fields of activity there may, for example, be a usage or practice that when a reply is to be received on a stated day it must be received by close of business on that day.

C. Source of the rules

The rules in this Article reflect rules which are commonly found in national systems and which have been found to be commercially convenient. The actual wording is derived with minor drafting changes, from the *Regulation (EEC/Euratom) No. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits*. Article 3 of the Regulation provides as follows.

Article 3

1. Where a period expressed in hours is to be calculated from the moment at which an event occurs or an action takes place, the hour during which that event occurs or that action takes place shall not be considered as falling within the period in question .

Where a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be considered as falling within the period in question.

2. Subject to the provisions of paragraphs 1 and 4 :

(a) a period expressed in hours shall start at the beginning of the first hour and shall end with the expiry of the last hour of the period;
(b) a period expressed in days shall start at the beginning of the first hour of the first day and shall end with the expiry of the last hour of the last day of the period;
(c) a period expressed in weeks, months or years shall start at the beginning of the first hour of the first day of the period, and shall end with the expiry of the last hour of

whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last hour of the last day of that month;
(d) if a period includes parts of months, the month shall, for the purpose of calculating such parts, be considered as having thirty days.

3. The periods concerned shall include public holidays, Sundays and Saturdays, save where these are expressly excepted or where the periods are expressed in working days .

4. Where the last day of a period expressed otherwise than in hours is a public holiday, Sunday or Saturday, the period shall end with the expiry of the last hour of the following working day. This provision shall not apply to periods calculated retroactively from a given date or event .

5. Any period of two days or more shall include at least two working days .

It will be noticed that there is a difference between Article 3 of the Regulation and the present Article in relation to starting points. The Regulation refers in article 3(1) to a period “calculated from the moment at which an event occurs or an action takes place". It says nothing about periods calculated from a specified time, such as 11.30. This is probably not an important omission in practice because usually a person setting a time limit of this type would specify the time of expiry and would, for example, say “You have until 16.30” rather than “You have five hours from 11.30”. Nonetheless it is perfectly possible that a time limit could be expressed as running from a specified time and the gap in the Regulation could give rise to some uncertainty. It might not be entirely clear whether a period of five hours from 6.30 ends at 11.00 (five hours after the beginning of the clock hour in which the period starts) or 11.30 (if "first hour" means the hour beginning at 6.30 and not the first clock hour) or 12.00 (if the rule applying to "events" is applied by analogy). The present Article contains a separate paragraph on periods which are to be calculated from a specified time. Under the Article a period expressed in hours which is to be calculated from a specified time begins at the specified time. So a period of five hours from 6.30 begins at 6.30 and ends at 11.30, which is the result most people would expect. The same considerations do not seem to apply to times expressed in days, weeks, months or years, where it would be rather arbitrary and difficult to distinguish between a specified event and a specified time. In relation to such periods the Article retains the normal rule that the time runs from midnight to midnight.

Apart from paragraph (4), the only provision in the Article which is not derived from the Regulation is paragraph (8). This is derived from PECL art. 1:304, which is narrower than the present Article in scope as it applies only in relation to periods of time “set by a party in a written document for the addressee to reply or take other action”.

The provisions of the present Article are consistent with, but more comprehensive than, those of the Council of Europe’s *European Convention on the Calculation of Time-Limits* of 16 May 1972 (ETS No 76) which, as at 14 April 2005, had been ratified by Austria, Liechtenstein, Luxembourg and Switzerland.

D. Time expressed in days, weeks, months or years runs from midnight to midnight.

The effect of the rules in the Article is that where a period is expressed in days, weeks, months or years, the day during which the starting point occurs is not counted. The same effect is achieved in another way by the European Convention on the Calculation of Time-Limits, which provides in article 3(1) that time runs from midnight to midnight.

E. Non-working days count unless the last day of the period

The Article follows Regulation No 1182/71 (above), the European Convention (above) and PECL art. 1:304 in including Saturday, Sundays and public holidays in the period, except that if the last day of a period is an official non-working day or public holiday in the relevant place (e.g. where a message is to be delivered or an action performed) the period is extended to include the next working day. In cases turning on the interpretation of a contract, this rule could be affected by the existence in a particular trade or activity of a usage of working on what is officially a holiday, or by a local usage of working or not working on the relevant day.

F. "Two working days" rule

Paragraph (7) states that any period of two days or more is regarded as including at least two working days. The purpose of this rule is to prevent the preceding rule from having too dramatic an impact in the case of short time periods. For example, if a period of three days from a Friday is allowed and if the following Monday is a public holiday, then the effect of the preceding rule is that the period would expire at midnight on the Tuesday. The nominal three days would include only one working day. The effect of paragraph (7) is that the period expires at midnight on the Wednesday. So the nominal three days includes two working days. Clearly, there is no need for this provision when the period is only one day because the normal rule already gives one working day even if the period ends on a non-working day.

G. Special rules for periods of time set by a person for another to reply etc.

Paragraph (8) contains special rules for this situation. They are derived from PECL art. 1:304, with slight drafting changes and with the omission of a reference to "normal close of business" which is difficult to apply in modern conditions.

Documents. These special rules apply only to documents because if a person sets a period of time in an oral communication, whether face to face or by phone, and does not state from when it is to run, the natural assumption is that it runs from the moment of communication. (This would apply even to a message left on a telephone answering machine: the period will start from the moment the message is recorded.) No special rule is needed for this case. Problems arise only with communications in writing or other textual form.

Express time prevails. The rules in paragraph (8) apply only if the person setting the period has not said when it is to begin. If the person setting the time has stated how it is to be computed that should govern. In some situations the model rules require that a person set a reasonable time. Choosing an inappropriate method of computation might mean that the notice given is not adequate and the period will have to be extended.

Default rule on starting point where date shown on document. In default of a stated method of computation, there might be uncertainty whether the period should start from the time the communication was prepared, the time it was sent or the time it was received. It is well known that delays occur not only in the actual transmission of communications such as letters but also in the sending out of all types of communication. For example a fax may be signed on one day but the sender's office may not dispatch it until the next. This will not necessarily be apparent to the sender, who may simply be given back the original; nor to the person in the recipient's office who is charged with responding. Although fax machines record the time the message was received at the top or bottom of the page, this is very easily lost when the document is photocopied again. For this reason the paragraph adopts the rule that the date shown as the date of the letter or other document should normally be treated as the starting date by whatever method the document was transmitted.

Default rule on starting point where no date shown. With non-instantaneous communications like letters, if the letter itself is undated, time should run from the date at which it was received, which will be all that is clear to the recipient. With instantaneous written communications like a fax, there is little difficulty because the sending and receipt are simultaneous.

No special default rule on ending of period set by a person for reply etc. The normal rule under the Article is that a period of time expressed in days, weeks, months or years expires at midnight. If a person who is setting a period for a reply or action wishes the period to end at some other time of day, and if that result is not already achieved by an applicable usage or practice, then the particular time should be specified.

NOTES

I. Time expressed in days, weeks, months or years runs from start of next day to midnight of last day

1. This rule is very common: e.g. AUSTRIAN CC § 902; BELGIAN Judicial Code art. 52(1); ENGLAND, presumption to this effect, see *Chitty* on Contracts I[29], no. 21-020 and *Halsbury's* Laws of England XLV[4], paras. 1134-1135; FINLAND, specific rule in Insurance Contracts Act of 1994, § 11 (5); FRENCH NCPC arts. 641-642; GERMAN CC §§ 187 and 188; GREEK CC art. 241, CCP art. 144(1); PORTUGUESE CC art. 279(c). The BULGARIAN rule is similar, but it covers only time expressed in days, not in weeks, months and years – in the latter cases the period starts from the same day mentioned and not from the following one (LOA art. 72(1)).
2. The same rule is to be found, as noted above, in art. 3 of the EEC/Euratom Regulation No. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits, in art. 3(1) of the European Convention on the Calculation of Time-limits of 16 May 1972 (ETS. No. 76) and in PECL art. 1:304(3).

II. Official holidays and non-working days

3. Many systems provide or assume that official holidays and non-working days are included in the period of time: ENGLAND, see *Chitty* on Contracts I[29], no. 21-019, *Halsbury's* Laws of England XLV[4], para. 1140; GERMANY, *Larenz and Wolf,*

Allgemeiner Teil des deutschen Bürgerlichen Rechts, § 52 no. 10 and the BULGARIAN doctrine.

4. The rule that if the last day of the period is a holiday or non-working day, the time is extended to the next working day is also found widely: e.g. AUSTRIAN CC § 903; BELGIAN Judicial Code art. 53; FRENCH NCPC art. 642 GERMAN CC § 193; NORDIC Instruments of Debt Act § 5(2); PORTUGUESE CC art. 279(e), BULGARIAN LOA art. 72(2) which also refers to judicial holidays. In ENGLAND, however, the rule applies only to acts to be done by a court or in court; in other cases, the general rule is that the fact that the last day is a Sunday or a holiday does not extend the time, *Halsbury's* Laws of England XLV[4], para. 1138.

5. The rule in the Article is derived from the *EEC/Euratom Regulation No 1182/71* (above) and corresponds to art. 5 of the European Convention on the Calculation of Time-Limits (above) and PECL art. 1:304(2).

III. Special rules for some situations

6. Some systems have a rule or presumption that, in certain contexts or situations, a time to reply ends at the normal close of business on the last day, rather than at midnight: e.g. BELGIAN Judicial Code art. 52(2); ENGLAND, see *Chitty* on Contracts I[29], § 21-019. In GERMAN commercial law, performance must be effected by the close of business on the last day, Ccom § 358. The European Convention on the Calculation of Time-limits, art.3(2) provides that the normal rule that a period of time expressed in days, weeks, months or years ends at midnight does "not preclude that an act which is to be performed before the expiry of a time-limit may be performed on the *dies ad quem* only before the expiry of the normal office or business hours". See also PECL art. 1:304(3).

7. In BULGARIAN law there is a special rule on a period of time computed before a certain day (LOA art. 72(3)) – in those cases this certain day and the preceding day are not counted in the period. The purpose is to ensure that the period of time computed in that manner includes as many full days (i.e. full 24 hour days) as stated.

8. In HUNGARIAN civil law the order with statutory force no. 11 of 1960 on the Entry into Force and Execution of the Civil Code (Ptké. as amended) sets forth some provisions on the computation of time. If a period is expressed in days, the initial day does not have to be included (i.e. it runs from the start of the next day) (Ptké § 3(1)). A period expressed in weeks, months or years expires on the day which by its name or number corresponds to the beginning day; if such a day does not exist in the last month, the period expires on the last day of the month (Ptké § 3(2)). If the last day of the period is a non-working day, the period expires on the next working day (Ptké § 3(3)). If the parties extend the period, the new period in doubt has to be counted from the day on which follows the expiration of the original period (Ptké § 4(1)). If acquisition of a title is bound to a specific day, it occurs at the beginning of this day (Ptké § 4(2)). The legal consequences of the omission of a period or of a delay come about only after the expiration of the last day of the period (Ptké § 4(3)). CC § 282(1) has a provision in contract law regarding the performance period: the day on which the contract is concluded is not included in the performance period; if the last day of the performance period falls on an official holiday the performance period expires on the next working day. CCP § 103 includes parallel provisions in civil procedural law. CCP § 103(5) says the period expires by the end of the last day, but the period for submissions to the court and for anything to be done in presence of the court ends at the end of the office hours.

BOOK II

CONTRACTS AND OTHER JURIDICAL ACTS

CHAPTER 1: GENERAL PROVISIONS

II.–1:101: Meaning of "contract" and "juridical act"

(1) A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act.

(2) A juridical act is any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral.

COMMENTS

A. Contracts

The word "contract" is used in at least three different ways in current European and international texts. The word is used, first, in the "agreement" way given here. It is used, secondly, to indicate a legal relationship arising from a contract in the agreement sense. When it is said, for example, that a contract may be terminated in a certain way what is usually meant is that the legal relationship resulting from a contract may be terminated in that way. The word is used, thirdly, to indicate a document in which the terms of a contract, in the agreement sense, are set out. An analysis of relevant EU and international legal texts shows that the "agreement" sense given here is, however, by far the preponderating sense in which the word is currently used in such texts.

The definition in the Article covers not only an agreement which is intended to create rights and obligations but also an agreement which is intended to have some other legal effect. For example, an agreement to vary the terms of an existing contract, or to terminate an existing legal relationship between the parties, would itself be within the definition. An agreement which transfers property immediately, or assigns a right immediately, or renounces a right immediately, without there being any intermediate obligation to do so, would be a contract within the definition.

B. Juridical acts

The notion of a juridical act is a useful one. It covers not only contracts but also many statements which are intended to have legal effect – including offers, acceptances, unilateral promises or undertakings intended to be binding without acceptance; unilateral grants of authority to act as a representative; unilateral grants of consent or permission; unilateral acts of ratification or approval; unilateral acts of withdrawal, revocation, avoidance or termination; and unilateral acts granting, transferring or waiving rights. There is no essential difference between a unilateral "promise" intended to be binding without acceptance and a unilateral "undertaking" intended to be binding without acceptance. Both give rise to an obligation, often a conditional obligation. The difference is simply linguistic. In some contexts the word

"promise" will be more natural - for example, when a person promises to pay a reward. In some contexts the word "undertaking" (in the sense of an assumption of an obligation) will be more natural - for example, when a person assumes a security obligation. A unilateral promise or undertaking may merge into a contract if it is accepted by the person to whom it is addressed. The law needs to regulate many aspects of juridical acts.

The term "juridical act" is not universally used. The Principles of European Contract Law refer, for example, to "statements and other conduct indicating intention". (See PECL Art. 1:107 which applies the Principles to such statements and conduct "with appropriate modifications".) The reference to "intention" means in the context an intention to create some legal effect but it seems better to make that clear. The Rome Convention on the Law Applicable to Contractual Obligations (Article 14(2)) talked of "a contract or other act intended to have legal effect". This is essentially the same as the definition used here but an adjective such as "juridical" is useful to distinguish this sort of act from other acts of a purely physical or non-legally-significant nature. The adjective "legal" might be considered but would have the disadvantage of suggesting a contrast with "illegal".

NOTES

I. Contracts

1. The FRENCH, BELGIAN and LUXEMBOURG CCs art. 1101, the ITALIAN CC art. 1321 and the SPANISH CC art. 1254 define a contract as an agreement by which one or several persons bind themselves to one or several others to give, to do or not to do something. The first three of these codes distinguish between synallagmatic contracts and unilateral contracts, see arts. 1103 and 1104. The former create reciprocally binding obligations for the parties; the seller, for instance, must deliver the goods and the buyer in return pays the purchase money. Unilateral contracts create obligations for only one party and rights for the other. Some systems treat agreements to modify or end a contract as conventions, not contracts, see on FRENCH law *Ghestin*, La formation du contrat[3], pp. 1 ff. On the other hand, the ITALIAN CC expressly refers to modifications and terminations of contract in the general definition of contract (art. 1321). In BELGIAN law, agreements to modify or terminate a contract are treated as contracts, See: *Stijns*, Verbintenissenrecht I, no. 19. BULGARIAN law adopts the definition of contract of the French CC (LOA art. 8(1)). The Bulgarian law and doctrine similarly distinguish between unilateral and bilateral contracts. There is a further significant division of contracts into consensual, formal and real contracts (similarly to GERMAN and AUSTRIAN law, see infra).
2. In ENGLAND, *Treitel* describes a contract as an agreement giving rise to obligations which are enforced or recognised by law, see *Treitel*, The Law of Contract[9], para. 1-001. The law makes a distinction between *bilateral* and *unilateral* contracts. A bilateral contract is a synallagmatic contract. A unilateral contract is one under which a counter promise of the offeree is not required. The acceptance occurs in *doing the act or suffering the forbearance*, which is asked, or possibly by beginning the act or forbearance, provided that it unambiguously shows acceptance (*Treitel*, The Law of Contract[9], para. 2-053). Thus an offer of a reward made to the public is accepted when a person being aware of the offer does, or possibly begins, the act which is asked for. For either type of contract there must also be *consideration*, see notes to II.–4:101 (Requirements for the conclusion of a contract). In a bilateral contract, each promise is

normally the consideration for the other; in a unilateral contract, the act or forbearance is the counter-performance which makes the promise of the offeror binding.

3. In SCOTLAND a contract has been defined in terms of an agreement which creates, or is intended to create, a legal obligation between the parties to it (see *Gloag*, Law of Contract[2], pp. 8, 16). The exact meaning of "intention to create legal obligation" is controversial and not yet settled: 15 *SME* paras. 656-658; *McBryde*, Law of Contract in Scotland, paras. 5.02-5.09.

4. In GERMAN, AUSTRIAN and PORTUGUESE law a contract is a legal transaction which consists of at least two declarations of will which constitute an agreement (see e.g. AUSTRIAN CC § 861). However, in Austrian law there are also contracts which require not only agreement but also a transfer of something (*real contracts* vs. *contracts by agreement*) such as a loan (CC § 983) or a loan for use (CC § 971). A contract may be unilaterally binding or bilaterally binding. A unilaterally binding contract, such as a donation or a contract of guarantee only creates obligations for one person. In principle the offer or promise needs express acceptance by the other party. However, in German law acceptance of a donation is presumed when the other party remains silent, see CC § 516(2). There is also an acceptance by conduct (e.g. AUSTRIAN CC § 864 part 1 where the other party accepts by performing). Silence, however, only constitutes a valid acceptance if the accepting party is under a "duty" to say something. A bilaterally binding contract is one which creates reciprocal duties for both parties, such as a sale or a lease contract. It presupposes the parties' concordant intention to be legally bound, see *Larenz and Wolf*, Allgemeiner Teil des deutschen Bürgerlichen Rechts[8], §§ 22 and 23. The formation of a contract is treated in title 3 of Book 1 Part 3 of the BGB. In SLOVENIAN law a contract is an agreement which creates, modifies or abrogates a right or a legal relationship (*Cigoj*, Teorija obligacij, p. 93). It can be bilateral or multilateral. The LOA provides some special rules for synallagmatic contracts (LOA §§ 100-124), as opposed to other bilateral contracts where the obligation of the parties are not reciprocally connected. As in Austrian law, there are also contracts which, as well as an agreement, demand a transfer of something (*real* contracts, e.g. the so called "arrha", LOA § 64).

5. DANISH law is similar to German and Austrian Law. See *Gomard*, Almindelig kontraktsret[2], 18 ff and 50 ff. The NORDIC Contract Acts adhere to the 'løfteteori' under which an offer is binding on the offeror, and the contract consists of two binding and concordant declarations of will or legal acts (Dan. *viljeserklæringr*, Swed *rättshandling Finn. oikeustoimi*). Whereas in the Romanistic legal systems mistake, fraud and coercion render a *contrac*t invalid, these circumstances make the aggrieved person's *declaration of will* or *legal act* invalid under the Nordic Contract Acts as under the German CC. In SLOVAKIA there is no definition of contract in the CC. Generally a contract is defined as a legal transaction which consists of at least two unilateral consensual acts, which express agreement.

6. The DUTCH CC says that a contract is a multilateral juridical act whereby one or more parties assume an obligation towards one or more other parties (CC art. 6:213). The ESTONIAN LOA § 8(1) defines contract similarly.

7. In CZECH law contracts are traditionally defined as bilateral or multilateral juridical acts established by the consensus, which is the complete and unconditional acceptance of an offer for conclusion of a contract, see Knappová (*-Knapp and Knappová*), Civil Law II, 29. The purpose of contracts is to establish, secure, amend or terminate obligations, Knappová (*-Knapp/Knappová/Švestka*), Civil Law II, 40; Czech contract law does not make any conceptual distinctions between regulations of these types of contracts.

8. According to the HUNGARIAN legal doctrine a contract is two or more persons` concordant declarations of will (consensus) intended to trigger, and capable of triggering, legal effects (*Bíró and Lenkovics*, Általános tanok[4], 188). CC § 205(1) Contracts are concluded by the mutual and concordant expression of the parties' intent. CC § 198(1) lays down that a contract constitutes an obligation to perform and a right to demand such a performance. A contract can both establish and operate on (i.e. secure, amend or terminate) an obligation.

II. Juridical acts

9. All legal systems know the idea of an act (or statement) intended to have legal effect and all are familiar with various types of acts of this nature and regulate them in one way or another. The concept of the juridical act (*acte juridique*) is a key one in FRENCH law. Juridical acts are defined in art. 2 of the Projet de Reforme du Droit des Contrats published by the Ministry of Justice in July 2008 as manifestations of will intended to produce legal effects. They can be conventional or unilateral. Not all legal systems, however, use the generalised notion of a "juridical act". ENGLISH law, for example, does not use this term, though it recognises many types of statement which would be termed "juridical acts" in other systems. For example, an obligation may be created by a promise contained in a deed, which requires neither acceptance nor consideration: see further below, II.–1:103 (Binding effect); but even more common examples would be contractual notices given by one party to the other that have legal effect, such as notices of avoidance or termination. SCOTTISH law does use the term "juridical act" and of course recognises and regulates a large number of juridical acts such as offers, acceptances, promises, notices to quit and so on, but it is not a familiar term and little in the way of a general theory has been developed.

10. In GERMAN, AUSTRIAN and PORTUGUESE law a contract is one of several juridical acts. A juridical act is an act by one or more persons the purpose of which is to bring about legal effects. Every juridical act must consist of at least one declaration (or conduct) which expresses a person's intention to be legally bound by the effect which the declaration purports to bring about, also called a *declaration of will* and to which the law gives that effect because it is intended. A promise is a *declaration of will (declaration for a transaction* in PORTUGUESE law*)*, which binds the promisor and may do so without acceptance. In SLOVENIAN law, juridical acts are understood in a very similar way. In AUSTRIA the juridical act generally only produces its effects when it reaches the addressee, which means that the latter is able to get to know its contents (*empfangsbedürftige Willenserklärung*, i.e. a declaration of will which becomes complete upon receipt by the other party). In BELGIUM, the same rules were developed by case law. Under the DUTCH CC a juridical act requires an intention, manifested by a declaration, to produce juridical effects (CC art. 3:33) In the SLOVAK CC § 34 an act in law - a juridical act - is defined as a manifestation of will aimed particularly at the creation, modification or extinction of rights and obligations which statutory provisions attach to such manifestation. In DANISH law the terms juridical act and declaration of will are used in almost the same way as in German law. Similarly, the ESTONIAN GPCCA § 67(1) defines a transaction as an act or a set of interrelated acts which contains a declaration of intention directed at bringing about a certain legal consequence.

11. According to the CZECH CC, a juridical act is a manifestation of will which aims especially at the establishment, modification or termination of rights or obligations which are assigned to such manifestation by the law (CC § 34). Juridical acts are a kind of juridical facts (facts which induce legal consequences), namely such juridical

facts which realize the human will. They are classified into unilateral, bilateral and multilateral juridical acts. A juridical act ensues either from an action of a person or from an omission of a legally relevant action of that person, Knappová (-*Knapp and Knappová*), Civil Law I, 137.

12. The BULGARIAN LOA (art. 44) provides an express definition of unilateral statements of will, stating that the rules applicable to contracts apply "accordingly" to them. There is a further specialty – while a contract is always a source of obligation, the unilateral juridical act (statement of will) is such a source only if a statute so provides. This means that party autonomy in this field is not possible. While party autonomy is almost absolute in the field of contracts (bilateral juridical acts), the unilateral juridical acts are a numerus clausus.

13. In HUNGARIAN law a juridical act is a declaration of will of one or more persons which is intended to bring about legal effects. The (bilateral or multilateral) contract is the most prevalent juridical act. Unilateral juridical acts are able to create, amend or terminate a legal relationship without the consent of others (*Bíró and Lenkovics*, Általános tanok[4], 182-183 and 189).

II.–1:102: Party autonomy

(1) Parties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules.

(2) Parties may exclude the application of any of the following rules relating to contracts or other juridical acts, or the rights and obligations arising from them, or derogate from or vary their effects, except as otherwise provided.

(3) A provision to the effect that parties may not exclude the application of a rule or derogate from or vary its effects does not prevent a party from waiving a right which has already arisen and of which that party is aware.

COMMENTS

Like the national legal systems of the European Union, this instrument acknowledges the right of the citizens and their enterprises to decide with whom they will make their contracts and to determine the contents of these contracts. The principle of freedom of contract is a key principle. This principle of party freedom extends also to the making of other juridical acts.

The principle of freedom of contract and other legal action is, however, always subject to important restrictions. This instrument cannot itself impose restrictions as it is not a legislative instrument. The present Article recognises, however, that any legislator using provisions from the model rules would wish to impose certain restrictions. Some Articles do indicate that they are intended to be mandatory or that derogations from them would have only a limited effect. For example, derogations to the detriment of a consumer might be ineffective. The effect of such provisions is, of course, not actually to make the Articles mandatory or to limit the effect of derogations. This instrument cannot do that. The effect is just to indicate that if a legislator were to adopt the rules it might be expected to make them mandatory or to limit the effect of derogations. The following comments must be read in the light of these preliminary observations.

Paragraph (1) of the Article provides that the parties' freedom to make a contract and to determine its contents is subject to any applicable mandatory rules. This is just a reminder that party autonomy is not absolute. The freedom to decide with whom to contract, the freedom to conclude or not conclude a contract, and the freedom to formulate the terms of a contract may all be limited in one way or another, and similarly for other juridical acts. This instrument itself indicates certain rules which restrict party autonomy and which are intended to be regarded as mandatory.

It does not follow from this provision that an offending contract will always be invalid. It may sometimes be, but the consequences of non-compliance or infringement is determined by later Articles or other rules. For example, a contract concluded by fraud or unfair exploitation would be liable to be avoided under the rules on these subjects (see II.–7:205 (Fraud) and II.–7:207 (Unfair exploitation)) but would not be automatically invalid. A provision in a contract which said that one party reserved the right to ignore any duty to act in accordance with good faith and fair dealing without this having any consequences whatsoever would be ineffective because a later Article (III.–1:103 (Good faith and fair dealing)) provides that the parties cannot contract out of this duty. A contract for the transport of slaves would be contrary to principles recognised as fundamental in all Member States and would be automatically void

(see II.–7:301 (Contracts infringing fundamental principles)). A contract contrary to some less fundamental mandatory rule would have the effect determined by that rule or, if no such effect was laid down, might be avoided in whole or in part, or modified, by a court (see II.–7:302 (Contracts infringing mandatory rules)).

The freedom to conclude a contract implies the freedom not to do so, but again party autonomy is not absolute. The reference to good faith and fair dealing is relevant here. Breaking off negotiations contrary to good faith and fair dealing may give rise to liability in damages (see II.–3:301 (Negotiations contrary to good faith and fair dealing)).

One effect of paragraph (2) is that each provision on contract law in the following rules has to be read as if it began, "unless the contract otherwise provides". The paragraph is intended to save a great deal of repetition in later Articles.

Paragraph (3) is designed to avoid a doubt which has sometimes arisen. The fact that a rule is mandatory does not prevent any right which has already arisen under that rule from being waived. In particular it does not prevent a party from settling any dispute relating to that right.

NOTES

1. The freedom of the parties to make the contract and provide the contract terms they wish is recognised in all the Member States. It is provided in art. 2(1) of the GERMAN Constitution. In addition, it is found in art. 5(1) of the GREEK Constitution and in art. 361 of the Greek CC. However, according to art. 3 of the Greek CC "mandatory rules cannot be set aside by the volition of the parties." It is also provided for in the old DANISH code "*Danske Lov*" of 1683 in § 5.1.1; in FRENCH, BELGIAN and LUXEMBOURG law (where the freedom of the parties can be derived from CC's art. 1134(l) on the binding effect of valid contracts); in the ITALIAN CC art. 1322; the NETHERLANDS CC art. 6:248; the PORTUGUESE CC art. 405; the SLOVENIAN LOA §§ 2 and 3; the POLISH CC art. 353^1; the SLOVAKIAN CC § 2(3) and Ccom § 263; and the SPANISH CC art. 1255. It is elevated to a governing principle in the Projet de Reforme du Droit des Contrats published by the FRENCH ministry of Justice in July 2008 (arts. 15 and 16). Under AUSTRIAN law, freedom of contract exists as a constitutional principle and is underpinned by § 859 of the CC. Freedom of contract is expressly stated in the BULGARIAN LOA (art. 9). The only restrictions are the mandatory provisions of law and the *bonos mores*. In Member States where no statutory provision can be invoked, freedom of contract is a basic principle: e.g. for ENGLAND, see *Chitty* on Contracts I^{27}, nos. 1-011-1-012. However, freedom of contract exists only within the limits set by the mandatory rules. In modern law considerations of policy, notably the need to protect the weaker party to a contract, have led to many statutory restrictions of contractual freedom.
2. In ESTONIA the principle of freedom of contract is generally recognized and has been safeguarded first of all in the Constitution arts. 19, 31 and 32 stating the rights to free self-performance, free entrepreneurship, and protection of ownership. LOA § 9 also states that contracts are concluded on the basis of the mutual consent of the parties. As the rules of contract law are presumed to be dispositive (LOA § 5), parties are generally free, subject to specific statutory restrictions, to determine the content of their contract (LOA § 23).

3. In the CZECH CC the principle of freedom of contract is set forth in § 2(3) according to which the parties may arrange their rights and obligations by an agreement that differs from the law, if the law does not expressly forbid this or if it does not result from the nature of the provision that it cannot be derogated from. The principle is further supported by CC § 51 pursuant to which the parties may conclude contracts which are not specially regulated in the CC, and CC § 491 which allows for mixed contracts made up of several types of contracts regulated in the CC. However, the same freedom does not apply to all juridical acts. There is a principle in CZECH law that unilateral juridical acts have legal consequences only if this is stipulated by the law (numerus clausus), *Švestka/Jehlička/Škárová*, OZ[9], 35. The situation is the same in BULGARIAN law (LOA art. 44).
4. In HUNGARIAN civil law the principle of freedom of contract is important but it is subject to restrictions (CC § 200(1)).

II.–1:103: Binding effect

(1) A valid contract is binding on the parties.

(2) A valid unilateral undertaking is binding on the person giving it if it is intended to be legally binding without acceptance.

(3) This Article does not prevent modification or termination of any resulting right or obligation by agreement between the debtor and creditor or as provided by law.

COMMENTS

A. Binding character of contracts

The first sentence of paragraph (1) of this Article expresses one of the most fundamental and general principles of European contract law. Valid contracts are binding on the parties. *Pacta sunt servanda.*

B. Binding character of a unilateral undertaking

A contract is defined in terms of an agreement. If there is no agreement there is no contract. Often an agreement can be spelled out of conduct indicating acceptance. However, this is not always possible. Sometimes there is simply a unilateral undertaking which is intended to be binding without acceptance. To force such cases into the contractual mould can be artificial and unconvincing. A more direct approach can be taken. The unilateral undertaking is itself binding.

Paragraph (2) is derived from Article 2:107 of the Principles of European Contract Law. The word "undertaking" is used instead of "promise" as it now seems to be more commonly used in European instruments and is the term used in the rest of the DCFR. No change in meaning is intended. An "undertaking" is simply a voluntary assumption of an obligation. Any expression which clearly indicates an intention to be legally bound will suffice – for example, "I undertake to", or "I bind myself to" or "I promise to" or "we assume an obligation to" or "we hereby guarantee".

Some legal systems do not enforce a party's unilateral undertaking even if it is intended to be legally binding without acceptance. Some do so but only if it is not gratuitous or is couched in a solemn form or is found to serve a socially desirable purpose which cannot be achieved by other means.

The fear that the enforcement of unilateral undertakings will lead to socially undesirable results is not well founded. In fact many such undertakings serve legitimate commercial purposes.

Nor is it necessary to inquire into the social desirability of the undertaking if it is sincerely made. Experience shows that the legal systems which enforce gratuitous undertakings (whether they are intended to be binding without acceptance or were intended to be, and were, accepted and thus fall within the definition of a contract in II.–1:101 (Meaning of "contract" and "juridical act") do not in general encounter problems. People of sound mind do not normally assume obligations without good reason. In *some* cases a requirement of writing may be justified (see II.–1:106 (Form) and the Comments on it), but that is a different

question from the question whether a unilateral undertaking can be binding. On the other hand, those legal systems which do not enforce "gratuitous" promises have faced problems when such promises sincerely made have since been revoked. These problems arise in a most acute form when the promisee has acted in reasonable reliance on the promise, but they do not arise only in this case. Legitimate expectations fall to be respected even if there has been no actual reliance. The position in this respect is similar to that encountered in the case of contracts.

Leaving aside exceptional cases where some requirement of writing may be justified for special reasons, on balance it appears to be justifiable and desirable to regard unilateral undertakings as binding if they are intended to be binding without acceptance; and (as is provided expressly in II.–1:106 (Form)) not to subject all such undertakings to formal requirements. Of course, they must be valid. They may, for example, like contracts, be avoided for mistake or fraud or threats and so on. See Chapter 7 (Grounds of Invalidity).

C. Unilateral undertaking and offer distinguished

An offer is a unilateral juridical act which requires acceptance. An offeror is not bound by the act unless it is accepted. Other undertakings may be binding without acceptance. Whether there is such an undertaking depends on the language used and other circumstances. The undertaking must of course be communicated to the other party or to the public.

Illustration 1
When the Gulf War started in 1990 the enterprise X in country Y published a statement in several newspapers in Y promising to establish a fund of €1 million to support the widows and dependent children of soldiers of country Y who were killed in the war. After the war X tried to avoid payment invoking big losses recently made. X will be bound by its promise.

D. Modification or termination

Paragraph (3) is added to make it clear that the fact that a contract or juridical act can create obligations does not mean that those obligations cannot be modified or terminated by agreement between the debtor and the creditor or as provided by law. (The debtor and creditor will not necessarily be the original parties to a contract: there may have been an assignment of the creditor's right or a substitution of a new debtor or a transfer of one party's whole contractual position.) Very often a contract will itself provide a mechanism whereby its terms can be varied. Variation in accordance with such a mechanism is simply giving effect to the contract. The reference to modification or termination "as provided by law" takes account, for example, of the later provisions on termination for non-performance of a contractual obligation (see Book III, Chapter 3, Section 5) and of the provisions which, exceptionally, enable a court to modify the terms of a contract or terminate the contractual relationship altogether in certain situations (see III.–1:110 (Variation or termination by court on a change of circumstances)).

E. Commercial importance of unilateral undertakings

Many unilateral undertakings made in the course of business are binding without acceptance and it is important in practice that they generally should be. An irrevocable documentary credit issued by a bank (the issuing bank) on the instructions of a buyer binds the issuing bank; a confirmation of such a credit by an advising bank binds the bank as soon as it is

delivered to the seller. Some assumptions of security obligations also fall under this category (see further Book IV Part G (Personal Security)).

Illustration 2
C sends a letter to the creditors of its subsidiary company D, which is in financial difficulties, undertaking to ensure that D will meet its existing debts. The undertaking is made in order to save the reputation of the group of companies to which C and D belong. It is binding upon C without acceptance since it is to be assumed that C intends to be bound without the acceptance of each creditor.

We will see below (II.–4:202 (Revocation of offer)) that an offer which is stated to be irrevocable or which subject to a fixed time limit for acceptance may not be revoked within the period. In this case making the offer itself amounts to a unilateral juridical act which is binding without acceptance, since it carries with it an express or implied unilateral undertaking not to revoke it.

NOTES

The rule that contracts are legally binding is universal within the systems of the European Union and national notes would be superfluous. Of more interest is the question whether unilateral undertakings may be binding without acceptance.

I. Unilateral undertakings binding

1. Under some of the legal systems of the Union, promises may be binding without acceptance when this is stated in the promise or follows from the nature of the promise. This applies to GERMAN, AUSTRIAN, SLOVENIAN and ESTONIAN law where, for instance, promises of rewards are binding without acceptance (for Austria CC § 860 and German CC § 657, *Auslobung*; and for Slovenian LOA §§ 207-211. In PORTUGUESE law a public promise is binding in favour of the person who is in the situation or makes the action described by the public announcement (CC art. 459).
2. Under the ITALIAN CC, art. 1333 allows for a promise to be binding without acceptance when its purpose is to conclude a contract with obligations for the promisor only.
3. A promise is also binding on the promisor without acceptance in FINNISH and SWEDISH law, Contract Acts § 1. These impose formal requirements for a promise to make a gift, but do not require acceptance by the promisee, see for Finland, *Timonen*, Inledning till Finlands rättsordning, 280. The promise is also binding without acceptance in DANISH law, which does not require formalities for gift promises.
4. In THE NETHERLANDS such promises may be binding, see CC arts. 6:219 and 6:220. The same holds true of BELGIAN law, where promises can be binding without any acceptance, see Cass. 9 May 1980, *Arr.Cass.* 1979-80, 1132 and 1139, Cass. 3 Sept 198l, *T. Aann.* 1982, 131, Cass. 16 March 1989, *Arr.Cass*. 1988-89, 823, Cass. 27 May 2002 www.cass.be, *Cauffman*, De verbindende eenzijdige belofte, nos. 176 and 228; *Simont*, L'engagement unilatéral, 4 ff, *Van Ommeslaghe*, JT 1982, 144.
5. In SCOTTISH law there are “unilateral” promises for which no consideration is required and which are binding without acceptance, although writing is required unless the promise is in the course of business, see *McBryde*, Law of Contract in Scotland[1], chap. 2 (pp. 15-26) and Requirements of Writing (Scotland) Act 1995, s. l.

6. In POLAND a public promise, as defined by the code (CC 919-921), is a binding unilateral act. A promisor who offers the public a reward for performance of an action or the best performance of an action is bound. The promisor can decide whether the promise is to be revocable or irrevocable.

7. The SLOVAK CC § 850 provides for unilaterally binding promises to the public: whoever makes a promise to pay a reward or provide some other performance to one or more persons from the public (or from an otherwise unspecified number of persons) who meet conditions stated in the public promise will be bound by the promise.

8. In HUNGARIAN law a right to demand performance can be established from a unilateral statement only in the cases defined by legal regulations; (unless otherwise provided by law, the provisions on contracts are applied to unilateral statements) (CC § 199). The Hungarian CC recognises e.g. the public offer of a reward (Auslobung) (CC § 592) and public commitments (CC §§ 593-596). A gift is a contract: a gift must be accepted (CC §§ 579-582).

9. In BULGARIAN law a unilateral promise is binding only if so provided by law (*numerus clausus* of unilateral juridical acts – LOA art. 44). However there are several situations where unilateral acts not explicitly regulated by law have a binding effect – e.g. a unilateral termination of a contractual relationship according to a termination clause in the contract (and not provided by law).

II. Acceptance required

10. In ENGLISH law promises generally need acceptance (which may, however, be by conduct) before they will give rise to a binding legal obligation. The only clear cases of a binding promise which do not require acceptance are (i) the deed – the beneficiary need not know of it (the deed must have been delivered but it need not have been delivered to the beneficiary: see *Treitel,* The Law of Contract[9], paras. 3-164–3-166), and (ii) the irrevocable letter of credit. The latter is considered binding as soon as the confirming bank notifies the seller that the credit has been opened, see *Adams/Atiyah/MacQueen*, Sale of Goods[9],440; *Treitel,* The Law of Contract[9], para. 3-153; *Goode*, Abstract payment undertakings.

11. FRENCH and LUXEMBOURG law require acceptance of promises. In SPANISH law promises are not binding unless accepted which may take place by performing the act required, see Supreme Court Judgment 17 October 1975, RAJ (1975) 3675 and 6 March 1976 RAJ (1976) 1175 and *Sancho*, Elementos del Derecho Civil II[2], 173-181. This applies even in situations in which it could be presumed that the addressee's silence amounts to acceptance e.g. a contract for the provision of personal security: Supreme Court Judgment 23 March 1988, RAJ 2422). However, in cases in which the unilateral promise is backed by a previous "moral obligation", the promise is binding, as having "fair cause" regardless of the acceptance of the beneficiary. (See: Supreme Court Judgment 17 October 1932).

12. Acceptance is generally required under GREEK law; a mere promise is not enough. However, the CC art. 193 provides that under special circumstances the acceptance as such may suffice, regardless of whether it has been dispatched or arrives at the offeror's place, see Erman (-*Simantiras*), BGB I[9], 193 no. 11.

13. The ITALIAN CC art. 1987 provides that a unilateral promise of a performance, i.e. an undertaking which does not require acceptance, is not binding except in specific cases provided by law, such as a promise to the public (CC art. 1989), and a promise of payment and acknowledgment of debt (CC art. 1988).

14. In DANISH law promises made exclusively for the advantage of the promisee, such as promises of a gift, do not require acceptance. See *Ussing*, Aftaler[3], 61. However, in the case where an offeror has declared that no reply is expected the offeree is nevertheless obliged on request to say whether the offer is to be accepted; should the offeree omit to do so, the offer lapses. See Contracts Act § 8.

15. In ESTONIAN law acceptance is presumed for contracts of surety (LOA § 144(1)) and guarantees (LOA § 155(1^1). Contracts for gift, like contracts generally, need acceptance for their formation (LOA §§ 259 ff).

16. CZECH law holds that a unilateral juridical act (including a promise) is binding on the promisor only if it is provided by the law (numerus clausus), *Švestka/Jehlička/Škárová*, OZ[9], 35, so CZECH law does not allow for innominate unilateral promises. However, the Civil Code and the Commercial Code contain a broad regulation of nominate promises – e.g. the public competition (CC §§ 847 et seq.), public tender (Ccom arts. 281 et seq.), promise of indemnity (Ccom arts. 725 et seq.) or public promise (CC §§ 850 et seq.). The latest seems to be the broadest of all – its definition reads: whoever makes a public promise binds himself, under such promise, to pay a reward or provide other consideration to one or more of an unspecified number of persons who meet the conditions provided in the public promise (CC § 850). Although a simple promise not accepted by the recipient is not binding, its breach may give rise to damages award (CC § 415).

17. Acceptance of a unilateral promise is not required by BULGARIAN law, as far as the promise itself is regulated by special law (LOA art. 44). An “acceptance of a promise” automatically brings about a concluded contract. In those cases the “promise” is regarded as an offer.

II.–1:104: Usages and practices

(1) The parties to a contract are bound by any usage to which they have agreed and by any practice they have established between themselves.

(2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable.

(3) This Article applies to other juridical acts with any necessary adaptations.

COMMENTS

A. Scope

This Article deals with usages and with practices which the parties to a contract have established between themselves. Under paragraph (1) a usage applies if the parties have expressly or tacitly agreed that it should. Under paragraph (2) a usage which would be considered applicable by persons in the same situation as the parties will bind them even without their agreement, provided the usage is not unreasonable and is consistent with the express terms of the agreement.

A usage may be described as a course of dealing or line of conduct which is, and for a certain period of time has been, generally adopted by those engaged in a trade or other activity.

A practice which the parties have established between themselves may arise as a result of a sequence of previous conduct in relation to a particular transaction or a particular kind of transaction between the parties. It is established when their conduct may fairly be regarded as a common understanding. The conduct may not only lend a special meaning to words and expressions which they use between themselves but may also create rights and obligations.

B. Priority of usages and practices over the rules of law

Both usages and practices will, when applicable, preclude the application of default rules of law which are designed to fill gaps in a contract. However, although not stated, it is implicit in the Article that usages and practices are only valid in so far as they do not violate mandatory rules of the law applicable to the contract or to the particular issue in question.

C. Parties refer to a usage

Sometimes the parties may refer to a usage which otherwise would not operate between them under the second paragraph of the Article. Such a usage then becomes binding under the first paragraph.

Illustration 1
A, who operates in Copenhagen and who has bought a commodity in Hamburg resells it to B, who also lives in Copenhagen. In their contract the parties agree to have the local usages of the Hamburg Commodity Exchange apply. These usages will then bind both of them.

D. A practice between the parties

A practice established between the parties may vary their initial agreement, and it may create other mutual rights and obligations between them.

> *Illustration 2*
> Having been called a couple of times to fill A's oil tank, B, on the basis of information received regarding A's consumption, has done so for more than 5 years without having been called. B has seen to it that A, whose factory is dependant on the oil, never runs out of oil. A has always paid B close to but not later than 90 days after receipt of the oil.
>
> The initial agreement between the parties that B should only fill the tank when called upon has been changed by their practice; an obligation on B to see to it that the tank never runs out of oil has been created. Also, although never expressly agreed upon, a practice between the parties extending to a credit of not more than 90 days after receipt has been established between them.

It goes without saying that the parties may later agree to vary a practice which they have established between them.

In case of a conflict between a practice between the parties and a usage not agreed upon by the parties, the former will take precedence over the latter.

E. Usages not agreed upon

A usage may operate without having been agreed upon by the parties (provided that the parties have not agreed, expressly or by implication, to exclude it). For such a usage to be binding, paragraph (2) of the Article requires that it is one which would be considered applicable by persons in the same situation as the parties and is not unreasonable.

The usage must be so well established and have such general application among those engaged in the trade or activity that persons in the same situation as the parties would consider it applicable. Parties may thus be bound by usages which have application to all or several trades and by usages which apply in a particular trade only.

The Article applies to local, national and international usages. A usage may be international either in the sense that it operates in the world trade, or in the sense that in a contract between parties which have their place of business in two different states, it operates in both states.

A local or national usage which operates at the place of business of one of the parties but not at that of the other party can only bind the latter if this would be reasonable. A party who comes into a market of the other party will often be bound by the local usages.

> *Illustration 3*
> A in Brussels sends an order to B, a broker in Paris, to be executed on the Paris Stock Exchange. A is ignorant of stock exchange transactions and has no knowledge of the usages of the Paris exchange. A can, therefore, have no intention to submit to these

usages. Nevertheless the order is to be executed in accordance with the reasonable usages of the Paris Stock Exchange.

Illustration 4
A, a merchant from Milan, goes to London and there negotiates and concludes a contract to deliver to B in London "ground walnuts". These words mean a finer grinding in London than the corresponding expression does in Milan. Unless otherwise agreed the contract is taken to refer to the London usage.

The application of a usage must not be unreasonable. A usage can never set aside a mandatory rule of law, but if the law merely supplies a term in the absence of contrary agreement, the usage may reverse what would otherwise be the normal rule, provided its application is not unreasonable. Commercial acceptance by regular observance by business people is some evidence that the usage is reasonable but even a usage which is regularly observed may be disregarded by the court if it finds the application of the usage unreasonable.

The way in which the usages are ascertained - through expert witnesses, by opinions submitted by the national or local Chamber of Commerce etc. - is decided by the applicable national law.

F. Other juridical acts

Paragraph (3) applies the rules in the Article, with any necessary modifications, to other juridical acts. In the case of certain unilateral juridical acts, such as offers or notices of withdrawal of offers, for example, the word “parties” may have to be regarded for the purposes of paragraph (1) as referring to the parties to a pre-contractual relationship. In certain other cases the word “parties” may have to be regarded as referring to the sole party involved. In such a case, of course, the references in paragraph (1) to usages or practices agreed between the parties will be inapplicable, but paragraph (2) could still apply.

Illustration 5
It is a well-established usage in a certain trade that the sending of a request to act in a certain form confers authority to act in accordance with the rules of the trade association. A person engaged in that trade who sends such a form will be bound by the usage and could not argue that the rule in the Article is inapplicable because there is no contract but only a unilateral act.

NOTES

I. Definition of usage

Statutes, courts and authors have offered various definitions of usages:

1. Some have required that if a trade practice is to be classified as a usage, it must be accepted as binding by those engaged in that line of business, see *Schmitthoff,* International Trade Usages, 14, and the GERMAN RG 10 January 1925, RGZ 110, 47 (48).
2. The UNITED STATES UCC § 2.105 defines a usage as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify

an expectation that it will be observed with respect to the transaction in question". This definition does not take into consideration the possibility that a usage may bind the parties even though, at the time of the conclusion of the contract, none of them was aware of the usage, see the ENGLISH House of Lords decision in *Comptoir d'Achat et de Vente Belge SA* v. *Luis de Ridder Limitada* [1949] AC 293.

3. In ENGLAND the definition of a usage provided in *Halsbury's* Laws of England[4], 12(1), 650 is "a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life".

4. In POLAND, courts and legal writers have held that the usage must not be contrary to statutory law and the principles of social co-existence. In CZECH law trade usages are defined as rules which are as a matter of fact observed by the parties in economic relations, although they are not set forth by the law, *Štenglová/Plíva/Tomsa,* Commercial Code[10], 4. Conviction of the binding character is not required; Pelikánová, Commercial Code, 21. In SLOVENIA, the trade usage is understood as a line of conduct the observance of which is expected by those engaged in a trade or business (*Juhart and Plavšak*, Obligacijski zakonik I, p. 127).

5. In AUSTRIA CC § 10 refers to usages or practices and states that usages are to be observed only in statutorily defined cases. CC § 914 expressly states that usages have to be considered when interpreting contracts. CC § 863(2) refers to usages when determining the implied meaning of acts and omissions.

6. In ESTONIA, according to the general clause in the introductory part of the civil code, custom (*tava*) is a source of law when it has been applied for a long period of time and the persons involved consider it legally binding (GPCCA § 2). However, a custom cannot change the law. For contracts entered into with respect to the economic or professional activities of the parties, a provision resembling the present Article applies additionally (see LOA § 25). See also Supreme Court Civil Chamber's decision from 11.02.2003, civil matter no. 3-2-1-9-03 p. 30 for accepting international usage as a source of law qualifying a guarantee as a first demand guarantee.

7. In BULGARIAN law no strict distinction between usages and practices is made. The terms are used synonymously.

II. Proof of a usage

8. The way in which a usage is proved differs from country to country; see on the laws *Schmitthoff*, International Trade Usages, 20 ff.

III. Parties' choice of usage and practice

9. Paragraph (1) of the Article is drafted in the same way as CISG art. 9(1) which is in force in the majority of Member States of the European Union. See also ULIS art. 9(1).

10. The first branch of the rule, providing that the parties are bound by any usage they have agreed upon, seems to be generally accepted by the legal systems, see Dölle (-*Junge*), Kommentar zum einheitlichen Kaufrecht, art. 9 no. 8.

11. The second branch of the rule, which provides that practices established between the parties will bind them, is applied in several legal systems. In case of a conflict between a practice established between the parties and a usage not expressly agreed upon, the former takes priority, see FRENCH Cass.com. 14 June 1977, Bulletin IV no. 172, p. 148 and Schlechtriem and Schwenzer (-*Schmidt-Kessel*), CISG, art. 9 no. 8.

12. The rule in paragraph (1) has also been adopted in NORDIC, DUTCH, SCOTTISH and SPANISH law: see Nordic Contract Acts § 1, Scotland: *McBryde*, Law of

Contract in Scotland[1], paras. 9.60-9.64 (although cases of the paragraph (2) type have been more common), and Spanish CC arts. 1282 and 1287 as interpreted by the courts. A similar rule is also found in SLOVAKIA under the Ccom § 264(2). See also PORTUGUESE CC art. 405(1). Under Portuguese law practices established between the parties are only considered to be a guide for the interpretation and supplementation of the contract. See also the ITALIAN CC arts. 1340 and 1368 (and *Antoniolli and Veneziano*, Principles of European contract law and Italian law, 38 ff, with reference to the scholarship and case law distinguishing between *usi normativi* and *usi negoziali* for further references).

13. There is no general rule such as the one in this Article in the POLISH CC. However it refers to usages (customs) in a number of contexts such as: effects of an act in law (CC art. 56); interpretation of a declaration of will (CC art. 65 § 1); acceptance of an offer (CC art. 69); the manner in which a debtor must perform the obligation and a creditor must co-operate in the performance (CC art. 354).

14. ESTONIAN LOA § 25(1) literally follows paragraph (1) of the present Article. However, it is applicable only with regard to contracts concluded in relation to professional and economic activities. Additionally, a practice the parties have established between themselves and a usage observed in the profession or field of activity of the parties may give rise to implied terms in the contract (see LOA § 23(1) (2) and(3) respectively).

15. CZECH law mentions practices established by the parties only in the Commercial Code, which applies in legal relationships between businesspersons (Ccom arts. 266(3), 275(4), 369a(4) etc.), and the practices serve merely as an interpretation aid. Although CC does not expressly provide for practices at all, it can be at least assumed that the practices should be taken into account in course of interpretation of the parties' will (as under the Commercial Code). It can be further assumed that if the practices are obviously a component of the parties' will, they are a part of the contract (but there is little experience with this attitude yet).

IV. Usages not expressly chosen by the parties

(a) Implied intention

16. Some legal systems refer to the implied intention of the parties. For the position in ENGLAND, see *Treitel*, The Law of Contract[9], paras. 6-047–6-049; see also the ENGLISH law on incorporation of terms through a course of dealings, e.g. *Henry Kendall & Sons* v. *Lillico & Sons Ltd* [1969] 2 AC 31. On FRENCH law see the current interpretation of CC art. 1135 and art. 1160 (*Bénabent*, Les obligations[7], nos. 208 ff); on AUSTRIAN law, see CC §§ 863(2), 914; and BELGIAN law, Cass. 29 May 1947, *Pas. belge* 1947, I 217. These laws consider the will of the parties as the legal basis for the application of usages. CISG art. 9(2) provides that the parties are considered impliedly to have made certain usages applicable to the contract Schlechtriem and Schwenzer (-*Schmidt-Kessel*), CISG, art. 9 no. 12). In contrast, paragraph (2) of the present Article treats usages as legal norms applicable independently of the volition of the parties (cf., in GREECE, Athens Administrative Court of Appeal 7388/1991, EEN 58 (1991) 336, 337-338); usages may bind parties who were unaware of them when they made the contract. On NORDIC law see *Ramberg*, Köplagen, 160 and the Nordic Contract Acts (§1(2)). ESTONIAN LOA § 25(2) has the same effect if the parties have concluded a contract in the course of professional and economic activity. See also the SPANISH CC art. 1258 which refers expressly to usage as an implied term to which the parties are assumed to have agreed. In SLOVAKIA under Ccom § 264(1) common business practices, generally observed

in the particular line of business, unless contradicting the contents of the contract or law, are taken into account when determining the rights and obligations ensuing from a contractual relationship. Similarly, in SLOVENIAN law, trade usages and practices established between the parties are taken into account with regard to contractual relationships in the course of business activity, see LOA § 12.

17. In BULGARIA usages are decisive for the interpretation of contracts (LOA art. 20) and for determining the content of an obligation (LOA art. 63(1)) and are for that reason binding for the parties (expressly stated in Ccom art. 288).

(b) Imputed knowledge

18. CISG art. 9(2) relies on the knowledge or the imputed knowledge of the parties in question. This test leaves doubt as to whether newcomers in the trade or outsiders are bound by a usage of which they cannot reasonably have any knowledge. It has not been included in the present Article. A usage conceived as a legal norm will apply to everybody within its scope and will bind even the newcomer to the market.

19. CZECH Ccom art. 1(2) provides that trade usages are to be taken into account if a case cannot be resolved according to the written law. Ccom § 264 further stipulates that in determining the rights and duties arising from an obligational relationship, regard is to be had also to trade usages observed generally in a particular branch of business, unless they contradict the terms of the contract or the law; trade usages which should be taken into consideration pursuant to the contract prevail over rules of law which are not mandatory. So, this concept uses neither implied intention nor imputed knowledge, but simply makes the usages a part of the law. The regulation applies only in relations between business persons; the CC does not contain any provision on usages.

(c) Unreasonable usage

20. In several legal systems unreasonable usages will not bind the parties. This holds true of AUSTRIA, see CC § 863(2); DENMARK, see *Andersen and Nørgaard*, Aftaleloven[2], 35; ENGLAND, see the discussion in *Treitel*, The Law of Contract[9], paras. 6-047–6-049; GREECE, see Athens Court of Appeal 2449/1960, EEN 28 (1961) 225-226, note *Pothos*; GERMANY, see *Baumbach/Duden/Hopt* (-*Hopt*), Handelsgesetzbuch[12], § 346 no. 11; the NETHERLANDS, see CC art. 6:248(2); PORTUGAL, see CC art. 3(1); SPAIN, see CC art 3.1 and *Vicent Chuliá*, Compendio crítico de Derecho Mercantil[3], 1, 44; SWEDEN, see *Ramberg*, Köplagen, 161; SCOTLAND, see *"Strathlorne" S.S. Co* v. *Baird & Sons* 1916 SC 134; and probably for FRANCE, see the discussion in *Marty and Raynaud*, Introduction générale[2], no. 114. In ITALY *Disposizioni sulla legge in generale*, art. 8 seems to exclude any usage which is contrary to statutory law. See also *Antoniolli and Veneziano*, Principles of European contract law and Italian law, 38 ff for further references.

21. CISG does not expressly require the usage to be reasonable. Writers on CISG, however, regard this requirement to be implied. See Schlechtriem and Schwenzer (-*Schmidt-Kessel*), art. 9 no. 5.

(d) International, national and local usages

22. Unlike CISG art. 9(2), which applies only to usages in international trade, the present Article applies also to national and local usages.

II.–1:105: Imputed knowledge etc.

If a person who with a party's assent was involved in making a contract or other juridical act or in exercising a right or performing an obligation under it:

(a) knew or foresaw a fact, or is treated as having knowledge or foresight of a fact; or
(b) acted intentionally or with any other relevant state of mind

this knowledge, foresight or state of mind is imputed to the party.

COMMENTS

A. Purpose

It is the purpose of this Article to neutralise the legal risks inherent in the modern division of labour in trade and industry. This is achieved by imputing actual or constructive knowledge or a legally relevant state of mind, such as intention, negligence or bad faith, of a person assisting in the making of a contract or other juridical act, or in exercising rights or performing obligations under it, to the party to whom that assistance is rendered.

The issues covered by this Article are not always clearly regulated in the existing national laws. The Article represents what are thought to be the principles which underlie each law's approach, shorn of the technical concepts which many laws use to arrive at much the same results.

B. Scope

Under modern conditions, most contracts are not concluded by the contracting parties personally. Rather, at least one and often each party makes the contract through the agency of employees or other persons and entrusts performance of the obligations under the contract to employees, representatives, subcontractors and other third persons. A later Article (III.–2:106 (Performance entrusted to another)) provides that a party cannot escape from an obligation by delegating it to another; if the obligation is not performed, the party will remain responsible. The present Article is complementary to that Article. It deals with other aspects of this modern division of labour, namely the imputation to the contracting party of actual or constructive knowledge of persons assisting in the making of a contract or the performance of obligations under it (paragraph (a)) and with the imputation of intention or some other relevant state of mind such as negligence. The same considerations apply to other juridical acts, such as the giving of legally effective notices for various purposes.

The clearest case of a person acting with the assent of a party in performing a contractual or other similar obligation is where the debtor in the obligation has entrusted performance to that person. However, a third person may nevertheless under certain conditions be entitled to perform the obligation. If the third person acted with the debtor's assent that is equivalent to an entrustment and therefore falls under the present Article.

In contrast, if the third person has acted only by virtue of a legitimate interest in the performance, and not with the assent of the debtor, that falls outside the scope of the Article.

C. Imputed knowledge and foresight

Many of the following rules use the criteria of knowledge, awareness or foresight. A party who could reasonably be expected to have known or foreseen a fact is often treated as having had the knowledge or foresight.

When a contract is being made, a party is normally only fixed with the knowledge imputed to the party's employees or representatives involved in making the contract. Under some Articles, knowledge or foreseeability at the time of non-performance is relevant. In this case, knowledge or intention even of any subcontractor or other person to whom performance has been entrusted may be imputed to the party.

However, there is one limitation. The employee or other person must have been someone who was, or who appeared to be, involved in the negotiation or performance of the contract. If a person not so related to the contract knows a relevant fact he or she may not be able to appreciate its relevance to the contract and thus might not report it. The burden of proving that the person for whom the contracting party is held responsible was not and did not reasonably appear to the other party to be involved in the making or performance of the contract rests on the first party.

D. Imputed intention, etc.

According to paragraph (b), certain states of mind or behaviour of the person acting are also imputed to the contracting party for whom a contract has been concluded or an act of performance is rendered (and similarly for other juridical acts).

Under several rules, intentional or similar behaviour or bad faith by a party creates or increases liability. However, it should be noted that, under the following rules on contractual and other voluntary obligations, liability is not generally based on the notion of fault. This limits the scope of the Article.

The intentional or other behaviour of a party or of a person whose state of mind is imputed to a party only refers to the act or omission which constitutes the non-performance. It is not necessary that the intention or state of mind also extend to the consequences which may follow from the non-performance.

NOTES

I. Imputation of knowledge

1. Imputation of knowledge when a contract is being made is dealt with in rules on agency or mandate in BELGIUM (*de Page and Dekkers*, Traité élémentaire de droit civil belge[3] no. 52), GERMANY (CC § 166), ITALY (CC art. 1391) and PORTUGAL (CC art. 259(1)). In Germany it is held that the rule of CC § 166 on agency expresses a general principle: a person who entrusts another with executing certain affairs on his or her own responsibility will be regarded as having the knowledge which the other has acquired in that context (BGH 25 March 1982, BGHZ 83, 293 (296)); this principle corresponds to the idea underlying sub-paragraph (a) of the present Article. Although there is no explicit rule in the AUSTRIAN Code, the Austrian Supreme

Court (OGH) reaches the same result by reference to CC § 1017 (OGH 13 February 1963, SZ 36/25; see Schwimann (-*Apathy*), ABGB IV[3], § 1017 no. 14). The matter is also discussed when determining a company's (or other legal entity's) knowledge. Whenever a person is responsible to a certain extent for the company's affairs, the knowledge of this person is considered the company's knowledge, even if that responsibility is not conferred upon the person by the company's internal constitution (*Koziol and Welser*, Bürgerliches Recht I[13], 75). In SLOVENIAN law the issue is dealt with in the rules on agency (direct effect, LOA § 70(1) and (2)) and mistake (LOA § 48). In ENGLISH law the question is treated as one of agency (cf. *Chitty* on Contracts I[27], nos. 6-048 and 6-068; *Treitel*, The Law of Contract[9], para. 9-029 with references) or, when the question is whether a person's knowledge may be attributed to a corporation, "identification" (see *Meridian Global Funds Management v. Securities Commission* [1995] 2 AC 500 (PC)). In the NORDIC countries the representative's knowledge is imputed to the principal, *Kaisto* s. 265. This is not absolutely clear according to SWEDISH law; see *Dotevall*, Mellanmannens kunskap och huvudmannens bundenhet, passim. In POLISH law, the issues covered by this Article are not clearly regulated. However, a contract made through a representative, acting with authority, has "direct effects for the person represented" (CC art. 95). Legal writers hold that if those effects depend on good or bad faith, or knowledge or lack of knowledge, one has to take into consideration both the representative's and the principal's state of mind (e.g. *Pietrzykowski*, Kodeks cywilny, art. 95). In ESTONIA, in addition to special rules for representatives (GPCCA § 123, see note 3 below), GPCCA § 133(1) states that if a person uses another person in a business (i.e. in the first person's economic or professional activity) on a continuous basis, the first person is deemed to be aware of the circumstances known to the other person, except if the duties of that person do not include communication of such information to the first person or if the other person cannot reasonably be expected to communicate such information taking into account the duties involved. Similar provision applies for persons involved in performing an obligation (GPCCA § 133(2)). For CZECH law, see CC § 32(3): if the principal acts in good faith or knew or ought to have known of certain circumstances, account of this shall be taken also with regard to the representative, unless the representative had learned about the circumstances before the grant of the authority. The principal who is not in good faith cannot appeal to the good faith of the representative.

2. In BELGIUM a similar rule is justified by analogy to the rule on performance entrusted to another (see below). In FRANCE, a corresponding rule has apparently not yet been formulated; but it may be compatible with the solutions to be found in case law, especially in determining foreseeability of damage (cf. *Viney and Jourdain*, Les effets de la responsabilité[1], no. 325).

3. In GERMANY (CC § 166(1), GREECE (CC art. 214), ITALY (CC art. 1391(1)), ESTONIA (GPCCA § 123(1)) and PORTUGAL (CC art. 259(1)), only the representative's state of mind is, as a rule, considered. If, however, the representative has acted according to instructions, also the principal's state of mind is considered in Germany (CC § 166(2)) and Greece (CC art. 215). Though not explicitly regulated, the situation is the same in SLOVENIA (*Juhart and Plavšak*, Obligacijski zakonik I, p. 433). By contrast, in Italy (cf. supra), Estonia (GPCCA § 123(2)) and Portugal (CC art. 259 (2)) only the principal is then considered. A very flexible rule has been enacted in THE NETHERLANDS: either the representative or the principal or both are taken into account, depending on the extent to which each of them took part in concluding the contract or in determining its contents (CC art. 3:66(2)). Under the

SLOVAK CC § 32(3) if the principal knew or must have known of certain circumstances, this is taken into consideration also with regard to the representative, unless it concerns circumstances about which the representative had already learned before the authorisation was granted.

II. Imputation of intention etc.

4. In some national laws, the imputation of intention, negligence and bad faith is very important in the framework of a fault principle for liability. According to several provisions, a non-performing party is responsible for the culpable behaviour of persons charged with performing the obligations (AUSTRIAN CC § 1313a; BELGIUM: CC art. 1245 and Cass. 21 June 1979, *Pas. belge* 1979 I 1226; Cass. 5 Oct. 1990, *Pas. belge* 1991, 115; Cass. 27 Feb. 2003, *RGDC* 2004, 410); DENMARK: Danske Lov 1683 art. 3-19-2; GERMANY: CC § 278 sent. 1; GREECE: CC arts. 330 and 334; ITALY: CC art. 1228; the NETHERLANDS: CC art. 6:76; PORTUGAL: CC art. 800(1); ESTONIA GPCCA § 132 (LOA § 1054 for delictual claims); SLOVAKIA Ccom §§ 331 and 580(2). FRENCH law reaches the same result for exclusion clauses (*Malaurie and Aynès*, Les obligations[9], no. 986). In POLISH law the debtor is liable, as for the debtor's own act or omission, for acts and omissions by the persons with the assistance of whom the debtor performs the obligation, as well as the persons entrusted with the performance of the obligation (CC art. 474). Thus, under CC art. 474 the third persons' behaviour (acts and omissions) is imputed to the party, regardless of the party's own fault. (See also CC: arts. 429 and 430 on the delictual position). In other words a non-performing party is responsible for the culpable behaviour of the persons whom such party has charged with performing (or assisting in performing) the party's obligations – as for the party's own acts or omissions.

5. In SPANISH law, there is no corresponding general rule for contractual liability, but legal writers and case law acknowledge contractual liability for acts of persons for whom the non-performing party is responsible (*Díez-Picazo*, Fundamentos I[4], paras. 724-726; *Fraga*, La responsabilidad contractual, 561 ff; TS 22 June 1989 (RAJ 1989/4776); TS 1 March 1990 (RAJ 1990/1656)), although intention probably cannot be imputed. In ENGLISH law, the question does not arise because the fact that a breach is deliberate usually does not affect a party's liability in contract.

6. The CZECH Ccom art. 331 provides that the debtor who performs an obligation through another person is liable as if the debtor had performed personally. The CC has no similar provision but the civil law doctrine has adopted the same position, see *Švestka/Jehlička/Škárová*, OZ, 989. Analogical standards apply in case of liability for damages – according to CC § 420(2), the damage is deemed to have been caused by a certain person if it has been caused within the scope of that person's activity by those who were used for performance of the activity. The Commercial Code further specifies that if a breach of an obligation is caused by a third party, whom the debtor entrusted with the performance, the liability of the debtor is excluded only if it is excluded under the law and the third party would also not be liable if directly obliged to the creditor (Ccom art. 375). In SLOVENIAN law, the general principle of liability of the debtor for persons entrusted with performance of an obligation is based on the rules of liability within the contract for work (LOA § 630), transport (LOA § 694) and mandate (LOA § 770(4)). In addition, LOA § 174 establishes a general rule on the (delictual) liability of employers for damage caused by employees within the scope of their duties.

7. Some of the modern civil codes also deal with good and bad faith. ITALY and PORTUGAL start out from the general principle set out above. However, a principal

who is in bad faith cannot invoke the representative's ignorance or good faith (Italian CC art. 1391(2) and Portuguese CC art. 259(2)). Under the SLOVAKIAN CC § 32(3) if the principal acts in good faith this is taken into consideration also with regard to the representative. A principal who is not in good faith cannot rely on the representative's good faith. In the HUNGARIAN CC § 315a person who charges another person to perform obligations or exercise rights is liable for the conduct of that person.

8. In BULGARIAN law there is no special rule. Such a rule can, however, be derived from the rules on representation. For support for having such an express rule, see *Takoff*, Dobrovolno predstavitelstvo, 456 ff.

9. See generally *Treitel*, Remedies for Breach of Contract, § 1 and literature cited there.

II.–1:106: Form

(1) A contract or other juridical act need not be concluded, made or evidenced in writing nor is it subject to any other requirement as to form.

(2)Where a contract or other juridical act is invalid only by reason of non-compliance with a particular requirement as to form, one party (the first party) is liable for any loss suffered by the other (the second party) by acting in the mistaken, but reasonable, belief that it was valid if the first party:

(a) knew it was invalid;

(b) knew or could reasonably be expected to know that the second party was acting to that party's potential prejudice in the mistaken belief that it was valid; and

(c) contrary to good faith and fair dealing, allowed the second party to continue so acting.

COMMENTS

A. General rule: no formal requirements

Paragraph (1) lays down the general principle that there is no formal requirement for a contract or other juridical act. This may be displaced by a particular provision on a particular topic but, in general, there is no need for writing, sealing, authentication by a notary, filing in a public registry or anything else. This principle is widely accepted among the legal systems at least as far as commercial contracts are concerned. For international contracts it is particularly important since many such contracts have to be concluded or modified without the delays which the observance of formalities will cause.

B. Exceptions

In some cases the model rules themselves require some formality (e.g. textual form, or textual form on a durable medium) for a particular juridical act and national laws often require writing or some other formality, particularly in relation to land. This does not need to be expressly recognised in this Article as it follows from the general principle that particular provisions prevail over more general ones (I.–1:102 (Interpretation and development) paragraph (5)). Any legislator using the model rules is, of course, free to prescribe writing or any other formality in relation to any type of contract or other juridical act. It is important, however, to establish the basic rule that there is no formal requirement unless otherwise provided.

One context in which a formal requirement may be called for is that of certain unilateral undertakings to make a donation. Many legal systems impose formal requirements in such cases, in order to provide evidence that the promise was actually made (the "evidentiary function") and was intended to be legally binding (the "channelling function") and at the same time to encourage the promisor to stop and think before assuming an obligation which may turn out to be burdensome (the "cautionary function"). This issue is dealt with in Book IV, Part H on Donation.

Another context is which a formal requirement may sometimes be called for is that of consumer protection. See, for example, IV.G.–4:104 (Form) in relation to consumer contracts for the provision of personal security.

As will be seen from the comparative notes, the present Article represents the law of the majority of Member States in that there are no general requirements of writing or other form. However these model rules as a whole require formality in fewer specific cases than do many laws. Experience shows that formal requirements can hinder commerce and can enable parties to escape obligations for no good reasons. Most systems have developed mechanisms to limit unjustified evasions, but the better approach is to target formal requirements on cases in which they are really needed.

C. Liability for allowing other party to proceed in reliance on formally invalid contract or juridical act

Paragraph (2) can be regarded as a particular application of the principle of good faith and fair dealing. It would be contrary to good faith and fair dealing for one party, knowing that a contract was invalid because of lack of form, to stand by and knowingly allow the other party to suffer loss in the mistaken and reasonable belief that it was valid. The paragraph imposes a liability to compensate the other party for any loss suffered in these circumstances.

NOTES

I. Formal requirements

No formal requirement for contracts in general

1. In the majority of countries of the European Union, writing or other formalities are not required for the validity of contracts in general. This holds true of FRANCE, see *Bénabent*, Les obligations[7], no. 101; DENMARK, see Danske Lov § 5.1.1; SWEDEN, see *Ramberg*, Allmän avtalsrätt[4], 125; FINLAND, see *Hoppu*, Handels-och förmögenhetsrätten i huvuddrag, 36; GREECE, CC art. 158; GERMANY, CC § 125 (impliedly); BULGARIA (LOA art. 26(2), Ccom art. 293(1)); AUSTRIA, CC § 883; PORTUGAL, CC 219 ff; SLOVENIA, LOA § 51(1); ESTONIA, GPCCA § 77(1), LOA § 11(1); ITALY, CC art. 1325 no. 4 (see *Sacco and De Nova*, Il contratto I[2], 706 ff; *Roppo*, Il contratto, 218 ff); ENGLAND (see e.g. *Chitty* on Contracts I[27], no. 4-001); and SCOTLAND, Requirements of Writing (Scotland) Act 1995; SLOVAK CC § 46 impliedly. The DUTCH CC art. 3:37 lays down that unless otherwise provided declarations, including communications, may be made in any form. The same rule applies in SPAIN, see CC art. 1278, Ccom art. 51 and art. 11 of the Retail Trade Act (l996). In POLAND, the principle that a contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form is implied from the freedom of contract principle (see e.g. the Supreme Court's decision of April 28, 1995, III CZP 166/94). There are, however, statutory requirements as to the form of certain contracts. These forms are the following: writing, writing with official certification of date, writing with notarial certification of signatures, notarial deed. The requirement of form can play different legal functions, e.g. for the validity of an act, for proof of an act, or to cause specific effects of an act. Further limitations may be created by the parties themselves (CC art. 76). The GREEK CC provides that contracts and other juridical acts have to be made in a certain form when the law so provides (CC art. 158) or the parties have agreed on it (art. 159 (1)) and this holds true of the other laws which do not require form. See for example arts. 1350–1351 of the ITALIAN CC or

the ESTONIAN GPCCA § 77(1) for transactions generally and LOA § 11(1) for contracts specifically.

2. CZECH law similarly adopts the principle of informality of contracts, see § 46 CC and Švestka/Jehlička/Škárová/Spáčil (-*Hulmák*), OZ[10], 263.

3. Under the HUNGARIAN CC § 216a contract may be concluded either orally or in writing, unless otherwise provided by legal regulation. The intention to conclude a contract can also be expressed by conduct that implies such intention. Failure to make a statement, if it is not implicit conduct, is deemed to be acceptance only if a legal regulation has so prescribed or the parties have so agreed.

4. CISG art. 11 provides that a contract for the sale of goods need not be concluded in writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses. Under art. 29(1) a contract may be modified or terminated by the mere agreement of the parties. A State which is party to the Convention may , however, make a declaration to the effect that articles 11 and 29 do not apply where any party has the place of business in that State. None of the Members of the European Union has made such a declaration.

5. Art. 1.2 of the UNIDROIT Principles provides that nothing in the Principles requires a contract to be concluded in any form. It may be proved by any means, including witnesses.

II. Writing required

6. Unless the defendant is a merchant, the FRENCH courts will not admit proof of a contract above a certain value (1500€) unless it is in writing, see CC art. 1341. But the requirements of writing are not great. A commencement of proof by writing is sufficient, see CC art. 1347, and in special cases where it was not possible for a party to provide a written document, oral testimony is allowed, see art. 1348. Under art. L.110-3 of the Commercial Code, oral testimony of contracts made between merchants is allowed. BELGIUM and LUXEMBOURG have similar rules (see on Belgium: *Mougenot and Mougenot*, La preuve[3]). BULGARIA has the same rule on *forma ad probationem* – CCP art. 164.

7. In ITALY proof by witnesses will not be allowed for contracts above a certain value unless they are in writing, see CC art. 2721(1), but there are a number of exceptions from this rule. Thus art. 2721(2) provides that the court can admit proof by witness even beyond that limit, taking into account the character of the parties, the nature of the contract and any other circumstances. Moreover, the ITALIAN CC art. 2724 provides that proof by witnesses is admissible in all cases where there is *prima facie* written evidence; when it has been morally or materially impossible for the contracting party to secure any written evidence; when the contracting party has lost, without fault, the document providing the evidence.

8. The SPANISH CC art. 1280 lists several contracts for the validity of which written notarial form would be required. However, ever since the enactment of the Code the courts have unanimously held that this requirement does not affect the validity of the contract. Though lacking this form, contracts create effects as between the parties and normally also in relation to third parties.

9. In CZECH law a requirement of writing may result from a stipulation of law or from an agreement of the parties. The written form requirement is construed fairly strictly by the courts – the entire will of the parties must intelligibly follow from the writing; it does not suffice that the content of the contract is clear to the parties (Supreme Court 3 Cdo 227/96).

10. Under the HUNGARIAN CC § 217a legal regulation may prescribe definite forms for contracts. A contract concluded in violation of formal requirements is void, unless otherwise provided by legal regulation. A form stipulated by the parties is a condition for the validity of a contract, if the parties have expressly so agreed. In such cases, the contract will become valid by acceptance of performance or partial performance.

III. Specific contracts

11. In all the countries, certain specific contracts need to be in writing or in a notarial document in order to be valid. For example there may be formal requirements for such contracts as consumer contracts, contracts for the establishment of companies, loans, guarantees, sales of motor vehicles, employment contracts and tenancies.

12. In SPANISH law, notarial deeds are needed for mortgages and contracts regulating the joint economy of married people. In addition, most consumer contracts (consumer credit contracts, time-sharing contracts, etc.) have by statute to be in writing, although there is no clarity about the consequences of lacking the required form. Such contracts are not, however, voidable on this ground against the consumer.

13. Formal requirements for special agreements are found in some *C*onventions. For arbitration clauses, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, art. II requires writing. Art. 23 of the Brussels I-Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters has formal requirements for a jurisdiction clause. See also arts. 12 and 96 of CISG.

14. In IRISH law informality is the rule but a considerable number of contracts must be evidenced in writing: contracts of guarantee, contracts for which the consideration is marriage, contracts for the sale of land or an interest in it, contracts that will not be performed within one year (see Statute of Frauds (Ireland) 1964, s. 2), contracts for the sale of goods in excess of a certain value (SGA 1893, s. 4) and hire purchase contracts (ConsCredA, 1995, s. 30).

15. In ITALY writing is required for the sale of land, see CC art. 1350, which includes a number of other contracts regarding land as, for example, settlement or lease of a certain duration. In GERMANY, CC § 311b(1) requires a notarial document, as do GREEK CC arts. 1033 and 369, PORTUGUESE CC art. 875 (with few exceptions), SPANISH CC art. 1280, ESTONIAN LPA § 119(1) and POLISH CC art. 158. In the U.K., contracts for the sale of land must be in writing and signed by both parties (not by deed - that is required for the conveyance), see, for SCOTLAND, the Requirements of Writing (Scotland) Act 1995 s. 1 and, for ENGLAND, the Law of Property (Miscellaneous Provisions) Act 1989 (1925 ??), s. 2. (replacing the earlier requirement that the contract be evidenced in writing; for England the Statute of Frauds 1664 (1677 ??) still requires that guarantees be evidenced in writing. See *Chitty* on Contracts I[27], chap. 4. In SWEDEN writing and in FINLAND writing and the signature of an official sales witness are required, see SWEDISH Land Code chap. 4, § 1 and FINNISH Land Code chap. 2, § 1. DANISH law has no formal requirements. In FRANCE, some contracts must take the form of a deed to be valid: donation (art. 931), prenuptial agreement (art. 1394), mortgage (art. 2127), off-plan real estate sale (CCH art. 216-11). In SLOVAKIA under CC § 46a contract for the transfer of immovables, as well as certain other contracts for which the law or the agreement between the parties requires a written form, must be in writing. In SLOVENIA writing is required for the sale of immovables and the establishment of other property rights in immovables (LOA § 52) as well as for some other contracts, e.g. personal security (LOA § 1013), building contracts (LOA § 649) or a donation where the gift is not handed over at the

time of conclusion (LOA § 538); some contracts require a notarial deed, e.g. transfer of property between spouses (Notary Act art. 47).

16. In CZECH law writing is required for contracts for the transfer of immovables (CC § 46(1)), pledge and mortgage contracts (CC § 156(1)), contracts for the assignment of a receivable (CC § 524(1)), donation contracts if the subject of the donation is not handed over at the time of conclusion of the contract (CC § 628(2)) and many more.

17. In several systems a contract for the sale of land will not transfer the property to the buyer; further formalities are necessary to achieve this. AUSTRIAN law provides an example: according to CC § 883 a contract for the sale of land can be concluded without any form. Property, however, is transferred by registration in the land register (CC § 431), a process that is done in writing. For the transfer of property it is therefore necessary to draft the agreement in writing and have it certified by an official authority such as a court or a notary (see § 31 *Grundbuchsgesetz*). In SLOVENIA a contract for the sale of immovables must be concluded in writing but a notarial verification of the seller's signature is required for the transfer of property by registration in the land register (Land Registry Act art. 33).

18. In BULGARIAN law, contracts for rights in immovables need to be in the form of a notarial deed, a huge number of contracts need a notarial verification of the signatures and a large number of contracts should be concluded in writing in order to be valid (*forma ad substantiam*) – for more then 100 examples see *Takoff*, Zakon za zaduljeniyata i dogovorite[6], 22. The authorisation of a representative for the conclusion of such a contract should be in the same form as is required for the contract (LOA art. 37).

19. Written form is a requirement for the validity of the contract in HUNGARIAN law in many cases. Under CC § 254(2) lien contracts must be concluded in writing. For the creation of liens on certain properties, additional formal requirements may be prescribed by law. Under CC § 365(3) contracts for the sale of immovables are valid only if concluded in writing. Under CC § 272(2) personal security contracts are valid only if made in writing. Under CC § 522(2) bank credit contracts are valid only if concluded in writing. Under CC § 579(2) contracts for the donation of real properties are valid only if concluded in writing.

II.–1:107: Mixed contracts

(1) For the purposes of this Article a mixed contract is a contract which contains:

(a) parts falling within two or more of the categories of contracts regulated specifically in these rules; or

(b) a part falling within one such category and another part falling within the category of contracts governed only by the rules applicable to contracts generally.

(2) Where a contract is a mixed contract then, unless this is contrary to the nature and purpose of the contract, the rules applicable to each relevant category apply, with any appropriate adaptations, to the corresponding part of the contract and the rights and obligations arising from it.

(3) Paragraph (2) does not apply where:

(a) a rule provides that a mixed contract is to be regarded as falling primarily within one category; or

(b) in a case not covered by the preceding sub-paragraph, one part of a mixed contract is in fact so predominant that it would be unreasonable not to regard the contract as falling primarily within one category.

(4) In cases covered by paragraph (3) the rules applicable to the category into which the contract primarily falls (the primary category) apply to the contract and the rights and obligations arising from it. However, rules applicable to any elements of the contract falling within another category apply with any appropriate adaptations so far as is necessary to regulate those elements and provided that they do not conflict with the rules applicable to the primary category.

(5) Nothing in this Article prevents the application of any mandatory rules.

COMMENTS

Book IV has a number of Parts on specific types of contracts – for the sale of goods, for the supply of services, for mandate, for franchises and similar long-term "framework" contracts, for the lease of goods, for the provision of personal security, for donation etc. The problem is that there may be mixed contracts – e.g. a contract to construct and sell, or a contract to sell and provide a training service, or a contract to lease and sell. There are many such contracts. Which special rules, if any, then apply and how?

It might be tempting to argue that cases of mixed contracts really involve two or more contracts. So the problem disappears. This might be a possible argument in systems with a different notion, or a vague and flexible notion, of what a contract is. However, it does not work under these rules where a contract is defined as a type of agreement – a juridical act. If there is one agreement – often constituted by an offer and an acceptance – there is one contract. It is quite normal under these rules for a contract to give rise to several sets of reciprocal obligations. So the problem of mixed contracts cannot always be avoided by saying there are really two or more contracts. Of course there may in fact be two or more contracts. If each is a pure contract then the case is no longer one in the realm of mixed contracts.

However, although this "two contract" solution does not work under the present rules it contains a pointer to the appropriate solution. It will often be a mere matter of chance whether there is one contract or two. This suggests that the practical results should preferably not differ depending on whether the parties conclude one contract or two. This is one reason for

the solution adopted in the Article. Another reason is that all alternative solutions seem unacceptable. To apply only one set of special rules would leave the other part of the contract unregulated by the rules specially created for it. To apply only the general rules of Books I to III would be open to the same objection in relation to both parts of the contract. To create specially designed rules for every conceivable type of mixed contract would be impracticable.

So the Article opts for the solution which involves applying the relevant set of rules to the relevant part of the mixed contract. This basic policy is slightly modified to deal with some special situations.

Paragraph (1) defines what is meant by a mixed contract for the purposes of the Article. Paragraph (1)(b) is not meant to deal with a contract which is partly governed by special rules and partly by the general rules. A pure contract for the sale of goods would then be governed by the rules on mixed contracts. This is not what is intended and not what is said. The provision is, as its wording indicates, intended to deal with contracts which contain a part falling within one category and *another* part falling only within the general rules – e.g. a contract for (a) the sale of a horse and (b) the granting of permission to keep it on a certain plot of land.

> *Illustration*
> A contract provides for something to be donated and also for something not to be done. The part of the contract which deals with the donation falls under the special rules for contracts of donation in Book IV. The part which contains an obligation not to do something falls under only the general rules in Books I to III. This is a mixed contract for the purpose of the Article.

Paragraph (2) is meant to deal with cases where the two matters might just as well have been dealt with in separate contracts but the parties chose to deal with them in one contract. For example, where a contract obliges one party to sell a machine and then to provide a training course in how to use it, the sales rules would apply to the sale part of the contract and the services rules would apply to the training part of the contract. Similarly, if a contract obliges one party to buy goods from the other and then lease them back to the other, the sales rules would apply to the sale part of the contract and the leases rules to the lease part. Another important type of mixed contract which would often fall under the rule in paragraph (2) is a contract for sale and processing, or processing and sale. For example, a garage agrees to sell and fit a new tyre or an exhaust. Or an engineer agrees to repair a machine at so much per hour and sell the client at list prices any parts necessary for the job. An advantage of this approach is that it enables the same solution to be reached whether the parties conclude one contract or two. The words “unless this is contrary to the nature and purpose of the contract” are inserted to cover cases where although the contract contains elements of specific types of contracts it is clearly designed to be governed only by the general rules or only, perhaps, by a special set of standard terms. Paragraph (5) prevents this possibility from being used to avoid mandatory rules.

Paragraphs (3) and (4) are meant to deal with other contracts, such as contracts for construction and sale, where one part is purely incidental to the other. They cover two situations.

Paragraph (3)(a) covers the situation where a rule provides that a certain type of mixed contract is to be regarded as primarily a contract falling within one category. For example, there is a rule in the Sales provisions to the effect that a contract for the manufacture of goods and the transfer of the ownership of them to the ordering party, in exchange for a price, is to be considered as primarily a contract for sale. The reasoning is that the construction is for the purposes of the sale. It is a means to an end. The ordering party is primarily interested in getting an end product which conforms to the contract.

However, special rules of this type cannot be devised for every possible situation which might arise and would not be appropriate in many cases. So paragraph (3)(b) covers the situation where one part of a mixed contract is in fact so dominant that the contract can only reasonably be regarded as falling primarily within one category. For example, in a contract for hotel accommodation, a part of the price is for the right to use movables, such as bed, chair, TV, towels etc. Yet most people would regard it as artificial to say that the contract was a mixed contract, one part of which was a contract for the lease of movables. The lease of movables is purely incidental. Similarly, the short-term storage of goods is often an incidental element of a contract which is primarily of another nature. And the repairing obligations of a lessor under a contract for the lease of movables will usually be best regarded as merely an incidental aspect of a contract for lease.

For a contract under paragraph (3), which either in law or in fact is primarily of a certain type and only incidentally of another type, paragraph (4) provides that the dominant rules prevail. The rules applicable to the incidental part apply only so far as necessary and only so far as they do not conflict with the dominant rules. In a contract for the construction and sale of a boat, for example, the sales rules on conformity and the passing of risk will apply at the end of the construction process to the exclusion of the construction rules. The construction rules might still fall to be applied to questions arising during the construction process – for example, if the client wanted to change the specification or if the constructor became aware of something of which the client ought to be warned. Similarly in a contract with a hotel, the general rules on services would apply. In theory the rules on leases of movables could apply incidentally and so far as necessary but in practice it is hard to imagine a case where it would be necessary to apply them to the normal movables (bed, chair, table etc) which the guest has the right to use. However, the rules on mixed contracts (probably paragraph (2)) would naturally apply if a guest made a special arrangement, but under the one contract, for the hire of a special piece of equipment during his or her stay at the hotel.

One of the dangers of allowing one set of rules to prevail in a mixed contract is that mandatory rules designed to protect certain people, such as consumers, might be denied effect. Paragraph (5) therefore expressly preserves the effect of mandatory rules.

NOTES

1. There are few legislative provisions on this topic. One is the ESTONIAN Ccom art. 1(2) which provides that "If a contract has the characteristics of two or more types of contract provided by law, the provisions of law concerning such types of contract apply simultaneously, except provisions which cannot apply simultaneously or the application of which would be contrary to the nature or purpose of the contract." Another provision is the DUTCH CC art. 6:214 which applies only to contracts which

fall under the rules applicable to two or more specific types of contract: 'Where a contract meets the description of two or more particular kinds of contracts provided for by law, the rules applicable to each of them apply to the contract concurrently, except to the extent that these provisions are not easily compatible or that their necessary implication, in relation to the nature of the contract, results in incompatibility.' However, the topic has been the subject of considerable discussion in doctrine in several countries. In the past there has been a tendency to apply a preponderance test but different solutions are used, including a distributive application of the relevant rules to the relevant parts of the contract. See e.g. for FRANCE, *Terré/Simler/Lequette*, Les obligations[6], no. 76 and for GERMANY, BGH 15 June 1951, BGHZ 2, 331, 333, CA Cologne 20 June 1979, NJW 1980, 1395; Palandt (-*Grüneberg*), BGB[67] Pref. to § 311 no. 26. See also, for mixed contracts involving sale, the Notes to IV.A.–1:101 (Contracts covered) and, for mixed contracts involving lease, the Notes to IV.B.–1:101 (Lease of goods).

2. Other systems tend to treat contracts that might fall within this article as separate types of contract. For example, ENGLISH law would treat a building contract or a contract to repair a car using new parts as a "contract for work and materials", not as a mixed contract for services and the supply of goods. Those contracts thus do not fall within the Sale of Goods Act (SGA) 1979 but within Supply of Goods and Services Act 1982. But the net effect is similar, as ss. 3-4 of the 1982 Act imply terms about the quality of the description and goods that are almost identical to those that apply to sale of goods, while the work element is governed by the same provision (s. 13) as applies to pure services contracts. But it seems likely that an English court faced with a new form of "hybrid" contract would approach it in the way proposed by this article.

3. The SLOVAKIAN CC § 491(3) states that the obligations arising from mixed contracts should be appropriately governed by the statutory provisions governing obligations of that type, unless the contract stipulates otherwise.

II.–1:108: Partial invalidity or ineffectiveness

Where only part of a contract or other juridical act is invalid or ineffective, the remaining part continues in effect if it can reasonably be maintained without the invalid or ineffective part.

COMMENTS

There are various situations in which a contract or other juridical act may be partly invalid or ineffective. A term may infringe the rules on unfair contract terms and may be ineffective as a result. A term may be contrary to some fundamental principle and therefore void or it may infringe a mandatory rule which says that it is to be void or invalid or ineffective. Part of a contract may be invalid because of failure to comply with a formal requirement for validity. A contract may, for example, be partly for donation and partly for sale or the provision of a service. The rules on contracts for donation may require some legal formality. They will apply to the donation part but not to the other parts. See the preceding Article.

Consistently with the general intention of preserving contractual relationships so far as possible, this Article provides the possibility that if a contract is invalid or ineffective only in part the remainder of the contract continues to be valid and effective unless this would be unreasonable in all the circumstances. Circumstances which might be taken into account in assessing the reasonableness of upholding the remaining part include whether or not the contract has any independent life without the invalidated part; whether the parties would have agreed to a contract consisting only of the remaining parts of the contract; and the effect of partial invalidity upon the balance of the respective obligations of the parties.

NOTES

1. Severability of a contract only partly invalid is widely recognised in the European legal systems, albeit in varying forms (see e.g. GERMAN CC § 139; SWISS LOA art. 20; GREEK CC art. 181; ITALIAN CC art. 1419; SLOVENIAN LOA § 88; the NETHERLANDS CC art. 3.41) and the POLISH CC (art. 58 § 3). It is widely thought in GERMANY that CC § 134 is a *lex specialis* to CC § 139 (MünchKomm (-*Mayer-Maly*), BGB, § 134 no. 109). The general rule under CC § 134, is that the contract is void in its totality unless the purpose of the prohibitory rule can be met by partial nullity. The practical effect of that rule is normally however the same as it would be under § 139. BELGIAN case law and legal writers apply similar rules (starting from CC art. 900): only a part of the contract or even only a single clause will be declared void if partial nullity is consistent with the purpose of the prohibitory rule and if the remaining part of the contract can continue in effect (depending on the common intention of the parties and its objective purpose): Cass. 18 March 1988, Pas. belge 1988, 868, RW 1988-89, 711, note *Dirix*; *Cornelis*, Algemene theorie van de verbintenis, no. 568; *Stijns*, Verbintenissenrecht I, no. 182. The rule in the Article is consistent with the general principles of DANISH contract law: see *Gomard*, Almindelig kontraktsret[2], 128. In SPAIN, while there is no explicit provision in the CC, there is special provision in the rules on standard terms (art. 10 General Terms of Contracts Act) and in consumer protection legislation (art. 10 bis ConsProtA). There are no special rules about partial invalidity for illegality in the PORTUGUESE CC:

the general rules are applicable. For severability of illegal clauses in ENGLAND, see *Chitty* on Contracts I[27], nos. 16-188 ff; for SCOTLAND, *Stair*, The Laws of Scotland XV, para. 764. In contrast, where a contract term is of no effect under the UK Unfair Contract Terms Act 1977, the contract is simply treated as if it had not contained the relevant term.

2. Under AUSTRIAN law the extent of a "partial nullity" (*Teilnichtigkeit*) follows primarily from the protective purpose of the rule providing for the invalidity (see e.g. Supreme Court OGH. SZ 63/23). The question whether it may be reasonable for a party to uphold the contract is not so important. In the majority of cases where a statute has been violated (especially in respect of consumer contracts concluded on the basis of standard terms which are unfair and therefore unlawful under the ConsProtA § 6), the contract will be upheld in those parts which are not affected by the violation of the law: the validity is reserved but the content reduced.

3. Under ITALIAN law, and according to a general principle of favouring contracts, the nullity of single terms does not imply the nullity of the contract, when, by operation of law, mandatory rules are substituted for the void terms, but if it appears that the contracting parties would not have concluded the contract without that part of its content which is affected by nullity, partial nullity of the contract implies the nullity of the entire contract (CC art. 1419(1)). The BULGARIAN LOA art. 26(4) has almost the same wording of the respective rule.

4. Under SLOVAK law the effect of a partial nullity is regulated by a general provision for all grounds of nullity and invalidity of any contract or juridical act. According to CC § 41 if the reason for invalidity is related only to a part of the juridical act, only this part is invalid unless it follows from the nature of the act or from its content or from the circumstances under which the act was done that this part cannot be separated from the other content.

5. Under ESTONIAN law, the general rule is that the nullity of a part of a transaction does not render the other parts void if the transaction is divisible and it may be presumed that the transaction would have been entered into without the void part (GPCCA § 85). Special rules for partial avoidance (GPCCA § 90(3)) and for the contracts with a void standard term (LOA § 41) generally follow the idea of this general rule.

6. The HUNGARIAN CC § 239 states that in the event of partial invalidity of a contract, the entire contract fails only if the parties would not have concluded it without the invalid part. Legal regulation may provide otherwise. In the case of partial invalidity of a consumer contract, the entire contract fails only if the contract cannot be fulfilled without the invalid part.

II.–1:109: Standard terms

A "standard term" is a term which has been formulated in advance for several transactions involving different parties and which has not been individually negotiated by the parties.

COMMENTS

Several later rules make reference to standard terms. The use of such terms is very common. The key element of them is that they are formulated in advance for several transactions involving different parties and that they have not been individually negotiated by the parties (on which see the following Article).

NOTES

1. The definition of "standard term" is similar to the definition of "general conditions of contract" in art. 2:209 of the Principles of European Contract Law. The only significant difference is that those Principles refer to terms formulated in advance "for an indefinite number of contracts.". That seems too strict, however. Terms formulated in advance for, say, a hundred contracts should equally be considered standard terms. See further the Notes to the following Article.

II.–1:110: Terms "not individually negotiated"

(1) A term supplied by one party is not individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms.

(2) If one party supplies a selection of terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection.

(3) If it is disputed whether a term supplied by one party as part of standard terms has since been individually negotiated, that party bears the burden of proving that it has been.

(4) In a contract between a business and a consumer, the business bears the burden of proving that a term supplied by the business has been individually negotiated.

(5) In contracts between a business and a consumer, terms drafted by a third person are considered to have been supplied by the business, unless the consumer introduced them to the contract.

COMMENTS

A. General principle and scope

Some of the model rules refer to terms which are not individually negotiated. See e.g. II.–9:402 (Duty of transparency in terms not individually negotiated) and II.–9:403 (Meaning of "unfair" in contracts between a business and a consumer). The present Article provides a definition of a term that is "not individually negotiated" and sets up complementary burden of proof rules. This definition, which is reproduced in the Annex, is also relevant to the term "individually negotiated". See I.–1:108 (Definitions in Annex) paragraph (2). The positive form is used in e.g. paragraphs (3) and (4) of this Article, II.–4-104 (Merger clause) and II.–8:104 (Preference for negotiated terms). The definition takes it for granted that the question whether or not a term has been individually negotiated falls to be answered by reference to the contract or transaction in question. It will be not be enough to make a term "not individually negotiated" if, for example, a consumer party to the transaction had been able to influence its content some years ago in his or her capacity as a former employee in the legal department of the business now supplying the term.

B. Real and meaningful possibility to influence the content of the term

Paragraph (1) defines under which conditions a term is considered to be "not individually negotiated". This provision is not limited to terms of a contract. Thus, terms in other instruments (e.g. powers of attorney, receipts) are covered as well.

Illustration 1
Supplier X requires potential customers to submit an "application form" which technically constitutes an offer. According to a term in this form, the customer is bound by the offer for three months. The term falls under this Article although technically, a term of an offer is not a contract term.

Illustration 2
A supplier uses a standard receipt form. Although, in most cases, a receipt does not constitute a contract, the text of the receipt may be subject to judicial control, e.g. concerning its transparency.

The definition is a negative one: a term supplied by one party has not been individually negotiated if the other party "has not been able to influence its content". A party to a contract is able to exercise influence on a term if negotiations take place between the parties which offer a real opportunity to change the term. Thus, the crucial criterion is whether such real and meaningful negotiations took place. This requires an assessment of the substantial qualities of the negotiations which can be formalised only in part. In general, such negotiation not only requires a simple conversation about the term but must offer a real chance to influence it. Thus, it is usually an indication of the existence of real and meaningful negotiations if a term has in fact been substantially changed in the course of the negotiations.

> *Illustration 3*
> Supplier X offers to explain a certain term to the other party. This is not sufficient for a negotiation. If however, after having read the supplier's terms, the other party makes a counter-proposal for a certain term and the parties engage in a discussion about a compromise acceptable to both parties, the term is negotiated.

In order to be considered an "individually" negotiated term, the negotiation must have taken place between the individual parties. However, a single negotiation between the same parties will be sufficient to cover several uses of the same term if the relevant legal circumstances are similar.

> *Illustration 4*
> A contract is negotiated between consumer association X and business association Y. If a business Z uses this term, the term is not considered to be individually negotiated, merely because it was the subject of negotiations between X and Y. However, the courts may consider the collective bargaining when assessing the unfairness of the term pursuant to II.–9:403 (Meaning of "unfair" in contracts between a business and a consumer).

> *Illustration 5*
> Business X sells goods to business Y on the basis of a continuing business relationship. They always use the same standard contract. It will generally be sufficient if a term has been negotiated once.

Paragraph (1) gives some further guidance in this direction by indicating that a party is usually unable to influence the content of a term if the other party has drafted the term in advance, whether as part of standard terms or not. A term is drafted in advance if its content is fixed by the user prior to the negotiations. The moment "prior to the negotiations" refers to the negotiations concerning the issue governed by the term; it does not necessarily refer to the whole negotiation process. This idea is complemented by paragraph (3) which contains a burden of proof rule according to which a party supplying a standard term bears the burden of proving that it has been individually negotiated. In addition, a standard term stating that the other party confirms that individual negotiations took place is not sufficient to qualify the content of a contract term as having been negotiated.

C. Selection of terms

Paragraph (2) further concretises the requirements for real and meaningful negotiations. According to this provision, a term will not be considered to be individually negotiated

merely because it has been chosen from a "menu of terms" supplied by the other party. In such a case, the party supplying the terms usually does not give the other party a real opportunity to change the terms. The freedom to influence the content of the contract is limited to selecting one of several terms supplied by the other party.

Illustration 6
Insurance company X offers 5-year and 10-year contracts. The term is drafted in advance because the possible choices are defined by the supplier of the "menu of terms". The situation is different if the insurance company leaves it to the customer to decide on the duration of the contract. For example, if the consumer may fill in a gap in a form and thereby choose the duration of the contract according to his or her preferences and the insurance company is willing to accept any duration, the duration is individually negotiated.

D. Burden of proof

Paragraphs (1) and (2) are complemented by paragraphs (3) and (4) which deal with the burden of proving that a term has been individually negotiated. Paragraph (3) contains a general rule applicable regardless of the status of the parties, whereas paragraph (4) only applies to contracts between a business and a consumer. According to paragraph (3), if it is disputed whether a term supplied by one party as part of standard terms has since been individually negotiated, that party bears the burden of proving that this term has been individually negotiated. "Standard terms" (as defined in the preceding Article) are terms which have been formulated in advance for several transactions involving different parties, and which have not been individually negotiated by the parties. Thus the rule in paragraph (3) has to be read in the sense that if a term has been initially supplied as part of standard terms, but has since been the subject of individual negotiations, the party who supplied it must prove that it has since been individually negotiated. If this party fails to prove the individual negotiations, the term is considered to be a standard term.

For relations between businesses and consumers paragraph (4) sets up an even stricter burden of proof rule. Here the business bears the burden of proving that a term supplied by the business has been individually negotiated.

Both paragraphs (3) and (4) only address the matter of the burden of proof, i.e. determining which party has to present evidence and to bear the consequences of a remaining lack of factual certainty about individual negotiations. The standard of proof (e.g. preponderance of the evidence or judicial certainty) must be determined pursuant to the applicable procedural law.

E. Terms drafted by a third person

Terms not individually negotiated can normally be attributed to one of the parties to a contract. However, it is possible that a third person (such as a notary) has drafted one or more of the terms. This situation is dealt with by paragraph (5). In order to prevent a circumvention of the Article this provision states that in contracts between a business and a consumer, terms drafted by a third person are considered to have been supplied by the business, unless the consumer introduced them to the contract. This provision is based on Article 3(2) of the Unfair Terms Directive 1993/13/EEC which generally refers to a "term which has been drafted in advance and the consumer has therefore not been able to influence the substance of

the term". Thus, under the Directive it does not matter whether the business introduced the term into the contract itself. Rather, in order to protect consumers, terms introduced by third parties are subject to control under the Directive.

NOTES

1. The ESTONIAN LOA § 35(1) refers to a contract term which is drafted in advance for use in standard contracts or which the parties have not negotiated individually for some other reason. This definition covers standard terms in the strict sense and also terms which are not individually negotiated for other reasons (see also Supreme Court Civil Chamber's decision from 30.04.2007, civil matter no. 3-2-1-150-06 p. 17). Although there is no specific rule corresponding to paragraph (2) of this Article, the question is treated similarly within the framework of LOA § 35(1) cited above (Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, § 35, no. 4.1.4.). The party supplying a term in circumstances where the other party has not been able to influence its content, in particular because it has been drafted in advance (i.e. otherwise qualified as a standard term in the meaning of LOA § 35(1)) generally bears the burden of proving that a term has been individually negotiated (LOA § 35(2), Supreme Court Civil Chamber's decision from 30. 04.2007, civil matter no. 3-2-1-150-06 p. 17, Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, § 35, no. 4.2.). The stricter burden of proof rule stated in paragraph (4) of this Article is thus applied regardless of the status of the parties. The principle stated in paragraph (5) may be inferred from LOA § 35(1) (Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, § 35, no. 4.1.3.).
2. There is a very similar provision in § 53(2) and (3) of the SLOVAK CC. Paragraph (2) states that : "terms of which the consumer was aware before the conclusion of the contract, but the content of which the consumer did not have any right to influence are not considered to be individually negotiated terms." Paragraph (3) states that: "If the supplier does not prove the contrary, terms agreed on between the supplier and the consumer are not considered to be individually negotiated." In other words, the supplier bears the burden of proving that the terms were individually negotiated. However it does not matter whether the terms were part of standard terms or not. Moreover, art. 53(4)(a) stipulates that one of the situations in which a term will be presumed to be unfair is when the consumer is obliged to fulfil a commitment which he or she did not have an opportunity to become aware of before the conclusion of the contract.
3. The HUNGARIAN CC § 205/A has similar provisions to those in the present Article.

CHAPTER 2: NON-DISCRIMINATION

II.–2:101: Right not to be discriminated against

A person has a right not to be discriminated against on the grounds of sex or ethnic or racial origin in relation to a contract or other juridical act the object of which is to provide access to, or supply, goods, other assets or services which are available to the public.

COMMENTS

A. General

This Article and the following express a general prohibition of any discrimination on the grounds of sex, ethnicity or racial origin. Their content has mainly been harvested in EC Law. As these model rules are drafted with a view to being used in the field of contract law (excluding labour law) and patrimonial law, the non-discrimination rules set out here contain just a part of the much broader general law on non-discrimination. The two main limitations of these provisions are, first, the rather short list of prohibited discrimination criteria (just 'sex' or 'ethnic or racial origin'), which reflect the current status of EC law in the field of general contract law (see below under C) and, secondly, the limitation to certain contracts on goods, other assets and services 'available to the public' (see below under D). This is by no means meant as a political statement in the sense that non-discrimination law should not be broadened according to the example of some national laws. By contrast, the rules are drafted in such a way that it should be fairly easy to add further discrimination criteria and situations if a legislator so wants.

B. Context

This Article is not a complete rule. It is only a part of the rule and needs to be read with other provisions in this Chapter. II.–2:102 (Meaning of discrimination) contains a definition of discrimination while II.–2:103 (Exception) provides a possible justification where unequal treatment is the result of a legitimate aim. II.–2:104 (Remedies) makes clear that an infringement of the right not to be discriminated against granted under this Article triggers, without prejudice to any other remedies available, the remedies for non-performance of an obligation under Book III, Chapter 3. As the heading of the Article indicates, the right stated here forms not only a part of contract law, but also fulfils functions traditionally associated with the law on non-contractual liability for damage. The general provisions on non-discrimination law are nevertheless located in Book II (Contracts and other juridical acts), because the stage of the preparation of contracts is one of their main fields of application. III.–1:105 (Non-discrimination) clarifies that these rules apply not only in relation to contracts and other juridical acts as such but also to obligations generally, including contractual, 'post-contractual' and non-contractual obligations, with appropriate modifications.

C. Discrimination on grounds other than 'sex' or 'ethnic or racial origin'

The discrimination criteria 'sex' or 'ethnic or racial origin' are lifted from the two Directives which are applicable to the field of general contract law (and not just to labour contracts), i.e. the Antiracism Directive 2000/43/EC and the General Sex Discrimination Directive 2004/113/EC. Other grounds for discrimination which are also applicable in general contract

law could be religion or belief, disability, age or sexual orientation (cf. art. 13 EC-Treaty); colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (cf. art. 14 European Convention for the Protection of Human Rights and Fundamental Freedoms) or genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation (cf. art. 21 EU Charter of Fundamental Rights). All these provisions are not directly applicable in general contract law. Hence, the particular remedies spelled out here in Chapter 2 of Book II are not applicable to cases where discrimination occurs on the basis of these further criteria. This does not, of course, mean that such discrimination is allowed. Discrimination on grounds other than 'sex' or 'ethnic or racial origin' are to be taken into account when applying these model rules, in particular the rules on good faith and fair dealing. This follows from I.–1:102 (Interpretation and development) paragraph (2) according to which these rules are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms.

Another ground for discrimination, which may widely overlap with 'race or ethnic origin', is nationality (cf. art. 12 of the EC-Treaty). But several Directives on non-discrimination exclude nationality from their scope of application (e.g. art. 3(2) of the Antiracism Directive 2000/43/EC). The reason may be that the prohibition of discrimination on the ground of nationality in art. 12 EC-Treaty can be seen as being directly applicable (cf. ECJ, 6 June 2000, C-281/98 – *Angonese*). Hence, Art. 12 EC-Treaty is a general principle of Community law and can therefore be invoked against any private person. But the EC-Treaty does not provide any sanctions for a violation of its art. 12. Therefore it seemed more appropriate not to include discrimination on the ground of nationality into the system of remedies set out in these rules. In the (almost unimaginable) case of discrimination on the ground of nationality, which at the same time is not discrimination on the grounds of race or ethnic origin, the general rules, in particular I.–1:102 (Interpretation and development) paragraph (2), apply.

In the ECJ judgment of 22 November 2005, it is pointed out that "The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law" (C-144/04 – *Mangold*). However, this statement can be read in connection with the preceding passage which primarily refers to the Directive on General Framework for Equal Treatment in Employment and Occupation. Even if the ECJ favours a broader understanding, expanding the prohibition of age related discrimination to all areas of private law, this would not solve the question of what the consequences of a violation of the prohibition should be. Hence, as in the case of art. 12 of the EC-Treaty, these model rules do not provide a system of remedies for age discrimination.

> *Illustration 1*
> A group of citizens from one of the Member States books rooms in a hotel in a different Member State. The hotel refuses to perform its obligations under the contract, arguing that the citizens of this State are not welcome in the hotel. This type of discrimination is covered by art. 12 of the EC-Treaty. From the perspective of this draft it also fulfils the conditions of discrimination based on ethnic origin. The notion of ethnic origin is sufficiently broad to also cover common citizenship.

It should be stated that in European law any kind of discrimination – for the reasons mentioned in arts. 12 and 13 of the EC-Treaty – is wrongful behaviour. It does not mean however that every instance of such behaviour will automatically amount to a violation of the law. The sanctioning of all possible kinds of discrimination in many different contexts would

lead to conflict with other, often highly protected, values such as personal freedom, freedom of thought and freedom of contract. The current EC law shows an attempt by the law-maker to find a balance among all of these important values. The rules on non-discrimination are drafted with the idea of allowing easy modification and extension of the scope of its application in other areas of discrimination. The decision of whether such extension should happen is purely political.

D. Sex

Discrimination based on sex means that a person is treated by the other party differently from another person for the reason of being a man or a woman. The terminology suggested here is partially modelled on art. 2 General Sex Discrimination Directive 2004/113/EC, which uses the term "sex" to describe the prohibited discrimination criteria. It might also have been possible to use the term "gender", which refers to a social, cultural, or psychological condition, as opposed to that of biological sex. The terminology used by EC documents is not always consistent with regard to this distinction. Yet, as art. 2 of the General Sex Discrimination Directive 2004/113/EC and art. 2(1) (a) Directive on Principle of Equal Opportunities and Equal Treatment of Men and Women use the term "sex" in the definition of "direct discrimination", these model rules follow this terminology.

E. Ethnic or racial origin

Discrimination based on ethnic origin means that a person is treated in a different way because that person, supposedly or actually, belongs to a group with a common tradition, culture or language. Discrimination based on race means that that person is treated differently because he or she, supposedly or actually, belongs to a specific race. The term "race" has to be understood in a subjective way, leaving it open to the discriminating persons to determine what they understand as being of a different "race". Specifically, the use of the term "race" does not mean that these model rules accept any of the theories classifying people by race. However, one should acknowledge that the notion "race" cannot be purely understood in its subjective sense, i.e. from the perspective of the wrongdoer. A purely subjective criterion could lead to forbidden discrimination in any case where unequal treatment occurs due to the appearance of the person. Rather, discrimination based on race should be understood as relating to certain traits that, within a concrete cultural and social environment, are understood as a distinguishing criterion from the group of people to which a discriminator is believed to belong. It is necessary to evaluate each case with consideration to the local cultural and historical context and background.

Illustration 2
Landlord A refuses to rent an apartment to B for the reason that B has naturally red hair. A declares openly that he does not trust red-haired people. This example shows the difficulties in applying a purely subjective criterion of "race". Generally it cannot be treated as discrimination based on racial reasons, unless there are some local contexts, which evidence that the local community treats "red-haired people" as strangers or some type of 'other'.

Illustration 3
A shopkeeper refuses to sell bread to a customer, arguing that the buyer is Jewish. It is a clear case of racial discrimination, and it also follows a shameful tradition of discriminatory treatment of Jewish people as a different race. In this situation, it does

not matter whether the client in fact belongs to the Jewish community or not. Legally, it is solely a question of evaluating the reason for the shopkeeper's decision.

F. Access to goods, other assets and services available to the public

The right not to be discriminated against granted here is confined to contracts or other juridical acts which provide access to, or supply goods, other assets and services which are available, to the public. The notion of goods, other assets and services is meant to correspond to the notion of "goods and services" in the Antiracism Directive 2000/43/EC and the General Sex Discrimination Directive 2004/113/EC and should have a similar meaning to the meaning of that expression in these Directives. The words "other assets" are added here because in the DCFR the word "goods" is limited to corporeal movables, which would be a narrower meaning than in the Directives. In addition the expression "goods, other assets or services" should be interpreted in the light of art. 23(1) EC-Treaty and art. 50 EC-Treaty regarding the free movement of goods and services. The contracts must either be designed to transfer certain assets from the seller to the buyer, or to allow the customer to receive or make use of a service of the provider. The assets and services are available to the public if they are typically offered in a general manner, irrespective of the person to whom the product is offered. This is precisely the case where goods or services are marketed to the public at large, for example, via an advertisement in the media or where goods and services are publicly offered by the owner of a shop or restaurant, regardless of whether this qualifies as an "offer" in the technical sense. Another example is the transport business, where the person of the contractual partner typically has no or little relevance.

Illustration 4
A one year contract to teach a foreign language has been concluded by the respective parties. A male student verbally violates the dignity of his female teacher because of her sex. This kind of contract is not covered by this Article because it is the supplier of the service and not the recipient who is discriminated against. Aside from this, the definition of harassment in II.–2:102 (Meaning of discrimination) paragraph (2) is fulfilled. Although this has the consequence that the remedies of this Chapter are not applicable, there may be other remedies. For example, the teacher may terminate the contractual relationship according to the rules on non-performance and might have a claim for damages under Book VI (Non-contractual Liability for Damage caused to Another).

NOTES

I. Grounds of discrimination

1. Rules on non-discrimination can be found in many sources of Community law. For instance, the general rule on non-discrimination in Art. 12 of the Treaty establishing the European Communities (EC-Treaty) prohibits discrimination on the basis of nationality, while art. 141 of the EC-Treaty ensures the principle of equal pay for male and female workers. Article 13 of the EC-Treaty mentions discrimination on the basis of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. But this provision is not directly applicable; it merely authorises the Council to prevent and stop such discrimination. However, it has to be borne in mind that according to art. 6(2) of the Treaty on the European Union, the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of

Human Rights and Fundamental Freedoms. Article 14 of the Convention sets out that the enjoyment of the rights and freedoms under the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Building on these provisions, art. 21 of the EU Charter of Fundamental Rights prohibits discrimination based on any ground "such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation". Article 23 of the EU Charter of Fundamental Rights guarantees the equal treatment of men and women in all spheres, including employment, occupation, and education.

2. Regarding secondary legislation, there are numerous directives dealing with the question of non-discrimination. These are, in particular:

   Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin – further referred to herein as the Antiracism Directive;

   Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation – also referred to as the Directive on a General Framework for Equal Treatment in Employment and Occupation;

   Directive 2002/73 of the European Parliament and of the Council of 23 September 2002 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions – further referred to herein as the Directive on Equal Treatment for Men and Women as Regards Access to Employment (with effect from 15 August 2009 the Directive 2002/73/EC will be repealed and replaced by the Directive 2006/54/EC);

   Council Directive 2004/113 of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services – further referred to herein as the General Sex Discrimination Directive;

   Directive 2006/54 of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation – also referred to as the Directive on the Principle of Equal Opportunities and Equal Treatment of Women and Men.

3. The EC directives identify different reasons on the basis of which one may not discriminate. These proscribed reasons need to be enumerated. Another ground defined by primary Community law is nationality (art. 12 of the EC-Treaty), which is, however, not included in the directives on non-discrimination (art. 3(2) Antiracism Directive; art. 3(2) Directive 2000/78/EC). This is due to the fact that the prohibition of discrimination on the ground of nationality in art. 12 of the EC-Treaty is directly applicable. That is the view held by the majority of the commentators, although there are some diverging opinions. The majority opinion can be supported by the ECJ's decision of 6 June 2000 in C-281/98 – *Angonese*. Hence art. 12 of the EC-Treaty is a general principle of Community law and can therefore be invoked against any private person. It should however be noticed that there is no sufficient Acquis governing the consequences of a violation of the requirement of non-discrimination under art. 12 of the EC-Treaty. The EC-Treaty does not provide any sanctions for a violation of its Art. 12; however it could be considered to expand the scope of application of the non-discrimination rules of this instrument to include discrimination based on nationality.

4. In its judgment of 22 November 2005, the ECJ points out that "the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law" (C-144/04 – *Mangold*). However, this statement should be read in connection with the preceding passage which primarily refers to the Directive on a General Framework for Equal Treatment in Employment and Occupation. Even if the ECJ favours the broader understanding, expanding the prohibition of age related discrimination to all areas of private law, this would not solve the question of what the consequences of a violation of the prohibition should be. Hence, as in the case of art. 12 of the EC-Treaty, no further rules of the Acquis can be identified.

5. The Antiracism Directive (art. 1) and the General Sex Discrimination Directive (art. 2) refer only to sex, ethnic or racial origin as prohibited grounds of discrimination. In contrast, the Directive 2000/78/EC (art. 1) prohibits discrimination on the grounds of religion or belief, disability, age or sexual orientation. However, this directive applies only with regard to employment and occupation. Although art. 13 of the EC-Treaty gives the Community the competence to extend this prohibition to other contracts as well, the legislator has not made use of this power. In early 2008 a European Commission proposal for a single EU anti-discrimination directive has been issued which provides for protection from discrimination on grounds of age, disability, sexual orientation and religion or belief in areas other than employment – including, *inter alia*, access to and supply of goods and services which are commercially available to the public.

6. Some Member States have extended the list of unlawful discrimination criteria by applying the grounds of discrimination contained in the Directive 2000/78/EC, i.e. religion or belief, disability, age and sexual orientation, to all contractual obligations. For example, the GERMAN General Equal Treatment Act mentions in § 19(1) religion, age, disabilities and sexual orientation alongside race and sex and extends these criteria explicitly to general contract law. The same applies to BULGARIAN, HUNGARIAN, LITHUANINAN, SLOVAKIAN and SLOVENIAN law. DENMARK extends the prohibition of discrimination only to religion or belief and sexual orientation. The NETHERLANDS General Equal Treatment Act art. 1(1)(b) provides that "distinction" on grounds of, inter alia, religion, belief, hetero- and homosexual orientation shall be unlawful. In SWEDEN, discrimination is prohibited on the grounds of ethnic origin, religion or belief and sexual orientation and disability (Discrimination (Goods and Services) Act art. 1).

7. Discrimination criteria that are not derived from the Employment Equality Directive can be found in the anti-discrimination laws of BULGARIA (Law on Protection against Discrimination art. 4(1): education, opinions, political affiliation, marital status, property status); FINLAND (Non-Discrimination Act art. 6(1): language, opinion, health, other personal characteristics); HUNGARY (Equal Treatment Act art. 8: health, family status, financial status, work, membership in an organisation representing employees' interests); NETHERLANDS (General Equal Treatment Act art. 1(1)(b): political opinion); SLOVAKIA (Anti-Discrimination Act s. 2(1): language, family status, property); SLOVENIA (Act implementing the Principle of Equal Treatment art. 1(1): health state, language, education, financial state, social status). All these criteria are applicable within general contract law (access to and supply of goods and services).

8. BULGARIAN law extends the grounds of discrimination to "any other ground, established by the law, or by international treaties to which the Republic of Bulgaria is a party" (Law on Protection against Discrimination art. 4(1)).

II. Race and ethnic origin

9. The Antiracism Directive prohibits discrimination based on the grounds of "racial or ethnic origin" (art. 1(1)), but neither of these terms is defined or explained. Recital 6 of the Directive however declares that the "European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply the acceptance of such theories." Another ambiguity within the Directive is the extent to which criteria such as colour, national origin or national minority, language or social origin fall within the scope of "racial or ethnic origin". A further unclear issue concerns the relationship of ethnic origin and religion. Although religion is expressly included in the Employment Equality Directive (and not in the Antiracism Directive) the concepts of ethnicity and religion are closely linked. Thus, the European Court of Human Rights recently took the view that "ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds" (*Timishev v Russia*, 13 December 2005).

10. The discrimination criterion "ethnic or racial origin" set out by the Directive has been incorporated by all Member States. However, a number of Member States have adopted legislation concerning discrimination on grounds of race and ethnic origin only in the area of employment and have fallen short of enacting discrimination legislation outside employment. Notably, this includes the CZECH REPUBLIC, ESTONIA (draft Equal Treatment Act, 2008, still in legislative process), LATVIA, and POLAND (draft anti-discrimination act, last legal proceeding 16 July 2008).

11. Some Member States have felt uncomfortable in including "race" or "racial origin" in their anti-discrimination legislation because that may reinforce the perception that humans can be distinguished according to "race". Therefore, not all national provisions refer literally to "ethnic or racial origin". For example, the AUSTRIAN Equal Treatment Act does not mention "race" but only "ethnic origin" (art. 31(1)), the FINNISH Non-Discrimination Act refers to "ethnic or national origin" (art. 6(1)), whilst the SWEDISH Discrimination (Goods and Services) Act refers to "ethnic belonging" (arts. 1 and 4).

12. Nearly all Member States that have implemented the Antiracism Directive have refrained from providing a definition of the concept of racial and ethnic origin. Similarly, most national preparatory works and explanatory memoranda lack any specific definition of the anti-discrimination grounds. IRELAND and the UNITED KINGDOM have defined "race" by listing a number of more specific grounds, see Ireland Equal Status Act art. 3(2)(h): "the ground of race: being of different race, colour, nationality, or ethnic or national origins"; United Kingdom Race Relations Act 1976 art. 3(1): "racial grounds means any of the following grounds, namely colour, race, nationality, origin or national or ethnic decent." SWEDEN Discrimination (Goods and Services) Act art. 4 defines ethnic origin (or: belonging) as "the condition of belonging to a group of persons of the same national or ethnic origin, race or skin colour."

13. Many national laws include, as a minimum, colour and national origin within legislation implementing the Antiracism Directive. E.g., BELGIUM Law of 10 May 2007 on Combating Racial Discrimination art. 4(4), BULGARIA Protection against Discrimination Act art. 4(1), PORTUGAL Law 18/2004 art. 3(2) and SLOVAKIA Anti-Discrimination Act art. 2(1) list colour and nationality as additional grounds of discrimination alongside race and ethnic origin. DUTCH, ROMANIAN and SLOVENIAN anti-discrimination legislation declare discrimination on grounds of

nationality unlawful. HUNGARY Equal Treatment Act art. 8(e) also includes "origin of national or ethnic minority" as a specific ground of discrimination. POLAND and SLOVENIA have special laws on the protection of national and/or ethnic minorities, but it remains unclear whether these laws will be relied upon when national courts interpret anti-discrimination legislation.

14. National case-law has tried to balance the relationship of religion and ethnic origin that has been left open by the Directive. In the NETHERLANDS, discrimination against Jews and, in certain circumstances, Muslims has been accepted as discrimination on racial grounds. In the UNITED KINGDOM, case law has established that Jews, Gypsies and Sikhs are ethnic groups but that Muslims and Rastafarians are not (*Seide v. Gillette Industries Ltd.* [1980] IRLR 427; *Mandla v. Dowell Lee* [1983] 2 AC 548).

III. Sex

15. Discrimination based on "sex" is part of EC anti-discrimination law. It is banned by the General Sex Discrimination Directive which was the very first EC instrument to implement the principle of gender equality outside the workplace. The term "sex" is also used by art. 2(1) Burden of Proof Directive 1997/80 and art. (2)(1)(a) Recast Directive 2006/54. Before the adoption of the Directives, art. 141 EC-Treaty (the principle of equal pay between men and women for equal work or work of equal value) has been the legal base used for gender equality measures in EC law. The concept of sex discrimination is not legally defined by EC primary legislation or by the Directives adopted under Art. 13 EC-Treaty, but has been developed by several rulings of the ECJ. In the *Dekker* case (9 November 1990 – C-177/88 *Decker v. Stichting VJV* [1990] ECR I-3941) the ECJ held that the definition of sex also covers pregnancy. This view has been adopted by the EC legislator in Recital 20 of the General Sex Discrimination Directive which states that "less favourable treatment of women for reasons of pregnancy and maternity should be considered a form of direct discrimination based on sex." Additionally, the General Sex Discrimination Directive provides that "[t]his Directive shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity" (art. 4(2)). The neglect to clearly define the concept of sex discrimination strengthens the idea that pregnancy and maternity rights are exceptions to, rather than conditions and part of, the achievement of gender equality. Other case law from the area of sex equality is concerned with discrimination on grounds of gender reassignment and discrimination on grounds of sexual orientation. In *P. v. S.* the ECJ accepted that transsexualism is so closely related to sex that a distinction based on this ground can be regarded as a distinction that is directly based on grounds of sex (30 April 1996 – C-13/84 *P. v. S. and Cornwall County Council* [1996] E.C.R. I-2143). On the other hand, the ECJ refused to find that discrimination on grounds of sexual orientation is sex discrimination because in such a case it is not a person's own sex that is at issue but the sex of his or her partner (17 February 1998 – C-249/96 *Grant v. South-West Trains* [1998] ECR I-621).

16. The General Sex Discrimination Directive had to be implemented by the Member States by 21 December 2007. Most Member States have implemented the Directive and, thus, the sex criteria in their national legal systems. Some Member States have done so by amending their already existing gender equality law, e.g. IRELAND and the UNITED KINGDOM. A series of Member States has set up completely new legislation to introduce the discrimination criteria into their national legal systems. This approach was, for example, taken by ITALY, PORTUGAL and SPAIN. So far, only AUSTRIA has not undertaken any activity concerned with the implementation of

the Directive. The POLISH draft anti-discrimination act covers sex discrimination in the area of general private law. The same applies to the CZECH anti-discrimination bill which, however, was vetoed by the president of the Czech Republic on 16 May 2008. The discrimination criterion "sex" is thus not part of all Member States' legislation.

17. In the majority of Member States there is no definition of the notion of sex discrimination. Only a small number of national anti-discrimination laws provide that distinction on grounds of pregnancy, childbirth and/or maternity are deemed (direct) discrimination based on sex (BELGIUM Law of 10 May 2007 on Combating Gender Discrimination art. 4(1); ESTONIA Gender Equality Act art. 3(3); FINLAND Gender Equal Treatment Act art. 7(2); LUXEMBOURG Law of 21 December 2007 art. 1; NETHERLANDS General Equal Treatment Act art. 1(2); SPAIN law 3/2007 art. 8). HUNGARY Equal Treatment Act art. 8(l) mentions motherhood (pregnancy) and fatherhood and thus goes beyond the General Sex Discrimination Directive that, in Recital 20, only refers to maternity. The UNITED KINGDOM Sex Discrimination Act 1975 s. 3B(1)(b) is more specific on the period of maternity ("period of 26 weeks beginning on the day on which she gives birth").

18. Only under BELGIAN (Law of 10 May 2007 on Combating Gender Discrimination art. 4(2)) and BRITISH (Sex Discrimination Act 1975 s. 2A(1)) law is gender reassignment expressly considered as a ground of sex discrimination.

19. Member States differ on whether protection from discrimination should encompass not only transsexuals (undergoing, intending to undergo, or having undergone a medical operation resulting in gender reassignment), but also other categories, such as "transvestism". For example, the DUTCH Equal Treatment Commission regards discrimination on the ground of "transvestism" as a form of sex discrimination (ETC 15 November 2007, Opinion 2007-201). In other Member States, discrimination on grounds of transgenderism is treated neither as sex discrimination nor as sexual orientation discrimination, resulting in a lower level of protection. This includes the CZECH REPUBLIC, ESTONIA, GREECE, CYPRUS, LITHUANIA, LUXEMBOURG, MALTA, PORTUGAL and ROMANIA. GERMANY considers discrimination on grounds of transgenderism as sexual orientation discrimination (Explanatory Memorandum to the General Equal Treatment Act, Bundestag, publication no. 16/1780, p. 31) and applies this ground of discrimination also to goods and services, which results in a higher level of protection.

IV. Scope of application

(a) Personal scope

20. Recital 16 of the Antiracism Directive states that it is important to protect all natural persons against discrimination and that Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members. The General Sex Discrimination Directive does not contain a similar recital or provision, but its recital 21 states that "associations, organisations and other legal entities should also be empowered to engage in proceedings […] either on behalf or in support of any victim."

21. Several Member States expressly provide that both natural and legal persons are protected against discrimination. Under BULGARIAN law, legal persons are protected when they have been discriminated against with regard to their members or the persons employed by them (Law on Protection against Discrimination art. 3(2)).

The HUNGARIAN Equal Treatment Act art. 8 mentions groups alongside persons. The IRISH Equal Status Act defines the term person as including "an organisation, public body or other entity" (s. 2(1)). SLOVAKIAN equal treatment law defines discrimination against a legal entity as the failure to observe the principle of equal treatment with respect to its, inter alia, members, shareholders or employees (Anti-Discrimination Act art. 2a(9)). In BELGIUM, FINLAND, GERMANY, GREECE and LATVIA, where the law does not expressly distinguish between natural and legal persons, it is assumed that both are protected. Legal persons remain categorically unprotected in LITHUANIAN and SWEDISH law, while ESTONIAN local legal tradition implies that only natural persons can be victims of discrimination.

(b) Material scope

22. The Antiracism Directive and the General Sex Discrimination Directive extend the material scope of protection against discrimination to access to and the supply of goods and services that are available to the public. The term "goods and services" has been adopted by all Member States that have implemented the Directives, e.g. AUSTRIA Equal Treatment Act § 31(1) no. 4; BULGARIA Law on Protection against Discrimination art. 37; FRANCE Law 2008-496 art. 2(1) and (4); GERMANY General Equal Treatment Act § 2(1) no. 8; UNITED KINGDOM Race Relations Act 1976 s. 20. Some Member States have fallen short of enacting discrimination legislation outside employment. Notably, this includes the CZECH REPUBLIC, ESTONIA, LATVIA and POLAND (see above).

23. Most Member States restrict the protection against unlawful discrimination to publicly available goods. A smaller number of Member States go beyond the requirements of the Directives in not distinguishing between goods and services that are available to the public and those that are only privately available: BULGARIA Law on Protection against Discrimination art. 37; FRANCE Law 2008-496 art. 2(1); ITALY Law 215/2003 art. 3(1)(i); SLOVENIA Act Implementing the Principle of Equal Treatment art. 1(1); SPAIN Law 62/2003 art. 29(1). It is thus presumed that the discrimination criteria apply to both publicly and privately available goods and services. PORTUGUESE Law 18/2004 and Law 14/2008 are applicable to all goods and services (art. 3(2)(a) and art. 2(1)), but, according to Decree-law 594/74 (as amended by Decree-law 71/77), private associations have the right to restrict goods and services to their members. The DUTCH General Equal Treatment Act requires the notion of availability to the public only for goods and services which are offered by private persons not engaged in carrying on a business or exercising a profession (art. 7(1)(d)). The SWEDISH Discrimination (Goods and Services) Act prohibits discrimination in connection with the "professional provision" of goods and services (art. 9(1)) and does not distinguish between goods and services available to the public and those which are privately available.

24. Another approach is taken by the HUNGARIAN Equal Treatment Act which does not enumerate the fields falling under its scope, but instead lists the public and private entities which must respect the requirement of equal treatment in all their actions. These are mostly public bodies and include state, local and minority self-governments, public authorities (art. 4). Four groups of private actors are listed (art. 5): (i) those who offer a public contract or make a public offer; (ii) those who provide public services or sell goods at their premises open to customers; (iii) entrepreneurs, companies and other private legal entities using state support; and (iv) employers and contractors.

25. For discrimination based on the grounds of sex the GERMAN General Equal Treatment Act is according to § 19(1) no. 1 only applicable for "*Massengeschäfte*"

which are legally defined as contractual obligations which are "typically concluded in many cases under comparable conditions irrespective of the person concerned or in which the special characteristics of a person are of inferior importance with regard to the nature of the contractual obligation".

26. The FINNISH Non-Discrimination Act covers the "supply of or access to housing and movable and immovable property and services on offer or available to the general public other than in respect of relationships between private individuals" (art. 2(2)(4)). This goes beyond the Directives since their provisions do not cover immovable property.

27. Under SLOVAKIAN law the principle of equal treatment applies only in combination with separate laws regulating the access to and provision of goods and services, in particular the ConsProtA (Anti-Discrimination Act art. 5(2)(d)). Art. 6 of this Act provides that any seller may not discriminate against any consumer in any way. There remains some ambiguity about the interaction of these two provisions.

V. Further national notes

28. The principles of equality and non-discrimination have general constitutional protection under the ESTONIAN Const. art. 12 (Everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds). GEA prohibits discrimination based on sex (§ 5(1)) and has a wide scope of application (§ 2(1)). The principle of equal treatment in labour relations (on grounds of sex, racial origin, age, ethnic origin, level of language proficiency, disability, sexual orientation, duty to serve in defence forces, marital or family status, family-related duties, social status, representation of the interests of employees or membership in workers' associations, political opinions or membership in a political party or religious or other beliefs) is addressed by the Employment Contracts Act § 10.

29. The SLOVAK law was fully harmonized with the Antiracism Directive 2000/43/EC, General Sex Discrimination Directive 2004/113/EC, Directive 2000/78/EC which established a general framework for equal treatment in employment and occupation and Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions. Therefore there are no major discrepancies concerning the legal regulation of discrimination under Slovak law. Slovak regulation on discrimination is mainly included in the Act No. 365/2004 Z.z. on equal treatment in some areas and on protection from discrimination as amended by Act No. 85/2008 Z.z. effective from April 1st, 2008. There is also a general framework regulation in the Constitution of the Slovak Republic. Furthermore the prohibition of discrimination is also mentioned in Act No. 311/2001 Z.z. Labour Code (Article 5 Section 2 Letter (f) and Article 13 thereof) and in Act. No. 250/2007 Z.z. on the protection of the consumer (Article 4 Section 5 thereof). There is a much broader scope of grounds of discrimination stipulated in Article 2(1) of the Slovak Act No. 365/2004 Z.z. on equal treatment in some areas and on protection from discrimination. The areas in which the protection from discrimination applies are specified are art. 3(1) and in art. 5, which states the rules on the supply of goods and services available to the public.

30. SPANISH law does not contain specific non-discrimination rules applicable to civil contracts. Nevertheless, art. 14 of the Spanish Constitution sets forth a general right to equality before the law which forbids any discrimination, based on birth, race, sex, religion, opinion or any other personal or social circumstances. Naturally, the observance of this non-discrimination principle is strong in public law, but in private

law it necessarily has to be more flexible, due to the general principle of autonomy of the will that rules the civil law: as long as the discrimination does not go against the values held by the Constitution, it may be accepted (e.g. a person may choose to make a donation to any chosen person, thus discriminating against all other possible donees); cf. *Bercovitz*, Principio de igualdad y Derecho privado, pp. 369-428). Regarding the effectiveness of the constitutional rights in private law relations, the Supreme Court admits the right to equality between private persons only in the area of labour relations and partially in gender distinctions (cf. *Carrasco*, Derecho Civil, p. 43). However, there are some specific provisions that limit party autonomy in some areas of law. For example, arts. 1 and 2 of the Defence of Competition Act forbids an application of unequal conditions for equal provisions that may provoke unfair treatment of one competitor compared to the others; that situation may arise from the dominant position of one company in the market or may have its origin in an illegal agreement that has the ability to cause a distortion of the market. The Unfair Competition Act (art.16) prohibits discriminatory treatment of a consumer with regard to prices and other conditions of sale. The Workers' Statute (art. 28) prohibits discrimination in remuneration of a job of equal value, whether it is performed by a man or a woman (the result of the transposition of an EU Directive). Non-discrimination is also one of the general principles of the Spanish Equality between Men and Women Act (art. 3) which aims to combat gender violence and establish an equal legal position of both sexes. The Consumer Law contains no specific provision on non-discrimination, but it contemplates a series of consumers' rights in its art. 8; among others, protection of the consumer against abusive contract clauses and a right to correct information about the goods and services, as well as a right to be consulted and heard (through consumers' associations) when general provisions affecting consumers are elaborated.

31. In the HUNGARIAN CC § 76 any breach of the principle of equal treatment is regarded as a violation of basic human rights.

32. Non-discrimination is protected in BULGARIA by the Constitution (art. 19(2) – equal legal conditions for economic activity) and especially by the Law on Protection against Discrimination 2003.

II.–2:102: Meaning of discrimination

(1) "Discrimination" means any conduct whereby, or situation where, on grounds such as those mentioned in the preceding Article:

(a) one person is treated less favourably than another person is, has been or would be treated in a comparable situation; or

(b) an apparently neutral provision, criterion or practice would place one group of persons at a particular disadvantage when compared to a different group of persons.

(2) Discrimination also includes harassment on grounds such as those mentioned in the preceding Article. "Harassment" means unwanted conduct (including conduct of a sexual nature) which violates a person's dignity, particularly when such conduct creates an intimidating, hostile, degrading, humiliating or offensive environment, or which aims to do so.

(3) Any instruction to discriminate also amounts to discrimination.

COMMENTS

A. Generic definition

Since the prohibited grounds for discrimination – ethnic or racial origin and sex – are already included in II.–2.101 (Right not to be discriminated against), there is no need to repeat them in the definition of the notion of discrimination. Therefore this Article provides a generic definition which also operates for other grounds of discrimination. The definition thereby underlines the idea that in principle all unequal treatment in a comparable situation may amount to discrimination, although there is not a remedy for each sort of discrimination.

B. Direct and indirect discrimination

This Article is a synthesis of the definitions expressed by the non-discrimination Directives. It contains a definition of the term "discrimination" that covers both direct and indirect discrimination. In both cases the same remedies are available, and in both cases there is the possibility of justifying the unequal treatment (II.–2:103 (Exception)). Thus, these rules do not treat direct and indirect discrimination separately.

Generally, discrimination can be understood as meaning that a person is treated "less favourably than another person would be treated in a comparable situation". Although the definition states that the unequal treatment must happen "on grounds" such as those mentioned in II.–2.101 (Right not to be discriminated against), no causal link between that reason and the treatment is required. Such a link would be very difficult to prove for the person discriminated against. According to II.–2:105 (Burden of proof) the person who considers himself or herself discriminated against on such grounds must merely establish the facts from which it may be presumed that there has actually been discrimination. In that case, it falls on the other party to prove that there has been no such discrimination.

Direct discrimination (paragraph (1)(a)) refers to a person being treated less favourably than another person would be treated in a comparable situation. The less favourable treatment means all treatment that disadvantages, such as rejecting the conclusion of a contract, not providing sufficient information, terminating a contractual relationship, requiring additional security or guarantees or additional services. A comparable situation is taken to mean a real or

a potential situation of normal treatment of a person in similar circumstances subject to market conditions.

Illustration 1
A bank does not provide loans to coloured people. This is unequal treatment because the bank differentiates on the ground of race; white people who fulfil the other loan requirements would get the loan.

Illustration 2
A woman needs the additional signature of her husband in order to finance a lease, while a man could conclude that type of contract without his wife's signature.

Illustration 3
A seller delivers goods to Roma people only against payment in advance, while other customers are able to get goods with a 14 day payment period after delivery.

The definition of indirect discrimination in paragraph (1)(b) tries to prevent the use of criteria that are not immanently linked to a specific group of people, but that could (proportionately) affect such a group more than another group of people.

Illustration 4
A bank grants loans only to full-time employees. Since most people who are employed in part-time jobs are women, such a policy of the bank is discriminatory.

C. Harassment

Paragraph (2) extends the notion of discrimination to two kinds of harassment: harassment in a broader sense and, in particular, sexual harassment. The harassment cases are not covered by the definition of discrimination under paragraph (1) because a harassed person is formally treated like others; yet such a person cannot enter into the transaction without being put into an intimidating or hostile or otherwise difficult or negative situation. The definition is modelled on the notion of harassment in Art. 2 (3) of the Directive on General Framework for Equal Treatment in Employment and Occupation 2006/54/EC, Art. 2 (3) of the Antiracism Directive 2000/43/EC and Art. (2)(c) of the General Sex Discrimination Directive 2004/113/EC. The inclusion of harassment cases in these rules on contract law can be justified by a need for coherence of the whole text on non-discrimination. In this case the proximity to the law on non-contractual liability for damage caused to another is evident.

Illustration 5
Racist music is played in a bar or restaurant. Such conduct violates human dignity and creates a humiliating and offensive environment.

Illustration 6
During a bus journey, a pornographic movie is being shown without the prior consent of the passengers. This constitutes sexual harassment because it may cause a degrading or humiliating situation for the passengers.

D. Instruction to discriminate

The term "discrimination" also includes an instruction to discriminate. The relation between the person acting in a discriminating way and the person discriminated against is of no

relevance. Therefore, the prohibition of an instruction to discriminate could belong to the law on non-contractual liability. However, due to the close relationship to the whole system of non-discrimination, it has been included here. An "instruction to discriminate" means all orders to discriminate in the sense of paragraph (1) of this Article. An instruction to harass is also discrimination according to these rules.

Illustration 7
The manager of a barbershop orders employees to stop providing services to coloured people.

NOTES

I. Direct discrimination

1. The notion of direct discrimination as opposed to indirect discrimination was first established by the ECJ in C-43/75 *Defrenne v SABENA (II)* [1976] ECR 455. The court held that "a distinction must be drawn … between, first, direct and overt discrimination … and, secondly, indirect and disguised discrimination…" However, no further guidance on how to define direct (or indirect) discrimination was given. The distinction between direct and indirect discrimination was soon recognised by EC legislation (Art. 2(1) Gender Employment Directive 1976/207). The first express definition of direct discrimination was provided by Art. 2(2)(a) Antiracism Directive. Similar definitions are part of other Directives on equal treatment, e.g. Art. 2(2)(a) Directive 2000/78/EC; Art. 2(a) General Sex Discrimination Directive. The present definition contains three components. First, a comparable situation must be established. Secondly, a comparator must be found. The ECJ had already established the possibility of comparators from the present and from the past (27 March 1980 – 129/79 *Macarthys Ltd.v Smith* [1980] ECR 1275), the Directives additionally allow the use of hypothetical comparators. Thirdly, a less favourable treatment of the discriminated person has to be established.
2. Nearly all Member States have introduced a definition of direct discrimination that generally reflects the definition adopted by the Directives. Most national definitions contain the need to demonstrate less favourable treatment, the requirement for a comparison with another person in a similar situation and the possibility to use a comparator from the past or a hypothetical comparator. E.g. AUSTRIA Equal Treatment Act § 32(1); BULGARIA Law on Protection against Discrimination art. 4(2); CYPRUS Equal Treatment Law art. 2; ESTONIA Gender Equality Act art. 3(1)(3); FINLAND Non-Discrimination Act art. 6(2)(1); FRANCE Law 2008-496 art. 1(1); GERMANY General Equal Treatment Act § 3(1)(1); IRELAND Equal Status Act s. 3(1)(a); ITALY Law 215/2003 art. 2(1)(a); Law 196/2006 art. 55-bis(1); LUXEMBOURG Law of 28 November 2006 art. 1(2)(a); Law of 21 December 2007 art. 2(2)(a); MALTA Equal Treatment of Persons Order art. 2(2)(a); PORTUGAL Law 18/2004 art. 3(3)(a); Law 14/2008 art. 3(a); SLOVAKIA Anti-Discrimination Act art. 2a(2), SLOVENIA Act Implementing the Principle of Equal Treatment art. 4(2); SWEDEN Discrimination (Goods and Services) Act art. 3(1).
3. Several definitions do not explicitly include the comparator from the past, e.g. HUNGARY Equal Treatment Act art. 8; SPAIN Law 3/2007 art. 6(1); Law 62/2003 art. 28(1)(b); UNITED KINGDOM Race Relations Act 1976 s. 1(1)(a) and Race Relations (Northern Ireland) Order 1997 s. 3(1)(a). The express reference to

hypothetical comparators has not been incorporated into the national legislations of SPAIN (Law 62/2003 art. 28(1)(b)) and HUNGARY (Equal Treatment Act art. 8).

4. The national provisions implementing the definition of direct discrimination state – consistently with the Directives – that there is no justification in case of direct discrimination. However, BELGIAN law explicitly provides a justification with regard to direct discrimination. According to the Law of 10 May 2007 on Combating Racial Discrimination art. 4(7), direct discrimination can only be established if the conduct in question lacks an objective and reasonable justification. Similar Law of 10 May 2007 on Combating Gender Discrimination art. 5(6).

5. There are Member States where the meaning of direct discrimination has not been codified in legislation. FRANCE and the NETHERLANDS, although having adopted legislation that forbids direct discrimination in the area of supply of and access to goods and services, have stopped short of providing a definition of direct discrimination; see for France, Law 2008-496 art. 2(1) and for the Netherlands, General Equal Treatment Act art. 1(1)(a).

6. The NETHERLANDS legislator did not literally implement the term (direct or indirect) "discrimination", but rather refers to "*onderscheid*", which can be translated as "distinction". In the process of legislative drafting, it was argued that the term "*discriminatie*" would give the wrong impression that the discriminator must have the intention to discriminate. Since the Dutch term is wider that the one adopted by the Directives, it does comply with them. DANISH anti-discrimination legislation uses (direct and indirect) "unequal treatment" instead of "discrimination".

II. Indirect discrimination

7. The concept of indirect discrimination is part of EC primary and secondary legislation. It was developed with regard to the application of the fundamental freedoms, especially the free movement of goods. The ECJ applied this concept to natural persons in a case concerned with discrimination on grounds of nationality under (today) Art. 39 EC (12 February 1974, 152/73, *Sotgiu v. Deutsche Post*). The first legislative definition of indirect discrimination was set out in Art. 2(2) Burden of Proof Directive 1997/80: "For the purposes of the principle of equal treatment indirect discrimination exists where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of on sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex." All Directives on equal treatment contain similar definitions of indirect discrimination. E.g., Art. 2(b) General Sex Discrimination Directive defines indirect discrimination as follows: "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage as compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

8. Most Member States that have already implemented the definition of indirect discrimination have done so by repeating the relevant definitions word for word: BELGIUM Law of 10 May 2007 on Combating Gender Discrimination art. 5(7); BULGARIA Law on Protection against Discrimination art. 4(3); CYPRUS Equal Treatment Law art. 2; DENMARK Ethnic Equality Act art. 3(3); ESTONIA Gender Equality Act s. 3(1)(4); FINLAND Non-Discrimination Act art. 6(2)(2); GERMANY General Equal Treatment Act § 3(2); IRELAND Equal Status Act s. 3(1)(c); ITALY Law 215/2003 art. 2(1)(b); Law 198/2006 art. 55-bis(2); LUXEMBOURG Law of 28 November 2006 art. 1(2)(b), Law of 21 December 2007 art. 2(2)(b); MALTA Equal

Treatment of Persons Order art. 2(2)(b); PORTUGAL Law 18/2004 art. 3(3)(b); Law 14/2008 art. 3(b); SLOVAKIA Anti-Discrimination Act art. 2a(3); SLOVENIA Act Implementing the Principle of Equal Treatment art. 4(3); SPAIN Law 3/2007 art. 6(2); Law 62/2003 art. 28(1)(c); SWEDEN Discrimination (Goods and Services Act) art. 3(2).

9. Some Member States have slightly deviated from the definition set out in the equal treatment directives. The AUSTRIAN Equal Treatment Act § 32(2) does not require the comparison to a different group of persons to establish indirect discrimination. The definition requires only evidence that the measure in question disadvantaged the individual complainant. Similarly, SWEDISH law makes no explicit reference to the comparison with other persons (Discrimination (Goods and Services) Act art. 3(2)). The SPANISH transposition of the Antiracism Directive refers only to a "legal or administrative provision, a clause of a convention or contract, an individual agreement or a unilateral decision", i.e. only to "provisions" in the sense of the Directive, while the Directives' terms "criterion or practice" are not included (Law 62/2003 art. 28(1)(c)). The UNITED KINGDOM Race Relations Act 1976 s. 1(1A) requires that the complainant personally as well as the group to which the complainant belongs are put at a particular disadvantage. The definition is narrower than the one set out in the Directives.

10. FRANCE has not implemented the definition of indirect discrimination but simply declares indirect discrimination unlawful. The NETHERLANDS provide a different definition of indirect discrimination (General Equal Treatment Act art. 1(c): "distinction on the ground of other criteria than [*inter alia*, religion, belief, race] which results in direct discrimination"). Under HUNGARIAN law the definition of indirect discrimination is modelled closely on the definition of direct discrimination (Equal Treatment Act art. 9: "Those dispositions are considered indirect negative discrimination, which are not considered direct negative discrimination and apparently comply with the principle of equal treatment but put any persons […] at a considerably larger disadvantage than other persons […] in a similar situation were or would be").

III. Harassment

11. All non-discrimination directives include the notion of harassment (Art. 2(3) Directive 2000/78/EC; Art. 2(3) Antiracism Directive; Art. (2)(c) General Sex Discrimination Directive). They define harassment as a situation where unwanted conduct relates to a ground of discrimination and occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. There are however differences as to the obligation of the Member States to implement the concept of harassment. Whereas the Directive on a General Framework for Equal Treatment in Employment and Occupation and the Antiracism Directive have left it to the discretion of the Member States to define the notion of harassment in accordance with their national laws and practice, the later Directives do not contain a similar restriction. They apply to every kind of unwanted conduct and therefore define the notion of "harassment" in an absolute manner.

12. The majority of Member States have adopted definitions of harassment that contain the elements adopted by the Directives. Several national provisions slightly deviate from the wording set out in the Directives: FRANCE Law 2008-496 art. 1(3)(1) does not require the creation of an "intimidating" environment; LITHUANIA Law on Equal Treatment art. 2(5) and ROMANIA Law 137/2000 art. 2(5) omit the notion of the "humiliating" environment; SPAIN Law 62/2003 art. 28(d) and Law 3/2007 art. 7(2)

do not include the words "hostile" and "degrading". PORTUGAL Law 18/2004 art. 1(4) uses "disturbing" (*desestabilizador*) instead of "offensive".

13. Some Member States provide definitions of harassment that are somewhat broader than the one found in the Directives. Some national provisions do not require the unwanted conduct to both violate a person's dignity *and* create an intimidating etc. environment. The BULGARIAN Law on Protection against Discrimination [Additional Provisions] art. 1 (1) and the UNITED KINGDOM'S Race Relations Act 1976 s. 4A(1) and Sex Discrimination Act 1975 s. 4A use the term "or" instead of the Directives' "and", thus providing a more favourable definition for the harassed person. The SWEDISH Discrimination (Goods and Services Act) art. 3(3) does not require that the behaviour also creates an intimidating etc. environment, but only that it violates the dignity of a person. The Swedish definition also omits the qualification of "unwanted", a criterion which is understood to be an integral part of the term "harassment" in Swedish (*trakasserier*).

14. On the other hand, ITALY has adopted a wording slightly unfavourable to the harassed person by providing that the unwanted conduct must have the effect of "creating an intimidating, hostile, degrading, humiliating *and* offensive environment" (Law 215/2003 art. 2(3)). However, the definition of harassment was correctly transposed with relation to gender equality by Law 198/2006 art. 55-bis(4). The FINNISH Non-Discrimination Act art. 6(2)(3) provides a definition that adversely deviates from the Directives by stating that the infringement of the dignity of a person has to be caused *by* the creation of an intimidating etc. environment.

15. Some Member States have introduced specific rules on how to determine whether the conduct in question is such as to violate a person's dignity or create an intimidating etc. environment. E.g. SLOVAKIAN law stresses the perception of the harassed person by making reference to treatment "which that person can justifiably perceive" as harassment (Anti-Discrimination Act art. 2a(4)). MALTESE law further defines the harassing conduct as "to subject the person to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material" (Equal Treatment of Persons Order art. 2(1)).

IV. Instructions to discriminate

16. The early Directives on equal treatment did not contain a provision dealing with instructions to discriminate. This concept as a specific form of discrimination was introduced by Art. 2(4) of the Antiracism Directive and Art. 2(4) of Directive 2000/78/EC. Art 4(4) of the General Sex Discrimination Directive extends the definition of discrimination to instructions to directly or indirectly discriminate. All the Directives mentioned above provide that instructions to discriminate are deemed to be discrimination. However, they do not provide a definition of what constitutes an instruction to discriminate.

17. The Member States' provisions on instructions to discriminate are very similar to those set out in the Directives. Most Member States have opted to replicate the wording of the Directives and merely provide that instructions to discriminate "constitute" discrimination (AUSTRIA Equal Treatment Act § 32(3); LITHUANIA Law on Equal Treatment art. 2(8)), are "considered" as discrimination (GERMANY General Equal Treatment Act § 3(5); ITALY Law 215/2003 art. 2(4) and Law 198/2006 art. 55-bis(6); LUXEMBOURG Law of 28 November 2006 art. 1(4) and Law of 21 December 2007 art. 2(4); PORTUGAL Law 18/2004 art. 3(5); ROMANIA Law 137/2000 art. 2(2); SPAIN Law 62/2003 art. 28(2) and Law 3/2007 art. 6(3)), are "deemed" to be a form of discrimination (GREECE Law 3304/2005 art. 2; MALTA

Equal Treatment of Persons Order art. 2(2)(d); SLOVENIA Act Implementing the Principle of Equal Treatment art. 4(4)), simply "mean" discrimination (FINLAND Non-Discrimination Act art. 6(2)(4); HUNGARY Equal Treatment Act art. 7(1)), or are "included" in the definition of discrimination (FRANCE Law 2008-496 art. 1(3)(2)).

18. A small number of Member States have provided some guidance on the notion of instructions to discriminate. The BULGARIAN Law on Protection against Discrimination [Additional Provisions] s. 1(5) defines "instigations" to discrimination as "direct and purposeful encouragement, instruction, exertion of pressure or prevailing upon someone to discriminate when the instigator is in a position to influence the instigated". The SLOVAKIAN Anti-Discrimination Act art. 2a(7) provides that "incitement to discrimination shall mean persuading, affirming or inciting a person to discriminate against a third person". In two Member States the orders or instructions have to be given to someone who is under the command of, or in a position of dependency on, the instructor: SWEDEN Discrimination (Goods and Services Act) art. 3(5) ("who is […] in a subordinate or dependent position relative to the person who gives the orders or instructions"); UNITED KINGDOM Race Relations Act s. 30 ("person who has authority over another person"). According to the UNITED KINGDOM's Sex Discrimination Act s. 40 the induced person has to be offered a benefit or threatened with a detriment.

II.–2:103: Exception

Unequal treatment which is justified by a legitimate aim does not amount to discrimination if the means used to achieve that aim are appropriate and necessary.

COMMENTS

A. General

This provision brings some necessary flexibility into the process of evaluating unequal treatment. It allows the justification of such treatment by legitimate aims. In this way, rational use of the freedom of contract, as long as it does not violate human dignity, is still granted. The rule also allows for different factors to be taken into account. It prevents the mechanical qualification of all unequal treatment as discrimination. The provision also allows specific measures to prevent or compensate disadvantages (positive discrimination), although these may constitute discrimination themselves.

B. No distinction between direct and indirect discrimination

II.–2:102 (Meaning of discrimination) does not distinguish between direct and indirect discrimination. This provision generalises the ideas expressed in Art. 4(5) of the General Sex Discrimination Directive 2004/113/EC. By contrast, the Antiracism Directive 2000/43/EC formulates the prohibition of direct discrimination on the grounds of race and ethnic origin as an absolute principle without any exception, whereas indirect discrimination in this Directive by definition also presupposes that there is no justified reason for the different treatment. II.–2:102 does not follow the strict division between direct and indirect discrimination because it does not seem practical to maintain this distinction with regard to the requirements and effects of discrimination. Both the questions of whether there is discrimination, and of whether it could be justified, are a matter of evaluation, and their answers depend on its intensity as well as on a number of different facts. This approach also allows the law to justify and accept any 'positive discrimination' which is aimed at compensating or improving the position of disadvantaged people, often referred to as "reverse discrimination" or "affirmative action".

The intention of this Article is therefore not to expand the possibilities of justification of unequal treatment, in particular in relation to the Antiracism Directive 2000/43/EC. The provision just merges different definitions and thereby reaches a higher level of abstraction. The consequence of such a synthesis is a reduction of the casuistic approach, which leads to the necessity of a more flexible interpretation and application. As this Article is an exception to the general prohibition of discrimination it has to be interpreted strictly. In the case of ethnically and racially based unequal treatment, only very exceptional circumstances may lead to the justification of such practices.

C. Justification by a legitimate aim

Unequal treatment may be justified by legitimate aims if the means applied to reach these aims are appropriate and necessary. The aims are legitimate, if they constitute a protected value in a society, which should not be surrendered. It could reflect the need to protect privacy, decency, religion or cultural identity. In exceptional cases (e.g. insurance contracts) certain economic factors can also provide justification. It is not sufficient, however, that such societal values are in conflict with the requirement of equal treatment. Rather, it must be decided whether the protection is of such value that it does not violate the main goal of non–

discrimination laws: the protection of human dignity. The existence of a legitimate aim is not sufficient in itself. There needs to be proof that the unequal treatment is the only way to achieve this goal. The application of such a justification is tempered by the requirement of proportionality.

The fact that II.–2:102 (Meaning of discrimination) may apply to all cases of discrimination does not mean that the grounds on which discrimination occurs would not be relevant in deciding whether such discrimination can be justified. Depending on the kind of discrimination at hand, the exception test must be applied differently, i.e. more or less strictly. For instance, in the case of racial discrimination, the possibility of justification is extremely limited and absolutely exceptional, because of the overriding principle that the criterion of race should be abandoned as a means of classifying people. Since the criterion of race and, to some extent, that of ethnic origin are predominantly subjective categories, unequal treatment usually cannot bring real benefit worthy of justification. Therefore, only an exceptional justification test may be used when deciding whether to permit this kind of discrimination. The main example where unequal treatment on the ground of race or ethnic origin could be justified would be 'positive discrimination'. In case of any harassment (sexual or otherwise) there is no possible justification because of the reprehensibility of the very nature of such behaviour.

Illustration 1
A woman makes an offer to rent two rooms in her apartment, but only to female students. This discrimination can be justified for reasons of privacy and decency.

Illustration 2
A woman makes an offer to rent rooms in her apartment only to white students. This discrimination cannot be justified. Although there might be a legitimate privacy argument, this must not be based on or linked to the race of the roommates. One of the goals of non–discrimination law is to fight against unreasonable stereotypes. Race is such a stereotype that leads to degrading conditions for certain groups of people. Therefore, privacy motivations alone cannot be sufficient. Europe has an extremely painful history of racial discrimination. The memory of this history is reflected in constitutionally protected values, which must obviously influence which justifications for discrimination are permitted and which are not.

NOTES

I. Justification

1. As previously mentioned, the Directives distinguish between direct and indirect discrimination. The prohibitions against direct discrimination are phrased differently from those against indirect discrimination. While indirect discrimination by definition presupposes that there is no justified reason for the different treatment, the proscription of direct discrimination on the grounds of race and ethnic origin in the Antiracism Directive is formulated as an absolute principle without any exception. On the other hand, Art. 4(5) of the General Sex Discrimination Directive provides that differences based on sex ("provision of the goods and services exclusively or primarily to members of one sex") are not precluded if they can be justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. In addition, Art.

5(2) of the same directive allows justification of different premiums and benefits in insurance between men and women. These justifications apply to both direct and indirect discrimination.

2. Most national provisions implementing the definitions of direct and indirect discrimination state – consistently with the Directives – that direct discrimination is not open to justification, whereas indirect discrimination can be justified by legitimate aims. Thus, the laws of AUSTRIA, BULGARIA, DENMARK, FINLAND, FRANCE, GERMANY, IRELAND, ITALY, LITHUANIA, LUXEMBOURG, MALTA, NETHERLANDS, PORTUGAL, ROMANIA, SLOVAKIA, SLOVANIA, SPAIN, SWEDEN, and the UNITED KINGDOM provide justifications only for indirect discrimination while not providing any justification for conduct that has been established as direct discrimination.

3. Only a few Member States have departed from the Directives' definitions and enacted anti-discrimination laws which expressly permit the justification of direct discrimination. BELGIUM Law of 10 May 2007 on Combating Racial Discrimination art. 4(7) defines direct discrimination as a "difference in treatment lacking objective and reasonable justification". See also BELGIUM Law of 10 May 2007 on Combating Gender Discrimination art. 2(3). The HUNGARIAN Equal Treatment Act art. 7(2) did not distinguish between direct and indirect discrimination and provided that any action or conduct "shall not be taken to violate the requirement of equal treatment if it is found by objective consideration to have a reasonable ground directly to the relevant legal relation." After a recent amendment, which came into force on 1 January 2007, this justification is not anymore applicable to direct discrimination based on racial origin, see art. 7(3).

4. Some legal systems provide specific legal justifications for different treatment that apply to both direct and indirect discrimination. Under BULGARIAN law, *inter alia*, minimum or maximum age requirements are not deemed discrimination if they can be objectively justified and do not exceed what is necessary (Protection against Discrimination Act art. 7(1) nos. 5, 6, 11). Under GERMAN law different treatment based on, inter alia, sex can be justified if a "reasonable ground" ("*sachlicher Grund*") can be established. Reasonable grounds include the prevention of damage, or the need for protection of private life or personal security (General Equal Treatment Act s. 20(1)). Further justifications will be established by the courts. This justification is not applicable to different treatment based on racial or ethnic origin.

5. Under LITHUANIAN law direct and indirect discrimination are treated differently, but this is done differently from the way followed in the Directives. The Law on Equal Treatment art. 2(7) lists several exceptions for direct discrimination, for example legislation on age restrictions, on requirements to know the State language or legislation concerning different rights applied on the basis of citizenship. Conversely, there is no justification for indirect discrimination.

6. Consistently with the Directives, a series of Member States provide specific justifications for discrimination based on sex. Under FRENCH (Law 2008-496 art. 2(4)), LUXEMBOURGIAN (Law of 21 December 2007 art. 4), ITALIAN (Law 198/2006 art. 55-bis(7)), SLOVAKIAN (Anti-Discrimination Act art. 8(7)(c)), SLOVENIAN (Act Implementing the Principle of Equal Treatment art. 2a(3)) and SWEDISH (Discrimination (Goods and Services) Act art. 9(2)) law differences in treatment that are based on a person's sex can be justified by a legitimate aim if the means of achieving that aim are appropriate and necessary. The DUTCH legislator has adopted an exception for cases "in which sex is a determining factor" (General Equal Treatment Act art. 2(2)(a)). Although under PORTUGUESE and SPANISH law the

General Sex Discrimination Directive has been implemented by independent laws there is no specific provision under which unequal treatment based on sex may be justified.

II. Genuine occupational requirement

7. The Directives on equal treatment authorise the Member States to grant an exception from the prohibition of unequal treatment if a genuine and determining occupational requirement requires this. For example, Art. 4 of the Antiracism Directive allows Member States to "provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin, shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate." Similar provisions containing exceptions for occupational requirements can be found in the Directive 2000/78/EC (art. 4(1)), the Directive 2002/73/EC (art. 1) and the Directive 2006/54/EC (art. 14(2)).

8. The majority of Member States have adopted genuine occupational requirement exceptions that are closely modelled on the ones found in the Directives. This includes BELGIUM, CYPRUS, DENMARK, ESTONIA, FINLAND, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, LITHUANIA, LUXEMBOURG, MALTA, POLAND, PORTUGAL, SLOVAKIA, SPAIN, SWEDEN and the UNITED KINGDOM. Under ITALIAN law the occupational requirement has to be established "in compliance with the principles of proportionality and reasonableness" (proporzionalità e ragionevolezza), thus, the requirement of "legitimate objective" has been replaced by "reasonableness" which leaves more room for discretion (Law 215/2003 art. 3(3)).

9. LUXEMBOURG and IRELAND have chosen not to include an exception for genuine occupational requirement in their national law. The Irish legislator removed a previous exception under which distinctions on various grounds could be justified if the relevant characteristic was an occupational qualification.

II.–2:104: Remedies

(1) If a person is discriminated against contrary to II.–2:101 (Right not to be discriminated against) then, without prejudice to any remedy which may be available under Book VI (Non-contractual Liability for Damage caused to Another), the remedies for non-performance of an obligation under Book III, Chapter 3 (including damages for economic and non-economic loss) are available.

(2) Any remedy granted should be proportionate to the injury or anticipated injury; the dissuasive effect of remedies may be taken into account.

COMMENTS

A. General

The provision indicates which sanctions apply for violation of the right not to be discriminated against. Sanctions serve to undo the results of discrimination and also to prevent further discrimination. Moreover, the effect should also be general prevention. According to the underlying Directives, the sanctions for discrimination must be effective, proportionate and dissuasive and entail the payment of damages for loss to the victim.

As II.–2.101 (Right not to be discriminated against) grants a right not be discriminated against, an infringement of this right triggers the remedies for non-performance of an obligation under Book III, Chapter 3. Such remedies can be, in particular, the right to claim damages under Book III, Chapter 3, Section 7 or the right to terminate a contractual relationship under Book III, Chapter 3, Section 5. In exceptional cases, the remedy can also be a right to enforce performance under III.–3:302 (Enforcement of non-monetary obligations), which may include the right to demand the conclusion of a contract.

B. Right to claim damages

The primary remedy for forbidden discrimination is the right to claim damages. Which persons are entitled to claim damages is a particularly controversial question. On the one hand, it would be going too far to grant this right to anyone who belongs to the discriminated group of persons. On the other hand, it would excessively restrict the right to damages if one required a person to actively try to enter into a contract with the discriminating person, even though the latter has made it clear that he or she will reject that attempt. It seems that a certain amount of proximity between the person who claims to be discriminated against and the discriminating situation or behaviour itself is a pre-condition to a right to claim damages. Otherwise the person will not be considered to have suffered loss, not even a non-economic loss. The question of who has a right to claim damages must be determined by bearing in mind that the remedies have to be effective, proportionate and dissuasive. Generally, a party to a contract, or at least a potential contractual partner, may be entitled to claim damages. It could, however, also be a person who is simply a customer and not a party to a contract or a potential contractual partner.

Illustration 1
A invites her boyfriend B, a person of colour, to a restaurant. The waiter does not want to serve B on racial grounds. In this situation, B is entitled to claim damages for non-economic loss even though he is not a party to the contract.

Paragraph (1) of the Article clarifies that the right to claim damages for loss includes non-economic loss in the sense of III.–3.701 (Right to damages) paragraph (3). Because of the nature of discrimination, it may be extremely difficult in a large number of cases to prove that an economic loss has been suffered. Above all, discrimination violates human dignity. Therefore, it usually causes a non-economic loss.

Illustration 2
X, a credit institution, refuses to provide a loan to client B on the basis of B's ethnicity. B is forced to enter into a contract with another institution, Y, under less beneficial financial conditions. B has a right to a claim damages for economic loss from X, which is the difference between the cost of the loan by institution Y and the costs of the loan by institution X. B may also have a right to claim damages for non-economic loss because of the violation of his dignity.

C. Right to terminate

Another remedy could be the termination of a contractual relationship, even if the contract does not allow such termination before the end of the regular duration of the contract.

Illustration 3
B, a person of colour, has, by contract, taken out a subscription to a newspaper. The newspaper unexpectedly publishes a series of articles presenting clearly racist positions. In this situation, B can terminate the contractual relationship because the criterion of harassment has been fulfilled.

D. Right to demand the conclusion of a contract

In exceptional cases, this Article in connection with III.–3:302 (Enforcement of non-monetary obligations) can result in a right to demand the conclusion of a contract. Although such a remedy should not generally be excluded, it needs to be applied with the highest level of caution. It fundamentally infringes the principle of freedom of contract and is usually considered inefficient in the field of civil law contracts. Normally, a right to claim damages should be a sufficient means to satisfy the aggrieved party. In very specific situations, however, it is necessary to ensure that the victim of discrimination has access to the goods or services, where there has been a general denial to provide them on the basis of discrimination.

Illustration 4
A is a landlord who refuses to rent an apartment to a young pregnant woman, B, because specific protective measures exist which limit the ability to terminate contractual relationships with pregnant women. B may demand the conclusion of the contract with her. Since it is very likely that she will also face similar refusals from other people for the same reason, other remedies such as damages may not be sufficient to undo the effects of the discrimination.

Illustration 5
A seller refuses to sell food to a person of colour for racist reasons. Damages (also non-economic) should be a sufficient remedy, unless there are no other places to purchase food in the immediate or nearby area.

E. Other remedies, cumulation of remedies

The catalogue of remedies provided for in this Article is not exhaustive. There are various types of discrimination that could possibly occur in different situations, so that an adequate remedy has to be left to the circumstances. For instance, if a discriminating act occurred and will probably be repeated, it must also be possible to prohibit future discrimination. An exhaustive list of remedies could endanger the real possibility of undoing the consequences of discrimination. Other remedies for discrimination can be derived from many provisions of these model rules. Examples are nullity of a contract under II.–7:301 (Contracts infringing fundamental principles), interpretation of a contract or implying a term in favour of a discriminated party under II.–8:102 (Relevant matters) sub-paragraph (g) or II.–9:101 (Terms of a contract), setting aside a contract term as being unfair under Chapter 9, Section 4 of Book II, the application of the rules on non-discrimination to all obligations, including 'post-contractual' and non-contractual obligations, under III.–1:105 (Non-discrimination) or remedies available under Book VI (Non-contractual Liability for Damage caused to Another).

> *Illustration 6*
> A is a landlord who rents apartments to tenants T1 to T4. Only the contract with T3, who is a person of colour, contains a provision according to which an additional guarantee payment is required to secure potential claims for damages. As this is a discriminatory clause, it is void under II.–7:301 (Contracts infringing fundamental principles).

All remedies can be combined, if appropriate. Save for cases of abuse of rights, a person who has been subjected to discrimination can choose from different remedies.

> *Illustration 7*
> If the victim is terminating a contractual relationship, the victim cannot at the same time require that the contract be modified, invalidating the discriminating clause(s). The victim may, however, simultaneously claim economic and non-economic damages.

F. Proportionality test and dissuasive effect

The remedies must be proportionate to the injury or anticipated injury. When applying this proportionality test, the particular situation of a person who has discriminated against others has to be taken into account, since the remedy must have a dissuasive effect. The dissuasive effect of sanctions plays its main role when non-economic loss is to be measured. The general policy function of the remedy, i.e. its dissuasive effect, must be taken into account. Consequently, the general rule on measure of damages in III.–3:702 (General measure of damages) has to be applied with a view to also give the remedy a dissuasive effect. In that sense, damages for non-economic loss may have a punitive element. Such damages are related to the specific kind of injury that has been suffered. When determining the amount of damages it should be borne in mind that the remedy must make any future acts of discrimination economically unattractive for the discriminating person. A dissuasive effect can only be achieved if the kind and size of the business belonging to the discriminating person is taken into consideration. The kind of discrimination and its degree of "intimidating power" should also be relevant. However, if the discriminatory act does not really affect the life conditions or real market opportunities of the person discriminated against, the amount of damages must not be disproportionate even when it has to be measured with a view to have a dissuasive effect.

Illustration 8
A large enterprise that provides hotel services only offers rooms with lower standards to certain ethnic groups. Each potential client from such ethnic groups, who was trying to rent a higher quality room and was refused, may claim non-economic damages in a "significant" amount, which would reflect the enterprise's position in the market.

Other remedies (apart from damages for economic and non-economic loss) must also be proportionate and dissuasive. In cases where the remedies directly relate to the modification of contract terms or the termination of a contractual relationship, the requirement of dissuasiveness has a limited scope of application. This simply means that the aggrieved party may also use stronger remedies than those needed to undo the consequences of discrimination, although the dissuasive purpose cannot lead to the abandonment of the requirement of proportionality. It follows that in particular cases, the termination of a contractual relationship may be granted although another remedy would be sufficient to undo the effects of discrimination, for example, a modification of the terms of the contract.

Illustration 9
In the case presented as Illustration 6, the tenant, instead of just declaring the discriminating contract clause void, terminates the entire contractual relationship. The remedy may apply, although the nullity of the clause would be sufficient to undo the effects of the discrimination.

NOTES

I. Compensation

1. The Antiracism Directive and the General Sex Discrimination Directive contain a sort of general description of the aim and content of remedies. Art. 15 of the Antiracism Directive says that sanctions may include the payment of compensation to the victim of discrimination and that all sanctions must be effective, proportionate, and dissuasive. Art. 8(2) of the General Sex Discrimination Directive explicitly requires effective compensation or reparation for any loss and damage sustained by a person injured as a result of discrimination in a way which is dissuasive and proportionate to the damage suffered. Other directives on non-discrimination related to labour law formulate similar concepts (cf. Art. 17 Directive 2000/78/EC and Art. 18 Directive on Principle of Equal Opportunities and Equal Treatment of Men and Women 2002/73). With regard to the Directive 1976/207, dealing with discrimination on grounds of sex in the field of employment, the ECJ held that when a Member State chooses to penalise the breach of the prohibition of discrimination under rules governing civil liability, "the Directive … preclude[s] provisions of domestic law which make reparation of damage suffered as a result of discrimination … subject to the requirement of fault" (judgment of 22 April 1997, C-180/95 – *Nils Draehmpaehl v Urania Immobilienservice OHG*, ECR 1997, I-2195). In the *Colson* case, the ECJ expressed the view that "compensation must in any event be adequate in relation to the damage sustained" (judgment of 10 April 1984 – *Von Colson and Kamann/Land Nordrhein-Westfalen*, ECR 1984, 1891, para. 23). According to the Court, the limitation of the right to compensation to a purely nominal amount would not satisfy the requirements of an effective transposition of the directive. Later, the court held that

where compensation is the remedy chosen by the national legislator "the fixing of an upper limit of the kind at issue, cannot by definition constitute proper implementation of art. 6 of the Directive, since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of the discriminatory dismissal". (judgment of 2 August 1993, C-271/91– *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority*, ECR 1993, I-4367). Art. 8(2) of the General Sex Discrimination Directive explicitly prohibits a fixing of a maximum limit for compensation. According to the European Commission "there can be no doubt that upper limits on compensation for discrimination are not acceptable either in the context of either the Race or Employment Framework Directives. Even though, to date, explicit case law and legislation on this issue concern sex discrimination, there is no conceivable convincing reason why a different approach should apply in relation to other types of discrimination" (European Commission publication "Remedies and Sanctions in EC non-discrimination law", 2005). Only the last directive in the field of labour law provides for the possibility to fix a maximum limit for compensation, but only in the case of a refusal to take a job application into consideration (Art. 18 Directive 2002/73/EC).

2. A vast majority of Member States provides for compensation awards. Under AUSTRIAN law the claimant can claim compensation for economic loss and also for non-economic loss (Equal Treatment Act § 35(1)). In the latter case the amount granted must compensate the victim for any personal suffering; the minimum amount is € 400. These claims are permissible only after mediation. Under BELGIUM law, the victim of a discrimination may seek reparation (damages) according to the usual principles of civil liability (Law of 10 Mai 2007 Combating Racial Discrimination art. 16(1): "*en application du droit de la responsabilité contractuelle ou extra-contractuelle*"). According to the BULGARIAN Protection against Discrimination Act art. 71(1) no. 3 the discriminated person can lodge a claim before the Regional Court demanding compensation for damage, which primarily means compensation for economic loss. In CYPRUS, the court may award all types of damages available in civil procedures, like pecuniary, nominal or punitive damages. In DENMARK, when a violation of the Ethnic Equality Act can be established, it is possible to bring a civil action for delictual damages before the courts (cf. Act on Torts art. 26). However, in practice, it seems less likely that a person will be compensated for discrimination which has not been declared a criminal offence in a previous criminal court case. Under ESTONIAN law the injured party has a right to demand compensation for damage, including non-pecuniary loss (Gender Equality Act art. 13(1)). In GERMANY the discriminator is liable to pay damages for material loss only if the loss was caused by the discriminator's fault (wilful or negligent wrongdoing). Only in the case of non-material loss does the law impose a strict liability on the discriminator (General Equal Treatment Act § 21(2)). Given the case law of the ECJ demanding strict liability (mentioned above) this is in breach of EC law. SLOVAKIAN law provides that the victim may seek non-pecuniary damages, especially where the violation of the principle of equal treatment has considerably impaired the dignity and the social status of the victim (Anti-Discrimination Act art. 9(3)). Whereas the SPANISH legislation implementing the Antiracism Directive does not contain sanctions at all, the legislation implementing the General Sex Discrimination Directive provides for "*indemnizaciones que sean reales, efectivas y proporcionadas al perjuicio sufriode*" (Law 3/2007 art. 10).

3. Member States differ on the question of upper limits for pecuniary damages. Some states have adopted limits for compensation. In BELGIUM, the victim may opt for a payment of the lump sums defined in the law (Law of 10 MAI 2007 Combating Racial Discrimination art. 16(2)(1): € 1300, reduced to € 650 if the discriminator provides evidence that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element). According to the FINNISH Non-Discrimination Act art. 9(1) compensation for the injured party is not to exceed € 15,000. This maximum compensation may only be exceeded for "special reasons" (e.g. the length and seriousness of discrimination). The (theoretical) maximum sum in compensation is to be adjusted every three years by a decree by the Ministry of Labour (art. 21). However, the award of compensation is without prejudice to the possibility of obtaining damages under the Tort Liability Act (412/1974) or some other law (art. 9(3)). A considerable number of Member States have refrained from including upper limits to the amount of compensation that can be awarded, e.g. AUSTRIA, BULGARIA, CZECH REPUBLIC, DENMARK, ESTONIA, GERMANY, ITALY, LUXEMBOURG, the NETHERLANDS, PORTUGAL, SLOVAKIA, SLOVENIA, SPAIN, and the UNITED KINGDOM. In HUNGARY there is equally no upper statutory limit. However, Hungarian courts tended to be rather cautious in the amounts awarded. In a number of cases concerning discrimination in access to services (most frequently denying Roma guests entry to discos and bars), the amount of compensation was quite steadily around € 400. Recently however, the average amounts have started to rise. In some recent cases, discrimination based on racial or ethnic origin was sanctioned with non-pecuniary damages of around € 2000, which is a promising change in the general judicial approach. In LATVIA there is no limit for compensation under civil law; however for damage caused by state administration institutes the law provides for maximum amounts ranging from around € 5000 to around € 20000. Under SWEDISH law no limits apply, but according to the Discrimination (Goods and Services) Act art. 18 damages can be reduced or even cancelled if this is "deemed reasonable".

4. Some Member States have included time limits for making claims for compensation. For example, in GERMANY, the claimant has to lodge the claim within two months (General Equal Treatment Act § 21(5)), whereas ESTONIAN law provides for a period of one year from the date when the injured party became aware or should have become aware of the damage caused (Gender Equality Act art. 14). In IRELAND the complainant is required to initiate the complaint by notifying, in writing, the respondent within two months of the date of the occurrence of the discriminatory conduct (Equal Status Act art. 21(2)(a)). If there is no satisfactory response, the claimant can pursue the matter to the Equality Tribunal. Furthermore, a long-stop rule of six months from the date of the occurrence is applicable. Under SWEDISH law the legal proceedings must be initiated within two years from the date of the alleged offence (Discrimination (Goods and Services Act) art. 23).

5. Some Member States do not provide for civil compensation. The GREEK Law 3304/2005 only provides for penal sanctions (ranging from administrative fines to even imprisonment). Legislative proposals which included reparation, restitution and other civil remedies have not become law.

II. Other civil sanctions

6. The Directives only require the Member States to lay down sanctions that are effective, proportionate and dissuasive. No further guidance is given on the character

of the remedies, i.e. their orientation as backward-looking (e.g. damages) or forward-looking (e.g. remedies seeking to adjust future behaviour).

7. Some Member States declare contractual terms that are incompatible with the prohibition of discrimination to be void. Under BELGIAN law such terms are void (Law of 10 MAI 2007 Combating Racial Discrimination art. 13: "*sont nulles*"). In FINLAND, a court may amend or ignore contractual terms which are contrary to the prohibition of discrimination (Non-Discrimination Act art. 10(1)). If circumstances so warrant, a court may also amend other parts of the contract or declare the whole contract void (art. 10(2)). Similarly, under SWEDISH law terms that are in conflict with the principle of equal treatment can be adjusted or declared invalid. Even the whole contract may be adjusted or declared invalid, if the provision is of such importance for the contract that it is unreasonable to demand that the contract apply as to the rest without material changes (Discrimination (Goods and Services) Act art. 15(1)). In the case of discrimination in terminating a contractual relationship, the legal document effecting the termination must be declared invalid if so requested by the aggrieved person (art. 15(2)). The LUXEMBOURG Law of 28 November 2006 art. 6 makes null contractual provisions which violate the principle of equal treatment (also Law of 21 December 2007 art. 9(1)). SPANISH law declares provisions violating the anti-discrimination laws to be void and not binding (Law 3/2007 art. 10: "*nulos y sin efecto*"). Under DUTCH law, contractual provisions which are in conflict with the General Equal Treatment Act are void (art. 9: "*nietig*").

8. Under some national laws, the victim may seek termination of the discriminatory behaviour, conduct or act. Furthermore, the consequences of such acts and behaviour must be removed and the previous situation must be restored. In BELGIUM the person discriminated against may lodge a claim before the Regional Court for an order requiring the discriminatory practice to cease (Law of 10 May 2007 Combating Racial Discrimination art. 18(1): "*ordonne la cessation d'un acte*") and the decision may be posted publicly (art. 18(3)). In the event of non-compliance with a judicial order the addressee (discriminator) may be subject to fines (*astreintes*) (art. 17). Under BULGARIAN law the victim may seek termination of the violation and restoration of the status quo ante. Furthermore, the discriminator can be obliged to refrain in future from further violations (Protection against Discrimination Act art. 71(1) no. 2). Under ESTONIAN law the injured party has a right to demand termination of the harmful activity (Gender Equality Act art. 13(2)). In GERMANY, the victim has a claim for the cessation of the discriminatory acts and the removal of the disadvantage (General Equal Treatment Act § 21(1)). According to ITALIAN Law 215/2003 art. 4(5) the judge can order the termination of the discriminatory behaviour and the removal of its effects, and can also adopt a plan aiming at the removal of the identified discriminations. Similarly, under Law 198/2006 art. 55-quinquies(1) the judge may order termination (*cessazione*) of the discriminatory conduct and removal of the effects of discrimination (*rimuovere gli effetti delle discriminazione*). In the NETHERLANDS the Equal Treatment Commission can initiate legal action requesting that conduct contrary to the relevant equal treatment legislation be prohibited and that the consequences of such conduct be rectified (General Equal Treatment Act art. 15(1)). According to the SLOVAKIAN Anti-Discrimination Act art. 9(2) the court may order the person violating the principle of equal treatment to refrain from such conduct and to rectify the illegal situation.

II.–2:105: Burden of proof

(1) If a person who considers himself or herself discriminated against on one of the grounds mentioned in II.–2:101 (Right not to be discriminated against) establishes, before a court or another competent authority, facts from which it may be presumed that there has been such discrimination, it falls on the other party to prove that there has been no such discrimination.

(2) Paragraph (1) does not apply to proceedings in which it is for the court or another competent authority to investigate the facts of the case.

COMMENTS

A. General

The aim of paragraph (1) is to facilitate the requirement of proving the occurrence of the discriminatory act. Paragraph (2) does not change these rules. It only states that an investigating court or authority, acting ex officio, should also collect evidence which is in favour of the person allegedly acting in a discriminatory way. The provision is modelled along similar rules in EC law, e.g. in the Antiracism Directive 2000/43/EC and the General Sex Discrimination Directive 2004/113/EC.

B. Presumption

This provision does not entail a formal shift of the burden of proof, but it allows for the drawing of a conclusion from facts based on life experiences which indicate discrimination. It relaxes the rigidity of the law of evidence in favour of the person who claims to be discriminated against. The facts on which the presumption is based must be fully proved by this person. They must be facts which make the existence of discrimination likely according to the local practices, customs, or existing bias and traditional ideas. If such facts are proved the person who allegedly acted in a discriminatory way has the right to prove that there has not been such discrimination. This requires convincing the responsible court that the behaviour was motivated by – legitimate – grounds other than sex, race or ethnic origin.

> *Illustration*
> A landlord does not want to rent an apartment advertised in the press to an affluent Roma family. Because of the well known general problems faced by the members of Roma minorities, it is sufficient, at least in some Member States, to infer from the established fact alone that discrimination has occurred. In a situation where a landlord refuses to rent an apartment to a woman, this would by itself not be enough to give rise to a presumption of discrimination, unless in a specific country or region or local community such a sex-based refusal was common.

The burden of proof rule plays a crucial role in order to ensure the efficacy of anti-discrimination law. However, it is a highly controversial instrument, which in the context of civil law, is considered close to being an instrument allowing control over the intentions and other thoughts of the alleged discriminator. Because of the ambivalence of the criterion for discrimination (in particular in cases of race) it is extremely difficult to determine the circumstances justifying the shift of the burden of proof.

C. Exception for ex officio inquisition proceedings

Paragraph (2) restates an exception from paragraph (1). The provision must be understood to mean that in such proceedings the alleged discriminator does not need to prove innocence. In such cases, the investigating authority has to collect the evidence proving all relevant circumstances, as well as evidence that is in favour of the respondent. It does not exclude the possibility, however, that conclusions or inferences can be made from the established facts. In this sense, presumptions based on paragraph (1) may also apply to proceedings in the sense of paragraph (2).

NOTES

I. Shifting the burden of proof

1. The principle of shifting the burden of proof can be traced back to case-law from the ECJ, see 109/88 [1989] ECR 3199; *Enderby* – C-127/92 [1993] ECR I-5535. Subsequently, it was codified in legislation through Art. 4(1) of the Burden of Proof Directive 1997/80 which lays down that persons who consider themselves to have been discriminated against need only establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination. The burden of proof will then shift to the respondent who must then prove that there has been no breach of the principle of equal treatment. Art. 8(1) of the Racial Equality Directive 2000/43, Art. 10(1) of Directive 2000/78/EC, and Art. 9(1) of the General Sex Discrimination Directive set out equivalent rules on the burden of proof. In addition, the preambles to all non-discrimination directives provide that "the rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought" (Recital 21 of the Antiracism Directive; Recital 31 of the Directive 2000/78/EC; Recital 22 of the General Sex Discrimination Directive; and Recital 30 of the Directive on Principle of Equal Opportunities and Equal Treatment of Men and Women 2002/73).
2. Recent ECJ case law has dealt with the meaning of "facts from which it may be presumed that there has been direct or indirect discrimination". In *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* (10 July 2008 – C-54/07) it was held that "public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43." Some ambiguities exist with regard to the requirements placed on the person alleging discrimination. According to the English version of the Directives he or she has to establish facts from which it may be presumed that there has been discriminatory conduct, i.e. has to fully prove these facts. In the German version the person is only required to provide credible evidence ("*glaubhaft machen*") of the facts from which the discrimination may be presumed. Thus, the German version suggests that the Directive was intended to lower the burden of proof in three respects. First, to lower the requirements posed on the complainer; he or she does not have to prove the facts but is only required to "provide credible evidence of" these facts. Secondly, the facts need not inevitably point to a discriminating conduct: it is sufficient if they indicate a possible discrimination. And thirdly, once the complainer has provided

credible evidence of these facts, the burden of proof shifts to the alleged discriminator. Although most of the other language versions make a difference at least in the wording between the complainer and the discriminator – for the former, "*établit*" (French), "*espongono*" (Italian), "*prezinta*" (Romanian), "*referir*" (Spanish), while for the latter "*prouver*" (French), "*provare*" (Italian), "*dovedească*" (Romanian), "*demostrar*" (Spanish) – it does not seem that the different wordings do in fact imply a different meaning. The Hungarian version requires both the complainer and the discriminator to prove and uses the same word ("*bizonyítania*" or "*bizonyítanak*"). The legal term "*valóstínusiteui*" which comes close to the German "*glaubhaft machen*" is not used.

3. Most Member States chose to simply copy the text of the Directives into national law. For example, the provisions on the shift of the burden of proof in DENMARK (Ethnic Equality Act art. 7); FINLAND (Non-Discrimination Act art. 17); GREECE (Law 3304/2005 art. 14(1)); IRELAND (Equal Status Act s. 38A(1)); LUXEMBOURG (Law of 28 November 2006 art. 5(1); Law of 21 December 2007 art. 8(1)); MALTA (Equal Treatment of Persons Order art. 13(1)); the NETHERLANDS (General Equal Treatment Act art. 10(1)); PORTUGAL (Law 18/2004 art. 6(1) and Law 14/2008 art. 9(1)) are almost identical to that found in the Directives. According to the FRENCH Law 2008-496 art. 4(1) the complainer has to present facts (*présente les faits*), whereas the respondent has to prove that the conduct is justified. Under SLOVENIAN law the discriminated person has to "quote" facts before the alleged offender must prove that he or she did not violate the principle of equal treatment (Act Implementing the Principle of Equal Treatment art. 22(2)). SPANISH law provides that the burden shifts if well-founded evidence of discrimination can be inferred from the allegations (*alegaciones*) of the complainant (Law 62/2003 art. 32; Law 3/2007 art. 13(1)), whilst according to the SWEDISH Discrimination (Goods and Services) Act art. 21 it is sufficient if the victim can point to circumstances that support a claim. ESTONIAN law requires the alleged discriminator, at the request of the competent body, to explain the reasons and motives for his or her behaviour (Gender Equality Act art. 4(1)).

4. BELGIAN law provides some guidance on how the victim can establish facts which could lead the judge to presume that discrimination has occurred. According to Law of 10 May 2007 on Combating Racial Discrimination art. 30 the victim who is seeking damages on the basis of CC art. 1382 will be authorised to produce "*statistical data*" and "*tests de situation*". But statistical data and situation tests are merely "*exemplative*" of the kinds of facts which could be brought forward to reverse the burden of proof. From a distinction which is "*intrinsèquement suspect*" it can also be presumed that there has been discrimination (Law of 10 May 2007 on Combating Gender Discrimination art. 33(3)(2)).

5. The burden of proof provision adopted by the HUNGARIAN legislator (Equal Treatment Act art. 19) is more generous for the victim than the solution applied by the Directives as it requires the victim only to substantiate that he or she has suffered a disadvantage and that he or she falls under any ground of discrimination. The victim is thus not required to establish the causal link between the discrimination criteria and the disadvantage.

6. Several legal systems have rules that require the complainer to "prove" (rather than to "establish") facts from which a discrimination may be presumed. This is in line with the English version of the Directive (see above, Note 2). Although the German version of the Directive speaks of "credible evidence", under GERMAN law (General Equal Treatment Act § 22) the claimant has to "*beweis[en]*" (rather than "*glaubhaftmachen*") facts which may indicate a possible discrimination. Literally interpreted this provision is not in line with the Directives; however, it is argued that it can be interpreted

accordingly (MünchKomm (-*Thüsing*) BGB[5], § 22 AGG no. 2). The old CYPRUS Equal Treatment Law art. 7 required the claimant "to prove" facts from which a violation could be inferred. This was changed by the Law amending the Equal Treatment (Racial or Ethnic origin) No. 147(I)/2006: the claimant has now merely to introduce such facts. The BULGARIAN Protection against Discrimination Act art. 9 requires the victim to "prove" ("*докаже*") the facts. Similarly, under the ROMANIAN law (Law 137/2000 art. 27(4) the person alleging discrimination has to "prove" the existence of facts from which a discrimination may be presumed ("*dovendi existenta unor fapte care permit a se presupune existenta unei discrimină directe sau indirecte*"). The UNITED KINGDOM Race Relations Act s. 57ZA(2) and Sex Discrimination Act s. 63A(2) also provide that the claimant has to "prove facts from which the court could conclude that the respondent has committed such an act of discrimination."

7. Some Member States have not satisfactorily transposed the reversal of burden of proof. The AUSTRIAN Equal Treatment Act § 35(3), while lowering the burden, is not considered to comply with the Directives. According to this provision, the respondent has only to prove that "it is more likely that a different motive – documented by facts established by the respondent – was the crucial factor in the case or that there has been a legal ground of justification (in cases of indirect discrimination)". Under ITALIAN law (Law 215/2003 art. 4(3)), if the person who considers himself or herself wronged by discrimination establishes facts about the existence of discrimination, the judge can evaluate such elements on the basis of CC art. 2729 that allows a "prudent appreciation" of presumptions. There is no explicit shift of the burden of proof. However, the reversal of burden of proof contained in the General Sex Discrimination Directive has been implemented correctly by repeating the provision word for word (Law 198/2006 art. 55-sexies).

8. A small number of Member States have fallen short in implementing the burden of proof provisions. Under LATVIAN law the burden of proof only shifts in the area of employment. The same applies to POLISH law, where, however, the draft Anti-Discrimination Act will introduce a provision that is applicable also outwith employment law. Originally, the LITHUANIAN Law on Equal Treatment had no provision for shifting the burden. However, after a recent amendment a provision on the burden of proof can be found in art. 4.

II. Exceptions

9. All the non-discrimination directives provide an exception with regard to procedures in which a competent authority has to investigate the facts of the case (Art. 8(5) of the Antiracism Directive, Art. 10(5) of Directive 2000/78/EC, Art. 9(5) of the General Sex Discrimination Directive, and Art. 19(3) of Directive 2002/73/EC – in this last case the provision also encompasses other named procedures). Additionally, the Directives exempt criminal cases from the shift of the burden of proof, e.g. Art. 8(3) of the Antiracism Directive; Art. 9(3) of the General Sex Discrimination Directive.

10. Express exceptions for penal proceedings are provided by the anti-discrimination laws of BELGIUM, ESTONIA, FINLAND, FRANCE; HUNGARY; LUXEMBOURG; PORTUGAL and SPAIN. In the other Member States it is presumed that criminal cases are excluded from the provisions on the burden of proof.

11. Some Member States made use of the exceptions provided by Art. 8(5) of the Antiracism Directive and Art. 9(5) of the General Sex Discrimination Directive and decided not to apply the shift of the burden of proof to cases in which courts have an investigative role. For example, in ESTONIA (Gender Equality Act art. 4(2)) and

FRANCE (Code of Administrative Justice art. R441-1) the burden of proof is not shifted in administrative procedures which are inquisitorial in nature. Under PORTUGESE law this principle does not apply to actions when it is up to the court to carry out the investigation (Law 18/2004 art. 6(2)).

12. Several legal systems refrained from including an exception for administrative procedures, e.g., HUNGARY; MALTA; NETHERLANDS; SWEDEN; UNITED KINDOM. Under GERMAN law, which also does not provide such an exception, it is presumed that the shift of the burden of proof is applicable also to administrative procedures (MünchKomm (-*Thüsing*), BGB[5], § 22 AGG no. 5). On the other hand, under SLOVAKIAN law the shifting of the burden of proof is applicable to "civil judicial proceedings" only.

13. A third group of Member States explicitly extend the burden of proof principle to administrative proceedings. According to GREEK Law 3304/2005 art. 14(3) the shift also applies in the framework of administrative actions. The LUXEMBOURG Law of 28 November 2006 art. 5(1) and Law of 21 December 2007 art. 8(1) states that if a victim establishes facts from which discrimination may be presumed "*devant la jurisdiction civile ou administrative*" the other party has to prove the contrary. Similar provisions can also be found in SLOVENIAN (Act Implementing the Principle of Equal Treatment art. 22(1)) and SPANISH law (Law 62/2003 art. 32).

CHAPTER 3: MARKETING AND PRE-CONTRACTUAL DUTIES

Section 1: Information duties

II.–3:101: Duty to disclose information about goods, other assets and services

(1) Before the conclusion of a contract for the supply of goods, other assets or services by a business to another person, the business has a duty to disclose to the other person such information concerning the goods, other assets or services to be supplied as the other person can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances.

(2) In assessing what information the other person can reasonably expect to be disclosed, the test to be applied, if the other person is also a business, is whether the failure to provide the information would deviate from good commercial practice.

COMMENTS

A. General principle and scope

Each party to a contract can generally be expected to assume the responsibility of obtaining the relevant factual and legal information that party may need before entering into a contract. There is no overarching general principle that requires the full disclosure of all the relevant information which the opposite party may need in order to make a fully-informed decision about whether to conclude a contract on particular terms.

This Article focuses on circumstances where the supplier of goods, other assets or services is in possession of information about the quality and performance of those goods, other assets or services, disclosure of which can reasonably be expected by the other party. It does not require the positive disclosure of all the information the supplier may have about the assets or services, but only of information which is relevant in assessing the quality and performance and which the other party can reasonably expect to be given. It is a disclosure provision in the sense that the supplier can usually not be reasonably expected to provide information that it neither has nor ought to have. However, where the supplier has such information, it must be disclosed in order to avoid any subsequent liability for supplying assets or services not in conformity with the contract.

The information duty imposed by this Article is limited in two respects. Firstly, the duty to disclose is only imposed on businesses. Secondly, the subject matter of the contract to be concluded by the business must be the supply of goods, other assets or services to another person. Consequently, for other types of contracts (e.g. partnership agreements), different and even stricter disclosure rules may apply. The status of the other person, i.e. the recipient, is relevant for determining how the “reasonable expectations” test is concretised. If the other party is not a business, the “normal standards of quality and performance” test applies (paragraph 1). If, however, the other party is also a business, the less strict “gross deviation from good commercial practice” test is applicable (paragraph 2).

B. Normal standards of quality and performance

If the other party to the contract is not a business, the starting point for establishing the information to be disclosed is the "standards of quality and performance which would be normal in the circumstances of the case" (paragraph 1). If there is no information that would indicate that the goods, other assets or services would deviate from this standard, then there will be no further duty to disclose information.

> *Illustration 1*
> Business A is the seller of a car, and B is the buyer. There are no problems with the car and it is of the quality normal for the type and make of car, and performs as normal. There is no duty under this Article on the seller to disclose any information.

However, if the business supplying the goods, other assets or services has information that the quality or performance of the goods or services to be provided will fall below the normal standard, then there is a duty to disclose this information to the other party.

> *Illustration 2*
> Business A is the seller of a car, and B is the buyer. A is aware that there is a problem with this car's engine when the car is driven for short distances only. This information would affect the level of quality and performance B could reasonably expect of a car of this type and make. A has a duty to disclose this information.

Information relevant in this context often relates to sub-normal standards of quality of performance. However, other information concerning what is to be supplied may be relevant as well. If, for example, the supplier knows that goods cannot be used for a particular purpose mentioned by the buyer, the buyer can reasonably expect to be informed about the uselessness of the goods for this purpose.

> *Illustration 3*
> Business A is the seller of a car, and B is the buyer. There are no problems with the car and it is of the quality normal for the type and make of car, and performs as normal. However, it is the previous season's model, and a new model is about to replace the model of the car to be sold within the next few days. If A knows this it must disclose this fact to the buyer.

Legal requirements related to the subject matter of the contract may be as relevant as physical ones. If the seller knows that the buyer is not allowed by law to use the goods in the way the buyer plans to do, and the seller is aware of these plans, the seller must inform the buyer of the legal obstacles.

> *Illustration 4*
> Business A is selling premises of a size suitable for a small shop to B. A knows that B plans to use them for a shop and also knows that according to municipal legislation the premises cannot be used for shop keeping. A should inform the buyer of this fact.

C. Deviation from good commercial practice

If the other party to the contract is also a business, the "reasonable expectations" test is modified. In this case, the test to be applied when assessing what information has to be

provided is whether the failure to provide the information would deviate from good commercial practice. The reason for this modification is that in business to business relationships there are fewer pre-contractual disclosure duties than in business to consumer relationships. The standard of good commercial practice is also used in determining pre-contractual information duties applicable to commercial agency, franchise and distributorship agreements cf. IV.E.–2:101 (Pre-contractual information duty). A related (yet less strict) standard is used for assessing the unfairness of standard terms in a contract between business parties under II.–9:405 (Meaning of "unfair" in contracts between businesses). According to this provision a term is considered unfair if it "grossly deviates from good commercial practice, contrary to good faith and fair dealing".

D. Relationship to other provisions

This Article only deals with duties to provide information. False and misleading information is not dealt with in this context, cf. paragraph (1) of the following Article and II.–7:201 (Mistake) and II.–7:205 (Fraud).

The Article ties in with the provisions on non-conformity of goods as expressed e.g. in Book IV.A, Chapter 2, Section 3 (Conformity of the goods) and in the Consumer Sales Directive 1999/44/EG. As explained above, it is generally the case that a seller of goods who is aware of matters rendering goods not in conformity with the contract can make the buyer aware of these and thereby avoid liability for failure to perform the contractual obligation to ensure that the goods conform with the contract (see, in particular, IV.A.–2:307 (Buyer's knowledge of lack of conformity). There is therefore already an incentive for the seller to make such a disclosure. The present Article restates this position as a disclosure duty which applies to suppliers of goods, other assets or services.

NOTES

1. There is in ESTONIAN law no such specific provision as the present article. However, different provisions form the basis for similar duties. LOA § 14(2) creates a general pre-contractual duty to inform the other party of all circumstances the other person can reasonably expect, i.e. with regard to which the other party has, based on the purpose of the contract, an identifiable essential interest. If such circumstances directly concern the subject matter of the contract, LOA § 218(4) creates an incentive for the seller to make a disclosure as the seller is not liable for any lack of conformity of a thing if the purchaser was or ought to have been aware of the lack of conformity upon entry into the contract. Additionally, LOA § 221(1) 2) provides that a purchaser may rely on the lack of conformity regardless of the purchaser's failure to examine a thing or give notification of the lack of conformity on time if the seller is aware or ought to be aware of the lack of conformity or the circumstances related to it and does not disclose such information to the purchaser (see LOA § 645(1) and (2) respectively for service contracts). In relation to consumers, a seller or a service provider should disclose information according to ConsProtA §§ 4-8.
2. In SLOVAKIA, generally the doctrine of mistake (CC § 49a) would apply to situations where a supplier fails to provide necessary information to the other party when entering into contract, if the mistake was caused or known by the supplier. This duty is stressed in business to consumer relations. The act of the trader is considered misleading also in the event of not disclosing a variety of information (see ConsProtA

§ 5), which is illicit. There is no express test of reasonable expectations of the consumer which underlies the information to be provided regarding characteristics of the goods or services (the test uses only the notion of the "ordinary quality" of goods – see ConsProtA § 2(k)). This duty is based on several provisions e.g. mistake (CC § 49a), consumer sales law (CC § 617), liability for defects (CC §§ 499, 596, 597), consumer protection and unfair commercial practices (ConsProtA §§ 5, 7 et seq., 11 et seq.). The principle of fair trade practices pursuant to Ccom § 265, as a general principle governing commercial legal relations, together with the doctrine of mistake, could similarly be taken into account, as there are no specific information duties imposed on businesses in business to business contracts.

3. In the HUNGARIAN CC § 205(3) parties must cooperate during the conclusion of a contract and respect each other's rightful interests. Parties must inform each other regarding all essential circumstances in relation to the proposed contract before the contract is concluded.

4. Under BULGARIAN law, there are two related provisions. The first one is the classical rule of LOA art. 12 (1950) – "in the negotiation and conclusion of contracts parties have to act according to good faith.". The second one is ConsProtA arts. 4 and 5 which concerns the duties of a business towards a consumer on the conclusion of sales and services contracts.

II.–3:102: Specific duties for businesses marketing to consumers

(1) Where a business is marketing goods, other assets or services to a consumer, the business has a duty not to give misleading information. Information is misleading if it misrepresents or omits material facts which the average consumer could expect to be given for an informed decision on whether to take steps towards the conclusion of a contract. In assessing what an average consumer could expect to be given, account is to be taken of all the circumstances and of the limitations of the communication medium employed.

(2) Where a business uses a commercial communication which gives the impression to consumers that it contains all the relevant information necessary to make a decision about concluding a contract, the business has a duty to ensure that the communication in fact contains all the relevant information. Where it is not already apparent from the context of the commercial communication, the information to be provided comprises:

(a) the main characteristics of the goods, other assets or services, the identity and address, if relevant, of the business, the price, and any available right of withdrawal;
(b) peculiarities related to payment, delivery, performance and complaint handling, if they depart from the requirements of professional diligence; and
(c) the language to be used for communications between the parties after the conclusion of the contract, if this differs from the language of the commercial communication.

(3) A duty to provide information under this Article is not fulfilled unless all the information to be provided is provided in the same language.

COMMENTS

A. General scope

This Article imposes specific information duties on businesses marketing goods, other assets or services. Its scope deviates in two respects from the scope of II.–3:101 (Duty to disclose information about goods, other assets and services). Firstly, the duties under the present Article only apply to relations between businesses and consumers. Secondly, the duties arise only in the context of the marketing of goods, other assets or services.

Paragraph (1) imposes a duty not to give misleading information when goods, other assets or services are marketed to consumers. It is aimed in particular at "bait" advertising designed to lure customers into a store with misleading information about bargains on offer.

Paragraph (2) contains a "completeness rule" for commercial communication (e.g. advertising and marketing information), which seeks to improve the rather unclear model of Art. 7 paragraph (4) of the Unfair Commercial Practices Directive 2005/29/EC. In a situation where a business uses a commercial communication to draw the availability of particular assets or services to the consumer's attention, and the communication itself gives the impression to consumers that it contains all the relevant information necessary to make a decision about concluding a contract, the commercial communication must in fact provide all the relevant information.

In such circumstances, some information will have to be given, provided that this is not already apparent from the communication. However, it does not apply to general marketing activities by a business where it is clear that a consumer may have to take additional steps

before it will be possible to acquire the assets or services, such as visiting a shop or a web-site.

B. Duty not to give misleading information

Paragraph (1) imposes a duty on businesses not to give misleading information in the marketing of goods, other assets or services to consumers. It is based on Art. 7(1) of the Unfair Commercial Practices Directive 2005/29/EC. Information is misleading for this purpose if it misrepresents or omits material facts which the average consumer could expect to be given for an informed decision on whether to take steps towards the conclusion of a contract. In assessing what an average consumer could expect to be given, account is to be taken of all the circumstances and of the limitations of the communication medium employed

As this provision is a consumer protection provision related to marketing, its formulation has to be in more general terms (using the notion of the average consumer) than the more individual "reasonable expectations" mentioned in II.–3:101 (Duty to disclose information about goods, other assets and services) paragraph (1). In many cases the requirements of both Articles are similar. However, this Article indicates that in consumer relationships the required information should, to the extent prescribed by the Article, have been provided in the marketing of the goods.

> *Illustration 1*
> Business X markets 'antique' decoration telephones to consumers. Both II.–3:101 (Duty to disclose information about goods, other assets and services) paragraph (1) and paragraph (1) of the present Article require that X should provide information about the material fact that connecting these telephones to the telephone network is not allowed. According to paragraph (1) of the present Article, however, X should have provided this information in its marketing even before entering into any communication with a particular potential buyer.

In addition, the scope of this Article is broader in the sense that it covers information other than just information concerning the assets or services to be provided.

The notion of the "average consumer" was developed in the case law of the European Court of Justice, primarily in the context of Art. 28 EC (free movement of goods) and misleading advertising (cf. e.g., C-210/96 – *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung*, C-220/98 – *Estee Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* and C-44/01 – *Pippig Augenoptik GmbH & Co. KG v Hartlauer Handelsgesellschaft GmbH*) and is also defined in the Preamble to the Unfair Commercial Practices Directive 2005/29/EC, Recital 18.

The duty under the present Article is subject to two limitations. First, in assessing what an average consumer could expect to be given, account is to be taken of all the circumstances and of the limitations of the communication medium employed. Regard must be had to the whole context in which the information might be provided. The circumstances and context may therefore determine which information is material, and how detailed the information to be provided must be. Secondly, the limitations of the communication medium employed are relevant. Thus, where the business is communicating with the consumer by telephone, it may

be possible to provide fewer items of information than when using a website, or e-mail communication.

C. Completeness rule

Paragraph (2) only covers the situation where the business uses a commercial communication which gives the impression to consumers that it contains all the relevant information necessary to make a decision about concluding a contract. In such a case, the commercial communication must in fact contain all the relevant information. In addition, more concrete requirements on the content of the information can be given.

The information that has to be made available covers the main characteristics of the assets or services, the address and identity of the business, and the price. The consumer's right of withdrawal, where available according to the law, must also be included in this. In most commercial communications, this information will already be provided, and this paragraph would not impose any additional duties on a business.

In addition, if the practices of the business with regard to payment, delivery, performance and complaint handling depart from the requirements of professional diligence, then this must also be stated. The term "professional diligence", which is derived from Art. 2(h) of the Unfair Commercial Practices Directive 2005/29/EC, relates to the standard of special skill and care which a business may reasonably be expected to exercise, measured with reference to honest market practice in the particular business sector, and good faith. In some situations, a business may offer a level of complaint handling which goes beyond this basic standard. Where this is the case, it is likely that a business would advertise this fact as part of its overall marketing strategy, and such information would therefore already be provided.

Paragraph (2) does not exclude the simultaneous application of paragraph (1), if its requirements are not fulfilled.

D. Sanctions for breach of information duties

The provision is derived from unfair commercial practices law (cf. Art. 7 Unfair Commercial Practices Directive 2005/29/EC), but it seems to have a useful role to play within the contract law framework as well. As it will be at least partially 'consumed' by II.–3:101 (Duty to disclose information about goods, other assets and services) in a situation when a contract is concluded, it will have its main role as a basis for damages under II.–3:109 (Remedies for breach of information duties) paragraph (2). However, as the information requirements according to this Article in some aspects go further than those of II.–3:101 (Duty to disclose information about goods, other assets and services), it may be used as a basis for contractual claims according to II.–3:109 paragraph (3) as well.

Illustration 2
Business X, which markets 'antique' decoration telephones, omits in its marketing to inform consumers of the material fact that to connect these telephones to the telephone network is not allowed. Consumers who run up travel expenses for visiting X's shop because of the marketing can claim damages for such costs under II.–3:109 (Remedies for breach of information duties) paragraph (2), even though they do not conclude any contract, having learnt about this feature.

NOTES

1. There is no specific comparable provision in ESTONIAN law. See note to Article II.–3:101.
2. In SLOVAKIA, generally, the binding effect of publicly presented statements regarding the characteristics of goods or services is provided for in CC § 496. The prohibition of omitting to provide material information is referred to in ConsProtA § 8 cl. 4 (in connection with other provisions of that paragraph), which implements Art. 7(1) of the Unfair Commercial Practices Directive respectively. The situation in paragraph (2) is regulated by ConsProtA § 8 cl. 6 in connection with other provisions of ConsProtA § 8. Specific information requirements in relation to commercial communication including advertising or marketing are to be found in separate acts (see ConsProtA § 8 cl. 7 and fn 15 thereof).
3. The respective rules in BULGARIAN law are ConsProtA arts. 4–8. ConsProtA arts. 9(1), 13(3), 68g, pp. 8, 153 (the latter concerns specially the time-sharing contract) set obligations regarding the language of contracts. According to the general civil law, (abuse of language not known or familiar to one of the contracting parties can lead to nullity because of lack of consent (LOA art. 26(2)).

II.–3:103: Duty to provide information when concluding contract with a consumer who is at a particular disadvantage

(1) In the case of transactions that place the consumer at a significant informational disadvantage because of the technical medium used for contracting, the physical distance between business and consumer, or the nature of the transaction, the business has a duty, as appropriate in the circumstances, to provide clear information about the main characteristics of any goods, other assets or services to be supplied, the price, the address and identity of the business with which the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available right of withdrawal or redress procedures. This information must be provided a reasonable time before the conclusion of the contract. The information on the right of withdrawal must, as appropriate in the circumstances, also be adequate in the sense of II.–5:104 (Adequate information on the right to withdrawal).

(2) Where more specific information duties are provided for specific situations, these take precedence over the general information duty under paragraph (1).

(3) The business bears the burden of proof that it has provided the information required by this Article.

COMMENTS

A. General idea and scope

This Article sets out, in general form, three key situations in which particular pre-contractual information duties are imposed on a business dealing with a consumer, because the consumer is placed at a significant informational disadvantage. Such situations may be based on (i) the technical medium used for entering into a contract; (ii) the physical distance between the consumer and the business, or (iii) the nature of the particular transaction.

B. Significant informational disadvantage

The Article does not impose a general duty to disclose information before a contract is concluded between a business and a consumer. Instead, the circumstances are limited to those where the consumer is at a significant informational disadvantage. It is generally the case that consumers are subject to an informational disadvantage when dealing with a business, because the business will generally know more about the goods or services it provides. It will also have the benefit of experience from repeat transactions, whereas a consumer will often engage in the transaction once only. The scope of this Article is therefore restricted by requiring that the informational disadvantage has to be significant.

The Article is further limited by linking the significant informational disadvantage to the technical medium used for entering into a contract; the physical distance between business and consumer and the nature of the transaction. Therefore, it is not merely the existence of the significant informational disadvantage that activates the duty to provide information before a contract is made, but the fact that this disadvantage is caused by one (or more) of the three factors mentioned. Thus, buying goods over the internet creates a significant informational disadvantage because the consumer is unable to examine the goods (or a sample or representative model). The same applies where a consumer orders goods by telephone. Distance selling and e-commerce are therefore paradigm situations.

Illustration 1
S runs an on-line electronics store. C wishes to buy a washing machine and places an order over the internet. As C cannot inspect the washing machine before deciding to purchase, he is placed at a significant informational disadvantage. S is therefore required to provide information about the main characteristics of the washing machine, its price, including the cost of delivery, and other relevant information (including the existence of a right of withdrawal).

The nature of the transaction might also cause a significant informational imbalance; this will particularly be so in the case of high-value low-frequency transactions. An example is a contract for a timeshare, which is complex and requires the provision of information before a consumer decides to enter into a transaction. If, however, the informational disadvantage is based on the inexperience of the consumer rather than on the complexity of the transaction, the Article does not impose an information duty on the business.

Illustration 2
C who knows very little about personal computers has gone to S's store to purchase a new laptop. C is at a significant informational disadvantage because she has very little information about computers. However, the disadvantage is not caused by the technical medium used, nor is there a physical distance between C and S, nor is the nature of the transaction itself the cause of the disadvantage. Consequently, there is no duty on S to provide information under this Article.

C. Categories of information

The Article lists a number of categories of information. These are expressed in very general terms, but they reflect the different items of information that have been required by the existing rules on pre-contractual information disclosure in the acquis communautaire. This generalisation is inspired by the provisions of the Unfair Commercial Practices Directive 2005/29/EC, where broad general categories similar to the ones listed in this Article are used. Existing legislation which requires the disclosure of information in particular situations frequently contains more detailed requirements. It is generally possible to group these requirements under the headings provided by the categories listed in this Article. For example, the present Article refers to the "main characteristics" of the goods, other assets or services. Under the Timeshare Directive 1994/47/EC, a business is required to provide a long list of particulars about the property subject to the timeshare contract. Many of these could be classed as relating to the main characteristics of the service provided. Paragraph (1) is therefore not intended to replace these more detailed catalogues of information, but to provide a broad statement of the instances when information duties may be imposed, and what sort of information will be required.

The phrase "rights and obligations of both contracting parties" may include obligations regarding the means of delivery. Also, where there are no "redress procedures" available, it may be desirable to at least provide an address to which a consumer may send a complaint.

The Article contains the qualification that the business must provide the relevant information "as appropriate in the circumstances". This emphasises that it may not always be appropriate to provide information under all of the headings listed in the Article. Alternatively, some of the information may be obvious and need not be provided separately.

D. Time and form of information

The Article requires the business to provide the information in reasonable time before the conclusion of the contract. In order to effectively compensate the informational disadvantage addressed the consumer must be able to assess the relevance of the information provided for the decision whether or not to conclude the contract. How much time the consumer needs for evaluating the information provided by the business depends in particular on the nature of the product.

With regard to the information on the right of withdrawal, the last sentence of this Article stipulates that such information must also be adequate in the sense of II.–5:104 (Adequate information on the right to withdraw). Consequently, the existence of a right to withdraw has to be appropriately brought to the consumer's attention and must provide, in textual form on a durable medium and in clear and comprehensible language, information about how the right may be exercised, the withdrawal period, and the name and address of the person to whom the withdrawal is to be communicated.

The formal requirements applicable to the other information items mentioned are set out in II.–3:106 (Clarity and form of information) paragraph (1).

E. Relation to more specific information duties

Paragraph (2) reflects the fact that paragraph (1) is a generalisation, and that it will be necessary to spell out the items of information that should be provided in the context of specific contracts in more detail, such as package travel or timeshare, or in particular, contracting situations, such as distance or doorstep selling. Paragraph (2) confirms that where rules have been adopted for specific contracts, these rules apply instead and no recourse should be allowed to paragraph (1) to create additional information duties.

NOTES

1. There is no specific comparable provision in ESTONIAN law (see also note to II.–3:101). However, detailed regulation can be found covering information duties in case of distance contracts (LOA § 54(1)), distance selling of financial services LOA § 54(1^1)) and contracts entered into through computer networks (LOA § 62^1, see also note to Article II.–3:104 (Information duties in real time distance communication).
2. In SLOVAKIA, the general duty to provide information in the sense of the list in Art. 6 of the Unfair Commercial Practices Directive is provided for in ConsProtA § 8 as stated above. These duties are specified with regard to a particular disadvantage of the consumer in specific cases in separate Acts – Distance selling (§ 10 Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling as amended) – here regulation of the duty to inform about the withdrawal period proved necessary (see amendment No. 118/2006); e-commerce (§§ 4, 5 Act No. 22/2004 on electronic commerce as amended); time-sharing (CC § 55) and others.
3. In BULGARIA no such general rule can be found. The consumer law, however, contains several regulations of the same kind which can be used by way of analogy. These are arts. 48 ff (distance sales), ConsProtA arts. 149 ff (time sharing), consumer credits (ConsCredA), distance financial services contracts (arts. 8 ff of the Distance Financial Services Act 2006) and electronic trade (Electronic Trade Act 2006).

II.–3:104: Information duties in real time distance communication

(1) When initiating real time distance communication with a consumer, a business has a duty to provide at the outset explicit information on its name and the commercial purpose of the contact.

(2) Real time distance communication means direct and immediate communication of such a type that one party can interrupt the other in the course of the communication. It includes telephone and electronic means such as voice over internet protocol and internet related chat, but does not include communication by electronic mail.

(3) The business bears the burden of proof that the consumer has received the information required under paragraph (1).

(4) If a business has failed to comply with the duty under paragraph (1) and a contract has been concluded as a result of the communication, the other party has a right to withdraw from the contract by giving notice to the business within the period specified in II.–5:103 (Withdrawal period).

(5) A business is liable to the consumer for any loss caused by a breach of the duty under paragraph (1).

COMMENTS

A. Background and purpose

This Article is modelled on Art. 4(3) of the Distance Selling Directive 1997/7/EC and Art. 3(3)(a) of the Distance Selling of Financial Services Directive 2002/65/EC which both require businesses to disclose their identity and their commercial purposes when initiating certain kinds of real time distance communication with a consumer. The provision, which has the character of a market practices rule, is designed to ensure that the consumer is warned at the outset of the communication that he or she is engaging in a commercial communication and should assess the statements made by the business with the necessary attention and caution.

It should be noted that II.–3:106 (Clarity and form of information) specifies that a duty to provide information – including the duty established by the present Article – is not fulfilled unless the information is clear and precise, and expressed in plain and intelligible language.

B. Real time distance communication

Paragraph (1) states that the disclosure duty applies when a business initiates "real time distance communication" with a consumer. This term is used neither in the Distance Selling Directive 1997/7/EC nor in the Distance Selling of Financial Services Directive. 2002/65/EC Art. 4(3) of the Distance Selling Directive 1997/7/EC stipulates the duty to disclose the identity and the commercial purpose of the communication only for "telephone communications". The more recent Art. 3(3)(a) of the Distance Selling of Financial Services Directive 2002/65/EC uses the term "voice telephony communications". This wording clarifies that the disclosure rule also applies to electronic means such as voice over internet protocol ("voice over IP"). What both traditional telephones and voice over IP communication have in common is that they involve a direct, immediate and interruptible ("real time") communication between the business and the consumer. Paragraph (2) spells this out and, in order to provide some guidance on the scope of application mentions some technologies covered, and not covered, by this expression.

C. Burden of proof and sanctions

The Article provides two sanctions for breach of the duty.

First, under paragraph (4) the consumer has a right to withdraw from any contract concluded as a result of a failure by the business to comply with the duty. The withdrawal period is the general one laid down in II.–5:103 (Withdrawal period). The effect of this rule is that the consumer who is not told that there is a right to withdraw has a year from the time of conclusion of the contract but a consumer who is told that there is a right to withdraw (on any ground) has 14 days from that notification. It should be noted that, in the vast majority of cases, the withdrawal right granted in paragraph (4) does not add anything to the rights of the consumer, as there will in any event be a withdrawal right under II.–5:201 (Contracts negotiated away from business premises). Thus, paragraph (4) is just a gap filling sanction for those cases where the consumer has no right of withdrawal under II.–5:201 (Contracts negotiated away from business premises) because of the exceptions set out in paragraphs (2) and (3) of that Article.

Secondly, under paragraph (5) the business is liable for any loss caused to the consumer by a breach of the duty.

In order to make sure that the sanction for a violation of the disclosure rule is "effective, proportional and dissuasive" – as required e.g. by Art. 11 of the Distance Selling of Financial Services Directive 2002/65/EC – paragraph (3) states that the business bears the burden of proof that the consumer received the information required under this Article.

NOTES

1. ESTONIAN LOA § 54(2) sent. 2 is similar to paragraph (1) of the present Article, but is limited to "telephone communication" only.
2. The SLOVAK law does not specify the "distance communication over telephone" in case of distance selling of financial services pursuant to § 4 cl. 3 of the Act No. 266/2005 on Consumer Protection in distance financial services as amended, nor the "offer over telephone" in distance selling cases (§ 10 cl. 2 Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling as amended). In spite of that, the notion and its resulting information duties as in this Art., could apparently be used also for VoIP. Internet related chat would fall under the general regime of information duties in distance communication (§ 10 cl. 1 Act No. 108/2000 as amended, resp. § 4 ods. 1 et seq. Act No. 266/2005 as amended). The sanctions for breaching these duties are to be found in separate acts (see the fn. 23 resp. 25 of the above Acts).
3. Several regulations in the sense of this article of the DCFR are contained in BULGARIAN law in arts. 4 and 5 of the Electronic Trade Act 2006. However, the questions of the burden of proof and of the withdrawal are regulated in the respective general texts of the ConsProtA (arts. 61, 107, 146(4) and 47, 55, 154).

II.–3:105: Formation by electronic means

(1) If a contract is to be concluded by electronic means and without individual communication, a business has a duty to provide information about the following matters before the other party makes or accepts an offer:

(a) the technical steps to be taken in order to conclude the contract;
(b) whether or not a contract document will be filed by the business and whether it will be accessible;
(c) the technical means for identifying and correcting input errors before the other party makes or accepts an offer;
(d) the languages offered for the conclusion of the contract;
(e) any contract terms used.

(2) The business has a duty to ensure that the contract terms referred to in paragraph (1)(e) are available in textual form.

(3) If a business has failed to comply with the duty under paragraph (1) and a contract has been concluded in the circumstances there stated, the other party has a right to withdraw from the contract by giving notice to the business within the period specified in II.–5:103 (Withdrawal period).

(4) A business is liable to the consumer for any loss caused by a breach of the duty under paragraph (1).

COMMENTS

A. General scope

This Article contains a list of information items necessary for the smooth conclusion of contracts by electronic means. The scope of the Article is limited in two respects. First, the information duties are imposed only on businesses (irrespective of the status of the other party). Secondly, the information duties do not apply to contracts concluded by exchange of electronic mail or other equivalent individual communications.

It should again be noted that II.–3:106 (Clarity and form of information) specifies that a duty to provide information – including the duty established by the present Article – is not fulfilled unless the information is clear and precise, and expressed in plain and intelligible language.

B. Information requirements

The Article is broadly modelled on art. 10 of the E-Commerce Directive 2000/31/EC. However, there are some notable deviations from the model. While art. 10(1)(c) of the E-Commerce Directive 2000/31/EC requires information about technical means for identifying and correcting input errors "prior to the placing of the order", under sub-paragraph (c) the information has to be given "before the other party makes or accepts an offer". This change allows for the application of the rule without taking a position as to how the conclusion of the contract takes place, i.e. which party makes or accepts the offer.

Unlike art. 10(2) E-Commerce Directive 2000/31/EC, the wording of this Article does not stipulate a duty of the business to indicate the relevant codes of conduct to which it has subscribed. An express reference to codes of conduct has been omitted in this Article mainly for two reasons. First, the Member States' experience with art. 10(2) E-Commerce Directive

2000/31/EC does not show clearly that the duty to indicate relevant codes of conduct does play an important role in legal practice across the European Union. Second, in those cases in which the specific provisions of a code of conduct are of importance for the contractual relationship, one can expect that these provisions will be referred to or even included in the contract itself. Consequently, in those cases reference to those terms will be covered by the disclosure duty provided by sub-paragraph (e).

C. Sanctions for breach of information duties

See the Comments to the preceding Article.

NOTES

1. Paragraph (1) corresponds to LOA § 62^1(2) in ESTONIAN law. Paragraph (2) corresponds to LOA § 62^1(5) in Estonian law.
2. The SLOVAK provision of § 5 (esp. cl. 3) Act No. 22/2004 on electronic commerce as amended, uses the wording of the E-Commerce Directive and thus refers to the present Article. There is a duty to reveal a code of conduct only if an applicable one for such services exists (§ 5 cl. 5 (a)).
3. This article of the DCFR corresponds almost literally to the BULGARIAN Electronic Trade Act 2006.

II.–3:106: Clarity and form of information

(1) A duty to provide information imposed on a business under this Chapter is not fulfilled unless the requirements of this Article are satisfied.

(2) The information must be clear and precise, and expressed in plain and intelligible language.

(3) Where rules for specific contracts require information to be provided on a durable medium or in another particular form it must be provided in that way.

(4) In the case of contracts between a business and a consumer concluded at a distance, information about the main characteristics of any goods, other assets or services to be supplied, the price, the address and identity of the business with which the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available redress procedures, as may be appropriate in the particular case, must be confirmed in textual form on a durable medium at the time of conclusion of the contract. The information on the right of withdrawal must also be adequate in the sense of II.–5:104 (Adequate information on the right to withdraw).

COMMENTS

A. Meaning and purpose

This Article complements the other provisions in this Chapter by explaining how information required elsewhere has to be provided. It contains requirements with regard to both the clarity and the form of information.

B. Clarity of information

According to paragraph (2) all pre-contractual information supplied by a business under Book II, Chapter 3 must be clear and precise. This means that the information should not be ambiguous, and must, reasonably, avoid leaving room for different interpretations. In addition, the language used must be plain and intelligible. This means that technical language should be avoided as much as possible. Where such language has to be used, it should be explained adequately.

Illustration

Company S operates a website for selling laptops on-line. It is required (under II.–3:105 (Formation by electronic means)) to provide a consumer with certain items of information. In giving this information, S needs to ensure that the information is clear and precise. For example, a statement about the cost of supplying a laptop along the lines of "€499.99, with additional tax and delivery charges as notified in our standard terms and conditions" is insufficiently clear and precise, whereas a statement that supplying the laptop "costs €549.99 (including all taxes and delivery costs)" would be acceptable.

C. Form of information

Paragraph (3) recognises that there may be instances where such information has to be provided on a durable medium or in another particular form. It is not a general requirement that information always has to be provided in a particular form, but this may be needed for specific contracts. Paragraph (4) provides an example of such a rule stipulating that specific

information items required for distance contracts need to be confirmed in textual form on a durable medium at the time of the conclusion of the contract.

D. Sanctions for breach of form requirements

The effect of paragraph (1) is that failure to satisfy particular form requirements for an information duty will amount to a breach of the duty. However, the consequences of this particular type of breach may nevertheless be different for damages than the consequences of a failure to provide information. This is because of the causation requirement – the loss for which damages are claimed must have been caused by the incorrect or missing information, or the fact that information was not provided in the correct form. But the losses caused by having information in an incorrect form may not be the same as the losses caused by not having received the information in question at all.

It must also be noted that there may be additional consequences, because a failure to observe the correct form may trigger additional rights, such as the right to withdraw from the contract or to terminate the contractual relationship.

NOTES

1. In ESTONIA there is no general provision comparable to paragraph (2), but the principle that information duties are not fulfilled unless the information is clear and precise, and expressed in plain and intelligible language is generally supported (e.g. explicitly for distance contracts see LOA § 54(2)). Paragraph (2), LOA § 54(1) provides for a detailed regulation on information duties in the case of distance contracts with consumers. Required information should be confirmed in writing or by means of any other durable data medium accessible by the consumer not later than during the time of the performance of the contract or, in the case of movables, not later than at the time of delivery (LOA § 55). As the consequences of failure to observe requirements of LOA § 55 (see previous paragraph of the note), the time-limit for the consumer to exercise the right of withdrawal from the distance contract will be postponed up to 3 months from conclusion of a contract (LOA § 56(2)). Additionally, a consumer may, on general grounds, claim compensation for damage which occurred due to the non-performance of the obligation (LOA § 115(1)).
2. In SLOVAKIA, the need of clarity, preciseness or unambiguity of information provided, is reiterated in several acts: ConsProtA § 5 cl. 1 and § 11 et seq., § 4 cl. 5 Act No. 22/2004 on electronic commerce as amended, § 4 cl. 2 Act No. 266/2005 on Consumer Protection in distance financial services as amended, CC § 56 cl. 1. Specific forms of information, in line with the directives' provisions, are necessary in certain situations. For example, (in line with the present Art. para. (3)), there is a requirement of a written form of information in distance selling pursuant to § 10 cl. 3 and 4 Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling as amended. The effect of paragraph (4) would be the same, as there are no special provisions on remedies for non-justification of the information duty's form (see e.g. § 12 cl. 1 Act No. 108/2000 as amended).
3. In BULGARIA duties in relation to the clarity and preciseness of information are contained in several texts of the consumer law (business to consumer – relations) – e.g. BULGARIAN ConsProtA arts. 5, 9, 16, 24, 25, 52, 59, 68f, 119, 145.

II.–3:107: Information about price and additional charges

Where under this Chapter a business has a duty to provide information about price, the duty is not fulfilled unless what is provided:

(a) includes information about any deposits payable, delivery charges and any additional taxes and duties where these may be indicated separately;

(b) if an exact price cannot be indicated, gives such information on the basis for the calculation as will enable the consumer to verify the price; and

(c) if the price is not payable in one sum, includes information about the payment schedule.

II.–3:108: Information about address and identity of business

(1) Where under this Chapter a business has a duty to provide information about its address and identity, the duty is not fulfilled unless the information includes:

(a) the name of the business;

(b) any trading names relevant to the contract in question;

(c) the registration number in any official register, and the name of that register;

(d) the geographical address of the business;

(e) contact details;

(f) where the business has a representative in the consumer's [Member] state of residence, the address and identity of that representative;

(g) where the activity of the business is subject to an authorisation scheme, the particulars of the relevant supervisory authority; and

(h) where the business exercises an activity which is subject to VAT, the relevant VAT identification number.

(2) For the purpose of II.–3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage), the address and identity of the business include only the information indicated in (1) (a), (c), (d) and (e).

II.–3:109: Remedies for breach of information duties

(1) If a business has a duty under II.–3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage) to provide information to a consumer before the conclusion of a contract from which the consumer has the right to withdraw, the withdrawal period does not commence until all this information has been provided. Regardless of this, the right of withdrawal lapses after one year from the time of the conclusion of the contract.

(2) If a business has failed to comply with any duty imposed by the preceding Articles of this Section and a contract has been concluded, the business has such obligations under the contract as the other party has reasonably expected as a consequence of the absence or incorrectness of the information. Remedies provided under Book III, Chapter 3 apply to non-performance of these obligations.

(3) Whether or not a contract is concluded, a business which has failed to comply with any duty imposed by the preceding Articles of this Section is liable for any loss caused to the other party to the transaction by such failure. This paragraph does not apply to the extent that a remedy is available for non-performance of a contractual obligation under the preceding paragraph.

(4) The remedies provided under this Article are without prejudice to any remedy which may be available under II.–7:201 (Mistake).

(5) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. Scope of remedies

This Article provides for several categories of remedies for breach of information duties stated in Book II, Chapter 3, Section 1. The first remedy, which is only available for violations of II.–3:103 (Duty to provide information when concluding a contract with a consumer who is at a particular disadvantage), is a delay in the commencement of the period for the exercise of an existing right to withdraw (paragraph (1)). Secondly, the failure to fulfil any duty under this Section of this Chapter may also affect the substance of the obligations assumed under the contract and may result in the incorrect performance or non-performance of contractual obligations (paragraph (2)). The third remedy, which also applies to all information duties in this Section, is a right to damages for loss caused by the failure to inform (paragraph (3)). Finally, it is made clear by paragraph (4) that remedies for mistake are not affected. Under II.–7:201 (Mistake) paragraph (1)(b)(iii) a party may be able to avoid a contract for mistake if the other party caused the contract to be concluded in error by failing to comply with a pre-contractual information duty.

B. Prolongation of the right to withdraw

Paragraph (1) is based on several provisions in the Acquis communautaire that provide for the prolongation of an existing right of withdrawal in case of a violation of certain information duties (cf. Art. 5 Doorstep Selling Directive 1985/577/EEC, Art. 5(1) Timeshare Directive 1994/47/EC, Art. 6 Distance Selling Directive 1997/7/EC and Art. 6(1) Financial Services Distance Selling Directive 2002/65/EC). Reflecting these provisions, paragraph (1) of this Article states that in case of a violation of the information duty under II.–3:103 (Duty to provide information when concluding contract with a consumer who is at a particular

disadvantage) the period for the exercise of an existing withdrawal right does not commence until all the information required has been provided.

One of the more thorny issues in this context is whether the commencement of the withdrawal period is extended indefinitely or whether there should be a long-stop for extending the withdrawal period. Case law before the ECJ had established that the prolongation of the withdrawal period because of a violation of information duties under certain Directives which do not provide for a clear long-stop may be unrestricted (C-481/99 – *Heininger v. Bayerische Hypotheken- und Wechselbank*). However, the second sentence of paragraph (1) provides for such a long-stop stating that the right of withdrawal lapses after one year from the time of the conclusion of the contract.

C. Consequences for the substance of the contract

Paragraph (2) reflects the general idea that information available in the pre-contractual context can have a bearing on the substance of a contract. Thus, if a contract has been concluded, failure to provide the required pre-contractual information, or to use the correct form, can affect the substance of the obligations assumed under the contract, and may result in the non-performance of contractual obligations.

D. Right to damages

Paragraph (3) deals with the issue of damages. A right to damages is available regardless of whether or not a contract is concluded. Thus, if the information provided by one party was incomplete and has caused the consumer to decide not to conclude a contract at all, the other party may still have a right to damages, although in these circumstances damages could not be awarded for non-performance of a contractual obligation. The question of damages is further considered in II.–3:501 (Liability for damages).

E. Relation to other provisions

The remedies available for breach of pre-contractual information duties are partially found in other parts of contract law, related both to business-to-consumer relations as well as to other contractual relationships. In some situations an omission to give information can be misleading in a way that makes the general provisions on validity of contracts or on unfair contract terms applicable. Failure to comply with the duties in this Section may have consequences within existing validity rules, e.g. when establishing whether there has been legal intention, fraud, etc., although those consequences may not amount to remedies in the strict sense.

In other situations the omission can lead to such a difference between the other party's expectations and the actual performance that remedies for non-performance of contractual obligations may be available. In particular, if the omission to provide information leads to a situation in which the other party concludes a contract misinformed about some relevant fact, this party in a contract of sale has the ordinary remedies for lack of conformity.

NOTES

1. If there is a failure to observe the requirements of ESTONIAN LOA § 55 or LOA § 54^1 in case of financial services, the commencement of the withdrawal period for the consumer distance contract is extended, but the consumer may withdraw from the contract within three months as of the date on which the consumer receives the goods or, in the case of services, as of the date of entry into the contract (LOA § 56(2)). If required information is communicated in the required form during this three-month term, the consumer may withdraw from the contract within the term initially foreseen, i.e. 14 days in case of distant contracts. The right to withdraw from a contract for services expires if the supplier has commenced the service before the expiry of the term for withdrawal with the consent or on the initiative of the consumer (LOA § 56(2) sent. 4). Similarly to paragraph (3), non-performance of the obligation to inform may give grounds to claim for compensation of damage irrespective of whether parties concluded a contract (LOA § 115(1)) or not (LOA § 115(1) in conjunction with § 14(2)) There is no specific provision comparable to paragraph (2) in ESTONIAN law. However, the same principle may be drawn from several provisions. LOA § 217(2) 6) generally provides that a thing does not conform to a contract if, in a consumer sale, the thing does not possess the quality usual for that type of thing which the purchaser may have reasonably expected based on the nature of the thing and considering the statements made publicly with respect to particular characteristics of the thing by the seller, producer or previous seller of the thing or by another retailer, in particular in the advertising of the thing or on labels. Further, LOA § 221(1) 2) provides that a purchaser may rely on the lack of conformity regardless of the purchaser's failure to examine a thing or give notification of the lack of conformity of the thing on time if the seller is aware or ought to be aware of the lack of conformity of the thing or the circumstances related to it and does not disclose such information to the purchaser (similarly LOA § 645(1) 2) for service contracts). LOA § 101(2) gives general freedom to choose a remedy: in the case of non-performance, the creditor may resort to any legal remedy separately or resort simultaneously to all legal remedies which arise from law or the contract and can be invoked simultaneously unless otherwise provided by law or the contract. However, according to the good faith principle a party may be hindered from declaring the contract void because of a mistake in circumstances related to the subject matter of the contract if remedies for non-performance of the contractual obligations are available and are less detrimental to the other party (Varul/Kull//Kõve/Käerdi (*-Kull*), Võlaõigusseadus II, Pref. to §§ 217-228, no. 3.1.1.). Similarly to paragraph (5) of the present Article, LOA §§ 62 and 62^1(7)) state that agreements which derogate from the provisions regulating minimum protection of consumers in case of distance contracts and contracts entered into through computer networks to the detriment of the consumer are void.
2. In SLOVAKIA, the stricter remedies according to paragraph (1) are to be found in separate Acts implementing respective Directives (§ 12 Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling as amended, CC § 59 cl. 2, § 5 cl. 1 Act No. 266/2005 on Consumer Protection in distance financial services as amended). The wording of § 8 cl. 1 in connection with § 7 cl. 1 lit. d) Act No. 108/2000 differs from the Art. 5(1) Doorstep Selling Directive and thus could be interpreted as denying the prolongation of the withdrawal period contrary to the requirements of European law. Since there are no special provisions on damages regarding breach of information duties, the general provisions on damages (CC §§ 415 and 420) would apply. Similarly, failure to provide information does not absolve the business from its contractual obligations, but gives rise to additional rights of the

consumer (cf. CC § 55 cl. 2, § 12 cl. 3 Act No. 108/2000 as amended). If the requirements of the doctrine of mistake under CC § 49a are met, the contract would be voidable by the misled party (cf. CC § 40a).

3. The BULGARIAN ConsProtA art. 68f(4) contains such obligations for a business only in the field of consumer sales. Remedies for non-compliance with the respective requirements are not provided. So they remain for the time being a *lex imperfecta*. The last paragraph of the same article uses a very unsatisfactory juridical technique – instead of listing the requirements, the law simply refers to the "requirements of Directives nos. …".

Section 2: Duty to prevent input errors and acknowledge receipt

II.–3:201: Correction of input errors

(1) A business which intends to conclude a contract by making available electronic means without individual communication for concluding it, has a duty to make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer.

(2) Where a person concludes a contract in error because of a failure by a business to comply with the duty under paragraph (1) the business is liable for any loss caused to that person by such failure. This is without prejudice to any remedy which may be available under II.–7:201 (Mistake).

(3) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. Scope

Paragraph (1), which is modelled on Art. 11(2) of the E-Commerce Directive 2000/31/EC sets up specific technical requirements for enabling an e-commerce customer to identify and correct input errors in the process of concluding a contract. The scope of application of this Article is limited in two respects: Firstly, the duties under paragraph (1) are only imposed on businesses (irrespective of the status of the other party). Secondly, no such duty applies if the contract is concluded by means of individual electronic communication, e.g. e-mail.

Art. 11(2) of the E-Commerce Directive 2000/31/EC requires that technical means for identifying and correcting input errors have to be provided "prior to the placing of the order". In contrast, the above Article states that such technical means have to be available "before the other party makes or accepts an offer". This change of wording allows for the application of the rule without taking a preconceived position as to how the conclusion of the contract takes place, i.e. which party makes or accepts the offer.

According to paragraph (3), in relations between businesses and consumers, the Article is mandatory in favour of a consumer.

B. Sanctions and relation to other provisions.

The E-Commerce Directive 2000/31/EC does not provide for a clear sanction for the breach of the duty under its Art. 11 and leaves the determination of sanctions to the Member States. In contrast, paragraph (2) of the present Article states that the business is liable for any loss caused to the other party because of the erroneous conclusion of a contract due to the business's failure to comply with sub-paragraph (1) of this Article. This is without prejudice to any remedy which may be available under II.–7:201 (Mistake). Under II.–7:201 paragraph (1)(b)(iii) a party may be able to avoid a contract for mistake if the other party caused the contract to be concluded in error by failing to comply with a duty to make available a means of correcting input errors.

The Article is complemented by II.–3:105 (Formation by electronic means) paragraph (1)(c) which requires businesses to provide information about the technical means for identifying and correcting input errors.

NOTES

1. ESTONIAN LOA § 62^1(1) is similar to paragraph (1) of the present Article. The principles stated in paragraph (2) can be inferred from LOA § 14(1), LOA § 14(2) and LOA § 115. LOA § 14(1) imposes an obligation to take reasonable account of the other party's interests and rights in the precontractual stage, LOA § 14(2) imposes a general duty to provide information with regard to which the other party has, based on the purpose of the contract, an identifiable essential interest and LOA § 115 enables a party to claim compensation for damage in the case of non-performance of an obligation. As to avoidance for mistake, see note to Article II.–3:109 (Remedies for breach of information duties) paragraph (4). According to LOA § 62^1(7), in relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of LOA § 62^1(1) (duty to provide technical means for correction of input errors) or derogate from or vary its effects. A standard term which precludes or unreasonably restricts the claims of the other party *vis a vis* the party supplying the terms or another party, i.e. modifies otherwise available remedies (LOA § 101(2) 2), see also note to II.–3:109 paragraph (4)) to the detriment of the consumer is deemed to be unfair and is therefore void according to the "black list" in LOA § 42(3) 2).
2. The SLOVAK provision of § 5 cl. 3 lit. a) Act No. 22/2004 on electronic commerce as amended, takes the wording of the E-Commerce Directive provision, and similarly does not provide for specific remedies for breach of this duty. Therefore general civil law (CC § 49a – mistake; CC § 420 – damages) prevails. If the contract is concluded between businesses, liability under §§ 373 et seq. Ccom would apply.
3. The BULGARIAN Electronic Commerce Act 2006 contains the duties mentioned in paragraph (1), but does not provide remedies for non-fulfilment as is done in paragraph (2). The prohibition of derogation in business to consumer relationships (paragraph (3)) is regulated in the general text of ConsProtA art. 143, pp. 1 and 2.

II.–3:202: Acknowledgement of receipt

(1) A business which offers the facility to conclude a contract by electronic means and without individual communication has a duty to acknowledge by electronic means the receipt of an offer or an acceptance by the other party.

(2) If the other party does not receive the acknowledgement without undue delay, that other party may revoke the offer or withdraw from the contract.

(3) The business is liable for any loss caused to the other party by a breach of the duty under paragraph (1).

(4) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Section 3: Negotiation and confidentiality duties

II.–3:301: Negotiations contrary to good faith and fair dealing

(1) A person is free to negotiate and is not liable for failure to reach an agreement.

(2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract.

(3) A person who is in breach of the duty is liable for any loss caused to the other party by the breach.

(4) It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

COMMENTS

A. The subject matter

In trying to obtain a contract a person may commit fraud or make misrepresentations or threats. For such behaviour the person may become liable in damages whether there is a valid contract or not. The question of validity is dealt with later.

The present Article deals primarily with the duty to negotiate in accordance with good faith and fair dealing and with the liability of a party to negotiations for harm caused to the other party by entering into or continuing negotiations with the intention not to make a contract or by breaking off negotiations contrary to good faith and fair dealing.

B. Freedom to negotiate and to break off

Apart from cases where the law imposes a duty to make certain contracts, or at least prevents the selection of a contracting partner in a discriminatory fashion (see Chapter 2 (Non-Discrimination), a person is free to decide whether or not to enter into negotiations and whether or not to conclude a contract. This principle is restated in paragraph (1), which sets the scene for the rest of the Article. A person may enter into negotiations even though uncertain as to whether a contract will result. A person may break off the negotiations, and does not have to disclose why they were broken off. Shopkeepers and other sellers will generally have to accept that people inspect their goods and ask for prices and other terms without buying. The same applies to lessors and sellers of apartments and houses who invite inspection of the premises.

C. Freedom qualified by duty

The freedom stated in paragraph (1) is qualified by the duty, set out in paragraph (2), to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. The duty may not be excluded or limited by contract. It will be noted that this is a duty, not an obligation. The remedies for non-performance of an obligation are not all available. In particular, the remedy of specific performance is not available: it could be impracticable to try to enforce specifically a duty to negotiate fairly and in good faith. The remedies of withholding performance of reciprocal obligations and

termination of reciprocal obligations are also unavailable. This means that, for example, breach by one party of the duty to negotiate in accordance with good faith and fair dealing does not entitle the other to disregard his or her reciprocal duty. However, breach of the duty may give rise to a liability for damages under paragraph (3).

D. Entering into negotiations contrary to good faith and fair dealing

A person, and especially a professional, who enters into negotiations knowing that they will never result in a contract may be held liable to the other party if the other, in negotiating in vain, incurred significant costs.

Illustration 1
A, who lives in England, applies for a senior post at B's factory in Spain. B has offered to pay travel expenses for attending an interview. A never has any intention of taking the job, but simply wants a free trip to Spain in order to visit a friend. B pays A's travel expenses but later learns the truth. A is liable to B for the costs B incurred in paying for A's travel.

E. Continuing negotiations contrary to good faith and fair dealing

There may also be liability for continuing negotiations after one has decided not to conclude the contract.

Illustration 2
The facts are the same as in Illustration 1 except that when starting the negotiations A did intend to take the job if it seemed suitable. The decision not to accept any offer of a post with B was made after the first interview. However, in order to get a second free trip A pretends to be interested in attending a second more intensive interview and gets travel expenses for that. B then learns the truth. A is liable to B for the costs incurred by B in paying for the second lot of travel expenses.

F. Breaking off negotiations contrary to good faith and fair dealing

A person may incur liability for breaking off negotiations contrary to good faith and fair dealing.

Illustration 3
B has offered to write a software programme for A's production. During the negotiations B incurs considerable expenses in supplying A with drafts, calculations and other written documentation. Shortly before the conclusion of the contract is expected to take place, A invites C, who can use the information supplied by B, to make a bid for the programme, and C makes a lower bid than the one made by B. A then breaks off the negotiations with B and concludes a contract with C. A is liable to B for the expenses incurred by B in preparing the documentation.

G. Basis of liability

Liability may be based on misrepresentation: see Illustrations 1 and 2 where A led B to believe that he intended to conclude a contract. Such misrepresentation may give rise to a right to damages under Book VI (Non-contractual Liability arising out of Damage caused to Another) but the present Article provides an alternative basis of claim. Liability may also be imposed because a party gave promises during the negotiations.

Illustration 4
A assures B that B will obtain a franchise to operate a grocery store as one of A's franchisees. The conditions are that B invest a stated amount and acquire some experience. In order to prepare herself for the franchise B sells her bakery store, moves to another town, and buys a lot. The negotiations, which last over two years, finally collapse when A charges a substantially larger financial contribution than the one originally contemplated, and B finds herself unable to make this contribution. Although there is no evidence that the promises originally made by A were made contrary to good faith, A's breach of these promises is contrary to good faith, and A will be held liable to B for the losses B suffered in preparing for the franchise.

H. Heads of damages

The losses for which the person who acted contrary to good faith and fair dealing is liable include expenses incurred (Illustration 1), work done (Illustration 3) and loss on transactions made in reliance of the expected contract (Illustration 4). In some cases loss of opportunities may also be compensated. However, the aggrieved party cannot claim to be put into the position in which that party would have been if the contract had been duly concluded and if the obligations under it had been duly performed.

Illustration 5
Weare, a company which manufactures clothes, is about to order material of a registered design from Cloth, a company which owns the copyright. Another company, Scham, falsely claims that it owns the copyright and offers to supply the material to Weare at a lower price than Cloth has offered. By the time Weare discovers that Scham does not own the copyright and cannot sell the material, Weare has lost the chance to sell the dresses it intended to make from the material. Weare, which has not made any contract with Scham, may claim damages for lost opportunity and wasted expenses from Scham, but not the amount Weare would have saved by paying the lower price which Scham had offered.

NOTES

I. Liability for negotiation contrary to good faith.

1. Under the laws of the Union, a person is free to start negotiations even if it is not known whether or not any contract will be concluded. A person may also break off negotiations, and, in general, will not have to account for the reasons for doing so. For example, where the contracts are prepared by the parties' lawyers, there is in general no deal and no duty to make a deal until the contract documents are signed and delivered, see *von Mehren*, Formation of contracts, no. 38.
2. However, several systems have rules similar to those in the Article, imposing liability on a party who, when negotiating a contract, acts contrary to good faith and fair dealing and thereby causes loss to the other party.
3. In the 19th century the German writer *von Jhering* established a doctrine on *culpa in contrahendo*. Under this doctrine, entering into contractual negotiations creates a special legal relationship which imposes on each party a duty of care. A violation of this duty of care constitutes *culpa in contrahendo*, which entails liability. The courts in GERMANY and AUSTRIA and in 2002 the GERMAN CC § 311(2) have adopted

this doctrine, and so has the GREEK CC, arts. 197 and 198, SLOVENIAN LOA § 20 and the PORTUGUESE CC art. 227. Also the ITALIAN CC art. 1337 and the BULGARIAN LOA art. 12 impose upon the parties a duty to act in accordance with good faith when conducting negotiations and concluding contracts. In SPAIN, liability is based on the good faith principle laid down in CC art. 7(l), see *Díez-Picazo*, Fundamentos I[4], 274-76. The courts oscillate between contractual liability (CC art. 1101, see Supreme Court decisions of 2 December 1976, RAJ (1976) 5246 and 30 October 1988 (labour court), RAJ (1988) 8183), and delictual liability under CC art. 1902, see Supreme Court decision of 16 May 1988, RAJ (1988) 4308.

4. FRENCH, BELGIAN and probably LUXEMBOURG law also employ delictual liability under CC art. 1382 in case of a wrongful breaking off of negotiations. One example is when a firm offer is wrongfully revoked; see on France, *Terré/Simler/Lequette*, Les obligations[6], no. 183. (However, in exceptional cases the court might hold that a contract has been concluded in spite of the revocation.) The principle is used more widely, however. See on the *culpa in contrahendo* in Belgium: *De Boeck*, Informatierechten en –plichten, 2000, nos. 418-447; *Stijns*, Verbintenissenrecht I, no. 192. Liability for negotiations contrary to good faith is well established in FRENCH case law (no. 185).

5. In a few cases the NORDIC courts have imposed liability for *culpa in contrahendo* in the circumstances described in the present Article. See on DANISH law *Andersen and Nørgaard*, Aftaleloven[2], 109 and Hondius (-*Lando*), Pre-contractual Liability, 113 ff; on SWEDISH law, *Adlercreutz*, Avtalsrätt I[10], 103 ff and *Ramberg*, Allmän avtalsrätt[4], Chapter 6 and on FINNISH law, *Hemmo*, Sopimusoikeus I, 206-226 and Supreme Court case 1999:48 in *Sisula-Tulokas*, Contract and tort law: twenty cases from the Finnish Supreme Court.

6. In POLAND, liability for negotiations contrary to good faith is expressly provided by the civil code (CC art. 72 § 2): "a party who entered into or continued negotiations contrary to fair dealing, especially without any intention to conclude a contract, is liable for losses caused to the other party as a result of that party's reliance that a contract will be concluded". Liability is delictual, unless the parties have concluded a separate negotiation contract.

7. In SLOVAKIA generally the doctrine of freedom of contract prevails. Pre-contractual negotiations do not give rise to specific stricter duties of care. However, according to the general provisions on prevention of harm, parties must not exercise their rights so as to infringe the legitimate interest of others or contravene morality (CC § 3 cl.1). While forming a contract, they have to avoid everything causing dissension (CC § 43). They have to prevent damage by their actions (CC § 415). This duty (of a delictual nature) pursuant to CC § 420 imposes liability on the basis of culpability and covers also the liability of auxiliaries. There is, however, no distinction in legal consequences or procedural position of the parties when considering contractual or delictual liability. A person is also liable for causing damage by an intentional act *contra bonos mores* (CC § 424). Abridgement of such damages is impossible.

8. ENGLISH law does not impose any specific duty on the parties to enter into or continue negotiations in good faith, see *Walford v. Miles* [1992] AC 128, HL Even an express agreement to negotiate cannot be enforced, see *Courtney & Fairbairn Ltd. v Tolaini Bros (Hotels) Ltd.* [1975] 1 WLR 297 (though it has been suggested that an express undertaking to negotiate in good faith is merely part of a wider contract which is binding, the obligation may be enforceable: see *Petromec Inc. v Petrobas Brasileiro SA Petrobras (No 3)* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep 121 at [117]-[121]). Either party has a right to break off negotiations at any stage before the final

conclusion of the contract. Liability for pre-contractual behaviour is only imposed under limited circumstances, see below.

9. In SCOTTISH law, where good faith is an underlying and legitimating principle rather than an active source of liability, older case law imposes liability in some cases where negotiations were broken off in circumstances connoting *culpa*. These are now understood to entail reliance liability where one party acts on the other's implied assurance that there is a binding contract when in fact there was no more than an agreement falling short of contract (*Dawson Internationa*l *plc v. Coats Paton plc* 1988 SLT 854), but this has been criticised as too narrow (*MacQueen and Thomson*, Contract Law in Scotland, §§ 2.89-2.96; cf. *McBryde*, Law of Contract in Scotland[1], paras. 5.57-5.67).

10. In ESTONIAN law, LOA § 14(3) broadly corresponds to the present Article. Breach of the pre-contractual obligation creates liability for damages (as breach of any other existing obligation, incl. contractual) based on LOA § 115. For discussion on the nature and scope of the pre-contractual liability in Estonian law see Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, § 14, no. 4.6.2.

11. The HUNGARIAN CC in its introductory provisions sets forth that in the course of exercising civil rights and fulfilling obligations, all parties should act in the manner required by good faith and fair dealing, and are obliged to cooperate with one another (§ 4(1)). In contract law CC § 205(3) provides that parties must cooperate during the conclusion of a contract and respect each other's legitimate interests. In case of failure to do so, the sanction can be liability for damages.

II. Examples of a behaviour which entails liability

12. In several of the systems a person who enters into or continues negotiations without any intention of concluding a contract may be held liable in damages. A party who becomes unwilling, or knowingly unable, to conclude the contract will have to inform the other party. This view is supported by courts and writers in FRANCE, see *Malaurie and Aynès*, Les obligations[9], no. 464; Cass.civ. 1ère , 6 janv. 1998: Bull.civ. I, no. 7; ITALY, see Hondius *(-Alpa)*, Pre-contractual Liability, 200; DENMARK, Hondius *(-Lando)* Pre-contractual Liability, 117; SWEDEN, see *Ramberg*, Allmän avtalsrätt[4], 83 f and NJA 1990, 745, *(obiter dictum*); FINLAND, *Hemmo*, Sopimusoikeus I, 209; AUSTRIA, see Hondius (-*Posch*), Pre-contractual Liability, 44; GERMANY, see Hondius (-*Lorenz*), Pre-contractual Liability, 165; SLOVENIA, see LOA §. 20(2) and Juhart and Plavšak (-*Kranjc*), Obligacijski zakonik I, p. 24; see also UNIDROIT art. 2.15. For the express rule in ESTONIAN law, see GPCCA § 14(3) sent. 2. There is also support for this view in the laws of ISRAEL, SWITZERLAND AND THE UNITED STATES, see Hondius (-*Hondius*), Pre-contractual Liability, l6.

13. Some countries will hold liable a party who has made the other party believe that a contract may be concluded, and then without good cause breaks off the negotiations. The GERMAN Supreme Court has held a person liable for refusing, without good reason, to continue negotiations after having behaved in such a way that the other party had reason to expect a contract to come into existence with the content which had been negotiated, see BGH 6 February 1969. *Lindenmaier and Möhring*, Nachschlagewerk des BGH, §276 no. 28 and Hondius (-*Lorenz*), Pre-contractual Liability, 166. The same rule applies in AUSTRIA, see Rummel (-*Reischauer*), ABGB I[3], Pref. to §§ 918-933 no. 17: Liability in the case that negotiations are broken of without good reason and therefore against good faith; see also Austrian Supreme Court (OGH) 30 May 1979, 1 Ob 617/79, SZ 52/90; BELGIUM, see *De Boeck*, De precontractuele aansprakelijkheid, 87; *De Coninck*, Le droit commun de la rupture des

négociations précontractuelles, 17 ff; DENMARK, Hondius (-*Lando*), Pre-contractual Liability, 117; FRANCE, see *Terré/Simler/Lequette*, Les obligations[6], no. 185 and Cass.com. 11 juillet 2000 (v. note 6), THE NETHERLANDS, Hondius (-*Dunné*), Pre-contractual Liability, 228, *Plas v. Valburg*, HR 18 June 1982, NedJur 1983, 723 and *CBB v. JPO*, HR 12 August 2005, RvdW 2005, 93); PORTUGAL, STJ 4 July 1991 and 3 October 1991, see BolMinJus 409, 743 and 410, 754 and *Prata*, Notas sobre responsabilidade pré-contratual, 66 ff; ITALY Hondius (-*Alpa*), Pre-contractual Liability, 201 and *Castronovo*, Liability between Contract and Tort, 273 ff; see Cass. 14 June 1999, no. 5830, GI 2000, 1179 and probably also in FINLAND, see *von Hertzen*, Sopimusneuvottelut, 239. For the express rule in ESTONIAN law, see GPCCA § 14(3) sent. 2; for SLOVENIAN law, see LOA § 20(3).

14. In ENGLAND a party will generally not be held liable for breaking off negotiations in such a situation. However, there may be liability if the innocent party has relied on a negligent misstatement by the other party which induced a belief that a contract would be concluded, whereby the innocent party suffered loss, and on the facts there was a special relationship between the parties, see *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465, HL and *Box v. Midland Bank* [1979] Lloyds Rep 391.

15. In IRELAND a "contract to enter into a contract" was held to be binding in *Guardians of Kelly Union v. Smith* (1917) 52 ILTR 65 HC

16. Generally a party will have to bear the expenses incurred by that party in negotiating a contract. If, however, in the *bona fide* belief that a contract will be concluded, a party incurs expenses or does work which exceeds that which one can normally expect from an offeror, and does so at the other party's request or with the other party's consent, the other party will have to pay these expenses or compensate for the work done if the other party breaks off the negotiations without good reasons. This rule is applied in some countries sometimes on the basis of an alleged pre-contract, see on DENMARK Hondius (-*Lando*), Pre-contractual Liability, 121; the NETHERLANDS (semble) idem *(-van Dunné*) 227; and SPAIN, see *Diez-Picazo 276-278*. The SCOTTISH cases base liability upon the reliance interest of the party who has incurred wasted expenditure (*MacQueen and Thomson*, Contract Law in Scotland, § 2.93. In ENGLAND compensation has been awarded on a *quantum meruit* basis, see *William Lacey Ltd. v. Davies* [1967] 1 WLR 932.

17. Contracts for building and engineering works are often preceded by an invitation to make tenders for which the law provides certain rules of procedure. If, in violation of these rules, the employer does not award the contract to a tenderer, the latter has sometimes been awarded damages, see e.g. the GERMAN Supreme Court decision of 25 November 1992 (BGHZ 120, 28l), the ENGLISH case of *Blackpool & Fylde Aero Club Ltd. v. Blackpool Bororough Council* [1990] 1 WLR 1195 CA (where however the facts were slightly different), and the DANISH Supreme Court decision of 30 April 1985 (UfR 1985 550). In AUSTRIA not contracting with the objectively best tenderer might constitute an infringement of § 338 of the *Bundesvergabegesetz* and therefore entitle that tenderer to compensation for loss caused by an unlawful act in the pre-contractual stage (*Koziol and Welser*, Bürgerliches Recht II[13], 19).

18. The preceding situations have been illustrations. There are other situations as well. One is where a person falsely claims to act as a representative of another. For other examples see Hondius (-*Alpa*), Pre-contractual Liability, 201.

III. Remedy

19. In most countries the remedy in such cases is damages, though in ENGLAND sometimes restitution is awarded and not damages. In DENMARK, GERMANY,

AUSTRIA, SCOTLAND, FINLAND, and SWEDEN compensation will be awarded for expenses incurred in reliance on a contract but damages will generally not cover the expectation interest. See for Sweden NJA 1963 105; for Finland CC 1999:48; and for Austria *Welser*, ÖJZ 1973, 287. In AUSTRIA – following the principle of restitution in kind – the remedy might also be the rescission or adaptation of the contract (*Bydlinski*, Bürgerliches Recht I[3], no. 6/39). In GERMANY reliance interest may in certain cases include lost profit, see BGH 17 October 1983, NJW 1984, 866, and sometimes even expectation interest, see BGH 6 April 2001, NJW 2001, 2875.

20. In SPAIN and in ITALY damages are limited to the reliance interest, and do not cover lost opportunities (see for ITALY Cass. 14 February 2000, no. 1632, GI 2000, 2252; *Benatti*, Culpa; *Bianca*, Diritto civile III, 175; *Galgano*, Diritto civile e commerciale II(2)[3], 552; *Sacco and De Nova*, Il contratto II[2], 260; *Antoniolli and Veneziano*, Principles of European contract law and Italian law, 50). In exceptional circumstances, however, the damages awarded have gone beyond the reliance interest. This has happened in the tender cases mentioned above in 1(d). In PORTUGAL the opinions are divided between those who will only give compensation for expenses incurred in reliance on a contract and those who will cover any loss which is adequately caused by the loss of the contract, including lost profit; see on the one hand *Almeida Costa*, RLJ 114 (1983-84), 73 ff, and on the other, *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 216 and *Prata*, Notas sobre responsabilidade pré-contratual, 166 ff. In THE NETHERLANDS the courts most often only award the reliance interest, which may include loss of other opportunities. However, in a case where negotiations have been broken off they may also award damages for the expectation interest, see *Hartkamp*, Interplay.

21. In FRANCE, which does not make, and BELGIUM, which rarely makes, any distinction between reliance and expectation interest, damages may include: various expenses incurred during the time of the negotiation which has been improperly broken, expenses incurred by the breach of the negotiation, the loss of a chance to conclude the negotiated contract with a third party. However, the loss of a chance to make the earnings that the conclusion of the contract would have allowed, had the negotiation not been breached, is not a recoverable loss (Cass.civ. 3è, 28 June 2005, D. 2006, 2693).

22. The amount of damages that can be claimed as a result of breach of pre-contractual negotiations is controversial in POLISH legal doctrine. Most authors maintain that it only includes losses incurred in anticipation of a future contract (see: *Czachórski*, Zobowiązania[8], 170); however, others would agree to award the full damage, including the loss of other opportunities to contract. In any case, damages should not include lost benefits that a party would have gained, had the final contract been concluded (expectation damages).

23. In SLOVAKIA the aggrieved party can claim actual damages and lost profit. Unless the aggrieved party requests it and it is possible, restitution will not be awarded. The courts will usually award compensation for expenses incurred. The reimbursement of lost profit on the unconcluded contract will be judged strictly according to the individual circumstances of each case.

24. In ENGLAND a person who indicates an intention to grant an interest in land to another and who stands by while the other incurs some detriment on the assumption that the interest will be granted, may be liable on the principle of proprietary estoppel, and the court may even order specific performance, see *Crabb v. Arun District Council* [1976] chap. 179, CA

25. In the NETHERLANDS the court may order the party who broke off the negotiations to resume them, see CC art. 3:296 and the case law of the *Hoge Raad* and other courts.

26. In ESTONIAN law, in the absence of express provision, the general principle that damage is not compensated for to the extent that prevention of damage was not the purpose of the obligation or provision in question (LOA § 127(2)) is the guideline for determining the scope of the recoverable damage (Varul/Kull//Kõve/Käerdi (-*Sein*), Võlaõigusseadus I, § 127, no. 4.4.). Following that principle, in case of breach of pre-contractual obligations recoverable damage is generally limited to the reliance interest (Supreme Court Civil Chamber's decision from 5.01.2007, civil matter no. 3-2-1-89-06, p. 16; Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, no. 4.6.2.)

27. In SLOVENIAN law only expenses incurred in preparation for the conclusion of the contract will be reimbursed; however, some authors support the view that the scope of recoverable damages can be larger, see Juhart and Plavšak (-*Kranjc*), Obligacijski zakonik I, p. 230. In the decisions of the Supreme Court No. II Ips 490/2004 from 13.7.2006, lost profit was awarded.

28. See generally *Hondius*, Precontractual Liability.

II.–3:302: Breach of confidentiality

(1) If confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for that party's own purposes whether or not a contract is subsequently concluded.

(2) In this Article, "confidential information" means information which, either from its nature or the circumstances in which it was obtained, the party receiving the information knows or could reasonably be expected to know is confidential to the other party.

(3) A party who reasonably anticipates a breach of the duty may obtain a court order prohibiting it.

(4) A party who is in breach of the duty is liable for any loss caused to the other party by the breach and may be ordered to pay over to the other party any benefit obtained by the breach.

COMMENTS

A. No general duty of confidentiality

Parties who negotiate a contract have in general no obligation to treat the information they have received during the negotiations as confidential. Should there be no contract, the recipient may disclose the information to others, and may make use it.

B. Confidential information

A party, however, may be interested in confidentiality and may expressly declare that information given is to be kept secret, and may not be used by the other party. Further, when no such declaration is made, the receiving party may be under an implied duty to treat certain information as confidential. This implied duty may arise from the special character of the information, and from the parties' professional status. The other party knows or can reasonably be expected to know that this information is confidential. It will be contrary to good faith and fair dealing to disclose it or to use it for the recipient's own purpose if no contract is concluded.

> *Illustration*
> A has offered to acquire B's know-how for the use of special plastic bags in the dyeing industry. During negotiations B must give A some information about the essential features of the know-how in order to enable A to assess its value. Although B has not expressly requested A to treat the information given as confidential, B has sent the written documentation to A at A's personal address and by registered mail, and B has only talked to A about it when they were alone.

A has a duty to treat the information given as confidential. A may not disclose it to others. Should there be no contract, the information may not be used for A's own purposes.

C. Rights and remedies

In relation to breach of confidentiality prevention is often more important than the recovery of damages. This is reflected in paragraph (3). Paragraph (4) gives a right to damages for any loss caused by a breach. The injured party may also be entitled to recover the benefit which the person in breach has received by disclosing the information or by using it even if that

party has not suffered any loss. Although this remedy is not provided by the laws of all the Member States, it seems appropriate by analogy to remedies available for infringement of other intellectual property rights.

NOTES

I. Duty of confidentiality

1. The duty of confidentiality imposed by this Article seems to be accepted in most of the countries of the Union. The writers often treat it as an instance of the parties' duty to observe good faith in contract negotiations, see on DANISH, ITALIAN and DUTCH law, Hondius (-*Lando*), Pre-contractual Liability, 201, (-*Alpa*), 228 and (-*van Dunné*), 120; on GREEK law CC art. 197; and on BELGIAN law, *Derains/Goffin/Hanotiau/Herbots/Marchandise/Renaudière,* Le contrat en formation, 20. In FRANCE and LUXEMBOURG breach of confidentiality is a delict, a violation of a duty to act in good faith, see *Viney and Jourdain*, Les conditions de la responsabilité[1], no. 474. The breach of a duty of confidentiality can amount to an act of unfair competition or a parasitic action (Le Tourneur, no. 847).
2. In GERMANY, AUSTRIA and PORTUGAL the duty of confidentiality follows from the duty of care in contractual negotiations see for Germany, *Larenz and Wolf,* Allgemeiner Teil des deutschen Bürgerlichen Rechts[8], p. 609 and for Portugal *Prata,* Notas sobre responsabilidade pré-contratual, 63 ff. In ENGLAND the courts have established "the broad principle of equity that he who received information in confidence shall not take unfair advantage of it*", see Seager v. Copydex Ltd* [1967] 1 WLR 923, CA, and Hondius (-*Allen*), Pre-contractual Liability, 137. SCOTLAND also recognises a duty of confidentiality; see *Stair*, The Laws of Scotland XVIII, 1451-1492. The ESTONIAN LOA § 14(4) contains a rule similar to the one in the Article (Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, § 14, notes 2. and 4.5).
3. SPAIN is reported not to have a rule similar to the one in the Article. The same is true for SLOVENIA, though a duty of confidentiality follows from the general duty of acting in accordance with good faith.
4. In POLAND, liability and remedies for breach of confidentiality at the stage of negotiations, as stated in the Article, are provided for in CC art. 72.
5. In SLOVAKIA the protection of confidential information in the pre-contractual stage is accepted in commercial legal relations (Ccom § 271). The contractual party has to state the confidentiality of the information, without a need of a specific form. The wrongdoer is obliged to compensate for the damage pursuant to Ccom §§ 373 et seq. (liability regardless of culpability). This duty can be analogically accepted in pure civil relations, as well, with the liability and remedy provisions of the CC § 420 as stated above. If the information is considered a commercial secret according to Ccom §§ 17-20, the protection is stricter and the remedies are the same as provided for in unfair business practices (see Ccom §§ 51, 53-55).
6. In HUNGARIAN law there is no independent head of liability for "breach of confidence". Under CC § 81(1) a violation of another's right of personality is committed by anyone who interferes with the secrecy of postal correspondence, comes into the possession of private or business secrets and publishes them without authorisation or misuses them in any other way. The sanctions are in CC § 84. See also Act no. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices § 4

under which it is prohibited to gain access to, or use, business secrets in an unfair manner, and to disclose such secrets to unauthorised parties or publish them.

7. In BULGARIA a particular duty for confidentiality is contained in CA art. 52, but this norm refers only to the different kinds of commercial representatives. A general duty of confidentiality can be deduced from interpretation of LOA art. 12 (good faith during negotiations and in concluding contracts).

II. What is compensated?

8. In AUSTRIA, BELGIUM, DENMARK, FRANCE, GERMANY and LUXEMBOURG the aggrieved party's loss is compensated, see for Belgium, *Derains/Goffin/Hanotiau/Herbots/Marchandise/Renaudière*, Le contrat en formation, 20 and for Denmark, *Andersen and Nørgaard*, Aftaleloven[2], 109.

9. ITALIAN and PORTUGUESE law will compensate the aggrieved party for loss suffered, and will also allow recovery of the benefit received by the party who misused the information even when the aggrieved party suffered no loss, see for Portugal *Prata,* Notas sobre responsabilidade pré-contratual, 49 ff; for ITALY *Benatti*, Culpa; *Bianca*, Diritto civile III, 166; *Scognamiglio*, Dei contratti in generale, 206; in favour of resorting to the remedies of unjust enrichment (CC art. 2041) *Castronovo*, Obblighi di Protezione. Under DUTCH law also the court may measure the damages by the profit received by the person liable, see CC art. 6:104.

10. In ENGLAND damages for a deliberate misuse of information given may include the defendant's profits, see *Peter Pan Manufacturing Corp.* v. *Corsets Silhouette Ltd.* [1964] 1 WLR 96. If the defendant was merely negligent, the damages may be based on the market value of the information, see *Seager* v. *Copydex Ltd.* [1967]1 WLR 923, CA

11. In SCOTLAND the remedies include compensation for loss and restoration of enrichment, see *Stair,* The Laws of Scotland XVIII, 1488-149l.

12. In SLOVAKIA the remedies are actual loss and lost profit. Instead of lost profit, the aggrieved party can claim recovery of a profit usually realised under similar circumstances according to fair trade and fair dealing (Ccom § 381).

Section 4: Unsolicited goods or services

II.–3:401 No obligation arising from failure to respond

(1) If a business delivers unsolicited goods to, or performs unsolicited services for, a consumer:

(a) no contract arises from the consumer's failure to respond or from any other action or inaction by the consumer in relation to the goods and services; and

(b) no non-contractual obligation arises from the consumer's acquisition, retention, rejection or use of the goods or receipt of benefit from the services.

(2) Sub-paragraph (b) of the preceding paragraph does not apply if the goods or services were supplied:

(a) by way of benevolent intervention in another's affairs; or

(b) in error or in such other circumstances that there is a right to reversal of an unjustified enrichment.

(3) This Article is subject to the rules on delivery of excess quantity under a contract for the sale of goods.

(4) For the purposes of paragraph (1) delivery occurs when the consumer obtains physical control over the goods.

COMMENTS

A. Purpose

The purpose of this Article is to protect consumers from an unwanted marketing technique, the unsolicited delivery of goods or provision of services. It should help to promote correct behaviour by the threat of a private law sanction. As the provision seeks to avoid an aggressive practice, there is in principle no reason to protect the position of the business. The present Article may even be partially just affirmative, as it should anyway follow from the general rules on the formation of contracts (Book II Chapter 4) or on unjustified enrichment (Book VII) that in most cases the business cannot claim anything from the consumer on the basis of such selling methods. But following the model of the Distance Selling Directives 1997/7/EC and 2002/65/EC, the Article expressly makes it clear that no contract arises and that no non-contractual obligation arises except in genuine cases of unjustified enrichment (e.g. delivery in error) or benevolent intervention. The Article deliberately leaves open, whether the ownership of goods passes to the consumer in case of the unsolicited provision of goods. This question is regulated in Book VIII on the Acquisition and Loss of Ownership in Movables. See below.

B. Goods and services in business to consumer relations

The rule concerns both the supply of goods as well as the provision of services by a business to a consumer. This scope of application, in particular the limitation to business to consumer relations (business to consumer), reflects the situation in EC law. This limitation does not support an e contrario conclusion that the unsolicited delivery of goods or provision of services is allowed between businesses in any case.

C. Delivery

Paragraph (4) provides that for the purposes of paragraph (1) delivery occurs when the consumer obtains physical control over the goods. It is useful to say this because the normal definition of "delivery" in the Annex applies only for the purpose of an obligation to deliver goods and here there is no obligation. See also VIII.–2:304 (Passing of ownership of unsolicited goods). The definition makes it clear that delivery to a carrier for the purposes of transmission to the consumer does not suffice for the purpose of this Article.

D. Unsolicited

The delivery of goods or provision of services must be unsolicited. This is not the case where, prior to the supply of the goods or the provision of the services, the consumer has ordered them. If the consumer has made a request which did not amount to an offer in the sense of II.–4:201 (Offer) and the business in response delivered the goods or services in question together with an offer, it is not always clear whether the goods or services are unsolicited. In such cases, the goods or services are not unsolicited if the consumer knew or ought to have known in the circumstances that, in response to the request, the business would link its offer with the delivery of the goods. If a contract has already been concluded between consumer and business, but has subsequently been avoided, the goods or services originally ordered do not thereby become unsolicited. It is also not regarded as an unsolicited supply if the business has supplied goods or provided services which are different from those ordered, but which are similar in terms of price and value, and if the business makes it clear that the consumer is not obliged to accept them and does not have to bear the costs of return. In such circumstances the consumer does not require the protection provided under the present Article.

E. Benevolent intervention, error, excess quantity

Paragraph (2) clarifies some further exceptions from the rigid rule of paragraph (1) with regard to non-contractual obligations. These exceptions are justified because they cover cases where the business clearly is not using an unwanted marketing technique. Benevolent intervention may occur, in particular with regard to services, in emergency situations where non-contractual claims should not be excluded. Where the unsolicited delivery of goods or provision of services is just the consequence of an error (which the business will have to prove) it would be inappropriate to exclude all non-contractual claims. It should be noted that paragraph (2) does not itself grant any right to the business. It just does not exclude non-contractual rights arising from Book V (Benevolent Intervention) or Book VII (Unjustified Enrichment). Paragraph (3) regulates the relationship of the present Article with the more specific provisions in IV.A.–3:105 (Early delivery and delivery of excess quantity).

Illustration 1

Consumer B has ordered a men's wrist watch from business A. By mistake, business A sends a ladies' wrist watch to B. B assumes that A has made a mistake and throws the ladies' wrist watch away. In this case, the present Article does not – according to the purpose of the rule (to prevent improper market behaviour) – catch the behaviour of A, as A has sent B the wrist watch in response to the latter's order and has thus acted in the context of acceptable market behaviour, but has merely made a mistake. The present Article therefore does not apply; thus the business may have a claim based on unjustified enrichment and – if applicable – for damages under the general rules.

Illustration 2
Consumer B has ordered a men's wrist watch for €50 from business A. A intentionally sends B a different, higher value model and, without any further explanation, invoices him for €200 . This case concerns the supply of unsolicited goods. B is under no obligation to pay for the product or to return it.

F. No contract

Paragraph (1)(a) is just affirmative. In the case of unsolicited goods or services, it follows from the general rules on the formation of contract that no contract is concluded as long as the consumer does not respond. This applies in all cases, whether the goods or services were supplied deliberately or by mistake. Mere silence by the consumer is not to be regarded as offer or acceptance. The rule excludes any obligation on the part of the consumer arising from his or her failure to respond. If the consumer does not state that he or she wishes to conclude a contract, no contract is concluded. This also applies if the consumer makes use of the goods supplied or disposes of them, if no other circumstances clearly show that the consumer intends to conclude a contract with the business. All claims which are based on the existence of a contract are excluded. This also includes, in addition to the claim for payment of the price for the goods or service, all contractual claims for non-performance and remedies associated therewith (e.g. damages). No contract based on conduct arises between consumer and business.

Illustration 3
Business A sends consumer B a product together with a statement that, if B does not object, then B will be billed for the product in two weeks time. B does nothing and receives a bill from A after two weeks. B is under no obligation to pay for the product.

Illustration 4
The facts are the same as in Illustration 3, except that B, without making any statement towards B, has used the product a few times. The mere use of the product by B is not to be regarded as an acceptance of A's offer; a contract has therefore not been concluded. B is under no obligation to pay for the product. Neither need B pay any damages for use of the product.

G. No non-contractual obligations

The main field of application of this Article could be paragraph (1)(b) which states that no non-contractual obligation arises from the consumer's acquisition, retention, rejection or use of the goods or receipt of benefit from the services. The provision clearly seeks to have a dissuasive effect on businesses which want to use this marketing technique. The consumer does not need to return the goods or keep them or in any way treat them with care. Paragraph (1)(b) therefore excludes all claims against the consumer for restitution for use and for value, provided they relate to the unsolicited goods or services, irrespective of whether such claims are based on unjustified enrichment, non-contractual liability for damage or property rights, and irrespective of whether the consumer behaved negligently or deliberately. Also restitutionary claims based on property law (rei vindicatio) are excluded.

Illustration 5
The facts are the same as in Illustration 3, except that one week later B dumps the product in a rubbish bin. B is under no obligation to pay damages to business A.

H. Ownership

The provision does not deal not with the question whether the recipient of unsolicited goods becomes owner of them. That is regulated in VIII.–2:304 (Passing of ownership of unsolicited goods) which provides that the consumer acquires ownership if the business (as would normally be the case) had the right or authority to transfer it. The consumer may however promptly reject the acquisition of ownership.

I. Claims against the sender of unsolicited goods

The present Article does not regulate possible claims of the recipient against the supplier of the unsolicited goods or services. If the recipient returns the unsolicited goods, the costs of return may have to be borne by the supplier under the rules of Book V (Benevolent intervention). However, the recipient should be expected to communicate with the supplier before sending the goods back at the supplier's expense. In the rare case where the recipient cannot contact the supplier and comes to the reasonable conclusion that the supplier would want to have the goods back, then the rules on benevolent intervention would apply and there would be a right to reimbursement of the expenditure on sending the goods back. The situation may be similar in the – probably rare – case that the recipient has to incur specific costs for the disposal of the goods. The recipient can recover any price already paid in error under the rules of Book VIII (Unjustified enrichment).

NOTES

1. Distance Selling Directives 1997/7/EC, art. 9, and 2002/65/EC, art. 9, require Member States to "exempt the consumer from any obligation in the event of unsolicited [goods or services being supplied], the absence of a reply not constituting consent."
2. In ESTONIA, LOA § 99 provides protection, similar to the one prescribed in the Article, only for consumers. Any claim is excluded, unless the goods or services were not intended for the consumer, or the person who dispatched the goods or provided the services erroneously believed that the consumer ordered the goods or services and the consumer was or should have been aware of the error. In the latter cases, the rights arising from the law (e.g. unjustified enrichment (LOA § 1027 ff), vindication (LPA § 80)) are not excluded Varul/Kull//Kõve/Käerdi (-*Parkel*), Võlaõigusseadus I, § 99, no. 4.) In SLOVENIA, art. 45 of the ConsProtAmakes clear that for a consumer, no obligations can arise from unsolicited goods or services.
3. In SLOVAKIA, the consumer protection is provided for accordingly in cases of distance selling (§ 11 Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling as amended) and distance selling of financial services (§ 7 Act No. 266/2005 on Consumer Protection in distance financial services as amended). Pure silence or inertia does not imply consent (cf. CC § 44 cl. 1). With the exception of the distance selling of financial services, a vindication right or more usually a right to the reversal of unjustified enrichment (CC §§ 451 et seq.) would be applicable. All the costs would have to be borne by the sender acting in bad faith (CC § 458). It should be noted, that conduct of the sender considered illegal and *contra bonos mores* does not enjoy legal protection (CC §§ 3 cl. 1, 39), not even in commercial legal relations (cf. Ccom § 265).
4. In the UK, the Consumer Protection (Distance Selling) Regulations 2000 (No. 2334) Reg 24 makes it an offence for the supplier to claim payment for unsolicited goods or services. The consumer may treat unsolicited goods as a gift. In addition, the

Unsolicited Goods and Services Act 1971, s. 2. makes it an offence to demand payment for unsolicited goods sent to a business.

5. In BULGARIA there is a long-established doctrinal consensus that silence in response to an offer does not lead to the conclusion of a contract. There are exceptions in Ccom arts. 43, 292 and 301, but they apply to business to business relations only. In the PCL (art. 62) there is now an explicit regulation corresponding to paragraph (1) of the present Article. Paragraphs (2) and (3) of the Article have no corresponding provision in the Bulgarian legislation.

Section 5: Damages for breach of duty under this Chapter

II.–3:501: Liability for damages

(1) Where any rule in this Chapter makes a person liable for loss caused to another person by a breach of a duty, the other person has a right to damages for that loss.

(2) The rules on III.–3:704 (Loss attributable to creditor) and III.–3:705 (Reduction of loss) apply with the adaptation that the reference to non-performance of the obligation is to be taken as a reference to breach of the duty.

COMMENTS

A. General

The main sanction for a breach of one of the duties imposed by this Chapter is that the person in breach is liable for any loss caused by the breach. See II.–3:109 (Remedies for breach of information duties) paragraph (3); II.–3:201 (Correction of input errors) (paragraph (2)); II.–3:202 (Acknowledgement of receipt) paragraph (3); II.–3:301 (Negotiations contrary to good faith and fair dealing) paragraph (3) and II.–3:302 (Breach of confidentiality) paragraph (4). Paragraph (1) of the present Article simply makes it clear that the practical consequence of such liability is that the person who suffers the loss has a right to damages.

This is a self-standing non-contractual right. In case C-334/00 – *Fonderie Officine Meccaniche Tacconi Spa v Heinrich Wagner Sinto Maschinenfabrik GmbH*, a case from Italy involving a claim for wrongfully breaking-off negotiations regarding a contract, the ECJ took the view that this kind of action was a "matter relating to tort" for the purposes of the Brussels Convention. Under these model rules there might indeed be a right to reparation under Book VI (Non-contractual Liability arising out of Damage Caused to Another) for some types of pre-contractual behaviour causing damage. However, as it might not be so straightforward to establish liability under that Book, the person suffering the damage would normally find it easier to recover under the express provisions of this Chapter.

"Loss" is defined in the Annex as including economic and non-economic loss. "Economic loss" includes loss of income or profit, burdens incurred and a reduction in the value of property. "Non-economic loss" includes pain and suffering and impairment of the quality of life.

"Caused" has its normal meaning in this context. See by way of analogy VI.–4:101 (General rule). Given the purpose of pre-contractual duties it should not readily be assumed that normal and reasonable behaviour by the person who suffers the loss would break the chain of causation.

B. Non-application of some provisions from Book III

Book III, Chapter 3, Section 7 (Damages and interest) deals with damages for non-performance of an obligation. The provisions of that Section would not automatically apply to breach of a duty. So III.–3:702 (General measure of damages) and III.–3:703 (Foreseeability)

do not apply here. Indeed the second of these provisions is expressly limited to obligations arising from a contract or other juridical act. So it is the basic test of a sufficient causal link which applies for the purposes of the present Chapter. Tests or rules based on the assumption that the parties are already in contractual relations with each other are inappropriate.

C. Application of two provisions from Book III

Paragraph (2) of the Article applies two provisions from Book III. The first - III.–3:704 (Loss attributable to creditor) – has the effect that a person should not be able to recover damages for loss caused by a breach to the extent that that person contributed to the breach or its effects.

> *Illustration 1*
> X has broken off negotiations with Y, without warning and contrary to good faith and fair dealing. However, Y contributed to this breach of duty by extremely rude and insulting behaviour towards X. If Y tries to recover damages for loss caused by X having broken off negotiations, Y's own conduct will be taken into account.

The second provision taken over from Book III is III.–3:705 (Reduction of loss). This has the effect that the person in breach is not liable for loss suffered by the other person to the extent that the latter could have reduced the loss by taking reasonable steps.

> *Illustration 2*
> In response to some very misleading "bait" advertising X decides to visit a shop in another town. Hoping to get a great bargain and knowing that the business will be liable for any loss if the marketing is misleading, X takes a taxi to travel 50 miles to the shop, when there is perfectly good public transport. The business's liability will be limited to reasonable travel costs.

NOTES

1. For the different approaches to the basis of liability for breach of pre-contractual duties see the Notes to II.–3:301 (Negotiations contrary to good faith and fair dealing).
2. For paragraph (2) see the Notes to the Articles there cited.

CHAPTER 4: FORMATION

Section 1: General provisions

II.–4:101: Requirements for the conclusion of a contract

A contract is concluded, without any further requirement, if the parties:

(a) intend to enter into a binding legal relationship or bring about some other legal effect; and

(b) reach a sufficient agreement.

COMMENTS

A. Contract

In these rules the notion of a contract covers any agreement between two or more parties which is intended to give rise to a binding legal relationship or to have some other legal effect, such as the modification or termination of existing rights or obligations or the immediate assignment or waiver of a right. The notion of a contract includes not only cases where both parties have reciprocal rights and obligations but also cases where only one party has obligations. The present Article is concerned not with defining a contract but with stating the requirements for the conclusion of a contract.

The basic requirements for the conclusion of a contract are that the parties have an intention to enter into a binding legal relationship or bring about some other legal effect and reach a sufficient agreement.

B. Parties

For there to be a contract there must be two or more parties. A contract is a bilateral or multilateral juridical act. Under these rules, unilateral juridical acts of various types, including undertakings intended to be binding without acceptance, may produce legal effects but they are not contracts.

C. Intention

The requirement of an intention to enter into a binding legal relationship or bring about some other legal effect serves to distinguish a contract from such agreements as mere social engagements or mere provisional understandings reached in the course of negotiations. It also leaves it open to parties, if they prefer, to make it clear that they are operating under an agreement or arrangement which is not intended to be a legally binding contract.

It is not necessary that both parties must intend to incur obligations under the contract. They both must intend to enter into a binding legal relationship or to bring about some other legal result but there could be a contract even although only one party had obligations under it.

There could also be a contract even if the intention was to bring about a binding legal result immediately and directly without the intervention of any obligation to do so by a further step.

A party's intention is for this purpose to be ascertained from the party's statements or conduct as reasonably understood by the other party. See the following Article.

D. Sufficient agreement

The requirement of an agreement serves to distinguish a contract not only from unconcluded negotiations which have not yet led to agreement but also from a unilateral juridical act where there is no agreement between two or more parties.

The agreement may be reached by one party's acceptance of the other's offer, by the parties' assent to terms which have been drafted by a third party, or in other ways. An acceptance may be express or may be by doing an act or suffering a forbearance asked for by the offeror.

There must be agreement but a very vague and general agreement might not be enough for there to be a contract. The agreement must also be "sufficient" – that is to say, it must have sufficient content.

E. No further requirement

The existence of two or more parties, the relevant intention of the parties and sufficient agreement between the parties are enough. There are no further requirements. No form is required, save in exceptional cases where this is provided for expressly. Nor is it necessary that one party undertakes to furnish or furnishes something of value in exchange for the other party's undertakings (consideration). Unlike the laws of some Member States, these model rules do not require consideration or *cause*, nor do they require that to create certain contracts, property must be handed over to the party who is to receive it (real contracts). The additional requirements (which in many cases are attenuated or are readily evaded) do not seem to fulfil a sufficiently important function to be desirable elements of a modern model for contract law. Any residual functions of consideration or cause, such as preventing very one-sided agreements from being enforceable, are fulfilled by other rules, such as II.–7:207 (Unfair exploitation).

The fact that there is no further requirement for the formation of a contract does not mean that a contract, once formed, may not be invalid because of some defect of consent or illegality. These topics are dealt with later (see Chapter 7 (Grounds of Invalidity)).

NOTES

I. Introduction.

National laws

1. In BELGIUM, FRANCE and LUXEMBOURG the rules on formation are laid down in the decided cases, which were in origin inspired by the 18th century writer *Pothier,* Obligations. CC art. 1108 of BELGIUM, FRANCE and LUXEMBOURG is the only provision of the codes dealing with the formation of contracts. It provides that the

necessary conditions for the validity of a contract are consent of the party who assumes an obligation, capacity to contract, a certain object which forms the matter of the agreement and a lawful *cause*. The SPANISH CC has similar rules in arts. 1261 and 1262. It mentions that the agreement of the parties manifests itself by the offer and acceptance. PORTUGUESE law deals with the requirements for conclusion of a contract under the requirements for juridical acts in general; similarly in CZECH law (CC §§ 37 and 38 provide for the necessity of due will, proper expression of will, existence of an object and the capacity of the parties). ITALIAN law takes much the same position as French law, since in order for a contract to be binding agreement by the parties is not sufficient. Existence of a lawful causa and a possible, lawful and determined object are also necessary, as well as compliance with certain formalities, when prescribed by law: see CC art. 1325. Similarly, in SLOVENIAN law, a contract is concluded when the parties, having the intent to enter a binding legal relationship, reach an agreement on the essential elements of the contract (LOA § 15), and some further requirements are met: the contract must have a lawful cause (LOA § 39(1), and its object be sufficiently determined or determinable, lawful and possible (LOA § 34). However, the existence of the cause is presumed, even if it is not apparent (LOA § 39(3). In BULGARIAN law, full coincidence between offer and acceptance is required for the conclusion of a contract.

2. In ENGLAND, IRELAND and SCOTLAND the rules on the formation of contracts are based largely on case law, although statutes prescribe certain formal requirements for certain types of contracts. In the other Member States rules on the conclusion of contracts are generally provided in codes and statutes, sometimes in the context of the requirements for juridical acts in general. For AUSTRIA see CC §§ 861 ss: A contract is an agreement between two or more parties with the intention to create legal relations. It is not essential that this results in rights and obligations for both or all parties; a contract can also be unilateral, i.e. only binding for one party (such as a donation or a contract of guarantee). Some – older – types of contract require the transfer of the goods to be binding (so-called *real contracts* such as a loan (CC § 983) or a loan for use (CC § 971).

3. According to the HUNGARIAN legal doctrine a contract is two or more persons` concordant declaration of will (consensus) intended to and able to trigger legal effects (*Bíró and Lenkovics*, Általános tanok[4], 188). CC § 205(1) provides that contracts are concluded upon the mutual and concordant expression of the parties' intent. CC § 198(1) lays down that a contract constitutes an obligation to perform and a right to demand such performance.

II. Paragraph (1). "A contract is concluded when..."

4. On the requirements for a contract there are differences between the legal systems, mostly of a terminological character.

5. In all the systems an intention to be legally bound is presumed when the transaction involves a patrimonial interest for the parties, but not when it is only a social engagement, such as a dinner appointment. Friends and family members often agree to help each other but such agreements are generally not regarded as contracts and are not legally enforceable, see *Kötz*, European Contract Law I, l18 who cites the ENGLISH case *Balfour v. Balfour* [1919] 2 KB 571 (CA), FRENCH Cass. 19 March 1974 Bull. Cass. I no. 117, and the GERMAN BGH 22 June 1956, BGHZ 21, 102. See also for BELGIUM Cass. 2 Dec. 1875, *Pas. belge* 1876, 37; DENMARK *Gomard*, Almindelig kontraktsret[2], 30 and for IRELAND, *Friel* 78; AUSTRIA Schwimann (-*Apathy and Riedler*), ABGB IV[3], § 861 ABGB no. 7. For CZECH law see Knappová

(-*Knapp/Knappová/Švestka*), Civil Law II, 70 (the intention to be legally bound is missing).

6. Even in business relations, parties may conclude agreements which oblige them only morally, not legally. It may follow from the language of the agreement or be implied from the circumstances that the parties assumed only a moral obligation, for example if the agreement provides that it is to be 'binding in honour only', as in the English case of *Rose & Frank v JR Crompton & Bros Ltd.* [1925] AC 445, HL, see further *Treitel*, The Law of Contract[9], paras. 4-004-4-007; for Ireland, *Cadbury Ireland Ltd. v Kerry* Co-operative *Creameries Ltd.* [1982] ILRM 77, HC. Gentlemen's agreements, which give rise to only a moral bond between the parties, are also well-known in ITALIAN law; see *Roppo*, Il contratto 15.

7. In ENGLAND collective labour agreements are presumed not to be intended to create legal relations: *Ford Motor Co. Ltd. V. AUEFW* [1969] 2 QB 303, QB. In IRELAND statements made *obiter* in several cases suggest that they are, see *Goulding Chemicals Ltd. V. Bolger* [1977] IR 211, SC and *Ardmore Studios v. Lynch* [1965] IR 1, HC. In BELGIUM gentlemen's agreements are valid but bind only morally: Cass. 11 Jan. 1978, *Pas. belge* 1978, 530.

8. In POLISH law a contract is considered to be a type of juridical act - i.e. an act by one or more persons which brings about legal effects. Every juridical act must consist of at least one declaration of will. Barring the exceptions provided for by statutory law, a declaration of will may be expressed by any behaviour of a person performing an act in law which manifests their intent sufficiently. A contract is a legal transaction which consists of at least two declarations of will which express agreement. In the General Part of the Polish civil code there are provisions that refer to all juridical acts and others that apply specifically to contracts.

9. CZECH law provides that the contract is concluded at the moment when the acceptance of an offer to enter the contract comes into effect (CC § 44(1)), which happens at the moment when the expression of consent with an offer reaches the offeror (CC § 43c(2)). These provisions comply with both requirements of the commented article: the acceptance means reaching the agreement and the intention to be legally bound is implied in both the offer and the acceptance which presuppose the intention of the parties to cause legal consequences (CC § 34). There are no requirements other than reaching consensus on at least the essential terms of the contract (essentialia negotii), see Knappová (-*Knapp and Knappová*), Civil Law II, 39.

10. In SLOVAK law also a contract is considered to be a type of juridical act and the requirements are regulated in that context.

11. Under ESTONIA law a contract is entered into by an offer and acceptance or by the mutual exchange of declarations of intent in any other manner if it is sufficiently clear that the parties have reached an agreement (LOA § 9(1)). For further details see notes below.

III. Social engagements, engagements involving no patrimonial interests, moral engagements

12. In all the legal systems, the parties' intention to be legally bound is a condition of the formation of a contract. Agreements made in jest or in the course of play-acting are not contracts. For CZECH law, see CC § 37(1) – juridical acts must be made seriously; otherwise they are not binding (invalid).

IV. "Without any further requirement"

(a) Consideration

13. In ENGLAND and IRELAND (but not SCOTLAND) "consideration" is generally required for the formation of a contract. The doctrine of consideration is complex and unclear, but its essence is that a promise or offer, even if seriously meant and accepted by the other party, will not result in a contract unless the other party gives or does something, or promises to give or do something, in exchange. See e.g. *Re Hudson* (1885) 54 LJ chap. 811 and *cf. Re McArdle* [1951] chap. 669, C.A.; "past consideration is no consideration".

14. It is not necessary that the action taken or promised is of direct benefit to the promisor. What is important is that the promisee has in some sense incurred a detriment in exchange for the promise. Thus a promise to a bank to guarantee a loan made to a third party is made for good consideration and, if accepted, would result in a contract though the guarantor may obtain no benefit; the bank incurs a detriment by advancing the money to the debtor. But if the money has been advanced already, and the bank does not give the debtor any concession as a result of the guarantee, e.g. extra time to pay, the guarantee will be without consideration and, even if there is agreement between the parties, there will be no contract, see *Treitel,* The Law of Contract[9], paras. 3-034-3-035; compare *Alliance Bank* v. *Broom* (1864) 2 Dr & Sm 289 (actual forbearance by creditor, therefore consideration).

15. Certain actions, or promises of actions, are treated as not being good consideration because they involve the promisee in no detriment. For example, a promise to pay a person to perform an act which that person is already obliged to do under the general law is usually treated as being for no consideration: *Glasbrook Bros. v. Glamorgan CC* [1925] AC 270, HL

16. Further, the doctrine does not often prevent the formation of a contract if the courts wish there to be an enforceable contract. First, the consideration need not be 'adequate', i.e. of equivalent value, so that a small or even a purely nominal payment is good consideration, e.g. *Thomas v. Thomas* (1842) 2 QB 851. Secondly, the courts seem to 'invent' consideration by fixing on some action, or the possibility of some action, by the promisee and treating it as exchanged for the promise: e.g. *de la Bere v. Pearson* [1908] 1 KB 280. In that case a newspaper's promise to give readers financial advice was held to be contractual, because the newspaper had the right to publish the readers' letters if it so wished. See generally *Treitel*, The Law of Contract[9], para 3-009. *Atiyah* argues that this means that the doctrine is incoherent and means no more than 'a good reason to enforce the promise': Essays on Contract, 241.

17. In relation to agreements to alter the terms of existing contracts, there were formerly in ENGLISH law considerable difficulties when the terms were varied in a way that benefited only one of the parties; e.g. one party promised to release the other from part of the obligation (*Foakes* v. *Beer* (1884) 9 App. Cas. 605 (HL)) or to increase the price payable to the other (*Stilk* v. *Myrick* (1809) 2 Camp 317). More recently, the courts have prevented the promisor from going back on the promise (unless it was unfairly extorted) via, in the first situation, the doctrine of promissory estoppel (see *WJ Alan & Co. Ltd. v. El Nasr Export & Import Co* [1972] 2 QB 189, CA) or, in the second, by treating the promise as being for good consideration if the promisor got a 'practical benefit', and there was no element of coercion, even though the promisee was doing no more than previously bound to do (*Williams v. Roffey Bros & Nicholls (Contractors) Ltd.* [1991] 1 QB 1 (CA)).

18. In SLOVAKIA it is not necessary that one party undertakes to furnish or furnishes something of value in exchange for the other party's undertakings (consideration). HUNGARIAN law does not know the doctrine of consideration either. Gratuitous contracts are certainly recognised , but it is rebuttably presumed in contract law that contracts are non-gratuitous. See CC § 201. Unless the contract or the applicable circumstances indicate otherwise, a consideration is due for any services to be provided under the contract. If at the time of the conclusion of the contract the difference between the value of a service and the consideration due, without either party having the intention of bestowing a gift, is grossly unfair the injured party is allowed to contest the contract.

(b) Cause, causa

19. The model rules do not expressly provide for a requirement of *cause* or *causa*. *Causa* is, however, mentioned as a requirement for the formation of a contract in AUSTRIAN law, in FRENCH, BELGIAN and LUXEMBOURG CCs arts. 1108 and 1131-1133, ITALIAN CC arts. 1325 and 1343-45, SLOVENIAN LOA § 39 and SPANISH CC art. 1261. It is also mentioned in SLOVAK legal theory see *Lazar*, Základy občianskeho hmotného práva, 108 (and see CC § 495). C*ausa* is a prerequisite for the validity of a contract under BULGARIAN law as well (LOA art. 26 (2)), although nullity because of an absence of causa is proclaimed by courts only in extreme situations. There has been a broad discussion about *causa* in the BULGARIAN doctrine in recent years, but no definite solution seems to have been found yet.

20. In AUSTRIAN law the *causa* signifies the economic purpose of the contract, which has to be transparent from the contract itself or the circumstances. A promise which has no apparent purpose is not binding. Exceptions are recognised in such cases as a promissory note or the acceptance of a payment or delivery order (*Bydlinski*, Bürgerliches Recht I[3], nos. 5/15 et seq.). Under GERMAN law *causa* is sometimes identified with the purpose, see *Schlechtriem and Schmidt-Kessel*, Schuldrecht, Allgemeiner Teil[6], nos. 22 et seq. However, CC §§ 780 and 781 show that such a purpose is not necessary for the (formally) binding effect of promises; but those promises may be set aside by virtue of a claim for unjustified enrichment.

21. In FRENCH law, *la cause* can be defined as the justification, the grounds for existence of the undertaking signed by both parties to the contract. There is a distinction between the objective *cause* which can be found in the existence of consideration and which protects each party against an undertaking without consideration, and the subjective *cause* which is the deciding motive which has led a party to commit itself and which enables the public interest to be protected against contracts contrary to public policy and good morals. Thus, the party who concludes a bilateral contract for a derisory or illusory consideration can claim that the contract is void for lack of *cause*. (*Terré/Simler/Lequette*, Les obligations[6], no. 337). A similar solution is applied in the event of a mistake as to the existence of the *cause* by one party, that is when one party has falsely believed in the existence of a justification, a consideration for its undertaking. If the cause is partially false, the contractual obligation is therefore reduced (Cass.civ. 1ère, 11 mars 2003: Bull.civ. I, no. 67). When a party has sought an illicit or immoral goal, the contract is null and void (Cass.civ. 1ère, 10 février 1998: Bull.civ. I, no. 49). In BELGIAN law both aspects of the *cause* are referred to in case law (Cass. 13 Nov. 1969, *RCJB* 1970, 326, note *Van Ommeslaghe*; Cass. 13 March 1981, *Pas. belge* 1981, 760; Cass. 16 Nov. 1989, *Pas. belge* 1990, 331; Cass. 21 Jan. 2000, *Pas. belge* 2000, 165; see also *Nudelhole*, L'obligation sans cause, l'obligation

sur une fausse cause et l'erreur sur le mobile déterminant, 709) and modern legal writers stress the fact that there is only one, subjective concept of *cause* because one of the main motives for contracting (subjective concept) will be the objective reason (abstract cause) for contracting (*Foriers*, La caducité des obligations contractuelles par disparition d'un élément essentiel à leur formation, nos. 84-85; *Stijns*, Verbintenissenrecht I, nos. 139-151; *Van Ommeslaghe*, RCJB 1970, 326).

22. Since the ITALIAN CC remains silent on the issue, the meaning of the term *causa* has historically caused a division of opinion among legal writers. From a subjective approach, according to which *causa* would mean the aim pursued by the parties in entering into a binding agreement, an objective approach has to be distinguished, under which *causa* would stand for the social and economic function of the contract (see *Bianca*, Diritto civile III, 447 f). This latter view is the one taken by prevailing case law (see, among others, Court of Cassation, 15 July 1993, no. 7844, published in excerpt in *Bessone*, Casi e questioni di diritto privato, 1027).

23. Some DUTCH authors argue that *causa*, although no longer mentioned in the Dutch CC, does remain a requirement for the validity of a contract - see *van Schaick*, Contractsvrijheid en nietigheid (with summaries in English, French and German) and *Smits*, Het vertrouwensbeginsel in de contractuele gebondenheid (with a summary in English). Other authors consider *causa* as “the content of the contract as a whole", see on these theories *Becker*, Gegenopfer und Opferverwehrung, 237. If used in this sense the *causa* is hardly a requirement other than that the contract must contain legal obligations for the debtor.

24. In SLOVENIAN LOA § 39 the *causa* is referred to as “grounds” (reason) for contractual obligations. Even in cases where the cause is not apparent, its existence is presumed (LOA § 39(3)). As to the meaning of the cause, there are different opinions among legal writers, see Juhart and Plavšak (-*Grilc*), Obligacijski zakonik I, 289. The prevailing view seems to be, that the cause is the purpose of the contract in the sense of the reason of the parties for entering the contract or the reason of one party of which the other party was aware or could not have been unaware. A mere motive of one party to conclude the contract, does not affect its validity (LOA § 40). If, however, an unlawful motive has essentially influenced the decision of one party and this was known or could not have remained unknown to the other party, the contract is void, see LOA § 40(2) With regard to donation contracts, this applies regardless of the essential influence, see LOA § 40(3).

25. The POLISH CC does not expressly provide for a requirement of *cause* or *causa*, although many authors argue that *causa* remains a general requirement for the validity of a contract aimed at a shift of assets. The doctrine distinguishes different types of causa: *causa solvendi, causa acquirendi, causa donandi, causa cavendi*. The concept of *causa* is referred to in the Polish CC in an article which provides that performance of an obligation is undue when the basis for performance, i.e. *causa*, drops off (CC art. 410 § 2). There are exceptions to the general rule of causality of juridical acts in the POLISH system. As opposed to the “causa-based” acts, there are certain listed “abstract” acts such as taking over a debt (CC art. 524 § 2) or granting a bill of exchange or cheque. Some contracts may be valid despite of the lack of *causa*, i.e. without regard to any underlying relationship (see the Supreme Court’s decision of April 28, 1995, III CZP 166/94, OSNC 1995/10, poz. 135, with reference to bank guarantees).

26. The GREEK and PORTUGUESE CCs do not require cause as a condition for the formation of the contract, but the Greek CC arts. 174-178 provide that contracts the contents of which are unlawful are invalid and arts. 904-913 that payments made

without a cause or without a lawful cause may be recovered. On this basis, some Greek writers infer that cause is an essential element for the validity and enforceability of contracts *(Kerameus and Kozyris*, Introduction[2], 65 f). The same is the predominant view in Portugal, see *Carvalho Fernandes*, Teoria geral do direito civil II [3], 345 ff.

27. *Causa* has no role in the formation and validity of contracts in ENGLISH or IRISH law. Nor is the concept used in GERMANY, see *Zweigert and Kötz*, An Introduction to Comparative law[3], 381 (but see § 812(2) where a residual element of cause leads to restitution where an abstract promise is given without *causa*, see *Schlechtriem and Schmidt-Kessel*, Schuldrecht, Allgemeiner Teil[6], no. 23), the NORDIC COUNTRIES, see for DENMARK, *Ussing*, Aftaler[3], 113, ESTONIA, see Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, § 8, no. 4.1, or SCOTLAND, see *Smith*, Laws of Scotland, 742 f.

28. "Cause" in SPANISH law has various meanings. In bilateral contracts, "cause" means the counter-obligation of the other party to a contract; in gratuitous promises, "cause" is the intention of the donor (CC art. 1274). "False cause" and "falsity of the cause" are seen in arts. 1276 and 1301 of the SPANISH CC, where the reference is to the underlying motive and the main function of "cause" is to avoid contracts in which the parties do not have the purpose typically intended by the rule of law; for instance, when parties disguise a gratuitous transfer under the cover of a sale or when the real intention of the parties to a sale contract is to create a security right in favour of the transferee (see as seminal contribution, *De Castro*, El Negocio Jurídico, 163 ff).

29. CZECH CC § 495 provides that the validity of an obligation is not influenced if the contract does not express the causa on the basis of which the debtor is obliged to perform, but the creditor must prove the causa in case of need (with an exception for certain securities). From this provision it is clear that CZECH law subjects the validity (or at least enforceability) of contracts to the existence of a causa. However, the causa is traditionally interpreted extensively as an immediate economic purpose of the contract. Thus, as a matter of fact, every contract has its causa and it is relevant only whether the causa is lawful and whether the creditor is able to bring evidence of it (which helps to reveal dissimulated or coerced contracts etc.); for details see *Švestka/Jehlička/Škárová*, OZ[9], 887.

(c) Real contracts

30. Today these agreements are often interpreted as a promise to make a contract to lend, deposit, pledge, etc. which is valid but its violation can only give rise to damages and not to specific performance: when performed these contracts are governed by the same rules as other contracts (see for France *Terré/Simler/Lequette*, Les obligations[6], nos. 147 and 148 and for Belgium *de Page, Traité II* no. 505). Under the PORTUGUESE CC the rules on real contracts are applied to loans, deposit and pledge. However under the influence of *Mota Pinto*, Cessão da posição contratual, 11 ff, it has been held that the mere agreement between the parties makes these contracts enforceable.

31. In SPAIN, ITALY, AUSTRIA, SLOVENIA and the NETHERLANDS the concept of the "real contract" still exists: in Spain for loans, including gratuitous loans, deposit, and pledge, see *Díez-Picazo*, Fundamentos I[4], 139; the same is true of Italy, see *Bianca*, Diritto civile III, 241; and in Austria for deposit contracts, loans (of money and other consumable goods) loans for use and "orders to sell" *(Kaufaufträge)*, see CC §§ 957, 971, 983, 1086. A mere agreement without the handing over of the good is – if the special requirements are met – seen as a preliminary contract (CC § 936).

32. In SWEDEN and FINLAND one alternative prerequisite for a binding gift is that it is physically handed over (Act on Gifts § 1) but there is nothing else approaching the notion of a “real contract”.

33. In POLAND “real contracts” are not validly concluded until the property to which they relate has been handed over to a person authorised to receive it. This applies, for example, to lending for use (CC art. 710, deposit (art. 835) and pledge (art. 307 § 1).

34. In SCOTLAND the early writers adopted the civil law division between real and other contracts but modern writers consider that the term “real contract” now has no legal significance. See *Gloag*, Law of Contract[2], 14.

35. In SLOVAKIA it has been held that the so-called "real contract" (e.g. a storage contract, CC §§ 747–753) is not validly concluded until the property to which it relates has been handed over to the creditor or some other person authorised to receive it.

36. Also CZECH law distinguishes real contracts as opposed to consensual contracts (see Knappová *(-Knapp/Knappová/Švestka*), Civil Law II, 100), but if a contract, statutorily regulated as a real contract, is concluded as a consensual one (i.e. providing consideration is not part of the formation of the contract), the result is usually not regarded as defective, but simply as an innominate consensual contract.

37. Under BULGARIAN law the real contracts are: deposit, (real) pledge, loan, *commodatum*, donation, transmission of ownership over bearer-securities. Most of these contracts can, however, be formed in another way as well – pledge over rights can be effected by notification to the debtor and handing over of the documents vouching the right; pledge exists in the form of registered pledge as well (Registered Pledges Act 1996); loan in the case of bank credit agreement is a purely consensual contract and donation can be made by a notarially authenticated deed.

38. In the GERMAN CC some residual elements of a former doctrine of real contracts may be found in § 516 (gift from hand to hand) and in the former version of § 607 (credit contract) in force until 2001. The prevailing opinion interprets these rules in the sense of pure consensualism, see *Schlechtriem,* Schuldrecht, Besonderer Teil[5], no. 185.

39. “Real contracts" are not known in the other countries. It is not necessary as a condition for the coming into existence of a contract that the goods or money contracted for should be handed over to the creditor. The handing over may, however, be a condition for the perfection of a security interest in relation to third parties.

40. And in ENGLISH law a person who takes possession of another party’s goods, even without any agreement between them (e.g. a finder) may come under obligations under the law of bailment: see *Chitty* on Contracts I[27], chap. 33.

II.–4:102: How intention is determined

The intention of a party to enter into a binding legal relationship or bring about some other legal effect is to be determined from the party's statements or conduct as they were reasonably understood by the other party.

COMMENTS

A. Intention

Parties often make preliminary statements which precede the conclusion of a contract but which do not indicate any intention to be bound at that stage. The parties to an arrangement may also make statements which attempt to make it clear that they will be morally but not legally bound. It will often be necessary to interpret such statements. It can, for example, be difficult to distinguish between a non-binding letter of intent or letter of comfort and a letter which is intended to be legally binding and which, if accepted, will lead to a contract

> *Illustration*
> When a subsidiary company asked a bank to grant it a loan of €8 million, the bank asked the parent company to guarantee the loan. The parent company refused, but gave a letter of comfort instead. This read: "It is our policy to ensure that the business of (the subsidiary) is at all times in a position to meet its liabilities to you under the loan facility arrangement". The letter also stated that the parent company would not reduce their financial interests in the subsidiary company until the loan had been repaid. When during the negotiations the bank learned that a letter of comfort would be issued rather than a guarantee, its response was that it would probably have to charge a higher rate of interest. When later the subsidiary company went into liquidation without having paid, the bank brought an action against the parent company to recover the amount owing. The action failed since the parent company's statements made it clear that it did not intend to be legally bound.

A statement is sometimes an invitation to one or more other persons to make an offer. Such an invitation is not meant to bind the person who makes it. It may, however, produce effects later if it has provoked an offer and acceptance which refer to the terms stated in the invitation.

B. The appearance of intention

The Article provides that the intention of a party to enter into a binding legal relationship or bring about some other legal effect is to be determined from the party's statements or conduct as they were reasonably understood by the other party. This is consistent with the normal rule on the interpretation of unilateral juridical acts. See II.–8:201 (General rules).

This represents the law in many (probably the majority) of Member States. Others maintain their traditional position that a party who can prove that, despite an apparent intention, there was no actual intention to contract will not be liable in contract; but even in these laws the party will normally be liable on some other basis for having carelessly misled the other party. It seems better for the model rules to follow the first approach and hold a party liable on the basis of what reasonably appeared to the other party to be an intention to be bound or to produce some other legal effect.

C. Silence or inactivity

Silence or inactivity will generally not bind a person. However, specific exceptions from this rule are provided in several later Articles.

NOTES

I. Real or apparent intention?

Party bound by apparent intention

1. Even if a party had no intention to be legally bound, most of the laws will hold that the party is bound if the other party to whom the statement or other conduct was addressed had reason to assume that the first party intended to be bound. Whether this is the case is to be decided under the rules of interpretation.

2. The rule is provided in the DUTCH CC art. 3:35: a person's absence of intention cannot be invoked against another person to whom the declaration or conduct was addressed and who gave it a meaning which was reasonable in the circumstances. In AUSTRIA, a similar rule is inferred from CC §§ 861 and 863, see Schwimann (-*Apathy and Riedler*), ABGB IV[3], § 863 nos. 1-4: Applying the so-called *Vertrauenstheorie* (principle of confidence) a declaration of will and with it the intention to create legal relations is given the content that a reasonable person under the given circumstances would have inferred. This principle, however, does not apply if the addressee knew that the declaration was meant differently. In NORDIC law, the rule is based on an interpretation *e contrario* of the Contract Acts § 32, according to which an error in expression does not bind the promisor if the promisee knew or should have known of the mistake, see for DENMARK Dahl *(-Møgelvang) 231* and *Gomard*, Almindelig kontraktsret[2], 56; for SWEDEN, *Ramberg*, Allmän avtalsrätt[4], 180. In GREECE the rule is based on CC art. 200, which provides that contracts are to be interpreted in accordance with good faith, see A.P. l340/l977, NoB l978.l053; see also for GERMANY CC § 157 and *Larenz and Wolf*, Allgemeiner Teil des deutschen Bürgerlichen Rechts[8], § 28 paras. 16 ff. In ITALY and PORTUGAL the rules on interpretation apply to ascertain the intention of the parties; good faith and reasonableness play an important part, see on Italy*: Bianca*, Diritto civile III, 417 ff. and on Portugal *Almeida*, Negocio juridico 719 ff. However, the statement is not binding if the party who made it was convinced that the other party would realise that the statement was not serious or was not conscious of having made a statement, see CC arts. 245 and 246. In ESTONIA, ordinary rules on interpretation apply to ascertain the intention of the parties (GPCCA §§ 68, 75). Silence or inactivity is deemed to be a declaration of intention only if so prescribed by law, an agreement between the parties, practices which the parties have established between themselves or a usage observed in their field of activity (GPCCA § 68(4), LOA § 20(2)).

3. In POLAND a statement is not binding if the other party realises that it is not serious. (Cf. CC art. 83 § 1.) Otherwise, a unilateral mental reservation by a party who makes a statement is irrelevant. General rules on the interpretation of a declaration of will apply. Based on CC art. 65 which gives priority to the congruent intention of the parties and the purpose of their contract, courts and legal writers point out that one must first examine what has been understood by the parties. Only if their understanding is inconsistent, should objective standards be applied (see the Supreme Court's decisions of June 13, 1963, II CR 589/62, OSNCP 1964/10, poz. 200, and

February 20, 1986, III CRN 443/85, OSNCP 1986/12, poz. 211). "Silence" in POLISH law generally does not amount to a declaration of will (e.g. acceptance of an offer). Nevertheless, in certain rare circumstances inactivity may produce legal effects.

4. In SLOVAKIA an expression of will aimed at the conclusion of an agreement and addressed to one or more certain persons is considered as an offer to conclude an agreement if it is sufficiently definite and if the offeror expresses the will to be bound in case of acceptance (CC § 43a sub-para. 1). A unilateral mental reservation by a party who makes a statement is irrelevant. General rules on the interpretation of a declaration of will apply. "Silence" in SLOVAK law generally does not amount to a declaration of will (CC § 44 sub-para. 1).

5. ENGLISH contract law is concerned with objective appearance rather than with the actual fact of agreement. The classic statement of the principle is that of Blackburn J. in *Smith* v. *Hughes* (187l) LR 6 QB 597, 607: "If, whatever, a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that the other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." See also: *The Hannah Blumental*, [1983] 1 AC 854 (HL) and *Treitel*, The Law of Contract[9], para. 1-002; for IRISH law, see *Friel* 78 ff.

6. In SCOTLAND see *Muirhead & Turnbull v. Dickson* [1905] 7 SC 686, 694: "… commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made by what people say." See also *MacQueen and Thomson*, Contract Law in Scotland, §§ 2.5-2.7.

7. In SPAIN the courts generally rely on CC art. 1281 (on the interpretation of contract terms) to hold as ineffective a "mental reservation" by one party as to the real intention to be bound. Even in a marriage contract a mental reservation will not allow a party to escape the obligatory effect of the contract. According to a solid body of doctrine, the individual "motives" of one party to a contract have no relevance at all; if these motives are not shared by the other party (see Morales, *Comentario*, 281).

8. § 43a(1) of the CZECH CC makes it clear that the offer to enter a contract is a manifestation of will aimed at conclusion of a contract. The "manifestation" as an objective factor is decisive. Although CC § 37(1) stipulates that seriousness of will is one of the essentials of a juridical act, the provision is interpreted in such a way that the absence of seriousness must be objectively recognisable so as to satisfy the principle of protection of good faith, see *Švestka/Jehlička/Škárová*, OZ[9], 245. Any reference to mental reservations in connection with juridical acts is disallowed, Knappová (-*Knapp and Knappová*), Civil Law I, 154. The courts hold consistently that the contents of a juridical act may be interpreted according to the will of the parties only so far as it will not conflict with the language used (e.g. Supreme Court 25 Cdo 1116/2001).

9. In SLOVENIAN law, the intention of the party to conclude a contract can be expressed by statements or by conduct. It must be free and serious (LOA § 18). According to the principles of interpretation, priority must be given to the way it is reasonably understood by the addressee. A mental reservation of a party is not relevant, unless the other party knew that the statement was not serious.

10. Under the HUNGARIAN CC § 207 in the event of a dispute, contractual statements are to be interpreted as the other party must have understood them in the light of the presumed intent of the person issuing the statement and the circumstances of the case,

in accordance with the general accepted meaning of the words. Parties' secret reservations or concealed motives are immaterial, CC § 216.

11. In BULGARIAN law, the contract should be interpreted according to the "actual will of the parties" (LOA art. 20). This means that if there is no will even of one of the parties there should be no contract. Apparent will is considered however to be sufficient – although there is no special rule on this matter. Doctrine follows the German approach for most cases of apparent will (hidden dissensus) – s. *Tadjer, V., Civil law*. The subjective understanding of the other party however is of no importance – the objective criterion prevails – argument from the interpretation of contracts rule of LOA art. 20.

II. Subjective intention governs

12. Generally, in FRANCE, one can only be bound by a contract if one has shown an intention to be bound: to contract is to want (*Terré/Simler/Lequette*, Les obligations[6], no. 93). If there is a contradiction between the declarations made by one party and that party's real intention, the latter will prevail if it can be established with certainty; in the reverse situation, the declared intention will be taken into account. If there is a conflict between the internal intention and the declared intention and if that conflict is due to negligence on the part of the person who expressed the intention, that person may be held delictually liable (*Terré/Simler/Lequette*, Les obligations[6], no. 93). The same rules apply in LUXEMBOURG. The PORTUGUESE CC arts. 245 and 246 impose liability on a person who acted negligently when making a statement which was not meant seriously or which was made unconsciously.

III. Divided opinion

12. In BELGIUM there is one school which sticks to the traditional FRENCH "doctrine of the intention", see e.g. *Verougstraete*, TPR 1990, 1195-96, and another school which will apply the same rule as the one in the present Article, see *van Ommeslaghe*, Rev.dr.int.dr.comp. 1983, 144; *M.E. Storme*, RGDC/TBBR, 1993, 336; *Stijns-Van Gerven-Wéry*, JT 1996, 693-696; *De Boeck*, Informatierechten en –plichten, 2000, nos. 280-345; *Van Gerven*, 2006, 74-75; *Stijns & Samoy*, 2007, pp. 74 ff. The rule in the Article has been applied by the *Cour de Cassation* in a decision of 20 June 1988, *Pas. belge* 1988 I 1256, where it was held that a principal was bound by an act done by the representative when the third party had reason to rely on the representative's apparent authority; see also CA Brussels 26 May 1996, RGDC/TBBR, 1996, 333 where the rule was also applied.

II.–4:103: Sufficient agreement

(1) Agreement is sufficient if:

(a) the terms of the contract have been sufficiently defined by the parties for the contract to be given effect; or

(b) the terms of the contract, or the rights and obligations of the parties under it, can be otherwise sufficiently determined for the contract to be given effect.

(2) If one of the parties refuses to conclude a contract unless the parties have agreed on some specific matter, there is no contract unless agreement on that matter has been reached.

COMMENTS

A. Sufficient content to agreement

For there to be a contract there must be agreement and there must be a sufficient content to the agreement. The parties could draw up very full and precise terms in a written document but there would be no contract until they had agreed to be bound. If the contract was to be concluded by signatures, then there would only be a draft contract until the parties signed. However, agreement by itself is not enough. There must also be a sufficient content to the agreement. A vague and general agreement of the type "We hereby conclude a contract", without anything more, would not be a contract because it would not have sufficiently precise content. This Article is concerned with the second requirement – the need for sufficient content to the agreement.

The test used here is not, as in some laws, whether the "object" or the price of the contract have been agreed but a broader one of whether the agreement reached is sufficient, or can be fleshed out sufficiently, for the contract to be given effect. It must normally be possible to determine what each party has to do.

B. Terms defined by the parties

The parties may themselves define the terms of the contract with sufficient precision. Under paragraph (1)(a) the test of sufficient precision for this purpose is whether the contract can be given effect. This paragraph will apply where the contract is of a type where the rights and obligations of the parties are not laid down by the law or by applicable usages or practices.

Illustration 1
Two enterprises have entered into negotiations about their "future co-operation in the market". There will be no contract between them until they have agreed upon the essential features of their co-operation - that is, the main rights and obligations of both parties.

C. Content otherwise determinable

Most contracts belong to certain familiar and usual types (sale of goods, supply of services, employment, insurance, etc.). For these contracts the parties' agreement on the type of contract (e.g. sale) and a few crucial terms (type of goods and quantity) will suffice. If the parties are silent on other issues (e.g. price, quality, delivery) these issues will be decided either by the general rules in Chapter 9 (Contents and Effects of Contracts) of this Book (e.g.

II.–9:104 (Determination of price), II.–9:108 (Quality)) or by the rules of law applying to that particular type of contract (e.g. for sale contracts IV.A.–2:201 (Delivery)). These issues may also be determined by other means such as usages and practices between the parties.

D. Terms made essential

An agreement to negotiate a contract (a contract to contract) is in itself a binding contract which entails an obligation on both parties to make serious attempts to conclude the planned contract. However the parties are not obliged to reach agreement.

A party may consider a term to be so essential that assent to the contract will be dependent upon agreement on that point. For example, if the parties bargain over the price of the goods to be sold, they show that the price is a decisive term. Even points which are normally not considered essential points can be made so by one party.

However a party who has made one or more points essential for assent to the contract may nevertheless accept performance of the envisaged contract by the other party. In that case the contract is to be considered concluded by the conduct of the parties, and the rules and other factors, see comment C, will supply the disputed terms.

Although two parties have not agreed on all terms they may agree to commence performance. In that event, it will normally be assumed that they did after all intend a contract from that point on. The rules and factors mentioned in comment C may supply the missing terms so as to give sufficient content to the agreement for there to be a contract.

> *Illustration 2*
> A has negotiated with B to maintain B's computers every month for one year 'at a monthly fee to be agreed'. Although they have not agreed on A's fee they have decided that A will begin, and A does so. A reasonable fee will be payable, see II.–9:104 (Determination of price).

However, the parties' conduct may demonstrate that they have not concluded a contract:

> *Illustration 3*
> The facts are as before but they are still arguing over the fee when A starts work. After one month they realise that they cannot reach agreement and B asks A to stop. B will be liable to A under the rules of unjustified enrichment (Book VII) and will have to reverse the enrichment obtained by the receipt of A's services.

NOTES

I. Terms determinable

1. Under all the systems, there is only a contract when the terms of the parties' agreement can be determined. Questions may arise when the parties have left terms open, when they have agreed that they will later make a contract, and when they have made a framework agreement.

II. Object required

2. Some systems require that a contract has an object. Art. 1108 of the FRENCH, BELGIAN and LUXEMBOURG CCs makes it a condition for the validity of a contract that the contract has an object which constitutes the subject matter of the agreement; see also the rules in arts. 1126-1130. In FRANCE, the object must be ascertained or ascertainable (art. 1129), licit and possible (*Malaurie and Aynès*, Les obligations[9], nos. 600 et seq.) Similar provisions are found in ITALIAN CC art. 1325(3) and arts. 1346-1349, in SPANISH CC arts. 1261 and 1271–1273, PORTUGUESE CC art. 280(1) and in the SLOVENIAN LOA §§ 34-38.

3. In POLISH law the object is a necessary element of a contract. The object of a contract generally is the conduct of one of the parties, i.e. performance of an obligation, which can be claimed by the other party (CC 353). In CZECH law the object is traditionally placed among the essentials of a contract (and it is seen – depending on the point of view – either as the contractually stipulated conduct of the parties or as the assets which are subject of the conduct of the parties, see Knappová (*-Knapp and Knappová*), Civil Law I, 180). However, the term "object" is construed very extensively (it is assumed that each contract, intrinsically, has some object), so the concept usually does not have any major practical effect.

4. The purpose of the object is also to prevent agreements where one of the parties arbitrarily fixes the contents of the obligations, and the other party is left helpless. On recent developments in FRENCH law concerning the price, see *Bénabent*, Les obligations[7], nos. 148 f.

5. In SLOVAKIA the object must be possible (a juridical act concerning an impossible performance is invalid, CC § 37 sub-para. 2) and legal (a juridical act whose content or purpose are at variance with an Act, circumvent the Act or are at variance with good morals is invalid, CC § 39). According to the Ccom parties may conclude a contract of a type not specifically regulated. However, should the parties not sufficiently identify the subject matter of their obligations, then the contract is void. Parties may also agree that a certain part of a contract is to be subject to the parties' agreement on a procedure to enable the subsequent specification of the subject-matter of the contract, if this procedure does not depend on the will of only one party. If a court or a designated person is to specify the missing part of the contract, the agreement must be in writing. (Ccom § 269 sub-paras. 2, 3).

6. In BULGARIA, the consent of the parties should cover all the *essentialia negotii*, which is more than the "object" of the contract.

III. No requirement of object

7. An object is not mentioned as a requirement in the other legal systems. However, as provided in the NETHERLANDS CC art. 6:227, it is everywhere a condition for the formation of a contract that "the obligations which the parties assume are determinable". The parties' agreement must make it possible for a court which is asked to enforce it (either specifically or by awarding damages) to do so, with the help of the terms of the contract and the rules of law, see the UNITED STATES Restatement 2d, § 33, and for AUSTRIA Schwimann (*-Apathy and Riedler*), ABGB IV[3], § 869 nos. 3 et seq.; Rummel (*-Rummel*), ABGB I[3], § 869 no. 5; for DENMARK, *Ussing*, Aftaler[3], 33; for FINLAND, *Kivimäki & Ylöstalo*, 167 f.; for GERMANY, RKGK (*-Piper*); Pref. to § 145 no. 3; and for GREECE, Full Bench of Areios Pagos 138l/1983, NoB 1984.1193-1194; A.P. 1186/1986 NoB 35 (1987) 901; 1473/1987 NoB 36 (1988) 1618; 393/2002 NoB 50 (2002) 1855.

8. The law of ENGLAND also requires that the parties' agreement is sufficiently definite to be enforced. There is no fixed minimum content; but if a critical term of the contract is left open or vague, and the court has no way of determining what was intended, the contract will fail, e.g. *Scammell & Nephew Ltd. v. Ouston* [1941] AC 251 (HL), where an agreement to *'sell'* a truck 'on hire purchase terms' was held to be too imprecise, since the precise terms of the hire purchase were not settled and at that date such contracts took a variety of forms. The rule is the same in IRELAND; see *Central Meat Products v. Corney* (1944) 10 IrJurRep. 34. Also under SCOTTISH law the contract must be sufficiently clear to be enforceable, see *McBryde*, Law of Contract in Scotland[1], paras. 5.19-5.33.

IV. Terms left open

9. Agreement between the parties to a contract is a condition for its formation. This is expressed in several laws, for instance FRENCH, BELGIAN and LUXEMBOURG CCs art. 1108, ITALIAN CC arts. 1321 and 1325(1) and SPANISH CC arts. 1258 and 1261.

10. However, the agreement of the parties need not always be perfect. After having ended their negotiations the parties may not have reached agreement on a term. Some point brought up by them or one of them has not been settled. Several of the laws seem to agree on the following rules. If the unsettled point is one which is generally regarded as material, there is no contract until agreement on that point is reached. If the term is generally considered to be immaterial the contract is considered to have been concluded, and the rules of law - or a later agreement - will settle the matter.

11. Parties may, however, have agreed expressly or by implication that their failure to settle a point which is normally material, such as the price, will not prevent the contract from coming into existence. In these cases the rules of law will supply the term which the parties have not agreed. This is not true in FRENCH law see *Terré/Simler/Lequette*, Les obligations[6], no. 188 in fine and Cass.soc. 19 déc. 1989). Conversely, one party may state or let the other party understand that a term, which is normally held to be immaterial, is considered to be material, and the parties' failure to reach agreement on that term will then prevent the conclusion of a contract, see for AUSTRIA, Rummel (-*Rummel*), ABGB I[3], § 869 no. 10; FRANCE, *Terré/Simler/Lequette*, Les obligations[6], no. 188; BELGIUM, *Kruithof & Bocken* 313 f, *Stijns*, Verbintenissenrecht I, no. 99; DENMARK, *Lynge Andersen* 70 ff; FINLAND, *Kivimäki & Ylöstalo*, 188 f and SGA § 45; SPAIN, *Durany*, 1059 ff; and SWEDEN, *Ramberg*, Allmän avtalsrätt[4], 135.

12. The DUTCH CC art. 6:225 provides that where a reply which was intended to accept an offer only deviates from the offer on points of minor importance, the reply is considered to be an acceptance and the contract is formed according to the terms of the reply, unless the offeror objects to the difference without undue delay. This principle also covers terms which have been left open without there having been an offer and a reply. In that case the rules of law will decide the issue.

13. Although there is no express rule such as that in the Article, it holds true under POLISH law that the obligations which the parties assume must be determinable. If the parties are engaged in negotiations, pursuant to CC art. 72 § 1, a contract is deemed concluded once the parties have reached an agreement on *all* its provisions which have been the subject matter of negotiations. It means that in such situations Polish law makes no distinction between material and immaterial terms. This rigorous approach has been criticised by legal writers (see Brzozowski, *Komentarz* (red. Pietrzykowski), Art. 72). If one party makes an *offer* to be accepted by the other party,

in accordance with CC art. 66, it is sufficient when the offer determines only the *essential* provisions of the contract proposed.

14. PORTUGUESE law makes no distinction between material and non-material terms. Every term is material if one of the parties considers it necessary for the agreement, see CC art. 232 and *Vaz Serra* 130 ff.

15. In ENGLISH and IRISH law the parties must have reached agreement, and if some matter is left 'to be agreed' there will be no concluded contract (*May & Butcher Ltd. v R* [1934] 2 KB 17n, HL) unless there are clear indications that the parties intended to be bound nonetheless (e.g. the matter was minor and they have commenced performance: *Foley v. Classique Coaches* [1934] 2 KB 1, CA). In SCOTLAND there are essentials in law for particular contracts on which the parties must have agreed before there is a contract, see also *McBryde*, Law of Contract in Scotland[1], paras. 5.11-5.18.

16. The GERMAN CC provides in § 154 that in case of doubt a contract is not concluded until the parties have agreed on all the points on which they or one of them require agreement. CC § l55 lays down that if the parties regard a contract as having been concluded, without realizing that in fact agreement has not been reached on some term, then what has been agreed upon is binding if it is shown that the contract would have been concluded even without agreement on that term, see MünchKomm (-*Kramer*), BGB, §§ 154, 155; Staudinger *(-Dilcher)*, §§ 154, 155. GREEK CC arts. l95 and 196 has similar provisions as the GERMAN CC, see on their application, A.P. 69/1966 NoB 14 (1966) 800; 827/1986 EEN 54 (1987) 265, 266 I; Athens Court of Appeal 1010/1976 NoB 24 (1976) 737, 738 I. Furthermore, if the price is left open by the parties GERMAN law gives the creditor the right to fix it unilaterally under CC §§ 316, 315.

17. Under ITALIAN law, in order for a valid contract to come into existence parties have to reach an agreement at least on the essentials of the contract: see *Roppo*, Il contratto 456; *Cataudella*, 68 and, among others, Court of Cassation, 29 March 1995, no. 3705, Giust.civ. 1995, 2565. For a stricter approach see however Court of Cassation, 18 January 2005, no. 910, in I contratti 2006, 22 ff. Missing terms will be integrated by law, which failing by usages or equity, as provided for by CC art. 1374. Good faith is unanimously considered a further important source of integration of contract content and parties' duties: see *Bianca*, Diritto civile III, 500 ff. Nonetheless, parties may always decide to make the conclusion of a contract dependent on subsequent agreement on terms originally missing (see *Cataudella*, 68 and Court of Cassation, 9 January 1993, in Corr.giur. 1993, 574).

18. In SLOVENIAN law the contract is concluded when the parties reach an agreement on the material (essential) terms of the contract (LOA § 15). If there is no disagreement on the non-material terms, they are provided for by rules of law. If however the parties deliberately leave some non-material terms open and at the same time intend to enter a binding contract, they will be, if the parties are unable to reach an agreement on them, provided by the court, taking into account negotiations, practice established among the parties and usages (LOA § 22(2)).

19. In SLOVAKIA the parties may explicitly express their will that a contract with incomplete content is to be valid even if no agreement is reached on the rest of the content (CC § 50b).

20. ESTONIAN law does not specify under which conditions it is sufficiently clear that the parties have reached an agreement as a necessary element for the conclusion of a contract (LOA § 9(1)). Law (e.g. LOA § 27) and doctrine (Varul/Kull//Kõve/Käerdi (-

Kull), Võlaõigusseadus I, § 9, no. 4.1.1.) make a distinction between material and non-material terms. For the contract to be concluded, it is generally necessary that material terms are determined or determinable in such a way that the right to performance could be enforceable by the court (Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, § 9, no. 4.1.1.). Rules for terms deliberately left open by the parties (LOA § 26), absence of agreement on material terms (LOA § 27) and determination of price (LOA § 28) apply accordingly.19.

21. The CZECH CC holds a contract to be concluded only upon the unconditional acceptance of all of the proposed terms whether objectively material or not. According to CC § 44(2) an acceptance which contains additions, reservations, limitations or other amendments, is a refusal and is regarded as a new offer. But a reply which expresses the contents of the proposed contract in other words without changing the substance is regarded as an acceptance. There are two major exceptions to the principle that all the proposed terms must be accepted. The first follows from CC § 50b which allows for an agreement of the parties according to which the contents of a contract will be further supplemented, provided that the parties have manifested the intention at the same time that the contract should come into force despite the need for this supplementation. The second exception can be found in the Ccom: § 269(3) provides that in relation to a particular part of a contract the parties may agree on a method whereby the contents of the obligation can be determined later, provided that the method does not depend on the will of one of the parties only.

22. Under the HUNGARIAN CC § 205(2) it is fundamental to the existence of a contract that an agreement is reached by the parties concerning all essential issues as well as those deemed essential by either of the parties. The parties need not agree on issues that are regulated by statutory provisions. CC § 213(2) An acceptance with contents which deviate from the offer is regarded as a new offer.

23. Under BULGARIAN law it is possible to have terms left open. Such terms should be determined later either by the parties or by a third person. If no consensus between the parties can be reached or if the third person refuses to determine the terms, the determination can be made by the court (Ccom arts. 299, 300). Although this rule is provided for business to business relations, it can be applied for business to consumer relations as well.

II.–4:104: Merger clause

(1) If a contract document contains an individually negotiated term stating that the document embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the document do not form part of the contract.

(2) If the merger clause is not individually negotiated it establishes only a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract. This rule may not be excluded or restricted.

(3) The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated term.

(4) A party may by statements or conduct be precluded from asserting a merger clause to the extent that the other party has reasonably relied on such statements or conduct.

COMMENTS

Merger clauses

When concluding a contract which is embodied in a document the parties sometimes agree that the document contains their entire agreement, and that earlier statements and agreements are not to be considered. Such a merger clause may be useful when during the negotiations the parties made promises and statements based on assumptions which were later abandoned. A merger clause which has been individually negotiated, i.e. inserted in the contract as a result of a mutual discussion between the parties, will prevent a party from invoking prior statements and agreements not embodied in the document. This follows from the principle of freedom of contract.

The merger clause will not apply to prior agreements or statements which, though made when the contract was negotiated, are distinct and separate from the contract.

If, on the other hand, the prior agreement is one which has such a connection with the contract that it would be natural to include it in the contract document, the merger clause will apply.

> *Illustration*
> During the negotiations for the sale of a property the parties orally agree that the seller will remove an unsightly ice house from a nearby tract. This agreement was not mentioned in the contract document which contained an individually negotiated merger clause. The buyer cannot require the ice house to be removed.

If, however, the merger clause has not been individually negotiated it will only establish a rebuttable presumption that the parties intended that their prior statements should not form part of the contract, see paragraph (2) of the Article. Experience shows that in such cases a party should be allowed to prove that the merger clause was not intended to cover a particular undertaking by the other party which was made orally or in another document. It often happens that parties use standard form contracts containing a merger clause to which they pay no attention. A rule under which such a clause would always prevent a party from invoking prior statements or undertakings would be too rigid and could often lead to results which were contrary to good faith.

A merger clause will not prevent the parties' prior statements from being used to interpret the contract. This rule in paragraph (3) of the Article applies also to individually negotiated merger clauses, but in an individually negotiated clause the parties may agree otherwise.

On a party's reliance on the other party's later conduct, see Comment B to the following Article.

NOTES

I. Merger clauses in general

Clauses upheld

1. A provision similar to that in paragraph (1) of the Article is to be found in the UNIDROIT Principles art. 2.1.17. A merger or 'entire contract' clause is conclusive in SCOTTISH law even if not individually negotiated (Contract (Scotland) Act 1997 s. 1(3)); but the un-negotiated term would be subject to regulation under the unfair contract terms legislation (*McBryde*, Law of Contract in Scotland[1], para. 5.56). The Article is also in accordance with PORTUGUESE law where it follows from CC art. 221 and the good faith principle that a person is not allowed go back on an agreement earlier made (*venire contra factum proprium*), and corresponds to the ESTONIAN LOA § 31. Merger clauses are generally enforced in the U.S.A., see *Farnsworth* II § 7, 3 ff. They are upheld under arts. 8, 11 CISG; see Schlechtriem and Schwenzer (-*Schmidt-Kessel*), art. 8 no. 35.

2. Neither from CZECH law nor from Czech court practice can any particular conclusion on merger clauses be derived. It must probably be assumed that merger clauses require more or less strict respect, as the CC's provisions on interpretation of juridical acts clearly prefer the written terms of a contract over any other relevant circumstances (CC § 35(2)). Exceptions (if any) must be based on the assumption that the mutual consensus of the parties does not include the merger clause (especially in case of standard contract terms). The position is the same in SLOVAKIA and BULGARIA.

II. Merger clause probably not conclusive

3. This is so in ENGLAND. At one time it appears that English law prohibited the bringing of 'parol evidence' (that is, evidence of terms which were not contained in the document) to add to, vary or contradict a written contract. However, when faced with clear evidence that the parties had in fact agreed on some term which was not in the document, the courts evaded the rule by the simple expedient of saying that the contract was not wholly in writing, so that the rule did not apply, see for example *J. Evans & Son (Portmouth) Ltd. v. Andrea Merzario Ltd.* [1976] I WLR 1078, CA. As the Law Commission points out, this renders the rule meaningless, and it is now agreed that there is at most a presumption that the written document contains all the terms of the contract (*Treitel*, p 193). It is generally thought that a merger clause will do no more than add weight to this presumption (*Law Commission*, Report on Parol Evidence Rule) and it will not be conclusive; see *Thomas Witter Ltd. v. TBP Industries Ltd.* [1976] 2 AllER 573, noted at (1995) 111 LQR 385). However it has recently been suggested that the parties might be prevented from relying on the promise not contained in the writing under the doctrine of estoppel by convention: see *Peekay*

Intermark Ltd. v. Australia & New Zealand Banking Group Ltd. [2006] EWCA Civ 386 at [56]. The Contract (Scotland) Act 1997 has abrogated the parol evidence rule for SCOTLAND. In IRELAND the rule, if it still exists, has been greatly modified, see *Friel*, 153-154. Under the CISG the parol evidence rule does not apply, see Schlechtriem and Schwenzer (-*Schlechtriem*), art. 11 no. 13.

4. Under DUTCH law, evidence of oral agreements may always be brought: there is no such thing as a parol evidence rule. The landmark case is HR 13 March 1981, Nederlandse Jurisprudentie 1981, 635 *(Haviltex).* It has been argued that clauses which purport to import the parol evidence rule into the Netherlands are invalid, at least when they are to be found in standard terms: *Hondius*, Entire Agreement Clauses 24-34.

5. In FRANCE, LUXEMBOURG and SPAIN merger clauses are reported to be rare, and there does not seem to be literature about them. They would probably be covered by the rules on proof of juridical acts or through the guidelines set up for the judges in the process of interpreting the contract (see CC arts. 1163 and 1161). In Spain the rules on interpretation may also be applied, see *Díez-Picazo*, Fundamentos I[4], paras. 259-261. Although merger clauses seem to be valid in commercial contracts in BELGIAN law, the authors tend to give the clauses a restrictive interpretation, see *Storme*, Invloed no. 183; Walschot (2004) 151.

6. Rules such as those provided in paras. (1) and (2) of the Article are not to be found in the ITALIAN CC and the issues have not been dealt with in the legal writing or in reported cases. On the one hand a rule on evidence in CC art. 2711 provides that "proof of witnesses is not permitted to establish clauses which have been added or are contrary to the contents of a document, and which are claimed to have been made prior to or at the same time as the document". This rule may be relevant for merger clauses. On the other hand CC art. 1362(2) on interpretation of contracts provides that "in order to ascertain the common intention of the parties, their common behaviour, also after the conclusion of the contract, shall be taken into account." This rule may exclude merger and no-oral modification clauses, but it may nonetheless lead to the conclusion that a merger clause is enforceable under CC art. 1322: see *A*ntoniolli and Veneziano, Principles of European contract law and Italian law, 103. A party entitled to rely on parties' statements and conduct in contrast with a merger clause's content may invoke the venire *contra factum proprium* principle: *Antoniolli and Veneziano*, Principles of European contract law and Italian law, 104.

7. Merger clauses are not dealt with in the GREEK CC, nor in the reported cases. Whether they will be enforced will probably be viewed as a question of interpretation and of CC art. 200, which provides that "contracts are to be interpreted in accordance with good faith having regard to business practices". This provision is mandatory in the sense that parties are not allowed to contract out of it, see *Balis* para. 53, *Filios*, Principles § 174B, *Georgiadis*, Principles § 41 No. 6, *Papantoniou* para. 64 1, pp. 347-349; cf. A.P. 908/1978 NoB 27 (1979) 758; 240/1995 EllDik 37 (1996) 681; 154/2002 EllDik 43 (2002) 1638.

8. The rules laid down in the Article are not found in the POLISH CC and these issues have not been dealt with in the legal writing or reported cases. It is generally held that the parties' prior statements (including those made during their negotiations) may be used to interpret the contract (see the Supreme Court's decision of July 4, 1975, III CRN 160/75, OSPiKA 1977/1, poz. 6).

III. Merger clauses disregarded.

9. In the other countries of the union a merger clause has the effect that the written contract is presumed to contain a complete record of the contract terms, but the courts

will admit evidence of an oral agreement whereby the parties expressly or impliedly decide to disregard a merger clause. If the court is convinced, the merger clause will be disregarded, and an oral agreement which adds to it or varies it will be enforced. This holds true of the law in GERMANY, *Larenz and Wolf*, Allgemeiner Teil des deutschen Bürgerlichen Rechts[8], § 27 V p 528 and *Boergen;* Die Effektivität von Schriftformklauseln, *BB* 1971, 202; see also BGH WM 1966, 1335; BGHZ 66, 378; for AUSTRIA see the presumption is provided in CC § 884. For DENMARK see, *Lynge Andersen* 93 and for Sweden see, *Ramberg*, Allmän avtalsrätt[4], 264. In FINLAND, a negotiated term, even if made orally, takes priority over written standard form terms. Parties may orally agree to disregard a merger clause, see *Telaranta* 191; *Wilhelmsson*, Standardavtal 86. In SLOVENIA, LOA § 56(1) provides that if the contract has to be concluded, by law or by agreement, in a certain form, only agreements embodied in this form are part of the contract. However, paras. (2) and (3) allow simultaneous oral agreements to become a part of contract under some circumstances. Consequently, a merger clause constitutes a rebuttable presumption.

IV. Not-individually negotiated merger clauses

10. With the possible exception of THE NETHERLANDS, few of the countries seem to make any distinction between individually and not individually negotiated merger clauses. However, the *Indicative and illustrative list of terms which may be* regarded as unfair, annexed to the EEC Council Directive on Unfair Terms in Consumer Contracts of 5 April 1993 includes in para. (n) a term which has the object or effect of limiting the seller's or the supplier's ob1igation to respect commitments undertaken by a representative or making commitments subject to compliance with a particular formality. Under this rule a merger clause will (semble) not be upheld. § 10(3) of the AUSTRIAN Consumer Protection Act invalidates clauses like the one mentioned in para. (1) (n) of the EEC list of terms. In accordance with paragraph (2) of the present Article, the ESTONIAN LOA § 31(2) states that if a merger clause is prescribed in standard terms, it is only presumed that the parties intended their prior declarations of intent, acts or agreements to be deemed not to form part of the contract, i.e. the effect of the clause is left to be decided by the rules on standard terms (LOA §§ 37 ff), see Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, § 31, no. 4.2.

11. As under the PORTUGUESE Decree Law 446 / 85 of October 25 1985, art. 7, on standard terms, and POLISH CC art. 385 § 1, individually negotiated terms take priority over terms in a standard form contract; a merger clause in such a contract cannot set aside a prior or simultaneous individual agreement. The same is true of ITALY (see CC art. 1342), where in order for a merger clause contained in standard terms to be effective it is also necessary that the adhering party knew, or should have known, of the standard terms at the time of conclusion of the contract by using ordinary diligence (see CC art. 1341).

V. Extrinsic evidence on interpretation of the contract

12. In the systems which enforce merger clauses, it is generally held that the parties' prior statements may be used to interpret the contract, see UNIDROIT Principles art. 2.1.17, second sentence, and the notes to II.–8:101 (General rules) and II.–8:102 (Relevant matters) in the Chapter on interpretation, below.

13. Under ESTONIAN law, LOA § 31(3) allows the parties' prior statements to be used to interpret the contract even in the case of a merger clause. Subject to the principle of good faith, this rule may be excluded by the express agreement of the parties (Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, § 31, no. 4.3)

II.–4:105: Modification in certain form only

(1) A term in a contract requiring any agreement to modify its terms, or to terminate the relationship resulting from it, to be in a certain form establishes only a presumption that any such agreement is not intended to be legally binding unless it is in that form.

(2) A party may by statements or conduct be precluded from asserting such a term to the extent that the other party has reasonably relied on such statements or conduct.

COMMENTS

A. 'No oral modification' clauses in general

Contract terms which provide that modification or termination by agreement must be in writing (or some other specified form) often occur, especially in long-term contracts. Under this Article such clauses will only establish a rebuttable presumption that any such later oral agreements or agreements made by conduct were not intended to be legally binding. It would be contrary to good faith to let the parties' agreement to use a particular form bind them to that form when later they have clearly made up their minds to use another form. If, therefore, it can be shown that both parties agreed to a modification of the contract terms or a termination of the contractual relationship, but did not use the specified form, effect must be given to their agreement. This applies even if in an individually negotiated clause in their contract they provided that they would not give effect to an oral agreement to disregard the "no oral modification" clause.

B. Reliance in spite of a merger or 'no oral modification' clause

If the parties have reached an oral agreement – for example, they have agreed orally to modify a contract that contains a merger clause or a "no oral modification" clause - but it cannot be shown that they have agreed to disapply the clause, yet one party has reasonably acted in reliance on the oral agreement, the other party will be precluded from invoking the clause

> *Illustration*
> A construction contract contains a clause providing that "this contract may only be modified in writing signed by both parties". Subsequently the parties orally agree to some changes in favour of the owner. The changed obligations are performed. When later the contractor invokes another oral modification made in its favour the owner invokes the "no oral modification clause.

The contractor may invoke the performance of the obligations as modified by the first oral agreement to show that the second oral agreement, in favour of the contractor, is binding on the owner. The contractor has in fact relied on the abrogation of the "no oral modification" clause.

NOTES

I. Evidential value only

1. The rule in paragraph (1) which only gives evidential weight to the written modifications clause is in accordance with the laws of most of the countries of the Union as far as contracts in general are concerned.

2. Thus in FINNISH, DANISH and SWEDISH law, even if the parties have agreed that any modification of their contract is without effect unless made in writing, they may nevertheless later orally agree to disregard their previous no-oral modification agreement. However, a party invoking such a later oral agreement has to prove it, see *Ramberg*, Köplagen, 108, and. *Bryde Andersen*: Grundlæggende 235 and Finnish case law e.g. CC 1998:75 (Finnish Supreme Court in e.g. *Sisula-Tolokas*, Twenty Cases).

3. The same appears to be the case in GERMAN law see Schlechtriem and Schwenzer (-*Schlechtriem*), art. 29 no. 19. Parties who "seriously and definitely" wish to make an informal modification of a contract which contains a no-oral modification clause may do so. Such an informal agreement may, however, be difficult to prove, see Dölle (-*Reinhardt*), Kommentar zum einheitlichen Kaufrecht, art. 15 no. 68. The position of SLOVENIAN law is the same, see LOA § 52(2), (3), (4). 4. The Supreme Court of GREECE has held that even if the parties have agreed to conclude their contract in writing, they may later orally agree to modify it (A.P. 1054/1976, NoB 25 (1977), 508). Even contracts for which the law requires form for their modification may be ended by oral agreement (A.P. l376/ 1982, EEN 50 (1983), 600).

5. Paragraph (1) also appears to be in accordance with the law of ENGLAND and IRELAND, although there is no authority on this exact point. There are cases holding that a contractor cannot recover extra payment when under the terms of a building contract a written instruction for a variation of the contract should have been obtained, see *Hudson* §§ 7-055-058.

6. The ITALIAN CC art. 1352 provides: "If the parties have agreed in writing to adopt a specified form for their future contract, it is presumed that such a form was intended as a requirement for the validity of the contract". The same rule applies if parties to a contract have agreed in writing that any subsequent modification or addition will be made in a specific form: *Antoniolli and Veneziano*, Principles of European contract law and Italian law, 106 and Court of Cassation, 14 April 2000, no. 4861, in I contratti 2000, 873. Special formalities may also be agreed for acts which enforce already existing rights and duties such as acts of communication or performance, see *Bianca*, Diritto civile III, 300.

II. A mixed approach, or the law is unsettled

7. In those countries which refuse to admit proof of the existence of civil contracts not made in writing, modifications must also be in writing, see FRENCH, BELGIAN and LUXEMBOURG CCs art. 1341. A specific example of this: under art. l793, in a contract providing a fixed price for the work as a whole, architects and contractors may only demand an increase in the price for extra work if this extra work and its price have been agreed in writing.

8. In BELGIUM, however, the courts have admitted evidence by other means than writing of agreements on extra work in building contracts, once the extra work has been performed, see Cass. 22 March 1957, Pas. belge I, 887. Likewise in SPAIN both CC art. 1593 and the Supreme Court admit oral and tacit agreements on payment for extra work in building contracts once the work has been carried out (see Supreme

Court decision of 25 January 1989 RAJ (1989) 126). Relying on the prescribed written consent may amount to abuse of right, where the party is proved to have orally agreed (Supreme Court decision of 20 December 1990 RAJ (1990) 10364). Likewise in FRANCE where reliance is a criterion which is becoming more and more important (see. D. Mazeaud's report, RTDC 2004).

9. In FRANCE the question whether in commercial contracts which need not be made in writing, no-oral modification clauses are valid, has not arisen. The rule is that agreements on evidence, be it agreements on whether evidence is to be admitted or on the effects of such evidence, are enforced.

10. As any evidence is admitted for the existence of a commercial contract covered by art. L.110-3 of the FRENCH and art. 25 of the BELGIAN Commercial Codes, the parties may orally agree to disregard a previous no-oral modification clause (Dölle (-*Reinhardt*), Kommentar zum einheitlichen Kaufrecht, 105, who for FRANCE quotes Schlessinger (-*Bonassies) II 165*).

11. No-oral modification clauses are generally not enforced in the USA, see *Farnsworth* II 228 ff. However the UCC § 2-209(2) enforces such clauses in sales contracts, but, except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party if the other is not also a merchant.

III. No-oral modification clauses enforced

12. CISG gives effect to no-oral modification clauses. Art. 29(2), first sentence, provides that a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement, see also UNIDROIT Principles art. 2.1.18. The ESTONIAN LOA § 13(2) is similar. AUSTRIAN law is reported to give effect to no-oral modification clauses except in consumer contracts.

13. According to POLISH law, modification of a contract has to be made in the same form which either legal provision or the parties provided for its conclusion (CC 77). Accordingly, if the parties required writing for the validity of their agreement any subsequent modification must be in writing as well. Unless stated otherwise by the parties, writing is required for evidential purposes only. Therefore, although an oral agreement on modification would be valid, there are serious restraints as to its proof. Where the written form provided for evidential purposes is not observed, evidence by witnesses or evidence in the form of statements made by the parties concerning the performance of the act, is not admissible, unless (i) both parties consent to that effect, (ii) a consumer so demands in a dispute with a business, or (iii) the fact of the performance of the act in law is made probable in writing. The provisions requiring writing for evidential purposes are not applicable to juridical acts in business relations (CC art. 74).

14. The SLOVAK CC § 40 sub-para. 2 provides that "a written agreement may be changed or cancelled only in writing". According to the SLOVAK Ccom, should a contract which has been concluded in writing include provisions stipulating that the contract may be amended or cancelled by an agreement of the parties in writing, then the contract may be amended or cancelled only in writing. (Ccom § 272 sub-para. 2).

15. The CZECH CC simply provides that a contract concluded in writing may be modified or terminated only in writing (§ 40(2)). It makes no difference whether the written form is required by the law or whether the parties chose this form of their own will. In commercial relations, Ccom § 272(2) applies according to which if a contract concluded in writing contains a provision that it may be modified or terminated only

by an agreement in writing, then the contract may be modified or terminated only in writing. So a modification agreement made orally contrary to the contract may be at best an aid to interpretation; see *Štenglová/Plíva/Tomsa,* Commercial Code[10], 1011.

16. Under the HUNGARIAN CC § 218(3) if the validity of a contract requires a definite form determined by law or the agreement of the parties, termination or cancellation is normally valid only if in the specified form. However, this can be overridden by the parties' mutual consent.

17. BULGARIAN law provides that modifications of a contract should be made in the form of the original contract (Ccom art. 293(6)). Non-conformity with the required form makes the contract void (Ccom art. 293(2), LOA art. 26(2)).

IV. Reliance despite merger clauses and no oral modification clause

18. Paragraph (2) of the Article provides that a party by word or conduct may be precluded from invoking a no-oral modification clause if the other party has acted in reliance on the words or conduct. Similar rules are provided for the no-oral modification clause in US UCC arts. 2.209(4) and (5), CISG art. 29(2) second sentence and UNIDROIT art. 2.18. The same rules on reliance apply in AUSTRIAN law, see Schwimann (-*Apathy*), ABGB IV[3], § 884 no. 3 and in ESTONIAN law (LOA § 13(3)). In BULGARIA too the good-faith reliance of a party on the (informal and null) statement is protected by the law – the other party cannot invoke the nullity if it did not challenge the validity of the statement upon its receipt (Ccom art. 293(3)).

19. Even though they give effect to merger and 'no-oral modification' clauses, in those countries which allow the good faith and fair dealing principle to operate generally, a reliance rule will probably apply. In GREEK law the principle of *venire contra factum proprium* would apply. On ITALIAN CC arts. 1175, 1337 and 1375 see *Bianca*, Diritto civile III, 422 ff and 500 ff. In FRANCE, see Mazeaud's report.

20. In ENGLAND reliance may be invoked based on the doctrine of estoppel. If in a binding contract the court finds that the employer allowed extra work to be done, the contractor may recover payment for this work although the employer did not consent in writing as required by the contract, see *Hudson* §§ 7-094 - 097.

21. In SPAIN, reliance may be invoked on the doctrine of the abuse of right, as a form of abuse consisting in defending voidability on formal grounds only (see, Bercovitz [-*Carrasco*] *Comentarios al Código Civil*, 2006, 66).

Section 2: Offer and acceptance

II.–4:201: Offer

(1) A proposal amounts to an offer if:

(a) it is intended to result in a contract if the other party accepts it; and

(b) it contains sufficiently definite terms to form a contract.

(2) An offer may be made to one or more specific persons or to the public.

(3) A proposal to supply goods from stock, or a service, at a stated price made by a business in a public advertisement or a catalogue, or by a display of goods, is treated, unless the circumstances indicate otherwise, as an offer to supply at that price until the stock of goods, or the business's capacity to supply the service, is exhausted.

COMMENTS

A. The "offer and acceptance model"

This section deals with contracts concluded by an offer followed by an acceptance, which is the usual model for the conclusion of contracts.

However, there are other models for the conclusion of a contract. Agreements are often made under circumstances where it is not possible to analyse the process of conclusion into an offer and an acceptance. The rules of this section may sometimes apply to these cases.

B. Requirements for an offer to become effective

An offer is a proposal to make a contract. If it is accepted it becomes a contract provided that the general requirements for concluding a contract are met.

For a proposal to amount to an offer it must (a) show an intention that a contract is to result if it is accepted; and (b) contain terms which are sufficiently definite. Before it can be effective it must also be communicated to one or more specific persons or to the public. This follows from the general rules on the making of juridical acts.

C. Proposals to the public

Proposals which are not made to one or more specific persons (proposals to the public) may take many shapes - advertisements, posters, circulars, window displays, invitations for tenders, auctions etc. These proposals are generally to be treated as offers if they show an intention to be legally bound if they are accepted. However, proposals made in circumstances where the personal qualities of the other party are likely to be important are generally presumed to be invitations to make offers only. This applies to an advertisement of a house for rent at a certain price. Further, an advertisement for a job-opening for persons who meet certain requirements does not oblige the advertiser to employ a person offering his or her services and meeting the requirements. Construction contracts are often made on the basis of public bidding. Owners generally only invite tenders, which are the offers.

Other considerations may also lead to the assumption that, unless otherwise indicated, a proposal is only an invitation to make an offer.

Putting up an item for auction is generally only an invitation to bid. The auctioneer need not accept a bid and may withdraw the goods if the highest bid is too low. The bid is the offer which is accepted by the fall of the hammer. A clear indication that the goods are sold "without reserve" or the like may, however, turn putting them up for auction into an offer.

On the other hand, in order for a proposal to have effect it may be necessary for the proposer to make an offer which may be binding if accepted. This applies for example to an offer of a commission if a representative effects a sale of the proposer's property. Furthermore, persons who make advertisements etc. may wish prospective suppliers or purchasers to know that they will be able to deliver or acquire the goods or services by accepting the proposal, and that they do not risk refusal of their "acceptance" and the consequent waste of their efforts and reliance costs. Therefore, proposals which are sufficiently definite and which can be accepted by anybody without respect of person are to be treated as offers. This consideration has led to the provision in paragraph (3) and will also result in a proposal being an offer in other cases.

Illustration 1
Company A advertises in a trade paper that it will buy "all fresh eggs delivered to our premises before 22 February" and pay a certain price. A's advertisement is to be considered an offer which may be accepted by bringing the eggs to its premises.

Illustration 2
In the local paper Bell advertises a plot of land for sale to the first purchaser to tender €25,000 in cash. This constitutes an offer and when Mart tenders €25,000 there is a contract.

D. Goods and services offered at stated prices

Paragraph (3) provides that a proposal to supply goods from stock, or a service, at a stated price made by a business in a public advertisement or a catalogue or by display of goods is regarded, unless the circumstances indicate otherwise, as an offer to supply at that price until the stock of goods, or the business's capacity to supply the service, is exhausted.

The business which advertises goods in the way described is, unless otherwise indicated, taken to have a reasonable stock of goods and a reasonable capacity to provide services.

The rule applies only if the circumstances do not indicate that the proposal is not intended to be an offer. A different intention may appear from the advertisement, etc. and may follow from the circumstances. Thus, if the goods or services are offered on credit terms the business may refuse to deal with persons of poor credit-worthiness.

Although the "offer and acceptance" model is known throughout the laws of the Member States, the precise application of it differs. In particular some laws do not normally recognise an offer by a business to supply goods at a stated price, or a display of goods marked with a price, as an offer. However the rule adopted in paragraph (3) seems preferable, since otherwise a business may mislead customers into thinking that goods or services are available at prices at which the business has no intention to supply them.

NOTES

I. The "offer and acceptance" model in the laws

1. The "offer and acceptance" model, by which one person makes an offer to another person which the latter accepts, has been the prototype for the conclusion of contracts in all the legal systems of the Union, see GERMAN CC §§ l45-l50, AUSTRIAN CC §§ 861-864a, NORDIC Contract Acts §§ l-9, GREEK CC arts. 185-192, ITALIAN CC arts. 1326-1329, DUTCH CC arts. 6:2l7- 6:225, CZECH CC §§ 43a–45, ESTONIAN LOA §§ 16-22, SLOVENIAN LOA §§ 21-32, SLOVAK CC §§ 43a–51; HUNGARIAN CC §§°211-214;. BULGARIAN LOA arts. 13-14; and POLISH CC arts. 66-70. The same is true in the ENGLAND, IRELAND and SCOTLAND jurisdictions: see e.g. *Treitel,* The Law of Contract[9], chap. 2; *Gloag and Henderson* para. 5.09. It is also the main model used in CISG part II, arts. 14-24, and in chapter 2 of the UNIDROIT Principles. In all the countries of the Union, including those which do not have any statutory provisions on the conclusion of contracts in general, writers treat the offer and acceptance as the principal model.

II. What is required for an offer to be binding?

2. All the laws of the UNION require that the offer must show an intention to be bound, and that it must be sufficiently definite to establish an enforceable contract. Thus the AUSTRIAN CC § 869 provides that "the acceptance of an offer as well as the offer itself must be declared freely, seriously, precisely and intelligibly." SPANISH law also requires seriousness of intention, definitiveness and completeness, see Supreme Court decisions of 28 May l945 RAJ (1945) 692 and 10 October l980, RAJ (1980) 3623. The general rule is also followed in BELGIUM (see e.g. Cass. 23 Sept. 1969, *Pas. belge* 1970, 73, *RCJB* 1971, 216). The ITALIAN CC does not contain any specific definition of the term "offer", but both scholars (see *Bianca,* Diritto civile III, 214 f.; *Roppo,* Il contratto 101) and case law (see, among others, *Court of Cassation* 24 May 2001, Giust.civ.Mass 2001, no. 7094 and 3 July 1990, published in excerpt in Bessone, Casi e questioni di diritto privato 813 ff) require a proposal purporting to be an offer to show the offeror's intention to be legally bound and to specify the essentials of the proposed deal with sufficient certainty. POLISH law requires that the offer is a firm proposal to conclude a contract and that it "defines essential terms of this contract" (CC art. 66 § 1). The "firm" proposal means that the conclusion of a contract then depends on the offeree and is made by acceptance of the offer. The term "offer" need not be used; as every declaration of will that fulfils basic requirements specified in CC art. 66 constitutes an offer (see the Supreme Court's decision of September 28, 1990, III CZP 33/90, OSPiKA 1991/3, poz. 70). Similarly, the SLOVENIAN LOA § 22(1) defines an offer as a proposal for conclusion of a contract, addressed to a specific person, containing all the essential terms of the contract, so that the contract would be concluded by mere acceptance. An intention of the offeror to be legally bound is also required (*Juhart and Plavšak,* Obligacijski zakonik I, p. 237). The BULGARIAN law states also that the offer is binding for the offeror – LOA art. 13; the offer however should contain all the terms of the contract. Under ENGLISH and IRISH law a proposal does not amount to an offer if it expresses some reservation on the part of the maker or if the terms proposed are not sufficiently specific. On both points see, e.g., the English case of *Gibson* v. *Manchester City Council* [1979] 1 WLR 294, HL The ESTONIAN LOA § 16(1) corresponds to paragraph (1) of the present Article. The

SLOVAK CC § 43a sub-para. 1 provides that an expression of will aimed at the conclusion of an agreement and addressed to one or more certain persons is to be considered as an offer to conclude an agreement if it is sufficiently definite and if the offeror expresses in it a will to be bound in case of acceptance. The SLOVAK Ccom § 269 sub-para. 2 allows parties to conclude a contract of a type not specifically regulated. However, should the parties not sufficiently identify the subject matter of their obligations, then the contract is void. CZECH CC requires the offer to be definite enough and the offeror's will to be bound in case of acceptance (§ 43a(1)); additional requirements are given in CC § 37(1)– the offer must be made freely, seriously, definitely and understandably.

III. Proposals to the public

3. All the legal systems accept that in some situations proposals to the public may amount to an offer. However, in a number of situations the laws reach different results on the question whether a proposal is an offer. Most of them have general principles, and provide special rules applicable to special situations.

4. The ITALIAN CC art. 1336(1) provides that a proposal to the public which contains the main elements of the contract towards whose formation the proposal is directed is effective as an offer unless it appears otherwise from the proposal or from usages, see *Bianca*, Diritto civile III, 251, who stresses the necessity of a clear undertaking.

5. For the international sale of goods, CISG art. 14(2) provides that a proposal other than one addressed to one or more specific persons is to be considered merely an invitation to make offers unless the contrary is clearly indicated by the person making the proposal.

6. Paragraph (2) differs from the ITALIAN rule and CISG in that it does not establish a presumption one way or the other, but leaves the issue to be decided by the rules of interpretation. This also appears to the attitude taken by the UNIDROIT Principles which do not provide rules on offers to the public.

7. SPANISH courts and established legal doctrine agree that offers made to the public amount to contractual offers if the following requirements are met: (1) there is an intention to be bound; (2) the essential terms of the contract are established and (3) the offer can be known by the third parties (Supreme Court Judgments 10 October 1980, RJ 3623, 30 May 1996, RJ 3864, 26 Febrero 1994, RJ 1198; *Moreno*, La Oferta de Contrato, p. 146; *Gómez*, Comentarios, p. 66).

8. The SLOVENIAN LOA § 22(3) provides that a proposal addressed to an undetermined number of persons generally does not constitute an offer but an invitation to make offers, unless the circumstances indicate otherwise. However, a display of priced goods is considered an offer, unless the circumstances or usages indicate otherwise, LOA § 23.

9. In BULGARIAN commercial law the invitation to make an offer (Ccom art. 290) as well as the offer to the public (Ccom art. 291) are regulated. The distinction between them depends however on the concrete circumstances.

10. In POLISH law an offer can be addressed to one or more specific persons as well as to the public, see: *Radwański, System prawa prywatnego, II, Supl., 26*. However, in case of doubt as to their legal effects, advertisements, notices, price-lists and other information directed to the public or to specific persons, are not considered as offers, but as invitations to take steps to conclude a contract (CC art. 71).

11. CZECH law is based on the concept that the offer must be made to one or more individually identified persons; *Švestka/Jehlička/Škárová*, OZ[9], 292, Knappová (-

Knapp and Knappová), Civil Law II, 37. The most important exception to this principle are consumer contracts where it is inferred that even a proposal to the public may establish the offer (CC § 53 and Švestka/Jehlička/Škárová/Spáčil (-*Hulmák*), OZ[10], 346). Other public offer provisions may be found e.g. in the Copyright Act (as to the license agreements, with special regard to software license agreements - § 46(5)), or in the Ccom (§§ 276 et seq., which sets forth quite detailed regulation on how the public offer may be repealed, with whom of the acceptors the contract is concluded etc.).

12. According to the SLOVAK law an offer can be addressed to one or more certain persons (CC § 43a sub-para. 1). The SLOVAK Ccom § 276 sub-para. 1 provides that a manifestation of will by an offering party towards unspecified persons in order to conclude a contract is to be deemed a public offer to conclude a contract.

13. Apart from these rules there are no general statutory provisions on the subject in the European Union. Its regulation is left to the courts. Whether a proposal to the public is an offer or only an invitation to make an offer has been a question of interpretation of the proposal. However, the rules of interpretation which the courts have established differ.

14. In FRANCE the courts have shown an inclination to treat proposals to the public as offers, see *Terré/Simler/Lequette*, Les obligations[6], no. 114. However, in some contracts the offeror wants to know the identity of the other party. Therefore in France, as in BELGIUM and LUXEMBOURG, the proposal is probably only an offer if the proponent will be ready to conclude a contract without further investigations once the proposal has been accepted, see for Belgium (see *Cornelis*, TBH 1983, 39). But there is an exception when the content corresponds to an offer, e.g. advertisements in catalogues (see *De Boeck*, Informatierechten en –plichten, (2000) no. 269) and for FRANCE, *Terré/Simler/Lequette*, Les obligations[6], no. 114.

15. In ENGLAND, IRELAND and SCOTLAND proposals to the public are in general treated as invitations to make an offer, but they may amount to an offer, see *Carlill* v. *Carbolic Smoke Ball Co*. [1893] 1 QB 256. CA; *Treitel*, The Law of Contract[9], paras. 2-007-2-011; and the IRISH case of *Billings v. Arnott* (1945) 80 ILTR 50, HC. In SCOTLAND they may also amount to a unilateral promise *McBryde*, Law of Contract in Scotland[1], para. 2.27. In AUSTRIAN law the proposal to the public does not, as a rule, qualify as an offer since it is not sufficiently definite and therefore does not show any intention of the offeror to be bound, see OGH 3 October 1972, SZ 45/102. It is treated as a mere invitation to anybody who might be interested to negotiate.

16. In the NETHERLANDS there is no general rule. An offer in an advertisement to sell immovable property will generally be an invitation to submit an offer, even if the person who is the first to respond agrees to pay the full price charged. But a department store which offers a free teddy bear to every purchaser who buys goods for over a certain amount will generally be bound.

IV. Specific issues

(a) Proposals to supply goods and services at stated prices

17. The presumption established in paragraph (3) applies in several countries to proposals made in advertisements in the press and in the television, and to advertising material and price lists communicated to a large number of addressees: for DENMARK, see *Lynge Andersen* 54 ff; for BULGARIA, Ccom art. 291, sent. 2; for ITALY, see *Bianca*, La vendita e la permuta 247, who maintains that in the retail business such

proposals remain offers as long as there is stock at hand; and PORTUGUAL, see *Almeida* Negocio juridico 804.

18. In FRANCE it has been held that such proposals constitute offers "which bind the offeror to the first acceptor" unless the contrary follows from the proposal or from the circumstances, see French Cass.civ. 28 November 1968, Bull.civ. III 389. A proposal for an employment, a lease, the granting of loan or other contracts where the proponent may want to know the personal characteristics of the other party are only invitations to make an offer, see *Terré/Simler/Lequette*, Les obligations[6], no. 113 and *Bénabent*, Les obligations[7], no. 58. BELGIAN law does not generally regard proposals made in advertisements in papers as offers, see *Cornelis*, Tidschridt voor Belgisch Handelsrecht 1983, 39. The same holds true for GERMAN law but proposals may by way of interpretation be qualified as binding offers, see MünchKomm (-*Kramer*), BGB, § l45 no. 10.

19. In ENGLISH law public advertisements of goods are generally invitations to make offers, see *Grainger & Son v. Gough* [1896] AC 325, HL) and *Treitel*, The Law of Contract[9], para 2-010. SCOTTISH law is to the same effect, see *Hunter* v. *General Accident Corporation* 1909 SC 344, aff'd. 1909 SC (HL) 30 and *McBryde*, Law of Contract in Scotland[1], paras. 6.25-6.27. In AUSTRIA such proposals generally are also not treated as offers (Rummel (-*Rummel*), ABGB I[3], § 861 nos. 7 et seq.).

20. In SWEDEN and DENMARK advertisements are invitations to make offers. When such offers are made Danish authors hold that the rule in the Contract Acts § 9 on the binding effect of silence by the offeree to the offer applies, see *Lynge Andersen* 56 f and *Bryde Andersen*, Grundlæggende 183 f. In Sweden that is uncertain, see *Ramberg*, Allmän avtalsrätt[4], 104, *Adlercreutz*, Avtalsrätt I[10], 55. That advertisements are invitations to make offers is also the prevailing view in FINLAND, see *Hemmo*, Sopimusoikeus I, 107-108.

21. In CZECH law, a public advertisement may result in an offer only if made to consumers (Švestka/Jehlička/Škárová/Spáčil (-*Hulmák*), OZ[10], 346) and if it is specific enough (i.e. the supplier, the goods and the price are definitely specified). In other cases, advertisements or proposals not addressed to one or several identified persons are only invitations to make an offer.

22. In SLOVENIA proposals with stated prices made in the newspapers, television, or in catalogues etc. generally do not constitute offers but invitations to treat, LOA § 24(1). However, the supplier is liable in damages to the offeror, if the supplier rejects the offer without good reason, LOA § 24(2).

(b) Display of priced goods

23. In FRANCE, LUXEMBOURG and BELGIUM, displays of priced goods in windows and self-service stores are held to be offers, see in FRANCE: *Terré/Simler/Lequette*, Les obligations[6], no. 113 and *Bénabent*, Les obligations[7], no. 58 and in BELGIUM *Dekkers*, II no. 92; *Van Gerven*, Verbintenissenrecht, (2006) 156. The same applies in SPAIN; see Retail Trading Act (1996), art. 9, where special rules apply to consumer contracts. In ITALY too a priced display is considered an offer to the public, see note (a) (aa) above and *Roppo*, Il contratto 112. This is also true of PORTUGAL, see *Almeida*, Negocio juridico *804* and *Hörster 45*, BULGARIA, see *Kozhuharov*, Law of Obligations, 65 and SLOVENIA, see LOA § 23. In DENMARK a shopkeeper is taken to have made an offer of the displayed goods, but not of all goods which are in stock, see *Lynge Andersen* 54. In POLAND, the display of goods with the price to the public at a place of sale is deemed an offer of sale (CC art. 543).

24. In DENMARK there is some support for the view that advertisements in interactive media such as the internet are binding offers UfR 2003. 907, *Lynge Andersen* 57 f and *Bryde Andersen*, Grundlæggende 184 f.

25. Displays of priced goods in shops and markets are normally treated as invitations to make an offer in ENGLISH law and in IRISH law, see for ENGLAND, *Fisher* v. *Bell* [1961] 1 QB 394 (display of goods in shop window) and *Pharmaceutical Society of GB* v. *Boots Cash Chemists (Southern) Ltd*. [1953] 1 QB 401, CA (display of goods marked with prices on self-service shop shelves) and, for IRELAND, *Minister for Industry and Commerce v. Pim* [1966] IR 156. The same holds true of GERMANY, see BGH 16 January 1980, NJW l980, 1388; AUSTRIA, see Rummel (-*Rummel*), ABGB I[3], § 861 no. 7; ESTONIA, see Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, § 16, no. 4.2; SWEDEN, see *Grönfors*, Avtalslagen 28; and in FINLAND, see *Hemmo*, Sopimusoikeus I, 107. SCOTTISH law is probably the same, but has been criticised as being contrary to normal expectations, see *Walker, Contracts*, para. 7.9.

(c) Auctions

26. Applying the offer-acceptance model, some laws consider the putting up of property for an auction as an invitation, and each bid as an offer which lapses when a higher bid is made; the final bid is then accepted if and when the agreed concluding step is taken – i.e. the step which indicates acceptance of the highest bid. In traditional auctions this might be when the auctioneer lets the hammer fall. This rule, which means that either party may withdraw an offer before the concluding step, such as the fall of the hammer, is applied in GREECE, see CC art. 199; PORTUGAL, see *Almeida*, Negocio juridico 804 and *Hörster* 457; BELGIUM, see *Kruithof & Bocken* 307, the NETHERLANDS; DENMARK, see *Lynge Andersen* 58; SWEDEN, see *Grönfors*, Avtalslagen 37 and Christina *Ramberg*, Internet Marketplaces: The Law of Auctions and Exchanges Online, Oxford University Press 2002, Chapter 8; SLOVENIA, see *Juhart and Plavšak*, Obligacijski zakonik I, 199, and ESTONIA LOA § 10; and FINLAND, see Finnish Contracts Act § 9 and POLAND, see CC arts. 70^2 § 2. The same rule applies in ENGLAND, SCOTLAND and IRELAND, see the UK Sale of Goods Act 1979, s. 57, and *Treitel*, The Law of Contract[9], para. 2-008. In GERMANY only the seller may withdraw while the bidder is bound until a higher bid is made or the auction is cancelled altogether, see CC § 156 and MünchKomm (-*Kramer*), BGB, 1316 § 156 no. 5.

27. However, in ENGLAND, SCOTLAND and IRELAND, if the sale has been advertised as being 'without reserve', the highest bidder will have a remedy. However, this will be not against the seller but against the auctioneer who allows the goods to be withdrawn, see the English case of *Warlow v. Harrison* (l859) 1 E&E 309 and the Irish case of *Tully v. Irish Land Commission* (1961) 97 ILTR 174, HC. For Scotland see *Gloag*, Contract, 22-3.

28. In contrast, in FRANCE, LUXEMBOURG, ITALY and SPAIN the proposal to the public to bid is the offer, and the highest and last bid is the acceptance, see for France, *Malaurie and Aynès*, Les obligations[9], no. 468; Spanish Retail Trading Act 1996 art. 56 and *Díez-Picazo*, Fundamentos I[4], 300 f; and for Italy, *Bianca*, Diritto civile III, 249. The situation seems to be the same in BULGARIA, where the auction is regulated in Ccom arts. 337–341, but under subsidiary application of the general rules of offer and acceptance (LOA arts. 13-14).

29. In CZECH law, transfer of ownership in an auction is not regarded as a contract, but as a special (original) acquisition title, so questions of offer and acceptance do not arise; see Knappová (-*Mikeš*), Civil Law II, 196.

(d) Rewards

30. It appears that in most, if not all the systems, an offer of a reward is held to have been accepted by performing the act for which the award is offered. This rule is expressly provided in the DUTCH CC art. 6:120, and is adopted in DENMARK, see *Ussing*, Aftaler[3], 51 and in SPAIN, see Supreme Court 17 October 1975, RAJ (1975) 3675 and 6 March l976, RAJ (1976)1175. In ESTONIA, GERMANY, GREECE, PORTUGUAL and ITALY the offeror must pay the reward to the person who performs the act even though that person did not act in response to the award, in most cases because he or she did not know of it, see the ESTONIAN LOA § 1005, GERMAN CC § 657, GREEK CC arts. 709 ff, PORTUGUESE CC art. 459 and ITALIAN CC art. 1989. The situation in BULGARIA (LOA arts. 368-369) is similar, although there is no definite doctrinal or court opinion on this matter. This is also the unanimous opinion of AUSTRIAN writers, see e.g. *Koziol and Welser*, Bürgerliches Recht II[13], 15 et seq.

31. In ENGLAND an advertisement of a reward is an offer but, for there to be a contract, the person who acts must have been conscious of the offer. A person cannot claim a reward for information given if at the relevant time he or she did not know of or had forgotten the offer. The act is then not an acceptance of the offer, see *R* v. *Clarke* (1927) 40 CLR 227, H.Ct of Australia, and *Treitel,* The Law of Contract[9], para. 2-047 and (on unilateral contracts in the English sense of the word) paras. 2-050 ff. In SCOTLAND advertisements of rewards may, depending on the interpretation given to them, be offers, see *Hunter* v. *General Accident Corporation*, 1909 SC (HL) 30 or binding promises which do not need acceptance, see *Petrie* v. *Earl of Airlie* (1834) 13 S 68.

32. In FRANCE and LUXEMBOURG the issue is not settled by statute or precedent. The French authors are divided. Some regard the promise of a reward as an offer: thus an offer of a reward to the one who returns a lost dog will only bind the offeror to pay the person who returns the dog if that person in awareness of the offer has accepted it. Others regard it as a unilateral engagement, see *Terré/Simler/Lequette,* Les obligations[6], no. 53. In BELGIUM it is held to be a binding promise which does not need acceptance, see *Cauffman*, De verbindende eenzijdige belofte, nos. 464-484; *Stijns*, Verbintenissenrecht I, no. 363. In FINLAND and SWEDEN the law on this point is unsettled.

33. In POLAND, such a public promise for a reward is not an offer in the strict sense; however, it is binding on the promisor.

34. The SLOVAK CC § 850 provides that a public promise binds the person who publicly undertakes to pay a reward or give another performance to any person from a number of persons not specified in advance who fulfils the terms laid down in the public promise.

35. According to the CZECH CC, the public promise (§§ 850–852) is regarded not as a contract but as a unilateral juridical act. This concept is motivated by the fact that the condition which must be satisfied in order to get the reward, need not be a juridical act but may simply be factual conduct of the recipient (who may not even intend to satisfy the condition); Švestka/Jehlička/Škárová/Spáčil (-*Macek*), OZ[10], 1402. In principle, the same holds true in case of the public competition (CC §§ 847–849).

36. In SLOVENIA the obligation of the promisor to pay a reward is not based on a contract, but on the fact that someone meets the conditions, as stated in a unilateral juridical act. See Juhart and Plavšak (-*Polajnar-Pavčnik*), Obligacijski zakonik II, p. 75.

II.–4:202: Revocation of offer

(1) An offer may be revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.

(2) An offer made to the public can be revoked by the same means as were used to make the offer.

(3) However, a revocation of an offer is ineffective if:

(a) the offer indicates that it is irrevocable;
(b) the offer states a fixed time for its acceptance; or
(c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

(4) Paragraph (3) does not apply to an offer if the offeror would have a right under any rule in Books II to IV to withdraw from a contract resulting from its acceptance. The parties may not, to the detriment of the offeror, exclude the application of this rule or derogate from or vary its effects.

COMMENTS

A. Revocation and withdrawal distinguished

An offer becomes effective when it reaches the offeree. However, before it reaches the offeree the offer may be countermanded or withdrawn, and it will not become effective. It cannot then be accepted by the offeree. However, an offer may be revoked before the offeree has dispatched an acceptance; the offer which is revoked has become effective, and might have been accepted, but if the acceptance has not been dispatched, and if the contract has not been concluded by an act of performance or other act by the offeree, the offer is revoked when the revocation reaches the offeree.

B. Acceptance by conduct

In case of acceptance by conduct the contract is normally concluded when the offeror learns of it. In this case the revocation is effective if it reaches the offeree before the offeror has learned of the conduct. In those cases where the offeree can accept by performing an act without notice to the offeror, the revocation must reach the offeree before the latter begins to perform.

C. Offers to the public

Revocation of offers to the public which are not irrevocable can be made by the same means as the offer. The revocation must then be as conspicuous as the offer. If the offer appeared as an advertisement in a newspaper the revocation must appear at least as visibly in the paper as the advertisement.

The revocation of an offer made in an advertisement which was mailed to the offeree must reach the offeree before the acceptance is dispatched. If the offer has been published in a newspaper, the paper announcing the revocation must be in the offeree’s mailbox or available in the news-stands before the offeree dispatches the acceptance.

D. Irrevocable offer

Under paragraph (3) there are three exceptions to the general rule in paragraph (1):

(a) if the offer indicates that it is irrevocable;

(b) if it states a fixed time for its acceptance;

(c) if the offeree had reason to rely on the offer as being irrevocable, and has acted in reliance on the offer.

In these cases the offer, if accepted, results in a contract even though it was purportedly revoked before it was accepted. If the offeror does not perform the obligations under the contract, the normal consequences of such non-performance will follow. The offeror may, for example, have to pay damages.

There is wide variation among the laws of the Member States as to when an offer may be revoked and when not, and, if the offer is regarded as irrevocable, as to the effect if nonetheless the offeror purports to revoke it. Paragraph (3) represents an improved version of the compromise adopted by the CISG. Paragraph (3) applies rules that accord with what businesses or consumers without legal knowledge are likely to understand when they receive an offer. If an offer is stated to be irrevocable for a period, the offeree is reasonable in assuming that an acceptance within the time limit will result in a contract. Likewise, if the offer simply contains a time limit the offeree is likely to understand that it will be held open until the limit expires. It is of course open to the offeror to state that the offer may be withdrawn at any time.

E. Irrevocability stated

The indication that the offer is irrevocable must be clear. It may be made by declaring that the offer is a “firm offer” or by other similar expressions. It may also be inferred from the conduct of the offeror.

F. Fixed time for acceptance

Another way of making the offer irrevocable is to state a fixed time for its acceptance. This statement must also be clear. If the offeror states that the offer “is good until January 1” the offer is irrevocable. The same applies if the offeror states that the offer “lapses on September 1”. If on the other hand the offeror only advises the offeree to accept quickly, the offer will be revocable.

G. Reliance

The third exception to the rule in paragraph (1) concerns cases where “it was reasonable for the offeree to rely on the offer as being irrevocable” and the “offeree has acted in reliance on the offer”. Reliance may have been induced by the behaviour of the offeror. It may also be induced by the nature of the offer.

Illustration
Contractor A solicits an offer from sub-contractor B to form part of A’s bid on a construction to be assigned within a stated time. B submits its offer and A relies on it

when calculating the bid. Before the expiry of the date of award, but after A has made its bid, B revokes its offer. B is bound by its offer until the date of assignment.

H. Revocation always possible if withdrawal from contract possible

Paragraph (4) deals with the situation where a person makes an offer which would normally be irrevocable but where that person would have a right to withdraw from any contract resulting from the offer's acceptance. In this situation the offer is always revocable until it is accepted (after which the right to withdraw would come into play). The rule should be read along with the rules on the right of withdrawal in Chapter 5 of this Book. In the absence of this rule a person might give an ineffective notice of revocation of an offer but, having done that, might not realise that a separate notice of withdrawal was necessary in order to escape from a contract resulting from acceptance of the offer. The rule is mandatory in the interests of the offeror.

I. Incompatible contracts

It may happen that an offeree accepts an offer knowing that it is incompatible with another contract which the offeror has made. A collector accepts the offer of an art dealer to sell a picture knowing that the dealer has already sold the same picture to another collector. A theatre manager accepts the offer of an actor to perform at the theatre knowing that the actor has engaged himself to perform at another theatre for the same period. The offeree may still accept the offer: the contract is not invalid. The offeree is not bound to inquire into the validity or terms of the first contract or the steps which the offeror intends to take in relation to it. For all the offeree knows, the art dealer may be able to buy back the picture from the first customer or the actor may be willing and able to negotiate a release from his obligations under the first contract.

Neither the fact that at the time of the conclusion of the contract the performance of the obligation was impossible, nor the fact that at that time the party had no right or authority to dispose of the assets to which the contract relates, will prevent the contract from coming into existence (see II.–7:102 (Initial impossibility or lack of right or authority to dispose).

NOTES

I. Are offers revocable? Effects of wrongful revocation.

1. In this matter the laws of the Union differ on various questions. Is an offer revocable or irrevocable before it has been accepted? If it is normally revocable, can an offeror make the offer irrevocable? What are the effects of an improper revocation?

II. Offers are revocable but may be made irrevocable

2. Like the Article, some laws provide that an offer is revocable, but that it may follow from the offer or from the circumstances that it is irrevocable. If in spite of an attempted revocation the offeree accepts an irrevocable offer in due time, there is a contract.
3. Art. 1328 of the ITALIAN CC provides that the offeror may revoke the offer until the contract is concluded, *i.e.* the offeror has knowledge of the other party's acceptance. However, an offer must be deemed irrevocable when the offeror has made a

declaration in that sense (see *Bianca*, Diritto civile III, 234) or has undertaken to keep the promise open for a certain time, see CC art. 1329. Some Italian writers (see, among others, *Roppo*, Il contratto, 153) and case law prevailing in the past (see e.g. *Court of Cassation*, 9 July 1981, no. 4489, Foro it. 1982, I, 456) maintain that revocation is effective provided that it is dispatched before acceptance reaches the offeror, while others (see *Bianca*, Diritto civile III, 232; *Sacco and De Nova*, Il contratto III, 206) together with more recent case law (see *Court of Cassation*, 16 May 2000, no. 6323, Foro it. 2001, I, 227) hold that revocation is effective only if it reaches the offeree before the offeror has knowledge of the acceptance (thus granting wider protection to the offeree's interests). If the offer is accepted within the time originally envisaged by the offer, there is a contract in spite of the revocation. And if the offeree has acted in reliance on the offer in good faith the offer may be revoked but the offeree may claim damages under the rules on precontractual liability, see *Bianca*, Diritto civile III, 231. The rules in the DUTCH CC art. 6:219 come close to those of the Italian CC with the exception that an offer can be revoked until the offeree has dispatched the acceptance. In SCOTLAND the offer is generally revocable unless the offeror states otherwise. A firm offer is treated as a promise not to revoke the offer for whatever is the stated period, see *McBryde*, Law of Contract in Scotland[1], para. 6.57, but it is thought that the consequences of a breach would be liability for damages rather than the ineffectiveness of a revocation, see *Gloag and Henderson*, para. 5.01. In SPANISH case law offers are generally revocable, see Supreme Court 23 March l988, RAJ (1988) 3623 and 3 November 1993, RAJ (1993) 8963, but an option given by a seller to a prospective buyer is irrevocable. See Supreme Court 4 February l994 RAJ (1994) 910 and 14 February l995, RAJ (1995) 837.

4. CISG art. 16, and art. 2.4 of the UNIDROIT Principles provide:

   (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before an acceptance has been dispatched.

   (2) However, an offer cannot be revoked:

   (a) if it indicates whether by stating a fixed time for acceptance or otherwise that it is irrevocable; or

   (b) if it was reasonable for the offeree to rely on the offer as being irrevocable, and the offeree has acted in reliance of the offer.

5. The wording of art. 16(2)(a) reflects a disagreement among the delegates of the Diplomatic Conference which in 1980 adopted CISG. The common lawyers wished the offeror's fixing of a period for acceptance to be a time limit after which the offer could no longer be accepted but before which it could still be revoked. The civil lawyers saw the fixing of a time limit for acceptance as a promise by the offeror not to revoke the offer within that time limit (see also ULFIS art. 5(2)).The wording of art. 2(a) was a compromise. The offer can be made irrevocable, but the provision has not cleared the controversy as to whether the mere fixing of a time for acceptance makes the offer irrevocable. Common lawyers believe that it does not *per se* make the offer irrevocable; there must be additional grounds for assuming that, see *von Caemmerer and Schlechtriem*, Kommentar zum einheitlichen UN-Kaufrecht[2], art. 16 note 10 and *Honnold* nos. 141 ff. The question is to be solved by the rules in CISG art. 8 on interpretation of statements.

6. The present Article obviates this doubt. The fixing of a time for acceptance will make the offer irrevocable for that period.

7. In the SLOVAK law an offer is generally revocable. The SLOVAK CC § 43a sub-paras. 3, 4 provides that if the agreement has not yet been concluded, the offer may be

revoked if the revocation is delivered to the addressee before the addressee sends an acceptance. The offer cannot be revoked during a time period stipulated for its acceptance unless the a right to revoke it even before the lapse of this period follows from the content of the offer. It cannot be revoked if its irrevocability is explicitly expressed in the offer. Besides the revocation the offeror may cancel even an irrevocable offer if the expression of the cancellation is delivered to the addressee prior to or at least at the same time as the offer (CC § 43a sub-para. 2). The SLOVAK Ccom § 277 provides that a public offer may be revoked if the offeror announces the revocation before the acceptance, and the announcement is made in the same manner as the announcement of the offer.

8. According to CZECH CC, an offer may be revoked until the contract is concluded, on the condition that the revocation reaches the person whom it is addressed before this person dispatched the acceptance thereof (§ 43a(3)). The offer cannot be revoked (i) during time specified in the offer for the acceptance, unless from the contents of the offer results a right to revoke the offer before the lapse of this time-limit, or (ii) if the offer is marked as irrevocable (§ 43a(4)).

III. Non-contractual liability for improper revocation

9. The FRENCH courts have held that the offeror can revoke the offer until it has been accepted. The offeror may, however, expressly or by implication, for instance by fixing a time limit for acceptance, promise not to revoke the offer; and even if no such promise is made it may follow from the circumstances of the case or from usage that the offeror cannot revoke it without incurring liability. If the offeror nevertheless revokes the offer, there is a disagreement between French academics as to the consequences of such a revocation. Some consider that there will be no contract but the offeror will incur liability in damages if the offer is revoked before a reasonable time has lapsed but other academics consider that the revocation should be deprived of its effects and the contracts could be formed see *Bénabent*, Les obligations, no. 59 and *Terré/Simler/Lequette*, Les obligations[6], no. 118. The amount for which the offeror will be held liable in damages is to be finally settled by the courts. The rules are reported to be the same in LUXEMBOURG.

IV. Even offer stated to be irrevocable may be revoked

10. In ENGLISH law the offer is revocable even if it is stated to be irrevocable. By giving a notice to the offeree the offeror may revoke the offer before acceptance. The offeree can make the offer irrevocable with the offeror's consent by furnishing a consideration for holding the offer open, for instance by paying the offeror £1, or by using a deed. Apart from this the offeror cannot unilaterally make the offer irrevocable, see *Treitel,* The Law of Contract[9], paras. 3-154-3-155.

V. Offers are generally irrevocable

11. Under some laws the offer is binding and remains so until it lapses, either because it has not been accepted within the time limit set for its acceptance, which is either the time fixed by the offeror or a reasonable time, or because it has been rejected. An acceptance of the offer in due time makes it into a contract even though it has been revoked. The offeror may, however, state in the offer that it is revocable.

12. These rules apply in GERMANY, see CC § 145, AUSTRIA, see CC § 862, GREECE see CC arts. 185 and 186, SLOVENIA, see LOA § 25, PORTUGAL see CC art. 230, in BULGARIA (LOA art. 13(2)), in BELGIUM, where the offer becomes irrevocable when it reaches the offeree, see *Dirix & van Oevelen, RW* 1992-93, 1210 and in the

NORDIC law, see Contract Acts § 7. § 9 of the DANISH and SWEDISH Contract Acts provide that where a person has stated in a proposal that it is made "without obligation", or has used similar expressions, the statement is regarded as an invitation to make an offer. In FINLAND, which has not adopted § 9, the same rule applies. Also under ESTONIAN law an offer becomes irrevocable when it reaches the offeree (GPCCA § 72 (impliedly), see also Supreme Court Civil Chamber's decision from 1.12.2005, civil matter no. 3-2-1-129-05, p. 37). In AUSTRIA, however, the offer can be revoked before it reaches the sphere of the offeree; whether the same is true if the offer has reached the offeree, but is revoked before the offeree actually got knowledge of it, is controversial (*Koziol and Welser*, Bürgerliches Recht I[13], 124).

13. In POLISH law an offer is generally irrevocable. This results from the fundamental principle stating that the withdrawal of a declaration of will communicated to another person is only effective if it arrives simultaneously with or prior to this declaration (CC art. 61 § 1). By way of exception, and only between businesses, an offer can be revoked if the revocation reaches the offeree before the acceptance has been dispatched (CC art. 66^2 § 1). Nevertheless, even in this exceptional case, an offer is irrevocable when it states a fixed time for acceptance or otherwise indicates that it is irrevocable (CC art. 66^2 § 2).

14. In FRENCH law, an offer made for acceptance without delay must be maintained during a "reasonable delay" (*Benabent*, no. 59).

VI. Revocation of offers to the public

15. The general rule seems to be that a proposal to the public which is an offer to make a contract can be revoked by taking reasonable steps to revoke it, see *Schlesinger* I 113. Thus the ITALIAN CC art. 1336(2) provides that a revocation of an offer to the public, if made in the same form or in equivalent form as the offer, is effective even towards persons who have no notice of it (on rewards see below). A similar rule is found in PORTUGAL, see CC art. 230(3); BELGIUM; DENMARK, see *Ussing*, Aftaler[3], 51; ENGLAND, see *Treitel*, The Law of Contract[9], para. 2-060; and IRELAND. In SCOTLAND a proposal which is interpreted as an offer (rather than as a promise intended to be binding without acceptance) is on principle revocable by whatever means the proposal itself was made (cf. *McBryde*, Law of Contract in Scotland[1], paras. 6.58-6.61).

16. In FRANCE some offers to the public are not revocable for a certain period, see *Terré/Simler/Lequette*, Les obligations[6], no. 118. In GREECE, authors consider proposals to the public as invitations to make an offer and they will therefore never become binding, see *Georgiadis/Stathopoulos* CC 199 no. 2, p. 322. In SPAIN the issue is reported not to be regulated.

17. In POLAND, if the offer was made to the public (*ad incertas personas*) it can be revoked or changed at any time, unless the offeror stated a fixed time for acceptance. Revocation or modification of an offer to the public does not affect those persons who have accepted the offer and thereby already concluded a contract, see: *Radwański, System prawa prywatnego, II, Supl., 33.*

18. According to the CZECH Ccom, a public offer may be revoked only prior to its first acceptance and by the same means as those used for the publication of the offer (§ 277).

19. The BULGARIAN Ccom does not contain a rule on this specific matter. So the general regulation of the irrevocability of an offer (LOA art. 13(2)) should be applied. However, there is a mitigation of this excessively harsh rule – the offer (including an

offer to the public) – should be accepted "immediately". Otherwise it ceases to be binding (LOA art. 13(3)).

VII. Offers of rewards

20. Under GERMAN law, an offer of a reward is not revocable if the possibility of its revocation was renounced when it was published, either expressly or impliedly by fixing a time limit for the act to be accomplished, see GERMAN CC § 658(2). The same rule is adopted in SPAIN, see *Díez-Picazo*, Fundamentos I[4], 288 f and in ESTONIA (LOA § 1006). In AUSTRIA an offer of a reward can be revoked in the same way as it was published or in another effective way at any time before the other party fulfils the required action (CC § 860a). The offer of a reward is irrevocable if this was expressly stated in the publication or if the irrevocability is implied from the statement of a fixed period for fulfilment (CC § 860a).

21. In the NETHERLANDS and ITALY an offer of a reward may only be revoked or modified for important reasons, see DUTCH CC art. 6:220 and ITALIAN CC art. 1990 (where it is stated that a reward may be revoked only for *juste cause;* yet, revocation has no effect if the specific situation has already occurred or the specific act has already been performed). The NETHERLANDS CC art. 6.220 provides that even in the event of a valid revocation the court may grant equitable compensation to a person who has prepared the requested performance on the basis of the offer.

22. According to POLISH law, a public promise of a reward can be made by the promisor as revocable or irrevocable. The promisor may revoke such promise if the time for the performance of an act was not specified, and there was no stipulation that the promise is irrevocable. The revocation must be made by a public notice in the same manner as the promise was made. However, the revocation is ineffective against a person who has already performed the act (CC art. 919 § 2).

23. In BULGARIA, similarly, the promise of reward is revocable or not depending on the will of the promisor (argument from LOA art. 9 – freedom of contract).

24. In FRANCE, according to case law, the promisor of a reward is bound to perform if another person has accomplished the requested service. If that person knew about the offer of a reward, a contract is thus concluded. Conversely, the undertaking of the offeror amounts to a quasi-contract (*Terré/Simler/Lequette*, Les obligations[6], no. 53). The law does not provide any special regulation of public promises or offers of reward (*see* CC §§ 850–852).

25. In CZECH law a public promise (as well as a public competition) may be revoked only for important reasons. The revocation must be made by the same means as the promise was announced, or by another equally effective means. The promisor of the revoked promise must indemnify those who entirely or partially fulfilled the conditions of the promise prior to its revocation; the promisor must point out the right to indemnification in the revocation. See CC § 849 and Švestka/Jehlička/Škárová/Spáčil (-*Macek*), OZ[10], 1403.

26. According to § 208 of the SLOVENIAN LOA a public promise of a reward may be revoked in the same way it was given or by a personal message, unless a time for performance was set. However, a person who performed the act and did not and could not have known of the revocation is entitled to the reward. A person who, acting in reliance of the promise, incurred expenses before revocation can claim these expenses, unless the promisor proves they were useless.

27. In ENGLISH law, the advertisement of the reward is treated as an offer for a unilateral contract which is accepted by performing the required act. Until the act has been

performed, or at least performance of it has been begun (e.g. the person who has found the lost dog is in the process of returning it) the offer may be revoked.

II.–4:203: Rejection of offer

When a rejection of an offer reaches the offeror, the offer lapses.

COMMENTS

When a rejection of an offer reaches the offeror, the offer lapses, even if the offer is irrevocable and even if the time for acceptance has not yet run out. The offer can then not be accepted even if the offeree has a change of mind.

The rejection need not be express but may be implied, for instance if the offeree makes a counter-offer or invites a lower bid or a smaller consignment than the one offered.

An acceptance which contains a modification of the offer may be, but is not always, a rejection. This is regulated by II.–4:208 (Modified acceptance).

A rejection may be withdrawn provided that the withdrawal - whether accompanied by an acceptance or not - reaches the offeror before or at the same time as the rejection. This follows from the general rules on notices.

An offer will normally also lapse if, when the time for acceptance runs out, the offer has not been accepted.

NOTES

1. In most if not all the countries of the Union, an offer lapses if it is rejected, see for instance, the NORDIC Contract Acts § 5; CZECH CC § 43b(1); the GERMAN CC § 146; SLOVENIAN LOA § 26(59); DUTCH CC art. 6:221(2); GREEK CC art. 187; ESTONIAN LOA § 19(1); SLOVAK CC § 43b sub-para. 1 c; for PORTUGAL, *Cordeiro,* I-I, 556; and see also CISG art. 17 and the UNIDROIT Principles art. 2.5.
2. The rejection takes effect when it reaches the offeror so that, as stated in art. 235(2) of the PORTUGUESE CC, the offer will be regarded as accepted if an acceptance which is dispatched later than the rejection reaches the offeror before or at the same time as the rejection. Under DUTCH law the same rule flows from CC art. 3:37(3) and (5).
3. Similar rules apply in countries where there is no statutory provision on rejection; see on SCOTLAND, *McBryde*, Law of Contract in Scotland[1], paras. 6.37-6.43 and on BELGIUM: *Delforge*, in *Fontaine* (2002), p. 166. On ITALIAN law, see *Roppo,* Il contratto 108. In ENGLAND it is probable that the offer lapses if the rejection reaches the offeror before an acceptance sent earlier by the offeree, even if the acceptance was posted, and therefore would have concluded the contract, before the rejection reached the offeror, see *Treitel,* The Law of Contract[9], para. 2-063. There is no case authority for this rule. In IRELAND there is, see *Kelly v. Cruise Catering* [1994] 2 ILRM 394.
4. In POLAND, there is no statutory provision on rejection. However, it results from the rules on contract formation and declaration of will that the offer lapses when a declaration of rejection reaches the offeror. The offeror is not bound any longer even if the rejection was made before the lapse of time fixed for acceptance. There is no

special form required for the rejection, even if the offer was made in a special form, see: *Radwański, System prawa cywilnego, II, Supl., 33*.

5. In AUSTRIA there is no express rule on rejection, but on termination of the offer because of lapse of time see CC §§ 862, 862a.

6. The same is the situation in BULGARIA, where only termination because of lapse of time is regulated – see LOA art. 13(3).

II.–4:204: Acceptance

(1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.

(2) Silence or inactivity does not in itself amount to acceptance.

COMMENTS

A. Acceptance

Like other declarations of intention a party's acceptance of an offer can be made by a statement and by conduct, e.g. by performing an act. The acceptance need not be made by the same means as the offer. An offer sent by letter may be accepted by email or even orally by telephone.

It will be remembered that the intention of a party to enter into a binding legal relationship is to be determined from the party's statements or conduct as they could reasonably be expected to be understood by the other party.

The acceptance must be unconditional. It may not be made subject to final approval by the offeree, or the offeree's board of directors, or by a third party, unless the offeror knew or could reasonably be expected to know that the approval of a third party (e.g. government authorities) was required. II.–4:208 (Modified acceptance) deals with the question of acceptances which contain modifications. In some cases they may be effective acceptances.

B. Silence or inactivity

Silence and inactivity will generally not amount to acceptance. This is provided by paragraph (2). There are, however, some exceptions to this rule under later Articles.

Nor is acceptance required when it follows from an earlier statement by the offeree, e.g. in an invitation to make an offer, or from usage or practices between the parties, that silence will bind the offeree.

> *Illustration 1*
> O asks P for a bid to paint the railing surrounding O's factory telling P that it can start painting a week after it has sent its bid unless before that time O has rejected the offer. Having sent the bid and heard nothing from O, P starts painting. O is bound by the contract.

Further, it may follow from a framework agreement between the parties that a party's silence to an offer by the other party will amount to acceptance.

Under the usages of some trades, an order to provide goods or services from one professional to the other will be considered as accepted unless it is rejected by the offeree without undue delay. It may also follow from practices between the parties that silence will be considered as acceptance.

Illustration 2
Between A who runs a maintenance service and B who owns a factory, a practice has developed according to which A sends B a note telling B the day A intends to service B's machinery. If B does not want A's services, B informs A immediately. If B keeps silent, A will come. A's note will oblige A to come at the date fixed. B is obliged to receive A if B does not cancel A's visit immediately upon receipt of the note.

NOTES

I. What is acceptance?

1. Under all the legal systems of the Union acceptance is any statement or conduct by the offeree which manifests assent. In general no form is required, see *Bénabent*, Les obligations[7], no. 66.

2. In POLISH law, no special form for acceptance is required. However, if a special form is necessary for conclusion and validity of a contract, both offer and acceptance should be in such form. Besides, the offeror may require that acceptance be made in a specific form or through special means of communication, see: *Radwański*, *43*. Under ITALIAN law, acceptance does not have to be effected by a specific form, but if the offeror has requested otherwise, acceptance given in a form other than that expressly required is without effect: see CC art. 1326(4). The same rule applies under DUTCH law (*Asser-Hartkamp*, 4_II algemene leer der overeenkomsten, no. 222). Under ESTONIAN law acceptance is generally defined as an assent to conclude a contract indicated by a direct declaration of intent or by an act (LOA § 20(1)), subject to certain exceptions to this rule (see notes below).

3. According to the SLOVAK law a timely declaration of the addressee or other timely conduct from which consent can be derived is considered acceptance of the offer (CC § 43c sub-para. 1). No special form for acceptance is required, however, if a special form is necessary for the conclusion and validity of a contract, both offer and acceptance should be in such form.

4. For CZECH law, see CC § 46(2) pursuant to which the requirement to conclude a contract in writing is satisfied if both the offer and the acceptance are made in writing. But it has been held that if the offeror makes the offer by presenting a signed wording of a contract, the offeree may accept the contract only by co-signing the presented wording. (Supreme Court 22 Cdo 114/99).

5. According to the BULGARIAN law silent acceptance is possible (*Kozhuharov*, Law of Obligations, 68), but this is applicable only to consensual contracts, being naturally impossible in the case of formal and real contracts.

II. Silence

6. There is also general agreement that silence in itself does not amount to acceptance, see on BELGIUM where the circumstances of the silence must indicate assent to the offer: *Delforge*, in *Fontaine* (2002), p. 168-169; *Kruithof & Bocken*, TPR 1994, 265; NORDIC Contract Acts § 8 and on DENMARK, *Ussing*, Aftaler[3], 393 and *Lynge Andersen* 99 and on SWEDEN, *Ramberg*, Allmän avtalsrätt[4], 137 ff; FRANCE, *Bénabent*, Les obligations[7], no. 66; LUXEMBOURG; GERMANY, MünchKomm (-*Kramer*), BGB, Pref. to § 116, no. 23; AUSTRIA, Rummel (-*Rummel*), ABGB I[3], § 863 no. 15 and Austrian Supreme Court (OGH) 18 December 1991 SZ 64/ 185; GREECE, *Georgiadis*, Principles § 32 no. 22, *Karasis* in *Georgiadis/Stathopoulos* art.

189 no. 5, *Simantiras*, no. 653; ITALY, *Bianca*, Diritto civile III, 211 ff; PORTUGAL, CC art. 218; SLOVAKIA, CC § 44 sub-para. 1; SLOVENIA, § 30(1) LOA; SPAIN, Supreme Court decisions of 2 February l990 and 19 December l990, RAJ (1990) 10287; ENGLAND, *Treitel*, The Law of Contract[9], para. 2-042; CZECH CC § 44(1) and in POLAND, see: *Radwański*, 43-44. The same rule applies in IRELAND, see *Friel* 50 ff, in ESTONIA, LOA § 20(2) (impliedly), and is provided in CISG art. 18(1) second sentence and in the UNIDROIT Principles art. 2.1.6, second sentence.

7. Silence may, however, amount to acceptance if before the offer was made the offeree had indicated to the offeror or let the offeror believe that the offeree's silence would mean acceptance. Thus the offeree will generally be bound by silence if the offer followed an invitation to deal by the offeree. § 9 of the NORDIC Contract Acts, which deals with an invitation to make an offer, provides that if an offer arrives within reasonable time from anyone invited, and the person who made the invitation must realise that the offer was caused by it, that person is regarded as having accepted the offer unless it is rejected by sending a notice to the offeror without undue delay. In FINLAND, which has not adopted § 9, a similar rule is applied. In the AMERICAN Restatement 2d § 69 it is provided generally that the offeree will be bound by silence if the offer followed an invitation to deal by the offeree.

8. ENGLISH authors support the proposition that if an offeror has indicated to the offeree that the offeree need not communicate acceptance, and the offeree, although willing to accept, remains silent, the principle of estoppel will prevent the offeror from arguing that the offer had never been accepted, see *Beale*, *Bishop and Furmston* 213 and *Miller, Felthouse v. Bindley* Revisited [1972] M.L.R. 489. However, the only decided case on the issue seems to be against the rule, see *Kerr* J in *Fairline Shipping Corpn v. Adamson* [1975] Q.B .180.

9. Further, silence will be considered an acceptance if the parties have established a practice between themselves to this effect, or if it follows from usage, see on BELGIUM, *Delforge*, in *Fontaine* (2002), 169; on the NORDIC COUNTRIES, see for DENMARK, *Ussing*, Aftaler[3], 393, and *Lynge Andersen* 99 ff; for SWEDEN *Ramberg*, Allmän avtalsrätt[4], 138. This holds true also of FRANCE, *Ghestin*, La formation du contrat[3], no. 404, LUXEMBOURG, see Cour 26 June 1914, Pasicrisie 11, 89; SCOTLAND, *McBryde*, Law of Contract in Scotland[1], paras. 6.78-6.81; GERMANY, MünchKomm (-*Kramer*), BGB, § 151 nos. 4 et seq.; for AUSTRIA see Schwimann (-*Apathy and Riedler*), ABGB IV[3], § 863 nos. 19 et seq. with references to case law; ITALY, *Bianca*, Diritto civile III, 211 f and Court of Cassation, 20 February 2004, no. 3403, Rep.Foro it. 2004 398, PORTUGAL CC art. 218; SLOVENIA, LOA § 30(3); SPAIN, Supreme Court decisions of 18 October 1982 and 3 December 1993 RAJ (1993), 9494 and POLAND, see: *Radwański, 44*. The same rule is applied in IRELAND, see *Friel* 51. In ENGLAND this view is maintained by *Treitel*, The Law of Contract[9], paras. 2-043 ff, but there is no case authority.

10. Some laws have provided further exceptions to the main rule, see the NORDIC Law on Commission Agents § 5, art. 22(2) of the PORTUGUESE decree no. 177/86 on commercial agents, and the SPANISH Retail Trading Act (l996), art. 4l).

11. § 362 of the GERMAN Ccom provides that if a merchant is asked to act for another merchant with whom there are business connections or for whom the merchant has offered to act, the merchant is obliged to answer without undue delay; silence is considered as an acceptance. Outside commercial relationships GERMAN law in CC § 663 reduces the duties of a service provider to a duty to give notice. In AUSTRIA the equivalent provision in the former Ccom § 362 has been cancelled with the

introduction of the new commercial code. Now the general rules apply. The same rule exists in BULGARIA (Ccom art. 292). There are several further cases where silence amounts to an acceptance, e.g. tacit prolongation of a hire contract (LOA art. 236), tacit acceptance in case of sale by sample (LOA art. 203).

12. In POLAND silence will be considered acceptance between entrepreneurs who have permanent business relations provided that an offer is within the offeree's scope of business (CC art. 68).

13. In ESTONIA silence or inactivity is deemed to be acceptance only if so provided by law, an agreement between the parties, practices which the parties have established between themselves or a usage observed in their field of activity (LOA § 20(2). A special rule provides that silence is deemed to be acceptance if a business person receives an offer from a long-term business partner and has not responded to the offer within a reasonable time (LOA § 20(3)).

14. In SLOVENIA, LOA § 30(4) provides that if a person offers to carry out certain orders for another person or if such orders are within the person's business or profession, the person must reject an order immediately, if a contract is not to be concluded, as in such circumstances silence constitutes acceptance.

15. See generally, *Schlesinger I*, 134 and *Kötz*, European Contract Law I, 41.

II.–4:205: Time of conclusion of the contract

(1) If an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror.

(2) In the case of acceptance by conduct, the contract is concluded when notice of the conduct reaches the offeror.

(3) If by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by doing an act without notice to the offeror, the contract is concluded when the offeree begins to do the act.

COMMENTS

A. Significance of the time of conclusion

From the moment when the contract is concluded each party is bound to the other and cannot revoke or withdraw consent. The time of conclusion may also have effects in other respects. For example, standard terms may not be binding if not brought to the attention of the other party until after the conclusion of the contract. And the amount of damages payable for non-performance of a contractual obligation may depend on what was foreseeable at the time of conclusion of the contract.

B. Moment of acceptance

This Article deals with the moment when the acceptance becomes effective and the offer cannot any longer be revoked or withdrawn. The next Article deals with the period of time available for an acceptance to be effectively made.

The general rule is that once the acceptance has been dispatched the offeror can no longer revoke the offer. However, the acceptance becomes binding on the offeree when it reaches the offeror. The offeree cannot then revoke the acceptance, and the contract is concluded.

This rule reflects what seems to be the practical outcome in almost all the laws, though some explain it differently, treating the contract as made when a postal or similar acceptance is dispatched but then applying exceptions which result in much the same outcome as the rule stated in paragraph (1).

C. Conduct

In the case of acceptance by conduct the contract is concluded when the offeror learns of the accepting conduct. An offeree may accept by delivering goods ordered by the offeror, by accepting unsolicited goods sent by the offeror, by opening a credit in the offeror's favour, by starting a production of goods ordered etc. Whether conduct amounts to acceptance will depend upon the circumstances.

Illustration 1
Having learned from a colleague that B may be interested in buying and reselling A's goods, A sends unsolicited goods to B. B accepts by advertising the goods for sale in a trade paper which A reads. A learns of the acceptance on reading the advertisement.

In the case of a more complicated offer, especially if it is one for a contract of long duration, conduct which shows a positive attitude to the offer may not amount to an acceptance of the offer.

Illustration 2
Having learned from a colleague that B may be interested in selling A's goods, A sends B goods with a draft distribution contract by which B is to become A's sole distributor in B's country. B's advertisement of the goods in a trade paper, which A reads, without mention of any distributorship agreement does not amount to an acceptance of the latter.

If, however, the relationship develops, and both parties observe the terms of the draft contract, B's behaviour will be considered an acceptance of the offer though B never signs the draft contract.

When notice of conduct, such as the production of goods ordered or other preparations by the offeree, will not reach the offeror within the time set for acceptance, an express assent by the offeree will be needed. Commencement of performance will be at the offeree's own risk.

Illustration 3
Opera Manager M offers soprano S the part of Susanna in The Marriage of Figaro, which will start in two months time. S immediately starts rehearsing the part, but does not send M any answer. M engages another soprano. S claims to be entitled to play the part. M is not bound by any contract to S.

D. Acceptance without notice

However, if it follows from the offer or from practices between the parties or from usage that the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective at the moment performance of the act begins, see paragraph (3). In these cases the start of production or other preparations makes the acceptance effective even though the offeror does not get notice of these acts.

Illustration 4
The facts are the same as in Illustration 3 except that M in his offer to S advises her to start rehearsing at once and by herself, because the rest of the company will tour the province during the next two weeks and cannot be reached. S immediately starts rehearsing. M and S have concluded a contract when S starts rehearsing.

A similar acceptance which is effective from the moment a performance begins may also follow from practice between the parties.

In cases covered by paragraph (3) the acceptance is effective when the act is performed even if the offeror learns of it after the time for acceptance.

The performance which will bind both parties under paragraph (3) is one which the offeree cannot revoke. It only applies to acts which are real performances, not to acts which prepare for a performance. If in view of the offer the offeree applies to a bank for a cash credit in

order to increase available funds this act in itself will not constitute a beginning of a performance covered by paragraph (3).

NOTES

I. Significance of the time of conclusion

1. Among the various effects of the time of conclusion of the contract, the one which is considered here is the time when the parties are bound to the contract and none of them can withdraw from it. The laws attach various other effects to the time of conclusion, see, for instance, CISG art. 35(2)(b) and (3), 42(1), 55, 66, 74, 79(1) and 100(2), and, generally, *Rodière*, Formation 136 f.

II. Time of conclusion when acceptance is communicated by language

2. In determining the moment when a contract is concluded through communication of an acceptance, the laws are divided.

3. Some laws consider the contract to be concluded when the acceptance reaches the offeror. This is the rule of CISG art. 23 and the UNIDROIT Principles 2.6(2), and the main rule in GERMANY, see Staudinger (-*Bork*) 2003, § 146 no. 4; BULGARIA, see LOA art. 14; AUSTRIA, see CC § 862a; CZECH REPUBLIC, see CC § 43c(2) and § 44(1); GREECE see CC art. 192; the NETHERLANDS, see CC art. 3:37(3); PORTUGAL, see CC art. 224; ESTONIA, see LOA § 9(2) sent. 1; SLOVENIA, see LOA § 28(1) and SLOVAKIA, see CC § 43c sub-para. 2. According to the NORDIC Contract Acts the acceptance may be revoked before the offeror has taken cognisance of the acceptance. Thus in effect the contract is not concluded before the offeror has read the acceptance (it is not enough that the acceptance has reached the offeror), see Contracts Acts §§ 2 and 3. However, under § 7 of the Act the offeree can revoke the acceptance, if the revocation reaches the offeror before or at the same time as the acceptance comes to the offeror's knowledge. Also in POLAND a contract is concluded when the acceptance reaches the offeror, see CC art. 70 § 1. In addition, POLISH law provides separately that in the case of an auction a contract is concluded at the moment of manifestation of selection of the highest bid (when the "hammer falls" – CC art. 70^2 § 2).

4. The receipt rule is also the main rule in ENGLAND, but there are important exceptions. The most important is the "postal rule" whereby an acceptance sent by post takes effect when the letter of acceptance is posted. From that moment a withdrawal of the offer, even if it has been posted previously, has no effect, see *Henthorn* v. *Fraser* [1892] 2 Ch 27, CA The acceptance has effect even though the letter never reaches the offeror, and the contract is considered concluded, *Household Fire and Carriage Accident Insurance Co. Ltd.* v. *Grant* (1879) 4 ExD 216, unless perhaps the loss or delay was the fault of the offeree, cf. *Adams* v. *Lindsell* (1818) 1 B&Ald 681. But the offeree may prevent conclusion by sending an "overtaking" withdrawal of the acceptance, see *Treitel*, The Law of Contract[9], para. 2-063. The "postal rule" only applies when it was reasonable to use the post, and it does not apply if the offeror has stipulated for actual communication of the acceptance, see *Holwell Securities Ltd.* v. *Hughes* [1974] 1WLR 155, CA. For an acceptance made by instantaneous means of communication such as email, fax and telephone, the main rule applies, as it does for an acceptance sent through a messenger, see *Treitel*, The Law of Contract[9], paras. 2-023 and 2-032. The IRISH law is basically the same as the English. However, in *Kelly v. Cruise Catering Ltd.* [1994] 2 ILRM 394 the Irish Supreme

Court suggested obiter that the postal rule would not apply if the letter of acceptance was lost in the post.

5. SCOTTISH law is to the same general effect as English law (*McBryde*, Law of Contract in Scotland[1], paras. 6.109-6.118). The Scottish Law Commission has proposed the abolition of the postal rule (*Scottish Law Commission*, Report No. 144, 1993) but this has not yet been enacted.

6. Other laws consider the offeror's knowledge of the acceptance as decisive, however, with the proviso that the offeror is considered or presumed to have the knowledge when the acceptance is received. This rule applies in BELGIUM, see Cass. 25 May 1990, *Pas*. *belge* 1990, 1086; Cass. 19 June 1990, *Pas*. *belge* 1990, 1182, and in ITALY CC arts. 1326(1) and 1335, according to which an offer, acceptance and any other declaration addressed to a person are deemed to be known at the time when they reach the address of the person to whom they are directed.

7. In PORTUGUESE law the contract is also concluded when the offeror gets effective knowledge of the acceptance or culpably prevents that from happening. On the other hand, the contract is not concluded if without fault the offeror was prevented from getting knowledge of the acceptance, see CC art. 224.

8. The same rule applied in SPAIN until 2002, when the fundamental rule was modified and the civil and commercial law provisions were harmonised. Under the current law, the contract is concluded when the acceptance is known to the offeror, unless the absence of knowledge is due to the offeror's fault; if this is the case, the contract can be concluded when the acceptance reaches the offeror or even (if, for example, the offeror indicated a wrong address) when the acceptance is dispatched. The change has meant the codification of the construction developed in the past by the Supreme Court in limiting the radical effects of the "knowledge rule" (Supreme Court Judgements 29 September 1960, 22 October 1974, RAJ (1974) 3971, 26 May 1976, RAJ (1976) 2366, 29 September 1981, RAJ 3247, 10 December 1982, RAJ (1982) 7474, 22 December 1992, RAJ (1992) 10642, 24 April 1995, RAJ (1995) 3546. The amended rules contain a special provision for the so-called "contracts made by automatic devices" or "click contracts" (e.g. vending machines, contracts entered into through web sites, automatic phone messages, etc): in such cases, the contract is concluded when the offeree takes the necessary steps to express acceptance, regardless of factual delivery or the real knowledge of the offeror.

9. In FRANCE and LUXEMBOURG the question appears to be unsettled. The French *Cour de Cassation has* considered it a question of fact left to the sovereign appreciation of the lower courts. In FRANCE, the *Cour de Cassation* held that the contract is concluded as soon as the offeree has dispatched the acceptance, unless stipulated otherwise. see Cass. 7 January 1981, Bull.civ. IV no. 14. This may be considered a general decision on when a contract by correspondence is concluded, see *Bénabent*, Les obligations[7], no. 68 (with a comparison with PECL).

III. Acceptance by conduct

10. The systems agree that an offer may be accepted by conduct. Under most systems the contract is concluded when notice of the conduct reaches the offeror, see on ENGLISH law, *Treitel*, The Law of Contract[9], paras. 2-017 and 2-023; on the DUTCH CC art; 3:38(1); for CZECH law, see CC § 43c(2); GERMANY, Staudinger (-*Bork*) 2003, § 146 no. 5; for GREECE, Erman (-*Simantiras*), BGB I[9], 189 nos. 2-5, *Karasis* in *Georgiadis & Stathopoulos* art. 189 no. 5; for ITALY see *Roppo*, Il contratto 122; for ESTONIA, LOA § 9(2) sent. 2; see also CISG art. 18(2), UNIDROIT art. 2.6(2). The same rule applies in IRISH law, see *Package Investments* v. *Shandon Park Mills*,

unreported High Court decision of 2 May 1991, *Friel* 52 and in SCOTTISH law, see *McBryde*, Law of Contract in Scotland[1], paras. 6.73-6.77.

11. In FRANCE the courts oscillate between the moment the act is performed and the moment notice of the performance reaches the offeror; see *Terré/Simler/Lequette*, Les obligations[6], no. 123. The laws of SPAIN, BELGIUM and LUXEMBOURG also seem to be unsettled on that point.

12. In POLAND, if the offer does not require that a declaration of acceptance reaches the offeror, and in particular if the offeror demands immediate performance, the contract is deemed to be concluded when the other party in due time proceeds to perform (CC arts. 69, 70 § 1). BULGARIAN law is silent on this matter.

IV. Performance of an act without notice

13. Paragraph (3) is similar to CISG art. 18(3) and UNIDROIT Principles art. 2.6(3). In all the systems the offeror may stipulate the way by which the offer is to be accepted - except by silence - and practices between the parties and usages may also regulate the mode of acceptance.

14. The GERMAN CC § 151 provides that the contract is concluded without a declaration of acceptance by the offeree to the offeror being required, if it follows from general commercial practices that such a declaration is not to be expected or the offeror has renounced it. It seems to be the prevailing view that the act which shows acceptance must be one which manifests itself to the outer world. The mere fact that the offeree has resolved internally to accept is not enough, see on the German CC § 151 and MünchKomm (-*Kramer*), BGB, § 151 no. 54.

15. Similar solutions are to be found in or follow from the AUSTRIAN CC § 864, which assumes that acceptance by conduct is a "declaration" of will which does not need to be communicated to the addressee (see Schwimann (-*Apathy and Riedler*), ABGB IV[3], § 864 no. 1); CZECH Ccom § 275(4); SCOTTISH law, where *McBryde*, Law of Contract in Scotland[1], para. 6.76 suggests there will be no acceptance if there is another reasonable interpretation of the offeree's action; FRENCH law, *Terré/Simler/Lequette*, Les obligations[6], no. 123; NORDIC Contract Acts § l(2); GREEK CC art. l93(1); ITALIAN CC art. 1327(1); PORTUGUESE law, see *P.M. Pinto*, Declaracàò tacita 620 and *Almeida*, Negocio juridico 794; SLOVENIAN LOA § 28(2) and ENGLISH law, see *Weatherby v. Banham* (1832) 5 C&P 228 and *Treitel*, The Law of Contract[9], paras. 2-026. and 2-046.

16. In SLOVAKIA, a person to whom an offer is directed may signify acceptance by performing the relevant activity (e.g., the dispatch of goods or the payment of a purchase price) without advising the other party. In this event, the acceptance of the offer is deemed to be effective from the moment of the performing of the activity as long as it occurred prior to the time limit for accepting the offer (Ccom § 275 sub-para. 4, applicable for commercial contracts).

17. The ESTONIAN LOA § 9(3) is similar to paragraph (3) of the present Article. BULGARIAN law is silent on this matter.

II.–4:206: Time limit for acceptance

(1) An acceptance of an offer is effective only if it reaches the offeror within the time fixed by the offeror.

(2) If no time has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time.

(3) Where an offer may be accepted by performing an act without notice to the offeror, the acceptance is effective only if the act is performed within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

COMMENTS

A. Time for acceptance

This Article provides for the period of time within which the offeree's acceptance must reach the offeror in order to be effective.

B. Time fixed

The acceptance of the offer must reach the offeror within the time fixed by the offeror. The acceptance may be made by an express statement or by conduct. This rule represents the practical result reached in most laws under which the question has been considered.

C. Reasonable time

If the time for performance has not been fixed by the offeror, the offeree's acceptance must reach the offeror within a reasonable time. Due account has to be taken of the circumstances of the transaction. One factor is the rapidity of the means of communication used by the offeror.

Another factor is the type of contract. Offers relating to the trade of commodities or other items sold in a fluctuating market will have to be accepted within a short time. Offers relating to the construction of a building may need a longer time for reflection.

In the cases covered by paragraphs (1) and (2), the acceptance must reach the offeror in time. The offeree will generally be expected to use the same means of communication as the offeror. However, the time for acceptance is to be counted as an entirety. An offeree who receives an offer by mail may, if too much time has been taken for reflection, catch up by accepting by some faster means of communication.

This result doe not obtain under the laws of all the Member States; some place the risk of delay in transmission wholly on the offeree. The rule in paragraph (2) is thought to represent a fair compromise between the interests of the parties, neither of whom is to blame for the delay.

D. Acceptance by performance

In the case of acceptance by conduct, notice of the conduct must normally reach the offeror within the time for acceptance. In those situations where an act of performance by the offeree

will constitute acceptance even before the offeror gets notice of it, the performance must be commenced within the time fixed by the offeror or, if no such time is fixed, within a reasonable time, but it is not required that the offeror learns of it before that time.

NOTES

1. The rules in paragraphs (l) and (2) are similar to CISG art. 18(2), and (3), UNIDROIT arts. 2.6 and 2.7, NORDIC Contract Acts §§ 2 and 3, GERMAN CC §§ 147(2) and 148, BULGARIAN LOA art. 13(3), AUSTRIAN CC § 862, ESTONIAN LOA §§ 17(1) and 18, GREEK CC art. 189, DUTCH CC art. 6: 221(1) and BELGIAN case law. The ITALIAN CC art. 1326(2) provides that the acceptance must reach the offeror within the time set by the offeror, or within the time which is ordinarily required according to the nature of the transaction or usage. Art. 228(l) of the PORTUGUESE CC provides that the acceptance must reach the offeror within the time set by the offeror or within 5 days after the time which is reasonable according to the nature of the transaction. In POLISH law, if the offeror did not fix a time for acceptance, an offer made in the presence of the other party or by any means of instantaneous communication lapses if it is not accepted immediately; an offer communicated in any other manner lapses after the period in which the offeror might have received an answer transmitted under ordinary circumstances without undue delay (CC art. 66 § 2).
2. In SLOVAKIA the rules on the time limit for acceptance can be inferred from CC § 43b sub-para. 1 a), b), which provides that even an irrevocable offer expires after the lapse of the period stipulated in it for acceptance or after the lapse of an adequate time period having regard to the nature of the offered agreement and to the means of communication used by the offeror. CC § 43c sub-para. 2 refers to acceptance as a "timely" declaration of the addressee or other "timely" conduct indicating consent.
3. The rules in paragraphs (1) and (2) also apply in ENGLISH, SCOTTISH and IRISH law. In English law it is not clear whether, if the offeror has set a time limit for acceptance, it suffices that the acceptance is dispatched within the period or whether it must reach the offeror within the period, cf. *Holwell Securities Ltd.* v. *Hughes* [1974] 1 WLR 155, CA. However, in Scotland and Ireland an acceptance by post is timely, if dispatched before the time set for acceptance, see for Scotland, *Jacobsen* v. *Underwood* (1894) 21 R 654.
4. Under FRENCH law an acceptance by correspondence is made in time if dispatched before the time set by the offeror, Cass. 7 January 1981. Unless the offeror has set a time limit, the acceptance must be dispatched within a reasonable time, see *Terré/Simler/Lequette,* Les obligations[6], nos. 115 and 171. The latter rule has also been adopted in SPAIN, see Supreme Court decision of 23 March 1988, RAJ (l988) 2422.
5. CZECH law is similar to what is laid down in paragraphs (1) and (2) of the Article (but instead of "reasonable time" the CC § 43b(1) uses "appropriate time taking into account the nature of the offered contract and the speed of the means of communication used by the offeror to transmit the offer"). In addition, CC § 43b(2) provides that an oral offer lapses if not accepted immediately, unless the contents of the offer do not indicate otherwise. The CC further specifies in detail the moment from which the time for acceptance starts to run: e.g. for offers delivered by post it is the date shown in the letter or, if there is no such date, the date of the postmark.

6. The regulation in SLOVENIAN law is very similar. Paragraph (1) of the Article corresponds to LOA § 26(1) in conjunction with § 28(1) and § 31(2); and the rule contained in the paragraph (2) is basically the same as in LOA § 26(3) and (4). As in Czech law, the moment from which the time for acceptance runs is defined in detail in § 26(2).

II.–4:207: Late acceptance

(1) A late acceptance is nonetheless effective as an acceptance if without undue delay the offeror informs the offeree that it is treated as an effective acceptance.

(2) If a letter or other communication containing a late acceptance shows that it has been dispatched in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer is considered to have lapsed.

COMMENTS

A. Late acceptance ineffective

The normal rule is that in order for an acceptance to be effective it must reach the offeror within the time for acceptance. Any acceptance which reaches the offeror after that time may be disregarded by the offeror. Normally the offeror does not even have to reject the acceptance.

B. Assent to a late acceptance

Paragraph (1) of the present Article states, however, that notwithstanding that normal rule the offeror may render the late acceptance effective by accepting it. The offeror must then without undue delay inform the offeree. If this is done the contract become effective from the moment the late acceptance reached the offeror, and the offeree is then bound by the acceptance.

The notice need not be an express statement of acceptance. An electronic transfer of the purchase money, which will reach the offeree as quickly as a notice, may suffice to make the contract effective.

Illustration 1
A has indicated 31 July as the last day for an acceptance of its offer. B's acceptance reaches A on 2 August. A immediately orders a transfer of the purchase money demanded by B. Notwithstanding that the payment does not come to B's notice until 4 August the contract is concluded on 2 August. Even if B now regrets the acceptance B cannot invoke its lateness to avoid the contract.

C. Late acceptance caused by delay in transmission

If the acceptance is late because the offeree did not send it in time, it is ineffective unless the offeror immediately indicates assent to the contract. If, however, the offeree has sent the acceptance in time, but the acceptance reaches the offeror after the time set for acceptance because of a delay in transmission, the offeree should be notified if the offeror does not want to assent to the contract. The late acceptance should be considered effective unless the offeror without undue delay informs the offeree that the offer as considered to have lapsed or gives notice to that effect. The offeror, however, only has this duty if the acceptance shows that it was sent in time and that it arrived late due to an unexpected delay in transmission.

Illustration 2
A has indicated 31 July as the last day for an acceptance of its offer. B, knowing that the normal time of transmission of letters is two days, sends its letter of acceptance on 25 July. Owing to a sudden strike of the postal service in A's country the letter, which shows the date 25 July on the envelope, arrives on August 2. B's acceptance is effective unless A objects without undue delay.

D. Late acceptance as a new offer

Some legal systems treat a late acceptance as a new offer which the offeror may accept within the time set for acceptance which is often longer than the time provided for in paragraph (1). The Article does not contain such a rule.

NOTES

I. Late acceptance

1. Paragraph (1) is in accordance with CISG, art. 21(1) and UNIDROIT Principles art. 2.9(1), and is similar to the CZECH CC § 43c(3), DUTCH CC art. 6:223(1), PORTUGUESE CC art. 229, ESTONIAN LOA § 22(2), ITALIAN CC art. 1326(3) and SLOVAK CC § 43c sub-para. 3.

2. Under some systems the late acceptance operates as a new offer which requires acceptance by the offeror, see NORDIC Contract Acts § 4(1), GERMAN CC § 150, AUSTRIAN law, see Rummel (-*Rummel*), ABGB I[3], § 862 no. 4 and (Austrian Supreme Court (OGH) 24 November 1976 SZ 49/142, GREEK CC art. 191, POLAND, see: *Radwański, 41*, Arbitration Commission, December 9, 1976, OSP 1977, no. 7, poz. 122 and SLOVENIA, LOA § 31(1). In FRANCE, LUXEMBOURG and BELGIUM it is the general opinion that this is the rule (see, however, Trib. de Grande Instance de Paris 12 February l980, D. 1980, I.R. 261 note *Ghestin*), but there are no recent cases of authority. SPANISH and BULGARIAN law have no similar provision to paragraph (1) of this Article. In ENGLAND, SCOTLAND and IRELAND there is no authority on the point.

II. Delay in transmission

3. Paragraph (2) is identical to CISG art. 21(2), see note 1 above, UNIDROIT art. 2.9(2), SLOVENIAN LOA § 31(2), BULGARIAN LOA art. 13(5), and is similar to the NORDIC Contract Acts § 4(2), GERMAN CC § 149, AUSTRIAN law, see Rummel (-*Rummel*), ABGB I[3], § 862a no. 6 (depending on the fact that the dispatch in due time is recognisable), CZECH CC § 43c(4), GREEK CC art. 190, NETHERLANDS CC art. 6:223(2), POLISH CC art. 67 and ESTONIAN LOA § 22(1), (3). In BELGIAN law the offeror's obligation to inform the offeree would follow from the principle of good faith and fair dealing.

4. Paragraph (2) is similar also to the SLOVAK law, according to which if it follows from the acceptance letter or document that it was sent under such circumstances that it would have been delivered to the offeror in time if transmission had taken place in a usual way, the delayed acceptance has effect as a timely one unless the offeror notifies the addressee without undue delay that the offer is considered to have lapsed.

5. In the UK, where the acceptance has effect when posted, the offeror will carry the risk of a delay in transmission unless it is due to the fault of the offeree who, for instance,

misunderstood or misspelled the address, see on ENGLISH law *Treitel*, The Law of Contract[9], paras. 27-28 and on SCOTTISH law *Jacobsen v. Underwood* (1894) 21 R 654.

6. FRENCH, LUXEMBOURG, ITALIAN, PORTUGUESE and SPANISH law have no rule similar to the one in paragraph (2) of the Article. However, in Spain the solution laid down in art. 21(2) CISG has been regarded as generally applicable to other contracts (*Díez-Picazo*, Fundamentos I, p. 317; G*ómez*, Comentarios al Código civil XVII 1º-B, pp. 140-141, *Moreno*, La oferta de contrato, p. 157).

II.–4:208: Modified acceptance

(1) A reply by the offeree which states or implies additional or different terms which materially alter the terms of the offer is a rejection and a new offer.

(2) A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.

(3) However, such a reply is treated as a rejection of the offer if:

(a) the offer expressly limits acceptance to the terms of the offer;
(b) the offeror objects to the additional or different terms without undue delay; or
(c) the offeree makes the acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

COMMENTS

A. The main principles

This Article contains the following rules:

(1) A contract is concluded if the reply expresses a definite assent to the offer.

(2) A reply containing terms which materially alter the terms of the offer is a rejection and a new offer.

(3) Additional and different terms which do not materially alter the terms of the offer become part of the contract.

(4) If in the case mentioned in (3) the offeror has limited the acceptance to the terms of the offer, or objects without undue delay to the different or additional terms, the offer is considered to have been rejected by the different or additional terms. The same applies if the offeree makes acceptance conditional upon the offeror's assent to the additional or different terms, and the offeror does not give assent within a reasonable time.

B. Considerations underlying the main principles

The notion that non-material additions or modifications become part of the contract has been widely accepted. Such additions and modifications are frequently attempts to clarify and interpret the contract, or to supply terms which would otherwise be considered "omitted terms". The offeror should object to them if they are not acceptable.

Under these rules an answer containing additions or modifications which materially alter the terms of the contract is to be considered as a counter-offer which the offeror may accept either by express assent or by conduct, for instance by performance of the contract. The special question of the "battle of forms" (conflicting standard terms) is covered in the following Article.

C. When is an alteration material?

Whether an alteration is material is a question of degree to be decided on the facts of each case. An alteration would not be material if it would not be likely to influence the offeror in deciding whether to contract or as to the terms on which to contract.

CISG art. 19(3), provides a list of additional and different terms which are to be considered material, such as terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other, or the settlement of disputes. This technique has not been used in the present Article. The range of contracts and circumstances covered by the model rules is so extensive that any such list could only have been illustrative. For example, though a clause relating to settlement of disputes is often material, if among merchants in the trade it is usual, though not customary, to refer disputes to settlement by arbitration, an arbitration clause in the offeree's answer will not materially alter the terms of the contract.

D. Modification by conduct

An acceptance by conduct may contain additional or different terms. These terms may be material, for instance, if the offeree dispatches a much smaller quantity of a commodity than that which was ordered by the offeror, or immaterial if only a very small quantity is missing.

E. Acceptance of modification by conduct

A modification is an "acceptance" which makes the answer a rejection and a new offer. It may be accepted by the offeror's conduct. After having received the modified acceptance the offeror may perform the contract or accept the offeree's performance and this will amount to an acceptance of the new offer.

> *Illustration*
> S offers B a contract under which B is to buy 350 tonnes of coal, at a certain price, to be delivered in instalments. The draft contract document contains a jurisdiction clause. B returns the contract document with the jurisdiction clause struck out and an arbitration clause inserted instead. The contract is then put into S's manager's desk by one of S's employees. S subsequently delivers the first instalment which B accepts. Before the second instalment is to be delivered there is a sharp rise in the market price of coal, and S then tries to avoid the contract by invoking B's modified acceptance to which, it says, it never has agreed. However, S is to be considered as having accepted the contract by delivery of the first instalment.

F. Modified acceptance and conflicting standard terms

A reference in a typed or hand-written reply to the offeree's standard terms which contain terms which materially alter the terms of the contract is covered by the present Article when the offeror has not made any reference to standard terms. If the offeror has referred to standard terms, the case is covered by the following Article on conflicting standard terms (the battle of the forms) even though the reference is made in a hand-written or typed letter.

NOTES

I. Modified acceptance as rejection and a new offer

1. The rule in paragraph (1) is almost identical with CISG art. 19(1) and UNIDROIT art. 2.11(1). It is in accordance with AUSTRIAN law, the NORDIC Contract Acts § 6(1), GERMAN CC § 150(1), GREEK CC art. 191, POLISH CC art. 68, PORTUGUESE CC art. 233, ITALIAN CC art. 1326(5), DUTCH CC art. 2:226 (1), ESTONIAN LOA § 21(1), SLOVENIAN LOA § 29(1) and the laws of BELGIUM, see *Kruithof & Bocken*, TPR 1994 no. 97; *Stijns*, Verbintenissenrecht I, no. 163, ENGLAND, see *Treitel,* The Law of Contract[9], paras. 2-018-2-020, SCOTLAND, see *Wolf & Wolf v. Forfar Potat*o Co 1984 SLT 100, *Rutterford v. Allied Breweries* 1990 SLT 249 and SLOVAKIA, see CC § 44 sub-para. 2, according to which an acceptance which contains amendments, reservations, restrictions or other changes is considered to be a rejection of the offer and a new offer. In BULGARIA there is no express rule on this matter, but it can be derived from the existing regulation which envisages only a full acceptance as an effective one.

II. Contract upheld in spite of non-material modifications

2. With slight modifications the rules in paragraphs (2) and (3) are the same as in CISG art. 19(2) and UNIDROIT art. 2.11(2). They were first introduced in the UCC § 2.207, see also ULFIS art. 7(2) and the DUTCH CC art. 6:225(2). The ESTONIAN LOA § 21(2) is to the same effect, as well as the SLOVENIAN LOA § 29(2) and (3), where a list of modifications which are deemed material is included.

3. Several other systems also accept that in case of non-material modifications, the contract is concluded on the terms of the offeree, see on FRENCH law, *Terré/Simler/Lequette*, Les obligations[6], no. 121; on SPANISH law, Supreme Court decisions of 26 March 1993 and 26 February 1994, RAJ (1994) 1198. In LUXEMBOURG and SCOTLAND there is no authority to this effect but some Scottish jurists have advocated the same approach, see for instance *MacQueen and Thomson,* Contract Law in Scotland § 2.26, *McBryde*, Law of Contract in Scotland[1], paras. 6.92-6.95. Under GERMAN law CC §§ 154, 155 could provide a similar solution.

4. In BELGIAN law the prevailing view is that acceptance of the essential terms of the contract may suffice (*Delforge*, in *Fontaine* (2002), 170). The law or usages will determine the (accessory or inessential) terms on which there is disagreement, *Kruithof & Bocken*, TPR 1994 nos. 97-98, contra *Cornelis*, TBH 1983, 37.

5. In POLAND, the rules on non-material modifications, as provided by paragraphs (2) and (3), apply only between businesses CC art. 68[1]).

6. In SLOVAKIA the offer is considered to be accepted if the addressee's answer defines the content of the offered agreement in other words, unless a modification follows from the answer.

III. Complete agreement required: the "mirror image rule"

7. Most of the systems do not have rules corresponding to paragraphs (2) and (3). Several of them seem to require complete agreement between the parties so that even non-material modifications in the offeree's reply prevent the contract from coming into existence - with the proviso that mere trifles are to be disregarded. This seems to be the position in GERMAN law, see Staudinger (*-Bork*) 2003, § 150 no. 13; AUSTRIAN law, see Austrian Supreme Court (OGH) 31 May 1988 SZ 61/136;

BULGARIAN law (*Kozhuharov*, Law of Obligations, 67, 71); CZECH law, see CC § 44(2) and *Švestka/Jehlička/Škárová*, OZ[9], 297 (CZECH CC allows nothing more than different wording compared with the offer); PORTUGUESE law, see CC art. 232 and *Vaz Serra* 130 ff; ITALIAN law, see, among others, Cass. 24 October 2003, no. 16016, in I contratti 2004 221 and 4 May 1994, no. 4 in *Repertorio del Foro Italiano*, 1994 727 no. 272; for a more flexible approach by legal writers see *Roppo*, Il contratto 107, and *Bellelli*, 130 ff; and in ENGLAND, see *Treitel*, The Law of Contract[9], paras. 2-019-2-020, and IRELAND. The same rule applies in the NORDIC countries, see Contract Acts § 6(l) and for DENMARK, *Lynge Andersen* 70 ff, for FINLAND, *Telaranta* 147. However, under § 6(2) of the Contract Acts the "mirror image rule" does not apply where (1) the offeree considered the reply to be in conformity with the offer, and (2) the offeror must have realised this. If in that case the offeror does not wish to be bound by the terms of the reply, the offeror must give notice without undue delay. The "double awareness test" of (1) and (2) does not leave much room for application of the rule in practice, see *Ramberg*, Allmän avtalsrätt[4], 114 f.

8. SPANISH court decisions have held that a contract is concluded if the offeree slightly modified the original offer and at the time of acceptance the offeror did not object to the modifications. See: (TS 3 November 1955 (RAJ 1955) 3564 (contract for the provision of personal security), TS 30 January 1965 (RAJ 1965) 1803 (transfer of leasing contract), TS 26 March 1993 (RAJ 1993) 2395, TS 30 October 1995 (RAJ 1995) 8352 (sale of goods).

IV. Modification accepted by conduct

9. When because the acceptance was not in the same terms as the offer a contract has not come into existence, it may nevertheless be "healed" by the subsequent conduct of the parties, e.g. by performance by one party and acceptance of performance by the other party. It seems that several of the legal systems accept this solution. The ENGLISH case *Trentham Lt.d v. Archital Luxfer Ltd.* [1993] 1 Lloyd's Rep 25, 27 supports the view that it will be easier for the courts to infer that the outstanding point of disagreement is inessential and that therefore there is a contract if the parties have begun performance. In SCOTLAND also there may be acceptance by conduct in this situation, see *Uniroyal v. Miller* 1985 SLT 101. But if negotiations are still pending an English case has held that there was no contract and that any performance made would have to be paid for on a restitutionary basis, see *British Steel Corp.* v. *Cleveland Bridge Engineering Co. Ltd.* [1994] 1 AllER 94, QB.

10. It is often held that by making a counter-offer the offeree becomes the offeror, and the offeror becomes the offeree who by conduct accepts the counter-offer, see on the CISG, Bianca-Bonell *(-Farnsworth)* 179 and *Honnold* nos. 170 ff and on FRENCH law, *Terré/Simler/Lequette*, Les obligations[6], no. 121. On the battle of the forms see the notes to the following Article.

11. DANISH cases and writers support the rule that performance may heal a contract. An offeror who has received an acceptance with modifications but who acts as if the contract is concluded must be considered to have accepted the modifications of the offeree, see UfR 1989 486 H. In other cases of performance where there is no basis for giving preference to one party's terms, the conflicting terms may be disregarded, and the rules of law will apply, see *Gomard*, Almindelig kontraktsret[2], 104 f and *Bryde Andersen* Grundlægende 208 ff. See also on SWEDISH law, *Adlercreutz*, Avtalsrätt I[10], 71 and *Ramberg*, Allmän avtalsrätt[4], 114 f.

II.–4:209: Conflicting standard terms

(1) If the parties have reached agreement except that the offer and acceptance refer to conflicting standard terms, a contract is nonetheless formed. The standard terms form part of the contract to the extent that they are common in substance.

(2) However, no contract is formed if one party:

(a) has indicated in advance, explicitly, and not by way of standard terms, an intention not to be bound by a contract on the basis of paragraph (1); or
(b) without undue delay, informs the other party of such an intention.

COMMENTS

A. The battle of forms

To-day's standardised production of goods and services has been accompanied by the standardised conclusion of contracts through the use of pre-printed supply and purchase orders. The pre-printed forms have blank spaces meant for the description of the performance, the quantity, price and time of delivery. All other terms are printed in advance. Each party tends to use terms which are favourable to it. Those prepared by the supplier, or by a trade organization representing suppliers, may, for example, contain limitations of liability in case of difficulties in production and supply or of defective performance, and provide that customers must give notice of any claim within short time limits. The forms prepared by the customer or its trade association, in contrast, hold the supplier liable for these contingencies, and give the customer ample time for complaints.

A special rule for this battle of forms is called for because it often happens that the parties purport to conclude the contract each using its own form although the two forms contain conflicting provisions. There is an element of inconsistency in the parties' behaviour. By referring to their own standard terms, neither wishes to accept the standard terms of the other party, yet both wish to have a contract. A party will only be tempted to deny the existence of the contract if the contract later proves to be disadvantageous for that party. The purpose of the rule is to uphold the contract and to provide an appropriate solution to the battle of forms.

Compared to the rules applied by those laws which still require offer and acceptance to be "mirror images" of each other before there can be a contract, this Article provides solutions which are much more likely to accord with the reasonable expectations of businesses and consumers who are not familiar with the technicalities of contract law. It does not, however, limit the freedom of the parties in any way. They remain free to state exactly what will or will not amount to offer and acceptance in their dealings.

B. Scope of the rule

The rule in the Article is not needed in every situation in which each party has a set of standard terms and these are not identical.

First, the parties may have so conducted themselves that only one set applies. This may happen because they have agreed explicitly that one set should govern their contract, for example when a party has signed a document which is to be treated as the contract, although in previous correspondence that party has referred to its terms of contract. It may also happen

because one party fails to bring its standard terms to the other party's attention before or when the contract is concluded.

Secondly, the question as to which terms govern only arises when the standard terms are in real conflict. This is not always the case. It may be that one party's standard terms contain terms which are implied in any contract of that kind, or that they merely list technical specifications of the goods or services to be supplied or performed. Such clauses are often not at variance with the other party's standard terms, which may not contain any clauses on these points.

There is, however, a battle of forms even if only one party's terms contain provisions on an issue, when its terms deviate from the general rules of law, and it is to be understood that the other party meant the rules of law to cover the issue. Thus the rules in the Article will govern the situation where in its offer the supplier's general terms contain a price escalation clause and the buyer in its acceptance uses a form which says nothing about later changes in the price.

C. The solutions

Is there a contract? The Article provides that there may be a contract even though the standard terms exchanged by the parties are in conflict. This is an exception to the general rule on modified acceptance in the preceding Article. Under that Article, an acceptance which differs from the offer will be effective only if the differences are not material. Otherwise, the acceptance would be (i) a rejection of the offer and (ii) a new offer. It is true that, if the party who receives the new offer does not object to it and performs the contract, it will be deemed to have accepted that there is a contract. The difference made by the present Article, is that the contract may be formed by the exchange of standard terms, rather than only if and when the performance takes place.

Under the present Article, a party who does not wish to be bound by the contract may indicate so either in advance, or later.

If done in advance, this must be indicated explicitly and not by way of standard terms. Experience has shown that a party whose standard terms provide that there will be no contract unless those terms prevail (such a clause is often called a 'clause paramount') often remains silent in response to the other party's conflicting terms, and acts as if a contract had come into existence. The provision is often contradicted by the party's own behaviour. To uphold it would erode the rule.

A party, however, may prevent a contract from coming into existence by informing the other party, without undue delay after the exchange of the documents which purport to conclude the contract, of an intention not to conclude a contract.

Which terms govern? If despite a conflict between the two sets of terms, a contract does come into existence, the question is: which terms will apply? Until recently many legal systems would answer the question as follows: By performing without raising objections to the new offer, the recipient must be considered to have accepted the standard terms contained in the new offer (the 'last shot' theory). Under another theory it is argued that a party which

states that it accepts the offer should not be allowed to change its terms. Under this theory (the so-called ‘first shot’ theory) the conditions of the first offeror prevail.

Under the present Article the standard terms form part of the contract only to the extent that they are common in substance. The conflicting terms ‘knock out’ each other. As neither party wishes to accept the standard terms of the other party, neither set of standard terms should prevail over the other. To let the party which fired the first or the last shot win the battle would make the outcome depend upon a factor which is often coincidental.

It is then for the court to fill the gap left by the terms which knock each other out. The court may apply applicable rules of law to decide the issue on which the terms are in conflict. Usages in the relevant trade and practices between the parties may be particularly important here, for example if there is a usage of employing terms which have been made under the auspices of official bodies or standard forms promoted by some other neutral organisation. If the issue is not explicitly covered either by the law or by usages or practices, the court or the arbitrator may consider the nature and purpose of the contract and apply the standards of good faith and fair dealing to fill the gap.

> *Illustration 1*
> A orders some goods from B. A’s order form says that the seller must accept responsibility for delays in delivery even if these were caused by force majeure. The seller’s sales form not only excludes the seller’s liability for damages caused by late delivery where there was force majeure, but also states that the buyer has no right to terminate for delay unless the delay is over six months. The delivery is delayed by force majeure for a period of three months and the buyer, who because of the delay no longer has any use for the goods, wishes to terminate the contractual relationship. The two clauses knock each other out and the general rules of law will apply: thus the seller is not liable in damages but the buyer may terminate for delay if the delay was fundamental.

The term “common in substance” conveys that it is identity in result not in formulation that counts. However, what is “common in substance” will not always be easy to decide.

> *Illustration 2*
> A sends B an order, which has on the back general terms providing, among other things, that any dispute between the parties will be submitted to arbitration in London. B sends A an acknowledgement accepting the offer. On the back of the acknowledgement is a clause submitting all disputes to arbitration in Stockholm. Although offer and acceptance have in common that they both refer to arbitration, the clauses are not ‘common in substance’ and accordingly neither of the places of arbitration is agreed upon. But did the parties agree on arbitration?

A court might conclude that the parties preferred arbitration to litigation in any case and would then apply the normal rules on jurisdiction in civil and commercial matters to decide where the place of arbitration should be.

If, however, the court finds that the parties or one of them would only have agreed to arbitration if it was to be held at a certain place the arbitration clause may be disregarded and the court may then admit the action.

NOTES

I. Is there a contract ?

1. In most of those countries where the courts have addressed the battle of forms it seems to be held that a contract has come into existence by the offer and its purported acceptance unless the offeror objects to the purported acceptance without undue delay. Thus the contract is held to exist even before the parties have acknowledged it in any other way, for instance by tendering performance. This is also the position of some of the writers in the countries where there is no case law on the subject.

2. In countries where the classical rules on offer and acceptance govern the battle of forms, a contract only comes into existence when these rules so provide. Under the classical rules on the conclusion of contracts the contract may also come into existence when the parties treat it as concluded expressly or by conduct, for instance by performing the contract. This is the position in ENGLISH law, see *Sauter Automation Ltd. v. Goodman (Mechanical Services) Ltd.* (1986) 34 Building LR 81. See on PORTUGAL, *Almeida*, Negocio juridico 886 and on SPAIN, *Diez-Picaso* 211. In FRENCH and in BELGIAN law the contract is not formed unless both parties consider the conflicting terms as unessential, see *von Mehren*, Formation of contracts, 164; *Terré/Simler/Lequette*, Les obligations[6], no. 188; *Kruithof & Bocken*, TPR 1994, no. 99.

3. In sales governed by CISG part II, where the terms of the purported acceptance do not materially alter the terms of the offer, the acceptance will conclude the contract unless the offeror objects without undue delay, see art. 19(2). If the terms of the purported acceptance materially alter the terms of the offer, there is a counter-offer, and therefore no contract until the offeror has shown by statements or conduct that the counter-offer is accepted, for instance by performing the contract, see arts. 19(1) and 18(1), and *Farnsworth* in *Bianca & Bonell* art. 19, ss. 2.3-2.6. The situation seems to be the same under the SLOVENIAN LOA § 29 which is identical to CISG art. 19, but there has not been any case law to support this.

II. Which terms govern?

(a) The "knock out" rule

4. The Article is in accordance with the UNIDROIT Principles art. 2.22, see Bonell, International Restatement 124 ff. The GERMAN courts have adopted a similar "knock out" principle. In most of the cases they have solved the conflict by applying the rules of law (das dispositive Recht) governing the issue, see BGH 20 March 1985, NJW 1985, 1838, BGH 23 January 1991, NJW 1991 1606, and Staudinger (-*Bork*) 2003, § 150 no. 18. Basically the same position has been taken by the AUSTRIAN courts, see OGH 22 September 1982, SZ 55/134 and OGH 7 June 1990, JBl 1991, 120; see also Rummel (-*Rummel*), ABGB I[3], § 864a no. 3. Also, DANISH law appears to support this rule see *Bryde Andersen* Grundlæggende 208 ff, *Lando*, UfR 1988, B 1 and *Gomard*, Almindelig kontraktsret[2], 104. The ESTONIAN LOA § 40 corresponds to the present Article.

5. In FRENCH and BELGIAN law the contract is concluded provided the conflicting terms do not cover an essential element, '*cause determinante'*, of the contract, see *Terré/Simler/Lequette*, Les obligations[6], nos. 188, 189, 366. It is held that in such cases no terms have been agreed and the rules of law will fill the gap, see *de Ly &*

Burggraaf 47 and *Mahé; Delforge*, in Fontaine (2002), 488-489; *Stijns-Van Gerven-Wéry*, JT 1996, p. 715, no. 79.

6. In POLAND the "knock out" rule is reflected in CC art. 385[4]. It provides that a contract concluded between entrepreneurs who use conflicting standard terms remains valid, but does not include those provisions of the standard forms which are mutually contradictory. A contract is not concluded, however, if any party immediately declares that it does not intend to conclude such contract.

(b) The "last shot" theory

7. The last shot theory seems to be the prevailing view in ENGLAND, see *B.R.S.* v. *Arthur Crutchley* [1967] 2 AllER 285, 287, although the outcome will depend on the exact facts, see *Butler Machine Tool Co.* v. *Ex-Cell-O Corporation(England) Ltd* [1979] 1 WLR 811, 817, C.A. and *Treitel*, The Law of Contract[9], paras. 2-019-2-020. It is also the prevailing view in SCOTLAND, see *SME*, vol. 15, § 636; *McBryde*, Law of Contract in Scotland[1], paras. 6.97-6.105

8. CISG arts. 18-19 seem to lead to the same outcome, both in cases where the conflicting terms of the acceptance materially alter the terms of the offer, see arts. 19(1) and 18(3), and when they do not, see art. 19(2), see Schlechtriem and Schwenzer (-*Schlechtriem and Schroeter*), CISG, art. 19 no. 19 and *Farnsworth* in *Bia*nca & Bonell art. 19, ss. 2.3-2.6.

(c) The first shot rule

9. The DUTCH CC art. 6:225(3) provides that if offer and acceptance refer to different standard terms, the second reference is without effect, unless it explicitly rejects the applicability of the standard terms contained in the first reference. It appears that the explicit rejection must be one which the offeree communicates for the occasion and not one which only appears in the offeree's standard terms.

10. In the USA § 2-207 of the UCC provides a general rule on additional terms in acceptance or confirmation. It is the prevailing view that the result is similar to that of the Dutch CC. However, if the additional terms do not materially alter the terms of the offer, these additional terms will become part of the contract, unless the offer expressly limits acceptance to the terms of the offer or notification of objection has already been given or is given within a reasonable time after notice of them is received. Several authors have criticised the rules in § 2-207, see *von Mehren*, Formation of contracts, 157-180.

(d) The law is unsettled

11. In the law of several countries, statutory provisions on the conclusion of contracts do not address the issue or do not provide what the authors consider to be clear and satisfactory answers. There is no case law and the authors are sometimes divided.

12. There is no general rule in SPAIN, where the authors tend to favour the classical rules on offer and acceptance and on interpretation of contracts. This is also the position of the PORTUGUESE authors, but tempered by the good faith principle; see Frada de Sousa, 140 ff. There is no express rule in ITALY, where some authors favour the "*last-shot" theory* (see *Bellelli*, 151), while others are in support of the "*knock-out*" doctrine (see *Sacco and De Nova*, Il contratto III, 407). In CZECH law there is no specific rule on conflicting standard terms. So the general rules on conclusion of contracts apply.

13. Many authors assert that there can be no hard and fast rule which solves the conflict. The cases are to be decided individually. This is the attitude of the SWEDISH authors,

see *Ramberg*, Allmän avtalsrätt[4], 174 ff; *Göransson*, passim, who seems to favour the first shot theory; *Adlercreutz*, Avtalsrätt II[4],73; and *Hellner*, Kommersiell avtalsrätt 50, who is not even sure what is the right approach, and who shows some sympathy for the last shot rule, a sympathy which *Ramberg*, Allmän avtalsrätt[4], seems to share; see also *Bernitz* 40.

14. The question is treated by the FINNISH author *Wilhelmsson* (Standardavtal 1995), who seems to prefer the knock out principle, see pp. 79 f. *Hemmo*, Sopimusoikeus I, 170-178 is less willing to consider any of the alternatives as a main rule and emphasises the role of the merits of every particular case. Among DANISH authors, *Lando*, Kampen, and *Bryde Andersen*. Grunlæggende 210 favour the knock out principle; *Gomard*, Almindelig kontraktsret[2], argues for the last shot rule where the offeror treats the contract as concluded without objecting to the additional or different terms in the acceptance, while in other cases the rules of the law should apply, see p. 105; *Lynge Andersen* 74 seems to prefer the last shot rule.

15. In SLOVAKIA only the classical rules on offer and acceptance govern the battle of forms, as statutory provisions on the conclusion of contracts do not address this issue and there is no case law.

II.–4:210: Formal confirmation of contract between businesses

If businesses have concluded a contract but have not embodied it in a final document, and one without undue delay sends the other a notice in textual form on a durable medium which purports to be a confirmation of the contract but which contains additional or different terms, such terms become part of the contract unless:

(a) the terms materially alter the terms of the contract; or

(b) the addressee objects to them without undue delay.

COMMENTS

A. Background

Between persons engaged in business transactions who have made a contract, it may not be entirely clear on what terms their contract has been concluded. A party may then send the other party a confirmation (e.g. by letter or email) containing the terms which the first party believes were agreed upon, and the terms which that party believes to be implied. The party needs to send this confirmation in order to be sure of the terms of the contract before performance begins. In most cases the recipient will assent to the confirmation by silence, having no reason to reconfirm what has already been agreed upon and confirmed by the other party. The silence will, therefore, be considered as assent. A recipient who disagrees with the terms must object without undue delay.

In many cases the additional terms provided in the confirmation will take the shape of an interpretation of the contract.

> *Illustration 1*
> Upon the termination of a distribution contract between the supplier S and the distributor D, D requests, and it is agreed orally, that S will take over D's stock of machinery "at the usual trade discount". These words usually mean the discount applied in sales from S to D (30%). However, in a letter of confirmation sent to S immediately after the oral agreement D points out that it means the discount which D applies to customers (28%). Since S does not object to D's letter, D's interpretation will prevail.

The rule stated in this Article is not recognised, or not clearly recognised, in all the laws but it again represents what seems to be widely accepted as fair commercial dealing between businesses. It would not be appropriate to apply it between a business and a consumer; however, as consumers cannot be expected to check all the documents sent to them by the business to ensure that they are consistent with the oral agreement made earlier.

B. Requirements

In order for the confirmation to become binding upon the recipient, the following requirements must be met:

> (1) The rule only operates between persons operating in their business capacity, as distinguished from relationships between professionals and consumers or between private individuals.

(2) The confirmation must be in textual form on a durable medium.

(3) The contract must have been incomplete in the sense that it did not materialise into a document which was a record of all the contract terms.

(4) The confirmation must reach the recipient without undue delay after the negotiations and it must refer to them.

(5) If the recipient does not object without undue delay to the terms additional to or different from the terms agreed upon in the preceding negotiations, they become part of the contract unless they materially alter the terms agreed upon.

Illustration 2
Upon the oral conclusion of a sales contract S sends B a letter of confirmation in which, inter alia, it is provided that B has to make an advance payment of half of the purchase price three months before delivery of the goods. S cannot prove that this was agreed when the contract was concluded; the term is unusual in the trade, and would materially alter the terms of the contract. B is not bound by the term on prepayment. S, on the other hand, must perform the contractual obligations without getting the advance payment.

NOTES

I. Unidroit, German, Estonian, Nordic and Polish law.

1. The rule laid down in this Article is provided in the UNIDROIT Principles, art. 2.1.12. The same rule probably also applies in SWEDEN in contracts between professionals, see *Adlercreutz,* Avtalsrätt II[4], 74 ff and NJA 1980, 46 (Swedish Supreme Court). The same rule applies in DENMARK, ESTONIA, FINLAND and GERMANY, see references below.

2. In these four countries a professional's written confirmation may also create a contract even though it was not clear that one existed already. The letter of confirmation will bind the addressee to a contract even if the addressee did not believe there was a contract, if the sender of the confirmation had reason to believe that the negotiations between the parties had led to a contract, see on DANISH law, *Lynge Andersen* 100 ff and the Supreme Court's decision in UfR l974 119 H; on FINNISH law, *Telaranta* 172; and on GERMAN law, *Baumbach/Duden/Hopt* (-*Baumbach and Hopt*), Handelsgesetzbuch[12], § 346 nos. 16 et seq. However, in this case the recipient will not be bound, if the letter contains surprising terms, or the recipient objects to the writing without undue delay. The general rule in ESTONIAN law corresponds to the present Article (LOA § 32(1)). In LOA § 32(2) it is further specified that the rules do not apply if the sender of the written confirmation knew or should have known that the contract had not been concluded or if the terms in the written confirmation differ from the terms agreed upon earlier to such an extent that the sender of the written confirmation cannot reasonably rely on the other party's consent to the contents of the written confirmation.

3. The rule of the present Article, as applicable to contracts concluded between businesses, is explicitly embodied in POLISH law (CC art. 77^1). The rule was introduced in 2003 and there is no case law on the subject to date.

II. English, Irish and Scottish law

4. It is argued that also under ENGLISH law, usages and practices between the parties may mean that if a party receives a letter of confirmation or similar document modifying the terms of the contract, and does not object, the party may nevertheless be bound. Although the principles of good faith and fair dealing are not generally adopted in English law, some cases seem to show that even when there are no usages and practices between the parties, silence in response to such a communication may be regarded as acceptance when it would be unreasonable to hold otherwise, such as when the recipient had initiated the negotiations, see Schlesinger *(-Leyser*) 116 ff, *Treitel,* The Law of Contract[9], para. 2-043 and *Rus*t v. *Abbey Life Ins. Co*. [1979] 2 Lloyd's Rep 355. Although there is little authority in IRELAND to support this view, it appears to be in line with the spirit of the law. The same may be true in SCOTLAND; cf. *McBryde*, Law of Contract in Scotland[1], paras. 6.71-6.77.

III. The other systems

5. In most other European countries, a party's silence in response to a letter of confirmation or other communication purporting to change the terms of the contract will only amount to acceptance if this follows from usages and a practice between the parties, or when under the principle of good faith and fair dealing silence must be interpreted as acceptance. See for instance the LUXEMBOURG Cass. 26 June 1914, Pasicrisie 11, 89, where it was stated that under the circumstances "the confirmation of a purchase is implied by the silence of the buyer to the letter of confirmation of the seller." The same solution applies under the CISG, see Schlechtriem and Schwenzer (-*Schmidt-Kessel*), CISG, art. 9 nos. 22-24. In AUSTRIAN law a professional's silence to another professional's written confirmation which adds to or deviates from the agreement made is in general not regarded as an acceptance of the written confirmation, see Rummel (-*Rummel*), ABGB I^3, § 861 no. 13, and Austrian Supreme Court (OGH) 7 July 1982 SZ 55/106, 28 April 1993 JBI 1993, 782.

6. In FRANCE, LUXEMBOURG, BELGIUM and THE NETHERLANDS there seems to exist a general usage under which the recipient of an invoice is taken to have accepted the terms in the invoice unless the recipient objects to them without undue delay. A party's acceptance of a performance without objecting to the terms communicated by the performing party before or with the performance, or other similar circumstances may also be interpreted as acceptance of these terms, if good faith and fair dealing so require: see on Belgian law, *Rodière,* Formation 53 and *Storme* TBH 1991, 467 ff; on French law, *Terré/Simler/Lequette,* Les obligations[6], nos. 104-121; and on Dutch law, *Rodière,* Formation 100.

7. In ITALY, a written confirmation containing new terms diverging from those embodied in the original contract tends to be considered as an offer to amend the content of the agreement already reached between the parties (see Cass. S.U. 9 June 1995 no. 6499 in Foro it. 1997, I, 562; see also 14 March 1983 no.1888, Giur.it. 1984, I, 1 336. For a more flexible approach by legal writers see however *Bonell*, Tecnica di redazione dei contratti internazionali, Enciclopedia giuridica Treccani 3 ff; *Addis*, 232 ff.

8. There is no rule developed on this in SPANISH law. However, the situation raises the problem of when silence will be regarded as acceptance. In this situation, the other

party is bound by the good faith rule to give an express objection to the writing. There is a duty to speak and silence counts as acceptance. It should be noted, however, that the rule just explained does not apply when a notarial deed differs from the terms previously embodied in a private contract document (CC art. 1224).

9. In SLOVAKIA there is no special rule and only the general rule according to which silence or inactivity is not to be considered as an acceptance (CC § 44 sub-para. 1) will be applicable. In SLOVENIA, too, no special rules for formal confirmation between businesses exist and the general rules on conclusion are applicable. It is the same in BULGARIAN law – see under acceptance by silence, Ccom art. 292.

10. The CZECH CC does not deal with this issue and so the courts apply the general rules on the formation of contracts.

II.–4:211: Contracts not concluded through offer and acceptance

The rules in this Section apply with appropriate adaptations even though the process of conclusion of a contract cannot be analysed into offer and acceptance.

COMMENTS

A. Other models than the offer and acceptance model

The conclusion of a contract may not always be separated into an offer and an acceptance. The parties may start with a letter of intent or a draft agreement made by one party or a third party. Then follow negotiations either in each other's presence or in an exchange of letters. Or they start by sitting down together to negotiate, sometimes with rather vague ideas of where they will end. It may not be easy to tell where in this process the parties reach an agreement which amounts to a binding contract. The same may be true of the many contracts that are made by conduct alone, as when a motorist parks in a car park and gets a ticket from a machine or a traveller takes out travel insurance by putting money into a slot machine and receiving the policy from the machine. Or a multilateral contract may be concluded by the parties voting at a meeting to accept the terms of a prepared draft.

B. Application of Section 2

The rules in Section 2 cannot always be applied to such other models. Sometimes, however, they may apply:

> *Illustration 1*
> Two parties meet to draft a written contract. When they have made the draft they agree that each party will have two weeks to decide whether to accept it. The draft is treated as an "offer". If after the two weeks each of them has not received the other party's acceptance there is no contract. The same applies if before that time a party receives the other's rejection. If during the respite a party makes proposals for additions which materially alter the terms of the draft, this is to be treated as a rejection and a "new offer".

> *Illustration 2*
> After conclusion of an oral agreement a person acting for two professional parties is asked to prepare a written contract. The person then sends both parties a draft accompanied by a letter saying that the draft will be taken to be their agreement unless either replies to the contrary within a certain time. The draft contains the terms which the parties had agreed upon and some additional terms which reflect usual commercial practices in the trade. The parties will be bound if neither opts out within the stated time.

NOTES

1. The conclusion of a contract by way of an offer and acceptance is the principal model in all the legal systems. Other models are only sparsely regulated in the statutes, and several of the problems are not solved in the case law, see for ENGLAND *Treitel,* The

Law of Contract[9], paras. 2-076-2-079 and for the NETHERLANDS, *Asser-Hartkamp* 4-II, Algemene leer der overeenkomsten, nos. 135 and 156.

2. It seems, however, to be universally agreed that the rules on the principal model apply by way of analogy to the other models, in so far as this is possible and reasonable. In many countries this follows from the general principle of analogous application of the laws. The authors are in agreement on this; see for GERMANY, Staudinger (-*Bork*) 2003, before § 145 no. 38; for DENMARK, *Lynge Andersen* 85 f; and for FINLAND and SWEDEN, The Contracts Act § 1 and *Grönfors*, Avtalslagen 35 f. This also appears to be the position in ENGLAND, see *Treitel,* The Law of Contract[9], paras. 2-076-2-079; for ITALY, see *Roppo,* Il contratto 136 and *Bianca*, Diritto civile III, 238. For ESTONIA, see LOA § 9(1): a contract may be concluded by the mutual exchange of declarations of intent *in any other manner* if it is sufficiently clear that the parties have reached an agreement (Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, § 9, no. 4.1.1).

3. In SLOVAKIA it is generally accepted (no regulation in Codes) that a contract is concluded when sufficient agreement is reached without strictly following the contractual model of offer and acceptance. (*see Fekete,I: Občiansky zákonník, komentár. Bratislava, Eops, 2002, p. 161)*.

4. Under BULGARIAN law, the silent conclusion of a contract is generally accepted. If the prerequisites of the latter are satisfied, a contract can be concluded without offer and acceptance too.

5. See generally *Schlesinger* II, 1583-1620*; Fontaine*, in Mélanges Van Ommeslaghe (2000), 115.

Section 3: Other juridical acts

II.–4:301: Requirements for a unilateral juridical act

The requirements for a unilateral juridical act are:

(a) that the party doing the act intends to be legally bound or to achieve the relevant legal effect;

(b) that the act is sufficiently certain; and

(c) that notice of the act reaches the person to whom it is addressed or, if the act is addressed to the public, the act is made public by advertisement, public notice or otherwise.

COMMENTS

A. General

The rules on the formation of contracts, with their emphasis on agreement, cannot be applied directly to the formation of other unilateral acts. Nonetheless, questions about the effectiveness of a unilateral juridical act can arise.

Illustration

Under a contract between A and B, A has the right to terminate the contractual relationship upon one month's notice and the payment of a certain sum. A sends B a letter giving one month's notice but then changes her mind and calls B to tell her to ignore the notice, which has not yet reached B. As the notice has not yet taken effect it can be revoked. The intention necessary under sub-paragraph (a) is no longer present (see also I.–1:109 (Notice) paragraph (5)).

This Article represents the general approach taken by the majority of laws in which the matter has been discussed.

An offer and an acceptance are types of unilateral juridical acts but the more specific rules regulating them will prevail over the general rules in this Article in any case of conflict (see I.–1:102 (Interpretation and development) paragraph (5)).

B. Requirements

The requirements for the formation of a unilateral juridical act are, however, very similar to the requirements for the formation of a contract. The need for an intention on the part of the maker of the act to be legally bound or to achieve the desired legal result, and the need for sufficient certainty are very similar to the requirements for a contract. These requirements are coupled with the need for an appropriate externalisation of the intention. A secret intention which is not communicated to anyone is not binding. The person who forms an intention to achieve some legal result remains free to have a change of mind so long as the intention, even if written down, is not communicated to anyone. The general rule is that a juridical act is made only when notice of it reaches the person to whom it is addressed. The general provisions on notices determine when a notice "reaches" the addressee. A special rule is needed for juridical acts addressed to the public at large and here the Article requires that the

act be made public by advertisement, public notice or otherwise. The model rules are not intended to apply to testamentary acts. If they did so apply then the requirement of notice would have to be modified: the event which precludes a subsequent change of mind is not notice in such a case but death. There are also specific rules which dispense with the need for a juridical act to reach the addressee. For example, an acceptance by doing an act may in certain circumstances be effective even without communication to the offeror. See II.–4:205 (Time of conclusion of the contract) paragraph (3).

NOTES

1. The requirements for the formation of contracts are applied by analogy to unilateral juridical acts by BELGIAN case law (see *Stijns-Van Gerven-Wé*ry, JT 1996, 708; on unilateral promises: *Cauffman*, De verbindende eenzijdige belofte, nos. 228 and 777).
2. In PORTUGUESE law, the principle is that unilateral acts are not able to create obligations (CC art. 457). The main exceptions are public promises (CC art. 459) and written declarations on negotiable instruments. In the absence of statutory provisions, requirements for these unilateral acts and for many others which affect the formation and the effects of contracts (such as offer, acceptance, waiver, authorisation) may be inferred from general principles and from the rules on legal transactions (CC art. 295).
3. Pursuant to art. 1324 of the ITALIAN CC, rules governing contracts apply, unless otherwise provided by law and to the extent they are compatible, to unilateral *inter vivos* juridical acts having a patrimonial content. Scholars favour the application of the rule also to *mortis causa* acts and juridical acts not having a patrimonial content (see *Roppo*, Il contratto 87; *Sacco and De Nova*, Il contratto III, 73). Similarly, according to SLOVENIAN LOA § 14, the rules on contracts apply with appropriate modifications to other juridical acts. There are no special rules on the formation of unilateral juridical acts. The same solution is contained in the BULGARIAN LOA art. 44.
4. In FRANCE, there is no general theory of unilateral juridical acts but some of these acts are submitted to special rules. In the absence of specific rules, the rules regarding contracts are adapted and applied. (*Terré/Simler/Lequette*, Les obligations[6], no. 50). The position is the same in SCOTLAND; a promise which is capable of creating a binding obligation will not do so unless it is communicated to the addressee (*Burr* v. *Boness Police Commissioners* (1896) 24 R. 148).
5. GERMAN law distinguishes between strict unilateral acts and other unilateral acts. The effectiveness of strict unilateral acts does not depend on the knowledge of a certain person (so called “nicht empfangsbedürftige Willenserklärung” - declaration of intent which does not need to be received). It is deemed sufficient that the party doing the act expresses the declaration of intent in a noticeable way, for instance, by paying the agreed prize or dispatching the ordered products (Staudinger (-*Singer/Bemedict*) 2004, § 130 No. 11). Non-strict unilateral acts (so called “*empfangsbedürftige Willenserklärung*” – declaration of intent which has to be received) are regulated in CC § 130(1) sentence 1 and become effective at the time they reach the addressee. Regarding CC § 151 an exception from this rule is possible in case of an acceptance of an offer. The acceptance is dispensable, if such a declaration is not to be expected according to common usage, or if the offeror has waived it.
6. The DUTCH CC, like the German CC, takes the ‘juridical act’ as a starting point for regulation (arts. 3:33 ff) and treats contract and the non-strict unilateral act as species.

Therefore regulation of the non-strict unilateral juridical act in the CC is quite limited (art. 3:37(3), (4) and (5)).

7. In AUSTRIA unilateral juridical acts exist in the form of e.g. testamentary acts, offers of rewards, the authorisation of a representative, notices and withdrawals. In part general provisions of the law of contracts are applicable by analogy, if the unilateral juridical act has to reach the addressee in order to be binding (see CC § 876).

8. POLISH law does not regulate unilateral juridical acts separately from juridical acts in general. According to the general rules, a party making a juridical act must act intentionally, and can express the will by any conduct which manifests it sufficiently clearly (CC art. 60). The declaration of will is deemed to be made at the moment when it reaches the addressee in such a way that the addressee can access it. Among all unilateral juridical acts only a public promise is regulated separately (CC arts. 919-921): anyone who, by way of advertisement, publicly promises a reward for the performance of a specified act, is obliged to fulfil that promise. In this case public announcement of the declaration of intent is a requirement for the formation of the unilateral act.

9. In SLOVAK law there are special rules for the formation of a few types of unilateral juridical act – i.e. public promise (CC §§ 850-852), public competition (CC §§ 847-849) and promise of indemnity (Ccom §§ 725-728). For the rest the general rules on juridical acts apply.

10. In CZECH law unilateral juridical acts are subject to the same general rules as contracts (see CC §§ 34-42a). So, a unilateral juridical act must be made freely, seriously, in a definite manner and must be understandable (CC § 37(1). Performance of a unilateral juridical act must be objectively possible (CC § 37(2). It is generally recognized that an addressed unilateral juridical act is not effective unless the manifestation of will reaches the addressee, see *Švestka/Jehlička/Škárová*, OZ[9], CC, 231. Regarding non-addressed unilateral juridical acts, CZECH law does not contain any common provision on making a manifestation of will public – the answer usually results from particular regulations as set forth in special parts of the CC (e.g. CC §§ 847, 850) and (CC §§ 276, 281). That is because a general public promise regulation is unknown to Czech law, see Knappová (-*Knapp/Knappová/Švestka*) Civil Law II, 73.

11. Under ESTONIAN law, a general provision for both unilateral and multilateral juridical acts can be found in GPCCA §§ 67-75. A unilateral juridical act (e.g. testamentary act, public offer of reward, the authorisation of a representative, notice of withdrawal) is defined as a transaction for which a declaration of intention of one person is necessary (GPCCA § 67(2) sent. 2). A declaration of intention (to bring about a legal consequence) directed at a certain person, if it is properly expressed (directly or indirectly) becomes effective at the time it reaches the addressee (GPCCA § 69(1) sent. 1). A declaration of intention which is not directed at a certain person (e.g. a public offer of reward) enters into force upon expression of the intention (GPCCA § 69(1) sent. 2).

12. In ENGLISH law, there is no general rule for unilateral juridical acts since the concept is not recognised as such. For most such acts – for example, notices that affect the obligations under a contract, such as a notice of avoidance or termination - the communication will have to reach the other party in order to be effective. See the Notes to I.–1:109 (Notice). In contrast, a promise by deed does not have to be communicated to be effective. However, promises under deed and contractual notices are subject to the usual defences of invalidity, such as fraud: see *Chitty* on Contracts I[27], no. 1-091.

13. In HUNGARIAN law a juridical act is a declaration of will of one or more persons which is intended to bring about legal effects. From a unilateral statement a right to demand performance arises only in the cases defined by legal regulations; the provisions on contracts are to be applied to unilateral statements, unless otherwise provided by law (CC § 199).

II.–4:302: How intention is determined

The intention of a party to be legally bound or to achieve the relevant legal effect is to be determined from the party's statements or conduct as they were reasonably understood by the person to whom the act is addressed.

COMMENTS

This is very similar to the equivalent rule for contracts. It would be unacceptable to allow a party's subjective intention to prevail over the reasonable understanding of the other party.

NOTES

1. See the notes on II.–4:102 (How intention is determined).
2. The same interpretation rules as to contracts apply also in CZECH law, (CC § 35) and DUTCH law (CC art. 3:35).

II.–4:303: Right or benefit may be rejected

Where a unilateral juridical act confers a right or benefit on the person to whom it is addressed, that person may reject it by notice to the maker of the act, provided that is done without undue delay and before the right or benefit has been expressly or impliedly accepted. On such rejection, the right or benefit is treated as never having accrued.

COMMENTS

A. Freedom to reject right or benefit

This Article reflects the policy that a person should not be forced to accept a right or benefit which the person does not want. There could be various reasons for rejecting an apparent benefit. The recipient may have personal reasons for not wishing to be under any moral obligation to the person trying to confer the benefit. Or the benefit may come with inherent burdens or disadvantages. For example, the owner of certain types of property may well come under certain duties or burdens of a public law nature.

It is obvious that the Article cannot apply to all juridical acts. A person who is given notice of avoidance of a contract, for example, cannot reject it. It should also be remembered that this is just a default rule. The parties may have contracted otherwise. The recipient may be contractually bound to accept the right or benefit.

NOTES

1. By analogy with the rejection of an offer, the rejection of the benefit of a promise is accepted by BELGIAN legal writers (see *Cauffman*, De verbindende eenzijdige belofte, no. 1221).
2. The principle *invito non datur beneficium* (nobody can be constrained to accept a benefit) is unanimously recognised by PORTUGUESE lawyers (see JORGE 216), but there is no particular statutory provision or regime about it. The same situation is observed in BULGARIA, where donations (LOA art. 225) and remissions of a debt (LOA art. 108) are contracts and not unilateral acts and where the contract in favour of a third person becomes effective towards the third person only after acceptance (LOA art. 22). In the NETHERLANDS, the above-mentioned principle and the proviso that the person to whom the right or benefit is addressed may reject it only without undue delay may be concluded from the CC arts. 6:5(2), 6:160(2), 6:253(3) and 7:175(2). The same principle can be found in the GERMAN CC §§ 333, 515(2) and is partly mirrored by CC § 167.
3. In FRANCE, the rule stating that a person can refuse a unilateral act which would trigger a gain is firmly established.
4. Under POLISH law, there is no express similar rule but it is recognised that a benefit may not be conferred on anyone against that person's will. Donation is a contract (CC art. 888), a benefit conferred in a testament can be rejected (CC art. 1012). Until a 2005 judgment of the Constitutional Court, there applied a CC rule (former CC art. 179) that an owner of a real estate may renounce it, upon which title to that real estate passed to the municipality or the State. However, this rule was found unconstitutional

(Judgment of the Constitutional Tribunal of 15 March 2005, K 9/04, Journal of Laws, 2005/48/462), as it shifted title without conferring any right to reject it.

5. In SLOVAKIA the policy or the rule that a person should not be forced to accept a right or benefit which the person does not want is not explicitly expressed in the CC or the Ccom but results from the basic rules on which the private law is based.

6. In SCOTLAND it is accepted that the benefit conferred by a promise can be rejected. *Gloag and Henderson* para. 5.11.

7. In CZECH law it is accepted that, unless the law provides otherwise, no right or obligation may be imposed on the addressee by the way of a unilateral juridical act until the addressee consents to (Knappová *(-Knapp/Knappová/Švestka)* Civil Law II, 72). The consent may result from the addressee's own unilateral juridical acts made after the unilateral juridical act in question had taken effect (typically, accepting or following the unilateral juridical act) or from the addressee's previous legal undertakings (concluded contracts etc.) This principle is not stated in the CC but is inferred from provisions regulating particular types of unilateral juridical acts.

8. In ESTONIA there is no general rule comparable to this Article. In Estonian law acceptance is presumed for contracts of surety (LOA § 144(1)) and contracts of guarantees (LOA § 155(11). Contracts for gift, like contracts generally, need acceptance for their formation (LOA § 259).

CHAPTER 5: RIGHT OF WITHDRAWAL

Section 1: Exercise and effect

II.–5:101: Scope and mandatory nature

(1) The provisions in this Section apply where under any rule in Books II to IV a party has a right to withdraw from a contract within a certain period.

(2) The parties may not, to the detriment of the entitled party, exclude the application of the rules in this Chapter or derogate from or vary their effects.

COMMENTS

A. General rules on exercise and effect of withdrawal

Section 1 of this Chapter contains a set of rules which are applicable to all individual rights of withdrawal. These common rules concern only the exercise and effect of the right of withdrawal, including some related matters such as time limits for exercising this right and requirements to inform the party who is entitled to withdraw on the basis of this right. Paragraph (1) clarifies that these rules apply where a party has the right of withdrawal within a certain period under any rule in Books I to IV. Such withdrawal rights are granted, for example in II.–5:201 (Contracts negotiated away from business premises) and II.–5:202 (Timeshare contracts) and may be granted in possible future parts of Book IV. The present Article provides that the rules of this Section apply, where under these rules in the DCFR the right of withdrawal exists, but they do not indicate *when* the right of withdrawal exists. Hence, this Article does not extend the rights of withdrawal beyond those that are established by other provisions. The general rules on exercise and effect of withdrawal of this Section are modelled on the individual provisions on withdrawal rights in Community law, namely in the Doorstep Selling Directive 1985/577/EEC, the Distance Selling Directive 1997/7/EC, the Financial Services Distance Selling Directive 2002/65/EC, the Timeshare Directive 1994/47/EC and the Life Assurance Directive 2002/83.

B. Mainly, but not exclusively consumer law

The provisions in this Section are drafted as rules of general contract law, applicable to all parties to contracts including businesses, although their main field of application consists of consumer contracts. The reason is that in systematic terms, the concept of the right to withdraw from a contract does not necessarily have to be restricted to the field of consumer protection. Although the right to withdrawal did emerge in this sector, its purpose may transcend the concept of consumer, as protection for one party from being too hastily bound in a situation where that party is in a structurally disadvantageous position at the time of conclusion of the contract. Correspondingly, in Art. 35(1) of the Life Assurance Directive 2002/83/EC the right of withdrawal is available irrespective of whether the entitled party is a consumer. Thus, existing EC law (and many national laws) do not totally restrict the right of withdrawal to consumer contracts, neither in its legal structure nor in all individual provisions. The (potentially) overarching nature of the rules for rights of withdrawal implies that they are more accurately categorised as general contract law than as belonging only to the specific

field of consumer protection law. A right of withdrawal may be granted under any piece of legislation, if the legislator assumes that a party, whether a consumer or a business, who concludes particular types of contract, or does so under particular circumstances, deserves particular protection which is best served by the right of withdrawal.

C. Mandatory nature

Because the main purpose of the general rules on withdrawal rights is to protect the entitled party, paragraph (2) stipulates that the rules of this Chapter (Section 1 and Section 2) may not be amended to the disadvantage of the protected party by any agreement between the parties. For the same reason, the present Article does not prohibit any contractual amendments which are more favourable to the protected party. Therefore, the parties to the contract are allowed to facilitate the exercise of the withdrawal and to extend its effects by deviating from the rules of this Chapter, as long as this operates in favour of the entitled party. Parties may equally agree that a party to the contract may withdraw even where no such right is granted in these model rules.

Although the rules of this Section apply expressly only where a party has a right of withdrawal granted by these model rules, this does not exclude the application of this Section to contractually stipulated rights of withdrawal. In those cases, the rules in this Section are not mandatory in the sense of paragraph (2). Negotiated rights of withdrawal do not have to be regulated expressly in this Section, as they are not based on explicit provisions of the DCFR, but on agreement between the parties, which in turn is based upon the principle of freedom of contract.

Illustration 1
In a sales contract concluded outside of business premises within the meaning of II.–5:201 (Contracts negotiated away from business premises), the buyer and seller agree that the buyer has three months within which to exercise the right of withdrawal. This term deviates from II.–5:103 (Withdrawal period) where a fourteen day period is provided. As paragraph (2) of the present Article only prevents agreements to the disadvantage of the entitled party, the term is valid.

Illustration 2
In a sales contract concluded outside of business premises within the meaning of II.–5:201 (Contracts negotiated away from business premises), the buyer and seller agree that the buyer has only three days within which to exercise the right of withdrawal. This term is contrary to II.–5:103 (Withdrawal period). As paragraph (2) of the present Article states that the following provisions are mandatory, this term is invalid.

Illustration 3
As above, but the buyer and the seller agree that the buyer must give reasons why the right of withdrawal is exercised. Again, this agreement is not in accordance with II.–5:102 (Exercise of right to withdraw), and this term is therefore invalid.

D. Meaning and function of withdrawal

The Directives which grant withdrawal rights, and the national laws even more so, use many different terms for regulating withdrawal rights. In order to reach a coherent terminology these model rules have opted for the uniform use of the term “withdrawal”. Its meaning and

the main function of withdrawal rights is described in the definition provided in the Annex , which reads as follows.

> A right to 'withdraw' from a contract or other juridical act is a right to terminate the legal relationship arising from the contract or other juridical act, without having to give any reason for so doing and without incurring any liability for non-performance of the obligations arising from that contract or juridical act. The right is exercisable only within a limited period (in these rules, normally 14 days) and is designed to give the entitled party (normally a consumer) additional time for reflection. The restitutionary and other effects of exercising the right are determined by the rules regulating it.

The idea behind such a generalisation is that the individual withdrawal rights to be found in Community law and in the national laws are based upon a common concept. They all require the presence of specific situations of contract formation where in the eyes of the law one party, usually a consumer, deserves protection. In doorstep sales or distance sales (cf. II.–5:201 (Contracts negotiated away from business premises), this need for protection arises from the way in which the contract is initiated. In distance sales, it reflects in particular the customer's inability to visually inspect the goods before buying, as well as the customer's lower inhibition threshold to buy goods. In timeshare (cf. II.–5:202 (Timeshare contracts)) and life assurance contracts, the complexity of the contract calls for protection of the consumer. In order to counteract the structural imbalance between the parties in such situations, the right of withdrawal allows the protected party to escape contractual obligations without having to give reasons.

E. Differences between withdrawal and termination and other rights to be released from a contract

The rights of withdrawal provided by these rules must be distinguished from other rights to be released from the binding effect of a contract or a binding juridical act. The primary aim of withdrawal rights is to allow the consumer time for further consideration (a so-called 'cooling-off' period) and for obtaining information. The entitled party can therefore rely on a right of withdrawal without having to show non-performance by the other party, as would be required for termination of a contractual relationship under Art. 3(2) and (5) of the Consumer Sales Directive. (which uses the word 'rescind') or under Art. 49 CISG (which uses the term 'avoidance') or under Book III, Chapter 3, Section 5 of these model rules. Nor is withdrawal linked to mistake, fraud or other conduct of which the law disapproves. The applicable principle is rather that withdrawal brings the contractual obligations to an end without there having to be any specific reasons, as long as the requirements for both the right and its exercise (such as time limits) have been met.

F. Overlapping remedies

There may be situations in which all the requirements for the right of withdrawal are met, but where the contract is void or voidable under Book II Chapter 7, or where the contractual relationship can be terminated for other reasons (e.g. termination for non-performance under Book III, Chapter 3, Section 5). In this case, the entitled party should not be limited to remedies based on these other reasons, but should rather be entitled to exercise the right of withdrawal and benefit from the effects of withdrawal, which may be more favourable. It would counteract the protective effect of the right of withdrawal if it could be considerably compromised by the mere existence of a further defect of the contract, and even more so if

this defect has been caused by the other party (cf. also II.–7:216 (Overlapping remedies) with regard to avoidance and remedies for non-performance).

Illustration 4
Two parties conclude a contract which is avoidable under II.–7:205 (Fraud) because of one party's fraudulent behaviour. The other party may nevertheless withdraw from this contract and is not confined to the remedy of avoidance under Book II, Chapter 7.

G. Provisions on withdrawal rights in other parts of these model rules

Some general provisions on withdrawal rights are located in other parts of these model rules. For instance, II.–3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage) paragraph (1) stipulates that the necessary information on the right of withdrawal must be provided within a reasonable time before the conclusion of the contract. II.–3:109 (Remedies for breach of information duties) paragraph (1) postpones the beginning of the withdrawal period if certain information has not been not given to a consumer, but also provides for a maximum time limit of one year for the withdrawal period.

As the rules of this Section generally regulate the exercise and the effects of all rights of withdrawal, in some cases provisions for a particular right of withdrawal deviate from the general rules. This is the case, for instance, in II.–5:202 (Timeshare contracts) paragraphs (2) and (3) with regard to the restitutionary effects of withdrawal. As usual, such particular provisions will take precedence under the general principle of *lex specialis derogat legi generali* (see I.–1:102 (Interpretation and development) paragraph (3)).

NOTES

I. Rights of withdrawal

1. Provisions on withdrawal rights are part of EC secondary legislation, namely of the consumer protection directives. Both the Doorstep Selling Directive and the Timeshare Directive contain a right of withdrawal in Art. 5. The Distance Selling Directive as well as the Distance Selling of Financial Services Directive provide for a right to withdraw in Art. 6. The Life Assurance Directive contains in Art. 35(1) a right to cancel an individual life-assurance contract. This right of withdrawal is available irrespective of whether the entitled party is a consumer. Thus, existing EC law does not totally restrict the right of withdrawal to consumer contracts. The terminology used in these Directives is somewhat incoherent, e.g. the Doorstep Selling Directive refers to a "right of cancellation" (recital 5, art. 4(1); art. 5(2)), a "right to renounce" (art. 5(1)), as well as a "right of renunciation" (art. 7). The right of withdrawal contained in the Timeshare Directive is partially called a "right to cancel" (cf. "cancellation and withdrawal" in the 2nd and 13th recital; "right to cancel or withdraw" in art. 7 and in lit. (l) of the Annex). Some Directives that confer rights on a consumer do not provide for a right to withdraw. E.g., the Package Travel Directive, the Unfair Contract Terms Directive, the Price Indications Directive, the Injunctions Directive and the Consumer Sales Directive make no reference to a right of withdrawal.

2. All Member States have implemented the Directives' provisions on rights of withdrawal. Some states have done so by including the rights of withdrawal in several Acts that cover different situations of consumer protection. This includes CYPRUS, DENMARK, HUNGARY, IRELAND, LUXEMBOURG, MALTA, ROMANIA, and the UNITED KINGDOM, where separate laws on distance selling, doorstep selling, or timeshare contracts can be found. Other Member States have set up single acts that deal with consumer protection in different areas, e.g. AUSTRIA, BULGARIA, FINLAND, FRANCE, ITALY, SLOVENIA and SPAIN. A third group of states have included the rights of withdrawal into their civil codes: GERMANY, LITHUANIA and the NETHERLANDS. The SLOVAK CC contains special provisions dealing with the right of withdrawal in consumer contracts (CC § 59). This provision was implemented on the basis of Directive 94/47/EC (Svoboda). There are special legal acts – no. 108/2000 about protection of a consumer in relation to doorstep selling and mail-order selling, no. 250/2007 about protection of a consumer, no. 258/2001 in relation to consumer credits – published in the Slovak CC which prescribes specific rules and withdrawal periods in the area of consumer law.

3. The Member States have conceived the right to withdraw from a contract primarily as a consumer protection right. Thus, the entitled party has to be consumer. However, as the notion of consumer (and of trader or supplier) varies considerably in national legislation (see Notes on I.–1:105 ("Consumer" and "business")) the scope of application of the right of withdrawal differs throughout the Member States.

II. Mandatory nature

4. The Directives containing a right of withdrawal require the Member States to provide for the imperative nature of the Directives' provisions. Art. 6 of the Doorstep Selling Directive, Art. 12(1) of the Distance Selling Directive, and Art. 12(1) of the Distance Selling of Financial Services Directive state that the consumer "may not waive" the rights conferred on him or her. Art. 8 of the Timeshare Directive requires the Member States to ensure that contractual clauses whereby the consumer waives his or her rights are not binding.

5. Nearly all Member States have adopted a mandatory law provision. For doorstep selling contracts only IRELAND and FRANCE refrained from doing so. With regard to distance selling contracts both FRANCE and SLOVENIA did not implement such a provision. Some Member States, e.g. DENMARK (Distance and Doorstep Selling Act art. 28) and SLOVAKIA (CC § 574), only state that the consumer may not waive the rights conferred on him or her. However, most of the states declare contractual terms that remove or reduce the rights of the consumer to be void, e.g. ESTONIA LOA § 51; ITALY ConsC art. 143(1); LUXEMBOURG Doorstep Selling Act art. 10(2); MALTA Doorstep Selling Act art. 11(c); NETHERLANDS Doorstep Selling Act art. 23(5); ROMANIA Doorstep Selling Act art. 17; UNITED KINGDOM Consumer Protection Reg. 1987 reg. 10(1).

6. Most of the national rules explicitly allow contractual terms that are more profitable for the consumer. E.g., the GERMAN CC § 312f sent. 1 states that agreements between the parties may not derogate "to the disadvantage of the consumer" from the provisions on the right to withdraw. The LITHUANIAN CC art. 6.357(12) requires agreements to be detrimental to the consumer's position whereas The SLOVENIAN ConsProtA § 1(11) simply states that the consumer's rights cannot be limited or excluded.

7. According to the GERMAN CC § 312f sent. 2 the provisions in favour of the consumer apply even if they are circumvented by other constructions.

II.–5:102: Exercise of right to withdraw

(1) A right to withdraw is exercised by notice to the other party. No reasons need to be given.

(2) Returning the subject matter of the contract is considered a notice of withdrawal unless the circumstances indicate otherwise.

COMMENTS

A. Exercise by notice

In stipulating that the right to withdraw is exercised by notice, the provision makes applicable I.–1:109 (Notice) paragraph (3), which lays down that notice becomes effective when it reaches the addressee. Generally, this requirement ensures that the entitled party communicates the withdrawal to the other party who thereby becomes aware of the withdrawal and, if necessary, can prepare the restitution of, e.g., goods delivered and payments made under the contract. According to I.–1:109 paragraph (2) the notice may be given by any means appropriate to the circumstances. This includes an explicit declaration of the withdrawal but also, as paragraph (2) of the present Article clarifies, by returning the subject matter of the contract (cf. B. below).

The communication must be sufficiently precise to indicate that the entitled party is withdrawing from the contract. It is also necessary that the withdrawing party and the contract from which that party is withdrawing can be clearly identified. The entitled party does not have to use the word “withdrawal”. It is sufficient if the addressee can understand from the notice that it is meant as a communication of withdrawal.

B. Returning the subject matter of the contract

"Returning" means sending back the subject matter of the contract (which is, in such a case, usually goods) to the supplier in a way which the entitled party can choose, for example, by handing them over personally, or by sending them by mail. It is also necessary that the withdrawing party can be clearly identified by the addressee. Returning the subject matter of the contract is of course not an option for services. In case it is unclear whether the subject matter of the contract is returned in order to withdraw from the contract or, for instance, to claim replacement because of a defect, paragraph (2) of the provision indicates that the communication is considered as the exercise of a right to withdraw unless the circumstances indicate otherwise.

Illustration 1
B is entitled to withdraw from a contract. She simply returns the goods by mail without giving any further information. The goods reach the other party. In this case, the withdrawal is effective.

C. No reasons need to be given

It is one of the core characteristics of a withdrawal right that no reasons have to be given in order to exercise the right effectively. In fact, a reason does not even have to exist. The function of a withdrawal right is to give the entitled party the necessary time to rethink the decision to conclude the contract. A right to withdraw does not require any non-performance

of obligations by the other party or any other specific justification. That is why the entitled party does not need to give any reasons when exercising its right to withdraw.

Illustration 2
A is entitled to withdraw from a contract. He sends a letter to the other party which states that he considers himself to be no longer bound to the contract. But he does not give any reasons for the withdrawal. Nevertheless, the withdrawal is effective.

Illustration 3
F has the right of withdrawal from a contract with G. F communicates her withdrawal to G and indicates reasons for her withdrawal which in fact are unfounded. The withdrawal is effective (provided all other requirements have been met) as no reasons have to be given at all. Therefore, unfounded reasons do not affect this right.

D. No formal requirements for the exercise of withdrawal

The provision does not stipulate a formal requirement for the exercise of the right to withdraw. The reference to the provisions on notice makes clear that, according to paragraph (2) of I.–1:109 (Notice), the withdrawal may be communicated by any means appropriate to the circumstances. This is partially in contrast to the relevant Directives which allow the Member States to stipulate formal requirements for the exercise of the right to withdraw. Also the ECJ emphasises that the Member States are not precluded from adopting rules which provide that the communication of withdrawal is subject to formal requirements (for the Doorstep Selling Directive 1985/577/EEC cf. case C-423/97 – *Travel Vac*, para. 51). Some, but not many, Member States have made use of this option by stipulating that the entitled party can only withdraw by notice in textual or written form (or even, in a few cases, by registered letter).

Requirements as to form may indeed provide a higher degree of certainty. This can be in the interest of both parties and could even help the entitled party to prove that the right of withdrawal has been exercised in time. But this requirement may also lead to the result that the entitled party loses the right if the required form is not used. Moreover, a requirement of textual or written form would not serve as reliable proof for the entitled party. If a formal requirement was to be probative, anything short of a registered letter would not fulfil this function. A further argument against the introduction of a formal requirement is that it could be seen as inconsistent with the possibility of withdrawing by returning the subject matter of the contract. Also the entitled party might find it unlikely, and therefore might not expect, that a contract concluded without any formality (e.g. over the phone) could not be withdrawn from in the same way.

NOTES

1. The Directives do not have a specific formal requirement for withdrawal. Thus, Art. 5(1) of Directive 85/577/EC only requires the consumer to send a withdrawal notice to the trader and, furthermore, expressly allows the Member States to regulate the procedure for the exercise of the withdrawal right. The Distance Selling Directive does not contain an explicit provision allowing the Member States to regulate formal requirements for the exercise of the withdrawal right by the consumer. But as Art. 5(1) 1st indent provides that the consumer has to be informed about “the conditions and

procedures for exercising the right of withdrawal", it is generally assumed that the Member States are free to regulate formal requirements. The Timeshare Directive does not stipulate any formal requirements either and only states in its Art. 5(2) that the consumer has to notify the recipient by a means that can be proven. Annex (l), however, only speaks of a cancellation sent by letter. Article 3(1)(3)(d) of Directive 2002/65/EC requires the supplier to provide "practical instructions for exercising the right of withdrawal", but does not specify how the right is to be exercised. The ECJ emphasises that the Member States are not precluded from adopting rules which provide that the communication of withdrawal is subject to formal requirements (for the Doorstep Selling Directive cf. case C-423/97 – *Travel Vac*, para. 51).

2. As a result of this lack of regulation the Member States have discretion to regulate formal requirements for the exercise of the withdrawal and therefore their laws vary considerably on this matter. In several Member States, the right of withdrawal can be exercised without any formal requirements. Regarding doorstep contracts, this is explicitly provided by the laws of DENMARK (Distance and Doorstep Selling Act art. 19), ESTONIA (LOA § 49) and SWEDEN (Distance and Doorstep Selling Act s. 4(5)). Similarly, FINLAND, HUNGARY, the NETHERLANDS, MALTA and PORTUGAL do not have any formal requirements. This means that, in these countries, the consumer can withdraw by any means, including a pure oral declaration. For SPANISH law it has been held that "the withdrawal is also valid if it is exercised verbally within the period of seven days, particularly when the trader has failed to comply with his/her legal duty to provide a withdrawal form or document" (Audiencia Provincial Asturias judgment of 15 September 2003, 369/2003 *Laura v Cambridge Institute 1908, S. L.*). This is mirrored by recent legislation which states that no specific formal requirement has to be met, and that, "*en todo caso*", the withdrawal will be effective by posting a document of withdrawal or by sending back the goods received under the contract (ConsProtA art. 70).

3. In other Member States, a written notice has to be sent to the trader to withdraw from a doorstep selling contract, e.g. in BULGARIA, CYPRUS, the CZECH REPUBLIC, IRELAND, LATVIA, LITHUANIA, POLAND, ROMANIA, SLOVENIA and the UNITED KINGDOM. In LATVIA, the consumer additionally has to make a note on the withdrawal form in order to confirm receipt of the form (Cabinet Reg. 327 art. 3). Besides a written notice, SLOVAKIAN law provides for the possibility of mutually agreeing other formal requirements for exercising the right of withdrawal (Distance and Doorstep Selling Act § 8). According to AUSTRIAN law, the consumer can withdraw from the contract by giving written notice. He or she may also send the contract document to the trader with a withdrawal notice. Furthermore, a verbal withdrawal notice is possible if the trader agrees to this form of withdrawal (OGH 13 February 2002, 2 Ob 11/02k). In POLAND, the consumer is provided with a standard withdrawal form by the trader. Therefore, it can be assumed that the consumer should make use of this form, but it remains unclear whether he or she can also withdraw by other means. Under GERMAN law (CC § 355(1)), the withdrawal notice has to be sent to the trader in textual form (which also allows text on another durable medium). With regard to distance selling contracts a similar provision can be found in GREECE, where the consumer can exercise the right of withdrawal in written form or in another durable medium available and accessible to him or her (ConsProtA art. 4(10). For timeshare contracts the CYPRUS Timeshare Act art. 9(1) sent. 1 specifies that the consumer must complete and send a written notification of withdrawal which has to contain the purchaser's decision to withdraw, the date at which the notice is given and

the name and address of the recipient of the notice according to the recipient named in the contract.

4. Under several laws it is possible to withdraw from a contract by returning the goods to the trader (or supplier), cf. FINLAND ConsProtA art. 6(9); GERMANY CC § 355(1); SPAIN ConsProtA art. 70. DANISH law equally does not require the consumer to send a cancellation notice, but to return the goods received before the cancellation period expires.

5. Some legal systems require the consumer to send the letter of withdrawal by recorded delivery. For timeshare contracts this applies to BELGIUM (Timeshare Act art. 9(2)), MALTA (Timeshare Act art. 8(1)), and LUXEMBOURG (Timeshare Act art. 10(2) sent. 1). Under FRENCH and ITALIAN law the notification of withdrawal from a doorstep selling contract must similarly be in writing and sent as a registered letter. GREEK law also requires recorded delivery, but Greek literature and case law accepts a withdrawal without formal requirements as well. The position is similar in PORTUGAL. Under Portuguese law the notice is always considered effective if it is sent by recorded delivery, but it is assumed that case law would accept another notice mechanism if it could be proved that notice had been given.

6. In a small number of Member States, e.g. FRANCE, ITALY and PORTUGAL, the consumer who wishes to withdraw from a timeshare contract has to send a signed registered letter with return receipt. Thus, in France, ConsC art. L. 121-64(1) states that if the consumer does not send a letter with a return receipt, he or she can use any other means that provide for the same guarantees as to the determination of the date. In Italy, it is also possible to use telegram, telex or fax to meet the period of withdrawal, if they are confirmed by a registered letter with return receipt within the following 48 hours (ConsC art. 73(5)).

7. With regard to distance selling contracts ITALIAN law requires the consumer to send the notice of cancellation in a letter sent by registered mail with advice of receipt ("*lettera raccomandata con avviso di ricevimento*") and it has to be signed by the person who concluded the contract or drafted the proposal. It can also be sent by telegram, telex, fax and e-mail within the period, but it must be confirmed by a letter sent by recorded delivery within the following 48 hours. The presentation of the receipt ("*avviso di ricevimento*"), however, is not an essential condition for proving the exercise of the right of withdrawal (ConsC art. 64(2) sent. 3).

II.–5:103: Withdrawal period

(1) A right to withdraw may be exercised at any time after the conclusion of the contract and before the end of the withdrawal period.

(2) The withdrawal period ends fourteen days after the latest of the following times;

(a) the time of conclusion of the contract;
(b) the time when the entitled party receives from the other party adequate information on the right to withdraw; or
(c) if the subject-matter of the contract is the delivery of goods, the time when the goods are received.

(3) The withdrawal period ends no later than one year after the time of conclusion of the contract.

(4) A notice of withdrawal is timely if dispatched before the end of the withdrawal period.

COMMENTS

A. Function of the withdrawal period

The main function of the withdrawal period is to determine exactly the moment until when the right to withdraw can be exercised. This is important, because the additional period of reflection which is granted to one party to the contract leads to uncertainty for the other party as to whether the contractual relationship will continue to exist and whether restitution will be required in relation to goods or services provided and payments made. Paragraph (1) therefore stipulates that a right to withdraw can only be exercised before the end of the withdrawal period. According to paragraph (4) timely dispatch suffices (cf. E. supra). When the withdrawal period ends, the right to withdraw ceases to exist. Paragraph (1) makes it clear that the right to withdraw can be exercised at any time after the conclusion of the contract (e.g. after the conclusion of the contract, but before the goods are delivered, cf. paragraph (2)(c) of the present Article).

B. Length of the withdrawal period

The normal period of withdrawal is fourteen days (paragraph (2)), calculated from the latest time set out in paragraph (2). By stipulating a fourteen day period, this rule mediates the great diversity of withdrawal periods to be found in Community law and in the Member States' laws, which vary between 7 and about 15 days (and in some specific cases even reach 30 days). Such a unification of the different withdrawal periods is desirable, because this would very much facilitate the conduct of business where withdrawal rights apply. The common idea behind the withdrawal period is to guarantee a sufficient period of time for calm consideration ('cooling off' period) and for obtaining information. The fourteen day period follows the model of the Financial Services Distance Selling Directive 2002/65/EC, which – unlike the earlier Directives which provide shorter periods – seeks full harmonisation. The model of a uniform fourteen day period has also been followed by some Member States, whereas very few Member States have gone beyond the fourteen days by providing (only slightly) longer periods.

The fourteen day period set out in paragraph (2) always applies unless a *lex specialis* provides for a different period because of specific needs of protection (which could be the case, for instance, for life assurance contracts, for which a possible future part in Book IV on insurance

contracts could follow the model of the Life Assurance Directive 2002/83/EC, where a 30 day withdrawal period is stipulated). As the fourteen day period begins at the point in time set out in paragraph (2), the actual period during which the entitled party can withdraw can be much longer than fourteen days and amount to up to one year. Also the rules on the computation of time, which are set out in I.–1:110 (Computation of time), can lead to a prolongation of the actual time span for withdrawal, because, for instance, a time limit which would otherwise end on a Saturday, a Sunday or a national holiday will expire at the end of the next working day instead (cf. paragraph (5) of that Article).

C. Beginning and end of withdrawal period

The withdrawal period begins at the time of conclusion of the contract (paragraph (1)). Paragraph (2) sets out three events or actions and provides that the withdrawal period normally ends fourteen days after the latest of them. They are: (a) the conclusion of the contract; (b) the receipt of adequate notification that there is a right to withdraw; or (c) the receipt of the goods, if the subject-matter of the contract is the delivery of goods. As the withdrawal period is to be calculated from one of these events or actions, it has to be computed according to the rule given in paragraph (3)(b) of I.–1:110 (Computation of time).

The time when the contract is concluded has to be determined according to the rules laid down in Chapter 4 of Book II. The principle that the withdrawal period does not commence before the conclusion of the contract is expressly laid down in several provisions of Community law and in many Member States' laws. The reason for this rule is that the entitled party must not lose the right of withdrawal even before the contractual obligations have been conclusively fixed. If the entitled party, for instance, makes a binding offer, it is not known whether the offer will be accepted by the other party. If the fourteen days withdrawal period began when the offer was made, the offeror would have to withdraw the offer within the fourteen days just by way of precaution; and also in cases where it has not yet been accepted and perhaps will never be accepted. This would be a very formalistic result, which may surprise the offeror because it forces him or her to make an unnecessary declaration. The rules should avoid such provisions which lead to inefficiency. For this reason, paragraph (2)(a) should also apply to cases where the validity of a contract, although it is concluded, depends on further action of the parties, as is the case, for instance, in a sale on approval. In such a case the withdrawal period should not begin before the contract is finally valid (cf. BGH (German Supreme Court), judgment of 1 March 2004, Neue Juristische Wochenschrift-Rechtsprechungsreport (NJW-RR) 2004, 1058 et seq.).

> *Illustration 1*
> Even before conclusion of a sales contract, the seller gives the buyer adequate notice of the buyer's right of withdrawal in case the contract is concluded. The withdrawal period starts to run on the date of the conclusion of the contract and not on the date of the notice of the right of withdrawal.

The requirements for adequate information on the right to withdraw (paragraph (2)(b)) are laid down in II.–5:104 (Adequate information on the right to withdraw). It is solid ground in Community law and the laws of the Member States that the withdrawal period is at least substantially extended if the entitled party does not receive adequate information on the right to withdraw. Paragraph (2)(c) of the present Article reaches this result by stipulating that the normal withdrawal period of fourteen days does not begin before the receipt of such adequate notification. The provision has a double function. On the one hand, it protects the entitled

party, who has not been adequately informed of the right to withdraw, by granting a much longer period of one year, giving this party the chance to learn otherwise about the right to withdraw during the extended period. On the other hand, the rule is a sanction against the party who did not inform the other party adequately of the right of withdrawal. The sanction results in a substantial extension of the withdrawal period, which is, from the perspective of this party, a period of pending uncertainty whether the contractual relationship will continue to exist and whether there will have to be restitution.

> *Illustration 2*
> A party is entitled to withdraw from a contract. The goods are delivered, but the other party fails to indicate, in the notification of the right to withdraw, the name of the person to whom the notice of withdrawal should be addressed. The entitled party can withdraw even after the expiry of fourteen days, and loses the right of withdrawal after one year has passed.

For contracts where the subject matter is the delivery of goods, paragraph (2)(c) postpones the date from which the end of the withdrawal period is calculated to the time when the goods are received. This rule follows the model of Art. 6(1) Sentence 3 of the Distance Selling Directive 1997/7/EC, but broadens it to all cases where one party has a right to withdraw. It is not sufficient that the other party has just fulfilled the obligation to dispatch the goods, as the time of receipt may be considerably later than the time of dispatch. The rationale of this rule follows from one of the core functions of the right to withdraw, which is to give the entitled party additional time for reflection. Where goods are delivered under the contract, the rule ensures that the entitled party can inspect the goods during the full duration of the fourteen day period in order to make an informed decision whether to stick to the contract or to withdraw. This time for inspection is typically needed in many situations where withdrawal rights exist, because, as in the case of distance selling or of an order made at the doorstep, there was usually no opportunity to see the goods at the time of the placing of the order.

There may be other provisions in these rules which make the beginning of the withdrawal period dependent on other events. This is the case in II.–3:109 (Remedies for breach of information duties) paragraph (1) which also prevents the period from beginning if certain pre-contractual information duties other than the duty to inform on the right to withdraw have been infringed. Moreover, II.–5:101 (Scope and mandatory nature) does not prevent agreements on the beginning of the withdrawal period which are in favour of the entitled party and which therefore take precedence over the rules in paragraph (2).

D. ‘Long stop’ maximum time limit

For the case where the ordinary fourteen day withdrawal period under paragraph (2) does not begin at all, paragraph (3) stipulates a ‘long stop’ maximum period of one year. This period begins at the time of the conclusion of the contract and is to be computed according to the rules laid down in I.–1:110 (Computation of time). Also in the (unlikely) case of a pending offer made by a party entitled to withdraw from the contract, the ‘long stop’ withdrawal period will never begin, as there is no contract concluded. Hence, the entitled party has an eternal right to revoke the offer in this case. (See also II.–4:202 (Revocation of offer) paragraph (4)). In the other cases of paragraph (2) (i.e. the lack of adequate notification or the – unlikely – situation of a delivery of goods later than one year after the conclusion of the contract), the right to withdraw ceases to exist after one year.

Illustration 3
The other party delivers the goods, but the anticipated conclusion of the contract has not yet materialised (e.g. because applicable form requirements have not yet been complied with). The entitled party can withdraw at any time. As the withdrawal period does not start to run before the conclusion of the contract, the maximum time limit of one year does not apply to this situation.

The uniform one year 'long stop' period is not based on communalities of Community law and the laws of the Member States. For most legal orders it is an innovation which follows the model of Finnish law. The reason for this suggested innovation is the very incoherent regulation of this question in Community law, and the even greater incoherence in the Member States' laws. Whereas the Doorstep Selling Directive 1985/577/EEC, the Financial Services Distance Selling Directive 2002/65/EC and the Life Assurance Directive 2002/83/EC do not provide for a maximum time limit, the Distance Selling Directive 1997/7/EC and the Timeshare Directive 1994/47/EC do. Both of these Directives establish a maximum time limit of three months (plus the ordinary withdrawal period). With regard to the Doorstep Selling Directive the ECJ held that the Member States may not provide for a maximum time limit if this is not intended by the relevant Directive (cf. ECJ 31 December 2001 C-481/99 – *Heininger*). In theory, this leads to an eternal right of withdrawal, which is only limited by general prescription rules (if they apply) or by the application of the principle of good faith and fair dealing. Such extreme differences do not seem to be justified by the peculiarities of the individual Directives. Therefore a uniform maximum period seemed desirable in order to simplify the law and to make it more coherent. An eternal period, although rather consumer friendly, did not seem advantageous, because such a right would be alien to contract law principles and would lead to a lot of uncertainty. The one year maximum period is a compromise that balances the existing rules. It simultaneously extends the 'three months plus periods' (which are perhaps too short) of several Directives but it considerably shortens the eternal period. In case a legislator wants to stipulate a shorter or longer maximum period for particular rights of withdrawal, this can be provided in specific legislation.

Paragraph (3) of this Article overlaps with II.–3:109 (Remedies for breach of information duties) paragraph (1) in so far as a 'long stop' maximum period of one year is provided for in both. The two provisions are nevertheless not identical, because their scope of application is different. II.–3:109 paragraph (1) also prevents the commencement of the ordinary fourteen day withdrawal period for cases where the information to be given under II.–3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage), which also includes information other than the notification on the right to withdraw, has not been provided. Hence, the 'long stop' maximum period regulated in II.–3:109 paragraph (1) is necessary to avoid an eternal period in these cases.

E. Dispatch rule

Paragraph (4) lays down that the entitled party merely has to dispatch the notice of withdrawal within the period in order to comply with the time limit. It is unnecessary for the notice to reach the addressee within the period. This rule is in line with similar provisions in several of the Directives regulating individual withdrawal rights (e.g. Art. 5(1) Sentence 2 Doorstep Selling Directive 1985/577/EEC; Art. 5 No. 2 Sentence 2 Timeshare Directive 1994/47/EG). The purpose of this provision is to protect the entitled party by giving this party the benefit of the full withdrawal period for reflection, rather than having to bear the risk and the burden of proof associated with a delay in the transmission of the notice.

Illustration 4
A party is entitled to withdraw from a contract. The entitled party writes a letter to the other party which contains notice of withdrawal. The entitled party places this letter in the mail box on the last day of the withdrawal period. The withdrawal notice reaches the other party three days later. As the notice was dispatched within the withdrawal period, and actually reached the other party, withdrawal is effective.

F. Risk of loss of the notice of withdrawal

Paragraph (4) also distributes the risk between the parties in case a notice of withdrawal, which has been dispatched before the end of the period, does not reach the addressee. According to its wording, paragraph (4) seems to be only a 'timeliness rule', not a 'lost letter' or 'mailbox rule'. However, the question is put too simply. In case of a lost letter (or other form of communication), which has been dispatched in time, the present Article answers three questions, namely (i) whether the withdrawal is effective despite the loss of the letter, (ii) whether it has been exercised in time, if a second letter is dispatched after the end of the period, and (iii) at which point in time the withdrawal becomes effective. Question (i) is not a question: If the addressee never receives notice of withdrawal, there is, of course, no withdrawal. Question (ii) is the core issue, namely how to solve the case, when the entitled party writes a second letter which is dispatched after the end of the period, informing the other party of the lost notice of withdrawal and manages to prove that he or she has dispatched the first notice of withdrawal in time. As paragraph (4) of this Article seeks to disburden the entitled party from the risk of delayed transmission of the notice, it would be odd to distinguish between a delay caused by an unusually slow transmission and a delay caused by the fact that the letter got lost and a second letter had to be sent. Therefore paragraph (4) should lead to the result that withdrawal is effective if the second letter (or other form of communication) actually reaches the other party, even if this second letter – other than the first – has been dispatched after the end of the withdrawal period (for the same result cf. OLG Dresden (German Court of Appeal), 20 October 1999, Neue Juristische Wochenschrift-Rechtsprechungsreport (NJW-RR) 2000, 354).

With regard to question (iii), when the withdrawal becomes effective, I.–1:109 (Notice) paragraph (3) applies. According to that Article a notice becomes effective "when it reaches the addressee". Thus, in the 'lost letter case' the withdrawal will not be effective before the second letter reaches the addressee. The opposite rule, according to which notice (even if it has been lost) becomes effective at the time at which it would have arrived in normal circumstances, can be found in III.–3:106 (Notices relating to non-performance). But that Article concerns cases of non-performance, i.e. cases where the addressee has failed to perform an obligation under the contract. As explained above under A., it is a core characteristic of withdrawal rights, that there is typically no legal reason e.g., non-performance of obligations under the contract. Moreover, the rule on the effects of withdrawal (II.–5:105) reaches more convincing results if the withdrawal is not effective before the notice actually reaches the addressee. Therefore, III.–3:106 is a rule for a specific case. There is no reason to deviate from the general rule in I.–1:109 paragraph (3). The withdrawal becomes effective when the notice reaches the addressee.

Illustration 5
A party is entitled to withdraw from a contract. The notice of withdrawal is dispatched within the withdrawal period, but the letter gets lost in the post and therefore never reaches the other party. As the risk of loss of the notice of withdrawal is borne by the

entitled party, the withdrawal is not effective. But if the entitled party writes a second letter in order to replace the first, the withdrawal becomes effective when this letter reaches the addressee, even if it is dispatched after the end of the withdrawal period.

NOTES

I. Length of the withdrawal period

1. At EC level there are significant divergences in relation to the length of withdrawal periods, and as to the beginning and calculation of the periods. The shortest period can be found in Art. 5(1) of Directive 85/577/EEC which sets out a period of "not less that seven days". Under Art. 6(1) of Directive 97/7/EC the consumer has the right to withdraw from the contract within seven "working days" which may amount to a significantly longer period than seven calendar days. Cf., Art. 2(2) of Regulation 1182/71 determining the rules applicable to periods, dates and time limits which expressly defines "working days" as all days other than public holidays, Sundays and Saturdays. Directive 94/47/EC states in Art. 5(1) a period of withdrawal of ten calendar days after the signature of the contract by both parties or the signature of a binding preliminary contract, and further specifies that "if the 10th day is a public holiday, the period shall be extended to the first working day thereafter." Directive 2002/65/EC, which unlike the earlier Directives seeks full harmonisation, sets out a period of fourteen calendar days (art. 6(1)). Directive 2002/83/EC contains in Art. 35(1) a right to cancel an individual life-assurance contract within a "period of between 14 and 30 days".
2. The great diversity found within the Directives is mirrored by national legislation implementing the withdrawal periods. The time limit for exercising the withdrawal right ranges from seven calendar days up to fifteen working days.
3. A series of Member States chose precisely the periods that were contained in the Directives. The seven working days period of the Distance Selling Directive has been adopted by AUSTRIA, BELGIUM, BULGARIA, IRELAND, LITHUANIA, LUXEMBOURG, the NETHERLANDS, SLOVAKIA, SPAIN and the UNITED KINGDOM. However, it cannot be assessed, whether "working day" has the same meaning in all these countries as defined in the Regulation mentioned above, and in particular, whether the term excludes Saturdays. But as the term must be interpreted in accordance with the Directive, there should be no infringement, unless a national court comes to a different result. The ten calendar days period set out by the Timeshare Directive has been adopted by DENMARK, ESTONIA, FINLAND, FRANCE, GREECE, IRELAND, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, ROMANIA, SLOVAKIA, SPAIN and SWEDEN. The seven days period of the Doorstep Selling Directive has been implemented as a seven working days period by the legislators of BELGIUM, LITHUANIA, LUXEMBOURG, ROMANIA, SLOVAKIA and the UNITED KINGDOM. The period is seven calendar days in BULGARIA, the CZECH REPUBLIC, FRANCE, IRELAND and SPAIN.
4. Many Member States have used the minimum clauses to prolong the withdrawal periods. The seven days provided for by the Doorstep Selling Directive have been extended to eight calendar days in the NETHERLANDS and to eight working days in HUNGARY. In AUSTRIA, the consumer has one week to withdraw from the contract. According to POLISH law, the period is ten calendar days, whereas

according to GREEK and ITALIAN law, the consumer can withdraw from a contract within ten working days. The longest withdrawal period (15 calendar days) can be found in MALTESE and SLOVENIAN law. Whereas the Timeshare Directive provides for a period of ten calendar days, the period lasts for ten working days in BULGARIA, ITALY and PORTUGAL, 14 calendar days in AUSTRIA, LATVIA and the UNITED KINGDOM, two weeks (in some cases one month) in GERMANY, 15 calendar days in CYPRUS, the CZECH REPUBLIC, HUNGARY and SLOVENIA and even 15 working days in BELGIUM. The seven calendar days period contained in the Distance Selling Directive has been prolonged by the legislators of HUNGARY (eight working days), GREECE, ITALY and ROMANIA (ten working days). The period is ten (calendar) days in POLAND, 14 (calendar) days in CYPRUS, the CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, LATVIA, PORTUGAL and SWEDEN, two weeks in GERMANY and even 15 (calendar) days in MALTA and SLOVENIA.

5. Concerning the seven working days period of the Distance Selling Directive the FRENCH implementation seems to be problematic because the consumer has a period of only seven days ("*jours francs*") to withdraw from the contract. "*Jour franc*" is a one-day-period (0h to 24h). The day of the event, in this case the receipt of the goods in the case of delivery of goods or the day of the conclusion of the contract in the case of provision of services, is not included for the computation of the period. Furthermore, for the computation of the withdrawal period it is irrelevant whether the seven "*jours francs*" include "*jours ouvrables*" (working days) or "*jours feriés*" (Sundays and public holidays). This understanding of the notion "*jours francs*" is supported by the text of ConsC art. L. 121-20(4). According to this provision a Sunday or a public holiday is not included in the withdrawal period unless the period expires on such a day. Therefore, the seven "*jours francs*" period in France is a breach of EC law.

II. Beginning of the withdrawal period

6. The Directives contain provisions that determine the beginning of the withdrawal period. A common feature in all the Directives is that the ordinary (short) period, which is applicable when the business fulfils its information obligations, does not begin before the receipt of the information, cf. Art. 5 of Directive 85/577/EEC, Art. 5(1) 2nd indent of Directive 94/47/EC, and both Art. 6(1) sent. 3, 2nd indent of the Distance Selling Directive 97/7/EC and of Directive 2002/65/EC. Similarly, Art. 35(1) of Directive 2002/83/EC provides that the period begins when the policy holder was informed that the contract had been concluded and of the time within which to cancel the contract. A second feature of the Directives is the requirement for the conclusion of the contract. Thus, Art. 6(1) 2nd indent of Directive 97/7/EC and Art. 6(1) sent. 3, 2nd indent of Directive 2002/65/EC require the contract to have been concluded. According to Art. 5(1) 1st indent of Directive 94/47/EC the period begins when both parties sign the contract or a binding preliminary contract. However, the Doorstep Selling Directive seems to provide that in certain cases the period may begin (and even end) before a contract has been concluded (art. 4 lit. (c): "when the offer is made by the consumer"). Regarding this second feature the Directives are incoherent. A further requirement for the beginning of the period is the receipt of goods to be delivered under the contract. This requirement allows the consumer to examine the goods before deciding whether to withdraw. At present, only Art. 6(1) sent. 3, 1st indent of Directive 97/7/EC stipulates the start of the withdrawal period in the case of delivery of goods as the day of receipt of goods by the consumer.

7. Most Member States' laws state that the withdrawal period does not begin before the trader has fulfilled the information obligations. If the entitled party does not receive adequate information of his or her right to withdraw, the withdrawal period is extended. With regard to doorstep selling contracts, in AUSTRIA, BULGARIA, GERMANY and LITHUANIA, the withdrawal period starts upon receipt of the notice regarding the right of withdrawal. If, under Bulgarian law, the information on the right of withdrawal is not provided, the consumer can exercise the right of withdrawal within three months from the conclusion of the contract (ConsProtA art. 46(2)). In ROMANIA, the parties can contractually prolong the period of withdrawal if necessary (Doorstep Selling Act art. 9(2)). Under ITALIAN law, the withdrawal period starts with the signing of an order form containing the information on the right of withdrawal (ConsC art. 47(3)). If no order form is used, the withdrawal period starts upon receipt of the information itself. In FINLAND, the withdrawal period starts when the door-to-door selling document (set form) is supplied (ConsProtA art. 6). In the NETHERLANDS, the trader is obliged to register the contract at the *Kamer van Koophandel* (Chamber of Commerce). Therefore, the withdrawal period starts on the day of registration (cf. Doorstep Selling Act art. 25(2)).

8. The Member States have transposed the Directives' provisions that the period starts on the day on which the contract is concluded. Some laws have provisions varying from the Directives. In GREECE, the period begins when the consumer receives the documentation informing him or her that the contract is concluded (ConsProtA art. 4(10) sent. 1). In BELGIUM (ConsProtA art. 80(1) sent. 4, 2nd indent) and CYPRUS (Distance Selling Act art. 7(1)(b)), the period begins on the day following the day of the conclusion of the contract if the confirmation has already been provided. CZECH law refers to the "receipt of performance" for the beginning of the withdrawal period in the case of provision of services (CC art. 53(7)).

9. With regard to doorstep contracts, DANISH law distinguishes between contracts under which the trader supplies goods and contracts under which services are provided. In the case of contracts for services, the withdrawal period begins upon conclusion of the contract. If the trader supplies goods, the withdrawal period starts upon their delivery (Distance and Doorstep Selling Act art. 10(2)). The same distinction is made in HUNGARY. However, where the goods are delivered after the contract is concluded, it is from this delivery that the withdrawal period starts (Doorstep Selling Act art. 3(1)). Similar provisions can be found in ROMANIA, SLOVENIA and SWEDEN.

10. Some Member States have included a provision for timeshare contracts under which the withdrawal period begins when both parties sign the contract or a binding preliminary contract. Notably, this includes BULGARIA, CYPRUS, FINLAND, IRELAND, LUXEMBOURG, MALTA, ROMANIA and SPAIN. Alternatively in Bulgarian law, the period starts with the end of the precontract (ConsProtA art. 154(1)). Many Member States do not refer to the signing of the contract but to the conclusion of the contract. They are: the CZECH REPUBLIC, DENMARK, ITALY, LATVIA, LITHUANIA, PORTUGAL, SLOVAKIA, SLOVENIA and the UNITED KINGDOM. In BELGIUM (Timeshare Act art. 9(1) no. 1) and SWEDEN (Timeshare Act art. 12), the period begins the day after the signature of the contract by both parties. In FRENCH law, the ten day period starts when the purchaser sends the accepted offer to the professional. In addition, France attempts to improve the protection of the consumer by requiring that the offer should be maintained for at least seven days (ConsC art. L. 121-64(2)). However, this provision just regulates the period during which the vendor is bound by the offer (Cf. Calais-Auloy, Steinmetz, *Droit de la Consommantion*, no. 483). The consumer is not prevented from accepting

the offer before the seven day period expires. In AUSTRIA, GERMANY, GREECE, ESTONIA, HUNGARY, the NETHERLANDS and POLAND, the withdrawal period starts running from the day when the contract document is delivered to the purchaser. In Germany, the period does not start running before the vendor additionally has informed the purchaser about the right of withdrawal and provided some further information (BGB-InfoV § 2). These provisions improve the position of the consumer and are therefore in accordance with the Directive. Only some member states have seen the necessity to include an explicit provision on the signature of a binding preliminary contract in their national law, e.g. BULGARIA, CYPRUS, GREECE, HUNGARY, IRELAND, LUXEMBOURG, MALTA, ROMANIA and SLOVENIA.

11. Most Member States have transposed the day of receipt of goods by the consumer as the beginning of the withdrawal period for distance selling contracts, e.g. AUSTRIA, BELGIUM, BULGARIA, the CZECH REPUBLIC, DENMARK, ESTONIA, FRANCE, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA, SPAIN and SWEDEN. Under BELGIAN (ConsProtA art. 80(1)) and CYPRIOT (Distance Selling Act art. 7(1)(a)) law, the period begins on the day following the day of receipt of goods. In the UNITED KINGDOM, the period begins with the day on which the contract is concluded but does not end until seven days after receipt of the goods, starting on the day after receipt (Consumer Protection Reg. 2000 reg. 11). In FINLAND, the period begins after the receipt of confirmation or, if the goods are delivered after confirmation, with the delivery of the goods (ConsProtA art. 6(15)).

12. Some legal systems have applied the rule that the day of receipt of goods is the beginning of the withdrawal period also to doorstep contracts. In FINLAND, the withdrawal period normally starts when the door-to-door selling document (set form) is supplied. However, there is a special provision concerning the sale of tangible goods according to which the withdrawal period begins with the delivery of the goods if this delivery is later than the receipt of the document (ConsProtA art. 6(9)). Under GREEK law, the withdrawal period starts with the conclusion of the contract or, if goods are handed over at a later date, with the delivery of the goods to the consumer (ConsProtA art. 3(4)). An equivalent rule can be found in PORTUGAL (Distance and Doorstep Selling Act art. 18(1)).

III. "Long stop" rule

13. A "long stop" period is not part of all Directives containing a right of withdrawal. Whereas the Doorstep Selling Directive, the Distance Selling of Financial Services Directive and the Life Assurance Directive do not provide for a maximum time limit, the Distance Selling Directive and the Timeshare Directive do. Both of these Directives establish a maximum time limit of three months (plus the ordinary withdrawal period). According to Art. 5(1) of Directive 94/47/EC, if by the end of the three-month period the purchaser has not exercised the right to cancel and the contract does not include the information referred to in points (a), (b), (c), (d) (1), (d) (2), (h), (i), (k), (l) and (m) of the Annex, the consumer has the right to withdraw from the contract within the regular withdrawal period (in the Directive: ten days) from the day after the end of that three-month period. Similarly, Art. 6(1) sent. 4 of Directive 97/7/EC. With regard to the Doorstep Selling Directive the ECJ decision in *Heininger* has clarified that in doorstep selling cases the period does not begin before the consumer has been informed about the right of withdrawal. This may lead to an eternal withdrawal right.

14 Regarding the long stop rule contained in the Timeshare Directive the transposition in the Member States varies considerably, partially also because the length of the regular withdrawal period is different in the Member States. For instance, in LITHUANIA, the period is four months counting from the conclusion of the contract. In BELGIUM, the period of withdrawal is one year, counting from the day following the day on which the contract was signed, if the missing information has not been provided within three months (Timeshare Act art. 9(1) no. 3). In GERMANY, the length of the period depends on the type of information that is lacking. If the information about the right of withdrawal is lacking or incomplete, there is no period for the withdrawal at all. In this case, the consumer has in effect an eternal right of withdrawal. If other necessary information is lacking, the extended withdrawal period is six months (CC § 355(3), (1)). Also in AUSTRIA, the withdrawal period does not begin before the purchaser is informed of the right of withdrawal (Timeshare Act art. 6(2)).

IV. Dispatch rules

15. Dispatch rules can be found in several Directives, notably in Art. 5(1) sent. 2 of Directive 85/577/EEC and Art. 5(2) sent. 2 of Directive 94/47/EC. Strikingly, the Distance Selling Directive is (together with the Life Assurance Directive) the only Directive which does not contain a dispatch rule. Even the later Distance Selling of Financial Services Directive comprises such a rule in Art. 6(6) sent. 2. The wording of the existing dispatch rules is non-uniform and also unclear with regard to the effect of a timely dispatch. They allow different interpretations in the case of a letter which was dispatched in time, but got lost and therefore never reached the addressee. If the rule only regulates the calculation of the period, and leaves the consumer to bear the risk of a successful transmission of the declaration, the contract is not withdrawn, if the letter gets lost. The rule that the declaration is deemed to be received (cf. Art. 5(2) sent. 2 of Directive 94/47/EC) could, however, also be construed as being a legal fiction.

16. In the vast majority of Member States the rule is that a withdrawal is within the deadline if the consumer dispatches the notification before the deadline expires. Most of the national dispatching rules are substantially equivalent to the Directives' provisions. This applies, inter alia, to AUSTRIA (ConsProtA § 3(4)), BELGIUM (ConsProtA arts. 88 and 89(2)), GERMANY (CC § 355(1) sent. 2), DENMARK, ESTONIA, GREECE, LITHUANIA (CC art. 1.122(2)), POLAND, PORTUGAL, ROMANIA, SLOVAKIA (Distance and Doorstep Selling Act § 7(2)), SLOVENIA, SPAIN (Timeshare Act art. 10(3) sent. 2) and SWEDEN.

17. Some of the Member States may achieve the result required by the Directives with the application of their general rules on the computation of periods. ITALY has not laid down a dispatch rule, but the purchaser has to send a registered letter with advice of delivery and may therefore prove that the notice was sent within the withdrawal period. In the DUTCH regulations on doorstep selling – and running counter to the general rule – the message is assumed to have reached the addressee when it is first delivered (Doorstep Selling Act art. 25(4)).

18. In IRELAND, there is a form of postal rule stipulating that the cancellation has effect from the date of delivery of the cancellation form by hand or the date on which it is posted (European Communities Reg. 1989 reg. 5(1)). In CYPRUS (Doorstep Selling Act art. 8) and the UNITED KINGDOM (Consumer Protection Reg. 1987 reg. 4(7)), the transposition law contains a postal rule stating that a withdrawal notice sent by post is deemed to have been served at the time of posting, whether it has been received or not. A similar provision exists in FINLAND: if the withdrawal notice is sent appropriately, it can be invoked even if it is delayed, altered or lost (ConsProtA art.

12(1)(c)). The FRENCH provisions do not contain a dispatching rule, but as the withdrawal notice must be sent by recorded delivery (ConsC art. L. 121-25: "*par lettre recommandée avec accusé de réception*"), the letter can be regarded as being served at the time of posting.

19. Only few Member States have no specific legislative transposition. In BULGARIAN and CZECH law, there is no postal or dispatching rule. In MALTA there is no dispatching rule either. The withdrawal can be exercised without any formal requirements. It is only necessary that the intention of the consumer is substantially conveyed to the trader, cf. Doorstep Contracts Act art. 8(2). On the one hand, the term 'delivery' may be interpreted to mean that the notice only needs to be dispatched and not received. On the other hand, the requirement that the intention be conveyed to the consumer seems to imply that the door-to-door salesman must have actually received the notice.

20. Member States differ on whether the dispatch rule purely ensures the timeliness of the withdrawal (as in GERMANY) or whether it even makes a withdrawal valid should the declaration never reach the supplier (e.g. because the letter got lost after being dispatched), as in CYPRUS, FINLAND and the UNITED KINGDOM.

II.–5:104: Adequate information on the right to withdraw

Adequate information on the right to withdraw requires that the right is appropriately brought to the entitled party's attention, and that the information provides, in textual form on a durable medium and in clear and comprehensible language, information about how the right may be exercised, the withdrawal period, and the name and address of the person to whom the withdrawal is to be communicated.

COMMENTS

A. Duty to inform of the right to withdraw

The Article, which regulates when information on the right to withdraw is adequate, presupposes the existence of a requirement or duty to inform the entitled party of the right to withdraw. A requirement of information follows indirectly from II.–5:103 (Withdrawal period) paragraph (2)(b). A duty to inform is explicitly laid down in II.–3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage). II.–3:103 also clarifies that the information on the right to withdraw must be provided within a reasonable time before the conclusion of the contract, if that is appropriate in the circumstances. The explicit reference to the present Article at the end of II.–3:103 paragraph (1) further clarifies that the information on the right to withdraw must be in textual form on a durable medium and must contain all the items listed in the present Article, if that is appropriate in the circumstances. The requirements for the adequacy of the information have been extracted from the corresponding provisions of the Doorstep Selling Directive 1985/577/EEC, the Timeshare Directive 1994/47/EC, the Distance Selling Directive 1997/7/EC, the Financial Services Distance Selling Directive 2002/65/EC and the Life Assurance Directive 2002/83/EC.

It should be noted that the present Article is not applicable to the duties imposed on businesses by II.–3:102 (Specific duties for businesses marketing to consumers) paragraphs (1) and (2). The information on the right to withdraw to be given to the entitled party under that article can be limited to the fact that a right of withdrawal exists. The business does not need to provide all the information items listed in the present Article. It also does not need to provide the information in textual form on a durable medium. As paragraph (1) of that article states, it is sufficient that the information is given, "so far as is practicable having regard to all the circumstances and the limitations of the communication medium employed". It also follows from II.–3:102 paragraph (2) that the information on the right to withdraw has to be given within the commercial communication (which could be, e.g., a TV spot); thus by the means the communication medium allows, but not necessarily in textual form on a durable medium.

B. Two step information can be necessary

If it is not appropriate in the circumstances to provide complete information or to provide it in textual form on a durable medium before the conclusion of the contract (e.g. TV spots and subsequent conclusion of contracts over the phone), the business must inform the entitled party twice about the right to withdraw. Firstly, within a reasonable time before the conclusion of the contract, the entitled party must generally be informed of the right to withdraw in the appropriate way having regard to the communication channel used under II.–3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage). Secondly, according to II.–3:106 (Clarity and form of information)

paragraph (3), the information must in any case be confirmed in textual form on a durable medium at the time of the conclusion of the contract. If the first information was only general and did not contain all the information items necessary under the present Article, it must also be completed, at the latest, at this time in order to avoid the consequence of the extended withdrawal period under II.–5:103 (Withdrawal period) paragraph (2)(b). Such a 'two step' duty to inform the entitled party of his or her right to withdraw is in line with the Directives that confer rights of withdrawal upon the consumer. It is in particular modelled on Art. 4 and Art. 5 of the Distance Selling Directive 1997/7/EC.

C. Sanctions for the infringement of the duty to provide adequate information

If the other party does not give adequate notification as laid down in the present Article, the withdrawal period of one year according to II.–5:103 (Withdrawal period) paragraph (3) applies. Moreover, the withdrawing party is not liable for any diminution in value caused by normal use of goods received under the contract (cf. II.–5:105 (Effects of withdrawal) paragraph (4)) and can even be entitled to damages as provided for in II.–3:109 (Remedies for breach of information duties) paragraph (2).

> *Illustration 1*
> In the autumn A orders an electric heater by mail. He has not been adequately informed of his right to withdraw. A few days after the receipt of the heater he notices that it consumes much more energy than another model with the same thermal output available on the market for the same price. As A does not know about his right to withdraw, he uses the heater despite the high energy consumption during the winter. In spring, A learns by chance about his right to withdraw and withdraws. A can claim damages for the loss, which are the higher energy costs, under II.–3:109 (Remedies for breach of information duties) paragraph (2). This claim may in particular reduce or even outweigh the counterclaim of the business for compensation for the use of the heater under II.–5:105 (Effects of withdrawal) paragraph (2) and III.–3:513 (Use and improvements).

In addition to such inter-party consequences, an infringement of the duty to provide adequate notification of the right to withdraw can lead to preventative proceedings or fines under the applicable unfair commercial practices law.

D. Appropriately brought to the entitled party's attention

The duty to bring the information on the right to withdraw appropriately to the entitled party's attention requires the business to make some reasonable effort to emphasise or highlight in particular the information on the right to withdraw. The information on the withdrawal right must not be hidden in unspecified other information. It is not sufficient to state the right of withdrawal in standard terms in such a way that it will most likely not be read by the entitled party. Appropriate means are, for example, bold letters or a frame on an order form close to the space for the client's signature. Also a highlighted paragraph in the standard terms may suffice.

Illustration 2
A party has the right of withdrawal. The complete information on the right is provided within one of many standard clauses. This can not be regarded as adequate as the information is not appropriately brought to the entitled party's attention.

E. Textual form on a durable medium

The notion of textual form on a durable medium is defined in I.–1:106 ("In writing" and similar expressions) paragraphs (2) and (3). Examples are printed paper or an e-mail. An oral communication – e. g. in the situation of a doorstep sale – or a leaflet which is only shown and not handed over to the entitled party is not sufficient. Information just on a HTML page on the internet which can be downloaded or stored by the computer user is also not sufficient because the information is just provided in textual form, but not on a durable medium. The possibility that the addressee produces a durable medium, e.g. by storing the information on the hard drive or by printing it out, is not the 'provision' of a durable medium.

F. Clear and comprehensible language

The requirement of using clear and comprehensible language in the information is also lifted from the relevant Directives. The information must be drafted in a way that the "average consumer who is reasonably well-informed and reasonably observant and circumspect" in the sense of the ECJ case law can understand it (cf. ECJ, C-210/96, *Gut Springenheide*). In particular, the information must not be ambiguous as this could deter the entitled party from exercising the right.

G. Necessary content of the information

The Article limits the required information to three elements, namely (i) how the withdrawal right may be exercised, (ii) the withdrawal period, and (iii) the name and address of the person to whom the withdrawal is to be communicated. Compared with some more detailed requirements in individual Directives (cf. e.g. Art. 3(3) Financial Services Distance Selling Directive 2002/65/EC) and the even more specific requirements in the laws of some Member States, this Article only provides for a common core of the compulsory information items which can be found in EC and national legislation on the duty to inform of withdrawal rights.

There are two reasons for the approach adopted. The first is that the Article is part of a general regulation of withdrawal rights. It therefore does not exclude more specific provisions with regard to individual withdrawal rights (e.g. in the field of financial services such as consumer credit, information on the consequences of withdrawal might be needed). The second reason is that a more modern approach seeks to limit the number of necessary information items to core information ('information chunks') in order to avoid information overkill on the side of the addressee. This approach is in line with at least several of the Directives and laws of the Member States. Hence, the purpose of this Article is to ensure that the entitled party has a basic knowledge of the right to withdraw and the most important information necessary in order to withdraw. The purpose of the information is not to create a comprehensive knowledge basis for reflection on the question whether to exercise the right of withdrawal or not. In particular, the following information does not need to be provided: the calendar dates when the withdrawal period begins and ends, the method of its calculation (including the influence of public holidays and Saturdays), the fact that no reasons need to be given, the effects of withdrawal, also information with regard to restitution. It would be very difficult for

the business to provide this information correctly. At the same time the information would become rather long and complicated to understand.

H. How the right may be exercised

The information on how the right may be exercised must make clear, ideally with the help of examples, that there are no formal requirements, thus, that the entitled party can withdraw over the phone, by email, fax, letter, or by returning the goods received under the contract. It need not be expressly stated that no reasons have to be given.

I. Withdrawal period

This information must include the length of the withdrawal period (i.e. fourteen days), the event(s) which trigger(s) the start of the period and that the deadline is met if the notice of withdrawal has been dispatched before the end of the period. Adequate information on the right to withdraw does not include that the entitled party must also be informed of the dates on which the withdrawal period starts and ends. Nevertheless, if any date that is given turns out to be earlier than the correct end date of the period, the information is not adequate. The incident that triggers the start of the withdrawal period is not sufficiently indicated if the information on the right of withdrawal does not make clear whether the withdrawal period begins at the time of conclusion of the contract or at the time when the entitled party receives adequate notification of the right to withdraw from the other party or at the time when the goods are received.

Illustration 3

A party to a sales contract concluded at a distance merely gives the entitled party the information that she can withdraw within fourteen days after both the contract has been concluded and adequate notification of the right to withdraw has been received. The information that the withdrawal period does not begin before the goods have been received is missing. The information is therefore not adequate.

J. Address of the person to whom the withdrawal is to be communicated

"Address" means the postal or geographical address under which the other party will actually receive an express notice of withdrawal or the goods. If the other party provides details of their company's name, a PO Box number and the municipality in which the company is based, but fails to give more precise geographical indicators (e.g. the street name and house number), the requirements of this Article are not fulfilled. A PO Box number cannot be regarded as an address. Street name and house number are necessary parts of the address as this ensures that returned goods, in particular if they are bulky, actually reach the other party. Moreover, under some national mail systems it is also easier to get proof of the notice of withdrawal if it is sent to a geographical address (e.g. registered letter with return receipt). The requirement to indicate a geographical address is in line with the provisions in some of the Directives (cf. Art. 3(1)(1)(a) of the Financial Services Distance Selling Directive 2002/65/EC)

NOTES

I. Formal requirements and language

1. All Directives that give the consumer a right to withdraw require the trader or supplier to provide adequate information on the right of withdrawal (Art. 4 of Directive 85/577/EEC; Art. 4(1) and Annex (l) of Directive 94/47/EC; Art. 4(1)(f) of Directive 97/7/EC; Art. 3(1)(3)(a) of Directive 2002/65/EC; Art. 36(1) and Annex III(A) of Directive 2002/83/EC). The Directives require the information on the right to withdraw to be in writing, meaning practically on paper (Art. 4 sent. 1 of Directive 85/577/EEC; Art. 4 1st indent of Directive 94/47/EC; Art. 5(1) of Directive 97/7/EC; Art. 5(1) of Directive 2002/65/EC). In cases where electronic communication has been established between business and consumer, the information can also be provided on a "durable medium" (Art. 5(1) of Directive 97/7/EC; Art. 5(1) of Directive 2002/65/EC).

2. Not all Directives explicitly require the information to be given in clear and comprehensible language. This requirement is not part of the Doorstep Selling Directive. The Timeshare Directive provides in Art. 3(1) that "brief and accurate information" of the right to withdraw is to be provided to any person requesting information. There is no requirement for clarity and comprehensiveness with regard to the information of the withdrawal right included in the written contract. Annex III of Directive 2002/83/EC states that information must be provided in "a clear and accurate manner". The most detailed requirement of clarity can be found in Art. 4(2) of Directive 97/7/EC and Art. 3(2) of Directive 2002/65/EC which both state that the information "shall be provided in a clear and comprehensible manner […] with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors". On the concept of "clear and comprehensible information" see notes on II.–3:106 (Clarity and form of information). Only the Timeshare Directive provides for a specific language requirement: Art. 4 2nd indent obliges the vendor to provide the information "in the language or one of the languages of the Member State in which the purchaser is resident or […] of which he is national".

3. The Member States mostly transposed the requirement to provide written notice established by the Directives. With regard to doorstep selling, in BELGIUM, GREECE, MALTA, the NETHERLANDS, PORTUGAL, ROMANIA and SPAIN, the whole contract has to be in writing. In other Member States, only the information on the right of withdrawal has to be in writing, e.g. AUSTRIA, BULGARIA, the CZECH REPUBLIC, DENMARK, FINLAND, FRANCE, HUNGARY, IRELAND, LUXEMBOURG, LITHUANIA, POLAND, SLOVENIA SLOVAKIA and SWEDEN.

4. Several Member States require the trader to provide a separate document containing information on the right to withdraw. For example, FINNISH law has a general duty to provide a doorstep selling document in accordance with the model approved by the Ministry of Trade and Industry (ConsProtA art. 6(8)). Similarly to the Finnish regulation, FRENCH legislation requires, alongside a version of the contract, delivery of a detachable withdrawal document containing the information on the right of cancellation (ConsC art. R. 121-4). In CYPRUS, the trader must inform the consumer about the right of withdrawal in a separate written notice and attach a standard cancellation form, which the consumer can use to exercise the right of withdrawal (Doorstep Selling Act art. 7(1)). In LATVIA, upon entering into a contract, the seller

or service provider must issue the consumer with a written withdrawal form identifying the specific contract involved. The consumer, in order to acknowledge the receipt of the withdrawal form, must make a note on a copy of that form (Cabinet Reg. 327 art. 5). Furthermore, in IRELAND and the UNITED KINGDOM, two written forms of information documents exist: a "cancellation notice" comprising the data set by the Directive and a "cancellation form", which is prescribed in an annex to the doorstep regulations (cf. United Kingdom Consumer Protection Reg. 1987 reg. 4(1)). ITALIAN regulations state that the notice of the right of withdrawal must be enclosed with the order form to be signed separately from any other contractual provisions and in print of the same size or larger than in the other parts of the form. A copy of the order form, containing details of the date and place of signature, has to be sent to the consumer. Under POLISH law, the consumer has to be provided with a standard withdrawal form even before the contract is concluded (ConsProtA art. 3(1)).

5. A number of legal systems require that the right of cancellation has to be stipulated in big letters. Cf. ROMANIAN law (Doorstep Selling Act art. 8(2)) which furthermore requires the information to be placed near the consumer's signature of the contract. Also the UNITED KINGDOM'S Timeshare Order 2003 s. 3(5) requires the information to be "immediately adjacent to the place where the offeree signs the agreement". The FRENCH ConsC art. R. 121-5 requires the information to be given "*en caractères très lisibles*". MALTESE law requires a clause accompanying the contract to be "set in clear, bold and highlighted letters", in which the right of withdrawal is communicated in writing (Doorstep Selling Act art. 7(h)). Furthermore, in BELGIUM, the information about the right of withdrawal and the text of provisions stating the right of withdrawal must be in bold letters and in a separate frame on the first page of the contract (Timeshare Act art. 7(1)). Also in LUXEMBOURG, this information has to be provided in bold (Timeshare Act art. 7(1), (3)).

II. Content of information

6. The common core of the Directives is the requirement to inform the consumer about the existence of a withdrawal right and the name and address of the person against whom that right may be exercised, see Art. 4 of Directive 85/577/EEC and Annex (l) of Directive 94/47/EC. Furthermore, Art. 5(1) of Directive 97/7/EC and Art. 3(1)(3)(a) of Directive 2002/65/EC state that the consumer has to be informed about "the conditions for exercising" the right to withdraw. Only Directive 2002/65/EC explicitly provides that information about the "duration" of the right of withdrawal must be given, but since the other Directives require information on the existence and/or the conditions of exercising the right to withdraw, it could also be argued that the length of the period must generally be indicated. Under some Directives more detailed information is required. Thus, Annex (l) of Directive 94/47/EC states that the consumer has to be provided with information on "the arrangements under which [letters of withdrawal] may be sent" and given a "precise indication of the nature and amount of the costs" which the purchaser will be required to defray" if he or she exercises the right to withdraw. Similarly, Directive 2002/65/EC requires further information on the amount which the consumer may be required to pay as a consequence of exercising the right to withdraw.

7. Most of the Member States have implemented provisions that require information on the right to withdraw to be given to the consumer. A number of states have additionally laid down precise provisions on how to inform the purchaser, e.g. by standard forms or precise wording. Such countries are, e.g., BELGIUM, CYPRUS, FRANCE, GERMANY, GREECE, LATVIA, LUXEMBOURG, MALTA and the

UNITED KINGDOM. According to the Maltese Timeshare Act art. 4(4), a clause with the following wording must be included in the contract: "You as the buyer have the right to withdraw or cancel such a contract in accordance with 'The Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations, 2000'. These Regulations provide that a buyer may withdraw, without giving any reason, from such a contract within ten days from when the parties sign the contract." If the clause is missing, the buyer may claim that the contract is void. Under the law of the United Kingdom, timeshare contracts must include the following statement: "You have the right to cancel this agreement. You have until … in which to do so. (This date must be at least fourteen days after the day you signed the agreement)" (Timeshare Order 2003 s. 3(5)).

8. GERMAN law also prescribes that the vendor must formally inform the consumer about the right of withdrawal. For this purpose, the vendor can use an information form of withdrawal designed by the legislator (cf. Regulation on duties to supply information in civil law). This information does not necessarily have to be in written form, but must be sufficiently provided in textual form (email, fax, CD-ROM). Some authors assume that this is an infringement of EC law because Art. 4 of Directive 94/47/EC states that the contract with the information referred to in the Annex including the information on the right of withdrawal needs to be in writing (*Kelp*, Timesharing-Verträge, 63; *Mankowski*, VuR 2001, 364).

9. Other Member States oblige the supplier to provide more detailed information than prescribed by the Directives. For instance, in ROMANIA, the supplier's phone/fax and e-mail address also have to be provided (Distance Selling Act art. 4(1)(c)). Additionally, in ESTONIA, the confirmation has to provide information about the conditions of the supplier's liability (LOA § 55(2), (4)).

II.–5:105: Effects of withdrawal

(1) Withdrawal terminates the contractual relationship and the obligations of both parties under the contract.

(2) The restitutionary effects of such termination are governed by the rules in Book III, Chapter 3, Section 5, Sub-section 4 (Restitution) as modified by this Article, unless the contract provides otherwise in favour of the withdrawing party.

(3) Where the withdrawing party has made a payment under the contract, the business has an obligation to return the payment without undue delay, and in any case not later than thirty days after the withdrawal becomes effective.

(4) The withdrawing party is not liable to pay:

(a) for any diminution in the value of anything received under the contract caused by inspection and testing;

(b) for any destruction or loss of, or damage to, anything received under the contract, provided the withdrawing party used reasonable care to prevent such destruction, loss or damage.

(5) The withdrawing party is liable for any diminution in value caused by normal use, unless that party had not received adequate notice of the right of withdrawal.

(6) Except as provided in this Article, the withdrawing party does not incur any liability through the exercise of the right of withdrawal.

(7) If a consumer exercises a right to withdraw from a contract after a business has made use of a contractual right to supply something of equivalent quality and price in case what was ordered is unavailable, the business must bear the cost of returning what the consumer has received under the contract.

COMMENTS

A. Content and context

The Article seeks to provide for a complete set of rules for the effects of withdrawal on the contractual obligations and on the unwinding of the contractual relationship. Paragraph (1) terminates the obligations of both parties for the future, but says nothing on the restitutionary effects. Paragraph (2) refers to the rules on restitution after the termination of a contractual relationship under Book III Chapter 5 Section 5, i.e. the rules on termination for non-performance. Paragraphs (3), (4) and (5) contain some modifications of the restitutionary effects in favour of the withdrawing party. Paragraph (6) clarifies that the withdrawal as such does not lead to any liability of the withdrawing party for non-performance of the contractual obligations. Finally, paragraph (7) makes it clear that in the special case where a consumer exercises a right to withdraw from a contract after a business has made use of a contractual right to supply something of equivalent quality and price in case what was ordered is unavailable, the business must bear the cost of returning what the consumer has received under the contract

B. Termination of the obligations under the contract

Paragraph (1) provides that the withdrawal has the effect of terminating the contractual relationship and the obligations of both parties under the contract for the future. The withdrawal releases both parties from any obligations to perform. Any claim for performance of the contractual obligations becomes unjustified when the withdrawal becomes effective.

The precise moment when the withdrawal becomes effective is the moment when the notice of withdrawal reaches the addressee in the sense of I.–1:109 (Notice) paragraph (3).

If the entitled party has already revoked an offer to conclude a contract before the contract has been concluded, the offer ceases to have effect. Where there would have been a right to withdraw from the contract had it been concluded, there will be a right to revoke the offer even if it would otherwise be irrevocable. See II.–4:202 (Revocation of offer) paragraph (4).

The present Article presupposes that the parties to a contract from which one of them can withdraw have a right to claim performance of the contractual obligations during the withdrawal period. Such a contract is valid and enforceable despite the existence of the right of withdrawal. This seems to be in line with the Distance Selling Directive 1997/7/EC (cf. Art. 6(1) Sentence 3 of this Directive). However, the validity and enforceability of a contract during the withdrawal period may differ from the solution chosen in some Member States where the contract may be considered as not being concluded as long as the withdrawal period is pending (cf. e.g. art. 89 of the Belgian Unfair Trade Practices Act with regard to doorstep selling).

C. Restitutionary effects of withdrawal

In general, the provisions on the restitution of benefits after the termination of a contractual relationship under III.–3:510 (Restitution of benefits received by performance) to III.–3:515 (Liabilities arising after time when return due) apply. Thus, both parties must return any benefit received in the course of the performance of the obligations under the contract. Each party must do so at its own expense. The contract can provide otherwise in favour of the party entitled to withdraw from the contract. Payments received must be repaid. Other benefits, if transferable, must be returned by transferring them, unless such a transfer would cause unreasonable expense. In that case, or if the benefit is not transferable at all, the recipient is obliged to pay the value of the benefit to the other party.

These model rules do not contain an express rule on the question of which party has to bear the expenses for the initial sending of the benefit (e.g. goods ordered at a distance) and for their return. This question is answered rather differently within the Member States, whereas the Directives applicable do not contain specific rules. Paragraph (2) of the present Article leads to the result that, in case of withdrawal, it is in any case the sender who will finally have to bear the expenses for shipment, e.g. a distance seller must bear the costs for shipping the goods to the client, but the client must bear the costs for sending them back (unless otherwise agreed or unless returning the goods would be unreasonable). This follows, for the seller, from the fact that the seller will have to return all payments made by the client in performing the contractual obligations under III.–3:510 (Restitution of benefits received by performance) paragraph (2). The client is obliged to return the goods by transferring them under paragraph (3) of that Article. This obligation to transfer includes the costs of transport.

D. Return of payments without undue delay

Paragraph (3) seeks to solve a problem which often surrounds returning goods and reimbursement. The provision that any payment made by the withdrawing party must be returned without undue delay, and in any case not later than thirty days after the withdrawal becomes effective, corresponds to Art. 6(2) of the Distance Selling Directive 1997/7/EC. The main function is to secure repayment at the latest within thirty days and to exclude a right to

withhold performance against the withdrawing party under III.–3:401 (Right to withhold performance of reciprocal obligation) after the expiry of the thirty day period. The reason is that the party who has received a notice of withdrawal (i.e. usually a business, e.g. a distance seller of IT hardware) and who had also already received the price, might block the restitution by exercising a right to withhold performance. As the withdrawing party (i.e. usually a consumer) also has a right to withhold performance (i.e. returning the goods) in such a case, the contractual relationship might not be unwound for a long time, e.g. until the end of litigation. This could factually secure the economic profit of the other party (i.e. the seller) despite the withdrawal, as the withdrawing party might have to pay, e.g., for the reduction in value of the benefit received (e.g. a laptop) and for the value of any use made of it under III.–3:512 (Payment of value of benefit) to III.–3:514 (Liabilities arising after time when return due). The present Article avoids the possible deadlock by creating the obligation to return any payments received from the withdrawing party in advance. The reason is that, in the long run, the other party (i.e. the seller), if it has received the price, might have a greater interest in blocking the unwinding of the contract, Moreover, the party entitled to withdraw should not be discouraged from exercising that right by the factual need to return the goods received in advance of any return of payment. It should be noted that this applies only in so far the goods received still exist and are to be actually returned by transfer. If the recipient of the goods (e.g. because they do not exist any more) is obliged to pay their value, the rules on set-off (Book III Chapter 6 Section 1) apply. The same is true for any claim to pay for reduction in value or use of the goods where the goods still exist.

The thirty day period starts running when the withdrawal becomes effective, i.e. when the notice of withdrawal reaches the addressee (and not from the moment when it is dispatched). The period is to be calculated according to the rules in I.–1:110 (Computation of time).

E. Liability for loss, damage or diminution in value

Paragraphs (4) and (5) modify the general rules on restitution with regard to the specific function of withdrawal rights. These provisions are based on the principle which is implied in some provisions (e.g. in Art. 6(1) and (2) Distance Selling Directive 1997/7/EC) and in the jurisprudence of the ECJ – particularly case C-350/03 – *Schulte* and C-229/04 – *Crailsheimer*, that the entitled party must not be deterred from exercising the right of withdrawal by its factual consequences. On the other hand, abuse of the right of withdrawal must be avoided and the other party must not be made to bear excessive risks. Paragraphs (4) and (5) seek to balance these aspects.

Paragraph (4)(a) deals with the delicate problem of diminished value caused by inspection and testing of the goods. As the right of withdrawal is meant to enable the entitled party to make an informed choice, there should be no disincentive to inspecting and testing the goods. However, inspection and testing must be reasonable and appropriate. Any use that goes beyond the possibilities a consumer would have had in a shop buying the same goods should not fall under this rule.

> *Illustration 1*
> A woman buys clothes by mail order, unpacks the clothes and tries them on. She decides they do not flatter her and sends them back. She does not have to compensate for the damage caused by unpacking and trying on the clothes.

Paragraph (4)(b) excludes liability for loss of or damage to anything received under the contract, provided the entitled party used reasonable care to prevent such loss or damage. What can be considered to be reasonable care may vary depending on the circumstances. One of the circumstances that must be taken into account is whether the entitled party has been informed of the existence of a right of withdrawal. The standard of care which is considered to be reasonable will be lower if the entitled party was not aware of the possibility of returning the goods. If the consumer has not been informed of his or her right of withdrawal, the standard of care is the *diligentia quam in suis*, i.e. the level of care which the consumer exercises in his or her own affairs. However, if the consumer was informed of the right of withdrawal, no such privilege applies.

> *Illustration 2*
> A party buys a camera on the internet. The camera is delivered, but on the same day the buyer's house is struck by lightning and burns down. The camera is destroyed. The buyer can still withdraw from the contract and the seller will have to return the price although the buyer will be unable to return the camera.

Paragraph (5) deals with liability for the diminished value of the goods due to their normal use. If the withdrawing party was aware of the right to withdraw from the outset, it was in that party's power to use the goods during the withdrawal period only in a way that no diminution of value other than by inspection and testing occurred. So even a diminution of value by normal use (e.g. walking with shoes) must be compensated. But, if the entitled party has not been informed of the existence of a right of withdrawal, the balance of interests leads to a different solution: the entitled party will then not be held liable for diminished value due to normal use.

> *Illustration 3*
> A party buys a flat screen and uses it for a number of days, thus exceeding what is necessary to test it. The buyer then withdraws from the contract. He will have to return the screen at his own expense, and is liable to compensate for the loss of value, or damage caused to the screen caused by its use (cf. OGH (Austrian Supreme Court), 27 September 2005, 1 Ob 110/05s). No such compensation is due if the buyer has not been informed of his right of withdrawal.

In any event, paragraph (6) makes it clear that the withdrawing party does not incur any other liability because of the exercise of the right of withdrawal. No damages or penalty can be imposed on the withdrawing party for the sole reason that he or she has exercised a right of withdrawal. The ECJ held in Case C-423/97 – *Travel Vac* that a contract must not provide that the consumer must pay a specified lump sum for damage caused to the business on the sole ground that the consumer has exercised a right of withdrawal.

NOTES

I. Leeway for Member States according to the Directives

1. The Directives contain rather incomplete provisions on the effects of withdrawal. The Doorstep Selling Directive, for example, only states that, by exercising the right of withdrawal, the consumer is released from any obligations under the cancelled undertaking (art. 5(2)). A similar provision can be found in Art. 35(1)(2) of Directive

2002/83/EC. Likewise, Art. 6(1) sent. 1 of Directive 97/7/EC provides that the consumer may withdraw "without penalty". Thus, the Member States have been given leeway to shape and specify their provisions. Art. 7 of Directive 85/577/EEC states explicitly that the effects of withdrawal are governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received. Similarly, Art. 35(1)(3) of Directive 2002/83/EC states that the legal effects are determined by the national law applicable to the contract. Art. 10 of Directive 94/47/EC leaves it to the Member States to enact provisions on the effect of non-compliance with the Directive.

2. For the Doorstep Selling Directive the ECJ stated in its judgments *Schulte* and *Crailsheimer Volksbank*, that it is up to the Member States to regulate the effects of withdrawal and that the transposition laws have to consider the aims of the Directive, essentially its *effet utile* (ECJ, C-350/03 – *Schulte*, no. 69).

II. Validity and termination of the contract

3. EC secondary law does not clarify whether the contract remains valid during the withdrawal period. Apart from the Timeshare Directive, which contains a prohibition of advance payments (art. 6), the Acquis does not regulate the rights and obligations of the parties to the contract for which the period for withdrawal is pending. Per argumentum e contrario, one could therefore conclude that in all other cases the Directives allow the business to claim payments during the period. This interpretation seems to be supported by the Distance Selling Directive (cf. Art. 6(1) sent. 3). By exercising the right to withdraw the consumer is released from the obligations under the contract (cf. Art. 5(2) of Directive 85/577/EEC). Thus, it can be argued that withdrawal terminates the contractual relationship.

4. Under most national laws, the contract is valid and enforceable despite the existence of the right of withdrawal. Thus, the parties to a contract from which one of them can withdraw have a right to claim performance of the contractual obligations during the withdrawal period. The validity and enforceability of a contract during the withdrawal period differs from the solution chosen in some Member States where the contract may be considered as not being concluded as long as the withdrawal period is pending. Notably, this includes BELGIUM where doorstep selling contracts are not regarded as having been concluded so long as the withdrawal period has not expired (ConsProtA art. 89). In FRANCE, no payments may be made, no goods delivered, nor services provided before the seven day withdrawal period has expired (ConsC art. L. 121-26). In GREECE, the trader may not receive any payments as long as the period of withdrawal has not expired.

5. All Member States provide that withdrawal releases the consumer from his or her obligations under the contract, e.g. BULGARIA ConsProtA art. 47(2); CYPRUS Doorstep Selling Act art. 8(5); ESTONIAN LOA art. 188(2); ITALY ConsC art. 66(1); LITHUANIA ConsProtA art. 15(4) and CC art. 6.357(9); SLOVENIA LOA § 111(1). According to the UNITED KINGDOM'S Consumer Protection Reg. 1987 reg. 4(6) the cancelled contract is "treated as if it had never been entered into by the consumer". Under GERMAN law the consumer is "no longer obliged by his declaration of intention to enter into the contract" (CC § 355(1) sent. 1). In IRELAND, the contract is rendered void on cancellation (European Communities Reg. 1989 reg. 5(3)), so that any sum paid by the consumer to the trader is subject to provisions governing unjustified enrichment. In the CZECH REPUBLIC and SLOVAKIA, the contract is void from the beginning (CC § 48(2)). Under POLISH law the contract is equally void, and the consumer is relieved of all obligations (CC art. 2(3)).

BULGARIAN law only states vaguely that the consumer will be released from any obligations under the contract.

III. Restitution

6. While the Doorstep Selling Directive expressly leaves the rules on the unravelling of a withdrawn contract to the Member States, the Timeshare Directive regulates some details on the costs of legal formalities (cf. art. 5(3) and 5(4); see notes on II.–5:202 (Timeshare contracts)). By contrast, the Distance Selling Directive already contains some basic general rules on reimbursements. According to its Art. 6(2) the supplier is obliged to reimburse sums paid by the consumer. The reimbursement must be carried out as soon as possible and in any case within 30 days. The consumer can be required to pay only the "direct cost of returning the goods". Art. 7(4) and (5) of Directive 2002/65/EC require both supplier and consumer to return any sums they have received from the other party "without any undue delay and not later than within 30 calendar days".

7. The obligation under the Distance Selling Directive to reimburse, free of charge, the sums already paid by the consumer has been transposed in all Member States. With regard to the deadline of 30 days at the latest to reimburse the sums, some Member States have adopted even stricter rules, e.g. CYPRUS, where the supplier has to reimburse the sum immediately (Distance Selling Act art. 11(1)), or LITHUANIA (ConsProtA art. 18(6)), SLOVAKIA (Distance and Doorstep Selling Act § 12(4)(b)), and SLOVENIA (ConsProtA art. 43d) where sums have to be reimbursed within 15 days. GERMANY has indirectly transposed Art. 6(2) of the Directive. The obligation to reimburse the sums paid has to be fulfilled within 30 days according to CC § 286(3) in conjunction with § 357(1) sent. 2 and 3. If the trader is late in reimbursing the sums already paid, the SLOVENIAN and SPANISH legislators have adopted special sanctions to enforce the Directive's provisions. Spain has established the right of the consumer to claim for double the sum if not paid within the specified time (ConsProtA art. 76). Slovenian law obliges the trader to pay, in addition to the legal interest on arrears, an additional ten percent of the total value for every 30 days of delay in reimbursing (ConsProtA art. 43d(2)).

8. With regard to the consumer's reciprocal obligation to return the goods received, some Member States have specified a time limit for the return. For instance, ITALIAN law obliges the consumer to return the goods within 10 days, if they have already been delivered (ConsC art. 67(1)); SLOVENIAN law stipulates a period 15 of days (ConsProtA art. 43d(1) and (2)) whereas according to the LATVIAN ConsProtA art. 12(5) the consumer has to return the goods within seven days from the sending of the withdrawal notice. In PORTUGAL, after having exercised the right of withdrawal, the consumer must keep the goods, so that he or she can return them to the supplier or person for this purpose appointed, in a good condition (Distance and Doorstep Selling Act art. 8(2)). The consumer is obliged to store the products received by the supplier, to maintain their quality and ensure their safety during the withdrawal period in BULGARIA (ConsProtA art. 55(7)). Furthermore, the consumer is not obliged to pay a fine or damages. The supplier is obliged to return money paid by the consumer within 30 days. For doorstep selling contracts, DANISH law obliges the consumer to return the goods to the trader *before* the cancellation period expires in order to benefit from the right of withdrawal. In order to fulfil this requirement, it is sufficient that the consumer has delivered the goods to a courier who transports them back to the trader (Distance and Doorstep Selling Act art. 19(2)).

9. The rule that only the costs of returning the goods can be charged to the consumer (Art. 6(2) of Directive 97/7/EC) has been implemented with some variations by most Member States. Under some legislations the trader is allowed to charge the costs to the consumer. For instance, in AUSTRIA (ConsProtA § 5g(2)) and ITALY (ConsC art. 67(3)), the consumer may be obliged to pay the cost of returning goods if this has been agreed by the parties. The BELGIAN legislator has limited this possibility, as the consumer may not be charged for the direct cost of returning the products when (1) the product or service did not match the offer, or (2) the seller did not fulfil information duties (ConsProtA art. 81(3). The POLISH provision is unclear. However, ConsProtA art. 12(3) and (4), referring to cases where alternative goods or services were provided, stipulate that in such cases the cost of returning the goods ought to be borne by the trader. One could, therefore, assume that in other cases the cost is to be borne by the consumer. In FINLAND, the supplier even has to compensate the consumer for the costs of returning the goods or other performances if goods and performances can be returned normally by post (ConsProtA art. 6(17)). However, in LITHUANIA, the legislator seems not to have transposed the limitation that the only charge that may be made to the consumer is the direct cost of returning the goods. Therefore, theoretically, the consumer may be charged with additional costs, too. Under GERMAN law the consumer must pay for any benefits he or she has gained as well as, in some cases, benefits not gained through his or her own failings (CC §§ 357(1) sent. 1, 346(1), 347). German commentators are divided on the extent to which these arrangements contravene the Directive. The fact that Art. 6(1) sent. 2 and Art. 6(2) sent. 2 of Directive 97/7/EC stipulate that the consumer should only be liable for the direct costs of returning the goods suggests that this does indeed constitute non-compliance. For a fuller assessment, see MünchKomm (-*Wendehorst*), BGB[5], § 312d nos. 10-11.

IV. Liability

10. The Directives do not contain provisions on the liability of the consumer for diminution in value, destruction or loss of anything received under the contract. The ECJ has provided some guidance on the issue of liability by stating that the entitled party must not be deterred form exercising the right of withdrawal by its factual consequence (cf. C-350/03 – *Schulte*; C-229/04 – *Crailsheimer*). It has been argued that this principle is also implied in some provisions of EC secondary legislation (cf. Art. 6(1) and (2) of Directive 97/7/EC).

11. Some Member States have stipulated express rules on additional costs, in particular if the consumer has made use of the goods or cannot return the acquired goods in their original state. For instance, in GERMANY, according to CC §§ 357(1) sent. 1, (3), 346(2), (3), the consumer is liable to cover the costs of any depreciation in value of the goods received. This obligation is restricted by imposing a duty on the seller to inform the consumer about this possible consequence at the latest by the time of the conclusion of the contract (CC § 357(3)). An exception is made for diminution of value caused by inspection and testing of the goods. The consumer is also not liable for loss and damage provided he or she showed the care customarily exercised in his or her own affairs ("*diejenige Sorgfalt […], die er in eigenen Angelegenheiten anzuwenden pflegt*") to prevent such loss or damage. Under AUSTRIAN law the consumer has to pay compensation for the use of the goods, mainly in the case of depreciation in value (ConsProtA § 5g(1)(2)). Austrian case law has held that, where the purchase item (a monitor) had been used for many hours and far in excess of the time one might reasonably take for a product trial, leading to wear and tear and a reduction in the item's value, the consumer had to pay compensation for the use of the

monitor (OGH judgment of 27 September 2005, 1 Ob 110/05s). In HUNGARY, the consumer has to compensate the seller if he or she caused damage due to the improper use of the goods (Distance Selling Act art. 4(5)). The CYPRIOT (Distance Selling Act art. 7(6)) and ITALIAN (ConsC art. 67(2)) legislators saddle the consumer with the obligation to take good care of the goods while in his or her possession. According to the LATVIAN ConsProtA art. 12(6) a consumer is bound to maintain the quality, and ensure the safety, of the goods during the withdrawal period. In GREECE, the same rule applies during the period of withdrawal: the consumer is obliged to take any necessary measures to keep the product in good repair.

12. In some Member States the issue of diminution of value is dealt with in a different way. Under LITHUANIAN law, the consumer may exercise the right to withdraw from doorstep selling contracts only if the goods received from the trader have not been damaged or their appearance has not been substantially altered. Damage that was necessary in order to examine the received thing is not treated as material and does not preclude the right to withdraw (CC art. 6.357(7)). This provision might inhibit the consumer in exercising the right of withdrawal. The HUNGARIAN Doorstep Selling Act art. 4(6) and (7) states that, after withdrawal, the parties have to return any goods received or other contractual agreements performed. The consumer has to compensate for any depreciation in value only where he or she has defaulted on the contract. If the consumer is not able to return any goods received in full or if services have already been performed in full, it is not possible to withdraw from the contract (CC § 320(3)). In contrast to these rather restrictive provisions, the consumer is entitled to keep the goods received in CYPRUS and SWEDEN even if he or she has exercised the right of withdrawal. This is subject to the trader's not requesting the goods within a period of 21 days (Cyprus) and three months (Sweden). In Cyprus, the consumer can treat the goods as an unconditional gift after another period of 21 days has expired (Doorstep Selling Act art. 11(7)). The consumer is entitled to keep the goods and deal with them as he or she likes if the trader has not requested their return within a total of 42 days from the day the right of withdrawal is exercised. Under SPANISH law, the consumer does not have to compensate for any depreciation in value if the goods have only been used in accordance with the terms of the contract (ConsProtA art. 74(2)).

V. Further national notes

13. ESTONIAN LOA § 188(2) corresponds to paragraph (1) of the present Article. Similarly to paragraph (2), LOA § 194(1) as a special provision on the consumer's right to withdraw refers to general provisions on the termination of contractual relationships. The restitutionary effect of such termination is covered by LOA §§ 189-191. The requirement stated in paragraph (2) sent. 2 can be found in LOA § 49(4) for doorstep contracts and in LOA § 56(3) for distance contracts. In other cases, withdrawal must be performed by the parties simultaneously and the provisions on withholding performance in case of reciprocal contracts (LOA § 111) apply *mutatis mutandis* (LOA § 189(1)). Interest must be paid on money refunded as of the moment of receipt of the money (LOA § 189(1) sent. 3). The general liability standard prescribed in paragraph (3) and (4) is regulated in LOA § 189(4)-(5) and § 190(1) 3), i.e. the withdrawing party is liable for deterioration (except where it is the result of the regular use) of the thing if the party has not exercised at least such care as the party would exercise in the party's own affairs or, in case a party who, under the circumstances, should have reasonably foreseen the possibility of withdrawal from the contract has not ensured that it is possible to return that which was received in the case of withdrawal from the contract. If a claim is excluded under these provisions, the other party may have a claim based on unjustified enrichment (LOA § 190(2)). LOA §

194(5) as a specific provision for withdrawal from consumer contracts prescribes that in case the consumer has not been notified of the right of withdrawal, the consumer is liable only for damage caused to the thing intentionally or through gross negligence. However, as according to LOA § 189(1) in addition to claiming the return of the subject matter of the contract, a party may claim delivery of the fruits and other gain received, the diminution in the value caused by normal use may be indirectly recoverable regardless of the liability standard described above (Varul/Kull//Kõve/Käerdi (-Kõve), Võlaõigusseadus I, § 194, no. 10). The mandatory and exclusive nature of the provisions of LOA § 194 is prescribed in LOA § 194(3) and (7).

14. According to § 48 of the SLOVAK CC withdrawal terminates the contract from its conclusion (effects “ex tunc”). The opposite is the case under the Ccom. The contract is terminated from the moment of effectiveness of the withdrawal (effects “ex nunc”). In a case of withdrawal the contractual parties are obliged to return any benefits received under the contract (legal act *no. 108/2000* prescribes the seller`s obligation to return money received under the consumer contract in a 15 day period). The provisions on unjustified enrichment are relevant (CC §§ 451- 459). Also liability for damages (CC §§ 420–420a) is considered to be one of the possible effects in the case of the right of withdrawal (if one of the contractual parties cause a damage to property which creates an object of the contract).

15. The BULGARIAN law contains provisions only on the “free” right of withdrawal and has no provisions similar to paragraphs (2)–(4) and (6) of this Article. Such rules can be however derived from the general provision on unjustified enrichment. There is no respective court practice on that matter at the moment.

II.–5:106: Linked contracts

(1) If a consumer exercises a right of withdrawal from a contract for the supply of goods, other assets or services by a business, the effects of withdrawal extend to any linked contract.

(2) Where a contract is partially or exclusively financed by a credit contract, they form linked contracts, in particular:

(a) if the business supplying goods, other assets or services finances the consumer's performance;
(b) if a third party which finances the consumer's performance uses the services of the business for preparing or concluding the credit contract;
(c) if the credit contract refers to specific goods, assets or services to be financed with this credit, and if this link between both contracts was suggested by the supplier of the goods, other assets or services, or by the supplier of credit; or
(d) if there is a similar economic link.

(3) The provisions of II.–5:105 (Effects of withdrawal) apply accordingly to the linked contract.

(4) Paragraph (1) does not apply to credit contracts financing the contracts mentioned in paragraph (2)(f) of the following Article.

COMMENTS

A. Extension of the withdrawal right to linked contract

The contract from which the consumer withdraws often does not stand alone. A credit contract may have been concluded to finance the price for goods or services. Specific provisions are then needed to determine the effect of withdrawal from one contract on linked transactions. The effect on linked contracts determines to a large extent the effectiveness of a right of withdrawal. Therefore, the present Article extends the effects of the withdrawal from a contract to any linked contract.

The Article is modelled on Distance Selling Directive 97/7/EC art. 6(4). Similar rules regarding linked contracts are provided for in Financial Services Distance Selling Directive 2002/65/EC art.6(7), Timeshare Directive 94/47/EC art. 7, Proposal for a Revision of the Timeshare Directive (COM (2007) 303) art. 7 and arts. 3(1) and 14 of the Second Revised Proposal for a Consumer Credit Directive (COM (2005) 483). In contrast, the Doorstep Selling Directive 85/577/EEC has no explicit provision on linked contracts.

The general rule on the fate of linked contracts avoids the uncertainty that presently governs the matter. Cases C-350/03 – *Schulte* and C-299/04 – *Crailsheimer* have illustrated that, in the absence of explicit provisions in a Directive, the general concept of effectiveness of Community law, in principle, cannot be relied on for determining the fate of linked contracts, as this remains a question of national law. In these cases, the effect which the withdrawal from a secured credit contract concluded in a doorstep selling situation has on the contract for the sale of immovable property was at stake. The ECJ held in *Schulte* that 'although the Directive does not preclude national law from providing, where the two contracts form a single economic unit, that the cancellation of the secured credit contract has an effect on the validity of the contract for sale of the immovable property, it does not require such an effect in a case such as that described by the referring court'. The ECJ nevertheless did impose some

limits on the discretion of the national legislator to determine the effects of the exercise of the right of withdrawal in case the necessary information with regard to the right of withdrawal had not been provided.

Paragraph (1) sets out the general principle. Paragraph (2) gives further guidance for the interpretation and application of the concept of "linked contracts" to linked credit contracts. Paragraph (3) makes it clear that the effects of withdrawal on the linked contract are the same as for the main contract. In order to avoid abuse for the purpose of speculation, paragraph (4) provides for an exception regarding contracts for goods or services whose price depends on fluctuations in the financial market as defined in II.–5:201 (Contracts negotiated away from business premises) paragraph (2)(f).

Withdrawal from the main contract automatically entails withdrawal from the linked contract. No separate notice of withdrawal is needed. It is a different question whether in cases where the supplier under the main contract is not the same person as the supplier under the linked contract, one may want to consider imposing an obligation on the supplier under the main contract to inform without delay the supplier under the linked contract of the notice of withdrawal. The present Article which only deals with the relation between the supplier(s) and the consumer, does not provide an answer to this question.

Illustration 1
Consumer A is contacted on her doorstep by a salesman of business B. She concludes a contract for the installation of a burglary alarm by business B as well as a separate five year contract for the maintenance of this system with business C, the latter being represented by business B. She withdraws from the contract for the installation of the alarm by sending a registered letter to business B. As the maintenance contract is a linked contract in the sense of paragraph (1) of the present Article, the consumer will automatically no longer be bound by the maintenance contract.

B. The concept of "linked contracts"

For two contracts to be considered as "linked contracts" under paragraph (1) it is necessary that the connection between the two contracts is close enough to justify the solution that the withdrawal from one contract has legal consequences for the other contract. This is the case if the two contracts form an economic unit from an objective point of view. It is the close economic link from the commercial point of view, and not the exact legal constellation, that determines whether the contracts can be considered to form a unit. This concept leaves some discretion to the judge who will have to decide, on the basis of objective factors, depending on the specific circumstances of the case, whether the contracts can be considered to form linked contracts. This will be so when both contracts are linked in such a way that one contract could not have been concluded without the other or when one contract only has reason to exist because of the existence of the other contract. Reference to objective factors bars businesses from avoiding this effect on a linked contract by pointing out to consumers that they cannot expect the contracts to be linked. The criteria specifically set out in paragraph (2) for credit contracts are also to be taken into account in the application of paragraph (1).

Linked contracts will most often be credit contracts financing sales contracts, but it is not excluded that other contracts, such as e.g. maintenance contracts (cf. Illustration 1) or insurance contracts are also linked contracts. Contracts between the same parties can form linked contracts. It is also possible that contracts in a tripartite relationship form linked

contracts. In particular, this may be the case if a third party provides goods, other assets or services to a consumer on the basis of a contract with a business with whom the consumer has concluded the main contract.

C. Linked credit contracts

Paragraph (2) provides a non-exhaustive list of situations in which a credit contract forms a linked contract with a contract that is wholly or partially financed by this credit contract. The elements in this list, which give further guidance for the interpretation of the term "economic unit", are based on German CC § 358 and the Proposal for a Directive on Consumer Credit (cf. Art. 3 lit. (l) of the Draft, COM (2005) 483), except that the aforementioned list is exhaustive.

> *Illustration 2*
> A consumer is contacted by car dealer 'CNX' and concludes in her house a contract for the sale of a CNX car. A credit contract between the consumer and CNX-Bank for financing the sale of the car is concluded on the same day, and the consumer fills out the forms with the help of car dealer CNX. The contract for the sale of the car and the contract financing that sale are linked contracts (cf. LG Braunschweig (German Regional Court), judgment of 16 June 1994, 7 S 7/94). Withdrawal from the contract for the sale of the car will entail automatic withdrawal from the credit contract.

D. Legal consequences of the withdrawal for the linked contract

The legal consequences of withdrawal from the main contract for the linked contract are determined by paragraph (3). This rule refers to II.–5:105 (Effects of withdrawal) which deals with the effects of withdrawal on the obligations of the parties that stem from the main contract. Withdrawal has the same effect on the obligations stemming from the linked contract. It follows from II.–5:105 in conjunction with paragraph (3) of the present Article that the obligations to perform the linked contract are terminated and that both parties have to return what they received under the linked contract. Payments received under the linked contract will have to be returned in accordance with II.–5:105 paragraph (2). Liability for damages to goods that may have been received under the linked contract will be governed by II.–5:105 paragraphs (3) and (4).

E. Exception for speculative contracts

The present Article does not exclude that withdrawal from a credit contract (as may be, for instance, possible under the future Consumer Credit Directive) may have consequences for a linked sales contract. Speculation by the consumer should, however, be excluded. Therefore, if a consumer can withdraw from a credit contract that forms a linked contract with a contract for the supply of goods or services whose price depends on fluctuations in the financial market which are outside the supplier's control and which may occur during the withdrawal period under II.–5:201(Contracts negotiated away from business premises), paragraph (2)(f), withdrawal from the credit contract will not affect this linked speculative contract.

NOTES

1. Apart from the Doorstep Selling Directive (and the Life Assurance Directive where it is not appropriate) all the other Directives which contain a withdrawal right comprise a

rather similar provision on credit agreements. For example, Art. 6(4) of Directive 97/7/EC calls on the Member States to regulate the automatic and immediate cancellation of a credit agreement if the credit is either granted by the supplier or by a third party on the basis of an agreement between the third party and the supplier, and in the case that the consumer exercises the right to withdraw from the credit financed main contract. Similar provisions can be found in Art. 7 of Directive 94/47/EC and Art. 6(7) of Directive 2002/65/EC. Furthermore, Art. 7 of the Proposal for a Revision of the Timeshare Directive (COM (2007) 303) provides that in the event of withdrawal "any ancillary contracts" are "automatically terminated". Art. 3(l)(ii) Second Revised Proposal for a Consumer Credit Directive (COM (2005) 483) describes linked contracts as agreements that form, from an objective point of view, a "commercial unit". Most Directives require the Member States to lay down detailed rules for the cancellation of the linked contract (cf. Art. 7 sent. 2 of Directive 94/47/EC; Art. 6(4) sent. 2 of Directive 97/7/EC).

2. ECJ case law (C-350/03 – *Schulte* and C-299/04 – *Crailsheime*) has illustrated that, in the absence of explicit provisions in a Directive, the general concept of effectiveness of Community law, in principle, cannot be relied on for determining the fate of linked contracts, as this remains a question of national law. In these cases, the effect which the withdrawal from a secured credit contract concluded in a doorstep selling situation has on the contract for the sale of immovable property was at stake. The ECJ held in *Schulte* that "although the Directive does not preclude national law from providing, where the two contracts form a single economic unit, that the cancellation of the secured credit contract has an effect on the validity of the contract for sale of the immovable property, it does not require such an effect in a case such as that described by the referring court". The ECJ nevertheless did impose some limits on the discretion of the national legislator to determine the effects of the exercise of the right of withdrawal in case the necessary information with regard to the right of withdrawal had not been provided.

3. As most Directives require detailed provisions on that question the countries are given leeway, so that a huge variety of solutions can be found. This can be particularly examined with regard to the Distance Selling Directive. All Member States except SLOVENIA have implemented provisions transposing Art. 6(4) of the Directive. LUXEMBOURG (Distance Selling Act art. 5(5)) and MALTA (Distance Selling Act art. 11) transposed the mentioned article literally using the copy and paste technique. Other Member States like FINLAND (ConsProtA art. 6(24)), GREECE (ConsProtA art. 4(1)), LITHUANIA (ConsProtA art. 18(5): "without any additional commitments on the side of the consumer"), PORTUGAL (Distance and Doorstep Selling Act art. 8(3): "automatically and simultaneously") and SPAIN (ConsProtA art. 77) have implemented variations but these differences seem to be deviations in wording, but not in substance.

4. Whereas in most countries the credit contract is automatically cancelled when a consumer withdraws from the distance contract, in some member states like ESTONIA (LOA § 57), LATVIA (ConsProtA art. 31(1)) and the NETHERLANDS (CC book 7 art. 46e) the consumer has to withdraw from both agreements, the distance contract and the credit agreement. In BELGIUM, two kinds of solutions can be examined. Whereas under the Unfair Trade Practices Act art. 14(4) sent. 1 the credit agreement is automatically cancelled, without any charges or damages for the consumer, the consumer has a only right of withdrawal according to the ConsProtA (ConsProtA art. 81(4) read in conjunction with the Consumer Credit Act art. 20bis). AUSTRIAN, ESTONIAN and GERMAN law require, additionally, the credit contract

to be regarded as economically linked with the distance contract (cf. Austria ConsProtA § 5h(1) and German CC § 358(3) sent. 1: "*wirtschaftliche Einheit*") This is, e.g. in ESTONIA, the case if the third party used the assistance of the supplier in the preparation of or entry into the contract (LOA § 57). Furthermore HUNGARY (Distance Selling Act art. 6), ITALY (ConsC art. 67(6)) and the UNITED KINGDOM (Consumer Protection Reg. 2000 reg. 15(2)) impose a duty on the supplier to inform the creditor that the consumer has withdrawn from the distance contract.

5. Most other Member States seem to refer to their general civil law for the reimbursement of the money already paid. Some Member States have fixed the period for the reimbursement of the money already paid to the supplier or creditor. In LATVIA, the supplier has to reimburse the amount of money, together with interest, that has been paid for the goods or services up to the moment of withdrawal from the contract within a period of seven days (ConsProtA art. 31). In FINLAND (ConsProtA art. 6(24)) and IRELAND (European Communities Reg. 2001 reg. 8(3)), the money has to be repaid "without delay and in any time within 30 days after being informed of the withdrawal of the distance contract".

6. Art. 6(4) sent. 1 of Directive 97/7/EC states that the credit agreement is cancelled without penalty. Most of the Member States have transposed this provision, e.g. BELGIUM, ESTONIA, GREECE, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, PORTUGAL and ROMANIA. POLISH and SLOVAKIAN law have left out the terms "without penalty", whereas BULGARIA ConsProtA art. 56 replaces the notion by ensuring that the consumer is not liable for any damages or compensation.

7. Member States differ on whether the consumer can be required to pay further costs. In some states, e.g. IRELAND, the consumer can be obliged to pay interest and other costs if agreed in the contract. According to the CYPRUS Distance Selling Act art. 12(2), the supplier or the consumer is liable to pay the interest that has accrued on the sum paid. In HUNGARY, claims regarding costs and interest from the consumer are expressly excluded (Distance Selling Act art. 6(2)). However, damage related to the conclusion of the contract may be demanded. In AUSTRIA, the consumer can be made to bear the costs of an eventual necessary notarisation of signature and compensation for the discharged expenses of the supplier or third party due to the grant of credit, but solely under the condition that the parties have agreed this. Claims regarding other costs or interest are expressly excluded (ConsProtA § 5h(2) sent. 3). In the UNITED KINGDOM no charges can be put on the consumer. Nevertheless, a special rule concerning interest exists. Only if the whole or a portion of the credit is repaid, either before the expiry of one month following the cancellation of the credit agreement, or in the case of a credit repayable by instalments before the date on which the first instalment is due, is no interest payable on the amount repaid (Consumer Protection Reg. 2000 reg. 16).

Section 2: Particular rights of withdrawal

II.–5:201: Contracts negotiated away from business premises

(1) A consumer is entitled to withdraw from a contract under which a business supplies goods, other assets or services, including financial services, to the consumer, or is granted a personal security by the consumer, if the consumer's offer or acceptance was expressed away from the business premises.

(2) Paragraph (1) does not apply to:

(a) a contract concluded by means of an automatic vending machine or automated commercial premises;

(b) a contract concluded with telecommunications operators through the use of public payphones;

(c) a contract for the construction and sale of immovable property or relating to other immovable property rights, except for rental;

(d) a contract for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer by regular roundsmen;

(e) a contract concluded by means of distance communication, but outside of an organised distance sales or service-provision scheme run by the supplier;

(f) a contract for the supply of goods, other assets or services whose price depends on fluctuations in the financial market outside the supplier's control, which may occur during the withdrawal period;

(g) a contract concluded at an auction;

(h) travel and baggage insurance policies or similar short-term insurance policies of less than one month's duration.

(3) If the business has exclusively used means of distance communication for concluding the contract, paragraph (1) also does not apply if the contract is for:

(a) the supply of accommodation, transport, catering or leisure services, where the business undertakes, when the contract is concluded, to supply these services on a specific date or within a specific period;

(b) the supply of services other than financial services if performance has begun, at the consumer's express and informed request, before the end of the withdrawal period referred to in II.–5:103 (Withdrawal period) paragraph (1);

(c) the supply of goods made to the consumer's specifications or clearly personalised or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly;

(d) the supply of audio or video recordings or computer software

(i) which were unsealed by the consumer, or

(ii) which can be downloaded or reproduced for permanent use, in case of supply by electronic means;

(e) the supply of newspapers, periodicals and magazines;

(f) gaming and lottery services.

(4) With regard to financial services, paragraph (1) also does not apply to contracts that have been fully performed by both parties, at the consumer's express request, before the consumer exercises his or her right of withdrawal.

COMMENTS

A. Purpose and general scope

Paragraph (1) grants a consumer a right to withdraw from a contract if he or she expresses the offer or acceptance away from business premises. This right of withdrawal includes and slightly broadens the situations covered by Art. 5(1) Doorstep Selling Directive 85/577/EEC, Art. 6(1) Distance Selling Directive 97/7/EC and Art. 6(1) Financial Services Distance Selling Directive 2002/65/EC. Paragraphs (2), (3) and (4) reorganise the exceptions established in these Directives. The parties can agree to deviate from the exceptions of paragraphs (2) to (4) in favour of the consumer.

The provision only requires that the consumer actually concluded the contract outside of business premises. He or she need not be influenced or put under pressure by the business (Case C-423/97 – *Travel Vac*). Where the contract has been concluded with the help of an intermediary, it is also not a prerequisite that the business was aware, or should have been aware, that the consumer expressed his or her consent outside the normal business premises (Case C-299/04 – *Crailsheimer*).

Illustration 1
A consumer concludes a contract in the course of a visit by a salesman at his workplace, thus, outside of business premises. He decides to exercise the right of withdrawal. The business alleges that no undue pressure was exercised and that no aggressive sales practices were used in the circumstances. The consumer can exercise his right of withdrawal without having to prove that the opposite is true. It suffices that the consumer was in a situation described in paragraph (1) of the Article.

Illustration 2
A consumer is contacted at home by an independent agent acting on behalf of a business. The consumer signs a contract but later on exercises the right of withdrawal. The business claims that the consumer does not have a right of withdrawal as it was not aware that the agent had contacted consumers in a doorstep selling situation. The consumer has nevertheless a right of withdrawal. When a third party intervenes in the name of (or on behalf of) a business in the negotiation or the conclusion of a contract, the right of withdrawal is not subject to the condition that the business was or should have been aware that the contract was concluded in circumstances such as those as described in the present Article. The legal position of the third party intervening in the conclusion of the contract is irrelevant for the application of the provisions protecting the consumer with respect to contracts concluded away from normal business premises (ECJ, Case C-299/04 – *Crailsheimer*; Commercial Court Leuven (Belgium), 1 June 1993, Droit de la Consommation – Consumentenrecht (DCCR) 1993-94, 527).

B. Slightly broader scope than the Directives

By the general rule in paragraph (1), some particular situations which are not covered by the three Directives mentioned above are also included (particularly the supply of goods, other assets and services on public streets and spaces). But this extension is in line with the situation in several Member States. Moreover, the general rule also allows a gap to be bridged in the current Directives: contracts that were negotiated in a doorstep situation but concluded afterwards by means of distance communication, for example by phone, were not covered by either of these Directives.

Paragraph (1), together with II.–5:103 (Withdrawal period) paragraph (2)(a) also implies that the period for withdrawal will be calculated differently for doorstep selling in comparison with the Doorstep Selling Directive 85/577/EEC. Differing from these model rules and the rules in several Member States, this Directive does not require the goods to be delivered for the withdrawal period to start.

C. Justification of the withdrawal right

The Doorstep Selling Directive 85/577/EEC concerns "contracts negotiated away from business premises" according to its official title. But the contracts within the scope of the Distance Selling Directive 97/7/EC and the Financial Services Distance Selling Directive 2002/65/EC are not negotiated in the professional supplier's business premises either. In these cases the consumer also expresses the intention to conclude the contract away from the professional supplier's business premises. The rights of withdrawal granted under these Directives are concordant in this respect: they all recognise that risks exist for consumers when a contract is concluded away from the professional supplier's business premises ('out of shop contracts'). In these situations, it is assumed that consumers are usually less prepared for (or focused on) contractual negotiations, or are less informed about relevant contractual circumstances, than they are when they enter the professional supplier's business premises. This is why a structural imbalance in the negotiations can arise. Each of the three Directives seeks to counter this imbalance by introducing a 'cooling off' period and a right of withdrawal for a specific situation.

The consumer buying on the doorstep or in another face-to-face situation outside of business premises is usually unable to compare products and prices. He or she will also often not be able to really inspect the goods offered on sale. The extra time provided by the withdrawal period allows him or her to compare products or services and prices. However, in doorstep selling and similar situations, the cooling off period does not only cure a problem of asymmetric information. Since in a doorstep selling situation consumers are more easily influenced by aggressive sales practices, the cooling off period also allows consumers to consider the merit of the contract they concluded without being subject to the pressure exercised by a salesperson. This function of the cooling off period is relevant to both contracts for goods and contracts for services that are concluded in a doorstep situation.

In distance selling situations, asymmetric information is due to the fact that the contract is concluded by means of distance communication and that the consumer is unable to inspect or test the goods, contrary to what happens for contracts concluded at the seller's business premises. There is no problem here of pressure exercised by a business. The cooling off period allows the consumer to verify the quality or to test the goods as she or he could have done if the contract had been concluded at the business premises.

When contracting for (financial) services at a distance, the means of communication used are not the primary reason for an informational asymmetry. Concluding the contract at the business premises would generally not give much more information on the services offered. With respect to the distance selling of financial services, it is therefore harder to justify the right of withdrawal based on the situation in which the contract was negotiated. Financial services are intangible. They are a bundle of contractual rights and obligations. It is perfectly possible to provide all the information needed to be informed of this bundle of rights and

obligations even through means of distance communication. A cooling off period does not seem to put the consumer in a much better position in any way. It may well be that there are advantages in receiving information on financial services in a face-to-face context, but the cooling off period does not remedy this possible shortcoming. If it is the complexity of the contract that justifies granting the consumer the right of withdrawal, one could argue that the consumer should have this right irrespective of the circumstances in which the contract was concluded. Finally, one could argue that a consumer may not be fully aware that a contract has been concluded through the clicking of a button, but the provisions in II.–3:105 (Formation by electronic means) should provide for sufficient protection in this regard. One may therefore want to reconsider whether the right of withdrawal is an efficient means at all for the purpose of enhancing consumer protection with respect to distance selling of services and of financial services in particular. However, the present Article reflects the current situation in EC law.

D. Exemptions from the right to withdraw

Paragraphs (2), (3) and (4) exempt certain contracts from the right to withdraw. These exemptions are necessary to achieve a balance between the interests of businesses and consumers. The consumer will not have the right of withdrawal if such a right would systematically lead to substantial losses for the business, or if such a right is likely to lead to abuse by the consumer or, if the protection afforded by the right of withdrawal is unnecessary for the specific contract. Whereas the exemptions in paragraph (2) are applicable to all contracts irrespective whether the contract has been concluded in a face-to-face situation or at a distance, paragraph (3) only applies to contracts concluded at a distance. Paragraph (4) only applies to financial services.

E. General exemptions (paragraph 2)

Paragraph (2)(a) and (2)(b) are based on Art. 3(1), 2nd and 3rd indent Distance Selling Directive 97/7/EC. These exemptions for automatic vending machines and public payphones are transposed by the large majority of Member States and concern contracts that are not considered to be problematic. The same rationale underlies paragraph (2)(d) on regular roundsmen (in particular the English milkmen) which combines Art. 3(2)(b) Doorstep Selling Directive 85/577/EEC and Art. 3(2), 1st indent of the Distance Selling Directive 97/7/EC.

Paragraph (2)(c) on immovable property combines Art. 3(2)(a) of the Doorstep Selling Directive 85/577/EEC and Art. 3(1), 4th indent of the Distance Selling Directive 97/7/EC. These contracts are excluded as the genuine consent of parties to these contracts is warranted by other instruments of protection in accordance with national legislation, such as the conclusion of the contract before a public notary or other formal requirements. The counter-exception for tenancies, which stems from Art. 3(1) 4th indent Distance Selling Directive 97/7/EC, comes in here and not under paragraph (3), because it is incoherent to grant the consumer a right to withdraw from rental contracts concluded in distance selling situations, but not to grant him or her the right of withdrawal for rental contracts concluded in one of the other situations covered by the present Article.

Paragraph (2)(e) corresponds to the current definition of distance contract in Art. 2(1) of the Distance Selling Directive 97/7/EC and Art. 2(a) of the Financial Services Distance Selling Directive 2002/65/EC. Contracts in which the business uses means of distance communication as an exception to conclude the contract are outside the scope of application

of these provisions. The term ‘means of distance communication’ refers to any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties in the sense of Art. 2(4) sentence 1 Distance Selling Directive 1997/7/EC.

F. In particular: exemptions for financial services (paragraphs (2) and (4))

Paragraph (1) clarifies that the right to withdraw is in principle also granted for contracts under which financial services are provided. The term ‘financial services’ means any service of a banking, credit, insurance, personal pension, investment or payment nature in accordance with Art. 2(b) of the Financial Services Distance Selling Directive 2002/65/EC.

Paragraph (2)(f) states an important exemption for many financial services. In accordance with Art. 6(2)(a) Financial Services Distance Selling Directive 2002/65/EC, financial services whose price depends on fluctuations in the financial market outside the supplier’s control which may occur during the withdrawal period, are exempted. This may be services related to foreign exchange, money market instruments, transferable securities, units in collective investment undertakings, financial-futures contracts, including equivalent cash-settled instruments, forward interest-rate agreements, swaps, or options to acquire or dispose of any such instruments including equivalent cash-settled instruments, in particular options on currency and interest rates.

Paragraph (2)(h) reflects the exception in Art. 6(2)(b) of the Financial Services Distance Selling Directive 2002/65/EC. Due to the nature of the contract and in order to avoid speculation by the consumer, it is reasonable to exclude short-term insurance policies from the right of withdrawal.

Paragraph (4) is based on Art. 6(2)(c) of the Financial Services Distance Selling Directive 2002/65/EC (cf. with regard to this rule below under H.).

G. In particular: auctions

Paragraph (2)(g) is based on Art. 3(1) 5th indent Distance Selling Directive 97/7/EC. It is an open question whether this provision of the Distance Selling Directive only refers to traditional auctions (such as a fine art auction in one of the major auction houses, or a racehorse auction) or whether it also applies to internet auctions (such as eBay™ “auctions”). In the case of traditional auctions it would be entirely impractical if a bidder who participates in the auction via phone could benefit from the right of withdrawal, while bidders who are present at the auction do not have such a right. With regard to internet auctions, in which all bidders participate via means of distance communication, one might argue that there is no such issue of unjustified unequal treatment of present and absent bidders. While the Acquis does not provide a clear answer to the question of how the term “auction” is to be understood, the Member States seem to be moving towards a narrow interpretation of the term and thus towards limiting it to traditional auctions as described above.

H. Particular exemptions for distance contracts (paragraph (3))

Paragraph (3) supplements paragraph (2) with particular exceptions for contracts concluded by the business exclusively by means of distance communication. The term ‘means of

distance communication' refers to any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties in accordance with Art. 2(4) sentence 1 Distance Selling Directive 97/7/EC.

Paragraph (3)(a) is based on Art. 3(2), 2nd indent of the Distance Selling Directive 97/7/EC. The scope and rationale of this exemption was set out by the ECJ in the case C-336/03 – *EasyCar*. It is aimed at exempting suppliers of services in certain sectors because the requirements of the Directive could affect those suppliers disproportionately. In particular, where the request of a service resulted in a booking and that booking is cancelled by the consumer at short notice before the date specified for the provision of that service. The ECJ therefore considered that car hire undertakings are transport services for the purposes of this exception. The exception applies when the time of performance was agreed upon at the time of the conclusion of the contract.

> *Illustration 3*
> A consumer hires a car through the internet for a specific period. She wants to withdraw from the contract. The consumer does not have a right of withdrawal because these contracts fall under the exception of paragraph (3)(a) of the Article (cf. ECJ, C-336/03 – *EasyCar*).

Paragraph (3)(b) is based on Art. 6(3), 1st indent of the Distance Selling Directive 97/7/EC. The provision should be read in relation to paragraph (4), which is based on Art. 6(2)(c) of the Financial Services Distance Selling Directive 2002/65/EC. Art. 6(3), 1st indent of the Distance Selling Directive 97/7/EC provides that the consumer may not exercise the right of withdrawal in respect of contracts for the provision of services if performance has begun, 'with the consumer's agreement', before the end of the withdrawal period. Art. 6(2)(c) of the Financial Services Distance Selling Directive 2002/65/EC states that the right of withdrawal shall not apply to contracts that have been fully performed by both parties 'at the consumer's express request' before the consumer exercises her or his right of withdrawal. Paragraph (3)(b) aligns and clarifies the two provisions. The right of withdrawal will be lost 'at the consumer's express and informed request' for performance. Since the request needs to be informed, the consumer needs to be aware that performance (for distance selling of services other than financial services; full performance for financial services) during the period for withdrawal at her or his request extinguishes the right of withdrawal.

It should be noted that the requirement of an 'informed' request also avoids uncertainty (with regard to services other than financial services) about what acts constitute performance for the purposes of this rule (i.e. any small partial performance after the conclusion of the contract, or only performance of the 'characteristic' service). A Belgian Court held that booking a flight service by a business provider constituted performance. Consequently, the right of withdrawal was extinguished; provision of the flight service during the withdrawal period was not required (Judge of the Peace Ghent (Belgium), eerste kanton, 7 April 2003, A.R. 010617 – *Airstop*). The wording of this rule prevents businesses from claiming that a minor act of performance during the withdrawal period extinguishes the right of withdrawal if the consumer was not informed of this consequence.

In the case of paragraph (3)(b), i.e. services other than financial services, performance just by the business before the end of the period for withdrawal extinguishes the right of withdrawal.

In the case of financial services, paragraph (4) stipulates that only full performance by both parties before the end of the withdrawal period extinguishes the right of withdrawal. The right of withdrawal is in any case preserved if (other) pre-contractual information which was required has been omitted. In such a case, the withdrawal period is extended under II.–3:109 (Remedies for breach of information duties) paragraph (1) and II.–5:103 (Withdrawal period).

Paragraph (3)(c) is based on Art. 6(3), 3rd indent of the Distance Selling Directive 97/7/EC. Allowing the consumer the right of withdrawal for these categories of goods would result in significant losses for businesses. If such an exemption were absent, it may well be that businesses would decline to sell these categories of goods through means of distance communication.

Illustration 4
A consumer buys curtains through the internet and specifies length and width. The consumer will not have a right of withdrawal.

Illustration 5
A consumer buys a laptop through the internet and specifies the operating system, memory and hard disk capacity required. The laptop is delivered and the consumer then decides to exercise the right of withdrawal. The exemption of paragraph (3)(c) for goods made to the consumer's specifications does not apply if the goods were made out of standard units and can be disassembled with relatively minor costs and efforts (cf. BGH (German Supreme Court), judgment of 19 March 2005, VIII ZR 295/01, Neue Juristische Wochenschrift (NJW) 2003, 1665-1667).

Illustration 6
A business sells horticultural products by mail-order. Its catalogue states that consumers do not have a right of withdrawal. Such a statement is too general as not all horticultural products deteriorate rapidly and are therefore exempted from the right of withdrawal under Art. II.–5:201(4)(c) (cf. Hof van Beroep/Cour d'appel Brussels (Belgium) 21 January 1999, P. Bakker Hillegom / Ets. Gonthier).

Paragraph (3)(d) is based on Art. 6(3), 4th indent of the Distance Selling Directive 97/7/EC. The rationale for this exemption is the prevention of possible abuse from the consumer. The exemption is, however, broadened as it also applies to the supply of audio, video and computer software supplied by electronic means if the consumer is in a position to download or reproduce the data. The rationale for this exemption is identical: prevention of possible abuse from the consumer. Such an exemption already exists in several Member States.

Illustration 7
A consumer downloads music against payment. It can be copied on any medium . The consumer will not have the right of withdrawal.

Paragraphs (3)(e) and (3)(f) are based on Art. 6(3) 5th indent and Art. 6(3) 6th indent of the Distance Selling Directive 97/7/EC. Again, these exemptions seek to balance the interests of businesses and consumers. Allowing the right of withdrawal for these goods could lead to substantial losses by businesses and possible abuse from consumers in the case of gaming and lottery services.

Illustration 8
A consumer buys a lottery ticket using the internet. The contract is not subject to the right of withdrawal because the exemption in paragraph (3)(f) applies.

I. No exception for expressly requested business visits

In contrast to Art. 1(1) 2nd indent of the Doorstep Selling Directive 85/577/EEC, the present Article does not stipulate for an exception from the right to withdraw from contracts concluded in a doorstep situation where the consumer had expressly requested the visit. This follows a tendency visible in several Member States. Consumers may be subject to high pressure selling even when they requested the business visit themselves. Thus, consumers enjoy protection in doorstep cases irrespective whether the visit was unsolicited or solicited.

J. No exemption for low value contracts

The present Article does not contain an exemption for low value contracts as can be found in Art. 3(1) sentence 1 of the Doorstep Selling Directive 85/577/EEC. Although it can be argued that consumers who conclude low value contracts need less protection than in cases where high value goods are marketed, nearly half of the Member States have not transposed this exemption. The others stipulate for such an exemption, whereby the threshold varies between 10 and 50 Euro. Contracts with a price up to that amount concluded in a doorstep situation cannot be withdrawn in these States. However, it might be confusing for consumers that there is a withdrawal right only for contracts of a value above the threshold. The consumer might expect that such a threshold, if he or she actually happens to know about it, is much lower than 40 or 50 Euros. Businesses will not be burdened very much by the lack of such exemption for low value contracts, as consumers may not have a great interest to withdraw if the price of the goods was low. Moreover, it would not be appropriate to extend this option to distance selling contracts anyway, as in such cases the impossibility to inspect the goods and to verify their quality deprives the consumer of the information needed to make an informed choice. For these reasons a uniform rule for all contracts which fall under the present Article seemed preferable.

NOTES

I. Scope of the right of withdrawal

1. Art. 5(1) of Directive 85/577/EEC, Art. 6(1) of Directive 97/7/EC and Art. 6(1) of Directive 2002/65/EC grant a consumer a right to withdraw from a contract which has been concluded, generally speaking, “away from business premises”. Directive 85/577/EEC concerns “contracts negotiated away from business premises” according to its official title. Under this Directive the contract has to be concluded either during an excursion organised by the trader away from business premises, or during a visit by a trader. In the latter case, the Directives’ provisions are only applicable if the trader visits the consumer at his or her home or at the home of another consumer, or if the trader visits the consumer at his or her place of work (art. 1(1)). According to this provision contracts concluded on business premises are not covered, even if the consumer has previously been influenced in a doorstep situation. The ECJ has clarified some details with regard to the situations covered by the Directive. In its judgment *Travel VAC*, C-423/97, the ECJ held that where a contract is concluded after a trader has invited a consumer to go in person to a specified place at a certain distance from

the place where the consumer lives (other than the premises where the trader usually carries on business and not clearly identifiable as premises for sales to the public), in order to present the products and services offered, this contract must be considered to have been concluded during an excursion organised by the trader away from the trader's business premises within the meaning of the Directive. In the same judgment, the ECJ clarified that the consumer need not prove that he or she was influenced or manipulated by the trader. It is sufficient that the contract is concluded in circumstances such as those described in the Directive. Moreover, in its judgment *Crailsheimer Volksbank*, C-229/04, the ECJ held that, when a third party intervenes in the name or on behalf of a trader to negotiate or conclude a contract, the application of the Directive cannot be made subject to the condition that the trader was, or should have been, aware that the contract was concluded in a doorstep selling situation.

2. For distance selling contracts Art. 2(1) of Directive 97/7/EC states that the contract has to be concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded. Art. 2(4) sent. 1 of the Directive specifies that the contract has to be concluded "without the simultaneous physical presence of the supplier and the consumer". Thus, the contracts within the scope of Distance 97/7/EC (and Directive 2002/65/EC) are equally not negotiated in the professional supplier's business premises.

3. The Doorstep Selling Directive applies to "contracts under which a trader supplies goods and services to a consumer" (art. 1(1)) whereas according to art. 2(1) of Directive 97/7/EC "any contract concerning goods and services" is covered. The Directives are unclear with regard to the kind of contracts or other transactions that are covered. In *Bayerische Hypotheken- und Wechselbank* (case C-45/96) the ECJ has stated that, in principle, a guarantee falls under the scope of the Doorstep Selling Directive. Directive 2002/65/EC applies to contracts "concerning financial services" (art. 2(a)).

II. Exceptions for doorstep selling contracts

4. The Doorstep Selling Directive provides for several exceptions. According to its art. 3(1) Member States are free to apply the provisions of the Directive only to contracts "for which the payment to be made by the consumer exceeds a specified amount". This amount must not exceed the sum of € 60. Specific exceptions are laid down in art. 3(2). In particular the Directive does not apply to contracts concerning immovable property (art. 3(2)(a)) and to contracts for the supply of foodstuffs and beverages or other goods intended for current consumption in the household and supplied by regular roundsmen (art. 3(2)(b)).

5. The option for Member States to exclude contracts that do not exceed the sum of € 60 from the scope of their national transposition law has been made use of by the majority of states. Member States which have not exercised this option are, for instance, CYPRUS, the CZECH REPUBLIC, DENMARK, FRANCE, GREECE, HUNGARY, LATVIA, LUXEMBOURG and SLOVAKIA. Other Member States have fixed different limits varying from € 10 (POLAND) up to € 50 (BELGIUM). In BELGIUM, additionally, the sale must be made for non-commercial and exclusively charitable purposes. In ESTONIA, there is a limit of € 15 which only applies where the consumer pays the sum at the moment the contract is concluded (ConsProtA art. 46(2)). PORTUGUESE law is applicable to contracts under € 60, although some

provisions (regarding contract form, content and terms) are applicable only to contracts exceeding this amount (Distance and Doorstep Selling Act art. 16(4)).

6. The Member States have not consistently exercised the specific options to limit the scope as provided for in art. 3(2) of the Directive. For instance, in GREECE, ITALY, IRELAND (exclusion of insurance and assurance contracts), PORTUGAL, POLAND, ROMANIA and the UNITED KINGDOM, the same situations are basically exempt from protection as provided for under the Directive. In contrast, LATVIAN law does not contain any restrictions in the general definition of the contract. With regard to the exception of contracts related to immovable property some variations may be highlighted. GERMANY (CC § 312(3) no. 3), LITHUANIA (CC art. 6.357(3) 6th indent), MALTA (Doorstep Selling Act art. 3(c)) and SPAIN (ConsProtA art. 108(f)) exclude contracts concluded before a notary public. This exclusion is broader than what is provided for in Art. 3(2)(a) and may therefore infringe the Directive. On the other hand this exception can also be narrower than the one provided for in the Directive. For example, in Germany, there is no requirement for authentication before a notary public in the case of contracts for the building or rent of immovable property; accordingly, such contracts generally fall within the scope of the right of withdrawal in doorstep selling situations). The Maltese law, in implementing the exemptions laid down in art. 3 of Directive 85/577/EEC, goes beyond the Directive's scope by excluding contracts negotiated solely in writing and contracts concluded before a court, notary or another person who is bound to inform the parties of their rights and obligations even if they are concluded in a doorstep situation (Doorstep Selling Act art. 3(c)). The Maltese legislator has presumed that these contracts would not generally stem from a doorstep situation. This exemption may be considered to be necessary because the definition of "doorstep contract" includes contracts that have been negotiated at any other place or premises other than the door-to-door seller's business premises. Moreover, the Maltese Minister is empowered by law to make other contracts exempt from the national Doorstep Selling Act (art. 3(f)).

7. Apart from AUSTRIA, FINLAND and GERMANY, all Member States have implemented an exception for contracts for the supply of food and beverages. In the NETHERLANDS, contracts in the case of an ongoing relationship between the parties concerning the sale of food are exempt (Doorstep Selling Act art. 1(3)). The LITHUANIAN (CC art. 6.357(3) 1st indent) and SLOVENIAN (ConsProtA art. 46a no. 2) derogation for the supply of foodstuffs, beverages or other goods intended for current consumption in the household does not require that the goods were supplied by "regular roundsmen". Under POLISH law the exception only refers to food products which are supplied regularly and does not mention "regular roundsmen" (ConsProtA art. 5(2)). The MALTESE Doorstep Selling Act art. 2 excludes vendors who sell foodstuffs and drinks from "door-to-door" regardless whether they are supplied regularly and frequently. The SWEDISH exception only applies to the rules on the trader's duty to inform the consumer and the rules about the right to withdraw from the contract (Distance and Doorstep Selling Act art. 4(2)(2)).

III. Exceptions for distance selling contracts

8. With regard to distance selling contracts three kinds of exceptions can be examined. According to art. 3 of Directive 97/7/EC all the Directive's provisions do not apply to contracts concluded by means of automatic vending machines (art. 3(1) 2nd indent), to contracts concluded through the use of public payphones (art. 3(1) 3rd indent), to contracts concluded for the construction and sale of immovable property or relating to other immovable property rights, except for rental (art. 3(1) 4th indent), and to

contracts concluded at an auction (art. 3(1) 5th indent). With regard to the latter exception it is an open question whether this provision of the Directive 97/7/EC only refers to traditional auctions (such as a fine art auction in one of the major auction houses, or a racehorse auction) or whether it also applies to internet auctions (such as eBay™ "auctions"). Secondly, art. 3(2) of Directive 97/7/EC lists partial exceptions for contracts for the supply of foodstuffs etc. supplied by regular roundsmen (1st indent) and for contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period (2nd indent). To these contracts Art. 4 (prior information), 5 (confirmation), 6 (right of withdrawal) and 7(1) (obligation to execute the order within a maximum of 30 days) of the Directive do not apply. Thirdly, Art. 6(3) of Directive 97/7/EC lists several exceptions that apply only to the right of withdrawal. Thus, art. 6(3) 1st indent of Directive 97/7/EC provides that the consumer may not exercise the right of withdrawal in respect of contracts for the provision of services if performance has begun, "with the consumer's agreement", before the end of the withdrawal period. Similarly, art. 6(2)(c) of Directive 2002/65/EC states that the right of withdrawal does not apply to contracts that have been fully performed by both parties "at the consumer's express request" before the consumer exercises the right of withdrawal. Furthermore, the Distance Selling Directive does not give a right to withdraw from a contract if the price of goods and services provided under the contract is dependent on fluctuations in the financial market (art. 6(3) 2nd indent). With regard to financial services a similar provision can be found in art. 6(2)(a) of Directive 2002/65/EC. According to art. 6(3) 3rd indent of Directive 97/7/EC the right of withdrawal is not given in the case of goods that were made to the consumer's specifications. Regarding this exception the Directive refers to five alternatives: goods made to the consumer's specifications, goods clearly personalised, goods which, by reason of their nature, cannot be returned, goods which are liable to deteriorate, and, finally, goods which perish rapidly. Other exceptions to the right of withdrawal apply with respect to audio and video recordings or computer software which were unsealed by the consumer (art. 6(3) 4th indent), to newspapers and periodicals (art. 6(3) 5th indent) and to gaming and lottery services (art. 6(3) 6th indent).

9. Until now, the exception contained in art. 3(2) 2nd indent (contracts for the provision of accommodation, transport, catering or leisure services) is the only provision of Directive 97/7/EC which had to be applied by the ECJ (judgment of 10 March 2005 C-336/03 *EasyCar (UK) Ltd v Office of Fair Trading*; see in particular nos. 28, 29). The Court held that Art. 3(2) of the Directive is to be interpreted as meaning that 'contracts for the provision of transport services' includes contracts for the provision of car hire services. The reasoning offers some guidance for the future application of this provision. The Court stated that the exemption has the purpose of protecting the interests of suppliers of certain services in order that they should not suffer the disproportionate consequences arising from cancellation at no expense and with no explanation. An example of this would be a booking which is made and then cancelled by the consumer at short notice before the date specified for the provision of that service. In the view of the ECJ, car hire undertakings carry out an activity which the legislature intended to protect against such consequences by means of the exemption. The reason is that those undertakings must make arrangements for the performance, on the date fixed at the time of booking, of the agreed service and, therefore, suffer the same consequences in the event of cancellation as other undertakings operating in the transport sector or in the other sectors listed in the exemption.

10. The exemption concerning contracts concluded by means of automatic vending machines or automated commercial premises has been adopted by a great majority of Member States, with the exception of BELGIUM. AUSTRIA has, in general, transposed this exemption, but the specific protection with regard to fraudulent use of credit cards according to art. 8 of Directive 97/7/EC has been transposed in a way that it is also applicable to contracts concluded by means of automatic vending machines (ConsProtA § 31a). ESTONIA (LOA § 53(2), (1)), HUNGARY (Distance Selling Act art. 1(3)(b)), LITHUANIA (ConsProtA art. 17(3) 5th indent) and SLOVENIA (ConsProtA art. 43a(1), (5) 1st indent) did not implement the exemption for "automated commercial premises", but only for "automatic vending machines". LITHUANIA exempts these contracts from the application of art. 4 (prior information), 5 (confirmation), 7(1) (obligation to execute the order within a maximum of 30 days) and art. 11(3)(a) of Directive 97/7/EC (ConsProtA art. 17(3); CC art. 6.366(3)).

11. The exemption for contracts concluded through the use of public payphones has been transposed in all countries except for AUSTRIA, BELGIUM and GREECE. The LITHUANIAN legislator did not restrict the provision to the use of public payphones, but excludes all contracts concluded with telecommunications operators. In ESTONIA (LOA § 53(2), (3)), GERMANY (CC § 312b(3), (7)) and ROMANIA (Distance Selling Act art. 6(c)), the transposition law only exempts contracts concluded with telecommunications operators through the use of public payphones in so far as they concern the use of those payphones.

12. Contracts concluded for the construction and sale of immovable property are exempt under nearly all national laws. Only GREECE, LATVIA and LITHUANIA did not make use of this exemption. Whereas ESTONIA did not implement the part "except for rental" (LOA § 53(2) no. 3), SPAIN did not include the entire part relating to "other immovable property rights, except for rental" (ConsProtA art. 93(1)(d)). The NETHERLANDS (CC art. 7:46i(2)(b)) and SWEDEN (Distance and Doorstep Selling Act chap. 2 art. 1(2) 1st indent) only exempt contracts for the construction of immovable property. In contrast, FINLAND ConsProtA art. 6(6) does not refer to the construction of immovable property. Swedish law also mentions, besides the construction of buildings, "other fixed plant on land or in water". Member states like GERMANY (CC § 312b(3) no. 2), Finland and SLOVENIA (ConsProtA art. 43a(1) no. 2) explicitly exempt timeshare contracts besides contracts concluded for the construction and sale of immovable property.

13. Art. 3(1) 5th indent of the Distance Selling Directive, which exempts contracts concluded at an auction, has been implemented by all Member States, except BELGIUM, BULGARIA and GREECE. However, BELGIUM has not totally exempted auctions, as the ConsProtA (art. 83 undecies(1) no. 6) and the Liberal Professions Act (art. 11 sent. 3) only contain provisions that empower the King to lay down specific provisions for public auctions organised by means of distance communication. Again, a significant number of Member States have deviated from the Directive. According to the LATVIAN Cabinet Reg. 207 art. 8(3) and art. 19(5), the supplier is disburdened from any duties of information and from a right of withdrawal, when the contract has been concluded at an auction, whereas the other provisions of the distance selling law seem to be applicable. GERMANY and ESTONIA have not completely exempted auctions. In ESTONIA, auctions are only exempted from the right of withdrawal (LOA § 53(4) no. 8). This is similar in GERMANY, where the rules on distance contracts in principle apply to auctions, but the consumer does not have the right of withdrawal (CC § 312d(4) no. 5). The Federal Supreme Court has

held in this context that an EBay "auction" is not to be considered as an "auction" in this sense (judgment of 3 November 2004, VIII ZR 375/03, NJW 2004, 53-56). Consequently, EBay auctions fall under the distance selling laws. The same result with regard to EBay auctions should be reached in the following countries. DENMARK exempts auctions where "a significant number of bidders is normally present at the place of the auction" (Distance and Doorstep Selling Act art. 2(1), (4)). The FINNISH ConsProtA does not apply to contracts concluded at an auction, "if participation in the auction is also possible without using a means of distance communication" (ConsProtA art. 6(6)). SWEDISH law does not apply to contracts concluded at auctions where the bidding could be made by means other than at a distance (Distance and Doorstep Selling Act chap. 2 art. 1(2) 4th indent). In FRANCE (ConsC art. L. 121-17), SLOVAKIA (Distance and Doorstep Selling Act § 9(4) lit. g) and SLOVENIA (ConsProtA art. 43a(1) no. 5) only public auctions are exempted.

14. The exception of contracts for the supply of foodstuffs by regular roundsmen has been implemented by all Member States, except for BELGIUM (on the implementation of this exception with regard to doorstep selling contracts see above under II.). FINLAND has also implemented the exemption for the supply of foodstuff by regular roundsmen, but has narrowed it slightly. If the supplier offers those goods and services by way of "cold calling", the provisions on prior information, the confirmation and the right of withdrawal all apply (ConsProtA art. 6(7), (2)). According to LITHUANIAN law, no reference to the supply by regular roundsmen is made (CC art. 6.366(3)). By contrast, some member states, such as the CZECH REPUBLIC, GREECE, SLOVAKIA and SLOVENIA, have widened the exemption and completely excluded these contracts from the scope of application of their transposition laws. Contrary to the Directive, ESTONIA has broadened the exemption by also excluding the provisions transposing art. 7(2) of the Directive (LOA § 53(3)). The IRISH transposition law states that Reg. 4, 5, 6 and 7(1) shall not apply to the contracts for the supply of foodstuff etc. supplied by regular roundsmen. Reg. 7(1) of the Irish Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation does not contain the obligation to execute the order within a maximum of 30 days. This is a wrong transposition – probably a drafting mistake – because this obligation is stated in Reg. 9(1) of Irish transposition law. Some Member States have different rules concerning the place of the supply of the goods. HUNGARIAN law only refers to the "foodstuff and contracts concerning the regular delivery of everyday consumer goods" (Distance Selling Act art. 1(3) lit f.). Also, the GREEK legislator did not explicitly lay down the consumer's residence or workplace as places that the food could be supplied to (ConsProtA art. 4(13)(γ)). According to the CYPRUS Distance Selling Act art. 4(2)(a), the scope has been widened to the supply of goods by regular roundsmen at all places other than the supplier's workplace.

15. Only four Member States, i.e. CYPRUS, PORTUGAL, ROMANIA, and the UNITED KINGDOM, have transposed art. 3(2) 2nd indent of Directive 97/7/EC (exemption of contracts for the provision of accommodation, transport, catering or leisure services) faithfully. Many other Member States have chosen different methods of transposing this exemption. For instance, the CZECH REPUBLIC, GREECE, LITHUANIA, SLOVAKIA and SLOVENIA have completely exempted the contracts regulated in Art. 3(2) 2nd indent of Directive 97/7/EC. As this provision allows only a partial exemption, such member states are in breach of EC law. This may also be the case with ESTONIA, which has broadened the exemption by also excluding the provisions transposing Art. 7(2) of Directive 97/7/EC (LOA § 53(3)). One core element of the

partial exemption of contracts for the provision of accommodation etc. is that the date of execution must be fixed at the time of the conclusion of the contract. AUSTRIA, BELGIUM, CYPRUS ("upon conclusion of the contract"), DENMARK, ESTONIA ("upon conclusion of the contract"), FINLAND, GERMANY, GREECE, IRELAND, ITALY, LUXEMBOURG, MALTA, the NETHERLANDS, PORTUGAL, SPAIN ("upon conclusion of the contract"), SWEDEN ("in the contract") and the UNITED KINGDOM have implemented this clause. Others, for example, the CZECH REPUBLIC, FRANCE, HUNGARY, LATVIA, LITHUANIA, POLAND, SLOVAKIA and SLOVENIA have extended the exemption to contracts where the date of execution is fixed after the conclusion of the contract.

16. Most Member States have transposed the exception to the right of withdrawal if performance of services has begun before the end of the seven working day period. This can be observed for AUSTRIA, BELGIUM, BULGARIA, CYPRUS, the CZECH REPUBLIC, DENMARK, ESTONIA, FRANCE, GERMANY, HUNGARY, IRELAND, ITALY, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, PORTUGAL, ROMANIA, SLOVAKIA, SPAIN and SWEDEN. However, GREECE, LITHUANIA and SLOVENIA have not transposed this exception. Some countries have implemented provisions differing from the Directive. FINLAND, LATVIA and the UNITED KINGDOM have supplemented this exemption with a provision which obliges the supplier to inform the consumer that he or she will not be able to withdraw from the contract if performance of the service has begun. In FINLAND, this information must be given in the confirmation of the information, while in LATVIA (ConsProtA art. 55(2)(a)) and the UNITED KINGDOM (Consumer Protection Reg. 2000 reg. 13(1)(a)), this is to happen prior to the conclusion of the contract. According to the BELGIAN ConsProtA art. 80(4) sent. 2, the consumer is granted a right of withdrawal if the supplier has not informed him or her of the absence of the right of withdrawal.

17. The exception to the right of withdrawal in the case of goods or services, the price of which is dependent on fluctuations in the financial market, has been transposed by the majority of Member States. Only in ESTONIA, GREECE and LITHUANIA is there no corresponding provision. It cannot be assessed how these legal systems organise the unravelling of such contracts. GERMANY and SLOVENIA have given some examples of goods and services which fall under this exception. The German CC § 312d(4) no. 6 lists, inter alia, tradable securities, foreign currency, derivatives or money market instruments. In LATVIA, the supplier has to inform the consumer about the absence of a right of withdrawal prior to the conclusion of the contract. FRANCE (ConsC art. L. 121-20-2 no. 2) and POLAND (ConsProtA art. 10(3) no. 3) have omitted the clause "which cannot be controlled by the supplier". HUNGARY has implemented a clause stating that goods or services are exempted where the price cannot be "controlled" by the supplier and BULGARIA uses the expression "beyond the control of the supplier". Such variations seem to be more a difference in the wording than in the substance. However, in Bulgaria this exception is made binding on the parties. The SPANISH ConsProtA art. 102(a) does not refer to services and consequently limits the exception to goods. In the case of services the position of the consumer is therefore better than foreseen in the Directive, as there is a right of withdrawal.

18. The exception to the right of withdrawal in the case of goods made to the consumer's specifications is part of most Member States' laws. Only ESTONIA, GREECE and LITHUANIA have not implemented any provisions transposing this exception. Several countries have not implemented all alternatives regulated in the Distance

Selling Directive. DANISH and SWEDISH law does not mention the alternative No. 1 (consumer's specification). However, in Denmark, the parties can agree that the supplier may initiate the production of the goods before the expiration of the withdrawal period, in which case, the right of withdrawal also expires at the date the production is initiated (Distance and Doorstep Selling Act art. 18(6)). FINLAND, LATVIA and SWEDEN have not transposed the alternative No. 2 (clearly personalised). The CZECH transposition law (CC art. 53(8) lit. c) does not refer to products which, by reason of their nature, cannot be returned (No. 3). LATVIAN, POLISH and SLOVAKIAN law does not mention the rapidly perishable criterion (No. 5). The Latvian Cabinet Reg. 207 art. 15(3) instead exempts products which can be "quickly utilised", which is somewhat different and, therefore, may be an infringement of the Directive. FINLAND (ConsProtA art. 6(16), (3)) has clarified alternative No. 1 by exempting "goods manufactured to the consumer's specifications so that they cannot be resold without incurring considerable loss or that they cannot be resold at all" and thereby perhaps slightly enhancing consumer protection. Some Member States have regulated additional criteria. The practical relevance of this exemption is illustrated by some case law of national courts. For instance, the GERMAN Federal Court of Justice stated that the consumer's right of withdrawal is not exempted if the product (in this case a laptop which has been constructed out of prefabricated standard units according to the consumer's wishes) can be disassembled with minor effort and without interference to its (the standard unit's) functional capability (judgment of 19 March 2003, VIII ZR 295/01, NJW 2003, 1665-1667). The court held that the exemption only covers products which are personalised in such a way that they can only be sold to other consumers with a significant reduction of price. In BELGIUM, the CA Brussels judged that plants, flowers, fruit trees and similar products – as a general rule – cannot be considered as products that age or deteriorate easily (judgment of 21 January 1999; *P. Bakker Hillegom v Ets. Gonthier*).

19. Most Member States have transposed the exception for audio or video recordings, or computer software, namely AUSTRIA, BELGIUM, BULGARIA, CYPRUS, DENMARK, FRANCE, GERMANY, HUNGARY, IRELAND, LITHUANIA, MALTA, the NETHERLANDS, ROMANIA, SLOVAKIA, SLOVENIA, SWEDEN and the UNITED KINGDOM. However, ESTONIA and GREECE have not incorporated this exemption into their laws. Some variation can be observed with regard to the term "which were unsealed by the consumer": LATVIA (Cabinet Reg. 207 art. 15(4): "the consumer opened the packaging") and POLAND (ConsProtA art. 10(3), (2): "the consumer has removed the original packaging") refer to the packaging, which at least comes close to the Directive. Also the CZECH transposition law (CC art. 53(7)(d): "if the consumer damages the original packing") may perhaps be interpreted in the same sense. In PORTUGAL, the consumer may not withdraw from the contract if he or she removes a certain kind of seal (Distance and Doorstep Selling Act art. 7(d): "*selo de garantia de inviolabilidade*"), which may just be seen as a clarification of the function of the seal referred to in the Directive. Some Member States have broadened the exemption. The LUXEMBOURG Distance Selling Act art. 5(4)(d), for example, also exempts software that has been downloaded by the consumer. This is more or less the same in SPAIN, where electronic files supplied via electronic means, able to be downloaded or reproduced immediately to be used permanently, are exempted from the withdrawal right (ConsProtA art. 102(c)).

20. Most Member States have transposed the exemption with respect to newspapers, periodicals and magazines. However, DENMARK, ESTONIA and GREECE have not transposed this exemption. Some Member States have implemented provisions

deviating from the Directive. In AUSTRIA, contracts for the supply of periodicals ("*Verträge über periodische Druckschriften*") are not exempted from the right of withdrawal (ConsProtA § 5f no. 5). FINLAND only excepts these products if they are not offered by way of cold calling. CYPRUS grants no right of withdrawal for the supply of newspapers and any form of periodicals. POLAND uses the term "the press" (ConsProtA art. 10(3), (6)). In PORTUGAL (Distance and Doorstep Selling Act art. 7(e)) and SWEDEN (Distance and Doorstep Selling Act art. 2(4) 4th indent), the legislator only exempted newspapers and magazines, but not periodicals.

21. The exception to the right of withdrawal with respect to gaming and lottery services has been implemented by most Member States. Only ESTONIA and GREECE refraining from doing so. Some variations of the wording can be observed, e.g. BULGARIA (games of hazard and lotteries), HUNGARY (exempts gaming agreements, which also includes the lottery), POLAND (games and betting), SLOVAKIA (lottery and other similar games), SLOVENIA (games of chance and lottery services) and SWEDEN (gaming or other lottery services). The UNITED KINGDOM (Consumer Protection Reg. 2000 reg. 13(1)(f)) adds betting to the services which are exempted. A clear difference can be stated for FRANCE, which only makes authorised lotteries exempt (ConsC art. L. 121-20-2 no. 6).

II.–5:202: Timeshare contracts

(1) A consumer who acquires a right to use immovable property under a timeshare contract with a business is entitled to withdraw from the contract.

(2) Where a consumer exercises the right of withdrawal under paragraph (1), the contract may require the consumer to reimburse those expenses which:

(a) have been incurred as a result of the conclusion of and withdrawal from the contract;
(b) correspond to legal formalities which must be completed before the end of the period referred to in II.–5:103 (Withdrawal period) paragraph (1);
(c) are reasonable and appropriate;
(d) are expressly mentioned in the contract; and
(e) are in conformity with any applicable rules on such expenses.

The consumer is not obliged to reimburse any expenses when exercising the right of withdrawal in the situation covered by paragraph (1) of II.–3:109 (Remedies for breach of information duties).

(3) The business must not demand or accept any advance payment by the consumer during the period in which the latter may exercise the right of withdrawal. The business is obliged to return any such payment received.

COMMENTS

A. Purpose and structure

The present Article, which grants consumers the right of withdrawal for timeshare contracts, is based on the provisions of the Timeshare Directive 94/47/EC, in particular Arts. 5 and 6 and Recitals 11 to 14. For timeshare contracts, the complex provisions of the contract create a structural imbalance between the parties. The cooling off period gives the purchaser the chance to understand better what the obligations and rights under the contract are (Recital 11 of the Timeshare Directive 94/47/EC). Timeshare contracts are, moreover, often concluded abroad and may be governed by foreign laws (Recital 11 of the Timeshare Directive 94/47/EC). Extra time may therefore be required to consult a local lawyer to understand the content of the contract. In addition, timeshare contracts are sometimes sold through aggressive sales practices. A cooling off period allows the purchaser to assess the merit of the contract without being subject to any external pressure. Finally, personal preferences during a holiday may vary from preferences in everyday life. A cooling off period allows consumers to reconsider their decision in the light of more usual conditions.

Paragraph (1) sets out the objective situation in which the consumer has the right of withdrawal. Paragraph (2) limits the costs of legal formalities that the consumer may be required to defray in case of withdrawal. This paragraph balances the need not to unduly hamper the conclusion of timeshare contracts with the need to ensure that the costs related to legal formalities imposed on the consumer do not deter her or his exercise of the right of withdrawal. Paragraph (3) intends to enhance the efficiency of the right of withdrawal. It prohibits the demand or acceptance of advance payments during the withdrawal period for these contracts. The prohibition protects the consumer against the risk of being deterred from exercising the right of withdrawal because of the uncertainty of whether these payments can be easily recovered.

B. Definition of timeshare contracts

The wording of paragraph (1) (a right which allows him or her to use immovable property under a timeshare contract) is deliberately chosen to cover a wide variety of situations. Thus this provision applies irrespective of the particular contractual construction chosen by the parties, be it the transfer of a real property right or any other right relating to the use of the timeshare property (cf. Art. 2, 1st indent Timeshare Directive 94/47/EC). Furthermore, the provision also applies to binding preliminary contracts.

However, for a future revision of these rules extending the right of withdrawal might have to be considered. According to the recent Proposal for a revision of the Timeshare Directive (COM (2007) 303) the definition of timeshare would no longer exclusively be linked to immovable property. Thus, contracts for accommodation in canal boats, caravans or cruise-ships would also be covered. In addition, the right of withdrawal would also be granted for timeshare-like products, e.g. discount holiday clubs (so-called "long term holiday products", cf. Art. 2 (1) (b) of the Proposal). Yet, for the time being, the present Article reflects the current acquis communautaire as stated in the existing Timeshare Directive 94/47/EC. Also the majority of Member States did not go beyond this scope.

C. Length and beginning of withdrawal period

The withdrawal period granted in these rules is fourteen days. Under Art. 5(1) 1st indent Timeshare Directive 94/47/EC the consumer has ten days from the signing of the contract to exercise the right of withdrawal. In contrast to this, the length of the withdrawal period for timeshare contracts has been harmonised. Thus, the general rule of II.–5:103 (Withdrawal period) now also governs timeshare contracts to which, therefore, the uniform regular period applies.

One may, however, consider an even longer period to allow withdrawal from timeshare contracts. A period of fourteen days will not always ensure that consumers can reflect on their decision once at home. In this period the consumer may still be on holiday or abroad. A period of one or several months may be more adequate. In addition, fourteen days may not be sufficient for a consumer to obtain the advice that is needed to make a well-considered decision. Finally, one may want to consider if the withdrawal period should run from the day of the first inspection of the property, or possibility to use the property (similar to distance selling cases, cf. Art. II.–5:103(1) sent. 2). This would better ensure that the consumer is fully aware of the exact scope and object of the timeshare contract. However, the acquis communautaire presently does not provide sufficient basis for such a prolongation of the withdrawal period. Also the laws of the Member States currently do not provide a longer withdrawal period. In addition, the approach followed by these rules is in line with the Proposal for the revision of the Timeshare Directive, which also provides for a fourteen day withdrawal period (cf. Art. 5(1) of the Draft, COM (2007) 303).

The withdrawal period starts in accordance with the general rule in II.–5:103 (Withdrawal period). Therefore the date of the conclusion of the contract and the notice of the right of withdrawal are decisive. In general, the period starts after the conclusion of the contract and after the consumer has received notice of the right of withdrawal in textual form on a durable medium in accordance with II.–5:104 (Adequate information on the right to withdraw). This approach brings the computation of the withdrawal period for timeshare contracts in line with other withdrawal rights in these rules and abandons the deviating solution provided for in Art.

5(1) 1st indent Timeshare Directive 94/47/EC according to which the withdrawal period starts from the signing of the contract or the signing of a binding preliminary contract.

When determining the beginning of the withdrawal period, consideration must also be given to the fulfilment of the pre-contractual information duty under II.–3:103 (Duty to provide information when concluding a contract with a consumer who is at a particular disadvantage). According to II.–3:109 (Remedies for breach of information duties) paragraph (1) the withdrawal period does not commence until the information required under II.–3:103 has been provided. However, even in such a case the right of withdrawal lapses at the latest after one year from the time of the conclusion of the contract. The present Article thus abandons the complicated rules introduced by Art. 5(1) 2nd and 3rd indent of the Timeshare Directive 94/47/EC that prolong the withdrawal period in cases where the required information was omitted. The information duty under II.–3:103 and the corresponding remedy for its violation provided in II.–3:109 paragraph (1), offer a satisfactory and consistent solution on the point. Moreover, the consumer is better protected by these general rules as they prolong the withdrawal period to up to one year. According to Art. 5(1) 2nd and 3rd Timeshare Directive 94/47/EC the withdrawal period is prolonged only up to a maximum of three months and ten days.

D. Reimbursement of expenses

Paragraph (2) rephrases Art. 5(3) and (4) of the Timeshare Directive 94/47/EC. The expenses that the consumer may be required to defray include the costs of notarisation and attestation of the contract and the duties and taxes charged for it. Such expenses must be expressly mentioned in the contract. Consequently, the same formal requirements that apply to timeshare contracts in general also apply to the information about expenses. The requirements laid down in paragraph (2)(a) to (2)(e) are therefore cumulative and not alternative. Art. 5(4) of the Timeshare Directive 94/47/EC provides that the purchaser may not be required to defray certain expenses when the right of withdrawal is exercised during the prolonged period for withdrawal. The last sentence of paragraph (2) reaches the same outcome.

> *Illustration 1*
> A consumer concludes a timeshare contract but then withdraws from it. The other party is entitled to the costs of notarisation and attestation of the contract, as well as to the pertinent duties and taxes, provided that the expenses are reasonable and appropriate (paragraph (2)(c)), if they are expressly mentioned in the contract (paragraph (2)(d)) and conform to any applicable rules on such expenses (paragraph (2)(e)).

E. Prohibition of advance payments

Paragraph (3), which is based on Art. 6 Timeshare Directive 94/47/EC, prohibits the demand or acceptance of any advance payment by the consumer while the withdrawal period is running. This prohibition enhances the effectiveness of the right of withdrawal. With regard to Art. 6 of the Timeshare Directive 94/47/EC, it is debated whether the prohibition on advance payments should only apply during the initial ten day withdrawal period, or also during the prolonged withdrawal period. Since the withdrawal period is prolonged because the business failed to provide certain information, it is preferable to hold that such prohibition should be extended accordingly. Thus, the prohibition established by paragraph (3) of the present Article should be interpreted accordingly. This interpretation is in line with the Proposal for a revision of the Timeshare Directive (COM (2007) 303), which contains a clarification on this

issue. In addition, the prohibition of advance "payments" also prohibits the provision of guarantees, reservation of money on a credit card, explicit acknowledgement of debt or any other consideration to the business (cf. Draft Art. 6(1) from the Proposal, COM (2007) 303).

Illustration 2
A consumer signs a timeshare contract. The price is only due when the withdrawal period is over. The deposit by the consumer of a sum as a guarantee for the payment of the deferred price is also prohibited under paragraph (3) (cf. Audiencia Provincial Las Palmas (Spain) 22 November 2003, 682/2003 Benedicto and Margarita v Palm Oasis Maspalomas S.L.).

Illustration 3
A consumer signs a timeshare contract but does not receive the information required. This prolongs the withdrawal period according to II.–3:109 (Remedies for breach of information duties) paragraph (1). The prohibition on demanding or accepting advance payments under paragraph (3) of the present Article also applies during the prolonged withdrawal period. (cf. Audiencia Provincial Cantabria (Spain) 24 May 2004, 196/2004 - *Sergio and Carmela v. "Free Enterprise S. L.*).

Illustration 4
The prohibition on demanding or accepting payments is also infringed when a consumer is required to pay advance money in trust to a lawyer during the withdrawal period (cf. Fővárosi Ítélőtábla (Court of Appeal, Hungary), 1 December 2004, 2. Kf.27.379/2003/3, Holiday Club Hungary Kft, Proinvest 2001 Kft vs. Wirtschaftswettbewerbsamt (GVH).

Illustration 5
The prohibition on demanding or accepting payments is also infringed when the business accepts a cheque during the withdrawal period, even if it did not explicitly request it and even if it was not cashed during the withdrawal period (cf. Cour de Cassation (French Supreme Court), 1re chamber, 22 November 1994, 1995, Somm.Comm., 311).

The second sentence of paragraph (3) is justified (a) because a business might breach the prohibition (when it becomes desirable to regulate the private law consequences of such a breach) and (b) because a business may receive money (e.g. cash sent by post or deposited in the letter-box when the office is closed) without having demanded it or actively accepted it. This provision is, of course, without prejudice to any criminal law or other non-private-law sanctions which may be imposed for a breach of the prohibition.

NOTES

I. Length and beginning of withdrawal period

1. The Timeshare Directive provides in art. 5(1) 1st indent for a period of withdrawal of 10 calendar days after the signature of the contract by both parties or the signature of a binding preliminary contract. If the last day of the period is a Sunday or a holiday, the period is prolonged to the next working day. The Commission's Proposal for a new

timeshare directive (COM(2007) 303 final) extends the withdrawal period to fourteen days (art. 5(1)).

2. The 10 calendar days period has been adopted by DENMARK, ESTONIA, FINLAND, FRANCE, GREECE, IRELAND, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, ROMANIA, SLOVAKIA, SPAIN and SWEDEN. Many member states have used the minimum clause to prolong the withdrawal period. The period lasts for 10 working days in BULGARIA, ITALY and PORTUGAL, 14 calendar days in AUSTRIA, LATVIA and the UNITED KINGDOM, two weeks (in some cases one month) in GERMANY, 15 calendar days in CYPRUS, the CZECH REPUBLIC, HUNGARY and SLOVENIA and even 15 working days in BELGIUM.

3. In BULGARIA, CYPRUS, FINLAND, IRELAND, LUXEMBOURG, MALTA, ROMANIA and SPAIN (Finland, Spain and LITHUANIA not referring to the preliminary contracts), the beginning of the withdrawal period is regulated as in the Directive. Alternatively in Bulgarian law, the period starts with the end of the precontract. Many member states do not refer to the signing of the contract but to the conclusion of the contract. They are: the CZECH REPUBLIC, DENMARK, ITALY, LATVIA, LITHUANIA, PORTUGAL, SLOVAKIA, SLOVENIA and the UNITED KINGDOM. In BELGIUM and SWEDEN, the period begins the day after the signature of the contract by both parties. In FRENCH law, the 10 day period starts when the purchaser sends the accepted offer to the professional. In addition to that, France attempts to improve the protection of the consumer by requiring that the offer should be maintained for at least seven days (ConsC art. L. 121-63). However, this provision just regulates the period during which the vendor is bound by the offer (Cf. *Calais-Auloy, Steinmetz,* Droit de la Consommantion, no. 483) The consumer is not prevented from accepting the offer before the seven day period expires. In AUSTRIA, GERMANY, GREECE, ESTONIA, HUNGARY, the NETHERLANDS and POLAND, the withdrawal period starts running from the day when the contract document is delivered to the purchaser. In Germany, the period does not start running before the vendor additionally has informed the purchaser on the right of withdrawal and provided some further information (cf. BGB-InfoV § 2). These provisions improve the position of the consumer and are therefore in accordance with the Directive.

4. Only some member states have seen the necessity to include an explicit provision on the signature of a binding preliminary contract in their national law, e.g. BULGARIA, CYPRUS, GREECE, HUNGARY, IRELAND, LUXEMBOURG, MALTA, ROMANIA and SLOVENIA.

II. Reimbursement of expenses

5. Art. 5(3) and (4) of Directive 94/47/EC state what costs the consumer who exercises the right to withdraw has to bear. According to art. 5(3) of Directive 94/47/EC, the purchaser may, where he or she exercises the right of withdrawal provided for in the 1st indent of paragraph (1), be required to defray, where appropriate, only those expenses which, in accordance with national law, are incurred as a result of the conclusion of and withdrawal from the contract and which correspond to legal formalities which must be completed before the end of the period referred to in the 1st indent of art. 5(1) of Directive 94/47/EC (the 10 calendar day period). Such expenses must be expressly mentioned in the contract. According to art. 5(4) of Directive 94/47/EC, the purchaser is not required to make any defrayal where he or she exercises the right of cancellation provided for in the 2nd indent of paragraph 1 (the case of missing information).

6. Member States like BULGARIA, the CZECH REPUBLIC, GREECE, LUXEMBOURG, ROMANIA and SWEDEN have transposed art. 5(3) of Directive 94/47/EC by using nearly exactly the Directive's wording. Furthermore, GREECE has stated that the costs must not exceed 3 % of the purchase price (Timeshare Act art. 4(3)). A remarkable number of Member States has increased the consumer protection level by ruling that no costs and damages can be charged to the consumer, e.g. BELGIUM (Timeshare Act art. 9(2) sent. 3), CYPRUS (Timeshare Act art. 10), DENMARK (Timeshare Act art. 10), the NETHERLANDS (CC art. 48c(3)), PORTUGAL (Timeshare Act art. 16(1)), SPAIN (Timeshare Act art. 10(1) sent. 3) and the UNITED KINGDOM (Timeshare Act 1992 s. 5(8). The ITALIAN (ConsC art. 73(1)), HUNGARIAN (Timeshare Act art. 10(2)), POLISH (Timeshare Act art. 7(2)) and SLOVENIAN (ConsProtA § 60c(3)) laws allow only the costs of entering into the contract to be imposed on the purchaser, but not the costs of withdrawal.

7. Contrary to these countries, in SLOVAKIA (CC § 59(3) sent. 1), the vendor can only request reimbursement of "demonstrably expended unavoidable costs connected with withdrawal from the contract". Some Member States have specified which costs the purchaser has to defray, e.g. AUSTRIA (Timeshare Act § 6(4): the costs of a notarisation or necessary translation of the contract and the duties and taxes that result from agreeing on the contract, if the purchaser has been informed of this possibility in the contract), ESTONIA (LOA § 383(5): the costs for notarisation and attestation of the contract), FINLAND (ConsProtA art. 10(14): costs that must be paid before the end of the cooling-off period and because of formal requirements "or are otherwise of a public nature"), GERMANY (CC § 485(5) sent. 1 and 2: the costs for a necessary notarisation of the contract) and HUNGARY (Timeshare Act art. 10(2): costs for preparation and translation of the contract). In Austria, Germany, Hungary and SLOVENIA (ConsProtA art. 60c(3)), the law explicitly states that the vendor cannot demand rent for the use of the immovable property.

8. In IRELAND and MALTA, this provision has not been transposed. In Malta, the intention was to maintain the more favourable rights the purchaser has under the general rules.

9. Art. 5(4) of Directive 94/47/EC, which makes an exception from the purchaser's obligation to reimburse expenses, has been transposed in a substantially equivalent way by the following Member States: AUSTRIA, BULGARIA, the CZECH REPUBLIC, GREECE, IRELAND, ITALY, LUXEMBOURG, POLAND, ROMANIA, SLOVAKIA, SPAIN and SWEDEN. In GERMAN (CC § 485(5) sent. 3) and HUNGARIAN (Timeshare Act art. 10(3)) law, it is additionally stated that the consumer can claim damages from the vendor. In BELGIUM, CYPRUS, DENMARK, LITHUANIA, MALTA and the NETHERLANDS, the general rule on costs for every case of withdrawal is applicable (see above). In PORTUGAL (Timeshare Act art. 16(7)) and the UNITED KINGDOM (Timeshare Act 1992 s. 5(8)(a)), the Directive's provision is transposed indirectly, as all sums paid by the consumer must be refunded by the vendor. Thus, in consequence, no costs are left with the consumer. In SLOVENIA, the provision is not explicitly transposed, but can be deducted from the general provision (ConsProtA § 60c(3), (2)). According to the LATVIAN regulation, the consumer need not pay any costs except those for returning the goods to the vendor (ConsProtA art. 12 (1) and (4)). In FINLAND, the provision, which also transposes Art. 5(3) of the Directive, applies. According to ConsProtA art. 10(14), the costs which must be paid before the end of the cooling-off period are imposed on the consumer. In FRANCE, the provision is not specifically transposed, but as the contract is void anyway (cf. ConsC art. L. 121-76 and L. 121-61), the result should be the same.

III. Prohibition of advance payments

10. According to art. 6 of Directive 94/47/EC, the Member States must make provision in their legislation to prohibit any advance payments by a purchaser before the end of the period during which he or she may exercise the right of withdrawal. It is debated whether the prohibition on advance payments should only apply during the initial ten day withdrawal period, or also during the prolonged withdrawal period (three months plus 10 days period provided for in art. 5(1) 2nd and 3rd of Directive 94/47/EC). Since the withdrawal period is prolonged because the business failed to provide certain information, it is preferable to hold that such prohibition should be extended accordingly. This interpretation is in line with the Proposal for a revision of the Timeshare Directive (COM(2007) 303 final), which contains a clarification on this issue. In addition, the prohibition of advance "payments" also prohibits the provision of guarantees, reservation of money on a credit card, explicit acknowledgement of debt or any other consideration to the business (cf. Draft Art. 6(1)). It goes without saying that, if any advance payments have been made by the consumer, the vendor has to return them. The Timeshare Directive does not contain any provisions dealing with this matter but states in its art. 10 that the Member States shall enact provisions for the "consequences of non-compliance with this Directive."

11. All Member States have transposed the prohibition of advance payments provided in Art. 6 of Directive 94/47/EC. In BELGIUM (Timeshare Act art. 9(3)), FINLAND, FRANCE (ConsC art. L. 121-66) and PORTUGAL (Timeshare Act arts. 53 and 14), the prohibition only applies to the regular period of withdrawal (which is 15 days in BELGIUM and 10 days in the other countries mentioned), but not to the longer periods (e.g. three months plus X days) in the case of non-compliance with information duties. According to the wording of the ESTONIAN regulation (LOA § 385), payments must not be received within ten days after the submission of the signed contract to the consumer. In SLOVENIAN law, any contract clause stipulating that the consumer must pay a partial amount of the price or costs before the expiry of the cancellation period (usually 15 days) is void (CC art. 60c(3) sent. 1, and art. 45d). In SWEDEN, advance payments are prohibited during the normal period of withdrawal and in the time until a surety is provided in the case of property still under construction (Timeshare Act art. 13(1)).

12. In CYPRUS (Timeshare Act art. 11), the CZECH REPUBLIC (CC art. 61), DENMARK (Timeshare Act art. 12), GREECE (Timeshare Act art. 5), HUNGARY (Timeshare Act art. 11(1)), IRELAND (European Communities Reg. 1997 and 2000 reg. 10(2)), ITALY (ConsC art. 74), MALTA (Timeshare Act art. 10(1)), the NETHERLANDS (CC art. 7:48d), SLOVAKIA (CC § 57(b)), SPAIN (Timeshare Act art. 11) and the UNITED KINGDOM (Timeshare Act 1992 s. 5B(1)), payments are prohibited for the duration of the normal and of the prolonged period of withdrawal in the case of missing information, which can be up to three months and 10 days.

13. In a number of Member States the transposition laws just read "withdrawal period", not specifying whether the normal or the prolonged period is meant. This applies to AUSTRIA (Timeshare Act § 7(1)), BULGARIA (ConsProtA art. 156), LUXEMBOURG (Timeshare Act art. 10(6)), LATVIA (ConsProtA art. 11(3)), POLAND (Timeshare Act art. 8(1)), and SLOVENIA (ConsProtA § 60č). It is assumed that this has to be interpreted in line with the Directive and therefore means for the full duration of the withdrawal period, even if prolonged. The same applies to ROMANIA (Timeshare Act art. 7) where clauses which require advance payments by the purchaser before the end of the withdrawal period are void.

14. In LITHUANIA (ConsProtA art. 22(5) sent. 1) and GERMANY (CC § 486), the prohibition also applies within the whole period of withdrawal, which can, in the case of missing information, be up to 4 months in Lithuania and up to 6 months in Germany. In GREECE, the prohibition of advance payments does not apply to the costs of the contract, the costs of withdrawal and the cost of acts which have to take place within the cooling-off period of ten days (which may be a maximum 3 % of the agreed price). In SPAIN, the parties can make appropriate agreements to guarantee the payment. These must not be contrary to the prohibition of advance payments and must not mean a direct or indirect compensation for the vendor in case of withdrawal (Timeshare Act art. 11).

15. With regard to the refund of sums paid, many Member States rely on their general rules (e.g. BULGARIA, GERMANY, where the refund has to be made immediately). Others have specific rules, for instance, LITHUANIA (refund within a period of ten days) or SLOVENIA (ConsProtA § 60c(3) sent. 1, § 43d). In some Member States, the obligation to return the amount, which has already been paid, is aggravated. In AUSTRIA, the vendor is obliged to pay interest on the sum amounting to 6 percentage points above the base rate, which means a total of about 8 % at the moment (Timeshare Act § 7(1)). In HUNGARY, the vendor has to pay additional default interest, too (Timeshare Act art. 11(2)). The interest on the sums starts with the day of their payment. In SPAIN, the vendor is obliged to return double the amount of the sum which the consumer has paid in advance (Timeshare Act art. 11(2)). In addition, the consumer is given a period of three months within which he or she can choose to terminate the relationship or claim performance.

16. Some Member States have provided for fines if the vendor infringes the prohibition on demanding and receiving any advanced payment. In SWEDEN (Timeshare Act art. 13(2)), a person is liable to a fine in case of a deliberate infringement of the prohibition. In AUSTRIA, the obligation to pay the interest described above is combined with a fine (for an administrative offence) of up to € 7 260 (Timeshare Act § 13(2)). In FRANCE, ConsC art. L. 121-71 states that if the seller asks for or receives any payment before the 10 day withdrawal period ends, the seller will have to pay a fine of € 30 000. GREECE provides for fines between € 1 467 and € 58 694 and other public law sanctions. In PORTUGAL, the fine is between ca. € 10 000 and ca. € 100 000 (Timeshare Act art. 54(1), art. 55). Under ITALIAN law, a penalty between € 500 and € 3 000 is foreseen. In case of repeated infringements an additional administrative penalty or a suspension of pursuit of business between 15 days and three months can be imposed (ConsC art. 81). In the UNITED KINGDOM (Timeshare Act 1992 s. 5B(2)), the infringement constitutes a criminal offence. It is the same in IRELAND (European of the Communities Reg. 1997 and 2000 reg. 16(1), (2)), where the fine amounts to € 1 904,61 (1500 pounds). In MALTA, too, any violation of the prohibition an offence (Timeshare Act art. 10(1) and (2)). Similar provisions can be found in the laws of LUXEMBOURG (Timeshare Act art. 12), BELGIUM (Timeshare Act art. 17), and CYPRUS (Timeshare Act art. 18(2)).

CHAPTER 6: REPRESENTATION

II.–6:101: Scope

(1) This Chapter applies to the external relationships created by acts of representation – that is to say, the relationships between:

(a) the principal and the third party; and
(b) the representative and the third party.

(2) It applies also to situations where a person purports to be a representative without actually being a representative.

(3) It does not apply to the internal relationship between the representative and the principal.

COMMENTS

A. General

This chapter deals mainly with the effect of an act done by a representative, or a person purporting to be a representative, on the legal position of the principal or purported principal in relation to the third party. However, some Articles deal with the effect of an act of representation or purported representation on the legal position of the representative or purported representative in relation to a third party.

In general the Articles of this Chapter reflect the principles that are to be found in the large majority of laws of the Member States, even if the ways of expressing these principles differ from law to law. Where the Chapter adopts an approach that is not known in all the laws (for example, some do not apply the same rules to representation where the authority is granted by a contract or other juridical act and where it is given by law (see II.–6:103 (Authorisation)), this will be noted.

B. Restrictions on scope

The general restrictions on the intended scope of the model rules apply to this Chapter. So the rules on the authority of representatives in this Chapter are not intended to be used, or used without modification or supplementation, in relation to (1) representatives appointed by public or judicial authorities to perform public law functions (2) those, such as parents, tutors or guardians, acting as the legal representatives of children or of adults with incapacity (3) executors of deceased persons. (See I.–1:101 (Intended field of application) paragraph (2)). Another important restriction in that paragraph relates to “the creation, capacity, internal organisation, regulation or dissolution of companies and other bodies corporate or unincorporate”. It follows from this that the authority of directors and other company officers in the internal affairs of a company are not intended to be covered by the present Chapter. However, the authority of representatives of a company in dealings with the outside world is intended to be covered and it is important that it should be covered because this is one of the most important practical applications of the rules on the authority of representatives. Companies can engage in juridical acts only through representatives.

C. Internal relationship not covered

The chapter does not govern the internal relationship between the principal and the representative. That is governed by later Books.

D. Application of general rules on contracts and other juridical acts

The Chapter does not deal with the way in which a principal may grant authority. That will be by a contract or unilateral juridical act, very often the latter. The general rules on contracts and other juridical acts apply, including the rules on formation, interpretation and grounds of invalidity. The general rules are also relevant in relation to contracts concluded, or acts done, by the representative on behalf of the principal.

NOTES

I. Internal and external relations not clearly distinguished

1. Following the Roman tradition of mandate, the older European codifications (FRANCE, BELGIUM and LUXEMBOURG: CCs arts. 1984-2010; See on Belgium: *Wéry*, Le mandat, no. 88; *Tilleman*, Lastgeving, 1997; SPAIN: CC arts. 1709-1739; AUSTRIA: CC §§ 1002-1034) do not distinguish between the internal relationship between representative and principal on the one hand and the external relationship between principal and third party on the other hand. This separation has, however, been developed in these countries by legal writers.

2. Under ENGLISH and IRISH LAW, treatments of the law of agency cover the relations both between principal and third party and between principal and agent. This is also so for SCOTTISH law see *SME Reissue*, 'Agency and Mandate' (*Macgregor*).

II. Internal and external relations distinguished

3. By contrast, several Civil Codes or special legislation enacted since the start of the 20th century do make a distinction between the external and the internal relationship. The rules on representation govern the relationship between principal and third party whereas the internal relationship between principal and representative is regulated by contract law in general. ITALY, for example, distinguishes expressly between mandate as a type of specific contract (CC arts. 1703-1730) and representation as a category of the general law of obligations (CC arts. 1387-1400). Similar distinctions are made by other Codes (GERMANY: CC §§ 164-181 [representation], 662-676 [mandate]; ESTONIA: GPCCA §§ 115-131 [representation], LOA §§ 619-634 [mandate]; GREECE: CC arts. 211-235 [representation], 713-729 [mandate]; THE NETHERLANDS: CC arts. 3:60 - 3:67 [representation], 7:400-7:427 [mandate]; PORTUGAL: CC arts. 258-269 [representation], 1157-1184 [mandate]); POLAND CC: arts. 95-109[9] [representation], 734-751 [mandate]; SLOVENIA: LOA §§ 69-81 [representation], 766-787 [mandate]; BULGARIAN LOA arts. 36-43 [representation] and arts. 280-292 [mandate]; and the HUNGARIAN CC §§ 219-225 [representation], CC §§ 474-483 [mandate]. The NORDIC Contract Acts of DENMARK, FINLAND and SWEDEN of 1915-1917 deal in their chapters 2 only with the external relation between principal and third party. Italy (CC arts. 1704-1705) and PORTUGAL (CC arts. 1178, 1180) distinguish between the mandates with and without power of representation. The CZECH CC § 23 provides that representation arises on the basis of an agreement on authorisation, which clearly indicates the distinction between the representation and the mandate (further see Supreme Court Odon 28/95). Most other

countries also regard direct representation as a general category of private law or at least of patrimonial law. In SLOVAKIA direct representation is regulated in CC §§ 22-33 as an external relationship. The internal relationship is regulated by the rules on the contract of mandate (CC § 724-736, Ccom §§ 566-576).

III. Representatives with limited authority

4. A representative normally has the power to bind the principal to a contract with the third party, but there are also classes of representatives whose authority is often more limited. For example *Handelsvertreter* often have authority only to solicit offers, and not to sell.

IV. Convention on Agency in International Sale of Goods

5. The scope of the Unidroit Convention on Agency in the International Sale of Goods, concluded in Geneva on 17 February 1983 (cited here: Geneva Convention on Agency), is confined to the external relationship between the principal and the representative on the one hand and the third party on the other (art. 1(3)). The Convention has, however, not (yet) entered into force; it has been signed and ratified by three Member States of the European Union (France, Italy, and the Netherlands).

V. Authority based on contract and based on law

6. In some jurisdictions the rules on representation only apply to authority based upon contract (DENMARK, FINLAND and SWEDEN: Contract Acts §§ 10-27). Similarly the Geneva Convention on Agency is not applicable in a number of cases where the agency arises from statutory or judicial authorisation (art. 3(1)(d)). In other jurisdictions a statutory power of representation is governed by the same rules as the authority of a representative conferred by contract (e.g. GERMANY: CC § 164; GREECE: CC art. 211; ITALY: CC art. 1387; DUTCH: CC arts. 3:78-3:79; also in SLOVAKIA: CC §§ 22-33; ESTONIA: GPCCA § 117(2); BULGARIA: LOA art. 36; and SLOVENIA: LOA §§ 69-73. In POLISH law there is a presumption that a person active on premises of an enterprise whose purpose is to serve the public is authorised to perform such legal transactions as are usually concluded with persons using the enterprise's services (CC art. 97).

7. In FRANCE, the rules governing representation vary according to the sources of the representation power and especially according to the fact that the representation is perfect (the representative is "transparent") or imperfect (the representative acting on behalf of the principal hides that fact from the third party).

8. In AUSTRIA authority is normally granted by a juridical act. However, there are situations where the existence of authority is derived from a certain situation which was created earlier by the principal, e.g. in the case of a shop-assistant who is assumed to have the necessary powers to conclude contracts for the principal if that is normally done in that type of business (see CC §§ 1017 ff and *Koziol and Welser*, Bürgerliches Recht I[13], 205 et seq.).

II.–6:102: Definitions

(1) A "representative" is a person who has authority to affect directly the legal position of another person, the principal, in relation to a third party by acting on behalf of the principal.

(2) The "authority" of a representative is the power to affect the principal's legal position.

(3) The "authorisation" of the representative is the granting or maintaining of the authority.

(4) "Acting without authority" includes acting beyond the scope of the authority granted.

(5) A "third party", in this Chapter, includes the representative who, when acting for the principal, also acts in a personal capacity as the other party to the transaction.

COMMENTS

The term "representative" is used rather than "agent" in order to focus more sharply on the situation where one person represents the other in legal transactions or the doing of juridical acts. No term is ideal because ordinary language is rather loose. It is common for the word "agent" to be used of people who have no authority to affect the principal's legal position. A detective agent, for example, might be employed to make enquiries about something or locate a missing person but might have no power to conclude contracts or do other juridical acts on behalf of the principal. An estate agent might be authorised to search for a suitable property but might have no authority to make an offer for it on behalf of the principal. It is true that the word "representative" is also often used in ordinary language to refer to those who speak for others but do not have power to affect their legal relations. However, "representative" seems closer to the desired meaning than "agent". The important point is that the term used has to be defined so that it is clear what it means in the present context. This is the purpose of paragraph (1).

So far as the definition is concerned a choice has to be made between defining a "representative" as a person who actually is authorised to affect the legal relations of another person (the principal) and defining a "representative" as a person who is or purports to be so authorised. The first alternative looks at the position from the point of view of the principal: the second more from the point of view of the third party. Either definition can be made to work but the choice affects the drafting of subsequent Articles. One slight advantage of including the person who purports to be authorised is that this makes it easier to talk later of representatives acting without authority. On the other hand using the word "representative" to cover a person who does not have authority would have the consequence that "authorised representative" would frequently have to be used elsewhere in the text if the intention was to cover only those who could directly affect the principal's legal position. This latter consideration seems more important than a slight drafting convenience in the present Chapter. So "representative" is defined here as a person who has authority to affect the legal position of another person (the principal) in relation to a third party. II.–6:103 (Authorisation) makes it clear that the authority need not be derived from an express or tacit grant of authority by the principal. It may also be conferred by law.

The definition of "representative" is functional and applies whatever name is given to the representative.

The words “affect directly the legal position of the principal” are used rather than some shorter expression such as “bind the principal” because the word “bind” might be thought to refer only to the process of creating an obligation for the principal. The representative’s acts may, however, acquire a right for the principal or liberate the principal from an obligation or simply fulfil a requirement which the principal has to fulfil before taking some other legal step. The representative’s act may be, for example, the giving or receipt on behalf of the principal of a notice which has a legal effect. The general effect of representation is that the act of the representative is attributed to the principal as if done by the principal and therefore affects the principal’s legal position just as an act by the principal in person would have done. The word “directly” is included so as to exclude agents acting under mandates for indirect representation – such as commission agents employed to conclude transactions in their own name but with the expectation that the principal will take them over. Such agents have no authority to bind the principal directly but may in certain circumstances affect the principal’s legal position indirectly.

Paragraphs (2) and (3) deal with the distinction between the “authority” of the representative (that is to say, the power to affect the principal’s legal position by means of a juridical act) and the “authorisation” of the representative (that is to say, the granting of the authority or the process by which the representative obtains and continues to have authority).

Paragraph (4) is probably not necessary because in relation to any particular juridical act a person acting as a representative will either have authority to do it or will not. One situation where the person will not have authority is where the act is beyond the scope of the authority granted by the principal or the law. However, the paragraph may help to remove any doubts or hesitations on this point.

Paragraph (5) is necessary because there are occasions when a representative acting for the principal contracts with himself or herself acting in a personal capacity and there is a need for rules to cover that situation. There may also be cases where the representative, acting for the principal, concludes a contract with himself or herself acting as representative for another principal. However, no special provision is needed for this second type of case because the second principal is already in law the third party.

II.–6:103: Authorisation

(1) The authority of a representative may be granted by the principal or by the law.

(2) The principal's authorisation may be express or implied.

(3) If a person causes a third party reasonably and in good faith to believe that the person has authorised a representative to perform certain acts, the person is treated as a principal who has so authorised the apparent representative.

COMMENTS

A. How representative can obtain authority

This Article sets out the ways in which a representative may obtain authority. Essentially authority may be derived from the principal or from the law.

B. Express or implied grant of authority by principal

A representative's authority may be granted by the principal expressly or impliedly.

In giving express authority to the representative, no particular form needs to be observed. It is important that this should be the general rule because in ordinary life there are many informal situations where, for example, one private individual asks another to buy something for him or her or to conclude on his or her behalf some service contract such as one for the dry cleaning of clothes or the development of photographs. In more formal situations, however, a written grant of authority will almost invariably be regarded as essential for the protection of all the parties involved. Frequently, but not necessarily, the authorisation of the representative will be communicated by the principal to others.

Express authority may be granted by using, or making reference to, a standard form listing the powers of representative of a certain type. The use of such standard forms has many advantages for all the parties involved. The Conférence des Notariats de l'Union Européenne (CNUE) has published a collection of such standard forms for different situations and plans to publish a new collection.

In many situations there is no express grant of authority but the principal intends the representative to have authority and impliedly grants it, often by placing an employee in a position where the granting of authority must be implied from the circumstances. This way of granting authority plays an important role in practice.

> *Illustration*
> A store which employs a salesperson in its sales department impliedly authorises that person to transact any business relating to the merchandise offered for sale and to bind the shop by any such transaction.

An implied authority may well be subject to express limitations by the principal; such express limitations may even indicate the authority which is otherwise implied.

Usages and practices are often very important in deciding whether a principal has impliedly granted authority to a representative. The appointment of a person as an agent of a certain

type may by usage, or by practices established between the parties, confer on that agent authority to act as the principal's representative in relation to certain types of legal transaction.

C. Authority granted by law

The representative may derive authority from a rule of law. For example, directors of a company may have authority by law to bind the company or otherwise affect its legal relations. Partners may have a similar authority to act as representatives of the partnership. National laws frequently grant powers of representation to persons in certain positions or situations. Some of the rules of this Chapter can themselves be regarded as conferring authority even if they do not always do so in so many words. For example, paragraph (3) of this Article in effect confers authority based on the appearance of things. The Article on ratification by the principal in effect confers authority retrospectively once ratification occurs. The Article on the effect of termination of authorisation confers authority by law to do certain things even after the principal has recalled the representative's authorisation.

It is important that the rules of this Chapter should apply to representatives who are granted their authority by a rule of law (provided the situations are within the intended scope of the model rules). In these cases the law (e.g. a Company Law) often merely deals with the grant of authority for the legal representatives of the company, but impliedly leaves the consequences of the exercise of the authority to the general rules on representation. This gap can and should be filled by the general rules of this Chapter on representation except in so far as the respective law contains specific restrictions or other qualifications.

D. "Apparent" authority

A representative's authority is not necessarily based on statements or acts by which the principal intended to grant authority. Even without the principal's express or implied intention, a representative's authority may come into being by law if the principal has induced a third party reasonably and in good faith to believe that the representative has been granted authority to represent the principal. This type of authority is called, perhaps slightly misleadingly, "apparent" authority because it is authority based on the appearance of things.

A representative who has this type of authority will have power to bind the principal as much as if the principal had expressly granted the representative authority. This rule is designed to protect the third party who has relied, reasonably and in good faith, upon the impression that the principal had in fact granted authority.

On the other hand, the possibly countervailing interest of the principal not to be bound by the representative's act also deserves to be taken into account. Paragraph (3) balances these two interests by requiring that the person who is treated as a principal must have caused the third party reasonably and in good faith to believe that the person had granted the representative authority to perform the relevant acts.

A specific situation in which an apparent authority may arise is the case where authorisation is recalled by the principal but this is not made known to third parties. Because of its importance, this situation is specifically regulated by a later Article (II.–6:112 (Effect of ending or restriction of authorisation)).

It will be noted that paragraph (3) goes further than saying that the principal is precluded from invoking against the third party the representative's lack of authority. The representative actually has authority no matter who invokes the fact that there was no express or implied grant of authority by the principal.

The provision in paragraph (3) may be supplemented by provisions of national or European law dealing with particular situations. For example Article 8 of the First Company Directive 68/151/EEC provides that completion of the formalities of disclosure of the particulars concerning the persons who, as an organ of the company, are authorised to represent it shall constitute a bar to any irregularity in their appointment being relied upon as against third parties unless the company proves that such third parties had knowledge thereof. See also EC Directive 89/666/EEC.

NOTES

I. Express and implied authority

1. In most European Member States, the representative's authority generally may be granted not only expressly but also impliedly (SPAIN: CC art. 1710(1); PORTUGAL: STJ 8 February 1979, Revista de legislação e jurisprudencia 112, p. 219; FRANCE: Benabent no. 638; THE NETHERLANDS: CC art. 3:61(1); GERMANY: Staudinger [-*Schilken*] BGB (2004), § 167 no. 13; BULGARIA (no form generally required – LOA art. 37, see also *Takoff*, Dobrovolno predstavitelstvo, 3.3); AUSTRIA: Rummel (-*Strasser*), ABGB I[3], § 1002 nos. 43 et seq., see also AUSTRIA: CC § 1005 (no form) and § 863; DENMARK: see *Ussing*, Aftaler[3], 299 and *Lynge Andersen*, 304; ENGLAND: Bowstead (-*Reynolds and Graziadei*), Agency[16], no. 3-003). SCOTLAND *SME Reissue*, paras. 49-50. The same is true under the Geneva Convention on Agency art. 9(1). It is also a general rule under POLISH law (CC art. 96 in connection with art. 60 § 1) as well as under ESTONIAN law (GPCCA §§ 68(3), 118(1)).
2. Some countries, although they seem to accept the "*mandat tacite*", distinguish between "acts of administration" and "acts of disposition": a general authority covers only the former but not the latter acts, for which "express" authority should be given (FRANCE, BELGIUM and LUXEMBOURG: CCs art. 1988; SPAIN: CC art. 1710(1); ITALY: CC art. 1708(2); cf. also NETHERLANDS: CC art. 3:62) and SLOVENIA: LOA § 76. In Belgium this distinction has, however, been overruled by the courts (Cass. 3 May 1955, Pas. belge 1955 I 962; Cass. 13 April 1984, Arr.Cass. 1983-84, 1078, Cass. 20 Jan. 2000, Arr.Cass. 2000, 156): it is a mere interpretation rule intended to help the courts in finding the common intention of the parties and they may even conclude that a general authority was in fact intended to cover acts exceeding administration (see *Wéry*, Le mandat, no. 35; *Tilleman*, Lastgeving, no. 296). It is also the majority opinion in Belgium that when an "express" authority is required (see CC art. 1988) it means only that the *scope* of the authority must be defined clearly and precisely and be certain. Writing is therefore not required, but it will help to evidence the authority (see *Wéry*, Le mandat, no. 30).
3. Formal requirements may limit the implied granting of authority. In some countries the granting of authority must fulfil the formal requirements prescribed for the authorised act (ITALY: CC art. 1392; BULGARIA, LOA art. 37; GREECE: CC art. 217(2); IRELAND: *Athy Guardians v. Murphy* [1896] 1 I.R. 65, 75 (V.C.);

SLOVENIA: LOA § 75; PORTUGAL: CC art. 262(2); the same is in some cases true if a writing is required for proof of the underlying act, e.g. when granting a mortgage. (FRANCE, BELGIUM and LUXEMBOURG: CCs arts. 1985(1), 1341). Under ESTONIAN law, the authorisation must be in the same form as the authorised act if the latter is subject to such formal requirements that failure to follow the form would render the transaction void (GPCCA § 118(3)). Under the Geneva Convention on Agency art. 10, as well as in GERMANY and the NORDIC countries, no form is required for the grant of authority (Germany: CC § 167(2), but see Staudinger [-*Schilken*] BGB (2004), § 167 nos. 18 et seq. for the exceptions to that rule; NORDIC Contract Acts § 10(2)). The same goes for AUSTRIA (see CC § 1005). Under POLISH law, the granting of so-called general authority should be made in writing *ad solemnitatem* (CC art. 99 §2), and – if a particular form is required for the transaction to be effected by the agent – the grant of authority should be made in that particular form (CC art. 99 § 1). The SLOVAK CC § 31(3) requires that the power of representation must be conferred in writing where an act in law is required to be executed in writing, or if it concerns more than one specific act in law (general power of representation). In CZECH law, implied authority may be granted only to represent the principal in one certain legal act which, furthermore, may not be made in writing; otherwise it is necessary to grant the authority in writing (CC § 31(4)) and the implied authority would mostly be out of the question. See *Švestka/Jehlička/Škárová*, OZ[9], 219. This principle does not concern certain special commercial authorities as defined by the law (as e.g. Ccom art. 15)

II. Interpretation of principal's statement

4. As a general rule, the scope of a representative's authority is defined by the principal's statement and its interpretation. According to the ESTONIAN GPCCA § 120(2) sent. 2. rules of objective interpretation apply. Some countries distinguish between general and specific authority, "specific" meaning that only a particular act is authorised or a certain kind of act (FRANCE, BELGIUM and LUXEMBOURG: CCs art. 1987; ITALY: CC art. 1708; SPAIN: CC art. 1712; THE NETHERLANDS: CC art. 3:62). POLISH law (CC art. 98) distinguishes between general authority, specific authority for a certain type of transaction and specific authority for a particular act. The position is the same in SLOVAKIA (CC § 31(3)) and in BULGARIA, although no express legal rule on this matter exists, see *Takoff*, Dobrovolno predstavitelstvo, 3.5.3-3.5.5. AUSTRIAN law also distinguishes between general and specific authority (CC § 1006) as well as between full and restricted authority (CC § 1007) concerning the concrete acts of the representative. For some transactions (e.g. sales contracts, loans, donations) a general authorisation is not enough unless the type of transaction is specifically defined in the grant of authorisation (§ 1008). Similar rules apply for SLOVENIA: LOA § 76. (excluded from general authority: e.g. suretyship, bill of exchange, settlement, sale or pledge of immovable property).

III. Authority defined by legislation

5. There are also certain types of authority whose scope is defined by statute. The GERMAN, AUSTRIAN, BULGARIAN, DANISH, ESTONIAN, FINNISH, SLOVENIAN, SLOVAK and ITALIAN commercial authority (*Prokura*) authorises all transactions required in a commercial undertaking, except the selling of real estate (Germany: HGB §§ 48-53; Austria: UGB §§ 48-53); Danish Act on Public Companies, §§ 60-62; Finnish Act on *procura* no. 130/1979; Italy: CC arts. 2203-2204; CZECH Ccom art. 14; Slovakia Ccom art. 14; ESTONIA: Ccom §§ 16-21); SLOVENIA: Companies Act arts. 33-38, for representation of company in general, see

art. 32). Germany, Austria and Italy also provide for another commercial authority with a somewhat narrower statutory scope, i.e. limited to ordinary commercial transactions (Germany: HGB § 54 (*Handlungsvollmacht*); Estonia: GPCCA § 121; AUSTRIA: UGB §§ 54 ff (*Handlungsvollmacht*); Italy: CC arts. 2210-2213 (*commessi*)). The CZECH Ccom art. 15 and CC § 20(2) have something similar – the latter provision extends the authority to represent to employees and members of all legal persons, so it somewhat overreaches the commercial sphere. Contractual limitations upon these types of authority agreed between principal and representative have no effect toward third parties. Similar provisions (CC arts. 109^{1}-109^{9}) refer to "*prokura*" (commercial authority) under POLISH law – see CC art. 109^{1} § 2 on the effect of contractual limitations. The SLOVAK regulation of legal entities is found in the Ccom provisions on entrepreneurs' conduct (arts. 13-16). These state that a person entrusted to carry out certain tasks in the operation of the enterprise is considered authorised (art. 15). In BULGARIA, the statutory representatives of commercial companies (limited liability and share-holders companies) – as in all the other member states of the European Union – have a strictly defined scope of authority which cannot be extended or restricted.

IV. Apparent authority

6. The idea of apparent authority is almost nowhere laid down in legislation except in the Geneva Convention on Agency art. 14(2) and in the DUTCH CC art. 3:61(2) (cf. for PORTUGAL the special provision of Decree-Law no. 278/86 on commercial agents art. 23; cf. *P.M. Pinto*, Aparencia). The ESTONIAN GPCCA § 118(2) provides that if the statement or conduct of a person acting as a representative lead another person to reasonably believe that the person is validly authorised, and the principal knows or ought to know that the person is acting as a representative on behalf of the principal and the principal tolerates such activities, the principal is deemed to have authorised the person. This principle is supported by the presumption that the transaction is entered into on behalf of the person engaged in economic or professional activity if a transaction is entered into by an employee or by any other person for whom that person is responsible, and the transaction is related to such economic or professional activity (GPCCA § 116(2)). The idea is very well known in ENGLISH and SCOTTISH law: see Bowstead (-*Reynolds and Graziadei*), Agency[16], nos. 8-013 - 8-049 and *SME Reissue*, paras. 75-83 (ostensible authority). It is also accepted by BELGIAN and ITALIAN courts (Belgium: Cass. 20 June 1988, Pas. belge 1988, 1258, RW 1989/90, 1425; Cass. 20 Jan. 2000, Arr.Cass. 2000, 163, Pas. belge 2000, 163; Cass. 25 June 2004, RGDC/TBBR 2004, 457; Italy: Cass. 12 January 2006, no. 408, Guida al Diritto 2006, fasc. 11, 86; *Antoniolli and Veneziano, Principles of European contract law and Italian law*, 156); and see the FRENCH theory of *mandat apparent*, *Terré/Simler/Lequette*, Les obligations[6], no. 177. This theory necessitates that all believe that the principal had a legitimate power to act and this belief is legitimate only if third parties were, in the circumstances, allowed not to check that these powers were existing. See in LUXEMBOURG, Cass. 13 January 1998, 30, 465. Its essential elements are defined as being a declaration or conduct of the "principal" which induces a reasonable inference in the third person that a sufficient authority has been granted (for IRELAND: *Barrett v. Irvine* [1907] 2 IR 462 (KB) and *Allied Pharmaceutical Distributors Ltd. v. John F. Walsh* [1991] 2 IR 8 at 15 and 17 (HCt)). GERMAN law distinguishes between two types of apparent authority: authority by knowingly tolerating the representative's conduct (*Duldungsvollmacht*), cf. BGH 22 October 1996, NJW 1997, 312, 314) and authority by causing a misconception about the representative's authorization (*Anscheinsvollmacht*) (Staudinger [-*Schilken*] BGB

(2004), § 167 nos. 28 et seq.). This distinction has been adopted by some writers in SWEDEN (*Grönfors*, Ställningsfullmakt 79-102, 164-194; *Ramberg*, Allmän avtalsrätt[4], 68. In Sweden, it is controversial whether a principal can be bound contractually due to conduct of the second kind.) In DANISH law both types of apparent authority are known, see on the latter type UfR1969 380 H. In AUSTRIA the *Anscheinsvollmacht* is derived by analogy from specific provisions in the CC (§§ 1027 ff): apparent authority is drawn from a former act or creation of a situation and therefore a certain ostensible existence of a legal situation; the term *Duldungsvollmacht* has a twofold meaning: tolerating certain acts of representation might create a situation that justifies the existence of the aforementioned apparent authority; however, it may also constitute either an implied grant of authorisation or the ratification of authority (see *Koziol and Welser*, Bürgerliches Recht I[13], 205 et seq.). In SLOVENIA the concept is recognised, the rules applying primarily to commercial contracts; see Usages for trading with goods No. 21 and *Cigoj*: Komentar I, pp. 328-329). In BULGARIA the concept is recognised by doctrine (*Takoff*, Dobrovolno predstavitelstvo, 3.3.2.1-3.3.2.3), but no related court decisions can be adduced.

7. In several countries specific situations are circumscribed by statute in which an authority is deemed to be present. Regardless of the principal's true intentions the principal may then be bound by the representative's acts. Under the NORDIC Contract Acts (§ 10(2)) everyone in the typical position of a representative is supposed to be authorised. The clerk in a shop or an open warehouse may be treated as being authorised to make ordinary sales and receive payments (GERMANY: HGB § 56. AUSTRIA: UGB § 56 and CC §§ 1027-1031 gives supplementary detailed rules. Similarly in POLISH law: CC art. 97 and in ESTONIAN law: GPCCA § 121(2)); as well as in SLOVENIAN law, LOA §§ 80 and 81). In ENGLISH and IRISH law, but by case law not statute, the appointment of a person to a particular position normally gives rise to apparent authority to do what a person in that position would normally be empowered to do, e.g. *Waugh v. HB Clifford & Sons Ltd* [1982] Ch 374, CA, unless the third party knows that the person does not have the usual authority. In SLOVAKIA, conduct of a person within an entrepreneur's establishment may give rise to authority unless the third party knows that the person does not have the usual authority. (Ccom art. 16)

8. Relying on arts. 1734 and 1738 of the SPANISH CC, which provide for particular cases, the Spanish Supreme Court has decided that the principal may be bound by the representative's act, even in absence of a grant of authority, if the principal, by conduct or omission creates in third bona fide parties the confidence that they may rely on the representative's authority. (Supreme Court Judgments 18 September 1987, RAJ (1987) 6067, 22 June 1989, RAJ (1989), 4776, 1 March 1990, RAJ (1990) 1656.

9. In the HUNGARIAN CC § 219(1) it is possible to conclude a contract or do other juridical acts through another person (representative), unless the law provides otherwise of a particular kind of act. Persons with limited capacity can represent competent persons. The person who is represented becomes debtor or creditor on the basis of the representative's actions. § 220(1) Employees or members of a legal person that is regularly engaged in buying or selling goods or providing other services who work in the customer area of the legal person are regarded as representatives of that legal person in concluding and performing the contracts that are customary in that place, unless otherwise provided by legal regulation or otherwise indicated by the circumstances. Restrictions on the scope of authority of an employee or member have no effect on third persons, unless the third person is or could have been aware of the restrictions. These provisions also apply to the employees of private persons. The CC

§ 222 states that in addition to representation that is based on the law, official orders, or statutes; the right to represent may be established by a statement (power of attorney) addressed to the representative, the other party, or the authority involved. The CC § 223 has the following rules on powers of attorney. A power of attorney is subject to the same formal requirements as prescribed by legal regulation for contracts to be concluded on the basis of the power of attorney. A general power of attorney is valid unless it is in writing. A power of attorney remains valid until withdrawn, unless otherwise provided; withdrawal is effective in relation to a third party who is in good faith only if the third party has been informed of it. The right of withdrawal cannot be validly waived. A power of attorney ceases to exist with the death of either party.

II.–6:104: Scope of authority

(1) The scope of the representative's authority is determined by the grant.

(2) The representative has authority to perform all incidental acts necessary to achieve the purposes for which the authority was granted.

(3) A representative has authority to delegate authority to another person (the delegate) to do acts on behalf of the principal which it is not reasonable to expect the representative to do personally. The rules of this Chapter apply to acts done by the delegate.

COMMENTS

A. Scope of authority depends on terms of grant

The scope of a representative's authority depends primarily on the terms in which it is granted or conferred. This is confirmed by paragraph (1). In several Member States commercial law statutes provide standardised forms of authority defining exactly the contents and limits of the powers conferred if, for example, an employer decides to grant authority to employees in a certain category.

B. Authority to do incidental acts

Paragraph (2) applies only where the grant of authority, or the circumstances of the case, do not indicate the contrary. It deals with one limited matter - namely, the representative's authority to do incidental acts which are necessary to achieve the purposes for which the authority was granted. In the absence of such a provision express grants of authority might have to be excessively detailed so as to cover every possible incidental act which the representative might have to do. Such careful provision may be expected in legally drafted grants of authority but cannot reasonably be expected of informal grants of authority by lay persons acting without legal advice.

C. Delegation of authority

Frequently, a representative cannot reasonably be expected to perform personally the acts or all the acts required and may wish to involve other persons. This may occur, in particular, because of distance from the place where the necessary acts have to be performed or because of the representative's lack of specific competence. In these cases, it may be reasonable for the representative to delegate authority to do the acts, and although not all the laws permit delegation (or do so only in certain cases), this Chapter provides for it.

Delegation of authority must be distinguished from delegation of performance – where a debtor consents to the obligation being performed by someone else. Delegation of authority relates not to the performance of an obligation but to the actual doing of a juridical act for the principal

The representative may have express authority to delegate. Indeed it is to be recommended that the principal clarify expressly whether or not the representative is so authorised. In order to clarify a situation where the principal has failed to do so, paragraph (3) establishes a default rule which will apply unless otherwise provided in the grant or indicated by the circumstances.

Illustration

An old lady P living in a small European town has given a general power to her representative A living in the same town. She directs A to invest a substantial sum of money by acquiring an apartment house in New York. A has power under this Article to appoint a qualified person in New York to do the necessary juridical acts.

The person to whom the authority is delegated ("the delegate") acts on behalf of the principal. All the provisions of this chapter apply to the acts done by that person. This rule is laid down by the second sentence of paragraph (3).

The delegate's authority is derived directly from the representative and only indirectly from the principal. The representative cannot delegate more authority than the representative already has. It follows that, for the delegate to effect the same consequences that are achieved by the acts of the representative, the acts of the delegate must be within both the delegated authority and that of the representative. If the acts of the delegate are to affect the legal position of the principal directly it is also necessary that the delegate should act in the name of the principal or otherwise in such a way as to indicate an intention to affect directly the legal position of the principal.

Under these conditions the acts of the delegate have the same effects as if these acts had been done by the representative. They bind the principal and the third party directly, while the representative is not bound.

The appointment of a delegate must be distinguished from the replacement of the original representative by a new representative. The new representative assumes (usually) the same position as the predecessor. The acts of the new representative are fully subject to the rules of this chapter; no special rule is required to express this idea.

NOTES

I. Authority to do incidental acts

1. The general formula of paragraph (2) on the scope of a representative's authority corresponds to the Geneva Convention on Agency art. 9(2). Similar provisions can be found in ITALY (CC art. 1708), in PORTUGAL (CC art. 1159(2), Ccom. arts. 233, 249) and in ENGLAND: Bowstead (-*Reynolds and Graziadei*), Agency[16], no. 3-003. For AUSTRIA see CC § 1009. The ESTONIAN GPCCA § 121(2) creates a similar presumption for a representative who sells goods or provides services at the request of another person in the economic or professional activities of that person. The idea is supported by the rules of objective interpretation of the grant of authority (GPCCA § 120(2)).

II. General rule against delegation

2. Some European countries have statutory provisions on the delegation of authority: SPAIN: CC arts. 1721 ff; THE NETHERLANDS: CC art. 3:64; AUSTRIA: CC § 1010; BELGIUM and LUXEMBOURG: CCs art. 1994; ITALY: CC art. 1717; GREECE: CC arts. 715-716; POLAND: CC art. 1061; PORTUGAL: CC art. 264; SLOVAKIA: CC §§ 24, 33a; SLOVENIA LOA § 71 and Companies Act art. 37. As a

general rule, delegation of authority regularly is not allowed. On the other hand, in SPAIN the representative is allowed to appoint a substitute, unless prohibited by the principal (CC art. 1721).

3. The AUSTRIAN CC § 1010 generally decides against delegation. The representative may, however, use an ancillary person for whose actions or omissions the representative is fully liable. In the case of unallowed (full) delegation the representative is liable for the result. If delegation is expressly allowed in the authorisation the representative is only liable for negligence in the process of selecting a delegate (see CC § 1010 and *P. Bydlinski* in Koziol/Bydlinski/Bollenberger, ABGB, 2nd, ed., § 1010). Special rules of delegation can be found e.g. in RAO (*Rechtsanwaltsordnung*, the professional rules for counsel) § 14 or BTVG (*Bauträgervertragsgesetz*) § 13(1), (2).

III. Delegation permitted in certain situations

4. Under GERMAN law the possibility of a delegation (which is strictly separated from substitution and leads to a "sub-authority") in general depends on the interpretation of the authority and there is an implied term that delegation is possible unless there is a reasonable interest of the principal that the representative acts personally, see Staudinger [-*Schilken*] BGB (2004), § 167 no. 63 (and nos. 64 et seq. to the exceptions). Even though delegation of authority is in most legal orders not allowed in general, certain exceptions from this principle are frequently admitted.

5. In the first place, the principal may expressly allow substitution (AUSTRIA: CC § 1010; BULGARIA, LOA art. 43; PORTUGAL: CC art. 264(1); SLOVAKIA CC § 33a); cf. implicitly BELGIUM and LUXEMBOURG: CCs art. 1994(1); ITALY: CC art. 1717(1)-(2); GREECE: art. 715; THE NETHERLANDS: CC art. 3:64; POLAND CC art. 106 and SLOVENIA, LOA § 71(1)). An implied permission may result from an interpretation of the principal's grant of authority. Under Polish law such permission may derive from the legal relationship constituting the basis of the authority.

6. Also in DENMARK it depends on the circumstances whether the representative has power to delegate authority. If authority is given to a private representative in a personal relationship there is a presumption against such powers; if it is given to a professional delegation is often permitted. An attorney may, for instance, let a colleague in the same firm act for the client see *Bryde Andersen* Grundlæggende 294.

7. Moreover, certain statutory authorizations may also be found in some countries. Thus the representative may delegate authority if the representative is unable or not authorised by law to perform certain necessary acts and delegation therefore is unavoidable ((AUSTRIA: CC § 1010, see Schwimann (-*Apathy*), ABGB IV[3], § 1010 no. 4); THE NETHERLANDS: CC art. 3:64 lit. b; GREECE: CC art. 715 and Athens 612/1974, NoB 1974.1077 I; ENGLAND: Bowstead (-*Reynolds and Graziadei*), Agency[16], no. 5-001 lit. b); BULGARIA LOA art. 43; SLOVENIAN LOA § 76(2)) or if the principal has no interest in the transaction in question being carried out by the representative personally (GERMANY: OLG Frankfurt 28 November 1974, VersR 1974, 173; OLG München 30 March 1984, WM 1984, 834; England: Bowstead (-*Reynolds and Graziadei*), Agency[16], no. 5-003). The Netherlands also allows delegation of authority if the agency relates to goods located outside the representative's country of residence (CC art. 3:64 lit. c). Under ESTONIAN law, a right of representation granted by law may be delegated (GPCCA § 119(2)), while the authority granted by the principal may be delegated only if so prescribed by the authorisation (GPCCA § 119(1) sent. 1). However, such right is presumed if

authorisation is granted for entry into a transaction which cannot be reasonably expected to be entered into by the representative personally ((GPCCA § 119(1) sent. 2).

IV. Usage

8. The appointment of a subagent may also be justified by usage (ENGLAND: *De Bussche v. Alt* (1878) 8 ChD 286, 310-311; SCOTLAND: *SME Reissue* para. 99; THE NETHERLANDS: CC art. 3:64 lit. a).

V. Direct links

9. Some systems establish direct bonds between the principal and the delegate. In particular, the principal is often authorised to bring claims directly against the delegate whom the representative has substituted (FRANCE, BELGIUM and LUXEMBOURG: CCs art. 1994(2); SPAIN: CC art. 1718; ITALY: CC art. 1717(4); and GREECE: CC art. 716(2). However, in FRENCH law, this “action directe” is contained within some limits. Cass.com. 3 Déc. 2002. D. 2003.786 note Mallet-Bricout. In AUSTRIA the principal – if having no contract with the delegate – is seen as a beneficiary of the contract between the representative and the delegate, see Schwimann (-*Apathy*), ABGB IV^{3}, § 1010 no. 3.

10. French courts have extended this rule by allowing the substituted delegate to bring claims against the principal: Cass.com. 9 November 1987, Bull.civ. 1987 IV no. 233, and 19 March 1991, Bull.civ. 1991 IV no. 102.

II.–6:105: When representative's act affects principal's legal position

When the representative acts:

(a) in the name of a principal or otherwise in such a way as to indicate to the third party an intention to affect the legal position of a principal; and

(b) within the scope of the representative's authority,

the act affects the legal position of the principal in relation to the third party as if it had been done by the principal. It does not as such give rise to any legal relation between the representative and the third party.

COMMENTS

A. Basic effect of representation

This Article deals with the normal basic effects of a juridical act by a representative. The rule is that where the representative has acted openly as such (i.e. in the name of the principal or otherwise in such a way as to indicate an intention to affect directly the legal position of the principal) and has acted with authority, the representative's act directly affects the legal relationship between the principal and the third party but does not give rise to any legal relation between the representative and the third party. In other cases, the basic rule is that the principal's legal relations are not directly affected by the representative's act. The consequences for the representative are dealt with in succeeding Articles.

B. Representative must act as such if principal is to be affected

The act of the representative will bind the principal or otherwise affect the principal's legal relations only if the representative acts in the name of the principal or otherwise in such a way as to indicate to the third party an intention to directly affect the legal relations of a principal. It is not necessary that the representative should say "In the name of …" or use any other special form of words. Indeed the name of the principal need not even be mentioned. However, if the representative wishes to avoid personal liability it will be important to make it clear by one means or another that the act in question is being done in a representative capacity.

If paragraph (1)(a) of the Article is complied with, the third party will know, or at least could reasonably be expected to know, that the representative is acting as a representative of a principal and not in a personal capacity.

C. Representative must have authority if principal is to be affected

The act of the representative will bind the principal or otherwise affect the principal's legal position only if it is done with authority. As we have seen, the representative (or the person purporting to be a representative) will not have authority to do the act either if there is no authority at all or if the particular act is beyond the representative's authority.

D. Special situations

The Article deals with the basic and normal position. Of course, the representative and the third party or the principal and the representative may by agreement depart from the normal rules and impose personal liability upon the representative. The representative may become a

co-debtor or a guarantor of the principal's obligations. The following Article establishes another exception.

NOTES

I. Authorised act binds principal and third party

1. The general principle laid down in this Article is to be found in many European codifications (GERMANY: CC 164(1); FRANCE, BELGIUM and LUXEMBOURG: CCs art. 1998; ITALY: CC art. 1388; BULGARIA: LOA art. 36(2); PORTUGAL: CC art. 258; SPANISH: CC art. 1727(1); THE NETHERLANDS: CC art. 3:66(1); AUSTRIA: CC § 1017; NORDIC Contract Acts § 10(1); for ENGLAND, see Bowstead (-*Reynolds and Graziadei*), Agency[16], art. 73 (no. 8-050); for SCOTLAND *SME Reissue* para. 127 for POLAND, see CC art. 95 § 2; for ESTONIA, see GPCCA § 115(2) sent. 2; for SLOVENIA, see LOA § 70 and for SLOVAKIA, see CC § 32(2). Under the HUNGARIAN CC § 219(2) the person who is represented becomes a debtor or creditor on the basis of the representative's actions.

2. Under the Geneva Convention on Agency the principal and the third party are bound to each other if and only if the third party knew or ought to have known that the representative was acting as a representative, unless it follows from the circumstances that the representative is willing to contract as a principal only (art. 12).

II. Exceptional circumstances when principal not bound

3. As an exception to the aforementioned general rule the representative cannot bind the principal - even though acting within authority - if the representative cooperates with the third party in order to harm the principal (collusion) (GERMANY: BGH 17 May 1988, NJW 1989, 26; AUSTRIA: cf. OGH 10 July 1985 SZ 58/123 and 13 February 1991, SZ 64/13; GREECE: Thessaloniki Court of Appeal 1010/1993 Arm. 48 (1994) 1019, 1020-1021; BULGARIA: LOA art. 40).

4. A related idea which probably leads to the same results is expressed by GREEK law under the heading "abuse of right" (CC art. 281): if the third party knows or should know that the representative acts against the principal's interest or against the purpose of the representative's authority and the principal never would have concluded the contract if acting alone, such an act is not binding upon the principal and the third party (A.P.: 213/1965 EEN 33 (1966) 36; 466/1977 NoB 26 (1978) 47, 48 I). A similar rule prevails in PORTUGAL: the representative's acts are treated as being unauthorised if the third party knew or should have known about an abuse of the representative's authority (CC art. 269). The same opinion is found in AUSTRIAN case law and expressed by some authors, c.f. *Koziol and Welser*, Bürgerliches Recht I[13], 215 with references to case law and literature.

II.–6:106: Representative acting in own name

When the representative, despite having authority, does an act in the representative's own name or otherwise in such a way as not to indicate to the third party an intention to affect the legal position of a principal, the act affects the legal position of the representative in relation to the third party as if done by the representative in a personal capacity. It does not as such affect the legal position of the principal in relation to the third party unless this is specifically provided for by any rule of law.

COMMENTS

If the representative acts in his or her own name or otherwise in such a way as not to indicate to the third party an intention to affect directly the legal relations of a principal, then the representative will be regarded as acting in a personal capacity and the act, if it is valid, will establish direct legal relations between the representative and the third party. The Act will not directly affect the legal position of the principal in relation to the third party unless this is specifically provided for by a special rule of law for a particular situation. For example, there may be cases where it would be safe and appropriate for a special rule to provide for the ownership of property bought by the representative for a hidden principal to pass directly to the principal, or at least to do so in certain clearly identified circumstances.

It is important to note that the representative may be personally bound even if the existence of a principal is disclosed to the third party. Everything depends on whether the representative acts in such a way as to indicate to the third party an intention to affect directly the legal relations of a principal. A representative may, for example, say "I am instructed and authorised to buy this item for a collector who prefers to remain anonymous. However, any contract for its purchase will be concluded by me in a personal capacity and will not directly affect my principal." In such a case the third party must decide whether to accept the risk of contracting only with the representative. In the absence of any special rule on the question of passing of ownership in such a situation the manner in which, and terms on which, the item acquired by the representative would be passed on to the principal would be regulated by the contract between the representative and the principal.

NOTES

I. Representative and third party bound

1. The general rule that the representative and the third party are bound to each other in the circumstances covered here is accepted everywhere in Europe. Differences exist, however, on the question of a contractual relationship between the principal and the third party.

II. Geneva Convention on Agency

2. The Geneva Convention on Agency has a rule similar in effect to the one in the present art. 13(1).

III. Undisclosed principal: third party and principal bound

3. Under the undisclosed principal doctrine of ENGLISH law the principal may sue the third party on a contract made by an agent on the principal's behalf, if the agent was

acting within the scope of the authority (*Siu Yin Kwan v. Eastern Insurance Co. Ltd*. [1994] 2 WLR 370, 376 (PC)). Equally the third party may sue the undisclosed principal. English law does not prescribe any further conditions for the direct relationship between the undisclosed principal and the third party. SCOTTISH law also has an undisclosed principal doctrine: *SME Reissue* paras. 147-163.

4. The Common Law does not prescribe any further conditions for the direct relationship between the undisclosed principal and the third party.

IV. Principal and third party generally not bound

5. The usual rule is that the principal and the third party are not bound by a legal relationship in the circumstances covered here. In ITALY, PORTUGAL and SPAIN the general rule is laid down that if the representative was acting in his or her own name there is no direct relationship between the third party and the principal (Italy: CC art. 1705(2) first sentence; Portugal, CC art. 1180; Spain: CC art. 1717(1). Likewise in FRANCE see *Terré/Simler/Lequette*, Les obligations[6], no. 181 and GERMANY see Staudinger [-*Schilken*] BGB (2004), § 164 no. 3 and CC § 164(2).

6. Nevertheless, in some specific situations direct relations between the principal and the third party are recognised in a number of countries (for AUSTRIA see *Koziol and Welser*, Bürgerliches Recht I[13], 200 et seq., for GERMANY Staudinger [-*Schilken*] BGB (2004), Pref. to § 164 nos. 51 et seq.). Except for THE NETHERLANDS, however, no country provides a full set of conditions for direct relations between principal and third party. Typically the principal's right to sue the third party, on the one hand, and the third party's right to sue the principal, on the other, are regulated differently (see on BELGIUM and FRANCE: *Samoy*, Middellijke vertegenwoordiging, 2005).

7. In SLOVAK law, the principal and the third party are not generally bound in this situation, but in the commission agent contract (Ccom §§ 577-590) the principal has some special cases rights against the third party (claim delivery or a performance of an obligation).

8. Under ESTONIAN law, the principal and the third party are not bound by a legal relationship if the representative acts in his or her own name. If the representative acts in his or her own name but does so on account of the principal, an obligation to reveal the name of a third party may be based on the internal relationship between the principal and the person acting on account of the principal (see LOA §§ 624(1) and 692(2) for contract of commission, LOA §§ 624(1), 854(2) and 858(1) for forwarding contracts). The principal's interests are protected generally by LOA § 626(1) which states that an agent has an obligation to hand over anything received or created in connection with performance of the mandate to the principal. In addition, LOA § 626(3) prescribes that claims and movables which an agent acquires when performing a mandate in the agent's name but on account of the principal are not included in the bankruptcy estate of the agent and they cannot be subject to a claim against the agent in an enforcement procedure. Thus, the principal has a right to claim an assignment of rights against the third party, but does not have any direct right against the third party (for express provision to that effect for forwarding contracts see LOA § 858(3)).

9. In the HUNGARIAN CC § 507 under a commission agency contract the commission agent is obliged to conclude a sales contract in the agent's own name, in favour of the principal in return for a commission. Under § 513(1) a contract in which a commission agent assumes an obligation to conclude a contract other than a sales contract is also deemed to be a commission agency contract. Under § 509(1) a sales contract concluded under a commission agency contract entitles and binds the commission

agent against the party contracting with the commission agent; (2) the commission agent is responsible to the principal for performance of all of the obligations that are undertaken by their contracting partner in the contract; (3) creditors of a commission agent have no rights against (a) claims against the party contracting with the commission agent and due to the principal; (b) things bought by the commission agent in the case of consignment purchases; or (c) amounts of money received by the commission agent and kept or handled separately, which are apparently due to the principal.

II.–6:107: Person purporting to act as representative but not having authority

(1) When a person acts in the name of a principal or otherwise in such a way as to indicate to the third party an intention to affect the legal position of a principal but acts without authority, the act does not affect the legal position of the purported principal or, save as provided in paragraph (2), give rise to legal relations between the unauthorised person and the third party.

(2) Failing ratification by the purported principal, the person is liable to pay the third party such damages as will place the third party in the same position as if the person had acted with authority.

(3) Paragraph (2) does not apply if the third party knew or could reasonably be expected to have known of the lack of authority.

COMMENTS

A. Consequence of lack of authority

This Article deals with the consequences which follow if a person purporting to act for a principal does an act without authority. It does not matter whether the person is a representative who is acting beyond authority or a person who has no authority at all. The basic rule is that the act does not bind the purported principal or otherwise affect the legal relations between the purported principal and the third party. The act does not directly bind the person acting as a representative either. The third party has no reason to suppose that that person is acting in a personal capacity and no reason to rely on that person's credit or reputation. The third party intends to transact with the supposed principal, not the purported representative. The person purporting to act as a representative with authority may, however, be liable in damages to the third party. (See paragraph (2)).

There may be ratification by the purported principal. When that occurs the act of the representative will affect the principal's legal relations but only as a result of the ratification and not as a result of the act itself.

B. Partial lack of authority

Where an existing authority of a representative covers an act in part only, the effect of such partial lack of authority depends upon whether the legal relationship or effect involved is divisible or indivisible. In the latter case, the principal is not bound at all. In the former case, the authorised part of the act will bind the principal and the third party but not the unauthorised part.

Illustration

If a representative has power to overdraw the principal's account to an amount of €10,000 and overdraws €11,000, the principal is bound to repay €10,000 only.

C. Liability for damages

By acting in a principal's name or otherwise in such a way as to indicate an intention to affect a principal's legal relations, a person can be regarded as warranting to the third party that there is authority to do so. If the person does not in fact have this authority, this does not mean that the person is bound by the contract or act; but only that there is an obligation to pay damages to the third party. The compensation must put the third party into the same position

as if the person had acted with authority. If the person proves that the principal could not have performed the contract, nor have paid compensation (for instance because the principal is insolvent) the person need not even pay damages.

D. Effect of ratification or third party's knowledge

The person is not liable under paragraph (2) if the purported principal ratifies the act. There is no need for liability in such a case and no justification for it. Nor is the person liable if the third party knew or could reasonably be expected to have known of the lack of authority. In such a case the third party must be regarded as having taken the risk that the supposed representative had no authority or that the purported principal would not ratify.

NOTES

I. Principal not bound by unauthorised acts

1. The Geneva Convention on Agency (art. 14(1) and many European codifications provide for a rule comparable to the one contained in paragraph (1) (GERMANY: CC § 177(1); AUSTRIA: CC § 1016; GREECE: CC art. 229; FRANCE, BELGIUM and LUXEMBOURG: CCs art. 1998(2); SPAIN: CC art. 1259; THE NETHERLANDS: CC art. 3:66(1); POLAND: CC art. 103; PORTUGAL: CC art. 268(1); SLOVAKIA CC § 33(1); ESTONIA: GPCCA § 129(1); SLOVENIA: LOA § 72-73. The same rule is implied in ITALY (CC art. 1398); in BULGARIA (non explicitly LOA art. 42) and in the Nordic Contract Acts (§§ 10, 11 etc.) and is adopted by IRISH law as well (*Xenos v. Wickham* (1866), LR 2 HL 296; *British Bank of the Middle East v. Sun Life Assurance Co* [1983] 2 Lloyd's Rep 9, HL). SCOTTISH law is to the same effect: *SME Reissue* para. 60.
2. In case of a partial lack of authority, the contract may be completely or partially invalid depending on whether it would have been concluded without the unauthorised part (GERMANY: CC § 139; GREECE: CC art. 181; ESTONIA: GPCCA § 129(2)); BULGARIA: LOA art. 26(4); AUSTRIA: Rummel (-*Strasser*), ABGB I^3, §§ 1016, 1017 no. 10).

II. Unauthorised representative liable to third party

3. The unauthorised representative's liability for damages as a consequence of acting without authority is, in principle, recognised by all Member States. However, the details of this liability vary to some degree. In ENGLISH, IRISH and SCOTTISH law, as under paragraph (2) of the Article and under the very similar Geneva Convention on Agency art. 16(1), the representative is liable even in the absence of knowledge of the lack of authority, since the representative's liability is strict and not based upon fault (*SME Reissue* para. 165). The representative's ignorance of the lack of authority is irrelevant also under the NORDIC Contract Acts of DENMARK, SWEDEN and FINLAND (§ 25(1)) and in THE NETHERLANDS (CC art. 3:70). The Dutch Supreme Court has confirmed that the representative is liable for the full damage suffered by the third party (including the expectation interest) (HR 28 March 1997, NedJur 1997 no. 454). In SLOVENIA both the purported principal and representative are liable for damages from acts beyond authority (LOA § 72(5)). Only the purported representative is liable when acting without authority (LOA § 73(4)).
4. In GERMAN and GREEK law, if the representative was aware of the lack of authority, the third party may claim performance of the contract or damages, see CC §

179(1) and CC art. 231(1) respectively. If the representative did not know of the lack of authority, the representative's liability is limited to reliance damages, which, however, cannot exceed the interest the third party would have if the contract was valid CC § 179(2), CC art. 231(2). The same is true in ESTONIA, except for the right to require performance (GPCCA § 130(1),(2)) and in ITALY and PORTUGAL the representative is held liable for violation of precontractual obligations so that the third party can only recover reliance damages (Italy: Cass. 29 September 2000, no. 12969, Foro it. 2001, I, 1658; *Sacco and De Nova*, Il contratto II[2], 192; *Galgano*, Il negozio giuridico, 406; PORTUGAL: C.M. Pinto, General Theory 549). The same limitation also prevails in FRANCE, BELGIUM and LUXEMBOURG, where the representative is liable in delict (France: *Malaurie/Aynès/Gautier*, Contrats spéciaux VIII[8], no. 575 Belgium: *Tilleman*, Lastgeving, nos. 387 & 391; Luxembourg: Supreme Court 7 January 1975, Pas. belge 23, 68), and as well in SPAIN. In POLAND the representative's liability is always limited to reliance interest (CC art. 103 § 3), the same applies to SLOVENIA, see *Juhart and Plavšak*, Obligacijski zakonik I, p. 451. In SLOVAKIA (CC § 33(2)), the third party may demand from the purported representative either performance of the obligation or compensation for any damage caused by such negotiations provided there was negligence or intention. In AUSTRIA the general rules were clarified in 2007 with the introduction of a new CC § 1019. Now in both commercial and general civil matters the purported representative can be held liable only for reliance damages. The amount payable is limited by the expectation interest (BGBl I 2005/120). According to BULGARIAN law, the representative is liable only if aware of the lack of authority (argument from LOA art. 81 – principle of liability only for fault). The third party may claim damages only if the third party was in good faith (LOA art. 42(1)) and if the purported principal refuses to confirm the contract. A claim against the *falsus procurator* for performance of the contract concluded without authority is however not possible.

5. However, in FRANCE, BELGIUM and LUXEMBOURG the representative is liable for the third party's full damage if the representative had expressly or impliedly guaranteed that there was authority, see CC art. 1997 last clause. The same solution has been proposed in PORTUGAL if the representative knew of the lack of authority (*C.M. Pinto*, General Theory 549).

6. The HUNGARIAN CC § 221 provides as follows. (1) A person who, in good faith, exceeds the scope of the authority to represent or who concludes a contract in the name of another person without having the authority to do so must pay compensation to the other contracting party for damages incurred as a result of the conclusion of the contract (on the assumption that the purported principal does not ratify the action). However, the court may grant exemption from this liability, particularly if the person had previously been a representative and was, through no fault of their own, unaware of the cessation of the right to represent at the time the contract was concluded. (2) A mala fide false representative is liable for full compensation.

III. Third party knew of lack of authority

7. All countries agree on the exception contained in the last paragraph of the Article. The same solution is to be found in the Geneva Convention on Agency art. 16(2). Nowhere is the representative liable if the third party knew or could reasonably have been expected to know of the lack of authority (GERMANY: CC § 179(3); GREECE: CC art. 231(3); ESTONIA: GPCCA § 130(3)); THE NETHERLANDS: CC art. 3:70; ITALY: CC art. 1398; BULGARIA: LOA art. 42(1); NORDIC Contract Acts § 25(2); FRANCE: Cass.civ. 16 June 1954, Bull. civ. 1954 I no. 200; ENGLAND: *Beattie v. Ebury* (1872) LR 7 CA 777, 800; Bowstead (-*Reynolds and Graziadei*), Agency[16], no.

9-067; SCOTLAND: *SME Reissue* para. 170; SLOVAKIA CC § 33(3). Cf. also AUSTRIA CC § 1304; SLOVENIA: LOA §§ 72(5) and 73(4). In FRANCE, BELGIUM and LUXEMBOURG, CCs art. 1997 is based upon the same principle. (Belgium: *Tilleman*, Lastgeving, no. 378). Under ESTONIAN law, liability is also excluded, if the active legal capacity of the person without the right of representation was restricted and he or she acted without the consent of his or her legal representative (GPCCA § 130(3)).

II.–6:108: Unidentified principal

If a representative acts for a principal whose identity is to be revealed later, but fails to reveal that identity within a reasonable time after a request by the third party, the representative is treated as having acted in a personal capacity.

COMMENTS

A. Unidentified principal

The act of a representative may affect the principal's legal position and not the representative's even if the representative, although acting expressly for "a" principal, does not at first reveal the principal's identity. But such secrecy cannot be continued for ever if the third party demands to be told the principal's identity.

B. Representative failing to identify principal

If the third party has asked for identification of the principal and the representative fails or refuses to reveal that identity (possibly on the principal's instruction), the representative becomes personally bound to the third party. This rule, which is not found in all the laws, is justified because the representative assumed that risk by refusing to reveal the principal's identity.

Binding the representative to the third party is also justified by the fact that the representative usually will be able to transfer to the principal any assets received from the third party, and conversely the principal will usually reimburse the representative for the charges incurred vis-à-vis the third party. This distinguishes the cases covered by this Article from those in which the representative acts without authority where by virtue of the warranty of authority the representative is merely obliged to pay damages to the third party.

NOTES

I. Rules on unidentified principal

1. Some Civil Codes have rules which correspond to this Article (ITALY: CC art. 1405; THE NETHERLANDS: CC art. 3:67(2). In other countries, the rule is recognised without statutory authority (FRANCE, BELGIUM and LUXEMBOURG [*déclaration de command/commandverklaring*]: *Malaurie/Aynès/Gautier*, Contrats spéciaux VIII[8], no. 535). However, in Belgian law the "representative" has a faculty to reveal the identity. If he does not do so, the rule applies and he will stay personally bound (see *Samoy* (2005) nos. 641 & 672).

II. "Contracts for a person to be nominated": Italy and Portugal

2. As mentioned before, in ITALY and PORTUGAL the case of an unidentified principal is not governed by the rules on representation. The special rules of both countries on the "contract for a person to be nominated" practically lead to the same result as that reached under this Article: once nominated, the person acquires the rights and assumes the obligations of the original party who has made the nomination (Italy: CC art. 1404; Portugal: CC art. 455(1). However, this nomination is subject to several requirements: it must be communicated to the other party within three or five days, unless another

term has been agreed; and, to be effective, this communication must be accompanied by the nominee's acceptance or of a power of attorney issued before the conclusion of the contract (Italy: CC art. 1402; Portugal: CC art. 453). If the person is not validly nominated, the original parties to the contract remain bound by it (Italy: CC art. 1405; Portugal: CC art. 455(2).

III. Principal must be identified

3. In GERMANY, GREECE, AUSTRIA and the NORDIC countries the representative who fails to disclose the principal's identity is not necessarily bound. Under German law the representative is treated as if acting without authority (BGH 20 March 1995, NJW 1995, 1739, 1742). Therefore the representative is, at the choice of the third party, liable either to perform the contractual obligations or to pay damages (details in German CC § 179). The same rule applies in Greece (CC art. 231(1)) and in the Nordic countries (Nordic Contract Acts § 25 on the duty of the *falsus procurator* to compensate expectation interests). By contrast, in Austria in civil transactions the representative may only be liable for reliance damages provided there was negligence or intention. A representative sued for such damages may still avoid this liability for damages by identifying the principal until the opening of trial at first instance. In AUSTRIA the "Transaction for whom it may concern" is recognised if the third party agrees that the identity of the principal is not disclosed (see Rummel (-*Strasser*), ABGB I[3], § 1002 no. 50). Then the undisclosed principal is bound. In no case is the contract effective for the representative. Similarly, under ESTONIAN law, while there is neither express regulation nor relevant court practice, it could be inferred that a representative who fails to disclose the principal's identity is treated as a purported representative without authority together with the relevant consequences, i.e. nullity of contract and liability for damages (GPCCA §§ 129(1), 130).

4. Under ENGLISH common law the agent may incur personal liability under a contract where the principal is not named (*The Virgo* [1976] 2 Lloyd's Rep 135, CA). But the presumption is against the representative being liable (*The Santa Carina* [1977] 1 Lloyd's Rep 478, CA; Bowstead (-*Reynolds and Graziadei*), Agency[16], no. 9-045).

5. Under POLISH and SLOVENIAN law – despite the lack of an express regulation – it is accepted that a representative who fails to disclose the principal's identity is personally bound. This is the same in SLOVAKIA.

II.–6:109: Conflict of interest

(1) If an act done by a representative involves the representative in a conflict of interest of which the third party knew or could reasonably be expected to have known, the principal may avoid the act according to the provisions of II.–7:209 (Notice of avoidance) to II.–7:213 (Partial avoidance).

(2) There is presumed to be a conflict of interest where:

(a) the representative also acted as representative for the third party; or
(b) the transaction was with the representative in a personal capacity.

(3) However, the principal may not avoid the act:

(a) if the representative acted with the principal's prior consent; or
(b) if the representative had disclosed the conflict of interest to the principal and the principal did not object within a reasonable time;
(c) if the principal otherwise knew, or could reasonably be expected to have known, of the representative's involvement in the conflict of interest and did not object within a reasonable time; or
(d) if, for any other reason, the representative was entitled as against the principal to do the act by virtue of IV.D.–5:101 (Self-contracting) or IV.D.–5:102 (Double mandate).

COMMENTS

A. The basic issue

In the triangular situation of representation, the representative is exposed to the usually diverging interests of three persons. While being obliged to promote and preserve the principal's interests, the representative may be approached by the third party who is seeking to pursue other interests. In addition, the representative may be tempted to pursue the representative's own interests at the expense of the principal. The situation creates so much danger for the principal that, although not all the laws currently provide a solution, or do so only in some cases, it is important to provide the principal with an appropriate remedy.

B. Relevant conflict of interests

Sanctions affecting a contract concluded by the representative or other act done by the representative can be imposed only if this is equitable in relation to the parties to the transaction.

The principal's interests in this respect are protected by allowing the principal to decide whether or not to avoid the act.

The third party's interest in preserving the act is protected by the requirement that the third party knew or could reasonably be expected to have known of the conflict of interests.

C. Consequences of a relevant conflict of interests

Paragraph (1) provides that the principal may avoid the act if the representative had concluded it in spite of a relevant conflict of interests.

D. Special cases

Paragraph (2) deals with two specific instances of a potential conflict of interests. A conflict may arise if the representative for principal A acts at the same time as representative for principal B and as such a dual representative concludes a transaction. Since in this situation the representative must take care of the potentially opposite interests of two persons, a risk of neglecting the interests of one of the two principals is often present.

The same duality and therefore potential conflict of interests exists if the transaction is between the representative, acting as representative, and the representative in a personal capacity, i.e. if the representative is also the "third party" in relation to the principal.

In these two situations, a material conflict of interests is presumed to exist. This presumption of a conflict of interests is, however, rebuttable.

> *Illustration*
> Representative A is instructed by the principal to buy 50 shares of X Corp. at the current market price. Since A wishes to dispose of A's own holding of shares in X Corp., A sells these shares to the principal for the current market price. The latter fact neutralises the conflict of interests.

E. Consequences of a conflict of interests

Where a representative in concluding a transaction acts for both contracting parties or with himself or herself, the act can be avoided by the principal, unless one of the justifications enumerated in paragraph (3) applies. In the case dealt with in sub-paragraph (a) of paragraph (2), where the representative also acts as representative for the third party, each of the two principals is entitled to avoid the act.

F. Exceptions

Customs and national legislation may give certain types of representatives the option of dealing with themselves under certain conditions.

G. Avoidance excluded

The third paragraph lays down four instances in which avoidance of the act is excluded. The first - prior consent of the principal - is self-evident. The second and third - disclosure of the conflict of interests by the representative, or knowledge or constructive knowledge of it by the principal - require a brief explanation. The disclosure, or actual or constructive knowledge, must occur in advance of the representative's act so that the principal is in a position to prevent the representative from acting. Disclosure or actual or constructive knowledge suffices to bar avoidance, unless the principal concerned objects within a reasonable time.

Where there are two principals (in the situation covered by paragraph (2) (a)), and only one has the knowledge, as a result of disclosure or otherwise, only that one is barred from avoiding the act.

In addition to the three instances regulated in paragraph (3), avoidance is also excluded if the representative was entitled to do the act by virtue of the rules in IV.D.–5:101 (Self-contracting) or IV.D.–5:102 (Double mandate). It is also excluded if the principal, or both

principals, has or have confirmed the act expressly or impliedly after learning of the ground for avoidance. This follows from the general rules on the avoidance of contracts and other juridical acts which are covered in later Articles.

NOTES

I. Contract voidable or ineffective where conflict of interest

1. A few systems provide that where there is a conflict of interest, the contract may be avoided by the principal (ITALIAN CC art. 1394, ESTONIAN GPCCA § 131, and see also art. 1395; PORTUGUESE CC art. 261, or is ineffective (DUTCH CC art. 3:68). The solution is similar in BULGARIAN law, where acting against the interest of the principal makes the contract voidable (LOA art. 40, *Takoff*, Dobrovolno predstavitelstvo, 4.8). There is however a separate regulation on self-contracting cases (LOA art. 38(1)) and the effect is voidability of the concluded contract (*Takoff*, Dobrovolno predstavitelstvo, 4.7.3); SCOTTISH law holds that an agent cannot adopt a position where there would be a conflict of interest with the principal and cannot profit from any contract concluded personally with the principal. A transaction entered into in breach of this duty is voidable (*SME Reissue*, para. 97).

II. No rule that contract affected by conflict

2. No conflict-of-interest rule is contained in the Geneva Convention on Agency. ENGLISH law does not seem to know a rule comparable to paragraph (1). The contract concluded in a conflict of interests situation of which the third party knew is therefore not voidable. There is, however, English authority allowing the avoidance of the contract in the more extreme case where the third party bribes the representative (*Panama & South Pacific Telegraph Co. v. India Rubber Co.* (1875) LR 10 CA 515).

III. Partial recognition of rule

3. In some European countries, the invalidity (GERMANY: CC § 181; GREECE: CC art. 235; THE NETHERLANDS: CC art. 3:68; POLAND CC art. 108; SLOVAKIA CC § 22(2) in connection to § 39)) or voidability (ITALY: CC art. 1395; PORTUGAL: CC art. 261(1) of a representative's transactions with himself or herself is prescribed. The FRENCH, BELGIAN and LUXEMBOURG) CC's merely regulate the special case of a sale by public auction (CCs art. 1596), but this provision is considered to express a general principle (France: *Terré/Simler/Lequette*, Les obligations[6], no. 182 and note (4); Belgium: Cass. 7 December 1978, Pas. belge 1979 I 408, 410; *Wéry*, Le mandat, no. 105); violation of the prohibition entails voidability of the contract (France: Cass. 29 November 1988, Bull.civ. 1988 I no. 341; Belgium: Cass. 7 December 1978, supra). Also, SPANISH law prescribes the invalidity of the contract of sale when a representative acts in a personal capacity or on behalf of another. See: SPANISH CC art. 1459.

IV. In fact no conflict

4. In legal systems predicated on prohibiting conflicts of interests, a representative's transaction with himself or herself is valid if in fact there can be no conflict of interests (ITALY: CC arts. 1394, 1395; The NETHERLANDS: CC art. 3:68; PORTUGAL: CC art. 261(1); BULGARIA: *Takoff*, Dobrovolno predstavitelstvo, 4.7.2.1; AUSTRIA cf. *Koziol and Welser*, Bürgerliches Recht I[13], 215 et seq.; and for POLAND CC art. 108).

The ESTONIAN GPCCA § 131(1) sent. 2. provides for a presumption similar to the one in paragraph (2) of the Article.

5. By contrast, under GERMAN CC § 181, contracts which the representative makes with himself or herself or as representative for the third party are ineffective whether there is a conflict of interests or not. For this reason CC § 181 provides that there may be conflicts of interests which do not preclude the representative from representing the principal; on the other hand, in some cases the representative cannot bind the principal even though a conflict of interests is impossible (BGH 24 January 1991, NJW 1991, 982, 983).

V. Principal's consent

6. The principal's consent, of course, validates the contract. A specific provision comparable to paragraph (3) seems to exist only in GERMANY (CC § 181, "*soweit nicht ein anderes ihm gestattet ist*"), PORTUGAL (CC art. 261(1)) and in ESTONIA (GPCCA § 131(2)). Under POLISH law a similar rule is accepted in connection with CC art. 103.

7. Under the HUNGARIAN CC § 221(3) a representative must not proceed if the other interested party is the representative personally or another person whom the representative also represents. The representative, if a legal person, may however proceed in a case of conflicting interests with the express consent of the principal.

II.–6:110: Several representatives

Where several representatives have authority to act for the same principal, each of them may act separately.

COMMENTS

It is common in practice for principals to grant authority to two or more representatives. The same result may follow in situations where authority is conferred by law. The purpose may be to spread the workload or simply to ensure that if one representative is unable to act the other will be able to do so. In some cases the double appointment may be seen as a safeguard against abuse, both representatives being required to act together before the principal will be bound. In this situation, their authority is said to be joint. It is necessary to have a default rule for this situation.

The default rule chosen here is that each representative may act separately unless otherwise provided. The reason for choosing this as the default rule is that it leads to greater freedom of action. A requirement of joint action could be restrictive in many situations. A principal who wishes to require joint action as a safeguard against abuse can easily do so.

NOTES

1. A similar provision can be found in ITALY (CC art. 1716), in the NETHERLANDS (CC art. 3:65), in BULGARIA – LOA art. 39(2); and in ESTONIA (GPCCA § 122(1)). The Estonian GPCCA § 122(2) further specifies that if several representatives may represent a principal only jointly, each of them may, however, separately accept declarations of intention on behalf of the principal.
2. In SLOVAKIA (CC § 31(3)) A power of representation may be conferred jointly upon several representatives. Unless otherwise determined in the power of representation, all of them must act jointly
3. Under POLISH law, this is provided for in CC art. 107, and the rule applies also to further representatives appointed by the original representative (where there is authority to make such further appointments).
4. In DANISH law there are no similar legislative provisions but the rule must be presumed to be same.
5. In ENGLISH law, several representatives may act for a principal either jointly or both jointly and separately. Where a principal gives authority to act, without further instruction, the authority is "joint" and can only be acted on by the representatives jointly (*Brown v. Andrew* (1849) 18 LJQB 153). Authority given jointly and separately may be acted upon by all or any of the representatives and bind the principal (*Guthrie v. Armstrong* (1822) 5 B & Ald 628).
6. Under GERMAN law basically the question is one of interpreting the authorisation: no general priority of the one or the other sort of authority exists (Staudinger [-*Schilken*] BGB (2004), § 167 no. 52). But in all cases joint representatives are able accept declarations of other parties separately (Staudinger [-*Schilken*] BGB (2004), § 167 no. 56).

II.–6:111: Ratification

(1) Where a person purports to act as a representative but acts without authority, the purported principal may ratify the act.

(2) Upon ratification, the act is considered as having been done with authority, without prejudice to the rights of other persons.

(3) The third party who knows that an act was done without authority may by notice to the purported principal specify a reasonable period of time for ratification. If the act is not ratified within that period ratification is no longer possible.

COMMENTS

A. The principle of ratification

The first paragraph establishes the general principle that, by ratification, a purported principal may cure any lack of authority on the part of a person who has purported to act as his or her representative.

Ratification may be made by express declaration addressed to the representative or the third party. Ratification may also be implied from acts of the purported principal which unambiguously demonstrate an intention to adopt the contract made or act done.

> *Illustration 1*
> In the name of a principal P, who is a merchant, representative A has contracted with T, also a merchant, for the purchase of the most recent model of a computer for €2,500 although the authority was limited to €2,000, which T did not know. After learning what A has done, P sends instructions about delivery of the machine. This implies ratification of A's act.

B. The effect of ratification

The effect of ratification is stated by paragraph (2): the act is regarded as having been authorised from the beginning. The principal takes over the benefits as well as the burdens produced by the act.

> *Illustration 2*
> The facts are as in Illustration 1. The market price rose the day after P had sent the letter of confirmation. Three days later T, alleging A's lack of authority, purports to avoid the contract. That is unjustified since P had ratified the contract and T can no longer invoke the lack of authority to escape the contract.

The purported principal may not yet be in existence or may not yet be identifiable at the time of the act (e.g. where a person acts in the name of a company which is not yet created or of a subcontractor who has yet to be selected). In such a case, the purported principal may still ratify the act later and will then be bound as from the moment of coming into existence or becoming identified. Special rules of the applicable company law with respect to pre-incorporation contracts take, of course, precedence.

C. Protection of other persons' rights

The question of the rights which other persons may have acquired is outside the scope of this Chapter.

D. Third party's right to set reasonable time for ratification

Paragraph (3) provides that the third party may by notice to the purported principal specify a reasonable period of time for ratification. If the purported principal does not ratify within that period ratification is no longer possible. The purpose of this rule, which is derived from the Unidroit Principles Article 2.2.9, is to prevent the principal from being able to keep a third party in a state of legal uncertainty for an indefinite time. The paragraph applies only if the third party knows that the representative had no authority. If the third party has reason to be uncertain, the appropriate course is for the third party to ask the representative to produce evidence of authority or to seek clarification of the position from the principal and in the meantime to withhold performance.

NOTES

I. Ratification: the general rule

1. The principle of ratification is generally accepted in the law of Member States (GERMANY: CC § 177; AUSTRIA: CC § 1016; NORDIC Contract Acts § 25(1); THE NETHERLANDS: CC art. 3:69(1); FRANCE, BELGIUM and LUXEMBOURG: CCs art. 1998(2); ITALY: CC art. 1399(1); BULGARIA: LOA art. 42(2); SPAIN: CC art. 1259(2); PORTUGAL: CC art. 268; GREECE: CC art. 229; ENGLAND: *Bird v. Brown* (1850) 4 Exch 786, 798; SCOTLAND: *SME Reissue* paras. 61-74; POLAND CC art. 103 § 2 and § 3; SLOVAKIA CC § 33; ESTONIA: GPCCA § 129(1); and SLOVENIA: LOA §§ 72(1) and 73(1). HUNGARIAN CC § 221(1). The same principle is expressed in the Geneva Convention on Agency, art. 15(1).

2. Under ENGLISH law, however, an undisclosed principal may not ratify (*Keighley Maxsted & Co.* v. *Durant* [1901] AC 240, HL). It has been held that a principal who could not have been identified at the time the agent made the purported contract with the third party is also unable to ratify, *Southern Water Authority* v. *Carey* [1985] 2 AllER 1077, QBD., but this is doubtful, see *Treitel,* The Law of Contract[9], para. 16-045; compare *Chitty* on Contracts II[27], no. 31-028. The position, although less certain on the authorities, is probably the same in SCOTTISH law: *SME Reissue*, paras. 73-74.

II. Implied ratification

3. The ratification may be express or implied (Geneva Convention on Agency art. 15 para. 8; FRANCE, BELGIUM and LUXEMBOURG: CC art. 1998(2); GERMANY: BGH 2.11.1989, BGHZ 109, 177; GREECE: Thessaloniki Court of Appeal 2966/1992 EllDik 35 (1994) 636 I; IRELAND: *Bank of Ireland Finance Ltd.* v. *Rockfield Ltd* [1979] IR 21 at 35-36 (SC)); ESTONIA GPCCA § 68(3); SCOTLAND: *SME Reissue*, para. 61. If the principal accepts the benefits arising from the unauthorised contract, this can be regarded as an implied ratification (AUSTRIA: CC § 1016). This doctrine is also fully recognised in SPANISH law (TS 1 March 1988, RAJ (1988), 1541, TS 23 October 1990, RAJ (1990) 8040, TS 19 July 1999, RAJ (1999) 6772. The same is true if the principal voluntarily performs the obligations towards the third party (see on

Belgium: *Wéry*, Le mandat, no. 205). In POLAND an implied ratification may take place in the contract of agency (CC art. 760^3). In SLOVAKIA (CC § 33) when the principal does not communicate disapproval to the person with whom the representative negotiated without undue delay after learning of the representative's act outside the scope of the latter's authority , the principal is deemed to approve such act. The same is true under ESTONIAN law for the contract of agency (LOA § 676(4)). Generally, if ratification has not been granted within two weeks after receipt of the proposal for ratification, the person is deemed not to have ratified the transaction (GPCCA § 129(4)). Until ratification of a transaction, the declaration of intention made by the other party for entry into the transaction may be withdrawn unless the party knew or should have known of the absence of the right of representation upon entry into the transaction (GPCCA § 129(5)). In SLOVENIAN law LOA § 72(2) provides that if the principal does not ratify the act within a reasonable time, the principal is deemed to have refused it.

4. An implied ratification is, however, excluded where the observation of a form is prescribed for the ratification, either the same formality as is required for the contract to be ratified (ITALY: CC art. 1399(1) or that for the grant of authority; BULGARIA: LOA art. 42(2); NETHERLANDS: CC art. 3:69(2); PORTUGAL: CC art. 268(2); ESTONIA: GPCCA § 129(6)); SLOVENIA: LOA § 75; GERMANY: Staudinger [-*Schilken*] BGB (2004), § 177 no. 10).

III. Effect of ratification

5. The effect of ratification as expressed in paragraph (2) corresponds to the Geneva Convention on Agency (art. 15(1) second sent.) and to the laws in many countries (GERMANY: CC § 184(1); THE NETHERLANDS: CC art. 3:369(1); AUSTRIA: Rummel (-*Strasser*), ABGB I^3, §§ 1016, 1017 no. 12; FRANCE and LUXEMBOURG: *Malaurie/Aynès/Gautier*, Contrats spéciaux $VIII^8$, no. 585; BELGIUM: Cass. 6 Feb. 1953, *Pas. belge* 1953, 436; Cass. 13 Jan. 2003, *JTT* 2003, 268; ITALY: CC art. 1399(2); BULGARIA – no special rule, s. *Takoff*, Dobrovolno predstavitelstvo, 5.3.4.1; GREECE: *Balis* 319; POLAND: CC art. 103; PORTUGAL: CC art. 268(2); ENGLAND: (*Koenigsblatt* v. *Sweet* [1923] 2 chap. 314, 325); ESTONIA: GPCCA § 113; SCOTLAND: *SME Reissue*, para. 60; and SLOVENIA: LOA § 72(3). However, the rights acquired by third persons are not affected (Portugal: CC art. 268(2); Belgium: Cass. 6 February 1953, Pas. belge 1953 I 436, 437). This conclusion may also follow from general rules on the effect of an approval (France, Belgium, Luxembourg: CCs art. 1338(3); Greece: CC art. 238 sent. 2). In SLOVAKIA, upon ratification the act is considered] as having been done with authority, ex tunc. (Svoboda, J: Civil Code – commentary. 5^{th} Edition, Eurounion. Bratislava, 2004, p.78).

II.–6:112: Effect of ending or restriction of authorisation

(1) The authority of a representative continues in relation to a third party who knew of the authority notwithstanding the ending or restriction of the representative's authorisation until the third party knows or can reasonably be expected to know of the ending or restriction.

(2) Where the principal is under an obligation to the third party not to end or restrict the representative's authorisation, the authority of a representative continues notwithstanding an ending or restriction of the authorisation even if the third party knows of the ending or restriction.

(3) The third party can reasonably be expected to know of the ending or restriction if, in particular, it has been communicated or publicised in the same way as the granting of the authority was originally communicated or publicised.

(4) Notwithstanding the ending of authorisation, the representative continues to have authority for a reasonable time to perform those acts which are necessary to protect the interests of the principal or the principal's successors.

COMMENTS

A. Basic idea

This Article deals with a predicament which may arise in several typical situations when a representative's authorisation comes to an end or is restricted. A third party who knew of the authority may not know of the ending or restriction; or the ending or restriction may be prohibited by a contract between the principal and the third party; or the ending of the authorisation may be so sudden that it does not allow the principal sufficient time to provide for a substitute. For the purposes of this Article it does not matter how the representative ceases to be authorised. The reason for the loss of authorisation does not matter. It may, for example, be an avoidance of the act granting the authority, or the expiration of a period of time, or termination or restriction by the principal.

In these cases, the interests of the third party and those of the principal, respectively, must be protected by providing for a limited continuation of the representative's authority.

B. Grounds for termination or restriction

The grounds for termination or restriction of the representative's authorisation are part of the law on the internal relationship between representative and principal and are dealt with in the Book on that topic (see Book IV.D. (Mandate)).

C. Continuation of authority in relation to third party

The effect of paragraph (1) is that the representative's authority, notwithstanding that authorisation has come to an end or been restricted, continues in relation to the third party until the third party knows or can reasonably be expected to know of the ending or restriction. This is an example of so-called "apparent" authority – authority derived by operation of law from the appearance of things

Paragraph (2) deals with the situation where the principal is under an obligation to the third party not to terminate or restrict the representative's authorisation. There are several situations

where this sort of arrangement is of practical importance and where the third party has to be able to rely on the grant of authority being irrevocable. Therefore, although it is not clear that the notion of irrevocable authorisation is known in all Member States' laws, paragraph (2) provides that in this case the authority of the representative continues notwithstanding the termination or restriction of the authorisation even if the third party does know of it. See also IV.D.–1:105 (Irrevocable mandate) for the internal relationship.

D. Communicated or publicised ending of authority

Paragraph (3) deals with a specific case of "constructive knowledge". An authorisation which has been addressed to a third party can be ended or restricted in the same manner in which it was granted. This is of particular importance if the grant of authority has been publicised, e.g. by a notice in a newspaper.

E. Continuation of an authority of necessity

Paragraph (4) adopts a useful innovation which goes beyond the law of most Member States but which is found in the Geneva Convention on Agency. It extends the representative's authority for a reasonable period, provided this is necessary for the protection of the principal's (or, in case of the principal's death or other extinction, a successor's) interests. There is no necessity if another representative has been granted authority immediately upon extinction or if the principal (or a successor) is in a position to undertake all necessary and urgent acts.

The extension of the representative's authority is only in time. By contrast, in substance it is restricted because it is limited to acts which are necessary for the preservation of the principal's interests.

NOTES

I. Authority normally depends on duration of internal relationship

1. Even if a national law distinguishes between the internal and the external relationship, the duration of the authority is, as a rule, made dependent upon the duration of the underlying internal relationship (GERMANY: CC § 168; GREECE: CC art. 222; ITALY: CC art. 1396(2); PORTUGAL: CC art. 265(1); ESTONIA: GPCCA § 125(2) and (8). In Portugal, the reverse is also true: the mandate ends if the representative's authority is revoked or renounced (CC art. 1179). However, even though terminated the authority may well still deploy effects vis-à-vis third persons (cf. infra no. 2).
2. In general, revocation by the principal, renunciation by the representative or contractual termination agreed between them are considered to be grounds for the extinction of authority (Geneva Convention on Agency art. 17 lit. a, c; FRANCE, BELGIUM and LUXEMBOURG: CCs art. 2003; SPAIN: CC art. 1732 nos. 2, 3; THE NETHERLANDS: CC art. 3:72 lit. c, d; AUSTRIA: CC § 1020, 1021; GERMANY: CC §§ 168, 671, 675(1) together with §§ 620 et seq. or §§ 643, 649; GREECE: CC arts. 222, 724, 725; ITALY: CC art. 1722 nos. 2, 3; BULGARIA: LOA art. 41(1); PORTUGAL: CC art. 265; ENGLAND: Bowstead (*-Reynolds and Graziadei*), Agency[16], § 122; POLAND CC art. 101; ESTONIA: GPCCA § 125(2), (5), (6); SLOVAKIA CC § 33b death of representative), SLOVENIA LOA §§ 77 and 79. In addition, the authority may be limited in time or made dependent upon certain

conditions by stipulation. The agent's or the principal's insolvency are mostly grounds for termination of authority. In ENGLISH law insolvency may have this effect: *Chitty* on Contracts II[29], no. 31-160.

3. The Geneva Convention on Agency refers to the applicable national law with respect to further grounds for termination of the representative's authority (art. 18).

II. Third party protected

4. Everywhere in Europe there is some protection for the third party who is unaware of the termination of the authority. In effect, the authority regularly is deemed to subsist until the third party knows or ought to know about the termination - either in the form of actual authority or as an apparent authority (Geneva Convention on Agency art. 19; GERMANY: CC §§ 170-173, 674; AUSTRIA: CC § 1026; DENMARK, SWEDEN, FINLAND: Nordic Contract Acts §§ 12 ff.; THE NETHERLANDS: CC art. 3:76(1); FRANCE, BELGIUM and LUXEMBOURG: CC arts. 2005-2006, 2008-2009; ITALY: CC art. 1396; BULGARIA: LOA art. 41(2); SPAIN: CC art. 1738; PORTUGAL: CC art. 266; SLOVENIA: LOA § 78(1); ESTONIA: GPCCA § 127; ENGLAND: *Drew* v. *Nunn* (1879) 4 QBD 661; *Pole* v. *Leask* (1862) 33 LJCh 133, 162-163; SCOTLAND: *SME Reissue*, paras. 75-76 (ostensible authority and personal bar). As an exception, under GREEK law the principal is not bound by acts of the representative if the latter knew about the termination of the authority, but the principal may be liable to the third party for damages if the principal could have easily notified the third party of the termination of the authority (CC arts. 224, 225). Under POLISH CC art. 105, if after the expiration of the authority the agent concluded a legal transaction in the name of the principal within the limits of the original authorisation the legal transaction is valid (i.e. the principal is bound) unless the other party knew about the expiration of the authority or could easily have obtained that knowledge, also in SLOVAKIA CC § 33b(4)).

5. Under the HUNGARIAN CC § 223(2) a power of attorney is valid until withdrawn, unless otherwise provided; in relation to a bona fide third person withdrawal is effective only if the third party has been informed of it. The right of withdrawal cannot be validly waived. Under § 223(3) a power of attorney ceases to exist with the death of either party.

III. Authority normally revocable

6. The laws of all Member States agree on the principle that a representative's authority is revocable. Sometimes this principle is expressed by statute (FRANCE, BELGIUM and LUXEMBOURG: CCs art. 2004; SPAIN: CC art. 1733; ITALY: CC art. 1723; BULGARIA: LOA art. 38(2) which rule is mandatory and cannot be abrogated by the parties); PORTUGAL: CC art. 265(2); AUSTRIA: CC § 1020; GERMANY: CC § 168 sent. 2; POLAND: CC art. 101 § 1; SLOVENIA: LOA § 77(1); ESTONIA: GPCCA § 126). The Geneva Convention on Agency provides that revocation by the principal terminates the authority even if this is not consistent with the terms of the agreement between principal and representative (art. 17 lit. c). Authority is, as a rule, revocable at any time. In SLOVAKIA (CC § 33b(3)) The principal may not validly waive the right to revoke the power of representation at any time.

IV. Irrevocable authority

7. Exceptionally, an authority may be granted as irrevocable. In GERMANY, ITALY and PORTUGAL, the irrevocability of the authority is a matter of agreement between representative and principal (see Staudinger [-*Schilken*] BGB (2004), § 168 nos. 8 et seq.). It is similar in POLAND, where the irrevocability has to be justified by the

nature of the legal relationship constituting the basis of the authority (CC art. 101 § 1). However, such a clause has different effects: while in Germany a revocation is ineffective (CC § 168 sent. 2), in the other two countries the principal's revocation (Italy and Geneva Convention, supra) or either party's revocation terminates the representative's authority (Italy: CC art. 1723(1); Portugal: CC art. 265(2). But in Italy the principal is liable to compensate the representative for any damage suffered, unless there was an important reason for the revocation; in Portugal, the revoking party is liable to the other party (CC art. 1172 lit. b).

8. In most countries the granting of an effective irrevocable authority is possible only in certain conditions. One typical condition is an authority granted in the representative's interest (The NETHERLANDS: CC art. 3:74(1); GREECE: CC art. 218 sent. 2 and A.P. 187/1983, NoB 1983.1550-1551; DENMARK: *Ussing*, Aftaler[3], 309 f; FINLAND: *Kivimäki & Ylöstalo* 271 - 272; ENGLAND: Bowstead (-*Reynolds and Graziadei*), Agency[16], no. 10-007). Under the ESTONIAN GPCCA § 126(2) an irrevocable authority, which may be withdrawn only with good reason (GPCCA § 126(3)), may be granted in the interest of a representative or a third person. In AUSTRIA an irrevocable authority may be against good faith, see OGH 1 October 1958 EvBl 1959/3; 15 December 1966 MietSlg 18.101). In GERMANY and GREECE, irrevocability of an authority given in the representative's interest may even be implied (Germany: BGH 13 December 1990, NJW-RR 1991, 439; Greece: Thessaloniki Court of Appeal 1236/1990 Arm 44 (1990) 214, 215 I). In ITALY and PORTUGAL an authority granted in the representative's or a third party's interest cannot, as a rule, be revoked without the consent of the person interested in its granting (Italy: CC art. 1723(2); Portugal: CC art. 265(3). FRANCE and BELGIUM have come to the same result by declaring an authority given in the common interest of principal and representative to be irrevocable (France: *Benabent*, Specific Contracts nos. 678 ff see the "mandat d'intérêt commun" nos. 682 ff; Belgium: Cass. 28 June 1993, Pas. belge 1993 I 628, 630). In AUSTRIA, an authority granted for a limited period of time may be made irrevocable (Rummel (-*Strasser*), ABGB I[3], §§ 1020-1026 no. 4).

9. However, exceptionally even an irrevocable authority may be revoked for an important reason (GERMANY: BGH 12 May 1969, WM 1969, 1009; BGH 8 February 1985, WM 1985, 646; AUSTRIA: OGH 1 September 1954, SZ 27/211; 15 December 1966 MietSlg 18.101; GREECE: A.P. 1108/1984, NoB 33 (1985) 771 (772 I); ESTONIA, ITALY AND PORTUGAL: cf. provisions cited supra). In THE NETHERLANDS, an irrevocable authority may only be terminated by a court decision upon an important reason; the principal has to file a petition at the *rechtbank* (CC art. 3:74(4)).

10. According to SPANISH case law and scholarly literature, though not mentioned in the SPANISH CC, there are two types of irrevocable authority. Firstly, when parties agree to no revocation. Secondly, when the mandate or grant of authority is the mere vehicle for satisfying the representative's legitimate interest. In this last case the irrevocability becomes "absolute" or "of the essence". (Supreme Court judgments 20 April 1981, RAJ (1981) 1658, 27 April 1989, RAJ (1989) 3269, 30 January 1999, RAJ (1999) 331. According to BULGARIAN law authority is revocable at any time (LOA art. 38(2)). The rule is mandatory. Doctrine maintains the same point of view (*Takoff*, Dobrovolno predstavitelstvo, 6.1.4).

V. Manner of revocation

11. Provisions similar to paragraph (2) can be found in some European countries. Nowhere, however, is this rule expressed in a comparably general manner. Commonly

it is provided that the revocation of authority has to take place in the same manner as that used in granting the authority (GERMANY: CC §§ 170-172; GREECE: CC arts. 219-221; DENMARK, SWEDEN and FINLAND: Nordic Contract Acts §§ 12-16; ESTONIA: GPCCA §§ 126(1), 127). In PORTUGAL the third party has to be informed by suitable means (CC art. 266(1). Under POLISH law it is accepted that the authority can be revoked in any form, irrespective of the form required for the grant of authority (*Pietrzykowski*, Kodeks cywilny I, p. 358). In SLOVAKIA authority may be revoked in any form, irrespective of the form required for the grant of authority (Svoboda, J et col.: Civil Code – commentary. 5th Edition, Eurounion. Bratislava, 2004, p. 80. According to BULGARIAN law, no formal requirements are set for revocation vis-à-vis the representative; towards the third party the requirements of the *forma ad probationem* (CPC art. 164) should be however observed. The entry into a public register (as far as foreseen for the respective kind of representation) replaces the *forma ad probationem* for effectiveness towards third persons. Upon entry the revocation is opposable to everybody independent of knowledge (LOA art. 41(2)).

VI. Acts necessary to protect principal's interests

12. The Geneva Convention on Agency art. 20 is very similar to paragraph (4). In the Member States there are no comparable general rules. There are, however, provisions of a more limited scope. In GERMANY CC §§ 169, 674 provide for a continuing apparent authority where the authority has ended in another way than by revocation. Under the CCs of FRANCE, BELGIUM and LUXEMBOURG, in case of danger the representative has to complete the tasks already begun even after the principal's death (art. 1991(2)). In THE NETHERLANDS and in ITALY, after the principal's death or incapacitation, the representative is still authorised to perform certain acts: in the Netherlands those acts that are necessary for the management of a business enterprise or acts which cannot be put off without detriment (CC art. 3:73(1), (2)); in Italy the representative has to continue performance of acts already begun, provided delaying them would be dangerous (CC art. 1728(1)). Under the NORDIC Contract Acts, § 24, after the principal has become bankrupt or incapacitated, the representative may on the strength of the authority perform such acts as are necessary to protect the principal or the bankrupt estate against losses, until necessary measures can be taken by the person who according to law has the right to act on the principal's behalf. The PORTUGUESE law of mandate provides that mandate and authority are extinguished by the principal's death or incapacitation, unless the extinction would harm the principal or the heirs (CC art. 1175). In SLOVAKIA (CC § 33b(6)) if the principal dies or if the representative terminates the power of representation, the representative is nonetheless bound to perform an immediate act in law in order to prevent detriment to the rights of the principal or the principal's legal successor. Acts thus performed have the same legal effects as if the representation had continued, unless such acts are in conflict with the arrangements made by principal or the legal successor. In AUSTRIA two provisions of the CC are relevant in this respect: According to CC § 1022 authority continues despite the death of the principal, if the interests of the principal or the principal's successors require that the legal transaction is brought to an end. For any case of termination of authority CC § 1025 imposes a duty on the representative to continue to represent the principal until the principal or the principal's successors can take over. For similar rules in SLOVENIAN law, see LOA §§ 79(3), 783(3), 784(4).

13. The ESTONIAN LOA § 632(1) and GPCCA § 125(3) state that it is presumed that a contract of mandate (and therefore authorisation) does not expire upon the death of the principal. If the contract of mandate does expire upon the death or bankruptcy of the

principal the contract of mandate (and therefore also the authorisation) is nevertheless deemed to be in force until such time as the representative becomes aware or ought to become aware of the death of the principal or of the declaration of the principal as bankrupt. Also LOA § 630(2) states that a representative has the right to cancel an authorisation agreement entered into for an unspecified term only on condition that the principal can receive the service or enter into the transaction which is the object of the mandate in another manner. This is aimed at protection of the principal's interest. On continuance of the rights of representation in civil procedure, see CCP § 225.

CHAPTER 7: GROUNDS OF INVALIDITY

Section 1: General provisions

II.–7:101: Scope

(1) This Chapter deals with the effects of:

(a) mistake, fraud, threats, or unfair exploitation; and

(b) infringement of fundamental principles or mandatory rules.

(2) It does not deal with lack of capacity.

(3) It applies in relation to contracts and, with any necessary adaptations, other juridical acts.

COMMENTS

This chapter deals with various grounds on which a contract or other juridical act may be invalid. It deals not only with the invalidity as such but also with other effects of the ground of invalidity, including the possibility of obtaining damages whether or not the contract is avoided. Section 2 deals with what are often called vices of consent – mistake, fraud, threats or unfair exploitation - which have in common that they vitiate the consent which one party has given or apparently given to the conclusion of the contract or the making of the juridical act and make the contract or act voidable. The relevant intention to bring about a legal result was present and was duly manifested but it was there because of some reason which makes it objectionable to hold the party to it. Section 3 deals with what are often called illegality and immorality – namely the effects of an infringement of fundamental principles or mandatory rules. Here there may be no defect of consent or intention but the contract or other juridical act may nonetheless be so objectionable for other reasons that it should be void or voidable.

Although a lack of capacity may be a ground of invalidity, and may negate or vitiate consent or intention, this chapter does not deal with that topic because it is more a matter of the law of persons than of contract proper.

The question of unfair contract terms is covered in the next chapter. It involves rather different considerations and techniques.

It is important that the rules on grounds of invalidity should be capable of applying to juridical acts other than contracts and, in particular to unilateral promises intended to be binding without acceptance. Such acts may be the result of mistake or fraud or threats or unfair exploitation. They may infringe fundamental principles or mandatory rules. Paragraph (3) provides for the necessary extension. The rules of the Chapter can generally be applied without difficulty to juridical acts other than contracts. However, II.–7.203 (Adaptation of contract in case of mistake) will disapply itself because it depends on there being reciprocal obligations.

NOTES

1. In many of the national laws it is customary to refer to a general notion of vices of consent (*vices de consentement*, *Willensmängel*) under which mistake, threats and fraud are factors which prevent there being valid consent to a contract and thus give rise to a right to avoidance. This notion may be explicit in the Civil Codes: for example, ITALIAN CC arts. 1427-1440 are contained in a section headed *Dei vizi del consenso.* The FRENCH, BELGIAN and LUXEMBOURG CC's simply list *erreur*, *violence* and *dol* as grounds on which there may be no valid consent (art. 1109) and provide common rules as to their consequences (art. 1117). See also AUSTRIAN CC §§ 869-877; BULGARIAN LOA art. 27; GERMAN CC §§ 119-124; GREEK CC arts. 140-157; PORTUGUESE CC arts. 240-257 (which cover also simulation and temporary incapacity) and ESTONIAN GPCCA §§ 90-101. The French jurisprudence admits that the grounds listed are a single form of action and are to some extent fungible: *Ghestin*, La formation du contrat[3], no. 481. The Belgian case law and legal writers admit also abuse of circumstances (*lésion qualifiée*) as an additional vice of consent: *Stijns*, Verbintenissenrecht I, no. 124. The DUTCH CC art. 3:44 deals with threat, fraud and abuse of circumstances, but mistake is dealt with in Book 6 on contracts (art. 6:228). The notion of vices of consent is also familiar in SCOTTISH law (*McBryde*, Law of Contract in Scotland[1], paras. 13-17; *MacQueen and Thomson*, Contract Law in Scotland, §§ 4.1-4.66).
2. The NORDIC laws allow relief under broadly the same circumstances but under separate provisions, mainly contained in Chapter 3 of the Nordic Contract Acts (1915-29), or in case law. The courts employ the notion of an invalid declaration of will or legal act.
3. CZECH law uses the concept of requisites of will. These are the freedom of will, the seriousness of will and absence of error and duress, see Knappová (-*Knapp and Knappová*), Civil Law I, 151 et seq. Statutory expressions of this concept can be found in CC §§ 37, 49 and 49a. If any of the requisites is missing, the juridical act is invalid or at least avoidable.
4. The POLISH CC deals with defects in a declaration of will in one section (arts. 82-88) and abuse of circumstances in a separate article applicable to contracts only (art. 388). Similarly, the SLOVENIAN LOA deals with vices of consent (threat, mistake and fraud), in one section (§§ 45-50), whereas abuse of circumstances ("usury") is dealt with within the chapter on reciprocal contracts (§ 119). In another section, invalidity as such and its consequences are dealt with (nullity: LOA §§ 86-93, avoidability: LOA §§ 94-99).
5. ENGLISH and IRISH law do not recognise a unitary concept. Rather, there are several separate grounds on which a contract may be set aside because of some impropriety in the making of the contract or some problem over consent: mistake, misrepresentation, duress, undue influence and unconscionable advantage-taking. However, all but mistake are subject to apparently common rules about loss of the right to set aside, and the same is even true of certain of the rules on mistake: see further below.
6. Grounds of invalidity are not separately and systematically regulated in the SLOVAK CC. The CC deals with grounds of invalidity within its fourth head ("Juridical Acts" §§ 37-42) that regulates juridical acts in general. These grounds of invalidity are common for contracts (bilateral and multilateral juridical acts) as well as unilateral juridical acts. The fourth head deals also with lack of capacity. Some grounds of invalidity (abuse of circumstances, mistake and fraud) are provided under the subhead on "Contracts" §§ 47-49a.

7. In most systems, threat, fraud and (where applicable) abuse of circumstance are grounds for avoiding unilateral juridical acts (including a notice to determine a contract) as well as contracts. In ESTONIAN law, LOA § 12(1) states that the validity of a contract is not affected by the fact that, at the time of conclusion of the contract, performance of the contractual obligations was impossible or one of the parties did not have the right to dispose of the thing or right which is the object of the contract. However, this does not preclude the voidability of the contract on the ground of fundamental mistake (GPCCA § 92).

8. Some of the matters covered by this chapter are not always subsumed within the notion of vices of consent. Thus the existence of a mistake in the communications between the parties may be seen as preventing the formation of a contract (e.g. FRENCH *erreur obstacle*, see *Nicholas* 98-100, though the notion of *erreur obstacle* is wider than this, *Benabent* no. 76. Some English writers also explain the effect of such a mistake as resting on the absence of a valid offer and acceptance, see *Atiyah*, Essays 253-260 and the discussion in *Treitel*, The Law of Contract[9], para. 8-054).

9. Under the HUNGARIAN CC § 200(2) contracts in violation of legal regulations and contracts concluded by evading a legal regulation are void, unless the legal regulation stipulates another legal consequence. A contract is also void if it is manifestly in contradiction to good morals. *Usurious contracts* are governed by CC § 202. This states that if a contracting party has gained excessive benefit or unfair advantage at the conclusion of the contract by exploiting the other party's situation, the contract is void. *Mistake, fraud and threats* are governed by CC § 210. Under paragraph (1) a person acting under a misapprehension regarding any essential circumstance at the time a contract is concluded is entitled to contest their offer or acceptance if the mistake had been caused or could have been recognised by the other party. Under paragraph (2) an offer or acceptance may be contested on the grounds of misapprehension of a legal issue if such misapprehension is deemed significant and if competent legal advice to the parties affected has been patently erroneous. Under paragraph (3) if the parties had the same mistaken assumption at the time the contract was concluded, either of them may contest the contract. Under paragraph (4) a person who has been persuaded to conclude a contract by deception or duress by the other party is entitled to contest the offer or acceptance. This provision applies also if deception or duress was committed by a third person and the other party had or should have had knowledge of such conduct. Under paragraph (5) a gratuitous contract may be contested on the grounds of mistake, deception or duress even if these circumstances could not have been recognised by the other party.

10. All the legal systems now provide some relief against harsh contract terms but it is not clear to what extent there is a common conceptual basis underlying the various provisions.

II.–7:102: Initial impossibility or lack of right or authority to dispose

A contract is not invalid, in whole or in part, merely because at the time it is concluded performance of any obligation assumed is impossible, or because a party has no right or authority to dispose of any assets to which the contract relates.

COMMENTS

In some legal systems initial impossibility may preclude the formation of a contract or make a purported contract invalid. This approach is not taken here. Very often such cases will be ones of mistake under which either party affected may avoid the contract, but there may be cases when a party takes the risk of impossibility or should be treated as taking that risk. An order for specific performance of the obligation will of course be unobtainable if performance is still impossible at the time when it falls due, but the party who has taken the risk may be liable in damages for non-performance.

Illustration
A sells to B, who is a salvage contractor, the wreck of an oil tanker which A says is at a particular location. As A should have known, there never was an oil tanker at that location, but B does not discover this until B's preliminary salvage expedition searches the area. The contract is valid and A is liable in damages to B.

The second situation covered by the Article – namely, where the seller of an asset, at the time of conclusion of the contract, has no right or authority to dispose of it – is an even more clear case where it would be bad policy to preclude the formation of a contract. It might be perfectly possible for the seller to obtain the asset, or to acquire authority to dispose of it, by the time the obligation to transfer ownership falls to be performed. In practice many contracts are entered into in relation to assets which do not yet exist but which are expected to exist by the time when the obligation falls to be performed.

NOTES

1. In many of the legal systems a contract which, at the time it was made, provided for obligations impossible to perform is not voidable but absolutely void: e.g., in the case of "evident" impossibility, AUSTRIAN CC § 878 (this includes only cases which are legally impossible and factually absurd, such as the promise of an eternal life; a "simple" initial possibility - e.g. the sale of goods that belong to another – is subject to the legal consequences of bad performance); ITALIAN CC art. 1346; and so did the former § 306 of the GERMAN CC in case of "objective" impossibility. FRENCH law, and the law of BELGIUM and LUXEMBOURG, require "*un objet certain qui forme la matière de l'engagement*" (CC art. 1108). Thus a contract to supply a specific object which does not exist is void (*nullité absolue*), unless it is a future object (art. 1130(1)). See *Malaurie/Aynès/Gautier*, Contrats spéciaux VIII[8], no. 598. The situation is similar in BULGARIA, where the "impossible object" is ground for nullity, LOA art. 26(2); PORTUGUESE and SPANISH law are broadly similar, see Portuguese CC arts. 280, 399 and 401; Spanish CC arts. 1184, 1272 and 1460. French and Belgian law treat the sale of an item which belongs to another in a broadly similar way, but the contract is voidable (*nullité rélative*) (CC art. 1599). Italian CC art. 1478 differs in not treating this last case as one of impossibility and so did the former German CC in § 437. In

GERMAN and AUSTRIAN law, if one party knew or ought to have known that the performance was impossible, the other may recover reliance interest damages: German CC § 307; Austrian CC § 878 3rd sentence. There may also be delictual liability in French law if the conditions for such liability are satisfied (i.e. if there is a fault) see Benabent no. 84 (for a comparison of French law and PECL). In GERMANY the rule was not only abolished in 2002 but the legislator felt a need to establish an explicit rule similar to PECL art. 4:102 (and hence similar to the present Article) in CC § 311a(1).

2. POLISH civil law differentiates between "objective" impossibility (nobody can perform the contract) and "subjective" impossibility (the party cannot perform the contract). In the former case, the contract is invalid (POLISH CC art. 387 § 1). A party who at the time of concluding the contract knew about the impossibility of performance of an obligation, and did not inform the other party, is bound to redress the damage which the other party sustained by concluding the contract without knowledge of the impossibility of performance (art. 387 § 2). The same distinction between "objective" (nullity) and "subjective" impossibility (rescission) is made in BULGARIAN law. CZECH law is similar. The CC § 37(2) provides that if the object of performance of a juridical act is impossible, the juridical act is invalid (absolutely), however it is interpreted rather restrictively, i.e. the impossibility must be objective and definite – e.g. a contract for delivery of goods may not be held invalid for impossibility of performance if the goods are designated generically; for details see *Švestka/Jehlička/Škárová*, OZ[9], 248. In SLOVENIA too, "objective" impossibility of performance at the time of conclusion is a ground for the nullity of the contract or other juridical act, see LOA §§ 34 and 35. The party who knew or ought to have known about the impossibility is liable for damages arising out of nullity of contract, sustained by the other party, not knowing about the impossibility, see LOA § 91. Mere "subjective" impossibility does not prevent the contract coming into existence. For details, see *Možina*, p. 334.

3. In SLOVAKIA initial impossibility is a ground for the invalidity of the juridical act (CC § 37(2)). If damages arise due to invalidity of the juridical act, the liability for that damage is regulated by the provisions of the CC on liability for damage (CC § 42). If the creation, change or extinction of a right or obligation is linked to fulfilment of an impossible condition, the condition is not taken into consideration (CC § 36(1)).

4. In other systems the same results do not necessarily follow. Thus in GREEK law initial impossibility is a ground for avoidance but does not render the contract void, CC arts. 362-364. In NORDIC law impossibility does not invalidate the contract: see *Ramberg*, Köplagen, 314. DUTCH law resembles the commented Article in that a contract is not invalid merely because at the time of the conclusion of the contract performance is impossible (*Parlementaire Geschiedenis* Boek 6, pp. 485 and 896 and *Asser-Hartkamp*, 4-I, *De verbintenis in het algemeen*, no. 26). The same holds true for the situation that a party is not entitled to dispose of any assets to which the contract relates: a contract is according to Dutch law not invalid merely on this latter ground either.

5. In ENGLAND and IRELAND there are traces of the traditional civil law doctrine. First, a contract to sell specific goods which without the knowledge of the seller have perished at the time the contract is made is void: Sale of Goods Act 1979, s. 6. However it is now widely accepted that the common law is more flexible; a contract for non-existent goods may be void for common mistake but is not necessarily so. Thus in a case in which a seller purported to sell goods which, as the seller should have known, had never existed at all, the High Court of Australia held that the contract

was not void; the seller was liable for non-delivery: *McRae* v. *Commonwealth Disposals Commission* (1950) 84 CLR 377 (the illustration in the comment is based on this case). Secondly, the doctrine of common mistake (the "common law" rule) results in the contract being void, not voidable. It had been said that there is a separate rule in equity that a contract may be voidable for common fundamental mistake: see *Solle* v. *Butcher* [1950] 1 KB 671, CA, but the Court of Appeal has now held this to be incorrect: *Great Peace Shipping Ltd.* v. *Tsavliris Salvage (International) Ltd. (The Great Peace)* [2002] EWCA Civ 1407, [2003] QB 679. See *Chitty* on Contracts I[27], nos. 5-009 and 5-043-5-049.

6. SCOTTISH law holds that impossibility at the time of the contract can in certain circumstances make it void (*McBryde*, Law of Contract in Scotland[1], paras. 15.34-38). The concept of common error making the resultant contract void has been adopted, the error being in the “essentials” or the “substantial’s” of the contract (*McBryde*, Law of Contract in Scotland[1], paras. 15.35-39; *Stair*, The Laws of Scotland XV, paras. 690-691); but parties may contract to undertake the risk of the impossibility of the performance required (e.g. *Gillespie v. Howden* (1885) 12 R 800; *Pender-Small v. Kinloch’s Trustees* 1917 SC 307).

7. In ESTONIAN law, LOA § 12(1) expressly states that the validity of a contract is not affected by the fact that, at the time of entry into the contract, the performance of the contract was impossible or one of the parties did not have the right to dispose of the thing or right which is the object of the contract. However, this does not preclude the voidability of the contract on the ground of fundamental mistake (GPCCA § 92).

8. Under the HUNGARIAN CC § 227(2) contracts providing for the performance of impossible services are void.

Section 2: Vitiated consent or intention

II.–7:201: Mistake

(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:

(a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and

(b) the other party;

(i) caused the mistake;

(ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake;

(iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or

(iv) made the same mistake.

(2) However a party may not avoid the contract for mistake if:

(a) the mistake was inexcusable in the circumstances; or

(b) the risk of the mistake was assumed, or in the circumstances should be borne, by that party.

COMMENTS

A. General

It frequently happens that a party concludes a contract on the basis of a misapprehension about the facts or the law affecting the contract. As will appear from the Notes, there are substantial differences between the laws of the Member States in the way in which such cases are conceptualised and also in the substantive outcomes. In particular, some systems are very reluctant to grant relief when a party has concluded the contract as the result of a "self-induced" mistake, rather than as the result of incorrect information given by the other party. Moreover, even if the other party becomes aware of the first party's mistake, the other party may not be required to point it out. Others laws treat such conduct, depending on the circumstances, as contrary to good faith; and may allow a party to avoid a contract on the ground of a serious mistake even if it was self-induced and unknown to the other party. This Article (along with the following four Articles) seeks to set out principles which strike a fair balance between the voluntary nature of contract and protecting reasonable reliance by the other party. It does not purport to lay down rules which are "common principles" to be found in the different laws, though it reflects what is found in many of them. In appropriate cases, particularly in consumer contracts, the provisions of this Article will fall to be supplemented by rules on pre-contractual information duties, see Chapter 3, Section 1 (Information duties).

While the principle of freedom of contract suggests that a party should not be bound to a contract unless the consent to it was informed, the need for security of transactions suggests that the other party should in general terms be able to rely on the existence of the contract unless that other party:

(a) has not acted in good faith; or
(b) has taken deliberate advantage of the first party in circumstances in which standards of fair dealing would not permit this; or
(c) has behaved carelessly or in some other way which was unreasonable.

Further, a party who has entered a contract under some mistake or misapprehension should not normally be entitled to avoid a contract unless the misapprehension was very serious. Thus a contract may be set aside for mistake only if the mistake is such that but for the mistake the mistaken party would not have concluded the contract or would have done so only on fundamentally different terms. The only exception is the case of fraud, where the intention to deceive is itself a sufficient ground to justify the innocent party having the power to avoid the contract.

If one of the conditions (a) - (c) above is satisfied, and, even on a correct interpretation of the contract, a party has made a mistake which is to something fundamental (see D below), there may be a case for a remedy.

It may also be appropriate to allow the contract to be avoided when a mistake which both parties shared has made the contract fundamentally different to what was anticipated. Here there was usually no bad faith, advantage-taking or careless behaviour at the time the contract was made, but this is a risk which neither party anticipated and which the contract did not allocate. In such a case it may be bad faith to insist on the contract being carried through when it has turned out to be fundamentally different from what either party anticipated.

B. Priority of interpretation

Before a remedy on the ground of mistake is allowed, it is frequently necessary to consult the contract and to interpret its provisions to see whether it in fact covers the situation which has now been revealed. If it does, there will be no ground for invoking mistake.

Illustration 1
A builder employed to build a house finds, when starting to dig the foundations, that across the site runs an old sewer which is not marked on the maps and which neither it nor the employer had ever expected. This will make completion of the task very much more expensive. It must first be determined whether the contract, as properly interpreted, covers the problem. If the contract provides that in the event of "unforeseeable ground conditions" the contractor is entitled to extra time and extra payment, and a correct interpretation of "unforeseeable ground conditions" would include the sewer, there is no basis for the contractor to invoke this Article.

C. Mistake must make contract fundamentally different

Security of transactions demands that parties should not be able to escape from contracts because of misapprehensions as to the nature or quality of the performance unless the mistakes are very serious. It is only in the case where the seller knows that the buyer would not enter the contract at all, or would only do so on fundamentally different terms, that the seller should be required to point out the buyer's mistake. Less important misapprehensions must be borne by the party on whom they fall. Equally only very serious shared mistakes should give rise to relief. The Article therefore confines relief for mistake to cases where the other party knew or should have known that the mistaken party, if aware of the true situation,

would not have entered the contract or would have done so only on fundamentally different terms.

It is not sufficient that the matter in question should have been "material" in the sense of being such as to merely influence the decision as to whether to contract or as to the terms on which to contract. A matter may be material in this sense without being fundamental. For example it might have slightly affected the price the mistaken party would have agreed to pay. A material difference between offer and acceptance may prevent the formation of a contract; but a mistake as to something which is material but not fundamental will not give rise to a right of avoidance under the present Article.

D. Mistakes caused by other party

Perhaps the most likely reason for a mistake is that the mistaken party has been given incorrect information by the other party, which has thus caused the mistake. When the resulting misapprehension is fundamental, the first party should be permitted to avoid the contract. Not only was the party not properly informed, but that resulted from the behaviour of the other party.

Even if the party giving the information reasonably believed it to be true, that party chose to give the information; and cannot complain if the recipient is allowed to avoid the contract provided that the resulting misapprehension was serious enough.

> *Illustration 2*
> The seller of the lease of a property which he had used for residential purposes told a prospective purchaser that the purchaser would be able to use it as a restaurant, which was the purchaser's main object. In fact the seller had forgotten that there was a prohibition on using the property other than for residential purposes without the landlord's consent and the landlord refuses consent. The purchaser of the lease may avoid the contract.

Depending on the facts of the case, the mistaken party may have a remedy under other Articles. For example, if the statement gave rise to a contractual obligation there will be a remedy for non-performance of the obligation. Even if the statement did not give rise to a contractual obligation there may be a remedy for fraud or a right to damages for loss caused by incorrect information which the party giving it had no reasonable grounds for believing to be true.

In these cases the misapprehension which results from the incorrect statement need not be fundamental. But if the conditions of (i) - (iv) are not met, or if there has been no fundamental non-performance or fraud and the mistaken party wants to avoid the contract, that may be done only on the basis of fundamental mistake under this Article.

There will also be ground for avoidance if the mistake was caused by the other party in some other way than by the giving of false information. For example, a party may have set up a website in such a way as to induce parties entering into contracts through that website to make certain errors.

E. Mistake known to other party

A party should not normally be permitted to remain silent, with the deliberate intention of deceiving the other party, on some point which might influence the other party's decision on whether or not to enter the contract. It is true that some legal systems within the EU as a general rule do allow a party to remain silent about important information, even if aware that it would influence the other's decision. That may be appropriate in certain cases, for example when the knowledgeable party has only gained the knowledge at considerable expense, or in highly competitive commercial situations (see Illustration 2 below), but as a blanket rule it is not appropriate. It does not accord with either commercial morality or what contracting parties will normally expect of each other. Unless there is a good reason for allowing the party to remain silent, silence is incompatible with good faith and will entitle the other party to avoid the contract under this Article.

The Article recognises a general principle that a party should not be entitled knowingly to take advantage of a serious mistake by the other as to the relevant facts or law. The same applies when it cannot be shown that the non-mistaken party actually knew of the mistake but where that party could reasonably be expected to have known of the mistake because it was obvious.

Illustration 3
A sells her house to B without revealing to B that A knows there is extensive rot under the floor of one room. She does not mention it because she assumes B will be aware of the risk of it from the fact that there are damp marks on the wall and will have the floor checked. B does not appreciate the risk and buys the house without having the floor checked. B may avoid the contract.

Illustration 4
Through extensive research, A discovers that demand for a particular chemical made by X Corporation is about to rise dramatically. A buys a large number of shares in X Corporation from B without revealing his knowledge, which he knows B does not share. B has no remedy.

F. Breach of pre-contractual information duties etc.

Paragraph (1)(b)(iii) deals with a situation where there is a breach, not of a general duty of good faith, but of a particular pre-contractual information duty or a duty to make available a means of correcting input errors and where that breach has caused the contract to be concluded. This provision therefore provides a sanction for duties laid down elsewhere in these rules (see Chapter 3, Section 1 (Information duties) and Chapter 3, Section 2 (Duty to prevent input errors) of this Book and the pre-contractual information duties laid down in Book IV in relation to specific contracts).

G. Shared mistake

When both parties conclude a contract under a serious misapprehension as to the facts the question is a different one. It must be asked whether the contract was intended to allocate the risk of the loss caused by the facts turning out to be different. Sometimes the parties realised that their knowledge was limited, or the contract was by its nature speculative; then it can be said that the contract was intended to apply despite the difference between what the parties assumed and reality. But sometimes it is more realistic to say that the risk of the facts turning out to be different was not allocated by the contract. If the result is that the contract would be

very seriously different for one party, that party should have the right to avoid it. This usually results in the resulting losses being divided between the parties, if only in a very rough and ready way.

Illustration 5
An Englishwoman who owns a cottage in France agrees to rent it for one month to a Danish friend, although the Englishwoman does not normally rent the cottage. The lease is to start five days later. The Dane books non-refundable air tickets to fly to France. It is then discovered that the cottage had been totally destroyed by fire the night before the contract was agreed. The contract may be avoided by either party, with the result that no rent is payable and the Dane gets no compensation for the wasted air tickets.

H. No special categories

It is not necessary to lay down categories of misapprehension which will give rise, or not give rise, to a remedy for mistake. So the Article provides that the mistake may be about the facts surrounding the contract or the law affecting it. The Article does not apply to cases in which one party has performed the contract or intends to do so knowing that it involves an illegal act. The effects of illegality are covered separately.

Mistakes which relate to the mere value of the item sold are not usually fundamental. There is no explicit rule refusing any relief in this case.

Illustration 6
A woman pays €200,000 for an antique desk made by Chippendale. She agrees to this price because she has read that such prices were commonly paid for Chippendale desks a few years ago. She does not know that subsequently the market prices for antique furniture of all types have declined dramatically and that the desk is much less valuable than she supposed. She may not avoid the contract.

Cases of initial impossibility and the non-existence of a thing sold are treated in the same way as other mistakes. The contract may be avoided for mistake but it is not void for lack of an object. Indeed there may be cases in which a sale of a non-existent object is valid and the seller is liable for non-performance, because the court concludes that in the circumstances the seller should bear the risk.

Illustration 7
J sells K a piece of used equipment which is on a remote construction site from which K is to collect it; it is not feasible for K to inspect the equipment before agreeing to purchase. When K arrives there it finds that the equipment had been destroyed by fire some time before the contract was made. J should have known this. J is liable for non-performance and cannot avoid the contract for mistake.

See also Illustration 5 above.

Mistakes as to the person are treated in the same way as other mistakes.

I. Mistakes in communication

A frequent form of mistake is that one party makes some slip in communicating intentions, e.g. by writing 10,000 instead of 100,000. Such mistakes may be brought within the Article by virtue of the following Article.

J. Mistake inexcusable

It does not seem appropriate to allow a party who was a major cause of the mistake to avoid the contract because of it unless the other party was at least equally to blame. That would allow the first party to shift the consequences of the carelessness on to the other party. The other should not normally bear the burden of checking that the first party has not made careless mistakes. On the other hand, if the second party is aware that the first has made a mistake and it would take little trouble to point it out, the fact that the first party has been careless should not prevent relief and the mistake should not be treated as inexcusable.

> *Illustration 8*
> N asks for bids for a piece of construction work. The information given to tenderers indicates that the contractor will probably strike rock at one point on the site. O sends in a tender which has no item for excavating rock, only for excavating soil. N should point this out, and if it does not and the mistake is sufficiently serious, O should be able to avoid the contract.

K. Risk

There are some contracts under which the parties are deliberately taking the risk of the unknown, or should be treated as so doing. In such a case a party should not be able to avoid the contract for mistake if the risk eventuates. One example of this is where one party is well aware that the contract is being concluded without knowledge of an important matter but proceeds to conclude the contract anyway.

> *Illustration 9*
> A decides to sell at an auction the entire contents of a house he has inherited. He is conscious that he does not know the value of the items, but he deliberately decides not to bother to have them valued first. At the auction B buys a picture for a low price. B knows that it is by Constable but does not point this out. A cannot avoid the contract for mistake.

In other cases one party should be seen as taking the risk.

> *Illustration 10*
> A yacht chandler in England charters to a German amateur sailor a yacht which both parties believe to be moored at Marseilles. Unknown to either party, shortly beforehand the yacht had been sunk when it was rammed by another vessel. The chandler, being a professional dealing with a non-professional, and moreover being in a position to know the facts whereas the other party had no possibility of this, may not avoid the contract but is liable for non-performance of the obligations under it.

L. Remedies

The normal remedy for mistake is for the mistaken party, or the one who wishes to escape from a contract entered under a shared mistake, to avoid the contract as a whole or in part.

The question of damages is dealt with in other Articles but it may be noted here that the mistaken party may be able to recover damages where the mistake was the result of incorrect information given by the other party, or where the mistake was or should have been known to the other party, or was caused by the other party.

NOTES

In all the systems, a contract which one or both parties have entered into as the result of a mistake may, under varying conditions, be escaped from by the mistaken party or, where the mistake is shared, by either of the parties. This includes cases in which the "mistake" involved some error in expression or communication, so that the question relates to the terms of the contract; this is dealt with in the following Article. This note deals with mistakes as to the facts or the law.

I. Mistake, misrepresentation and other doctrines

1. In many systems, the doctrine of mistake is available in a wide range of circumstances and is a ground on which relief is given quite frequently (for AUSTRIA and GERMANY see CC §§ 871 et seq. and CC §§ 119 et seq. for mistakes in communication and mistakes regarding essential elements of the contract or the scope of the contract, but in general not for mistakes as to the motive). In contrast, the ENGLISH and IRISH doctrines of mistake as to facts are very narrow and there are few cases. The principal reason for this is that the doctrines are limited to cases of shared (or "common") mistake. In practice, many of the cases that in some other systems would fall under the doctrine of mistake will be dealt with in the English and Irish systems under the doctrine of "innocent" misrepresentation. This is an equitable extension of the rules of fraud to cover cases in which one party has misled the other into making the contract by giving, innocently (i.e. without fraud), incorrect factual information: see *Redgrave* v. *Hurd* (1880) 20 Ch. D 1. Thus if a seller of land has (without fraud) given the buyer incorrect information about it, in many systems the case is likely to be dealt with via mistake (e.g. in FRENCH law, *The Villa Jacqueline* case, Civ. 23.11.1931, DP 1932.1.129, note *Josserand*); in the English and Irish law the mistaken party would be permitted to avoid the contract on the ground of misrepresentation. SCOTTISH law in principle allows relief on the ground of a mistake more readily than does English law and Irish law, but in practice relief is more often obtained on the ground of misrepresentation and there have been very few cases in which mistake has been pleaded successfully without a preceding misrepresentation (though see *Angus v. Bryden* 1992 SLT 884).
2. In some systems, what in functional terms may be cases of mistake may be covered by separate rules. Thus in some systems, as an alternative to relief on the ground of mistake, relief may be given on the basis of *clausula rebus sic stantibus*: e.g. GERMAN law, where the doctrine may apply to changes which have already occurred when the contract was made if the parties were not aware of the change, see CC § 313(2); POLISH CC (art. 357^1); PORTUGUESE CC art. 252(1); SPANISH case law, TS 6 October 1987, 16 October 1989, 10 December 1990 and 8 July 1991; ESTONIAN LOA § 97; BULGARIAN law LOA art. 210 (on sale of land with an area different from the promised one – *actio de modo agri*). NORDIC law has a doctrine of "failure of assumptions" or implied conditions: see *Dahl* 250-252. However, in Sweden the matter is controversial, see *Ramberg*, Allmän avtalsrätt[4], 235-246, and in FINLAND the applicability of this principle is more limited, *Hemmo*, Sopimusoikeus I, 402-411; relief is also possible via interpretation or via the general clause on unfair

contract terms in Contracts Act § 36. In AUSTRIA the ConsProtA contains special rules in relation to mistake, which allow avoidance of the contract if expected circumstances in the future are not met (§ 3a KSchG). In SLOVENIA, the rules on the avoidability of contract in case of "lesion" (*laesio enormis*, LOA § 118) are considered to be a special kind of mistake, see *Juhart and Plavšak*, Obligacijski zakonik I, p. 621.

3. Rules requiring a contract to have an object and a cause can also be used as a functional equivalent of rules on mistake. In a French case M agreed with R (as was legally permissible) to do R's military service in R's place. Unknown to either of them, R was not liable for service. It was held that the agreement lacked both *objet* and *cause*: Req. 30 July 1873, S. 1873.1.448, D. 1873.1.330. Under the present Article this would be dealt with as a case of mistake.

4. A different example is that many systems preserve special regimes for defects in property sold, e.g. GERMAN CC §§ 434 ff.; FRENCH and BELGIAN CC arts. 1641-1649; BULGARIAN LOA arts. 191 ff; POLISH CC arts. 556-581 and special statutes concerning consumer sales (French law: L.211-1 and L.221-1 C. conso.); CZECH law: Supreme Court 25 Cdo 1454/2000 (the buyer may claim a remedy for defects in goods only under the rules on liability for defects and not under the rules on mistake); ESTONIAN LOA §§ 217 ff; PORTUGUESE CC arts. 913-921 and Decree-Law 63/2003, 8 April 2003 concerning consumer sales. There are major differences as to whether these special rules prevail over the general rules on mistake or whether a buyer who is disappointed with the qualities of the property purchased may claim on either ground.

II. Mistake as to any matter which was fundamental to the mistaken party

5. In all the systems a party who has entered a contract under a serious mistake as to the substance of the subject matter of the contract may, subject to differing conditions, avoid the contract. In the majority of systems the party seeking avoidance must show, broadly speaking, (i) that the mistake was sufficiently serious that the mistaken party would not have entered the contract on the terms it did had it known the truth, and (ii) that the other party knew or should have known that the matter was of importance to the mistaken party. Thus the systems draw a contrast with cases of fraud, where any fraud will entitle the innocent party to avoid the contract. In many systems there is a strong tradition that, to be a ground for avoidance, the mistake must relate to the subject matter of the contract, as opposed to a motive for entering the contract, but this restriction is not universal. It is discussed in Note 6(a) below.

6. In FRENCH, BELGIAN and LUXEMBOURG, CCs art. 1110 allow relief for *erreur* in cases of mistake as to the substance of the subject-matter of the contract. Case law has interpreted this broadly. Thus, in France, provided that the error was *déterminant* for the party seeking to avoid the contract and this was known to the other party, relief may be given, see Civ. 17 November 1930, S. 1932.1.17, DP 1932.1.161, GazPal 1930.2.1031, *Malaurie and Aynès*, Les obligations[9], nos. 497-507; Civ. 23 November 1931, DP 1932.1.129, n. Josserand; Civ. 27 April 1953, D. 1953 Somm.Comm. 97; Paris 14 October 1931, D. 1934.2.128. When the characteristic is objectively non-essential but has nonetheless determined the consent of the mistaken party, the contract can be avoided for mistake only if the mistake has entered the contractual field, that is to say only if the other party knew that the characteristic which, in actual fact, did not exist, was of importance to the mistaken party. The rules on error are interpreted similarly in Belgium: the error was related to an element that convinced the mistaken party to conclude the contract (Cass. 31 Oct. 1966, Arr.Cass. 1967, 301; Cass. 3 March 1967, Arr.Cass. 1967, 829; Cass. 27 Oct. 1995, Pas. belge 1995, 950) and the importance of that element "entered the contractual sphere" (the other party

did know it or ought to know it); a party should not be able to rely on the absence of some characteristic which would not be important to the normal person unless its importance to him had been indicated to the other party, see *De Boeck*, Informatierechten en –plichten, no. 539; *Storme*, Invloed Nos. 180 ff; and Luxembourg, Tribunal Luxembourg 1 March 1966, Pasicrisie 20, p. 142 and, on the other party's knowledge, Cour, 30 June 1993, Pasicrisie 29, p. 253; 9 February 2000, 31, 956. The situation is similar in BULGARIA too, but the knowledge of the other party of the mistake has no independent and governing meaning in respect of the importance of the mistake.

7. In GERMAN law the relevant provision of the CC (§ 119), has two paragraphs; and the situations envisaged by the present Article may fall under either. CC § 119(1) deals with errors as to the content of the declaration. If a party's mistake leads to stipulation *x* when in fact *y* is intended (see RG 11 March 1909, RGZ 70, 391 ff) there may be a mistaken declaration under § 119(1). Other situations envisaged by the present Article (except those involving error in motive, see Note 6(a)), would fall under CC § 119(2). This covers errors relating to any characteristic of the subject matter, e.g. the age of a car sold (BGH 26 October 1978, NJW 1979, 160, 161), provided the quality is essential for the contract in question and the parties concerned: BGH 22 September 1983, BGHZ 88, 240. The test under § 119(2) is whether the error concerns qualities that business regards as essential; and there has been a debate as to whether this refers to the objective perception of business in general or that of the parties concerned (*Flume* AT II, § 24 2a). The BGH has ruled that a quality is essential for business if the mistaken party has based its declaration on the quality in question and that was discernable by the other party, even if it was not agreed on or made part of the mistaken party's declaration (BGH 22 September 1983, BGHZ 88, 240, 246). Under CC § 119(1) the test is whether the person would have made the declaration if he or she had known and reasonably understood the situation. GREEK law is similar: CC arts. 140, 141; A.P. 1109/1976 EEN 44 (1977) 311-312.

8. The ITALIAN CC art. 1428 requires that the mistake be essential and recognisable by the other party; arts. 1431 and 1429 state explicitly that the importance of the mistake must be apparent to the other party. PORTUGUESE law requires that the error as to the quality of the subject matter be as to a matter which determined the assent of the aggrieved party and that the importance of the matter was known or should have been known to the other party, CC art. 247. The SPANISH CC art. 1266 provides that an error may invalidate a contract; the error must be substantial or essential and these requirements are interpreted strictly, *Morales*, Comentario del Codigo Civil, Ministerio de Justicia, art 1266, p. 459. The SPANISH Supreme Court has long held the persuasive doctrine that mistake is only excusable if it can be attributed to the conduct of the other party. Only a few cases have held that a contract can be avoided by mistake alone: (TS 14 June 1943, RAJ (1943) 719, TS 18 February 1994, RAJ (1994), 1096, TS 28 September 1996, RAJ (1996), 6820; *De Castro*, El negocio jurídico, p. 102; *Morales*, El error en los contratos, 1988, pp. 215 ff). The AUSTRIAN law of mistake generally only recognises mistakes as to the subject matter or content of the contract, mistakes regarding the other party and mistakes in the declaration. Mistakes regarding the motive are only relevant under certain circumstances, if e.g. the motive is made a condition for the conclusion of the contract, in cases of fraud or coercion or with donations (see also note 22 below). The mistake must have been decisive for the mistaken party to conclude the contract. Austrian law distinguishes between "essential" (CC § 871) and "non essential" (CC § 872) mistakes. The former give a right to avoid the contract; the latter to a claim of adaptation, if the non-

mistaken party would also have agreed to the different content, see *Koziol and Welser*, Bürgerliches Recht I[13], 147 et seq.

9. POLISH CC art. 84 requires the mistake to be essential. Where a declaration of will containing a mistake is made to another person, the mistake must be caused by that person (even if without fault) or must be one which was known to, or could easily have been noticed by, that person. The latter limitations do not apply to gratuitous juridical acts.

10. In the NORDIC Contract Acts § 33, which regulate mistakes other than errors in communication, the question is whether good faith and honesty require that the contract be annulled. The mistake must concern some fact which fundamentally influenced the contract (e.g. Finnish CC 1972 II 84, CC 1970 II 38 and CC 1998:150 e.g. in *Sisula-Tulokas*, Contract and tort law: twenty cases from the Finnish Supreme Court) and good faith will not be contravened unless the non-mistaken party knew or must have known of the importance of the matter to the other (see *Ramberg*, Allmän avtalsrätt[4], 196; a more liberal test, 'ought the party to have known?', may be applied under the doctrine of 'failure of assumptions', Note 1 above, *Lynge Andersen* 189 and 193 ff). The NORDIC Contract Acts § 36 allow for a general possibility to adopt contracts due to unreasonableness which may include mistakes. According to BULGARIAN law the mistake is relevant only if it is "material" in relation to the contract's object or if it relates to the person of the other party in the case of *intuito personae* contracts. The knowledge of the other party of the mistake is not important except in relation to damages in case of avoidance of the contract, where the other party can seek damages only if it was in good faith. Doctrine has unfortunately not yet explored all of the problem areas in this field.

11. In ENGLAND and IRELAND relief for mistake (which as noted earlier, must be shared mistake) only applies when the mistake is as to the existence or ownership of the subject matter of the contract, or "as to the existence of some quality which makes the thing without the quality essentially different from the thing it was supposed to be": Lord Atkin in *Bell* v. *Lever Bros.* [1932] AC 161, 218, HL This requirement seems to be interpreted very strictly. Lord Atkin said that there would be no relief if the parties mistakenly bought and sold a horse that they thought was sound when it was not, or leased a house that they thought was habitable when it was not; in neither case would the subject-matter (the horse or the house) be essentially different. In *Great Peace Shipping Ltd.* v. *Tsavliris Salvage (International) Ltd. (The Great Peace)* [2002] EWCA Civ 1407, [2003] QB 679 the Court of Appeal said that the mistake must make the "contractual adventure" impossible: at [70]. See *Chitty* on Contracts I[27], no. 5-040. IRISH law may be more liberal: see *Western Potato Co-operative* v. *Durnan* [1985] ILRM 5, CC. So were some of the English cases which allowed relief in equity for common mistake: e.g. *Grist* v. *Bailey* [1967] Ch 532, ChD; but these can no longer be regarded as good law: see *Chitty* on Contracts I[27], nos. 5-009 and 5-043-5-049. As stated earlier, in English and Irish law, in cases where only one party is mistaken, any relief is given on the basis of misrepresentation. Originally, the misrepresentee could rescind as of right provided the misrepresentation was material (i.e. not so unimportant that no reasonable person would be influenced by it: see *Treitel,* The Law of Contract[9], paras. 9-013 – 9-016) and it had been at least one factor which had induced the conclusion of the contract; it did not need be of particular importance or the main reason for the decision (see *Chitty* on Contracts I[27], no. 6-033). However since the passing of the (English) Misrepresentation Act 1967, s. 2(2) the court has power to declare the contract subsisting, and to award damages in lieu of rescission, if that would be more equitable. The fact that the representation was

relatively unimportant is one reason for refusing to permit rescission: *William Sindall* v. *Cambridge C.C.* [1994] 1 WLR 1016, CA

12. SCOTTISH law also limits relief on the ground of mistake to "essential error", which must be as to something essential to both parties, Bell, *Principles*, s. 11; *McBryde*, Law of Contract in Scotland[1], paras. 15.04 f. However it also gives more liberal relief for error induced by misrepresentation: see *McBryde*, Law of Contract in Scotland[1], paras. 15.43-15.73; *Stair*, The Laws of Scotland XV, paras. 680-685. It has been suggested that the Scottish case law can be best explained by using the distinction between error in transaction and error in motive, with the latter only relevant if caused by the other party's misrepresentation: *SME*, vol. 15, paras. 686-694. *MacQueen and Thomson*, Contract Law in Scotland, chaps. 4.35-4.66; *Gloag & Henderson* (12th edn), chaps. 6.21-6.33.

13. The SLOVAK CC requires the mistake to be essential. This means that the acting person made the juridical act in mistake arising from a circumstance decisive for the making of the act (CC § 49a). This is interpreted very broadly. The mistake may be as to the subject matter of the contract (error in corpore), as to quality (error in qualitate), as to the party to the contract (error in persona), as to the legal interpretation of the juridical act etc. Error must be essential objectively with regard to all the circumstances. (see *Lazar, J. et al.*: Občianske právo hmotné. 1. zväzok, Iura Edition 2006, p. 128)

14. A liberal approach on the question of the other party's knowledge is that of DUTCH CC art. 6:228(1). This requires that the contract was entered into under the influence of error and would not have been entered into had there been a correct assessment of the facts. Relief will not be given if the other party was justified in assuming that the mistake was not important to the other party. When this party knew or ought to have known that the mistaken party, had it known the truth, would have entered into the contract on only slightly different terms, this is sufficient for avoidance of the contract (*Asser-Hartkamp* II, Verbintenissenrecht, no. 177 and HR April 3, NedJur 2003, 361) (In Dutch law relief is limited in other ways.)

15. In relation to additional prerequisites that the fact of the mistake is known or caused by the non-mistaken party (GPCCA § 92(3), 1), 2)), the ESTONIAN GPCCA § 92(1)-(2) adopts a general objective criterion, requiring that the mistake as an erroneous assumption relating to existing facts was of such importance that a reasonable person similar to the person who entered into the transaction would not have entered into the transaction in the same situation or would have entered into the transaction under materially different conditions. A subjective criterion restricts the right to avoid the contract in cases of shared mistake as GPCCA § 92(3) 3) provides that the mistaken party may not seek relief if the other party could have presumed, having the correct perception of the circumstances, that the mistaken party would have entered into the transaction even if aware of the mistake

16. In CZECH law, only a decisive error counts (CC § 49a), i.e. the party would not have entered the contract or at least not under the same conditions if the party had not been mistaken. Errors are classified into errors in legal title (error in negotio), errors in the object of a contract (error in corpore), errors in quality of the object of a contract (error in qualitate), errors as to the person of the contractual partner (error in persona) and errors in other circumstances which are decisive according to the expressed will of the mistaken party, see Knappová (-*Knapp and Knappová*), Civil Law I, 154. The courts have held that the contractual partner's false assurance of solvency may lead to a decisive mistake (*Švestka/Jehlička/Škárová*, OZ[9], 315).

17. SLOVENIAN law requires the mistake to be essential (and excusable), see LOA § 46(2). Essential mistake is defined as relating to circumstances considered to be decisive from the viewpoint of the intention of the parties (subjective criteria) or the usages of the trade (objective criteria), i.e. the party would not have entered the contract or not under these terms, see LOA § 46(1). In this article, two cases of *per se* essential mistake are mentioned: mistake relating to essential characteristic of the object and mistake relating to a person, when the contract is concluded in view of this person. According to legal scholars the subjective criteria (i.e. the decisive criteria for one party of which the other party was aware or could not have been unaware) takes precedence – the parties can elevate a circumstance, which would not be considered essential under objective criteria, to be the decisive one, see Juhart and Plavšak (-*Dolenc*), Obligacijski zakonik I, p. 347).

III. Fact of mistake known to, or caused by, other party

18. This note and the next consider the position of the party against whom relief is sought. One possibility is that that party has made the same mistake: this is dealt with in the next note. Another is that that party caused the mistake, e.g. by giving incorrect information. Or perhaps that party knew or should have known of the mistake. Are any of these essential before the mistaken party can avoid the contract?

19. As we have seen, some systems require that a party has made a serious mistake and that the non-mistaken party knew that the matter about which there was a mistake was determining; but they do not require that the non-mistaken party knew there had been a mistake or contributed to it. In GREEK law it is not necessary that the non-mistaken party knew of the mistake. Similarly, in GERMAN law, though some writers have argued that relief should be given only when the mistake was caused by the other party or where the latter at least ought to have realised the mistake (MünchKomm (-*Kramer*), BGB, § 119 nos. 113 et seq.), the courts and the prevailing opinion have not required that the other party knew of the mistake. This may seem liberal, but it should be noted that in both systems the mistaken party may be required to compensate the non-mistaken party for losses thereby caused (Greek CC art. 145; German CC § 122). The non-mistaken party's knowledge is relevant to this; under Greek CC art. 145 and German CC § 122(2) the mistaken party is not liable for damages where the other party knew or should have known of the mistake. The solution is the same in BULGARIA, LOA art. 28(3). Also in PORTUGUESE law, and in FRENCH, BELGIAN and LUXEMBOURG law, as well as in SLOVENIAN law, a mistaken party may get relief even though the other party did not know of the mistake (if there was such knowledge, there may be *dol*) and did not cause it. Thus in French law, mistake is treated as a defective consent and not as a defective behaviour. It is a matter of protecting the mistaken party, not of punishing the other party for it. The mistaken party might be liable for having committed a pre-contractual fault but it is said that in practice this is not found: *Rodière*, Vices 23. However, in Belgium the tendency is to treat a mistake as excusable when it was the result of the fault (incorrect information or failure to disclose) by the other party (*De Boeck*, Informatierechten en –plichten, no. 544; but where the mistake was the consequence of one's own failure to investigate, or perhaps to check the information given, to hold that the mistake was inexcusable and thus that there is no right to avoidance (see note 12 below). See *Kruithof & Bocken*, TPR 1994, p. 338; *Stijns*, Verbintenissenrecht I, no. 107; Luxembourg, 1 March 1966, 20, 142.

20. CZECH law (CC § 49a) sets forth three situations in which an error is legally relevant: (i) the party knew or must have known about the mistake of the other party, (ii) the party induced the mistake of the other party (even if the former party did not know

about the mistake or if the mistake was not the former party's fault), and (iii) the party intentionally induced the mistake of the other party (fraud). In the first two cases the mistake must concern a fact which was (objectively) decisive for the conclusion of the contract; in the third case the mistake may concern any fact relevant to the contract.

21. Some systems are less ready to grant avoidance (but they have no provision for damages to the non-mistaken party). Thus under AUSTRIAN CC § 871(1) a claim for avoidance on the ground of mistake may be brought only if the mistake was or should have been known to the other party, or was caused by the other party, or if the mistaken party notified the other promptly of the mistake. This last requirement is deemed satisfied if the mistake is notified before the non-mistaken party has made a disposition in reliance on the contract (see *Bydlinski*, Bürgerliches Recht I[3], no. 8/19). ITALIAN CC arts. 1429, 1431 require that a mistake by one party be patent, i.e. one that should be apparent to the other party. DUTCH CC art. 6:228(1) requires that the mistake either have been caused by incorrect information given by the other party, or be one that the other party, in view of what that party knew or should have known of the error, should have pointed out to the mistaken party. Similarly, the ESTONIAN GPCCA § 92(3) provides for the right for avoidance only if the mistake was caused by circumstances disclosed by the other party to the transaction, or non-disclosure of circumstances by the other party if disclosure of the circumstances was required pursuant to the principle of good faith; the other party knew or should have known of the mistake and leaving the mistaken party in error was contrary to the principle of good faith; or parties share the mistake. In the case of a unilateral transaction, the person to whom the declaration of intention is directed and the person who acquires rights on the basis of the transaction is deemed to be the other party within the meaning of those requirements (GPCCA § 92(4)).

22. The NORDIC systems base relief for mistake on the principle of good faith. Thus relief will be refused unless the non-mistaken party actually knew of the mistake, see Contract Acts § 33. In some decisions this rule has been extended to situations where the party "must have known" of the mistake, and FINNISH courts have extended it to situations where the party "ought to have known" (e.g. CC 1968 II 33). Relief will also be given in Nordic law if the non-mistaken party caused the mistake (see Swedish Sup.Ct. NJA 1985 p. 178, *Kalmar varv*; *Ramberg*, Allmän avtalsrätt[4], 227 f).

23. As stated earlier, ENGLISH and IRISH law will not allow escape from the contract on the ground of mistake unless the mistake was shared. Avoidance may be given for misrepresentation but only where one party misled the other, see above. SCOTTISH law generally requires that the error have been induced by the other party's misrepresentation (*Stewart* v. *Kennedy* (1890) 17 R (HL) 25; *Menzies* v. *Menzies* (1893) 20 R (HL) 108) and has been reluctant to recognise uninduced unilateral error (*Spook Erection (Northern) Lyd* v. *Kaye* 1990 SLT 676; but there may be an exception where the other party knew and took advantage of the other party's essential error about the meaning of the contract (*Steuart's Trustees* v. *Hart* (1875) 3 R 192; *Angus* v. *Bryden* 1992 SLT 884). See *Stair*, The Laws of Scotland XV, para 694; *MacQueen and Thomson*, Contract Law in Scotland, §§ 4.45-4.56; *McBryde*, Law of Contract in Scotland[1], paras. 15.30-15.33.

24. For HUNGARIAN law see Notes to II.–7:101 (Scope).

IV. Shared mistake

25. All the systems allow avoidance by either party where the parties have entered the contract under a shared fundamental mistake; see, e.g., on ITALIAN law, *Pietrobon* 517, 527 and *Antoniolli and Veneziano, Principles of European contract law and*

Italian law, 191 with further references; on AUSTRIA, OGH 2 September 1980, SZ 53/108; 15 June 1983, SZ 56/96; 3 March 1988, SZ 61/53 (but discussed controversially in the literature see Rummel (-*Rummel*), ABGB I[3], § 871 no. 18); in ESTONIA: GPCCA § 92(3) 3); on FRENCH law, *Terré/Simler/Lequette*, Les obligations[6], no. 217; on SCOTTISH law, *Hamilton v. Western Bank of Scotland* (1861) 23 D 1033.

V. Relief where the other party has not yet relied on the contract

26. UNIDROIT art. 3.5.1(b) adds an additional circumstance in which the mistaken party may escape: if the other has not yet relied on the contract. Of the European systems, this seems to be paralleled only in AUSTRIAN law as one of the cases, which justify avoidance (see above), though in certain cases the same result may follow under the NORDIC Contract Acts § 39 but the courts in SWEDEN have been hesitant to apply the rule, see NJA 1999 s. 575 (Swedish Supreme Court), as opposed to the Danish courts, U2001.42 (Danish Supreme court). As noted earlier, GERMAN and GREEK law require the mistaken party to compensate the other for reliance loss in some circumstances. In FRANCE, the mistaken party can put in a plea of avoidance based on mistake in order to bring to a halt an action for specific performance of the obligations under a contract affected by a cause of avoidance.

VI. Particular types of mistake

(a) Mistaken motive

27. As mentioned in Note 2, there is a strong tradition excluding relief when an error relates merely to motive. Thus in FRANCE, doctrine is divided but the courts have regularly refused to permit contracts to be annulled on this ground; *Benabent* no. 81. Errors as to the facts which fall under GERMAN CC § 119(1) (for an example, see Note 2 above) clearly relate to the subject matter of the agreement. § 119(2) deals with errors *in motivis*, but to count as a sufficient error of motive under § 119(2), the mistake must be reflected in the contractual agreement. Thus someone who buys a wedding present may not avoid the contract on discovering that the wedding had in fact been called off. See also AUSTRIAN CC § 901(2); and PORTUGUESE CC art. 252(1). The Austrian Supreme Court has applied the test whether the mistake is as to what the party wants or merely as to why it is wanted: OGH 23 January 1975, EvBl 1975/205, JBl 1976, 145. In BULGARIA also a mistake in the motive is irrelevant. In GREEK law a mistake exclusively as to motive is not substantial (CC art. 143; see A.P. 268/1974, NoB 22 (1974) 1269; *Balis* No. 42), unless the motives have been discussed by the parties beforehand or good faith and business usage would require it to be taken into account: Full Bench of A.P. 5/1990, NoB 38 (1990) 1318 (1319 I). ITALIAN CC art. 1429 seems to exclude mistakes as to motive, since it lists ways in which a mistake may be essential and mistake as to motive is not one of them; whether the mistake may relate to a circumstance extraneous to the content of the contract is disputed; see, *P.Barcellona* 148, *Rossello*, L'errore nel contratto, 64. According to the POLISH CC the mistake must concern the essence of the juridical act (art. 84 § 1). Mistakes relating to motive are excluded. According to the SLOVAK CC and doctrine, error in motive does not make the legal act invalid. In SCOTTISH law, error in motive must be caused by the other party's misrepresentation before the contract can be avoided: *Stair*, The Laws of Scotland XVIII, paras. 680-686. CZECH CC § 49a stipulates that an error in motive does not invalidate the juridical act.

28. In a few systems relief may be given for errors in motive. DUTCH CC art. 6:228 is not restricted in this way. In Nordic Contract Act § 33 it does not matter that the error was

in motivis; the important question is whether good faith and honesty require that the contract be annulled (e.g. FINNISH CC 1977 II 76). In SLOVENIAN law relief for a mere mistaken motive of one party is generally not granted, but an exception applies to gratuitous contracts (donations): here a mistake in the motive of one party which was decisive for assuming an obligation is relevant, too, see LOA § 47. However, the contract can only be avoided if an essential mistake is excusable, see LOA § 46(2).

29. In *Bell* v. *Lever Bros.* [1932] 161, 224 Lord Atkin gives examples of mistakes which, in English law, would not invalidate a contract. Many of these involve errors of motive. But for rescission for innocent misrepresentation, it does not matter whether the misrepresentation relates directly to the subject matter or not: e.g. *Redgrave* v. *Hurd* (1880) 20 ChD 1, where the misrepresentation related to a separate but linked transaction.

(b) Mistake as to value

30. FRENCH, BELGIAN and LUXEMBOURG law refuse relief when the mistake is simply as to the value of the subject-matter of the contract, save where there has been fraud or where a narrower ground such as *lésion* applies (CC arts. 1118, 1674) *Benabent* no. 80; similarly AUSTRIAN law (OGH 30 November 1966, JB1 1967, 620) where the same is true for a mistake as to the calculation of costs. Only if the contract – visibly for both parties – is based on the calculation, is relief granted. However, a mistake as to the subject-matter may be grounds for avoidance even though the most obvious reason that this concerns the avoiding party is that the subject-matter is not worth the buying price, or is worth more than the selling price: e.g. the celebrated Poussin case in which the seller of a painting was allowed to avoid the contract when it was shown to be by that artist and not by some lesser mortal as the seller had supposed, Civ. 13 February 1983, D. 1984.340, JCP 1984.II.20186; Versailles 7 January 1987, D. 1987.485, GazPal 1987.34. Belgian case law allows relief based on the same reasons when land was sold as building land and it seems to be an error and the land is not worth the price paid (e.g. CA Brussels 28 Nov. 1987, T. Not. 1988, 39). In BULGARIA the value is obviously considered to be part of the motivation and, for this reason, no relief is granted in such cases. A mistake in calculation is not a ground for avoidance either; such a mistake should simply be corrected – LOA art. 28. Under GERMAN jurisprudence error as to mere value or market price does not give rise to relief under CC § 119(2) (BGH 18 December 1954, BGHZ 16, 54, 57), whereas an error as to the facts from which value is derived may do so; e.g. in the case of sale of a company, an error as to the possible profits from the business may be grounds for avoidance (OLG Düsseldorf, 8 November 1991, NJW-RR 1993, 377). See also *Witz* § 332. The position is similar in GREEK law: *Georgiadis/Stathopoulos*, Art. 142 no. 4; A.P. 268/1974, NoB 22 (1974) 1269; ITALIAN law, e.g. Cass. 3 April 2003, no. 5139, Foro it. 2003, I, 3047 and *Sacco and De Nova*, Il contratto, 516 ff; PORTUGUESE law, STJ 12 January 1973, BolMinJus 223, pp. 181 ff: and SLOVENIAN law, see e.g. Supreme Court No. II Ips 347/2004 from 18 April 2005. In Slovenian law, a contract can be challenged on the grounds of mistake as to value according to the rules on "gross disparity" (*laesio enormis*), see LOA § 118. Price is one of the essentials of a contract in SCOTTISH law, but this does not extend merely to making a bad bargain: before there can be avoidance there must be common error, or misrepresentation inducing the error, or a party knowing and taking advantage of the other party's error in circumstances such that the party cannot be held to be taking the risk of making an error (*McBryde*, Law of Contract in Scotland[1], paras. 15.30-15.33). Other systems have no specific rule on mistakes as to value but would not normally give relief for such an error. E.g. in DUTCH law a seller

would not be expected to point out such a mistake under CC art. 6:228(1)(b). There is no specific rule in ENGLISH law but it seems that a mistake merely as to something's value would never render it "essentially different from what the parties supposed it to be", see above, 2. There could be an actionable misrepresentation as to the value of the object, provided that the statement was not merely an expression of opinion but one of fact (e.g. as to the current market price). In NORDIC law, Contract Acts § 33 could be applied to a question of value (cf. FINNISH CC 1968 II 33). In POLISH law there is no specific rule on mistake as to value. However, in some contracts (e.g. sale) value can be regarded as an essential feature and a party may raise an argument that there was no consent, and hence no contract. In CZECH law, the value – if not guaranteed by the non-mistaken party in some way – would be a question of motive and thus cannot qualify as a legally relevant error (CC § 49a).

31. The present Article does not necessarily exclude mistakes as to value.

(c) Mistake as to the identity of the other party

32. The majority of systems treat a mistake as to the identity of the other party as a form of mistake as to the facts and give relief accordingly. Thus FRENCH, BELGIAN and LUXEMBOURG CCs art. 1110 allow mistake as to the person as a ground on nullity when the 'consideration of the person was the principal cause of the agreement' see *Terré/Simler/Lequette*, Les obligations[6], no. 219. Attributes as well as identity may be sufficiently fundamental. Similarly AUSTRIAN CC § 873; BULGARIAN LOA art. 28; CZECH law, *Švestka/Jehlička/Škárová*, OZ[9], 314; GREEK law, *Georgiadis/ Stathopoulos*, Art. 140 no. 10; ITALIAN CC art. 1429(3); SCOTTISH law, see *Morrisson* v. *Robertson* 1908 SC 332, *MacLeod* v. *Kerr* 1965 SC 253 and *McBryde*, Law of Contract in Scotland[1], paras. 15.82-15.85; SLOVENIAN LOA § 46(1); SPANISH CC art. 1266. DUTCH law treats mistaken identity as a normal case under CC art. 6:228, and NORDIC law seems to accept *error in personam* as falling within Contracts Act § 32, see *Ussing*, Aftaler[3], 179. In GERMAN law mistake as to the person is covered by CC § 119. A mistake as to the identity of the other party is treated as a mistake in the declaration under § 119(1); while a mistake as to attributes is explicitly dealt with by § 119(2). Portuguese CC art. 251 also treats a mistake as to identity as a mistake in declaration, so the contract may be annulled under art. 247; see *C.M. Pinto*, General Theory 517. In ENGLISH and IRISH law the case of mistaken identity does not fall under the doctrine of mistake as to the facts considered here, since mistake as to the facts has no effect on the contract unless the mistake is shared. Rather it is dealt with as a mistake over the terms: the question is whether the non-mistaken party knew or should have known that the offer was open only to the individual he was supposed by the offeror to be (*Ingrams* v. *Little* [1961] 1 QB 31, CA). Thus the mistake must normally be as to the identity, rather than the attributes, of the other party. The fact that a party wrongly assumed the other party to be credit-worthy is not a sufficient ground for relief. However, if the offer is in writing it is likely to be treated as open only to the person named in the writing: *Shogun Finance* v. *Hudson* [2003] UKHL 62, [2004] 1 AC 919 (see *Chitty* on Contracts I[27], nos. 5-076 and 5-085). An incorrect statement by one party as to one of the party's attributes (e.g. the party's qualifications) could give rise to avoidance for misrepresentation, see above.

33. The present Article covers mistakes as to the identity or attributes of the other party.

(d) Mistake as to law

34. In most systems the fact that a party's mistake is as to the legal position, rather than as to the facts, is irrelevant if the other conditions for relief are fulfilled. Thus for

GERMAN law see Staudinger [-*Singer*] BGB (2004), § 119 nos. 67 et seq.; but contrast the case of a pregnant worker who agrees to cancel her contract of employment without knowing that she thereby loses her legal protection (BAG 16 February 1983, AP CC § 123 no. 22, mistake as to motive only). Under GREEK law the Supreme Court has held that a mistake of law is to be treated in the same way as a mistake of fact; and similarly with a mistake as to the kind of juridical act or its legal effect: A.P. 374/1974, NoB 22 (1974) 1364 and Full Bench of A.P. 3/1989 NoB 38 (1990) 606 II, 607 I). See also ITALIAN CC art. 1429(4); on FINNISH law, CC 1960 II 47; on DANISH law, *Lynge Andersen* 189; on DUTCH law, *Asser-Hartkamp*, Verbintenissenrecht II, No. 196; on PORTUGUESE law, *Cordeiro* 616; *Fernandes* 149 f; *Vasconcelos* 498. FRENCH, BELGIAN and LUXEMBOURG law allow relief for a mistake of law except where the agreement concerned is a compromise, CC arts. 2052(2); *Terré/Simler/Lequette*, Les obligations[6], no. 224. However, in Belgian law the cases are rare because this kind of mistake is not often accepted as an *excusable* mistake (see Cass. 10 April 1975, RCJB 1978, 198, note *Coipel*). In contrast, ENGLISH and IRISH law have in the past refused relief (either via mistake or via misrepresentation) when the mistake is purely one of law, though a mistake or misrepresentation as to "private rights" (e.g. the legal effect of a document) is different. In England this rule has changed; after the decision of the House of Lords in *Kleinwort Benson Ltd v. Lincoln City Council* [1999] 1 AC 153 that a payment made under a mistake of law may be recovered, it has been accepted that a mistake of law may render a contract void: *Brennan v. Bolt Burdon* [2004] EWCA Civ 1017, [2005] QB 303: (See *Chitty* on Contracts I[27], nos. 5-042 and 29-040–29-51). For Ireland, see Friel 199. SCOTTISH law seems to say that an error of law is generally not sufficient unless shared by both parties (*Dickson* v. *Halbert* (1854) 16 D 586; *Mercer* v. *Anstruther's Trustees* (1871) 9 M 618). An error as to the content or nature of a deed being signed is generally irrelevant unless there has been misrepresentation or other fault by the other party (*Royal Bank of Scotland plc v. Purvis* 1990 SLT 262). Payments made under error of law may be recovered in the law of unjustified enrichment (*Morgan Guaranty Trust Co of New York v. Lothian Regional Council* 1995 SC 151). In POLISH law a mistake must concern the juridical acts (facts) to give relief. In AUSTRIA a mistake as to law is generally not relevant if not explicitly made part of the agreement (see Rummel (-*Rummel*), ABGB I[3], § 871 no. 13; *Apathy/Riedler*, ABGB IV, 3rd ed., § 871 no. 13). In CZECH law, an error in legal title is accepted as a cause for avoidance of the juridical act (*Švestka/Jehlička/Škárová*, OZ[9], 314), but there is little experience with other mistakes as to law. In BULGARIA, a mistake of law is generally irrelevant – the rule *ignoratio juris nocet* is strictly observed.

35. The Article applies to both mistakes as to the facts and mistakes as to the law.

VII. Cases in which one party takes the risk

36. Some systems acknowledge explicitly that relief will not be given where one party has clearly undertaken the risk that the facts will not turn out to be as hoped, or the court thinks that the risk should be on that party: e.g. the case of the bookseller who is unaware of the value of a book, when the purchaser/collector does know it, which is discussed in SCOTTISH law, see *Stair*, The Laws of Scotland XV, para. 694; *MacQueen and Thomson*, Contract Law in Scotland, §§ 4.53-4.55; and *McBryde*, Law of Contract in Scotland[1], paras. 15.30-15.33. The contract will be upheld if the parties have contracted on the basis of a particular allocation of risk: *Pender-Small* v. *Kinloch's Trustees* 1917 SC 307.

37. Perhaps the clearest statement of this is in DUTCH CC art. 6:228(2): annulment will not be given for an error for which, given the nature of the contract, common opinion or the circumstances of the case, the party in error should remain accountable. Similarly, the ESTONIAN GPCCA § 92(5) provides that a person may not avoid the contract if according to the circumstances under which the transaction was entered into and the content of the transaction, the risk of mistake was to be borne by that person. In FRENCH law relief for error will not be given if the question of substantial quality was obviously aleatory: e.g. if the relevant characteristic of the subject matter was explicitly stated not to be guaranteed: *Terré/Simler/Lequette,* Les obligations[6], no. 220. It has been held that a contract for the sale of a picture "attributed to Fragonard" could not be annulled by the seller when it was later concluded by experts that the picture was indeed by that artist; the parties had both known it might or might not be genuine. Civ. 24 March 1987, D. 1987.488.

38. The Spanish Supreme Court has held that in the paintings market the purchaser takes the risk of untrue authorship, where the seller did not act with fraud (Supreme Court Judgments 9 October 1981, RAJ (1981) 3595, 2 September 1998, RAJ (1998) 7546 and Note by *Verda y Beamonte* en *Cuadernos Civitas de Jurisprudencia Civil* no. 49, 1999, pp. 175 ff). Likewise it is recognised that a mistake concerning the financial means of the principal debtor is borne by the guarantor, not by the beneficiary of the surety contract (*Carrasco,* Tratado de los Derechos de Garantía, 2002, p. 197).

39. Under GERMAN law a party who bears a legal risk may not avoid the contract on account of a mistake with respect to that risk. Thus a surety may not avoid the contract of suretyship if it turns out that the debtor is in fact unable to pay, so that the surety will become liable to the creditor, even if the creditor knew of the debtor's inability: Staudinger [-*Singer*] BGB (2004), § 119 no. 102.

40. It is thought that other systems would reach similar results by other means; e.g. if one party knew or should have known that there was a risk that the subject matter would not have the hoped-for quality, there is no mistake or the thing is not substantially different from what was expected. In ENGLISH law, the courts have also posed the question in terms of whether as a matter of construction the contract is dependent upon the facts assumed - see *Associated Japanese Bank (International) Ltd* v. *Crédit du Nord SA* [1989] 1 WLR 255, QB– which is rather the same question: see *Chitty* on Contracts I[27], no. § 5-015 and *Smith,* Implied terms.

41. In NORDIC law generally it would not be contrary to good faith for one party to insist on the other respecting a contract which the latter entered knowing the risk being taken.

42. The present Article is explicit that relief may not be given when one party assumed the risk of the mistake.

VIII. Inexcusable error

43. Relief on the ground of mistake is generally denied when the mistake was primarily the fault of the mistaken party. Thus in FRENCH, BELGIAN and LUXEMBOURG law the *erreur* must not be *inexcusable*: see for France *Terré/Simler/Lequette,* Les obligations[6], no. 223. According to Belgian case law, the mistake is excusable if a normally careful person in the same circumstances would have made the same mistake: Cass. 6 January 1944, Arr.Cass. 1944, 66; Cass. 10 April 1975, RCJB 1978, 198 note Coipel; Cass. 20 April 1978, Arr.Cass. 1978, 960; Cass. 28 June 1996, Pas. belge 1996, 714; Luxembourg, Cour 16 June 1970, Pasicrisie 21, p. 362; and see Note 7 above. In SPANISH law there is no doubt among courts and scholars that an inexcusable mistake is given no relief. In ENGLISH law it seems that relief will not be

given to a party whose mistake was that party's own fault: see *The Great Peace* [2002] EWCA Civ 1407 at [76],. and see *Associated Japanese Bank (International) Ltd.* v. *Crédit du Nord SA* [1989] 1 WLR 255, QB where Steyn J. referred to *McRae* v. *Commonwealth Disposals Commission* (1950) 84 CLR 377, HCt of Australia. SCOTTISH law also denies relief on the ground of uninduced error to a party at fault: see *McBryde*, Law of Contract in Scotland[1], paras. 15.33, 15.42. In GREEK law rescission is permitted only if this is consonant with good faith (CC art. 144; *Balis*, No. 144); this might exclude rescission in the situation being considered. In DUTCH law a mistake for which the party seeking relief was largely responsible would be treated as one for which that party is accountable under CC art. 6:228(2), so that relief will be denied. For the similar outcome under ESTONIAN law, see GPCCA § 92(5). CZECH courts take the position that a contract may be avoided for a mistake only if the mistaken party exercised due care while concluding the contract, i.e. the mistaken party verified all circumstances essential to the contract, see *Švestka/Jehlička/Škárová*, OZ[9], 315. Similarly, in SLOVENIAN law, avoidance can be sought only if a mistake is excusable, i.e. the mistaken party exercised due care while concluding the contract, see LOA § 46(2).

44. In NORDIC law the fault of the mistaken party is not an absolute bar to avoidance but is a factor taken into account by the court in deciding whether to grant a remedy.

45. In a minority of systems the fault of the mistaken party is irrelevant, e.g. ITALIAN law, in AUSTRIAN law, POLISH law and in GERMAN law (RG 22 December 1905, RGZ 62, 201, 205). However it should be remembered that German law may require the mistaken party who avoids the contract to compensate the non-mistaken party, CC § 122, above. In PORTUGUESE law avoidance may be permitted even if the error was inexcusable, but it has been suggested that in extreme cases avoidance might be prevented as being an abuse of right, *C.M. Pinto*, General Theory 511 ff. Again, the mistaken party might incur pre-contractual responsibility, *ibid*.; *Fernandes* 156. The BULGARIAN doctrine has not dealt with the excusability of the mistake. However, inexcusable mistakes are generally irrelevant, because otherwise there will be a danger of abusive argumentation relying on affirmed – but in fact not present – mistake.

46. ENGLISH and IRISH law also allow rescission for misrepresentation even though the party who was misled could have discovered the truth by taking reasonable steps: *Redgrave* v. *Hurd* (1880) 20 ChD 1. However it has been argued that this rule may not apply to cases in which the incorrect information was given without negligence: *Treitel,* The Law of Contract[9], para. 9-020, but compare *Chitty* on Contracts I[27], no. 6-039.

IX. The effect on the contract

47. In FRENCH, BELGIAN and LUXEMBOURG law the existence of a *vice de consentement*, gives rise to relative rather than absolute nullity; i.e., only the party affected by the *vice* may invoke it *Terré/Simler/Lequette*, Les obligations[6], no. 227. GERMAN law, CC §§ 119-124, 142; GREEK law, CC art. 140; POLISH law, CC art. 84; ITALIAN law, CC arts. 1427, 1441; BULGARIAN law, LOA art. 28; CZECH law, CC § 40a; PORTUGUESE law, CC arts. 247, 251, 287; SLOVENIAN law, LOA § 46(2) and DUTCH law, CC art 3:49 are similar in effect, which means that the contract has to be avoided. So are the NORDIC laws (except where the contract is modified under Contract Act § 36). Provided that all other prerequisites are met, in AUSTRIA the existence of a mistake entitles the mistaken party to avoid or adapt (see note 8 above) the contract. Any transferred property automatically falls back to the other party.

48. In ENGLISH law the effect of an operative mistake at common law is that the supposed contract is void, and cases suggesting that the contract might be voidable in equity have been held to be incorrect: *Great Peace Shipping Ltd* v. *Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679. Misrepresentation makes the contract voidable and a party who has a right to rescind on either ground may lose that right through affirmation, lapse of time and other bars to rescission (see *Treitel,* The Law of Contract[9], paras. 9-094–9-111. In SCOTTISH law, essential error is traditionally said to make a contract void; but in cases of error in motive induced by misrepresentation the contract seems to be voidable only. This is probably also the outcome in the rare cases of error in transaction known to and wrongfully taken advantage of by the other party. See *Stair*, The Laws of Scotland XV, paras. 680, 690, 691, 694; *McBryde*, Law of Contract in Scotland[1], paras. 15.72, 15.85-15.87.

X. Damages for the mistaken party

49. In many systems a party who has caused the other party's mistake by culpably (intentionally or negligently) giving incorrect information may be liable to the other party in delict. See on Belgium: *Stijns*, Verbintenissenrecht I, no. 108. In AUSTRIAN law this is regarded as a form of pre-contractual liability (see *Bollenberger* in Koziol/Bydlinski/Bollenberger, § 874 no. 2). Under GERMAN law the liability for the other party's mistake may follow from the rules on culpa in contrahendo, CC §§ 311(2), 280, 276.

50. In BULGARIAN law, the mistaken party should indemnify the other party for the damages arising from the avoidance of the contract, unless the other party knew or ought to have known of the mistake. The contrary cases – indemnification of the mistaken party by the other party (if it caused or knew of the mistake) – are not generally regulated. A remedy can be however found in LOA art. 12 (precontractual liability).

51. On mistake generally see *Kötz*, European Contract Law I, chap. 10.

II.–7:202: Inaccuracy in communication may be treated as mistake

An inaccuracy in the expression or transmission of a statement is treated as a mistake of the person who made or sent the statement.

COMMENTS

A. No common intention: objective interpretation normal rule

It sometimes happens that because of an inaccuracy of expression in a communication, or an inaccuracy in its transmission, the communication does not express a party's true intention. For example, in an offer a party may write the price as €10,000 in mistake for €100,000. If the other party simply accepts this offer without noticing or pointing out the mistake, what should be the position should there later be a disagreement over the amount?

If the parties do not have a common intention, a party is normally bound by the apparent meaning of the expressions used, because the other party will reasonably have taken them at face value. So if the offeree does not know and has no reason to know that the offer contains a mistake, the offeree may hold the mistaken party to the contract.

This follows from the rules on interpretation in the next chapter.

B. Inaccuracy in communication may not prevent parties' having common intention

If in fact the recipient of the offer knows what the offeror meant, and accepts the offer without comment because the recipient too intended the price to be €100,000, the case is simply resolved: the parties' common intention was that the price should be €100,000 and the contract is for that sum even if the other party later uses the inaccuracy as a pretext for avoiding the contract.

This also follows from the rules on interpretation in the next chapter.

C. Objective rule does not apply if other party not misled by inaccuracy

A non-mistaken party who does not intend to accept an offer at €100,000, but knows that this is what was meant and simply accepts without pointing out the inaccuracy, should not be able to take advantage of the inaccuracy. On the contrary, such a party should be bound to a contract at that price. Although a party is normally bound by the objective meaning of words used, the meaning that a reasonable person would give to them, this does not apply when the recipient of the words does not understand them in this sense but as they were in fact intended. A contract results on the terms actually intended by the non-mistaken party.

This also follows from the rules on interpretation.

Illustration 1

A offers to sell B, another fur trader, hare skins at £1.00 per kg; this is a typing error for £1.00 per piece. Skins are usually sold by the piece and, as there are about six skins to the kilo, the price is absurdly low. B knows what A meant as skins are never sold by

the kilo, always by the piece, but nonetheless B purports to accept. He cannot hold A to supplying skins at £1.00 per kilo; instead there is a contract at £1.00 per piece.

D. Party knows of inaccuracy but not what was intended

It sometimes happens that a party knows there has been an inaccuracy but not what was meant. Nonetheless the party simply accepts the offer or other communication without pointing the inaccuracy out. Then it would not be feasible to hold the party to whatever the mistaken party actually meant. Nonetheless, provided the mistake is fundamental the mistaken party should be able to avoid the contract. The present Article treats this as a form of mistake so that the mistaken party can seek to avoid the contract.

Illustration 2
A and B have been negotiating for a lease of A's villa; A has been asking 1,300 per month, B has offered 800 per month. A writes to B offering to rent him the villa for 100 per month; this is a slip of the pen for 1,000. B realises that A must have made a mistake but does not know what it is. He writes back simply accepting. A may avoid the contract.

E. Inaccuracy should have been known to other party

Even if a party did not know that the other had made an inaccuracy in a communication, that party should not necessarily be able to hold the mistaken party to the normal meaning of the words used.

If in the circumstances a reasonable person would not have interpreted the words in their usual meaning, but in the way in fact intended by the party making the communication, then under the rules on interpretation the other party will be held to this interpretation.

Illustration 3
As Illustration 1 above but it is not proved that B knew of the mistake. If, given the custom in the trade and the price offered, the meaning of A's communication should have been known to any reasonable person in the same circumstances, B cannot hold A to the apparent contract and is bound to buy at £1 per piece.

If it is not clear what the intended meaning was, the mistaken party may again seek to avoid the contract.

F. Mistake caused by other party

Sometimes a party makes a mistake in apparently agreeing to something because of the conduct of the non-mistaken party. The non-mistaken party cannot hold the mistaken party to the apparent agreement if the non-mistaken party should have realised that the other might be agreeing to something in error.

Illustration 4
A books a package holiday with B Company. B offers various tours as well as the flight and hotel accommodation. A does not want these tours as they are very expensive, but the booking form used by B is very hard to follow and by mistake A checks a box indicating that she wants all the tours. B cannot hold A to this.

G. Fault of mistaken party

Under the preceding Article, relief is denied to a party if the mistake was inexcusable. This is justified by the need for security in transactions; the other party should not be put to the burden of investigating all the many possible misapprehensions that the other party might be labouring under; but should at least be able to ignore any which could only arise through gross carelessness. Usually mistakes in communication of the kind discussed above are careless, but this does not necessarily mean that they are inexcusable. In any event the concept of "inexcusable" is a relative one. When the mistake is not about the facts or law but is a problem of the accuracy of the communication, it is much less burdensome to ask the other party just to check any apparent statement which looks as if it might be a mistake, even when the mistake was due to the mistaken party's carelessness. The non-mistaken party has only to ask, "You do mean what you say on page 2?", or "You are aware of clause x?" The fact that the mistaken party was seriously at fault is not necessarily a bar to relief.

H. Seriousness

It is necessary to restrict relief to mistakes which make the contract fundamentally different. To allow relief for lesser mistakes would undermine the security of transactions. This applies equally to relief where there has been an inaccuracy in communication.

I. Mistake in communication treated as mistake of sender

It sometimes happens that a mistake occurs in the transmission of a communication sent via a third party, such as a telegraph company, without any fault on the part of the sender. Nonetheless the sender, having chosen that form of communication must bear the risk. Under these rules the situation is treated just as if the mistake had been caused by the sender, except in one situation. This is where the need for a notice has been caused by the recipient's non-performance of an obligation. Here, by virtue of a later Article (III.–3:106 (Notices relating to non-performance)) the dispatch principle applies and the risk of an inaccuracy in the transmission of the notice is borne by the recipient.

NOTES

1. All the systems by one means or another give relief when one party has made a mistake as to the terms of the contract being concluded; but the conditions under which relief will be given differ markedly.
2. If the other party makes the same verbal mistake, so that in fact they intend the same thing, or if the other party spots the verbal mistake and knows what was meant, it is generally accepted that the contract stands on the terms actually intended; *falsa demonstratio non nocet*. It is in the case in which the other party did not know of the mistake that the differences between the systems appear.
3. In some systems, the party who has made the verbal mistake may avoid the contract even though the other party did not know and had no reason to know of the mistake. For example, in GERMAN law CC § 119(1) covers cases of mistakes in the act or declaration, so that a slip of the tongue may entitle the mistaken party to avoid the contract. (Errors in the transmission of a declaration to the other party are treated similarly, CC § 120.) There is no requirement that the other party knew or ought to have known of the mistake. The same is true in AUSTRIA, where a mistake in the declaration is treated as a relevant mistake just as a mistake in regard to the subject

matter of the contract. No additional requirements have to be met. Similarly, in FRENCH, BELGIAN and LUXEMBOURG law it is sometimes said that a mistake in an offer or acceptance (often referred to as *erreur matérielle*) will give rise to an *erreur obstacle* which prevents the formation of a valid contract, though this concept is not mentioned in the CC. But it usually results only in the relative nullity of the contract (e.g. French Cass.com. 15 February 1961, Bull.civ. IV no.19; *Terré/Simler/Lequette*, Les obligations[6], nos. 210 and 227); on Belgium: *Stijns*, Verbintenissenrecht I, no. 106). In practice the jurisprudence usually gives relief under the normal conditions for mistake (see e.g. Civ. 15 April 1980, D. 1981 IR 314 and cases cited in *Nicholas* 99-100). In French law the fact that a mistake has been made need not be known to the other party, but Belgian case law has tended to apply the principle of legitimate confidence and to refuse relief where the other party did not know and had no reason to know of the mistake (*Kruithof & Bocken*, TPR 1994, p. 325 No. 108). In Luxembourg, the knowledge of the other party on the essential character of the quality of the goods or other relevant considerations is often required Cass. 30 June 1993, 29, 253. In PORTUGUESE law the same conditions apply as to errors in general; that is the error must be determining for the mistaken party and this must have been apparent to the other party, CC arts. 247, 250(1). Although art. 27 of the BELGIAN Decree-Law 7/2004, 7 January (e-commerce law), states a duty of the provider to offer technical means to identify and correct mistakes when introducing data, the law does not establish a specific consequence concerning invalidity due to mistake. POLISH law does not have a specific regulation on this issue. Rather, it should be treated not as mistake but as a matter for interpretation of the declaration of will. The court will look for the consent between parties that is necessary to conclude a contract. Generally, to protect the other party, the will expressed will prevail over the "will in the mind". The solution in BULGARIAN law is probably the same although no doctrinal discussion on this matter has so far taken place.

4. SLOVAK law does not have a specific regulation on this issue. An inaccuracy in the expression of a statement may be treated as a matter of interpretation of the declaration of will. In the case of a clear inaccuracy the concluded contract is void as a juridical act *contra bonos mores* (contrary to good morals) or on the ground of uncertainty. However if an expression of will is affected by an error in transmission caused by the means used by the sender by other circumstances arising in the course of transport, the provision on error will apply (CC § 45 2nd clause). The viewpoint of SLOVENIAN law is very similar, see Juhart and Plavšak (-*Dolenc*), Obligacijski zakonik I, p. 342.

5. In contrast, several systems, though applying the usual rules of mistake to this situation, limit mistake generally to cases in which the other party knew or should have known of the mistake (or caused it or shared it, which are not relevant here): e.g. DUTCH CC art. 3:35; GREEK CC art. 146; ITALIAN CC art. 1433; CZECH CC § 45(2); ESTONIAN GPCCA § 92; NORDIC Contract Acts § 32(1) which provides that if a message, because of a misprint or other error, differs from what the sender intended, the message does not bind the sender if the recipient knew or ought to have known of the misprint or error. In addition § 32(2) provides that if a message sent by telegram or by "bud", i.e. a person transferring the message to another person is garbled in the transmission, the sender will not be bound by what the message appears to say. It is uncertain if "bud" includes internet providers. In SCOTTISH law, if an offer is transmitted inaccurately, acceptance does not create any contract (*Verdin Brothers v. Robertson* (1871) 10 M 35). Under ESTONIAN law, however, an inaccuracy in the expression of a statement should first be treated as a matter of interpretation of the declaration of will (GPCCA § 71: if the content of a declaration of intention is altered due to the circumstances for which the recipient bears the risk, the

declaration of intention is deemed to be made with such content as was expressed; GPCCA § 75: if the recipient of the declaration did not know nor should have known the actual intention of the person making the declaration, the declaration of intention is interpreted according to the understanding of a reasonable person similar to the recipient under the same circumstances; LOA § 29(2)-(3): *falsa demonstratio non nocet*).

6. ENGLISH and IRISH law, by a different route again, produce a similar outcome. Mistakes as to the terms of the contract (bidding for the wrong item or expressing the price wrongly, for example) are also treated under the rubric of mistake, but a quite different type of mistake which may 'negative' (prevent there being) consent - in other words, prevent there being offer and acceptance. And offers, acceptances and other declarations are interpreted objectively - that is, parties are bound by what they reasonably appear to be saying. Thus if one party made a mistake but the other had no reason to know it, no relief will be given. The only case in which relief will be given is the one where the mistake was known to the other party (e.g. *Hartog v. Colin & Shields* [1939] 3 AllER 566, QB), or possibly where the other party suspected a mistake and deliberately distracted the mistaken party's attention from the matter (cf. *Commission for New Towns v. Cooper (GB) Ltd* [1995] 2 AllER 929, CA). (It is not clear whether the contract is void or whether the non-mistaken party simply cannot hold the mistaken party to what they appeared to say, but is bound by what the mistaken party (as the non-mistaken party knew) actually meant: see *Chitty* on Contracts I[27], no. 5-068; *Treitel*, The Law of Contract[9], para. 8-053.)

7. The case where one party has made a mistake as to the terms is the only one in which English and Irish law allow relief on the ground of *mistake* where only one party has made a mistake. A unilateral mistake which is as to the facts and which was not induced by misrepresentation gives no remedy: *Smith* v. *Hughes* (1871) LR 6 QB 597. This can produce nice distinctions as to whether the mistake was about, for example, the amount of work to be done or the total price to be charged, see *Imperial Glass Ltd.* v. *Consolidated Supplies Ltd* (1960) 22 DLR (2d) 759 (CA, British Columbia). Similar distinctions appear in other systems: thus AUSTRIAN law has special rules for so-called *Kalkulationsirrtum* (mistake as to the underlying calculation). A mistake in stating the price, e.g. in a building contract, will be a mistake of expression, but a mistake in the underlying calculation will only be one of motive (OGH 6 November 1986, WB1 1987, 62; 26 January 1988, JBl 1988, 714); see also notes on II.–7:201 (Mistake) above. However if the basis of calculation has been disclosed to the other party and the latter has agreed that the contract is on this basis, relief may be given as for an error of expression. Elsewhere, under PORTUGUESE law, a simple mistake in calculation or writing, revealed in the declaration or clear in those particular circumstances, does not allow relief but only a correction of that declaration (CC art. 249). In SCOTTISH law, a similar distinction is recognised in building contracts, where an error in calculation in a contract where payment is to be made in accordance with schedules of rates is one which a court may correct, but not so if the work to be done was for a lump sum, where an error in the calculation of that sum is irrelevant (*McBryde*, Law of Contract in Scotland[1], para. 8.99 note 369). These distinctions need not be made under the present rules, since errors in expression are treated in the same way as errors as to facts or law.

II.–7:203: Adaptation of contract in case of mistake

(1) If a party is entitled to avoid the contract for mistake but the other party performs, or indicates a willingness to perform, the obligations under the contract as it was understood by the party entitled to avoid it, the contract is treated as having been concluded as that party understood it. This applies only if the other party performs, or indicates a willingness to perform, without undue delay after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance.

(2) After such performance or indication the right to avoid is lost and any earlier notice of avoidance is ineffective.

(3) Where both parties have made the same mistake, the court may at the request of either party bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred.

COMMENTS

A. Mistake which was or should have been known to other party

The most obvious application of this Article is when a party is entitled to avoid a contract because there was an error in communication, but the non-mistaken party did not know what the mistake was. If, when told what the mistake was, that party offers to perform according to what the mistaken party actually intended, the latter's right to avoidance should be lost.

The Article may also apply to mistakes as to facts or law.

Illustration 1
A flooring contractor employed to floor a large building makes a fundamental mistake over the amount of work needed. This mistake should have been known to the other party. So the contractor has the right to avoid the contract. The employer offers to release the contractor from the extra work without any reduction in the payment. The contractor cannot avoid the contract.

B. Shared mistake

In cases in which the contract may be avoided because both parties have made the same mistake, paragraph (1) applies. Thus if one party seems to stand to benefit from the mistake and the other to lose, the first may offer to perform in the way the contract was originally understood. But if it is not clear that one stands to lose more than the other, or the gaining party is not prepared to perform the contract as it was originally understood, it may be more appropriate to adjust the contract than simply to avoid it. In this case paragraph (3) permits either party to apply to the court for the contract to be adjusted in such a way as to reflect what might have been agreed had the mistake not occurred.

Illustration 2
The facts are as in Illustration 1 except that both parties were mistaken as to the amount of work needed. The employer may indicate a willingness to release the contractor from the extra work under paragraph (1). Alternatively, either party may request the court to adapt the contract under paragraph (3). In such a case the court

might apply the contract rates to the additional work, with appropriate adjustments for the volume of work involved.

Sometimes it will be clear that, but for the mistake, the parties would not have entered the contract. In this case adaptation will not be appropriate.

Illustration 3
A sells a painting, which the parties think is by a little known artist, to B for €500. It is then discovered that the painting is by a very well known artist and is worth €50,000. B could not possibly have paid €50,000. A may avoid the contract; it should not be adapted so that B has to pay A the true value of the painting.

Equally a subsequent change in one party's position may make adaptation inappropriate

Illustration 4
The parties to a building contract were both mistaken in thinking that it would involve less work than is actually the case. Had the true quantity of work been known, the builder would have agreed to do all the work at the same unit prices as in the contract, but subsequently it has taken on other work and cannot do the extra work on this contract. Adaptation is not appropriate and the contract may be avoided.

C. Damages after adaptation of contract

The adaptation of the contract by the other party or by the court under this Article does not preclude the mistaken party claiming damages for any loss which is not compensated by the adaptation of the contract.

NOTES

1. The GREEK CC art. 144.1, the ITALIAN CC art. 1432 and the SLOVENIAN LOA § 46(4) have a provision parallel to paragraph (1) of the present Article. GERMAN law would reach the same result but by invoking the principle of fair dealing: see *Lobinger*, AcP 195 (1995) 274, 278; MünchKomm (-*Kramer*), BGB, § 119 no. 142. The PORTUGUESE CC art. 248 is broadly similar in approach to the present Article. The same is true under ESTONIAN law for GPCCA § 93.
2. In German, Portuguese and SPANISH law a contract entered under a shared mistake may be adapted under the principle of the *clausula rebus sic stantibus*; again, the doctrine of mistake would not be invoked.
3. In ENGLISH law the court has no power to adapt the contract; it is either valid or void. Earlier cases apparently holding that a contract may be held to be voidable in equity for fundamental mistake, and the court may impose terms upon the party seeking rescission (e.g. *Solle* v. *Butcher* [1950] 1 KB 671, CA), are now held to be wrong: *Great Peace Shipping Ltd.* v. *Tsavliris Salvage (International) Ltd. (The Great Peace)* [2002] EWCA Civ 1407, [2003] QB 679. Ironically, in that case (at [161]) the Court called for legislation to give greater remedial flexibility.
4. Although in BELGIUM the general remedy for mistake is the relative nullity, some legal writers would prefer the adaptation of the contract (e.g. reduction of the price) and suggest to reach this solution when the mistaken party invokes a partial nullity (*Van Gerven*, Verbintenissenrecht, 2006, 121).

5. FRENCH law does not permit adaptation of the contract in case of error but it admits partial nullity see *Terré/Simler/Lequette*, Les obligations[6], no. 227; but in LUXEMBOURG CC art. 1118 on *Lésion* has been amended and now it would be possible for the victim of an abuse of circumstances which has resulted in 'des *obligations lésionnaires*' to demand that they be reduced by the court.

6. Some systems go rather further than the present Article. The DUTCH CC art. 6:230(2) gives the court a general power, at the request of either party, to modify the contract instead of annulling it (see also art. 3:53). In NORDIC law the court may adapt the contract on the basis of the doctrine of failed assumptions or under the general clause under Contracts Act § 36, but only at the request of the mistaken party.

7. The AUSTRIAN CC § 872 allows claims for adaptation of the contract when there has been a non-essential error, to bring the contract into line with what would have been agreed had the mistake not occurred. The adaptation is only possible if it reaches a result that both parties would have accepted n the first place. Similarly, PORTUGUESE CC art. 293 allows modification of the contract when the scope of the parties allow to consider that they would have wanted that adaptation had they previewed the invalidity.

8. There is no special regulation or case law on the subject under POLISH law. However, on the principle of favouring contractual relations (*favour contracti)* it seems that the courts would allow performance of the contractual obligations in the way understood by the party entitled to avoid the contract for mistake. There is the same situation in CZECH law.

9. SLOVAK law has no special provisions on this issue. But the concluded contract will be considered valid unless the affected person challenges the validity of the act (see CC § 40a). The court may not bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred.

10. In SCOTTISH law, errors of expression obvious on the face of a concluded contract will be corrected as a matter of construction, while at common law a latent defect in a document's expression is a ground for reduction of a contract along with a declarator of the parties' true agreement (*McBryde*, Law of Contract in Scotland[1], paras. 8.98-8.101). An erroneously expressed written contract may also be rectified to conform to the parties' proved common intention under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s. 8.

11. BULGARIAN law has no analogue of the provisions of this article. Adaptation of contract is possible in cases of *clausula rebus sic stantibus*; correction of "purely arithmetical" mistake is also possible (LOA art. 28) and interpretation of the wrongly expressed will of a party is a must (LOA art. 20).

II.–7:204: Liability for loss caused by reliance on incorrect information

(1) A party who has concluded a contract in reasonable reliance on incorrect information given by the other party in the course of negotiations has a right to damages for loss suffered as a result if the provider of the information:

(a) believed the information to be incorrect or had no reasonable grounds for believing it to be correct; and

(b) knew or could reasonably be expected to have known that the recipient would rely on the information in deciding whether or not to conclude the contract on the agreed terms.

(2) This Article applies even if there is no right to avoid the contract.

COMMENTS

A. General effect of Article

This Article reflects the idea that a party to contractual negotiations should not act in an irresponsible way in giving information to the other party on which the other party may rely. The Article can be regarded as a concretisation of the requirement of good faith and fair dealing. It would be possible to locate this provision in the Book on Non-contractual Liability for Damage Caused to Another but, because it is so closely related to the conduct of a party in contractual negotiations, it seems likely to be for the convenience of users to place it here

A party who gives information to the other during the course of negotiations may in some circumstances be treated as undertaking a contractual obligation by making the statement. But not all statements of fact are treated as giving rise to a contractual obligation.

Even if the statement does not give rise to a contractual obligation, a party should not necessarily be expected to take the risk of the information given by the other party being incorrect. If the incorrect information leads the recipient party to make a mistake justifying avoidance of the contract, or if it amounts to fraud on the recipient party, that party will have a right to avoid the contract for mistake or fraud and to damages for loss under the rules on those topics. But even if the matter is not such as to give rise to a right to avoid the contract, the misled party should have a right to reparation if the other party has given incorrect information recklessly or carelessly.

B. Who should bear the risk of information being incorrect?

Where there is no fraud, the incorrect information is in a sense an accident which befalls the making of the contract. In some cases the party providing the information may have believed it to be correct and had good reason to believe it was correct. In those circumstances, it seems fair to leave the loss caused where it falls (unless it makes the contract fundamentally different, in which case the contract may be avoided under the rules on mistake). If, on the other hand, the party who has given the information believed the information to be incorrect or had no reasonable grounds to believe it to be correct, [and knew or could reasonably be expected to have known that recipient would rely on it], then the misled party should have a remedy. The Article confers a right to damages where incorrect information has been given in these circumstances.

The remedy will apply even if the incorrect information was not the only or principal reason the misled party entered into the contract. However the damages should compensate only for the loss which has been caused by the incorrect information.

The first limb of the double test (*believed the information to be incorrect or had no reasonable grounds to believe it to be correct)* is necessary because there could be cases where a person has reasonable grounds for believing information to be correct but has other grounds for believing it to be incorrect and actually believes it to be incorrect. For example, a seller of livestock may have had it inspected by a government inspector who pronounced it healthy. This provides reasonable grounds for believing it to be healthy. However, the seller may be more knowledgeable and experienced than the inspector and may actually believe, with good reason, that it is unhealthy. In such circumstances it would be contrary to good faith to say that the livestock was healthy. The second limb is necessary because a person involved in negotiations should not be so irresponsible as to provide information to the other party which the provider has no reasonable grounds for believing to be correct, even if the provider has no knowledge or belief either way on the question of its correctness.

C. Party could have discovered truth

Even when the party giving the information believed the information to be incorrect or had no reasonable grounds to believe it to be correct, it would not be appropriate to give damages if, in the circumstances, it was unreasonable for the party given the information to rely on it, or to rely on it without checking it. This is why the Article refers to "reasonable" reliance.

> *Illustration 1*
> E, an elderly lawyer who wishes to retire, invites F to buy his practice. He tells F that the income of the practice is €90,000 per year. It is normal for the buyer of such a practice to have the account books checked very carefully before deciding to purchase. E makes the books available. In fact, as an examination of the accounts would have shown, the practice has suddenly become much less valuable, though E does not know this because, due to illness, he has not been paying attention to the figures. F buys the practice without checking the accounts. It is so unreasonable to buy a practice without checking the accounts that F could not recover damages.

D. Information given by the other party

The Article applies only to incorrect information given by the other party to the contract. This, however, must be read with the Article which attributes to a person the statements or conduct of certain other persons for whom that person was responsible. A party misled by information provided by a third person falling outwith these categories cannot recover damages.

> *Illustration 2*
> G leased a machine from H, relying on a statement made by J, a friend who has a similar machine, that its fuel consumption was 5 litres per hour. In fact the fuel consumption was much higher. G may not recover damages from H.

However, if the party who was given the information was dealing with a professional supplier and the information was given by someone earlier in the business chain (e.g. a party buys goods from a retailer relying on information from the manufacturer), the party will have a remedy for non-performance under the Article on Statements giving rise to contractual obligations.

E. Remedies

The party misled by incorrect information is entitled to reparation for the loss which the incorrect information has caused. As the assumption for present purposes is that the incorrect statement did not give rise to a contractual obligation, the injured party is not entitled to damages on the normal contractual basis (that is, the difference between the value of what was received and the value of what would have been received had the information been correct), but only to compensation for the loss actually caused by the incorrectness of the information (that is, the difference between the value of what was received and the amount paid).

Illustration 3
A sells B a used car, telling B that the car has done only 50,000 kms. B agrees to pay €100,000 for the car, although the market price for that model of car with 50,000 kms on the clock is €105,000. In fact the car has done 150,000 kms and is worth only €85,000. On the assumption that the statement does not in the circumstances give rise to a contractual obligation, B may recover damages of €15,000 (and not the €20,000 which would have been due if the statement had given rise to a contractual obligation).

Where the incorrect information causes the misled party loss beyond the difference in value between what was given and what was received (this further loss is sometimes called "consequential" loss), the party may recover this also.

Illustration 4
C employs D, a firm of contractors, to lay a road across a field. C tells D that the ground all over the site has been investigated and is quite firm. In fact part of it is a quagmire. D discovers this when one of its machines sinks into it. Not only does the soft ground make the job much more expensive but D has to pay €100,000 to have its machine recovered. It may recover the €100,000.

F. Relationship to other rights to reparation

Book IV (Non-contractual Liability for Damage Caused to Another) has a provision on liability for loss caused by detrimental reliance on incorrect advice or information. The provision applies, however, only if the advice or information is provided by a person in pursuit of a profession or in the course of trade. It is therefore narrower in scope than the present Article in that respect but wider in others. It provides expressly that the present Article is unaffected by its provisions. Clearly, therefore, there could be an overlap between the two provisions. That does not matter: the aggrieved person could choose which Article to rely on.

NOTES

1. The majority of systems will allow a party who has entered a contract on the basis of incorrect information supplied by the other party to recover damages from the other if the other was at fault, even though there was no fraud involved. For example FRENCH and BELGIAN law grant damages on the basis of pre-contractual liability: e.g. Orléans 21 January 1931, D.H. 1931. 172; Civ. 29 November 1968, GazPal 1969 January 63 see also Cass.civ. 1ère 14 nov. 1979: Bull.civ. 3, no. 279; Belgium: *De Boeck*, Informatierechten en –plichten, nos. 455-505. In theory the liability is delictual rather than contractual. The measure of damages is the ordinary one for delictual

responsibility, and is within the discretion of the trial judge. This is also the solution in BULGARIAN law, where precontractual liability is considered to be delictual (LOA art. 12). This text governs all cases of precontractual relationships where there is a duty to act according to good faith; there is however no special rule similar to the present Article of the DCFR. AUSTRIAN law at one time allowed damages only in cases of fraud but now awards Austrian law formerly allowed damages only in cases of fraud (see CC § 874) but now awards damages for *culpa in contrahendo*; the party is to be placed in the position which would have existed, if the incorrect information had not been given (see *Bydlinski*, Bürgerliches Recht I[3], nos. 6/36 et seq.). See also GREEK CC arts. 197-198 and 914; A.P. 1505/1988, NoB 1990.62; in ITALY, *Mengoni*, Pre-contractual responsibility, *Castronovo*, Obbligazione 147, 160 ff, *Roppo*, Il contratto, 878; DUTCH CC art. 6:162; POLISH CC art. 72 (§ 2 – *culpa in contrahendo*); PORTUGUESE CC art. 227 (*culpa in contrahendo*, considered by part of the doctrine as a "third way", distinct either form delictual and contractual liability; see *Almeida*, Contracts 173; *Leitão* 312, 317) and SWEDEN, Sup.Ct. NJA 1989 p. 156. In FINLAND *culpa in contrahendo* has less importance as the statement will normally be treated as a contractual promise, but see Supreme Court KKO 1999: 48 and *Hemmo*, Sopimusoikeuden oppikirja, 122. In DENMARK the courts will only grant damages for culpa in contrahendo if a party has committed fraud or has been guilty of a clear violation of the rules governing contracting see *Bryde Andersen* Grundlæggende 116 ff. SPANISH literature and practice knows as "incidental mistake" the situation where inaccurate information given by the vendor (or fraudulent silence), even though not amounting to fundamental mistake, allows the affected party to recover damages (CC art. 1270).

2. In GERMAN law the remedies would be based on the principle of *culpa in contrahendo*, which was laid down by the new law of obligations in §§ 311(2), 280, 276. The aggrieved party should be restored to the position he or she would have been in had the contract not been concluded. The aggrieved party may seek rescission of the contract (e.g. BGH 31 January 1962, NJW 1962, 1196; BGH 27 February 1974, NJW 1974, 849, 851; BGH 24 May 1993, NJW 1993, 2107), or claim damages to the extent of the reliance interest (e.g. BGH 14 March 1991, BGHZ 114, 94; BGH 21 March 2005, NJW 2005, 1787. If the aggrieved party, but for the incorrect information, would have contracted with a different party, the damages may include profit that would have made on such a contract (BGH 2 March 1988, NJW 1988, 2236). For CZECH law, the delictual liability analogous to the present article rests in part on the *culpa in contrahendo* doctrine and in part on CC § 43 according to which the parties must take care to eliminate everything which could give rise to conflicts in regulating their contractual relationships.

3. In ENGLISH and IRISH law the victim of a pure mistake cannot recover damages; but the victim of a mistake which was induced by a misrepresentation may recover damages if the person who gave the incorrect information had no reasonable grounds for believing what was said to be true: English Misrepresentation Act 1967, s. 2(1), Irish Sale and Supply of Goods Act 1980, s. 45 (1). It may also be possible for the victim to sue on the basis of liability in tort for negligent misrepresentation, under the doctrine of *Hedley Byrne & Co Ltd.* v. *Heller & Partners Ltd.* [1963] AC 465, HL; and for Ireland, *Bank of Ireland* v. *Smith* [1966] IR 646 and, generally, *McMahon & Binchy* 150 ff. However this requires a "special relationship" between the parties and, while there may be such a relationship between contracting parties (as *Esso Petroleum CoLtd*v. *Mardon* [1976] QB 801, CA) this will not always be the case: see *Howard Marine & Dredging Co. Ltd.* v. *A Ogden & Sons Ltd.* [1978] QB 574, CA. Damages cannot usually be recovered if the misrepresentor acted without negligence; but

exceptionally, if an English court exercises its discretion under Misrepresentation Act 1967, s. 2(2) to refuse to allow rescission on the ground of an innocent, non-negligent, misrepresentation, it may give damages instead of rescission. See also the Irish Sale and Supply of Goods Act 1980, ss. 44, 45(2).

4. In SCOTLAND pre-contractual negligent misrepresentation may give rise to a delictual damages claim: Law Reform (Miscellaneous Provisions) Act 1985, s. 10.

5. SLOVAK law has no special provisions on this issue. So the liability for loss by reliance on incorrect information is regulated by the provisions on liability for loss and unjustified enrichment. (CC Sixth part §§ 415 et seq.).

6. The ESTONIAN LOA § 14(1) sent. 2 provides for an obligation of a party to ensure that information provided in the course of preparation of the contract is accurate. Under the majority view, negotiations create a legal relationship between the parties and breach of any of the obligations under this relationship should be treated similarly to the breach of a contractual obligation (LOA § 100), incl. non-fault liability (see LOA §§ 103, 115(1)). Recoverable damage is, however, generally limited to the reliance interest (see Supreme Court Civil Chamber's decision from 15 January2007, civil matter no. 3-2-1-89-06, p. 16). For discussion on the nature of the precontractual liability see Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, § 14, no. 4.6.2.

7. In SLOVENIAN law, there are no statutory provisions on liability for incorrect information, apart from fraud and contractual liability for statements, giving rise to contractual duties. Liability for incorrect information could be construed on the basis of precontractual liability for *culpa in contrahendo* e.g. for negotiations contrary to good faith (LOA § 20), and, possibly, also on contractual liability of each party for breach of duty to notify the other party of all circumstances, influencing their relationship, see LOA § 245.

II.–7:205: Fraud

(1) A party may avoid a contract when the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose.

(2) A misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false and is intended to induce the recipient to make a mistake. A non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake.

(3) In determining whether good faith and fair dealing required a party to disclose particular information, regard should be had to all the circumstances, including:

(a) whether the party had special expertise;
(b) the cost to the party of acquiring the relevant information;
(c) whether the other party could reasonably acquire the information by other means; and
(d) the apparent importance of the information to the other party.

COMMENTS

A. General policy

In a case of fraud there is no reason to protect any interest the fraudulent party may have in upholding the contract; nor is the risk of being deliberately misled one that a party should be expected to bear.

B. Nature of representation

A representation is a definite statement that something is the case. It does not matter whether the fraudulent statement is as to facts or law.

The statement must be as to matters existing at the time of the contract. A statement that a party intends to do something does not become a false representation within the Article simply because the party has a change of mind. For such a change of mind to give rise to a remedy, it will have to be shown that the party's statement of intention amounted to a contractual promise. However, if a person states that he or she holds an intention which in fact is not held, that is a false representation within this Article.

Statements which are obviously mere sales talk are not representations within this Article.

> *Illustration 1*
> A leases a computer to B. A casually remarks that the computer is "the best of its size on the market". In fact a more powerful machine of similar size is available. As buyers may disagree over whether a more powerful machine is necessarily "better", B does not have a remedy.

A statement of opinion does not normally amount to a representation of fact or law. The fact that the statement is expressed as an opinion should warn the other party that it may or may

not be accurate. However, a false statement that a party thinks something will be a false statement of fact.

Illustration 2
C rents a country cottage to D, telling D that in C's opinion the cottage is a very quiet spot. In fact C knows that it is under the flight path of the nearest airport and at certain times is very noisy. C has made a fraudulent misrepresentation.

C. Form of the misrepresentation

It does not matter whether the incorrect information is given by words or takes the form of misleading conduct.

Illustration 3
A leases a house to B. The house suffers severely from damp but just before leasing it A has had the walls repainted to conceal the damp, which B therefore does not notice. B may avoid the contract.

D. Fraud must be intentional

The effect of paragraph (2) is that a party's misrepresentation or non-disclosure is fraudulent if it was intended to deceive – that is, to cause the other party to make a mistake. This is in accordance with the definition of fraudulent for other purposes of the model rules. It is not fraud, however, to fail to point out some fact of which the other party is ignorant if there was no intention of deception. The mistake need not be such a mistake as would justify avoidance in itself.

E. Reliance

The party given incorrect information will not have a remedy unless that party has relied on the information in deciding to enter the contract.

Illustration 4
A sells a used car to B after turning back the odometer so that it shows that the car has done much less than the distance the car has been driven. However B never looks at the odometer until after she has bought the car. B has no remedy for fraud.

F. Non-disclosure

A party should not normally be permitted to remain silent, with the deliberate intention of deceiving the other party, on some point which might influence the other party's decision on whether or not to enter the contract. Unless there is a good reason for allowing the party to remain silent, silence is incompatible with good faith and will entitle the other party to avoid the contract under this Article.

Often a party to whom a fundamental fact has not been disclosed will be entitled to avoid the contract for mistake. There may also be a right to damages. Otherwise there is no general duty to point out to the other party possibly disadvantageous facts, but still a party should not normally be entitled to keep quiet with the intention of deceiving the other party.

G. Non-disclosure consistent with good faith and fair dealing

The duty to disclose is part of a general notion of good faith and fair dealing and may not always require a party to point out facts of which the other is known to be ignorant. For example, while a professional party will often be required by good faith and fair dealing to disclose information about the property or services to be supplied under the contract, the same may well not be true of a non-professional party. (See paragraph (3)(a).)

Further, a party may fairly be expected to provide information about the performance that party is undertaking, but is less likely to be required to do so about the performance the other party is to make. The latter is normally expected to know or find out relevant facts about such performance. (See paragraph (3)(c). In particular there may not be any obligation to disclose information which concerns the other party's performance and which the informed party had to make a great investment in order to acquire. (See paragraph (3)(b).)

The list in paragraph (3) is not intended to be exhaustive.

H. Remedies

Fraud gives the misled party the right to avoid the contract, if notice is given within a reasonable time. Where the fraud relates to an individual term of the contract, the party may be able to avoid the contract partially. In addition to, or instead of, avoiding the contract the party may recover damages. These will be limited to recovery of the amount the party is out of pocket, since it is assumed for present purposes that the other party did not give a contractual undertaking that the representation was true.

> *Illustration 5*
> C, an art dealer, sells a picture to D stating that in his opinion, but not undertaking that, it is by a well-known artist. D pays €5,000 for the picture. D later discovers that it is not by that well-known artist but is by a lesser known artist, as C knew perfectly well. It is worth only €1,000. If it had been by the well-known artist it would have been worth €9,000. If D decides to keep the picture she may recover damages limited to €4,000.

I. Incorrect information amounts to non-performance

In some cases the giving of incorrect information may give rise to a contractual obligation. The fact that the information is incorrect will amount to a non-performance of the obligation. In this case the party misled will have the usual remedies for non-performance.

> *Illustration 6*
> As in 5 but C states categorically that the picture is by the well-known artist. B may obtain remedies for non-performance which may include damages of €8,000.

J. Remedies cannot be excluded

Fraud can never be justifiable and therefore it is provided later that the remedies for it cannot be excluded or restricted.

NOTES

I. Fraud need not be as to an important matter

1. Fraud is a situation in which one party has been led into a mistake by the trickery of the other. Almost all the systems allow avoidance more readily than for a mere mistake. Thus in most systems it is not necessary to show that the fraud was as to an important matter. GERMAN CC § 123 allows avoidance for every kind of fraud (see *Flume* AT II, § 29 2, p. 543); similarly, AUSTRIAN CC § 870, (where avoidance is also granted despite a mere mistake as to the motive); GREEK CC art. 147, and see A.P. 249/1976 NoB 24 (1976) 785, 290/1989 EEN 57 (1990) 69; POLISH CC art. 86; DUTCH CC art. 3:44; CZECH CC § 49a (error which is intentionally induced and concerns any contractually relevant fact, not necessarily a substantial one); SLOVAK CC § 49a 2nd sentence; SLOVENIAN LOA § 49(1), (intentionally induced error need not be substantial); ESTONIAN GPCCA § 94. The same rule is applied in NORDIC law under the Contract Acts § 30; and in ENGLISH and IRISH law the victim of any fraudulent statement is entitled to rescission provided it influenced in any way the decision to conclude the contract (see, for England, *Chitty* on Contracts I[27], no. 6-034; and, for Ireland, *Friel* 226). For avoidance in SCOTTISH law the fraud must induce the contract (*McBryde*, Law of Contract in Scotland[1], para. 14.38).

2. The FRENCH, BELGIAN and LUXEMBOURG CCs art. 1116 on dol refer to *manoeuvres* without which the other party would not have contracted. It is clear that a contract may be set aside when fraud has produced a mistake without having to show that the mistake went to the substance of the subject-matter. Traditionally, however, a distinction was drawn between *dol principal* (without which the victim would never have entered the contract at all) and *dol incident*, where the victim would have entered the contract but on different, less onerous terms; avoidance was allowed only for *dol principal*, damages only being awarded for *dol incident*. This distinction is still applied in Belgian (see Cass. 1 Dec. 1997, Pas. belge 1997, 1315 but for criticism: *Kruithof & Bocken*, TPR 1994, no. 126; *Stijns*, Verbintenissenrecht I, nos. 113 & 115) and ITALIAN law (CC art. 1440); and in FRENCH courts, Cass.com. 8 juillet 2003, CCC 2003 no. 153 obs. *Leveneur*, but sometimes, this distinction is not applied, Cass.civ. 3è, 22 juin 2005 RDC 2005, 1025 obs. *Ph. Stoffel-Munck*. See *Terré/Simler/Lequette*, Les obligations[6], no. 238. The SPANISH CC art. 1270 provides that an incidental deception gives only a right to damages.

II. Sales talk and opinion

3. Most systems do require that any incorrect statement be more than sales talk or *dolus bonus* (on which see *Ghestin*, La formation du contrat[3], no. 564); but increasingly consumer protection laws require that any factual information be correct (e.g. FRENCH Code de la Consommation, art. L121-1, see *Malaurie and Aynès*, Les obligations[9], §§ 521-522; BELGIAN Trade Practices and Consumer Protection Act of 14 July 1991, art. 24; and the POLISH Consumer Sale Act of 27 July 2002, arts. 3 and 4, SLOVAK ObchZ § 45. In PORTUGAL it has been argued that the concept of *dolus bonus* does not apply in consumer transactions, *Almeida*, Consumer law 102; contra, *Ascensão*, 158. In any event, what appears mere advertisement may constitute fraud if it contains factual elements which can be verified (e.g. "a good price" that is in reality higher than other offers): see, in GERMAN law, OLG Saarbrücken, 7 October 1980, OLGZ 1981, 248; OLG Frankfurt, 12 May 1982, DAR 1982, 294; as to DANISH law, *Lynge Andersen* 162; in GREEK law, *Karakatsanis* in *Georgiadis/Stathopoulos*, AK 147 nos. 4, 7; as to LUXEMBOURG, see Cour 17 October 1919, Pasicrisie 11, p. 190.

In ITALIAN law modern case law and scholars favour the idea that the fraud must concretely affect the consent of the other party (see Cass., S.U., 11 March 1996, no. 1955, Giust.civ. 1996, I, 1284, and *Bianca*, Diritto civile III, 666). In ENGLISH, IRISH and SCOTTISH law the statement must be one of fact, rather than opinion; but it is accepted that a statement of opinion may carry the implication that the speaker knows facts to justify the opinion, and that a statement of an opinion which the speaker does not actually hold is itself a false statement of fact. See for England, *Chitty* on Contracts I[27], nos. 6-004 - 6-006; or Scotland, *McBryde*, Law of Contract in Scotland[1], paras. 14.09-14.18; and, for Ireland, *Friel* 213. Under SPANISH law, the Consumer Protection General Act 26/1984 states that commercial advertising always forms part of the contract in consumer transactions, even if not expressly incorporated into the contract by the parties. PORTUGUESE law adopts the same solution under Law 24/96 of 31 July art. 7 (5) and so does the ESTONIAN LOA § 217(2) 6).

III. Reliance

4. The systems also require that the party seeking to avoid the contract was actually influenced by the fraud. In some systems, the burden of proving reliance is on the party seeking avoidance (e.g. GERMAN, AUSTRIAN, ESTONIAN, GREEK and PORTUGUESE law; and see for LUXEMBOURG, Cour 16 June 1970, 21, 362); in others, once it is proved that an incorrect statement was made deliberately, it is presumed that the statement influenced the party to whom it was made: e.g., for ENGLISH law, *Chitty* on Contracts I[27], no. 6-035; for SCOTTISH law, *McBryde*, Law of Contract in Scotland[1], paras. 14.51-14.54; for IRELAND, *Smith* v. *Lynn* [1954] 85 ICTR 737; and for NORDIC law, Contract Acts § 30(2)

IV. Dishonesty

5. It is the deliberate nature of the fraud which justifies the ready grant of avoidance, and the systems agree that the test of fraud is dishonesty, the intention to trick the other party: e.g. FRENCH Req. 27 January 1874, D.P. 1874.1.452; 3 January 1900, S. 1901.1.321 note *Wahl*; Civ. 1, 12 November 1987, D. 1987, I.R. 236; Bull.civ. I no. 293; BELGIUM (the intention to trick the other is not presumed and is to be proved by the victim): Cass. 25 Feb. 2000, Arr.Cass. 2000, 478); LUXEMBOURG, 9 February 2000, 31, 356; NORDIC law, *Lynge Andersen* 160 and *Telaranta*, Sopimusoikeus 329-330); SPANISH CC art. 1269. In GERMAN law the party must have known that the statement was untrue or have turned a blind eye to the truth: BGH 16 March 1977, NJW 1977, 1055, 1056; cf BGH 21 January 1975, BGHZ 63, 382, 388. The party must also have acted intentionally, that is, with the aim of influencing the other party or knowing that the trickery might influence the other party: BGH 28 April 1971, LM no. 42 to CC § 123; but it is not necessary that there be an intention to cause loss to the other or to gain from the fraud: BGH 14 July 1954, LM no. 9 to CC § 123. AUSTRIAN law (see Rummel (-*Rummel*), ABGB I[3], § 870 no. 2), GREEK law (see A.P. 249/1976 NoB 24 (1976) 785; Court of Appeal of Larisa 565/2000 EllDik 43 (2002) 793), PORTUGUESE law (see *C.M. Pinto*, General Theory 522), POLISH law (CC art. 86 § 1), SLOVAK law (CC § 49a 2[nd] sentence), SLOVENIAN law (LOA § 49(1)) and ITALIAN law (Cass. 20 April 2006, no. 9253, Rep.Foro it. 2006, 799; *Bianca*, Diritto civile III, 665; *Sacco and De Nova*, Il contratto, 549) law are similar. So it seems is ENGLISH law: *Chitty* on Contracts I[27], nos. 6-029 and 6-046. In SCOTTISH law the classic definition of fraud is “a machination or contrivance to deceive” (*Erskine*, Institute III, i, 16).

V. Non-disclosure

6. A major difference between the systems is that in most cases there can be fraud when a party deliberately does not point out some relevant fact to the other party, who is ignorant of it. In FRENCH, BELGIAN and LUXEMBOURG law *manoeuvres* may cover any kind of dishonest conduct; and, though traditionally merely acquiescing in the other party's self-deception was not fraud, it is now often held that there was a duty to disclose information and a party who deliberately keeps silent is guilty of *dol par réticence*: e.g. for France: Civ. 2 October 1974, D. 1974, I.R. 252; Civ.1, 12 November 1987, Bull.civ. I no. 293, Cass.civ. 1ère, 13 mai 2003 Bull.civ. 5, no. 144; Cass.civ. 3è, 11 mars 2005; D. 2005, I.R. 1451 and see *Malaurie and Aynès*, Les obligations[9], no. 510; for Luxembourg, Tribunal Luxembourg, 24 June 1959, Pasicrisie 17, p. 495; for Belgium, see Cass. 8 June 1978, RCJB 1979, 525 note *Masson*; Cass. 21 April 1988, TBH 1991, 203; Cass. 16 Sept. 1999, Pas. belge 1999, 1160. The factors taken into account in deciding whether there is a duty to disclose in Belgian law are broadly similar to those listed in paragraph (3) of the present Article: see *Kruithof & Bocken*, TPR 1994, Nos. 75 ff; *De Boeck*, Informatierechten en –plichten, nos. 671 & 665.

7. In GERMAN law, keeping silent may amount to fraud under CC § 123 when there was a duty to disclose. There is no general duty, but there is one where the other party relies on the knowledge or expertise of the contracting partner or where there is already a relationship based on mutual trust and good faith (MünchKomm (-*Kramer*), BGB, § 123 nos. 16, 17.) There is a rich case law, e.g. the seller of a used car was held to be under a duty to tell the buyer that the car had been in a serious accident which had caused permanent damage to the chassis: BGH 8 January 1959, BGHZ 29, 148, 150; an estate representative had to disclose a suspicion that a house suffered from rot (OLG Celle, 6 November 1970, MDR 1971, 392). There are similar duties to disclose in AUSTRIAN law (see Rummel (-*Rummel*), ABGB I[3], § 870 no. 4); GREEK law, see CC art. 147; ITALIAN law, CC art. 1439; DUTCH law, see CC art. 3:49 and *Vranken*; PORTUGUESE law, see CC art. 253; SLOVENIAN law, see LOA § 49(1) and 625(2); and NORDIC law, where Contract Acts § 30 may apply when a party in bad faith fails to reveal a fact, and the Sale of Goods Act in force in Finland and Sweden may make a seller who has sold "as is" nonetheless liable for non-conformity if there was a failure to fulfil the duty of disclosure. Under ESTONIAN law, GPCCA § 95 closely resembles paragraph (3) of the present Article. Court practice insists that without request, the party has to disclose only information the importance of which to the other party is recognisable to the first party (Supreme Court Civil Chamber's decision from 19 October 2005, no. 3-2-1-93-05, p. 17).

8. ENGLISH, IRISH, SLOVAK and SCOTTISH law, in contrast, do not recognise any general duty of disclosure, even when the party knows that the other party is ignorant of a critical fact and would not contract if aware of the truth: *Smith* v. *Hughes* (1871) LR 6 QB 597, QB There is a duty to disclose only if the contract is one of a very limited number of contracts *uberrimae fidei* (insurance contracts are the most important example); or if there is a confidential relationship between the parties: *Tate* v. *Williamson* (1866) LR 2 CA 55. For English law see *Chitty* on Contracts I[27], nos. 6-0139 - 6-0157; on Irish law, *Friel* 217; on Scottish law, *Gloag* 480. Thus in ENGLAND and IRELAND there is fraud only if a party has made a positive representation by words or conduct. However, conduct may carry an implication of fact and, if the implication is misleading, the party must correct the impression created. Thus in the Irish case of *Gill* v. *McDowell* [1903] 2 IR 295, KB it was held that a seller of a hermaphrodite animal was under a duty to disclose this fact because

he was selling it in a market where only cows and bulls were normally sold. In SCOTTISH law the possibility of fraudulent concealment, where silence is part of a 'machination or contrivance to deceive' a party into entering a contract, has also been recognised (*McBryde*, Law of Contract in Scotland[1], paras. 14.13-14.18).

VI. Fraud by a third party

9. Systems differ on the question whether a contract may be avoided because of fraud by a third party. This is dealt with below, see notes to II.–7:208 (Third persons).

VII. Effect of fraud

10. In most systems the effect of fraud is to give the party who has been deceived the right to avoid the whole contract, even if the fraud related only to a part of it. In ENGLISH, IRISH, SCOTTISH, POLISH, CZECH, SLOVAK, SLOVENIAN and NORDIC law fraud as to any part of the contract entitles the victim to escape the whole. Provided that the fraud was the reason the party entered into the contract, the same is true under GREEK CC art. 181 (*Karasis* in *Georgiadis/Stathopoulos* art. 184 no. 3). In FRANCE, the effect of fraud is the nullity of the contract and/or damages. Traditionally, the victim of an intentional mistake caused by fraud, has a right to the nullity of the contract if he or she would not have concluded the contract but for the mistake. Conversely, should he or she have only concluded the contract on different conditions, the victim of the mistake has only a right to damages. In some cases, the Cour de Cassation makes no distinction and the contract is avoided even when the victim of the mistake caused by fraud would have, but for the mistake, concluded a contract on different conditions (Cass.civ. 3è, 22 juin 2005: RDC, 1025, obs. Ph. Stoffel-Munck). In BELGIAN and LUXEMBOURG law the relative nullity applies; however, the general rules on partial invalidity may apply: the question is whether the fraud relates to an essential part of the contract or overturns its whole economy. The DUTCH CC art. 3:44 is to the same effect; see *Asser-Hartkamp*, Verbintenissenrecht II, no. 490. In GERMAN law the part to which the fraud relates may be annulled leaving the rest of the contract standing if it is severable and this is what the parties are assumed to want: BGH 5 April 1973, LM HGB § 119 no. 10, MünchKomm (-*Kramer*), BGB, § 143 no. 11. According to AUSTRIAN case law partial avoidance is only possible if the remaining contract would have been agreed upon by both parties (OGH 17 February 1966, EvBl 1966/255). The ESTONIAN GPCCA § 90(3) provides for a similar rule.

11. In the HUNGARIAN CC § 210(4) a person who has been persuaded to conclude a contract by deception by the other party is entitled to challenge the contract. This provision also applies if the deception was committed by a third person and the other party had or should have had knowledge of such conduct.

12. On fraud generally see *Kötz*, European Contract Law I, pp. 196-208.

II.–7:206: Coercion or threats

(1) A party may avoid a contract when the other party has induced the conclusion of the contract by coercion or by the threat of an imminent and serious harm which it is wrongful to inflict, or wrongful to use as a means to obtain the conclusion of the contract.

(2) A threat is not regarded as inducing the contract if in the circumstances the threatened party had a reasonable alternative.

COMMENTS

A. Introduction

The notion of freedom of contract suggests that a party should only be bound by actions which were both voluntary and free, in the sense that the party had some choice. In practice the notion of freedom has to be tempered. On the one hand, a person who is made to sign by the other grabbing the arm and moving it simply does not consent and has not even appeared to agree. In such a case there would not be an agreement within these rules. On the other hand, there are frequent occasions when the choices facing a person are so constrained by circumstances as to give rise to a feeling that he or she has to agree to a contract. During food shortages a hungry person may have little choice but to pay the high market price for food. The law of contract, dependent as it is on notions of the market, cannot insist that every contract should be free from such constraints. In some such cases the following Article (Unfair exploitation) may apply.

The law can insist that a party should not be constrained by the actions of the other party when those actions are unjustifiable. A person should not be bound if the person's consent was obtained by coercion or by threats of an unjustifiable type.

B. Coercion

Consent is vitiated if a person is coerced into doing something. Normally coercion will involve the use of threats but this is not necessarily so. There may be a situation of such dominance that one party can force the other person to act by simply giving an order. Often there will be implied threats in the background but it should not be necessary to imply threats artificially if there was factual coercion in the absence of threats.

C. Threats of acts wrongful in themselves

A party should not be able to hold the other to a contract which the other agreed to as the result of a threat that some other legal wrong would be inflicted on the first party.

> *Illustration 1*
> A and B are partners. A wishes to buy B's share of the business and, in order to induce B to sell her share, threatens to have some goods belonging to B wrongfully seized and impounded if she does not sell. B agrees to sell her share to A. B may avoid the contract.

The same would follow if A had threatened a third party, e.g. a member of B's family. It is not only threats of physical violence or damage to property which constitute wrongful threats. A threat to inflict economic loss wrongfully, e.g. by breaking a contract, can equally constitute duress.

Illustration 2
X owes a large debt to Y. Knowing that Y desperately needs the money, X tells Y that he will not pay it unless Y agrees to sell X a house which Y owns at a price well below its market value. Faced with bankruptcy, Y agrees. X then pays the debt. Y may avoid the contract to sell the house.

In practice the threat of a breach of contract is often used in an attempt to secure re-negotiation of the same contract. In this case the re-negotiation agreement may be avoided.

Illustration 3
C has agreed to build a ship for D at a fixed price. Because of currency fluctuations which affect various subcontracts, C will lose a great deal if the contract price is not changed and it threatens not to deliver unless D agrees to pay 10% extra. D will suffer serious harm if the contract is not performed. D pays the extra sum demanded by C. D may recover the extra sum paid.

D. Not every warning of non-performance amounts to a threat

If one party genuinely cannot perform the contract unless the other party promises to pay an increased price and the first party simply informs the second of this fact, the second party cannot later avoid any promise to pay a higher price. The first party's statement was merely a warning of the inevitable; there is no threat within the meaning of this Article.

Illustration 4
A employs a company, B, to build a road across A's farmland at a fixed price. B finds that the land is much wetter than either party had realised and B will literally be bankrupt before it has performed the contract at the original price. B informs A of this and A agrees to pay an increased price. Although A had no real choice, A cannot avoid the agreement to pay the increased price.

E. Threats of lawful acts wrongfully used

Even a threat to do something lawful may be illegitimate if it is not a proper way of obtaining the benefit sought, as in blackmail.

Illustration 5
E threatens his employer F that he will reveal to F's wife F's affair with his secretary unless F increases E's wages. F complies. He may avoid the agreement to pay E the higher wages.

F. Threat must have led to the contract

Relief will not be given unless the threat did influence the threatened party's decision. If the primary reason for paying the amount demanded is to settle the dispute rather than to avoid the threatened action, relief will not be given.

Illustration 6
A company, E, employs a firm of contractors, C, to do some building work. C has underpriced the work and tells E that it will not do it unless the price is increased. E is not much affected by the threat, which it regards as a bargaining ploy, but feels that C

has made a genuine mistake and deserves a better price. So it agrees to pay the extra. It cannot avoid the agreement to pay extra.

Provided the threat has some influence it need not be the only reason for the contract.

Illustration 7
A and B are partners. A wishes to buy B's share of the business and, in order to induce B to sell his share, threatens to have B murdered if he does not sell. B agrees to sell his share to A. Even if B also has good business reasons for selling to A, B may avoid the contract.

G. No reasonable alternative

Relief will not be given if a party gave in to a threat when there was a perfectly good alternative - e.g. the party could have found someone else to do the work, or could have obtained an order forcing the other party to do it. If there was a reasonable alternative, which suggests that the threat was not the real reason for the threatened party agreeing to the demand. The burden of proving that the threatened party had a reasonable alternative rests on the party making the threat.

H. Remedies

The party coerced or subjected to the threat may avoid the contract, provided notice is given within a reasonable time. There may also be a right to damages.

I. No exclusion of remedies

Coercion or threats are forms of wrongful behaviour and therefore it is provided later that the remedies cannot be excluded or restricted by contrary agreement.

NOTES

1. All the systems recognise that a contract which is procured by one party making an illegitimate threat against the other may be avoided by the latter. For example, AUSTRIAN CC § 870 (if illegal threat and well-founded fear); POLISH CC art. 871; NORDIC Contract Acts §§ 28, 29; DUTCH CC art. 3:44; FRENCH, BELGIAN and LUXEMBOURG CCs art. 1112 (avoidance if *violence* produces in the victim a fear of present and considerable harm to person or property); GERMAN CC § 123(1) (party may avoid a contract induced by illicit threats); GREEK CC arts. 150 and 151; ITALIAN CC art. 1434; PORTUGUESE CC arts. 246 and 256; SPANISH CC arts. 1267 and 1268, SLOVAK CC § 37 1st clause; SLOVENIAN LOA § 45(1); ESTONIAN GPCCA § 96. For ENGLISH law ("duress") see *Chitty* on Contracts I[27], nos. 7-001 - 046; for IRISH law, *Clark* 260-268; for SCOTTISH law ("force and fear" or "extortion") see *McBryde*, Law of Contract in Scotland[1], paras. 17.01-17.11 for CZECH law see Knappová (-*Knapp and Knappová*), Civil Law I, 151 (inferred from the concept of the freedom of will), see also Supreme Court 3 Cdo 1522/96. There are some variations in the conditions under which relief will be granted.

I. Threat must have influenced the party seeking to avoid

2. In most systems the party seeking to avoid must have actually been influenced by the threat: GERMAN law: BGH 22 January 1964, NJW 1964, 811 (though the threatening party must have acted with the intention of obtaining the other party's consent: MünchKomm (-*Kramer*), BGB, § 123 no. 40); LUXEMBOURG, Cour, 29 April 1904, 6, 477, LUXEMBOURG, 7 April 1948, 14, 399; NORDIC law (*Lynge Andersen* 156 and *Telaranta*, Sopimusoikeus 320); PORTUGUESE CC art. 255; ESTONIAN GPCCA § 96(1). SCOTTISH law *McBryde*, Law of Contract in Scotland[1], para. 17.03. In ENGLISH law the threat must have influenced the party seeking to avoid the contract; thus a payment which the threatening party had demanded and which was not due, but which was paid not because of the threat but to save trouble ("voluntarily to close the transaction"), is not recoverable: *Maskell* v. *Horner* [1915] 3 KB 106, CA However the burden of proving that the threat did not influence the threatened party is a heavy one (*Chitty* on Contracts I[27], nos. 7-020 - 7-07-022). In cases of physical duress it suffices that the threat had some effect on the victim's consent; the threat need not be the only or even the main reason the victim agreed to the contract. See *Barton* v. *Armstrong* [1976] AC 104, PC It does not appear that the threat must have been one which would have influenced a reasonable person.

3. Under FRENCH, BELGIAN and LUXEMBOURG CCs art.1112 it seems that the test is not purely subjective: the threat must have been one that would influence a reasonable person of the same age, sex and condition (and see also ITALIAN CC art. 1435). See also SCOTTISH law: *McBryde*, Law of Contract in Scotland[1], para. 17.03. But it is said that the courts in France take a subjective approach (e.g. Cass.com. 28 May 1991, D. 1992.166, note *P. Morvan*; *Nicholas* 106, citing Req. 27 January 1919, S. 1920.1.198; Req. 17 November 1925, S. 1926.1 121.) AUSTRIAN law also seems to take a subjective approach in practice; the fear must be "well-founded" but the physical and mental state of the threatened person is taken into account as well as the gravity and probability of danger.

4. POLISH CC art. 87 sets the test as both subjective and objective. The threat must be illegal and it must appear from the circumstances that the threatened party had reason to fear, because they themselves or another person was in serious danger either with regard to their persons or their property. CZECH law takes the subjective approach (see CC § 37(1)), but the courts apply also an objective-circumstances corrective (Supreme Court 3 Cdo 1522/96 or 22 Cdo 752/99) – the threat must be of such kind and intensity as to – under the circumstances and nature of the particular case – objectively incite understandable apprehension in those against whom the threat was used (Knappová (-*Knapp and Knappová*), Civil Law I, 152). In SLOVENIAN law, too, the threat must actually influence the conclusion of the contract by the threatened party but it must also be objectively recognizable from the circumstances, see LOA § 45(1) and (2).

5. DUTCH law takes an objective approach in that the threat must be one that would have influenced a reasonable person CC art. 3:44(1).

6. Under the SLOVAK CC § 37 1st clause the juridical act must be done in a free way, seriously, definitely and intelligibly; otherwise, it will be invalid. Legal theory interprets free will as a will without direct coercion (*vis absoluta*) and unjustified threat (*vis compulsiva*). Slovak legal theory considers both objective and subjective factors relevant (see Lazar et al. p. 126).

7. The present Article applies whenever the threat was imminent and serious and actually led to the conclusion of the contract which the party threatened is seeking to avoid.

II. The threat may be of physical or financial harm

8. Most systems do not limit relief to cases of threats of physical harm, but also include threats of causing financial or moral harm provided that the threat is illicit: for example FRENCH, see *Terré/Simler/Lequette*, Les obligations[6], nos. 246ff, BELGIAN and LUXEMBOURG CCs art. 1112 (fear of harm to person or fortune); PORTUGUESE CC arts. 246 (contract made under physical threat null) and 256 (if under moral threat, which comprises most cases of physical harm, avoidable); in GERMAN law, BGH 25 June 1965, LM § 123, no.32 (threat not to pay bill of exchange in order to induce other party to sell real estate); GREEK CC art. 151; ITALIAN CC art. 1435; POLISH CC art. 87 (a serious threat to the person or property); SLOVENIAN LOA § 45(2); THE NETHERLANDS, HR 27 March 1992, NedJur 1992, 377, HR 29 May 1964, NedJur 1965, 104; ESTONIA, Supreme Court Civil Chamber's decision from 21 May 2004, no. 3-2-1-66-04. SCOTTISH law *McBryde*, Law of Contract in Scotland[1], para. 17.06. The NORDIC Contract Acts § 28 deals with constraint caused by physical violence or by threats involving imminent use of physical harm, and § 29 with threats of causing other kinds of harm. In ENGLISH law it at one time seemed that the threat had to be one of physical violence or of wrongful seizure of property, but it is now recognised that a contract may be avoided in cases of "economic duress": that is, where the contract was made as the result of a threatened wrong, such as a breach of contract, and the party seeking relief gave in to avoid suffering serious losses if the threat was carried out and had no real alternative: e.g. obtaining effective protection by taking legal action. See *North Ocean Shipping Co. Ltd.* v. *Hyundai Construction Co. Ltd., The Atlantic Baron* [1979] QB 705, QB, which is the source of Illustration 3. Economic duress has not yet been recognised in IRISH law. For CZECH law see Knappová (-*Knapp and Knappová*), Civil Law I, 152 (any illegal threats of a mental character – i.e. inducing fear). The present Article applies to all kinds of wrongful threats.

III. The threat must be illegitimate but need not be one of an act itself unlawful

9. The threat must be illegitimate, but most systems recognise that it may be illegitimate to use a threat of something itself not unlawful to extract a payment or promise. In FRENCH law, the threat to use a legal procedure (criminal proceedings, execution) does not generally amount to duress which would cause the avoidance of the contract (Cass.civ. 3è, 1è janvier 1984, Bull.civ. III, no. 13). Nonetheless, the threat to use a legal procedure can amount to duress if it is improper ("abusive") and if the author of the threat used it to obtain an excessive benefit (Cass.civ. 1ère, 3 novembre 1959: D. 1960, 187, note *Holleaux*); similarly LUXEMBOURG law, Cour, 10 May 1929, Pasicrisie 11, p. 459; in BELGIAN and GERMAN law, to threaten criminal proceedings against a relative of the other party, see respectively CA Brussels, 7 Feb. 1980, Pas. belge 1980, II, 55; CA Brussels 25 Feb. 1987, Soc. Kron. 1988, 129; OLG Karlsruhe, 11 January 1991, VersR 1992, 703; PORTUGUESE CC art. 255; ESTONIAN GPCCA § 96(2) 3); SLOVENIAN law, see LOA § 45(1) and Juhart and Plavšak (-*Dolenc*), Obligacijski zakonik I, p. 339. SCOTTISH law *McBryde*, Law of Contract in Scotland[1], para. 17.03. In English law, a contract made in similar circumstances was held to be voidable (*Williams* v. *Bayley* (1866) LR 1 HL 200, HL). In *Universe Tankships of Monrovia Ltd.* v. *ITWF* [1983] 1 AC 366, HL, Lord Scarman recognised that a threat to do something itself legal for an improper purpose ("blackmail") would amount to duress, but it is doubtful whether threats of lawful action which do not amount to a crime would suffice. In *CTN Cash & Carry Ltd.* v.

Gallaher Ltd. [1994] 4 AllER 714 the Court of Appeal has said that it will be slow to accept cases of "lawful act duress". Similarly, in AUSTRIAN law the threat must be "illegal", which may mean that the threat must amount to the crime of extortion (CP § 144) or the misdemeanour of compulsion (CP § 105). POLISH law takes the same position (CC art. 87 refers to "illegal threat"). Threats of lawful actions may also be illegitimate under Nordic Contract Acts § 29 e.g. FINNISH Supreme Court, CC 1997:67 in *Sisula-Tulokas,* Contract and tort law: twenty cases from the Finnish Supreme Court. In SPANISH law there have been cases where a creditor has threatened civil enforcement or foreclosure of a matured debt if the debtor does not provide a guarantee. A guarantee given under such a threat is deemed valid (Provincial Court Alicante 23 April 1999 (El Derecho 2686), Provincial Court Valencia 12 January 2000, Aranzadi Civil 2000) 392). For more complete information as to the case law, see *García Vicente*, La intimidación en los contratos (Estudio jurisprudencial), Rev. Der. Patrim. 9, 2002, 117 ff. In CZECH law the unlawfulness of a threat is interpreted as meaning that either the threat is unlawful in itself or the threat in itself is not wrongful but is used for a purpose which it should not serve (e.g. a threat to report a crime to the authorities in order to make the offender conclude a contract), see Knappová (-*Knapp and Knappová*), Civil Law I, 152.

IV. A demand for extra payment in exchange for performing a contractual obligation will not necessarily be treated as wrongful

10. Some systems recognise explicitly that a party who is faced with unforeseeable expense in performing may state truthfully that performance will be impossible unless there is extra payment and that, if the other party promises the extra payment, the promise will not be avoidable on the ground of duress. See on DANISH law *Gomard*, Almindelig kontraktsret[2], 155. Similarly in ENGLISH law it has been argued that there is no duress if the party claiming an inability to perform is merely stating the inevitable (e.g. that he or she will go bankrupt if not paid extra) or perhaps if the threatening party acts in good faith in demanding more (see the discussion in *Burrows* 215 - 216). Under the Article a truthful statement to the effect that the party will be unable to perform unless paid extra will not amount to a threat, see Comment B.

V. Threat made by a third party

11. On this point there are considerable differences between the systems. In ENGLISH law a threat made by a third party only gives a right of avoidance if the other party had actual or constructive notice of it, or the person making the threat was the other party's agent. The AUSTRIAN CC § 875 and DUTCH CC art. 3:44(5) are to similar effect. In contrast, art. 1111 of the FRENCH (see *Terré/Simler/Lequette*, Les obligations[6], no. 246), BELGIAN and LUXEMBOURG CCs explicitly covers the case of a threat made by a third party, and so do the POLISH CC art. 87, ITALIAN CC art. 1434, SLOVENIAN LOA § 45(1) and PORTUGUESE CC art. 256. The latter requires that, in the case of a threat by a third person, the harm threatened be serious and the victim's fear justified, whereas these conditions do not apply to a threat made by the other party. GERMAN law also covers threats made by third parties and it does not matter that the other party to the contract acted in good faith (BGH 6 July 1966, NJW 1966, 2399, 2401; contrast to CC § 123(2) which explicitly states the opposite rule for fraud). ESTONIAN law is to the same effect (GPCCA § 96 for threat, contra special rule for fraud: GPCCA § 94(4)). SCOTTISH law is to the same effect: *McBryde*, Law of Contract in Scotland[1], para. 17.03. The GREEK CC arts. 150 and 153 and SLOVAK law are still more liberal: the victim of a threat by a third party has an unqualified right to avoid the contract but the other party may, at the judge's

discretion, be compensated for reliance loss in the absence of knowledge or constructive knowledge of the threat (see *Maridakis* 195, 196). CZECH jurisprudence holds that the threat may come from a third person but the culpable party must know about the threat and use the situation to its own advantage, see *Švestka/Jehlička/Škárová*, OZ[9], 245.

12. NORDIC law takes an intermediate position. Under the Contracts Act § 28, the party who was threatened with imminent violence may avoid the contract even if the threat was by a third party; other threats (§ 29) are only a defence against a party who knew or ought to have known of them.

13. The present rules adopt the position that if a threat is made by a third person for whom a party is responsible, or if a party knew or ought to have known of a threat made to the other party by some third person, the position will be as if the first party had made the threat. See Notes to II.–7:208 (Third persons) below.

14. Under the HUNGARIAN CC § 210(4) a person who has been induced to conclude a contract by an unlawful threat by the other party is entitled to challenge the contract. This provision also applies if the duress was committed by a third person and the other party had or should have had knowledge of such conduct.

15. On duress generally see *Kötz*, European Contract Law I, 209-213.

II.–7:207: Unfair exploitation

(1) A party may avoid a contract if, at the time of the conclusion of the contract:

(a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill and

(b) the other party knew or could reasonably be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or grossly unfair advantage.

(2) Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been observed.

(3) A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for unfair exploitation, provided that this party informs the party who gave the notice without undue delay after receiving it and before that party has acted in reliance on it.

COMMENTS

A. Binding force of contracts and unfair exploitation

Contract law does not in general insist that bargains be fair in the sense that what is to be supplied or provided by each party should be objectively of equal value. Although some systems allow contracts, or certain types of contract, to be avoided simply on the ground that the price is grossly unfair (*lésion*), it is commonly held that the parties are the best judges of the relative values of what is to be exchanged. However many systems refuse to uphold contracts which involve an obviously gross disparity in these values when this appears to be the result of some bargaining weakness on one side and conscious advantage-taking on the other. This is the approach taken by this Article

The Article adopts the principle that a contract which gives one party excessive advantage and which involved unfair exploitation may be avoided or modified at the request of the disadvantaged party.

B. Weakness or need essential

It would create too much uncertainty if a party could escape from a contract, even if it is disadvantageous, when there is no apparent reason why the party did not take better care when agreeing. Relief should only be available when the party can point to some need, weakness or disability to explain what happened. This may include the fact that the party had a confidential relationship with the other party and was relying on the other for advice, if this meant that the party was not exercising independent judgement.

C. Knowledge of party obtaining advantage

It would also create too much uncertainty to upset contracts which are one-sided when the party who gains the advantage neither knew nor could reasonably be expected to have known that the other party was in a weaker position. In such circumstance the stronger party cannot reasonably be required to have any special regard to the weaker party's interests.

D. Excessive benefit

The Article applies where the benefit gained by one party is demonstrably excessive in comparison to the "normal" price or other return in such contracts. The fact that a shortage of supply has led to generally high prices is not a ground for the application of this Article, even if the sudden price increase has allowed one party to make an abnormally high profit.

Illustration 1
During a sudden cold snap during early summer the price of tomatoes increases dramatically. B agrees to buy tomatoes from A at the increased price. B cannot avoid the contract under this Article even though B discovers that A had bought the tomatoes at a much lower price earlier in the summer and had kept them in cold store.

Where however a party takes advantage of another's ignorance or need to make a particularly one-sided contract, this Article will apply.

Illustration 2
X, an uneducated person with no business experience, is left some property. He is contacted by Y who offers to buy it for a sum much less than it is actually worth; telling X that he must sell quickly or he will lose the chance. X agrees without consulting anyone else. X may avoid the contract.

Illustration 3
U and her family are on holiday abroad when they are involved in a car crash and U's husband is badly hurt. He urgently needs medical treatment which is not locally available. V agrees to take the man by ambulance to the nearest major hospital, charging approximately five times the normal amount for such a journey. U is so worried that she agrees without getting other quotations; she does not discover until later that she has been overcharged. She may obtain relief.

Illustration 4
The facts are as in the last Illustration. U realises that V is demanding an extortionate price but his is the only ambulance available. She may obtain relief.

E. Grossly unfair advantage

The Article may apply even if the exchange is not excessively disparate in terms of value for money, if grossly unfair advantage has been taken in other ways. For example, a contract may be unfair to a party who can ill afford it even if the price is not unreasonable.

Illustration 5
X, a widow, lives with her many children in a large but dilapidated house which Y, a neighbour, has long wanted to buy. X has come to rely on Y's advice in business matters. Y is well aware of this and manipulates it to his advantage: he persuades her to sell it to him. He offers her the market price but without pointing out to her that she will find it impossible to find anywhere else to live in the neighbourhood for that amount of money. X may avoid the contract.

F. Risk taking

Relief should not be given when the apparent one-sidedness of the bargain is the result of a party gambling and losing. The contract was not unfair when it was made, even though it may have turned out badly for one party.

G. Remedies

It may not be appropriate simply to set aside the contract which is excessively advantageous. The disadvantaged party may wish the contract to continue but in modified form. Under paragraph (2) the court may therefore substitute fair terms. This goes further than a right of partial avoidance, since it allows the substitution of a fair term.

Conversely it may not be fair to the party who gained the advantage simply to avoid the whole contract; that could result in unfairness the other way. So the court has power to adapt the contract at the request of either party, provided the request so to do is made promptly and before the party who has received a notice of avoidance has acted on it.

The court should adapt the contract only if this is an appropriate remedy in the circumstances. For example, adaptation would not be appropriate in a case like Illustration 5 above.

In addition to or instead of avoidance the disadvantaged party may recover damages; these are limited to the amount by which the party is worse off compared to the position before the contract was made (the "reliance interest"). Damages are dealt with later.

H. Remedies cannot be excluded

Since unfair exploitation of another's weakness or distress in the circumstances covered by this Article is unconscionable, it is provided later that the remedies for unfair exploitation cannot be excluded or restricted by agreement.

NOTES

1. All the systems in some circumstances permit avoidance of a contract which has been obtained by unfair means, but some allow relief simply because the substance of the contract is unfair. Most systems have fairly broad rules permitting avoidance where one party has deliberately taken advantage of the other party's need or circumstances to obtain a very one-sided contract (see note 1), but some do not insist on the aggrieved party having been in a vulnerable position (see note 2) or grant relief simply on the basis of great disproportion in value (lesion; see note 3). A few systems give relief primarily in cases of abuse of a special relationship between the parties, and in the absence of such a relationship allow a remedy only under very limited conditions. Many systems have particular rules governing loans or consumer credit transactions.
2. SLOVAK law has a different approach on this ground. Two provisions of the CC are applicable, depending on the contractual terms. Under CC § 49 the participant who concluded an agreement in pressure under strikingly disadvantageous conditions is entitled to withdraw from the agreement. The pressure may be economic or social. The pressure is considered objectively. It does not matter whether the other contractual party knew about it or not or whether it was induced by the affected party or another

person. The right to withdraw from the agreement is not the same as a right to avoid the contract. This ground is provided only for lesser gross disparity. In the case of greater gross disparity the juridical act is contrary to good morals (*contra bonos mores*) and so it is void (see *Svoboda, J. et al.*: Občiansky zákonník. Komentár a súvisiace predpisy. p. 117). The CC § 39 is applicable.

I. Taking advantage of a vulnerable party

3. Many systems give relief when one party has taken advantage of the other's particular circumstances to obtain an unfair contract. Thus FRENCH jurisprudence, treats exploitation of a party's economic necessity or other circumstances as a form of *violence*: Soc. 5 July 1965, Bull.civ. IV no. 545; Civ. 1, 24 May 1989, Bull.civ. I, no. 212; Cass.civ. 1ère, 30 may 2000: Bull.civ. I, no. 169; Cass.civ. 1ère, 3 avril 2002: Bull.civ. I, no. 108. *Terré/Simler/Lequette*, Les obligations[6], no. 248 and Ccom art. 420-2 al 2; compare in BELGIUM, CA Brussels 7 February 1964, Pas. belge 1965 II 70. Otherwise relief is only given for error, threat or fraud and, in very limited circumstances, for *lésion* (see below). Belgian doctrine and case law gives relief for abuse of right (or: abuse of circumstances) when it gives rise to a disproportionate transaction, under the doctrine of qualified lesion, whereas relief for lesion without abuse of right (see Note 3 below) is rare: see *Stijns*, Verbintenissenrecht I, no. 124; *Kruithof & Bocken*, TPR 1994 no. 149 and Cass. 21 Sept. 1961, Pas. belge 1962 I 92; Cass. 25 Nov. 1977, Arr.Cass. 1978, 343; Cass. 29 April 1993, JT 1994, 294. The new art. 1118 of the LUXEMBOURG CC gives a remedy for abuse of circumstances generally. The DUTCH CC similarly allows annulment of a juridical act where there has been threat, fraud or abuse of circumstances; the latter is defined as being induced to execute a juridical act as a result of special circumstances such as state of necessity, dependency, wantonness, abnormal mental condition or inexperience (art. 3:44(4)). In NORDIC law, Contract Act § 31 applies where one party has taken advantage of another party's economic or personal difficulties, want of judgment, recklessness or state of dependence to acquire a disproportionate benefit; but there is also the possibility of the setting aside or adjustment of an unfair contract under § 36 without the need for special circumstances, see below. Both approaches exist also in SLOVENIAN law: according to LOA § 119, a contract is void (null), if a party takes advantage of personal or economic necessity, inexperience, want of judgement or state of dependence to acquire an obviously disproportionate benefit. On the other hand, a party can avoid the contract merely on the grounds of obvious disproportionality according to LOA § 118 (*laesio enormis*), see below. SCOTTISH law allows a remedy in cases of "facility and circumvention" when advantage was taken of a person who was "facile"- for example, elderly and confused or unwell (*McBryde*, Law of Contract in Scotland[1], paras. 16.12-16.21).

4. In ENGLISH and IRISH law, relief may be given under two separate rules, each involving the exploitation of a person who is particularly vulnerable. The first is the doctrine of undue influence where one party has exercised, or is in a position to exercise, a high degree of influence over the other. Relief may be available if it is shown either that one party exercised such a degree of influence over the other that the latter's independence of mind was undermined ("actual" undue influence: see *Chitty* on Contracts I[27], nos. 7-053 -7-057), or that the parties were in a confidential relationship. In the latter situation, if the weaker party enters into a contract which "calls for explanation" with the stronger, a presumption arises that undue influence has been used: *Royal Bank of Scotland v. Etridge (No.2.)* [2001] UKHL 44, [2002] 2 AC 773. Some relationships (e.g. doctor and patient) are treated as always giving rise to a confidential relationship; in other cases such a relationship may be proved (e.g.

between husband and wife, see *Barclays Bank* v. *O'Brien* [1994] 1 AC 180, HL or bank manager and client, see *Lloyd's Bank Ltd.* v. *Bundy* [1975] QB 326, CA For Ireland, see *Bank of Ireland* v. *Smyth* [1993] 2 IR 102, affirmed on other grounds [1996] 1 ILRM 241; Annual Review of Irish Law 1993, 194.). The doctrine of undue influence is also known in SCOTLAND but the presumption of undue influence is not used and the influence must always be proved. Secondly, the doctrine of unconscionable bargains states that if a party takes deliberate advantage of the other party's poverty and ignorance to buy property from the poor and ignorant person at much less than its true value, the weaker party may have the contract set aside (see *Fry* v. *Lane* (1888) 40 ChD 312). The doctrine is old and not much used in England, though see *Boustany* v. *Piggott* [1993] EGCS 85, PC, and the parallel rule in a case where a party, though not completely incapable of transacting, is suffering from some mental disability, see *Hart* v. *O'Connor* [1985] AC 1000, PC In Ireland the doctrine of unconscionability is used more frequently, e.g. *Grealish* v. *Murphy* [1946] IR 35 (HC), *Lyndon* v. *Coyne* (1946) 12 IrJurRep. 64 (HC); *JH* v. *WJH* (unrep., 20 Dec. 1979, (HC). English, Irish and Scottish law do not recognise any general doctrine of abuse of circumstances. Relief in this kind of case is limited to salvage on the high seas (e.g. *The Port Caledonia and The Anna* [1903] P 184) and to cases of consumer credit agreements. The Consumer Credit Act 1974, new ss. 140A-140D (inserted by Consumer Credit Act 2006, ss. 19-22), gives the court extensive powers to intervene if it determines that there was an "unfair relationship" as between the creditor and the debtor, or an associate of the creditor and the debtor. This replaces the provisions on "extortionate credit bargains" in former ss. 137-140 of the 1974 Act.

5. Other systems seem to follow the notion of limiting relief to abuse of circumstances but give relief in more limited conditions. Thus ITALIAN law recognises that a contract made in circumstances of economic distress may be avoided but only if the performances are disproportionate in a ratio of greater than 1:2 (art. 1448); or if the contract was made in a situation of danger and on iniquitous terms (art. 1447). The PORTUGUESE CC arts. 282 and 283 apply when the victim is inexperienced, imprudent or in a state of necessity, but it may be possible to interpret the provisions to cover all the situations referred to in the Article, see *Eiró*, Do negocio usurário 45; *Cordeiro* 158; *Vasconcelos* 465. The ESTONIAN GPCCA § 97 is similar to paragraph (1) of the present Article but limits the right to avoid on this basis to natural persons.

6. The POLISH CC has an express provision (art. 388) concerning the issue. If one of the parties, taking advantage of the involuntary situation, disability or inexperience of the other party, in exchange for its performance accepts or stipulates for itself or for a third party a performance, the value of which at the moment of concluding the contract grossly exceeds the value of its own performance, the other party may demand a reduction of its own performance or an increase in the performance due to it, and in the event one or the other would be excessively difficult, it may demand invalidation of the contract. The above rights cease to exist on the passing of two years from the day the contract was concluded.

7. CZECH law has a concept of duress (CC § 49) which is explained as social (especially economic) or mental state of a person which – from the objective point of view - bears on the person to such a serious extent that he or she, without free formation of will, concludes a contract which obviously causes harm to him or her and which he or she would not have concluded under normal circumstances (*Švestka/Jehlička/Škárová*, OZ[9], 311). So, the formulation is quite wide and covers all known cases of unfair exploitation, such as usury, confusion, dependency etc. Application of duress is completely excluded in commercial relations – Ccom § 267(2).

II. Excessive advantage-taking rather than protection of particularly vulnerable parties

8. In contrast there are systems in which the position of the aggrieved party is not so important as the disparity between the obligations. The AUSTRIAN CC § 879, GERMAN CC § 138(2) and GREEK CC arts. 178 and 179 treat contracts which involve a gross disparity as contrary to good morals and therefore voidable. The cases concentrate on the excessive disparity rather than the particular vulnerabilities of the weaker party; the most important group of cases in German law are those dealing with consumer credit and hire-purchase agreements, which are void if the overall interest rate to be paid is deemed to be excessive, e.g. if it is 100% above the average rate (BGH 24 March 1988, BGHZ 104, 102, 105; BGH 13 March 1990, BGHZ 110, 336, 338, which refer to exploitation of the needs, inexperience, lack of judgement or weakness of will of the losing party, are consequently rarely applied. The vulnerability of the weaker party is, however, important in cases of sureties who have given guarantees without the means to meet their possible liability (e.g. BVerfG 19 October 1993, NJW 1994, 36; BGH 24 February 1994, NJW 1994, 1278). In NORDIC law a contract which is substantively unfair may be set aside or adjusted under Contracts Act § 36 without the need to show that the gaining party took advantage of the other's circumstances. In CZECH law contracts concluded under manifestedly unfair terms may be void as such (so not only voidable as in case of simple unfair exploitation) on the basis of being contrary to good morals, *Švestka/Jehlička/Škárová*, OZ[9], 312.

III. Lesion

9. FRENCH (*Terré/Simler/Lequette*, Les obligations[6], no. 248 and Rep. Civ. Droit civil, Dalloz, *D.Mazeaud*) and BELGIAN CCs art. 1118 state that a contract may be set aside on the ground of lesion only in certain situations, principally if in sales of immovables the price paid is less than 5/12ths of the value (arts. 1674-1685), in the case of division between heirs (arts. 887 and 1079) or where the contract is with a minor or someone who is incapable (art. 1305). LUXEMBOURG law foresees the same solution also in the broader hypothesis of abuse of circumstances, see Note 1 above. AUSTRIAN CC §§ 934, 935 recognise lesion as a ground for avoidance or adaptation of a contract where a party to a synallagmatic contract receives a counter-performance of less than 50% of the value of the performance, judged by the relative values at the time the contract was made. The rule cannot be excluded by contrary stipulation and has become an important remedy in consumer protection. According to the SLOVENIAN LOA § 118 a party can avoid the contract within one year after conclusion if the performances of the parties were grossly disproportionate at the time of conclusion and the party did not know and could not reasonably have known the true value. The rule does not apply to gambling contracts, public auctions or contracts where the price was higher because of personal circumstances (*pretium affectionis*); it cannot be excluded by contract. The SCOTTISH doctrine of lesion gives spasmodic control in some cases but no general principle has been established (*McBryde*, Law of Contract in Scotland[1], paras. 17.12-17.22).

10. The Article follows what seems to be the majority position in requiring one party to have taken advantage of the other's special weakness to obtain an unfair contract, rather than giving relief simply on the basis of a disproportion in values between the performances.

IV. Deliberate exploitation

11. Apart from the cases of lesion described in the last note, the majority of systems agree that it is only when one party has deliberately taken advantage of the other that relief will be given. Thus in ENGLISH law it has been said that relief o7n the grounds of mental incapacity or unconscionability can be given only where one party consciously took advantage of the other's weakness: *Hart* v. *O'Connor* [1985] AC 1000, PC But this is not required in IRISH law. DUTCH CC art. 3:44 applies when the gaining party ought to have known of the other's weakness. For PORTUGUESE law see *Eiró* 51, 57. In practice courts in the various systems will infer advantage-taking from the objective facts of gross disparity: e.g. in GERMAN law BGH 14 June1984, NJW 1984, 2292; BGH 10 July 1986, BGHZ 98, 174, 178; in ENGLISH law, the presumption of undue influence which arises from a manifestly disadvantageous transaction, above, and see *Crédit Lyonnais Bank Nederland NV* v. *Burch* [1997] 3 AllER 144, CA

V. The contract must be excessively one-sided

12. In all systems the transaction must be excessively one-sided or unfair before relief will be given. In some systems it seems that the unfairness must be measured by an objective criterion such as the market price: e.g. GREEK law, A.P. 281/1968 NoB 16 (1968) 815, 529/2001 ChrID A/2001, 694; and NORDIC law, Contracts Act § 31 ("obviously disproportionate", see *Telaranta* 336-337). In ENGLISH law for the presumption of undue influence to arise, the transaction must be one that cannot be explained by ordinary motives (*Turkey v. Awadh* [2005] EWCA Civ 382, [2005] 2 FCR 7,CA); to be unconscionable it must involve a sale at undervalue. But "objective unfairness" is not always required: e.g. in DUTCH law, if the old widow did not want to sell her house it is no excuse to say that she received a fair price, HR 27 March 1992, NedJur 1992, 377. See also HR 29 May 1964, NedJur 1965, 104; in English law in cases of actual undue influence the weaker party may set aside the transaction without showing that it was manifestly disadvantageous: *CIBC Mortgages Ltd* v. *Pitt* [1994] 1 AC 200, HL The POLISH CC refers to the gross imbalance of the two performances (art. 388). In CZECH law, a contract is voidable for duress (unfair exploitation) only if concluded under conspicuously disadvantageous terms (CC § 49), which should be judged from the objective point of view.

13. The HUNGARIAN CC § 201(2) states if at the time of the conclusion of the contract the difference between the value of a service and the consideration due, without either party having the intention of bestowing a gift, is grossly unfair the injured party may contest the contract. CC § 202 states that if a contracting party has gained excessive benefit or unfair advantage at the conclusion of the contract by exploiting the other party's situation, the contract is void (usurious contract).

VI. Adaptation of the contract

14. Although the traditional remedy granted is simply avoidance of the contract, some systems permit in some cases the court to adapt the contract to remove the disproportion: e.g. when lesion is admitted; FRENCH and BELGIAN CCs art. 1681; LUXEMBOURG CC art. 1118 (at the request of the disadvantaged party only); similarly, DUTCH CC art. 3:54; AUSTRIAN CC § 935 (*laesio enormis*); NORDIC Contract Acts § 36 and in Denmark, § 31 (see *Lynge Andersen* 171); PORTUGUESE CC art. 283(1) and (2) and SLOVENIAN LOA § 119(3), where the disadvantaged party can demand adaptation within 5 years after conclusion. BELGIAN case law reaches a kind of adaptation of the contract by applying reduction as a form of partial

nullity or as a sanction for a *culpa in contrahendo* or for abuse of right (see on reduction for abuse of right: Cass. 18 Feb. 1988, RW 1988-89, 1226. Additionally, many systems allow the court to reduce excessive interest rates on loans, e.g. Belgian CC art. 1907(3); Luxembourg CC art. 1907-1; U.K. Consumer Credit Act 1974, s. 140B (inserted by Consumer Credit Act 2006, s. 20). In POLISH law adaptation of the contract has priority. Where this is impossible or too difficult, a party may plead for the contract to be nullified (art. 388).

15. The idea that a party who has received notice of avoidance may maintain the contract by offering an amendment which would remove the injustice is found in ITALIAN law (CC. art. 1450).

16. The sanctions of violence, in FRENCH law, are either absolute or relative nullity and, if a fault has been committed, damages can also be granted (*Terré/Simler/Lequette*, Les obligations[6], no. 250): it is a kind of indirect adaptation of the contract.

II.–7:208: Third persons

(1) Where a third person for whose acts a party is responsible or who with a party's assent is involved in the making of a contract:

(a) causes a mistake, or knows of or could reasonably be expected to know of a mistake; or

(b) is guilty of fraud, coercion, threats or unfair exploitation, remedies under this Section are available as if the behaviour or knowledge had been that of the party.

(2) Where a third person for whose acts a party is not responsible and who does not have the party's assent to be involved in the making of a contract is guilty of fraud, coercion, threats or unfair exploitation, remedies under this Section are available if the party knew or could reasonably be expected to have known of the relevant facts, or at the time of avoidance has not acted in reliance on the contract.

COMMENTS

A. Responsibility for agents, employees and others

A party is generally treated as responsible for not just the actions of employees but also of those whom the party involves in the making of the contract or to whom performance is delegated. This applies just as much to behaviour or knowledge which might invalidate a contract as to other things. The contracting party will be liable just as the third person would have been had the contract been made with the third person. Normally the third person will be acting on behalf of the party against whom the remedy is sought, but this need not be so if the third party was involved with the party's assent; it need not be shown that the third party was acting for the party.

Illustration 1

A supplier of goods holds an informal negotiation with a buyer; another customer is present and with the supplier's assent joins in the discussion. Out of the supplier's hearing, the other customer gives the buyer some inaccurate information. The buyer should have a remedy just as if the information had been given by the supplier, without having to show that the other customer was acting on the supplier's behalf.

B. Remedies where fraud, etc. by a third person for whom party is not responsible

There are some legal systems within Europe which allow a party to avoid a contract concluded as the result of an improper threat whoever made the threat. However, it is more generally considered that a party should not be fixed with the consequences of improper or careless behaviour of a third person for whom that party is not responsible and who does not fall into the other categories mentioned in Comment A. To permit avoidance of the contract for such reasons risks undermining the party's reasonable reliance on the contract and might deter people from making contracts that in fact would benefit all parties. Thus if a contract to provide personal security for a loan made by a bank could be avoided by the security provider on the ground that the security provider had been threatened by the debtor or some third party, even though the bank had no way of discovering that fact, banks might be deterred from making loans which need to be secured in this way. The result would be a reduction in the availability of credit.

In contrast, the party should not be allowed to enforce a contract if the party knows or should know that the contract was concluded only through behaviour by a third person which, if by a contracting party, would give rise to a remedy under the foregoing provisions of this Chapter

Illustration 2
A bank lends money to a husband's business on the strength of a charge, signed by the wife, over the family home. The charge is very much against the wife's interest and the husband has procured the wife's signature by duress. The bank ought to know that it is most unlikely that the wife would sign voluntarily and the bank cannot enforce the charge. It should have made enquiries to ensure that the wife was acting freely.

The party should also be liable for damages if the party knows of the ground for avoidance, but does not inform the other party that the information is incorrect.

C. Remedy when party knows of mistake

A party may also know of a mistake which was known to or caused by a third person. There is no need for a special rule to cover this case since a party may avoid a contract entered under a mistake if the mistake was known to the other party.

D. No reliance on contract by other party

It also seems fair to allow a party who has concluded a contract because of the fraud, etc of a third person, or because of a mistake which was or should have been known to the third person, to avoid the contract, even if the other party to the contract did not know or have reason to know of the circumstances, provided the party seeking to avoid the contract can prove that the other party has not yet acted in reliance on it, even by passing up other opportunities.

NOTES

I. Actions by a third person for whom a party is responsible

1. All Member States adopt the principle that a contract may be avoided against a party whose employee or representative has behaved in such a way that, if the representative or employee had been the party to the contract, it could have been avoided on one of the grounds described in this chapter. E.g. AUSTRIAN CC § 1313(a); ITALIAN law, CC art. 1390; ESTONIAN GPCCA §§ 132-133; ENGLISH law, see *Chitty* on Contracts I[27], no. 7-090; BELGIAN case law: Cass. 9 Nov. 1987, Pas. belge 1988, 298; GERMAN law, see MünchKomm (-*Kramer*), BGB, § 123 no. 23 (for cases of fraud). CZECH law makes one exception from this principle, namely that the principal's good faith acting or knowledge or ignorance of certain circumstances should be taken into consideration also with regard to the representative, unless it concerns circumstances about which the representative had learned before the authority was granted (CC § 32(3)); so, in this case the representative's knowledge is not imputed to the principal. In all other situations CZECH law conforms to the basic concept. In the HUNGARIAN CC § 315a person who employs another person to perform obligations or exercise rights of the first person is liable for the conduct of that person.

II. Actions by a third person for whom the party is not responsible

2. As noted earlier, some systems allow avoidance of a contract entered as the result of a threat by a third person for whom the other party was not responsible, even if the other party did not know and had no reason to know of the threat. The majority of systems, however, hold that the contract may be avoided for duress or any other factor mentioned in this chapter only if the other party participated in the misbehaviour or knew or should have known of what was happening: e.g. AUSTRIAN CC § 875 (participation or actual knowledge); DUTCH CC art. 3:44(5). Some of the systems which do not require knowledge in the case of duress do require it in case of fraud. In FRENCH law, as a rule, fraud by a third party does not make the contract void. The rule is different if the other party of the victim of the fraud has been an accessory to the third party or if the litigious act is a unilateral act (*Terré/Simler/Lequette*, Les obligations[6], no. 235) or a unilateral contract. Besides, in the event of duress, the contract can be declared void if it comes from a third party BELGIAN and LUXEMBOURG law (CCs art. 1111 cover only *violence* by a third person); in SLOVENIAN law, threat and fraud as well as unfair exploitation by a third party are relevant, if the party knew or should have known about them, with the exception of fraud with regard to unilateral contracts (e.g. donation), see LOA §§ 45, 49(3) and (4) and 119; GERMAN CC § 123(2) (for cases of fraud); POLISH CC art. 87; ITALIAN CC art. 1434 (duress is cause for annulment of a contract even if exerted by a third person); art. 1439 (when the deception was employed by a third person, the contract is voidable if it was known to the party who derived benefit from it); arts. 1447, 1448 (in cases of danger or need, relief only when known to party or to third person who was acting as representative); Nordic Contract Acts §§ 29-31 on threats, fraud and unfair exploitation (knew or ought to have known); PORTUGUESE CC art. 254(2) (fraud; not required in cases of exploitation of the weak position of a contracting party under art. 282, *Mendes* 129; *Eiró* 69); ESTONIAN GPCCA § 94(4). In SPAIN, the courts have interpreted CC art. 1269 as limited to cases of fraud by one of the contracting parties but this approach is criticised, e.g. by *Lasarte Álvarez*, § 3.6(c). Pursuant to CZECH jurisprudence, an avoidance ground may come from a third person, for whose actions no party is responsible, but the culpable party must know about it and use the situation to its own advantage, see *Švestka/Jehlička/Škárová*, OZ[9], 245.

3. In ENGLISH law it has been held that if a lender is given a guarantee or security by a party whose relationship with the debtor is non-commercial (e.g. they are husband and wife), the lender must ensure that the surety has had independent advice. If the lender fails to do this, it will be fixed with constructive notice of any impropriety which has occurred: *Barclays Bank* v. *O'Brien* [1994] 1 AC 180, HL; *Royal Bank of Scotland* v. *Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773. In SCOTLAND a similar result has been reached but via the different route of recognising a duty of good faith by the creditor towards the surety: *Smith* v. *Bank of Scotland* 1997 SC (HL) 111. The HUNGARIAN CC § 210(4) on deception or duress applies if the deception or duress was committed by a third person and the other party had or should have had knowledge of this conduct.

III. Fraud etc by a third person where the party against whom avoidance is sought did not know of the fraud but has not relied on the contract

4. The question whether the party has relied on the contract may exceptionally be taken into account in NORDIC law, Contract Acts § 39. It is not relevant in BELGIAN, DUTCH, ENGLISH, ESTONIAN, FRENCH GERMAN, GREEK, SLOVAK or LUXEMBOURG law.

II.–7:209: Notice of avoidance

Avoidance under this Section is effected by notice to the other party.

COMMENTS

Avoidance may be effected by the party entitled to avoid the contract; it is not necessary to seek a court order to avoid the contract.

Under the normal rules on notice, the receipt principle applies and the avoidance will not be effective unless the notice reaches the other party. Under the normal rules on notice, the notice may be given by any means appropriate to the circumstances. In informal circumstances it need not be in writing and need not use technical legal terms. The requirement of good faith and fair dealing will often require the notice to give some indication, even if only in lay person's language, of the reason for the avoidance, unless this can be regarded as already obvious to the receiving party. Statements or conduct by a party unequivocally indicating that, because of the facts giving ground for avoidance, the party is no longer to be regarded as bound by the contract may amount to notice of avoidance if made known to the other party.

> *Illustration*
> A takes a job as manager with B's firm after B makes fraudulent statements about the commission which previous managers have made with the firm. After A discovers the truth, he protests about B's dishonesty and says he is considering what to do. He then takes a job with another firm and informs B of this. Taken together A's statements and conduct amount to notice of avoidance.

Provided the time limit for avoidance has not passed, a party may give notice of avoidance by raising the ground of avoidance as a defence to an action on the contract brought by the other party.

NOTES

1. In some systems the effect of some of the grounds for invalidity mentioned in this chapter is that the contract is altogether void (e.g. for *erreur obstacle* in FRENCH law, or if contra bonos mores or induced by threat and coercion in SLOVAK law, or in the case of mistake at common law in ENGLISH law). In such case the party need not take any step to avoid the contract, though action may be necessary to recover property, money or payment for services rendered.
2. Where the contract is merely voidable, in many of the legal systems of Member States, a contract may be avoided on the traditional grounds of invalidity by simple notice to the other party: e.g. GERMAN CC § 143; DUTCH CC art. 3:49; POLISH law (CC art. 88 § 1); ESTONIAN GPCCA § 98(1); NORDIC law (*Gomard*, Almindelig kontraktsret[2], 142); ENGLISH and IRISH law (notice normally required but dispensed with if third party has deliberately gone into hiding and party seeking to avoid has taken all reasonable steps such as notifying police: *Car & Universal Finance Co Ltd.* v. *Caldwell* [1965] 1 QB 625, CA); SCOTTISH law (notice to police insufficient, *McLeod* v. *Kerr* 1965 SC 253). However a court action is required in GREECE, CC

art. 154; in FRANCE, BELGIUM and LUXEMBOURG (CCs art. 1117), unless the annulment is accepted by the other party; and similarly in ITALIAN law (CC art. 1441) and PORTUGUESE law, *Ascensão* 378; *Cordeiro* 648, *Vasconcelos* 587 (but supporting, depending on the circumstances, a simple notice or an agreement). In AUSTRIAN doctrine and court practice the opinion prevails that avoidance on the ground of error requires a court decision, and that it is not sufficient to direct an informal notice to the other party. However this is doubtful as the CC does not require court proceedings. The situation in SLOVENIAN law with regard to avoidability (the consequence of fraud, threat, mistake and lesion, whereas contracts made by unfair exploitation are per se null) is similar: the LOA does not directly address this issue; the court practice demands court action, and there are different opinions among scholars. This is doubtful also in SLOVAK doctrine. However the party may always avoid the contract by filing an action or taking appropriate steps during court proceedings. There is also the right to withdraw, noted above, in the case of one ground for invalidity Under SPANISH law the avoidance can only be brought about by court judgment.

3. CZECH law distinguishes between particular situations. Defective contracts are either per se invalid (e.g. in case of threats) or voidable (e.g. in case of error) or may be withdrawn from (in case of duress). To avoid a contract, it suffices to claim the invalidity against the other party. But not only parties to the voidable contract may raise the claim, but every person legally affected by the contract (except for those who caused the voidability). See CC § 40a.

4. Several systems have a different regime for unfair terms, under which the term is simply of no effect and so notice of avoidance is not needed. In practice, it is for the courts to avoid the unfair term, even if it is considered to be an unwritten term. E.g. FRENCH CC in art. L.132.1; LUXEMBOURG; PORTUGUESE Act of 25 October 1985; POLISH law on consumer contracts; and GERMAN CC; also ESTONIAN LOA § 42(1). Under the HUNGARIAN CC § 236(1) the other party must be given written notification of avoidance within one year, and if the notification is not successful, avoidance should be immediately sought in court. Under the Directive, Member States are to provide that unfair terms will not be binding on consumers, art. 6(1).

II.–7:210: Time

A notice of avoidance under this Section is ineffective unless given within a reasonable time, with due regard to the circumstances, after the avoiding party knew or could reasonably be expected to have known of the relevant facts or became capable of acting freely.

COMMENTS

A. Party must take avoiding action with reasonable speed

The need for security in transactions requires that the party entitled to avoid a contract should do so within a reasonable time after learning of the relevant facts or becoming free of the coercion, threats or influence of the other party, rather than within the much longer time limits allowed by some laws.

B. Knowledge of facts

The party should act within a reasonable time of learning the relevant facts; it is not necessary that the party should know that the facts give rise to a right to avoid the contract. If in doubt, the party should take legal advice. A reasonable time will include time to take advice and consider the position.

NOTES

I. Avoidance for defect in consent

1. There is wide variation between the systems on the time within which avoidance must be sought. In ENGLISH law it has been held that the right to avoid a contract for misrepresentation may be lost within a matter of weeks, even though the misrepresentation has not been discovered (see *Leaf* v. *International Galleries* [1950] 2 KB 86, CA and *Bernstein* v. *Pamson Motors (Golders Green) Ltd.* [1987] 2 AllER 220, QBD), or within months of the cessation of duress (*North Ocean Shipping Co. Ltd.* v. *Hyundai Construction Co. Ltd.* [1979] QB 705, QBD). In cases of fraud time will not run until the fraud has been discovered but then prompt action will be required: see *Chitty* on Contracts I[27], no. 6-124. At the other extreme, the BELGIAN CC art. 1304 (as am. in 1976) gives 10 years from the discovery of the fraud or error or the cessation of the threat, and even after that time the error, fraud or threat may be raised as a defence.
2. Other systems take intermediate positions. The FRENCH CC art. 1304 allows 5 years from cessation of a threat or from discovery of fraud or error when the sanction is relative nullity. In the event of absolute nullity, the time of action runs for 30 years from the day of conclusion of the contract; ITALY CC art. 1442 similarly, and in other cases five years from date of contract; LUXEMBOURG, as French law but one year in cases of unfair advantage, CC art. 1118; SPAIN, four years from end of threat or, in cases of fraud and error, from date of contract, CC art. 1301; POLAND, 1 year from discovery of fraud and mistake and also 1 year from cessation of threat (CC art. 88 § 2); GERMANY: mistake, without delay (§ 121; two weeks was regarded as the upper limit by OLG Hamm 9 January 1990, NJW-RR 1990, 523); fraud or threat, one year from discovery or cessation, CC § 124; AUSTRIA, threat or mistake, 3 years CC §

1487; fraud or usury, 30 years (CC § 1478). GREECE, two years after error, fraud or threat has ceased and in any event within 20 years from the conclusion of the contract (CC art. 157); the NETHERLANDS: 3 years from date of discovery of fraud or error or cessation of threat, CC art. 3:52; otherwise three years from when right of avoidance arises; ESTONIA: six months from cessation of the influence of the corresponding circumstance (threat, violence or abuse of circumstances) or discovery of the fraud or mistake, but maximum of 3 years from the day of contract (10 years in case of a threat); NORDIC law: Contract Acts §§ 28(2) (physical violence) and 32(2) (message incorrectly communicated by intermediary), notice of avoidance must be given without unreasonable delay; otherwise, general limitation period. However, in Denmark the right to avoid may be lost if not exercised for a long period, see *Lynge Andersen* 121; in FINLAND, the party wishing to avoid will lose the right to avoid if the party knows that the other has acted in reliance on the contract and yet does not react within a reasonable time: *Ämmälä*, Helsinki 1993). SCOTTISH law has no set time limits except a general prescription period of twenty years (Prescription and Limitation (Scotland) Act 1973, s. 8.), but a right to avoid may be lost by failure to exercise it promptly (*McBryde*, Law of Contract in Scotland[1], para. 13.22). In PORTUGAL, the contract must be avoided within a year from discovery of fraud and mistake or from cession of threat if it has been executed but if it has not been executed there is no time limit (CC art. 287(1) and (2)). In SLOVAKIA the contract must be avoided generally 3 years from the day when the right (right to avoid or right to withdraw) could be exercised for the first time (CC § 101) and 4 years in commercial contracts (ObchZ § 397). In CZECH law the right to avoid a contract is limited by the general prescription period of 3 years running from the first day on which the right could have been exercised, *Švestka/Jehlička/Škárová*, OZ[9], 275. In case of absolute invalidity (as for threats), the invalidity is effective permanently independently of any parties' actions; in these cases, a limitation effect is attained by the prescription of the right to a return of the consideration provided under the contract (unjustified enrichment), *Švestka/Jehlička/Škárová*, OZ[9], 244. In SLOVENIAN law the right to avoid the contract is lost one year after the party has discovered the error or the threat has ceased but in any event in 3 years from the day when the contract was concluded (LOA § 99); a time-limit of one year applies in case of "obvious disproportionality" (*laesio enormis*, LOA § 118). The right to adaptation of the contract in case of unfair exploitation is lost 5 years after the time of conclusion, see LOA § 119(4). According to LOA § 92 there is no time-limit in cases of nullity (e.g. unfair exploitation) However, claims with regard to the consequences of nullity are subject to prescription.

3. Under the HUNGARIAN CC § 236(1) a written notification of avoidance must be given within one year, and if the notification is not successful, avoidance should be immediately sought in court. The time limit for avoidance begins (a) upon recognition of the mistake or deception;)b) in the case of unlawful threat, upon the cessation of duress; (c) in the event of any apparent discrepancy between the services of the parties or an unfair contractual condition [§ 209/A (1) and § 301/A (4)], on performance by the injured party (in the case of performance by instalments at the time of first performance) or, if this party was under duress at the time of performance, upon cessation of the duress. The provisions pertaining to the suspension and interruption of prescription are applied to the time limit for avoidance. The party entitled to avoid a contract may challenge a claim originating from the contract, even if the time limit for avoidance has already expired.

II. Avoidance of an individual unfair term

4. Several systems simply apply the same general rule to avoidance of an individual unfair term e.g. GERMANY (but under CC simply void); HOLLAND, CC 6:235(4), which starts time running from the date the clause was invoked by other party; in ITALY, the previous debate was settled for consumer contracts by art. 36 d.lgs. no. 206/2005 (see *Antoniolli and Veneziano, Principles of European contract law and Italian law,* 232); semble in NORDIC law. In others the unfair term is simply of no effect, e.g. LUXEMBOURG; PORTUGAL Law of 25 October 1985; CZECH CC §§ 41 and 55(2); U.K. Unfair Contract Terms Act 1977. Under the Directive, Member States are to provide that unfair terms will not be binding on consumers, art. 6(1), which seems to imply that the clause may be challenged at any time.

II.–7:211: Confirmation

If a party who is entitled to avoid a contract under this Section confirms it, expressly or impliedly, after the period of time for giving notice of avoidance has begun to run, avoidance is excluded.

COMMENTS

A party cannot be allowed to avoid a contract after indicating a wish to continue with it, since the other party may act in reliance on the contract continuing. The first party's indication may be made expressly or impliedly by conduct, e.g. by continued use of goods.

In cases of mistake and fraud, this rule only applies once the party who may have been entitled to avoid knows of the relevant facts and, in cases where there has been some form of coercion, it only applies when the party becomes capable of acting freely.

NOTES

1. This provision is broadly the same as FRENCH, BELGIAN and LUXEMBOURG law (CC art. 1338); GERMAN law, CC § 144 (confirmation may be implicit, e.g. by continuing to use goods, BGH 28 April 1971, NJW 1971, 1795, 1800, provided that the party knew there was a right of avoidance or expected to have such a right, BGH 8 March 1961, WM 1961, 785, 787); ITALIAN CC art. 1444 (but confirmation is not recognised in cases of lesion or of iniquitous terms accepted in situations of danger: see CC art. 1451); PORTUGUESE CC art. 288; SPANISH CC artss 1309 ff. DUTCH CC arts. 3:55 and 3:35 (act which reasonably appears to be a confirmation); ESTONIAN GPCCA § 100. In ENGLISH and IRISH law the right to avoid may be lost through election, which in principle requires knowledge of the right to avoid, though an act which is done without knowledge of the right to avoid but which reasonably leads the other party to believe that the contract will not be avoided may give rise to an estoppel, see *The Kachenjunga* [1990] 1 Lloyd's Rep 391, HL, per Lord Goff at 399). It appears that NORDIC law reaches this result also: *Ämmälä*, pp. 222-224; *Gomard*, Almindelig kontraktsret[2], 141, *Ramberg*, Allmän avtalsrätt[4], 137 and 142. In SCOTTISH law a party may homologate (affirm) the voidable contract (*McBryde*, Law of Contract in Scotland[1], paras. 13.16-13.17, 13.22). There is no similar express provision in the POLISH CC or SLOVAK CC and SLOVENIAN LOA. However, it is recognised that the lapse of time for avoidance, or a waiver of the right to avoid, result in the validation of the defective declaration of will. There is no provision on this issue in the CZECH CC, so the right to avoid a contract may be lost before expiration of the limitation period only in flagrant situations on the basis of the good morals clause (CC § 3(1)). It is also accepted that the party entitled to avoid may ratify the contract (Knappová (-*Knapp and Knappová*), Civil Law I, 165); the ratification may take place explicitly or in any other manner which leaves no doubt as to what the ratifying person wanted to express (CC § 35(1)). The HUNGARIAN CC § 236(4) states that the right of avoidance is suppressed if the party entitled to avoid the contract confirms the contract in writing or otherwise waives the right to avoid in writing after the expiration of the time limit for avoidance

II.–7:212: Effects of avoidance

(1) A contract which may be avoided under this Section is valid until avoided but, once avoided, is retrospectively invalid from the beginning.

(2) The question whether either party has a right to the return of whatever has been transferred or supplied under a contract which has been avoided under this Section, or a monetary equivalent, is regulated by the rules on unjustified enrichment.

(3) The effect of avoidance under this Section on the ownership of property which has been transferred under the avoided contract is governed by the rules on the transfer of property.

COMMENTS

A. General effect

Avoidance has retrospective effect. It is distinct from termination, which has only prospective effect. Avoidance involves setting aside the contract, or the part of it avoided, as if it had not been made.

B. Personal right to restitution

The mutual restoration of benefits, or where the benefits themselves cannot be returned, their value, is a natural consequence of avoidance; it would not be right that avoidance should leave either party with a benefit at the other's expense. This is a clear case of unjustified enrichment. The rules on this matter are contained in Book VII. The general position is that the benefit obtained or retained by one party at the expense of the other as a result of avoidance will be an unjustified enrichment and that the disadvantaged party will have a right to have the enrichment reversed, either by the re-transfer of property (if that does not happen automatically, see below) or by a monetary equivalent, or monetary remuneration of services rendered.

C. Proprietary effects

The effect of avoidance on property is governed, in the case of movables, by Book VIII (Acquisition and Loss of Ownership in Movables). The general rule under that Book is that ownership does not pass under an avoided contract. The avoidance has retrospective proprietary effect. The property will be deemed never to have left the transferor. In the case of types of property not covered by that Book, the rules of the applicable law will govern.

NOTES

I. Restitution after avoidance

1. The legal systems of the Member States agree that avoidance has retrospective effect and that after avoidance of a contract the parties may recover the value of performances they had rendered before avoidance by way of restitution.
2. There are no particular differences between the systems in two situations. First, when money has been paid over, under all systems it must be repaid. Second, when services have been performed, the recipient must make restitution by paying their reasonable value.

3. However there are differences in the way in which the systems treat restitution of property which was purportedly transferred under the avoided contract.

II. Does avoidance revest property?

4. Many legal systems of the Member States apply generally the rule that property which was transferred automatically revests in the transferor. So, in FRENCH, BELGIAN and LUXEMBOURG law the theory of nullity holds that the parties are to be treated as if the contract had never existed, see in France: *Malaurie and Aynès*, Les obligations[9], 674; in Belgium: *de Page*, Traité élémentaire de droit civil belge I[3], nos. 95-99, 809, 812-815; *Van Gerven*, Algemeen deeel, no. 129, p. 407. ITALIAN and PORTUGUESE law adopt a similar principle. In AUSTRIAN law, invalidation of the contract itself invalidates the transfer of title and the transferor remains legal owner (Austrian Supreme Court OGH 30 January 1980, JBl 1981, 425). The same is true for SLOVENIAN law, see art. 40 Property Code and *Tratnik*, Introduction, p. 62. According to SPANISH law (CC art. 609) property is transferred by the existence of an "obligatory" contract and the delivery of the asset. On avoidance of the contract, the transferee does not keep the property as it reverts to the transferor. Also in ENGLISH and IRISH law, if the contract is void for mistake no property is transferred (e.g. *Ingram* v. *Little* [1961] 1 QB 31, CA); if the contract is voidable and is validly avoided, the property revests in the transferor (e.g. *Car & Universal Finance Co. Ltd.* v. *Caldwell* [1965] 1 QB 625, CA), but if an innocent third party has bought the property before notice of avoidance has been given, the right to avoid is lost. In DANISH law each party must return what has been received, see *Lynge Andersen* 114. In DUTCH law the retroactive effect of avoidance (CC art. 3:53(1)) does not only lead to the conclusion that performance has been undue (CC arts. 6:203 ff), but in so far as the contract led to a transfer of the ownership of property, also to the conclusion that this transfer never took place (CC art. 3:84(1)). In other systems, avoidance of the contract is not necessarily seen as having retroactive effect on property rights which have been transferred. Thus in GERMAN law, according to CC § 142(1), a contract which has been avoided is treated as being void from the time of conclusion of the contract; but in cases of avoidance for mistake, for example, this does not itself affect any transfer of property since German law separates the passing of property from the underlying contract. The transferor must rely on a claim in unjustified enrichment under CC § 812(1) and, if the recipient is bankrupt, the claimant will receive only a dividend in the bankruptcy. Where services are provided for by one party CC § 812(1) is frequently replaced by the rules on benevolent intervention in another's affairs under §§ 677 et seq., cf. BGH 2 April 2007, NJW 2007, 1483, 1485. However, a different rule is applied in cases of fraud and threat. Here, since these grounds for avoidance are strongly tainted, avoidance of the contract extends to the transfer of property also, so the avoiding party may vindicate the property itself even if the other party is bankrupt (CC § 985). ESTONIAN law follows the principle of separation with the result that avoidance of the underlying contract does not itself affect the transfer of property. Property should be returned pursuant to provisions concerning unjustified enrichment (GPCCA § 90(2)), unless, exceptionally, both transactions may be avoided (e.g. in case of threat). SCOTTISH law also, in principle, treats the contract and the transfer of property as distinct juridical acts (see *McBryde*, Law of Contract in Scotland[1], paras. 13.01-13.11) but this is modified by statute in the case of sale of goods. The POLISH CC does not have any separate provision. However, mistake, fraud and threat are thought to be defects in the declaration of will. Thus, from the time of conclusion up to the time of avoidance the contract is regarded as valid (but voidable). When a party exercises the right to avoidance, the contract is treated as

invalid from the beginning. Any performance rendered under such a contract is *undue performance* in the meaning of the provisions of the code on unjustified enrichment (CC art. 410 § 2). The SLOVAK CC has no special provision on this issue. However if the contract is invalid any property must be returned regardless of a subsequent transfer of the property. But if the ground for invalidity was less gross disparity and social or economic pressure, the property is returnable only if there was no subsequent transfer. Failing return monetary compensation must be paid. For CZECH law, a lawfully avoided juridical act is invalid *ex tunc*, *Švestka/Jehlička/Škárová*, OZ[9], 274, so the contractual consideration is seen as never having been transferred.

III. Impossibility of restoring the property transferred

5. Under ENGLISH, IRISH and SCOTTISH law, if the property cannot be restored in substantially the same condition as when it was transferred, for example through being used up, the right of avoidance is lost. (though the rule is applied flexibly, see *Chitty* on Contracts I[27], nos. 6-112–115, *McBryde*, Law of Contract in Scotland[1], para. 13.22).

6. Other systems generally allow avoidance in such a case; they may require the party who received the property, instead of returning it, to make restitution of its value. (Under art. 1308 of the SPANISH CC restitution is no longer required when the other party cannot give back what that other party received under the contract.) Under the present Article, inability to restore property transferred is not a bar to avoidance; the party who received the property may have to make restitution of the value of the benefits received. These same rules apply in THE NETHERLANDS (see CC arts. 6:204 ff as for the rule on restitution of the value). In AUSTRIAN law in the cases of mistake and fraud it is possible that in the meantime a third party acquires property bona fide (CC § 367).

II.–7:213: Partial avoidance

If a ground of avoidance under this Section affects only particular terms of a contract, the effect of an avoidance is limited to those terms unless, giving due consideration to all the circumstances of the case, it is unreasonable to uphold the remaining contract.

COMMENTS

A. Party wishes to avoid only part of the contract

The ground of avoidance may relate only to a particular term which the avoiding party wishes to avoid without affecting the remainder of the contract. The party should be permitted to do this.

Illustration 1
C takes a dress to be cleaned. She is asked to sign a contract limiting the cleaner's liability for any damage to the dress. She asks why she has to agree to this and is told that it is just to protect the cleaners if any of the sequins on the dress come off in the cleaning. She signs. The dress comes back with a large stain on it and the cleaners try to rely on the clause. C may avoid the clause without avoiding the whole contract.

B. Appropriate to limit avoidance to part of contract

An incorrect statement or a mistake in communication may relate to a minor term of the contract. In such a case it may not be necessary or desirable to permit the party affected to avoid the whole contract if it is feasible to allow avoidance of the term involved and if this would not result in the contract being unbalanced in that party's favour.

Illustration 2
B, a building company, submits a bid for a major project. The total of its tender is made up of a number of items shown in the bid. There is clearly a mistake in one of these items, though it is not clear what the correct figure should be. The employer accepts the bid without pointing out the mistake. B may not avoid the whole contract but, on the assumption that the requirements of the rules on avoidance for mistake are satisfied, it can avoid the term fixing a mistaken price for the item in question. It will be paid a reasonable sum for the item.

Illustration 3
D buys a household insurance policy. Because the clauses of the contract are confusingly written he does not realise that the policy has an exclusion of any loss caused by theft which does not involve forcible entry. Such clauses are common in insurance policies of the type he is sold given that he lives in a high crime area; insurance against theft without forcible entry is much more expensive. D, on the assumption that the necessary requirements are satisfied, may avoid the whole contract and recover his premium but he cannot avoid just this exception, since the effect would be to give him "expensive" cover at a low price.

In some cases a mistake as to a single term may make it reasonable to avoid the whole contract. The burden of proving that it would be unreasonable to uphold the remainder of the contract is on the party who argues that it should be avoided as a whole.

One of the circumstances which is relevant is the behaviour of the party against whom avoidance is sought. In cases of fraud or duress, it may well be appropriate to allow the other party to avoid the whole contract if so wished.

NOTES

1. In some systems, when there is a ground of validity affecting only part of the contract, and the term affected is not essential to the rest of the contract, the contract may be upheld without the offending clause. This is the case with unfair clauses, both under the Directive on Unfair Terms in Consumer Contracts and many national laws; but it is in some systems true for other grounds of invalidity, e.g. in FRENCH, BELGIAN and LUXEMBOURG law (see in France: *Malaurie and Aynès*, Les obligations[9], nos. 717-721; in Belgium: *Stijns*, Verbintenissenrecht I, no. 182); in GERMAN law, if the clause is severable within CC § 139; similarly in DUTCH law, CC art. 3:41 and in ESTONIAN law: GPCCA §§ 85, 90(3). Other systems allow avoidance of the whole contract if the avoiding party would not have entered the contract at all without the offending part: e.g. GREEK CC art. 181; ITALIAN CC art. 1419 (partial nullity); PORTUGUESE CC art. 292 and SLOVENIAN LOA § 88 (partial nullity). This is the result reached by BELGIAN case law. Similarly in SLOVAK law if the reason for invalidity is related only to a part of the legal act, only this part is invalid unless it follows from the nature of the legal act or from its content or from the circumstances under which the act was done that this part cannot be separated from the other content. (CC § 41) In CZECH law, a part of a contract may be held invalid if its content or the circumstances under which it has been concluded enable this part to be separated from the rest (CC § 41); pursuant to the court practice, the purpose of the contract and the common will of the parties are also taken into the account (Supreme Court 3 Cdo 1248/96).
2. In NORDIC law the remedy is in principle avoidance of the whole contract but in practice there have been cases in Finland in which partial avoidance has been used (CC 1961 II 100 and 1962 II 80) and in all Nordic countries the aggrieved party may ask for adjustment of the contract under Contracts Act § 36. In ENGLISH, IRISH and SCOTTISH law the remedy is usually thought of as avoidance of the whole contract, and in a recent case of misrepresentation as to the content of a contract, the court refused to enforce the contract in the form that the misrepresentee had been led to expect (*TSB Bank plc* v. *Camfield* [1995] 1 WLR 430, CA) But where a party misrepresented the effect of an exclusion clause in a contract the court simply enforced the rest of the contract without the clause, *Curtis* v. *Chemical Cleaning Co. Ltd.* [1951] 1 KB 805, CA. In POLISH law the remedy is avoidance of the whole contract.
3. In the HUNGARIAN CC § 239(1) in the event of limited invalidity of a contract, the entire contract falls only if the parties would not have concluded it without the invalid part. Legal regulation may provide otherwise.

II.–7:214: Damages for loss

(1) A party who has the right to avoid a contract under this Section (or who had such a right before it was lost by the effect of time limits or confirmation) is entitled, whether or not the contract is avoided, to damages from the other party for any loss suffered as a result of the mistake, fraud, coercion, threats or unfair exploitation, provided that the other party knew or could reasonably be expected to have known of the ground for avoidance.

(2) The damages recoverable are such as to place the aggrieved party as nearly as possible in the position in which that party would have been if the contract had not been concluded, with the further limitation that, if the party does not avoid the contract, the damages are not to exceed the loss caused by the mistake, fraud, coercion, threats or unfair exploitation.

(3) In other respects the rules on damages for non-performance of a contractual obligation apply with any appropriate adaptation.

COMMENTS

A. Liability in damages

It is not sufficient that the party who has concluded a contract because of a mistake which the other party did not share, fraud, coercion, threats or unfair exploitation should only have a right to avoid the contract or part of it. First, the party may not wish to exercise the right of avoidance. In such a case it would be harsh to leave the party without any remedy, although that is the position under the laws of some Member States. The Article gives a right to damages.

Illustration 1
L tells the prospective tenant of a house that the drains are in good order. Relying on this the tenant signs the lease. They are not and the tenant becomes ill as a result. Whether L was fraudulent or merely careless, L should have to compensate the tenant.

Illustration 2
O employs P to build a house for it on a particular site. O knows that under the site there is an old sewer which is in danger of collapsing. It is obvious that P does not know this but O says nothing. One of P's lorries gets stuck when the sewer gives way under its weight and P has to pay a large sum to have it pulled out. O is liable for this cost.

It may be that on some facts the tenant in Illustration 1 would have a claim for non-performance of a contractual obligation. In this case the damages would include any higher cost involved in finding another house with drains which are in good order.

B. Measure of damages where contract avoided

Damages for non-performance of a contractual obligation aim to put the aggrieved party into the position it would have been in had the obligation been performed. In cases within this Section there has not been a non-performance, or at least not necessarily so: even in cases of fraud, the person making the statement is not necessarily giving a contractual undertaking that it is true. If there was no such undertaking, the untrue statement should not have caused any loss of expectation and the damages should not include an element for this. The aim, when the contract is avoided, should be to put the party in the same position as if the contract had not been concluded.

Sometimes a statement which is made fraudulently, or which is incorrect, does also give rise to a contractual obligation. In this case the creditor in the obligation may choose between remedies under this chapter and remedies for non-performance of the obligation.

If the contract has been avoided and the aggrieved party suffered no consequential loss, there may be no further loss for which damages could be obtained under this Article.

> *Illustration 3*
> A leases a used car to B, fraudulently telling B that it has only done 20,000 km when in fact the odometer has been "clocked" and it has done 70,000 km. Because the car has covered such a great distance, a fair rental would be much less than B agreed to pay. Soon after he has taken delivery of the car, B discovers the truth and avoids the contract. His money is refunded. He has not suffered any further loss for which damages can be recovered under this Article, even if it costs him more to lease a car from another company.

"Loss" includes economic and non-economic loss. "Economic loss" includes loss of income or profit, burdens incurred and a reduction in the value of property. "Non-economic loss" includes pain and suffering and impairment of the quality of life. See Annex 1. It follows that damages under the Article may include compensation for opportunities which the party passed over in reliance on the contract.

> *Illustration 4*
> E accepts an offer of employment from F after F fraudulently tells her that the job carries an index-linked pension. E finds that the job does not have such a pension scheme and she avoids the contract. To take the job she had passed up another job offer at a much better salary than she can now get elsewhere. E may recover as damages the difference between what she would have earned in the other job and the salary she can now get.

C. Measure of damages where the contract is not avoided

A party who has the right to avoid the contract but does not do so, for instance because of a failure to act quickly enough to avoid the contract, should be able to recover damages. However, the party should not necessarily be put into the same position as if the contract had not been concluded. To allow this might permit the party to throw other losses, such as a decline in the value of the property, on to the other party, when that item of loss was in no way related to the ground for avoidance.

> *Illustration 5*
> A, a developer, buys a plot of land for €5 million, relying inter alia on a statement by the seller that the land is not subject to any rights in favour of third parties. Later A finds that there is a right of way running across part of the site. This is serious enough to constitute a mistake which would justify avoidance of the contract but A decides not to avoid the contract. It will cost €10,000 to divert the path. Meanwhile, because of a slump in property prices, the value of the site has fallen from €5 million to €2.5 million. A's damages are limited to €10,000.

D. Cases where no fault

In cases of mistake as to the nature or circumstances of the obligation where the mistake was shared, there is not the same reason to make either party liable, except where one of them was at fault.

E. Contributed to own loss

Sometimes the victim of a fraud or mistake contributed to the loss suffered. In such a case the damages may be reduced. This is one the effects of applying the general rules on damages for non-performance of a contractual obligation except as modified in the Article.

NOTES

I. Availability of damages

1. It is widely recognised that damages are available where the ground for avoidance of the contract was the result of the fault of one of the parties. This may be based on general principles of delictual responsibility (as in FRENCH and LUXEMBOURG law, CCs art. 1382; in POLISH law, CC art. 415; in BELGIAN law, *culpa in contrahendo* is seen as an application of general delictual principles); ITALIAN law, the majority of case law and scholars agrees on the extra-contractual nature of this liability (see Cass., S.U., 16 July 2001, no. 9545, Foro it. 2002, I, 806; *Sacco and De Nova*, Il contratto II[2], 260, 595 ff; *contra Castronovo*, L'obbligazione senza prestazione) (as in SLOVAK law, CC § 420 and SLOVENIAN law, see Juhart and Plavšak (-*Polajnar-Pavčnik*), Obligacijski zakonik I, p. 520). In other systems grounds of liability may be contractual or delictual. Thus in GERMAN law, in a case of excessive advantage taking, the victim may recover damages if the requirements of CC § 826 or those of *culpa in contrahendo* are fulfilled, BGH 12 November 1986, BGHZ 99, 101, 106. PORTUGUESE law is similar: STJ, 13 January 1993; O Direito 125, I-II, pp. 145 ff; *Almeida*, Contracts 174, 187 ff; *Cordeiro* 698 ff. NORDIC law probably also allows claims on either basis, though there is little authority; in Danish law it is accepted that the aggrieved party may recover reliance losses if the other party has acted negligently or in bad faith, *Gomard*, Almindelig kontraktsret[2], 140. See also *Ramberg*, Allmän avtalsrätt[4], 99 and *Kleineman*. In some systems general principles may be supplemented by special provisions on particular topics, as in AUSTRIAN law, where CC § 874 covers fraud and coercion, but error is dealt with by *culpa in contrahendo*; GREEK law, where a provision on error (CC art. 145) supplements the general delictual provisions (CC arts. 149, 152). SPANISH law also has rules on these situations. Although SPANISH CC art. 1270 contemplates a situation in which damages are granted *in lieu* of avoidance, it is currently recognised that the innocent avoiding party may also recover damages, based on the "reliance interest" of this party. Under a special provision in ESTONIAN law the party who has avoided the contract is entitled to damages for loss from the other party if the latter knew or should have known of the mistake, fraud or threat (GPCCA § 101). The measure of damages is the negative interest (GPCCA § 101(1) sent. 2). For CZECH law, see CC § 42; the liability is classified as *culpa in contrahendo* (*Švestka/Jehlička/Škárová*, OZ[9], 280), however *culpa in contrahendo* is regarded as a kind of delictual liability. The liability depends on the fault of the liable party.
2. ENGLISH, IRISH and SCOTTISH law do not have rules applicable generally to cases covered by this Section. Damages may be recovered for fraud and for negligent

misrepresentation (e.g. English Misrepresentation Act 1967, s. 2(1); Irish Sale of Goods and Supply of Services Act 1980), s. 45; Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s. 10.) Duress may in certain circumstances amount to a tort or delict: see *Carty and Evans*. Even in the rare cases in which English law recognises a duty of disclosure, non-disclosure is normally only a ground for avoidance of the contract and not for damages, unless the non-disclosing party has assumed responsibility towards the other within the doctrine of *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] AC 465, HL: see *Banque Financière de la Cité SA* v. *Westgate Insurance Co. Ltd.* [1989] 2 AllER 952, CA, at p. 1007. It does not appear that damages can be given in other cases of mistake not involving misrepresentation, nor in cases of undue influence.

II. Measure of damages

3. In those systems in which the measure of damages is discussed, it is generally accepted that in cases of *culpa in contrahendo* and delictual claims only the aggrieved party's negative interest, or reliance loss, will be compensated: GERMAN law; AUSTRIAN law; SLOVENIAN law, NORDIC law (see on Finnish law *Taxell*, Avtal ach rättsskydd 391); ENGLISH law (fraud: *East* v. *Maurer* [1991] 1 WLR 461, CA; negligent misrepresentation, *Royscot Trust Ltd.* v. *Rogerson* [1991] 2 QB 297, CA). See also ITALIAN law (Cass. 30 July 2004, no. 14539, Foro it. 2004, I, 3009 and *Sacco and De Nova*, Il contratto II^2, 605). It has been argued that in DUTCH law a mistaken party may be able to claim the expectation interest: *Asser-Hartkamp*, Verbintenissenrecht II no. 487. n PORTUGUESE law, most writers and court decisions accept that negative interest damages are sufficient, e.g. *Almeida*, Contracts 192 ff if the contract is avoided; *Almeida Costa*, RLJ 114 (1983-84), 73 ff; *Vasconcelos*, 241 ff; others argue that the positive interest should be protected, *Cordeiro* 609; *Prata*, Notas sobre responsabilidade pré-contratual, 176 ff. In POLISH law damages cover *damnum emergens* and *lucrum cessans* – as far as a party can prove them; and the same holds true for CZECH law.

4. Illustration 6 is modelled on the English case of *Sindall (William) plc* v. *Cambridgeshire County Council* [1994] 1 WLR 1015, CA, and the Article produces a similar result to that which the court indicated it would have reached if there had been a misrepresentation. On the facts, no misrepresentation had been made.

II.–7:215: Exclusion or restriction of remedies

(1) Remedies for fraud, coercion, threats and unfair exploitation cannot be excluded or restricted.

(2) Remedies for mistake may be excluded or restricted unless the exclusion or restriction is contrary to good faith and fair dealing.

COMMENTS

Fraud, coercion, threats and unfair exploitation are of such seriousness that a party should not be able to exclude or restrict liability; they are all forms of bad faith.

Mistake does not involve bad faith and it is permissible to exclude or restrict remedies for mistake provided that the term doing so is consistent with good faith and fair dealing and not for instance, one which was hidden in small print or over which the party relying on it refused to negotiate.

The burden of proving that the clause is contrary to good faith and fair dealing should rest on the party seeking to avoid its effect.

This Article does not prevent a party agreeing to a settlement of a claim which in effect involves surrendering rights under this Section.

NOTES

1. Those legal systems in which this question has been discussed have generally held that remedies for grounds of invalidity involving immoral behaviour cannot be excluded, but that remedies for others may be. In FRENCH law, the parties cannot provide, from the conclusion of the contract, for a term excluding remedies for defects of consent,. However, they may confirm a voidable contract ("nullité relative"); on Belgium: *De Boeck*, Informatierechten en –plichten, nos. 576-580). In GERMAN law, remedies for mistake may be excluded by an individually negotiated term, though generally not by standard terms, BGH 28 April 1983, NJW 1983, 1671; exclusion is not possible if an agreement is *contra bonos mores* within CC § 138. In DUTCH law remedies for mistake may be excluded not only by an individually negotiated term, but also by standard terms; this exclusion does however not apply when this would be unacceptable according to the criteria of reasonableness or equity (CC art. 6:248(2)) or in case of the standard terms when this would be unreasonably onerous vis-à-vis the other party (CC art. 6:233 under (a)). SPANISH CC art. 1102 prevents exclusion of liability for fraud. PORTUGUESE law would appear to prevent exclusion of liability for what is contrary to good morals, CC art. 280(2). In AUSTRIAN law, remedies for mistake caused by simple negligence may be excluded, OGH 20 March 1968, SZ 41/33; 7 March 1978, RZ 1979/14, but remedies for fraud cannot be and the same is argued for gross negligence, OGH 19 December 1991, SZ 64/190; however, in consumer contracts no remedies for mistake can be excluded ex ante (see ConsProtA § 6 para. 1 no. 14). In NORDIC law the rules on avoidance in the Contract Acts §§ 28-36 are mandatory; but liability for misrepresentation by simple negligence may sometimes be excluded (see e.g. Swedish Supreme Court NJA 1987 ss. 692, 703; the

clause must be reasonable, *Gomard,* Almindelig kontraktsret[2], 187). In ENGLISH law and SCOTTISH law, remedies for fraud cannot be excluded (*Pearson* v. *Dublin Corp.* [1907] AC 351, HL; *Boyd & Forrest v Glasgow & SW Railway Co.* 1915 SC (HL) 20, 35-36) It may be possible to exclude liability for the fraud of one's agent, see *HIH Casualty and General Insurance Ltd. v. Chase Manhattan Bank* [2001] EWCA Civ 1250 , [2001] 2 Lloyd's Rep 483 rev'd in part [2003] UKHL 6, [2003] 2 Lloyd's Rep 483; a clause excluding or restricting remedies for any other type of misrepresentation will be valid only if it is fair and reasonable, Misrepresentation Act 1967, s. 3 (as amended by Unfair Contract Terms Act 1977, s. 8; see also for Scotland s. 16). Unfair Terms in Consumer Contract Regulations 1994, S.I. 1994 no. 3159 may also apply. For IRELAND, see Sale of Goods and Supply of Services Act 1980 and EC Unfair Terms in Consumer Contract Regulations, SI 27 of 1995. The matter is not settled under POLISH law and ESTONIAN law. Any remedies may not be excluded or restricted beforehand under SLOVAK law generally (CC § 574 second clause). The CZECH CC disallows any waiver of rights which can arise in the future (§ 574(2)), including a prospective right to damages (see *Švestka/Jehlička/Škárová,* OZ[9], 1019). The scope of this provision is discussed and it is interpreted rather restrictively so as not to prohibit a non-abusive contractual arrangement of rights. However, the requisites of consent represent the very basics of juridical acts, so it can be deduced that CC § 574(2) applies in full and no remedy can be excluded. Under SLOVENIAN law only remedies for unfair exploitation and lesion are explicitly mandatory, however according to a general principle liability and remedies for intended and reckless acts cannot be excluded.

II.–7:216: Overlapping remedies

A party who is entitled to a remedy under this Section in circumstances which afford that party a remedy for non-performance may pursue either remedy.

COMMENTS

In some situations the same facts may be analysed either as a case of mistake, or as one in which there is a non-performance of a contractual obligation. For example there may be a remedy for non-performance because the performance of one party is not of the required quality; or one party may have given a contractual undertaking that a particular fact relating to the performance is true.

Although some systems prevent the aggrieved party from choosing which set of remedies to pursue in cases of this type, there seems no good reason to do so provided that there is no "double recovery" and the choice does not have the effect that a claim escapes contractual or other restrictions which should properly apply to it. Normally the remedies for non-performance will give a fuller measure of recovery, but the aggrieved party may find it simpler to exercise rights under this Section, e.g. just to give notice of avoidance on the ground of mistake.

Needless to say, the aggrieved party will still have to choose remedies which are compatible. It would not be possible, for example, both to avoid the contract and claim damages for non-performance of an obligation under it.

NOTES

1. In GERMAN law, when the case falls within the special rules on defective goods, the buyer's only remedy is under those provisions; the same holds true for CZECH law – see Supreme Court 25 Cdo 1454/2000 or 33 Odo 513/2004. In FRENCH law, when both types of action are potentially available the case law now provides that, as a rule, the aggrieved party does not have a choice: he or she must bring an "*action en garantie*" and cannot bring an action to avoid the contract (Cass.civ. 1ère, 7 juin 2000, CCC 2000. no. 159). The rule is different in the event of fraud: Cass.civ. 1ère, 6 novembre 2002, CCC 2003. no. 38; contra; Cass.civ. 3è, 17 novembre 2004: Bull.civ. III, no. 206 (*Bénabent*, Contrats Spéciaux[6], no. 235). See generally *Tallon*, Hamel. Other systems accept that there may be overlaps between the various sets of rules and allow the aggrieved party to choose which remedy to use. For BELGIAN law see *Stijns*, Verbintenissenrecht I, no. 181, and for LUXEMBOURG law, Cour 30 June 1993, Pasicrisie 29, p. 253; Cour, 16 March 1900, Pasicrisie 5, 245. A choice of remedies is also permitted in AUSTRIA, GREECE, ITALY, THE NETHERLANDS, POLAND, SLOVENIA and the NORDIC countries. In SPANISH law, too, there is an overlap between remedies for misrepresentation or error and contractual remedies for hidden defects or non-conformity. The Supreme Court has upheld the compatibility of both remedies. Supreme Court Judgment 18 March 2004, RAJ (2004), 1904. In ENGLISH, IRISH and SCOTTISH law the principal overlap is between remedies for misrepresentation and for non-performance; here the English Misrepresentation Act 1967, s. 1, confirms that the aggrieved party may choose. In PORTUGAL it appears

that the party may choose between remedies for non-performance and for error, but that the same short limits laid down by CC arts. 916 and 917 and Ccom art. 471 will be applied whichever remedy is chosen, *Martinez*, 413. However a different solution, based on non-performance, applies to consumer contracts under the Decree-Law no. 63/2003, 8 April 2003. In ESTONIA, there is no explicit rule or court practice on this matter. Writers tend to support the free choice of remedies (Varul/Kull//Kõve/Käerdi (-Kõve), Võlaõigusseadus I, § 101, no. 8). In SLOVAK doctrine if the contract is invalid any contracting party is not entitled to a remedy for non-performance generally.

2. See generally *Kötz*, European Contract Law I, 175-178.

Section 3: Infringement of fundamental principles or mandatory rules

II.–7:301: Contracts infringing fundamental principles

A contract is void to the extent that:

(a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and

(b) nullity is required to give effect to that principle.

COMMENTS

A. Scope of section

This Section deals with the effects on a contract of infringement of fundamental principles or mandatory rules. Like the rest of the chapter it also applies, with appropriate adaptations, to other juridical acts. See the first Article of the Chapter. The subject matter is sometimes described as "illegality" and was so described in the Principles of European Contract Law, from which this Section is derived. However, "illegality" is not necessarily the most appropriate term for some infringements of fundamental principles or mandatory rules. In some cases the contract may be immoral rather than illegal and in some cases it may just suffer from a defect of a rather formal or regulatory character. So the present title of the Section is descriptive and neutral.

B. Contrary to principles recognised as fundamental in the laws of the Member States

The formulation of the first Article is similarly intended to avoid the varying national concepts of immorality, illegality at common law, public policy, *ordre public* and *bonos mores*, by invoking a necessarily broad idea of fundamental principles found across the European Union, including EU law. Guidance as to these fundamental principles may be obtained from such documents as the EC Treaty (e.g. in favour of free movement of goods, services and persons, protection of market competition), the European Convention on Human Rights (e.g. prohibition of slavery and forced labour (art. 3), and rights to liberty (art. 5), respect for private and family life (art. 8), freedom of thought (art. 9), freedom of expression (art. 10), freedom of association (art. 11), right to marry (art. 12) and peaceful enjoyment of possessions (First Protocol, art. 1)) and the European Union Charter on Fundamental Rights (which includes many of the rights already mentioned and adds such matters as respect for personal data (art. 8), freedom to choose an occupation and right to engage in work (art. 15), freedom to conduct a business (art. 16), right to property (art. 17), equality between men and women (art. 23), children's rights (art. 24), rights of collective bargaining and action (art. 28), protection in the event of unjustified dismissal (art. 30), and a high level of consumer protection (art. 38).

Merely national concepts as such have no effect under the Article and may not be invoked directly, although comparative study can give further help in the identification and elucidation of principles recognised as fundamental in the laws of the Member States. Thus the Article extends to contracts placing undue restraints upon individual liberty (for example, being constraints of excessive duration or covenants not to compete), upon the right to work, or being otherwise in restraint of trade, contracts which are in conflict with the generally

accepted norms of family life and sexual morality, and contracts which interfere with the due administration of justice (e.g. champertous agreements in England, *pacta de quota litis* elsewhere). See further *Kötz and Flessner* 155-161.

Many infringements of principles mentioned in the preceding paragraphs might not be such as to justify automatic nullity of the contract. Sub-paragraph (b) therefore provides that the contract will be void only to the extent that nullity is required to give effect to the fundamental principle.

The public policy underpinning principles recognised as fundamental may change over time, in accordance with the prevailing norms of society as they develop.

Situations covered by the rules on vices of consent or unfair contract terms fall outside the scope of the present Article.

C. Void

A contract which infringes fundamental principles, and the nullity of which is required by the Article, is void from the beginning and not merely voidable by a party or by a court. Unlike the position under the following Article, the judge or arbitrator is given no discretion to determine the effects of the contract: such a contract is to be given no effect at all. The intentions and knowledge of the parties are irrelevant.

NOTES

1. All European systems make provision for the nullity of contracts which are contrary to fundamental principles of morality or public policy. The terminology varies.
2. The FRENCH code, which locates its treatment of immorality in the doctrines of *cause* and *objet*, makes use of two concepts: *bonnes moeurs* and *ordre public* (CC arts. 6, 1133, 1172, 1217, 1218) and the same goes for BELGIUM (*Van Gerven* (2006) 78) and LUXEMBOURG. In practice the first concept has been subsumed in the second. The ITALIAN CC (art. 1343) is framed in terms of *ordine pubblico* and *buon costume*. The PORTUGUESE CC (arts. 280, 281) is framed in terms of *ordem pública* and *bons costumes*: a special rule provides that voluntary limitations of fundamental civil rights are void if contrary to the public interest (CC art. 81 no. 1). In the NETHERLANDS the CC (art. 3:40) talks of violation of good morals and public order; as does GPCCA § 86 in ESTONIA. In SLOVENIAN law juridical acts are void if contrary to the constitution, mandatory rules or moral principles (LOA § 86).
3. The SPANISH code (CC art. 1275) talks of a cause being unlawful when it is contrary to good morals. A contract may also be declared void and without effect (1) when the parties do not keep within the limits of freedom of contract, morals or *ordre public* being among these limits (CC art. 1255); (2) when the object of the contract is unlawful because it deals with services which are contrary to *bonos mores* (CC art. 1271(3)).
4. The GERMAN (CC § 138) and AUSTRIAN (CC § 879) codes speak of violation of good morals. The SWISS obligations code (LOA art. 20) speaks simply of immorality. See also the GREEK CC art. 178.

5. In FINNISH law contracts against *bonos mores* are held to be invalid. See e.g. *Telaranta* 250-274, and *Hemmo*, Sopimusoikeus I, 445-447. Under DANISH law, the rule in Danske Lov (1683) art. 5.1.2 provides that contracts which violate public policy are void. This covers contracts to commit a crime or to reward a person who commits a crime. It also covers promises whereby the promisor undertakes to limit inappropriately his or her freedom of action, such as a promise to vote for a certain political party or to change or not change religious faith. A promise to pay a person for doing something which the law favours or requires may be immoral and unenforceable: e.g. a promise to pay a person to speak the truth as a witness in a litigation. The courts apply this rule ex officio (see *Andersen & Madsen* 247 and *Gomard*, Almindelig kontraktsret[2], 195 ff).

6. In POLISH law a juridical act is null and void if it breaches the law or the principles of social co-existence (in case law and the legal doctrine, this general clause is interpreted to mean *bonos mores* and good faith) – (CC art. 58). A contract is also invalid where its contents or purpose exceed the limits of freedom of contract (CC art. 353^1): law, principles of social co-existence and the nature of the legal relation created by the contract.

7. In CZECH law, a juridical act is null and void if it contravenes good morals (CC § 39). Good morals are understood as a complex of social, cultural and moral rules, which show a certain stability in the course of history, represent substantial historical tendencies, are shared by a dominant part of the society and have the character of basic rules (Supreme Court 3 Cdo 69/96). Conflict with good morals is an objective condition which does not depend on the fault or good faith of any party, see *Švestka/Jehlička/Škárová*, OZ[9], 265.

8. In ENGLISH, IRISH and SCOTTISH law the subject matter of the present Article is often presented under such headings as “illegality at common law”, “immoral contracts” or contracts “contrary to public policy”. While such a contract may be void, it is more often presented as “unenforceable”. See *Chitty* on Contracts I[27], nos. 16-001-16-16-012;16-141;16-159-16-172. *MacQueen and Thomson*, Contract Law in Scotland, §§ 7.1-7.9; *McBryde*, Law of Contract in Scotland[1], paras. 13.25-13.28, 19.14-19.27. English law remains under review by the Law Commission after its Consultation Paper on Illegal Transactions (No. 154, 1998). The Commission's provisional proposals were to the effect that courts should have discretion to decide whether or not illegality or infringement of public policy should act as a defence to a claim for contractual enforcement.; Clark 323-7; 9. In SLOVAK law a legal act whose content or purpose are at variance with a statute, circumvent the statute or are at variance with good morals is invalid. In the HUNGARIAN CC § 200(2) contracts in violation of legal regulations and contracts concluded by evading a legal regulation are void, unless the legal regulation stipulates another legal consequence. A contract is also void if it is manifestly contrary to good morals.

II.–7:302: Contracts infringing mandatory rules

(1) Where a contract is not void under the preceding Article but infringes a mandatory rule of law, the effects of that infringement on the validity of the contract are the effects, if any, expressly prescribed by that mandatory rule.

(2) Where the mandatory rule does not expressly prescribe the effects of an infringement on the validity of a contract, a court may;

(a) declare the contract to be valid;
(b) avoid the contract, with retrospective effect, in whole or in part; or
(c) modify the contract or its effects.

(3) A decision reached under paragraph (2) should be an appropriate and proportional response to the infringement, having regard to all relevant circumstances, including:

(a) the purpose of the rule which has been infringed;
(b) the category of persons for whose protection the rule exists;
(c) any sanction that may be imposed under the rule infringed;
(d) the seriousness of the infringement;
(e) whether the infringement was intentional; and
(f) the closeness of the relationship between the infringement and the contract.

COMMENTS

A. General

Many contracts infringe a mandatory rule of law without being contrary to any fundamental principle. This Article deals with such contracts. If the infringement also involves a violation of a fundamental principle within the meaning of the preceding Article it is that Article which applies. In practice, therefore, the present Article deals with less important violations of the law. Indeed, given the extent of statutory regulation in modern States, some infringements covered by the Article may be of a merely technical nature. This means that a flexible approach has to be taken to the effects of an infringement.

B. Mandatory rules of the applicable law

The Article does not declare when a contract infringes a mandatory rule of law. Although the model rules constitute a self-contained system applying to contracts governed by them, it is not possible to ignore altogether the provisions of national and other positive laws otherwise applying to such contracts, in particular those rules or prohibitions expressly or impliedly making contracts null, void, voidable, annullable, or unenforceable in particular circumstances. Where such rules are applicable to the contract the present Article is to be brought into play. The Article is however concerned only with the *effects* of the infringement.

C. Infringement

An infringement of a mandatory rule of law may arise in respect of who may conclude the contract, how it may be concluded, the contents or purpose of the contract, or (exceptionally) the performance of the contract.

The clearest case is where an applicable mandatory rule as to who may make certain contracts is infringed.

Illustration 1
A statute provides that a company may provide credit to consumers only if it holds a licence granted by the government, and that consumer credit agreements entered into by unlicensed providers are unenforceable by the provider. The unlicensed provider of consumer credit is also guilty of a criminal offence. Here the making of a consumer credit agreement by an unlicensed provider would infringe the rule of law.

More difficult is the issue of the contract with an illegal purpose. In general, for an illegal purpose to impact upon the effectiveness of the contract, it would seem that this must be the common purpose of the parties, at least in the sense that the illicit purpose of one is known to or ought to be known to the other.

If it is only the performance of the contractual obligation which infringes the mandatory rule, the contract itself may well be unaffected by the infringement. Thus if a haulier breaks the speed-limit from time to time, or jumps a stop light, while performing a contract for the carriage of goods by road the contract remains unaffected by the rules in this Article. The contract itself does not infringe the mandatory rules of the road traffic law. Only if it was intended by one or both parties from the outset that a contractual obligation be performed in an illegal manner do questions arise about whether and to what extent the contract is voidable. The situation is then similar to that of a contract with an illegal purpose.

Illustration 2
A buyer, who is in urgent need of the seller's goods, persuades the seller to promise to break the speed limit when bringing the goods. This promise by the seller is within the scope of the rules on illegality.

D. Effects of infringement

In determining the effects of an infringement upon a contract under this Article, regard is to be had first to what the mandatory rule in question provides upon the matter.

If the mandatory rule provides expressly for the effect of an infringement then that effect follows. If the relevant rule expressly states that infringement invalidates a contract, or if it provides that contracts are not to be invalidated by any infringement, then these consequences follow. For example, Article 81 of the EC Treaty prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition within the common market and declares such prohibited agreements to be "automatically void". Conversely, the legislation may provide that the criminal offence which may be committed in the course of concluding a contract or performing an obligation under it does not of itself make the contract void or unenforceable or prevent any cause of action arising in respect of any loss (see e.g. UK Package Travel, Package Holidays and Package Tours Regulations 1992 reg. 27, implementing Council Directive 90/314/EEC on package travel, package holidays and package tours).

The rule in question may not provide expressly for the effects upon a contract of an infringement of the rule. It is necessary for the Article to deal with this second situation. It does so by making reference to a person (judge or arbitrator) with power to determine matters arising under the contract. If the matter is never referred to a judge or arbitrator (and is not within the preceding Article) then the contract is not affected by the infringement. Contracts

are valid unless otherwise provided, and in this situation there is no Article or mandatory rule of law which provides for invalidity.

Where paragraph (2) is brought into operation, the judge or arbitrator is given a discretion to declare the contract to be valid, to avoid the contract with retrospective effect in whole or in part, or to modify the contract or its effects. The power to modify would include power to dispense with future performance of obligations under the contract but to let matters otherwise rest as they are, without any restitution. Equally, the contract may be given some but not complete future effect: for example, it may be made enforceable by one of the parties only, or only in part, or only at a particular time. It may be that some remedies, such as an order for specific performance, are not to be available, while others, such as damages for non-performance, are to be. The decision must be an appropriate and proportional response to the infringement having regard to all the relevant circumstances and, in particular, to those spelled out in paragraph (3).

E. Factors to be taken into account in determining effect of infringement

Paragraph (3) enjoins the judge or arbitrator to take into account all the relevant circumstances in determining the effect of the infringement of the law upon the contract. To assist in this process, a number of factors are listed. The list is not exclusive, and the factors mentioned may well overlap in application.

Purpose of the rule. Where the rule in question contains no express provision about the effect on the validity of a contract which infringes the rule, the legislative intent will have to be determined in accordance with the usual rules on the interpretation of the law. A purposive approach is to be adopted. Consideration should always be given to whether, in the absence of an express statement on the point, enabling the rule to take full effect requires the contract to be set aside. Examples where the purpose of the legislation should be considered might include whether a piece of domestic legislation was intended to apply to a trans-national or cross-border transaction, or whether an international or European rule was to apply to a purely domestic transaction.

For whose protection does the rule exist? This factor is closely related to the issue of the purpose of the rule. If, for example, the rule in question merely prohibits one party from entering or making contracts of the kind in question, it does not follow that the other party may plead the illegality to prevent the contract taking effect.

> *Illustration 3*
> A statute lays down that domestic construction work is only to be carried out by registered builders, but does not say what effect the prohibition has upon contracts made by unregistered builders. 75% of a contract to build an extension to a private dwelling house is completed by an unregistered builder, who then abandons the job. If the court or arbitrator concludes that the main purpose of the rule is to protect clients then, while the client may not be able to insist on specific performance of the contract by the unregistered builder, the client may have a claim against the builder for damages in respect of defective work or the additional cost of having the work completed by a registered builder.

Illustration 4
In breach of companies legislation, a company agrees to provide financial assistance to shareholders to enable them to purchase more of the company's shares. The purpose of the legislation is the protection of shareholders and creditors of the company. The agreement may be upheld if all the shareholders in the company are purchasers and no creditors are adversely affected by the transaction.

Illustration 5
A consumer protection statute prohibits the negotiation or conclusion of loan agreements away from business premises. The aim of the statute is to protect consumers from 'cold selling' by home-visiting or telephoning salesmen of credit acting on behalf of consumer credit companies. While such companies are unable to enforce agreements entered in such circumstances, the consumer for whose protection the prohibition exists may do so.

Sanctions already incurred. If the rule in question provides for a criminal or administrative sanction against the wrongdoer, the imposition of that sanction may be enough to deter the conduct in question without adding the nullity of the contract. The goal of deterrence is usually better achieved through such criminal or administrative sanctions than by way of private law. Often such sanctions will take into account the degree of blameworthiness of the party concerned, and this may be a more appropriate response to the conduct than avoiding the contract in whole or in part.

Illustration 6
A statute provides that ships of a certain size must not carry cargoes above a certain quantity. Criminal sanctions are provided, but the statute says nothing about any civil consequences of infringement of the prohibition. A, a shipowner, contravenes the statute in carrying a cargo for B. B invokes the illegality of the performance and refuses to pay the freight. Because the aim of the statute is sufficiently fulfilled by the imposition of the criminal sanction upon A, the contract would be unlikely to be avoided by a court. B must pay the freight.

Illustration 7
Legislation prohibits court officials from engaging in remunerated activities outside their employment. The purposes of the rule are protection of the professional integrity of officials and deterring them from entering such arrangements, but this can be achieved by the application of disciplinary sanctions adjusted to take account of the degree of guilt, rather than by enabling the other party to the transaction to have the official's services for nothing.

Seriousness of the infringement. The judge or arbitrator is able to consider the seriousness of the infringement of the rule in assessing what if any effect it should have upon the contract. If the infringement is minor or very slight, that may point to the contract being declared valid and given effect.

Illustration 8
A shipowning company is in breach of statutory regulations as to the maximum load to be carried by ships but only by a very small amount. It should not be disabled on this ground alone from recovery of freight for the voyage.

If on the other hand the infringement had major or serious consequences that might suggest that there should be some effect upon the contract.

Was the infringement intentional? This enables the judge or arbitrator to take account of the knowledge or innocence of the parties with regard to the infringement of the rule. Subject to the other factors in the case, in particular the purpose of the law in issue, there is a stronger case for the infringement rendering the contract invalid if it was known to or intended by the parties than if both were unaware of the problem. More complex is the situation where one party knows of the infringement and the other does not, where much may depend upon which of them is trying to enforce the contract.

> *Illustration 9*
> A contract of carriage involves illegal performance of the obligations under it by the carrier, who is aware of the requirements of the law in question. The customer who is aware of the proposed illegality when the contract is concluded cannot sue for damages for non-performance of the contractual obligation by the carrier, unlike the customer who is not so aware. Whether or not the carrier can sue for payment of the price under the contract once the obligations under it are fully performed may additionally depend upon factors such as the purpose of the prohibition and the other sanctions available, e.g. under the criminal law.

The most difficult situation is the contract for an illegal purpose. If it is lawful for A to sell a weapon or explosive material to B, and these materials may be lawfully used (for example, in self-defence or in construction work), the fact that B intends to use the goods illegally ought not to affect the validity of the contract of sale. If however at the time of contracting A is aware of or shares B's illicit purpose (e.g. supplies Semtex to a person whom A knows to be an active member of a terrorist organisation), then there may be some deterrence from entering the contract (on credit terms at least) if A cannot compel B to pay for material supplied.

Relationship between infringement and contract. This factor requires examination of whether or not the contract expressly or impliedly stipulates for an illegal performance by one or both of the parties. Thus a contract of carriage which can only be performed by overloading the ship or lorry may be more readily avoided by a court (although possibly the case might be addressed by an appropriate modification of the contract).

NOTES

I. Contracts contrary to law

1. All European systems deal with contracts which contravene some rule of law, as opposed to contracts which are contrary to fundamental principles of morality or public policy.
2. In a number of systems the relevant rules are contained in the rules on the limits of contractual freedom or on the cause or object of the contract. See e.g. the FRENCH, BELGIAN and LUXEMBOURG CC (art. 6; art. 1129; art. 1133 - cause illicit when prohibited by the law); BELGIAN law makes a distinction between imperative statutory provisions (in case of violation: relative nullity) and provisions of public policy (in case of violation: absolute nullity); the ITALIAN CC (art. 1343 - cause

unlawful when it is contrary to mandatory rules; art. 1344 - cause also unlawful when the contract constitutes the means for evading the application of a mandatory rule; art. 1345 - contract unlawful "when the parties are led to conclude it solely by an unlawful motive, common to both"; art. 1346 unlawful object; *Sacco and De Nova*, Il contratto, 559-572; *Mariconda* 367-400; *Bianca*, Diritto civile III, 616 ff); the SPANISH CC (arts. 1255, 1271, 1275; *Díez-Picazo* I, 4th ed., 242-243); and the PORTUGUESE CC (art. 280 no. 1; *Hörster* 526) and the SLOVENIAN LOA (§§ 35 and 39 - object or cause (purpose) contrary to constitution, mandatory rules or moral principles, § 40(3) – decisive unlawful motive, shared by the parties).

3. GERMAN law (CC § 134) speaks of violation of a statutory prohibition; as does the AUSTRIAN law (CC § 879) and ESTONIAN law (GPCCA § 87). The ITALIAN CC (art. 1418(1)) is framed in terms of mandatory rules, while the law in the NETHERLANDS (CC art. 3:40) has the concept of violation of an imperative statutory provision. The SWISS law (LOA art. 20) speaks simply of illegality.

4. FINNISH law has no general statutory provision on the validity of illegal contracts, but both doctrine and court practice accept that contracts infringing legal rules can be invalid. See *Telaranta* 250-274, and *Hemmo*, Sopimusoikeus I, 435-445.

5. In ENGLISH, IRISH and SCOTTISH law the standard texts all include chapter headings such as "Illegality", or "Statutory Invalidity". See further *Enonchong, McBryde*, Law of Contract in Scotland[1], paras. 19.28-19.36, and, for the confused development of Scottish law, *Macgregor* in *Reid & Zimmermann* vol. II, chap. 5.

6. In SLOVAK law the object of the juridical act must be lawful. An unlawful juridical act is a) a juridical act whose content or purpose is at variance with a statute, b) a juridical act whose content or purpose circumvent the statute c) a juridical act whose content or purpose is contrary to good morals (*contra bonos mores*) (see Lazar et al. p. 130, and CC § 39).

7. The CZECH CC makes invalid every juridical act whose content or purpose contradicts or circumvents the law (§ 39). The contradiction is judged objectively, so it does not matter whether the parties or any of them knew about the contradiction, *Švestka/Jehlička/Škárová*, OZ[9], 256. Circumvention of the law is construed by reference to the purpose of the law *(ratio legis), Švestka/Jehlička/Škárová*, OZ[9], 257.

II. Effects of infringement

8. The general starting point in most European legal systems is that contracts violating legal rules are void. There is often, however, considerable flexibility in the law.

9. Art. 1418 of the ITALIAN CC provides that: "A contract that is contrary to mandatory rules is void, *unless the law provides otherwise*." And in the case of violation of a prohibition imposed by law, if this law explicitly provides for nullity the contract is void; but if the prohibition concerns the content, or the subjects of the contract, and in case of violation it provides an administrative or criminal sanction, without saying anything about the contract, nullity is ascertained having regard to the case in point (see Cass. 24 May 2003, no. 8236, I Contratti, no. 1/2004, 46; *Gazzoni* 988-989).

10. FRENCH, BELGIAN, LUXEMBOURG, SLOVENIAN and AUSTRIAN law distinguish between "absolute" and "relative nullity" *Terré/Simler/Lequette*, Les obligations[6], no. 357. Absolutely null and void are agreements violating statutes that aim at the protection of interests of the general public and safety. Everyone may resort to the nullity; no specific act of avoidance is necessary. However in FRENCH law, "absolute nullity" must be sought in court. Besides, the judge may choose to raise the nullity ("soulever d'office"), should the nullity be absolute or relative (NCPC arts. 12 and 16). However, if the violated statute aims at nothing more than the protection of a

party to the contractual agreement, that party has to claim that the contract is null and void before a competent court. So, a victim of usurious activity [cf. AUSTRIAN CC 879(2) No. 4 see *Bydlinski*, Bürgerliches Recht I[3], nos. 7/43 et seq.] who wants to have the agreement declared null and void has to invoke nullity of the bargain. (See Appel Luxembourg, 29 march 2000, LJUS 99819186). In Belgium however both, absolute and relative nullity, must be claimed in court (*Cornelis*, Algemene theorie van de verbintenis, no. 557; *Stijns*, Verbintenissenrecht I, nos. 50 & 176; *Van Gerven* (2006) 146). In SLOVENIAN law, relative invalidity (avoidability) must be claimed in court, whereas the absolute invalidity (nullity) exists per se and the decision of the court is declaratory.

11. SLOVAK law also distinguish between absolute and relative nullity. But relatively null juridical acts are only those expressly mentioned as such in the statutes (CC § 40a).

12. CZECH law knows the categories of absolute and relative nullity – juridical acts affected by absolute nullity are void, while relatively null juridical acts are merely voidable. Grounds causing relative nullity are expressly enumerated in the CC (§ 40a); all other nullity grounds result in absolute nullity. Absolutely null juridical acts (and relatively null juridical acts as well, if the nullity has been rightfully claimed) have no legal consequences: it is as if they had never been made. Everybody who has a sufficient legal interest may claim the absolute nullity at the court, but the nullity exists independently of court proceedings, *Švestka/Jehlička/Škárová*, OZ[9], 243. In commercial relationships, on the contrary, it is held that where a sanction of nullity is laid down for the protection of one of the parties only, the nullity may be claimed only by this party (Ccom § 267(1)).

13. The GERMAN CC § 134, the SPANISH CC (art. 6.3), the PORTUGUESE CC (art. 294), the POLISH CC (art. 58 § 1), the SLOVENIAN LOA (§ 86) and the GREEK CC (art. 174) state that a juridical act which violates a statutory prohibition is void unless a contrary intention appears from the statute. In AUSTRIA not every contractual agreement that is concluded in violation of a statutory provision is null and void. Unless a statute expressly provides that an agreement by which it is violated is null and void the effect of the illegality of an agreement depends on the normative goal and purpose of the violated statute. That need not necessarily entail nullity but may suggest other sanctions. Thus the validity of an agreement violating statutory rules not affecting its content but only the manner, place and time of its conclusion is upheld (see *Bydlinski*, Bürgerliches Recht I[3], no. 7/36). Somewhat similarly, in the NETHERLANDS, the CC art. 3:40(2) and (3), while stating that violation of an imperative statutory provision entails nullity, also provide that if the statute is for the protection of only one of the parties to a contract, the contract can only be annulled (i.e. it is not absolutely void). This does not apply if the necessary implication of the statute produces a different result, while statutory provisions which do not purport to invalidate juridical acts contrary to them will not have the above rule applied to them. The basic thrust of these provisions is to ensure judicial consideration of whether giving effect to the statute requires the nullity of the contract as a supporting sanction. Again, in PORTUGAL, in consumer credit transactions the omission of certain elements makes the contract void, avoidable or partially unenforceable according to the nature of the omitted elements (Decree-law no. 349/91, 21 Sept 1991, art. 7 nos. 1, 2, 3). But where the statute is silent, the effect upon the contract may be inferred from the purpose of the rule: e.g. a contract of sale of goods made after the shop's legal closing time is valid, since the applicable mandatory rule concerns fair competition only (*Hörster* 521). But if a contracting party does not have the professional qualifications required by law the contract is void (STJ 05.11.74). The ESTONIAN

GPCCA § 87 is to the same effect: a transaction contrary to a statutory prohibition is void only if the purpose of the prohibition is to render the transaction void upon violation of the prohibition, especially if it is provided by law that certain legal consequence must not arise. In SLOVENIAN law, if the violated statutory prohibition is "less important" and the contract was performed, nullity cannot be invoked, see LOA § 90(2).

14. In ENGLISH and SCOTTISH law, while an illegal contract may be void, it is more often presented as "unenforceable", in that neither specific performance nor damages are available to the parties. Thus a party may withdraw from an illegal contract with impunity. Courts will take notice of illegality of their own motion and dismiss actions accordingly (*Chitty* on Contracts I[27], no. 16-199; *MacQueen and Thomson*, Contract Law in Scotland, § 7.15; *McBryde*, Law of Contract in Scotland[1], paras. 13.31-13.34, 19.17-19.27).). Again, however, there is flexibility in the law on contracts infringing statutory provisions. There are several cases in which the courts have considered whether giving effect to the statute requires the nullity of the contract as a supporting sanction (see e.g. *St John Shipping Corp.* v. *Joseph Rank Ltd.* [1957] 1 QB 267; *Archbolds (Freightage) Ltd.* v. *S Spangletts Ltd.* [1961] 2 QB 374, CA). English law is currently under review by the Law Commission: see its Consultation Paper on Illegal Transactions. The Commission's provisional proposals were to the effect that courts should have the discretion to decide whether or not illegality should act as a defence to a claim for contractual enforcement. But the discretion should be structured by requiring the court to take account of specific factors: (1) the seriousness of the illegality involved; (2) the knowledge and intention of the party seeking enforcement; (3) whether denying relief will act as a deterrent; (4) whether denial of relief will further the purpose of the rule rendering the contract illegal; and (5) whether denying relief is proportionate to the illegality involved.

15. In DANISH law, the effect upon the contract of a violation of a rule of law is the effect declared by the rule in question. If the rule is silent on this point the effect depends upon the circumstances. The issue mainly arises when a prohibition dictated by the public interest is violated. Some infringements do not entail invalidity. Purchases made after business hours in violation of the Danish Shop Act, and moonlight agreements have not been considered invalid. However it is maintained in *Andersen & Madsen* (244 note 265) that a party who has only promised to perform but not actually performed the illegal act may refuse to do so. However, it is submitted that a party who has received the performance will often have to pay for it. On the other hand agreements which violated the price ceilings fixed by law, and an agreement to evade the prohibition upon selling land to foreigners by agreeing on a tenancy for life (decision by the Western High Court in Ugeskrift for Retsvæsen 1972 794) has been declared unenforceable. See generally, *Ussing*, Aftaler[3], 186 ff; *Gomard*, Almindelig kontraktsret[2], 195, and *Lynge Andersen* 242 f and 244 ff.

16. In SWEDEN there is no general statutory provision. Some statutes explicitly declare that contracts involving illegal acts or tainted by illegality are null and void but other statutes do not deal with the legal effects at all. Generally, Swedish law seems to be in line with the Article (see, in particular the principles referred to by the Supreme Court in NJA 1997 p. 93 and the principle of partial invalidity in Jordabalken chap. 4 § 1(2); a comprehensive study by Jan Andersson appears in TfR 1999, 533-752).

17. In FINLAND the effect of illegality on a contract depends upon the situation. See *Telaranta* 250-274 and *Hemmo*, Sopimusoikeus I, 435-445.

18. Under the HUNGARIAN CC § 200(2) illegal contracts void, unless the legal regulation infringed or evaded stipulates another legal consequence. A contract which is manifestly contrary to good morals is void.

II.–7:303: Effects of nullity or avoidance

(1) The question whether either party has a right to the return of whatever has been transferred or supplied under a contract, or part of a contract, which is void or has been avoided under this Section, or a monetary equivalent, is regulated by the rules on unjustified enrichment.

(2) The effect of nullity or avoidance under this Section on the ownership of property which has been transferred under the void or avoided contract, or part of a contract, is governed by the rules on the transfer of property.

(3) This Article is subject to the powers of the court to modify the contract or its effects.

COMMENTS

A. Restitution

If the prohibitions and rules of other legal orders commonly fail to state the effect upon contracts that infringe their requirements, it is even more common for them to fail to state what are the remedial consequences of a finding of invalidity for the contract where one or both parties have commenced performance of the obligations under it. In general, for reasons ranging from deterrence, punishment or protection of the dignity of the courts to a notion that parties to an illegal or immoral transaction have placed themselves outside the legal order, the national systems of Europe have commenced their analysis of this problem from the traditional basis of Roman law, which denied restitution and left the parties in whatever position had been achieved at the time the invalidity was recognised (*ex turpi causa melior est conditio possidentis*). But restitution, or unwinding the performances rendered under the illegal contract, appears to be a more appropriate response to the invalidity. The problems to which denial of restitution can lead, namely leaving the effects of the invalidity standing, may be illustrated by the following example:

> *Illustration*
> A statute declares that any contract using an abolished system of weights and measures is to be void. A sells goods to B in a contract using the abolished system of weights and measures to determine the quantity of goods to be delivered and the price. B, having taken delivery and consumed the goods, refuses to pay. If A has no action for the contract price, denial of restitution would allow B to have the benefit of the infringing transaction without paying for it.

This Article therefore recognises in principle that restitution of performances rendered under the invalid contract may be available but refers to the rules on unjustified enrichment for the detailed rules.

Similarly, the Article refers to the law on the transfer of property for the proprietary effects of a contract which is void or avoided under this Section. In cases of transfer of movables regulated by the later Book on that subject the effect is that there will normally be no effective transfer of the property. The nullity or avoidance has retrospective proprietary effect. The property will remain in the ownership of the party who owned it before it was transferred under the void or avoided contract.

The rules here are the same as in Section 2 of this chapter but their effect may be modified by the powers of the court to modify a contract, or the effects of a contract, which infringes mandatory rules.

NOTES

1. The starting point for many systems is that restitutionary as well as contractual remedies are unavailable to parties in a transaction tainted by illegality or immorality (as in AUSTRIA, CC § 1174, but with a limited scope of application, as it applies only to cases in which the party *knew* of the illegality and performed to realise the illegal or immoral action; see *Rebhahn* in Schwimman, ABGB V, 3rd ed., § 1174 nos. 3 et seq.); SWITZERLAND, LOA art. 66; ITALY, CC art. 2035). In FRANCE, LUXEMBOURG and BELGIUM this approach has also been developed by the courts. This is usually taken to follow from the application of two principles ultimately derived from Roman law: (1) no claim can be based upon the claimant's own wrongdoing; (2) in cases of equal wrongdoing, there is no recovery (D 12.5.4.3). There is often a distinction drawn between illegality and immorality, with restitution being easier to obtain in the former case. This approach is much used in FRANCE, but leads to difficult borderline questions about whether a transaction is illegal or immoral. Refusal of restitution is now largely at the discretion of the court and this refusal is becoming exceptional (in France: *Terré/Simler/Lequette*, Les obligations[6], nos. 428 ff with the developments on *Nemo Auditur* and in *pari causa turpidunis*, two maxims which constitute the basis of the refusal as well of its limits; in Belgium: Cass. 8 Dec. 1966, Pas. belge 1967, 434; Cass. 24 Sept. 1976, Pas. belge 1977, 101; Cass. 5 Sept. 1996, Pas. belge 1996, 760; *Cornelis*, Algemene theorie van de verbintenis, no. 567; *Kruithof & Bocken*, TPR 1994, no. 164;). See for Luxembourg, Cour 26 march 1998, 31, 13; 1 March 2000, 31, 367. In SPAIN, under CC arts. 1305, 1306, recovery depends on whether or not the illegality is a criminal offence, and whether or not the illicit purpose is attributable to both parties. Where the illegality is a criminal offence attributable to both parties, they will have no actions against each other and the things which were the object of the contract will be treated as instruments of the criminal offence (CC art. 1305(1)). If only one of the parties is to blame for the criminal offence, then that party will not be granted the right to recover anything rendered in execution of the contract, but the other party will be able to recover and will not be compelled to perform (CC art. 1305(2)). Where the illegality does not constitute a criminal offence, the following rules apply: if both parties are to blame for the illegality, neither is entitled to demand recovery or ask for performance (CC art. 1306(1)); if only one of them is to blame, that party is not entitled to demand recovery or ask performance, while the innocent party may recover what was rendered and cannot be compelled to fulfil what was promised under the contract (CC art. 1306(1)).). In AUSTRIA restitution depends on the scope of the norm that was infringed. Restitution is granted if the transfer or supply as such is not tolerated (see Schwimann (-*Apathy and Riedler*), ABGB IV[3], § 879 no. 39).
2. The starting rule in GERMANY is that restitution is allowed, and the *ex turpi causa non oritur actio* defence in CC § 817, second sentence, is the exception to the general rule. It is regarded as a rule of a punitive character and applied rather restrictively. Furthermore, the provision requires actual knowledge that the contract was void: even knowledge of the factors that render the contract void does not suffice if the party did not know the prohibitory rule; in any case "ought to have known" does not suffice. § 817 is applied by analogy if only the party rendering performance knew that the

contract was illegal. In SLOVENIA, restitution is generally allowed, but when a contract has immoral content or cause (purpose), the court may, with regard to fairness to the parties and the scope of the norm infringed, refuse restitution, see LOA § 87. In the NETHERLANDS, the CC, following the jurisprudence of the Hoge Raad under the old Dutch code, rejects a general rule against restitution: restitution is allowed unless the court finds it morally unacceptable to assess the value of a particular act or performance (CC art. 6:211). The GREEK CC requires restitution of a prestation the cause of which is illegal or immoral (art. 904), although this is restricted in immorality cases if the immoral cause also affected the party making the prestation (art. 907). In ESTONIAN law, there is a general clause stating that transferor may not claim restitution if it would be contradictory to the provision which prescribes the nullity of the transaction or to the normative purpose of it (LOA § 1028(2) 3)). In PORTUGAL there are no special rules about restitution in the case of a contract which is illegal or contrary to good custom or public policy: the general rules are applicable. This is also the position under POLISH, SLOVAK law and CZECH law (which fully follows the unjustified enrichment regulation).

3. The ITALIAN CC (art. 2035) provides that a person who has made a performance for a purpose which, as it affects both parties, is contrary to morals cannot demand return of what has been paid. Art. 2035 is not applicable to a contract in fraud of law (art. 1344), because in this case the right to restitution of what was paid is admitted according to art. 2033.

4. As far as illegal contracts in DANISH law are concerned, restitution will be granted only when it serves the purpose of the prohibition to grant it, e.g. when the purpose is to prevent the recipient from acquiring the property in question such as an unlicensed person buying a gun or a foreigner purchasing Danish land (*Ussing*, Aftaler[3], 201). With contracts against morality, it is generally held that restitution will be granted when by accepting the performance the recipient acted *contra bonos mores* and the supplier did not. Thus restitution will be denied if both parties acted immorally. However, if only the recipient acted inappropriately restitution will often be granted, as in cases where a person has received money for doing something which the law favours, e.g. abstention from committing a crime (*Ussing*, Aftaler[3], 199).

5. In ENGLISH law the general rule is against restitution but it is possible in exceptional cases where the claimant is not *in pari delicto* with the recipient, or the transaction has not been completely executed, or if the claim can be formulated without reference to the prohibited contract (*Treitel*, The Law of Contract[9], 490-504). IRISH law is similar (*Clark* 314-19), and so is SCOTTISH law (*Stair Memorial Encyclopaedia* vol. 15, paras. 764-765), although in one Scottish case where, by statute, contracts using old Scottish measures were void, restitutionary recovery was allowed in respect of a sale of potatoes by the Scottish acre, on the ground that there was no moral turpitude in such a transaction (*Cuthbertson* v. *Lowes* (1870) 8 M 1073; see further *Macgregor*, (2000) 4 ELR 19-45*; McBryde*, Law of Contract in Scotland[1], paras. 13.31-13.34, 19.22-19.26). The English Law Commission in its Consultation Paper on Illegal Transactions suggested that a court should have discretion to decide whether or not illegality should be recognised as a defence to a claim for restitution, various factors being taken into account. In addition the court should have a discretion to allow a party to withdraw from an illegal contract and to have restitution where this will reduce the likelihood of the completion of an illegal act or purpose, although it must be satisfied that the contract could not be enforced against the claimant, that there is genuine repentance of the illegality, and that it is not too serious.

6. Under the HUNGARIAN CC § 237 the state of affairs which existed prior to the conclusion of the invalid contract is to be restored. If it cannot be, the court is to declare the contract effective for the period up to the date of judgment. An invalid contract may be declared valid if the cause of invalidity can be eliminated, in particular by eliminating the excessive benefit in the case of a usurious contract or the unreasonable advantage between the services of the parties. In such cases, it may be necessary to provide for the return of any services that might remain without consideration. With regard to usurious contracts, the court may cancel reimbursement in full or in part if the aggrieved party would find itself in dire straits. Nevertheless, the party who caused the injury is obliged to reimburse the aggrieved party for that part of the received services that is equivalent to the excessive advantage. On application by the public prosecutor, the court may award to the state the performance that is due to a party who has concluded a contract that is contrary to good morals, who has deceived or illegally threatened the other party, or who has otherwise proceeded fraudulently. In the case of a usurious contract, the performance to be returned to the party who caused the injury is to be awarded to the state. Anything due to the state under these provisions is usually awarded in cash.

7. For a comparative view see *Schlechtriem*, Restitution und Bereicherungsausgleich in Europa, pp. 216 et seq.

II.–7:304: Damages for loss

(1) A party to a contract which is void or avoided, in whole or in part, under this Section is entitled to damages from the other party for any loss suffered as a result of the invalidity, provided that the first party did not know and could not reasonably be expected to have known, and the other party knew or could reasonably be expected to have known, of the infringement.

(2) The damages recoverable are such as to place the aggrieved party as nearly as possible in the position in which that party would have been if the contract had not been concluded or the infringing term had not been included.

COMMENTS

Restitution will not be possible in every case, since benefits will not necessarily have been transferred between the parties when the invalidity takes effect; yet one of the parties may be unfairly out of pocket as a result of concluding the invalid contract. Not every law has in the past provided a remedy in such a case and, in the case of an unlawful competitive agreement, the ECJ has said that a remedy in damages against the other party to the illegal agreement should be provided. (*Courage Ltd* v *Crehan* [2001] All ER (EC) 886; and see the Advocate General's opinion at para 41). The Article accordingly provides for a right to damages. It would be inappropriate for the damages to extend to the positive or expectation interest of the party, since putting the party in the same position as if the obligations under the contract had been performed would be to enforce the invalid contract. The aim of the damages should therefore be to place the aggrieved party in the same position as if the contract had not been concluded. A party who knows or ought to have known of the infringement cannot, however, recover damages.

> *Illustration*
> Legislation requires the suppliers of certain chemicals to hold licences indicating compliance with safety and environmental standards. Contracts made by suppliers holding no licence are declared to be null. Company A, which has recently been deprived of its licence by government action, nevertheless concludes a contract for the supply of the chemicals to Company B, which is unaware of A's fall from grace and buys from it because its price is lower than that of the only other licensed supplier, C. B intends to use the chemicals for industrial purposes leading on to profitable contracts of its own, and spends money preparing its premises to handle the material safely. A's illegal conduct is discovered and the contract with B is declared null before either delivery or payment have taken place. B is unable to make the intended further contracts. While B cannot recover the expectation loss of profit on these further contracts, it may recover its incidental reliance expenditure on preparing its premises and any other costs associated with having contracted with A. These might include a figure for the loss of the opportunity to contract with C (as distinct from the extra cost of contracting with C or the profits which would have been earned had B concluded the contract with C rather than A).

The solution here is similar to that adopted for avoidance for a vice of consent under Section 2.

NOTES

1. In former times GERMAN law by CC §§ 309, 307 enabled a party to a contract contrary to a statutory provision to recover damages protecting that party's negative interest if the other party knew or should have known of the illegality and the first party did not; today the same may follow from general rules of culpa in contrahendo, §§ 311(2), 280, 276. Also see ESTONIAN law (LOA § 15). The same is true for GREEK law only when the contract itself is void (CC arts. 174, 180); in other cases of legal impossibility, which exists when the fulfilment of the performance is prevented on legal grounds, if there is a fault on the part of the debtor, then the interest owed is a *positive* one (CC arts. 365, 362, 363). Under AUSTRIAN and CZECH law a claim for damages is available only in the case of fault of the party responsible for the infringement of the law. In PORTUGUESE law there are no special rules about damages for contracts which are illegal or contrary to good custom or public policy: the general rules are applicable. This is also the position under POLISH, SLOVAK and HUNGARIAN law. DANISH law will only compensate for the reliance interest and only if this is not inconsistent with the law or with morality (*Ussing*, Aftaler[3], 259 ff).
2. The ITALIAN CC (art. 1338) provides that "A party who knows or should know the existence of a reason for invalidity of the contract and does not give notice to the other party is bound to compensate for the damage suffered by the latter in relying, without fault, on the validity of the contract." See *Sacco and De Nova*, Il contratto I[2], 605-608; *Bianca*, Diritto civile III, 170-173). The compensation is aimed at recovering the loss suffered, (so called "negative interest") and putting the party as far as possible in the same position as if the contract had not been made. This means that positive interest (what the party would have gained if the contract had been performed) is excluded (Cass. 30 July 2004, no. 14539, Corr.giur. 2005/8, 1099). The same is true for SLOVENIAN law, see LOA § 91.
3. ENGLISH, IRISH and SCOTTISH law do not have rules applicable generally to cases covered by these articles. In ENGLISH law, where the illegality was the fault of one party and the other party was innocent, the party at fault has been held liable for breach of a "collateral contract" (e.g. *Strongman (1945) Ltd. v. Sincock* [1955] 2 QB 525, CA (employer liable for failure to obtain licence needed for building work) (see *Treitel*, The Law of Contract[9], para. 11-121). As explained earlier (see Notes to Article II-7:214), damages may also be recovered if there has been fraud or negligent misrepresentation. But generally "English law does not allow a party to an illegal agreement to claim damages from the other party for loss caused to him by being a party to the illegal agreement" (*Gibbs Mew plc v. Gemmel* [1999] 1 EGLR 43, 49). This may lead to a party who has entered an illegal contract as the result of economic pressure from the other being unable to claim, an outcome which has been criticised by the ECJ (*Courage Ltd. v. Crehan*, Case C-453/99 [2001] ECR 1-6297).
4. In FRENCH law, if the nullity of the contract causes a prejudice to one party because of expenses incurred in view of the conclusion of the contract, he or she is entitled to damages from the party liable for the nullity, provided fault is proved. If both parties know the cause of nullity, a partition of liabilities will be pronounced (*Malaurie and Aynès*, Les obligations[9], no. 730).

CHAPTER 8: INTERPRETATION

Section 1: Interpretation of contracts

II.–8:101: General rules

(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

(2) If one party intended the contract, or a term or expression used in it, to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could reasonably be expected to have been aware, of the first party's intention, the contract is to be interpreted in the way intended by the first party.

(3) The contract is, however, to be interpreted according to the meaning which a reasonable person would give to it:

(a) if an intention cannot be established under the preceding paragraphs; or
(b) if the question arises with a person, not being a party to the contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract's apparent meaning.

COMMENTS

A. General

Contracts are interpreted in order to determine their contents. This is particularly the case when the contract contains a term which is ambiguous, obscure or vague; that is, when one cannot immediately see the exact meaning. But interpretation will also be necessary if terms which seem clear enough in themselves contradict each other, or cease to be clear when the general setting of the contract is taken into account.

When a contract contains gaps which need to be filled, the process is sometimes referred to as completive interpretation (*ergänzande Auslegung*) or the addition of implied terms. This is covered in II.–9:101 (Terms of a contract).

Determining the exact meaning of the contract may be necessary before it can be determined whether the contract is valid or whether there has been a non-performance. For example, it may be necessary to decide whether the debtor's obligation was one to produce a particular result (*obligation de résultat*) or only one to use reasonable care and skill (*obligation de moyens*).

Any kind of contract may need interpretation, from a very formal contract drawn up by, and concluded in the presence of, a notary to a very informal contract concluded orally. Similarly, the rules of interpretation apply to contracts made on standard forms. In fact some of the rules apply particularly to these types of contract. Interpretation may be needed for the whole or part of a contract and for any term or expression used in it. And it may be needed for non-verbal expressions of intention such as symbols, signs or gestures.

It is not only judges who are called on to interpret contracts. Indeed one of the functions of rules of interpretation is to enable the parties and their advisers to apply the rules and arrive at an agreed interpretation in the light of them, thus possibly avoiding the need for litigation.

B. The search for common intention

Following the majority of laws of EU Member States, the general rules on interpretation combine the subjective method, according to which pre-eminence is given to the common intention of the parties, and the objective method which takes an external view by reference to objective criteria such as reasonableness, good faith etc. The person interpreting the contract (the "interpreter") is thus encouraged to start by looking to see what was the parties' common intention at the time the contract was made. This is normal because the contract is primarily the creation of the parties and the interpreter should respect their intentions, expressed or implicit, even if their will was expressed obscurely or ambiguously. One of the clearest cases for the application of the rule in paragraph (1) is where the parties have, perhaps for reasons of commercial secrecy, deliberately used code words in contracting.

In seeking this common intention the interpreter should pay particular attention to the relevant circumstances as set out in the next Article.

There may be a common intention of the parties even in the case of a contract of adhesion, in so far as the party who was not responsible for drafting the contract had a sufficient knowledge of the clauses and adhered to them.

The search for common intention is compatible with rules which forbid the proof of matters in addition or contrary to a writing, for example if the parties have negotiated a merger clause to the effect that the writing contains all the terms of the contract, as it refers to external elements only to clarify the meaning of a clause, not to contradict it.

The Article states another important point: the interpreter should give effect to the common intention of the parties over the letter of the contract. This means that in a case of conflict between the words written and the common intention, it is the latter which must prevail. Thus if a document is described as a loan but its content indicates that it is really a lease, the interpreter should not attach importance to the description in the document.

> *Illustration 1*
> The owner of a large building employs a painting firm to repaint the "Exterior window frames". The painters repaint the outside of the frames of the exterior windows and claim that they have finished the job; the owner claims that the inside surfaces of the frames to exterior windows should also have been painted. It is proved by the preliminary documents that the representatives of the owner and of the painting firm who negotiated the contract had clearly contemplated both surfaces being done. Although the normal interpretation might suggest that only the outside surfaces were within the contract, since exterior and interior decoration are usually done separately, the parties' common intention should prevail.

All the same, the interpreter must not, under the guise of interpretation, modify the clear and precise meaning of the contract where there is nothing to indicate that this is required by the Article. This would be to ignore the principle of the binding force of contract.

C. Party knows the real intention of the other party

If one party's words do not accurately express that party's intention, for instance because the intention is expressed wrongly or the wrong words are used, the other party can normally rely on the reasonable meaning of the first party's words. But this is not the case if the second party knew or could reasonably be expected to have known of the first party's actual intention. If the second party concludes the contract without pointing out the problem the first party's intended interpretation should be binding.

> *Illustration 2*
> A, a fur trader, offers to sell B, another fur trader, hare skins at so much per kilo; this is a typing error for so much a piece. In the trade, skins are usually sold by the piece and, as there are about six skins to the kilo, the stated price is absurdly low. B knows or could reasonably be expected to know what A really meant but nonetheless purports to accept. There is a contract at the stated price per piece as A intended.

One may see in this rule also a consequence of the rule that the intention of the parties prevails over the letter of the contract.

D. Objective method

The interpreter should not try to discover the intentions of the parties at any price and end up deciding what they were in an arbitrary way. When a common intention cannot be discerned, and paragraph (2) of the Article does not apply, paragraph (3) comes into operation. This refers not to fictitious intentions but to the meaning which a reasonable person would have given to the contract. A reasonable person would, of course, take into account the objective circumstances in which the contract was concluded and the nature of the parties between whom it was concluded. This provision will be of very wide application because in practice it is quite common for parties to have no special intention as to the meaning of expressions used in their contract. But equally this use of objective interpretation does not empower the judge to overturn the contract under the guise of interpretation and to go against the unequivocal will of the parties.

Paragraph (3) also applies in a question with a third party who has reasonably and in good faith relied on the apparent objective meaning of the contract. Third parties who rely, reasonably and in good faith, on the apparent meaning of contracts cannot be expected to be bound by special meanings secretly attached to terms or expressions by the parties. Paragraph (3) provides protection for third parties in this type of case. It will be remembered also that many contracts of a type which are intended from the outset to be relied on by third parties (such as negotiable instruments and contracts registered in a land register) are outwith the scope of the model rules and will be regulated by special rules.

However, paragraph (3) preserves the rule that an assignee has no better right against the other party to the original contract than the assignor. An assignee has to take many risks, including the risk that a contract has been modified by agreement between the parties since it was concluded, and has appropriate rights against the assignor who conceals the existence of defences or exceptions available to the other party to the contract. To allow an assignee to take advantage of the apparent meaning of a term, when its real meaning as between the parties was something else, would be to allow one party to a contract to cheat the other party by the simple expedient of an assignment. This would be contrary to the requirements of good

faith and fair dealing. Of course, if the other party to the contract participated in a fraud on the assignee there would also be delictual remedies against that party based on the fraud.

NOTES

I. General

1. Some legal systems have detailed legislative provisions on interpretation: FRENCH, BELGIAN and LUXEMBOURG CCs arts. 1156 - 1164 (see in France *Terré/Simler/Lequette*, Les obligations[6], nos. 418-436; in Belgium: *Stijns*, Verbintenissenrecht I, nos. 73-81; *Stijns-Van Gerven-Wéry*, JT 1996, 716-718); SPANISH CC arts. 1258 and 1281 - 1289, and see *Ministerio de Justicia* II, 509 ff; ITALIAN CC arts. 1362- 1371 (see *Sacco and De Nova*, Il contratto II[2], 369 ff, *Bianca*, Diritto civile III, 414 ff, *Roppo*, Il contratto, 465 ff and *Antoniolli and Veneziano*, *Principles of European contract law and Italian law*, 251 ff); SLOVENIAN LOA §§ 82-85; ESTONIAN GPCCA § 75 (interpretation of declaration of intent), LOA § 29 (interpretation of contracts), LOA § 39 (interpretation of standard terms); also UNIDROIT arts. 4.1-4.8.
2. Others content themselves with statements of general principle: e.g. GERMAN CC §§ 133 and 157 (see Staudinger [-*Singer*] BGB (2004), § 133 no. 3; AUSTRIAN CC §§ 914, 915; GREEK CC arts. 173 and 200; POLISH CC art. 65; PORTUGUESE CC arts. 236-238 (see *Fernandes* II, 409 ff).; CZECH CC § 35(2) and (3); CISG art. 8.
3. The DUTCH CC deliberately omits rules of interpretation as being too general and too well-known. They are to be found in the case law (*Asser-Hartkamp*, Verbintenissenrecht II, nos. 279 ff). Similarly, in the NORDIC countries rules of interpretation are to be found in case law and doctrine. See for Denmark, *Lynge Andersen* 374 ff and *Gomard*, Almindelig kontraktsret[2], 245 ff; for Finland, *Hemmo*, Sopimusoikeus I, 561-664 and *Wilhelmsson*, Standardavtal, *passim*; for Sweden, *Adlercreutz*, Avtalsrätt II[4], 31 ff and *Ramberg*, Allmän avtalsrätt[4], 179 ff.
4. ENGLISH, SCOTTISH and IRISH rules of interpretation are derived from case law and are sometimes not clearly distinct from rules of evidence and rules about mistake (for England, see *McKendrick* 95-202; Scotland, *McBryde*, Law of Contract in Scotland[1], para. 8; see also Scottish Law Commission, Report on Interpretation (1997), which proposes a systematisation of the rules on Interpretation which is very much on the lines of this Chapter; and *MacQueen & Zimmermann* (-*Clive)* 176-203.
5. In FRANCE and LUXEMBOURG the rules of interpretation are considered to be mere guidelines which do not have to be followed (see for France, Cass.req. 24 February 1868, D.P. 1868.1.308 and for Luxembourg, 24 December 1896, 4, 230, Cour, 18 June 1987, 27, 117, *Terré/Simler/Lequette*, Les obligations[6], nos. 458 ff). The BELGIAN case law has abandoned this position and violation of one of the rules on interpretation by a judge can be invoked before the *Cour de cassation* (Cass. 22 March 1979, Arr.Cass 1978-79, 860; Cass. 27 Nov. 1986, Pas. belge 1987, 392; Cass. 24 March 1988, Arr.Cass. 1987-88, 972; Cass. 10 Jan. 1994, Arr.Cass. 1994, 16), as has the ITALIAN doctrine and case law (see *Scognamiglio* 179, *Sacco and De Nova*, Il contratto II[2], 371 ff and, e.g., Cass. 30 January 1995, no. 1092; Cass.sez.lav. 4 July 2005, no. 14158). Similarly, violation of the rules on interpretation may be bases for appeal to the Supreme Court in ESTONIA (e.g. Supreme Court Civil Chamber's decisions from 30 November 2004, no. 3-2-1-129-04 and 11 June 2007, no. 3-2-1-64-07).

6. In France, interpretation is a question of fact which is not reviewed by the *Cour de cassation*, unless clear and unambiguous clauses of the agreement have been "denatured" (since Cass.civ. 15 April 1872, D.P. 1872.1.176) and the scope of this control of "denaturation" has constantly been broadened. The position is similar in Italy (*Bianca*, Diritto civile III, 413 ff) and generally also in Germany, see Staudinger [-*Singer*] BGB (2004), § 133 no. 79. In England, on the other hand, interpretation is a question of law, as it is in Greece (A.P. 1176/1997, NoB 1977.709) and Portugal (STJ 8 May 1991, BolMinJus 407, 487 ff).

7. See generally *Zweigert and Kötz*, An Introduction to Comparative law[3], 400-409; *Kötz*, European Contract Law I, chap. 7.

II. Principle of common intention

8. The most generally accepted principle, which flows from the will theory of contract (*Terré/Simler/Lequette*, Les obligations[6], nos. 20 ff) is that of interpretation according to the common intention of the parties, complemented sometimes by the warning that "one should not simply take the words in their literal meaning" (FRENCH, BELGIAN and LUXEMBOURG CCs art. 1156). See also GERMAN CC § 133; AUSTRIAN CC § 914; ITALIAN CC art. 1362; GREEK CC arts. 173 and 200; DUTCH CC art. 3:33 (by implication) and the case law, e.g. the *Haviltex* case, HR 13 March 1981, NedJur 1981, 635; SPANISH law, CC art. 1281; POLISH CC art. 65 § 2; SLOVENIAN LOA § 82(2). and ESTONIAN LOA § 29(1). The NORDIC laws are to the same effect, *Gomard*, Almindelig kontraktsret[2], 249. See also UNIDROIT art. 4.1(1) and CISG art. 8.1.

9. In contrast, ENGLISH and IRISH law traditionally did not permit a search for the intentions of the parties outside the document which contains their agreement (*Lovell & Christmas Ltd.* v. *Wall* (1911) 104 LT 85, CA. However, if the meaning of the words is not clear, one must take into account commercial certainty and the factual matrix of the contract (*Prenn* v. *Simmonds* [1971] 1 WLR 1381, HL). More recently the courts have softened their approach. The contract must be interpreted in a way that will make commercial sense, even if that means disregarding the literal meaning of the words used; *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 WLR 896 (HL). See *Chitty* on Contracts I[27], nos. 12-050 ff. The CZECH CC in § 35(2) expressly provides that the will may be taken into account only to such extent as not be contrary to the wording of the juridical act.

10. In SCOTTISH law the contract is to be interpreted according to the common intention of the parties as expressed in the contract; *McBryde*, Law of Contract in Scotland[1], paras. 8.02-8.04. The old doctrines of excessive concentration on the "ordinary" meaning of words and on not going outside the terms of a contract document unless there was ambiguity have now been replaced by an approach which stresses interpretation in the whole context, including relevant surrounding circumstances. See e.g. *Credential Bath Street Ltd. v Venture Investment Placement Ltd.* [2007] CSOH 208.

11. The SLOVAK CC and Ccom deal with the interpretation of contracts under the general rules on the interpretation of juridical acts and also specifically. In CC § 35 there is the fundamental principle of interpretation, but it refers to all juridical acts, not only contacts. According to § 35(2) "Legal acts expressed in words shall be interpreted not only according to their linguistic expression but in particular also according to the will of the person who did the legal act unless this will is at variance with the linguistic expression." As we can see, a legal act is interpreted according to the will of the person who did it only if this is not at variance with the linguistic expression. But

we can also say that the "linguistic expression" is not the same as the literal meaning of the words. Only if the will of parties is sternly different in comparison with the linguistic expression, can the contract not be interpreted according to their will. A rule of interpretation of contracts according to the common intention of the parties is not given expressly in the CC or the Ccom, but the importance of the common will in interpretation is clear from theory and decisions of courts and also for example from CC § 41a: "(1) If an invalid legal act has the essentials of another act that is valid, this act may be appealed to if it obviously follows from the circumstances that it expresses the will of the acting person. (2) If a legal act is to cover up another legal act, this other legal act is valid if it corresponds to the will of participants and all its requisites are met. The invalidity of such legal act cannot be appealed to vis-à-vis a participant who considered it not to be covered up."

III. One party aware of the other party's real intention (paragraph (2))

12. This rule is to be found in ENGLISH and IRISH law: *Centrovincial Estates plc* v. *Merchant Investors Assurance Ltd.* [1983] Com LR 158, CA (illustration 2 is derived from *Hartog* v. *Colin & Shields* [1939] 3 AllER 566, QBD and SCOTTISH law (*Muirhead & Turnbull v. Dickson* (1905) 7 F 686 at 694 per Lord President Dunedin); though in that case it was said that the contract was void for mistake, it is thought that the mistaken party (the seller) could have held the non-mistaken party (the buyer) to a contract on the terms the seller intended: see *Chitty* on Contracts I[27], no. 5-068), and it seems that the contract document can be rectified accordingly, cf. *Commission for New Towns* v. *Cooper* [1995] 2 WLR 677, CA. The rule is also clearly established in SCOTTISH law, *Sutton* v. *Ciceri* (1890) 17R (HL) 40. In CZECH law the rule of paragraph (2) is expressly formulated for commercial relations only (Ccom § 266(1)), but may be probably deduced also from the CC's more general rules. In SLOVENIAN law this rule can be deduced from LOA §§ 82(2) and 459 no. 2.

13. A similar rule is to be found in CISG art. 8, and see also SPANISH CC art. 1258 and ESTONIAN LOA § 29(3). It is also to be found in the DUTCH and AUSTRIAN jurisdiction (see respectively the *Haviltex* case, above, and OGH 11 July 1985, JBl 1986, 173. It is generally accepted in NORDIC law, based on Contract Acts § 32(1), see *Gomard*, Almindelig kontraktsret[2], 169; *Ramberg*, Allmän avtalsrätt[4], 129, and in FINLAND, *Hemmo*, Sopimusoikeus I, 624-631. GERMAN law is to the same effect: RG 8 June 1920, RGZ 99, 147.

14. In FRENCH, BELGIAN and LUXEMBOURG law, the rule in paragraph (2) does not appear openly in the jurisprudence, nor is it discussed in doctrine. These laws rely on general rules on interpretation (e.g. the common intention will prevail over the letter of the contract), good faith and error. It is the same in ITALIAN law.

15. This rule appears in the SLOVAK Ccom § 266: "(1) The manifestation of will shall be interpreted according to the intention of the acting person, if this intention was known or must have been known to the party to which the manifestation of will was directed."

IV. Principle of objective interpretation (paragraph (3))

16. Interpretation according to the meaning which would be given to the words by a reasonable person in the same situation is the basic rule in some systems: PORTUGUESE CC art. 236(1) (theory of the "impression gained by the recipient"); ENGLISH law, which applies the normal meaning of the words in the context in which they were used (see Lord Wilberforce's judgments in *Prenn* v. *Simmonds* [1971] 1 WLR 1381, HL and in *Reardon Smith Line Ltd.* v. *Yngvar Hansen-Tangen* [1976] 1 WLR 898, HL, especially at 995-996), unless it is clearly established that the parties shared a different intention (see *The Karen Oltmann* [1976] 2 Lloyd's Rep 708,

QBD).The rule is expressly stated to apply when it is not possible to discover any common intention of the parties by CISG art. 8(2) and Unidroit art. 4.1(2); see also AUSTRIAN CC § 914 (*objektiver Erklärungswert*; the contract has to be interpreted according to how a reasonable person would have understood the declarations of will); ESTONIAN LOA § 29(4) and NORDIC law, (*Gomard*, Almindelig kontraktsret[2], 251). The same holds true for POLAND where courts and legal writers hold that objective standards should be applied only if it is impossible to discover any common intention of the parties (see e.g. the Supreme Court decisions of June 13, 1963, II CR 589/62, OSNCP 1964/10, poz. 200, and February 20, 1986, III CRN 443/85, OSNCP 1986/12, poz. 211). More frequently, the principle of reasonable interpretation is not formulated explicitly but is applied in the guise of good faith: this is the case in GERMAN law, FRENCH and BELGIAN law, DUTCH law (see *Haviltex*, supra), ITALIAN law (see CC art. 1366 and also arts. 1367-1371), SPANISH law (on the latter see CC art. 1258) and GREEK law (*Balis* § 90). In DUTCH law, objective interpretation is the overriding approach to be used in cases where the contract is intended to affect the position of (a potentially large number of) third parties who were not involved in the conclusion of the contract and could not be aware of the intention of the parties (*Asser-Hartkamp*, Verbintenissenrecht II, no. 286a and DSM v. Fox, HR 20 February 2004, RvdW 2004, 34). In CZECH law the principle of objective interpretation generally takes a subsidiary role to the regard to the will of the parties (see e.g. Ccom § 266(2)); on the other hand, it takes a primary significance in the interpretation of unilateral juridical acts (CC § 35(3)). The position is similar in SLOVENIAN law, where there are no explicit rules, but the general principle is recognized, see *Schlechtriem/Možina*, p. 43.

17. The principle of objective interpretation is given in the SLOVAK Ccom § 266(2) "(2) In the event that it is impossible to interpret the manifestation of will under subsection 1 above, the manifestation of will shall be interpreted according to the meaning, which as a rule is assigned to it by a person of the same status as the status of the person to which the manifestation of will was directed. The terms, used in business, shall be interpreted according to the meaning which business circles usually attribute to them."

18. The HUNGARIAN CC § 207(1) states that in the event of a dispute, the contractual statements are to be interpreted as the other party must have understood them in the light of the presumed intent of the person issuing the statement and the circumstances of the case, in accordance with the general accepted meaning of the words. A waiver of rights is not to be broadly construed. The parties' secret reservations or concealed motives are immaterial with regard to the validity of the contract.

II.–8:102: Relevant matters

(1) In interpreting the contract, regard may be had, in particular, to:

(a) the circumstances in which it was concluded, including the preliminary negotiations;

(b) the conduct of the parties, even subsequent to the conclusion of the contract;

(c) the interpretation which has already been given by the parties to terms or expressions which are the same as, or similar to, those used in the contract and the practices they have established between themselves;

(d) the meaning commonly given to such terms or expressions in the branch of activity concerned and the interpretation such terms or expressions may already have received;

(e) the nature and purpose of the contract;

(f) usages; and

(g) good faith and fair dealing.

(2) In a question with a person, not being a party to the contract or a person such as an assignee who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract's apparent meaning, regard may be had to the circumstances mentioned in sub-paragraphs (a) to (c) above only to the extent that those circumstances were known to, or could reasonably be expected to have been known to, that person.

COMMENTS

A. Relevant matters

Paragraph (1) of the Article gives the interpreter a non-exhaustive list of matters which may be relevant in determining either the common intention of the parties or the reasonable meaning of the contract.

Thus the interpreter may consider the preliminary negotiations between the parties (paragraph (a)): for example, one of the parties may have defined a term in a letter and the other not have contested this interpretation when an opportunity arose. The interpreter may do this even where the parties have agreed that the written document embodies the entirety of their contract (merger clause), unless in an individually negotiated clause the parties have agreed that anterior negotiations may not be used even for purpose of interpretation. This sort of clause may be very useful when long and complicated negotiations were necessary for the contract.

The conduct of the parties, even after the making of the contract, may also provide indications as to the meaning of the contract (paragraph (b)).

Illustration 1

A German manufacturer of office supplies has engaged B to represent A in the north of France. The contract is for six years but the contractual relationship may be terminated without notice if B commits a serious non-performance of its obligations. One of these obligations is to visit each of the 20 universities in the area "every month". Assuming that this obligation applies only to the months, in the country concerned, when the universities are open and not to the vacations, B only visits each one 11 times a year, and A knows this from the accounts which are submitted to it by B. After 4 years A purports to terminate the contractual relationship for serious non-performance by B of B's obligations. Its behaviour during the four years since the

conclusion of the contract leads to the interpretation that the phrase “every month” must be interpreted as applying only to the months when universities are active.

Not all the laws of the Member States allow evidence to be given of pre-contractual negotiations, on the grounds that what one party said was meant is not useful evidence as the other might not have agreed with the interpretation. A better approach is not to exclude the evidence but to allow the court to assess it for what it is worth. Similarly with subsequent conduct.

The practices established between the parties (paragraph (c)) are often decisive.

Illustration 2
A has made a franchise contract with B. A clause provides that B is to pay within ten days for goods received from A. For a three month period B pays within 10 working days. Then A demands payment within ten days including holidays. The practice adopted by the parties indicates that this is not a correct interpretation.

The reference (paragraph (c)) to the interpretation which has already been given by the parties to terms or expressions which are the same as, or similar to, those used in the contract is particularly relevant in relation to standard terms.

Paragraph (d) (concluding words) extends the same idea to terms or expressions which have already been the subject of interpretation by courts. This obviously may inform the interpreter’s decision. The meaning generally given to terms and expressions in a particular sector may also be useful when one is dealing with terms which have a technical meaning different to their ordinary meaning, for example the “dozen” which is understood in a particular trade to mean thirteen (the “baker’s dozen”).

The nature and the purpose of the contract may also be considered (letter (e)).

Illustration 3
The manager of a large real estate development makes a fixed price contract with a gardening company for the maintenance of the "green spaces". The manager later complains that A has not repaired the boundary wall. The contract cannot be interpreted as covering this as it is a contract for gardening.

Furthermore, it is normal to refer to usages whether the parties may be considered to have contracted with reference to them or whether these usages form the basis of a reasonable interpretation used to resolve an uncertainty in the meaning of the contract.

The Article refers in principle to usages which are current at the place the contract is made, although there may be difficulty in establishing this place.

Illustration 4
A wine merchant from Hamburg buys 2,000 barrels of Beaujolais Villages from a co-operative cellar B. In Beaujolais a barrel contains 216 litres, whereas a Burgundian barrel contains more. A cannot claim that the barrels referred to in the contract are Burgundian barrels.

Illustration 5
A film producer A and a distributor B make a distribution contract in which there is a clause providing for payment of a certain sum if the number of exclusive screenings (i.e. screenings only in a single cinema or chain of cinemas) is less than 300,000. A meant exclusive for the whole of France, B only for the Paris region. According to usages of the French film industry, exclusivity means exclusivity only in the Paris region. It is this meaning which applies.

Finally, good faith and fair dealing will often determine the interpretation of the contract.

B. Third parties

In a question with third parties, where an objective interpretation is adopted, it would be unreasonable to refer to circumstances such as the negotiations or the subsequent conduct of the parties unless the third party knew of them or could reasonably be expected to have known of them. This is provided for by paragraph (2).

NOTES

1. The circumstances which are to be taken into account in discovering the common intention of the parties are indicated in some of the laws of the EU Member States. They may be found either in legislative texts or in the case law. E.g.: ITALIAN CC arts. 1362(2) (behaviour), 1368 (usage), 1369 (nature and purpose of the contract) (see *Sacco and De Nova*, Il contratto II[2], 403 ff and *Antoniolli and Veneziano, Principles of European contract law and Italian law*, 254 ff); FRENCH and BELGIAN CC art. 1159 (usage; see *Terré/Simler/Lequette*, Les obligations[6], no. 451; SPANISH CC arts. 1282 (behaviour), 1258 (nature of contract); GERMAN CC § 157 (usage; see MünchKomm (-*Busche*), BGB, § 157 nos. 16 et seq.; AUSTRIAN CC § 914 and UGB § 346 (both provisions refer to fair practices; the latter provision specifies them as usages between entrepreneurs). PORTUGUESE doctrine and the jurisprudence look at the same indicators, see *Fernandes* 416 ff; GREEK case law is to the same effect, as is DANISH law (*Gomard*, Almindelig kontraktsret[2], 251 ff); FINNISH law (*Commission Report* 17 ff); and SWEDISH law, *Ramberg*, Allmän avtalsrätt[4], 90 ff. UNIDROIT art. 4.3 refers to six factors; CISG art. 8.3 to four (the negotiations, practices between the parties, usages and subsequent conduct of the parties). CZECH law enumerates the circumstances to be taken into account in the interpretation process (similarly as in paragraph (1) of the Article) in the Ccom only (§ 266(3)); for the CC, the factors must be derived from case law (e.g. Supreme Court 1 Odo 95/97 – the will of the parties may be disclosed also from their subsequent conduct). The circumstances to be taken into account in the interpretation process according to DUTCH (case)law resemble those mentioned in paragraph (1) of the commented Article (*Asser-Hartkamp*, 4-II, *Algemene leer der overeenkomsten*, no. 287).
2. ENGLISH and IRISH law are different in that they show a marked reluctance to rely on the pre-contractual negotiations as being an unreliable guide to the interpretation of a formal contract document (see *Prenn* v. *Simmonds* [1971] 1 WLR 1381, HL); and the subsequent conduct of the parties is not taken into account; *James Miller & Partners* v. *Whitworth Street Estates (Manchester) Ltd.* [1970] AC 583, HL. However, the circumstances in which the contract was made and its aim and purpose are considered (see *Chitty* on Contracts I[27], nos. 12-118 – (12-120). The elements listed

under (e) (meaning given to the provision previously) and (f) (usages) are also accepted by English law, and even a usage may not be accepted if it is not consistent with the written agreement (*Palgrave Brown & Sons* v. *SS Turid* [1922] 1 AC 397, HL.

3. SCOTTISH law has in the past been reluctant to refer to prior negotiations in the interpretation of a formal contract document, but this has been criticised and many exceptions are now recognised. There are conflicting authorities on the question of referring to subsequent conduct of the parties. See *McBryde*, Law of Contract in Scotland[1], paras. 8.11-8.17.

4. In SLOVAKIA the circumstances which are to be taken into account are indicated from decisions of courts and are also stated in many texts on the theory of law and legal literature. The rules of interpretation in the Ccom § 266 continue with "(3) All circumstances, which are associated with the manifestation of will, including the negotiations about the contract and practice, which the parties introduced between themselves, as well as the subsequent conduct of the parties, shall be duly considered when interpreting the manifestation of will under subsection 1 and subsection 2 above." In § 266 we can find rules on preliminary negotiations, the conduct of the parties, the meaning commonly given to such terms, the circumstances, and also the practices parties have established between themselves.

5. The ESTONIAN LOA § 29(5) lists the factors similarly to paragraph (1) (a)-(f) of the present Article. The requirement of good faith derives from general principles (LOA § 6).

6. The SLOVENIAN LOA § 82(2) states that contracts are to be interpreted in a way which complies with general principles of the law of obligations. Factors to be taken into account include negotiations, practice established among the parties and usages, see LOA § 22(2). According to the supplementary rule in LOA § 84, unclear statements in unilateral contracts (e.g. donation) are to be interpreted in a way which is favourable for the promisor, whereas in reciprocal contracts, they are to be interpreted in a way which favours an equitable relation between obligations.

II.–8:103: Interpretation against supplier of term or dominant party

(1) Where there is doubt about the meaning of a term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.

(2) Where there is doubt about the meaning of any other term, and that term has been established under the dominant influence of one party, an interpretation of the term against that party is to be preferred.

COMMENTS

The rule in paragraph (1), often called the *contra proferentem* rule, is widely recognised both in legislation and in case law in the different national and international laws. It rests on the idea that the party who has drafted a clause, or the whole contract, unilaterally should normally bear the risk of any defect in the drafting. The rule applies not only against the author but also against anyone who supplies pre-drafted clauses. This will be the case when the clauses have been prepared by a third party, for example the professional association to which the party employing the clauses belongs.

It applies in particular to standard terms drawn up unilaterally by one party, but it may also apply to a contract of adhesion which has been drawn up for the particular occasion but which is non-negotiable.

> *Illustration*
> An insurance contract contains a clause excluding losses caused by "floods". The insurance company which drafted the contract cannot maintain that this exclusion applies to damage caused by water escaping from a burst pipe, since it has not made this clear.

It should be noted that the Article states only that the interpretation against the party who supplied the term "is to be preferred". An interpreter could, in appropriate circumstances, interpret a clause which has not been individually negotiated in favour of the party who proposed it.

Paragraph (2) is an extension of the rule to cases where, even if a term has been individually negotiated, it has been established under the dominant influence of one party. In such a case an interpretation against that dominant party is to be preferred. This could find application not only in contracts between businesses and consumers but also in, for example, contracts for the provision of personal security where the creditor may have exerted a strong influence on a non-professional security provider to provide the security. Where the security provider is a professional acting for remuneration it is much more likely that an interpretation against the security provider will be preferred, either because of the application of paragraph (1) or because of the application of paragraph (2).

Both paragraphs apply only where the meaning of a term is doubtful. In many, if not most, cases the general rules on interpretation in the two preceding Articles will enable a clear meaning to be arrived at. The scope for the application of the present Article is therefore limited.

NOTES

1. This rule, or some variant of it, is very widely recognised, either explicitly or implicitly; it appears frequently in texts on consumer protection, particularly in those which consider the Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, art. 5 and the legislation which implements it. See for GERMANY: CC § 305c(2), following earlier case law, which continues to apply to non-consumer contracts; AUSTRIA, CC § 915 which applies to both ordinary contracts and consumer contracts; for the latter also the transparency rule of ConsProtA § 6(3) has to be taken into consideration, applying to all pre-formulated contracts; ENGLAND: *Hollier v. Rambler Motors (AMC) Ltd.* [1972] 2 QB 71, CA (English law has sometimes applied the rule in an exaggerated way to restrict the effect of clauses limiting liability, but this approach is no longer to be followed: *Photo Productions Ltd. v. Securicor Transport Ltd.* [1980] AC 827, 851 (HL)); DENMARK: ContrA § 38(b) on consumer contracts and generally *Gomard*, Almindelig kontraktsret[2], 257; FINLAND: ConsProtA chap. 4, § 3 and for other applications see *Wilhelmsson*, Standardavtal 91; SWEDEN: see *Ramberg*, Allmän avtalsrätt[4], 173-177; SPAIN: CC art. 1288, General Contract Terms Act art. 6 and ConsProtA 1984 art. 10(2); FRANCE, case law applying CC arts. 1162 (interpretation against the stipulator) and 1602 (interpretation against the seller), ConsC art. L. 133-2, al 2 (Cass.civ. 1ère 21 January 2003: Bull.civ. I, no. 19), avant-projet de réforme du droit des obligations et de la prescription arts. 1140 and 1140-1, and see, for a proposal which inspired the form of the present Article, *Fauvarque-Cosson et Mazeaud*, Principes Contractuels Communs 478); BELGIUM: case law which applies the rule of interpretation against the stipulator (CC art. 1162) only if the other rules do not give a result, case law which also applies CC art. 1602 (against the seller) and Commercial Practices and ConsProtA art. 31, § 4 (interpretation contra proferentem); LUXEMBOURG, case law which applies CC arts. 1162 and 1602; ITALY: CC art. 1370, which the case law applies only to 'mass contracts' (see also CC art. 1469(4), 2nd co.); THE NETHERLANDS: the rule, which has not yet been adopted legislatively, is viewed by the recent decisions of the Hoge Raad as 'one point of view', see HR 12 January 1996, NedJur 1996, 683); SCOTLAND: *McBryde*, Law of Contract in Scotland[1], paras. 8.38-8.43. In GREECE and POLAND the rule is recognised only for consumer contracts, for Greece see: Law 2251/1994, art. 2.5; for Poland see: CC art. 385 § 2; CZECH REPUBLIC: for commercial relations see Ccom § 266(4) (applies not only to not individually negotiated but to all contract terms) and for other civil relations see *Švestka/Jehlička/Škárová*, OZ[9], 237 (although the *contra preferentem* rule is not expressed in the CC, it can be deduced from general provisions). In PORTUGAL the *contra proferentem* rule applies only to standard terms (DL 446/85 of 25 October 1985, art. 11(2); in other cases the judge may, if in doubt, choose the meaning which will give better balance to the contract. In ESTONIAN law, the rule applies to interpretation of standard terms (regardless of the qualification of the parties), LOA § 39(1) sent. 2. In SLOVENIA the *contra preferentem* rule (LOA § 83) is a supplementary rule, it applies if the general rules on interpretation fail to deliver a clear result. See also ConsProtA art. 22(5). See also UNIDROIT art. 4.6 and for the CISG see Schlechtriem and Schwenzer (-*Schmidt-Kessel*), CISG, art. 8 nos. 47 et seq.

2. The SLOVAK Ccom § 266(4) expressly provides that expressions in any manifestation of will which may lead to different interpretations should, in any case of doubt, be interpreted to the disadvantage of the party who first used the expressions in negotiations.

3. For HUNGARIAN law see CC § 207(2) which applies to standard contract terms and consumer contracts.

II.–8:104: Preference for negotiated terms

Terms which have been individually negotiated take preference over those which have not.

COMMENTS

If in an otherwise non-negotiable contract (standard form or otherwise) there is, exceptionally, a term which has been negotiated, it is reasonable to suppose that this term will represent the common intention of the parties, other indications apart. This rule complements the rule in the preceding Article.

The preference given to negotiated terms applies also to modifications made to a printed contract, whether by hand or in any other way (e.g. typed or stamped on). One may in effect assume that these modifications were negotiated. However, it is a rebuttable presumption.

> *Illustration*
> A printed form is used for the conclusion of an option to purchase land. One of the clauses provides that the eventual buyer will deposit a cheque for 10% of the price with an intermediary until the option is either taken up or is refused. The parties agree to replace the requirement for a cheque with a bank guarantee. The intermediary writes this change on the margin of the document but omits to cross out the printed clause. The contradiction between the two clauses is to be resolved in favour of the hand-written clause.

The rule applies even if the modification was oral.

NOTES

1. This rule is sometimes formulated only in legislation on consumer protection or on particular contracts, for example on insurance contracts. See for GREECE: ConsProtA art. 2(4); SPAIN: General Contract Terms Act art. 6.0; PORTUGAL: General Contract Terms Decree Law art. 10. In other laws the rule applies generally; see for GERMANY CC § 305b and for POLAND CC art. 385(1); for AUSTRIA see OGH ÖBA 1989/135; the idea behind rule II.–8:104 is also expressed in the ConsProtA § 6, which provides for the validity of otherwise invalid clauses, if they are individually negotiated (see § 6(2)); on NORDIC law see for Denmark, *Gomard*, Almindelig kontraktsret[2], 254; Sweden, *Ramb Ramberg*, Allmän avtalsrätt[4], 178 and NSA 1993, 436; Finland, *Hoppu*, Handels-och förmögenhetsrätten i huvuddrag, 46. ENGLISH and SCOTTISH law are to the same effect, *Glynn* v. *Margetson* [1893] AC 351, HL*; Taylor v John Lewis Lt.d* 1927 SC 891 at 898. In FRENCH and BELGIAN case law (for France see Cass.com. 7 January 1969, JCP 1969.II.16121 and rappr. 1162 C. civ) the same result is reached by application of the common intention test; similarly the DUTCH case law, see *Asser-Hartkamp*, Verbintenissenrecht II, no. 287. In ITALY the rule is formulated in CC art. 1342 in a section on "Agreement of the parties"; this is an imperative rule and not a presumption left to the appreciation of the judge (Cass. 5 April 1990, no. 2863, Rep.Foro it., Contratto in genere, no. 240). This rule is not formulated explicitly in SLOVAK law, but the contract will be interpreted in accordance with what was negotiated either in writing or orally because of emphasis

on the will of the person who did the legal act. In ESTONIAN law, the rule is expressly stated in LOA § 38, but has been previously supported by court practice on the basis of the supremacy of the intent of the parties (Supreme Court Civil Chamber's decision from 1 April 2003, civil matter no. 3-2-1-34-03). No clear conclusion on the subject can be found in CZECH law: the CC does not contain a provision similar to the present Article. So the precedence of individually negotiated terms would have to be based on the assumption that they better represent the parties' will than the not negotiated ones. In SLOVENIAN law the rule is formulated in LOA § 120(4).

II.–8:105: Reference to contract as a whole

Terms and expressions are to be interpreted in the light of the whole contract in which they appear.

COMMENTS

It is reasonable to assume that the parties meant to express themselves coherently. It is thus necessary to interpret the contract as a whole and not to isolate clauses from each other and read them out of context. It must be presumed that the terminology will be coherent; in principle, the same word or expression should not be understood to have different meanings in different parts of the same contract. The contract must be interpreted in a way that gives it basic coherence, so that the clauses do not contradict each other.

There is normally no particular hierarchy between the elements of a contract, save under special circumstances: for example, particular emphasis should be given to any definition of terms or to a preamble which could have been introduced into the contract.

This Article may also be applied to groups of contracts. For example one can treat a frame-work (master) contract and the various contracts made under it as a whole. By the "whole contract" must be understood the "whole group of contracts".

Illustration
Miss A, an inexperienced singer, is taken on for six months by B, the manager of a cabaret on the Champs-Elysées. The contract contains a clause authorising the manager to end the contract in the first three days of the singer starting work. Another clause allows either party to determine the contract on payment of a significant sum of money as a penalty. Miss A is fired after one day and claims payment of the sum. Her claim should fail because the penalty clause is to be read in the light of the clause allowing determination within three days, which is a trial period.

NOTES

1. This rule is stated in a number of texts: ITALIAN CC art. 1363; FRENCH, BELGIAN and LUXEMBOURG CCs art. 1161 (and also art. 1158); ESTONIAN LOA § 29(6)-(7); SPANISH CC art. 1285; UNIDROIT art. 4.4 and for the CISG see Schlechtriem and Schwenzer (-*Schmidt-Kessel*), CISG, art. 8 no. 29. In PORTUGAL it is found in General Contract Terms Decree Law and has been extended to all contracts. It is also found in NORDIC law: Swedish Supreme Court, NJA 1990, 24; for Denmark, see *Lynge Andersen*, 390 ff; for CZECH law, see Supreme Court 2 Cdo 386/96. The rule is also found in ENGLISH law (*Chitty* on Contracts I[27], nos. 12-063 - 12-071 and refs. there), SCOTTISH law (*McBryde*, Law of Contract in Scotland[1], paras. 8.17-8.21), GERMAN and AUSTRIAN law (see OGH 4 December 1985, JBl 1978, 387; cf. MünchKomm (-*Busche*), BGB, § 157 no. 6), and GREEK and SLOVENIAN law.
2. The *illustration* is inspired by French Cass.soc. 7 March 1973, B 73 V no.145.
3. This rule is stated in many texts on the theory of law and legal literature in SLOVAK law: all legal texts – laws, legal acts, contracts - have to be interpreted as a whole.

II.–8:106: Preference for interpretation which gives terms effect

An interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not.

COMMENTS

The parties must be treated as sensible persons who intended that their contract should be fully effective (*magis ut res valeat quam pereat*). Thus if a term is ambiguous and could be interpreted in one way which would make it invalid or another which would make it valid, the latter interpretation should prevail (*favor negotii*).

> *Illustration 1*
> Architect A assigns his practice to architect B and undertakes not to exercise his profession for five years "in the region". If region is interpreted to mean the administrative region which contains several departments, the clause would be invalid as too wide. If region is interpreted in a less technical and more reasonable sense (a reasonable area) the clause will be valid and fully effective.

For identical reasons, if one of two possible interpretations would lead to an absurd result the other must be taken.

> *Illustration 2*
> A grants B a licence to produce pipes by a patented method. B must pay a royalty of €500 per 100 metres if annual production is less than 500,000 metres and €300 if it is over 500,000 metres. To calculate the royalties on 600,000 metres, one can interpret the clause as fixing the price at €500 per metre for the first 500,000 metres and €300 per metre for the remainder, or the rate of €300 per metre could be applied to the whole quantity. The latter interpretation is not valid because it leads to an absurd result: the royalty for a production of 600,000 m. would be less than that for 400,000 m.

NOTES

1. The rule in favour of full effect is to be found in several codes: FRENCH, BELGIAN and LUXEMBOURG CCs art. 1157; ITALIAN CC art. 1367; SPANISH CC art. 1284. See also indirectly PORTUGUESE CC art. 237. It is adopted by UNIDROIT art. 4.5 and under the CISG, see Schlechtriem and Schwenzer (-*Schmidt-Kessel*), CISG, art. 8 no. 49. It is recognised by case law in GERMANY, MünchKomm (-*Busche*), BGB, § 157 no. 14; AUSTRIA, OGH 4 December 1985, JBl 1987, 378; ENGLAND, e.g. *NV Handel Smits* v. *English Exporters Ltd.* [1955] 2 Lloyd's Rep 317, CA; *Chitty* on Contracts I[27], no. 12-072. IRISH and SCOTTISH (*McBryde*, Law of Contract in Scotland[1], para. 8.16)) law are similar. For DUTCH law see *Asser-Hartkamp*, *Algemene leer der overeenkomsten*, no. 287 sub (b) and the former CC art. 1380). For DANISH law see *Lynge Andersen* 442; for FINLAND, *Hoppu*, Handels-och förmögenhetsrätten i huvuddrag, 47; for SWEDEN, *Ramberg*, Allmän avtalsrätt[4], 178. For ESTONIAN law, see LOA § 29(8), except when the special rule for standard terms applies (see LOA § 39(2)). Only some more or less remote hints of this principle can be found in CZECH law: e.g. from the Constitutional Court's rulings in favour of

constitutionally compliant interpretation of the law (e.g. Constitutional Court Pl. ÚS 5/05) may be deduced a need of legally compliant interpretation of all juridical acts (which thus as far as possible avoids invalidity of juridical acts).

2. It should be noted that for the purposes of article 7(2), collective action, of the Directive on Unfair Terms in Consumer Contracts of 5 April 1993 (93/13/EEC), the interpretation in favour of full effect is not applied because in this case the Article intends to strike down abusive clauses.
3. *Illustration 2* is taken from Restatement of Contracts 2d, § 206, comment (c).
4. The SLOVAK CC regulates the lawfulness or effectiveness of juridical acts in various ways but this rule of interpretation does not appear in the codes. In SLOVENIAN law this rule is recognized and can be derived from LOA §§ 88-89.

II.–8:107: Linguistic discrepancies

Where a contract document is in two or more language versions none of which is stated to be authoritative, there is, in case of discrepancy between the versions, a preference for the interpretation according to the version in which the contract was originally drawn up.

COMMENTS

International contracts are sometimes drafted in more than one language and there may be divergences between the different linguistic versions. The parties may provide a solution by stating that one version is to be authoritative, in which case that version will prevail. If nothing is provided and it is not possible to eliminate the divergences by other means (e.g. by correcting obvious errors of translation in one version), the present Article gives a reasonable solution by providing that the original version is to be treated as the authoritative one, since it is likely to express best the common intention of the parties.

> *Illustration*
> A French business and a German business make a contract in French and in German. The contract contains an arbitration clause. The French text provides that the arbitrator "*s'inspire*" from the rules of the ICC, i.e. may follow them. The German version provides "*er folgt*", i.e. the arbitrator must follow the ICC rules. The French version was the original and this is the one which should prevail.

If the contract provides that the different versions are to be equally authoritative, the will of the parties must be respected by observing this and resorting to the general rules of interpretation. It is not possible simply to give precedence to one version. It must be decided which version corresponds better to the common intention of the parties or, if this cannot be established, what reasonable persons would understand.

It is important to read this provision along with the *contra proferentem* rule if the original version was drafted by one of the parties.

NOTES

1. The nearest provision to this Article is UNIDROIT art. 4.7, which deals only with discrepancies between versions which are stated to be equally authoritative. For the CISG see Schlechtriem and Schwenzer (-*Schmidt-Kessel*), CISG, art. 8 nos. 41-43. The national laws, except for ESTONIAN law (LOA § 29(9)), do not appear to contain any rules on the points covered by the Article applying specifically to contracts.

Section 2: Interpretation of other juridical acts

II.–8:201: General rules

(1) A unilateral juridical act is to be interpreted in the way in which it could reasonably be expected to be understood by the person to whom it is addressed.

(2) If the person making the juridical act intended the act, or a term or expression used in it, to have a particular meaning, and at the time of the act the person to whom it was addressed was aware, or could reasonably be expected to have been aware, of the first person's intention, the act is to be interpreted in the way intended by the first person.

(3) The act is, however, to be interpreted according to the meaning which a reasonable person would give to it:

(a) if neither paragraph (1) nor paragraph (2) applies; or
(b) if the question arises with a person, not being the addressee or a person who by law has no better rights than the addressee, who has reasonably and in good faith relied on the contract's apparent meaning.

COMMENTS

A. General

The rules on the interpretation of contracts cannot all be applied directly to the interpretation of unilateral juridical acts. The primary rule in the interpretation of contracts refers to the common intention of the parties. That in itself introduces an element of objectivity. The "common intention" is not the same as secret uncommunicated individual intentions, even if they happen to be identical.

B. Reliance interest

Although some systems appear in principle to take a subjective approach, it seems inappropriate to interpret a unilateral juridical act according to the subjective intention of the maker. A person could not be allowed to say that he or she meant something entirely different to the ordinary meaning of the expressions used and expect this secret subjective meaning to have a legal effect on other people. So paragraph (1) lays down the general rule that a unilateral juridical act is to be interpreted in the way in which it could reasonably be expected to be understood by the person to whom it is addressed. This does not allow the subjective meaning placed on the act by the recipient to govern. That would be just as unreasonable as giving preference to the subjective intention of the maker of the act. However, it does allow account to be taken of the characteristics of the recipient. For example, a notice given by one trader to another trader in the same line of business would be interpreted as a trader in that line of business could be expected to interpret it, not as an ordinary citizen might be expected to interpret it. Paragraph (1) reflects the policy that a person receiving a communication which is intended to have legal effect is entitled to rely on its having the meaning which any recipient of the same type could reasonably be expected to place on it. The recipient is not at the mercy of the secret intentions of the sender; and the sender is not at the mercy of any unreasonable interpretation placed on the act by the recipient.

C. Recipient knows real intention of maker

Paragraph (2) of the Article is very similar to the equivalent provision for the interpretation of contracts and reflects the same policy. It clarifies a point which might have been unclear if paragraph (1) were left to apply on its own. It can be regarded as a particular application of the requirement of good faith and fair dealing. It would be contrary to good faith for a person who knows that the maker of an act attached a particular meaning to an expression, and who does nothing to indicate that this is not acceptable, to argue later that this meaning was different to the meaning which the recipient could reasonably be expected to give to the expression in other circumstances. The same applies if the recipient could reasonably be expected to know the particular meaning which the maker attached to the act or to any expression in it. In such circumstances the act is to be interpreted in the way intended by the maker.

D. Objective interpretation for all other cases

If neither paragraph (1) nor paragraph (2) applies, the act is to be interpreted according to the meaning that a reasonable person relying on the act would give to it in the circumstances. In most cases this rule will produce the same results as paragraph (1) but the rule is necessary to cover cases where there is no identifiable addressee – for example, cases of offers addressed to the public.

This rule of objective interpretation also applies in a question with any person, not being the person to whom the act was addressed, who has reasonably and in good faith relied on its apparent meaning. Again, however, the rule that an assignee has no greater rights than the assignor is preserved.

NOTES

1. The rules in paragraphs (1) and (2) of this Article are to the same effect as those in the UNIDROIT Principles Article 4.2.
2. In FRANCE since 1808 (Cass. Sect réun, 2 février 1808 S. Chron., Grands arrêts no. 159) interpretation of any juridical acts is not under the control of the Cour de Cassation. There is currently no general theory on unilateral juridical acts but CC arts. 1156-1164 contain some rules on the interpretation of contracts. In art. 1136 of the Catala Project, it is stated that “one must in conventions seek what is the common intention of the contracting parties, rather than adhere to the literal meaning of the words. Likewise, in a unilateral act the true intention of its author must prevail”.
3. In GERMAN law unilateral acts are interpreted according to CC §§ 133 and 157 notwithstanding that § 157, considering its wording, only applies to already concluded contracts (see MünchKomm (-*Busche*), BGB, § 133 nos. 10 et seq.). A distinction has to be drawn between declarations of intention (or unilateral juridical acts) which have to be acknowledged by the addressee and declarations to the public. The latter have to be interpreted according to the comprehension of an average participant or a member of the addressed group of persons (MünchKomm (-*Busche*), BGB, § 133 no. 11). The meaning of acts which have to be acknowledged has to be determined in the sense in which the addressee had to understand the declaration given good faith and common usage (perspective of the addressee of the declaration – “Empfängerhorizont”) (MünchKomm (-*Busche*), BGB, § 133 nos. 12 et seq.). The German approach to the situation covered in paragraph (2) of the present Article is not so clear cut, but

following the argumentation under Comments C, German law would give the declaration the meaning intended by the party tendering the declaration.

4. In DUTCH law it follows from CC art. 3:35 that interpretation of unilateral juridical acts is to take place in conformity with the sense the person to whom it is addressed could reasonably attribute to it in the circumstances. According to CC art. 3:36 a third person who under the circumstances reasonably bases an assumption as to the creation, existence or extinction of a juridical relationship on a declaration or conduct of another, and has acted reasonably on the basis of the accuracy of that assumption, cannot have invoked against him the inaccuracy of that assumption by the other person.

5. As noted above, SLOVAK law looks, in this situation, only to the will of the person who did the unilateral juridical act.

6. The rules in paragraphs (1) and (2) of this Article generally correspond to the principle of objective interpretation stated in the ESTONIAN GPCCA § 75(1)-(2).

7 In DANISH law there is no general theory on unilateral juridical acts. The rules on interpretation of contracts apply to the extent they are appropriate.

8. In so far as ENGLISH law recognises other juridical acts (such as contractual notice), the courts apply the same rules of interpretation as they do for contracts. *Chitty* on Contracts I[27], nos. 5-069;12-050. See the leading case of *Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749. This case is also regarded as a leading case in SCOTLAND. See *Credential Bath Street Ltd v Ventura Investment Placement Ltd* [2007] CSOH 208, quoting Lord Steyn's statement (at [1997] AC 767): "The question is not how the landlord [the sender] understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices." The result is that the approach taken is essentially the same as in paragraph (1) of the Article.

II.–8:202: Application of other rules by analogy

The provisions of Section 1, apart from its first Article, apply with appropriate adaptations to the interpretation of a juridical act other than a contract.

COMMENTS

Application by analogy of other rules on interpretation of contracts

The preceding Article replaces only the first Article of Section 1 on the interpretation of contracts. The other Articles of Section 1 apply with appropriate adaptations. For example, references to the parties to the contract in Section 1 might have to be read as references to the person making the juridical act and the person to whom it is addressed. The references to negotiations would not always apply to unilateral juridical acts but might do so. For example, the scope of the authority to be granted to an agent might have been the subject of negotiations even if the eventual grant of authority was done by a unilateral act of the principal.

NOTES

Application of contract rules by analogy

1. It is not uncommon for legal systems to provide that the rules on formation, validity, authority of representatives, interpretation and contents of contracts also apply with appropriate modifications to other juridical acts.
2. In AUSTRIA this result follows from the general principle of analogous application of the Civil Code, see CC § 7. In the NETHERLANDS the CC provides in art. 6:126 that the rules on contracts apply to agreements other than contracts. For unilateral acts the same rules are adopted in the legal writing, see *Asser-Hartkamp*, Algemene leer nos. 83 ff). FRENCH and BELGIAN law apply the rules on contracts by way of an analogy to statements and conduct indicating an intention to establish legal relationships (on Belgium: *Stijns*, Verbintenissenrecht I, no. 368. See also ITALIAN CC art. 1324 according to which "unless otherwise provided in the law, the rules that regulate contracts apply, to the extent compatible, to unilateral *inter vivos* acts having patrimonial content". See also PORTUGESE CC art. 295 and SLOVENIAN LOA § 14. In CZECH law all juridical acts (i.e. contracts as well as unilateral juridical acts) are subject to the same general interpretation rules – see CC § 35(2, 3), Ccom § 266.
3. ENGLISH law is thought to be broadly the same in so far as it recognises unilateral juridical acts as affecting contractual rights; thus a notice of withdrawal of a ship under a charterparty was treated as analogous to acceptance of an offer in *Brinkibon Ltd. v. Stahag Stahl und Stahlwarenhandelsgesellschaft mbH (The Brimnes)* [1983] 2 AC 34, HL.
4. Other systems have rules applying directly to juridical acts as such e.g. NORDIC Act on Contracts and other Legal Acts; GREEK CC arts. 127 ff; DUTCH CC arts. 3:32 ff; ESTONIAN GPCCA §§ 67 ff.
5. In the SLOVAK legal system there are only a few specific provisions on the interpretation of contracts. So the provisions on juridical acts are used or apply also for the interpretation of contracts.

CHAPTER 9: CONTENTS AND EFFECTS OF CONTRACTS

Section 1: Contents

II.–9:101: Terms of a contract

(1) The terms of a contract may be derived from the express or tacit agreement of the parties, from rules of law or from practices established between the parties or usages.

(2) Where it is necessary to provide for a matter which the parties have not foreseen or provided for, a court may imply an additional term, having regard in particular to:

(a) the nature and purpose of the contract;
(b) the circumstances in which the contract was concluded; and
(c) the requirements of good faith and fair dealing.

(3) Any term implied under paragraph (2) should, where possible, be such as to give effect to what the parties, had they provided for the matter, would probably have agreed.

(4) Paragraph (2) does not apply if the parties have deliberately left a matter unprovided for, accepting the consequences of so doing.

COMMENTS

A. Sources of contract terms

The terms of a contract are not only those expressly agreed by the parties. They may also include terms only tacitly agreed by the parties, terms supplied by law and terms supplied by usages or practices. In most cases those sources will supply all the terms necessary. Exceptionally, however, even those terms may leave a gap caused by some unforeseen contingency which has not been provided for. Paragraph (2) enables a court to imply an additional term in such exceptional circumstances, having regard in particular to the nature and purpose of the contract, the circumstances in which it was entered into and the requirements of good faith and fair dealing. Such implied terms may impose additional obligations but they need not be limited to the imposition of additional obligations. They may, for example, affect the circumstances or manner in which existing obligations have to be performed in unforeseen circumstances.

B. Express agreement of the parties

This is the most obvious and normal source of the terms of a contract, particularly in the case of more formal contracts. The terms need not all be recited or set out at length. They may be imported by reference to other terms such as, for example, standard terms drawn up by trade associations or similar bodies.

C. Tacit agreement of the parties

There are many everyday contracts where expressly agreed terms are of a minimal nature and where a great deal depends on tacit agreement. For example, in a contract for the purchase of a newspaper from a newsagent only the name of the newspaper may be spoken but there will normally be a tacit agreement that the newspaper to be supplied will be the current edition and

not yesterday's or last week's and that the price payable will be the price marked on it. In a contract with a licensed taxi driver the only express term may be the destination but there will normally be a tacit agreement that the driver will follow a more or less direct route to the destination and that the fare payable will be that shown on the meter.

The distinction between terms based on tacit agreement and terms implied by a court under paragraph (2) is that there is nothing exceptional about the first category. Indeed the reverse is true. The matters which any reasonable observer would say had been tacitly agreed will be matters which are so ordinary and so obvious that they are simply taken for granted.

There are no restrictions on the ascertainment of what the parties tacitly agreed. In deciding what may be held as tacitly agreed regard may be had to any relevant circumstances. II.–8.102 (Relevant matters) on matters relevant to the interpretation of contracts may provide some guidance here. The factors mentioned there include – the circumstances in which the contract was concluded; the conduct of the parties, even subsequent to the conclusion of the contract; the nature and purpose of the contract; the practices the parties have established between themselves (which may, however, also bind the parties directly, as noted below); usages; and good faith and fair dealing. There is an overlap between the ascertainment of tacit agreement and the interpretation of expressions used in concluding the contract and also with the effect of usages or practices, but there are cases where the tacit agreement route will be the most obvious way to a conclusion. It can be difficult or artificial, for example, to use the interpretation route if no words or other expressions are used by the parties. And there are cases where tacit agreement is so obvious that it is unnecessary to investigate the question of usages or practices.

D. Terms derived from other legal rules

Several of the provisions in these rules help to determine the terms of the contract where matters are not fully regulated by express terms or by usages or practices. Some of these deal with specific types of contract. Others, however, deal with general issues which do not depend on the nature of the contract and which may arise in many types of contract: e.g. the price, the quality of what is to be supplied or provided under the contract and what is to happen if an agreed mechanism for determining the price or some other term fails. It is not only the present rules which may supply a term in the absence of express regulation in the contract. There may be national or other laws which apply to the contract and which supply a term or terms.

E. Usages and practices

These are an important source of implied terms in their own right, quite apart from their role in ascertaining the tacit agreement of the parties. It will be remembered that Article II.–1:104 (Usages and practices) provides that:

> (1) The parties to a contract are bound by any usage to which they have agreed and by any practice they have established between themselves.
>
> (2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable.

F. Filling gaps

Even when all the possible sources of terms listed in paragraph (1) are taken into account there may be cases where there is an obvious gap in the contract. There may be some matter which the parties simply did not foresee or provide for and where it would be unrealistic to assert that there was any tacit agreement. There may simply have been no agreement at all on the matter, express or tacit, and there may be no rule of law, usage or practice to provide a solution. In such circumstances paragraph (2) allows a court to imply an additional term, having regard in particular to the nature and purpose of the contract, the circumstances in which it was concluded and the requirements of good faith and fair dealing. The additional term need not be an independent term: it may be a term which is dependent on, and adjusts the effect of, an existing term. The reference to the court does not, of course, mean that the parties have to resort to litigation to resolve every unforeseen contingency. It is always open to them to modify or supplement the terms of their contract by agreement.

G. Exceptional nature of the power

Because of the danger of giving courts too much power to rewrite contracts according to their own ideas of what the parties should have provided, paragraph (2) limits this power to cases where it is necessary to provide for a matter which was not foreseen or provided for by the parties. The word "necessary" serves two functions. First it makes it clear that the power under paragraph (2) cannot be exercised if the matter is already regulated by a term derived from any of the sources mentioned in paragraph (1). Secondly, it indicates that the court should not exercise its power merely to "improve" the operation of the contract. It will be for the court to decide whether an additional term is necessary, having regard in particular to the factors mentioned in paragraph (2). One criterion will be whether the contract would be workable without the term but that is not an exclusive criterion. There may be cases where the contract as a whole would be workable after a fashion without the additional term but where some particular aspect of it is unregulated and where the lack of regulation causes an obvious problem or gross distortion in the balance of the contract.

The extent to which gaps in the parties' agreed terms are likely to be already filled by rules of law, usages or practices, and the fact that the parties can always agree to modify or supplement the terms of their contract, means that resort to paragraph (2) is likely to be unusual. This can be illustrated by the sort of fact situation which occurred in the classic English case on implied terms (*The Moorcock* (1899) 14 P.D. 64).

> *Illustration*
> A ship-owner contracted to unload the ship alongside a wharf in the Thames, where at low tide the ship will rest on the river-bed. The state of the river-bed was unknown to the ship-owner. In fact there was a ridge of rock across it which damaged the ship. The wharfinger was held to be under an implied obligation to warn the ship-owner of the danger.

Under these rules a more direct route to the same result is provided by the Article on the obligation to co-operate to give effect to the contract. There would be no need to resort to the exceptional power to imply an additional term in order to impose such an obligation. It should also be noted that the rules on service contracts provide expressly for certain obligations to inform.

H. The nature and purpose of the contract

The reference to the nature and purpose of the contract allows consideration to be given to how the contract can best be carried out if there are gaps in the terms agreed by the parties or supplied by the law or by usages and practices. Considerable guidance may be obtained by looking at terms usually contained in similar contracts, or laid down in international conventions dealing with analogous contracts.

I. The circumstances in which the contract was concluded

The circumstances in which the contract was concluded, including the negotiations, may provide a good indication of what the parties would probably have agreed had they foreseen and provided for the contingency which has arisen.

J. Good faith and fair dealing

The reference to the requirements of good faith and fair dealing allows a court, in exercising its limited gap-filling function under paragraph (2), to look in an objective fashion at what good faith and fair dealing would require. If the matter which has not been provided for would pose an unacceptable risk for one party unless a term is implied to give that party some protection, a suitable term may be implied.

K. The probable intention of the parties

Paragraph (3) provides that any term implied under paragraph (2) should, where possible, be such as the parties, had they provided for the matter, would probably have agreed. In some cases there may be evidence which would enable the probable agreement of the parties to be determined with some confidence. For example, the parties may have consistently rejected one type of solution and consistently opted for another type of solution in relation to a range of foreseen problems. In such circumstances it might be reasonable to conclude that they would probably have applied the same approach to an unforeseen problem. In other cases the assessment of what the parties would probably have agreed will have to be based on more general considerations. For example, it would usually be justifiable to assume that the parties would have wished the contract to be carried out in a way which is fair, reasonable and practicable. The words “where possible” are inserted to provide for the situation where it is not possible to reach any conclusion about what the parties would probably have agreed within a range of fair, reasonable and practicable solutions but where it is still necessary to imply an additional term to give effect to the contract.

L. Matter deliberately left unprovided for

Paragraph (4) deals with the situation where the parties have foreseen a contingency and have deliberately left it unprovided for, accepting the risks and consequences of so doing. The principle of autonomy of the parties means that it must be open to the parties to do this if they wish. This situation falls to be contrasted with the situation where the parties foresee a situation but either think it will not materialise or “forget” to regulate it, without intending to accept the risks.

NOTES

I. General

1. The topics dealt with in the different paragraphs of this Article are not always kept separate in the national systems but the results reached are generally similar.

2. The AUSTRIAN CC § 863(1) expressly recognises that a party's intention may be declared not only expressly by words and standardised signs but also tacitly by acts which, having regard to all the circumstances, clearly reveal an intention. Para. 2 substantiates this by saying that whether a term forms part of an agreement on this basis must be scrutinised by taking "[t]he practices and usages established in such transactions" into consideration. A term will be regarded as tacitly agreed upon only if there is no doubt at all about the significance of the relevant act or omission (see e.g. OGH 21 December 1987, MietSlg 39.008; 6 October 2000, wobl 2002/69). SLOVENIAN law is to the same effect.

3. The DUTCH CC, art. 6:248(1) is similar in that it provides that a contract has not only the juridical effects agreed to by the parties, which includes tacit agreement, but also those which, according to the nature of the contract, result from the law and usage. In so far as this article also mentions the juridical effects resulting from the requirements of reasonableness and equity, it differs from the commented Article from a theoretical point of view, since these effects are according to Dutch law supposed to operate *ex jure*, whereas the commented Article requires a decision of a court.

4. PORTUGUESE law reaches a result similar to that of the Article by the application of the general principles on tacit declarations, interpretation and the filling of contractual gaps, and the execution of obligations in good faith (*Pinto*, Declaraçâo tácita 138). In SPANISH law, CC art. 1258 provides that contractual duties can also arise even if they have not been agreed expressly; so long as they are in accordance with usage and practice, the law and good faith. Even in ENGLAND, it is recognised that "[t]erms implied by law are, in truth, simply duties prima facie arising out of certain types of contracts, or, as it has been put, 'legal incidents of those kinds of contractual relationship'" (*Treitel*, The Law of Contract[9], para. 6-042, quoting *Mears* v. *Safecar Securities Ltd.* [1983] QB 54, 78, CA)

5. The FRENCH, LUXEMBOURG and BELGIAN CCs arts. 1135 provide that "the obligations under a contract extend not only to what is expressly stipulated, but also to everything which by law, equity or custom must follow from the nature of the particular contract". See on French law *Terré/Simler/Lequette*, Les obligations[6], no. 453. On the basis of CC art. 1135 french judges have implied certain terms such as an obligation of security and an information obligation. On Belgian law: Cass. 22 June 1978, RW 1978-79, 1443 (duty derived from the requirements of good faith); *Stijns-Van Gerven-Wéry*, JT 1996, p. 702, no. 35; *Vermander*, "De interpretatie en aanvulling" (2005), 21. The same provision is set forth by the ITALIAN CC art. 1374: "A contract binds the parties not only as to what it expressly provides, but also to all the consequences deriving from it by law or, in its absence, according to usage and equity". (Gazzoni 772; Roppo *Il contratto*, 455-456). For law intended as including also regulations see Cass. I, 29-9-2004, no. 19531.

6. The rules in the Article are in accordance with SWEDISH law, see *Adlercreutz*, Avtalsrätt II[4], 32 ff. SCOTTISH law is also to the same effect, see *Stair*, The Laws of Scotland XV, paras. 711-717; *McBryde*, Law of Contract in Scotland[1], para. 9. The rules are also in accordance with DANISH law, see *Bryde Andersen*, Grundlæggende aftaleret, 2nd ed., 2002, p. 320, *Lynge Andersen and Madsen*, Aftaler og Mellemmænd,

5th ed, 2006, p. 374. The same is true in FINNISH law, see *Hemmo*, Sopimusoikeuden oppikirja, 315 ff.

7. Under the HUNGARIAN CC § 216(1) the idea of tacit agreement is accepted. A contract need not be concluded in writing, unless otherwise provided by legal regulation. The intention to conclude a contract can be expressed by conduct which implies such intention.

II. Filling gaps

8. The phrase "implied terms" derives from ENGLISH law and refers to the process by which the courts supply terms to fill lacunae in the contract. The approach of Article 9:101 is in accordance with the ENGLISH law except that (1) the latter does not normally refer to good faith and fair dealing; and (2) the English courts are reluctant to imply terms into a contract. This is particularly the case when the term is an unusual one (a term to be 'implied in fact') which would not be applicable to the general run of contracts of that type. Then the term will be implied only if it is necessary to give the contract business efficacy or is so obvious that it goes without saying. In the case of terms of a more general nature (terms to be 'implied in law') it has sometimes been said that the test is again one of necessity (e.g. Lord Wilberforce in *Liverpool CC v. Irwin* [1977] AC 229, HL; other judges have taken a less restrictive approach, e.g. Lord Denning M.R. in *Shell UK Ltd. v. Lostock Garage Ltd.* [1976] 1 WLR 1187, CA.See *Treitel,* The Law of Contract[9], para. 6-042; *Chitty* on Contracts I[27], nos. 13-003–13-004 and, for illustrative cases, *The Moorcock* (1889) 14 PD 64; *Thake* v. *Maurice* [1986] QB 644, CA; and *Young & Marten Ltd.* v. *McManus Childs Ltd.* [1969] 1 AC 454, HL

9. The GERMAN courts use the term "constructive interpretation". "Where the parties have omitted to say something", the judge must "discover and take into account what, in the light of the whole purpose of the contract, they would have said if they had regulated the point in question, acting pursuant to the requirements of good faith and sound business practice", see BGH 18 December 1954, BGHZ 16, 71, 76. For ITALIAN law see CC art. 1367, regulating preservation of contract. In AUSTRIA this method is also applied with the interpretation of the agreement (*ergänzende Vertragsauslegung*, complementary interpretation) where also the parties' hypothetical intention is scrutinised. Practices and usages as well as good faith and fair dealing are also taken into consideration (see Rummel (-*Rummel*), ABGB I[3], nos. 11 et seq.).

10. The FRENCH courts have also resorted to "constructive interpretation" by referring to CC art. 1135 (see note 4 above).

11. The SLOVAK CC § 35 provides expressly that the expression of will may be done by acting or omitting and that it may be done explicitly or in any other way which does not cast doubt on what the participant wanted to express.

12. The ESTONIAN LOA § 23(1) generally corresponds to paragraphs (1) and (2) of the present Article.

13. In DANISH law the court may under special circumstances imply an additional term to the contract according to § 36 of the Contracts Act.

14. Under the HUNGARIAN CC § 206(4) if the parties' agreement fails to provide for an issue of minor importance, and if this issue is not addressed by any legal regulation or other statutory provision, the court may, with due regard to the purpose and contents of the contract, supplement the contract terms on the basis of standard measures.

15. See generally *Kötz*, European Contract Law I,117-120.

II.–9:102: Certain pre-contractual statements regarded as contract terms

(1) A statement made by one party before a contract is concluded is regarded as a term of the contract if the other party reasonably understood it as being made on the basis that it would form part of the contract terms if a contract were concluded. In assessing whether the other party was reasonable in understanding the statement in that way account may be taken of:

(a) the apparent importance of the statement to the other party;

(b) whether the party was making the statement in the course of business; and

(c) the relative expertise of the parties.

(2) If one of the parties to a contract is a business and before the contract is concluded makes a statement, either to the other party or publicly, about the specific characteristics of what is to be supplied by that business under the contract, the statement is regarded as a term of the contract unless:

(a) the other party was aware when the contract was concluded, or could reasonably be expected to have been so aware, that the statement was incorrect or could not otherwise be relied on as such a term; or

(b) the other party's decision to conclude the contract was not influenced by the statement.

(3) For the purposes of paragraph (2), a statement made by a person engaged in advertising or marketing on behalf of the business is treated as being made by the business.

(4) Where the other party is a consumer then, for the purposes of paragraph (2), a public statement made by or on behalf of a producer or other person in earlier links of the business chain between the producer and the consumer is treated as being made by the business unless the business, at the time of conclusion of the contract, did not know and could not reasonably be expected to have known of it.

(5) In the circumstances covered by paragraph (4) a business which at the time of conclusion of the contract did not know and could not reasonably be expected to have known that the statement was incorrect has a right to be indemnified by the person making the statement for any liability incurred as a result of that paragraph.

(6) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. Certain pre-contractual statements may become part of contract

Paragraph (1) reiterates the rule that certain statements made before the time of conclusion of the contract may become part of the contract even though not expressed as terms of the contract. Whether or not this is the case is dependent upon the circumstances and the reasonable expectations of the party to whom the statements are made. The paragraph enumerates some circumstances which may be particularly relevant.

Even without this paragraph the same results could often be reached by relying on the rules on unilateral promises and the interpretation of offers and other juridical acts. Also relevant would be rules on the reasonable expectations of the parties to contracts such as sales contracts. However, the rule provides a focussed way of achieving reasonable results in a common type of situation.

A misrepresentation by a party may also give rise to a right to avoidance on the grounds of a mistake or to a right to damages for incorrect information. The fact that there are overlapping remedies does not matter. The other party may choose between remedies.

B. Special rules for professional suppliers

The rule in paragraph (2) relates only to statements by a professional supplier about the specific characteristics of what is to be supplied under the contract. Very often the statements will relate to the quality or use of goods or services but the paragraph is deliberately expressed in wide terms so as to catch whatever might be supplied under the contract. The statements may be made to the other party or publicly (e.g. in advertisements or in the course of marketing). They must be made before the contract is concluded.

Under the rule in paragraph (2) any such statement by a supplier becomes part of the contract unless one of the exceptions applies. If information given in the statement is incorrect or if an undertaking given in the statement is broken, the other party may resort to the normal remedies for non-performance of a contractual obligation.

The first exception applies if the other party to the contract was aware when the contract was concluded, or could reasonably be expected to have been so aware, that the statement was incorrect or could not otherwise be relied on as such a term. This would cover, for example, the situation where a misleading advertising statement had been publicly corrected before the contract was concluded. It would also prevent parties from creating contractual obligations out of mere advertising "puff", or obviously outdated statements, or very vague and general statements, or statements qualified by a warning that special terms might apply.

The second exception applies if the other party's decision to conclude the contract was not influenced by the statement. This is essential in order to introduce a causal connection between the statement and the decision to conclude the contract.

C. Liability for others

Paragraph (3) extends the liability of a professional supplier to statements made by a person advertising or marketing the services or property for the professional supplier. This goes beyond those acting as agents for the supplier and extends to independent contractors supplying services to the supplier.

D. Extended liability for others in consumer contracts

The rule in paragraph (4) applies only to contracts between professional suppliers and consumers. It extends the liability of a supplier under paragraph (2) to public statements made by a producer, professional distributor or other person in the business chain between producer and consumer. The Article goes somewhat beyond what is currently found in the laws of most Member States but the policy is similar to that underlying Article 2(2)(d) of the Consumer Sales Directive of 25 May 1999 (Directive 99/44/EC of the European Parliament and of the Council) which provides that any public statements on the specific characteristics of the goods made about them by the seller "the producer or his representative, particularly in advertising or labelling" can be taken into account in deciding whether consumer goods are in conformity with the sale contract.

The provision in paragraph (4) is confined to consumer contracts because in the case of contracts between professionals it is expected that the purchaser of the goods or services who wishes to rely on statements made by such third parties will ask the supplier if responsibility is accepted for the statements.

Statements made by producers, distributors or other persons in the business chain are such as is supplied in advertisements, in the press or in advertising matters distributed by manufacturers or wholesale dealers.

The rule in paragraph (4) applies even though the supplier has not invoked the statement, or referred to it, when marketing the goods or services or when making the contract.

Paragraph (4) does not apply if, at the time of conclusion of the contract, the supplier did not know and could not reasonably be expected to have known of the statement.

> *Illustration*
> Before buying type Z fibreboard from S, B asks the manufacturer M whether the fibreboard, which B intends to use in the construction of a building, is fireproof. M by an error transmits the information on fibreboard T which is fireproof. S, who knows nothing of the information given to B, is not responsible for the error.

E. Right of indemnity

It could be harsh to fix a supplier with liability for incorrect statements made by others, such as manufacturers further up the business chain, if the supplier did not know and had no reason to suppose that the statements were incorrect. While it may be justifiable to give the consumer a remedy against the supplier, there is no reason why the supplier should bear any resulting loss in a question with the person who has actually made the incorrect statement. Accordingly paragraph (5) gives a right of indemnity in such circumstances.

The policy underlying this rule may be compared with the policy underlying Article 4 of the Consumer Sales Directive of 25 May 1999 (Directive 99/44/EC of the European Parliament and of the Council) which provides that:

> "Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain. The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law."

F. Merger clauses

The effect of this Article could be displaced by a merger clause stating that the terms of a contract were to be found exclusively in the contract document.

NOTES

I. Statements become part of the contract

1. The rule in paragraph (1) is part of the common core of the legal systems of the Union, see for example CISG art. 8(3) and for GERMANY, *Larenz and Wolf*, Allgemeiner Teil des deutschen Bürgerlichen Rechts[8], pp. 520 f, and for FRANCE *Terré/Simler/Lequette*, Les obligations[6], nos. 187-189; also *Malaurie and Aynès*, Les obligations[9], nos. 462-463. It is also in accordance with DANISH law, see *Lynge Andersen* 396 f. The legislation of the last decades imposing penal sanctions for misleading marketing has made civil liability for marketing information more stringent; statements made by a party as marketing information will now more often than before become contractual undertakings – see *Gomard*, Almindelig kontraktsret[2], 117 and the decision of the Supreme Court in *Ugeskrift for Retsvaesen* 1984, 384. For AUSTRIA see CC § 914: the contract also has to be seen in the light of reliable statements made in the pre-contractual stage (see Schwimann (-*Binder*), ABGB IV[3], § 914 no. 180).

2. In ENGLISH law, a statement made by one party, if it is a statement of fact, may amount to a representation. If it is not correct, there will then be a remedy for misrepresentation (avoidance and damages if there was fault. However, a statement may also amount to a contractual undertaking that what is stated is true. The question is one of the intention of the party (*Heilbut Symons & Co.* v. *Buckleton* [1913] AC 30, HL), but this is judged objectively, as the other party should reasonably understand the statement. In practice, the courts look at whether the statement was particularly important (e.g. *Bannerman* v. *White* (1861) 10 CBns 844); whether the person speaking was expert in relation to the other party or vice versa (see *Oscar Chess Ltd.* v. *Williams* [1975] 1 WLR 370, CA and *Dick Bentley Productions Ltd. v. Harold Smith Motors Ltd.* [1965] 2 AllER 65, CA; and similar factors, see *Treitel*, The Law of Contract[9], para. 9-042–9-049; *Chitty* on Contracts I[27], no. 12-003. SCOTTISH law is broadly similar, see *SME*, vol. 15 §§ 698-701; *McBryde*, Law of Contract in Scotland[1], paras. 5.45-5.55.

3. PORTUGUESE law also looks to the intention of the parties to determine the existence and content of contractual declarations, *P.M.Pinto*, Declaracão tácita these are judged by the reasonable understanding of the recipient, *Almeida* 177 ff.

4. As to Italian law, lacking a general provision concerning pre-contractual statements as part of the contract, reference should be made to the more general provision of good faith and fair dealing during negotiation and formation of the contract (art. 1337) under which scholars regulate liability for incorrect information (Roppo *Il contratto*, 179). However, as to consumer protection, see the *Consumer Code* (d.lgs. 6-9-2005, no. 206). CZECH law is similar: a party's pre-contractual statements constitute a part of the contract if it can be deduced (by the help of the interpretation rules) that there has been a common intention to make such statements a part of the contract. Otherwise the statements do not fall within the contractual terms, but if they prove to be false there may be liability for damages or defects (see e.g. Supreme Court 29 Cdo 2228/2000).

5. In FRENCH law, the case law provides that advertising documents which have been given by a professional to the other party at the time of conclusion of the contract are included as part of the content of the contract (*Le Tourneur*, no. 3713; Cass.civ. 3è, 17 juillet 1997: Bull.civ. III, no. 174).

6. In SLOVENIAN law a statement of intention may be made expressly, by signs or by any conduct that reliably reveals intention, see LOA § 18(1). As to the implied term about the quality of goods in a sales contract, see LOA § 459(1) and (3) and Appellate Court Ljubljana No. I Cp 2087/98, 6. Oct. 1999.

II. Advertising by manufacturers and producers

7. A rule similar to paragraph (2) covering warranties by the seller is found in the U.S., UCC Article 2-313. FINNISH and SWEDISH Sale of Goods Acts, §18 provides:

   (1) Goods are to be considered defective if they do not conform with information about their quality or use which the seller has supplied before the conclusion of the contract and which must be presumed to have influenced the buyer when making the purchase.

   (2) Goods are to be considered defective if they do not conform with information about their quality or use supplied by other persons than the seller in earlier links of the sales chain or on account of the seller when marketing the goods, and which must be presumed to have influenced the buyer when making the purchase. There is, however, no defect if the seller did not know or ought not to have known of the said information.

   (3) The rules in paragraph (1) and (2) do not apply if the information has been corrected in time and in clear terms.

8. A similar provision is also found in the chapters on consumer sales in the Nordic Countries. In the DANISH Sale of Goods Act, this rule is given only for consumer contracts, see § 76(2), but *Gomard*, Almindelig kontraktsret[2], 118 assumes that the rule also applies to business- to- business sales of goods and supply of services. For SLOVENIAN law, see ConsProtA art. 37.

9. A rule similar to para. (3) is found in DUTCH CC, art. 7:18, where it only applies to protect the consumer (and only in the case of sale of goods); and in the PORTUGUESE Law 24/96 of 31 July 1996, art. 7, No. 6. In AUSTRIA the law of malperformance takes publicly made statements of the supplier as well as the producer into consideration, see CC § 92(2). If a good supplied is not in conformity with such statements, the other party is given a choice of remedies. This provision does not distinguish between consumer contracts and others. However, in cases with consumer participation the rule is of mandatory character (see ConsProtA § 9(1). GERMANY provides the same rule in CC § 434(1) sent. 3 for sales contracts, but a similar rule applies to other contracts as well, BGH 25 October 2007, NJW-RR 2008, 258.).

10. Under art. 24(3) of the BELGIAN Trade Practices and ConsProtA of 14 July 1991, contracts may be interpreted in the light of the factual elements contained in advertisements (including the qualities and use of the products offered).

11. Other laws do not have similar provisions; but in some, doctrine has developed a similar approach, particularly as a way of protecting consumers against misleading advertising, treating what was said in the advertisement as part of the contract. See for SPAIN, *Lasarte*, RPD (1980) 50 ff; *Font Galán*, CDC (1988) 7 ff. In ENGLISH law there is no direct equivalent to the present Article but, as stated earlier, (see note 2), a statement by a party who is relatively expert (e.g. a professional supplier) is likely to be treated as a term of the contract. English law does not recognise the rule in paragraph (3) except in consumer sales, where new sections 14(2D) – (2F) of Sale of Goods Act 1979 (inserted to implement directive 1999/44) are to similar effect. (See also Supply of Goods (Implied Terms) Act 1973 s. 10 (2D) – (2E) (hire purchase) and Supply of Goods and Services Act 1982, s. 4 (2B) –(2D) (other contracts for the supply of goods). There is no equivalent to the Article in non-consumer contracts; the

seller or supplier will not be liable for the statement made in advertising by another party unless the seller or supplier expressly or implicitly adopted the statement.

12. In CZECH law the supplier's statements, as such, are not regarded as contractual terms. Nevertheless they may be a cause for the supplier's liability for defects (see CC §§ 597(2) and 616, § 3(b) of the ConsProtA, or Supreme Court 29 Cdo 2228/2000).

13. See generally: SWEDISH *Regeringens Proposition* 87-90; *McGregor*, Contract Code §103; *Asser-Hijma* No. 341.

14. Only a general rule on preliminary negotiations is given in the SLOVAK Ccom § 266(3) which refers to "all circumstances, which are associated with the manifestation of will, including the negotiations about the contract etc". There are also some provisions protecting consumers against misleading advertising.

15. In POLISH law there is no regulation corresponding directly to the rule in the present Article, the general rules of CC arts. 60 and 65 remaining relevant. According to these regulations, a declaration of will can be expressed in any conduct revealing the party's will in a sufficiently clear manner (CC art. 60); it should be interpreted in the light of the circumstances in which it was made (CC art. 65 para. (1)). In contracts the aim of the contract should prevail over the literal expression (CC art. 65 para. (2)). However, in relations between consumers and professional suppliers, the Act on Sale of Goods to Consumers imposes further duties on the professional supplier (art. 3), who has to provide complete information on the object of the contract. Any non-compliance may give rise to claims, according to art. 4-12 of the Act.

16. The ESTONIAN LOA §§ 217(2) 6), 217(3) for sales and LOA § 641(5) for contracts for services provide a rule similar to paragraphs (2) and (3) of the present Article. However, the applicability of those provisions is restricted to consumer contracts.

II.–9:103: Terms not individually negotiated

(1) Terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying the terms took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.

(2) If a contract is to be concluded by electronic means, the party supplying any terms which have not been individually negotiated may invoke them against the other party only if they are made available to the other party in textual form.

(3) For the purposes of this Article

(a) "not individually negotiated" has the meaning given by II.–1:110 (Terms "not individually negotiated); and

(b) terms are not sufficiently brought to the other party's attention by a mere reference to them in a contract document, even if that party signs the document.

COMMENTS

A. General purpose

The Article is not phrased as a comprehensive rule on the incorporation of non-negotiated terms into a contract. Instead, it is intended to supplement the rules governing the formation of contracts. It is applicable in addition to these general rules. Thus, consent of both parties, as defined in II.–4:101 (Requirements for the conclusion of a contract) and II.–4:103 (Sufficient agreement), is necessary to include non-negotiated terms into a contract in all cases. Consequently, the provisions on the formation of contracts in Book II, Chapter 4 apply in addition to this Article.

Based on the rules on formation of contracts, it could be sufficient for the incorporation of non-negotiated terms that the parties merely refer to these terms in their contract document or in the offer, e.g. if the offer refers to the standard terms of the offeror and the other side accepts this reference without asking to see the terms. Thus, without the provision at hand, the other party could be bound by terms without having had the opportunity to take notice of their content. The purpose of the general rule in paragraph (1) is to require the supplier to take reasonable steps to draw the other party's attention to the terms. It is then the other party's responsibility to take actual notice of the terms. In particular if the other party is a business, it can expected to take the trouble to become acquainted with the terms as far as necessary once the terms have been drawn to its attention.

B. Meaning of "terms not individually negotiated"

Paragraph (3)(a) refers to the definition in II.–1:110 (Terms "not individually negotiated") Thus, a term supplied by one party (the supplier) is not individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms. The main field of application are standard terms, which are, according to the definition in Annex 1, terms which have been formulated in advance for several transactions involving different parties, and which have not been individually negotiated by the parties.

C. Before or at the time of conclusion

Non-negotiated terms must be brought to the attention of the other party when, or before, the contract is concluded. This requirement is met if the terms are attached to the offer or to the contract form used. Standard terms sent with a supplier's acceptance of the customer's offer may be treated as a modified acceptance under II.–4:208 (Modified acceptance). Terms which the seller sends with the goods the buyer has ordered may be considered as accepted by the buyer when the buyer accepts the goods. However, terms sent with a supplier's bill which the customer receives after having received the performance will not bind the customer.

D. Reasonable steps

If the other party is unaware of the terms, the supplier has to take reasonable steps to draw the other party's attention to them. This requirement is met if the supplier has communicated the terms to the other party and has taken steps which, under normal circumstances, are sufficient to let the other party know that there are non-negotiated terms and where to find them. Usually, it will be sufficient:

- if the terms are part of the document signed by the parties,

- if the terms are reprinted on the reverse side of an offer with the offer referring to them,

- if they are attached to an offer or a contract document with the offer or contract referring to them, or

- if they are communicated to the other party and if the contract or the declarations forming the contract refer to them so that it is sufficiently clear that the terms should be incorporated.

Paragraph (3)(b) is a clarification of paragraph (1). It makes clear that a mere reference to terms in the contract document by the supplier, even if the document is signed by the other party, is not sufficient to draw the other party's attention to these terms. Whilst a mere reference to certain terms may be sufficient to draw the attention to the fact that those terms exist, such a reference cannot draw any attention to the terms themselves. This may be different if the other party knew of the terms beforehand – for instance, because in earlier similar contracts between the parties the supplier brought the terms to the other party's attention; then a reference to them may suffice. If the other party does not know of the terms referred to, they must be included in the document or other steps must be taken to inform this party of them.

Illustration 1
The parties sign a contract drafted by A. In bold letters above the signature line, the contract refers to A's standard terms. B signs the contract without having received the terms previously. Despite its bold print, the reference in the contract is a mere reference. The terms are not included.

Paragraph (1) applies only if the other party is unaware of the terms. It does not apply if the other side knows the terms and the supplier refers to them. This may be the case if the other party knows the terms from previous contracts or if the terms are generally known in a certain industry or by the customers of a certain industry (and the other party is such a customer).

Illustration 2
In the construction industry of a Member State, most contracts refer to certain standard terms (known as the "Construction Standard Terms"). A construction company C wishes to use these terms in a subcontract with another domestic construction company S. It is sufficient to refer to the "Construction Standard Terms" in the contract between C and S. C does not have to communicate these terms to S.

Illustration 3
The facts are as in Illustration 2; but C wishes to use the Construction Standard Terms in a contract with a foreign company F which has no experience in this Member State's market. C has to take reasonable steps pursuant to paragraph (1).

E. Waiver

A party cannot unilaterally meet the requirement of bringing standard terms to the attention of the contracting partner by a term in its offer or at a notice board in its premises. However, before or after the conclusion of the contract, the other party may waive the right to be informed of the terms, and such a waiver can be implied when under the circumstances it would not be reasonable to require such information.

Illustration 4
On Friday A sends an advertisement to B, a newspaper, asking B to publish it on Sunday. B receives A's letter on Saturday. It cannot be required to inform A about its general conditions regarding advertising before it publishes the advertisement in the paper.

According to the rationale of the present Article, a waiver included in non-negotiated terms of the party supplying the terms is not sufficient.

F. Usage

It may follow from a usage that terms which have not been individually negotiated may be binding upon a party who did not know of them. Thus, in a particular trade, terms which have been published by the association of suppliers as the terms which its members will apply, may be binding upon customers without further steps by suppliers who are members of the association. Such usages may even bind foreign customers, cf. II.– 1:104 (Usages and practices).

G. Effects

Terms which have been duly brought to the attention of a party will become part of the contract. If a party has not taken appropriate steps to bring the terms to the other party's attention the contract is treated as having been made without the terms, if the other party wishes this result. It should be noted that the rules on non-negotiated terms clearly distinguish between the incorporation of such terms into the contract (which is dealt with in the present Article) and their fairness. Terms may be incorporated into a contract and may nevertheless be not binding on the party who did not supply them according to II.–9:408 (Effects of unfair terms). If, on the other hand, the terms are not part of the contract under the present Article, the question of fairness does not arise.

H. Textual form required for a contract to be concluded by electronic means

Paragraph (2) supplements II.–3:105 (Formation by electronic means), paragraphs (1)(e) and (2), which reflect Art. 10 paragraph (3) of the E-Commerce Directive 2000/31/EC. However, the Directive does not make clear which sanction for the violation of the duty to provide contract terms in electronic form applies (besides the possibility to file injunction proceedings against the supplier). Paragraph (2) of the present Article imposes on the supplier, who did not make the terms available in electronic form, the same sanction provided in paragraph (1), i.e. the terms do not become part of the contract if the other party wants this result. Following the model of the E-Commerce Directive 2000/31/EC, paragraph (2) of the present Article is not limited to consumer contracts but applies to all contracts.

Electronic means include electrical, digital, magnetic, wireless, optical, electromagnetic, or similar means, cf. I.–1:107 ("Signature" and similar expressions), paragraph (4). The terms are made available if the recipient is able to read them before the conclusion of the contract with the use of standard technical equipment. Textual form is defined under I.–1:106 ("In writing" and similar expressions), paragraph (2) and means a text which is expressed in alphabetical or other intelligible characters by means of any support that permits reading, recording of the information contained therein and its reproduction in tangible form. This includes the presentation of the terms on an internet site in a such a way that they can be downloaded, stored and printed by the other party.

I. Particular requirements for consumer contracts

The present Article does not contain stricter requirements for the incorporation of terms into consumer contracts. However, according to II.–9:407 (Factors to be taken into account in assessing unfairness), paragraph (2), it can lead to the unfairness of a term, if the consumer was not given a real opportunity to become acquainted with the term before the conclusion of the contract.

NOTES

I. In general.

1. The mere reference in the contract document to terms which were not included in the document and which the stipulator had not brought to the notice of the adhering party will generally bind the latter if the latter knew of them.

2. In ENGLAND, if a party has signed a contract document, all the terms in the document, or referred to in it, form part of the contract (*L'Estrange* v. *F Graucob Ltd.* [1934] 2 KB 394, CA) However, the degree of notice given will be highly relevant to whether the terms are unfair under the Unfair Terms in Consumer Contract Regulations 1999 (S.I. 1999 No. 2083, implementing Directive 93/13) or unreasonable under the Unfair Contract Terms Act 1977. If the terms were not in a signed document, they will not form part of the contract at all unless either reasonable notice was given of them when or before the contract was made (*Parker* v. *South Eastern Railway Co.* (1877) 2 CPD 416) or they are incorporated by a course of previous dealing (*Hollier* v. *Rambler Motors AMC Ltd.* [1972] 2 QB 71, CA) or trade understanding (*British Crane Hire Corp. Ltd.* v. *Ipswich Plant Hire Ltd.* [1975] QB 303, CA) The "red hand rule", to the effect that the stipulator must give the other party

a particularly clear and perceptible notice of unusually burdensome terms, applies in ENGLAND, see *Interfoto Picture Library Ltd. v. Stiletto Visual Productions Ltd.* [1989] QB 433, CA, and probably also in SCOTLAND. However, unless the contract is a consumer contract governed by the Unfair Terms in Consumer Contracts Regulations 1999, the "red hand rule" does not apply if the party against whom the clause is invoked has signed the contract document.

3. For GERMANY a similar rule may be found in CC § 305(2) and (3), which in part is excluded for terms used against a business and for employment contracts by CC § 310(1) and (4).

4. Some laws, like the ITALIAN CC art. 1341(1), provide that standard contract terms prepared by one party are binding upon the other party if at the time of the conclusion of the contract the latter knew them or, using ordinary diligence, should have known them.

5. Other countries have general rules which protect both businesses and consumers. Under the AUSTRIAN CC § 864a, enacted in 1979, unusual terms in standard form contracts which a party uses do not become part of the contract, if considering the circumstances and the appearance of the contract document, they are disadvantageous and surprising for the other party, unless the stipulator has explicitly referred to them. LUXEMBOURG CC art. 1135-1, as amended in 1987, provides that standard contract terms which have been established in advance by one of the parties are not binding upon the other party unless the latter had the opportunity of becoming acquainted with them when concluding the contract, or must be considered to have accepted them.

6. The DUTCH CC art. 6:233(b) lays down that standard contract terms are voidable if the stipulator has not offered the other a reasonable opportunity to take notice of the general conditions. CC art. 6:235 enumerates the ways in which the stipulator gives the other party a reasonable opportunity. One way is to give the other party a copy of the terms before or at the time of the conclusion of the contract. These provisions protect consumers and smaller enterprises.

7. Under the PORTUGUESE Decree Law 446 / 85 of October 25 1985, art. 5 the stipulator is to communicate the standard contract terms in their entirety to the adhering party, and the communication is to be made in an adequate manner and at such an early stage that, taking into consideration the importance, the length and the complexity of the terms, it is possible for a person using ordinary care to acquire complete and effective knowledge of them. Under art. 6 the stipulator must also where appropriate supply all the explanations necessary for their clarification.

8. The ITALIAN CC art. 1341(2) provides that in order to be valid, certain contract terms which have been drafted in advance by one of the parties must be specifically approved in writing by the other party. This applies, *inter alia,* to exemption clauses, cut-off clauses, and jurisdiction and arbitration clauses.

9. In SLOVAK law, according to Ccom § 273(1) a certain part of the contents of the contract may be specified by reference to general commercial clauses which have been worked out by expert organisations or societies, or by reference to other commercial rules, which are known to the contracting parties or are attached to the contract. Some specific provisions can be found in 250/2007 Z.z. (Consumer protection act) and in 258/2001 Z.z. (Consumer credit contract act), but there is no such general provision.

10. ESTONIAN law broadly corresponds to paragraphs (1) and (3) (b) of the present Article. Pursuant to LOA § 37(1), standard terms become part of a contract only if the party supplying the terms clearly refers to them as part of the contract before entering into the contract or while entering into the contract or their existence could be presumed from the manner in which the contract was entered into and the other party

has real opportunity to examine their contents. It is recognised that mere reference to standard terms in a contract document is not sufficient, unless the other party knows the terms from previous similar contracts (Varul/Kull//Kõve/Käerdi (-*Kull*), Võlaõigusseadus I, § 37, no. 4.1.1.3.) According to the ESTONIAN LOA § 62^1(5), if a contract is to be concluded through the computer network, the terms of the contract, including standard terms, must be presented to the customer in a manner which enables them to be saved and reproduced.

II. The "red hand rule"

11. In GERMANY and the NORDIC COUNTRIES the stipulator must give the other party a particularly clear and perceptible notice of unusually burdensome terms. In GERMANY, General Conditions of Business Act of 1976, § 3 protects both consumers *and* businesses. In the Nordic countries the rule is based on case law, see for DENMARK, *Lynge Andersen* 78 ff, for FINLAND, *Wilhelmsson*, Standardavtal 87 and for SWEDEN, *Grönfors*, Avtalslagen 40 f.

12. This rule, which is sometimes called the "red hand rule", applies also in ENGLAND, see *Interfoto Picture Library Ltd. v. Stiletto Visual Productions Ltd.* [1989] QB 433, CA, and probably also in SCOTLAND. However, unless the contract is a consumer contract, the "red hand rule" does not apply if the party against whom the clause is invoked has signed the contract document.

III. Rules covering consumers only.

13. § 2 of The GERMAN General Conditions of Business Act of 1976 requires that the stipulator makes express reference to his general conditions of business, and that the other party agrees to them, an agreement which does not need to be express and may be implied from the circumstances, see MünchKomm (-*Kötz*), BGB, 1816. This provision protects only consumers, see § 24 of the Act.

14. AUSTRIAN ConsProtA § 6 contains a provision similar to CC § 864a dealt with at note 5 *supra.*

15. Under art. 30 of the BELGIAN Act of 14 July 1991 on Commercial Practices and Information and Protection of Consumers, the supplier, acting in accordance with the requirements of good faith, must provide the consumer with correct and useful information on the characteristics of the goods or services supplied and the *conditions of supply*, having regard to the information needs expressed by the consumer and the use which the consumer has indicated will be made of the goods and services or which were foreseeable for the supplier (italics added).

16. The SPANISH Act of 19 July l984 on Consumers and Users art. 10(1)(a) requires the clauses, terms or stipulations generally applied by the suppliers to be written in a specific, clear and simple language which may be easily understood without resort to texts or documents not provided prior to or at the time of conclusion of the contract, and to which in all events an express reference shall be made in the contractual document.

17. The GREEK Law 2251/1994 on Consumer Protection requires that the stipulator brings the standard terms to the consumer's attention so that the consumer is able to learn their contents.

II.–9:104: Determination of price

Where the amount of the price payable under a contract cannot be determined from the terms agreed by the parties, from any other applicable rule of law or from usages or practices, the price payable is the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price.

COMMENTS

A. Introduction

This Article and the Articles which follow it are intended to govern cases in which there is no doubt that the parties intended to be bound by the contract, but some element of it is not determined sufficiently precisely for it to be given effect on the basis only of what is expressed in it. The Articles create rules which can be used to "save" the contract in those cases in which it seems reasonable to do so because it is probable that the parties meant there to be a binding contract. This is in accordance with the approach taken in many Member States' laws. Others require that the price be determined or determinable from the terms of the contract.

The commonest case of a need for supplementation of the express terms is where the price is not fixed, and it is this which is covered by the present Article.

B. Requirements for rule to apply

Firstly, there must be a contract. The Article never applies if the parties have never reached agreement and therefore have not concluded a contract at all; if, for instance, during the negotiations the parties have been unable to come to any agreement over the price. Similarly, if the parties left the question open for future negotiation and when this took place they were unable to reach an accord, the court may not intervene to fix a reasonable price. However, the subsequent behaviour of the parties may show that they did intend to enter contractual relations. In this case, the rule in the Article can be applied to fill the gap.

> *Illustration 1*
> Construction Company A normally hires the cranes it uses for its works from Company B. The latter informs A that it is increasing its prices "to a figure to be agreed by the parties". Before any agreement on the price has been reached A orders a further crane. The crane is delivered and put into use. The contract may be considered as concluded at a normal or reasonable price.

Secondly, the contract must be of a type where a price is payable – not, for example, a contract to give something or a contract of barter.

Thirdly, the Article applies only where the price cannot be determined from the terms agreed by the parties (expressly or tacitly) or from any other rule of law (that is, other than the current rule) or from usages or practices. Usually the price will be fixed by the express terms of the contract. Quite often it will be fixed by tacit agreement. For example, there may be a price list on display. Even if nothing is expressly said about price it may be clear that the tacit agreement was that the listed price should be payable. In such cases of clear tacit agreement

the present Article does not need to apply and will not apply. In a free market economy it is rare for the price to be fixed by law but this could happen. For example, there may in certain countries be a fixed price payable for prescription medicines bought by certain categories of people from pharmacists, the State making up any difference. Usages and practices established between the parties may also enable the price to be precisely determined. Where this is the case there is no need for the present Article to apply and it would be inappropriate for it to apply. For example, if it is customary for a contract with an architect to be at the scale fee established by the architects' professional association, the price is already determinable.

C. Practical applications

Notwithstanding these essential restrictions, there are many cases where the Article could apply. The Article may, for example, find application in situations of emergency.

> *Illustration 2*
> A helicopter carrying urgently needed medical supplies has to land after having engine trouble. The carrier telephones the helicopter manufacturer and asks for a repair engineer to be sent as soon as possible. Nothing is said about the price. The contract is valid nonetheless and is considered to be one for a reasonable price.

In some other contracts it is not the custom to ask the price in advance; or the debtor leaves it to the creditor to fix the price (e.g. when an opinion is sought from a professional person).

In yet other cases the parties may think they have agreed on the price and may perform the contract and may then discover that there was in fact no agreement.

D. The rule

Where the Article does apply, the price payable is the price normally charged in comparable circumstances. If there is no such price then a reasonable price is payable.

On what constitutes a reasonable price, see the definition of "reasonableness" in Annex I.

NOTES

I. Agreement on subject matter

1. Parties who wish to make a contract must determine its subject matter; they must agree on what is to be performed. All the laws agree on that. Several of the legal systems call this subject matter the "object" of the contract and insist that the object must be possible and lawful.

II. Price as a requirement

2. Systems also differ as to whether a price must be determined by the parties, or be determinable, in order for a contract (or certain types of contract) to be valid. The latter applies e.g. in AUSTRIA (see *Koziol and Welser*, Bürgerliches Recht I[13], 27 et seq.) and GERMANY (see *Schlechtriem and Schmidt-Kessel*, Schuldrecht, Allgemeiner Teil[6], no. 201). In some of the systems this question is linked to the object.

3. The laws of the countries which do not apply the concept of object do not require the parties to have agreed on price. The law will decide which price is to be paid, see below. Even some of the systems which require an object will make exceptions as far as the price is concerned, see ITALIAN CC art. 1474(1) for the sale of goods (with the exception in case of immovable, see Cass. I, 23-7-2004, no. 13807), art.1657 for supply of work and materials, art.1709 for mandate, art.1733 on factorage and art. 2233 for professional services; PORTUGUESE CC art. 883 for sale of goods and art. 1211 for work and materials; SPANISH CC art. 1447 for sale of goods, arts. 1543 and 1547 for *locatio conductio rei*, art. 1589 for work contracts and art. 1711 for mandate; and CZECH CC § 634(1) for work contracts, § 671(1) for lease contracts, and further broadly in the Ccom (e.g. § 409(2) for commercial sale of goods). In SLOVENIAN law the object must be determined or determinable LOA § 35, but exceptions apply to commercial sales (LOA § 442), where the price is determined by law (usual seller's price, or, if non-existent, market price) or by the court (in the absence of a market price) and contract for the supply of work, see LOA § 642(2).

4. In FRENCH law, since the decisions of "*l'Assemblée Plénière*" on the 1st December 1995, it has been considered that, in the absence of contrary specific statutory provisions, the price of the contract can be determined during the execution of the contract according to a term which enables one party to fix the price unilaterally. Should the price that has been unilaterally fixed be improper ("*abusif*"), the contract can be rescinded and the party who fixed the improper price can be liable for damages. In practice, this rule regarding the fixation of the price is now applied to most contracts that are scheduled to be performed over time ("*contrats à exécution successive et échelonnée*") such as framework contracts ("*contrats-cadre*") which plan for the conclusion of "*contrats d'application*" (franchise contracts) and contracts of loans (Cass.com. 9 juillet 1996: JCP 1996. II. 22721). But in some cases, according to specific rules, if the price has not been agreed upon from the conclusion of the contract and if it is only ascertainable at a later date, by referring to the unilateral undertaking of one party, the contract is void. The same rule applies to sales (art. 1591) and lease (art. 1709). However, the ambit of these cases is uncertain: in some specific contracts, the price still has to be agreed upon and this is notably still the case for leases and even for sales not concluded in the context of a "contrat cadre" (framework contract); see *Terré/Simler/Lequette*, Les obligations[6], no. 291. In BELGIUM the object must at least be *determinable* (CC arts. 1129 and 1591) meaning that it can be determined by using objective elements without any new agreement of the parties (Cass. 21 Sept. 1987, Arr.Cass. 1987-88, 84 (price fixation); Cass. 21 Feb. 1991, Arr.Cass. 1990-91, 679; Cass. 20 May 1994, Arr.Cass. 1994, 507). Belgian case law has also been ready to infer a reference to the current price, though sometimes the absence of an agreed price has been taken to mean that one party may determine it unilaterally: *M.E. Storme*, TPR 1988, 1259, nos. 29 ff. The LUXEMBOURG courts have been exacting in exclusive supply agreements which have been held void for lack of determination (Cass. 27 Sept. 1989, No. 10470; see however, Cour 17 December 1997, 30, 105; supply agreement which made reference to the price list of the supplier was declared valid) but have been less severe as regards contracts for exclusive dealership, which were held valid (Cass. 26 Oct. 1988, No. 9804) and other framework contracts, which need not fix the terms of the contracts to be made under them (Cour d'appel (commercial), 2 October 1996, Pasicrisie 30, p. 145). SPANISH courts favour a flexible approach under CC arts. 1539 and 1711: the court may fix the price according to the market price, uses or, preferably, the specific circumstances of the contract (See TS 21 May 1983, TS 12 June 1984, TS 16 January 1985 and TS 21 October 1985). POLISH law generally requires determination of the price in a sale contract (CC art.

535), but the price can be determined indirectly, by giving a basis for its determination (CC art. 536 § 1). If it appears that the parties were thinking of the usual price in relations of a given kind, in case of doubt it is assumed that they intended the price at the place and time of delivery (CC art. 536 § 2). In a contract for work the parties also have to determine the price, although they can give only a basis for the calculation (CC art. 628 § 1). If the price has not been determined, a normal, usual price has to be applied. If this is not possible, the court should fix a price corresponding to the expenditure of work, time and money. The latter rule – a price corresponding to the expenditure – is applied also in mandate (CC art. 736 § 2).

III. What price?

5. Those States which do not require an object and those which make exceptions as far as the price is concerned have often provided in their laws that if the parties have not agreed upon the price it is the one which is usually charged: see for AUSTRIA, CC § 1152 on labour contracts and § 1054 on sales contracts; for GERMANY CC § 612(2) on labour relationships, § 632(2) on supply of work and materials, § 653(2) on representatives' commissions and Ccom § 354 for several commercial activities; for PORTUGAL and ITALY see the provisions cited above; and for the NETHERLANDS see CC arts. 7:4 on sales, 7:405(2) on mandate and 7:601(2) on deposit. Under Dutch sales law, where the price has not been determined a reasonable price may be charged. In deciding what is reasonable regard is had to the seller's customary charges. In mandate and deposit the rule is reversed: the customary price may be charged unless it is unreasonable. CZECH law employs various formulations – the most common are "usual price" (e.g. lease contracts – CC § 671(1), or commercial sale of goods – Ccom § 448(2)) and "reasonable price" (e.g. work contracts – CC § 634(1)). SLOVENIAN law also employs various formulations – "usual price" of the seller, "reasonable price" – being the market price at the time of conclusion or is determined by the court (commercial sales, LOA § 442); "fair price" (mandate, LOA § 778) and the price corresponding to the reasonable and justifiable expenditure (contract for the supply of work, LOA § 642(2).

6. Under several provisions the parties are taken to have agreed upon a price which is fair and reasonable, and this seems to have been accepted as a general principle: see GREEK CC art. 371 which applies to specific contracts as well. See also Greek CC art. 288. Under the DANISH Sale of Goods Act § 5 the price is the one charged by the seller unless it is unreasonable, and this rule applies to other contracts as well. § 45 of the FINNISH and SWEDISH Sale of Goods Acts provides that if the price is not determinable from the contract, the buyer must pay what is reasonable with regard to the nature and condition of the goods, the current price at the time of the conclusion of the contract and other circumstances; § 47 treats the buyer as accepting the price stated on the seller's invoice if it is not unfair and the buyer does not object to it within a reasonable time. See *Ramberg*, Köplagen, 478 et seq. A similar rule applies in consumer sales, see § 35 of the SWEDISH Consumer Sales Act and *Herre*, Konsumentköplagen 397 et seq. and the FINNISH ConsProtA, Chapter 5 § 23. In DANISH law the equivalent principle is found in Sale of Goods act § 5, see *Lookoksy and Ulfbeck*, Køb, 2nd ed., 2008. In AUSTRIAN law the parties' intention to have agreed on a reasonable price can only be assumed if there is some indication that this was what they intended: Rummel (*-Aicher*), ABGB I[3], § 1054 no. 10. Under GERMAN law it is for the creditor of the price to determine it, if no other rule on implied agreements upon the price applies, see CC § 316.

7. Under ENGLISH law the price to be charged in the absence of an agreement is the reasonable price, see UK Sale of Goods Act 1979, s. 8 and *British Bank for Foreign*

Trade Ltd. v. *Novinex Ltd.* [1949] 1 KB 623. The position is the same in SCOTLAND; Sale of Goods Act 1979, s. 8 and *Avintair Lt.d v. Ryder Airline Services Ltd.* 1994 S.C. 270 and IRELAND Sale of Goods Act 1893, s. 8.

8. In POLISH law there are no general provisions concerning determination of the price. Failing a contractual clause referring to the price, a normal, usual price has to be applied according to CC art. 536 § 2 for sale, CC art. 628 § 1 for contracts for work. Further, CC art. 628 § 2 and CC art. 736 § 2 (mandate) allows the court to fix a price corresponding to the reasonable and justified expenditure.

9. In SLOVAK law some contracts require the parties to have agreed on a price as a condition of the validity of the contract. A general rule about a reasonable price does not exist, but there are some specific provisions which adopt this idea. See e.g. CC § 634, Ccom §§ 448 and 546.

10. The ESTONIAN LOA § 28(2) states the rule for determining the price similarly to the present Article. According to LOA § 28(1) contracts entered into in the course of economic or professional activities are presumed to be entered into for a price.

IV. International instruments

11. A rule similar to the one stated in the Article is to be found in Art.6 of the EC Directive on the Co-ordination of the Laws of Member States Relating to the Self-employed Representative of 18 Dec. 1986 (OJEC No. L 382/17). CISG art.14 makes a fixed or determinable price a necessary element of the offer. Where a contract is nonetheless concluded without such a price, Art. 55 makes reference to the price generally charged for similar goods, see *Honnold*, §§ 137.4-137.8 and 324-325. Under the *Unidroit* Principles art. 5.7 (1) the parties are considered to have made reference to the price generally charged for such performance in comparable circumstances in the trade concerned, and if no such price is available, to a reasonable price.

12. See generally *Zweigert and Kötz*, An Introduction to Comparative law[3], 383-386; *Tallon* chap. 1; *Nicholas* 49-50.

II.–9:105: Unilateral determination by a party

Where the price or any other contractual term is to be determined by one party and that party's determination is grossly unreasonable then, notwithstanding any provision in the contract to the contrary, a reasonable price or other term is substituted.

COMMENTS

The text first of all recognises that the parties may leave the price to be determined unilaterally by one of them. As in the majority of Member States' laws, this does not prevent the formation of a contract. However, possibly unlike under some laws, the determination must be made in a reasonable manner. If it is not, the court may intervene to protect the debtor against the creditor fixing the price abusively. Thus if a broker were to fix its commission at a grossly unreasonable level, the court could reduce it to a reasonable level.

The rule may work the other way round if it is the debtor who is to fix the price. The court could then increase an unreasonably low price.

The operation of this Article cannot be excluded by contrary agreement; any clause (which might be a standard clause) which purported to exclude the jurisdiction of the court to review a price fixed unilaterally will be of no effect.

It should be noted that, to prevent abuse of this section, the section stipulates that the price or other term fixed must be grossly unreasonable.

As to what is reasonable, see the definition in I.–1:104 (Reasonableness).

NOTES

I. Unilateral determination allowed

1. Most of the Member States allow agreements whereby a party may unilaterally determine a contractual term, and therefore also the price: see GERMAN CC §§ 315, 316; GREEK CC art. 371 (where, however, according to art. 372, if the price is to be determined by one party *with absolute discretion*, the contract is void); PORTUGUESE CC art. 400; ESTONIAN LOA § 26(1); DANISH Sale of Goods Act, § 5; FINNISH AND SWEDISH Sale of Goods Acts, § 45. The term must be reasonable and is subject to the court's control. The latter rule also applies to those countries where in principle a unilateral determination is not allowed (see below) but where exceptions are made, in FRENCH law, when the price can unilaterally be determined, it must not give rise to an "abuse". When the price unilaterally fixed by one party is improper ("*abusif*"), the court does not have the power to substitute a reasonable price. The court may only decide that the author of the improper price be liable for damages (A.P. 1995). AUSTRIAN CC § 1056 provides expressly only for determination of the price by a third party, but unilateral determination is permitted provided the price fixed is reasonable: See OGH 10 July 1991 SZ 64/92, *F. Bydlinski*, JBI 1975, 245; *Krejci*, ZAS 1983, 204; *Bürge*, JBI 1989, 687. In the DUTCH CC there are no provisions which expressly allow unilateral determination, but one will be set

aside by the courts only if it is unreasonable and unfair, CC art. 6:248(2). The same is true for BELGIAN law: *M.E. Storme*, TPR 1988, 1259; FINNISH law, see *Wilhelmsson*, Standardavtal 147; SWEDISH law, *Ramberg*, Köplagen, 485. The position of POLISH law is similar. There are no provisions expressly allowing unilateral determination, but this possibility is accepted (see T. Dybowski, System Prawa Cywilnego (t. III, part 1), Ossolineum 1981, p. 98). See also *Unidroit* art 5.7(2). For the requirement that the unilaterally determined term must conform to the principles of good faith and reasonableness and court discretion see LOA § 26(3) and (11) in ESTONIAN law.

2. In ENGLAND *May & Butcher Ltd.* v. *R.* (1929) [1934] 2 KB 17n. contains a dictum to the effect that the price may be left to the determination of one party. However there is no authority to the effect that the determination must be reasonable, nor does any such rule exist in SCOTTISH law or IRISH law, see *Tradax (Ireland)* v. *Irish Grain Board* [1984] IR 1.

II. Unilateral determination allowed in certain cases

3. Some legal systems only admit the validity of a contract which allows the price to be fixed by one party alone only in certain circumstances. Thus SPANISH CC art. 1449 forbids unilateral determination in the sale of goods context, but the rule has been construed narrowly in order to preserve the general principle stated in art. 1256: unilateral determination is allowed if accepted later by the other party or if related to objective circumstances such as prices in reasonably competitive markets (arts. 1447 and 1448). BELGIAN law applies the same rule but with greater flexibility. In FRENCH law, the possibility of a unilateral determination of the price has become the rule since the cases decided in 1995. Nevertheless, numerous significant exceptions remain such as sale, lease or insurance. LUXEMBOURG law does not permit one party to fix prices in a sales contract, CC art. 1591, but does in a service contract. French, Belgian and Luxembourg law have long accepted judicial reduction of excessive charges by *mandataires*, see note 1 above. 6.

III. Unilateral determination not allowed

4. In ITALY CC arts. 1349 and 1473 allow determination by a third person; the implication is that determination by a party is not permitted. See *Sacco and De Nova*, Il contratto II[2], 553 ff and *Gabrielli* 103 ff. Notwithstanding the absence of a general discipline, provisions granting one party the power to determine partially the content of obligations may be found in supply (art. 1560(2)) and construction contracts (art. 1661). In SLOVAK law it is possible for the price to be determined by a third person. This can be agreed as a "method of determining the purchase price", but determination by a party is not permitted. See Ccom § 269(3). In SLOVENIAN law unilateral determination of price is generally not allowed see LOA § 446 (sales contract).

5. Although the subject is not clearly regulated by CZECH law, scholars are reluctant to accept any concept of unilateral determination (see Pelikánová, Commercial Code III, 86), except for cases where it is provided by the law (e.g. CC § 779 for bank deposits – interest rates unilaterally determined by the bank) or where the contract gives clear guidelines for the determination (see Štenglová *(-Plíva)*, Commercial Code, 1366). This position is supported by Ccom § 269(3) which provides that a method of additional determination of the contents of a contract (i.e. determination made after conclusion of the contract), may not depend on the will of one of the parties alone. However, the courts take the opposite view from time to time, see e.g. Supreme Court 29 Odo 503/2001 (unilateral determination of the purchase price by the seller is acceptable). There is little experience yet when the unilateral determination is

unreasonable – the case should be probably judged under the good morals clause (CC § 3(1)).

6. See generally *Tallon* § 2.2.1.15.

II.–9:106: Determination by a third person

(1) Where a third person is to determine the price or any other contractual term and cannot or will not do so, a court may, unless this is inconsistent with the terms of the contract, appoint another person to determine it.

(2) If a price or other term determined by a third person is grossly unreasonable, a reasonable price or term is substituted.

COMMENTS

A. Term to be fixed by court

Using a variety of forms and types of clause, it is common practice in international contracts for the price or part of it to be fixed by a third person chosen by the parties.

It may be that the price for a work of art is to be fixed by an "expert opinion". The whole or a fraction of the price may be left to be determined either as at the date of the contract or later. For example in the FIDIC Conditions for Engineering Work it is provided that the engineer will fix the price for, among other things, additional work. If the engineer does not do so, or does not do it properly, the contract is not void: the contractor is entitled to a reasonable sum.

Frequently the third person is in a contractual relationship with one of the parties, but still acts as a third person if expected to act independently (for example, the consulting engineer under the FIDIC conditions).

The purpose of the Article is to save the contract in the case where the third person chosen cannot carry out the task or refuses to do it. Of course, the parties may agree on a replacement, but it can happen that one refuses to do so in order to escape a contract which has turned out to be disadvantageous.

One solution would be to hold that the contract fails to take effect. The preferred general policy is, however, to save contracts whenever this is likely to be in accordance with the wishes of the parties. It seems better to give the court power to replace the third person. Of course, if both parties wish to terminate their contractual relationship they can do so.

The rule does not apply where this would be inconsistent with the terms of the contract. The parties may expressly or implicitly agree that the third person is to be irreplaceable, for instance when an expert is chosen for unique personal qualities. In this case, if the third person does not act, the contract falls.

B. Term fixed by third person unreasonable

If the price or other term fixed by the third person is grossly unreasonable, it seems coherent, particularly in the light of the preceding Article which allows for the revision of a price fixed unilaterally by one party, to substitute a reasonable price or term. However, taking into account that the parties in choosing valuation by a third person have taken the risk of errors, a reasonable price or term will be substituted under this Article only when the error is manifestly unreasonable, such as a clear mistake of arithmetic or a grossly wrong valuation. If

the parties cannot agree on what is a reasonable price or term, this will have to be fixed by a court.

NOTES

I. Determination by third person

1. All the legal systems permit the parties to appoint a third person to determine the price or any other contract term. However, they differ as to what will happen if the third person fails to fix the price or the term.

(a) Third person replaced.

2. The solution adopted by the Article, leaving it to the court to appoint another person to determine the price or the term in all cases where the third party fails to do so or fixes an unreasonable price or term, is in accordance with DUTCH law, see CC arts. 6:2 and 6:248, and BELGIAN law: there the judge will appoint another third person to act unless the parties agree that the court should act for him (*M.L. and M.E. Storme* TPR 1985, 732 nos. 15 and 16). It is probably not found in the other Member States.

(b) Court determination

3. In GERMANY, CC § 317(1), GREECE, CC art. 371, ITALY, CC art. 1349(1) and PORTUGAL, CC art. 400, there is a presumption that the third person was appointed to fix a reasonable price. If the third party fails to act the court will act and fix a reasonable price (see, for ITALY see also CC art. 1473 regulating determination of price entrusted to third person; see for GREECE, Full Bench of Areios Pagos 678/1977 NoB 26 (1978) 360-361, A.P. 36/1991 NoB 40 (1992) 543). In ENGLAND, where the agreement is generally avoided if the third party fails to fix the price, see below, the court will nevertheless fix the price or the term provided that the third party provision is subsidiary and inessential, and only made to provide a machinery for fixing a reasonable price or term, see *Chitty* on Contracts I[27], nos. 2-128 -129 and *Sudbrook Trading Estate Ltd.* v. *Eggleton* [1983] AC 444 (HL); similarly for IRELAND, see *Cotter* v. *Minister for Agriculture* (High Court, 15 Oct. 1991, unrep.). Under ESTONIAN law LOA § 26(9) authorises a court, upon the request of a party, to determine a term if a third party fails to determine the term during the agreed period of time or, if no such agreement exists, during a reasonable period of time before the time by which performance of the obligation may be required. The courts determine the terms which have been left open by taking into account the nature and purpose of the contract (LOA § 26(10)), therefore the court may also appoint a third person to determine the terms of the contract if this best serves the purpose of the contract.

4. Under *Unidroit* art. 5.1.7 where the price is to be fixed by a third person, and that person cannot or will not do so, the price is to be a reasonable price. This means that in cases where the parties cannot agree on what is a reasonable price the court may have to decide it.

5. In POLISH law there are no provisions similar to those in the present Article, but the solutions adopted are nonetheless similar (see T. Dybowski, System Prawa Cywilnego (t. III, part 1), Ossolineum 1981, pp. 96-98).

(c) Contract void

6. Several legal systems treat the contract as void if the third person fails to determine the price: FRANCE and LUXEMBOURG CCs art. 1592; AUSTRIA, CC §§ 1056, 1057;

ENGLAND and SCOTLAND, Sale of Goods Act 1979, s. 9 (1) (but see above); SPANISH CC art. 1447(2) for sale of goods, though the rule has been construed strictly in order to preserve the contract if possible. See further *Tallon* §§ 3.3.2.01 ff. The same rule applies in GERMANY under CC § 319(2) (only for the rare cases where the third person is completely free to determine and is not under control of the courts; the courts tend to rather replace the third person by drawing an analogy to CC § 319(1) sent. 2, see BGH 14 July 1971, BGHZ 57, 47, 52), GREECE under CC art. 373 and ITALY CC art. 1349(2), and BELGIUM in cases where the third person has a free discretion as to how to determine the price or term. Neither the SLOVAK CC nor Ccom foresee this situation, A contract without agreement on price will be treated as void. There is no possibility of replacing a third party who fails to determine the price by a decision of a court. Also a court cannot fix a reasonable price. CZECH Ccom declares the contract void if the obligation of the third person to determine contents of the contract lapses (§ 270(2)); in cases not covered by this provision, i.e. especially in all non-commercial contracts, the situation would be governed by the rules on subsequent impossibility of performance (CC § 575-577) – so, generally said, the obligation to render the performance terminates (in full or in part, depending on circumstances). In SLOVENIA LOA § 38(2) provides that if the third party cannot or will not determine the price, the contract is void, unless parties reach another agreement.

II. Determination by third person unreasonable.

7. If the price or term fixed by the third person is unreasonable the court will fix a reasonable price or term in GERMANY, GREECE, ITALY and PORTUGAL, see note 1(b) above. In ITALY a revision by the court is also possible if a third person who has unfettered discretion acts in a way which is contrary to good faith, and in GERMANY, if the third party's determination is contrary to law or good morals. A revision by the court seems also to be possible in Belgium if the third person acted in violation of the good faith or abused of his rights (*Vanderschot*, "De bindende derdenbeslissing…", 2005, (425), nos. 16-18.); but GREEK case law does not permit judicial intervention in such cases: A.P. 217/1974, NoB 22 (1974) 1164. In DENMARK, FINLAND and SWEDEN the general fairness clause in Contract Act § 36 would apply in this situation. In POLISH law the court can fix a reasonable price or term (general rule), unless it clearly appears from the contract that this determination can be made only by a certain third party. In that case, the obligation depends on the reasonable determination made by the third party and the court has no power to fix the price (T. Dybowski, System Prawa Cywilnego (t. III, part 1), Ossolineum 1981, p. 97). In CZECH law courts do not have a power to determine new contract terms, but may refuse to enforce abusing terms, including those determined by third persons (see CC § 3 and Ccom § 292(1)).

8. FRENCH and LUXEMBOURG law do not permit the court to fix a reasonable price or term if the one fixed by the third person is unreasonable. "Having left the decision to fix the price to a third person in accordance with CC art. 1592 the parties have given his decision the force of law. The judge may not by modifying this decision impose upon the parties a contract different from their agreement": FRENCH Cour de Cassation, Civ. 2, 6 June 1950, Bull. II no. 205, p. 141. (The rule may differ in respect of service contracts.) ENGLISH law takes a similar attitude, see *Collier* v. *Mason* (1858) 25 Beav 200.

9. See generally *Tallon* §§ 3.3.2.01 ff.

II.–9:107: Reference to a non-existent factor

Where the price or any other contractual term is to be determined by reference to a factor which does not exist or has ceased to exist or to be accessible, the nearest equivalent factor is substituted unless this would be unreasonable in the circumstances in which case a reasonable price or other term is substituted.

COMMENTS

In periods of inflation it becomes common practice to use price fluctuation clauses. There are other circumstances where the price is to be determined by reference to an external factor. But it can happen that the index of prices, or other external factor, selected as the basis of the clause ceases to be available, perhaps because the organisation which published it stops doing so or because the components of the index are changed so that it no longer complies with the clause. It is not easy to determine the consequences of the disappearance of the index and thus of the indexation. Does the contract continue at a price fixed in accordance with the last price published in the index? Or does it cease to be enforceable? It seems preferable in this situation, unless it would be unreasonable in the circumstances, to use the nearest equivalent index, which if necessary can be determined by the court, so that the contract can continue more or less as intended by the parties.

> *Illustration 1*
> In a long-term lease the rent is indexed by reference to the index of construction costs published by the Academy of Architects. The latter discontinues publications of the index. The index of construction costs published by the National Statistical Institute may be substituted.

The rule can apply to factors necessary to determine other terms than price.

> *Illustration 2*
> An employment contract provides for holidays in accordance with the nationally agreed terms of employment of a certain category of employees. When this category of employees ceases to exist, there is no longer such an agreement. The nationally agreed terms on holidays for the nearest equivalent category of employees may be substituted.

Where it would be unreasonable to apply the nearest equivalent factor, a reasonable price or other term is substituted.

NOTES

I. Modification of the contract

1. When the price or another term is to be determined by reference to a factor and this factor proves not to exist or disappears, some of the legal systems provide for a modification of the contract. Thus in DENMARK the situation has been considered a "failure of assumptions", in GERMANY such a case may in certain cases be analysed as a *Wegfall der Geschäftsgrundlage*, see CC § 313(1) and (3) (but courts will rather apply rules on interpretation), and in the NETHERLANDS an unforeseen contingency

under CC art. 6:258. In these countries the contract is modified and the missing factor is replaced by the nearest equivalent one, see e.g. DENMARK, Supreme Court 15 June 1977, UfR 1977 641 and *Gomard*, Almindelig kontraktsret[2], 79. See also Unidroit art. 5.7(1). ITALIAN law does not contain a similar provision: the contract is considered void because the object is neither determined nor determinable (see CC art. 1346), unless art. 1374 on contract integration is applicable. The ESTONIAN LOA § 26(4) corresponds to the present Article.

II. Interpretation

2. The disappearance of a factor in LUXEMBOURG is considered to put an end to the contract because the object (price) has disappeared. In FRENCH law, in the event of a disappearance of a factor chosen by the parties at the time of conclusion of the contract, the courts have the power to substitute an existing factor. Besides, in the event of an illegal factor chosen by the parties, the Cour de Cassation has finally admitted that the courts could substitute a valid factor. (Cass.civ. 1ère, 9 novembre 1981, Bull.civ. I, no. 332). Relying on the presumed intention of the parties they have modified the contract, see e.g. Cass.civ. 3, 12 January 2005 D. 2005, panorama p. 2847 obs. *B. Fauvarque-Causson*, Bull. II no. 113 p. 84. The BELGIAN courts have taken the same attitude, see Cour de Bruxelles 29 Oct. 1962, JT 1963 102. Similar methods are used in PORTUGAL, GREECE and SPAIN where the courts may resort to the presumed intention of the parties and the good faith principle, see Portuguese CC art. 239; Greek CC art. 200; Spanish CC art. 1158. A similar approach may be taken by the AUSTRIAN courts on the basis of CC § 914 (see Schwimann (-*Binder*), ABGB IV[3], § 914 no. 186) and by the POLISH courts on basis of CC art. 65 § 2. In ENGLAND it is thought that the court would hold the contract to have become of no effect unless it is decided that the reference to the factor was merely a way of fixing a reasonable term or price, in which case the court would presumably either substitute an equivalent index or fix the reasonable price or term itself. SCOTTISH law seems to be to this effect. In *Wight Civil Engineering v Parker* (O.H.), 1994 SLT 140 the contract referred to interest fixed in accordance with the Minimum Lending Rate published by the Bank of England. When this ceased to be published the Average Base Lending Rate of four leading banks was substituted. In CZECH law the initial impossibility of performance (including the case where a reference to a non-existent factor disables determination of performance) leads to partial or entire invalidity of the contract (CC § 37(2)), unless the impossibility can be reasonably bridged by interpretation (as e.g. if a no-more-published index, which is referred to, is substituted by another analogous index). The situation is similar in case of subsequent impossibility of performance – the obligation entirely or partially terminates from the time when the impossibility occurred. If the impossibility concerns only one or several terms of the contract, the invalidated or terminated terms are replaced by the statutory default regulation (there is little experience yet if also substantial parts of the contract, like the price, may be replaced this way). In SLOVAK law this type of contract is void. CC § 37(2).

3. See generally *Rodière & Tallon* § 3.1.2.01 and *Tallon* 191 f.

II.–9:108: Quality

Where the quality of anything to be supplied or provided under the contract cannot be determined from the terms agreed by the parties, from any other applicable rule of law or from usages or practices, the quality required is the quality which the recipient could reasonably expect in the circumstances.

COMMENTS

It may be helpful to provide a rule to supplement the parties' agreement on the quality of what is to be supplied or provided under the contract. If the quality cannot be determined from the terms agreed by the parties, from any other applicable rule of law or from usages or practices, the quality must be what the recipient could reasonably expect.

The scope of this Article will depend on how many particular contracts are eventually regulated by Books of their own which provide default rules on quality. The Article may eventually have only a limited residual application.

One effect of the Article is that in a contract which does not make provision for quality, which cannot be supplemented by usages or practices on this point and which is of a type where there are no special default rules on quality, the supplier need not supply an abnormally high quality which could not reasonably be expected.

In some cases it may be easy to determine the quality which could reasonably be expected. For example, there may be evidence that contracts of that type normally provide for the quality to comply with a standard set by some regulatory body or respected institution. In other cases it may be necessary to refer to a range of factors. In particular, the nature of what is supplied or provided and the price paid will be of great importance. The circumstances in which the contract was concluded may also be of importance. For example, it may be clear that a particular service was required as a matter of urgency and that both parties placed the emphasis on speed rather than quality. On the other hand, the reverse may be true: both parties may have understood and accepted that some delay was acceptable in order to achieve a better than usual quality.

NOTES

1. Under *Unidroit* art. 5.1.6 where the quality of performance is neither fixed by nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average quality. No Member State has a statutory provision of this general nature. As for the delivery of goods the statutes either focus on the quality of the goods or the purpose for which they are meant. For services the requirements concern the care and skill with which the services are to be performed.
2. The ESTONIAN LOA § 77(1) sent. 2, subject to special regulation for contracts for sales or services (LOA §§ 217 and 641 respectively), provides a general rule that where the quality of the performance of a contractual obligation is not determinable from the contract or from law, the party must perform the obligation with a quality not less than average in the circumstances.

I. Average quality of goods

3. The GERMAN CC § 243 lays down that the performance of a generic obligation must be of average kind and quality, and GREEK CC art. 289(2) contains a similar provision. Likewise, art. 1167 of the SPANISH CC states the average quality rule. In AUSTRIA the same rule was formerly laid down in the Ccom § 360 and applied generally by way of analogy. Now – after the adoption of a new code – the rule is amalgamated into the CC where art. 905b provides that generic goods must be of average kind and quality. Under art. 1246(3) of the FRENCH, BELGIAN and LUXEMBOURG CCs a person who delivers generic goods must deliver the kind of goods that the parties agreed on, and of an average quality unless statutory dispositions or contractual terms state otherwise. In the NETHERLANDS and ITALY a person may not deliver goods which are below average good quality: Italian CC art. 1178, Dutch CC art. 6:28. ESTONIAN LOA § 77(2) has the same effect. The former rule in ENGLAND and SCOTLAND was that goods delivered should be of merchantable quality, but the reference is now to "satisfactory quality", Sale of Goods act 1979, s. 14(2)–(2c) as amended by Sale and Supply of Goods Act 1994, s. 1. In IRELAND the goods delivered must be of merchantable quality, IRISH SGA 1893, s. 14(2) as amended by Sale of Goods and Supply of Services Act 1980, s. 10. The general POLISH regulation of CC art. 357 provides that the performance of a generic obligation must be of average quality, unless the quality is defined by law or by contract or appears from the circumstances. CZECH CC speaks of the "average medium quality" (§ 496) and CZECH Ccom of the "quality appropriate to the purpose for which, as a rule, the goods are used" (§ 420(2)). SLOVENIAN LOA § 286 states that the performance of a generic obligation must be of medium quality.

4. In assessing whether goods delivered meet the requirements as to quality under PORTUGUESE law one has to take into account the purpose for which the goods are meant, CC art. 913(2); CISG art. 35(2)(a) and the NORDIC Sale of Goods Act, § 17 (in force in FINLAND and SWEDEN) provides that the goods must be fit for the purposes for which goods of the same description would ordinarily be used. The FINNISH and SWEDISH Sale of Goods Act, § 17 para. 3, also makes clear that the goods must conform with the buyer's reasonable expectations. See e.g. FINNISH Supreme Court case, CC 1991:153.

5. In some systems (e.g. English law) the same rules apply to specific and generic goods. In other systems (e.g. FRANCE, BELGIUM and LUXEMBOURG) quality requirements for specific goods may be determined by statutory provisions (e.g. CC arts. 1693, 1694 and 1792 (durability)). In FRENCH law, the debtor of specific goods must carry out its obligation by performing exactly as promised. The debtor cannot carry out its obligation by delivering different goods even if they are similar or more attractive to the creditor (*Bénabent*, Les obligations[7], no. 795). In HUNGARY CC § 288 if the parties have not stipulated the quality of something defined by type and quantity, the quality of what is supplied must be that of commercially available things of standard good quality.

II. The good paterfamilias and services

6. If the obligation of a party is to provide services, the debtor must act as a *bon père de famille*: see for services in general ITALIAN CC art. 1176, under which the standard must be appropriate to the nature of the activity (*Cendon -(Castronovo*) art. 1176 no.6); on deposits FRENCH, BELGIAN and LUXEMBOURG CCs art. 1137(1); and Dutch CC art. 7:602. DANISH case law requires that a professional party renders a professionally satisfactory performance, see *Gomard*, Obligationsret I[2], 150 and

GERMAN law seems to have the same requirement, see CC § 276 and *Palandt* § 276 Comment 4 B. The ENGLISH Supply of Goods and Services Act 1982, s. 13 provides that services must be carried out with reasonable care and skill; similarly the IRISH Sale of Goods and Supply of Services Act 1980, s. 39(b); SCOTTISH law is to the same effect (*McBryde*, Law of Contract in Scotland[1], para. 9.37). In general, CZECH CC requires, in connection with performance, "due care" and CZECH Ccom "professional care". POLISH law requires the diligence generally required in relations of a given kind ("due diligence" – CC art. 355 § 1). The professional character of a party's activity determines the level of diligence of those engaged in economic activity (CC art. 355 § 2). In SLOVENIAN law the diligence standard varies with regard to the person providing services – generally it is the diligence of a good paterfamilias, but it can be the diligence of a good professional or expert, see LOA §§ 6 and 768(1).

7. The SLOVAK Ccom § 420(2) provides that unless the contract provides otherwise, the seller undertakes to deliver the goods in the quality and way which is suitable for the purpose stated in the contract, or, in its absence, for the purpose for which such goods are usually used. This rule can be applied generally by way of analogy.

8. See on sales generally *Honnold* nos. 233 ff; *Bianca & Bonell (-Bianca*) 268 ff.

II.–9:109: Language

Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be determined from the terms agreed by the parties, from any other applicable rule of law or from usages or practices, the language to be used is that used for the conclusion of the contract.

NOTES

1. The same rule applies under the CISG, see Schlechtriem and Schwenzer (-*Schmidt-Kessel*), CISG, art. 8 no. 41. Under GERMAN law there is no general rule, but courts tend to solutions similar to the present Article, see CA Hamm 8 February 1995, NJW-RR 1996, 1271; CA Saarbrücken 29 June 2005, NJOZ 2006, 4479.

Section 2: Simulation

II.–9:201: Effect of simulation

(1) When the parties have concluded a contract or an apparent contract and have deliberately done so in such a way that it has an apparent effect different from the effect which the parties intend it to have, the parties' true intention prevails.

(2) However, the apparent effect prevails in relation to a person, not being a party to the contract or apparent contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the apparent effect.

COMMENTS

A. Definition and types of simulation

Simulation is the situation in which the parties, with the aim of concealing their real intentions, have made two agreements: an overt one (the sham transaction) and another which is intended to remain secret. This covert agreement is sometimes embodied in a document (variously called a back-letter, counter-letter or side-letter). The situation is therefore different to the case where there is a single agreement which is merely ambiguous or vague, so that its meaning falls to be discovered by interpretation. However, there is an overlap with the provisions on interpretation and it may be a matter of choice which rule to apply. For example, if the parties for reasons of commercial secrecy use the word "refrigerators" in their written contract so that clerks and secretaries seeing contractual documents will not know that it relates to some commercially sensitive new equipment, this could be regarded either as a case of simulation or as a case where the common intention of the parties is to use a word in a special sense. Because of this overlap it is important that the rules on simulation should be to the same broad effect as the rules on interpretation.

The simulation may have the aim of making it appear that there is a contract which in fact the parties have no intention of concluding. For example, a debtor who is threatened with distraint of goods by creditors may pretend to sell the goods to a friend, neither having any intention that ownership will be transferred. This type of situation is covered by the reference in the Article to "an apparent contract". The simulation may also relate to the nature of the transaction. For example, there may be a gift disguised as a sale with a secret agreement that the price will not be paid. Or it may be simply the content of the agreement (e.g. the price) which is disguised by the simulated contract. Finally, the simulation may relate to the true beneficiary of the contract. For example, a sale is apparently concluded with one person when the true buyer is another person. In this last type of case there may be, but will not necessarily be, an overlap with the rules on representation. In any case of conflict, the rules on representation will prevail because they are the special rules for the situation.

Although simulation is dealt with in different ways in different legal traditions, paragraph (1) represents what is found in most legal systems. There is even more divergence over the question of the effect as against third parties. Paragraph (2) adopts what is considered to be a fair and appropriate rule. See Comment C.

B. Effect as between the parties

As between the parties, it is the true agreement which prevails if the contract is otherwise valid. Thus simulation is not in itself a cause of invalidity when it does not have a fraudulent or illegal purpose. It is the covert act which expresses the real intentions of the parties and it follows from the principle of freedom of contract that it should govern.

> *Illustration 1*
> A, a wine merchant, is in urgent need of cash. As it does not want to drive down market prices and as it cannot find a buyer quickly at the current price in a dull market, it sells part of its stock to B, apparently at the current market price but with a counter-letter to the effect that the real price will be 30% lower than the market price. A cannot recover the full market price from B, only the price fixed in the counter-letter.

For the same reason one party cannot, as against the other, use the apparent agreement as a defence.

C. Effect as against third parties

It would, however, be contrary to the requirements of good faith and fair dealing to allow the parties or one of them to invoke the secret true agreement in a question with a third party who has reasonably and in good faith relied on the simulated contract. Paragraph (2) provides protection for the third party in this type of case. The rule that an assignee has no better right than the assignor is, however, preserved: an assignee who was met by a defence based on simulation would have remedies against the assignor, not the other party to the simulated contract. Any other rule would have the effect that a party to a simulated contract could cheat the other party by the simple expedient of assigning the apparent rights under the contract for their apparent full value.

> *Illustration 2*
> A contract between A and B apparently confers a right on C and is in such terms that C can enforce the right against A. C is informed of the right and, reasonably and in good faith, incurs expenditure in reliance on it. A and B then turn round and say that their true agreement was that the right conferred on C was only conditional and that the conditions have not been met. This argument based on simulation will not succeed. C is entitled to rely on the apparent effect.

> *Illustration 3*
> The facts are as in Illustration 1. Immediately after the conclusion of the contract with the simulated price, A assigns the right to payment under the contract to C for a fraction less than the full price apparently payable under the contract. C then attempts to recover the full price from B. B can reply that in a question with A he is only liable to pay the discounted price and that C, as A's assignee, has no better right. C will have a remedy against A.

The rule in paragraph (2) may however be displaced by special rules for special situations. In particular there may be situations involving deliberate simulations where it would be reasonable to provide that an innocent third party should have the option of invoking either the apparent effect or the true effect.

D. Risks of simulation

It is not the purpose of this Article to deal with the possible risks of simulation for the parties. In fact, however, such risks are often real, particularly if the parties are disguising a transaction for some illegal or fraudulent or tax-avoiding purpose. The contract may well be avoided under Chapter 7 (Grounds of Invalidity).

NOTES

1. The rule stated in the Article is recognised in all Member States. In contrast, the rules in relation to third parties differ.
2. ENGLISH law does not have a general theory of simulation; the problems are dealt with by way of proof of the true contents of the contract, of illegality and of estoppel (Nicholas 195); and by refusing to rectify a document to make it accord with the true agreement between the parties if a third party has relied on it: see *Chitty* on Contracts I[27], nos. 5-111.). For example, the court may "re-characterise" a contract that purports to be a sale and lease-back as a security agreement that must be registered rather than (See Goode, Commercial Law, 605-607); while the endorser of a bill of exchange may be stopped from denying certain facts as against third parties: see Goode, Commercial Law 501 ff. SCOTTISH law is similar. However, note the particular provision of the U.K. SGA 1979, s. 62(4) (Security disguised as a sale).
3. Some laws state that the apparent act is invalid, even in relation to third parties. Only the hidden act is valid. See for GERMANY, CC § 117 (the rule may apply even in cases of good faith, though this is discussed in the doctrine); for ESTONIA: GPCCA § 89(2) (apparent act is invalid even in relation to third parties); for AUSTRIA: CC § 916(1) stating that an apparent contract is void, and that – if it hides another contract – the latter contract is regarded valid; CC § 916(2) then protects the third party who acted in good faith; for GREECE: CC arts. 138 and 139 (the third party who acted in good faith may always invoke the apparent act, *Karakatsanis,* in *Georgiadis/Stathopoulos* art. 138 no. 8, or demand annulation of the contract: A.P. 475/1991 EllDik 34 (1993) 564); for PORTUGAL, CC arts. 240-242, although under art. 243 a party may not invoke the nullity of the apparent act against a third party who was unaware of the simulation when the rights accrued. In POLISH law – see CC art. 83. The apparent contract is invalid and the validity of the hidden act has to be judged by its character (art. 83 § 1). A third party may invoke the apparent act, if in reliance on a contract concluded on its basis, the third party has acquired a right or is released from an obligation, unless the third party acts in bad faith (art. 83 § 2). SLOVAK law is similar. (CC § 41a(2)).
4. Other laws have a more subtle theory which allows the third party or chirographic creditors a choice. Thus in FRANCE, BELGIUM and LUXEMBOURG, CC art. 1321 and the jurisprudence allow the third party to invoke the apparent act and, if there is a conflict between third parties, preference is given to the one who relied on the apparent act (see in France: *Malaurie and Aynès*, Les obligations[9], nos. 765-771; in Belgium: *Samoy*, "De gevolgen van gesimuleerde rechtshandelingen", 2005, 249; *Van Ommeslaghe*, "La simulation …", 2000, 147). Some other systems produce similar results: ITALIAN CC arts. 1414-1417 (the hidden agreement will prevail on the simulated one if the latter is detrimental to third party, on the contrary, the simulated contract will prevail if the third party has relied in good faith on it. Specific rules are provided for creditors (CC art. 1416); Gazzoni 949-950, Roppo, *Il contratto*, 702-704); DUTCH law, see *Hartkamp-Tillema* no. 74 and SLOVENIAN LOA, § 50(3).

According to the SPANISH CC art. 1276; the hidden contract is valid as between the parties, but neither of them may claim avoidance of the apparent contract when a third party has relied on it in good faith. In NORDIC law the secret act is valid as between the parties but the third party who acquires in good faith is protected, particularly as a result of Contracts Acts § 34 (for DENMARK, see *Gomard*, Almindelig kontraktsret[2], 136; for SWEDEN, *Ramberg*, Allmän avtalsrätt[4], 288 and *Adlercreutz*, Avtalsrätt I[10], 242; for FINLAND, see *Hemmo*, Sopimusoikeus I, 432. In POLISH law, the apparent contract is invalid, while the validity of the hidden contract depends on whether the form appropriate for that hidden contract has been observed. Invalidity of the apparent contract does not affect a bona fide third party who, for a value, acquires a right or is released from an obligation, based on the simulated act in law (CC art. 83). CZECH CC § 41a(2) clearly stipulates that invalidity of a simulated juridical act may not be raised against a person who considered it unconcealed.

5. The HUNGARIAN CC § 207(6) states that a simulated contract is void and, if such contract is intended to disguise another contract, the contract is to be judged on the basis of the disguised contract. Under § 238(2) a person who has, in good faith, believed in the existence of an invalid contract can demand compensation from the parties for damages that originate from the conclusion of the contract. However, if invalidity is attributable to the conduct of one of the parties, the court is not to condemn the other party. If either of the parties has acted in bad faith towards the third person, such party shall be liable for full compensation for damages even if invalidity is not attributable to that party's conduct. The court may also award such indemnification by maintaining the validity of the contract either in part or in full.

Section 3: Effect of stipulation in favour of a third party

II.–9:301: Basic rules

(1) The parties to a contract may, by the contract, confer a right or other benefit on a third party. The third party need not be in existence or identified at the time the contract is concluded.

(2) The nature and content of the third party's right or benefit are determined by the contract and are subject to any conditions or other limitations under the contract.

(3) The benefit conferred may take the form of an exclusion or limitation of the third party's liability to one of the contracting parties.

COMMENTS

A. Background, scope and purpose

All but a very few of the laws of the member States now recognise that a contract may create rights in a third party beneficiary. Even English law (for long hostile to the idea of third party rights under contracts) did so in the Contracts (Rights of Third Parties) Act 1999.

The Principles of European Contract Law already contained an Article on this subject (Article 6:110). That provision was a considerable achievement at the time. Since then, however, there have been significant developments, including the English Act. On this subject the UNIDROIT Principles have also now an Article which in many ways is an advance on the PECL provision. In these circumstances it has been considered appropriate to reconsider and revise the treatment of stipulations in favour of a third party.

The Article deals with the situation which arises when a contract confers a right or benefit on a third party. This is not uncommon. For example, a contract between a man and an insurance company may provide for a benefit to be paid to the man's widow. Or a contract between a person and a carrier may provide for the goods to be delivered to a named third party. Or a transport insurance contract may provide for the insurance company to pay the amount insured to any person who becomes owner of the insured goods within the period covered by the contract and who suffers loss of a type covered by the policy. Or a contract with a florist may provide for flowers to be sent to a person named by the buyer. Or a grandparent may put money in a bank account for a grandchild, the contract with the bank providing for payments to be made to the grandchild. Or the parties to a contract may agree that one of them renounces a right or claim against the third party or agrees to a limitation of the third party's liability.

The purpose of the stipulation in favour of the third party is often to avoid an additional transaction. If such stipulations were not legally possible, the contracting party who wishes to confer a benefit on the third party would have first to receive performance from the other and then perform to the third party; or would have to assign the right to performance to the third party.

It is because the nature of the benefit depends entirely on the agreement of the contracting parties, and because the situations covered are so various, that the Article refers in paragraph (1) to a “right or other benefit”. The word “right” alone might not be read as covering for example the benefit of an immediate renunciation of a right against the third party, or the benefit of a limitation of liability clause in favour of the third party, or the benefit of an immediate grant of permission or authority to a third party. It might also be open to argument that a “right” which is available or removable at the sole discretion of someone else is not really a right so much as a mere expectation or interest. The use of the word “benefit” avoids these problems.

B. Agency and trusts not covered

The Article does not cover the case where the person who receives a contractual undertaking acts as a representative or legal representative of the “third person” since in that case the “third person” is in fact the other party to the contract. Nor does the Article cover the case where a trustee or fiduciary concludes, as such, a contract which is for the benefit of a beneficiary under the trust or fiduciary relationship. In such a case the agreement between the contracting parties is to confer a right or benefit on the trustee or fiduciary as such. The relationship with the beneficiary would be indirect and would be governed by the law governing the trust or fiduciary relationship.

C. "Legal beneficiaries" not covered

Nor does the Article deal with situations where the promisor did not intend to give third parties any rights under the contract but where the law extends the promisor’s obligation vis-a-vis the promisee to cover other persons as well. Under the laws of some countries the seller’s warranty to the buyer extends to members of the buyer’s household. If a breach of the warranty causes personal injury to them, they have a direct claim in contract against the seller.

D. The third party need not be identified at the time of conclusion of the contract

The beneficiary need not be known when the contract is concluded. An insurance company may promise the policy-holder to pay the insurance proceeds to any future owner of the goods insured. A bank may promise a customer to pay the purchase price to any seller who delivers a certain piece of equipment to the customer. A contract for the payment of a pension may provide for the beneficiary to be nominated by one of the parties at a later date. An employer who rents accommodation for workers may not know the identity of particular tenants at the time of the contract but may reserve the right to nominate tenants later. There are many similar examples. It goes without saying; however, that before a third party could enforce or assert a right under the contract the third party would have to be identified or identifiable under the contract. It also goes without saying that the third party need not be a single individual or legal person but could be several persons or a class of persons identified as such.

E. The contract determines the nature and content of the third party’s right or benefit

In many cases third parties have merely incidental or factual benefits under contracts and acquire no legal rights which they can enforce or assert. For example, a contract between a local authority and a developer for the development of a public park may provide benefit to many other people but they would not acquire rights which they could enforce or assert under the contract. Paragraph (2) of the Article makes it clear that the nature and content of the third

party's right or benefit are determined by the contract. In particular, it is the intention of the contracting parties as expressed or implied in the contract which determines whether the third party acquires a right which can be enforced by the third party against a contracting party. In some cases, the contract may make it clear that it is only the other contracting party, and not the third party, who has direct rights against the other contracting party. In other cases, this result may follow from the nature of the contract and the absence of any clear intention to give the third party direct rights. For example, a contract between X and Y whereby X agrees to pay off Y's debts would not of itself give the creditors a direct right against X. In yet other cases, the nature of the contract may reveal an implied agreement that the third party is to have direct rights against a contracting party. Everything depends on the express or implied agreement of the contracting parties.

Illustration 1
P opens a bank account in her own name and pays €800 per month to the account. Under the contract between P and the bank, the bank promises to pay sums, up to the amount in the account, to P's son B on B's demand. B may claim performance.

Illustration 2
A landlord L gives P permission to erect high voltage lines over a quarry which is worked by T, a tenant. P has promised L to pay an indemnity for damage done to T's property. It can reasonably be concluded that there is an implied agreement that T has a direct claim against P when damage is done.

Illustration 3
When taking a lease P, which intends to carry on production of inflammables, promises the landlord L that it will compensate the other tenants for any increase of their household insurance premiums which is caused by P's dangerous activity. The tenants who are informed by L about P's promise have a direct claim against P to have the increase of their premiums reimbursed.

The governing principle is the autonomy of the contracting parties: it is up to them to shape the nature and content of the third party's benefit. They may provide, for example, that the benefit is to be subject to conditions which have to be fulfilled by either the other contracting party or the third party. For example, a contract between a man and a sporting coach for lessons to be given to the man's daughter may provide that each lesson will be provided only if the fee for it is paid by the daughter at the beginning of the lesson. The parties may provide for the right or benefit to be subject to revocation or modification by one of them or both of them. For example, a contract between an individual and a pension provider may enable the individual to change the beneficiary by nomination.

Third parties' rights often accrue in contracts for the carriage of goods. A carrier promises the consignor to deliver the goods to a consignee. The conditions under which the consignee may claim delivery of the goods are provided for in international conventions. They vary depending upon the special procedures followed for each means of transport. As a rule, however, the consignee acquires a right to have the goods delivered when they have arrived at the place of destination, see Article 13 of the Warsaw Convention on the International Carriage by Air, Article 16(4) of the Uniform Rules Concerning the Contract for the International Carriage of Goods by Rail (CIM) and Article 13 of the Convention on International Carriage of Goods by Road (CMR).

However, under most of the transport conventions the consignor has a right to dispose of the goods in transit. The carrier acting as representative of the consignor must follow the consignor's instructions, see Article 20 of CIM and Article 12 of CMR. This right to dispose of the goods ceases when the consignee claims the goods after they have arrived at the place of destination. It also ceases to exist when the carrier has handed over the transport document to the consignee, see e.g. Article 21(4) of CIM and Article 12(2) of CMR. These rules are consistent with the provisions of Article 6.203.

Another provision frequently found in contracts for the carriage of goods is a provision excluding or limiting the liability of third parties, such as the master and crew of the ship, or stevedores engaged in loading or unloading the goods. The benefit of such an exclusion or limitation of liability clause would be within the scope of the present Article. Paragraph (3) of the Article makes this clear for the avoidance of any doubt about this matter of practical importance. It is also expressly covered in the UNIDROIT Principles. (Article 5.2.3).

NOTES

General

1. A stipulation in favour of a third party beneficiary is recognised as valid in most systems; the stipulation gives the third party a right or benefit if certain requirements are met. See for AUSTRIA, CC § 881; DENMARK, *Lynge Andersen* 368 ff and FINLAND: *Kivimäki & Ylöstalo* 204 and *Telaranta* 446. In ENGLAND the Contracts (Rights of Third Parties) Act 1999 is like the Article in that parties to a contract may confer a right or benefit on a third party if they do so expressly in the contract. These rights can then be enforced by the third party (s. 1(1)(a) – s. 1(1)(b); s. 1(2) of the Act). The Article differs from the Act, however, in that the third party must be "identified in the contract by name, as a member of a class or as answering to a particular description." However, like the Article, the third party does not need to exist when the contract is concluded (s. 1(3)). Part (2) of the Article is mirrored in the Act (s. 1(1), s. 1(2), s. 1(4)) in respect of rights and benefits being exclusively defined by the contract, subject to limitations in the contract (s. 1(2), s. 1(4), s. 2 (1) - (3). The Act is the same as Part (3) of the Article as a contract can exclude third party's liability (s. 1(6)). Stipulations in favour of third parties are also valid in FRANCE, BELGIUM and LUXEMBOURG, CC art. 1121 as interpreted (and extended) by the courts, see for France *Malaurie and Aynès*, Les obligations[9], nos. 807-821 and for Belgium *Dirix*, 1984, no. 115; *Cauffman*, De verbindende eenzijdige belofte, nos. 349-374, and Belgian Insurance Contract Act of 25 June 1992, art. 22; GERMANY, CC § 328; GREECE, CC arts. 410 and 411 (see A.P. 1017/1990, EllDik 33(1992) 74-75); ITALY, CC art. 1411 (see also CC art. 1412 regulating performance to be executed after the death of stipulator, and CC art. 1413 stating that the promisor can raise against the third person defences based on the contract from which the third person derives his right, but not those based on other relationship between the promisor and the stipulator); NETHERLANDS, CC art. 6:253; POLAND, CC art. 393; PORTUGAL, CC art. 443; SCOTLAND, (see *McBryde*, Law of Contract in Scotland[1], para. 10); SPAIN, CC art. 1257(2) (see *Diez Picazo* I, 398; *Lacruz(-Rams*) II, 1, 549); SWEDEN, *Rodhe*, Obligationsrätt 609, *Adlercreutz*, Avtalsrätt I[10], 142 et seq. and NJA 1956 p. 209; CZECH REPUBLIC, CC § 50; ESTONIA, LOA § 80(1); and SLOVENIA, LOA § 126(1).

2. In IRISH law the doctrine of privity of contract (and of consideration) is held to prevent stipulations in favour of third parties. In order to confer an enforceable right upon the third party it would be necessary for the promisor to execute a deed in the third party's favour, or for the promisee to make a declaration in trust in his favour, or (provided that the third party was furnishing some consideration) for the promisee to act as an agent of the third party. However, statute has created exceptions to the doctrine of privity, for instance in the field of insurance: see *Clark* 383-394. In ENGLISH law the doctrine of privity of contract (and of consideration) used to be held to prevent stipulations in favour of third parties. In order to confer an enforceable right upon the third party it would formerly be necessary for the promisor to execute a deed in the third party's favour, or for the promisee to make a declaration in trust in their favour, or (provided that the third party was furnishing some consideration) for the promisee to act as an agent of the third party. However, there were many statutory exceptions, for instance in the field of insurance: see *Treitel,* The Law of Contract[9], paras. 14-129–14-135 and now the Contracts (Rights of Third Parties) Act 1999 provides that a third party may enforce a term, if the contract expressly so provides, or if the term purports to confer a benefit on them unless it appears that the parties did not intend the third party to have the right to enforce it. The third party must be "identified in the contract by name, as a member of a class or as answering a particular description " but need not be in existence at the time the contract was made (s. 1, see Tre *Treitel,* The Law of Contract[9], paras. 14-095–14-127).

3. Agreements in favour of third parties are permitted in SLOVAK law (CC § 50). The third party acquires rights under the agreement as from the time when the third party expresses consent. Until that time the agreement is valid only between those who concluded it; the right to the performance belongs to the party who reserved the performance in favour of the third person unless anything else was agreed. The debtor can raise the same objections against the third party as against the other contracting party. Specific provision for insurance agreements is made in CC § 794.

4. Under the HUNGARIAN CC § 233 if the parties have concluded a contract for services to be performed for a third party, the third party will be an immediate beneficiary only if the parties have expressly so stipulated. A third party is entitled to exercise the rights stipulated in its favour as of the date on which it receives notice of the contract from either party. If these rights are declined by the third party, they become the property of the party who has made the contract in favour of the third party.

II.–9:302: Rights, remedies and defences

Where one of the contracting parties is bound to render a performance to the third party under the contract, then, in the absence of provision to the contrary in the contract:

(a) the third party has the same rights to performance and remedies for non-performance as if the contracting party was bound to render the performance under a binding unilateral promise in favour of the third party; and

(b) the contracting party may assert against the third party all defences which the contracting party could assert against the other party to the contract.

COMMENTS

Once it has been decided that, under the contract, one of the parties owes an obligation to the third party and the third party has a corresponding right to performance, the question arises as to the remedies available to the third party for the enforcement of performance or in the case of non-performance. These are not necessarily the same remedies as the other contracting party would have if the obligation were owed to that contracting party. The significant difference between the two situations is that there will generally be some mutuality of rights and obligations between the contracting parties. As between one contracting party and the third party, however, there is not the same mutuality: the third party has a right but no obligations. Remedies which depend on mutuality – withholding of counter-performance, termination of the contractual relationship so as to put an end to the obligation to render counter-performance, reduction of price – have no application. The third party is much more in the position of the beneficiary under a unilateral juridical act.

This is why the Article provides that the third party is to have the same rights to performance and remedies for non-performance as if the contracting party was bound to render the performance under a binding unilateral promise. This means that the third party will be able to obtain a court order for performance, subject to the usual qualifications, or obtain an award of damages for non-excused non-performance. The third party will not, however, be able to withhold performance or terminate the contractual relationship between the two contracting parties, even if there is fundamental non-performance. That may seem self-evident. Nor will the third party be able to terminate, for fundamental non-performance, the legal relationship between the contracting party who owes the obligation and the third party. The main point of termination for fundamental non-performance is to relieve the aggrieved party of future obligations of reciprocal performance. This does not arise in the present situation. These rules are subject to any provision in the contract to the contrary. For example, the contract may provide that only the other contracting party is to be able to enforce the obligation owed to the third party.

Paragraph (b) regulates the question of the defences available to the contracting party who owes the obligation. The normal rule is that the contracting party may assert against the third party all defences which could be asserted against the other contracting party.

Illustration 1

P has taken out a single premium insurance policy on his own life for the benefit of B. P has, however, failed to disclose a significant medical condition which would, as between P and the insurance company, C, give C a defence to any claim under the policy. C can assert this defence against B.

Again, however, the rule in (b) is only a default rule. The contract may provide for another solution, expressly or by implication.

Illustration 2
A buyer and a bank contract for the bank to provide an independent personal security on first demand for the benefit of the seller. The whole point of the contract is to provide the seller with an absolute assurance of payment. The buyer has misled the bank as to the buyer's financial position. It is clear that the bank could not invoke this misrepresentation against the seller in order to refuse to meet its obligation to the seller. That would defeat the whole point of the contract. (See also IV.G.–1:101 (Definitions) in relation to the nature of an independent personal security and IV.G.–3:104 (Independent personal security on first demand).)

The focus of the Article is on the position of the third party. The position of the contracting parties depends on the general contract rules and on the terms of the contract. In the absence of any provision to the contrary each contracting party will continue to have the normal rights and obligations of a contracting party towards the other contracting party. It will very often be the case that there will be rights and obligations between the contracting parties which are independent of the right or benefit conferred on the third party. For example, a man who concludes a contract with a pension provider for a pension for his widow may have rights under the contract to annual information about the value of the pension. A person who concludes a contract with a carrier may have rights against the carrier to have the goods picked up at a certain time and place and those rights may have nothing to do with the carrier's obligation to deliver the goods to a third party.

In some cases there is a theoretical risk of double liability. A contracting party might be liable to the other contracting party for not performing in favour of the third party and also liable to the third party. This is only a theoretical possibility, however, because the parties would be most unlikely to provide expressly for this and it would not be reasonable or in accordance with the requirements of good faith and fair dealing to imply an agreement to this effect.

NOTES

1. Paragraph (2) is similar to the UNIDROIT Principles art. 5.2.4.
2. PORTUGUESE law adopts a solution similar (CC art. 444), but it is not clear if some remedies to non-performance such as termination may also be invoked by a third party. Under CC art. 499 the contracting party may only assert against the third party the defences related to that contract. AUSTRIAN law (CC § 881(1) and (2)) makes it depend on the agreement whether only the other party or also the third party has a direct claim. The latter is presumed, if the performance is mainly in the interest of the third party. Under GERMAN law the solution depends on the interpretation of the contract, see Jauernig [-*Stadler*], BGB, § 328 no. 5; CC §§ 329, 330 contain presumptions for special cases.
3. For SLOVAKIA see the notes to II.–9:301 (Basic rules).
4. Under ESTONIAN law, the third party may require performance of an obligation under the contract only if this is so prescribed by the contract or determined by law (LOA § 80(2)). If the third party has the right to performance (e.g. in case of life

insurance, LOA §§ 80(3), 532), similarly to the present Article sub-paragraph (b), LOA § 80(7) allows the debtor to invoke all defences that were available against the other party to the contract. Together with the right to require performance the third party acquires the right to use appropriate remedies in the event of the debtor's non-performance. Remedies like withholding of counter-performance, termination of the contractual relationship and reduction of price remain available only to the other party to the contact (see Varul/Kull//Kõve/Käerdi (-*Varul*), Võlaõigusseadus I, § 80 no. 4.4.4.).

5. In DUTCH law the third party, after having accepted the stipulation in its favour, has the same rights to performance and on account of non-performance as the stipulator does (CC art. 6:253(1)), but may terminate the contract for non-performance only together with the stipulator (*Asser-Hartkamp*, 4-II, *Algemene leer der overeenkomsten*, no. 425). The rule expressed in paragraph (b) of the commented Article holds true in DUTCH law as well, but has not been expressed in the CC.

6. CZECH law conforms (CC § 50): the third party acquires rights from the contract at the moment of expressing consent to it. The contracting party has the same defences against the third party as he has against the party with whom he concluded the contract. If the third party waives its right to performance, the debt is extinguished, unless agreed otherwise. Unless the third party expresses consent, the contract is effective only between the parties who concluded the contract and the party who reserves performance in favour of the third party has the right to performance, unless agreed otherwise; the same holds true if the third party refuses to give consent with the performance.

7. Under DANISH law it is assumed that a third party can claim performance under a third party contract. It is not a requirement that the third party has accepted the offer. However until the contract is performed the parties to it may change the contract if they agree to do so. See *Ussing*, Aftaler[3], 374.

8. Under SLOVENIAN law, in the absence of contrary provision, both the stipulator and the third person may require performance from the promisor (LOA § 126). The promisor can raise against the third person defences from the contract with the promisee (LOA § 128).

9. The Article corresponds to ENGLISH law. See Contracts (Rights of Third Parties) Act s. 1(5) for third party rights to performance and remedies. It corresponds also in terms of defences which may be asserted against a third party (s. 3 (2)–(4) of the Act).

10. For SCOTTISH law see *MacQueen and Thomson*, Contract Law in Scotland, § 2.82; *McBryde*, Law of Contract in Scotland[1], para. 10.24.

II.–9:303: Rejection or revocation of benefit

(1) The third party may reject the right or benefit by notice to either of the contracting parties, if that is done without undue delay after being notified of the right or benefit and before it has been expressly or impliedly accepted. On such rejection, the right or benefit is treated as never having accrued to the third party.

(2) The contracting parties may remove or modify the contractual term conferring the right or benefit if this is done before either of them has given the third party notice that the right or benefit has been conferred. The contract determines whether and by whom and in what circumstances the right or benefit can be revoked or modified after that time.

(3) Even if the right or benefit conferred is by virtue of the contract revocable or subject to modification, the right to revoke or modify is lost if the parties have, or the party having the right to revoke or modify has, led the third party to believe that it is not revocable or subject to modification and if the third party has reasonably acted in reliance on it.

COMMENTS

A. The third party may refuse the right or benefit

Paragraph (1) of this Article makes it clear that the beneficiary may refuse to accept the right or benefit. This is necessary because nobody has to accept an unwanted benefit. If the benefit is rejected, it is considered never to have accrued to the beneficiary. To be effective, rejection must, however, take place before the right or benefit has been expressly or impliedly accepted. It is not necessary, and would not be reasonable, to allow the third party to enjoy a right or benefit for many years and then to reject it with retrospective effect. Under paragraph (1) rejection is effected by notice to either of the contracting parties. Normally the third party would give notice of rejection to the contracting party who sent notice of the benefit. This could be either of them. In Illustration 1 to the preceding Article, for example, either the father might tell the son that he had opened the account for him or the bank might tell the son that the account had been opened and give him information about how to operate it. The obligation to co-operate would require the contracting party who receives notice of the rejection to convey this information to the other party. In some cases, rejection may amount to a breach of a separate contract between one of the contracting parties and the third party but this does not have to be regulated by the Article.

Illustration 1
A seller of goods contracts with a carrier to deliver them to the buyer. The buyer refuses to accept delivery. This may or may not be a non-excused non-performance of the buyer's obligation under the sales contract to take delivery of the goods but that is a question between buyer and seller, not between buyer and carrier.

Of course, the third party can, in accordance with general principles, renounce the right non-retrospectively at any time.

B. Revocation or modification by the contracting parties

The law on this question has to reconcile two doctrines. First, the terms of a contract can always be modified by the contracting parties and they can terminate their contractual relationship by agreement at any time. Second, a right is something on which the holder of the right can rely: once conferred it should take effect according to its content. That content may of itself provide for it to be revocable or modifiable. But if the right is conferred without any

such qualifications it should not be within the control of anybody other than the holder of the right.

Paragraph (2) reconciles these two ideas in the following way. First, the contracting parties remain free to modify the terms of their contract so long as neither of them has notified the third party of the right or benefit conferred. Under the rules on notice in653Book I the notice would become effective when it reached the third party. Up until that time the terms of the contract are a matter entirely for the parties to it. There is no reason to modify the general rule that the parties control the terms of their contract. At that stage the third party has no reason to653suppose that a benefit is to be conferred and has no rights or expectation interests which demand protection. This approach is consistent with the approach taken under these Articles to unilateral juridical acts. A unilateral promise to pay X €100, even if written down and intended to be binding, has no effect until communicated to X. The promisor can have a change of mind after writing out the promise and can tear up the document. In the present situation the two contracting parties acting together have the same freedom of action. It will be noted that paragraph (2) says that the parties can remove or modify the contractual term. It does not say that they can revoke or modify the right or benefit because at this stage no right or benefit has yet been conferred.

Illustration 2
As part of a separation agreement a husband and wife agree that the husband will pay the wife's mortgage payments for a period of two years. The intention is for the husband to undertake a direct obligation towards the lender and for the lender to have a direct right against the husband. Before the agreement has been notified to the lender, the husband receives legal advice to the effect that it would be better from the tax point of view for him to make increased alimentary payments to the wife and for her to pay the mortgage herself. The husband and wife can tear up their agreement or modify it to provide for payments to be made to the wife herself. The third party has acquired no rights.

Illustration 3
The purchaser B has promised the seller V that B will pay the price to F which has financed V's acquisition of the goods. Later, but before any notification to F, B and V agree that B should pay the price to V. F, even if by chance becoming aware of what B and V had originally agreed, cannot claim the purchase price.

It should be noted that the rule in the first sentence of paragraph (2) does *not* say that once the conferral of the right or benefit has been notified to the third party it becomes irrevocable. Whether or not it is revocable at that stage depends, as we have seen, on the content of the right or benefit as determined by the contract. This is made clear, for the avoidance of any doubt, by the second sentence of paragraph (2). The right or benefit conferred may well be one which can be revoked or modified by one or both of the contracting parties.

Illustration 4
P has made B a beneficiary of a life insurance policy P has taken out with C, on terms that P may change the intended beneficiaries. B has been notified of this and informed of the terms of the policy. P may alter the beneficiary from B to D, but after P's death P's executors cannot do so.

If, however, the contract is to the effect that an irrevocable right is conferred on the third party and that the content of the right, once conferred, cannot be modified by either or both of the contracting parties then a new legal relationship is created which is quite distinct from the contractual relationship between the contracting parties. It is a relationship between the contracting party who undertakes an obligation to the third party and the third party who holds the corresponding right. That relationship is, in these circumstances, beyond the control of the contracting parties. The contracting parties could terminate their own contractual relationship by agreement at any time but this would not affect the relationship between one of them and the third party. In some cases both contracting parties may undertake obligations To the third party, but that does not affect the applicable principles.

It would be possible for the law to provide that the contracting parties could modify or revoke the right or benefit, even after it had been effectively conferred and even if it was in terms irrevocable, at any time before the third party had accepted it or reasonably acted in reliance on it. This is the solution adopted in the UNIDROIT Principles Article 5.2.5. It is not, however, the solution adopted by the present Article. It would not be coherent With the solution adopted for rights conferred by unilateral juridical acts or indeed with the general notion of a right, which is that the holder of the right is not subject to the mere whims of others. The approach adopted here is that if the parties want to be able, or if one of them wants to be able, to revoke or modify the right or benefit after it has been notified to the third party, this should be provided for in their contract.

Illustration 5
P has made B the beneficiary of a life insurance which P has taken out with C. B has been notified of this and sent a copy of the policy document. The policy provides that P may stop paying premiums at any time and that the surrender value of the policy will then be payable to P. The content of B's right has been determined by the contract. B's right will be dependent on P's continuing to pay the premiums.

Illustration 6
The facts are the same as in the preceding Illustration except that the policy is a single premium policy and does not allow P to modify its terms or otherwise affect B's right. P has paid the single premium and B has been notified of the benefit conferred and sent a copy of the policy. In this case P and C could not revoke or modify B's right. It is irrelevant whether B has accepted the right or acted in reliance on it.

C. Reliance on revocable right or benefit

In some cases it may not be clear to the third party that the right or benefit conferred is, under the contract, intended to be revocable by one or other of the contracting parties. In such cases the requirement of good faith and fair dealing would prevent revocation if the third party had reasonably acted in reliance on the right. Paragraph (3) makes this clear for the avoidance of any doubt. If, on the other hand, it had been made clear to the third party that the right was revocable then the third party would take the risk of acting in reliance on it.

NOTES

1. The conditions under which the third party beneficiary's right becomes irrevocable are treated differently in the legal systems.

2. Rules which agree with or which come close to the rules in the Article are found in AUSTRIA, CC § 881(3); BELGIUM, see *Dirix*, Obligatoire no. 123; DENMARK, see *Lynge Andersen* 373; GERMANY, see CC §§ 328(2), 331 and 332; NETHERLANDS, CC art. 6:253(2)-(4); PORTUGAL, CC art. 448; SCOTLAND, *McBryde*, Law of Contract in Scotland[1], paras. 10.25-10.32. In ENGLAND, under the Contracts (Rights of Third Parties) Act 1999, unless the contract provides otherwise, the third party's rights cannot be varied once it has communicated assent or it has relied on the term and the promisor knew that or should have foreseen it (s. 2).

3. Some of the laws seem to make the third party's right irrevocable only when it has been accepted: FRANCE, see *Malaurie and Aynès*, Les obligations[9], no. 815; GREECE, CC art. 412; ITALY, CC art. 1411(3), but see the exception in art. 1412(1); POLAND, CC art. 393 § 2; SPAIN, CC art. 1257(2) (see *Diez Picazo* I, 398); CZECH REPUBLIC, CC § 50(2); and SLOVENIA, LOA § 127(1), with an exception for the case when the promise is to be fulfilled after the promisee's death, see LOA § 127(2). In ENGLISH law a person cannot be made to take a benefit he or she does not wish to accept (*Thompson* v. *Leach* (1690) 2 Vent 198) and on becoming aware of the benefit, is entitled to reject it.

4. In the case of life insurance contracts (or at least certain types of such contracts) the beneficiary generally acquires an irrevocable right at least upon the death of the promisee. This is provided in BELGIUM (irrevocable from the moment of acceptance): Insurance Contract Act of 25 June 1992, art. 112; DENMARK, Insurance Contract Act 1930, § 102; ENGLAND, Married Women's Property Act 1882, s. 11 (only in favour of spouses or children); FINLAND, Insurance Contract Act § 47; GERMANY, Insurance Contract Law, § 159; ITALY, CC art. 1921; SCOTLAND, Married Women's Policies of Assurance (Scotland) Act 1880, s. 2; SWEDEN, Insurance Contract Act, (2005:104), chap. 14 §§ 1 and 2; SPAIN, Insurance Act 1980, art. 87; compare FRENCH Insurance Code (*Code des assurances*) art. L.132.9; CZECH REPUBLIC, Insurance Contract Act, § 51.

5. For SLOVAKIA see the notes to II.–9:301 (Basic rules).

6. According to ESTONIAN LOA § 80(6), the parties may amend or terminate the contract without the consent of the third party unless otherwise provided by law or the contract. This plain rule, which itself corresponds to the idea that the rights in favour of the third party are created without the consent of, or even notification to, the third party, may be qualified by the good faith principle if the third party has actually the right to claim performance and has accepted or partially received performance; or the benefit was given as the surety (see Varul/Kull//Kõve/Käerdi (-*Varul*), Võlaõigusseadus I, § 80 no. 4.5. and Supreme Court practice based on former law: decisions from 12 December2000, civil matter no. 3-2-1-142-00 and from 2 October 2002, civil matter no. 3-2-1-94-02)

7. See generally *Zweigert and Kötz*, An Introduction to Comparative law[3], 456 ff, *Kötz*, IECL s. II. ; *Kötz*, European Contract chap. 13.

Section 4: Unfair terms

II.–9:401: Mandatory nature of following provisions

The parties may not exclude the application of the provisions in this Section or derogate from or vary their effects.

COMMENTS

According to this Article the provisions of the DCFR on unfair terms have a mandatory character. Thus, parties may neither exclude their application nor vary their effects. Other issues of circumvention are addressed by way of interpretation of the individual provisions. For example, a standard term stating that the other party has confirmed that individual negotiations took place, is not sufficient to qualify the content of a contract term as having been negotiated (cf. comments to II.–1:110 (Terms "not individually negotiated"). It should be noted, that II.–9:401 only has an effect in favour of the party who did not supply an unfair term, and not of the supplier of the unfair term. This can be seen, for instance, in II.–9:408 (Effects of unfair terms) which provides that an unfair term "is not binding on the party who did not supply it". Hence, the unfair term is binding on the party who supplied it.

NOTES

1. The Unfair Contract Terms Directive (Directive 93/13/EEC) does not state that consumers may not waive the rights conferred on them. In its art. 6(2) the Directive only requires that its provisions may not be circumvented by choosing the law of a non-Member country. However, other consumer contract directives provide for the binding nature of the provisions in favour of the consumer, cf. Directive 85/577/EEC art. 6; Directive 97/7/EC art. 12(1); Directive 1999/44/EC art. 7(1).
2. Directive 93/13/EEC art. 6(2) has been implemented by the vast majority of Member States. Only LATVIA, POLAND and ROMANIA have refrained from granting protection against unfair clauses notwithstanding a choice of law purporting to prevent such protection. LITHUANIAN law does not provide for division between EU countries and other countries in this respect. All the provisions applicable in respect of consumers regarding unfair contract terms are applied equally to all consumers notwithstanding their country of origin.
3. Although not required by Directive 93/13/EEC many Member States declare that all consumer-protecting provisions, including the provisions on unfair terms, are mandatory, cf. AUSTRIA ConsProtA § 2(2); CZECH REPUBLIC CC § 55(1); SLOVENIA ConsProtA § 1. The SLOVAKIAN CC contains in § 54(1) a similar provision stating that: "The terms and conditions of contracts with consumers may not deviate from this regulation if such a deviation would be disadvantageous for the consumer. In particular, the consumer cannot waive the rights conferred by this regulation in advance or worsen his or her contractual position in any other way". This article relates to contracts in which the consumer is a contractual party. Another similar regulation is included in CC § 52(2) which stipulates that provisions on consumer contracts, as well as all other provisions regulating legal relationships in which the consumer is one of the parties, are to be used always when in the favour of

the consumer. ESTONIA LOA § 51 states that all consumer-protecting provisions are mandatory and that agreements derogating from these provisions to the detriment of the consumer are void. In GERMANY, according to CC § 306a the provisions on unfair terms are mandatory, even in business to business transactions. Under LATVIAN law contract terms are be deemed to be in contradiction with the principle of legal equality of the contracting parties if the terms stipulate that the consumer is waiving his or her lawful rights (ConsProtA art. 5(2) and (4)). MALTESE law provides that the terms in the Consumer Affairs Act protecting a consumer against unfair terms prevail over anything to the contrary contained in the CC and the Ccom (Consumer Affairs Act s. 47B). In the NETHERLANDS the core provisions of the law on standard terms are mandatory according to CC art. 6:246. In BULGARIAN law there is no clear statement as to whether the provisions on standard terms are mandatory. However, LOA art. 16 states that in cases of discrepancy between general terms and particular provisions of law the latter prevail.

II.–9:402: Duty of transparency in terms not individually negotiated

(1) A person who supplies terms which have not been individually negotiated has a duty to ensure that they are drafted and communicated in plain, intelligible language.

(2) In a contract between a business and a consumer a term which has been supplied by the business in breach of the duty of transparency imposed by paragraph (1) may on that ground alone be considered unfair.

COMMENTS

A. General principle and scope

This Article, which is modelled on Article 5, sentence 1 of the Unfair Terms Directive 1993/13/EEC requires that terms which have not been individually negotiated have to be drafted and communicated in plain, intelligible language. Thus, in the case of non-negotiated terms, the party supplying the terms assumes responsibility for their quality. As a consequence, the supplier has to conceive the terms in a way that is sufficiently transparent for it to be possible for the other party to be familiar with the content of the contract before conclusion and to use the terms as a reliable source of information before and during the time of performance. The purpose of the Article is to ensure that the other party can figure out unaided the contractual rights and obligations from the contract terms.

While Article 5, sentence 1 of the Unfair Terms Directive 1993/13/EEC only refers to written terms, the present Article does not contain such a limitation of scope. Therefore, it applies to all terms. It seems likely that Art. 5 of the Unfair Terms D. assumes that non-negotiated terms will only or mostly be in writing, whereas oral terms were envisaged only in the context of negotiations. Member State experience, however, demonstrates that non-negotiated oral terms actually exist. Since it is even more difficult to memorise oral terms, it seems more coherent to apply this provision to all terms instead of only to written terms (cf. also Recitals 11 and 20 of the Unfair Terms Directive 1993/13/EEC which also refer to non-written contracts).

B. Plain, intelligible language

The requirements of paragraph (1) are met if the other party can see from the contract and its terms what the contractual rights and obligations of the parties are. Consequently, the wording must be plain and intelligible. The same applies to the textual organisation, which must guarantee that the relevant terms can be recognised and identified without any unnecessary difficulty. Any information given by the terms has to be correct and complete so that no term is misleading.

> *Illustration 1*
> The standard terms used by landlord X state that in the winter, tenant Y may require "heating in the rooms used most frequently". According to this term, it is unclear which rooms have to be heated. Assuming this situation cannot be resolved by interpretation, the term is not transparent. In consequence, heating has to be provided either in all rooms, or in those rooms to be heated under general rules.

While the scope of paragraph (1) is not limited to businesses, the standard for transparency may differ depending on whether the contract is between two business (business to business) or between a business and a consumer (business to consumer).

Illustration 2
In its terms for reservations, hotel company X limits refunds for cancellation to situations covered by "the recommendations of the national tourist and hotel association". The term is unclear since the other party is unable to discover the scope of the right to a refund from the contract itself. The situation is different if the other party is a travel agency which can be expected to know the "recommendations".

C. Sanctions and relationship to other provisions

According to paragraph (2), in business to consumer relations, a contract term may be considered unfair for the sole reason that the term is not transparent. In consequence, if a term is supplied in breach of the duty of transparency imposed by paragraph (1) it is not binding on the party who did not supply it, (see II.–9:408 (Effects of unfair terms)). In other cases the duty of transparency is to be taken into account in assessing the unfairness of a contract term (II.–9:407 (Factors to be taken into account in assessing unfairness)). The present Article is also complemented by II.–3:106 (Clarity and form of information) which requires that pre-contractual information must be clear and precise and provided in plain and intelligible language. Furthermore, II.–8:103 (Interpretation against supplier of term or dominant party) states a *contra proferentem* rule for ambiguous contract terms which have not been individually negotiated.

NOTES

I. Duty of transparency

1. According to Directive 93/13/EEC art. 5 sent. 1 terms must always be drafted in plain, intelligible language. Recital 20 additionally makes clear that the consumer should be given a genuine opportunity to examine all the terms. It has to be noticed that – unlike II.–9:402 – Directive 93/13/EEC art. 5 sent. 1 only refers to written terms. It seems likely that Directive 93/13/EEC art. 5 assumes that non-negotiated terms will only or mostly be in writing, whereas oral terms were envisaged only in the context of negotiations. However, since it is more difficult to remember oral terms, it seems more coherent to apply this provision to all terms instead of only to written terms (cf. also Directive 93/13/EEC recitals 11 and 20). Directive 93/13/EEC does not contain any clear guidelines on whether a term is formulated in plain and intelligible language. It is also unclear, whether and to what extent the benchmark of the average consumer who is reasonably well informed and reasonably observant and circumspect, developed in the ECJ's case law on the fundamental freedoms and interpreting directives of trade practices law (see also Directive 2005/29/EC recital 18) also applies in the context of control of unfair terms.
2. The vast majority of Member States, including the most recent new Member States BULGARIA and ROMANIA, have transposed Directive 93/13/EEC art. 5 sent. 1 word for word. After the ECJ in its judgment C-144/99 (judgment of 10 May 2001, C-144/99 - *Commission v. Kingdom of the Netherlands* [2001] ECR I-03541, para. 17), clarified that, to implement the principle of transparency in full, "it is essential that the legal position under national law is sufficiently precise and clear that individuals are made fully aware of their rights" and that "even where the settled case-law of a member state interprets the provisions of national law in a manner deemed to satisfy the requirements of a Directive, that cannot achieve the clarity and precision needed to

meet the requirement of legal certainty", the principle of transparency was explicitly anchored in DUTCH and GERMAN law.

3. By contrast Directive 93/13/EEC art. 5 sent. 1 was not explicitly transposed in the CZECH REPUBLIC, ESTONIA, GREECE, HUNGARY, LUXEMBOURG and in SLOVAKIA. These countries do of course have rules on the incorporation and interpretation of pre-formulated terms, in the context of which the issue of whether the clause is formulated in plain, intelligible language also has a role to play. Whether this sufficiently accommodates the requirements of the ECJ is doubtful, however, since in those countries the danger exists that consumers and consumer associations do not know that they can take action against clauses which lack transparency.

4. The issue of whether a term is formulated in plain and intelligible language is assessed by reference to how it is understood. In this regard it is not surprising that the various benchmarks of the consumer in the individual Member States deviate considerably from one another. Clear differences in practice are above all evident in the extent to which legal terminology is permissible. In the UNITED KINGDOM, there is a clear tendency towards the fact that clauses must always be formulated in everyday layman's terms. In the guidance on unfair terms in consumer contracts issued by the Office of Fair Trading it is laid down that expressions such as "indemnity" must always be avoided, since such references can have onerous implications of which consumers are likely to be unaware (see 19.5 and 19.7 of the guidance, available at http://www.oft.gov.uk/Business/Legal/UTCC/guidance.htm). In place of such legal words, terms like "pay damages" are preferred. In GERMANY, by contrast, case law in this respect is more generous, but the BGH is however ready and keen to emphasise in a number of judgments, that the duty of the user to formulate the content of the clause clearly and intelligibly only exists within the bounds of what is actually possible. Should various kinds of legal and factual difficulties exist for the drafter, the terms will nonetheless be binding even if the other party has to make a certain effort in order to understand them rather than being able to understand immediately (BGH NJW 1998, 3114).

II. Consequences of lack of transparency

5. The wording of Directive 93/13/EEC does not specify the legal consequences which follow where the transparency requirement has been breached in the individual case. The sole legal consequence of failure to fulfil the requirement of transparency to be explicitly provided is the interpretation rule in Directive 93/13/EEC art. 5 sent. 2. This interpretation rule, however, only applies to clauses not drafted in plain language and which are capable of interpretation. However, the legal consequences of plain, but unintelligible clauses are not regulated (an example would be where, due to legal terminology or insufficient command of the language in which the terms are drafted, the clause is unintelligible to the consumer). Accordingly there are widely differing views on the legal consequences of a breach of the transparency imperative. Some assume that the Member States are free to decide on the legal consequences. However, others see the requirement of transparency, by reference to recital 20, as a condition for the incorporation of terms. Finally there is the view that clauses which lack transparency are to be assessed according to Directive 93/13/EEC art. 3. If one follows this latter view, it is furthermore doubtful whether lack of transparency *per se* results in the term being rendered unfair or non-binding according to Directive 93/13/EEC art. 3(1) in conjunction with art. 6(1) or whether there is a further condition that the content of the clause is disadvantageous, i.e. causes a considerable and unjustified imbalance in the contractual rights and obligations contrary to the principle of good faith.

6. The interpretation rule laid down in Directive 93/13/EEC art. 5 sent. 2, according to which any doubt on the meaning of a clause is always to be resolved in the manner most favourable to the consumer, has been transposed by all Member States, cf. e.g. BELGIUM ConsProtA art. 31(4); CZECH REPUBLIC CC art. 55(3); GERMANY CC § 305c(2); FRANCE ConsC art. L. 133-2(2); ITALY ConsC art. 35(2); LITHUANIA ConsProtA art. 11(5) sent. 2; POLAND CC art. 385(2) sent. 2; SPAIN ConsProtA art. 80(2). The implementation of the requirements of the Directive in ESTONIA however seems problematic. According to LOA § 39(1) sent. 2, "in the case of doubt, standard terms shall be interpreted to the detriment of the party supplying the standard terms." Directive 93/13/EEC however goes beyond a mere interpretation to the detriment of the user, in that it requires not only an interpretation favourable to the consumer, but an interpretation "most" favourable to the consumer.

7. In a few legal systems clauses in general terms and standard form contracts can be deemed unfair if they are not composed in plain intelligible language. In AUSTRIA, for example, unclear contract terms are ineffectual according to ConsProtA § 6(3). This rule has resulted in a certain confusion, as some authors assume that clauses lacking transparency are to be assessed according to this rule alone, so that the consumer cannot rely on the *contra-proferentem* rule in CC § 915 2nd alternative. The majority view, by contrast, holds that the consumer, even in the case of mere lack of transparency, can rely on an interpretation favourable to him or her. GERMAN law provides in CC § 307(1) sent. 2 that an unreasonable disadvantage may also result from the fact that the provision is not clear and comprehensible. This should make clear that, in the context of a content review, clauses lacking transparency are *per se* regarded as non-binding, without an additional criterion of unreasonable disadvantage to the contractual partner. Legal consequences of a breach of the transparency imperative therefore include not only an interpretation favourable to the consumer and non-incorporation into the contract, but also the ineffectuality of the clause within the content review.

8. The state of the law remains unclear in ITALY. Whereas some authors assume that lack of transparency implies nullity *per se*, for some commentators the infringements of the principle of transparency must be evaluated under ConsC art. 36(2) lit. (c) (binding the consumer to terms with which he or she had no real opportunity of becoming acquainted before the conclusion of the contract).

9. In LATVIA, although the legal consequences are not regulated in the ConsProtA, general norms of civil law could be nevertheless applied, particularly LOA art. 1506 stating that absolutely disreputable and unintelligible and also contradictory terms are not to be interpreted at all, but deemed null and void.

10. In MALTA, there are no express rules on the consequences of a lack of transparency for individual cases. However under general civil law rules, if the lack of transparency is such as to amount to fraud or bad faith on the part of a party to the contract, then that contract may be avoided by the choice of the other party. Moreover, the Director of Consumer Affairs in accordance with powers under Consumer Affairs Act art. 94 may issue a compliance order under that article if the Director considers that the term used is unfair to consumers and is in breach of art. 47. This article requires terms in a consumer contract to be written in plain and intelligible language "which can be understood by the consumers to whom the contract is directed."

11. For the non observance of the principle of transparency ROMANIA Unfair Contract Terms Act art. 14 provides that consumers prejudiced by contracts concluded in breach of the provisions of the law (including the breach of the transparency principle), have the right to file claims before the courts of law in accordance with the

provisions of the CC. Therefore, it seems that the Romanian legislator chose not to regulate the consequences for breach of the transparency requirement in individual actions. It rests with the courts to apply the transparency principle and relevant sanctions in cases of breach.

12. In the UNITED KINGDOM, it is unclear whether a term is capable of being found to be unfair *principally* or *solely* because it is not transparent, but the Law Commission and the Scottish Law Commission recommend in their final report on unfair contract terms that it should be possible for a contract term to be found to be unfair principally or solely because it is not transparent (See the final report of the Law Commission and the Scottish Law Commission on unfair terms in contracts, LAW COM No. 292/SCOT LAW COM No. 199, paras. 3098-3102).

II.–9:403: Meaning of "unfair" in contracts between a business and a consumer

In a contract between a business and a consumer, a term [which has not been individually negotiated] is unfair for the purposes of this Section if it is supplied by the business and if it significantly disadvantages the consumer, contrary to good faith and fair dealing.

COMMENTS

A. General principle and scope

This Article sets the standard for judicial control of terms in contracts between a business and a consumer. It is a highly controversial issue whether in business to consumer relations, the "content control" should only apply to terms which have not been individually negotiated or whether it should also cover individually negotiated terms. In the Acquis Principles prepared by the Acquis Group (which have been used as the model for these rules) the scope of the unfairness test is limited to non-negotiated terms. Thus, strictly speaking, the Acquis Group has only drafted rules on an unfairness test for non-negotiated terms, and has taken no position with regard to an unfairness control of individually negotiated terms. However, the majority of Study Group members wanted to extend this unfairness test to individually negotiated terms. Therefore, in the current version of the Article the words "which has not been individually negotiated" are put in square brackets. However, the practical consequence of this divergence is not to be overestimated considering the fact that II.–1:110 (Terms "not individually negotiated") provides a very broad definition of what a not individually negotiated term is. The practical relevance of the distinction is reduced even further by the burden of proof rule in paragraph 4 of that Article according to which, in business to consumer contracts the burden of proving that a term has been individually negotiated is imposed upon the business.

B. Significant disadvantage, contrary to good faith and fair dealing

The unfairness test in the present Article comprises two criteria: the "contrary to good faith and fair dealing" criterion as well as the "significant disadvantage" criterion. This structure is modelled on Article 3 Unfair Terms Directive 1993/13/EEC, according to which a term which has not been individually negotiated is considered unfair "if, contrary to the requirement of good faith, it causes significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." Compared to the Directive, the wording of the unfairness test in the present Article has been slightly altered. In particular, the term "good faith" has been replaced by the couplet "good faith and fair dealing". This brings the Article into line with other provisions of the model rules, e.g. II.–3:301 (Negotiations contrary to good faith and fair dealing), III.–1:103 (Good faith and fair dealing) which also use this pair of terms. The term "significant imbalance" has been replaced by the phrase "significantly disadvantages" in order to avoid the possible misunderstanding, that the price-performance ratio of the contract could be a measure to determine unfairness. The phrase "significantly disadvantages" should make clear, that a core element of the unfairness test is to compare the contract term in question with the default rules which were applicable if the term had not been agreed. In other words, the question is, whether the contract term in question significantly disadvantages the consumer in comparison with the default rule, which would be applicable otherwise. If the answer to this question is yes, the next question is whether this is contrary to good faith and fair dealing or whether there is a justification for this significant disadvantage. The good faith and fair dealing criterion allows a very flexible test: the more significant the disadvantage, the better the justification must be.

C. Relation to other provisions

More concrete criteria for the application of the unfairness test are provided in II.–9:407 (Factors to be taken into account in assessing unfairness). In addition, II.–9:406 (Exclusions from unfairness test) sets out the limits of the unfairness test. If a term is considered unfair under the present Article, according to II.–9:408 (Effects of unfair terms) it will not be binding upon the party who did not supply it.

In a more general perspective, the present Article can be interpreted as a derivative of the general principle of good faith. It is thus related to other provisions referring to good faith, e.g. II.–3:301 (Negotiations contrary to good faith and fair dealing), III.–1:103 (Good faith and fair dealing). The Article does not exclude an application of these other provisions. It may be that a term is generally in accordance with the requirements of good faith but invoking this term in a certain exceptional and unforeseeable situation is contrary to good faith. However, unfair results, even if limited to certain situations, constitute a strong argument that the term as such is contrary to the good faith requirement in the present Article especially if changed wording of a term can easily exclude unfair effects of the term. Moreover, according to II.–9:407 (Factors to be taken into account in assessing unfairness)., the courts will also look at the circumstances at the time of the conclusion of the contract in order to determine the unfairness of the term.

NOTES

I. Terms not individually negotiated

1. Directive 93/13/EEC art. 3(1) excludes contractual terms which have been individually negotiated by the consumer from the unfairness test. According to Directive 93/13/EEC art. 3(2) sent. 3, a seller or supplier who claims that a standard term has been individually negotiated has the burden of proof in this respect.

2. 15 Member States have adopted the exclusion of terms which have been individually negotiated: AUSTRIA (CC § 879(3), ConsProtA § 6(2)), CYPRUS, ESTONIA (LOA § 35(1)), GREECE, , HUNGARY, IRELAND (European Communities Regulations 1995 and 2000 reg. 3(1)), ITALY (ConsC art. 33(1)), LITHUANIA (CC art. 6.188(2)), the NETHERLANDS (CC art. 6.231), POLAND, PORTUGAL (ConsProtA art. 9), ROMANIA, SLOVAKIA (CC § 53(1)), SPAIN (ConsProtA art. 82(1)) and the UNITED KINGDOM (Unfair Terms in Consumer Contracts Regulations 1999 reg. 5(1)). In GERMANY, although “individually negotiated terms” are excluded from review (CC § 305(1) sent. 1), this is counterbalanced by a very narrow definition of that notion. The BGH held that for a term to be individually negotiated the customer has to fully understand the content of the contract and be aware of its legal consequences (BGH judgment of 19 May 2005, NJW 2005, 2543).

3. The remaining ten Member States, by not having transposed this exclusion, allow their courts or authorities to monitor individually negotiated terms. This is the case in the DENMARK, FINLAND and SWEDEN, and also in BELGIUM (ConsProtA), the CZECH REPUBLIC, FRANCE, LATVIA, LUXEMBOURG, MALTA and SLOVENIA. The Belgian Unfair Trade Practices Act opts for the middle way. The unfair contract terms, mentioned in Directive 93/13/EEC annex no. 1 are sanctioned with relative nullity even when individually negotiated (Unfair Trade Practices Act art. 7(4)). The principle of Directive 93/13/EEC art. 3(1) (Art. 7(2) LPA) applies to other

contractual terms. In BULGARIA, the general clause and even the black list of Art. 143 apply to all contract terms. However, as to the legal consequences Bulgarian law differentiates between individually and not individually negotiated terms: According to ConsProtA art. 146(1), which transposes Directive 93/13/EEC art. 6(1), terms not individually negotiated are automatically void. In contrast, unfair terms individually negotiated are remedied only by general contract law.

4. Although ten countries generally provide for a review of individually negotiated terms, of those only FRANCE and SLOVENIA have decided not to transpose Directive 93/13/EEC art. 3(2) sent. 3. It can be concluded that in the remaining countries which allow the monitoring of individually negotiated terms (BELGIUM, CZECH REPUBLIC, DENMARK, FINLAND, LUXEMBOURG, LATVIA, MALTA, SWEDEN) the distinction between standard and negotiated terms remains relevant for assessing unfairness, i.e. that different benchmarks apply. However Belgian practice does not show such a different approach.

II. Unfairness test in the Unfair Contract Terms Directive

5. According to Directive 93/13/EEC art. 3(1) a term (which has not been individually negotiated) is considered unfair "if, contrary to the requirement of good faith, it causes significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." The general clause according to its wording requires an "imbalance in the parties' rights and obligations" and, in addition, that the imbalance is "contrary to the requirement of good faith". The relationship of the principle of good faith to the criterion of "imbalance" remains unclear. The wording of the Directive suggests that a clause is unfair only if it causes an imbalance *and* this imbalance is furthermore contrary to the principle of good faith. Following this reading, a clause can therefore cause an imbalance without simultaneously being contrary to good faith. Others however, assume that any clause which generates a significant imbalance is always (automatically) contrary to the principle of good faith (cf. *Tenreiro*, ERPL 1995, 273, 279). It is ultimately worth considering whether the criteria "significant imbalance" and "good faith" are to be understood as alternatives in the sense that the two criteria operate independently of one another, so that a clause is unfair if it results in a significant imbalance, *or* if it is contrary to the requirement of good faith. In view of these multifarious interpretation possibilities it is not surprising that the member states have constructed their general clauses very differently.

III. "Significant imbalance to the detriment of the consumer"

6. The general clause has taken a number of very different forms in the Member States. The following countries make direct reference to "significant imbalance" in their general clauses: BELGIUM (ConsProtA art. 31(1)), BULGARIA, CYPRUS, DENMARK, ESTONIA, GREECE (ConsProtA art. 2(6) in conjunction with art. 2(1)), FRANCE (ConsC art. L. 132-1(1): "*un déséquilibre significatif entre les droits et obligations des parties au contrat*"), HUNGARY (CC art. 209(1)), IRELAND, ITALY (ConsC art. 33(1)), LITHUANIA, LUXEMBOURG (ConsProtA art. 1), MALTA, POLAND (CC art. 385/1(1) sent. 1), POTUGAL, ROMANIA (Unfair Contract Terms Act art. 4(1)), SLOVAKIA (CC § 53(1)), SLOVENIA (ConsProtA § 24(1)), GREECE, SPAIN (ConsProtA art. 82(1)) and the UNITED KINGDOM. However seven of these countries do not explicitly mention the additional criterion "good faith": BELGIUM, DENMARK, FRANCE, GREECE, LITHUANIA, LUXEMBOURG and SLOVAKIA. This legislative technique tends to result in a lowering of the burden of proof for consumers.

7. Under the NETHERLANDS CC art. 6:233 lit. (a), a standard contract term is considered voidable, if it is "unreasonably disadvantageous" (*onredelijk bezwarend*) to the other party. In addition to the possibility for the other party to annul a specific unfair clause, they can also argue that the stipulation – although valid – is not applicable in the sense that, in the given circumstances, this would be unacceptable according to the criteria of reasonableness and justice. There is no reference to good faith, significant imbalance or other related concepts.

IV. "Contrary to good faith"

8. The requirement of "good faith" is only explicitly mentioned in 15 Member States in total, namely in BULGARIA, CYPRUS, the CZECH REPUBLIC, GERMANY, HUNGARY, IRELAND, ITALY, LATVIA, MALTA, POLAND, PORTUGAL, ROMANIA, SLOVENIA, SPAIN and the UNITED KINGDOM. In FRANCE where the legislator refrained from making reference to "good faith" the concept of good faith exists as a general principle of interpretation (CC art. 1134(3)). It was deliberately not adopted in the framework of contract terms, as the view was held that a business which endeavours to achieve a significant imbalance cannot, by definition, be acting in good faith. Similarly, in FINLAND, the principle of good faith, although known in general contract law, is not applied when it comes to assessing unfairness. According to ConsProtA chap. 3 § 1 the assessment of unfairness is based on a reasonability test from the point of view of the consumer. In LITHUANIA CC art. 6.188(2) there is no reference to the principle of good faith, but ConsProtA art. 11(2) provides that contractual terms (other than those in the black list) may also be regarded as unfair, provided that they are contrary to the requirements of "good will" and cause inequality of mutually enjoyable rights and obligations between the seller, service provider and consumer. The DANISH legislature did not use the wording of the Directive ("*god tro*"), since according to Danish legal language the expression that a person is in "*god tro"* means that this person did not know and could not have been aware of a certain fact. Against this background the expression used in the Formation of Contracts Act art. 38c(1) seems to many authors to be a more adequate way of expressing the criterion of "good faith". In order to meet the requirements of the Directive, the legislator included a special provision (Formation of Contracts Act art. 38c(2)) which explicitly states that circumstances arising after the contract has been concluded cannot be taken into consideration to the detriment of the consumer.

9. In the NETHERLANDS the notion of good faith is equally not part of the law of unfair terms. However, a general rule outwith the law of unfair contract terms states that contractual regulations which are contrary to good faith are ineffective (CC art. 6:248(2). According to Dutch case law the general rule is not overruled by the specific provisions on standard terms and can be called upon in court by the parties at their discretion (Hoge Raad (NL) 14 June 2002 COO/315 HR *Johannes Maria Bramer v. Hofman Beheer B.V. & Colpro B.V.*).

10. BELGIAN law applies the principle of good faith indirectly. The key feature of the Belgian domestic legislation on unfair contract terms is the existence of two slightly different general clauses. According to ConsProtA art. 31(1), an unfair term is a clause or a condition which creates a "manifest" imbalance between the parties' rights and obligations. By contrast, in respect of the liberal professions the Unfair Trade Practices Act art. 7(2) defines an unfair term as a clause or a condition which has not been individually negotiated and which creates a "significant" imbalance between the parties' rights and obligations arising under the contract, "to the detriment of the consumer". At present Belgian practice does not show any distinction between the application of these criteria (manifest imbalance versus significant imbalance).

11. GERMAN law attaches significant emphasis to the principle of good faith. The "significant imbalance in the parties' rights and obligations arising under the contract" is not named. According to the general clause of CC § 307(1) standard contract terms are invalid, if they "place the contractual partner of the user at an unreasonable disadvantage contrary to principles of good faith". CC § 307(2) lists examples of where this is presumed (incompatibility with the essential basic principles of the statutory rule from which it deviates, restriction of essential rights or duties resulting from the nature of the contract in such a manner that there is a risk that the purpose of the contract (*Vertragszweck*) will not be achieved). In making reference to the purpose of the contract ESTONIAN law resembles the German approach. Pursuant to LOA § 42(1) a standard term is deemed void if the term causes "unfair harm" to the other party, particularly if it causes a "significant imbalance in the parties' rights and obligations" arising from the contract to the detriment of the other party or if the standard term is "contrary to good morals". Additionally, according to LOA § 42(2) "unfair harm" is presumed if a standard term derogates from a fundamental principle of law or detrimentally affects the rights and obligations of the other party in a manner inconsistent with the nature of the contract in such a manner that it becomes questionable as to whether the purpose of the contract can be achieved.

V. Other concepts

12. The MALTESE Consumer Affairs Act arts. 44 and 45 contain a combination of different concepts. Firstly, the provisions refer to "a significant imbalance between the rights and obligations of the contracting parties to the detriment of the consumer" (art. 45(1)(a)), a verbatim transposition of the Directive. Secondly the legislator adopted the principle of good faith (art. 45(1)(d) "or is incompatible with the requirements of good faith"). Additionally, a term may be regarded as unfair if "it causes the performance of the contract to be unduly detrimental to the consumer" (art. 45(1)(b)); or causes the performance of the contract to be significantly different from what the consumer could reasonably expect" (art. 45(1)(c)). All these definitions are applied as alternatives, i.e. it is sufficient for a term to fulfil one of the criteria to be considered as unfair.

13. In SLOVENIA, according to the general clause of ConsProtA § 24(1), the terms of the contract are considered unfair (1) if they bring about a significant imbalance in the contractual rights and obligations of the parties to the detriment of the consumer or (2) if they cause the fulfilment of the contract to be detrimental to the consumer without good reason or (3) if they cause the fulfilment of the contract to differ substantially from what the consumer rightly expected or (4) if they go against the principles of fairness and good faith. The Slovenian approach combines the benchmarks prescribed by the Directive ("significant imbalance", "to the detriment of the consumer", "good faith") with the principle of fairness.

14. SWEDISH law contains no precise definition of unfairness. There is the Unfair Contract Terms Act art. 11 which makes reference to ContrA art. 36 which has been in force and unchanged since 1976. ContrA art. 36(1) sent. 1 states very broadly: "A contract term may be adjusted or held unenforceable if the term is unreasonable with respect to the contract's content, circumstances at the formation of the contract, subsequent events or other circumstances". Good faith, imbalance or other concepts do not form part of the law as far as unfair terms are concerned. Circumstances which occurred after the conclusion of the contract can only be considered if this would not be to the disadvantage of the consumer (Unfair Contract Terms Act art. 11(2)).

II.–9:404: Meaning of "unfair" in contracts between non-business parties

In a contract between parties neither of whom is a business, a term is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and significantly disadvantages the other party, contrary to good faith and fair dealing.

COMMENTS

A. General principle

This Article sets the standard for judicial control of terms in contracts between parties, neither of whom is a business. This provision marks a sort of middle ground between the rather strict fairness test for business to consumer relations in II.–9:403 (Meaning of "unfair" in contracts between a business and a consumer) and the more liberal fairness test for business to business relations in II.–9:405 (Meaning of "unfair" in contracts between businesses). Consequently, it combines elements from both of the two other provisions.

B. Scope

The personal scope of the Article is defined in a negative way by the expression "parties neither of whom is a business". The provision therefore applies to contracts e.g. between two consumers. It also applies to contracts between two non-profit organisations which are neither qualified as businesses nor as consumers, as the notion of consumers does not include legal persons. The scope of the Article is further limited to standard terms, i.e. terms which have been formulated in advance for several transactions involving different parties, and which have not been individually negotiated by the parties.

C. Significant disadvantage, contrary to good faith and fair dealing

The criteria of the fairness test under this Article are identical to the criteria used in II.–9:403 (Meaning of "unfair" in contracts between a business and a consumer). Thus, the relevant comments to that Article apply accordingly. However, it has to be borne in mind that in the cases covered by the present Article the "content control" is not justified by the assumption of unequal negotiation power between a business and a consumer but by the assumption that the use of standard terms drafted in advance by one party enabled the party supplying these terms to restrict the other party's contractual freedom. This difference in the justification of the judicial control may lead to a difference in the application of the unfairness test between II.–9:403 and II.–9:404.

D. Relation to other provisions

More concrete criteria for the application of the unfairness test are provided in II.–9:407 (Factors to be taken into account in assessing unfairness). In addition, II.–9:406 (Exclusions from unfairness test) sets out the limits of the unfairness test. If a term is considered unfair under the present Article, according to II.–9:408 (Effects of unfair terms) it will not be binding upon the party who did not supply it.

NOTES

1. Directive 93/13/EEC is applicable to terms in contracts concluded between a seller or supplier and a consumer (business to consumer). At present, the Acquis does not provide for content review of person to person contracts.
2. In several Member States the general unfairness test is applicable regardless of the status of the parties, thus allowing a review of person to person contracts. Especially, in the Nordic states (DENMARK, FINLAND, SWEDEN), due to the general clause of ContrA § 36, a content review of unfair terms (even if they are individually negotiated) has always been possible in all manner of contractual relationships, thus also in person to person contracts.
3. In a series of Member States there are general clauses which provide for a content review of standard terms, which do not merely apply to business to consumer contracts, but also to person to person contracts. According to ESTONIAN law, for example, the requirements for a standard term to be part of the contract (LOA § 37) and the general unfairness test (LOA § 42(1)) are applicable regardless of the status of the parties. Similarly, in GERMANY the basic principles on general terms and conditions are not limited to business to consumer situations, thus the same rules apply in other situations. Similar concepts, which allow a content review of P2P contracts, exist in AUSTRIA, HUNGARY, LITHUANIA, the NETHERLANDS, PORTUGAL and SLOVENIA.
4. In the UK, a review of standard contract terms for person to person contracts is possible, since the Unfair Contract Terms Act also applies to certain “private” contracts for the sale of goods where neither of the two parties is a business. However, the Unfair Contract Terms Act applies only to exclusion and limitation of liability clauses and indemnity clauses.
5. In contrast, BELGIUM, BULGARIA, CYPRUS, the CZECH REPUBLIC, FRANCE, GREECE, IRELAND, ITALY, LATVIA, LUXEMBOURG, MALTA, SLOVAKIA and SPAIN do not provide for a content review of person to person contracts.

II.–9:405: Meaning of "unfair" in contracts between businesses

A term in a contract between businesses is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

COMMENTS

A. General principle

This Article sets the standard for judicial control of terms in contracts between businesses. Compared to the unfairness tests in II.–9:403 (Meaning of "unfair" in contracts between a business and a consumer) and II.–9:404 (Meaning of "unfair" in contracts between non-business parties) this is the most liberal of the three provisions on contractual "content control". It is a controversial political issue in itself whether the judicial control of contract terms should be extended to business to business relations. Several Member States also have such control for business to business contracts. The acquis communautaire also seems to provide a basis for such an extension. While the Unfair Terms Directive 1993/13/EEC only applies to business to consumer contracts, Article 3(3) of the Late Payment Directive states the criteria for judicial control of certain terms in business to business contracts ("grossly unfair" with regard to "good commercial practice"). The present Article reflects these guidelines by introducing limited "content control".

As in the case of II.–9:404 (Meaning of "unfair" in contracts between non-business parties) the "content control" is not justified by a general assumption of unequal negotiation power between the parties but by the assumption that the use of standard terms drafted in advance by one party enabled the party supplying these terms to restrict the other party's contractual freedom.

B. Scope

The personal scope of the Article covers contracts between businesses, i.e. any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person's self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity. As in II.–9:404 (Meaning of "unfair" in contracts between non-business parties) the scope of the present Article is limited further to standard terms, i.e. terms which have been formulated in advance for several transactions involving different parties, and which have not been individually negotiated by the parties. Thus, terms which have been formulated in advance by one of the parties but only for a single transaction, are not subject to the "content control" under this Article.

C. Significant disadvantage, contrary to good faith and fair dealing

The criteria of the fairness test under the Article are different from the criteria used in II.–9:403 (Meaning of "unfair" in contracts between a business and a consumer) and II.–9:404 (Meaning of "unfair" in contracts between non-business parties). While under these provisions a term is considered unfair if it "significantly disadvantages the other party, contrary to good faith and fair dealing", the present Article requires the term to "grossly deviate from good commercial practice, contrary to good faith and fair dealing". The reference to "good faith and fair dealing", which is the common element of the three unfairness tests, indicates that in all three cases the "content control" is a derivative of the

general principle of good faith. Nevertheless, the standard applied under the present Article is considerably different from the one used in the two preceding ones. In effect, under the present Article a term is considered unfair only "if it grossly deviates from good commercial practice". This standard is derived from Article 3(3) Late Payment Directive.

Illustration
According to the standard term of supplier A, a set-off against the claim of the supplier for payment is excluded. Whilst such a term would be presumed to be unfair in business to consumer cases under II.–9:403 (Terms which are presumed to be unfair in contracts between a business and a consumer) paragraph (1)(b), a set-off may be excluded in business to business contracts in order to prevent a buyer from invoking an unfounded set-off as a means to delay court proceedings. The buyer may raise separate court proceedings to enforce the right on which the set-off is based, which is no undue burden in business to business cases.

D. Relation to other provisions

More concrete criteria for the application of the unfairness test are provided in II.–9:407 (Factors to be taken into account in assessing unfairness). In addition, II.–9:406 (Exclusions from the unfairness test) sets out the limits of the unfairness test. If a term is considered unfair under the present Article, according to II.–9:408 (Effects of unfair terms) it will not be binding upon the party who did not supply it.

NOTES

1. While Directive 93/13/EEC only applies to business to consumer contracts, Directive 2000/35/EC art. 3(3) states criteria for the judicial control of certain terms in business to business contracts ("grossly unfair" with regard to "good commercial practice").

I. Member States that provide for a contents review of business to business contracts

2. In a series of Member States a review of business to business contracts is possible at different levels. In the Nordic states (DENMARK, FINLAND, SWEDEN), due to the general clause of ContrA § 36, a content review of unfair terms (even if they are individually negotiated) has always been possible in all manner of contractual relationships, thus also in business to business contracts. However, according to ContrA § 36, in determining what is unfair, regard must be had not only to the content of the contract and to the circumstances prevailing at and after the conclusion of the contract, but also to the positions of the parties. This means that in business to business contracts, very strict requirements must be overcome to render a clause unfair.
3. In some Member States, including ESTONIA, GERMANY and PORTUGAL as well as AUSTRIA, HUNGARY, LITHUANIA, the NETHERLANDS and SLOVENIA, there are general clauses which provide for a content review of standard terms, which do not merely apply to business to consumer contracts, but also to business to business contracts:
4. According to the AUSTRIAN CC § 879(3), a contractual term contained within the general conditions of business or contractual forms which does not make clear one of the party's ancillary performance duties, is void, if, in consideration of all the

circumstances of the case, it grossly disadvantages ("*gröblich benachteiligt*") one party. This rule does applies not only to business to consumer but also to business to business contracts.

5. The HUNGARIAN CC contains general provisions applicable to all persons on the incorporation and interpretation of standard contract terms (CC arts. 205a et seq.). According to CC art. 209(1), a standard contract term is unfair if, contrary to the requirement of good faith, it causes a considerable and unjustified disadvantage to the other party.

6. In LITHUANIA in general, applying to all situations, including business to business, a contract term which limits or excludes a party's liability for non-performance of an obligation, or which allows performance to be made in a substantially different manner from what the other party reasonably expected is not valid if such condition, having regard to the nature of the contract and other circumstances, is unfair (CC art. 6.211). Moreover, CC art. 6.186(3) provides a right to dissolve or modify a pre-drafted contract even after its conclusion if this contract excludes the rights and options commonly granted to the other party in a contract of that particular class, or excludes or limits the civil liability of the party who prepared the standard terms or establishes other provisions which violate the principle of equality of parties, cause imbalance in the parties' interests, or is contrary to the criteria of reasonableness, good faith and justice.

7. The SLOVENIAN legislator transposed Directive 93/13/EEC by amending ConsProtA arts. 22-24. Terms used in other contracts (business to business or person to person) can be reviewed under LOA art. 121 which provides that standard terms which oppose the actual purpose for which the contract was concluded or good business customs are null and void.

8. The scope of the DUTCH provisions on unfair terms also extends to business to business transactions. However, contractual parties who employ more than 50 staff cannot seek review of either incorporation or content (CC art. 6:235). The black list and the grey list (CC arts. 6:235 and 6:236) on the other hand relate only to consumer contracts.

9. Several Member States also employ a grey list and black list with regard to business to business contracts. The GERMAN provisions for monitoring of standard terms (CC §§ 305 et seq.), in principle, protect all contractual parties against whom standard terms are used. So far as standard terms are being used against a business, certain specific provisions do not have any direct application, especially the grey list (CC § 308) and black list (CC § 309), which apply to business to consumer contracts (CC § 310(1)). However, where the use of a particular clause against consumers would be prohibited according to CC §§ 308, 309, in a business to business situation the judge must examine whether the clause is also to be considered void in the business sphere. According to the case law of the BGH, the black list especially (CC § 309) has an indicative effect of whether the relevant rule leads to a disproportionate imbalance to the detriment of the business. PORUGUESE law, in addition to the general clause applying to all transactions (Unfair Contract Terms Act art. 15), also has a grey and a black list, which are applicable to all contractual relationships (Unfair Contract Terms Act arts. 18, 19). In ESTONIAN law requirements for a standard term to be part of the contract (LOA § 37) and pass the general unfairness test (LOA § 42(1)) are applicable regardless of the status of the parties. The black list, which applies to business to consumer contracts (LOA § 42(3)) is, pursuant to LOA § 44, to be considered as a grey list in respect of business to business contracts.

10. The scope of the GREEK ConsProtA, which also transposed the requirements of Directive 93/13/EEC, is extended to all natural and legal persons who are the end recipients of goods or services, irrespective of the purpose or nature of the transaction (ConsProtA art. 1(4)). It thus goes considerably further than the Directive. POLISH law distinguishes between forms used in all contracts, those used in contracts between professionals (traders) and those used in contracts with consumers. A review of the incorporation of standard terms is according to CC art. 384 in principle not confined to business to consumer relationships, but yet stronger provisions on incorporation apply to consumer contracts.

11. In the UNITED KINGDOM only the Unfair Contract Terms Act also applies to business to business contracts, unless stated otherwise in the Act. Therefore terms of such contracts, even if they are not standard terms of business, fall within the Act's scope of protection. Hence, the clauses must not equal those on the black list and must prove to be reasonable. Since the Unfair Contract Terms Act mainly focuses on such terms that restrict or exclude liability, these terms in business to business contracts are subject to review under the Act. However, in business to business contracts a higher level of the parties' independence as professionals is applied when reviewing a questionable clause. "In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne it is wrong to place a strained construction on words in an exclusion clause which are clear and fairly susceptible of one meaning" (*Photo Production Ltd. v. Securicor Transport Ltd.* [1980] AC 827). However, the fact that two business parties are dealing with each other does not automatically exclude any argument on a certain clause. In *Edmund Murray Ltd. v. BSP International Foundations Ltd.* [1992] 33 Con LR 1 as well as in *Lease Management Services Ltd. v. Purnell Secretarial Services Ltd.* [1994] 13 Trad LR 337 exclusion clauses of different types were subject to review by the court, although these clauses formed part of a business to business contract.

II. Member States that do not explicitly provide for a content review of business to business contracts

12. In contrast, there are no special clauses providing for a content review of pre-formulated terms in business to business contracts in BELGIUM, BULGARIA, CYPRUS, the CZECH REPUBLIC, FRANCE, IRELAND, ITALY, LATVIA, LUXEMBOURG, MALTA, SLOVAKIA and SPAIN.

13. It is nevertheless worth noting that in some of these member states a content review is possible indirectly. Many Member States regulate the incorporation of standard terms in a way which has a general application to all kinds of contractual parties. In LUXEMBOURG, for example, parallel to the provisions on business to consumer contracts, provisions on the distinction between individual agreements and pre-formulated clauses were introduced into CC art. 1135-1 and a new rule on the incorporation of standard terms was adopted: according to CC art. 1135-1 standard terms are binding only as long as the other party has had the possibility of becoming acquainted with the terms at the time of signing, and if in the prevailing circumstances is to be treated as having accepted them. Whereas the review of content provided in the ConsProtA is only applicable in the context of business to consumer relationships, the incorporation rules of CC art. 1135-1 apply to all persons. In SPAIN, the provisions of Directive 93/13/EEC have been implemented into the General Contract Terms Act and the ConsProtA, in which the list of unfair clauses was extended by a further 29 clauses. Both Acts are different in terms of scope and content. The Act on standard contract terms deals with standard terms in contracts in general, its provisions

apply equally to business to consumer contracts and business to business contracts. This Act however only regulates the incorporation and interpretation of standard terms, and does not review content.

14. Furthermore, the process of reviewing incorporation and interpretation often represents a hidden form of content review, in which not only formal aspects are examined. Thus, in a number of Member States the incorporation of standard terms does not merely depend upon whether the other party has had the opportunity of becoming acquainted with the contractual terms (such formal requirements are e.g. the duty of the user to inform the other party of its use of standard terms; the duty of the user to give the other party a genuine opportunity to become acquainted with the terms; the duty of the user to communicate the standard terms; the duty of the user to draft the terms transparently). Rather, in some of the Member States the content of the clause (and thus its fairness) are considered as well when deciding whether or not a term has been incorporated into the contract.

15. Finally it should be noted that some Member States apply general concepts, which can be used to correct an extremely disproportionate imbalance in the main performance duties, also in business to business contracts, such as on the basis of the *laesio enormis* or the benchmark of "public policy/good morals". SPANISH courts, for example, quite often use "indirect control" by applying the general theory on vices of consent (mistake, fraud, etc.). Moreover, the Civil law of Navarre and Catalonia admits a *laesio enormis* (but not the Spanish CC). In FRANCE, the Cass.civ. has sporadically allowed a review of clauses between two businesses (via the doctrine of *cause*, CC art. 1131), although the French provisions on content review are in principle limited to consumer contracts (see Cass.civ. 22 October 1996 D. 1997, 121 *Société Banchereau v. Société Chronopost* ; in later decisions however the Cass.civ. placed limitations on the extent of the principles developed in Chronopost, see Chambre mixte 22 April 2005, pourvoi nos. 02-18326 and 03-14112; Chambre commerciale 21 February 2006, pourvoi no. 04-20139).

II.–9:406: Exclusions from unfairness test

(1) Contract terms are not subjected to an unfairness test under this Section if they are based on:

(a) provisions of the applicable law;

(b) international conventions to which the Member States are parties, or to which the European Union is a party; or

(c) these rules.

(2) For contract terms which are drafted in plain and intelligible language, the unfairness test extends neither to the definition of the main subject matter of the contract, nor to the adequacy of the price to be paid.

COMMENTS

A. General principle and scope

This Article limits the scope of application of the unfairness test under the preceding three Articles. It contains two different exclusion rules. According to paragraph (1) contract terms which are based on statutory or international "background law" are excluded from the unfairness test. If a term is identical to a statutory provision or a provision in an international convention which is applicable to a contractual relationship, it does not make sense to control the term. If such a term were held invalid, the (identical) statutory provision or provision from a convention would apply. The unfairness tests in this Chapter give no power to control provisions of applicable law.

According to paragraph (2), the terms defining the subject matter and stating the price are excluded from the unfairness test. There are two reasons for this. First, judicial control of the quality of the goods or services as well as control of the adequacy of the price is incompatible with the needs of a market economy. Usually, the choice of the parties to enter into an exchange of goods and services for a certain price will be made individually so that there is neither room nor need for judicial control. Secondly, such control would require an application of legal criteria which do not exist (for fixing the subject matter of a contract) or an inappropriate and potentially burdensome application of legal criteria which do exist but which are intended to be invoked only in very rare cases where these matters cannot be determined from the contract terms (see e.g. II.–9:104 (Determination of price) and II.–9:108 (Quality)). These criteria are not intended to be used every time one party claims that the contractually agreed terms on price or quality are unfair.

The situation is different, however, if the requirement of transparency is not met. In the case of terms which are insufficiently transparent, an informed market decision has not been made so that it is adequate to apply judicial control. Furthermore, there is an interest to eliminate terms lacking transparency in collective proceedings.

Illustration 1

In its terms, Bank X states that securities are sold at their actual price on the stock exchange with an additional commission of 1%. The term is not subject to a review of its content under II.–9:403 (Meaning of "unfair" in contracts between a business and a consumer) or II.–9:405 (Meaning of "unfair" in contracts between businesses). However, if the term is found to be lacking in transparency, it can be reviewed under

II.–9:402 (Duty of transparency in terms not individually negotiated) according to II.–9:406(2).

B. Terms based on statutory provisions or international conventions

Paragraph (1) applies to terms which reflect an identical provision in a statutory or international instrument provided, however, that this provision would be applicable if the contract term did not exist. If this is the case, the term is not subject to the fairness test in this Section. In the case of international conventions, it is, therefore, not necessary for all Member States to be a party. It is sufficient that the convention is applicable because one or more Member States are a party. The provision applies to international conventions only, and not to private instruments.

Illustration 2
Airline X claims that its terms are based on the recommendations of the International Air Travel Association which are partly based on the Warsaw and Montreal Conventions. As far as the terms are identical to these conventions, the exception is applicable. This does not apply to other terms because a mere reflection of recommendations of a private association is insufficient.

It is not necessary for the statute or provision to be of a mandatory nature. Paragraph (1) only requires statutory or conventional "background law" which is identical to the contract terms so that the term is merely a restatement of an (otherwise applicable) provision or statute. Common law, customary law and case law have the same effect as statutes or conventions.

C. Terms defining the main subject matter of the contract or price

Paragraph (2) refers to the definition of the main subject matter of the contract or the adequacy of the price. The exception for subject matter of the contract means terms which identify and describe the subject matter of the contract, i.e. (in most cases) the goods or services to be delivered.

Illustration 3
In its terms X, a seller of furniture, states that the colour of the furniture actually delivered may slightly differ from the colour seen in the seller's shop or catalogue. The term does not define the colour (and thereby, the delivered goods as the subject matter of the contract) but allows the seller to deviate from this definition. The term is subject to control.

The "main subject matter of the contract" refers to the obligation characteristic of the contract (cf. Art. 4(2) of the Rome Convention on the law applicable to contractual obligations). Since the present Article is based on the theory that the main subject matter is individually negotiated, where the other party has made an individual choice that a certain object has been accepted, the provision applies only as far as this individual choice has not been altered or modified by the terms of the contract. Paragraph (2) requires a distinction between the definition of the subject matter and terms which alter subject matter already defined by the parties. Whereas the former falls under paragraph (2), the latter does not. Paragraph (2) moreover, does not apply to the terms dealing with the legal effects of a definition, e.g. terms limiting the effect of a contractual warranty.

The same principles apply to terms determining the price.

Illustration 4
In its terms, a manufacturing company states that the price will be determined according to its newest price list after the conclusion of the contract. The term is subject to control because it gives the manufacturer the right to change the price unilaterally.

NOTES

I. Terms based on statutory provisions etc.

1. According to Directive 93/13/EEC art. 1(2) contractual terms which reflect mandatory statutory or regulatory provisions and provisions or principles of international conventions, particularly in the transport area, are excluded from the scope of the Directive.

2. Roughly half of the Member States have implemented this exclusion, namely BELGIUM (Unfair Trade Practices Act art. 2(2)), CYPRUS, the CZECH REPUBLIC (CC art. 64), ESTONIA (LOA § 36(1)), HUNGARY (CC § 209(5)), IRELAND (European Communities Regulations 1995 and 2000 reg. 3(1)), ITALY (ConsC art. 34(3)), PORTUGAL, ROMANIA (Unfair Contract Terms Act art. 3(2)), SPAIN (General Contract Terms Act art. 4(2)) and the UNITED KINGDOM (Unfair Terms in Consumer Contracts Regulations 1999 reg. 4(2)). Under SLOVAKIAN law only legislative rules on the creation of legal instruments are excluded; however, according to the Slovakian Constitution art. 7(5) certain international conventions take priority over laws of the Slovak republic. In GERMANY, CC § 307(3) sent. 1 excludes mandatory provisions from content review (via the general clause assessing unfairness and the black and grey lists). Nevertheless, clauses repeating mandatory legislative provisions may be reviewed in terms of incorporation and transparency.

3. The remaining Member States, i.e. AUSTRIA, BELGIUM (ConsProtA), BULGARIA, DENMARK, FINLAND, FRANCE, GREECE, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, SLOVENIA and SWEDEN have decided not to transpose Directive 93/13/EEC art. 1(2) at all. To some extent the exclusion of mandatory provisions may nonetheless be established as an unwritten principle through case law or legal literature, for example in the Nordic countries (Denmark, Finland, Sweden) and also in Greece and Lithuania. In AUSTRIA, following a judgment of the OGH, there is a clear assumption that the applicability of the Directive, and thus of the national implementation, is limited where contract clauses are based on national law or international conventions (judgement of 7 October 2003 – 4 Ob 130/03a).

II. Main performance duties

4. According to Directive 93/13/EEC art. 4(2) the definition of the main subject of the contract and the adequacy of the remuneration for the delivered goods or services provided are excluded from the general unfairness test established by the Directive. Therefore, the unfairness test only relates to the remaining rights and duties arising out of the contract. However, even terms defining the main subject matter or the adequacy of the price have to be in plain intelligible language.

5. In most Member States the definition of the main subject and the adequacy of the price payable for the goods or services are excluded from the unfairness test given that these clauses are drafted in plain and intelligible language, cf. BELGIUM ConsProtA art.

31(3) sent. 2; BULGARIA ConsProtA art. 145(2); CYPRUS Unfair Contract Terms Act art. 3(2); ESTONIA LOA § 42(2); FINLAND ConsProtA chap. 4 § 1; FRANCE ConsC art. L. 132-1(1) and (7); GERMANY CC § 307(3); HUNGARY CC art. 209(4); IRELAND European Communities Regulations 1995 and 2000 reg. 4; ITALY ConsC art. 34(2); LITHUANIA CC art. 6.188(5) sent. 2; MALTA Consumer Affairs Act s. 45(2); NETHERLANDS CC art. 6:231(a); POLAND CC art. 385/1(1) sent. 2; PORTUGAL ConsProtA art. 9(2)(a); ROMANIA Unfair Contract Terms Act art. 4(6); SLOVAKIA CC § 53(2); UNITED KINGDOM Unfair Terms in Consumer Contracts Regulations 1999 reg. 6(2).

6. In AUSTRIA, DENMARK, GREECE, LATVIA, LUXEMBOURG, ROMANIA, SLOVENIA, SPAIN and SWEDEN Directive 93/13/EEC art. 4(2) has not been transposed, so that in principle, the monitoring of the main subject matter of the contract and the adequacy of price is possible. However, in some Member States, for example GREECE and SPAIN, this silence has produced uncertainty in interpreting national law with the result that academia and case law use different approaches to solve the problem with contradictory solutions.

II.–9:407: Factors to be taken into account in assessing unfairness

(1) When assessing the unfairness of a contractual term for the purposes of this Section, regard is to be had to the duty of transparency under II.–9:402 (Duty of transparency in terms not individually negotiated), to the nature of what is to be provided under the contract, to the circumstances prevailing during the conclusion of the contract, to the other terms of the contract and to the terms of any other contract on which the contract depends.

(2) For the purposes of II.–9:403 (Meaning of "unfair" in contracts between a business and a consumer) the circumstances prevailing during the conclusion of the contract include the extent to which the consumer was given a real opportunity to become acquainted with the term before the conclusion of the contract.

COMMENTS

A. General principle and scope

This Article provides the criteria for the unfairness tests contained in II.–9:403 (Meaning of "unfair" in contracts between a business and a consumer), II.–9:404 (Meaning of "unfair" in contracts between non-business parties) and II.–9:405 (Meaning of "unfair" in contracts between businesses). While these provisions define the standard of fairness, i.e. "good faith and fair dealing" in II.–9:403, and II.–9:404 and "good commercial practices" in II.–9:405, the present Article determines which factors have to be taken into account in assessing unfairness. Paragraph (1) contains a general rule which is applicable to all three unfairness tests mentioned above. Paragraph (2) concretises this rule for the unfairness test under II.–9:403, which is applicable for contracts between a business and a consumer.

B. Factors to be taken into account for all contracts

The list of factors to be taken into account when assessing the unfairness of a contract term is based on Article 4(1) Unfair Terms Directive 1993/13/EEC, and it has been clarified that the transparency of the term is also included as a factor. It has to be borne in mind that the starting point and the subject of the unfairness test is an abstract assessment of the relevant single term in question and not on "overall acceptability" of the contract as a whole. Nevertheless, other terms of the contract and terms of any other contracts on which the contract depends are also included into the assessment. This approach, however, may not compromise the principle that the subject of control is each individual term. Thus, in principle, each term has to be considered separately. An "overall acceptability" of the contract as a whole is irrelevant. Consequently, the supplier of terms is not allowed to justify an unfair term by including other terms which are favourable to the other party unless there is a close connection between the subject matter of both terms so that the favourable term constitutes an effective compensation. In particular, a low price cannot justify unfair terms unless this arrangement is the result of an individual negotiation. In summary, the reference to other terms in paragraph (1) only means that the effect of one term may be influenced by other terms.

As the unfairness test starts from an abstract assessment of an individual term, the "circumstances prevailing during the conclusion of the contract" might only influence the result of the test in exceptional cases. For instance, if the abstract fairness test has the result that the term in question lies on the borderline between fair and unfair, the term may be considered as 'only just' fair, if the party supplying the term has made a particular effort to explain the consequences of the term to the other party.

C. Additional rule for contracts between a business and a consumer

According to paragraph (1) when assessing the unfairness of a contract term regard is to be had to the duty of transparency under II.–9:402 (Duty of transparency in terms not individually negotiated). Thus, one of the factors to be taken into account is whether the term has been drafted in plain, intelligible language. This question has to be distinguished from the question regulated in paragraph (2), according to which (in consumer cases), another relevant factor is the extent to which the consumer was given a real opportunity to become acquainted with the term before the conclusion of the contract. This rule is based on several provisions of the acquis communautaire, in particular, Annex I (i) Unfair Terms Directive 1993/13/EEC, Article 4(2)(b) Package Travel Directive, Article 3 Cross-Border Credit Transfers Directive and Article 5 Financial Services Distance Selling Directive, which confirm that this aspect is a key fairness requirement (at least) in business to consumer contracts.

Paragraph (2) stipulates an intensification of the general rule in II.–9:103 (Terms not individually negotiated), according to which the supplier of non-negotiated terms has to draw the other party's attention to the terms before the conclusion of the contract. Paragraph (2) requires the business to do more, namely to give the consumer a real opportunity to become acquainted with the term.

> *Illustration 1*
> In a shop, there is a clear reference to the standard terms available at the cash desk. A copy of these terms is attached to the cashier's desk. It is only possible for the consumer to read these when standing immediately next to the cashier and not while waiting in line. Once the consumer has reached the cashier, there is not enough time to read the terms, since there are other clients waiting behind. The requirements of the general incorporation rule in II.–9:103 (Terms not individually negotiated) are met, because the supplier has drawn the other party's attention to the terms before the conclusion of the contract. But the requirements of paragraph (2) of the present Article are not met.

It should be noted that the consequences of II.–9:103 (Terms not individually negotiated) and of paragraph (2) of the present Article are different. If the supplier of the terms does not take reasonable steps to draw these terms to the attention of the other party, the supplier may not invoke the terms against the other party. Thus, the terms are not part of the contract unless the other party so desires. However, if the business takes reasonable steps to draw the attention of the consumer to the terms, but the consumer is not given a real opportunity to become acquainted with the term, the terms become part of the contract. Nevertheless, the lack of this opportunity is a factor which has to be taken into account when assessing whether a term is to be considered unfair.

Under paragraph (2) the supplier has to ensure that the consumer actually takes notice of the terms and has a real opportunity to read them. A real opportunity to read is both necessary and sufficient. Whether the consumer takes this opportunity or not is irrelevant.

> *Illustration 2*
> An online shop offers mobile phones to private customers. The active website shows a hyperlink to standard terms prior to the conclusion of the contract. It accepts orders only if the consumer confirms that the standard terms have been read. Customer B

confirms that they have been read but actually has not read them. The requirements of paragraph (2) are met although B's confirmation was incorrect. B had a real opportunity to read the terms.

The requirement of a real opportunity relates to all aspects relevant to this opportunity, especially to the availability and readability of the terms. In most cases, it will be necessary to provide a readable print version of the terms prior to the conclusion of the contract and to give the consumer enough time to carefully read the terms.

Illustration 3
In a department store, the standard terms are posted on the wall right beside the cashier so that it is impossible to overlook them and consumers have a good opportunity to read them. In this case, the requirements of paragraph (2) are met.

If a term is used for several contracts in a continuing relationship between the same parties who always use the same standard contract, it will generally be sufficient if the consumer had a real opportunity to become acquainted with the term at the beginning of the relationship.

NOTES

I. Assessing the unfairness of a contract term

1. According to Directive 93/13/EEC art. 4(1) the unfairness of a contractual term is to be assessed (1) by taking the nature of the goods or services for which the contract was concluded into account, and (2) by referring to all the circumstances attending the conclusion of the contract (as at that time) and (3) in relation to all the other terms of the contract or of another contract upon which it is dependent. Recital 16 of the Directive further provides that in making an assessment of good faith, particular regard shall be given to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer. Additionally, the annex to Directive 93/13/EEC has a certain indicative effect in the assessment of the fairness of a clause.
2. Directive 93/13/EEC art. 4(1) has been implemented by the Member States. Several of them make reference to all the criteria established by the Directive. Thus BELGIUM (ConsProtA art. 31(3) sent. 1), BULGARIA (ConsProtA art. 145(1)), CZECH REPUBLIC (CC art. 56), DENMARK (ContrA § 38c(2) and § 36(2)), GREECE (ConsProtA art. 2(6) sent. 2), HUNGARY (CC art. 209(2)), ITALY (ConsC art. 34(1)), LATVIA (ConsProtA art. 6(4)), LITHUANIA (CC art. 6.188(5) sent. 1), NETHERLANDS (CC art. 6:233(a)), POLAND (CC art. 385/2), ROMANIA (Unfair Contract Terms Act art. 4(5)), SLOVAKIA (CC § 54(1) and (2)), SLOVENIA (ConsProtA § 24(2)) and SPAIN (ConsProtA art. 82(3)) provide that the unfairness of a term has to be assessed by taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent.
3. Some Member States amplify the guidance of Directive 93/13/EEC art. 4(1) by also implementing the indications given in recital 16 of the Directive. CYPRUS Unfair Contract Terms Act art. 5(2), IRELAND European Communities Regulations 1995

and 2000 schedule 2 and UNITED KINGDOM Unfair Contract Terms Act schedule 2 contain guidelines for the assessment of a term such as *inter alia* the strength of the bargaining positions of the parties relative to each other, whether the consumer had an inducement to agree to the term or whether the goods or services were sold or supplied to the special order of the consumer and the extent to which the seller or supplier have dealt fairly with the consumer. The MALTESE legislator gives some examples of the circumstances attending the conclusion of the contract. According to Consumer Affairs Act art. 45(2)(c) such circumstances may also include: the bargaining power of the parties; whether a consumer was subjected to undue pressure; and whether the lack of knowledge or skill of a consumer was improperly taken advantage of. In the NETHERLANDS a possibly unfair standard term has to be assessed taking into account also the identifiable mutual apparent interests of the parties (CC art. 6:233(a)).

4. Several Member States slightly deviate from the requirements of Directive 93/13/EEC art. 4(1). Thus, AUSTRIAN law only states that the circumstances of the conclusion have to be taken into account as well as the special situation of the contractual parties (CC § 879(3)); no reference is made to other terms of the contract or to the nature of the goods and services. In ESTONIA (LOA § 42(1)), FRANCE (ConsC art. 132-1(5)) and LUXEMBOURG (ConsProtA art. 1) no reference is made to the nature of the goods and services sold under the contract. GERMAN law only provides that the circumstances surrounding the conclusion of the contracts have to be taken into account for the assessment of a possibly unfair term (CC § 310(3) no. 3).

5. There is uncertainty whether changes of the circumstances can also be taken into account to the detriment of the consumer. While under FINLAND ConsProtA chap. 4 § 1 those changes may not be taken into consideration, GERMAN academics argue that taking into account those individual circumstances can also be disadvantageous for the consumer (see *Ansgar Staudinger*, RIW 1999, 921).

II. Consumer's possibility to become acquainted with a contract term

6. At EC level Directive 93/13/EEC annex 1(i) states that irrevocably binding the consumer to terms with which the consumer had no real opportunity of becoming acquainted before the conclusion of the contract may be regarded as unfair. Similarly, Directive 90/314/EEC art. 4(2)(b) provides that all the terms of the contract must be communicated to the consumer before the conclusion of the contract. Similarly, Directive 2002/65 art. 5(1) confirms the view that the consumer must have a real opportunity to become acquainted with the terms before the conclusion of the contract.

7. Most Member States have transposed Directive 93/13/EEC annex 1(i) and thus provide that a term irrevocably binding the consumer although he or she had no real opportunity of becoming acquainted with the content may be considered as unfair. Only DENMARK, FINLAND and SWEDEN have not explicitly transposed the provision but the annex to the Directive was reproduced in the preparatory work for the Acts implementing the Directive.

8. In several Member States the clauses in the annex to Directive 93/13/EEC are always regarded as unfair (black list), i.e. if the consumer was not given a possibility to become acquainted with a contract term, the respective clause is deemed unfair. This applies to AUSTRIA, BELGIUM, the CZECH REPUBLIC, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA and SLOVENIA.

9. In some legal systems standard terms only become a part of a contract if the party supplying the standard terms clearly refers to them as part of the contract before concluding the contract (or while concluding it) and the other party has an opportunity to examine their contents, cf. ESTONIA LOA § 37(1) sent. 1; GERMANY CC §

305(2); GREECE ConsProtA art. 2(7) lit. κδ. In Estonia and Germany, this rule applies not only to business to consumer but to all contracts. Similarly, HUNGARY CC art. 205/B states that "standard contract terms will become part of a contract only if they have previously been made available to the other party for perusal and if the other party has accepted the terms explicitly or through conduct that implies acceptance". Under SLOVENIAN law, the terms of a contract are binding on the consumer only if the consumer was acquainted with the complete text of the terms prior to concluding the contract. The consumer is deemed to have been acquainted with the complete text of the terms of a contract if the enterprise expressly notified him or her of, and provided easy access to, the terms (ConsProtA § 22).

10. A series of Member States, e.g. CYPRUS, FRANCE, IRELAND, the NETHERLANDS, POLAND, PORTUGAL, SLOVAKIA and the UNITED KINGDOM, have implemented the annex of Directive 93/13/EEC in the form of a non-binding grey list. Thus, terms which the consumer had no opportunity to become aware of before conclusion of the contract are only presumed to be unfair.

II.–9:408: Effects of unfair terms

(1) A term which is unfair under this Section is not binding on the party who did not supply it.

(2) If the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties.

COMMENTS

A. Purpose and scope

The provision states the legal effects of unfairness on contracts. Paragraph (1) deals with the effect of unfairness on the term itself. It follows a unilateral solution, according to which the other party is not bound to an unfair term whereas the supplier is. This means that it is for the other party to decide whether the term, regardless of its unfairness, should be applied or not. Paragraph (2) deals with the effects of paragraph (1) on the remaining contract. The contract is binding for both parties if it can be maintained without the unfair term. It is the purpose of this provision simply to strike out the unfair term so that the other side is not deprived of the advantages of a contract and to maintain the remaining contract as far as this is possible.

B. Effect of unfairness on the term considered unfair

According to paragraph (1), a term which is unfair is not binding for the other party, i.e. the party who did not supply it. Not binding means that no legal effects can be based on such a term: neither any rights against the other party nor any exclusion or limitation of rights or defences of the other party.

> *Illustration 1*
> In its sales terms, a seller excludes all rights of the buyer in cases of a defect except for the right to terminate the contractual relationship. A right to terminate, even without giving the seller an opportunity to cure the defect, is however expressly conferred by the term. The term is not binding on buyers, even in business to business contracts, since it excludes all rights to claim damages even in cases of gross negligence or even intent. A buyer gives notice of termination. The seller invokes the unfairness of the term, arguing that the buyer has no rights to terminate under it and must allow an opportunity for repair or replacement. According to paragraph (1), the seller is barred from invoking the unfairness of its own terms. The term is binding on the seller.

> *Illustration 2*
> Based on the same circumstances as in Illustration 1 but the defect was caused by the seller's negligence. As a consequence of the defect, the buyer could not resell the goods to a third party. The buyer may claim damages for lost profits from the seller. The unfair term is not binding on the buyer.

The provision can operate without any further definitions of "not binding". Not binding "on a party who did not supply them" means that the term has no legal effect against this party whereas it may be invoked against the supplier of the term, if the other party so desires. Thus, the other party, especially a consumer, has no obligation to invoke the non-binding effect in a legal proceeding. However, as stated by the ECJ in *Océano Grupo* (C-240/98 to C-244/98), *Cofidis* (C-473/00) and *Mostaza Claro* (C-168/05), a consumer has to be protected, even if he or she fails to raise the unfair nature of the term, either because unaware of available rights or

because deterred from enforcing them. Therefore, if the consumer does not take an explicit decision as to whether to be bound to the term or not, courts have to decide on their own accord about the consequences of unfairness.

C. Effect of unfairness on the remaining contract

According to paragraph (2), a contract can be maintained without the unfair term if the content of the remaining contract without the term is legally viable. This may be the case because the term addresses a question which does not need a contractual answer either because the question is not essential or because there is a default rule or statutory background provision to fill the gap. The non-binding effect is thus as a rule limited to the unfair term. Consequently, it is no defence against a binding effect of the remaining contract that the remaining contract is less advantageous for the supplier. It is up to the supplier to supply adequate terms in order to avoid this effect.

> *Illustration 3*
> X buys goods from seller Y. The standard terms of Y include a general and unlimited right for the seller to change the price stated in the contract. The term is not binding. The contract, however, can be maintained without the unfair term. The seller may not claim that it is more burdensome to be bound at the initial price and that the contract would not have been concluded without the invalid term: there may be an exception when doctrines of general contract law, e.g. good faith because of hardship, apply.

A contract cannot be maintained without the unfair term if this term is essential for the contract and cannot be supplied by reference to default rules or background provisions.

NOTES

I. Consequences for the term considered unfair

1. Directive 93/13/EEC art. 6(1) provides that Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. The ECJ first addressed the legal consequences of unfairness in *Océano* (judgment of 27 June 2000, joined Cases C-240/98 to C-244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941). The case concerned the procedural issue of the reviewability of a jurisdiction clause, disadvantageous to the consumer. In this decision the ECJ held, that "the protection provided for consumers by the Directive entails the national court being able to determine of its own motion whether a term of a contract (…) is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts". In *Cofidis* (judgment of 21 November 2002, C-473/00 – *Cofidis v. Fredout*, [2002] ECR I-10875) the ECJ extended the competence to review further and stated that the protection of the consumer precludes *any* national provision which prohibits the national court, on expiry of a limitation period, from finding that a term of the contract is unfair. In contrast to the *Océano* case, the dicta of the ECJ relate not only to the issue of whether the member state court can review its jurisdiction "on its own motion", but on the nullity of clauses generally. It is therefore to be assumed that, according to the view of the ECJ, national courts must have the power to review

the fairness of a clause on their own initiative generally (and not only for the special case of jurisdiction clauses). In *Mostaza Claro* (judgment of 26 October 2006, C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421, para. 36), the court clarified that Directive 93/13/EEC art. 6(1) "is a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them."

2. The open wording of Directive 93/13/EEC does not clarify how the Member States shall establish the form of the non-binding nature. Many member states have decided to adopt or maintain the concept of absolute nullity. In ESTONIA, GERMANY, IRELAND, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA and SPAIN, a contractual term considered unfair will be automatically deemed null and void. In MALTA (Consumer Affairs Act s. 44(1)), FRANCE (ConsC art. L. 132-1) and LUXEMBOURG (ConsProtA art. 1), unfair clauses are regarded as non-existent or "*non écrites*". Apart from the wording and creation of a legal fiction, no significant practical differences between nullity and non-existence can be identified. As to the legal consequences BULGARIAN law differentiates between individually and not individually negotiated terms. According to ConsProtA art. 146(1), which transposes Directive 93/13/EEC art. 6(1), terms not individually negotiated are automatically void. In contrast, unfair terms individually negotiated are remedied only by general contract law.

3. In some Member States, however, there exists the more flexible concept of relative nullity, according to which the unfair term initially remains in force, so long as this suits the contractual partner of the user (i.e. generally the consumer), who alone can unilaterally assert its nullity. This concept of relative nullity can be found in the CZECH REPUBLIC, LATVIA and the NETHERLANDS with different specifications. According to Czech Republic CC art. 55, an unfair term is only relatively ineffectual, i.e. ineffectual only upon assertion by the consumer. According to Latvian ConsProtA art. 6(8), unfair terms included in a contract entered into between a seller or service provider and a consumer shall be declared null and void upon the consumer's request. The consumer is the one who needs to initiate particular actions in order to trigger the procedure that could ensure that the Consumer Rights Protection Centre (State Institution) or the court will declare the contractual term in question is unfair. Also in the Netherlands, CC art. 6:233 provides that an unfair term is merely voidable (*vernietigbaar*).

4. In a series of Member States it remains controversial whether or not the domestic provisions can be interpreted in such a way as to provide for relative nullity. In AUSTRIA, it is recognised that the jurisdiction of the relevant court is in principle to be exercised on its own motion. The unfairness of other (substantial) clauses by contrast is in principle not assessed *ex officio*, but rather only on a plea raised by the consumer. Under the BELGIAN ConsProtA the nullity of terms considered unfair is compulsory. However, there is some discussion on the nature of nullity. In a case concerning an infringement of the general clause of former ConsProtA art. 31, the CA Mons (judgment of 29 March 1999, Journal des Tribunaux 1999, 604) pointed out that given the relative nullity it did not have the competence to assess the unfair character of terms on its own motion. On the other hand, the CA Ghent (judgment of 3 March 2003, Algemeen Ziekenhuis St-Lucas VZW/R. Jonckheere, Tijdschrift voor Gentse rechtspraak 2003, 162) stated that although most of the provisions on unfair contract terms only concerned private interests, and consequently are sanctioned by relative nullity, there are some provisions which do concern public policy and are therefore

sanctioned by absolute nullity. There are also legal scholars who proclaim absolute nullity as a general consequence of unfairness.

5. In CYPRUS, the transposition law copies the Directive, thereby stating that an unfair term does not bind the consumer (Unfair Contract Terms Act art. 6(1) and (2)). In POLAND, CC art. 385/1(1) stipulates that "prohibited contractual clauses" do not bind the consumer and no absolute nullity is expressly provided. Therefore, it remains controversial in both countries whether or not the domestic provisions can be interpreted in such a way as to provide for relative nullity.

6. According to the GREEK ConsProtA art. 2(8), the supplier cannot claim nullity of the contract as a whole if one or more terms are unfair and therefore considered void. Some authors regard this provision as an argument for relative nullity, others argue that, due to the public law character of the provisions and the lack of an explicit claim for damages for the use of unfair terms, only absolute nullity would match the intention of the domestic legislator. In HUNGARY, the legislator changed the consequences of unfairness in 2006, however, without clarifying whether the consumer can influence the validity of the term in question. CC art. 209a(2) provides that unfair clauses in consumer contracts are void. On the other hand the same article states that the unfairness of a clause can only be *asserted* to the advantage of the consumer. In ITALY, the legislator changed the legal consequences of the use of unfair terms by introducing the concept of protective nullity (*nullità di protezione*). This provides that the nullity of a clause can only occur to the advantage of the consumer, whereby the court has jurisdiction to declare the term void on its own motion (ConsC art. 36(3): "*La nullità opera soltanto a vantaggio del consumatore e può essere rilevata d'ufficio dal giudice*"). Against this background it remains unclear in Hungary and Italy whether, according to the present state of the law, the court can also declare nullity if the consumer expressly wishes to be bound by the clause.

7. The Nordic countries DENMARK, FINLAND and SWEDEN traditionally apply a more flexible approach based on the vast usage of general clauses. The courts are entitled not only to declare an unfair term null and void, but also to alter, amend and adjust the particular term, other terms or the entire contract, thereby taking into account circumstances that have arisen after the contract was entered into. Although there is no relative nullity in the strict sense, this discretionary power allows the Courts to decide in the interests of the consumer. In the course of the implementation of Directive 93/13/EEC, Denmark introduced a special provision enabling the consumer to demand that the remaining part of the contract is upheld without any amendment if it is possible (ContrA art. 38c(1) referring to the general clause in art. 36(1)). Similarly in PORUTGAL, the consumer may choose to keep the contract itself in force, in accordance with the principle of conservation. Under LITHUANIAN law, the consumer is entitled to apply to a court for invalidation or alteration of any unfair term (ConsProtA art. 12(1); CC art. 6.188(6)).

II. Splitting terms

8. The possibility of a so-called partial retention, i.e. a preservation of the unfair clause with content which is still permissible, is not mentioned in Directive 93/13/EEC. One argument against a partial retention is that the clause would thereby, contrary to the prescription in Directive 93/13/EEC recital 21 and art. 6(1) not be rendered "non-binding" but merely "partly binding". Additionally, such a possibility would reduce the risk of use of unfair terms from the point of view of the business and thereby run contrary to consumer protection. It nonetheless remains unclear whether a partial retention is admissible.

9. The question whether it is admissible – if possible – to split a contract term into a valid and an unfair part i.e. to reduce an unfair term to its legally permitted core, has been regulated and discussed only in a few Member States. In SLOVAKIA, it is not expressly stated that if the contract can reasonably be maintained without the unfair terms, the other terms remain binding on the parties. However the CC establishes partial nullity of the contract, thus it is possible to split a contractual term into valid and void parts, in order to keep the valid parts. In ESTONIA, LOA § 39(2) sent. 2 states that if a term can be divided into several independent parts and one of them is void, the other parts remain valid. Similarly, under NETHERLANDS CC art. 3:42 a contractual, invalid (annulled) term can be legally replaced by a contractual term that would have been agreed on by the parties. In AUSTRIA and the UNITED KINGDOM the legitimacy of such a "reduction" of an unfair term is still being controversially discussed in legal literature, whereas in GERMANY it is acknowledged case law (BGHZ 114, 342; BGHZ 120, 122 and NJW 2000, 1110) and established in legal literature that a reduction is inadmissible for it would stimulate the use of unfair terms and weaken consumer protection. The latter legal attitude also applies to GREECE.

III. Consequences for the contract as a whole

10. Directive 93/13/EEC art. 6(1) envisages that unfair clauses are not binding, whereas the remainder of the contract is usually preserved. Thus the whole contract remains binding on both parties, so long as this is possible without the offending clause according to the purpose and legal nature of the contract. The nullity is thus as a rule limited to the unreasonable term. In *Ynos* (judgment of 10 January 2006, C-302/04 – *Ynos Kft v. János Varga* [2006] ECR I-00371) the ECJ was asked whether the hypothetical consideration of whether the business or user would have concluded the contract without the corresponding term, is to be taken into account in Hungarian law, but as the facts occurred prior to Hungary's accession to the European Union, the ECJ stated it lacked jurisdiction, without giving an opinion. However, it seems to be fairly clear from the Directive that the contract stays in force, and the trader has to live with the fact that the particular clause is no longer available.

11. As far as the consequences for the contract as a whole are concerned, virtually all member states followed the prescriptions of the Directive upholding the entire contact if it is capable of a continuing existence without the unfair terms. Minor differences relate to the exact legal techniques applied. Some countries achieve the result via general contract law while others have inserted a specific provision in the relevant act or chapter dealing with unfair contract terms, e.g. CYPRUS Unfair Contract Terms Act art. 6; IRELAND European Communities Regulations 1995 and 2000 reg. 6(1); ITALY ConsC art. 36(1); LATVIA ConsProtA art. 6(8); LITHUANIA CC art. 6.186(6); POLAND CC art. 385/1 § 1 and § 2. In GERMANY the contract as a whole stays in force as long as this effect does not constitute an unacceptable burden on one of the parties (CC § 306(3)). Because of the more flexible approach as described above, SWEDEN has not explicitly regulated the consequences for the contract. In FINLAND, the contract as a whole may either be altered or ordered to lapse if this is in favour of the consumer (ConsProtA chap. 4 § 2). Under ESTONIAN law (LOA § 41 sent. 1) the remaining part of the contract is valid unless the party supplying the term proves that the party would not have entered into the contract without the standard term which is void or deemed not to be part of the contract. The same hypothetical assumption can be found in SLOVENIA.

IV. Other consequences

12. Directive 93/13/EEC does not prescribe any further sanctions for the use of unfair terms such as damages, fines and criminal penalties.

13. Nevertheless, a number of Member States in using the minimum harmonisation (cf. Directive 93/13/EEC art. 8) have provided for compensation for the use of unfair contract terms. In BELGIUM, BULGARIA, the CZECH REPUBLIC, ESTONIA, HUNGARY, GERMANY, ITALY, LATVIA, LITHUANIA, MALTA, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA, SPAIN and the UNITED KINGDOM compensation is available under general civil law principles (via breach of a contractual duty, tort or delict or related concepts).

II.–9:409: Exclusive jurisdiction clauses

(1) A term in a contract between a business and a consumer is unfair for the purposes of this Section if it is supplied by the business and if it confers exclusive jurisdiction for all disputes arising under the contract on the court for the place where the business is domiciled.

(2) Paragraph (1) does not apply if the chosen court is also the court for the place where the consumer is domiciled.

COMMENTS

A. Background and scope

This Article is based on the ECJ's judgment in C-240/98 – *Oceano Grupo*, according to which a term conferring exclusive jurisdiction for all disputes arising under a contract between a business and a consumer on the court for the place where the business is domiciled, is unfair under Article 3 of the Unfair Terms Directive 1993/13/EEC.

The Article does not address the procedural admissibility of jurisdiction terms. It only deals with the question of their contractual validity. It applies to jurisdiction terms which are included in a contract as well as to separate agreements. It does not distinguish between terms addressing international jurisdiction and those addressing local jurisdiction or venue. If the term provides for the jurisdiction at the domicile of the business, it is regarded as unfair.

B. Relation to other jurisdictional terms and Brussels I Regulation

The provision does not exclude other jurisdictional terms, e.g. terms giving jurisdiction to another remote forum, from falling under II.–9:404 (Meaning of "unfair" in contracts between non-business parties), II.–9:405 (Meaning of "unfair" in contracts between businesses) and II.–9:410 (lit. (p). The same may apply to arbitration clauses (cf. ECJ C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*).

In international cases, Articles 15 to 17 of the Brussels I Regulation may apply. According to Art. 17, a business may enter into a jurisdictional agreement with a consumer (i) if it is concluded after the dispute has arisen; (ii) if it allows the consumer to bring proceedings in courts other than those indicated in Art. 15 or 16 of the Brussels I Regulation; (iii) or if it is entered into by both the consumer and the other party within the contract, both of whom at the time of conclusion of the contract are domiciled or habitually resident in the same Member State on whose courts jurisdiction is conferred, provided that such an agreement is not contrary to the law of that Member State. As the wording of paragraph (1), only leaves room for cases (i) and (ii), paragraph (2) clarifies that a jurisdiction term stipulating case (iii) is also not prohibited by this provision.

Illustration 1
In its standard terms for consumer contracts, business A states: "All disputes arising from or in the context of this contract are subject to the exclusive jurisdiction of the courts of our domicile". The term is invalid.

Illustration 2
In contracts used for consumers domiciled in the same Member State X as the business, a term states: "All disputes arising from or in the context of this contract are subject to the exclusive jurisdiction of the courts of X." The term does not give preference to the courts at the domicile of the business; it only assures that the courts of State X still have jurisdiction if the consumer leaves the country after the conclusion of the contract. The term is valid.

NOTES

1. Contract terms, conferring exclusive jurisdiction for all disputes arising under the contract on the court for the place where the business is domiciled fall with within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in Directive 93/13/EEC annex 1(q). Since the annex of the Directive only contains an indicative and non-exhaustive list of the terms which may be regarded as unfair, exclusive jurisdiction clauses were not per se unfair under the Directive. However, in C-240/98 – *Oceano Grupo*, the ECJ ruled that those terms are in any case unfair under Directive 93/13/EEC art. 3.
2. Member States have transposed the Annex of Directive 93/13/EEC differently (see Notes on II.–9:410 (Terms which are presumed to be unfair in contracts between a business and a consumer)). In AUSTRIA, BELGIUM, the CZECH REPUBLIC, ESTONIA, GREECE, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, SLOVENIA and SPAIN, where the clauses in the annex are always regarded as unfair (black list), exclusive jurisdiction clauses are per se unfair. The same applies to GERMANY, HUNGARY, the NETHERLANDS and PORTUGAL (countries that have opted for a combination of both black and grey lists), where Directive 93/13/EEC annex 1(q) can be found in the black list.
3. In CYPRUS, FRANCE, IRELAND, ITALY, POLAND, SLOVAKIA and the UNITED KINGDOM, where Directive 93/13/EEC annex 1(q) has been implemented as non-binding grey letter rule, those clauses are only presumed to be unfair.

II.–9:410: Terms which are presumed to be unfair in contracts between a business and a consumer

(1) A term in a contract between a business and a consumer is presumed to be unfair for the purposes of this Section if it is supplied by the business and if it:

(a) excludes or limits the liability of a business for death or personal injury caused to a consumer through an act or omission of that business;

(b) inappropriately excludes or limits the remedies, including any right to set-off, available to the consumer against the business or a third party for non-performance by the business of obligations under the contract;

(c) makes binding on a consumer an obligation which is subject to a condition the fulfilment of which depends solely on the intention of the business;

(d) permits a business to keep money paid by a consumer if the latter decides not to conclude the contract, or perform obligations under it, without providing for the consumer to receive compensation of an equivalent amount from the business in the reverse situation;

(e) requires a consumer who fails to perform his or her obligations to pay a disproportionately high amount of damages;

(f) entitles a business to withdraw from or terminate the contractual relationship on a discretionary basis without giving the same right to the consumer, or entitles a business to keep money paid for services not yet supplied in the case where the business withdraws from or terminates the contractual relationship;

(g) enables a business to terminate a contractual relationship of indeterminate duration without reasonable notice, except where there are serious grounds for doing so; this does not affect terms in financial services contracts where there is a valid reason, provided that the supplier is required to inform the other contracting party thereof immediately;

(h) automatically extends a contract of fixed duration unless the consumer indicates otherwise, in cases where such terms provide for an unreasonably early deadline;

(i) enables a business to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; this does not affect terms under which a supplier of financial services reserves the right to change the rate of interest to be paid by, or to, the consumer, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the consumer at the earliest opportunity and that the consumer is free to terminate the contractual relationship with immediate effect; neither does it affect terms under which a business reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that the business is required to inform the consumer with reasonable notice, and that the consumer is free to terminate the contractual relationship;

(j) enables a business to alter unilaterally without a valid reason any characteristics of the goods, other assets or services to be provided;

(k) provides that the price of goods or other assets is to be determined at the time of delivery or supply, or allows a business to increase the price without giving the consumer the right to withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described;

(l) gives a business the right to determine whether the goods, other assets or services supplied are in conformity with the contract, or gives the business the exclusive right to interpret any term of the contract;

(m) limits the obligation of a business to respect commitments undertaken by its agents, or makes its commitments subject to compliance with a particular formality;

(n) obliges a consumer to fulfil all his or her obligations where the business fails to fulfil its own;

(o) allows a business to transfer its rights and obligations under the contract without the consumer's consent, if this could reduce the guarantees available to the consumer;

(p) excludes or restricts a consumer's right to take legal action or to exercise any other remedy, in particular by referring the consumer to arbitration proceedings which are not covered by legal provisions, by unduly restricting the evidence available to the consumer, or by shifting a burden of proof on to the consumer;

(q) allows a business, where what has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the business must bear the cost of returning what the consumer has received under the contract if the consumer exercises a right to withdraw.

(2) Subparagraphs (g), (i) and (k) do not apply to:

(a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate beyond the control of the business;

(b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.

COMMENTS

A. Background and general scope

This Article contains a list of terms which would typically constitute a serious disadvantage for a consumer. Therefore these terms are presumed to be unfair in contracts between a business and a consumer if such a term is supplied by the business. The purpose of the non-exhaustive list is to give examples of terms which are typically unfair under II.–9:403 (Meaning of "unfair" in contracts between a business and a consumer). Apart from some minor linguistic variations, the list is more or less a restatement of the Annex to the Unfair Terms Directive 1993/13/EEC with two notable exceptions. Firstly the reference in paragraph (1) lit. (i) of the Annex to terms with which the consumer had no real opportunity to become acquainted before the conclusion of the contract has been dropped from the list, since this provision is sufficiently reflected in II.–9:407 (Factors to be taken into account in assessing unfairness) paragraph (2). Secondly, some of the exceptions in listed in paragraph 2 of the Annex have been incorporated into the listed terms themselves.

B. "Grey list" instead of "indicative list" or "black list"

The general character of the list has been changed. Whereas the list in the Annex of Directive 1993/13/EEC is only indicative, the list in the present Article DCFR is, following the model of several Member States, a "grey list" of terms which are presumed to be unfair. It is a political question, whether it would even be better for some of the items on this "grey list" to be placed on a "black list" in the sense that such a term cannot be justified by any means and is thus invalid even in very exceptional cases. A candidate to be blacklisted could be a term that excludes or limits the liability of a business for death and personal injury caused to a consumer (cf. paragraph (1)(a)). But this example shows that there must be exceptions (e.g. terms limiting strict liability under the law on non-contractual liability for damage). Therefore these model rules do not blacklist terms except in the single case of II.–9:409 (Exclusive jurisdiction clauses) which goes back to a clear ECJ judgment. But even this very short "black list" with only one item on the "list" in II.–9:409 proves the disadvantages of such a rigid

approach, as it became necessary to spell out the exception in paragraph (2). As a result, the "grey list", which is only presumptive, generally seemed the favourable and more flexible approach even for those cases where terms can be justified only in very exceptional cases.

C. List of examples

The list of examples of unfair terms contains *inter alia* terms that exclude the business's liability in cases of personal injury inflicted by the business or a limitation or inclusion of important contractual remedies in cases of non-performance or terms that give complete control to the business over the "if" and "how" of the performance.

Illustration 1
According to its standard terms, business A limits its liability to cases of intention and gross negligence. The term applies to all kinds of damage so that cases of death or personal injury are included. The term falls under paragraph (1)(a) since X excludes its liability for death and personal injury in cases of simple negligence.

Illustration 2
The standard terms of bus company B state that scheduled journeys are subject to cancellation without prior notice. The terms are meant to apply even if a passenger has a ticket with a reservation for a certain journey. Paragraph (1)(c) applies because the right to cancel is not limited to certain cases such as force majeure, impossibility etc.

Illustration 3
Electrician C provides electrical installations for private homes. In order to be compensated for the effort of initially estimating the costs, C's terms state in a sufficiently transparent manner that a down-payment is required for the costs of an estimate and that it will not be refunded if no contract is concluded. If asked to estimate for a certain project, C informs potential customers about this term but refuses to enter into any negotiations about this issue. Technically, the term falls under paragraph (1)(d) since the electrician can keep money paid by the consumer without giving the consumer the equivalent right in the reverse situation. However, under these circumstances it is clear for a consumer that an estimate is not available for free. Although the term technically constitutes a non-negotiated term, the situation is similar to free consent. The consumer is sufficiently informed about the costs of the estimate and agrees to these terms in a way which is similar to a separate contract. Provided that this is the case, the term may be considered acceptable although it falls under paragraph (1)(d).

Even if a term does not fall under one of the examples contained in paragraph (1) the list of examples may provide some guidance when assessing whether a term is to be considered unfair under II.–9:403 (Meaning of "unfair" in contracts between a business and a consumer") as the examples in the present Article may be considered as statements of more general fairness principles.

Illustration 4
The terms of a package travel company state that tourists may be excluded from the package tour if one of the providers (e.g. hotel or transportation) asks the package travel company to do so. The term does not fall under paragraph (1)(g) since a contract for a package travel tour does not constitute a contract of indeterminate duration; nor is the term covered by any other subparagraph of paragraph (1). However, paragraph

(1)(g) may be seen as a statement of the principle that a termination of a contractual relationship requires a sufficient reason, adequate under the circumstances. The mere wish of one of the providers is not sufficient for this purpose: so that the term should be held unfair under II.–9:404 (Meaning of "unfair" in contracts between a business and a consumer").

C. Interpretation of the examples

Some of the examples listed in the present Article comprise terms which require judicial discretion, e.g., "reasonable", "unreasonable", "valid reason", "disproportionate" or "inappropriate". In such a case, judicial discretion can only exist in a "weaker sense" (for this term see *Dworkin*, Taking Rights Seriously, Cambridge/Mass. (1978), p. 31), which means that judges must not follow their personal subjective standards but develop reliable objective case law in order to give meaning to these provisions.

Illustration 5
The standard terms of seller A state that "a set-off against our claims is excluded, unless it is based on a counterclaim recognised by a final court decision". The question whether this term is covered by paragraph (1)(b) depends on an interpretation of the word "inappropriately" in this provision. The courts have to develop a reliable case law for the interpretation of this term. In this context, courts should consider that there are other cases where the existence of a counterclaim is obvious, e.g. if the seller does not dispute the counterclaim or if the seller's defences against the counterclaim are obviously unfounded. Therefore, such a term should be considered to be contrary to paragraph (1)(b).

NOTES

Grey list or black list?

1. According to Directive 93/13/EEC art. 3(3), the "annex shall contain an indicative and non-exhaustive list of the terms which *may* be regarded as unfair." Therefore, a contractual term corresponding to the annex is not automatically unfair. In contrast to the preliminary drafts of Directive 93/13/EEC (see COM 90, 322 final and COM 92, 66 final) the annex does not contain a so-called "black list" of terms which are always (per se) ineffective. Rather, the annex – as the ECJ emphasised in C-478/99 (judgment of 7 May 2002, C-478/99 – *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I-04147, at para. 22) – "is of indicative and illustrative value". As stated in the opinion of advocate general *Geelhoed* (at para. 29) – "The list thus offers the courts and other competent bodies, affected groups and individual consumers, sellers and suppliers – including those from another Member State – a criterion for interpreting the expression unfair terms. Thus by giving concrete form to the open provision contained in art. 3(1), that is to say, the first criterion for determining whether a contractual term is unfair, their certainty is reinforced." In this respect the annex to Directive 93/13/EEC is usually referred to as a "grey list".
2. In AUSTRIA (ConsProtA § 6), BELGIUM (ConsProtA art. 32), BULGARIA, the CZECH REPUBLIC (CC art. 56(3)), ESTONIA, GREECE (ConsProtA art. 2(7)), LATVIA, LITHUANIA (CC art. 6.188(2)), LUXEMBOURG (ConsProtA art. 2), MALTA (Consumer Affairs Act s. 44), ROMANIA (Unfair Contract Terms Act annex), and SPAIN the clauses in the annex – in so far as they have been transposed –

are always regarded as unfair (black list). In MALTA, the Minister responsible for consumer affairs after consultation with the Consumer Affairs Council is empowered to amend, substitute or revoke any of the terms in the black list. In SLOVENIA the wording of ConsProtA § 24(3) ("contract terms are regarded as unfair") indicates a black list. However, until now there is no case-law or literature confirming this interpretation.

3. A series of Member States have opted for a combination of both black and grey lists. Thus, in ESTONIAN law, a non-exhaustive "black list" of typically unfair standard terms can be found in LOA § 42(3). For business to business contracts the same list is applied as a "grey list" (LOA § 44), i.e. in this case the listed term is only presumed to be unfair. In GERMANY, CC § 308 contains a grey list followed by a black list in CC § 309. Although these lists are according to the wording of the law only applicable in business to consumer situations they have a strong indicative significance in business to business situations, as well (CC § 310(1) sent. 2). ITALIAN law also contains a grey list (ConsC art. 33(2)) as well as a black list (ConsC art. 36(2)) and the black list in certain cases even applies to terms individually negotiated. In the NETHERLANDS, CC art. 6:236 contains a black list and CC art. 6:237 a grey list for business to consumer situations. HUNGARY and PORTUGAL have also adopted both a black and a grey list.

4. In CYPRUS (Unfair Contract Terms Act annex to art. 5(4)), FRANCE, IRELAND, POLAND, SLOVAKIA and the UNITED KINGDOM on the other hand there are only non-binding grey lists. In special cases, however, other legislation (such as in the United Kingdom through the Unfair Contract Terms Act) can result in certain clauses being rendered unfair per se. In France, the annex is by contrast only a "light" grey, as the list is not binding on the judge. The clauses contained in the Annex have an indicative function, as according to ConsC art. L. 132-1(3) sent. 2, a consumer involved in a dispute is not relieved of the burden of proving a term is unfair. Moreover, the judge must decide whether the criteria of unfairness are fulfilled on a case by case basis.

5. FINNISH law does not contain any list, neither grey nor black, regarding unfair terms. However, in transposing Directive 93/13/EEC the grey list contained in its annex was reproduced in the preparatory work for the implementing Act (ConsProtA). According to common legal tradition in the Nordic countries, this preparatory work constitutes an important aid for the interpretation of an Act. The same applies to DENMARK and SWEDEN. This legislative technique was accepted by the ECJ in C-478/99 (judgment of 7 May 2002, C-478/99 – *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I-04147). It can thus be said that the Nordic countries have an "indirect" grey list.

6. It has to be noticed that national case law can have wide ramifications on the character of the listed rules. In certain circumstances it can therefore be the case that rules indicated in the table as "grey letter rules" have to all intents and purposes become "black letter rules" through the Member State's case law.

BOOK III

OBLIGATIONS AND CORRESPONDING RIGHTS

CHAPTER 1: GENERAL

III.–1:101: Scope of Book

This Book applies, except as otherwise provided, to all obligations within the scope of these rules, whether they are contractual or not, and to corresponding rights to performance.

COMMENTS

A. General

This Chapter moves from rules relating to contracts and other juridical acts to rules relating to obligations and corresponding rights to performance. The obligations and corresponding rights must be within the intended scope of the model rules but, as is made clear by the next Article, need not arise from a contract.

B. Limited scope

The scope of this Book is limited by the intended field of application of these rules as a whole. This means that it is not intended to apply, for example, to public law rights and obligations, to family law rights and obligations, to employment law rights and obligations or to land law rights and obligations. Many non-contractual obligations – for example, obligations to pay taxes or social security contributions, or obligations to submit reports and returns – are of a public law nature and therefore beyond the intended scope of these rules. The legislation imposing the obligations can be expected to regulate the modalities of performance and the consequences of non-performance. Of course, there is nothing to stop a legislator, when imposing an obligation of any kind, from adopting rules similar to those in this Book or from making provision by reference or analogy on such matters as place of performance and time of performance and the remedies for non-performance. But the intended field of application of this Book is what might be called traditional obligations of a patrimonial law nature in the field of private law, and corresponding rights.

Not all legal systems commonly refer to all such obligations by that name. They may, for example, speak of “liability” to pay damages for loss caused to another rather than “an obligation” to do so. But in practice the modalities of the liability – for example, where the damages must be paid, or whether interest in payable – are then governed by the same rules, or close parallels to them, as apply to contractual obligations. It seems better to use the one word “obligation” in relation to all cases in which, as a matter of private law, a person must render a performance of some kind to another.

C. Obligations, rather than duties

The Book does not contain general rules on duties, as opposed to obligations. So, for example, the normal rules on non-performance of an obligation do not apply to a breach of the moral duty not to harm other people, intentionally or negligently, without justification. It is only when legally relevant damage has occurred that an obligation to make reparation arises. The circumstances in which the obligation does arise are set out in the Book on non-contractual liability for damage caused to another. The way in which the obligation falls to be performed is also regulated where necessary in that Book but some aspects do not need to be regulated there because they are covered by the general rules in this Book.

D. Obligations, rather than contractual obligations

There are good reasons for not applying this Book only to contractual obligations and corresponding contractual rights. It is not only contractual obligations which must be performed and which may not be performed. It is not only contractual rights which prescribe after a certain length of time. It is not only contractual rights which can be assigned. In many situations the legal relations between two or more parties will be composed of a mixture of mutual rights and obligations, not all of them arising from a contract. Rules are necessary in relation to all types of obligations. This was already recognised in the Principles of European Contract Law where, in spite of the name, many of the Articles, particularly in Part III, apply to rights and obligations in general.

The obligations to which this Book applies include, for example, obligations arising out of unilateral promises or undertakings, pre-contractual obligations, obligations arising by operation of law to pay damages for loss caused to another, obligations arising by operation of law out of benevolent intervention in another's affairs, and obligations arising by operation of law to reverse an unjustified enrichment. In the last case the obligations will generally be to return property or pay a monetary equivalent. In all of these cases questions may arise about the modalities of performance. When and where, for example, must an obligation to reverse an enrichment be performed? And in all of them questions may arise about the meaning of, and remedies for, non-performance. Sometimes these matters are dealt with specifically in the relevant places but it is advantageous not to have to repeat default rules of a standard type in every provision for a non-contractual obligation.

There are, however, a few provisions which apply only to contractual obligations – as is indicated by the words "except as otherwise provided". These are clearly identified. Of course, such specific provisions prevail over the general rule. (I.–1:102 (Interpretation and development) paragraph (5).)

III.–1:102: Definitions

(1) An obligation is a duty to perform which one party to a legal relationship, the debtor, owes to another party, the creditor.

(2) Performance of an obligation is the doing by the debtor of what is to be done under the obligation or the not doing by the debtor of what is not to be done.

(3) Non-performance of an obligation is any failure to perform the obligation, whether or not excused, and includes delayed performance and any other performance which is not in accordance with the terms regulating the obligation.

(4) An obligation is reciprocal in relation to another obligation if:

(a) performance of the obligation is due in exchange for performance of the other obligation;

(b) it is an obligation to facilitate or accept performance of the other obligation; or

(c) it is so clearly connected to the other obligation or its subject matter that performance of the one can reasonably be regarded as dependent on performance of the other.

(5) The terms regulating an obligation may be derived from a contract or other juridical act, the law or a legally binding usage or practice, or a court order; and similarly for the terms regulating a right.

COMMENTS

A. "Obligation"

It is necessary to define "obligation" because in national laws and legal literature the word is used in at least two senses. Sometimes it is used, as here, as the correlative of a right to performance – the debtor's side of the legal relationship between the debtor and the creditor. The expression "rights and obligations" is found very frequently. Sometimes the word "obligation" is used to denote the whole legal relationship between the debtor and the creditor. This usage, although traditional and eminently respectable, appears to be less frequent in modern European and international legal instruments. The Principles of European Contract Law, for example, use "obligation" predominantly in the first sense. An obligation is performed or not performed. One does not perform a relationship. The important thing from the drafting point of view is to make a clear choice and stick to it. Paragraph (1) of the Article defines "obligation" in the first of the two senses mentioned.

Under the definition in paragraph (1) an obligation presupposes a legal relationship and is owed to a particular creditor. This is one of the features which distinguishes an obligation from a duty under these rules. A person has a duty if that person is bound to do something, or expected to do something, in accordance with an applicable normative standard of conduct (see Annex 1). A duty does not presuppose a legal relationship and need not be owed to a particular creditor. There can, for example, be a duty to be a good citizen or a duty not to cause harm to others without justification but these would not be obligations in the sense in which the word is used here. Another difference is that there is normally, in principle, a remedy for non-performance of an obligation. Unless otherwise stated, the normal remedies for non-performance are available. There is not necessarily a remedy or sanction for a breach of a duty. It follows that when these rules impose a duty, rather than an obligation, they state the sanction, if any, for breach of the duty. The normal remedies for non-performance of an obligation will not automatically apply.

References to a “debtor” in these rules are to a person who owes an obligation, whether or not the content of the obligation is the payment of money (a monetary obligation). This in turn makes it possible, without risk of misunderstanding, to use the words “debtor” and “creditor” in later provisions rather than “debtor” and “creditor”, which are not common English words and which can be confusing.

It will be a question of wording and of interpretation whether a particular statement gives rise to an obligation or is merely a representation (which might nonetheless give rise to various remedies if it is false). A statement relating to the conformity of x to y might, for example, be a simple representation that x does in fact conform to y, or the undertaking of an obligation to ensure that x does conform to y, or the undertaking of an obligation to pay a certain sum if x does not conform to y.

B. “Performance”

The main purpose of this definition is to remove a possible doubt as to whether “performance” can apply only to an obligation to do something, with some word like “forbearance” being used for an obligation not to do something. The definition makes it clear that “performance” covers both positive and negative obligations.

C. “Non-performance”

Under the system adopted in these rules non-performance of an obligation is any failure to perform the obligation. There is a unitary concept of non-performance. In the case of an obligation to receive or accept the other party's performance the failure to perform may take the form of refusing to accept the performance. Non-performance is not limited to total failure to perform. The non-performance may consist in a defective performance (i.e. a performance which does not conform to the terms regulating the obligation) or in a failure to perform at the time performance is due, be it a performance which is effected too early, too late or never.

Non-performance is used of any non-performance whether or not excused. The consequence of this is that when a remedy is available only for a non-excused non-performance this has to be made clear.

Whether or not there is non-performance will depend on the terms regulating the obligation and on the facts. A distinction is often made between an obligation to achieve a particular result *(“obligation de résultat”)* and an obligation to make reasonable efforts to do something or use reasonable skill or take reasonable care in doing something *(“obligation de moyens”).* In the latter case there will be a non-performance only if reasonable efforts are not made, or reasonable skill or care is not taken. Many variations are possible as to the degree of effort, care or skill required.

D. “Reciprocal”

Some rules apply, and some remedies for non-performance are available, only in the case of reciprocal obligations. This is the case for the rules on the order of performance and for the remedy of withholding performance. In the contractual context the notion of reciprocal obligations is also important in the remedy of termination for fundamental non-performance. Generally speaking, however, the relevant distinction here is not between contractual and non-contractual obligations. It would be wrong to suppose that all contractual obligations are reciprocal and all non-contractual obligations are not reciprocal. There can be a contract in

which only one party has obligations, the other party being not even obliged to accept performance. And there can be a contract in which there are different packages of obligations, the obligations of one party in one package not being reciprocal to the obligations of the other party in another package. Conversely, there can be reciprocal obligations which arise under separate contracts in an inter-related series of contracts between the same parties. There may even be cases where a non-contractual obligation and a contractual obligation may be reciprocal. For example, an obligation under a unilateral promise may be the counterpart of an obligation under a contract. And there can be cases where two non-contractual obligations are reciprocal. For example both parties may be enriched and disadvantaged by the same void contract. Both may be under an obligation to reverse the relevant enrichment. Each obligation is the counterpart of the other. In short, reciprocal obligations need not both be contractual and, if contractual, need not both arise from the same contract

It should not be assumed that it is only in the case of complicated commercial transactions that there can be a mixture of inter-related contractual and non-contractual obligations. This is often so in the case of ordinary consumer transactions. One common example is the combination of rights and obligations under a unilateral guarantee and rights and obligations under a related contract. Another might be, depending on the actual terms, the common marketing device announced by the slogan "Buy one. Get one free." Whatever the economic reality of such a situation, it may in certain cases have to be analysed legally as a combination of a contract and a unilateral undertaking, with reciprocal obligations under each. And consumers may be affected by reciprocal non-contractual obligations. For example, if a consumer avoids a contract the law on unjustified enrichment may give rise to reciprocal obligations between the consumer and the business.

The definition of "reciprocal" covers not only an obligation performance of which is due in exchange for performance of the first obligation but also an obligation to facilitate or accept performance of the first obligation and an obligation which is so clearly connected to the other obligation or its subject matter that performance of the one can reasonably be regarded as dependent on performance of the other. Examples of this last category might be an obligation to do something only if the other party performs an obligation to supply certain information or pay certain expenses or return certain property. One typical case is where there is an obligation to return property only if certain costs related to keeping it and protecting it from damage are paid.

E. "Terms regulating an obligation"

The only reason for having this definition is that the expressions "terms regulating an obligation" or "terms regulating a right" are not so familiar as "terms of a contract" and may cause some initial uncertainty. The definition makes it clear that the terms regulating an obligation or a corresponding right may be derived from a contract or other juridical act, from a law, from a court order or from a legally binding usage or practice.

NOTES

Non-performance as a unitary concept

1. Non-performance as used here covers failure to perform an obligation in any way, whether by a complete failure to do anything, late performance or defective

performance. Furthermore, it covers both excused and non-excused non-performance. This unitary concept of non-performance is found in some but not all of the legal systems.

2. Breach of contract in ENGLISH and SCOTTISH law covers the non-excused non-performance of any contractual obligation, and so does the FRENCH "*inexécution*": non-performance covers both non-performance, whether total or partial, and defective performance. (See CC art. 1146). In such cases, the creditor may pursue specific performance of the contractual obligations if it is possible, failing which damages are available. This corresponds to the concept of "*tekortkoming*" in DUTCH law; see CC arts. 6:74 and 6:265 ; to "niet-nakoming" (sometimes "tekortkoming", "wanprestatie") / "inexécution" in BELGIAN law (CC art. 1146); non- performance; in ITALIAN law, see CC arts. 1218 and 1453 ff; and "*kontraktsbrott*" or "*misligholdelse*" in NORDIC law, see *Ussing*, Obligationsretten[4], 20, 50 and *Bryde Andersen & Lookofsky* 27. In FINNISH law, "*kontraktsbrott"* or "*sopismusrikkomus"*, see *Taxell*, Avtal och rättsskydd 171. See also on "breach" in CISG arts. 45-52, 61-65 and 75-80 and on "non-performance" UNIDROIT arts. 7.1.1 ff. The SPANISH CC art. 1101 has a broad concept of non-performance. Each "non-fulfilment" (*contravencíon)* is regarded as a breach, whatever form it may take - delay, non-delivery, bad performance, hidden defects of the asset (*Carrasco*, Albaladejo- Comentarios CC y Compilaciones Forales, XV-2º, pp. 392 ff). In AUSTRIA the term non-performance (*Nichterfüllung*) is used for non-performance and late-performance as well as bad performance, see *Rummel* in Rummel, ABGB I, 3rd ed., Pref. to §§ 918 no. 1. Similarly, LOA § 100 in ESTONIAN law provides for a unitary concept of non-performance of an obligation.

3. In POLISH law CC art. 471 uses the notion of "non-performance or improper performance of an obligation", which covers all cases of lack of performance or failure to comply with the contents of the obligation. This is also the position in SLOVENIAN law; see *Plavšak* in *Juhart/Plavšak*, 537.

4. In GERMAN law non-performance ("*Nichterfüllung*") was not accepted for terminological reasons. Instead the central category of the new law of obligations since 2002 is breach of a duty ("*Pflichtverletzung*"), which also covers the breach of contractual duties to protect the other party's integrity ("*Schutzpflichten*"). The central norm of the concept is CC § 280 which generally provides for a claim for damages in case of a breach of a duty. The breach of a duty is a prerequisite to most other remedies as well, see *Schlechtriem and Schmidt-Kessel*, Schuldrecht, Allgemeiner Teil[6], 219.

5. In GREEK LAW, the CC has no single concept of non-performance: it regulates impossibility of performance, on the one hand, and default of the debtor, on the other. All other instances fall within a third category, that of improper performance, which is not regulated, but to which the consequences of impossibility of performance and default of the debtor apply by analogy (see *Michael P. Stathopoulos*, Contract Law in Hellas, Athens, 1995, no. 262).

6. In PORTUGUESE law (CC arts. 790 ff, 799, 804 ff) non-performance covers impossibility, delay in performance and defective performance (lack of conformity, in consumer contracts).

7. In CZECH law, the concept of "non-performance" exists and can be found in written law by reasoning a contrario, because under the general principle in CC § 559, "a debt is discharged by its performance". The word "non-performance" of an obligation ("*nesplnění*" or "*neplnění*") - often used by local judges - appears only very occasionally in the Ccom (arts. 323a, 347, 376, 392, 435, 662 and 750) and never in the CC. Instead of a general notion of "non-performance", the written CZECH law

prefers to use a more specified concept of delayed performance, i.e. “delay in performance” which is considered as non-performance. This concept is based on the existence of a general concept of due performance ("*a debt must be duly and timeously fulfilled*" under CC § 559 and the Commercial Law decrees that "*an obligation is discharged when performed to the creditor duly and in time*" Ccom art. 324). So notions of "faulty performance" or "defective performance" or "delayed performance" of a civil or commercial obligation can be found in many legal dispositions (see CC arts. 169e, 517, 519, 520, 522, 568, 592 for delayed performance considered as a non-performance, CC § 735 for faulty performance and also Ccom arts. 324, 345, 599, 600, which can be seen as three different descriptions or three applications of one general concept of non-performance).

8. In SLOVAK law, CC § 559 states that an obligation is to be performed properly and in a timely fashion. Such a performance extinguishes the obligation. Non- performance in Slovak law is the opposite of performance. It covers all cases of performance which is not done properly and in time - delayed performance, failure to comply with the terms regulating the obligation. Non-performance usually brings about the mutation of obligation, not its extinction – see, for example, CC § 517 (delay in performance of the obligation).

III.–1:103: Good faith and fair dealing

(1) A person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship.

(2) The duty may not be excluded or limited by contract or other juridical act.

(3) Breach of the duty does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.

COMMENTS

A. Good faith and fair dealing

This Article sets forth a basic principle. Good faith and fair dealing are required in the performance of obligations, in the exercise of rights to performance, in pursuing or defending remedies for non-performance or in exercising a right to terminate an obligation or contractual relationship.

As will appear from the Notes, a general duty of good faith is not recognised in the laws of all Member States. However, those that do not recognise it explicitly frequently have specific rules which produce very similar results. This justifies the adoption of a general duty of good faith and fair dealing in these rules. Nonetheless drafters of European legislation should note that in the laws that do not recognise a general duty of good faith, the legislation will not be reinforced by such a duty and the courts may not always readily develop specific rules to achieve the same result. If it is desired that a legislative rule should be supported by a requirement that the parties act in good faith, for example to prevent evasion of the rule, it may be wise to spell this out in the legislation itself, or to include specific provisions to prevent at least those forms of evasion that can be foreseen.

The Article uses the word “duty” rather than “obligation” because of the rather vague, supplementary and all-pervasive nature of what is expected from the parties and because the ordinary remedies for non-performance of an obligation are not directly available – although they may be indirectly available if the principle of good faith and fair dealing gives rise to a tacit or implied term of a contract. See paragraph (3).

B. Nature of the duty

The composite expression "good faith and fair dealing" refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question. See I.–1:103 (Good faith and fair dealing) and the Comments to that Article.

C. The role of the duty

The role of the duty of good faith and fair dealing under this Article must be distinguished from the wider roles the concept of good faith and fair dealing may play under other Articles. We have already seen that good faith and fair dealing may play an important role in the interpretation and development of these rules as a whole and in the filling of gaps in their

provisions. The concept is also relevant to the interpretation of contracts and other juridical acts and to the ascertainment of tacitly agreed terms and the creation of implied terms to fill a gap in a contract's provisions. In these wider contexts the instruction to have regard to good faith and fair dealing is directed to the judge or interpreter. In the present context, as also in the earlier Article imposing a duty to negotiate in accordance with good faith and fair dealing, the instruction is directed to the parties.

The role of the duty under this Article must also be distinguished from the historical role the duty has played already in determining the existence and content of many specific rules of law. Particular applications of the requirements of good faith and fair dealing appear in many specific provisions, such as the duty of a party not to negotiate a contract with no real intention of reaching an agreement with the other party, not to disclose confidential information given by the other party in the course of negotiations, and not to exploit unfairly the other party's dependence, economic distress or other weakness. Good faith and fair dealing could also be said to underpin the debtor's rights to cure a defective performance; the debtor's right to refuse to make specific performance of a contractual obligation if this would involve unreasonable effort and expense; and the requirement that a creditor should limit as far as possible any loss which will be suffered as a result of a non-performance of the obligation by the debtor, thereby reducing the amount of damages.

The role of the duty under the present Article is to serve as a direct and general guide for the parties. Its purpose is to give effect in legal transactions to community standards of decency and fairness. The law expects the parties to act in accordance with the requirements of good faith and fair dealing. The consequences of a breach of the duty are discussed later. They may be serious.

D. Rule is intended to be mandatory

Paragraph (2) provides that the duty may not be excluded or limited by contract or other juridical act. Of course, as noted above, these rules cannot make anything mandatory. This provision serves only as an indication that any legislator adopting the principle might be expected to consider making it mandatory.

What is in accordance with good faith and fair dealing will, however, to some extent depend upon what was agreed upon by the parties in their contract. Thus, parties may agree that even a technical breach by one party will entitle the other party to refuse performance, when, for instance, that party's representatives can ascertain a technical breach but not whether it is a trifle or not.

E. Effect of breach

Paragraph (3) provides that breach of the duty does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have. The word "precluded" is not intended to mean that the person must be entirely precluded: a partial preclusion or restriction may be sufficient in some cases.

The word "directly" is significant. If good faith and fair dealing have resulted in a tacit or implied term of a contract or other juridical act then, of course, that term will take effect like any other term. If it imposes an obligation then non-performance of that obligation will give

rise to all the available remedies in the usual way. There is a policy decision here. It would have been possible to provide for an obligation (rather than a mere duty) to act in accordance with good faith and fair dealing and to attach the normal consequences to a non-performance of that obligation, including the possibility of an order for specific performance or an award of damages. Using the filter of an implied term, however, perhaps gives slightly more weight to the autonomy of the parties and leaves slightly less room for a court to hold a party liable in damages where the party has complied with the agreed terms of the contract. It makes it clear that the function of a court is to use the duty of good faith and fair dealing to fill gaps where necessary but not to use the duty to correct or improve the contract by making it more fair than the parties themselves intended. Moreover, the normal remedies for non-performance of an obligation do not always seem appropriate for a breach of the duty to act in accordance with good faith and fair dealing. The idea of a court order compelling a party, subject to sanctions which might be severe, to act fairly could be said to confuse the roles of law and morality. Moreover the remedy of withholding performance of a reciprocal obligation does not seem attractive in this area. One party should not be able to say "I am not going to perform my obligation to act fairly until you perform your obligation to act fairly."

Other Articles in these rules provide for damages for loss caused by fraud, unfair exploitation or misuse of confidential information. In most if not all of such cases there will also have been a breach of the duty of good faith and fair dealing. There is also an overlap between the duty of good faith and fair dealing and the obligation on parties to co-operate so as to enable an obligation to be performed. Breach of that obligation may also give rise to a liability to pay damages.

One consequence of a breach of the duty of good faith and fair dealing is that it may preclude the person in breach from taking advantage of a term in a contract or of a rule in a way which, given the circumstances, would be unacceptable according to the standards of good faith and fair dealing. Contract language which gives a party such a right should not be enforced. Thus, even if a contract provides that a certain type of non-performance of an obligation is to be regarded as fundamental, a creditor would not necessarily be permitted to terminate the contract because of a completely trivial and irrelevant failure to perform in the required way.

The principle of good faith and fair dealing also covers situations where a party without any good reason stands on ceremony.

> *Illustration 1*
> In an offer to B, A specifies that in order for B's acceptance to be effective B must send it directly to A's business headquarters where it must be received within 8 days. An employee of B overlooks this statement and sends the acceptance to A's local representative who immediately transmits it to A's headquarters where it is received 4 days later. It would be contrary to good faith and fair dealing for A to rely on the technicality to deny a contract.

The principle covers a party's dishonest behaviour.

> *Illustration 2*
> The contract between A and B provides that A must take legal proceedings against B within two years from the final performance by B if A wants to make B liable for defects in B's performance. Some time before the expiration of this time limit A

discovers a serious defect in B's performance and notifies B of an intention to claim damages. B uses dilatory tactics to put A off. On several occasions B assures A that A has no reason for concern. B undertakes to look into the matter, but insists that the investigation will have to be done carefully. When, after the expiration of the time limit, A loses patience and sues B, B invokes the time limit. Not having acted in good faith, B is precluded from relying on the time limit.

In relationships which last over a long period of time, such as many tenancies, agencies, distributorships, partnerships and employment and insurance relationships, the concept of good faith and fair dealing has particular significance as a guideline for the parties' behaviour. It underlies many of the specific rules in, for example, the Part of Book IV dealing with Commercial Agency, Franchise and Distributorship, including the rules on continuation or termination of the contractual relationship (see IV.E.–2:301 (Contract for a definite period) and IV.E.–2:302 (Contract for an indefinite period)) but has an important role to play even in areas not specifically regulated.

NOTES

I. Survey of the laws

1. The principle of good faith and fair dealing is recognised, or at least appears to be acted on as a guideline for behaviour in the performance of obligations and the exercise of corresponding rights, in all Member States. There is, however, a considerable difference between the legal systems as to how extensive and how powerful the penetration of the principle has been. At one end of the spectrum we find GERMAN law where the principle has revolutionized the law of obligations and added a special feature to the style of the legal system. At the other end we find the ENGLISH and IRISH laws which do not recognize a general obligation of the parties to conform to good faith, but which in many cases by specific rules reach the results which other systems have reached by the principle of good faith.
2. The other systems in the European Union range between these two opposites. They recognize a principle of good faith and fair dealing as a general provision, but have not given it the same degree of infiltration into their law of obligations as has German law.

II. Germany

(a) In general

3. In GERMANY CC § 242 has been used to make possible what has been called a "moralization" of obligational relationships. § 242 states in general terms that parties must perform their obligations in the manner required by good faith and fair dealing (*Treu und Glauben*) taking into consideration the general practice in commerce.
4. The provision has been used to qualify a rigorous individualism of the original contract law of the German CC. It has operated as a "superprovision" which may modify the effect of other statutory provisions. Based on CC § 242, German courts have developed new institutions (see (b) below), and have created a number of obligations to ensure a loyal performance of contractual obligations such as a duty of the parties to co-operate, to protect each others' interests, to give information and to submit accounts.
5. There is, however, one important limit to the operation of the good faith principle. It does not permit the courts to establish a general principle of fairness and equity. A

court may not replace the effects of a contract or of a statutory provision by an outcome which it believes to be more fair and equitable (see *Staudinger* § 242 no. 4).

(b) The institutions

6. Among the institutions created by the courts relying on the good faith principle the following should be mentioned:

- a change of circumstances (*Wegfall der Geschäftsgrundlage*) which makes the performance of a contractual obligation extremely onerous for the debtor may lead to the modification or termination of the obligation; since 2002 the change of circumstances is dealt with by a special provision, see CC § 313;
- a party's right may be limited or lost if enforcing it would amount to an abuse of right. Abuse of right is found in the following typical cases: (1) A party cannot acquire a right through dishonest behaviour (*exceptio doli specialis*); this rule bears some resemblance to the concept of "unclean hands" in English equity. (2) A party will lose a right by breach of the party's own duty (*Verwirkung).* (3) A party cannot claim a performance which will soon have to be given back to the debtor (*dolo facit, qui petit, quid statim redditurus est*). (4) A party may not pursue an interest which is not worth protecting. (5) A party may not rely on a behaviour which is inconsistent with the party's earlier conduct (*venire contra factum proprium*);
- ending of contractual obligations which extend over a period of time. These obligations may be ended for compelling reasons (*wichtiger Grund*) even though this is not supported by a statutory or contractual provision. Since 2002 the right to terminate for serious and extraordinary reason is dealt with by a special provision, see CC § 314. The right to end these obligations may be limited by the contract, but it may not be completely excluded (BGH 4 April 1973, BB 1973, 819).

III. England and Ireland

7. As was mentioned above, note 1, the laws of ENGLAND and IRELAND do not recognise any general obligation to conform to good faith and fair dealing. However, many of the results which in other legal systems are achieved by requiring good faith have been reached in English and Irish law by more specific rules: see the judgment of *Bingham* L.J. in *Interfoto Picture Library Ltd. v. Stilletto Visual Programmes Ltd.* [1989] QB 433; but contrast *Walford v. Miles* [1992] 2 AC 128. For example, the courts have on occasion limited the right of a party who is the victim of a slight breach of contract to terminate the contractual relationship on that ground when the real motive appears to be to escape a bad bargain: see *Hoenig v. Isaacs* [1952] 2 All ER 176 and *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 QB 26. Conversely, the victim of a wrongful repudiation is not permitted to ignore the repudiation, complete performance and claim the contract price from the repudiating party, unless the victim has a legitimate interest in doing so: see *Attica Sea Carriers Corporation* v. *Ferrostaal Poseidon Bulk Reederei Gmbh* [1976] 1 Lloyd's Rep. 250 (C.A.). There are many examples of the courts interpreting the terms of a contract in such a way as to prevent one party using a term in circumstances in which it was probably not intended to apply. The clearest examples of this occur in relation to clauses excluding or limiting liability (*Treitel*, Contract 6-028–7-032 and *Coote* [1970] Cambridge LJ 221) but other terms have been construed similarly: see for example *Carr v. Berriman (JA) Pty Ltd.* (1953) 27 ALJR 273, where it was held that an architect under a construction contract could not exercise a power to order work to be omitted simply in order to give the same work to another contractor who was prepared to do it for less. Thus to some extent the present Article merely articulates trends already present in English law. But the English approach based on construction of the

agreement is a weak one as it cannot prevail against clear contrary provisions in the agreement (see *Photo Production Ltd*. v. *Securicor Transport Ltd*. [1980] A.C. 827 (H.L.): clauses excluding or limiting liability) or even clear implication from the circumstances (*Bunge Corporation v. Tradax SA* [1981] 1 WLR 711: right to terminate for breach which might not have any serious consequences). Thus the Article represents an advance on English and Irish law.

IV. The other EU systems

(a) Sources

8. Provisions laying down a principle of good faith in the performance of obligations are found in BELGIUM, FRANCE and LUXEMBOURG, see CC arts. 1134(3); ESTONIA, see GPCCA § 138 and LOA §§ 6, 76(2); GREECE, see CC art. 288; ITALY, see CC art. 1375, and see also art. 1175; THE NETHERLANDS, see CC arts. 6:2 and 6:248; POLAND, see CC art. 354; PORTUGAL, see CC art. 762(2); SPAIN, see CC arts. 7 and 1258 and Ccom art. 57; CZECH REPUBLIC, see CC §§ 43, 559(2), 3(1) and 424, Ccom arts. 655(1) and 265; and SLOVAKIA, see CC § 3 and Ccom art. 265.

9. In the NORDIC countries the principle is recognized by the courts and the legal writers. Although it has not been expressed in the statutes in the same general terms as it has in the countries mentioned above, several statutory provisions presuppose its existence, see for instance Contracts Acts § 33 (on validity) and § 36 (DANISH law see *Ussing*, Obligationsretten4, 23; *Bryde Andersen* I 472 f. The rule in para. 2 that breach of the duty to observe good faith does not give rise directly to the remedies for non-performance of an obligation is unknown to Danish law. For other Nordic countries see *Telaranta* 344; *Ramberg*, Avtalsrätt 39; *Hemmo*, Sopimusoikeus I 368-384).

10. In AUSTRIA the good faith principle is a generally acknowledged ethical rule (*cf.* OGH 29 April 1965, SZ 38/72), which is derived from the Imperial Decree of 1 June 1811, introducing the General CC, where "the general principles of justice" are recognized as the basis of civil law (*cf.* OGH 7 October 1974, SZ 47/104). The Austrian CC expressly refers to the good faith principle in § 879 (relating to contract conclusion); "Fair dealing" (*Verkehrssitte*) is expressly mentioned in CC §§ 863 and 914. and expressly mentioned as "fair dealing" in the Code: see ABGB §§ 863, 914. From this it is clear that performance of contractual obligations is subject to "good faith and fair dealing" see *Ehrenzweig/Mayrhofer*, Schuldrecht AT, 20; *Binder* in Schwimann, ABGB IV, 3rd ed., § 914 no. 67). However, in Austria the concept is not as settled as the "good faith requirement" and is not as extensively construed as "*Treu und Glauben*" in the GERMAN CC § 242. The position is similar in SLOVENIAN law with the distinction that there is a general principle of good faith provided in LOA § 5.

11. As has been recognised by the House of Lords in *Smith v. Bank of Scotland* 1997 SC (HL) 111, there is also an underlying principle of good faith in the SCOTTISH law of obligations which is of an explanatory and legitimating rather than an active or creative nature, and otherwise exists more to exclude bad faith than to impose standards of conduct beyond those found in other more concrete rules of law (*Gloag & Henderson* para. 3.02).

(b) Degree of penetration

12. It is not easy to measure and compare how deeply into the law the good faith principle has been integrated in the various legal systems.

13. The DUTCH CC art. 6:2 uses strong language. Good faith will not only supplement obligations arising from contract but may also modify and extinguish them. Under art. 6:2(2) a rule which binds the parties by virtue of law, usage or legal act does not apply to the extent that under the circumstances this would be unacceptable under the standards of reasonableness and equity, see also art. 6:248 (see *Hartkamp*, Civil Code XXI). In some ways the CC goes further than German law: under exceptional circumstances arts. 6:2 and 6:248(2) allow the court to replace the effects of a contract or of a statutory provision by an outcome which it believes to be more fair and equitable. Similarly, under ESTONIAN law in addition to the general duty to act in accordance with good faith (see GPCCA § 138(1), LOA § 6(1)). The LOA § 6(2) provides courts with power to set aside any term arising from law, a usage or a transaction if the result of its application would be contrary to the principle of good faith. According to special provisions, the principle of good faith serves as the means for determining the content of the parties' obligations (e.g. in pre-contractual relations (LOA § 14), implied obligations (LOA 23(4)), requirements for performance (LOA § 76(2), release in case of change of circumstances (LOA § 97)) or restrictions on abuse of rights (e.g. to preclude reliance on non-performance and resort to remedies in so far as such non-performance was caused by an act of the creditor or by circumstances dependent on the creditor (LOA § 101(3)), loss of rights in case of undue delay in exercising them (LOA §§ 118, 159). The importance of the principle of good faith in Estonian law has repeatedly been emphasized in legal literature (see *Kull/Käerdi/Kõve* 69ff., *Varul et al (-Kull)* § 6 n 4.1.). The principle is relatively widely accepted in court practice (see e.g. Supreme Court Civil Chamber's decisions from 21 May 2002, civil matter no. 3-2-1-56-02, from 29 November 2004 civil matter no. 3-2-1-120-04 and from 14 February 2007, civil matter no. 3-2-1-140-06).

14. Extensive application of the good faith principle is also found in PORTUGUESE and GREEK law. In Portugal the principle is expressed not only generally in the CC art. 762(2), but also in special provisions such as art. 227 on *culpa in contrahendo*, art. 239 on omitted terms, art. 334 on abuse of rights and art. 437 on change of circumstances. In Greece the courts have given the principle as laid down in CC arts. 200, 281, 288 and 388 a broad application, see Full Bench of A.P. 927/1982, NoB 31 (1983) 214 and A.P. 1537/1991, EllDik 34 (1993) 318 on the courts' power to change the terms of the contract, and A.P. 433/1953, NoB 1 (1953) 747-748, note *Sakketas*, on adaptation of money obligations.

15. Several provisions of the ITALIAN CC refer to good faith and fair dealing, see on good faith arts. 1337 (negotiation of contracts), 1366 (interpretation) and 1375 (performance). Art. 1175, dealing with obligations in general, provides that the debtor and creditor must behave in accordance with the rules of fair dealing (*correttezza*). The scholars point out that good faith and fair dealing are objective concepts which refer to the behaviour of the honest business person (*Betti* 65 ff; *Antoniolli,* General Duties, 50 ff; *D'Angelo*, 1 ff). They operate as a limitation on a party's exercise of rights and protect the other party's interests in matters other than the main performance: *Castronovo*, Protezione, passim.

16. Arts. 1134 of the FRENCH, BELGIAN and LUXEMBOURG CC provide that contracts must be performed in good faith, and the principle has been extended to the formation and the interpretation of contracts. The French courts have not given the rule the same importance as have the courts of Germany and other countries mentioned above in the determination of the parties' obligations. However, the principle of good faith has constantly expanded and the Cour de cassation has felt it necessary to distinguish between a "prérogative contractuelle", which cannot be exercised in bad faith and which the judge can control, and the very "substance" of the

rights and obligations, which cannot be modified by the judge (Cass. Com. 10 July 2007, RDC 2007.1107 note L. Aynès and 1111 note D. Mazeaud). Besides, similar results have often been obtained without reference to good faith, for instance by using the well-established theory of abuse of rights (see *Malaurie & Aynès,* Obligations 50 ff) and *apparence*. In the last two decades the courts have frequently and openly used the good faith principle in the determination of the parties' obligations. The writers invoke the principle in order to impose upon the parties a duty of mutual loyalty, of information and co-operation and to restrict the operation of clauses exempting a party from liability for breach of contract, etc., see *Malaurie & Aynès,* Obligations no. 622; *Marty & Raynaud,* Obligations I no. 246; and Cass.com. 22 October 1996, D. 1997 121 (*SA Banchereaus v. Sté Chronopost*).

17. In BELGIUM the courts have used good faith extensively to interpret contracts and to supplement contractual obligations including i.a. a duty to deliver accessories of goods (Cass. 6 June 1974, Arr.Cass. 1974, 1102) or a duty to limit damages (Cass. 17 May 2001, pas. 2001 I 889) but have used it to limit obligations only in cases of disproportion and abuse of rights (e.g. Cass. 17 September 1983, RW 1983-84, 1482, and RCJB 1986, 282) and some more specific applications (e.g. a clause having lost its purpose, Cass. 21 September 1989, Pas. 1990 I 84). The principle is also applied to contract formation (Cass. 7 February 1994, JTT (1994) 208, RW (1994-95) 121). Some of the German ideas described earlier have been accepted. See *van Ommeslaghe,* TBBR 1987, 101; *Fagnart,* RCJB 1986, 285; *Dirix* TBH 1988, 660; *M.E. Storme,* Invloed; *van Gerven & Dewaele* 103. The same is true of SPANISH law, CC art. 7 imposes a duty to act in good faith when exercising rights. Furthermore, as in the FRENCH, BELGIAN and LUXEMBOURG CCs art. 1135, SPANISH CC art. 1258 provides that once a contract has come into existence the obligations of the parties extend not only to what is expressly stipulated but also to everything that by the nature of things, good faith, usage and law is considered as incidental to the particular contract or necessary to carry it into effect. The Spanish Ccom art. 57 requires the parties to execute commercial contracts in accordance with the standards of good faith (see *Lacruz (-Rams),* II, 11, §§ 69, 534).

18. The CZECH law applies the legal concept *good faith* above all to protect rights acquired in good faith (CC § 35.3). But there is also a general principle that parties to a contract are bound to see to it that in regulating their contractual relationship they eliminate everything which could give rise to conflicts or litigation (CC § 43) and that all debts must be duly fulfilled (CC § 559.2). Due fulfilment is also performance in good faith. So there is an obligation to execute a civil contract in good faith. Also the correct performance of a contractual duty requires a fulfilment consistent with the principles of proper morality (CC § 3.2). This is a general obligation to act as a person of good manners (for the liability, see the general rule in CC § 424). For a particular application of this rule, see Ccom art. 655(2). A positively existing obligation to act in good faith is also very close to the expressly stated principle of general prevention of harm (see CC § 415: everyone is obliged to behave in such a way that no damage occurs), it is for instance the meaning of *Jehlička, Švesktka, Škárová a kol.,* p. 485. *Fair dealing:* A commercial legal rule says that an exercise of a right which is contrary to the principles of fair business dealings is not granted a legal protection (Ccom art. 265).

19. In SLOVAK law there is anchored in CC § 3 a general rule that performance of obligations must not be contrary to good morals (which means rules of a moral character dependent on the objective valuation of recent society). According to CC § 39, a legal act is not valid if it is contrary to such moral rules. The law also deals with the good faith of the person in whose favour a juridical act is made (CC § 35).

According to CC § 586, an agreement on disputable rights between contracting parties concluded in good faith is valid, even if a contracting party did not have stipulated rights at the time of conclusion of agreement. In the Commercial Code there is a general rule in art. 265 that legal protection is not provided for an exercise of rights which is not in accordance with fair dealing.

20. In POLISH law CC art. 354 states that an obligation should be performed by the debtor in accordance with its contents, and the manner in which it is performed should comply with the socio-economic purpose of the obligation and with the rules of social co-existence. If there exists a custom, it also shapes the way an obligation is to be performed. The creditor should co-operate with the debtor in the same manner. The reference to the rules of social co-existence means that performance should comply with the general commonly accepted standards manifested, e.g., in the principle of loyalty of the debtor. A debtor's failure to act loyally, if it harms the creditor's legitimate interests, may lead to liability for non-performance or improper performance.

V. Mandatory

21. In GERMANY and in the systems mentioned in note 8 above the good faith rule as such is mandatory. But it is self-evident, that the several rules derived from the general principle are basically non-mandatory, see AnwKomm [-*Krebs*], BGB, § 242 no. 36.

22. *Illustration 3* is based on *Deutsche Bank v. Beriro* (1895) 73 I.T 669, cited in *Zweigert & Kötz* 586.

III.–1:104: Co-operation

The debtor and creditor are obliged to co-operate with each other when and to the extent that this can reasonably be expected for the performance of the debtor's obligation.

COMMENTS

A. Terminology

The Article refers to an "obligation" to co-operate rather than a "duty" to co-operate because in this case the policy is that the normal remedies for non-performance of an obligation are to be attracted. See Comment G. The Principles of European Contract Law achieved this result indirectly by first providing that there was a duty to co-operate (Article 1:202) and then providing that non-performance of a contractual obligation included failure to co-operate in order to give full effect to a contract. (Article 1:301). This should not be seen, however, as a deliberate choice of an unnecessarily complicated approach. The truth is that the Principles did not distinguish clearly between duties and obligations.

B. The obligation to co-operate

Where a debtor owes an obligation, the debtor and creditor each have a subsidiary obligation to co-operate with the other when this can reasonably be expected for the performance of the debtor's obligation. This can be regarded as a particular application of the duty of good faith and fair dealing.

The obligation to co-operate includes an obligation to allow the debtor to perform and thereby earn any fruits of the performance.

> *Illustration 1*
> S in Hamburg agrees to sell goods to B in London at a stated price f.o.b. Hamburg. B fails to nominate a vessel to carry the goods. Such failure constitutes non-performance of B's obligations under the sales contract and also infringes this Article by preventing S from performing S's own obligation to ship the goods and thereby earn the contract price. S can terminate the contractual relationship and recover damages.

> *Illustration 2*
> B contracts to erect an office building for O. As the result of O's failure to apply for a building licence, which it is clearly O's responsibility to obtain, and which would have been granted, B is unable to proceed with the building works. O thereby infringes the requirements of this Article, whether or not the contract with B imposed on O an express obligation to apply for the licence. O has no remedy against B for failing to build and is liable to B for non-performance of the obligation to co-operate.

A party to a contract has to inform the other party if the other party in performing the contract may not know that there is a risk of harm to persons or property.

> *Illustration 3*
> Subcontractor S of country A is about to send some staff to perform S's contractual obligation to Contractor C, also from country A, to assist in building a dam in country Y. C learns that the government of Y intends to detain any citizens from A who are

found in Y as hostages, in order to exert pressure on the government of A to release some of Y's citizens who have been detained in A charged with terrorism. C has an obligation to inform S of the risks involved in sending staff to Y.

The obligation to co-operate may be particularly important in relation to the obtaining of licences or permissions on which the performance of a primary obligation depends. Often there will be an express or tacit term on such matters but in the absence of such a term the obligation to co-operate will come into play.

C. Obstruction of performance

Non-performance of the obligation to co-operate may take the form of obstruction of performance of the main obligation. Obstruction of performance may result either from non-performance of a specific obligation imposed on a party by a contract or by the law (such as the obligation of the buyer of goods to accept delivery) or from some other act which has the effect of preventing or inhibiting performance by the other party. For example a party's refusal to accept performance constitutes a breach of the obligation to co-operate where the other party has an interest in having performance accepted.

Illustration 4
S contracts to do something which requires access to B's land. S has an obvious interest in performing the contractual obligation. B, however, refuses to accept performance and denies S access. This constitutes non-performance by B of the obligation to co-operate.

D. Right to withhold performance

A party may in certain circumstances withhold performance of the party's own obligations until the other party has performed. This will include the right to withhold performance of the obligation to co-operate.

E. Co-operation required only so far as this can reasonably be expected

An absolute obligation of co-operation in order to enable the main obligation to be performed would go too far and might, for example, interfere with a contractual allocation of obligations. This is why the obligation is to co-operate only when and to the extent that this can reasonably be expected for the performance of the debtor's obligation. There are, for example, cases where co-operation cannot reasonably be expected until the other party has first taken some step.

Illustration 5
The facts are as in Illustration 1 except that S is given the right to ship the goods at any time during July or August. B is under no obligation to nominate a vessel until B has received notification from S of the time at which S intends to ship the goods.

F. Effects of failure to perform obligation to co-operate

Failure to perform the obligation to co-operate has the same effects as failure to perform any other contractual obligation and attracts the various remedies prescribed for non-performance of a contractual obligation. These remedies include specific performance. So, for example, if X needs access to Y's land in order to perform the obligations under a contract between them and if Y refuses access for no good reason, X could obtain a court order compelling Y to grant

access. It should be noted, however, that there are general restrictions on the remedy of specific performance which could be particularly relevant in relation to the obligation to co-operate. For example, a person could not be forced to accept services or work of a personal character.

NOTES

1. In many systems the duty to co-operate is derived from the principle of good faith and fair dealing.
2. Thus under the GERMAN CC § 242 the debtor and the creditor have a duty to co-operate in the performance of the obligation (Prütting/Wegen/Weinreich (-*Schmidt-Kessel*), BGB[3], § 242 no. 60). For instance, they must both help to obtain a permission from a third party or a government authority, where this is required. The duty to co-operate may also oblige a party to support the other party to a contract when a third party may threaten that other party's rights, but CC § 242 does probably not entail a duty to safeguard the other party's interests in general, see Staudinger (-*Olzen*), BGB, § 241, no. 172 et seq. . Under AUSTRIAN law, it follows from the requirement of fair dealing (ABGB § 1914) that the partners to a contract are subject to a collateral contractual duty to take the necessary efforts to make sure that the contract is correctly performed (Schwimann (-*Binder*), ABGB IV[3], § 914 no. 67). The position is similar in SLOVENIAN law, LOA §§ 5, 9 and 271.
3. A similar duty to assist the other party in the performance of the contract, and derived from the good faith principle, is to be found in GREECE, A.P. 179/1956, NoB 4 (1956) 707, see *Tsirintanis* II/1 art. 288 no. 6 (1949); ITALY, CC art. 1175 (see *Breccia* 413, with references, *Bianca*, Il contratto 500-511 and *Sacco(-De Nova)*, Il contratto, II, 436-438, see also Cass. 18 October 2004, no. 20399, in I Contratti. 2005, 429 ff); THE NETHERLANDS, CC arts. 6:2, 6:248, see also 6:58 on *mora creditoris*; PORTUGAL, *Varela* II 10 ff, see also CC arts. 762(2) and 813; ESTONIA LOA § 23(2), which is however unclear as to the enforceability of the obligation (*Varul et al (-Kull)* § 23 no. 4.3; see also LOA § 119 on *mora creditoris* and LOA § 101(3) on restrictions on relying on non-performance and resort to remedies in so far as such non-performance was caused by an act of the creditor or by circumstances dependent on the creditor; and SPAIN, *Díez-Picazo* I 733; *Lacruz(-Rams)*, II, 1 Obligaciones, § 69, no. 320, 534).
4. In FRANCE the duty to co-operate has recently been accepted as flowing from the principle of good faith (*Terré/Simler/Lequette*, Les obligations[9], n° 43. The courts have applied it to contracts for the supply of sophisticated products such as computer software, see *Picod* JCP 1988 I 3318. In BELGIUM also good faith has been used as the basis for a duty to co-operate (*Van Gerven*, Verbintenissenrecht, p. 99).
5. NORDIC statutes do not provide a general duty to co-operate in the performance of contractual obligations, but this duty pervades the provisions of the Sale of Goods Acts (DENMARK, 1906; FINLAND and SWEDEN 1987-1990) which in many respects are considered to provide general principles of contract law. See also the emphasis on the duty to co-operate in authors such as *Taxell*, Avtalsrättens normer II and *Wilhelmsson*, Perspectives 21; *Ramberg*, Avtalsrätt 39. In Nordic countries this duty is also often characterised as a "duty of loyalty".
6. In POLISH law the parties' duty to co-operate is derived from CC art. 354. According to CC art. 354 § 1, the debtor should perform the obligation in compliance with its

terms, with its economic aim and with established customs and according to art. 354 § 2 – the creditor should co-operate in the same manner.

7. ENGLISH law will impose an implied duty to co-operate where this is necessary in order to give business efficacy to the agreement: see *The Moorcock* (1889) 14 PD 64. Beyond this the attitude of the English courts has not been very consistent. See *Burrows* (1968) 31 MLR 390. The strongest recognition has perhaps been in relation to contracts of employment: see *Secretary of State for Employment v. Associated Society of Locomotive Engineers and Firemen (No. 2)* [1972] 2 QB 455.

8. In SCOTTISH law too it may be possible to imply into a contract a term imposing an obligation to co-operate (see *Mackay v. Dick* (1880-81) 6 App. Cas. 251, per Lord Blackburn) but the technique of *ad hoc* implication of terms is not so reliable as having a general rule.

9. A general duty of contractual co-operation cannot be found in the CZECH statute law, but in fact it could be derived, case by case, from the general rule of good faith and the commercial principle of the fair dealing. Moreover, a duty of co-operation is recognised for some kinds of contracts (for instance: the buyer is obliged to co-operate with the seller, see *Štenglová, Plíva, Tomsa a kol.* Obchodní zákoník – komentář, C.H. Beck Praha 2004, p. 1109, under Ccom art. 447).

10. In SLOVAK law, a debtor is not considered to be in delay in performing the obligation if the delay is due to the creditor's lack of co-operation at the time of performance (see CC § 520). The creditor who fails to co-operate may be regarded as being in delay (see CC § 522).

11. Under the HUNGARIAN CC § 277(4) the parties are under an obligation to co-operate in the performance of the obligations under a contract. The debtor must act to perform in the manner that can generally be expected in the given situation, while the creditor must promote performance in the same manner. Under CC § 277(5) the parties are under an obligation to inform each other of all important circumstances affecting performance. See also CC Introductory provisions § 4(1) which provides that in exercising civil rights and fulfilling obligations, all parties should act in the manner required by good faith and fair dealing and are obliged to co-operate with one another.

III.–1:105: Non-discrimination

Chapter 2 (Non-discrimination) of Book II applies with appropriate adaptations to:

(a) the performance of any obligation to provide access to, or supply, goods, other assets or services which are available to members of the public;

(b) the exercise of a right to performance of any such obligation or the pursuing or defending of any remedy for non-performance of any such obligation; and

(c) the exercise of a right to terminate any such obligation.

COMMENTS

This Article is needed because the provisions in Chapter 2 (Non-discrimination) of Book II apply only to contracts and juridical acts and not to the obligations and corresponding rights arising out of them. It is clear, however, that the principle of non-discrimination in that Chapter is as important in relation to the performance of the relevant obligations and the exercise of corresponding rights to performance as it is in relation to such matters as the initial decision to conclude or not to conclude a contract. The same goes for the decision to terminate any such obligation.

On the content of the Article see the Comments to the Articles in Book II. Chapter 2 (Non-discrimination).

NOTES

1. See the Notes to Book II, Chapter 2 (Discrimination).

III.–1:106: Conditional rights and obligations

(1) The terms regulating a right, obligation or contractual relationship may provide that it is conditional upon the occurrence of an uncertain future event, so that it takes effect only if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).

(2) Upon fulfilment of a suspensive condition, the relevant right, obligation or relationship takes effect.

(3) Upon fulfilment of a resolutive condition, the relevant right, obligation or relationship comes to an end.

(4) When a party, contrary to the duty of good faith and fair dealing or the obligation to co-operate, interferes with events so as to bring about the fulfilment or non-fulfilment of a condition to that party's advantage, the other party may treat the condition as not having been fulfilled or as having been fulfilled as the case may be.

(5) When a contractual obligation or relationship comes to an end on the fulfilment of a resolutive condition any restitutionary effects are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.

COMMENTS

A. Need for provision

Most of this Article is not necessary for substantive purposes. It already follows from the principle of party autonomy that contracting parties can make a right or obligation, or the whole complex of rights and obligations involved in their contractual relationship, or indeed any other result, conditional on the occurrence or non-occurrence of an uncertain future event. And it goes without saying that a legislator could do the same. In the absence of provision to the contrary, a term providing that a right or obligation would come into effect, or would cease to have effect, on the occurrence of an event would not have retrospective effect. So substantively the first three paragraphs of the Article do nothing. They are, however, useful for the purposes of establishing a recognised terminology on suspensive and resolutive conditions. Paragraph (4) does have a substantive effect. It is considered below.

B. Meaning of "conditional"

A right or obligation is conditional if it is subject to an "if" provision. Either it becomes effective "if" something happens or it ceases to be effective "if" something happens. The "something" must be an uncertain future event.

Illustration 1
The Government of Bettaravia has suspended indefinitely all exports of sugar beets from its ports. A contract requires the seller to ship beets on 31 July if the export embargo has been lifted by that date. This is a suspensive condition affecting the seller's obligation.

Illustration 2
Under a joint venture agreement, a landscape gardener and a water engineer agree to develop land for a theme park if an environmental permit becomes available. This is a suspensive condition affecting both parties' obligations.

An obligation may be conditional on the occurrence of a future uncertain event even although the condition is expressed negatively and refers to the non-occurrence of the event.

Illustration 3
A contract for the sale of sugar beets f.o.b. a named port in the country of Bettaravia provides that the seller's obligation to deliver is dependent upon the Government of Bettaravia not introducing export restrictions on sugar beets before the date fixed for delivery. Here the uncertain event is the introduction of the restrictions. The seller's obligation to deliver on the due date is subject to a resolutive condition. It will come to an end if the Government introduces export restrictions before that date.

C. An uncertain event

The essence of a condition, within the meaning of the Article, is its uncertain character. This uncertainty stems from external events which the parties to the contractual or other legal relationship may in certain cases be able to influence but which they do not control. The reference to an "uncertain future event" is not intended to cover the performance or non-performance by the debtor of the debtor's own obligations under the contract. The consequences of the "bringing about" by a debtor of the performance or non-performance of the debtor's obligations are regulated by the terms regulating the obligations and the rules on the remedies for non-performance and not by paragraph (4) of the present Article. By exercising due diligence, a party may help to bring about the fulfilment of a suspensive condition or prevent the occurrence of a resolutive condition. For example, in a contract for the export of goods the seller's obligation may be conditional on the award of an export licence. This may be subject to a quota or other system of discretionary control operated by the authorities. The award of an export licence may therefore be affected by the diligence and skill with which the applicant makes a case to the authorities. The seller's obligation to deliver the goods is nevertheless conditional upon the award of the licence.

Some conditions, however, will be so heavily dependent upon the will of one party as to signify a total lack of contractual commitment by that party and hence the absence of a binding contract. For example, a company may say that it will do something or pay a sum of money if, as a matter of pure discretion, it chooses to do so. This is not a conditional obligation: it is not an obligation at all. Such arbitrary conditions are to be distinguished from valid conditions where one party's obligation is dependent upon the will of another. A seller, for example, may be bound to supply raw materials to a buyer at a stated price in the event of the buyer deciding to accept an offer by a third person to purchase goods specially manufactured by the buyer.

D. A future event

An obligation may *appear* to be conditional upon a past event in those cases where the parties do not know whether the event has occurred. Uncertainty concerning past events may play a vital role in shaping rights and obligations, even in a world of rapid communication. Nevertheless, on a true interpretation of the situation, it is often not the past event that forms the basis of the condition but the future publication or availability of information concerning that event.

Illustration 4
A agrees to purchase from B a number of shares in company C if C's net profits in the preceding financial year reached a stated minimum figure. It is not known at the time

of the agreement whether the profits did reach the figure. The past profits of C will become known only when its accounts have been finalised. A's obligation falls to be interpreted as conditional on an uncertain future event – whether or not the amount of net profits brought out in the final accounts reaches the stated figure.

E. Operation of law

A right or obligation may be conditional on compliance with a country's law which is not the law applicable to the obligation.

Illustration 5
A contract for the export of works of art from Pictoria provides that the seller's obligation is conditional upon the export being lawful according to Pictorian law, which is not the law governing the contract. Pictorian law requires an export licence. The seller's obligation is therefore conditional upon the grant of a licence by the Pictorian authorities.

In the above illustration, the seller may be under a separate contractual obligation, express or implied, to obtain the licence or to use due diligence to obtain the licence and may be in breach of *that obligation*, as opposed to the delivery obligation, if unsuccessful in obtaining the licence.

F. Suspensive and resolutive conditions

In the case of a suspensive condition, the creditor may not demand performance from the debtor whose obligation is suspended for that would be to alter the basis of the bargain. This does not prevent a debtor from incurring liability for anticipated non-performance in accordance with the rules on that subject.

As is the case with suspensive conditions (see Illustrations 1 and 2 above), a resolutive condition may qualify the obligations of one party or both parties.

Illustration 6
A contract for the sale of five separate weekly shipments of 10,000 Russian Birchwood standards to be shipped from a northern Russian port provides for the parties' future obligations under the contract to come to an end if, contrary to expectations, the port is closed by ice before all the shipments have been made. The port is closed by ice after four shipments have been made. The parties' obligations were subject to a resolutive condition. In relation to the last shipment the condition has been fulfilled. The seller is no longer liable to make the last shipment and the buyer is no longer bound to pay for it.

G. Effect of fulfilment of conditions

The rule expressed in paragraphs (2) and (3) of the Article ascribes a prospective (or *ex nunc*) effect to the fulfilment of a condition unless otherwise provided. This is the simplest default rule. A rule giving retrospective effect to the fulfilment of a condition would have had to be subject to significant exceptions.

An example of prospective effect in the case of a suspensive condition is the following.

Illustration 7
A contract for the sale of a house in Bordeaux provides that the seller's obligation to sell is subject to the seller being appointed to a senior civil service position in Paris by a stated date. The seller is duly appointed.

It is only when that appointment is made that the seller's obligation to sell the house takes effect as an unconditional obligation. Before that there is only a conditional obligation.

An example of prospective effect in the case of a resolutive condition is the following.

Illustration 8
A carrier enters into a contract with a farmer to transport water by lorry to the farm for four weeks but this obligation is to come to an end if the local drought comes to an end within that time. Under the contract, the farmer pays carriage charges 30 days after each delivery.

The end of the drought within the four week period brings to an end the carrier's obligation. The farmer, nevertheless, remains bound to pay outstanding charges for deliveries made before the end of the drought. These charges are not affected by the condition: they accrue with each delivery even if payable in the future.

Problems regarding the recovery of money or property paid or delivered in the expectation that a condition will be fulfilled or not fulfilled may be resolved by the terms regulating the relevant obligations. For example, it may be expressly provided that a deposit is to be forfeited or returned. If the matter is not regulated it will be resolved by the rules in Chapter 8 which deal with such matters generally in relation to obligations which are extinguished otherwise than by performance.

H. Interference

Paragraph (4) deals with the situation where the debtor or creditor interferes with events so as to prevent a condition from being fulfilled or bring about fulfilment, in breach of the duty of good faith and fair dealing or the obligation to co-operate. It gives the other party an option to treat the condition as fulfilled or not fulfilled as the case may be.

Illustration 9
The licensing of a software package by D to E is agreed by the parties to be dependent upon the professional approval of the package by an independent computer engineer, F, who is nominated by D. The contract is favourable to D and unfavourable to E. Despite F's professional misgivings, D persuades F to approve the package. D, having acted contrary to good faith and fair dealing, cannot rely on F's approval, so that E is under no obligation to perform the licensing agreement and may have a right to damages for any loss caused by D's breach of the obligation to co-operate.

The above example is an illustration of interference in the case of a suspensive condition. Similar results may follow in the case of a resolutive condition.

Illustration 10
S enters into a contract to sell a horse to B. B expects to sell the horse on to T. S and B agree that B's obligation under the contract is to come to an end if T does not take the horse by a certain date. B also obtains another horse from a different seller and sells this horse to T instead, making no effort to sell T the horse purchased from S.

If the innocent party chooses not to exercise the option conferred by this paragraph the normal consequences of a breach of the duty to act in accordance with good faith and fair dealing or a non-performance of the obligation to co-operate will follow. This means that the interfering party may not be able to rely on any right which would have accrued as a result of the wrongful interference and may be liable in damages for non-performance of the obligation to co-operate. In many cases the innocent party will also be able to terminate the contractual relationship for fundamental non-performance.

It should be noted that the result of an improper interference which prevents a condition from being fulfilled is not necessarily that the condition is deemed to be fulfilled for all purposes. That could produce rigid and unacceptable results. For example, it could preclude the innocent party from terminating the contractual relationship or obtaining damages.

Illustration 11
The licensing of a software package by B to A is agreed by the parties to be dependent upon the professional approval of the package by an independent computer engineer, C, who is nominated by A. Regretting the bargain, A bribes C, against C's better judgement, to disapprove the software package.

If the condition were deemed to be fulfilled then both A and B would be bound to proceed with the contract. However, given A's cynical and serious breach of the duty to act in accordance with good faith and fair dealing and A's non-performance of the obligation to co-operate, B may prefer to terminate the contractual relationship and claim damages for any loss caused by A's conduct. There can also be cases where deeming a condition to be fulfilled makes no practical sense. For example, there is no point in deeming a condition relating to the obtaining of an export licence to have been fulfilled if the licence has not in fact been obtained. Damages are a much better remedy.

I. Restitutionary effects

It may happen that when a contractual obligation or relationship comes to an end because of the fulfilment of a resolutive condition there has been part performance of an obligation, or performance of a reciprocal obligation. The question whether either party is bound to return or pay the value of whatever has been received from the other in such circumstances is regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) .

Illustration 12
X has paid in advance for something which is to be supplied by Y. Y's obligation comes to an end because of the fulfilment of a resolutive condition. The rules in Chapter 3, Section 5, Sub-section 4 (Restitution) mean that Y has to return the payment.

If a person has paid or transferred something in the anticipation that a suspensive condition will be fulfilled and the condition is not fulfilled, the situation is different. The payment or

transfer would have taken place in the absence of any legal obligation and with no intention of donation. In such circumstances the law on unjustified enrichment would come into operation and the payment or property transferred would normally be recoverable on that basis.

NOTES

I. History

1. The rules on conditions have a long history. They can be traced back in some instances to the earliest records of Roman law and have formed an unbroken thread in the European legal tradition for many centuries. See generally *Zimmermann*, Obligations 716 ff.

II. Suspensive and resolutive conditions

2. The distinction is common to many legal systems. See the BELGIAN, FRENCH and LUXEMBOURG CCs art. 1168; the GERMAN CC § 158; the DUTCH CC art. 6:22; the AUSTRIAN CC § 696; the SPANISH CC art. 1113; the ITALIAN CC arts. 1353-1361; the GREEK CC arts. 201-02; the SLOVAK CC § 36(2); the SLOVENIAN LOA § 59; the ESTONIAN GPCCA § 102; the POLISH CC art. 89; and the PORTUGUESE CC art. 270. See also for DENMARK *Ussing*, Aftaler[3], 447-457; for the CZECH law CC § 36(2) and for SCOTLAND *Gloag* chap. XVI, *McBryde* para. 5.35 ff. The distinction is known in ENGLISH law though it is more usual to refer to suspensive conditions as conditions precedent and to resolutive conditions as conditions subsequent (*Chitty* para. 2-144; *Treitel*, Contract, 2-109–2-110) IRISH law generally follows the English approach (*Clark* 198-205). For CZECH law see (Jehlička, Švestka, Škárová et coll. Občanský zákoník - komentář. C.H. Beck Praha 2004, p.219). DANISH and FINNISH law have no general legislative provisions on the subject, though the distinction is known in the Land Act (Maakaari 12.4.1995/540). More recent Finnish authors subsume conditions in the discussion of interpretation, though an earlier text (*Kivimäki & Ylöstalo* 291-297) devotes separate space to the subject. On Danish law see *Bryde Andersen II* 201 ff. For SWEDEN see e.g. Hagstrom, p. 766 et seq.

III. Uncertain events; past and future events

3. It is generally recognised that the event on which an obligation may be conditional must be uncertain. See the FRENCH, BELGIAN and LUXEMBOURG CCs (arts. 1168 and 1181), the DUTCH CC (art. 6:21) and the SPANISH CC (art. 1113) where it is provided that the event may be either a future event or (in contrast with these rules) a past event that is not known to the parties. If only the time of arrival is uncertain, it is not a condition (e.g. death of a person), see Notes under III-1:107. See also the AUSTRIAN CC § 704; SLOVENIAN LOA § 59; PORTUGUESE CC art. 270; ITALIAN (e.g., *Barbero* 1099, *Bianca*, Il contratto, 543-544, *contra Gazzoni*, 938); GERMAN (e.g. MünchKomm *(-Westermann)* § 158 no. 8); ENGLISH (e.g., *Treitel*, Contract 2-109–2-110); SCOTTISH (e.g. *Stair* 1.3.7); and IRISH (e.g., *Clark* 198-205) authors recognise the uncertain character of conditions. GREEK law insists on an uncertain future event (CC arts. 201 and 202) and so does ESTONIAN GPCCA § 102 and the POLISH CC art. 89. If the event is uncertain, yet past, there is no real condition but only a subjective uncertainty (see *Balis* 255). See generally *Treitel*, Remedies 255-265.

IV. Conditions and party interference

4. FRENCH, BELGIAN and LUXEMBOURG laws have a provision similar to para. (4) (CC art. 1178), as does GERMAN law (CC § 162); DUTCH law (CC art. 6:23); SLOVENIAN law (LOA § 59 (4)); ESTONIAN law (GPCCA § 104); POLISH law CC art. 93; and ITALIAN law (CC arts. 1358-1359; Cass. 16 December 1991, no.13519, in Giust. Civ. 1992, I, 3095, and Cass., SS. UU., 19 September 2005, no.18450, in Vita not. 2006, 289); jurisprudence requires the interfering party's behaviour to be in breach of an obligation or contrary to good faith (Cass. 22 April 2003, no.6423 and Cass. 28 July 2004, no.14198, in Giust.civ. 2004, I, 2793 and 2539). A similar rule exists in PORTUGUESE law (CC art. 275(2)); GREEK law (CC art. 207); AUSTRIAN law (see the jurisprudence of the Austrian Supreme Court (-OGH) 27 March 1996, JBl 1996, 782; ÖBA 1996, 892; 19 December 1990, JBl 1991, 382; 21 February 1989, JBl 1990, 37); FINNISH law (*Kivimäki & Ylöstalo* 295). The principle is the same in the CZECH law (CC § 36). Any fact in law should become unconditional, if a party to whom non-fulfilment of a condition is advantageous intentionally frustrates its fulfilment and any fulfilment of a condition should be ignored if its fulfilment was intentionally brought about by a party who had no right to do so and for whom its fulfilment is advantageous. Some abusive conditions are considered unwritten when stipulated in a consumer contract (CC § 56). A similar principle is also to be found in the SPANISH CC (art. 1119); fraud is not a requirement and a mere conscious act attributable to the party suffices; and the SLOVAK CC (§ 36). DANISH law recognises an obligation of non-interference but would deem fulfilment or non-fulfilment as the case may be to occur only in appropriate cases (*Ussing*, Aftaler[3], 448 ff and *Bryde Andersen II* 203). SCOTTISH law may in appropriate cases deem a condition to be fulfilled or not fulfilled if a party has improperly brought about fulfilment (cf. *Mackay v. Dick & Stevenson* (1881) 8R (HL) 37; *Credential Bath Street Ltd. v. Venture Investment Placement Ltd.* [2007] CSOH 208). ENGLISH law would often treat the action of the interfering party as the breach of an implied term of the contract but, though *Mackay v Dick* is frequently cited, would not deem fulfilment or non-fulfilment to have occurred: *Treitel*, Contract 2-116. IRISH law appears to adopt a similar approach to English law, the courts intervening only where there is an express or implied obligation to do or not to do something (see *Clark* 200-01).

V. Contractual obligations ancillary to conditions

5. Whether a contracting party has undertaken expressly or impliedly to exercise due diligence to assist the occurrence of a suspensive condition, or has even undertaken to bring about its occurrence, will be a question of interpretation of the contract. For examples in ENGLISH law see *Anglo-Russian Merchant Traders Ltd.* [1917] 2 KB 679; *Pagnan SpA v. Tradax Ocean Transportation SA* [1987] 2 Lloyd's Rep 342 National laws do not generally provide for these specific obligations (as opposed to general obligations to act in good faith) to arise by operation of law.

VI. Effect of fulfilment of condition

6. The activation of a condition does not have retrospective effect in GERMAN law. An agreement that it should do so has only personal effect. (CC §§ 158(2) and 159). In DUTCH law the same hold true: fulfilment of a condition does not have retrospective effect (CC art. 6:22) and has only personal effect (CC art. 6:24). A prospective effect is also the rule in GREEK law (CC art. 203(1) and (2)) and AUSTRIAN law (CC § 696 - for resolutive conditions - and OGH 13 July 1987 SZ 55/109 - for suspensive conditions) as well as in ESTONIAN law (GPCCA § 105). In FINNISH law,

conditions operate prospectively, unless otherwise agreed (*Kivimäki & Ylöstalo* 296-97); the same rule follows from POLISH CC art. 90. SCOTTISH law appears to be the same (*Gloag & Henderson* para. 3.12). It appears to be a matter of contractual construction in DANISH law just as it would be in ENGLISH and IRISH law whether conditions operate prospectively or retrospectively. In CZECH law, the principle is that the condition has only a prospective effect. Nevertheless, for a suspensive condition, a retrospective effect is possible if agreed (CC § 36, interpretation by Jehlička, Švestková, Škárová a kol., abovementioned, p. 218; the same meaning: Josef Fiala in D.Hendrych a kol. Právnický slovník, Praha 2006, p. 857). The principle of retrospective effect upon the occurrence of a condition is firmly recognised by FRENCH law (CC art. 1179) but there are significant exceptions arising for example out of contrary agreement (*Malaurie & Aynès* n. 184), fiscal law and the transfer of risk (CC art. 1182(2)). The same principle of retroactivity is to be found in BELGIAN and LUXEMBOURG law (CC art. 1179), with similar exceptions, (see for Belgium *J. de Coninck*, De voorwaarde in het contractenrecht (2007), p. 408 ff) and in ITALIAN law (CC art. 1360), where it is subject to contrary agreement and where a rule to the opposite effect applies in the case of long-term contracts (CC art. 1360(2)). Retroactivity is the rule in PORTUGUESE law (CC art. 276) but again there are exceptions. Again, it is the rule (but with exceptions) in SPANISH law (CC arts. 1120(1) and 1123(1)).

7. Under the HUNGARIAN CC § 228(1) if the parties have made the coming into effect of a contract contingent upon an unpredictable future event (suspensive condition), the contract becomes effective when such condition occurs. Under paragraph (2) of the same article if the parties have made the termination of a contract contingent upon an unpredictable future event (resolutive condition), the contract expires when such condition occurs. Under paragraph (3) incomprehensible, contradictory, illegal or unattainable conditions are void; the provisions of limited invalidity (§ 239) apply to contracts with such conditions. Under CC § 229(1) as long as a condition is pending, neither party is entitled to do anything that would infringe or violate the other party's rights upon the realisation or frustration of the condition. This provision does not affect the rights of third persons acquired in good faith and for consideration. Under CC § 229(2) persons who have wrongfully caused the realisation or frustration of a condition are not entitled to establish any right as a result. Under CC § 229(3) the provisions on conditions are also applied to time clauses by which the parties link the coming into effect or termination of a contract to a certain date.

III.–1:107: Time-limited rights and obligations

(1) The terms regulating a right, obligation or contractual relationship may provide that it is to take effect from or end at a specified time, after a specified period of time or on the occurrence of an event which is certain to occur.

(2) It will take effect or come to an end at the time or on the event without further steps having to be taken.

(3) When a contractual obligation or relationship comes to an end under this Article any restitutionary effects are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.

COMMENTS

A. Time clauses and conditions

Terms relating to time must be distinguished from conditions. A debtor may be obliged to perform on a future date which is fixed and sure to arrive, as would be the case where a contract of sale is concluded on July 1 with delivery to be made by the seller on July 15. It would be a misuse of language to say that the obligation to deliver is conditional upon the arrival of the due date, for July 15 is sure to arrive. The obligation does not depend on the occurrence of a future uncertain event. It is an existing, unconditional obligation to perform in the future. The right which corresponds to it is an existing, unconditional right to future performance.

Similarly an obligation which is to come to an end on a specified time or after a specified period of time is not subject to a resolutive condition, although the effect is rather similar.

The line between conditional and temporal terms is not always clear-cut. Some events must occur though the date of their occurrence cannot be known. Provisions referring to such events will often be temporal terms as is recognised in the Article, but may involve a hidden condition if the obligation is contingent on something else happening or not happening before the specified event.

Illustration 1
X is bound to pay Y €5000 when Z dies. This is not a condition but a simple time term. Z is bound to die. The term is a "when" term, not an "if" term.

Illustration 2
The trustees of a family settlement undertake to provide A with alimentary support on the death of B, her father. Since B's death is sure to happen, this may look at first sight like an obligation which is future but not conditional. However, A may die before B, in which event the trustees would be under no obligation. So in fact the obligation is conditional on A surviving B.

B. Restitutionary effects of extinction of contractual obligation by expiry of time

In many cases the parties to a contract will know in advance when an obligation is going to come to an end by the expiry of a specified time and will ensure that it is fully performed and that any reciprocal obligation is also fully performed. It may happen, however, that an

obligation comes to an end unexpectedly by the arrival of a time limit - for example, one expressed by reference to an event which is certain to arrive but not at a time which can be known in advance. In such cases the situation is effectively the same as when a resolutive condition is fulfilled. At the moment when the obligation comes to an end something may have been transferred from one party to the other in part performance or attempted performance. Or one party may have performed in expectation of a reciprocal performance which is no longer forthcoming because of the unexpected extinction of the relevant obligation. The rules in Chapter 3, Section 5, Sub-section 4 (Restitution) regulate such questions. Normally there would be an obligation on the part of the recipient to return what had been received.

Illustration 3
X has paid in advance for something which is to be supplied by Y. Y's obligation comes to an end because of the unexpected arrival of a time limit. The rules in Chapter 3, Section 5, Sub-section 4 (Restitution) mean that Y has to return the payment.

Not only specific rights and obligations but also whole contractual relationships can be subject to a time clause, as in leases, charterparties and agencies.

NOTES

1. The distinction between a condition and a time clause (whether relating to a fixed time or an uncertain time which is nonetheless bound to arrive) is of very long standing in the European legal tradition and is generally recognised. See e.g. for FRENCH law CC art. 1185 and Civ. 3ème, 4 déc. 1991, pourvoi nº 90-15153; for ENGLISH law *Chitty on Contracts* para. 2-142; for GREEK law CC art. 201; 210 for DUTCH law (CC art. 6:39 and *Asser-Hartkamp* 4-I, no. 155); for POLISH law CC art. 116; and generally *Zimmermann*, Obligations 741 ff. The same is held for SLOVAK law. The CZECH CC and also the Ccom ignore the concept of time clause; however, practice recognises exactly the same distinction between a condition (*podmínka*) and a time clause (*doložení času*) (Jehlička, Švestka, Škárová et coll. abovementioned, p. 219). The distinction is taken for granted in SCOTTISH law. For example, in *Credential Bath Street Ltd v. Venture Investment Placement Ltd.* [2007] CSOH 208 the guarantor's obligation was both conditional and subject to a time clause.
2. SPANISH law also distinguishes between a condition and a time clause. The CC (art. 1125) points out that a time clause exists when the day established in the terms of an obligation is certain to occur, no matter if it is known *when* it will happen (*término cierto* and *término incierto*). But when there are doubts about *whether* the event will ever occur, CC art. 1125.3 regards such a term as a condition. A time clause in Spanish law takes effect automatically when the established event occurs and no specific declaration by the parties is needed.

III.–1:108: Variation or termination by agreement

(1) A right, obligation or contractual relationship may be varied or terminated by agreement at any time.

(2) Where the parties do not regulate the effects of termination, then:

(a) it has prospective effect only and does not affect any right to damages, or a stipulated payment, for non-performance of any obligation performance of which was due before termination;

(b) it does not affect any provision for the settlement of disputes or any other provision which is to operate even after termination; and

(c) in the case of a contractual obligation or relationship any restitutionary effects are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.

COMMENTS

The debtor and creditor can always agree to vary or terminate the obligation and corresponding right; the parties to a contract can always agree to vary or terminate their relationship. The agreement need not be express. It may be implied from what the parties have said or done. For example, the extinction of a contractual obligation may sometimes be inferred from the fact that a new contract has been concluded on, or in relation to, the same subject-matter. This is sometimes known as novation but that term is used in different senses in different legal systems. The extinction of a right or obligation should not, however, be readily implied. Only if that is clearly the intention of the parties should that result follow.

The parties will normally regulate the effects of a termination by agreement. Paragraphs (2) and (3) of the Article merely provide default rules. In the absence of agreement to the contrary, termination is prospective in effect. It does not affect liability for damages caused by past non-performance. It does not affect provisions of a contract, such as an arbitration clause, intended to survive termination.

When an obligation is terminated by agreement the parties will normally regulate what is to happen to anything already transferred from one to the other in part performance or attempted performance of the obligation or under a reciprocal obligation. In any case where, unusually, they forget to do so, the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) would come into play. Those rules would normally require the recipient party to return what had been received.

Illustration

X has paid in advance for something which is to be supplied by Y. Circumstances change and the parties agree to terminate Y's obligation. X assumes that the advance payment will be returnable but forgets to mention this. So nothing is said about it in the agreement. The rules in Chapter 3, Section 5, Sub-section 4 (Restitution) mean that Y has to return the payment. Of course, if the parties want Y to keep the advance payment they can easily provide for this, but the default rule is that it is returnable.

As an agreement to vary or terminate a right, obligation or contractual relationship will be a contract (see II.–1:101 (Meaning of "contract" and "juridical act")) it follows that no form or

other requirement such as consideration will be required (see II.–4:101 (Requirements for the conclusion of a contract)).

NOTES

1. This rule generally follows from the principle of freedom of contract.
2. Under FRENCH and BELGIAN law, for example, the parties can always agree to vary or terminate their contract (*Terré/Simler/Lequette*, Les obligations[9], no. 476 ff) but depending on the variation the result may be another contract (a "novation") which terminates the first (arts. 1271 ff) or the same contract with modification. The prospective or ex nunc effect can be decided by the parties. The position of POLISH law is that a contract to terminate another contract has an effect for the future; a contract to vary an existing contract may either waive or modify the contractual provisions (P. Machnikowski in E. Łętowska, System prawa prywatnego. Prawo zobowiązań – część ogólna, 463).
3. In GREEK law (CC art. 361) in order to create or amend an obligation a contract is required, provided that the law does not determine otherwise (see *Michael P. Stathopoulos*, Contract Law in Hellas, no. 13 and *Penelope Agallopoulou*, Basic Concepts of Greek Civil law, Athens 2005, p. 235).
4. Under DUTCH and GERMAN law the parties can always agree to vary the contract or terminate the contractual relationship with prospective effect (*Asser-Hartkamp* 4-II, no. 27; Staudinger (-*Löwisch*), BGB [2005], § 311 nos. 4, 76 et seq.).
5. In SCOTTISH law the parties may agree to discharge or vary their contractual rights and obligations (*McBryde*, chap. 25.04). Subject to the possibility of waiver of rights, termination or variation would in principle be prospective in effect (*McBryde*, chap. 25; *E Reid and J Blackie*, Personal Bar (2006)).
6. Under SPANISH law, the mutual agreement to terminate has only efficacy ex nunc. This rule flows from a more general principle according to which if parties "novate" a pre-existing obligation, the substitution has as a rule no extinctive effect as to the matured duties: TS 28 December 2000, RAJ 2000/10382.
7. In ENGLISH law an agreement to vary or terminate an obligation in principle requires consideration in the same way as consideration is required to form a contract. If the change is wholly to the benefit of one party – as when one party agrees to let the other off paying an outstanding debt, see *Foakes v. Beer* (1883-84) 9 App. Cas. 605, or promises to pay the other extra for performing an existing contractual obligation, see *Stilk v. Myrick* (1809) 2 Camp 317, 170 ER 1168 – the traditional position is that the agreement is ineffective for want of consideration. However in recent years the requirement of consideration has been severely attenuated, in the first type of case by the development of the doctrine of promissory estoppel (see *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] KB 130) and in the second by finding that if the promisor made the promise freely and derived a practical benefit from having the obligation performed, there is consideration: see *Williams v. Roffey Brothers & Nicholls (Contractors) Ltd.* [1991] 1 QB 1. See *Chitty on Contracts* paras. 3-072–3-136.
8. Under SLOVAK law, in compliance with the principle of freedom of contract, the parties may vary their mutual rights and obligations (CC § 516(1)), replace an existing obligation with a new one and terminate the existing obligation (CC § 570(1)) or terminate an obligation not yet performed (or a part of it) without forming a new

obligation (CC § 572(2)) by agreement. Moreover, an obligation can also be replaced with a new obligation by settlement pursuant to CC § 585 *et seq*. A distinction has to be made between an agreement resulting in a new obligation being formed instead of the existing one *("novatio privativa")* and an agreement merely modifying the existing obligation or forming a new obligation beside the existing one *("novatio cumulativa")*. In this respect, CC § 516(2) stipulates that, unless it unequivocally results from the agreement that, by forming a new obligation, the existing obligation is to be terminated, a new obligation is formed beside the existing obligation, provided that the conditions required by law for forming such an obligation are met. Furthermore, under CC § 571, in case of replacement of an existing obligation, it is deemed replaced only as far as this unequivocally results from the agreement on forming a new obligation. The obligation is terminated, unless otherwise agreed by the parties, by the acceptance of the proposal for terminating it by the other party (CC § 572(2)). Such termination is, in principle, prospective in effect. In the absence of an agreement to the contrary, once the obligation is terminated, the parties have to return what they have accepted under the obligation. Any consideration thus received and not returned would be qualified as an unjustified enrichment (see CC §§ 451 and 457).

9. In CZECH law, the general rule is similar to that in the Article parties may, by agreement, modify or terminate their mutual rights and obligations (see CC § 516.1 for modification, CC § 570.1 for replacement of an already existing obligation by a new one, CC § 572.2 for termination). This *novation* has an ex tunc and reciprocal effect (CC § 573) unless otherwise agreed (CC §§ 573 ff). For both the variation and termination of an obligation, the obligation is regarded as varied or terminated only so far as that undoubtedly follows from the new agreement; if there are doubts about the scope of the variation or substitution by a new obligation, the agreement is to be judged as constituting a new relationship in addition to the old one (CC § 516(2) and § 571). The CZECH CC distinguishes between a simple waiver of right and a complex dissolution of reciprocal rights and obligations; both must be executed in the form of an agreement, which must be in writing in the former case, but may be informal in the later (unless the terminated obligation is agreed in writing itself) (CC §§ 572(2) and (3), 574(1)). The terminated obligation is extinguished *ex nunc* (CC § 572(2), § 573) further specifies that a written agreement on termination of an obligation of one party entails the termination of the reciprocal obligation of the other party (unless expressly agreed otherwise), and if this obligation has been already performed, the first party may claim the return of the performance […].

10. Under the HUNGARIAN CC § 240(1) unless otherwise provided by legal regulation, the parties are entitled to amend the content of a contract by mutual consent or change the legal title of their commitment. Under CC § 319(1) parties are entitled to terminate or cancel contracts by mutual consent. Under CC § 319 (2) in the case of termination, the contract is extinguished with prospective effect, and the parties owe no further obligations. The contractual price for obligations performed before termination must be paid, and if the other party has not yet performed the reciprocal obligation for a price that has already been paid, the money must be refunded. Under CC § 319(3) in the case of cancellation of a contract, the contract is extinguished with retroactive effect as of the date of conclusion, upon which benefits already received under the contract must be returned.

III.–1:109: Variation or termination by notice

(1) A right, obligation or contractual relationship may be varied or terminated by notice by either party where this is provided for by the terms regulating it.

(2) Where, in a case involving continuous or periodic performance of a contractual obligation, the terms of the contract do not say when the contractual relationship is to end or say that it will never end, it may be terminated by either party by giving a reasonable period of notice. In assessing whether a period of notice is reasonable, regard may be had to the interval between performances or counter-performances.

(3) Where the parties do not regulate the effects of termination, then:

(a) it has prospective effect only and does not affect any right to damages, or a stipulated payment, for non-performance of any obligation performance of which was due before termination;

(b) it does not affect any provision for the settlement of disputes or any other provision which is to operate even after termination; and

(c) in the case of a contractual obligation or relationship any restitutionary effects are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.

COMMENTS

A. General

This Article provides for two situations in which a right, obligation or contractual relationship may be terminated by unilateral notice. The first is where this possibility is provided for by the terms regulating the obligation. The second is where the contract is for an indefinite or perpetual duration.

B. Variation or termination by notice as provided for by terms regulating right or obligation

The principle of party autonomy means that it is possible for the parties to agree on rights to terminate for any reason or none. The effects of exercising such an agreed right to terminate in a case not involving fundamental non-performance will depend primarily on the terms of the provision conferring it. In the absence of clear provision to the contrary, accrued rights to damages would not be affected but neither party would be entitled to damages for the fact that any performance falling due in the future would not any longer have to be made.

Illustration 1

A long-term supply contract under which a certain quantity of goods has to be delivered every month for ten years provides that the purchaser can terminate the relationship on giving one month's notice if the purchaser no longer needs the supply to be continued. In due course the purchaser exercises this right in good faith. The purchaser is not liable to pay damages for terminating the contractual relationship. The seller is not liable to pay damages for not performing in the future.

Illustration 2

A long-term supply contract under which a certain quantity of goods has to be delivered every month for ten years provides that the purchaser can terminate the whole contractual relationship on giving one month's notice and without giving any

opportunity to cure if there is even a minor non-conformity in any delivery. After some years of satisfactory performance there is, because of the negligence of a temporary employee of the seller, a minor non-conformity in one delivery. There is no reason to suppose that there will not be satisfactory performance in the future. The purchaser exercises the right to terminate, returns the goods to the seller and buys elsewhere. The purchaser is not liable to pay damages for terminating the contractual relationship. The seller is liable to pay damages for loss caused by the non-conforming delivery but is not liable to pay damages for not performing in the future. The contractual relationship has been terminated. Neither party has any further obligations to perform under it.

In some cases the parties may wish to provide not only for an agreed right to terminate but also for the payment of compensation or extended damages (going beyond what would be payable under the normal rules) by one or the other. For example the purchaser under a long-term supply contract may be given the right to terminate by notice but only on compensating the supplier for extra costs incurred in gearing up to meet the purchaser's special requirements. Or the purchaser may be given the right to terminate for a minor breach and also the right to damages for the extra costs of obtaining supplies elsewhere for the whole remaining period of the contract. Whether the parties have provided not only for a right to terminate but also for compensation or damages beyond what would be due under the normal rules will depend on the terms of the contract, interpreted in accordance with the rules on interpretation.

C. Contracts of indefinite or perpetual duration

Paragraph (2) applies both to contractual relationships which purport to be everlasting and to such relationships which are for a period the duration of which cannot be determined from the contract. It expresses two principles:

(1) even a contractual relationship which purports to be everlasting may be ended: no party is bound to another for an indefinite period of time.

(2) to end such a relationship, or one which is for an indeterminate period, either party must give reasonable notice.

The paragraph applies only where the case involves continuous or periodic performance under a contract and only where the time when the contractual relationship is to end cannot be determined from the terms of the contract. Accordingly it will not apply if the contract provides for a fixed duration or a fixed time of termination. Also, it will not apply if the contractual relationship is to last for a "reasonable time" because that expression can be interpreted and applied to the circumstances: a time for the relationship to end can be determined from the terms of the contract. Similarly, a contract for life will not be within the scope of the paragraph. Whether such a contract is valid will depend on other provisions of these rules. If it is in effect a contract of quasi-servitude then it could be void on the ground that it infringes the fundamental right to liberty. Again, a contractual relationship which is to last until a particular job is completed, or until the occurrence of an uncertain event, would not be within the paragraph. It is, in one sense, for an indefinite duration but a time for it to end is determinable from the contract.

In practice certain types of contract often give rise to relationships which are to last for indefinite periods. This is often the case under agency and distributorship contracts, under franchising contracts, partnerships and joint ventures, for contracts for the supply of services, goods and electricity and for leasing. Such contracts often do not contain any provision for the termination of the relationships to which they give rise.

The principle does not cover cases where the contract provides a method of termination – for example, a period of six months notice. In such cases the contract says when the contractual relationship will end.

The principle may, however, apply to contractual relationships which were originally for a definite period, but which the parties have tacitly continued after the end of that period although they have not expressly agreed to renew them.

The scope of the paragraph may be regarded as rather arbitrary from the policy point of view. Why, it may be asked, does it not apply to a contractual relationship which is to last for 200 years, or until the occurrence of an event which in practice is very unlikely to occur? The answer is that the autonomy of the parties is to be respected. The results are not so dramatic as might at first sight be supposed because in the case of contracts for such very long periods the rules on change of circumstances and termination for serious grounds (see next paragraph) would often provide a means of escape.

The party intending to end the contractual relationship under paragraph (2) must give a reasonable period of notice. What is reasonable depends, among other things, upon the period the contractual relationship has lasted, the efforts and investments which the other party has made in performance of the contract, and the time it may take the other party to obtain another contract with somebody else. The length of notice will often be governed by usages. The second sentence of paragraph (2) makes it clear that, in cases where performance or counter-performance is due at regular intervals, regard may be had to these intervals in assessing what is a reasonable period of notice. Often, but not necessarily always, the interval between performances (or counter-performances, if longer) could be regarded as a reasonable period of notice.

D. Time when notice takes effect

Following the general rules on notices, the notice which purports to end the contractual relationship will not be effective unless and until it reaches the person to whom it is sent.

E. Restitutionary and other effects

The question whether either party is bound to return or pay the value of whatever has been received from the other when an obligation is extinguished as a result of a notice given under this Article is regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution).

Illustration 3
A contractual relationship of indefinite duration is terminated by notice under paragraph (2). At the time of termination one party has supplied part of a consignment of goods. Payment for the whole consignment is due 28 days after the whole consignment has been delivered. Termination extinguishes both parties' obligations for the future. The effect of the rules in Articles Chapter 3, Section 5, Sub-section 4

(Restitution) is that the supplier is entitled to the return of what has been supplied in part performance of the extinguished obligation.

The other effects are the same as for the preceding Article. In other words, termination has prospective effect only but does not affect provisions intended to survive termination.

Of course, the terms regulating the obligation may provide for more extensive effects than would normally follow. A contract for example may give one party a right to terminate the whole contractual relationship for even a minor and non-fundamental non-performance by the other and may provide for a stipulated sum or extended damages to be paid not only for loss caused by that non-performance but also for the fact that the terminating party will lose the benefit of future performance of the extinguished obligations. There are some limited controls on unfair contract terms, acting contrary to the requirements of good faith and fair dealing and excessive stipulated payments in lieu of damages but, if these usual controls do not come into play, such contractual provisions have to be respected and applied. It may be expected, however, that a party who wishes to have extended or unusual rights to payment from the other party after termination should provide for such rights in clear terms.

NOTES

I. Party autonomy

1. The rule in paragraph (1) is universally recognised, even if not expressly stated.

II. Eternal engagements prohibited

2. One principle underlying paragraph (2) - that nobody can be contractually bound to another eternally - is generally accepted. art. 4(1) of the European Convention of Human Rights prohibits slavery and bondage. Therefore, a servant cannot be bound to work for an employer indefinitely. The GERMAN CC § 624 provides that an employment contract for the lifetime of the employee or employer or for more than five years can always be ended by a six months notice after five years; and this Article represents the general prohibition of an eternally binding contract under German law, cf. *Oetker*, Das Dauerschuldverhältnis und seine Beendigung, 254. FRENCH and LUXEMBOURG law prohibit “eternal undertakings” (*Malaurie & Aynès* Obligations no. 884). SPANISH law is the same, CC art. 1583 and art. 1705. Under BELGIAN, ITALIAN, SLOVENIAN and PORTUGUESE law contracts entered into for an indefinite period may be ended, see respectively Belgian Cass. 22 November 1973, Arr.Cass. 327; *Bianca*, Il contratto 736, *contra (Sacco-)De Nova*, Il contratto, II, 729 ff; Cass. 4 August 2004, no.14970, in Giust.civ.Mass. 2004, 7-8, and, for employment contracts, Italian CC art. 2118; Slovenian LOA § 333; *Martinez*, Da cessação do contrato 59 ff. Under AUSTRIAN law there is a general principle that obligations for an unlimited period can be terminated if there is a serious reason, but generally also without such a reason, if a reasonable period of notice is given. Moreover, obligations for a very long time might be regarded as being against good faith, although the Austrian courts take a fairly liberal approach towards this (a contract regarding the lease of a telephone operation system for 10 years was considered valid, see OGH 30 May 2006, RdW 2006, 626) based on a number of provisions of the CC (§§ 1117, 1118, 1162, 1210) that obligations for an indefinite period of time may be terminated by notice for serious reasons. Despite a principle prohibiting eternal engagements in

CZECH law, a contractual obligation to refrain from a certain activity could be interminable if so agreed between the parties (see CC § 582 and Ccom art. 1).

3. ENGLISH law does not in principle refuse to admit an everlasting contract but a contract term creating an obligation to supply water at a fixed price "at all times hereafter" has been construed to mean that the contract may be ended by giving notice, see *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.* [1978] 1 WLR 1387. In SCOTTISH law the position is not clear (*McBryde* chaps. 9.15-9.21). In SWEDISH law the question whether an everlasting contract should be upheld depends upon the circumstances, NJA 1994 p. 359. SLOVAKIAN law generally recognises that it is possible to terminate an obligation of indefinite period with continuous or periodical performance (CC § 582). The Labour Code provides a possibility for employees to terminate the contractual relationship without giving any reasons.

III. Contracts for indefinite period determinable on reasonable notice

4. A general principle by which a contract for an indefinite period of time may be ended after a reasonable period of notice is found in DANISH law (*Gomard*, Obligationsret I, 26); ENGLISH law (see the *Staffordshire* case above, note 2); SCOTTISH law, see *McBryde* para. 9.16); GERMAN law (cf. *Oetker*, Das Dauerschuldverhältnis und seine Beendigung, 254)FRENCH, and LUXEMBOURG law, where it is founded on the doctrine of abuse of rights (*Malaurie & Aynès*, loc.cit.); BELGIAN law (Cass. 9 march 1973, Arr.Cass. 1973, 671; *Van Gerven*, Verbintenissenrecht p. 255); ITALIAN law (*Bianca*, loc.cit., *Roselli*, Recesso dal contratto, 267 ff) and PORTUGUESE law (*Martinez*, loc.cit.). In SPANISH law contracts for an indefinite period may be terminated at will (mandate, CC art. 1732), or according to the uses (loan for use, CC art. 1750) or after a reasonable period if the circumstances so require and, always, according to the good faith principle (CC art. 1705). See also CC art. 1581 (land leases).

5. Many laws provide for special periods of notice for specific contracts (e.g. SWEDISH Partnership Act § 2:24; FRENCH and BELGIAN CC arts. 1869, 1870). GERMAN law does not provide a general principle of reasonable notice, but the CC lays down special rules on notice for leases (§ 565), services (§§ 620(2), 622 and 624), cf. also mandate (§ 671) and civil companies (§ 723). The same holds true of other laws such as DUTCH, FINNISH, ESTONIAN and GREEK law which do not provide a general principle. For AUSTRIA see note 2 above and special rules e.g. in regard to leases CC § 1116, for employment contracts CC § 1159.

6. In POLISH law the general provision of CC art. 365^1 allows either party to terminate a contract for an indefinite period by giving notice. The notice period is fixed by law (e.g. CC art. 673 § 2 for lease), by contract or by custom. If nothing else appears from law, contract or custom, the contract expires immediately the notice is given (CC art. 365^1 in fine). The same applies in SLOVENIAN law, see LOA § 333. In CZECH law, under CC § 582, an indefinite contractual engagement may be terminated by notice at the end of a calendar quarter. The notice period in civil law is generally fixed *ex lege* at 3 months, unless otherwise agreed between the parties. There is an exception for labour contracts for an indefinite period. Here the notice period is fixed at two months without any possibility for the employer or the employee to change its duration (Czech law 262/2006 art. 51, unless it has been agreed that the contractual relationship is to end at an exactly agreed date. In SLOVAK law the notice period is fixed by law at 3 months to the end of a calendar quarter (CC § 582) if the matter is not regulated by the contract.

IV. Determination at short notice in special cases

7. In some laws shorter periods of notice (or no notice) may apply in case of hardship. This is the case in GERMANY (CC § 242); ITALY (CC art. 1467); SLOVENIA (LOA § 333(3)) and in the NETHERLANDS (CC art. 6:258). In CZECH law, a shorter notice or withdrawal without notice may be legal in some circumstances. A commercial contract may be determined by short notice (shorter than 3 months) of one contractual party if the performance is delayed on the part of the other contractual party and if the delay constitutes a non-fundamental breach of contract (Ccom arts. 345 and 346).

V. Termination by notice for extraordinary and serious reason

8. On the basis of rules in the CC on premature ending of some continuous contracts for an important reason, GERMAN case law had developed a general rule by which continuous contracts may be ended without notice or with a shorter notice if evidence is brought showing that, taking into consideration all the circumstances of the case and weighing the interests of both parties, the person giving notice cannot reasonably be expected to continue the relationship until it ends or may be ended under the contract. This general principle is now dealt with (since 2002) in a special provision, CC § 314. See also on employment contracts, CC § 626(1); on mandate, § 671(2); and on partnership, § 723(1) and (2). Rules on extraordinary termination under ESTONIAN law are similar (see e.g. on lease contract LOA § 313, on agency contracts LOA § 687). In ENGLISH, IRISH and SCOTTISH law similar results would often be achieved indirectly by implying a term allowing the contractual relationship to be terminated in the exceptional circumstances which have arisen. In AUSTRIA continuous contracts can be terminated for serious reasons whether they are concluded for a limited or an unlimited period of time. For the former this states the exception as they normally only end after termination of the stated period (see *Bollenberger* in Koziol/Bydlinsky/Bollenberger, ABGB, 2nd ed., § 859 no. 7). In CZECH LAW, the withdrawal of either party to any commercial contract constitutes a legal termination of the contractual relationship if the performance by the other party constitutes a fundamental breach of a contractual obligation and the withdrawal has been notified to this other party without undue delay on the side of the first party (Ccom art. 345). In SPANISH law, a right of withdrawal for serious reasons in long term contracts with a definite duration is recognised in certain cases (CC art. 1586- services- and art. 1707- partnership).

9. Under the HUNGARIAN CC § 320(1) a person who is entitled to withdraw on the basis of a contract or legal regulation may exercise this right by making a statement to the other party. Withdrawal cancels the contract retrospectively (ex tunc). Under § 321(1) a person authorised to rescind by virtue of a contract or a legal regulation may exercise the right by issuing a statement to the other party. Rescission terminates the contract prospectively (ex nunc).

III.–1:110: Variation or termination by court on a change of circumstances

(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.

(2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may:

(a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or

(b) terminate the obligation at a date and on terms to be determined by the court.

(3) Paragraph (2) applies only if:

(a) the change of circumstances occurred after the time when the obligation was incurred,

(b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;

(c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and

(d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

COMMENTS

A. General

The majority of countries in the European Community have introduced into their law some mechanism intended to correct the situation which may arise in very exceptional cases when performance of a contractual obligation, although not completely impossible, has become so excessively and disproportionately onerous as a result of supervening events which the parties to a contract could not reasonably have foreseen when they made the contract that it would be grossly unjust to hold them to their obligations. In practice contracting parties often adopt the same idea, supplementing the general rules of law with a variety of clauses, such as "hardship" clauses. If they do not do so, the reasonable conclusion may often be that they assumed the risk. However, this will not always be a reasonable conclusion. There may be cases where the parties simply overlooked the need for a hardship clause or the need for a clause to cover the circumstances which in fact arose.

This Article begins by recognising the important principle that obligations must be performed even if performance turns out to be more onerous than anticipated. It then recognises that there may, however, be cases where an exceptional change of circumstances, which could not reasonably have been taken into account, is so extreme that it would be manifestly unjust to hold the debtor to the obligation. It provides a mechanism whereby, if certain rather demanding requirements are satisfied, a court may adapt the obligation to the changed circumstances or even terminate it altogether.

This Article must be read along with the Article on "impossibility". Although in either case an unforeseen event has occurred, impossibility presupposes that the event has caused an insurmountable obstacle to performance, whereas in the situation covered by this Article

performance may still be possible, although ruinous, for the debtor. The consequences are different under the two Articles. Impossibility of performance, if it is total, can only lead to the end of the obligation. Exceptional hardship, under this Article, gives the court the choice of revising the terms regulating the obligation or terminating it altogether. Of course there is sometimes a very fine line between a performance which is only possible by totally unreasonable efforts, and a performance which is only very difficult even if it may drive the debtor into bankruptcy. It is up to the court to decide which situation is before it.

This Article must also be read along with the rules allowing an obligation to be brought to an end in other circumstances, for example the rule allowing an obligation of indefinite duration to be terminated by giving notice. Where an obligation can be terminated by the debtor there will be no need to rely on the present Article.

B. Scope of Article

The court's powers arise only in the case of contractual obligations and obligations arising under a unilateral juridical act. It would not be appropriate to allow a court to modify or terminate an obligation which arises by operation of law, even if the obligation is one which is within the intended scope of these rules. In some cases, as in the obligation to reverse an unjustified enrichment, the question of change of circumstances is already addressed by the relevant rules. In others, as in the case of an obligation to pay damages for loss caused to another, relief based on a change of circumstances does not seem appropriate. And, generally, the idea of assumption of risk which is crucial to the rules on change of circumstances is not applicable in the case of obligations which are not voluntarily undertaken. On the other hand, there is no reason to exclude obligations arising under unilateral juridical acts from the scope of the provision. Indeed there may be a stronger case for including such obligations, which are often gratuitously undertaken, than for including many contractual obligations.

Illustration 1

X has promised to pay to put his niece Y through a 5 year university course. The promise is legally binding. At the time of the promise 90% of university fees are met by the government and there is no reason to suppose that this will change. By the time, some years later, when Y is ready to embark on the course this government support has been withdrawn and X, who is retired and on a fixed income, cannot afford to perform his obligation without selling his house. X asks Y to accept a lower contribution and to take advantage of the state-backed student loan scheme which has replaced the old system but Y insists that X should sell his house and perform his obligation in full. The obligation can be modified or terminated.

C. The role of negotiation

The Principles of European Contract Law (Art. 6:111) imposed an obligation on contracting parties to enter into negotiations with a view to adapting the contract or ending it: damages could be awarded for loss caused by a refusal to negotiate or by breaking off negotiations contrary to good faith and fair dealing. Only if negotiations failed did a court have power to modify or terminate. On consultation, this technique was criticised by some stakeholders as being undesirably complicated and heavy. It was pointed out, for example, that a creditor in an obligation might be acting in a fiduciary capacity and might be placed in a difficult situation of conflict of interests if obliged to negotiate away an advantage.

The present Article takes account of these criticisms. It does not impose an obligation to negotiate but makes it a requirement for a remedy under the Article that the debtor should have attempted in good faith to achieve a reasonable and equitable adjustment by negotiation. There is no question of anyone being forced to negotiate or being held liable in damages for failing to negotiate. The Unidroit Principles (art. 6.2.3) adopt a similar basic approach but use a slightly different drafting technique. They provide that in case of hardship the disadvantaged party is entitled to request renegotiations and that only if there is a failure to reach an agreement within a reasonable time may the party resort to the court. However, as a matter of drafting, there seems to be no need to provide that a party is entitled to request renegotiations. A party to a contract is entitled to request renegotiations at any time.

D. When do court's powers arise

The Article places strict limits on the powers of the court to vary or terminate an obligation because of a change of circumstances. It is essential that it should do so. Consultation on this topic revealed a great concern that any mechanism for adjusting obligations on the basis of hardship might, if not strictly controlled, undermine fundamental principles of the law of contract and the stability of contractual relations.

Change of circumstances must be exceptional. This requirement was implied in the equivalent Article in the Principles of European Contract Law but was not expressly stated. On consultation, the lack of such a statement was criticised by stakeholders. The present Article makes it clear that the court's power arises only if the change of circumstances is exceptional.

> *Illustration 2*
> A canning business buys the whole of a producer's future crop of tomatoes at 10 cents per kilo. It could not obtain an adjustment merely because by harvest time the market price had fallen to 5 cents per kilo as a result of an unexpected flood of imported tomatoes. This sort of situation is not exceptional. (There are other ways of reaching the same result under the Article. For example it could be said that the risk was one which the business must be regarded as having assumed. See below.)

Performance must have become unjustly onerous. The change in circumstances must have made performance of the obligation so onerous that it would be manifestly unjust to hold the debtor to the obligation. When this happens in a contractual situation there will be a major imbalance in the parties' respective obligations. The whole basis of the contractual relationship can be regarded as completely overturned by events.

The excessive onerosity may be the direct result of increased cost in performance - for example, the increased cost of transport if the Suez Canal is closed and ships have to be sent round the Cape of Good Hope. Or, as indicated in paragraph (1), it may be the result of the expected counter-performance becoming valueless; for example if a drastic and unforeseeable collapse in an index of prices means that the debtor will be expected to do demanding and extensive work for practically nothing.

Change must have occurred since obligation was incurred. The next requirement is that the change of circumstances must have occurred after the obligation was incurred. In the case of a contractual obligation this will normally be the time when the contract was made. If,

unknown to either party, circumstances which make the contract excessively onerous for one of them already existed at that date, the present Article does not apply. In certain cases, but not in all, the rules on mistake may come into operation.

Illustration 3
A building contractor submits an estimate for replacing some stonework in a house. The house owner accepts the estimate. After the old stonework has been removed the contractor asks for an increase in the price on the ground that when he submitted the estimate he did not realise that the price of new stone had recently gone up considerably. The customer is entitled to reply that this is something which the contractor should have checked before submitting the estimate. There has been no change in circumstances since the contract was concluded. The contractor would have no remedy under the present Article.

Circumstances could not have been taken into account. The court's powers will not arise if at the time when the obligation was incurred the debtor took into account, or could reasonably be expected to have taken into account, the possibility or scale of the change of circumstances.

Illustration 4
During a period when the traffic in a particular region is periodically interrupted by lorry drivers' blockades, a reasonable person would not choose a route through that region in the hope that on the day in question the road will be clear; a reasonable driver would choose another route.

Hardship cannot be invoked if the matter would have been foreseen and taken into account by a reasonable person in the same situation as the debtor. A professional can reasonably be expected to take into account matters within the area of professional knowledge or experience, such as the fact that a particular market for a certain raw material is known by those in the trade to be very volatile, even if a consumer could not be expected to be aware of this.

In modern times it is reasonable to expect a considerable degree of fluctuation in the values of currencies and in market prices to be taken into account, particularly over the course of a contractual relationship of long duration, but the same would not necessarily apply to altogether exceptional and sudden fluctuations of a kind which no reasonable person could expect.

Assumption of risk. The court will have no power to vary or terminate the obligation if the debtor assumed the risk of the change of circumstances. Even if there was no actual assumption of risk the court will have no power if the circumstances are such that the debtor can reasonably be regarded as having assumed the risk of the change. It would generally be reasonable to take this view if the obligation arose out of an inherently speculative transaction (for instance a sale on the futures market) or if the events which occurred were within the debtor's own control. Where a professional contracts with a consumer it would also generally be reasonable to regard the professional as having assumed the risk of changes of circumstances in relation to matters within the area of professional expertise.

Debtor must have attempted a negotiated settlement. As noted above, the Article does not impose an obligation on the parties to negotiate. In order to encourage negotiated solutions to the problems caused by changes in circumstances it does, however, make it a requirement for relief that the debtor has attempted, reasonably and in good faith, to achieve a satisfactory negotiated adjustment. The words "reasonably and in good faith" imply that a reasonable time must have been allowed for the negotiation process. It is not expressly stated that the debtor's attempt must have failed but this goes without saying. There would be no point in litigation if a satisfactory adjustment has been negotiated. It will be for the debtor to decide whether an offer by the creditor is so inadequate that the risk of a court application is worth taking.

E. The court's powers

The court is given power to terminate the obligation or modify the terms of the contract or juridical act regulating it. The modification must be aimed at making the obligation reasonable and equitable in the new circumstances. In the case of a contractual obligation this will normally mean re-establishing the contractual balance by ensuring that any extra costs caused by the unforeseen circumstances are borne fairly by the parties. They should not be placed solely on one of them. The assumption is that, unlike the risks which result from total impossibility, the risks of unforeseen events are to be shared.

A modification could take various forms, including an extension of the period for performance, an increase or reduction in a price, or an increase or reduction in what is to be supplied or provided. Any modification must only be such, however, as will make the obligation reasonable and equitable in the new circumstances. It would not be reasonable and equitable if the effect of the court's order were to introduce a new hardship or injustice.

In some cases the only option open to the court would be to terminate the obligation. The court will have to fix the time as from which termination takes place, taking into account the extent to which performance has already been made. It is this time which will determine the extent of restitution which will become due. The Article also empowers the court to terminate upon terms, for instance by providing that an indemnity is given. It may also order the payment of an addition to the price or of compensation for a limited period and termination at the end of the period.

Although the court has wide powers, the experience of countries which already have a similar rule suggests that these powers are likely to be used in moderation and in such a way as to avoid any reduction in the vital stability of contractual relations.

NOTES

1. UNIDROIT arts. 6.2.1-6.2.3 are similar to the present Article. The various national laws solve in very different ways the problem of changes of circumstances which make the obligations of one party to a contract much more onerous but which do not amount to impossibility or *force majeure*. Some accept it as a basis for modifying the contract, others do not.

I. Change of circumstances accepted as basis for modifying contract

2. A famous example, though applying only to administrative contracts, is the FRENCH doctrine of *imprévision*. Under this doctrine, change of circumstances may lead to the

ending of the contract or its modification by the court granting a monetary compensation, see the *Gaz de Bordeaux* case, Conseil d'Etat 30 March 1916, D.P. 1916 3:25; *Ghestin, Billiau & Jamin* No.283.

3. Several laws, whether by statute or case law, admit as a general principle that the contractual relationship may be terminated or modified, when as expressed in a GERMAN case, "to maintain the original contract would produce intolerable results incompatible with law and justice". See BGH 25 May 1977, NJW 1977, 2262, 2263; BGH 13 November 1975, NJW 1976, 565, 566. According to another German case, RG 3 February 1922, RGZ 103, 328, 33, the normal consequence is that the contract will not be terminated unless it is impossible to adapt it. The German case law originally was based on the good faith principle in CC § 242 and is today merged in the new CC § 313. In a case of fundamental change of circumstances both parties may claim an agreement to adapt the contract; if that adaptation is not reasonable the party aggrieved by the change may terminate the contractual relationship. Also the DUTCH CC art. 6:258 applies the good faith principle to provide for a termination or modification of the contract in the case of changed circumstances. This provision was "applied" by the Dutch courts under the former Code's good faith rule before the new provision came into force in 1992.

4. Art. 1467 of the ITALIAN CC provides that in contracts for continued or periodic performance or for deferred performance, if extraordinary and unforeseeable events make the performance of one of the parties excessively onerous the party who owes such performance may demand dissolution of contract (CC art. 1467 (1)). The other party may avoid dissolution by offering to modify equitably the conditions of the contract (CC art. 1467(3)). Under ITALIAN law the offer of an equitable modification can be made only by the party against whom dissolution is demanded, while an obligation to renegotiate the terms of the contract is not expressly provided for in CC art. 1467(3). Traditional ITALIAN scholarship does not allow judicial revision of the agreement by the court. See *Boselli, Eccessiva onerosità,* in *Nuoviss. D.I.*, VI, 1960, 331 ff and in case law Cass. 30 April 1953, no. 1199; 5 January 200, no. 46. More recent Italian scholarship and some judicial decisions, however, allow the court to determine equitable modifications of the contract, if it considers the indications given by the party not to be adequately specified. See for all *Macario, Eccessiva onerosità, riconduzione ad equità e poteri del giudice,* in *Foro it.*, 1990, I, 573 ff; ID., in *Antoniolli-Veneziano, Principles of European Contract Law*, 2005, 316; Cass. 25 May 1991, no. 5922; Cass. 11 January 1992, no. 247. SPANISH case law permits the court to end the contract if a less radical way of preserving it cannot be found (*Díez Picazo*, II 873: "*rebus sic stantibus*" clause, TS 23 December 1963, 12 November 1990, 23 April 1991, 8 July 1991, 10 February 1997); but the principle is applied only exceptionally ("*pacta sunt servanda*": see *Albaladejo* II, 1, § 78); it is noteworthy that over the past century the Supreme Court has applied the clause *rebus* only to contracts affected by disruptions caused by the Spanish Civil War, and never to duties consisting in payment of money.

5. GREEK CC art. 388 gives the judge wide powers to adapt the contract to new circumstances or to end it altogether. The same solution appears in PORTUGUESE law, if the enforcement of the obligation is against good faith and not covered by the risk of the contract (CC art. 437).

6. In AUSTRIAN CC §§ 936, 1052, 1170a form, by way of analogy, were the statutory starting point foundation for the development recognition of the *clausula rebus sic stantibus*-rule that a fundamental change of circumstances may, under certain rather restrictive conditions, affect the validity of a contract. The change must have been

unforeseeable for both parties at the time of the conclusion of the contract and relate to characteristic features of the type of the relevant agreement (*Pisko* in Klang II/2, 1st ed., 348 ss). There is, however, no general principle that every contract can be terminated or adapted, if the circumstances change.

7. The POLISH CC art. 357^1 accepts that if an unusual and unexpected change of circumstances causes particular difficulties to one of the parties or endangers one of the parties with an excessive loss – and this situation has not been foreseen by the parties at the time of the conclusion of the contract – the court may modify the amount of performance, the way of performance or even dissolve the contract. The same is true in SLOVENIAN law, see LOA § 112.

8. In a few decisions NORDIC courts, which generally do not accept change of circumstances as a ground for the revision of a contract, have modified the terms of long-lasting continuing contracts, at first by invoking an "implied condition" but lately by applying § 36 of the Contracts Act on unconscionable clauses, see for DENMARK, *Gomard, Kontraktsret* 179 ff, and *Bryde Andersen & Lookofsky* 188 ff, who comparing Danish law with UNIDROIT maintain that Danish courts may probably not adapt the contract as provided in UNIDROIT art. 6.2.3. See for FINLAND, *Wilhelmsson,* Standardavtal 130 ff; for SWEDEN, *Hellner,* Speciell avtalsrätt II; 2, 59 ff. In the U.S. change of circumstance has made a hesitant appearance, see e.g. *Aluminum Company of America* v. *Essex Group* 499 F.Supp 53 (W.D.Pa. 1980); U.C.C. § 2-615 and Restatement 2d. of Contracts, § 261 comment (a). For any contract concluded under the CZECH law (both civil and commercial contracts), the debtor of an obligation is discharged if the performance becomes strictly impossible (CC § 575).

9. § 97 of the ESTONIAN LOA provides that the injured party may demand (i.e. file the court action) amendment of the contract if the circumstances unexpectedly change after the conclusion of the contract and this results in a material change in the balance of the obligations of the parties due to which the costs of one party for the performance of an obligation increase significantly or the value of that which is to be received from the other party under the contract decreases significantly. Provided that the risk of a change in the circumstances is not borne by the injured party, the amendment of a contract may also be demanded if the circumstances under which the contract was entered into had already changed before the contract was entered into but became known to the injured party after the contract was entered into. Only if the amendment of the contract is obviously not possible or would not be reasonable with respect to the other party, may the aggrieved party terminate the contractual relationship by unilateral notice (see also *Varul et al (-Kull)* § 97, nos. 4.5.1., 4.6). In SLOVAK law only objective impossibility effects termination of the obligation (CC § 575). The court may modify only the compensation of damage or a contractual penalty (Ccom art. 301).

10. Under the HUNGARIAN CC § 241 the court may amend a contract when it becomes injurious to any substantial lawful interest of one of the parties in consequence of a circumstance arising in the long-term relationship of the parties following the conclusion of the contract. *Clausula rebus sic stantibus.*

II. Change of circumstances not accepted as basis for modification

11. Some legal systems do not give any relief. This is the case for FRENCH, BELGIAN and LUXEMBOURG law except for administrative contracts, see note 1 above, though in Belgium relief may be given on the basis of other doctrines, such as abuse of right; see generally *Philippe*. ENGLISH law seems to reject any notion of relief for changed circumstances not amounting to impossibility: *Davis Contractors v. Fareham*

Urban District Council [1956] AC 696 The only possible exception, frustration of the venture, may follow from the isolated decision in *Krell v. Henry* [1903] 2 KB 740 where a change of circumstances rendered the contract pointless. It has to be said, however, that the courts have on occasion been ready to interpret the agreement in such a way that it will not apply when there has been a severe change of circumstances: *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.* [1978] 1 WLR 1387 (effect of drop in value of currency over a long period). In SCOTTISH law it is accepted that a contract may be frustrated by a change of circumstances, but the effect is to bring the contractual relationship to an end, not to permit modification or termination by a court: see *McBryde* chapter 21. The law of IRELAND appears to be the same as English law, see *Clark* 422-438. CISG art. 79 appears to be limited to cases of impossibility though there is disagreement among the various commentators. The fundamental principle of the CZECH law (except the abovementioned situation of strictly impossible performance), is that any modification of contractual obligations in the case of simple change of circumstances cannot be recognised. A change of circumstances does not have any influence on the scope of contractual obligations. So the principle is that parties are bound whatever happens to fulfil their obligation if performance is still possible. The result is that a contract can be modified only if a partial impossibility of performance is found by the judge. Another sort of exception exists: a contractual obligation to conclude a future contract or an obligation to supplement the missing content of a contract is extinguished in the case of a change of circumstances under condition of notification of the creditor of the change of circumstances without undue delay. Furthermore, as a result of the power to construe contracts (cf. Ccom art. 292.5) a judge can by way of interpretation in concreto proceed to some justified modifications of the content or extent of interpreted contractual obligations or to some adaptations of these obligations if the judge construes the contract after the change of circumstances has occurred. In SLOVAK law a change of circumstances would not be a basis for a modification of an obligation by a court.

12. See generally *Zweigert and Kötz* 516-536; *Abas*; *Philippe*; *Rodière and Tallon*; Chambre de Commerce Internationale: Force majeure et imprévision; on CISG art. 79 see Bianca & Bonell (-*Tallon*) 572; *Honnold* § 423 ff; *von Caemmerer and Schlechtriem* 675 ff.

III.–1:111: Tacit prolongation

Where a contract provides for continuous or repeated performance of obligations for a definite period and the obligations continue to be performed by both parties after that period has expired, the contract becomes a contract for an indefinite period, unless the circumstances are inconsistent with the tacit consent of the parties to such prolongation.

COMMENTS

General

This Article expresses a rule commonly found in relation to leases, contracts of commercial agency and other similar contracts of a continuing nature. However it can be regarded as a rule of general application to any contract providing for continuing or repeated performance of obligations for a definite period. The thinking behind it is that if the parties choose, to the knowledge of each other and without objection from either, to continue performing the obligations under the contract, they are tacitly agreeing to its prolongation, unless the circumstances are inconsistent with such consent. The prolongation will be on the same terms so far as this is consistent with the new circumstances, with the exception that the contract becomes one for an indefinite period. The result is that either party will be able to terminate the contractual relationship by giving a reasonable period of notice. See III.–1:109 (Variation or termination by notice) paragraph (2).

For the application of this rule to the leases of goods, see the Comments to IV.B.–2:103 (Tacit prolongation).

NOTES

1. Reference may be made to the notes on IV.B.–2:103 (Tacit prolongation) for the application of this doctrine in relation to leases of goods, to the notes on IV.D.–1:103 (Duration of the mandate contract) for its application to mandate contracts and to the notes on IV.E.–2:301 (Contract for a definite period) for its application in relation to commercial agency, franchise and distributorship contracts.
2. Under GERMAN law there is no clear general tendency to restrict termination by rules on tacit prolongation. On the one hand parties' attempts to agree on such a rule are in some cases analysed as a circumvention of the prohibition of eternally binding contracts, cf. *Oetker*, Das Dauerschuldverhältnis und seine Beendigung, 624 et seq. On the other hand a party who continues performance after termination, is seen contravening good faith if it subsequently denies being bound to the contract.

CHAPTER 2: PERFORMANCE

III.–2:101: Place of performance

(1) If the place of performance of an obligation cannot be otherwise determined from the terms regulating the obligation it is:

(a) in the case of a monetary obligation, the creditor's place of business;

(b) in the case of any other obligation, the debtor's place of business.

(2) For the purposes of the preceding paragraph:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the obligation; and

(b) if a party does not have a place of business, or the obligation does not relate to a business matter, the habitual residence is substituted.

(3) If, in a case to which paragraph (1) applies, a party causes any increase in the expenses incidental to performance by a change in place of business or habitual residence subsequent to the time when the obligation was incurred, that party is obliged to bear the increase.

COMMENTS

A. Significance

The place of performance is significant in several respects. A party who is to perform services will have to bear the inconvenience and the costs of appearing at the place and tendering performance there. For a debtor to tender or offer performance at a wrong place will often constitute a non-performance. In a contract for the delivery of goods the party who is to perform will in general have to bear the costs and carry the risk of the goods until they have been put at the disposal of the creditor at the place of performance. A creditor who makes a mistake about the place of performance and who accordingly is unable to receive performance in due time may also fail to perform obligations or may bear the risk of a non-performance by the debtor.

This makes it very important to have a clear rule as the place of performance when that has not been agreed by the parties, the more so because the laws of the Member States do not reach the same results, particularly when the question is the place of performance of a monetary obligation. The Article adopts the solution found in the majority of the national systems and international conventions.

B. Place otherwise determinable

Very often the place of performance is fixed by, or otherwise determinable from, a contract. A catering company will bring the food and cater for the party at the address given to the company by the host. A contract for the sale of goods may provide for the goods to be delivered to a particular place. In many cases terms derived from usages and practices will determine the place of performance. In many cases the place of performance will be only tacitly agreed and in such cases the knowledge of the parties at the time of concluding the contract may be relevant. For example, if both parties to a contract for the sale of bulky goods know that the goods are in a third country and are required there by the buyer, it may be easy

to conclude that there is a tacit agreement that the goods are to be delivered there. Similar situations can arise in relation to contracts for the provision of services.

Illustration 1
Company A which has its headquarters with an accounts department and a shipbuilding yard in Hamburg runs a shipbuilding yard in Bremerhaven as well. By an email to A in Hamburg B, who is a shipowner in London, asks if A can carry out certain repairs to his ship which, known to both parties, is on its way to Bremerhaven. A offers to do the work and quotes a price which A accepts. Nothing is said about the place of performance but because both parties know the ship is going to Bremerhaven it is reasonable to suppose that there was a tacit agreement that the ship is to be repaired there. It would be contrary to good faith for A to remain silent if intending to do the repair in Hamburg.

Similarly, the place of performance may be fixed by, or otherwise determinable from, the terms of a unilateral juridical act, a law, a court order, or a usage or practice imposing or regulating the obligation.

C. Monetary obligations

If the place of performance is not otherwise determinable, the place of performance of a monetary obligation is normally the creditor's place of business. "The debtor must seek the creditor". This rule will leave the debtor with a free choice of how to send or transfer the money to the creditor, who, when the debtor carries the risk of transmission, will have no right to interfere with the mode of transportation or transfer used.

Illustration 2
In the facts given in Illustration 1, the payment for the repair is to be made to Hamburg.

D. Other obligations

As far as non-monetary obligations are concerned, the place of performance is normally the debtor’s place of business. This is in conformity with the general principle that in cases of doubt the debtor is assumed to have undertaken the least burdensome obligation.

E. The "place of business"

It is difficult to give an exact definition of "place of business". In most cases it is a party's permanent and regular place for the transaction of general business and not a temporary place of sojourn during sales negotiations.

Illustration 3
Seller A wants to make a sales drive in country B and hires salesrooms in a hotel in the capital of B for a week. From these rooms it solicits orders from buyers. Thereafter the salesrooms are closed down. A has not had a place of business in the capital of B.

F. Several places of business

If a party at whose place of business performance is to be made has more than one place of business, the place of performance is that which has the closest connection with the

obligation. The word “party” here refers to a party to the debtor/creditor relationship: it may, depending on the facts, be either the debtor or the creditor.

Illustration 4
A firm has two places of business – a headquarters where legal and other paperwork is done and a factory where manufacturing and delivery take place. It concludes a complicated contract, requiring a lot of negotiation over several weeks and many meetings at the headquarters, for the manufacture of a piece of machinery. The first place of business, the headquarters, has more connection with the contract. The second place of business, the factory, has more connection with the firm’s obligation under the contract. It is the second place of business where the machinery is to be produced.

G. Habitual residence

If a party at whose place of business performance would normally be made has no place of business, or if the obligation relates to a non-business matter, performance is to be effected at that party’s habitual residence. Habitual residence is a "factual" not a "legal" concept. A person’s habitual residence is at the place where that person actually lives, regardless of whether the residence is lawful, and whether the person sometimes goes to another place to stay for some time, provided that the person normally returns to the first place, see Resolution 72 of the Council of Europe of 18 January 1972.

I. Change of the place of business or habitual residence

The place of performance is the party's place of business (or habitual residence) at the time when performance falls due. However, if the party causes an increase in the cost of performance by the other party by changing a place of business (or habitual residence) between the time when the obligation was incurred and the time when performance falls due, that party must bear the increase. This is provided for by paragraph (3) of the Article. In assessing the impact of this provision it must be borne in mind that it operates only in cases to which paragraph (1) applies. It has no effect in the many normal cases where the place of performance is determinable from the terms regulating the obligation. A party who intends to change a place of business can easily displace paragraph (3) by making it clear at the time of contracting that performance will be due at the new place of business. It must also be borne in mind that a creditor who causes a debtor’s non-performance (as might sometimes happen in the case of an uncommunicated change in the place where performance is to be made) has no remedy for that non-performance. (III.–3:101 (Remedies available) paragraph (3)).

NOTES

I. Monetary obligations

1. In many systems the place of performance of a monetary obligation, if it has not been agreed expressly, is the creditor's residence or place of business, see for the NORDIC countries Instrument of Debts Acts (1938) § 3(1); GREECE CC art. 321(1); ENGLAND and IRELAND, *Chitty* para. 21-043; SCOTLAND, *Bank of Scotland v. Seitz* 1990 SLT 584, I.H.; ITALY CC art. 1182(3) (the rules set forth in art. 1182 are default rules, see *Gazzoni* (2004), p. 573); NETHERLANDS CC’s arts. 6:115 - 6:118, especially art. 6:116; PORTUGAL CC art. 774; POLAND CC art. 454 § 1; ESTONIA LOA § 85(2) sentence 1; SLOVAKIA Ccom art. 337. In CZECH law the rule is the

same, under Ccom art. 338, for the performance of commercial monetary obligations. However, the general principle for other monetary obligations is that the place of performance is the debtor's residence or place of business unless otherwise agreed, see CC § 567. Every monetary obligation (commercial or non- commercial) may also be settled by the debtor through a bank by crediting the payment to the creditor's account (CC § 567.2; Ccom art. 339.1).

2. Usually, the place of payment is the creditor's place of business at the time of payment, subject to provisions protecting the interests of the debtor in case the place of payment is different from the place at the time of the conclusion of the contract, see AUSTRIAN CC § 905(2); NORDIC Instruments of Debts Acts § 3(1) second sentence; GERMANY CC § 270(3); GREECE CC art. 322; ITALY CC art. 1182(3); NETHERLANDS CC art. 6:117; PORTUGAL CC arts. 772(2) and 775; POLAND CC art. 454 § 1; SLOVAKIA Ccom art. 337.2; CZECH REPUBLIC Ccom art. 337.2; and SLOVENIA LOA § 295. CISG art. 57 is similar; see also ULIS art.59 and UNIDROIT art. 6.1.6(1)(a). In ENGLISH, IRISH and SCOTTISH law, however, the place is the creditor's place of business at the time the contract is made: *Chitty* para. 21-043, *Gloag & Henderson* para. 3.29. Under ESTONIAN law, although the place of payment is determined by the creditor's place of business at the time when the obligation arose (LOA § 85(2) sentence 1), the creditor may require performance of the obligation at the changed place of business, provided that the creditor bears any related additional expenses and risks (LOA § 85(3), see also *Varul et al (-Varul)* § 85, no. 4.4.).

3. In some of the laws the debtor's residence or place of business is the place of performance of a money obligation, see SPANISH CC art. 1171(3); FRENCH, BELGIAN and LUXEMBOURG CCs art. 1247(3), except that if the price for goods is payable on delivery it is payable at the place of delivery, arts. 1609 and 1651. In CZECH Law, this general rule of payment, i.e. performance of monetary obligation, in the debtor's residence or place of business can be found in CC § 567 but this principle is applicable only if not otherwise stated by a statutory disposition, i.e. only for non-commercial obligations, furthermore if not otherwise agreed. The debtor who sends money to the creditor bears the risk of loss or delay, see for Belgian law Cass. 6 January 1972, Arr.Cass., 441; Cass. 23 September 1982, Pas. I, 118; similarly Luxembourg District Court 31 January 1874, 1, 128.

4. In GERMAN law it is the debtor's place of business which for the purposes of jurisdiction and venue is the place of performance, see CC §§ 269 and 270(4). However, the debtor is responsible for transferring the money to the creditor and bears both the expense and the risk of loss and of delay in transfer, CC § 270. The former case law, which left the risk of delay with the creditor (RG 11 January 1912, RGZ 78, 137, 140; BGH 5 December 1963, NJW 1969, 499), is overruled by the ECJ, 3 April 2008, ECJRep 2008 (not yet published) (*01051 Telecom GmbH/Deutsche Telekom*) as contrary to the Late Payment Directive 2000/35/EC (see Gebauer/Wiedmann (-*Schmidt-Kessel*), Zahlungszeit und Verzug no. 19-23). For a similar outcome under ESTONIAN law see CCP § 89(2). Under the HUNGARIAN CC § 292(1) unless otherwise provided by legal regulation, the place of performance of a monetary obligation is the creditor's domicile or registered place of business.

II. Non-monetary obligations

5. It seems to be generally accepted that for obligations other than monetary obligations the place of performance is, unless otherwise agreed, the debtor's residence or place of business (e.g. in AUSTRIA according to CC § 905(1) if the parties did not agree on another place of performance). This is a general rule of CZECH civil law and is

applicable as abovementioned for non-commercial non-monetary obligations (CC § 567).

6. However, some laws provide that the place of performance of an obligation relating to specific goods is the *situs* of the goods: FRANCE, BELGIUM and LUXEMBOURG, CCs art. 1247(1); ENGLAND and SCOTLAND, for sale of goods, see Sale of Goods Act s. 29(2); IRELAND, Sale of Goods Act 1893 s. 29(1); ITALY, CC art. 1182(2), but see also CC art. 1510 concerning the delivery of movables, which should take place where the thing was at the time of the sale if such place was known to the parties, otherwise at the domicile or place of business of the seller; NETHERLANDS, CC art 6:41(a); PORTUGAL, CC art. 773; SPAIN, CC art. 1171(1) and (2); FINLAND and SWEDEN, SGA § 6; ESTONIA, LOA § 85(2), (3). According to the SLOVAK Ccom art. 336 the debtor is obliged to perform the obligation not at the debtor's registered place of business but at the relevant business premises if the obligation arose in connection with those business premises.

7. According to the POLISH CC art. 454 § 1 the place of performance of a non-monetary obligation, if it is not agreed and does not appear from the nature of the obligation, is the place of the debtor's seat at the time of the conclusion of the contract. The same applies in SLOVENIAN law, see LOA § 294. The same rule is expressly stated in CZECH law for commercial non- monetary obligations: if the place where performance is to be rendered is not specified in the contract, and nothing else ensues from the nature of the obligation, the debtor must render performance at the place of the debtor's seat, place of business or home address, at the time when the contract is concluded (Ccom art. 336).

8. Under the HUNGARIAN CC § 278(1) the place of performance is the domicile or registered place of business of the debtor unless (a) it is otherwise provided by legal regulation (b) the object or purpose of the service suggests otherwise or (c) the object of the service is at a different location, which is known to the parties. Under CC § 278(2) if the object of a service is to be sent to a place other than the domicile or registered place of business of the debtor, and if such place or an intermediate location has not been stipulated as the place of delivery, performance is regarded as accomplished when the debtor delivers the object to the beneficiary, a shipping agent, or a carrier. In the case of consumer contracts, performance is deemed to be effected upon delivery to the consumer. Under CC § 278(3) if the debtor delivers the thing by its own means of transportation or through its representative, the place of performance is the domicile or registered place of business of the latter. Under CC § 278(4) regarding contracts between economic organisations, the place of performance is the registered office (place of business) of the beneficiary, unless otherwise requested by the beneficiary, or the destination if performance is effected through a carrier. Legal regulations can prescribe otherwise. Under § 279 if one of the contracting parties changes domicile or registered address prior to performance, that party bears the extra expenses resulting from the change. The risk of damage falls on the other contracting party upon performance, unless otherwise provided by law.

9. See also CISG art. 31, ULIS art. 23(2) and Unidroit art. 6.1.6. Paragraph (2) of the Article is based on CISG art. 10.

III.–2:102: Time of performance

(1) If the time at which, or a period of time within which, an obligation is to be performed cannot otherwise be determined from the terms regulating the obligation it must be performed within a reasonable time after it arises.

(2) If a period of time within which the obligation is to be performed can be determined from the terms regulating the obligation, the obligation may be performed at any time within that period chosen by the debtor unless the circumstances of the case indicate that the creditor is to choose the time.

(3) Unless the parties have agreed otherwise, a business must perform the obligations incurred under a contract concluded at a distance for the supply of goods, other assets or services to a consumer no later than 30 days after the contract was concluded.

(4) If a business has an obligation to reimburse money received from a consumer for goods, other assets or services supplied, the reimbursement must be made as soon as possible and in any case no later than 30 days after the obligation arose.

COMMENTS

A. Significance

The time for performance has significance in several connections. An early performance by a party may be, and a late performance is almost always, a non-performance of an obligation. A party who is to receive performance which is duly tendered at the time for performance and who does not do so at that time will often bear the risk of performance not being effected.

B. Time determinable from the terms regulating the obligation

If a time for performance is otherwise determinable from the terms regulating the obligation, performance must be made at that time. This may be a date which is fixed by the calendar, for instance "delivery on October 15", or it may be otherwise determined.

Illustration 1
A and B have agreed that B will begin to harvest A's crop one week after A has called for it. The time is determinable from the contract.

C. Performance within a period of time

It may also occur that under the terms regulating the obligation the time of performance is to be within a period of time or by a certain time. In such a case it goes without saying that performance is to be made within that time. Paragraph (2) deals with the question of which party may choose the actual time when performance is to be made within the period. Normally the choice is the debtor’s but the circumstances may indicate otherwise.

An example of where the time for performance is to be determined by the creditor is the f.o.b. sale where delivery is to be made during a period of time. Here it is for the buyer to provide the vessel (see INCOTERMS 1990 f.o.b. under B7) and thus decide the date when the goods will be received on board the ship.

It may follow from the circumstances of the case that the period of time fixed for the performance begins as soon as the contract is made and as soon as the creditor - or in an appropriate case the debtor - requires performance.

Illustration 2
A makes an agreement with bank B for a cash-credit in favour of A up to €100,000. The agreement does not mention anything about when A can begin to draw money under the credit, but it follows from the circumstances that A can start drawing at once.

D. Performance within reasonable time

If no time when, or period within which, performance is to take place is otherwise determinable from the terms regulating the obligation, performance is to be made within a reasonable time after the obligation arises. What is a reasonable time is a question of fact depending upon such factors as the nature of the goods or services to be supplied. In the case of a monetary obligation it will not be reasonable to expect performance before the amount has been quantified and, in some cases, an invoice rendered.

E. Special rules for businesses contracting with consumers

Comments to be supplied by Acquis Group

NOTES

I. Time of performance agreed

1. It follows from the parties' freedom of contract that an agreed time for performance rules.

II. No time for performance agreed

2. The rule in paragraph (1) is in accordance with the rule in the U.K. Sale of Goods Act 1979 s. 29(3); IRISH Sale of Goods Act 1893 s. 29 and *Macauley* v. *Horgan* [1925] I.R. 1; FINNISH and SWEDISH SGA § 9(1); ESTONIAN LOA § 82(3). It has also been adopted by CISG art. 33(c) and UNIDROIT art. 6.1.1(c).

3. Most of the other laws provide rules which are different but which will often bring about the same or very similar results as the rule on performance within a reasonable time laid down in paragraph (1). See for FRANCE CC art. 1901 and *Ponsard & Blondel* nos. 136 and 137; AUSTRIA, CC § 904; DENMARK, Sales Act § 12; GERMANY, CC § 271(1); GREECE, CC art. 323; ITALY, CC art. 1183; NETHERLANDS, CC art. 6:38; PORTUGAL CC art. 777(1); ITALIAN CC art. 1183(1), according to which, in the absence of agreement between the parties, the time is fixed by the judge; PORTUGUESE CC art. 777(2); SLOVENIA LOA § 289; and SPAIN, CC art. 1128, under which the court may fix the time for performance, but only where the contracts provide for a time limit and this limit is not agreed. As a general rule, the Spanish CC (art. 1500) requires immediate performance when the other party tenders its own performance, unless the contract provides otherwise. In GERMANY the rule on immediate performance is tempered by the principle of good faith, CC § 242, and by the fault principle, CC §§ 280(1) sentence 2, 286(4), and the same applies in DENMARK (semble), Court of Appeal (East) 31 March 1987, U.f.R.

1987, 738; GREECE, CC art. 288; BELGIUM and the NETHERLANDS, CC art. 6:2. Under the CZECH CC, § 563 if no time for performance has been agreed, stipulated by some written provision or specified by a judgment, the debtor is obliged to render performance on the first day following the day when performance was requested by the creditor and under the Ccom, art. 340.2 the creditor of a commercial obligation has a right to require performance of this obligation immediately after conclusion of a contract if the time of performance is not stated; in this situation, the debtor is obliged to perform the obligation without undue delay. However usage, the nature of the contract or other circumstances will often prevent the creditor from demanding immediate performance:

4. Under the POLISH CC art. 455, if the time of performance is not defined or apparent from the nature of the obligation, the obligation should be performed upon demand (in a reasonable period after the creditor's demand). In SLOVAK law, if the time of performance cannot be determined from the contract, legal regulation or decision, the debtor is obliged to perform on the first day after the demand of the creditor (CC § 563). For business matters, Ccom art. 340 determines that the debtor is obliged to perform without any delay on the demand of the creditor. The creditor is entitled to demand performance immediately after the formation of the contract.

5. Under the HUNGARIAN CC § 280(1) if the time of performance is not specified, (a) either of the parties may demand simultaneous performance by the other party, (b) in the case of a gratuitous contract, the beneficiary is entitled to invite the debtor to tender performance at any time.

III. Performance within a period of time

6. The rule in paragraph (2) seems to be widely accepted, see BELGIAN CC art. 1187; GERMAN CC § 271(2), ESTONIAN LOA § 82(2), ITALIAN CC art. 1184 and PORTUGUESE CC art. 779. The same rule probably applies in FRANCE, compare CC art. 1187 and *Malaurie & Aynès* no. 1100; in DENMARK, see Sales Act § 13, which applies to other kinds of contract also; and FINLAND and SWEDEN, SGA § 9(2). See also CISG art. 33(b) and Unidroit art. 6.1.1(b). In CZECH Commercial Law, the same rule exists as a clear consequence of expressly stipulated provision: If the time of performance is determined to the advantage of the debtor, the creditor is not entitled to demand performance of the obligation prior to this time; however, the debtor may perform the obligation earlier than at the determined time. (Ccom art. 342.2) The rule mentioned in the paragraph (2) of the Article is applied in SLOVAK law although it is not expressly specified in legislation.

III.–2:103: Early performance

(1) A creditor may reject an offer to perform before performance is due unless the early performance would not cause the creditor unreasonable prejudice.

(2) A creditor's acceptance of early performance does not affect the time fixed for the performance by the creditor of any reciprocal obligation.

COMMENTS

A rule to the effect that a debtor may always perform the obligation early would not meet the needs of modern contractual relations. Usually the performance is scheduled in accordance with the creditor's activities and availability and an earlier performance may cause the creditor extra expense or inconvenience.

Illustration 1
A sells to B 10 tons of perishable goods. The date of delivery provided in the contract is October 1. Since the ship on which the goods were loaded arrives at the place of destination earlier than expected, A asks B to take delivery of the goods on September 20. B is entitled to refuse the earlier performance.

On the other hand, although some of the laws always allow the creditor to decline to receive early performance, there is no reason to allow this when the creditor will not suffer any inconvenience through early performance and has no other legitimate interest in refusing.

Illustration 2
The facts are the same as in Illustration No. 1, except that B has storage room available and A is ready to cover the expenses and to carry the risk for the storage of the goods during the period from September 20 to October 1. B must accept the earlier performance, having no legitimate interest in refusing.

The rule requiring acceptance of an early tender if it would not cause the creditor unreasonable prejudice will usually apply in the case of monetary obligations, where the creditor faces no prejudice in receiving the money before the expected time, provided that an earlier payment does not affect the interest due.

Illustration 3
The date for the payment of the price fixed in a contract is July, 1. In order to avoid late payment, the debtor instructs its bank to transfer the funds to the creditor's account well in advance. The price is credited to the creditor's account on June 20. The creditor may not refuse the payment.

A party's acceptance of an earlier performance does not affect the time fixed for the performance of that party's own obligation, even if the other party's right to withhold performance is lost.

Illustration 4
The facts are the same as in Illustration 2 with the addition that payment is to be made at the time agreed for delivery on October 1 when the goods are to be handed over to

B. B is not obliged to pay the price when he receives the goods on September 20. A cannot withhold the goods because it is not paid on September 20.

This is, however, only a default rule. The terms regulating the creditor's reciprocal obligation may provide for it to be performed at a time which is to be determined by reference to the actual time of the debtor's performance even if that is early.

NOTES

I. Early tender may be refused

1. An early tender may be refused in SPAIN (CC art. 1127: time of performance is presumed to have been fixed for the benefit of both the parties. Similarly the creditor cannot be compelled to accept early performance under AUSTRIAN law: CC § 1413 or in the CZECH REPUBLIC (Ccom art. 342.1) unless the time for performance has been fixed exclusively in favour of the debtor (Ccom art. 342.2 and 342.3).

2. In ENGLISH and SCOTTISH laws a buyer of goods may refuse an early tender, see *Benjamin* § 8-039, and in DENMARK the buyer may do so if an early delivery of the goods will amount to a substantial breach of contract: *Nørager-Nielsen & Theilgaard* 293. In ITALY the creditor may refuse early performance but not if the time was fixed in the interests only of the debtor as provided by CC art. 1184 (see *di Majo* 167-168). On the other side, CC art. 1185 states that if time is fixed in favour of the creditor, the creditor may claim performance before it becomes due, but always within the limits set by the fair dealing principle, see *Gazzoni* (2004), 574. CISG art. 52(1) provides that the buyer may take delivery or refuse to take delivery but this rule is probably subject to the good-faith principle provided in art. 7(1), see *Bianca & Bonell (-Will)* 380. In SLOVAKIA, in business matters, an early tender may be refused, if the time of performance is determined in favour of the creditor or in favour of both of the contracting parties (Ccom art. 342).

II. Early tender must be accepted

3. In some laws there is a presumption that the time for performance is fixed in favour of the debtor, and that, therefore, the creditor must accept an early performance, see on BELGIAN, FRENCH and LUXEMBOURG law CC art. 1187; GREEK CC art. 324; POLISH CC art. 457; SLOVAK CC § 342 for business matter; SLOVENIAN LOA § 290; ESTONIAN LOA § 84(1); PORTUGUESE CC art. 777(1) and 779 (see e.g. *Leitão* II 159 ff.). The same presumption is found in GERMAN law (CC § 271(2), DUTCH law (CC art. 6:39) and, for money debts, NORDIC law, see Instrument of Debts Act § 5 (note that in FINNISH law it is said that a creditor need not accept early performance of an interest-bearing money obligation if not compensated for loss of the interest which would have been received according to the contract: *Hakulinen,* Velkakirjelaki 61). The presumption is rebutted when this follows from the agreement or from the circumstances of the case. Thus in FRANCE, BELGIUM, LUXEMBOURG and DENMARK money debts carrying interest cannot be repaid in advance, and a person who has agreed to provide services at a certain time cannot choose to perform earlier. In the CZECH REPUBLIC, money debts can be paid in advance but the general commercial rule is that if the debtor settles a monetary obligation prior to the determined time of performance, the debtor may not, without the creditor's consent, deduct an amount corresponding to the interest on the sum in respect of the length of time by which payment was premature (Ccom art. 343). This

rule is not applicable to consumer's debts which can be paid in advance and this payment gives a right to modify the interest (see art. 11, L. 321/2001 Sb., 17 August 2001). Under ESTONIAN law, the creditor should have a legitimate interest in order to refuse early performance. While the creditor may claim interest until the due date (LOA § 84(4), except in consumer credit contracts, where interest may be claimed for the first nine months of a credit contract (LOA § 411(1), (3)), the creditor has generally no legitimate interest to refuse money debts being repaid in advance (*Varul et al (-Varul)* § 84 no. 4.6.). Additional expenses arising from the early performance should not generally constitute legitimate interest to refuse as those are borne by the debtor (LOA 84 (3)). Under GERMAN law early repayment of monetary loans at a fixed interest rate is possible only in exceptional circumstances and subject to paying compensation to the lender, see CC § 490(2); but under consumer credit agreements early repayment is always possible without compensation, CC § 489(1) no. 2, which is based on Consumer Credit Directive (2008/48/EC) art. 16.

III. No duty for the creditor to perform earlier

4. The rule in paragraph (2), under which an earlier performance does not affect the time for performance of the receiving party's obligation, seems to be accepted by those systems which have addressed the issue, see e.g. for DANISH law, *Nørager-Nielsen & Theilgaard* 293 and for SWEDISH LAW, *Ramberg,* Köplagen 263 and for CZECH LAW, where the general principle is expressly recognised that an obligation cannot be modified in any case without the consent of the parties concerned (CC §§ 493 and 516.1). ESTONIAN LOA § 84(2) specifies that the rule takes effect only if a time for the creditor's own performance has been set irrespective of the performance of the other party's obligations.

5. Under the HUNGARIAN CC § 282 (2) a debtor may complete performance before the deadline or prior to the initial date of the performance period with the consent of the creditor. In the absence of consent, the creditor must observe the provisions on responsible custody. In the case of monetary obligations CC § 292 (2) provides that the creditor must accept performance that is provided before the deadline or prior to the initial date of the performance period; in such cases, no interest or compensation is due for the period between performance and the deadline. Any agreement between the parties concerning interest or compensation, as such agreements are not permitted by law, is void; the invalidity does not affect other provisions of the contract.

6. UNIDROIT art. 6.1.5(1) and (2) are similar to the Article.

III.–2:104: Order of performance

If the order of performance of reciprocal obligations cannot be otherwise determined from the terms regulating the obligations then, to the extent that the obligations can be performed simultaneously, the parties are bound to perform simultaneously unless the circumstances indicate otherwise.

COMMENTS

Where there are reciprocal obligations it must be determined whether the parties are to perform their obligations simultaneously or whether one is to perform before the other.

In many cases the matter will be resolved by the terms regulating the obligations. It will often be expressly or tacitly agreed, for example, that one party to a contract must perform before the other. Usages and practices may be particularly important. In contracts for services it is common to find the custom, "work first, payment later", which may reflect the fact that the employer is a better credit risk than the service provider or may simply be a reflection of market power or social standing.

> *Illustration 1*
> A employs B to spend three afternoons a week tending the garden of A's villa. The time for payment is not discussed when the contract is made. B demands payment in advance. A may refuse to pay B until each afternoon's work has been done.

There may, however, be a usage to the effect that A can refuse to pay in advance.

> *Illustration 2*
> C books theatre tickets in advance over the phone and comes to collect them from the box office. There will almost certainly be a usage to the effect that the theatre may demand payment before A is admitted to the show.

Even where simultaneous performance is feasible there may be a usage to the effect that one party must perform before the other. Thus it is possible for food in a restaurant to be handed over in exchange for an immediate cash payment, as happens in some cheaper restaurants and bars; but in other types of restaurant the usage may be that the customer is obliged to pay only after the meal has been finished.

This Article provides a default rule for the situation where the question of the order of performance is not solved by the terms regulating the obligations. The default rule is to the effect that, where performances can be rendered simultaneously, the parties are in general bound to perform simultaneously. This is because the party who is to perform first will necessarily have to extend credit (in one form or another) to the other party, thereby incurring a risk that the other will default when the time for the counter-performance comes. This additional risk is avoided if the performances are made simultaneously. Thus it is the general rule in sales contracts that, unless otherwise agreed, delivery and payment are to be simultaneous.

However, simultaneous performance is often impracticable. A person employing a builder cannot realistically be expected to pay the builder brick by brick. Either the employer must pay in advance or, as is more usual, the builder must complete some or all of the work before payment. The Article does not provide a rule as to which party should perform first if simultaneous performance is not appropriate. The variety of circumstances is too great for this to be practical. Almost every general rule would require many exceptions. Sometimes the very nature of the obligations will provide the answer. For example, an obligation to co-operate in order to enable a main obligation to be performed will, of its very nature, fall to be performed first. In contractual cases the gap caused by the absence of a default rule may have to be filled by the creation of an implied term, having regard in particular to the nature and purpose of the contract; the circumstances in which the contract was concluded; and the requirements of good faith and fair dealing.

Illustration 3
Hamlet engages a troupe of players to perform at his country house. Nothing is said about when payment is due. Whether the players may demand payment in advance will depend on usages in the country or previous practices between the parties. If there are none, the question will depend on other factors such as whether the play to be performed had to be specially written and rehearsed.

NOTES

1. This provision is in line with the law in most jurisdictions in Europe, such as AUSTRIA, CC § 904 (expressly for sales contracts in CC § 1062 and barters in CC § 1052); FRANCE (case-law as set out by *Terré/Simler/Lequette*, Les obligations[9], n° 616); GERMANY CC § 320 (and sometimes CC § 273 or Ccom § 369); SLOVENIA LOA § 101; SPAIN, CC arts. 1124 and 1500; DENMARK Sales Act § 14; POLAND CC art. 488 § 1; ESTONIA LOA § 82(5); ENGLAND (see *Beale*, 28-34 and *Treitel*, Contract 17-013–17-023); SWEDEN (see e.g. *Almén*, 133, *Hellner, Hager and Persson*, 49 and *Ramberg*, Köplagen 78 and 202 et seq.); and SCOTLAND (expressly for sales contracts in the Sale of Goods Act 1979 s. 28) - and with UNIDROIT art. 6.1.4. In other European jurisdictions, the rule is the same although there is no express provision. This is the case in ITALY, GREECE, THE NETHERLANDS and in the CZECH REPUBLIC, where the rule set forth in Italian CC art. 1460, Greek CC art. 374, Dutch CC art. 6:52 or Czech law (CC § 560; Ccom art. 325) is not concerned with the simultaneity of performance, but with the consequences of failure to respect that simultaneity. Under the Italian CC art. 1460 andGreek CC art. 374, for example, each party may refuse to perform if the other party does not perform or offer to perform at the same time, unless different times for performance have been established by the parties or appear from the nature of the contract. The right to refuse performance, however, is limited by the good faith principle (art. 1460(2)), therefore refusal is justified only if the other party's failure to perform is of a serious nature (see Cass, 4743/1998, Giust.civ.Mass. 1998, 998, and Cass. 7 November 2005, no. 21479, Dir. e Giust. 2005, fasc. 46, 14). The position is similar in PORTUGAL. According to art. 376 of the Greek CC, if one of the parties has partially fulfilled an obligation, the other party may not refuse counter-performance, when this refusal contravenes the good faith principle under the special circumstances and in particular when the part of the remaining performance is not substantial.
2. In all systems, the rule that performances are due simultaneously is only a default rule which will not apply if the parties have agreed otherwise, for example when credit is

given by one party to the other, or if the circumstances make it inappropriate, e.g. when the performance by one party is necessary before the other party can perform (see e.g. in BELGIUM, Cass. 5 May 1971, Arr. 871, *RW* 1971-72, 147, *JT* 1972, 85). In the CZECH REPUBLIC the rule of simultaneous performance applicable to reciprocal obligations is a sort of exception to the ordinary rules on when performance is required. Normally a debtor has to perform, if not otherwise agreed, on the first day following the day when the creditor has requested performance for non-commercial obligations, (see CC § 563) or without undue delay after the request for commercial obligations (Ccom art. 340). In SLOVAKIA the order of performance results from the contract, legal regulation or from the nature of the obligation. CC § 560 provides that if the parties are bound to perform simultaneously, performance can be required only by the party who has already performed or is prepared to perform. A party has the right to refuse performance until simultaneous performance is secured or provided, if the performance of other participant is endangered by facts related to that other participant. Ccom art. 325 provides a similar rule.

3. Some jurisdictions provide a further rule for the case where performance by one of the parties requires some time. The other party will then only have to perform after the performance of the former party has been rendered. Thus in BELGIAN law, when the obligation of one party concerns a continuous performance, and the other one not, the former party normally has to perform first. For the relevant express rule in ESTONIAN law see LOA § 82(5). Similarly, UNIDROIT art. 6.1.4(2) provides that to the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise. But in all systems there are customary exceptions: for example, it is customary for theatre-goers to have to pay in advance of seeing the performance.

4. Under HUNGARIAN CC § 280(1) if the time of performance is not specified, (a) either of the parties may demand simultaneous performance by the other party, (b) in the case of a gratuitous contract, the beneficiary is entitled to invite the debtor to tender performance at any time.

III.–2:105: Alternative obligations or methods of performance

(1) Where a debtor is bound to perform one of two or more obligations, or to perform an obligation in one of two or more ways, the choice belongs to the debtor, unless the terms regulating the obligations or obligation provide otherwise.

(2) If the party who is to make the choice fails to choose by the time when performance is due, then:

(a) if the delay amounts to a fundamental non-performance, the right to choose passes to the other party;

(b) if the delay does not amount to fundamental non-performance, the other party may give a notice fixing an additional period of reasonable length within which the party to choose is required to do so. If the latter still fails to do so, the right to choose passes to the other party.

COMMENTS

This provision lays down some rules for the not infrequent situations where a debtor must perform one of alternative obligations or an obligation may be performed in one of two or more ways. It can often be difficult to distinguish between these two situations but that does not matter because the Article lays down the same rules for both. The basic rule is that the debtor may choose which alternative to perform. However, this is only a default rule. The terms regulating the obligations (or the obligation, if there is only one) may indicate that it is the creditor who is to make the choice.

Illustration 1
A contract provides that X must by a certain date either pay Y €1000 or remove certain rubbish from Y's land. This is a case of alternative obligations and the default rule is that X can choose.

Illustration 2
A contract provides that X must clear Y's land of bushes by a certain date either by uprooting them or by cutting them down to ground level and poisoning the roots. This is a case where there is one obligation (to clear the land) but alternative methods of performing it. Again the default rule is that X can choose.

If the person who has the right to choose does not exercise the right within a reasonable time, especially after having been asked to do so by the other party,. the right to choose may pass to the other party. The point at which the right to choose will pass depends on how serious the delay is in the circumstances. If it is fundamental the choice passes to the other party; if it is not, the other party can serve a notice fixing a period of reasonable length for the choice to be made. If it is still not made by the end of that period then paragraph (3) makes the choice pass to the other party.

NOTES

1. Paragraph (1) of the Article is in line with many national rules - see for instance DUTCH CC art. 6:19, FRENCH and BELGIAN CCs arts. 1189-1196; GERMAN CC §§ 262, 263; AUSTRIAN CC § 906; ESTONIAN LOA § 86(1); GREEK CC arts. 305

and 306, in addition GREEK CC arts. 308 and 309 are used when the right to choose passes to the third party; ITALIAN CC art. 1286(1); PORTUGUESE CC arts. 543(2) and 548; POLISH CC art. 365 § 1; SLOVAKIA CC § 561 and Ccom art. 327; SLOVENIAN LOA § 384; and SPANISH CC art. 1132. The basic rule is the same under SWEDISH law (see Ccom chap. 9 § 5, NJA 1944 s. 536 and *Rodhe*, 162 et seq.). The position is the same in the CZECH REPUBLIC. Under CZECH CC § 561.1: "If an obligation can be fulfilled in two or more ways, the debtor shall have the right to select the manner of its performance unless the parties have agreed otherwise". This disposition is construed by *Knappová M, Švestka J, a kol.*, Učebnice Občanské právo hmotné, vol. II, ASPI Praha 2002. The same rule is applicable in commercial legal relationships, see Ccom art. 327. In SCOTTISH law the same result would probably be reached by interpretation of the terms regulating the obligation; in a case of unresolvable doubt the preference would be for the interpretation least burdensome to the debtor, see *Bankton*, An Institute of the Laws of Scotland I.11.56. As for DENMARK see *Gomard*, Obligationsret I, 37 and *Ussing*, Obligationsretten[4], 24. However, the law in ENGLAND is less certain - see *Treitel*, Contract 17-005. Rules equivalent to the second paragraph are less common but similar rules are found in some countries, e.g. Dutch CC art. 6:19. In POLISH law, if the party entitled to choose does not make the choice, the other party may set an appropriate period and after the passing of that period the right to choose passes to that party (CC art. 365 § 3). This rule does not exist in CZECH REPUBLIC where the debtor of alternative obligation holds his right to choose till the performance or till the judicial decision (see *Jehličkа, Švestka, Škárová a kol*. Občanský zákoník – komentář, 8. vydání, Praha 2003, pp. 718-719). In SLOVAKIA in business matters, if the creditor is entitled to choose and fails to choose, the right passes to the debtor. (Ccom art. 327). Under ESTONIAN law, the right to choose passes to the other party if the choice is not made during the time period agreed upon or, if no agreement exists, within a reasonable period of time before the obligation falls due (LOA § 87(1)). In Italian law, CC art. 1287 states that if a party fails to perform within the time fixed by the court, the election belongs to the other party, but if the election is referred to a third person and that person fails to exercise it within the allotted time, it is made by the court.

2. Under the HUNGARIAN CC § 230(1) if the parties have defined several services as the subject matter of a contract in a manner that makes it possible to choose among the services, the debtor has the right to choose, unless otherwise prescribed by legal regulation. This right of the debtor passes to the creditor upon the expiration of the performance deadline stipulated by court decision. Under CC § 230(2) if the creditor is presented with a choice, but is late in making it, the right to choose passes to the debtor.

III.–2:106: Performance entrusted to another

A debtor who entrusts performance of an obligation to another person remains responsible for performance.

COMMENTS

A. General

Under modern conditions, many obligations are not performed in fact by the debtor personally. This provision deals with one aspect of this modern division of labour, namely the debtor's responsibility for non-performance. Two other aspects, namely the imputation of actual or constructive knowledge as well as of certain states of mind of persons assisting in the performance of the contract, are dealt with by an earlier Article.

B. Purpose

The basic principle is that if the debtor does not perform the obligation personally but entrusts performance to a third person, the debtor remains nevertheless responsible for the proper performance of the obligation vis-à-vis the creditor. The internal relationship between the debtor and the third person is irrelevant in this context. The third person may be subject to instructions of the debtor, such as an employee or an agent; or may be an independent subcontractor.

NOTES

1. In several countries there are code provisions which are either close equivalents to the Article (see DUTCH CC art. 6:76; ITALIAN CC art. 1228 and PORTUGUESE CC art. 800(1)) or which in other terms lay down the same principle, see AUSTRIAN CC § 1313a; in DENMARK Ancient Danish Code § 3.19.2; GERMAN CC § 278; ESTONIAN GPCCA § 132; GREEK CC arts. 317 and 477; SLOVENIAN LOA § 434 and POLISH CC art. 474, SLOVAK Ccom art. 331. Under SPANISH law the debtor may entrust performance to another unless the contract requires personal performance, CC art. 1161; but unless the creditor accepts the substitution, the debtor remains responsible, (CC arts. 1596 and 1721). The general principle in CZECH written law that the debtor is discharged by performance of the obligation (CC § 559.1: "A debt is discharged by its fulfilment"), is construed in the same way (see *Jehlička, Švestka, Škárová a kol*. Občanský zákoník – komentář, 8. vydání, Praha 2003, p.711).
2. In other countries, the principle is not provided by legislation but is recognized by the courts or writers. This is the case in FINLAND, see Hoppu 130; FRANCE see Viney, la Responsabilité nos. 813-847 whereas the CC does not provide for a general principle but merely specific rules for specific situations (see for instances CC arts. 1245, 1735, 1797, 1953, 1994 , Viney, n° 816), there still is a general and autonomous principle of "responsabilité contractuelle du fait d'autrui", as a result of case law. Consequently, the debtor who has wilfully entrusted performance to a third person remains responsible and this can be justified by the fundamental principle of the law of contracts, which prohibits any transfer of debt without the creditor's explicit consent (Viney, Les conditions de la responsabilité, n° 818 and 919). BELGIUM, Cass. 5 October 1990, Arr. Cass., 125 no. 58; De Page II, no. 592; van Oevelen, R.W. 1987-88, (1168) 1187 ff; Dirix, Aansprakelijkheid 341 ff; ENGLAND: Treitel, Remedies §

15; SCOTLAND: McBryde chaps. 12.12, 12.44. Under the HUNGARIAN CC § 315 those who employ another person to perform their obligations or exercise their rights are liable for the conduct of that person. The rule is the same in SWEDISH law, see SGA 1990 §§ 11 and 48, being an expression of a general principle of Swedish law. See also *Ramberg*, Köplagen, 206 et seq and 487 et seq.

III.–2:107: Performance by a third person

(1) Where personal performance by the debtor is not required by the terms regulating the obligation, the creditor cannot refuse performance by a third person if:

(a) the third person acts with the assent of the debtor; or

(b) the third person has a legitimate interest in performing and the debtor has failed to perform or it is clear that the debtor will not perform at the time performance is due.

(2) Performance by a third person in accordance with paragraph (1) discharges the debtor except to the extent that the third person takes over the creditor's right by assignment or subrogation.

(3) Where personal performance by the debtor is not required and the creditor accepts performance of the debtor's obligation by a third party in circumstances not covered by paragraph (1) the debtor is discharged but the creditor is liable to the debtor for any loss caused by that acceptance.

COMMENTS

A. Scope

This Article addresses the questions, under what conditions does performance of a debtor's obligation by a third person constitute due performance in relation to the creditor who cannot then refuse performance, and under what conditions does the performance by a third person discharge the debtor vis-à-vis the creditor.

Nothing in the Article relieves the creditor of any obligations towards the debtor.

B. When will a tender constitute performance?

The third person making the performance may be acting on behalf of the debtor as the debtor's representative. In that situation the legal position is the same as if the debtor were performing. Even in the absence of representation, however, a third party who performs is often acting with the assent of the debtor. In such cases paragraph (1)(a) provides that the creditor cannot refuse performance, unless the terms regulating the obligation require personal performance.

However, performance by a third person may also be made without the volition of the debtor. The third person may have a legitimate interest in doing so. A surety pays a debt in order to avoid costly proceedings against the debtor which eventually the surety will have to pay. A tenant pays the mortgage in order to avoid a forced sale of the property. In the interests of the family, a wife pays the debt of her husband for which she is not liable. A parent company pays the debt of its subsidiary to save the latter's credit rating. In these cases it seems sensible to permit payment by the third person even though this is not allowed under the laws of all the Member States (where unauthorised payment by the third person will not have the effect of discharging the debtor). So paragraph (1)(b) has the effect that the creditor cannot refuse performance by the third person provided that the debtor has failed to perform when performance fell due or it is clear that the debtor will not perform at the time when it falls due.

C. Is the debtor discharged?

Due performance by the third person who is entitled to perform discharges the debtor. This is the effect of paragraph (2). Of course, the debtor will not be discharged to the extent that the third party takes over the creditor's right by assignment or subrogation.

It follows from the Article that the debtor remains responsible if a third person who has promised to perform and who has got the debtor's assent to performance fails to perform or makes a defective tender. Where performance has been undertaken or carried out by a third person who has a legitimate interest in performance the debtor will also remain responsible if the third person fails to tender performance when it is due, or if the tender is refused because it is defective. The debtor will not be excused for a failure to perform by a third person unless the third person's non-performance was due to an impediment which would also have excused the debtor.

A creditor who refuses to accept a performance by a third person made in pursuance of paragraph (1) will normally have failed to perform a reciprocal obligation and will be precluded from exercising any of the remedies for non-performance.

D. When may a tender be refused?

There are, however, situations where the creditor is entitled to refuse performance by a third party. Such performance may be excluded by the terms regulating the obligation. There are also situations where it follows from the nature or purpose of the obligation that it cannot be performed vicariously.

Where in contracts for the performance of personal services it can be inferred that the debtor has been selected to perform because of skill, competence or other personal qualifications, the creditor may refuse performance by a third person. However, if it is usual in the type of contract to allow delegation of the performance of some or all of the services, or if this can be done satisfactorily by third persons, the creditor must accept such performance.

Where the third person cannot show any assent by the debtor or any legitimate interest the creditor is entitled to refuse the tender of performance. Thus the creditor can refuse payment from a person who attempts to collect claims against the debtor. If the debtor has not assented to the performance the creditor may also refuse performance by a friend of the debtor whose motive is unselfish.

E. Where creditor voluntarily accepts performance by third party

Paragraph (3) deals with the situation where the contract does not require personal performance by the debtor but the creditor, although not bound to do so, voluntarily accepts performance of the debtor's obligation by a third party. In such cases it would be contrary to the requirements of good faith and fair dealing to allow the creditor to continue to hold the debtor liable. On the other hand there may be cases where the debtor suffers some prejudice as a result of the creditor's acceptance of performance by a third party. The paragraph therefore provides that the debtor is discharged but that the creditor is liable for any loss suffered by the debtor as a result of the creditor's acceptance of performance.

F. Recourse against the debtor

Whether the third party who discharges the debtor's obligation has any recourse against the debtor will depend on the circumstances and on other rules which may be applicable. If the third party is the debtor's representative then their internal relationship will regulate recourse. In other cases where the third party pays with the debtor's assent the matter may be regulated by a contract between the third party and the debtor. In certain other cases special subrogation rules applicable to particular relationships may apply. In yet others the rules on benevolent intervention may come into operation. Finally, there may be cases where the law on unjustified enrichment will apply. It should be noted, however, that under the rules on that subject a person who voluntarily, and without error, confers a benefit on another cannot normally recover.

NOTES

I. Debtor assents to vicarious performance

1. The legal systems all seem to agree that performance by a third person which is agreed to by the debtor before or after it is made (vicarious performance) is, in principle, admitted (for AUSTRIA see CC § 1423). However, it may not be permitted if it is against the interests of the creditor. This idea is expressed differently in the legal systems.

2. GREEK and PORTUGUESE law will not permit vicarious performance when it is prejudicial to the interests of the creditor, see Greek CC art. 317 *in fine* and PORTUGUESE CC art. 767(2). Under DUTCH law a third party may perform an obligation "unless this is contrary to its content or necessary implication", see CC art. 6:30.

3. Most of the laws exclude vicarious performance of obligations which have a personal character: DENMARK, see *Ussing*, Obligationsretten[4], 58; FINLAND, see *Saarnilehto, Hemmo & Kartio*, 171; FRANCE and BELGIUM, CC art. 1236, see *Malaurie & Aynès*, Obligations no. 962 and for Belgium Cass. 28 September 1973, RW 1973-74, 1158, RCJB 1974, 238 obs. *van Damme*; ENGLAND, *Treitel*, Contract 15-001 - 15-004; AUSTRIA, a generally acknowledged principle based on provisions for specific contracts: CC § 1153 (labour employment contract), § 1171 (work contract for work and services), etc.; GERMANY, see CC § 267(1); ITALY, CC art. 1180; GREECE: *Zepos* in Ermak II/1 art. 317 no.13 (1949) *Georgiadou* in *Georgiadis & Stathopoulos* art. 317 no. 12, *Stathopoulos,* Obligations §17 no. 36; NETHERLANDS, CC art. 6:30(1); SCOTLAND, *McBryde* chap. 12.33-12.41; SLOVENIA, LOA § 271(3); SPAIN, CC arts. 1158, 1161 and see *Díez-Picazo* II, 481; SWEDEN, see *Rodhe,* Obligationsrätt 158; CZECH REPUBLIC, general rule of civil law, see *Jehlička, Švestka, Škárová a kol.*, Občanský zákoník – komentář, p. 711 and for commercial cases stated in Ccom art. 332; ESTONIA LOA § 78(1); POLAND CC art. 356 § 1; and SLOVAKIA Ccom art. 332.

II. Performance without the consent of the debtor

4. Provided the performance by the third party is not excluded as being against the interests of the creditor under the rules discussed in note 1 above, most other systems seem to allow it on varying conditions. Under AUSTRIAN law, the debtor's consent is not necessary, if the creditor accepts performance by the third party (see CC § 1423). In GERMANY, CC § 267(2), ESTONIA, LOA § 78(2), SLOVENIA LOA § 271(4)

and ITALY, CC art. 1180 the creditor must accept performance but may refuse if there is an actual interest in having the debtor perform personally, or if the debtor has notified an objection to the creditor. However, as this paragraph is an expression of the *favor creditoris* principle, if the debtor objects to it the creditor is not obliged to reject performance but has a choice whether or not to accept (but see the GERMAN exception of CC § 268 to protect some particularly interested third parties). This rule also applies in DENMARK, see *Ussing*, Obligationsretten[4], 307; the NETHERLANDS, CC art 6:30(2); PORTUGAL, CC arts. 592(1) and 768(2); SWEDEN, *Rodhe*, Obligationsrätt 66; and probably SCOTLAND, *Gloag and Henderson* 3.22, although the Scottish law in this area is unclear. In FRANCE the debtor can oppose performance if it would be prejudicial, see *Malaurie & Aynès*, Obligations, no. 962. In BELGIUM the debtor cannot oppose performance, but the third party will not acquire the rights of the creditor by subrogation unless the third party acted with the debtor's consent or had a legitimate interest in performance, CC art. 1236.

5. Similarly, under ESTONIAN law, if a third party performs the obligation in order to avoid compulsory execution with regard to an object which belongs to the debtor but is in the lawful possession of the third party or for which the third party has some other right and if, in the case of compulsory execution, such possession or right would terminate, the creditor may not refuse to accept performance even if the debtor has objected to such performance (LOA § 78(3)).

6. Under SPANISH law the creditor must accept performance by a third party even if the debtor opposes it, but the third party will then not have a right of subrogation but only a claim for enrichment (CC arts. 1158(3) and 1159; *Díez-Picazo* II, 484; *Albaladejo* II, 1 § 24.3; TS 26 June 1925, 16 June 1969, 30 September 1987 and 12 November 1987).

7. In GREECE the creditor may not accept performance by a third party if the debtor opposes it, see CC art. 318.

8. Under POLISH law, as far as obligations to pay a sum of money are concerned, the creditor cannot refuse payment by a third party, even if made without the debtor’s knowledge or consent (CC art. 356 § 2). CC art. 518 provides that in certain cases the third party will acquire the paid debt and will become the debtor’s new creditor.

9. In ENGLISH law a performance made without the permission of the debtor is not admitted. This holds true when the effect would be a subrogation in favour of the third party: "a man cannot make himself the creditor of another without his knowledge or consent". The same seems even to hold true when there is no subrogation, see *Chitty* para. 29-093. It is probably now settled that payment by a third party will only discharge the debtor if the debtor authorized or subsequently ratified the payment, see *Goff and Jones* 17. There are, however, specific provisions allowing a subtenant of a lease to intervene to prevent forfeiture of the head lease, see Law of Property Act 1925, s. 146. Also in the CZECH REPUBLIC the debtor’s agreement is necessary under civil law, (CC § 559 as construed by *Jehlička, Švestka, Škárová a kol.*, Občanský zákoník – komentář, p. 711) but not under commercial law (this is expressly stated by Ccom art. 332.1 as a general principle of commercial law).

10. Under SLOVAK law the consent of the debtor is not necessary if the third person secures the performance by guarantee or by other legal manner and the debtor did not perform the obligation (Ccom art. 332}.

11. Under the HUNGARIAN CC § 286 the creditor must accept performance offered by a third person if the debtor has consented to this and the service is not bound to a specific person and does not require any expertise that is not possessed by the third

person. The debtor's consent is not required if the third party has a lawful interest in completing performance. In such case, any security securing the right remains in force if the right passes to a third person who effects performance or if such third person is entitled to demand reimbursement from the debtor.

III.–2:108: Method of payment

(1) Payment of money due may be made by any method used in the ordinary course of business.

(2) A creditor who accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured. The creditor may not enforce the original obligation to pay unless the order or promise is not honoured.

COMMENTS

A. General remarks

Payment is not only made by legal tender but also by bank transfer, handing over of a cheque and in many other ways. The development of new techniques for payment must not be prevented by a detailed enumeration of possible manners of payment. It is in the general interest of business to allow payment to be made in any manner which is currently being used and is easy, quick and reliable. Without special permission the debtor can pay in such manner, e.g. by cheque, and the creditor is bound to accept it (see on this specific way also paragraph (2)).

B. Manner of payment

Many national laws provide that payment must be made by legal tender and that the creditor is not entitled to demand any other method of payment except where a contract so provides. However, the debtor may prefer another manner of payment, provided this is in conformity with the ordinary course of business. The creditor must be protected against a surprising, unusual or burdensome manner of payment.

> *Illustration 1*
> A owes B €5000. As A wants to annoy B, A takes 500,000 pieces of one cent and sends them to B. Since it is not in the ordinary course of business to pay such a large sum by such a small unit, A is not allowed to make payment in this manner.

What manner is usual depends on the nature of the transaction involved and on the usages prevailing at the place of payment. The creditor does not have the right unilaterally to demand or refuse any particular manner.

C. Acceptance of promise to pay or order to pay conditional only

It often occurs that the creditor, in order to accommodate the debtor, accepts in lieu of cash a cheque, a bill of exchange, or some other promise to pay or order to a third party to pay. In all these cases the creditor generally does not wish to run the risk that the cheque or other claim for payment will not be honoured. Therefore paragraph (2) sentence 1 makes it clear that the original right to payment subsists until satisfaction of the substituted performance has in fact been achieved. If this is not done the creditor may enforce the underlying right. But the creditor cannot proceed with the latter until the substituted performance becomes due and remains unperformed (paragraph (2) sentence 2).

> *Illustration 2*
> A owes B €3000. A accepts B's request to give it a promissory note payable two months later. B's remedies for non-performance of the original obligation are

suspended until the promissory note is due but revive if the note is dishonoured (see Comment D).

As paragraph (2) sentence 1 establishes a rebuttable presumption, parties may expressly or impliedly stipulate otherwise.

D. Consequences of dishonouring the substituted performance

If the substituted right is not honoured the creditor may proceed with the underlying right to payment as if no substituted performance had been accepted. If interest was due on the debt, it is recoverable. But a creditor who takes a promissory note or another negotiable instrument in substitution for the original obligation to pay will usually find it more efficient to ignore the original obligation and sue on the instrument.

However, a creditor who fails to take any steps necessary to enforce the right received as a substitute cannot then revert to the original remedies for non-performance except to enforce the payment due itself.

Illustration 3
B owes A €5000 from a contract of sale. A has declared that it will accept the €5000 no later than August 1: otherwise it wants to terminate the contractual relationship. On this day B gives A a cheque which A accepts. The cheque is not presented to B's bank until several months later and is not honoured by the bank because of the expiry of the period of presentation. A cannot terminate since it has not presented the cheque in the ordinary way.

NOTES

I. Ordinary method of payment

1. In many countries the ordinary method of paying a monetary obligation is by transfer of legal tender. This rule is expressly fixed in ITALY (CC art. 1277(1), but see also arts. 1278, 1279 and 1281); PORTUGAL (CC art. 550); POLAND (CC art. 358^1 § 1); and SPAIN (CC art. 1170), but exists also in several other countries, especially in those of the French-inspired legal orbit (e.g. FRANCE, BELGIUM and LUXEMBOURG); in GREECE, see *Stathopoulos Law of Obligations, 2004, § 18, 986* in ENGLAND and SCOTLAND, see *Chitty* para. 21-044 and *Wilson*, Debt paras. 1.2, 12.1; and in IRELAND, see *Forde* para. 1.086. In AUSTRIA CC § 1054 requires in respect of sales that payment of the price be “in cash”; this provision is liberally interpreted, however. Payment by bank transfer or cheque is recognised as an alternative if the creditor assents which is normally presumed according to the rules of fair trading (see CC § 1414). Special legislation in these countries often authorises or even obliges a debtor to make payment of substantial sums of money in cashless form, e.g. by bank transfer or cheque. DUTCH CC art. 6:112 allows payment in "current" form and art. 6:114 authorizes a bank transfer if the creditor has a bank account in the country of the place of performance, unless the creditor has validly objected. In BELGIUM a Royal Decree of 10 November 1967 makes it obligatory to accept a bank transfer or cheque for payments of more than a certain amount in commercial transactions (currently 2,500 Euro); similarly in FRANCE (L. 22 October 1940). According to ESTONIAN LOA § 91(1) monetary obligations may be performed in

cash (subject to the limits of special regulation or the good faith principle (*Varul et al (-Varul)* § 91 no. 4.1.), but may also be performed in some other form if so agreed by the parties or if such form is used in the ordinary course of business at the place of payment. If the creditor has a settlement account in a credit institution in the state in which a monetary obligation is to be performed, the debtor may perform the obligation by transferring the amount due to the account unless the creditor has expressly prohibited this option (LOA § 91(2)). Payment in cash above a certain amount may, however, be forbidden by money laundering legislation (in Belgian law maximum 15,000 Euro: art. 10ter Money laundering prevention Act of 11 January 1993).

2. There is no rule of legal tender in the CZECH REPUBLIC. The law is silent. It is construed as a freedom for all parties to determine any currency of performance as they want. Only for an international monetary obligation is it stated expressly that the debtor has to fulfil it "in the currency which was agreed on" (Ccom art. 731). Under SLOVAK law the debtor is allowed to pay by any method if it is agreed in the contract. The CC and the Ccom directly mention paying by "cash" in the place of performance, paying on account of creditor in the bank of creditor and by the Post Office (cheque). Other countries allow payments to be made in any form that is current and acceptable for present-day business (DENMARK: *Gomard*, Obligationsret I 127; SWEDEN: *Rodhe*, Obligationsrätt 33; but in FINLAND a creditor is usually not obliged to accept payment by cheque, *Aurejärin* 13).

II. Substituted payment

3. The disadvantage of most forms of substituted payment is that they do not immediately transfer a monetary value to the creditor. Therefore in most countries the acceptance of a cheque or the production of a credit card or any transfer of a similar form of substituted payment is considered to be a conditional acceptance of performance of the monetary obligation, the condition being that the substituted obligation will be honoured. See e.g. the GERMAN CC § 364(2), ESTONIAN LOA § 91(4) and DUTCH CC art. 6:46. The same rule is applied in SCOTLAND (*Leggat Brothers v. Gray* 1908 SC 67).

4. In FRANCE it is held on the basis of CC art. 1243 and special texts that the collection, not the handing over, of a cheque is a performance of the monetary obligation (Cass. Req. 21 March 1932, D.P.33.1.65). However, case law has sometimes moderated this rule(François, Les Obligations, Régime général, n° 42). A presumption has been established in ENGLAND *(D. & C. Builders Ltd. v. Rees* [1966] 2 QB 617; *Chitty* paras. 21-061-062),) and IRELAND (*Forde* para. I.087, though it can be rebutted: *P.M.P.S. v. Moore* [1988] ILRM 526). According to the SPANISH CC art. 1170(2) and (3) the transfer of a negotiable instrument or similar commercial instrument has the effect of payment only after the instrument has been honoured, the underlying obligation being in the meantime suspended. The same applies under BELGIAN law (See i.a. Cass. 6 January 1972, Arr.Cass. 1972, 441). In PORTUGAL it is assumed that acceptance of those instruments normally is a *datio pro solvendo* and therefore does not constitute payment until the instrument is actually honoured (*Varela* II 175). This latter rule is expressly laid down in ITALY: in pecuniary obligations, performance by a bank cheque, or by bill of exchange, banker's draft instead of cash constitute a different performance (on this point, Bianca (2002), 431), therefore, according to CC art. 1197(1) sentence 2 the creditor may refuse payment in such form unless it has been accepted on a previous occasion (Cass. 13 June 1980, no. 3771, Giur.it. 1981 I, I 1984). The rule is also confirmed by case law in GREECE (A.P. 209/1963, NoB 11 (1963) 1050, 1739/2002 ChrID 2003, 230). For FINLAND see *Wilhelmsson, Sevón* 150.

5. In SLOVAKIA for business matters the position is similar in effect to that under paragraph (2) of the above Article. Under Ccom art. 334, offering a letter of credit, bill of exchange or cheque is not in itself performance of an obligation. But the creditor is entitled to demand performance of the underlying obligation only if it is impossible to achieve fulfilment by these means.

6. In some countries, commercial practice and case law turn the suspensive condition of factual honouring into a resolutive condition: payment is regarded as effected by handing over the substituted form of payment, unless it later turns out that the instrument is not in fact honoured (FRENCH Cass.Civ.I, 2 December 1968, JCP 1969.II.15775; banking practice in GERMANY and AUSTRIA).

7. UNIDROIT art. 6.1.7 is similar to the present Article.

III.–2:109: Currency of payment

(1) The debtor and the creditor may agree that payment is to be made only in a specified currency.

(2) In the absence of such agreement, a sum of money expressed in a currency other than that of the place where payment is due may be paid in the currency of that place according to the rate of exchange prevailing there at the time when payment is due.

(3) If, in a case falling within the preceding paragraph, the debtor has not paid at the time when payment is due, the creditor may require payment in the currency of the place where payment is due according to the rate of exchange prevailing there either at the time when payment is due or at the time of actual payment.

(4) Where a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made.

COMMENTS

A. Definitions

Three different currencies may be involved in an international contract. The *currency of account* indicates in which currency the primary payment obligation, i.e. typically the price, is measured. The parties or the circumstances usually clearly indicate this currency. The *agreed currency of payment* may and often does, on grounds of convenience, differ from the currency of account. It is one agreed upon by the parties (paragraph (1)). Absent such an agreement, the currency of account will normally be the currency of payment. *The currency of the due place of payment* may differ from the agreed currency of payment and become relevant under certain circumstances (paragraphs (2)-(3)).

> *Illustration 1*
> A merchant in Colombia sells a quantity of coffee for 100,000 US$ (currency of account) to a trader in London. It is agreed that payment of the purchase price be made in Euros (agreed currency of payment) to the seller's account at a bank in Geneva (Swiss francs being the currency of the due place of payment).

B. Payment in the agreed currency of payment

This is clearly a matter of great practical importance and one on which it is highly desirable to have uniformly recognised rules. The laws of the Member States currently diverge to some extent. The rules laid down in this Article are based on two widely adopted uniform laws – the Uniform Law on Bills of Exchange of 1930, art. 41 and the Uniform Law on Cheques of 1931, art. 36.

The rule of the Article starts from the assumption that in the first place the creditor may require and the debtor must make payment in the agreed currency of payment, i.e. the currency in which the obligation to pay is expressed. This is but a consequence of the creditor's right to require performance. Whether the courts at the place of payment or elsewhere are willing to give judgment in a currency which is foreign to them, is a matter of procedure; it is not affected by these rules.

C. Payment in the currency of the due place of payment

If a monetary obligation is expressed in another currency than that of the due place of payment, the debtor may wish to make payment in the local currency; usually this is also in the creditor's interest. The rule of paragraph (2) presupposes that the agreed currency of payment and the currency of the due place of payment differ.

> *Illustration 2*
> A Canadian manufacturer sells machines to a foreign buyer for a purchase price of 540,000 Canadian $ but it is provided that the purchase price of $540,000 is to be paid in London.

Two basic issues arise: First, does either party have the right to effect such a conversion, or does only one have such a right or even a duty to effect the conversion? Second, if so, which rate of exchange is to apply? The latter question is of special interest if the debtor delays payment and the currency of account, the agreed currency of payment or the currency of the due place of payment has depreciated in the meantime.

D. Right of conversion

The Article adopts the widely accepted rule that the debtor has the option of effecting payment in the currency of the due place of payment rather than in the currency of payment (see Comment A). This is usually practical for both parties.

A creditor who wants to avoid this result must stipulate that payment be made only in the currency of the money of account (or in the agreed currency of payment). This right of the parties to agree on a different solution is stated expressly in paragraph (1).

E. Rate of exchange

The debtor's right of conversion must not be allowed to diminish the extent of the monetary obligation. Consequently, the rate of exchange for the conversion into the currency of payment must be that prevailing at the due place of payment at the date of maturity (paragraph (2)).

This rule also covers the case where payment is made before the date of maturity.

Difficulties arise where the debtor pays after the date of maturity and in the meantime either the currency of account, the agreed currency of payment or the currency at the due place of payment has depreciated. Should the date of maturity or the date of actual payment determine the rate of exchange? Neither solution is fully satisfactory. If after maturity the currency of account has depreciated, the creditor would be disadvantaged if the rate of exchange on the date of payment were selected. If, on the other hand, after maturity the agreed currency of payment or the currency of the due place of payment has depreciated, the creditor would be injured if the debtor were to be allowed to convert at the rate of exchange of the date of maturity, because this exchange rate places the risk of depreciation of the local currency on the creditor.

The guiding principle for an equitable solution ought to be that the defaulting debtor, and not the creditor, must bear the risk if a currency depreciates after the date of maturity of a

monetary obligation. A creditor who had been paid in time would bear both the chances and the risks of depreciation and could have avoided any foreseeable currency risk by converting the money received in a weak currency into money of a strong currency. It is the debtor who, actually or in effect, is speculating by delaying payment. Two solutions may be envisaged.

One would be to select the rate of exchange of the date of maturity and to grant, in addition, a claim for those damages that have been occasioned through currency depreciation during the debtor's delay. However, this route relies on two separate remedies and may entail a duplication of proceedings.

It is therefore preferable to allow a choice of the dates for the rate of conversion, and this choice must be the creditor's. The creditor may choose between the date of maturity and the date of actual payment. This rule is laid down in paragraph (3).

Of course, the parties may agree on a fixed rate of conversion, and such an agreement takes precedence.

F. Exchange restrictions

The rules of the Article may not operate if and insofar as exchange restrictions affect the payment of foreign money obligations. The question as to which country's exchange restrictions must be taken into account is not addressed.

G. Currency not expressed

Paragraph (4) deals with the problem which arises if the contract does not express any currency. For example, it may just refer to a price to be fixed by a third person without mentioning any currency. In such circumstances the rule provided by paragraph (4) is that payment must be made in the currency of the place where payment is to be made.

NOTES

I. Uniform laws

1. This Article has been modelled upon two widely adopted uniform laws: (Geneva) Uniform Law on Bills of Exchange of 1930, art. 41 and (Geneva) Uniform Law on Cheques of 1931, art. 36. Both laws are in force in more than 30 continental European countries. (See also UNIDROIT art. 6.1.9) A closely related, more elaborate model is the European Convention on Foreign Money Liabilities of 1967 (not yet in force).
2. The national laws are more diversified.

II. Currency clause

3. Almost all national laws recognize a currency clause, i.e. a stipulation that the debtor must make payment in an agreed currency. Some countries have express provisions (NORDIC Instrument of Debts Act 1938 § 7(1); ITALIAN CC art. 1277 laying down the so-called nominal principle, and arts. 1278, 1279; SPANISH CC art. 1170; SLOVAK Ccom art. 732; AUSTRIAN CC § 905a(1)). Other laws recognise a currency clause only implicitly (BELGIUM: Cass. 4 September 1975, Pas. I 16 RW 1975-76, 1561); GERMAN CC § 244(1); GREEK CC art. 291; LUXEMBOURG CC

art. 1153-1(1); NETHERLANDS CC art. 6:121(2); PORTUGUESE CC art. 558; CZECH Ccom art. 732 (currency clause expressly recognised only for international commercial relationships); SLOVENIA Act on Foreign Currencies arts. 4 and 18; and ESTONIAN LOA § 93(3). In SCOTLAND the rule in paragraph (1) would follow from the principle of freedom of contract, *Gloag and Henderson* 3.28.

4. In FRANCE such a clause is void in so far as payment is to be made in France (Civ.I, 11 October 1989, JCP 1990 II 21393). The position in POLAND is similar – according to CC art. 358 § 1, except as otherwise provided by the law, obligations to pay money in Poland may be expressed only in Polish currency.

III. Payment in local currency

5. In the absence of a currency clause, payment in the local currency of the due place of payment, irrespective of the currency of account, is permitted almost everywhere. This rule is often based upon statutory provisions: see NORDIC Instrument of Debts Act 1938 § 7(1); GERMAN CC § 244(1); GREEK CC art. 291; ITALIAN CC art. 1278; PORTUGUESE CC art. 550; NETHERLANDS CC art. 6:121(1); ESTONIAN LOA § 93(3); AUSTRIAN CC § 905a(1) law: 4th Introductory Regulation of the Commercial Code (4. EVHGB) § 8 no. 8(1) which also applies in matters of civil law; CZECH Ccom art. 744 (only for international commercial relationships); and SPANISH CC art. 1170(1), the meaning of which is debated by scholars, see *Díez Picazo* II, 278. Sometimes the rule is based on case law: see ENGLAND: *Barclays International Ltd. v. Levin Brothers (Bradford) Ltd.* [1977] QB 270, 277 ; FRANCE: Cass.req. 17 February 1937, S. 1938.1.140; BELGIUM: Cass. 4 May 1922, Bull. Institut Belge Droit Comparé 1923, 299. *Dekkers-Verbeke,* Handboek burgerlijk recht III no. 569.

IV. Exchange rate

6. The exchange rate is controversial. If payment is made at maturity, so that the dates of payment and of maturity coincide, the exchange rate of this day applies.

7. Difficulties appear to exist on late payment. Under one approach, the rate of exchange is that of the day of payment (NORDIC laws: Instrument of Debts Act § 7(1); ENGLAND: *Miliangos v. George Frank (Textiles) Ltd.* [1976] AC 443; AUSTRIAN law, 4. EVHGB § 8 no. 8(2); GERMAN CC § 244(2); GREEK CC art. 291; NETHERLANDS CC art. 6:124). Under another approach, the rate of exchange is that at the date of maturity (FRANCE: case law, Cass.req. 17 February 1937, S. 1938 I 140; ITALY: CC art. 1278 considering also the limitation laid down by art. 1281 as far as special laws are concerned; also BELGIUM, LUXEMBOURG, SLOVENIA and PORTUGAL).

8. The two conflicting approaches are, however, mitigated by supplemental rules. Where the exchange rate is that of the date of maturity and the currency of account has been devalued between that date and the time of payment, several countries grant damages to the creditor for delayed payment. These damages are based either on the general rules on late performance (BELGIUM: case law, e.g. Cass. 4 September 1975, Pas. belge 1976.I.16 (impliedly); Cour d'appel Bruxelles 15 Jan., 5 February 1965, Pas. belge 1965.II.310 - damages after debtor's default; NETHERLANDS CC art. 6:125; CZECH REPUBLIC Ccom art. 733; PORTUGAL: *Varela* I 868; *Costa* 693 and 694); or they comprise the difference between the rates of exchange at maturity and at payment (ITALY: Cass. 12 March 1953 no. 580, Giust.civ. 1953, I 830; LUXEMBOURG: CC art. 1153-1, as inserted by Law of 12 July 1980, with qualifications in favour of the debtor which are in accordance with the general rules as to liability for non-performance).

9. Conversely, in those countries which use the exchange rate at the date of payment, the debtor has to pay the difference between the exchange rates at the date of payment and a higher rate either at default (formerly in AUSTRIA: OGH 10 January 1989, ÖBA 1989, 735; GERMANY: RG 13 May 1935, RGZ 147, 377, 381; GREECE: Athens 3030/1969, Hazm 24 (1970) 409; 1905/1978, NoB 27 (1979) 221, 222, under a theory of damages) or even at the date of maturity (NORDIC countries: Instrument of Debts Act § 7(2); ENGLAND: *Ozalid Group (Export) Ltd. v. African Continental Bank Ltd.* [1979] 2 Lloyd's Rep 231).

10. An alternative remedy allows the creditor to elect between the exchange rates of the date of payment and of maturity (FRANCE: *semble* Civ. 2, 29 May 1991, B.II, no. 165, p. 89: creditor allowed to elect the date of *mise en demeure.* In SPAIN the same solution ought to be adopted applying the common principles of compensation for loss: the creditor has the right to be put in the situation the creditor would have been in had the obligation been duly performed; now also AUSTRIA CC § 905a(2) and ESTONIA, LOA § 93(4)). This solution corresponds to para. (3) of the present Article.

11. The SLOVAK CC does not contain any legal regulation of currency of payment. The Ccom regulates this matter for obligations in international business (i.e. obligations with at least one contracting party resident in a country different from that in which the other parties are resident). Ccom art. 732 provides that the debtor is obliged to pay in the currency stipulated by the contract (any damages being payable in the same currency). If the law does not allow payment in the stipulated currency, the debtor is obliged to pay damages for any loss which arises from payment in a different currency. Conversion of the currency is governed by the Ccom art. 733. If a monetary obligation is expressed in one currency, but the debtor is obliged to pay in a different currency, the rate is the middle exchange rate between the currencies at the time of performance in the place determined by the contract, which failing, the place of creditor’s residence. Contracting parties can agree on a currency clause for the purpose of protection from the risk of conversion of the exchange rates, see Ccom art. 744.

III.–2:110: Imputation of performance

(1) Where a debtor has to perform several obligations of the same nature and makes a performance which does not suffice to extinguish all of the obligations, then subject to paragraph (5), the debtor may at the time of performance notify the creditor of the obligation to which obligation the performance is to be imputed.

(2) If the debtor does not make such a notification the creditor may, within a reasonable time and by notifying the debtor, impute the performance to one of the obligations.

(3) An imputation under paragraph (2) is not effective if it is to an obligation which is not yet due, or is illegal, or is disputed.

(4) In the absence of an effective imputation by either party, and subject to the following paragraph, the performance is imputed to that obligation which satisfies one of the following criteria in the sequence indicated:

- ***(a) the obligation which is due or is the first to fall due;***
- ***(b) the obligation for which the creditor has the least security;***
- ***(c) the obligation which is the most burdensome for the debtor;***
- ***(d) the obligation which has arisen first.***

If none of the preceding criteria applies, the performance is imputed proportionately to all the obligations.

(5) In the case of a monetary obligation, a payment by the debtor is to be imputed, first, to expenses, secondly, to interest, and thirdly, to principal, unless the creditor makes a different imputation.

COMMENTS

A. The problem

Sometimes a party is obliged, not necessarily contractually, to accomplish two or more performances of the same nature - in particular, to pay money. If a performance does not suffice to meet all these obligations, the question arises which obligation has been extinguished by the performance, i.e. to which obligation such performance is to be imputed. The question may become relevant if different securities have been created for the different obligations, or if they bear interest at different rates, or if the periods of prescription expire at different dates. This Article sets out clear rules for imputation, reflecting what is found in the laws of the Member States, which show only minor variations.

B. Debtor's right to impute performance to a particular obligation

The generally accepted principle is that the debtor may at the time of payment expressly or impliedly declare to which obligation the payment is to be imputed.

> *Illustration 1*
> Bank B grants to A a loan of €2000 for buying a Peugeot car and some months later a loan of €2500 for buying another car, a Ford. Security interests are created in both cars for B. When later paying €2000 to B, A may declare that his payment concerns the loan for the Peugeot. B cannot object and the security interest in the Peugeot lapses.

A debtor may distribute a payment among various outstanding obligations, thus liquidating them partially. However, the effects of such partial performance are subject to the general rules on non-performance.

To be effective the debtor's imputation must, in general, be declared to the creditor. Otherwise the latter would not know to which of the several obligations the debtor wishes to impute the performance. Usually, such a declaration must be express. An implied imputation may, however, be inferred from the fact that the debtor paid the exact amount of one of the debts or that the other debts are barred by limitation.

The debtor's right of imputation is limited in two ways. First, an agreement on a mode or sequence of imputation prevails. This is simply a consequence of the parties' right to contract out of default rules.

> *Illustration 2*
> A and B, to whom A owes different sums, including interest, agree on a scheme for discharge of A's debts. The payments then made by A are imputed according to the scheme for discharge and not according to declarations which A may make on payment.

Second, the debtor of a sum of money is in certain cases prevented from imputing a payment. Paragraph (5) prescribes that the sequence of imputation is: expenses - interest - principal; the term "interest" covers both contractual and statutory interest. Such sequence even applies if the creditor has accepted a tender of performance in which the debtor has declared a different imputation, unless the creditor has clearly consented to such declaration.

> *Illustration 3*
> A owes B €50,000. B starts enforcement proceedings and obtains a judicial mortgage of €50,000 on A's land; the costs of these proceedings are €10,000. A then pays to B €50,000. B accepts this payment but refuses to sign a receipt stating that payment is made on the principal and not the costs. According to paragraph (5) the costs and 40/50 of the principal are discharged. Consequently, the remaining €10,000 are still secured by the mortgage.

C. Creditor's subsidiary right to impute

Where there is no agreed rule of imputation and the performing party fails to impute the performance the law must supply a solution. Basically, there are two different approaches: either the right of imputation is granted to the creditor; or objective criteria are fixed for the imputation. Paragraphs (2) to (4) combine those two approaches but give a preference to the first. According to paragraph (2) the right to impute devolves upon the creditor if the debtor does not impute the performance. But, for the imputation to be effective the creditor must exercise this right within a reasonable time after receiving the performance and must notify the debtor, who has a legitimate interest in knowing which obligations are still outstanding; otherwise the performance is imputed according to paragraphs (4) and (5).

In order to protect the debtor from being prejudiced by the creditor's imputation the latter's choice is further restricted by paragraph (3). The creditor cannot impute the performance to an obligation which is not yet due, which is illegal or which - on whatever grounds - is disputed. If none of the obligations is yet due, imputation is regulated by paragraph (4)(a), the effect of which is that the performance will be imputed to the obligation which will be the first to fall due. This is a reasonable result since the debtor would presumably intend to satisfy that obligation rather than one which is to fall due later.

The creditor is not prevented from imputing performance to an obligation which has prescribed. This follows from the fact that, under these rules, prescription does not extinguish the obligation but merely entitles the debtor to refuse performance.

D. Imputation by law

Where neither the debtor (under paragraph (1)) nor the creditor (under paragraphs (2) and (3)) has validly imputed the performance, the law determines to which obligation a performance is imputed.

Under paragraph (4) the performance is imputed to that obligation which according to the sequence of the criteria is the first to correspond to one of the following criteria:

a) earlier date of falling due;

b) less security - this criterion must be interpreted in accordance with its economic bearing: also a debt for which a third person has solidary liability or for which enforcement proceedings can already be started offers more security;

c) more burdensome character - e.g. producing interest at a higher rate, or a penalty,

d) earlier date of creation.

Illustration 4
B grants a loan of €240,000 to A, which is guaranteed by C. Later, B grants another loan of €220,000 to A. A pays back to B only €220,000 . B may sue C for €240,000 because according to paragraph (4) (b) the payment of €220,000 is imputed to the unsecured second loan.

This sequence of criteria is considered to correspond to the interests of both parties. If none of the four criteria leads to imputation of the performance, it is imputed proportionally.

E. Imputation to part of single obligation

The Article presupposes that there are several distinct obligations (cf. paragraph (1)). Some rules of the Article may, however, be extended to cases where partial payment of a single debt needs to be imputed to a proportion of the debt.

Illustration 5
B grants a loan of €240,000 to A which is guaranteed by C up to €150,000. If A repays €50,000, this amount is imputed to the unsecured part of B's loan if neither A nor B makes an imputation.

Whether the Article applies directly if payment is made on a current account being in debit depends on the nature of the current account, which must be determined under the applicable law. The rule applies directly and fully if the (negative) current account is not regarded as an integration (novation) for the individual obligations constituting the account; in this case, the current account in law still consists of the original number of several obligations towards the

creditor. If, by contrast, the negative balance of the current account is regarded as constituting an integrated single obligation, the Article does not apply.

NOTES

I. Debtor's choice

1. The principle expressed in paragraph (1) is generally accepted, but there are certain restrictions: FRANCE: CC art. 1253, cf. *Couturier*, JClCiv, arts. 1253-1255, fasc. 84-85 nos. 21-30; BELGIUM: CC art. 1253, *De Page* III no. 488; DENMARK: *Bryde Andersen & Lookofsky*, 126; ENGLAND: *Chitty §* 21-046 et seq.; FINLAND: Ccom of 1793 chap. 9 § 5 and Consumer Protection Act chap. 7 § 15; GERMANY: CC § 366(1); GREECE: CC art. 422 sent. 1; ITALY: CC art. 1193(1) (however, the debtor's freedom to choose which debts to pay first is limited by art. 1194 according to which the debtor is not allowed to appropriate the payment to the principal rather than to the interest and costs without the consent of the creditor); NETHERLANDS: CC art. 6:43(1); ESTONIA: LOA § 88(1); PORTUGAL: CC arts. 783-785; SCOTLAND: *McBryde*, paras. 24.34-24.36; SLOVENIA: LOA § 287(1); SPAIN: CC art. 1172(1); and SWEDEN: *Rodhe*, Obligationsrätt USA: Restatement of Contracts 2d s. 258(1), but with a restriction for cases where the debtor is obliged to a third party to devote the performance to the discharge of another obligation, cf. § 258(2). A very similar rule can be found in the CZECH REPUBLIC where it is codified in Ccom art. 330 (however the rule is applicable as a general principle for both commercial and civil law, see *I. Pelikánová*, Komentář k § 330 OZ, Lit. ASPI 8947): under this rule, it is up to the debtor to determine which obligation is discharged. If the debtor fails to impute the payment to any obligation, the payment is imputed to the obligation which is the first to the mature (see Ccom art. 330). The position is similar in SLOVAKIA: Ccom art. 330. In AUSTRIA, CC § 1415 requires the creditor's consent to the debtor's choice.
2. *Illustration 1* is based on French Cour de cassation Civ. I, 4 Nov. 1968, Bull.civ. I no. 261 p. 199.

II. Express provision in contract

3. It is probable that a contractual stipulation prevails (cf. FRANCE: *Couturier*, JClCiv arts. 1253-1255, fasc. 84-85 no. 15; GERMANY: Reichsgericht 25 April 1907, RGZ 66, 54, 57-59); CZECH REPUBLIC: *I. Pelikánová*, Komentář k § 330 ObchZ, Lit. ASPI 8947 (the meaning of this author is that the legal rule expressed in Ccom art. 330 is not imperative but a convincing judgment on this point is still missing); AUSTRIA CC § 1415. A contractual stipulation prevails in BELGIUM (*Van Gerven*, Verbintenissenrecht, p. 614).

III. Debtor has not imputed payment

4. If the debtor has not declared any imputation, the laws show two different approaches:

(a) Creditor's choice

5. Like the Article, ENGLISH, IRISH, SCOTTISH, BELGIAN, ESTONIAN, DANISH and SWEDISH law devolve the right to impute to the creditor if the debtor has not made an imputation (ENGLAND: *Chitty* para. 21-046, but Consumer Credit Act 1974 s. 81 deviates from the general rule; SCOTLAND: *McBryde*, para. 24.34(b); BELGIUM and FRANCE: CC art. 1255 (in effect); ESTONIA: LOA § 88(4), subject

to the immediate objection to the creditor's choice and imputation of the performance by the debtor; DENMARK: *Bryde Andersen & Lookofsky*, 126; SWEDEN, *Rodhe*, Obligationsrätt and Handelsbalken chap. 9 § 5; but cf. also the *ius commune*, *Windscheid & Kipp* § 343). But there are restrictions on the creditor's right to impute: performance may not be imputed to an obligation which is not yet due if there are debts which are already due or to an obligation which is illegal (ENGLAND: *Chitty* para. 21-049; SCOTLAND: *Walker* no. 31. 36; ESTONIA: LOA § 88(4)) or to an obligation which is disputed (SCOTLAND: *Walker* no. 31. 36; ESTONIA: LOA § 88(4)). However, the fact that an obligation is barred by the statute of limitation does not hinder imputation to such obligation by the creditor (England: *Chitty* para. 21-050; to the contrary: SCOTLAND: *Walker* no. 31. 36 but this is because in Scotland prescription extinguishes the obligation). In BELGIUM the creditor may not make an imputation without having a legitimate interest, *De Page* III p.494; *van Ommeslaghe*, RCJB 1988, and p. 110 no. 203. In POLISH law the appropriation made by the creditor is definite only when the debtor has accepted a receipt indicating the appropriation (CC art. 451 § 2).

(b) Objective criteria

6. By contrast, many legal systems lay down objective criteria (cf. AUSTRIA: CC § 1416; GERMANY: CC § 366(2); GREECE: CC art. 422 sent. 2; ITALY: CC art. 1193(2); NETHERLANDS: CC art. 6:43(2); PORTUGAL: CC art. 784; SLOVENIA: LOA § 287(2); SPAIN: CC art. 1174; CZECH REPUBLIC: Ccom art. 330, maturity of the obligation; SLOVAKIA: Ccom art. 330). Even systems following the first approach are forced to fall back on objective criteria if the creditor also fails to impute (cf. SCOTLAND: *Walker* 31. 36; FRANCE and LUXEMBOURG CC art. 1256; BELGIUM CC art. 1256; POLAND CC art. 451 § 3, referring to the time factor); ESTONIA: LOA § 88(6)).

7. Illustration 4 is modelled upon French Cour de cassation Civ. I, 29 October 1963, D. 1964.39 (which, however, reached the contrary result).

IV. Receipt accepted

8. Some codes contain express provisions on the effect of the acceptance of a receipt which indicates the imputation (cf. FRANCE, BELGIUM and LUXEMBOURG: CC art. 1255; ITALY: CC art. 1195 (if the debtor accepts the release it means acceptance of the appropriation made by the creditor; hence the debtor cannot claim that the payment be otherwise imputed, unless the creditor has used fraud or surprise to force the debtor to accept (see *Bianca* (2002), 342)); SPAIN: CC art. 1172(2); POLAND, CC art. 451 § 2. In the NETHERLANDS such a provision, previously contained in the old CC art. 1434, was considered to be superfluous for the NCC, cf. Parlementaire Geschiedenis Boek 6, 180 note 1). In France and Belgium it is controversial whether this means that the creditor has the right to impute where the debtor has failed to exercise the option (in this sense *De Page* III no. 489) or whether the rule concerns imputation by agreement of both parties (*Couturier*, JClCiv arts. 1253-1255, fasc. 84-85, no. 56; *Planiol & Ripert (-Esmein/Radouant/Gabolde)* VII no. 1204).

V. Money debts

9. The rule of paragraph (5) of the Article is, as far as general private law is concerned, common to many legal systems (cf. BELGIUM, FRANCE and LUXEMBOURG: CC art. 1254; AUSTRIA: CC § 1416 (interest before principal, the obligation already challenged before other obligations, and – in case the obligation is not challenged – the obligation that is due and then the obligation that is the most burdensome);

FINLAND, Ccom chap. 9 § 5 (interest); GERMANY: CC § 367; GREECE: CC art. 423; ITALY: CC art. 1194; NETHERLANDS: CC art. 6:49; ESTONIA: LOA § 88(8); POLAND: CC art. 451 § 1; PORTUGAL: CC art. 785; SPAIN: CC art. 1173 (for interest); SLOVAKIA Ccom art. 330).

10. However, in consumer credit legislation special provisions deviating from this rule exist (GERMANY: CC § 497(3) and (4) because the indebted consumer is to be encouraged in efforts to repay; see also DANISH Credit Contract Act § 28; SWEDISH Consumer Credit Act, § 19; ESTONIAN LOA § 415(2). Further, the rules on imputation are subject to a different imputation declared by the debtor, if the creditor has accepted the performance (FRANCE: *Couturier*, J.Cl. civil art. 1253-1255, fasc. 84-85 no. 36; GERMANY: CC § 367(2); NETHERLANDS: Parlementaire Geschiedenis Boek 6, 182; GREECE A.P. 702/1976, NoB 25 (1977) 51).

11. Illustration 3 is modelled upon CA Düsseldorf 27 May 1975, RPfleger 1975, 355 (which, however, reached the opposite result).

VI. Debt partially secured

12. Whether the principle of paragraph (1) can be applied to partial payment on a debt which is only partially secured is disputed (cf. *contra* for FRANCE: *Couturier*, JClCiv arts. 1253-1255 nos. 28, 29 with ref.; *pro* for GERMANY: BGH 13 July 1973, NJW 1973, 1689). In LUXEMBOURG it has been decided that where the debt is unsecured and another is secured by a guarantee from a third party, partial payment is imputed to the latter debt: 11 November 1987, Pasicrisie XXVII, p. 319. In SPAIN, the question is still disputed (*pro* the application of paragraph (1) *Guilarte*, Comentarios al Código Civil y Compilaciones Forales, XXIII, 298; *contra Carrasco/Cordero/Marín* , Tratado de los Derechos de Garantía, 2002, 146). In commercial loans and financial transactions it is very common to agree the imputation to unsecured debt. In AUSTRIA the creditor cannot be forced to accept partial payment (CC § 1415 first sentence). In SLOVENIA where one debt is secured and the other is not, the payment is imputed to the non-secured debt. See LOA § 287(3). See also the SLOVAK Ccom art. 330 under which, in the case of monetary obligations where the debtor has not imputed payment, payment will be imputed first to the obligation with least security and then to the obligation which is first to fall due.

VII. Current accounts

13. The rules on imputation of performance usually are not applied to payments made on a current account (cf. for BELGIUM: Cass. 26 February 1886, Pas. belge 1886 I 90; ENGLAND: *Clayton's Case* (1816) 1 Mer. 572, 608; 35 ER 781, 793; FRANCE: *Chavanne & Ponsard* no. 46; GERMANY: RG 7 January 1916, RGZ 87, 434, 438, BGH 11 June 1980, BGHZ 77, 256, 261; SCOTLAND: *Royal Bank* v. *Christie* (1841) 2 Rob. 118 (H.L.)). In AUSTRIA this used to be the case but now the new UGB § 355(2) refers to the general provisions; see *Koziol* in Koziol/Bydlinski/Bollenberger, ABGB, 2nd ed., § 1416 no. 11.); PORTUGAL: *Varela* II 59 (note 1), *Leitão* II, 173.

III.–2:111: Property not accepted

(1) A person who has an obligation to deliver or return corporeal property other than money and who is left in possession of the property because of the creditor's failure to accept or retake the property, has an ancillary obligation to take reasonable steps to protect and preserve it.

(2) The debtor may obtain discharge from the obligation to deliver or return and from the ancillary obligation mentioned in the preceding paragraph:

(a) by depositing the property on reasonable terms with a third person to be held to the order of the creditor, and notifying the creditor of this; or

(b) by selling the property on reasonable terms after notice to the creditor, and paying the net proceeds to the creditor.

(3) Where, however, the property is liable to rapid deterioration or its preservation is unreasonably expensive, the debtor has an obligation to take reasonable steps to dispose of it. The debtor may obtain discharge from the obligation to deliver or return by paying the net proceeds to the creditor.

(4) The debtor left in possession is entitled to be reimbursed or to retain out of the proceeds of sale any costs reasonably incurred.

COMMENTS

A. Scope of the rule

This Article deals with a specific form of prevention of performance, namely the creditor's failure to take delivery or to retake corporeal property, other than money, tendered by the debtor. The effect of failure to accept a tender of money is covered by the next Article.

The scope of the provision is fixed in paragraph (1) and comprises three different situations. In the first a party who is obliged to deliver corporeal property (e.g. under a contract of sale) has made a tender conforming to the terms regulating the obligation but the other party refuses to take delivery. In the second situation the party to whom delivery was to be made has received the property but has lawfully rejected it, and the other party fails to retake it. In the third situation an obligation has been lawfully terminated and a party who had received property under it has then to return the property to the other party. If the other party refuses to accept it, the present Article applies.

For the application of the Article it is irrelevant whether or not the refusal to accept property is a non-performance of an obligation.

The laws of the Member States often regulate the situations covered by this Article by scattered and fragmentary rules but some have an integrated approach like that of the present Article.

B. Protection and preservation of the property

Where this provision applies, the party who is unwillingly left in possession of property is not on that account entitled to abandon the goods or wantonly to leave them exposed to loss, damage or theft. The party must take reasonable steps for their protection, e.g. by taking them back or depositing them in a store or warehouse (paragraph (2)).

C. Perishables and goods expensive to preserve

In the case of perishables, the obligation to protect encompasses sale of the perishables where they are in danger of deteriorating. The same applies if the expenses of preserving the goods are unreasonably high, i.e. disproportionate to the value of the goods; this covers also the case where the goods take much space which is urgently needed by the debtor. In both cases the party must take reasonable steps for disposition, depending on the value of the goods on the one hand and the trouble and expense of finding a favourable opportunity for sale on the other hand (paragraph (3)).

D. Legal consequences

The Article imposes an obligation to protect and preserve the goods. However, the party left in possession of them is not relieved from the original obligation to deliver or return them.

If the party left in possession wishes to be freed from the obligation to deliver, or to return, the property or its substitute must be made available to the other party. The steps which can be taken to achieve this purpose are prescribed in paragraph (2) for property in general and in paragraph (3) sentence 2 for perishables and equivalent goods.

E. Discharge of party left in possession

In paragraph (2) two ways are set out by which the party left in possession of property (the debtor) may be discharged from the obligation to deliver or to return the property.

The debtor may deposit the property on reasonable terms with a third party to be held to the order of the creditor. The debtor can recover under paragraph (4) all storage charges reasonably incurred. In most cases, the deposit is likely to be a prelude to the debtor's exercise of the power of sale under sub-paragraph (b), for the debtor will be responsible to the depositary for the latter's charges and may find it impossible to recover these from the creditor.

Alternatively, the debtor may sell or otherwise dispose of the object on reasonable terms. The interests of the creditor are protected by requiring that the debtor normally act only after reasonable notice; in the case of perishables this notice may be very short or no notice may be needed at all. The debtor must then account to the creditor for the net proceeds of the disposal. The debtor may be entitled to set off a right (e.g. to the payment of damages for non-performance of an obligation) against the creditor's entitlement to the net proceeds.

If the debtor had already sold the goods according to paragraph (2) sentence 1, discharge from the obligation to deliver or return may be obtained by paying the net proceeds (see paragraph (4)) of the sale to the creditor.

F. Other remedies unaffected

If by not taking delivery the creditor fails to perform an obligation, the debtor is entitled to exercise any of the remedies available for non-performance, including damages.

NOTES

1. In combining in one rule several factual situations where a party has not accepted property, the Article uses a new and original approach.

I. Duty of preservation

2. Some European laws expressly provide that if the buyer without justification fails to take delivery of the goods, the seller must take reasonable care of them (U.K. Sale of Goods Act 1979 s. 20(3); DANISH SGA § 33; FINNISH and SWEDISH SGAs §§ 72-78; see also CISG art. 85. In the CZECH REPUBLIC (despite the fact that there is no general rule of transfer of property by *consensus* on the sale of a determined thing; even for movable property, the transfer of property takes place on the basis of a contract by the act of delivery, see CC § 133, for immovable property later, by the registration of buyer as a new owner in the land register) in case of mora creditoris, legislation, doctrine and jurisprudence organise a very similar debtor's obligation to preserve the goods during a reasonable time and – at the same time – allow to this debtor the right to take appropriate measures to prevent damage, see Ccom art. 462 and *Štenglová, Plíva, Tomsa a kol*., Obchodní zákoník – komentář, C.H. Beck Praha 2004, p. 1117. In other European laws, there is no special duty of protection which would exceed what is required by good faith and fair dealing (for PORTUGAL *Soares & Ramos* 243 and 245). By contrast, for the case of *mora creditoris* it is expressly provided in some systems that the debtor is responsible only for deliberate or reckless acts or omissions (GERMAN CC § 300(1); GREEK CC art. 355; PORTUGUESE CC art. 814(1); ESTONIAN LOA § 119(2); this is acknowledged by AUSTRIAN courts also as a result of the general rule laid down in CC § 1419); compare BELGIAN CA Antwerp 29 October 1980, R.W. 1981-82, 1563, and see *Pothier* no.55. See also NETHERLANDS CC art. 6:90 which includes both non-performance and *mora creditoris*. In SPANISH law there is a duty of preservation as a result of CC arts. 1167 ff, 1185, 1452(3), 1505, 1589 and 1590; as a general rule, CC art. 1094 subjects the debtor in this situation to the duties of a depositary. There is a duty of preservation in SLOVAK law, in a contract to purchase, under CC § 592 and in SLOVENIAN law under the LOA § 301.

3. The other factual situation covered by paragraph (1), i.e. that of the party left in possession of non-conforming goods, is in the NETHERLANDS governed by a general rule in CC art. 7:29, in FINLAND and SWEDEN by SGA § 73; in ESTONIA by special rule for contracts of sale (LOA § 229); and in CISG by art. 86. In GERMANY and AUSTRIA a corresponding rule applies to commercial transactions and where delivery is made from one place to another (Ccom § 379 and AUSTRIAN UGB § 379, respectively - *Distanzkauf*; see Heymann *(-Emmerich)* HGB, § 379 nos. 3 and 4). In non-commercial cases, good faith and fair dealing may require the party not to let the goods perish, but they may be sent back (*Schlegelberger (-Hefermehl)* § 379 HGB no. 1).

4. Some countries have specific provisions placing the cost of preserving goods on a party who has failed to accept them (e.g. a buyer who has failed to accept delivery, UK Sale of Goods Act 1979 s. 37, CISG art. 85 sent 2; a seller who has failed to take back goods properly rejected by the buyer, CISG art. 86(1) sentence 2; or generally, DANISH SGA § 36, FINNISH and SWEDISH SGA § 75; CZECH commercial law, see Ccom art. 462). Other laws deal with the issue in the context of *mora creditoris*, and therefore impose the costs on the creditor (GERMAN CC § 304; GREEK CC art. 358 and A.P. 115/1970, NoB 18 (1970) 811, 812; POLISH CC art. 486; PORTUGUESE CC art. 816; ESTONIAN LOA §§ 120(5), 125(6)). ITALY CC art.

1207(2). Moreover, a general duty of preservation may be inferred from the general principle of good faith and fair dealing set forth in art. 1175, and by the provisions laid down in arts. 1176 and 1177 concerning diligence in performance and the obligation to safeguard). In AUSTRIA this is deduced from the general rules on benevolent intervention (*Geschäftsführung ohne Auftrag*).

II. Depositing goods

5. A party left with goods after a failure to take them by the other (*mora creditoris*) is expressly given a right of deposit by CISG art. 87 as well as in FRANCE, BELGIUM and LUXEMBOURG (CC arts. 1264 and 1961(3), *M.E. Storme*, Invloed no. 451); AUSTRIA (CC §§ 1525, 1425); THE NETHERLANDS (CC art. 6:66); FINLAND and SWEDEN (SGA § 74); ESTONIA (LOA § 124, with effect of discharging the debtor, unless deposited with right of reclamation LOA § 122(1)) and ITALY (CC art. 1210 - see also arts. 1212, 1514-1515, 1686 and 1690. In the case of immovables, where deposit is obviously not possible, the Italian CC art. 1219 provides for the possibility of a discharging seizure of the goods). There is also a right of deposit in the CZECH REPUBLIC in commercial cases (Ccom art. 462); SLOVAKIA (CC § 568, but judicial permission is required) and SLOVENIA (LOA §§ 302–310, but rigid procedural rules must be complied with). The situation is similar SPAIN (CC art. 1176, Ccom art. 332 and old Civil Procedure Code art. 2.127 (still in force as to this issue); POLAND (CC art. 486 § 1 and arts. 467-470); and PORTUGAL, where deposit discharges the obligation (see CC arts. 841 ff) but a court procedure is necessary (CCP arts. 1024 ff, see *Varela* II 186, *Cordeiro* II 217, *Leitão* II 191). In GERMANY, discharge by deposit is provided for in CC § 378 only for money and valuables, but in commercial cases deposit of other goods is possible under Ccom § 373.

6. In FRANCE, the party left in possession has an effective alternative to the complicated method of depositing: asking for a court order compelling the creditor to take away or accept the goods, combined with an *astreinte* (judicial penalty) in case of disobedience (*Malaurie and Aynès*, Obligations no. 1019). In SCOTLAND a decree of specific implement of the obligation of the other party to take or accept the goods, combined with penalties for contempt of court in case of disobedience, would also be available in theory but does not seem to be used much, if at all, in practice.

7. In GERMANY deposit in a case of *mora creditoris* between merchants does not discharge the debtor under Ccom § 373(1) as opposed to a deposit under CC § 378. This is the same in AUSTRIA (§ 373(1) UGB). Nor is there a direct equivalent to paragraph (2)(a) in ENGLAND. If a buyer refuses to take the goods and the property has not yet passed, the seller's only remedy will be to terminate the contractual relationship and claim damages from the buyer (see e.g. *Stein, Forbes & Co. Ltd.* v. *County Tailoring Co. Ltd.* (1916) 86 L.J.K.B. 448 (K.B.)).

III. Resale

8. Resale as a means of self-help in paragraph (2)(b) is known in AUSTRIA in Ccom § 373(2)-(5) in cases of *mora creditoris* between merchants and in the GERMAN CC §§ 383-386; and similarly under the PORTUGUESE Ccom art. 474; and the FINNISH and SWEDISH SGAs § 76. Except in the Scandinavian laws and the CZECH law, however, generally only sale by auction is permitted. Only when the goods have a market price is a sale through officially licensed brokers or auctioneers for the current price admitted (GERMAN CC § 385 and Ccom § 373(2)). The place and time of such sale are not expressly regulated, but are subject to the seller's diligent determination (Baumbach/Hopt (-*Hopt*), HGB, §§ 373, 374 no. 19-22). Outside commercial sales contracts the place of the sale is the place of performance (CC § 383(1)) subject to

some exceptions (CC § 383(2)). In DENMARK (SGA § 34), FINLAND and SWEDEN (SGA § 76(3)), the CZECH REBUBLIC (Ccom art. 466), AUSTRIA and GERMANY (UGB § 373(2) and Ccom § 373(2) and GERMAN CC § 384) prior notice of the sale must be given; it must be so timely and sufficiently clear as to give the buyer the opportunity to take proper steps to protect his interests (ROHG 11 January 1876, ROHGE 19, 293 (293 f.)). The notice is dispensed with for emergency sales and when it is not reasonably feasible (Ccom § 373(2) sentences 3 and 4 and CC § 384(1) and (3)). According to Ccom § 373(3) resale which is justified as self-help takes place for the account of the defaulting buyer; the latter remains liable for that part of the purchase price which is not covered by the proceeds of the resale; and the same result follows from CC § 383(1). ESTONIAN law is generally similar. However, LOA § 125(1) provides for a right to resale only if depositing is unreasonable or impossible due to the nature of the goods, in case of rapid deterioration or unreasonably expensive preservation or if the period of deposit may be of unpredictable length because the debtor does not know and does not have to know the identity of the creditor.

9. Also GREEK law allows the debtor, during the creditor's default and after notice to the latter, to dispose of the object at public auction and to pay the proceeds to a public entity ("Deposits and Loans Fund") for the creditor's account; notice may be dispensed with if the object is liable to perish or if notice is particularly difficult (CC art. 428). An auction can be dispensed with by leave of the judge, if the object has a market price or small value (art. 429). On sale by auction or "in a similar reasonable way", see also DANISH SGA § 34. In ITALY, resale on merely "reasonable terms" is allowed only in the special case of deposit of goods in a public warehouse (CC art. 1789 but see also art. 1211 allowing the debtor, in the case of perishable goods or goods whose custody is expensive, to sell them). Under SPANISH law, resale is permitted after termination of the contractual relationship and may even be required in order to mitigate the damages (*Carrasco*, Comentario, p. 736 and TS 23 May 2005, RAJ 2005/ 6364).

10. BELGIAN law has different provisions for different contracts: sales, see CC art. 1657; carriage, see Transport Contract Act art. 8; on contracts for custody, cleaning, repair, etc. of goods, see Act of 21 February 1983.

11. In the CZECH REPUBLIC, in cases of mora creditoris between merchants, the party in delay (i.e. the buyer) can be urged by the seller to take delivery of the goods. Notice of the seller’s intention to resell the goods can be sent to the buyer and then a reasonable period for response can be set. After this period has expired without result, the seller is entitled to sell the goods in an appropriate manner to another buyer (see Ccom art. 466 *in fine*, the commentary by *Štenglová, Plíva, Tomsa a kol.*, Obchodní zákoník – komentář, C.H. Beck Praha 2004, p. 1119, and an elementary but accurate synthesis by Miloš Tomsa in *Hendrych a kol.* Právnický slovník, C.H. Beck Praha 2006, p, 1055).

12. In ENGLAND, resale according to the Sale of Goods Act 1979 s. 48 has the effect of terminating the original contractual relationship. The resale is on the seller's own account and the buyer is liable in damages for the seller's net loss (*R.v. Ward Ltd. v. Bignall* [1967] 1 QB 534. SCOTTISH law is the same.

13. In SLOVENIA a resale is only allowed in cases of rapid deterioration or when goods are not suitable for deposit, or when the cost of deposit is excessive with regard to the value (see LOA § 308).

IV. Rapid deterioration

14. In sales, the party's duty to effect a resale in case of rapid deterioration or unreasonably expensive preservation is recognised in AUSTRIA; see, however, AUSTRIAN UGB § 379(2): such goods "can" be sold, DENMARK (SGA § 35), FINLAND and SWEDEN (SGA § 76(2)), the CZECH REPUBLIC (see Ccom art. 467: if the goods are perishable or if the preservation involves excessive costs, the seller is legally bound to take measures to sell the goods and has to notify the other party only if this notification is still possible) and the NETHERLANDS (CC arts. 6:66 and 7:30). BELGIAN case law reaches the same result: Court of Appeals Brussels 3 July 1931, Jur. P. Anvers 418; see *M E Storme,* Invloed N° 393; *Demogue* VI, nos. 26 and 45. In ITALY, CC art. 1211 on *mora creditoris* is similar, but it requires judicial approval and merely authorises, but does not oblige, the debtor to resell (*Cattaneo* 217). CISG art. 88 also allows resale as a form of self-help; similarly SPANISH law, *Vicent Chuliá* II 108. Under ESTONIAN law, the debtor must effect a resale if sale is clearly in the interests of the creditor or if the creditor gives notice that the creditor requires the movable to be sold (LOA § 125(3)). The GERMAN Ccom only gives an option to sell rejected goods.

15. In HUNGARIAN civil law the provisions on so called "responsible custody" are applicable in all the situations where someone has to keep a thing in the interest of another person without being entitled or obliged to do so. These general provisions are located in the law of things in the Hungarian CC. Under CC § 196(1) a person who keeps a thing in the interest of another person without being entitled or obliged to do so by a special legal relationship must provide for the safekeeping of the thing at the cost and risk of the entitled party until such party takes over the thing (responsible custody). Responsible custodians may retain the thing until their expenses are reimbursed. Under CC § 196(2) responsible custodians must not use the thing during the period of responsible custody, unless its use is required for maintenance. If they use the thing in spite of such prohibition, they are liable to the entitled party for all damage that would not otherwise have occurred. Under CC § 196(3) a responsible custodian must surrender the existing proceeds of a thing and reimburse the value of the proceeds consumed or not collected, less any claims proceeding from the custody. Under § 197(1) if an entitled party fails to remove a thing within a reasonable period of time, despite being requested to do so, and the relocation of the thing would involve unreasonable difficulties or require an advance on costs, the responsible custodian is allowed to sell or use the thing. Under § 197(2) perishable things, whenever possible, must be sold or utilised. Under § 197(3) the sum received from the sale or consideration of a utilised thing is due to the entitled party.

III.–2:112: Money not accepted

(1) Where a creditor fails to accept money properly tendered by the debtor, the debtor may after notice to the creditor obtain discharge from the obligation to pay by depositing the money to the order of the creditor in accordance with the law of the place where payment is due.

(2) Paragraph (1) applies, with appropriate adaptations, to money properly tendered by a third party in circumstances where the creditor is not entitled to refuse such performance.

COMMENTS

A. Explanation

This provision enables the debtor in a monetary obligation, after notice, to be freed from the obligation to pay by depositing the money in any manner authorised by the law of the place for payment, e.g. by paying it into court. (The question of which methods of payment are authorised falls outside the scope of these rules.) This possibility is now recognised in many, though not all, Member States and is clearly convenient to the debtor while (because of the conditions imposed) posing little or no risk to the creditor.

The deposit must be to the order of the creditor so that the creditor obtains the right to dispose of the money deposited. The notice to the creditor must be reasonable both with respect to the method of transmission and with respect to the time given to the first party to reply.

B. Scope of application

The provision applies to any obligation to pay whether or not contractual. So it applies, for example, both to an obligation to pay the price under a contract for the sale of goods and to an obligation to pay damages. The tender of payment must have been properly made - i.e. it must have been in conformity with the terms regulating the obligation to pay.

For the application of the Article it is irrelevant whether or not the refusal to accept money is a non-performance of an obligation.

C. Payment by a third person

There are situations where an obligation which does not require personal performance can be performed by a third person and where the creditor cannot refuse performance. The payment of money will not usually require personal performance. Paragraph (3) of the Article covers this situation.

NOTES

I. Depositing money

1. European laws generally have detailed rules on deposit of money for cases of *mora creditoris* (DENMARK: Depositing Act 1932 § 1; FINLAND: Depositing Act 1931; FRANCE, BELGIUM and LUXEMBOURG: CC arts. 1257-1264; GERMANY: CC §§ 372 et seq.; GREECE: CC art. 427; ITALY: CC art. 1206 ff, PORTUGAL: CC art.

841(1) (b); SPAIN: CC art. 1176; SLOVAKIA: CC § 568; CZECH REPUBLIC: CC § 568, *Občanský soudní řád* § 352, *Vyhláška ministerstva spravedlnosti č. 37/1992 Sb.* § 105 ff; ESTONIA: LOA §§ 121-123; SWEDEN: Act on Depositing 1927 § 1). In SWEDEN, depositing is permitted only in certain cases, particularly when the debtor has difficulty in discovering the correct payee: *Rodhe,* Obligationsrätt 130. In contrast, ENGLAND and SCOTLAND have no equivalent rule. In IRELAND payment may be made into court, *Clark* 403. In the CZECH REPUBLIC, the payment has to be made into official custody if the debtor is unable to pay the creditor who is absent or in default or unknown or if there are justified doubts about the creditor's identity (see CC § 568 and its commentary by *Jehlička, Švestka, Škárová a kol.*, Občanský zákoník – komentář, p. 730-733).

2. Deposit is to be made either with a court (AUSTRIA: CC § 1425; GERMANY: Regulation on Deposits, § 1(2); POLAND: CC arts. 467-470 and art. 486; SLOVENIA: Act on Non-contentious Civil Procedure arts. 168–177; SPAIN: CC art. 1178; SLOVAKIA CC § 568; CZECH REPUBLIC: *Občanský soudní řád* § 352) or with a special Deposits and Loans Fund (BELGIUM: Royal Decree of 18 March 1935, though there is some flexibility in judicial practice; FRANCE: Law of 28 July 1875, D. 15 December 1875; GREECE: CC art. 430 and Presidential Decree of 30 December 1926/ 3 January 1927) or the enforcement authority or a financial institution (DENMARK: Law on Depositing § 6; FINLAND and SWEDEN, Laws on Depositing, § 1) or a person whose business it is to take custody of sums of money (NETHERLANDS: CC arts. 6:67, 6:68) or a public notary (ESTONIA: LOA § 120(1)). According to ITALIAN law, the deposit can be made at a banking institution, as provided by art. 1212(5). As far as deadlines are concerned, see Cass. 9 March 2001, no. 3481 in *Giur. It.* 2001, 2581.

3. A deposit often has the effect of liberating the debtor from the monetary obligation (for BELGIUM, FRANCE, the NORDIC countries and PORTUGAL see above, para. 1). In the CZECH REPUBLIC, the placement of money into official custody has an effect of performance, see CC § 568. The same applies in GERMANY, provided the depositor waives the right of reclaiming the money (see CC § 378), AUSTRIA (CC § 1425) after a definite refusal, POLAND (CC art. 470) and in ITALY and SPAIN when the deposit is accepted by the creditor or approved by the court (Italian CC art. 1210(2), Spanish CC art. 1180). The position is similar in SLOVAKIA (CC § 568). Under ESTONIAN law, deposit has the effect of discharging the debtor, unless it is made with right of reclamation by notifying the depositary of the intention to retain the right to reclaim the property (LOA §§ 121(1), 122(1)).

4. In DENMARK and GERMANY if the depositor does not waive the right to reclaim the money, and generally in SPAIN, deposit does not discharge the debtor from the obligation. In Germany, the debtor has merely the right to refer the creditor to the deposited asset; the debtor no longer bears the risk and need no longer pay interest or compensation for fruits reaped (German CC § 379).

II. Notice to creditor

5. A prior notice to the creditor is, in contrast to the Article, not required in GREECE (*Capodistrias* in ErmAK II/2 art. 427 no. 11 (1954)) *Stathopoulos,* Obligations § 24, no. 22; the CZECH REPUBLIC (see CC art. 568 as commented by *Jehlička, Švestka, Škárová a kol.*, Občanský zákoník – komentář, p. 730-732) or GERMANY, where a subsequent notice given without undue delay suffices (CC § 374(2) sent. 1). ESTONIAN law is similar, see LOA § 120(3). See also the FINNISH Act on Depositing § 2(2)) and the SWEDISH Act on Depositing § 3. A notice may sometimes even be dispensed with (GREEK CC art. 430; GERMAN CC § 374(2) sentence 2).

Prior notice is also not required in AUSTRIA. In GERMANY, GREECE, DENMARK and POLAND, if notice is omitted, the deposit is nevertheless valid (Palandt (-*Heinrichs*) BGB, § 374 no. 1), but it may give rise to a claim for damages (Germany: CC § 374(2) sentence 1; Greece: AP 161/1977, NoB 25 (1977) 1156, 1157, CA Athens 4534/1987 HellDni 29 (1988) 945, CFI Thessaloniki 2344/1988 Harmenopoulos MB (1988) 588; Danish Law on Depositing § 1(3)); and POLISH CC art. 468). Other countries require a judicial or other procedure (FRANCE: CC art. 1258(7); ITALY: CC art. 1212; PORTUGAL: CCP arts. 1024 ff; SPAIN: CC art. 1178, Royal Decree 34/1988, CCP art. 2127 (third parties who are interested must be given prior notice, CC art. 1177)).

III. Costs of deposit

6. The costs of deposit are imposed upon the creditor who failed to accept the money (FRANCE: CC art. 1260; GERMAN CC § 381, ITALIAN CC art. 1215; (inverting the general rule set forth in art. 1196, placing the expenses upon the debtor) POLISH CC art. 470; SPANISH CC art. 1179; SLOVAKIA CC § 568; CZECH CC § 568 in fine; ESTONIAN LOA § 120(5)).

7. In the HUNGARIAN CC § 287(1) if the identity of the creditor is uncertain, if the creditor's domicile or registered place of business is unknown, or if the creditor is late, an obligation to pay cash or deliver securities or other documents can also be performed through deposit in court. Under CC § 287(2) when making the deposit, the debtor is entitled to stipulate that the deposit can only be surrendered to the creditor upon their performance of consideration or upon the provision of security therefore; the deposit may be withdrawn until the creditor is notified thereof. Under CC § 287(3) the deposit is effected at the court having jurisdiction for the place of performance or the domicile or registered office of the debtor. The costs of the deposit are borne by the creditor.

III.–2:113: Costs and formalities of performance

(1) The costs of performing an obligation are borne by the debtor.

(2) In the case of a monetary obligation the debtor's obligation to pay includes taking such steps and complying with such formalities as may be necessary to enable payment to be made.

COMMENTS

The performance of obligations usually entails costs and often involves complying with formalities. Transportation, money transfers, government licences, risk insurance, etc. will all have to be paid for. Paragraph (1) lays down that such costs are to be borne by the debtor, the performing party. Paragraph (2) particularises this for the case of monetary obligations, making it clear that the debtor bears the responsibility of taking such steps and complying with such formalities as may be necessary to enable payment to be made. The rule is commonly found in relation to sale but is included here because it is of a more general nature.

Illustration

A orders a book from Publishers B, located in another country, after B has stated a price for the book knowing that A resides in another country. The Publishers may not invoice A extra for the costs of mailing the book, unless this was agreed. Likewise, A has to bear the costs of paying for the book through an international money order or other means of payment.

NOTES

1. This provision is in line with the law in most jurisdictions in Europe. See for instance FRENCH and BELGIAN CCs art. 1248, DUTCH CC art. 6:47, ESTONIAN LOA § 90 (§ 215 for contracts of sale), GERMAN CC § 364, SPANISH CC art. 1168, ITALIAN CC art. 1196 and the FINNISH Act on Depositing § 6(2). The rule is considered self-evident under AUSTRIAN, SLOVENIAN and POLISH law. The same applies to ENGLISH and SCOTTISH law: there is no explicit statement of a general rule but the principle is illustrated by Sale of Goods Act 1979 s. 29(6), under which the seller must bear the expenses of putting goods into a deliverable state: see *Chitty* on Contracts II, no. 41-195. The rule also applies in PORTUGAL (*Telles* 294), although the present CC has dropped the express provision to this point contained in art. 746 of the old Code of 1867. UNIDROIT art. 6.1.11 is to the same effect as this Article. In CZECH law, the rule is applied for both non-monetary and monetary obligations in civil (see *Jehlička, Švestka, Škárová a kol*. Občanský zákoník – komentář, 8. vydání, Praha 2003, p. 728 *ad* § 567 para. 2 in fine) or commercial relationships. Nevertheless, it is expressly stated only for commercial monetary obligations (see Ccom art. 337.1: the debtor performs the monetary obligation at the debtor's own risk and cost; and cf., for settlement of a monetary obligation through a bank, Ccom art. 339.1: the obligation is settled by crediting the payment to the creditor's bank account). There is no general rule stated in SLOVAK law but specific provisions are found for particular types of contracts, for example contracts to purchase (CC § 593).
2. In the HUNGARIAN CC § 283(3) unless otherwise provided by legal regulation, the costs of physical delivery, including the costs of packaging and measuring, are to be

borne by the debtor, while the costs of receiving delivery are to be borne by the creditor.

3. In the GREEK law, CC art. 425 stipulates that the costs of the pay-off receipt are borne by the debtor, if something else does not derive from the relationship with the creditor. In relation to sale, in CC art. 526 it is mentioned that the seller bears the costs for the delivery of the thing which was sold and especially for weighing or measuring or numbering; the buyer bears the expenses of taking over and of dispatching to a place other than the place of performance. On the other hand as far as expenses of the contract of sale and of transcription are concerned, it is mentioned in CC art. 527 that the expenses and the charges required for the written drawing up of a contract charge both parties in equal shares. The buyer of an immovable or of a right in an immovable is burdened with the transcription expenses (see *Ap. Georgiadis*, Law of Obligations, Special Part, I, 2004, § 6 no. 23).

III.–2:114: Extinctive effect of performance

Full performance extinguishes the obligation if it is:

(a) in accordance with the terms regulating the obligation; or

(b) of such a type as by law to afford the debtor a good discharge.

COMMENTS

It is obvious that full performance in accordance with the terms regulating the obligation will extinguish the obligation. It is the corollary which is important: performance which is not full or not in conformity with the terms regulating the obligation will not extinguish the obligation. This, however, is subject to the qualification that there are various situations where these rules provide for the debtor to obtain a good discharge even if performance is not strictly in accordance with the obligation. For example the rules on assignment sometimes enable the debtor to obtain a good discharge by paying the "wrong" creditor in good faith. And III.–2:107 (Performance by a third person) provides for performance by a party other than the debtor to be effective in some situations. Other rules of this nature are to be found in the Chapter on Plurality.

NOTES

1. This rule is generally accepted even if not always considered worthy of express legislative statement, but see for GERMANY CC § 362. In SLOVAK law CC § 562 provides that an obligation is discharged by performance to the person with creditor's confirmation. In CZECH law, see CC §§ 559 ff ("a debt is discharged by its performance"; "a debt must be duly and timeously fulfilled") as commented by *Jehlička, Švestka, Škárová a kol*. Občanský zákoník – komentář, 8. vydání, Praha 2003, pp. 711 ff and Ccom arts. 324 ff ("an obligation is discharged when performed to the creditor duly and in time") as commented by *Štenglová, Plíva, Tomsa a kol.* Obchodní zákoník – komentář, pp. 1012 ff. In SCOTTISH law it is accepted that an obligation is extinguished by due performance, *Gloag and Henderson* 3.20. In DUTCH law the same holds true, but was not considered worthy of express legislative statement (Parl. Gesch. Boek 6, p. 153). The rule is fully recognised, but is not expressed in the POLISH CC. In ENGLISH law a contractual promise will be discharged by due performance (Halsbury's Vol. 9(1) 4th ed. 1998, Reissue para. 920).
2. The SPANISH CC regulates the different ways of extinction of an obligation in art. 1156; full performance is one of them and art. 1157 states that it has to be not only in accordance with the obligation, but also it has to be complete. Regarding the discharge, CC art. 1164 enables the debtor to obtain a good discharge of an obligation by paying in good faith to the person who seems to be the creditor, when there is a sufficient legal appearance, e.g. when the creditor has transferred the right to a third party and the debtor does not know that this has been done (*vide* CC art. 1527). The Supreme Court does not consider a fake signature as a sufficient legal appearance to cause a good discharge (i.e. TS 1 March 1994, RAJ 1994/1636). In any case, the good or bad faith of the creditor is irrelevant in this case, but the objective good faith of the debtor has to be proved (cfr. TS 17 October 1998, RAJ 1998/7439). However, the receipt of payment by the person who does not have the right to be paid creates an obligation to restore it (CC art. 1895).

3. In FRANCE and BELGIUM CC art. 1235 expressly provides that an obligation is discharged upon: payment, delivery (as in the present article), novation, set-off, confusion, loss of thing, nullity or rescinding, fulfilment of a resolutive condition and prescription (Bénabent no. 780 et seq.). However, the list is rather diverse and it is an open list and not limitative.

4. In GREEK LAW, see CC art. 416, the obligation is extinguished by payment. The CC means by payment the fulfilment of the performance, that is, the satisfaction of the creditor in accordance with the aim of the obligation (see *Stathopoulos*, Contract Law in Hellas, no. 228).

CHAPTER 3: REMEDIES FOR NON-PERFORMANCE

Section 1: General

III.–3:101: Remedies available

(1) If an obligation is not performed by the debtor and the non-performance is not excused, the creditor may resort to any of the remedies set out in this Chapter.

(2) If the debtor's non-performance is excused, the creditor may resort to any of those remedies except enforcing specific performance and damages.

(3) The creditor may not resort to any of those remedies to the extent that the creditor caused the debtor's non-performance

COMMENTS

A. Remedies available

The remedies available for non-performance of an obligation depend upon whether the non-performance is not excused, is excused due to an impediment or results from behaviour of the other party. This represents the common core of the laws of the Member States, though some reach broadly similar results through a rather different conceptual structure.

Non-performance which is not excused. A non-performance which is not excused may give the creditor the right to claim performance - recovery of money due or specific performance - to claim damages, to withhold performance of a reciprocal obligation, to terminate the contractual relationship in whole or in part and to reduce the price (if a price is payable). If a party violates an obligation to receive or accept performance the other party may also make use of the remedies just mentioned.

Non-performance which is excused. A non-performance which is excused due to an impediment does not give the creditor the right to claim specific performance or to claim damages. However, the other remedies may be available.

Illustration 1
A has let his land to B for ten years and B has undertaken to grow vines on the land. B plants vines but the vines die from phylloxera which invades the region. Although B's failure to grow vines is excused, and B therefore is not liable in damages, B has not performed his obligations under the contract and A can terminate the lease, with the effect that the whole contractual relationship will come to an end.

Illustration 2
A in Torino has undertaken to lease a motor lorry to B in Grenoble from December 1 and to deliver it on that day in Grenoble. The lorry is held up at the frontier due to a road block unexpectedly effected by French farmers, and arrives in Grenoble on December 15. Although A is not liable for the delay, B can withhold payment until

delivery is made of the lorry, and may then deduct 15 days rent from the sum to be paid.

Non-performance wholly or partially caused by the creditor. The fact that the non-performance is caused by the creditor's act or omission has an effect on the remedies open to the creditor. This is expressed by the third paragraph of the text. It would be contrary to good faith and fair dealing for the creditor to have a remedy when responsible for the non-performance.

The most obvious situation is the so-called mora creditoris, where the creditor directly prevents performance (e.g.: access refused to a building site). But there are other cases where the creditor's behaviour has an influence on the breach and its consequences. For example, when there is an obligation to give information to the other party, and the information given is wrong or incomplete, the contract is imperfectly performed.

Illustration 3
A has contracted to design schools to be built by B in the Tripolis area, and is expecting instructions from B as to the exact location of the schools. Due to dissensions in its staff, B fails to give the instructions within the stipulated period of time, which prevents A from designing the schools. The non-performance on A's side does not give B the right to exercise any remedy, but A will have a remedy against B.

Illustration 4
The facts are the same as in Illustration 3 except that B's failure to give instructions is due to the fact that the relevant member of B's staff has been killed in an air crash on the way to Libya. Although B is not liable for the failure to instruct A, the non-performance on A's side does not give B any remedies either.

In other cases where there is also a non-performance by the debtor, the creditor may exercise the remedies for non-performance to a limited extent.

When the loss is caused both by the debtor - who has not performed - and the creditor - whose behaviour has partially caused the breach - the creditor should not have the whole range of remedies.

The creditor's contribution to the non-performance has an effect on the remedy "to the extent that the creditor caused the debtor’s non-performance". This effect may be total, that is to say that the creditor cannot exercise any remedy, or partial.

Illustration 5
A agrees to carry B's glassware from Copenhagen to Paris but subjects the packages to rough handling. This would have broken some of the glass which is fragile but not some heavy pieces of thick glass. B, however, has not packed any of the glass properly and all is ruined. B can refuse to pay the carriage charges and recover damages in respect of the fragile glass, but not in respect of the heavy glass.

The word “caused” does not carry any implication that the creditor is at fault. Even if the creditor has been unavoidably prevented from doing something which was necessary to

enable the debtor to perform, the creditor is still barred from resorting to remedies for the non-performance.

Illustration 6
A has concluded a contract with B under which B is to paint some rooms in A's house. On the day when the work is to begin A is unavoidably and unexpectedly detained somewhere, is unable to contact anyone and cannot open the house or arrange for it to be opened to allow B access. A cannot recover damages from B for non-performance.

In the situation described in this last example B could also not recover damages from A because A's non-performance of the obligation to co-operate would have been due to an impediment beyond A's control. (See III.–3:104 (Excuse due to an impediment).

B. Normal remedy for non-performance of monetary obligation

The normal remedy for non-performance of a monetary obligation will be recovery of the sum due plus interest for any delay in payment. However, damages may also be recoverable if there is any further loss.

NOTES

I. Remedies covered - the excused non-performance

1. Several legal systems use the concept of non-performance both for excused and non-excused non-performance. This is true of *kontraktsbrott* and *misligholdelse* in NORDIC (or *sopimusrikkomus* in FINNISH law, of *kohustuse rikkumine* in ESTONIAN law, of *tekortkoming* in DUTCH and BELGIAN law and of breach under CISG, see arts. 45, 61). Remedies such as termination and price reduction are available to the creditor in both situations. Thus a performance prevented by *force majeure* is treated as a non-performance. In the CZECH REPUBLIC, the concept of excused non-performance is not frequently used but exists especially in commercial legal relationships (see Ccom arts. 367 and 382).
2. Some laws follow another system. In ENGLISH and IRISH laws there is breach of contract only in the case of a non-excused non-performance. Under theses systems, however, contract liability is strict liability, and will occur in most cases of non-performance. In the rarer case where the failure to perform is excused, the creditor's remedies will be circumscribed. The most obvious case is if the contract has been discharged by frustration, when the remedies will be of a generally restitutionary nature (see Law Reform (Frustrated Contracts) Act 1943, but this Act does not apply in IRELAND; there the common law still applies. In SCOTLAND the notion of breach of contract is similar but the remedies for frustrated contracts depend upon the general law of unjustified enrichment, see *Cantiere San Rocco SA v. Clyde Shipbuilding & Engineering Co. Ltd.* 1923 SC (HL) 105. However, under all three systems a party may be excused from a particular obligation without this invalidating the rest of the contract. It appears that the outcome is that the creditor may not claim damages in respect of the portion which is impossible but may enforce the remainder, *H. R. & S. Sainsbury Ltd. v. Street* [1972] 1 WLR 834. If the failure to perform deprives the creditor of the substance of what was contracted for then the creditor may terminate (*Poussard v. Spiers and Pond* (1875-76) 1 QBD 410). It will be seen that the outcome is similar to that under the Article.

3. In GERMAN law "*Pflichtverletzung*" does not presuppose that the debtor's non-performance was attributable to the debtor's fault, and apart from damages the remedies for non-performance, including specific performance, are available even in case of an excused failure to perform. For damages the rules on fault apply, see CC § 276. In several cases, however, the liability of the debtor is strict, of which the most practical is a failure to deliver generic goods, see the list at Staudinger (*-Löwisch*), BGB [2004], § 276 nos. 141 et seq. In most other cases the debtor's fault is presumed and the burden of disproving fault will be on the debtor, see CC § 280(1) sentence 2 and § 311a(2). The rules on impossibility no longer influence the standard of liability for damages but only provide a defence for the debtor against claims for specific performance. AUSTRIAN law is basically similar, see AGBG §§ 918 ff, damages may be awarded only if the non-performing party was at fault. Similarly, PORTUGUESE CC arts. 792, 793, 795, 801 ff. The position is the same in SLOVENIAN law, see LOA § 246 in connection to § 131.

4. For certain obligations some systems will grant remedies for non-performance only if the non-performance was attributable to the debtor, and this frequently requires fault. Thus in BELGIAN, DUTCH, FRENCH, AND LUXEMBOURG law there is non-performance of an *obligation de moyens* only if there has been fault. The creditor must prove that the debtor did not act with the care required. However, in case of an *obligation de résultat*, the creditor must only prove that the result which the debtor undertook to provide has not been achieved. In either case the debtor is excused by *force majeure* which extinguishes the obligation. According to the SPANISH CC art. 1101, remedies for breach of contract in general do not depend on the debtor's fault. The essential wording is *contravención a la obligación.* However, the action for damages depends on fault, pursuant to CC art. 1105. But other remedies, such as rescission for breach (CC art. 1124) or reduction of price (CC art. 1486) or withholding of performance (CC art. 1467) are independent of fault, and should be granted in case the expectation of the creditor be frustrated (*Carrasco*, Comentarios al Código Civil y Compilaciones Forales, XV-1, 1989, 392 ff). In ITALIAN law CC art. 1218 provides for the debtor's liability without fault; scholars and case law, however, have recognized the difference between *obligation de moyens* and *obligation de résultat* for certain obligations (see *Mengoni*, Obbligazioni "di risultato" e "obbligazioni di mezzi" (studio critico) in Riv. Dir. Comm., 1954, I, 185 ff).

5. Under POLISH law the remedies are not available if the debtor proves that the non-performance or improper performance of the obligation was a result of circumstances for which the debtor is not liable (CC art. 471). Failing any stipulation to the contrary, the debtor is liable for not observing due diligence (CC art. 472 and art. 355), but the scope of circumstances for which the debtor will be liable can be determined by the parties in the contract (CC art. 473 § 1). The relevance of the distinction between "*obligation de moyens"* and "*obligation de résultat"* under Polish law is controversial. It seems that – under Polish law – the type of performance (which can be described either by "*moyens*" or by "*résultat")* does not influence the principles on the liability of the debtor, who can still prove the non-imputability of the non-performance. However, *de facto* the type of performance may have an influence on the allocation of the burden of proof as far as the non-performance is concerned. (For the controversies regarding this distinction under Polish law – see *T. Dybowski*, System Prawa Cywilnego (t. III, part 1), Ossolineum 1981, pp. 81-85; *T. Pajor,* Odpowiedzialność dłużnika za niewykonanie zobowiązania, Warszawa 1982, pp. 70-92).

6. In SLOVAK law the concept of non-performance is used both for excused and non-excused non-performance. The debtor who fails to perform the obligation duly and properly is considered to be in default. If the debtor fails to perform even within an

additional adequate period granted by the creditor, the creditor is be entitled to withdraw from the agreement. As for a default with performance of a pecuniary debt, the creditor is entitled to ask the debtor to pay also default interest unless the CC stipulates that the debtor must pay a default charge. As for a default with performance of a thing, the debtor is liable for its loss, impairment or destruction unless this damage would have occurred even otherwise (CC § 517). The creditor's right to damages for loss caused by the debtor's default is not affected (CC § 519). Within commercial relationships the rule is that whoever breaches a contractual obligation is liable for compensation for the damage thus caused to another party, unless it is proved that the breach was caused by circumstances excluding the debtor's liability (Ccom art. 373).

II. Non-performance caused by the creditor

7. There is agreement among the legal systems that a non-performance which is due solely to the other party's wrongful prevention does not give the latter any remedy. In most of the systems the party who has prevented performance will be the non-performing party against whom the remedies may be exercised. However, in BELGIAN, DUTCH, GERMAN, GREEK and NORDIC law it is not generally considered to be a *tekortkoming*, *Vertragsverletzung*, (DANISH) *Misligholdelse* or (SWEDISH) *Kontraktsbrott* to prevent performance by the other party. It will depend upon whether the acceptance of the performance is an obligation of the creditor or whether it is only a kind of onus (*Obliegenheit*). Such an onus only protects the interest of the debtor in the reward and gives the debtor a defence against the creditor's remedies for non-performance; this last part is completely in line with III.–3:101(3). However, the party who has prevented performance by the other party remains bound to perform itself. In ITALIAN law CC arts. 1206 et seq. regulate the *mora creditoris*, which applies to the creditor who refuses performance without a legitimate reason or fails to do what is necessary to enable the debtor to perform (see *Veneziano*, in *Antoniolli – Veneziano*, Principles of European Contract Law and Italian Law – A Commentary, 360 ff). Similarly, PORTUGUESE CC art. 801(2) regulates the matter, although there is controversy among authors and court decisions as to the measure of damages.

8. Under SLOVAK law the debtor is not in default if the creditor fails to accept the debtor's duly and properly tendered performance or fails to grant the debtor assistance necessary for performance. In such cases, the creditor is liable to compensate the debtor for all costs that arose due to this default. Furthermore, the risk of an accidental destruction of the thing passes to the creditor. The debtor is also entitled to damages from the creditor for other losses caused by the default if the creditor can be charged with a fault (CC §§ 520 and 522).

9. See generally *Mengoni*, Contractual responsibility 1072; *Zweigert and Kötz*, Chapter 36; *Treitel*, Remedies *passim*.

III.–3:102: Cumulation of remedies

Remedies which are not incompatible may be cumulated. In particular, a creditor is not deprived of the right to damages by resorting to any other remedy.

COMMENTS

A. Cumulation of remedies

Remedies which are not incompatible are cumulative. A party entitled to withhold performance of a reciprocal obligation and to terminate the contractual relationship may first withhold and then terminate. A party who pursues a remedy other than damages is not precluded from claiming damages. This applies in the exceptional case where damages can be claimed in addition to interest under III.–3:101 (Remedies available) paragraph (4). A party who terminates for fundamental non-performance may also claim damages.

B. Incompatible remedies

It is obvious that a party cannot at the same time pursue two or more remedies which are incompatible with each other. So a party cannot at the same time terminate an obligation and claim specific performance. A creditor who has accepted a non-conforming tender, the value of which is less than that of a conforming tender, and who has obtained a reduction of the price corresponding to the decrease in value, cannot also claim compensation for that same decrease in value as damages.

When two remedies are incompatible with each other, the creditor will often have to choose between them, see Comment C below.

C. Change of remedy

However, a creditor who has chosen one remedy is not precluded from shifting to another later, even though the later remedy is incompatible with the first elected. If, after having claimed specific performance, the creditor learns that the debtor has not performed or is not likely to do so within a reasonable time, the creditor may terminate for fundamental non-performance. On the other hand, an election of a remedy is often definite and will preclude later elections of incompatible remedies. A party who has terminated a contractual relationship cannot later have a change of mind and claim specific performance of the primary obligation, because by giving notice of termination the creditor may have caused the debtor to act in reliance on the termination. If the debtor has adapted to a claim for specific performance and taken measures to perform within a reasonable time, the creditor cannot change position and terminate for fundamental non-performance. This applies when the defaulting debtor has received a notice fixing an additional time for performance. The rule is in accordance with the widely accepted principle that when a party has made a declaration of intention which has caused the other party to act in reliance on the declaration the party making it will not be permitted to act inconsistently with it. This follows from the general principle of exercising rights and remedies in accordance with good faith and fair dealing.

NOTES

1. The rule in the Article is in accordance with CISG art. 45 (2) and with the laws of the Member States. GERMANY switched to the general European standard in 2002, when the legislator i.a. introduced the new CC § 325, but the relationship between several remedies remains a weak point of the German system of remedies for non-performance, which suffers mainly from the idea of a general prevalence of the claim for specific performance. Similarly also under SLOVAK law the creditor's right to compensation for loss caused by the debtor's default is not affected by termination; however, in case of default with performance of a pecuniary debt, damages can be claimed only if the loss is not covered by the default interest or default charge, CC § 519. The same rule is applicable in CZECH law: although not precisely expressed in the CC, the principle of cumulation of remedies is widely recognized. The right of the creditor to compensation for damage caused by the debtor's default shall not be affected by termination but compensation may only be claimed if the damages are not covered by interest or by any penalty for default (see CC § 510, § 519 as commented by *Jehlička, Švestka, Škárová*, pp. 658-659; Ccom art. 367). In AUSTRIAN law also termination of the contract does not prevent a claim for damages for non-performance against a party at fault, see e.g. CC § 921, if additional damages occurred and were caused by the non-performing party's acts or omissions. The same applies in SLOVENIAN law, see LOA § 103. The DUTCH CC art. 6:277 expressly provides that a creditor who has terminated a synallagmatic contract may ask for damages under the contract (expectation interest). Under GREEK CC art. 387 the creditor who has terminated a synallagmatic contract may ask for equitable damages (AP 33/1980, NoB 28 (1980) 1145-1146, 1417/1999 HellDni 41 (2000) 767; CA Athens 3906/2002 Hell Dni 44 (2003) 224. It is similar under POLISH law, where CC art. 494 provides that the party terminating a synallagmatic contract may claim damages resulting from non-performance. According to the SPANISH CC art. 1124, the creditor may ask for compensation, for specific performance plus compensation and for rescission plus compensation up to the amount of the expected value of the contract. In ITALIAN law the CC art. 1453(1) provides for the cumulation of remedies with regard to contracts with mutual counter-performance offering the aggrieved party the choice between specific performance and termination and at the same time allowing damages as an addition to the chosen remedy. For the similar outcome under ESTONIAN law see LOA § 115(1) and for SWEDEN, see e.g. *Hellner, Hager and Persson*, 146. The principle of cumulation of remedies which are not incompatible applies also under SCOTTISH law, *Gloag and Henderson* 10.01.

2. In FRANCE and BELGIUM, CC art. 1184(2) contains the same principle. The creditor can elect to pursue specific performance, if it is possible, or termination of the contract. In either case, the creditor is not deprived of the right to damages. However, this solution rests on a paradox, as noted by a legal author (See Philippe Rémy: "*how is it that the creditor may pursue the retroactive termination of the contract for non-performance and at the same time claim the resultant damages*"). In accordance with the principle of full reparation, compensation covers suffered harm (*damnum emergens*) and lost profits (*lucrum cessans*) (CC art. 1149). This serves the creditor's interest in being put in as good a position as the creditor would have been in had the contract been performed. It follows that only "positive interest" is envisaged and (practically) never "negative interest". Some scholars argue that the distinction between positive interest and negative interest, which is inspired by Jhering and widely admitted in other legal systems, should be introduced in French law (See Projet de Cadre Commun de Référence, Terminologie contractuelle commune, AHC/SLC).

According to Prof. *Viney*, recent case law may have paved the way for such introduction (Cass. Com., 26 nov. 2003: in a case of termination of a contract, the Court of cassation denied a party to a contract compensation for loss of opportunity to have the benefit of one's bargain under the contract; however, the Court left open the issue of compensation of loss of opportunity to conclude a contract with a third person, had the contract not been concluded) and thus resolve the paradox which arises out of cumulative remedies (*supra*, in particular in the case of damages resulting from termination of a contract). Lastly, as recently suggested by scholars, legal terminology should reflect the new functions assigned to damages, (See Projet de Cadre Commun de Référence, Terminologie contractuelle commune, AHC/SLC). While the terms "dommages et intérêts" (CC art. 1149) et "dommages-intérêts" (CC art. 1152) are generally considered interchangeable in FRENCH law, the terms "compensatory damages", "exemplary/punitive damages" or "restitutionary damages" should be used for purposes of legal security.

3. See generally *Treitel*, Remedies § 288.

III.–3:103: Notice fixing additional period for performance

(1) In any case of non-performance of an obligation the creditor may by notice to the debtor allow an additional period of time for performance.

(2) During the additional period the creditor may withhold performance of the creditor's reciprocal obligations and may claim damages, but may not resort to any other remedy.

(3) If the creditor receives notice from the debtor that the debtor will not perform within that period, or if upon expiry of that period due performance has not been made, the creditor may resort to any available remedy.

COMMENTS

Paragraph (1) of this Article is not necessary by itself. Even without the paragraph a creditor could by notice allow the debtor an additional period of time for performance. However the paragraph sets the scene for the rest of the Article.

The main effect of paragraph (2) is that if the creditor has by notice given the debtor an additional period of time for performance, the creditor may not change course without warning and exercise remedies inconsistent with the allowance of extra time – such as enforcing specific performance or terminating the contractual relationship. This could be regarded as a specific example of the requirement to exercise remedies in accordance with good faith and fair dealing. The creditor may, however, withhold performance of reciprocal obligations or even claim damages for any loss already suffered by the delay because these remedies are not inconsistent with the allowance of additional time.

> *Illustration 1*
> A company leases a new car to B for 2 years, and B collects it from the company's premises. The car breaks down and B has to have it towed back to the company's premises. The defect in the car amounts to a fundamental non-performance but B tells the company that the car will be accepted if it is fixed within 3 days. B may refuse to pay the rental and may claim damages for any inconvenience in not having the car while it is repaired and for the cost of the tow, but may not demand delivery of another car or terminate for fundamental non-performance unless the car is not repaired and redelivered within the 3 days.

Paragraph (3) makes it clear that the creditor will not lose remedies (e.g. by the lapse of time for the exercise of the remedy of enforcing specific performance) by allowing additional time.

A later Article provides that, where there has been a delay in performance, failure to comply with a notice allowing additional time for performance may give the creditor the right to terminate the contractual relationship in whole or in part. Quite apart from that, however, the notice procedure may be useful. The creditor may not wish to terminate immediately even where the delay or other non-performance is fundamental but may be prepared to accept a proper performance by the debtor provided it is rendered within a certain period. The procedure set out in the Article permits the creditor to give the debtor a final chance to perform (or to correct a defective performance), without the creditor losing the right to seek specific performance or to terminate if by the end of the period of notice the debtor has still not performed in accordance with the contract. At the same time, however, the rule that the creditor may not seek specific performance or terminate during the period of notice protects

the debtor from a sudden change of mind by the creditor. The debtor may have relied on having the period set in the notice in which to perform.

The notice procedure may also be used when a performance is prompt but defective in a way which is not fundamental. In such a case the creditor will not have the right to terminate and serving a notice fixing an additional time for performance will not confer that right. Nonetheless, serving a notice may still perform the useful functions of informing the debtor that the creditor still wants proper performance and of giving the debtor a last chance before the creditor seeks specific performance. In these respects the notice serves the same function as a *mise en demeure* in French law or *Mahnung* in German law.

NOTES

1. The case of the creditor who indicates a willingness to accept performance or the cure of a defective performance but then has a change of mind, gives rise to little problem in systems where a court order is traditionally needed for termination. This was formerly the case in FRANCE and BELGIUM (CC art. 1184(3)); however, French courts now admit, in certain circumstances, unilateral termination). Instead of terminating the contract at once the court can simply grant a further delay for performance *Terré/Simler/Lequette,* Les obligations[9], 641, no. 652.
2. Systems which allow termination by simple notice without prior warning have often developed rules to prevent a sudden change of mind by the creditor. In ENGLAND e.g. there is a rule that if the creditor has "waived" the right to terminate for the time being the waiver can be withdrawn only by giving reasonable notice: *Charles Rickards Ltd. v. Oppenhaim* [1950] 1 KB 616. In SPAIN, creditors cannot change their mind, and seek termination, when they have previously granted the debtor a new opportunity to comply: the prohibition of *venire contra factum proprium* (CC art. 7) applies. In the DUTCH CC there is no specific provision against the change of mind of the creditor envisaged in this Article, but interpretation of the creditor's waiver will mostly produce the same effects.
3. Many other systems also recognise that creditors should not be allowed to terminate the contractual relationship during the period in which they indicated that they would still accept performance: e.g. AUSTRIAN law, e.g. OGH 21 December 1987, SZ 60/287 (regarding CC § 918; the creditor cannot terminate without setting an additional period after the due date, within which the debtor can perform); 12 March 1991, JBI 1992, 318 (also regarding CC § 918; the creditor can terminate without granting an additional period if it is clear that the debtor will not perform); GERMAN law, see MünchKomm (-*Ernst*), BGB[5], § 323 no. 148; FINNISH and SWEDISH SGAs, §§ 25(3), 54(3) and 55(3); GREEK law (*Michaelides Nouaros* Erm.AK vol. II/1 art. 383 nos. 17-18 (1949) *Stathopoulos* in *Georgiadis & Stathopoulos* arts. 383-385 no. 6; in SLOVENIAN law (LOA §§ 104(2) and 105(2). The creditor may also be barred from seeking performance *in natura*, as, for example, in ITALIAN law (CC art. 1454(3) which provides that if the time elapses without performance having been made, the contract is dissolved by operation of law) but contra for GERMAN law, see MünchKomm (-*Ernst*), BGB[5], § 323 no. 161. It is often recognised that the creditor may resort to termination immediately, however, if the other party indicates that there will be no performance within the time allowed (GREEK law, *ibid*., no. 18; GERMAN law: CC § 323(2) no. 1 and (4). In POLISH law, in case of delay, the creditor cannot terminate at once (except a *lex commissoria*-clause and *Fixgeschäft* – CC art. 492), but

has to set an additional period (CC art. 491). Setting an additional period can be cumulated with a claim for damages caused by delay, but – after setting the additional period –termination is not possible until the expiry of the additional period. A similar solution is seen in the PORTUGUSE CC art. 808. In ENGLAND and SCOTLAND the buyer of materially defective goods who has accepted an offer of repair by the seller does not thereby lose the right to reject the goods but must allow the seller to complete the attempt to repair: see *J. & H. Ritchie Ltd. v. Lloyd Ltd.* 2007 SC (HL) 89, applying Sale of Goods Act 1979 s. 35(6) (a). Consumer buyers have a right to repair or replacement of defective goods unless this is impossible or disproportionate; while repair or replacement is being carried out, the buyer's right to terminate is suspended until the seller has had a reasonable opportunity to complete: Sale of Goods Act 1979 ss. 48A, 48C. Under ESTONIAN law, similarly to the Article, LOA § 114(3)-(4) provides that during the additional period the creditor may withhold performance, claim damages caused by the non-performance or payment of a penalty for late payment, while other remedies (incl. damages in lieu of performance or termination of the contractual relationship) are available only after receipt of a notice that the debtor will not perform an obligation or if the additional period expires without proper performance by the debtor. Unless the non-performance is fundamental, fixing an additional period is a necessary precondition to termination or a claim for damages in lieu of performance (LOA §§ 115(2), 116(4)). Similarly in CZECH law, in the case of mora debitoris, the creditor cannot terminate without a "reasonable extension of time-limit granted" for performance (see CC §§ 517.1 and 656; Ccom art. 350). Some exceptions to this principle exist, especially in commercial law, if the non-performance constitutes a "fundamental breach of obligation", the creditor may terminate after notice to debtor (Ccom art. 353). Also in SLOVAK law; according to CC § 517(1) if the debtor fails to perform even within an additional adequate period granted by the creditor, the creditor is entitled to withdraw from the agreement. In SLOVAKIA setting an additional adequate period can be cumulated with a claim for damages caused by delay, but – after setting the additional adequate period – termination is not possible until the expiry of the additional period.

4. Under the HUNGARIAN CC § 316(1) if a creditor accepts performance in the knowledge that it is defective, the creditor can later raise a claim on the basis of the defective performance only if the creditor has retained the rights to that effect. Under CC § 300(1) a creditor is entitled to demand performance or, if performance no longer serves the creditor's interest, to withdraw from the contract irrespective of whether or not the debtor has offered an excuse for the default. Under CC § 316(2) it is not necessary to prove the cessation of an interest in performance if, according to the agreement of the parties or due to the imminent purpose of the service, the obligation had to be performed at a definite time and no other, or if the creditor has stipulated a reasonable deadline for subsequent performance and this period too elapsed without result.

5. A rule preventing the creditor suddenly changing direction may be inferred from ULIS art. 44(2); it is explicit in CISG arts. 47(2) and 63(2).

III.–3:104: Excuse due to an impediment

(1) A debtor's non-performance of an obligation is excused if it is due to an impediment beyond the debtor's control and if the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences.

(2) Where the obligation arose out of a contract or other juridical act, non-performance is not excused if the debtor could reasonably be expected to have taken the impediment into account at the time when the obligation was incurred.

(3) Where the excusing impediment is only temporary the excuse has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such.

(4) Where the excusing impediment is permanent the obligation is extinguished. Any reciprocal obligation is also extinguished. In the case of contractual obligations any restitutionary effects of extinction are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.

(5) The debtor has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the creditor within a reasonable time after the debtor knew or could reasonably be expected to have known of these circumstances. The creditor is entitled to damages for any loss resulting from the non-receipt of such notice.

COMMENTS

A. General

This Article governs the consequences when an event which is not the fault or responsibility of the debtor prevents the debtor from performing the obligation. It reflects the results that, broadly speaking, are reached in the laws of all the Member States though in some a different conceptual structure is employed. Paragraph (5) does not have an equivalent in many of the laws but is clearly commercially sensible.

The rules in the Article are not mandatory. The parties to a contract may modify the allocation of the risk of impossibility of performance, either in general or in relation to a particular impediment; usages (especially in carriage by sea) may have the same effect. Also, in accordance with the rule that specific provisions prevail over more general provisions, special rules on the passing of risk in particular situations (such as sale of goods) may modify the effects of this Article.

B. Scope

The excuse may apply to any obligation, including obligations to pay money. While insolvency would not normally be an impediment within the meaning of the text, as it is not "beyond the control" of the debtor, a government ban on transferring the sum due might be.

The term "impediment", covers every sort of event (natural occurrences, restraints of princes, acts of third parties).

It is conceivable that an impediment existed, without the parties knowing it, at the time when a contract was concluded. For example, the parties might sign a charter of a ship which,

unknown to them, has just sunk. This situation is not covered by the Article but the contract might be avoidable under the rules on mistake.

There is less need for the doctrine of excused non-performance in the case of an obligation which is merely to make reasonable efforts to do something *("obligation de moyens")*. There will be cases where the debtor makes all reasonable efforts but some unforeseen impediment beyond the debtor's control prevents the result being achieved. In such a case there will not be excused non-performance; there will simply be no non-performance at all. There may also, however, be cases where an impediment prevents the debtor from making reasonable efforts and in such a case the Article may apply.

C. The circumstances of the impediment

The requirements laid down for the operation of the Article are analogous to the traditional requirements for *force majeure*. They are necessarily in general terms, given the great variety of fact situations to which they must apply. It is for the party who invokes the Article to show that the requirements are satisfied.

Outside the debtor's control. First, the obstacle must be something outside the debtor's sphere of control. The risk of the debtor's own activities must be borne by the debtor. Thus the breakdown of a machine under the debtor's control, even if unforeseeable and unpreventable, cannot be an impediment within the article and this avoids investigation of whether the breakdown was really unforeseeable and the consequences unpreventable. The same is true of the actions of persons for whom the debtor is responsible, and particularly the acts of the people the debtor puts in charge of the performance. The debtor cannot invoke the default of a subcontractor unless this was outside the debtor's control - for instance because there was no other subcontractor who could have been employed to do the work; and the impediment must also be outside the subcontractor's sphere of control.

> *Illustration 1*
> In consequence of an unexpected strike in the nationalised company which distributes natural gas, a chinaware manufacturer which heats its furnaces only with gas is obliged to interrupt its production. The manufacturer is not liable toward its own clients, if the other requirements of the Article are fulfilled. The cause of non-performance is external.

> *Illustration 2*
> The employees of a company unforeseeably go on strike in order to force the management to buy foreign machines which will improve the working conditions. For the time being it is actually not possible to obtain these machines. The company cannot claim as against its customers that the strike is an excuse, as the event is not beyond its control.

There will be no excuse if an unforeseeable event impedes performance of the obligation when the event would not have affected the obligation if the debtor had not been late in performing.

> *Illustration 3*
> A French bank, A, is instructed by company B to transfer a sum of money to a bank in country X by 15 July. It has not carried out the instruction by 18 July when all

transfers of money between France and X are suspended. Bank A cannot claim to be excused from its obligation to B; the transfer could have been made if it had been done in the time allowed under the contract.

Could not have been taken into account. In the case of an obligation incurred by contract or other juridical act the impediment must also be one that could not have been taken into account by the debtor at the time the obligation was incurred. If it could have been, one may say that the debtor took the risk or was at fault in not having foreseen it. These notions are not applicable in the case of an obligation which arises by operation of law. This is why paragraph (2) is confined to obligations which arise from contracts or other juridical acts.

However, it may be relevant whether the debtor could have taken into consideration not just the event itself but the date or period of its occurrence. A price control for some period may be foreseeable, but it could be an excuse if the period for which it is kept in force was not foreseeable. Equally it is stated that the test is whether the debtor could "reasonably" have been expected to take the impediment into account: that is to say, whether a normal person, placed in the same situation, could have foreseen it without either undue optimism or undue pessimism. Thus in a particular area cyclones may be foreseeable at certain times of year, but could not reasonably be expected to be foreseen at a time of year when they do not normally occur.

Insurmountable impediment. Reasonableness also qualifies the requirement that the impediment must be insurmountable or irresistible. It must be emphasised that both conditions - that the debtor could not have avoided it and could not have overcome it - must be fulfilled before an excuse can operate.

Whether an event could have been avoided or its consequences overcome depends on the facts. In an earthquake zone the effects of earthquakes can be overcome by special construction techniques, though it would be different in the case of a quake of much greater force than usual.

One cannot expect the debtor to take precautions out of proportion to the risk (e. g. the building of a virtual fortress) nor to adopt illegal means (e.g. the smuggling of funds to avoid a ban on their transfer) in order to avoid the risk.

D. Effects

A temporary impediment to performance which fulfils the requirements just set out relieves the debtor from liability for as long as it lasts. This means that the creditor cannot obtain an order for specific performance and cannot recover damages for the non-performance. The creditor can, however, withhold performance of reciprocal obligations or reduce the price payable (if any) or, if the impediment leads to a fundamental non-performance, terminate the contractual relationship.

Illustration 4
If A has leased a warehouse to B and subsequently it is partially destroyed by fire, causing a temporary impediment, B may terminate the lease if occupation of the whole of the premises was an essential part of the contract. If, on the other hand, B does not

give notice of termination, B cannot obtain damages for loss of occupation but the rent will be reduced proportionately.

A temporary impediment means not only the circumstances which cause the obstacle but also the consequences which follow; these may last longer than the circumstances themselves. The excuse covers the whole period during which the debtor is unable to perform.

Illustration 5
The warehouse containing a pharmaceutical manufacturer's raw materials is unforeseeably flooded and the raw materials are rendered unusable. The delays in delivering to clients which will be excused include not only the period of the flood itself but also the time necessary for the manufacturer to obtain new supplies.

It may be, however, that late performance will be of no use to the creditor. Therefore the creditor is given the right to terminate provided that the delay is itself fundamental.

Illustration 6
An impresario in Hamburg has engaged a famous English tenor to sing at the Hamburg Opera from 1 to 31 October. The singer catches flu and has to retire to bed (which would constitute an impediment within paragraph (1)); he tells the impresario that he will be unable to come to Hamburg before 10 October. Assuming that the tenor's presence for the whole month is an essential part of the contract, the impresario may terminate for fundamental non-performance. If this is not done, the obligations on both sides remain in force for the remaining period but the tenor's fees will be reduced proportionately.

Equally in the case of a temporary excuse, the creditor can use the procedure of serving a notice fixing an additional period of time for performance with a right to terminate if there is no performance within that period.

If the excusing impediment is permanent the obligation is extinguished (paragraph (4)) The main reason for making extinction automatic in this situation, rather than leaving the matter to the rules on termination by notice for non-performance, is that it would be unnecessary and unrealistic to require the creditor to terminate by notice. It could also be pernicious. Notice of termination for non-performance must be given within a reasonable time. If it is not, the creditor loses the right to terminate. However, this would result in an unfortunate situation in the case of a permanent excusing impediment. The obligation could never be performed and could never be terminated. It would continue to exist in a sort of ghostly state. The cleaner solution is to provide for automatic termination both of the obligation in question and any reciprocal obligation. Any restitutionary effects are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations. Again, it should be noted that these rules will be subject to any specific rules on the passing of risk. There may be cases where an obligation (e.g. to transfer the ownership of goods) is extinguished but where the reciprocal obligation (e.g. to pay the price) still has to be performed because the risk of destruction has passed to the buyer.

Whether an impediment is temporary or permanent must be assessed in relation to the nature of the obligation. There are cases where late performance would manifestly not be performance at all, whatever the attitude of the creditor to delay. In such cases an impediment

may permanently prevent performance of the obligation even if the cause of the impediment is not itself permanent.

Illustration 7
The tenor in the previous illustration is, two days before the first night of the opera, injured in a car crash and confined to a hospital bed in plaster for at least six weeks. He notifies the impresario immediately. There is a permanent impediment to performance in relation to this obligation (even although his debilitated condition is hopefully not permanent).

If the debtor's obligation is extinguished it follows that any reciprocal obligation of the creditor must also be extinguished. In cases where one of the debtor's obligations is extinguished but the creditor has to pay a global price for performance of all of them the remedy of price reduction may come into play.

Illustration 8
A company is under an obligation to a landowner to plant trees on three islands. One of the islands disappears under the sea as a result of a geological event. The landowner had a reciprocal obligation to pay for the work. If the obligation was to pay a separate sum for the planting on each island then the obligation to pay for the planting on the sunken island is extinguished entirely. If the obligation was to pay a lump sum for the whole work but the landowner is willing to accept performance in relation to the two surviving islands then the landowner can reduce the price under III.–3:601 (Right to reduce price).

It may happen that the extinguished obligation of the debtor is just one of several obligations under a contract and that performance of the remaining obligations has become valueless to the creditor as a result of the extinction of the one obligation. In such a case the creditor will have the option of terminating the whole contractual relationship for fundamental non-performance.

Another reason for providing for the extinction of the obligation, rather than just allowing it to continue in a sort of limbo, is that extinction attracts the provisions of chapter 8 on the restitutionary effects of prematurely ended obligations At the time when an obligation is affected by a permanent impediment which excuses further performance completely and for ever, one party may have supplied something to the other. The only fair solution may be to require restitution of the benefit or payment of its value. This can most easily and appropriately be achieved by applying the provisions of Chapter 8.

E. Notice by debtor

Paragraph (4) of the Article is an application of the general duty of good faith and fair dealing. The debtor has a duty to warn the creditor, within a reasonable time, of the occurrence of the obstacle and of its consequences for the obligation to perform. The purpose is to allow the creditor the chance to take steps to avoid the consequences of non-performance. It is also necessary in order for the creditor to be able to exercise any right to terminate when performance is partial or late.

Illustration 9
In the example given in illustration 5, the manufacturer must notify its customers of the loss of the raw materials and also of the time it will take to replace them and the probable date for resumption of deliveries.

The reasonable time may be a short one: circumstances may even require immediate notification. The time starts to run as soon as the impediment and its consequences for the performance of the obligation become known (see above); or from when the debtor could reasonably be expected to have known. Good faith may even require two successive notices, if for example the debtor cannot immediately tell what the consequences of the impediment will be.

The sanction for failing to give this notice is liability for the extra loss suffered by the creditor as the result of not being informed; normally the creditor will recover damages.

Illustration 10
In the example given in Illustration 6, if the tenor does not warn the impresario immediately of his unavailability, the latter may recover compensation for being deprived of the chance to obtain a replacement, so reducing his loss.

NOTES

I. Force majeure and impossibility

1. Paragraph (1) is modelled on CISG art. 79(1), which has been followed in the FINNISH and SWEDISH SGAs §§ 27 and 40 and ESTONIAN LOA § 103. See also UNIDROIT art. 7.1.7.
2. Even if all legal systems now admit that impossibility of performance should be recognised as an excuse, the way the excuse is given effect varies considerably.
3. Some legal systems rest on the theory of *force majeure* laid down in arts. 1147 and 1148 of the FRENCH, BELGIAN and LUXEMBOURG CCs, on which has developed detailed case law on the conditions under which the debtor will be excused.
4. In FRANCE these conditions are strict. Performance must be impossible and this must be due to circumstances which were unforeseeable at the time when the contract was made and which are outside the control of the debtor (*cause étrangère*). However, some recent cases tend to put aside the condition of unforeseeability. This condition has been criticised by some authors who doubt that the two Assemblée plénière cases of the Cour de cassation (14 April 2006, D. 2006.1577, note *P. Jourdain*) should be interpreted as imposing systematically this condition (*Viney*, Conditions de la responsabilité, no. 396). In SPAIN there exist two rules with different scopes. According to CC art. 1182, the duty to deliver a specific asset becomes extinct where the thing is lost due to force majeure. A more general rule is framed in CC art. 1105, which applies outside the field of the extinction of obligations. Pursuant to this general rule, a debtor is not liable for damages if the performance is prevented by unforeseeable events as well as by events outside the debtor's control.
5. A related doctrine of impossibility is found in AUSTRIAN, ITALIAN, SLOVENIAN law and PORTUGUESE law; see AUSTRIAN CC § 1447, CC § 275; Italian CC arts. 1218 and 1256; Slovenian LOA § 116; and Portuguese CC art. 790. For AUSTRIA see also CC § 920 which sets out the remedies for an impediment (impossibility) the

debtor can be held liable for: The remedy is withdrawal and – in cases of fault – damages. The GERMAN doctrine of impossibility, see CC § 275, since 2002 no longer provides the debtor with a general excuse but only excludes the claim for specific performance. The question, whether a certain impediment is relevant in the field of damages, is answered by the fault principle by way of exceptions only, see CC § 276.

6. Some laws take a more flexible approach. CISG art. 79; the FINNISH and SWEDISH SGAs §§ 27, 40 and 57; and DANISH SGA § 24, which is held to embody a general principle of contract law, include impediments which must be equated with impossibility: see Schlechtriem and Schwenzer (-*Schwenzer*), CISG[4], art. 79 no. 4; *Honnold* 542; *Ramberg*, Köplagen 346 f; and *Gomard*, Obligationsret II 161. In DANISH law this strict liability only applies to performances of a generic nature. In other cases fault is required. In DANISH law this strict liability only applies to goods and other performances of a generic nature. In other cases fault is required. DUTCH and GREEK law will also excuse the debtor in cases other than absolute impossibility, see respectively CC arts. 6:74 and 6:75, Greek CC arts. 336 and 380. Traces of a more flexible attitude are also to be found in recent BELGIAN case law, see Trib. Comm. de Bruxelles 9 March 1981, JCB/BRH 1982 I 182; compare. Cass. 13 April 1956, Arr. Cass. 670, R.C.J.B., 1957, 85, obs. *Heenen*. See *Kruithof*, Hommage Dekkers 281. Similarly, CZECH law discharges the debtor if the performance becomes impossible (see CC § 575.1). If the debtor is found responsible for this objective impossibility of performance the debtor can be obliged to pay damages (see Jehlička, Švestka, Škárová a kol. p. 742. Similarly, in the absence of any agreement between the parties or stipulation by law, under the default rule for existing obligations in ESTONIAN law (LOA § 103) the non-performance of the debtor is excused if it is caused by circumstances which are beyond the control of the debtor and which, at the time the contract was entered into or the non-contractual obligation arose, the debtor could not reasonably have been expected to take into account, avoid or overcome (*force majeure*).

7. POLISH law does not have any provision referring to *force majeure* and its importance for the imputability of non-performance. Generally, the debtor has to prove that the non-performance is a result of circumstances for which the debtor is not liable (CC art. 471). The debtor may invoke a *cause étrangère*, which became the source of non-performance, and such a proof will excuse the debtor. Normally – failing any stipulation to the contrary – the debtor is liable only for negligence (not observing due diligence – CC art. 472) and the negligence of entrustees (CC art. 474), Proving an occurrence of *cause étrangère* or *force majeure* will excuse the debtor, since the occurrence of *cause étrangère* or *force majeure* is not connected to any negligence of the debtor nor of the persons entrusted by the debtor with the performance.

8. However, a party may accept liability for a broader set of circumstances, including not only negligence, but also other potential causes of non-performance (CC art. 473 § 1). It may be stipulated, that the debtor will be liable for any non-performance, except non-performance caused by strictly defined circumstances (like for example *force majeure, fait d'un tiers* or *fait du créancier*) – see Supreme Court's judgments of 11 January 2001 (SN 11 January 2001, IV CKN 150/00, OSNC 2001, No 10, text 153) and of 26 July 2001 (SN 26 July 2001, II CKN 1269/00, OSP 2002, No 9, text 121). It can be agreed, that the debtor will be liable for any sort of non-performance, independent of its source. This kind of liability would be absolute liability; including the risk of any *causes étrangères* (compare Supreme Court's judgment of 29 November 2002 – SN 29 November 2002, IV CKN 1553/00).

9. Several legal systems, and notably the AUSTRIAN, DUTCH, ESTONIAN, GERMAN, GREEK, ITALIAN, PORTUGUESE, SLOVENIAN and SPANISH have, in addition to the rules on impossibility or *force majeure*, accepted that changed circumstances may excuse the debtor under restricted circumstances.

10. In ENGLISH and IRISH law a party is normally obliged to fulfil obligations and will be liable in damages for failure to perform. However, a debtor is sometimes excused where performance has become impossible without fault, e.g. because the subject matter of the contract has been destroyed. If the impossibility occurred after the contract was made, and it is impossible to perform the contract as a whole, the debtor may be excused under the doctrine of frustration, see *Taylor v. Caldwell* (1863) 3 B & S 826, 122 ER 309. The results of frustration are similar to those under the Article, in that both parties are discharged automatically. SCOTTISH law is broadly similar.

11. SLOVAK law does not have any provision referring to *force majeure* and its importance for liability for non-performance. However according to CC § 575(1) and (2) if the performance becomes impossible, the debtor's obligation to perform is extinguished. The performance is not regarded as impossible if it can be realised even under aggravated circumstances, with higher costs or after the agreed date. According to the SLOVAK CC § 577 the debtor must inform the creditor without undue delay after learning about the facts which make the performance impossible; otherwise the debtor is liable for damages for loss caused to the creditor by the lack of timely information about the impossibility. The right to a reversal of unjustified enrichment is not affected by this rule. The special regulation for commercial relationships provides that the performance of an obligation is deemed unattainable if legal regulations with an unlimited time validity passed after the conclusion of the contract prohibit what the debtor is bound to do under the contract, or require a licence for it which the debtor cannot obtain (Ccom art. 352(2)). The debtor, whose obligation was extinguished due to the impossibility of performance, is obliged to pay damages for loss thereby caused to the creditor, unless the impossibility of performance was caused by circumstances excluding responsibility (i.e. by a hindrance which occurs independently of the debtor’s will and which prevents the debtor from performing the obligation, if it cannot reasonably be assumed that the debtor could have prevented or overcome such a hindrance or its effects, or anticipated it at the inception of the obligation) (Ccom arts. 353 and 374).

II. Effect of impediment

12. CISG art. 79(3) is equivalent to the first sentence of paragraph (3). CISG does not address the question of termination but writers support the rule laid down in the second sentence of paragraph (3), see Schlechtriem and Schwenzer (*-Schwenzer*), CISG[4], art. 79 no. 42. It is probably the rule in all legal systems that the excuse has effect as long as the impediment lasts. The rule is expressed in ESTONIAN LOA § 103(3), ITALIAN CC art. 1256(2); PORTUGUESE CC art. 792, and CZECH CC § 575.2 in fine (the performance is not impossible if it can be fulfilled after an agreed time limit) and is accepted in GREEK law, see *Gasis* in Erm.AK II/1, intro. to arts. 335-348 no. 42, art. 336 no. 7 (1949) *Stathopoulos*, Obligations, § 19 nos. 70-73, *Georgiadis*, Obligations, § 24 nos. 35-36.

13. Under several legal systems the creditor may terminate the contractual relationship if the delay has lasted so long that there would be a right to terminate under the rules on non-performance. This holds true of ITALIAN law (see art. 1256(2) CC with reference to the source of the obligation or the nature of its subject matter) and PORTUGUESE law, see the provisions cited above, of AUSTRIAN law, see CC § 918 (right of withdrawal in the case of late performance, which only takes effect after

a certain period of time set by the creditor); of DUTCH law, see CC art. 6:74(2); of ESTONIAN law, see LOA §§ 105, 116 (implicitly); and of BELGIAN law (*Kruithof*, TPR 1983, 629 no. 119, see also Cass. 13 June 1956, Arr. Cass., 367). GREEK and DANISH case law support the same rule: Greece, Athens 3384/1976, NoB 25 (1977) 389 II. It is unlikely that this rule would follow from ENGLISH and IRISH law or SCOTTISH law but a long delay may frustrate the contract. In SPANISH law a temporary impediment may justify termination if it frustrates the purpose of the contract (*Díez Picazo*, II 660; *Lacruz-Delgado* II, 1, § 25. 193; Margarita Castilla Barea, *La imposibilidad de cumplir los contratos*, 2001*Castilla*, La imposibilidad de cumplir los contratos, 2001, pp. 462 ff).

14. Several systems recognise that an obligation comes to an end automatically if performance becomes permanently impossible for a reason not imputable to the debtor: e.g. ITALIAN CC art. 1463. Under SLOVAK law also if the performance becomes impossible the debtor's obligation to perform is extinguished. If the impossibility concerns only a part of the performance, the obligation is extinguished only for this part; however, the creditor may withdraw from the agreement as for the rest of performance, CC § 575(3). In SCOTTISH law the effect of a permanent impossibility of contractual performance which is not imputable to the debtor is also that the contract is dissolved and therefore that the obligations of both parties under it are extinguished. This does not necessarily mean that the debtor is not liable for damages or a stipulated payment under a term of the contract imposing such liability whatever the reason for the non-performance. See *Gloag and Henderson* 11.01 to 11.05.

III. The duty to give notice

15. Paragraph (5) is similar to CISG art. 79(4), and see the FINNISH and SWEDISH SGAs, §§ 28, 40 and 58; the SLOVAK Ccom art. 377; and the CZECH CC § 557.2. The duty of the defaulting party to give notice of the impediment has been stated in DANISH, GREEK and GERMAN case law: see respectively *Ussing*,Obligationsretten[4], 141; 4271/1956 EEN 25(1958) 226, 227 II; and CA Hamburg 13 May 1901, OLGE 3 no. 4 p. 8, but at least in GERMANY was left open by the legislator, see *Medicus*, NJW 1992, 2384, 2385. In ITALY writers have expressed the view that the duty follows from the principle of good faith and CC art. 1780 imposes a duty on the depository to notify loss of goods in custody. In some other countries the duty to give notice may also follow from good faith or from the debtor's duty to warn of risks which may affect the performance due, e.g. SPANISH CC art. 1559. Under AUSTRIAN law a duty to inform derives from the (implied) contractual duties to inform the contractual partner of all relevant circumstances.

16. Under ENGLISH, IRISH, POLISH and SCOTTISH law there is no such principle. It is the same in PORTUGUESE law, although, under particular circumstances, an argument in favour of a duty might be made under the CC art. 762 (general principle of good faith performance).

17. In the HUNGARIAN CC § 312(1) if performance has become impossible for a reason for which neither of the parties is liable, the obligation is extinguished. The party gaining knowledge of the impossibility should immediately notify the other party. A party who fails to give such notification is liable for loss thereby caused. Under CC § 312(2) if performance has become impossible for a reason for which the debtor is liable, the creditor may demand damages for the non-performance. Under CC § 312(3) if performance has become impossible for a reason for which the creditor is liable, the debtor is relieved of the obligation and is entitled to demand compensation for loss caused. Under CC § 312(4) if performance of any one of a set of alternative

obligations becomes impossible, the contract is limited to the other obligations. Under CC § 312(5) if the party who has no right to choose is liable for subsequent impossibility, the other party may choose either the possible obligation or the consequences of subsequent impossibility. Under CC § 312(6) if the remnants of the object of a service that has become impossible have remained in the possession of the debtor, or if the debtor has received or might demand compensation instead of the object of the service from another person, the creditor is entitled to demand surrender of the remainder or compensation against a proportional part of the consideration.

18. See generally *Zweigert and Kötz*, An Introduction to Comparative law[3],chaps. 36 and 37; *Rodière and Tallon*; Mengoni Riv.Dir.Comm. 1954, I, 185; *Honnold* no. 423ff., *v. Caemmerer and Schlechtriem* 679-704; Bianca and Bonell (-*Tallon*) 572-595; Force majeure and hardship; *Treitel*, Frustration.

III.–3:105: Term excluding or restricting remedies

(1) A term of a contract or other juridical act which purports to exclude or restrict liability to pay damages for personal injury (including fatal injury) caused intentionally or by gross negligence is void.

(2) A term excluding or restricting a remedy for non-performance of an obligation, even if valid and otherwise effective, having regard in particular to the rules on unfair contract terms in Book II, Chapter 9, Section 4, may nevertheless not be invoked if it would be contrary to good faith and fair dealing to do so.

COMMENTS

A. General

It is very common for parties to contracts to try to limit their liability by an exclusion or limitation clause. Many such clauses are perfectly reasonable and acceptable. There is no reason why parties should not, in general, allocate the risks of certain events as between themselves and reflect this allocation in the price. Some such clauses may, however, be oppressive and unfair. This problem is dealt with to some extent by the rules in Book II, Chapter 9, Section 4 on unfair contract terms, but those rules do not cover all cases. Often they are confined to terms which are standard terms or not individually negotiated. The present Article goes further. It adopts two different techniques. Paragraph (1) makes certain types of exclusion or limitation clause void and therefore completely ineffective. Its scope is, however, deliberately very limited. Paragraph (2) comes into operation only if an exclusion or limitation term is valid and otherwise effective. It provides, as a sort of residual protection, that the term cannot be relied on if it would be contrary to good faith and fair dealing to do so. Paragraph (2) is, strictly speaking, unnecessary. The result follows from the general duty to exercise rights in accordance with good faith and fair dealing. It is included, however, because of the practical importance of the subject and because it is useful to make clear the potentially powerful effect of the good faith requirement in this area.

Close equivalents to both paragraphs can be found in the laws of many Member States, but each is somewhat more demanding than the controls the law imposes on exclusion clauses in other Member States. Nonetheless each paragraph represents a balanced approach that seems to be widely accepted within Europe. As to paragraph (1), it is almost impossible to envisage a situation in which the potential victim of intentional or grossly negligent personal injury would wittingly agree that he or she should have no remedy for it, or in which the other party could have any legitimate interest in excluding liability. As to paragraph (2), while a party should be permitted to rely on an exclusion or restriction of other kinds of liability when that is what was genuinely agreed, that should not be the case when, exceptionally, the particular circumstances - typically, the party's own conduct - make it contrary to good faith and fair dealing to do so.

B. Terms excluding or restricting liability for damages for personal injury

Paragraph (1) is based on the consideration that it is always unacceptable for a party to try to contract out of liability for damages for causing personal injury (fatal or non-fatal) intentionally or by gross negligence. Annex 1 provides that there is "gross negligence" if a person is guilty of a profound failure to take such care as is self-evidently required in the

circumstances. It is important to note that paragraph (1) does not say that there is liability. Whether or not there is liability will depend on the law and the facts quite apart from the exclusion or limitation clause. There can be cases where there is no liability for causing personal injury intentionally. For example, a doctor who has a contractual obligation to amputate a limb will cause personal injury intentionally but, far from this being a non-performance of an obligation giving rise to liability, it will be the performance of an obligation.

C. Other terms excluding or restricting remedies

Paragraph (2) is very general and covers all terms which in practice prevent the creditor from obtaining the normal remedy. No distinction is drawn between terms which limit responsibility and those which exclude it altogether. It is difficult to distinguish them anyway since a derisory limit on recovery is effectively an exclusion, and there is no good reason for imposing different controls in the two cases.

The limitation of liability may be fixed directly as a figure or by a formula (e.g. so may times the contract price).

Agreed payments for non-performance may operate so as to limit the recovery of the creditor. In this case the creditor can demand full compensation if the requirements of the Article are met.

> *Illustration 1*
> The contract for the construction of a factory contains a term imposing liability for €10,000 per week for late completion. The work is completed late because the contractor has deliberately neglected the job in favour of another, more profitable, one. If the loss suffered by the employer amounts to €20,000 per week, the latter may recover this amount despite the term, as for the contractor to invoke it when it has deliberately disregarded the contract would be contrary to good faith and fair dealing (see further below).

Exclusion or limitation terms most frequently concern liability for damages. However, nothing in the Article prevents its application to terms limiting or excluding other remedies for non-performance (termination for fundamental non-performance, reduction of the price, etc.).

D. Contrary to good faith to invoke the term

The criterion applied by paragraph (2) is whether it would be contrary to good faith and fair dealing to invoke the term. The paragraph applies whether or not the term has been individually negotiated and whether or not it was contrary to good faith and fair dealing to include the term in the contract.

It may still be contrary to good faith and fair dealing for the other party to invoke the term, even if it has been individually negotiated and even if it escapes the rules on unfair contract terms, particularly if this is done in circumstances which the first party would not have contemplated, such as a deliberate decision by the party invoking the term to perform the contract in a quite different way not in accordance with its other terms.

Illustration 2
A security firm agrees to send men to check on a customer's premises once an hour during the hours of darkness. It limits its responsibility to the customer. It deliberately decides to send men only every three hours. It would be contrary to good faith and fair dealing to invoke the limitation of responsibility term.

An intentional disregard of the other terms of the contract may make it contrary to good faith to invoke the term even if there was no intention to harm the other party.

It should suffice that the non-performance was committed knowingly.

Illustration 3
A carrier which has undertaken to provide a lorry capable of carrying a refrigerated load at minus ten degrees, but which does not have one, provides a lorry capable of refrigeration only to minus five. The carrier thinks that for the short journey involved this will not matter. The goods are damaged. The contractor cannot rely on a term limiting its liability for damage caused by inadequate refrigeration.

Some breaches, though intentional, may be within the contemplation of the parties as a decision one of them may have to make. Such intentional breaches would not mean that it is contrary to good faith to invoke the term.

Illustration 4
A voyage charter allows a certain number of ‘lay days’ for the charterer to have the ship loaded and unloaded; if the lay days are exceeded, the charterer must pay damages for demurrage, but the amount is limited to €1,000 per day. As both parties are aware, the loading port is subject to congestion, and the charterer deliberately delays having the ship loaded until after another of its vessels has been loaded. Loading of the chartered vessel is not completed within the lay days. The loss to the owner exceeds the limit set in the demurrage term. Even though the delay by the charterer was deliberate, it is not contrary to good faith for it to invoke the €1,000 per day limit.

It should be noted that the test in the present Article is based on the actual facts, not on the unfairness or otherwise of the term in the abstract. It may be contrary to good faith and fair dealing to include a very broad limitation of liability term when the term has not been negotiated: nonetheless if the same term had been individually negotiated it may not be contrary to good faith and fair dealing to invoke it in a particular situation.

Illustration 5
A contract for the carriage of goods in a refrigerated lorry limits the carriers’ liability, in the event of inadequate refrigeration however arising, to €100 per box of food. The food is damaged because the refrigeration machinery, despite proper maintenance, breaks down. If the term were not individually negotiated, it might not be binding on the client as it is capable of limiting liability even when the carrier had been reckless or grossly negligent. If it has been individually negotiated and is therefore outside the rules on unfair contract terms, it does not seem contrary to good faith and fair dealing for the carrier to invoke it on the actual facts.

Compare also II.–7:215 (Exclusion or restriction of remedies) which covers the exclusion or restriction of remedies for mistake and incorrect information.

E. Negotiated term which is still contrary to good faith.

Even though there has been some negotiation over a term, so that it is outside the rules on unfair contract terms, in an extreme case it might still be contrary to good faith to invoke it. If the party in whose favour the term operated had refused to make more than marginal concessions and the other party had no real choice but to accept, the court may decide under this Article that the term cannot be invoked.

> *Illustration 6*
> A seed company offers seed to a farmer on terms that its liability if the seed is defective is limited to returning the contract price. The farmer protests at this but the seed company refuses to amend the term except by adding that, in the event of seed failure, the farmer will be entitled to a 10% discount on the next purchase of similar seed. Other seed companies all take a similar attitude. The seed companies could cover liability in defective seed by insurance; the farmer cannot easily insure against crop failure due to defective seed. The seed supplied is of completely the wrong type and the farmers' crop fails. It is contrary to good faith and fair dealing for the seed company to invoke the term.

In practice mandatory laws on consumer protection will often supersede the rule in paragraph (2)the present Article.

It should not be possible to set aside by agreement the restrictions on the availability of terms under the Article; this exclusion would be contrary to the duty of good faith and fair dealing.

F. The consequences under paragraph (2)

If to invoke the term is found to be contrary to good faith and fair dealing, the term will not operate. Paragraph (2) The Article does not give the court a discretion simply to increase the liability but leaves it to be assessed in accordance with the normal rules, as there is no effective limitation of liability.

NOTES

I General

1. In principle clauses excluding or limiting a party's liability are valid in all the Member States. There are, however, restrictions on the validity of such clauses. The techniques of these restrictions differ. Some systems refer to a test of good faith or a very close equivalent; some employ a test of reasonableness; some have rules about intentional or grossly negligent non-performance; and some have rules about death or personal injury. There are often distinctions between consumer contracts and other contracts.

II. Good faith

2. A test of good faith was employed by GERMAN courts, applying CC § 242 (e.g. BGH 29 October 1956, BGHZ 22, 90; see *Kötz*, European Contract 141-142); it is still used where the special rules on unfair terms (CC §§ 307 et seq.) do not apply. Under

AUSTRIAN § 879((1) for individual clauses and (3) for pre-formulated clauses) invokes a good faith test which was subject to elaborate and extensive case law (see also ConsProtA § 6 for consumer contracts). The Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts uses more or less the same test. All Member States were required to implement this by 31 December 1994.

III. Unreasonable clauses

3. Exclusion and limitation clauses are covered by the general principles in DUTCH CC art 6:248(2) and of NORDIC Contracts Acts § 36 under which unreasonable contract clauses are invalid. In BELGIAN case law they are invalid if they take away the essence of the obligation, see Cass. 25 September 1959, Arr.Cass. 1960, 86; even if valid, it may be an abuse of right to invoke them under the circumstances. The ENGLISH Unfair Contract Terms Act 1977 applies rules dealing with contracts between businesses and with consumer contracts. Exemption and limitation clauses may either be invalid *per se* or valid only if they are reasonable. The Unfair Contract Terms Act 1977 is in force also in SCOTLAND. These rules are not restricted to clauses which were not individually negotiated: e.g. the Unfair Contract Terms Acts invalidates certain types of clause (such as restrictions on liability for death or personal injury caused by negligence in the course of a business, s. 2(1)), and holds others valid only if they are reasonable (such as restrictions on a seller's liability if the goods are not of satisfactory quality, s. 6(3)), even if the clauses were negotiated. In matters not covered by the Act, such as most international contracts, the House of Lords after some judicial hesitation has laid down a rule of interpretation that an exclusion clause will normally not apply when there has been a breach of a fundamental term, a fundamental breach or simply a serious breach, see *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] AC 827. But the courts have frequently used such rules of construction to prevent a party relying on a clause when the circumstances of the case seem outside what could have been contemplated by the parties. See *Treitel*, Contract 6-028–6-032; *Kötz*, European Contract 141.

4. In IRELAND, some unreasonable exclusion clauses are regulated by the Sales of Goods and Supply of Services Act 1980. Beyond that, case law favours the rule that an exclusion clause cannot excuse a fundamental breach of contract (*Clayton Love v. B. & I. Line* (1970) ILTR 157) while doctrine favours the position reached under the English cases, see *Clark* 150.

IV. Intentional and grossly negligent non-performance

5. ITALIAN CC art. 1229 and SPANISH CC arts. 1102, 1256 and 1476 also invalidate clauses which exonerate the debtor from liability or limit liability for fraud, malice or gross negligence; in Spain it is thought that clauses excluding or limiting liability for simple negligence are valid, *Díez-Picazo* 730-731. Rules on specific contracts are found in the Italian CC in arts. 1490(2), 1579, 1580, 1581 and 1838(5). This latter provision also covers clauses which exclude or limit a bank's liability for ordinary negligence. AUSTRIAN case law has established a clear and undisputed rule that liability for intentional wrongdoing can neither be excluded nor restricted by party agreement (OGH 24 April 1958, SZ 31/67; 22 October 1968, SZ 41/139; 19 November 1968, Jbl 1970, 201). In SLOVENIAN law an obligation of the creditor is extinguished, but the claim against the debtor remains in force. See LOA § 117.

6. FRENCH case law also invalidates clauses excluding or limiting liability for intentional and grossly negligent non-performance, see Cass.req. 24 October 1932, S.1933.1.289 and Cass.civ, 4 February 1969, D.69.601. The general rule is that it is not possible to escape liability in case of "*dol*" or intentional fault. The "*faute lourde*"

is generally assimilated to intentional fault (*Terré/Simler/Lequette*, Les obligations[9], no. 615). The "Chronopost" case (Cass.com. 22 October 1996, D.1997, 121, note *A. Sériaux*) is now expanded to other types of contracts under the "*visa"* of CC art. 1131 on the "*cause"*. It results from these "Chronopost" cases that a limitation clause cannot be enforced in the case of non-performance of an "essential obligation". However, when such clauses originate in a decree, they are valid because of their legal origin and the only way to invalidate them is to establish a "*dol*" or a "*faute lourde*" . The Cour de cassation has specified that a mere breach of contract does not by itself constitute a "*faute lourde*". The latter must be inferred from the gravity of the behaviour of the debtor (Cass.ch.mixte, 22 April 2005, D. 2005, 1864, note *Tosi*). In PORTUGAL, according to the prevailing opinion, only vicarious liability may be excluded, CC arts. 809 and 800; clauses limiting liability are valid except for intentional or grossly negligent non-performance (recent Constitutional Court decisions confirm this view). Under the Law of 25 October 1985 (modified in 1995, 1999 and 2001) general conditions of contract exempting the defaulting party from liability for intentional and grossly negligent non-performance are invalid. Under BELGIAN case law, exclusion or limitation of liability for intentional non-performance is not permitted, but exclusion for grossly negligent non-performance is, see Cass. 22 March 1979, RCJB 1981, 196, unless it goes to the essence of the obligation, see Cass. 25 September 1959, Arr.Cass. 1960, 86 and above.

7. Under POLISH law, CC art. 473 § 2 provides that a clause excluding liability for damage which the debtor may cause intentionally, is not valid. This regulation implies a general validity of exclusion clauses. Clauses that exclude liability for intentional non-performance are invalid by virtue of art. 473 § 2. Other clauses – excluding or limiting the debtor's liability are generally valid - but they can underlie a "test of good faith". The exclusion cannot be inequitable having regard to the nature and the purpose of the contract. There is no general rule of invalidity of clauses which would exclude liability for gross negligence, because art. 473 § 2 invalidates only clauses that would exclude or limit the redress of intentionally caused damages. However, art. 473 § 2 does not affect the court's power to judge other exclusion clauses as invalid, if they are contrary to good faith – see Supreme Court's judgment of February 17th 1972 (SN 17 February 1972, II CR 72/71).

8. In other systems it is frequently accepted that liability for intentional acts cannot be excluded. In DENMARK and FINLAND clauses limiting liability for intentional non-performance as well as gross negligence have usually not been accepted as valid, see *Gomard*, Obligationsret II 236, *Taxell*, Avtal och rättsskydd 457-457 and Finnish Supreme Court 1983 II 91. Liability for intentional non-performance cannot be excluded or limited in GERMANY, see CC § 276(2). However such limitation clauses are valid as regards the acts of persons to whom the debtor has entrusted performance, and for whose acts the debtor is responsible, see CC § 278 sent. 2. The rules on unfair terms prevent standard terms excluding the liability for gross negligence, see CC § 309 no. 7 limb b) (for consumers), and this applies to a certain extent even to businesses, see MünchKomm (-*Kieninger*), BGB[5], § 309 Nr. 7 no. 36. Vicarious liability cannot be excluded by standard terms altogether, see CC § 309 no. 7 limb b) (for consumers) MünchKomm (-*Kieninger*), BGB[5], § 309 Nr. 7 no. 36 (for businesses). A rule similar to the GERMAN CC § 276(2) is found in GREEK CC art. 332. After the amendment of GREEK CC art. 332 § 2 by art. 2 § 1 of the law 3043/2002, the same also applies if the exclusion clause is included in a term of the contract that has not been individually negotiated or if by the exclusion clause the debtor is liberated from liability for certain very serious wrongs - in particular for infringements of the rights to life, health, freedom or honour. In addition, GREEK CC art. 334, as it has been amended by art. 2

§ 2 of the law 3043/2002, applies the same rule on exclusion clauses covering persons entrusted with performance by the debtor and for whose acts the latter is responsible. However, liability towards persons in the service of the debtor and liability arising out of a licensed business cannot be excluded or limited even in cases of ordinary negligence, see art. 332(2). In the NETHERLANDS, the Hoge Raad has stated that a clause may not be invoked to limit liability for damage caused by intentional or grossly negligent conduct by the debtor or a person charged by the debtor with the direction of a business: e.g. HR 31 December 1993, NedJur 1995, 389; 5 September 1997, RvdW 1997, 161. Under ESTONIAN law, agreements under which liability is precluded or restricted in the case of intentional non-performance or which allow the debtor to perform an obligation in a manner materially different from that which could be reasonably expected by the creditor or which unreasonably exclude or restrict liability in some other manner are void (LOA § 106(2)). The rule applies also in cases of the acts of persons to whom the debtor has entrusted performance. ESTONIAN LOA §§ 42 ff further limits the validity of exclusion clauses included in a term not individually negotiated. Also, some room may have been left for the good faith principle as according to LOA § 6(2) a term of the contract will not be applied if it is contrary to the principle of good faith (see also *Varul et al (-Kõve)* § 106, n. 5).

9. In ENGLISH law there is no special rule about intentional breaches, either at common law, see *Photo Production Ltd. v. Securicor Transport Ltd*. [1980] AC 827, or under the Unfair Contract Terms Act 1977. But clauses are less likely to be interpreted as applying to such breaches than to mere negligence, and the fact that a clause may exclude liability for intentional breaches may be a factor in holding it to be unreasonable, see *Thomas Witter Ltd. v. TBP Industries Ltd.* [1976] 2 All ER 573.

V. Death or personal injury

10. As regards clauses excluding or limiting liability for death or personal injury, the distinction between consumers and non-consumers is often relevant (ENGLAND, FINLAND, GERMANY, AUSTRIA, THE NETHERLANDS). This is even true in FRANCE, where the leading view is that clauses excluding or limiting liability for death or personal injury are not valid because the integrity of the human person is a matter which falls within the range of public order (Bénabent, no. 423; for a more nuanced approach based on the idea that such clauses only relate to the amount of damages, *Terré/Simler/Lequette*, Les obligations[9], no. 615 and the references). In the event of services provided to consumer clients, contract clauses limiting or excluding liability for death or personal injury may be considered as unfair on the basis of art. 1(a) on the annex related to art. 3(3) of the Unfair Contracts Terms Directive. A similar provision is to be found in the legislation of England (schedule 2, para. 1(a) of the Unfair Terms in Consumer Contracts Regulations 1999), France (annex to ConsC art. L. 132-1) and Germany (CC § 309 no. 7a), although the provision in Germany may (together with CC § 310(3)) be interpreted in the stricter sense that limitation or exclusion of liability for death or personal injury in consumer contracts is not allowed at all. This is also the approach in AUSTRIA (ConsProtA § 6(1) no. 9) and Finland (chap. 8 § 2 in conjunction with § 20(1) and § 21(3); chap. 9 § 2 in conjunction with § 20(3) (16/1994) of the Consumer Protection Act). In Poland a limitation or exclusion of liability for death or personal injury is expressly excluded in the case of consumer contracts (CC art. 385^3 § 1). Outside the scope of consumer services, clauses limiting or excluding liability for death or personal injury are often not prohibited in principle, although they may turn out to be invalid after the application of rules that exist for reviewing limitation and exclusion clauses in general (for AUSTRIA see *Rummel* in Rummel, ABGB I, 3rd ed., § 879 nos. 113 et seq.). Clauses limiting or excluding

liability for death or personal injury are however prohibited in THE NETHERLANDS in the case of some treatment services (CC art. 7:463). A prohibition can also be found for all types of services in ENGLAND in art. 2(1) of the Unfair Contract Terms Act, which states that exemption from liability for death or personal injury caused by the negligence of a service provider is not allowed.

11. A general principle of CZECH law is that the legal rules on liability and remedies cannot be excluded in advance by private agreement. Clauses agreed inter partes and excluding or limiting a party's liability for non performance or for a bad performance are however valid, as an exception to this general rule, in certain very restricted cases, essentially in commercial law. For instance, after a permissive, till now uncertain, interpretation of the Ccom art. 386 (see Štenglová, Plíva, Tomsa commentary p. 1054), the liability of the debtor could be restricted to the payment of a penalty fixed in advance by agreement inter partes. This construction is not still clearly confirmed by jurisprudence.

12. In SLOVAKIA the general principle is that an agreement by which a person waives rights which can arise in the future is invalid, CC § 574(2). This means that remedies for non-performance of an obligation may not be excluded or restricted by contract because the exclusion relates to rights which can arise in the future (a right to compensation for future damage, rights resulting from the liability for prospective defects etc.), see Svoboda *(-Górász) Občiansky zákonník*, § 574, pp. 524-525. Under the HUNGARIAN CC § 314 (1) liability for a non-performance caused intentionally or by gross negligence or by a criminal act and liability for a non-performance damaging life, physical integrity or health cannot be validly excluded. Under CC § 314(2) unless otherwise prescribed by law, liability for non-performance of a contractual obligation cannot be excluded or restricted, unless the disadvantage incurred thereby can be offset by the adequate reduction of the consideration or by some other advantage. Under CC § 314(3) legal regulations on domestic contracts connected with foreign trade contracts can provide for non-performance and for its consequences differently from this Act and can allow limitation or exclusion of liability with the exception contained in (1).

VI. Consumer contracts

13. Special rules against the use of exclusion clauses in consumer contracts are now found in several Member States, see AUSTRIAN ConsProtA (KSchG) § 6(1) no. 9; art. 32(11) and (12) of the BELGIAN Law on Trade Practice and Information and Protection of Consumers of 14 July 1991; DANISH SGA § 80(1); FRANCE: Ccom art L. 132-1; GERMAN CC § 309 no. 7; GREEK ConsProtA no. 2251/1994 arts. 2(7) nos. 12, 13, 6(12) and 8(6); LUXEMBOURG Consumer Protection Acts 1984 and 1987, CC art. 1135(1); DUTCH CC art. 6:237(f); POLISH CC art. 385^1 and art. 385^3 pts. 1-2; PORTUGUESE Decree Law of 25 October 1985 arts. 18(c) and 20; and the SLOVAK CC § 53 [3, c–d)]. ITALIAN Codice del Consumo, d.lgs. 6 September 2005, no. 206 (see arts. 33, 36, 78, 124). In FINLAND and SWEDEN general consumer protection legislation generally invalidates exclusion clauses when the consumers in that field or a related field have a mandatory right to some remedies. The DUTCH rule may, as in GERMANY, have repercussions on the validity of exclusion clauses in contracts between businesses. The IRISH legislation referred to in note 2 is designed to protect consumers. According to LOA § 42 in ESTONIAN law, exclusion clauses like those which preclude the liability arising from law of the party supplying the standard term or restrict such liability in the case where the death of the other party or damage to the health of the other party is caused or in other cases where damage is caused intentionally or due to gross negligence are considered to be unfair and

therefore void in consumer contracts (and only presumably unfair in business contracts, LOA § 44). There are no special rules prohibiting exclusion clauses in the CZECH law of consumer contracts. Thus the abovementioned civil principle is applicable. The consumer law protects consumers against abuses of professionals, a fortiori the situation of consumers has to be protected by the judge at least to the same level as in the case of non-consumer contracting parties (see *Jehličkа, Švestka, Škárová*, p. 267). There is no special rule in consumer law (see *L. Tichý*, Seminar Consumer's protection under Czech Civil Law.

VII. Stipulated payment

14. In some Member countries the courts will treat a penalty or liquidated damages clause as a clause limiting liability if the stipulated sum is below the damages which the creditor could recover. Thus, the reasonableness test dealt with in note 2 can apply to increase an unreasonably low payment, especially if the purpose of the clause is to limit liability. For BELGIAN law see *Kruithof* TPR 1986 no. 6. In FRENCH law a stipulated payment which is a "clause pénale" can be diminished or increased if it is "*manifestement excessive ou dérisoire*", see CC art. 1152(2) and *Malaurie & Aynès*, Obligations nos. 864-869. In POLISH law the penalty clause also can act as a limitation clause (see CC art. 484 § 1), therefore such a clause has to be judged according to CC art. 473 § 2 –it may not exclude nor limit the liability for intentionally caused damage. If the non-performance was intentional, the aggrieved party may claim full damages irrespective of the sum agreed as penalty. For CZECH commercial law, we can find the same opinion (see for ex. *K.Marek, K limitaci náhrady škody a smluvním pokutám, Právní fórum 6/2005, ed. ASPI a.s.*) but there is so far no judicial confirmation.

15. See generally *Ghestin* (ed), Les Clauses limitatives; *Hondius; Kötz,* European Contract 137-153 ; *S. Gaudemet*, La clause reputée non écrite.

III.–3:106: Notices relating to non-performance

(1) If the creditor gives notice to the debtor because of the debtor's non-performance of an obligation or because such non-performance is anticipated, and the notice is properly dispatched or given, a delay or inaccuracy in the transmission of the notice or its failure to arrive does not prevent it from having effect.

(2) The notice has effect from the time at which it would have arrived in normal circumstances.

COMMENTS

A. The dispatch principle for cases of default

The normal rule on the giving of notices for the purposes of these rules is that a notice takes effect when it reaches the addressee. See article . This normal rule applies only "unless otherwise provided". The present Article provides otherwise for one special situation. Where a creditor gives notice to a debtor because the debtor is in default, or because it appears that a default is likely it seems appropriate to put the risk of loss, mistake or delay in the transmission of the message on the defaulting debtor rather than on the creditor. The dispatch principle thus applies to notices given under the following articles:

III.–2:111	Property not accepted
III.–2:112	Money not accepted
III.–3:302	Enforcement of non-monetary obligations
III.–3:503	Termination after notice fixing additional time for performance
III.–3:505	Termination for inadequate assurance of performance.

The dispatch rule does not apply to a notice which is to be given by the defaulting debtor, e.g. under III.–3:104 (Excuse due to an impediment), or by a debtor who wishes to invoke hardship under III.–1:110 (Variation or termination by court on a change of circumstances), or who gives an assurance of performance under III.–3:505 (Termination for inadequate assurance of performance).

The dispatch principle for notices of this kind is not recognised in all systems but it seems a fair allocation of the risk that the notice will be delayed or lost in the course of transmission.

B. Means of notice given on default must be appropriate

The dispatch principle will not apply if the means of notice was not appropriate in the circumstances. For instance, for the dispatch principle to apply, the means chosen must be fast enough. If great speed is needed a letter sent by air mail may not be appropriate and the sender may not rely on the fact that it was dispatched. The sender will be able to rely on it only if and when it arrives.

C. Time at which notice takes effect

A notice subject to the general "receipt" principle takes effect when it is received. A notice subject to the dispatch principle may be effective even though it never arrives or is delayed, but it is not effective from the moment it is dispatched. It would not be fair that even a non-

performing debtor should be affected by a notice as from that time. Accordingly the notice takes effect only from the time at which it would normally have been received.

NOTES

Dispatch principle when notice because of a default

1. The DANISH SGA § 61 explicitly provides that as long as a notice by the buyer objecting to an unreasonable price or by an aggrieved party who wishes to use a remedy in case of the other party's non-performance, is properly dispatched, it does not cause a loss for the sender that the notice is delayed or does not reach the person to whom it is given. The FINNISH and SWEDISH SGAs provide that certain notices, in particular notices sent to a party who is in breach of contract, will be effective even though they do not reach the recipient, § 82. See also Nordic SGAs § 40 concerning notices to be given by a party who wishes to avoid a contract; reasonable means of communication must be used. Similarly, GPCCA § 70 in ESTONIA provides that the dispatch rule applies if the creditor's notice concerns breach of contract by the debtor. In AUSTRIAN and GERMAN law a number of rules of consumer protection and commercial law - especially UGB § 377(4) and Ccom § 377(4), respectively, as well as AUSTRIAN ConsProtA §§ 3(4), 3a(5) and 5e(1) - provide that timely sending of certain notices is sufficient. However, these rules do not relieve the sender from the risk of loss, only from the risk of delay (BGH 13 May 1987, BGHZ 101, 49, 53). In ITALY, according to case law (see e.g., Cass. N. 953/1973 and 639/1996) the declaration served by the creditor to the non-performing party is "recettizia": thus the defaulting party is in breach only in so far as that party knows or should have known of the notice.
2. ULIS art. 39(3) applies the dispatch principle to notices of non-conformity and CISG art. 27, in contrast to its provisions on most other statements (see note 1 above), applies the dispatch principle to notices which the creditor gives to the other under Part III relating to non-performance: see *Honnold* §§ 162 and 189-190.
3. There is no such expressly stated provision in CZECH law where an opposite view may be seen in at least two express legal provisions. For the civil law, CC § 517.1 recognises the right to withdraw if an additional reasonable extension of the time-limit is granted to the debtor which may be construed as meaning a time-limit "effectively granted". According to this interpretation, the creditor's right to withdraw arises only if the notice reaches the debtor. There is no conclusive case law yet but the Czech supreme court appears to be going this way (see decision under Sou R NS no. 3/2001 C 292, p. 131). The principle seems to be the same in the commercial law (see Ccom art. 344 ff) but the construction is less certain; the creditor has the right to withdraw if the creditor notifies the debtor of the withdrawal. This different formulation could be construed, perhaps according to the circumstances of a case, in two ways, as permitting the withdrawal after dispatching the notice or as linking the right of withdrawal to the effective receipt of the notice by the defaulting debtor. There is as yet no fixed case law on this question.
4. In SLOVAK law only general provisions dealing with the dispatch principle in relation to the acceptance of an offer to conclude an agreement can be found, but no special regulation on the effect of notices relating to non-performance. The position is similar in SCOTTISH law where the dispatch principle (the "postal rule") applies in relation to certain acceptances of offers but not more widely.

5. In DUTCH and BELGIAN law the general rule that a notice takes effect when it reaches the addressee (Dutch CC art. 3:37; Belgian CC art. 2281) applies also to this special situation where the creditor gives notice to a debtor because the latter is in default and the exceptions to this rule do not specifically relate to this special situation (for Belgium, See e.g. Cass. 22 December 1994, Pas. 1994 I 754 = RW 1994-95, 1264 on the effect of a notice of termination).

6. As a general rule, notification is not a requirement of the debtor's liability for non-performance in SPANISH law. However, a notice dispatched by the creditor requiring performance puts the debtor in the situation of qualified delay (mora). No specific form of that notification is required. However, the notification of default is considered in Spanish law as an act producing a legal effect when the debtor becomes aware of it (*R. Bercovitz* (ed.) *Comentarios al Código Civil*, 2006, art. 1100; *Lacruz*, Elementos de Derecho Civil II-2 1987, p. 181, *Albaladejo,* Comentarios al CC y Compilaciones Forales, XVI-1, 1989, p. 361, *Diez Picazo*, Fundamentos, p. 632). Nevertheless, relying on the analogy with the CC art.1262 which provides that an acceptance of an offer may take legal effect from the moment it was sent if the offeror cannot ignore it without infringing good faith, a notice of non-performance also may take effect if it does not reach the debtor because of the debtor's lack of good faith.

7. In some countries, only judicial termination is permitted in the CC. This used to be the case in FRANCE (CC art. 1184) and for this reason, there is no specific provision in the Civil code on notices relating to non-performance. However, CC art. 1146 provides that the debtor is liable to pay damages once notice has been given ("*est en demeure"*), except as otherwise provided by law (for instance, notice is not required when the creditor withholds performance by virtue of the principle of *non adimpleti contractus*) or otherwise agreed by the parties (for instance, it was held that the parties agreed to equate *mise en demeure* with the mere occurrence of the term). Case law adds more exceptions to this requirement, notably in case of compensatory damages (Cass.ch.mixte, 6 July 2007, D. 2007, 2975 obs. *B. Fauvarque-Cosson*, p. 2642, note *G. Viney*). A letter (*lettre missive*) may constitute a sufficient notice provided the notification resulting therefrom is sufficient ("*s'il en ressort une interpellation suffisante*" (CC art. 1146, as amended by an Act passed in 1991). Some scholars have suggested that a general requirement of notice may be found in the CC. In the "Avant-projet de réforme du droit des obligations et de la prescription (Avant-Projet Catala), recent case law has been taken into account and termination by notice is allowed in relation to non-performance (art. 1158 of this Avant-projet). Notice takes effect when the defaulting party receives it.

8. In ENGLISH law it seems to be assumed that default notices, such as notices to terminate a contract for non-performance, must reach the other party to be effective; but if the other party is deliberately hiding then it may be that notice to a third party in an official position (such as the police) may suffice: cf *Car & Universal Finance Co. Ltd. v. Caldwell* [1965] 1 QB 525 (rescission for fraud). See Treitel, *Law of Contract*, para. 18-009.

9. POLISH law recognises a rule that a declaration of will takes effect when it reaches the addressee so that the addressee has an opportunity to get acquainted with it (CC art. 61). The Code provisions regulating the statutory warranty for defects in the thing sold, however, while obliging the buyer to notify the defect to the seller within one month of discovering the defect (such notification being necessary so that the buyer can enforce the claims), also state that it is enough that notice is sent by registered letter prior to expiry of that deadline (CC art. 563), so the date of dispatch is conclusive.

III.–3:107: Failure to notify non-conformity

(1) If, in the case of an obligation to supply goods, other assets or services, the debtor supplies goods, other assets or services which are not in conformity with the terms regulating the obligation, the creditor may not rely on the lack of conformity unless the creditor gives notice to the debtor within a reasonable time specifying the nature of the lack of conformity.

(2) The reasonable time runs from the time when the goods or other assets are supplied or the service is completed or from the time, if it is later, when the creditor discovered or could reasonably be expected to have discovered the non-conformity.

(3) The debtor is not entitled to rely on paragraph (1) if the failure relates to facts which the debtor knew or could reasonably be expected to have known and which the debtor did not disclose to the creditor.

(4) This Article does not apply where the creditor is a consumer.

COMMENTS

A. General

The starting point for a consideration of this Article is that there is a general duty to exercise remedies in accordance with good faith and fair dealing. In certain cases that would mean that a person supplied with goods, other assets or services which did not conform to the contract would be prevented from relying on the non-conformity because of that person's conduct – for example, by sitting on the remedies for an excessive length of time knowing that the supplier was suffering prejudice by the delay. Similarly, a person who withheld performance or reduced the price without saying why would hardly be acting in accordance with good faith and fair dealing. However, a mere delay in notification of a non-conformity would not always fall under the provision on good faith and fair dealing. This Article is therefore designed to concretise the requirement to act in accordance with good faith and fair dealing in this situation. One rationale for the requirement of notification is that the supplier should be given an opportunity to put things right.

The reason for limiting the requirement to non-conforming goods, other assets or services and not any non-performance is that it is only in relation to defects that notification becomes important. The debtor who has not performed at all knows the position and does not need to be notified and the creditor should not lose any remedies by not notifying. This applies also to an obligation not to do something or to cease doing something. It is safer to confine the requirement to non-conforming goods or services.

Not all the laws of the Member States recognise this rule in full, though most will in some circumstances prevent a party who has delayed in telling the other party about the defect from exercising some remedy, particularly remedies that involve rejection of non-conforming goods. The Article, which applies only to non-consumer contracts for goods, other assets and services, mirrors the broader approach found in the CISG.

B. Requirement of notification

Paragraph (1) lays down the requirement that the supplier be notified within a reasonable time, if the person supplied is to be able to rely on the non-conformity. This is a requirement, not a duty or an obligation. The supplier cannot recover damages for failure to notify. That

would go far too far: the person supplied may not be troubled by a particular non-conformity and may not wish to pursue the matter. In such a case there is no reason why that person should be under any duty or obligation to notify. The only effect of a failure to notify is that the person supplied loses the right to rely on the non-conformity. This is of particular importance in relation to damages, price reduction and withholding performance. There are already requirements of giving notice within a reasonable time in the case of the remedies of specific performance or termination of the contractual relationship. So the Article is of less importance in relation to those remedies.

The notice must specify the nature of the non-conformity. What is sufficient specification will depend on the circumstances but the provision must be interpreted in the light of its purpose, which is largely to give the supplier a fair opportunity to cure the non-conformity. The relevant circumstances would include the buyer's knowledge and expertise. A buyer or client who is not an expert cannot be expected to diagnose a problem but can be expected to describe what seems to be wrong.

C. When time begins to run

Paragraph (2) provides that the period for notification begins to run from the time when the goods or other assets are supplied or the service is completed or from the time, if it is later, when the creditor discovered or could reasonably be expected to have discovered the non-conformity. The situation where the creditor in the obligation becomes aware during the period for its performance that there is or will be a non-conformity is dealt with by other provisions in later Books. The present provision is designed to deal with the situation where goods or assets have been supplied or a lease period has ended or a service has been completed. So the period runs at earliest from that time. However, it will not begin to run until the person supplied has discovered or could reasonably be expected to have discovered the non-conformity. The second part of this formula ("could reasonably be expected to have discovered") is necessary to maintain a fair balance between the parties. Without it, it would be all too easy in many cases for the creditor to deny knowledge. However, it is a flexible formula which enables all relevant circumstances to be taken into account.

D. Defects known to supplier

Paragraph (3) provides an exception for those cases where the failure to notify relates to facts which the debtor knew or could reasonably be expected to have known and which the debtor did not disclose to the creditor. This is consistent with the idea of good faith and fair dealing which underlies the Article. A supplier who has knowingly concealed defects should not be able to insist on being notified of them.

E. Consumer exception

Paragraph (4) exempts consumers from the requirement to notify. The rationale is that lay people may be unaware of such a legal requirement and that it could be harsh to deprive them of remedies for failure to observe it. This does not mean, however, that consumers are not subject to any requirements to notify and can sit on remedies indefinitely regardless of the circumstances. Any person, consumer or not, who wishes to exercise the remedy of specific performance must give notice within a reasonable time. The same applies to the remedy of termination of the contractual relationship for fundamental non-performance. These remedies can place the creditor in a particularly difficult position and fairness between the parties requires a general requirement of notice within a reasonable time. Further, as noted above,

any person exercising a remedy for non-performance of an obligation is bound to exercise it in accordance with good faith and fair dealing. The argument that consumers may be unaware of legal requirements does not apply here because everybody can be expected to be aware of the need to act in accordance with such basic criteria of decent behaviour. The general duty of good faith and fair dealing will, however, be less strict on consumers than the notification rules in the Article in at least two respects. First, it would normally only be actual knowledge which will trigger any duty and secondly some prejudice or likely prejudice to the supplier would normally be required. Finally, it may be noted that these rules contain a relatively short period of prescription – three years – in those cases where the creditor is aware of all relevant facts.

NOTES

1. Most national laws on the sale of goods have a requirement of notification of non-conformity within a reasonable time or even a short time. This is true under the HUNGARIAN CC § 307. For further details see the Notes to IV.A.–4:302 (Notification of lack of conformity). For requirements to notify in relation to service contracts see the Notes to IV.C.–2:110 (Client's obligation to notify anticipated non-conformity). DUTCH law has a general duty in CC 6:89. A similar rule can be found for most contracts (with some exceptions for consumers) in BELGIAN law, see *Storme*, Invloed.
2. CISG provides in art. 39(1) that the buyer "loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it". GERMAN law has a general rule in CC § 363, which shifts the burden of proof of a defective performance to the creditor, when the creditor accepts the performance as performance.
3. See further for requirements of notification in relation to claims for damages, Notes 5 to 8 to III.–3:701 (Right to damages).

III.-3:108: Business unable to fulfil consumer's order by distance communication

(1) Where a business is unable to perform its obligations under a contract concluded with a consumer by means of distance communication, it is obliged to inform the consumer immediately and refund any sums paid by the consumer without undue delay and in any case within 30 days. The consumer's remedies for non-performance remain unaffected.

(2) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Section 2: Cure by debtor of non-conforming performance

III.–3:201: Scope

This Section applies where a debtor's performance does not conform to the terms regulating the obligation.

COMMENTS

A. General

The rules in this Section give the debtor a right to cure a non-conforming performance. The allowance of a reasonable opportunity to cure is consistent with the notion of good faith and fair dealing and with the desire to uphold contractual relations where possible and appropriate. However, the interests of the debtor in being given a chance to rectify matters must be balanced by due regard for the interests of the creditor. After all, it is the debtor who has been guilty of the non-performance. If there is any doubt about the fairness of allowing an attempted cure it ought to be resolved in favour of the innocent creditor.

The rules in the present Section are wider in scope than the corresponding Article in the Principles of European Contract Law (Art. 8:104) which (as in some of the Member States' laws) applied only when the tender of performance had not been accepted because it was non-conforming. In effect, the PECL rule operated only as a restriction on the right to terminate the contractual relationship. That is probably the case which is most likely to be problematic. If, for example, the contract is for the sale of goods and, since it was made, the market price for the goods has fallen, the buyer has a strong incentive to use the non-conformity as a ground on which to escape from the contract. It seems contrary to good faith for the buyer to terminate when the seller can still deliver satisfactory goods in time. However, this is not the only case in which a right to cure may be appropriate.

The PECL provision did not apply if the buyer accepted the defective goods – so, for example, the buyer could reduce the price or claim damages for the cost of repairing the goods or the reduction in their value, without first giving the seller a chance to repair or replace them. In contrast, the Directive on certain aspects of the sale of consumer goods and associated guarantees (1999/44/EC) envisaged the seller having the opportunity to repair or replace the goods before the buyer could reduce the price or have the contract rescinded (art 3. The Directive does not deal with damages.) When work was being done on the Books on Sales and Leases of Movables it became obvious that a broader approach, along the lines of the Directive, would be appropriate for contracts in general. There is not such a broad "right to cure" in the laws of all the Member States, but in commercial sales such a provision is often expressly agreed. The PECL Article has therefore been considerably expanded.

B. Non-conformity

The opportunity to cure arises only where there is a non-conforming performance. This means a performance which does not conform to the terms regulating the obligation. In most cases these will be the terms of a contract but the Article is not confined to contractual obligations. Similar fact situations involving defective performances could arise in relation to other obligations.

III.–3:202: Cure by debtor: general rules

(1) The debtor may make a new and conforming tender if that can be done within the time allowed for performance.

(2) If the debtor cannot make a new and conforming tender within the time allowed for performance but, promptly after being notified of the lack of conformity, offers to cure it within a reasonable time and at the debtor's own expense, the creditor may not pursue any remedy for non-performance, other than withholding performance, before allowing the debtor a reasonable period in which to attempt to cure the non-conformity.

(3) Paragraph (2) is subject to the provisions of the following Article.

COMMENTS

A. Still time for conforming performance

There will be many cases where the debtor has performed before the expiry of the period of time allowed for performance and where there is still time to make a conforming performance within the period. In this situation paragraph (1) provides that the debtor may make a new and conforming tender within the time allowed.

Illustration

In May S, a commodity dealer, contracts to sell a quantity of cocoa to B and to deliver this by 1st September. In mid-July S delivers the cocoa to B but upon arrival the cocoa is lawfully rejected by B as not in accordance with the contract description. S has until 1st September to deliver a fresh quantity of cocoa which conforms with the terms of the contract.

B. Conforming performance would be later than provided for

In this situation, the debtor may still make a prompt offer to cure the defective performance and the creditor cannot pursue any remedy other than withholding performance of reciprocal obligations until the debtor has had a reasonable chance to attempt a cure. This is the general rule provided for by paragraph (2). At first sight it seems very favourable to the debtor. However, this rule is heavily qualified by the restrictions in the next Article.

C. Notification of non-conformity

The debtor must make the offer to cure promptly after being notified of the lack of conformity. There is no separate requirement of notification but it is an essential element in all remedies except withholding performance. In practice a creditor would usually have an interest in giving prior informal notice of non-conformity in any event before taking steps to exercise legal remedies. In many cases the giving of notice could be regarded as required by the duty to exercise remedies in accordance with good faith and fair dealing.

NOTES

1. Most national laws recognise in some form a defaulting party's right to cure a non-performance. However, except for the U.S. UCC § 2.508 on the seller's right to cure, no statutes have expressed the rule in the same general terms as the Article. However the first paragraph seems to correspond to ENGLISH and SCOTTISH law: for

England see *Borrowman, Phillips & Co. v. Free & Hollis* (1878) 4 QBD 500 and *Goode,* Commercial Law 298-301; for SCOTLAND, *McBryde* paras. 20.122-20.127, and *Strathclyde Regional Council v. Border Engineering Contractors* 1998 SLT 175. ENGLISH law also allows cure after the time for performance if time is not of the essence of the contract, since until it is, the other party will not be entitled to terminate. If the seller cannot perform correctly within that time, there is no further right of cure. See Beale, *Remedies for Breach of Contract* (1980), 92. Consumer buyers have a right to repair or replacement of defective goods unless this is impossible or disproportionate: Sale of Goods Act 1979 s. 48A, but these provisions do not *require* the buyer to give the seller an opportunity to cure.

2. CISG art. 48 and ULIS art. 37 provide a general right for the seller to cure even after the date for delivery, as long as the buyer has not terminated the contract. However the seller cannot cure in cases where this would lead to unreasonable inconvenience or uncertainty of reimbursement for the creditor.

3. The DANISH SGA § 49 gives the seller a right to cure if this can be done before the buyer becomes entitled to terminate because of late performance, and it is apparent that the buyer will not be put to expense or inconvenience thereby. In contracts other than sale of goods and related contracts (such as leasing), the right for the defaulting party to cure is wider. Cure is permitted unless the creditor will suffer serious inconvenience thereby. The creditor will not be permitted to terminate unless the request for cure has proved in vain, see *Gomard,* Obligationsret II 55 f. The FINNISH and SWEDISH SGAs allow the seller a right to cure in the same manner as CISG, see SGA § 34 and *Ramberg,* Köplagen, 402 H.

4. DUTCH law has introduced the right to cure a non-performance. The creditor may refuse performance if the defaulting debtor does not offer payment of due damages and costs at the same time (cf. CC art. 6:86). This right to cure ends at the moment the creditor notifies the defaulting debtor that the creditor claims damages instead of performance (CC art. 6:87) or terminates the contract (CC art. 6:265). This right to cure is not subject to provisions like the ones mentioned in the following Article, but may be frustrated in advance by the creditor in cases where the creditor has to give notice to the debtor in order to put the debtor in default and also notifies the debtor in advance that the creditor claims damages instead of performance or terminates in case the debtor still has not performed the obligation.

5. Under GERMAN law the debtor normally has a possibility to cure, which is not a right in the strict sense of the word but only results in an onus of the creditor to accept or otherwise co-operate, the breach of which gives the debtor defences against the creditor's remedies but no claim for damages or for specific performance. The debtor's possibility to cure is not provided for explicitly in the code but follows from the *Nachfrist* prerequisite for the most relevant remedies apart from specific performance, see particularly CC §§ 323(1), 281(1).

6. The only provision in the ITALIAN CC which provides the right to cure a non-performing tender is art. 1192 which gives the seller who has performed by delivering goods of which there was no right to dispose the right to tender goods which there is a right to dispose of. However case law and legal writers agree in general that, whenever the creditor does not accept a tender of performance because it does not conform to the contract, the defaulting debtor may make a new and conforming tender as long as the creditor has not brought an action for termination (*Giorgianni* 80; Cass. 31 July 1987 no. 6643, in Foro It., 1988, I, c. 138). CC art. 1512 allows the court to give the debtor extra time to repair or replace defective goods if the contract on usages provide a warranty that the goods will operate correctly for a period of time, see *Castronovo,*

Contract and Tort 281 ff. If the contract of sale is a consumer contract, art. 133 d.lgs. 6 September 2005 no. 206 (Codice del Consumo) on guarantees applies.

7. In SPANISH law the defaulting debtor may cure the default at any time before the creditor has given notice of default or, according to some writers, before the creditor has terminated the contractual relationship (*Díez Picazo* II, 622; *Lacruz-Delgado,* II, 1, § 23, 184; contra, *Albaladejo,* II, 1, § 32.4). There is no explicit provision to this effect, apart from the rule laid down in the law on consumer sales, but it is a necessary consequence of the requirements for rescission. The cases take a pragmatic approach, requiring the creditor to accept the performance if refusal would be contrary to good faith: see *Carrasco,* ZEuP 3/2006, 574 ff. In the Law on Real Estate Sales late payment must be accepted before the seller has specifically demanded termination, CC art. 1504.

8. In GREEK law a result allowing cure can be reached on the basis of CC art. 288. This article requires performance in accordance with good faith and business usage. CC art. 383 provides that when a creditor has set a reasonable term for the debtor to perform and the term has elapsed without performance, the creditor is entitled to either claim damages instead of performance or rescind the contract (cf. CC art. 385 on cases where setting a term for performance is not required).

9. In PORTUGUESE law a result allowing cure may be reached in that before the time for performance has expired, or even after that time but before a *Nachfrist* has expired, the defaulting debtor may offer a conforming tender. Since the creditor will still have an interest in performance the tender cannot be refused (*Telles* 309, *Leitão* II 242).

10. In FRENCH, BELGIAN and LUXEMBOURG law an offer to cure made in an action for *résolution* will sometimes prevent the remedy being granted by the judge. The court's decision on this matter cannot be reviewed by the Cour de Cassation, (Cass.civ. 1, 15 February 1967, B.I No.68, p. 50). In other cases when the offer has been made slightly late the court has held that the delay did not amount to a sufficiently serious non-performance to justify termination, see Cass.civ. 24 February 1970, Bull.civ. I no. 67 p. 54. In French law, there is no express provision that would correspond to the present article.

11. In AUSTRIAN and SLOVENIAN law there is no express provision that would correspond to the Article. However a supplier of a defective item may prevent termination by replacing it by a conforming one or by repairing it under the rules regarding bad performance (see CC § 932 esp. (2)). Under circumstances similar to those laid down in the preceding Article the remedy available is termination (see CC § 932(4)).

12. In POLISH law – similar to Austria – there is no general and express regulation corresponding to the Article. A similar solution can be found among rules concerning specific contracts – e.g. for sale CC art. 560 § 1 provides that the buyer cannot renounce the contract if the seller immediately exchanges the defective performance or removes its defects.

13. In ESTONIAN law, LOA § 107 has an express provision on the debtor's right to cure modelled generally on the UNIDROIT Principles art. 7.1.4. However, the debtor's right to cure ends if the creditor gives notice exercising the right to terminate the contractual relationship for fundamental non-performance, LOA § 116.)

14. In CZECH law, there is no similar general disposition. Generally, if a debtor fails to perform the obligation properly and timeously, that is a default (except in the case of non-performance by application of the general principle *exceptio non adimpleti contractus* if the creditor is the first one to default, CC § 520) and the other party – the creditor – has immediately and *ipso facto* the right to every remedy except termination

(cf. CC § 517, Ccom arts. 345-346, 366 ff). For the requirements for termination, see CC § 517.1, Ccom arts. 345-346 and abovementioned notes). There are no special civil law or commercial law rules on this question (see CC §§ 588–627 and Ccom arts. 409–470).

15. In SLOVAK law – similar to Austria and Poland – there is no general and express regulation corresponding to the Article. A similar solution can be found among rules concerning specific contracts, e.g. a right of the buyer in a commercial relationship to demand the removal of defects of the goods by replacement of the defective goods or by providing missing goods etc. (Ccom art. 436). The situation when the debtor performs an obligation prior to the agreed term is regulated only in the Ccom and therefore only for commercial relationships, and it deals only with a monetary obligation. According to Ccom art. 343 if the debtor performs a monetary obligation prior to the agreed term, the debtor is not entitled, without the creditor's consent, to deduct the amount corresponding to the interest from the sum in arrears for the period by which the obligation was performed earlier.

16. Under the HUNGARIAN CC § 306(1) in the case of non-conformity with the contract, (a) the creditor is, in the first place, entitled to choose either repair or replacement unless this is impossible or it results in disproportionate expenses on the part of the debtor as compared to the alternative remedy, taking into account the value the goods would have had there been no lack of conformity, the significance of the lack of conformity, and whether the alternative remedy could be completed without significant inconvenience to the creditor; (b) if the creditor is entitled to neither repair nor replacement or if the debtor refuses to provide repair or replacement or is unable to meet the conditions described in paragraph (2), the creditor may require an appropriate reduction of the price or have the contract withdrawn. The creditor is not entitled to have the contract withdrawn if the lack of conformity is minor. Under CC § 306(2) any repair or replacement must be completed within a reasonable time and without any significant inconvenience to the creditor, taking account of the nature of the goods and the purpose for which the creditor required the goods. Under CC § 306(3) if the debtor is unable or unwilling to repair the goods within a reasonable time, the creditor is entitled to repair the goods personally or have them repaired by others at the expense of the debtor. Under CC § 306(4) until repair or replacement is completed, the creditor is entitled to withhold a proportionate portion of the purchase price of the goods in question. Under CC § 306(5) any clause in a consumer contract that deviates from the statutory guarantee rights to the detriment of the consumer is void.

17. Generally see *Treitel*, Remedies § 276.

III.–3:203: When creditor need not allow debtor an opportunity to cure

The creditor need not, under paragraph (2) of the preceding Article, allow the debtor a period in which to attempt cure if:

(a) failure to perform a contractual obligation within the time allowed for performance amounts to a fundamental non-performance;

(b) the creditor has reason to believe that the debtor's performance was made with knowledge of the non-conformity and was not in accordance with good faith and fair dealing;

(c) the creditor has reason to believe that the debtor will be unable to effect the cure within a reasonable time and without significant inconvenience to the creditor or other prejudice to the creditor's legitimate interests; or

(d) cure would be inappropriate in the circumstances.

COMMENTS

A. General

This Article protects the reasonable interests of the creditor by placing some essential restrictions on the debtor's right to be allowed an opportunity to cure a non-conformity.

B. No chance to cure if performance late and the delay is a fundamental non-performance

The first essential restriction is, in the case of a contractual obligation, that the debtor has no opportunity to cure if performance is late and the delay is a fundamental non-performance. This is laid down by sub-paragraph (a) when read with paragraph (2) of the preceding Article. If the delay does not amount to a fundamental non-performance then the debtor may still attempt a cure if no other restrictions apply. The definition of "fundamental non-performance" in Annex 1 provides that a non-performance of a contractual obligation is fundamental if (a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result; or (b) it is intentional or reckless and gives the creditor reason to believe that the debtor's future performance cannot be relied on.

Illustration 1

In May S, a commodity dealer, contracts to sell a quantity of cocoa to B and to deliver this by 1st September. It is not delivered until 2nd September, on which date B rejects it. Assuming (as is usually the case upon a commercial sale of a commodity of this nature) that any delay in delivery will amount to a fundamental non-performance, it is too late for S to make a new and conforming tender.

Illustration 2

A agrees to build a house for B by 1 March. By 1 March some important items of work remain incomplete. Since a minor delay of this type would not normally be a fundamental non-performance of a building contract, A may complete the work at any time before the delay has become a fundamental non-performance, e.g. through the giving and expiry of a notice allowing extra time for performance.

C. Debtor in bad faith

Paragraph (b) contains an important rule. If the creditor has reason to believe that the debtor knew of the non-conformity and was not acting in accordance with good faith and fair dealing in making the defective performance, then the creditor need not offer an opportunity to cure. This is important because one of the dangers of a cure regime is that it could encourage debtors to take chances with defective performances knowing that if they were noticed there would still be an opportunity to cure. The principle of good faith and fair dealing which lies behind the provisions in this Article does not require any favours to be given to opportunistic debtors who themselves are acting in bad faith.

D. Further protection of creditor's interests

Paragraph (c) protects the creditor's interests in a more general way by providing that an opportunity to cure need not be made available if the creditor has reason to believe that the debtor will be unable to effect the cure within a reasonable time and without significant inconvenience to the creditor or other prejudice to the creditor's legitimate interests. Paragraph (d) adds that an opportunity to cure need not be offered if cure would otherwise be inappropriate in the circumstances. This is a sweeping up provision designed to catch situations which cannot be foreseen and which might not fall under any of the preceding paragraphs. It is justified by the policy of erring on the side of protecting the innocent creditor rather than the defaulting debtor.

NOTES

1. Art. 7.1.4 of the UNIDROIT Principles is along similar lines.
2. Similarly, the ESTONIAN LOA § 107(1) provides that the creditor may have a legitimate interest in refusing cure, mainly if cure is unreasonable in the circumstances or causes unreasonable inconvenience or expenses to the creditor. The POLISH CC art. 491 provides that in case the performance is delayed, the creditor may fix an additional time for the debtor to perform and state that if the time lapses without performance being provided the creditor will withdraw from the contract. The creditor may demand performance and reparation of the damage caused by the delay without fixing an additional time or after the time fixed lapsed without the performance being provided. The same rule applies also to obligations in which the performance is divisible and the creditor delays a part of the performance; the creditor may withdraw with respect to the delayed part or to all of the remaining parts of the performance. The creditor has a right to withdraw with respect to the entire contract if partial performance does not satisfy the creditor's interest due to the nature of the performance or to the purposes the contract was supposed to serve of which the debtor was aware. ENGLISH law applies the restriction in (a), see note to previous article, but not the other restrictions.
3. The SPANISH CC barely provides any regulation of cure. However, the CC art. 1100 sets forth that if the time established for the performance was of the essence, the default becomes automatically a non-performance and there is no possibility of cure. Regarding bad faith, the Supreme Court's decisions show that when the performance is still possible, but the debtor's attitude shows bad faith and no intention to fulfil the obligation, the creditor is allowed to terminate the contract immediately in accordance with the CC art. 1124 (TS 30 June 1981, RAJ 2622; TS 13 March 1986, RAJ 1250). Nevertheless, if the chosen option was not carried out in a reasonable time or it was

performed causing a significant difficulty for the consumer, or neither replacement nor repair may cure the nonconformity, there is no further opportunity of cure. In that case, the consumer has the possibility of choosing between reduction of the price or termination of the contract; but if the lack of conformity is not essential, there is no possibility of terminating the contract. However, according to ConsProtA art. 123.4, the consumer has to inform the seller of the lack of conformity of the product within two months of becoming aware of it, or the consumer loses the right to claim the cure.

4. Regarding SLOVAK law see also Notes to proceeding Article.

5. There is no such general requirement in CZECH law (see above-mentioned notes, p. 137). Only the Ccom contains provisions similar to the present article (arts. 345, 346, 436 and 437: no additional period to cure is needed if the failure to perform is a fundamental non-performance or if the obliged party declares that it will not perform). CC makes no exception from the additional-period rule, unless the obligation is to be performed at an exact time, which extinguishes *per se* if not timely performed. However, as mentioned in Notes to III.–3:202 (Cure by debtor: general rules), the additional period is required only in the context of termination

6. Under FRENCH law, there is no statutory provision similar to the present article. When termination has been requested by the creditor, it is left to the judge's discretion to determine if the requirements for termination are satisfied. Depending on circumstances, the judge may either declare the contract terminated or merely award damages to the creditor; the judge may also have regard to the debtor's offer to perform when it is made during the proceedings (Req. 17 July 1923, Civ. 17 May 1954) or grant a "délai de grâce" to the debtor and this amounts to the granting of an opportunity to cure. Termination clauses have the automatic effect of terminating the contract when they are invoked. In principle, the judge is thus bound to declare the contract terminated, to the extent that non-performance is established, and the debtor may not offer to perform. In order to avoid some harsh results, French judges resort to the good faith principle ; however, this does not enable them to exercise a control of the proportionality between the termination of the contract and the breach (*Terré/Simler/Lequette*, Les obligations[9], no. 664).

7. Under GERMAN law the exceptions to the debtor's possibility to cure are encapsulated in exceptions to the *Nachfrist* requirement. So the creditor is not forced to allow the debtor an opportunity to cure in the case of a *Fixgeschäft* which is the equivalent to this Article limb (a) (see CC § 323(2) no. 2, Ccom § 376), in case of repudiation (see CC §§ 281(2), 323(2) no. 1), in case of impossibility or impracticability (see CC §§ 283, 326(5)), in case of a very severe breach of duties (see CC §§ 282, 324) and in cases which come under the general clauses of CC § 323(2) no. 3 and § 281(2) respectively. These cases are supplemented by rules for special contracts, e.g. CC §§ 440, 536a(2) and 536c, 636.

8. For the HUNGARIAN law see CC § 306 which is explained in the notes to the preceding Article.

9. According to the GREEK CC art. 385, it is not necessary for a time-limit to be set, that is, the creditor may exercise the rights of CC art. 383 immediately after the debtor is in default, if (1) it can be seen from the whole attitude of the debtor that it would be pointless to set a time-limit or (2) the creditor, on the debtor's failure to perform, no longer has an interest in the execution of the contract (see *Stathopoulos*, Contract Law in Hellas, no. 277).

10. See also Notes to preceding Article

III.–3:204: Consequences of allowing debtor opportunity to cure

(1) During the period allowed for cure the creditor may withhold performance of the creditor's reciprocal obligations, but may not resort to any other remedy.

(2) If the debtor fails to effect cure within the time allowed, the creditor may resort to any available remedy.

(3) Notwithstanding cure, the creditor retains the right to damages for any loss caused by the debtor's initial or subsequent non-performance or by the process of effecting cure.

COMMENTS

A. Consequences of allowing opportunity for cure

The consequence for the creditor of allowing the debtor an opportunity to cure is that during the period allowed for cure the creditor may withhold performance of reciprocal obligations but may not resort to any other remedy. In particular, the creditor may not terminate for fundamental non-performance. If the debtor fails to effect cure within the time allowed, the creditor may resort to any available remedy.

Paragraph (3) makes it clear that even if the debtor does cure the non-conformity within the time allowed, the creditor retains the right to damages for any loss caused by the debtor's initial or subsequent non-performance or by the process of effecting cure. This could include compensation for any inconvenience caused or any consequential loss caused by the temporary non-availability of what is being cured.

NOTES

1. This provision is similar in effect to art. 7.1.4 (3) to (5) of the UNIDROIT Principles. See also Notes to III.–3:202 (Cure by debtor: general rules). ESTONIAN LOA § 107(3)-(4) correspond to the present Article. POLISH CC art. 491 is similar in effect. In SCOTLAND there is no statutory provision and in relation to the case law the discussion has been mainly about the effect of remediability on the remedy of termination (*McBryde* 3rd edn nos. 20.122–20.127) but there seems little doubt that if the creditor did allow a period for cure the consequences would be as stated in the Article. ENGLISH law has the effect of restricting the right to terminate the contract pending cure. In principle other remedies are not affected but the practical effect seems to be much the same as the article.
2. In the SPANISH CC there is no specific provision of withholding the creditor's performance until the cure is carried out. The only cases of withholding it are regulated in the CC arts. 1466 and 1467 which establish that the seller is not obliged to perform if the other party has not paid or when the buyer seems to be insolvent. It is logical that during the period of cure the creditor cannot resort to any other remedy besides withholding performance, such as terminating the contract because it would signify contradiction of the creditors own acts (allowing the cure) and abuse of law which is explicitly prohibited by the CC art. 7. Damages for any loss caused by the default are recoverable in any case, even if a period of cure is given by the creditor (CC 1101).

3. In CZECH law, a comparable provision can be found only in the Ccom within the provisions on sale of goods (§ 437(3)), but the same result undoubtedly follows from common sense (see e.g. Knappová *(-Knapp, Knappová, Švestka)* Civil Law, II, 109.Knappová *(-Knapp, Knappová, Švestka)*, Civil Law, II, 110. For HUNGARIAN law see CC § 306 discussed in the Notes to III.–3:202 (Cure by debtor: general rules).

4. Under FRENCH and BELGIAN law, there is no statutory provision similar to the present Article. As a general rule, the creditor may invoke the principle of *non adimpleti contractus*, allowing the creditor to withhold reciprocal obligations when the debtor does not perform. If non-performance persists, the creditor will be entitled to request the court to order termination and grant damages for loss caused.

5. The rules under GERMAN law have the same starting point, but the creditor may resort to other remedies in case of a supervening reason which makes the *Nachfrist* unnecessary.

III.–3:205: Return of replaced item

(1) Where the debtor has, whether voluntarily or in compliance with an order under III.–3:302 (Enforcement of non-monetary obligations), remedied a non-conforming performance by replacement, the debtor has a right and an obligation to take back the replaced item at the debtor's expense.

(2) The creditor is not liable to pay for any use made of the replaced item in the period prior to the replacement.

Section 3: Right to enforce performance

III.–3:301: Enforcement of monetary obligations

(1) The creditor is entitled to recover money payment of which is due.

(2) Where the creditor has not yet performed the reciprocal obligation for which payment will be due and it is clear that the debtor in the monetary obligation will be unwilling to receive performance, the creditor may nonetheless proceed with performance and may recover payment unless:

(a) the creditor could have made a reasonable substitute transaction without significant effort or expense; or

(b) performance would be unreasonable in the circumstances.

COMMENTS

A. The principle

As a rule it is always possible to enforce monetary obligations. The procedural mechanisms are for national laws but the assumption is that a suitable procedure will be available.

This is the basis of the rule in paragraph (1). A monetary obligation for the purposes of this rule is every obligation to make a payment of money, regardless of the form of payment or the currency. This includes even a secondary obligation, such as the payment of interest or of a fixed sum of money as damages. But in each case, the monetary obligation must be due before it can be enforced.

The first paragraph of this Article represents the general position in all the legal systems. The restriction in the second paragraph is less commonly found. It is derived from the experience of a number of legal systems which have confronted the problem addressed by the paragraph. In some other systems similar results have been obtained by application of the principle of good faith. It seems better to have a clear provision on the issue.

B. Money not yet due

The principle that monetary obligations always can be enforced is not quite so certain where the monetary obligation has not yet been earned by the creditor's own performance and it is clear that the debtor will refuse to receive the creditor's future performance. This is the situation regulated by paragraph (2).

Basic approach. The basic approach underlying the rules of paragraph (2) is obvious. Obligations are generally binding according to their terms. The creditor is normally entitled to perform and thereby to earn the price. The debtor's unwillingness to receive the creditor's performance is therefore, as a rule, irrelevant.

However, according to sub-paragraphs (a) and (b) there are two situations where the above principle does not apply.

Cover transaction. A creditor who can make a reasonable cover transaction without significant trouble or expense is not entitled to continue with performance against the debtor's wishes and cannot demand payment of the price for it (paragraph (2) sub-paragraph (a)). The creditor should terminate the contractual relationship and either make a cover transaction, thus becoming entitled to the difference between the cover price and the contract price, or simply claim damages without making any cover transaction. The debtor cannot invoke paragraph (2)(a) unless two conditions are satisfied. The first is that the creditor can make a cover transaction on reasonable terms because there is a market for the performance or some other way of arranging a substitute transaction. The second is that the cover transaction does not substantially burden the creditor with effort or expense.

> *Illustration 1*
> A sells 10,000 ball bearings to company B for €50,000,- payment to be made in advance. If B indicates that it will not accept delivery, A cannot force the ball bearings on B (e.g. by simply leaving them in B's yard) and sue for the price if there is a ready market for ball bearings or if A can easily find a new customer. In contrast, if A would have to make considerable efforts in finding a new customer and would have to shoulder the costs of transportation to another continent, A would not be obliged to make a cover transaction. A could sue for the price under the contract and, if B maintains its refusal to accept the goods, could deposit the goods with a third party to be held to B's order.

In certain situations the creditor may even be bound by commercial usage to effect a cover transaction. Whenever the creditor makes, or would have been obliged to make, a cover transaction, the creditor may claim from the debtor the difference between the contract price and the cover price as damages.

Unreasonable performance. A very different situation is dealt with in paragraph 2(b): Here performance by the creditor would be unreasonable. A typical example is where, before performance has begun, the debtor makes it clear that performance is no longer wanted. This situation can arise, for example, in construction contracts, other contracts for services and especially long term contracts. It should be noted, however, that under the model rules for contracts for services in Book IV the client in this type of case could simply terminate the contractual relationship subject to a claim for damages by the service provider if the termination is unjustified. See IV.C.–2:111 (Client's right to terminate).

> *Illustration 2*
> H has hired for a period of three years advertising space on litter bins supplied to local councils by C. Before commencement of that period and before preparation of the advertisement plates by C, H purports to cancel the contract. Even though paragraph 2(a) does not apply because there is plenty of advertising space available, C may not proceed to perform the obligations under the contract and then claim the hire charges, for it is unreasonable to undertake performance after H has indicated that it is no longer wanted.

The non-performance may be actual (i.e. the date for performance has passed) or anticipated.

An instance where performance might be reasonable is where the creditor has an interest in performing in order to occupy and train a workforce which must be kept on.

Common features. The feature common to the two cases dealt with in paragraph (2) is that the debtor is at risk of being forced to accept a performance which is no longer wanted.

However, neither of the two exceptions laid down in paragraph (2) affects the right of a beneficiary under a letter of credit to claim payment from the bank. This is because letters of credit are treated as independent of the underlying contract.

Legal consequences of exceptions. One of the consequences that arise if either one of the exceptions applies, is spelt out in paragraph (2): the creditor may not demand the money owed under the contract for the counterperformance, in particular the price. However, damages for non-performance may be claimed.

NOTES

I. Money due generally recoverable

1. In accordance with the general principle of *pacta sunt servanda*, most European legal systems allow a creditor to require performance of a contractual obligation to pay money; see for DENMARK *Gomard*, Obligationsret II 24). Also according to ENGLISH and IRISH law an action for an agreed sum is often available, although it is limited in certain respects: unless the contract provides otherwise, it may be brought only when the price has been "earned" by performance, e.g. the performance of a service or the passing of property in the goods (e.g. U.K. Sale of Goods Act 1979 s. 49(1), IRISH Sale of Goods Act 1893 s. 49(1)). For ITALIAN law the rule can be derived from CC art. 1453(1). In SCOTLAND the standard remedy for non-performance of a monetary obligation is an action for payment. See *Macdonald* v. *North of Scotland Bank* 1942 SC 369.

II. Resale possible without unreasonable effort or expense

2. The restriction in paragraph (2) (a) has a precursor in ULIS art. 61. ULIS art. 61(2) restricts the seller's right to require payment of the price where a resale was in conformity with usage and reasonably possible. CISG art. 62 have dropped this restriction. The seller is bound to the contract; and is therefore obliged to tender performance to the buyer even if the latter is unwilling to receive performance, and may claim the purchase price. This approach expresses the general rule which seems to prevail in most European countries.

III. Performance would be unreasonable

3. Paragraph (2) (b) is based on considerations to be found in experience gained from ENGLISH, IRISH and SCOTTISH practice. Once an action for the price was available there was no requirement that it must be reasonable to pursue it rather than to enter a cover transaction. This gave rise to difficulties when a party had announced in advance that a service was no longer required but the other performed it nonetheless and then sued for the price: see *White & Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413 (H.L.) (see Illustration 2 of the Comment). The rule in contracts other than sale of goods now appears to be that if at the date of the repudiation the innocent party has not yet performed, the performance may be made and the price claimed only if there is a legitimate interest in doing so: see *Attica Sea Carriers Corporation v. Ferrostaal*

Poseidon Bulk Reederei GmbH [1976] 1 Lloyd's Rep 250. A party who has no legitimate interest in performing is confined to an action for damages, and recovery will be limited by the principle of mitigation. SCOTTISH law is the same - *White & Carter* (above) is a Scottish case. The guilty party has the onus of showing that the innocent party has no legitimate interest in performing (Scotland: *Salaried Staff London Loan Co. Ltd.* v. *Swears & Wells Ltd.* 1985 S.L.T. 326, I.H.). The Scottish Law Commission has recommended that Scottish law be brought into line with the provision in the Article: Report on Remedies for Breach of Contract (Scot. Law Com. No. 174, 1999).

4. Continental European legal systems do not generally know the general restriction upon a claim for payment provided for in paragraph (2)(b). Their general solution is the *mora creditoris* solution: The "price-creditor" may claim the price even if its own performance is prevented by lack of co-operation of the "price-debtor". If due performance can no longer be obtained, the price claim is (ipso iure and even retroactively) reduced by the costs the price-creditor has or should have saved and by a gain obtained from a substitute transaction (cf. for GERMAN law CC §§ 326(2), 537, 615). The result of keeping the claim for the price in existence is the most important function of the continental concept of mora creditoris, see for GERMAN law AnwKomm (-*Schmidt-Kessel*), BGB [2005], § 293 no. 7. This solution in most cases co-exists with the well known combination of termination and damages which applies under English law. The price-creditor, therefore, has an option how to proceed.

5. However in BELGIAN and DUTCH law there are a number of situations in which the creditor is obliged to terminate and claim damages, e.g. in a construction contract, CC art. 1794, or more generally in all obligations to be rendered in exchange for work or services (Dutch Code arts. 7:764 and 7:408 respectively). The creditor must also terminate when to insist on performance would be contrary to good faith or an abuse of right, see Cass. 16 January 1986, Arr.Cass. no. 317, R.W. 1987-88, 1470 obs. *van Oevelen*, R.G.D.C. / T.B.B.R. 1987, 130. Due to the expansion of the principle of good faith, a similar solution should be possible in FRANCE. The FINNISH and SWEDISH SGAs § 52 provide that, in the case of goods which the seller must procure or produce specifically for the buyer, if the buyer cancels the contract the seller may not procure or produce the goods and claim the price. The seller may only claim damages, including any loss of profit. However, this does not apply if the cancellation would result in substantial inconvenience for the seller or if the seller would be at risk of not being reimbursed for losses resulting from the cancellation. See *Ramberg*, Köplagen 512 ff. In POLISH and in CZECH law there are no provisions corresponding to the Article. Money due is generally recoverable and the laws do not provide any exceptions similar to those in paras. (2)(a) and (b) of the Article. The position is similar in SLOVAK law. The same holds generally true for ESTONIAN law. However, ESTONIAN LOA § 655, providing for the client's right to terminate the contractual relationship under a contract for services at any time (subject to the contractor's right to demand payment of the agreed remuneration from which the savings made by the contractor due to the termination and anything which the contractor obtained or could reasonably have obtained by using the labour force thereof for different purposes are deducted) substantially decreases the necessity for general exceptions. Also, it is suggested that the creditor may be barred from exercising the right to payment if the result would not be acceptable under the principle of good faith (LOA § 6(2), see *Kull/Käerdi/Kõve*, 219).

6. According to SPANISH case law, the creditor cannot proceed to performance when it is clear that the debtor will fail to perform in the future and that the creditor's

performance would lead to an unreasonable increase in the amount payable by the debtor (TS 14 May 2003, RAJ (2003), 4749; TS 23 May 2005 RAJ (2005), 6364).

III.–3:302: Enforcement of non-monetary obligations

(1) The creditor is entitled to enforce specific performance of an obligation other than one to pay money.

(2) Specific performance includes the remedying free of charge of a performance which is not in conformity with the terms regulating the obligation.

(3) Specific performance cannot, however, be enforced where:

(a) performance would be unlawful or impossible;
(b) performance would be unreasonably burdensome or expensive; or
(c) performance would be of such a personal character that it would be unreasonable to enforce it.

(4) The creditor loses the right to enforce specific performance if performance is not requested within a reasonable time after the creditor has become, or could reasonably be expected to have become, aware of the non-performance.

(5) The creditor cannot recover damages for loss or a stipulated payment for non-performance to the extent that the creditor has increased the loss or the amount of the payment by insisting unreasonably on specific performance in circumstances where the creditor could have made a reasonable substitute transaction without significant effort or expense.

COMMENTS

A. General

This Article allows the creditor to enforce specific performance of a non-monetary obligation by the debtor. The creditor has not only a substantive right to the debtor's performance but also a remedy to enforce this right specifically, e.g. by applying for an order or decision of a court. Again the procedural mechanisms available for the enforcement of specific performance are for national laws, as are the sanctions for non-compliance with any judgment ordering specific performance.

The Article covers all non-monetary obligations - e.g. to do or not to do an act, to make a declaration or to deliver something. It covers an obligation to accept performance. In some cases a court order itself will act as a substitute for performance by the debtor.

> *Illustration 1*
> A who had first rented his immovable to B and later on agreed to sell it to him, refuses to transfer ownership to B. Unless paragraph (2) applies, B is entitled to a court order directing A to transfer ownership to B or, in some countries, a court order which itself takes the place of a document of transfer executed by A.

The right to enforce specific performance of a non-monetary obligation applies not only where no performance at all is tendered by the debtor but also where the debtor has attempted to perform but the attempt does not conform to the terms regulating the obligation. This is made clear by paragraph (2).

However, the right to enforce specific performance is subject to the exceptions in paragraph (3) and to the time limit in paragraph (4).

B. The principle and exceptions

Whether a creditor should be entitled to enforce specific performance of a non-monetary obligation is controversial. In England and Ireland specific performance is regarded as an exceptional remedy but in other European countries, including Scotland, it is regarded as an ordinary remedy. There is reason to believe, however, that results in practice are rather similar under both theories. The Article takes a pragmatic approach. A right to enforce specific performance is admitted in general (paragraphs (1) and (2)) but excluded in several special situations (paragraphs (3) and (4)). Paragraph (5) also operates indirectly as a restriction in cases in which the creditor could have avoided losses by making a substitute transaction instead of insisting upon enforcing specific performance.

A general right to enforce specific performance has several advantages. Firstly, through specific relief the creditor obtains as far as possible what is due; secondly, difficulties in assessing damages are avoided; thirdly, the binding force of obligations is stressed. A right to enforce specific performance is particularly useful in cases of unique objects and in times of scarcity.

On the other hand, comparative research of the laws and especially commercial practices demonstrate that the principle of allowing the enforcement of specific performance must be limited. The limitations are variously based upon natural, legal and commercial considerations and are set out in paragraphs (3) and (4). In all these cases other remedies, especially damages and in appropriate cases termination, may be adequate remedies for the creditor.

C. Right to require remedying of defective performance

If the debtor attempts to perform, but the attempted performance does not conform to the terms regulating the obligation, the creditor may choose to insist upon a conforming performance. This may be advantageous for both parties. The creditor obtains what is due and the debtor obtains a discharge (and any price or other counter-performance which is due) and preserves a reputation as a person who fulfils obligations.

A conforming performance may be achieved in a variety of ways: for example, repair; delivery of missing parts; or delivery of a replacement.

The right to enforce a conforming performance is, of course, subject to the same exceptions as the general right to enforce performance (see Comments D-J). Thus a debtor cannot be forced by court order to accomplish a performance conforming to the contract if this would be unduly burdensome or expensive or if the creditor has failed to demand performance within a reasonable time.

D. Exceptions, but no judicial discretion

Under the Article the creditor has a right to enforce performance of a non-monetary obligation. Granting an order for performance thus is not in the discretion of the court; the court is bound to grant the remedy, unless the exceptions of paragraphs (3) or (4) apply.

E. Impossibility and illegality

For obvious reasons, there is no right to enforce performance if it is impossible (paragraph (3)(a)). This is particularly true in case of factual impossibility, i.e. if some act in fact cannot

be done. The same is true if an act is prohibited by law. Similarly, specific performance is not available where a third person has acquired priority over the creditor to the subject matter of the obligation.

If an impossibility is only temporary, enforcement of performance is excluded during that time.

Whether or not the impossibility makes the debtor liable in damages is irrelevant in this context.

F. Performance unreasonably burdensome or expensive

Performance cannot be required if it would be unreasonably burdensome or expensive for the debtor (paragraph (3)(b)). Burdensome does not mean financially burdensome. It is wider than that. It could cover something which involved a disproportionate effort or even something which was liable to cause great distress, vexation or inconvenience. No precise rule can be stated on when a performance would be "unreasonably" burdensome or expensive. However, considerations as to the reasonableness of the transaction or of the appropriateness of the counter-performance are irrelevant in this context. Nor is paragraph (3)(b) limited to the kind of supervening event cases covered by III.–1:110 (Variation or termination by court on a change of circumstances) .

> *Illustration 2*
> A, who has sold his yacht "Eliza" to B, promised to deliver it at B's domicile. On the way "Eliza" is hit by a ship and is sunk in 200 metres of water. The costs of raising her would amount to forty times her value. The cost of forcing A to perform would be unreasonable.

Performance may have become useless for the creditor. In such cases it may then be vexatious and unreasonably burdensome to force the debtor to perform.

> *Illustration 3*
> A leased his farm for five years to mining company B for strip mining. In addition to paying rent, B promised to restore the land after completing the mining operation. In the meantime, A decides to lease the land after its return from B to the army for use as a training area for tank crews. If B would have to spend a large amount of money in order to restore the land and its value would thereby increase by only marginally, the restoration would be unreasonably burdensome.

In deciding whether performance would be unreasonably burdensome or expensive it may be relevant to take into account whether the creditor could easily obtain performance from another source and claim the cost of doing so from the debtor.

> *Illustration 4*
> Company A sells and delivers to company B a piece of machinery. On delivery B discovers that an adjustment of the machinery is defective. The defect can easily be cured by a competent engineer. A has no engineers within 300 km of B's place of business. It would cause A unreasonable expense to send one of its own engineers to do something which could be done locally. A offers to pay for the adjustment to be

done by a local engineer. If B can easily get a local firm to do the adjustment B cannot require A to do it.

G. Performance would be of such a personal character that it would be unreasonable to enforce it

Paragraph (3)(c) is based partly on considerations of practicality. It might be pointless to try to enforce specific performance of certain obligations of a highly personal character. Mainly, however, it is based on respect for the debtor's human rights. The debtor should not be forced to perform if the performance consists in the provision or acceptance of services or work which is of such a personal character or is so dependent upon a personal relationship that enforcement would infringe the debtor's human rights. The criterion here is not simply the personal nature of the work or services to be provided. To exclude enforcement of specific performance of all obligations to provide work or services of a personal character would be far too broad. The criterion is whether enforcing performance would be unreasonable. In deciding that question regard would have to be had to the debtor's human rights and fundamental freedoms, including in particular the rights to liberty and bodily integrity. For example, an obligation to take part in a medical experiment involving surgical procedures on the debtor would not be specifically enforced. There is no reason, however, why a firm of professional carers should not be forced to perform their contracts to supply personal caring services. And there is no reason why many ordinary employment contracts should not be enforced, although certain employment contracts requiring work or services of a highly personal nature from the debtor's point of view, or the continuance of a highly personal relationship, might be caught by this sub-paragraph. The position is similar in relation to partnership contracts or contracts to form a company. Some might involve such a close personal relationship that the exception would apply. Others might not.

Illustration 5
The six heirs of a factory-owner conclude a contract in due form to establish a limited company in order to continue the inherited business. Later A, one of the heirs, who was not to assume any management functions in the company, refuses to co-operate in the creation of the company. The other heirs may enforce performance of A's obligation under the agreement. The result might be different if the agreement were one to create a partnership in which all the partners were to play an active role.

The expression "of a personal character" does not cover services or work which may be delegated. However, a provision in a contract that work may not be delegated does not necessarily make the work of a personal character. If the contract does not need the personal attention of the contracting party but could be performed by employees, the term prohibiting delegation may be interpreted as preventing only delegation to another enterprise, e.g. a sub-contractor. The signing of a document would not usually constitute performance of a personal character. An obligation to sign a document can mostly be enforced since the debtor's act can often be replaced by a court decree (See Comment A).

The reason for the exception in paragraph (3)(c) is not that the work or services, if forced, might not be satisfactory for the creditor. That is a question for the creditor to decide, not a reason for a sweeping automatic exception. A creditor who has doubts about the value of enforced performance does not need to seek an order for specific performance. It would be for the creditor to decide, for example, whether it would be advisable to seek an order to enforce specific performance by an artist of an obligation to paint a portrait. There might be situations (e.g. portrait almost finished apart from some routine background work; completion and

signature by the artist would greatly increase the value) where the creditor might wish to enforce specific performance of such an obligation and where it would be entirely reasonable to do so. There might be other situations where the creditor might consider that enforced performance would result in a ghastly portrait. It is for the creditor to decide.

H. Reasonable certainty

There is another restriction on the availability of a court order enforcing specific performance, under the sanction of imprisonment or a fine, which stems from human rights requirements and therefore does not need to be set out in the Article. The court order would have to make it reasonably clear what the debtor was required to do in order to comply. It would be unacceptable to imprison or fine someone for disobeying a court order if the order did not make it clear what had to be done.

I. Reasonable time

A request for performance of a non-monetary obligation must be made within a reasonable time (paragraph (4)). This provision is supplementary to the normal rules on notification of non-conformity and on prescription and is intended to protect the debtor from hardship that could arise in consequence of a delayed request for performance by the creditor. Where the creditor is a consumer, the creditor's interests are not seriously affected by this limitation because other remedies are still available. (See III.–3:107 (Failure to notify non-conformity))

The length of the reasonable period of time is to be determined in view of the rule's purpose. In certain cases, it may be very short, e.g. if delivery can be made out of the debtor's stock in trade. In other cases it may be longer. The rules on prescription in Chapter 7 will come into operation if there is a sufficiently long delay.

It is the debtor who will have to show that the delay in requesting performance was unreasonably long.

J. Limitations on abuse of remedy

There could be a danger that a creditor, by insisting unreasonably on specific performance by the debtor when the creditor could easily obtain performance elsewhere, could inflate the damages payable for non-performance by the debtor or the amount of a stipulated payment for non-performance which is calculated by the day or week. One control on such abuse is the general provision that remedies must be exercised in accordance with good faith and fair dealing. Another, more specific, control is provided by paragraph (5) which prevents the creditor from recovering damages or a stipulated amount for non-performance to the extent that the creditor has increased the loss or the amount of the payment by insisting unreasonably on specific performance in circumstances where the creditor could reasonably be expected to obtain performance from another source.

NOTES

I. General approaches

1. With respect to non-monetary obligations, traditionally there are important differences between the legal systems, at least in theory.

2. In ENGLISH and IRISH law specific performance is a discretionary remedy that will only be granted if damages are inadequate (ENGLAND: *Chitty* § 27-005; IRELAND, *Keane*, §§ 16.01 ff; cf. USA: Restatement of Contracts 2d §§ 345(b), 357-369). There is also some doubt as to whether specific performance will be given of a continuing obligation, see e.g. *Co-Operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* [1998] AC 1. In SCOTLAND specific implement is usually said to be a remedy available as of right but in fact it is not granted in the cases set forth in paragraph (3) (*McBryde* paras. 23.15-23.22). But in Scotland the idea of the right to performance has meant that continuing obligations may be enforced more readily than in England; see *Highland & Universal Properties Ltd v Safeway Properties Ltd* 2000 S.C. 297. However, in England injunctions for enforcement of express negative stipulations are sometimes said to be granted as a matter of course (*Chitty* § 27-059).

3. In the other European countries the creditor's right to performance is generally recognised. In the German legal family this is widely seen as "axiomatic" (*Zweigert and Kötz,* An Introduction to Comparative law[3], 472) and seen as "*das Rückgrat der Obligation*" (*Rabel,* Recht des Warenkaufs I, p. 375). But under the new law of obligations this view is doubted nowadays in academic writing, see *Schlechtriem and Schmidt-Kessel,* Schuldrecht, Allgemeiner Teil[6], 465 et seq. The AUSTRIAN CC §§ 918, 919 (regarding delay), ITALIAN CC (art. 1453(1)), SLOVENIAN LOA (§ 103) and the DUTCH CC (art. 3:296(1)) expressly provide that the creditor can insist on performance. So do the DANISH SGA § 21 which is expressive of a general principle of contract law, see *Gomard,* Obligationsret II 21 and the FINNISH, SWEDISH SGAs § 23 and subject to several exceptions (see note III below), also ESTONIAN LOA § 108(2).

4. The principle of enforced performance *in natura* is particularly emphasised in FRENCH law. It follows from CC art. 1184(2) and from the contemporary interpretation of CC art. 1142. Also, CC art. 1143 empowers the creditor to demand destruction of anything that has been produced contrary to an agreement. And art. 1 of the Law of 9 July 1991 on the reform of civil enforcement proceedings also establishes the principle that every creditor may force the debtor, in accordance with legal provisions, to perform. Performance *in natura* is facilitated by the liberal use of judicial penalties (*astreinte*) (*Malaurie and Aynès,* Obligations, nos 1017-1023). Whether enforced performance *in natura* is available as a matter of right for the creditor (and therefore the judge must grant it if it is asked for) is, however, unsure. According to traditional case law, the judge holds a sovereign power to choose the mode of reparation that appears the most appropriate, and in particular can reject enforced performance *in natura* asked for by the creditor, based on CC art. 1142 (see Cass.Civ. 1, 30 June 1965, Bull.civ. I no. 437, p. 327, Gaz.Pal. 1965.2.329). But there is a new move to grant specific performance, based on the literal wording of CC art. 1184(2) (Cass., com., 3 December 1985, Bull.civ., IV, no. 286 p. 244; 28 February 1969, motifs, Bull.civ. III No. 182 p. 139; Cass., Civ. 1ère, 16 January 2007, RDC 2007. 719, obs. D. Mazeaud, adding that the judge can order the necessary measures for this by way of an "*astreinte*"). However, according to the Cour de cassation, a breach of a promise of sale may only give rise to damages, and not to specific performance (Cass., Civ. 3ème, 15 December 1993, Somm., Comm. p. 230, obs. L. Aynès). This is not very consistent and has given rise to fierce criticism, especially considering the fact that the Chambre Mixte of the Cour de cassation has adopted the opposite solution for a "*pacte de préférence*" (Cass., Ch. Mixte, 26 May 2006, D. 2006, p. 2644, obs. B. Fauvarque-Cosson; on specific performance under French law, see more generally the special issue of Revue des Contrats 2005, no. 1, "*Exécution du contrat en nature ou par equivalent*").

5. In BELGIAN law the pre-eminence of specific performance is acknowledged (Cass. 30 January 1965, Pas. I 58; Cass. 5 January 1968, Pas. I 567) (though subject to the fact that the demand must not be an abuse of right) and the same is true for PORTUGAL (CC art. 817). In SPAIN specific performance is an ordinary remedy (CC arts. 1096, 1098; *Díez Picazo*, II 679; *Lacruz-Delgado*, § 21, 170) What is under discussion is whether the creditor can rely on this remedy in every circumstance and whether the creditor is entitled to resort to a cover contract before giving the debtor an opportunity to cure (see *Carrasco*, INDRET 1/2006, www.indret.com). Under the ITALIAN law an action for specific performance has different requirements according to whether the right being enforced regards non-performance of an obligation to perform, to abstain, to give consent or to pay (see CC arts. 2930–2933 and *Sartori*, 395 ff)

6. In POLISH law specific performance (*in natura*) remains the primary content of the debtor's obligation. The principle of "real performance" was strongly emphasized during the past decades (see W. Warkałło, Wykonywanie zobowiązań i skutki ich niewykonania według kodeksu cywilnego, PiP 1965, nos. 8-9; W. Warkałło, Ogólne zasady wykonywania zobowiązań, Studia Prawnicze 1973, No 37). Although now – after the transition to a free market economy – the importance of specific performance has decreased, it remains a general principle that specific performance is enforceable (see W. Czachórski [et al.] Zobowiązania. Zarys wykładu, Warszawa 2002, p. 316). In CZECH law specific performance is positively also the primary content of the debtor's obligation. The debtor is obliged to perform the obligation and the creditor has a corresponding right to obtain this performance. Nevertheless the general remedy granted by judges in cases of non-performance seems to be still today a monetary compensation in the form of damages. But since the applicable general principle (common to other laws of the European tradition) is *restitutio in integrum* if it is possible (see CC art. 442), *restitutio in natura* appears as a subsidiary form of compensation and the order of specific performance is generally recognized as lawful in cases where a compensation in natura is found really possible and useful (this unwritten general legal principle is widely accepted, for confirmation see a basic literature, for ex. Věra Korecká *in D. Hendrych a kol*., Právnický slovník). Certainly the idea of an order to perform exists. It can be found occasionally in some of the comments on general provisions of civil and commercial law (for ex. *Jehličk*a, *Švestka, Škárová a kol*., p. 724) and the Court Civil Procedure law recognises a regulated power of every judge to grant a decree for the performance in natura of the debtor's obligation.

7. Also in SLOVAK law specific performance remains the primary content of the debtor's obligation. Generally all performances are enforceable except in the case of merely natural obligations (e.g. those arising from a game of chance or a bet concluded between individuals, a statute-limited debt etc.). Under the HUNGARIAN CC § 277(1) contractual obligations must be performed as stipulated; performance can be enforced.

8. ULIS and CISG give the buyer generally a right to performance (ULIS arts. 24, 26, 30, 42; CISG art. 46). However, courts are not bound to decree performance if they would not do so according to their national law (ULIS art. 16 and art. VII of the convention relating to ULIS; CISG art. 28).

II. Practical convergence

9. The basic differences between the systems are of theoretical rather than practical importance. Even in countries where enforcing specific performance is the primary remedy it appears that a creditor will pursue an action for performance, in general,

only if having a special interest in performance which would not be satisfied by damages (cf. *Zweigert & Kötz* 484). See also the comments on CZECH law in note 6 above.

III. Exceptions to specific performance

(a) Judicial discretion and exceptions

10. In ENGLISH and IRISH law specific performance is a discretionary remedy. Nevertheless, this discretion will be exercised in accordance with settled principles (cf. *Hanbury & Maudsley* 651 with refs.; *Martin*, Modern Equity (17th ed, 2005)), some of which are similar to the exceptions in the Article. Also in FRANCE it has been said that in principle the judge was free to grant damages even though performance *in natura* has been demanded (*Cass. civ*. 1ère, 30 June 1965, Gaz. Pal. 1965.329). However the cases where this has in fact been done seem to fall under para. (3)(b) (performance would be unreasonably burdensome or expensive) or to have been cases where other sources of supply were available. In SPANISH law the courts may refuse specific performance if it would not be reasonable in the circumstances to grant it: *Díez Picazo* II, 696; *Lacruz-Delgado* II, 1, § 26, 204; *Albaladejo*, II, 1, § 33.1.B. For BELGIAN law see note 5 to the preceding Article. In SCOTTISH law the remedy may exceptionally be refused and damages awarded instead if such is the proper and suitable remedy (*McBryde* para. 23.15). In GERMAN law the right to performance and its enforcement do not depend upon the judge's discretion; the same is true of AUSTRIAN, PORTUGUESE and ESTONIAN law. But the far reaching exceptions in general clauses, in particular in defences for reason of impracticability (see GERMAN CC § 275(2) and (3)), give the judge a power which in practical terms frequently comes close to discretion. For CZECH law see Note 6 above.

11. Under CISG art. 28 and under ULIS art. 16 in connection with art. VII of the covering convention, restrictions under national laws are preserved even under the uniform sales laws.

(b) Performance impossible

12. The rule that no-one will be forced to perform the impossible seems to be common to the laws of Europe (cf. ENGLAND: *Forrer* v. *Cash* (1865) 35 Beav. 167, 171; 55 E.R. 858, 860; IRELAND, *Keane* § 16.10; SCOTLAND, *McBryde*, para. 23.18; FRANCE and BELGIUM: CC arts. 1184(2) sentence 2, 1234, 1302; CZECH REPUBLIC: CC § 37.2 (for impossibility ab initio), CC § 575.1 (for performance becoming impossible); GERMANY: CC § 275(1); AUSTRIA: CC § 1447 (if the impossibility can neither be attributed to the sphere of the debtor nor the creditor, see also CC § 920); GREECE: CC art. 336; ITALY: CC arts. 1256, 1463; POLAND: CC arts. 475 § 1, 493, 495; PORTUGAL: CC art. 828; SLOVENIA: LOA § 329; SPAIN: CC arts. 1182, 1184; NETHERLANDS: CC art. 3:236; ESTONIA: LOA § 108(2)(1); DENMARK: *Gomard*, Obligationsret II 33; FINLAND: *Taxell*, Avtal och rättsskydd 196 and SGA § 23; SWEDEN: *Rodhe*, Obligationsträtt 348 ff, SLOVAKIA CC § 575. CISG art. 79(5) appears to be to the contrary, but this is controversial (cf. *Schlechtriem* 51, 96-97 with references; *Audit* nos. 185 - 186).

(c) Performance unreasonably burdensome or expensive

13. Paragraph (3) (b) corresponds to a view which is widely accepted in NORDIC case law and literature (cf. *Ussing*, Obligationsretten[4], 68, *Gomard*, *op.cit*. 46 *Taxell*, op.cit. 197; *Ramberg*, Köplagen 313 ff.; FINNISH and SWEDISH SGAs § 23; ESTONIAN LOA § 108(2) 2); and is accepted in GERMANY by CC § 275(2) and (3); ITALY

(*Mengoni*, Contractual responsibility 1089-1090) and POLAND (for the controversial concept of "economic impossibility" which corresponds to "unreasonably burdensome" – see W. Czachórski [et al.], Zobowiązania, p. 72). It is a clear rule under AUSTRIAN law that specific performance is not available if it would be unreasonable if the unreasonableness amounts to an impossibility: see *Mayrhofer/Ehrenzweig*, Schuldrecht AT, 396 et seq., e.g. OGH 20 March 1963 SZ 36/44. In PORTUGAL, such a rule is expressly provided for in the case of an obligation to demolish a building erected in violation of a duty not to do so (CC art. 829 no. 2). IRISH law achieves this position, *Keane* § 16.12. GREEK courts have refused a claim for performance *in natura* where that would burden the debtor with excessive and disproportionate sacrifices (A.P. 93/1967, NoB 15 (1967) 791, 595/1999 HellDni 41 (2000) 34; cf. Athens 5917/1976, NoB 25 (1977) 401). In FRANCE, the cases which recognise the judge's sovereign power to refuse performance *in natura* (see above, note 1) are sometimes based on the excessive cost of the operation (see e.g. Cass. req. 23 March 1909, S. 1909.1.552; Cass.civ.1, 8 June 1964, Bull.civ. I, no. 297, p. 232). However, recent case law favours specific performance, whatever the cost is (e.g. Cass. civ. 3, 9 December 1975, B. III, no. 363, p. 275; Cass. Civ. 1ere, 16 January 2007, RDC 2007. 719, obs. *D. Mazeaud*) This rigorous solution is based upon the binding force of the contract. In SCOTTISH law the court will in its equitable discretion not order implement if the performance involves disproportionate effort and expense: *McBryde*, para. 23.22. In BELGIAN law the restrictions mentioned in note 5 to the preceding Article apply also to the choice between specific performance and damages: Cass. 10 September 1971, Pas. 1972, I, 28 note *Ganshof*, R.C.J.B. 1976, note *van Ommeslaghe*. Specific performance will not be ordered if the performance would be quite different to the original obligation, e.g. a lessee who has carelessly burned down the leased premises will not be ordered to re-build them. SLOVENIAN law provides for several situations where a specific performance is unreasonable and a contract is terminated *ipso iure*. E.g. LOA § 104. In the CZECH Republic, the judge is to make a reasonable reduction of monetary compensation in cases of non-intentionally caused damage if there are reasons which merit special consideration. This general legal provision of CC § 450 introduced to the Czech written law a so-called *principle of moderation* (see commentary *Jehličkа, Švestka, Škárová*, pp. 561-562). As a result, the judge is obliged to try to find an equitable solution to every case involving responsibility which the judge has to decide.

14. *Illustration 3* is modelled upon *Peevyhouse* v. *Garland Coal & Mining Company* 382 P. 2d 109, 116 (Okl. 1962), which, however, deals with a claim for damages for a substitute transaction.

15. In SLOVAKIA the performance is not to be deemed to be impossible if it can be realised even under aggravated circumstances, with higher costs or after the agreed date (CC § 575(2)). This means that such a performance is possible and therefore also enforceable.

(d) Performance of a personal character

16. Paragraph (3)(c) is based on considerations common to the laws of Europe (see *Remien*, (1989) RabelZ 53, 165 ff).

17. Thus, in ENGLAND, IRELAND and SCOTLAND specific performance is not available for contracts involving personal services (cf. *Treitel*, Contract 21-035; *Keane* § 16.05; *McBryde*, para. 23.20; but note *MacQueen & Thomson* para.6.14. Similarly in FRENCH law under CC art. 1142 there is no right to enforcement of certain personal obligations to do or not to do (Cass.civ. 20 January 1953, JCP 1953, 7677 note *Esmein*). In BELGIUM the rule is also applied though only where specific

performance would involve physical coercion, (Cass. 23 December 1977, Arr. Cass. & Pas 505) and agency cases (CC art. 2007). In SPAIN it is admitted that there is no right to specific performance of obligations consisting in the provision of services or work of a personal nature (CCP arts. 706, 709; CC art. 1098; *Díez-Picazo*, II 124 and 680). In NORDIC law a claim for performance in kind is excluded for employment contracts and in some other cases (DENMARK *Lyngsø* 125; and generally when performance consists of work of a personal character, *Gomard, op.cit.* 48 f; FINLAND: *Taxell*, op.cit. 192; SWEDEN: *Ramberg*, Avtalsrätt 43 and *Hellner, Hager & Persson*, Speciell Avtalsrätt II: 2, 155 et seq). An exception to specific performance corresponding to paragraph (3) (c) can be found in ESTONIAN LOA § 108(2) sent. 4. AUSTRIAN law in general allows for a claim to enforce contracts for personal services. While GERMAN law allows a claim for personal services as long as CC § 275(3) does not apply, CCP § 888(2) excludes the enforcement of judgments for non-delegable personal services. GREEK CCP art. 946(2) takes a similar position and so does POLISH law (KPC arts. 1050-1059). Under PORTUGUESE law this would be a case of impossibility of specific performance, damages being the solution (CC art. 566(1)).

18. ITALIAN law, however, does not have a rule about specific performance of contracts involving personal services and difficulties have arisen: *Mazzamuto*.

19. In ENGLAND and SCOTLAND specific performance of an agreement for partnership will be granted only in some special situations (*Lindley* on Partnership 536). FRENCH law, too, excludes a right to performance *in natura* of a promise to form a "*société*" (*Perrot*, J.Cl. Sociétés Fasc. 7bis, nos. 23 and 37). GERMAN law, however, allows the enforcement of preliminary contracts to form a limited liability company (*Schlosser (-Emmerich) § 2 no. 81* with references).

20. SLOVAK law does not provide for rules concerning specific performance of contracts regarding personal services.

IV. Delay

21. Paragraph (4) takes up the ENGLISH view that a creditor who delays unreasonably in requiring performance *in natura* may lose the right (cf. *Hanbury & Maudsley* 677; *Keane* § 3.10). A similar rule is found in the FINNISH and SWEDISH SGAs § 23, and in ESTONIAN LOA § 108(3). In DENMARK SGA § 26 provides that the creditor must give a notice to the debtor within a reasonable time that the contract continues; otherwise the creditor will lose the right to claim specific performance (see *Ussing*, Obligationsretten[4], 70 and *Bryde Andersen & Lookofsky*, 275). This idea can be found in CISG, too, but it is limited to cases where the buyer claims delivery of substitute goods and repair of non-conforming goods (art. 46(2) and (3)). No equivalent rule exists in AUSTRIA, FRANCE, GERMANY, POLAND, PORTUGAL, SLOVAKIA or SPAIN but in BELGIAN law a similar rule has been accepted: Cass. 5 December 1946, Arr.Cass., 428, Cass. 29 November 1962, Pas. 405; see *M.E. Storme*, Invloed nos. 394 and 389-391. CZECH law provides for specific performance only if the judge finds a compensation in natura possible and useful. Specific performance which is *non*-useful cannot be granted to the creditor. *A fortiori* specific performance is not available if it would be unreasonable. Under HUNGARIAN law the case of delay is regulated by CC § 300(1); a creditor is entitled to demand performance or, if performance no longer serves the creditor's interest, to withdraw from the contract irrespective of whether or not the debtor has offered an excuse for the default.

V. Defective performance

22. The rules on performance *in natura* after a non-conforming tender has been made differ very much.

23. The uniform laws on international sales grant a right to performance *in natura* in case of "non-conforming" goods (cf. ULIS arts. 42, 52; CISG arts. 41, 46). However, the right to require delivery of substitute goods in CISG art. 46(2) is limited to cases of fundamental "breach of contract".

24. Recent European codifications tend to grant a right to demand cure of non-conformities as does the Consumer Sales Directive (1999/44/EC) art. 3. The DUTCH CC provides for such a right in case of lack of full title (art. 7:20) and in case of "non-conforming" goods (art. 7:21 litt. b) and c)). The same is true under the new GERMAN law of obligations, which gave up the former restrictions under sales law, see CC §§ 437 no. 1, 439. In DENMARK the SGA, which formerly provided only for a right to delivery of substitute goods in case of sale of generic goods (§ 43(1)), has been amended by the addition of a new § 78 which provides for consumer sales in general a right to demand cure of defects. The New Nordic SGA § 34 which is now in force in FINLAND and SWEDEN provides a right (with certain limitations) to demand cure of defects in commercial sales in general. In PORTUGAL a right to have a defective performance corrected or to receive a new delivery is expressly provided for contracts of sale and for work (CC arts. 914, 1221); it can be considered as an application of a general principle relating to defective performances (*Jorge* 479). In ESTONIAN law, LOA § 108(6) as a general provision states that the right to require performance of an obligation includes the right of the creditor to require repair, replacement or other cure of a defective performance in so far as this may be reasonably expected from the debtor. However, a special regulation on specific performance applies for contracts of sale (LOA § 222) and contracts for services (LOA § 646): a demand for repair or substitute delivery/work is an available remedy if the chosen remedy is possible and does not cause the debtor unreasonable costs or unreasonable inconvenience. Instead of repairing, the debtor has always the right to provide for substitute delivery/work. A non-consumer creditor could demand substitution only in a case of fundamental non-performance.

25. AUSTRIAN law provides in respect of all contracts for consideration a general right to have a defective performance cured: see CC § 932(1) granting the creditor first the right either to demand repair or replacement (the debtor gets a “second chance”) and if that is not possible or unreasonable or not done within a reasonable period of time the right to a reduction of the price or the cancellation of the contract., or the repair of the defect or the addition of missing parts of the performance by the debtor. The exchange or repair of the defective piece may be seen as a secondary duty to perform (see for all this and the recently modified rules on bad performance *Koziol/Welser* II, 13th ed., 63 ss). Similar is the provision of the SLOVENIAN Code of Obligations art. 468, whereby a creditor has first to demand a cure of performance and can only then exercise other remedies.

26. ITALIAN and SWISS law (for cases of lack of quality) are similar to the former state of German law (cf. Italian CC arts. 1482(2), 1512(2), 1668(1) and e.g. ConsC art. 126); Swiss LOA arts. 689, 206, 368(2)). In Greece, after the amendment of GREEK CC art. 540 by art. 1 § 1 of l. 3043/2002, a rule has been introduced for all sales providing for the buyer’s right to demand cure of defects or the replacement of the sold goods, without any additional cost, unless such a cure or replacement is impossible or demands disproportionate costs. In GREECE a general right to have non-substantial defects cured also exists for lack of quality in contracts for work

(GREEK CC art. 688). In SPANISH law, both writers and the courts accept that a buyer may demand cure in the form of replacement of defective goods (cf. CC arts. 1166, 1484 ff, 1553 and 1591; see *Díez Picazo* II, 670; *Albaladejo* II, 1 §§ 23.5 and 31.3; TS 3 March 1979, RAJ (1979), 1184; TS 14 March 1981, RAJ (1981), 913 and TS 28 June 1982, RAJ (1982), 3447). POLISH CC art. 561 § 1 provides that the buyer may demand replacement of the defective performance in case of generic goods. In case of goods defined by identity, the buyer may demand removal of the defect, but the seller may refuse to remove the defect if the removal would require excessive expenditures (CC art. 561 § 2). The above rights do not affect the right to renounce the sale contract (CC art. 561 § 3).

27. According to the SLOVAK Ccom art. 324(3) (applicable only for commercial relationships) if the debtor provides inadequate performance and the creditor is not entitled to terminate the contractual relationship or fails to exercise this right, the contents of the obligation are to be modified in a manner corresponding to the creditor's rights arising from inadequate fulfilment of contractual obligations, and the obligation terminates when it is met .

28. In FRANCE and BELGIUM it is uncertain whether the debtor can be constrained to cure or to provide cure of a defective performance (generally, no distinction is made between cases where it is for the debtor or the creditor to have the cure made). Formerly, in such cases the Cour de cassation appeared to deny a duty of performance *in natura* (Cass.civ. 4 June 1924, S. 1925.1.97 with note *Hugueney*, D.P. 1927.1.136 with note *Josserand*; Cass.civ. 15 March 1968, D. 1968.346, S. 1968.1.100) but at present the courts are more willing to order specific performance.

29. In the UNITED KINGDOM the consumer's right to repair or replacement under Directive 1999/44 is implemented by making available specific performance under a new Part 5A of the Sale of Goods Act 1979 (see *Chitty* §§ 43-114 ff.), but the change does not affect non-consumer contracts.

30. In the CZECH REPUBLIC there is no express legal provision allowing a general right of the creditor to have defects of performance cured. It appears in different special situations. For instance the buyer has a right to obtain an appropriate reduction in the price of the thing, repair of the thing or supply of that which is missing (CC § 507.1). Similarly under the commercial law the buyer is allowed to demand an order of specific performance to force delivery of the missing goods or elimination of defects of goods sold (see Ccom arts. 436.1 and 437.1). For the HUNGARIAN law see CC § 306 discussed in the Notes to III.–3:202 (Cure by debtor: general rules).

VI. Relevance of cover transaction

31. Under ENGLISH and IRISH law the possibility of a cover transaction is an important consideration for denying specific performance (*Treitel*, Contract 19-114; and cf. Restatement of Contracts 2d §§ 360 (b), 359). In SCOTLAND a similar approach is taken, in spite of the fact that specific performance is regarded as a normal remedy (*McBryde*, para. 23.21). Some BELGIAN authors have suggested a similar approach in certain, mainly commercial, contexts, *Fredericq*, III no.1432, *van Ryn and Heenen* III, no. 688. In most systems, the buyer has the option of a cover transaction but is not obliged to use it, unless there is a usage to that effect. In ESTONIAN law the availability of a cover transaction has been formulated as a possible restriction to a claim for specific performance (LOA § 108(2) sent. 3). However, writers emphasise its relevance more as one argument in weighing the parties' interests than as an independent basis for exclusion of specific performance (see e.g. *Varul et al (-Kõve)* § 108, no. 7.4.).

III.–3:303: Damages not precluded

The fact that a right to enforce specific performance is excluded under the preceding Article does not preclude a claim for damages.

COMMENTS

A. The basic situation

This Article makes it clear that even in those exceptional cases where specific performance cannot be enforced the creditor may still recover damages, if they are otherwise available. Damages are always available if the non-performance has caused the creditor to suffer loss, unless the non-performance is excused.

B. Other consequences

The provision does not deal with the question whether in the cases in which a claim to performance of a contractual obligation is excluded the creditor may terminate the contractual relationship in whole or in part. This will depend on the application of other Articles. In some cases it might be possible to imply an agreement between the parties to terminate their mutual obligations. For example, if the creditor accepts that it would be unreasonably burdensome for the debtor to perform and obtains performance elsewhere with the debtor's express or implied assent, it may be possible to imply an agreement between the parties that their obligations to provide and pay for that particular performance are at an end.

NOTES

1. The rule in the Article is in accordance with NORDIC, ENGLISH, SCOTTISH, CZECH, FRENCH BELGIAN, DUTCH, LUXEMBOURG, ITALIAN, PORTUGUESE and SPANISH law, see e.g. Czech CC §§ 100, 583 and Czech Ccom art. 387.2; French CC art. 1184(2) and Italian CC arts. 1218 and 1453. Generally speaking it also corresponds to GERMAN law, POLISH law; ESTONIAN law; SLOVENIAN law (see LOA § 103); AUSTRIAN law (see CC § 921 and SLOVAK law CC § 519). In SCOTLAND it is common practice for parties to seek specific implement which failing damages to cover the possibility of the court refusing the former remedy (*McBryde*, para. 23.10-23.12).

Section 4: Withholding performance

III.–3:401: Right to withhold performance of reciprocal obligation

(1) A creditor who is to perform a reciprocal obligation at the same time as, or after, the debtor performs has a right to withhold performance of the reciprocal obligation until the debtor has tendered performance or has performed.

(2) A creditor who is to perform a reciprocal obligation before the debtor performs and who reasonably believes that there will be non-performance by the debtor when the debtor's performance becomes due may withhold performance of the reciprocal obligation for as long as the reasonable belief continues. However, the right to withhold performance is lost if the debtor gives an adequate assurance of due performance.

(3) A creditor who withholds performance in the situation mentioned in paragraph (2) has a duty to give notice of that fact to the debtor as soon as is reasonably practicable and is liable for any loss caused to the debtor by a breach of that duty.

(4) The performance which may be withheld under this Article is the whole or part of the performance as may be reasonable in the circumstances.

COMMENTS

A. General

Although this Article applies to all reciprocal obligations (provided they are within the intended scope of these rules) it will find its main application in relation to contractual obligations. Where under a synallagmatic contract (that is, one in which both parties have obligations) one party is to perform first but has not yet done so, or is to perform simultaneously with the other but is not able or willing to do so, it is both just and commercially convenient for the other party to have the right to withhold or suspend the counter-performance. This both protects the withholding party from having to advance credit to the non-performer and gives the latter an incentive to perform in order to receive the counter-performance. The well-known *exceptio non adimpleti contractus* is an expression of this idea. Performance of one obligation may be withheld so long as the other is not fully performed.

Illustration 1
A employs B to build a house for him; the contract provides that within two days of the contract being signed, A will make an advance payment to B. B need not start work until the payment has been made.

A party whose own conduct causes the other party's non-performance may not invoke this Article to withhold performance. See III.–3:101 (Remedies available) paragraph (3).

Illustration 2
The owner of a house enters a contract with a municipal organisation for communal steam heating. The account is to be sent out by the 15th of one month and to be paid by the 15th of the next month. Because of a computer breakdown the organisation does not send out the account for 15 January until 10 February, and the house-owner has not paid by 15 February. The municipality cannot suspend the supply of steam.

B. Non-performance need not be fundamental

A party's non-performance need not be fundamental in order to entitle the other party to withhold performance. This is balanced, however, by a reasonableness requirement and by other provisions for the protection of the debtor. The Article on good faith and fair dealing must also be kept in mind.

C. Reasonableness

Paragraph (4) introduces a reasonableness requirement which applies to the whole Article. The performance which may be withheld under the Article is the whole or part of the performance as may be reasonable in the circumstances.

> *Illustration 3*
> A agrees to buy a new car from B, a dealer. When A comes to collect the car there is a scratch on the bodywork. A may refuse to accept the car or pay any part of the price until the car is repaired.

> *Illustration 4*
> The same except that the car is to be shipped to A's home in another country, where B has no facilities. Since it would be unrealistic to expect B to repair the scratch, it would be unreasonable and contrary to good faith for A to withhold more than the cost of having the car repaired locally.

In some cases the creditor cannot practicably withhold performance in part - for instance, many obligations to perform a service must realistically be performed in full or suspended in full. The creditor may only withhold performance in full if in the circumstances that is not unreasonable. However, it may be expressly provided in a contract that a performance is made reciprocal to the other performance.

The restriction in this paragraph is not found in the laws of all the Member States, at least in such a clear form, but it seems only consistent with the general duty of good faith and fair dealing.

D. Party who is to perform at same time or after the other

Paragraph (1) provides that a creditor who is to perform a reciprocal obligation simultaneously with or after the debtor performs has a right to withhold performance of the reciprocal obligation until the debtor has tendered performance or has performed. This will be the normal case for a withholding of performance.

E. Party who is to perform first

It is obvious that a party who is obliged to tender performance first is not entitled to withhold performance merely because the other is not willing to perform at that stage.

> *Illustration 5*
> A contracts with B to have a wall built in A's garden for a fixed sum payable on completion. B cannot require an advance payment as a condition of starting work.

However, paragraph (2) provides for the remedy of withholding performance to be available in certain cases of anticipated non-performance. It is available if the creditor reasonably believes that there will be non-performance by the debtor when the debtor's performance becomes due. The creditor may withhold performance of the reciprocal obligation for as long as the reasonable belief continues. An unqualified right to withhold performance in such situations could be open to abuse. However the debtor is protected in two ways. First, if the creditor's belief is not reasonable – an objective test – the creditor will be liable for non-performance. Secondly, the right to withhold performance is lost if the debtor gives an adequate assurance of due performance. So as to enable the debtor to clarify the situation (and thereby perhaps destroy the reasonableness of the creditor's belief) or make an adequate assurance of due performance, the Article provides in paragraph (3) that the creditor has a duty to give notice of the withholding to the debtor as soon as is reasonably practicable. This is not a requirement for withholding performance. That would be unrealistic in some cases. But the creditor will be liable for any loss caused to the debtor by a breach of the duty.

Illustration 6
In January B agrees to build a house for O and to start work on 1st May. O undertakes to make an advance payment as part of the price by not later than 1st June, time of payment being regarded as fundamental. During May O tells B that because of recent heavy expenditure it will not be possible to pay the advance payment until the beginning of July. Instead of terminating for non-performance, B may keep the obligations in being for performance by O and may meanwhile suspend the building works. B must notify O that this is being done so that O has a chance to raise the money or provide security for payment.

NOTES

I. Presumption on concurrent performances

1. The GERMAN CC § 320 provides that, unless obliged to perform first, the debtor of a reciprocal obligation may withhold performance until the counter-performance has been tendered. This corresponds to the POLISH CC art. 488 § 1, and generally also to the ESTONIAN LOA § 111(1)-(3) and the SLOVENIAN LOA § 101. A similar presumption on concurrent obligations has been established in GREECE, see CC arts. 374 and 378; ITALY, see CC art. 1460(1); the NETHERLANDS, see CC art. 6:262; and AUSTRIA (for barter and sale: see CC § 1052 first sentence and § 1062 which are applied analogously to other contracts); see e.g. OGH 16 September 1985, SZ 58/144 regarding a leasing contract; PORTUGAL, see CC § 428(1).
2. The FRENCH, BELGIAN, LUXEMBOURG and SPANISH codes and the NORDIC statutes do not have general provisions but only fragmentary rules to the same effect as the CC, see on sales French, Belgian and Luxembourg CCs art. 1651, Spanish CC arts. 1100, 1466, 1467, 1500 and 1502, DANISH SGA § 14 and FINNISH and SWEDISH Sale of Goods Acts §§ 10, 49. However, in these countries the courts have established a general principle similar to the one just mentioned: see on FRANCE, *Huet* JJCLCiv art. 1184; on BELGIUM, *de Bersaques* RCJB 1949, 125, no. 8, and *Storme*, RW 1989-90, 317 no. 12; on SPAIN, *Díez-Picazo* II 692; *Albladejo* II, 1, § 20.1; on DENMARK, *Gomard*, Obligationsret II 61 ff; on SWEDEN, *Ramberg*, Köplagen 202 ff. For sale of goods CISG art. 58(1) also provides for concurrent performances.
3. It may however follow from the parties' agreement or from the circumstances of the case that one party has to perform or to begin performance first. This is the case when

concurrent performance is impossible such as in contracts for lease and services. Cf. for BELGIUM *M.E. Storme* De Exceptio, R.W. 1989-90, 317.

4. In ENGLISH and SCOTTISH law s. 28 of the UK Sale of Goods Act 1979 provides that unless otherwise agreed, delivery of goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods. The IRISH Sale of Goods Act 1893 s. 28 is to the same effect. Also in other contracts than sales there is a tendency to treat the parties' promises as concurrent conditions, see *Treitel*, Remedies § 214; but it may follow from the circumstances that one of the parties will have to perform first, such as where simultaneous performances are not possible.

5. Under CZECH civil law (CC § 560) performances are considered as reciprocal only in cases when this is required (the provision states "if the parties to a contract are required to render a reciprocal performances, one party may only demand performance of the obligation from the other party if this party has already performed, or is ready to perform, its obligation"). This presumption on concurrent performances is not recognized in CZECH law. For this interpretation see *Jehlička, Švestka, Škárová*, p. 716 (an explicit agreement on reciprocity is required) and established case law from 1979 (see decision R 1/19779). Nevertheless the same authors seem to recognise liability to reciprocal performance as "typical" for any synallagmatic contract (and so for major agreements inter partes); see *Jehlička, Švestka, Škárová*, p. 715. The same principle is applied in commercial law (see Ccom art. 325 and commentary by *Štenglová, Plíva, Tomsa*, p. 1013).

6. Also under SLOVAK law if the parties are to give performance to each other according to the agreement, performance may be demanded only by the party who has already performed the reciprocal obligation or who is prepared to perform it (CC § 560 and Ccom art. 325).

II. Withholding performance of a reciprocal obligation

(a) In general

7. The rule laid down in paragraph (1) seems to be widely accepted in most countries where a party may withhold performance until the other party performs, both in cases of concurrent obligations and where the other party has to perform first. See on contracts in general GERMAN CC § 320; GREEK CC art. 374; ITALIAN CC art. 1460(1); DUTCH CC art. 6:52; POLISH CC art. 488 § 2; ESTONIAN LOA § 111(1)-(3); CZECH law (see explicit provisions of CC § 560 first phrase and Ccom art. 325); SLOVENIAN LOA § 101 and PORTUGUESE CC art. 428. In FRANCE, BELGIUM, LUXEMBOURG, AUSTRIA, SPAIN and DENMARK the courts have established this rule as a general principle (*exceptio non adimpleti contractus*: *Terré/Simler/Lequette*, Les obligations[9], no. 629 et seq.) based on specific provisions and the spirit of the law: see on sales French, Belgian and Luxembourg CCs arts. 1653, 1707 and (semble) 1612 and 1613; on recognition as a general principle in Belgian case law, Cass. 26 April 1945, Pas. I; 24 April 1947, RCJB 1949, 125; 12 September 1973, Arr.Cass. 1974, 36. For AUSTRIA see CC §§ 1052, 1062 and *Jabornegg*; for SPAIN, CC art. 1466, and the literature cited above, para 1(a). For DENMARK see *Ussing*,Obligationsretten[4], 79 and *Bryde Andersen & Lookofsky* 144 ff. For FINLAND and SWEDEN see SGA §§ 10 and 42 and respectively *Taxell*, Avtal och rättsskydd 237 and *Rodhe*, Obligationsrätt 391. In SCOTTISH law, the principle of mutuality of contract enables a party to withhold performance in response to the other party's breach, so long as there is a link between the breach and the performance

withheld: *Bank of East Asia Ltd. v. Scottish Enterprise* 1997 SLT 1213; *McBryde*, paras. 20.44-20.61. CISG art. 58 gives each party a similar right to withhold performance. See also UNIDROIT art. 7.1.3.

(b) Proportionality (reasonableness test)

8. Provisions to the same effect as paragraph (4), under which a party may withhold performance in whole or in part as may be reasonable in the circumstances are found in some of the systems. Thus the DUTCH CC art. 6:262(2) provides that in the event of partial or defective performance, withholding of the creditor's own performance is allowed only to the extent justified by the non-performance. GREEK law (CC art. 376) prevents the creditor from withholding performance when the other party has partly performed and the withholding of the counter-performance would be contrary to good faith under the specific circumstances and in particular because the part of the performance still delayed is non-substantial. ITALIAN law (CC art. 1460(2)) prevents the creditor from withholding performance when this would be contrary to good faith. GREEK case law holds that part performance by one party may only entitle that party to a corresponding counter-performance from the other: A.P. 574/1990, EEN 58 (1991) 166-167. Italian writers have argued in favour of a partial withholding when the non-performance by the defaulting party does not justify a withholding of the entire performance, see *Persico* 145. Similarly GERMAN CC § 320(2) provides that after partial performance the creditor may not withhold performance in so far as this would be contrary to good faith. ESTONIAN LOA § 111(3) states that a party's right to withhold performance is limited if this would be unreasonable in the circumstances or contrary to the principle of good faith, in particular if the other party has performed the obligations for the most part or without significant deficiencies. Under AUSTRIAN law the right to withhold performance is limited by the provision of CC § 1295(2) prohibiting the vexatious abuse abusive exercise of a legal right: such abuse of the right to withhold performance may be found in a flagrant disproportion in of the parties' the interests of the parties, see e.g. OGH 31 October 1989, JBI 1990, 248. The POLISH CC and the PORTUGESE CC do not have explicit provisions. However, Portuguese writers have invoked the rule on the creditor's right to reduce performance to reach the same result; see *Varela* I 404, *Leitão* II 276, 277. Also SPANISH, FRENCH and LUXEMBOURG courts have adopted the proportionality test, the exercise of which in France is left to the free and final appreciation of the trial judge. For SPAIN see Supreme Court 27 March 1991 (*Díez Picazo* II 693) and 11 July 1991 (*Lacruz-Delgado* § 26, 199). On BELGIAN law see *Storme*, RW 1989-90, 313, 319-321.

9. In ENGLISH and IRISH law a party may only withhold performance because the other has not performed if:

   (a) the first party's obligation to perform is expressly or by implication made dependent on the performance by the second party, or

   (b) the court construes the second party's obligation as being a condition of the contract, or

   (c) the second party's non-performance will have the effect of depriving the first party of the substance of what was contracted for.

   In other words the test for withholding performance is the same as for termination save that termination also requires the time for performance to have expired, see *Beale* chapters 2 and 3. Under this approach there is only the right to withhold performance for a non-performance that is sufficiently serious to justify termination. However, when the non-performance is less serious, much the same result as under the present

Article is reached by alternative means. In contracts for the sale of goods, the buyer may set up the non-conformity "in diminution or extinction of the price" (Sale of Goods Act 1979 s. 53(1)(a)). In other contracts, the aggrieved party may set off a claim in damages against the price.

III. Anticipated non-performance

10. CISG art. 71(1) provides that a party may suspend the performance of that party's obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of that other party's obligations as a result of:

    (a) a serious deficiency in ability to perform or creditworthiness; or

    (b) conduct in preparing to perform or in performing.

11. A very similar rule is adopted by the FINNISH and SWEDISH SGAs § 61, see *Ramberg*, Köplagen 586 ff.

12. GERMAN CC § 321 provides that a party who is to perform first may withhold performance if, due to an essential deterioration of the other party's financial position after the conclusion of the contract, the first party's claim for the counter-performance is endangered. AUSTRIAN CC § 1052 second sentence provides for basically the same remedy and so does DANISH law see Gomard *Obligationsret* II 14f and III Chapter 17. This is also the case under the SLOVENIAN LOA § 102 and the PORTUGUESE CC arts. 429 and 780. The GREEK CC art. 377 is wider: it covers cases of pre-existing financial difficulties of which the first party did not and had no reason to know, *Michaelides-Nouaros* in Erm. AK II/1, art. 377 no. 4 (1949), *Stathopoulos* in *Georgiadis and Stathopoulos*, arts. 374-378 nos. 18-19, *the same*, Obligations §17 nos. 72-73. See also DUTCH CC arts. 6:80 and 6:263; ITALIAN CC art. 1461. The scope of application of AUSTRIAN CC § 1052 second sentence which expressly refers only to barters was extended by applying the provision analogously to other contracts. The ESTONIAN LOA § 111(4) provides that if circumstances which become evident to the party after the conclusion of the contract give sufficient reason to believe that the other party will not be able to perform the other party's contractual obligation due to insolvency, or the other party's conduct in preparing for performance or during performance or any other similar circumstance giving reason to believe that the party will not perform the obligation, the party who is obliged to perform first may withhold performance. If what is anticipated is partial performance or performance which is defective in any other manner, the right to withhold performance is justified only if it can be presumed that there will be a fundamental breach of the contract by the other party. The party entitled to withhold performance may require the other party to perform at the same time as the first party and may set a reasonable term for the performance of the obligation, for confirmation of the performance or for the provision of security (LOA § 111(5)). Failure to fulfil those requirements gives the party who is entitled to withhold performance a right to terminate the contractual relationship under special provisions in LOA § 117.

13. In POLISH law, if the performance of an obligation under a synallagmatic contract is doubtful because of one party's financial state (bankruptcy not necessary), the other party may withhold performance until the party with financial problems performs the obligation or provides a security (CC art. 490(1)). A party who knew about the difficult financial state of the second party at the time of conclusion of the contract is not entitled to withhold performance (CC art. 490(2)).

14. CZECH civil law (see CC § 560 *in fine*) allows every contractual party to withhold its own performance until the reciprocal performance of the other party if the other's party performance is put at risk by circumstances which affect the other party and

were not known at the time the contract was concluded. The law specifies that it concerns “even a party bound to render its performance in advance”. The applicable commercial rule is very similar. One party to a commercial contract may refuse its performance if - after conclusion of the contract - it becomes obvious that the other party will not perform its obligation because of a lack of capacity to do so or a lack of preparation to perform (see Ccom art. 326.1 *in fine*).

15. Provisions which provide a right to withhold the goods in case of the buyer's insolvency or bankruptcy are found in the DANISH Sales Act § 39; FRENCH, BELGIAN and LUXEMBOURG CCs art. 1613; SPANISH CC arts. 1467 and 1502; PORTUGUESE CC art. 429; and UK Sale of Goods Act 1979 ss. 39(1)(b) and 41(1). For IRELAND see Sale of Goods Act 1893 ss. 39 and 41. Furthermore, the French and Belgian CCs art. 1653 and the Spanish CC art. 1502 permit the buyer to suspend payment of the price if the buyer has reason to fear that a third party's claim to the goods will disturb the possession of them. In Belgian law the existence of a more general principle is disputed: see *van Ommeslaghe* RCJB 1975, 615, no. 68; *Storme,* Invloed, nos. 299 ff; *Vanwijck-Alexandre.*

16. In SLOVAKIA even the party who must perform in advance may withhold performance until the reciprocal performance is received or secured if the other party's performance is jeopardized by facts affecting the other party which were not known to the first party at the time of concluding the contract (CC § 560 and Ccom art. 326). For HUNGARY see CC § 306(4) discussed in the Notes to III.–3:202 (Cure by debtor: general rules).

17. See generally *Treitel,* Remedies, Chapter VIII; *Rabel* I 135. See also the Notes to III.–3:506 (Scope of right to terminate).

Section 5: Termination

III.–3:501: Scope and definition

(1) This Section applies only to contractual obligations and contractual relationships.

(2) In this Section "termination" means the termination of the contractual relationship in whole or in part and "terminate" has a corresponding meaning.

COMMENTS

A. Termination as a remedy

This Section appears in a Chapter headed "Remedies for non-performance". It follows that it is dealing only with termination as a remedy for non-performance of an obligation or, in a few cases, for something (such as a failure to give an adequate assurance of performance) which is treated as the equivalent of non-performance.

B. Contractual obligations

Unlike most of this Chapter, the present Section applies only to contractual obligations and contractual relationships. There are two reasons for this. First, it will be extremely unusual for the remedy of termination to be useful in relation to non-contractual obligations. The main usefulness of termination is that it frees the creditor to obtain goods or services elsewhere and, in certain situations, to recover what has been paid or provided already under the contract. In the case of reciprocal non-contractual obligations other available remedies - withholding performance, enforcing specific performance, damages and interest - should be adequate. Secondly, it could be regarded as inappropriate to allow private citizens to terminate by notice obligations arising by operation of law.

C. Meaning of "termination"

There is great variation between, and sometimes even within, legal systems in the terminology used for the remedy provided by this Section. These rules opt for the neutral "termination" instead of any technical term such as "rescission". It is hoped that this may help to avoid the translation problems which are inherent in the use of technical terms and may help to make it clear that the general effect of the remedy is prospective, not retrospective.

The use of the word "termination" immediately raises the question of what is terminated.

The Principles of European Contract Law talk of "termination of the contract". However, in the context of these rules the expression "termination of the contract" is inaccurate. It is not the contract as defined in these rules (i.e. an agreement of a certain kind; a type of juridical act) which is terminated. The juridical act took place. It was done and cannot be terminated. It is the contractual relationship between the parties which is terminated. However, the relationship is not necessarily terminated completely. There may be cases where, for example, only a separable part of the parties' obligations and rights under the contract is terminated. In such cases the relationship may continue with a more limited content: only part of it is terminated. A particular case is where aspects of the relationship relating to arbitration, or payment of a fixed sum by way of compensation for losses, or the return of property may

survive. This is why the Article refers to termination of the contractual relationship in whole or in part.

D. Grounds for termination in general

The grounds for termination under this Section are essentially of two types. First there is fundamental non-performance by the debtor, regulated by III.–3:502 (Termination for fundamental non-performance) . And secondly there are what might be called equivalents to non-performance, regulated by the succeeding three Articles. These are:

> (a) where the creditor has allowed the debtor a further time to perform but the debtor has not performed within that time (III.–3:503 (Termination after notice fixing additional time for performance)).
>
> (b) where there is an anticipated fundamental non-performance (III.–3:504 (Termination for anticipated non-performance)); and
>
> (c) where the debtor has failed to give an adequate assurance of performance when called upon to do so (III.–3:505 (Termination for inadequate assurance of performance)).

Termination under this Section may be effected by the act of the creditor alone; there is no need to bring an action in court. Termination is effective only if notice of termination is given by the creditor to the debtor. This is regulated by subsequent Articles.

If the requirements for termination are satisfied these rules do not provide for any period of grace to be granted to the debtor by a court or an arbitral tribunal.

NOTES

1. See the Notes on the following Articles.

Sub-section 1: Grounds for termination

III.–3:502: Termination for fundamental non-performance

(1) A creditor may terminate if the debtor's non-performance of a contractual obligation is fundamental.

(2) A non-performance of a contractual obligation is fundamental if:

(a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result; or

(b) it is intentional or reckless and gives the creditor reason to believe that the debtor's future performance cannot be relied on.

COMMENTS

A. Termination for fundamental non-performance

Whether, in the case of a non-performance of a contractual obligation, the creditor should have the right to terminate the contractual relationship in whole or in part depends upon a weighing of conflicting considerations.

On the one hand, the creditor may desire wide rights of termination. The creditor will have good reasons for terminating if the performance is so different from that due that the creditor cannot use it for its intended purpose, or if it is so late that the creditor's interest in it is lost. In some situations termination will be the only remedy which will properly safeguard a creditor's interests, for instance when the debtor is insolvent and cannot perform the obligation or pay damages. The creditor may also wish to be able to terminate in less serious cases. A creditor who fears that the debtor may not perform may wish to able to take advantage of the threat of termination to ensure that the debtor performs in complete compliance with the terms regulating the obligation. A creditor may also wish to terminate for less appropriate reasons. The creditor may, for example, hope to escape from a contract that has turned out to be unprofitable because of a change in the market price since the contract was concluded.

For the debtor, on the other hand, termination usually involves a serious detriment. In attempting to perform the debtor may have incurred expenses which are now wasted, and may lose all or most of the value of the performance when there is no market for it elsewhere. When other remedies such as damages or price reduction are available these remedies will often safeguard the interests of the creditor sufficiently so that termination should be avoided.

For these reasons it is only a fundamental non-performance which will justify termination under this Article. The debtor's interests are also protected by the provisions on cure; subject to important exceptions, a creditor cannot terminate without giving the honest and willing debtor another chance to perform. See III.–3:202 (Cure by debtor: general rules) and Comment C below.

In one respect the present Article differs from both the law in some Member States and the provision in PECL which defined "fundamental non-performance", art. 8:103. PECL 8:103(a) provided that a non-performance would also be fundamental if strict compliance with the obligation was "of the essence" of the contract. This left it open to a court to treat an obligation as "of the essence", so that any failure to perform it would give the other party the right to terminate the contractual relationship, even if the non-performance had no serious consequences for the other party. In some situations the parties may wish certain obligations to be treated in that way, for example time provisions in commodity contracts. However it does not seem appropriate to apply the same approach as a general rule for all contracts. If the parties wish non-performance of an obligation to have that effect, they remain free to provide for it in their agreement, see Comment C; or there may be a usage to that effect in the trade concerned.

B. Meaning of fundamental non-performance

Paragraph (2)(a) provides that where the effect of non-performance is substantially to deprive the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, then in general the non-performance is fundamental. This is not the case, however, where the debtor did not foresee and could not reasonably be expected to have foreseen those consequences.

There are three elements in the definition.

First, what was the creditor entitled to expect? This depends to a large extent on the nature and terms of the contract. If the contract allows the debtor a certain latitude in performing then the creditor will not be entitled to expect conformity with some more exacting standard. If it provides for strict compliance with certain provisions then the creditor is entitled to expect such strict compliance. Usages and practices may be important in deciding what a party is entitled to expect. For example, in certain fields of activity strict adherence to the precise time of delivery, or the provision of documents in a precise form may be expected. In some cases the nature of the contract may be decisive. For example, where a contract is for the delivery of flowers for a wedding at a stated time the purchaser will be entitled to expect delivery in time for the wedding and not the next day. What the creditor is entitled to expect will also depend on the qualifications and experience of the party concerned. It is reasonable to expect more skill and knowledge from a highly paid specialist than from an unskilled, modestly paid employee.

The second question is whether the non-performance *substantially deprives* the creditor of what the creditor was entitled to expect. This will be a question of fact to be answered on the circumstances of each case.

> *Illustration 1*
> A, a contractor, promises to erect five garages and to build and pave the road leading to them for B's lorries, all the work to be finished before October 1st, when B opens its warehouse. On October 1st the garages have been erected; the road has been built but not paved, which prevents B from using the garages. B has been substantially deprived of what he was entitled to expect under the contract. A's non-performance is fundamental.

Illustration 2

The facts are as in Illustration 1 except that the unpaved road is sufficiently smooth that the garages may be used by B's lorries in spite of the fact that the road is not yet paved, and A paves the road soon after October 1st. B has not been substantially deprived of what he was entitled to expect. A's non-performance is not fundamental.

The third question is whether the debtor foresaw or could reasonably be expected to have foreseen the result.

Illustration 3

A agrees to install a temperature control system in B's wine cellar which will ensure that his fine wines are not adversely affected by substantial temperature fluctuations. Owing to a defect in the installation the control system proves ineffective, with the result that B's stock of fine wines is made undrinkable. A's non-performance is fundamental. B has been substantially deprived of what he was entitled to expect under the contract. Moreover A was aware, or could reasonably be expected to have been aware, of the likely consequences of an inadequate system.

Illustration 4

A agrees to install central heating in B's house with a temperature control system which will enable the temperature to be maintained at a constant temperature of 20 degrees centigrade. Unknown to A one room is required to develop and preserve certain rare species of plant which are extremely sensitive to changes in temperature and which have taken several years' intensive work to breed. As a result of a defect in one of the heating pipes in the room the temperature falls by two degrees centigrade and all the plants die, rendering abortive years of work. A's non-performance is not fundamental, as it could not reasonably be expected to have foreseen that such grave consequences would ensue from a slight temperature fluctuation in the room of a private house.

The reference to the relevant part of the performance in sub-paragraph (a) is important in relation to cases where the contractual obligations are to be performed in parts or are otherwise divisible. In such cases, the effect of III.–3:506 (Scope of right to terminate) is that if a separate counter-performance can be allocated to each part, the creditor will not normally be able to terminate the entire contractual relationship merely because substantially deprived of what was expected in relation to one divisible part. So, in a contract for the delivery of supplies monthly over a period of ten years a delay or non-conformity in one month’s instalment may amount to a fundamental non-performance in relation to that month but not in relation to the contract as a whole.

Paragraph (2)(b) makes it clear that even where the non-performance of an obligation does not substantially deprive the creditor of what the creditor could have expected to receive the creditor may treat the non-performance as fundamental if it was intentional or reckless and gives the creditor reason to believe that the debtor’s future performance cannot be relied on.

Illustration 5

A, who has contracted to sell B's goods as B's sole distributor and has undertaken not to sell goods in competition with those goods, nevertheless contracts with C to sell C's competing goods. Although A's efforts to sell C's goods are entirely unsuccessful and

do not affect his sales of B's goods, B may treat A's conduct as a fundamental non-performance.

Illustration 6
P's agent, A, who is entitled to reimbursement for his expenses, submits false vouchers to P. Although the amounts claimed are insignificant P may treat A's behaviour as a fundamental non-performance and terminate his agency.

But where no future performance is due from the debtor, other than the remedying of the non-performance itself, or where there is no reason to suppose that the debtor will not properly perform future obligations under the contract, the creditor cannot invoke sub-paragraph (b).

Illustration 7
A contracts to build a supermarket for B. A completes performance except that, angered by a dispute over an unrelated transaction, it refuses to build a cover over a compressor. B can have the cover built by another contractor for a trifling sum. A's non-performance, even although intentional, is not fundamental.

Illustration 8
A contracts to build a supermarket for B; the specification calls for the building to be faced with an expensive type of brick. A's supervisor orders a cheaper type of brick to be used to face a wall which is not easily visible but, as soon as B points out the discrepancy, A agrees to remove the cheaper bricks and to use the proper sort in future. A's non-performance does not give B reason to believe that it cannot rely on A's performance in future.

C. Relationship to right to cure

In many contracts, a party's obligation has a double aspect: it is to do *x* by date *y*. Until *y*, the time for performance, has arrived the obligation is not due and there will, by definition, be no non-performance. This is why the debtor has the right to cure a non-conforming performance if this can be done before the time for performance has arrived (see III.–3:202 (Cure by debtor: general rules) paragraph (1)). The debtor should be in no worse position than if performance had not been attempted at all: if the debtor can perform properly by *y*, the performance will have been in accordance with the contract.

Even when the time for performance has arrived, the debtor who has tendered a performance which does not meet the requirements of the contract may still have the right to cure provided that the delay is not already fundamental (see III.–3:203 (When creditor need not allow debtor an opportunity to cure) sub-paragraph (a)). Again, the starting position is that the debtor who has tried to perform but has not done it well enough should not be in a worse position than one who had not performed at all. Had the debtor not performed at all by the time performance was due, the creditor would not necessarily be entitled to terminate immediately. Termination would be available as a remedy only if the delay was, or when it became, sufficiently serious that it deprived the creditor of the substance of what the creditor was entitled to expect (see III.–3:502 ((Termination for fundamental non-performance) paragraph (2)(a)); or after the creditor had set a reasonable time for performance under III.–3:503 (Termination after notice fixing additional time for performance) paragraph (1) and the debtor had failed to perform within that time. However, in this case allowing the debtor "a second chance" might be inconvenient to the creditor, or in some cases may be too generous to the

debtor. Therefore III.–3:203 (When creditor need not allow debtor an opportunity to cure) imposes other restrictions.

It follows that the creditor's right to terminate is in effect subject to the debtor's right to cure. There is no right to cure, however, in cases that fall within paragraph (2)(b) of III.–3:502 (Termination for fundamental non-performance), since in that case the creditor has the right to terminate immediately (cf the parallel right to terminate immediately when fundamental non-performance is anticipated, see III.–3:504 (Termination for anticipated non-performance).

D. Agreed rights to terminate not covered by this Section

The terms of the contract will, as we have seen, always be important in deciding whether or not a non-performance is fundamental under the present Article. What a party is entitled to expect depends on what the contract provides. However, the parties may wish to go beyond merely indicating what the creditor is entitled to expect. They may wish to confer an express right to terminate for any non-performance, however minor, or even for something which is not a non-performance at all. They are free to do so. Such express rights to terminate are not, however, within the present Section. They are governed by an earlier Article. (See III.–1:109 (Variation or termination by notice.)) In some cases the parties may wish to provide not only for a right to terminate but also for the payment of compensation or extended damages or a stipulated sum for non-performance. Again they are free to do so. The effect of any such provisions will depend primarily on their terms, interpreted if need be. It is in the interest of any party who wishes to rely on such terms to ensure that their meaning and effect is clear.

NOTES

I. Termination when non-performance is fundamental

1. Not all systems allow the creditor to terminate by giving notice. FRENCH, BELGIAN and LUXEMBOURG CCs art. 1184 requires that *résolution* be by judicial pronouncement, and the court must decide whether the non-performance is sufficiently important to justify it; but, as noted above, clauses allowing automatic termination (*clauses résolutoire de plein droit*) are permitted (*Malaurie & Aynès*, Obligations, nos. 735-759) to the extent that the creditor invokes them in accordance with good faith, as will be decided *ex post* by the court (on this judicial control and its limits, see *Terré/Simler/Lequette*, Les obligations[9], no. 652). The broad language of CC art. 1184 ("*where one of the parties does not fulfil its obligation*") indicates that even partial non-performance gives rise to the right to pursue termination of the contract (Cass. Com., 2 July 1996). However, this should not be strictly applied in circumstances where such remedy is out of all proportion with the breach. It is argued in legal writings that judges should use their discretion to make such a determination (See *Terré/Simler/Lequette*, Les obligations[9], no. 650 (b)). Besides, French law contains specific provisions which in specific cases allow unilateral termination (e.g. CC art. 1657). French case law has also considerably evolved since 1998: unilateral termination is now admitted under certain conditions (Cass.civ. 1re, 13 October 1998, D. 1999.198, note *C. Jamin*). The French Avant-projet also provides for unilateral termination (art. 1158). In BELGIAN law, there is a distinction between resolutory conditions which apply automatically and resolutory clauses, which apply when the creditor invokes them. Parties can thus define which non-performances are sufficient for an automatic or for a unilateral termination, subject to the abuse of right test. Such

clauses will, however, be interpreted restrictively (*Van Gerven*, Verbintenissenrecht p. 202). As to the question whether termination can be done by notice, see Notes under Art. III-3:507. See also ITALIAN CC art. 1453 for the general rule on judicial termination and art. 1456 for automatic termination. However, similar results appear to be reached in most systems, even those which rely on judicial discretion to decide when there should be termination.

2. In cases of non-performance, termination by withdrawal after notice and a reasonable extension of the time-limit to perform is allowed to the creditor in both civil and commercial CZECH law (see CC § 517.1 and Ccom arts. 344 ff). However in the case of *fundamental breach* of contract, the commercial law allows the creditor to terminate immediately after notification of the non- performance (Ccom arts. 345 ff).

3. A distinction between fundamental and non-fundamental non-performance is regulated in the SLOVAKIAN Ccom (arts. 344 et seq.) and hence applies only for commercial relationships. Where a party's performance is overdue and constitutes a breach of a fundamental contractual obligation, the other party is entitled to terminate the contractual relationship provided that after having learned of such a breach, it informs the delinquent party without undue delay (Ccom art. 345(1)). The new GERMAN law of obligations adhered to that view in 2002: The new CC § 323(2) no. 3 contains a general clause which together with CC § 323(5) allows termination for fundamental non performance. In case of permanent impossibility or impracticability of performance (CC § 275) CC § 326 provides for a kind of *ipso facto* avoidance. These rules apply independently of fault and apply also to contracts involving continuing or periodic performance, see CC § 314(2).

II. Excused and non-excused non-performance

4. DUTCH CC arts. 6:74 and 6:265, ESTONIAN LOA § 116 (additionally LOA § 196 in case of contracts of successive performance), NORDIC law (see *Taxell*, Avtal och rättsskydd 225 and *Håstad*, Den nya köprätten 52), ULIS (for excused non-performance see art. 74), CISG (see art. 79) and UNIDROIT see art. 7.3.1. use the same rules for termination whether or not the non-performance was excused; the creditor may give notice of termination. In many systems, however, the case of termination because performance has become impossible is treated separately from the case of termination because of a breach of contract. Thus in FRENCH and BELGIAN law in the case of impossibility the contract will be determined according to the theory of risks, the question being which of the parties must bear the risk of the impossibility to perform (*Terré/Simler/Lequette*, Les obligations[9], no. 666); where the risk has not passed, both obligations will be terminated automatically (although in practice at least one of the parties will have to invoke it). In the SPANISH CC excused non-performance (impossibility by force majeure: arts. 1182 and 1184) is treated separately from non-excused non-performance (art. 1124). The current doctrine of courts and authors is that the remedy of rescission (termination) is available for non-excused failure to perform. (*San Miguel*, Resolución del contrato por incumplimiento y modalidades de su ejercicio, 2004; *Carrasco*, Failure, Breach and Non-conformity in Contracts. A Spanish and European Approach, 297 ff, in *Espiau / Vaquer* Bases de un Derecho Contractual Europeo / Bases of a European Contract Law, 2003).

5. In GERMAN law a separate paragraph of the CC, § 323, formerly applied to impossibility due to circumstances for which neither party is responsible (see *Treitel*, Remedies § 255), a similar approach is taken by the AUSTRIAN CC §§ 1447, 1147; the GREEK CC art. 380; CZECH law (see CC § 575; Ccom arts. 352 ff and some special rules, e.g. Ccom art. 731 applicable for impossibility in international relationships) and the POLISH CC art. 493. However, in ITALIAN law there is a

separate regime for supervening impossibility, CC arts. 1463-1466. In ENGLISH, SCOTTISH and IRISH law the doctrine of frustration will apply. In SLOVENIAN law an obligation terminates by law if neither party is responsible. See LOA § 329. In case of other non-performance, the result depends on whether a late performance is still reasonable or not. If a late performance is no longer reasonable, a contract is terminated by law immediately, otherwise an additional time for performance has to be given. See LOA §§ 104–105.

6. In SLOVAK law the case of termination because performance has subsequently become impossible is treated separately from the case of termination because of a breach of contract (CC § 575, Ccom art. 352 et seq. - for commercial relationships).

III. No additional time once right to terminate has arisen

7. It should be noted that these rules do not permit the debtor to be given extra time once the non-performance is fundamental; compare the FRENCH and BELGIAN *délai de grâce* (CC art. 1184; similarly, POLISH CC art. 491 § 1; SPANISH CC art. 1124(3); SLOVAK Ccom art. 345(1)) and ITALIAN statute no. 392/1978 on protection of tenants) or relief against forfeiture in the ENGLISH and IRISH systems (in which, for instance, a tenant may be able to obtain relief against forfeiture of a lease by the landlord for non-payment of rent: see *Treitel*, Remedies § 247). ESTONIAN law is similar to the rule in the above Article, see LOA § 116(1). However, (extraordinary) termination of contracts of successive performance can only be effected if the party terminating cannot reasonably be expected to continue performing until the due date agreed upon, taking into account all the circumstances and the mutual interests of the parties (LOA § 196(1)). Unless strict compliance with the obligation which has not been performed is the precondition for the other party's continued interest in the performance of the contractual obligations, non-performance was intentional or grossly negligent (LOA § 116(2) sent. 3) or there is reason to believe that the debtor's future performance cannot be relied on (LOA § 116(2) sent. 4) termination for fundamental non-performance of an obligation is generally not allowed without providing additional time for performance to the debtor (LOA § 196(2)).

8. CZECH law generally recognises a reasonable extra time in cases of non- performance (see abovementioned provisions: CC art. 517.1 and Ccom arts. 344 ff). Nevertheless the creditor of a commercial obligation may terminate immediately after notification of the non-performance if the non-performance is qualified as a *fundamental breach of a contractual debtor's obligation* (see above and the provision of Ccom arts. 345 ff).

IV The notion of fundamental non-performance

9. The concept of fundamental non-performance as set out in this Article corresponds very closely to ENGLISH law. In particular there is a direct correspondence to the following cases: (i) where the effect of the breach was to deprive the creditor of the substance of what was contracted for (see *Hong Kong Fir Shipping Co Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 QB 26 (CA)) and (ii) where the breach evinces an intention not to perform the remainder of obligations under the contract (e.g. Sale of Goods Act 1979 s. 31(2)). However, whereas paragraph (2)(b) is confined to intentional or reckless breaches, it is established in English law that even an unintentional breach may give rise to an anticipatory repudiation of the rest of the contract (cf. *Universal Cargo Carriers Corp. v. Citati* [1957] 2 QB 401, 438). IRISH law is similar. SCOTTISH law uses the concept of "material breach", meaning breaches going to the root of the contract (*McBryde*, paras. 20.88-20.120; see e.g. *Macari v. Celtic FC* 1999 SC 628).

10. Note that "fundamental non-performance" is not equivalent to the notion of "fundamental breach" in English law. The doctrine of "fundamental breach" was developed to declare certain exclusion clauses void. It has been overruled in *Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL). In IRELAND case law still accepts the doctrine, *Clayton Love v. B. & I. Line* (1970) 104 ILTR 157, but writers favour the *Suisse Atlantique* approach, *Clark* 150.

11. UNIDROIT art. 7.3.1. also provides for termination for fundamental non-performance. Art 7.3.1(2) provides a list of factors relevant to deciding whether the non-performance was fundamental, including the situations mentioned in paragraph (2) of the Article.

12. In the laws of the NORDIC countries the creditor can terminate for non-performance or claim that a defective performance be replaced by a conforming tender only if the non-performance is substantial. This rule is provided in the DANISH SGA §§ 21, 28, 42 and 43 and is applied to other contracts as well. The same rules are laid down in CISG arts. 45, 49 and 64. The corresponding sections of the Sale of Goods Acts in FINLAND and SWEDEN (§§ 25, 39, 54 and 55) are to similar effect as the Article. CISG art. 25 provides that a "breach ... is fundamental if it results in such detriment to the other party as substantially to deprive it of what it is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result." CISG has no provision on intentional or reckless non-performance like the one provided in the Article. Nor do the Nordic Acts, but it is generally held that the creditor can terminate if the defaulting debtor has committed fraud either when making the contract or performing the obligations under it, see DANISH SGA §§ 42 and 43. It is the prevailing view that in sales governed by CISG the remedies for fraud are to be found in national law, see e.g. *Honnold*, no. 65.

13. The approach of CZECH commercial law is in fact very similar. A *breach of contractual obligation* (see notes above) is considered to be *fundamental* if the debtor breaching knew or could have reasonably predicted at the time of the conclusion of the contract that the creditor would not have been interested in performance of the obligation in the event of such a breach of contract (see Ccom art. 345.2).

14. Most of the other legal systems do not apply the doctrine of fundamental non-performance but approach it in various ways.

15. Those systems which like AUSTRIAN, GREEK and PORTUGUESE law have no unitary concept of non-performance have different rules for the various kinds of non-performance. For delay and impossibility Greek law makes a distinction between non-performance of the "main" obligation and of a "subordinate" obligation; only the non-performance of the main obligation permits the creditor to terminate. Under these laws termination is possible in certain cases of "qualified delay", such as when the contract has provided for performance at a definite time which has not been met, or if the creditor has lost any interest in performance, see AUSTRIAN, Ccom § 376 and CC § 919 (the equivalent provision of Ccom § 376 has been cancelled); GREEK CC arts. 401 and 385(2); PORTUGUESE CC art. 808.

16. In a case of defects in goods sold, the former GERMAN law permitted the buyer to reduce the price or to terminate unless the defect is trifling, see the abolished CC §§ 459 and 462, or the termination would be contrary to good faith. See also GREEK CC arts. 534, 540. Under AUSTRIAN law there is a remedy of termination in the case of bad performance, if the debtor does not repair or replace the item in time or is not able to repair or replace (see CC § 932(2) and (4)). is similar to former GERMAN law but

provides in addition a right to demand repair, CC § 932(1). PORTUGUESE law permits the buyer to terminate if repair is impossible or if the goods delivered are so different from the goods contracted for that the buyer cannot be fully satisfied (*Telles* 337; *Varela* II 128).

17. Under the new GERMAN law a fundamental breach in the sense of CC § 323(2) no. 3 relieves the creditor from the need to give the debtor a *Nachfrist* and the additional requirements under CC § 323(5) as to the weight of the breach normally do not apply then but restrict only termination in the case of a *Nachfrist*.

18. DUTCH law does not apply the concept of fundamental non-performance. In principle any non-performance will entitle the creditor to terminate. However the law requires that, unless the contract provides for performance at a definite time, the creditor must give the debtor a *Nachfrist* in case of delay, and provides that a non-performance of minor importance for the creditor will not justify termination, see Dutch CC art. 6:82-83 and 6:265.

19. Under ITALIAN law termination is not allowed when the non-performance has little importance for the other party, CC art. 1455 (see Cass. 20 April 1994, no. 3775 in Corr. Giur. 1995, 566 ff; *Antoniolli* in *Antoniolli – Veneziano,* Principles of European Contract Law and Italian Law – A Commentary, 406ff; *Cubeddu*, L'importanza dell'inadempimento; *Sacco(-De Nova)*, Il contratto, II, 631 ff).

20. In SPANISH law, termination is permitted if the non-performance is material even if it is less than total. The traditional view that only an intentional non-performance will justify termination has been rejected by recent case law, see *Díez Picazo* II, 716; *Lacruz-Delgado* II, 1 § 26, 200; *Albaladejo* II, 1, § 20.2 and *Carrasco*, ZEuP 3/2006, 565 ff.

21. In FRENCH, BELGIAN and LUXEMBOURG law the question of termination is in principle left to the discretion of the trial judge. However it appears that the gravity of the non-performance is an important factor to be taken into account: see, e.g., Belgian Cass.8 December 1960, Pas 1, 382; Cass. 12 November 1976, Arr. Cass. 1977, 293; Cass. 13 March 1981, R.W. 1982-83, 1049. When there is a resolutive clause, termination is subject, to a certain extent, to the good faith principle (*Terré/Simler/Lequette*, Les obligations[9], no. 664; *Nicholas* 242 ff. The French Cour de Cassation has held that a buyer could not use a clause in a sales contract allowing termination without previous notice and without the court's intervention unless the time for delivery of the goods was a "*condition essentielle et déterminante*" (Cass.Com 13 April 1964, Bull. 3 no. 180, p. 153). For unilateral termination (see Notes under III-3:507), the criterion used by French and Belgian courts is not only that of the "gravité du comportement"; the creditor who unilaterally terminates does this at the creditor's own risk ("à ses risques et perils"). This means that en ex post control will be done by the judge. The French Avant-projet also provides for such an ex post control which may go so far as enabling the judge to order performance of the contract (art. 1158-1). In the avant projet, there is no express condition as to the importance of the breach; this lacuna has been criticised.

22. POLISH law does not apply the notion of fundamental non-performance. In case of synallagmatic contracts, the debtor's imputable delay entitles the creditor to terminate after setting an additional period for the debtor (CC art. 491 § 2). Setting an additional period is not necessary if there was a stipulation giving the creditor a right to terminate in case of delay. Moreover, setting an additional period is not necessary for termination in all these cases, when it appears from the nature or purpose of the contract, which is known to the debtor that late performance will have no significance for the aggrieved party (CC art. 492). If the performance of a synallagmatic obligation

became impossible due to circumstances for which the debtor is liable, the other party may claim damages or terminate (CC 493 § 1), regardless of the gravity of the non-performance. The termination may be cumulated with a claim for damages resulting from the non-performance (CC art. 494).

23. ESTONIAN LOA § 116(2) sent. 1-4 generally correspond to the UNIDROIT Principles art. 7.3.1.(2) lit. a)-d) providing an open list of characteristics inherent to fundamental breach. Differently from the present Article, intentional or grossly negligent non-performance (LOA § 116(2) sent. 3) and reason to believe that the debtor's future performance cannot be relied on (LOA § 116(2) sent. 4) may independently constitute a fundamental non-performance (see for critics *Varul et al (-Kõve)* § 116 n. 4.4.3.3). The concept of fundamental non-performance has central meaning as a precondition of the right to withhold performance for anticipated partial non-performance (LOA 111(6)), to terminate the contractual relationship for non-performance (LOA § 116(1)), to terminate the contractual relationship for anticipated non-performance (LOA § 117), to claim damages in lieu of performance (LOA § 115(2)-(3)) and to require substitute performance in contracts of sale or services (LOA §§ 222(2), 646(2).

24. In SLOVAKIA according to Ccom art. 345(2) (only for commercial relationships) a breach is deemed fundamental if the party breaching the contract knew or could have anticipated at the time of its conclusion from the contents of the contract or the circumstances under which it was concluded, that the other party would not have an interest in its performance in the event of a breach of the contract. If in doubt, it is presumed that the breach of the contract is non-fundamental.

25. See generally *Treitel*, Remedies § 253 ff.; *Honnold* no. 181ff.; *Bianca & Bonell* (*-Will*) 205; *Flessner*.

III.–3:503: Termination after notice fixing additional time for performance

(1) A creditor may terminate in a case of delay in performance of a contractual obligation which is not in itself fundamental if the creditor gives a notice fixing an additional period of time of reasonable length for performance and the debtor does not perform within that period.

(2) If the period fixed is unreasonably short, the creditor may terminate only after a reasonable period from the time of the notice.

COMMENTS

A. General

The effect of this Article is that where there has been a delay in performance but the delay is not yet fundamental the creditor may terminate after having given the defaulting debtor reasonable notice. This very practical rule is now to be found in the laws of many Member States, though not always in precisely the same form or with precisely the same effects.

B. Setting a time-limit for performance in cases of non-fundamental delay

Not every delay in performance of an obligation will constitute a fundamental non-performance and so the creditor will not necessarily have the right to terminate immediately merely because the date for performance has passed. In cases of non-fundamental delay, however, the creditor can fix an additional period of time of reasonable length for performance by the debtor. If upon expiry of that period of time performance has not been made, the creditor may terminate.

> *Illustration 1*
> C employs D to build a wall in C's garden. The work is to be completed by April 1st but prompt completion is not fundamental. By that date D has not completed the work and appears to be working very slowly. Less than a week's work is necessary to complete the wall. C may give D a further week in which to complete the wall and, if D does not do so, C may terminate the contractual relationship.

The notice procedure may be useful when the non-performance is of an accessory obligation to accept or to allow performance of a primary obligation by the other party.

> *Illustration 2*
> E employs F to decorate the interior of an empty apartment owned by E but E fails to give F a key to the apartment by the date on which it was agreed that F should start work. F may give E a reasonable time in which to arrange access for F and, if E fails to do so, F may terminate.

It should be noted that this Article applies even if the non-performance is excused because of a temporary impediment.

C. When the notice must be for a definite reasonable period

When a notice fixing an additional period for performance is served after a non-fundamental delay, it will only give the creditor the right to terminate if, first, it is for a fixed period of time, and secondly, the period is a reasonable one.

If the notice is not for a fixed period of time it may give the defaulting party the impression that performance can be postponed indefinitely. It will not suffice to ask for performance "as soon as possible". It must be a request for performance, say, "within a week" or "not later than July 1". The request must not be couched in ambiguous terms; it is not sufficient to say that "we hope very much that performance can be made by July 1".

Because in cases of non-fundamental delay the notice procedure is conferring an additional right on the creditor, the period of notice must be reasonable. If the creditor serves a notice of less than a reasonable period a second notice is not needed; the creditor may terminate after a reasonable time has elapsed from the date of the notice.

D. What period of time is reasonable?

The determination of what is a reasonable period of time must ultimately be left to the court. Various factors may be important. The period of time originally set for performance may be relevant: if the period is short, the additional period of time may also be short. The need of the creditor for quick performance may be relevant, provided that this is apparent to the defaulting debtor. The nature of the goods, services or rights to be performed or conveyed may be important: a complicated performance may require a longer period of time than a simple one. The nature of the event which caused the delay may also be relevant; a party who has been prevented from performance by bad weather should be granted a longer respite than a party who merely forgot about the obligation .

E. The creditor may provide for automatic termination

If the defaulting debtor has not performed the obligation by the expiry of the period of time fixed for performance, or has before that time given notice of a refusal to perform, the creditor may then give notice of termination. However, the creditor may provide for automatic termination. The notice may, for example, say that the creditor will be free from liability if the defaulting debtor fails to perform within the period of the notice.

If the defaulting debtor in fact tenders performance after the date set in the notice, the creditor may simply refuse to accept it. However, if the creditor actually knows that the debtor is still attempting to perform after the date, good faith requires the creditor to warn the debtor that the performance will not be accepted. If the debtor asks the creditor whether performance will be accepted after the date set, good faith requires the creditor to give an answer within a reasonable time.

NOTES

1. Several systems provide that even if the creditor has no immediate right of termination for delay (because for instance in Germany there was no *Fixgeschäft* or in England time "was not of the essence"), the right to terminate may be acquired by giving the debtor a reasonable time in which to perform, provided that the obligation which

remains unperformed at the end of the period of notice is sufficiently serious to warrant termination.

2. The best known device, and the one which has inspired the present Article, is the GERMAN *Nachfrist* under CC § 323(1). This applies to all kinds of non-performance but *Nachfrist* is not necessary in case of impossibility, *Fixgeschäft*, repudiation or other cases of fundamental breach. The *Nachfrist* is primarily aimed at protection of the debtor (see *Treitel*, Remedies § 245) but the practical effect is the same as that of the Article. Like the Article, the German rule will in general apply if the debtor is in delay in performing a major obligation; the creditor may then withdraw from the contract or claim damages for non-performance. If the debtor does not comply with a minor obligation, the creditor can only use the *Nachfrist* procedure if the breach of that obligation imperils the purpose of the whole transaction (see CC § 323(5) sentence 1). In case of defect the creditor cannot use the *Nachfrist* procedure if the defect is trifling (see CC § 323(5) sentence 2).

3. Some other systems, e.g. AUSTRIAN (CC §§ 918 and 919) and PORTUGUESE law, follow the German model closely, but very different systems also produce close parallels. The FINNISH and SWEDISH SGAs §§ 25(2), 54(2) and 55(2) give a right to terminate after expiry of a *Nachfrist*. The same applies in SLOVENIAN law (LOA § 105), with the difference that no special notice of termination is necessary. A contract is terminated by law unless a creditor immediately declares otherwise. It is similar in POLISH law, where termination is possible only after passing of the additional period (CC art. 491 § 1) – except in the case of a *lex commissoria*-clause and *Fixgeschäft* (CC art. 492). In ENGLISH and IRISH law the creditor may sometimes be able to "make time of the essence" once the date for performance has passed by serving on the debtor a notice to perform within a reasonable time; if the non-performance continues the creditor may terminate at the end of the period. There is some doubt as to the scope of the rule: the traditional view is that it applies only to certain categories such as sale of land and sale of goods (see *Treitel*, Remedies § 249) but the House of Lords has on two recent occasions approved a passage from *Halsbury* 9 § 481 which states as a general rule that a party may make time of the essence by serving a reasonable notice on the defaulting party, just as the Article envisages (*United Scientific Holdings Ltd* v. *Burnley Borough Council* [1978] A.C. 904; *Bunge Corporation v. Tradax SA* [1981] 1 WLR 711; for SCOTLAND see *Rodger (Builders)* v. *Fawdry* 1950 S.C. 483 (I.H.)). Under the DANISH SGA the creditor can always terminate in case of a fundamental non-performance, and may do so without having given the debtor a *Nachfrist*. In other contracts a notice of a reasonable length may sometimes make time of the essence, see *Gomard*, Obligationsret II 93 ff. SCOTTISH law has an “ultimatum” procedure by which a failure to perform timeously (and probably other forms of failure to perform) may be converted into a material breach justifying termination: the notice must set a reasonable time for the party in breach to comply (*McBryde*, paras. 20.128-20.131). ESTONIAN LOA § 116(2) sent. 5 provides that not only non-fundamental delay, but non-performance of *any obligation* not amounting to fundamental non-performance under LOA § 116(2) sent. 1-4 (see note 3 to art. III.-3:502 above) is considered as fundamental non-performance (and as such gives rise to the right to terminate the contractual relationship under LOA § 116(1)) after an additional period for performance set by the creditor lapses without conforming performance by the debtor (solution criticised by *Varul et al (-Kõve)* § 116, n. 4.4.2.).

4. CZECH law considers delay in performance to be a breach of contractual obligation (see notes above). The creditor has a right to terminate after notice and a reasonable extra time in both civil and commercial law (see CC art. 517.1 and Ccom art. 344 ff).

5. Also under SLOVAK law if a party's default constitutes a non-fundamental breach of a contractual obligation, the other party may terminate the contractual relationship only if the delaying party fails to perform even within an additional reasonable period which has been provided for such performance. (Ccom art. 346(1) - only for commercial relationships). If the delaying party declares that it will not perform the obligation, the other party may terminate without providing an additional reasonable period for such performance, or may terminate before the expiration of this period (Ccom art. 346(2)).

6. Under DUTCH law if a party's default constitutes a non-fundamental breach, the other party may as a rule terminate the contract and may only not do so by way of exception (CC art. 6:265 paragraph 1 *in fine*). Only in case such an exception applies is it imaginable under Dutch law that the creditor has to give a notice fixing an additional period of time in order to obtain the right to terminate the contract.

7. The idea that the creditor may terminate for non-fundamental delay after giving reasonable notice is not accepted by all systems: for instance it is unknown to FRENCH law. SPANISH law delay justifies termination only if it is fundamental or frustrates the purpose of the contract, according to case-law (Supreme Court 5 January 1935; see *Díez Picazo* II, 714.) In such cases prior warning to the debtor is not required (*Lacruz-Delgado*, II, 1 § 36, 201). However many systems have accepted rules permitting termination after notice (e.g. GREEK CC art. 383 sentence 1; ITALIAN CC art. 1454(1), (3) according to which the aggrieved party can serve on the other a written notice to perform within a specified time, declaring that, unless performance takes place within such time, the contract is deemed dissolved; if the time elapses without performance having been made, the contract is dissolved by operation of law).

8. In BELGIUM doctrine and case law now accept that sometimes termination may be effected by the creditor; whether notice has been given to the debtor is a relevant factor, though it is not necessary if the debtor has indicated a refusal to perform. See *De Page* II, no. 891; Cass. 24 March 1972, Arr. Cass., 707; Cass. 17 January 1992, TBH/RDC 1993, 239.

9. The rule contained in the Article is also adopted by ULIS (arts. 27(2), 44(2), 62(2) and 66(2)) and by CISG (arts. 47, 49(1)(b), 63 and 64(1)(b)).

10. There are differences in detail between the various national rules. For instance in GERMAN law at the end of the notice period the creditor lost the right to seek performance *in natura* at the end of the *Nachfrist* (this has changed under the new law, see CC § 281(4)), whereas in ENGLISH and IRISH law the creditor can probably simply set a fresh period of time. In German law a notice which was too short will automatically be extended, so that the creditor may still terminate after a reasonable time, unless the period set was so short that it indicated a lack of good faith (see *Schlechtriem and Schmidt-Kessel*, Schuldrecht, Allgemeiner Teil[6], 246). The position is similar in ESTONIAN law, LOA § 114(1). In ENGLISH and IRISH law a fresh notice may have to be served, as a notice which is too short seems to be treated as having no effect (e.g. *Behzadi v. Shaftesbury Hotels Ltd.* [1992] Ch 1. If the notice period given is too short, AUSTRIAN law effects the termination after a reasonable period of time (OGH 5 December 1951, SZ 24/332).

11. Under the HUNGARIAN CC § 300(1) a creditor is entitled to demand performance, or, if performance no longer serves the creditor's interest, to withdraw from the contract irrespective of whether or not the debtor has offered an excuse for the default. Under CC § 300(2) it is not necessary to prove the cessation of an interest in performance if, according to the agreement of the parties or due to the imminent

purpose of the service, the contractual obligation had to be performed at a definite time and no other, or if the creditor has stipulated a reasonable deadline for subsequent performance and this period has elapsed without result.

12. See generally *Zweigert and Kötz,* An Introduction to Comparative law[3], 492-494; *Treitel,* Remedies §§ 252.

III.–3:504: Termination for anticipated non-performance

A creditor may terminate before performance of a contractual obligation is due if the debtor has declared that there will be a non-performance of the obligation, or it is otherwise clear that there will be such a non-performance, and if the non-performance would have been fundamental.

COMMENTS

A. Terminology

The neutral and descriptive expression "anticipated non-performance" is used here rather than the expression "anticipatory non-performance" which is the technical term of art in some legal systems and which is used in the UNIDROIT Principles (Article 7.3.3). "Anticipated" is more accurate in relation to the content of the present Article. The Article does not deal with actual non-performance of a special type, requiring a special adjective. It deals with the situation where future non-performance of a type which would justify termination is clearly anticipated.

The right of a creditor to terminate the contractual relationship in a case of anticipated fundamental non-performance is recognised in many laws. That is not so in some systems, especially those in which a contractual relationship can be terminated normally only by the decision of a court (see Comments to III.–3:507 (Notice of termination)), but at least some of these systems have used other means to reach the same, very convenient, result.

B. Anticipated non-performance equated with actual non-performance

The Article entitles the creditor to terminate if the debtor has repudiated the contract by saying that there will be no performance or if it is otherwise clear that there will be a fundamental non-performance by the debtor. There will have to be an obvious unwillingness or inability to perform where the failure in performance would be fundamental. The creditor's right to terminate rests on the notion that the creditor cannot reasonably be expected to continue to be bound by such obligations once it has become clear that the debtor cannot or will not perform the main obligation at the due date. The main effect of the Article is that for the purpose of the remedy of termination a clearly anticipated fundamental non-performance is equated with an actual fundamental non-performance after performance has become due.

Illustration 1
In January a construction company agrees to build a house for O and to start work on 1st May. In April the company tells O that owing to labour troubles it will not be able to carry out the contract. O may immediately terminate the whole contractual relationship.

C. Threatened non-performance must be fundamental

Termination under this Article is permitted only where the main obligation is of such a kind that its non-performance would entitle the creditor to terminate. This applies also to a threatened delay in performance. If a debtor indicates that there will be performance but that it will be late this, in the absence of an agreed right to terminate, does not satisfy the requirements of the Article except where the threatened delay is so serious as to constitute a fundamental non-performance.

Illustration 2
B has agreed to build a house to O's design. B informs O that the double glazing specified by O is no longer available but that it can install double glazing from a different supplier which is almost identical. The failure to provide the double glazing originally specified would not, in these circumstances, be a fundamental non-performance, and O therefore cannot terminate under the Article.

Illustration 3
In January S contracts to sell goods to B for delivery on 1st March. In February S tells B that delivery will be a few days late. B can terminate immediately if in the circumstances this delay would be a fundamental non-performance, but not otherwise.

D. Inability or unwillingness to perform must be manifest

In order for the Article to apply it must be "clear" that the debtor is not willing or able to perform at the due date. An express repudiation by the debtor will satisfy this requirement but even in the absence of a repudiation the circumstances may make the situation clear. If the debtor's behaviour merely engenders doubt as to willingness or ability to perform, the creditor's remedy is to demand an assurance of performance.

E. Remedies consequent on termination

A later Article (III.–3:509 (Effect on obligations under the contract)) makes it clear that a creditor who exercises a right to terminate for anticipated non-performance has the same rights to damages as on termination for actual non-performance.

F. Time for notification of termination

The creditor may terminate at any time while it remains clear that there will be a fundamental non-performance by the debtor.

NOTES

I. Termination for anticipated non-performance a recognised doctrine

1. The root of this provision lies in ENGLISH law (cf. *Hochster v. de La Tour* (1853) E & B 678 (QB); *Universal Cargo Carriers Corp v. Citati* [1957] 2 QB 401 (QB); *Clark* 414). SCOTTISH law has adopted the same doctrine. (*McBryde*, paras. 20.22-20.43). UNIDROIT art. 7.3.3, CISG art. 72(1) and ULIS art. 76 also adopt the notion. The FINNISH and SWEDISH SGAs § 62 adopt the CISG rule: see *Ramberg,* Köplagen, 583 ff. There is a similar provision in SLOVAK law (Ccom art. 348 - only for commercial relationships).

II. Some equivalent rule recognised

2. The GERMAN CC since 2002 contains an express provision, see CC § 323(4). In AUSTRIA an unambiguous and definite refusal to perform is considered a non-performance, see *Reischauer* in Rummel, ABGB I, 3rd ed., § 918 no. 14. *Rummel (-Reischauer)* CC § 918 no. 14. The SLOVENIAN LOA § 106 has a similar rule.
3. Under DANISH law the right of a creditor to terminate in case of anticipated non-performance is, in general, limited to cases where there is certainty, or probability

amounting almost to certainty, that there will be a fundamental non-performance by the debtor. This rule, however, is qualified: (1) when a buyer goes bankrupt or becomes insolvent and the time for delivery has come, the seller may terminate unless security is provided (cf. SGA § 39; Bankruptcy Act § 57); (2) where the buyer of goods has been declared bankrupt and the administrator of the estate does not confirm the take-over of the contract within a reasonable time, the seller may terminate (cf. SGA § 40); (3) in a sale where the goods are to be delivered in instalments and where the delay or defect in respect of one instalment or payment for one instalment amounts to a fundamental non-performance (cf. SGA § 29: "unless there is no reason to expect a future delay"; see also §§ 22 and 46). See also *Gomard* Obligationsret III 16 ff, and *Bryde Andersen & Lookofsky* 222 ff.

4. In DUTCH law, CC art. 6:80 provides that the consequences of non-performance – for instance termination of the contractual relationship - operate although the obligation is not yet due (a) if conforming performance is not possible; (b) if from a communication of the debtor the creditor cannot but conclude that there will be a non-performance; (c) if the creditor has good reasons to fear a non-performance by the debtor, and has not received adequate assurance of the debtor's willingness to perform. The breach that is thus anticipated does not have to be fundamental in order to bestow on the creditor the right to terminate.

5. Under GREEK law, genuine anticipated non-performance exists where the debtor before the date for performance expressly declares (A.P. 339/1982, NoB 30 (1982) 1459 at 1460) or by conduct necessarily implies (Athens 2671/1957, EEN 25 (1958) 538-539), that there will be non-performance. In such situations, CC art. 385(1) equally relieves the creditor from setting an additional period for performance, and allows the remedies of damages and termination even prior to the date of performance (*Gasis* Erm. AK II/1 Introd. remarks to arts. 335-348 no. 62 (1949); *Stathopoulos, Georgiadis* & *Stathopoulos* Introd. remarks to arts. 335-348 no.6 (1979), *Stathopoulos*, Obligations § 19, nos. 130-132, *Filios*, Obligations, § 64 B III.; also cf. CC art. 686; in any case, the notice of termination, in terms of time and otherwise, may not result in an abuse of right (CC art. 281)).

6. In ITALIAN law CC art. 1219 provides an automatic *mora debitoris* if the debtor declares in writing an unwillingness to perform. The way is then open for termination. On insolvency of the debtor, see CC art. 1461 which gives a party a right to withhold performance if the patrimonial conditions of the other party have become such as obviously to endanger fulfilment of the counter-performance, unless adequate security is given.

7. Under POLISH law an equivalent solution (the creditor's right to terminate for anticipated non-performance) can be adopted despite the lack of any explicit regulation (see *J. Napierała*, Odpowiedzialność dłużnika za nieuchronne niewykonanie zobowiązania, Warszawa 1997, p. 174 and p. 182).

8. Although there is no general rule as to termination for anticipated non-performance under PORTUGUESE law, authors discuss whether the refusal to perform constitutes a non-performance or an equivalent, allowing the creditor to terminate the contractual relationship, or simply a *mora debitoris* which obliges the creditor to notify the debtor fixing an additional period of time to performance before termination (see e.g., respectively, *Almeida* 317, *Leitão* II 236, 237). The Supreme Court of Justice has considered that an unambiguous and serious refusal to perform is equivalent to a non-performance (see v.g. STJ 7 March 2006, STJ 21 January 2003, STJ 13 March 1997, STJ 10 December 1996). A similar rule can be found in CZECH commercial law but the creditor may terminate for this objective anticipated non-performance (as opposed

to a repudiation by the debtor) only in cases of inadequate assurance of performance. The requirements are strict. It is possible to terminate only if it indisputably appears that the debtor will breach a contractual obligation in a substantial manner and only if, after a request by the creditor, the debtor fails to provide sufficient security for the performance without undue delay. The appreciation of this future non-performance is based on the real observed conduct of the debtor or on other circumstances occurring before the time limit set for performance (see Ccom art. 348.1). A second ground for termination for anticipated non-performance is repudiation by the debtor: if the debtor declares a refusal to perform, the creditor can terminate (see Ccom art. 348.2).

9. ESTONIAN LOA § 117 generally follows the pattern of CISG art. 72 *(Varul et al (-Kõve)* § 117, no. 2), also in restricting the right to terminate in case of anticipated fundamental non-performance. There is a requirement of prior notice to the debtor of the intended termination in order to allow the latter to confirm the future performance or provide assurance within a reasonable time after such notice (LOA § 117(2); cf. the right to withhold own performance and require assurance provided in LOA § 111(4)-(5)). Prior notice of intended termination by the creditor is not necessary, if the debtor has given notice that the debtor will not perform the obligation (LOA § 117(3)). Under the HUNGARIAN CC § 313 if a debtor refuses to perform without legitimate reason, the creditor is entitled to invoke the consequences of either delay or subsequent impossibility.

III. No equivalent doctrine

10. In contrast, there is no general rule as to termination for anticipated non-performance in FRENCH law and SPANISH law. This problem has hardly been subject to academic discussion nor regulated in the Codes. In general, the law is reluctant to support the creditor prior to the time of performance (cf. SPAIN: *Lacruz-Delgado* II, 1, § 26, 200; *Albaladejo* II. 1, § 20.4 K and M; but termination for anticipated non-performance is possible if the debtor's behaviour makes it clear that performance will not take place: CC arts. 1129 and 1183). In Portuguese law, some of the results of anticipated non-performance are also reached in other ways: *Soares-Ramos* 195 ff.; STJ 15 March 1983, BMJ 325, 561; STJ 19 March 1985, BMJ 345, 400; STJ 19 February 1990, Act. jur., 1990. 2. 10. The same is true for BELGIUM: Cass. 5 June 1981, R.W. 1981-82, 245, R.C.J.B. 1983, 199; Cass. 15 May 1986, R.C.J.B. 1990, 106, Arr.Cass. no.565; *Vanwijck-Alexandre* nos. 177 and 199 ff; *M.E. Storme*, Invloed no. 299 ff.

11. In CZECH Civil law, there is no equivalent rule to the Article.

III.–3:505: Termination for inadequate assurance of performance

A creditor who reasonably believes that there will be a fundamental non-performance of a contractual obligation by the debtor may terminate if the creditor demands an adequate assurance of due performance and no such assurance is provided within a reasonable time.

COMMENTS

A. Purpose of rule

This Article is intended to protect the interests of a party to a contract who believes on reasonable grounds that the other party will be unable or unwilling to perform an obligation at the due date but who may be reluctant to terminate for anticipated non-performance in case it transpires that the other party would after all have performed. In the absence of a rule along the lines of this Article the creditor will be in a dilemma. To wait until the due date for performance may mean heavy losses if performance does not take place. To terminate for anticipated non-performance may mean a liability for damages if it is later found that it was not clear that the other party would commit a fundamental non-performance. The present Article enables the creditor to demand an assurance of performance, in default of which the remedy of termination can be safely used.

This rule is not found, at least in such a developed form, in the law of any of the Member States, though several have something similar that applies if one party has become insolvent. The general rule of "adequate assurance of performance" was developed in the American Uniform Commercial Code (art. 2-609). It reflects what parties reasonably expect to be their rights and it has proved to be of considerable practical value.

B. Right to withhold performance

So long as the creditor's reasonable belief in future non-performance by the debtor continues the creditor may withhold performance of reciprocal obligations, until adequate assurance of performance has been received. This is regulated by III.–3:401 (Right to withhold performance of reciprocal obligations))

C. Effect of non-receipt of adequate assurance

If the creditor does not receive adequate assurance of performance and still believes on reasonable grounds that performance will not be forthcoming, the creditor may terminate. On termination, the debtor's failure to give the assurance requested is itself treated as a non-performance of the obligation, giving the creditor the right to damages where the deemed non-performance is not excused (III.–3:509 (Effect on obligations under the contract)).

Illustration 1

A, a caterer, contracts with B to cater for the reception at the wedding of B's daughter in three months' time. A month before the wedding B telephones A to discuss some outstanding details of the arrangements and is then told by A: "I am having some staff problems and there is a slight risk that I will not be able to organize the reception. But do not worry too much; everything should turn out all right." B is entitled to demand an adequate assurance that the reception will be provided. If this is given, as by A informing B that its staff difficulties have now been resolved, both parties remain bound by the contract and there is no non-performance of any obligation by A. If the

assurance is not given, B is not expected to court disaster on the occasion of his daughter's wedding. He is entitled to terminate the contractual relationship, engage another caterer and recover from A any additional expense involved.

Illustration 2
A, a boat builder, agrees to build a yacht for B, to be delivered in three months' time. B stipulates that time of delivery is of fundamental importance. Soon after the making of the contract B learns that A's boatyard has been seriously damaged by fire. B is entitled to ask for an adequate assurance from A that the yacht will be delivered on time. A might give this assurance by showing that it has rented facilities to build the yacht at another yard.

D. What constitutes an adequate assurance

This will depend on the circumstances, including the debtor's standing, integrity and previous conduct in relation to the obligation and the nature of the event that creates uncertainty as to the ability and willingness to perform. In some cases the debtor's declaration of intention to perform will suffice. In other cases it may be reasonable for the creditor to demand evidence of the debtor's ability to perform.

Illustration 3
B enters into three successive contracts for the purchase of goods from S. Subsequently B defaults in payment of the price under each of the first two contracts. S is entitled to demand a bank guarantee of the purchase price under the third contract or other reasonable assurance that payment will be made and is not obliged to rely solely on B's promise of payment.

NOTES

I. Likelihood of non-performance

1. Several European systems have rules which entitle a party to terminate when it is clear that the other party will not perform, see the notes to the preceding Article. Further, many systems allow a creditor to withhold performance of a reciprocal obligation when there is a real and manifest danger that the debtor will not perform when the debtor's obligation falls due. Most of the laws deal with the situation where the other party becomes insolvent. See the Notes to Article III.–3:401 (Right to withhold performance of reciprocal obligation).
2. The right to withhold performance generally persists until the other party provides adequate security, or performs the obligation: e.g. AUSTRIAN CC § 1052 second sentence; FINNISH and SWEDISH SGAs § 61(4); GERMAN CC § 321(1); SPANISH CC art. 1467(2); ESTONIAN LOA § 111(4)-(5) and CZECH commercial law (Ccom art. 348.1). If security is not provided the DANISH Sales Act § 39 gives the seller the right to terminate when the time for delivery of the goods has come. In GERMAN law not to provide security gives the creditor a right to terminate (CC § 321(2)). The position is similar under GREEK law, see *Michaelides-Nouaros* in Erm.AK II/1 art. 377 nos. 8, 11 (1949) *Stathopoulos* in *Georgiadis & Stathopoulos* arts. 374-378 no. 22. Similarly, a failure to provide assurance within a reasonable time after the creditor's relevant request gives the creditor a right to terminate under ESTONIAN LOA § 111(5). In addition, LOA § 98 provides specific rules for the

obligation to provide assurance. Under ITALIAN CC art. 1461 the creditor can withhold performance, but cannot terminate. However under CC art. 1186, if a debtor is insolvent the creditor can demand immediate performance and, if this is not forthcoming or security provided, may terminate. Under DUTCH law, if a debtor is insolvent, the creditor may also demand immediate performance (art. 6:40) and the trustee in bankruptcy will lose the right to performance if the trustee does not show a willingness to perform or does show this willingness but fails to provide adequate assurance (Faillissementswet art. 37). Under POLISH law, where the debtor becomes insolvent or where due to circumstances for which debtor is liable, the value of a security previously given materially decreases, the creditor may demand immediate performance (CC art. 458). The CC also provides that in reciprocal obligations, unless otherwise stipulated, the two performances should be rendered at the same time, and one of the parties may withhold its performance until the other party offers its performance (CC art. 488).

3. In those laws in which only insolvency is a ground for demanding an assurance, to demand an assurance of performance in other circumstances may be wrongful. Thus in SCOTLAND a party who threatened to terminate unless assurance of performance was given was held to be in material breach: *GL Group plc v. Ash Gupta Advertising Ltd* 1987 SCLR 149.

4. In SPAIN the termination of an obligation because of a reasonable belief that it will not be performed before the deadline expires is possible according to the Supreme Court's decisions if the debtor acts with bad faith and has no intention to fulfil the obligation (TS 30 June 1981, RAJ 1981/2622; TS 13 March 1986, RAJ 1250). Regarding the creditor's right to demand an adequate assurance so that, it is not provided, the creditor may terminate the obligation, the SPANISH Civil Code only provides (for the contract of sale) that the seller may withhold performance on becoming aware of the buyer's insolvency (CC art. 1467), but if the debtor gives an assurance of payment, the creditor has to deliver the product. The assurance may be of any kind allowed by law. However, not getting an adequate assurance does not give the creditor a right to anticipate the termination of the obligation, even if there are reasons to believe in the non-performance of the debtor (*R. Bercovitz* (ed.) Comentarios al Código Civil, 2006, art. 1467).

5. Under FRENCH and BELGIAN law, there are no general rules which entitle the creditor to terminate if it is clear that the debtor will not perform, except in cases of insolvency. The seller may simply withhold performance (as an application of the exception non adimpleti contractus) or use a right of retention (on the distinction between these two concepts, *Terré/Simler/Lequette*, Les obligations[9], no. 636).

6. There is no precise equivalent of the Article's rule in ENGISH law, but see the Notes to II.–3:401 (Right to withhold performance of reciprocal obligation).

7. See generally *Treitel,* Remedies 405 ff.

Sub-section 2: Scope, exercise and loss of right to terminate

III.–3:506: Scope of right to terminate

(1) Where the debtor's obligations under the contract are not divisible the creditor may only terminate the contractual relationship as a whole.

(2) Where the debtor's obligations under the contract are to be performed in separate parts or are otherwise divisible, then:

(a) if there is a ground for termination under this Section of a part to which a counter-performance can be apportioned, the creditor may terminate the contractual relationship so far as it relates to that part;

(b) the creditor may terminate the contractual relationship as a whole only if the creditor cannot reasonably be expected to accept performance of the other parts or there is a ground for termination in relation to the contractual relationship as a whole.

COMMENTS

In relation to this Article it is important to remember that termination is prospective only. A contractual relationship can be terminated only for the future.

Paragraph (1) states the general rule that if the debtor's obligations under the contract are indivisible the creditor may only terminate the contractual relationship as a whole, assuming of course that there are grounds for termination.

Paragraph (2) deals with the situation where the debtor's obligations under the contract are divisible. There are two types of divisibility. One type is where the debtor's future obligations are to be performed in separate parts or instalments. The other is where the performance of the obligations is divisible as to content but not necessarily as to time – for example, where a farmer has in one contract agreed to buy two identical tractors and one of them is fundamentally disconform to contract while the other is in conformity with the contract.

Where a contract calls for a series of performances by one party, each with a matching counter-performance (typically, a separate price for each performance), the contractual obligations may be seen as divisible into a series of separate parts. The same may apply when the obligations under the contract are to be performed continuously over a period of time: even if performance is not broken down into discrete parts it may be possible to apportion payment on a daily or weekly basis.

If the debtor fails to perform one part, the creditor may want to put an end to the obligations of both parties relating to that part, including the obligation to accept performance of that part: for instance, in a contract for services the employer may want to arrange for someone else to do the work. However, it may not be appropriate for the creditor to have the right to terminate all the remaining obligations under the contract because the failure, although fundamental in relation to the relevant part of the debtor's obligations, may not be fundamental in relation to the whole. The part of the obligations not performed may not affect the rest of the contractual rights and obligations significantly, and the non-performance may not be likely to be repeated. In these circumstances, it is appropriate to allow the creditor to terminate the contractual

relationship only in relation to the part of the debtor's obligation not performed, leaving the rest untouched.

Illustration 1
The lessor of a machine under a 5 year lease, with rent payable monthly, announces in year 2 that a fault has been discovered in machines of that type and that the machine must be recalled immediately for repairs. Repairs will take at least 10 days but the machine will be returned as soon as possible. The lessor is unable to provide a replacement. This is a non-performance of obligations of the lessor under the contract. The lessee could simply reduce the price for the period during which the machine will be out of service but needs to be able to hire a substitute machine for the period. The minimum period of hire of such a machine is a month. The lessee can terminate the contractual relationship for the month during which the machine will be largely out of service.

Illustration 2
An office cleaning company agrees to clean a law firm's office on Saturday of each week for a fixed price per week. One Saturday the cleaning company's employees hold a one day strike. The law firm may terminate the obligations relating to that Saturday's work (including, in particular, the obligation to accept and pay for it) and bring in another cleaning firm to clean the office for that week. They may not terminate the contractual relationship as a whole unless it is clear that the strike will be repeated and that therefore there will be a fundamental non-performance of the whole of the cleaning company's obligation. This would then be a case of anticipated non-performance.

Sometimes one party's obligation to perform consists of distinct parts, and the non-performance affects only one of those parts, but the payment to be made for them is not split up into equivalent sums. If nonetheless the first party's performance is really divisible and the payment can be properly apportioned, the Article applies and termination is allowed in respect of the part affected.

Illustration 3
The facts are as in Illustration 2 but the price is a lump sum for the fifty week period. This price was initially calculated by the cleaning company simply by multiplying the weekly charge by 50. The creditor may terminate the contractual relationship, and thereby bring to an end the obligations of both parties, in respect of the week missed.

Paragraph (2)(b) deals with situations where, even although the performance is divisible, the creditor can terminate the whole relationship. One such situation is where the creditor cannot reasonably be expected to accept the remaining performance.

Illustration 4
A farmer has ordered some harvest machinery which is to be delivered in two parts with a separate price for each. The supplier tells the farmer that one part is ready for delivery at the due time but that the second part cannot be delivered at the time when it is due to be delivered and indeed cannot be delivered until after the harvest time. In this situation the farmer has no use for the first part and can terminate the contractual relationship as a whole and not merely the part relating to the second instalment of the machinery.

Another situation where the whole relationship can be terminated is where, notwithstanding the divisibility of the obligations, it is clear that there is a ground for termination in relation to the whole. Usually the ground in this type of case will be anticipated non-performance of the remaining parts.

Illustration 5
The contract is as in Illustration 2. The cleaning work done in the first week is completely inadequate. It is clear that the cleaning company is trying to do the work using too few employees to cover an office of that size. The cleaning company refuses to use more employees. The law firm may terminate the contractual relationship as whole.

NOTES

1. Where an obligation is to be performed in instalments or separate parts, most systems recognise that the creditor should have the right to refuse to accept, and to refuse to render the counter-performance for a defective instalment or part, without necessarily having the right to refuse to accept further performance of the remaining parts of the obligation; but the creditor may be entitled to refuse to accept any further performance when the non-performance affects the whole contract. This is provided, for instance by DANISH SGA §§ 22, 29 and 46; FINNISH and SWEDISH SGAs §§ 43, 44 (see *Ramberg*, Köplagen 462); IRISH Sale of Goods Act 1893 s. 31(2); UK Sale of Goods Act 1979 s. 31(2) (and in the case law similar results are reached for other contracts; see *Treitel*, Remedies § 278); GREEK CC art. 386 (under which the creditor may choose between damages and termination even with respect to parts already performed: *Michaelides-Nouaros* Erm. AK vol. II/1 art. 386 nos. 7-14), *Stathopoulos* in *Georgiadis & Stathopoulos*, art. 386 nos. 3-6, *the same*, Obligations § 21 nos. 82-85 and ESTONIAN LOA § 116(3). GERMAN law reaches similar results by applying the restrictions to the *Nachfrist* solution under CC § 323(5). Virtually the same rule applies in AUSTRIAN law, see CC §§ 918(2) and § 920 second sentence; in the case of contracts which provide for delivery in instalments a partial termination is also possible where the performance is divisible according to the parties' intention or the economic scope of the contract. Such a rule is also to be found in SLOVENIAN LOA § 108. In BELGIUM, the scope of termination depends on the divisibility in parts or indivisibility of the contractual relationship, given the economy of the contract; the resulting rule is identical to the proposed rule, see *Lefebve* Rev. de Notariat Belge (1988) 266 ff; *Fontaine* R.C.J.B. 1990, 382 ff; *M.E. Storme* T.B.B.R/R.G.D.C 1991, 112, no. 12 ff; Cass. 29 May 1980, Arr.Cass. no. 310, R.W. 1980-81, 1196; *Van Gerven*, Verbintenissenrecht, pp. 207-208. Similar results are reached in FRANCE, where according to its *pouvoir souverain*, the court may partially terminate for a partial non-performance (*Malaurie et Aynès* nos. 742-744); it will take into account the divisibility of the performance. (See Cass. 1ière, 13 January 1987, Gaz.pal. 1987 II 20860 obs. G. Goubeaux.) ITALIAN CC art. 1564 provides that in contracts for the periodical supply of goods the whole contract may be terminated if the non-performance is of major importance and leads to loss of confidence in future performance, but according to CC art. 1458(1) termination does not extend to performances already executed; on the question of partial termination see *Corrado* 363 ff and *Gentili*, La risoluzione parziale. PORTUGUESE CC art. 434(2) provides for termination of the whole of a contract for performance by instalments or over a period

of time when the ground for termination relates to the unperformed instalments. DUTCH CC art. 6:265 allows the creditor in all cases to choose between termination in part or of the whole, but subject to the general principle that the failure must justify the type of termination chosen. POLISH law does not expressly provide for termination in part, but the concept is accepted under CC art. 491 § 1 and art. 493 § 1 as far as the performance is divisible (compare *W. Czachórski* [et al.], Zobowiązania, p. 337; *Z. Radwański*, A. Olejniczak, Zobowiązania – część ogólna, Warszawa 2005, pp. 305-306). Moreover, CC art. 493 § 2 provides that in case of partial impossibility the aggrieved party may terminate the whole contractual relationship if a partial fulfilment would have no significance for that party. In CZECH REPUBLIC, the creditor is obliged to accept partial performance (CC § 566; Ccom art. 329) and he can refuse to render the counter-performance for defective part (by application of the principle *exceptio non adimpleti contractus*, see notes above) or cancel the contract in part (CC § 517.1 in fine; Ccom art. 347.1). SLOVAK CC § 517(1) allows the creditor to choose between partial termination or complete termination.

2. ULIS arts. 45 and 75 and CISG art. 73 are similar to the present Article.

3. According to the SPANISH CC art. 1124, the contract may be terminated even if the non-performance refers only to a part of an obligation (*Lacruz*, Elementos, p. 199: the CC art. 1124 does not distinguish between non-performance of a part and of the whole obligation). Nonetheless, in order to terminate the contract, this partial non-performance must imply the frustration of the whole contract's purpose (TS 18 October 1993, RAJ 1993/7615; TS 11 April 2003, RAJ 2003/3017). If the debtor fails to carry out an accessory or complementary counter-performance, the termination of the whole contract is not allowed (TS 26 July 1999, RAJ 1999/6777). But when the obligations are divisible, a partial termination of a contract is admitted by the Supreme Court (TS 26 October 1990, RAJ 1990/8052).

4. Under the HUNGARIAN CC § 317(1) in the case of a non-performance of an obligation forming a part of a divisible service, the consequences of non-performance have effect only in respect of that part. However, the creditor is entitled to exercise the rights originating from the non-performance with regard to the entire contract if the creditor is able to prove that further performance is of no further interest due to the non-performance. Under CC § 317(2) if a non-performance concerns a part of an indivisible service, its consequences affect the entire contract.

III.–3:507: Notice of termination

(1) A right to terminate under this Section is exercised by notice to the debtor.

(2) Where a notice under III.–3:503 (Termination after notice fixing additional time for performance) provides for automatic termination if the debtor does not perform within the period fixed by the notice, termination takes effect after that period or a reasonable length of time from the giving of notice (whichever is longer) without further notice.

COMMENTS

A. The requirement of notice.

Fair dealing requires that, as the minimum, a creditor who wishes to terminate for non-performance of an obligation should normally give notice to the defaulting debtor. The debtor must be able to make the necessary arrangements regarding goods, services and money. Uncertainty as to whether the creditor will accept performance or not may often cause a loss to the debtor which is disproportionate to the inconvenience which the creditor will suffer by giving a notice. When performance has been made, passiveness on the side of the creditor may cause the debtor to believe that the former has accepted the performance even if it was too late or defective. If, therefore, the creditor wishes to terminate, notice must be given to the debtor within a reasonable time.

The laws of some Member States are more demanding, in that at least in principle they require a court order to terminate a contractual relationship. This traditional approach has been found to be inconvenient and is now subjected to more and more exceptions. Therefore these rules adopt the now more common rule that termination may be effected by notice to the other party.

Notice may be given in any form. It need not use any particular words or expressions. It need only indicate in one way or another that the creditor regards the contract or the contractual relationship as terminated. This may be indicated by, for example, words to the effect that a contract is ended or over or finished or rescinded; or that a contractual relationship (dealership, franchise, agency or whatever) is terminated or at an end; or that the creditor considers himself or herself to be no longer bound by the contract or, in a case of partial termination, by the contract as applied to a particular part of the performance; or that the debtor need not bother to perform. Whether rejection of a performance can be regarded as notice of termination will depend on the circumstances and on what else is said or done: it may only be a prelude to a withholding of payment until the debtor's obligation is properly performed. The duty to exercise rights in accordance with good faith and fair dealing (III.–1:103 (Good faith and fair dealing) may, in appropriate cases, require the notice to indicate the reason for the termination and, if it is partial, the extent of the termination.

B. When additional notice not required

Paragraph (2) deals with the situation where a notice under III.–3:503 (Termination after notice fixing additional time for performance) setting a reasonable period during which the defaulting debtor must perform has provided that at the end of the period termination will occur automatically if performance has still not been made. In such a case an additional notice of termination is not required.

NOTES

1. Legal systems differ in their approach to the question of how termination is to be effected and how quickly the creditor must act if the right is not to be lost. See *Treitel*, Remedies §§ 243-252.

I. Termination by notice to debtor

2. The Article merely requires notice to the non-performing debtor in order to effect termination. This accords with ENGLISH and IRISH law; DANISH SGA §§ 27, 32, and 52 see *Gomard* Obligationsret II 80; CZECH law (see above); GERMAN law, see CC § 349; FINNISH and SWEDISH SGAs §§ 29, 39, 59. The PORTUGUESE CC art. 436(1); and the DUTCH CC art. 6:267 allow rescission by notice. In SCOTTISH law, even notice is not always required; conduct showing that the contractual relationship is regarded as terminated may be enough: *McBryde* para. 20.107. In SPAIN the creditor may terminate by giving notice of termination. Court proceedings are needed only when the debtor challenges the termination or when a decision is required on compensation or restitution *Díez-Picazo*, II, 722; *Lacruz-Delgado* II, 1, § 26, 204. Also in ESTONIAN law, termination is exercised by notice to the other party (LOA § 188(1)). The notice does not need specific form, unless the form is prescribed for specific contracts (e.g. LOA § 325 on residential lease requires notice of termination to be submitted in form which can be reproduced in writing). In certain circumstances declaration to similar effect may be inferred from the creditor's conduct, i.e. claiming damages in lieu of performance (*Varul et al (-Kõve)* § 115 no. 11.1.) or returning the non-conforming goods (special rule for consumer contracts: LOA § 19(2), see Varul et al (-Kõve) § 188 no. 4.2. and Supreme Court Civil Chamber's decision from 19 April 2006, civil matter no. 3-2-1-29-06). Similarly to the paragraph (2) of the present Article, exceptionally no separate notice is required if the debtor has been given conditional notice to that effect when granted an additional period for performance (LOA § 116(5)). SLOVAK CC § 517 (1) also requires notice to the non-performing party for termination of the contractual relationship. But if the creditor is obliged to grant an additional adequate period the creditor may terminate after this additional period. The creditor has to first give notice to the debtor to grant an additional period and subsequently after this additional period the creditor may give notice of termination to the debtor. The position of POLISH law is similar (CC art. 491). The provision of the GREEK CC art. 341 § 2 is similar to the one in paragraph (2) of the commented Article.

3. The FRENCH, BELGIAN and ITALIAN laws at least in general principle require court proceedings to effect termination: see FRENCH, BELGIAN and LUXEMBOURG CC art. 1184(2). The time limit on the court's power to order termination is the general period of limitation (see French CC art. 2262 and Ccom art. 189bis); but in the case of defective goods the buyer, if electing for *résolution,* must do so "*within a two-year period running from the date the defect was known by the creditor*" FRENCH CC new art. 1648 (as amended in 2005), The ITALIAN CC arts. 1454, 1456 and 1457, and Belgian case law, recognise exceptions to the rule that the creditor needs a court order to terminate: see *Dirix and van Oevelen*, RW1992-93, 1236; *van Ommeslaghe* RCJB 1986, nos. 98-100; *M.E. Storme* TBBR 1991, 110-11, no. 12; Cass. 2 May 2002, RW 2002-2003, 501 obs Van Oevelen. In AUSTRIA CC § 918(1) provides that notice of termination in the case of delay needs at the same time the statement of a *Nachfrist*. In practice, however, it is seen as sufficient that the

creditor waits for a reasonable period of time after notice of termination. After that period termination takes effect automatically (see *Koziol/Welser* II, 13th ed., 54).

4. CISG arts. 49 and 64 and UNIDROIT art. 7.3.2 adopt an approach similar to that of the Article.

III.–3:508: Loss of right to terminate

(1) If performance has been tendered late or a tendered performance otherwise does not conform to the contract the creditor loses the right to terminate under this Section unless notice of termination is given within a reasonable time.

(2) Where the creditor has given the debtor a period of time to cure the non-performance under III.–3:202 (Cure by debtor: general rules) the time mentioned in paragraph (1) begins to run from the expiry of that period. In other cases that time begins to run from the time when the creditor has become, or could reasonably be expected to have become, aware of the tender or the non-conformity.

(3) A creditor loses a right to terminate by notice under III.–3:503 (Termination after notice fixing additional time for performance), III.–3:504 (Termination for anticipated non-performance) or III.–3:505 (Termination for inadequate assurance of performance) unless the creditor gives notice of termination within a reasonable time after the right has arisen.

COMMENTS

A. Notice must be given within reasonable time

A creditor is normally required to give notice of termination within a reasonable time or the remedy will be lost. This provision is required for the protection of the debtor who may be continuing to spend time, effort and money on performance.

However, paragraph (1) applies only where performance has been tendered, but is either late or defective. If performance is simply not tendered at all the creditor can wait. The creditor may hope that the debtor will still perform and should not be put into the position where allowing the debtor more time would cause a loss of a right to terminate. The effect of that would be that the greater the delay the more likely it would be that the right to terminate would have been lost. The creditor, who already has a difficult decision to make, should not be put under pressure to act on what may only be a belief or fear, but should be able to allow the situation to clarify itself further before taking any action.

When a tender of performance is due but has not been made, the courses of action open to the creditor will depend on the circumstances.

(1) The creditor does not know whether the debtor intends to perform or not but wants performance. In that case the creditor should request specific performance within a reasonable time after the creditor has, or could reasonably be expected to have, become aware of the non-performance.

(2) The creditor does not know whether the debtor intends to perform and either does not want the performance or is undecided. In this case the creditor may wait to see whether performance is ultimately tendered and may make a decision if and when this happens. The debtor may ask the creditor whether performance is still wanted, in which case the creditor must answer without delay or risk being in breach of the duty to act in accordance with good faith and fair dealing.

(3) The creditor has reason to know that the debtor is still intending to perform within a reasonable time, but no longer wishes to receive the performance. In this case

it would be contrary to good faith for the creditor to allow the debtor to incur further effort in preparing to perform and then to terminate when the debtor eventually performs. The creditor in this situation would therefore have to notify the debtor that the performance will not be accepted, on pain of losing the right to terminate if the debtor does in fact perform within a reasonable time.

What is a reasonable time will depend upon the circumstances. For instance the creditor must be allowed long enough to be able to know whether or not defective goods will still serve their purpose. If delay in making a decision is likely to prejudice the debtor, for instance because the debtor may lose the chance to prevent a total waste of effort by concluding another contract, the reasonable time will be shorter than if this is not the case. If the debtor has tried to conceal the defects, a longer time may be allowed to the creditor.

B. When period begins to run

Paragraph (2) specifies the starting point for the period allowed under paragraph (1). Where the creditor has given the debtor a period of time to cure the non-performance under III.–3:202 (Cure by debtor: general rules) the time mentioned in paragraph (1) begins to run from the expiry of that period. In other cases the time begins to run from the time when the creditor has become, or could reasonably be expected to have become, aware of the tender or the non-conformity.

C. Time limit in cases equivalent to non-performance

Paragraph (3) applies the reasonable time rule to situations equivalent to non-performance – that is where additional time has been allowed for performance but the debtor has not complied, or there is anticipated not-performance by virtue of a repudiation by the debtor or other circumstances, or the debtor has failed to give an adequate assurance of performance when called upon to do so. See III.–3:503 (Termination after notice fixing additional time for performance), 3:504 (Termination for anticipated non-performance) and 3:505 (Termination for inadequate assurance of performance). In these cases the creditor loses the right to terminate by notice unless notice of termination is given within a reasonable time after the right has arisen.

D. Other ways in which right to terminate lost

The creditor may also, on the application of the general rule on good faith and fair dealing, lose the right to terminate by indicating that the right will not be exercised on the ground of a non-performance that has occurred.

Illustration
A orders a sweater in a particular shade of red from Shop B. When the sweater arrives and A goes to collect it, she discovers that it is not the correct colour. She nonetheless says to B that she will take it. She cannot later reject the sweater and terminate the contractual relationship on the ground that it was not the correct colour. A would not, of course, be prevented from terminating on the ground of some other non-performance, e.g. if the sweater turns out to be defective and B fails to replace it within a reasonable time (see III.–3:202 (Cure by debtor: general rules)).

Unlike some laws, the Article does not prevent the creditor from terminating the contractual relationship simply because the creditor is unable to return a tangible benefit which has been

received under the contract. Thus a buyer of goods which were not in conformity with the contract may terminate the contractual relationship, and restitutionary remedies under this chapter will apply, despite the fact that the buyer cannot return the goods because, for example, they have been sold on.

NOTES

I. Notice of termination must be given within reasonable time

1. In the case of non-conformity the notice must generally be within a reasonable time of the defective performance. This corresponds broadly to many systems: e.g. DANISH SGA §§ 27, 32 ("promptly" or "within a short time"); FINNISH and SWEDISH SGAs §§ 29, 32, 39, 59 (“reasonable time”); ESTONIAN LOA §§ 118(1), 196(3) (“reasonable time”); DUTCH CC art. 6:89 ("promptly"); GERMAN CC § 314(3) (only for contracts involving continuous or periodic performance but not for the normal right to terminate under CC § 323); FRENCH, BELGIAN and LUXEMBOURG CC art. 1648 for *garantie des vices cachés* (within “a two-year period from the date at which the defect was known by the creditor”) and, in Belgium, in some other cases on the basis of good faith, see Cass. 18 May 1987, Arr. Cass. 546 and Cass. 8 April 1988, Arr.Cass., no. 482; ITALIAN CC art. 1495 on sales contracts ("within eight days of its discovery") and art. 1667(2) on work contracts ("within sixty days of its discovery"); IRELAND "promptly and decisively", *Clark* 420; UK Sale of Goods Act 1979 ss.34 and 35 (and see *Treitel*, Contract 18-062); PORTUGUESE CC art. 436(2); or the same result may be reached by application of the doctrine of good faith, e.g. in SPAIN and in GERMANY, see Staudinger (-*Otto*), BGB, § 323 no. E22. AUSTRIAN and GERMAN law have special time limits for claims to terminate in cases of defects, e.g. CC §§ 932, 933, UGB § 377 (see the Notes to III.–3:107). The same is true for SLOVENIAN law, see LOA § 462. In cases not involving defective goods in FRANCE the time limit on the court's power to order termination is the general period of limitation (see CC art. 2262 and Ccom. art. 189bis). In SCOTTISH law the right to terminate may be lost by (1) waiver or personal bar; (2) lapse of a reasonable time; or (3) tender of effective performance (*McBryde*, para. 20.121).
2. In CZECH civil law, termination for non-conformity of performance is possible only in cases when a defect of the performance cannot be remedied (CC § 507) and if the defective performance was notified without undue delay (CC § 504). This condition of notification without undue delay does not exist in cases of non- performance. The rules of CZECH commercial law are different. A debtor who renders defective performance is still in delay (Ccom art. 365) and the creditor has a right to terminate under condition of notification without undue delay and only in cases when the delay constitutes a fundamental breach of the debtor’s contractual obligation (Ccom art. 345.1).
3. Some systems offer protection to the debtor by requiring that reasonable notice be given before termination: for example AUSTRIA provides for the necessity to provide for a reasonable *Nachfrist* in cases of late performance (see CC § 918(1)). This is not required in cases of a contractual obligation that has to be performed at an exact date (*Fixgeschäft*) or in cases where the debtor refuses to perform the obligation. DUTCH law also requires notice of default, unless the contract provides for a fixed time for performance, or the creditor must conclude from a communication by the debtor that the latter will fail to perform (CC arts. 6:82 and 6:83).

4. GREEK law is not alone in allowing the non-performing debtor to set a reasonable time within which the creditor must decide whether or not there will be termination (CC arts. 546, 395, 387(2): see *Michaelides-Nouaros* ErmAK II/1 art. 382 no. 15, art. 383 no. 22 (1949), *Stathopoulos* in *Georgiadis & Stathopoulos*, art. 382 no. 8, *the same*, Obligations § 21 no. 42, *Papanikolaou* in *Georgiadis and Stathopoulos*, art. 395 nos. 1-7); see PORTUGUESE CC art. 436(2); and POLISH CC arts. 491(1) and 492. There are no special provisions on this issue in SLOVAK law.

II. Inability to restore property may be a bar to termination.

5. Under some systems a party who has received property may not be permitted to terminate either the contractual relationship as a whole, where the contract was for a single performance, or, where performance was by instalments, in relation to the part already received, if what has been received cannot be returned, for instance because it has been consumed or resold. Generally this rule applies where the inability to restore is attributable to the acts of the party who received the goods: DANISH SGA §§ 57 and 58; FINNISH and SWEDISH SGAs § 66 (see *Ramberg*, Köplagen 637 f.); BELGIAN case law, e.g. CA Gent 22 October 1970, R.W. 1970-71, 893; CA Liège 10 November 1982, J.L. 1983, 153; GREEK CC arts. 391-394; PORTUGUESE CC art. 432(2). This was also the position in GERMAN law but it was abandoned by the Schuldrechtsmodernisierungsgesetz (Law Modernising the Law of Obligations) (2002); the CC § 346 today treats this case as one of non-performance of the obligation to restore. The rule does not apply when the defect constitutes a non-performance: FRENCH CC art. 1647(1); ITALIAN CC art. 1492(3); ENGLISH law, *Rowland* v. *Divall* [1923] 2 KB 500, (CA). It is not clear that SCOTTISH law would reach the same result: see *Atiyah, Adams and MacQueen, Sale of Goods* (11th ed. 2005), 114 n. 12. When the inability is due to accidental destruction, solutions differ: see the discussion in *Treitel*, Remedies § 285. Though no authoritative decision is yet available, this solution should be applied in SPANISH Law, by analogy to CC art. 1308.

6. With services, in contrast, the usual rule seems to be that the fact that there is nothing to be returned does not prevent termination. Systems differ as to whether the creditor must make restitution of the value of what has been received.

7. These rules, like AUSTRIAN (see CC § 921), FRENCH law (see *Malaurie and Aynès* § 762), GERMAN (CC § 346(2) and (3)) and the DUTCH CC, do not follow this distinction. In neither case is inability to restore a bar to termination; the creditor will however be expected to pay for benefits received, see below. In this these rules differ from CISG art. 82.

III. Completed performance may be a bar to termination

8. In some systems, e.g. ENGLISH law, there is a rule that if the claiming party has completed its performance, or a severable part of it, the only remedy is an action for the agreed price. Thus a seller of goods who has delivered them to the buyer but has not been paid cannot terminate and recover the goods but can only bring an action for the price. The only exception is if the property in the goods has not passed to the buyer, for instance because the contract provided that property would not pass until the goods were paid for (see *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.* [1976] 1 WLR 676). DANISH SGA § 28(2), FINNISH and SWEDISH SGAs § 54(4) and GREEK CC arts. 531 and 532 provide the same rule. The equivalent AUSTRIAN provision in the Commercial Code has been cancelled, 4.EVHGB art. 8 no. 21. POLISH law does not adopt this rule. Under CC art. 552, if the buyer is in delay with payment of the price, the seller may withhold any remaining performance

and set a period for the buyer to pay or secure the payment of the price. After the passing of that period, the seller may terminate.

9. The functional equivalents in GERMANY to the English rule are special rights to terminate in the case of contracts involving continuous or periodic performance (*Kündigung*). In these contracts most of the retroactive effects of general termination rules (*Rücktritt*) are excluded once performance has begun; see *Schlechtriem and Schmidt-Kessel*, Schuldrecht Allgemeiner Teil[6], 211 et seq.

Sub-section 3: Effects of termination

III.–3:509: Effect on obligations under the contract

(1) On termination under this Section, the outstanding obligations or relevant part of the outstanding obligations of the parties under the contract come to an end.

(2) Termination does not, however, affect any provision of the contract for the settlement of disputes or other provision which is to operate even after termination.

(3)A creditor who terminates under this Section retains existing rights to damages or a stipulated payment for non-performance and in addition has the same right to damages or a stipulated payment for non-performance as the creditor would have had if there had been non-performance of the now extinguished obligations of the debtor. In relation to such extinguished obligations the creditor is not regarded as having caused or contributed to the loss merely by exercising the right to terminate.

COMMENTS

A. What obligations are terminated?

The main point of termination is generally to terminate the debtor's unperformed obligation which gives rise to the right to terminate and any obligations of the creditor which are reciprocal to that obligation, including in particular the obligation to accept and pay for the debtor's performance. In many cases the creditor is essentially saying "I do not want your performance any more and I am not going to pay for it. I regard myself as free to get what I want elsewhere." In other cases, where the creditor is the supplier of goods who has not been paid and who has probably given plenty of extra time for payment, the creditor is essentially saying "I've waited more than long enough. I don't want any more promises to pay. Return the goods and I'll sell them (or lease them) to someone else."

However, termination goes further than this. Paragraph (1) provides that the outstanding obligations or relevant part of the outstanding obligations of the parties under the contract come to an end. An obligation will be "outstanding" for this purpose if it has not been fully performed, whether or not it was due. An obligation will not be fully performed if what has been supplied is not in conformity with the terms of the contract.

There are exceptions (paragraph (2)) for contract terms relating to such matters as arbitration or the settlement of disputes. And in some cases where performance is divisible only partial termination will be possible.

This wider effect of termination is plainly necessary when the obligation which is not performed by the debtor is not the debtor's primary obligation.

> *Illustration 1*
> F, a farmer, is bound to allow C, a contractor, access over F's land in exchange for a monthly payment but subject to certain restrictions on the manner of use. C deliberately and blatantly disregards these restrictions. This is a fundamental non-performance of C's obligations regarding the manner of exercise of the right of access. F notifies C that, because of his conduct, access is no longer allowed and that F

regards himself as no longer bound by the contract. This operates as a termination of the whole contractual relationship. F is no longer bound to allow access. C no longer has a right of access. C no longer has to pay future monthly payments.

It is important to note that termination operates for the benefit of both parties.

Illustration 2
A seller of goods fails to deliver on time and makes it clear that delivery will be so late that the buyer will no longer have a use for the goods. The buyer says "That's too late to be of any use to me. I'll get what I want elsewhere." Although no technical words are used, this is an effective notice of termination for non-performance. The main effect desired by the buyer is to terminate the buyer's own obligations to accept and pay for the goods. However, the buyer's notice also has the effect of terminating the seller's obligation to deliver the goods. If the buyer is unsuccessful in obtaining goods elsewhere it is too late to hold the seller to the original obligation.

B. Corresponding rights also terminated

It goes without saying that if obligations are terminated corresponding rights are also terminated.

Illustration 3
The facts are as in Illustration 1. The contractor cannot argue that a continuing right has been granted and cannot be taken away. Termination for the future of the farmer's obligation to allow access also terminates for the future the contractor's right to access.

C. No retrospective effect

The outstanding obligations of both parties under the contract "come to an end". This means that they have existed but are now extinguished for the future, subject to the exceptions already noted. Termination does not have retrospective effect.

Illustration 4
A cleaning company is employed to clean a law firm's office for 50 weeks at a fixed sum per week. In the 25th week the cleaning company ceases trading and the law firm justifiably terminates the contractual relationship. The first 24 weeks' work have already been paid for; the payments are not affected by the termination.

The fact that later provisions in this Chapter provide for the restitution of certain benefits received by the other party's performance or part-performance under the contract is not an exception to the rule of prospective effect. These provisions are not based on any fiction that the contract and contractual relationship did not exist. They are based on the reality that they did exist and have now come to an end. They impose new obligations to redress economic imbalances resulting from the termination. Of course, there will have to be some looking backwards in order to discover what has to be returned but that is a different matter. It could be said that there is a prospective effect based on a retrospective investigation.

D. Certain rights and obligations survive

Paragraph (2) makes it clear that termination does not affect any provision of the contract for the settlement of disputes or any provision which is to operate even after termination.

> *Illustration 5*
> The holder of a patent licences a firm in another country to make its product but forbids it to sell it under anything but the patent holder's trademark. The licensee receives confidential information about production methods which it undertakes not to divulge so long as it is not publicly known. The contract contains a term referring all disputes to arbitration. The licensee, in breach of the licence, markets the patented product under its own brand name, and the patent holder justifiably terminates the contractual relationship. This extinguishes both parties' obligations for the future, including in particular the patent holder's own obligation to allow continued manufacture by the licensee. Termination ends the licensee's corresponding rights under the licence for the future but does not prevent the patent holder from seeking damages for non-performance of the contractual obligation; nor does it release the licensee from its obligation to keep the production information confidential. The dispute must be referred to arbitration.

Where there are such provisions in the contract the result is in effect partial termination – termination of the main relationship but preservation of the ancillary relationship.

E. Damages

In some cases the effect of termination is that the debtor no longer has a chance to perform an obligation which might have been performed if there had been no termination. Termination prevents there being a non-performance or further non-performance by the debtor. Nonetheless the creditor, if the whole contractual relationship is terminated, loses the whole benefit to which the creditor was entitled under the contract and the reason for that loss was the debtor's initial non-performance or the equivalent (anticipated non-performance or failure to give an adequate assurance of performance). Paragraph (3) therefore makes it clear that a creditor who exercises a right to terminate under this Section not only retains rights to damages for actual non-performance (which would follow anyway from the normal rules) but also has the same right to damages or a stipulated payment for non-performance as the creditor would have had if there had been actual non-performance of the now extinguished obligations of the debtor.

> *Illustration 6*
> A contracting company repudiates a contract by saying that there will be no performance because it is going to give priority to another job which will absorb all its resources for a number of years. The other party terminates for anticipated non-performance. The terminating party is entitled to damages for the loss caused by the contractor's failure to perform the obligations under the contract. The contractor cannot argue that it might have changed its mind and that it has been prevented from performing by the termination of the contract.

> *Illustration 7*
> A contracting company is guilty of such repeated and serious delays and incompetence that the other party concludes that it will never complete the job in a satisfactory way and terminates the contractual relationship. A court holds that there was fundamental

non-performance by the contracting company. The other party is entitled to damages for loss caused not only by the past non-performance but also for loss caused by the non-performance of the rest of the contractual obligations. The contracting company cannot argue that it was prevented by the termination from rendering such further performance.

The second sentence of paragraph (3) is inserted so as to avoid the possibility of any argument based on III.–3:101 (Remedies available) paragraph (3), which provides that the creditor may not resort to any remedies to the extent that the creditor caused the debtor's non-performance, or III.–3:704 (Loss attributable to creditor), which provides that the debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects.

In long-term contracts involving periodic performances there might be thought to be a danger of injustice in the rule under paragraph (3). If there is a contract for monthly deliveries over a period of ten years, and if the purchaser terminates the whole contractual relationship merely because there is a non-performance, which is unlikely to be repeated, in relation to one delivery at the end of the second year it might seem unfair to allow the creditor to recover damages for loss caused by the non-performance of the obligations for the remaining eight years. In such a case it would not be unrealistic for the debtor to argue that it was perfectly willing and able to perform the rest of the contractual obligations and that in reality it was the creditor's act in terminating which caused any loss the creditor suffered in relation to the last eight years. The answer is that in such a case the creditor would not be able to terminate the whole contractual relationship under this Section. The creditor would at most be able to terminate in relation to the month in which the defective delivery occurred. Indeed if the creditor insisted on withdrawing from the whole relationship because of one defective delivery it would itself be guilty of a repudiation of the contract and would be liable in damages to the supplier.

On the other hand, if the supplier's breach was intentional and gave the purchaser good grounds for believing that it could no longer count on the supplier's performance in the future (cf III.–3:502 (Termination for fundamental non-performance) paragraph (2)(b)), the purchaser would be entitled to terminate the contractual relationship as a whole and in principle would be entitled to claim damages for loss caused by the non-performance of all the supplier's obligations. In practice, however, the purchaser's damages will be limited because it will be able to make alternative arrangements to cover its needs, and it will not be entitled to damages for any loss that it could have avoided by doing so (cf III.–3:705 (Reduction of loss)). However, if there are foreseeable loses that it is not able to prevent (for example if the price of "forward contracts" for the goods in question has risen), it may claim for them.

There may be cases where at the time of termination both parties have rights to damages for past non-performances by the other. The debtor's rights are not lost by termination. This follows from the general rules on damages.

NOTES

1. The various legal systems exhibit great differences in concepts and terminology in this area. The differences in the practical results obtained are not so great but are still significant.

2. The most apparent difference is between systems such as the FRENCH which treats *résolution* as essentially retrospective (this is the approach of CZECH law where the termination is retrospective – operated ab initio – and is frequently called cancellation, "*odstoupení"*, see for instance CC § 517) and those such as ENGLISH law which sees termination (or "rescission for breach") as essentially prospective (see *Treitel*, Remedies §§ 282-283). However, as the differences are sometimes more apparent than real, it may be helpful to consider the effect of "termination" in the various systems in a number of factual situations.

I. Effect on claims by either party which arose before the date of termination.

3. In "prospective" systems such as ENGLISH and SCOTTISH law these claims are largely unproblematic: they are not affected by subsequent termination, except that if money due but as yet unpaid would in any event have to be repaid after termination, it will for obvious reasons cease to be payable (see *Treitel*, Contract 19-096, *McBryde*, para. 20.108). It seems likely that other systems would reach the same result even if in theory termination was retrospective; for instance, in FRENCH law for a contract *à exécution successive* only *résiliation* for the future might be ordered. The position is similar, as a rule, under the PORTUGUESE CC art. 434 (2). The same holds true for ITALIAN law where the retrospective effects do not prejudice rights acquired in good faith by third parties and where an exception for long-term contracts is also provided (see CC art. 1458). In BELGIAN law, the question is which parts of the contract are terminated and which ones not, a question dealt with under these rules by III-3:506. Obligations relating to terminated parts are no longer due; those relating to parts not terminated are still due, whether or not they arose before the date of termination.

4. In GERMAN law it used to be said that *Rücktritt* had a retrospective effect but this view is no longer accepted. Contractual claims for damages which arose before termination are treated as surviving termination which is said only to end the primary duty to perform (Staudinger (-*Kaiser*), BGB [2004], § 346 no. 67). In AUSTRIA termination because of late or bad performance does not deprive the creditor of a claim for damages (see CC § 918(1) and § 933a(1)).

5. In DUTCH law termination does not have a retroactive effect: CC art. 6:269. It is the same under ESTONIAN law: LOA §§ 188(2), 195(2). In SPANISH law some writers favour prospective termination (*Díez-Picazo*, II, 724), others maintain the traditional, retrospective approach (*Lacruz-Delgado*, II, 1, § 26.206 and *Albadejo* II, 1, § 24.45) The Supreme Court, 28 June 1977, has adopted prospective termination when past performances were unaffected. This is today an undisputed doctrine when contracts bring about mutual duties that arise and have been performed before the rescission. In the Spanish case law it has never been doubted that the penalties and jurisdiction agreements set out for the case of non-performance remain valid and effective after the rescission. DANISH law also starts from the assumption that termination has effect *ex nunc*, see *Bryde Andersen and Lookofsky 208*. The rules are the same under SWEDISH law, see e.g. *Rodhe*, 420 et seq. and *Hellner, Hager and Persson*, 192 et seq. See also UNIDROIT art. 7.3.1.

6. Under POLISH law the majority view is that the termination has retrospective effect and the contract is regarded as not concluded (see e.g. *W. Czachórski* [et al.], Zobowiązania, p. 337; *Z. Radwański*, A. Olejniczak, Zobowiązania, p. 300 – prospective effect only in contracts with successive performance). Some writers, however, accept only the notion of prospective termination (*A. Klein*, Ustawowe prawo odstąpienia od umowy wzajemnej, Wrocław 1964, p. 165). Despite the retrospective effect of termination, Polish law entitles the terminating party to claim full damages (CC art. 494). This is also the position of SLOVENIAN law, see LOA § 111 in connection to § 103.

7. Under SLOVAK law termination has retrospective effect and results in cancellation of the agreement ex tunc unless an act or an agreement of the participants stipulates otherwise (CC § 48(2)).

8. In SCOTTISH law termination has prospective effect (*McBryde*, para. 20.109).

9. In CZECH civil law the termination is called "odstoupení" (translated generally as "cancellation") and its retrospective effect *ab initio* is expressly stated (see CC § 517.1 and § 48). Some problems of application of this principle have arisen in cases of cancellation of sales of immovable property (see for instance *Štenglová, Plíva, Tomsa*, pp. 239-241). The rule in commercial cases is very different. The termination in commercial relationships is called also "*odstoupení"* (but this expression is translated generally as "withdrawal") and operates *ex nunc* (see Ccom art. 349 as commented by *Štenglová, Plíva, Tomsa*, p. 1028 and Ccom art. 351 stating expressly that "all rights and duties arising from the contract are discharged upon withdrawal", see commentary by *Štenglová, Plíva, Tomsa*, p. 1030).

II. Damages for the non-performance itself.

10. Most systems now allow full damages despite termination. For instance: full damages are available in CZECH law (see commentaries by *Štenglová, Plíva, Tomsa*, under CC § 48 and § 420, pp. 239 and 493; see also Ccom art. 351.1). In SPANISH law this rule has been uncontroversially held by the doctrine of the Supreme Court: see TS 4 February 2003, RAJ (2003) 846 and TS 17 November 2000, RAJ (2000), 9343. For GERMAN law see CC § 325.

III. Effect on contract clauses intended to apply even after termination.

11. All systems now accept that termination will not affect the application of clauses such as arbitration clauses which were intended to apply despite termination. E.g. ENGLISH law: *Heyman* v. *Darwins* [1942] A.C. 356, H.L.; cf. in SCOTLAND the very special case of *Johannesburg Municipal Council v Stewart & Co. Ltd.* 1909 S.C. (H.L.) 53; but in general in Scottish law clauses intended to apply after termination continue to take effect: *Lloyds Bank plc v Bamberger* 1993 S.C. 570, and see McBryde, paras. 20.110, 119; BELGIUM *a fortiori ex* art. 1697 II Judiciary Code on invalidity; FINLAND: *Aurejärvi* 106; FRANCE: *clause compromissoire* (NCPC art. 2061) and penalty clause (*Malaurie & Aynès*, Obligations no.543); GERMANY, see Staudinger (-*Rieble*), BGB [2004], § 340 nos. 61, 62; in GREEK law see *Kerameus* 171-173, with further refs., and *Papanicolaou* in *Georgiadis & Stathopoulos* art. 389 no. 14 (1979); ITALIAN law: no specific provision but see *Satta* 852; Cass. 5 August 1968 no. 2803, in Foro It., 1969, I c. 445 and Cass. 27 May 1981 no. 3474, in Foro It., 1982, I c. 199; NETHERLANDS CC art. 6:271; PORTUGUESE CC art. 434(1); CZECH Ccom art. 351.1; SLOVENIAN law: no specific provision but see *Ude*, Arbitražno pravo, 82; SPANISH Arbitration Act 1988 (see *Bercovitz*, Arbitraje, arts. 1, 17 ff; ESTONIAN LOA § 188(3) and UNIDROIT art. 7.3.5(3). SLOVAK Act on Arbitration no. 244/2002 § 5(3).

Sub-section 4: Restitution

III.–3:510: Restitution of benefits received by performance

(1) On termination under this Section a party (the recipient) who has received any benefit by the other's performance of obligations under the terminated contractual relationship or terminated part of the contractual relationship is obliged to return it. Where both parties have obligations to return, the obligations are reciprocal.

(2) If the performance was a payment of money, the amount received is to be repaid.

(3) To the extent that the benefit (not being money) is transferable, it is to be returned by transferring it. However, if a transfer would cause unreasonable effort or expense, the benefit may be returned by paying its value.

(4) To the extent that the benefit is not transferable it is to be returned by paying its value in accordance with III.–3:512 (Payment of value of benefit).

(5) The obligation to return a benefit extends to any natural or legal fruits received from the benefit.

COMMENTS

A. General

When a contractual relationship is terminated for fundamental non-performance or the equivalent under this Section it may easily happen that one or other party is left with some property or other benefit which ought to be returned if unfairness is to be avoided.

> *Illustration 1*
> A firm of accountants agrees to lease a computerised accounts system, which requires a particular kind of computer. The lessor supplies the hardware but completely fails to supply the software. The accountants have not yet paid anything under the contract. They terminate for fundamental non-performance. They should not, however, be allowed to keep the hardware.

This Sub-section regulates the circumstances in which, the way in which and the extent to which restitution is to be made when a contractual relationship is terminated for fundamental non-performance or the equivalent.

This Article provides wide and flexible restitutionary remedies, as are found in most (but not all) the laws of the Member States, in order to ensure that neither party is left unjustly enriched after termination of the contractual relationship. It must be read together with the following Article, which defines its scope of application

B. Requirement of restitution

The basic rule is that the recipient is obliged to return any benefit received by the other's performance. The way in which restitution is effected depends on the nature of the benefit. Where money has been received, the amount received (i.e. not necessarily the actual notes) is to be repaid. Transferable property other than money must be returned in kind. In many cases, however, an actual return is not possible. This applies to work and labour, services, the hiring

out of goods, the letting of premises, and the carriage and custody of goods. A party who has received a performance of this kind cannot give it back. In contracts for sale or barter restoration may become impossible when the goods have perished or have been consumed or resold. In these situations the recipient is obliged to pay the value of the benefit.

C. Repayment of money paid

Under the Article a party may claim back money paid in advance for a performance which the party did not receive because the obligation was extinguished before it was fully performed. This rule has general application where a party who has prepaid money rightfully rejects performance by the other party or where the latter fails to effect any performance. It applies equally, for example, to contracts of sale, contracts for work and labour and contracts of lease.

The party claiming repayment of money paid may also claim interest (III.–3:708 (Interest on late payments)).

D. Return of transferable property other than money

The Article provides for the actual return of property other than money which is of a type which can be restored. On the extinction of the obligation by termination under the Section such property must be re-transferred.

> *Illustration 2*
> A contract called for A to deliver goods to be paid for by B upon their receipt. B did not pay for the goods on receipt. This, in the circumstances, is a fundamental non-performance. A may terminate the contractual relationship and claim back the goods from B.

The rule applies to contracts under which the obligations are to be performed in parts. If the creditor is entitled to terminate in respect of a part, the creditor may recover property transferred under that part of the contract.

Even if the actual subject-matter of an obligation is not returnable, restoration may be possible of things which attach to the subject-matter. Know-how and literary works are written on paper, paintings are made on canvas, sculptures cast in bronze. Tangible things which in this way materialise the product of the mind may be restored on termination. These things often have a value.

> *Illustration 3*
> A famous artist contracts with B to make illustrations for a new edition of Homer's Odyssey to be published by B; the copyright is to vest in B. When B receives the drawings he does not pay for them. The artist may terminate the contractual relationship and claim the illustrations back; the copyright must also be revested in him.

E. Return of property in case of bad bargains

Return may be claimed when one party has fully performed obligations to transfer property under a contract and only the other party's obligation to pay the price remains outstanding. It does not matter that the property is worth more than was to be paid for it so that by obtaining return the party escapes a bad bargain.

Illustration 4
A has sold a Renoir painting to B for €200,000; the true value of the painting is over €250,000. When the picture is delivered, B does not pay for it and makes it clear that he has no intention of paying for it. A is entitled to terminate and claim back the painting.

F. Return too onerous

Paragraph (3), second sentence, allows the value to be paid where the return of property would involve the recipient in an unreasonable effort or expense.

Illustration 5
A has painted a fresco which has been mounted on a wall in B's house and for which B has not paid A. Although it would be physically possible to dismantle the fresco the costs would be disproportionately high. A cannot claim back the fresco but only a payment representing its value.

G. Payment of value of non-transferable benefits

To the extent that a benefit is not transferable its value must be paid. Further provision on the calculation of value is made in III.–3:512 (Payment of value of benefit).

H. Fruits also to be returned

It may happen that something received in part performance or attempted performance of an obligation produces natural fruits (e.g. lambs or calves) or legal fruits (e.g. rents or interest or dividends) while in the possession of the recipient and before it can be returned. In such a case the fruits must be handed over along with the return of what was received. The obligation to return fruits corresponds to an obvious requirement of justice. Without this obligation there would, in a case where fruits had been produced, be no adequate restitution. Moreover the results of termination would be entirely arbitrary depending on whether notice of termination was given just before or just after fruits had been produced.

Illustration 6
F has bought ten sheep guaranteed to be pregnant. The seller extends a month’s credit. The month expires shortly before lambing is due to begin. F does not pay. The seller gives more time for payment but says that if payment is not made by the end of that time the contract will be cancelled. F has still not paid by the end of the additional time allowed for payment. The seller gives notice of termination and calls for the return of the sheep. By that time some of them have lambed.

It would be manifestly unjust to allow F to keep the lambs and manifestly arbitrary to allow the economic consequences of termination to depend on whether lambs had or had not been produced by the time termination took effect.

NOTES

1. Most systems recognise a general obligation to return or pay the value of whatever is received in part performance of an obligation which is extinguished on the termination

of a contractual relationship or in performance of an obligation reciprocal to such an obligation. The matter is complicated because in some systems certain types of extinction have retrospective effect. Where there is such retrospective effect the rules on unjustified enrichment can readily apply.

(a) Money paid

2. If money has been paid before the date of extinction, and assuming that it was not paid as a deposit or on terms that it would be forfeited if the obligation was not performed, most systems will normally allow the money to be recovered. It does not matter whether the party seeking to recover the money is the creditor or the non-performing debtor: FRENCH law, *Malaurie and Aynès,* Obligations no. 376 and FRENCH and BELGIAN CC arts. 1376 - 1377; DUTCH CC arts. 6:271-272; ITALIAN CC arts. 1458, 2033 and, for sales, arts. 1479(2) and 1493(1); GERMAN law, Staudinger (-*Kaiser*), BGB [2004], § 346 no. 73; DANISH law, SGA § 57 and *Nørager- Nielsen and Theilgaard*, 981 ff; FINNISH and SWEDISH law, see SGAs § 64 and *Ramberg,* Köplagen 614 ff; SLOVAK CC § 457; CZECH CC § 457 and POLISH CC art. 494. The same is true for SLOVENIAN law and a party returning money also has to pay interest, see LOA § 111(5). For the requirement of reciprocal restitution (together with a claim for fruits and other gains) under ESTONIAN law see also LOA § 189(1).

3. ENGLISH law is more restrictive. Except in cases of frustration (now governed by the Law Reform (Frustrated Contracts) Act 1943 s. 1(2)), it allows recovery by the creditor only where there has been "a total failure of consideration" and by the non-performing party only where the party who had received the money can be restored to the original position (see *Treitel*, Remedies, para. 284; *Treitel*, Contract, 822-824, 906-907, and 911).

4. The position in SCOTTISH law is controversial and not yet settled: see *McBryde*, paras. 20.132, 142-143, for the debate. It is however settled that a party unable to claim in contract because it is in breach may have a claim against the other party in unjustified enrichment (*McBryde,* paras. 20.133-20.140).

5. ULIS art. 78(2) and CISG art. 81(2) take the same broad approach as the Article.

(b) Property transferred

6. If the property remains in the possession of the recipient, and is not claimed by a third party, many systems allow the transferor to recover it: e.g. FRENCH law, *Malaurie & Aynès,* Obligations no. 376 and FRENCH and BELGIAN CC art. 1379; ITALIAN CC arts. 1458(2) and 1493(2) (sales); FINNISH and SWEDISH SGA § 64(2); SPANISH CC art. 1295; PORTUGUESE CC art. 433 and 289(1); SLOVENIAN LOA § 111(2); CZECH CC §§ 457 and 458(1); and for ESTONIAN law see note 2 above.

7. Systems differ where a third party such as a creditor of the recipient claims the property. In GERMAN law the right to the return of the property is only “obligational" and third parties' interests will not be affected (Staudinger (-*Kaiser*), BGB [2004], § 346 nos. 43, 68). See also AUSTRIAN CC § 921 second sentence; SPANISH law (*Albaladejo,* II, 1,§ 20.4.U: Supreme Court 1 October 1986); GREEK CC art. 393. This result is consistent with SLOVAK judicial practice in interpretation of provisions of CC (§ 458(1)) and the same construction of CZECH law (see CC § 458(1) as commented by *Jehlička, Švestka, Škárová*, pp. 574 ff: everything must be restored if possible). The result is the opposite in FRENCH law, where the effect is in principle (but subject to important restrictions) "proprietary" (see *Malaurie et Aynès,* Obligations, no. 143; *Nicholas*, 245-246; *Treitel*, Remedies, § 282). The same is true under BELGIAN law, but the proprietary right will be overridden in the case of bona

fide acquisition by an acquirer of movables in possession, in the case of seizure by creditors or insolvency proceedings; in the case of land, the proprietary right of the transferor will in principle only stand if it was reserved in the land register. Also under CZECH law proprietary aspects, at least to some extent, play a role, see Švestka (-*Škárová, Pokorný, Salač*), OZ, § 805.

8. ENGLISH law provides that if, on termination for non-performance, the claiming party has completed performance, or a severable part of it, the only remedy is an action for the agreed price. In the situation of partial performance it distinguishes between cases of frustration (impossibility) and cases of breach. Where the contract has been frustrated, the court has a discretion under the Law Reform (Frustrated Contracts) Act 1943 s. 1(3) to award what are basically restitutionary awards (see the judgment of Robert Goff J in *BP Exploration Co. (Libya) Ltd. v. Hunt (No. 2)* [1979] 1 WLR 783, though see also *Lawton* LJ in [1981] 1 WLR 232 (CA)). Where there is termination for breach, the creditor may recover a reasonable sum; the defaulting party may recover nothing (see *Treitel*, Contract, 696-699, 592). As noted above, the law in SCOTLAND is controverted and undecided, but it is clear that the law of unjustified enrichment governs the relations of parties to a frustrated contract: *Cantiere San Rocco SA v. Clyde Shipbuilding Co. Ltd.* 1923 SC (HL) 105.

9. The termination of a contract in SPANISH law creates an obligation of mutual restitution of the counter-performances, the purpose of which is to place the parties in the hypothetical financial situation that they would have had if the contract had never taken place (*Lacruz*, p. 241). Regarding the price, it is always considered as a quantitative debt which means that for the purposes of restitution it stays the same, even if the economic circumstances vary. Nevertheless, the party who terminates has always the right to claim damages for any loss. There are some specific provisions in the Consumers' Laws: art. 9.1 of the Hire Purchase of Movable Assets Law provides that the consumer who withdraws from the contract has to restore the property in the state in which it was received. Nevertheless, the Law on Contracts Negotiated away from Business Premises in its art. 7.2 provides that the consumer who exercise the right to revoke the contract and cannot restore the property *in natura*, must pay the equivalent which is taken to be the market value of the property at the moment of exercising the right to revoke, except when that value is higher than the price paid (when the equivalent to pay will be equal to the price). The Supreme Court (TS 1 July 2005, RAJ 2005/5090) considers that the restitutionary effects of termination for non-performance under CC art. 1124 are the same as those provided for resolutive conditions (CC arts. 1122 and 1122). This means that if the property is damaged without the debtor's fault, the debtor is not liable for the reduction in value. In relation to the consequences of the benefit being disposed of, supposing the good faith of the holder, the holder would only restore *in quantum sit locupletior* (CC art. 1778). However, as the debtor knew exactly the title of the possession and the obligation to restore derived from the termination, the debtor will have to restore all the value of the counter-performance and compensate any loss caused to the creditor (CC arts. 1295.3, 1298). (cfr *Monfort*, La restitución en la resolución por incumplimiento de los contratos traslativos de dominio, 2000).

10. Again these rules follow ULIS, CISG and UNIDROIT art. 7.3.6(1) in taking a broad flexible approach.

III.–3:511: When restitution not required

(1) There is no obligation to make restitution under this Sub-section to the extent that conforming performance by one party has been met by conforming performance by the other.

(2) The terminating party may elect to treat performance as non-conforming if what was received by that party is of no, or fundamentally reduced, value to that party because of the other party's non-performance.

(3) Restitution under this Sub-section is not required where the contract was gratuitous.

COMMENTS

A. Exception for completed and conforming reciprocal performances

The essence of termination of a contractual relationship under these rules (as opposed to the avoidance of a contract for invalidity) is that it is prospective in effect. There may have to be restitution in so far as termination leaves an unbalanced situation but there is no need to unravel performances which have been properly made on both sides. The most common application of this rule is in relation to obligations which are to be performed in parts or instalments or are otherwise divisible (for example, if an obligation is to be performed continuously over a period of time and separate payments can be apportioned to units of time within the period). The duly completed parts of the performance on both sides do not normally have to be unravelled. The rules on restitution apply, however, to payments made in respect of so much of the obligation as was not fully performed.

Illustration 1
A has given B advance payment for the construction of 12 houses. B builds only 3 houses and then declares that no further work will be done as a more profitable contract has been obtained. The three houses already built are entirely satisfactory and A is content to keep them. A terminates the whole relationship for the future. A can claim back the advance payment for the 9 houses still to be built but not for the three which were built.

Illustration 2
Company X has leased machinery from company Y for a period of 24 months. Y has to inspect the machinery once a week and perform maintenance operations. Payment of rent is to be made monthly. For 10 months the obligations are properly performed on both sides. Then Y's performance becomes fundamentally unsatisfactory to such an extent that X can hardly use the machinery. After 3 months of this, X concludes that it cannot rely on Y's performance improving for the future and terminates the whole contractual relationship for fundamental non-performance. X will have a claim for restitution of all or part of the rent paid for the 3 months when Y's obligations were not performed but has no claim in relation to the first 10 months when the parties' obligations were performed on both sides.

The rule in paragraph (1) is not, however, confined to obligations which are to be performed in parts or instalments. That could be too narrow – particularly when it is remembered that these rules apply to cases of termination other than for fundamental non-performance (e.g. fulfilment of resolutive condition; arrival of time limit). For example, there may be only a single set of reciprocal obligations but the contractual relationship may continue for an

incidental purpose after they have been fully performed and may then be terminated by, say, the arrival of a time limit. There should be no requirement of restitution in such cases.

B. Exception for cases where what was received is now of no or little value to recipient

A party who terminates a contractual relationship may have received from the other some property or some service which conformed to the contract at the time but which is now of no value to the recipient because the termination of the contractual relationship means that the recipient will not receive the rest of the performance. In such cases the recipient may opt under paragraph (2) of the Article to treat the performance as non-conforming. There will then be an obligation to make restitution both ways.

> *Illustration 3*
> A complete computer system is to be installed and paid for one component at a time so that it can be fitted into a new office as the building is being built. An essential item is not delivered and the buyer terminates the contractual relationship for fundamental non-performance. The buyer may elect to regard the components already received as non-conforming. The buyer will then have to return them but will be entitled to recover the price paid for them.

The recipient could in the alternative claim damages or a reduction in the price for the reduced value that the property received now has. However it will often be more convenient simply to return the unwanted property than to have to dispose of it some other way.

C. Exception for gratuitous contracts

Gratuitous contracts are by their nature unbalanced. To require restitution when the contract is terminated prospectively could therefore, in the case of a non-returnable benefit like a service, oblige the recipient to pay for something which was always intended to be provided for nothing. Paragraph (3) therefore provides that restitution is not required on the termination of a relationship resulting from a gratuitous contract. This is, of course, without prejudice to the rules on revocation of donations.

NOTES

1. It is generally accepted that where an obligation for performance in successive parts or instalments is extinguished after some parts of it have been performed but before completed performance, there is no need to undo the completed parts (see *Treitel*, Remedies, § 283). In BELGIAN law, the problem in the case of termination for non-performance is solved by the rule that where the scope of termination relates only to part of the contractual relationship, the rest remains unaffected. The rule in para (3) deviates from BELGIAN law, which does not make this exception. In FRENCH and LUXEMBOURG law, *résolution* for non-performance is only retroactive when the contractual obligations are to be performed at one time: for a contract *à exécution successive* the contract is treated as disappearing only from the date at which the debtor ceased performing or was given notice of termination by the creditor. In this context the process is often termed *résiliation* (*Malaurie and Aynès*, Obligations nos. 743 and 744). In ITALIAN law termination for non-performance is in principle retrospective but there is an exception for contracts involving continuous or periodic

performance (see CC art. 1458). In PORTUGUESE and DUTCH law termination does not affect performances already rendered unless they are affected by the non-performance, CC art. 434(2) respectively CC art. 6:270 and Parlementaire Gescheiedenis Boek 6, pp. 1018 ff. In SPANISH law termination is not necessarily retroactive and does not affect past performance if this is not rendered useless by the non-performance (*Montés*, Comentarios al Código Civil y Compilaciones Forales, XV-1, 1989, 1246 f). In CZECH commercial law termination is never retroactive (see Ccom arts. 344 and 349) and so a partial withdrawal may intervene in case of a partial non-performance by the other party (see Ccom art. 347). In SCOTLAND termination is not retrospective. However, restitution of benefits which have ended up in the "wrong" hands (e.g. payments made for which nothing has been received in return) would normally be required (*Gloag and Henderson*, 10.19, 25.13) but this would not apply in the situation covered by paragraph (1). In GERMAN law termination of the whole contract is allowed only if the creditor has no interest in partial performance (CC § 323(5)); for contracts for the performance of a continuing obligation termination does not lead to restitution, because the general rules of termination (*Rücktritt*) in CC §§ 323 et seq. and §§ 346 et seq. are replaced by a special kind of termination, which has hardly any restitutionary effects (*Kündigung*), see CC § 314. Under ESTONIAN law, on terminating contracts of successive performance (*kestvuslepingu ülesütlemine*) parties are only required to return that which has been delivered in advance with respect to the time of termination (LOA § 195(5)). Restitution is optional in the situation where, due to the termination, a party is no longer interested in the previous performance (LOA § 196(4)). In SLOVAKIA restitution is principally retrospective unless there is partial termination (CC § 517(1)). In POLAND in obligations in which the performance is divisible and the creditor delays a part of the performance, the creditor may withdraw with respect to the delayed part or to all of the remaining parts of the performance. The creditor has a right to withdraw with respect to the entire contract if partial performance does not satisfy the creditor's interest due to the nature of the performance or to the purposes the contract was supposed to serve of which the debtor was aware (CC art. 491(2)).

2. The rule in paragraph (2) is derived from PECL art. 9:306. Most systems recognise the rule that the party terminating the contractual relationship may elect to reject property which has already been delivered and which was itself in conformity with the contract if the subsequent non-performance has rendered it of no use or interest. In GERMAN law, if the performances are inter-related either party may demand return of the part delivered earlier. In ENGLISH, SCOTTISH and IRISH law, where a part of the goods to be delivered are defective, the buyer may reject the whole (for England and Scotland, see UK Sale of Goods Act 1979 s. 30; for Ireland see *Forde* § 1.192) and this will apply even if the goods are to be delivered in instalments provided that the instalments are similarly inter-connected and thus the contract is not severable (see *Gill & Dufus SA v. Berger & Co. Inc.* [1983] 1 Lloyd's Representative 622, reversed without reference to this point [1984] AC 382 (HL); *Atiyah* 452). The position with severable contracts is less clear but probably there is a right to reject instalments already received if they are rendered useless by the later breach (*Atiyah*, 455; *Forde*, § 1.198*).* The DANISH SGA § 46, and the FINNISH and SWEDISH SGA §§ 43 and 44 (see *Ramberg*, Köplagen 462) provide that a buyer who has received a defective instalment can reject instalments received earlier if the instalments are so inter-connected that it would be detrimental to the buyer to have to keep earlier ones. In DUTCH law the same holds true as a general rule of contract law (cf Parlementaire Geschiedenis Boek 6, p. 1023).

3. Under ITALIAN law there is no general rule but it is generally held that the aggrieved party may claim compensation to an amount corresponding to the decrease in value of the thing (see for references *Mancaleoni* in *Antoniolli – Veneziano*, Principles of European Contract Law and Italian Law – A Commentary, 436 ff). Under POLISH law – see CC art. 494: the terminating party should return to the other party everything it has received from it under the contract and it may demand everything it gave, independent of the importance of the non-delivered parts.

4. The rule is reminiscent of the AUSTRIAN doctrine of divisibility which follows the parties' intention or the economic scope of the contract (*P. Bydinksik* in Bydlinski/Koziol/Bollenberger, ABGB, § 918 no. 15).

5. Under SLOVAK law there is a different approach. According to CC § 518 if the agreement stipulates an exact time of performance and if it follows from the agreement or from the nature of the case that the creditor cannot have any interest in the delayed performance, the creditor must notify the debtor without undue delay that the creditor insists on the performance; unless the creditor does so, the agreement is cancelled ex tunc (terminated). And if the contract has been terminated, each party must return to the other party everything that it gained according to the agreement (see CC § 457).

6. When terminating a contract, in SPANISH law the parties are obliged to restore mutually the properties that were the object of the contract (CC art. 1124 in relation with CC art. 1295), returning everything received. But in any case, a synallagmatic relation may be terminated under the CC art. 1124 only if the terminating party's performance has been carried out. The termination of a contract has a retroactive effect (CC art. 1295) except for two kinds of contract: a contract of continuous fulfilment (e.g. a lease) and a supply contract, where the counter-performance is divisible (*Diez Picazo*, p. 249) - in those kinds of contracts the effects are *ex nunc* and the Supreme Court (TS 20 April 1994, RAJ 1994/3216) considers that until the moment of termination of the contract the counter-performances had properly fulfilled the pursued purpose.

7. The CZECH rules on this question are laid down by CC §§ 518 and 457. If the non-performance concerns merely a part of the obligation the creditor may terminate only as to this part. However, the creditor may terminate the entire contract if a partial performance would be contrary to the agreement or to the nature of the obligation (CC § 566). A similar provision can be found in the Commercial Code for commercial relations (the right to terminate the whole is connected with lack of economic significance of partial performance, see § 347(3)). If the entire contract is terminated the parties must return to each other every benefit already provided by performance.

8. Paragraph (2) first part is the same as English law but the second part is different in cases of "breach". A terminating party who has received a benefit and who has not rejected it will normally not be able to claim back the counter-performance by way of restitution because there will have been no total failure of consideration, see *Whincup v. Hughes* (1871) LR 6 CP 78 ; but the party may be able to claim damages instead. See Beale, *Remedies*, 205. In cases of frustration, money paid or the value of other benefits transferred may be claimable under the Law Reform (Frustrated Contracts) Act 1943 s. 1.

III.–3:512: Payment of value of benefit

(1) The recipient is obliged to:

(a) pay the value (at the time of performance) of a benefit which is not transferable or which ceases to be transferable before the time when it is to be returned; and

(b) pay recompense for any reduction in the value of a returnable benefit as a result of a change in the condition of the benefit between the time of receipt and the time when it is to be returned.

(2) Where there was an agreed price the value of the benefit is that proportion of the price which the value of the actual performance bears to the value of the promised performance. Where no price was agreed the value of the benefit is the sum of money which a willing and capable provider and a willing and capable recipient, knowing of any non-conformity, would lawfully have agreed.

(3) The recipient's liability to pay the value of a benefit is reduced to the extent that as a result of a non-performance of an obligation owed by the other party to the recipient:

(a) the benefit cannot be returned in essentially the same condition as when it was received; or

(b) the recipient is compelled without compensation either to dispose of it or to sustain a disadvantage in order to preserve it.

(4) The recipient's liability to pay the value of a benefit is likewise reduced to the extent that it cannot be returned in the same condition as when it was received as a result of conduct of the recipient in the reasonable, but mistaken, belief that there was no non-conformity.

COMMENTS

A. Non-transferable benefit

It frequently happens that after a contractual relationship has been terminated one party is left with a benefit which cannot be returned - either because the benefit is the result of work which cannot be returned, or because property which has been transferred has been used up or destroyed - but for which the party has not paid. The other party may have a claim for the price, but this will depend upon the agreed payment terms and the price may not yet be payable. The other party may have a claim for damages, but the party who has received the benefit may be the creditor in the relevant obligation, or may be a debtor who is not liable for damages because the non-performance was excused. It would be unjust to allow the party to retain this benefit without paying for it.

Illustration 1

A contract to build a garage on to a house provides that the builder is to be paid upon completion of the work. After doing two-thirds of the work, the builder becomes insolvent and stops work. The employer terminates the contractual relationship and gets another builder to finish the garage. The amount the employer has to pay the second builder is less than the original contract price and the employer receives a net benefit. Under the Article the employer must pay the first builder a reasonable sum for the value of the work received. The employer might have a claim against the first builder for damages for the inconvenience caused, but that is a separate matter.

Illustration 2

A purchases from B a car for €12,000. As a result of a road accident, the car is damaged beyond economic repair and is later disposed of for scrap. An examination of

the car after the accident reveals, however, that the car was fitted with defective cylinders. In view of that defect the car was actually only worth €4,000 when A bought it, although it would have been worth €8,000 if the cylinders had been of the quality demanded by the contract. On the basis of the severe defect, A terminates for fundamental non-performance. A is entitled to a return of the purchase price but is liable to pay B the value of the car as this cannot be returned. As the parties agreed a price and A obtained a performance only half as valuable as the one he should have received under the contract, B is entitled to retain half the price as representing the value of the benefit received by A.

The rule in this Article seems to represent a common position, though in some systems the risk of accidental loss or damage to property transferred is placed on the party to whom it would otherwise have been returned.

NOTES

1. Many systems have little difficulty in allowing either party upon termination to recover the value of services rendered. On FRENCH law, see *Ghestin, Jamin & Billiau* § 482ff.; BELGIAN law, Cass. 27 March 1972, Arr. Cass. 707; ITALIAN law, where there is no provision as to contracts in general (but see CC art. 1672 and Cass. 5 August 1988 no. 4849, in Mass. Foro It., 1988; Cass. 23 June 1982 no. 3827, in Mass. Foro It., 1982; Cass. 13 January 1972 no. 106 in Rassegna Avvocatura Stato, part I, 1972, 161); PORTUGUESE CC art. 434(1) and, when the performance cannot be returned, CC art. 289(1); for SCOTTISH law, see *Graham v. United Turkey Red Company* 1922 SC 583. In SPANISH case law this is an uncontroversial rule, according to the principles of unjustified enrichment and of the prospective effect of rescission in contracts with successive execution. As to property which cannot be returned, FRENCH and BELGIAN law distinguish whether the loss or deterioration is due to the fault of one of the parties or to *force majeure*. See CC art. 1379. Where the loss or deterioration of the goods is caused by the fault of one of the parties, that party will be liable to compensate the other party (Cass. Com., 16 December 1975). Where the loss of the goods is due to *force majeure*, the adage *res perit domino* is applied: in the case of contracts transferring property, the risk of the loss of generic goods (*chose de genre*) falls on the seller, who is deemed the owner up until the delivery. Upon termination of the contract, the seller must reimburse the price to the buyer who has paid. However, *res perit domino* does not apply in the case of the mere deterioration of the goods: the seller does not bear the risk of deterioration of the goods which occurred between delivery and restitution (Cass. Com., 21 July 1975). In the case of unique goods (*corps certain*), the risk of the loss or deterioration falls on the buyer, who is deemed the owner as at the conclusion of the sale contract, unless otherwise stipulated (CC art. 1308). Upon termination, the seller keeps the benefit of the price, unless the loss was attributable to the seller or the seller had not delivered the goods upon notice by the buyer or the loss was caused by fault.
2. For this case GERMAN law has a special rule that where the counter-performance has been fixed in money this amount is to be taken as a basis for calculation: CC § 346(2) sentence 2 (see further Staudinger (-*Kaiser*), BGB [2004], § 346 nos. 155-159). To similar effect is the ESTONIAN LOA § 189(2)–(4). GREEK law reaches the same result: *Gasis* in Erm.AK II/1, art. 389 no. 11 (1949) *Papanikolaou* in *Georgiadis and Stathopoulos*, art. 389 no. 15. A similar rule should be applied under POLISH law. In

DANISH law the party who has rendered a performance which cannot be returned is not entitled to its value or the enrichment which the other party has received if a claim for counter-performance or damages is available, *Ussing*, Obligationsretten[4], 98. Under DUTCH CC art. 6:272 the party who has rendered performance is entitled to its value. In AUSTRIA the rules of unjustified enrichment (CC §§ 1431 ff), which are decisive irrespective of a fault requirement, are applicable. The same is true in SLOVENIAN law, see LOA § 111(3) in connection to § 190. In the CZECH REPUBLIC there is no special provision but a similar result is reached in civil law by the application of a general principle of *restitutio in integrum* (see CC § 457). There is no similar general provision in commercial law because for commercial relationships termination has no retroactive effect.

3. In ENGLISH law it has been held that the buyer of goods may terminate the contractual relationship, and recover the price paid, on the grounds that the goods did not conform to the contract, even though the buyer cannot return the goods because they have been destroyed in an accident: *Head v. Tattersall* (1871-72) LR 7 Ex. 7.

4. ESTONIAN law generally corresponds to the Article, see LOA §§ 189(2)-(5) and 190(1). If not liable to compensate under those special rules, the party may still be obliged, under the provisions on unjustified enrichment, to return what was received (LOA § 190(2)).

5. The basic rule under SWEDISH law is the same as in the Article. See SGA § 65, which is an expression of a general principle of Swedish law.

6. Under SLOVAK law the recipient must give back everything that was gained from the unjustified enrichment. If this is not possible, particularly if the enrichment consisted of a non-monetary performance, the recipient must grant a cash compensation. Unless the recipient gained the enrichment in good faith, any proceeds from the unjustified enrichment must also be handed over. The value of the monetary compensations depends on the economic value of the unjustified enrichment at the time when it arose (CC § 457 and § 458).

III.–3:513: Use and improvements

(1) The recipient is obliged to pay a reasonable amount for any use which the recipient makes of the benefit except in so far as the recipient is liable under III.–3:512 (Payment of value of benefit) paragraph (1) in respect of that use.

(2) A recipient who has improved a benefit which the recipient is obliged under this Section to return has a right to payment of the value of improvements if the other party can readily obtain that value by dealing with the benefit unless:

(a) the improvement was a non-performance of an obligation owed by the recipient to the other party; or

(b) the recipient made the improvement when the recipient knew or could reasonably be expected to know that the benefit would have to be returned.

COMMENTS

The rule in paragraph (1) obliges the recipient of a returnable benefit to pay a reasonable amount for any use made of the benefit. The exception in the second part of the paragraph prevents a double liability from arising. In so far as the use of the benefit led to a reduction in the value of the (returnable) benefit the debtor is already obliged to pay recompense under III.–3:512 (Payment of value of benefit) paragraph (1) and so does not need to pay again.

Illustration 1

A purchases a kitchen stove from B for €500. A uses the stove for five months, at which time A notices that the frame of the oven is becoming seriously distorted. A exercises her right to terminate the contractual relationship for fundamental non-performance. The value of the stove in its much changed condition is €50. As the change in condition is the result of A's use of the stove in the legitimate assumption that it was not defective, A is not liable to pay recompense for the deterioration in the stove's condition: see III.–3:512 (Payment of value of benefit) paragraph (4), reducing liability under paragraph (1) of that Article to nil. However, A is liable under paragraph (1) of the present Article to pay a reasonable amount for the use of the stove for five months. The reasonable amount will take account of the fact that the stove which A has used was defective and will not reflect the full sum that would be appropriate for the use of a fully-functioning appliance.

The rule in paragraph (2) deals with what is functionally the reverse situation – namely, where the recipient has improved the benefit so that the other party would actually be better off on the return of the benefit than if there had been no improvements. The improver has in such circumstances a right to payment of the value of the improvements but only if the other party can readily obtain that value by dealing with the benefit. It would be unfair to saddle the other party with a liability to pay for improvements which had not been asked for and which could not be translated into realised value. There are two other restrictions in sub-paragraphs (a) and (b) of paragraph (2). The policy behind both is that the improver has no right to payment for improvements if the improver was, so to speak, in the wrong in making the improvements. Sub-paragraph (a) deals with the situation where the improvement was actually a non-performance of an obligation owed to the other party. Clearly in this situation the improver cannot be allowed to profit from the non-performance. Sub-paragraph (b) deals with the situation where the improver knew or could reasonably be expected to have known at the time of making the improvements that the benefit would have to be returned. This can be regarded as an application of the principle of good faith.

Illustration 2
D, a motor cycle dealer, purchases a dozen prestige motor bikes from their manufacturer M. D customises the bikes by replacing various parts with more expensive components of superior quality and reputation. D is unable to re-sell the bikes because, contrary to the terms of the contract, the bike frames in their delivered condition do not satisfy safety regulations which govern the use of motor cycles on the road in D's country. Restoring the bikes to their original condition is no longer possible as most of the components have been welded to the bikes. While, on termination of the contractual relationship, D is liable to return the bikes to the manufacturer under III.–3:510 (Restitution of benefits received by performance) paragraph (3), M is liable to pay to D the value of the improvements made to the bikes if M can sell them without difficulty and thus realise that value.

NOTES

1. In SPANISH law, although with diverse motivations (i.e. application of the rules on unjustified enrichment or of the rules on eviction of possession), the case law now grants the debtor the right to reimbursement for improvements, whether or not the non-performance was due to the debtor's fault (TS 13 October 1995, RAJ (1995), 7080; TS 19 June 1996, RAJ (1996), 5102; TS 23 July 1996, RAJ (1996), 5567. CZECH law states expressly that everything must be returned which was acquired through unjustified enrichment but the person who returns the benefit has the right to be compensated for necessary expenses (see CC §§ 458.1, 458.2 and 458.3). These provisions can be construed in the above-mentioned meaning (see construction based on CC § 458.1 in *Sbírka soudních rozhodnutí a stanovisek* 65/1972, p. 144). There is a similar specific rule in the SLOVENIAN LOA § 111(4). GERMAN law follows the same approach as paragraph (1) of the present Article the recipient is obliged to pay for any use made of the benefit except and in so far this would amount to double compensation for a reduction in value resulting from the use (CC § 346(1) and (2) sentence 1 no. 3; Staudinger (-*Kaiser*), BGB [2004], § 346 no. 141). A recipient who is obliged to return or pay the value of the benefit has a right to payment of the value of improvements if they were necessary (for example to maintain the benefit) (CC § 347(2) sent. 1); in respect of other improvements the recipient has a right to payment of their value only if and in so far as the other party is enriched (CC § 347(2) sent. 2).
2. The ESTONIAN LOA § 189(1) sets requirements for the restitution of any benefit, including any advantages derived from the use of an object and any potential benefit which the party could have received upon adherence to the requirements for regular management, exercising of such care in the receipt of fruits and gain as the party would exercise in the party's own affairs (LOA § 191(1)). LOA § 191(2) provides that if a party returns an object or compensates for the value of the object or if the obligation to compensate for the value of the object is precluded because the circumstances on which termination is based become evident only upon processing the thing, or deterioration or destruction occurred due to circumstances dependent on the other party or due to circumstances the risk of which is borne by the other party, or if the damage would also have occurred if that which was received had been in the possession of the other party (LOA § 190(1) sent. 1 or 2), the other party must compensate the first party for the necessary expenses incurred with respect to the object. Other expenses may be compensated pursuant to the provisions concerning unjustified enrichment. POLISH law provides in CC art. 494 a rule applicable in case

of withdrawal from a reciprocal contract, namely that a party who withdraws from a reciprocal contract should return to the other party everything that they received from the other party under the contract; it may demand that everything they provided should be returned and that damage arising from non-performance should be repaired. The performances should as a rule be returned in kind, unchanged, unless the change is a result of ordinary management. The Supreme Court has ruled that the recipient is not obliged to pay for using the thing in accordance with its purpose, and a contractual stipulation attempting to create such an obligation would be ineffective (SN, 26 October 1972, III CZP 48/72, OSNCP 1973.2.23).

3. There is no express regulation of, or case law precisely on, this topic in FRENCH law (see however, in the French Avant Projet, the detailed provisions on restitutions, particularly, on this point, art. 1164-4). Nor is there any express regulation in SCOTTISH law but, given that the principles of unjustified enrichment apply in cases of termination (rescission), it is likely that the results reached by the Article could be reached in appropriate cases. There is no express regulation in DUTCH law either; unjustified enrichment might lead to a claim against the recipient for compensation for use but not in cases where it is the non-performing party that makes the claim. In SLOVAKIA there are no special provisions on this topic but similar rules can be reached by application of the general provisions on unjustified enrichment (CC § 458) and good faith.

4. In ENGLISH law the results in (1) would probably follow if the claim were made by the victim of a breach of contract (*Planché v. Colburn* (1831) 8 Bing 14, or under the Law Reform (Frustrated Contracts) Act 1943, s 1; but a party who was guilty of a breach of contract would not have a restitutionary claim, *Sumpter v. Hedges* [1989] 1 QB 673. The question of improvements seems not to have been discussed in the context of non-performance, cf *Chitty* on Contracts, nos. 29-052-29-053.

5. As to paragraph (1), in FRANCE and BELGIUM, termination for non-performance of a contract has a retroactive effect, which gives rise to a right to a "return to the *status quo ante*, by way of restitution, *in natura* or in value, or *in natura* and in value" (see Cass.com. 11 May 1976), involving, as appropriate, the payment of an indemnity (*indemnité d'occupation* ou *d'usure*). The payment of the benefit received is founded on the doctrine of the unjustified enrichment of the receiver. In BELGIAN and FRENCH law, the question of paragraph (2) is dealt with by CC art. 1381: the improver is entitled to compensation for necessary and useful improvements. In the Projet de réforme du droit des contrats, article 107 provides for a compensation for the costs of conservation and improvements.

6. According to the CZECH CC, any fruits of the benefit must be surrendered along with the benefit, unless the recipient acted in good faith, and the recipient has the right to be compensated for the necessary expenses incurred with regard to the benefit (§ 458(2)(3)). Any conclusions as to compensation for improvements to be inferred from the CC are limited to dealings by the recipient in good faith (cf. § 130(3)).

III.–3:514: Liabilities arising after time when return due

(1) The recipient is obliged to:

(a) pay the value (at the time of performance) of a benefit which ceases to be transferable after the time when its return was due; and

(b) pay recompense for any reduction in the value of a returnable benefit as a result of a change in the condition of the benefit after the time when its return was due.

(2) If the benefit is disposed of after the time when return was due, the value to be paid is the value of any proceeds, if this is greater.

(3) Other liabilities arising from non-performance of an obligation to return a benefit are unaffected.

COMMENTS

Where the benefit conferred under a contract ceases to be transferable or deteriorates before termination of the contractual relationship takes place, the legal consequences are determined by III–3:512 (Payment of value of benefit). The present Article, by contrast, governs the consequences for the recipient's liability under III.–3:510 (Restitution of benefits received by performance) paragraph (3) to return the benefit by transferring it when the benefit ceases to be transferable or its condition deteriorates in the period *following* termination of the contractual relationship and before return of the benefit. As provided for by paragraph (3), these rules partially displace the general rules which otherwise apply in the case of a non-performance of the obligation to return the benefit.

Illustration
In 2006 W purchases from Z a substantial stamp collection on the agreed basis that the collection includes a complete series of South African commemorative stamps for 1952 to 1968. A sale price of €22,000 is agreed. Z terminates the contractual relationship after W fails to pay the third of the ten instalments due. After termination, W, instead of returning the collection, arranges for it to be auctioned, where it is sold in 2007 for €26,500. W is liable to pay to Z the proceeds of sale from the auction in accordance with paragraph (2), but can set-off the right to repayment of €6,600 paid by W before termination.

NOTES

1. Under GERMAN and POLISH law the general rules apply to the obligations arising after termination. If the recipient disposes of the benefit after the time return was due, this is regarded as non-performance of the obligation to return and the other party may demand surrender of what has been received as substitute (CC § 285 and POLISH CC art. 475 § 2). In CZECH law this benefit is an unjustified enrichment (CC arts. 457 ff and the commentaries on this subject by *Jehlička, Švestka, Škárová*, pp. 564-575). Under DUTCH law if the recipient disposes of the benefit after the time return was due, this is also regarded as non-performance by the recipient which will however only lead to a claim for damages.
2. The ESTONIAN LOA § 189(2) and (4), imposing an obligation to pay the value or compensate, does not distinguish between the cases where the reasons for this obligation arise before or after the time return was due. In any case, the price is

deemed to be the value of that which was received (LOA § 189(3)). However, upon exercising the right of termination arising from the law, e.g. in case of fundamental non-performance, a party is exempted from paying the value or compensating in so far as that party exercised such care as the party would exercise in the party's own affairs (LOA § 190(1) sent. 3). LOA § 189(5) prescribes that a party who, under the circumstances, should reasonably be able to foresee the possibility of termination of the contract should ensure that it is possible to return what was received, thus setting higher standard for liability for *after* cases. This is highly controversial: LOA § 190 might be applicable to the obligation to pay the value or compensate exclusively, leaving LOA § 189(5) to apply to the question of possible compensation of damages, see *Varul et al (-Kõve)* § 189, no. 6, § 190, no. 4.3.3. There is no specific regulation similar to paragraph (2) of the Article; the applicability of LOA § 108(7) (right to require transfer of the proceeds, if claim for specific performance is unenforceable, e.g. for impossibility) is also doubtful. However, damages for non-performance of the obligation in LOA § 189(5) (see notes above) could be obtained.

3. SCOTTISH law has not so far distinguished between the situations where the reason for the non-returnability in kind arises before or after the date when the return was due. Nor do these issues appear to be covered in ENGLISH law. Under SLOVAK law it is not important whether liabilities arise after the time when the return was due or not.

4. Under (FRENCH) and BELGIAN law, the rules on non-performance of the obligation to return will also apply. The risk of *force majeure* is on the party who has to return the goods from the moment the contractual relationship is terminated, as this is equivalent to a *mise en demeure* and thus Article 1302 applies. That party will have to pay the value of the benefit which can no longer be returned, unless it proves that the benefit would also have been destroyed or would have deteriorated if it had been returned already.

5. In CZECH law, the general provisions on unjustified enrichment apply, according to which everything which was acquired through unjustified enrichment must be surrendered, and if this is not feasible, particularly when such enrichment resulted from performance of services, monetary compensation must be provided (CC § 458(1)). The duty to surrender everything which was unjustifiably acquired is to be fulfilled in such a way as to restore the original situation, or to constitute a situation which would be economically equivalent to the original situation (Supreme Court R 1/1979).

Section 6: Price reduction

III.–3:601: Right to reduce price

(1) A creditor who accepts a performance not conforming to the terms regulating the obligation may reduce the price. The reduction is to be proportionate to the decrease in the value of what was received by virtue of the performance at the time it was made compared to the value of what would have been received by virtue of a conforming performance.

(2) A creditor who is entitled to reduce the price under the preceding paragraph and who has already paid a sum exceeding the reduced price may recover the excess from the debtor.

(3) A creditor who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered.

(4) This Article applies with appropriate adaptations to a reciprocal obligation of the creditor other than an obligation to pay a price.

COMMENTS

A. The principle of price reduction

Under this Article the creditor is entitled to a reduction in the price where the debtor's performance is incomplete or otherwise fails to conform to the terms regulating the obligation. The remedy is given whether the non-conformity relates to quantity, quality, time of delivery or otherwise. The remedy is designed both as an alternative to damages (see Illustration 2 below) and for cases where the debtor is excused from liability for damages (see Comment B below). The Article applies only where the creditor accepts the non-conforming performance. In other cases, the remedy is either to pursue a restitutionary claim under III.–3:510 (Restitution of benefits received by performance) or to claim damages under Section 7.

Price reduction is a normal remedy in most European legal systems. The common law systems, however, did not know it as such until they implemented the Directive on certain aspects of the sale of consumer goods and associated guarantees (1999/44/EC), which refers to price reduction; but in most cases they reached broadly similar results by other means.

The amount of the price reduction is proportional to the reduction in the value of what is received compared to the value of what would have been received if there had been conforming performance. In some cases the value received will be directly related to the proportion of the obligation performed and the price may simply be reduced accordingly.

> *Illustration 1*
> S contracts to sell 50 tonnes of coffee to B at a price of €2,400 a tonne. S tenders only 30 tonnes. B may accept the short tender and reduce the price under this Article from €120,000 to €72,000 (see Illustration 3). Alternatively B can reject the short tender, in which case it can either claim recovery of the price under III.–3:510 (Restitution of benefits received by performance) or claim damages under Section 5, but it cannot invoke the present Article.

In other cases the value of the performance may be reduced by a greater (or less) proportion.

Illustration 2
B agrees to build a house for O for €150,000. If the work had been properly executed the house would have been worth €100,000 when completed, but because of B's defective workmanship it is worth only €80,000. As an alternative to claiming damages of €20,000, O may withhold or recover one-fifth of the price, i.e. €30,000.

B. Price reduction available even where non-performance excused

The fact that a shortfall in performance is excused does not affect the creditor's right to a price reduction under this Article, for the only remedies which are excluded in the case of an excused non-performance are specific performance and damages.

Illustration 3
S in Marseilles contracts to sell 20 hospital scanning machines to B in London. As the result of the introduction of a quota system governing the export of scanning machines S is only able to supply B with 15 machines. S's non-performance is excused but if B decides to accept the 15 machines it is entitled to a price reduction of 25 per cent.

C. Price reduction may be obtained before or after payment

The creditor may obtain a price reduction under this Article either by withholding payment, if the price has not yet been paid, or by recovering the amount of the price reduction if the price has already been paid.

D. Price reduction is alternative to damages for reduction in value

A creditor who reduces the price under this Article cannot also claim damages for the difference in value between what was received and what would have been received by virtue of conforming performance (see Illustration 1). The two remedies are incompatible so that there is no right to cumulate them. However, other loss remains recoverable within the limits laid down by Section 7.

Illustration 4
The facts are as in Illustration 2. O cannot live in the house until the defects in it have been put right and incurs a loss of €500 in renting an apartment to live in meanwhile. The €500 remains recoverable whichever of the above remedies is pursued.

NOTES

I. The actio quanti minoris

1. The right to reduce the price, as provided in this Article, is found in most European legal systems and in CISG art. 50. It is primarily applied when goods sold are defective, see AUSTRIAN CC § 932(1) and (4) but only as a secondary device; DANISH SGA §§ 42 and 43; FINNISH and SWEDISH SGAs §§ 37, 38; FRENCH, BELGIAN and LUXEMBOURG CC art. 1644; GERMAN CC §§ 437 no. 2, 441; GREEK CC arts. 534, 535, 540; ITALIAN CC art. 1492(1)(sales contracts); POLISH CC art. 560 § 1 and § 3; CZECH CC §§ 507, 622.3, 624; SLOVENIAN LOA § 478; and PORTUGUESE CC arts. 911 and 913. However, in many countries the rule also applies to other contracts, see DANISH Lease Act §§ 11(2), 15 and 16(2) and on

construction contracts, *Gomard*, Obligationsret II 115 ff; FINLAND, Sale of real property and service contracts, see *Sisula-Tulokas* 18 - 36. GERMAN CC §§ 515 (barter), 536 (lease), 634 no. 3, 638 (work, but not services) and 651(d) (travel) and for the view that price reduction is a remedy under general contract law see *Schlechtriem and Schmidt-Kessel*, Schuldrecht Allgemeiner Teil[6], 258 et seq.; GREEK CC arts. 573 (barter), 576 (lease) and 688 and 689 (work); ITALIAN CC art. 1668 (construction contracts) and recently ITALIAN ConsC art. 130; POLISH CC arts. 560 and 604 (barter), art. 637 § 2 (work contract), 664 § 1 (lease), 700 (tenancy); PORTUGUESE CC art. 1222 (work); and SPAIN CC art. 1486 (sales). In FRANCE, outside cases of defects, price reduction (*réfaction*) is limited to commercial cases, as a consequence of usages: *Terré/Simler/Lequette*, Les obligations[9], no. 630, in fine; but there is a tendency to generalise it to other contracts, through various mechanisms (Bénabent, no. 299) such as in services contract, the judicial reduction of price or the judicial deletion of illicit clauses or the substitution by the judge of a valid clause for an invalid one. The ESTONIAN LOA § 112 provides for price reduction as a general remedy for non-performance of a contractual obligation, subject to several special regulations (e.g. LOA §§ 220(3) and 224 for contracts of sale). Price reduction as a remedy can be exercised even if non-performance is excused (LOA § 105).

2. The DUTCH CC treats price reduction as partial termination which in principle is available in all contracts, see CC arts. 6:265 and 6:270. SLOVAK CC § 507(1) applies the right to reduce the price generally for all contracts that contain reciprocal obligations. The general right to reduce the price is restricted only for obligations relating to things. There are also special provisions on price reduction (for example § 623(2) (sale), § 648(2) (works), § 674(lease)).

3. In some systems price reduction applies also where the non-performance is excused.

4. Although SCOTTISH law once recognised the *actio quanti minoris*, it is not a general part of the modern law (*McBryde*, para. 22.10). However, the Sale of Goods Act 1979 s. 53(1) allows the buyer in case of defects to set up certain claims "in diminution or extinction of the price". And see notes under V. below.

5. Under the HUNGARIAN CC § 306(1) in the case of non-conformity with the contract (a) the creditor is, in the first place, entitled to choose either repair or replacement unless this is impossible or it results in disproportionate expenses on the part of the debtor as compared to the alternative remedy, taking into account the value the goods would have had there been no lack of conformity, the significance of the lack of conformity, and whether the alternative remedy could be completed without significant inconvenience to the creditor; (b) if the creditor is entitled to neither repair nor replacement or if the debtor refuses to provide repair or replacement or is unable to do so in the way required by the law, the creditor may require an appropriate reduction of the price or have the contract withdrawn. The creditor is not entitled to have the contract withdrawn if the lack of conformity is minor.

II. Calculation of the reduction

6. As in the Article, CISG art. 50 provides that the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of delivery bears to the value that conforming goods would have had at that time, and the same rule applies in most European countries, see e.g. GERMAN CC § 441(3) (value at the time of contracting). Although in ITALIAN law there is no general rule providing for a proportional reduction of price, it is unanimously accepted that the buyer may reduce the price in proportion to the lower value of the defective goods.

See *Bianca, La responsabilità*, V, 325 ff; *Trabucchi, Istituzioni di diritto civile,* 774 ff; *Gazzoni, Manuale di diritto privato*, 1099 ff.

III. Recovery of the excess paid

7. The rule stated in paragraph (2) under which a party who has paid the full price may recover the excess is widely accepted, see GERMAN CC § 441(4).

IV. Damages not excluded

8. It is in the nature of things that a party who reduces the price cannot also claim a sum equal to the reduction in value as damages. However, most laws allow the creditor to recover damages for further loss. See e.g. AUSTRIAN CC § 933a; § 933a(2) states in addition to the possibility to claim damages for further loss that also the reduction in value itself can found a claim for damages if the badly performing party was at fault. Compensation in such a case is modelled according to the provisions on bad performance. CC § 2(1) last sentence stating, that "in all cases, the transferor is liable for damages caused by his fault" or CZECH law (CC arts. 420 ff, 510, 519). See also CISG art. 45(2). In GREECE, however, damages and reduction of price exclude each other, but further loss may be recovered: *Deliyannis & Kornilakis* I 243-244. GERMAN law had the same solution until 2002, when it was abolished by CC § 325. Under ITALIAN law reduction of price can be cumulated with a claim for damages (see Cass. 2000/7718; Cass. 2001/15481 and 2004/6044. Pursuant to CC art. 1494 (2), the buyer can also recover damages caused by defective goods. Under SPANISH law the creditor can recover damages if the debtor acted in bad faith (CC art. 1486(2)), but case law since TS 6 May 1911 (Jur. Civ. T. 121, no. 53) has extended this rule to any debtor in fault. In POLISH law, in sale contracts, price reduction can be cumulated with a claim for damages (CC art. 561 § 3). ESTONIAN court practice (Supreme Court Civil Chamber's decision from 30 November 2005, civil matter no. 3-2-1-131-05) has confirmed that damages for the same interest as is remedied by the price reduction cannot be claimed; damages for other types of loss is not excluded (see also *Varul et al (-Kõve)* § 112 no. 8). The same applies in SLOVENIAN Loa § 468(2).

V. Systems not having price reduction

9. The remedy of price reduction is unknown in ENGLISH and IRISH law but when the non-performance is not excused the law reaches very similar results.

(a) Cases of breach

10. Where goods are defective the *prima facie* rule is that the buyer can recover as damages the difference between the value of the goods actually delivered and the value which the goods would have had if they had been in accordance with the contract, see *Treitel*, Remedies §100. Further,

(i) where the performance is incomplete and the price can easily be apportioned, the buyer may treat the contract as apportionable and pay only for the units delivered (e.g. *Dawood Ltd. v. Heath Ltd.* [1961] 2 Lloyd's Rep 512 (QB));

(ii) the UK Sale of Goods Act 1979 s. 53(1) allows the buyer in case of defects to set up certain claims "in diminution or extinction of the price"; and

(iii) the creditor may also - and this applies to all contracts - set off claims arising out of the same transaction against sums otherwise payable.

On (ii) and (iii) see *Beale*, Remedies 50-52 and *Goode*, Commercial Law, 621. As in most other countries, further loss may be claimed as damages.

The position is similar in SCOTLAND.

(b) Non-performance excused

11. In cases of frustration the position in ENGLAND is normally governed by the Law Reform (Frustrated Contracts) Act 1943 s. 1(3). As a measure, sometimes described as essentially restitutionary (see *Robert Goff* J. in *BP Exploration Co. (Libya) Ltd. v. Hunt (No. 2)* [1979] 1 WLR 783, though see also *Lawton* LJ in the CA [1981] 1 WLR 232), the court may order the return of money paid and payment for benefits (other than money) received before the time of discharge of the obligation, subject to deductions for expenses incurred, see *Treitel*, Contracts, no. 19-098.

12. In the unusual case where the contract is not frustrated but non-performance of part of the obligation is excused, whether the price may be reduced will probably depend on whether the performance can easily be apportioned, see (a)(i) above.

13. In SCOTLAND if a contract is frustrated the obligations of the parties under the contract cease but there may be an equitable adjustment of the rights of the parties under the principles of unjustified enrichment (*Cantiere San Rocco* v. *Clyde Shipbuilding and Engineering Co* 1923 S.C. (H.L.) 105).

VI. General

14. See generally *Treitel*, Remedies, § 100; *Beale*, Remedies, 50-52.

Section 7: Damages and interest

III.–3:701: Right to damages

(1) The creditor is entitled to damages for loss caused by the debtor's non-performance of an obligation, unless the non-performance is excused.

(2) The loss for which damages are recoverable includes future loss which is reasonably likely to occur.

(3) "Loss" includes economic and non-economic loss. "Economic loss" includes loss of income or profit, burdens incurred and a reduction in the value of property. "Non-economic loss" includes pain and suffering and impairment of the quality of life.

COMMENTS

A. Scope of Article

The Article covers damages for non-performance of an obligation which is within the scope of these rules. It does not apply to damages recoverable under Book VI (Non-Contractual Liability Arising out of Damage Caused to Another); they are recoverable not for non-performance of an obligation but for breach of a more general duty not to harm others in certain ways or circumstances. Also the rules in this Section are not intended to be used, or used without modification, in relation to damages for non-performance of public law obligations or family law obligations.

It has already been noted that damages cannot normally be recovered for non-performance of a monetary obligation unless there are exceptional circumstances which make interest an insufficient remedy. It follows that there could not normally be a claim for damages for non-payment of an award of damages.

B. No damages without loss

This Article enables the creditor to recover damages whenever the creditor suffers loss from the debtor's unjustified failure to perform an obligation. The section does not provide for nominal damages for a breach which has caused the creditor no loss.

A few of the laws permit the creditor in particular circumstances to recover the gains made by the debtor through the non-performance, even if these exceed the loss to the creditor. The situations are so limited that this approach has not been adopted in these rules.

C. No fault necessary

Where a debtor's obligation is to produce a given result, failure to do so entitles the creditor to damages whether or not there has been fault by the debtor, except where performance is excused. Where the obligation is not to produce a result but merely to use reasonable care and skill the debtor is liable only if that obligation has not been performed, that is to say if the debtor has not exercised the care and skill required. In the absence of a term specifying the required degree of care and skill, this is equivalent to the commission of a fault.

Illustration 1
A contracts to supply and install in B's house a central heating system that will provide a temperature of up to 22 degrees when the outside temperature is no greater than 0 degrees. A installs the system but despite the exercise of all reasonable care and skill on its part the maximum temperature it can achieve is 18 degrees. A is liable for damages.

Illustration 2
A, a surgeon undertakes to carry out a major operation on B. Despite all reasonable care and skill on A's part, the operation is unsuccessful. A is not liable, for the undertaking was merely to act with due care and professional skill, not to guarantee a successful outcome.

D. All forms of failure in performance covered

This Article applies to all forms of failure in performance. There is no requirement that the creditor serve a notice to perform before being able to recover damages for delay.

Illustration 3
S agrees to build a boat for B for €100,000. No time for completion is fixed by the contract but a reasonable time would be six months. S takes nine months to complete the boat and make it available to B. S is liable for damages for the delay, whether or not B has given notice requiring the boat to be finished within a given period.

E. Loss that would not have occurred without the failure in performance

The creditor may not recover damages for loss not caused by the failure to perform. However, not every intervening event, even if unforeseeable, which exacerbates the loss falls within this principle. The question in each case is whether that event would have had an impact on the loss if the failure in performance had not occurred. Only if this question is answered in the affirmative will the event in question be treated as breaking the chain of causation.

Illustration 4
S agrees to sell to B machinery which S knows is required by B to manufacture goods in its factory. The machinery is due to be delivered on 1st June but S fails to make delivery. B is losing profit at the rate of €10,000 for each week's delay. This is a normal level of profit for a business of this kind. On 29th June a fire breaks out in B's factory, which is burnt to the ground. On 16th July S delivers the machinery. B, which would not have been able to put the machinery to use elsewhere during this period, can recover €40,000 damages for the loss of profit up to 29th June but nothing for loss suffered beyond that date.

Illustration 5
In June a company, S, in London agrees to sell a quantity of machine guns to a weapons dealer, B, in Serbia for £50,000, the guns to be shipped by 30th September against payment. In July S decides that it does not wish to support B's arms business and informs B that it does not intend to ship the guns. In August the British government places an embargo on the exportation of arms to the former Yugoslavian Republics and this is still in force when B's claim for damages is heard 18 months later. B is not entitled to damages.

Illustration 6
In June S in Paris contracts to sell a Seurat painting to B in Hamburg for €1,000,000, the painting to be shipped to B in Hamburg by the end of August. Because of the delays on the part of its staff S is unable to arrange shipment earlier than 1st October. On 5th September the French government impose a ban on the exportation of works of art without a licence, and despite using its best endeavours S is unable to obtain a licence to export the Seurat painting. The value of the painting at the end of August is considered by experts to be €2,000,000. B is entitled to damages of €1,000,000, the difference between the value of the painting and its price, since but for S's delay in shipping the painting its export would not have been affected by the ban.

F. Non-economic loss

Recoverable loss is not confined to economic or pecuniary loss but may cover, for example, pain and suffering, inconvenience, mental distress and any other impairment of the quality of life resulting from the failure to perform.

Illustration 7
A books a package holiday from B, a travel organisation. The package includes a week in what is described as spacious accommodation in a luxury hotel with excellent cuisine. In fact, the bedroom is cramped and dirty and the food is appalling. A is entitled to recover damages for the inconvenience and loss of enjoyment suffered.

Of the issues dealt with by this Article, the recovery of damages for non-economic loss, particularly for disappointment, is the principal one on which the national laws differ: see Case C-168/00 *Simone Leitner v TUI Deutschland* [2002] ECR I-2631. Paragraph (3) follows the guidance given by the ECJ in that case.

G. Future loss

The loss recoverable by the creditor includes future loss, that is, loss expected to be incurred after the time damages are assessed. This requires the court to evaluate two uncertainties, namely the likelihood that future loss will occur and its amount. As in the case of accrued loss before judgment this covers both prospective expenditure which would have been avoided but for the non-performance and gains which the creditor could reasonably have been expected to make if the non-performance had not occurred. Future loss often takes the form of the loss of a chance.

Illustration 8
E is appointed sales manager of F's business under a three-year service contract. She is to be paid a salary and a commission on sales. After 12 months E is wrongfully dismissed, and despite reasonable efforts to find an alternative post she is still out of work when her action for wrongful dismissal is heard six months later. E is entitled to damages not only for her accrued loss of six months salary but also for the remaining 18 months of her contract, due allowance being made for her prospects of finding another job meanwhile. She is also entitled to damages for loss of the commission she would probably have earned.

NOTES

I. Loss

1. It is a common feature of the legal systems in the European Union that damages are awarded only if and to the extent that the creditor has suffered a loss as a consequence of the non-performance of the debtor's obligation. This applies both to pecuniary and to non-pecuniary loss. See on the latter note 4 below. There are however some exceptions. In ENGLISH and IRISH law, apart from recent case law on "restitutionary damages", it is recognised that even if the creditor has suffered no loss, nominal damages are allowed in case of breach of contract. In SCOTLAND, while what are described as nominal damages have been awarded, it would appear that in the cases concerned there has been loss in the form of inconvenience, see *McBryde*. paras. 22.98-22.100; *Mack v. Glasgow City Council* 2006 SC 543.

2. In FRANCE, there are some exceptions to the compensatory nature of damages (i.e.: a loss must have been suffered); when the obligation is to abstain from doing something, CC art. 1145 provides that the mere violation of this obligation gives rise to damages and case law has applied this text on several occasions where no loss had been suffered (Cass.civ. 1re, 31 May 2007, D. 2007.2974, obs. *B. Fauvarque-Cosson*) ; moreover, it results from the distinction between the concept of « reparation » and that of « execution » that no prejudice is required when forced "execution" is asked for *A. Bénabent, Les obligations*, § 403-1 (Bénabent, n ° 403-1).

3. Subject to these exceptions, the legal systems seem to agree that damages are not awarded if there has been a gain for the defaulting debtor but no loss to the creditor. Nor are punitive damages awarded.

II. Strict liability or fault liability

4. Some laws impose strict liability on the defaulting party, others require fault, and others again have a mixed system, where the defaulting party is strictly liable in some cases but liable only for fault in other cases.

III. Notice

(a) Notice of non-performance not required

5. Notice of the non-performance is not a condition for claiming damages in ENGLISH, SCOTTISH or IRISH law. Performance is due without demand even when no time for performance has been set. The same rule is followed in CISG as far as delay of performance is concerned, see *Treitel*, Remedies § 115; on defects see (b) below. It is the same under ESTONIAN law. A notice is not required under POLISH law or under CZECH law, neither for a claim for damages nor for any other effects of delay (POLISH CC art. 476 and CZECH CC §§ 517, 420 ff and Ccom art. 373). The position is the same in SLOVENIAN law (see LOA § 239). A notice is not generally required under SLOVAK law. But special notice of defects (given without delay) is necessary in a sale (CC § 599(1)) and works (CC § 649).

(b) Notice of non-performance necessary

6. Several laws require that the creditor gives notice of the non-performance. However, the effects of the notice vary.

7. In a sale of goods between merchants, GERMAN Ccom § 377 and AUSTRIAN UGB Ccom §§ 377 and 378 require notice of defects to be given without delay, or the buyer will lose all remedies, including the claim for damages. The same rule applies for all

sales in DENMARK, see SGA § 52, and in CISG, see art. 39. See also DUTCH CC art. 7:23 and ESTONIAN LOA § 220 (contracts of sales) and similar provision for contracts of services (LOA § 644) and the FRENCH, BELGIAN and LUXEMBOURG CC art. 1648. The AUSTRIAN CC § 933 deprives the buyer of the right to damages for defects if the seller is not sued within certain time limits, i.e. within two years as from the date the defect is known and within 6 months respectively. In Belgian law this is considered to be an application of a more general rule based on good faith: Cass. 8 April 1988, Arr.Cass. no. 482; *Foriers* 261 no. 4; *M.E. Storme* Invloed no. 461 ff. See also GREEK CC arts. 554-558 which used to provide for a six-month prescription, but now, after their amendment by art. 1 § 1 of l.3043/2002, provide for a prescription period of 2 years; ITALIAN CC art. 1495.on sales contracts which requires the buyer to give notice of non-conformity of the goods within eight days of its discovery and is applicable to claims for damages as well (see Cass. 3 August 2001, no. 10728 in Giust. Civ. 2002, I, 2234 ff) See also FINNISH and SWEDISH SGA §§ 29 and 59, see *Ramberg*, Köplagen 371 and 573 f.

8. Most other rules requiring notice do not deprive the creditor who has not given notice, or sued the other party within certain time limits, of all rights. However, whether notice has been given has other effects. Damages may not be recovered unless notice has been given. Notice may also increase the debtor's liability: damages for delay will start to run, and some losses will be recoverable, only if they occur after notice has been given. On notice, see FRENCH, BELGIAN and LUXEMBOURG CC arts. 1139 and 1146; SPANISH CC art. 1100; ITALIAN CC art. 1219; AUSTRIAN CC § 904 (*Mahnung*; the notice that requests the debtor to perform if no date is stipulated in the contract); DUTCH CC art. 6:82; and GREEK CC art. 340. See also *Treitel*, Remedies §§ 111-114.

IV. Non-pecuniary loss

9. Non-pecuniary loss may be pain and inconvenience following from physical harm or from disappointment or vexation, and may be due to attacks on a person's personality, reputation or honour or to the death of a spouse or other closely related person. The legal systems differ not only in the extent to which they award damages but also as to which harm they will compensate. The European Court of Justice, when interpreting the Package Travel Directive, asked the member states to provide the consumer with a claim for non-pecuniary loss, ECJ 12 march 2002, ECJRep 2002, I-2631 nos. 23 et seq. (*Simone Leitner/TUI Deutschland*); a similar tendency was shown in some anti-discrimination cases, see e.g. ECJ 10 April 1984, ECJRep 1984, 1891, no. 28 (*Colson and Kamann*).

(a) Préjudice moral

10. Important developments have occurred in FRANCE and BELGIUM. Non-pecuniary damages were formerly seldom awarded, but today damages are allowed for "*préjudice moral*" which includes damages for attacks on a person's honour or reputation, loss of a closely related person, certain kinds of physical harm which do not entail economic loss (loss of sense of smell, disfiguring scar) and disappointment. See *Viney*, Conditions nos. 253 ff.; *Van Gerven*, Verbintenissenrecht, pp. 454-455 and *Treitel*, Remedies, § 156.

11. PORTUGUESE law also provides rules on damages for non-pecuniary loss; see *Telles* 383, *Jorge* 597 and *Costa*, Obrigações 549 ff, *Leitão* I 318 and II 256, as well as several court decisions. So does SPANISH law, Supreme Court 9 May 1984, 13 December 1984, 16 December 1986, 3 June 1991 (*Lacruz-Delgado*, II, 1, § 27, 211-212; *Díez-Picazo* II, 688. CZECH law protects a *right of personhood* (CC § 13). A

monetary compensation can be allowed for if the individual's dignity or reputation in society was diminished (CC § 13.2).

(b) Pain and suffering and disappointment distinguished

12. In ENGLISH law damages for non-pecuniary loss such as pain and suffering or physical inconvenience may be recovered for breach of contract: e.g. *Godley* v. *Perry* [1960] 1 W.L.R. 9, Q.B.; *Hobbs* v *L.S.W.R.* (1875) LR 10 Q.B. 111, C.A. However, damages are not awarded for vexation or disappointment unless the contract was specifically meant to provide enjoyment (e.g. a package holiday contract: *Jarvis v. Swan Tours Ltd.* [1973] QB 233 (CA)) or to give peace of mind (*Heywood v. Wellers* [1976] QB 446 (CA)): see *Bliss v. SETRHA* [1985] I.C.R. 700 (CA). These authorities have been followed in IRELAND, see *Clark* 461. SCOTTISH law seems to be similar to English law, see e.g. *Diesen v. Samson* 1971 SLT (Sh.Ct.) 49 *McBryde*, paras. 22.104-22.105. In AUSTRIAN law, damages for pain and suffering may be recovered in both contractual and non-contractual cases (CC § 1325; see also § 1331). General recovery of non-pecuniary losses is unrestricted, see (c) below. In CZECH law damages for *pretium doloris* are limited (see CC § 444). Under ESTONIAN law non-pecuniary loss is defined primarily as physical and emotional distress and suffering and is generally recoverable (LOA § 128(5)). However, recovery of non-pecuniary loss arising form non-performance of a contractual obligation may only be claimed if the purpose of the obligation was to pursue a non-pecuniary interest and, under the circumstances relating to entry into the contract or to the non-performance, the debtor was aware or should have been aware that non-performance could cause non-pecuniary loss (LOA § 134(1)). A special rule on package travel contracts provides for non-pecuniary damages for wasted holiday (LOA § 877(2)).

(c) Limited recovery for non-pecuniary loss

13. ITALIAN, GERMAN, DANISH, FINNISH, GREEK, POLISH and DUTCH law will only allow damages for non-pecuniary loss if this is provided for by statute; see, e.g. GERMAN CC § 253(1); Treitel, Remedies § 157. The ITALIAN CC art. 2059 limits recovery in non-contractual cases to situations where the defendant's conduct amounts to a criminal offence, which excludes non-pecuniary damages for non-performance of contractual obligations (see Cian & Trabucchi arts. 1223 and 2059; Mari in Antoniolli – Veneziano, Principles of European Contract Law and Italian Law – A Commentary, 443 ff and Gazzoni, Manuale di diritto privato, 641 ff). In GERMANY the rule in CC § 253(2) on non-pecuniary damages for bodily harm and false imprisonment applies to both contractual and non-contractual liability, but not where the claim was contractual only. Additionally, CC § 651 f entitles a customer to a reasonable compensation for a wasted holiday where a supplier of travel facilities through breaking the contract has prevented or seriously prejudiced the customer's journey, and the Equal Treatment Act §§ 15(2), 21(2) sent. 3 provides for a reasonable compensation in cases of discrimination. In AUSTRIA, an influential writer has argued that all types of non-pecuniary loss may be recovered if there has been gross negligence: F. Bydlinski JBlJbl 1965, 173, 237. The state of the law is, however, that non-pecuniary loss is generally – and despite CC § 1323 – only compensated if this is expressly provided by statute (see CC §§ 1325 and 1330). The courts have recently expanded the possibility of claiming damages for non-pecuniary loss in the case of death also for relatives and close friends (see OGH 16 June 1994, ZVR 1995/46 if relatives need medical treatment for the shock after notice of the death - *Schockschaden*; OGH 16 May 2001, ZVR 2001/73 for "normal" grief after the death of a close relative in cases of gross negligence - *Trauerschaden*). In DENMARK and the NETHERLANDS non-

pecuniary damages are mostly available in cases of non-contractual liability but the rules such as CC art. 6:106 and Danish Damages Act 1984 §§ 3 and 26 may in certain cases also apply to contractual liability; see on DUTCH law CC arts. 6:95 and 6:106, and on DANISH law, *Vinding Kruse* 345 ff; similarly SWEDISH law, see *Hellner and Radetzki*, Skadeståndsrätt, 366 and FINNISH law, see *Taxell*, Skadestånd 183. On GREEK law, see CC art. 299 (only for non-contractual liability and where personality rights have been infringed) and *Ligeropoulos*, Erm.AK art. vol. II/1 299 nos. 2-4, 8 (1949), who criticizes the existing rule, cf. also *Stathopoulos*, in Georgiadis and Stathopoulos, art. 299 nos. 4-7, *Stathopoulos*, Obligations, § 8 nos. 64-68. Equally this is seen in POLISH law, where recovery for non-pecuniary loss can be claimed only in cases of non-contractual liability when personality rights have been infringed (CC arts. 445 and 448). This strict limitation is being criticized by writers (see *M. Safjan*, Naprawienie krzywdy niemajątkowej w ramach odpowiedzialności ex contractu [in:] Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara [Ed. M. Pyziak-Szafnicka], Kraków 2004, pp. 255-280). It seems that a general admission of recovery of non-pecuniary loss in contract would require a legislative change. The same is true in SLOVENIAN law, see LOA §§ 178–185. CZECH law recognise regulated damages for pretium doloris but damages for *pretium affectionis* are excluded (Jehlička, Švestka, Škárová, p. 545).

V. Future loss

14. All the legal systems allow damages for loss which will occur after the day damages are assessed provided the loss is not too remote. Such loss may follow from the death of a breadwinner (spouse or parent) or personal disablement, where recoverable as contract damages, and from loss of future profit. See for instance CISG art. 74 and, on the indemnity which the commercial agent whose contract with the principal has been ended may claim for future commissions, art. 17 of the Council Directive of 18 December 1986 (86/653 EC). In some legal systems damages are awarded even if the loss is to some extent speculative. Under AUSTRIAN law, recoverability of loss of future profits is, according to CC §§ 1324, 1325 and 1331, dependent on the degree of fault: lost profits may only be recovered if the injury is attributable to the debtor's intentional or grossly negligent act. However, the dependants of a person who has been killed may claim compensation for loss of support from the person who caused the death irrespective of the degree of fault. In AUSTRIA a future loss as described in the rule is treated as *positiver Schaden* and is compensated, because the high degree of expectation already constitutes a value that is recoverable. This is to be distinguished from *entgangener Gewinn* which is a value the party suffering from the damage might have achieved if the damaging event had not occurred. Whether such a loss is compensated depends on the degree of fault (see CC §§ 1323, 1324). Admittedly it is very often not easy to draw a clear distinction (see *Koziol/Welser* II, 13th ed., 304).

15. For the rules on delay see HUNGARIAN CC § 299. Under paragraph (1) the debtor must reimburse the creditor for damages caused by the debtor's delay, unless the debtor is able to prove that the debtor has acted in the manner that can generally be expected in the given situation in order to prevent such delay. (exculpation). Under paragraph (2) if the debtor is unable to offer any reasonable excuse for the delay, the debtor is liable for all loss caused by the delay, unless the debtor is able to prove that such loss would have occurred regardless. In relation to monetary obligations, under CC § 301(4) creditors are entitled to demand compensation for losses in excess of the default interest. Under CC § 303(1) a creditor must reimburse the debtor for losses originating from the creditor's delay, unless the creditor can prove that the creditor has acted in the manner that can generally be expected in the given situation in order to

prevent the default. Under CC § 303(2) an creditor, irrespective of whether the fault is excused (a) must reimburse the expenses originating from debtor's responsible custody (b) bears the risk of the destruction, loss, or damage of a thing as if the performance had been duly accepted and (c) is not entitled to any interest for the duration of the default. In the case of non-conformity, under CC § 310, apart from guarantee rights, the creditor is entitled to demand compensation for loss resulting from lack of conformity under the rules on delict. Under CC § 312(1) if performance has become impossible for a reason for which neither of the parties is liable, the contract is extinguished. The party gaining knowledge of the impossibility of performance should immediately notify the other party thereof. The party failing to notify is liable for any resulting loss. Under paragraph (2) of that article if performance has become impossible for a reason for which the debtor is liable, the creditor may demand damages for non-performance. Under paragraph (3) if performance has become impossible for a reason for which the creditor is liable, the debtor is relieved of the obligation and is entitled to demand compensation for resulting loss. Under CC § 318(1) the provisions on delictual liability are applied to liability for non-performance of contractual obligations and to the extent of damages, with the difference that such damages may not be reduced, unless otherwise prescribed by legal regulation.

16. See generally *Treitel*, Remedies, Chapter IV.

III.–3:702: General measure of damages

The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor as nearly as possible into the position in which the creditor would have been if the obligation had been duly performed. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived.

COMMENTS

A. Scope of Article

The Article applies only to the measure of damages for loss caused by non-performance of an obligation. It does not therefore apply to damages for loss caused by other conduct, however, reprehensible it may be and even if it amounts to a clear breach of some general duty, such as the duty to act in accordance with good faith and fair dealing. In such cases, any remedy for breach of the duty will depend on the provision creating the duty. For example II.–7:204 (Liability for loss caused by reliance on incorrect information) provides that a party who has concluded a contract in reasonable reliance on incorrect information given by the other party in the course of negotiations has a right to damages for loss suffered as a result if the provider of the information believed the information to be incorrect or had no reasonable grounds for believing it to be correct. Here the damages are not designed to put the party in the position which would have prevailed if the information had been correct but rather in the position which would have prevailed if no contract had been concluded in reliance on the information. Similarly II.–7:214 (Damages for loss) provides that damages for loss suffered as a result of being induced to conclude a contract by mistake, fraud, coercion, threats or unfair exploitation should generally be such as to place the creditor as nearly as possible in the position in which the creditor would have been if the contract had not been concluded.

B. Nature of interest protected

This Article combines the widely accepted "expectation interest" basis of damages for non-performance of an obligation and the traditional rule of "*damnum emergens*" and "*lucrum cessans*" of Roman law, namely that the creditor is entitled to compensation of such amount as will provide the value of the defeated expectation. In a contract for the sale of goods or supply of services this is usually measured by the difference between the contract price and the market or current price; but where the creditor has made a cover transaction then in the conditions set out in III.–3:706 (Substitute transaction) the creditor can elect to claim the difference between the contract price and the cover price. The sums recoverable as general damages embrace both expenditure incurred and gains not made. Damages under this Article are not intended to provide restitution of benefits received; this remedy may however be available on termination of a contract in the circumstances described in III.–3:510 (Restitution of benefits received by performance) .

Illustration 1

S sells a car to B for €5,000, warranting that it is an X model. In fact it is an S model, an older version the market value of which is €1,500 less than the value of an X model. The contract price is not as such relevant to the computation of damages. S is entitled to damages of €1,500, the difference between the value of the car as warranted and its value as delivered.

C. Other loss

In addition to the primary claim for loss of what was due (that is, the loss which any creditor would be likely to suffer from the non-performance) the creditor can recover for foreseeable loss resulting from the particular circumstances. Such loss is sometimes termed "consequential loss".

Illustration 2
B buys a washing machine in a sale at a special price of €200. The normal cost is €300. Because of a serious defect in the machine, garments put into it for washing, worth €50, are ruined. On rejecting the machine B is entitled to recover not only the price paid and €100 for loss of bargain but also the sum of €50 for consequential loss.

The damages recoverable may include a sum to represent interest upon the amount of the loss from the date at which the loss was incurred to the date of payment.

D. Computation of losses and gains

The creditor must bring into account in reduction of damages any compensating gains which offset the loss; only the balance, the net loss, is recoverable. Similarly, in computing gains of which the creditor has been deprived, the cost which would have been incurred in making those gains is a compensating saving which must be deducted to produce a net gain. Compensating gains typically arise as the result of a cover transaction concluded by the creditor. But it is for the debtor to show that the transaction generating the gains was indeed a substitute transaction, as opposed to a transaction concluded independently of the default. A compensating saving occurs where the future performance from which the creditor has been discharged as the result of the non-performance would have involved the creditor in expenditure.

Illustration 3
O, a construction company which owns a piece of equipment for which it has no immediate need, enters into an agreement to lease the equipment to H for a year at a rental of €1000 a month. After three months, O terminates the lease and repossesses the equipment because of H's default in payment of the rent. Two months later, O succeeds in re-letting the equipment for seven months at a rent of €1200 a month. O is entitled to the rent due and unpaid at the time it terminated the original lease and to damages for loss of future rental income, but its claim for the two months' loss of rent after termination, i.e. €2000, is reduced by €1400, the additional rental it will receive over the remaining 7 months of the original agreement.

Illustration 4
S, a commodity dealer, contracts to sell to B 50 tonnes of soybean meal at a price of €300,000 a tonne for delivery on 1st August. On that date, when the price of soybean meal has fallen to €250,000 a tonne, B fails to take up and pay for the meal. A week later S sells 50 tonnes of soybean meal to C at €375,000 a tonne. Even if the market price rule (that is to say the rule that, in the case of goods of a kind available on a market, the normal measure of damages is taken to be the difference between contract price and market price) did not apply, S would not have to bring into account in its claim against B the extra profit on its sale to C, in the absence of evidence that its transaction was a substitute for the contract with B.

E. "Unless otherwise provided"

The measure of damages set out in the Article applies only unless otherwise provided. We have already seen that some of these model rules provide for other measures of damages, typically damages designed to place a person in the position which would have prevailed in the absence of acting in reliance on something. The particular rules mentioned above in Comment A do not relate to damages for non-performance of an obligation. Nonetheless it is perfectly conceivable that a rule relating to a particular kind of obligation could provide for a special measure of damages. This possibility is left open by the Article.

NOTES

I. Expectation interest

1. The legal systems seem to agree that the general measure of damages should be such as to put the creditor into the position which would have existed if the debtor's contractual obligations had been duly performed. In ENGLISH law this measure of damages has come to be called the expectation interest (see *Fuller & Perdue* (1936) 46 Yale L.J. 52), in GERMANY and AUSTRIA (see e.g. *Koziol/Welser* II, 13th ed., 308) "*positives Interesse"* or *"Erfüllungsinteresse*", in CZECH REPUBLIC "*to co poškozenému ušlo*», e.g. profit lost by the injured party, see CC § 442.1. It is contrasted with the reliance interest which aims at putting the creditor into the position which would have existed if the contract had not been concluded (German "*Vertrauensinteresse*"). On this distinction see in DENMARK, *Gomard,* Obligationsret II 143 ff; ENGLAND, *Treitel*, Remedies, § 82, and on the expectation interest *Robinson v. Harman* (1848) 1 Ex. 850, 855; SCOTLAND, *McBryde* paras. 22.92-22.930; FINLAND, *Aurejärvi* 132-136; GERMANY, *Schlechtriem and Schmidt-Kessel*, Schuldrecht, Allgemeiner Teil[6], 144 et seq.; AUSTRIA, *Kozoil*, I 34; ITALY, *Visintini* 196; SWEDEN, *Ramberg.* Köplagen 112, 649 and *Herre*, Ersättningar, 301. In FRENCH law writers are generally unfamiliar with the distinction, see *Treitel*, Remedies § 89. But in SPAIN, it is increasingly accepted (*Díez Picazo* II, 683). Under POLISH law this distinction is widely accepted: it derives from the very nature of damages, that the measure should put the creditor into the position in which the creditor would have been if the obligation had been duly performed. This distinction is also accepted in SLOVENIAN law (*Plavšak* in *Juhart/Plavšak*, 225). The distinction is also made in ESTONIAN legal doctrine (e.g. *Varul et al (-Sein)* § 127 no. 4.4.) and court practice (Supreme Court Civil Chamber's decision from 21 October 2003, civil matter no. 3-2-1-106-03). In PORTUGAL, the measure of damages (positive or negative interest) when cumulated with termination is a controversial matter. The majority of authors and court decisions consider only the negative interest (see v.g. *Telles*, 463 f, *Varela*, II 109, *Costa*, 976, *Leitão*, II 267 f) . A minority, though with reflexes in case law, argue for a positive interest (see *Vaz Serra*, 204 ff, *Machado*, 175 ff, *Prata*, 479 ff).

II. Loss and gain

2. That damages generally may cover both actual loss suffered and lost gain is expressly provided in FRENCH, BELGIAN and LUXEMBOURG CC art. 1149, (under French law, judges have a "pouvoir souverain d'appréciation" in the evaluation the amount of the damages, i.e.: there is no control by the Cour de cassation), GREEK CC art. 298, GERMAN CC § 252, ITALIAN CC art. 1223, POLISH CC art. 361 § 2, DUTCH CC art. 6:96, ESTONIAN LOA § 128(2), PORTUGUESE CC art. 564(1), CZECH law

("actual damages and profit lost", see CC art. 442.1; Ccom art. 379) and SPANISH CC art. 1106; see also CISG art. 74. SLOVAK CC § 442(1) provides in general terms that the compensation shall include compensation for what the damaged party lost, but the scope of the loss is disputable. SCOTTISH law does not presently allow recovery of the contract-breaker's gain: *Teacher v. Calder* (1899) 1 F. (H.L.) 39; *McBryde*, para. 22.94. The same is true in SLOVENIAN law, see LOA § 243. In AUSTRIA compensation for loss and gain is dependent on the degree of fault unless the gain the creditor has been deprived of was to be expected with certainty (see CC §§ 1323 and 1324).

3 The legal systems seem to agree that damages are not awarded if there has been a gain for the defaulting debtor but no loss to the creditor, save that in ENGLISH law "restitutionary damages" exceeding the creditors' loss may be recoverable in exceptional circumstances. They have been awarded particularly when the defendant acted deliberately to make a profit and the creditor, though not suffering any provable loss, had a legitimate interest in preventing the debtor from so doing: *Attorney-General v. Blake* [2001] 1 AC 268; see *Chitty* on Contracts, paras. 26-022 ff. Nor are punitive damages awarded.

III. Consequential loss

4. Damages for loss due to personal injury and damage to property (other than the thing contracted for) are allowed in most of the legal systems, see for ENGLAND, *McGregor*, Damages §§ 57 ff; for SCOTLAND, *McBryde*, para. 22.114; for GERMANY, CC §§ 280(1), 241(2) and for POLAND see *T. Dybowski*, System Prawa Cywilnego (vol. III, part 1), pp. 217-221. However, under AUSTRIAN law recovery of "loss of profits" in addition to "positive damage" (loss suffered) is, according to CC §§ 1323, 1324, provided only if the party responsible is to blame for gross negligence (see CC §§ 1323, 1324). Except for personal injury, the principle of *non-cumul* in ESTONIAN law provides that damage arising from the non-performance of a contractual obligation, if the objective of the contractual obligation was other than to prevent the damage for which compensation is claimed, can only be recovered under rules of delictual liability, i.e. including requirement of fault ((LOA §§ 127(2), 1044(2)). According to the Roman precedents, SPANISH CC art. 1486 grants an action for compensation of consequential loss only in case of fraud of the seller. However, case law has totally overcome this limitation (see TS 19 April 1928, Colecc. Legisl. N. 53; TS 8 November 1997, RAJ (1997), 7891). ITALIAN case law allows the aggrieved party the possibility to recover also indirect damages falling within the scope of the regular consequences of non-performance according to a probability and reasonableness test (Cass. 6 March 1997, no. 2009 in Giust. Civ. Mass. 1997 and Cass. 9 May 2000, no. 5913 in Giust. Civ. Mass 2000).

5. In CZECH law compensation for personal injury is not considered as damages stricto sensu. Under the special civil rule (CC § 13), an individual has a right to an elimination of the consequences of an unjustified interference in the right of personality and only if this appears insufficient, will the individual concerned acquire a right to monetary compensation for detriment suffered.

IV. Loss to be offset by gains

6. It seems to be universally accepted that loss should be offset by the gains which the creditor has made due to the non-performance, see on ENGLISH and GERMAN law *Schlechtriem and Schmidt-Kessel*, Schuldrecht, Allgemeiner Teil[6], 164 et seq.; SCOTTISH law, *McBryde*, para. 22.55; DANISH law, *Bryde Andersen and Lookofsky* 255; FINNISH law, *Sevon-Wilhelmsson and Koskelo*, 87; FRENCH law, Cass.req. 1

January 1927, D.H.27.65; ITALIAN law, Cass. 5 April 1990 no. 2802 in Mass. Foro It. 1990; GREEK law, *Stathopoulos,* Georgiadis and Stathopoulos, arts. 297-298 nos. 87-111; POLISH law, *T. Dybowski*, System Prawa Cywilnego (t. III, part 1), pp. 303-305; PORTUGUESE law, *Telles* 392 and *Costa*, Obrigações 722 f; BELGIAN law, *Ronse*, nos. 519 ff; DUTCH CC art. 6:100; ESTONIAN LOA § 127(5); CZECH law (see for instance CC § 442, compensation provided for *actual* damages) and SPANISH law, Supreme Court 17 February 1925, 19 November 1928, 20 June 1953, 13 May 1965 (*Alabaladejo,* II, 1, § 33.3). AUSTRIAN law reaches virtually the same results but distinguishes cases where the application of the rule would not be justified, e.g. in the case of an increased obligation of the father to pay maintenance if his child was hurt in a traffic accident; see *Wilburg*, JherJB 82, 76 ss. For SLOVENIAN law see LOA § 243(3).

V. Reliance interest

7. Some laws allow the creditor to claim reliance interest instead of expectation interest. This is possible under DANISH law where the creditor can claim it on terminating the contractual relationship, even though thereby put into a better position than if the contract had been performed, see *Gomard*, Obligationsret II 196 ff. For the position in AUSTRIAN law see *Koziol/Welser* II, 13th ed., nos. 308 and 323 et seq. GREECE has a specific provision permitting equitable damages. The position in SWEDISH law is unresolved, see *Herre*, Ersättningar 305. In GERMANY the creditor may claim expenses wasted for a frustrated purpose instead of performance interest, see CC § 284; this claim does not depend on a termination of the contractual relationship but is to be seen as a way to calculate the measure damages.

8. ENGLISH law allows recovery of the reliance interest but this cannot put the creditor in a better position than if the contract had been performed, see *Treitel*, Remedies § 94. Thus expenditures which are wasted can be recovered as reliance interest, but if these expenditures would not have been recouped if the contract had been performed they cannot be recovered, for this would put the creditor into a better position: *C. & P. Haulage Ltd. v. Middleton* [1983] 1 WLR 1461. For SCOTTISH law see *Macgregor and McBryde*, para. 22.94.

9. See generally *Treitel*, Remedies §§ 75-107.

III.–3:703: Foreseeability

The debtor in an obligation which arises from a contract or other juridical act is liable only for loss which the debtor foresaw or could reasonably be expected to have foreseen at the time when the obligation was incurred as a likely result of the non-performance, unless the non-performance was intentional, reckless or grossly negligent.

COMMENTS

A. Scope of Article

This Article applies only to obligations voluntarily incurred by contract or other juridical act. In such cases the debtor at the time of incurring the obligation has an opportunity to restrict liability in relation to foreseeable losses but not in relation to unforeseeable losses. This consideration does not apply to obligations which arise by operation of law.

The Article also does not apply where the default was intentional, reckless or grossly negligent. In such cases it seems more reasonable to place the risk of a non-foreseeable loss on the debtor rather than on the innocent creditor. A person is reckless if the person knows of an obvious and serious risk of proceeding in a certain way but nonetheless voluntarily proceeds to act without caring whether or not the risk materialises; there is gross negligence if a person is guilty of a profound failure to take such care as is self-evidently required in the circumstances. See Annex 1.

Where the Article does not apply, the normal rules on causation will determine the extent of the debtor's liability.

Not all the laws of the Member States limit damages by a rule of foreseeability; some, for example, use a criterion of "adequate causation". However, the results are usually rather similar to those obtained by employing the foreseeability test, which has been adopted by international conventions such as the CISG (art 74). Cases of intentional, reckless or grossly negligent non-performance are often not expressly excluded from the rule in the national laws, but in practice the courts may well reach this result and the limitation seems a fair one.

B. Foreseeable consequences of failure to perform

The Article sets out the principle by which liability for loss caused by non-performance of a voluntary obligation is limited to what the debtor foresaw or could reasonably be expected to have foreseen, at the time when the obligation was incurred, as the likely consequence of the failure to perform. However, as noted above, the last part of the Article provides a special rule for the case where the default was intentional, reckless or grossly negligent.

Illustration 1

B, a stamp dealer, contracts to buy from S for €10,000 a set of stamps, to be delivered to B on 1st June. S fails to deliver the stamps, which on 1st June have a market value of €12,000. The failure is not, however, intentional, reckless or grossly negligent. Because of S's non-performance of the obligation, B is unable to fulfil a contract to resell the collection to T for €25,000. S, though aware that B required the stamps for resale, was not aware that B would resell the stamps as a collection. B is entitled to recover as damages the sum of €2,000, being the difference between the market value

of the stamps on 1st June and the sale price. S is not liable for the remaining €13,000 of B's loss, which S could not reasonably have foreseen at the time of contracting to sell the stamps to B.

Illustration 2
Company S sells an animal food compound to B for feeding to pigs. B does not tell A for what breed of pigs the food is required. S negligently supplies a batch of the compound which contains a mild toxin known to cause discomfort to pigs but no serious harm. B's pigs are, however, of an unusual breed which is peculiarly sensitive to the toxin and after being fed with the compound many of the pigs die. S is not liable for the loss since it could not reasonably have foreseen it.

C. Exception for breach which is intentional, reckless or grossly negligent

Although in general the debtor is liable only for loss which the debtor foresaw or could reasonably be expected to have foreseen at the time of the contract, the last part of this Article lays down a special rule in cases of intentional or reckless failure in performance or gross negligence. In this case the damages for which the debtor is liable are not limited by the foreseeability rule and the full damage has to be compensated, even if unforeseeable.

Illustration 3
A contracts with B to construct and erect stands for a major exhibition at which leading electronic firms will display their equipment, hiring the stands from B. A week before the exhibition is due to open A demands a substantial increase in the contract sum. B refuses to pay, pointing out that A's failure to complete the remaining stands will not only cost B revenue but expose B to heavy liability to an exhibitor, C, which intended to use the exhibition to launch a major new product. A nevertheless withdraws its workforce, with the result that C's stand is not ready in time and C claims substantial compensation from B. A's breach being intentional and with knowledge of the likely consequences, the court has to award B an indemnity in respect of its liability to C, even though A could not reasonably have foreseen the magnitude of such liability at the time it made its contract with B. The same may be done even if A was not aware of the serious consequences for B of the intentional breach.

NOTES

I. Foreseeability

1. As in the Article, ENGLISH law limits liability to foreseeable losses. The rule was stated in *Hadley* v. *Baxendale* (1854) 9 Ex. 431 (Court of Exchequer). The defaulting party is liable for loss actually foreseen or which a reasonable person in the same position ought to have foreseen when the contract was made. If a seller of machinery wrongfully delays delivery with the result that the buyer is unable to reap the profits from using the machinery, the buyer may recover the profits, which in the normal course of things would have been made on the machinery. However, the buyer cannot recover the profit which could have been earned on some exceptionally lucrative contracts of which the seller knew nothing, see *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 KB 528 (CA). See on English law, *Treitel,*

Contracts, 20-083–20-093. This limitation to the foreseeable loss, which has been adopted in CISG art. 74, must be seen in light of the strict contract liability in English law and in CISG. On CISG see Schlechtriem and Schwenzer (-*Schwenzer*) CISG[4], art. 74 no. 74.

2. This foreseeability test is also provided in FRENCH, BELGIAN and LUXEMBOURG law, see CC art. 1150. In Belgium and France the test is applied broadly: only the possibility of the particular kind of damage needs to have been foreseeable, see respectively Cass., 23 February 1928, Pas. 85 and Cass.com. 1965, D. 1965.449. For regulation corresponding to the present Article see ESTONIAN LOA § 127(3).

3. IRISH, SCOTTISH and DANISH laws are similar to English law, see on Danish law, *Gomard*, Obligationsret II 179 ff; on Irish law *Clark* 543 ff; and on Scottish law, *McBryde*, paras. 22.56-22.90.

4. SPANISH and ITALIAN laws are similar to French law, see Spanish CC art. 1107 (*Carrasco*, Comentarios, 710 ff) and on Italian CC arts. 1223 and 1225, *Visintini* 209. There is a similar provision in the SLOVENIAN LOA § 243(1).

5. The foreseeability test is also applied in CZECH commercial law. Compensation is provided for *damnum emergens* and *lucrum cessans* but only for damage which the debtor at the inception of the obligation envisaged as a possible result of the breach of obligation. Compensation is provided also for damage which could have been envisaged taking into account the facts of which the debtor was aware or ought to have been aware on taking all due ordinary care (see Ccom art. 379). Nevertheless, in the Czech Republic this principle limiting the liability to foreseeable damages is not generally recognised by civil law where compensation covers the whole actual damage but the civil judge can operate a reasonable reduction of compensation for reasons which merit special consideration (see CC §§ 420, 442, 450).

6. Under SLOVAK law liability is not limited to foreseeable losses, but the court will reduce damages for reasons worthy of special respect. In deciding on the reduction, the court particularly takes account of how the damage arose and of the personal and economic position of the individual who caused the damage; the court also takes account of the position of the injured party. However, a reduction is not admissible if the damage was caused intentionally (CC § 450).

II. "Immediate and direct" consequences

7. In addition to the foreseeability test of art.1150, FRENCH, BELGIAN and LUXEMBOURG CCs art. 1151 provides that liability for damages is limited to losses which are the "immediate and direct" consequences of the non-performance. It has been questioned whether this additional test adds anything to the foreseeability test, see *Treitel*, Remedies §§ 140 and 141. In Belgium it is held to add nothing, Cass. 24 June 1977, Pas. 1087. On ITALIAN law see *Visintini*, Trattato breve della responsabilità civile. Fatti illeciti. Indampimento. Danno risarcibile, 699 ff; *Franzoni*, Trattato della responsabilità civile. Il danno risarcibile, 18 ff; *Monateri*, Le fonti delle obbligazioni. La responsabilità civile, 144 ff. In SPANISH CC art. 1107: although the distinction between foreseeability and “directness” of the damages is expressly laid down in the legal provision, case law has not evolved any consequences from it.

III. The principle of "adequate causation"

8. GERMAN law has rejected the foreseeability test and applies instead the theory of "adequate causation". The loss must have been caused by the non-performance and only such kinds of loss as occur in the ordinary course of things are recoverable. However, if there is causation the principle will make the defaulting party liable if the

default appreciably increased the possibility of the loss that in fact occurred. In determining whether this was the case the court will apply the standard of an experienced observer at the time of the non-performance.

9. The rule puts the creditor in a better position than under the foreseeability test, as the experienced observer may foresee more than a reasonable person would have at the time the contract was made. The German rule must be seen in the light of the fault principle governing German contract law. On German law, *Faust*, Die Vorhersehbarkeit des Schadens gemäß Art. 74 Satz 2 UN-Kaufrecht, 1996 and *Schlechtriem*, ROW 1988, 505 et seq.

10. GREEK and (*semble*) PORTUGUESE laws seem to follow German law. See on Greek law *Ligeropoulos*, Pref. to arts. 297-300 nos. 44-46a, 49-50, 53 and *Stathopoulos* in Georgiadis and Stathopoulos, arts. 297-298 nos. 51-56; on PORTUGUESE law, *Varela* I. Also 898 ff. AUSTRIAN law applies the test of adequate causation esp. with losses incurred with third parties (see *Koziol/Welser* II, 13th ed., 311 *Koziol*, 140); SLOVAK law (CC § 441) and SWEDISH law (see *Rodhe*, Obligationsrätt 121) also resemble German law. FINNISH law also uses "adequate causation" but in practice elements of foreseeability appear, see *Taxell*, Skadestånd 178 and *Hemmo*. SWEDISH and FINNISH laws are also similar to English Law, even if the basis is derived from the principle of adequate causation, see *Herre*, Ersättningar, 321.

11. POLISH law applies the concept of "normal consequences" (CC art. 361 § 1), which corresponds to the rule of "adequate causation". The debtor is liable for damages resulting from normal consequences of the non-performance, irrespective of the foreseeability of the damage caused to the creditor.

11. The ESTONIAN LOA § 127(2) excludes compensation to the extent that prevention of damage was not the purpose of the obligation or provision due to the non-performance of which the compensation obligation arose (*Schutzzwecktheorie* known in German dogmatics, see also *Varul et al (-Sein)* § 127 no. 2). LOA § 127(4) additionally prescribes that a person shall compensate for damage only if the circumstances on which the liability of the person is based and the damage caused are related in such a manner that the damage is a consequence of the circumstances (causation).

IV. "Imputability"

12. DUTCH law applies an imputability test, see CC art. 6:98. Damages can only be recovered for loss which is related to the event which made the debtor liable in such a way that the loss, having regard to its kind and that of the liability, can be imputed to the debtor as a consequence of the event.

V. Intentional non-performance

13. In FRENCH, BELGIAN and ITALIAN law the foreseeability requirement - but not the "directness" requirement - is excluded in case of intentional non-performance (*dol - dolo*), see French and Belgian CCs arts. 1150 and 1151 and Italian CC art. 1225. In French law gross negligence is regarded as *dol*; case law also excludes the foreseeability requirement when there is a "faute lourde". On the contrary Italian case law holds that a grossly negligent non-performance cannot be considered equivalent to an intentional non-performance (Cass. 9 February 1956, no. 399 in Rep. Gen. Giur. It. 1956 and Cass. 10 December 1956, no. 4398 in Rep. Gen. Giur. It. 1956). In the same more restrictive sense is BELGIAN case law, see Cass. 18 May 1987, R.W. 1988-89, 1124. SPANISH CC art. 1107(2) is similar to French CC art. 1150 (see *Pantaléon*, (ADC 1991) 1019-1091 and (1993) 1719-1745). Similarly to the Article, the

foreseeability requirement is excluded in case damage is caused intentionally or due to gross negligence under ESTONIAN LOA § 127(3).

14. Under AUSTRIAN law the degree of fault affects the extent of damage to be recovered, since loss of profit is only compensated in the case of gross negligence and intentional wrongdoing, as well as the method of computation (whether based on objective or on subjective criteria).

15. In POLISH law intentional non-performance by itself does not influence the computation method or the scope of liability. The debtor's intentional non-performance may lead to liability even for damages which are not "normal consequences" of the non-performance (compare CC art. 361 § 1) only where the debtor's actions or omissions were taken in order to harm the aggrieved party (*cum animo nocendi*). The requirement of "non-performance *cum animo nocendi*" goes further than the French notion of "*l'inexécution dolosive*".

16. The degree of the debtor's fault is not taken into account as a general rule for the purpose of awarding damages in ENGLAND, GERMANY, IRELAND or SCOTLAND, see *Treitel*, Remedies, §§ 123-126; *McBryde*, para. 22.95.

VI. Certainty

17. The systems generally require a sufficient degree of "certainty" of loss in order to award damages, but this is not to be taken literally. In BELGIUM, ENGLAND, FRANCE, GERMANY and SCOTLAND the courts have awarded damages for loss of future profit, which is not always "certain" (for Belgium: *Ronse*, Schade en schadeloosstelling, no. 104.1). Damages for the loss of a chance, e.g. to win a beauty contest, have also been awarded, see the English case of *Chaplin v. Hicks* [1911] 2 KB 786 and, on SCOTTISH law, *Hogg* and *McBryde*, paras. 22.78-22.79. See for Belgium Cass. 5 June 2008, stating expressly that the loss of chance is in itself a damage in proportion to the chance that the damage would not have been caused without the non-performance, thus in fact accepting proportional causality (although formulated in terms of damage instead of causality). The GREEK CC art. 298 sentence 2 provides for the recovery of lost profit which probably could have been made in the ordinary course of events or according to the special circumstances.

18. Under ITALIAN law CC art. 1226 provides that if the damages cannot be proved precisely, they are awarded by the judge on an equitable basis (see *Gazzoni*, Manuale di diritto privato, 641 ff and *Bianca*, La responsabilità, 165 ff).

19. Under POLISH law the courts require a "reasonable degree of certainty" or "sufficient degree of probability" – see Supreme Court's judgments of October 3rd 1979 (SN 3.10.1979 r., OSNIC 1980, No 9, text 164), of November 11th 1977 (SN 11.11.1977 r., OSNIC 1978, No 9, text 161).

20. See generally *Treitel*, Remedies, Chapter IV.

III.–3:704: Loss attributable to creditor

The debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects.

COMMENTS

A. Loss caused by unreasonable action or inaction

This Article embodies the principle that a creditor should not recover damages to the extent that the loss is caused by the creditor's own unreasonable behaviour. It embraces two distinct situations. The first is where the creditor's conduct was a partial cause of the non-performance; the second, where the creditor's conduct, though not in any way responsible for the non-performance itself, exacerbated its loss-producing effects. A third situation, where the loss resulting from the non-performance could have been reduced or extinguished by appropriate steps in mitigation, is covered by the next Article.

B. Conduct contributing to the non-performance

To the extent that the creditor contributed to the non-performance by act or omission the creditor cannot recover the resulting loss. This may be regarded as a particular application of the general rule set out in III.–3:101 (Remedies available) paragraph (3).

Illustration 1
B orders a computer system from S which is to be specially designed to allow B to send to prospective property buyers details of houses coming on to the market which appear to meet their requirements. The computer system fails to operate properly, due partly to a design defect and partly to the fact that B's instructions to S were incomplete. B's loss is irrecoverable to the extent that it results from B's own inadequate instructions.

C. Conduct contributing to the loss-producing effects of non-performance

Where the creditor, though not in any way responsible for the non-performance, exacerbates its adverse effects damages cannot be recovered for the additional loss which results.

Illustration 2
A leases a computer which under the terms of the contract is to be ready for use in England where the voltage is 240v. The computer supplied is capable of operating on various voltages and, contrary to the terms of the contract, is actually set for 110v. A prominent sign pasted on the screen warns the user to check the voltage setting before use. A ignores this and switches on without checking. The computer is extensively damaged and repairs will cost A £1,500. The court may take the view that the loss was at least half A's fault and award only £750 damages.

NOTES

1. See the Notes to the following Article.

III.–3:705: Reduction of loss

(1) The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps.

(2) The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.

COMMENTS

A. Failure to mitigate loss

Even where the creditor has not contributed either to the non-performance or to its effects, the creditor cannot recover for loss which would have been avoided if the creditor had taken reasonable steps to do so. The failure to mitigate loss may arise either because the creditor incurs unnecessary or unreasonable expenditure or because the creditor fails to take reasonable steps which would result in reduction of loss or in offsetting gains.

Illustration 1
B buys an old car from S for €750. S warrants that the car is in good running order. B discovers that it will cost €1,500 to put the car into good running order, and has this work done although similar cars in good condition are available for €800. B's damages will be limited to €800; the extra amount represents an expenditure which was quite disproportionate to the value of the car as repaired (The result might be different if there were some good reason for B to have repairs done, e.g., the car was unique in that it had once belonged to General de Gaulle).

Illustration 2
C hires a camper van for a holiday in Portugal. When C comes to collect the camper van, the car hire company says that it has made a mistake in bookings and no van is available from it, but it has managed to find another company which has a van available at a higher price. Even if C unreasonably ignores this and abandons the holiday, damages should be limited to the loss which would have been suffered if C had acted reasonably in taking the substitute van, namely the difference in cost between the vans and compensation for inconvenience in having to collect the replacement.

The creditor will not necessarily be expected to take steps to mitigate the loss immediately on learning of the debtor’s non-performance; the outcome will depend on whether the creditor’s actions are reasonable in the circumstances.

Illustration 3
O engages B, a builder, to come within 24 hours to repair the roof of O's house, which is leaking and causing damage. B does not come within the 24 hours but assures O that the work will be done the next day. It is reasonable for O to wait until the day after before calling in another builder, and O may claim damages resulting from this period of delay; but it may not be reasonable to wait any longer and if O does so O may not recover damages for the resulting additional loss.

The creditor is only expected to take action which is reasonable, or to refrain from action which is unreasonable, in the circumstances. The creditor need not, for example, act in a disreputable way just to reduce the debtor's liability.

Illustration 4
D buys goods from E in order to resell them to F. The goods supplied by E are not of proper quality. Although under the terms of its contract with F, D could require F to take the goods without a price reduction, this would be unreasonable in the light of their long-standing business relationship and D gives F a reduction of price. D may recover the amount by which it reduced the price as damages from E.

The principle applies also when there is anticipated non-performance, e.g., when the debtor has announced that the obligation will not be performed when the time comes. The creditor should not incur further expenditure needlessly and should take steps to reduce the loss.

Illustration 5
K contracts to build a yacht to L's special design. L has a sudden change of mind and repudiates the contract. If K has done little work on the yacht and would not be able to find a ready buyer for such a unique design of boat, it is reasonable to expect K to stop work; K may recover the cost of the work done to date and the loss of anticipated profit. If, on the other hand, K has done most of the work and can find another buyer at a reasonable price, then K may be expected to complete the boat and resell it. K will be entitled to damages of the difference between the original contract price and the resale price, plus the incidental costs of arranging the resale.

C. Expenses incurred in mitigating loss

Frequently the creditor will have to incur some further expenditure in order to mitigate the loss. This incidental expenditure is also recoverable provided it is reasonable.

Illustration 6
X agrees to buy Y's chalet, which Y had advertised widely. Later X repudiates the contract. Y decides to make a cover transaction. In order to resell the house she has to advertise it again. She is entitled to the reasonable cost of the further advertising as well as to the difference between the price X had agreed to pay and the price for which the chalet was ultimately sold.

D. Reasonable attempts to mitigate which in fact increase the loss

Sometimes a party may take what at the time appears to be a reasonable step to reduce the loss but in fact increases it. The full loss suffered is recoverable.

Illustration 7
G enters a long term supply contract to buy oil from H; deliveries are to commence in six months' time. Three months later oil prices rise rapidly because of a threatened war in the Gulf and H repudiates the contract. G quickly terminates and enters a substitute contract with J at the price then being quoted for delivery three months later. By the time the date for delivery comes the threat of war has receded and G could have bought the oil for the original contract price. G acted reasonably in entering the substitute contract and is entitled to damages based on the difference between the original contract price and the price paid to J.

E. Loss reduced by steps going beyond what could reasonably be expected

Sometimes a creditor will take a step which reduces the loss but which goes beyond what could reasonably be expected. The reduction in loss will still be taken into account, as the creditor is entitled only to damages for actual loss.

NOTES

Notes to this and preceding Article.

I. Loss caused by creditor

(a) Different treatment of loss caused by creditor and "mitigation"

1. Some legal systems treat the creditor's contributory negligence and "duty" to mitigate loss differently. FRENCH cases, which mostly have dealt with non-contractual liability, have admitted that in contracts also contributory negligence by the creditor may reduce the claim for damages. The creditor's act will constitute a cause of exoneration even if it does not constitute *force majeure*: Civ.1, 31 January 1973, D.1973.149, note Schmelk; see *Malaurie and Aynès,* Obligations, no. 833. French law does not know mitigation as such, but some similar results may be obtained by the application of the general rule about fault. See Cass.civ. 1, 29 April 1981, JCP 1982, 19730 where damages were reduced, as it was a "fault" of the creditor not to avoid loss due to the negligent non-performance of the debtor, and Paris, 7 January 1924 DP 24.1.143 where the court would not permit the creditor to let the loss grow without notifying the debtor so that the supply of defective goods could be stopped. See also on leases CC art. 1760. Such a result could also be obtained on the basis of the obligation, for both parties, to perform the contract in good faith (*Malaurie, Aynès,* Stoffel-Munck, no. 963). However, French law is reluctant to impose duties on the creditor. The position is similar in POLISH law, where there is no provision on the creditor's duty to mitigate the loss. According to the general provision of CC art. 362, if the person who sustained a loss contributed towards the occurrence or the extent of the loss, the damages that can be claimed are subject to reduction. This rule is applied in contract law when the creditor contributed towards the loss caused by the debtor's non-performance (see Supreme Court's judgment of November 28th 1974 (SN 28 November 1974, OSNCP 1975, text 133): however there is no general legal duty to mitigate the loss. On SPANISH law, Supreme Court 1960, 15 November 1994 (see *Bercovitz,* CCJC 1995 § 550; and *Díez Picazo*, II, § 89) and TS 28 January 2000, CCJC 53, *Fernández* [también Oliva Blázquez, RdP 5/2000, pp. 203-220].TS 28 January 2000, RAJ 2000/454. On DANISH law see *Gomard,* Obligationsret II, 177 (duty to mitigate) and 178 (contributory negligence). In SLOVAK law the general provision of CC § 441 applies - if the damage was caused partly by the intention or negligence of the injured party, the injured party must bear a proportionate share; if the damage was caused exclusively by the injured party's intention or negligence, the injured party must bear the loss.
2. In ENGLISH law "contributory negligence" will generally either be no defence to a claim in contract or, on the theory that the loss was not caused by the breach, will lead to no compensation at all. However, a reduction of damages may be allowed in certain cases where the debtor was under a concurrent duty of care in tort and the plaintiff also

failed to act carefully, see *Treitel*, Contract, 20-105–20-112. The creditor's failure to mitigate may lead to a reduction of the damages: *ibid.*, 881-886. The same rule is laid down in CISG art. 77. Furthermore, CISG art. 80 provides that a party may not rely on the failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission. It has been convincingly argued that this rule may be extended by way of the interpretation by analogy rule provided in art. 7(2) so as to allow reduction of damages in case of the creditor's "contribution" to the non-performance, see Bianca and Bonell (-*Tallon*), art. 80 note 2.5 p. 598, but see v. Caemmerer and Schlechtriem (-*Stoll*), 677.

3. In SCOTTISH law, mitigation is recognised as a general principle (*McBryde*, paras. 22.37-22.55), but the creditor's contributory negligence may only be pleaded in breach of contract cases when the breach itself consists in the other party's actionable negligence (whether in contract or delict): *McBryde*, paras. 22.32-22.36; *MacQueen & Thomson*, paras. 6.42-6.44; Law Reform (Contributory Negligence) Act 1945, ss. 1, 4 and 5 (application to Scotland). In IRELAND there is a duty to mitigate the loss, as in England. Furthermore, Civil Liability Act 1961 ss. 2 and 34(1) allow the court to reduce the damages by reason of the defendant's contributory negligence. Similarly in CZECH commercial law, a duty to prevent or mitigate the loss is treated separately from contributory negligence (see Ccom arts. 384 and 376).

(b) Contributory negligence and "duty" to mitigate loss treated alike.

4. Several systems treat the creditor's contributory negligence and "duty" to mitigate the loss on an equal footing. Contributory negligence and failure to mitigate may lead the court to reduce or to disallow the claim for damages. This is the position in GERMANY, see CC § 254(1) dealing with contributory negligence and § 254(2) with the failure to mitigate the loss. For similar regulation in ESTONIAN law, see LOA § 139(1)-(2). The ITALIAN CC has similar provisions in art. 1227(1) treating contributory negligence and in art. 1227(2) dealing with avoidance of loss, see *Gorla*, which in recent decisions has been extended to cover mitigation of loss: see e.g. Cass. 3 March 1983, no. 1594 in Giust. civ., 1984, I c. 3156. See also AUSTRIAN CC § 1304 and GREEK CC art. 300, covering both contribution to the damage and mitigation of damage, CZECH Civil law (CC §§ 417 and 441) and DUTCH CC art. 6:101; *Asser-Hartkamp*, Verbintenissenrecht nos. 448 ff, 453. The same is the position in the SLOVENIAN LOA § 243(4). Contributory negligence is treated in the PORTUGUESE CC art. 570 and the "duty" to mitigate may be imposed upon the creditor by way of an analogy of CC art. 570, or under the rule on abuse of right. In BELGIAN law mitigation is treated as a sub-species of contributory negligence, Cass. 14 May 1992; *Ronse* no. 460 ff; *Kruithof*, RCJB 1989, 12 ff. It is mentioned as a separate duty only in the Insurance Contracts Act of 25 June 1992, art. 20. The SPANISH CC has no express provision on this topic. However, doctrine seems to consider mitigation as a sub-species of contributory negligence or *mora creditoris*, *Díez-Picazo* 733 ff. Recent SPAINSH court decisions support this point of view (TS 14 May 2003, RAJ (2003), 4749; TS 23 May 2005 RAJ (2005) 6364; in fact, the duty to mitigate has become in Spanish case Law the most important application of the "foreseeability" doctrine. In FINLAND SGA § 70 provides an express duty to mitigate the loss. This is seen as connected to the general principle of contributory negligence, *Sevón, Wilhelmsson and Koskelo*, 94.

II. Expenses incurred

5. The legal systems allow the creditor to recover expenses reasonably incurred in attempts to avoid or mitigate the loss. In the CZECH REPUBLIC, reasonable expenses

can be reimbursed and only to the extent of the total sum of the averted damage (CC § 419). The reimbursement can never overrun it (see *Jehlička, Švestka, Škárová*, p. 492). In some other countries expenses are to be reimbursed even if they increased the total loss, provided they were reasonable. This is the law in AUSTRIA, see e.g. Ehrenzweig (-*Mayrhofer*), 309; BELGIUM, see esp. Insurance Contracts Act of 25 June 1992 art. 52; DENMARK, see *Nørager-Nielsen*, 410; ITALY, Cass. 28 April 1988, no. 3209, Archivio civile 1988, 1054, *Cian and Trabucchi*, art. 1227, 964; GERMANY, BGH 15 November 1978, BGHZ 70, 39 and BGH 1 April 1993, BGHZ 122, 172, 179; ENGLAND, *McGregor*, Damages §§; SCOTLAND, *McBryde*, para. 22.44; the NETHERLANDS, CC art. 6:96(2)(a); ESTONIA, LOA § 128(3); SWEDEN, see *Ramberg*, Köplagen 649 ff. In GREECE the rule is based upon the rule on adequate causation in CC art. 300, or on the benevolent intervention rule in CC art. 736, and in PORTUGAL on the rule in CC art. 566(2) on full compensation. The right to recover expenses incurred is implicit in CISG art. 77, see also art. 74.

6. See generally *Treitel*, Remedies, §§ 145 ff.

III.–3:706: Substitute transaction

A creditor who has terminated a contractual relationship in whole or in part under Section 5 and has made a substitute transaction within a reasonable time and in a reasonable manner may , in so far as entitled to damages, recover the difference between the value of what would have been payable under the terminated relationship and the value of what is payable under the substitute transaction, as well as damages for any further loss.

COMMENTS

A. Cover transactions

It is often appropriate to measure the creditor's loss by the cost of procuring a substitute performance. Where the creditor has terminated for fundamental non-performance and has made a reasonable cover transaction, this Article provides that the difference between the value of the terminated relationship and the value of the substitute transaction is recoverable. In many cases the comparison will be a simple comparison between prices. The debtor may also be liable for any further loss which the creditor has suffered, e.g. the cost of arranging a cover transaction.

> *Illustration 1*
> O agrees to allow H the use of its art gallery for an exhibition at a fee of €1,000. Shortly before the exhibition is to take place O informs H that the gallery will not after all be available. H terminates and succeeds in obtaining the use of a nearby gallery of similar size and quality for a fee of €1,500. H is entitled to damages of €500 representing the amount by which the cost of the cover transaction exceeds the contract price, as well as damages for any reasonable expenses (e.g. changing the address on leaflets and posters).

The rule is not, however, stated in terms of a simple comparison of prices. This could lead to misunderstandings in contracts of some duration like lease contracts. Rent may be agreed as an amount per day, per month etc., while the lease period may be much longer or indefinite. Rent may be payable in advance or in arrears. A mere comparison of the agreed rent under the two contracts will not directly indicate the loss suffered by termination of the contractual relationship and its replacement by a substitute relationship. What must be compared are the values of what would have been payable under the terminated relationship and the value of what is payable under the substitute transaction. The values would normally have to be calculated as at the time of the substitute transaction. They would normally be established by means of a cash flow analysis.

The use of value rather than raw price enables comparisons to be made between different types of contract. For example, a substitute transaction resulting from termination for fundamental non-performance of the lessor’s obligations under a contract for lease is not always a new lease contract. In the circumstances it may be necessary, or at least more practical and reasonable, to buy goods serving the same purposes as those for which the leased goods were intended. The value of what would have been payable under the lease contract must be compared with the value of what is payable under the sales contract (in practice a comparison of net present values of costs if the expected income is unchanged).

The rule applies both where the party terminating the relationship is the paying party (e.g. a buyer or lessee who has to pay more to get equivalent goods) and where the terminating party is the party receiving payment (e.g. a seller or lessor who has to accept a lower amount from a new buyer or lessee).

B. Alternative transaction must be a reasonable substitute

The creditor cannot recover the difference between what was due under the terminated relationship and what is due under the alternative transaction if the alternative transaction is so different from the original transaction in value or kind as not to be a reasonable substitute.

Illustration 2
O supplies a small car on hire to H for three weeks at a rent of €1000 a week. The car breaks down at the end of the first week while H is on holiday, and as no other small car is available H terminates the contractual relationship with O and hires a large luxury car from another firm for the remaining two weeks at a rent of €5000 a week. H's damages for extra rental charges will be restricted to the additional cost, if any, of hiring the nearest available equivalent of the original car in size and value.

C. Creditor must be entitled to damages

This Article is not intended to provide an independent ground of liability which overrides the normal rules on damages. If the creditor is not entitled to damages, or is entitled to only restricted damages because for example of a contractual limitation on the amount recoverable, then these restrictions cannot be avoided simply by making a cover transaction.

Illustration 3
A contract provides that on termination by either party for any reason the other will not be liable for any loss caused by non-performance of obligations falling due for performance after the time when termination takes effect. This provision cannot be avoided simply by the making of a cover transaction.

NOTES

1. The assessment of damages on the basis of a cover transaction is possible in all the legal systems; however, in some of them it is subject to restrictions.
2. A general rule on cover transactions is found in the FRENCH, BELGIAN and LUXEMBOURG CCs art. 1144 on the creditor's *faculté de remplacement*. This in principle must be ordered by the court but French usages have allowed creditors to do it by themselves in commercial transactions. Belgian case law has accepted the same even in non-commercial cases provided the non-performance was sufficiently fundamental (*van Ommeslaghe*, R.C.J.B. 1986, nos. 98-100). In the other legal systems, where the cover transaction is a "self help" remedy, the rules are found in provisions on sales, see DANISH SGA §§ 25, 30(2) and 45; FINNISH and SWEDISH SGAs § 68; GERMAN BGH 15 November 1978, BGHZ 70, 39 and BGH 1 April 1993, BGHZ 122, 172, 179; Ccom § 376(3) and AUSTRIAN Ccom § 376(3) sent. 2 (applicable to commercial sales but extended in practice, which is, however, not undisputed in AUSTRIA, see *Ch. Rabl*, Schadenersatz wegen Nichterfüllung, 87 s); the DUTCH CC art. 7:37; and ITALIAN CC arts. 1515 and 1516. CISG art. 75 is similar to the Article and so are GREEK and SPANISH case law: see respectively

A.P. 1137/1990, EEN 58 (1991) 444-445 and TS 27 October 1992, RAJ (1992) 8363; TS 14 May 2003, RAJ (2003) 4749 and *Carrasco*, Comentario, 694 ff. The ESTONIAN LOA § 135(1), as a general provision does not limit, similarly to the Article, the possibility to recover the difference between the contract price and the price of the substitute transaction as well as damages for further loss for contracts of sale. In CZECH law the substitute-transaction rule can be found only in the Ccom (art. 385 generally and art. 469 specifically in the context of the sale of goods). Within the scope of the CC any conclusions on the question have to be deduced from the general prevention duty, but there is no particular experience yet).

3. The POLISH CC art. 479 provides that in contracts with performance defined only generically the creditor may – in case of the debtor‘s unexcused delay – purchase the same amount of goods of the same type and quality at the debtor’s expense or may demand from the debtor the payment of their value. In both the above cases entering a “cover transaction” does not affect the creditor’s claim for damages. For obligations consisting in actions or omissions (not in delivery of goods) – see CC art. 480 (generally court authorization required for substitute performance at the debtor’s expense, except urgent cases - § 3).

4. The DUTCH CC, ESTONIAN LOA, BELGIAN case law, the FINNISH and SWEDISH SGAs and CISG require that the transaction is a reasonable one. The DANISH, GERMAN and ITALIAN provisions contain procedural rules; in Italy these have restricted the use of the cover transactions, see Cass., 14 July 1956, no. 2670 and 18 June 1957, no. 2313 in Mass.Foro.It. 1956 and 1957. In SLOVENIAN law a rule on cover purchase is developed from the rule on the duty to mitigate in the LOA § 243(4).

5. ENGLISH law does not specifically adopt the "cover price" as a means of measuring the damages. However, where there is no market for the performance, and a current price cannot be established English courts will treat the cover price as a strong evidence of the amount of loss, see *Beale*, Remedies 196-197. SCOTTISH law is similar see: *McBryde*, paras. 22.107-22.110. SLOVAK law also does not adopt the cover price as a means of measuring the damages.

6. See generally, *Treitel*, Remedies, §§ 102 ff; *Honnold*, §§ 409-415.

III.–3:707: Current price

Where the creditor has terminated a contractual relationship in whole or in part under Section 5 and has not made a substitute transaction but there is a current price for the performance, the creditor may, in so far as entitled to damages, recover the difference between the contract price and the price current at the time of termination as well as damages for any further loss.

COMMENTS

Damages measured by current price

In so far as the cost of substitute performance fairly measures the shortfall in the value of the debtor's performance it is recoverable as such whether or not the creditor actually incurs the expenditure.

> *Illustration*
> S agrees to sell 50 tons of coffee to company B at €1,800 a ton for delivery on 1st July. S fails to deliver the coffee. In the circumstances this is a fundamental non-performance. B terminates. The market price on 1st July is €2,000 a ton. B is entitled to damages of €10,000 (i.e. 50 x 200 = 10,000) even if it does not make a substitute purchase on the market.

Again, as in the preceding Article, it should be noted that this rule presupposes that the creditor is entitled to damages. It is a way of quantifying damages, not an independent ground of liability.

This Article represents a commonly accepted principle, although the formulations sometimes differ as to the date by reference to which the current price should be calculated

NOTES

I. Current price as a measure of loss

1. This "abstract" way of assessing the amount of loss is used in all the legal systems. The relevant provisions are mostly found in the provisions on sales, see DANISH Sales Act §§ 25, 30(1) and 45; DUTCH CC art. 7:36; FINNISH and SWEDISH SGAs § 69; GERMAN Ccom § 376(2) (as to the discussions on the question of generalising this rule see MünchKomm (-*Emmerich*) BGB[5], Pref. to § 281 no. 46 et seq.; normally only a business but not a consumer may calculate damages on an “abstract” basis, the main exceptions are cases of damaged cars); and AUSTRIAN Ccom § 376(1) as well as AUSTRIAN CC § 1332(2); ITALIAN CC art. 1518; U.K. Sale of Goods Act 1979 s. 50(3), (for SCOTLAND see *McBryde*, paras. 22.108-22.110); and s. 51(3); CZECH REPUBLIC Ccom art. 470; and in IRELAND see *Forde*, § 1.207. A provision similar to the Article is found in CISG art. 76. Similar, but not limited to contracts of sale, is the ESTONIAN LOA § 139(2).
2. Though not provided in the legislation, the assessment of damages on the basis of the current price is admitted in FRANCE, BELGIUM, SLOVAKIA and in the NETHERLANDS, where it is covered by the general clause in CC art. 6:97 under which the court evaluates the damages in the manner best corresponding to its nature.

The assessment is also admitted in SPAIN (TS 27 March 1974, 30 January 1976, 31 March 1977, 14 November 1977, 28 February 1978; see (*Vicent Chuliá,* II, 106; see also *Díez Picazo,* II, 683-684 and *Carrasco,* Comentario, 670) and in GREECE with respect to commercial transactions, *Ligeropoulos*, in Erm.AK II/1, art. 298 nos. 23-29, 83-86 (1949). Under POLISH law there is a rule of a "concrete" (not "abstract") assessment of damages, which should correspond to the loss actually suffered by the creditor. Still, there is a possibility of adopting current prices as a basis for the computation of damages in these cases, where this kind of "abstract" assessment reflects the creditor's actual loss and in those where the assessment of the loss actually suffered would be impossible or would meet excessive difficulties.

II. Time of assessment

3. In CISG art. 76 and the FINNISH and SWEDISH SGA, the ESTONIAN LOA and the CZECH Ccom the current price is generally that at the time of termination. In several other laws it is, however, the price at the time when performance was due, see UNITED KINGDOM SGA s. 51(3); IRELAND, see *Forde* § 1.206; ITALIAN CC art. 1518; GERMAN and AUSTRIAN Ccom § 376(2) and AUSTRIAN UGB § 376(1); DANISH Sales Act § 25; and SPANISH Ccom arts. 329, 363 and 371 (see *Vicent Chuliá,* II, 106). The AUSTRIAN CC § 1332, however, talks of the value at the time when the loss occurs.

III.–3:708: Interest on late payments

(1) If payment of a sum of money is delayed, whether or not the non-performance is excused, the creditor is entitled to interest on that sum from the time when payment is due to the time of payment at the average commercial bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place where payment is due.

(2) The creditor may in addition recover damages for any further loss.

COMMENTS

A. Purposes

This Article provides for interest and damages on failure to pay money by the date at which payment is due. This is the result reached in the laws of the Member States, though there are significant differences in detail.

B. Interest

Paragraph (1) confers a general right to interest when payment of a sum of money is delayed. The question of interest on interest, or capitalisation of interest, is dealt with in the next Article and so, by implication, is not covered here.

Interest is not a species of ordinary damages. Therefore the general rules on damages do not apply. Interest is owed whether or not non-payment is excused. Also, the creditor is entitled to it without regard to any question whether the creditor has taken reasonable steps to mitigate the loss.

The rate of interest is fixed by reference to the average commercial bank short-term lending rate. This rate applies also in the case of a long delay of payment since the creditor at the due date cannot know how long the debtor will delay payment. Since interest rates differ, the lending rate for the currency of payment (III.–2:109 (Currency of payment)) at the due place of payment (III.–2:101 (Place of performance)) has been selected because this is the best yardstick for assessing the creditor's loss. Unless otherwise agreed, interest is to be paid in the same currency and at the same place as the principal sum. The parties are free to exclude or modify paragraph (1) e.g. by fixing the rate of default interest and/or its currency in their contract.

C. Additional damages

Paragraph (2) makes it clear that the creditor's remedy for non-payment or delay in payment is not limited to interest. It extends to additional and other loss recoverable within the limits laid down by the general provisions on damages. This might include, for example, loss of profit on a transaction which the creditor would have concluded with a third party had the money been paid when due; a fall in the internal value of the money, through inflation, between the due date and the actual date of payment, so far as this fall is not compensated by interest under paragraph (1); and, where the money of payment is not the money of account, loss on exchange. However, in this last case the creditor has the option of proceeding instead under III.–2:109 (Currency of payment) paragraph (3).

Illustration 1
A agrees to pay B €50,000 if B will vacate A's property and find alternative accommodation. B moves out of the property but A fails to pay the agreed sum. In consequence B, who as A knew intended to use the payment to buy a house from C, has to negotiate with C to leave part of the purchase price outstanding on mortgage at interest. B is entitled to sue A for the interest and legal costs reasonably incurred.

Illustration 2
C agrees to lend €200,000 to D to enable D to purchase a business at a price equal to that sum from E. Under the contract of sale, the terms of which are known to C, time of payment is fundamental and any delay entitles E to terminate. At the last moment C refuses to advance the money and D is unable to obtain alternative funds in time. E terminates and sells his business to F for €300,000, its true value. D is entitled to damages from C for the loss of the contractual rights.

Illustration 3
S in London agrees to sell goods to B in Hamburg at a price of US$ 100,000 payable in London 28 days after shipment. The goods are duly shipped to B, who is three months late in paying the price. During this period the value of the US dollar in relation to the pound sterling (the currency in which S normally conducts his business) depreciates by 20 per cent. Assuming that these consequences of delay in payment could reasonably have been foreseen by B at the time of the contract, S is entitled to recover US$ 20,000 damages from B, in addition to interest, for the loss on exchange.

NOTES

I. Duty to pay interest

1. A statutory duty to pay interest exists under several international conventions and in all continental European countries; for references see note 2 below. CISG also recognizes this obligation (arts. 78, 84(1)). Contrary to all other conventions and statutes, CISG does not, however, fix a rate of interest because it proved impossible to agree upon a standard: the discount rate was thought to be inappropriate for measuring credit costs; nor could agreement be reached on whether the credit costs in the seller's or the buyer's country were to be selected. See however UNIDROIT art. 7.4.9. For commercial relationships and public procurement contracts the Late Payment Directive 2000/35/EC provides for a claim for interest on a high and flexible rate in cases of late payment, see Gebauer and Wiedmann (-*Schmidt-Kessel*), Zahlungszeit und Verzug, nos. 1 et seq. and no. 42.

2. ENGLISH law did not until recently impose, in general, a statutory or common law obligation to pay interest upon default or damages for the late payment of money (*President of India v. La Pintada Cia. Navegacion SA* [1985] AC 104 (HL)). These rules have been much criticised; before the *President of India* case the English *Law Commission* had proposed the introduction of statutory interest on contractual obligations to pay money (Report on Interest, No. 88, Cmnd 7229, 1978). The rule has recently been changed for commercial debts by the Late Payment of Commercial Debts (Interest) Act 1998; and in *Sempra Metals (formerly Metallgesellschaft Ltd) Ltd. v. IRC* [2007] UKHL 34; [2007] 3 WLR 354 the House of Lords has said that a creditor who suffers a foreseeable loss as the result of money being paid late is entitled to damages In any case, if proceedings have been commenced the court has a

discretion to award interest: Administration of Justice Act 1982, amending the Supreme Court Act 1981. The 1998 Act also applies in SCOTLAND (*McBryde*, paras. 22.131-22.135). SCOTTISH law in general allows damages for failure to pay money only where the debtor has knowledge of the special consequences of the failure (*McBryde*, paras. 22.133-22.137).

3. In IRELAND, although a court can order a contractual debtor to pay interest from the date of judgment, and a creditor who has served notice claiming interest on a defaulting debtor can have interest from the date of demand (Debtors (Ireland) Act 1840 s. 53), there is equally no general duty on a defaulting debtor to pay interest on the unpaid sum for the period of delay: see *Clark*, 467.

II. Normal rates

4. The rates of statutory interest and the methods of computing them vary considerably.

(a) Fixed rate

5. The traditional method is to fix a statutory rate; it varies between 10 and 2,5 percent.

4%: AUSTRIAN CC § 1000(1).

5%: GERMAN Ccom § 352(1) (but in case of delay in the sense of CC § 286 the higher flexible rate for delay applies);

2,5 %: ITALIAN CC arts. 1224(1), 1284 (as amended in 2003);

6%: the Geneva Conventions on Bills of Exchange of 1930 art. 48(2) and on Cheques of 1931 art. 45(1);

(b) Flexible rates

6. In recent years many countries have introduced flexible interest rates. The methods of determining the rate vary considerably. The Late Payment Directive (2000/35/EC) provides for a flexible minimum rate for commercial relationships and public procurement contracts, see art. 3(1)(d); this minimum rate is the sum of the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, plus at least seven percentage points, unless otherwise specified in the contract. For Member States which do not participate in the Euro, the reference rate is the equivalent rate set by its national central bank. In both cases, the minimum rates applies for six months respectively.

7. DENMARK adds 7% to the reference rate, to be fixed biannually by the Bank of Denmark as the official discount rate (Consolidated Law on Interests of 1 4 September, 2002 § 5) The Minister of Justice may increase but not decrease the 7% rate. In FINLAND the Act on interest, as amended 3 March 1995, prescribes different rates: if there is an agreed rate of interest on the debt, the interest for delay is 4% above the agreed interest rate, in other cases the interest for delay is 7% (in certain cases 4%) above an official reference rate determined by the Bank of Finland. SWEDEN adds 8% to the official discount rate and, when time for payment has not been fixed in advance, allows a grace period of 30 days after notice that interest will be charged. In FRANCE the rate is the arithmetical average of the last twelve monthly figures of the official discount rate (Law of 11 July 1975 art. 1, as am. by Law of 23 June 1989); two months after a judicial condemnation to pay, that rate is increased by 5% (Law of 11 July 1985 arts. 1-2). The GERMAN §§ 288(1), 247 fix the rate of 8% above the reference rate drawn from the European Central Bank refinance operations; in contracts, which have at least one consumer as a party the rate is 5% above the reference rate. Greek law distinguishes between interest by agreement and interest

imposed by law (legal interest). The most important instance of legal interest is default interest. The upper limit of both agreed interest and legal interest is determined by law (GREEK CC art. 293), and today, through delegation of the law, by the Council of Ministers. According to the Resolution 1/14.1.2000 of the Council of Ministers, the upper limit of the agreed interest is 5% above the rate of interest charged by the central bank for financing credit institutions against state funds given as pledge, while the upper limit of the legal interest is 2% above the upper limit of the agreed interest. Note also that, according to art. 3 § 2 of the law 2842/2000, references to interest rates defined by the Bank of Greece are replaced by rates defined by the European Central Bank. By application of the above, the rate of legal interest is fixed at the time of writing (October 2005) at 10% and that of the agreed interest at 8%. In ESTONIA the interest rate on late payments is 7% above the last interest rate applicable to the main refinancing operations of the European Central Bank before 1 January or 1 July of each year (LOA §§ 113(1), 94(1)). AUSTRIAN commercial law (UGB § 352) adds 8% to the basic lending rate. In SLOVENIA an interest rate for non-performance of monetary payments is 8% added to the ECB interest rate for the operations of main refinancing. In the second half of 2007 this represents a 12% interest rate for non-performance of monetary obligations. This is regulated by art. 1 of the Act on Prescribed Interest Rate. In the CZECH REPUBLIC legal interest in the case of civil delayed performance is fixed at double the official discount rate (CC § 517.2 and relating regulation, especially nař. vl. č. 142/1994 Sb., art. 1). For some special cases, such as lease of flats, a different legal daily penalty rate exists (0,25%, see CC § 697).

8. In other countries, the interest rate is fixed (and amended) annually by the government (LUXEMBOURG: Law 22 February 1984; the NETHERLANDS: CC art. 6:120; POLAND: CC art. 481 § 2, art. 359 § 3 – see Order of the Council of Ministers of January 4th 2005 on the Level of Statutory Rate (*Rozporządzenie RM z 04.01.2005 r. w sprawie określenia wysokości odsetek ustawowych*) § 1; PORTUGAL: CC art. 559(1), Ccom art. 102(2); SPAIN: CC art. 1108 and Law of 29 June 1984 arts. 1 and 2.) In BELGIUM an Act of 30 June 1970, as amended in 1986, allows the rate to be fixed by Royal Decree; it is now 7 %.

9. SLOVAK law distinguishes between two interest rates – a commercial interest rate in commercial relations and an interest rate in other legal relations. The commercial interest rate is fixed biannually at the official discount rate increased by 10% (Ccom art. 369(1)). There are two kinds of other interest rates (CC § 517(2)) – interest for delay and a penalty for delay (e.g. delay in paying the rent for a flat). Both of them are fixed by regulation of the Ministry of Justice (Regulation N. 87/1995 O.J.). The rate of interest for delay is fixed at double the official discount rate. The penalty for delay is 0,25% of the debt for every day of delay but at least 25 Slovak crowns for every month of delay.

III. Higher contractual rates

10. In some countries if there is a contractual interest rate that is higher than the statutory rate, the higher rate is applied to the time after default (AUSTRIAN CC § 1000(1) limited by the provisions on usury within the meaning of CC § 879(4) and others); DANISH law, see note 2(b) above, § 6; ITALIAN CC art. 1224(1) sentence 2; the NETHERLANDS: CC art. 6:119(3); GERMANY CC § 288(3); ESTONIAN LOA § 113(1) sentence 3; POLISH CC art. 481(2); PORTUGUESE CC art. 806(2)); SLOVAK Ccom art. 369(1); CZECH Commercial law, Ccom art. 369.1); GREEK Introductory law to the CC art. 109(1) sent. 3. SPANISH CC art. 1108; also see CCP art. 576 establishing higher, punitive rate; SWEDISH Interest Act § 1. In GERMANY, in contrast, the Federal Supreme Court has expressly refused to apply such a rule

because it might give a windfall profit to the creditor if the market rate is much lower at the time of default. A bank is merely entitled to the average market rate for its various types of credits and, if the bank cannot establish this, to the market rate for its cheapest type of credit (BGH 8 October 1991, BGHZ 115, 268, 269 f, 271 f). In SLOVENIA a contractual interest higher than the statutory rate may be agreed. However, this should not exceed the statutory rate by more then half (i.e. 18% instead of 12%). See LOA § 377.

IV. Loss in addition to interest

11. Loss in addition to interest may be claimed in most countries by virtue of the general rules on damages but lost profits and loss through inflation cannot always be recovered. See DENMARK (*Gomard*, Obligationsret II 190); FINLAND (*Wilhelmsson & Sevón* 156; *Aurejärvi & Hemmo* 82); FRENCH CC art. 1153(4); GERMAN CC § 288(4); GREEK CC art. 345 sent. 2; ESTONIAN LOA § 113(5), subject to claim for reduction of the amount of penalty interest, if grossly excessive (LOA §§ 113(8), 162); ITALIAN CC art. 1224(2), except if the parties had fixed the rate of interest for default in the contract, to which add case law establishing presumptive loss depending on the qualities and conditions of the creditor's economic category (Cass. Sez. Unite 5 April 1986, no. 2368 in Foro It. 1986, I, c. 1265; *Galgano*, Diritto civile e commerciale, I, 98 ff and *Trabucchi*, Istituzioni di diritto civile, 689 ff); SWEDEN (*Ramberg*, Köplagen 568); SPANISH law, TS 28 November 1983, 6 May 1988, (*Albaladejo* II, 1, § 33.3*)*. The possibility is not recognised in BELGIUM, see CC art. 1153, except for losses caused by devaluation of foreign currency. In CZECH law the principle is that the right of creditor to compensation for loss is not affected (CC § 517 and § 519) but compensation for loss can only be claimed if it is not covered by interest or legal penalty rate (CC § 519 in fine). This is another application of a general rule of *restitutio in integrum* (see notes above).

12. The AUSTRIAN CC § 1333 provides for virtually the same rule as the present Article. Additional loss can be claimed besides the interest. For the rate CC § 1333 refers to CC § 1000.

13. Under POLISH law further loss may be claimed according to the general rules on damages without any other limitations or conditions – CC art. 481 § 3.

14. Under SLOVAK law the creditor's right to compensation for damage caused by the debtor's default is not affected; however, in case of default with performance of a pecuniary debt, such compensation can be claimed only if it is not covered by the default interest or default charge (CC § 518).

15. Further loss may be recovered in ENGLAND (*Sempra Metals (formerly Metallgesellschaft Ltd) Ltd. v. IRC* [2007] UKHL 34; [2007] 3 WLR 354, supra note 2); in SCOTLAND (*McBryde*, para. 22.89) and in FRANCE (Civ. 1, 21 June 1989, Bull, I. no. 251); and the position is thought to be the same in IRELAND.

16. In contrast, additional damages may not be claimed in the NETHERLANDS (except in the special case mentioned in Notes on Article III.–2:109 (Currency of payment) paragraph (3); and in PORTUGAL (under CC art. 806(3) additional damages might be claimed only in case of a delict or strict liability).

17. Under ESTONIAN law, if the debtor is excused for non-performance, the interest for delay is only recoverable if the parties to the relationship are engaged in economic or professional activities (LOA § 105 sent. 2). Estonian law has opted for the solution, that a penalty for late payment may not be required for a delay in the payment of interest. Agreements which derogate from such requirement to the detriment of the debtor are void (LOA § 113(6)).

18. Under the HUNGARIAN CC § 301(1) in respect of a monetary debt, the debtor, unless otherwise provided by law, must pay an annual interest at the central bank base rate in effect on the last day preceding the calendar half-year to which it pertains, even if the debt is otherwise free of interest. The obligation to pay interest is effective even if the debtor's default is excused. Under CC § 301(2) if, on the basis of a legal regulation or contract, any interest is due to the creditor up to the date of default, the debtor, unless otherwise provided by law, is liable to pay additional interest as of the due date at a rate equal to one-third of the central bank base rate in effect on the last day preceding the calendar half-year to which it pertains, and the combined amount of these is no less than the interest specified in paragraph (1). Under CC § 301(3) the court may reduce the rate of the default interest if the interest fixed by parties is excessive. Under CC § 301(4) creditors are entitled to demand compensation for losses in excess of the default interest. Under CC § 301/A the provisions on interest for late payment apply to economic organisations with some exceptions. Interest for late payment is calculated by reference to the central bank base rate in effect on the last day preceding the calendar half-year to which it pertains, plus seven per cent.

19. See generally *Treitel*, Remedies, §§ 159-162.

III.–3:709: When interest to be added to capital

(1) Interest payable according to the preceding Article is added to the outstanding capital every 12 months.

(2) Paragraph (1) of this Article does not apply if the parties have provided for interest upon delay in payment.

COMMENTS

A. Notion

Simple interest (whether contractual or legal) does not affect the capital upon which it is calculated: the capital remains unaltered. If, however, a capitalisation of interest (or compound interest) has been agreed or is imposed by law or custom, the interest which has fallen due during the agreed period (rest period) and has remained unpaid, is added to the capital. Therefore, during the second rest period, since more capital is bearing interest, the amount of interest will increase, and so on.

Illustration 1
Bank B has extended to L a credit of €10,000 due to be repaid on 31 December 2000. No payment is made. If the parties had not agreed upon delay interest, Article 9:508(1) applies: it is assumed that the interest rate according to this provision is 10% per year. Consequently, on 1 January 2002, an unpaid delay interest of €1000 will be added to the capital of €10,000, increasing it to €11,000; and on 1 January 2003, an amount of €1100 will be added, increasing the capital to €12,100; etc.

B. Scope of application

The Article applies as a remedy for delayed payment of interest. But the capitalisation of interest may, of course, be agreed upon for contractual obligations in the absence of any question of delayed payment. An important example is the capitalisation of interest on positive or negative balances of a current account. Contractual arrangements of this type are not affected by the present rule.

In the laws of many Member States, compound interest is payable only when the parties have so agreed or in other limited circumstances. However it is generally acknowledged that when there has been a delay in the payment of money, an award of simple interest to the creditor will seldom be adequate compensation. The delay will normally cause the creditor a loss in one of two ways. If the creditor needs the money for other purposes, it will have to borrow to cover the temporary shortfall, and it will almost certainly have to pay compound rates to the lender. If it did not have an immediate need for the money, it would have been able to invest it at compound rates. Therefore it seems sensible to adopt a general rule that default interest may be compounded at an appropriate interval.

C. Justifications

The Article confers upon the creditor of an interest bearing monetary debt, after the debtor has failed to pay interest which has fallen due, a right to capitalisation of interest. This is justified by the fact that interest earned by the creditor of a monetary obligation is an asset. Delay in its payment deprives the creditor of a due benefit as much as delay in the payment of the capital itself. Moreover, delay in payment often has a highly detrimental effect upon creditors,

especially smaller business enterprises which may be driven into bankruptcy. There is therefore, both at Community level and in several member states, a clear tendency to provide a sanction for late payments. The capitalisation of interest is an effective sanction because of its gradually increasing effect.

D. Party agreement on delay interest

The Article provides, in accordance with general principle, that the general rule on the capitalisation of interest does not apply where the parties have agreed, explicitly or implicitly, upon the payment of delay interest. The fact that the parties have addressed themselves to the question of interest means that it is up to them to provide for capitalisation if they so wish.

Illustration 2
The parties agree on interest of 7 % p.a. "until payment". This clause covers both credit interest and delay interest. The capitalisation of the delay interest is excluded by the second sentence of the Article.

E. Computation of time

In order to determine the beginning of the rest period of twelve months, one has to look to the terms regulating the obligation to pay interest. Unless the parties have agreed upon that time, it must be determined according to applicable legal rules. Reference may be made to III.–2:102 (Time of performance) and to III.–3:708 (Interest on late payments). So far as other aspects of the computation of time are concerned reference may be made to the Annex.

F. Relation to damages

The obligation to pay interest upon delay in payment is functionally equivalent to an obligation to pay damages. The interest can be regarded as a form of abstract damages, although it is not ordinary damages. (See Comment B to the preceding Article.) The capitalisation of interest has the advantage of extending this remedy. Consequently, the scope of application of III.–3:708 (Interest on late payments) paragraph (2) (additional damages for loss caused by delay in payment of money, so far as not covered by interest) will be further narrowed since the creditor need not and cannot claim damages for any loss which is already compensated by the payment of interest.

However, the creditor is entitled to any additional damages not so compensated. But the amount of such damages and the sometimes difficult task of proving them will, generally speaking, be much restricted if and in so far as capitalisation of interest is allowed.

G. Consumer protection

The national rules on consumer protection, especially on consumer credit, such as those based upon the relevant EC-Directive of 1986, have, of course, preference. The Directive itself does not deal with capitalisation of interest.

NOTES

I. General

1. Due to the differing impact of religious and ideological conceptions, the national rules on interest for delayed payment of interest vary considerably. Six major justifications are recognized: remedy provided by law as a legal form of compensation; unilateral demand; judicial action; express agreement; current account; and usage.

II. Legal form of compensation

2. In the NETHERLANDS, capitalisation of interest is the only statutory compensation for delayed payment of interest (CC art. 6:119(2)). This provision must be understood as an extension of a corresponding rule providing that (simple) statutory interest is the only remedy for delayed payment of a sum of money (art. 6:119(1)). The parties may agree upon a higher rate of interest (art. 6:119(3)). Under Dutch law, therefore, the creditor cannot claim compensation for that portion of the damage due to delayed payment of interest which is not covered already by interest on that interest when capitalised. The same is true for SLOVENIAN law. See LOA § 380.

3. In FINLAND (*Wilhelmsson and Sevón*, 73) and SCOTLAND (*Wilson*, 132 and *McBryde*, paras. 22.138-22.139), if the capital has been repaid but not interest due, interest starts to run on the unpaid interest. Under ENGLISH law, compound interest (or capitalisation of interest) may now be awarded by way of damages: see *Sempra Metals (formerly Metallgesellschaft Ltd) Ltd. v. IRC* [2007] UKHL 34; [2007] 3 WLR 354, (the actual decision was that an unjust enrichment claim arising from tax being paid too early should be valued with reference to compound interest which the defendant would have had to pay to borrow an equivalent amount of money to that which had been received from the taxpayer). Compound interest may also be awarded in equity at the courts' discretion where money has been obtained by fraud or where it has been withheld or misapplied by a fiduciary (cf. *President of India v. La Pintada Cia. Navigacion SA* [1985] AC 104, 116). The Law Commission has recommended that the courts be given a general discretion to award compound interest: Report No. 287, *Pre-judgment Interest on Debts and Damages* (2005). Claimants should be allowed to ask for compound interest instead of the interest that would otherwise be available as of right under the Late Payment of Commercial Debts (Interest) Act 1998 (which as amended implements Directive 2000/35).

III. Unilateral demand

4. In BELGIUM, the provision of CC art. 1154 requiring a judicial action by the creditor (as in France and Luxembourg, see the following paragraph) has in recent years been interpreted broadly as authorising also an extrajudicial demand by the creditor. However, this demand cannot be made until, as required by CC art. 1154, one year has passed since the interest fell due (Cass. 28 March 1994, Pasicrisie 1994.I.317 at 321-322).

IV. Judicial action

5. In several other countries the creditor may obtain capitalisation of interest by unilateral, although formalized, action. This unilateral right must be based upon an implied basic legal obligation of the debtor and therefore appears to be related to the Dutch system of capitalisation of interest as a legal form of compensation for delayed payment of interest. However, the detailed requirements for exercising this right differ considerably, both from Dutch law and among the Romanic countries.

6. Closest to the Dutch and the Belgian system is PORTUGUESE law since the creditor need merely request a judicial notification of the debtor demanding capitalisation of interest that has fallen due or will fall due (CC art. 560(1)).

7. According to the AUSTRIAN CC § 1000(2) capitalisation of interest can (apart from agreement, see below) be claimed after having brought an action for the outstanding interest. In AUSTRIA, FRANCE, LUXEMBOURG, GREECE, POLAND, ITALY and apparently also in SCOTLAND the creditor must bring an action against the debtor for payment of capitalised or compound interest. However, the requirements vary considerably from country to country. In AUSTRIA (Law on interest of 1868 § 3(1)(b)) and in SPAIN (CC art. 1109(1)), capitalised interest can be demanded as of the date of the action and at the statutory rate (although in Austria an agreed rate will prevail over the statutory rate).

8. Many countries require that interest must have been due for at least one year (FRANCE, BELGIUM and LUXEMBOURG: CC art. 1154; GREECE: CC art. 296 (1)); PORTUGAL: CC art. 560(2)). In ITALY generally and in GREECE for debts among merchants, the period is reduced to six months (Italy: CC art. 1283 and Resolution of Interministerial Committee on Credits and Savings of 9 February 2000 (Banca, Borsa e Titoli di Credito 2000, I, 439) art. 5; Greece: CCIA art. 111(2)).

9. However, the French and Luxembourg legal provision is interpreted differently in these countries. In Luxembourg, CC art. 1154 is understood narrowly as requiring a new action for every successive year because the creditor cannot demand capitalised interest *pro futuro* (Luxembourg: Cass. 10 April 1908, Pas.Lux. VIII 148). By contrast, in France action may be brought for successive future maturities (Cass.com. 20 October 1992, Bull.civ. IV no. 332; Cass.civ. 18 February 1998, Bull.civ. III no. 42).

10. In POLAND interest on interest may be demanded only from the moment of filing an action for the "primary" interest (CC art. 482 § 1). Compound interest can be demanded *pro futuro*, but only for the time after bringing the action.

V. Agreement of the parties

11. An agreement of the parties is recognised everywhere, although subject to various restrictions. In some countries, the parties are free to agree on capitalisation of interest (for AUSTRIA see CC § 1000(2), Law on interest of 1868 § 3(1)(a); DENMARK, *Gomard*, II 189; FINLAND, *Wilhelmsson and Sevón*, 74; the NETHERLANDS, *Asser-Hartkamp*, Verbintenissenrecht I, no. 525; SPAIN, *Díez-Picazo* II, 287; ENGLAND, *Chitty* on Contracts, no. 38-253; *Mann*, 70); SCOTLAND, principle of freedom of contract.

12. Other countries admit agreement on capitalisation of interest but only after interest has fallen due. This is the only condition in GERMANY (CC § 248(1), but credit institutions are exempted, (2)), POLAND (CC art. 482 § 1, but long term loans made by credit institutions are exempt, CC art. 482 § 2) and SPAIN (Ccom art. 317). In FRANCE and LUXEMBOURG, as well as in ITALY and GREECE, agreement is only permitted after one year has elapsed since interest had fallen due: thus both the requirements and even the sources are the same as indicated for these countries in Note 4. In ITALY generally and in GREECE for debts among merchants, the period is reduced to six months (Italy: CC art. 1283; Greece: CCIA art. 111(2)). Italy has recently forbidden agreements on capitalised interest for financing contracts providing for repayment by instalments, except if repayments have to be paid into a current account. By contrast, contracts for advance payments may provide for capitalising of the interest falling due at the end of the period of advance payments (Interministerial

Committee on Credits and Savings, Resolution of 9 February 2000 (*Banca*, Borsa e Titoli di Credito 2000 I 439) arts. 3-4). Italy has also recently introduced an innovative special transparency rule for agreements on capitalised interest in credit and savings contracts. These must indicate the agreed rest period and the interest rate. If the rest period is shorter than one year, the effective interest rate, taking into account the effect of the capitalisation, must be indicated. Clauses on the capitalisation of interest are invalid, unless specifically approved by the customer in writing (Resolution cited above art. 6).

VI. Current account

13. Current accounts, being based upon agreement, are everywhere recognized as an implied justification of capitalisation of interest, but without the restrictions mentioned above. Whenever a balance is struck, any interest covered, whether credit or debt interest, is integrated with the capital and bears interest thereafter. In GERMANY and AUSTRIA as well as GREECE and ITALY there are express statutory provisions on capitalisation (Germany and Austria: Ccom § 355(1); Greece: CCIA art. 112(1); Italy: Resolution of the Interministerial Committee on Credits and Savings 9 February 2000 (*Banca*, Borsa e Titoli di Credito 2000 I 439) art. 2). In most other countries, case law has established the special situation of current accounts (FRANCE: Cass.com. 11 January 1984, Bull.civ. IV no. 15; BELGIUM: Cass. 27 February 1930, Pas. 1930 I 129 (134); LUXEMBOURG: Cour supérieure 13 March 1934, Pas. Lux. XIII 240 (244); Cour d'appel 27 February 1986, Bulletin Droit et Banque 1986 no. 9 p. 76; ENGLAND: *National Bank of Greece v. Pinios Shipping Company No. 1*, [1990] 1 AC 637 (HL) at 683 ff; for ITALY Cass. 30 May 1989, no. 2644, Foro It. 1989, I, 3127; cf. also Cian-Trabucchi (-*Zaccaria*) art. 1283 no. IV, art. 1825 no. II).

14. In Italy it has been specified that within each current account the rest periods for the capitalisation of credit and debit interests must be the same. Further, it was thought necessary to specify that after closing of the current account the final balance may produce interest, if so agreed, but any post-closing interest cannot be capitalised (Resolution of 9 February 2000, cited above, art. 2(2) and (3)).

VII. Usage

15. Usage as a separate source of allowing capitalisation of interest is in some countries expressly recognized, even if it deviates from statutory provisions (ITALY, CC art. 1283; PORTUGAL, CC art. 560(3); cf. also for ENGLAND the National Bank of Greece case, cited above). Usage as a justification for capitalisation of interest is also recognized in DENMARK *Bryde Andersen and Lookofsky*, 110 f) and SWEDEN (*Walin*, 255).

16. The ITALIAN Supreme Court had held in several decisions that there is a fixed usage on capitalisation of interest in the relations between credit institutions and their customers (basic decision: Cass. 15 December 1981, no. 6631, Riv.dir.comm. 1982, II, 89; cf. also Cass. 30 May 1989, cited in note 5 above). When in 1999 the Court retreated from this line of decisions (cf. especially Cass. 16 March 1999, Banca e Borsa 1999, II, 389), the legislator immediately intervened and, by a legislative decree, validated contract clauses on capitalisation of interest. This governmental decree was in turn declared to be unconstitutional as being in violation of the enabling law (Const. Court 17 October 2000, Giurisprudenza Commerciale 2001, II, 179). Thus, in effect, the case law of the Supreme Court since 1999 governs again but the issue is still hotly debated by writers.

17. The standard practice in relation to current accounts (see note 6 above) is but one example, although a prominent one, of a usage.

18. Under SLOVAK law there are no special provisions on the capitalisation of interest, but the usage and coherent case law do not allow the capitalisation of interest for delay. The same holds true for CZECH law (see Supreme Court 35 Odo 101/2002), but different arrangements by the parties are not excluded.

III.–3:710: Interest in commercial contracts

(1) If a business delays the payment of a price due under a contract for the supply of goods, other assets or services without being excused under III.–3:104 (Excuse due to an impediment), interest is due at the rate specified in paragraph (4), unless a higher interest rate is applicable.

(2) Interest at the rate specified in paragraph (4) starts to run on the day which follows the date or the end of the period for payment provided in the contract. If there is no such date or period, interest at that rate starts to run:

(a) 30 days after the date when the debtor receives the invoice or an equivalent request for payment; or

(b) 30 days after the date of receipt of the goods or services, if the date under (a) is earlier or uncertain, or if it is uncertain whether the debtor has received an invoice or equivalent request for payment.

(3) If conformity of goods or services to the contract is to be ascertained by way of acceptance or verification, the 30 day period under paragraph (2) (b) starts to run on the date of acceptance or verification.

(4) The interest rate for delayed payment is the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question ("the reference rate"), plus seven percentage points. For the currency of a Member State which is not participating in the third stage of economic and monetary union, the reference rate is the equivalent rate set by its national central bank.

(5) The creditor may in addition recover damages for any further loss.

III.–3:711: Unfair terms relating to interest

(1) A term whereby a business pays interest from a date later than that specified in the preceding Article paragraph (2) (a) and (b) and paragraph (3), or at a rate lower than that specified in paragraph (4), is not binding to the extent that this would be unfair.

(2) A term whereby a debtor is allowed to pay the price for goods, other assets or services later than the time when interest starts to run under the preceding Article paragraph (2) (a) and (b) and paragraph (3) does not deprive the creditor of interest to the extent that this would be unfair.

(3) Something is unfair for the purposes of this Article if it grossly deviates from good commercial practice, contrary to good faith and fair dealing.

III.–3:712: Stipulated payment for non-performance

(1) Where the terms regulating an obligation provide that a debtor who fails to perform the obligation is to pay a specified sum to the creditor for such non-performance, the creditor is entitled to that sum irrespective of the actual loss.

(2) However, despite any provision to the contrary, the sum so specified in a contract or other juridical act may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and the other circumstances.

COMMENTS

A. Stipulation as to payment for non-performance binding

It is common for the parties to a contract to specify a sum to be paid for non-performance, with a view to avoiding the difficulty, delay and expense involved in proving the amount of loss in a claim for unliquidated damages. Such a term may also prompt the debtor to perform voluntarily, when the penalty is heavy. To perform is then cheaper than paying the penalty. Paragraph (1) gives effect to such a provision, so that except as provided by paragraph (2) the court must disregard the loss actually suffered by the creditor and must award neither more nor less than the sum fixed by the contract. It follows that the creditor is under no obligation to prove any loss. The terms regulating a non-contractual obligation may also provide for a stipulated payment to be made by the debtor in the event of non-performance.

Illustration 1
B agrees to build a house for A and to complete it by April 1st. The contract provides that for every week's delay in completion B is to pay A the sum of € 200. B completes the house on April 29th. A is entitled to €800 as agreed damages, whether his actual loss (e.g., the cost of renting alternative accommodation during the four week period of delay) is greater or less than that sum.

Illustration 2
A agrees to sell a house to B and obtains a deposit of 20 per cent of the price to secure B's performance of the contract. B refuses to complete the transaction. A may forfeit the deposit.

Where, however, the contract specifies merely the minimum sum payable by the debtor, the creditor may recover a higher figure if the loss exceeds the minimum sum. In this case the creditor may elect to sue for damages at large instead of invoking the provision for agreed damages.

The treatment of “agreed damages” clauses varies from one legal system to another. Some systems admit them provided that the damages are not substantially greater than the loss that a non-performance is likely to cause, and strike down stipulations for substantially more than that amount as unenforceable “penalties”. Others accept that the parties may agree on a penal sum but give the court power to reduce it in some circumstances. As it seems generally to be agreed that there is nothing wrong with the parties agreeing a penalty for non-performance provided that they are fully aware of what they are doing and it does not operate unfairly, the rules take the approach that penalties may be agreed but the court should have power to reduce them when necessary.

B. Court's power to reduce grossly excessive stipulations

To allow the parties to a contract complete freedom to fix the sum payable for non-performance may lead to abuse. If there is a gross disparity between the specified sum and the actual loss suffered by the creditor the court may reduce the sum even if at the time of the contract it seemed reasonable. Since the purpose is to control only those stipulations which are abusive in their effect, the court's reducing power is exercisable only where it is clear that the stipulated sum substantially exceeds the actual loss. This power of the court has a limit: it should respect the intention of the parties to deter default and therefore should not reduce the award to the actual loss. The court has to fix an intermediate figure.

> *Illustration 3*
> A supplies equipment to B on lease for five years at a rent of €50,000 a year. The agreement provides that in the event of termination because of default by B in performing its obligations B is to pay A by way of agreed damages a sum equal to 80% of the future rentals. In the light of circumstances existing at the time of the contract this stipulation is not unreasonable. After a year A terminates because of B's default in payment. As the result of an unexpected increase in the demand for the type of equipment in question A, having secured the return of the equipment, is able to re-let it at twice the rent payable under the original lease. The court may reduce the agreed damages payable so as to take account of this fact.

The power to reduce the stipulated sum also applies to sums specified in unilateral juridical acts, where similar considerations apply. It does not, however, apply to sums stipulated by rules of law. It would be inappropriate to allow courts to modify such sums if the relevant rule of law has not provided for the possibility of such modification.

C. "Excessive" sum

In deciding whether the stipulated sum is excessive the court should have regard to the relationship between that sum and the loss actually suffered by the creditor, as opposed to the loss legally recoverable taking account of the foreseeability principle. On the other hand, the computation of actual loss should take into account that element of the loss which has been caused by the unreasonable behaviour of the creditor, e.g. in failing to take reasonable steps in mitigation of loss.

D. Genuine options not covered

The Article does not apply to a genuine option to pay a sum of money instead of performing a non-monetary obligation, since the Article deals with non-performance, not with alternative obligations or methods of performance (forfait clause, "*clause de dédit*").

NOTES

I. Stipulated payment clause valid

1. The laws of most European countries will enforce a stipulation in a contract under which the debtor undertakes to pay a fixed sum of money in the event of non-performance. The stipulated payment clause will be enforced whether its purpose was to coerce the debtor to perform the principal obligation (penalty clause) or to serve as a

pre-estimate of the loss suffered by the creditor in case of non-performance (liquidated damages clause). See also UNIDROIT art. 7.4.1

2. Many civil codes confirm the validity of stipulated payment clauses either expressly or impliedly, see AUSTRIAN CC § 1336(1); BELGIAN CC arts. 1152 and 1229; FRENCH CC arts. 1152 (as amended in 1975 and 1985) and 1229; LUXEMBOURG CC arts. 1152 and 1226 ff. (as amended in 1987); GERMAN CC §§ 339-345; GREEK CC art. 405(2); ITALIAN CC arts. 1382-1384; NETHERLANDS CC arts. 6:91-6:94; POLISH CC arts. 483-484; PORTUGUESE CC art. 810(1); SLOVAK CC §§ 544-545; ESTONIAN LOA §§ 158-163 and SPANISH CC art. 1152. The same holds true of DANISH law, see *Gomard*, Obligationsret II 236 ff; FINNISH law (see *Taxell*, Avtal och rättsskydd 441) and SWEDISH law (see *Ramberg*, Avtalsrätt 309). Only an express clause on stipulated payment is valid in SLOVENIAN law. See LOA § 247. The legal rate of interest for delay is binding under CZECH CC, which obliges the creditor to apply a legal rate (CC § 517.2) but another rate of interest for delay can be agreed in case of commercial debts (Ccom art. 369.1).

3. Unless otherwise agreed the stipulated payment is not payable if the non-performance is excused, see expressly DUTCH CC art. 6:92(3); GREEK CC art. 405(1); ESTONIAN LOA § 160 and by implication LUXEMBOURG CC arts. 1152 and 1226 ff. (as amended in 1987); GERMAN CC §§ 339, 286(4). In CZECH law the interest of delay is a form or legal compensation for loss and at the same time a sanction for conduct violating a legally protected principle of fair business (see Ccom art. 265 and decision PP 10/1997). So in some cases of excused non-performance, the debtor is never obliged to pay interest for delay (for instance in case of *mora creditoris*, see CC §§ 520 and 522 or in cases when the performance became impossible, see CC § 575.1 applicable also to commercial relationships). In POLISH law the above rule is accepted as a consequence of CC art. 471. On the other hand, and subject to the rules on reduction, see note 5 below, the stipulated payment is due irrespective of whether the creditor suffered any loss, and irrespective of how great the loss was.

II. Stipulated payment replaces damages

4. In most European systems the stipulated payment replaces the damages for non-performance which the creditor would have recovered. This means that the creditor cannot claim damages instead of the stipulated payment. Nor can the creditor claim damages in addition to the stipulated payment, unless, as provided in the ITALIAN CC art. 1382(1); POLISH CC art. 484 § 1; PORTUGUESE CC art. 811(2) and (3); SLOVAK CC § 545(2) and SPANISH CC art. 1153, the parties have agreed on such payment. In AUSTRIAN law, damages over and above the stipulated sum may be claimed according to CC § 1336(3). However, in the case of consumer contracts this needs to be individually negotiated to be enforceable. in respect of commercial transactions (4. EVHGB art. 8 no. 3). The same is true for SLOVENIAN law (LOA § 253). By contrast, under GERMAN law the creditor may claim damages for non-performance or improper performance in addition to stipulated payment (CC §§ 340(2), 341(2)). If payment is stipulated for a failure to perform properly (as opposed to a performance which is not tendered), the creditor is entitled to claim both performance and the agreed payment (CC § 341(1)). In CZECH REBLIC a principle is that the creditor may demand interest and damages but the law specifies that the creditor of a monetary debt has right to damages only if there are not covered by legal interest or legal penalty for delay (see CC § 519 and Ccom art. 369.2). These latter rules also apply in GREECE, see CC arts. 406(2) and 407 sentence 2; and in ESTONIA, see LOA §§ 159, 161. In ITALY a payment stipulated for delay in performance may be recovered together with a claim for performance, see CC art.

1383. The same rule is applied in POLISH law, although it is not stated expressly, but appears from CC art. 477 § 1. In FINNISH and DANISH law the solution depends on the interpretation of the term; see *Aurejärvi*, 151 and *Gomard*, Obligationsrett II, 237.

III. Reduction

5. Under several systems the court may reduce the stipulated payment if it is manifestly excessive, see AUSTRIAN CC § 1336(2); DANISH, FINNISH and SWEDISH Contracts Acts § 36; SLOVENIAN LOA § 252; DUTCH CC art. 6:94; ITALIAN CC art. 1384 (older case law limiting the application of this provision to an express request by the non-performing party (see Cass. 23 November 1990, no. 11282 in Giust. Civ. Mass. 1990 and *Magazzù*, Clausola penale, 195 ff) was overruled by more recent decisions stating that the power of reduction may be exercised *ex officio* but the interested party must give evidence of the disproportion between the value of the contract and the amount of the penalty (see Cass. 23 May 2003, no. 8188 in Giust. Civ. Mass. 2003 and *Gazzoni*, Manuale di diritto privato, 647 ff); FRENCH and LUXEMBOURG CCs art. 1152(2); POLISH CC art. 484 § 2; GREEK CC art. 409, even if the parties have agreed otherwise; ESTONIAN LOA § 162 (mandatory in favour of debtor); and GERMAN CC § 343. However in the CZECH REPUBLIC, GERMANY and AUSTRIA a payment stipulated in contracts between merchants cannot be reduced, see Ccom § 348 and Czech Ccom art. 369.1 as commented by Štenglová, Plíva, Tomsa, pp. 1041-1042). At first sight the same rule appears to apply in BELGIUM, see CC art. 1152, which is not restricted to merchants. In GERMANY, however, the payment may be set aside or modified under the general clause of good faith or the rules on unfair terms (CC §§ 242, 307 et seq.) if it would be unconscionable to enforce it, see *Baumbach and Hopt*, HGB, § 348 no. 5 et seq. Under CZECH commercial law, the right to interest for delay is protected only if it is not qualified in a particular case by a judge as contrary to the principle of fair dealing (see Ccom art. 265 and decision cited in *Sou R NS 4/2001*, p. 116). And in BELGIUM the Supreme Court has held that if a stipulated payment is so excessive in relation to the loss which was foreseeable at the time the contract was made that it loses its function as a pre-estimate of the loss suffered and becomes a mere private penalty, it should be set aside as violating public policy, see Cass 24 November 1972, R.C.J.B. 1973 302. Even if this is not the case, the stipulated payment may still be reduced if it is manifestly unreasonable at the moment of non-performance, see law of 23 November 1998, in effect confirming Cass. 18 February 1988, Arr. Cass. 1987-88, 790 no. 375; T.B.H./R.D.C. 1988, 636 note *Dirix*. Under the SPANISH CC art. 1154 the court may reduce payment to an equitable amount if the principal obligation has been performed partly or irregularly. Under POLISH law the stipulated penalty may be reduced by the court on the demand of the debtor if the obligation has been performed in a substantial part or if the stipulated sum is excessive in amount (CC art. 484 § 2). In PORTUGAL reduction is also possible; however, in a decision of the Supreme Court it has been held that the payment may only be reduced if it was stipulated as a pre-estimate of the loss suffered and not if it was made to coerce the defaulting party to perform the principal obligation, see on STJ 3 November 1983, *Pinto Monteiro*, 474 ff. Conversely, in a decision of the DUTCH Supreme Court, it has been held that the payment may not be reduced if it was stipulated as a pre-estimate of the loss suffered (See HR 3 December 2004, RvdW 2004, 119). See also: UNIDROIT art. 7.4.13(2). In SLOVAKIA reduction is possible only in commercial legal relations (Ccom art. 301). Reduction in other legal relations is impossible, but the court may declare a stipulation as contra bonos mores (contrary to good morals). In such case the creditor may claim damages.

IV. Penalty clauses and liquidated damages clauses

6. In ENGLISH and IRISH law stipulated payment clauses are divided into penalty and liquidated damages clauses. The former are invalid, the latter are valid. Penalty clauses are clauses stipulated "*in terrorem*" in order to coerce the debtor to perform the principal obligation. Liquidated damages clauses are clauses by which an attempt is made to pre-estimate the loss suffered by a breach of contract. The latter clauses cannot be modified. A clause will be regarded as a penalty clause if it is extravagant and unconscionable in amount in comparison with the greatest loss that could be proved to follow from such a breach, see *Dunlop Pneumatic Tyre Co. Ltd v. New Garage and Motor Co. Ltd.* [1915] AC 79, 87 (HL). A stipulation is a liquidated damages clause if the circumstances were such that an accurate or precise pre-estimate of the loss was impossible and the stipulated payment was a genuine attempt to make a pre-estimate of the loss, *ibid.* SCOTTISH law is the same (*McBryde*, paras. 22.146-22.185); a clause has been upheld when precise assessment of damages was not possible: *Clydebank Engineering & Shipbuilding Co. Ltd. v. Castaneda* (1904) 7 F 77 (HL). The Scottish Law Commission has proposed reforms which would bring Scottish law into line with the above Article (Report on Penalty Clauses (Scot. Law Com. No. 171, 1999).

7. Penalty clause are valid under CZECH commercial law but a disproportionably high penalty may be reduced by judge (see Ccom art. 301).

V. Clauses setting a sum less than the likely loss

8. On clauses which though drafted as penalty or liquidated damages clauses in effect limit the liability of the non-performing party, see notes to Article III.–3:105 (Term excluding or restricting remedies), above.

VI. General

9. See generally ICC Guide to Penalty and Liquidated Damages Clauses no. 478; *Fontaine,* Contrats, 127-170; *Treitel*, Remedies, §§ 164-181.

10. Under the HUNGARIAN CC § 246(1) a debtor may undertake to pay a certain sum of money in the event of non-performance of the contractual obligations (liquidated damages). A clause stipulating liquidated damages is valid only if in writing. Any provision for interest on liquidated damages is void. Under CC § 246(2) the creditor is entitled to demand payment of liquidated damages even if the creditor sustains no damage, and is entitled to damages for any loss suffered in excess of the liquidated damages as well as other rights resulting from the non-performance. The creditor is entitled, in accordance with the relevant regulations, to demand compensation for damage caused by the non-performance, even if the creditor has not enforced the claim for liquidated damages. Under CC § 246(3) enforcement of liquidated damages stipulated for non-performance precludes any demand for performance. Payment of liquidated damages stipulated for late performance and lack of conformity does not provide an exemption from performance. Under § 247(1) excessive liquidated damages can be reduced by a court. Under § 247(2) the provisions on default interest are applied to default penalties for late payment of cash debts. Under § 247(3) liquidated damages stipulated as security for a claim that cannot be judicially enforced cannot be enforced in a court of law.

III.–3:713: Currency by which damages to be measured

Damages are to be measured by the currency which most appropriately reflects the creditor's loss.

COMMENTS

A. General remarks

Exchange rates between individual currencies are subject to more or less heavy fluctuations. Consequently, the question in which currency damages have to be measured is relevant. Over or under-compensation must be avoided by fixing damages measured by reference to the correct currency. This provision fixes the currency in which damages are to be measured. Technically speaking, the currency of account for damages is laid down.

By contrast, III.–2:109 (Currency of payment) deals in a general way with the currency of payment. If damages (or interest) have arisen in a currency other than the local currency of the place of payment, any conversion into the latter currency is governed by that Article.

Measurement of damages by reference to the most appropriate currency is not yet accepted in all Member States but it seems to be the modern tendency

B. Purpose

Since damages have the purpose of putting the creditor into the same position as if there had been performance (III.–3:702 (General measure of damages)) they have to be expressed in the currency which is most appropriate to achieve that result. Damages therefore should not automatically be measured in the local currency of the court; in most countries judgments in foreign currency are allowed. Even if they are not allowed, but the damages had arisen in a foreign currency and are measured in that currency, the conversion into the local currency at current exchange rates will lead to an appropriate result.

C. Explanation

In view of the vast variety of the facts of international commercial intercourse, the currency of the damages which is most appropriate to compensate the creditor cannot generally be determined with precision. In many cases it will be the contractual currency of account. But where this is not the currency which the creditor had to utilize in order to make good the loss, e.g. by making a cover transaction, the latter currency may be more appropriate, especially if the creditor utilizes the currency of the creditor’s home country for this purpose. Generally this will be the currency in which the creditor makes business deals.

> *Illustration 1*
> Japanese machine manufacturer C has made a contract for delivery of certain machinery with French importer F. F wrongfully cancels the contract. C's damages have arisen in Japanese yen.

However, the factors may be different.

Illustration 2
As in Illustration 1, but C is an internationally active company stipulating that payments for its export sales are to be made on a US-Dollar bank account in New York. C's lost profits are to be calculated in US dollars.

It is also possible for loss to arise in several currencies.

D. Derived claims

Where a party is entitled to interest, such interest is usually measured and payable in the same currency as the principal. This is so in particular where the interest is expressed as a percentage of the principal sum.

The same is true if the amount of damages is fixed in a contract as a percentage of the price.

Illustration 3
In a construction contract, the parties have agreed on a penalty of 1% of the price for every week of default in completion of the construction, the price being expressed in Euros. The penalty will be due in Euros as well.

E. Autonomy of the parties

Of course, the parties to a contract are free to fix the currency of damages or interest by reference to any currency they like.

NOTES

I. Case law

1. The Article follows the modern ENGLISH and SCOTTISH rule on the currency of damages, which has been developed in *The Despina R. & the Folias* [1979] A.C. 685 (H.L.) (see also *Goode*, Commercial Law, 1133; *Goode*, Payment Obligations, 136 ff; *McBryde*, para. 24.44). Also in some GERMAN and ITALIAN cases it has been accepted by the courts that a foreign currency may reflect the creditor's loss more appropriately (Germany: especially CA Hamburg 7 December 1978, VersR 1979, 833; Italy: Cass. 6 June 1981 no. 3656, Mass. Foro It. 1981; see also Trib. Udine 24 December 1987, Foro It. 1989, I, 1618). However, in Germany the BGH still accepts that damages may be awarded in the German currency provided that the debtor does not object (BGH 9 February 1977, WM 1977, 478, 479; BGH 10 July 1954, BGHZ 14, 212, 217). In FRANCE, judgment is mostly given in the French currency, but as the tendency is to use the rate of exchange of the date of payment for the conversion (see Réponse Ministerielle no. 949, JCP 1982, IV, 166; *Derrida*, no. 919 ff; *Chartier*, no. 442) the result is practically the same as in case of a proper foreign currency judgment. In SPAIN a decision of the Tribunal Supremo (TS 26 November 1987) has calculated damages in foreign currency but converted to the Spanish currency according to the official rate of exchange of the day of the definitive judgment. The same holds true in GREECE under CC art. 291 which, however, focuses on the official rate of exchange at the date of payment. Claims for damages in foreign currency are accepted by the courts in AUSTRIA (see e.g. CA Wien 8 July 1987,

REDOK 12.624). ; the relevant time for converting is the time when the obligation is due (see e.g. Ehrenzweig (-*Mayrhofer*) Schuldrecht AT, 49-53).

2. Under DUTCH CC art. 6:121 when, pursuant to an obligation, payment must be made in a currency other than that of the country where the payment must be made, the debtor is entitled to pay in the currency of the place of payment. There is a similar rule under the ESTONIAN LOA § 93(3).

II. Legal writers

3. The position of legal writers in Europe appears not to be uniform. Whereas in ITALY judgments awarding damages in foreign currency have been criticized (*Ascarelli* 416, *Campeis & De Pauli* 412 ff), there is support for awarding damages in foreign currency not only in ENGLAND and in BELGIUM (*Fallon*, Annal. dr. Liège 33 (1988) 77-89; *Niyonzima* 206 ff nos. 233, 214 no. 239), but also in GERMANY, where some authors advocate a more careful analysis of the currency of the loss and propose following either the very wide English formula (*Alberts*, NJW 1989, 609, 612; *idem*, Währungsschwankungen 48 f, 135, 137, 166) or, more precisely, recommend the creditor's currency (*von Hoffmann* 125-141) or the currency of the assets of the creditor (*Remien*, RabelsZ 53 (1989) 245-292). See also in GREECE *Kallimopoulos* 130-138, 350-375. In SPAIN, traditional doctrinal analysis and case law (TS 7 November 1957, 6 April 1963) favoured payment in the national currency but more recent scholarship would allow the debtor the choice: *Paz-Ares.*

4. In POLISH law there is no corresponding regulation or coherent case law, but under Polish law a principle corresponding to the Article should be applied. Polish courts can calculate and award damages in the currency in which the loss was suffered or which reflects the creditor’s loss. In SLOVAKIA there are no provisions, but the courts may award damages in foreign currency only if the party is a foreigner or if the defending party has an account in foreign currency (CCP § 155 (2)).

III. Currency of the contract

5. It is sometimes thought that damages for breach of contract should be measured in the currency of account of the contract (Staudinger (-*K. Schmidt*) § 244 no. 17), but such a rule is not accepted in ENGLISH practice (see *The Despina R and the Folias*, *ibid*. 700-701) and also disputed in GERMANY (see *Remien*, RabelsZ 53 (1989) 245, 276-280: only where contractual claims for damages take the place of a contractual claim for the price). Under CZECH commercial law, in international relationships the debtor is expressly obliged to pay damages in an agreed currency or in the currency of the place of payment (see Ccom art. 731 and commentary by *Štenglová*, *Plíva*, *Tomsa* to Ccom art. 744). See also UNIDROIT art. 7.4.12.

CHAPTER 4: PLURALITY OF DEBTORS AND CREDITORS

Section 1: Plurality of debtors

III.–4:101: Scope of Section

This Section applies where two or more debtors are bound to perform one obligation.

COMMENTS

Section 1 of this Chapter is not intended to cover all cases of plurality of debtors. It deals only with those cases which call for regulation because of their practical importance or theoretical difficulty. So, it does not cover, for example, multiple obligations arising from a number of different contracts concluded in order to meet a single objective, such as orders given by a trader to several suppliers to satisfy the needs of the trader's customers. The fact that several debtors are bound by parallel obligations arising from distinct contracts does not affect the legal nature of each debt. The situation is the same when distinct obligations arise under the same contract. The problems which require resolution arise where there is one obligation with two or more co-debtors and in certain specific cases where two or more debtors are liable under closely related obligations – for example, where they are liable for the same damage. The Article makes it clear that the scope of the Section is confined to such cases. It follows that in subsequent Articles in the Section references to the debtors must be read as references to co-debtors who are within the scope of the Section.

It should be noted that in the case of a contractual obligation the debtors' liability need not arise from one contract. It could, and often does, happen that A is bound under one contract to perform an obligation and B then, by another contract, undertakes to perform the same obligation as a co-debtor. If this is really a security obligation then Book IV.D. on personal securities will be the primary source of rules on the rights and obligations of the parties. The ordinary co-debtorship rules of the present Chapter will apply so far as not inconsistent with the personal security rules. This result is achieved by IV.G.–1:104 (Co-debtorship for security purposes) which provides that "A co-debtorship for security purposes is subject to the rules of Parts 1 and 4 and, subsidiarily, to the rules on plurality of debtors".

III.–4:102: Solidary, divided and joint obligations

(1) An obligation is solidary when each debtor is bound to perform the obligation in full and the creditor may require performance from any of them until full performance has been received.

(2) An obligation is divided when each debtor is bound to perform only part of the obligation and the creditor may claim from each debtor only performance of that debtor's part.

(3) An obligation is joint when the debtors are bound to perform the obligation together and the creditor may require performance only from all of them together.

COMMENTS

A. General remarks

The Article deals with three types of plural obligations - solidary obligations, divided obligations and joint obligations. Solidary obligations and divided obligations are known in all legal systems, with variations in terminology and detail, but not all laws expressly recognise joint obligations. Legal systems which do not recognise joint obligations sometimes have a category of "indivisible obligations" which covers much of the same ground. French law gives indivisibility a special role in the law of succession: i.e. a debt which is indivisible, in contrast to a solidary debt, is not divided among the heirs (CC 1217 ff). It goes without saying that the fact that a contract is governed by these rules does not prevent the parties, to the extent permitted by the law of succession, from supplementing a solidarity clause, covered by these rules, with a clause of indivisibility for the purpose of obtaining particular effects in relation to succession.

B. Solidary obligations

Paragraph (1) of the Article defines solidary obligations, which are the plural obligations most frequently encountered in practice. The definition reflects their characteristic features. The creditor can claim the whole performance from any one of the debtors, without being obliged to involve all the debtors or even warn them. The debtor against whom the claim is made cannot compel the creditor to divide the claim.

> *Illustration 1*
> A lends €10,000 to B and C. The contract contains a clause of solidarity. A can claim repayment of the loan from B or C according to choice.

Having the option of claiming the whole performance from any of the debtors, the creditor is in a position, if that debtor fails to perform, to put into operation right away the various remedies for non-performance provided by these rules. So, the creditor can terminate the contractual relationship in whole or in part if the selected debtor's non-performance of a contractual obligation is fundamental. Similarly, the creditor can withhold performance of reciprocal obligations so long as the selected debtor has not performed or tendered performance. However, the other debtors can perform the obligation in order to put a stop to the termination or the withholding of performance. As this is a case where the other debtors have a legitimate interest in performance the creditor cannot refuse their performance.

C. Divided obligations

Paragraph (2) defines divided obligations. They are distinguished from solidary obligations in that each of the debtors is liable for only part of the performance due. The debtors have separate liability for their own shares. So the creditor cannot claim the whole performance from one of the debtors but must necessarily divide the claim.

Illustration 2
A lends €10,000 to B and C. The contract provides that B must repay €8000 and C €2000. A can claim only the agreed part from each.

The effects of non-performance by one of the debtors on the operation of the creditor's right to withhold performance of reciprocal obligations or to terminate for fundamental non-performance are very different in this case. Non-performance by one of the debtors leads, in principle, only to partial termination. Where a contract gives rise to divided obligations the situation falls within the rules on termination for fundamental non-performance in relation to obligations which are to be performed in separate parts or are otherwise divisible. Similarly, the creditor may not, as a general rule, withhold performance except partially. Where, however, the performance due by the creditor is indivisible, the debtors having only a joint right, the withholding will necessarily be total.

Illustration 3
Three farmers, A, B and C, order twelve sacks of winter wheat seed from a producer, D, for a price of €9000. The contract provides that each buyer is liable only for a one-third share (€3000). A becomes insolvent. D could terminate only the obligations relating to A's share.

Illustration 4
Two farmers, A and B, order an agricultural machine from a manufacturer, C. The contract provides that the two buyers are to be under separate obligations for the price, payable on delivery. A and B having a joint right against C for delivery of the machine (see Article III.–5:202(3)), C can withhold delivery so long as A does not pay A's part of the price.

D. Joint obligations

Paragraph (3) defines joint obligations, which are characterised by the unitary nature of the obligation binding the several debtors. Joint obligations are more rare in practice. They relate to performances which by their nature have to be rendered in common by several debtors, bound to the creditor by a single contract.

A joint obligation is distinguished from a solidary obligation in that the creditor in a joint obligation can take action only against all the debtors together. It is distinguished from a divided obligation in that the performance due by each debtor is not limited to an independent performance of that debtor's own share of the obligation. The joint obligation is not simply a combination of isolated parts of an obligation. Each of the debtors is obliged to collaborate with the others to provide the common performance.

Illustration 5
A recording company enters into a single contract with several musicians who are to play a symphony with a view to making a record. In the event of non-performance, the recording company will have to take action against all the musicians.

Illustration 6
The owners of a piece of ground wish to have a house built. If they approach contractors in different trades, asking for a single performance (namely the construction of the house), and if the co-contractors agree to work together to achieve that result, the obligation will be a joint one.

The non-performance of one of the debtors in a joint obligation necessarily has an effect on the obligation as a whole. It follows that the creditor can terminate for fundamental non-performance even if the non-performance is imputable to only one of the debtors. Similarly, the creditor can withhold reciprocal performance totally, even if the failure to give or tender the debtors' performance emanates from only one of the debtors.

NOTES

I. General

1. The Article reproduces the two types of obligations most widely recognised in legal systems, solidary and divided obligations. The main originality is in expressly recognising the joint obligation (not recognised in this form in many systems, see under IV below) and in not providing for certain other types of concurrent obligations frequently found in Europe, namely the indivisible obligation and the obligation *in solidum.*

2. A number of legal systems deal with indivisibility alongside solidarity: AUSTRIA (CC §§ 890-895); SPAIN (CC arts. 1149-1151 however, there is no explicit extension of the solidarity regime to the joint obligations); FRANCE, BELGIUM and LUXEMBOURG (CC arts. 1217-1224, the principle of division of debts among the heirs by operation of law, even where the debts are solidary, being found in art. 1220); GREECE (CC arts. 494-495); ITALY (CC arts. 1316-1320); the NETHERLANDS (CC art. 6:6(2)); PORTUGAL (CC art. 535); and the CZECH REPUBLIC (CC §§ 511 ff). The GERMAN CC § 431 also mentions indivisible obligations as giving rise to solidary liability. This is also the position of CZECH law (see CC § 511.1). Under POLISH law debtors bound to perform an indivisible obligation are liable for rendering the performance as solidary debtors (i.e. they are not solidary debtors as such but their obligations are as those of solidary ones). In addition, in the absence of an agreement to the contrary, debtors bound to perform a divisible obligation are liable as solidary debtors, if the reciprocal obligation of the creditor is indivisible (Polish CC art. 380). Some of the texts cited above mention natural indivisibility and conventional indivisibility. However, indivisibility does not seem to be the object of any special developments in the NORDIC countries or in ENGLAND, IRELAND or SCOTLAND. The SLOVENIAN law is familiar with solidary, joint and divided obligations.

3. In CZECH law, solidarity may be presumed: the Ccom presumes solidarity of debtors in commercial relations, if there is doubt about the character of the obligation (Ccom art. 293). Also Czech civil law recognises that solidarity may be not only expressly

stipulated or agreed but also implied because is stated that the solidary obligation may be stipulated by legal provisions, found by a court decision, agreed between the parties or it can follow from the nature of the performance (see CC § 511.1).

4. FRENCH, BELGIAN and LUXEMBOURG laws recognise an obligation *in solidum*, in relation to jointly caused damage, which differs from an ordinary solidary obligation. This obligation *in solidum* has developed in the law on non-contractual liability for damage in order to compensate the fact that solidarity is not presumed. French judges may declare obligations *in solidum* (See *Terré/Simler/Lequette*, Les obligations[9], no. 1261). The obligation *in solidum* does not have the secondary effects of a normal solidary obligation under these laws, such as the fact that a formal notice given to one of the debtors is deemed to be equally effective in relation to the others. These secondary effects (which have no equivalent in these rules) flow from the idea of a community of interests which is supposed to unite solidary debtors and which is generally absent when the same damage is caused by several persons.

5. According to SLOVAK law an indivisible obligation of several debtors is treated as a solidary obligation unless a legal regulation stipulates or parties agree otherwise, or if it follows from the nature of the performance that it has to be rendered by joint activity of all debtors. (*Lazar*, OPH II, 21) As for an indivisible performance to two or more creditors, the debtor is entitled to perform to any of the creditors unless the parties agreed on something else. The debt is discharged by performance to one of the creditors. However, the debtor does not have to perform to one creditor without the consent of the other creditors.

II. Solidary obligations

6. Most European codes recognise solidarity and give a definition similar to that in the Article: see: the GERMAN CC §§ 421 ff; the AUSTRIAN CC § 891; the SPANISH CC art. 1137; the CC's of FRANCE, BELGIUM AND LUXEMBOURG arts. 1200 ff; the GREEK CC art. 481; the ITALIAN CC arts. 1292 ff; the NETHERLANDS CC arts. 6:1 ff; the PORTUGUESE CC art. 512; the ESTONIAN LOA § 65(1); the CZECH CC §§ 511 and 514; the SLOVENIAN LOA §§ 395–405; the POLISH CC arts. 366-367 (which provide separately for solidarity of debtors and solidarity of creditors); the SLOVAK CC §§ 511 and 513 (which provide separately for solidarity of debtors and solidarity of creditors). In the NORDIC countries, doctrine adopts the same definition and the uniform Nordic Promissory Note Act (PNA) (DENMARK, FINLAND and SWEDEN) makes use of it see § 2. In ENGLISH law, the category of "joint and several" debts corresponds to solidary obligations (*Chitty* on Contracts I[29], chap. 17). The Article does not contain a precise equivalent to the English "joint liability", under which all the joint debtors must be sued, and on the death of one liability passes to the survivors, but performance by any one of the joint debtors discharges them all: see *Chitty* on Contracts I[29], nos. 17-009–17-015). In IRISH law solidary obligations, described as *in solidum*, are expressly regulated by Part 3 of the Civil Liability Act 1961 which deals with liability to make reparation for damage caused by several persons. The rules are very similar to those in the text. SCOTTISH law also recognises solidary obligations, using the terms "joint and several" or *in solidum* to describe them (*Gloag and Henderson*, The Law of Scotland[11], no. 3.13).

III. Divided obligations

7. Divided obligations, known by various terms, are the rule where there is no presumption of solidarity. It is sometimes even presumed that in any case of plurality of debtors the obligation is divided: see e.g. the SPANISH CC art. 1138 and the POLISH CC art. 379 § 1. The idea of separate liability is often linked with that of

divided or divisible obligations. The national texts either define the divisible obligation by reference to the indivisible obligation (e.g. the FRENCH CC art. 1217) or refer to it as a notion on its own (GERMAN CC § 420; AUSTRIAN CC § 889; GREEK CC art. 480; ITALIAN CC art. 1314; the NETHERLANDS CC art. 6:6(1)); ESTONIAN LOA § 63(1); the POLISH CC art. 379 § 2: the performance is deemed divisible, if it can be rendered partially without essentially changing the object or value); and SLOVENIAN LOA § 393 (the obligation is divisible if what is owed can be divided and performed in parts that have the same quality as the total). Slovenian law presumes solidarity of divided obligations for commercial contracts, unless otherwise agreed (see LOA § 394). There is not an express regulation of divided obligations in CZECH law. The notion of divided obligation ("dílčí závazek") was created by reasoning *a contrario* mainly on the basis of CC § 511: a divided obligation is a common obligation which is not considered solidary by the legislator, by a judge or by an agreement between the parties (see the provision of CC § 511 and its commentary by *Švestka/Jehlička/Škárová*, OZ[9], 639).

8. According to the SLOVAK legal literature a performance is commonly regarded as divisible if the object of the performance is technically and legally divisible (*Lazar,* OPH II, 20). In FRANCE, BELGIUM and LUXEMBOURG the principle of division of debts among the heirs by operation of law, even where the debts are solidary, is found in CC art. 1220.

IV. Joint obligations

9. The notion of the joint obligation is unknown in most national laws. Its effects partly overlap those of the obligation which is indivisible by nature. It is found however in GERMAN doctrine and case law (see Staudinger (-*Noack*), BGB [2005], Pref. to § 420 nos. 24 et seq.) and it is codified in ESTONIAN law (LOA § 64) in terms corresponding to paragraph (3) of the above Article. The concept is also found in AUSTRIAN law, see Koziol/Bydlinski/Bollenberger (-*Bydlinski*), ABGB[2], § 890 no. 4. ITALIAN doctrine also speaks of the indivisible obligation to be performed collectively (*Bianca*, Diritto civile IV, 767-771). In SLOVENIAN law the concept of joint obligations is known from family law where there is joint property of spouses consisting of rights and obligations. It is therefore clear that such a concept does exist in Slovenian law. It is also regulated in the LOA § 416 with analogous application of rule on solidarity. In CZECH law the concept of joint obligation (and joint performance) can be found in commercial law (Ccom art. 295 for commentary see *Štenglová/Plíva/Tomsa,* Commercial Code[11], 977). A concept near to *joint obligation* appears also in the CZECH CC § 145 which deals with the property of spouses (see expressions *joint performance of an obligation, joint liability)* but it does not give the creditor a right to joint performance and the concept of *joint obligation of spouses* is unanimously analysed as a *solidary obligation* within the meaning of the Article (see *Švestka/Jehlička/Škárová*, OZ[9], 418).

10. The HUNGARIAN CC § 334 provides as follows. (1) If an obligation is owed by several persons or can be claimed by several persons and this obligation is divisible, each debtor owes only that debtor's own share, and each creditor may claim only that creditor's due share, unless provided otherwise by legal regulation. In case of doubt, the share of the debtors or creditors is equal. (2) If an obligation is indivisible, performance can be demanded from any or all of the debtors. (3) If several persons are entitled to an indivisible obligation, it must be performed into the hands of all of them. Any of the creditors may require the object of the obligation to be deposited in court for the benefit of all of them.

III.–4:103: When different types of obligation arise

(1) Whether an obligation is solidary, divided or joint depends on the terms regulating the obligation.

(2) If the terms do not determine the question, the liability of two or more debtors to perform the same obligation is solidary. Liability is solidary in particular where two or more persons are liable for the same damage.

(3) The fact that the debtors are not liable on the same terms or grounds does not prevent solidarity.

COMMENTS

A. General

This article sets out the situations where the different types of plural obligation arise. The basic rule is that the character of an obligation depends on the terms of the contract or other juridical act or rule of law giving rise to the obligation.

B. Default rule of solidarity

Often the terms regulating the obligation will not say whether it is solidary, divided or joint. In some cases that will not be a problem; the nature of the obligation or the circumstances of the case may provide an answer. It will almost always be obvious from the nature of the obligation or the circumstances when an obligation is joint. For example, a contract with 28 street entertainers for the construction of a human pyramid containing them all gives rise by its very nature to a joint obligation. Sometimes the circumstances will indicate that an obligation is to be a divided one.

> *Illustration 1*
> A and B order, by one contract, a fixed quantity of fuel to be delivered to different tanks. The reason for the combined order is to benefit from a reduction in price. Their obligation to pay will be a divided one if the contract provides that each is to be liable for only half the price. The same result will follow if the parties have agreed that the supplier will send separate bills to A and B, that being a tacit indication that the parties wished to provide for a divided obligation.

In many cases, however, it will not be clear whether an obligation is solidary or divided. If A and B bind themselves to pay X €1000 and it is obvious that X is to receive no more than €1000 it is not clear whether the obligation is solidary or divided. It is necessary to have a default rule.

The laws of the Member States have different approaches on this question. However, the solidary obligation is clearly better from the creditor's point of view and can perhaps be said to be the natural interpretation of provisions providing for plural liability for one obligation. If A and B say "We oblige ourselves to pay X €1000 but only €1000 in total is due" then that can reasonably be read as meaning that each is bound to pay the full amount provided that the total payable to X is only €1000. If they want to provide that each is liable for a part then they should say so. The same applies, although perhaps with less force, to obligations arising by operation of law. Paragraph (2) therefore provides for a default rule of solidary liability when there are two or more debtors but one single obligation. It is justified because the natural

implication from the fact that A and B are both bound, without any qualification, to perform the same obligation is that each is bound to perform in full if called upon to do so.

Illustration 2
Several friends conclude a contract with a landlord for the rent of a holiday villa in the south of France. The landlord can claim the whole rent from one of the tenants under the rule in paragraph (2).

Illustration 3
Several students come across a holiday chalet in the mountains and occupy it for two weeks without permission. They are liable under the law on unjustified enrichment to pay an equivalent of rent. Their liability will be solidary.

C. Solidarity when several persons liable for same damage

Paragraph (2) provides, in order to protect the victim of damage caused by several people, that the obligation of reparation arising out of damage is solidary. The victim can therefore claim reparation for the harm from any one of those responsible for it. This solidarity applies whatever the nature of the responsibility in question. One of those responsible could be bound contractually, the other non-contractually. (On recourse between the co-debtors, see III.–4:107 (Recourse between solidary debtors))

Illustration 4
A, an employer, and B, an employee, are bound by a contract of employment containing a lawful restrictive covenant. C employs B with full knowledge that this violates the contract. B and C will be solidarily liable to A. B is contractually liable for breach of the restrictive covenant and C is liable for wrongfully inducing the breach of contract.

D. Debtors not liable on same terms or grounds

Paragraph (3) deals with the case where the conditions required for solidarity are fulfilled but the liability of one or more of the debtors is subject to a qualification, such as a condition or a time limit. The existence of this qualification does not prevent solidarity. The same rule applies when the liability of one of the debtors, but not others, is backed by a security.

Illustration 5
A, B and C borrow funds to buy a building from D. B's liability is subject to the condition that a purchaser can be found for B's present house within a year. This condition affecting B's liability does not prevent the debt of A, B and C from being solidary. Similarly, the solidary character of the obligation is not excluded if A's debt is secured and the debts of B and C are unsecured.

More generally, the fact that the debtors are not liable on the same terms or grounds does not prevent solidarity. For example, one might be liable as a debtor and the other as a security provider (see e.g. IV.G.–2:105 (Solidary liability of security provider) or one might be directly liable and the other vicariously liable (see e.g. VI.–6:105 (Solidary liability).

NOTES

I. Presumption of solidarity in contractual obligations

1. National solutions are diverse and can be classified in three categories. First, GERMAN law (CC § 427); ITALIAN law (CC art. 1294, except in succession matters); ESTONIAN law (LOA § 65(2)-(4)); SLOVAK law (Ccom art. 293 applies to commercial relationships); and the NORDIC countries have a general presumption of solidarity in the circumstances indicated in the paragraph. For AUSTRIA see *Ehrenzweig and Ehrenzweig*, System II(1)[3], 100; Secondly, in some countries, such as: GREECE (CC art. 480); the NETHERLANDS (CC art. 6:6(1)); SCOTLAND (*Gloag and Henderson*, The Law of Scotland[11], no. 3.13); SPAIN (CC arts. 1137 and 1138); SLOVAKIA (CC § 511(1)); and POLAND (CC art. 369), solidarity in contractual obligations is not presumed and there is therefore no solidarity unless it is provided for. However, in commercial debts (mainly, guarantees), case law in SPAIN has established that solidarity is the residual rule (*Carrasco Perrera/Cordero Lobato/Marín Lopéz*, Derechos de Garantía, 78). Thirdly, some legal systems distinguish between civil obligations, where solidarity is not presumed, and commercial obligations, where it is presumed. (See e.g. FRENCH and BELGIAN CC art. 1202, which can be displaced – and is widely displaced – by commercial custom; CZECH law where a general civil law principle is that unless otherwise provided the obligation is divided (unanimous interpretation of CC § 511) but the Ccom presumes - for a similar obligation - the solidarity of the debtors (Ccom art. 293); PORTUGUESE CC art. 513 and Ccom art. 100 and SLOVENIAN LOA § 394).

2. In ENGLISH law the question is one of interpretation of the contract (*Treitel*, The Law of Contract[11], nos. 13-002-13-003). In FRANCE, it has been suggested that the exception mentioned above (solidarity) has - and should - become the principle. In practice, solidary obligations are commonly used, either as a result of a legal disposition (solidary obligations are founded on the notion of common interests, common liability or credit protection) or a contractual stipulation

II. Solidarity between joint wrongdoers

3. Solidarity between those responsible for the same harm is very widely recognised. See e.g. the GERMAN CC § 840(1); the AUSTRIAN CC §§ 1301-1304; the SPANISH Criminal Code art. 116 and various civil regulations (i.e. on hunting activities, building undertakings, etc.); the GREEK CC arts. 926-927; the IRISH Civil Liability Act 1961 ss. 11(1), 12(1) and 21; the ITALIAN CC art. 2055(1); the NETHERLANDS CC art. 601; the PORTUGUESE CC arts. 497(1) and 507(1); the ENGLISH Civil Liability (Contribution) Act 1978 s. 1(1); the SCOTTISH Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 s. 3(1); the ESTONIAN LOA § 137(1); the CZECH CC § 438.1; the POLISH CC art. 441; and the SLOVAK CC § 438 (If the damage is caused by several wrongdoers, they are liable jointly and severally. In special cases, however, the court may decide that those who caused the damage are liable individually according to their participation in causing it.). Liability in solidum between those responsible for the same harm is recognised by case law in FRANCE, BELGIUM (Cass. 10 July 1952, Arr.Cass. 1952, 650), LUXEMBOURG and DENMARK, see *Gomard*, Obligationsret IV, 35. The sharing of the liability for reparation among those responsible is done in different ways in different countries.

III. Debtors not liable on same terms

4. The solution adopted in paragraph (3) is very generally admitted, if not in the texts of national laws, at least in the doctrine. See e.g. the SPANISH CC art. 1140; the FRENCH CC art. 1201; the ITALIAN CC art. 1293; the PORTUGUESE CC art. 512(2); the CZECH CC §§ 438.2 and 511.2 and the POLISH CC art. 368. For ENGLISH law see *Chitty* on Contracts I[29], nos. 17-029–17-030.

III.–4:104: Liability under divided obligations

Debtors bound by a divided obligation are liable in equal shares.

COMMENTS

This Article provides a default rule which comes into play when the share of a divided obligation for which each debtor is liable cannot be otherwise established. The rule in III – 4:103 (When different types of obligations arise) paragraph (2) makes divided obligations more rare, which limits the scope of the present rule in practice.

Illustration
A and B undertake to repay a sum of €10,000 to C. The contract contains a clause excluding solidarity between the debtors. A and B will each have to repay €5000.

NOTES

1. This rule is often provided by the texts of national laws. See e.g. the GERMAN CC § 420; the AUSTRIAN CC § 889; the SPANISH CC art. 1138; the GREEK CC art. 480; the NETHERLANDS CC art. 6:6(1); the PORTUGUESE CC art. 534; SLOVAK CC § 512, Ccom art. 294; CZECH CC §§ 511(2) and 512, Ccom art. 294 in fine; ESTONIAN LOA § 63(1); SLOVENIAN LOA § 393(2); and the POLISH CC art. 379 § 1. In other countries doctrine admits the rule without difficulty: SCOTLAND: *Gloag and Henderson*, The Law of Scotland[11], no. 3.13. There does not appear to be a presumption in ENGLISH law.
2. In FRANCE, plural obligations, whether passive or active, are in principle divided (*obligations conjointes*), in the absence of solidarity (legal, contractual or customary) or of the application of the concept of obligation *in solidum* or of indivisibility (objective - which may derive from the nature of things (CC art. 1121 - or subjective). Each debtor is liable only for that debtor's share of the obligation, normally in equal shares (*parts viriles*), and the creditor may only claim such share from each. The creditor bears the risk of a co-debtor's insolvency. It may be noted that solidary obligations may become divided obligations as CC art. 1120 contains a special rule by which heirs to the debtor are liable, not in equal shares, but as determined by their succession rights, even if solidarity was stipulated (See *Terré/Simler/Lequette*, Les obligations[9], 1181 nos. 1242 et seq.). However, the principle of divided obligations is limited in scope since joint obligations are common practice in contract law and solidarity is presumed in commercial contracts by virtue of commercial usages. The position is the same in BELGIUM (*van Gerven*, Verbintenissenrecht, 542).

III.–4:105: Joint obligations: special rule when money claimed for non-performance

Notwithstanding III.–4:102 (Solidary, divided and joint obligations) paragraph (3), when money is claimed for non-performance of a joint obligation, the debtors have solidary liability for payment to the creditor.

COMMENTS

This provision states clearly the principle (found in some laws) that the debtors of a joint obligation have, in any case when money is claimed for total or partial non-performance, a solidary responsibility towards the creditor. It follows that the creditor can claim damages from any one of the debtors. Two considerations justify this rule. First, it is an extension of the principle of the joint obligation. The debtors being liable collectively, it is logical that they should assume full responsibility in the event of non-performance due to the acts of one of them. Secondly, the obligation to pay damages, unlike the primary obligation to perform, is divided since it consists of a right to a sum of money. It is therefore capable of being satisfied by one of the debtors alone. It follows that each debtor should be held liable for the whole.

Debtors who performed their part or who were prepared to do so will often have remedies for non-performance of contractual obligations against the debtor who was responsible for the non-performance, at least if this debtor is not excused from performing. This will enable them to claim damages to cover the whole of the loss which they have suffered. In certain cases the damages could exceed the sum which the non-performing debtor was due to pay to the creditor.

Illustration 1
A contracts with B, a firm of masons and plumbers, and C, a carpenter, for the construction of a country cottage. B and C undertake a joint obligation to A of collective performance and corresponding obligations to each other. B does its work but C does not. In any proceedings by A for damages, B cannot avail itself of the fact that it has done its part of the work. On the other hand, B can avail itself of that fact in the context of its remedies against C.

Illustration 2
A recording company enters into a single contract with several musicians who are to play a symphony with a view to making a record. This is a joint obligation. The musicians also incur mutual contractual obligations to each other. One of the musicians does not turn up. As the recording cannot proceed without all the musicians being present, those who are present and ready to perform on the agreed day cannot plead, in any subsequent action against them by the creditor, that they were ready to play. But they will be able to found on that fact in the context of an action for damages brought by them against the musician who failed to turn up.

NOTES

1. As the notion of the joint obligation is not used in most laws there is little to be found on its operation. The rule of the Article is found, however, in most laws in relation to indivisible obligations. See above. GERMAN jurisprudence is divided on this question. The BGH has held that the debtors are solidarily liable in case of non-

performance (BGH 18 October 1951, LM § 278 no. 2/3). On the other hand, the BAG has held that only the debtor responsible for the non-performance is liable to the creditor (BAG 24 April 1974, BAGE 26, 130). The same rule is to be found in the SLOVENIAN LOA § 416. In SLOVAK law there is no explicit regulation corresponding to the Article. Similarly, the CZECH CC does not have a comparable provision, but the same result will usually follow from the "nature of the performance", which is one of the statutory causes giving rise to solidarity (CC § 511). Nevertheless, the same construction is also possible on the basis of CC § 512.1 and Ccom art. 293 ff. Each qualification depends on the circumstances of the individual case. Solidary liability as prescribed by the Article is supported by ESTONIAN writers (Varul/Kull//Kõve/Käerdi *(-Käerdi)*, Võlaõigusseadus I, § 64, no. 4.3). In ENGLISH law, where two or more debtors have joined together to promise to perform one obligation (joint liability), each is liable for the performance of the whole promise. In this situation, all debtors must generally be joined as defendants to the action (*Kendall v. Hamilton* (1879) 4 App. Cas. 504, 544 (HL)) (*Halsbury's* Laws of England IX[4], no. 1080). However, payment by one debtor discharges the other's obligation. If liability is solidary ("joint and several"), which arises when two or more persons join together to promise to perform an obligation and also promise to perform individually, payment by one will discharge the other (*Halsbury's* Laws of England IX[4] , no. 1079).

2. In SCOTTISH law, where joint debtors have an obligation to do a particular act other than the payment of money, non-performance will mean that each debtor is liable for the whole amount awarded as damages, with a right of relief against the co-debtor for its share (*Gloag and Henderson*, The Law of Scotland[11], no. 3.13). Under POLISH law, the general principle applies that solidary debtors remain fully liable until the creditor is fully satisfied (CC art. 366 § 2).

3. In SPANISH law liability for damages for non-performance of a joint obligation, regulated in the CC art. 1150 arises from the moment that one of the debtors fails to perform. The other debtors, who want to fulfil their part of the obligation are obliged to pay only their respective shares of the damages, while the debtor who failed to perform is obliged to satisfy all the *lucrum cesans* and *damnum emergens* created. The CC provision does not specify if the secondary obligation (payment of the damages) is regarded as divided or rather solidary. However, the Supreme Court takes the view that the joint obligation after the non-performance is transformed into a divided one, when there is an impossibility of *in natura* performance (TS 19 February 1959, RJ 1959/486; TS 10 October 1995, RJ 1995/8254). In SPANISH law a joint obligation can never be created when the performance is divisible; according to the CC art. 1138. If performance is divisible the obligation is divided, unless solidarity is stipulated in the terms of the obligation. Therefore the liability of the debtors of a joint obligation when the creditor claims money for the non-performance will never be solidary in Spanish law (except for the case when the solidarity of this secondary obligation is explicitly established), but divided, because of the divisible nature of the object of claim.

4. In FRANCE, the notion of joint obligations is not found in legal provisions: the principle is divided obligations (CC art. 1220), and the exception is solidary obligations.

5. The basic rule in SWEDISH law is the same as in the Article, see SKL chap. 6 § 4, expressing a general principle of Swedish law.

III.–4:106: Apportionment between solidary debtors

(1) As between themselves, solidary debtors are liable in equal shares.

(2) If two or more debtors have solidary liability for the same damage, their share of liability as between themselves is equal unless different shares of liability are more appropriate having regard to all the circumstances of the case and in particular to fault or to the extent to which a source of danger for which one of them was responsible contributed to the occurrence or extent of the damage.

COMMENTS

A. Default rule of equality

In providing a default rule of equal sharing, paragraph (1) adopts a natural and logical rule in line with III.–4:104 (Liability under divided obligations).

Illustration 1
A lends €10,000 to B and C. The contract contains a clause of solidarity. If B has paid the €10,000 to the creditor, B will be able to reclaim €5000 from C.

The rule of equal sharing is laid down only as a general rule. Unequal sharing may result from an express or implied provision of the contract or other juridical act or from the rule of law regulating the obligation .

Illustration 2
A and B order from C, by a contract including a clause of solidarity, a fixed quantity of fuel to be delivered into two tanks of different volume. 10,000 litres are to be delivered to A and 5000 to B. C claims payment from A who pays the whole amount. A will have a right of recourse against B but there is in the circumstances an implied provision of the contract that this will be only for the price of 5000 litres.

Illustration 3
D lends €60,000 to A, B and C who are made solidarily liable. A is to receive €30,000. B and C are to receive €15,000 each. A pays the whole amount and can reclaim a share from B and C but again there is in the circumstances an implied provision of the contract that A can reclaim from each of B and C only the amount of their part of the loan, namely €15,000, and not €20,000.

B. Rule for cases of damage

Paragraph (2) contains a special rule for cases of solidary liability resulting from causing the same damage, a matter which is treated rather differently in the various laws. The starting point is equal liability as between the solidary debtors but this applies only if another method of sharing is not more appropriate in the circumstances having regard in particular to fault or to the extent to which a source of danger for which one of them was responsible contributed to the occurrence or extent of the damage.

Illustration 4
Three companies are liable for loss caused to another company by unfair competition consisting of the release of products on to the market. The three companies are not

equally at fault. They submit their dispute to arbitration. The arbitrator could apportion the liability between them according to the degree of seriousness of their respective wrongdoing.

NOTES

I. Presumption of equality

1. A presumption, or default rule, of equal shares is contained in some civil codes. See e.g. the GERMAN CC § 426(1); the AUSTRIAN CC § 896; the FRENCH and BELGIAN CCs art. 1213; the GREEK CC art. 487; the ITALIAN CC art. 1298; the NETHERLANDS CC art. 6:1; the ESTONIAN LOA § 69(1); the PORTUGUESE CC art. 516; the SLOVAK CC § 511(2); the SLOVENIAN LOA § 405; the CZECH CC § 511.2; and the POLISH CC art. 376 § 1. Elsewhere it is recognised by doctrine. See, e.g. for ENGLISH law, *Chitty* on Contracts I[29], no. 17-027 and for SCOTTISH law *Gloag and Henderson*, The Law of Scotland[11], no. 3.14. The presumption does not exist in IRISH law.

II. Wrongful damage

2. The sharing of liability for damages between those responsible for the same damage is done in different ways in different legal systems. Sometimes it is done according to the degree of seriousness of the wrongdoing of those involved. This is the case, for example, in FRENCH jurisprudence; under the DANISH Law on Damages for Wrongful Acts § 25; under the GREEK CC art. 926 and under the POLISH CC art. 441 § 2, but in non-contractual matters only. Elsewhere causal participation is what matters. See the GERMAN CC § 254; the AUSTRIAN CC § 1302 if that is determinable, otherwise there is solidary liability; the ITALIAN CC art. 2055(2) and (3); and SPANISH jurisprudence. According to the ESTONIAN LOA § 137(2), in such cases liability is divided taking into account all the circumstances, in particular the gravity of the non-performance (or the unlawful character of other conduct) and the degree of risk borne by each person. Finally, under the ENGLISH Civil Liability Contribution Act 1978 s. 2, and the SCOTTISH Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 s. 3(1) the matter is left to the discretion of the judge: see *Chitty* on Contracts, no. 17-034. It is the same in IRISH law under s. 21(2) of the Civil Liability Act 1961. In CZECH law, the principle of solidarity is applied between wrongdoers and equal liability is presumed (CC § 438.1) but the provision establishes the judge's power to divide the liability according to the proportionate share of the blame for causing the damage (see CC § 438.2 and *Švestka/Jehlička/Škárová*, OZ[9], 538). According to the SLOVAK CC § 439 the person who is liable for damages solidarily with others, settles with them according to their respective participations in causing the damage.

3. Under the HUNGARIAN CC § 338(1) persons under solidary liability owe their obligations in equal shares, unless their legal relationship implies otherwise. If a co-debtor has performed in excess of that debtor's own obligation, there is a right to reimbursement from the other co-debtors up to the value of their share of the claim. Under CC § 338(2) none of the debtors may refer to an advantage against the others that they have received from the creditor. Under CC § 338(3) security rights held by the creditor pass to the debtor who has effected performance to the creditor, if that debtor is entitled to demand reimbursement from the other debtors.

III.–4:107: Recourse between solidary debtors

(1) A solidary debtor who has performed more than that debtor's share has a right to recover the excess from any of the other debtors to the extent of each debtor's unperformed share, together with a share of any costs reasonably incurred.

(2) A solidary debtor to whom paragraph (1) applies may also, subject to any prior right and interest of the creditor, exercise the rights and actions of the creditor, including any supporting security rights, to recover the excess from any of the other debtors to the extent of each debtor's unperformed share.

(3) If a solidary debtor who has performed more than that debtor's share is unable, despite all reasonable efforts, to recover contribution from another solidary debtor, the share of the others, including the one who has performed, is increased proportionally.

COMMENTS

A. General

This Article gives the solidary debtor who has paid or performed more than that debtor's share a right of recourse against the co-debtors to the extent that they, or any of them, have not paid or performed their shares. The Article does not give a right of recourse before performance. However, the co-debtors are bound by the general duty of good faith which may, in certain situations, oblige them to contribute to the settlement of the debt before it has been satisfied by the debtor who is pursued by the creditor.

This Article should be read along with the following three Articles.

B. Personal right of recourse

Paragraph (1) deals with the debtor's personal action, generally recognised by national laws on the basis of mandate, benevolent intervention in another's affairs (*negotiorum gestio*) or unjustified enrichment. The text makes it clear that costs reasonably incurred can be added to the principal claimed.

C. Subrogatory recourse

Paragraph (2) allows the solidary debtor to exercise, in the context of the right of recourse, the rights and actions of the creditor. The rule therefore recognises what is known in a number of national systems as subrogatory recourse, by virtue of which the debtor who has performed more than a proper share benefits from securities obtained by the creditor. The debtor can choose the most advantageous course of action. The Article makes it clear, however, that the exercise of this right of subrogatory recourse must not prejudice the creditor. Such prejudice might occur because of a potential competition between the creditor who has not yet been fully paid and the debtor subrogated to the creditor's rights. The rule gives effect to the adage that subrogation should not operate against the subrogated person - "*nemo contra se subrogare censetur*".

Illustration 1

Bank A agrees to a loan of €200,000 to a customer, B. The loan is secured by a real security and by a solidary obligation undertaken by C. C pays €150,000 for which C is subrogated to A. B being insolvent, the building subject to the real security is sold for €100,000, to be shared between A and C. By virtue of the rule in paragraph (2), the

exercise by C as paying solidary debtor of the rights and actions of the creditor cannot prejudice A, the creditor, who will take €50,000. Without this rule the price might have been shared proportionately between the two holders of the real security, ranking equally - that is, €25,000 for A and €75,000 for C. A would then have lost €25,000.

D. Effect of inability to recover

Paragraph (3) contains a rule based on equitable considerations and commonly recognised. The risk of non-payment by one of the solidary debtors should be shared proportionally among the solvent debtors. The burden of the risk should not depend on which debtor the creditor chooses to pursue.

Illustration 2
A, B and C are under a solidary obligation to repay a sum of €12,000, A being liable for €6000, and B and C for €3000 each. The creditor claims the full amount from A who pays the full €12,000. B is insolvent. The shares of the two solvent debtors, A and C, are then increased in proportion to their respective shares. The ratio of A's share to C's share is 2:1. So, of the €3000 due by B, €2000 is apportioned to A and €1000 to C, which increases A's share to €8000 and C's to €4000.

NOTES

I. Personal right of recourse

1. This right of recourse is often provided for by national statutes, even if they do not always mention reasonable costs. See e.g. the GERMAN CC § 426(1); the AUSTRIAN CC § 896; the NORDIC Promissory Notes Acts § 2(2); the SPANISH CC art. 1145(2); the FRENCH and BELGIAN CCs art. 1214; the ITALIAN CC art. 1299(1); the NETHERLANDS CC art. 6:10; the PORTUGUESE CC art. 524, the CZECH CC §§ 511.2, 511.3 and 439; the SLOVENIAN LOA § 404; and the POLISH CC art. 376 § 1. In ENGLAND and SCOTLAND the right of recourse depends partly on statute and partly on case law. See the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 s. 3 (applying to joint wrongdoers) and the Civil Liability (Contribution) Act 1978 (applying to liability for damages): both statutes give the courts considerable discretion. For rights of relief in SCOTTISH common law see *Gloag and Henderson*, The Law of Scotland[11], no. 3.14. For IRELAND see the Civil Liability Act 1981. In GREECE the right of recourse is admitted by doctrine. The SLOVAK CC § 511(3) provides that a debtor who pays the whole debt may require a reimbursement from the others according to their shares.

II. Subrogatory recourse

2. The right of subrogatory recourse is mentioned in many national laws - the GERMAN CC § 426(2); the AUSTRIAN CC § 896; the SPANISH CC art. 1210(3); the FRENCH and BELGIAN CCs arts. 1251(3) and 1252(2) which mentions also that the subrogation cannot prejudice the creditor; the GREEK CC art. 488; the ITALIAN CC art. 1203(1) no. 3; the NETHERLANDS CC art. 6:12(1) and the ESTONIAN LOA § 69(2) (see also LOA § 167). It is also known in ENGLISH law and IRISH law (Civil Liability Act 1981). In AUSTRIA, however, securities assign automatically only to the extent that the paying debtor has performed more than obliged to in the internal relationship between the co-debtors (see *Koziol and Welser*, Bürgerliches Recht II[13],

140; OGH 25 April 2001, JBl 2001, 647). This subrogation can be deduced from the CZECH CC § 511.3.

III. Effect of failure to recover

3. The rule in paragraph (3) is very widely adopted. See the GERMAN CC § 426(1) sentence 2; the AUSTRIAN CC § 896 sentence 2 and OGH 17 February 1954, SZ 27/35; the SPANISH CC art. 1145; the FRENCH and BELGIAN CCs art. 1214(2); the GREEK CC art. 487(2); the ITALIAN CC art. 1299(2); the NETHERLANDS CC art. 6:13; the PORTUGUESE CC art. 526; ESTONIAN LOA § 69(6); and the POLISH CC art. 376 § 2. The CZECH CC § 511.3 provides the same rule but without mention of "all reasonable efforts". The NORDIC and IRISH laws are similar. In English law the amount of contribution is the amount of the debt divided by the number of co-debtors who remain solvent *Chitty* on Contracts, no. 17-027. In SCOTTISH law the principles on unjustified enrichment could be used to reach the same kind of result in any case not covered by the statutes mentioned above. SLOVAK law CC § 511(3) provides that the share of any debtor who cannot pay is divided equally among all the others.

III.–4:108: Performance, set-off and merger in solidary obligations

(1) Performance or set-off by a solidary debtor or set-off by the creditor against one solidary debtor discharges the other debtors in relation to the creditor to the extent of the performance or set-off.

(2) Merger of debts between a solidary debtor and the creditor discharges the other debtors only for the share of the debtor concerned.

COMMENTS

A. Effect of performance or set-off

The rule in paragraph (1) is the consequence of the extinction of the obligation by performance or by some equivalent, such as set-off. This has a discharging effect in relation to the creditor to the extent of the performance made or amount set off, subject of course to the right of recourse of the debtor who has performed. In the event of bankruptcy it will be necessary to take account in appropriate cases of any restrictive rules of the applicable bankruptcy law.

Illustration 1
A lends €2,500,000 to B, C and D who are associates in a financial group. B becomes a creditor of A for €500,000 and gives notice of set-off. The solidary debt will be reduced to €2,000,000. The set-off will benefit the other debtors.

B. Effect of merger

The rule in paragraph (2) will apply where, for example, one of the debtors inherits from the creditor or there is an amalgamation of debtor and creditor companies. Where merger of debts (*confusio)* operates between the creditor and one of the debtors, the whole of the debt borne by the other debtors is reduced by the amount affected. If one of those debtors is insolvent, that debtor's share must be borne by all the debtors including the one concerned by the *confusio*, in application of the principle of III.–4:107 (Recourse between solidary debtors) paragraph (3).

Illustration 2
A is creditor of a solidary debt of €12,000 owed by B, C and D in equal shares. Following on an amalgamation, B becomes entitled to A's right. The right acquired by B is extinguished in relation to B by the operation of merger of debts (confusio), but subsists in relation to C and D to the amount of €8000. If C is insolvent, B and D must bear C's share by virtue of III.–4:107 (Recourse between solidary debtors) paragraph (3). B will be able to claim €6000 from D (4000 plus 2000).

NOTES

1. So far as payment or other performance is concerned, the rules under discussion flow from the very definition of solidarity. Set-off is normally treated as a form of payment. See the GERMAN CC § 422(1); the AUSTRIAN CC § 896; the NORDIC Promissory Note Act § 2; the SPANISH CC art. 1143(1); the GREEK CC art. 483; the ITALIAN CC art. 1302; the NETHERLANDS CC art. 6:7(2); the PORTUGUESE CC art. 523; SLOVAK CC § 511(1) (if one debtor pays, the others are discharged); the POLISH

CC art. 366 § 1 ("the satisfaction of the claim of the creditor by one debtor releases the other solidary debtors"); and the ESTONIAN LOA § 67(1); the HUNGARIAN CC § 337(1). The BELGIAN and FRENCH CC art. 1294(3) *a contrario* (A solidary debtor cannot invoke set-off between its debt and a debt of the creditor against another solidary debtor) (see *van Gerven*, Verbintenissenrecht, 552). ENGLISH law is to the same effect (*Owen v. Wilkinson* (1858) 5 CB (N.S.) 526) as is IRISH law (Civil Liability Act 1961 ss. 16 and 17). The same effect is evident in FRENCH law (see *Terré/Simler/Lequette*, Les obligations[9], 1193, no. 1254). However, the position is more complex because of the special nature of set-off or compensation which, in principle, operates automatically. (See *Terré/Simler/Lequette*, Les obligations[9], 1330, no. 1405). In CZECH law the rule is different. Under CC § 559.1 a debt is extinguished by performance. Some other legal reasons of extinction of the obligation do not automatically affect all co-debtors: this is the case with impossibility of performance or release (see *Švestka/Jehlička/Škárová*, OZ[9], 641). But if the obligation becomes extinct by *setting-off* of mutual claims (even of only one debtor), the obligation of the other solidary debtors becomes extinct simultaneously (the rule is based on CC § 580 as commented by *Švestka/Jehlička/Škárová*, OZ[9]). In SLOVENIAN law a set-off affecting one solidary debtor has no effect on other solidary debtors, but these have a right to accept the set-off. See LOA § 399.

2. Merger of debts (*confusio*) is not always mentioned in the texts of national laws but the solution can be deduced from the other types of extinction of the obligation provided for. See the SPANISH CC art. 1142; the FRENCH and BELGIAN CCs art. 1209; and the ITALIAN CC art. 1303. In CZECH law merger brings about the extinction of the obligation only in relation to the debtor concerned. The rule is derived from CC § 584 as commented by *Švestka/Jehlička/Škárová*, OZ[9]). The GERMAN CC § 425(2) and GREEK CC art. 486 refer expressly to merger of debts as one of the events which does not affect the other debtors. Although there is no express wording to that effect, ESTONIAN LOA § 68(3) most probably covers the question similarly. For SCOTTISH law on *confusio* see *Gloag and Henderson*, The Law of Scotland[11], nos. 3.39-40. According to SLOVAK legal literature merger of debts discharges the other debtors only for the share of the debtor concerned (*Lazar*, OPH II, 16).

III.–4:109: Release or settlement in solidary obligations

(1) When the creditor releases, or reaches a settlement with, one solidary debtor, the other debtors are discharged of liability for the share of that debtor.

(2) As between solidary debtors, the debtor who is discharged from that debtor's share is discharged only to the extent of the share at the time of the discharge and not from any supplementary share for which that debtor may subsequently become liable under III.–4:107 (Recourse between solidary debtors) paragraph (3).

(3) When the debtors have solidary liability for the same damage the discharge under paragraph (1) extends only so far as is necessary to prevent the creditor from recovering more than full reparation and the other debtors retain their rights of recourse against the released or settling debtor to the extent of that debtor's unperformed share.

COMMENTS

A. Effect of release or settlement

Few systems deal in full with the effects of both release and settlement. The rule in paragraph (1) is the same as for merger of debts under III.–4:108 (Performance, set-off and merger in solidary obligations) paragraph (2). It is equally appropriate in the present context. There is nothing to prevent a release or settlement from discharging the other debtors completely but there is no need to provide specifically for that. It can be done under the normal rules on renunciations of rights by unilateral juridical acts or contracts for the benefit of third parties.

B. Effect on later liability for supplementary share

It is fair that the discharged debtor should nonetheless bear any appropriate supplementary burden (under III.–4:107 (Recourse between solidary debtors) paragraph (3)) due to the insolvency of one of the other debtors.

Illustration

A has agreed to a commercial lease in favour of a partnership, the partners B, C and D being, under the applicable law, solidarily liable for the partnership debts. Arrears of €60,000 mount up. A releases B. C and D remain bound but only for €40,000. If D turns out to be insolvent, B will be bound to pay €10,000 in spite of the release.

C. Special rule for liability for same damage

Paragraph (3) contains a special rule for the case where two or more debtors have solidary liability for the same damage. The normal solution under paragraph (1) could give rise to potential injustice in cases of liability for damage. Why should the fact that the victim has settled with one of the wrongdoers for 50% of that wrongdoer's proper share (something which may have been done for good reasons, such as the inadequacy of that wrongdoer's insurance cover) deprive the victim of the right to recover from the others the full balance of the reparation due?

NOTES

1. Few national laws expressly cover both release and settlement. It is everywhere admitted that the rules apply only in the absence of an expression of intention on the

matter by the creditor who releases the debt or by those who have agreed the settlement. See the GERMAN CC § 423 (for the release of debt: according to the case law a settlement has, in principle, no effect on those who are not parties to it); the AUSTRIAN CC § 894 and case law (release of one debtor does not affect the position of the others, and according to CC § 896 sentence 3 the remaining debtors still have a right of recourse against the released debtor); the SPANISH CC art. 1143(1) (release of debt); the FRENCH and BELGIAN CCs art. 1285 (release of debt: case law since Cass. req. 3 December 1906, S. 07.1.269, admits that a settlement applies to the other co-debtors when it is favourable to them, by an effect of representation); the GREEK CC art. 484 (release of debt); the ITALIAN CC arts. 1301 (release of debt) and 1304 (settlement: this does not benefit the other co-debtors except if they declare that they wish to benefit from it); the NETHERLANDS CC art. 6:14 (release of debt). See also the PORTUGUESE CC art. 864(1). In ENGLISH law a release of one of the debtors releases all the debtors as joint and joint and several liability creates just one obligation, which would now be discharged. It is different with a simple "covenant not to sue" which leaves the creditor's rights against the other debtors intact (*Chitty* on Contracts, no. 17-017). IRISH law is substantially the same as the rules in the Article (Civil Liability Act 1981 s. 17(1) and (2). In SCOTTISH law a distinction is drawn between ordinary co-debtors and security providers (co-cautioners). In the latter case a release of one releases all, Mercantile Law Amendment (Scotland) Act 1856 s. 9. In the case of ordinary co-debtors a release of one leaves the others liable for their shares but discharges them of liability for the share of the released debtor (*Gloag and Henderson*, The Law of Scotland[11], no. 3.17). In POLISH law, release from debt or waiver of the solidary liability by the creditor in respect of one of the solidary debtors has no effect on the co-debtors (CC art. 373). The same holds generally true under ESTONIAN law (LOA § 66(1)). Other solidary debtors are released from the obligation only if by agreement the creditor expressly waives the claim against *all* of the solidary debtors (LOA § 66(2) sentence 1). It is provided that a solidary debtor may, on behalf of the other solidary debtors, accept a proposal from the creditor that the creditor will waive the claim against all the solidary debtors free of charge (LOA § 66(2) sentence 2). In SLOVENIAN law a release of one solidary debtor has the same effect against all, unless it was expressly provided that such a release was only of this individual. See LOA § 397. Under the CZECH law, the creditor may conclude an agreement (the written form is necessary under sanction of invalidity) with the debtor and waive the right or mitigate the debt. This affects neither the obligations of the remaining debtors to the creditor, nor the apportionment between them. The obligation of the discharged debtor as against the remaining debtors continues to exist. The same applies to impossibility of performance, which affects one of the debtors (CC §§ 575 ff). The Czech CC only implicitly accepts the effect on later liability for a supplementary share (CC § 511.3). The proposed special rule for liability for the same damage is not accepted by the CC. In SLOVAK legal literature it is said that release or settlement concerning only one solidary debtor has no effects on the other debtors. The creditor retains the right to demand the performance from the remaining debtors (*Lazar*, OPH II, 16).

III.–4:110: Effect of judgment in solidary obligations

A decision by a court as to the liability to the creditor of one solidary debtor does not affect:

(a) the liability to the creditor of the other solidary debtors; or

(b) the rights of recourse between the solidary debtors under III.–4:107 (Recourse between solidary debtors).

COMMENTS

A. Effect of court decision as to liability of one debtor on liability of others

Under these rules the reference to a court extends to arbitrators. See Annex 1. It is also appropriate to bear in mind the provisions on good faith and fair dealing given the risk of a fraudulent collusion between the creditor and one of the debtors to adversely affect the others.

National laws adopt different solutions to the problem of a court decision as to the liability of one debtor - no effects on the other debtors; full effects in favour of, but not against, the other debtors. These rules opt for the solution whereby the decision has no effects on the other debtors who were not parties to it. The idea of reciprocal representation is rejected. Each debtor should be free to make maximum use of that debtor's own defensive resources. There will be no *res judicata* effect except in relation to those who were parties to the litigation.

B. Effect of court decision as to liability of one debtor on rights of recourse

The rule in sub-paragraph (b) is intended primarily to clarify the effects of a court decision that one debtor is not liable in relation to the rights of recourse which the other debtors have. The rule on the absence of wider effects of the court decision applies here also. The other debtors retain their rights of recourse. Of course, a decision by a court that one debtor is liable does not prevent that debtor from exercising the right of recourse against the others: this situation too is covered by sub-paragraph (b).

NOTES

1. National laws are divided on the question regulated by this Article.
2. Under some laws a court decision on one debtor's liability has no effect on the co-debtors. This is the case under GERMAN law (CC § 425(2), AUSTRIAN case law (see Rummel (-*Gamerith*), ABGB I[3], § 894, no. 10); the GREEK CC art. 486; and NORDIC doctrine. From the CZECH regulation it does not follow that a decision by a court as to the liability to the creditor of one solidary debtor should affect the liability to the creditor of the other solidary debtors or the rights of recourse between the solidary debtors (see commentary by *Švestka/Jehlička/Škárová*, OZ[9], 640 ff). The same would follow in SLOVENIAN doctrine without express provision in the LOA. In ENGLISH law a judgment against one debtor does not bar an action against the others, (*Chitty* on Contracts, no. 17-016) but there is no discussion of the effect of a judgment in favour of one of the debtors. The position is the same in SCOTLAND (*Wilson*, Scottish Law of Debt[2], 320-321). For IRISH law see (Civil Liability Act 1981 s. 18). The SPANISH CC art. 1252(3) used to provide that a court judgment had full

effect in relation to the co-debtors who were not parties to it, but this rule has been abrogated by the new Procedural Civil Law and the common opinion now is that the judgment does not extend to other co-debtors. According to SLOVAK legal literature a court decision concerning one debtor has no effect on other solidary debtors who are not parties to the court decision (*Lazar*, OPH II, 16). In SCOTTISH law a creditor who had not been fully paid (even after suing one co-debtor) would continue to have rights against the other debtors (*McBryde*, Law of Contract in Scotland, no. 11.22).

3. In other laws such effect is only partial. See the ITALIAN CC art. 1306 (there is absence of effect in principle but the other debtors can plead the decision against the creditor, except when it is based on reasons personal to the debtor party to it). PORTUGUESE law is similar (CC art. 522). FRENCH case law considers on the other hand that the decision is pleadable against the other debtors except in the case of fraudulent collusion or if the debtor against whom the decision is pleaded can take advantage of a personal defence or exception. According to POLISH law, one of the characteristics of solidarity is that in certain cases it brings in effects in favour of the other debtors. Accordingly, a judgment rendered in favour of one of the solidary debtors releases the co-debtors, if defences common to all debtors have been considered (CC art. 375 § 2).

III.–4:111: Prescription in solidary obligations

Prescription of the creditor's right to performance against one solidary debtor does not affect:

(a) the liability to the creditor of the other solidary debtors; or

(b) the rights of recourse between the solidary debtors under III.–4:107 (Recourse between solidary debtors).

COMMENTS

This Article deals with a matter which is treated differently in the various laws. Under sub-paragraph (a) the effect of prescription is personal to the debtor concerned and does not affect the liability of the other debtors to the creditor. There is no reason why the other debtors should benefit from the prescription of the claim against one debtor when the claims against them have not prescribed. This rule fits in well with the way prescription operates under these rules: it does not extinguish the claim automatically but merely gives the debtor a right to refuse performance. It follows from the principle of paragraph (a) that anything – such as judicial proceedings against one debtor - which suspends the running of the prescription period against one debtor will not affect the liability of the others. Prescription may run against them even if its running is suspended against the one involved in the litigation.

Sub-paragraph (b) is justified primarily by the need to protect a debtor (not the one whose debt has prescribed) who has paid more than that debtor's share. Such a debtor should not be deprived, by the creditor's inaction, of the right of recourse against the debtor whose debt has prescribed. Sub-paragraph (b) also protects the debtor whose debt has prescribed but who nonetheless pays. As prescription under these rules does not extinguish the obligation it follows that such a debtor is fulfilling an existing obligation and is entitled to any available right of recourse against the co-debtors.

Illustration

A has lent €20,000 to B and C, who are solidary debtors. After 3 years the claim against B has prescribed but, because C has acknowledged the claim, the period of prescription against C has not yet expired. At this stage A cannot compel B to pay but can proceed against C for the whole amount. By virtue of the rule in paragraph (2), if C pays the whole amount C will be able to reclaim €10,000 from B.

NOTES

I. Effect of prescription of claim against one debtor on liability of other debtors

1. The solutions in national laws are contradictory, reflecting to some extent the different ways in which prescription or limitation of actions operates in the system concerned. In favour of the absence of effects on other debtors are: the GERMAN CC § 425(2); AUSTRIAN law (solution deduced from CC § 894, see *Ehrenzweig and Ehrenzweig*, System II(1)^{3}, 104); the GREEK CC art. 486; the ESTONIAN LOA § 68(3); the PORTUGUESE CC art. 521; SLOVENIAN LOA § 403. DANISH law is also to this effect; see *Gomard*, Obligationsret IV 63; as is ENGLISH law (Limitation Act 1980 s. 31(6)). According to SLOVAK legal literature prescription of the creditor's right to

performance against one solidary debtor has no effects on other solidary debtors (*Lazar,* OPH II, 16). For SWEDISH law see the Limitations Act (1981:130) § 9. According to that rule, where several persons are bound jointly and severally for the same debt and the debt is barred by the expiry of the limitation period in relation to one such person, each and every one of the other persons is liable only in respect of his or her own share. See also *Lindskog,* Preskription, 516 et seq. In favour of full effect are SCOTTISH law (Prescription and Limitation (Scotland) Act 1983 s. 6); SPANISH law (CC art. 1974); FINNISH law (Decree on Prescription of 9 November 1868); FRENCH and BELGIAN case law and doctrine (*van Gerven,* Verbintenissenrecht, 551); and ITALIAN doctrine, *Bianca*, Diritto civile IV, 732-733, but see Cass. 9 April 2001, no. 5262, in Giust. Civ. 2002, I, 3242.

II. Effect of prescription of claim against one debtor on right of recourse

2. GERMAN case law is to the same effect as the rule in sub-paragragh (b) (RG 16 November 1908, RGZ 69, 422 ff). See the ITALIAN CC art. 1310(3) on the waiver of prescription, but also Cass. 28 March 2001, no. 4507, in Giust. Civ. Mass. 2001, 612, where prescription of the creditor's right to performance may affect the rights of recourse between the solidary debtors and the PORTUGUESE CC art. 521. In ENGLAND contribution can be claimed from a debtor who has ceased to be liable: for debts, see *Chitty* on Contracts, no. 17-027 and, where the liability is for damage, Civil Liability (Contribution) Act 1978 s. 1(2). The NETHERLANDS CC art. 6:11(3) has a special rule. A debtor against whom recourse by way of contribution is sought can take advantage of the prescription of the creditor's claim only if, at the time when the obligation to contribute arose, both that debtor and the one who claims contribution could have pleaded prescription against the creditor.

3. From both the Czech and POLISH regulation it does not follow that rights of recourse between the solidary debtors should be affected (see respectively commentary by *Švestka/Jehlička/Škárová,* OZ[9], 639 ff and *Sychowicz*, 109). According to the general principle expressed in the POLISH CC art. 376 § 1, the contents of the legal relationship among the solidary debtors are decisive for whether and to what extent they have rights of recourse.).

4. ESTONIAN law states that generally the limitation period for the right of recourse expires at the time when the claim of the creditor against solidary debtor against whom the right of recourse is exercised would prescribe (LOA § 70(1)). However, this period is prolonged up to six month as of the date on which the solidary debtor performed the obligation (LOA § 70(2)), unless the solidary debtor performs the obligation after the limitation period for the claim against the debtor or the solidary debtor against whom the debtor exercises the right of recourse has expired (LOA § 70(3)).

III.–4:112: Opposability of other defences in solidary obligations

(1) A solidary debtor may invoke against the creditor any defence which another solidary debtor can invoke, other than a defence personal to that other debtor. Invoking the defence has no effect with regard to the other solidary debtors.

(2) A debtor from whom contribution is claimed may invoke against the claimant any personal defence that that debtor could have invoked against the creditor.

COMMENTS

Paragraph (1) recognises the traditional distinction between defences inherent in the debt itself and defences personal to each of the debtors. Only defences of the first type can be pleaded by all the debtors. Personal defences are exclusive to the debtors concerned.

Defences inherent in the debt are those, such as illegality or non-compliance with a formal requirement, which flow from the contract itself. Personal defences are those, such as lack of free consent or incapacity, which relate only to the personal position of one of the debtors. Indeed, the possibility of avoiding the contract for a defect in consent is necessarily personal to the person whose consent was affected.

Illustration 1
A, B and C borrow €50,000 from D at a rate of interest of 12%. The contract is in French. C, who does not speak French, is subject to an error producing a lack of true consent. B, if pursued by the creditor, cannot take advantage of this.

Paragraph (2) provides that personal defences can be pleaded against a debtor who claims a contribution from a co-debtor, whether the recourse is by personal action (III –4:107 (Recourse between solidary debtors) paragraph (1)) or based on subrogation (III.–4:107 paragraph (2)).

Illustration 2
The facts are as in Illustration 1. B, having paid the whole amount to D, now seeks recourse against C. C can found on the lack of true consent to defeat B's claim.

NOTES

I. Invoking defences against creditor

1. The distinction between personal defences and defences inherent in the debt is a general one, subject to some nuances. The general rule may sometimes be modified by special provision for certain types of defence (such as prescription or *res judicata).* The distinction is found in the GERMAN CC §§ 422-425; the ESTONIAN LOA § 67(2); the AUSTRIAN CC § 894; the SPANISH CC art. 1148; the FRENCH and BELGIAN CCs art. 1208 (which also creates a third category of exceptions "purely personal", on this concept see *François*, Les Obligations, no. 204); the GREEK CC art. 486 (which mentions certain exceptions operating subjectively); the ITALIAN CC art. 1297; the PORTUGUESE CC art. 514(1); and the POLISH CC art. 375 § 1. The distinction is taken for granted in ENGLISH law (see *Treitel,* The Law of Contract[11],

no. 13-011) and SCOTTISH law (*McBryde*, Law of Contract in Scotland, no. 11.19) and is also used in IRISH law. The second sentence of paragraph (1) regulates a matter which is sometimes unregulated, and a matter of dispute, in national systems. ESTONIAN LOA § 67(3) provides for a duty to invoke a defence inherent in the debt under the threat of losing the right of recourse to the extent by which the solidary obligation would have diminished as a result of such defence, subject to the actual or constructive knowledge of the circumstances underlying the defence.

2. Under CZECH regulation, objections regarding the common base of the obligation (for instance invalidity of the agreement, extinction of the obligation by performance) may be raised by any of the co-debtors. If the objection is justified, the obligation is extinguished with effect on all co-debtors. In addition to such common objections, any of the co-debtors may raise *special* objections, which have reference only to that debtor's own obligation (the maturity of the debt, release from the debt or prescription of action). The same position is taken in SLOVAK law, where there is no explicit regulation corresponding to the Article.

II. Invoking defences against other debtors exercising right of recourse

3. The rule in paragraph (2) is not expressed in a general form in national laws (but see the PORTUGUESE CC art. 525) where one finds only particular applications of it. There is generally, however, nothing to cast doubt on it. In SPANISH law, CC art. 1840 laid down this rule for a particular kind of co-obligation. See also the NETHERLANDS CC art. 6:11 (slightly different).

4. In the CZECH REPUBLIC the objection of prescription may be raised only by each co-debtor separately without legal effects for all co-debtors. Under CC § 580, which governs set-off, only the claim of the debtor invoking the right of set-off may be set off.

Section 2: Plurality of creditors

III.–4:201: Scope of section

This Section applies where two or more creditors have a right to performance under one obligation.

COMMENTS

This Section is not intended to cover all cases where there is a plurality of creditors. It does not deal with an accumulation of rights arising out of multiple contracts concluded by several creditors with one person, such as customers who order merchandise from one dealer. The existence of such parallel contracts does not affect their legal nature.

Plurality of creditors is not a topic which is dealt with explicitly in the laws of all the Member States, but it is sufficiently important that it is useful to set out a clear system of rules.

III.–4:202: Solidary, divided and joint rights

(1) A right to performance is solidary when any of the creditors may require full performance from the debtor and the debtor may perform to any of the creditors.

(2) A right to performance is divided when each creditor may require performance only of that creditor's share and the debtor owes each creditor only that creditor's share.

(3) A right to performance is joint when any creditor may require performance only for the benefit of all the creditors and the debtor must perform to all the creditors.

COMMENTS

A. General

The typology of plural rights to performance follows that of plural obligations (III.–4:102 (Solidary, divided and joint obligations). Solidary rights, divided rights and joint rights are thus, broadly speaking, the converse of solidary, divided and joint obligations. The following Articles in this Chapter are not, however, a simple reflection of the Articles on a plurality of debtors.

B. Solidary rights

Solidarity of rights is comparatively rare. It is not the default rule under this Chapter. See the following Article. Because of the risks inherent in solidarity of rights (notably, that one creditor may claim and squander the whole funds) it would not be appropriate as the default rule. For the same reason, solidarity of rights is rarely stipulated for by the parties. It is, however, frequently encountered in relation to bank accounts, particularly joint accounts where the holders are solidary creditors of the bank.

The definition of solidary rights given here reflects their characteristic features. Each creditor can obtain from the debtor the totality of the debt without the debtor being able to plead that it should be divided. Reciprocally, the debtor can make payment of the whole debt to one of the creditors, at the debtor's choice, thereby being discharged in relation to all the creditors. The debtor retains this choice even when faced with demands from all or any of the creditors.

In the event of non-performance by the debtor in the face of a claim by one of the creditors, the creditor can put in operation the various remedies for non-performance provided by these rules, without any obligation to act in concert with the other creditors. So, the creditor can terminate for fundamental non-performance, if there is substantial non-performance by the debtor. Similarly, the creditor can withhold performance of reciprocal obligations until the debtor performs or tenders performance.

C. Divided rights

Divided rights are the most frequent in practice. It follows that the relative practical importance of the different categories of plurality is different in the case of rights and obligations.

D. Joint rights

Joint rights arise when the performance is indivisible and when it can be rendered only for the benefit of all the creditors. A common field of application for joint rights is that of joint and

indivisible bank accounts. Another is contracts concluded by the title holders of property held jointly and indivisibly, as may happen, depending on the applicable law, under the law of trusts or succession.

It is of the essence of joint rights that their exercise is in the hands of all the creditors. It is conceivable; however, that one of the creditors may have received a mandate or authority from the others to receive the funds or performance due.

Illustration 1
A and B, members of a partnership or society which does not have legal personality, open a joint bank account as such members. They are joint creditors of the bank.

Illustration 2
A engages a married couple as caretakers and makes a caretakers' apartment available to them. Each is a joint creditor of the right to the tenancy.

Illustration 3
A group of friends hire a car with a driver for a joint excursion. The driver's performance can only be rendered for the benefit of the whole group, the members being accordingly creditors of a joint claim.

Where the debtor, in a case of joint rights, does not perform the obligation, the question arises whether the creditors must act in concert against the debtor or whether it is sufficient for one of them to act for the benefit of all. The Article, in providing that "any creditor can require performance only for the benefit of all", facilitates recovery and allows the creditors to avoid the paralysis which would otherwise result from the inaction of one of their number.

Illustration 4
A is the debtor in relation to a joint claim held by B and C. The debt is due but has not been paid. C can sue A for payment of the debt to both creditors.

Non-performance by the debtor in the case of joint rights necessarily affects the whole of the contract. The nature of the rights, and corresponding obligation, makes a termination or suspension by only one or some of the creditors inconceivable. All the creditors will have to act together to terminate for fundamental non-performance or to withhold performance of reciprocal obligations.

Illustration 5
The facts are as in Illustration 3. The driver does not turn up on the agreed date. The group of friends want to recover the money paid in advance. They will have to give notice of termination jointly to the debtor or authorise one of them to give notice on behalf of all.

NOTES

I. General

1. Plurality of creditors is not always dealt with in national laws (as is the case in SCOTLAND (but see *McBryde*, Law of Contract in Scotland, no. 11.24 for

discussion) and IRELAND) and is sometimes covered by reference to the regulation of plurality of debtors. For instance this is position of the CZECH law (CC §§ 512-515). The notion of joint rights does not exist in most national laws, otherwise than in doctrine. GERMAN law provides for it expressly (CC § 432(1)) as does ESTONIAN LOA § 72. The same may be said about CZECH civil law where a concept of joint rights can be observed as a counterpart of the notion of joint obligation at least in CC § 145 which deals with the property of spouses, including a particular form of rights and obligations which could be analysed as an intermediary category like the solidary obligation. Nevertheless this particular concept has to be analysed as a solidary right corresponding to the meaning of the Article (see commentary to CC § 145 by *Švestka/Jehlička/Škárová*, OZ[9], 418 and abovementioned notes about *joint obligation*). But a special commercial rule (Ccom art. 296) provides that if a debtor has concurrent obligations towards several creditors for an indivisible performance, any of these creditors may require this performance, unless the law or contract provides otherwise (see notes about joint obligation). Some other laws have the notion of indivisibility on the creditors' side, the rules being similar to those of the joint obligation. There are references to this type of indivisibility in the ITALIAN CC arts. 1314-1320; the GREEK CC art. 495 and the AUSTRIAN CC §§ 891, 892 and 895. ENGLISH law (see *Treitel*, The Law of Contract[11], nos. 13-020-13-034) recognises that creditors may be joint rather than separate ("several") but the effects of joint entitlement are different from solidary entitlement under these rules, for example a release of one of the joint creditors discharges the entire debt. It seems that promises made to a number of persons jointly and severally are treated for all purposes as several (*Treitel*, The Law of Contract[11], no. 13-020). In SLOVAK law plurality of creditors is dealt with in CC § 512(1) (divisible performance), § 512(2) (indivisible performance) and § 513 (solidary performance). In SCOTTISH law the question of a plurality of creditors is not expressly regulated and is not much discussed in the literature. The principle of freedom of contract means, however, that the parties can create the types of legal relationships mentioned in the Article. Everything depends on the interpretation of the terms regulating the obligation. In BELGIAN law, doctrine distinguishes between the obligational question of the relationship between the creditors and the debtor on the one hand and the proprietary question of ownership of the right on the other hand. The answer to the first question depends in principle on the answer to the second, but is not identical. The internal relationship between the creditors is first of all a question of property law: are the different creditor's co-owners or not, and if so, in which form of co-ownership (joint ownership or mere co-ownership). If the right is not indivisible and does not form part of a joint ownership or an estate, it is automatically divided in separate rights. In the obligational relationship with the debtor, separate creditors can act separately, joint owners and owners of indivisible rights can in principle act only jointly, but the law or a juridical act can grant one of the co-owners the authority to act for all of them, and such authority can also have been be stipulated by the debtor in its own interest. If the creditors can only act jointly, this corresponds to the joint right of this Section, if one has authority to act on behalf of all, this corresponds to the solidary right of this Section. A special rule is found in CC art. 1220 (with exceptions in CC art. 1221), which provides that the debtor of a deceased person can split up its debt over the heirs in proportion to their share of "saisine", despite the fact that these heirs are still joint owners (as follows from CC art. 832). It can also be stipulated that the debtor may only pay to one specific co-owner and not to the other ones (see CC art. 1277 II).

II. Solidary rights

2. The elements of the definition and governing rules in this paragraph are to be found in a certain number of codes. See e.g. GERMAN CC § 428; the SPANISH CC arts. 1137-1143; AUSTRIAN CC § 891; the CC's of FRANCE, BELGIUM and LUXEMBOURG arts. 1197 and 1198; the GREEK CC arts. 489-493; the ITALIAN CC arts. 1292-1310 (each article dealing successively with active and passive solidarity); the CZECH CC § 513; the ESTONIAN LOA § 73; the PORTUGUESE CC arts. 512(1) and 528(1); and the SLOVAK CC § 513 (if the debtor is obliged to an equal performance to two or more creditors who are jointly and severally entitled vis-à-vis that debtor according to law, to a judicial decision or to an agreement, any of the creditors may ask for the whole performance and the debtor must perform the whole debt to the first creditor to ask for the performance). There is also reference to solidary rights in the NORDIC laws (*Gomard*, Obligationsret IV, 14-16 and SLOVENIAN LOA § 406). It is uncertain whether ENGLISH law recognises solidary rights as a distinct juridical category; it (*Treitel*, The Law of Contract[11], no. 13-020).

III. Divided rights

3. As it is the background norm, sometimes even built on a presumption of divisibility (PORTUGUESE CC art. 513; the NETHERLANDS CC art. 6:15), the divided right of co-creditors is not always defined in the national codes. See, however; the ITALIAN CC art. 1316; the NETHERLANDS CC art. 6:15; the PORTUGUESE CC art. 534; the CZECH CC § 512.1; AUSTRIAN CC § 891; and the POLISH CC art. 375 § 1. The GERMAN CC envisages the existence of the divisible right without defining it (cf. CC § 420, but it is irrelevant from a practical perspective, see Staudinger (*-Schmidt-Kessel*), Eckpfeiler des Zivilrechts [2008], 293 et seq.), and similarly under ESTONIAN law (LOA § 71). Note also the provisions of the FRENCH CC arts. 1220 and 1221 on divisibility by operation of law between heirs. In the SLOVAK CC § 512(1) there are rules governing performance of divisible debts to more creditors, however the provision contains no definition of the divisible right.

IV. Joint rights

4. The category of joint rights, as distinct from indivisible rights, is directly known in GERMAN and ESTONIAN law. For BELGIAN law, see note 1 above. For the CZECH law see above commentary to CC § 145 by *Švestka/Jehlička/Škárová*, OZ[9], 418 and also notes about joint obligations. AUSTRIAN law addresses joint rights in CC § 890 sentence 2). In other laws, reference may be made to the rules on indivisibility. The reference to such rules is sometimes made expressly: the NETHERLANDS CC art. 6:16.

5. For HUNGARIAN law see CC § 334, discussed in the Notes to III.–4:102 (Solidary, divided and joint obligations). In addition, under CC § 335(1) if a right is held by several creditors in such a manner that each is entitled to demand the entire performance but the debtor is bound to a single performance (solidary right), the obligation to each creditor ceases to exist if any of them is satisfied. Under CC § 335(2) each creditor is affected by anything done by any of them in relation to the right, particularly a notice of termination, a warning, and the exercise of a right to choose. Under CC § 335(3) aright does not lapse in respect of any of the creditors until the conditions of the period of limitation have materialised in respect of all of them. Under CC § 335(4) if any of the creditors raises a legal action for performance, the debtor may refuse performance to the other creditors, without being exempted thereby from the legal consequences of default, until the non-appealable conclusion of the

action. Under § 336 creditors are entitled to equal shares of a claim, unless their legal relationship suggests otherwise.

III.–4:203: When different types of right arise

(1) Whether a right to performance is solidary, divided or communal depends on the terms regulating the right.

(2) If the terms do not determine the question, the right of co-creditors is divided.

COMMENTS

This Article sets out the default rule for plurality of creditors. As noted above, the rule is different from that applying to a plurality of debtors. There solidarity is the default rule. However, that would be dangerous for creditors because any one of them could claim performance to the prejudice of the others. So the default rule for creditors is that their right is divided. This regime will apply unless the terms regulating the right (typically the terms of a contract) provide otherwise or the nature of the right itself, or the relationship between the creditors, indicates otherwise.

NOTES

1. It is a settled rule under ESTONIAN law that unless the law or a transaction provides otherwise, the right of co-creditors is divided (*osanõue*), see LOA § 71. In SCOTLAND this result would probably follow from the application of the rules on interpretation: in a case of doubt there would be a preference for the result which would be in accordance with reasonable expectations and which would be less onerous for the debtor rather than more onerous. In ENGLAND there is a statutory presumption that rights under a deed are divided: Law of Property Act 1925 s. 81, see *Treitel,* The Law of Contract[11], no. 13-020.
2. In the SPANISH CC the default rule is that the right of the co-creditors is divided (CC art. 1138). It is the same in BELGIAN law (Cass. 10 May 1979, Arr.Cass. 1978-79, 2080; *van Gerven*, Verbintenissenrecht, 542), unless it is indivisible by nature or forms part of a joint property or estate. Also under GERMAN law the default rule is that the rights are divided if they are divisible, CC § 420, but divisibility rarely occurs.

III.–4:204: Apportionment in cases of divided rights

In the case of divided rights the creditors have equal shares.

COMMENTS

This provision is the counterpart of the rule applying in the case of a plurality of debtors. The general rule laid down in the Article may be displaced by contrary provision in the terms regulating the right.

Illustration
A and B lend €10,000 to C. In the absence of any special provision, C owes €5000 to each of the creditors. Conceivably, however, a term in the contract might provide for a different apportionment because, for example, of a debt owed by one of the creditors to the other.

NOTES

1. This rule is sometimes expressed. See the GERMAN CC § 420; the GREEK CC art. 480; the ITALIAN CC art. 1298; the PORTUGUESE CC art. 534; the ESTONIAN LOA § 71; the SLOVAK CC § 512(1); the SLOVENIAN LOA § 1004(1); the CZECH CC § 512.1 and the POLISH CC art. 379 § 1. It is not contested. In SCOTLAND the result would be reached by applying the rules on interpretation. In ENGLISH law, where a debtor only makes one promise to two or more debtors to pay them a sum of money it is important to know whether the promise was made to the creditors jointly or separately. The general rule is that if they are joint creditors, payment to one discharges the debt but this may be varied by the contract. In contrast, payment to just one of a number of separate creditors "does not discharge the whole debt since each is separately entitled to their share." (*Treitel,* The Law of Contract[12], nos. 13-030-13-031). How much is owed to each seems to be a matter of interpretation of the relevant agreement(s). In SWEDEN, the basic rule is probably the same as in the Article, see Partnership and Non-registered Partnership Act (1980:1102) chap. 4 § 5(2) and *Rodhe,* Obligationsrätt, 151 et seq.
2. The SPANISH CC art. 1138 not only provides a presumption that the obligation is divided, but also that the creditors or debtors have equal shares in it. Any of those presumptions may be displaced by a contrary provision in the terms regulating the right. According to the Supreme Court, the unequal parts may result also from the interpretation of the obligation, for example, in case of a civil liability for an offence (TS 26 October 2002, RJ 2002/9183).
3. In FRANCE and BELGIUM, the default rule in the case of plurality of creditors is that the right is divided and each creditor can claim payment of an equal share (See *Terré/Simler/Lequette,* Les obligations[9], 1182, nos. 1243, 1182). The default rule does not apply where the right forms part of a joint property or estate. However, in case of succession, the authority of each creditor to receive payment is in proportion to the part for which they are "saisi" as representative of the deceased (FRENCH and BELGIAN CCs art. 1220 with exceptions in CCs art. 1221).

III.–4:205: Difficulties of performing in cases of joint rights

If one of the creditors who have joint rights to performance refuses to accept, or is unable to receive, the performance, the debtor may obtain discharge from the obligation by depositing the property or money with a third party according to III.–2:111 (Property not accepted) or III.–2:112 (Money not accepted).

COMMENTS

This rule is intended to protect the debtor who, without it, could not obtain an effective discharge if one of the creditors refused, or was unable, to receive the performance. It will be remembered that the debtor must render the performance to the creditors together. Because of the rule in the present Article the debtor will, in case of difficulty caused by this requirement, be able to put into operation the measures provided for by III.–2:111 (Property not accepted) or III.–2:112 (Money not accepted).

Illustration
A and B buy a second hand car from C, the contract making it clear that they have a joint claim. B is hospitalised and, because of his condition, is not able to receive the performance or give a mandate to A. C wants to deliver the car at the agreed time. C cannot deliver the car for the sole benefit of A, because A and B have a joint claim. C will be able to deposit the car with a third party for the benefit of A and B according to the rules laid down in III.–2:111 (Property not accepted).

NOTES

1. GERMAN law has a rule comparable to the Article (CC § 432(1) sent. 2). ESTONIAN LOA § 72(3) implies that each of the joint creditors may require performance of the obligation, "including the deposit or sale of the thing owed", only for the benefit of all the joint creditors. A similar rule is provided in POLISH law regarding the execution of an indivisible claim. When there are several creditors entitled to an indivisible claim, each of them may require performance of the entire claim. However, in case of opposition on the part of even one creditor, the debtor must perform to all the creditors jointly or deposit the object of the claim with the court (CC art. 381). SLOVAK law provides for a similar rule regarding indivisible performance (CC § 512(2)). The indivisible debt could be discharged by performing it to one of the creditors. However the debtor does not have to perform to one of the creditors without the consent of other creditors. Unless all joint creditors agree on the performance, the debtor may deposit the debt in court. CZECH law is the same (CC § 512.2 in fine).
2. In other laws a similar result can be obtained by applying the general mechanisms of deposit (in this type of situation) and consignation. A right of deposit is also mentioned in the AUSTRIAN CC § 890 last sentence.
3. There is no regulation of this matter in ENGLISH or SCOTTISH law.
4. The SPANISH CC art. 1139 provides that when there are several creditors with joint rights and one of them refuses to accept the performance, the debtor will get a discharge only when the debtor consigns the property, because this article requires a collective participation of all the creditors in order to cause a legal effect on the obligation, therefore the debtor may not fulfil in any other way. Although the creditor cannot be forced to accept the performance, the creditor has to facilitate the obtaining

of a discharge by the debtor, as the debtor should not remain eternally bound by the obligation in spite of wanting to perform it (*Lacruz Berdejo and Rivero Hernández*, Elementos II[3], 132). CC art. 1176 sets forth a general principle that forbids the creditor to refuse the performance offered by the debtor when there is no justified reason. Facing the unjustified refusal, the debtor will obtain a discharge by judicial consignment of the property, in accordance with the CC art. 1178. The previous refusal is not needed when the creditor is legally absent or unable to receive the performance at the place and time agreed.

5. In FRANCE, there is no rule comparable to this Article. In the case of indivisible obligations, a similar result can be obtained by applying the general mechanisms of deposit (in this type of situation) and consignation. Where the creditor refuses, or is unable, to receive the performance, the debtor, may make an *offre réelle* to the creditor (by way of *huissier*) and, upon refusal of the offer by the creditor, consign the payment or the offered goods in the *Caisse des Dépôts et Consignations* pursuant to CC arts. 1257 and 1258. The effect of this *offre réelle* is to discharge the debtor. In the case of indivisible obligations, an *offre réelle* by the debtor is not required since the creditor of the price of the sale of a building cannot receive the full price alone (Civ 2è, 16 February 1972: *D. 1972. 638*). CC art. 1264 together with Ccom art. L. 133-4 provide that if the creditor refuses to receive the goods, the debtor must request the creditor to take delivery and, upon a failure to do so, may be authorized by a court to deposit the goods in a place other than the place of delivery. These provisions only apply to money debts and goods, not to obligations to do (T. civ. Lille, 7 June 1905: DP 1906, 5, p. 15).

III.–4:206: Apportionment in cases of solidary rights

(1) In the case of solidary rights the creditors have equal shares.

(2) A creditor who has received more than that creditor's share has an obligation to transfer the excess to the other creditors to the extent of their respective shares.

COMMENTS

Paragraph (1) is the counterpart of the rule on apportionment between solidary debtors. Like that rule, it is only a default rule. The terms constituting the solidarity will generally specify the share due to each of the creditors. In the absence of such provision, sharing will be in equal parts.

Paragraph (2) lays down an understandable rule. A creditor who has received more than that creditor's share obviously cannot be allowed to keep the excess. It must be handed over to the other creditors.

Illustration
A and B are solidary creditors of C for an amount of €10,000. C pays €10,000 to B. A has a right of recourse against B for €5000.

NOTES

1. The rule in paragraph (1) is not found in many of the national laws, but it follows from the parallelism with the rules on passive solidarity. It is found, however, in the GERMAN CC § 430; the SPANISH CC art. 1143(1); the GREEK CC art. 493; the ITALIAN CC art. 1298; the PORTUGUESE CC arts. 516 and 533; the ESTONIAN LOA § 75(1); and the POLISH CC art. 378. The basic rule is probably the same in SWEDISH law, cf. Partnership and Non-registered Partnership Act (1980:1102) chap. 4 § 5 and *Rodhe*, Obligationsrätt, 150 et seq. The AUSTRIAN CC § 895, however, contains the opposite presumption that in the absence of an agreement the creditor who received payment has no obligation towards the other solidary creditors.
2. The CZECH CC specifies explicitly that any of the creditors may demand only its own share (§ 512.1) and that only the relationship between the solidary creditors determines, whether one of the creditors, who received the whole performance, has obligations to the other creditors or not (CC § 515.1).
3. According to the SLOVAK CC § 515 the relationship between the joint creditors determines whether the creditor who received the whole performance that could have been asked by any of the creditors has any duty vis-à-vis the other creditors. The same rule applies if a joint creditor received more than that creditor's share.
4. In SCOTLAND the rule in paragraph (1) would follow, in the absence of any indication to the contrary in the terms regulating the obligation, from an application of the rules on interpretation. The rule in paragraph (2) would follow from an application of the rules on unjustified enrichment. In BELGIUM, the internal relationship between solidary creditors is first of all a question of property law. In the absence of any terms of the internal relationship governing the question, the default rule will as in this Article follow from a parallel to the rules on passive solidarity.

5. In FRANCE, a similar rule is found in the secondary obligations of solidarity, either passive or active, amongst which is the principle that the creditor who receives full or partial payment is exposed to the right of recourse of the other creditors to the extent of their rights to performance (See *Terré/Simler/Lequette*, Les obligations[9], 1184, no. 1246).

6. ENGLISH law seems not to recognise solidary creditorship, see above.

III.–4:207: Regime of solidary rights

(1) A release granted to the debtor by one of the solidary creditors has no effect on the other solidary creditors.

(2) The rules of III.–4:108 (Performance, set-off and merger in solidary obligations), III.–4:110 (Effect of judgment in solidary obligations), III.–4:111 (Prescription in solidary obligations) and III.–4:112 (Opposability of other defences in solidary obligations) paragraph (1) apply, with appropriate adaptations, to solidary rights to performance.

COMMENTS

A. Release by one solidary creditor

Under paragraph (1) a release of the debt agreed to by one of the solidary creditors has no effect on the other creditors. This rule is different from the rule provided above for the case of solidary obligations (III.–4:109 (Release or settlement in solidary obligations)). It means in effect that one creditor cannot dispose of the right to performance to the detriment of the other or others.

> *Illustration 1*
> A and B are solidary creditors of C for the amount of €10,000. A grants a total release to C, who is therefore discharged in relation to A. A will no longer therefore be able to sue for recovery of the money. B remains creditor of C for the whole amount of €10,000.

The rule envisages only the release of the debt, as opposed to a settlement. A settlement, in so far as it provides for partial payment, will come under the rules on payment (see paragraph (2) read with III.–4:108 (Performance, set-off and merger in solidary obligations) paragraph (1)) and, in so far as it involves a release, will come under the rule of the present paragraph.

> *Illustration 2*
> A and B are solidary creditors of C for an amount of €10,000. A sues C and, in the course of the proceedings, concludes a settlement providing for a release of half the debt on payment of the other half. In accordance with the settlement C pays €5000 to A. The settlement cannot be pleaded against B who has the right to sue C. However, because of the partial payment which has been made, B can claim only €5000 (III.–4:207 (Regime of solidary rights) paragraph (2) read with III.–4:108 (Performance, set-off and merger in solidary obligations) paragraph (1)).

B. Application of certain rules for solidary obligations

The form of paragraph (2) is explained by the parallelism between plurality of debtors and plurality of creditors. It avoids a repetition of the relevant rules provided for the case of a plurality of debtors. The following consequences ensue.

By virtue of the application of III–4:108(Performance, set-off and merger in solidary obligations) paragraph (1) both the payment of the debt and the operation of set-off between the debt due by the debtor and one of the rights discharge the debtor in relation to the co-creditors. It is the same in the case of merger (*confusio)*: the debt is extinguished, but the

debtor who has thus become creditor is exposed to the right of recourse of the other creditors, as provided by III.–4:206 (Apportionment in case of solidary rights) paragraph (2).

Illustration 3
A and B are solidary creditors of C for an amount of €10,000. B dies and C, his sole heir, succeeds. A will be able to claim €5000 from C, the new co-creditor.

In the same way, by virtue of III.–4:110 (Effect of judgment in solidary obligations), a court decision has effect only between the parties to the litigation.

Under III.–4:111 (Prescription in solidary obligations) paragraph (1), as applied to solidary rights, when one of the rights has prescribed, the other creditors keep their rights. Under paragraph (2) of that Article the creditor whose right has prescribed can nonetheless exercise a right of recourse (under III.–4:206 (Apportionment in cases of solidary rights) paragraph (2)) against a creditor who has received more than a due share of the right.

Illustration 4
A and B are solidary creditors of C for an amount of €10,000. B's claim has prescribed but A's has not. A can proceed against C and recover the whole of the sum. B can then exercise a right of recourse against A to the extent of €5000.

Finally, by virtue of III.–4:112 (Opposability of other defences in solidary obligations) paragraph (1) the debtor can plead against the creditor any defences, personal or inherent in the debt, apart from any defences personal to another of the solidary creditors.

Illustration 5
A and B are solidary creditors of C for €10,000. C can argue against A that the contract giving rise to the rights is ineffective by reason of its illegality, as it relates to a matter which cannot be the object of a lawful contract. This would be a defence inherent in the debt.

Illustration 6
A joint bank account is opened in the names of A and B. B is legally incapable of contracting by reason of mental incapacity. A wants to make a withdrawal. The Bank cannot plead the incapacity of B against A. This is a personal defence which can be invoked only in the Bank's relations with B.

Paragraph (2) of III.–4:112 (Opposability of other defences in solidary obligations) is not applied by analogy to solidary rights. The creditor who has received full payment, the debtor being thereby discharged, is exposed to the right of recourse of the co-creditors without being able to plead against them the defences which the debtor could have used against them. The sharing of the amount due under the obligation should be regulated exclusively by the terms regulating the right of the solidary creditors.

Illustration 7
A and B are solidary creditors of C for an amount of €10,000. A sues C who pays €10,000. C could have pleaded a vice of consent against B. A will have to pay over €5000 to B, without being able to invoke the vice of consent which C could have pled against B.

NOTES

I. Release by one solidary creditor

1. The rule in this paragraph is different from that of several legal systems which, in the case of a release by one of the solidary creditors, come down expressly in favour of a partial reduction of the claim. See the FRENCH and BELGIAN CCs art. 1198(2); the GREEK CC art. 491(1); the ITALIAN CC art. 1301(2); the PORTUGUESE CC art. 864(3); as well as SLOVENIAN LOA § 409. For settlements, see the ITALIAN CC art. 1304 (according to which a settlement between one of the creditors and the debtor has effect against the other creditors only if they declare that they want to benefit from it). In the absence of express provisions, other laws adopt the solution of a partial reduction by analogy with passive solidarity. POLISH law provides that the release of the debtor by one of the creditors entitled to an indivisible performance has no effect in respect of the other creditors (CC art. 382 § 1). Provision similar to paragraph 1 of the Article can be found in the ESTONIAN LOA § 74; however this is equivalent to the rule (different from CFR) applied for solidary debtors (LOA § 66(1)), see also notes to Article 4:109). In the SPANISH CC, arts. 1143 and 1146: a release granted by one creditor extinguishes also the claim of the other creditors, regardless of whether the release was addressed to one or to all the debtors; one creditor may release the debtor of the whole obligation as well as only of the internal part of this debtor. Nevertheless it is difficult to reconcile these provisions with the general rule (CC art. 1141) according to which no creditor is empowered to take steps that harm the others creditors' positions. In AUSTRIA, however, the state of the law is the same as in the Article. Release by one creditor does not affect the position of the other creditors (see *Koziol and Welser*, Bürgerliches Recht II[13], 139). There is no special disposition in CZECH law. Nevertheless the general rule is that an agreement reached has legal effects only on the relationship of the debtor and creditor who concluded it (CC § 574 as generally construed and interpreted by *Švestka/Jehlička/Škárová*, OZ[9], 740). The position is the same in SCOTTISH law. In ENGLISH law, the release of a debtor by one joint creditor discharges the debt. Where there are a number of creditors entitled to payment separately and one of these creditors releases the debtor then only the share of the grantor is released (*Treitel,* The Law of Contract[12], nos. 13-028–13-029). English law seems not to recognise solidary creditorship, see above. In SLOVAK law there is no special regulation of the matter treated in the Article.

II. Application of certain rules for solidary obligations

2. The technique of legislation by reference to the rules on passive solidarity is found in a number of laws. See the GERMAN CC § 429(3) (the second paragraph of this article being devoted to merger); the SPANISH CC art. 1137. Others deal together with active and passive solidarity (the ITALIAN CC arts. 1300-1306) or have distinct rules (the GREEK CC arts. 491 and 492; the PORTUGUESE CC arts. 532, 869, 530 and 514(2)); and the ESTONIAN LOA §§ 66, 68, 73 and 74. In the absence of express rules, the rules on passive solidarity will probably be applied by analogy. In addition the SPANISH CC provides in art. 1141 that each co-creditor can act for the benefit of the others but not to their detriment. AUSTRIAN law, on the other hands, contains separate provisions for solidary creditors (see CC §§ 891, 892, 895 and the above notes).

CHAPTER 5: CHANGE OF PARTIES

Section 1: Assignment of rights

Sub-section 1: General

III.–5:101: Scope of section

(1) This Section applies to the assignment, by a contract or other juridical act, of a right to performance of an obligation.

(2) It does not apply to the transfer of a financial instrument or investment security where such transfer is required to be by entry in a register maintained by or for the issuer or where there are other requirements for transfer or restrictions on transfer.

COMMENTS

A. The topics covered by the Chapter

The Chapter covers three topics – an assignment of the right to performance to a person who becomes the new creditor; a change of debtor by the substitution of a new debtor for the existing debtor; and the transfer to another person of the entire contractual position, rights and obligations, of one party to a contract. These topics are related to each other; they all involve a change in the parties to a legal relationship; but they are also different in important respects.

An assignment of a right to performance, often a right to the payment of money, does not involve any transfer of the assignor's obligations. The debtor's own rights continue to lie solely against the assignor. Since an assignment does not involve the release of either of the parties to a contract, it does not require the consent of the debtor unless the underlying contract so provides. Assignment is therefore to be distinguished from the situation where a third party is substituted for the debtor, who is released from liability completely or incompletely, an arrangement requiring the assent of all three parties (see Section 2 of this Chapter. It is also to be distinguished from the situation where a third party is substituted completely for one of the contracting parties, taking over both rights and obligations. This also requires the assent of all three parties (see Section 3 of this Chapter).

B. The topics covered by Section 1

Section 1 applies only to assignments by a contract or other juridical act. It does not apply to transfers of rights by operation of law – for example, on death or bankruptcy. It is common to find statutory provisions to the effect that on the amalgamation or re-organisation of certain organisations or bodies, or on the transfer of businesses, rights and obligations are transferred by operation of law to the new entity. The Section does not apply to such cases. Nor does it apply to the transfer of rights by mere delivery of a document of title or other such document.

The Section applies only to assignments of rights to performance of an obligation. This covers contractual and non-contractual rights to performance, such as rights to payment under a unilateral undertaking, or rights to the payment of damages for non-performance of a contract, or rights under the law on unjustified enrichment to have an enrichment reversed by the payment of money or transfer of property. In practice, rights of various types are often intermingled and it would be inconvenient and unjustifiable to have one set of rules applying to the assignment of rights to performance of obligations under a contract and other rules applying to the assignment of other closely related rights to performance.

Rights to performance include rights to the payment of debts already payable or becoming payable in the future and rights to non-monetary performance such as the construction of buildings, the delivery of goods, and the provision of services. Rights to the performance of negative obligations, such as obligations not to compete within a certain area for a certain time, are also covered. However, the general limitations on the intended scope of these rules must be kept in mind. They are not intended to apply to public law rights and obligations. For example, the law conferring a right to certain social security payments may well provide that the right to the payments is not transferable. Nor is the Section intended to apply to family law rights and obligations

C. Financial instruments and investment securities

Although the holder of a bond or stock in the nature of a registered financial instrument or investment security will have a right to payment against the issuer, such instruments or securities differ in important respects from ordinary rights governed by the law of obligations. Their transfer will be governed by special rules, generally involving an entry in the issuer's register. They are therefore excluded from the scope of this Chapter.

D. Negotiable instruments

Under the general provisions on the scope of these rules (I.–1:101 (Intended field of application)) bills of exchange and other negotiable instruments are excluded. This is of particular relevance in the present context. Although a bill of exchange or other negotiable instrument may set up a series of contractual relationships, the transfer of rights under a negotiable instrument is usually effected by delivery, with any necessary endorsement, not by assignment. Since the obligation of the party or parties liable on the instrument is to pay the current holder, who may not be the original payee, there is no requirement of notice of the transfer as there would be for an assignment; and a debtor who pays an assignee who is not the holder of the instrument remains liable to the holder. Moreover, negotiable instruments are by their nature governed by distinct rules which in various respects differ sharply from those applicable to assignments. For example, a person taking a negotiable instrument for value and without notice of any defect in the transferor's title is not affected by such a defect or by defences that would have been available against the transferor, whereas an assignee takes subject to these matters.

While negotiable instruments as such are outside the scope of these rules, this does not necessarily preclude an assignment of the underlying right to payment. This is most likely to occur in a global assignment of assets which does not involve the delivery of negotiable instruments. Where a right to payment embodied in a negotiable instrument is assigned, negotiable instruments law will usually give the holder of the instrument priority over the assignee. This also is a matter not covered by the present Chapter.

E. Importance of assignment

Rights to payment or other performance of obligations represent a major tradable asset. They can be sold outright, as in the typical factoring transaction, or assigned by way of security for a loan or other obligation. The purpose of Section 1 of this Chapter is to set out principles and rules which are designed to facilitate the assignment of rights, whether individually or in bulk, whilst at the same time ensuring that the debtor's rights are not prejudiced by the assignment.

NOTES

1. This Section covers the assignment of both monetary and non-monetary rights. It is therefore somewhat broader than the UN Convention on the Assignment of Receivables in International Trade (hereafter the UN Convention), which by its nature is confined to certain rights to payment of money (art. 2).
2. It is common for the transfer of financial and negotiable instruments to be governed by special rules. For example, in SLOVAKIA the contractual assignment of monetary and non-monetary claims is governed by CC §§ 524 et seq., whereas the transfer of financial and negotiable instruments is regulated separately (cf. Act no. 566/2001 §§ 19 et seq. as amended - Securities Act). Similarly, in SPANISH law, the regulations on the transfer of financial instruments are excluded from the general assignment provisions in the CC and contained in the Securities Market Law and the different Company Laws. GERMAN law provides for a subsidiary application to such transfers, see CC § 413.

III.–5:102: Definitions

(1) An "assignment" of a right is the transfer of the right from one person (the "assignor") to another person (the "assignee").

(2) An "act of assignment" is a contract or other juridical act which is intended to effect a transfer of the right.

(3) Where part of a right is assigned, any reference in this Section to a right includes a reference to the assigned part of the right.

COMMENTS

Definitions

This Article introduces the key terms of "assignment", "act of assignment", "assignor", and "assignee".

An *"assignment"* of a right is defined as a transfer of the right from one person to another person. The preceding Article has already made it clear, however, that the rules in this Section are limited to voluntary transfers – that is, transfers by a contract or other juridical act. They do not apply to the transfer of rights by operation of law (for example by way of legal subrogation). The purpose of the transfer does not matter. It may be to give effect to an agreement to sell. It may be to give effect to a legal obligation to assign arising from some other source, such as a statute. It may be gratuitous. It may be for purposes of security or a trust. However, in the last two cases there are special rules elsewhere in these rules which have priority. The present Section will apply only subsidiarily in so far as a matter is not regulated by those special rules. See the following Article.

The *"assignor"* is the creditor who transfers the right. The *"assignee"* is the person to whom it is transferred.

An *"act of assignment"* is defined as a contract or other juridical act which is intended to effect a transfer of the right. In many cases the contract or other juridical act will actually effect the transfer. But there can be situations where, for one reason or another, the contract or other juridical act fails to achieve its purpose. For example, the right may be non-assignable by law. Or the person purporting to assign the right may not be the creditor. This is why it is defined in terms of what is intended rather than in terms of what is achieved.

The "act of assignment" (i.e. the contract or other juridical act which is intended to effect the transfer and which may actually effect the transfer) must be distinguished from the assignment itself – the transfer of the right from the assignor to the assignee – the result of an effective act of assignment. The act of assignment must also be distinguished from the underlying obligation to assign, if there is one. An act of assignment will often derive from an agreement to assign. In some cases an agreement to assign is separate from and prior to the act of assignment and governs the wider business transaction or relationship of which the assignment will form part. In such cases the act of assignment may be a very simple unilateral act which contains no express undertakings or supplementary provisions at all. In other cases the agreement and the act of assignment may be embodied in a single contract document. The formation and validity of acts of assignment are governed by the general provisions on contracts and other juridical acts and not by this Chapter.

In these rules a valid agreement for an immediate assignment (or equivalent juridical act) suffices to effect the assignment if the other requirements of III.–5:104 (Basic requirements) are met, and (unlike in some of the Member States' laws) there is no principle of abstraction. Thus if the agreement to assign (or juridical act) is invalid, there will not be an effective assignment.

"Right" includes part of right. In some cases, but not in all, a right can be assigned in part (See III.–5:107 (Assignability in part)). Paragraph (3) is inserted purely for drafting purposes – to avoid the need for constant repetition of "right or part of the right".

NOTES

1. In most European legal systems a consensual assignment is considered to be based on agreement and is dependent on the validity of the agreement. However, GERMAN law, GREEK law, ESTONIAN law and SWISS law adopt a principle of abstraction by which the assignment is considered to be independent of the agreement to assign, so that a defect in the latter does not necessarily affect the validity of the assignment, though in most cases it will. (see for GERMANY BGH NedJurW 1959, 498, 499)Since SCOTTISH law follows the abstraction principle in general, it is thought, in the absence of direct authority that this also applies in assignments (*Reid*, The Law of Property in Scotland, no. 612; see further ibid, nos. 652-658; *McBryde*, Law of Contract in Scotland, nos. 12.06-12.08. It may be noted that in Scotland the term "assignation" is used, but in these Notes, for the sake of consistency, this will be referred to as "assignment".) See, for a comparative treatment, *Kötz*, Rights of Third Parties, no. 67, reproduced in *Zweigert and Kötz*, An Introduction to Comparative law[3], 446; for a Franco-German comparison, *Cashin-Ritaine*; for GERMAN law Staudinger (-*Busche*), BGB [2005], Pref. to §§ 398 ff, nos. 20-25; for GREEK law A.P. 481/1960, NoB 1961, 227; 946/2002 ChrID B/2002, 689; EllDik 44 (2003) 1355; 826/2001 EllDik 43 (2002) 731; CA Athens 459/1993 NoB 42 (1994), 206. In ENGLISH law a completed assignment of an existing right, as opposed to a mere agreement to assign or an assignment of a future right, is treated as a transfer of property and accordingly is not required to fulfil the conditions of a valid contract, such as consideration: *Holt v. Heatherfield Trust Ltd*. [1942] 2 KB 1, 5; *Chitty* on Contracts, nos. 20-018, 20-027; *Goode*, Commercial Law[3], 680-681.
2. The AUSTRIAN CC § 1392 describes assignment as a form of novation by substitution of a new creditor; the transfer, however, does not impose liability on the debtor and must not deteriorate the debtor's position (1395). In the BELGIAN, LUXEMBOURG and FRENCH CCs the provisions relating to consensual assignments are contained in the chapter on sales but extend to assignments based upon another relationship. Doctrine, however, treats the assignment as a matter of property law in the first place. In addition Title II of Book 4 of the FRENCH CC and BELGIAN CC arts. 2075 ff include provisions covering the pledge of rights. Similarly GERMAN law distinguishes between the assignment of rights, which is governed by the general rules on contract (CC §§ 398 ff) and pledge, which is governed by the rules on property law (CC §§ 1273 ff). The same holds true for ESTONIAN law (LOA §§ 164 ff and LPA §§ 314 ff respectively). The rules governing the consensual assignment of rights (*cessioni di crediti*) in ITALIAN law are laid down in CC arts. 1260-1267, in statute no. 52, 21 February 1991 and, about securitization, in statute no.

130, 30 April 1999. The LUXEMBOURG CC deals with the assignment of rights in arts. 1689-1691 and 1295. The original provisions were modified in important respects by the Loi of 21 December 1994 to relax the legal requirements. The SLOVENIAN LOA deals with assignment in §§ 417–426. Although regulated in the LOA, an assignment is considered to be a real contract in causal relationship to the obligatory contract (e.g. sale of the right). CZECH legal provisions relating to assignment of rights can be found mainly in the CC §§ 524-530, see also commentary by *Švestka/Jehlička/Škárová*, OZ[9], 663-672. Some special commercial rules applicable to assignment of rights can be found in Ccom art. 477).

3. In the NETHERLANDS the provision on assignment in CC art. 3:94 forms part of the general rules on transfer of ownership (CC arts. 3:83 ff). Dutch law considers a full transfer of fiduciary ownership to be void (on the basis of CC art. 3:84(3), as interpreted by HR 19 May 1995, NedJur 1996, 119), but recognises two forms of pledge of rights. The first is the normal pledge, which is considered possessory in character and for the creation of which it is necessary that the pledge be in writing signed by the assignor and that notice be given to the debtor: CC arts. 3:236(2), 3:94, 3:98. The second is the so-called 'silent' (or non-possessory) pledge, which does not depend on notice to the debtor but must be contained in a writing which is either authenticated by a duly authorised person (e.g. a notary) or has the date of its signature certified by a tax authority and the fact of certification entered in a register which is not open to the public. PORTUGUESE law treats the assignment of rights to performance as falling within the law of obligations, distinguishing between transfers (CC arts. 577 ff) and pledges (CC arts. 679 ff). Both outright assignments and assignments by way of security are covered by the NORDIC Uniform Promissory Notes Acts (DANISH PNA 1938, FINNISH PNA 1947, SWEDISH PNA 1936), parts of which apply even to the assignment of non-documentary, non-negotiable rights: *Björn*, 107. On DANISH law see *Gomard*, Obligationsret III, chap. 18 and *Bo von Eyben a.o.* chap. 12.

4. Under POLISH law, the assignment of rights to performance falls within the law of obligations; it is considered a contract between the creditor and a third party (assignee). The assignment is shaped as an agreement based on *causa*, see: CC art. 510 ("The contract of sale, barter, donation or any other contract which obliges transfer of the claim transfer the claim to the assignee, unless a special provision provides otherwise or the parties have agreed otherwise. If the conclusion of the contract of assignment takes place in the course of the performance of an obligation arising from a contract previously concluded and obliging transfer of the claim, from a bequest, from unjustified enrichment or from another occurrence, the validity of the contract of assignment depends on the existence of that obligation.")

5. In SPANISH law, the assignment of rights to performance is regulated as a form of the sale contract. Notwithstanding, it is widely admitted that the assignment may be supported in other contractual cases. The assignment is dependent on its cause (it is not an abstract disposition), is not subject to any special form and brings about the transfer of property as from the day of perfection, without any kind of formality or notification to the debtor. See TS 6 October 2004, RAJ (2004) 5986 and Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-*Pantaleón*), Código Civil I, 1019 ff.

6. Being a part of the provisions on change of subjects of obligations, in SLOVAKIA, the right to performance can be assigned to a different subject through a contract between the creditor (assignor) and a third party, without the need of the debtor's consent pursuant to CC § 524. This includes also the commercial legal relations. On the basis of general rules on obligations (CC § 495), assignment is on principle a

causal contract. The assignment of rights for purposes of security is regulated separately (CC § 554). However, the general rules on assignment of claims apply as to the requirements for the assignment (in particular the written form of such contract).

III.–5:103: Priority of provisions on proprietary securities and trusts

(1) In relation to assignments for purposes of security, the provisions of Book IX apply and have priority over the provisions in this Chapter.

(2) In relation to assignments for purposes of a trust, or to or from a trust, the provisions of Book X apply and have priority over the provisions in this Chapter.

COMMENTS

This Article serves as a reminder that there are special rules in other Books on proprietary securities and on trusts and that, in so far as there is any conflict, those rules will take priority over the rules of the present Chapter. Subject to that priority the rules of the present Chapter apply to assignments for any purpose.

NOTES

1. In SLOVAKIA, the provisions on assignment of rights are used also for assignments for purposes of security. Although there are no rules on trust, detailed provisions on fiduciary transfers of rights for purposes of security are provided for in the CC §§ 553-553e , which would prevail in cases of conflict. The same holds true for GERMAN law, where, however, some particular rules were developed to amend the rules on assignment for the purpose of security; the handling of both types of assignment differs in cases of insolvency, cf. Insolvency Act §§ 47, 51 no. 1. For trusts see the special rule in Insolvency Act § 47 (on “personal rights” which would include most trust relationships).
2. In SPAIN, the basic rules on proprietary securities are in the CC arts. 1857 ff. Although the problem of priority of application has provoked discussions, it seems that it depends on the will of the parties and on the terms of the specific obligation whether the assignment provisions or the security provisions should have priority. Due to the limitations of the formalistic approach, a functional approach should prevail; therefore, the application of potentially overlapping rules of law should depend on the intention and the purposes the parties seek in giving and taking security. Regarding trust, the SPANISH CC only regulates it in a testamentary framework (CC arts. 781-786).

Sub-section 2: Requirements for assignment

III.–5:104: Basic requirements

(1) The requirements for an assignment of a right to performance are that:

(a) the right exists;
(b) the right is assignable;
(c) the person purporting to assign the right has the right or authority to transfer it;
(d) the assignee is entitled as against the assignor to the transfer by virtue of a contract or other juridical act, a court order or a rule of law; and
(e) there is a valid act of assignment of the right.

(2) The entitlement referred to in paragraph (1)(d) need not precede the act of assignment.

(3) The same contract or other juridical act may operate as the conferment of an entitlement and as the act of assignment.

(4) Neither notice to the debtor nor the consent of the debtor to the assignment is required.

COMMENTS

A. The basic requirements

Paragraph (1) sets out the basic requirements for an assignment of a right – that is to say, for an actual transfer. An act of assignment may be wider in scope. It may relate to rights which do not yet exist, or which are not yet assignable (e.g. because the debtor has not yet consented in a case where such consent is required) or which have not yet been acquired by the granter. This Article is not concerned with what an act of assignment may cover but with the requirements for an actual assignment. The several ingredients are elaborated in subsequent Articles. The time when an assignment takes place is covered in III.–5:114 (When assignment takes place).

B. The existence of the right

The right must exist before it can be transferred. This is obvious. It is mentioned in paragraph (1)(a) only to point up the contrast between the actual assignment – the transfer – and the act of assignment. See III.–5:106 (Future and unspecified rights) and III.

–5:114 (When assignment takes place).

C. The assignability of the right

The right must be assignable at the time when the transfer is to take place. On assignability, see III.–5:105 (Assignability: general rule). An act of assignment can relate to an unassignable right and the transfer will then take place if and when the right becomes assignable, assuming all other requirements are met. See III.–5:114 (When assignment takes place).

D. Right or authority to assign

The person purporting to assign the right must have the right or authority to assign. Again this requirement has to be satisfied at the time when the transfer is to take place. Normally the creditor will be the person making the assignment but the formula used in paragraph (1)(c) covers cases where the creditor acts through a representative and also cases where some other

person is authorised by law to effect an assignment. For example, the law on the financial consequences of divorce may provide that a spouse may be ordered by a court to assign certain rights to the other spouse. If the spouse refuses to assign, a clerk of court may be authorised to effect the assignment on behalf of the recalcitrant spouse. See further III.–5:111 (Right or authority to assign).

E. Assignee's entitlement

Paragraph (1)(d) answers a question which was left unanswered in the Principles of European Contract Law. It adopts the same solution as is adopted in Book VIII for the transfer of corporeal movables. The assignee must be entitled as against the assignor by virtue of a contract or other juridical act, court order or rule of law to the transfer of the right in question. This is of particular significance if the contract conferring the entitlement (for example, a contract of sale of the right) is void or avoided. The assignment then falls. See III.–5:118 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation).

F. Valid act of assignment

An entitlement is not enough. A person might be entitled under, say, a contract or a court order to an assignment at some point in the future but that will not by itself effect a transfer. There will in that situation have to be a separate act of assignment to effect the transfer. Of course, as already noted, the juridical act conferring the entitlement may itself operate as an immediate act of assignment. There will then be no need for a separate act of assignment.

G. No requirement of preceding underlying obligation or entitlement

In most cases an assignment will be made because of an underlying obligation to make it. However, this is not an essential requirement under the present Article. A person can transfer a right to another even if not obliged to do so, and it does not matter whether there never has been an obligation or whether there has been an obligation which has come to an end before the assignment. This is made clear by paragraph (2) which expresses the same idea from the other point of view – that of entitlement. The assignee must be entitled to the transfer but the entitlement can arise from the act of assignment itself: there does not need to be a *preceding* entitlement.

The effects of the invalidity or termination of the underlying obligation (if any) are regulated by III.–5:118 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation).

H. No need for separate act of assignment

Paragraph (3) makes it clear that there does not need to be a *separate* act of assignment – that is, an act of assignment separate from a contract or other juridical act giving rise to the assignee's entitlement. The contract or other juridical act which creates the entitlement to the transfer may itself, and very often will itself, operate as the act of assignment. The policy here is the same as in relation to the transfer of goods under Book VIII. An "abstract" system, drawing a clear distinction between the obligatory and the transferring aspect of, say, a contract for sale, is not adopted. It will be a question of interpretation whether a contract containing an undertaking to assign is to be construed as operating as an act of assignment or as requiring a separate later act of assignment.

I. Notice to debtor not a constitutive requirement

Paragraph (4) makes it clear that notice to the debtor is not required to effect the transfer of the right from the assignor to the assignee. However, as will be seen later, notice to the debtor plays a significant role in identifying a point in time after which the debtor is not discharged by paying to the assignor.

In some legal systems an assignment of a right is not validly constituted unless and until notice of the assignment has been given to the debtor or some other overt act performed, such as entry of the assignment in the assignor's accounting records. Failing such notice or equivalent act the assignment (i.e. the transfer of the right) is of no effect. The person attempting to assign the right remains the creditor.

There are two reasons for the approach adopted in the Article. The first relates to the question whether the notice requirement serves any useful purpose. Notice to the debtor is not equivalent to public notice (for example, by registration), since it is visible only to the debtor. While a requirement of notice may help to prevent a collusive ante-dating of an assignment made, for example, to overcome insolvency rules governing unfair preference, the date of an assignment is rarely in question and can usually be established by other means. The second, and more important, reason for omitting notice as a constitutive requirement is that it is inimical to modern receivables financing, which involves acts of assignment relating to a continuous stream of receivables arising from both present and future contracts. In the nature of things, future debtors cannot normally be identified at the time of the act of assignment. Moreover, in recent years there has been a sharp movement, particularly in factoring operations, from notification to non-notification financing, also known as invoice discounting, in order to avoid disturbing relations between the assignor-supplier and its customer, the debtor, and to allow the assignor to collect in the debts on behalf of the assignee. The use of non-notification financing depends heavily on the validity of the transfer of the debts from assignor to assignee. Accordingly any requirement of notice to the debtor as a constitutive element of the assignment could seriously undermine receivables financing generally and non-notification financing in particular.

J. Consent of debtor not normally required

Paragraph (4) also makes it clear that the consent of the debtor is not required for an assignment. There are, however, some cases where the consent of the debtor will have effects on the consequences of an assignment. One example is where there is a contractual prohibition of assignment. This will not make the right unassignable but, unless the debtor consents, it will preserve the debtor’s right to pay the assignor and obtain a good discharge by so doing. (See III.–5:108 (Assignability: effect of contractual prohibition) paragraphs (2) and (4)(a)).

NOTES

1. Because national systems differ in their approach to assignment they also differ as to the requirements. In countries, such as GERMANY, where property law is characterised by the abstraction principle, this will also apply to assignments. In others, transfer of property is generally “causal” and the same applies to assignments of rights (see e.g. for AUSTRIA, *Koziol and Welser*, Bürgerliches Recht II[13], 116 ff). See the Notes to III.–5:102 (Definitions).

2. On formal requirements for an act of assignment, see the Notes to III.–5:110 (Act of assignment: formation and validity).

3. In FRANCE, and BELGIUM, where transfer of property is in principle not-abstract and consensual and even implied in the underlying contract for assignment (see the model of para (3) of the Article), the assignment is regulated in the CC in association with the contract most frequently underlying it, namely the sale. In Belgium, contemporary doctrine rejects the treatment by the CC and now clearly distinguishes the proprietary aspect from the underlying contract, which can be of any type, though the rule stands that 1° the act of assignment can be merely consensual (CC art. 1690 I) and 2° parties having contracted an assignment are presumed to have fulfilled also the act of assignment (general rule on transfer of property in CC art. 1138). Notice to the debtor is not required for the transfer of property, but for the obligational effects vis-à-vis the debtor (CC art. 1690 II) and/or in relation to bona fide acquirers (CC art. 1690 III and IV, see infra art. II-5:121). Belgian law on assignment in general thus exactly corresponds to III-5:104. BELGIAN law does not recognise a "security ownership" in rights of performance other than financial instruments. If the right is not a financial instrument, it is either an outright assignment (whether fiduciary or not) or a pledge (charge) (Cass. 17 October 1996, Foyer culturel de Sart-Tilman, *RW* 1996-97, 1395 obs M.E. Storme). In FRANCE, an assignment of a right is treated as a sale of rights, only with a different terminology (CC arts. 1689-1695 refer to "*transport de la créance*"). The general rules on contracts and other juridical acts apply to it, unless it is of a type to which some special rule applies. It follows from these general rules that an act of assignment is subject to the general requirements of consent, capacity, object and *causa*. It need not normally be in writing and is not subject to any other requirement as to form (except for transfer of capital shares, which requires a writing under CC art. 1865). It is governed by the general rules of proof by which a writing is required for transfer of rights whose value is above an amount fixed by decree (CC art. 1341). However, acts of assignment differ from other contracts transferring property in that they also create a legal relationship (*lien de droit*) and in that the debtor must be informed of the assignment by way of notice (CC art. 1690). It is worth noting that the debtor's consent is not required for validity (See *Terré/Simler/Lequette*, Les obligations[9], 1217, nos. 1277 et seq.). It is worth noting also that acts of assignment which are not subject to notification (*signification*) have developed significantly in such cases as assignment of "negotiable" rights, assignment of professional rights to bank and credit institutions by a mere *bordereau* (law Dailly of 2 January 1981: CMF art. L. 313-33) and assignment for purposes of security (law of 23 December 1988: CMF arts. L. 214-1 f): See *Terré/Simler/Lequette*, Les obligations[9], 1217, no. 1297 et seq.).

4. In the NETHERLANDS notice to the debtor is required in order for the assignment to have any effect (CC art. 3:94), though sustained criticism of this rule seems likely to lead to a change in the law. See also ITALIAN CC art. 1262(1). In GREEK law (see *Stathopoulos*, nos. 203-206) the requirements for a valid assignment are: 1. a contract between the assignor and the assignee (CC art. 455) and 2. the assignability of the claim (CC arts. 464-466 lay down when the claim is unassignable). The assignment contract is without further formality valid between the parties, but for the assignee to acquire the claim against the debtor and third parties, there must be notification of the assignment to the debtor (CC art. 460). In SCOTLAND notification to the debtor is required before the assignment takes effect as a transfer of the right *(McBryde*, Law of Contract in Scotland, nos. 12.83-12.100). CZECH positive law is generally in accordance with the content of the Article. See CC § 524 as commented by *Švestka/Jehlička/Škárová*, OZ[9], 663-666. The contractual model is used and causa is

required (see CC §§ 524.2 and 495). However, if the assignment is to affect the debtor notification to the debtor is required; the notification must be made without undue delay (see commentary by *Švestka/Jehlička/Škárová*, OZ[9], 664 and CC § 526.1). In SLOVAKIA and POLAND, neither the consent of the debtor (respectively SLOVAK CC § 524(1) and POLISH CC art. 509 § 1) nor notification to the debtor are a prerequisite for a valid assignment. However, the assignor is obliged to notify the debtor about the assignment. Under SLOVAKIAN law, if the assignor does not notify and if the assignee does not inform the debtor, the assignment will not affect the debtor (see CC § 526(1)). In POLISH law, until the assignor informs the debtor about the assignment, the debtor is discharged by performing to the assignor, unless the debtor knew about the assignment at the time of the performance (CC art. 512).

5. ESTONIAN law and legal doctrine agree on the requirements for an effective assignment similarly to the present Article (LOA § 164; Varul/Kull//Kõve/Käerdi *(-Käerdi)*, Võlaõigusseadus I, § 164, no. 4.2). Generally neither notice to the debtor nor consent of the debtor is required. In order to protect the debtor, it is provided that if at the time of performance of the obligation to an assignor, the debtor is not and does not need to be aware of the assignment, the debtor is deemed to have performed the obligation for the benefit of the correct person (LOA § 169(1)).

6. In the SPANISH CC assignment is regulated only in the framework of the sale contract (CC arts. 1526-1536) but those rules are applicable to all assignable rights (*Lacruz Berdejo and Rivero Hernández*, Elementos II[3], 217). The requirements of a valid assignment by the creditor are in SPANISH law the same as expressed in the commented article: CC art. 1112 provides that all the rights acquired via obligation are able to be transferred, except for when there is a contrary provision established by the parties or when such assignment is contrary to law; e.g. in the CC the right to alimony (CC art. 151(1)) or a future inheritance (CC art. 1271(2)) are non-transferable rights. It is obvious that the transferred right has to exist and the person who is assigning must have a title to transfer it (CC art. 1529: the seller is liable for the *veritas nomini* of the assignment). There is no requirement of notifying the debtor and the debtor's consent is not needed (*Bercovitz*, Comentarios: CC 1527).

7. In ENGLISH law a simple act of assignment, which may be merely an informal notification to the assignee that the right is assigned, or an instruction to the debtor to pay the assignee, suffices to effect an assignment in equity: see *Chitty* on Contracts, no. 19-021. If the assignment is of a future right, an agreement supported by consideration may be required: *Chitty* on Contracts, nos. 19-027 et seq. A legal assignment, which will enable the assignee to sue in the assignee's own name, requires formalities under the Law of Property Act 1925 s. 136: see *Chitty* on Contracts, nos. 19-006 et seq. See generally *Chitty* on Contracts, chap. 19.

8. In HUNGARY the CC § 328 provides as follows. (1) A creditor is entitled to transfer the right to another person by contract (assignment). (2) Rights which are of a personal nature and rights whose assignment is not permitted by legal regulation cannot be assigned. (3) The debtor must be notified of an assignment; the debtor is entitled to tender performance to the assignor before notification. (4) If the debtor is notified by the assignor, the debtor is allowed to tender performance only to the new creditor (assignee) after notification; in the case of notification by the assignee, the debtor is entitled to demand certification of the assignment. In the absence of certification, the debtor is entitled to tender performance to the person claiming to be the assignee solely at the debtor's own risk. Under CC § 329(1) an assignee is subrogated to the original creditor through the assignment, and security rights also pass to the assignee. Under CC § 329(2) notification of the debtor regarding assignment suspends the

period of limitation. Under CC § 329(3) a debtor is entitled to invoke against the assignee defences and rights of set-off on the legal grounds prevailing at the time of notification. Under CC § 330(1) the assignor is liable as a security provider for the performance of the debtor's obligation to the assignee, up to the value of the consideration received in return for the assignment, unless the assignor has assigned the right to the assignee expressly as a non-guaranteed right or has otherwise excluded liability. CC § 330(2) provides that otherwise the provisions on contracts of sale apply to assignments for consideration, while the provisions on donations apply to gratuitous assignments. Under CC § 331 if a right is transferred to another person on the basis of a legal regulation or official order, unless otherwise prescribed therein, the provisions on assignment are applied. In such a case, the liability of the previous creditor as a security provider is maintained only if so prescribed by a specific provision.

III.–5:105: Assignability: general rule

(1) All rights to performance are assignable except where otherwise provided by law.

(2) A right to performance which is by law accessory to another right is not assignable separately from that right.

COMMENTS

A. The general rule of assignability

The general rule is that all rights to performance of an obligation are assignable. This is, however, subject to any rules of law which limit or prohibit assignment. For example, III.–5:109 (Assignability: rights personal to the creditor) provides that certain rights of a personal nature are not assignable. There may also be restrictions in national laws.

> *Illustration 1*
> H, a private individual, purports to assign all his future income and assets to A as security for a loan. Proceedings are brought in England to enforce payment. Under English law the assignment is void as contrary to public policy in that its effect is to deprive the assignor of all means of livelihood. This overriding rule of English law will displace the general rule of assignability.

There will often be mandatory rules to the effect that certain types of accessory rights cannot be transferred separately but only along with the main right.

B. Effect of contractual prohibition of assignment

The effect of a contractual prohibition of assignment is dealt with in III.–5:108 (Assignability: effect of contractual prohibition).

C. Existing rights to future performance

The rights which can be assigned need not be immediately exigible. A right to a payment at some time in the future can be assigned and this applies even if the payment still has to be earned.

> *Illustration 2*
> A company, C, has entered into a contract with E to construct a factory, payment to be made in stages against architects' certificates. C may validly assign its rights to future payment although these are dependent on its execution of the contract works.

D. Conditional rights

A conditional right can be assigned. The assignee will take it subject to the condition.

E. Accessory rights

An accessory right is not assignable separately from the right to which it is accessory. The typical example of an accessory right is a security right of a type which is dependent on the primary right. It is for other branches of the law to decide which rights are accessory and which are not.

NOTES

1. All European legal systems recognise the assignability of rights under existing contracts, though with exceptions, for example, where the assignment would be against public policy or where the rights are personal to the creditor: *Kötz*, Rights of Third Parties, nos. 68 ff. A global assignment of future debts by an individual will in most systems be considered contrary to public policy in that it deprives the assignor of future livelihood. Also considered against public policy in many jurisdictions are the assignment of salaries of public officers, such as judges, and the assignment of disputed rights. The Article requires effect to be given to any overriding mandatory rules.
2. In CZECH law the first rule is exactly and expressly the same. The assignment of civil as well as of commercial rights is still possible if not otherwise agreed between assignor and the debtor (CC § 525.2). In relation to a separate assignment of a right to performance which is by law accessory to another right, there is no such express provision but the applicable effective rule is the same, because by assignment of a right the appurtenances and all rights attached are *ex lege* transferred to the assignee (CC § 524.2).
3. Under ESTONIAN law claims for maintenance, claims for compensation for damage arising from a bodily injury or the death of a person may be assigned only if counter-performance of equal economic value is received in exchange for the assignment (LOA § 166(1)).
4. The DUTCH CC expresses the first rule but adds that the assignability of a right to performance may also be excluded by a contract concluded by the debtor and the creditor (art. 3:83). The same rules apply under GERMAN law and follow from CC § 398, see Staudinger (-*Busche*), BGB [2005], § 398, nos. 34 et seq. For several exceptions see the notes to the following articles.
5. In SCOTLAND the general principle is the assignability of any right to performance of an obligation, except where otherwise provided, as in paragraph (1) of the Article. Apart from statutory provisions on such matters as social security benefits, the main exceptions to the rule on assignability are alimentary provisions and rights strictly personal to the creditor. See *McBryde*, Law of Contract in Scotland, nos. 12.14-12.39; *Gloag and Henderson*, The Law of Scotland[11], nos. 8.16 and 33:01.
6. For the exceptions from the general rule of assignability in SLOVAK law, see especially CC § 525 and CCP §§ 317 and 319 (i.e. rights to performance that become extinguished with the death of the debtor at the latest, or rights the substance of which would be changed by the assignment, or rights which could not be subject to execution). Although any regulation of separate assignment of accessory rights is lacking, security rights cannot be assigned by their nature. It is however apparently possible to assign the right to performance without its appurtenances (cf. Judgment of the Supreme Court 4 Obo 210/01; Supreme Court's declaratory judgment Obpj 2/99).
7. The SPANISH CC art. 1112 provides that all the rights acquired via obligation are transferable, except when there is a contrary provision established by the parties or when such transfer is contrary to law. There is no express provision about separate assignment of an accessory right, but as the CC art. 1528 considers that when the principal right is assigned, the accessory rights are assigned as well (because of the impossibility of separating those rights), it is logical that a separate assignment of an accessory right is not possible in Spanish law (*Navarro Pérez*, La cesión de créditos, 114). That is also the rule when a right is transferred by the means of a subrogation (CC art. 1212).

8. In FRENCH and BELGIAN law the general rule is that all rights to performance of an obligation are assignable, including monetary and non-monetary obligations, conditional rights and, contrary to the present article, disputed rights. However, the assignability of rights is subject to legal exceptions such as for rights to aliment or social benefits, salaries and in insolvency law. The effect of a contractual prohibition of assignment is expressly recognized in France by statutory law (Law NRE of 15 May 2001). See *Terré/Simler/Lequette*, Les obligations, 1217, no. 1278).

9. In ENGLISH law, generally rights are assignable unless they are personal, assignment is forbidden by statute or the contract under which the right arises declares the right to be non-assignable, though in the last case the assignment may still be effective as between assignor and assignee. See *Chitty* on Contracts, nos. 19-042—19-056.

10. Under POLISH law the assignability of a right to performance may be excluded by statutory law, a contract, or the nature of obligation (CC art. 509 § 1).

11. In GREEK LAW (see *Stathopoulos*, no. 206) a right to performance is unassignable: (1) when the right is not subject to attachment (CC art. 464); (2) the right, by reason of the nature of the performance, is personal to a particular creditor (CC art. 465), e.g. a claim for the performance of a certain task where the personal factor is predominant (such as provision of confidential services) and (3) when the creditor and the debtor have agreed on its unassignability (CC art. 466).

III.–5:106: Future and unspecified rights

(1) A future right to performance may be the subject of an act of assignment but the transfer of the right depends on its coming into existence and being identifiable as the right to which the act of assignment relates.

(2) A number of rights to performance may be assigned without individual specification if, at the time when the assignment is to take place in relation to them, they are identifiable as rights to which the act of assignment relates.

COMMENTS

A. Future rights

Difficulty has been experienced with the assignment of future rights – that is, rights which do not yet exist as opposed to rights which exist but which are subject to a time restriction or a condition. Future rights might, for example, be rights under contracts which have not yet been concluded. There is a concern about the economic effects on the assignor of parting with future assets and possible means of subsistence and a perception that an act of assignment requires specificity of subject-matter at the time of its making, coupled with notification to, or acceptance by, the debtor which is often impossible in the case of future rights. But the commercial importance of receivables financing (i.e. the provision of finance through the purchase of, or loans on the security of, rights to payment and other rights to performance) and the impracticability of requiring rights to be individually specified or determinable at the time of the act of assignment have led to an increasingly general acceptance that an act of assignment can cover future rights and that the rights will then be transferred without the need for any new act of transfer once they come into existence. At the international level this is manifested by the 1988 UNIDROIT Convention on International Factoring and the UN Convention on Assignment of Receivables in International Trade. Under Article 5 of the former it suffices that the rights are identifiable to the assignment at the time they come into existence.

The present Article makes it clear that an act of assignment may relate to future rights. However, the actual transfer depends on the right coming into existence and being identifiable as the right covered by the act of assignment. No further act of assignment is required. The identifiability criterion need not be satisfied when the right comes into existence but must be satisfied before the right will be transferred.

> *Illustration 1*
> C, a credit card issuer, obtains a large loan from its bank, B, and agrees to assign to B its future rights against cardholders to a value not exceeding the amount of the loan. While this agreement is perfectly valid as a contract, it cannot effect a transfer, since it does not provide the means by which the assigned rights can be identified.

B. Rights not individually specified

Paragraph (2) makes it clear that there can be an assignment of a bundle of rights, the individual rights not being separately identified. This facility is important in practice. However, the rights must be capable of identification as covered by the act of assignment at the time when the assignment is to take place in relation to them.

Illustration 2
S, a company supplying timber to timber merchants, enters into a factoring agreement with F, a factoring company, by which S assigns to F by way of sale all its existing and future rights to payment arising under sale contracts made or to be made with S's customers carrying on business in the United Kingdom. This can validly effect assignments, since in relation to any future right it can be ascertained at the time it comes into existence whether it falls within the factoring agreement as a receivable due from a United Kingdom customer of S.

Illustration 3
S, a furniture manufacturer, supplies furniture to retail shops and department stores. S agrees to sell to F, a factoring company, such of its existing and future rights to payment as are listed in schedules from time to time sent by S to F. There can be effective assignments as to all rights so listed.

NOTES

1. The assignment of rights under future contracts has long been recognised in ENGLISH and IRISH laws, which require identifiability but not specificity: *Goode*, Commercial Law[3], 676-677. Similarly in SCOTTISH law a future right is assignable but must be defined: see *McBryde*, Law of Contract in Scotland, no. 12.31. The same position is taken in the UNIDROIT Convention art. 9(1)(b)). However, under ENGLISH law a statutory assignment (which enables the assignee to sue in the assignee's own name) is confined to the assignment of existing rights of which notice is given to the debtor. Many jurisdictions have tended to be hostile to the assignment of rights under future contracts, partly on the ground of want of specificity and the fact that the rights cannot be "determined" at the time of the assignment, partly, in some cases, because of the legal rule that an assignment of rights is not complete until notice has been given to the debtor or the assignment has been accepted by the debtor, which of course requires that the debtor is identifiable. Though a number of systems now accept the principle of assignability of rights under future contracts, there is divergence as to the time at which the determinability of the right is required to be satisfied. In some systems it is sufficient if the rights are determinable at the time they come into existence.
2. This is the position under AUSTRIAN LAW (OGH EvBl 1969/15; JBl 1984, 85; SZ 61/74; 18 April 1974, JBl 1975, 654; OGH 4 March 1982, SZ 55/32 170; for the assignment of a bundle of rights, which is valid if the single obligations are determinable, see OGH 26 June 2001, ecolex 2001, 907) and the same is true of GERMAN law as regards transfers (*Kötz*, Rights of Third Parties, no. 82; Staudinger (-*Busche*), BGB [2005], § 398, nos. 53 and 63) even if they take place for security purposes (Staudinger (-*Busche*), BGB [2005], § 398, nos. 60 et seq.) but not as regards pledges (see CC § 1280). The same is true for PORTUGUESE law (see *Brito*, Factoring, 54; *Cristas*, Transmissão Contratual do Direito de Crédito, 313 f; *Leitão*, Cessão de Créditos (2005), 428 f). In other systems the rule that the right must be determinable at the time of the assignment is retained, either expressly or through a requirement of notification to the debtor or identifiability of the debtor as a condition of validity of the assignment. This is the position in SCOTTISH law (*McBryde*, Law of Contract in Scotland, nos. 12.30-12.31), DUTCH law (CC art. 3:84(2)) and probably LUXEMBOURG law, as regards ordinary pledges. In BELGIAN law, the assignment of future rights is possible but will only take effect when the right comes into existence. One has to distinguish 1° the underlying contract, 2° the act of

assignment, and the effect. The contract can relate to any future right which can be defined, the act of assignment to any rights which can be identified, the effect to any existing right. However, a right which has already arisen from a contractual or non-contractual relationship is not seen as a future but as an existing right (e.g. future rent due under a contract of lease) and an assignment will thus have immediate effect. The position of CZECH doctrine is not certainly determined (see *Švestka/Jehlička/Škárová*, OZ[9], 663-664) and, at present, there is no very established jurisprudence on this question. The ESTONIAN LOA § 165 requires the right to be sufficiently defined "at the time of the assignment". As actual transfer, i.e. assignment, depends on the right coming into existence, this is understood as the requirement that the rights should be sufficiently defined at the time they come into existence (Varul/Kull//Kõve/Käerdi (-*Käerdi*), Võlaõigusseadus I § 165, nos. 3.2, 3.3.).

3. FRENCH law does not in principle recognise the assignment of rights under future contracts (see *Terré/Simler/Lequette*, Les obligations, no. 1178, but in the case of assignments to a bank or other credit institution the *Loi Dailly* of 2 January 1981 allows delivery of a memorandum (*bordereau*) identifying the accounts transferred which can include accounts from future operations where the amount of the debt and the identity of the debtor have not yet been determined. (art. 1). A similar rule exists in DUTCH law in relation to a 'silent' pledge (CC art. 3:239(1), and see *Verhagen and Rongen*, chap. 4) but for ordinary pledges the requirement of notification to the debtor limits the possibility of assignment of future rights. In ITALY the prevailing view is that only rights arising out of existing contracts (including rights payable in the future) may be assigned (*Bianca*, Diritto civile IV, 589; *Perlingieri*, Cessione dei crediti, 7 ff. See also Cass. 90/4040). However, there is a special regime for factoring (Law no. 52 of 21 February 1991 art. 3) which permits the assignment to the factor of rights under future contracts. See *Bassi*, Factoring. In POLISH law there is no statutory provision in regards to the assignment of future rights. However, such possibility is admitted by the doctrine and judiciary (e.g. Supreme Court 2 July 2004, II CK 409/03, Pr. Bankowe 2005/6/5; Supreme Court 30 January 2003, V CKN 345/01, OSNC 2004/4/65). A contract of assignment of a future right has to specify a relationship from which the future right will arise. On DANISH law on the assignment of pay not yet earned, of damages for personal injury and loss of dependency not yet awarded, see Notes to III.–5.109 (Assignability: rights personal to the creditor).

4. In SPANISH law, and even though some previous doubts existed as to the time when proprietary effects were produced (see for a summary *Garcia Vicente*, CCJC 2005, 1099 ff], the TS 6 November 2006 finally has admitted the global assignment of future rights as a proprietary device.

5. Also in SLOVAKIA, there is no explicit legal regulation of the assignment of future rights, but it is recognised by legal doctrine and practice. CC § 151c(2), which enables the parties to put in pledge future or conditional rights, can be used by way of analogy. A similar scheme is known in the suretyship guarantee in commercial relations (Ccom art. 304(2)).

6. According to the prevailing view in doctrine and jurisprudence in GREECE the subject of an assignment can be a future right to performance but the transfer of the right depends on the identification of the right as far as its object and extent are concerned at the time of its coming into existence (see in Georgiadis and Stathopoulos (-*Kritikos*), art. 455 no. 49; *Karakostas*, Interpretation of Civil Code, art. 455, § 1599.24; A.P. 1471/2000 EllDni 2001, 701. See also the recent monography of *Georgiades*, The assignment of future receivables).

III.–5:107: Assignability in part

(1) A right to performance of a monetary obligation may be assigned in part.

(2) A right to performance of a non-monetary obligation may be assigned in part only if:

(a) the debtor consents to the assignment; or

(b) the right is divisible and the assignment does not render the obligation significantly more burdensome.

(3) Where a right is assigned in part the assignor is liable to the debtor for any increased costs which the debtor thereby incurs.

COMMENTS

A. General

The creditor may not wish to assign the whole right but only such part as is necessary to achieve the commercial purpose of the assignment. For example, a company wishing to borrow €30 million from its bank on the security of a debt of €200 million owed to it by a third party may want to assign to the bank only such part of the debt as will provide the bank with adequate security for the loan. Similarly, a wholesaler who has contracted to buy a quantity of fungible goods to be delivered in two separate consignments to be separately paid for and who has orders from two sub-buyers, each for half the total quantity, may wish to assign the right to the first consignment to one sub-buyer and the right to the second to the other.

Whether a right may be assigned in part depends partly on whether it is a right to performance of a monetary obligation or a non-monetary obligation.

(i) Rights to money

Paragraph (1) provides that a right to performance of a monetary obligation may be assigned in part. Partial assignment of a right to the payment of money does not usually lead to any practical difficulties, though it may expose the debtor to increased costs, which under paragraph (3) the debtor would be entitled to recover (see Comment B).

Illustration 1

L lends B €10,000. L can assign to A the right to €4,000 forming part of the €10,000. If B incurs additional bank charges as the result of having to make two separate payments B is entitled to recover these from L or set them off against the liability to L.

(ii) Rights other than to money

Where the right is to performance of a non-monetary obligation the considerations are rather different. In the case of a non-monetary right it would often be unfair to the debtor to require a division of the performance, for this would change the relationship between performance and counter-performance in a manner which could prove detrimental to the debtor and could lead to problems if the assignee wished to terminate for fundamental non-performance. Accordingly, paragraph (2) of the Article provides that a right to performance of a non-monetary obligation may, unless the debtor consents to the assignment, be assigned in part only if the right is divisible and the assignment does not render the obligation significantly more burdensome.

Illustration 2
S contracts to sell 100 computers to B, delivery to be made to B in Hamburg in four instalments of 25 computers each. B can assign to A the right to delivery in Hamburg of one, two or three instalments, but cannot assign the right to delivery of part of an instalment, for this would require S to divide the performance of an obligation which by its terms is indivisible as to each instalment. It might also, depending on the facts, render the obligation significantly more burdensome to S.

Illustration 3
F engages C to build a factory, including a tool shed, for €20 million, payable in stage payments against architects' certificates. If F sells the tool shed to A for €50,000 while retaining the rest of the factory, F cannot assign to A its rights under the contract as regards the tool shed, because the contract is an entire contract under which C's performance is indivisible.

Illustration 4
The facts are as in Illustration 3 except that the contract allocates a separate price to the tool shed and stipulates that this is to become payable on completion of its construction. On selling the tool shed F can assign its rights relating to the construction of the tool shed.

B. Security or other accessory rights

Assignment of part of a right in conformity with this Article carries with it a transfer of a *pro rata* share of any security rights or other accessory rights securing performance of the debtor's obligations (III.–5:115 (Rights transferred to assignee) and obliges the assignor to transfer to the assignee a *pro rata* share of all transferable independent rights (III.–5:112 (Undertakings by assignor) paragraph (6)).

C. Protection of the debtor

From the debtor's perspective partial assignments have the disadvantage of bringing exposure to the expense and inconvenience of multiple rights. The debtor is already protected to some extent by the provision in paragraph (2) to the effect that a non-monetary right, even if of a divisible nature, cannot be assigned without the debtor's consent if that would render the obligation significantly more burdensome to the debtor. Paragraph (3) of the Article gives further protection by providing that where a right is assigned in part the assignor is liable to the debtor for any increased costs which the debtor thereby incurs.

A risk arises where the right as a whole is disputed, in which event the debtor, having pleaded and called evidence in one case, would face the burden of doing so all over again in subsequent proceedings, with the danger of conflicting decisions, the debtor's defence being upheld in one case and rejected in another. For these types of case the debtor's protection must be found in the applicable procedural law.

NOTES

1. Divisible rights are assignable under the laws of most Member States of the European Union. In ITALIAN CC partial assignment of credits is provided for in art. 1260(2). There is no special statutory rule for partial assignments under DUTCH law, but

partial assignments have been explicitly recognised in case law: see HR 19 December 1997, Ned. Jur. 1998, 690 (*Zuidgeest/Furness*) and further *Verhagen & Rongen* chap. 8. The situation is the same in CZECH and POLISH law where there is no express provision comparable to the Article but the existing possibility of "partial assignment" is not controversial (see respectively *Švestka/Jehlička/Škárová*, OZ[9], 664 and *Mojak*, p. 1038). There is no explicit statutory rule allowing partial assignment under GREEK law, but the possibility is inferred from CC art. 456, which regulates the obligations of the assignor regarding the handing over of the documents proving the right. Under CC art. 456(2), if part of the right is assigned, certified copies of such documents are to be handed over to the assignee in lieu of the originals. Also, scholars state that assignment of part of a right is possible, provided that the right is divisible: *Stathopoulos*, Law of Obligations, § 27, no. 9; *Filios*, § 88A. In AUSTRIA the possibility of assigning parts of a right is recognised if it is a monetary obligation (see OGH 17 March 1987, SZ 60/46) or another divisible obligation (see Schwimann (-*Heidinger*), ABGB VI[3], § 1393 no. 3). None of these countries appears to have a particular rule for the protection of the debtor of the kind embodied in this Article, though German scholars have argued for such a rule, deriving from the principle of good faith (see Staudinger (-*Busche*), BGB [2005], § 398 no. 46) and GREEK law is understood to require that the assignment should not be detrimental to the debtor: *Georgiadis* 409, no. 16; Georgiadis and Stathopoulos (-*Kritikos*), art. 455, nos. 44-45. Similar arguments have been made in PORTUGAL (*Cristas*, Transmissão Contratual do Direito de Crédito, 219). There is no regulation of assignability in part in SLOVAK law; although disputable, partial assignments are widely recognised by the courts (see e.g. Judgement of the Supreme Court 4 Obo 210/01; Supreme Court's declaratory judgement Obpj 2/99 - assignment of ancillary accessories to a claim). In SCOTTISH law, the assignability of divisible parts of a right to performance of an obligation is recognised (*McBryde*, Law of Contract in Scotland, no. 12.33). In ENGLISH law there cannot be a legal assignment of part of a debt, but an equitable assignment is possible. See *Chitty* on Contracts, no. 19-014.

2. No specific rules are provided on the partial assignability of a right in the SPANISH CC. However, regarding monetary obligations, as they are by nature divisible, a partial assignment is always possible. When the obligation is non-monetary, it is usually considered that it is not assignable in part either because of the impossibility of dividing the object of the obligation, or because assigning it in part without the debtor's consent would make the obligation more burdensome for the debtor. (For discussion see Navarro Pérez, *La cesión de créditos en el derecho civil español*, 352).

3. In FRANCE, transfer of rights may be partial, in which case the assignor and the assignee (or the assignees) may receive payment depending on the circumstances and unless otherwise agreed by the parties, without any right of preference for the assignor (See *Terré/Simler/Lequette*, Les obligations[9], 1128, no. 1290).

III.–5:108: Assignability: effect of contractual prohibition

(1) A contractual prohibition of, or restriction on, the assignment of a right does not affect the assignability of the right.

(2) However, where a right is assigned in breach of such a prohibition or restriction:

(a) the debtor may perform in favour of the assignor and is discharged by so doing; and
(b) the debtor retains all rights of set-off against the assignor as if the right had not been assigned.

(3) Paragraph (2) does not apply if:

(a) the debtor has consented to the assignment;
(b) the debtor has caused the assignee to believe on reasonable grounds that there was no such prohibition or restriction; or
(c) the assigned right is a right to payment for the provision of goods or services.

(4) The fact that a right is assignable notwithstanding a contractual prohibition or restriction does not affect the assignor's liability to the debtor for any breach of the prohibition or restriction.

COMMENTS

A. Conflicting interests

Where a contract contains a clause prohibiting the creditor from assigning rights under it two conflicting interests immediately come into play.

One interest is respect for freedom of contract and party autonomy. A contractual prohibition should in principle be respected. The debtor may have good commercial reasons for inserting a no-assignment clause. In the first place, the debtor may not want to have to deal with an unknown creditor who may be more severe than the assignor. Secondly, the debtor may wish to avoid the risk of overlooking the notice of assignment and paying the assignor, in which event there would be a risk of having to make a payment or give other performance a second time, to the assignee. Thirdly, a debtor who expects to have continued mutual dealings with the creditor will wish to preserve the right of set-off, a right which would be cut off as regards cross-rights arising after receipt of notice of assignment. Fourthly, the assignee may be incorporated or have its principal place of business in a jurisdiction whose legal or tax regime is unfavourable to the transaction. There is, therefore, an argument for saying that an assignment in breach of a no-assignment clause should be ineffective, whether the contract contains an outright prohibition or restricts the creditor’s right to assign, e.g. by requiring the debtor’s consent.

The other relevant interest is in the free alienability of assets. Rights to performance of obligations, particularly monetary obligations, are important assets. The marketability of monetary rights is of enormous practical and economic importance. In relation to the transfer of movables it is a widely accepted principle, adopted also in these rules, that contractual prohibitions or restrictions do not affect transferability. The market in monetary rights is no less important today than the market in movables.

The laws of the Member States differ in the effect they give to anti-assignment clauses.

B. Balancing the interests

There are various ways in which the interests in freedom of contract and the interest in the alienability of assets can be balanced. One way, adopted in the UNIDROIT Principles (art. 9.1.9) and to a more limited extent in the Principles of European Contract Law (art. 11:301) is to distinguish between monetary rights, or some monetary rights, and other rights and to allow the first to be more freely assignable than the second, in spite of a contractual prohibition. However, such a distinction, especially if limited to certain types of monetary rights (such as in PECL "future rights to the payment of money") risks giving inadequate weight to the interest in alienability, which is not confined to certain categories of monetary rights or even exclusively to monetary rights.

The present Article adopts two techniques to balance the interests, one applying to assignments in general and the other only to assignments of trade receivables (see para (3)(c) and Comment C below). The general technique is to allow the right to be transferable (thus recognising fully the interest in alienability) while providing that the debtor can obtain a good discharge by performing to the assignor (even although the assignor is no longer the creditor). The debtor also preserves full rights of set-off against the assignor as if the right had not been assigned. This does not affect the debtor's right under III.–5:116 (Effect on defences and rights of set-off) to invoke certain defences and rights of set-off against *the assignee* if the debtor chooses to pay the assignee and not the assignor. The debtor can also recover damages from the assignor for any loss caused by breach of the restriction or prohibition, although in practice such loss is likely to be minimal if the debtor is allowed to continue to perform in favour of the assignor. The debtor's interests are therefore protected and the principle of freedom of contract is respected so far as is possible consistent with not restricting alienability. The rules for the protection of the debtor do not prevent the debtor from consenting to, or acquiescing in, the assignment and paying the assignee, should the debtor wish to do so. The debtor is permitted, but not obliged, to pay the assignor. The notion that the debtor can obtain a good discharge by paying someone who is not the creditor is perhaps strange at first sight but it is not unfamiliar in this context. It is widely recognised, for example, that a debtor who has not been notified of an assignment and does not know of it can obtain a good discharge by paying the assignor. This is the position under these rules also (see III.–5:119 (Performance to person who is not the creditor)).

A practical advantage of the solution adopted here is that the assignee becomes the holder of the right as soon as the assignment takes effect and, as a result, is protected from the assignor's creditors so long as the right continues to exist. Once the debtor pays the assignor and is discharged the assignee can recover the proceeds from the assignor on the basis of unjustified enrichment. The assignor has been enriched by receiving a payment which discharges the debtor and therefore causes the assignee to suffer a corresponding disadvantage. The question of priority in the proceeds after the right is extinguished by performance is dealt with in a later Article (III.–5:122 (Competition between assignee and assignor receiving proceeds)) in a way similar to that employed in article 24 of the United Nations Convention on the Assignment of Receivables in International Trade. The assignee's claim to the proceeds has priority over competing claims, such as the claims of the assignor's creditors, so long as the proceeds are separately identifiable in the assignee's funds. There is a particular need to protect the assignee in this situation because the assignee cannot obtain protection in the normal way by notifying the debtor. The assignee is helpless to prevent the debtor from paying the assignor. The fact that the debtor is allowed to pay the assignor and thus obtain some benefit from the contractual prohibition should not prejudice any more than

is necessary the position of the assignee in relation to the assignor and the assignor's creditors.

C. Exceptions to rule that debtor can perform to assignor

The general rule stated in paragraph (2) is for the protection of the debtor. There is therefore no need for it if the debtor has consented to the assignment and no justification for it if the debtor has misled the assignee into believing that there is no prohibition or restriction. Exceptions for these situations are provided in paragraph (3)(a) and (b).

A further exception is provided in paragraph (3)(c). This applies a special rule for "trade receivables", a rule which is not found in the laws of the Member States but which has been adopted in a number of international conventions and also throughout much of North America. It is justified by a different consideration – the interest in enabling "trade receivables" to be used a source of finance. In this case too the assignment is completely effective and the debtor who has been notified of the assignment must pay the assignee. This exception is particularly necessary where the assignment relates to a continuing stream of future debts, for example, by a supplier to a factor under a factoring agreement. In this type of arrangement it is manifestly impossible to expect the factor to scrutinise the individual contracts, which may run into hundreds, in order to see whether these contain a provision against assignment. Even where, as will usually be the case, the contract is a standard-term contract which does not embody such a provision, the assignee who examines one such contract cannot be sure that the assignor will not at some stage change the terms without notification. So paragraph (3)(c) allows the assignment to take effect where it is an assignment of a right to payment for the provision of goods or services. In accordance with the normal rule, the debtor can invoke against the assignee the defences and rights of set-off allowed by III.–5:116 (Effect on defences and rights of set-off). This exception is confined to the assignment of rights to the payment of money for the provision of goods or services; for it is in the field of receivables financing that the no-assignment clause typically creates problems. The exception in paragraph (3)(c) represents a response to commercial needs which is steadily gaining acceptance. See, for example, the American Uniform Commercial Code, Revised Article 9, section 9-406(d); the 1988 UNIDROIT Convention on International Factoring, Article 6(1); and the UN Convention on the Assignment of Receivables in International Trade (2001), Article 9.

D. Right may be non-assignable for another reason

The Article deals only with the effect of a contractual prohibition or restriction on assignment. It is only such a prohibition or restriction which is denied effect by paragraph (1). If the right is non-assignable by law for another reason it will remain non-assignable. For example, a right may be non-assignable by virtue of the following Article on the ground that performance would be so personal to the creditor that the debtor could not reasonably be expected to render performance to anyone else. The rule in paragraph (1) would not render such a non-assignable right assignable merely because it had been reinforced by a contractual prohibition.

E. Assignor remains liable to debtor for non-performance of obligation

The overriding of contractual prohibitions or restrictions do not affect the assignor's liability to the debtor for non-performance of the obligation not to assign, a point made clear by paragraph (4).

F. Assignments in security

Paragraphs (2) and (3) of this Article do not apply to assignments in security of rights to the payment of money. See IX.–2:301 (Encumbrances of right to payment of money).

NOTES

1. The effect of a no-assignment clause on the assignee's rights against the debtor differs from country to country. Under the ITALIAN CC art. 1260(2), a no-assignment clause is ineffective as between assignee and debtor unless it is proved that the assignee knew of the clause at the time of the assignment, and the position is similar under GREEK law, CC art. 466(2) (though with a different allocation of the burden of proof), and PORTUGUESE law: CC art. 577(2). The ESTONIAN LOA § 166(2)-(3) clearly states that a no-assignment clause has no effect towards other persons. Under SPANISH law a prohibition against assignment is generally considered to be of no effect against an assignee except where the assignee acts in bad faith (*Díez-Picazo* II, 813), but some authors consider that even an assignee who took the right without knowledge of the no-assignment clause cannot assert the right against the debtor unless the latter consented to the assignment (*Pantaleón*, Comentario, 1023*)*. The case law affords as unique precedent the TS 26 September 2002, which implicitly grants efficacy to the prohibition of assignment [Commentary by *Veiga Copo*, Revista Derecho Bancario Bursátil 91 (2003) 281 ff and by *Cruz Moreno*, CCJC 63 (2003), pp. 915 ff]. The position in ENGLISH law is thought to be that an assignment is effective as between assignor and assignee despite a prohibition on assignment: see *Chitty* on Contracts, no. 19-045. In one case it was held that an assignment in breach of a prohibition against assignment was wholly void (*Helstan Securities Ltd.* v. *Hertfordshire County Council* [1978] 3 All ER 262), but since the case concerned only the question whether the assignee could recover from the debtor the ruling went beyond what was necessary for the decision, and a subsequent comment on the case suggesting that the debtor could not validly prohibit the assignor from disposing of the sums paid to it by the debtor (Goode, "Inalienable Rights?") received sympathetic consideration by the House of Lords in *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.* [1994] 1 AC 85, 104, though it was not found necessary to decide the point. Subsequent cases have held that an anti-assignment clause does not prevent the assignor holding any proceeds received from the debtor on trust for the assignee, and if the debtor has not paid it may be that the assignee can force the assignor to sue on the assignee's behalf. See *Don King Productions Inc v Warren* [2001] Chap. 291; *Barbados Trust Co. v. Bank of Zambia* [2007] EWCA Civ 148, [2007] 1 Lloyd's Rep 495. However, it is likely that the debtor may refuse to recognise a prohibited assignment and can rely on set-offs that arose even after it had been notified. There is no exception for receivables in English law but one was recommended by the Law Commission in its Report on Company Security Interests (Law Com 296, 2005), para. 6.73. In SCOTLAND no-assignment clauses are held effective: *James Scott Ltd. v. Apollo Engineering Ltd.* 2000 SC 228; *McBryde*, Law of Contract in Scotland, no. 12.38. NORDIC law fully recognises the validity and effectiveness of a no-assignment clause vis-à-vis the debtor (*Ussing*, Aftaler 229), as does DUTCH law (CC art. 3:83(2)) except in the rare case where the debtor led the assignee to believe that the right was assignable and the assignee relied in good faith and reasonably on the debtor's statement or other conduct (CC art. 3:36). In FRANCE, it has been held that, since the assignee is not a party to the contract containing the no-assignment clause, the assignee is not bound by such

clause and can obtain payment from the debtor: Cass.com. 21 November 2000, D. 2001, p. 123, obs. *Valérie Avena-Robardet*). However, the principle of the validity of a no-assignment clause and the effect of a contractual prohibition of assignment is expressly recognized in a statute enacted on 15 May 2001 (Law NRE "*sur les nouvelles régulations économiques*"). See *Terré/Simler/Lequette*, Les obligations[9], 1218, no. 1278. LUXEMBOURG law has no express provision corresponding to the present Article. In POLAND, some authors maintain that a no-assignment clause is effective towards other persons even if they act in good faith (see: *Czachórski, Zobowiązania,* 360). Undoubtedly, as provided in CC art. 514 with respect to claims verified in writing, the prohibition of assignment is effective towards an assignee acting in bad faith. In SLOVENIA a no-assignment clause prevents assignment in civil law relationships even against the third party. In commercial relationships such a clause has no effect. See LOA § 417(2) and (3). The basic rule under GERMAN law is the effectivness of a no-assignment clause, see CC § 399. But Ccom § 354a establishes a particular rule for monetary claims under commercial contracts, which remain assignable; but the debtor is protected as in III.–5:108(2). In SLOVAKIA, a contractual prohibition of assignment is detrimental for a valid assignment of rights pursuant to CC § 525(1) ("It is impossible to assign a claim in breach of a contractual prohibition"). This would affect also an assignee in good faith.

2. In AUSTRIA the rules on contractual prohibitions of assignment have recently been changed. The new CC § 1396a provides that with monetary obligations between parties who are not consumers a contractual prohibition of an assignment is only valid if it has been individually negotiated and does not considerably worsen the position of the creditor. Besides that the prohibition is only of relative effect: if the right is transferred despite a prohibition the transfer is still effective even if the assignee knew of the prohibition and without the assignee becoming liable towards the debtor (see CC § 1396a(3)). CC § 1396a is, however, not applicable if the obligation is non-monetary or if a consumer is involved. In such cases it is – in parts – still argued that a contractual prohibition of assignment has an absolute effect (see *Koziol and Welser*, Bürgerliches Recht II[13], 119). Under AUSTRIAN law there also exist statutory prohibitions of assignment (e.g. CC §§ 1070, 1074, ConsProtA § 12, EO § 293(2)). In CZECH law there is express legal provision stating that an assignment is not possible if it would violate an agreement made with the debtor (CC § 525.2).

3. In so far as the Article denies effect to no-assignment clauses in assignments of receivables it follows the approach first taken in what is now section 9–401(1)(b) of the AMERICAN UCC and in art. 6(1) of the UNIDROIT Factoring Convention. A similar approach is also to be found in many of the Canadian Personal Property Security Acts (e.g. Saskatchewan PPSA 1993 s. 41(9)). BELGIAN doctrine now clearly distinguishes the question of the validity of the no-assignment clause under the law of obligations from the effect of the clause in relation to the debtor and under property law. As a right to performance has no other existence than its "immaterial" existence between creditor and debtor, any restriction validly contracted between creditor and debtor will automatically and necessarily have effect erga omnes. A no-assignment clause will however be simply invalid, also between the parties, if the party who stipulated it has no legitimate interest in doing so. Stricter rules will apply to the validity of such clauses relating to shares in companies. The rule of para (4) is therefor an impossibility under Belgian law: either the clause is invalid, also between the parties, or it is effective erga omnes, subject only to the protection of an assignee as under para (2) (a) and (b) of the Article.

III.–5:109: Assignability: rights personal to the creditor

(1) A right is not assignable if it is a right to a performance which the debtor, by reason of the nature of the performance or the relationship between the debtor and the creditor, could not reasonably be required to render to anyone except that creditor.

(2) Paragraph (1) does not apply if the debtor has consented to the assignment.

COMMENTS

A. Rights personal to the creditor

In a sense, every assignment of a right changes the debtor's position in some degree. The debtor has to perform in favour of a different person, and that person may have a more stringent attitude towards enforcement of rights than the original creditor. That by itself is not a sufficient consideration to prevent the assignment.

There are, however, rights which by the nature of the subject-matter or the relationship between the parties are personal to the creditor, so that it would be unfair to expose the debtor to an obligation to perform to an assignee. Different legal systems have different formulations of the principle underlying this conception. Under some the rule is stated as being that rights to performance under personal contracts, or contracts for personal services, are not assignable; in others that a right cannot be assigned if this would significantly alter the nature or content of the performance or render counter-performance less likely. All these formulations would appear to be encompassed by the rule embodied in this Article, since they all presuppose that the identity of the original creditor is important to the debtor. The typical example given of an assignment that would materially increase the burden or risk on the debtor is one which relates to the assignment of rights under an insurance policy covering goods which the assignor is selling to the assignee. Since the personal character of the insured is material to the insurer's risk, to allow an assignment would be to expose the insurer to a risk of a kind different from that which it had agreed to accept. This is a factor indicating that the benefits of the insurance policy are intended to be personal to the insured.

> *Illustration*
> P agrees to publish a book W is writing. An act of assignment by P to A of P's right to call for the book from W is not effective to assign the right, since the character and reputation of the publishing house are matters of importance to an author and the publisher cannot be changed without the author’s consent.

An employer's right to performance under a contract of employment also falls into the category of non-assignable rights, since for both parties the relationship is a personal one which does not in principle permit substitution of a new party as creditor without the consent of the other party to the contract.

Where an act of assignment is ineffective to transfer the right because of the present Article the intended assignee will normally have the right to recover damages from the intending assignor for non-performance of the obligation to assign.

B. Mandatory rules

Independently of this and the preceding Article, overriding mandatory rules may render a purported assignment ineffective.

NOTES

1. In GERMAN law a right cannot be assigned if the effect would be to alter the substance of the debtor's performance (CC § 399) or if the right is personal to the creditor. The position is similar under BELGIAN, FRENCH, LUXEMBOURG, GREEK (see GREEK CC art. 465), ESTONIAN, SLOVENIAN (LOA § 417(1)) and DUTCH law. Similarly ITALIAN CC art. 1260(1) expressly excludes the assignability of rights which are of a strictly personal character such as alimony rights (CC art. 447(1)). These are considered to include rights where performance in favour of the particular creditor is of importance to the debtor, such as rights under an insurance policy or a contract of employment ENGLISH law too does not recognise the validity of an assignment of rights personal to the creditor, e.g. the benefit of an author's contract to write a book or the assignment of a motor insurance policy: *Treitel*, The Law of Contract[11], nos. 15-051–15-057. SCOTTISH law is the same: *McBryde*, Law of Contract in Scotland, nos. 12.36-12.41; cf discussion in *Anderson* paras. 2.34-2.46. DANISH law does not allow assignment of wages and salary not yet earned and of claims for damages for personal injury and loss of dependency, which have not yet been awarded or recognised, see *von Eyben a.o.* 39 ff. POLISH law provides that a claim cannot be assigned if this would be inconsistent with the nature of the obligation, CC art. 509(1) (e.g. where the nature of the performance is such that it is personal to the creditor). In AUSTRIA (deriving from CC § 1393 second sentence) the right to m personal work and services under an employment contract or the employee's right to holidays are not assignable (see Koziol/Bydlinski/Bollenberger (-*Neumayr*), ABGB[2], § 1393, no 3). Under the CZECH CC (§ 525(1)) firstly an assignment is not possible if the right of comes to an end no later than upon the creditor's death or if the content of the right would be changed by a substitution of the creditor and secondly there is expressly added that it is not possible to assign a receivable if it cannot be made subject to the execution of a judgment. SLOVAK law is to the same effect (CC § 525(1)). The restriction relating to a possible change of content of the right, according to case law, is applicable only to rights to performance which are by their nature personal to the creditor and the assignment of which might prejudice the debtor's position (See Judgment of the Supreme Court 4 Obo 210/01).
2. Strictly personal rights are non-transferable in SPANISH law, due to their special character *intuitu personae*. Although the CC does not have an express rule on the matter, this result may be inferred from the legal nature of assignment which is not compatible with any change of the legal content of the contract (*Navarro Pérez*, p. 110). An example of a personal right that is not assignable is a right to aliment, except when it is overdue and the right to sue is assigned (CC art. 151(1)). The debtor's consent may validate an assignment of a right only when the personal character does not stem from a legal provision (otherwise, the credit is non-transferable by the CC art. 1112), but either from the terms of the obligation or from the non-fungible nature of the performance to be made.

III.–5:110: Act of assignment: formation and validity

(1) Subject to paragraphs (2) and (3), the rules of Book II on the formation and validity of contracts and other juridical acts apply to acts of assignment.

(2) The rules of Book IV.I on the formation and validity of contracts of donation apply to gratuitous acts of assignment.

(3) The rules of Book IX on the formation and validity of security agreements apply to acts of assignment for purposes of security.

COMMENTS

A. Application of general rules

An act of assignment will be a contract or other juridical act. The general rules on contracts and other juridical acts apply to it, unless it is of a type to which some special rule applies. It follows from these general rules that an act of assignment need not normally be in writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses. In practice, contracts or other juridical acts by which rights are assigned are almost invariably in writing but there is no need to embody this as a general legal requirement. Later Articles give adequate protection to the debtor.

B. Gratuitous assignments

The policy considerations which justify special rules for the formation and validity of contracts of donation (to be dealt with in the later Part IV.I on Gratuitous Contracts) also justify such a requirement for gratuitous assignments. Paragraph (2) therefore applies the donation rules by reference.

C. Assignments for purposes of security

The same applies to assignments for purposes of security. The special rules for security agreements (to be dealt with in the later Book on Proprietary Securities) are therefore applied.

NOTES

1. The UN Convention has no substantive rule but provides in art. 8 that an assignment is valid as to form if it meets the formal requirements either of the law of the State in which the assignor is located or of the applicable law by virtue of rules of private international law. The UNIDROIT Factoring Convention does not prescribe any formal requirements for the assignment of receivables but is confined to assignments of which notice in writing is to be given to the debtor. The laws of most countries of the European Union do not have formal requirements for the validity of a non-gratuitous act of assignment of rights as between assignor and assignee. These countries include AUSTRIA, BELGIUM, ENGLAND, GERMANY (where it does not depend on non-gratuitousness), GREECE, ITALY, LUXEMBOURG, PORTUGAL, SCOTLAND, SLOVENIA, SPAIN and the NORDIC countries. In the NETHERLANDS an assignment and a pledge are always required to be in writing signed by the assignor (CC arts. 3:94 and 3:236(2)). For the creation of a ‘silent’, or non-possessory, pledge of rights either the written instrument must be officially authenticated (e.g. by a notary) or, if it is not, the date of its creation must be officially

certified. POLISH law does not require a special form for the validity of the assignment. However, if a right is verified in writing, its assignment must also be verified in writing (CC art. 511). The same is generally true for ESTONIAN law, as LOA § 11(3) states that if a contract must be entered into in a specific form, agreements on assignment of rights arising from the contract must also be entered into in such form unless otherwise provided by law or the contract (applicable to act of assignment (see Varul/Kull//Kõve/Käerdi (-*Käerdi*), § 164, no. 4.2.1. c)). For assignments for purposes of security, the format which can be reproduced in writing is required (LPA § 315(2^1)). In AUSTRIA – similarly to the rule in this Article – it depends on the contract that is the title for the assignment which requirements have to be met (*Koziol and Welser*, Bürgerliches Recht II^{13}, 120). In CZECH law the assignment needs to be done in writing (see above). Writing is also required in SLOVAKIA, pursuant to CC § 524(1).

III.–5:111: Right or authority to assign

The requirement of right or authority in III.–5:104 (Basic requirements) paragraph (1)(c) need not be satisfied at the time of the act of assignment but has to be satisfied at the time the assignment is to take place.

COMMENTS

Even if there is an existing, assignable right and a valid act of assignment there will be no transfer of the right if the person purporting to assign it by the act of assignment has no right or authority to do so. See III.–5:104 (Basic requirements) paragraph (1)(c). Normally only the creditor will be in a position to assign the right, whether acting personally or through a representative, but there may be cases where some other person is authorised by law to assign the right.

This Article makes it clear that the requirement of right or authority to assign need not be satisfied at the time of the act of assignment but must be satisfied at the time the assignment is to take place. A person can grant an act of assignment of a right yet to be acquired but the actual transfer of the right will not take place until it is acquired.

NOTES

1. This rule may be said to follow from the very nature of assignment as a transfer of the creditor's right to performance. It is normally taken for granted.
2. There are no specific provisions on entitlement to assign a right in the SLOVAK law. Therefore general civil law rules will apply, which means that only the creditor (even through a representative) may assign the right to performance.
2. In SPANISH law, the creditor is the only person authorised to assign a right, whether directly or by the means of any legal representation, due to the creditor's liability for the *veritas nomini* of the right (CC art. 1529). The assignor must have a legal title in order to assign a credit, but since it is legal to assign future rights, this title may arise *a posteriori*, when the right comes into the existence (see note on III.–5:114 (When assignment takes place)).

Sub-section 3: Undertakings by assignor

III.–5:112: Undertakings by assignor

(1) The undertakings in paragraphs (2) to (6) are included in the act of assignment unless the act of assignment or the circumstances indicate otherwise.

(2) The assignor undertakes that:

(a) the assigned right exists or will exist at the time when the assignment is to take effect;
(b) the assignor is entitled to assign the right or will be so entitled at the time when the assignment is to take effect.
(c) the debtor has no defences against an assertion of the right;
(d) the right will not be affected by any right of set-off available as between the assignor and the debtor; and
(e) the right has not been the subject of a prior assignment to another assignee and is not subject to any right in security in favour of any other person or to any other incumbrance.

(3) The assignor undertakes that any terms of a contract or other juridical act which have been disclosed to the assignee as terms regulating the right have not been modified and are not affected by any undisclosed agreement as to their meaning or effect which would be prejudicial to the assignee.

(4) The assignor undertakes that the terms of any contract or other juridical act from which the right arises will not be modified without the consent of the assignee unless the modification is provided for in the act of assignment or is one which is made in good faith and is of a nature to which the assignee could not reasonably object.

(5) The assignor undertakes not to conclude or grant any subsequent act of assignment of the same right which could lead to another person obtaining priority over the assignee.

(6) The assignor undertakes to transfer to the assignee, or to take such steps as are necessary to complete the transfer of, all transferable rights intended to secure the performance which are not already transferred by the assignment, and to transfer the proceeds of any non-transferable rights intended to secure the performance.

(7) The assignor does not represent that the debtor has, or will have, the ability to pay.

COMMENTS

A. General

A contract or other juridical act by which a right is assigned will normally impose obligations on the person assigning the right. The most basic obligation will be to assign the right in accordance with the contract or other juridical act.

Contracts or other juridical acts assigning rights frequently contain undertakings (warranties) by the assignor designed to ensure that the assignee acquires the benefit of the bargain. Often these are restricted to warranties as to the assignor's legal rights against the debtor and undertakings to perform any further acts necessary to perfect the assignee's title. Sometimes such undertakings go further and provide that if the debtor defaults the assignor will be liable for performance or will repurchase the assigned rights. In the absence of such a provision the normal rule is that the assignor incurs no liability for the debtor's non-performance. See paragraph (7).

In the absence of express provision in the contract or other juridical act of assignment the default rules relevant to the particular type of transaction may come into play. For example, if the right has been sold the default rules on the obligations of the seller and buyer will come into play. If the right has been donated the default rules applying to contracts of donation will come into play, and similarly if the right has been assigned in security. However, these background default rules may not cover every situation and it can be difficult to apply rules drafted primarily for corporeal movables to assignments of rights to performance. So, to fill any gaps and for the convenience of the user the present Article contains a set of implied undertakings which apply to any assignment unless otherwise provided. Such undertakings are found in many laws; in others they are often the subject of express provisions in the contract to assign. The undertakings by the assignor set out in the Article are designed to protect the assignee in the event that the assigned rights prove legally worthless or are subordinate to the interests of a prior party or are reduced in value by a modification of the contract under which they arise.

B. Existence and enforceability of right and entitlement to assign

Paragraph (2) of the Article imports undertakings that the right exists or will exist at the time when the assignment is to take effect, that the assignor is entitled to assign the right or will be so entitled at the time when the assignment is to take effect and that the right will not be subject to defences or rights of set-off against the assignor.

Illustration 1
C assigns to X by way of sale a batch of debts due from D. Subsequently C purports to assign the same debts to A by way of security for a loan. C thereby commits a breach of the undertaking to A that C is entitled to assign the right.

Illustration 2
C assigns to A a purported claim against D for the price of goods said to have been sold and delivered under a contract of sale. No such contract was ever made. C is liable to A for breach of the undertaking as to the existence of the claim.

Illustration 3
C assigns to A a purported claim against D for the price of goods sold and delivered under a contract of sale. When A sues D for non-payment of the price D successfully defends the claim on the ground that the goods were never delivered. C is liable to A for breach of the undertaking that D has no defence to the claim.

Illustration 4
C assigns to A all C's rights under a consumer credit agreement entered into by C as creditor with the debtor, D. C failed to comply with a statutory requirement that the agreement should state the annual percentage rate of charge for the credit. The statute provides that in such a case the agreement is unenforceable by C, though not by D. A can sue C for breach of the implied undertaking that D has no defences against an assertion of the right.

Illustration 5
C assigns to A a claim against D for repayment of a loan of €10,000. D does not dispute that the loan has become repayable but asserts a right to set off against it a cross-claim for €20,000 which is held to the credit of a separate account D holds with

C. The existence of the right of set-off constitutes a breach of C's implied undertaking to A.

However, the undertaking is not broken by the existence of rights of set-off that do not affect the assignee, for example, set-off in respect of cross-claims by the debtor against the assignor arising from dealings between them after the debtor's receipt of notice of assignment (see III.–5:116 (Effect on defences and rights of set-off). Moreover, the undertaking does not cover the assignee's inability to obtain performance because the debtor absconds or becomes bankrupt.

C. Freedom from prior rights

Paragraph (2)(e) imports an undertaking that the claim has not previously been assigned or made subject to a security interest or any other encumbrance. The undertaking is not limited to freedom from consensual security interests; it also applies to security interests or other incumbrances created by law.

D. Protection of assignee’s reliance on terms

The interpretation and effect of a contract depends in large measure on the intention of the parties. This could be dangerous for an assignee. The parties might have agreed that a term which has one apparent meaning should have some quite different meaning. As between themselves the true meaning will prevail. The assignee can have no better right than the assignor. So the assignee could also be affected by the secret agreement between the original parties. Paragraph (3) therefore imports an undertaking by the assignor that any terms of a contract or other juridical act which have been disclosed to the assignee as terms regulating the right have not been modified and are not subject to any undisclosed agreement as to their meaning or effect which would be prejudicial to the assignee.

After the assignment has taken effect the assignor is no longer the creditor and would no longer be able to modify the terms regulating the right unless the act of assignment so provides. Modification of the content of the assigned right and the corresponding obligation would be a matter for the debtor and the assignee as the new parties to that legal relationship. Of course, other terms of the contract between the assignor and the debtor could still be modified by agreement between them, provided they did not alter the terms regulating the assigned right.

In some cases an assignment of a contractual right will leave the assignor with no room to modify the contract from which the right arises. The assignor may have performed fully under the contract and may have assigned a simple right to payment. In relation to that right the assignee is the new creditor. Any modification of the amount to be paid or the time of payment would be a matter for agreement between creditor and debtor, that is to say between the assignee and the debtor. In other cases, however, the contract between the assignor and the debtor may remain in effect for many purposes between these two parties. For example, the assignor may still be obliged to perform under it. Clearly a modification of the contract agreed between the assignor and the debtor could indirectly affect the assignee’s right. In principle, once contractual rights have been assigned it should not be open to the assignor and the debtor to agree on modifications to the contract under which they arise, unless the assignment agreement so provides or the assignee consents to the modification. This is the main rule under paragraph (4). However, a strict adherence to this principle would cause considerable commercial inconvenience, particularly where the assignment relates to rights under an executory contract involving continuous performance on the part of the assignor, such as a

construction contract. For example, in the course of performance of a construction contract circumstances may arise where the parties find it necessary to agree on a variation outside the contractual variation provisions, as where additional work is required that could not have been reasonably anticipated. Again, the modification may be of a part of the contract which has no relevance to the assigned rights. Accordingly the last part of paragraph (4) permits modifications without the assignee's consent where these are made in good faith and are not modifications to which the assignee could reasonably object.

Illustration 6
C, a building contractor, agrees with D, a bank, to construct a vault for the storage of securities and other valuables belonging to D's customers. Soon afterwards D sells its banking business to E, to whom D assigns its rights under the building contract. In the course of construction it is discovered that a stream, the existence of which is not shown on any drawings relating to the site, flows directly under the floor of the vault and that to prevent the entry of water it is necessary to install an underground pump at considerable additional expense to pump away the water. Though this does not fall within the variation clause of the contract the architect nevertheless considers the installation of the pump unavoidable if the vault is not to be rendered unusable and issues the requisite order to the contractor, indicating that the cost of the pump and labour will be an addition to the contract price. This modification is binding on E even though made without E's consent.

E. No subsequent act which could destroy assignee's priority

The implied undertaking in paragraph (5) – that the assignor will not conclude or grant any subsequent act of assignment of the same right which could lead to another person obtaining priority over the assignee – is necessary because of the later Article which, as between successive apparent assignees of the same right, gives priority to the one who notifies the debtor first. In the absence of such a provision the first assignee would be left without a remedy. The assignor would not be liable for non-performance of the obligation to assign because the debtor would actually have assigned the right and the assignee would have obtained it. The assignee would then however have lost the right because of the operation of the rule on priority. It is obviously right in such circumstances that there should be a remedy against the assignor who has placed the second "assignee" in a position to obtain priority by notification.

F. Transfer of certain security rights

The general rule is that supporting security rights pass with the assignment to the assignee, in so far as they are transferable. They do not require separate assignment. See III.–5:115 (Rights transferred to assignee) paragraph (1). However, there may be situations where something needs to be done by the assignor to effect or complete the transfer. The undertaking in paragraph (5) obliges the assignor to do what is necessary for that purpose. The obligation can be excluded by agreement and applies only to security rights which are transferable. For example, an independent personal security on first demand will normally not be transferable (see IV.G.–3:108 (Transfer of security right)).The assignor can, however, be required to transfer the proceeds (see UCP art. 49).

G. No undertaking that debtor has ability to pay

Paragraph (7) makes it clear that unless otherwise agreed between the assignor and the assignee, the assignor does not undertake that the debtor has, or will have, the ability to pay.

This is to counter any arguments that in the case of a sale or security agreement the assigned right would not be fit for its purpose if the debtor could not pay.

H. Other obligations

This Article is not exhaustive of the obligations to the assignee which may be imposed on an assignor. In particular, while it does not import any undertaking that the assignor has no knowledge of any matters casting doubt on the debtor's ability to pay, the general duty to act in accordance with the requirements of good faith and fair dealing may require disclosure of matters known to the assignor indicating that the debtor may be insolvent.

NOTES

1. Provisions similar to those of the Article are contained in the UN Convention art. 14 and in the Unidroit Principles art. 9.1.15. GERMAN law applies the rules of the CC governing warranties on a sale as amended by some particular rules, see CC §§ 401-403. Similar warranties are to be found in PORTUGUESE law (CC arts. 587, 892 ff, 957 ff; *Varela* II 330 ff *Lima & Varela* 602 ff), ITALIAN law (CC art. 1266), and DUTCH law in respect of a silent pledge (CC art. 3:239(2)) and a sale or swap of rights (CC arts. 7:47, 7:17). In FRENCH, BELGIAN and LUXEMBOURG law, such rules will apply where the underlying contract is a sales contract (see CCs arts. 1693 and 1694); if the underlying relationship is a different one, different rules may apply. Similar rules are applicable in CZECH law but there is no such express provision (see notes above and CC mainly the § 524 as commented by *Švestka/Jehlička/Škárová*, OZ[9], 663-666 and the authoritative general literature, for instance *D. Hendrych* under headword “postoupení pohledávky” and CC § 527). Section 41 of the FINNISH and SWEDISH Sale of Goods Acts can be interpreted in this way, while under section 9 of the NORDIC PNA the seller of a right warrants its existence and validity. The UN Convention and ESTONIAN law draw no distinction in this regard between assignments for value and gratuitous assignments; most other codes confine the warranties to assignments for value (the same is true for SLOVENIAN law), while under GERMAN law the rules on donation apply as amended by CC §§ 401-403. Under SPANISH law the assignor warrants the existence and legitimacy of the right at the time of the assignment (CC art. 1529) but as a rule gives no further warranties, though if to the knowledge of the assignor and unknown to the assignee the debtor was insolvent at the time of assignment the assignor is liable for the debtor’s default. There appear to be no reported cases in ENGLISH law concerning implied warranties in an assignment, nor is the question discussed in the contract textbooks. This may be because of the common practice of including express warranty provisions in assignment contracts. AUSTRIAN law (CC § 1397) provides that if the assignment is made for consideration the assignor undertakes that the right exists and that payment will be paid on the due date, though liability is limited to what the assignor received from the assignee for the assignment. Liability of the assignor is excluded with assignments that are based on a contract of donation (CC § 1397 first sentence) as well as for incumbrances which can be seen in the public books or for coincidental circumstances or circumstances that fall within the sphere of the assignee (CC § 1398). According to POLISH law the assignor warrants to the assignee that the right exists and is due to the assignor. The assignor is liable for the solvency of the debtor at the time of the assignment only if this liability is assumed (CC art. 516). In ESTONIAN law, in relation to the underlying obligation to assign, relevant questions are covered

by sales law (LOA § 208(3): the provisions concerning the sale of things apply to the sale of rights and other objects unless otherwise provided by law and if this is not contrary to the nature of the object: the seller of a right must allow the purchaser to acquire the right which is the object of the contract of sale), or by the rules on donation (LOA §§ 259 ff) or factoring (LOA §§ 256 ff). In SCOTTISH law the assignor, where the assignment is for onerous cause, gives implied warrandice that the right assigned is due and the title to assign good, possibly also securing against its own actions that might hurt the assignee's right (*Stair Memorial Encyclopaedia*, vol. 15, para. 862). In SLOVAKIA, in case of assignment for value, the assignor would be liable to the assignee if the assignee did not take over as creditor of the right, or if the debtor performed lawfully to the assignor, or if the assigned right was wholly or partly extinguished due to rights of the debtor against the assignor (e.g. set-off) - see CC § 527(1). However, the assignor warrants the enforceability of the claim to the amount of obtained value, only due to a written contract with the assignee. This liability extinguishes if the assignee does not enforce the claim without undue delay (CC § 527(2)).

Sub-section 4: Effects of assignment

III.–5:113: New creditor

As soon as the assignment takes place the assignor ceases to be the creditor and the assignee becomes the creditor in relation to the right assigned.

COMMENTS

Once an outright assignment (as opposed to an assignment in security) takes effect the assignee becomes the creditor. The assignor will no longer be the creditor and will therefore not have the right to assign the right to anyone else. The right will not be the assignor's to assign. (If the assignment is by way of security, the assignor has the right to assign further, but that right is correspondingly limited in that there is no right to make a second assignment that will take priority over the first one. Assignments by way of security will be governed by Book IX.) However, a purported second assignment will not be completely ineffective, and in certain circumstances may even take priority over the first one. The rule is that where an assignor has made successive purported assignments, and the second "assignee" did not know of the earlier assignment at the time of the second purported assignment, priority goes to the assignee who first gives notice to the debtor. (See III.–5:121 (Competition between successive assignees). This is an exception to the *nemo dat* principle.)

The assignee becomes the creditor in relation to the right assigned – not in relation to some greater or lesser right. The right remains the same before and after the assignment. If, for example, it was a conditional right in the hands of the assignor it remains a conditional right in the hands of the assignee.

> *Illustration 1*
> In June a football club X concludes a contract with Y for the provision by Y of stewarding services at a football match which will take place in November (if the team qualifies). The contract provides for an advance payment to be made on 15 October. The contract also provides that all the rights and obligations under it are subject to the resolutive condition that they are to cease to have effect if the team fails to qualify. In August Y assigns its rights to payment under the contract to Z. In September the team fails to qualify. Z has no right to the advance payment due to be made in October. That right was subject to a resolutive condition and has now come to an end. The assignment cannot convert a conditional right into an unconditional right.

It goes without saying that the assignment of a right to performance does not make the assignee the debtor in any corresponding obligation or subject the assignee to any obligation which by law falls on the assignor.

> *Illustration 2*
> X sells and assigns to Y a right to a payment under a contract with B. The payment is to be made by B in advance of performance by X. It is to be returned if X does not perform. B is notified of the assignment and makes an advance payment to Y. X does not perform. X has assigned only the right to the payment. X's obligation to repay the

amount of the payment has not been transferred. B has a right to repayment from X, not Y.

The above two examples show the importance of careful analysis in cases involving advance payments. In Illustration 1, for example, the position would be the same as in Illustration 2 if the team had failed to qualify after the advance payment had been made on 15 October. The obligation to pay and the corresponding right would have been extinguished by the payment. The right would no longer have been subject to a resolutive condition, although other rights and obligations under the contract would be. Any obligation to repay would have to be based on an implied term of the contract or on the rules regulating the effects of the termination or extinction of rights and obligations. The rules on unjustified enrichment would not apply because the extinction of the relevant rights and obligations would not be retrospective and the payment was not affected by any error or other vitiating factor. Whether the obligation to repay is based on an implied term of the contract or an independent rule of law, it would originally have been an obligation on Y, the assignor, to the debtor and would not have been transferred or extinguished by the assignment of the right.

The general result, that the assignee becomes the new creditor in relation to the right assigned but is not subject to any obligations to repay which fall on the assignor, is important for commercial purposes and particularly for receivables financing. The United Nations Convention on the Assignment of Receivables in International Trade contains a provision (Article 21) to make it clear that failure by the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.

It will be remembered that "right" is defined earlier as including a part of a right. (III.–5:101(Scope of section) paragraph (3)).

NOTES

1. This generally follows from the nature of an assignment, without being expressly stated in the laws. This is the case in GREECE, see *Stathopoulos*, nos. 203 and 207. In POLAND it is recognised in case law that as a result of the assignment, all rights of the creditor are passed on to the assignee and the legal relationship itself does not get changed (see: Supreme Court 5 September 2001, I CKN 379/00, Lex no. 52661). Similarly in the SLOVAK judicature: cf. e.g. Judgment of the Supreme Court of SR 1 Cdo 73/2000. There is no such express provision in CZECH law but this non-controversial general rule is easily construed on the basis of the CC § 524 (see *Švestka/Jehlička/Škárová*, OZ[9], 663-666 and *D. Hendrych*). In SCOTLAND it is a basic rule that the assignment places the assignee in the shoes of the assignor (*Gloag and Henderson*, The Law of Scotland[11], no. 33.07). An effective assignation is said to deprive the assignor of a title to sue in respect of what has been assigned, and to give it to the assignee (*McBryde*, Law of Contract in Scotland, no. 12.79). The analysis in ENGLISH law is different, but the result is much the same in that the debtor is obliged to pay the assignor until notified of the assignment, when the debtor becomes obliged to pay the assignee.
2. In SPAIN according to the legal nature of assignment as a true *titulus transferendi* (CC art. 1526), the effect of an assignment is not to create a limited right or a kind of condominium or participation in the assigned claim, but to transfer the whole

ownership, without any right of redemption. That is why there is no need to put forward any special rule.

3. In FRANCE, once the assignment takes effect, the assignee becomes the new creditor. However, assignments subject to the form requirement of CC art. 1690 will only be "opposable" to the debtor once notice is given to the debtor, either by way of *signification* or by way of acceptation in an authenticated deed (*acte authentique*), which does not require the consent of the debtor. See *Terré/Simler/Lequette*, Les obligations[9], 1219, nos. 1279 et seq. In the case of successive assignments, the rule laid down by art. 1690 is strictly applied : the assignee who first gives notice to the debtor will be deemed the creditor, unless fraud is established (when the assignee was aware of the earlier assignment at the date of the purported second assignment). See *Terré/Simler/Lequette*, Les obligations[9], 1219, nos. 1286 et seq.

4. In BELGIUM, as soon as the requirements for assignment are met, the assignee will be the creditor in relation to anyone except the debtor (art. 1690 II), and subject to the application of the principle of confidence (CC arts. 1240 and 1690 IV).

III.–5:114: When assignment takes place

(1) An assignment takes place when the requirements of III.–5:104 (Basic requirements) are satisfied, or at such later time as the act of assignment may provide.

(2) However, an assignment of a right which was a future right at the time of the act of assignment is regarded as having taken place when all requirements other than those dependent on the existence of the right were satisfied.

(3) Where the requirements of III.–5:104 (Basic requirements) are satisfied in relation to successive acts of assignment at the same time, the earliest act of assignment takes effect unless it provides otherwise.

COMMENTS

This Article deals with the time an assignment takes place. Again it has to be read along with III.–5:121 (Competition between successive assignees).

A. Assignment of an existing, assignable right by the creditor

Where the right exists and is assignable at the time of an act of assignment by the creditor, the assignment normally takes effect immediately upon conclusion of the contract by which it is assigned or, in the case of an assignment by a unilateral juridical act, at the time when that act is made. (Under the rules in Book II a unilateral juridical act is not made until it is communicated to the person affected by it, in this case the assignee). Of course, this will not apply if the act of assignment itself provides for a later time. It is not necessary that an assigned right to money has become payable; it suffices that it exists as a present right, exigible in the future (*debitum in praesenti, solvendum in futuro*).

Illustration 1
On May 1st C enters into a contract with O to construct a factory at a price of €2 million, payment to be made in instalments against architects' certificates. On June 1st C assigns its rights to A. The first certificate is issued on August 12th. The assignment takes effect on June 1st.

B. Other cases

In other cases the assignment normally takes effect as soon as the requirements are satisfied, unless the act of assignment provides otherwise. If, for example, the right is not in existence or is not assignable at the time of the act of assignment, the assignment will take place when it comes into existence or becomes assignable, unless otherwise provided. Similarly, if the person granting an act of assignment of an existing right is not the creditor, the assignment will take place when that person acquires the right and becomes the creditor, unless otherwise provided.

Illustration 2
S, a timber supplier, enters into a factoring agreement with F by which S agrees to offer for sale to F monthly batches of rights to payment arising from sales of timber to S's customers. The agreement provides for the sale to take effect as regards any such receivables when the offer relating to them is accepted by F. A batch of receivables is offered to F on May 15th and accepted on May 20th. The assignment of those

receivables takes effect on May 20th because that was what was agreed in the act of assignment.

C. Special rule for future rights

The main policy reason behind the rule in paragraph (2) is that in the case of an act of assignment of future rights, the assignee, who will very often have paid for the rights, should be preferred to the creditors of the assignor. Solutions to achieve this policy objective are widely adopted. It follows from the earlier rules that there will be no assignment at all if the future right never comes into existence. The effect of the present provision is that once it has come into existence the assignment can be retrospectively regarded as having taken place when all the other requirements were satisfied. Normally that will mean that the right will be deemed to have been transferred at the time of the act of assignment.

D. Requirements satisfied simultaneously

Paragraph (3) deals with a situation which could arise when a person purports to assign the same right to successive assignees. If the right is not yet in existence or is not yet assignable or if the granter is not yet the creditor, the requirements for an effective assignment could be satisfied simultaneously for all the assignees. Paragraph (2) provides that in such a case the assignments are treated as being made in the same order as the acts of assignment, unless one of the acts provides that it is only to have effect at some later date (which would be unlikely).

Illustration 3
On September 1st X, a property developer, assigns to Bank Y all its rights under contracts of sale to be entered into in the future with purchasers of the properties currently in course of construction. On October 1st X assigns the same rights to Bank Z. The development is completed the following year and X sells one of the properties to P on 10th August of that year. The assignment of X's right to the price is dependent on the sale but thereupon takes effect in relation to Bank Y, which had the earlier act of assignment.

NOTES

1. Paragraph (1) is in line with art. 10 of the UN Convention (although differently expressed) and also reflects those national laws which recognise the assignment of rights under future contracts. See *Kötz*, Rights of Third Parties, no. 104. Such rights are treated as nascent at the time of the contract to assign. In AUSTRIA and POLAND the assignment of a future right is conditional on the coming into existence of that right, see respectively OGH 6 October 1984, JBl 1984, 85 *Koziol* and SN 19 September 1997, III CZP 45/97, OSNC 1998/2/22). The principles expressed in paragraphs (2) and (3) of the Article are accepted also under ESTONIAN law (see Varul/Kull//Kõve/Käerdi (-*Käerdi*), § 165, nos. 3.3., 4.4) and GERMAN law (see Staudinger (-*Busche*), BGB [2005], § 398 nos. 63 et seq.). In SLOVAKIA, the effect of a valid contract of assignment would be subject to a suspensive condition that the assigned right would have to come into existence (cf. CC § 36 cl. 2 and also the Judgment of the Supreme Court of SR 1 Cdo 73/2000). In SCOTLAND, as noted above, intimation to the debtor is necessary to complete the assignee's right but if that right is a future right the assignment will become effectual only when it vests in the assignor, *Gloag and Henderson*, The Law of Scotland[11], no. 33.01. Future rights are

said to vest by accretion. In the factoring of debts in Scottish practice there may be a further or corroborative assignment once the debt exists. See *McBryde*, Law of Contract in Scotland, nos. 12.31, 12.91. In ENGLISH law there may be an effective legal assignment of future rights under an existing contract, *Chitty* on Contracts, no. 19-008; assignment of rights under future contracts is possible in equity, though an agreement supported by consideration may be necessary: see *Chitty* on Contracts, nos. 19-028 ff.

2. On the subject-matter of the present rule there are two distinct problems in SPANISH law. Firstly, there is the question of the time when the assignee acquires a property right in the assigned claim when the claim did not exist at the time when the agreement to assign was reached. The question is highly disputed, specially where the assignor becomes bankrupt and the trustee seeks to retain the assigned right for the estate. Unfortunately, there is no prevalent opinion at present, and the case law is undecided. Secondly, who gets priority where there were multiple assignments? Most scholars suggest that the assignee who first gives notice to the debtor has the prior ranking. Although a highly pragmatic proposal, probably this approach is inconsistent with the rule governing property rights in claims (cfr, *Pantaleón*, Comentario, p. 1021).

3. In FRANCE, an act of assignment has the same effects as a contract transferring property, with the appropriate adaptations in relation to the fact that it also creates a legal relationship. Where the right exists and is assignable at the time of an act of assignment by the creditor, the assignment normally takes effect immediately upon conclusion of the contract by which the right is assigned in accordance with the solo consensus principle, except for assignments for purposes of securities (ordonnance of 24 June 2004: Ccom art. L. 228-1). Where the rights do not exist at the time of an act of assignment, the assignment takes effect provided that such rights are likely to come into existence and are sufficiently identifiable (Civ. 1ère, 20 March 2001). It has been held that rights under a future contract may not be assigned whereas merely potential rights are assignable provided that the contract was concluded (Com; 15 January 1973). See *Terré/Simler/Lequette*, Les obligations[9], 1217, no. 1278. For BELGIUM, see the notes under III-5:106.

4. CZECH law conforms with paragraph (1) and paragraph (2), see Knappová *(-Dvořák)* Civil Law, II, 114; in case of para. (3), there is no express statutory provision and little experience on the subject, however, it can be assumed that even though each of the successive acts of assignment is effective between its parties, as a practical matter it is important which one is notified to the debtor first (as the notification is the moment when any act of assignment becomes effective for the debtor, see *Švestka/Jehlička/Škárová*, OZ[9], 941). Similar rules applicable to future rights can be found also outside the CC and Ccom, for instance in the legal regulation of future transactions (*futures)*.

III.–5:115: Rights transferred to assignee

(1) The assignment of a right to performance transfers to the assignee not only the primary right but also all accessory rights and transferable supporting security rights.

(2) Where the assignment of a right to performance of a contractual obligation is associated with the substitution of the assignee as debtor in respect of any obligation owed by the assignor under the same contract, this Article takes effect subject to III.–5:302 (Transfer of contractual position).

COMMENTS

A. Transfer of primary right

The first effect of an assignment is to transfer the primary right to performance itself. This follows from the definition of an assignment as a transfer. The assignee becomes the new holder of the right, the new creditor, as soon as the assignment takes effect. However, there are later provisions which enable the debtor to obtain a discharge by paying the assignor in good faith at any time prior to the receipt of a notice of assignment. The assignee who does not give notice to the debtor is also liable to be replaced as the new creditor by a second purported assignee who gives notice to the debtor first: see III.–5:121 (Competition between successive assignees).

B. Transfer of remedies

An assignment of a right carries with it by implication a transfer of the assignor's right to damages and default interest for future non-performance. This follows from the fact that the assignee is now the holder of the right. Whether the assignment also transfers any rights accrued for past non-performance depends on the terms of the act of assignment.

C. Transfer of accessory rights and supporting security rights

An assignment also operates to transfer all accessory rights (or in the case of a partial assignment a *pro rata* share of those rights) such as contractual rights to interest or rights to call for earlier payment or otherwise modify terms. It transfers accessory rights securing the debtor's performance, for example, dependent personal securities and forms of proprietary security which are considered accessory to the right so as to be discharged when the right is satisfied. In many legal systems the transfer of accessory rights is considered so inherent in an assignment that it cannot be excluded by agreement, for the effect would be to leave the assignor with security for a right no longer vested in the assignor, with the result that neither assignor nor assignee would be able to enforce the security.

However, there are also rights which, though intended to secure performance, are not in terms accessory in character. These supporting security rights are also transferred unless, of course, they are by their nature non-transferable. The policy here is the same as in relation to subrogation in the case of a plurality of debtors or security providers (see III.–4:107 (Recourse between solidary debtors) paragraph (2) and IV.G.–2:113 (Security provider’s rights after performance) paragraph (3). There is no reason why a former creditor (the assignor) should retain a security right the exercise of which would merely constitute an unjustifiable enrichment.

D. Assignment of rights and substitution of assignee as debtor

Where the assignment of rights is associated with an agreement by which the assignee also assumes responsibility, in place of the assignor, for payment of rights incurred by the assignor to the debtor, this Article takes effect subject to III.–5:302 (Transfer of contractual position). That Article is designed to ensure that the assignee cannot obtain the benefit of the rights assigned before effectively assuming the burdens taken over from the assignor, this requiring the assent of the other party to the contract.

NOTES

1. This Article reflects the law in most jurisdictions: *Kötz*, Rights of Third Parties, no. 91. Paragraph (1) produces the effect stated in most of the European codes or doctrines, namely that accessory rights pass without the need for a separate act of transfer. In AUSTRIA it is considered implicit in CC §§ 1393, 1394: see OGH SZ 60/46; ÖRZ 1992/26, OGH 23 February 1993, RdW 1993, 362 (different in the case of pledges, see *Koziol and Welser*, Bürgerliches Recht I[13], 387). In CZECH law the same is stated by CC § 524(1) (see also above). The position is similar in BELGIUM (CC art. 1692; *van Gerven*, Verbintenissenrecht, 574); the NORDIC countries; FRANCE (CC art. 1692 and *Loi Dailly* art. 4(3)); GERMANY (CC §§ 398, 401), GREECE (CC art. 458; see Georgiades and Stathopoulos (-*Kritikos*), art. 458; *Agallopoulou*, 298; Athens Court of Appeals 459/1993, NoB 42 [1994] 206 at 207); ITALY (CC art. 1263(1)), LUXEMBOURG (CC art. 1692), the NETHERLANDS (CC arts. 6:142 and 3:82), ESTONIAN LOA § 167, PORTUGAL (CC art. 482), SLOVENIA (LOA § 421(1)) and SPAIN (CC art. 1528). The rule provided in paragraph (1) is also reflected in POLISH law (CC art. 509 § 2: "together with the claim, all rights connected therewith pass to the assignee, in particular rights to overdue interest"). There does not appear to be a rule to this effect in ENGLISH law. In SCOTTISH law an assignment carries all rights accessory to the assigned right: *Anderson* paras. 2.01-2.21. The SLOVAK CC similarly provides that the assignment of a right transfers also the ancillary rights (e.g. default interest) and all rights connected therewith (CC § 524(2)). The legal doctrine includes in this category also the accessory securities. It is explicitly stated in commercial relations regarding suretyship guarantees (§ 307 cl. 3 OBZ). However, there are exceptions in case law, stating that a separate contract (suretyship guarantee) cannot be transferred without the consent of the party to the contract, as it might alter the content of the obligation significantly (see Judgment of the Supreme Court of SR 2 Obo 155/04 - 156/04).

III.–5:116: Effect on defences and rights of set-off

(1) The debtor may invoke against the assignee all substantive and procedural defences to a claim based on the assigned right which the debtor could have invoked against the assignor.

(2) The debtor may not, however, invoke a defence against the assignee:

(a) if the debtor has caused the assignee to believe that there was no such defence; or
(b) if the defence is based on breach by the assignor of a prohibition or restriction on assignment.

(3) The debtor may invoke against the assignee all rights of set-off which would have been available against the assignor in respect of rights against the assignor:

(a) existing at the time when the debtor could no longer obtain a discharge by performing to the assignor; or
(b) closely connected with the assigned right.

COMMENTS

A. Defences

This Article assumes the existence of a valid assignment. If the purported assignment has not taken place (e.g. because the act of assignment is void or ineffective to effect a transfer) the debtor has no obligation to pay or otherwise perform in favour of the purported assignee.

A widely accepted principle, and that adopted in this Article, is that the assignee cannot stand in any better position than the assignor. Accordingly the assignee acquires the rights subject to all defences which the debtor could have asserted against the assignor, and this is so whether the grounds of defence arose before or after the notice of assignment. For this purpose, "defences" includes procedural defences.

Illustration 1
S sells and delivers goods to B and then assigns the seller’s rights to A. The goods do not conform to the contract of sale. If A claims the price B has the same defences against A as would have been available against S. So B may be able to terminate for fundamental non-performance and refuse to pay the price to A. Alternatively B can retain them and claim a reduction of the price.

Illustration 2
S contracts to sell goods to B, delivery to be made in one month's time. S then assigns the seller’s rights to A but fails to deliver the goods. B can refuse to pay the price to A.

Illustration 3
S agrees to sell goods to B, and then assigns the seller’s rights to A. The contract contains a provision that all disputes are to be referred to arbitration. There is a dispute as to the quality of the goods and B refuses to pay A the price. A sues B to recover the price. B is entitled to ask that the dispute be referred to arbitration in accordance with the contract.

B. Assignee incurs no positive contractual liability

The assignee incurs no positive contractual liability to the debtor for non-performance by the assignor. All the debtor can do is to rely on that non-performance as a defence to the assignee's right and to make a separate claim against the assignor.

C. Restrictions

Paragraph (2) contains two restrictions on the debtor's general right to invoke against the assignee any defence which could have been invoked against the assignor. The first - that the debtor cannot invoke a defence if the debtor has led the assignee to believe that there was no such defence - can be regarded as a special application of the principle of good faith and fair dealing in the exercise of rights, remedies and defences. The second – that the debtor cannot invoke any defence based on breach by the assignor of a no-assignment clause - is designed to prevent the rules on no-assignment clauses from being defeated indirectly. The debtor must be prevented from withholding performance from the assignee, or terminating for fundamental non-performance and pleading the fact of termination against the assignee, if the ground for withholding or termination is simply a breach by the assignor of a no-assignment clause.

D. Right of set-off

General. Somewhat different rules apply to set-off. It is generally accepted that the debtor should be allowed to exercise against the assignee the same right of set-off (if any) as the debtor could have invoked against the assignor in respect of cross-rights which exist at the time of receipt of the notice of assignment. In cases where no notice of assignment is given the relevant cut off time should be the time when the debtor can no longer obtain a discharge by performing to the assignor.

Illustration 4
C, who is owed €100,000 by O for the cost of building works, assigns the rights under the building contract to A, who gives notice of the assignment to O. Subsequently O lends C €40,000 under a loan agreement which is unconnected with the building contract. O cannot set off the right for repayment of the loan against the liability to A.

Illustration 5
S sells machinery to B at a price of €1 million payable by five annual instalments of €200,000. By a separate contract S agrees to service the equipment for a period of five years. S assigns all S's rights under these contracts to A. In a claim by A for non-payment of an instalment B can set off a cross-right for damages for loss suffered as the result of S's breach of the servicing contract.

Unmatured obligations. It is not necessary to the right of set-off that the relevant cross-right should have matured at the time of the debtor's receipt of notice of assignment; it suffices that it is in being as a debitum in praesenti, solvendum in futuro. If the rule were otherwise, a debtor's potential right to set off against the creditor a cross-right due to mature at the same time as the creditor's right would be extinguished by the creditor's assignment of the creditor's right, contrary to the fundamental principle that an assignment should not prejudice the debtor. However, under the rules on set-off it is necessary that the cross-right should have matured by the time the debtor is called upon to give performance of the assigned right, for the debtor is not entitled to use set-off to accelerate the cross-right. Once the debtor has received a notice of assignment or is otherwise precluded from obtaining a discharge by performing to the assignor, it would be unfair to the assignee and contrary to principle to

allow the assignee's interest to be reduced or extinguished as the result of the debtor setting off independent rights arising from new dealings between the debtor and the assignor. Where, however, those new rights are closely connected with the assigned right, it is reasonable that the assignee should take subject to them.

Illustration 6
In June S supplies goods to B at the price of €10,000, payment to be made on or before 31st December. In August B lends S €4,000 under a loan agreement which requires the loan to be repaid by 1st November. In October S assigns to A the debt of €10,000 due from B, and A gives notice of the assignment to B immediately afterwards and requires B to pay the €10,000 on or before 31st December. B can set off the loan of €4,000 which will by then have become repayable, and it is irrelevant that it had not become repayable when B received the notice of assignment from A.

Illustration 7
The facts are as in Illustration 6 except that the loan of €4,000 is not repayable until 1st February in the following year. On 15th January in that year, following B's failure to pay A the €10,000, A makes demand for payment of that sum. B cannot set off the loan of €4,000, since this has not yet become repayable.

NOTES

1. The principle that the assignee acquires rights subject to all defences which the debtor could have asserted against the assignor is common to all European legal systems and reflects the policy that the debtor should not be prejudiced by the assignment (*Kötz*, Rights of Third Parties, no. 97). However, legal systems differ as to whether the grounds of defence must exist, either actually or potentially, at the timeof the assignment coming into effect. This is a requirement in FRANCE (CC art. 1690); LUXEMBOURG (CC art. 1690); GERMANY (CC § 404); GREECE (CC art. 463(1)); BELGIUM (*Cornelis*, Handboek para. 335; *van Gerven*, Verbintenissenrecht, 575 – "existence" is broadly understood: e.g. the right to suspend performance until the other party performs is seen as arising with the obligation itself and thus necessarily existing at the time of notice even if there is not yet any actual non-performance by the assignor, Cass. 13 September 1973, *RCJB* 1974, 352 obs. M.L. STENGERS; Cass. 27 September 1984, *RW* 1984-85, 2699; Cass. 28 January 2005, no. C.04.0035N, VTB-VAB t. ABB, *RW* 2006-2007, 476); SLOVAKIA (CC § 529); and PORTUGAL (CC art. 585). and probably also in DENMARK see on PNA § 27, *Ussing* Alm. Del 219; and SCOTLAND (*McBryde*, Law of Contract in Scotland, no. 12.68). The rule can be construed in CZECH law from the CC §§ 526(1) and 528, see *Švestka/Jehlička/Škárová*, OZ[9], 668 and 670. In ENGLISH law, the debtor may rely on defences connected to the contract but may only set off other claims if they arose before the debtor was notified of the assignment: see *Chitty* on Contracts, no. 19-069. In most other systems, and under art. 20(1) of the UN Convention, it is immaterial whether the ground of defence arises before or after the receipt of notice of assignment. In AUSTRIA CC § 1396 stipulates that the assignment cannot worsen the position of the debtor and that the debtor has against the assignee all defences available against the assignor. Following the principle that a person cannot transfer more rights that that person actually has, defences can be relied on only as far as they exist at the time when the assignment takes place (OGH 4 April 1978, SZ 51/38;

Lukas, Zession, 154; a different opinion that all remedies that exist up to the time of notice are available is supported by Rummel (-*Ertl*), ABGB II(3)[3], § 1396 no. 1).

2. The right of set-off is more complex. In some systems the right of set-off is excluded altogether if the assignment has been perfected by acceptance by the debtor, as opposed to notification, unless the debtor in signifying acceptance reserves the right of set-off. This is the position in FRANCE (CC art. 1295, but abolished in BELGIUM), LUXEMBOURG (CC art. 1295 and the DUTCH CC art. 6:130), ITALY (CC art. 1248(1); Cass. 15 October 1997, no. 4416; Cass. 1980, no. 1484) and SPAIN (CC art. 1198). In most systems the availability of set-off depends on whether the debtor's right against the assignor is closely connected to the assigned right or is an independent right. In the former case set-off is available even in respect of a right arising after receipt of notice of assignment; in the latter case it is restricted to rights that have matured prior to such receipt (though under art. 4(2) of the Loi Dailly in FRENCH law the relevant date is the date of the assignment) and to rights accrued but not matured at the time of receipt provided that these have matured at the time of the assignee's demand for payment (e.g. LUXEMBOURG CC art. 1295 and the DUTCH CC art. 6:130). Thus under BELGIAN law, set-off by the debtor with a right against the assignee is only possible if (a) the requirements for set-off were met before the notification or (b) the rights are closely connected (the latter rule with some exceptions in case of transfer of contract, See Cass. 26 June 2003, *RW* 2003-2004, 1419 critical obs. *M. de Theije* "Compensatie na cessie" = *Rev.not.b.* 2003, 620 =*TBH* 2004, 476 critical obs. *I. Peeters*). See *Kötz*, Rights of Third Parties, no. 98. GERMAN law upholds all set-off situations and even protects the debtor's reliance on future opportunities for set-off, see CC § 406. Under POLISH law, the debtor may set up against the assignee all defences which the debtor had against the assignor at the time of learning of the assignment (CC art. 513). As stated by the case law, the debtor can set up the defences related to the relationship between the assignor and the assignee, and in particular can question the causa of the assignment (see: Supreme Court 19 February 1998, III CKN 387/97, OSNC 1998/10/162). In addition, the debtor may set-off against the assigned claim any claim the debtor has against the assignor, even though that claim has become due after the debtor learned of the assignment; however, this does not apply where the claim against the assignor became due later than the assigned claim (CC art. 513). Pursuant to SLOVAK CC § 529 cl. 1 the debtor's defences that could have been invoked against the claim at the time of assignment, are retained by the debtor. The debtor may invoke against the assignee all rights of set-off the debtor had against the assignor at the time of the notification about the assignment by the assignor, or adequate averment by the assignee, if reported to the assignee without undue delay. This applies to unmatured claims as well (CC § 529(2)).There is no special regulation for rights of set-off closely connected to the claim. Also according to GREEK law (CC art. 463(2) on set-off) a cross-right which the debtor had against the assignor, at the time of the notification, may, even though not due, be asserted in set-off against the assignee, if it became due not later than the right that has been assigned. For AUSTRIA the principles mentioned above also apply in the case of set-off. In SLOVENIAN law the debtor has against the assignee all valid counter-claims available against the assignor, regardless of notification. See LOA § 421(2).

3. The Nordic PNA § 28 provides: "The debtor is entitled to invoke against the assignee a valid counter-claim on the assignor unless the debtor acquired the counter-claim after the time he had obtained knowledge or surmise of the assignment. If the counter-claim was due after that time and later than the debt fell due it cannot be invoked against the assignee." However it is generally held that a connected counter-claim

against the assignor may be set off even if it was acquired after the claim was assigned and the assignment had been notified to the debtor, see *Ussing*. Alm Del 350.

4. Under ESTONIAN law grounds of defence must exist at the time of the assignment (LOA § 171(1), corresponds to GERMAN CC § 404), which is not dependent on receipt of the notice. Defences on the ground of effectiveness of the assignment (e.g. infringement of form requirements) are considered to be defences against the purported assignee (see Supreme Court Civil Chamber's decision from 21 April 2005, civil matter no. 3-2-1-35-05). The debtor may not invoke a defence against the assignee based on a no-assignment clause in their contract (LOA § 171(2)). The debtor has also a right to set off a claim against the assignor against the claim of the assignee unless: 1) the debtor has acquired the claim from a third party and, at the time of acquiring the claim, the debtor knew or should have known of the assignment; or 2) the claim against the assignor falls due later than the assigned claim and after the debtor became or should have become aware of the assignment (LOA § 171(3), closely corresponds to GERMAN CC § 406).

III.–5:117: Effect on place of performance

(1) Where the assigned right relates to an obligation to pay money at a particular place, the assignee may require payment at any place within the same country or, if that country is a Member State of the European Union, at any place within the European Union, but the assignor is liable to the debtor for any increased costs which the debtor incurs by reason of any change in the place of performance.

(2) Where the assigned right relates to a non-monetary obligation to be performed at a particular place, the assignee may not require performance at any other place.

COMMENTS

A. Effect of assignment on place of performance of money obligation

Where the debtor has to pay the creditor at the latter's place of business or by transfer to the creditor's bank account an assignment of the right necessarily involves a change in the place of performance. Within a given country the place of payment is usually of little significance, since most payments of any significance are made by inter-bank transfer, and it is as easy for the debtor to arrange payment to the assignee's account as to the assignor's account. Rather different considerations may apply where the place of payment is changed to one in a different country. Apart from increased costs, which the debtor is entitled to recover from the assignor under paragraph (1) of this Article, the debtor may be affected by currency controls, increased transfer risks and the need to allow greater time for the transfer to be effected. Hence the general rule stated in paragraph (1) that the assignee may not require payment in a country different from that of the place where payment is due. However, this rule is modified where the original place of payment is in a Member State of the European Union, in which case the assignee may require payment to be made either in that State or in any other Member State. In effect, the European Union is treated as a single country for the purpose of paragraph (1) of this Article. This reflects the concept of the European Union as a single market and the advent of the European Monetary Union and the Euro as the obligatory common currency of Member States of the EMU. This rule goes beyond what is found in any of the national laws but is convenient in the context of a single market.

Illustration 1
S in Hamburg sells goods to B in Paris, payment to be made by inter-bank transfer to the credit of S's account with its bank in Hamburg. S assigns the debt to A in Milan. On giving notice of the assignment A can require B to make payment to the credit of A's account in Milan.

Illustration 2
The facts are as in Illustration 1 except that S is in New York and B is required to make payment to S in New York. A, the assignee in Milan, can require B to pay anywhere in the United States but not in any other country.

B. Place of performance of non-monetary obligations cannot be changed

Non-monetary obligations raise quite different considerations, since a change to a new place of performance even within the same country may fundamentally alter the nature of the obligation. For example, where there is a contractual obligation to ship goods f.o.b. Southampton, the place of shipment is an essential term of the contract and the obligation ought not, by reason of an assignment, to be converted into an obligation to ship f.o.b.

Liverpool. Accordingly paragraph (2) provides that the assignee of a right to the performance of a non-monetary obligation cannot change the place of the debtor's performance.

NOTES

1. An assignment of a monetary right almost invariably entails a change in the place of performance of the debtor, namely to the assignee's place of business or into the assignee's bank account instead of the place of business or bank account of the assignor. It is indeed inherent in the assignability of monetary rights that the assignee can require payment to be made to it instead of to the assignor. Accordingly while most legal systems do not appear to have an express rule concerning payment to the assignee it is generally accepted that, at least so long as payment is to be made within the same country, the assignee can require such payment to its location, though the assignor may be liable for any increased costs incurred by the debtor. NORDIC law is one of the few laws to make express provision to this effect in § 3 of the NORDIC PNA. In GREECE doctrinal opinions are divided, some taking the view that the debtor remains entitled to pay at the assignor's domicile (e.g. Georgiades and Stathopoulos (-*Kritikos*), art. 455, no. 60) while others argue for the domicile of the assignee (*Georgiades*, 421, note 57). GERMAN law imposes on the creditor who changes domicile the increased cost or risk of remittance (CC § 270(3)) and this rule is also found in DUTCH law (CC arts. 6:116-117); SLOVAK law regarding commercial legal relations (CC § 337 cl. 2); and ESTONIAN law LOA § 85(3). CZECH Ccom art. 337.2 and in art. 57 of the Convention on Contracts for the International Sale of Goods (CISG) is considered to be applicable by analogy to assignments. Some writers on CISG argue against the analogy, but the better view is that to insist on the debtor's right to pay at the original place of payment is inconsistent with the assignability of the right. In AUSTRIA it should follow from CC § 1396 that the place of performance does not change. It seems that under the SLOVENIAN law the assignee would not have a right to demand from the debtor anything that would put the debtor in a worse position than before the assignment. This is clearly provided in the LOA § 421(1). The rule in para. (2) of the Article would also be the position in SCOTTISH and ENGLISH law in accordance with the general principle that the assignee cannot acquire any right which the assignor did not have. CZECH CC does not have any express provision on the issue and legal writers insist on the strict position that the assignee cannot unilaterally designate another place of performance than originally agreed (*Švestka/Jehlička/Škárová*, OZ[9], 936).
2. POLISH law provides a general statutory rule regarding the place of performance, which can also be applied to assignments. In general, a monetary performance is to be effected at the place of residence or business of the creditor at the time of the performance. If the creditor has changed the place of residence or business after the creation of the obligation, the creditor must bear the additional costs of transfer (CC art. 454). As to the non-monetary performance, if its place has not been indicated and does not follow from the nature of the obligation, the performance is to be effected at the place of the debtor's residence or place of business at the time of the creation of the obligation. In SCOTTISH law the general rule is that payment should be made at the place of business of the creditor, who will be the assignee if there has been an intimated assignation (*McBryde*, Law of Contract in Scotland, no. 24.19).
3. The SPANISH CC does not distinguish between monetary and non-monetary obligations regarding to the place of performance. The CC art. 1171 states that the

place of performance of any obligation is the one indicated in the terms of the contract, or, in its default, the debtor's residence. A change of the place of performance requires an agreement between the parties, explicit or tacit. Furthermore, the debtor's situation must not get worse due to the assignment, therefore the debtor may oppose to the assignee any exceptions which could have been opposed to the assignor (*Navarro Pérez*, 352).

4. In FRANCE and BELGIUM, no similar rule expressly exists, probably because of the rules on place of performance providing that the normal place of performance is the debtor's place for monetary obligations and the place where the goods lie in other obligations to deliver.

III.–5:118: Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation

(1) This Article applies where the assignee's entitlement for the purposes of III.–5:104 (Basic requirements) paragraph (1)(d) arises from a contract or other juridical act (the underlying contract or other juridical act) whether or not it is followed by a separate act of assignment for the purposes of paragraph (1)(e) of that Article.

(2) Where the underlying contract or other juridical act is void from the beginning, no assignment takes place.

(3) Where, after an assignment has taken place, the underlying contract or other juridical act is avoided under Book II, Chapter 7, the right is treated as never having passed to the assignee (retroactive effect on assignment).

(4) Where, after an assignment has taken place, the underlying contract or other juridical act is withdrawn in the sense of Book II, Chapter 5, or the contractual relationship is terminated under any rule of Book III, or a donation is revoked in the sense of Book IV, Chapter 4, there is no retroactive effect on the assignment.

(5) This Article does not affect any right to recover based on other provisions of these model rules.

COMMENTS

A. Introduction

This Article had no equivalent in the Principles of European Contract Law. Those Principles deliberately left open the question here addressed, on the view that it fell to be resolved in the context of the transfer of movables generally. Now the question has been resolved for the purposes of Book VIII on the transfer of corporeal movables. It has been decided that where the underlying contract or other source of entitlement to a transfer is void or avoided then the transfer falls away also. There is no transfer. For the sake of consistency the same approach is adopted here.

The typical case of the application of the Article will be where there is a sale of a right to payment followed by notification to the debtor that the right has been assigned. Notification is not necessary for an effective assignment, but it produces the practical effect that the debtor is likely to pay the assignee. Then it becomes clear that the sale contract was void, or has been avoided. The effect of the present Article is that the assignment is regarded as never having taken place. It will normally be up to the assignor to notify the debtor of this situation, thus ensuring that the debtor would no longer be in good faith in paying the purported assignee and would no longer obtain a good discharge by so doing. See III.–5:119 (Performance to person who is not the creditor).

B. Contract or other juridical act

The Article does not apply where the entitlement derives from a court order or rule of law. In those cases, although it is possible that the order or rule might turn out to be invalid, this is very much less likely than in the case of a private law juridical act and the consequences can be left to the rules governing the source of obligation in question.

C. Invalidity of underlying contract or act

Paragraphs (2) and (3) contain the key rule. If the underlying contract or other juridical act is void or is avoided then there is no assignment in so far as entitlement derives from that contract or other juridical act. However, it is possible that there will be a separate entitlement by virtue of a later contract or other juridical act. Nothing in the Article prevents an assignment from taking place by virtue of such a later entitlement.

Illustration 1

X concludes a contract with Y whereby X will gratuitously assign a right to Y in a year's time. The contract is void because X is under the age of legal capacity for juridical acts. A year later X is no longer under the age of legal capacity. X knows the contract is void and that he is under no obligation to assign the right but decides to assign it anyway. X executes a formal document of assignment in favour of Y and mentions that he is aware of the invalidity of the earlier contract. The assignment is not based on the earlier contract. There is a separate juridical act of assignment which in itself confers entitlement on Y.

D. Termination, withdrawal or revocation

Paragraph (4) deals with the situation where the underlying contract or other juridical act is valid but where the relationship resulting from it is brought to an end, whether by withdrawal under Book II or by termination under Book III or by revocation of a donation under Book IV. In these situations there is no retrospective effect on any assignment which has already taken place. Restitution may sometimes be required but this will depend on the rules affecting the relevant situation and there would have to be a re-assignment of the right. It would not revert automatically.

Illustration 2

A contract between X and Y contains a provision (one among many in a complicated agreement) obliging X in exchange for payment to assign certain rights to Y. Payment is made and X assigns the rights. After some time it becomes clear that there has been a fundamental non-performance by Y of other obligations under the contract. X terminates the contractual relationship. The assignment is not automatically affected. Whether there will have to be a re-assignment of the rights and a repayment of the price paid for them will depend on whether this part of the performances due under the contract is divisible. See III.–3:510 (Restitution of benefits received by performance) and III.–3:511 (When restitution not required).

If restitution is required under other provisions (for example, those just cited) then the present Article does not affect the right to it. This is made clear by paragraph (4).

E. No need to regulate assignment subject to condition or time limit

It is not necessary to regulate specifically the situation where an assignment is made subject to a condition or time limit. If the condition or time limit is suspensive the situation is clearly covered by III.–5:114 (When assignment takes place) paragraph (1) which specifies that the assignment takes place when the requirements for an assignment are satisfied "or at such later time as the act of assignment may provide". If all the other requirements for an assignment are met then the assignment will simply take effect when the condition is fulfilled or the specified time arrives.

If the condition is resolutive (or if the assignment is subject to a resolutive time limit) then the transaction can be analysed simply as two assignments. The existing creditor assigns now and the assignee agrees to re-assign when the time arrives or the condition is fulfilled. It would be a question of interpretation whether the agreement to re-assign operated as an act of assignment itself or required a separate later act of assignment. If it fell to be interpreted as operating as an act of assignment, with delayed effect, there would be no need for a separate act of assignment when the time arrives or the condition is fulfilled. See III.–5: 104 (Basic requirements) paragraph (3).

NOTES

1. The question of the effect of some defect of, or some event affecting, an underlying obligation on a transfer of property made on the basis of that obligation is one which has divided legal systems. Reference should be made to the Notes on III-5:102 (in particular, note 1) and III-5:104 and to the Notes on the equivalent Article in Book VIII (VIII.–2:202) where the matter is fully discussed.

Sub-section 5: Protection of debtor

III.–5:119: Performance to person who is not the creditor

(1) The debtor is discharged by performing to the assignor so long as the debtor has not received a notice of assignment from either the assignor or the assignee and does not know that the assignor is no longer entitled to receive performance.

(2) Notwithstanding that the person identified as the assignee in a notice of assignment received from the assignor is not the creditor, the debtor is discharged by performing in good faith to that person.

(3) Notwithstanding that the person identified as the assignee in a notice of assignment received from a person claiming to be the assignee is not the creditor, the debtor is discharged by performing to that person if the creditor has caused the debtor reasonably and in good faith to believe that the right has been assigned to that person.

COMMENTS

A. General

This Article sets out the ways in which the debtor can obtain a discharge when the right has been assigned. It is in addition to the special rules in III.–5:108 (Assignability: effect of contractual prohibition) allowing the debtor, subject to certain exceptions, to obtain a good discharge by paying the assignor where the assignment has taken place in breach of a contractual prohibition or restriction. It is clearly necessary to have provisions for the protection of the debtor if notice to the debtor is not a requirement for an effective assignment. The debtor must be given the means of knowing to whom performance is to be made (a matter developed further in the next Article) and must be protected if performance has been made in good faith to the wrong person.

B. Performance to creditor

It goes without saying that the debtor will always be discharged by performing to the person who is for the time being the creditor. Performance to the creditor extinguishes the obligation.

C. Performance to assignor before receipt of notice of assignment

Paragraph (1) provides that the debtor is discharged by performing to the assignor so long as the debtor has not received a notice of assignment from either the assignor or the assignee and does not know that the assignor is no longer entitled to receive payment. The debtor would not necessarily lose this protection merely because the debtor knew from some other source that the right had been assigned. It is not uncommon for a right to be assigned but for the understanding between assignor and assignee to be that the assignment will not be notified and that the assignee will continue to receive payments.

There is no requirement that the notice of assignment must be in any particular form. However, the next Article enables the debtor to request adequate proof of the assignment in any case of doubt and to withhold performance until it is provided. The notice may be given either by the assignor or by the assignee, but in the latter case the next Article enables the debtor to request the assignee to provide reliable evidence of the making of the assignment.

The law on unjustified enrichment protects the assignee in any case where the debtor obtains a discharge under this provision by performing to the assignor. The debtor will have paid to a person who is no longer the creditor. The assignor is enriched without legal justification. The assignee suffers a corresponding disadvantage because the assignee can no longer recover from the debtor. So the assignee can recover from the assignor whatever has been paid or transferred by the debtor in performance of the obligation. This right is supplemented by the limited provision in III.–5:122 (Competition between assignee and assignor receiving proceeds) giving the assignee priority over the proceeds so long as they remain separately identifiable in the assets of the assignor.

D. Performance to person identified as assignee in notice of assignment

Where the debtor receives a notice of the assignment from the assignor the debtor should be entitled to rely on it and to obtain a discharge by performing in good faith to the person named as assignee in it. This is provided for by paragraph (2). The debtor would not be in good faith if there was reason to suppose that the notice of assignment was sent by a fraudster. The debtor would also not be in good faith if the debtor knew that the assignment was ineffective because the right was non-assignable by law. In cases of genuine doubt the debtor could request further particulars or evidence under the following Article and in the meantime withhold performance.

Paragraph (3) deals with the situation where a notice of assignment is received from a person claiming to be the assignee. Here there is an obvious risk of fraud. Anybody could send such a notice. Accordingly the requirements for the debtor to obtain a discharge by paying the person identified in the notice as the assignee are more strict. The debtor must have been given cause *by the creditor* to believe reasonably and in good faith that the person claiming to be the assignee is in fact the new creditor. To obtain protection the debtor should request reliable evidence of the assignment to the purported assignee under paragraph (3) of the following Article and in the meantime can withhold performance.

If the debtor does obtain a good discharge by virtue of the provisions of this Article the law on unjustified enrichment again comes into play. The debtor has obtained a discharge by performing to the wrong person. The person wrongly identified as the assignee has been enriched without legal justification. The assignor has suffered a corresponding disadvantage because no longer able to recover from the debtor. So the assignor can recover from the supposed assignee under the law on unjustified enrichment.

NOTES

I. General

1. All systems agree that a debtor who has no knowledge of the assignment obtains a good discharge by giving performance to the assignor, whilst a debtor who has been notified in accordance with the requisite formalities or (in most jurisdictions) has accepted the assignment must perform in favour of the assignee. In most legal systems all that the notice need state is that an identified right has been assigned.

2. Difficulties arise where notice is given to the debtor but is defective or where no notice is given but the debtor acquires knowledge of the assignment from other sources and in either case has not accepted the assignment.

II. Debtor's knowledge of assignment

3. In most systems the debtor's knowledge of the assignment, even without notification, precludes the debtor from performing in favour of the assignor, for this is seen as contrary to good faith. However, in SCOTTISH law mere knowledge does not preclude the debtor from performing in favour of the assignor (*McBryde*, Law of Contract in Scotland, no. 12.93; discussion in *Anderson*, paras. 6.21 et seq.), so that in effect until intimation is received the debtor has the choice whether to give performance to the assignor or the assignee. This is true also in NORDIC law (PNA § 29) and in the NETHERLANDS (CC art. 6:37). The position in BELGIAN law is controversial, some authors taking the position that mere knowledge of the assignment does not preclude the debtor from performing in favour of the assignor (*Dirix*, nos. 15–11; *Cornelis*, Handboek, no. 335), while others (e.g. *Herbots*, no. 309) consider that a debtor who performs in favour of the assignor after knowledge of the assignment is necessarily acting in bad faith. The text of CC art. 1690 provides that the debtor who is notified is only bound by the assignment when the debtor recognises it, which means that the debtor is not bound to perform to the assignee; the reason is that an assignee who has not notified leaves an auhority to collect with the assignor. In GREEK law before notification occurs, the debtor may and is obliged to make payment to the assignor and such payment releases the debtor (see CC art. 461); after notification the debtor is relieved only if payment is made to the assignee (see *Stathopoulos*, no. 205). The notification is not subject to a certain form but can be made by the assignor or the assignee to the debtor orally, in writing, judicially or extrajudicially, expressly or indirectly (see Georgiades and Stathopoulos (-*Kritikos*), art. 460, no. 15; *Stathopoulos*, Law of Obligations, § 27. no. 28). Also in GREECE it is debatable whether mere knowledge of the assignment precludes the debtor from performing in favour of the assignor. According to the prevailing view, however, a debtor who is aware of the assignment though there was no notification, and who is asked by the assignor to pay the debt, has the right to refuse payment, if the invocation of the right deriving from CC art. 461 would have the character of an obvious abuse of right (CC art. 281; see Georgiades and Stathopoulos (-*Kritikos*), art. 461, no. 6). It has even been proposed (*Stathopoulos*, Law of Obligations, § 27, no. 28) that the knowledge of the debtor about the assignment of the claim through another source should equal notification. In SLOVAKIA, the good faith principle does not come into play in this regard. Without notification by the assignor or averment by the assignee, the debtor is discharged by performing in favour of the assignor (CC § 526(1)). In CZECH law also (CC § 526.2) and POLISH law (CC art. 512) the rule is that until the assignor notifies the debtor, or until the assignee proves the fact of the assignment to the debtor, the debtor may still perform in favour of the assignor (see *Švestka/Jehlička/Škárová*, OZ[9], 668 and *Mojak*, p. 1062)

4. The majority of European Union legal systems favour the rule by which the debtor is entitled to act on mere knowledge of the assignment to perform in favour of the assignee but cannot any longer give performance to the assignor. This is the position in ITALY (CC art. 1264(2)); AUSTRIA (CC § 1365); GERMANY (CC § 407(1)); NETHERLANDS (CC art. 6:37); the NORDIC countries (PNA § 29); SLOVENIA (LOA § 419); ENGLAND (*Tolhurst* v. *Associated Portland Cement Manufacturers (1900) Ltd*. [1902] 2 KB 660, 668); ESTONIAN LOA § 169(1); PORTUGAL (CC art. 583(1)) and, according to one theory, BELGIUM (see note 3 above) and

LUXEMBOURG (CC art. 1691). In several countries this result is reached by the application of the principle that a debtor acting in good faith is to be protected: this is, for example, the case in SPANISH law, CC art. 1164.

5. In FRANCE, as long as the assignor has not notified the debtor of the assignment, performance in favour of the former creditor is effective as against the assignee, unless the debtor knew of the assignment at the time of the performance (see Bénabent, *Les obligations*, 11è éd., p. 521, no. 728). Until notification the assignment of a right is not effective against the debtor and the debtor cannot invoke it. Moreover, the assignee may not normally request performance from the debtor. However, it has been recently held that the assignee may request payment by the debtor provided that such payment does not affect third parties' rights (Com., 28 September 2004, *Bull. Civ*., IV, no. 173). On the other hand, once the debtor is notified, the debtor is bound to perform in favour of the assignee and may invoke the defences and rights of set-off that the debtor had against the assignor, in accordance with the principle that assignment of right must not alter the debtor's situation.

III. Competing demands

6. All the systems surveyed possess a rule of some kind for the protection of the debtor faced with competing demands. See the Notes to III.–5:121.

III.–5:120: Adequate proof of assignment

(1) A debtor who believes on reasonable grounds that the right has been assigned but who has not received a notice of assignment, may request the person who is believed to have assigned the right to provide a notice of assignment or a confirmation that the right has not been assigned or that the assignor is still entitled to receive payment.

(2) A debtor who has received a notice of assignment which is not in textual form on a durable medium or which does not give adequate information about the assigned right or the name and address of the assignee may request the person giving the notice to provide a new notice which satisfies these requirements.

(3) A debtor who has received a notice of assignment from the assignee but not from the assignor may request the assignee to provide reliable evidence of the assignment. Reliable evidence includes, but is not limited to, any statement in textual form on a durable medium emanating from the assignor indicating that the right has been assigned.

(4) A debtor who has made a request under this Article may withhold performance until the request is met.

COMMENTS

A. General

This Article is designed to protect a debtor in various situations of uncertainty.

B. Assignment but no notice

The first situation in which the debtor needs protection is where the debtor has reason to believe that there has been an assignment but has not received any notice of assignment. In such a case the debtor cannot safely perform to the assignee and indeed may not even know who the assignee is. However, the debtor may fear that performance to the assignor might also be unsafe. Paragraph (1) enables the debtor to ask the assignor to clarify the situation by providing a notice of assignment or a confirmation that the right has not been assigned or that the assignor is still entitled to receive payment. Until the position is clarified the debtor can withhold performance. The debtor would, however, not be able to rely on this right if acting contrary to the requirements of good faith and fair dealing – for example, if the debtor did not believe that the right had been assigned and was just adopting a delaying tactic.

Illustration 1
C assigns to A a right to payment by D. Neither C nor A gives notice of the assignment but D learns of it from another source. If D is confident that the right has been assigned to A then D may pay A and will be discharged. If D is not confident then D can ask C to clarify the position and in the meantime may withhold payment.

C. Inadequate or unclear notice

The next situation where the debtor needs protection is where a notice of assignment has been received but it is not in textual form or does not give enough information to enable the debtor to be able to perform to the assignee. In such a case the debtor may, under paragraph (2), ask the person who gave the notice to provide a new notice in textual form which contains adequate information. Again the debtor may withhold performance until the request is met. Again the debtor would not be able to rely on this right if acting contrary to the requirements of good faith and fair dealing.

D. Notice received from assignee

The notice may be in textual form and adequate on its face. However, if it is given by the assignee the debtor may have reason to doubt whether it is genuine. Paragraph (3) enables the debtor to ask the assignee to provide reliable evidence of the making of the assignment. This would include any document emanating from the assignor and indicating that the assignment has taken place. The debtor is entitled to withhold performance until the evidence is furnished.

Illustration 2
C orally assigns to A a debt due from D. A gives notice of the assignment to D but fails to respond when D requests evidence of the assignment. D may either pay A, in which case D obtains a discharge from liability, or withhold performance until A has provided reliable evidence of the making of the assignment.

NOTES

When debtor bound to perform in favour of assignee

1. Most systems seek to protect the debtor by a rule to the effect that a debtor cannot be compelled to give performance to the assignee unless the debtor has received notice in writing (sometimes reinforced by further formalities for the notice) or has accepted the assignment. So while the debtor may be able to obtain a good discharge by performing in favour of the assignee after receiving a defective notice or merely in reliance on knowledge of the assignment acquired from other sources, the debtor cannot be compelled to give such performance, see for GERMAN law CC §§ 410, 409. Exceptions, in which the debtor's knowledge is equated with notice for all purposes, are PORTUGUESE law (*Lima & Varela* 602 ff, *Cristas*, Transmissão Contratual do Direito de Crédito, 190 ff) and SPAIN (*Díez-Picazo* II, 815-816), under which a debtor acquiring knowledge of the assignment must give performance to the assignee even in the absence of notification. For GREECE see the note under the previous article. It is generally assumed that under ENGLISH law s. 136 of the Law of Property Act 1925 has the effect that an assignee cannot sue in its own name alone, but as a mere equitable assignee must join the assignor as claimant, unless the assignment was in writing signed by or on behalf of the assignor and written notice of assignment has been given to the debtor. Nevertheless a debtor who has acquired knowledge of the assignment cannot safely pay the assignor; and the question whether an equitable assignee is precluded from suing in its own name alone remains unsettled and may depend on whether the requirement to join the assignor is considered a rule of substantive law or merely a rule of practice: *Furmston* para. 6.273. According to POLISH law, as long as the assignor has not notified the debtor of the assignment, performance in favour of the former creditor is effective as against the assignee, unless the debtor knew of the assignment at the time of the performance (CC art. 512). The provisions of this Article generally correspond to the rule under the ESTONIAN LOA § 172. The AUSTRIAN CC § 1395 stipulates that notwithstanding an assignment the debtor can perform in favour of the old creditor if not given notice of the assignment. Notice can be given by both the assignor and the assignee, although this view was lately subject to criticism arguing that notice should only come from the former. Although not mentioned in the wording of the provision the debtor is under a "duty"

(not an obligation) to enquire about the lawfulness of the assignment if the debtor has reason to doubt this - e.g. if given notice twice and the notices are contradictory (see Schwimann (-*Heidinger*), ABGB VI[3], § 1395 no. 5). In BELGIUM, it is disputed whether notice of assignment can be given by the assignee without proof of consent of the assignor; however, the debtor who has reasonable doubts about the owner of the right can invoke the exceptio dubii to refuse payment to either party. In order not to have to pay interest, payment will have to be deposited (Comp. CA Antwerp 13 December 2001, TBH 2002, 466; CA Antwerp 13 December 2001, TBH 2002, 470).

2. The NORDIC PNA § 31(1) provides that the assignment is not valid against the creditors of the assignor unless the debtor has been notified of the assignment by the assignor or the assignee. DUTCH law not only provides as the main rule for assignment that it is not valid unless the debtor has been notified but also that the debtor may require a certified summary of the act of assignment (CC art. 3:94). DANISH law requires the assignment to be clear and visible but provides no form, see *Gomard*, Obligationsret III, 85 ff. In SCOTTISH law (for which see *McBryde*, Law of Contract in Scotland, nos. 12.83-12.100) intimation of an assignment must be made to the debtor by either the assignee or the assignor to perfect the assignee's rights; intimation regulates preference amongst assignments, with an unintimated assignment being effective only between the parties to it. Intimation may take various forms but the debtor's knowledge of the assignment is generally not enough unless the debtor was a party to the assignment itself.

3. In SLOVAKIA, notification by the assignor need not be in writing. In such case the debtor is not entitled to demand proof of the assignment (CC § 526(2)). The assignee has to sufficiently aver the assignment to the debtor. The rule is the same in CZECH law (CC § 526(2)) which also provides that until the debtor is notified of the assignment, or until the assignee proves the assignment to the debtor, the debtor is discharged by rendering performance to the assignor (CC § 526.1).

4. In FRANCE, no similar rule expressly exists.

Sub-section 6: Priority rules

III.–5:121: Competition between successive assignees

(1) Where there are successive purported assignments by the same person of the same right to performance the purported assignee whose assignment is first notified to the debtor has priority over any earlier assignee if at the time of the later assignment the assignee under that assignment neither knew nor could reasonably be expected to have known of the earlier assignment.

(2) The debtor is discharged by paying the first to notify even if aware of competing demands.

COMMENTS

A. General effects

The assignor may have purported to assign the same right to two or more assignees, whether dishonestly or inadvertently. There may also be honest and open successive assignments in security where the first assignment is for a debt substantially below the value of the assigned rights, so that there is scope for one or more further assignments. Assignments by way of security are governed by the Book on Proprietary Securities.

The first general effect of this Article is to displace *as between the successive purported assignees* the normal rule, which would apply by virtue of the preceding Articles, that the first assignment to take effect would result in the right being transferred to the assignee under that assignment. The assignor would then have no right to assign so that subsequent purported assignees would take nothing. The effect of this Article is that in this special situation the normal rule is replaced by a rule giving priority according to the time of notification to the debtor. The effect of giving priority to a particular assignment (if it is an absolute assignment and not one in security) is that the competing interest is extinguished.

This rule applies only as between the successive purported assignees. In a question between an assignee and creditors of the assignor, the assignee takes the assigned right as soon as the assignment is effective: notification is irrelevant. It might be thought that this combination of rules could lead to an inescapable circle of priorities.

> *Illustration 1*
> C assigns a right to A1 who does not notify the debtor. C's creditor, X, then attaches the right in C's hands. C then assigns the right to A2 who immediately notifies the debtor. It looks as if A1 has priority over X, who has priority over A2, who has priority over A1 and so on in a circle.

However, the answer is that X gets nothing. X merely attempts to attach something which is not there. The attachment is completely ineffectual. X has no priority over anyone. X was too late. A2 takes the right and becomes the new creditor. A1 has a claim against C for breach of the undertaking not to grant a subsequent act of assignment which could lead to another person obtaining priority (III.–5:112 (Undertakings by assignor).

There could also be a competition between the second purported assignee who has notified the debtor and a person, such as an attaching creditor or an assignee, deriving right from the first assignee who has not notified the debtor. However, any such person deriving right from the first assignee would take the right as it is – in essence as a right inherently liable to be defeated until the assignment is notified. For this reason the Compilation and Redaction Team considered it unnecessary to add some such words as "and any person deriving right from such an earlier assignee" immediately after "earlier assignee" in paragraph (1).

The second general effect is that the debtor will be discharged by paying the first purported assignee to notify even if the debtor is aware of the competing demands and even if the first to notify was aware, or could reasonably be expected to have been aware, of the earlier assignment. The debtor cannot be expected to investigate questions of good faith on the part of successive purported assignees. The earlier purported assignee will not have a right to recover from the one who is the first to notify (assuming that the notification is made in good faith and in ignorance of the prior assignment) because, by virtue of this Article, the one who is the first to notify is in this situation regarded as the assignee. The debtor will have paid to the true creditor. The earlier purported assignee will have a remedy against the assignor for breach of the implied undertaking not to conclude or grant a subsequent act of assignment which could lead to another person obtaining priority. If, however, the first notifier knew or ought to have known of the earlier assignment then the earlier assignee will be able to recover from the first notifier on principles of unjustified enrichment. In that situation the debtor will have obtained a discharge by paying a person who was not the creditor.

B. The first-to-notify rule

Legal systems differ in their approach to competing assignments. In some systems the principle *nemo dat quod non habet* is applied. Having made the first assignment, the creditor has nothing left to assign. Accordingly the second assignment is ineffective, and while the debtor obtains a good discharge by giving performance to the second assignee without knowledge of the first assignment, the second assignee is required to account to the first assignee for any performance received. Other legal systems give priority to the second assignee who neither knew nor ought to have known of the prior assignment if the second assignee's assignment is the first to be notified to the debtor (whether by that assignee or by the assignor). This latter approach is that adopted here. It reflects two distinct ideas. The first is that giving notice of assignment in good faith is the closest equivalent to the acquiring of possession in good faith, which is a recognised method of obtaining priority in the case of corporeal movables. The second is that an intending assignee, before giving value, can ask the debtor whether the debtor has received any prior notice of assignment. If the first assignee has failed to give such a notice the second assignee should be entitled to assume that there is no earlier assignment, unless the second assignee has acquired knowledge of the earlier assignment in some other way or ought to have known of the earlier assignment, e.g. because it had been registered in a public register.

Illustration 2
S assigns to A1 a right to payment from D and then purports to assign the same right to A2, who is the first to give notice of assignment to D. If A2 neither knew nor ought to have known of the prior assignment at the time of taking A2's own assignment, A2 has priority. This is the case whether the assignments or either of them were outright transfers or were transfers by way of security only. However, if the assignment to A2 is outright, A1's rights are not merely subordinated but extinguished.

C. Neither party notifies

Where neither party has given notice of assignment, the ordinary rule *qui prior est tempore potior est jure* applies. However, the priority of the first assignee is provisional only, being liable to be displaced if the second assignee, being unaware of the earlier assignment, gives notice of assignment before such a notice has been given by the first assignee.

D. Assignments in security

This Article does not apply to assignments in security of rights to the payment of money. See IX.–2:301 (Encumbrances of right to payment of money). It is inconsistent with the registration system for such security.

NOTES

1. Paragraph (1) of this Article represents the majority rule in European legal systems, albeit with certain variations in detail. It is the rule found in ENGLAND *(Dearle* v. *Hall* (1828) 3 Russ. 1), BELGIUM (CC art. 1690 III), FRANCE (*Terré/Simler/Lequette*, Les obligations, no. 1189), NORDIC countries (under the PNA § 31(2)), GREECE (*Stathopoulos*, Law of Obligations, § 27, no. 131, ITALY (CC art. 1265(1)), PORTUGAL (CC art. 584), SLOVENIA (LOA § 420). In FRANCE, once the debtor is notified, the assignor's creditors may still request an order of attachment on the assigned right. If a right has been successively assigned by an unscrupulous assignor, the successive assignee, if it first gives notice to the debtor, takes priority over the earlier assignee, unless a fraudulent collusion is established (Cass.com., 19 march 1980, *Bull. Civ*., IV, n°137: held that the mere knowledge of the earlier assignment by the successive assignee does not amount to fraudulent collusion ; see Bénabent, *Les obligations*, 11è éd., p. 522, n°729). The debtor is discharged by paying the first assignee to notify even if aware of the competing demands. By contrast AUSTRIAN law (OGH 13 July 1981, SZ 54/104; OGH 11 July 1985, JBl 1986, 235; OGH 27 April 1995, JBl 1996, 251); ESTONIAN law (LOA § 164(3)); POLISH and GERMAN law give priority to the first assignee, this being a corollary of the principle in those jurisdictions that a second assignment is devoid of legal effect (Staudinger (-*Busche*), BGB [2005], § 408 no. 2); but the debtor's reliance is protected under CC § 408, which may include the case of a first notice in favour of the second assignee unless the debtor knows of the first assignment. In the NETHERLANDS an assignment is ineffective without notification. It follows that the priority question arises only if both or all the competing assignees have given notice. In that event priority goes to the first assignee in accordance with the principle *nemo dat quod non habet*. The position is the same in SCOTLAND (*McBryde*, Law of Contract in Scotland, nos. 12.83(2), 12.87-12.90; *Wilson*, Scottish Law of Debt[2], no. 27.5(a)). In SPANISH law there is no rule on this matter; scholars propose the application of the first in time rule, but granting the debtor the privilege of discharging by paying in good faith to the assignee in respect of whom the notification was made (*Pantaleón*, Comentarios, 1021-1022). In CZECH law the first notification seems easily to prevail by application of prior tempore potior jure and having regard to the above mentioned provision of the CC art. 526(1). This principle applies in SLOVAKIA, as well, although notification is not needed. Only the first assignment is valid, but according to the general provisions on fulfilment of obligations (CC § 562), the debtor in good faith would obtain discharge by paying to the first to submit the creditor's warrant of entitlement (e.g. the contract itself). Subsequent relations would be governed by the law of unjustified enrichment.

III.–5:122: Competition between assignee and assignor receiving proceeds

Where the debtor is discharged under III.–5:108 (Assignability: effect of contractual prohibition) paragraph (2)(a) or III.–5:119 (Performance to person who is not the creditor) paragraph (1), the assignee's right against the assignor to the proceeds has priority over the right of a competing claimant so long as the proceeds are held by the assignor and are reasonably identifiable from the other assets of the assignor.

COMMENTS

In the two situations mentioned in the Article the assignor receives proceeds which are rightfully due to the assignee but the debtor obtains a good discharge. The assignee has a right against the assignor to the proceeds based on unjustified enrichment but that is merely a right to performance of an obligation and would confer no priority over other creditors of the assignor. The present Article confers a very limited, and generally rather temporary, priority over the other creditors. It applies only so long as the proceeds paid to the assignor are held by the assignor and can be identified as separate from the assignor's other assets.

NOTES

1. The solution adopted here is similar to that employed in article 24 of the United Nations Convention on the Assignment of Receivables in International Trade. The assignee's claim to the proceeds has priority over competing claims, such as the claims of the assignor's creditors, so long as the proceeds are separately identifiable in the assignee's funds. Under BELGIAN law, in the case of payment of money, the assignee is an unsecured creditor of the assignor and has no priority, unless the payment was made on a separate account.
2. GERMAN law, in contrast, only provides for an obligatory remedy under the rules of unjustified enrichment, see CC § 816(2).

Section 2: Substitution and addition of debtors

III.–5:201: Scope

This Section applies only to the substitution or addition of a new debtor by agreement.

COMMENTS

The rules in this Section are not intended to apply to transfers of obligations by operation of law – for example, under special laws providing for rights and obligations to be transferred automatically when businesses are transferred or when one public body is succeeded by another.

The rules in this Section apply to obligations generally and not only to monetary obligations or contractual obligations.

The question of which parties must agree is regulated by the later articles in the Section.

III.–5:202: Types of substitution or addition

(1) A new debtor may be substituted or added:

(a) in such a way that the original debtor is discharged (complete substitution of new debtor);

(b) in such a way that the original debtor is retained as a debtor in case the new debtor does not perform properly (incomplete substitution of new debtor); or

(c) in such a way that the original debtor and the new debtor have solidary liability (addition of new debtor).

(2) If it is clear that there is a new debtor but not clear what type of substitution or addition was intended, the original debtor and the new debtor have solidary liability.

COMMENTS

A. Introduction

The rules on the substitution or addition of debtors in this Section are designed to enable parties to achieve results, *while maintaining a legal relationship in existence*, which they could also achieve by bringing it to an end and starting afresh. This will often save time and energy and avoid the risks of opening up for renegotiation issues already satisfactorily settled. Although the rules in this Section are not confined to contractual relationships, it is in relation to such relationships that they will find their main application: they reflect the policy of favouring contractual security and stability which underlies many of these model rules.

There will often be situations where it is necessary or desirable to change the debtor in a contractual relationship. In many such cases the reason will be a change of legal personality without any change of economic functioning. An individual trader, or a partnership, becomes a company. A company is restructured and parts of its business hived off to a subsidiary. A public body is replaced by another public body. An office-holder without a separate legal personality is succeeded by a new holder of the office. Some such situations will be regulated by special laws providing for the automatic transfer of the ownership of assets and of rights and obligations. Such special laws are not affected by this Section. In many situations involving a change in legal personality without a change in economic functioning what is required is not just the transfer of obligations but the transfer of an entire contractual position – rights and obligations. This is regulated by the following Section but the rules on substitution of debtors are there incorporated by reference. There may also, however, be cases where no transfer of rights is required but just the taking over of an obligation or the addition of a new debtor. The debtor may have already received everything due under a contract and may be left only with an obligation to perform. In simple cases, such as for example the delivery of an item which has already been paid for, all that may be required if the debtor cannot easily perform personally will be for the debtor to delegate performance to a third party. This can be done under III.–2:106 (Performance entrusted to another). The debtor will remain liable under the contract. There is no change of parties. The creditor will not usually be entitled to refuse performance by the delegated person (III.–2:107 (Performance by a third person)). However, there may be cases where, for all sorts of possible reasons, the debtor or the creditor or the third party wishes the obligation to be taken over by the third party with the effect of discharging the debtor, wholly or partly, or at least with the effect of making the third party an additional debtor under the contract. This could be done by a termination of the original contractual relationship by agreement between the debtor and creditor followed by the conclusion of a new contract between the creditor and the new debtor, or with both the

original debtor and the new debtor. The rules in this Section enable it to be done more directly by keeping the existing relationship and simply replacing or adding a debtor.

B. The three techniques

Paragraph (1) of the present Article sets out three ways in which there can be a new debtor in a legal relationship, the relationship remaining otherwise unchanged. The first technique is complete substitution. The new debtor completely replaces the old, who is discharged. This is the converse of assignment. The second technique is incomplete substitution. The new debtor replaces the old, but the substitution is not complete so long as the new debtor has not performed the obligation. Until then the original debtor is retained as a subsidiary debtor in case the new debtor does not perform. The third technique is the addition of a new debtor. The original debtor is not discharged at all but the creditor gains another debtor, both debtors having solidary liability.

The key feature of the legal techniques regulated in this Section is that the legal relationship is preserved – with a change in parties on the debtor's side – rather than destroyed. Of course, if the parties to a contract prefer to tear up the contract and start again with a new one, they are free to do so.

In regulating these three types of situation the model rules go beyond the Principles of European Contract Law, which regulated only what is here called complete substitution. The extension was agreed in principle at the last meeting of the Study Group in Athens in June 2008. The decision reflected a view long held by some members of the Study Group that the PECL rules were incomplete. It also reflected the fact that many national systems regulate different types of substitution or addition of a new debtor and that the Unidroit Principles of International Commercial Contacts of 2004 do the same (see arts. 9.2.1 to 9.2.8). The Study Group gave the Compilation and Redaction Team authority to expand the PECL rules broadly on the policy lines of the Unidroit Principles. In carrying out this remit the Compilation and Redaction Team has had regard to the need to use DCFR concepts and terminology and to try to ensure coherence with the rest of the model rules.

C. Terminology

The terminology used – complete substitution of new debtor, incomplete substitution of new debtor, addition of a new debtor – is new. Traditional terms such as delegation or expromission or assumption of debt, or variants of them, have been deliberately avoided because of the danger that they might carry unwanted conceptual baggage with them and in accordance with the general policy of using neutral descriptive language whenever possible.

D. No formal requirements

In accordance with the general approach of these model rules no formal requirements are laid down for the substitution or addition of a new debtor.

E. Negotiating history irrelevant

Under this Article it does not matter how the change of parties was negotiated. Any one of the three parties – creditor, original debtor or new debtor – may take the initiative and may carry things forward by contacting either or both of the other two. Often it will be the original debtor who takes the initiative and negotiates with the new debtor with the objective of being

relieved of the obligation. Sometimes the new debtor will make an offer to the creditor to take over the obligation, perhaps as a bargaining counter to obtain some benefit from the creditor in return. Or the creditor may initiate the process, perhaps because of worries about the debtor's ability to perform. The process does not matter. What matters is the outcome – what the parties decide to do. As the creditor's consent is always required before a new debtor can be substituted the creditor will always be able to veto complete or incomplete substitution.

F. Default rule

It may happen that the creditor simply accepts a new debtor but does not make it clear which technique is being employed. For this situation, paragraph (2) provides that the addition of a new debtor, with both debtors having solidary liability, is the default rule. The reason for this is that the technique least damaging to the creditor ought to be preferred in case of doubt. The discharge of a debtor ought not to be readily presumed.

NOTES

I. "Cumulative" and "discharging" assumption of debt

1. Many European civil codes deal expressly with two types of assumption of debt. In the first type the debtor continues to be bound, with the third person collaterally stepping in as an additional debtor (cumulative assumption of debt). In the second type the original debtor is released from the debt and fully replaced by the new debtor (discharging or privative assumption of debt). See e.g. the AUSTRIAN CC §§ 1405, 1406; the GERMAN CC §§ 414-418 and Staudinger (-*Rieble*), BGB [2005], § 414 nos. 22 et seq.; the GREEK CC arts. 471, 477; the ITALIAN CC arts. 1268-1273; the SLOVAK CC § 531 cl. 1 and 2; and the PORTUGUESE CC art. 595(2). The FRENCH CC clearly recognises the possibility of a cumulative assumption of debt in CC art. 1275. On cumulative assumption of debt in SPANISH law, see *Díez-Picazo* II 4th edn 852. In POLISH law, see: *Czachórski, Zobowiązania*, 8th ed., 370-371. Under the ESTONIAN LOA § 178, a cumulative assumption of debt (or "joining in obligation") creates a solidary obligation; if the purpose of the joining in obligation is to provide additional security for the debt (no personal economic interest in debt); generally the provisions of personal security (LOA §§ 142 ff) apply *mutatis mutandis*. For a general historical and comparative survey, see *Adame Martínez,* Asunción de Deuda en Derecho Civil (*Comares*, Granada, 1996).

2. In the NETHERLANDS, the CC art. 6:155 deals only with a "transfer of a debt from the debtor to a third person" with the effect, if the creditor declares approval, of substituting the new debtor for the original debtor. BELGIAN law like the proposed article distinguishes basically three types of situations, each with at least two variations:

   a) cases where the old debtor is fully discharged, the new debtor either taking up an independent debt (novation) or substituted for the old debtor in the same debt (liberating assumption of debt) (see CC arts. 1271 and 1276)

   b) delegatio solvendi (CC art. 1275), where the new debtor becomes the primary debtor and the old debtor remains bound as a subsidiary debtor; the delegation can be either dependent delegation, in which case the new debtor takes up the same debt, or independent delegation, in which case the new debtor takes up an independent debt (compare the latter case with the independent guarantees in Book IV G Chapter 3,

differing however form the delegatio solvendi as the guarantor is normally the subsidiary debtor and not the primary debtor)

c) cases where an additional debtor takes up either exactly the same debt (solidary liability) or a concurrent debt.

3. The distinction between cumulative and discharging assumption of a debt is also recognised in non-codified systems. In SCOTLAND, for example, the original debtor will be released by delegation only if this is the creditor's clear intention. There is a presumption against release. (*Gloag and Henderson*, The Law of Scotland[11], no. 3.38*)*

II. Formal requirements

4. The codifications dealing expressly with the substitution of a new debtor for the original debtor do not generally lay down any formal requirements. This is true, for example, of GERMAN law: if, however, the contract from which the transferred debt arises required a special form, the same requirements are applicable for the agreement for the replacement of debtor (Staudinger (-*Rieble*), BGB [2005], § 414 nos. 57 et seq.). Form requirements are constructed in a similar way under ESTONIAN law (LOA § 11(3)). Under POLISH law, the contract for the assumption of a debt is void unless concluded in writing. The same requirement applies to the consent of the creditor (CC art. 522). In CZECH law the contract for the assumption of a debt needs also to be made in writing but it is not required for the consent of the creditor (CC art. 531.2 and *Švestka/Jehlička/Škárová*, OZ[9], 672). In SLOVAK law, written form is required for the contract of assumption (CC § 531(3)), unlike the form of the creditor's consent in case of the "discharging" assumption of the debt (see Judgments of the Supreme Court of SR 5 Obo 167/2001; 4 Obo 138/95; 4 Obo 163/95).

III. Distinctions between different types of agreement

5. In all legal systems providing express rules on the substitution of a new debtor for the original debtor such substitution may be arranged in different ways: either by an agreement between the creditor and the third party to which the original debtor may or may not have to agree; or by an agreement between the original and the new debtor to which the creditor consents. Everywhere, the creditor's consent is mandatory for the release of the original debtor, but systems differ on the question whether the debtor's consent is necessary to create the effects of substitution.

6. The GERMAN CC provides two rules for the creation of an assumption of debt: § 414 concerns the agreement between the creditor and the third person stepping in as the new debtor to which neither the co-operation nor consent of the original debtor is required (see BAG 20 March 2002, NJOZ 2002, 365 and Staudinger (-*Rieble*), BGB [2005], § 414 no. 25; such a juridical act is seen as a contract in favor of the creditor as a third party, which opens for the creditor a right to reject, see *Schlechtriem and Schmidt-Kessel*, Schuldrecht Allgemeiner Teil[6], no. 820); and § 415 provides for the practically more important agreement between the debtor and the person who is to replace the debtor. This needs approval by the creditor to have the effect of replacing the debtor (see Staudinger (-*Rieble*), BGB [2005], § 414 nos. 41 et seq.). For equivalent provisions under ESTONIAN law, see LOA § 175(1) and (2) accordingly. In case the contract between the debtor and the third party faces refusal by the creditor, the debtor is deemed to have the right to require timely satisfaction of the creditor's claim from the transferee of the obligation (LOA § 175(4).

7. Under AUSTRIAN law, CC § 1405 provides for the case in which the debtor and the third person agree to have the debt transferred to the latter and states that the creditor's assent is necessary to replace the debtor, whereas CC § 1406(1) provides for the

assumption of a debt by agreement between the third party and the creditor, which does not need the debtor's consent to be valid. CC § 1406(2), however, supposes that such an assumption rather counts as a cumulative one. The regulation in the SLOVENIAN law (LOA § 427) is the same.

8. In FRENCH law CC art. 1274 deals with the situation where the agreement is between the creditor and the third party. It provides that a novation by substitution of the new debtor can operate without the concurrence of the first debtor. Art. 1275 deals with delegation, by which the debtor finds another debtor who undertakes an obligation to the creditor. This does not release the original debtor by novation unless the creditor expressly declared that discharge was intended. A *cession de dette* may result from an agreement between the original debtor, the new debtor and the creditor (*Terré/Simler/Lequette*, Les obligations, no. 1306). Basically the same rules apply under BELGIAN law.

9. Under the PORTUGUESE CC art. 595(1) a debt may be transferred either by a contract between the original and the new debtor, which the creditor ratifies, or by a contract between the new debtor and the creditor to which the original debtor may or may not consent. A similar solution is provided by the GREEK CC art. 471: a bilateral agreement between the creditor and a third person willing to assume the debt is deemed to be sufficient for replacing the original debtor who may not necessarily become part of this agreement.

10. Under DANISH law the agreement of the creditor, the debtor and the third person is generally required but the creditor may approve of a substitution in advance (see *Gomard*, Obligationsret III, 143 ff). In the ITALIAN CC, arts. 1268-1271 deal with cumulative delegation (*delegazione cumulativa*, where the debtor assigns to the creditor a new debtor who undertakes an obligation to the creditor) and art. 1272 deals with expromission (*espromissione*, where the third party, without delegation by the debtor, assumes the debt). In both cases the original debtor is not released unless the creditor expressly grants a release. Art. 1273 deals with assumption of debt (*accollo*) by an agreement between the debtor and the third person to which the creditor may adhere. *Accollo* is considered as a contract in favour of a third person (see Cass. 7/8/1941, n. 2776, Foro It., I, 916 but, for a contrary opinion, Cass. 28/9/1971, n. 2663, Giur. It., 1971, I, 1, 302). The adhesion of the creditor imports the release of the original debtor only if this constitutes an express condition of the agreement or if the creditor expressly grants a release. (See generally, *Bianca*, 665-666; *Mancini*, 512; *Gazzoni*, 618; see also Cass. 7/7/1976, n. 2525, in Foro It. 1977, I, 708; Cass. 21/2/1983, n. 6935, Giust.civ. 1983, 2376).

11. Under ENGLISH and IRISH law a substitution by novation requires the assent of all three parties.

12. According to POLISH law, if the assumption takes place by a contract between the creditor and the third party, and the debtor has refused consent, the contract is deemed not to have been concluded (CC art. 521(1)). On the other hand, in the case of an assumption of a debt by a contract between the debtor and the third party, the refusal by the creditor results in the person who under the contract was to assume the debt being bound to indemnify the debtor against the creditor's requiring the debtor to effect performance (CC art. 521(2)). The consent of the creditor is ineffective if the creditor did not know that the person assuming the debt was insolvent (CC art. 519(2)(ii)).

13. In SLOVAKIA, the assumption of debts is concluded through a contract between the debtor and a third party that will replace the debtor's contractual position, if the creditor consents. This can be done towards either party to the contract (CC §531(1)),

and the creditor may agree in advance or subsequently (see Judgment of the Supreme Court of SR 5 Obo 167/2001). If, however, the contract is concluded between the creditor and a third party, the third party becomes a debtor together with the original debtor (CC § 531(2)).

III.–5:203: Consent of creditor

(1) The consent of the creditor is required for the substitution of a new debtor, whether complete or incomplete.

(2) The consent of the creditor to the substitution of a new debtor may be given in advance. In such a case the substitution takes effect only when the creditor is given notice by the new debtor of the agreement between the new and the original debtor.

(3) The consent of the creditor is not required for the addition of a new debtor but the creditor, by notice to the new debtor, can reject the right conferred against the new debtor if that is done without undue delay after being informed of the right and before it has been expressly or impliedly accepted. On such rejection the right is treated as never having been conferred.

COMMENTS

A. Consent of creditor required for complete or incomplete substitution

It is clearly essential that the creditor should have to consent to the complete substitution of an existing debtor by a new debtor. The existing debtor may be solvent and reliable: the proposed new debtor may be insolvent or unreliable. The same applies, although with less force, to incomplete substitution. Here the creditor retains the original debtor but only in a subsidiary capacity. There is no reason to force such a downgrading of the original debtor on an unwilling creditor who may not wish to have the trouble of proceeding first against an unsatisfactory new debtor.

Where consent is required it need not be given expressly, but it must be definite and unequivocal. It should not be lightly accepted that consent has been given. The policy should be the same as that underlying II.–4:204 (Acceptance) paragraph (2) – "Silence or inactivity does not in itself amount to acceptance". As long as the creditor's assent has not been declared, an agreement between the original and the new debtor cannot have the effect that the debtor is replaced by the third party.

> *Illustration 1*
> A has borrowed €100,000 from Bank B. Shortly thereafter C buys something from A for a price of €120,000 and agrees with A to take over, in part payment, A's debt to Bank B thereby replacing A as debtor. B declares its assent to this agreement. As a result, C is substituted for A as debtor to B.

If the creditor does not assent to an agreement between the original debtor and the third person whereby the third person is to take over the obligation, the agreement has legal effects only between the debtor and that person. This does not mean, however, that the third person automatically joins the debtor in the obligation to the creditor, so as to give the creditor a right to require performance from either. Whether the creditor acquires a right against the third person will depend primarily on the terms of the contract between the debtor and that person. It is perfectly possible for them to agree that the third person is to be added as a debtor, if the creditor will not agree to a substitution, but whether or not that is the effect of the agreement will depend on its terms.

B. Consent may be given in advance

Paragraph (2) makes it clear that assent may be given in advance by the creditor. In this case, the substitution will take effect only when the creditor is given notice of the agreement between the new and the original debtor. Since the creditor must know whether and when the substitution will take effect, the requirement of notice is not limited to cases where the new debtor has not yet been identified at the time of the advance assent.

> *Illustration 2*
> A is about to sell a building to C, but urgently needs a loan from Bank B. A asks Bank B to agree in advance to C taking over responsibility for repayment of the loan after the conclusion of the contract for the sale of the building. B agrees. C later agrees also and notifies B accordingly. As from the moment when the notice reaches B, C is substituted for A as the debtor.

The legal analysis of the advance consent situation is that the indication of advance consent by the creditor is the equivalent of an offer to the third party to accept the third party as the new debtor. The notification to the creditor is the equivalent of the communication of an acceptance of this offer. A contract therefore results. There is no need to regard the indication of advance consent as an actual offer or the third party's act as an actual acceptance because the process of conclusion of a contract need not be analysed into offer and acceptance (II.–4:211 (Contracts not concluded through offer and acceptance). Notice may be given by any appropriate means (I.–1:109 (Notice) paragraph (2)). There is no need for any particular form. For example, if the obligation involves payment by instalments and if the new debtor sends a letter with a first payment saying "Having now taken over this debt, I enclose payment for the current month" that would be a sufficient notification.

It is important that there should be a contract because it is this contract which insulates the creditor from any defects in the agreement between the original debtor and the new debtor (see III.–5:205 (Effects of complete substitution on defences, set-off and security rights) paragraph (3) and III.–5:207 (Effects of incomplete substitution) paragraph (1)).

C. Consent of creditor not required for addition of new debtor

The consent of the creditor is not, however, required for the addition of a new debtor. The creditor loses nothing by such an addition. The principle of solidary liability means that, although the creditor has the advantage of an additional debtor, the creditor can simply ignore the new debtor if so inclined and proceed against the original debtor as if nothing had happened. However, as anyone can refuse a benefit, the creditor has the right to reject the right conferred against the new debtor if this is done promptly. The approach taken here – that the agreement of the creditor is not required but that the creditor has a right to reject - is consistent with the approach taken elsewhere in the model rules (see II.–4:303 (Right or benefit may be rejected) and II.–9:303 (Rejection or revocation of benefit).

NOTES

1. In all European legal systems the consent of the creditor is necessary before the debtor can be replaced. Some provide expressly for the giving of consent in advance. Some provide that a new debtor can be added without the consent of the creditor. The details and the terminology vary. See the Notes to the preceding Article.

III.–5:204: Complete substitution

A third person may undertake with the agreement of the creditor and the original debtor to be completely substituted as debtor, with the effect that the original debtor is discharged.

COMMENTS

A. Scope

This Article deals only with the complete substitution of a new debtor for the original debtor, with the effect of discharging the original debtor. Later Articles deal with incomplete substitution and the addition of a new debtor.

B. The concept of complete substitution

It is a widely accepted principle that a person (the "third person" or "new debtor") may accept the debt of another person (the "debtor" or "original debtor"), thereby being substituted for the debtor.

An agreement between the third person and the debtor cannot by itself have the effect of discharging the debtor from the obligation to the creditor. To achieve that result the creditor has to consent to the substitution.

C. Relationship to other concepts

Assignment. Substitution is to some extent the antithesis of assignment. Assignment results in a new creditor. Substitution results in a new debtor. Assignment, however, does not require the agreement of the debtor, whereas substitution requires the agreement of all three parties.

Novation. "Novation" is used in different senses in different legal systems. Generally it means the replacement of a contract by a new contract, perhaps between the same parties but perhaps with a change of debtor. Substitution under the present Article, on the other hand, involves a change in the debtor, the contract (if the obligation is a contractual one) remaining in force and unchanged in other respects. It is this preservation of as much as possible of the contractual relationship which is the key distinction between substitution and novation. Novation remains possible as a technique under the model rules but is not specifically regulated. It is left to the principle of party autonomy. The parties to a contract can always agree to bring the relationship to an end. They, or one of them and another party, can freely conclude a new contract.

Stipulation in favour of a third party. In the case of a stipulation in favour of a third party the focus of attention is the contract between the two original parties and the right or benefit conferred on the third party. In the case of the substitution of a new debtor the focus of attention is not the contract between the creditor and the new debtor nor the benefit conferred on the original debtor but rather the original contract and the change in the parties to it by the replacement of the original debtor. The standpoint from which the legal arrangements are viewed is different. Moreover, all three parties must agree to a substitution (even if it is actually beneficial to one or more of them) but a third party beneficiary need not agree to the acquisition of a right under a contract between two other parties.

Performance by a third person. The rules in III.–2:106 (Performance entrusted to another) and III.–2:107 (Performance by a third person) do not involve a change of debtor. They involve performance by a third party, who does not become a party to the contractual relationship between the debtor and the creditor.

Methods of payment. The rule in III.–2:108 (Method of payment) to the effect that a creditor who accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured and that the creditor may not enforce the original obligation to pay unless the order or payment is not honoured is closely akin to a substitution of a new debtor subject to a resolutive condition. However, the rules of this Section are not intended to apply to bills of exchange, cheques and promissory notes and other negotiable instruments (I.–1:101 (Intended field of application) paragraph (2)(d)) and are subject to any special rules relating to such matters as payment by credit or debit cards.

D. Importance of creditor's agreement and new debtor's agreement

The preceding Article and indeed the opening words of paragraph (1) of this Article make it clear that the creditor's agreement to the substitution is essential. Often the substitution will be based on an initial agreement between the debtor and the third person, to which the creditor's assent is required if the debtor is to be discharged.

It is obvious, too, that the agreement of the new debtor must be required before an obligation can be imposed on the new debtor by a private arrangement.

E. Debtor's agreement also required

The question whether the debtor's agreement to a substitution should always be required is more controversial and more difficult. There is no uniform answer in the different European legal systems or international instruments.

Under the PECL art. 12:101 the agreement of the debtor was always required. This rule has been criticised. See e.g. Adame-Martínez in *The Principles of European Contract Law Part III* (Vaquer ed., 2005) at pp. 253-258. Under the Unidroit Principles of Uniform Commercial Law the consent of the original debtor is not required (art. 9.2.1(b)) although it is noted in Comment 6 to art. 9.2.5 that that debtor cannot be forced to accept the benefit of the substitution and can refuse to be discharged by the agreement between the creditor and the new debtor.

These model rules follow the PECL approach. The reason for doing so is that the replacement of a debtor by a new debtor cannot safely be regarded as the conferring of a simple unqualified benefit on the original debtor. There may be cases, such as those involving the provision of a service, where the debtor has a strong and legitimate interest in performing the obligation. The debtor's reputation could be affected if the debtor is summarily replaced by another service provider even if – perhaps particularly if - the debtor is paid in full. The debtor may wish to perform in order to keep a skilled workforce employed and to be able to attract future work. The debtor may have concluded ancillary contracts with others, such as suppliers and carriers, to enable the work to be done and may not wish to be forced to try to unravel these contracts. Moreover, even if in theory the debtor's rights are unaffected, in practice things might not be so clear. The rights may be conditional on certain events which the debtor may have a proper interest in continuing to control. In sum, the debtor often has an

interest in the security and stability of the contractual relationship and should not be deprived of that interest without consent.

It is true that in the case of a simple obligation to pay, where all other obligations under the contract have already been performed, the debtor may have no interest in not being replaced. It would be possible to frame the rules so as to distinguish between the case where the debtor has an interest in effecting or controlling performance (or in not being replaced) and the case where the debtor has no such interest. However, that would lead to a more complicated set of rules for the achievement of no significant practical advantage. In the "pure benefit" cases the debtor would be very likely to agree to the substitution. Moreover, the debtor would still have to be given the option of promptly rejecting the benefit, in accordance with the general principal that a benefit cannot be forced on a party. The difference between being required to agree and having a right of prompt rejection is significant, and is rightly reflected in other rules, but is not significant enough in the present context to warrant increased complexity. Finally, if the debtor does not agree to the substitution in such a pure benefit case it would still be open to the creditor to accept payment from the third party, with the effect that the debtor would be discharged and the creditor would be liable to the debtor for any loss caused by the acceptance (III.–2:107 (Performance by a third person) paragraph (3). This would not amount to the substitution of a new debtor but it means that the creditor would not be prejudiced by the debtor's refusal if the third party is still willing to pay and the debtor would not be harmed by the payment.

In some situations a refusal by the debtor to agree to a substitution desired by the creditor would not do the debtor much good in the longer term. The creditor might have the right to terminate the contractual relationship unilaterally. (See e.g. for services IV.C.–2:111 (Client's right to terminate).) However, that would bring into operation the rules on termination, which are designed to achieve a fair result for both parties. If the termination was unjustified the debtor would be entitled to damages.

In short, requiring the debtor's consent to a substitution is safer and simpler, more in accordance with the principle of contractual security, and not harmful to the interests of any of the parties involved.

F. Matters left to implication

The Article does not provide expressly for the substitution of a new debtor in relation to only part of the obligations under the contract. This, however, is not excluded by the Article and if the obligations are divisible, substitution may take place in relation to any part of them identifiable as a separate obligation. As the creditor must agree to the substitution there is no need for any equivalent of the special protection afforded by III.–5:107 (Assignability in part) in the case of partial assignments.

NOTES

Wide recognition of concept

1. The underlying concept of substituting a new debtor for the original debtor is widely recognised in national legal systems but terminology varies.

2. In the civil codes of AUSTRIA (CC §§ 1405-1410); GERMANY (CC §§ 414-418); PORTUGAL (CC arts. 595-600); ESTONIA (LOA §§ 175-177); SLOVAKIA (CC §§ 531-532); the CZECH REPUBLIC (CC arts. 531-534); SLOVENIA (LOA arts. 427–431); and the NETHERLANDS (CC art. 6:155-158) there are express rules under headings denoting the assumption, or taking over, of debts. Under GREEK law too (CC art. 471) a third party may assume the debt and thereby release the debtor. Assumption of debt" is an expressly acknowledged concept (*Ph. Christodoulou*, in Kerameus/Kozyris,118.) In these systems assumption of debt is distinguished from novation.

3. Many European systems mention the substitution of a new debtor under the heading of novation, although in some countries doctrine may also recognise a separate concept of assumption of debt without novation. The FRENCH CC, for example, provides (art. 1271(2)) that one of the ways in which novation may operate is when a new debtor is substituted for the original debtor, who is discharged by the creditor. Doctrine has also, however, developed a concept of *cession de dette*. (See *Terré/Simler/Lequette*, Les obligations, no. 1305. Note, however, that some authors show scepticism in accepting this concept. Cf. *Malaurie & Aynès* no. 310; *Aubert*, no.1.) For BELGIAN law, see the Note under III-5:202, The ITALIAN CC regards the situation where a new debtor is substituted for the original one who is released as a type of novation (subjective novation, art. 1235). The SPANISH CC, under the general heading of novation, provides in art. 1203(2) that an obligation may be modified by substituting another person for the debtor. The term *asunción* [without extinctive novation] *de deuda* is also, however, well-known in case law and literature (See TS 29 April 2005, RAJ (2005), 4550, TS 16 March 2006, RAJ (2006), 5724). In ENGLISH and IRISH law novation covers the replacement of one contract by another, with a third person being substituted for one of the existing parties (*Treitel*, The Law of Contract[11], no. 15-077; *Chitty* on Contracts, nos. 19-085-19-087). In FINLAND the substitution of a new debtor for the original debtor is usually shortly mentioned under the general heading of novation: see *Bärlund*, *Nybergh*, *Petrell* 216; *Aurjärvi & Hemmo* 179: n. In SCOTLAND the term delegation is used to describe the substitution of a new debtor for the original debtor, the original debtor being discharged. This is sometimes, however, regarded as a sub-head of novation. See *McBryde*, Law of Contract in Scotland, nos. 25.21-25.28. There are presumptions against novation and delegation (*McBryde*, Law of Contract in Scotland, no. 25.24). See further *Anderson* paras. 3.02-3.19.

4. In DANISH law, *debitorskifte* means "change of debtors". Functionally, this concept corresponds to substitution of a new debtor (see *Gomard*, Obligationsret III, 143-156). In SWEDEN the substitution of a new debtor for the original debtor is recognised and is distinguished from novation. That would require an *animus novandi* which is not at hand when the debt in essence remains the same (*Rodhe*, Obligationsrätt, 639 ff).

5. In POLISH law, substitution of a new debtor is provided under the heading of "Change of debtor" and is called "assumption of debt" (CC art. 519). It is distinguished from *novatio* (i.e. an agreement according to which the debtor undertakes with the consent of the creditor to effect another performance, or even the same performance but based on a different legal ground, CC art. 506(1)).

III.–5:205: Effects of complete substitution on defences, set-off and security rights

(1) The new debtor may invoke against the creditor all defences which the original debtor could have invoked against the creditor.

(2) The new debtor may not exercise against the creditor any right of set-off available to the original debtor against the creditor.

(3) The new debtor cannot invoke against the creditor any rights or defences arising from the relationship between the new debtor and the original debtor.

(4) The discharge of the original debtor also extends to any personal or proprietary security provided by the original debtor to the creditor for the performance of the obligation, unless the security is over an asset which is transferred to the new debtor as part of a transaction between the original and the new debtor.

(5) Upon discharge of the original debtor, a security granted by any person other than the new debtor for the performance of the obligation is released, unless that other person agrees that it should continue to be available to the creditor.

COMMENTS

A. General effect of complete substitution

The general effect of complete substitution follows from earlier Articles. The original debtor is replaced and discharged. The mere transfer of the obligation to a new debtor does not change the content of the obligation. In contrast to "novation", in its traditional meaning within the civil law tradition, the content of the obligation is not affected by the substitution of a new debtor for the original debtor but remains unchanged. This goes for such matters as the place and time for performance. What is transferred to the new debtor is the original obligation with the same content and accessory rights (for instance, the right to interest) as existed before.

However, any personal or proprietary security for the performance of the obligation granted by a person other than the new debtor is released upon the discharge of the original debtor. If, however, the person having granted the security agrees that it should not be affected by the change in the person of the debtor, the security will remain effective.

Substitution will not transfer to the new debtor any rights which the original debtor had under other ancillary contracts, such as contracts concluded with third parties to facilitate the debtor's performance. It is possible, although probably unlikely, that under such an ancillary contract the third party has incurred an obligation not only towards the original debtor but also towards any person later substituted for the original debtor in the principal contract. Whether that is so will depend on the terms of the contract with the third party as interpreted. If it is so, and the obligation turns out to be more burdensome in relation to the new debtor than it would have been in relation to the original debtor then the third party must nevertheless perform the obligation undertaken. That is a risk which the third party took.

Accessory rights which the creditor may have against the debtor remain available to the creditor and are not affected by the substitution. If the new debtor had granted a security to the creditor before agreeing to be substituted as debtor, that security will continue to be available to the creditor, who may also take advantage of any additional security provided by the new debtor on or after that time.

B. Defences stemming from the original relationship

The substitution of a new debtor for the original debtor means that the new debtor is put into the same legal position as the original debtor. The new debtor may therefore set up all the substantive and procedural defences against the creditor which the original debtor would have had under the original relationship with the creditor. This applies, for example, with regard to the defence of prescription.

The crucial moment for setting up a defence is the moment of conclusion of the agreement by which the new debtor is substituted for the original debtor. All the objections the original debtor might have been able to raise prior to this time, or based on events which had taken place by this time, may be raised by the new debtor. Defences that became available to the original debtor at a time when the substitution had already been effected cannot be raised by the new debtor.

The new debtor cannot, however, use a right held by the original debtor against the creditor in order to effect set-off. That is not strictly a defence and is something outside the original relationship. For the sake of clarity, this point (which was made in Comment D to art. 12:102 the Principles of European Contract Law but not in the article itself) is expressed in paragraph (2). It is also expressly made in the Unidroit Principles (art. 9.2.7).

The rule that the new debtor can invoke the defences available to the original debtor is implicitly limited to use pertaining to the obligation taken over. In particular, this rule will not apply whenever the new debtor has accepted an obligation that existed independently from the original obligation.

C. Defences stemming from the relationship between the original debtor and the new debtor

Paragraph (3) makes it clear that the creditor is not affected by any rights or defences which the third person may derive from that person's relationship with the debtor. Even a defect in an agreement for substitution between the original debtor and the new debtor that would make it void or voidable does not change the position of the new debtor in relation to the creditor. The creditor is entitled to proceed against the new debtor even if the creditor knew or could reasonably be expected to have known that the relationship between the original debtor and the new debtor is defective because it lacks consent of the parties, or is of such a kind as would allow the new debtor to raise a defence against the original debtor. The substitution is to this extent regarded as being independent of defects in the underlying relationship between the original debtor and the new debtor. The policy is to protect the creditor. If the creditor has a valid contract with the new debtor whereby the new debtor takes over the obligation of the original debtor, the creditor should not be concerned with defects in the legal relationship between the original debtor and the new debtor. It should be noted, however, that if there is no actual contract between the creditor and the new debtor but just a third party right under a contract between the original debtor and the new debtor a different rule applies and defences under that contract may be asserted against the creditor who is the third party beneficiary. See II.–9:302 (Rights, remedies and defences) paragraph (b).

Illustration 1

A sells to C an alleged original piece of medieval Chinese art for €20,000 and agrees with C that in exchange C should be substituted for A as debtor of Bank B. Upon

notification by A, Bank B contacts C and agrees with C that C will take over the debt. B knows nothing of the underlying sale transaction. Soon thereafter it becomes evident that A – who has meanwhile gone bankrupt – had sold a fake to C. This does not affect the substitution.

If, however, the new debtor's agreement with the original debtor was vitiated by mistake or fraud or some other vice of consent and if that in turn caused the agreement between the new debtor and the creditor to be concluded in mistake then the new debtor may be able to avoid the latter agreement and thereby escape liability. This will be the case, in particular, if the creditor caused the mistake, or knew or could reasonably be expected to have known of the mistake and left the new debtor in error contrary to good faith and fair dealing, or made the same mistake. See II.–7:201 (Mistake).

Illustration 2
The facts are as in Illustration 1 but B knows that A has defrauded C and remains silent, contrary to good faith and fair dealing, in order to have a new debtor substituted for A who is known to be verging on insolvency. C can avoid the contract with B and escape liability for the debt.

The application of the rules on the involvement of third parties in vitiated consent (II.–7:208 (Third persons) may also enable the new debtor to escape liability by avoiding the contract with the creditor. This is discussed in the following Comment.

D. Defences stemming from the relationship between the creditor and the new debtor

It follows from general principles, and does not need to be stated in the Article, that the new debtor can use any defences arising from the contract with the creditor. If, for example, the creditor has by fraudulent means induced the new debtor to take over the obligation there can be no doubt that the new creditor could avoid the contract. It would be the same if there were such a mistake as to justify avoidance. It should be noted in this connection that if the original debtor was, with the creditor's assent, involved in the making of the contract, as might often be the case, and induced the new debtor's agreement by causing a mistake or by fraud, coercion, threats or unfair exploitation, then remedies for the induced vitiation of consent are available against the creditor as if the behaviour in question had been that of the creditor (II.–7:208 (Third persons) paragraph (1)). Indeed this will also sometimes be the result if the creditor merely knew or could reasonably be expected to have known of the fraud, coercion, threats or unfair exploitation by the original debtor, even if the original debtor did not have the creditor's assent to be involved in the making of the contract between the creditor and the new debtor (III.–7:208 paragraph (2)).

Similarly, the creditor could avoid the contract with the new debtor if the new debtor had fraudulently induced the creditor to conclude it and thereby lose the obligation of the original debtor.

E. Discharge of the original debtor and of third persons with regard to security rights

Under paragraph (4) the original debtor who has granted a security for the performance of the obligation is generally discharged with regard to that security, as soon as the substitution takes

effect. Under paragraph (5), any third person who has granted a security for the performance of the obligation by the original debtor is also, as a rule, released. These rules are to be found in a clear majority of European legal systems.

There are however exceptions to these rules. With regard to a security provided by the original debtor the rule does not apply to any security over an asset which is transferred as part of a transaction between the original debtor and the third person stepping in as new debtor. This may have practical importance in the case of a reservation of title clause in respect of goods, for which part of the price had been owed to the creditor by the original debtor.

With regard to a personal or proprietary security granted by any other person for the performance of the obligation, this other person may agree to the continuation of the security in favour of the creditor, but will be released in the absence of any such agreement.

NOTES

1. In BELGIAN law, it is first of all a question of interpretation whether the substitution of a debtor is a mere substitution (in which case the same rule applies as in the Article) or a novation (in which case the new debtor owes a fully indpenden debt, only determined by the relationship between the creditor and the new debtor), but the first type is presumed (art. 1273 CC). In GERMAN law (CC §§ 417 and 418) the third person is allowed to raise defences against the creditor which arise from the legal relationship between the creditor and the third person. As a consequence of the separation of the obligating from the disposing part of a substitution, the third person cannot, however, raise any defences against the creditor resulting from the obligating relationship to the debtor, but solely defences arising from the disposing contract. The third person is not allowed to use a right of the debtor to effect set-off (see CC § 417(1) sent. 2 and cf. Staudinger (-*Rieble*), BGB [2005], § 417 no. 29)) The CC § 418 states that, in a case of assumption of debt, accessory security interests expire when the debtor changes (Staudinger (-*Rieble*), BGB [2005], § 418 no. 1). Only if the person providing security consents to the change of debtor does the security remain, CC § 418(1) sent. 3. The same rule is applicable to non-accessory security interests, because the policy of CC § 418 is to protect the person providing security from being liable to an unknown debtor (Staudinger (-*Rieble*), BGB [2005], § 418 no. 12); ESTONIAN law is similar (LOA §§ 176, 177).
2. In GREEK law CC arts. 473, 474 and 475 correspond to paragraphs (1), (3) and (4) of the Article.
3. According to the AUSTRIAN CC § 1407(2), existing rights with respect to the claim are, as a rule, not affected by the change in the person of the debtor. However, Austrian law is the same as paragraph (4) of the Article in that the second sentence of CC § 1407(2) makes the continuation of sureties and pledges by a third person dependent on that person's consent; and similar to paragraph (1) in that the new debtor may invoke, according to CC § 1407(1), all defences that the original debtor would have had against the creditor (see OGH 21 September 1982, SZ 55/132). The position is the same in SLOVENIAN law (see LOA arts. 428–431).
4. Under SPANISH law there is no problem with the possibility of raising defences based on the relationship between the creditor and the new debtor but there is some

uncertainty about other defences and securities (*Díez-Picazo* II, 848 - 849). There is no case law available.

5. In ITALY, in the case of *espromissione*, the third person cannot set up against the creditor defences connected with the third person's relationship with the original debtor (CC art. 1272(2)) but may raise against the creditor all the defences which the original debtor could have raised against the creditor unless such defences are personal to the original debtor or are derived from acts subsequent to the expromission. According to CC art. 1272(3), the third person cannot exercise against the creditor a right to set-off which might have been exercised by the original debtor, even if the requirements for set-off were satisfied before the expromission. A similar position can be found in art. 598 of the PORTUGUESE CC. In ITALY, in the case of *accollo*, the third person is, in every case, bound to the creditor who adhered to the stipulation up to the limits within which the third person assumed the debt, and can set up against the creditor the defences founded on the contract on the basis of which the assumption took place: CC art. 1273(3). So far as security rights are concerned, the CC art. 1275 provides that in all cases where the creditor releases the original debtor all guarantees attached to the right are extinguished unless the person who furnished them agrees specifically to continue them.

6. As a consequence of the rule in DANISH law that a change of persons in a contractual relationship is not to affect adversely any of the persons involved, the new debtor may set up against the creditor all defences which the original debtor could have used against the creditor. A registered mortgage is generally unaffected by a transfer of ownership of the immovable property unless otherwise agreed between the original debtor and the mortgagee.

7. Under SWEDISH law, whether any security given by the original debtor or another person remains effective, depends upon their agreement.

8. Since under the laws of ENGLAND and IRELAND any debt created by the contract is extinguished on novation it follows that accessory rights given by the debtor, such as security for the debt, are also extinguished except where they are over an asset transferred to the new debtor, who will take the asset subject to the security. Novation may also have the unintended consequence of releasing a surety to the original contract unless the surety's consent is obtained or the terms of the guarantee preserve the surety's liability in the event of a novation. In SCOTLAND the release of the original debtor will also release a cautioner for the original debt or the original debtor, *Gloag and Henderson*, The Law of Scotland[11], no. 3.37. See also *McBryde*, Law of Contract in Scotland, no. 25.27.

9. In POLAND, the new debtor may not set up against the creditor any defences arising from a legal relation existing between the new debtor and the former debtor; this, however, does not apply to defences of which the creditor knew (CC art. 524(2)). The new debtor is entitled against the creditor to any defences to which the former debtor was entitled, except for the defence of set-off against a claim of the former debtor (CC art. 524(1)). The rule provided in para. (4) of the present Article is expressed in the POLISH CC art. 525.

10. In SLOVAKIA, the content of the obligation does not change after the assumption of the debt, except for the securities, as in para. (4) of the present Article (see CC § 532). The defences can be invoked by the creditor in the same way as para. (1) provides, pursuant to CC § 531(4). Although without express statutory statement, the rights between the former and the new debtor, may not be invoked against the creditor, if not agreed otherwise. CZECH law is identical (see CC §§ 531 and 532).

11. In FRANCE, in the case of pure delegation or delegation by novation, the new debtor cannot raise the rights of defence arising out of the legal relationship between the original debtor and the creditor, unless the latter knew of the defects vitiating the original debt, which would amount to fraud. The new debtor may, however, set up against the creditor the defence of nullity. In contrast with pure delegation, simple delegation means the addition, not the substitution, of the new debtor. The creditor may pursue two debtors and the new debtor may not raise any defences arising out of the relationship between the original debtor and the creditor, it being the *causa* of the new debtor's obligation. (See Bénabent, *Les obligations,* 11è ed., p. 540, n° 755).

III.–5:206: Incomplete substitution

A third person may agree with the creditor and with the original debtor to be incompletely substituted as debtor, with the effect that the original debtor is retained as a debtor in case the original debtor does not perform properly.

COMMENTS

Incomplete substitution is not so potentially dangerous for the creditor as complete substitution because the original debtor is retained as a fall back. Nonetheless the creditor is affected The liability of the original debtor is reduced to a subsidiary liability. The creditor may have the trouble and expense of proceeding first against the new debtor. If the new debtor seems likely to be unsatisfactory and the original debtor is entirely satisfactory the creditor may prefer to refuse to agree to even an incomplete substitution. The original debtor and the new debtor may then, if they wish, proceed to add the new debtor as an additional debtor with solidary liability.

The position of the original debtor may also be seriously affected by an incomplete substitution. The original debtor may wish to perform the obligation personally and not be reduced to, in effect, the role of a provider of security for someone else's performance. For this reason the solution here is the same as in relation to complete substitution.

NOTES

The inclusion of this type of incomplete substitution in the model rules was inspired by the Unidroit Principles of International Commercial Contracts, art. 9.2.5.

III.–5:207: Effects of incomplete substitution

(1) The effects of an incomplete substitution on defences and set-off are the same as the effects of a complete substitution.

(2) To the extent that the original debtor is not discharged, any personal or proprietary security provided for the performance of that debtor's obligations is unaffected by the substitution.

(3) So far as not inconsistent with paragraphs (1) and (2) the liability of the original debtor is governed by the rules on the liability of a provider of dependent personal security with subsidiary liability.

COMMENTS

In so far as the new debtor takes over the obligation, the position in relation to the defences and rights which the new debtor can invoke against the creditor is the same as for a complete substitution. This is provided for by paragraph (1).

The position in relation to personal or proprietary security rights is, however, different. The original debtor is not discharged but retains a subsidiary liability which may come into full effect in the event of non-performance by the new debtor. There is no reason therefore to deprive the creditor of the benefit of any security provided for the performance of the original debtor's obligation. It will generally be much less likely than before the substitution that the security will be called upon but that is only to the advantage of the security provider. It will be noted that the security does not become a security for performance by the new debtor: it remains unaffected by the substitution and therefore is merely security for the performance of the original debtor's obligation.

Paragraph (3) deals with the subsidiary nature of the original debtor's liability. In effect the original debtor has become a provider of a dependent personal security with subsidiary liability. The rules of Book IV, Chapter 3, Section 2 are therefore applied. The effect is that the creditor, in order to preserve full rights against the original debtor, is required to proceed first against the new debtor (IV.G.–2:106 (Subsidiary liability of security provider). The creditor must also observe certain notification requirements (IV.G.–2:107 (Requirement of notification by creditor)). The creditor's rights against the original debtor may also be reduced if the creditor's conduct has adversely affected the original debtor's rights of relief against the new debtor (IV.G.–2:110 (Reduction of creditor's rights)). If the original debtor performs the obligation the original debtor will have rights to reimbursement against the new debtor and is subrogated to the creditor's rights against the new debtor (IV.G.–2:113 (Security provider's rights after performance).

Paragraph (3) is only a default rule. It could be modified by agreement between the parties affected by the relevant rights and obligations. In particular, as the original debtor is not someone who is assuming a new liability, but someone whose full liability is being reduced to a subsidiary liability, the new debtor and the original debtor might well wish to agree that the original debtor would have no recourse if the original debtor performs. Similarly, the creditor might be prepared to agree to a downgrading of the liability of the original debtor only if the creditor retained stronger rights against the original debtor than provided by the default rules. But it is useful to have a system of default rules in place

NOTES

For the position relating to defences and set-off, see the Notes to III.-5:205 (Effects of complete substitution on defences, set-off and security rights). For the position relating to the liability of the provider of a dependent personal security, see the Notes to Book IV.G, Chapter 2. In BELGIAN law, a *delegatio solvendi* is equally presumed not to create an independent debt: the delegated debtor is presumed to have engaged itself merely to the existing debt ("dependant delegation"). However, many cases of *delegatio solvendi* create by their nature or given the circumstances an independent debt, e.g. when a negotiable instrument is issued (e.g. a bill of exchange) or in the case of credit cards, etc. ("independent delegation"). Transfer of money is also analysed as a form of *delegatio solvendi*, by which the bank of the beneficiary takes up an independent debt.

III.–5:208: Addition of new debtor

A third person may agree with the debtor to be added as a debtor, with the effect that the original debtor and the new debtor have solidary liability.

COMMENTS

Unlike complete or incomplete substitution, the addition of a new debtor does not discharge the original debtor. Both debtors have solidary liability. As the creditor is not prejudiced, the creditor's consent is not required. However, in accordance with the principle that a person cannot be compelled to accept a benefit, or apparent benefit, the creditor may reject the right against the additional debtor if this is done promptly after learning of it. See III.–5:203 (Consent of creditor).

The consent of the original debtor is, however, required. The reason is that the addition changes the original debtor's position. The debtor is locked into a set of rules on solidary liability which the debtor may not wish to be locked into. The debtor loses an element of control over the performance of the obligation and becomes a party to a legal relationship with a person not of the debtor's choice. The arguments are similar to the arguments for requiring the consent of the debtor to the substitution of a new debtor. The addition of a new debtor with solidary liability is not necessarily a pure benefit for the original debtor and, particularly in the case of non-monetary obligations, may have disadvantages. If a new debtor is to be brought into the relationship the original debtor ought to have a say on that and on the terms regulating the relationship between the two debtors. The underlying principle is that of party autonomy. A person should be able to choose with whom to enter into a legal relationship and on what terms. In some cases, such as assignment of rights, this principle gives way to the principle of the free marketability of assets, but with important qualifications for the protection of the debtor. There is no such countervailing principle in the present context.

What happens if the creditor and the third person want the third person to become an additional debtor but the original debtor refuses consent? There are several options. If the purpose is the provision of a personal security there is nothing to prevent the third person from providing such a security, without the consent of the debtor, by a contract with the creditor or by a unilateral undertaking in accordance with the rules in Part IV.G. (see IV.G.–1:103 (Creditor's acceptance). If the third person simply wants to pay the debtor's debt this can be done under III.–2:107 (Performance by a third person). There is also nothing to stop the creditor and the new debtor from concluding a contract whereby the new debtor undertakes to pay a sum equal to the amount of the original debtor's debt and the creditor undertakes, on receipt of payment, to release the original debtor. None of these techniques involves a change in the parties to the original contractual relationship.

The default rule for solidary liability is that the debtors are, as between themselves, liable in equal shares (III.–4:106 (Apportionment between solidary debtors)) but this can be changed by agreement between the debtors. It does not affect the creditor.

NOTES

1. The technique of cumulative assumption of debt is well known in European legal systems. The details, however, vary. See the Notes to III.–5:202 (Types of substitution or addition).

III.–5:209: Effects of addition of new debtor

(1) Where there is a contract between the new debtor and the creditor, or a separate unilateral juridical act by the new debtor in favour of the creditor, whereby the new debtor is added as a debtor, the new debtor cannot invoke against the creditor any rights or defences arising from the relationship between the new debtor and the original debtor. Where there is no such contract or unilateral juridical act the new debtor can invoke against the creditor any ground of invalidity affecting the agreement with the original debtor.

(2) So far as not inconsistent with paragraph (1), the rules of Book III, Chapter 4, Section 1 (Plurality of debtors) apply.

COMMENTS

The general effect of the addition of a new debtor, without any discharge of the original debtor and without any agreement that the original debtor is to have only subsidiary liability, is that the new debtor and the original debtor have solidary liability. This is provided for by paragraph (2). The rules on solidary liability already regulate the effect on defences arising out of the debtor-creditor relationship and set-off. So there is no need for rules on these topics. It is also unnecessary to have a rule to the effect that any personal or proprietary security provided for the performance of the original debtor's obligations is unaffected by the addition of the new debtor because that follows anyway from the fact that the original debtor is not replaced or discharged and remains fully liable.

Although the consent of the creditor is not required for the addition of a new debtor there may be cases where the new debtor concludes a separate contract with the creditor assuming liability as an additional debtor. There may also be a simple unilateral undertaking to that effect. The first sentence of paragraph (1) deals with the position where there is such a separate contract or undertaking. It is to the same effect as paragraph (3) of III.–5:205 (Effects of complete substitution on defences, set-off and security rights). The basic idea is that the creditor's right under that contract or undertaking is regarded as insulated from the background agreement between the original debtor and the new debtor. Reference may be made to Comment C on that Article. As noted in that Comment there may, however, be cases where a vice of consent affecting the contract between the new debtor and the original debtor will indirectly enable the new debtor to avoid the contract with the creditor on the ground of mistake, particularly if the creditor has been involved in the causing of the mistake or in allowing the contract to be concluded in mistake. This follows from an application of II.–7:201 (Mistake) and II.–7:208 (Third persons). These provisions will also apply if there is simply a unilateral juridical act by which the new debtor assumes liability (II.–7:101 (Scope) paragraph (3)).

The second sentence of paragraph (1) is included because the preceding Article envisages that there may be cases where the mere agreement between the original debtor and the new debtor is sufficient to bring in the new debtor with solidary liability. In such cases there is no separate contract or juridical act in favour of the creditor. There is nothing to insulate the creditor from questions relating to the validity of the contract between the new debtor and the original debtor. It seems reasonable therefore to allow the new debtor to rely against the creditor on any ground of invalidity affecting the contract with the original debtor, such as fraud, mistake, threats or coercion. This will not place the creditor in any worse position than the creditor was in before the addition of the new debtor as the original debtor remains

undischarged and will become again solely liable. The rule in the second sentence of paragraph (1) is consistent with the approach taken in the provisions on stipulations in favour of a third party (II.–9:302 (Rights, remedies and defences) paragraph (b) – "the contracting party may assert against the third party all defences which the contracting party could assert against the other party to the contract".

The default rule on solidary liability is that, as between themselves, the co-debtors are liable in equal shares (III.–4:107 (Recourse between solidary debtors)). This can be varied by agreement between the co-debtors. It does not affect the creditor, who always remains free to claim full performance form either debtor.

NOTES

1. For the position relating to defences and set-off, see the Notes to III.-5:205 (Effects of complete substitution on defences, set-off and secuirty rights). For the position relating to the liability of solidary debtors, see the Notes to Book III, Chapter 4, Section 1 (Plurality of debtors).

Section 3: Transfer of contractual position

III.–5:301: Scope

This Section applies only to transfers by agreement.

COMMENTS

The rules in this Section apply only to transfers by agreement and not to transfers by operation of law under special rules on such matters as the transfer of undertakings or changes in public bodies.

III.–5:302: Transfer of contractual position

(1) A party to a contractual relationship may agree with a third person, with the consent of the other party to the contractual relationship, that that person is to be substituted as a party to the relationship.

(2) The consent of the other party may be given in advance. In such a case the transfer takes effect only when that party is given notice of it.

(3) To the extent that the substitution of the third person involves a transfer of rights, the provisions of Section 1 of this Chapter on the assignment of rights apply; to the extent that obligations are transferred, the provisions of Section 2 of this Chapter on the substitution of a new debtor apply.

COMMENTS

A. General remarks

Whereas an assignment is limited to the transfer of rights to performance and a substitution of a new debtor for the original debtor concerns only a change in the person owing a debt, the present article deals with the transfer of the entirety of contractual rights and obligations from a contracting party to a third person. Given that contracts of long duration, and take-overs or amalgamations of businesses, are common, the rules on transfer of an entire contract are of great practical importance. The preceding article makes it clear that these rules will be displaced by any special rules on transfer by operation of law.

Agreements for the transfer of an entire contractual position are often concluded with regard to tenancy agreements, loan arrangements, labour contracts and other types of contract of long duration. Some situations are regulated by special rules. Book IV.B. on the lease of goods contains a special rule to the effect that a change in the ownership of the goods results in the new owner becoming a party to the lease; the former owner remains subsidiarily liable for non-performance of the obligations under the contract as a personal security provider (IV.B.–7:101 (Change in ownership and substitution of lessor).

The transfer of an entire contractual position must not be confused with novation. Novation implies the extinction of the old contractual relationship and the constitution of a new one with a different object or a different source, whereas in a transfer of the entire contractual position the relationship remains the same. The contractual bond is the same, but it is transferred from the first party to the incoming third party.

B. Substitution of a party in respect of the entire contractual relationship

Either party to a contract can, with the necessary consent of the other, substitute a third person in the entire relationship arising from a contract, so that the third person assumes both the benefit and the burden of the contract in place of the first party. The third person takes over both the first party's rights to performance and the first party's contractual obligations to perform.

Illustration

A concludes a contract for the construction of a prefabricated house with Company B for a certain price and pays a first instalment. B becomes bankrupt soon thereafter.

Provided A agrees, Company C may step into the contractual relationship in place of B with all the contractual rights and obligations which were previously B's.

C. The importance of the other party's assent

For the introduction of a new party to the relationship the consent of the existing other party is necessary. This consent may be given in advance, a situation which is common and important in practice.

If the other party does not consent, the transfer has no effect. Neither obligations nor rights will be transferred. Of course it would then often be possible for the first party (a) to assign rights to the third party (which would not require the other party's consent) and (b) to entrust the performance of duties to the other party. But the latter would only be effective in accordance with III.–2:106 (Performance entrusted to another) and the original party would remain responsible for proper performance of the obligations.

D. Applicability of rules on assignment of rights and substitution of new debtor

A transfer of the contract is more than a mere combination of assignment of rights and transfer of obligations. It is a uniform transaction, transferring a whole structure of rights, obligations, legal positions, and duties, which can appropriately be regarded as more than a mere combination of single acts transferring rights and obligations. In practice, however, the most important result of such a transaction is the transfer of all contractual rights including collateral ones, as well as the acceptance of all contractual obligations by the incoming party. It follows from the application of the rules on the substitution of a new debtor that the transfer may take the form of a complete substitution (with the original debtor being discharged) or an incomplete substitution (with the original debtor remaining subsidiarily liable). It has already been noted that the latter solution is the one which has been chosen in the case of a lease of goods where the ownership changes. (IV.B.–7:101 (Change in ownership and substitution of lessor)).

The situation where the parties wish the outgoing party to remain solidarily liable for the obligations under a contract is not dealt with in this Article. There would not be a true transfer in such a case. The parties would however be free to adopt such a solution if they so wished.

NOTES

I. Provisions in recent codifications

1. The transfer of an entire contractual position is expressly acknowledged in some recent codes. See e.g. the ITALIAN CC arts. 1406–1410; the PORTUGUESE CC arts. 424–427; the ESTONIAN LOA § 179; the SLOVENIAN LOA arts. 122–124;and the DUTCH CC art. 6.159 (discussed in *Asser-Hartkamp* I, nos. 610-612.
2. Under the ITALIAN CC art. 1406 "each party can substitute for himself a third person in the relationships arising from a contract for mutual counter-performances, if these have not yet taken place, provided that the other party consents thereto". It is a multilateral contract, and the consent of the three parties involved is essential. (See Cass. 14 May 1962, n. 999, in Giust.civ. 1962, I 1906; Cass. 18 October 1971, no. 2929 in Riv. Notar. 1972, 278). Art. 1408(1) and (2) of the ITALIAN CC states that,

as the transfer becomes effective, the transferor is released from the obligations to the original contracting party, unless the latter refuses to release the transferor. Art. 1409 empowers the original contracting party to raise against the transferee all defences arising out of the contract, (for instance a defence based upon non-performance) but not those based on other relationships with the transferor, unless the contracting party expressly reserved a right thereto on consenting to the transfer. According to a certain doctrinal opinion the transferee acquires every right arising from the contract, save the right to avoidance and rescission (*Fusaro* 249; for a contrary opinion see *Galgano* 121).

3. In PORTUGUESE law the *transmissão da posição contratual* is expressly acknowledged by CC arts. 424–427. This concept is essentially the same as what is provided for in the present Article, although the express provision of a rule similar to paragraph (2) is not considered necessary in Portuguese law. It is the predominant opinion that the transfer of a whole contractual position cannot be seen as a mere accumulation of transfers of rights and duties (see *Varela* II 415 ff.; *Pinto* 387 ff.). Under the CC art. 427 the remaining party may raise against the transferee all the defences which might have been raised against the transferor. However, the defence of set-off that is available in the context of assignment may not be raised in the case of a transfer of a whole contractual position (see *Varela* II 406).

4. Under the ESTONIAN LOA § 179 a party to a contract may, with the consent of the other party, transfer the party's rights and obligations arising from the contract to a third party on the basis of a contract entered into with the third party (assumption of the debt). This transaction is seen as a transfer of an entire contractual position, substitution of the party to a contract, with a core element being assumption of debt (Varul/Kull//Kõve/Käerdi (-*Käerdi*), § 179, no. 1, 4.1.1). Upon assumption of a contract, all rights and obligations arising from the contract are deemed to have transferred to the new party to the contract (LOA § 179(2)), except for the obligations that have fallen due before the assumption of the contract, while these are personal obligations of the former party, no longer related to the contract (Supreme Court Civil Chamber's decision from 17 January 2005, civil matters no. 3-2-1-163-04). The provisions of assignment of rights and assumption of obligation apply *mutatis mutandis* to the assumption of contracts.

II. Concept acknowledged by practitioners and doctrine

5. In those countries lacking a statutory provision on the matter, the possibility of transferring a party's contractual position as a whole is nonetheless generally recognised.

6. Thus, in AUSTRIA the transfer of an entire contractual position is conceived, by courts and writers, as a uniform transaction requiring the agreement of all the three parties involved; see e.g. OGH 10 January 1984, JBl 1986, 131 (note *Krejci*); OGH 10 May 1988, JBl 1988, 720; OGH 17 January 1990, JBl 1990, 717; *Bydlinski*; *Koziol* 137; *Krejci*; Schima 319.

7. The GERMAN CC does not expressly provide for a transfer of the entire contractual position of a party apart from special cases of transfers of undertakings or of a flat, see CC §§ 566 et seq., 613a. Nevertheless, the concept is acknowledged as a general concept by the Federal Court; cf. BGH 27 November 1985, BGHZ 96, 302, see Staudinger (-*Rieble*), BGB [2005], § 414 nos. 93 et seq. The uniform concept of transfer of the whole contractual position is needed to terminate the relationship to the original contracting party in its entirety. This solution cannot be achieved by a mere

assumption of debt, since certain rights the original debtor may unilaterally exercise remain intact, such as the right to avoid or terminate.

8. In FRENCH and BELGIAN law, in the absence of an express provision in the CC, the traditional doctrinal position was to see a transfer of a party's contractual position as a mere combination of an assignment and a cession of debt. In FRENCH law, it has become the dominant opinion that it is the transfer of the entirety of rights and duties stemming from the original contract. (See *Aynès*, Cession; *Malaurie & Aynès* no. 510; *Terré/Simler/Lequette*, Les obligations, no. 1310; cf. Cass.civ. I, 12 December 1982, Bull. civ. I, no. 360). Unless otherwise provided for by a specific text, the Cour de Cassation makes the former party's agreement a requirement and accepts that the agreement may be given in advance in the first contract. (Cass.com., 6.5.1997, Bull. civ. IV, N° 117, note *Mazeaud*, Rép. Defrénois 1997, 977; note *Mazeaud*, D. 1997, 588; note *Billiau and Jamin*, Rev.trim.dr.civ. 1997, 936, Note *Mestre*. See also Cass.com., 6.5.1997, Bull. civ. IV, no. 118 and *Aynès*, Cession de contrat : nouvelles precisions sur le role du cédé, D. 1998, chron. 25 ff). BELGIAN law sticks to the more traditional approach and distinguishes the imperfect transfer of contract, under which the transferor remains liable for the debts towards the other party, and which can take place even without the consent of the other party, and the perfect transfer of contract, which requires the consent of the other party or an express statutory provision. Such provisions are found e.g. for transfer of some types of leases by the lessee, of insurance contracts by an insurance company, etc.

9. There is a similar situation under SPANISH law. Although it was once a matter of discussion whether, given that the CC contains no provision, a contractual relationship as a whole could be transferred; today the predominant view is in favour of such a possibility, arguing on the basis of CC art. 1255 (freedom of contract; *Díez-Picazo* II, 842-843; TS 6 November 2006, RAJ 2006/9425). Some special Acts contemplate the possibility (insurance contracts, labour contracts, leases).

10. No express provision on the transfer of an entire contractual position can be found in the GREEK CC. Nevertheless, the combination of an assignment of the rights arising from a contract and the substitution of a new debtor is acknowledged by the writers (see *Papantoniou*; ErmAK *Sourlas* art. 455 no. 3; Georgiades and Stathopoulos (-*Kritikos*), art. 455 no. 39) and the Courts: (see A.P. 1002/1991; EllDik 33 (1992) 829; 1369/1993, ibid. 36 (1995) 304, at 306; 681/1995, NoB 45 (1997) 607, at 606-607; 734/1998 EllDik 39 (1998) 1589; 479/2001 EEN 2002, 575.

11. In SCOTTISH law the notion of the transfer of an entire contractual position is recognised. It is called assignation of the contract. The consent of the other contracting party is required if the transferor is to be released from liability. Many of the cases are concerned with determining whether the advance consent of the other contracting party can be inferred. (See *McBryde*, Law of Contract in Scotland, nos. 12.33-12.41; *Anderson* paras. 3.28-3.37.)

12. No general statutory provisions on transfer of a contractual position exist under DANISH law but the problems are discussed in the context of the sale of an enterprise. Basically, the position is similar to that provided by the present Article. All three parties must agree to the transfer. There are, however, exceptions provided by a number of statutory provisions, and even by customary rules. Thus, if a newspaper or other periodical is transferred the subscribers will immediately get a right against the new owner, whereas the old owner remains liable until the contract with the subscribers could have been terminated by notice (see *Gomard*, Obligationsret III, 155).

13. With regard to FINNISH law the Article corresponds with doctrinal thinking.

14. Under SWEDISH law, an agreement between the original parties and the new party is required to create the effects of a transfer of an entire contractual relationship. Clauses permitting a person to substitute as a new party a legal entity within the same group of companies as the original party (often with the replaced party remaining as guarantor) are frequently contained in contracts. Unless otherwise agreed, the new party assumes all the rights and obligations of the original party (in accordance with the main principle on assignment as expressed in sec. 27 of the 1936 Act on Promissory Notes: *Lag [1936:81] om skuldebrev*); cf. Supreme Court, NedJurA 1997 p.886 concerning an arbitration clause; "special circumstances", however, may bar the substituted party from invoking the clause against the remaining party (see *Ramberg*, Stockholm Arbitration Report 1999:1 p. 26).

15. ENGLISH law deals with the transfer of an entire contractual position under the heading of novation (*Chitty* on Contracts, nos. 19-085-19-087*)*. It is important in relation to the amalgamation of companies, business take-overs, the commodity markets, credit card transactions and in other contexts. In theory, however, novation results in a new contract. The possibility of novation is often provided for contractually in advance.

16. In general, POLISH law does not recognise the transfer of an entire contractual relationship (i.e. mutual rights and obligations) in one juridical act. Only by way of exception, some statutory rules provide that a third party enters into an existing contractual relationship and undertakes rights and obligations of the former party to a contract (e.g. lease – CC arts. 678, 691; contract of sale of future farm products – CC arts. 625, 626).

17. Similarly, in SLOVAK law, there is no express rule on the transfer of the entire contractual position other than those described in the notes to earlier articles. There is, however, no legal hindrance to such agreements: they would have to meet the requirements for an assignment as well as for the assumption of a debt. A specific regulation of such a situation is known in certain types of contracts (e.g. sale of business under CC §§ 476–488 – with concrete rights and obligations that may differ from the general provisions on assignment).

18. Under CZECH law also, it is recognized that the transfer of an entire contractual position can be achieved by a combination of the rules on the assignment of a right and the rules on the substitution of a new debtor, see Holub (-*Eliáš*), Civil Code, II, 816.

Section 4: Transfer of rights and obligations on agent's insolvency

III.–5:401: Principal's option to take over rights in case of agent's insolvency

(1) This Article applies where an agent has concluded a contract with a third party on the instructions of and on behalf of a principal but has done so in such a way that the agent, and not the principal, is a party to the contract.

(2) If the agent becomes insolvent the principal may by notice to the third party and to the agent take over the rights of the agent under the contract in relation to the third party.

(3) The third party may invoke against the principal any defence which the third party could have invoked against the agent and has all the other protections which would be available if the rights had been voluntarily assigned by the agent to the principal.

COMMENTS

A. Situations covered

This Article applies where an agent has concluded a contract with a third party on the instructions of and on behalf of a principal but has done so in such a way that the agent, and not the principal, is a party to the contract. This can happen in two ways. First, the agent may be acting under a mandate for indirect representation. This is defined as a mandate under which the agent is to act in the agent's own name or otherwise in such a way as not to indicate an intention to affect the principal's legal position (IV.D.–1:102 (Definitions) paragraph (1)(e). The third party with whom the agent contracts may or may not know that the agent is acting for a principal: the important point is that the agent contracts in such a way as not to bind the principal. Secondly, the agent may be acting under a mandate for direct representation (where the agent is authorised to act as the principal's representative and to bind the principal directly) but may in fact, although having authority to bind the principal, contract in such a way as not to bind the principal. (See II.–6:106 (Representative acting in own name). The agent may, for example, simply not disclose the fact that there is a principal. The key point for the application of the present Article is therefore not whether the agent is a direct representative or an indirect representative but simply whether the agent in fact contracts in such a way as to bind the agent but not principal. The Article applies in such cases and only in such cases.

B. Purpose of provision

The purpose of the provision is to enable the principal to step in when the agent is insolvent and take over the agent's rights under the contract. Those rights, although held by the agent, are regarded as being earmarked for the principal from the beginning. It is almost as if they are held in trust for the principal. It would be unfair to enable a principal to take over the rights under the contract without the obligations. So the third party is given a counter-option by the following article whereby the third party can exercise the third party's rights under the contract against the principal instead of the agent.

C. History of the provision

This provision has had a chequered history. The Principles of European Contract Law had a set of articles in its Chapter 3 (Authority of Agents) dealing with indirect representation. The

agent in this situation was called the intermediary. The articles gave the principal an option to take over the intermediary's rights not only in the case of the intermediary's insolvency but also, if the intermediary "commits a fundamental non-performance towards the principal or if prior to the time for performance it is clear that there will be a fundamental non-performance" (PECL Art. 3:302). The third party was given a similar (but not identical) right if the intermediary became insolvent or committed a fundamental non-performance towards the third party or if it was clear that there would be such a fundamental non-performance (PECL Art. 3:303).

The Study Group, having considered criticisms of the PECL provisions by stakeholders and others, decided to limit the provisions to the case of the agent's insolvency and to limit the third party's right to a sort of counter-option to be exercised only if the principal opted to take over the agent's rights. It was considered that the question of non-performance of the agent's obligation to the principal was a matter entirely between principal and agent and should not expose the third party to a change of creditor. One practical consideration was that it could be difficult for the third party to know whether there had in fact been a fundamental non-performance of an obligation owed by the agent to the principal. The third party could therefore be exposed to great uncertainty about which party had the right to demand performance. In this respect the situation was different from assignment. If the agent was not insolvent there was no reason why the principal should not be left to seek a remedy against the agent with whom the principal had chosen to contract. In the converse situation it was considered that there was no justification for, in effect, enabling a third party, who had been content to contract with the agent alone, to bring in the principal as a sort of security provider if things began to go wrong. This argument was thought to be particularly strong if the third party had not even known that there was a principal.

D. Location of provision

The provision, along with the following article on the third party's counter-option, proved rather difficult to place. Its former location in the PECL Chapter on the authority of agents had been rightly criticised. To locate it in a Chapter on representation in a Book on contracts and other juridical acts would have been open to even stronger criticism. To locate it in the Part of Book IV dealing with mandate contracts would have been inappropriate as only a small part of it (the right to obtain the third party's name) had anything to do with the internal relationship between principal and agent. The essence of the provision is a right to bring about a change of party to the contract. It was therefore decided to place it here.

E. Obtaining name and address of third party

The principal may not know who the third party is. However, under the rules on mandate contracts the principal has a right to obtain the name and address of the third party from the agent on demand (IV.D.–3:403 (Communication of identity of third party).

F. The principal's option

The principal's option to take over the rights under the contract is exercisable only in the event of the agent's insolvency. "Insolvency" is not defined but a functional rather than a technical approach would be appropriate, given that the model rules are intended to have a uniform application across different legal systems (see I.–1:102 (Interpretation and development) paragraph (3)(a)). This would suggest that the test should be whether the agent's financial position is such that the agent is unable to meet the agent's debts. The duty

to exercise rights in accordance with good faith and fair dealing would suggest that the principal would have to give the third party credible evidence of this state of affairs (see III.–1:103 (Good faith and fair dealing)). In practice this would mean that there would have to be some overt indication of insolvency.

The option is exercisable by notice to both the third party and the agent, both of whom have an interest in knowing when the principal takes over the rights under the contract. The transfer will take place at earliest when the second notice reaches the addressee but the notice might fix a later time (see I.–1:109 (Notice) paragraph (3)) .

G. Defences and protections for third party

Paragraph (3) enables the third party may invoke against the principal any defence which the third party could have invoked against the agent and gives the third party all the other protections which would be available if the rights had been voluntarily assigned by the agent to the principal. The first part is self-explanatory. The second part means, for example, that the principal could not take over a right to performance of such a personal nature that the third party could not reasonably be required to render kit to anyone except the agent (III.–5:109 (Assignability: rights personal to the creditor). Similarly, if the agent has concluded one contract on behalf of many principals the third party would be protected against having the obligation made significantly more burdensome by a need to perform in parts (III.–5:107 (Assignability in part).

NOTES

1. These Notes to this and the following Article deal only with the situation where the agent has contracted in such a way as not to bind the principal, but only the agent.
2. The Geneva Convention on Agency of 1983 provides in art. 13(2)(a) that the principal can take over the agent's rights if the agent "fails to fulfil or is not in a position to fulfil his obligations to the principal".
3. In the NETHERLANDS under CC art. 7:420 the principal can assume the agent's rights under the main contract, if the agent does not perform the obligations towards the principal or goes bankrupt or if the third person does not perform its obligations.
4. BELGIAN and LUXEMBOURG law provide that in the case of the agent's bankruptcy the principal is entitled to proceed directly against the third party, but may claim only any outstanding part of the purchase price of the goods which the agent had sold on the principal's behalf (Belgium: New Bankruptcy Code of 1997 art. 103(2); Luxembourg: Ccom art. 567(2)).
5. If a DANISH or SWEDISH commission agent has acted in the course of business (handelskommission), the principal may claim directly from the third party if the latter has failed to fulfil its obligations in due time or the commission agent has failed to render due accounts or has acted fraudulently against the principal or has been adjudged bankrupt (Commission Agents Act § 57(2)).
6. In ITALY and PORTUGAL the principal is generally entitled to exercise the agent's rights arising from the execution of the mandate against third persons (Italy: CC art. 1705(2)(sent. 2); Portugal: CC art. 1181(2)).
7. In FRANCE, BELGIUM and LUXEMBOURG, the principal may sue the third party by an action oblique (CC art. 1166). If the agent fails to proceed against the third

party, the principal may exercise the agent's rights, but may not acquire the results of that action personally since such an action is for the benefit of the agent (Cass.civ. 16 June 1903, D.P. 1903.I.454; Cour Paris 12 June 1946, D. 1947.I.112). In general, many French legal writers are in favour of direct relations and corresponding direct actions between the principal and the third party if the agent is a commission agent (Starck 164 ff.; Ripert/Roblot no. 2635, 2672. The courts, however, explicitly disallow such actions (France: Cass.civ. 20 July 1871, D.P. 1871.I.232; Luxembourg: Cour Supérieure de Justice 19 March 1920, Pas. 11, 84).

8. The undisclosed principal doctrine of ENGLISH, IRISH and SCOTTISH law enables the principal to sue the third party without any conditions. A similar rule applies in DENMARK and SWEDEN when a commission agent is not acting in the course of business (i.e., in a *civilkommission*). The principal may then proceed against the third party at any time (Commission Agents Act § 57(1)).

III.–5:402: Third party's counter-option

Where the principal has taken over the rights of the agent under the preceding Article, the third party may by notice to the principal and the agent opt to exercise against the principal the rights which the third party has against the agent, subject to any defences which the agent has against the third party.

COMMENTS

The idea underlying this provision is that if the principal chooses to take over the rights under the contract by a unilateral act which, unlike a voluntary assignment by the agent, would not be even potentially challengeable by the agent's creditors, the principal should be prepared to take over the obligations under the contract as well. It would not be sufficient to rely on the argument that the third party could withhold performance to the principal until the agent performed. The third party may have already performed and may then discover that a remedy (e.g. a claim for damages for non-conformity) needs to be exercised against the other party to the transaction. The reason for giving the third party a counter-option, rather than simply limiting the principal's option to one to take over both rights and obligations, is that there may be rare cases where the third party might prefer to keep the agent as debtor.

If the third party brings in the principal as debtor under the contract between the third party and the agent (the principal having already opted to take over the agent's rights under that contract) the principal may invoke against the third party any defences which the agent would have had against the third party. This does not, of course, affect any defences which the principal might have against the agent under the mandate contract, if for example the agent claimed remuneration under that contract. It is unnecessary to provide for this.

NOTES

1. Some systems give the third party an independent right to bring in the principal as debtor under the contract with the third party, rather than just giving the third party a counter-option exercisable only if the principal chooses to take over the rights. This is the position, for example, under the Geneva Convention on Agency: the third party's right to sue the principal is admitted under the same conditions as the corresponding right of the principal to sue the third party (art. 13(2)(b).
2. In the NETHERLANDS the third party may exercise the agent's rights against the principal in case of the agent's bankruptcy or non-performance (CC art. 7:421(1)).
3. Under SPANISH commercial law the third party may be entitled to sue the principal in a very specific situation, namely if a factor, who according to Ccom art. 284 should act in the principal's name, did in fact act in the factor's own name (Ccom art. 287).
4. A similar, but more general rule prevails in FRANCE. Indirect representation is treated as a special case of simulation (*prête-nom*, cf. CC art. 1321). If the third party acquires knowledge of the fact that the agent, its contracting party, was acting on behalf of a principal, it may bring a declaratory action for a judicial statement of simulation (action en déclaration de simulation). On the strength of such a judicial decision, the third party has the choice either to rely on the hidden contract and sue the principal or, on the other hand, sue the agent on the basis of the "simulated" contract. The third party may not act against both the agent and the principal. By contrast, the

principal may not proceed directly against the third party on the basis of the dissimulated act. This is not the interpretation given to BELGIAN law which does not treat indirect representation, including prëte-nom, as a form of simulation, at least not in the law of obligations (different questions may arise under property law). The view taken is that the agent is indeed engaging itself into an obligation towards the other party; thus there is no simulation at all (See *P.A. Foriers*, "Observations sur le contrat de prête-nom et la théorie des extensions de faillite", JT 1980, 417 ff.; *M.E. Storme*, "De bescherming van de wederpartij en van het dwingend recht bij middellijke vertegenwoordiging, m.b. naamlening, in het burgerlijk procesrecht, en de betwistbare verwoording daarvan in de cassatiearresten van 25 november 1993", Proces & bewijs 1994, 53). The third party has the contracting party it has contracted with and has in general no right against the principal.

5. Under the undisclosed principal doctrine of ENGLISH, IRISH and SCOTTISH law, the third party may sue the principal without any preconditions. Therefore the third party has the choice to proceed against either the principal or the agent.

6. In DENMARK and SWEDEN, in general the third party may not proceed against the principal.

CHAPTER 6: SET-OFF AND MERGER

Section 1: Set-off

III.–6:101: Definition and scope

(1) "Set-off" is the process by which a person may use a right to performance held against another person to extinguish in whole or in part an obligation owed to that person.

(2) This Chapter does not apply to set-off in insolvency.

COMMENTS

A. Nature of set-off

The idea underlying set-off is a very simple one. If A owes B a certain amount and if B owes A the same amount, and if both debts are due, then either party can opt to have the rights, and corresponding obligations, cancel each other out. It is then not necessary for A to pay B, and for B to pay A the same amount. Some refinements are necessary, and are developed in the following rules, but that is the basic idea.

In these rules set-off is regarded as a matter of substantive law rather than as a purely procedural device. If the requirements for set-off are met, and if set-off has been declared, the obligations confronting each other are extinguished. Thus, if either of the parties subsequently sues the other, the action will have to be dismissed as unfounded since the right on which it is based no longer exists. There is one exception to this rule which is spelt out in III.–6:103 (Unascertained rights).

If a debtor declares set-off in the course of legal proceedings, it will have to be determined, under the rules of civil procedure applicable to the proceedings, whether such a plea is admissible. If it is, the set-off is immediately effective on the level of substantive law and the fact that the obligations have been extinguished has to be taken into account in deciding the dispute (unless III.–6:103 (Unascertained rights) applies). If it is not, the debtor may still assert the right outside the proceedings.

B. Insolvency set-off

The rules in this chapter are not intended to deal with set-off in insolvency. Special rules provided by the applicable national insolvency laws prevail.

NOTES

I. Nature of set-off

1. Set-off may be regarded as a purely procedural device or as a matter of substantive law. This Chapter follows the latter approach, which prevails among the continental European legal systems (e.g. AUSTRIA). The Chapter also follows the general approach in providing for a uniform, rather than fragmented, regime of set-off. They

thereby reflect a development which is also occurring in ENGLISH law. The traditional English distinction between statutory and equitable set-off (both of them originally procedural devices) has been considerably reduced as the equitable rules will prevail; significantly, however, a strong body of opinion now favours the substantive nature of equitable set-off (cf. *Derham* § 4.29 ff.[NB (3rd ed, 2003) – HB]). It is thus brought into line with insolvency set-off and set-off by agreement which are both, undoubtedly, substantive in nature. The modern approach recognises that equitable set-off is based on notions of fairness and natural justice (cf. *McCracken* 53 ff, 62 ff. [NB 2nd ed, 1998) – HB]) which ties in well with the underlying rationale traditionally advanced for set-off in continental jurisprudence: if A sues B for an amount which A is bound to pay B then A is acting in contravention of the precepts of good faith (*dolo petit qui petit quod statim redditurus est* - whoever claims what will have to be given back immediately, claims fraudulently): *Windscheid & Kipp* § 349, 2. In the development of continental jurisprudence, too, there has been a shift from a fragmented towards a uniform approach to set-off which has implied a shift from procedure to substance; see *Zimmermann*, FS Medicus, 710 ff.

II. Insolvency set-off

2. Most legal systems have special rules dealing with insolvency set-off. However, they are usually part of that country's insolvency regime: ENGLAND: Insolvency Act 1986, s. 323 on which see *Goode*, Credit and Security §§ 7-75 ff. and *Derham* §§ 6.01 ff.; IRELAND: Bankruptcy Act 1988 and, in case of insolvency of companies, Companies Act 1963 (esp. s. 284); SCOTLAND: "balancing accounts in bankruptcy": *McBryde*, Law of Contract in Scotland, nos. 25.60 ff; *Wilson*, Scottish Law of Debt[2], no. 13.10; GERMANY: *Insolvenzordnung* §§ 94 ff.; FRANCE: art. 25 de la loi du 26 juillet 2005 de sauvegarde des entreprises,; ITALY: art. 56 *legge fallimentare*, on which see *Perlingieri*, Estinzione 315 ff.; *Inzitari*, Effetti del fallimento, 159 ff; AUSTRIA: *Ausgleichsordnung* §§ 19 ss ff. and *Konkursordnung* §§ 19 ss ff on which see Rummel (-*Rummel*), ABGB II(3)[3], § 1439, no 8-11 and *Dullinger* 307 ss ff.; SWEDEN: chap. 5, §§ 15–17 *konkurslag* (1987); DENMARK: *Konkurslov* (1997) §§ 42-45; FINLAND: §§ 33, 33a and 34 *konkurssisääntö (konkursstadga)* (1868); SPAIN, art. 58 Insolvency Law; GREECE: Ccom art. 537; PORTUGAL: art. 99 Código da Insolvência e da Recuperação das Empresas (Insolvency Code, 2003); art. 283 (2) Código dos Valores Mobiliários (Securities Code, 1999); SLOVENIA Act on Forced Settlement, Bankruptcy and Liquidation art. 39; for LUXEMBOURG, however, see art. 455 code de commerce; ESTONIAN Bankruptcy Act § 99 (creditor should have the right to set off before the declaration of bankruptcy); CZECH Insolvency Act § 140; and for POLAND, arts. 93-96 of Law on Bankruptcy and Rehabilitation (Prawo upadłościowe i naprawcze) dated 28th of February 2003. Set-off cannot be opposed to the insolvent estate when the requirements for set-off were not met at the commencement of the insolvency procedure (Insolvency Act, art. 58). There is an EU-regulation on insolvency proceedings (No. 1346/2000 of 29 May 2000, OJ L 160, 30 June 2000, 1 ff.) art. 6 of which provides that the opening of insolvency proceedings does not affect the right of creditors to demand the set-off of their rights against the rights of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's right. Also in the legal system of SLOVAKIA there are special rules of insolvency. In BELGIAN law, there are no special rules for set-off in insolvency and it is rather a question of property law: a party can no longer extinguish its obligation by set-off when the other party is no longer entitled to receive performance because of rights one or more third parties have acquired in the right of the other party, whether by assignment, pledge, seizure by creditors or otherwise.

However, set-off is still possible against a closely connected right because of the reciprocal character of those obligations (set-off being a kind of liquidation of the right to suspend performance).

III.–6:102: Requirements for set-off

If two parties owe each other obligations of the same kind, either party may set off that party's right against the other party's right, if and to the extent that, at the time of set-off:

(a) the performance of the first party is due or, even if it is not due, the first party can oblige the other party to accept performance;

(b) the performance of the other party is due; and

(c) each party has authority to dispose of that party's right for the purpose of the set-off.

COMMENTS

A. Requirements for set-off

Mutuality. The rights must exist between the same parties. This requirement is expressed in the opening words of the Article – "If two parties owe each other obligations…". There must, in the traditional formulation, be *concursus debiti et crediti*. So, for example, a security provider who has a personal right against the creditor cannot set off that right against the creditor's right against the main debtor. It follows from the requirement of mutuality that there can be no set-off between a debt owed by a person (P) as an individual and one due to that person as a representative. P owes the first debt but the other debt is owed, not to P, but to the principal on whose behalf P is acting. Similarly, a right held by a person as an individual could not be used to effect set-off against a right owed to a company in which that person is a majority shareholder and managing director, even if it is for all practical purposes a one-person company.

There is one exception to the rule of mutuality. Where a right has been assigned, the debtor can assert against the assignee certain rights of set-off which would have been available to the debtor against the assignor. This is expressly allowed by a provision in the rules on assignment (III.–5:116 (Effect on defences and rights of set-off) paragraph (3)). It is justified by the need to protect the debtor.

Obligations of the same kind. Both obligations must be of the same kind: a money right can be set off only against a money right, a right for the delivery of grain only against a right for the delivery of grain of the same kind. Set-off usually relates to monetary obligations; the prime example of non-monetary obligations, to which set-off may be relevant today, are securities, whether certificated or dematerialised. Whether rights are of the same kind depends on their state at the time that notice of set-off is given. Set-off concerning foreign currency debts - the most important practical question in this context - is dealt with in III.–6:104 (Foreign currency set-off).

Right of party declaring set-off due. Since set-off constitutes a form of enforcement of the cross-right (i.e. the right of the party declaring set-off), the cross-right has to be enforceable. Thus, it has to be due, the other party must not be able to raise a defence, and the cross-right must not relate to a *naturalis obligatio* (i.e. an obligation which is not enforceable but which allows the recipient to retain performance once it has been effected). However, as far as prescription of the cross-right is concerned, see III.–7:503 (Effect on set-off).

Illustration 1

A has a right against B for €100 which arises from the sale of kitchen equipment and which has become due on 10 October. B wishes to effect set-off with a right against A.

B's right (i.e. the cross-right) is based on a loan, repayment of which is due on 20 October. Before 20 October B may not declare set-off. After 20 October B may still not effect set-off if A has a defence against B's right. The same applies if B tries to set off an unenforceable right such as, in some legal systems, one arising from gambling.

Party declaring set-off entitled to oblige other party to accept performance. The normal situation where set-off is possible is where both rights are due. This is the situation referred to in the opening words of paragraph (a). However, the right against the person declaring set-off does not necessarily have to be due; it is sufficient that the person declaring set-off can oblige the other party to accept performance. For as soon as a debtor may thrust performance on the creditor (which may be long before the right falls due) there is no reason not to allow the debtor to declare set-off. This rule has to be read with III.–2:103 (Early performance) which allows a creditor to reject an offer of early performance only if the early performance would cause the creditor unreasonable prejudice. A debtor who is not yet entitled to effect performance, however, may not declare set-off.

Illustration 2
A has a right against B, due on 10 October. B has a right against A, due on 10 September. While A is not entitled to declare set-off before 10 October, B may do so as from 10 September, provided that B is entitled to render performance in favour of A as from that date.

Illustration 3
A has invested a sum of €10,000 with B, the money being repayable on 10 October. The parties have fixed an interest rate of 10 %. A still owes B €10,000 arising from a contract of sale concerning B's car. B had transferred the car on 1 August and on the same day A's obligation to effect payment had become due. Nevertheless, B may not give notice of set-off before 10 October since A may decline to receive back the sum invested with B before 10 October.

Authority to dispose. This requirement relates not to the question of the performance as such (for example, whether it is due) but rather to the availability or disposability of the rights used to effect set-off. It means, for example, that a right which is the object of an attachment order so that it is frozen in the hands of the debtor cannot be used for set-off. It also means that a right held by a trustee as a trustee cannot be used for set off against a right held against the trustee in a personal capacity. The trustee would not normally be entitled to make use of the trust fund to settle personal debts. Some aspects of set-off will be specially regulated by the Book on Trusts but the rules will reflect this general principle that a trustee may dispose of trust assets for trust purposes but not for personal purposes (see X.–6:109 (Obligation not to obtain unauthorised enrichment or advantage) paragraph (2) and X–10:302 (Set-off)). Another consequence of this requirement is that a person who is a joint creditor could not use the jointly held right to effect set-off against a right held against that person. A solidary creditor could, however, do so because each solidary creditor can exercise the right alone. A creditor with a divided right could use that creditor's part of the right, but only that part, for the purposes of set-off. See III.–4:202 (Solidary, divided and joint rights).

The restriction works both ways, both at the declaring end and the receiving end, even if the receiving party takes no active role. It may, of course, be qualified by specific rules on particular types of restrictions on disposability, such as the rules on attachment by creditors, a matter which is not covered in these model rules.

In the Principles of European Contract Law this requirement was not expressly spelled out. Instead of paragraphs (a) and (c) of the present Article there was in the English text just one requirement – that the party declaring set-off was "entitled to effect performance". Comment B(4) to Article 13:101 explained that this was intended to cover not only the situation where the party was entitled to "thrust performance on the creditor", even if it was early performance, but also the situation where "the debtor may no longer perform because the principal claim has become subject to an order of attachment". It was not obvious from the text of the Article, however, that these two situations were covered. Accordingly the present Article attempts to spell out the intended effect more clearly.

B. Unascertained cross-right

It is not always a requirement for set-off that the cross-right is ascertained as to its existence or its value; see the rule in III.–6:103 (Unascertained rights).

C. Obligations to be performed at different places

Set-off is not excluded by the fact that the obligations have to be performed at different places (e.g. loan repayable at the lender's place of business to be set off against a right to payment of a purchase price which has to be paid at the seller's place of business. Allowing set-off in this type of situation is unlikely to cause any prejudice to the creditor of the principal right.

NOTES

I. Mutuality

1. It is generally recognised that the creditor of the one right has to be the debtor of the other, and *vice versa* (requirement of mutuality, *concursus debiti et crediti*, *réciprocité*, *Wechselseitigkeit*); FRANCE: CC art. 1289 and *Terré/Simler/Lequette*, Les obligations, no. 1297; BELGIUM: CC art. 1289 and *Cornelis*, Algemene theorie 869; LUXEMBOURG: CC art. 1289; GERMANY: CC § 387 and *Gernhuber* 233 ff; ITALY: CC art. 1241 and *Perlingieri*, Estinzione, 259 ff; the NETHERLANDS: CC art. 6:127(2) and *Asser-Hartkamp*, Verbintenissenrecht I, n. 533; SPAIN: CC art. 1195; PORTUGAL: CC art. 847, no. 1; *Varela* II, 200 ff; AUSTRIA: CC §§ 1438, 1441, *Koziol and Welser*, Bürgerliches Recht II[13], 102 101 and *Dullinger*, Handbuch der Aufrechnung, 5 ss ff; GREECE: CC art. 440; SLOVENIA LOA art. 311; SCOTLAND: *McBryde*, Law of Contract in Scotland, nos. 25.47 ff. and *Wilson*, Scottish Law of Debt[2], no. 13.4; SWEDEN: *Lindskog*, Kvittning 43; DENMARK: *Gomard*, Obligationsret III, 189; FINLAND: *Aurejärvi and Hemmo*, 187 ff, POLAND CC art.498 § 1 and ESTONIA LOA § 197(1) (see Supreme Court Civil Chamber's decision from 24 October 2006, civil matter no 3-2-1-93-06 on the possibility of set off between holder of the pledge claiming the enforcement and the owner of the property, who has a claim against the holder of the pledge). The DUTCH CC has specifically added a provision according to which the right of compensation does not exist with reference to a debt and a right falling into estates which are distinct from each other (CC art. 6:127(3); on which, see Parlementaire Geschiedenis 491). In ENGLAND, the underlying idea is often expressed by stating that the rights must exist between the same parties and in the same right; see, e.g., *Goode*, Credit and Security § 7-44 [3rd ed, 2003]. For IRELAND, see *Murdoch's Dict*. 722. The right of set-off was

conferred by s. 27(3) of the Supreme Court of Judicature (Ireland) Act 1877 and by s. 284 of the Companies Act 1963. See *Frawley v. Governor and Company of Bank of Ireland* [1975] IR 376; *In re Fredericks Inns Ltd.* [1994] ILRM 387. In general Ireland follows the common law position.

2. Concerning protection of a debtor whose creditor has assigned the right to a third party, see the Notes to III.–5:116 (Effect on defences and rights of set-off).

3. In SLOVAKIA regulation of the set-off process is a matter of substantive law in the CC. There are also some specific provisions in the Ccom. There is no legal definition of setting off, but its character can be derived from CC § 580: "If the creditor and the debtor have mutual receivables whose performances are of the same kind, they become extinct by setting off against each other if they cover each other and if one of the parties expresses its will to the setting-off to the other party. The discharge occurs at the moment when the receivables capable to be set off met each other."

4. CZECH law is identical, but there are some exceptions to the mutuality principle: the debtor may set-off against the assignee receivables, which the debtor had at the moment when notified of the assignment, (CC § 529(2)), the surety may set-off the debtor's receivables against the creditor (CC § 548(2)), etc.

II. Obligations of the same kind

5. All legal systems agree in principle that both rights must be of the same kind; GERMANY: CC § 387 and *Gernhuber* 236 ff.: ITALY: CC art. 1243(1) and *Perlingieri*, Estinzione 295 ff; the NETHERLANDS: CC art. 6:127(2) and *Asser-Hartkamp*, Verbintenissenrecht I n. 534; SPAIN: CC art. 1196(2); PORTUGAL: CC art. 847, n.1-b; *Varela* II, 205 f; AUSTRIA: CC §§ 1438, 1440, Rummel (-*Rummel*), ABGB II(3)[3], § 1440, no. 1 and *Dullinger* 77 ss ff; GREECE: CC art. 440; SCOTLAND: *McBryde*, Law of Contract in Scotland, nos. 25.42 f; SWEDEN: *Lindskog*, Kvittning 43; DENMARK: *Gomard*, Obligationsret III, 184; FINLAND: *Aurejärvi & Hemmo* 185; SLOVENIA LOA art. 311 POLAND CC art.498(1); CZECH REPUBLIC CC § 580; and ESTONIA LOA § 197(1). For FRANCE, BELGIUM and LUXEMBOURG CC art. 1291 lays down the same principle but adds that uncontested payments in crops and commodities whose price is regulated by market lists may be set off against sums which are liquid and enforceable. According to *Terré/Simler/Lequette*, Les obligations, no. 1298 this innovation by the drafters of the code civil, the reasonableness and advisability of which is far from obvious, does not appear to have been much applied. ENGLISH law confines set-off to money debts which is explicable in view of the exceptional nature of specific performance. Moreover, it reflects economic realities in that, in other countries too, set-off usually relates to money debts. Although IRELAND generally follows the common law, there seems to be no Irish authority or any rational reason why set-off should be confined to money debts.

III. Cross-claim enforceable

6. All legal systems accept that the cross-claim has to be enforceable; ENGLAND: *Derham* 27 f; SCOTLAND: *McBryde*, Law of Contract in Scotland, no. 25.45 ff; *Wilson*, Scottish Law of Debt[2], no. 13.5; FRANCE: CC art.1291(1) and *Terré/Simler/Lequette*, Les obligations, no. 1300; BELGIUM; CC art. 1291(1) and *Cornelis*, Algemene theorie n. 673; LUXEMBOURG: CC art. 1291(1); GERMANY: CC §§ 387, 390(1) [see now § 215 since 1 January 2002] and *Gernhuber* 247 ff; ITALY: CC art. 1343(1) and *Bianca*, Diritto civile IV, 485; *Perlingieri*, Estinzione, 297 ff; the NETHERLANDS: CC art. 6:127(2) and *Asser-Hartkamp*, Verbintenissenrecht I, n. 536; SPAIN: CC art. 1196(3)(4); PORTUGAL: CC art. 847,

n.1-a and *Varela* II, 204 ff; SLOVENIA: LOA art. 311 and *Juhart* in *Juhart/Plavšak*, 391; AUSTRIA: CC § 1439, *Koziol and Welser*, Bürgerliches Recht II[13], 103 102, *Dullinger*, 82 et seq.; GREECE: CC art. 440; SWEDEN: *Lindskog*, Kvittning 43; DENMARK: *Gomard*, Obligationsret III, 185; FINLAND: *Aurejärvi and Hemmo* 185 ff; POLAND CC art.498(1); CZECH REPUBLIC CC § 581(2) (unless agreed otherwise); and ESTONIA LOA § 197(1).

IV. Party entitled to perform may declare set-off

7. Also, it is widely recognised that the principal right does not have to be enforceable; it is sufficient that the person giving notice is entitled to perform; GERMANY: CC § 387 and *Gernhuber* 252 ff; the NETHERLANDS: CC art. 127(2) and Parlementaire Geschiedenis 492; AUSTRIA: Rummel (-*Rummel*), ABGB II(3)[3], § 1439, no. 7; PORTUGAL: *Varela* II, 207 ff.; GREECE: *Stathopoulos*, Law of Obligations § 24, no. 42, fn. 68 (against the wording of CC art. 440); SWEDEN: *Lindskog*, Kvittning 43; DENMARK: *Gomard*, Obligationsret III, 185; FINLAND: *Aurejärvi & Hemmo* 185 ff; and ESTONIA LOA § 197(1). According to ENGLISH and IRISH law, the principal right has to be enforceable; this is a natural consequence of the – traditionally – procedural nature of set-off in those legal systems. The laws of FRANCE, BELGIUM and LUXEMBOURG also require both rights to be exigible (CC art. 1291(1)); cf. also ITALY: CC art. 1243(1) and *Perlingieri*, Estinzione, 297 ff; for a different approach see *Nappi*, Contributo, 15 ff; SPAIN: CC art. 1196(3)); SLOVENIA LOA art. 312 and POLAND CC art 498(1). This follows from the *ipso iure* effect of set-off: none of the rights can be labelled principal right or cross-claim. French and Belgian courts, however, often reach the same result as German law by means of *compensation facultative*: the party exposed to a right which has not yet become due may renounce the legal protection arising from the lack of exigibility (see *Terré/Simler/Lequette*, Les obligations, no. 1312). In AUSTRIA, both rights, also the principle one, have to be due (CC § 1439; see Rummel (-*Rummel*), ABGB II(3)[3], § 1439, no. 7); the only exception is where the debtor of the principle right is entitled to early performance.

8. In SLOVAKIA the requirements of mutuality, obligations of the same kind, and an expression of will (declaration of set-off) are given in CC § 580 (see previous notes. On the question of enforceability § 581(1) provides that the setting-off is also not admissible against a receivable that can not be affected by enforcement of a decision. A receivable which is not yet due can be set – off , but only against a receivable which is also not due. “A receivable that is not yet due cannot be set off against a due receivable.” There are special provisions in the Ccom. Under Ccom § 358 only such debts as may be asserted in court can be mutually set-off. The fact, that a debt (claim) is statute-barred (i.e. that the term of prescription has run out), does not prevent its set-off if the prescription only occurred after the time when the claims became mutually applicable for being included in the set-off. Under Ccom § 359 a mature claim cannot be set off against an immature claim, unless it concerns a claim against a debtor who is unable to fulfil the payment obligations. Under Ccom § 360 a claim may also be included in the set-off when it is not due only because the maturity of the debtor’s obligation has been deferred by the creditor at the debtor’s request, without otherwise amending the obligation.

9. CZECH law is identical. However, it is disputed if a mature receivable can be set-off against an immature one, and if so, when the compensated receivables cease to exist (at the time of the act of compensation, or at the time of maturity of the so far immature receivable), for details see *Švestka/Jehlička/Škárová*, OZ[9], 1036.

V. Obligations to be performed at different places

10. It is generally accepted that set-off is not excluded by the fact that performance of the two obligations has to occur at different places. A number of legal systems, however, grant the creditor of the principal right a right to recover damages for any loss suffered as a result of not receiving performance or not being able to make performance at the right place; FRANCE, BELGIUM and LUXEMBOURG: CC art. 1296; GERMANY: CC § 391; ITALY: CC art. 1245; the NETHERLANDS: CC art. 6:138; SPAIN: CC art. 1199; PORTUGAL: CC art. 852; GREECE: CC art. 446; DENMARK: *Ussing*, Alm. Del. 324; cf. also *Dullinger* 80 ff; *Wood* 24–31 ff; ESTONIA LOA § 199; and POLISH CC art. 500.

III.–6:103: Unascertained rights

(1) A debtor may not set off a right which is unascertained as to its existence or value unless the set-off will not prejudice the interests of the creditor.

(2) Where the rights of both parties arise from the same legal relationship it is presumed that the creditor's interests will not be prejudiced.

COMMENTS

A. The options

There is an obvious danger that a debtor may protract legal proceedings by invoking set-off on account of a dubious cross-right such as one which cannot easily be proved or the existence of which is as yet uncertain, and there is thus the necessity of affording some protection to the creditor. This can be done in one of three ways.

Cross-right has to be ascertained. The fact that the cross-right is ascertained ("liquidity") could be elevated to a further substantive requirement of set-off. But this would go too far. There may be cases where set-off would not prejudice the other party and would be entirely appropriate. It may, for example, be clear that the value of the cross-right will be ascertained within the period which legal proceedings involving the principal right will take anyway. Or it may be certain that the cross-right exceeds the value of the principal right. A substantive requirement of liquidity, without any discretion on the part of the judge, would inhibit unnecessarily the possibility of set-off.

Cross-right need not be ascertained. Alternatively, a legal system may take the view that, on the level of substantive law, set-off is not prevented by the fact that the cross-right is unascertained. For practical reasons such a solution would normally be accompanied by provisions requiring the judge to refuse to consider set-off if this would unduly protract the proceedings. Typically, therefore, there would be a procedural provision allowing the judge to deal separately with principal right and cross-right and to give a provisional judgment on the principal right. But this solution would appear to be awkward, and somewhat impractical, in that a creditor who wants to enforce the provisional judgment would run the risk that this step may later turn out not to have been based on a valid title, with the consequence that the creditor might have to repay the amount obtained and pay damages. The creditor, in other words, does not really have a secure and useful title yet - a point which is hardly likely to prompt the debtor to tender payment.

Judicial discretion. The Article therefore adopts a third approach which can, essentially, be regarded as a compromise between the first two. If the cross-right cannot be readily ascertained, the judge is empowered to adjudicate upon the principal right without taking account of the set-off declared by the debtor, provided that the principal right is otherwise ready for adjudication. The judge is thus given a discretion and will have to take account of all the circumstances of the case, such as the probable duration of the proceedings concerning both principal right and cross-right, or the effect of a delay on the creditor. In the exercise of this discretion, the judge will, however, have to distinguish two cases.

(a) If principal right and cross-right arise from the same legal relationship, the judge will not normally deal only with the principal right but will deal also with the cross-right and consider

the issue of set-off. The Article establishes a factual presumption that the interests of the creditor of the principal right are not normally prejudiced in this situation.

(b) If principal right and cross-right do not arise from the same relationship, the decision will normally go the other way: Commercial predictability and fairness demand that a party who has an ascertained right should not be held up in pursuing this right. If the judge decides to adjudicate upon the principal right, the judgment is not merely of a provisional nature. The decision rests solely on the merits of the creditor's claim which the judge regards as being unaffected by the declaration of set-off. As a result, the declaration of set-off must be regarded as ineffective. The debtor's right will therefore have to be pursued independently.

B. Right to withhold performance

The problems analysed above do not arise in situations where the debtor can make use of a right to withhold performance in terms. In these cases the (principal) right is not ready for adjudication.

NOTES

I. "Liquidity" as a requirement for set-off

1. FRENCH and BELGIAN law as well as the law of LUXEMBOURG regard *liquidité* as a substantive requirement of set-off which, moreover, applies not only to the cross-claim but also to the principal right (CC art. 1291, on which see, for France, *Terré/Simler/Lequette*, Les obligations, no. 1299 and *Kegel*, Aufrechnung 160 ff, and for BELGIUM, *Cornelis*, Algemene theorie n. 672). The same is true for ITALY, see CC art. 1243 (on the interpretation of which cf. *Perlingieri*, Estinzione 293 ff; for a different approach see *Di Prisco* 321; for the meaning of liquidity according to the prevailing case law, cf. Cass. Sez. Lav, 18 October 2002, n. 14818, Rep. For. It. 2002, Voce Obbligazioni, n. 72; Cass.Civ. 22 April 1998, n. 4073, Rep. For. It. 2002, Voce Obbligazioni n. 51). This must be seen against the background of the *ipso iure* effect of set-off in French law: unless the principal right and the cross-claim are easily ascertainable it would be impossible to say whether, and to what extent, they have been discharged. But the requirement of *liquidité* also gives rise to a number of problems, so that in French and Belgian practice it has been modified considerably. On the one hand, the judge is granted some leeway in determining whether the right is sufficiently certain in order to be treated as liquid and thus capable of being taken into account for purposes of set-off. This is also the view taken in ITALY by the majority of legal writers and rare case law, although it may cause some overlapping between *compensazione legale* and *compensazione giudiziale*: see *Perlingieri*, Estinzione, 293; *Cantillo*, Le obbligazioni, Vol. II, 964; *Dalbosco*, Della compensazione giudiziale, 762 ff; as to case law, see Trib. Livorno, 27 November 1999, Corr. Giur. 2001, 1092 ff; Cass. 3 giugno 1991, n. 6237, Giur.it. 1992, I 882). On the other hand, and more importantly, the device of *compensation judiciaire* may be resorted to, provided the defendant asserts the cross claim by way of cross-action (*demande reconventionelle*). The legal nature of *compensation judiciaire* is disputed, but since the judge may decide to deal with both actions at one and the same time, and to give judgment for the balance, it has at least the practical effect of set-off. On *compensation judiciaire*, see *Terré/Simler/Lequette*, Les obligations, no. 1410 *Kegel*, Aufrechnung 10 f.; *Cornelis*, Algemene theorie n. 680; *Kruithof, de Ly, Bocken & de Temmerman* 711; for ITALY,

where it must however be distinguished between cross-action (*domanda riconvenzionale*) and *compensazione giudiziale*, *Perlingieri*, Estinzione, 312 ff. Despite the fact that set-off does not take effect *ipso iure* in SCOTLAND, there is nonetheless a requirement of liquidity under the Compensation Act 1592: the debt to be used for set-off must be certain in amount, presently payable and not disputed: *McBryde*, Law of Contract in Scotland, nos. 25.45 ff; *Wilson*, Scottish Law of Debt[2], no. 13.5. In SPAIN, art. 1196(4) CC requires the claim to be liquid. However that must be understood in the sense that until the liquidity requirement is satisfied the claims are not offset. It does not mean that a party cannot go to court to get a decision making liquid a claim not yet liquid: from the time of the judgment, the claims are offset, even though they were not offset at the time one of the counterparties sued for set- off.

2. According to ENGLISH law, claim and cross-claim must be liquidated or ascertained at the time of pleading (*Hanak v. Green* [1958] 2 All ER 151 at 145; *Stooke v. Taylor* [1880] 5 QBD 569, 575). However, this only applies to statutory set-off (i.e. in situations where claim and cross-claim arise from unconnected transactions). For IRELAND, see *Walek* v. *Seafield Gentex* [1978] I.R. 167. The position is generally as for England.

II. The procedural approach

3. Even in France, therefore, the emphasis has shifted from substantive law to procedure. The path towards a procedural solution (mapped out by Justinian and the Glossators and subscribed to by the Pandectist authors; see *Dernburg* 554 ff.) has been followed in GERMANY by the draftsmen of the CC. Liquidity of the cross-claim is not a requirement for set-off (see *von Kübel* 1092; the same view is usually advocated today, in spite of CC § 1439, for AUSTRIAN law: see *Koziol and Welser*, Bürgerliches Recht II[13], 102; *Dullinger* 90 ss for both set-off in civil proceedings (see the explicit rule of AUSTRIAN CCP § 381(3)) and set-off by notice. ff; *Reiterer* 38 ff; for a comparative evaluation, see *Kegel*, Aufrechnung 158 ss. ff). The draftsmen of the GERMAN CC could refer to two provisions in the Civil Procedure Act (which have been preserved, essentially unchanged, until today) according to which the Court may decide to deal separately with principal claim and cross-claim (as long as both do not arise from the same legal relationship) and that a provisional judgment may be given, under these circumstances, concerning the principal claim (CCP §§ 145(3), 302). There is also no requirement that the cross-claim be ascertained in FINLAND: *Halila & Ylöstalo* 58 ff and in PORTUGAL: CC art. 847, n. 3; and for POLAND CC art. 498(1). For SLOVENIA CCP arts. 319, 324, 337 and 348. See also *Ude*, Civilno procesno pravo, 227. The ESTONIAN LOA § 200(4), similarly to the German CC § 390, provides for a rule that a party requesting set-off cannot set off a claim against which the other party may set up defences. The general line of argumentation follows German example, as CCP § 450 provides for a similar procedural approach (Varul/Kull//Kõve/Käerdi (*-Käerdi*), § 200, no. 2, 3.4). Application of the LOA § 200(4) is in court practice limited to the defences which partly or completely excludes the cross-claim, see Supreme Court Civil Chamber's decisions from 24 October 2006, civil matter no 3-2-1-93-06 and from 27 March 2007 no 3-2-1-18-07. For the CZECH REPUBLIC, no requirements as to the ascertainability or liquidity of the rights subject to set-off are stipulated (and neither have they been developed in the case law).

III. Judicial discretion

4. A compromise approach is adopted in the NETHERLANDS: the judge may adjudicate upon the claim without taking account of the set-off declared by the defendant, if it

cannot easily be determined whether that defence is well founded, and if the claim is otherwise ready for adjudication: CC art. 6:136, on which see Parlementaire Geschiedenis 509 f. and *Asser-Hartkamp* Verbintenissenrecht I, nn. 550 ff. The solution proposed in the present article is also accepted by GREEK doctrine: see *Balis* 442 ff.; *Georgiadis* 497; *Filios*, § 76 Γ, Δ II. DANISH law does not require liquidity as a condition for substantive law but the courts will not allow set-off if it prejudices the interests of the other party (see §§ 249(2) and Code of Procedure 253). It is uncertain whether there is a presumption that the other party's interest will not be prejudiced if both rights arise from the same legal relationship In the case reported in Ugeskrift for Retsvaesen 1970, 599. The Supreme Court held that a landlord had been entitled to evict the tenant for not having paid rent even though the tenant claimed to have paid more than the required rent and to be entitled to repayment of some of the rent. The tenant's claim for repayment was held to have been so uncertain that the bailiff had been entitled to evict him. In IRISH law the judge is given an over-arching discretion, if the plaintiff applies before the trial (*Sheehan* v. *National Bank* [1937] IR 783), to refuse the defendant permission to use a set-off or counter-claim if it cannot be conveniently disposed of in the pending action, or ought not to be allowed for special reasons. See also *Rohan Construction Ltd.* v. *Antigen Ltd.* [1989] ILRM 783. In SLOVAKIA there are no special provisions about this question.

III.–6:104: Foreign currency set-off

Where parties owe each other money in different currencies, each party may set off that party's right against the other party's right, unless the parties have agreed that the party declaring set-off is to pay exclusively in a specified currency.

COMMENTS

A. Set-off not prevented

It is doubtful whether debts in different currencies are "of the same kind" and whether they may thus be set off against each other. The present Article takes its lead from Art. 8 (6) of the EU-Regulation on the Introduction of the Euro, no. 974/98/EC of 3 May 1998 (OJEC 1998, 139/1) which came into force on 1 January 1999. In terms of this regulation, the Euro has become the uniform denomination for those countries that have joined the monetary union. For a transitional period (until 31 December 2001) the former national currencies were regarded as sub-units of the Euro. As a result, set-off was no longer prevented, within the Euro-zone, as a result of the fact that the obligations were expressed in different currencies. This should also be the rule with respect to other currencies. It is in line with the modern view increasingly adopted in the national legal systems since it facilitates set-off without unduly prejudicing the reasonable interests of the creditor of the principal right. The free availability of foreign currency set-off may possibly encourage speculation on fluctuation of the money markets. However, this very fact will normally induce the party most likely to lose out as a result of such fluctuation to give notice of set-off as soon as possible. Since 1 January 2002 the issue of conversion no longer arises within the Euro-zone.

Illustration
A has to pay B a sum of £10,000 for the delivery of a machine. Payment is due on 10 October. On 20 October a right of A against B for payment of €40,000 arising under a loan agreement becomes due. As from 20 October (i.e. the due date of the cross-right), A may effect set-off by giving notice of set-off to B.

B. Exchange rate

Article 8(6) of the Euro Regulation states that any conversion has to be effected "at the conversion rates". "Conversion rate" is defined in Article 1 of the Regulation as "the irrevocably fixed conversion rate adopted for the currency of each participating Member State by the Council according to Article 109 l (4) first sentence (now Art. 123(4) first sentence) of the EC-Treaty". As far as other currencies are concerned, the rate of exchange to be applied should be the unified rate if there is such rate; if not, it should be the buying rate for the currency of the right against which set-off is declared.

NOTES

1. A straightforward solution was the one traditionally adopted in ENGLISH law where foreign currency debts were always converted to pounds sterling at the rate of exchange of the date when they fell due. In the 1975 case of *Miliangos v. George Frank (Textiles) Ltd.* [1976] AC 443, however, it was held that an English court may give judgment for a sum of money expressed in a foreign currency and that conversion will normally take place at the date when the Court authorises enforcement of the

judgment in pounds sterling: *Derham*, §§ 5.74-5.77. This applies to statutory set-off; the position with regard to equitable set-off still appears to be unclear: *Derham*, § 5.77 on foreign currency debts in the context of set-off in general. IRISH law generally follows English law on this matter. Contrary to England, Ireland has however joined the monetary union within which the problem no longer arises. SCOTTISH law follows *Miliangos*: see *Commerzbank Aktiengesellschaft* v. *Large* 1977 SC 375. According to the prevailing opinion in GERMAN law, debts in foreign and domestic currency are never "of the same nature". Set-off can consequently only be effected if the parties have so agreed: see, e.g., MünchKomm (- *Schlüter*), BGB, § 387 no. 32, unless the debtor may also perform in domestic currency under CC § 244. The same view is held in PORTUGAL: *Varela*, II, 205. There are good reasons for regarding this view as outdated: *Gernhuber*, 238 ff. (conversion at the date of set-off). FRENCH and BELGIAN legal writers incline towards accepting set-off of debts in different currencies, except where they are not convertible: *Malaurie & Aynès* no. 123 (for France) and *Cornelis*, Algemene theorie n. 671 (for Belgium); for the NETHERLANDS, see CC art. 6:129(3) and *Asser-Hartkamp*, Verbintenissenrecht I, n. 534; for ITALY, the possibility of setting off rights in different currencies implicitly results from the rules on payment of pecuniary obligations (CC arts. 1278 ff. see also *Bianca*, Diritto civile IV, 483, and Cass.civ. 26 aprile 1991, n. 4562, in Foro It., 1991, I, 1151); for AUSTRIA, see Rummel (-*Rummel*), ABGB II(3)[3], § 1440, no. 2 (set-off concerning debts in foreign currencies is possible, unless effective payment (*Effektivzahlung*) has been agreed upon); for GREECE, see *Stathopoulos*, Law of Obligations, § 24, no. 42, fn. 68 (obligations in different currencies are "of the same kind" and they may therefore be set-off against each other, provided they can be converted to the same currency); for DENMARK, see *Gomard*, Obligationsret III, 184 (set-off permissible also when the rights are payable in different currencies; an exception is possibly made when one of the currencies is not convertible see PNA §7); for FINLAND see *Aurejärvi & Hemmo* 185 (claims in different currencies are not regarded to be of the same kind; however, according to art. 7 of the Promissory Notes Act, the debtor may choose to pay a debt in the currency of the place where payment is due – unless there is an agreement to the contrary – and a debtor who has this choice may also use it in the case of set-off); for ESTONIA, see LOA § 197(3) (monetary claims expressed in different currencies may be set off at a freely developed exchange rate calculated as at the date of set-off at the place of business of the party requesting set-off); for a comparative survey, see *Wood* 24–34. On the legal nature of a foreign currency debt, see *Staudinger (-K. Schmidt)* § 244, nos. 11 ff; *Grothe*, 558 ff.; *Dullinger*, 78 ff. Under POLISH law it is acceptable to set-off a claim expressed in Polish currency with a cross-claim expressed in a foreign currency – see *K. Zawada* [in] Kodeks cywilny. Komentarz. Tom 1. [ed. K. Pietrzykowski], Warsaw 2004, p. 1270, 1271, see also Supreme Court's judgments of November 16th 2000 (III CZP 39/00, OSN 2001, No 7-8. text 98) and of 11 January 2001 (V CKN 1840/00, OSN 2001, No 7-8, text 114). In SLOVENIAN law no set-off is allowed in cases with a cross-claim expressed in a foreign currency, unless this foreign currency is just a measure of value, see *Juhart* in *Juhart/Plavšak*, 391. In SLOVAKIA, this question is provided for only in the OBZ (§362). Pecuniary rights, denominated in different currencies, can only be set off if such currencies are freely convertible. The set-off is accomplished according to the valid median rate of exchange on the day on which the rights became applicable for the set-off. The set-off is accomplished according to the rate of exchange applicable in the place of the registered office, the business, or the residence of the party that manifested the will to set off the rights. Also in CZECH law a set-off of rights denominated in different currencies is regulated for commercial

relationships only. Outside of this scope it may be disputed if the receivables are of the same kind and thus compensatable, see *Štenglová/Plíva/Tomsa,* Commercial Code[11], 1097.

2. According to the SPANISH CC art. 1196.2, in order to proceed to set-off, both rights should be monetary or, if fungible, of the same kind. If the monetary rights are configured in different currencies, set-off is possible as well, unless one of the parties expresses a special interest and preference for one of the currencies (*R. Bercovitz* (ed.) Comentario; art. 1196).

III.–6:105: Set-off by notice

Set-off is effected by notice to the other party.

COMMENTS

A. The requirement of notice

An informal, unilateral, extrajudicial declaration to the other party is sufficient to declare set-off. If the matter subsequently comes to court, the judgment has a merely declaratory effect: it does not bring about the set-off but merely confirms that it has been brought about. Since a declaration of set-off has the effect of discharging the two obligations as far as they are coextensive (III.–6:107 (Effect of set-off)), it has a direct impact on the legal relationship between the parties. Like other such unilateral rights to alter a legal relationship it cannot be subjected to a condition or time clause (*dies*). Thus, in particular, it is not possible for a debtor, if all requirements for set-off are met, to declare set-off as from some future date (deferred set-off). On the other hand, however, a debtor whose right is not yet due may declare set-off, but such declaration only takes effect when the right has become due (declaring set-off early).

B. Set-off by agreement

It goes without saying that the parties may, alternatively, effect set-off by agreement. This follows from the general recognition of freedom of contract. In the case of set-off by agreement the parties may derogate from the normal requirements for set-off. Usually, in fact, the parties resort to set-off by agreement if one or other of the normal requirements for set-off is not met. An agreement for a current account implies that the debits and credits will be set off against each other at each balancing of the account.

NOTES

I. Set-off by notice and automatic set-off

1. Since the days of the Glossators two different approaches have been vying with each other in continental Europe (see *Zimmermann*, Obligations 760 ff.). The one takes its cue from texts like Inst. IV, 6, 30 (…*ut actiones ipso iure minuant*, ... that the actions should be automatically reduced), the other is based on texts which appear to indicate that set-off has to be raised, or declared. This difference is still reflected in modern legal systems.

2. The first approach finds its clearest expression in the FRENCH CC art. 1290: as soon as two obligations capable of being set off against each other confront each other, both of them are extinguished *ipso iure*. French courts and legal writers have not, however, found it practical to implement this regime in its most literal and uncompromising form. In reality, the principle set out in art. 1290 is contradicted by other texts (CC arts. 1294, 1295 al. 1, 1299) ; it has not been maintained in the French Avant-projet de réforme du droit des obligations et de la prescription. Set-off is only held to be effective if the defendant raises it in court: see, e.g., *Terré/Simler/Lequette*, Les obligations, no. 1311. Strictly speaking, therefore, the automatic discharge of the two obligations confronting each other is subject to a requirement that the defence of set-off be pleaded in court. This regime has also been adopted in LUXEMBOURG and

ITALY (CC art. 1242(1)). SCOTLAND is similar but not identical: set-off must be pleaded in court and sustained by judgment before it has effect (*McBryde*, Law of Contract in Scotland, no. 25.53; *Wilson*, Scottish Law of Debt[2], no. 13.6). The IRISH approach appears to be similar. See Supreme Court of Judicature (Ireland) Act. s.27(3) and the Rules of Supreme Courts 0.12 R.7. To raise a set-off of deduction a tenant, in an action by the landlord for rent, must give notice to the landlord (see *Deale* 42). BELGIAN writers sometimes stick to the literal approach of CC art. 1290, but other writers and the court practice follow the same approach as the French.

3. In SPAIN a controversial point relating to the meaning of CC art. 1202 has been resolved by distinguishing between the "trigger" of set-off and the time from which the effect of set-off runs. If parties do not activate set-off, their obligations remain unchanged and the court cannot dismiss a claim founded on them. However, once the parties activate set-off, the rights and obligations are regarded as extinguished as from the time the set-off requirements were met.

4. The second of the approaches mentioned above has found its way into the GERMAN Civil Code: set-off has to be asserted by an extrajudicial, informal and unilateral declaration to the other party (CC § 388, and see *von Kübel* 1075 ff). It has been followed in AUSTRIAN law (in spite of the fact that CC § 1438 would appears to endorse the *ipso iure* effect of set-off; see *Koziol and Welser*, Bürgerliches Recht II[13], 103 102 ff; *Dullinger* 96 ss ff), in GREECE (CC art. 441, on which see *Stathopoulos*, Law of Obligations, § 24, nos. 47-52, in PORTUGAL (CC art. 848, n. 1, and see *Varela* II, 214 ff.); SLOVENIA (LOA art. 312); in the NETHERLANDS (CC art. 6:127, on which see *Asser-Hartkamp*, Verbintenissenrecht I, n. 530) and in ESTONIA (LOA § 198). It also enjoys widespread support in ITALY (*Perlingieri*, Estinzione 278 ss. *Di Prisco*, Estinzione, 327; as to case law, Cass. 16 July 2003, n. 11146, in Giur. It. 2004, 1380) and SPANISH law (*Díez-Picazo* II, 554 ff). SWEDISH, DANISH and FINNISH law also require notice (*Lindskog*, Kvittning 533 ff., 526 ff; *Gomard*, Obligationsret III, 182 and 184; *Aurejärvi & Hemmo* 183), and so does POLISH law: pursuant to CC art. 499, a set-off is effected by a notice made to the other party and has retroactive force from the moment set-off became possible.). Similarly for the CZECH law: "manifestation of the intent to set-off by one party to the other" (CC § 580).

II. Set-off by agreement

5. All legal systems allow set-off by agreement (contractual set-off); ENGLAND (and, following English law, IRELAND): *Derham* §§ 16.01; SCOTLAND: *McBryde*, Law of Contract in Scotland, no. 25.53; *Wilson*, Scottish Law of Debt[2], no. 13.6; GERMANY *Gernhuber* 326 ff.; AUSTRIA: *Dullinger* 259 ss ff, Rummel (-*Rummel*), ABGB II(3)[3], § 1438, nos. 31 ff; GREECE: *Georgiadis* 493, *Stathopoulos*, Law of Obligations, § 24, no. 26; DENMARK: *Gomard* III, 219; SPAIN: *Díez-Picazo* II, 538; *Rojo Ajuria* 58 f.; Supreme Court, TS 14.6.1971; 7.6.1983; 2.2.1989; ESTONIA: Varul/Kull//Kõve/Käerdi (-*Käerdi*), § 198, no. 4, PORTUGAL: *Varela* II, 227 f; comparative overview in *Wood* 24-43 ff. Cf. also the comprehensive monograph by *Berger*. On compensation conventionelle, or facultative, in FRANCE, see *Terré/Simler/Lequette*, Les obligations, no. 1312; and see also art. 1241 of the Avant-projet de réforme du droit des obligations et de la prescrition; in BELGIUM, see *Cornelis*, Algemene theorie nn. 681-685; in LUXEMBOURG, see Cour d'Appel of 17 March 1999, Pas. Lux., vol. 31, 129. For ITALY, see CC art. 1252 (compensazione volontaria) and *Perlingieri, Regolamento compensativo*, in Riv. dir. comm. 1974, 75 ff. For POLAND see W.Czachórski et al, Zobowiązania. Zarys wykładu, Warszawa 2004, p. 355. On set-off in current account relationships see *Wood* 3–1 ff.

(ENGLAND); *Berger* 173, 285 ff. (GERMANY); CC art. 6:140; LOA §§ 203-205 (ESTONIA); Parlementaire Geschiedenis 517 ff (NETHERLANDS) and *Wood* 24–36 ff (comparative). In the CZECH REPUBLIC (CC § 581(3) and Ccom § 364) all rights to performance may be subject to set-off on the basis of an agreement, even those which cannot be set-off unilaterally – rights to damages for injury to health, statute-barred rights, unenforceable rights etc.).

6. In SLOVAK law, as an alternative to set-off by a unilateral, extrajudicial declaration, the parties may effect set-off by agreement. In some categories of receivables set-off can be effected only by agreement: § 581(1,2,3): (1) The setting-off is inadmissible against a receivable to compensation of damage caused to health unless the case is a mutual receivable of compensation of damage of the same kind. The setting-off is also not admissible against a receivable that cannot be affected by enforcement of a decision. (2) Statute-barred receivables, receivables not enforceable before court and receivables from deposits cannot be set off. A receivable that is not yet due cannot be set off against a due receivable. (3) On the basis of the parties' agreement, also the receivables mentioned in paragraphs 1 and 2 may be settled by setting off. And §364 provides: “Any mutual claims may be included in the set-off if so agreed by the parties.” And there is a special provision in Ccom § 361: A party, which on the basis of a contract with another party keeps the other party’s current or deposit account, may utilise the pecuniary means in the account only to set off a mutual claim towards the holder of the account according to the contract concerning the keeping of such accounts.

III.–6:106: Two or more rights and obligations

(1) Where the party giving notice of set-off has two or more rights against the other party, the notice is effective only if it identifies the right to which it relates.

(2) Where the party giving notice of set-off has to perform two or more obligations towards the other party, the rules on imputation of performance apply with appropriate adaptations.

COMMENTS

The party giving notice of set-off may have two or more rights against the other party, or may be exposed to two or more rights of that party, or both. Where the party giving notice has two or more rights, that party has to identify the right, or rights, to which the notice of set-off relates. If this is not done, the notice of set-off is invalid for being insufficiently specific. However, it is not necessary expressly to identify the right, or rights, to which the notice of set-off relates; the intention of the party giving notice of set-off may be inferred from the context or circumstances. If no such intention may be inferred, it must be the party giving notice of set-off who has to bear the risk of uncertainty. Set-off constitutes a form of enforcement of the cross-right and a creditor who has several rights against a debtor must always be sufficiently specific as to which of the rights is being enforced.

Illustration 1
A has three rights for €30 each against B. B has a right for €300 against A. All rights are enforceable. A gives notice of set-off. A has to identify the right to which the notice of set-off relates. If this is not done, the notice of set-off is invalid.

Where the party giving notice of set-off is exposed to two or more rights of the other party, the party giving notice is in the position of a debtor making a payment which could be imputed to one or more obligations. Since giving notice of set-off is a means of discharging an obligation, the rules on imputation of performances should apply with appropriate modifications. This means that the determination by the party declaring set-off is normally decisive. If that party fails to determine to which of the obligations the notice of set-off relates, the other party may make the determination. Failing determination by either party, the normal default rules come into operation. In a number of national legal systems, the party receiving the notice of set-off is given the right to object, without undue delay, to the determination made by the party giving notice of set-off, provided the objecting party is in a position to give notice of set-off. This rule is based on the consideration that the issue of imputation, in the context of set-off, should not depend on which of the parties happens to give notice of set-off first. The provision in the present Article, on the other hand, is based on the desire to encourage set-off.

Illustration 2
The situation is the same as in Illustration 1, but B gives notice of set-off. B may determine which of A's three rights is discharged. If B fails to make such determination, A may within a reasonable time make such determination and inform B of the choice. Failing that, the criteria provided in III.–2:110 (Imputation of performance) paragraph (4) apply in the sequence indicated in that Article.

NOTES

1. The regime prevailing most widely in Europe can be summarised as follows: If either of the parties has several rights suitable for set-off, the party giving notice of set-off may determine which of these rights are to be set off against each other. If no such specification is given, or if the other party objects without undue delay, the general rules relating to appropriation of performance apply with appropriate modifications; GERMANY CC § 396; the NETHERLANDS CC art. 6:137 and see Parlementaire Geschiedenis 512 ff.; AUSTRIA Rummel (-*Rummel*), ABGB II(3)[3], § 1438, no. 17; GREECE CC art. 452; SCOTLAND *Wilson*, Scottish Law of Debt[2], no. 13.6; PORTUGAL CC art. 855; ESTONIA LOA § 201; and POLAND CC art. 451 in connection with CC art. 503. In legal systems where set-off operates automatically, the first part of this proposition does not, of course, apply and the rules relating to the imputation of performance (with appropriate modifications) apply immediately; FRANCE, BELGIUM and LUXEMBOURG: CC art. 1297; ITALY: CC art. 1249; SPAIN: CC art. 1201. For AUSTRIA and the applicability of CC §§ 1415, 1416 see *Dullinger*, 167 ss. In SLOVAKIA, there are no special provisions, but rules can be deduced from the general provisions about juridical acts: CC § 37 provides that a juridical act must be done in a free way, seriously, definitely and intelligibly; otherwise, it is invalid. Under CZECH law, the party must unambiguously identify the rights to be set-off, otherwise the set-off is not effective (see *Švestka/Jehlička/Škárová*, OZ[9], 1031).

III.–6:107: Effect of set-off

Set-off extinguishes the obligations, as far as they are coextensive, as from the time of notice.

COMMENTS

A. No retrospective effect

Set-off does not operate retrospectively. It merely has prospective effect: it is effective as from the moment when all substantive requirements for set-off have been met and when the notice of set-off has become effective. Generally speaking, therefore, the situation has to be evaluated as if both obligations had been performed at the moment when set-off was declared. This has the following consequences.

B. Interest

Interest (on both obligations) runs until set-off has been declared. It may therefore be advantageous to the party paying the higher rate of interest to declare set-off on becoming aware of this possibility.

C. Delay in Payment

Concerning delay in payment, the position is as follows. If B under a contract of sale has to pay A a sum of €100,000 on 10 October and fails to pay on that date, B would normally have failed to perform without excuse. A has the option of claiming performance, of claiming damages or, if the non-performance is regarded as fundamental in the circumstances, of terminating for fundamental non-performance. If B fails to declare a set-off or only subsequently becomes aware of the fact that there is a right against A for the same amount, this does not condone B's breach on 10 October.

D. Agreed payment for non-performance

Whether an agreed payment for non-performance has become due from a party who has not exercised the right to give notice of set-off, depends on the interpretation of the relevant clause. Normally, the agreed sum will have to be paid.

Illustration 1
A has to pay back a sum of €10,000, which he had borrowed from B, by 10 October. The parties have agreed that A has to pay an extra amount of €2000 if he fails to return the money by that date. On 1 September A inherits from his aunt C a right of €30,000 against B. He only realises that on 20 December and declares set-off. Since A has failed to make payment on 10 October, B may right the agreed sum of €2000.

E. Payment made after set-off

If payment is made after set-off has been declared it may be reclaimed under the rules on unjustified enrichment since it is payment of what is not due (i.e. there has been a performance without legal ground). If it was made before the declaration of set-off, it has had the effect of extinguishing the obligation and thereby removing the mutuality requirement for set-off. Thus, there is no particular problem about restitution.

F. Prescription of cross-right

On the effect of prescription on the right to declare set-off, see III.–7:503 (Effect on set-off).

G. Extinction only as far as the obligations are coextensive

Set-off extinguishes the obligations only as far as they are coextensive. This means, as far as monetary obligations are concerned, that they are extinguished only to the extent of the smaller one.

Illustration 2
A has a right of €10,000 against B, B has a right of €5000 against A. Notice of set-off by either A or B leads to the result that A's obligation is extinguished entirely, whereas B still owes A €5000.

H. Set-off of part of the cross right

The party declaring set-off may set off only part of the right against the other party. The obligation corresponding to the remaining part of the right will then not be extinguished.

NOTES

I. Automatic effect and retrospectivity

1. Wherever set-off is effective *ipso iure* (BELGIUM, LUXEMBOURG, and SPAIN), it operates although the parties have no knowledge of it. But even most legal systems which require a notice of set-off attribute retrospective effect to that notice: set-off has the effect that the rights, as far as they are coextensive, are deemed to have been discharged at the moment at which, being suitable for set-off, they first confronted each other. This is the rule adopted in GERMANY (CC § 389), AUSTRIA (*Dullinger* 147 ss 96 ff.), GREECE (CC art. 441), SLOVENIA (LOA art. 312(2)) the NETHERLANDS (CC art. 6:129 and *Asser-Hartkamp*, Verbintenissenrecht I, n. 538); CZECH REPUBLIC CC § 580; and PORTUGAL (CC art. 854 and *Varela* II, 224 ff). The position is the same in ITALY where set-off extinguishes both obligations "*dal giorno della loro coesistenza*" (provided that set-off is raised by a party *vis-à-vis* the other one) (CC art. 1242(1)). In SLOVAKIA, the CC § 580 provides that the discharge occurs at the moment when the relevant receivables capable to be set off meet each other. Set-off in SCOTLAND (which must be pleaded in court and sustained by judgment before it has effect) also operates retrospectively: *McBryde*, Law of Contract in Scotland, no. 25.54; *Wilson*, Scottish Law of Debt[2], no. 13.6. In POLAND the declaration of set-off has retrospective force from the moment set-off became possible (CC art.499). The same holds true also under ESTONIAN law, but with the qualification that if interest has already been paid on one or both of the claims, the set-off has retroactive effect only for the last period for which interest was paid (LOA § 197(2)).
2. Both approaches largely lead to the same practical results. Thus, in particular, it is generally accepted that interest no longer accrues (and where it has been paid it may be reclaimed by means of the *condictio indebiti*; but cf., for the NETHERLANDS, CC art. 6:129(2)), that neither party can be held to have been in delay (*mora debitoris*), and that conventional penalties have not become exactable; GERMANY: *Gernhuber* 309 ff.; ITALY: *Dalbosco*, La compensazione per atto unilaterale, 365 ff.; the

NETHERLANDS: *Asser-Hartkamp*, Verbintenissenrecht I, n. 538 and also CC art. 6:134; AUSTRIA: Rummel (-*Rummel*), ABGB II(3)[3], § 1438, nos. 14, 15. CZECH REPUBLIC: *Švestka/Jehlička/Škárová*, OZ[9], 1033.

3. Where a debtor has paid the debt even though it had already been discharged by way of set-off, according to FRENCH and BELGIAN law and the law of LUXEMBOURG the debtor is granted the *condictio indebiti* only if there was a just cause for not knowing of the claim on account of which the obligation had been discharged (CC art. 1299). In GERMANY, the question has for a long time been disputed (see, e.g., *Dernburg* 587 ff.); the prevailing view today is that a person who has paid without realising that notice of set-off could have been given cannot make a successful unjustified enrichment claim (*Gernhuber* 288 ff; for AUSTRIA, see Rummel (-*Rummel*), ABGB II(3)[3], § 1438, n. 15 who, however, records a number of dissenting authors; for ITALY, see *Di Prisco*, Estinzione 324; *Perlingieri*, Estinzione, 379; cf. also the discussion by *Dullinger* 162 ff.). In SPAIN, modern writers maintain that a debtor who has paid without realising that there is an enforceable claim against the creditor cannot take advantage of the *condictio indebiti* (in spite of the fact that CC art. 1202 seems to adopt the *ipso iure* effect of set-off): *Díez-Picazo* II, 554.

II. Prospective effect

4. The only legal systems in Western Europe which rely on an informal declaration of set-off but which do not attribute retrospective effect to it are the Nordic ones; for SWEDEN, see *Lindskog*, Kvittning 533 ff, 526 f; for DENMARK, see *Gomard*, Obligationsret III, 207; for FINLAND, see *Aurejärvi & Hemmo* 183. Somewhat surprisingly, in view of this, Swedish and Finnish law also know a rule which mirrors CC § 390(2) [see now § 215 since 1 Jan. 2002] ("Prescription does not exclude set-off, if the claim barred by prescription had not prescribed at the time at which it could have been set-off against the other claim"): Preskriptionslag § 10; Decree on Prescription 1868 § 5. It does not correspond with the general prospective effect of set-off in Swedish law and is therefore the subject of criticism: *Lindskog*, Kvittning 115 ff; for DENMARK, see *Gomard*, Obligationsret III, 207. However, for rights arising from the same legal relationship set-off, in certain respects, operates retrospectively. Interest will not accrue from the moment when the two rights could have been set off against each other; also set-off is not excluded if the cross-claim had prescribed before the notice of set-off was given; see Supreme Court, Ugeskrift for Retsvaesen 1956, 598; *Gomard*, Obligationsret III, 207. ENGLISH (and probably also IRISH) law also merely attributes prospective effect to set-off: it takes effect on and from the date of judgment. In GERMANY and AUSTRIA, retrospectivity has recently come in for criticism: see *P. Bydlinski*, AcP (1996) 196, 281 ff; *Dullinger* 174 ss ff, 182 ss ff; *Zimmermann*, Fs. Medicus 721 ff. It is not based on convincing rational arguments but rather constitutes an unreflected continuation of a thinking pattern of the *ius commune*, based upon Justinian's obscure pronouncements on the *ipso iure* effect of set-off (Inst. IV, 6, 30; cf. also C. 4, 31, 14; and see *Zimmermann*, FS Medicus 724; *Pichonnaz*, (2000) 68 TR 541 ff. Prospectivity appears to be the more natural rule and leads to entirely satisfactory results. In SLOVAKIA, the extent of set-off is regulated in CC § 580, see previous notes. The discharge occurs at the moment when the rights which are capable of being set off meet each other.

III.–6:108: Exclusion of right of set-off

Set-off cannot be effected:

(a) where it is excluded by agreement;

(b) against a right to the extent that that right is not capable of attachment; and

(c) against a right arising from an intentional wrongful act.

COMMENTS

A. Exclusion by agreement

Following the general principle of freedom of contract, the right of set-off may be excluded by agreement, subject to the normal limitations on private autonomy (e.g. the rules dealing with unfair standard terms). For example, a contract between a lawyer and a bank might ring-fence the lawyer's client accounts with a bank so as to prevent set-off by the bank against the lawyer's personal debts to the bank. It is a question of interpretation whether an agreement to exclude set-off refers only to rights arising from a specific legal relationship or to all rights between the parties.

B. Right not capable of attachment

Set-off should not deprive a person of rights (such as those for maintenance or wages) which provide a minimum level of subsistence. The simplest, most appropriate and most comprehensive way of dealing with this issue is to prohibit set-off to the extent that the principal right is not capable of attachment. Whether, and to what extent, the principal right is capable of attachment is decided by the law applicable to that issue.

C. Right arising from an intentional wrongful act

A creditor who is unable to collect what is due may be tempted to resort to self-help. The usual textbook example of a disappointed creditor feeling free to assault the debtor (secure in the knowledge that he will be able to set off his unpaid right against the debtor's right for damages) may not appear to be practically relevant. More realistic is the situation where the creditor holds some object belonging to the debtor and proceeds wrongfully to sell that object in order to satisfy the debt out of the proceeds. In those legal systems which do not allow the attachment of rights arising from delict, sub-paragraph (b) of the Article would already have the effect of excluding set-off.

D. Liability for unpaid calls

In some national legal systems it is regarded as desirable to prohibit contributories to a company from setting off the company's debt to them against their liability for unpaid calls. Such a rule serves to safeguard the interest of the company's creditors in the undiminished capital fund of the company but belongs in company law rather than in the general rules on set-off.

NOTES

I. Exclusion by agreement

1. It is recognised everywhere that set-off may be excluded by contract; ENGLAND: *Derham* § 5.78 ff.; IRELAND: *Hegarty & Sons Ltd.* v. *Royal Liver Friendly Society* [1985] IR 524; SCOTLAND: *McBryde*, Law of Contract in Scotland, nos. 25.53 and 25.56, *Wilson* para. 13.6; FRANCE: François, Les Obligations, Régime Général, n° 79; *Cornelis,* Algemene theorie n. 678 (p. 879 bottom); LUXEMBOURG: Cour d´Appel, 1 October 1963, Pas. Lux. vol. 19, 209; GERMANY: *Gernhuber* 274 ff.; ITALY: *Bianca*, Diritto civile IV, 491; NETHERLANDS: *Asser-Hartkamp*, Verbintenissenrecht I, n. 531; AUSTRIA: *Koziol and Welser*, Bürgerliches Recht II[13], 105 103; Rummel (-*Rummel*), ABGB II(3)[3], § 1440, no. 29 ss; there are, however, certain restrictions on the exclusion of set-off by agreement, if a consumer is involved (see ConsProtA § 6(1) no 8 , n. 29; Scotland: *McBryde*, Law of Contract in Scotland, nos. 25.57 f; SWEDEN: *Lindskog*, Kvittning 303 f.; DENMARK: *Gomard*, Obligationsret III, 196 (exceptions apply with regard to leases of land and consumer contracts where the tenant's and the consumer's right to set-off cannot be excluded); FINLAND: *Aurejärvi & Hemmo* 192; and the CZECH REPUBLIC: *Švestka/Jehlička/Škárová*, OZ[9], 1035. According to the GREEK CC art. 450(2) the debtor may waive in advance – even unilaterally – the right of set-off. Although not expressly regulated in the SLOVENIAN LOA this is recognised by doctrine and case law, see *Juhart* in *Juhart/Plavšak*, 409.

II. Claim not capable of attachment

2. Nearly all legal systems also ensure that set-off should not be allowed to deprive a person of rights which provide a minimum level of subsistence; FRANCE and BELGIUM: CC art. 1293, n. 3, *Terré/Simler/Lequette*, Les obligations, no. 1302 (for France) and *Cornelis*, Algemene theorie n. 674 (for Belgium); GERMANY CC § 394 and *Gernhuber* 261 ff.; ITALY CC art. 1246, n. 3 and *Bianca*, Diritto civile IV, 489 ff; the NETHERLANDS CC art. 6:135(a) and *Asser-Hartkamp*, Verbintenissenrecht n. 552; SLOVENIA LOA art. 316(1); SPAIN: CC art. 1200(2); POLAND CC art. 505; PORTUGAL: CC art. 853, n.1-b (except where both rights are not capable of attachment); AUSTRIA: *Koziol and Welser*, Bürgerliches Recht II[13], 105 103 and *Dullinger* 121 ss ff.; GREECE CC art. 451; SWEDEN *Lindskog*, Kvittning 247 ff., 283; DENMARK *Gomard*, Obligationsret III, 196; FINLAND: *Aurejärvi & Hemmo* 192 ff; ESTONIA: LOA § 200(1) 2); concerning ENGLISH (and probably IRISH) law, see *Wood* 12–04 ff; and the CZECH REPUBLIC: CC § 581(1).

III. Claim arising from a wilful delict

3. The rule concerning wilful delicts (dating back to C. 4, 31, 14, 2; on which see *Dernburg* 511 ff.) is found, in some form or other, in many legal systems. The FRENCH and BELGIAN CCs contain a fairly literal version of the Roman rule: set-off may not take place as far as concerns a claim for restitution of an object of which the owner was unlawfully deprived: CC art. 1293, n. 1 and *Terré/Simler/Lequette*, Les obligations, no. 1302; cf. also for ITALY CC art. 1246, n. 1; and, for AUSTRIA, CC § 1440. The GERMAN CC has generalised the underlying idea: set-off is not permissible against a right arising from a wilful delict: CC § 393 and *Gernhuber* 259 ff.; rules along the same, or very similar, lines can be found in the NETHERLANDS (CC art. 6:135(b)); POLAND: CC art. 505; PORTUGAL (CC art. 853, n.1-a); GREECE (CC art. 450(1)); ESTONIA (LOA § 200(1) 1)); SLOVENIAN LOA art.

316(3); SWEDEN (*Lindskog*, Kvittning 258 ff.) and FINLAND (Supreme Court 1969 II 90 and 1995: 196). ENGLISH and IRISH law do not have this rule; but see *Wood* 12–127 ff for certain "latent expressions" of it. The CZECH CC refers to “delicts causing damage to health” (which of course need not be wilful): CC § 581(1) provides that rights to damages for injury to health cannot be unilaterally set-off, unless the cross-right is of the same kind.

IV. Liability for unpaid calls

4. Most legal systems prohibit contributories to a company from setting off the company’s debt to them against their liability for unpaid calls, though there are a number of differences in detail. But this is widely seen to be a matter of company law. For ENGLAND: *Wood* 12–127 ff and *Derham* § 8.50 ff; for GERMANY: *Gernhuber* 270 ff; for AUSTRIA: Rummel (-*Rummel*), ABGB II(3)[3], § 1440, no. 28; for ITALY: *Nappi*, Contributo, 136 ff.

V. Other exceptions

5. In POLAND (CC art.505), set-off cannot be effected with respect to claims for providing means of subsistence or claims in respect of which set-off is excluded by specific regulations. Similar restrictions can be found in ESTONIAN law (LOA § 200(1) 1) and 3); additionally, claims for compensation for damage arising from bodily injury or the death of a person cannot be set off (LOA § 200(1) 1)). Also, LOA § 202 prohibits set off by the party who has to perform a contractual obligation for the benefit of a third party (with an exception for insurance contracts in LOA § 456). In SPAIN CC art. 1200 bars setting off debts arising out of deposit or gratuitous loan (comodato). In SLOVENIA the LOA art. 316(5) bars setting off claims arising from the statutory maintenance right. In SLOVAKIA, an exclusion is given in CC § 581 according to which: (1) set-off is inadmissible against a right to compensation for damage caused to health unless the other right is to compensation for damage of the same kind. Set-off is also not admissible against a right which cannot be affected by enforcement of a decision. CZECH law in addition excludes the unilateral set-off of rights which cannot be asserted in court (e.g. rights to winnings from unlicensed bets and games) and bank deposits (CC § 581(2); funds in a current or deposit account may be subject to a set-off by the bank only against reciprocal rights which arose under the bank account contract (Ccom § 361).

Section 2: Merger of debts

III.–6:201: Extinction of obligations by merger

(1) An obligation is extinguished if the same person becomes debtor and creditor in the same capacity.

(2) Paragraph (1) does not, however, apply if the effect would be to deprive a third person of a right.

COMMENTS

Paragraph (1) contains a widely recognised rule of evident utility. If the same person becomes debtor and creditor in the same capacity the relevant obligation is extinguished. Paragraph (2) provides an exception to this rule where the effect of extinction by merger would be to deprive a third person of a right.

NOTES

1. SCOTTISH law has a doctrine of *confusio* extinguishing obligations (*McBryde*, Law of Contract in Scotland, nos. 25.30-25.31). ENGLISH law also recognises that an obligation may be extinguished if the obligation and the corresponding right become vested in the same person: See *Halsbury's* Laws of England IX(1)[4], no. 1065.
2. According to the SPANISH CC art. 1192 a right is extinguished when the debtor and creditor merge, irrespective of how this happens. Sureties also can rely on this extinction (art. 1193). The same applies under the SLOVENIAN LOA art. 328. According to DUTCH the same rules apply with minor exceptions (art. 6:160).
3. The AUSTRIAN CC § 1445 also provides that the obligation generally ceases to exist when debtor and creditor merge. This does not apply when the debtor inherits the property of the creditor, as the right is then a right of the assets of the deceased. But also in the vice versa situation that the creditor becomes the heir of the debtor, the former can ask for the separation of the assets which in consequence does not lead to the extinction of the obligation. The third exception regards rights that are registered in the public books. These continue to exist (see CC § 1446).
4. The ESTONIAN LOA § 186(3) recognizes merger as a basis for extinction of a debt. LOA § 206(1) sent. 2 further specifies that extinction does not result from the merger if the person has legitimate interest in the continuation of the debt. If a pledge or other real right is established with regard to a claim, the claim remains in force with regard to the pledgee or the person holding the real right regardless of merger (with the result that the pledgee has become a creditor of the claim), LOA § 206(3). Regulation of merger does not apply to claims arising from securities (LOA § 206(4)).
5. According to GREEK Law, CC art. 453, an obligation is extinguished by merger when the capacities of the creditor and debtor have been united in the same person. The obligation revives when this union ceases to exist (for examples, see *Stathopoulos*, no. 243). However, rights of a third person on the extinguished right (such as pledge or usufruct of the right) are maintained (see Stathopoulos, Law of Obligations, § 24, no 57).

6. In SLOVAKIA if the right and obligation merge in one person in any way, the right and obligation are extinguished unless an act stipulates otherwise. (CC § 584)

7. Under FRENCH and BELGIAN law, the right is also extinguished when the debtor and the creditor in the same legal relationship merge in one and the same person (CC art. 1300). Such mergers occur with respect to physical persons, particularly in successions, but with respect also to legal persons as in the case of mergers of companies. The extinction of the obligation brings about the extinction of its accessories, including securities, as provided by CC art. 1301 ("the merger which affects the principal debtor extends to its guarantors"). In the case of plurality of creditors or of debtors, the extinction may only be partial in so far as the merger only affects one of them. It may be emphasised that legal authors regard merger more as a form of paralysis or parenthesis than of complete extinction of the obligation (See *Terré/Simler/Lequette*, Les obligations[11], 1338, no. 1414).

8. For CZECH law, see CC § 584: the merger applies strictly in every case when one person acquires the positions of both debtor and creditor.

9. In HUNGARY under CC § 322 an obligation is extinguished if the same person becomes the debtor and the creditor. Extinction does not affect the rights and obligations of third persons.

CHAPTER 7: PRESCRIPTION

Section 1: General provision

III.–7:101: Rights subject to prescription

A right to performance of an obligation is subject to prescription by the expiry of a period of time in accordance with the rules in this Chapter.

COMMENTS

A. Terminology and meaning of prescription

In traditional civilian terminology the term "prescription" comprehends (i) the acquisition of title to property as a result of the lapse of time ("acquisitive prescription") and (ii) the loss of a right as a result of the lapse of time ("extinctive prescription"). Predominantly, however, the combination of both types of prescription under one doctrinal umbrella is no longer regarded as helpful since they are largely governed by different rules. This Chapter deals only with the latter type of prescription. The term "extinctive" prescription, however, is incorrect in the present context because, under the rules set out in this Chapter, the right is not extinguished. It continues to exist but the debtor is granted a right to refuse performance; see III.–7:501 (General effect) paragraph (1). More appropriate, though not very descriptive, is the terminology of Scottish law ("negative prescription"). An alternative would be "liberative prescription". Another possibility would be "limitation of rights", i.e., a transposition into terms of substantive law of the English concept of "limitation of actions". For the sake of simplicity and since these rules do not deal with acquisitive prescription the term "prescription" is generally used without any qualifying adjective.

In the Articles the term “prescription” refers to the legal effect on the right of the lapse of time. Prescription occurs at a precise moment. The term “period of prescription” refers to the period on the expiry of which prescription occurs.

B. Prescription of rights to performance

Central to the institution of prescription is the notion of a right to performance of an obligation. Prescription is thus conceived as an institution of substantive law: because of the lapse of time the debtor is entitled to refuse performance. If the debtor does so, the creditor effectively loses the right to demand performance. As a result, of course, the creditor can no longer pursue the right in court. But prescription does not only limit the right to bring an action: it bars the actual right to receive performance. Thus, for instance, where a debtor invokes prescription against a demand to pay, and where all requirements for prescription are met, the debtor is no longer delaying payment and therefore no longer suffers the consequences attaching to non-performance of an obligation.

Since prescription applies only to rights to performance of an obligation, it does not affect a party's right to give notice of avoidance, to terminate for fundamental non-performance, or to affect a legal relationship in any other way. The specific rules governing such rights generally

require them to be exercised within a reasonable time. (On such special time limits, see also D, below.)

C. Right to withhold performance and right to reduce the price

The right to withhold performance is also not subject to prescription. This means that the right to withhold performance is still available even if the prescription period for the right on which it is based has run out.

> *Illustration*
> A has sold a car to B. The car has to be delivered on 10 October 1996, the purchase price has to be paid on 10 December of the same year. The prescription period for both rights is three years. After three years, B has still not received the car. If B sues A for the car after 10 October, A can raise the defence of prescription. If A, in turn, sues B for the purchase price on 10 November, B may exercise the right to withhold performance; it remains unaffected by the prescription of B's own right against A. After 10 December, B can raise the defence of prescription against A's claim.

The right to reduce the price is also not subject to prescription. If a party, as a result of having accepted a performance not conforming to a contract, has such a right of reduction, it may be exercised when the other party demands payment. The right to payment itself, of course, is subject to the normal rules of prescription. If the party entitled to reduce the price has already paid a sum exceeding the reduced price, the excess may be recovered from the other party. This right to payment of the overpaid amount is subject to the normal rules of prescription.

D. Range of application

This Chapter applies not only to contractual rights but also to other rights to performance. It would be unjustifiable in theory, and productive of difficulty and inconvenience in practice (see the Comments to III.–7:201 (General period)) to apply the rules on prescription only to some rights to performance. On the other hand, it does not appear to be advisable to cover other types of asset or right, such as property rights or the right to marry or the right to be an heir or executor. Here we are often dealing with the protection of absolute rights (such as the right of ownership). If they were subject to prescription, this would entail a considerable, and arguably unjustifiable, qualification of the absolute right. Thus, it may be maintained that rights arising from absolute rights should only perish with the absolute right itself. Also, within the law of property there will have to be a careful co-ordination with the law of acquisitive prescription, or usucaption. At the same time, the law on rights to performance of obligations is a sufficiently broad and distinct area of the law to warrant a special set of rules. The comparative evidence points in the same direction: most modern prescription regimes apply, expressly or at least effectively, to the law of obligations.

These rules contain a number of time limits (e.g. for acceptance; for a notice of avoidance; for a notice of termination for non-performance; and for the right to seek specific performance). These time limits do not constitute prescription periods. However, some of the rules contained in this Chapter (e.g. III.–7:303 (Suspension in case of impediment beyond creditor's control)) express policies which are also relevant in assessing whether an acceptance has been declared, or a notice of avoidance or of termination has been given, or specific performance has been sought, within a reasonable time from the moment set out in the relevant provisions.

The rules contained in this Chapter do not rule out the possibility that a party may be barred from pursuing a right even before the period of prescription has run out. This may be the case if the party has engendered reasonable reliance in the other party that the right would no longer be pursued and if the decision to pursue the right would therefore constitute a breach of the principle of good faith and fair dealing.

E. Underlying policy considerations

Prescription is based, essentially, on three policy considerations. (1) Protection must be granted to a debtor who, in view of the "obfuscating power of time" (*Windscheid and Kipp*, § 105 (p. 544)), finds it increasingly difficult to defend an action. (2) Lapse of time demonstrates an indifference of the creditor towards the right which, in turn, may engender a reasonable reliance in the debtor that no claim will be pursued. (3) Prescription prevents long drawn-out litigation about claims which have become stale. Thus, prescription aims, in a very special way, at legal certainty. Even well-founded claims may be defeated, but that is the necessary price a legal system has to pay for the benefits of prescription. The need for legal certainty must, however, be balanced against the reasonable interests of the creditor. Since prescription can effectively amount to an act of expropriation, the creditor must have had a fair chance of pursuing the claim. This consideration is taken account of, particularly, by the suspension ground provided in III.–7:301 (Suspension in case of ignorance)

In spite of its potential for causing harsh results in individual cases, prescription is generally regarded as an indispensable feature of a modern legal system.

NOTES

I. General

1. All European legal systems recognise that rights and obligations can be affected by the lapse of time. On the history of the law of prescription, see *Coing* I, 183 ff; *Coing* II, 280 ff; *Johnston* para. 1.13 ff; *Oetker* 12 ff.

II. Substantive or procedural?

2. The functional equivalent to liberative prescription in ENGLISH and IRISH law is limitation of actions. This is procedural in nature: limitation does not affect the right but merely the ability to pursue that right in court. This approach is by no means alien to the civilian tradition, and indeed there are still conflicting texts and views in some jurisdictions, but the prevailing doctrine today in most continental European countries is that prescription is a matter of substantive law and that the obligation itself is extinguished. See e.g. *Marty & Raynaud,* Obligations II, nn. 341 ff.; *Ferid & Sonnenberger* (1 C 246); *Spiro,* Begrenzung § 241; *Storme,* in: *Hondius* 47. In SCOTTISH law prescription extinguishes obligations but a limitation system like that of England has been introduced in respect of personal injuries cases (Prescription and Limitation (Scotland) Act 1973; see *Johnston*, passim).). *Lipstein* (n. 29) has noted that prescription in all modern European legal systems contains elements both of substantive and procedural law; cf. also *Staudinger(-Peters)* § 194, n. 4. In POLAND, the obligation which is subject to prescription does not extinguish, but it can no longer be brought up in a court action, unless the debtor has waived the right to rely on prescription (CC 117 § 2). Also, a debtor who performs an obligation after it has prescribed cannot claim back as undue anything supplied by virtue of the performance.

Under ESTONIAN law, prescription is a matter of substantive law, creating a right to refuse to perform the obligation after expiry of the period of prescription (GPCCA §§ 142(1), 143); the obligation itself is not extinguished. In CZECH law both procedural prescription (prescription stricto sensu) and substantive prescription (preclusion) are recognized (CC art. 100.1 and art. 583). The same holds true for ITALY (see arts. 2934 and 2940 CC, as well as the discussion in *Vitucci*, 27 ff. PORTUGUESE law knows another institution (caducity, "caducidade", CC arts. 328 ff), which is similar to the English limitation of actions, but the distinction between prescription and caducity is not always clear (*Fernandes*, Teoria geral do direito civil, II, 661 ff). In practice, caducity applies when a legal rule, without reference to prescription, establishes a time limit for exercising a right (CC art. 298, 2). Caducity is not subject to suspension or interruption (CC art. 328). According to the SLOVAK CC § 100(1) the obligation subject to prescription is not extinguished. However the right cannot be adjudicated upon by a court if the debtor raises an objection based on prescription once the right has prescribed. Performing voluntarily the prescribed obligation does not give rise to an unjustified enrichment.

3. The UNCITRAL Convention on the Limitation Period in the International Sale of Goods (in force 1 August 1988 but only ratified so far by 17 states, none belonging to the European Union) attempts "to sit on the fence": *Smit*, (1975) 23 AJCL 339; cf. also *Boele-Woelki* 112 ff. It uses the term "limitation" but talks of "claims" which can no longer be exercised. The qualification of prescription as substantive or procedural used to be important for private international law but the Rome Convention on the Law Applicable to Contractual Obligations has come down in favour of a substantive characterisation (art. 10(1)(d)). See also Chapter 10 of the UNIDROIT Principles and *Bonell*, Limitation Periods, 520 ff)

III. Prescription of rights but not defences etc

4. Prescription of defences raises difficult problems doctrinally. Under the *ius commune*, defences were widely regarded as not being subject to prescription. This principle is still accepted in a number of jurisdictions; see for FRANCE, *Ferid & Sonnenberger* 1 C 249; for BELGIUM, *Storme*, in: *Hondius* 44; for GREECE CC art. 273; for POLAND (CC 117§1 - pecuniary claims subject to prescription). The same applies under the SLOVENIAN LOA art. 335(1). The position is, essentially, the same in ENGLAND as a result of the fact that only the remedy and not the right is barred. Most legal systems do not have a general rule, but some have specific provisions in terms of which defences may, under certain circumstances, survive prescription of the right on which they are based. See *Spiro*, Begrenzung § 215; for ITALY, see Cass. Sez. III 28.7.1987, n. 6542, in Giust. civ. 1988, I, 456; more recently, Cass. Sez. II 5.5.2003 no. 6755 and the discussion in *Vitucci* 63 ff. Sometimes a distinction is drawn between independent defences and defences based upon a right (for SPAIN, see TS 12.3.1965; *Diéz-Picazo & Gullón Ballesteros*, 467). Independent defences are not subject to prescription: others are. For GERMANY, see *Münchener Kommentar (-von Feldmann)* § 194, n. 24. Generally on prescription of defences (and the effect of prescription of rights on defences), see *Spiro*, Begrenzung §§ 215 ff, 540.

5. The matter of most practical relevance appears to be the right to withhold performance (cf. Article 9:201 PECL). For GERMANY, see CC § 215; for PORTUGAL, see CC art. 430; for DENMARK, see *Gomard*, Obligationsret III, 232; for the NETHERLANDS CC art. 6:56; for AUSTRIA see *Dullinger*, Handbuch der Aufrechnung, 165 s (regarding set-off).

IV. Range of application

6. Most national laws give rules on prescription a wide application. The GERMAN rules relating to liberative prescription (CC §§ 195 ff) are based on the notion of *Anspruchsverjährung* and cover a much wider ground than the law of obligations. For criticism, see *Peters & Zimmermann* 186, 287 and *Zimmermann/Leenen/Mansel/Ernst*, 2001 JZ 684, 693. Similarly to German law, the ESTONIAN notion of *aegumine* (GPCCA § 142ff.) covers the right to require performance of an act or omission from another person (claim) irrespective of the basis of the claim (i.e. incl. claims based on property law, family law and succession law). The ITALIAN CC art. 2934 refers to the extinction of rights, without any qualification, but arts. 948(3) and 533(2) exempt *rei vindicatio* and *hereditatis petitio* from prescription. The situation in SLOVENIAN law is the same as in Italian law. The PORTUGUESE prescription rules apply not only to obligations but, in principle, to any right (CC art. 298(1)). According to the AUSTRIAN CC § 1451, prescription leads to the loss of a "right" but the exceptions provided in §§ 1458 ss ff make it clear that prescription effectively relates to rights based on an obligation. The long negative prescription (20 years) in SCOTTISH law applies to all rights and obligations that have become enforceable but there is a list of imprescriptible rights and obligations as well as special regimes for defective products and personal injuries and death (Prescription and Limitation (Scotland) Act 1973 ss. 7, 17, 22A-22D, Sch.3); in addition its short negative prescription (5 years) applies to a limited group of obligations, including those arising from breach of contract, non-contractual liability for damage (unless for personal injuries or death, where, as noted above, a limitation system operates) unjustified enrichment and *negotiorum gestio* (1973 Act, s. 6 and Sch.1). In the NETHERLANDS, the CC arts. 3:306 ff refers to *rechtsvorderingen*; on which concept see *Asser-Hartkamp*, Verbintenissenrecht I, nn. 638 ff.; the same is true of BELGIUM, see CC arts. 2262 and 2262bis and *Claeys*, 1998-99 R.W. 386 f. Generally, see *Spiro*, Begrenzung §§ 334 ff. For DENMARK, see Danske Lov art. 5.14.4, which refers to "instruments of debt", but which applies to all claims not covered by the numerous exceptions provided in the Act no 274 of 22 Dec. 1908, which applies to ‘claims ‘(*fordringer)*. In SPANISH CC art. 1930, prescription extents to any right and action.

7. Regarding the range of application, the SLOVAK law refers to all property rights (except for rights of ownership) being subject to prescription (CC § 100(2)). In commercial relationships (Ccom § 387(2)) all rights arising from contractual relationships are subject to prescription, with the exception of the right to cancel a contract concluded for an indefinite period of time.

V. Underlying policy considerations

8. For a discussion of underlying policy considerations, see *Savigny*, 267 ff.; *Story*, no. 576; English Law Commission Consultation Paper No. 151 on Limitation of Actions, 11 ff.; *Andrews*, (1998) 57 Camb.L.J. 590; *Johnston*, paras. 1.40 ff; *Spiro*, Begrenzung §§ 3 ff.; Staudinger(-*Peters*), BGB, Pref. to §§ 194 ff, nos. 5 ff; *Asser-Hartkamp*, Verbintenissenrecht I n. 653; *Loubser*, 22 ff; *Zimmermann*, 2000 JZ 853 ff.

Section 2: Periods of prescription and their commencement

III.–7:201: General period

The general period of prescription is three years.

COMMENTS

A prescription regime has to be as simple, straightforward and uniform as possible. This is why the Chapter lay down a general period of prescription covering all rights to performance of an obligation.

A. The argument for uniformity

One of the functions of the law of prescription is to prevent costly and long-drawn out law-suits (*ut sit finis litium*). It would therefore be intolerable if the prescription rules themselves gave rise to excessive litigation on the question whether or not prescription had occurred in a particular case. Wherever a rule lays down a period of prescription for a specific type of right, it is necessary to define that type of right. The concepts used in any such definition, however, are open to interpretation. At the same time, any type of right described in one provision will be bordering on other rules providing for different periods of prescription. Every creditor against whom the shorter of the two periods has run out will thus be tempted to argue that the right falls under the provision with the longer period, and the courts will then have to determine where exactly the line between the two provisions must be drawn. If one of the prescription rules is regarded as objectionable, there is the added danger that courts and legal writers may be tempted to distort the concepts used in these rules and to redefine the borderline between, for instance, different types of contract from the point of view of prescription rather than from a general perspective.

Moreover, there do not appear to be any general criteria which would be both sufficiently clear and convincing to provide a basis for a differentiated prescription regime, at least not within the law of obligations. Thus, one might want to subject rights arising from everyday transactions, or of a petty nature, to shorter periods of prescription than complex or extraordinary rights. But it is impossible to draw a plausible borderline and to define this borderline in precise statutory terms. Another potential point of reference might be the professional position of the creditor or debtor. But any regulation based on it would either be very casuistic and in permanent danger of being outdated, or too abstract and general (and thus open to conflicting interpretation). Moreover, any such differentiation would only appear to make sense as far as the right to performance under a contract and possibly also a right to damages for breach of contract are concerned. It is much less convincing for other rights arising *ex lege*, with the handling of which even a professional person often has little experience.

The most common criterion employed in the context of differentiated periods of prescription is the (legal) nature of the right. But this criterion, too, does not ultimately appear to be suitable. Whether or not prescription has occurred is a question which often has to be determined at a time when the legal position between the parties is unclear. It may be doubtful whether a contract is valid. The creditor does not, therefore, know whether there is a right to

specific performance, to damages, or to redress of unjustified enrichment. Or a contract may lie on the borderline between sale and lease, or sale and the contract for work, or the contract for work and the contract of service. Or the creditor's right to damages may be based on contract or on the fact that damage has been caused by another in a non-contractual situation or on *culpa in contrahendo*, wherever that may fit in. Hardly any right within the law of obligations can be dealt with in isolation. This interconnectedness is of particular relevance with regard to the law of prescription – with the result, *inter alia*, that differentiated periods of prescription tend to lead to inconsistencies in result and evaluation.

Thus, for instance, rights to reversal of an unjustified enrichment arising as a result of the invalidity of a contract should not prescribe within a longer period than contractual rights to specific performance: the "obfuscating power of time" hits the debtor as hard in the one case as in the other. At the same time, it would be inadvisable to differentiate between contractual restitution rights and those based on unjustified enrichment, or between the different types of unjustified enrichment rights. Unjustified enrichment, moreover, is frequently an alternative to benevolent intervention (*negotiorum gestio)*. Also, there is so often a concurrence between rights based on unjustified enrichment and rights based on damage caused by another in a non-contractual situation that they should be subject to the same prescription regime. Rights of the latter type are so closely related to *culpa in contrahendo* (fault in the process of contracting) or to contractual rights for consequential loss that no distinction should be drawn here either; and rights to damages for non-performance should not, at any rate, be subject to a longer period of prescription than the right to specific performance in view of the aggravated problems of proof. In this way nearly all important types of right are interconnected with each other. This is also the reason why the prescription rules should not be tailored specifically to contractual rights. If prescription rules are to conform to the general policy objectives mentioned in the Comments to III.–7:101 (Rights subject to prescription), they cannot attempt to provide the best possible regime for each individual type of right but must be applicable as broadly as possible. In particular, they have to take account of the need for clarity, certainty and predictability which is jeopardised by any unnecessary complexity. Thus, on balance, it is better to have a regime that does not suit all rights equally well than one that makes it difficult for debtors as well as creditors to assess their position and adjust their behaviour accordingly.

It is also not advisable to lay down (as some codifications do) a special rule for rights to periodical performances. The range of such rights is difficult to define. Moreover, the need for a special rule has to be evaluated against the background of a very long general period of prescription (e.g. thirty years). In the Chapter, however, the general period is only three years.

The general period laid down in the Chapter covers all rights to performance of obligations. It has been pointed out above that any differentiation within this area of the law may easily lead to inconsistency and distortion. Rights of a different nature arising in other areas of the law (especially property law, family law and succession) are not covered by this Chapter.

B. International trends

If we look at the development of the law of prescription, at new enactments and drafts proposed, over the past hundred years we find (i) a trend towards shorter periods of prescription and (ii) a trend towards uniform periods of prescription. And while modern European legal systems still recognise a large variety of periods, ranging from six months to thirty years, more and more rights in more and more countries are subject to a prescription period of between two and six years; and there is a growing conviction that the general period

should be somewhere between these poles. To a certain extent the choice is arbitrary. But if a third international trend is also kept in mind, namely the increasing recognition of the discoverability criterion (see III.–7:301 (Suspension in case of ignorance)), a period closer to the lower rather than the upper end of this spectrum should be chosen. For as long as a legal system makes sure that the period of prescription does not run against a creditor who does not know, and cannot reasonably know, of the claim, it may expect the creditor to act reasonably expeditiously. Three years is the period provided in an important act of European legislation - the Product Liability Directive (85/374/EWG) art. 10 - and it appears to be more and more accepted as a general standard within EU legislation.

NOTES

I. Criticism of unnecessary complexity

1. Unnecessary complexity in prescription rules has been widely criticised: see *Spiro*, Begrenzung § 259; *Hondius*, in: *Hondius*, 15 ff; *Loubser* 24. Similar criticism has been made in ENGLAND and in FRANCE: see Law Commission Consultation Paper on Limitation of Actions, 241 ff; *Bénabent* 123 ff. The BELGIAN Constitutional Court has even held that inconsistencies, based on widely diverging periods of prescription, may constitute an act of unconstitutional discrimination: see *M.E. Storme*, (1997) 5 ERPL 82 ff.; *Claeys*, 1998-99 R.W. 379 ff. ; since then, many prescription periods have come under scrutiny by the Constitutional Court and several divergencies have been declared unconstitutional. But cf. also *Andrews*, (1998) 57 Camb.L.J. 596.

II. Long general periods: complex regimes

2. A number of European legal systems have long general periods coupled with many different shorter periods for special situations, leading to complex regimes. The general prescription period in the GREEK CC is twenty years (art. 249) but for many important rights the code lays down much shorter periods; cf., e.g., arts. 250, 554, 937). The ITALIAN CC has a general prescription period of ten years but recognises shorter periods for a whole range of important rights (arts. 2946 - 2956). There is a twenty year period, however, for certain property rights; see CC arts. 954(4), 970, 1014 no. 1, 1073 (see Roselli – Vitucci, 471 ff). In the NETHERLANDS there is a general twenty year period (CC art. 3:306) but this is only nominally the general period. Effectively the general period is the five year period prescribed in arts. 3:307 (performance of a contractual obligation), 3:308 (payments of interest, liferents, dividends, etc.), 3:309 (unjustified enrichment), 3:310 (damages) and 3:311 (right of action to set aside a contract for failure to perform or a right of action to correct such failure). Under the PORTUGUESE CC, the general period of prescription is twenty years (art. 309) but a number of shorter periods are recognised (e.g. five years in art. 310). For extra-contractual liability for damage and unjustified enrichment a three-year period applies (arts. 498, 482). Before the reform of the law on prescription (17 June 2008), the FRENCH CC had a general prescription period of thirty years. For many situations, however, a ten year period applied, in particular for obligations involving merchants (Ccom art. 189 bis), for certain actions against a contractor (CC art. 2270) and for actions based on extra-contractual liability (CC art. 2270-1, since the law of 5 July 1985); cf. also the law of 10 July 2000, art. 30, al. 3, concerning liability for sales at public auctions. The CC also recognised various shorter periods (five, three and two years, one year, six months: arts. 2271 ff) Under the new law on prescription, the general period of prescription is 5 years (new CC art. 2224). Although one of the

objectives of the reform was to reduce specific periods of prescription, many of them have been maintained, either in the CC (arts. 2225, 2226, 2227) or outside the Code in other codes or statutes. On the other hand, the specific periods of CC arts. 2271-22278 have disappeared. The position in LUXEMBOURG is essentially the same as the pre-2008 French law, but for actions based on extra-contractual liability the general period of thirty years still applies. Under the AUSTRIAN CC (1811) the general period of prescription is thirty years, but there are numerous shorter periods, mainly of three years (for criticism, see *Koziol and Welser*, Bürgerliches Recht I[13], 226 ss 200). SPAIN has a general period of fifteen years (CC art. 1964 *in fine* (1889). Nonetheless there are several special prescription periods (thirty, twenty, six, five, three years and one year under the CC arts. 1963-1968 and five, four, three and two years, one year and six months under the Ccom arts. 945-954). In DANISH law there is a general period of twenty years (art. 5.14.4 Danske Lov of 1683), but the Law no. 274 of 22 December 1908 provides a period of five years for many common claims, such as claims arising from sale of goods and services, leases, interest and from non-contractual relationships (torts and *conditio indebiti*). Also, in CATALONIA there is a general period ten years and any shorter periods for especial rights (arts. 121-20 to 121-22 First Law of the Catalonian CC 2003).

III. The trend towards shorter periods and simpler regimes

3. In FRANCE, the new law on prescription has a 5 year period, with shorter periods for many situations, notably for the benefit of consumers (2 years, art. L 137-2 C. Cons.) The French law on prescription also creates a long stop period of 20 years. This long stop period starts on the day the right arises, while the normal 5 year delay starts on the day the holder of a right knew or ought to have known the facts which enable the right to be exercised. In some situations enunciated by CC art. 2232 al. 1, this long stop period does not apply.

4. SWEDEN has a ten year period (Preskriptionslag (1981:130) § 11): a shorter period of three years, however, applies with some exceptions for the benefit of consumers. FINLAND also has a ten year period (Prescription Decree of 1868 § 1) but a number of shorter periods in special legislation (such as, e.g., the Insurance Act of 1994). BELGIUM, since the law of 10 June 1998, now has five years for rights to damages arising from extra-contractual liability and ten years for all other personal rights (art. 2262 bis § 1; for criticism of this differentiation between rights arising from contractual and extra-contractual liability see, however, *Claeys*, 1998-99 R.W. 391 ff. and *Claessens & Counye* 83 ff.). However, a number of special periods have been retained, e.g. the ten year period of CC art. 2270.

4. Under the POLISH CC the general prescription period is ten years (CC art. 118). However, the same provision states that a period of three years applies to rights to periodical payments as well as rights relating to economic activity, unless a special provision provides for a shorter period (e.g.: contract for performing a specified task or work – two years CC art. 646, contract of lease – one year CC art. 677, contract of loan for use – one year CC art. 719, mandate – two years CC art. 751, extra-contractual liability – three years CC art. 442, product liability - three years 449[8]).

5. SCOTLAND used to have a general twenty year period and numerous shorter periods for special situations but the Prescription and Limitation (Scotland) Act 1973 subjected the vast majority of rights within the law of obligations to a five year prescriptive period (s. 6 with schedule 1). There is a long stop period of 20 years. A three year limitation period applies to personal injuries actions and to actions for

defamation (ss. 17, 18 and 18A). The ENGLISH Limitation Act 1980 recognises a period of six years for actions on tort or "simple contract" but shorter periods apply to actions for personal injuries (three years), negligent latent damage (three years), product liability (three years) and defamation and malicious falsehood (one year) (Limitation Act 1980 ss. 2, 5, 4A, 11, 11A, 12, 14A). IRISH law has six years for "simple contracts" and three years for tort actions and actions for personal injuries arising out of a breach of contract: Statute of Limitations Act 1957 s. 11.

6. Under the SLOVAK law the general prescription period stipulated in the CC § 101 is three years. Special provisions provide for longer or shorter periods (CC § 106 compensation of damage, CC § 107 unjustified enrichment, CC § 108 rights from transport, CC § 109 rights corresponding to an easements, CC § 110 rights established by judgment, rights acknowledged by the debtor in writing). According to the Ccom art. 397, the general period of prescription in commercial relationships is four years. CZECH law is the same.

7. Since the reform of the law of obligations in 2002 the GERMAN CC provides for a general prescription period of three years (CC § 195), starting at the end of the year in which the right comes into existence and the creditor becomes aware or should become aware of the facts giving rise to the right and the identity of the debtor (CC § 199). This general prescription period is limited by a maximum period of ten or thirty years (CC § 199(2)-(4)). Furthermore there are special prescription periods of six months (CC § 548) and two, five, ten and thirty years (CC §§ 438, 634a, 196, 197).

8. Under ESTONIAN law, as to the period of prescription, three categories are differentiated. Firstly, the prescription period for rights arising from transaction is generally three years (GPCCA § 146(1)). Secondly, for rights arising from law like rights arising from delictual damage (GPCCA § 150(1)) or unjustified enrichment (GPCCA § 151(1)) the prescription period is generally three years subject to a maximum period of ten years (GPCCA §§ 150(1), 151(1)). For other rights to performance arising from law the period of prescription is ten years as from the moment when the right falls due (GPCCA § 149). A third category comprises special prescription periods (for rights to performance within the law of obligations) of six month (e.g. LOA §§ 338(1), 395 (1)-(2)), one year (e.g. LOA §§ 690, 802(1)), five years (e.g. GPCCA § 146(2)-(3), LOA § 771), ten years (e.g. GPCCA §§ 146(4)-(5), 149, 157 (3), LOA § 475(2) or thirty years (for rights established by judgment, GPCCA § 157(1)), often along with special regimes as to the commencement of the term. Also, rights based on property law, family law and succession law have special regimes (GPCCA § 155).

9. The UNCITRAL Convention (1974) has a four year period for rights arising from an international sale of goods. As far as the development of a general, uniform standard in European Community legislation is concerned, see *von Bar* I, n. 395. The UNIDROIT Principles (art. 10.2(1)) provide for a three year period whose commencement depends on the creditor’s actual or constructive knowledge of its claim (see *Bonell*, Limitation Periods, 523).

10. The English Law Commission has recommended a uniform limitation period of three years (Law Commission Report No 270, Limitation of Actions).

11. The general prescription period in SLOVENIAN law is five years (LOA art. 346) with various special periods from three months to ten years at most.

12. In HUNGARY under CC § 324(1) the period of limitation for rights to performance is five years, unless otherwise prescribed by law. Under paragraph (2) of that article if the principal right prescribes, all of the dependent collateral rights also fall. The principal right is not affected when independent collateral rights prescribe. Under

paragraph (3) the prescription of a right does not prevent satisfaction from a pledge which secures it. Under CC § 325(1) a prescribed right may not be enforced in court. Under CC § 325(2) parties may agree on a shorter period of prescription but the agreement is valid only if in writing. If the period of prescription is shorter than one year, the parties are entitled to extend it, by an agreement in writing, to a maximum of one year; otherwise, an agreement on the extension of a period of limitation is void. Under CC § 326(1) the period of prescription commences upon the due date of the right. Under CC § 326(2) if the creditor is unable to enforce a right for an excusable reason, the right remains enforceable within one year from the time when the reason is eliminated or, in respect of a period of prescription of one year or less, within three months, even if the period has already elapsed or there is less than one year or less than three months, respectively, remaining. This provision also applies if the creditor has granted a respite for performance after expiration. Under CC § 327(1) a period of prescription is suspended by a written notice requiring performance, the judicial enforcement of the right, the amendment of a right by agreement (inclusive of composition), and the acknowledgment of a debt by the debtor. Under CC § 327 (2) the period of prescription recommences after suspension or following the non-appealable outcome of a suspension proceeding. Under CC § 327(3) if a writ of execution is issued in the course of a suspension proceeding, the period of prescription is suspended only by the acts of enforcement.

III.–7:202: Period for a right established by legal proceedings

(1) The period of prescription for a right established by judgment is ten years.

(2) The same applies to a right established by an arbitral award or other instrument which is enforceable as if it were a judgment.

COMMENTS

A. The need for a special period

This is the only special prescription period provided in this Chapter. It cuts off any potential doctrinal discussion as to the effect of the judgment on the original right. (Does it continue to exist, or is it replaced by a new right?) The period applicable in this case has to be substantially longer than the general period laid down in III.–7:201 (General period). A right established by judgment is as firmly and securely established as is possible and is thus much less affected by the "obfuscating power of time" than other rights. Moreover, the creditor has made it abundantly clear that the right is seriously pursued; the debtor knows that payment is still required. And finally, the legal dispute between the parties has been resolved. It does not create a source of uncertainty or a danger to the public interest. To the contrary: it would create unnecessary costs, and thus be more injurious to the public interest, if a short prescription period were to force the creditor at regular intervals to attempt an act of execution which, in view of the debtor's financial position, is known to be futile. The law of prescription here, as always, should prevent, not encourage or even engender, litigation.

Once again, of course, there is something arbitrary in fixing a specific period. But ten years would appear to be a reasonable choice in view of the fact that it is the period most frequently found, or proposed, in modern legislation.

Admittedly, the introduction of a special period for rights established by judgment is in conflict with the general quest for uniformity. But we are dealing here with a clearly distinguishable type of right which does not interfere with any others covered by this Chapter. The general reasons militating against a differentiated regime do not apply in this case.

B. Nature of the period; declaratory judgments

The ten year period proposed is a normal prescription period which is subject to the general rules. The one issue that merits special consideration is when it starts to run: see the provision in III.–7:203 (Commencement); cf. also the provisions on renewal of prescription in III.–7:401 (Renewal by acknowledgement) and III.–7:402 ((Renewal by attempted execution).

A declaratory judgment is sufficient for the purposes of the present Article, as long as it establishes the right and not only one of its prerequisites.

C. Other instruments

It cannot be specified in this Chapter which other instruments obtained by the creditor can have the effect of triggering the ten year period. The relevant criterion is whether they are regarded as enforceable as if they were a judgment. A court-approved settlement of the dispute between the parties could be one example. Private instruments are also covered as long as they do not require a formal act by a court before they can be enforced but may be

enforced directly. Arbitral awards are mentioned because of their general recognition and practical importance.

NOTES

I. Special period

1. Most codes have a special rule on prescription of a right established by legal proceedings. The period is normally a long one: it used to be thirty years in FRANCE (Cass.soc., 7 October 1981, Bull. civ. V, n. 764); under the new law of prescription (June 17 2008) it is 10 years when the right is established by a "titre exécutoire", AUSTRIA (see *Mader/Janisch* in Schwimann, ABGB VI, 3rd ed., § 1478 no. 22; Rummel (-*Schubert*), ABGB II(3)3, § 1487, no. 7) and GERMANY (CC § 197(1), no.3; twenty years in GREECE (CC art. 268(1)), ESTONIA (GPCCA § 157(1)); PORTUGAL (CC art. 311(1)), the NETHERLANDS (CC art. 3:234), DENMARK (see § 1(2) Law no. 274 of 22 December 1908 in conjunction with art. 5.14.4 Danske Lov), and SCOTLAND (Prescription and Limitation (Scotland) Act 1973 s.7 and Sch. 1, para. 2(a)); twelve years in IRELAND (Statute of Limitations Act 1957 s.6(a)); and ten years in ITALY (CC art. 2953 applicable, however, only to final judgments with respect to the rights for which a statute of limitation shorter than ten years is provided, not to declaratory or constitutive judgments); SWEDEN (Preskriptionslag (1981:130) § 7); FINLAND (Prescription Decree § 1); SLOVAKIA (CC § 110(1) applicable to final judgments of a court or other authority) ; and ten years in the CZECH REPUBLIC (CC § 110(1) applicable to courts, arbitral bodies and any other authorities competent to adjudicate upon the right). In BELGIAN law, the matter is disputed; some authors write that the 10 year period always applies, but the statute has no specific rule for the actio iudicati, from which it is deduced by others that the applicable prescription period depends on the type of right (see esp. CC art. 2262*bis*). In POLAND, a right recognised by a final judgment of a court or of any other authority entrusted with the adjudication of particular actions or by an award of arbitrators, as well as a right recognised by an agreement concluded before the court or before arbitrators, is subject to prescription after ten years, even though the period of prescription for a given type of right is shorter (CC 125§1). SLOVENIAN law is the same, see LOA art. 356. Only the (ENGLISH) Limitation Act 1980 recognises a shorter period (six years, s.24). Obviously, in a number of systems the period chosen for the prescription of rights established by a judgment is the general prescription period; but in other systems the long period is an exception to shorter general periods.

II. The effect of a judgment on the original right

2. For doctrinal discussion of the effect of a judgment on the original right see, as far as the pre-codification *ius commune* is concerned, *Windscheid and Kipp*, § 129, n. 3; for echoes of this debate in SCOTLAND, see *Johnston*, para. 6.43 ff.; cf. also *Spiro*, Begrenzung § 162.

III. Periodical payments falling due in the future

3. GERMAN, AUSTRIAN, CZECH, PORTUGUESE and POLISH laws recognise one exception to the long prescription period for rights established by judgment. In AUSTRIA (*Mader/Janisch* in Schwimann, ABGB VI, 3rd ed., § 1478 no 25) Austria (Rummel (-*Schubert*), ABGB II(3)3, § 1478, no. 7) a period of three years applies for periodical payments falling due after the date of the judgment. In PORTUGAL a

period of five years applies in such cases and in POLAND a period of three years (CC 125§1). Also in the CZECH REPUBLIC a three-year period applies (CC § 110(3)). The GERMAN code provides for an application of the general prescription period (CC § 197(2)). Similarly under ESTONIAN law, see GPCCA § 157(4). The DUTCH and BELGIAN codes have a rule according to which "payments to be made annually or more frequently pursuant to a decision are prescribed in five years": Dutch CC art. 3:324(3); Belgian CC art. 2277. The FRENCH code had a similar rule to the Dutch code (French CC art. 2277) but it has disappeared with the new law since the normal period of prescription is now 5 years. See also *Spiro*, Begrenzung, § 164 with references to SWISS case law and literature. This special rule is intended to protect the debtor: it may be burdensome to keep receipts for thirty years. But it must be remembered that the period proposed in the present Chapter is ten, not thirty years. In SPAIN, periodical payments are as a rule subject to a five year period.

4. In SLOVAK law there is no exception to the ten-year prescription period regarding individual instalments into which the performance was divided. Nevertheless periodical payments falling due after the court decision became final (in Slovak CC referring to “repeated performance”) are prescribed in a three years period (see CC § 110(2)(3)). Periodical payments finally awarded (falling due prior to the final judgement) become prescribed within ten years.

IV. Other instruments

5. Concerning other instruments, to which the ten year period applies, see for GERMANY: CC § 197(1), no.4, 5; for ITALY: *Roselli-Vitucci*, 588 ff; for GREECE, Full Bench of A.P. 30/1987, EllDik 28 (1987) 1444 (1445) (relating to an order of payment). In IRELAND the twelve-year period of the Statute of Limitations Act 1957 s.6(a) (cf. note 1, above) does not apply to arbitration awards: the general period of six years applies. In AUSTRIA an acknowledgement (*konstitutives Anerkenntnis*) as well as a settlement (*Vergleich*) also fall under the long prescription period of 30 years (see Rummel (-*Bydlinski*), ABGB II(3)[3], § 1478, no. 6). For SLOVAKIA and CZECH REPUBLIC see CC § 110(1) (rights acknowledged by the debtor in writing).

III.–7:203: Commencement

(1) The general period of prescription begins to run from the time when the debtor has to effect performance or, in the case of a right to damages, from the time of the act which gives rise to the right.

(2) Where the debtor is under a continuing obligation to do or refrain from doing something, the general period of prescription begins to run with each breach of the obligation.

(3) The period of prescription set out in III.–7:202 (Period for a right established by legal proceedings) begins to run from the time when the judgment or arbitral award obtains the effect of res judicata, or the other instrument becomes enforceable, though not before the debtor has to effect performance.

COMMENTS

A. General rule

As a rule, the period of prescription should run only against a creditor who has the possibility of enforcing the right in court, or of starting arbitration proceedings. For it is in the course of these proceedings that the merits of the case will be investigated. The running of the period is suspended as long as the proceedings last (see III.–7:302 (Suspension in case of judicial and other proceedings)). A right can, however, only be pursued in court, or before an arbitration tribunal, when it has become due - that is, when the debtor has to effect performance. The concept of the time when a party has to effect performance is widely known and relevant in many other situations.

Illustration 1
A and B have agreed that A has to pay the purchase price for a car delivered to B on 10 October. The time for A's performance is determinable from the contract: it is 10 October. The period of prescription starts to run against B on that day.

Illustration 2
A has, by mistake, transferred a sum of money to C rather than to B. From the moment when he receives the transfer, C is under an obligation to retransfer the money; this obligation is based on unjustified enrichment. The period of prescription relating to A's right to the retransfer starts to run on that day.

B. Rights to damages

There is, however, one situation which requires special consideration. A right to payment of damages for harm caused by another is generally due as soon as the right comes into being. But it comes into being only when all requirements of the rule imposing liability have been met. One of them will often be the occurrence of damage; and damage will sometimes only occur many years after the act giving rise to liability (for example, infringement of somebody else's bodily integrity, or rights to property) has been committed. Thus, it may be uncertain for a number of years whether a person has a right to damages based on an act infringing their rights. Moreover, it may be difficult to determine whether all rights to damages arising as a consequence of the act have to be subjected to the same prescription regime, or whether there may be completely unexpected, latent consequences in relation to which prescription should only start to run once they have become apparent. Pure economic loss cases also present special problems in the application of a rule that focuses on the occurrence of damage. Thus,

it appears advisable not to make commencement of the period of prescription dependent upon the occurrence of damage. The period of prescription, therefore, begins to run when all the other requirements for the right to damages have been met, i.e. at the moment when the relevant act has been committed (or at the moment when the non-performance of an obligation has occurred). This rule does not cause hardship to the claimant, since the period does not run, according to III.–7:301 (Suspension in case of ignorance), as long as the claimant does not know, and cannot reasonably know, about any latent damage. Thus, it is practically relevant only for the calculation of what is usually described as the "long-stop", and what is in this Chapter expressed as the maximum period to which the period of prescription can be extended (III.–7:307 (Maximum length of period)). Here, however, an easily ascertainable date is required to counterbalance the uncertainty necessarily associated with the discoverability criterion. This date can only be the commission of the act which gives rise to the right to damages. The specific advantage of the rule proposed here is that it provides, effectively, one and the same point of departure for the general prescription period and the "long-stop".

Illustration 3
A has been injured, on 1 October 1976, in a car accident for which B has been responsible. A appears to have suffered only light injuries (a bruise, or a mild concussion). In the summer of 1981, however, it turns out that an inner organ has been seriously affected. The three year prescription period would begin to run from 1 October 1976 but for the fact that it is suspended as long as A did not know, and could not reasonably know, about the latent consequences of the accident, i.e., in this case, presumably sometime in the summer of 1981 (III.–7:301 (Suspension in case of ignorance). If the latent consequences should have become apparent only in December 2006, A's right would have been prescribed in view of the fact that the period of prescription cannot be extended beyond a total period of thirty years (III.–7:307 (Maximum length of period)).

The same considerations apply to other rights to damages. The period of prescription of a right to damages for non-performance of an obligation runs from the date of non-performance, the period of prescription of a right to damages for *culpa in contrahendo* from the moment when the other party breaks off negotiations contrary to good faith and fair dealing.

C. Obligation to refrain from doing something

Prescription relates to rights to performance of obligations (III.–7:101 (Rights subject to prescription)). This covers cases where a party is under an obligation to refrain from doing something. When does the period of prescription begin to run in these cases? The due date cannot be the appropriate moment since the creditor's right is due even before the debtor has infringed the obligation. Yet, before such infringement has occurred, the creditor does not normally have any reason to sue the debtor so as to stop the period of prescription from running. Prescription problems can only arise where the debtor's obligation extends over some period of time, i.e. in the case of a continuing obligation to refrain from doing something. Here it appears to be appropriate for the period of prescription to commence, not once and for all with the first act of contravention, but with each new act of contravention.

Illustration 4
A has a studio in which he occasionally produces CD's of famous pianists. On 10 October, he plans to produce a CD with Alfred Brendel playing Schubert. B, A's

neighbour, is busy with noisy building operations to his house in the course of the month of October. A obtains an undertaking from B to stop these building operations for 10 October. Nevertheless, B carries on with them on that day. Here we do not have specific prescription problems. Before 10 October, a period of prescription cannot start; after 10 October, compliance has become impossible and A can only claim damages. The right to damages is subject to the normal rules of prescription.

Illustration 5
A is a former employee of B, an insurance company in Hamburg. She is under an obligation not to sell any insurance policies on her own account for the next three years in Hamburg. On 20 March, she sells some policies in a small suburb still belonging to the state of Hamburg. On 20 October, however, she sets up her own insurance agency right in the centre of Hamburg. Concerning the infringement on 20 March, the period of prescription begins to run on that day; concerning the one on 20 October, a new period begins to run on 20 October. This is justified in view of the fact that B may have refrained from taking steps which would have had the effect of extending or even recommencing the period of prescription, not because it wanted to condone any infringement of A's obligation, but merely because the first infringement was not sufficiently serious to warrant the cost and trouble of taking such steps.

The same problem may arise where the debtor is under a continuing obligation to do something.

Illustration 6
D, the owner of a dairy, has agreed to deliver 20 cans of milk to a restaurant in the neighbourhood every morning. As long as D complies with this obligation, the owner of the restaurant has no reason to sue him. He may, quite legitimately, not even want to sue him when occasionally less than the 20 cans are delivered or when, due to momentary difficulties that D may have with his own suppliers, he does not deliver at all for a day or two. That should not, however, prevent him from bringing an action against D if the latter, four years later, decides no longer to honour his obligation.

D. Rights established by legal proceedings

Here the choice would seem to be between the date of judgment and the date when that judgment becomes final (i.e. when an appeal is not, or no longer, possible). The second of these alternatives is the one more often found in existing legislation. It commends itself for reasons which will become apparent when the closely related question of the effect of legal proceedings upon a period of prescription is considered (see III.–7:302 (Suspension in case of judicial and other proceedings)). In order to cover all types of appeal that may possibly be brought against a judgment, paragraph (2) refers to the moment when the effect of res judicata is obtained.

If a declaratory judgment establishes an obligation on the part of the debtor to make periodic payments in the future, the period of prescription concerning each of these payments only starts to run when it falls due (see the clause starting with the words "though not" in paragraph (2)).

In the case of arbitral awards the relevant moment may also be described as the moment when the effect of res judicata is obtained. For other instruments, however, the period of

prescription begins to run when they become enforceable (III.–7:203 ((Commencement) paragraph (3); enforceability, after all, is the characteristic that justifies placing these instruments on a par with a judgment (III.–7:202 (Period for a right established by legal proceedings) paragraph (2)).

NOTES

I. General rule

1. The moment when the right becomes enforceable is widely used to commence the period of prescription: for AUSTRIA, CC § 1478 second sentence; for ITALY, CC art. 2935; for PORTUGAL, CC art. 306; for BELGIUM, *Claessens & Counye* 84; for SCOTLAND, Prescription and Limitation (Scotland) Act 1973, ss.6, 7 and 11; *Johnston* para. 4.06 ff; for DENMARK, § 3 Law no. 274 of 22 December 1908 (but under Danske Lov art. 4.14.4 the period begins when the obligation comes into existence); for SLOVENIA LOA art. 336; for SPAIN, CC art. 1969 and for the Catalonia Law, art. 121-23 First Law of the Catalonian Civil Code); for the NETHERLANDS, CC art. 3:307 (claims for performance of a contractual obligation); for ESTONIA, GPCCA § 147(1) for rights arising from transaction (with the exception that the period of prescription for rights to payment of remuneration agreed upon, and rights to performance of recurring obligations or a maintenance obligation exceptionally commence as of the end of the year when the right falls due (GPCCA § 147 (3), § 154). In FINLAND prescription begins to run when the obligation is created (see Prescription Decree § 1); in SWEDEN when the right arises (Preskriptionslag (1981:130) § 2). According to GREEK law (CC art. 251), the right must have come into being and become enforceable. See further *Spiro*, Begrenzung § 26; *Koopmann* 45 ff; *Loubser* 48 ff. The ENGLISH Limitation Act 1980 refers to the date of accrual of the cause of action (cf., e.g., ss. 2 and 5). This is the moment "when a potential plaintiff first has a right to succeed in an action against a potential defendant" (*Preston & Newsom* 8; cf. also *Dannemann, Karatzenis & Thomas*, (1991) 55 RabelsZ 702). IRISH law is the same (Statute of Limitations Act 1957 s. 11(1)). Art. 9 of the UNCITRAL Convention refers to "the date when the claim accrues".
2. According to POLISH law, the period of prescription begins on the day on which the right is enforceable. If the right arises only upon the carrying out of a particular act by the claimant, the period of prescription begins on the day on which it would have become enforceable if the claimant had carried out the act on the earliest possible date (CC art. 120 § 1).
3. According to SLOVAK CC § 101 the prescription period starts running from the day when the right could be exercised for the first time. As for rights that are to be asserted at first with an individual or a legal entity, the prescription period starts running from the day when the right was asserted in this way. According to the Ccom § 391 with regard to rights enforceable before a court, the period of prescription begins to run on the day it was possible to assert the right before a court, unless it is otherwise provided. With regard to rights concerning performance of an act in law (transaction), the period of prescription begins to run on the day it was possible to perform the act in law (applicable to commercial relationships). CZECH law is the same.
4. In FRANCE, the starting point of the prescription period was not specified in the texts of the CC. Judges have used the adage *contra non valentem agere non currit praescriptio* and the period of prescription runs only against a creditor who has the

possibility of enforcing the right in courts. Under the new law on prescription (June 17, 2008), the starting point of the prescription period of personal and real rights is the date at which the creditor knew or should have known of the facts giving rise to the rights. However, this "floating" starting point is limited by the long stop period (see below). It is also subject to some specific exceptions.

II. Rights to damages

5. Rights to damages present problems for all legal systems which regard due date or accrual of the cause of action as relevant for commencement of prescription (see: Law Commission Consultation Paper on Limitation of Actions, 30 ff). This is why there is a growing reliance on the discoverability criterion; for GERMANY CC § 199(1); and for ESTONIA GPCCA § 150(1) for delictual rights. However, the long-stop is usually counted from the moment when the wrongful act is committed; see e.g. GERMANY CC § 199(2) and (3), 1, no.2; AUSTRIA Rummel (-*Schubert*), ABGB II(3)[3], § 1487, no. 7; the NETHERLANDS CC art. 3:310, BELGIUM CC art. 2262bis and ESTONIA: GPCCA §§ 150(3), § 153(2. For POLAND, see: CC 442. In SCOTLAND, however, the long stop runs from enforceability (Prescription and Limitation (Scotland) Act 1973, s.7). In SPAIN there is a special rule (the prescription period starts when the claimant is aware of the damage) for actions in delict, and other special rules have been set up in case law for continuous damages (see *Reglero*, R. Bercovitz (edit.) Comentarios, pp. 2258 ff). SLOVENIAN law is similar with a three year period from the moment when the damage and the identity of the perpetrator are known, a five years period from the moment when the damage occurred and a criminal law period if longer then the civil law one for damages suffered by intentional criminal offences. See LOA arts. 352-353. In AUSTRIA the prescription period is 3 years from knowledge of the damage as well as the person causing the damage. A claim can, however, not be initiated after 30 years from the cause of action (see CC § 1489). The long prescription period also applies in the case that the action is sanctioned with 15 (or more) years of prison.

6. SLOVAK law (CC § 106) provides a two year prescription period for rights to compensation for damage. The period runs from the day when the injured person learned of the damage and of the person liable. The right to compensation for damage prescribes no later than in three years and as for damages caused by intention, in ten years from the day when the event causing the damage occurred. The three years or ten years prescription period does not apply to damages to health. For commercial relationships it is provided that the prescription period of rights to damages expires no later than ten years from the day when a breach of duty occurred (Ccom § 398). CZECH law is the same; a special provision applies to damage caused by bribery – the period of three years starts from the day of becoming aware of the damage, and the long-stop of ten years starts from the day when the corrupt conduct occurred (CC § 106(3)).

7. In FRANCE, the new law on prescription provides for a 10-year prescription period for "actions en responsabilité " for a personal injury. The delay runs from the day the original or aggravated damage is "consolidated". The prescription period is extended to 20 years in the case of injuries resulting from torture or other barbaric acts and sexual violence against minors. There is no long stop period in those cases (art. 2232 al. 2).

III. Obligation to refrain from doing something

8. The GERMAN code contains a special rule concerning obligations to refrain from doing something: subject to CC § 199(1), no.2 prescription runs from each

contravention (see CC § 199(5); *Staudinger(-Peters)* § 199, n. 71, 76). For similar regulation under ESTONIAN law, see GPCCA § 147(1) sent. 2. German authors have argued for an analogous application of this rule to cases where the debtor is under a continuing obligation to act: see *Münchener Kommentar (Grothe)* § 198, n. 11; but cf. *Staudinger (-Peters*) § 199, n. 75 (arguing that this follows anyway). Other legal systems reach similar conclusions by arguing from general principle; see *Asser-Hartkamp,* Verbintenissenrecht I n. 664; *Spiro,* Begrenzung § 48 f.; for DENMARK, see *Ussing*, Alm. Del. 399 and 407 (prescription runs from each act of non-compliance). In POLAND, the period of prescription of rights to a forbearance begins on the day on which the debtor contravened the obligation (CC 120 § 2).

9. The SLOVAK Ccom § 392(1) provides that if the relationship of obligation involves the duty to desist from a certain activity, the period of prescription begins to run as of the day the duty was breached. The same holds true for the CZECH Ccom.

IV. Rights established by legal proceedings

10. Prescription of a right established by judgment starts to run at the date of judgment in the NETHERLANDS (CC art. 3:324(1)) and AUSTRIA (see *Mader/Janisch* in Schwimann, ABGB VI, 3rd ed., § 1478 no 22 ss). Rummel (-*Schubert*), ABGB II(3)[3], § 1478, no. 7; cf. also Spiro, Begrenzung § 162. Prescription starts to run at the date when the judgment becomes final in GERMANY (CC § 201);ITALY (CC art. 2953, see *Roselli-Vitucci,* 486 ff.); GREECE (CC art. 268, first sentence); ESTONIA (GPCCA § 157 (2)) and SWEDEN (Preskriptionslag (1981:130) § 7). Under s.24(1) of the ENGLISH Limitation Act 1980 the limitation period for actions on a judgment starts from the date when the judgment becomes enforceable. The same applies under s.6(a) of the IRISH Statute of Limitations Act 1957. This appears to be too restrictive since it excludes declaratory judgments; see Spiro, Begrenzung § 133; Staudinger(-Peters) § 197, n.24, n.5. According to the SLOVAK CC § 110(1) prescription of a right established by judgment starts to run at the date when the liable party was to perform according to the decision (date specified therein or if no such day is specified, on the day when the court decision became final and conclusive) and the same applies for CZECH law.

V. Special commencement dates

11. Some codes have special commencement dates for certain situations - e.g. GREECE: CC art. 252; for comparative discussion, see *Spiro*, Begrenzung § 35; *Loubser* 54 ff.). The need for such special commencement dates has, however, been doubted: see *Peters & Zimmermann* 245 ff; *Spiro*, Begrenzung § 125. Cf. also *Staudinger(-Peters)* § 198, nn. 7 ff.

12. For SLOVAK law special commencement dates apply for rights following from insurance (prescription period starts running after the lapse of one year after the insurance event CC § 104), as for rights of the lawful heir to demand surrendering the inheritance (prescription period starts running from the moment when the decision finishing the inheritance proceedings became final and conclusive CC § 105). For special commencement dates in commercial relationships see Ccom §§ 392–396.

13. Also CZECH law sets forth a wide range of special commencement dates (especially in commercial matters). E.g. prescription of the obligation to reverse an unjustified enrichment is constructed similarly to prescription of the obligation to pay damages: there are two prescription periods, first of which is two years and starts to run from the date on which the entitled person became aware of the unjustified enrichment and of who is enriched, and the second one is three years, or ten years in case of deliberate

enrichment, and runs from the date on which the unjustified enrichment occurred (CC § 107).

Section 3: Extension of period

III.–7:301: Suspension in case of ignorance

The running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably be expected to know of:

(a) the identity of the debtor; or

(b) the facts giving rise to the right including, in the case of a right to damages, the type of damage.

COMMENTS

A. Terminology

Civilian legal systems traditionally distinguish between "interruption" and "suspension" of a period of prescription. If the period of prescription is interrupted, the time which has elapsed before the interrupting event is not taken into account: the period of prescription begins to run afresh. Suspension of the period of prescription, on the other hand, has the effect that the period during which prescription is suspended is not counted in calculating the period of prescription: when the cause of suspension ends, it is therefore the old prescription period that continues to run its course (unless the period of prescription had not even started to run in which case it only starts to run after the cause of suspension has ended). Suspension thus extends a given period of prescription. Another device that has the effect of extending the period of prescription is postponement of its expiry. Here the period of prescription runs its course but is only completed after the expiry of a certain extra period. The Chapter uses these three techniques but does not use the word “interruption”, which can be misleading. Instead the Chapter uses the term “renewal” to cover the case where a new period begins to run on the happening of some event. Thus, the systematic exposition for Sections 3 and 4 is as follows. The period of prescription can be (i) extended (Section 3) or (ii) renewed, so that a new period begins to run (Section 4). An extension may occur by way of (a) a suspension of the running of the period or (b) a postponement of its expiry. It should be noted that the running of a period of prescription can be suspended whether or not it has already started. A renewal may be triggered by an acknowledgement by the debtor or, in the case of the ten year period, by an attempt at execution by the creditor.

B. The argument for a general discoverability criterion

Prescription can effectively amount to an act of expropriation: a right is an asset of the creditor which loses its value if it can no longer be pursued in court. This is justifiable only if the creditor has previously had a fair chance of pursuing the claim. So, in the first place, the creditor must have known about the right or, at least, ought reasonably to have known about it. The importance of a discoverability criterion is accentuated, if (as under the Chapter) the general prescription period is comparatively short. Whereas the short period, and the institution of prescription of rights as such, are largely intended to protect the debtor, the discoverability criterion provides the necessary counterbalance to take account of the creditor's reasonable interests. This is increasingly recognised today. Not surprisingly, the rise of the discoverability criterion has been closely related to the general tendency towards shorter prescription periods. More precisely, there has been a trend towards (i) taking account of the creditor's ignorance with regard to a growing range of rights while (ii) reducing the inherent potential of this consideration for delaying the course of prescription by moving from

lack of knowledge towards a test of reasonable discoverability. The Chapter reflect these developments.

Essentially, there is a fundamental choice to be made. If discoverability applies across the board, a uniform three year period is acceptable. If, however, the uncertainty necessarily associated with a discoverability criterion is regarded as sufficiently serious to make the running of prescription dependent merely on objective criteria, the consequence is necessarily a differentiated system of prescription periods. But there is a very wide consensus that not all types of rights can be subjected to an objective regime: the prescription of non-contractual rights to compensation for damage caused by another must depend on knowledge (or reasonable possibility to acquire knowledge). It is, however, precisely with regard to such rights (and, more specifically, those arising from personal injury) that the discoverability criterion is particularly important. The other type of situation where a creditor will often be unaware of the right is non-performance of a contractual obligation. Non-contractual rights for damages and rights for damages based on non-performance of a contractual obligation can be closely related; the one right is often an alternative for the other. If it is unfair in the one case for the right to prescribe before the creditor knew or reasonably could have known of it, it is equally unfair in the other. Once, however, a legal system is prepared to swallow the subjective criterion with regard to rights to damages it might as well, given the interconnectedness of rights within the law of obligations, accept it across the board. The price to be paid in terms of legal uncertainty is not considerable. For, to mention some prominent types of rights, the parties to a contract will normally know when their contract has been concluded and when they are entitled to demand (specific) performance of the obligations arising under it. Also, they will usually be aware whether the contract has been avoided with the result that they may claim a reversal of any enrichment conferred, particularly under a system that makes avoidance for error, or fear, or fraud dependent on notice to the other party. And certain rights to reversal of unjustified enrichment based on unauthorised use of a person’s assets are too close to non-contractual rights to compensation for damage caused by another to justify a different treatment.

C. What has to be discoverable?

What, precisely, must the creditor's lack of knowledge relate to? It seems to be widely agreed that the facts giving rise to the right and the identity of the debtor are the two key issues.

> *Illustration 1*
> In the course of the early morning of 10 October 1994, A crashes his car into B's car which was parked in front of B's house. Since A fears public prosecution for drunken driving, he drives away from the scene of the accident. Nobody has observed the accident. Early in 1998, and in the course of a pub crawl, A boasts about what has happened that night. One of the persons present relates the story to B who now wants to sue A for damages. The running of the period of prescription (which would normally have begun on 10 October 1994) was suspended until B had heard about A's involvement in the accident. Before that time, he did not know and could not reasonably have known about the identity of his debtor.

In addition, a significance test is sometimes recommended: the running of the period of prescription is also suspended as long as the claimant did not know, and could not reasonably know, that the right is significant. This test is designed to prevent an apparently trivial injury triggering the prescription period for unexpected, serious consequences arising from the injury at a later stage. These concerns are also reflected in the development of the case law of

a number of countries. Another, related, problem arises in cases where the victim of an accident is aware, at first, of having suffered, for instance, damage to property and only later becomes aware of an injury to health as a result of the accident. Both types of cases are covered by the words "type of damage" in clause (b).

Illustration 2
On his way home from a football match one November, A is beaten up by supporters of another team. He has a laceration on his forehead which, at first, bleeds heavily but can quite easily be dressed. He therefore decides not to take action against those who have beaten him up. Only eleven months later, in the following October, does he become aware of the fact that he has picked up internal injuries of a much more serious nature. The period of prescription starts to run from that time in October.

Illustration 3
A is severely injured in a brawl in the course of which B has hit his head with a club. As a result of this, A's eyesight is diminished by 40 %. Four years later, A becomes completely blind. It can be established that this is a late result of B hitting A's head. Running of the period of prescription for the damage resulting from blindness (as opposed to the loss of 40 % of his eyesight) is suspended until A has become blind (unless that consequence was reasonably foreseeable at the date of the injury).

D. Ignorance as a ground for suspending the running of the period of prescription

The period of prescription should not run while the creditor is unaware of the right and cannot reasonably be expected to be aware of it. It might appear natural to link the discoverability criterion to the commencement of the period of prescription. This is not the approach adopted here. The starting date remains the moment when the debtor has to effect performance, but the running of the period of prescription is suspended until the creditor becomes aware of the right or could reasonably be expected to be aware of it. This means that normally the period of prescription does not start to run until the moment of reasonable discoverability; it is, in other words, a case of an "initial" suspension. Matters are different, where the creditor's ignorance is not an initial one; this may be the case when either the creditor or the debtor dies and either the new creditor does not know that the right has been inherited or the old creditor cannot reasonably find out who is the new debtor.

Ignorance as a ground of suspension of the running of the period of prescription (as opposed to knowledge as the criterion for commencement of the period) has the following advantages. (i) Even if discoverability were to determine commencement of the period of prescription, it would also have to be required that the obligation has come into existence and that performance is due. (ii) That the period of prescription should not run against a creditor who cannot reasonably be expected to be aware of the right is one specific emanation of a much wider idea: a right must not prescribe if it is impossible for the creditor to pursue it (*agere non valenti non currit praescriptio*). This is why the period of prescription does not run in cases of *vis major* and why the expiry of the period of prescription is postponed if the creditor is legally incompetent and does not have a legal representative. These (and other) impediments are taken into account by extending the period of prescription. It does not matter whether the impediment already existed at the time of commencement of the period of prescription. Thus, it would appear to be systematically more satisfactory to deal with the discoverability issue under the same heading. (iii) A creditor who brings an action against the debtor has to establish the requirements on which the right is based. That the right has not prescribed is not

one of these requirements. Prescription is a defence. If it is invoked by the debtor, it is the debtor who has to establish the requirements of that defence. The central requirement, of course, is that the period of prescription applicable to the right has elapsed. That depends on the date of commencement. If that were the date of discoverability, the debtor would, in many cases, face an unreasonably difficult task. For whether the damage to the creditor's house, the injury to the creditor's body, the consequences flowing from defective delivery, etc. were reasonably discoverable, or whether the creditor perhaps even had positive knowledge, are matters within the creditor's sphere and largely removed from the debtor's range of perception. Also, by and large, and considering the full range of rights, the creditor will normally know about the right at the time it falls due. That, exceptionally, this was not so, is a matter to be raised, and established to the satisfaction of the court, by the creditor. This would come out more clearly if discoverability were not to be made a requirement for commencement of the period of prescription but if the fact that the creditor could not reasonably be expected to be aware of the right were to give rise to an extension of the period of prescription: for it would, according to general principle, normally be for the creditor to prove that the running of the period of prescription was suspended, or that the period was otherwise extended. (iv) This way of proceeding also considerably simplifies the structure of the prescription regime, for it dispenses with the need to lay down a separate "long-stop" period running from a date different to that for the "normal" period of prescription and subject to specific regulation concerning extension, renewal, etc. It merely has to be stated that the period of prescription cannot be extended to a period longer than ten (or thirty) years (see III.–7:307 (Maximum length of period)).

NOTES

I. Terminology

1. On the traditional distinction between interruption and suspension of prescription, see *Windscheid & Kipp* §§ 108 f.; *Mugdan* I, 523; *Spiro*, Begrenzung §§ 69 ff., 127 ff. For definitions, see, for GERMANY, CC §§ 205, 217; for GREECE, CC arts. 257, 270; for AUSTRIA, CC §§ 1494 ss. 1497. GERMAN law now uses the term "renewal" instead of "interruption" (CC § 212); for a definition of "suspension" see CC § 209.

2. Suspension of prescription is a well known device: see, for FRANCE, 2230 CC, BELGIUM and LUXEMBOURG: CC arts. 2251; for AUSTRIA: CC §§ 1494 ff.; see for GERMANY: CC §§ 203 ff; for GREECE: CC arts. 255 ff; for ITALY: CC arts. 2941–2942; for ESTONIA GPCCA §§ 160 ff; and for the CZECH REPUBLIC: CC § 112, 113, Commercial Code § 402 et seq. The idea of postponing the expiry of the period of prescription is generally more recent but has gained ground: we find it in AUSTRIA, CZECH REPUBLIC, ESTONIA, GERMANY and GREECE. See: *Mugdan* I, 528; *Spiro*, Begrenzung §§ 87 ff.; *Zimmermann/Leenen/Mansel/Ernst*, 2001 JZ 684, 695 ff. In the NETHERLANDS this idea has completely replaced suspension: see CC arts. 3:320 f; *Asser-Hartkamp*, Verbintenissenrecht I n. 682; *Koopmann* 83 ff.

3. Suspension of commencement of prescription (*Anlaufhemmung*) is a notion familiar in a number of countries; see for GERMANY CC § 207; for GREECE: CC art. 256; for ITALY: CC art. 2941 for a number of examples). Cf. also the BELGIAN rule of art. 2262bis § 1 II, the DANISH suspension rule in case of ignorance (sub 2. in fine) and AUSTRIAN CC § 1494 for minors or individuals with mental incapability if they have no representative.). In the CZECH REPUBLIC this concept applies to rights of or against persons who must have a statutory representative and do not have any, rights

between statutory representatives and minors or other represented persons, and rights between spouses (see CC § 113, 114).

4. POLISH law provides for suspension of the prescription period in case of: (1) claims of children against their parents – while parental authority continues, (2) claims of persons not possessing full capacity for legal acts against persons performing guardianship or curatorship – while such persons are guardians or curators, (3) claims of one spouse against the other – while the marriage lasts (CC art. 121). A suspension of prescription operates in various situations in SLOVENIAN law. One of them is for damages (LOA art. 352(1)); others for claims between spouses while the marriage lasts, parental authority, curatorship or guardianship, etc. See LOA arts. 358–363.

5. Apart from some special provisions, SPANISH law does not recognise the suspension technique.

6. According to the SLOVAK law suspension of the prescription period applies as for rights between legal representatives on one side and minor children on the other, as for rights between legal representatives on one side and other represented persons on the other side and in case of rights between spouses (CC § 114).

II. The rise of the discoverability criterion

6. The reform of the law of obligations in the GERMAN CC introduced a discoverability criterion for the general prescription period; prescription starts at the end of the year in which the right comes into existence and the creditor becomes aware or should become aware of the facts giving rise to the right and the identity of the debtor (CC § 199(1)). In FRANCE, the new law on prescription (June 17, 2008) has the following starting point for all “personal and real actions” (except as otherwise expressly provided for by the legislator) : the date at which the creditor knew or should have known of the facts giving rise to the rights CC art. 2224). The GREEK code recognises a subjective criterion only for reparation for wrongful conduct: the injured party has to have had knowledge of the injury and of the identity of the person bound to make compensation (CC art. 937). In AUSTRIA (CC § 1489) no distinction is made between contractual and non-contractual rights (*Mader/Janisch* in Schwimann, ABGB VI, 3rd ed., § 1489 no 2; Rummel (-*Schubert*), ABGB II(3)3, § 1489, no. 2). The SWISS code requires knowledge with regard to rights to damages for wrongful conduct and actions based on unjustified enrichment (OR arts. 60(1), 67(1)). The same holds true for ESTONIAN law, see GPCCA §§ 150(1), 151(1), 153(1) and note 7 to Article III.-7:201 above. In the NETHERLANDS knowledge is required in the case of unjustified enrichment rights, rights to damages and rights "to set aside a contract for failure to perform it or to correct such failure" (CC arts. 3:309, 310, 311). According to the ENGLISH Limitation Act 1980 knowledge matters in actions for personal injuries or death, for latent damage in the tort of negligence, and products liability (see ss.11, 11A, 12, 14, 14A); and the Law Commission report (No 270, 2001) recommended that for limitation periods in general (the “core regime”) the period should start to run from the date of knowledge. In IRELAND the Statute of Limitations (Amendment) Act 1991 provided that in the case of personal injuries arising from breach of duty (tortious, contractual or statutory) the injured party has three years to bring an action from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured. SCOTLAND has a discoverability test for latent damage and personal injuries and a knowledge test for defamation (Prescription and Limitation (Scotland) Act 1973 ss.11 (3), 17, 18, 18A; *Johnston*, para. 4.17 ff). In BELGIUM, there has been doubt about the constitutionality of short prescription periods, "unless prescription runs only from the moment at which the damage manifests itself" (*M.E. Storme*, (1997) 5 ERPL 88; cf. also *Claeys*, 1998-99

R.W. 381); the discovery rule was introduced in the Statute itself in 1998 for non-contractual liability (art. 2262bis § 1 II). There was also doubt in IRELAND, before the Statute of Limitations (Amendment) Act 1991, about the constitutionality of a regime which had the effect of depriving a person of a property right even when the person was ignorant of having it. These doubts persist in relation to certain breaches of contract which are still subject to the rule that time runs from the date of accrual of the action. See *Morgan* v. *Park Developments Ltd.* [1983] I.L.R.M. 156; *Heagerty* v. *O'Loughren* [1990] ILR 148; *Brady & Kerr* 59 ff.

7. In POLISH law knowledge of the injury and of the identity of the person liable is a criterion for claims based on non-contractual liability for damage (CC art. 442) and product liability claims (CC art. 449[8]). CC art. 442: "A claim to have damage caused by an illicit act repaired is subject to prescription of three years from the day on which the injured person learned of the damage and of the person liable. In any case the claim is subject to prescription ten years from the day on which the event which caused the damage occurred."

8. For the SLOVAK law knowledge of damage and of the person liable is a subjective criterion for claims on compensation of damage (CC § 106(1)), accordingly, knowledge of the unjustified enrichment and of the enriched person is a criterion for claims on unjustified enrichment (CC § 107(1)). This is the same in CZECH law.

9. Under SPANISH law, it is disputed whether knowledge or discoverability is relevant in relation to rights based on liability for wrongful conduct: TS 10.10.1977 as opposed to TS 11.11.1968; cf. *Díez-Picazo & Gullón Ballesteros* I, 472. Under arts. 121-23 of the First Law of the Catalonian CC, prescription runs as from the time the holder of the claim may reasonably know the circumstances that support the claim and the person to whom it should be addressed. Under art. 498(2) of the PORTUGUESE CC prescription commences when the occurrence of damage is known by the injured person, even if the identity of the debtor and the extent of the damage are unknown. For ITALY, see CC art. 2941, n. 8: if a debtor has fraudulently concealed the existence of the debt, prescription is suspended until the fraud has been discovered. In DENMARK prescription under the Law no. 274 of 22 December 1908 (5 years) is suspended if the creditor did not know and could not reasonably have known of the right or the residence of the debtor (§ 3). However, suspension does not operate as regards the 20 year period provided in Danske Lov 5.14.4 see *Gomard,* Obigationsret III, 242. In FINLAND the provision concerning the ten year period of prescription for rights based on liability for a wrongful act is interpreted to mean ten years from when the consequence of the act became clear; see *Routamo & Ståhlberg* 345. Under the new BELGIAN law of 10 June 1998 the date of discoverability determines the commencement of the five-year prescription period for such rights (CC art. 2262 bis, § 1(2)). SWEDISH law, however, does not recognise the creditor's ignorance as a ground for extending the period of prescription (except for product liability).

10. Discoverability is the emerging general standard in European Community legislation on prescription, see *von Bar* I, n. 395. Cf. further *Zimmermann*, 2000 JZ 861 ff. (comparative), but also *Andrews*, (1998) 57 Camb.L.J. 589 ff. (criticising the English Law Commission's proposal to extend the discoverability criterion).

III. Significance test

11. In ENGLAND, the three year period for personal injury rights will not start to run until the claimant knows that the injury is significant; and similarly for latent damage: Limitation Act 1980, ss.14(1), 14A(7). There is a similar rule in the IRISH Statute of Limitations (Amendment) Act 1991 s.2(1). Other systems may reach similar results by

the way in which the courts interpreted a knowledge requirement for claims for damages (see, e.g., for GERMANY, the discussion and references in *Staudinger(-Peters)* § 199, n. 35, 45).

IV. Onus of proof

12. On questions of onus of proof, in the present context, see *Spiro*, Begrenzung §§ 359 f.; *Staudinger(-Peters)* § 199, n. 60; *Loubser* 112; Law Commission Consultation Paper on Limitation of Actions, 398.

III.–7:302: Suspension in case of judicial and other proceedings

(1) The running of the period of prescription is suspended from the time when judicial proceedings to assert the right are begun.

(2) Suspension lasts until a decision has been made which has the effect of res judicata, or until the case has been otherwise disposed of. Where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended.

(3) These provisions apply, with appropriate adaptations, to arbitration proceedings, to mediation proceedings, to proceedings whereby an issue between two parties is referred to a third party for a binding decision and to all other proceedings initiated with the aim of obtaining a decision relating to the right.

(4) Mediation proceedings mean structured proceedings whereby two or more parties to a dispute attempt to reach an agreement on the settlement of their dispute with the assistance of a mediator.

COMMENTS

A. The options

A creditor who institutes an action to assert the right does what the law of prescription expects: the creditor takes the initiative to bring about an authoritative resolution of the dispute. It would be manifestly unfair if the period of prescription were to continue to run while judicial proceedings are pending. The debtor is now able to raise whatever other defence there may be and knows that the creditor is not treating the incident as closed. The proceedings prevent the right from becoming stale.

In this situation a legal system can do one of three things. It can determine (1) that the period of prescription ceases to run; or (2) that it is "interrupted" or renewed, with the effect that it starts to run afresh or (3) that its running is suspended as long as legal proceedings are pending.

Cessation of period of prescription. The first option (cessation) is the one following most naturally from a concept of a limitation of actions. It does not commend itself for rules of private law for it either leaves open the question of what happens when the legal proceedings have ended without a decision on the merits of the case, or it has to deal with this situation by way of a somewhat artificial fiction.

Interruption or renewal of period of prescription. The second option (interruption or renewal) is the solution traditionally adopted in Roman-law based legal systems. There is, however, something odd in the idea that the bringing of an action should renew rather than merely suspend the period of prescription. For by instituting an action the creditor sets in motion the court proceedings which last until a decision is given or until the case has been otherwise disposed of. Thus, we are not, as in other cases of renewal, dealing with a momentary event which could not sensibly extend the original prescription period, but with a continuing process. At the end of this process, there is normally clarity about the merits of the claim. And if there is not, there is no reason to have the entire period of prescription run afresh. Those legal systems subscribing to the interruption approach normally either specify

how long the "interruption" lasts, or regard every act by any of the parties to the proceedings, and by the court, as a new cause of interruption. Both solutions are unsatisfactory. In particular, they lead to unnecessary complexities as well as undesirable practical consequences in cases where the proceedings have ended without a decision on the merits of the claim. Even an action that is dismissed without consideration of the merits (because it has been brought before a court lacking jurisdiction or because it is procedurally defective in other ways) has to have some effect on the running of the period of prescription because: (a) the creditor cannot always avoid the defect; (b) it would be impracticable to investigate in every individual case whether the creditor can be blamed for proceeding; and (c) the creditor has, after all, demonstrated a determination to pursue the claim. Legal systems subscribing to the interruption option can only come to one of two conclusions in this situation: the period of prescription is interrupted (which would go too far); or it is not interrupted after all (which not only entails clumsy fictions but is also practically unsatisfactory for the reason just mentioned).

Suspension of running of period of prescription. The preferable solution, therefore, is the third option: the running of the period of prescription is suspended while the legal proceedings last. If these proceedings lead to a judgment on the merits of the claim, there are two possibilities. Either the claimant succeeds in which case the right is now established by legal proceedings and thus subject to the prescription period of III.–7:202 (Period for a right established by judicial proceedings). Or the action is dismissed and it is now authoritatively settled that there is no right that could be subject to prescription. Where the proceedings end without a decision on the merits (because the action is procedurally defective, or because it has subsequently been withdrawn), the creditor has what remains of the old period of prescription to bring a new action. This is exactly what is required, subject to the special situation mentioned in the following Comment. In particular, no certainty as to the substance of the right has been achieved which might justify the setting in motion of an entirely new period of prescription under headings (i) and (iii) of the policy considerations mentioned in Comment E to III.–7:101 (Rights subject to prescription).

B. Details of implementation

Special attention has to be paid to the claimant whose action is dismissed, for procedural reasons, at a time when only very little of the old period of prescription is left. Here it may be regarded as reasonable to fix a minimum period which the claimant should have for taking action after suspension has ended. This is achieved by the second sentence of paragraph (2), which gives the creditor a minimum of six months after the proceedings have ended without a decision on the merits.

When suspension begins depends on what is regarded, under the applicable law, as an appropriate act to commence a lawsuit. Suspension lasts until a decision has been passed which is final in the sense of having the effect of res judicata, or until the case has been otherwise disposed of. Conveniently, therefore, if the judgment has been in favour of the claimant, the period of prescription of the right based on the judgment should also only start at that moment (see III.–7:203 (Commencement) paragraph (3)) and not when judgment is given. The latter approach would appear to be related to the view, rejected above, that every event within the legal proceedings, including the judgment itself, constitutes a cause of interruption.

Illustration
A has a right against B which is due on 15 March 2004. On 1 March 2007, A commences judicial proceedings on this right before the regional court in Regensburg. On 10 October 2007, the court passes a decision dismissing the right for lack of jurisdiction: the action should have been brought before the local court in Regensburg. On the same day, A waives the right to appeal. The running of the period of prescription was suspended between 1 March (the date when judicial proceedings were begun) and 10 October 2007 (the date when the decision of the regional court obtained the effect of res judicata). As a result, A now has another fourteen days to commence legal proceedings before the local court in Regensburg.

Normally, the claimant will bring an action with the aim of obtaining a title to start execution. However, an application for a declaratory judgment establishing the right is sufficient for the purposes of suspending the running of the period of prescription: just as the declaratory judgment itself is sufficient to warrant application of the special regime provided in III.–7:202 (Period for a right established by judicial proceedings).

C. Other proceedings

The rules applicable to judicial proceedings also apply to other proceedings, as long as these proceedings aim at procuring a binding decision on or relating to the right in question. Details depend on the applicable law. Arbitration proceedings are specifically mentioned because of their general recognition and practical importance. The general rule, as far as the commencement of arbitration proceedings are concerned, has to be that the creditor must have done everything in the creditor's power to start them. In the case of private instruments which may be enforced directly (see Comment C to III.–7:202 (Period for a right established by judicial proceedings)) it must be left to interpretation when the proceedings are begun. Mediation proceedings are also specifically mentioned because they are becoming increasingly important in relation to civil and commercial disputes. The policy expressed in the Article, and the definition of mediation proceedings, reflects the provisions of the Directive of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (see arts. 3 and 8). The reference to proceedings whereby an issue between two parties is referred to a third party for a binding decision is meant to cover cases such as those where a third party has to fix a price or some other term left open for external decision. The reference to all other proceedings initiated with the aim of obtaining a decision relating to the right is intended to cover all forms of alternative dispute resolution even if they do not fall within any of the named types.

NOTES

I. Limitation period ceases to run

1. In ENGLISH law, the limitation period ceases to run when the creditor commences proceedings against the debtor (*McGee* 2.001 ff.; [NB (4th ed, 2003) but new edition imminent; citation remains correct in 4th ed – HB]; Law Commission Consultation Paper on Limitation of Actions 164). This is also the approach adopted in IRELAND and by the UNCITRAL Convention: art. 13. On the problem of procedural delays, see, for English law, *McGee* 355 ff. In GERMANY the period of prescription is suspended from the time when judicial proceedings on the right are begun (CC § 204(1)); the suspension ends six months after the end of the proceedings (CC § 204(2); see

Zimmermann, in: Koller/ Roth/ Zimmermann, Schuldrechtsmodernisierungsgesetz 2002 (2002), pp. 31 f.). In ESTONIA, the period of prescription is suspended for the time of judicial proceedings (GPCCA § 160(1)) with the general effect of suspension being that the period for prescription should not expire earlier than two months after termination of suspension (GPCCA § 168(2), i.e. upon entry into force of the court decision (GPCCA § 160(3)) or, in case of suspension of a court proceeding, three years after the last procedural act is performed by the parties or the court (GPCCA § 160(4)). Under art. 14 of the UNCITRAL Convention, the limitation period is "deemed to have continued to run" where legal proceedings end without a decision binding on the merits of the claim but the creditor has an extra year if, when the proceedings end, the limitation period has expired or has less than one year to run. For criticism, see *Smit* (1975) 23 AJCL 342. ff.

II. Prescription is interrupted

2. Commencement of judicial proceedings has the effect of interrupting prescription in FRANCE (2241 CC), BELGIUM and LUXEMBOURG (CC art. 2244); AUSTRIA (CC § 1497); SPAIN (CC art. 1973; Ccom art. 944(1)); PORTUGAL (CC art. 323); GREECE (CC art. 261); SWITZERLAND (OR art. 138); ITALY (CC art. 2943); the NETHERLANDS (CC art. 3:316); SCOTLAND (Prescription and Limitation (Scotland) Act 1973 ss.6, 7 and 9 and *Johnston* para. 5.04 ff.); SLOVENIA (LOA arts. 365 and 369) and SWEDEN (Preskriptionslag (1981-130) § 7). In DENMARK prescription under Law no. 274 of 22 December 1908 is interrupted if the creditor brings a legal action and without unnecessary delay pursues that action to obtain judgment, settlement or other judicial decree (§ 2). There are no such rules for prescription under art. 5.14.4 of the Danske Lov since here a fresh prescription period begins to run again after a reminder by the creditor. The situation in FINLAND is the same as with regard to prescription under the Danske Lov. Reminder (*skriftlig erinran*) also triggers a fresh prescription period according to SWEDISH law (§§ 5 f Preskriptionslag (1981:130)). In POLAND, the period of prescription is interrupted by any action before a court or any other authority entrusted with the adjudication or enforcement of particular claims or before arbitrators, brought for the purpose of vindication, declaration or protection of the right (CC 123 § 1(1)).

3. According to the SLOVAK law if the creditor pursues the right before a court or other competent authority during the prescription period, the prescription period stops running from the moment of commencement of the proceedings. This rule also applies to a finally and conclusively awarded right where enforcement of the decision is applied for before a court or other authority (CC § 112). CZECH law is identical; more detailed rules can be found in the Ccom: if a right has been asserted in judicial or arbitral proceedings as a counterclaim, the prescription in relation to this right is regarded to have ceased to run on the day of commencement of the proceedings, on the assumption that the claim and the counterclaim are related to the same contract [...] (Ccom§ 404(1)).

4. For rules on how long the "interruption" lasts, see; the Greek CC art. 261; the ITALIAN CC art. 2945. Under the Austrian CC § 1497 interruption lasts as long as the judicial proceedings are "properly continued". Every act by any of the parties to the proceedings, and by the court, is regarded as a new cause of interruption under the Swiss OR art. 138; cf. also *Spiro*, Begrenzung § 147; for Scottish law, see *Johnston* para. 5.40. According to POLISH law, where prescription has been interrupted by an action brought before a court, arbitrators or any other authority, it does not begin anew until the proceedings have been terminated. After every interruption of the periods of prescription it begins to run anew (see: CC art. 124).

5. Under the SLOVAK CC § 112 the prescription period does not run during the proceedings subject to the proviso that the creditor properly continues the commenced proceedings. The same holds true for CZECH law.

III. Procedurally defective actions; withdrawal of action

6. Under the new GERMAN law (CC § 204) the running of the prescription period is suspended even if the action is procedurally defective; even an action before a court lacking jurisdiction suspends prescription (*Staudinger(-Peters)* § 204, n. 24 ff.). Under AUSTRIAN law (CC § 1497, 2) filing a claim is a reason for interruption but only an action meeting all procedural requirements interrupts prescription. The same is true in SLOVENIAN law (LOA art. 366). In FRANCE and LUXEMBOURG (CC art. 2246) also an action before a court without jurisdiction interrupts prescription. In ITALIAN law (CC art. 2943(3)) too, interruption is effective even if the judge lacks jurisdiction; the same applies to an action which is otherwise defective as long as it can be regarded as an act placing the debtor in default (see *Roselli-Vitucci*, 535 ff.).

7. In the NETHERLANDS (CC art. 3:316(2)), if the action is dismissed, commencement of the proceedings interrupts prescription only if within six months after the end of the first proceeding another action is instituted and this latter action is granted. For GREECE, cf. also CC art. 263; A.P. 1267/1995, EllDik 38 (1997) 838. In Greece and the Netherlands an action that is subsequently withdrawn is usually treated in the same way as a procedurally defective action; see *Spiro*, Begrenzung § 142 with references. Under art. 944(2) of the SPANISH Ccom prescription is deemed not to have been interrupted if the decision is not favourable to the claimant or if the action is withdrawn. SWISS law attributes the effect of interruption only to actions which result in a decision on the merits of the case and gets into difficulties where the claimant withdraws the action; see *Spiro*, Begrenzung §§ 139 ff. These problems are largely obviated by "downgrading" the effects of judicial proceedings from interruption to suspension.

8. In SLOVAK law bringing a procedurally defective action or an action which is otherwise defective (assuming that the defects are removable) has the same effect of interruption of the prescription period as for non-defective actions (see Supreme Court judgement (NS SR) R 46/2000). In case of stay of proceedings due to withdrawal of the action, commencement of such proceedings do not interrupt prescription (see Supreme Court judgement R 103/2001). Conclusions for CZECH law are very similar; in particular: if the creditor does not continue properly in the proceedings, i.e. the proceedings are finished without a decision on the merits, the prescription is regarded as never having been suspended (see *Švestka/Jehlička/Škárová*, OZ[9], 443).

IV. Legal proceedings remain in abeyance

9. Some laws provide for the case where the legal proceedings remain in abeyance because the claimant fails to pursue them further; see, for GERMANY, CC § 204(2), 2, 3; for GREECE, CC art. 261; for ITALY, CC art. 2945(3); for ESTONIA, GPCCA § 160(4); for the CZECH REPUBLIC, *Švestka/Jehlička/Škárová*, OZ[9], 444; Supreme Court 2 Cdon 302/97; for SLOVAKIA, CC § 112 and, for a comparative discussion, *Spiro*, Begrenzung § 147. However, a regulation of this situation appears to be dispensable since, if the claimant fails to advance the proceedings the defendant may normally be expected to take steps to have the action dismissed; see *Spiro*, Begrenzung § 147 (n. 16); *Staudinger(-Peters)* § 204, n. 122, 125 ff. Details, of course, depend on the applicable procedural law. SLOVAK law provides that the interruption of prescription requires the “proper continuing of the commenced proceedings”.

V. Extra time

10. The minimum period for a claimant to bring another action where the proceedings have ended without a decision on the merits of the right varies: sixty days (SWITZERLAND: OR art. 139; two months in (ESTONIA: GPCCA § 168(2); six months (GERMANY: CC § 204(2); GREECE: CC art. 263(2); the NETHERLANDS: CC art. 3:316(2)); one year (art. 14(2) UNCITRAL Convention) and the CZECH REPUBLIC for commercial matters: CC § 405(2)).

VI. When does prescription cease to run?

11. Prescription is interrupted (in GERMANY suspended, CC § 204(1)) from the moment when judicial proceedings are begun. The precise date will depend on the applicable procedural law. See the comparative observations in (1979) 10 UNCITRAL Yearbook 159. For AUSTRIA see *Mader/Janisch* in Schwimann, ABGB VI, 3rd ed., § 1497 no 10. In SLOVAK law suspension is triggered by delivering the petition for commencement of the proceedings (Civil Procedure Code § 79) or by issuing a ruling on commencement of the proceedings without a petition (Civil Procedure Code § 81).

VII. Declaratory judgment

12. An action for a declaratory judgment may suspend or interrupt prescription: see, for GERMANY, CC § 204(1), no.1; for ESTONIA, GPCCA § 160(1); comparative: *Spiro,* Begrenzung § 133. For AUSTRIA see *Mader/Janisch* in Schwimann, ABGB VI, 3rd ed., § 1497 no. 12. For the CZECH REPUBLIC, see Commercial Code § 402 (but the opposite conclusion is held in non-commercial matters, see Supreme Court 29 Odo 565/2001).

VIII. Other proceedings

13. Prescription may also be suspended or interrupted while arbitration or other similar proceedings are pending: see, for GERMANY, CC § 204(1), no.11; for SWITZERLAND, OR art. 135, no. 2; for GREECE: CC art. 269; for ITALY: CC art. 2943(4); for PORTUGAL: CC art. 324; for SCOTLAND: *Johnston* para. 5.07 f.; for ESTONIA: GPCCA § 161; for SLOVAKIA CC § 112 (court or other competent authority), Ccom § 403; for the CZECH REPUBLIC: *Švestka/Jehlička/Škárová,* OZ[9], 443 and Ccom § 403; UNCITRAL Convention art. 14; Unidroit Principles art. 10.7 (Alternative dispute resolution). Some of these provisions specifically regulate the moment from which prescription ceases to run: see e.g. UNCITRAL Convention art. 14. Conciliation proceedings are especially mentioned as suspending prescription in the GERMAN CC § 204(1), nos.4, 8, 11 and the ESTONIAN GPCCA § 167(3).

III.–7:303: Suspension in case of impediment beyond creditor's control

(1) The running of the period of prescription is suspended as long as the creditor is prevented from pursuing proceedings to assert the right by an impediment which is beyond the creditor's control and which the creditor could not reasonably have been expected to avoid or overcome.

(2) Paragraph (1) applies only if the impediment arises, or subsists, within the last six months of the prescription period.

(3) Where the duration or nature of the impediment is such that it would be unreasonable to expect the creditor to take proceedings to assert the right within the part of the period of prescription which has still to run after the suspension comes to an end, the period of prescription does not expire before six months have passed after the time when the impediment was removed.

(4) In this Article an impediment includes a psychological impediment.

COMMENTS

The creditor must have a fair chance of pursuing the claim: otherwise prescription would operate unduly harshly. The creditor can hardly, however, be reproached for not pursuing a proceedings when not able to do so: *agere non valenti non currit praescriptio*. Also, it must be remembered that while the short general period of prescription set out in III.–7:201 (General period) accommodates the reasonable interests of the debtor, the rules concerning commencement and suspension of the period of prescription have to be tilted in favour of the creditor. Moreover, it would seem incongruous to protect a creditor who does not know about the right and not one who is unable to pursue proceedings to assert it. There is, however, no compelling reason to extend the period of prescription if the impediment preventing the institution of an action has ceased to exist well before the end of the prescription period. Thus, it would normally appear to be quite sufficient to extend the period of prescription by the amount of time for which the creditor was prevented, within the last six months of the prescription period, from pursuing proceedings to assert the right.

Illustration 1
B has a right for €100,000 against A, which has fallen due on 10 March 2002. On 1 January 2003 B's holiday resort in Austria is cut off from the outside world by a huge avalanche. Only two weeks later are communications restored and is he able to leave the resort. Prescription of A's right occurs on 10 March 2005. The period is not extended since although A was prevented from claiming his money for two weeks in 2003 on account of an impediment beyond his control, he still had more than two years after that event to pursue his claim.

Illustration 2
The facts are as above but B is cut off between 25 August and 6 September 2004. Prescription of the right only occurs on 16 March 2005 since the impediment prevented B from exercising his right for six days within the last six months of the prescription period.

Illustration 3
The facts are as above but B is cut off between 20 and 23 January 2005. Prescription of the right occurs on 14 March 2005 since B was prevented from exercising his right for four days within the last six months of the prescription period.

Illustration 4
The facts are as above but B is cut off between 6 and 14 March 2005. Prescription of the right occurs on 18 March 2005. B was prevented from exercising his right for nine days due to an impediment arising within the last six months of the prescription period. Suspension began on 6 March and ended on 14 March. But what was suspended was the running of the original prescription period which, but for the suspension, would have run out on 10 March. Thus, it is only the remaining four days of that period that run after the end of the suspension.

The above examples relate to impediments of short duration and of such a nature that there is no good reason to give the creditor any further concession than the suspension of the running of the period. There may however be impediments of such a duration or nature that it would be unreasonable to cut off the creditor's rights within a very short time after the impediment is removed. To deal with such cases paragraph (3) postpones the expiry of the period of prescription until six months after the impediment is removed.

Illustration 5
X is abducted and held in an unknown location by the abductors, without any means of communication with the outside world, for over a year. The abduction took place two weeks before a right to payment was due to be rendered unenforceable by the expiry of the three-year period of prescription. In these circumstances it would not be sufficient to give X two weeks to start proceedings after being released. The period of prescription will not expire until six months after the time of release.

The formula chosen to define the range of impediments leading to suspension of the running of the period of prescription ties in with III.–3:104 (Excuse due to an impediment); the comments to that provision apply.

The reference to psychological impediments in paragraph (4) is intended to cover cases such as those where childhood victims of sexual or other abuse are psychologically unable to express or act upon the abuse until a very much later date. In such cases expert evidence would be required in order to establish that the impediment really was beyond the person's control.

NOTES

I. Suspension for vis major

1. Some codes have rules suspending prescription where it is factually impossible for the creditor to pursue the claim. In GERMANY, the creditor must have been prevented from exercising the right as a result of *vis major* (*höhere Gewalt*) (CC § 206), "cessation of the administration of justice" being an example. The same is valid for SLOVENIAN law (LOA art. 360). GREEK law (CC art. 255, 1) is virtually identical and so is PORTUGUESE law (CC art. 321). Also art. 121-15 of the First Law of the Catalonian Civil Code upholds the suspension of the running of the prescription period due to force majeure, and so does ESTONIAN GPCCA § 163. The UNCITRAL Convention takes account of "a circumstance which is beyond the control of the creditor and which he could neither avoid or overcome" (art. 21). The SWISS code has

a rule (OR art. 134, no. 6), suspending prescription as long as a claim cannot be asserted before a Swiss court. The interpretation of this rule is disputed (see *Spiro*, Begrenzung § 72; *Peters & Zimmermann* 271). For AUSTRIA, see CC § 1496 (regarding cases of military service, war, epidemics …). Under POLISH law, the prescription is suspended in relation to any claims where due to *force majeure* the entitled person is prevented from bringing them before a court or any other authority. The suspension lasts for the period while the hindrance continues (CC art. 121(4)).

II. Codes without such suspension ground

2. Other codes have no equivalent rule (for the NETHERLANDS, cf. *Asser-Hartkamp*, Verbintenissenrecht I n. 684) or one which only covers a very special situation (for ITALY, see CC art. 2942: claims against unemancipated minors, persons under disability due to insanity, members of the armed forces, and related persons, in time of war; for SPAIN, see art. 955 Ccom: prescription can be suspended by the Government in cases of war, health disasters or revolution; the CC does not contain an equivalent rule). Presumably, the courts have recourse to the *exceptio doli* or comparable devices in appropriate cases: see *Spiro*, Fs Müller-Freienfels, 624. In FRANCE, the draftsmen of the code civil adopted only specific grounds of suspension and made it clear that these grounds were to be exhaustive (CC art. 2251). Nonetheless, the courts have drawn upon the old maxim of the Roman-Canon common law *agere non valenti non currit praescriptio* (which was supposed to have been abolished) in order to establish suspension of prescription in cases of *impossibilité absolue d'agir* (see *Ferid & Sonnenberger* 1 C 224 who comment that the courts have decided essentially contrary to the text of the law; the same view is expressed by *Terré/Simler/Lequette*, Les obligations, no. 1396). The new law codifies this and article 2234 now states that prescription does not run or is suspended in cases of “impossibilité d’agir par suite d’un empêchement resultant de la loi, de la convention ou de la force majeure”. BELGIAN case law has accepted suspension of prescription in cases where the claimant is prevented *by law* from exercising the rights in question (see *Storme*, in: *Hondius* 69) but otherwise has continued to hold that the statutory grounds for suspension are exhaustive. In ITALIAN law, the *agere non valenti* rule is still occasionally relied upon though only to justify application by analogy of a specific ground of suspension, e.g. in cases of a *pactum de non petendo* (cf. *Roselli-Vitucci* 510 ff.). ENGLISH, and IRISH law do not recognise *vis major* as a ground of suspension. Neither does SCOTTISH law. There are also no rules concerning the effect of *vis major* on prescription in SWEDISH, DANISH or FINNISH law. In CZECH and SLOVAK law there is no regulation concerning suspension of prescription due to vis major.

III. Only the last part of the period is relevant

3. The codes and statutes suspending prescription in cases of *vis major*, etc., tend to confine the effect of this rule in a similar, though not identical, manner to the one set out in the Article. According to GERMAN, ESTONIAN and GREEK law (CC § 206, GPCCA § 163, CC art. 255, 1), prescription is only suspended for as long as the creditor is prevented from pursuing the claim as a result of *vis major* within the last six months of the prescription period. Thus, the maximum period for which suspension may be suspended is six months. PORTUGAL has a period of three months (CC art. 321). Art. 21 of the UNCITRAL Convention extends the limitation period "so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist" (for comment, see (1979) 10 UNCITRAL Yearbook 164). Effectively, therefore, the creditor is granted a minimum period of one year to

pursue the claim. But most impediments covered by the present rule will only last for a short while. It appears to be disproportionate in such cases to grant the creditor a full period of one year (or even six months) after the impediment has fallen away. There is no restriction period in POLISH law, the suspension lasts as long as the creditor is prevented from exercising the right. AUSTRIAN CC § 1496 does not mention this requirement.

III.–7:304: Postponement of expiry in case of negotiations

If the parties negotiate about the right, or about circumstances from which a claim relating to the right might arise, the period of prescription does not expire before one year has passed since the last communication made in the negotiations.

COMMENTS

Negotiations between the parties to reach a settlement out of court deserve to be encouraged. They should not have to be carried out under the pressure of an impending prescription of the claim. Nor should negotiations be allowed to constitute a trap for the creditor. A debtor who starts negotiating and who thus prevents the creditor from bringing an action should not later be allowed to refuse performance by invoking the time that has elapsed during those negotiations. Ultimately, the present provision has to be regarded as a special manifestation of the principle of good faith and fair dealing.

In order to minimise the effect of negotiations on prescription it is sufficient to postpone the expiry of the period of prescription rather than suspend its running (on the difference, see Comment A to III.–7:301 (Suspension in case of ignorance)). Once negotiations have failed, the creditor does not need more than a reasonable minimum period to decide whether to pursue the claim in court.

> *Illustration 1*
> A has a right to €20,000 against B. The right falls due on 10 October 2004. Between 10 October 2004 and 10 March 2005, negotiations are pending between A and B about whether the right exists. Prescription occurs on 10 October 2007; the period is not extended as a result of the negotiations.
>
> *Illustration 2*
> The facts are as above, but the negotiations take place between 20 December 2006 and 5 May 2007. The period of prescription is only completed on 5 May 2008 (one year after the end of negotiations).
>
> *Illustration 3*
> The facts are as above, but the negotiations take place between 1 September 2007 and 15 May 2008. Prescription occurs on 15 May 2009 (one year after the end of negotiations).

The term "negotiations" has to be interpreted widely. It covers any exchange of opinion which may reasonably lead the creditor to believe that the claim has not been finally rejected by the debtor. Conciliation proceedings, which appear to be of growing importance with regard, e.g., to medical malpractice suits in some countries, should also be taken as covered by the term negotiations.

The Chapter does not establish any formal requirements to clarify when the period during which prescription is delayed begins or ends. However, a debtor would be well advised to try to establish clearly when negotiations have broken down since, in accordance with general principle, it is the debtor who has to prove that negotiations have broken down. The general rules on when a notice or other communication takes effect may be relevant in this

connection: the last communication in the negotiations will normally be regarded as made only when it reaches the addressee.

NOTES

I. Negotiations as a statutory ground of suspension

1. The reform of the law of obligations in the GERMAN CC widened the rule of the former CC § 852(2) to a general rule: Under CC § 203 the running of the prescription period is suspended as long as the parties negotiate in relation to the claim or the facts constituting the claim. The claim cannot become time-barred until three months after the end of the suspension have expired (see *Zimmermann*, in: Koller/Roth/Zimmermann, Schuldrechtsmodernisierungs-gesetz 2002 (2002), pp. 33 f.); *Spiro*, Begrenzung § 108. The prescription period is suspended on a similar basis under ESTONIAN law (GPCCA § 167(1)), with the general effect of suspension being that the period for prescription should not expire earlier than two months after suspension has expired (GPCCA § 168(2)). On the contrary, the reform of the law of prescription in the FRENCH CC does not include negotiations among the various causes of suspension, while mediation and conciliation do constitute causes of suspension (CC art. 2238), with the general effect that prescription starts again, for a time which cannot be less than 6 months after the mediation or conciliation is finished.

2. In GREEK law, prescription is suspended as long as the debtor fraudulently dissuades the creditor from pursuing the claim within the last six months of the prescription period (CC art. 255 sent. 2). This rule was applied by the Areios Pagos in the case of negotiations (13/1989, EllDik 31 (1990), 1235 (1236)). In ITALY it has been held that prescription is suspended from the moment when a settlement out of court is reached until the final judgment invalidating that settlement (cf. *Roselli-Vitucci* 516). This is a situation similar to suspension as a result of negotiations. The principle behind the ruling appears to be that prescription does not run against a person who is unable to bring an action.

II. Other approaches

3. Most of the other legal systems do not have a provision of this kind, but only very few of them are happy to allow the debtor "to negotiate himself into limitation" (see the report on NORWEGIAN law to case study 20, Prescription I, in *Zimmermann & Whittaker* 504). Most want to help the creditor somehow. According to DANISH law, if the debtor has embarked upon serious negotiations, prescription is suspended until these negotiations have broken down; see *Gomard*, Obligationsret III, 239. As far as SWITZERLAND is concerned, *Spiro*, Begrenzung (§ 108) takes prescription to be suspended during negotiations even without a statutory basis. In other countries we find extended interpretations of the notions of acknowledgement and waiver; the use of equitable doctrines like promissory estoppel or personal bar; or resort to the general notion of good faith, to the doctrine of abuse of right or to the *exceptio doli* (for details, see the country reports for GREECE, AUSTRIA, FRANCE, BELGIUM, SPAIN, ITALY, the NETHERLANDS, ENGLAND, IRELAND, SCOTLAND and the NORDIC COUNTRIES to case 20, as well as the comparative observations at the end of case 21, in *Zimmermann & Whittaker* 493 ff., 530 f.). For the case law in the NETHERLANDS cf. also *Koopmann* 72 ff. In IRELAND the courts, on the basis of their equitable jurisdiction, may stop a party from pleading limitation if it appears that there was a representation (express or implied) by one of the parties that a suspension

would occur during the negotiations; see *Brady & Kerr* 171 ff. In SWEDISH law, negotiations would normally constitute a "reminder" which triggers a new ten year period according to Preskriptionslag (1981:130) §§ 5 ff. CZECH law does not recognize negotiations as a cause for suspension of the prescription, but pleading of prescription may be judged as contrary to good morals and thus inadmissible in certain situations (CC § 3(1) and Constitutional Court I ÚS 643/04).

4. Under POLISH law, there is no specific provision relating to negotiations, but a broad interpretation of the rule on acknowledgement of the claim by the person against whom it is made may be applied. Such acknowledgement causes the interruption of the period of prescription (CC art. 123 § 1(2)). See: Supreme Court judgment of September 19, 2002 (II CKN 1312/00, OSNC 2003/12/168), where it was found that when the debtor requests the creditor to accept the performance of an obligation in instalments and to exempt him from payment of interest for late performance, it can be deemed an acknowledgment of the claim even though the proposed agreement was finally not concluded between the parties. In SLOVAK law there is no specific regulation of postponement of expiry of the prescription period in case of negotiations.

III. A form requirement?

5. An argument against a rule suspending prescription in case of negotiations is that it can lead to uncertainty. When does suspension start and end? (See *Preston & Newsom* 146). A form requirement has sometimes been suggested to meet this objection: suspension begins if one of the parties requests negotiations in writing, and ends if one of them refuses, in writing, to continue to negotiate (see *Peters & Zimmermann* 320 f.) The reform of the law of obligations in the GERMAN CC (see CC § 203) did not follow this suggestion (see BT-Drucksache 14/6040, p.112). This argument has restrained the French legislator from admitting that negotiations can be a cause of suspension, although this had been recommended by Malaurie in the Avant projet de réforme du droit des obligations et de la prescription (art. 2264 Avant-projet).

III.–7:305: Postponement of expiry in case of incapacity

(1) If a person subject to an incapacity is without a representative, the period of prescription of a right held by or against that person does not expire before one year has passed after either the incapacity has ended or a representative has been appointed.

(2) The period of prescription of rights between a person subject to an incapacity and that person's representative does not expire before one year has passed after either the incapacity has ended or a new representative has been appointed.

COMMENTS

A. The options

The principle that prescription does not run against a person who is unable to bring an action also requires prescription not to run against a creditor who is subject to an incapacity. The paradigmatic example is the minor who is unable because of minority to pursue a claim in court. Some legal systems, therefore, have a general rule to the effect that prescription does not run against a minor. Arguably, however, it overshoots the mark. For a minor normally has a legal representative (such as a parent or guardian) capable of bringing proceedings on his or her behalf. It is arguable, therefore, that the minor only requires protection where there is no such representative.

B. The general approach

The choice between these two approaches is not an easy one. On balance, however, commercial certainty would appear to be too gravely jeopardised if a person exposed to a claim by a minor had to wait at least until the minor had reached the age of majority plus three years. The interests of the minor cannot in this respect prevail against those of the third party, since the legal system may reasonably proceed from the assumption that the parent or guardian has a responsibility to look after the interests of the minor. This is particularly obvious in the case of rights other than those for compensation for personal injuries, such as contractual rights. If the adult representative fails to act in the appropriate manner this is a risk that the minor should bear, subject to rights against the representative. Moreover, the minor can be protected at least to the extent that expiry of the period of prescription of the minor's rights *against the representative* can be postponed until a reasonable time after the minor reaches the age of majority.

C. Person under disability without a representative

The Article specifies the situations in which protection is required. The effect of the first paragraph is confined to the situation where the minor or other person subject to an incapacity is without a representative. Two additional points have to be noted. (i) Protection of the person subject to an incapacity only appears to be necessary if the lack of representation existed within the last year of the prescription period, as long as the law makes sure that a reasonable period is available after either the incapacity or the lack of representation has been removed. Lack of representation, therefore, does not suspend the running of the prescription period but merely postpones its expiry. (ii) The rule works both ways, i.e. it also affects rights against the person subject to an incapacity. Though not impossible, it is often not easy for the creditor of a person subject to an incapacity who lacks a representative to pursue a claim. Thus, it appears to be equitable to grant such a creditor the same protection as is granted to the person subject to the incapacity.

D. Rights between person subject to an incapacity and the representative

The second paragraph supplements the first. If, as far as third parties are concerned, a minor (for example) has to bear the consequences of the representative's failure to act, the minor must at least be able to sue the representative for damages. This the minor can normally only do on attaining the age of majority. Once again, however, it is unnecessary to suspend prescription. It is sufficient that a reasonable period is available for bringing an action after reaching the age of majority. Once again, it is equitable to make the rule work both ways.

E. Personal injuries

In some countries, sexual abuse of children has given rise to civil litigation. Here the law may arguably rely on the representative adult to take whatever action is appropriate, where the person abusing the child is an unrelated stranger. Where the person abusing the child is the parent, postponing the expiry of the period of prescription of all rights between child and parent would help, at least to a certain extent. However, the minor will often have repressed the traumatic childhood experience and may need considerable time to break down the psychological barriers preventing acknowledgement of what has happened. Thus, it may be more appropriate in these cases to suspend the running of, rather than to postpone the expiry of, the period of prescription. See III.–7:303 (Suspension in case of impediment beyond creditor’s control) paragraph (3). Moreover, there have been cases where the child is abused by another family member with whom the parent connives or whom he or she does not want to sue for other reasons. Here it might also be appropriate to introduce a rule suspending prescription – either of the rights against the third party or at least against the parent. However, this does not seem to be the place for such specialised rules, which raise difficult and emotive issues. If the rules in the Chapter are considered inadequate for this special situation, the matter would be best dealt with by special laws relating to this matter.

F. Rights between spouses

Another related matter may be mentioned here, although it is not a question of incapacity. In a number of codes, rights between spouses are subjected to the same regime as rights between children and their parents or guardians: prescription is suspended as long as the marriage persists. The common denominator is the family tie which constitutes, in the old-fashioned language of the draftsmen of the CC, a relationship of piety requiring utmost care and protection. But such a rule appears hardly defensible today. It leads to problems being swept under the carpet rather than solved. The death of one of the spouses should not enable the other to surprise disagreeable heirs by presenting them with rights which would normally have prescribed many years ago. Nor should divorce provide the trigger for settling old scores. Marriage would then have had the effect of removing protection against stale claims: a result which may well be regarded as discriminatory. If, on the other hand, one were to regard the rationale underlying suspension concerning rights between spouses as sound, it is difficult to see why the rule should not be generalised so as to cover other closely related persons living in a common household. However, delimitation of its range of application would then become an intricate exercise which would inevitably jeopardise legal certainty. The only special rule that is required is the one concerning rights between persons under a disability and their representatives, and it is based on a different rationale: not on the close personal ties existing between these persons but on the impossibility of action by the person under the disability.

G. Adults subject to an incapacity

The previous remarks have often focused on the minor. Of course, they apply with appropriate modifications also to persons who lack the capacity to pursue claims because they are of unsound mind.

NOTES

I. Prescription not running against persons subject to an incapacity

1. In FRANCE, BELGIUM, LUXEMBOURG, ENGLAND, IRELAND, SLOVENIA and SCOTLAND prescription does not run against persons subject to an incapacity: see, for FRANCE CC art. 2235 (see also 2236 which extends the rule to spouses and partners engaged in a PACS) see, for the other two countries, CC art. 2252 first part; the English Limitation Act 1980 s. 28; the Irish Statute of Limitations Act 1957 s. 49; the Prescription and Limitation (Scotland) Act 1973 s.6(4)(b) and *Johnston*, para. 6.130 ff. For exceptions to this general rule, see the French CC art. 2235, second part; the complex regulation in the English Limitation Act 1980 ss. 28, 28A. The Law Commission has recommended that the normal three-year period should not run against a person subject to mental incapacity, but in certain situations the claim may be barred after ten years: see Report No 270 on Limitation of Actions para. 3.133.). Though originally suppressed in art. 1932 SPANISH CC, the "*contra non valentem agere non currit praescripto"* rule has been included in the First Law of the Catalonian CC. In SLOVENIAN law, however, the prescription expires only two years after the attainment of full age or the time when a person is appointed as a curator or guardian. See LOA art. 362.

II. Person subject to an incapacity without a representative

2. Protection is granted to a person subject to an incapacity, but without a representative, according to AUSTRIAN (CC § 1494); GERMAN (CC § 210); GREEK (CC art. 258(2)); PORTUGUESE (CC art. 320); ITALIAN law (CC art. 2942(1)); ESTONIAN law (GPCCA § 165); CZECH law (CC § 113); and POLISH law (CC art. 122). At the same time, these codes generally suspend the prescription of rights of the person under disability against the representative as long as the disability lasts: CC art. § 1495; CC § 207(1), 2, no.2-5, 3; Greek CC art. 256; Portuguese CC art. 320; Italian CC art. 2941, nos. 2-4; Estonian GPCCA § 164(2)-(3) and the CZECH CC § 114. For similar rules, see for SWITZERLAND OR art. 134, nos. 1 and 2, for the NETHERLANDS, CC art. 3:321(1) under (b); for FRANCE CC art. 475; generally, see *Spiro*, Begrenzung §§ 75 f.

3. For the shift in continental legal development from taking account of the legal disability as such towards balancing the interest of the minor against those of the debtor, see *Mugdan* I, 528; *Peters & Zimmermann* 128. In SWITZERLAND and the NETHERLANDS the codes do not contain any provision suspending the prescription of a minor's rights (except in so far as these rights are against the representative). For details, and circumventions, see *Spiro*, Begrenzung §§ 95 ff., 106. In SPANISH law prescription runs to the disadvantage even of persons subject to incapacity, who are left to their remedy against the "representative whose negligence has caused the prescription" (CC art. 1932).

4. In GERMANY lack of representation does not suspend the running of the prescription period but merely postpones its expiry for six months; CC § 210. For the similar rule

in GREECE, see CC art. 258(2). Similarly, under POLISH law, the period of prescription against a person not possessing full capacity for legal acts does not terminate until two years have elapsed from the day on which legal representation was established or on which the grounds for such establishment ceased. If the period of prescription is less than two years, it is counted from the day on which legal representation was established or from the day on which the ground for such establishment ceased (CC art. 122). The Italian rule is different in that prescription is suspended for the period during which the person under disability lacks representation and for six months following the appointment of such representative or the termination of the disability: CC art. 2942. Under ESTONIAN law, lack of representation does suspend the running of the prescription and also postpones its expiry for a minimum of six months after expiry of suspension; GPCCA § 165.

5. Under the German CC § 210 prescription is suspended for *and* against the person under a disability who lacks representation. For ITALY see CC art. 2942; for ESTONIA see GPCCA § 165(1).

III. Claims between person under disability and representative

6. Prescription of rights between a person under a disability and his or her representative is normally extended by way of suspension rather than postponement of the expiry of the period of prescription; AUSTRIA CC § 1495; GERMANY CC § 207(1), 2, no.2-5, 3; GREECE CC art. 256, nos. 2 and 3; SWITZERLAND OR art. 134, nos. 1 and 2; ITALY CC art. 2941, nos. 2-4; PORTUGAL CC art. 318, b; CC-KE § 213; POLAND CC 121(2); ESTONIA GPCCA § 164(2)-(3); for FRANCE, see *Taisne*, Jurisclasseur civil, arts. 2251-2259, n. 14; for the CZECH REPUBLIC, see CC § 114. Contra: the NETHERLANDS: CC art. 3:321(1) under (b); *Staudinger (-Peters)* § 204, n. 3.

7. SLOVAK law provides that prescription of rights between a legal representative on one side and represented persons on the other (involving persons under disability as well) neither starts running nor goes on running unless the right is to the payment of interest or to a repeated performance (CC § 114). CZECH law is the same.

IV. Personal injuries

8. On prescription in cases involving sexual abuse of children, see *Hondius* 9 f; On prescription in cases involving sexual abuse of children, see *Hondius* 9 f; Law Commission Report No 270 on Limitation of Actions paras 4.23-4.33; the NETHERLANDS HR, 23 October 1998 and 25 June 1999, Ned. Jur. 2000, 15/16; and the IRISH Statute of Limitations (Amendment) Act 2000; the NETHERLANDS HR, 23 October 1998 and 25 June 1999, Ned. Jur. 2000, 15/16; GERMANY: CC § 208; and the IRISH Statute of Limitations (Amendment) Act 2000. In POLAND, generally, prescription of claims of children against their parents is suspended for the period when parental authority lasts (CC 121(1)).

V. Claims between spouses

9. Claims between spouses are suspended, as long as the marriage persists, in FRANCE (2236, extending it to partners in a registered partnership), BELGIUM and LUXEMBOURG (CC art. 2253); AUSTRIA (CC § 1495); GERMANY (CC § 207(1), 1; for a spirited attack on the rule, see *Staudinger(-Peters)* § 207, n. 2); GREECE (CC art. 256); PORTUGAL (CC art. 318, a); SWITZERLAND (OR art. 134, no. 3); ITALY (CC art. 2941, no. 1 and Constitutional Court, 19.2.1976, n. 35 in Giust.civ. 1976, III, 131); the NETHERLANDS (CC art. 3:321(1) under (a)); ESTONIA (GPCCA § 164 (1)); POLAND: CC 121(3); and the CZECH REPUBLIC: CC § 114.

Generally, see *Spiro*, Begrenzung § 74 and FS Bosch, 975 ff. In Germany the same rule applies to (registered) civil partners (CC § 207(1), 2, no.1).

10. SLOVAK law provides that prescription of rights between spouses (as long as the marriage persist) neither starts running nor goes on running unless the matter relates to the payment of interest or a repeated performance (CC § 114).

III.–7:306: Postponement of expiry: deceased's estate

Where the creditor or debtor has died, the period of prescription of a right held by or against the deceased's estate does not expire before one year has passed after the right can be enforced by or against an heir, or by or against a representative of the estate.

COMMENTS

When a person has died it can happen, at least under some succession regimes prevailing in Europe, that the estate is without a personal representative, or heir, who can sue or be sued for rights by or against the estate. It is reasonable in such a case to postpone expiry of the period of prescription on the model established for persons subject to an incapacity (III.–7:305 (Postponement of expiry in case of incapacity)). The situations are very similar, and so is the underlying rationale that prescription does not run against a person who is unable to bring an action. This applies to rights by and against the estate.

NOTES

1. The rule can be found in GERMAN law: CC § 211 but the minimum period is six months rather than one year. The rule has not given rise to problems and its wisdom has never been questioned. Few other legal systems, however, contain the same or a similar rule. See, however, for GREECE, CC art. 259 and for PORTUGAL, CC art. 321. In SWITZERLAND, the general provision of OR art. 134, no. 6 – concerning rights which the creditor is unable to pursue before a Swiss court - appears to be applied in appropriate cases: see *Spiro*, Begrenzung § 72 (158 f.). The codes in BELGIUM and LUXEMBOURG (CC art. 2258(2)) and SPAIN (CC art. 1934) even specifically state that prescription is not suspended (cf. *Díez-Picazo & Gullón Ballesteros* I, 471). In FRANCE, art. 2237 CC states that prescription does not run or is suspended in relation to the rights of an heir against the deceased's estate. The ENGLISH Limitation Act 1980 provides in s.11(5) that where an injured person dies before the three-year period has elapsed, the relevant period is three years from the date of death or from the date of the personal representative's knowledge of the facts, whichever is later. There is a similar rule in SCOTLAND: Prescription and Limitation (Scotland) Act 1973 s.18. For IRELAND, see s.9 of the Civil Liability Act 1961. AUSTRIA, POLAND and the NETHERLANDS have no equivalent rule. Under ESTONIAN law, the period of prescription for a claim which is part of an estate or directed against an estate is suspended until the time when the successor accepts the estate or bankruptcy is declared with regard to the estate or an administrator is appointed to exercise custody over the estate and its expiry is postponed for a minimum of six months after the ending of the suspension (GPCCA § 166). In SLOVAKIA and the CZECH REPUBLIC there is no regulation comparable to the Article.

III.–7:307: Maximum length of period

The period of prescription cannot be extended, by suspension of its running or postponement of its expiry under this Chapter, to more than ten years or, in case of rights to damages for personal injuries, to more than thirty years. This does not apply to suspension under III.–7:302 (Suspension in case of judicial and other proceedings).

COMMENTS

A. Uniformity or differentiation?

The Chapter establish a core regime of a short period of prescription (three years according to III.–7:201 (General period) but, because of the rule on reasonable discoverability (III.–7:301 (Suspension in case of ignorance)), prescription may nonetheless be postponed for decades. But prescription should not be deferred indefinitely: at some stage, the parties must be able to treat the incident as indubitably closed. A maximum period after which no claim may be brought, regardless of the creditor's knowledge, appears to be necessary as a counterbalance to the discoverability principle. It is required in terms of all three policy considerations referred to above (Comment E to III.–7:101 (Rights subject to prescription)) which underlie the law of prescription. This is increasingly recognised internationally. The question is how long this maximum period should be. Once again, we observe an international trend – though not an entirely unequivocal one – towards a shorter period. But this shorter period often only applies to rights which do not involve personal injuries. Thus, taking account of the more modern codifications and reform proposals, there appear, once again, to be two fundamental options: differentiation or uniformity.

Differentiation would have to be along the line of rights to damages for personal injuries versus other rights. Most situations which have been specified as being particularly problematic (sexual abuse of children, asbestosis, medical malpractice) fall into the category of rights to damages for personal injuries. The reasons for treating them differently are that there is often a long latency period and that life, health and the bodily integrity in general are particularly valuable objects of legal protection: personal injuries are generally regarded as more serious than property damage or economic harm. For the latter even a short long-stop of ten years is very widely regarded as sufficient. There should also be no objection to subjecting other types of rights (such as rights for specific performance, or rights for the reversal of unjustified enrichment) to a ten year long-stop. For personal injuries, a long-stop of thirty years is widely regarded as appropriate. Finally, the distinction between rights to damages for personal injuries and other rights appears to be comparatively straightforward. Personal injuries are all injuries to the bodily integrity of a person. All rights arising from such injury (including, for instance, psychiatric injury and compensation for pain and suffering) are covered by the thirty-year period.

Alternatively, one might try to find a compromise solution which accommodates both rights to damages for personal injuries and other rights while not providing a perfect solution to either of them. The arguments for this option are as follows. (i) Even a thirty year period will not provide a perfect solution for rights to damages for personal injuries since there will still be cases where the creditor did not know about the claim. (ii) An incident might cause both personal injury and damage to property. For example, a defective machine explodes and damages the purchaser's health and property. Or asbestos is used in the process of renovating a house; after some years, the owner contracts asbestos-related cancer and has to undergo

expensive treatment; at the same time, the house has to be pulled down. If it is possible, after all those years, to prove who was responsible for using asbestos, and that the presence of asbestos in the house has caused the owner's disease, it is hard to see why the owner should be able to pursue rights based on injury to health but not rights based on damage to property: if the one is established, so is the other. (iii) It is as difficult for the debtor to mount a defence after twenty or thirty years in an action for damages for personal injuries as it is in an action concerning damage to property. The obfuscating power of time does not distinguish between different types of rights. Witnesses die, the debtor's memory fades and vital documents are lost. Once again, it must be remembered that we usually only see the hardship involved for a creditor who is barred by prescription although able, even after the lapse of many years, to establish the claim; and that we tend to forget about the many cases in which a prescription regime prevents unjustified claims from being pursued. (iv) One important source of rights based on personal injuries is defective products. Here we have a general long-stop (for personal injuries and damage to property) in all member states of the EU as a result of the Product Liability Directive; and it was the relatively short period of ten years which was regarded as sufficient in this situation. (This period even starts to run when the producer has brought the defective product into circulation!).

On balance, it has been decided to follow the first of these approaches and to adopt the distinction between rights based on personal injuries (long-stop of thirty years) and other rights (long-stop of ten years). However, within the framework of the Chapter, this long-stop is not, as it is usually perceived, a prescription period. This is due to the fact that discoverability is not the moment of commencement of the period of prescription. Commencement is defined in III.–7:203 (Commencement), a provision which is of general application. The running of the period of prescription is merely suspended as long as the creditor does not know, and could not reasonably know, of the facts giving rise to the right and of the identity of the debtor. Thus, the long-stop becomes in fact a rule on the maximum effect of extension of the period of prescription. As a result, we do not have two prescription periods for one and the same claim, running side by side with each other; instead, we have a uniform regime of one period of three years which may be extended to a maximum length of ten (or thirty) years. It goes without saying that the ten (or thirty) years must be counted from the time laid down in III.–7:203.

Any specially extended period for environmental damage must be left to special legislation.

B. Range of application

Obviously, the maximum period applies to suspension in case of ignorance. If the special need for legal certainty in this field of law is kept in mind, however, it has to apply as broadly as possible. Only reasons inherent in the nature of things should override this final date. Such reasons are apparent only in one situation: suspension in case of judicial proceedings (III.–7:302 (Suspension in case of judicial and other proceedings)). One cannot expect more of the creditor than to attempt to establish the right by judicial proceedings. How long these proceedings take is very largely a matter the creditor cannot control. Everything is now under way to remove the existing uncertainty and it would clearly be inequitable if the creditor could be trapped by prescription in this situation.

Apart from III.–7:302 (Suspension in case of judicial and other proceedings), the maximum period laid down in the present Article applies to all grounds of suspension or postponement of expiry provided for in these Chapter, and also in situations where two or more of them

apply to the same claim. It therefore provides a limit to the operation of III.–7:301 (Suspension in case of ignorance), III–7:303 (Suspension in case of impediment beyond creditor's control), III.–7:304 (Postponement of expiry in case of negotiations), III.–7:305 (Postponement of expiry in case of incapacity) and III.–7:306 (Postponement of expiry: deceased's estate). For extension of prescription by way of agreement, see III.–7:601 (Agreements concerning prescription).

Illustration
On 10 March 2004, A observes some cracks in his house which was built by B a few years earlier. A investigates the matter and discovers (i) that the cracks are due to a defect in the foundations of the house, (ii) that B was responsible for that defect and (iii) that expensive repairs are necessary to prevent further deterioration. On the assumption that the moment triggering the period of prescription for A's right to damages for non-performance by B of B's contractual obligation (i.e. the moment of the defective performance) was 1 March 1996, the running of the period was suspended until 10 March 2004. If A and B now start to negotiate about the claim, the period of prescription can be further extended in terms of III.–7:304 (Postponement of expiry in case of negotiations), but not beyond 1 March 2006.

C. Fraus omnia corrumpit (fraud unravels all)?

In a number of countries, we find a general rule in terms of which the running of the period of prescription is suspended if the debtor fraudulently (or deliberately) conceals the existence of the right. Such a rule, however, appears to be unnecessary in view of the fact that the running of the period is suspended anyway, as long as the creditor does not know, and could not reasonably know, about the right. The only question of practical relevance is whether fraud (as opposed to mere ignorance) should override the long-stop. But even in this respect a special rule would do more harm than good. Whether the debtor, under certain circumstances, may be barred from raising the defence of prescription is a question of a general and complex nature which defies reduction to a simple and straightforward formula. A legal system that recognises an overriding requirement of good faith will not, in principle, deny such a possibility. Raising the defence of prescription is subject to the requirements of good faith and fair dealing. A person has a duty to act in accordance with good faith and fair dealing in, among other things, defending a remedy for non-performance of an obligation. Breach of the duty may preclude the person from relying on a defence which would otherwise have been available. Of course, it must be taken into account that prescription rules are geared specifically towards bringing about a state of legal certainty (even at the expense of individual justice) and therefore must not be interfered with lightly. Moreover, even here the lapse of time cannot be considered entirely irrelevant since, after many years have passed, it becomes increasingly difficult and unproductive to argue about whether there has been fraudulent concealment or not. Still, however, the good faith issue can arise. But if it does, it does not do so only in a clearly definable category of cases which can be grouped under the heading of fraudulent concealment of the claim. Force and fear can be equally relevant. And even in cases where there has been neither fraud, nor force, nor fear, a debtor may in certain situations be barred from invoking prescription: particularly where the debtor has promised not to do so.

NOTES

I. General

1. The GREEK CC art. 937(1) 2) provides for a long-stop of twenty years (from the moment when the wrongful act was committed and a short period of five years running from the moment of knowledge. The SWISS code has ten years in the two situations where it requires knowledge (OR art. 60(1), 67(1)). The NETHERLANDS (CC arts. 3:309, 310, 311) and SCOTLAND (Prescription and Limitation (Scotland) Act 1973 s.7) have long-stops of twenty years. A challenge to the consistency of the twenty-year period with the European Convention on Human Rights failed in the Scottish courts: *K v Gilmartin's Executrix* 2002 S.C. 602, affirmed 2004 S.C. 784 (child abuse case brought by adult victim 40+ years after the events in question). The ENGLISH Limitation Act 1980 recognises two exceptional long-stops of ten and fifteen years (ss.11A and 14A, relating to actions in negligence for latent damage and product liability). The GERMAN CC distinguishes between claims for damages for personal injury (CC § 199(2)), other claims for damages (CC § 199(3)) and claims other than for damages (CC § 199(4)): claims for damages because of personal injury have a long-stop of thirty years running from the moment when the wrongful act was committed; other claims for damages become time-barred ten years after they have come into existence or thirty years after the wrongful act was committed; the earlier being decisive. Claims other than for damages have a long-stop of ten years. The English Law Commission has recommended a solution based on a ten year long-stop applicable to all actions other than those for personal injury for which there should be no limit (Law Commission Report No 270 on Limitation of Actions). The new BELGIAN law has a long-stop of twenty years (applicable to all rights for damages for a wrongful act: art. 2226 bis § 1 al. 2; for details, see *Claeys*, 1998-99 R.W. 388 ff.). However, contrary to III-7:307, the long stop can also be interrupted/renewed and suspended: only the discovery rule does not apply to it. Generally, see *Storme*, in: *Hondius*, 58 (who regards the combination of two periods as the only balanced solution); Law Commission Consultation Paper on Limitation of Actions, 284 ff; *Spiro*, Begrenzung § 42; *Zimmermann*, 2000 JZ 863 f; cf. also the approach adopted in the Product Liability Directive, arts. 10 ff. (three and ten years) and art. 17 of the Convention on civil liability for damage resulting from activities dangerous to the environment (three and ten years). POLISH law, as regards non-contractual liability, has a long-stop of ten years from the moment when the wrongful act occurred (or in case of product liability – when the product was put into circulation); and the short period of three years from the moment of knowledge of the damage and the person liable (CC art. 442 and CC art. 449^8). In ESTONIA, along with the general period of three years with the commencement subject to discoverability, a long-stop of ten years applies to rights to delictual damages and to redress of unjustified enrichment (GPCCA § 150(3), § 151(2) and long-stop period of thirty years to claims arising from acts causing death, bodily injury or damage to health or deprivation of liberty (GPCCA § 153). On the other hand, neither the SOUTH AFRICAN Prescription Act or the QUEBEC CC recognise a long-stop. In FRANCE, the new law provides for a 20-year long-stop period (art. 2232).However, some exceptions are provided for in art. 2232 al. 2. Among these exceptions, there is a general one for personal injury, for which there is not only an extended delay (10 years from the date of the "consolidation" of the initial or aggravated damage) but no long stop period. The special responsibility regime for liability for defective products also has a long-stop period of 10 years starting from the date the defective product has been put into

circulation combined with a three-year prescription period for damages starting from the date the claimant knew or should have known of the damage, defect and the producer's identity (CC art. 1386-16, law of 18 May 1998). IRELAND also does not have a long-stop (except in the Liability for Defective Products Act 1991 and with regard to actions for recovery of money charged on land; see *Brady & Kerr*, 34) but recognises a general discretion inhering in the courts to dismiss proceedings on the basis of inordinate or inexcusable delay in their prosecution. This has the effect of providing the judiciary with a long-stop which can trump the extended limitation period provided by the discoverability rule introduced by the Statute of Limitations (Amendment) Act 1991. For discussion, see *Loubser* 37; *Deslauriers*, in: *Hondius*, 300.

2. As for rights to compensation for damage and rights to reversal of unjustified enrichment, the SLOVAK law (CC 106(2), 107(2)) has a long-stop of three years (ten years for intentionally caused damage) from the moment of occurrence of the event from which the damage arose. For commercial relationships the total period of prescription may not exceed a period of 10 years from the date when it first began to run (Ccom § 408(1)). CZECH law is identical.

3. In general, under the SPANISH CC a *suspension* of a prescription period is not allowed (only the *interruption*, after which the time begins to run again). Therefore, there are no provisions about a maximum period of the prescription's suspension.

II. Personal injuries claims

4. For a comparative assessment of the cases where a comparatively short long-stop may be problematic see *Hondius* 9 ff. The ENGLISH Law Commission has recommended that there should there should be no long-stop on personal injury claims (Law Commission Report No 270 on Limitation of Actions, para 3.107); the GERMAN code (CC § 199(2)) specifically lists life, health, bodily integrity and freedom as the relevant objects of legal protection. Freedom is included on the ground that unlawful deprivation of liberty may lead to psychological damage which only manifests itself much later: Abschlußbericht 76. In the FRENCH CC, there is an extended delay for personal injury (10 years from the date of the "consolidation" of the initial or aggravated damage) and no long stop period (2232 al. 2). In the NETHERLANDS since 2004, rights to damages for personal injury or death can prescribe only if five years have elapsed since the day following the one on which the claimant has become aware of both the damage and the person responsible for the damage (Article 3:310 (5)). In the preceding period in which such a right prescribed in any case by the lapse of twenty (or thirty) years since the event which caused the damage the Hoge Raad had already decided that this twenty-year long stop laid down in CC art. 3:310 could be set aside under exceptional circumstances: HR 28 April 2000, Ned. Jur. 2000, 430/431. Both cases concerned a special type of cancer caused by exposure to asbestos; the incubation period is normally between twenty and forty years. The Court based its ruling on CC art. 6:2 (according to which any rule based on the law, general usage or a legal act is not applicable as far as it is, under the circumstances, inappropriate according to the precepts of good faith). The cases have given rise to considerable comment, both favourable (e.g. *Hondius*, 2000 NTBR 275) and unfavourable (e.g. *van Schaick*, 2000 WPNR 6414). For an assessment of the former situation cf. also *Hartlief*, 2001 NTBR 58 ff. Under the ITALIAN law, see CC art. 2947, applicable unless the tort is also a crime (where the longer prescription for the crime is applicable) and art. 125 Codice del Consumo, d.lgs. September 6, 2005 no. 206.

5. In SLOVAK law the long-stop rule of three years (ten years for damage caused intentionally) does not apply to damage to health (CC § 106(2) in fine). The same holds true for CZECH law.

III. Fraud

6. Prescription is suspended on the ground of fraudulent conduct by the debtor (e.g. concealment, dissuasion) under the ITALIAN CC (art. 2941, no. 8; *Roselli-Vitucci* 513 ff); the GREEK CC art. 255, 2; the NETHERLANDS CC art. 3:321 (1)(f); the ENGLISH Limitation Act 1980 s. 32(1)(b) the IRISH Statute of Limitations Act 1957 s.71(1); and the SCOTTISH Prescription and Limitation (Scotland) Act 1973 s.6(4)(a)(i). The codes in FRANCE, BELGIUM, AUSTRIA, GERMANY, SWITZERLAND and QUEBEC do not have a general provision of this kind but for special provisions relating to certain short prescription periods see CC §§ 438(3), 634a(3). For comparative observations, see *Spiro*, Begrenzung § 82. CZECH CC operates with a more general category of "intentionally caused damage" and in this respect prolongs the long-stop from three to ten years (for damage caused by bribery even the short-stop is prolonged: from two to three years), see § 106(2)(3).

7. Should fraud override the long-stop? For a positive answer, see the ENGLISH Law Commission's Consultation Paper on Limitation of Actions 304 ff.; for a negative one, from the point of view of BELGIAN law, see *Claeys*, 1998-99 R.W. 397 ff. On the question of whether the long-stop may be disapplied, under certain circumstances, on the basis of good faith, see the DUTCH decisions, referred to in note 2, above.

Section 4: Renewal of period

III.–7:401: Renewal by acknowledgement

(1) If the debtor acknowledges the right, vis-à-vis the creditor, by part payment, payment of interest, giving of security, or in any other manner, a new period of prescription begins to run.

(2) The new period is the general period of prescription, regardless of whether the right was originally subject to the general period of prescription or the ten year period under III.–7:202 (Period for a right established by legal proceedings). In the latter case, however, this Article does not operate so as to shorten the ten year period.

COMMENTS

A. Terminology

This Article deals with what, in civilian legal systems, would traditionally have been called "interruption", which means that the time which has elapsed before the interrupting event is not taken into account. Prescription begins to run afresh. In spite of its near universal acceptance, however, the term "interruption" (based on the *interruptio temporis* of the Roman sources) is awkward and misleading. The Article therefore talks of renewal of the period. The essence of the concept is that a new period of prescription begins to run.

Obviously, renewal is a radical interference with the period of prescription, compared to suspension of its running and postponement of its expiry. It is justified only in two cases: acknowledgement of the right by the debtor (covered by the present Article) and acts of execution effected by, or on the application of, the creditor (III.–7:402 (Renewal by attempted execution)).

B. Acknowledgement

A debtor who acknowledges the right does not require the protection granted by prescription. Protection must, on the other hand, be granted to the creditor who may rely on the debtor's acknowledgement and refrain from instituting an action. The creditor's inactivity in this situation no longer carries the same weight, particularly in relation to any expectation on the part of the debtor that the matter is regarded as closed. Also, the debtor's acknowledgement reduces any uncertainty surrounding the claim. The only sensible way in which the law can take account of such acknowledgement is by starting a new period of prescription. Acknowledgement is a momentary event which cannot merely have a suspensive effect.

Some legal systems require the acknowledgement to be in writing. The argument for this solution is that it promotes legal certainty. Most European codifications, however, regard an informal acknowledgement (which may be either express or implied) as sufficient. Of course, it may sometimes be difficult to interpret the debtor's conduct but these difficulties can be resolved, as with all declarations or other conduct which may have legal relevance, by having recourse to the general rules of interpretation. Moreover, even a written statement by the debtor will often be open to various interpretations. The general trend in contract law has certainly been towards informality and though we are not dealing here with a contractual declaration there is no reason to regard an acknowledgement as sufficiently serious, or

special, or inherently precarious, to warrant the introduction of a form requirement. In none of the countries that recognise informal acknowledgements has the position been regarded as unsatisfactory.

Legal certainty is safeguarded sufficiently if the law requires acknowledgement of the right to the creditor. The latter cannot reasonably rely on an acknowledgement to a third party. This might well be based on considerations arising from the relationship between debtor and third party and is not sufficient evidence of any clear recognition of obligation towards the creditor.

Obvious examples of an acknowledgement by conduct are part payment, payment of interest, or the giving of security.

Illustration 1
A owes B €400. B's obligation to pay that sum is due on 10 October 2005. On 5 October 2008, B pays part of the sum and confirms that he will pay the remainder as soon as he is able to. As a result, on 5 October 2008 a new three year period starts to run for the remaining debt.

Illustration 2
A has been injured in a car accident caused by B. He has had expenses for hospitalization and medical bills amounting to €10,000 which he now claims from B. B's insurance is only willing to pay €5000. B therefore sends a cheque for €5000 stating that this is the whole amount he is prepared to pay. There is no renewal of prescription concerning the remaining €5000 since B has not acknowledged A's right so far as that amount is concerned.

The rule in the present Article also applies to a right established by judgment. However, acknowledgement of this right by the debtor does not set in motion a new ten year period. It is now the general period of three years that starts to run, though not so as to shorten the ten year period laid down in III.–7:201(General period) which is already running.

Illustration 3
A owes B €20,000. The right has been established by judgment which has become final on 10 October 1999. Four years later A acknowledges the right by part payment. Prescription still occurs on 10 October 2009.

Illustration 4
The facts are as above but the acknowledgement takes place on 10 March 2008. On that date a new period of three years starts to run.

NOTES

1. Whether an acknowledgement should have the effect of interrupting prescription was disputed under the *ius commune* (see *Peters & Zimmermann* 130, with references) but is generally accepted today; see for FRANCE CC 2240, BELGIUM and LUXEMBOURG: CC art. 2248; for AUSTRIA: CC § 1497; for GREECE: CC art. 260; for ITALY: CC art. 2944; for SPAIN: CC art. 1973; for PORTUGAL: CC art. 325; for the NETHERLANDS: CC art. 3:318; for POLAND: CC art. 123(1)(sent. 2); for SLOVENIA: LOA art. 364; for SCOTLAND: Prescription and Limitation

(Scotland) Act 1973 ss. 6, 7 and 10; *Johnston* para. 5.66 ff; DENMARK: Law no. 274 of 22 December 1908 § 2. 2d sentence and Danske Lov 5.14.4, see *Gomard*, Obligationsret III, 234 f; for SWEDEN Preskriptionslag (1981:130) § 5; UNCITRAL Convention art. 20; for ENGLAND: Limitation Act 1980 ss.29 ff (though not for all rights); the GERMAN code (CC § 212(1), no.1) (which now uses the term "renewal" of the prescription period); ESTONIAN GPCCA § 158; Law Commission Consultation Paper on Limitation of Actions 308 ff (recommending an extension of the present regime to all rights).

2. An acknowledgement in writing is required in England and according to the UNCITRAL Convention (see the references above), but the other laws just mentioned do not establish any form requirement. Some of them specifically state that the acknowledgement can be implicit (Austrian CC § 1497, Portuguese CC art. 325) and others mention part payment, payment of interest or the giving of security as typical cases implying an acknowledgement (CC § 212(1), no.1). The UNCITRAL Convention recognises an exception from the form requirement in cases of payment of interest or part payment "if it can reasonably be inferred from such payment or performance that the debtor acknowledges that obligation". English and Scottish law put part payment on a par with an acknowledgement in writing. Scottish law, apart from a written statement, also holds "such performance by or on behalf of the debtor towards implement of the obligation as clearly indicates that the obligation still subsists" to be an acknowledgement. According to POLISH law, acknowledgement of the claim takes place in every case of an explicit statement or any other conduct of the debtor towards the creditor which unequivocally shows that the debtor acknowledges the claim as existing (see: Supreme Court Judgment, SN March 7, 2003, I CKN 11/01, Lex nr: 83834).

3. The legal nature of an acknowledgement is explored by *Spiro*, Begrenzung §§ 151 ff.; *Staudinger (-Peters)* BGB, § 212, no. 6 ff.

4. Acknowledgement must be made to the creditor in GERMANY (CC § 212(1), no.1) and PORTUGAL (CC art. 325). The same is recognised, though not specifically stated, in the law of the NETHERLANDS (*Asser-Hartkamp*, Verbintenissenrecht I n. 680). ENGLISH law, SCOTTISH law and the UNCITRAL Convention also require acknowledgement to the creditor. Generally, see *Spiro*, Begrenzung §§ 153. The same conclusion applies for CZECH law, see *Švestka/Jehlička/Škárová*, OZ[9], 439.

5. In DENMARK prescription under art. 5.14.4 Danske Lov (but not under the Law no. 274 of 22 December 1908) begins to run again after any reminder by the creditor of the debt of which the debtor gets notice. Such a reminder need not be in the form of a legal action or in writing. Under § 2 of the 1908 Law an acknowledgement, which need not be in any form, makes the 5 year prescription period run again. For renewal of prescription in FINLAND a reminder in any form is sufficient. An acknowledgement in any form has the same effect. This applies to prescription under § 1 of the Prescription Decree. Under special prescription provisions the institution of legal proceedings may be required.

6. According to SLOVAK law if the debtor acknowledges the right in writing as for its title and sum, a new ten year period of prescription begins to run from the day when it came to the acknowledgement or if a performance period was mentioned in the acknowledgement, the new prescription period starts running from the lapse of this performance period (CC § 110 (1)). For commercial relationships payment of interest and partial performance of the obligation are considered as acknowledgement of the obligation (Ccom § 407(2)(3). CZECH law is identical (for non-commercial relationships, the acknowledgement must always be executed in writing).

III.–7:402: Renewal by attempted execution

The ten year period of prescription laid down in III.–7:202 (Period for a right established by legal proceedings) begins to run again with each reasonable attempt at execution undertaken by the creditor.

COMMENTS

If the creditor has obtained a judgment that has become enforceable, or any other instrument which is enforceable under the law under which it was made, the right based on such judgment, or other instrument, is also subject to prescription, though it is now the long ten year period laid down in III.–7:202 (Period for a right established by legal proceedings) that applies. As a result, the creditor's right can, once again, be threatened by prescription. The only way for the creditor to prevent this from happening (apart from extracting an acknowledgement from the debtor) is to attempt an act of execution. Such an act of execution will normally be of a momentary character and cannot, if it is to have any beneficial effect for the creditor, merely constitute a ground for suspending the running of the period or postponing its expiry. Also, the creditor has formally made clear that the right is insisted on. The act of execution therefore has to have the effect of starting a new period of prescription.

Normally, the attempt at execution will be effected on the application of the creditor by a court or public official. It is then sufficient that the creditor has made the application, as long as such application is not invalid or is not withdrawn before the act of execution has been attempted.

NOTES

1. For renewal of prescription as a consequence of acts of execution, see, for GERMANY, CC § 212(1), no.2 for ITALY: CC art. 2943(4); for GREECE: CC art. 264; for FRANCE and BELGIUM, CC art. 2244; for SLOVENIA: LOA art. 365; for SCOTLAND: *Johnston* para. 5.55; and for ESTONIA: GPCCA § 159. For POLAND: CC art. 123(1)(sent. 1); the act of execution interrupts the period of prescription and as a result it begins to run anew. Implicitly also CC art. 3:316 (for the NETHERLANDS) and many other laws. See generally *Spiro*, Begrenzung §134; Abschlußbericht, 80 ff. On acts of execution which are invalid for lack of one of their general requirements, and withdrawal of the application for execution, see CC § 212(2) and (3); and, generally, *Spiro*, Begrenzung §§ 134, 139 ff. In CZECH law, the execution proceedings do not renew but only suspend the prescription period (CC § 112).
2. In SLOVAK law there is no express regulation comparable to the Article. According to CC § 112 in fine the act of execution of a finally and conclusively awarded right has the consequence of suspending the running of the period of prescription while the legal proceedings last.
3. In SPANISH law, the general prescription period of the obligations created *ex novo* by a judgment is a fifteen year period and the *dies a quo* is the day when the judgment becomes final. Although the creditor loses the right to a judicial execution of the final judgment when the period of five years expires (according to art. 518 of the Civil Procedure Law), the material content of the action does not prescribe until the prescription period expires.

Section 5: Effects of prescription

III.–7:501: General effect

(1) After expiry of the period of prescription the debtor is entitled to refuse performance.

(2) Whatever has been paid or transferred by the debtor in performance of the obligation may not be reclaimed merely because the period of prescription had expired.

COMMENTS

A. "Weak" effect of prescription

Even if a legal system looks at prescription as a matter of substantive law (as the rules in this Chapter do; see the Comment B to III.–7:101 (Rights subject to prescription)), it has two options. Once the period of prescription has run out, the right may be held to have ceased to exist (strong effect of prescription); or the debtor may merely be granted a right to refuse performance (i.e. prescription constitutes a defence on the level of substantive law; weak effect). A debtor who has paid in spite of prescription having occurred, has paid with legal ground according to the latter approach and should be unable to recover; whereas the debtor should be able to recover as having paid without legal ground according to the former approach. This consequence, however, is not normally drawn by legal systems subscribing to the strong effect of prescription. Nor do all of them, as might be thought logical, regard prescription as a matter which must be taken into account *ex officio* by the court. Effectively, therefore, it is the weak effect of prescription that has been gaining ground internationally. This is not surprising. The weak effect is more appropriate in view of the aims pursued by the law of prescription. There is no reason for a legal system to foist protection on a debtor who is willing to pay and who can thus be taken to acknowledge the obligation to do so; and the public interest (*ut sit finis litium*) is not adversely affected if a debtor is allowed to pay, even after the period of prescription has run out. On the contrary, it would be detrimental to the public peace if the debtor were allowed to reclaim the payment made. Once payment has been made, even after prescription has occurred, the matter must be regarded as settled. While any prescription regime will inevitably result in creditors being unable to pursue even entirely valid claims, the law should not endorse this consequence where it is unnecessary in terms of the underlying policy objectives.

According to paragraph (1), the debtor is therefore given a right to refuse performance (a peremptory defence). This means that prescription does not operate *ipso iure*. It also means that the obligation continues to exist.

Whatever has been paid or transferred by way of performance may not be reclaimed merely because the period of prescription has expired. It may be reclaimed for other reasons - for example, if the debtor has performed under the reservation that the right had not prescribed or if the creditor had fraudulently induced the debtor to believe that the right had not prescribed.

Whether the debtor knew about the fact that prescription had occurred or not is irrelevant. The debtor who did not know that prescription had occurred still cannot recover what has been paid or transferred. The debtor who knew that prescription had occurred has still paid in discharge of an existing obligation and can, therefore, not be taken to have made a gift (a

conclusion which could be of importance in relation to, for example, claims by disadvantaged creditors).

The Chapter does not deal with the effect of prescription on security, whether real or personal.

B. Defence of prescription inadmissible

As has been pointed out already (see Comment C to III.–7:307 (Maximum length of period)) raising the defence of prescription can, under certain circumstances, be inadmissible because it constitutes an breach of the duty to act in accordance with good faith and fair dealing. This is the case, for instance, where the debtor has prevented the creditor from pursuing the right in good time, particularly where the debtor has waived the right to raise the defence of prescription. The question is of considerable practical relevance for those legal systems which prohibit agreements rendering prescription more difficult. Since they also usually regard a unilateral waiver as invalid, they can only help the creditor by having recourse to the general good faith provision. In view of the more liberal regime adopted in this Chapter (III.–7:601 (Agreements concerning prescription)) the problem is largely obviated: a waiver is no longer objectionable merely on account of the fact that the parties would not have been allowed to render prescription more difficult. Moreover, it is reasonable to assume that there will usually have been a tacit agreement. Nevertheless, the problem can still arise under the present Chapter, particularly in personal injury cases where the debtor waives the right to invoke prescription shortly before the end of the thirty year maximum period provided in III.–7:307 and III.–7:601. Here the debtor will be barred from invoking the defence of prescription for the period that he or she has delayed enforcement of the right.

After prescription has occurred, the debtor is entitled to waive the right of invoking the defence of prescription, either by way of agreement with the creditor or unilaterally: after all, the right still exists and the waiver merely has the effect of removing the possibility of preventing it from being enforced.

NOTES

I. The effect of prescription on the right

1. In SCOTLAND prescription has the effect of extinguishing the obligation in question: Prescription and Limitation (Scotland) Act 1973 ss.8A, 6, 7; and see *Johnston*. According to the civil codes of FRANCE (CC 2219), and LUXEMBOURG (CC art. 2223 on which see *Terré/Simler/Lequette*, Les obligations, no. 1042), ITALY (CC arts. 2934, 2938) and SPAIN (CC, art. 1930(2) and see *Díez-Picazo & Gullón Ballesteros* I, 467) prescription also extinguishes the obligation; nevertheless, the court cannot take note of this fact *ex officio*: prescription has to be pleaded as a defence (in FRANCE, see CC 2247). Cf. also for AUSTRIA CC §§ 1449, 1451, 1479, 1501. In GERMAN law, the defendant is granted a right to refuse performance; the obligation is not extinguished but continues to exist: CC § 214(1) and *Staudinger(-Peters)* § 214, nn. 34 ff; for BELGIAN law (despite the literal text of CC art. 2219) Cass. 22 september 1986, Arr.Cass. 1986-87, 88; Cass. 14 May 1992, Arr.Cass. 1991-92, 856 = Pas. 1992 I 798; *van Gerven*, Verbintenissenrecht, 645. Cf. also, for GREEK law, CC art. 272(1); for the NETHERLANDS, *Asser-Hartkamp*, Verbintenissenrecht I n. 655; for PORTUGUESE law, CC arts. 303 ff; for DANISH law, *Gomard*, Obligationsret

III, 231 and *Ussing*, Alm. Del. 384; for SLOVENIAN law, LOA art. 335 and *Kranjc* in *Juhart/Plavšak*, 445; for SWEDISH law, *Lindskog*, Preskription, 320 ff.; for FINNISH law, *Aurejärvi & Hemmo* 222; for ESTONIAN law, GPCCA § 142(1); and for POLISH law, CC art. 117 § 2. The latter approach is supported by *Spiro*, Begrenzung §§ 226 ff; 241, 244; *Loubser* 14 ff; and *Zimmermann*, 2000 JZ 855 ff. For the arguments advanced in favour of it by the draftsmen of the CC and still valid today, see *Peters & Zimmermann* 136. In ENGLAND, expiry of the limitation period operates to bar the remedy, rather than extinguish the right (see Law Commission Consultation Paper on Limitation of Actions 162 ff, 393 ff). The position in IRELAND is the same. According to art. 24 of the UNCITRAL Convention, expiration of the limitation period "is taken into consideration in any legal proceedings only if invoked by a party to such proceedings".

2. According to SLOVAK law prescription has the effect of granting the debtor the right to refuse performance. There is no effect of extinguishing the obligation. Expiry of the prescription period in connection with the debtor's objection leads to continuation of obligation's existence as an *obligatio naturalis* (*Lazar*, OPH I, 202). CZECH doctrine is similar: the right persists but is deprived of its enforceability (see Knappová *(Knapp, Knappová)* Civil Law, I, 241). The court may not advise the defendant about the possibility of pleading the prescription, even if it is evident that the prescription period has elapsed (see *Švestka/Jehličkа/Škárová*, OZ[9], 419).

3. What remains of the obligation after prescription has occurred is often described as a *naturalis obligatio*, both in legal systems which, in principle, proceed from the assumption that the obligation is extinguished and in those which hold that the obligation continues to exist: cf., e.g., *Malaurie & Aynès* n. 157; *Staudinger(-Peters)* § 214 n. 34; *Asser-Hartkamp*, Verbintenissenrecht I n. 657; *Lindskog*, Preskription, 320 ff.; *Spiro*, Begrenzung § 244. But it has also, correctly, been noted that the use of such terminology is not very helpful in view of the fact that, at any rate, we are not dealing with a *naturalis obligatio* in the historical sense of the word: after all, the creditor's right is perfectly enforceable (as long as prescription is not invoked).

II. "Presumptive" prescription

4. The civil codes of BELGIUM, LUXEMBOURG, ITALY and PORTUGAL recognise various short periods the expiry of which merely gives rise to a presumption that the obligation has been discharged: In France, the presumptive prescriptions which were formerly in CC arts. 2271 ff (*Terré/Simler/Lequette*, Les obligations, no. 1376) have been abolished de facto by the reform which reduces the general delay from 30 to 5 years; for Italy, CC arts. 2954 ff.; for Portugal, CC arts. 316 ff. Such a presumption provides only an imperfect protection against unjustified claims and therefore always requires, in addition, a proper prescription regime. If the general prescription period is brief, an additional presumptive prescription would render the law in this area unnecessarily complex. For criticism, see *Spiro*, Begrenzung § 246; *Peters & Zimmermann* 263 ff.; *Loubser* 9 ff.

III. Exclusion of right based on unjustified enrichment

5. It is very widely recognised that what has been performed in order to discharge a right cannot be reclaimed merely because the period of prescription has expired: see, for FRANCE, *Terré/Simler/Lequette*, Les obligations, no. 1403; for SPAIN, *Pantaléon*, Prescripción 5009; for PORTUGAL: CC art. 304(2); for AUSTRIA: CC 1432; for GERMANY: CC § 214(2); for SWITZERLAND: OR art. 63(2); for GREECE: CC art. 272(2); for ITALY: CC art. 2940; for DENMARK: *Gomard*, Obligationsret III, 231 and *Ussing*, Alm. Del. 384; for FINLAND: *Aurejärvi & Hemmo* 222; art. 26

UNCITRAL Convention; *Spiro*, Begrenzung § 232 ff; for ESTONIA: LOA § 1028(2) 2); for SLOVAKIA CC § 455(1) (receipt of a prescribed debt is not considered unjustified enrichment); for the CZECH REPUBLIC: CC § 455(1) and Ccom § 389; and for POLAND: CC 411(3). The exclusion of this right has also been recognised in art. 121-9 of the First Law of the Catalonian CC.

IV. Good faith and waiver

6. For the effect of good faith on the application of the prescription regime and, particularly, the way of taking into consideration a waiver which the debtor has declared before prescription has run out, see *Spiro*, Begrenzung § 343; *Staudinger (-Peters)* § 214, nn. 17 ff., 20 ff.; and the country reports for GERMANY, GREECE, AUSTRIA, FRANCE, BELGIUM, SPAIN, ITALY, the NETHERLANDS, ENGLAND, IRELAND, SCOTLAND, DENMARK, SWEDEN and FINLAND to case study 21 (Prescription II) in *Zimmermann & Whittaker* 508 ff. Cf. also Storme, in: *Hondius*, 70 ff. For ESTONIA, see GPCCA § 145(3).

6. Waiver of the right to invoke prescription after prescription has occurred is possible: see, for FRANCE, BELGIUM and LUXEMBOURG, CC art. 2220; for GREECE: CC art. 276; for ITALY: CC art. 2937; for PORTUGAL: CC art. 302; for GERMANY: *Staudinger(-Peters)* § 214, nn. 28 ff; for the NETHERLANDS: CC art. 3:322(2); *Asser-Hartkamp*, Verbintenissenrecht I nn. 659 ff.; *Koopmann* 95 ff; ;for the CZECH REPUBLIC: *Švestka/Jehlička/Škárová*, OZ[9], 419; and for a comparative survey: *Spiro*, Begrenzung § 343; *Loubser* 150 ff

III.–7:502: Effect on ancillary rights

The period of prescription for a right to payment of interest, and other rights of an ancillary nature, expires not later than the period for the principal right.

COMMENTS

Prescription occurs to prevent litigation about stale rights, both in the public interest and in order to protect the debtor. This policy would be undermined if the creditor could still sue the debtor for interest that may have become due on a right for which the period of prescription has run out; for the debtor, in order to mount a defence, might then be forced to go into the merits of the principal right itself. The same considerations apply to other rights of an ancillary nature, such as those for emoluments and costs. Hence the need for a rule that such rights prescribe with the principal claim, even if the prescription period applicable to them has not yet expired.

NOTES

1. The rule is found in GERMANY (CC § 217); GREECE (CC art. 274); SCOTLAND (*Johnston* 4.101(3)); SLOVENIA (LOA art. 344); POLAND (SN 26 January 2005, III CZP 42/04, OSNC 2005/9/149); SWITZERLAND (OR art. 133); the UNCITRAL Convention (art. 27, confined to interest). See also, for the NETHERLANDS, CC art. 3:312; for ITALY, *Trabucchi* 524; for DENMARK, *Gomard*, Obligationsret III, 232; for SWEDEN, Preskriptionslag (1981:130) § 8 and *Lindskog*, Preskription, 330, 341 ff; and for ESTONIA, GPCCA § 144. The rule may be said to be "generally recognised today" (*Spiro*, Begrenzung §§ 59, 236). For details as to the range of rights covered, see *Staudinger(-Peters)* § 224, nos. 6 ff. SLOVAK law provides that the prescription of a lien does not expire before the prescription of the secured receivable does (CC § 100(2)). In CZECH law the question is subject to discussion; at present it seems that the position that the prescription of interest rights runs independently is gaining more ground, see *Štenglová/Plíva/Tomsa,* Commercial Code[11], 1120.
2. In SPANISH law, the prescription of the main right implies the prescription of the ancillary rights, according to the rule of *accesorium sequitur principale*. The Supreme Court confirms that no payment of interest may be required when the main right has expired due to prescription (TS 30 December 1999, RAJ 1999/9753).

III.–7:503: Effect on set-off

A right in relation to which the period of prescription has expired may nonetheless be set off, unless the debtor has invoked prescription previously or does so within two months of notification of set-off.

COMMENTS

A right that is prescribed can no longer be enforced. But it may still provide a valid basis for a right of set-off. A number of codifications contain rules to the effect that the right of set-off is not excluded by the prescription of the cross-claim, provided it could have been set off against the principal right at a time when it was not prescribed. The policy of these rules is to preserve a right of set-off that has once accrued, even though set-off has not been declared at that stage. It does not, however, fit in well with the policy considerations underlying the law of prescription. The "obfuscating power of time" affects the creditor's right in the same way, whether it is pursued by way of action or used to effect set-off. In both cases the debtor needs protection. In both cases it would run counter to the public interest if a stale right could become the object of litigation. Set-off, under the scheme of these rules, does not operate retrospectively. This simplifies matters, for we merely have to look at the moment when set-off is declared. Obviously, considering the policy of the law of prescription, it cannot be declared where the debtor (of the cross-claim) has previously invoked prescription. But since the debtor has no reason to invoke prescription unless the creditor asserts a right (whether by way of bringing an action or by declaring set-off), the debtor will have to be granted a reasonable period, after receipt of notice of set-off, to raise the defence of prescription. If the debtor fails to do so, the set-off is effective: after all, the right continues to exist in spite of the prescription period having run out.

Illustration

A has sold B a car for €15,000. The car is delivered to B on 1 October 2005. On the same day A's right to receive the purchase price falls due. In September 2007 the car is involved in an accident caused by a defect in the brakes for which A was responsible. B suffers damage to the extent of €17,000. The period of prescription of B's right against A started to run on 1 October 2005 (the day of non-performance) but its running was suspended so long as B was unaware of the defect (until September 2007). If B sues A for damages before 1 October 2008, A can set off his own right for the purchase price. He may do so even when he is sued after 1 October provided B does not invoke prescription within two months of having received notice of set-off.

NOTES

1. The right of set-off is not excluded by the prescription of the cross-claim, provided it could have been set off against the principal claim at a time when it was not prescribed: see, for GERMANY: CC § 215; GREECE: CC art. 443; PORTUGAL: CC art. 850; SWITZERLAND: OR art. 120(3) and *Spiro*, Begrenzung § 216; the NETHERLANDS: CC art. 6:131(1); UNCITRAL Convention art. 25(2). For AUSTRIA, see *Koziol and Welser*, Bürgerliches Recht II[13], 106 (but see the objections raised by *Dullinger* 165 ss); for SCOTLAND, see *Wilson*, Scottish Law of Debt[2], no. 13.6; *Johnston* 4.101(1); for ESTONIA: LOA § 200(2); and for POLAND: CC 502. For SLOVENIA there is no express rule in the LOA but due to the retrospective effect

of set-off (art. 312(2)) the solution should be the same. The rule tries to take account of the retrospective effect of the declaration of set-off; obviously, it is unnecessary in a legal system where set-off operates *ipso iure*; but cf. for ITALY CC art. 1242 which specifically spells out that set-off is excluded only if prescription was completed on the date on which the two debts began to coexist. For SPAIN, see *Pantaléon*, Prescripción 5009. As far as legal systems are concerned which neither attribute *ipso iure* effect to set-off, nor retrospective effect to a declaration of set-off, see *Wood* 13-18 ff (ENGLAND); *Ussing*, Alm. Del. 384 (DENMARK); Prescription Decree § 5 (FINLAND); Preskriptionslag (1981:130) § 10 (SWEDEN). According to the SLOVAK CC § 581(2) prescribed receivables cannot be set off.

2. The CZECH CC contains the same provision but the question of expiration of the prescription is assessed backwards as to the date when the compensated rights first confronted each other (i.e. the time of the act of the set-off is of no relevance here), see *Švestka/Jehlička/Škárová*, OZ[9], 1036. Ccom§ 388(2) puts the matter more clearly: the entitled party may set-off its right even after the lapse of the limitation period, if both rights pertain to the same contract [...], or if the right could have been compensated prior to the expiry of its limitation period against a claim asserted by the other party.

Section 6: Modification by agreement

III.–7:601: Agreements concerning prescription

(1) The requirements for prescription may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription.

(2) The period of prescription may not, however, be reduced to less than one year or extended to more than thirty years after the time of commencement set out in III.–7:203 (Commencement).

COMMENTS

A. Agreements rendering prescription more difficult

The parties may wish to contract out of the prescription regime. This can happen in a number of ways. They may want to extend or shorten the period of prescription applicable to the right; they may want to change the date when the period begins to run; they may want to add to, or subtract from, the list of grounds of suspension, and so on. Agreements rendering prescription more difficult are generally considered to be more objectionable than agreements facilitating prescription. These objections are usually based upon the public interest which the prescription of rights is intended to serve. It must, however, be remembered that the prescription of rights predominantly serves to protect the debtor and that, where the debtor renounces such protection, private autonomy may well be seen to prevail over the public interest. Also, the general prescription periods applying in countries objecting to agreements rendering prescription more difficult are comparatively long (ten, twenty, or thirty years) so that a further lengthening may indeed be problematic; much more problematic, at any rate, than where there is a short general prescription period. Widely, therefore, agreements lengthening the period are specifically admitted, where the period is, exceptionally, a short one. Contractual warranties concerning latent defects in buildings or goods can have that effect and provide an obvious and practically important example. Equally, it tends to be accepted that the prohibition does not affect agreements which indirectly render prescription more difficult, such as agreements postponing the due date of a claim, or *pacta de non petendo* (agreements allowing additional time for performance). However, it is not easy to see why the parties should not be able to postpone the commencement of the period of prescription as such if they can postpone the due date of the claim. Moreover, these subtle distinctions provide ample opportunity for effectively circumventing the prohibition. These problems are obviated by abandoning the prohibition.

This appears all the more desirable under a system of prescription such as the one proposed in this Chapter. Party autonomy provides the necessary counterbalance to (i) the short general prescription period of three years and (ii) the uniformity of the regime in general. Neither the three year period nor a number of the other rules fit all types of rights and all imaginable situations equally well. The parties must be free to devise a more appropriate regime, as long as they observe the general limitations placed on freedom of contract. The rules in this Chapter rest on a delicate balancing of interests and it must be recognised that a reasonable balance could conceivably be achieved in an entirely different way. The parties to a contract may, for example, quite reasonably regard suspension in case of ignorance as a source of uncertainty and they may wish to balance the exclusion of this rule by providing for a longer period.

B. Restrictions

Two provisos have to be made. (i) Standard contract terms interfering with the prescription regime must be scrutinised particularly carefully. The rules on unfair contract terms provide the necessary tool. (ii) Public interest does not require a prescription regime to be mandatory: party autonomy may, to a large extent, prevail. The public interest is not adversely affected if a right prescribes in seven rather than three years; not sufficiently adversely affected, at any rate, to override the decision of a debtor to waive this protection by agreement with the creditor. The debtor should not, however, be able to agree upon a period of fifty, or one hundred, years since that would effectively exclude the right from prescription. This is why the present Article provides that prescription cannot be extended by agreement beyond a period of thirty years. Thirty years constitute the longest period envisaged in this Chapter under exceptional circumstances (maximum period of extension in cases of personal injuries rights: III.–7:307 (Maximum length of period)) and one which is, at present, still applicable as a general period in a number of member states. The thirty years are to be counted from the general time of commencement of prescription, as laid down in III.–7:203 (Commencement).

C. Agreements facilitating prescription

What has been said above applies with even greater force to agreements facilitating prescription. They are much more widely recognised even today; moreover, they do not conflict with the public interest based policy concerns underlying the law of prescription. Nonetheless it has been regarded as equitable also to fix a minimum limit for party autonomy. This limit is a period of one year. It applies even to individually negotiated agreements between professional parties.

NOTES

I. Prescription regime mandatory

1. There is a considerable divergence of views as to whether it is possible for the parties to contract out of the prescription regime by lengthening or shortening the prescription period, by providing for different starting dates, by introducing additional, or opting out of existing, grounds of suspension and so on. Some systems are particularly strict in this regard and prohibit agreements either way. See the SWISS OR art. 129; the GREEK CC art. 275; the ITALIAN CC art. 2936; the PORTUGUESE CC art. 300; and cf. also, most recently, the QUEBEC CC art. 2884. Under POLISH law, the period of prescription cannot be shortened or lengthened by an agreement or a unilateral act (CC art. 119). However, a person against whom the claim is due can waive the right to rely on prescription. Nevertheless, such a waiver cannot be made before the lapse of the period of prescription (CC art. 117 § 2). The situation is exactly the same in SLOVENIAN law (LOA arts. 340–341). The UNCITRAL Convention, too, regards its prescription regime as mandatory: art. 22 ("The limitation period cannot be modified or affected by any declaration or agreement between the parties …"). There are two exceptions, the one permitting the debtor at any time during the running of the period to extend it by a declaration in writing to the creditor, the other sanctioning, under certain circumstances, a clause in the contract of sale, in terms of which arbitral proceedings are to be commenced within a shorter period of limitation than that prescribed by the Convention.
2. According to the SLOVAK Ccom § 401 the party against whom a right is becoming prescribed may extend the time of prescription by means of a written statement issued

to the other party, even repeatedly; however, the total period of prescription may not exceed a period of 10 years from the date when it first began to run (applicable only to commercial relationships). The Slovak CC regards the prescription regime as mandatory. CZECH law is the same; it can be added that the Civil Code regime enables repeated acknowledgements of a right, each of which prolongs the limitation period by ten years, with no upper limit for the entire prescription period (see *Švestka/Jehlička/Škárová*, OZ[9], 440) However the debtor may not undertake an obligation to acknowledge the right.

II. Prescription regime unilaterally mandatory

3. A number of legal systems allow the parties to facilitate prescription, especially by providing for a period that is shorter than the statutory one, while they refuse to recognise agreements rendering prescription more difficult, particularly by extending the statutory period. In these countries the prescription regime is thus of a unilaterally mandatory character: see, for AUSTRIA: CC § 1502 (it is not possible to waive prescription or to prolong the prescription period; a shortening of the prescription period, however, is possible within the limits of good faith and fair dealing); for FRANCE: before the reform of 2008: *Ferid & Sonnenberger* 1 C 254 ff; for the NETHERLANDS: *Asser-Hartkamp*, Verbintenissenrecht I n. 678; for DENMARK: *Gomard*, Obligationsret III, 233; for FINLAND: *Halila & Ylöstalo* 103 ff. This may also be the position in This may also be the position in SCOTTISH law: see *Johnston* para. 4.05 (who, however, comments that the meaning of the relevant section - s.13 - of the Prescription and Limitation (Scotland) Act 1973 is unclear). There is no particular experience with the agreed shortening of the limitation period in CZECH law; from the mandatory character of the entire regulation it can be, however, assumed that such shortening is not possible.

4. However, where the prescription period is, exceptionally, a very short one, agreements lengthening it are permitted: for SWITZERLAND, see *Spiro*, Begrenzung § 345. Contractual warranties are thus permitted even if they have, as they often do, the effect of lengthening the period of prescription: see *Spiro*, Begrenzung § 346. Agreements which indirectly render prescription more difficult (e.g. agreements postponing the due date of a right, or *pacta de non petendo*) are permissible (for details, see *Spiro*, Begrenzung § 344).

III. Recognition of agreements both ways

5. The French 2008 reform has recognised agreements both ways: parties can either shorten or make longer the prescription period (CC 2254 al. 1), besides, they are allowed to add to the causes of suspension or interruption (CC art. 2254 al. 2). However, this freedom is limited in several ways: no less than one year and no more than ten years. Besides, in some specific situation where the parties are not on an equal footing, this freedom totally disappears. This is notably the case in respect to consumers (C Cons art. L 137-1). This is also true for a whole series of actions which concern debts payable every year or on shorter periods (CC 2254 alinea 2). Finally the ENGLISH Law Commission recommends recognition, in principle, of agreements both ways: Law Commission Report No 270 on Limitation of Actions, para. 3.175 (subject to safeguards). This seems to tie in with the legal position prevailing in England today (see Law Commission Consultation Paper, 389). However, the German Reform Commission proposes a limit of thirty years (to be calculated from the statutory commencement of prescription): BGB-KE § 220, 3. Equally, in BELGIAN law, prescription can be lengthened by agreement, with a maximum of 30 years; it can be shortened by agreement unless contrary to good faith (see *Storme*, in: *Hondius*, 71

ff); SPANISH law also appears to allow, in principle, recognition of agreements both ways. For agreements facilitating prescription, see: *Díez-Picazo & Gullón Ballesteros* I, 468. Agreements rendering prescription more difficult by extending the period of prescription are also valid, except when they render the right unprescriptable (*Díez-Picazo & Gullón Ballesteros* I, 468). Agreements to prolong or to shorten the general period are also valid under art. 121-3 of the First Law of the Catalonian CC, with some limitations. According to SWEDISH law, agreements prolonging or shortening prescription are valid in principle, though they are subject to the general rule that unreasonable contract terms may be set aside or modified in terms of the Contracts Act § 36 (*Lindskog*, Preskription, 582 ff). The same applies under DANISH law to agreements shortening the prescription period, see *Gomard* Obligationsret III, 233. Similarly, under ESTONAN law, shortening or prolonging (maximum up to ten years) of the prescription period by agreement is generally allowed (GPCCA § 145(1),(2)), subject to an unfairness test in the case of standard terms (LOA § 42(3) 9).

IV. Agreements facilitating prescription

6. Agreements facilitating prescription promote the policy concerns underlying the law of prescription even more effectively than the normal regime; see, e.g., *Zimmermann*, in: *Jayme*, 188; *Asser-Hartkamp*, Verbintenissenrecht I n. 687. Even such agreements are regarded as undesirable by *Spiro*, Begrenzung §§ 347 ff (who, however, also points out that the parties are free to limit their rights in other ways; considerable problems of delimitation can ensue).

BOOK IV

SPECIFIC CONTRACTS AND THE RIGHTS AND OBLIGATIONS ARISING FROM THEM

PART A. SALES

CHAPTER 1: SCOPE AND DEFINITIONS

Section 1: Scope

IV.A.–1:101: Contracts covered

(1) This Part of Book IV applies to contracts for the sale of goods and associated consumer guarantees.

(2) It applies with appropriate adaptations to:

(a) contracts for the sale of electricity;

(b) contracts for the sale of stocks, shares, investment securities and negotiable instruments;

(c) contracts for the sale of other forms of incorporeal property, including rights to the performance of obligations, industrial and intellectual property rights and other transferable rights;

(d) contracts conferring, in exchange for a price, rights in information or data, including software and databases;

(e) contracts for the barter of goods or any of the other assets mentioned above.

(3) It does not apply to contracts for the sale or barter of immovable property or rights in immovable property.

COMMENTS

A. Main application: contracts for the sale of goods

This Part of Book IV applies primarily to contracts for the sale of goods. It is not concerned with the formation, validity or interpretation of such contracts. Such questions are left to the general rules in Book II. It is concerned mainly with the effects of such contracts on the rights and obligations of the parties. There are good reasons for giving special attention to the rights and obligations of the parties under contracts for the sale of goods. Not only has the contract for the sale of goods served as the paradigm for contracts in general, but it is also probably the most common contract, and certainly the most common consumer contract, that there is. In fact, sales come in all shapes and sizes: ranging from the purchase of the daily newspaper at the news-stand or the groceries in the supermarket, through to the purchase of a new car and to commodity sales on highly specialised markets. Moreover, there are many mixed

transactions that contain a certain element of sale, such as distribution contracts or all sorts of manufacturing contracts.

A "contract for sale" is defined in IV.A.–1:202 (Contract for sale). The term "goods" is defined in Annex 1 as follows.

> "Goods" means corporeal movables. It includes ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases.

For future goods, see also IV.A.–1:201 (Goods).

B. Application with appropriate adaptations

According to IV.A.–1:201 (Goods) goods are defined as 'corporeal movables'. The sale of other types of property or assets involves different problems that are not regulated by this Part. Moreover, sales contracts dealing with any of the assets listed in paragraph (2) may not be subject to all the rules contained in these rules, e.g. conformity requirements in respect of shares sold. Therefore paragraph (2) provides that the rules in this Part may be applied to sales of certain types of assets provided that appropriate adaptations are made (see Comment C). This formula is used because the nature and the huge variety of transactions falling under this extended scope of application make it virtually impossible to provide an exhaustive list of which rules apply and which do not.

It should be noted that the extension of the scope provided by paragraph (2) is not restricted to sales contracts as it also applies to certain contracts which are very similar to sale. It applies to contracts conferring rights in information or data which are functionally equivalent to sale but are not technically contracts for "sale" because no ownership is transferred (paragraph (2)(d)). It also applies to contracts for barter (paragraph (2) (e)) whether relating to goods or to the other assets mentioned in the paragraph (e.g. exchanging electricity for gas).

C. Other assets

The types of assets listed in paragraph (2) have in common that they are, at least to a certain extent, incorporeal (cf. the reference to other forms of incorporeal property in (c)). By selling shares, for instance, one sells a bundle of rights. There may not be any transfer at all of a paper certificate. Indeed with the increase in the electronic issuing of shares, paper certificates are much less common than formerly. Likewise, a standard computer program can be downloaded directly without involving a durable medium such as a CD.

The list in this Article is exhaustive and contains the following assets:

Electricity. Taking the European and national trends towards the further deregulation of energy markets into account, these rules also apply to the sale of electricity, albeit subject to appropriate adaptations. One of the practical problems is the fact that energy does not possess a material aspect, which can, however, be remedied by measuring the amount of use (electric energy, heat). It should be noted that gas, steam and oil, already fall under the definition of "goods" in Annex 1.

Stocks, shares, investment securities and negotiable instruments. These rules do not apply directly to sales of shares, investment securities and negotiable instruments because, again, many of them are inappropriate for such direct application. When shares are sold to a buyer there is normally, for example, no undertaking that the shares will be fit for the buyer's purpose (such as a high income yield), even if the buyer's purpose is indeed known to the seller. Nonetheless, other rules may be applied with appropriate adaptations. It does not matter whether a few shares or a majority of shares are sold. Since the latter type of transaction may result in the sale of a controlling interest in a company, the transfer of the shares actually also results in the sale of the enterprise. These rules may therefore also be applied, indirectly and with appropriate adaptations, to the sale of enterprises.

Other forms of incorporeal property. The rules in this Part of Book IV apply with appropriate adaptations to contracts for the sale of other forms of incorporeal property, including rights to the performance of obligations, industrial and intellectual property rights and other transferable rights. The reason for this broad provision lies in the fact that it is virtually impossible to provide a list of proprietary, transferable rights that can be sold under the different legal systems. Examples of such rights are: security rights; split-property rights; usufructs; pledges; co-operative rights; mortgages; debt claims; an inheritance or parts thereof; rights in immaterial goods, such as patent rights; rights arising from the registration of trademarks; and rights to the performance of obligations generally.

Information and data (including software). Paragraph (2)(c) applies the rules of this Part of Book IV "with appropriate adaptations" to contracts conferring, in exchange for a price, rights in information or data, including software and databases. The reason for using this form of words rather than the simple "sale" is that the definition of a contract for sale requires an undertaking to transfer ownership (see IV.A.–1:202 (Contract for sale). There may be no such undertaking in the types of contracts under consideration. Of course, these rules may sometimes be applied to an outright sale of software or proprietary information, namely when the intellectual property rights are sold. Generally, however, although it is common to speak of 'selling' or 'buying' software, in fact the 'buyer' is often merely given a licence to use the software. In such a case, there is no transfer of ownership, and hence these rules are not directly applicable. Nonetheless, some of the underlying principles of the rules may be relevant to such transactions. For example, the rules on conformity may provide a useful guideline as to what obligations the 'seller' of software should be subject to. In one respect, however, 'sales' of software are covered directly by the rules. Many types of equipment are now wholly or partly controlled by microprocessors which are an integral part of the equipment. These microprocessors are in turn controlled by pre-loaded software. This 'embedded' software (for example, the programmes that control the electronic ignition of a car or its braking system) is simply treated as part of the goods for the purposes of these rules. While the sale of personal data is restricted due to data protection rules established by European Directives and other standards, it cannot be overlooked that information and data are 'sold' on a daily basis. The crucial point is to draw the borderline between the mere sale of information as opposed to the supply of information under a specific service contract. In some cases the distinction may be difficult to draw. In practice, this question of qualification is not of great importance as regards conformity, since the obligations of the seller or the service provider will be similar. Besides, if there is a deviation in substance between the regulation of sales and services, the solution used in Part IV.C on Services Contracts can still be applied if it is more appropriate, since the sales rules may be applied with appropriate adaptations concerning this kind of contract.

Illustration 1
The rules in this Part may be applied to the sale of standardised information, i.e. information already available and not custom-made: for instance, the sale of an electronic version of case law decisions on Lexis.

D. Immovable property

These rules do not apply to the sale of immovable property (paragraph (3)) or rights in such property. As a consequence, rights in land, buildings or other immovable property do not fall within their scope.

E. Relationship with Books I to III

The rules in Books I to III serve as the general part of the law applicable to sales transactions. Thus, issues of general contract law – such as formation, validity, effects etc. – have to be resolved by applying the provisions of Book II. The rules on the performance of obligations in general, including those of a seller or buyer, and on the remedies for non-performance of obligations in general will be found in Book III. Some of these rules are, however, modified or supplemented by the rules in this Part.

F. Consumer goods guarantees

Chapter 6 applies to consumer goods guarantees. The Chapter is included in this Part because of its close association with contracts for the sale of goods.

G. Freedom of contract

Although it goes to the nature of the provisions, rather than their scope, it may be appropriate to comment at the outset of this Part that most of the rules in it are default rules which can be varied by the parties. The basic rule contained in II.–1:102 (Party autonomy) is that parties are free to make a contract and to determine its contents, subject to any applicable mandatory rules. Therefore the parties are, in principle, free to exclude, amend, modify, or otherwise derogate from the rules in this Part.

However, some of the rules are, for the greater protection of consumers, declared to be mandatory. A non-binding instrument cannot, of course, make anything mandatory. So this is just an indication to any legislature thinking of making use of these model rules that consideration should be given to making the relevant rules mandatory.

Under two specific derogation provisions, any contractual term or agreement concluded with the seller, before a lack of conformity is brought to the seller's attention, which directly or indirectly waives or restricts the buyer's rights is not binding on the consumer: IV.A.–2:309 (Limits on derogation from conformity rights in a consumer contract for sale) and IV.A.–4:101 (Limits on derogation from remedies for non-conformity in a consumer contract for sale). This means that the parties are only free to deviate from the relevant provisions after the buyer has notified the seller of the lack of conformity. It is not possible to deviate in advance from the regime provided in these rules, unless the buyer is granted more far-reaching rights than provided in the relevant articles. It has to be noted that the mandatory rules of the present rules are merely relatively mandatory, i.e. the parties are still free to derogate from them to the benefit of the buyer. It is not sufficient that the buyer is granted more protection in an overall view: that is extending some rights, while limiting others.

Under other Articles, such as IV.A.–5:103 (Passing of risk in a consumer contract for sale), IV.A.–6:103 (Guarantee document), IV.A.–6:107 (Burden of proof) and IV.A.–6:108 (Prolongation of the guarantee period), the parties may not, to the detriment of the consumer, exclude the application of the Article or derogate from or vary its effects. This is a limitation which leads to similar results as the technique mentioned in the preceding paragraph. Under IV.A.–6:102 (Binding nature of the guarantee) certain formal requirements restricting the validity of the guarantee are not binding on the consumer. Under some Articles in Chapter 6, on the other hand, it is made clear that an exclusion or limitation of the scope of the guarantee in certain respects is possible but has to be clearly set out in the guarantee document in order to be effective, cf. IV.A.–6:105 (Guarantee limited to specific parts) and IV.A.–6:106 (Exclusion or limitation of the guarantor's liability). In addition, the comments to the relevant Articles will provide examples of their scope.

Derogation covers both direct and indirect derogation. Cases of direct derogation will include excluding a given rule in the sales contract or in standard terms. Cases of indirect derogation will include providing a lesser right than the one provided for in the relevant rule or otherwise varying the rule to the detriment of the consumer. It is important to remember that even terms which do not exclude the application of a mandatory rule, or derogate from or vary its effects may amount to unfair contract terms and, for that reason may not be binding on the consumer (see Book II, Chapter 9, Section 4).

A term of a contract for sale which purports to derogate from a mandatory rule to the detriment of the consumer, for example by contracting out of such a provision, will be void – that is, automatically of no effect from the beginning (see the definition of "void" in the Annex of definitions). As a consequence, the consumer is provided with the right laid down in the relevant provision, the protection of which the seller tried to circumvent.

NOTES

I. Overview of the rules relating to sales law

1. Since sale is such a fundamental contract, it is regulated as a specific contract in all the systems. The mode of regulation however differs under the various systems.
2. Under most systems, the sales rules can be found in the Civil Code (AUSTRIA CC §§ 1053-1089; BELGIUM CC arts. 1582-1701; CZECH REPUBLIC CC §§ 588-627; FRANCE CC arts. 1582-1701; GERMANY CC §§ 433-479; GREECE; HUNGARY CC §§ 365-377; ITALY CC arts. 1470-1547; LATVIA CC arts. 2002-2090; LITHUANIA; NETHERLANDS CC Book 7, Title 1, Sections 1-7; POLAND CC arts. 535-602; PORTUGAL CC arts. 874-938; SLOVAKIA CC §§ 588-610; SPAIN CC arts. 1445-1537). Similarly, in ESTONIA the sales regulation can be found in the extensive LOA §§ 208-237 and in SLOVENIA in the LOA arts. 435-506. Under some of these systems, a considerable amount of rules applicable to sales can be found among the general rules for contracts (cf. HUNGARY CC §§ 277-311/A; CZECH REPUBLIC CC §§ 499-510) where in particular the rules on lack of conformity and defective performance are generalised for all contracts for consideration.
3. Under other systems, the sales regulation can be found in a free-standing Sale of Goods Act (DENMARK *Købeloven* (KBL); ENGLAND and SCOTLAND Sale of Goods Act; FINLAND *Kauppalaki* (KL); NORWAY *Kjøpsloven* (Kjl); SWEDEN

Köplagen (KöpL)). This approach can also be found in the CISG and the Consumer Sales Directive dealing exclusively with commercial and consumer sales respectively.

4. These general rules are, at times, supplemented by specific rules relating to commercial sales law (AUSTRIA Ccom §§ 373 ff *(Handelskauf*); CZECH REPUBLIC Ccom arts. 409-475 (more detailed in comparison with the regulations in CC, including sale of an enterprise arts. 476-488a); GERMANY Ccom §§ 373 ff *(Handelskauf*); PORTUGAL Ccom §§ 463-476; SLOVAKIA Ccom arts. 409-496; SPAIN Ccom arts. 325-345).

5. In addition, all the systems have specific rules relating to consumer sales. On the one hand, these provisions can be contained in a separate Code or Act (AUSTRIA Consumer Protection Act (*Konsumentenschutzgesetz)* §§ 8, 9, 9a and 9b*;* FINLAND Consumer Protection Act (*Kuluttajansuojalaki*); FRANCE Consumer Code (*Code de la consummation*) in particular arts. L. 211-1-17; GREECE Consumer Protection Act; ITALY Consumer Code (*Codice del Consumo*); LATVIA Consumer Protection Act; NORWAY Consumer Sales Act (*Forbrukerkjopsloven*); POLAND Consumer Sales Act; PORTUGAL Consumer Protection Act; SLOVENIA Consumer Protection Act §§ 36-37č; SWEDEN Consumer Sales Act (*Konsumentköplagen*)). Under SPANISH law there are several Acts dealing with consumer sales: Consumer Sales Act 23/2003, Consumer Protection Act (Ley 26/1984), Retail Trade Act (Ley 7/1996) and Instalments Sales Act (Ley 28/1998). Most of these rules have been consolidated in the Consumer Protection Act (*Real Decreto Legislativo* 1/2007) in a single updated legal text. On the other hand, under a number of systems rules dealing specifically with consumer sales can also be found blended in with the general rules on sales (BELGIUM CC arts. 1649bis- 1649octies; CZECH REPUBLIC CC §§ 52-65 and 612-627; DENMARK Sales Act §§ 72-86; ENGLAND and SCOTLAND Sale of Goods Act s. 48A to 48F; ESTONIA LOA §§ 208-237; GERMANY CC §§ 474-479; LITHUANIA CC arts. 6.392-6.401; NETHERLANDS all through CC Book 7, Title 1, Sections 1-7; SLOVAKIA CC §§ 52-60, 588-610 and 612-627). Under HUNGARIAN law, since the rules on defective performance and liability for defective performance are generalised for all contracts for consideration, the rules dealing with consumer sales also appear as special rules for consumer contracts among the general rules on defective performance.

II. Definition of sale

6. See notes to IV.A.–1:202 (Contract for sale)

III. Analogous application to other contracts

7. In all systems, the statutory provisions on sale are applied by analogy to other contracts, under which one can distinguish between three main scenarios.

8. First, certain nominate contracts follow the rules on sales as such, for instance barter contracts and (certain) contracts for the manufacture or production of goods.

9. Second, the sales law provisions can be applied by analogy to both nominate contracts that fail to deal with a specific problem, and to innominate contracts, that is contracts that are not regulated as such. Such analogous application can take various forms. Under CZECH and SLOVAK law CC §§ 491 there is a general provision stating: “Obligations arise especially from contracts which are expressly governed by this Code; however, they may also arise from other contracts not governed by this Code (CC § 51) and from mixed contracts comprising elements of different types of contracts.” Moreover, the regime of unregulated contracts is laid down in CC §§ 491(2): ”With regard to obligations arising from contracts not governed by this Code,

it shall be necessary to apply the provisions of this Code which govern obligations most closely approximating to those contracts, unless the contract itself provides otherwise". Under AUSTRIA CC §§ 932 ff; HUNGARIAN law CC §§ 277-311/A a considerable number of rules applicable to sales can be found among the general rules for contracts, most importantly the rules on lack of conformity and defective performance are generalised for all contracts for consideration.

10. Third, the sales law provisions can be used as a source of general principles of contract law, which are then applicable to all kinds of contracts. This approach is typical of the NORDIC COUNTRIES, where the provisions in the Sales Acts to a certain extent are regarded as statutory specifications of non-statutory general contract law. For instance under FINNISH law, the general principles in the Sales Act such as the concept of termination of contract for breach, the right to withhold payment and the concept of anticipated breach are applicable to nearly all contracts (see *Aurejärvi and Hemmo,* Velvoiteoikeuden Oppikirja, 89 and 93).

11. In particular, the following contracts borrow from sales law: hire-purchase contracts (ENGLAND and SCOTLAND Supply of Goods (Implied Terms) Act 1973); supply and hire contracts (ENGLAND and SCOTLAND Supply of Goods and Services Act 1982); '*kaufähnliche Verträge'* (GERMANY *Hoeren and Martinek*, Systematischer Kommentar zum Kaufrecht, para. 34); applicability to contracts with a partial donational character and contracts for the transfer of property in exchange for the debt (LITHUANIA CC art. 6.436); delivery (POLAND CC art. 612); precontracted deliveries of agricultural products (POLAND CC art. 621); contracts for specific work (POLAND CC art. 638); sales on commission (SPAIN, *De la Cuesta Rute*, Contratos Mercantiles I, 228 and 236) and contracts for the supply of electricity (SPAIN, *De la Cuesta Rute*, Contratos Mercantiles, I, 228 and 236).

IV. Mixed contracts

12. Certain typical mixed contracts have been addressed by statutory provisions or by case law. Prominent amongst them is the contract for the production or manufacture of goods to be sold where there is an element of services and one of sales. See the Notes to the following Article.

13. When looking at a mixed contract, i.e. a contract that combines an element of sale with, typically, an element of services, there are basically three possibilities to establish the applicable rules.

14. First, one can merely apply one regime to the whole contract, usually the dominant part of the transaction, that is, the type of contract most akin to the overall transaction (the so-called *theory of absorption).* Such an approach can be found under the CISG art. 3(2) establishing that the sales regulation does not apply to contracts in which the preponderant part of the obligation of the party who furnishes the goods consists of the supply of labour or other services. A similar regulation can be found under a number of other systems (CZECH REPUBLIC Ccom art. 410(1); ESTONIA LOA § 208(2); FINLAND SGA § 2(2); LITHUANIA; NORWAY SGA § 2(2); SLOVAKIA Ccom art. 410; SWEDEN SGA § 2(2)). Under AUSTRIAN law CC § 1055 contains a similar provision concerning barter contracts. Under AUSTRIAN law CC § 1055 contains a similar provision concerning barter contracts. Under NORDIC law, while interpreting the norm at issue, first the fact whether one single contract or two separate contracts are at issue is to be considered. In case it has been ascertained that there is only one contract at issue, it remains to consider what "a preponderant part of the obligations" means. For this purpose, many circumstances are to be taken into account. By way of an example, if the required work demands specific expertise or the

employment of particular equipment, this is to be regarded as representing a preponderant part of the obligations. In this case, a service contract is at issue which falls outside the scope of application of the Sales Act. In the case where the components are easily changeable e.g., the service consists of changing the wheels of a car, the service is not preponderant; thus, in this latter case there is a sales contract (FINLAND *Routamo and Ramberg*, Kauppalain Kommentaari, 26-27; SWEDEN *Ramberg*, Köplagen, 151 f). Under ENGLISH and SCOTTISH law whether a mixed contract falls within the scope of the Sale of Goods Act depends upon the facts of each case; however, most mixed contracts have been interpreted by the courts as consisting of a single contract of sale, with a subsidiary arrangement that if the buyer delivers the other goods to the seller, an agreed allowance will be made against the price, Benjamin (-*Sealy*), Sale of Goods[6], § 1-039; see e.g. *G. J. Dawson (Clapham) Ltd. v. H. & G. Dutfield* [1936] 2 All ER 232. Alternatively, a mixed contract may be interpreted as a pair of reciprocal contracts of sale with a set-off of prices. Many transactions involve the supply of both goods and services, sometimes known as contracts for work and materials. Under ENGLISH and SCOTTISH law such contracts will be held to be sales if the substance of the contract is the ultimate result, services if it is the skill and labour of the supplier; for example, painting a portrait (*Robinson v. Graves* [1935] 1 KB 579), repairing another person's property with the replacement and installation of parts (*Lee v. Griffin* (1861) 1 B & S 272, 121 ER 716), manufacturing goods to another's orders (*Cammell Laird & Co. Ltd. v. Manganese Bronze & Brass Co. Ltd.* [1934] AC 402), installing additional goods on another's property, serving a meal in a restaurant (*Lockett v. A. & M. Charles Ltd.* [1938] 4 All ER 170). Under SPANISH law, the *absorption* principle has been explicitly adopted for contracts entered into by Public Sector bodies (Ley 30/2007 art. 12).

15. Second, one can combine the rules for the different parts of the contract, thus breaking down the transaction into different elements (so-called *theory of cumulation*: AUSTRIA; NETHERLANDS CC art. 6:215).

16. Third, one can apply the general law of obligations without falling back on rules for specific contracts (CZECH REPUBLIC CC § 491(3); HUNGARY BH 1982. 201; SLOVAKIA CC § 491(3); SPAIN for the contract of "cesión de suelo por obra" (*Ruda González*, El contrato de cesión de suelo por obra, 94)). Under CZECH law this for instance applies to leasing contracts (cf. *Bejček/Eliáš/Raban*, Kurz obchodního práva[3], 286; PP 11/2001, 29 and PR 6/2004, 231).

17. Under many systems there is no consistent policy in qualifying a mixed contract, but the different theories are combined (BELGIUM; FRANCE; GERMANY; SPAIN, HUNGARY). In FRANCE sometimes a distributive qualification is chosen, and then a contract is partly a sale and partly another contract (Cass.civ. III, 16 March 1977, Bull.civ. III, no. 131, sale of a nuclear plant to be built, this contract is partly a sale, partly a construction contract). But most of the time case law opts for an exclusive qualification of the contract, then applying the rules of the preponderant contract. However, the preponderant contract is defined in a particular way: case law has ruled that a contract shall be qualified as a contract for service and not a sale when it concerns the transfer of property of a thing to be manufactured according to specifications required to satisfy the particular needs of the client and not things having specifications determined in advance (see e.g. Cass.civ. I, 14 December 1999, Bull.civ. I, no. 340). In GERMANY both theories are present, the theory of absorption as well as the theory of cumulation. The former was in particular applied by the *Reichsgericht* before 1945. The latter is the majority opinion for leasing contracts, where sales and lease meet (see e.g. *Medicus*, Bürgerliches Recht[20], 236 f). In HUNGARY legal authors and court decisions often use the expressions 'mixed

contract' and 'atypical contract', but the distinction between these two expressions is rather blurred. Mixed contract could refer to a contract made up of elements of different regulated contracts, such as a financial lease. Atypical contract could refer to a contract where only the general law of contracts can be applied without falling back on the rules for specific contracts. But courts sometimes use the two expressions interchangeably, as if they meant the same. So all that can be said is that courts use both the method of breaking down the transaction into its various components and the method of relying on the general law of contracts. No clear theoretical background is available (see *Miskolczi Bodnár*, Gazdaság és Jog 1/1997, 3-11). In SPAIN there is no unique theoretical approach. Courts customarily apply sale or lease rules to leasing contracts, but not as cumulative rules (*Parra Lucán*, Aranzadi civil 2006, 2223). The *"cumulative approach"* is also applied in mixed transactions, as the *negotium mixtum cum donatione*, as well as in contracts to transfer immoveable assets to be made in the future. In particular, the *cumulative approach* (sale and agency) is sometimes used for the characterisation of contracts such as distributorship (TS 14 February 1997, RAJ 1997 no. 1418) and in the contract to transfer an immoveable in exchange for the transferee's support during the rest of the life of the transferor (TS 1 July 1982, RAJ 1982 no. 4213). When the regulation of one contract is said to "absorb" the whole contractual relationship, this normally happens because of the existence of some kind of simulation in the transaction.

18. Other combinations are also possible, see for instance sales contracts combined with the obligation to maintain the goods by the seller (LITHUANIA CC art. 6.156). A sales contract may also be combined with a contract for exclusive distributorship. Here the sales rules will be applied to the sales contract integrated in the overall contract (SWEDEN *Ramberg*, Köplagen, 147). Under ITALIAN case law a contract of sale with exclusivity is a mixture of sales and mandate, sales and agency, or sales and supply. However, it seems more appropriate to consider the concession of sales as an atypical contract, which is characterized by a realization of an integrated form of distribution of goods of a wide consumption (*Bianca*, La vendita e la permuta, 43).

V. Electricity

19. Generally, the sale of electricity falls within the scope of general sales law under most systems (AUSTRIA electricity is deemed to be incorporeal, see Products Liability Act § 4 and Consumer Protection Act § 15(1); CZECH REPUBLIC elements (natural energy powers) are deemed things; ENGLAND *Bridge*, Sale of Goods, 28; ESTONIA LOA § 208(3); FRANCE Crim., 8 January 1958: JCP éd. G 1958, II, 10546, with note *H. Delpech*; GERMANY CC § 453; GREECE cf. CFI Thessaloniki 1580/1998 8 Arm 1998, 929; HUNGARY CC § 94(2), if there is no legal provision to the contrary, the rules of ownership shall apply appropriately to money, securities and natural resources; LITHUANIA special provisions for the sale of various kinds of energy in CC arts. 6.383-391; POLAND CC art. 555; PORTUGAL RP 31-1-1994; SCOTLAND "The sale of water, gas, electricity and the like is competent at common law and *semble* under the Act." (*Gow*, Mercantile and Industrial Law of Scotland, 81, citing the Scottish judge Lord *Guest* in *Longhurst v. Guildford Water Board* [1961] 3 All ER 545 (HL), 549); SLOVENIA Property Code art. 15).

20. Under some systems, the provisions on the sale of goods apply by analogy to the sale of electricity (GERMANY CC § 453, NORWAY Ot. prp. no. 80 1987-1988 and *Krüger*, Norsk Kjøpsrett[4], 6). Similarly in the NETHERLANDS, where the rules on sales are either applied directly or at least by way of analogy (the prevailing opinion in the legal literature does not consider electricity as a thing as it would not be considered a good of a 'physical' nature; cf. *Loos*, De energieleveringsovereenkomst, 51-56).

21. In SWEDEN a contract for the distribution of electricity will rather constitute a service contract, and is not regarded as a sale, since it is argued that electricity is not corporeal (cf. *Ramberg*, Köplagen, 137). See also SPAIN where the provisions on sale are applied to supply contracts in so far as they are not opposed to the nature of the contract of supply (*De la Cuesta Rute*, Contratos Mercantiles, I, 228: legal literature traditionally considers the contract of supply as a variety of sales contracts; see also TS 10 March 1994, RAJ 1994 no. 1734, TS 23 May 2002, RAJ 2002 no. 7158.

22. In some countries, the sale of electricity is regulated by public law (BELGIUM Flemish region: Vlaams elektriciteitsdecreet, Brussels region: Elektriciteitsordonnantie, Walloon region: Décret relative à l' organisation du marché regional de l' électricité; FINLAND Electricity Market Act (*Sähkömarkkinalaki*); LATVIA Electricity Market Act; SPAIN Electricity Market Act 1997). This private-public divide may be due to the fact that the utilities have been privatised across Europe, whereby the private law of sale is thus potentially much more relevant in this area, whether involving suppliers *inter se* or in dealing with customers (cf. ENGLAND and SCOTLAND, but see the explanation for FINLAND, where the reason for the exclusion of electricity from the Sale of Goods Act lies in the fact that the supply of electricity, despite the broad meaning of the term of movable property (*irtain omaisuus*), is mainly considered as a service contract. According to the general view, in the case of electricity, the concept of transfer (*luovutus*) is lacking; see also SPAIN).

23. Under some systems, the sale of electricity is not regarded as a consumer sale in accordance with Consumer Sales Directive art. 1(2)(b) (FRANCE Consumer Code art. L.211-2(2); SWEDEN cf. Prop 2001/02:134, 24; SPAIN ConsProtA art. 115(2)). In the NETHERLANDS, however, since the liberalisation of the market for the supply of electricity and gas in 2004, such supply to a consumer is explicitly recognised as a consumer sales contract (CC art. 7:5(1)).

VI. Software

24. The problem with the sale of software is to determine what is actually being sold. While some systems seem to consider software as 'goods' without further qualification others grapple with the distinction between the transfer of the actual medium containing the software, such as a disk, and the transfer of the right to use the software, which belongs to the realm of intellectual property.

25. Under some systems software is simply considered to be 'goods' (AUSTRIA *Koziol and Welser*, Bürgerliches Recht II[12], 144, fn. 5; GREECE; LATVIA; LITHUANIA). Also in GERMANY the BGH has applied the provisions on the sale of goods to software, see BGH 18 October 1989, BGHZ 109, 97. Indirectly, this same approach has been consecrated by the SPANISH Supreme Court (TS 12 December 1988, CCJC 18/1988, pp. 1063 ff, annotated by *Delgado*).

26. While the 'sale' of software, as a rule, does not fall under the scope of the Sales Act in the NORDIC COUNTRIES, since it is a transfer of the right to use software assigned by way of licensing contracts, the respective Acts may, however, apply if software is sold together with hardware (FINLAND *Routamo and Ramberg*, Kauppalain Kommentaari, 15; NORWAY cf. Ot. prp. no. 44 2001-2002, 57; SWEDEN *Ramberg*, Köplagen, 138). However, this provides that such a transaction is considered to entail a proper transfer (FINLAND *Routamo and Ramberg*, Kauppalain Kommentaari, 15). Similarly in the NETHERLANDS, software is not considered to be a 'thing', but at least in cases of simple standard software, which can be considered forming a union with the disk or CD-Rom sold, the provisions on the sale of goods ultimately will

apply, see Asser-Hijma (2001), no. 196. In case standard software is downloaded from the Internet, the sales regulation is to be applied by way of analogy, Asser-Hijma (2001), no. 203.

27. Under other systems like in FRANCE the transfer of software is considered to be only a licensing of software rather than a sale, although this distinction might not always be clear-cut (see *Le Tourneau*, JCP 1982, I no. 3078). However, the *Cour de cassation* applied the guarantee for hidden defects to a computer disk infected with a virus, thus qualifying the contract as a sale (Cass.civ. I, 25 November 1997, Bull.civ. IV, no. 308; JCP 1998,853 note *Gross*; RTD civ 1998, 386 obs. Jourdain.). This led an author to consider that the contract for providing standard software can be characterised as a sale (*Huet*, De la "vente" de logiciel, 799 ff contra, *Girot*, User Protection in IT Contracts, 162 ff). Similarly in BELGIUM, the distinction is not clear (qualification as a sale: *Tilleman and Verbeke*, Bijzondere overeenkomsten in kort bestek, 234; Kh. Brussels 25 February 2000, AJT 1999-00, 843 ; Liege 19 February 2002, T. Aann. 2003, 133; Rb Brussels 2 May 1088, D.I.T. 1990, vol. 1, 47; Kh. Kortrijk 23 June 2003, TGR-TWVR 2004, vol. 4, 286; Kh. Turnhout 18 March 1996, Turnh. Rechtsl. 1995-96, 147; qualification as licence: Dirix and Van Oevelen (-*Taeymans*), Bijzondere overeenkomsten). In principle, rights conferred by copyright cannot be transferred *inter vivos* under HUNGARIAN law, they can only be the object of a license contract. However an exception has been made for economic rights related to software (Copyright Act art. 58(3)), database (Copyright Act art. 61(2)), motion picture works (Copyright Act art. 66(1)) and works ordered for advertising (Copyright Act art. 63(1)). Rights related to copyright (neighbouring rights and rights conferred by sui generis database protection) and industrial property rights are also transferable).

28. In ENGLAND and SCOTLAND there are conflicting cases on this issue. In *St. Albans City & District Council v. International Computers Ltd.* [1996] 4 All ER 481 (CA) it was held that a supply of a disk carrying software is either a sale or a supply of goods [the defendants delivered software to the claimants via a disk which was taken to their premises for the purpose of loading the software and then taken away; it was held that there was no sale of the software but merely a licence to use it]. In *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd* 1996 SLT 604 Lord Penrose held in the Outer House of the Court of Session that the supply of proprietary software for a price was a single contract sui generis and not a sale of goods, though it contained elements of contracts such as sales of goods and the granting of licences. On these authorities, the downloading of software from the Internet would appear not to be a sale of goods in either system.

VII. Rights and receivables and industrial or other intellectual property rights

29. The majority of the systems have a general regime of sales law that comprises the sale of goods, immovables and rights. As a consequence, the sale of rights is governed by the general rules. When it comes to rights, they need to be transferable (CZECH REPUBLIC rights must be property values; similarly NETHERLANDS, cf. CC arts. 3:6 and 7:47; SLOVAKIA CC § 118; SLOVENIA), which excludes purely personal rights (LITHUANIA). In POLAND sales covers shares, transferable proprietary rights and rights on immaterial goods (Radwański (-*Katner*), System Prawa Prywatnego VII^2, 42). In ESTONIA any right (including non-transferable rights) can be the object of a sales contract, if the right is not transferable the seller would merely commit a non-performance. Also in SPAIN, the contract of sale may have as its object every corporeal and incorporeal asset (*Lacruz Berdejo and Rivero Hernández*, Elementos II(2)^3, p. 17).

30. Since the NORDIC COUNTRIES use a wide definition of goods that also covers incorporeal property, such as sales of stock-options, shares, bonds, intellectual property rights, licences, rights of use, patent rights, trademark rights fall within the application of the respective Sales Act (cf. SWEDEN *Ramberg*, Köplagen, 136 f). It is however important to keep in mind that this only holds true for the transfer of existing rights, and not their coming into being. In FINLAND, the application of the Sales Act has given rise to discussion; the prevailing view is that the Act is also applicable to purchase of shares agreements (e.g. KKO 1992:158). A narrower approach is found in consumer sales, where the scope of application is limited to corporeal goods (FINLAND Consumer Protection Act chap. 5 § 1(1); SWEDEN Consumer Sales Act § 1(1)).

31. Under HUNGARIAN law the rules on ownership are made applicable to securities (both certificated and uncertificated – or dematerialised – securities), as if they were things and as a result securities can also be the object of a sales contract, CC § 94(2).

32. In ENGLAND and SCOTLAND the sale of incorporeal rights, such as intellectual property rights, rights of action, and contractual rights, will not be subject to the Sale of Goods Act. A prohibition upon assignation in a contract will generally be given effect so as to invalidate any purported transaction in breach of the prohibition (*Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; *James Scott Ltd. v Apollo Engineering Ltd.* 2000 SC 228).

33. In FRANCE, the transfer of intellectual property rights is governed by general sales law and specific provisions of the Intellectual Property Code, *Code de la propriété intellectuelle* (for copyright, droit d'auteur: arts. L. 131-1 ff; for patents: arts. L. 613-8 ff).

34. In BELGIUM the transfer of industrial property rights is considered a licence of these rights rather than a sale (*van Hoof*, Overdracht van intellectuele rechten en voorwerp van zekerheden, 119-170) The same principle applies in SPAIN for intellectual property rights (see *Bercovitz*, Manual de propiedad intelectual).

VIII. Barter

35. See Notes to IV.A.–1:203 (Contract for barter).

IX. Immovable property

36. See Notes to IV.A.–1:201 (Goods).

X. Mandatory provisions in consumer sales law

37. In all systems, special rules relating to consumer sales are mandatory. The most common approach is to declare them mandatory as such, i.e. the entire set of rules (Consumer Sales Directive art. 7(1); AUSTRIA Consumer Protection Act § 2(1); BELGIUM CC art. 1649octies; CZECH REPUBLIC CC § 2(3); FINLAND Consumer Protection Act chap. 5 § 2; FRANCE Consumer Code art. L. 211-17; ITALY Consumer Code art. 134(1): LITHUANIA CC art. 6.350; NORWAY Consumer Sales Act § 3; POLAND Consumer Sales Act art. 11; SLOVENIA Consumer Protection Act § 37č; SPAIN, ConsProtA art. 10; SWEDEN Consumer Sales Act § 3(1)). Under ESTONIAN law it is provided that under a consumer sale the provisions that govern the parties' liability in the case of non-performance (both in sales law and in general contract law) are mandatory and no deviations to the detriment of the consumer are allowed, LOA § 237(1). Under SWEDISH law it is expressly pointed out in the preparatory works that it is not sufficient to establish in an overall view whether the contract grants the consumer equal or better protection than by law (Prop 1989/90:89).

38. Under other systems, the sales regulation contains a list of which rules are declared mandatory in favour of the consumer (DENMARK SGA § 1(2); GERMANY CC § 475). A similar approach is to indicate in each specific article if the regulation is mandatory in consumer sales as is the case under HUNGARIAN law.

39. In the NETHERLANDS parties may not derogate from certain rules to the detriment of the consumer, whereas they may derogate to the detriment of the consumer from others, but not by means of standard contract terms (CC art. 7:6(1) and (2)). For a similar 'targeted' approach, see also ENGLAND and SCOTLAND where the provisions of the Sale of Goods Act relating to the seller's implied undertakings as to the conformity of goods with the description or sample, and as to their quality and fitness for any particular purpose, are mandatory in consumer sales (Unfair Contract Terms Act arts. 6(2) and 20(2)).

40. Given that there are indirect ways to restrict or exclude the rights of consumers, certain clauses are tackled specifically, see for instance BELGIUM with regard to clauses implying that the consumer was aware of any lack of conformity of the consumer goods existing at the time the contract was concluded, CC art. 1649octies.

41. Party autonomy may be limited by a general fairness rule, such as promulgated in FINLAND and SWEDEN (Contracts Act § 36). Moreover, certain (general) provisions can be declared mandatory as such. Provisions relating to the seller's implied undertakings as to title are mandatory in all sales (ENGLAND and SCOTLAND Unfair Contract Terms Act art. 6(1)). In SLOVAKIA certain rules within commercial obligations are rendered mandatory, Ccom art. 263. This applies to Ccom art. 444 requiring a written form if the property in goods is to be transferred earlier, Ccom arts. 458 and 459 dealing with passing of the risk in certain situations, Ccom arts. 477, 478, 479(2), 480, 481, 483(3) and 488 dealing with the sale of an enterprise and Ccom art. 493 concerning the sale of a rented thing.

IV.A.–1:102: Goods to be manufactured or produced

A contract under which one party undertakes, for a price, to manufacture or produce goods for the other party and to transfer their ownership to the other party is to be considered as primarily a contract for the sale of the goods.

COMMENTS

A. General

Many contracts involve the seller producing or manufacturing the goods before their ownership can be passed to the buyer in exchange for a price. If there is no undertaking to construct, but it just incidentally happens that the seller will construct the goods before selling them, then there is a pure contract of sale and this Article will not apply. It applies only where under the contract one party actually "undertakes" to manufacture or produce the goods. Under the rule in this Article such a contract is to be considered as primarily one of sale of the goods. It does not matter that the goods do not exist at the time when the contract is concluded. These rules apply to a sale of future goods (see IV.A.–1:201 (Goods). This applies whether the goods are to be mass-produced or are to be custom-built to an agreed design, like a ship.

There are two parties involved in such a transaction: the party who orders the goods to be manufactured or produced and who undertakes (either expressly or impliedly) to buy them, and the party who undertakes to manufacture or produce them and then transfer their ownership to the first party. Their contract contains two elements, that of the actual manufacture or production of the goods, and that of the transfer of ownership of these goods for a price. While the former part of the transaction may be considered a service contract, the second part, i.e. the transfer of goods for a price, may well be qualified as a proper sales contract. In fact, the only difference with the majority of sales of typically mass-produced goods is that the manufacturing process has yet to take place. It is the combination of this process with the subsequent 'sale' that gives rise to problems of qualification.

This is but one example of a "mixed contract" combining elements of two or more specific types of contract. This Article must therefore be read, and is designed to be read, along with the general rules on mixed contracts in Book II.

B. The rules on mixed contracts

The normal rule under II.–1:107 (Mixed contracts) is that the rules applicable to each relevant category apply, with any appropriate adaptations, to the corresponding part of the mixed contract and the rights and obligations arising from it. This will often be relevant for contracts which contain provisions for the sale of goods plus something les. For example, if a contract provides for the sale of machinery and for an after-sale maintenance service for a number of years, the sale part would be governed by the rules in this Part of Book IV and the maintenance part would be governed by the rules in the Services Part of Book IV. In the absence of any special provision for contracts providing for goods to be manufactured or produced for a person and then sold to that person, the same general rule would apply: the services rules would apply to the services part and the sales rules to the sales part. Experience has shown, however, that it is more convenient to regard most such contracts as sales contracts, particularly in the case of an order for the production and sale of standard mass-produced items where the ordering party has no input into the manufacturing process. As

pointed out above, such contracts are functionally just like ordinary sales contracts except that the goods are yet to be made instead of already made. So there is a special rule under II.–1:107 for cases where (as here) "a rule provides that a mixed contract is to be regarded as falling primarily within one category". In such a case the rules applicable to the primary category apply to the contract and the rights and obligations arising from it. However, rules applicable to any elements of the contract falling within another category apply with any appropriate adaptations so far as is necessary to regulate those elements and provided that they do not conflict with the rules applicable to the primary category.

What this means in the present context is that in a case where the service element in a contract for the manufacture and sale of goods is pronounced – for example, where a prototype or unique item is being constructed under the active direction of the party ordering it – the rules of Part IV.C on Services could be applied with any appropriate adaptations to the services part of the contract. This is necessary, or at least highly desirable, because in some such contracts the services part may last for years and involve many difficulties. There is every reason to apply the normal services rules to the solution of such difficulties in the absence of provision in the contract itself. In any case of conflict, however, the sales rules would prevail. Conflict is likely only at the end of the process when the rules on conformity might differ slightly. It is reasonable to allow the sales rules to prevail at this stage because ultimately what the party wants is to get conforming goods just as in any other case of sale.

There is a further provision in II.–1:107 (Mixed contracts) paragraph (5) which preserves the application of any mandatory rules. So all the mandatory consumer protection rules in this Part would apply notwithstanding the mixed nature of the contract. This is essential because otherwise it would be too easy to escape from these protective rules by qualifying a contract as sale plus something else.

It does not matter who supplied the materials, provided that there was an obligation to transfer ownership of the goods, once made, to the party ordering the goods. This means that a contract under which one party is to supply materials (or most of them) and the other is to construct something out of them (acquiring ownership of the new thing in the process) and then transfer the ownership of the new thing to the ordering party is primarily one of sale. The sales rules on conformity, notification of non-conformity, passing of risk and remedies will apply. The construction rules would apply only in an incidental and subsidiary way so far as was necessary to regulate the construction part of the contract.

> *Illustration 1*
> A company orders uniforms to be made for its employees. Whether the company supplies none of the materials, or some (say only the buttons and emblems) or all of the materials, is irrelevant. If the tailor becomes the owner of the finished uniforms and transfers that ownership to the company (as would generally be the case) the rules of this Part of Book IV apply, although the services rules may apply in a subsidiary way to the manufacturing stage (for example, if the company gave directions for a change in the work as it proceeded).

Of course, if the company supplied all the materials and the contract provided that the ownership of the materials at all stages up to and including the finishing of the uniforms was to remain with the company and was not to pass to the tailor then this would not be a contract for sale at all but simply a contract for the provision of a service. The important question is what has to be done under the contract, not who may have supplied the materials. In some

cases the contract may provide for the sale of a very valuable item, even if the raw materials supplied by the maker were not of great value. The purchaser of such an item is entitled to expect that the sales rules on delivery, conformity and so on will apply.

Illustration 2
A, a famous artist, contracts with B, a wealthy merchant, to paint his portrait and transfer the ownership of the finished painting to him. This falls under the present Article. Once the portrait is made the sales rules will apply. The services rules will apply subsidiarily to the painting stage of the performance.

In practice it will generally make little difference whether the case is one which falls within this Part or within the rules on construction or processing in Part IV.C. In most cases the obligations of the seller and the constructor or processor will be similar.

C. Consumer transactions

Under the Consumer Sales Directive (Directive 1999/44/EC) art. 1(4) contracts for the supply of consumer goods to be manufactured or produced are deemed to be contracts of sale for the purpose of the Directive. It does not matter who supplies the materials or a substantial part of the materials. The present Article follows the same approach (and not just for consumer transactions) but introduces an element of flexibility by using the word "primarily" and thereby allowing the services rules to apply subsidiarily where necessary. As noted above (Comment B) the sales rules prevail in case of conflict and mandatory consumer protection rules are expressly preserved.

There is a slight blurring of the distinction between consumer contracts for sale and services in IV.A.–2:304 (Incorrect installation under a consumer contract for sale) paragraph (a), which treats the incorrect installation of goods by the seller or under the seller's responsibility – no doubt a service – as a lack of conformity of the goods as such (see Comment B to that Article).

D. Price can be a global one

It is not necessary under this Article to find a part of the price which applies to the transfer of ownership as opposed to the carrying out of the construction or manufacturing service or to allocate a part of the price to the transfer. The price can be a global one. The contract will still be primarily one of sale and primarily regulated by these rules.

E. Immovables not covered

The Article applies only in relation to "goods". Accordingly, contracts for the construction and sale of buildings or other immovables, arguably the most important consumer contracts when it comes to construction, fall outside the scope of this Part.

F. Repair or maintenance not covered

It must also be kept in mind that this Article applies only to contracts under which there is an undertaking both to produce or manufacture goods and to transfer their ownership. This therefore excludes contracts for the repair or maintenance of goods from its scope.

Illustration 3
The parties enter into a contract for the repair of a car engine. The mechanic takes the engine apart and rebuilds it using some of the existing parts and some new parts obtained from the manufacturer. This is either a pure services contract or (depending on whether there is an actual undertaking to sell any of the parts as opposed to a mere understanding that ownership will pass by accession) a mixed contract for services and sale. In either case it is not governed by the present rule. It will be entirely or predominantly regulated by the services rules (see II.–1:107 (Mixed contracts) paragraph (3)(b)).

NOTES

I. General regulation of contracts for the supply of goods to be manufactured or produced

1. This contract has been expressly addressed in many systems, typically by extending the scope of the rules on sales to certain mixed contracts (CISG art. 3; CZECH REPUBLIC Ccom art. 410; DENMARK SGA § 2; FINLAND SGA § 2; GERMANY CC § 651; LATVIA CC art. 2214; LITHUANIA CC art. 6.306; NORWAY SGA § 2(1); SLOVAKIA Ccom art. 410; SWEDEN SGA § 2). In POLAND the Supreme Court ruled that the subject of a contract of sale may also be a thing that does not exist at the moment of the conclusion of the contract, but it is to be produced by the seller (Judgment of the Supreme Court of 18 March 1998, I CKN 576/97, unpublished). The scope of these rules is typically restricted to the manufacture or production of goods, as opposed to the construction of a building other then structures on land or in water, either expressly, e.g. in the NORDIC COUNTRIES (SGA § 2(1)) or by virtue of the wording in other systems. In GERMAN law, however, the new rule in CC § 651 also includes buildings that are only temporarily attached to real property (*Scheinbestandteile* CC § 95), machines that are constructed specifically for the needs of one company and where the intellectual work is predominant, goods that are first manufactured but then integrated into a building such as a kitchen or stairs that are made especially for one particular house, etc. (cf. *Metzger*, AcP 204 (2004), 231 ff).
2. In addition, such transactions include a qualification addressing the dual nature of the obligations undertaken by the seller, i.e. the sale and the service elements. As a result, the contract follows sales law, unless the buyer undertakes to supply a substantial part of the materials necessary for the manufacture or production (CISG art. 3(1); CZECH REPUBLIC Ccom art. 410(1); ESTONIA LOA § 208(2); FINLAND SGA § 2(1); NORWAY SGA § 2(1); SLOVAKIA Ccom art. 410(1); SWEDEN SGA § 2(1)). Under DANISH law it is merely provided that such contracts are regarded as a sale if the seller also provides the material necessary for the production, SGA § 2(1). Moreover, under many systems, there is also a more general qualification in that the contract is not regarded as a sale if the preponderant part of the obligations of the party who furnishes the goods consists of the supply of labour or other services.
3. Under other systems there is a specific provision dealing with only certain aspects of sales law, especially the issue of liability for lack of conformity (GREECE CC art. 562; SLOVENIA LOA § 100). Clauses of the latter nature pursue the same aim as legislators, who attempt to align this aspect of liability across the board of supply contracts in general (cf. AUSTRIA see *Jeloschek*, ERPL 9/2001, 168 and ENGLAND and SCOTLAND, where most contracts involving the supply of goods in the UK now have the same rules with regard to the seller's liability for the goods thanks to the

Supply of Goods and Services Act 1982 Part I, extended to Scotland by the Sale and Supply of Goods Act 1994).

4. Outside the realm of consumer sales law, certain systems do not have a specific contract for the supply of goods to be manufactured or produced. There, the transaction is qualified as either a sale or a contract for services. In this respect, there are several possibilities. First, the parties themselves have to determine the nature of the transaction (CZECH REPUBLIC cf. CC § 588 (sales contract) and CC § 631 (contract for work) in contrast to Ccom art. 410; ENGLAND and SCOTLAND *Robinson v. Graves* [1935] 1 K.B. 579: where the parties themselves have not determined the nature of a contract, the court will look to the substance of the contract to determine whether or not it is a contract of sale or a contract for services, for example, in one case a contract to build a ship was held to be a sale, although at the same time having some of the characteristics of a construction contract, *Hyundai Heavy Industries Co. Ltd. v Papadopoulos* [1980] 1 WLR 1129. Second, the Courts have to decide on the qualification of a mixed contract (AUSTRIA CC § 1166 for cases of doubt; *Koziol and Welser*, Bürgerliches Recht II[12], 233; BELGIUM Gent 19 July 1882, *Pas. belge* 1882, 384; Ghent 4 January 1892, *Pand. Pér.* 1892, no. 603; Ghent 22 July 1904, *Pas. belge* 1905, II, 291; Liege 13 December 1949, *RCJB* 1951, 97; Ghent 11 May 1953, RW 1953-54, 742; Bergen 2 March 1992, *JLMB* 1992, 1262; Liege 4 June 1992, *JLMB* 1992, 1292; Liege 29 January 1999, RGDC 2000, 313. Kh. Liege 25 June 1997, *TBH* 1997, 655; ENGLAND and SCOTLAND *Robinson v Graves* [1935] 1 K.B. 579, HUNGARY (only in cases of doubt, otherwise a service contract); ITALY CC art. 1655 ff; SLOVENIA LOA § 620 (cases of doubt). In SPAIN when the contractor also undertakes an obligation to supply the material (CC art. 1588) it is controversial whether the contract should be regarded as a sales contract, as a contract for work or as a mix between those two. According to the majority of court decisions, such a contract is to be deemed a construction contract, not a sale (TS 27 March 1981, RAJ 1981 no. 1077; TS 20 July 1995, RAJ 1995 no. 6194), which is of importance for the remedies for lack of conformity. The rule is the contrary, in the case of consumer sales (ConsProtA art. 115). Other minor services or changes to be made in the sold asset do not deprive the contract of its qualification as a contract of sale (TS 17 December 1928, Col.Leg.Esp. 1928, p. 651). In FRANCE, case law now consistently rules that a contract shall be qualified as a contract for service when it concerns the transfer of property of a thing to be manufactured according to specifications required to satisfy the particular needs of the client and that the contract is for sale when the thing is manufactured according to specifications determined in advance by the seller (see e.g. Cass.civ. I, 14 December 1999, Bull.civ. I, no. 340).

II. Consumer sales

5. The Consumer Sales Directive art. 1(4) introduces the notion of contracts for the supply of goods to be manufactured or produced into consumer sales contracts. It is important to note, however, that it is irrelevant for this qualification under this provision whether or not the transaction includes a preponderant element of services or which party provides the material. As a consequence, consumer sales law may apply to contracts that have traditionally been treated as contracts for services rather than sales. The ways of implementing this provision in the Member States vary greatly.

6. Under some systems the sales provisions now apply whether the supply of labour constitutes the preponderant part of the contract or not (NORWAY Consumer Sales Act § 2(1); BELGIUM CC art. 1649bis § 3). In ENGLAND and SCOTLAND, the provisions of the Consumer Sales Directive have been extended to contracts involving

both goods and work by virtue of amendments made to the Supply of Goods and Services Act 1982. The same applies under SPANISH law, Consumer Sales Act art. 2.

7. Under other systems the consumer may now use both sales provisions and provisions regulating contract for work. In the NETHERLANDS the rules on contracts for work may apply in addition to the sales rules (CC art. 7:5(4)). The provision further regulates that in case of conflict between the consumer sales rules and the rules on the contract for work, the former rules prevail (Bijl. H.TK. 2000-2001, 27809, no. 3, 13). Under SWEDISH law, certain of the provisions from the Consumer Services Act may now be applied in addition to the sales rules in order not to reduce the amount of consumer protection. Where the party ordering the goods undertakes to supply a substantial part of the necessary materials, the Consumer Sales Act § 2(1) prescribes that §§ 4(1), 6 and 7 of the Consumer Services Act apply in addition (these provisions mainly concern the seller's obligation to perform in a professional manner and to advise the consumer against ordering services unfavourable to him). In ESTONIA most of the contracts referred to in Consumer Sales Directive art. 1(4) would be treated as consumer sales, LOA § 208(2) and (4). However, contracts by which the buyer undertakes to supply a substantial part of the materials or contracts where the preponderant part of the obligation of the party who furnishes the goods consists in the supply of labour or other services are treated as a services contract, LOA § 208(2), and fall under the scope of the contract for works. This does not create problems in respect of the Consumer Sales Directive as the regulation of contracts for work contains specific provisions regarding consumer services, LOA § 635(4) that corresponds to the specific provisions regarding consumer sales, derived from the Consumer Sales Directive.

8. Under some systems, Consumer Sales Directive art. 1(4) has not been specifically implemented (CZECH REPUBLIC; HUNGARY; POLAND; SLOVENIA). However, under SLOVENIAN law, since the Consumer Protection Act applies the sales law regime, modelled after the Consumer Sales Directive, by analogy also to contracts for services, the level of consumer protection is satisfied. The same applies to AUSTRIAN and HUNGARIAN law, since the transposition of the Consumer Sales Directive took place through the amendment of the general provisions on defective performance, applicable to all contracts for consideration. As pointed out under I. above, this resulted to the abandonment of the previous, specific conformity regime for contracts of work in AUSTRIA.

Section 2: Definitions

IV.A.–1:201: Goods

In this Part of Book IV:

(a) the word "goods" includes goods which at the time of the conclusion of the contract do not yet exist; and

(b) references to goods, other than in IV.A.–1:101 (Contracts covered) itself, are to be taken as referring also to the other assets mentioned in paragraph (2) of that Article.

COMMENTS

A. Goods

Because the term "goods" is used not only in this Part but also elsewhere in these model rules it is not defined here but in the general list of definitions in Annex 1. The definition is quite short.

> "Goods" means corporeal movables. It includes ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases.

The present Article makes it clear that future goods are covered in the present Part and that references to "goods" are to be taken as covering also the other assets mentioned in the first Article. This avoids the constant repetition of phrases such as "goods and other relevant assets".

B. Corporeal movables

The basic meaning of "goods" is corporeal movables. It follows that land, buildings and other types of immovable property fall outside the ambit of the rules in this Part. This is expedient, given the complex and often diverging issues related to the sale of land, buildings or other immovable property throughout Europe. Sales of immovable property are in several systems regulated separately from sales of goods. Moreover, there are often formal requirements for the validity of a contract for the sale of land or other immovable property.

The second sentence of the definition of "goods" in Annex 1 lists certain specific items as being included within the concept of goods. This is to make it sufficiently clear that they, while falling outside the scope of some domestic and international sales laws, are deemed to be goods for the purposes of the present rules. These objects are the following.

Ships, vessels, hovercraft or aircraft and space objects. These objects have been excluded from the CISG in order to avoid questions of interpretation as to which ships, vessels (hovercraft) or aircraft are subject to the CISG, especially in view of the fact that the relevant place of registration might not be known at the time of the sale. However, they fall within the scope of the present rules, as they are clearly corporeal movables, notwithstanding the fact that their transfer may require certain formalities, such as registration.

Animals. During the last few decades, the legal status of animals, and in particular their protection, has been discussed and subsequently improved throughout Europe. As a result, many legal systems have adopted legislation to address the legal status of animals, such as rules relating to the trade in endangered species, mistreatment and health or hygiene requirements. While animals may therefore be considered to be something different from regular 'goods', contracts for the sale of animals nonetheless follow the same rules as any regular sales contract.

Liquids and gases. There is no doubt that liquids and gases fall under the scope of sales rules when packaged or otherwise contained, e.g. water in bottles or gas in canisters. However, this may be more controversial when it comes to contracts for the supply of liquids and gases via pipes. While such contracts certainly contain an element of sale in respect of the amount actually supplied, they may also involve a certain element of services, such as maintenance provisions. Notwithstanding this, the present rules apply to the actual sale part of the contract.

> *Illustration 1*
> In the wake of the privatisation programme of the municipality, A concludes a contract with W, a local water company, for the supply of fresh mountain spring water through the public water pipe grid. Due to a faulty filter in the reservoir, the water remains visibly dirty, and thus undrinkable, for two days. Chapter 4 of this Part answers the question of which remedies are available to A.

It should be noted that a contract to permit one party to extract liquids or gases from the land of another will not be a contract of sale within these rules.

C. Future goods

According to sub-paragraph (a) of the present Article, the term "goods" includes so-called future goods for the purposes of this Part. Therefore parties are free to conclude a valid sales contract concerning goods that are not yet in existence.

> *Illustration 2*
> At the beginning of spring, A, the owner of an orchard, sells the current year's future harvest to B, the local farming co-operative. Whether the contract is for the quantity of crop that A anticipates, but is subject to defeasance to the extent that there is a shortfall, or whether it is for whatever quantity is produced, it is still a contract of sale within these rules.

This solution ensures that, while future goods may have a distinct legal character in some national legal systems, they are not treated any differently from other goods. It is important to note that IV.A.–1:102 (Goods to be manufactured or produced) already addresses an important example of a contract dealing with future goods, i.e. goods which are still to be manufactured or produced.

However, a contract under which one party agrees to pay the full price even if no goods are produced is not a contract of sale within these rules.

Illustration 3
At the beginning of spring, A, the owner of an orchard, sells the current year's future harvest to B, the local farming co-operative. If B agrees to pay the full price whatever quantity is produced, in other words to buy the mere chance of A producing a harvest this year rather than the actual produce, a different type of contract comes into being.

This illustration makes it clear that it is ultimately the contract that will decide whether the buyer has to pay the price irrespective of the contingency occurring, i.e. the question of the goods coming into existence.

D. Goods extra commercium

Under many systems there are things that are extra commercium, which may not be sold at all. Examples of this are parts of the human body: cells, body parts, organs etc. These rules do not deal with such issues; they must be regulated by national law. However, it cannot be overlooked that some body parts, for instance hair, can generally be sold and a contract for the sale of such parts will fall under these rules.

NOTES

I. Object of sale in general

1. Under some systems, everything that is in commerce can be subject to a sale, unless prohibited by particular laws (BELGIUM and FRANCE CC arts. 1128 and 1598; HUNGARY CC § 365(2); LATVIA CC art. 2005).
2. Many systems refer to 'things' as the object of sale (AUSTRIA CC § 1053; CZECH REPUBLIC CC § 118(1); GERMANY CC § 433; ITALY CC art. 1470, also covering the transfer of other limited property rights than ownership; LITHUANIA; NETHERLANDS CC art. 3:2; PORTUGAL CC art. 874; SLOVAKIA CC § 118; SPAIN CC arts. 1271-1273, 1445 and 1526 ff). Many systems have a general regime of sales law that applies to a wide range of objects, such as goods, immovables and rights either expressly or impliedly (AUSTRIA CC § 285; CZECH REPUBLIC CC § 118(1); GREECE CC arts. 513 and 947; LITHUANIA; PORTUGAL; SLOVAKIA CC § 118; SLOVENIA LOA § 435; SPAIN).
3. Under some systems, the definition of sale refers to 'things', including both movable and immovable property, but not including rights. However, the rules on contract of sale are expressly made applicable to the sale of rights as well (ESTONIA LOA § 208(3); GERMANY CC § 453; POLAND CC art. 555; NETHERLANDS CC art. 7:47, SPAIN CC art. 1526). The property law notion of 'things' on the other hand may differ as to its scope under the national systems, cf. the Principles on Transfer of Movable Property.
4. Other systems have a more limited scope of the sales rules. ENGLAND and SCOTLAND have a (statutory) sales law that is restricted to the sale of goods including all personal chattels other than things in action and money, and in SCOTLAND all corporeal movables except money, Sale of Goods Act s. 61(1)). Corporeal movables are in essence any corporeal thing which does not comprise land or is not part of land (which includes things such as buildings that accede to land). 'Goods' in both ENGLAND and SCOTLAND 'includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to

be severed before sale or under the contract of sale, Sale of Goods Act s. 61(1). In ENGLISH law emblements are growing crops sown by a tenant for life which his personal representatives have the right to take after his death; they are personal property. In SCOTLAND industrial growing crops are those crops requiring annual seed and labour (so not including trees): *Paul v. Cuthbertson* (1840) 2 D 1286. In the NORDIC COUNTRIES, the sales regulation does not include the sale of immovables, cf. under II.

5. Under some systems the commercial or consumer regime has a narrower scope than under general sales law. Specific regimes dealing with commercial sales are typically restricted to the sale of goods, understood as corporeal movables (CISG art. 2; AUSTRIA Ccom § 373; CZECH REPUBLIC and SLOVAKIA Ccom art. 409; SPAIN Ccom art. 325). Under SPANISH law, however, the TS judgments of 15-3-94 and 26-11-87 broadened the scope of Ccom art. 325 to incorporeal goods (securities). Also rights like patents, trademarks or intellectual property rights may be the object of a commercial sale (*Lefebre*, Memento Práctico, 54)). Also under consumer sales some systems restrict the scope of application of the consumer regulation to corporeal movables (Consumer Sales Directive art. 1(2)(b); ESTONIA LOA § 208(4); FINLAND Consumer Protection Act chap. 5 § 1(1); POLAND Consumer Sales Act art. 1(1); SPAIN Consumer Sales Act art. 2; SWEDEN Consumer Sales Act § 1(1))

II. Sale of immovable property

6. Under most systems the general regime of sales law also covers the sale of immovable property, cf. under I. Immovable property follows the same rules on the sale of goods. However, the sale of immovables typically requires special formalities, such as a contract in writing and registration in the land register.

7. In ENGLAND and SCOTLAND, however, there are distinct regimes for the sale of immovables, which fall under the common law (for the SCOTTISH law of sale as it applies to immovables, see *Stair*, The Laws of Scotland XX, paras. 903-921). A similar situation can be found in the NORDIC COUNTRIES where the Sales Acts do not apply to the sale of immovable property (DENMARK SGA § 1a(1); FINLAND, NORWAY and SWEDEN SGA § 1(1)). Here, the sale of immovable (real) property is generally covered by separate statutes (FINLAND the Land Code (*Maakari*)*;* NORWAY the Sale of Real Property Act (*Lov om avhending av fast eigendom/Avhendingslova (Avhl)*); and SWEDEN the Land Code (*Jordabalken (JB)*). Under DANISH law, the sale of immovable property is an unregulated area where general contractual principles apply, or the Sales Act applies by way of analogy (DENMARK *Lookofsky*, Køb, 41). In FINLAND, however, the concept of movable property is rather wide and heterogeneous, by way of example both ancient monuments and space objects are considered movable property. In addition, the sale of real property is considered to refer only to the sale of buildings owned by the same owner together with the land on which these are fixed (see e.g. *Routamo and Ramberg*, Kauppalain Kommentaari, 13). This is based upon the principle that the buildings are considered as movable property if ownership of buildings is disjointed from ownership of the ground (see *Kartio*, Esineoikeuden Perusteet, 92). However, under the SGA § 1(3), the conveyance of a building or fixed installation or structure built on the land of a third person, if the right to use the land is transferred simultaneously, are excluded from the scope of application of the Sale of Goods Act. In SWEDEN, the definition of movable property in the Sales Act covers all kinds of property falling outside the scope of the Land Code, which means that the latter is used e contrario to establish the borderline between the two categories (see *Ramberg*, Köplagen, 134). In SPAIN, the sale of built flats and business premises is subject to

particular rules as to the liability arising out of hidden defects and non-conforming delivery (Construction Regulation Act 1999 art. 17).

III. Ships, vessels, aircraft and hovercraft

8. In most systems, ships, vessels, aircraft and hovercraft are treated as 'goods' or 'movables', and thus follow the rules on the sale of goods (CZECH REPUBLIC; ENGLAND and SCOTLAND; ESTONIA; FINLAND; FRANCE; LATVIA; NORWAY; POLAND; SLOVAKIA; SLOVENIA; SPAIN, SWEDEN). In contrast, under a few systems their sale is governed by the rules on the sale of immovables (GERMANY CC § 452; LITHUANIA CC art. 1.98). However, in GERMANY the sale of immovables largely follows the same regime as movables, with the main exception of the limitation periods.

9. As for the classification of the different vessels, see ENGLAND and SCOTLAND: Ships, which in the UK include every description of vessel used in navigation (Merchant Shipping Act 1995 art. 313(1)), are goods; but vessels whose only method of propulsion is oars are not ships (in ENGLAND see *Ferguson v. Hutchinson* (1870-71) LR 6 QB 280; *The CS Butler (No. 2)* (1872-75) LR 4 A & E 238; *Edwards v. Quickenden* [1939] P 261; in SCOTLAND, see *Cathcart v. Holland* 1681 Mor 8471; *McConnachie v. Geddes* 1918 SC 391). Aircraft, too, are goods (*Halsbury's Laws of England*, II(3), para. 694; *Stair*, The Laws of Scotland XX, para. 394), as are also seaplanes. A hovercraft, being a vehicle designed to be supported when in motion wholly or partly by air expelled from the vehicle to form a cushion of which the boundaries include the ground, water or other surface beneath the vehicle, is part aircraft, part ship but is generally not treated as an aircraft (see the Hovercraft Act 1968 as amended; Civil Aviation Act 1982, art. 100); such a machine is nonetheless a good.

10. Typically, ships, vessels, aircraft and hovercraft are, for the purpose of transfer of ownership, subject to a special registration regime that is similar to that of the land register (e.g. in ENGLAND; ESTONIA (in respect of ships only); FINLAND; LATVIA; SLOVENIA; SWEDEN).

IV. Specific rules for the sale of animals

11. Animals are generally considered goods and, thus, follow the respective rules on sales law. Similarly in POLAND where animals are not considered to be goods but are treated as goods, and as such can be the subject of a sales contract (Act on protection of animals non 21.8.1997, Dz. U. no. 11, poz. 724 with amendments). In GERMANY a number of issues surrounding the sale of animals have been discussed by the courts. For a landmark decision, see BGH 29 March 2006, NJW 2006, 2250 ff. On the question of when animals are second-hand concerning the different prescription periods applicable (cf. *Brückner and Böhme*, MDR 2002, 1406 ff). AUSTRIAN law contains a specific regime for certain types of defects in certain livestock, which deals with the presumption and time of non-conformity (see CC §§ 924 to 927). In SPANISH law the only particular rules refer to the remedies in case of hidden defects (CC arts. 1491 ff).

12. The sale of (dead) animals may be subject to a host of public law regulations. Moreover, there are laws on the protection of animals that may restrict trade, or the conditions for the sale of animals (cf. BELGIUM Dierenwelzijnwet of 14/08/1986: according to article 10 it is possible to impose conditions upon the marketability of animals with a view to protecting them and ensuring their welfare. These conditions may simply concern the age of the animals, the identification, the information to the buyer, the guarantees to the buyer and connected documents, the preventive medical

treatment, the packing and the offer and exhibition for the trading. Article 12 states that it is forbidden to trade dogs and cats on the public road as well as in markets, exhibitions and similar places as well as at the buyer's place, unless the initiative was taken by the buyer. That ban could be expanded to other species of animals; CZECH REPUBLIC Act no. 246/1992 Sb., on the protection of animals against mistreatment, Act no. 243/1997 Sb., on administrative torts of breeders and penal offences, Act no. 449/2001 Sb, on hunting; FINLAND The Animal Protection Act (*Eläinsuojelulaki*) and the Decree on the Transportation of Animals (*Asetus eläinten kuljetuksesta*) provide special rules for transportation; SLOVAKIA Act no. 39/2007 Z.z.).

V. Specific rules for the sale of human body parts

13. Ever since the abolition of slavery, humans cannot be the object of a sale contract as they are considered *res extra commercium* (FRANCE; BELGIUM; ENGLAND and SCOTLAND: the institution of slavery is not recognised *Sommersett, The Case of James* (1771-72) 20 St Tr 1; *Knight v. Wedderburn* (1778) Mor 14545; GERMANY against "*Gute Sitten*").

14. The same holds true for the transfer of organs, organic tissue and cells, as it may not occur with a view to making profits, i.e. as a commercial transaction. Under FRENCH law, it is generally provided that the human body and its elements cannot be subject to a patrimonial right, CC art. 16-1. Under other systems more specific regulation can be found on this issue (cf. BELGIUM art. 4 of the Act concerning the removal and transplantation of organs (*Wet betreffende het wegnemen en transplanteren van organen*) and art. 5 of the Act concerning scientific research on embryos in vitro (*Wet betreffende het onderzoek op embryo's in vitro*); CZECH REPUBLIC Transplantation Act; ENGLAND Human Tissue Act 2004: it is an offence to make or receive payment for transfer of material containing human cells; ESTONIA Act on Transplantation of Organs and Tissues art. 3; FINLAND Act on the Medical Use of Organs and Tissues (*Laki ihmisen elimien ja kudoksien lääketieteellisestä käytöstä*) art. 18; GERMANY Transplantation Act (*Transplantationsgesetz*) of 1997; HUNGARY Act CLIV of 1997 on Health Protection art. 207(1); LITHUANIA CC art. 2.25; SCOTLAND Human Tissue (Scotland) Act 2006: offence to give or receive award for supply of human body part; SPAIN Transplantation Act 30/1979 (*Ley de extracción y transplante de órganos)* art. 1; SWEDEN Transplantation Act (*Lag om transplantation m.m.*) art. 15).

15. This situation may, however, be different when it comes to other body parts, such as blood and blood derivatives (BELGIUM Act concerning blood and blood derivatives of human origin (*Wet betreffende bloed en bloederivaten van menselijke oorsprong*) art. 5 states that the removal of blood and blood derivatives is only permitted with voluntary non-paid donors and with their approval; ENGLAND and SCOTLAND no authority on the status of blood when it is bought and sold, but see in the USA *Perlmutter v. Beth David Hospital (1954)* 123 NE (2nd) 792; in Canada *ter Neuzen v. Korn* (1993) 103 DLR 473; in Australia *E v. Australian Red Cross Society* (1991-92) 105 ALR 53; *PQ v. Australian Red Cross Society* [1992] 1 VR 19; ESTONIA blood may be sold upon donor's consent, Blood Act art. 10; SWEDEN Transplantation Act art. 15(2)). In GERMANY the transfer of blood falls under the *Arzneimittelgesetz*. In POLAND it is treated as *res extra commercium* (Transplantation Act art. 18).

16. See also the sale of hair, breast milk and teeth (SWEDEN Transplantation Act art. 15(2)). In ENGLAND and SCOTLAND skeletons and hair are presumably goods (*Bridge*, Sale of Goods, 28-29). Under POLISH law such parts are claimed to be goods after they are removed (Radwański (-*Katner*), System Prawa Prywatnego VII^2, 36).

VI. The sale of future goods

17. Generally, it is possible to sell goods that do not exist at the time of the conclusion of the contract. Some systems contain specific provisions allowing for such type of sales (BELGIUM and FRANCE CC art. 1130; ESTONIA LOA § 208(1); ITALY CC art. 1472; SPAIN CC art. 1271, but lacking further regulation). The peculiarity of such a sale of future goods lies in the fact that property is not transferred upon the conclusion of the contract. Under most other systems the sale of future goods is not specifically regulated, since property generally only passes at a later period in time when the goods have already come into existence, cf. further the Principles on Transfer of Movable Property.

18. In general, a sale of 'future goods' can take different forms. First, the seller has to manufacture or produce the goods (see IV.A.–1:102 (Goods to be manufactured or produced) above). Second, the seller still has to acquire the goods sold (cf. ENGLAND and SCOTLAND Sale of Goods Act s. 5(1)). Third, the buyer's acquisition may depend on a contingency which may or may not occur (cf. ENGLAND and SCOTLAND Sale of Goods Act s. 5(2)). This latter case of buying an expectation can be divided into two sub-species (cf. SLOVENIA *Cigoj*, Insititucije obligacij[2], 25; LATVIA CC art. 2009).

19. On the one hand, the sale of future goods may be concluded under the implied condition that they will come into existence (so-called *emptio rei speratae*), such as the sale of an unborn calf (AUSTRIA CC §§ 1065 and 1275; BELGIUM and FRANCE CC art. 1181; FINLAND *Routamo and Ramberg*, Kauppalain Kommentaari, 10; GERMANY CC § 158; HUNGARY *Kisfaludi*, Az adásvételi szerződés[2], 68; POLAND Bieniek (-*author*) I[6], 9; SPAIN CC art. 1271 and *Díez-Picazo and Gullón*, Instituciones II, 207). In this case, the buyer has to pay for what he will eventually receive.

20. On the other hand, the sale of future goods may be concluded without this condition (so-called *emptio spei*); thus, the buyer has to pay the agreed price irrespective of whether he receives anything at all, i.e. independent from the question of the goods coming into existence at all (AUSTRIA CC § 1276; CZECH REPUBLIC and SLOVAKIA CC § 595; GERMANY CC § 453 and Jauernig (-*Berger*) BGB[12], § 433, no. 12; HUNGARY *Kisfaludi*, Az adásvételi szerződés, 68; POLAND Bieniek (-*author*) I[6], 9). Obviously, the distinction between these two variants largely depends on the contract of sale, in particular the obligation undertaken by the buyer.

IV.A.–1:202: Contract for sale

A contract for the "sale" of goods is a contract under which one party, the seller, undertakes to another party, the buyer, to transfer the ownership of the goods to the buyer, or to a third person, either immediately on conclusion of the contract or at some future time, and the buyer undertakes to pay the price.

COMMENTS

A. Definition of sale

The definition of a contract for the sale of goods is rather short and simple, as it merely addresses the main obligations of the parties, i.e. the transfer of ownership on the part of the seller and the payment of the price on the part of the buyer. This definition reflects the essence of the contract for the sale of goods: the transfer of ownership from the seller to the buyer, or a third party, for a price. The CISG and the Consumer Sales Directive as instruments of international sales law do not contain such a definition. In contrast, most national sales laws do contain a definition and it seems appropriate to include one in the present rules. The term "goods" is defined in Annex 1, as supplemented for present purposes by IV.A.–1:201 (Goods).

B. Parties to the sales contract

Normally, a sales contract involves two parties, the seller and the buyer, who are defined by their main obligations. Accordingly, the seller undertakes to transfer the ownership of goods, whereas the buyer undertakes to pay the price. The present rules apply regardless of whether the parties are professionals or consumers. For consumer contracts for sale (see IV.A.–1:204 (Consumer contract for sale)), the general provisions are sometimes modified. Sometimes, third persons are involved in a sales transaction, for instance a carrier transporting the goods, another party already holding the goods to be sold, or someone to whom delivery is to be made. Where necessary, the present rules have taken into account such involvement by third persons (e.g. IV.A.–2:201 (Delivery), IV.A.–2:204 (Carriage of the goods), IV.A.–2:303 (Statements by third parties), IV.A.–5:203: (Goods sold in transit), IV.A.–6:101 (Definition of a consumer goods guarantee)).

C. Obligation to transfer ownership

The main obligation on the part of the seller is to transfer ownership of the goods. The definition of the contract for the sale of goods covers only the full transfer of ownership. The present rules do not apply to contracts under which the transferee is to receive only a lesser right, such as the right to use goods under a lease. However, the subsequent sale of such a right, and also of any split property right, may fall under IV.A.–1:101 (Contracts covered) paragraph (2)(c).

By including both cases in which the seller is to transfer ownership immediately and those in which ownership is to be transferred at some future time, paragraph (2) ensures, first of all, that the present rules apply both to sales transactions where ownership passes immediately on conclusion of the contract, for instance at supermarkets, petrol stations or other self-service stores, and to sales transactions where this is not the case, for instance when the contract concerns the sale of goods that are not yet in existence or contains a retention of ownership clause.

This definition has a second point. The present rules do not govern the issue of when ownership of the goods passes between seller and buyer. This is left to be determined by the rules of Book VIII on the Acquisition and Loss of Ownership in Movables.

The seller may have to transfer ownership in the goods either to the buyer or to a third person (e.g. in the case of ordering flowers to be delivered to someone else). The reference to "a third person" in this Article makes clear that both transactions are covered by the present rules.

D. Obligation to pay the price

The main obligation on the part of the buyer is the payment of the price, which is elaborated in Chapter 3, Section 2 (Payment of the price). The payment of the price does not have to coincide with the transfer of the ownership of the goods. Therefore sales contracts where the buyer may have to pay the full price some time after the delivery of the goods, for instance in consumer credit agreements, are also covered by these rules.

NOTES

1. Under most systems there is an explicit statutory definition of sale or sales contract (AUSTRIA CC § 1053; BELGIUM CC art. 1582(1); CZECH REPUBLIC CC § 588; ENGLAND and SCOTLAND Sale of Goods Act s. 2(1); ESTONIA LOA § 208(1); FRANCE CC art. 1582(1); GREECE CC art. 513; HUNGARY CC § 365(1); LATVIA CC art. 2002; LITHUANIA CC art. 6.305; NETHERLANDS CC art. 7:1; PORTUGAL CC art. 874; SPAIN CC art. 1445). Some systems also provide an explicit definition of consumer sale (ESTONIA LOA § 208(4); NETHERLANDS CC art. 7:5.
2. While the necessary elements of a sale follow from the provisions dealing with the main obligations of the parties in some systems (GERMANY CC § 433; POLAND CC art. 535; SLOVAKIA CC § 588 and Ccom art. 409; SLOVENIA LOA § 435), others fail to provide for such a legal definition at all, thus leaving the definition to legal literature (CISG; Consumer Sales Directive and the NORDIC COUNTRIES).
3. These statutory or doctrinal definitions spell out the obligations which are typical of a sale, i.e. the main obligations of the parties. On the one hand, the seller is obliged to deliver, which is, at times, complemented or equated to the transfer of property (ENGLAND and SCOTLAND Sale of Goods Act s. 2(1); FINLAND *Routamo and Ramberg*, Kauppalain Kommentaari, 5 and 295-302; FRANCE CC art. 1582(1); GREECE CC art. 513; HUNGARY CC § 365(1); ITALY CC art. 1470; LITHUANIA CC art. 6.305; NORWAY *Krüger*, Norsk kjøpsrett[4], 1*;* POLAND CC art. 535; PORTUGAL CC art. 874; SPAIN CC arts. 1445, 1461 and 1474; though in the SPANISH literature it is still highly controversial whether the seller has a true duty to transfer the property (*Lacruz Berdejo and Rivero Hernández*, Elementos II(2), pp. 12-13); SWEDEN *Ramberg*, Köplagen, 125), cf. also the Notes to IV.A.–2:101 (Overview of obligations of the seller). On the other hand, the buyer is obliged to pay the price; in some definitions, the buyer is also obliged to take delivery (CZECH REPUBLIC CC § 588; ESTONIA LOA § 208(1); HUNGARY CC art. 365(1); LITHUANIA CC art. 6.305; POLAND CC art. 535; SPAIN CC arts. 1445 and 1500), cf. further the Notes to IV.A.–3:101 (Main obligations of the buyer).

4. Notwithstanding the fact that the essence of a sale is the transfer of property (which is also reflected by some definitions), the majority of the systems separate the contractual from the property aspects of a sale, cf. here particularly the CISG, which specifically points out that the Convention is not concerned with the effect which the contract may have on the property in the goods sold (CISG art. 4(b)). A similar approach is taken for instance under ESTONIAN and NORDIC law (cf. for SWEDEN *Ramberg*, Köplagen, 158). Under FRENCH and BELGIAN law where property passes upon the conclusion of the contract, the transfer of property is a consequence of the contract and not an element of its definition (CC art. 1583).

5. However, some interweave these two aspects (AUSTRIA CC § 1053 [definition: a sale is also a title for the transfer of property]; ITALY CC arts. 1376, 1465 and 1470). Under HUNGARIAN law the definition of sale reflects that the essence of a sale is the transfer of property, but the property aspects of the sale (which is only the *causa* of a transfer of property) are only partly dealt with in the chapter on sales, part of the rules applicable can be found in the part of the CC dealing with property law (CC §§ 117-119). Under SPANISH law CC art. 609 states that the transfer of property requires both a kind of contract with adequate *causa transferendi* and the effective or constructive delivery of the thing; this rule does not apply to incorporeal things, especially to rights to performance, in which mere consent suffices.

IV.A.–1:203: Contract for barter

(1) A contract for the "barter" of goods is a contract under which each party undertakes to transfer the ownership of goods, either immediately on conclusion of the contract or at some future time, in return for the transfer of ownership of other goods.

(2) Each party is considered to be the buyer with respect to the goods to be received and the seller with respect to the goods or assets to be transferred.

COMMENTS

A. General

The essence of a contract for the sale of goods is the transfer of ownership of goods for the payment of a price. However, there are also contracts where goods are not exchanged for money, but for other goods.

Such barter transactions are quite similar to sales contracts, as both deal with the transfer of ownership of goods from one party to the other in exchange for a counter-performance. Therefore this Article extends the scope of the present rules to barter contracts, thus reflecting the majority of the national sales laws.

There are two parties involved in such a transaction, who both act as buyer and seller at the same time. This is made clear by paragraph (2), which considers each party to be the buyer with respect to the performance to be received, and the seller in respect of the performance to be effected.

B. Application with appropriate adaptations

It is in the nature of barter contracts that certain provisions of the present rules do not apply. This is already taken into account by IV.A.–1:101 (Contracts covered) paragraph (2)(e), which declares that these rules are applicable with appropriate adaptations. In essence, this restriction relates to the provisions concerning the price (see Chapter 3, Section 2) and connected issues, such as the buyer's remedy of a price reduction.

C. Mixed contracts of sale and barter

A pure contract for barter involves no money, as goods are exchanged for goods. However, barter and sale contracts may be mixed: A contract may contain elements of both.

Illustration 2
A buys from a mobile phone seller the latest mobile phone. The seller informs him that, in a few weeks time, a new model will be on the market with an integrated camera. A can exchange the mobile phone for this new model if he is willing to pay an extra charge of 15 Euro. In this case we can speak of a contract with a preponderant barter element but also with a sale element.

Illustration 3
A contract under which an old car is traded in when a new car is bought is a typical example of a mixed contract for sale and barter. If there is indeed only one contract (which there need not be, as the parties could choose to conclude two separate

contracts for sale and use set-off to reduce the price payable for the new car) then it is a contract with an element of sale, because the seller of the new care undertakes to transfer ownership of it and the buyer undertakes to pay a price, albeit a reduced price. However, there is also an element of barter in so far as each party undertakes to transfer ownership of a car in exchange for a transfer of ownership of the other car, albeit that the buyer of the new car has to pay a reduced price as well.

A contract of the type mentioned in either of these Illustrations will be a mixed contract within the meaning of II.–1:107 (Mixed contracts). There is a sale element and a barter element. So the sale rules will apply to the sale part and the barter rules to the barter part. (If one element is so preponderant and the other so minor that it would be unreasonable not to regard the contract as falling primarily within one category, then the rules applicable to the primary category will be primarily applicable and the other rules will apply only in a subsidiary and subordinate way and only so far as necessary to regulate the minor element (see II.–1:107 paragraphs (3)(b) and (4)). However, by declaring the present rules applicable to barter contracts, the question of qualifying such mixed contracts or assessing the preponderance of their respective parts, loses its significance. The sale rules and the barter rules are the same for all practical purposes. By the same token, it is ensured that, as long as there is counter-performance (i.e. a price to be paid or goods to be exchanged), contracts for the transfer of ownership in goods follow the same rules.

NOTES

I. Barter [exchange] contracts

1. With the exception of ENGLAND and SCOTLAND, the rules relating to barter contracts follow statutory sales law. The underlying idea seems to be that the consideration paid in return for the goods sold may also be other than money. This is, by and large, achieved by a general clause declaring the sales rules also applicable to barter contracts, unless they are incompatible; such as rules on the purchase price (AUSTRIA CC § 1045; BELGIUM CC art. 1707; CZECH REPUBLIC CC § 611; DENMARK SGA § 2(2); ESTONIA LOA § 254; FRANCE CC art. 1707; FINLAND SGA § 1(2); GERMANY CC § 480; GREECE CC art. 573; HUNGARY CC § 378; ITALY CC arts. 1552 (notion of barter contract) and 1555 (application of the norms on the contract of sale to barter contracts); LATVIA CC art. 2092; LITHUANIA CC art. 6.432; NETHERLANDS CC art. 7:50; NORWAY SGA § 1(2) and Consumer Sales Act § 1(5); POLAND CC art. 604; PORTUGAL RP, 14-1-1982: CJ, 1982, IV, 202; SLOVAKIA CC § 611; SLOVENIA LOA § 529; in SPAIN CC arts. 1446 and 1541; SWEDEN SGA § 1(2)). However under SPANISH law there are also three specific rules for barter contracts (CC arts. 1538 to 1540).
2. In ENGLAND and SCOTLAND, barter contracts do not fall within the scope of the Sale of Goods Act. ENGLISH law recognises the contract of barter or exchange as distinct from sale, as does SCOTS law. In the latter barter may apply to both goods (see *Stair*, The Laws of Scotland XX, paras. 899-902) and land (where it is usually known as ‘excambion’ – see further *Stair*, The Laws of Scotland XX, para. 922). It has been held in SCOTLAND that a ‘trade-in’ of an old car in part-exchange for a new one, the remainder of the price being paid in money, is a sale rather than a barter (*Sneddon v. Durant* 1982 SLT (Sh.Ct.) 39; compare in ENGLAND *Aldridge v. Johnson* (1857) 7 E & B 885, 119 ER 1476). Under SCOTTISH common law a contracting party warrants against latent defects in the movable delivered (*Ballantyne*

v. Durant 1983 SLT (Sh.Ct.) 38); risk passes at the time of the conclusion of the contract (*Widenmeyer v. Burn Stewart & Co. Ltd.* 1967 SC 85); and property is transferred upon delivery (*Smith*, (1974) 48 TulLRev, 1029). Following the Sale and Supply of Goods Act 1994, the Supply of Goods and Services Act 1982 applies to contracts of barter under ENGLISH and SCOTTISH law, meaning that the statutory implied terms on the quality or fitness of the goods exchanged are now used rather than the former common law implied warranties. There is, however, 'a distinct shortage of authority' in ENGLISH law on the transfer of property and risk in barter contracts (*Bridge*, Sale of Goods, 63).

II. Trade-in of used goods

3. A special form of barter is where the buyer trades in old goods for a part of the purchase price, particularly concerning motor vehicles. Under AUSTRIAN law this is considered to be one or two contracts, most cases depending on the interpretation of the contract. Under SCOTTISH law it has been held that so far as the new vehicle is concerned the transaction is a sale rather than a barter, even if the amount allowed for the 'old' vehicle does not fall far short of that of the new one (*Sneddon v. Durant* 1982 SLT (Sh.Ct.) 39; cf *Ballantyne v. Durant* 1983 SLT (Sh.Ct.) 38). In ENGLAND a contract for the exchange of 52 bullocks for 100 quarters of barley, the difference in value to be made up in money, was treated as a sale (*Aldridge v. Johnson* (1857) 7 E & B 885, 119 ER 1476). There is controversy under GERMAN law as to how to treat the trade-in of old goods, in particular old cars. Clearly, there is only one contract. According to the BGH, the consumer primarily owes the (full) purchase price but is entitled to replace parts of it by trading in his old car (BGH 18 January 1967, BGHZ 46, 338). Consequently, if the consumer's car is destroyed or stolen before he could hand it over, the consumer owes the full purchase price. This has been criticised in academic writing because this view disadvantages the purchaser who never wanted to pay the full price. Authors favour a mixed contract of sale and barter where the consumer is entitled to replace the old car with money since the trader has no interest in the car (e.g. *Medicus*, Bürgerliches Recht[20], 522 f).

IV.A.–1:204: Consumer contract for sale

For the purpose of this Part of Book IV, a consumer contract for sale is a contract for sale in which the seller is a business and the buyer is a consumer.

COMMENTS

A. Consumer contracts for sale

The present rules start from the idea of a uniform regime for all kinds of sales transactions, complemented by specific rules for consumer contracts for sale, i.e. when a business seller is selling goods to a consumer buyer.

The qualification of a contract as a consumer contract for sale has several consequences for the application of the present rules. First, certain provisions apply exclusively to consumer transactions, while others are excluded for consumer purposes (for an overview, see Comment D). Secondly, some rules are declared to be mandatory when the contract is a consumer contract for sale. By doing this, the present rules ensure a high level of consumer protection similar to that established by European consumer law. The main purpose of the rules protecting consumers is to protect a party who may be regarded as the weaker party in the transaction involved.

By virtue of IV.A.–1:101 (Contracts covered) paragraph (2) the rules in this Part apply with appropriate adaptations to certain contracts going beyond sale of goods. It follows that the present Article applies with appropriate adaptations to consumer contracts for barter, and to consumer contracts for sale or barter relating to the assets other than "goods" mentioned in that paragraph. Thus the present rules have a wider scope of application than the Consumer Sales Directive. Also in so far as a contract for the manufacture or production of goods and their sale to the person ordering them is a contract for sale (see IV.A.–1:102 (Goods to be manufactured or produced) it will be a consumer contract for sale if the ordering party is a consumer and the mandatory consumer protection rules will apply.

B. The notion of unitary sales law

As pointed out above, the present rules have been drafted as a uniform set of rules covering the entire spectrum of sales transactions from the manufacturer to the retailers down to the final consumers.

This approach of regulating commercial and consumer transactions within one regime has advantages. First, it presents a more coherent and concise set of solutions than a fragmented approach with different rules for different types of sale contract and with the attendant risk of duplication and unnecessary inconsistencies. Secondly, it reflects the fact that consumer contracts for sale and commercial sales may be viewed as being inter-linked, since consumer transactions often constitute the bottom end of the chain of distribution, which aims to bring goods from the manufacturers to the end-users.

The present rules have not produced a completely separate body of rules for commercial sales, i.e. those involving only businesses. Most rules have a general application, with some additional rules and some deletions for consumer contracts for sale. There are several reasons for this policy choice. First, the regulatory trend in Europe seems to be heading towards a

mere dichotomy between consumer and non-consumer contracts for sale. Secondly, there is in practice almost as great a diversity within commercial sales as there is between commercial and consumer contracts for sale. This is because some commercial transactions have developed into a specialised field with separate rules and marketplaces, such as the commodity trade. Thirdly, commercial parties rely heavily on standard contracts and terms when doing business, such as the Incoterms, which address issues which are specific to commercial transactions.

One Article, however, (IV.A.–4:302 (Notification of lack of conformity)) applies only to contracts between businesses. This is because it is designed particularly for purely commercial sales.

C. Notion of consumer and business

The notions of a "consumer" and a "business" are used elsewhere in these model rules and not only in the Part. Accordingly they are defined in Annex 1. The definitions are as follows.

> A "consumer" means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession.
>
> "Business" means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person's self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity.

The definitions of consumer and business used here reflect the common features of the definitions offered by various European consumer protection instruments.

Concerning the consumer definition, there are, in principle, two ways of describing the purpose of a natural person's actions. The purpose could either be that the natural person acts for personal, family or household use (i.e. a positive description) or that he or she acts for purposes which are outside his or her trade, business or profession (i.e. a negative description). In most cases, but not always, both ways of describing the purpose will lead to the same result. An example is when the natural person concludes a contract of sale in his or her own name and where the purpose is that the goods should be used by a non-profit organisation of which the person is a member. In this case the purpose is outside the buyer's trade, business or profession, but the transaction has not been made for personal, family or household use. In order to include such situations in the definition, thus enabling natural persons worthy of protection to be also protected in borderline cases, the negative description has been opted for under these rules. The decisive factor ought to be whether or not the natural person is acting outside his or her professional sphere.

Such a negative definition also covers cases where the purpose of the transaction is to earn the natural person a profit, e.g. where the purchase of goods is made with a purpose of making a profit. However, if the purpose is to immediately resell the goods, the transaction could be regarded as having been made within the person's trade or business if he or she carries out several such transactions during a relatively short period of time. The main reason for including such cases is that the natural person, as long as not acting to a greater extent within his or her professional sphere, should be protected as a consumer as the reasons for protecting consumers as such are equally valid in this case. The approach chosen here is therefore that a

transaction should be regarded as a consumer transaction if the natural person has acted primarily outside his or her trade, business or profession.

> *Illustration 1*
> A buys a yacht from a professional seller of boats at a marina. His purpose is to use the yacht during most weekends and during at least three weeks of the summer vacation with family and friends. However, he will also allow people to lease or hire the yacht for a couple of weeks every year to help finance its purchase. He estimates that he will use the yacht for approximately 80% of the time for private purposes. As he is acting primarily outside his business, the rules regulating consumer contracts for sale will apply.
>
> *Illustration 2*
> B buys a laptop computer from a computer store. His purpose is to use the computer in his business as an engineering consultant. However, he will also use the computer for reading newspapers on the internet, his private e-mail, listening to music and watching films while commuting. He estimates that he will use the computer for approximately 20% of the time for private purposes. As he is not acting primarily outside his business, the rules regulating consumer contracts for sale will not apply.
>
> *Illustration 3*
> C buys tiles for the roof of her house, where 60% of the floor space is used for private purposes and 40% for business purposes (her law practice where she and her secretary spend most of their days). As she is acting primarily outside her business, the rules regulating consumer contracts for sale will apply.

A complicated question is whether the consumer definition contains or should contain a requirement that the consumer's purpose with regard to the transaction or act should be apparent to the professional as a requirement for the consumer protection rules to apply or if it is sufficient that the consumer had such a purpose concerning the transaction regardless of the knowledge of the professional. Under these rules the more consumer-friendly subjective approach is opted for in that the rules protecting consumers should be applicable regardless of whether the professional had knowledge of the consumer's purposes concerning the transaction. However, not explicitly addressing the question in the black-letter rule leaves room for the national courts and for the European Court of Justice to apply some flexibility depending upon the circumstances of the particular case.

As for the definition of the other party, "the business", it is evident from the definitions provided in the EC Directives that a "business" (or a "professional") could be a natural or legal person. It is appropriate to include also natural persons in the definition as long as they are acting for business purposes. One reason for this is that the way a person has chosen to organise the business should not be decisive when deciding whether or not the rules protecting the other party, i.e. the consumer, should be applicable. The important factor should therefore be whether the party is doing something on a more regular basis and for the purpose of earning money. The transaction or act in which the natural or legal person participates could either be described positively, i.e. as being for business purposes, or negatively, e.g. as being not for personal, family or household purposes. For a standard definition, the positive approach is chosen as it is of some importance that the specific rules protecting the other party are applicable only when the person is in fact acting as a professional or business person and therefore knows or ought to have known that there are

specific risks involved as the transaction is regulated by mandatory rules protecting the other party. Therefore, these rules should not apply in those borderline cases where the person is acting otherwise than for personal, family or household purposes, but not for business purposes.

In some cases, the natural or legal person could be acting both within and outside a trade, business or profession, i.e. the act or transaction could comprise elements or connecting factors from both spheres. As there is a risk that the consumer might believe that he or she is protected by mandatory consumer regulations when dealing with a person who at least to some extent is acting professionally in the field involved, the threshold should be rather low. Another reason for a relatively low threshold is that the consumer in these transactions is typically less informed than the other party. The main alternative here is therefore that the rules should be applicable as soon as the business or professional element is not negligible. It is for this reason that the word "primarily" is not used in the definition of a "business" as it is in the definition of a "consumer".

> *Illustration 4*
> A, the seller, and B, a consumer, conclude a contract for the sale of a boat. A owns a business selling and manufacturing yachts. The boat sold is of the kind produced by A's company and it is also situated at the company's premises where it is inspected by B. The boat is however owned by A personally and he makes B aware of the fact that since he has financed the boat by private means he will therefore be named as the seller in the contract. However, the boat has been used inter alia for demonstration purposes at trade fairs. B also receives information concerning the boat printed on the company letterhead. In such a case it can be said that A is acting (to some extent) for purposes relating to his trade and the transaction is therefore a consumer contract for sale.

Moreover, a business seller should not be able to circumvent mandatory consumer protection rules by claiming that the goods are being sold on behalf of somebody else when, in reality, it is the business which bears the economic risk.

Finally, a profit motive is not essential for there to be a "business". The definition says "even if the person does not intend to make a profit in the course of the activity". A person may, for example, carry on a trade with the intention of breaking even while indulging an interest; or a person might carry on a trade with the intention of making a loss to offset against income for tax purposes. There would still be a "business" within the definition used here.

D. Protection of small businesses etc.

According to the European legislation the consumer should be a natural person. Since the beginning of the trend in rules giving consumers protection there have been arguments in favour of also protecting a wider category of persons. A major concern might in some cases be what should be done with small businesses, non-profit organisations and other legal persons which are in a weak position. In many respects they are in the same position as consumers as they usually do not have expertise concerning many issues. The difficulty is where to draw the line between legal persons worthy of protection and other legal persons. An attempt has been continually made to draw a precise line between these two categories. Should it be the number of employees that is decisive? The assets of the company? The turnover? The non-profit status of the legal entity? One or several of the mentioned criteria

together with a description of the entity as a weaker party in the transaction in question? The problems seem to be insurmountable. At least, one could not find a formula which is applicable to all types of transactions or acts. Each possible solution will seem more or less arbitrary, where it is very difficult to provide convincing reasons for the substantive rules chosen. Therefore, these rules refrain from including special protection for small businesses and similar enterprises.

E. Consumer protection under the present rules

The present rules contain far-reaching protection for consumers.

First, some provisions apply exclusively to consumer contracts for sale: IV.A.–2:304 (Incorrect installation under a consumer contract for sale), IV.A.–2:308 (Relevant time for establishing conformity) paragraph (2), IV.A.–4:201 (Termination by consumer for lack of conformity), IV.A.–5:103 (Passing of risk in a consumer contract for sale) paragraph (1) and Chapter 6. These provisions provide the consumer with additional, more favourable rights than under the general regime.

Secondly, some provisions have been excluded for consumer purposes: IV.A.–4:301 (Examination of the goods), Chapter 5, Section 2 (excluded by IV.A.–5:103 (Passing of risk in a consumer contract for sale) paragraph (3)). These provisions are excluded as they are considered to be too harsh an obligation for the consumer or for being in conflict with a provision applying exclusively under consumer contracts for sale.

Thirdly, some rules are declared mandatory in consumer contracts for sale. For further information about mandatory rules under consumer contracts for sale and a list of the mandatory rules, cf. Comment B to the following Article.

Throughout these rules, the Comments to the relevant Articles will explain why and how the specific needs of the consumer-buyer have been taken into account.

F. Protection of parties other than consumer buyers

As pointed out in Comment A, the present rules deal only with a specific constellation of the parties acting in different capacities, i.e. the consumer contract for sale, by protecting the consumer buyer vis-à-vis a professional seller. However, these rules, subject to one exception, do not contain any rules protecting non-professional sellers, i.e. ‘consumers’ selling goods (whether to a business or to another ‘consumer’). It cannot be overlooked that, while such a seller may have little knowledge of doing business, he or she still has to meet the same standards as a professional seller, which are often tailored to the requirements of trade and commerce.

Since this general regime is therefore rather commercially oriented and, thus, may be harsh on the seller, it has been considered necessary to protect the non-professional seller from a possibly high level of liability in the case of damages (see IV.A.–4:202: Limitation of liability for damages for non-business sellers). Conversely, business sellers are considered to take this risk as part-and-parcel of their trade or profession.

NOTES

I. Overview of the rules on consumer sale

1. All the systems have specific rules relating to consumer sales. On the one hand, these provisions can be contained in a separate Consumer Code or Act. Such an instrument may aim at protecting consumers generally, thus not only applying to sales contracts, complementing the general legislation (AUSTRIA Consumer Protection Act; FINLAND Consumer Protection Act chaps. 5 and 6; FRANCE Consumer Code art. L. 211-1 – L. 211-18; GREECE Consumer Protection Act; ITALY Consumer Code arts. 50-61 and 128-135; LATVIA Consumer Protection Act; POLAND Consumer Sales Act; PORTUGAL Consumer Protection Act; SLOVENIA Consumer Protection Act; SPAIN, ConsProtA of 2007, Book II. Moreover, under SPANISH law additional consumer protection can also be found in the Act on retail trade art. 1.2, and the Act on the sale of movables in instalments arts. 1 and 4.

2. Under a few systems a general free-standing Consumer Sales Act has been enacted (NORWAY *Forbrukerkjopsloven* (Forkjl); SWEDEN *Konsumentköplagen* (KKL)).

3. On the other hand, rules dealing specifically with consumer sales can also be found blended in with the general sales regulation (BELGIUM CC arts. 1649bis -1649octies; CZECH REPUBLIC CC §§ 612-627; DENMARK SGA §§ 72 ff; ENGLAND and SCOTLAND Sale of Goods Act Part VA; ESTONIA LOA Chapter 11, Section 1; GERMANY CC §§ 474 ff; LITHUANIA CC arts. 6.392-6.401; NETHERLANDS CC Book 7, Title 1, Sections 1-7; SLOVAKIA CC §§ 612-627 and separately in §§ 52-62 and 588-610). Similarly under HUNGARIAN law, where a special regulation on consumer sale can be found blended in with the rules on defective performance which are generalised for all contracts for consideration. In ENGLAND and SCOTLAND see also separate legislation giving consumers greater protection against the seller, in particular: Supply of Goods (Implied Terms) Act 1973; Unfair Contract Terms Act 1977; Supply of Goods and Services Act 1982; Sale and Supply of Goods Act 1994; and Sale and Supply of Goods to Consumers Regulations 2002.

4. Under those systems where there is a separate regime regulating consumer sales, the question arises as to the relationship with the general sales regulation. Under some systems the consumer regime will generally prevail. This is for instance the case under NORDIC law where it is expressly laid down that the Sales Act does not apply if the Consumer Sales Act is applicable (FINLAND, NORWAY and SWEDEN SGA § 4). Also in SPAIN the Consumer Sales Act prevails over the rules of hidden defects. According to the legal literature the specific rules for consumers also prevail over the general rules of breach of contract, *Morales Moreno*, ADC 2003, 1625 and *Fenoy Picón*, El sistema de protección del comprador, 149-187. In POLAND the consumer is not allowed to invoke the general sales rules, in so far as the problem is regulated by the Consumer Sales Act (art. 1(4)). In the NETHERLANDS, after the implementation of the Consumer Sales Directive, the specific rules for consumer sales derogate from the general remedies regime, sometimes to the detriment of consumers as the consumer's right to termination and damages may be more restrictive than the non-consumer's right thereto (cf. Mon. NBW B-65b (*Loos*), no. 27).

5. Under other systems, the consumer may generally choose between the general sales regime and the consumer regime (BELGIUM CC art. 1649quinquies; ENGLAND and SCOTLAND Sale of Goods Act Part VA; FRANCE Consumer Code art. L. 211-13; ITALY Consumer Code art. 135). The same applies under CZECH law where CC § 612 establishes that the consumer regulation in §§ 613 to 627 shall apply in addition to the general provisions on contracts of sale.

6. Under some systems the consumer regime has a more narrow scope than under the general sales regime and is typically limited to the sale of corporeal movables.

II. Difference in substance to the general sales regime

7. Whereas the general sales regulation mainly contains default rules, the special consumer provisions are generally mandatory. Under some systems, there is little or no deviation in substance between the general regulation and the consumer regulation, basically most of the deviation is a result of the implementation of the Consumer Sales Directive. For instance under GERMAN law there are only few rules which are exclusively applicable to consumer sales: the reversed burden of proof (CC § 476); retailer redress (CC § 478) and guarantees (CC § 477). Under AUSTRIAN law the Consumer Protection Act contains few references to consumer sales, special rules are scarce (§§ 8, 9, 9a: specific warranty provisions; § 9b: commercial guarantees; § 15: long-term supply contracts; § 16: instalment sale; § 17). Under DUTCH law there is also a specific regime as regards damages in case of product liability (CC art. 7:24) and a specific provision on retailer redress (CC art. 7:25). Moreover, under some systems there are specific provisions pertaining to risk (ESTONIA LOA § 214(5); NETHERLANDS CC art. 7:11), delivery at the consumer's home address (ESTONIA LOA § 215(3); NETHERLANDS CC art. 7:13) and payment in advance (ESTONIA LOA § 213(4); NETHERLANDS CC art. 7:26). Under SLOVENIAN law the most important difference in substance are the time-limits for the seller's liability, which are considerably shorter in general sales law (6 months for 'hidden' defects, LOA § 462). In SPANISH law, the differences refer basically to the remedies for non-conforming delivery, the prescription rules and the mandatory duty to provide consumers with an after-sale maintenance service.

8. Under other systems, the differences are more significant. Under FINNISH law the consumer's liability for damages is more limited than under the general regulation (Consumer Protection Act chap. 5 § 28 and chap. 9 § 30). Moreover, the notice of defects is subject to different rules (Consumer Protection Act chaps. 5 and 9). Under SWEDISH law the provisions on remedies are to a certain extent more favourable to the consumer than under the general legislation (cf. Consumer Sales Act §§ 26-32). Moreover, the consumer is not under a general duty to examine the goods, and the rules on notification are more favourable to the consumer (Consumer Sales Act § 23(1)). Finally, the risk regulation is more favourable to the consumer, since risk passes only after the goods have actually come into the consumer's possession (Consumer Sales Act §§ 6 and 8). Under CZECH law notice of lack of conformity is subject to different rules (CC §§ 625-627), the remedies for lack of conformity (CC §§ 616-622) are more favourable to the consumer than under the general legislation and the time limit for the seller's liability is considerably longer.

9. Under some systems, the new consumer sales regime has been modelled more or less in accordance with the Consumer Sales Directive (BELGIUM; FRANCE; POLAND; SPAIN) without modification to the general sales regime. Here, there may be considerable deviation between the two different regimes both concerning the remedies available and the applicable time-limits and notification requirements. Under BELGIAN law there is a new unified concept of conformity which is only applicable to consumer sales. The provisions on remedies are to a certain extent more favourable to the consumer than under the general legislation: the priority of a free repair and replacement of the goods, secondary character of the remedies of price reduction and termination of the contractual relationship. Moreover, the time-limits under consumer sales follow the Consumer Sales Directive. Under SPANISH law the regulation of damages is more favourable in consumer sales. In non-consumer sales, damages are

only available in case of bad faith by the seller (see CC art. 1486 II); in consumer sales the general remedy of damages is available (*Disposición Adicional II* Consumer Sales Statute 23/2003); it is also noteworthy that, at least implicitly, it is only in consumer contracts that the purchaser is granted a right to specific performance. In POLAND many aspects of the general regulation are seen as more consumer friendly than the rules generated by the implementation of the Consumer Sales Directive. Under the general sales rules there is no hierarchy of remedies in the case of a non-consumer sale, notification is to take place within one month from the discovery of the defect (CC art. 563(1)), the buyer is to inspect the things bought in certain circumstances (CC art. 563), the rights to warranty for physical defects expires after the lapsing of one year from the time of releasing the thing to the buyer (three years in the case of a building) (CC art. 568).

III. Definition of 'consumer'

10. There are several EC Directives that define the term 'consumer'. Their wording, however, differs somewhat. The starting point has been the definition in the Doorstep-Selling Directive, where the consumer is defined as 'a natural person who […] is acting for purposes which can be regarded as outside his trade or profession.' (Directive 85/577/EEC art. 2). The Consumer Credit Directive contains an identical definition (Directive 87/102/EEC art. 1(2), amended by Directive 90/88/EEC). In the Unfair Contract Terms Directive, the consumer is defined as 'a natural person who […] is acting for purposes which are outside his trade, business or profession' (Directive 93/13/EEC art. 2(b)). The same definition is used in the Distant Sale Directive (Directive 97/7/EC art. 2(2)) and in the Consumer Sales Directive (Directive 1999/44/EC art 1(2)(a), see also E-Commerce Directive art. 2(e) (Directive 2000/31/EC). The only difference between this definition and the previous one is that the unfair contract terms directive and the distance contracts directive are also applicable if the person is acting outside his 'business'. The Timeshare Directive (Directive 94/47/EC art. 2) defines the 'purchaser' as a person who is 'acting in transactions […] for purposes which may be regarded as being outside his professional capacity', whereas the Price Indication Directive (Directive 98/6/EC art. 2(e)) defines the consumer as a 'natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional capacity'. Two common features in the consumer definitions are that the consumer is a natural person and that the purpose should be outside some kind of business, commercial or trade activity. The consumer notion has been interpreted rather narrowly by the European Court of Justice when dealing with the substantive acquis (see e.g. Criminal proceedings against *Patrice Di Pinto*, ECJ 14 March 1991, C-361/89, ECR 1991, I-1189 and *Bayerische Hypotheken- und Wechselbank AG v. Edgard Dietzinger*, ECJ 17 March 1998, C-45/96, ECR 1998, I-1199, both dealing with the doorstep-selling directive).

11. Under the CISG there is no actual definition of a consumer. However, art. 2(a) establishes that the Convention does not apply to goods bought for personal, family or household use, unless the seller, at any time before or after the conclusion of the contract, neither knew or ought to have known that the goods were bought for any such use.

12. The EC definitions are reflected under the different national systems, where the majority use a general definition of consumer (AUSTRIA Consumer Protection Act § 1(1); CZECH REPUBLIC CC § 52(3); ENGLAND Unfair Contract Terms Act art. 12(1); ESTONIA LOA § 34; FINLAND Consumer Protection Act chap. 1 § 4; GERMANY CC § 13; GREECE Consumer Protection Act art. 1(4)(a); HUNGARY CC § 685 d); ITALY Consumer Code art. 3(1)(a); LATVIA Consumer Protection Act

art. 1(3); NETHERLANDS CC art. 7:5(1); POLAND CC art. 22; PORTUGAL Consumer Protection Act art. 2; SCOTLAND Unfair Contract Terms Act art. 25(1); SLOVAKIA CC § 52(3); SLOVENIA Consumer Protection Act § 1; SPAIN ConsProtA art. 3.

13. Other countries use a definition specifically for consumer sales (BELGIUM CC art. 1649bis § 2 1; DENMARK SGA § 4a; LITHUANIA CC art. 1.39; NORWAY Consumer Sales Act § 1(3); SWEDEN Consumer Sales Act § 1(4)).

14. In FRANCE there is no general definition of consumer, but case law has extended the definition given by the provisions on *démarchage* (Consumer Code art. L. 121-22). A consumer is a contracting party that enters into a contract that is not in direct relation with its professional activity (for unfair contract terms, Cass.civ. I, 3 and 30 January 1996, Bull.civ. I, no. 9 and 55, JCP 1996.II.22654, note *Leveneur*; D. 1996, 228, note *Paisant*).

15. It is interesting to note that in ENGLAND and SCOTLAND it is also required for dealing as a consumer that the goods are of a type ordinarily supplied for private use or consumption (Sale of Goods Act s. 61(1) by reference to Unfair Contract Terms Act art. 12(1) [ENGLAND] and art. 25(1) [SCOTLAND]). *R. & B. Customs Brokers Co. Ltd. v. United Dominions Trust Ltd.* [1988] 1 WLR 321 (CA), it was held that a person does not buy "in the course of a business" within the meaning of the Unfair Contract Terms Act if the purchase is not integral to their business, unless there is a sufficient degree of regularity of similar purchases (claimant customs brokers were not buying in the course of a business when they purchased a car). Compare the somewhat disjunctive case of *Stevenson v. Rogers* [1999] QB 1028 (CA), in which it was held that goods sold by a business (a fisherman selling a trawler) are as a matter of course sales in the course of a business within the meaning of Sale of Goods Act s. 14 (term of satisfactory quality implied in contracts where the seller sells in the course of a business) (see generally, *Bradgate and White*, Commercial Law[3], § 2.6.4.2). In AUSTRIA Consumer Protection Act § 1(5) extends the ambit by including the activities of certain associations. Under SPANISH law the key term is 'final user'. Thus, when the buyer acts with the intention to bring goods, products or services purchased on the market, it is not to be considered as a consumer transaction. Also a person who buys goods, products or services to give them to somebody else is a consumer if he does not have the intention to bring them on to the market.

16. Under GERMAN case law there have been some cases where businesses try to circumvent the transaction being classified as a consumer sale. For instance, a contract clause in which the purchaser confirms that he is a trader was deemed irrelevant once the trader is aware that the buyer is a consumer (AG Zeven, 19 December 2002, DAR 2003, 379). However, in a case where a consumer claimed to be a trader because the seller did not wish to sell to consumers the buyer lost his consumer rights (BGH 22 December 2004, NJW 2005, 1045, see also *Halfmeier*, GPR 2005, 184 ff).

IV. Definition of 'professional'

17. The definition of the term professional differs between different EC Directives. The starting point has been the definition in the doorstep-selling directive, where a professional is defined as "a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a professional" (art. 2). Similar definitions could be found in the distance contracts directive, where the professional is defined as a person who is "acting in his commercial or professional capacity" (art. 2(3)). In the price indication directive, we find a definition stating that the professional is a person who sells or

offers for sale products "which fall within his commercial or professional activity" (art. 2(d)). The definitions in the consumer credit directive, the unfair contract terms directive and the consumer sales directive are very similar. Thus, in the consumer credit directive, the professional is a person who grants credit "in the course of his trade, business or profession" and in the consumer sales directive he is a person who sells consumer goods "in the course of his trade, business or profession". In the Unfair Contract Terms Directive, the professional is instead a person who is "acting for purposes relating to his trade, business or profession" with the addition "whether publicly owned or privately owned" (Directive 93/13/EEC art. 2(c)).

18. Also under the national systems there are similar definitions of the professional party: AUSTRIA Consumer Protection Act § 1(1); BELGIUM CC art. 1649bis § 2; CZECH REPUBLIC CC § 53(2); DENMARK Consumer Sales Act § 4a; ENGLAND and SCOTLAND Sale of Goods Act s. 61(1); FINLAND Consumer Protection Act chap. 1 § 5; GERMANY CC § 14; GREECE Consumer Protection Act art. 1(3); HUNGARY CC § 685 e) (implicit in the definition of consumer contract); LATVIA Consumer Protection Act art. 1(5); LITHUANIA CC art. 1.39; NORWAY Consumer Sales Act § 1(2); POLAND CC art. 563(2); PORTUGAL Ccom art. 2; SLOVAKIA CC § 52(2); SLOVENIA Consumer Protection Act art. 1; SPAIN Consumer Sales Act art. 1; SWEDEN Consumer Sales Act art. 1(4).

19. Under FRENCH law a non-professional is systematically assimilated with a consumer. If a party is not a consumer it is necessarily a professional, therefore a professional is the contracting party that enters into a contract that has a direct relation with his professional activity.

20. More concretely, for somebody to be regarded as a professional seller under SWEDISH law, it normally suffices that he has performed more than some occasional commission or sales transactions. It is not even necessary that it aims to make a profit (for this issue cf. also GERMAN law, BGH 29 March 2006, NJW 2006, 2250 ff). For the Consumer Sales Act to be applicable it is irrelevant whether the goods sold are of the kind normally sold by the businessman. The Act will for instance also apply if a grocery store sells its old computers and office equipment. It will however not be applicable if the seller sells his private furniture or car (see further *Herre*, Konsumentköplagen[2], 66 f). A similar result has been attained under GERMAN law in a case where a dentist sold her private second-hand car. She was deemed not to be a trader since she had no special knowledge of cars (LG Frankfurt, 7 April 2004, NJW-RR 2004, 1208). Under ENGLISH law, however, to be in the course of a business, habitual dealing in the type of goods sold is not required (*Stevenson v. Rogers* [1999] QB 1028). A closing-down sale is a sale in the course of a business (*Buchanan-Jardine v. Hamilink* 1983 SLT 149). Under SLOVENIAN law a 'business' is defined as a legal or natural person, who is "engaged in a profitable activity" regardless of its legal form or ownership; it is not necessary that the contract should fall within its activity, Consumer Protection Act § 1(3). Included are also institutions and other organizations and natural persons which supply goods or services to consumers.

21. Under some systems the transaction is classified as a consumer sale even if the seller is not a businessman, but the sale is effected on behalf of the seller by somebody who is qualified as a businessman. In such cases, the seller and the businessman are jointly liable to the buyer for the seller's obligation under the Act (DENMARK SGA § 4a(2); SWEDEN Consumer Sales Act § 1(2)). Also under ENGLISH law a consumer sale includes a sale by a person who in the course of a business is acting as the agent of another person except where the other person is not selling in the course of a business

and either the buyer knows that or reasonable steps have been taken to bring it to his notice (Sale of Goods Act s. 14(5); cf. *Boyter v. Thomson* [1995] 2 AC 628).

22. Under GERMAN law there have been instances where traders in second-hand cars present themselves not as the actual seller, but rather as agents acting for private sellers in order to circumvent the mandatory consumer protection. This matter was dealt with by the BGH in 2005. In general, the construction is legitimate and takes the sale outside the scope of the consumer sales provisions. However, in the individual case, consumer sales law provisions may be circumvented. The relevant criterion is the economic risk of the sale. If the trader guarantees the private seller of the car a fixed sum that is deducted from the purchase price for the new car, the trader is the true seller of the car. If, instead, the economic risk lies with the previous owner of the old car, the latter is the true seller (BGH 26 January 2005, NJW 2005, 1039–41 and OLG Stuttgart 19 May 2004, NJW 2004, 2169–71).

CHAPTER 2: OBLIGATIONS OF THE SELLER

Section 1: Overview

IV.A.–2:101: Overview of obligations of the seller

The seller must:

(a) transfer the ownership of the goods;
(b) deliver the goods;
(c) transfer such documents representing or relating to the goods as may be required by the contract; and
(d) ensure that the goods conform to the contract.

COMMENTS

A. Main obligations of the seller

This Article provides an overview of the main obligations which the seller assumes under a sales contract, some of which are elaborated in the following Sections of this Chapter. This short list is not meant to be a chronological account of the performance of the obligations under a contract for sale.

However, it follows from the general principle of party autonomy that the parties are free to regulate the content of their obligations. Therefore the seller may not, on the one hand, be subject to all the obligations set out in this Article. The seller may not, for instance, be under an obligation to deliver the goods, as they are already in the buyer's possession. On the other hand, the seller may also have to comply with a number of other obligations arising from the particular agreement between the parties (e.g. an obligation to provide training in the use of the machinery delivered), from commercial usage or from other provisions contained in the present rules.

B. Obligation to transfer ownership

The obligation to transfer ownership is essential to the very notion of a sales contract; if the parties contract out of this obligation, their contract can generally not be considered to be a contract for the sale of goods.

The issue of when the transfer of ownership will take place, and what separate steps, if any, must be taken to effect the transfer are addressed in Book VIII on the Acquisition and Loss of Ownership in Movables. The present rules only deal with obligational issues. They require the seller to transfer ownership of the goods either immediately upon the conclusion of the contract or at some future time (see above IV.A.–1:202 (Contract for sale)).

It may be possible that the seller has to transfer ownership to a person other than the opposing party in the sales contract, as is also reflected in the definition in IV.A.–1:202 (Contract for sale).

Illustration 1
A, situated in the Netherlands, orders flowers from Fleurop to be delivered to his girlfriend, currently working in Poland. Here, the flower seller has to deliver the flowers to a third party, who will also become the owner of the goods.

C. Obligation to deliver the goods

The seller is typically under an obligation to deliver the goods to the buyer. This important obligation is spelled out in greater detail in IV.A.–2:201 (Delivery), which also makes it clear that the seller may have to deliver the goods to a party other than the buyer.

However, there are cases where the seller may not have to deliver the goods at all, as the goods are already in the buyer's possession or they are to remain in the seller's possession. In these cases, the obligation to deliver under IV.A.–2:201 (Delivery) does not apply either (as it has been expressly or impliedly derogated from), or it is an obligation that is immediately performed (for example, the seller is treated as having delivered the goods which are still in the seller's possession but are held for the buyer).

Illustration 2
A has borrowed machinery for planting trees from his neighbour B. After the expiry of the period of use, A wants to buy the machine from B. The parties agree on a price, which A pays in cash.

Illustration 3
A agrees to sell her student books to B, who will come to the university to take the same course next year. Since B does not yet have a place to live while A has rented her room over the summer, they agree that A will store the books until the start of the new academic year.

It should be noted that the details of such a constructive delivery for the transfer of ownership are also left to Book VIII on the Acquisition and Loss of Ownership in Movables (e.g. the requirements for either the traditio brevi manu or the constitutum possessorium, or the question of what constitutes possession).

D. Obligation to transfer documents

The contract may require the seller to transfer documents representing or relating to the goods. Documents representing the goods serve an important purpose, as the seller can sometimes actually perform the obligation to deliver the goods by merely transferring the documents representing them (see IV.A.–2:201 (Delivery) paragraph (1)). The seller may also be under an obligation to deliver the goods to a carrier and then deliver the shipping documents to the buyer. If the goods are already in transit when they are sold, the seller's only delivery obligation may be to deliver the documents to the buyer (a 'documentary sale'). Documents relating to the goods may for instance be documents primarily relating to the use and proper function of the goods, which are significant for the performance of the sale.

Given the rapid changes on the documents market, the present rules do not provide a list of relevant documents. However, all kinds of documents may be covered, such as bills of lading, insurance policies, export licences, receipts of payment of customs duties, manuals, certificates, instructions, trade descriptions or reviews. The transfer of documents

encompasses more than just the handing over of the relevant documents. The seller may, for instance, also send them by electronic means or by fax. The seller's obligation may include taking steps to ensure the validity of the documents representing the goods, e.g. signatures, endorsements and other formalities.

Even if nothing has been expressly agreed, under IV.A.–2:302 (Fitness for purpose, qualities, packaging) sub-paragraph (e) the seller may have to transfer certain documents relating to the goods, such as installation or other instructions.

E. Obligation to ensure conformity with the contract

Section 3 of the present Chapter elaborates the seller's obligation to deliver goods which conform to the contract in every way. It should be pointed out, however, that the reference in (c) under this Article does not refer only to IV.A.–2:301 (Conformity with the contract), but also to the further provisions in Section 3 addressing various other aspects of conformity, such as IV.A.–2:302 (Fitness for purpose, qualities, packaging), IV.A.–2:304 (Incorrect installation in a consumer contract for sale) and IV.A.–2:305 (Third party rights or claims in general).

In this context, it is therefore important to note that the present rules start from a wide notion of conformity, which may give rise to the remedies for lack of conformity in Chapter 4, Section 2.

F. Remedies for the buyer

If the seller fails to perform any of the obligations under the contract, the buyer is entitled to the remedies set out in Book III, Chapter 3, as slightly modified by Chapter 4 of the present rules.

G. Relationship with Book II

Book II contains rules addressing the contents and effects of contracts in Chapter 9, and these may clarify what becomes part of a contract. Thus, they may also influence the seller's obligations under the contract. In particular, regard must be had to II.–9:101 (Terms of a contract), II.–9:102 (Certain pre-contractual statements regarded as contract terms), and II.–9:108 (Quality). However, the rules in this Chapter can be considered as more sales-specific applications of the general Articles just mentioned.

NOTES

I. Obligation to transfer ownership

1. As already pointed out in the Notes to IV.A.–1:202 (Contract for sale) the transfer of ownership is an essential obligation under a sales contract. Under a number of systems, this obligation is expressly included in the sales definition or in other provisions (CISG art. 30; AUSTRIA CC § 1053; BELGIUM CC art. 1583; ENGLAND and SCOTLAND Sale of Goods Act s. 2(1); ESTONIA LOA § 208(1); GERMANY CC § 433(1); HUNGARY CC § 365(1); ITALY CC art. 1470; NETHERLANDS CC art. 7:9(1); POLAND CC art. 535; SLOVENIA LOA § 435(1)). This also applies to CZECH and SLOVAK commercial sales (Ccom art. 409(1)). Under other systems it can be derived from other obligations or rights, such as the obligation to deliver (CZECH REPUBLIC CC § 588; LATVIA CC art. 2033;

SLOVAKIA CC § 588) or the obligation to warrant that the goods are free from any third party rights or claims (FINLAND SGA § 41; LITHUANIA CC art. 6.231; NORWAY SGA § 41 and Consumer Sales Act § 15(2)(g); SWEDEN SGA § 41).

2. Under FRENCH law the seller is under two mains obligations: to deliver the thing and to guarantee it, CC art. 1603. The transfer of property is therefore not an obligation of the seller but a legal effect of the contract (CC art. 1583). Similarly, in SPAIN the seller is, following Roman Law, under a duty to deliver and to ensure peaceful possession. Some authors therefore argue that the CC does not answer the question of whether the seller is also obliged to transfer ownership in the goods (cf. *García Goyena*, Código Civil Español, 1851; *Navarro Pérez*, La compraventa civil, 428). Other legal authors argue in favour of such an obligation (*Diez-Picazo and Gullón*, Sistema, 285; *Lacruz Berdejo and Rivero Hernández*, Elementos II(2), 6; *Morales Moreno*, La modernización del Derecho de obligaciones, 38), which has also been confirmed in jurisprudence (TS 1 December 1986, RAJ 1986/7189, TS 20 October 1990, RAJ 1990/8029 .

3. While the details relating to the transfer of ownership are typically found in the property law regulation, some systems contain sales-specific rules (cf. for commercial sales in SLOVAKIA Ccom arts. 443-446). In consumer sales in the CZECH REPUBLIC and SLOVAKIA, ownership passes at the time of the delivery ('taking over') of the goods. In distance selling, ownership passes at the time of the delivery ('taking over') of the goods to the buyer at the place of delivery determined by the buyer. In a self-service sale, ownership passes at the time of payment for the goods chosen (CC § 614(3)).

4. Under some systems it is explicitly provided that in addition to the property over a thing some other right may be transferred (ESTONIA LOA §§ 217(2)1) and 218(4); ITALY CC art. 1470).

5. For third party claims or rights, cf. the Notes to IV.A.–2:305 (Third party rights or claims in general) and IV.A.–2:306 (Third party rights or claims based on industrial property or other intellectual property). For the regulation of retention of title clauses, cf. Book IX on Proprietary Security in Movable Assets.

6. The rules in this Part do not, as a rule, deal with issues related to property law; for such matters see Book VIII on the Acquisition and Loss of Ownership of Goods.

II. Obligation to deliver the goods

7. In all systems, the seller is under the (main) obligation to deliver the goods (CISG art. 30; AUSTRIA CC §§ 1061 and 1047; BELGIUM CC arts. 1603-1604; CZECH REPUBLIC CC § 588; ENGLAND and SCOTLAND Sale of Goods Act s. 27; ESTONIA LOA §§ 208(1) and 209; FRANCE CC arts. 1604 ff; GERMANY CC § 433(1); HUNGARY CC § 365(1); ITALY CC art. 1476; LATVIA CC art. 2027; LITHUANIA CC art. 6.317; NETHERLANDS CC art. 7:9(1); POLAND CC art. 535; SLOVAKIA CC § 588 and Ccom art. 409; SLOVENIA LOA § 435(1); SPAIN CC art. 1461). In the NORDIC COUNTRIES, this obligation is implied in the provision giving the buyer the right to demand performance and terminate the contract if the seller fails to deliver (DENMARK SGA § 21; FINLAND, NORWAY and SWEDEN SGA § 22).

8. As a rule, the seller has to hand over the goods, including parts thereof and accessories thereto (AUSTRIA *Bestandteile und Zugehör*; BELGIUM and FRANCE CC art. 1615: accessories and all that is designed for their permanent use; SPAIN CC arts. 1097, 1468; CZECH REPUBLIC CC § 121(1); ESTONIA Act on the General Part of the Civil Code § 57(3) (it is presumed that an obligation to transfer title to certain

goods also encompasses the accessories thereto); ITALY CC art. 1477(2) and (3); LATVIA CC art. 2027; LITHUANIA CC art. 6.317; NETHERLANDS CC art. 7:9(2); POLAND (component parts CC art. 47, appurtenances CC art. 52) at the right time (ENGLAND and SCOTLAND Sale of Goods Act s. 29(5)): demand or tender of delivery may be treated as ineffectual unless it is made at a reasonable hour at the right place, and the goods are in the state in which they were when the contract was concluded.

9. The seller can, however, also deliver by passing control to the buyer as the owner, for instance by transferring documents or keys. The parties' obligations are typically concurrent conditions; thus, the seller may refuse to deliver the object of sale if the buyer fails to pay the purchase price on time.

III. Obligation to transfer documents

10. There are two major categories of documents. Firstly, documents representing the goods, such as a bill of lading, where the seller's failure to deliver them will mean that the buyer cannot take over the goods. Secondly, there are documents related to the goods, such as vehicle registration papers which undoubtedly belong to the goods. If the seller fails to transfer such documents, the buyer can still take over the goods.

11. Under many systems the obligation to hand over documents is not concretely regulated. However, under a number of systems, such an obligation is expressly regulated (CISG art. 30; CZECH REPUBLIC Ccom art. 417; ENGLAND and SCOTLAND Sale of Goods Act s. 29(4) and 47; ESTONIA LOA § 211; FRANCE CC art. 1615, cf. e.g. Com. 8 November 1972, Bull.civ. IV, no. 277 (the seller of a car shall deliver the related administrative documents); HUNGARY CC § 367; LITHUANIA CC art. 6.318; NETHERLANDS CC art. 7:9(1); POLAND CC art. 546; SLOVAKIA Ccom arts. 411 and 417-419; SLOVENIA LOA §§ 447(2) and 448(1)).

12. Generally, there is no clear differentiation between different types of documents under the existing regulations. For instance under the CISG, the seller is obliged to hand over any documents relating to the goods, art. 30. Under some systems it is regulated that the seller is obliged to hand over documents to the buyer that are needed for taking over and using the goods, as well as all other documents stipulated in the contract (CZECH REPUBLIC Ccom art. 417; ESTONIA LOA § 211; NETHERLANDS CC art. 7:9(1); SLOVAKIA Ccom arts. 411 and 417). Under SLOVENIAN law, however, a clear distinction is made where the seller is deemed to have delivered the goods, when he has handed over to the buyer the goods or the document, by which the goods can be taken over (LOA § 447(2)). Thus, it is a seller's main obligation to hand over these documents. As regards documents related to the goods it is provided that the seller must (in the absence of a different agreement) deliver the goods together with all the accessories (LOA § 448(1)). Under LITHUANIAN law, the seller is bound to surrender to the buyer related documents and titles of ownership in his possession, where required by the contract or by the CC. If the seller himself needs the above documents for enforcing other rights not related to the goods sold, the seller is bound to deliver to the buyer copies of the documents validated in the established manner. If the seller fails to transfer these documents, the buyer may, pursuant to CC art. 6.235, fix a reasonable time-limit and, after the expiry thereof, have the right to refuse acceptance of the goods, unless otherwise provided by the contract. In POLAND the seller is obliged to give to the buyer any necessary explanations concerning the legal and factual relationship pertaining to the thing sold and to deliver the documents in his possession pertaining to that thing. If the content of such document also pertains to other things, the seller is obliged to deliver a certified excerpt from that document (CC art. 546(1)). In SPAIN the obligation to deliver certain goods comprises the obligation

to provide all the accessories, even when these are not mentioned (CC art. 1097). Pursuant to a decision of the TS 4 January 1989 (RAJ 1989 no. 92), for an effective juridical delivery to take place, the seller has to deliver to the buyer the title of property and all documents which are necessary to make the transmission of the right efficient and its inscription in the correspondent registry.

13. Documents representing the goods certainly play an important role in the delivery of goods. Generally, such documents representing the goods are undefined; in ENGLAND and SCOTLAND the Factors Act 1889 art. 1(4) (extended to Scotland by the Factors (Scotland) Act 1890) lists various documents to be classed as such (bills of lading, dock warrants, warehousekeeper's certificates, warrants or orders for delivery of goods, any other document used in the ordinary course of business as proof of possession, control, or authorisation of possessor to transfer or receive goods represented by the document). It appears to mean any document which at least provides evidence that the holder is entitled to claim the property specified therein, but does not include vehicle registration documents. In ESTONIA LOA § 211(1) provides for the delivery of the documents necessary for taking the goods into possession, using them as well as the documents necessary for the disposal over the goods. The notions of 'possession' and 'disposal' refer to any documents of title such as the bills of lading, warehouse receipts or similar transport documents; the failure to deliver such documents would amount to the non-performance of the entire agreement. Documents necessary for use refer to a wide variety of documents from vehicle registration documents to the manuals and instructions for use, the obligation to transfer such documents will be judged under the conformity requirements and will not amount to a non-performance of the entire agreement.

14. The obligation to deliver documents related to the goods sold (e.g. vehicle registration papers), is usually considered as a secondary obligation (AUSTRIA; CZECH REPUBLIC; GERMANY Handkommentar-BGB[2] (-*Saenger*), § 433, no. 11; NETHERLANDS, CC art. 7:9(1); NORWAY; SLOVAKIA CC § 617) with regard to manuals in consumer sales. In SLOVENIA, the seller is obliged to hand over all accessories according to LOA § 448(1), including documents relating to the goods. The jurisprudence has however not been uniform as to when the delivery of the documents (i.e. accessories) represent a secondary obligation (and its non-performance does not constitute a non-performance of the entire obligation) and when it could be said that delivered goods without the documents cannot be considered to have been delivered at all. Under SPANISH law the obligation to provide the buyer with the documents related to the goods is considered accessory to the main obligation of delivery (TS 19 April 2007, RAJ 2007 no. 2072, TS 22 March 1993, RAJ 1993 no. 2529, TS 4 January 1989, RAJ 1989 no. 92) In the NETHERLANDS, CC art. 7:9(1) explicitly requires the seller not only to deliver the goods that were sold, but also any accessories and other things associated with the goods that were sold. Under many systems the obligation to transfer documents will probably be judged under the conformity requirements.

IV. Further obligations of the seller

15. In addition to the three main obligations of the seller (transfer of ownership, delivery of the goods and conformity), the seller may be under further obligations stipulated in the various sales laws.

16. The seller may be obliged to preserve the goods, cf. CISG art. 85. Similar provisions can be found under NORDIC law (FINLAND, NORWAY and SWEDEN SGA § 72). In the CZECH REPUBLIC, the seller has all the rights and duties of a depositary until delivery, if the buyer acquires ownership before that moment (CC § 590 referring to §

749(1) [including the obligation to insure the goods if this is customary]; see also SPAIN CC art. 1094: obligation to preserve the goods).

17. Certain information requirements may also be imposed on the seller. The seller has to inform the consumer of special regulations or instructions relating to the use of goods (CZECH REPUBLIC and SLOVAKIA CC § 617). Similarly, the seller may have to give advice (e.g. instructions as to use) or warnings of any danger under (AUSTRIA *Koziol and Welser*, Bürgerliches Recht II[12], 146) or to inform the buyer about the important properties of the goods, including any rights and claims which third parties may have (HUNGARY CC § 367).

Section 2: Delivery of the goods

IV.A.–2:201: Delivery

(1) The seller fulfils the obligation to deliver by making the goods, or where it is agreed that the seller need only deliver documents representing the goods, the documents, available to the buyer.

(2) If the contract involves carriage of the goods by a carrier or series of carriers, the seller fulfils the obligation to deliver by handing over the goods to the first carrier for transmission to the buyer and by transferring to the buyer any document necessary to enable the buyer to take over the goods from the carrier holding the goods.

(3) In this Article, any reference to the buyer includes a third person to whom delivery is to be made in accordance with the contract.

COMMENTS

A. General

This Article elaborates the seller's obligation to deliver the goods, which is typical of a sales contract (but see IV.A.–2:101 (Overview of obligations of the seller) Comment C for cases where the seller may actually not need to deliver the goods at all). Unless agreed otherwise, the main principle is that the seller is obliged to make the goods available to the buyer. If the parties' agreement involves documents representing the goods, the same principle applies to those documents. Paragraph (2) addresses the important case in which the goods are to be sent by a carrier to the buyer.

The point in time for delivery is important in many respects. In many cases, the risk concerning the goods will pass at the same time. This is for instance the case where carriage is involved, cf. paragraphs (2) and (4) of this Article and IV.A.–5:202 (Carriage of the goods) paragraph (3). Moreover, the requirement to examine the goods under IV.A.–4:301 (Examination of the goods) will mostly arise upon delivery.

B. Functional definition of delivery

Paragraph (1) provides a functional definition of the seller's obligation to deliver, the purpose being that the seller must make the goods, or documents representing them, available to the buyer. While this will normally result in the transfer of physical control over the goods, there may be cases where the transfer of physical control does not apply, for instance because such a transfer, though possible, has not been envisaged by the parties, since the goods are to remain with the seller or because the nature of the goods renders such a transfer impossible. (This latter case will however normally mainly apply to immovable property). In such cases, the seller can make the goods available to the buyer in other ways (see also Comment C).

Illustration 1
A sells a horse to B. The parties agree that the horse is to remain in A's stable, since B has no stable, and that B will pay for A's care of the horse each month.

At the same time, this broad functional definition of delivery ('making available') also makes sure that the seller can deliver assets other than goods, which fall under the scope of the present rules by virtue of IV.A.–1:101 (Contracts covered) paragraph (2). This applies especially to incorporeal property, such as certain rights.

C. Different modes of delivery

As pointed out in Comment B, the functional definition of delivery in paragraph (1) allows for different ways to comply with the obligation to deliver the goods. Above all, it is the contract that ultimately answers the question of how the seller has to deliver the goods. The seller may, for instance, be required to deliver in a certain way; likewise, the contract may give the seller different options for delivery.

While it is therefore virtually impossible to spell out all possible variants in the rule on delivery, it may help to provide a few examples of different methods of delivery.

The seller may deliver the goods by transferring physical control to the buyer. Unless the parties have agreed otherwise, the buyer has to pick up the goods at the seller's place of business or residence (see IV.A.–2:202 (Place and time for delivery) Comment B) and the seller's obligation will be to make them available there. The seller can also hand over keys to the goods, for instance car keys or the keys to a warehouse where the goods are located. This variant also covers other means to allow the buyer to take control of the goods, e.g. the seller can provide the buyer with an access code to the goods. However, the parties may also have agreed that the seller is to transport the goods to the buyer (cf. illustration 4); in such a case the seller will make the goods available by delivering the goods to the buyer at the buyer's residence or place of business.

It is also possible for the seller to deliver without the transfer of immediate physical control to the buyer. This is the case where the seller is to make the goods available at a place other than the seller's place of business (cf. also IV.A.–5:201 (Goods placed at buyer's disposal) paragraph (2)). The parties can agree that the seller has to make the goods ready for collection by the buyer at a designated place, at which the seller will have left them.

> *Illustration 2*
> A, a retailer, sells goods to B. They agree that the goods will be made available to B at a certain date directly at the place of production, a factory, which is close to B's place of business. A has fulfilled the obligation to deliver as soon as the goods are made available to the buyer at the agreed place.

Thirdly, as envisaged in paragraph (1), the seller can fulfil the obligation to deliver by transferring documents representing the goods to the buyer.

> *Illustration 3*
> A and B conclude a contract for goods that are already in transit. The seller performs the obligation to deliver by handing over the bill of lading to the buyer.

Since these documents embody the goods, their transfer is sufficient to deliver the goods as such. As a result, the buyer, while not having received the goods as yet, obtains the necessary means to demand the goods from the person who is in possession of them. This mode of

delivery plays an important role when the goods are subject to carriage (see Comment D below). The seller can also take other measures to enable the buyer to obtain the goods from a third person, for instance by instructing this person to release the goods (e.g. by e-mail, fax, telephone). In the context of delivery by means of documents, it should be noted that only documents representing the goods are of relevance.

D. Carriage of goods

This Article provides for a specific rule on delivery if the parties agree that the goods are to be carried from the seller to the buyer by a third party carrier. According to paragraph (2), the seller delivers by handing over the goods to the carrier, and by transferring to the buyer any document necessary to take over the goods from the carrier. This method of delivery reflects the important role that documents play in international commercial sales transactions, which frequently involve the carriage of goods.

Where the goods are to be carried by a series of carriers the seller fulfils the obligation to deliver by handing the goods over to the first carrier for transmission to the buyer and by transferring the relevant documents to the buyer. Those documents should enable the buyer to take over the goods from the carrier holding the goods.

It should be noted that the rule on delivery in the case of carriage only applies if an independent carrier transports the goods. Therefore it does not cover cases where the seller's or the buyer's own employees undertake the carriage of the goods.

> *Illustration 4*
> A and B conclude a contract for the sale of building materials. The parties agree that the materials will be directly transported to B's building site. Transportation is organised by one of A's employees. The seller is deemed to have fulfilled the obligation to deliver only when the goods are handed over to B or one of B's employees at the building site.

Finally, it should be pointed out that the parties may naturally agree that the seller's obligation to deliver is fulfilled at a later point in time even if a carrier is involved.

E. Delivery to persons other than the buyer

This Article starts from the assumption that the seller has to deliver the goods to the buyer. However, the parties are free to agree otherwise as is made clear in paragraph (3). It may be possible that the goods are either not destined for the buyer at all, for instance if the buyer has bought raw materials for a subsidiary, or are not to be directly delivered to the buyer, for instance in the case of an interim storage at a warehouse.

In such a case, the rules in this Article apply to the other person as if that person were the buyer. Therefore the seller complies with the obligation to deliver the goods by making them available to the person indicated in the contract.

F. Consumer contract for sale

This Article is only of a default nature and does not contain any special consumer protective elements. However, it should be kept in mind that under a consumer contract for sale, the risk

passes only upon handing over the goods to the buyer in the event of carriage (see IV.A.–5:103 (Passing of risk in a consumer contract for sale) Comment C).

NOTES

I. Modalities of delivery in general

1. As pointed out above (Notes to IV.A.–2:101 (Overview of obligations of the seller)), the seller is obliged to deliver the goods under all systems. By and large, one can distinguish between actual and constructive delivery; the former being physical delivery of the goods, and constructive delivery being the passing of control over the goods to the buyer as the owner (for this distinction, see BELGIUM CC arts. 1605-1606; ENGLAND and SCOTLAND *Adams/Atiyah/MacQueen*, Sale of Goods[11], 129-131; *Stair*, The Laws of Scotland XX, para. 860; SPAIN CC arts. 1462-1464).
2. The notion of delivery is not elaborated in great detail, if at all, in the different sales laws. On the one hand, it can be defined as the voluntary transfer of possession between the parties (see the definition in ENGLAND and SCOTLAND Sale of Goods Act s. 61(1); similarly in BELGIUM and FRANCE CC art. 1604; LITHUANIA CC art. 6.317; NETHERLANDS CC art. 7:9(2); POLAND CC arts. 348-351; SLOVENIA implied in the notion of delivery, see *Cigoj*, Komentar, 1403). Moreover, under SLOVENIAN law it is expressly provided that the seller as a rule performs his obligation to deliver by handing over the goods or documents, which enable the goods to be taken over, LOA § 447(2). On the other hand, some sales laws merely state that the goods have to be placed at the buyer's disposal (cf. CZECH REPUBLIC Ccom art. 412(2); ESTONIA LOA § 209(1); FINLAND SGA § 6(1); SPAIN CC art. 1462, NORWAY SGA § 6; SWEDEN SGA § 6(2)).
3. Under some systems there are explicit regulations on the delivery of incorporeal rights. The seller delivers rights by either handing over the titles to them or by the use that the buyer makes of them with the consent of the seller (see BELGIUM and FRANCE CC art. 1607). This is also the case in SPAIN in the absence of the granting of a public deed (CC art. 1464 with reference to art. 1462(2)). In POLAND the transfer of a receivable debt from a bearer document takes place by the transfer of that document. The transfer of ownership in such document requires its release (CC arts. 517 and 921).
4. Under some systems it is expressly regulated that the seller also can deliver the goods to a third person presenting the buyer's confirmation that he is entitled to accept delivery (CZECH REPUBLIC CC § 562; SLOVAKIA CC § 562). This does however not apply if the seller knows that this person is not entitled to do so.
5. For the carriage of goods, cf. IV.A.–2:204 (Carriage of the goods) and IV.A.–5:202 (Carriage of the goods).

II. Constructive delivery

6. The low level of detail in national sales laws concerning delivery in general holds even more true for constructive delivery, which covers cases of delivery by the transfer of documents of title (see below for so-called documentary sales in ENGLAND and SCOTLAND), the handing over of keys (expressly BELGIUM CC art. 1606 and FRANCE CC art. 1605), and by consent (SPAIN CC art. 1463) (as opposed to a real act; for the notion of *tradición ficticia* in SPAIN, see TS 18 February 1995, RAJ 1995/882, 1 July 1995, RAJ 1995/5421 and 31 May 1996, RAJ 1996/3866 'all the

acts, whatever kind, that show in a conclusive way that the seller has delivered the good to the buyer, which gets the disposal over the good in a real, absolute and unique manner, with an evident intention of the parties to do so'. This last category of delivery by consent reflects the Roman (property) law notions of *traditio brevi manu*, *longa manu* and *constitutum possessorium*, which have in common that the goods are not transferred at all, but rather remain where they were located upon sale (for more detail, see the Principles on Transfer of Movable Property). Under HUNGARIAN law, delivery can take place – beyond actual delivery – in any form which makes it undoubtable (apparent) that the control over the thing has been transferred (CC § 117(2)). In the CZECH REPUBLIC legal writing also establish that delivery could also mean taking over accessories of the goods; for instance keys, documents (e.g. certificate of car registration) (cf. Švestka/Jehlička/Škárová/Spáčil (-*Jehlička*), Občanský zákoník[9], 464).

7. As just pointed out, the goods can also be delivered by means of transferring documents, such as bills of lading. These so-called documentary sales are important in practice (ITALY CC art. 1527-1530; SPAIN CC art. 1464). In ENGLAND and SCOTLAND, the obligations of the seller with regard to the actual delivery of the goods apply *mutatis mutandis* to the delivery of documents. According to the Sale of Goods Act s. 29(4), where the goods are at the time of the sale in the possession of a third party, there is no delivery by the seller to the buyer unless and until the third party acknowledges to the buyer that he holds the goods on his behalf (known as attornment in ENGLISH law). The sub-section goes on to provide that this does not affect the operation of the issue or transfer of any document of title to the goods, and it has been argued for SCOTS law that in a normal commercial case there will always be a document of title involved; hence delivery may be effected even though the third party holder has made no acknowledgement to the buyer (*Reid*, The law of Property in Scotland, para. 620). Constructive delivery also includes the symbolical delivery of bills of lading representing the goods specified therein.

IV.A.–2:202: Place and time for delivery

(1) The place and time for delivery are determined by III.–2:101 (Place of performance) and III.–2:102 (Time of performance) as modified by this Article.

(2) If the performance of the obligation to deliver requires the transfer of documents representing the goods, the seller must transfer them at such a time and place and in such a form as is required by the contract.

(3) If in a consumer contract for sale the contract involves carriage of goods by a carrier or a series of carriers and the consumer is given a time for delivery, the goods must be received from the last carrier or made available for collection from that carrier by that time.

COMMENTS

A. General

The seller performs the obligation to deliver only if delivery is made at the right place and time. In the absence of an agreement between the parties, the general rules on performance in III.–2:101 (Place of performance) and III.–2:102 (Time of performance) apply. However, paragraph (2) introduces a special rule for the transfer of documents representing the goods.

B. Place and time for delivery

According to III.–2:101 (Place of performance), the seller has to deliver at the place fixed by or determinable from the sales contract. If the contract remains silent on this point, the seller has to deliver at the seller's place of business or, in the absence of such a place, at the seller's habitual residence. Thus, the default rule on the place for delivery is that the buyer has to pick up the goods from the seller's place of business or residence.

According to III.–2:102 (Time of performance), the seller has to deliver at the time, or within the period, fixed by or determinable from the sales contract. In the absence of such an agreement, the seller has to deliver within a reasonable time after the conclusion of the sales contract.

C. Transfer of documents representing the goods

The seller may sometimes be able to effect delivery by transferring documents representing the goods, see IV.A.–2:201 (Delivery) paragraph (1). In such a case, the seller must transfer such documents at the place and time and in the form required by the contract. This rule is so framed as to cover the transfer of documents to parties other than the buyer (cf. IV.A.–2:201 paragraph (3)).

D. Remedies of the buyer in the event of late delivery

If the seller is late in delivering, the buyer may resort to the remedies set out in Book III, Chapter 3. Conversely, if the seller delivers too early, the buyer may take or refuse delivery in accordance with IV.A.–3:105 (Early delivery and delivery of excess quantity) paragraph (1).

NOTES

I. Place for delivery

1. For delivery to be effective, the seller also has to deliver at the right place and at the right time. While the parties are, as a rule, free to agree on the place and time for delivery, all systems contain default rules in that regard.

2. The main rule as regards the place of delivery is that the seller has to put the goods at the buyer's disposal at the seller's place of business or residence (CISG art. 31(c); AUSTRIA CC § 905; BELGIUM CC art. 1609 (in fact repeating CC art. 1247); CZECH REPUBLIC CC § 567(1); DENMARK SGA § 9(1); ENGLAND and SCOTLAND Sale of Goods Act s. 29; ESTONIA LOA § 85(2) 4); FINLAND SGA § 6(1); GERMANY CC § 269(1); HUNGARY CC § 278(1); LITHUANIA CC art. 6.318(3); NETHERLANDS CC art. 6:41; NORWAY SGA § 6; POLAND CC art. 454; SLOVAKIA CC § 567; SLOVENIA LOA § 451(1); SPAIN CC art. 1171; SWEDEN SGA § 6(1)). A similar result is mostly reached under BELGIAN and FRENCH law where it is provided that the place of delivery is the place where the thing was situated at the time of the sale, CC art. 1609.

3. However, this general rule that the buyer has to collect the goods from the seller may be subject to a few exceptions. To start with, if the parties at the time of the conclusion of the contract knew that the (specific) goods, or the (specific) stock from which the goods were to be drawn, were at a particular place (such as the place of production), the goods are to be placed at the buyer's disposal at that particular place (CISG art. 31(b); CZECH REPUBLIC Ccom art. 412(2); DENMARK SGA § 9(2); ENGLAND and SCOTLAND Sale of Goods Act s. 29; ESTONIA LOA § 85(2) 2) and 3); FINLAND SGA § 6(1); LITHUANIA CC art. 6.318(2); NETHERLANDS CC art. 6:41; NORWAY SGA § 6(1); SLOVAKIA Ccom art. 412; SLOVENIA LOA art. 451(2); SWEDEN SGA § 6(1)).

4. Moreover, under NORDIC law when the parties have agreed that the goods are to be brought to the buyer at the same place or within the same area to which the seller normally undertakes to bring such goods (local sale), the delivery is made when the goods are received by the buyer at that place (FINLAND, NORWAY and SWEDEN SGA § 7(1)). A similar provision can be found under DANISH law (SGA § 11).

5. Under some systems there is also a specific regulation for the delivery of documents. The seller has to hand over the documents needed for taking over the goods at the place of payment (if the delivery is to take place at the time of payment), or at the seat, place of business or residential address of the buyer (CZECH REPUBLIC and SLOVAKIA Ccom art. 419). Other documents must be handed over at the stipulated time and place, otherwise at the place of delivery (CZECH REPUBLIC and SLOVAKIA Ccom art. 418(1)). Under ESTONIAN law, the seller is under the general obligation to deliver the documents necessary for taking over the goods or for their possession and use or for disposal over the goods together with the goods, LOA § 211(1)). If the goods are to be transported, the documents have to be delivered to the buyer's place of business or residential address, unless the documents are to be handed over against the payment of the purchase price in which case their delivery has to take place at the place of payment, LOA § 211(2).

6. If the goods are to be transported to the buyer and the parties have not agreed on a place of delivery, the goods are generally delivered when they are handed over to the carrier, cf. the Notes under IV.A.–2:204 (Carriage of the goods). Finally, there is some further deviation in consumer sales law (cf. under IV.).

II. Time of delivery

7. In the absence of an agreement as to the time for delivery, different default rules apply under the different systems. Under the majority of systems, the seller has to put the goods at the buyer's disposal within a reasonable time after the conclusion of the contract (CISG art. 33(c); PECL art. 7:102(3); ENGLAND and SCOTLAND Sale of Goods Act s. 29(3); ESTONIA LOA § 82(3); FINLAND SGA § 9(1); LITHUANIA CC art. 6.319; NORWAY SGA § 9; SLOVENIA LOA § 450; SWEDEN SGA § 9(1)). Under other systems delivery must be made without undue delay after the conclusion of the contract (AUSTRIA CC § 904; CZECH REPUBLIC CC § 591; NETHERLANDS CC art. 6:38; SLOVAKIA CC § 591) or immediately (GERMANY CC § 271(1)). Under CZECH law, for the interpretation of the term 'undue delay' the nature of the contract and specific circumstances under which it was concluded are decisive; in dubio, parties have to fulfil their mutual duties simultaneously and as soon as possible (cf. Švestka/Jehlička/Škárová/Spáčil (-*Jehlička*), Občanský zákoník[9], 884-5).

8. While BELGIUM, FRANCE and SPAIN do not have a general default rule to that effect, a similar result is achieved by means of the interpretation of the circumstances. In SPAIN, the time for delivery is linked to the buyer's obligation to pay the price, but neither obligation is subject to any special time limit, unless the contract provides otherwise (CC art. 1500). In contrast, the seller has, as a default rule, to deliver within 24 hours after the contract is concluded in commercial sales pursuant to Ccom art. 337.

9. Under some systems, delivery is to be effected upon demand by the buyer, unless the circumstances indicate otherwise. Under DANISH law, if it cannot be deduced from the circumstances that delivery shall be effected as soon as possible, it shall be effected upon request by the buyer, Sales Act. § 12. Under HUNGARIAN law the seller must put the goods at the buyer's disposal at the time determinable from the intended purpose of the performance, CC § 298, otherwise the obligor is to effect performance when the time necessary for the preparation of the performance has elapsed but at the latest upon the demand of the obligee, CC § 280(2). Similarly under POLISH law: if the time-limit for the performance is not specified and does not follow from the nature of obligation, the performance is to take place immediately upon demand (CC art. 455).

10. Under DANISH law SGA § 13 lays down that if the parties have established a time span within which the seller may deliver the goods; it is up to the seller to choose the time for delivery within this period, unless the circumstances indicate that the time span has been determined to the benefit of the buyer.

III. Cost of delivery

11. Under many systems there are also default rules relating to the costs of delivery. Under all systems the general rule is that seller is to bear the costs (AUSTRIA (commercial sales) EVHGB § 8 no. 19; ESTONIA LOA § 215(1); FRANCE CC art. 1606; GERMANY CC § 448; POLAND CC art. 547(1); SPAIN CC art. 1465 and Ccom art. 338). Under some systems it is further specified which kinds of costs the seller must bear. Under POLISH law this in particular includes the cost of measuring or weighing the thing, its packaging, insurance for the time of the transportation and the costs of the transportation (CC art. 547(1)). Under ESTONIAN law the seller has to bear the costs of delivery, including the cost of measuring or weighing and the transportation cost to the place of delivery (i.e. to the place where the risk passes to the buyer), LOA § 215(1).

12. On the other hand, if the goods are to be sent to a place other than the place where performance is due, such costs are borne by the buyer (ESTONIA LOA § 215(2); GERMANY CC § 448; POLAND CC art. 547(2)).

13. Under FRENCH law it is explicitly provided that the costs of taking delivery are for the buyer, CC art. 1606.

IV. Deviating consumer regulation

14. Under some systems, there are deviating rules when it comes to consumer sales. In the CZECH REPUBLIC and SLOVAKIA, the seller may be obliged to deliver the goods, because of their nature, to a place determined by the buyer (CC § 614(1)). Under some systems delivery takes place under a consumer sale when the goods come into the buyer's possession even if the goods are to be transported to the buyer by an independent carrier (FINLAND Consumer Protection Act chap. 5 § 3(2); HUNGARY CC § 278(2); NETHERLANDS CC art. 7:13; NORWAY Consumer Sales Act § 7; SWEDEN Consumer Sales Act § 6). However, in the NETHERLANDS the parties may derogate from this provision by individual agreement, CC art. 7:6(2). Under NORWEGIAN law the goods have to be delivered to the buyer if they were sold without any connection to the seller's place of business, Consumer Sales Act § 5(1)). Under FRENCH law, the seller is obliged to specify the time within which he undertakes to deliver the goods. If he does not deliver within seven days after the delay has elapsed, the buyer can withdraw from the contract (Consumer Code art. L. 114-1).

IV.A.–2:203: Cure in case of early delivery

(1) If the seller has delivered goods before the time for delivery, the seller may, up to that time, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or otherwise remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.

(2) If the seller has transferred documents before the time required by the contract, the seller may, up to that time, cure any lack of conformity in the documents, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.

(3) This Article does not preclude the buyer from claiming damages, in accordance with Book III, Chapter 3, Section 7 (Damages and interest), for any loss not remedied by the seller's cure.

COMMENTS

A. General

In the case of early delivery, this Article allows the seller a qualified right to rectify any lack of conformity, be it in the goods or in the documents, up until the due date for delivery. It is important to note that this right to cure does not allow the seller to deliver the goods earlier than agreed. Instead, if the seller tenders delivery before the due date (i.e. the original date for delivery agreed between the parties) the buyer has a right to either refuse or accept delivery under IV.A.–3:105 (Early delivery and delivery of excess quantity) paragraph (1). The present cure provision applies only if the buyer has accepted the goods.

The rationale behind this rule is that the seller is not yet in breach of the obligation. This follows from the presumption that the seller is only obliged to ensure that the goods are in conformity from the point in time when the performance is actually due. The seller may therefore remedy any shortcoming in the goods up until the due date for delivery, which, technically speaking, cannot yet be considered as a lack of conformity. The buyer's interests are protected in two ways. On the one hand, the buyer does not, as a rule, have to accept early delivery by the seller. The seller, on the other hand, is limited in the right to rectify any lack of conformity, since doing so must not cause unreasonable inconvenience or expense to the buyer. Finally, it should be noted that, in practice, it will be rather rare for the seller to deliver early. The impact of this rule is therefore likely to remain limited.

B. The seller's right to cure before the time for delivery

By and large, the seller may cure any shortcoming in the early delivery, provided that doing so does not cause the buyer unreasonable inconvenience or expense (for this condition, see Comment C). The different possibilities for rectification in this Article correspond to the buyer's remedies for a lack of conformity.

In addition, paragraph (2) enables the seller to rectify any lack of conformity in the documents up until the time agreed in the contract.

C. Unreasonable inconvenience or expense

The seller may exercise the right to rectify under this Article only if this does not cause the buyer unreasonable inconvenience or unreasonable expense, for instance by delivering the missing parts bit by bit or by interrupting the buyer's business by sending a technician to repair a machine that does not conform, but is still working at a time when the buyer needs to use the machine.

In order to establish what amounts to unreasonable inconvenience or expense, regard is to be had to the definition of "reasonable" in Annex 1.

> What is "reasonable" is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices.

Accordingly, the circumstances of the case will have to be considered in deciding the standards of unreasonableness. Apart from pure economic qualifications, also criteria such as time, transportation, logistics and storage have to be taken into account.

D. Buyer's remedies

The seller has not yet failed to perform the obligation to ensure that the goods are in conformity with the contract in the case of early delivery. Thus, the buyer cannot exercise rights in respect of lack of conformity under Chapter 4 until the due date for delivery. The buyer may, however, refuse to take delivery altogether according to IV.A.–3:105 (Early delivery and delivery of excess quantity) paragraph (1).

However, under paragraph (3) the buyer is not precluded from claiming damages for any loss not remedied by the seller's rectification. Such loss might include inconvenience or expense which are not sufficient to bar the seller's right to cure.

E. Relationship with Book III

Book III, Chapter 3, Section 2 contains provisions on cure by the debtor of a non-conforming performance. One of those provisions is that "The debtor may make a new and conforming tender if that can be done within the time allowed for performance" (III.–3:202 (Cure by debtor: general rules) paragraph (1).

The reason behind the present Article is that III.–3:202 paragraph (1) does not address cases where the buyer has actually accepted the goods tendered by the seller, which may well turn out not to be in conformity with the contract. The present Article has to be read in the context of IV.A.–3:105 (Early delivery and delivery of excess quantity) paragraph (1), which gives the buyer the opportunity to either reject or accept the goods. If the buyer chooses to accept the goods, the seller has several possibilities to cure a lack of conformity in the goods. By making sure that the seller may only exercise the rights if they do not cause the buyer unreasonable inconvenience or expense, the buyer's interests are taken into account. In contrast, the rule in III.–3:202 (Cure by debtor: general rules) paragraph (1) still applies if the buyer has not accepted the goods, which the buyer is entitled to do according to IV.A.–3:105 (Early delivery and delivery of excess quantity) paragraph (1).

NOTES

Cure in the case of early delivery

1. Under most systems this is an unregulated issue. This especially applies to those systems where a cure is allowed also after the time for delivery has expired.

2. However, under some systems where there is no right to cure or the general right to cure is subject to many restrictions this special situation is regulated (CISG art. 37; PECL art. 8:104; DENMARK SGA § 49). For this right to cure to apply it is required that the cure does not cause the buyer unreasonable inconvenience or expense (CISG art. 37) or that the cure clearly does not cause the buyer any cost or inconvenience (DENMARK SGA § 49). Under ENGLISH law if the buyer has rejected non-conforming goods, and time remains for the seller to make a new conforming tender, then the seller may elect to do so: *Borrowman, Phillips & Co. v. Free & Hollis* (1878) 4 QBD 500, affirmed in *The "Kanchenjunga"* [1990] 1 Lloyd's Rep 391 (HL). However, it is disputed whether such a right can persist where the confidence of the buyer has been destroyed (see *Adhar*, LMCLQ 1990, 364). There is no decision directly in point in SCOTLAND, but the developing idea of 'remediable breach' giving a supplier a right to cure a defective performance is consistent with these English cases (*McBryde*, Law of Contract in Scotland, 20-122 et seq.). In POLAND (for non-consumers) if the buyer wants to renounce the contract, the seller may immediately exchange the defective thing for a thing free from defects or immediately remove the defects. However, the seller loses this entitlement if the thing has already been exchanged by the seller or has been repaired, unless the defects are not substantial (CC art. 560(1)). Under CZECH commercial sales, if the seller has delivered earlier then agreed upon, with the consent of the buyer, he has a right to cure until the agreed time for delivery (Ccom art. 426). Moreover, Ccom art. 418 provides that if the seller hands over documents prior to the stipulated time, he may, up to that time, revise any faults in the documents, provided that the exercise of this right does not cause the buyer unreasonable inconveniences or expense.

3. There is no particular rule on this point in SPANISH law. However, the good faith requirements may lead to a conclusion similar to the one laid down in this article. Where the debtor will not suffer any delay (CC art. 1101), there is no basis to blame the seller for having delivered a non-conforming good, when there is still time to cure, provided that the purchaser did not suffer any relevant change of position following the early performance.

IV.A.–2:204: Carriage of the goods

(1) If the contract requires the seller to arrange for carriage of the goods, the seller must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(2) If the seller, in accordance with the contract, hands over the goods to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(3) If the contract does not require the seller to effect insurance in respect of the carriage of the goods, the seller must, at the buyer's request, provide the buyer with all available information necessary to enable the buyer to effect such insurance.

COMMENTS

A. General

This Article sets outs various obligations on the part of the seller where the goods are to be carried from the seller to the buyer (or to another agreed person) by a third party carrier. It is important to note that it does not answer the question of who has to arrange for the carriage of the goods, which ultimately depends on the agreement between the parties.

The notion of carriage of goods does not cover cases where the seller's or buyer's own employees undertake to transport the goods to the buyer (cf. IV.A.–5:202 (Carriage of the goods) Comment C).

B. Seller's obligations in the case of carriage

If the parties have agreed on the carriage of the goods, the seller has to undertake a number of obligations or duties in addition to the obligation to deliver, which already requires the seller to hand over the goods to the carrier and to transfer to the buyer any documents representing the goods. Accordingly, the seller has to:

i) make the necessary and appropriate contracts for the carriage of the goods, if obliged to arrange for carriage (paragraph (1));

ii) issue and provide the buyer with a notice of consignment for the dispatch of goods that are not clearly identified to the contract (paragraph (2)); and

iii) allow the buyer, upon request, to take out insurance for the goods unless the seller is to insure the goods (paragraph (3)).

While these obligations of the seller mostly concern international commercial sales involving cross-border carriage, they may also apply to other transactions where the parties agree that the seller is bound to arrange for carriage.

C. Remedies of the buyer

If the seller fails to fulfil the obligations set out in this Article the buyer may resort to the normal remedies contained in Book III.

In the case of paragraph (2), the buyer also benefits from IV.A.–5:102 (Time when risk passes) paragraph (2), as risk does not pass before the goods are duly identified to the contract.

D. Consumer contract for sale

It should be noted that under IV.A.–5:103 (Passing of risk in a consumer contract for sale) paragraph (1) the general rule under a consumer contract for sale is that the risk does not pass to the consumer until the goods are actually taken over. This means that the goods will travel at the risk of the seller. Hence, paragraph (3) of this Article will be of limited importance in consumer contracts for sale since it will generally be in the seller's interest to arrange for insurance, since any loss of or damage to the goods before they reach the consumer will be the seller's responsibility.

NOTES

Obligations relating to the carriage of goods

1. Where the seller is authorised or required to send the goods to the buyer, unless otherwise agreed, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer (CISG art. 31(a); CZECH REPUBLIC CC § 594 and Ccom art. 412(1); DENMARK SGA § 10; ENGLAND and SCOTLAND Sale of Goods Act s. 32(1); FINLAND SGA § 7(2); LITHUANIA CC art. 6.318(2); NORWAY SGA § 7(2); POLAND CC art. 544(1); SLOVENIA LOA art. 452; SWEDEN SGA § 7(2)). The same principle applies in commercial sales under some systems. This is the case in SLOVAKIA for example (Ccom art. 412). In SPANISH commercial law, unless the contract provides otherwise, the seller complies with the duty to deliver by handing the goods over to the carrier (Supreme Court Judgments 17 October 1984, RAJ 1984/4969, 3 March 1997, RAJ 1997/1638).
2. Under some systems there are also default rules regarding the quality required for the transportation. If the seller is bound to arrange for the carriage of the goods this must be done by means of transportation which is appropriate in the circumstances and according to the usual terms for such transportation (CISG art. 32(2); ESTONIA LOA § 210(2); FINLAND SGA § 8; LITHUANIA CC art. 6.373; NORWAY SGA § 8; SLOVENIA LOA § 453; SWEDEN SGA § 8). In ENGLAND and SCOTLAND, the seller must make such a contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits to do so, and the goods are lost or damaged in the course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or hold the seller responsible in damages, Sale of Goods Act s. 32(2). A similar rule applies under ESTONIAN law, LOA § 210(2).
3. Under a few systems, the seller must give the buyer a special notice of specification of the goods. If the seller is to hand over the goods to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or

otherwise, the seller must give the buyer notice of the consignment specifying the goods (CISG art. 32(1); CZECH REPUBLIC Ccom art. 413; ESTONIA LOA § 210(1); NORWAY SGA § 8(3) and Consumer Sales Act § 8(3)).

4. Under some systems there is a regulation concerning insurance for the goods during carriage. If the seller is not bound to effect insurance in respect of the carriage of the goods, the seller must, upon the buyer's request, provide the buyer with all available information necessary to enable the buyer to effect such insurance (CISG art. 32(3); ESTONIA LOA § 210(3); NORWAY SGA § 8(2) and Consumer Sales Act § 8(3)). Where the goods are sent by the seller to the buyer by a route involving sea transit, under certain circumstances where it is usual to insure, then the seller must give such notice to the buyer as may enable him to insure the goods during their sea transit, and if he does not do so, then the assets are at his risk during such sea transit (Sale of Goods Act § 32(3); this section might be extendable by analogy to other forms of transport, cf. Benjamin (-*Guest*), Sale of Goods[6], § 6-017). Also in LITHUANIA the contract may give rise to an obligation to insure the goods, CC art. 6.316. In POLAND if the goods are to be sent to a place which is not the place of performance, the buyer must bear the costs of the insurance (CC art. 547).

Section 3: Conformity of the goods

IV.A.–2:301: Conformity with the contract

The goods do not conform with the contract unless they:

(a) are of the quantity, quality and description required by the contract;
(b) are contained or packaged in the manner required by the contract;
(c) are supplied along with any accessories, installation instructions or other instructions required by the contract; and
(d) comply with the remaining Articles of this Section.

COMMENTS

A. General

One of the most important obligations in sales law is that the seller has to ensure that the goods sold are in conformity with the contract (see IV.A.–2:101 (Overview of obligations of the seller)). This Section elaborates the meaning of conformity. From the outset, it is important to note that this obligation is separate from the seller's obligation to deliver the goods. Most importantly, a non-performance of the seller's obligation to deliver (late delivery or no delivery at all) triggers the general remedies regime under Book III. However, a non-performance of the conformity obligation is followed by a separate remedies regime under Chapter 4 of this Part, which addresses particular problems linked to non-conforming goods.

Moreover, even if the seller may not have to deliver the goods at all, the obligation to ensure the conformity of the goods still applies.

> *Illustration 1*
> A has rented a TV set from B. B agrees that A can buy the set outright. If A exercises the right to buy, B's obligation to ensure that the goods conform to the contract applies even though the TV set does not have to be physically delivered to A because A already has it.

B. Agreed conformity: the obligation to ensure that the goods are in conformity with the contract

Above all, this Article emphasises the significance of the parties' agreement by referring to what is "required by the contract". Sub-paragraphs (a) to (c) spell out different features of conformity, which make it clear that the goods must be of the right quantity, quality and, description; must be contained or packaged in the right way; and must be supplied along with possible accessories and instructions.

Finally, sub-paragraph (d) contains an important reference to the remaining Articles of this Section, which makes it clear that the central provision of the present Article is complemented by further provisions addressing various other aspects of conformity, such as IV.A.–2:302 (Fitness for purpose, qualities, packaging), IV.A.–2:304 (Incorrect installation in a consumer contract for sale) and IV.A.–2:305 (Third party rights or claims in general).

C. Quantity, quality and description

Under (a) the seller has to ensure that the goods are of the quantity, quality and description required by the contract. The first aspect of conformity mentioned here, i.e. that of quantity, covers two different scenarios.

First, the seller may deliver less than was agreed upon, e.g. only 400 tyres instead of 500. This shortcoming is qualified as a lack of conformity. Consequently, the buyer may exercise the remedies contained in Chapter 4, Section 2. However, this does not apply if the seller fails to deliver any goods at all. Such non-performance (which may be late performance or delay, or total non-performance) is considered to be a non-performance of the obligation to deliver the goods and follows a different remedial regime (see Book III, Chapter 3 on Remedies for Non-performance).

> *Illustration 2*
> A agrees to sell 500 edible snails, packed in boxes, to B, but delivers only 400. The rules on lack of conformity apply. This case is a clear example of the rationale behind the concise nature of the notion of conformity. It does not make a difference in the applicable regime whether A delivers 500 snails, of which 100 are of the wrong quality, or 500 of the wrong quality.

Secondly, the seller may deliver more than was agreed upon, e.g. 550 tyres instead of 500. IV.A.–3:105 (Early delivery and delivery of excess quantity) addresses this special case by setting out the buyer's rights: if the seller delivers an excess quantity the buyer can either refuse to take, or take, delivery of the amount exceeding the quantity agreed upon. In the latter case, the buyer has to pay for the excess amount.

D. Conformity includes incidental matters

As shown by (b) and (c), the notion of conformity includes certain incidental aspects of the goods. The core goods may be flawless in their own right, while something else renders them not in conformity with the contract. The parties may, for instance, have agreed to package the goods in a special way, to deliver instruction manuals or to supply a repair kit with a car. A seller who fails to perform such obligations has failed to deliver goods conforming to the contract.

Such additional, extraneous features of conformity pose no problem under the present Article, since the parties have agreed on them. They are required by the contract. While these cases could arguably be solved by relying on the description of the goods under (a), for instance that selling a car includes a spare tyre and a repair kit, the express mention is designed to raise awareness of what the seller may also have to supply in addition to the core goods themselves.

However, these extraneous features of conformity play an important role under IV.A.–2:302 (Fitness for purpose, qualities, packaging). This idea of extending conformity beyond the core goods as such has even been carried further by IV.A.–2:304 (Incorrect installation in a consumer contract for sale) for consumer transactions, as the seller can also be held responsible for the incorrect installation of otherwise flawless goods.

E. The aliud

Some legal systems differentiate between defective goods and goods that are something completely different from what the parties had agreed upon, the so-called aliud. The present rules reject this idea. As a result, the notion of conformity applies to all goods, regardless of whether they may deviate substantially from what was agreed upon. If entirely different goods are supplied the buyer can still resort to the remedies for lack of conformity set out in Chapter 4 Section 2.

Illustration 3
A and B conclude a sale concerning red wine from a certain area in Italy. A delivers (a) white wine, (b) red wine from Spain and (c) red wine vinegar. All these deliveries deviate from the contract; arguably they constitute an altogether different performance. Instead of attempting to resolve the question of what can still be seen as a defective performance, and what is an aliud, these cases fall – beyond doubt – under the heading of lack of conformity

F. Remedies of the buyer

If the seller does not perform the obligation under this Article, the buyer can resort to the remedies set out in Chapter 4, Section 2 (subject, in some cases, to certain requirements such as examination and notification).

NOTES

I. The principle of conformity with the contract (Overview)

1. Under the international instruments, CISG art. 35 and Consumer Sales Directive art. 2 establish the uniform principle of conformity with the contract. While the idea, i.e. that the seller has to ensure that the goods delivered are in conformity with the contract in every way, is recognised in general, there are various ways to reach a similar, if not the same, result, which are reflected by a wide range of different notions.

2. To start with, there are systems that closely follow the spirit – but not necessarily the terminology – of the CISG and the Consumer Sales Directive (GERMANY CC § 434(1); ESTONIA LOA § 217(1); FINLAND SGA § 17(1); LITHUANIA CC art. 6.327; NETHERLANDS CC art. 7:17(1) and (2); NORWAY SGA § 17; SWEDEN SGA § 17(1)). This does not come as a surprise, since these systems have borrowed heavily from the CISG in reforming their sales laws, without necessarily throwing overboard their traditional labels (cf. the traditional notions of *mangel* in NORWAY; *fel* in SWEDEN and *Sachmangel* in GERMANY). This choice of terminology has been criticised in the legal literature in SWEDEN, since it can lead to the incorrect conclusion that the goods must be objectively defective in order for the provisions to apply (*Ramberg and Herre,* Allmän köprätt[2], 79, suggest the expression that the goods do not conform with the contract (*icke är avtalsenlig*) as an improvement).

3. Other countries have developed distinct regimes of liability under sales law, which achieve results similar to the notion of conformity contained in the CISG and the Consumer Sales Directive. On the one hand, there are systems with a more general liability (warranty) regime for defective performance that applies to a range of contracts for consideration, thus extending beyond sales contracts (AUSTRIA (*Gewährleistung*) CC § 922 ff; CZECH REPUBLIC CC §§ 499-510; HUNGARY CC

§§ 277 and 305-311/A; SLOVAKIA CC §§ 499-510; SLOVENIA (*jamčevanje)* LOA § 100). In AUSTRIA, these rules are valid for all types of contracts for consideration (*entgeltliche Verträge*); whereas the legal warranty is quite restricted in respect of contracts without consideration (*unentgeltliche Verträge*, see *Koziol and Welser*, Bürgerliches Recht II[12], 63). This general warranty regime is typically reflected by the notions of material and legal defects (see, for instance, SLOVENIA LOA §§ 458 ff and 488). In addition, specific provisions complement and modify this general regime in favour of (certain) sales contracts. Further rules on conformity can also be found in commercial law (cf. SLOVAKIA Ccom arts. 420 f and arts. 433-435 for legal defects).

4. On the other hand, there are systems with a narrower, sales-specific system of liability (DENMARK SGA §§ 42 ff; ENGLAND and SCOTLAND Sale of Goods Act s. 13(1); GREECE CC arts. 534 and 535; LATVIA CC arts. 1612-1615; POLAND CC art. 556 warranty for (material and legal) defects; PORTUGAL CC art. 913 ff). In ENGLAND and SCOTLAND, any failure to comply with the terms of a contract, whether express or implied, constitutes a breach of contract. Sale of Goods Act s. 13(1) provides, in cases of a sale of goods by description, an implied term that the goods will correspond to that description. A sale by description is one where the description used delimits the nature of the goods sold: *Beale v. Taylor* [1967] 1 WLR 1193; *Border Harvesters Ltd. v. Edwards Engineering (Perth) Ltd.* 1985 SLT 128. A sale will not be by description where the description did not sufficiently influence the decision to purchase the goods so as to become a term of the contract: *Harlingdon & Leinster Enterprises Ltd. v. Christopher Hull Fine Art Ltd.* [1991] 1 QB 564. Descriptive words which do not concern the nature of the goods sold may nonetheless amount to an actionable misrepresentation (see for instance *T. & J. Harrison v. Knowles & Foster* [1918] 1 KB 608) or extend to the quality of the goods, addressed in Sale of Goods Act art. 14(2), by the implied term as to the reasonable quality of the goods (which have to be of 'satisfactory quality' if the seller sells in the course of a business). In LATVIA, the seller is liable not only for discrepancies he knew of but failed to indicate, but also for hidden ones CC arts. 1612-1615. In GREECE, liability in sales law is structured in terms of real defects that nullify or substantially diminish the value or the usefulness of the thing (CC art. 534) and a lack of agreed qualities (CC art. 535); in order to determine whether the goods are free from real defects or possess the agreed qualities one should apply a combined test of objective and subjective criteria, the latter stemming from the specific agreement between the parties and their justified expectations. Similarly, the regime of the sale of defective assets in PORTUGAL consists of immanent defects of the asset so that it does not conform to the qualities expected by the buyer. The defect can either be subjectively assessed (the parties agreed on certain qualities of the asset, the seller assures the qualities of the asset; cf. STJ 3 March 1998, CJ (STJ), 1999, I, 107) or objectively when the parties did not establish in the contract the specific purpose of the sold asset (cf. STJ 23 March 1976, BolMinJus 255, 133). In the latter case, conformity of the asset is assessed by fitness for the normal purpose of assets of the same category (CC art. 913(2); cf. STJ 5 December 1967, BolMinJus 172, 230; *Calvão da Silva*, Compra e venda de coisas defeituosas[4], 130; *Romano Martinez*, Direito das obrigações[2], 130 ff; *Romano Martinez*, Cumprimento Defeituoso, 163 ff; *Braga*, Contrato de Compra e Venda). In POLAND CC art. 556(1) the seller is liable for three categories of physical defects: (1) defects which reduce the value or utility of the thing with respect to the purpose stipulated in the contract or resulting from the circumstances or the destination of the thing, (2) if the thing does not have the properties which the seller assured the buyer, or (3) if the thing was released to the buyer in an incomplete condition (warranty for legal defects).

5. Finally, there is a group of systems that rely on a distinction between, roughly speaking, hidden defects and non-conforming delivery. Common to those systems is often that the distinction between the different categories of defects is not always clear, but at the same time it is extremely important as, depending on the nature of the defect, different remedies and limitation periods apply.

6. Under FRENCH and BELGIAN law a distinction has to be made between hidden defects (*garantie des vices cachés/ vrijwaring voor verborgen gebreken* pursuant to CC arts. 1641 ff) and non-conforming delivery (*défaut de délivrance conforme/ niet-conforme levering* according to CC art. 1604). This distinction stems from the French CC, where art. 1603 states that the seller is under two obligations: the obligations to deliver and to guarantee the thing he sells. But while these obligations of the seller were initially simple, the interpretation of these articles by the *Cour de cassation* has completely changed the regime which is applicable to the buyer. The FRENCH *Cour de cassation* ruled that there is a hidden defect when the goods are not fit for their destined use (see for instance Cass.civ. I, 16 June 1993, Bull.civ. I, no. 224; D. 1994, 546, with note *Th. Clay*). In contrast, non-conforming delivery is based on a difference between the goods promised and the goods delivered. For example: the delivery is not in conformity when the ship sold is not as powerful (in terms of speed) as promised (Cass.com. 27 April 1979, Bull.civ. IV, no. 132); there is a hidden defect when the car sold rusts (Cass.civ. I, 4 July 1995, Bull.civ. I, no. 302). It is important to keep in mind that this distinction is not chronological, since the lack of conformity concerning delivery does not necessarily show up before the delivery and the buyer is not obliged to notice this defect when he takes delivery. The BELGIAN regulation of a guarantee against hidden defects has largely been developed by the case law of the BELGIAN *Cour de Cassation*. The seller's guarantee against hidden defects only exists under strict conditions. The thing sold must be affected by an intrinsic or a functional defect that is hidden and serious and that at least was already latently present at the moment the contract of sale was entered into. By judgments of the *Cour de Cassation* of 18 November 1971 (*AC* 1972, 274) and 17 May 1984 (*AC* 1983-84, 1205) a broad functional interpretation of the concept of 'defect' is used. It is thus possible that the thing in itself is perfect and shows no structural or intrinsic defect, but that it is unfit for the desired purpose. This functional interpretation of the concept of a defect is applicable to a condition that the seller knew about concerning the purpose of the thing because either the buyer informed him of the purpose or it concerns the usual application of the thing, or because the seller has suggested the purpose in the advertisement before or at the moment when the contract was entered into.

7. A somewhat similar system can be found in SPAIN where the seller is obliged to deliver the object of sale with the characteristics it had at the time the contract was concluded, including the fruits of the good as of that moment onwards (CC art. 1468), as well as all other stipulations agreed upon in the contract (CC art. 1469(1)). The seller is also obliged to guarantee the legal and peaceful possession of the good (CC arts. 1474 ff), and that the goods do not have hidden burdens (CC art. 1483) and hidden deficiencies (CC art. 1484) that render them unsuitable for the purposes for which assets of the same type would ordinarily be used (see also for commercial sales Ccom arts. 336 and 342). Some authors disagree with this variety of regimes and think that it would be better to apply a uniform regime (see *Morales Moreno*, ADC 2003, 1616 f). See also the proposal of the Project for reform of the civil code , which follows Professor Morales's thoughts ("Propuesta de Anteproyecto de ley de modificación del código civil en materia de compraventa" and *Fenoy Picón*, CCJC (68) 2005, 509-556). Nevertheless, in court practice the rules concerning hidden defects and their remedies have become obsolete. In fact, courts mainly resort to the

flexible category of "aliud" with the purpose both of encompassing in the vendor's guarantee a wider range of duties and of improving the useless set of old remedies laid down in the Civil Code (see *Fenoy Picón*, Falta de conformidad, pp. 79 ff and *Carrasco Perera*, ZEuP 2006, pp. 552 ff).

8. In ITALY three different categories of defects are distinguished: warranty for defects (CC art. 1490 *garanzia per vizi*); lack of essential qualities (CC art. 1497 *mancanza di qualità*); and *aliud pro alio.* Defects affect the good in a way that it is no longer suitable for the use for which it was intended or its value is notably lowered, whereas goods lack essential qualities where such qualities are considered essential for the use for which they were intended or when these qualities were specifically promised to the buyer (for *aliud pro alio*, see 3 below).

9. The systems which have retained their previous regime of liability have often introduced a separate regime for non-conformity under consumer sales in order to implement the Consumer Sales Directive (BELGIUM CC art. 1649ter §§ 1 ff; CZECH REPUBLIC CC § 616; ENGLAND and SCOTLAND Sale of Goods Act s. 48F, which refers to "[…] a breach of an express term of the contract or of a term implied by section 13, 14 or 15 […]"; FRANCE Consumer Code arts. L. 211-1 ff; ITALY Consumer Code arts. 128-135; LATVIA Consumer Protection Act arts. 13-16 and 27-30; POLAND Consumer Sales Act art. 4; SLOVAKIA CC § 616; SPAIN ConsProtA arts. 114 ff. However, it should be noted that in the CZECH REPUBLIC there was already an existing consumer sales regime applicable to goods sold in stores which was changed by the implementation of the Consumer Sales Directive (cf. CC §§ 616-627).

10. The other systems rely on the general regime also for consumer sales. As for non-conformity, only a few provisions deviate from the general regime, generally provisions included in order to implement the Consumer Sales Directive, such as the seller's liability for public statements. Moreover, the consumer sales regime is mostly mandatory in favour of the consumer.

II. Relationship to other instances of non-performance, in particular delay

11. Notwithstanding the introduction of a uniform concept of conformity, the traditional distinction between delay in delivery and defects in the goods was maintained in the NORDIC COUNTRIES (a 'breach of contract' on the part of the seller can be qualified as *tavaran luovutuksen viivästys/ forsinkelse/ dröjsmål* (embracing both delayed performance and non-performance), *tavarassa oleva virhe /mangel/ fel* (lack of conformity), or *oikeudellinen virhe/ rettsmangel/ rättsligt fel* (defects of title) (DENMARK; FINLAND; NORWAY; SWEDEN). This is also true for GERMANY where delay falls under a separate regime (a sub-type of breach) in CC §§ 280(1) and (2) and 286. Similarly in the NETHERLANDS (cf. CC arts. 6:81 ff) and POLAND (CC art. 491) where to a certain extent the difference between delayed performance, defect and defect of title exists.

12. As already pointed out at 1. above, this distinction remains of the utmost importance in some countries, notably in systems having two, or more, completely separate regimes such as BELGIUM, FRANCE, ITALY and SPAIN. To a certain extent, the same holds true for AUSTRIA and SLOVENIA, where the seller's liability is based on different forms of breach (defective performance, non-performance, impossibility, breach of secondary duties). In SLOVENIA, for instance, the liability (warranty) regime for defective performance (*jamčevanje*) differs considerably from liability for non-performance (*neizpolnitev*, LOA § 103). As it is difficult to separate them (especially '*peius*' from '*aliud*') the theory (Juhart and Plavšak (-*Juhart*), Obligacijski

zakonik II, 361) leaves the decision up to the creditor (buyer) – he can reject a defective performance (regard it as a non-performance) or accept it and claim warranty rights.

13. Also under other systems, there may be a differentiation between different types of breach of contract to a limited extent. For instance, although ESTONIAN contract law generally does not distinguish between defective performance, non-performance and delay as any breach entitles the other party to remedies under the general contract law rules (LOA §§ 100-107) the provisions of sales law contain certain specific rules regarding the seller's liability for defective performance (LOA §§ 217-227) which amend the general rules on contractual liability whereas the liability for non-performance and delay is covered with general liability rules only.

III. The notion of 'aliud'

14. In the majority of systems, the notion of '*aliud pro alio*', i.e. a delivery of goods different from what was agreed upon, does not constitute a separate ground for liability in sales law. Under some systems this is made clear by express reference (GERMANY CC § 434(3); NETHERLANDS CC art. 7:17(3)). In the NORDIC COUNTRIES, such a breach can either be qualified as lack of conformity or late/non-performance (for FINLAND, see *Routamo and Ramberg*, Kauppalain Kommentaari, 140 f; in SWEDEN such an incorrect delivery is normally considered to be a mistake, in which case the seller has failed to perform the contract and will be held liable for non-performance. However, if the seller intended to perform the contract through such a delivery, and hence there was no mistake involved, this will always fall under the provisions regarding non-conformity, see *Ramberg*, Köplagen, 265 f). Similarly in GERMANY there has been much debate as to whether all aliuds are aliuds in the terms of CC § 434(3) which is favoured by the majority of legal authors (see e.g. *Lettl*, JuS 2002, 868 f; *Musielak*, NJW 2003, 89 ff), or whether some are so different (delivery of red wine instead of a horse, example borrowed from *Medicus*, Bürgerliches Recht[20], 200) that this simply constitutes non-performance. Under ENGLISH and SCOTTISH law, however, many such cases would constitute a case of non-correspondence with description under Sale of Goods Act s. 13. Typically, such deliveries fall under the respective regimes relating to lack of 'conformity' in the widest meaning. Another interpretation is offered by the CZECH REPUBLIC, where the delivery of something completely different is either seen as a proposal to amend the sales contract, or as a lack of conformity. Under CZECH commercial sales an aliud is always considered to be a lack of conformity (Ccom art. 412). Under non-commercial sales an aliud is either a proposal to amend the contract or a lack of conformity, depending upon the reaction of buyer (cf. Knappová, Civil Law II[3], 103-104).

15. In contrast, in AUSTRIA, ITALY, SLOVENIA and SPAIN it is necessary to distinguish the delivery of an *aliud* from other breaches by the seller. The basic idea is that the seller, by delivering something completely different (i.e. an *aliud*) than what was agreed upon, does in fact not deliver at all, and is, thus, in default (SLOVENIA *Cigoj*, Komentar, 1439. In SPAIN, in Supreme Court Judgments (TS 23 March 1985, RAJ 1985 no. 1500, TS 6 April 1989, RAJ 1989 no. 2994) this concept has been broadly construed, so as to qualify as "aliud" any lack of conformity going "beyond the customary imperfections", *Fenoy Picón*, Falta de conformidad, pp. 223). As a consequence, the rules on non-performance apply, which differ from the otherwise applicable regime of seller's liability in various ways. In AUSTRIA, the main difference are the time-limits within which the buyer has to bring his claim and for commercial sales the notice requirement in Ccom § 378; it is interesting to note that

this issue has arguably become less pressing with the prolongation of the former short period of limitation of warranty claims (cf. the similar situation in GERMANY where the *aliud* has ceased to exist as a legal institution). In SLOVENIA the seller is automatically in delay, i.e. the buyer is not required to notify the seller. In addition, he can decide between claiming specific performance, termination of the contract and claiming damages (LOA § 103). In ITALY and SPAIN, both the time-limits and the applicable remedies are different. In ITALY CC art. 1497 governs cases of lack of quality of the goods, withdrawal from the contract is governed by the general rules of cancellation laid down in CC art. 1453, provided, however, that the lack of quality exceeds the normal tolerance limits set up by customs. However, the time-limits for withdrawing from the contract are the same as provided in CC art. 1495, i.e., the buyer is obliged to notify the seller within 8 days after becoming aware of the defects and, in any case, within one year after the delivery of the goods. In SPAIN, the buyer is protected by CC arts. 1101 and 1124; when it comes to the time-limits for the actions, the TS has maintained a flexible position since both the period of 15 years under CC art. 1964, i.e. the general prescription period for personal actions, and the period of six months under CC art. 1490, i.e. the time-limit for hidden defects, do not seem appropriate. This does not mean, however, that buyer can remain passive upon the discovery of a deficiency (see *Morales Moreno*, ADC 2003, 1617 and 1625 and *Fenoy Picón*, Falta de conformidad, and for consumer sales see *Fenoy Picón*, El sistema de protección del comprador, 179 ff). Similarly under HUNGARIAN law, if the seller delivers something other than what was agreed upon (aliud), the rules on late performance will apply (see *Kisfaludi*, Az adásvételi szerződés, 181).

16. Given the legal consequences attached to the delivery of an *aliud*, the issue of delimitation is of the utmost importance. However, it is fair to say that the question of what constitutes an *aliud* is complicated and can often only be answered on a case by case basis (a detailed overview for AUSTRIA is provided by Straube (-*Kramer*), HGB I^2, §§ 377, 378, nos. 58 ff). In ITALY the *aliud pro alio* has been defined as the 'most macroscopic non-performance of the vendor' (Cass. 13 February 1973 no. 452, Racc.Dec.Cass. 1972-82, voce *Vendita*, c. 9776 no. 39), which may, nonetheless, be very difficult to distinguish from a case of lack of qualities of the goods (*Intersimone*, Giur.mer. 1995, 1, 753-754). The traditional doctrine distinguishes two different cases of *aliud pro alio*. In a strict sense, *aliud pro alio* is a case of the delivery of a completely different good. In a broader sense, *aliud* can be detected when the goods delivered belong to a different *genus* from what was agreed upon. The first case is clearly recognisable by the buyer. While in the second one, the situation is more complicated. The goods belonging to a different *genus* may both be regarded as a case of lack of quality or of *aliud pro alio*. That is why case law has provided for a further criterion permitting a distinction. The good has to belong to a different *genus* and not to be in a condition to solve an economic-social function to which it is devoted (*Valentina*, Diritto e giurisprudenza 1997, 207-229; for an overview of the case law on the issue, see *Bin*, La vendita II, IV). In SLOVENIA some writers argue in a similar direction, as the distinction should be based on the *causa* of the contract, i.e. the question of whether the purpose of the contract can be achieved (*Cigoj*, Komentar, 412), which is akin to the concept of fundamental breach in the CISG. Others, however, argue in favour of leaving a decision for the system of sanctions (non-performance, defective performance) up to the creditor (buyer) – since the buyer cannot be forced to accept defective delivery and claim warranty rights, he can reject it (regard it as non-performance) or accept it and claim warranty rights (Juhart and Plavšak (-*Juhart*), Obligacijski zakonik II, 361). In SPAIN, the TS has distinguished between two types of *aliud*: when the goods have characteristics that are opposed to

the ones agreed upon (*prestación diversa sustancial*), and when the goods cannot be used for the purpose desired by the buyer (*prestación diversa funcional*). Since it is not easy to differentiate between the *aliud* and hidden defects, most of the doctrine is in favour of broadening the scope of *aliud pro alio* to cases where the object of the sale suffers from very important defects which render it of no use for the buyer (cf. *Rodrigo Bercovitz*, CCJC 1 § 125, CCJC 2 § 60, CCJC 8 § 199 and CCJC 14 § 369; Albaladejo (-*Carrasco*), Comentarios al Código Civil y compilaciones forales XV(1), 394 ff; *Orti Vallejo*, Los defectos de la cosa en la compraventa civil y mercantil, 52; *De la Cuesta Rute*, Contratos Mercantiles, I, 169-171).

17. Finally, LITHUANIA uses a somewhat different concept: if the goods do not conform to the range provided in the contract, CC art. 6.332 provides that the buyer has the right to refuse delivery and payment or, if payment has already been made, to demand restoration of the price paid, unless the contract provides otherwise.

IV. Restricted liability for lack of conformity in sales 'as is'

18. Various countries restrict the seller's liability in the case where the parties have agreed that the goods are sold 'as is' (AUSTRIA (*Pausch und Bogen)* CC § 930; CZECH REPUBLIC CC § 501; FINLAND SGA § 19; SWEDEN (*befintligt skick)* SGA § 19 and Consumer Sales Act § 17, which also applies to second-hand goods purchased at auctions). In AUSTRIA, such a sale is defined as the sale of goods without having counted, measured, or weighed them; whereas in LATVIA, when selling a rural land unit or a commercial, manufacturing or other business 'as is', everything is to be considered sold which is located there at the time of closing the purchase and is used for the benefit and ease of the farm or business, was needed or used by the vendor, was his reserve or property.

19. The NORDIC COUNTRIES set forth certain minimum requirements which the goods have to meet even if they are sold 'as is'. (1) If the goods have been sold subject to an 'as is' clause or a similar general reservation concerning their quality the goods are, nevertheless, to be considered defective if: (1) (i) the goods do not conform with information relating to their characteristics or use which was given by the seller before the conclusion of the contract and (ii) the information can be presumed to have had an effect on the contract; (2) (i) the seller has, before the conclusion of the contract, failed to disclose to the buyer facts relating to the properties or the use of the goods which the seller could not have been unaware of and which the buyer reasonably could expect to be informed about and (ii) the failure to disclose the facts can be presumed to have had an effect on the contract; or (3) the goods are in essentially poorer condition than the buyer could reasonably expect taking into account the price and other circumstances (FINLAND, NORWAY and SWEDEN SGA § 19(1)). Under NORDIC consumer sales, the goods are moreover regarded as non-conforming notwithstanding being sold 'as is', if they are in a worse condition than the buyer could reasonably have presumed, considering the price and other circumstances (FINLAND Consumer Protection Act chap. 5 § 14; NORWAY and SWEDEN Consumer Sales Act § 17). The provision has been criticised as superfluous since it only leaves room for a very slight difference between goods sold 'as is' and goods sold without such a limitation clause. However, such a clause may still lower the expectations of the buyer as to the quality and condition of the goods (see *Håstad*, Den nya köprätten[5], 243). Basically, the same applies for the NETHERLANDS under the general rule of CC art. 7:17(2). Under CZECH law CC § 618 contains a similar rule for the sale of sub-standard goods in consumer sales. Accordingly, goods with flaws that do not prevent use for the specified purpose, must be sold at a lower price than the market price for sound goods.

In addition, the seller has to inform the buyer about the nature of the goods, unless it is already obvious from the nature of the sale.

20. In FRANCE, on the other hand, CC art. 1643 provides that the parties can agree to exclude the seller's liability for hidden defects. However, case law has restricted this possibility to contracts between professionals in the same field of competence (see e.g. Com. 6 November 1978, JCP 1979.II.19178 note *J. Ghestin*) and contracts between non-professionals (Cass.civ. III, 12 November 1975, Bull.civ. III, no. 330). In POLAND parties may exclude liability for warranty (CC art. 558(1)), which is however ineffective if the seller insidiously conceals the defect from the buyer (CC art. 558(2)).

IV.A.–2:302: Fitness for purpose, qualities, packaging

The goods must:

(a) be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgement;

(b) be fit for the purposes for which goods of the same description would ordinarily be used;

(c) possess the qualities of goods which the seller held out to the buyer as a sample or model;

(d) be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods;

(e) be supplied along with such accessories, installation instructions or other instructions as the buyer may reasonably expect to receive; and

(f) possess such qualities and performance capabilities as the buyer may reasonably expect.

COMMENTS

A. General

This Article, together with IV.A.–2:303 (Statements by third persons), ensures that unless the parties have agreed otherwise, the goods have to live up to certain standards and expectations. The obligations under this article reflect what the buyer will normally expect.

The Article lays down various criteria for establishing conformity, and hence a lack of conformity. These criteria are default rules, as the parties are free to agree upon different standards in their contract. Nonetheless, they serve an important purpose by clarifying what conformity normally entails ('The goods must'). In fact, this wording seems slightly more straightforward than that of either the CISG, which stipulates when the goods do not conform to the contract ('goods do not conform […] unless'), or the Consumer Sales Directive, which sets out presumptions of conformity ('goods are presumed to be in conformity […] if they'). Notwithstanding these differences in drafting, the result remains the same in so far as the goods, unless the contract provides otherwise, are supposed to live up to certain standards and expectations, i.e. the minimum requirements laid down in sub-paragraphs (a) to (f).

The Article gives an indication as to what the notion of conformity entails, and, by doing so, can clarify vague statements, such as references to general quality standards. Conversely, if the seller wants to exclude the application of one of the requirements in (a) to (f), this will have to be addressed in the sales contract (see Illustration 2 below). In this way, even though the parties are free to agree on a different standard of conformity, these implied requirements may therefore influence the application of IV.A.–2:301 (Conformity with the contract).

A particularly important factor is how the goods have been described. The buyer is entitled to goods that will, for instance, be fit for the purposes for which goods of that description are ordinarily used. Thus goods sold as food for people must normally be at least fit for human consumption, shoes must be fit for wearing and motor cars must be roadworthy. But if the seller's description of what is offered for sale makes it clear that the goods are sub-standard,

then the goods only have to be fit for the purpose for which such sub-standard goods would commonly be used.

Illustration 1
A car dealer offers a used car for sale to a private motorist. The car has been involved in an accident and there is a major problem with the chassis which results in the car being unsafe. The car is not fit for the purpose for which cars are normally used and does not conform to the contract.

Illustration 2
The seller sells the car as a 'write-off' and 'for parts only'. The defect in the chassis does not prevent the car conforming to the contract, since it was described as not fit to drive.

In a non-consumer case the parties are in any event free to derogate from these rules. Thus the seller of the written-off car could in principle achieve the same result simply by excluding the application of the present Article paragraph (b) – although that would be a less transparent way of proceeding and would run more risk of a challenge under Book II, Chapter 9, Section 4. Even where the seller uses a description such as " scrap car, for parts only" , the goods must still be fit for the purposes for which goods of that description would normally be used. Thus if the dealer sells what is described as a 'written-off 2003 Peugeot, for parts only' and in fact the original parts that are useable have already been stripped out and replaced by worn-out parts taken from other cars, the goods are not in conformity with the contract. They are not fit for use in the way described as a source of parts.

It will be seen that the same principles apply to the other aspects of conformity. Thus if the seller shows the buyer a sample of, say, a computer that is for sale in a sealed box, and the computer shown is in perfect working order, then the actual computer supplied must be of the same standard. If, in contrast, the seller shows the buyer an obviously dysfunctional computer, the goods supplied need not be any better. (If the seller shows the buyer a new computer but says that the one supplied will not be in the same condition, the first computer is not being held out as a sample.)

This holds equally true for consumer contracts for sale, albeit with an important caveat in IV.A.–2:309 (Limits on derogation from conformity rights in a consumer contract for sale). In a consumer contract for sale the rights given by this Article cannot be excluded or restricted. This does not mean that a seller cannot sell a written-off car to a consumer without incurring liability for non-conformity. What it does mean is that the seller must ensure that the car is described as just what it is - a 'write-off, good for parts only' - rather than relying on some clause which the consumer may not read or may not understand. For the question of a derogation from these implied requirements under consumer contracts for sale, see further IV.A.–2:309 Comment B.

B. Default requirements of conformity

The different requirements of this Article constitute default rules; therefore the parties are in principle free to agree to modify or exclude, or otherwise to deviate from them. One can distinguish six basic aspects of conformity, which apply in a cumulative manner:

Fitness for purpose. The fitness for purpose issue is dealt with in (a) and (b). To start with the more general statement, the goods sold have to be fit for their ordinary purposes, i.e. the ones for which goods of that description are commonly used. Moreover, the goods may also have to be fit for a certain particular purpose, such as an uncommon application or use of goods. However, in such a case the seller is liable only if two conditions are met. First, the buyer must have made the particular purpose known when concluding the contract. Secondly, the buyer must have relied on the seller's expertise and it must have been reasonable to do so.

> *Illustration 3*
> A buys a notebook computer from B. If it fails to perform its normal task, that is work in an office environment, it is not in conformity. If it will work in the office but A uses the notebook for an unusual application, e.g. his research in a rainforest, where it fails to work, B can only be held responsible if he made this particular purpose known to the seller. The seller can still escape liability if he can show that the buyer could not (reasonably) have relied on his skill and judgement, for instance as the notebook was sold in bulk in a supermarket.

Sample or model. Reference to a sample or model is regulated by (c) as a special instance of the seller's description. In essence, this rule relates to specific information given to the buyer before the conclusion of the contract. In other words, the buyer can rely on the fact that the delivered goods will show the same qualities as the samples or models upon which the decision to purchase was made.

Packaging. The proper packaging for the goods is dealt with in (d). The seller has to package the goods in the manner usual for such goods, and if there is no such usual manner, has to package them in a way adequate to preserve and protect the goods. This distinction suggests that certain standards or usages in commerce prevail over the rationale of the rule, i.e. making sure that goods are not unnecessarily exposed to damage. Even though such a rule has an obvious application in commercial cases – as proper containment and packaging may prove essential for handling the goods – it may also play a role in other settings, such as consumer contracts for sale or transactions between private parties. The latter have become even more relevant with the increase in distance sales, especially those concluded via the Internet.

Accessories. The seller may have to deliver certain accessories, for instance a spare tyre and a repair kit together with a car. Obviously, these items could be sold separately, but should be covered by the conformity obligation if it is customary that they are included in the price and if the buyer can therefore reasonably expect them.

Instructions. Installation or other instructions are, according to (e), part of the conformity standard if the buyer can reasonably expect to receive them. Naturally, parties can agree to deliver goods with instructions; this obligation is then already governed by IV.A.–2:301 (Conformity with the contract) sub-paragraph (c). However, the rule in (e) takes into account the fact that certain goods are so complicated that the buyer may need instructions to use them. As a result, these instructions are considered to be part of the goods by way of implication. It depends on the circumstances whether the buyer can indeed expect instructions, but this would often be the case concerning technical equipment. In the case of brown or white goods, the consumer will expect instructions as to their use. Under sub-paragraph (e) there is no requirement as to the language or languages in which the instructions should be written. No practicable solution was found in order to safeguard that the buyer actually understands the instructions. Nevertheless, it can be required that the language has a

link to either the buyer or the seller, the place where the sales contract was concluded or the language in which it was concluded.

Illustration 4
A consumer buys a sewing-machine in a normal shop in an EU Member State. When he arrives home he discovers that the instructions are only provided in Chinese. This is clearly not what he may reasonably expect and hence the buyer will be entitled to claim remedies for non-conformity.

Buyer's reasonable expectations. The general quality standard is regulated in (f), as the goods have to show certain qualities and performance capabilities, which depend on the buyer's expectations. This rule is very important as it emphasises the buyer's point of view by introducing the buyer's expectations as a separate, stand-alone implied requirement which the goods have to meet. Having said that, it should be noted that the expectations on the part of the buyer are already implicit in the previous sub-paragraphs, but (f) functions as a general sweep-up rule, since it goes beyond what is already covered in the rest of the provision. However, it should be pointed out that not all subjective expectations of a buyer which are unknown to the seller should have an influence on the question of conformity, even if they are reasonable. In particular, there may be different opinions on what is reasonable with regard to performance capabilities: what may be regarded as excellent performance capacities in one country (shoes lasting only one year), may be seen as poor quality in another. Ultimately, what the buyer may reasonably expect under this paragraph will have to be decided by the Courts.

In evaluating the buyer's expectations, regard must be had to what one can expect from certain comparable goods (cf. the similar issue under art. 6 of the Product Liability Directive, which, inter alia, refers to 'the presentation of the goods' and 'the use to which it could reasonably be expected that the product would be put'). Some general examples may be where advertising creates expectations or where the goods are fit for their purpose but are not of a high enough general quality. More concretely, sub-paragraph (f) could be used, for instance, in relation to durability expectations for goods sold as sub-standard or for second-hand goods. Particularly under consumer contracts for sale, the buyer's reasonable expectations could also relate to after-sales services or the availability of spare parts. Also the expectations could concern the origin of a certain product.

Illustration 5
A buys a yacht from B. A has assumed that the boat has been produced in a certain country like all the previous ones of this type. However, it turns out that the keel was constructed in another country, a fact which gives the yacht a lower market value. The yacht is not in conformity with the contract since it does not live up to the buyer's reasonable expectations.

NOTES

I. (Implied) criteria for establishing lack of conformity

1. The criteria contained in the present Article have been inspired by both CISG art. 35(2) and Consumer Sales Directive art. 2(2); the comparative notes below will examine in how far these rules are also reflected by the various national sales laws. In

this context, it will not come as a surprise that both the systems influenced by the CISG (see e.g. ESTONIA LOA § 217(2); FINLAND SGA § 17(2); NETHERLANDS CC art. 7:17(2)-(4); NORWAY SGA § 17 and Consumer Sales Act §§ 15-18; SWEDEN SGA § 17(2)) and the rules on consumer sales tend to show a somewhat greater level of detail than traditional concepts.

II. Fitness for normal purpose

2. All systems contain rules on the goods' fitness for purpose, albeit not necessarily laid down explicitly for all kinds of sales transactions. It is generally required that the goods must be fit for their normal purpose (CISG art. 35(2)(a); Consumer Sales Directive art. 2(2)(c); CZECH REPUBLIC CC § 616(1)(d); ESTONIA LOA § 217(2)2); FINLAND SGA § 17(2)(1) and Consumer Protection Act chap. 5 § 12(1); ENGLAND and SCOTLAND Sale of Goods Act s. 14(2B); GERMANY CC § 434(1) no. 2; HUNGARY CC § 277(1); LITHUANIA CC art. 6.333; NETHERLANDS CC art. 7:17(2); NORWAY SGA § 17(2)(a) and Consumer Sales Act § 15(2)(a); POLAND Consumer Sales Act art. 4(3); SLOVAKIA CC § 496(1); SLOVENIA LOA § 459(1); SWEDEN SGA § 17(2)(1) and Consumer Sales Act § 16). A slightly different wording, although to the same effect, is used in AUSTRIA and the CZECH REPUBLIC, which refers to the fitness for use according to the nature [and purpose] of the contract or the express specification/agreement of the parties (AUSTRIA CC § 922(1); CZECH REPUBLIC CC § 499; POLAND (non-consumer sales) CC art. 556(1)). Under some systems this normal purpose is further specified. CISG art. 35(2)(a) speaks of the purpose for which goods of the same description would ordinarily be used; a similar rule has been adopted in ESTONIA (CC § 217(2)2)). Under GERMAN law the goods must be of the quality which is customary for goods of the same kind and which the buyer could expect for those kinds of goods, CC § 434(1)(2)); see also under AUSTRIAN law (CC § 922). The same principle is applied in ESTONIA as a general contract law rule (LOA § 77(1)) although the general quality test would only be relevant if the goods are found to be fit for the purpose within the meaning of sales law (LOA § 217(2)2)). Under ENGLISH and SCOTTISH law the goods must be fit for all the purposes for which goods of the kind in question are commonly supplied, Sale of Goods Act s. 14(2B)).

3. Certain systems introduce a(n) (explicit) fitness for purpose test in relation to commercial sales (CZECH REPUBLIC and SLOVAKIA Ccom art. 420; quantity, quality, workmanship and packaging of goods) or consumer sales (BELGIUM CC art. 1649ter § 1; CZECH REPUBLIC CC § 616; DENMARK SGA § 75a(2); LATVIA Consumer Protection Act art. 14(1) no. 1 and 2; SLOVAKIA CC § 616).

4. In other systems, fitness for purpose is implied in the traditional notions of liability in sales law. In BELGIUM, a broad functional interpretation of the concept of 'defect' is used in case law. It is possible that the goods as such are perfect and show no structural or intrinsic defect, but that they are unfit for the desired purpose. This functional interpretation of the concept of defect is applicable on condition that the seller knew about the purpose of the thing because it concerns the usual application of the goods (Cass. 18 November 1971, A.C. 1972, 274; Cass. 17 May 1984, A.C. 1983-84, 1205; Antwerp 20 September 1995, RW 1997-98, 880; Ghent 18 February 1994, RW 1995-96, 1238; Ghent 21 November 1996, RW 1997-98, 823; Brussels 5 June 1996, Res Jur. Imm. 1996, 122; Bergen 13 October 1997, JT 1998, 183, Rb Turnhout 19 January 1995, Turnh. Rechtsl. 1995-06, 146; Ghent 26 June 1997, RW 1998-99, 543). The FRENCH *Cour de cassation* ruled that there is a hidden defect (CC art. 1641) when the goods are not fit for their destined use (see for instance Cass.civ. I, 16 June 1993, Bull.civ. I, no.224; D. 1994, 546, with note *Th. Clay*). In ITALY, the

criterion of the essential qualities for the intended use under CC art. 1497 implies an evaluation of fitness for purpose of the good: essential qualities are those attributes as to the material, structure and measure that permit the utilisation of the good for its purpose. The goods have to present those properties necessary for an utilisation which is normally satisfactory (App Trieste 28 July 1961, in Rep.Giur.it., 1961, Vendita, no. 124). In PORTUGAL, the goods sold are considered defective if they have a defect that reduces their value or renders them unfit for their purpose, or if they do not have the qualities assured by the seller (CC arts. 905 and 913). If the purpose is not expressed in the contract, the normal purpose for that category is considered (CC art. 913(2); cf. *Romano Martinez*, Direito das obrigações[2], 131; *Calvão da Silva*, Compra e venda de coisas defeituosas[1], 42; STJ 23 March 1976, BolMinJus 255, 133; STJ 26 July 1977, BolMinJus 269, 152; RE 12 December 1996, CJ 20, 5, 273). However, if the qualities of the thing were expressed in the contract, the case is one of non-performance of the contract, and its consequences (termination, *exceptio inadimpleti contractu*) apply, not avoidability out of fraud/mistake (STJ 2 March 1995, BolMinJus 445, 445; RP 5 May 1997, CJ 1997, 3, 179. *Romano Martinez*, Cumprimento Defeituoso, 125 disagrees, arguing that termination should be the remedy in all cases, not avoidability). In SPAIN, the suitability for purpose test is enshrined in the rules on the guarantee against hidden defects (*saneamiento por vicios ocultos)*, which state that hidden defects must render the goods unfit for the intended use to such an extent that, if the purchaser had known of such defects, he would not have bought the item or would have paid a lower price for it. In the absence of an agreement on the use of the good, it is to be understood that the good is bought for the use normally given to it in accordance with its nature and with the activity of the buyer (TS 31 January 1970, RAJ 1970 no. 370 and *Diez-Picazo and Gullón*, Sistema II, 306).

III. Fitness for particular purpose

5. In addition, it is required that the goods are fit for any particular purposes not necessarily being part of the normal use of the goods under certain preconditions. The regulations in this respect differ between the different systems. Under many systems the goods must be fit for any particular purpose made known to the seller at the time of the conclusion of the contract (CISG art. 35(2)(b); Consumer Sales Directive art. 2(2)(b); ESTONIA LOA § 217(2)2); FINLAND SGA § 17(2)(2), (Supreme Court Case KKO 1991:153) and the Consumer Protection Act chap. 5 § 12(2); LITHUANIA CC art. 6.333; NETHERLANDS CC art. 7:17(2); NORWAY SGA § 17(b) and Consumer Sales Act § 15(c); POLAND CC art. 556(1) and Consumer Sales Act art. 4(2); SWEDEN SGA § 17(2)(2) and Consumer Sales Act § 16(2) no. 2). Under other systems a corresponding regulation is only to be found under consumer sales (BELGIUM CC art. 1649ter § 1; DENMARK SGA art. 75a(2); LATVIA Consumer Protection Act art. 14(1) no. 3; SPAIN Consumer Sales Act art. 1(c)). Under LATVIAN law it is further expressly established that such a purpose can be directly or indirectly communicated to the seller when entering into the contract (Consumer Protection Act art. 14(1) no. 3). Under ENGLISH and SCOTTISH law there is a similar regulation if the seller is a professional and the buyer, expressly or by implication, makes known any particular purpose for which the goods are being bought, so that there is an implied term that the goods supplied under the contract are reasonably fit for that purpose, Sale of Goods Act s. 14(3)). Buyers who intend to use goods for unusual purposes must make these explicit or the seller will not be in breach if the goods are inappropriate for the unusual purpose (*Slater v. Finning Ltd.* [1997] AC 473). In FRANCE the guarantee against hidden defects does not only concern the fitness of the good with its normal purpose, but also the fitness with the purpose

agreed by the parties. Such is the case concerning an old vehicle sold for collection purposes, where the buyer cannot later complain that its circulation is prohibited (Cass.civ. I, 24 November 1993, Bull.civ. III, no. 347).

6. Some systems focus more on the seller's actual knowledge of the particular purpose. Under SLOVENIAN law LOA § 459(2) establishes that there is a material defect if the goods lack the properties necessary for special use, intended by the buyer, of which the seller was aware or could not have been unaware. Similarly under BELGIAN case law the functional interpretation of the concept of defect is applicable on condition that the seller knew about the purpose of the thing because the buyer had disclosed the purpose to him.

7. Under other systems such a particular purpose has to be based on a promise by the seller. In ITALY CC art. 1497 the seller has to deliver goods that possess the quality promised to the buyer. The promise of certain qualities may be based on an explicit request by the buyer or on a specific offer by the seller when he declares, for instance, that the good possesses certain specific advantages (e.g. as to productivity, composition, age, originality, novelty of the model, etc.). The promise of certain qualities may be explicit or tacit (for an example of the liability of a seller for the delivery of a 'used' good instead of a new one, see Cass. 3 August 2001, no. 10728, in I contratti 2001, with note *Romeo*, 177-180). A tacit promise is for instance one which derives from the indication of an atypical or particular function of the good which exceeds the limits of a normal destination of the good. The seller is then obliged to hand over goods which present the qualities which are necessary in order to realise that function.

8. Other systems still rely on the contract in this case. Under GERMAN law CC § 434(1)(1) the relevant provision merely says that the goods must be fit for the purpose provided by the contract. Similarly under AUSTRIAN law CC § 922(1) which refers to the application or use according to the express specification. In SPANISH law the priority of the agreed and special purpose is largely accepted (see TS 3 March 2000, RAJ 2000 no. 1308, and *Morales* in *Commentary Civil Code* by the Ministry of Justice, 1991, II, p. 956).

9. Under the systems where a notice will bind the seller as to the particular purpose, there are some exceptions as to this rule. This applies where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgement (CISG art. 35(2)(b); ENGLAND and SCOTLAND Sale of Goods Act s. 14(3); ESTONIA LOA § 217(2) 2); FINLAND SGA § 17(2)(2); NETHERLANDS CC art. 7:17(2) and (5); NORWAY SGA § 17(b) and Consumer Sales Act § 15(c); SWEDEN SGA § 17(2)(ii)). Also under LATVIAN consumer sales, Consumer Protection Act art. 14(1) no. 3, there is a similar exception in cases where the seller could not comprehend such a specific purposes at the time of the conclusion of the contract and the consumer had no valid reason to rely on the competence and judgement of the seller. Under the Consumer Sales Directive art. 2(2)(b) the seller is only liable for a particular purpose made known to him, which he has accepted. An identical restriction can be found under SPANISH consumer sales (ConsProtA art. 116(c)). Similarly under DANISH law if the seller is only liable for any particular purpose if he has confirmed the buyer's expectations (SGA art. 75(a)(2)).

IV. Sample/model

10. The majority of the systems contain a provision relating to a sale based on a sample or model (CISG art. 35(2)(c); Consumer Sales Directive art. 2(2)(a); AUSTRIA CC § 922(1) and for commercial sales EVHGB § 8 no. 17; BELGIUM CC art. 1649bis § 1

[consumer sales]; CZECH REPUBLIC Ccom art. 420(3); DENMARK SGA § 75a(2); ENGLAND and SCOTLAND Sale of Goods Act s. 15; ESTONIA LOA § 226; FINLAND SGA § 17(2) no. 3 and Consumer Protection Act chap. 5 § 12 no. 3; ITALY CC art. 1522; HUNGARY CC § 277(1); LATVIA Consumer Protection Act art. 14(1) no. 4; LITHUANIA CC art. 6.333; NETHERLANDS CC art. 7:17(4); NORWAY SGA § 17(2)(c) and Consumer Sales Act § 15(2)(d); POLAND Consumer Sales Act art. 4(2) and Supreme Court Ruling of 10 December 1985, OSNCP 1986, poz. 181; PORTUGAL CC art. 919 and Ccom art. 469; SLOVAKIA Ccom art. 420(3); SLOVENIA LOA § 459 no. 4; SPAIN Ccom art. 327, and in consumer sales, ConsProtA art. 116(a); SWEDEN SGA § 17 no. 3 and Consumer Sales Act § 16(2) no. 3).

11. Under GERMAN law a concrete provision is lacking. According to the legislator, samples and models are included in the agreed quality in CC § 434. However, it has been criticised by academics that this has not been made more transparent in the law (see e.g. *Gsell*, JZ 2001, 66). As a rule, the goods sold must conform to the sample given prior to the purchase, subject to a few exceptions. To start with, the samples may only have been supplied by way of indication (NETHERLANDS CC art. 7:17(4)) or solely for the purpose of information (SLOVENIA LOA § 459 no. 4). This is similar in ITALY CC art. 1522(2) and ESTONIA LOA § 221(2) if the samples were aimed at determining the quality of the goods in an approximate way; termination of the contract is only possible to the extent that the lack of conformity is particularly relevant. In ENGLAND and SCOTLAND the seller may only be liable if the lack of conformity would not have been apparent on a reasonable examination of the sample (Sale of Goods Act s. 15(1) and (2)). Under HUNGARIAN law CC § 372 the seller is liable for any hidden defects even if those were also present in the sample; if the buyer fails to present the sample, he must prove that the thing does not correspond to the sample.

12. While the failure to conform with a sample usually gives rise to the remedies for lack of conformity, a distinction is made in SLOVENIA LOA § 518: in commercial contracts, this is deemed a non-performance (delay), but a material defect (lack of conformity) in all other contracts.

V. Packaging

13. Express rules on packaging can be found under a number of systems (DENMARK SGA § 75a(2); ESTONIA LOA § 217(2) 5); FINLAND SGA § 17 (2) no. 4 and Consumer Protection Act chap. 5 § 12 no. 4; LATVIA Consumer Protection Act art. 14(1) no. 5; LITHUANIA CC arts. 6.342-6.343; POLAND CC art. 545; NORWAY SGA § 17(2)(d) and Consumer Sales Act § 15(2)(e); SLOVENIA Consumer Protection Act § 36; SWEDEN SGA § 17 no. 4 and Consumer Sales Act § 16(2) no. 4). Under CZECH law there is also a general provision regulating which party carries the expenses of packaging (CC § 593). Moreover, such rules can be found under commercial sales law in some systems (CISG art. 35(2)(d); CZECH REPUBLIC Ccom art. 420(4); SLOVAKIA Ccom art. 420(4); SLOVENIA General Usances for Merchandise no. 79 (*Splošne uzance za blagovni promet*, 1954)).

14. In other systems, such an obligation of the seller may be implied, either based on the contract or on trade usage (AUSTRIA; ENGLAND and SCOTLAND Sale of Goods Act s. 29(6): seller obliged to put goods in a "deliverable state", which may imply packaging; NETHERLANDS Asser (-*Hijma*), Bijzondere Overeenkomsten I[6], no. 322). The same applies under CZECH non-commercial and non-consumer sales. Under GERMAN law it is uncertain whether inappropriate packaging is a defect under sales law or a breach of an ancillary duty that comes under the general (and different)

regime of breach of contract. Although the former solution has been supported in legal literature (see *Grundmann*, ERPL 9/2001, 250; *Brüggemeier*, WM 2002, 1378), no reference was included in CC § 434 and thus such an approach is not very likely to be followed by the courts.

15. In the absence of an agreement, the goods have to be packaged in a manner that is usual, or where there is no usage to that effect, in a an adequate way to protect and preserve the goods (CZECH REPUBLIC Ccom art. 420(4); ESTONIA LOA § 217(2) 5); SLOVAKIA Ccom art. 420(4); SLOVENIA Usance no. 79). In the NORDIC COUNTRIES the goods are to be packaged in a manner that is usual or in another acceptable way, if packaging is necessary in order to preserve or protect the goods (FINLAND; NORWAY and SWEDEN SGA § 17(2) no. 4). Under SLOVENIAN consumer sales the seller is obliged to ensure adequate packaging (Consumer Protection Act § 36). LITHUANIAN law contains quite detailed rules on the seller's obligation to deliver goods in containers or packaged: Where the contract provides no requirements regarding the containers and packaging of goods, the goods are to be delivered packaged in the manner customary for such goods, whereas in cases where the containers and packaging may be varied, the goods are bound to be packaged in such a manner or in such containers which would ensure the fitness of the type of goods during storage or carriage under normal conditions. Where mandatory requirements regarding containers or packaging are established by laws or other legal acts, the seller-businessman is bound to deliver items of goods to the buyer in containers or packaging which conform to the requirements set by laws or other legal acts. Where the seller, in breach of his obligation, delivers to the buyer items of goods not packaged or not in containers or in unsuitable containers, the buyer may refuse to accept them and demand that the seller packages the items of goods or deliver them in containers, unless otherwise provided by the contract or determined by the nature of the obligation or goods, unless the contract provides otherwise (CC arts. 6.342-6.343). Under POLISH law CC art. 545(1) the mode of the release and the receipt of the thing sold is to ensure its integrity and safety; in particular, the method of packing and transportation must correspond to the properties of the thing.

VI. Accessories and instructions

16. Conformity rules relating to accessories and instructions are fairly rarely found. When it comes to accessories, this seems to boil down to the question of what forms part of the goods. As was already shown above (see the Notes to IV.A.–2:201 (Delivery), the obligation to deliver may cover more than just the goods per se, as the seller has to hand over the goods including parts thereof (cf. AUSTRIA *Bestandteile und Zugehör*; BELGIUM CC art. 1615 accessories and all that is designed for their permanent use; LITHUANIA CC art. 6.317; NETHERLANDS CC art. 7:9(1); POLAND CC art. 52; SLOVENIA LOA § 448(1); SPAIN CC art. 1097).

17. In respect of instructions, concrete regulations can be found under NORDIC consumer sales, establishing that the goods must be accompanied by the necessary information about installation, construction, use, maintenance and conservation of the goods (FINLAND Consumer Protection Act chap. 5 § 12a(2); NORWAY Consumer Sales Act § 16(1)(d); SWEDEN Consumer Sales Act § 16(1)). In POLAND CC art. 546(2) lays down that the seller is to attach an instruction for use if that is necessary for the proper use of the thing in accordance with its destination. Under a consumer sale, the seller is moreover obliged to release to the buyer instructions as to use, maintenance and other documents required by specific rules of law (Consumer Sales Act art. 3(5)). Such information should be provided in Polish, or, as long as the type of information allows it, in a commonly understood graphical form (art. 3(6)). Under ESTONIAN

law the instructions necessary for the use of the goods form a part of the documents that the seller has to deliver together with the goods (LOA § 211(1)). Furthermore, LOA § 217(1) provides that non-conformity of the documents is to be treated as non-conformity of the goods.

18. It is also possible to argue that the absence of instructions may constitute a lack of conformity, see for instance ENGLAND and SCOTLAND, where the absence of such, or misleading or incomplete instructions, might render the goods of unsatisfactory quality or unfit for a purpose made known by the buyer (Sale of Goods Act s. 14(2) and (3)). The same applies in the NETHERLANDS under the general rule in CC art. 7:17(2), as the goods may then not have the qualities the buyer expects under the contract.

19. Another approach can be found in CZECH and SLOVAKIAN consumer sales, where CC § 617 requires the seller to inform the buyer about special regulations (instructions), especially if the use is explained in the instructions or is regulated by technical standards, unless such regulations are generally known. If the seller fails to comply with this duty he must compensate the buyer for any damage. Moreover, under CZECH consumer sales art. 10(2) of the Consumer Protection Act requires that instructions have to be provided in Czech.

20. The situation under GERMAN law is unclear when it comes to a lack of or incorrect instructions. The courts have applied: breach of an ancillary duty (BGH 5 April 1967, BGHZ 47, 312 – this would now be CC § 280(1)); non-conformity (OLG Frankfurt NJW 1987, 3206) and partial non-performance (BGH 4 November 1992, NJW 1993, 461).

VII. Reasonable expectations of the buyer (in particular with respect to the general quality standard)

21. The Consumer Sales Directive has introduced a general quality standard in art. 2(2)(d), which requires the goods to show the qualities and performance that the consumer can reasonably expect. In most countries there is now such a general standard of reasonable expectations under consumer sales (BELGIUM CC art. 1649ter § 1; ESTONIA LOA § 217(2) no. 6; CZECH REPUBLIC CC § 616(2); DENMARK SGA § 75a(2); FINLAND Consumer Protection Act chap. 5 § 12(5); LATVIA Consumer Protection Act art. 14(1) no. 1; NETHERLANDS CC art. 7:17(2); NORWAY Consumer Sales Act § 15(2)(b); SPAIN ConsProtA art. 116(d) SWEDEN Consumer Sales Act § 16(3) no. 3). Similarly under SLOVENIAN law, where according to the case law the standard of tacitly agreed properties are influenced by the buyer's expectations (cf. VS Ljubljana sodba I Cp 2087/98 from 6 October 1999).

22. According to the SWEDISH preparatory works the provision is to apply when the usability and quality of the goods deviates in a considerable way from the consumer's presumptions on which he has based his judgement at the time of concluding the contract (Prop 1989/90:89, 100). This prerequisite has primarily been applied to goods sold as substandard as for requirements of durability (cf. ARN 1992/93 ref. 54 and ARN 1993/94 ref. 48). Furthermore, the provision has been applied to the sale of second-hand cars, for instance in ARN 1995/96 ref. 54 (a car was considered not to conform to the contract because it had had 13 former owners, whereas the seller had stated that there had been only one). In another case, the HD found a sailing boat not to be in conformity with the contract, since the buyer justifiably expected the boat to have been produced in Scandinavia. However, it turned out that the hull was constructed in Poland, a fact which gave the boat a lower market value (NJA 2001, 155; cf. *Herre*, JT 2001/02, 120 ff).

23. Moreover, under some systems the goods shall correspond to the durability and other characteristics which the consumer may ordinarily expect in the purchase of such goods (FINLAND Consumer Protection Act chap. 5 § 12(5); NORWAY Consumer Sales Act § 15(2)(b)). Also under DANISH Consumer Sales Act § 75a(2) contains an express reference to durability.

24. On the other hand, the buyer's expectations as to the general quality have been incorporated in traditional notions, rather as an autonomous aspect of conformity (cf. AUSTRIA CC § 922(2); GERMANY CC § 434(1) no. 2). In ENGLAND and SCOTLAND, Sale of Goods Act s. 14(2) implies a term in consumer sales contracts that goods must be of satisfactory quality. This refers to 'the standard that a reasonable person would regard as satisfactory', taking into account any description of the goods, the price (if relevant) and all the other relevant circumstances (Sale of Goods Act s. 14(2A)). The price will not always be a relevant consideration, as there may be some cases where the quality expected bears no relationship to the price. In Sale of Goods Act s. 14(2B) a non-exhaustive list is provided of matters concerning the quality of goods which may be relevant in appropriate cases, namely "(a) fitness for all the purposes for which goods of the kind in question are commonly supplied, (b) appearance and finish, (c) freedom from minor defects, (d) safety, and (e) durability." Whether any particular matter is relevant depends upon the case. Thus there was held to be no expectation of durability in relation to a second-hand car of five years of age, with 80,000 miles on the clock: *Thain v. Anniesland Trade Centre* 1997 SLT (Sh.Ct.) 102.

25. Without doubt, the reasonable expectations of the buyer play an important role in assessing the (lack of) conformity of goods generally also outside consumer sales, as has already been shown in the notes above. In particular, this holds true for the fitness for purpose test when establishing the normal purpose or use of goods (LITHUANIA CC art. 6.333; CZECH REPUBLIC Ccom art. 410(2); SLOVAKIA Ccom art. 420(2)). Similarly under SPANISH law CC art. 1484 where case law has adopted a mixed approach between an objective standard, i.e. normal expectations regarding the same type of products, and a more subjective one, i.e. particular expectations on the part of the buyer, see TS 31 January 1970, RAJ 1970 no. 370, TS 3 March 2000, RAJ 2000 no. 1308, *Morales*, Comentarios al CC, Ministerio de Justicia, II, 1991, p. 956. In the NETHERLANDS, the buyer's reasonable expectations have long since been the most important criterion for establishing conformity under CC art. 7:17(2). What the buyer can reasonably expect, depends on 'the circumstances of the case'. Relevant is therefore whether the good was new or second-hand, a branded product or of an unknown origin, damaged or (outwardly) intact, the price (high or low, both in absolute figures as well as relatively), the type of business where the good was sold (a regular store or at a market), etc. (cf. Mon. NBW B65a (*Wessels*, Koop: algemeen, no. 43). In ESTONIA the law and court practice distinguish between reasonable expectations regarding the fitness for use (LOA § 217(2) no. 2) and the quality of the goods (LOA § 77(1) and, in case of consumer sales, LOA § 217(2) no. 6. Under LOA §§ 77(1) and 217(2) no. 6 the goods must be of the quality customary for goods of the same kind, taking into account the circumstances of the case. In the case of second-hand goods the question is therefore whether the goods sold have defects that comparable used goods of the same age usually do not have (NC CC 3-2-1-32-00). However, the question whether the goods are of a customary quality is relevant only if the goods are 'fit for the purpose'; in case the goods do not pass the fitness test, the non-conformity exists irrespective of whether comparable goods have similar defects (NC CC 3-2-1-115-04).

26. However, the most far-reaching example of a trend towards a more subjective test of conformity can be found in SWEDEN, which has a sweep-up clause for *general* sales law comparable to that of the present Article subparagraph (f). Pursuant to SGA § 17(3), goods do not conform if they 'in any other way deviate from what the buyer reasonably could expect'. This paragraph mainly serves as a clarification that the provisions in § 17(1) and (2) are not exhaustive (see *Ramberg*, Köplagen, 259); the legislator left the scope of this article to the courts to decide in which concrete cases the provision is to apply (Prop 1988/89:76, 87). While this rule is restricted to consumer sales in FINLAND and NORWAY, it may, according to legal doctrine, also play a role in general sales law (for NORWAY, the HD has considered the rule of the buyer's reasonable expectations to also exist in judge-made law (cf. Ot. prp. no. 44 2001-2002, 165 and Rt 1988, 774).

27. Instead of referring to the buyer's reasonable expectations, several systems traditionally provide for default rules concerning the level of quality of the goods to be delivered. With respect to the sale of generic goods (of which there may be various grades) the goods must be of an average kind and quality (AUSTRIA Ccom § 360 (this is applied by analogy to regular sales, see *Koziol and Welser*, Bürgerliches Recht II, 26)); fair merchandise (BELGIUM CC art. 1246); normal mid-range quality (CZECH REPUBLIC and SLOVAKIA CC § 496; SLOVENIA LOA § 286(1)); average quality, which results from an evaluation of the functionality, utility and value of the goods (ITALY CC art. 1178); the creditor may not demand superior quality, and the debtor cannot deliver inferior quality (SPAIN CC art. 1167). However, under SLOVENIAN law if the purpose of their use was known to the seller, he must deliver goods of appropriate quality (LOA § 286(2)). Moreover, under CZECH consumer sales, the Consumer Protection Act art. 3(b) provides that the goods must be of 'usual quality'.

VIII. Further aspects

28. In addition to the requirements set out above, there are other provisions relating to the issue of conformity.

29. To start with, some countries stipulate that the goods have to be in accordance with public requirements (CZECH REPUBLIC CC § 616(2) and Consumer Protection Act art. 3(b); ESTONIA LOA § 217(2) no. 3; FINLAND Consumer Protection Act chap. 5 § 12(6); NORWAY Consumer Sales Act § 15(f); SLOVAKIA CC § 616; SWEDEN Consumer Sales Act § 18(1)). This does not apply if the buyer intended to use the goods for a purpose where the said requirement is of no significance (FINLAND Consumer Protection Act chap. 5 § 12(6); NORWAY Consumer Sales Act § 15(f)). Under SWEDISH law there is an explicit reference to the Product Security Act (*produktsäkerhetslagen*) and the Marketing Act (*marknadsföringslagen*) or other similar provisions (Consumer Sales Act § 18(1)). In FRANCE, Consumer Code art. L. 212-1 provides that the goods sold must conform with public regulations related to security and health. Under SLOVENIAN law the provision defining material defects refers also to 'prescribed' properties/qualities (LOA § 459(3)).

30. The seller may also be under a duty to inform the buyer. Under some systems this is expressly regulated for consumer sales. Under SWEDISH and NORWEGIAN consumer sales the seller must inform the consumer about such circumstances concerning the qualities and usage of the goods that were known or should have been known to him that the consumer could reasonably have expected to be informed, on the assumption that this lack of information can be presumed to have influenced the contract. If the seller fails to do so, the goods are considered not to conform to the contract (NORWAY Consumer Sales Act § 16(1)(b); SWEDEN Consumer Sales Act

§ 16(3)). Similarly under DANISH consumer sales where the seller is obliged to inform the buyer about circumstances which might influence the buyer's assessment of the goods which he knew or should have known (SGA § 76(1)). Under LITHUANIAN consumer sales the seller is bound to provide the buyer with the necessary, accurate and comprehensive information about the goods offered for sale, indicating on their labels or otherwise: their price (inclusive of all taxes and charges), quality, method of use and safety, warranty period, period of fitness for use as well as other qualities of the goods and characteristics of their use, having regard to the type of goods, their purpose, the personality of the consumer and the requirements of the retail trade (CC art. 6.353). In the CZECH REPUBLIC and SLOVAKIA CC § 618 establishes that the seller must inform the buyer when selling sub-standard goods about the existence and the nature of the defect, unless it is already obvious from the nature of the sale. Under CZECH consumer sales the seller must also 'clearly warn' the buyer about the existence of defects or that the good is second-hand or otherwise limited in its use (Consumer Protection Act art. 10(6). Under other systems a duty to inform the buyer might arise under the general law of obligations. Under GERMAN law this would be an ancillary obligation under CC § 241(2), thus a breach would fall under CC § 280(1), not under the specific sales law regime. In ESTONIA the seller has no general contractual duty to inform the buyer as it is the buyer's duty to furnish himself with information regarding the goods. However, such duty to inform could arise under the general rules governing the pre-contractual duties of the parties under LOA § 14(2). The breach of pre-contractual duties entitles the buyer to the same remedies as the breach of the contractual duties. In art. 60 of the SPANISH ConsProtA, a person selling to a consumer buyer is subject to a far-reaching duty of disclosure and accurate information.

IV.A.–2:303: Statements by third persons

The goods must possess the qualities and performance capabilities held out in any statement on the specific characteristics of the goods made about them by a person in earlier links of the business chain, the producer or the producer's representative which forms part of the terms of the contract by virtue of II.–9:102 (Certain pre-contractual statements regarded as contract terms).

COMMENTS

A. General

This Article addresses the question of whether and to what extent the seller becomes bound by statements relating to the goods made by third persons. Such statements are very influential, as buyers may often trust more in advertisements and brand literature than in the expertise of a given retailer. On the one hand, this rule relates to the notion of agreed conformity of IV.A.–2:301 (Conformity with the contract), as it determines the seller's contractual liability for statements made by others. On the other hand, it also deals with the buyer's expectations under IV.A.–2:302 (Fitness for purpose, qualities, packaging), in that statements by third parties may also give rise to expectations as to the qualities and performance capabilities of the goods. Thus, under IV.A.–2:302(f), such statements may also be taken into account when assessing the reasonable expectations of the buyer.

B. Relationship to Book II

The Article refers to II.–9:102 (Certain pre-contractual statements regarded as contract terms). It is included here as a reminder. Reference is made to the Comments on that Article.

NOTES

Liability for (public) statements by third persons

1. While the seller may be held liable for his own statements in respect of the conformity of the goods, liability for statements from third persons is not generally accepted (for a more general view of contract law, see the Notes to II.–9:102 (Certain pre-contractual statements regarded as contract terms).
2. This has however changed in respect of consumer sales with the advent of the Consumer Sales Directive art. 2(2) and (4), which has introduced a liability of the seller for public statements made by third parties. Thus the same applies for consumer sales in all systems (AUSTRIA CC § 922(2); BELGIUM CC art. 1649ter § 1 no. 4; CZECH REPUBLIC CC § 616(2)(b) and (c); DENMARK SGA § 76(1); ENGLAND and SCOTLAND Sale of Goods Act s. 14(2D)-(2F); ESTONIA LOA § 217(2) no. 6; FINLAND Consumer Protection Act chap. 5 § 13; FRANCE Consumer Code art. L. 211-6; GERMANY CC § 434(1); HUNGARY CC § 277(1)(b) and (2); NETHERLANDS CC art. 7:18(1); NORWAY Consumer Sales Act § 16(2); POLAND Consumer Sales Act art. 4(4); SLOVENIA Consumer Protection Act § 37(3); SPAIN ConsProtA art. 116(1)(d); SWEDEN Consumer Sales Act § 19(2)).
3. Under a few systems, the seller's liability for statements made by third persons is not restricted to consumer sales (AUSTRIA CC § 922(2); FINLAND SGA § 18; GERMANY CC § 434(1); NORWAY and SWEDEN SGA § 18(2)).

4. Typically, the seller's liability for such statements is limited in several ways. Under the Consumer Sales Directive the seller is not bound by public statements if he: i) shows that he was not, and could not reasonably have been aware of the statement in question; ii) shows that by the time of the conclusion of the contract the statement had been corrected; or iii) shows that the decision to buy the consumer goods could not have been influenced by the statement. Under most systems, similar exceptions to the seller's liability are provided (AUSTRIA CC § 922(2); BELGIUM CC art. 1649ter § 2; ENGLAND and SCOTLAND Sale of Goods Act art. 14(2D)-(2F); ESTONIA LOA § 217(3); FINLAND SGA § 18(3); GERMANY CC § 434(1); HUNGARY CC § 277(2); NETHERLANDS CC art. 7:18(1); NORWAY SGA § 18(3); POLAND Consumer Sales Act art. 5; SPAIN ConsProtA art. 116.1 d); SWEDEN SGA § 18(3) and Consumer Sales Act § 19(3)). Under NORWEGIAN consumer sales, however, it is irrelevant whether the seller was aware of the statement or not (Consumer Sales Act § 16(1)(c)). Under the SLOVENIAN Consumer Protection Act, the seller has no possibility to exempt himself from liability.

IV.A.–2:304: Incorrect installation under a consumer contract for sale

Where goods supplied under a consumer contract for sale are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as a lack of conformity of the goods if:

(a) the goods were installed by the seller or under the seller's responsibility; or
(b) the goods were intended to be installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.

COMMENTS

A. General

This Article addresses incorrect installation as a special case of lack of conformity in a consumer contract for sale. The Consumer Sales Directive has introduced this special instance of the seller's liability, which actually covers two different scenarios: incorrect installation by the seller or under the seller's responsibility and incorrect self-installation by the buyer. In both cases, the buyer may resort to the remedies for lack of conformity set out in Chapter 4, Section 2.

B. Incorrect installation by the seller or under the seller's responsibility

The parties can agree that the seller will install the goods sold to the buyer. Such a sales contract actually also contains a certain element of services, i.e. the installation work undertaken by the seller. Instead of splitting the transaction into a sales part and a services part, under the present rule a lack of conformity resulting from an incorrect installation is qualified as a lack of conformity of the goods. If the goods do not conform to the contract after the installation, it does not matter whether they were initially unfit or whether something went wrong during the installation.

Illustration 1
A buys a kitchen from B, a business selling kitchen furniture. B delivers the kitchen to A's home, where it is subsequently installed by B's workers. After the installation, the buyer notices scratches on one of the doors. Whether or not the scratches were initially on the door or were caused during installation, the seller will be liable for lack of conformity.

Illustration 2
The facts are the same as in illustration 1 but the installation has been poorly done in that the work-surfaces are not level and the doors and drawers in the units do not close properly. The seller will be liable for lack of conformity.

The aim of the article is to protect the buyer against the situation where the goods are damaged during the installation or simply do not function properly as a result of the installation.

For the purposes of (a), it does not matter whether the seller has actually carried out the installation personally, since a contracting party who delegates performance to another remains responsible for the performance (see III.–2:106 (Performance entrusted to another).

Illustration 3
The facts are the same as in illustration 1, but B has entrusted the installation work to C an independent joiner and cabinet-maker.

C. Incorrect installation by the consumer

Frequently, consumers buy goods that are intended for self-installation (i.e. installation by the buyer in person), typical examples being furniture bought in flat-pack form. If the consumer fails to install the goods correctly, the seller will be liable for the resulting lack of conformity of the goods provided two conditions are met: first, the goods have to be intended to be installed by the consumer; and, Secondly, the installation went wrong due to shortcomings in the installation instructions.

Illustration 4
A buys a TV table at a department store. After assembling the table according to the enclosed instructions, he puts his TV on the table. After two days, the table collapses as the instructions failed to make it clear which of the different screws provided should be used to fasten the legs and the consumer used the wrong ones.

Illustration 5
A buys a computer from B. Even after hours of careful reading of the extensive manual, he does not manage to install the computer correctly. This case, albeit an example of an 'overflow' of information, still qualifies as a shortcoming in the installation instructions, if a reasonable user would not have been able to comprehend the instructions.

In fact, it does not matter whether the buyer actually carried out the wrong installation, as long as these two criteria are met. In other words, any person failing in the assembly on behalf of the buyer, such as a friend or neighbour, can give rise to the seller's liability under this rule. This even applies if the buyer has charged a professional with the assembly, because the buyer would otherwise be worse off than if he or she had tried personally to do the assembly.

Illustration 6
A buys a sink at a 'Do-It-Yourself' store, which can be installed without professional help. A asks B, a professional plumber, to help him, since A is notoriously impractical. However, due to some major flaw in the installation instructions even B does not manage to install the sink properly.

As for the question whether the seller is under an obligation to provide installation instructions in the first place cf. IV.A.–2:302 (Fitness for purpose, qualities, packaging) sub-paragraph (e).

C. Remedies of the buyer

In the two cases of incorrect installation covered by the Article, the consumer can resort to all the remedies set out in Chapter 4, Section 2. This may, at least in some cases, lead to the seller having to fix the lack of conformity at the buyer's residence. While this consequence may seem harsh, the present rule serves as an incentive for sellers to provide correct installation instructions. In other cases it might be sufficient that the seller provides the buyer with correct installation instructions.

NOTES

Incorrect installation

1. The Consumer Sales Directive has introduced a special instance of lack of conformity, the incorrect installation of goods under art. 2(5). In that regard, two situations are distinguished: first, the contract of sale includes installation of the goods by the seller or under his responsibility by the buyer; and, second, the goods sold are intended for self-assembly by the buyer, the so-called IKEA clause. However, both alternatives have the same legal consequences, as the seller is liable for a lack of conformity if the installation is not carried out correctly (without the goods necessarily showing a lack of conformity as such).

2. The majority of systems have implemented the Consumer Sales Directive by introducing a rule for consumer sales addressing both types of installations (AUSTRIA Consumer Protection Act § 9a; BELGIUM CC art. 1649ter § 4; CZECH REPUBLIC CC § 623; ESTONIA LOA § 217(5); FINLAND Consumer Protection Act chap. 5 § 12(a); FRANCE Consumer Code art. L. 211-4; HUNGARY CC § 305(2); LITHUANIA CC art. 6.363; NETHERLANDS CC art. 7:18(3); POLAND Consumer Sales Act art. 6; SPAIN ConsProtA art. 116(2); SWEDEN Consumer Sales Act §§ 16(1) and 16a). Under GERMAN law, the scope of application of the regulation is not limited to consumer sales (CC § 434(2)).

3. Other countries do not have such an (explicit) rule. In ENGLAND and SCOTLAND, faulty instructions which render installation by the consumer defective would be likely to render the goods of unsatisfactory quality in terms of Sale of Goods Act s. 14(2), or unfit for a purpose made known by the buyer in terms of s. 14(3). In contrast, a contract under which a party, at the time of contracting, agrees not just to supply goods but also to install them in the buyer's premises is not a sale of goods contract. It is, rather, a contract for the supply of goods and services, and as such is governed by the terms of the Supply of Goods and Services Act 1982. If the goods supplied under such a contract were defective, this would constitute a breach of the term implied by SGSA art. 11D(2), which requires goods supplied under such a contract to be of a satisfactory quality. If, on the other hand, it was the installation itself which was defective, this might well be a breach of a duty implied at common law that the services provided will be carried out with reasonable care by the supplier (or his workmen). In NORWAY, it is argued, in the absence of a specific rule, that if the seller is under a contractual duty also to install the goods, he will be liable for any non-conformity resulting from incorrect installation under the general conformity rule of SGA § 17(1) and Consumer Sales Act § 15(1). Lastly, the result would probably be the same in SLOVENIA, since the seller may be liable for lack of conformity if he either fails to supply any or faulty installation instructions resulting in the goods being unfit for normal or specific use (material defect).

IV.A.–2:305: Third party rights or claims in general

The goods must be free from any right or reasonably well founded claim of a third party. However, if such a right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by the following Article.

COMMENTS

See the Comments on the following Article.

NOTES

I. Third party rights

1. As a rule, the seller has to make sure that the goods are not subject to third party rights or claims. In the majority of the systems, this aspect of conformity (in a broad sense) is referred to as liability for legal defects or defects of title (CISG art. 41; AUSTRIA *(Rechtsmangel)* CC §§ 304 and 305; CZECH REPUBLIC CC § 499; ESTONIA LOA § 217(2) no. 4; GERMANY CC § 435; FINLAND SGA § 41(1); HUNGARY CC §§ 369 and 370; LATVIA CC arts. 1593(1) and 2010; LITHUANIA CC art. 6.321; NETHERLANDS CC arts. 7:15-16; NORWAY SGA § 41(1) and Consumer Sales Act § 15(2)(g); POLAND CC art. 556(2); PORTUGAL CC arts. 905 and 907; SLOVAKIA CC § 499 [see also CC §§ 500(2) and 503] and Ccom arts. 433-435; SLOVENIA LOA § 488; SWEDEN SGA § 41(1) and Consumer Sales Act § 21a). The seller is, however, not liable if the buyer has accepted the encumbrances on the goods (there is some discussion in the NETHERLANDS as to how such an acceptance can take place, for instance implied or 'all in one', cf. Parl. Gesch. Boek 7, 114-115; Asser (-*Hijma*), Bijzondere Overeenkomsten I[6], nos. 277-279).
2. Under NORDIC law the seller is liable for a legal defect even though the claim is contested if a third party presents a reasonable ground for its claim (FINLAND and SWEDEN SGA § 41(3)), or if the claim is not evidently groundless (NORWAY SGA § 41(3) and Consumer Sales Act § 15(2)(g)).
3. In ENGLAND and SCOTLAND, Sale of Goods Act s. 12(1) and (2) implies that contracts of sale contain implied terms that (i) the seller has the right to sell the goods, and (ii) that the goods are free, and will remain so until the time when ownership is to pass, from any charge or encumbrance not disclosed to the buyer, and that the buyer will enjoy quiet possession of the goods (save to the extent that he is disturbed by the rights of any person having a charge or encumbrance that was disclosed). In practice, the second implied term is unlikely to be pleaded very often, as securities over movable property depend for the most part upon possession by the security holder: once possession is lost, so is the security, thus limiting the rights of third persons. This is similar to LITHUANIA, where the seller, under CC art. 6.321, is bound to discharge the goods of all pledges (hypothecs) irrespective of the registration of the pledge or hypothec, unless the buyer, after he has been given notice by the seller of the encumbrances, agrees to buy the goods. The seller is also bound to warrant the buyer that the delivered good has not been seized and is not an object of a legal action, also that the seller has not been deprived of the right to dispose of the good or that there are no encumbrances.

4. In other countries, the seller's liability for legal defects is designed as a special regime in the event of the eviction of the goods (BELGIUM CC arts. 1626-1640; FRANCE (*garantie d'éviction)* CC arts. 1626-1640; ITALY CC art. 1481 [but see also art. 1482 for other legal defects]; SPAIN (*saneamiento por evicción)* CC arts. 1475-1483). Under BELGIAN and FRENCH law, the basic idea is that the seller has to guarantee the peaceful possession of the goods sold, which covers the seller's own acts and third party claims. The action based on a guarantee against eviction is regarded as an accessory right of the goods sold, which passes together with the ownership to later recipients. It does not matter if the seller acts in good or bad faith, as he will always be liable even if he did not know of the reason for eviction. The buyer who is sued by a third party and wants to be indemnified may summon the seller to the action. The buyer can also prefer to only defend himself against the third party and, in case he loses, submit a claim against the seller. A guarantee against eviction ceases, however, when the buyer has lost a judgment in the final instance, or which can no longer be appealed, without having summoned his seller, if the latter proves that there were grounds which were sufficient to defeat the claim (CC art. 1640). The same is true for the SPANISH law (CC arts. 1475, 1480 ff and *Durán Rivacoba*, Evicción y saneamiento, pp. 157 ff). In ITALY, a distinction is made between cases of eviction under CC art. 1481 and cases of an actual impairment of the transferred right due to the existence of a bond on the good under CC art. 1482. Eviction, intended as a third party's definitive assessment of a right to the good, may be complete (CC art. 1483) or only partial (CC art. 1484). While the buyer is entitled to remedies only to the extent that he was not aware of third party rights, his awareness is not relevant in the event of eviction (Cass. 17 June 1955, no. 1878, Rep.Foro it., 1955, voce *Vendita*, col. 1438, nos. 158-160; Cass. 11 May 1984, no. 2890, Rep.Foro it., 1984, voce *Vendita*, col. 3187, no. 47; Cass. 7 April 1986, no. 2398, Rep.Foro it., 1987, voce *Vendita*, col. 3553, no. 61).

5. Under the eviction regime, the seller is liable if the disturbance has been realized, i.e. if the buyer has lost a right (BELGIUM; ITALY *de Martini*, Nov.Dig.it 1957, vol. IV, 1050 ff; *Rubino*, La compravendita, 650 ff). In SPAIN, the purchaser must be deprived of all or part of the purchased item by a final court judgment based on a right existing prior to the purchase, CC art. 1475. However, that does not mean that the buyer is deprived of the right to sue the third party and the vendor jointly ("inverse eviction", *Durán Rivacoba*, Evicción y saneamiento, p. 302 and TS 7 June 1995, RAJ 1995 no. 4630 and TS 10 December 1996, RAJ 1996 no. 9191).

II. Differences with the conformity regime in general

6. Under most systems the regime applicable to a legal defect mainly follows the general rules on material defects. Under some systems the general time-limits do not apply to legal defects (CISG art. 43; FINLAND SGA § 41; NORWAY SGA § 41(1); SLOVENIA LOA §§ 488-495; SWEDEN SGA § 41). Under POLISH law the time-limit concerning legal defects only expires after the lapse of one year from the time when the buyer learned about the defect. If the buyer learned about the defect only as a result of a third party suit, the time runs from the day on which the decision delivered in the dispute with the third party has acquired legal force (CC art. 576(1)). Similarly under AUSTRIAN law, where actual knowledge is used as the starting point for the time-limits (CC § 933(1)).

7. Under SLOVENIAN law the primary sanction is specific performance (the buyer may, after or with notification of the defect, demand that the seller releases the goods of such rights or delivers substitute (generic) goods, LOA § 489). If his demands are not met, he can terminate the contract or reduce the price, in case of full eviction the

contract is terminated *ex lege* (LOA § 490). In the NETHERLANDS, the buyer may claim specific performance, requiring the seller to remove the legal defect. This remedy is restricted, however, to cases where the seller may reasonably comply therewith (CC art. 7:20). If this is not the case, the buyer will have to resort to termination or damages. Also under NORDIC law there are some differences between the two regimes. Firstly, the seller is strictly liable for damages if there was an existing legal defect at hand at the time of the conclusion of the contract of which the buyer neither knew nor should have known (FINLAND, NORWAY and SWEDEN SGA § 41(2)). Furthermore, the buyer may invoke his right to remedies for non-conformity against the seller due to a legal defect if a third party claims that he has property rights in the goods and there are probable reasons for this assertion (FINLAND, NORWAY and SWEDEN SGA § 41(3)). The buyer is moreover under no obligation to examine the goods concerning legal defects (FINLAND, NORWAY and SWEDEN SGA § 41(1)).

8. Under FRENCH and SPANISH law, however, there is a completely separate regime of eviction with remedies (FRANCE CC arts. 1626-1640; SPAIN CC arts. 1475-1483 for legal defects and CC arts. 1484 ff for hidden defects). In fact, though, in Spain the eviction regime consists only – apart from procedural rules - in the singularity of the remedy left to the buyer: the buyer may claim full compensation, including the actual value of the deprived asset; other consequential damages are only reimbursed in case of bad faith (CC art. 1478).

IV.A.–2:306: Third party rights or claims based on industrial property or other intellectual property

(1) The goods must be free from any right or claim of a third party which is based on industrial property or other intellectual property and of which at the time of the conclusion of the contract the seller knew or could reasonably be expected to have known.

(2) However, paragraph (1) does not apply where the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

COMMENTS

A. Relation to the notion of conformity

This and the preceding Article make it clear that the notion of conformity covers so-called legal defects as well as material or corporeal shortcomings. The wording of IV.A.–2:301 (Conformity with the contract) sub-paragraph (d), which requires the goods to 'comply with the remaining Articles of this Section', embraces these rules in the notion of conformity. As a result, the rules on conformity, subject to one exception in IV.A.–4:302 (Notification of lack of conformity) paragraph (4), do not distinguish between legal and material defects.

B. Third party rights or claims in general

According to IV.A.–2:305 (Third party rights or claims in general), the seller has to ensure that the goods are free from any right or claim of a third party.

> *Illustration 1*
> B buys a car from S. A couple of days later he is contacted by C who claims that he has bought the car from S two weeks ago and presents the sales contract. B can claim that S should rectify this situation; otherwise B may terminate the contractual relationship.

In this context, it is important to note that a claim is not synonymous with a right. A "claim" is a demand for something based on the assertion of a right. (See the Annex of definitions.) The article makes it clear that in the present context the claim must be reasonably well-founded to affect the goods. A totally and obviously unfounded claim would not attach to or affect the goods in any way.

In addition, it should be noted that the rules of this Part also apply, with appropriate adaptations, to the sale of rights, some of which are by definition split, or rather derived, from another right. Naturally, the existence of such a 'mother' right does not qualify as a third party right under this Article. An appropriate adaptation is here called for.

C. Third party rights or claims based on industrial property or other intellectual property

While the preceding Article addresses third party rights and claims in general, the present Article introduces a special regime for third party rights or claims based on industrial property or other intellectual property. Basically, these regimes differ in two respects. First, the seller is not strictly liable for such rights, if the seller did know and could not reasonably be expected

to have known of their existence (see paragraph (1)). In essence, this is a deviation from the usually strict standard of liability for other types of lack of conformity under the present rules. And, secondly, the seller can escape liability for third party rights or claims based on industrial property or other intellectual property, if they stem from the buyer's sphere. Basically, this exception relates to contracts for the sale of goods which the seller has manufactured or produced to the buyer's order. If the seller has complied with specifications furnished by the buyer, the seller is not held responsible for any rights or claims of a third party. In this article it is not necessary that the claim should be reasonably well-founded. If the seller knows of an unfounded claim the seller should inform the buyer of that. If the seller does not know of the claim and it is not reasonably well-founded it is unlikely that the seller could reasonably be expected to know of it.

NOTES

Industrial or other intellectual property

1. This provision is inspired by CISG art. 42. Only in commercial sales in the CZECH REPUBLIC and SLOVAKIA this issue addressed (Ccom art. 433(2)). Accordingly, the goods are in non-conformity as a consequence of existing industrial or other intellectual property rights of third persons, firstly, if these rights are protected in the country where the seller has his seat, place of business or residential address. Secondly, there is a lack of conformity if these rights are protected in the country where the buyer has his seat, place of business or residential address and the seller knew or should have known about these rights at the time of concluding the contract. Thirdly, the lack of conformity appears if these rights are protected in the country where the goods were to be resold or used and the seller knew about this resale or usage at the time of the conclusion of the contract.
2. Under all other systems this is an unregulated situation and hence the general regime set out in IV.A.–2:305 (Third party rights or claims in general) applies (expressly in NORWAY SGA § 41(4); similarly in FINLAND; GERMANY; LITHUANIA; NETHERLANDS). In ENGLAND and SCOTLAND the case law indicates that where a third party has an intellectual property claim which entitles him to restrain the sale of the goods, this means that the seller has no 'right to sell the goods' under Sale of Goods Act s. 12(1), and will be in breach of this section if a sale is attempted: *Niblett Ltd. v. Confectioners' Materials Co. Ltd.* [1921] 3 KB 387. It is interesting to note that the SWEDISH legislator decided not to adapt the rule of CISG art. 42 since it was considered to be too seller-friendly (*Ramberg*, Köplagen, 77 f).
3. In FRANCE, the sale of counterfeit goods is void considering that the goods are not marketable according to CC art. 1598 (Com. 24 September 2003, Bull.civ. IV, no. 147; D. 2003, 2683 note *Caron*). Consequently the buyer can obtain the restitution of the price paid and damages on the basis of general tort law.
4. In SPAIN there is no particular provision as to intellectual property rights causing eviction. However, it is understood that the scope of application of the CC art. 1475 (according to which the buyer has to be deprived "by operation of a contrary right existing before the sale") encompasses also intellectual property rights belonging to third parties, where such rights make impossible the fruitful and peaceful possession of the thing sold (cf. *Durán Rivacoba*, Evicción y saneamiento, p. 121).

IV.A.–2:307: Buyer's knowledge of lack of conformity

(1) The seller is not liable under IV.A.–2:302 (Fitness for purpose, qualities, packaging), IV.A.–2:305 (Third party rights or claims in general) or IV.A.–2:306 (Third party rights or claims based on industrial property or other intellectual property) if, at the time of the conclusion of the contract, the buyer knew or could reasonably be assumed to have known of the lack of conformity.

(2) The seller is not liable under IV.A.–2:304 (Incorrect installation in a consumer contract for sale) sub-paragraph (b) if, at the time of the conclusion of the contract, the buyer knew or could reasonably be assumed to have known of the shortcoming in the installation instructions.

COMMENTS

A. General

This Article makes it clear that the buyer cannot rely on any lack of conformity of which he knew or should have known when concluding the contract. In effect, this provision introduces a certain restriction as to the scope of the seller's liability by making sure that certain defects do not amount to a lack of conformity. It therefore balances the otherwise strict liability of the seller under the present rules.

The rationale of this Article is to maintain the equilibrium of the contract. That is to say that a buyer, who knew of a lack of conformity, should have taken that fact into account when deciding whether to buy the goods.

In a way, this provision is the other side of the coin of the buyer's reasonable expectations, which feature so prominently in IV.A.–2:302 (Fitness for purpose, qualities, packaging). There, the seller is held liable for reasonable expectations on the part of the buyer in respect of properties of the goods to be sold. By the same token, the buyer may have negative expectations, i.e. may actually know of the lack of conformity of the goods.

The case of incorrect installation under a consumer contract for sale is covered separately in paragraph (2) because in such a case the buyer could not possibly know of the defective installation at the time of conclusion of the contract. The buyer could, however, have known that installation instructions were defective.

> *Illustration 1*
> A is interested in buying a glass shower curtain for her bathroom in flat-pack form and identifies an apparently attractive model. The sales person says however "I don't recommend that one because the installation instructions are hopelessly inadequate." B replies "Don't worry. I am good at working out these things and have fitted similar ones before."

In this case the seller would not be liable under IV.A.–2:304 (Incorrect installation in a consumer contract for sale) sub-paragraph (b) even if A does install the goods incorrectly as a result of the inadequacy of the instructions.

B. Knowledge on the part of the buyer

Obviously, it will be quite difficult to establish that the buyer had knowledge about the lack of conformity of the goods upon the conclusion of the contract. In this context, one question features prominently in sales law: to what extent does the buyer have to examine the goods before concluding the contract? Under the present rules, the buyer is not obliged to examine the goods before purchase. The buyer will only have no remedy if the buyer actually knew of the non-conformity or, when actual knowledge cannot be proved, if it can reasonably be assumed that the buyer must have known (for example, because the buyer inspected the goods closely and the non-conformity was evident).

This Article differs in two important respects from IV.A.–4:301 (Examination of the goods). First, the present Article does not cut off remedies that the buyer could otherwise have resorted to, as it already rules out a lack of conformity as the possible trigger for the remedial process. Secondly, it applies at an earlier stage, namely at the time of the conclusion of the contract (as opposed to the time of delivery under IV.A.–4:301). The Article is without prejudice to other potentially relevant rules in Book II relating to the invalidity of a contract on such grounds as mistake, fraud, and duress.

C. Exceptions

It will be noted that the Article is limited to liability under the specified default rules. It does not apply to liability under the express terms of the contract. In such a case the contract will apply according to its terms. Thus, if the goods have certain shortcomings at the time of the conclusion of the contract, but the parties, expressly or impliedly, agree that the seller is to remedy those shortcomings before the time of delivery, the seller is not exempted from liability under this provision. Similarly, if the parties have expressly agreed upon certain features, then the buyer can expect that the seller will provide these features upon delivery, even if they were lacking at the time of concluding the contract.

> *Illustration 2*
> A informs B, a car dealer, that he wants to buy a roadworthy car. B accepts this requirement. They inspect a vehicle prior to concluding the deal. The car in question still has heavily used tyres, which render the car unroadworthy. The buyer notices this fact but still agrees to purchase the car on the agreed condition as to roadworthiness. The seller is not exempted from liability by the buyer's knowledge, since the buyer can expect that the seller will remedy the defect, i.e. by fitting new tyres before delivery.

At the end of the day, the relationship between the parties' agreement and the buyer's knowledge of certain defects will have to be solved through contract interpretation. Important features here will be whether it was reasonable for the buyer to expect that the seller would remedy the defect before delivery. Also the contract price can provide an indication as to which standards the buyer can expect to be met.

This Article does not apply to IV.A.–2:303 (Statements by third persons) because the relevant provision in II.–9:102 (Certain pre-contractual statements regarded as contract terms) already contains a separate, quite similar restriction in paragraph (2).

D. Consumer contract for sale

While the requirements in this Article depend upon the circumstances of each case, consumer transactions should generally be treated with more caution. Above all, the question of when the consumer could be assumed to have known of the lack of conformity is to be judged with the benefit of doubt. However, the consumer may still have to notice obvious shortcomings.

NOTES

I. Knowledge of the buyer at the time of the conclusion of the contract

1. While the liability of the seller for lack of conformity is in principle strict (i.e. it is irrelevant whether he is to blame for any defect in the goods), all systems acknowledge that the seller cannot be held liable for lack of conformity of which the buyer knew, or ought to have known, upon the conclusion of the contract (CISG art. 35(3); Consumer Sales Directive art. 2(3); AUSTRIA CC § 928; BELGIUM CC art. 1642; CZECH REPUBLIC CC § 500(1); ESTONIA LOA § 218(4); FINLAND SGA § 20(1) and Consumer Protection Act chap. 5 § 12(4); FRANCE CC art. 1642; GERMANY CC § 442(1); GREECE CC arts. 536 and 537; HUNGARY CC § 305/A(1); ITALY CC art. 1491 and Consumer Code art. 129(3); LATVIA CC art. 1613; NETHERLANDS CC art. 7:17(5); NORWAY SGA § 20(1) and Consumer Sales Act § 16(3); POLAND CC art. 557 and Consumer Sales Act art. 7: SLOVAKIA CC § 500 and Ccom arts. 424 [qualities] and 433 [legal defects]; SLOVENIA LOA § 460(1); and ConsProtA art. 116(3); SWEDEN SGA § 20(1)).

2. Instead of having an express rule excluding the seller's liability, in ENGLAND and SCOTLAND the knowledge of the buyer at the time of the contract's conclusion that the goods were defective, including by virtue of the fact that they lacked adequate instructions, would prevent the goods being deemed of unsatisfactory quality if the seller had drawn the buyer's attention to these defects (Sale of Goods Act s. 14(2C)(a)). A similar result can be achieved in consumer sales law in SWEDEN, where the legislator has decided not to incorporate a general rule on the knowledge of the buyer, fearing that such a rule could be misinterpreted in cases where the consumer knew about a certain quality of the goods, but did not realise the importance thereof for the usage of the goods (see *Herre*, Konsumentköplagen[2], 270 f). The same principle can, however, also be derived from Consumer Sales Act § 16(1) since the goods are in conformity with the contract because individual party agreements overrule the general presumptions regarding when goods are not in conformity. Cf. also the NETHERLANDS where the rule introduced by the Consumer Sales Directive is criticized for its unclear relation to the reasonable expectation test of CC art. 17(2), see Asser (-*Hijma*), Bijzondere Overeenkomsten I[6], no. 358. Under PORTUGUESE consumer sale the Consumer Protection Act art. 12 initially provided that the seller could not be liable for lack of conformity of which the buyer was previously informed or clarified. This Article was however changed in 2003 to provide that the consumer always have the right to compensation regardless of the fact that he knew about the lack of conformity prior to the conclusion of the contract.

3. Under some systems there is a special regulation if the seller has acted fraudulently or given an express guarantee of conformity. If the buyer, due to gross negligence, did not know about the lack of conformity, or if the defect was obvious, the seller may still be held liable if he has fraudulently concealed the defect (AUSTRIA CC § 928; GERMANY CC § 442(1); GREECE CC art. 537 and A.P.1259/1991 EEN 1993, 64).

Moreover, the seller will still be liable if he has given an express promise of conformity (AUSTRIA CC § 928; GERMANY CC § 442(1); GREECE CC art. 537; SLOVAKIA CC §§ 500 f; SLOVENIA LOA § 460(3)).

4. Moreover, the Consumer Sales Directive art. 2(3) provides that the seller is not liable if the lack of conformity has its origin in materials supplied by the buyer. The HUNGARIAN regulation also provides that the obligor (seller) is not liable for a lack of conformity which has its origin in materials supplied by the obligee (buyer), provided that the obligor informed the obligee of the defectiveness of the supplied materials (CC § 305/A(1)).

5. In the NETHERLANDS, it is undisputed that if the seller has accepted that certain defects that were apparent at the time of the conclusion of the contract would be remedied, he may not rely on the buyer's knowledge that these qualities were not (yet) there. In this respect, the buyer's reasonable expectations, based on the seller's acknowledgement, lead to the goods not being in conformity if the defects are not remedied after all (cf. CC art. 7:17(2)). In ENGLAND, there is doubt as to whether a buyer who has accepted faulty goods on the faith of a verbal but non-contractual undertaking by the seller that these will be repaired can plead that the goods are not of satisfactory quality if a repair is not effected: see *R. & B. Customs Brokers Co. Ltd. v. United Dominions Trust Ltd.* [1988] 1 WLR 321. However, in SCOTS law, whether or not the goods would be deemed to be of unsatisfactory quality, such an undertaking would be enforceable as a unilateral promise (on this issue of a cure promised by the seller, see also SWEDEN Prop 1988/89:76, 94).

II. Pre-contractual duty to examine

6. Generally, there is no express regulation under the different systems of a pre-contractual duty to examine the goods. However, under many systems the buyer may still be under such an indirect obligation, since the seller is not liable for obvious defects which are present at the time of the conclusion of the contract. Most systems address this issue indirectly by referring to the type of lack of conformity for which the seller is not liable (AUSTRIA 'evident'; CZECH REPUBLIC 'evident' (cf. *Knappová*, Civil Law II[3], 106); ITALY 'using ordinary diligence' (e.g. employed in Consumer Code art. 129(4a)); LATVIA 'least attention should be paid'; SLOVENIA LOA § 460(2) 'diligent person with the average knowledge and experience of a person of the same occupation or profession would note such during an ordinary inspection of the goods'). According to the SPANISH CC art. 1484, the seller incurs no liability where the defects were "to hand" or ought to be deemed "manifest"; nor is the seller liable when the buyer is an "expert" in the relevant business. It is still undecided whether this restriction also applies to eviction liability. In fact, the majority of recorded cases relate to sales of land encumbered with zoning restrictions (see Supreme Court Judgment 17 November 2006, CCJC 75 § 2007, pp. 1221 ff, and note by *Díaz Martínez*).

7. Under other systems, buyers are not obliged to examine the goods before purchase, but, if they do, they should take care in examining them, for any defect which they ought to have discovered by virtue of the examination which they undertake cannot be taken into account when considering whether the goods are in conformity (ENGLAND and SCOTLAND Sale of Goods Act s. 14(2C)(b); ESTONIA LOA § 218(4) and NC CC 3-2-1-50-06; LITHUANIA CC art. 6.337, which refers to the contract or to usage). If the buyer has examined the goods before the conclusion of the contract, or without good reason has failed to comply with the seller's invitation to examine them he cannot make a claim for lack of conformity for what he should have noticed at the examination, unless the seller has acted against good faith (DENMARK

SGA § 47; FINLAND, NORWAY and SWEDEN SGA § 20(2)). The same applies in respect of the inspection of samples prior to the purchase (ENGLAND and SCOTLAND Sale of Goods Act s. 14(2C)(c); FINLAND, NORWAY and SWEDEN SGA § 20(3)).

8. For the requirement to examine the goods upon delivery, cf. IV.A.–4:301 (Examination of the goods) under I.

IV.A.–2:308: Relevant time for establishing conformity

(1) The seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer, even if the lack of conformity becomes apparent only after that time.

(2) In a consumer contract for sale, any lack of conformity which becomes apparent within six months of the time when risk passes to the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods or the nature of the lack of conformity.

(3) In a case governed by IV.A.–2:304 (Incorrect installation under a consumer contract for sale) any reference in paragraphs (1) or (2) to the time when risk passes to the buyer is to be read as a reference to the time when the installation is complete.

COMMENTS

A. General

This Article defines the time when conformity, or a lack of conformity, is to be established for the purpose of the seller's liability for lack of conformity. In this context, there are two different questions. First, at what point in time does a lack of conformity have to be in existence in order to give the buyer a remedy? And, Secondly, when does it have to become apparent to the buyer? While the answer to the second question can be found in Chapter 4, Section 3 (Requirements of examination and notification), this Article contains the answer to the first question. In essence, the relevant point in time is normally determined by the passing of risk, but this has to be modified for cases governed by the rules on incorrect installation. Paragraph (2) contains a presumption as to the existence of a lack of conformity in favour of consumers.

B. Existence of the lack of conformity

As a rule, the seller is only liable for a lack of conformity which existed at the time when the risk passed. This rule is justified on various grounds. First, the passing of the risk means that the goods have left the seller's sphere of influence, in accordance with the main rule in IV.A.–5:102 (Time when risk passes) paragraph (1), so that the seller can no longer control them. It would therefore be unfair to burden the seller with liability for a lack of conformity emerging in respect of goods that are outside the seller's control. Secondly, this rule ensures that the buyer assumes the risk of payment, as defined in IV.A.–5:101 (Effect of passing of risk), together with the risk of lack of conformity.

> *Illustration 1*
> A sells cattle to B. After five months the animals start to show the first signs of a serious disease. The seller can be held liable only if the defect, that is the disease, was present at the time when the risk passed. If the cattle have only been infected in B's cowshed and, hence, after delivery, the seller is not responsible.

Generally, the risk will pass when the buyer takes over the goods, or should have taken them over, or when the goods are handed over to the first carrier (see the rules in Chapter 5). However, under a consumer contract for sale, the risk generally does not pass until the buyer actually takes over the goods (cf. IV.A.–5:103 (Passing of risk in a consumer contract for sale)). It follows from the passing of risk choice as the relevant point in time that, in the exceptional case where risk passes before actual delivery, the lack of conformity may also have to be in existence before the buyer actually takes charge of the goods (see IV.A.–5:201

(Goods placed at buyer's disposal), IV.A.–5:202 (Carriage of the goods) and IV.A.–5:203 (Goods sold in transit)).

Illustration 2
The facts are the same as in the previous illustration. If the risk passes before handing over the cattle, for instance due to default on the part of the buyer, and the cattle were subsequently infected by a virus without fault on the part of A, B has no claim despite the fact that the infection took place on A's farm.

C. Reversal of burden of proof in a consumer contract for sale

The general rule is that the buyer has to prove that the lack of conformity existed when the risk passed, which will often be rather difficult to establish. In order to facilitate this task, paragraph (2) lays down a short-term reversal of the burden of proof in favour of consumers: any lack of conformity becoming apparent within the first six months after the passing of the risk is presumed to have existed at that time. Under IV.A.–5:103 (Passing of risk in a consumer contract for sale)), risk passes when the consumer takes over the goods. In essence, this rule resembles a product guarantee, albeit that the seller can still rebut this presumption.

Illustration 3
B, a consumer, buys a washing machine from A, a white-goods dealer. After four months it stops working due to a short circuit. The defect in the wiring is presumed to have existed at the time of the passing of the risk – i.e. when the buyer got the machine. It is up to the seller to prove that this was not the case.

As a consequence of paragraph (2), the consumer buyer has an incentive to lodge a complaint early, as the buyer will then be exempted from the difficult issue of proof. By the same token, a consumer buyer may want to check the goods for lack of conformity, even though under no duty to do so (cf. IV.A.–4:301 (Examination of the goods) paragraph (4)).

This presumption applies unless it is incompatible with the nature of either the goods or the lack of conformity.

Illustration 4
A buys a cat from a pet shop. After 2 months of apparent good health the animal develops and then dies of a viral infection. Since the virus in question has an incubation period of just two weeks, and has very obvious symptoms, the presumption has no effect, as it is not compatible with the nature of the lack of conformity.

Illustration 5
A consumer cannot rely on the presumption when cheap straw sandals disintegrate after a long summer outdoors. This is an example of usual wear and tear of goods due to the nature of those goods.

D. Incorrect installation cases

Paragraph (3) has a special rule for cases where a consumer claims that the seller is liable for a lack of conformity under IV.A.–2:304 (Incorrect installation under a consumer contract for sale). It is obvious that in such a case the time when any lack of conformity has to be assessed cannot be the time when risk passes in relation to the goods themselves (which will generally be prior to their installation). So paragraph (3) provides that in such a case the lack of

conformity has to exist at the time when the installation is complete. The presumption in paragraph (2) still applies but with this time as the starting point.

NOTES

I. Point in time of the existence of lack of conformity

1. As a rule, the seller is only liable for a lack of conformity that existed upon the passing of risk (this is, however, different in the realm of the commercial guarantee, see Chapter 6).

2. In the majority of the systems, the relevant rules on conformity refer to the passing of risk (CISG art. 36(1); CZECH REPUBLIC Ccom art. 425(1); ESTONIA LOA § 218; FINLAND SGA § 21(1) and Consumer Protection Act chap. 5 § 15(1); FRANCE Cass.civ. III, 9 February 1965, Bull.civ. III, no. 103; GERMANY CC § 434; GREECE CC art. 534; HUNGARY CC §§ 279(2) and 305(1); NETHERLANDS cf. Parl. Gesch. Boek 7, 118; Asser (-*Hijma*), Bijzondere Overeenkomsten I[6], no. 332 and HR 2 April 1999, NedJur 1999, 585 (*Van den Broek and Van Dael*); NORWAY SGA § 21(1) and Consumer Sales Act § 18(1); POLAND CC art. 559; PORTUGAL CC arts. 796 ff *ex vi* art. 918; SLOVAKIA CC § 499 and Ccom § 425(1); SLOVENIA LOA § 458(1). In SPAIN, the relevant defect has to exist "at the time of the perfection of the sale" (CC art. 1488), that is the time at which the risk pass to the buyer (CC art. 1452); in consumer sales, though, arts. 114 and 123 of the ConsProtA, extend the seller's liability up to the time of delivery. A few systems refer directly to the moment of delivery (AUSTRIA CC § 924; ENGLAND and SCOTLAND Sale of Goods Act s. 14; SWEDEN Consumer Sales Act § 20). Similarly under HUNGARIAN law CC § 305(1), which refers to the 'time of performance' which obviously means performance by the obligor (seller), i.e. delivery. Since CC § 279(2) establishes that "the risk passes to the other contracting party with the performance" the result will be the same. The same applies under CZECH non-commercial sales, which refers to 'time of performance' in CC § 499, meaning the time of delivery by the seller and of taking delivery by the buyer (cf. *Knappová*, Civil Law II[3], 106). In ENGLAND and SCOTLAND, the difference in approach between the time of passing of the risk in Sale of Goods Act s. 20 and that of supply raises problems for cases where risk passes before supply. In such cases, it is generally asserted that the buyer takes the risk of any non-conformity after the passing of risk which is not due to the fault of the seller, although there is no statutory authority for this view (see *Adams/Atiyah/MacQueen*, Sale of Goods[11], 147 f; *Goode*, Commercial Law[3], 328, note 153).

3. In contrast, in many systems where a distinction is made between hidden defects and non-conforming delivery, hidden defects must have been in existence upon the conclusion of the contract (BELGIUM; ITALY; LATVIA Consumer Protection Act art. 13(2) and (3); SPAIN CC arts. 1488 and 1452 and TS 31-01-1970). However, under ITALIAN consumer sales no such distinction is made (Consumer Code art. 130(1)).

4. Notwithstanding the fact that the lack of conformity must have been in existence upon delivery (or the conclusion of the contract when it comes to hidden defects), it is acknowledged that lack of conformity does not have to have 'matured', thus extending the liability of the seller. Under some systems this is explicitly indicated in that the seller is liable even if the lack of conformity becomes apparent only after the passing of the risk (CISG art. 36(1); ESTONIA LOA § 218(1); FINLAND, NORWAY and

SWEDEN SGA § 36(1)). Under other systems, this principle is not expressly provided in the legal provisions (AUSTRIA: e.g. a defect that can be traced back to another defect, cf. *Koziol and Welser*, Bürgerliches Recht II[10], 71 f; ITALY: it is sufficient that its 'cause' pre-exists the conclusion of the contract; POLAND: the defects arose from a cause which was earlier inherent in the thing sold, see CC art. 559).

5. Moreover, the seller is liable if the goods deteriorate after the passing of risk/delivery, if the deterioration is due to an act or omission by the seller (CZECH REPUBLIC CC § 623 (consumer sales); ESTONIA LOA § 218(3); FINLAND SGA § 21(2); NORWAY SGA § 21(2) and Consumer Sales Act § 18(3); SWEDEN SGA § 21(2) and Consumer Sales Act § 20(3)). Such a situation may occur if the seller under the contract is also to install the goods at the buyer's place of business or home, and thereby damages the goods, or if a consumer damages the goods after delivery due to incorrect instructions provided by the seller concerning the usage of the goods, (SWEDEN Prop 1989/90:89, 109)).

6. Cf. also IV.A.–5:102 (Time when risk passes).

II. Burden of proof (consumer – other sales)

7. The six-month presumption contained in Consumer Sales Directive art. 5(3) has been implemented in all systems for consumer sales (AUSTRIA CC § 924; BELGIUM CC art. 1649quarter § 4; CZECH REPUBLIC CC § 616(4); ENGLAND and SCOTLAND Sale of Goods Act s. 48A(3) and (4); ESTONIA LOA § 218(2); FINLAND Consumer Protection Act chap. 5 § 15(2); FRANCE Consumer Code art. L. 211-7; GERMANY CC § 476; HUNGARY CC § 305/A(2); ITALY Consumer Code art. 132(3); NETHERLANDS CC art. 7:18(2); NORWAY Consumer Sales Act § 18(2); POLAND Consumer Sales Act art. 4(1); SLOVAKIA CC § 508; SLOVENIA Consumer Protection Act art. 37b; SPAIN, ConsProtA art. 123; SWEDEN Consumer Sales Act § 20a).

8. In some countries this issue has already been considered in a number of judgments. In GERMANY the BGH held that it is clear that the burden of proof only relates to the time aspect but not to the defect as such. In the case at hand, a belt in an engine had torn. The consumer claimed that the belt had been defective, whereas the trader claimed that a mistake by the consumer – changing into a lower gear at high speed – was responsible for the defect. The court held that the consumer had to prove that the belt had been defective as such before CC § 476 could apply (BGH 2 June 2004, ZIP 2004, 1368–70; this has been strongly criticised in academic literature, see *Looschelders and Benzenberg*, VersR 2005, 231 ff). A similar case also concerning a six-year old second-hand car was brought before the Swedish Board of Consumer Complaints (ARN). Three months after the delivery of the car, a strap broke, causing the engine to fail. The Board firstly established that the nature of the non-conformity was not such that it had been caused by the buyer and that no other circumstances concerning the nature of the non-conformity had been put forward which rebutted the six-month presumption. The Board further stated that the strap in question could be considered a detail of consumption. However, it could not definitely be said that a strap of this kind would necessarily break within six months of delivery, as is for instance the case with perishables. The seller was therefore ordered to compensate the buyer for the costs of repair (ARN 2002-8731, of 3 June 2003). In addition to this case, the ARN decided five further cases *in plenum* concerning the application of the six-month presumption for defects in used cars in March 2004. In three out of these five, the Board ruled in favour of the buyer. In two of them, the decisive fact was that the defect appearing was not a normal result of wear and tear for a car of that age (ARN 2003-4989, of 3 March 2004 (gearbox failure in an eight-year-old car) and

ARN 2003-5348, of 3 March 2004 (radiator failure in an eight-year-old car)). In the third case, the seller had not acted professionally by neglecting to change a strap, while performing other repairs (ARN 2003-4343, of 3 March 2004 (engine breaking down in a 15-year-old car)). In the two cases where the seller was not found liable, this was based upon different grounds. In one case, the car had, according to the contract, been sold as a 'repair object', and the seller was therefore not found liable (ARN 2003-5093, of 3 March 2004 (breakdown of an imported, 11-year-old car)). In the last case, the lack of conformity was *per se* not considered to be a normal result of wear and tear for a car of that age. The seller, however, was successful in rebutting the six-month presumption, by arguing that the car had been tested by an independent expert prior to the sale, and no such damage had been found. Therefore, the Board concluded that the defect had appeared after delivery (ARN 2003-4991, of 3 March 2004).

9. Outside of consumer sales and the ambit of Consumer Sales Directive art. 5(3) (which merely refers to the *existence* of the defect), the general rules on evidence apply. As a consequence, the buyer needs to prove both the defect and the fact that it already existed upon purchasing the goods. Since this may lead to difficulties, the burden of proof may, in certain cases, be on the seller instead (see NORWAY Rt 1998, 774 in which it is also stated that if none of the parties fulfil their duty to prove their cases, the seller may sometimes, depending on the circumstances of the case, have to bear the burden of proof, and Ot. prp. no. 44 2001-2002, 87). In SWEDEN it is argued that it should be considered sufficient if, after an evaluation of the circumstances, it is more probable that the defect existed at the time of delivery (cf. NJA 1991, 481, which, however, concerned services). A lack of durability is often the most probable cause of a defect, when the goods deteriorate within their normal life-span. Therefore it can be said that there is an existing legal presumption that the seller is responsible for such non-conformity (*Håstad*, Den nya köprätten[5], 94 f). See also BELGIUM, where there is a presumption that, if the normal use of the goods is not disputed, the defect existed prior to conclusion of the contract (Brussels 5 June 1996, Res Jur. Imm. 1996, 122; Liege 12 November 1997, JLMB 1998, 624; Brussels 21 January 1993, RW 1994-95, 820; Ghent 1 February 1995, AJT 1995-96, 168 *Tilleman and Verbeke*, Bijzondere overeenkomsten in kort bestek, 60; *de Page and Masson*, Traité élémentaire de droit civil belge IV(1), 282). Under CZECH law the general regime of civil procedure applies (Civil Procedure Code art. 120). Therefore the burden of proof that: (a) the goods did not meet the specifications set out in the guarantee document or in associated advertisements; is on the claimant (buyer), and (b) any failure of or damage to the goods is due to misuse, mistreatment, accident, failure to maintain, or other cause for which the guarantor is not responsible is on the guarantor. In SPANISH law a general presumption of the pre-existence of the defect has been developed only in the context of sales of buildings (cf. TS 25 January 1999, RAJ 1999 no. 4560).

IV.A.–2:309: Limits on derogation from conformity rights in a consumer contract for sale

In a consumer contract for sale, any contractual term or agreement concluded with the seller before a lack of conformity is brought to the seller's attention which directly or indirectly waives or restricts the rights resulting from the seller's obligation to ensure that the goods conform to the contract is not binding on the consumer.

COMMENTS

A. General

This Article attempts to set out the limits of derogation for consumer contracts for sale concerning the conformity requirements in this Chapter. In doing so, it is complemented by IV.A.–4:101 (Limits on derogation from remedies for non-conformity in a consumer contract for sale), which has a similar provision for the consumer's remedies for lack of conformity.

B. Derogation from the conformity rules in a consumer contract for sale

In a consumer contract for sale, the buyer's rights under Section 3 of this Chapter in respect of the seller's obligation to ensure that the goods conform to the contract cannot be waived or restricted by the seller before the consumer notifies the seller of the defect. After that moment in time, the parties are free to agree upon other solutions than envisaged in this Chapter. Thus, this Article prevents the seller from restricting the rights of a consumer beforehand, for instance in standard terms.

This provision has the effect that all the rules exclusively applicable to consumer contracts for sale, for instance IV.A.–2:304 (Incorrect installation in a consumer contract for sale) and IV.A.–2:308 (Relevant time for establishing conformity) paragraph (2) cannot be derogated from, unless in the (unlikely) event that the consumer is granted more far-reaching rights. Moreover, generally the provisions common to consumer and other sales will have the same effect, for instance IV.A.–2:305 (Third party rights or claims in general) and IV.A.–2:308 (Relevant time for establishing conformity) paragraph (1).

However, IV.A.–2:301 (Conformity with the contract) and IV.A.–2:302 (Fitness for purpose, qualities, packaging) are the rules that raise the most difficult questions as to how far the parties can deviate from what is laid down in these rules. The problem is that these Articles are strongly connected to the individual agreement between the parties. On the one hand, the parties should for instance be able to conclude a contract for the sale of goods that are not fit for their ordinary purpose. This should only be possible, however, where there is a special reason or this is clearly indicated in the description of the goods, for instance that they are substandard or second hand. In order for the seller to exclude the application of the requirement in IV.A.–2:302 paragraph (b) that the goods must be fit for the purpose for which goods of the same description would ordinarily be used this limitation must be clearly indicated in the contract (cf. also Comment A to that Article).

Illustration 1

A, a car dealer, sells a car to B, a consumer. The car has been severely damaged in an accident, but B intends to use it for spare parts only. It is clear that the car is not fit for driving on roads, the ordinary purpose for which cars are used. The seller will nevertheless not be liable under IV.A.–2:302 (Fitness for purpose, qualities,

packaging) paragraph (b) if it is clearly stated that the car is sold as a 'write-off' and 'for parts only'.

On the other hand, the seller will generally not be able to exclude the scope of IV.A.–2:302 (Fitness for purpose, qualities, packaging) without a special reason, particularly in the case of new goods which are not sold as substandard. Even in the case of durable second-hand goods like cars, the seller may not rely on a general description such as a 'wreck' or 'kit car' if the other circumstances, such as the price or the fact that the car is still being driven on public roads, indicate otherwise.

Moreover, the seller should not be able to exclude the elements in IV.A.–2:302 (Fitness for purpose, qualities, packaging) through standard terms. Normally, an individual agreement will be necessary. At the end of the day, the question to which extent the parties under a consumer contract for sale may exclude the scope of IV.A.–2:302 beforehand will depend on the concrete case and will ultimately have to be resolved by means of a case-by-case analysis of the circumstances.

NOTES

Exclusion or limitation of the seller's liability

1. Due to the implementation of the Consumer Sales Directive, the rules regarding the conformity of the goods are mandatory in all Member States under consumer sales (cf. Consumer Sales Directive art. 7(1)).
2. Under non-consumer sales, most regulations relating to sales law are generally of a default nature. However, under some systems the seller's possibility to restrict his liability within the area of non-conformity and remedies is restricted by law. In ENGLAND and SCOTLAND the implied undertakings as to the conformity of goods with their description or sample, and as to their quality and fitness for any particular purpose can be excluded or restricted only in so far as is reasonable (ENGLAND Unfair Contract Terms Act art. 6(3) and SCOTLAND Unfair Contract Terms Act art. 20(2)). In FRANCE, the question of the exclusion of liability is answered according to the different degrees of 'specialty' of the parties to a sales contract. While terms modifying the legal guarantee scheme are possible between professionals of the same speciality, this is not possible in the event of a professional buyer which is not as specialised as the seller in the thing sold (see e.g. Cass.com. 29 January 1974, Bull.civ. IV, no. 39, D. 1974, 268; JCP 1974.II.17852. In this case the contract of sale for a ship included a limitation of the guarantee and it was determined that the term was not valid because the buyer, a shipowner, had a different speciality than the builder). On the other hand, the conditions of validity of contractual terms concerning the obligation of a conforming delivery are different between professionals: the limitation clauses are valid between professionals, even if they have a different speciality (Cass.civ. I, 20 December 1988, Bull.civ. I, no. 11; Cass.civ. I, 24 November 1993, JCP 1994.II.22334, note *L. Leveneur*).
3. Under several systems, the seller's knowledge of the lack of conformity will restrict him from excluding liability. In BELGIUM (CC art. 1643) and ITALY, agreements that exclude or limit the rights of the buyer with regard to defective goods are not legitimate if the seller acted in bad faith, i.e. if he knew that the goods were defective. Under BELGIAN law bad faith is not presumed, thus the burden of proof of the

seller's knowledge of the defect rests with the buyer. However a professional seller is presumed to have known the defects in the sold thing. In that way he cannot refer to clauses in the contract that exclude or limit the rights of the buyer in the case of defective goods. The professional can only produce evidence to the contrary by proving that his ignorance was invincible and that the defect was untraceable (Cass. 4 May 1939, Pas. belge 1939, 223; Cass. 15 June 1989, A.C. 1988-89, 1233; Cass. 17 May 1984, A.C. 1983-84, 1205; Cass. 7 December 1990, A.C. 1990-91, 391; Cass. 19 September 1997, A.C. 1997, 840; Brussels 21 January 1993, RW 1994-95, 820; Antwerp 20 September 1995, RW 1997-98, 880; Liege 12 November 1997, JLMB 1998, 624; *de Page and Masson*, Traité élémentaire de droit civil belge IV(1), 285). The seller cannot rely upon an agreement limiting or excluding the buyer's rights due to non-conforming goods if he has fraudulently concealed the lack of conformity (ESTONIA LOA § 221(2) and GERMANY CC § 444) or has undertaken to guarantee the quality of the goods (GERMANY CC § 444). Under SLOVENIAN law, too, the parties are free to limit or exclude the seller's liability for defects, except where the seller was aware of the defect and where the seller has imposed the clause "using his predominant position" (LOA § 466). Similarly in POLAND the parties may extend, limit or exclude the liability for warranty (CC art. 558(1)), however such exclusion or limitation is ineffective if the seller insidiously concealed the defect from the buyer (CC art. 558(2)). Moreover, in such a situation, the seller may often not rely upon any notification periods or time-limits. Under the SPANISH CC (art. 1485 II), a waiver of the buyer's rights is effective, unless the seller was aware of the existence of the lack of conformity.

4. In some systems, the seller is not liable for a minor lack of conformity (LATVIA CC art. 1613) or insignificant discrepancies that do not affect the use of the item (SLOVENIA LOA § 458(3)).

CHAPTER 3: OBLIGATIONS OF THE BUYER

IV.A.–3:101: Main obligations of the buyer

The buyer must:

(a) pay the price;
(b) take delivery of the goods; and
(c) take over documents representing or relating to the goods as may be required by the contract.

COMMENTS

A. Main obligations of the buyer

This Article lists three obligations of the buyer that are typically found in sales transactions. They correspond to the main obligations of the seller set out in Chapter 2. The parties are, of course, free to regulate the content of their obligations, in accordance with II.–1:102 (Party autonomy). So a buyer may not be subject to all the obligations set out in this Article and may have other obligations. Most obviously, many sales do not involve documents and so the contract will not require the buyer to take delivery of such documents. But even in a non-documentary sale, the buyer may not be under an obligation to take delivery of the goods, as they may already be held by the buyer or it may have been agreed that they should remain in the seller's possession (cf. the corresponding issue for the seller's obligation to deliver in IV.A.–2:101 (Overview of obligations of the seller) Comment C). Besides, even where the contract requires the seller to deliver the goods, the buyer may not have to do anything to "take" delivery.

> *Illustration 1*
> M, a local dairy, offers free delivery of fresh milk to its customers in the vicinity. The milk is delivered in bottles, which are left at the buyers' premises, i.e. in front of the door. The dairy performs its obligation to deliver the goods by merely placing the bottles on the doormat, and there is no corresponding obligation on the buyer to actually take charge of the goods.

In addition, the buyer may also have to comply with a number of obligations arising from the particular agreement between the parties. There may, for example, be an obligation to allow the seller to have access to premises in order to install the goods or an obligation to pay export duties or to bear the cost of chartering a vessel. Additional obligations for the buyer will almost always be involved in mixed contracts, such as a contract for the sale of machinery and the provision of training in its operation.

B. Obligation to pay the price

The obligation to pay the price is essential for a sales contract in the strict sense. However, if parties agree to exchange goods for other goods, the present rules also apply to such a barter contract, see IV.A.–1:203 (Contract for barter).

The present rules do not contain provisions relating to the determination of the price, since such rules are already contained in Book II. See II.–9:104 (Determination of price), II.–9:105

(Unilateral determination by a party), II.–9:106 (Determination by a third person) and II.–9:107 (Reference to a non-existent factor). Nor do they contain provisions on the place and time for payment, the currency of payment or the formalities of payment since those matters are regulated in Book III. See III.–2:101 (Place of performance), III.–2:102 (Time of performance), III.–2:109 (Currency of payment) and III.–2:113 (Costs and formalities of performance). However, there is here one additional rule relating to the payment of the price: IV.A.–3:103 (Price fixed by weight).

If the buyer refuses to pay the price, the seller may sue for the price. However, the right to do so is qualified by III.–3:301 (Enforcement of monetary obligations) paragraph (2). If it is clear that the buyer does not want the goods, the seller cannot sue for the price if the seller could have arranged a substitute transaction without significant effort or expense, or performance would be unreasonable in the circumstances. If the seller cannot sue for the price, the seller will terminate the contractual relationship and sue for damages for the loss suffered as a result of the buyer's non-performance.

C. Obligation to take delivery of the goods

The present Article, and the more detailed provisions in Section 3, make it clear that the buyer is under an obligation to take delivery of the goods. It is important to note that this is a genuine obligation of the buyer, that is to say, that the buyer's failure to take delivery of the goods gives rise to remedies on the part of the seller.

Therefore the present rules do not embrace the idea of taking delivery as a soft obligation, which merely results in *mora creditoris* rather than an enforceable right to performance by the seller.

In practice, the seller's right to force the buyer to take delivery will seldom arise. To start with, a buyer who has actually paid the price will be unlikely to refuse to take delivery. The seller will only need to force the buyer to also take delivery in exceptional situations, for instance if the maintenance of the goods is expensive or if the goods take up too much storage space. Moreover, the seller will have extensive rights to deposit the goods at another place or to sell the property elsewhere, according to III.–2:111 (Property not accepted). If the buyer also refuses to pay the price the seller will probably first sue for the price (cf. Comment B). Finally, it has already been pointed out in Comment A above that the contract may not require the buyer to take delivery at all.

D. Obligation to take delivery of the documents

The contract may require the seller to transfer documents to the buyer. Basically, there are two groups of documents: those representing the goods; and those relating to the goods. Again, the contract has to answer the question of whether the buyer is under an obligation to take delivery of such documents.

E. Remedies of the seller

If the buyer fails to perform the obligations under the contract, the seller is entitled to the normal remedies for non-performance of an obligation.

NOTES

I. Determination of price

1. Under all systems, the buyer is obliged to pay the price. If no price has been agreed upon and the parties have not made any concrete indication as to how to calculate the price, there are two main approaches under the different systems. Firstly, the contract is regarded as void, or secondly the contract is still valid and it is presumed that the parties have agreed upon a reasonable price or a market price, etc.

2. Under the first group of systems the contract is void or it is considered that there is no contract at all if no price has been agreed upon (AUSTRIA CC § 1054; BELGIUM CC art. 1591; CZECH REPUBLIC CC § 588; FRANCE CC art. 1591; GERMANY *Hoeren and Martinek*, Systematischer Kommentar zum Kaufrecht, 28; POLAND SN of 28 April 1988, OSPiKA no. 7-12 poz. 342, Korzan w glosie do uchwały SN of 05 February 1992, III CZP 134/92, Glosa 1994, no. 5, poz. 81; SLOVAKIA CC §§ 588 and 589; SLOVENIA LOA § 442(1); SPAIN CC arts. 1271, 1445, 1447-1449 and 1450). Nevertheless, this approach may be more or less strict. For instance, under POLISH law it is established that if it follows from the circumstances that the parties had in mind the price which is usual in relationships of a given kind, it is to be deemed, in case of doubt, that they meant the price at the place and time where and when the thing was to be released to the buyer (CC art. 536(2)). Also under CZECH law the price can be determined in various ways. It can be based on existing expertise (NS ČSR 3 Cz 8/86) but when there is no existing expertise at the time of the conclusion of the contract, the contract (legal act) is void and null due to vagueness (NS ČR 22 Cdo 1625/2002: this judgment overruled earlier case-law of NS ČSR 3 Cz 8/86). Moreover, the contracting parties can agree that the price will be determined by a third person; it is however not possible to agree that the price will be solely determined by one party (*Knappová*, Civil Law II[3], 171). Furthermore, under commercial law, the price is sufficiently determined when the contracting parties agree upon a maximum price limit and the concrete price is determined by the seller within this scope (NS ČR 29 Odo 503/2001). Finally under commercial sales, the contracting parties may during the negotiations express their intent to conclude the contract without determining the price and in such a case the seller may demand payment of the price for which identical or comparable goods were sold at the time when the contract was concluded under contractual terms similar to those contained in the contract (Ccom art. 448(2)).

3. Under the other systems the contract is still valid. Different approaches can be found as to how to determine the price. The parties are presumed to have agreed upon a reasonable price (PECL Art. 6:104; ENGLAND and SCOTLAND Sale of Goods Act s. 8(2); ESTONIA LOA § 28; FINLAND SGA § 45 and the Consumer Protection Act chap. 5 § 23; NETHERLANDS CC art. 7:4; NORWAY SGA § 45 and Consumer Sales Act § 37(1); SWEDEN SGA § 45 and Consumer Sales Act § 35) or the market price (CISG art. 55; GREECE CC art. 530; LATVIA CC art. 2018; LITHUANIA). Under LATVIAN law, it is explicitly established that if the purchase was made at the market price, it is to be assumed that the average price at the location and time of concluding the contract was meant. But if there are no market prices at that location, the market prices of the nearest place of commerce is to be taken as a basis. Where price indexes exist, the price is to be determined according to the same (CC art. 2018). The determination of the market price may be entrusted to an indicated third person or, if one is not indicated, to the fair views of an objective specialist. The decision of a

third person commits both parties, assuming that the price indicated is not unfair (CC art. 2019).

4. It may also generally be up to the seller to determine the price (CZECH REPUBLIC Ccom arts. 409(2) and 448(2); DENMARK SGA § 5; GERMANY CC § 316; GREECE CC art. 379; ITALY CC art. 1474) or only under commercial sales (SLOVAKIA Ccom arts. 409(2) and 448(2); SLOVENIA LOA § 442(2) and (3)). However, the seller's power is often limited in one way or another. Accordingly, the price requested for may not be unreasonable (DENMARK SGA § 5; GERMANY CC § 315) or the seller can only ask a purchase price for which the same or comparable goods would be sold at the time of the conclusion of the contract, under similar contractual conditions (SLOVAKIA Ccom arts. 409(2) and 448(2); SLOVENIA LOA § 442(2)). If there is no customary price, an appropriate price is applicable. The appropriate price is the daily price at the time of the conclusion of the contract; if this cannot be determined, the court determines the price considering all the circumstances of the case (SLOVENIA LOA § 442(2) and (3)). Under ITALIAN law it is presumed that the price is the habitual price charged by the seller. As a final choice, the price may be determined by a third party appointed by the competent tribunal (CC art. 1474).

5. Under SWEDISH law the HD has established that if one party alleges that a fixed price has been agreed upon, generally the burden of proof rests upon him in this respect (NJA 2001, 177).

6. The buyer is bound by the price in the invoice received unless he notifies the seller within a reasonable time that he does not accept it, or unless a lower price was expressly or implicitly agreed upon or the price required is unreasonable (FINLAND, NORWAY and SWEDEN SGA § 47).

7. Finally, in NORWEGIAN consumer sales Consumer Sales Act § 37(3) establishes that the seller cannot claim a fee for issuing and dispatching an invoice in addition to the purchase price unless this follows clearly from the contract.

II. Time of payment

8. If the contract remains silent as to the time for payment, the different national systems provide different solutions.

9. The most common approach, based on either general contract law or a sales-specific regulation, is that the payment is due at the time of the delivery of the goods (CISG art. 58(1); BELGIUM CC art. 1651; ENGLAND and SCOTLAND Sale of Goods Act s. 28; FRANCE CC art. 1651; ITALY CC art. 1498(2); LATVIA CC art. 2033; LITHUANIA CC art. 6.39; NETHERLANDS CC art. 7:26(2); POLAND CC art. 488; SLOVENIA LOA § 496(2); SPAIN CC art. 1500(2) and Ccom art. 339).

10. The payment may instead be linked to the conclusion of the contract. The time of payment is the time of the conclusion of the sales contract (GREECE CC art. 323) or the payment is due within a reasonable period of time after the conclusion of the contract (PECL art. 7:102). The parties may also be obliged to render performance without undue delay (CZECH REPUBLIC and SLOVAKIA CC § 591) or immediately (GERMANY CC § 271(1)). Under some systems the buyer must pay upon demand by the seller (AUSTRIA CC § 904; CZECH REPUBLIC Ccom § 340(2); DENMARK SGA § 12; FINLAND SGA § 49(1) and the Consumer Protection Act chap. 5 § 24; NORWAY SGA § 49(1) and Consumer Sales Act § 38(1) and (2); SLOVAKIA Ccom art. 340(2); SWEDEN SGA § 49(1) and Consumer Sales Act § 36). However, even under those systems not principally linking the obligation to pay with the delivery, delivery and payment are mostly regarded as concurrent conditions,

thus giving either party the right to refuse to perform unless the other party performs at the same time (cf. e.g. CZECH REPUBLIC CC § 560; GREECE CC art. 374). Similarly, it may also be established that the buyer does not have to pay the price before the goods are delivered (CZECH REPUBLIC CC § 591; FINLAND, NORWAY and SWEDEN SGA § 49(1)).

11. Under some systems, the buyer is generally not bound to pay the price until he has had an opportunity to examine the goods (CISG art. 58(3); CZECH REPUBLIC CC § 591; ESTONIA LOA § 213(3); FINLAND SGA § 49(2) and the ConsProtA chap. 5 § 24(2); NORWAY SGA § 49(2); POLAND CC art. 544(2); SLOVAKIA CC § 591; SWEDEN SGA § 49(2)).

12. In NORWEGIAN consumer sales, Consumer Sales Act § 38(3) establishes that contract clauses obliging the buyer to pay the purchase price at a certain point in time regardless of whether or not the seller delivers the goods in due time are not binding on the consumer. Under ESTONIAN law, a clause requiring the buyer to make a prepayment in excess of 50% of the purchase price is not binding in consumer sales (LOA § 213(4)).

III. Place of payment

13. Generally, the place of performance is presumed to be the debtor's place of business, residence etc., unless the parties have agreed otherwise. For monetary performance, on the other hand, this is only exceptionally the rule. Hence, the place of payment varies under the different systems. Either the place of payment is the seller's or the buyer's place of business, residence etc., or the place of payment is the place of delivery.

14. The most common approach is that unless otherwise agreed the payment is to take place at the seller's place of business, residence etc. (PECL art. 7:101(a); CISG art. 57(1)(a); CZECH REPUBLIC CC § 567(2) (only in the case of payment through bank or by a post service); ENGLAND and SCOTLAND by virtue of mercantile custom; GERMANY CC § 270(1); ESTONIA LOA § 85(2)1); GREECE CC art. 321; FINLAND SGA § 48(1); POLAND CC art. 454; NORWAY SGA § 48(1); SLOVAKIA CC § 567 and Ccom art. 335; SLOVENIA LOA §§ 295 and 496; SWEDEN SGA § 48(1)). Under ITALIAN law CC art. 1498(3) establishes that in case the price is not due at the moment of the delivery, the buyer can effect payment at the domicile of the seller.

15. Under a few systems the payment is to take place at the buyer's place of business or residence (AUSTRIA CC § 905(2); CZECH REPUBLIC and SLOVAKIA CC § 567(1) and Ccom arts. 337(1) and 339(2)). In other words, the debtor, i.e. the buyer, has to send the money to the creditor, i.e. the seller. In principle, the place of performance remains the place of the debtor; he has performed if he transferred the money. However, under AUSTRIAN law this rule is slightly modified in that the buyer bears the risk and costs for sending the money (CC § 905(2)).

16. Moreover, under some systems it is established that under a sales contract, unless otherwise agreed upon, the payment takes place where the delivery is to be made (BELGIUM CC art. 1651; FRANCE CC art. 1651; ITALY CC art. 1498(2); LATVIA CC art. 2033; LITHUANIA CC art. 6.314; NETHERLANDS CC art. 7:26(2); SPAIN CC art. 1500(2) and TS 15 March 1994, RAJ 1994/1983, TS 12 December 1997, RAJ 1997/8759, TS 18 February 1998, RAJ 1998/876). The same applies if the payment is to be made against the handing over of the goods or of the documents (CISG art. 57(1); ESTONIA LOA § 213(2)).

IV. Formalities of payment

17. Under most systems, no such specific regulation is provided for: see e.g. Sale of Goods Act 1979 for ENGLAND and SCOTLAND. Such an obligation may however be derived from the principle of good faith under many systems.

18. Under the CISG art. 54 it is established that the buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made. Under NORDIC law it is provided that the buyer's obligation to pay the price also includes the duty to accept a bill of exchange and furnish a letter of credit, a bank guarantee or other security according to the contract, or to take such measures which are necessary to enable payment (FINLAND, NORWAY and SWEDEN SGA § 48(2)). Under DUTCH law CC art. 6:46 establishes that when a creditor accepts a cheque, an order of payment or other document offered to him by way of payment, it is presumed he does so under reservation of rights in case the payment does not take place. In ESTONIAN law the general provisions regarding the performance of monetary obligations (LOA § 91(1)), lays down that if the parties do not agree otherwise, any such obligation can be performed by making a payment in cash. If the creditor (the buyer) has a current account in a country where the monetary obligation is to be performed, the payment can be made by a wire transfer to that account, LOA § 91(2)). In POLAND the payment is effectively made if the seller receives cash or a transfer of money is recognised on his account. An order of payment as such does not constitute actual payment until the money is transferred to the account of the buyer (Judgement of the Supreme Court of 4 January 1995; III CZP 164/94, OSNIC 1995, poz. 62).

19. In SPAIN there is no rule on this point. However, as the obligation to perform (on the part both of the seller and of the buyer) is one of result (*obligación de resultado*), it is clear that the debtor has to take every measure necessary for the price to reach the vendor.

V. Obligation to take delivery

20. See Notes under IV.A.–3:104 (Taking delivery).

IV.A.–3:102: Determination of form, measurement or other features

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods, or the time or manner of their delivery, and fails to make such specification either within the time agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights, make the specification in accordance with any requirements of the buyer that may be known to the seller.

(2) A seller who makes such a specification must inform the buyer of the details of the specification and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

COMMENTS

A. General

The parties can agree upon the conclusion of the contract that the buyer has to make certain specifications relating to the goods to be sold. In principle, it is up to the buyer to make these specifications, which then become part of the standard of conformity. If the buyer fails to do so, however, the seller has a right to make the choice instead. Not only does this rule allow the seller to crystallise the contractual obligations under the contract in respect of delivery and conformity, but it also minimises the buyer's opportunities to avoid or delay performance of the buyer's obligations by failing to make the necessary specifications.

B. The seller's right to make specifications

The starting point for this Article is an agreement between the parties that allows the buyer to specify certain features of the goods, or the time or manner of their delivery, after the conclusion of the contract.

> *Illustration 1*
> B agrees to buy a car from S, to be delivered a month later. B is to specify the type of tyres she wants within a week. After a week, B has not contacted the seller, and S writes to the buyer to specify that the car will be delivered with standard tyres, and requests B to inform him within ten days if she does not agree with the choice. B does not reply. The seller's choice is then binding.

> *Illustration 2*
> S has sold a certain quantity of copper to be delivered over a period of three years in quarterly instalments to B. The buyer is to specify the quantity of every quarterly instalment by 'delivery orders' four weeks in advance. After a year B fails to do so. S may then make the specification in accordance with the procedure under this Article.

If the buyer fails to make the specifications, either within the time agreed upon or upon the request of the seller, the seller has a right to make the specification subject to certain requirements. First, the seller has to take into account any known requirements of the buyer, e.g. the intended use of the goods. Secondly, the seller has to follow the procedure set out in paragraph (2). Accordingly, the seller has to inform the buyer of the specification and provide a possibility to make a different choice. Then the buyer has some time to react, after the expiry of which the seller's choice becomes binding.

In addition to the right of specification, this Article makes it clear that the seller may also exercise any other rights, for instance claiming damages for any loss caused by the delay.

C. Consumer contract for sale

It is important to point out that the parties must have reached a binding agreement in the first place, in order for this Article to apply. In many cases, particularly a consumer contract for sale, the failure to agree on an important question, for instance the colour of a new car, will mean that there is no contract at all.

D. Relationship with Book III

The present Article, which reflects the CISG, is more specific than the rule in III.–2:105 (Alternative obligations or methods of performance) and displaces that rule to the extent of any inconsistency. (See I.–1:102 (Interpretation and development) paragraph (5) – special rule prevails over general rule.) It offers more safeguards to the buyer. According to III.–2:105 paragraph (2), the right to choose passes immediately to the seller if the delay in making a choice is fundamental; otherwise the seller is obliged first to give a notice determining an additional period of reasonable length in which the buyer must choose, before the right to choose passes to the seller.

NOTES

The seller's right to make specifications

1. Under most systems there is no corresponding regulation to the seller's right to make specifications: see e.g. Sale of Goods Act 1979 for ENGLAND and SCOTLAND. However, under a number of systems a sales-specific right to make specifications can be found (CISG art. 65; FINLAND SGA § 60; NETHERLANDS CC art. 7:31; NORWAY SGA § 60; POLAND CC art. 549; SLOVENIA LOA § 519; SWEDEN SGA § 60). Under a few systems such a right may only be found under commercial sales (AUSTRIA Ccom § 375; CZECH REPUBLIC Ccom art. 452; GERMANY Ccom § 375; SLOVAKIA Ccom art. 452). Under GREEK law this issue is regulated on a general level in CC art. 309.
2. Under a few systems specification may also be made by the court in such a situation (ESTONIA LOA § 26; GREECE CC art. 371).
3. In SPANISH law, CC art. 1452 III places the risk on the buyer from the time when specification is made in the case of a generic sale. Although the rule is silent as to the party competent to make this specification, scholars agree that the seller has this power, as a default rule (cf. *López*, Comentario del CC, Ministerio de Justicia, II, p. 898), and this opinion is strongly grounded in commercial sales (see Ccom art. 334.2). Were this power to be granted to the buyer in the contract, and if the buyer failed to carry out the specification, the rule states that the risk passes to the delaying party, but it remains dubious whether the power to individualise the sale shifts to the seller.

IV.A.–3:103: Price fixed by weight

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

COMMENTS

The parties may agree that the buyer has to pay a price based on the weight of the goods. In this case, the question is what constitutes the weight and, thus, the price due. The default rule is that weight refers to net weight.

Illustration 1
A Dutch supermarket chain concludes an agreement with a Greek farming co-operative for the delivery of original feta cheese from Greece during a period of one year. The parties agree on a price per kilo; the cheese is shipped in dark plastic boxes filled with a salty liquid to keep the Feta cheese fresh. It follows from this Article that the Dutch buyer, unless agreed otherwise, need pay only for the cheese, and not for the liquid and the packaging.

The reference to the agreement between the parties emphasises the subordinate role of the net-weight rule. Since it is a mere default rule, the parties are free to agree otherwise.

NOTES

Net weight price

1. If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight. This principle is established under a number of systems (CISG art. 56; DENMARK SGA § 8; ESTONIA LOA § 213(1); FINLAND SGA § 46(2); HUNGARY CC § 366(2); ITALY *Bianca*, La vendita e la permuta, 319; LITHUANIA CC art. 6.313; NORWAY SGA § 46(2) and Consumer Sales Act § 37(2); SWEDEN SGA § 46(2)). The same applies to commercial sales under some systems (AUSTRIA and GERMANY Ccom § 380). Under SLOVENIAN law, this is an established trade usage under commercial sales (Splošne uzance za blagovni promet (General usances for merchandise), 1954, no. 160). There is no such rule in SCOTTISH law.
2. In SPAIN there is neither a rule on, nor a constructive general approach to, this issue. The diversity of situations and the existence of particular usages for different kinds of goods make the lack of a default rule reasonable.

IV.A.–3:104: Taking delivery

The buyer fulfils the obligation to take delivery by:

(a) doing all the acts which could reasonably be expected in order to enable the seller to perform the obligation to deliver; and

(b) taking over the goods, or the documents representing the goods, as required by the contract.

COMMENTS

A. General

This Article requires the buyer to co-operate with the seller to enable delivery to be made and to actually take over the goods or documents. Thus, the notion of taking delivery is broader than the actual term may suggest. The rule is, like other rules not declared to be mandatory, a default rule. The contract may make other provision for the taking of delivery.

The buyer's obligation to take delivery is framed as an obligation that the seller, in principle, can enforce. However, as already noted, the buyer may not have to take any further steps in order to comply with the obligations under the contract. To start with, the goods may already be in the buyer's possession or it may have been agreed that they should remain in the seller's possession. Besides, the contract may not require the buyer to take the goods from the seller upon delivery, either because the seller merely has to deposit the goods at the buyer's premises (see Illustration 1 below), or because the seller has to deliver the goods to a third person. In either case, however, the buyer may still have to facilitate delivery by the seller (see Comment B).

B. Enabling the seller to deliver

According to sub-paragraph (a), the buyer must enable the seller to perform the obligation to deliver. In the default rule case where the seller's obligation to deliver is performed merely by making the goods available to the buyer at the seller's place of business (cf. IV.A.–2:201 (Delivery) paragraph (1)) this paragraph is not relevant; the buyer's obligation is to take the goods under sub-paragraph (b). However, where the contract provides for the seller to deliver in some other way, for example by bringing the goods to the buyer's premises, sub-paragraph (a) is crucial. The buyer is obliged to co-operate with the seller by taking such action as can reasonably be expected to enable the seller to deliver. This may include the designation of the precise place to which the seller should send the goods or having personnel ready to receive the goods. Likewise, the buyer may be obliged to co-operate in times of civil strife, special border controls, and the control of epidemics etc. In such cases, the buyer has to inform the seller of any special problems and of the required formalities to transfer the goods.

Sub-paragraph (a) also imposes obligations on the part of the buyer in cases where the buyer does not have to take charge of the goods or documents (see Comment A). Thus, the seller can force the buyer to co-operate in performing the obligation to deliver the goods.

Illustration 1

The parties may agree that the seller, a quarry, has to deliver a quantity of marble tiles by delivering them to the construction site operated by the buyer, a building constructor. In this case, the seller delivers the goods by a unilateral act, which does

not require the buyer to take delivery. However, the buyer still has to co-operate with the seller with a view to enabling him to make the delivery, by telling him where the premises are and the times at which they are accessible.

C. Taking over the goods or the documents

The buyer's obligation to take over the goods or documents under sub-paragraph (b) corresponds to the functional definition of delivery in IV.A.–2:201 (Delivery) paragraph (1), which requires the seller to make the goods available to the buyer, something which can be achieved by different methods (for examples, see IV.A.–2:201 Comment C).

By and large, the buyer's obligation to take delivery mirrors the seller's obligation to deliver. Accordingly, taking over can mean different things. To start with, both parties interact directly: the seller hands over the goods, or keys, which the buyer takes over, i.e. by assuming physical control of the goods. If the seller does not hand over the goods, but otherwise makes them available to the buyer (for example, by preparing the goods for collection at a factory), the buyer takes over by collecting the goods made available by the seller. Finally, the seller can transfer the documents representing the goods, which the buyer may have to take over.

In all these cases, the seller performs the obligation to deliver as the buyer takes over the goods or documents from the seller. However, taking over the goods by the buyer does not necessarily coincide with delivery by the seller. The parties may, for instance, agree that the buyer does not have to collect the goods placed at the buyer's disposal. Moreover, the seller can deliver by taking other measures to enable the buyer to take over the goods from a third party; thus, the buyer eventually takes over the goods from that party. The same holds true in the case of the carriage of the goods under IV.A.–2:201 (Delivery) paragraph (2).

D. Failure to take over the goods or documents

If, under this Article, the buyer fails to take delivery at the place and time determined by IV.A.–2:202 (Place and time for delivery), the seller can exercise the normal remedies for non-performance of an obligation. In practice, the seller will sue the buyer for the purchase price rather than for not taking delivery, unless the right to recover the price is excluded by III.–3:301 (Enforcement of monetary obligations) paragraph (2). The buyer will normally take over the goods for which payment has been made. If the buyer fails to do so the seller may dispose of the goods under III.–2:111 (Property not accepted). This means that the seller can either deposit or sell the goods subject to a notification procedure. Another important consequence is the fact that, in a non-consumer contract, the risk passes to the buyer according to IV.A.–5:201 (Goods placed at buyer's disposal). If the goods are lost or damaged during the period of delay, the buyer still has to pay the full price.

This obligation also applies to contracts involving the carriage of goods where delivery is made in accordance with IV.A.–2:201 (Delivery) paragraph (2): first, the buyer has to take charge of the documents representing the goods from the seller, and, secondly, the buyer has to take charge of the goods delivered by the carrier. This second obligation can be justified as follows. The seller, when concluding a contract with a carrier, has an interest in the buyer taking over the goods from the carrier, as the seller may otherwise be liable to the carrier for freight and demurrage.

NOTES

I. Enforceability of the obligation to take delivery

1. Under most systems the buyer has an express or implied duty to take over the goods. However, there are great differences as to the consequences of the buyer's breach under the different systems, mainly as to the question of whether the seller can ask for specific performance or termination. Nevertheless, one should not forget that in practice the differences will be minor under the different systems, since generally the seller will prefer to ask for the price and not for the buyer to take delivery.

2. Under some systems the buyer's obligation to take delivery is regarded as a main obligation, which the seller generally can enforce through a court order if the buyer fails to take over the goods (CISG art. 62; BELGIUM CC art. 1184; ESTONIA LOA § 208(1); FRANCE CC art. 1657; GERMANY CC § 433(2); HUNGARY CC § 365(1); LITHUANIA CC art. 6.346) or under commercial sales only (CZECH REPUBLIC and SLOVAKIA Ccom art. 453). In ENGLAND, while the seller cannot compel the buyer to take delivery by specific performance, he is entitled to damages for non-acceptance of the goods (Sale of Goods Act s. 37(1)). The same provision applies in SCOTLAND, where specific performance would probably also be refused because damages would be considered an adequate remedy. Under HUNGARIAN law where the buyer fails to take delivery of the goods without a legitimate reason, amounting to breach of contract, the seller may elect between the remedies available in case of late performance by the obligee *(mora creditoris*) and those available in case of supervening impossibility of performance (see *Kisfaludi*, Az adásvételi szerződés[2], 160).

3. Under other systems, the main obligation of the buyer is considered to be the payment of the purchase price. Hence, the buyer's obligation to take over the goods cannot generally be enforced by the seller (AUSTRIA CC § 1062; *Koziol and Welser*, Bürgerliches Recht II, 57; CZECH REPUBLIC CC § 522; FINLAND SGA § 51(2); NETHERLANDS CC art. 6:58; NORWAY SGA § 51(2); POLAND, Radwański (-*Katner*), System Prawa Prywatnego VII[2], 91; SLOVENIA *Cigoj*, Komentar, 1524; SWEDEN SGA § 51(2)). The buyer's refusal to take over the goods nevertheless results in unfavourable consequences for him, the main one being that he will bear the risk for the goods. In SPAIN the main obligation of the buyer is considered to be the payment of the purchase price (CC art. 1500) but where the buyer does not take delivery, rules of mora credendi are applied; taking up the sold asset is not a duty, but a "burden". The seller is not entitled to specific performance of a so called "duty to take delivery", but only to fulfil the seller's own obligation through judicial deposit of the goods (legal consignation), or to rescission (CC art. 1176 and Ccom art. 332).

4. Under some systems it is unclear whether the buyer's duty to take delivery is enforceable or not (GREECE; ITALY *Bianca*, La vendita e la permuta, 432).

II. Termination due to refusal to take delivery

5. Under a number of systems, the seller may terminate the contract if the buyer refuses to take over the goods. Ending the contract takes place automatically and without summons, to the benefit of the seller, after the expiration of the time agreed for collecting the goods (BELGIUM and FRANCE CC art. 1657). Under SLOVENIAN law the seller may terminate the contract if the buyer refuses to take delivery and the seller has reason to believe that the buyer is not going to pay the price (LOA § 499(2)). Under some systems the seller may terminate the contract if he has fixed an additional reasonable period of time within which the buyer must take over the goods and the

buyer does not take over within this time (ESTONIA LOA § 116(2) 5; GERMANY CC § 323(1)). Under NORDIC law, the seller may only terminate the contract if he has a special interest in getting rid of the goods (FINLAND, NORWAY and SWEDEN SGA § 55(2) no 2.) This can for example be the case if the object of sale is a house to be demolished, leftover building material from a building site, goods from a warehouse that has to be emptied, or toxic industrial waste from the seller's business sold for recycling (SWEDEN Prop 1988/89, 167 f). For commercial sales, this rule is explicitly set out in the SPANISH Ccom art. 332.

IV.A.–3:105: Early delivery and delivery of excess quantity

(1) If the seller delivers all or part of the goods before the time fixed, the buyer may take delivery or, except where acceptance of the tender would not unreasonably prejudice the buyer's interests, refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for by the contract, the buyer may retain or refuse the excess quantity.

(3) If the buyer retains the excess quantity it is regarded as having been supplied under the contract and must be paid for at the contractual rate.

(4) In a consumer contract for sale paragraph (3) does not apply if the buyer believes on reasonable grounds that the seller has delivered the excess quantity intentionally and without error, knowing that it had not been ordered. In such a case the rules on unsolicited goods apply.

COMMENTS

A. Scope

It is already clear that the buyer is under an obligation to take delivery. This Article, however, addresses two special situations: the seller may deliver too early or too much. In both cases, the question arises whether, and to what extent, the buyer is also under an obligation to take delivery of the goods tendered early or the excess quantity.

While this Article establishes a right of the buyer to refuse or take delivery, it also relates to the buyer's obligation to take delivery (as the buyer may, for instance, have to accept the early tender by the seller where the buyer's interests are not unreasonably prejudiced). Moreover, paragraph (3) creates an obligation for the buyer to pay for any excess quantity accepted.

This regulation does not apply in the opposite situations where the seller delivers late or a lesser quantity than agreed upon. For cases where the seller delivers late the general regime in Book III on remedies for non-performance of obligations applies. Where the seller delivers a lesser quantity than agreed upon this will be a non-conformity and the buyer will have the remedies in Book III as modified in Chapter 4 of this Part.

B. Early delivery

There may be cases where the seller delivers all or part of the goods too early. Here, the buyer has a choice (paragraph (1)). On the one hand, the buyer can take delivery, which will allow the seller a right to cure any lack of conformity up until the due date of delivery according to IV.A.–2:203 (Cure in case of early delivery). On the other hand, the buyer can refuse to take delivery; in which case the seller has to deliver once again at the time agreed. This right of refusal is, however, subject to an important restriction, since the buyer must not refuse early delivery if doing so would not unreasonably prejudice the buyer's interests.

Illustration 1
C, a building contractor, orders a set of steel pipes to be delivered to his construction site at noon. If the seller delivers the materials at 10 am, C must not refuse delivery. This may, however, be different if the seller delivers a day earlier or if the construction site is bustling with activity which prevents the buyer from taking delivery at that time.

C. Excess quantity

There may be cases where the seller delivers more than was agreed upon. Here, the buyer can chose between two possibilities. On the one hand, the buyer can refuse delivery of the excess quantity (paragraph (2), which merely confirms what would be the case in any event). On the other hand, the buyer can choose to take delivery of all or part of the excessive amount. Doing so can be considered as a new offer of conforming goods that goes beyond the initial contract. As a consequence, the buyer also has to pay for the excess amount accepted at the contractual rate (see paragraph (3)).

> *Illustration 2*
> A, a restaurant owner, buys 10,000 serviettes from S. Upon delivery, it turns out that S has delivered 12,000 instead. According to paragraph (2), A can either refuse the extra 2,000 (and take delivery of the agreed amount), or take delivery of all or part of the excess amount and pay at the contractual rate.

The delivery of an excess quantity falls under the ambit of lack of conformity (cf. IV.A.–2:301 (Conformity with the contract) sub-paragraph (a)). Nevertheless, it should be pointed out that this provision constitutes a special regulation in the case of excess delivery, thus overriding the seller's right to cure under III.–3:202 (Cure by debtor: general rules). The seller is thus not permitted to cure the lack of conformity through taking back the excess quantity (which the seller might want to do if prices have unexpectedly risen). It is up to the buyer to decide whether to retain or refuse the excess quantity. The decision would have to be made within a reasonable time. The buyer could lose the right to retain the goods unless the seller was notified of the non-conformity within a reasonable time. See III.–1:103 (Good faith and fair dealing) and, for non-consumer cases, III.–3:107 (Failure to notify non-conformity) and IV.A.–4:302 (Notification of lack of conformity).

D. Relationship with rule on early performance in Book III

The general rule in III.–2:103 (Early performance) paragraph (1) establishes the right to decline an early tender, which applies unless the early performance "would not cause the creditor unreasonable prejudice". Paragraph (2) makes it clear that acceptance of early performance does not affect the time fixed for the performance by the creditor of any reciprocal obligation.

The present rule can be considered an extension of this general rule in several respects. First, it also provides explicitly for the buyer's right to accept early delivery. Secondly, it addresses cases of excess quantity. And, finally, it sets out the buyer's obligation to pay for an extra delivery, corresponding to the right to accept it.

NOTES

I. Early delivery

1. If the seller delivers too early the buyer may take delivery or refuse to take delivery *(CISG art. 52*(1); HUNGARY CC § 282(2); SWEDEN *Ramberg*, Köplagen, 464). Nevertheless, the buyer may still be under an obligation to take care of the goods as part of his duty to preserve the goods in the case of goods which are to be transported

to the buyer. Hence, if goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession on behalf of the seller, provided that this can be done without the payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorised to take charge of the goods on his behalf is present at the destination (CISG art. 86; FINLAND and SWEDEN SGA § 73(2)).

2. Under other systems, specific regulation of this situation is found under general contract law. Under HUNGARIAN law the obligor (seller) is entitled to perform his obligations under the contract (i.e. to tender delivery) before the time fixed in the contract only if the buyer consents to the premature performance (CC § 282(2)). If the buyer did not consent, he is still under an obligation to take care of the goods – at the expense and risk of the seller. In the NETHERLANDS, a fixed time in a contract is presumed to protect only the debtor to the obligation, allowing him to perform earlier if he sees fit (cf. CC art. 6:39(1)). This implies that the buyer would not be entitled to refuse to take delivery without being in default. Similarly under SLOVENIAN general contract law the debtor may perform before the time of performance, if the time has been agreed upon "solely in the interest of the debtor" (LOA § 290(1)). The debtor has to notify the creditor of his intent. He is not entitled to perform at an 'inappropriate' time. In all other cases, the creditor can refuse an early performance or accept it; in the latter case he can reserve the right to damages (LOA § 290(2)). ESTONIAN contract law contains a general provision according to which the creditor (the buyer) can refuse to accept early performance only if it has a valid ground for refusal (LOA § 84(1)). Under CZECH commercial law Ccom art. 342 provides regulation regarding time of performance determined to one party's advantage. Firstly, where the time of performance is determined to the advantage of debtor, the creditor is not entitled to demand performance of the obligation prior to this time; the debtor, however, may perform his obligation earlier than at the determined time. Secondly, where the time is determined to the advantage of creditor the previous rule applies vice versa. Thirdly, where the time of performance is determined to the advantage of both parties, the creditor may not demand performance of the obligation, and the debtor may not perform the obligation earlier than at the determined time. Based on case-law, earlier performance (delivery) does not change the contracted time of performance of the obligation (NS ČR 29 Odo 114/2003).

3. Under SPANISH and POLISH law this issue is not specifically regulated. Nevertheless, in SPAIN the time of delivery is presumed to be for the benefit of both parties (CC art. 1127). Consequently, it could be said that the buyer can refuse to take early delivery.

II. Right to refuse excess quantity

4. Generally, it is up to the buyer to decide whether he wants to accept or refuse the excess quantity. Under some systems this is expressly provided (CISG art. 52(2); CZECH REPUBLIC Ccom art. 442(1); LITHUANIA CC art. 6.330; SLOVAKIA Ccom art. 442(1); SLOVENIA LOA § 473). It might also follow from general contract law or general legal principles (BELGIUM; SWEDEN *Ramberg*, Köplagen, 464). Similarly under HUNGARIAN law where this can be implied from general rules that the excess quantity constitutes a new offer and the buyer can refuse delivery or take it and pay for it at the contractual rate. The literature does not deal with the problem. In SPAIN if the buyer keeps excess goods, general rules of interpretation apply as to the existence and scope of an implied contract. Under GERMAN law legal literature qualifies excess quantity as non-performance (*Hoeren and Martinek*, Systematischer Kommentar zum Kaufrecht, § 434 (102)).

5. Under ENGLISH and SCOTTISH law, the buyer is entitled to reject the whole delivery under certain conditions. The buyer may accept the goods included in the contract and reject the rest, or he may, if the excess is more than trivial, reject the whole (Sale of Goods Act s. 30(2)(A) and (D)). In ENGLAND the right to reject the whole under consumer sales applies whether or not the deviation is trivial (Sale of Goods Act s. 30(2A)).

6. Under some systems, this situation is regulated more elaborately. In LITHUANIA the buyer must give notice to the seller within the time-limit specified by laws or in the contract or, where there is no fixed time-limit, within a reasonable time. If, upon receipt of the buyer's notice, the seller fails to notify, within a reasonable time, further actions that should be taken, the buyer has the right to take delivery of all goods or refuse to take the excess quantity, unless otherwise provided in the contract (CC art. 6.330). Under SLOVENIAN law the buyer may refuse the excess quantity within an appropriate time. If he fails to do so in a commercial sales contract, he must pay the same price for the exceeding quantity. If the buyer refuses to take the excess quantity, the seller is liable for damages (LOA § 473(1) and (2)).

III. Determination of the price for the excess quantity

7. The buyer must pay for the exceeding quantity at the contract rate (CISG art. 52(2); CZECH REPUBLIC Ccom art. 442(2); ENGLAND and SCOTLAND Sale of Goods Act s. 30(3); LITHUANIA CC art. 6.330; SLOVAKIA Ccom art. 442(2); SLOVENIA LOA § 473(1)). In applying the general regulation for determining the price, the same result is reached under NORDIC law (FINLAND, NORWAY and SWEDEN SGA § 45(1)).

CHAPTER 4: REMEDIES

Section 1: Limits on derogation

IV.A.–4:101: Limits on derogation from remedies for non-conformity in a consumer contract for sale

In a consumer contract for sale, any contractual term or agreement concluded with the seller before a lack of conformity is brought to the seller's attention which directly or indirectly waives or restricts the remedies of the buyer provided in Book III, Chapter 3 (Remedies for Non-performance), as modified in this Chapter, in respect of the lack of conformity is not binding on the consumer.

COMMENTS

A. Scope of Chapter

The starting point for the rules in this Chapter is that, in the event of the non-performance of any obligation by either party under the contract, the aggrieved party may resort to the remedies contained in Book III, Chapter 3 for non-performance of an obligation. However, the Chapter provides a few sales-specific rules on remedies which deviate from the general regime.

B. Changes to the regime of remedies provided by Book III

There are not many deviations from the rules on remedies contained in Book III, Chapter 3. Those rules are generally suitable for application to non-performance of obligations under a contract for sale. Some of the deviations are designed to provide greater protection for consumers who are sold defective goods. Others are designed to provide greater certainty and speed of action in relation to defective goods in commercial sales.

Section 1 contains only one modification of the general remedial regime. Its effect is to limit, in relation to a consumer contract for sale, the parties' freedom to derogate from the normal rules on remedies for non-conformity.

Section 2 contains two sales-specific rules on a buyer's remedies for lack of conformity. One extends the right of a consumer buyer to terminate the contractual relationship for non-performance. The other limits the liability of a consumer seller in certain situations.

Finally, Section 3 contains a special regime concerning the buyer's duty of examination and notification in relation to a lack of conformity. It is not applicable to consumer contracts for sale and is designed to increase certainty in commercial sales by ensuring that defects are notified promptly and that sellers know within a certain time whether they are going to be exposed to claims of non-conformity.

C. Derogation

This Article attempts to set out the limits of derogation for consumer sales concerning the buyer's remedies for non-conformity. It is complemented by IV.A.–2:309 (Limits on derogation from conformity rights in a consumer contract for sale), which sets out a similar provision for the conformity of the goods. The Article is one of the exceptions to the general principle of freedom of contract.

To have mandatory protection in favour of the consumer regarding remedies follows the approach of the Consumer Sales Directive. Moreover, the consumer will generally only negotiate on the price of the goods and not concerning which remedies will be available when there is a lack of conformity in the goods.

In a consumer sale, the buyer's rights under Book III, as slightly modified by this Chapter, in respect of the lack of conformity cannot be waived or restricted by agreement with the seller before the consumer notifies the seller of the defect. After that time, the parties are free to agree upon other solutions than those envisaged in this Chapter. For instance, the buyer, even if a consumer, should be able to agree to pay part of the cost of a repair which under the normal rules the seller would be bound to provide free of charge (cf. III.–3:302 (Enforcement of non-monetary obligations)) paragraph (2). Such an agreement would, however, not be possible before the buyer notifies the seller of the lack of conformity.

This Article prevents the seller from restricting the remedies of a consumer buyer for non-conformity beforehand, for instance in standard terms. For example, the seller cannot exclude in advance the consumer's right to damages, price reduction or termination if the normal requirements for them are fulfilled.

NOTES

I. General vs. sales-specific remedies of the buyer

1. The dividing line between sales law and other areas of the law, notably the general law of obligations, is sometimes difficult to determine. In some countries, the Civil Code provides a general remedies regime for non-performance (BELGIUM CC art. 1184; CZECH REPUBLIC CC §§ 507, 517 and 522; ESTONIA LOA §§ 100-118; HUNGARY CC §§ 298-318; ITALY CC arts. 1218, 1453 and 2930; NETHERLANDS CC arts. 6:74 ff and 6:265 ff; POLAND CC arts. 471-497; SLOVAKIA CC § 507; SLOVENIA LOA §§ 101-111 et al.; SPAIN CC arts. 1124 and 1101 ff) and/or for delivery which is not in conformity (BELGIUM CC arts. 1610-1611 (which in fact repeat the general principle stipulated in CC art. 1184(2)); FRANCE CC arts. 1610-1611, providing for a choice between specific performance and termination and a general right to damages). AUSTRIAN law has a general regime for non-performance with respect to contracts where goods are exchanged for a price (see §§ 922 ff, the so-called *Gewährleistung*). On the one hand, this regime is more specific than a general system of non-performance in that it distinguishes between different types of non-performance rather than using one unified system/notion of non-performance. It is, on the other hand, broader than just sales law as it applies also to contracts for works, barter etc. Other systems provide no general

regime, only sales-specific rules (NORDIC COUNTRIES; ENGLAND and SCOTLAND).

2. The systems which provide for a general remedies regime normally additionally provide for sales-specific rules. Under some systems, the different regimes provide for concurring rules. Here, the buyer may choose between the general rules and sales-specific regulation (SLOVENIA Juhart and Plavšak (-*Juhart*), Obligacijski zakonik II, 361; In SPAIN specific rules should have to be applied first, but jurisprudence has extended the general rules by the doctrine of aliud pro alio, leaving the special rules to be applied only in marginal cases, and mainly to dismiss the claim as being out of time; in cases relating to sales of built flats and premises, the specific rules have become totally inapplicable in practice; (BELGIUM; GREECE A.P.662/1991 EEN 1992, 373). In ITALY, on the other hand, the remedies for the two regimes have been merged through case law (see e.g. Cass.civ. 26 April 1991 no. 4564) and legal literature (see e.g. *Bianca*, Diritto Civile V, 41). In other systems some rules (notably termination and damages) are dealt with on a general level whereas others (notably repair and replacement) are dealt with in the sales sections (CZECH REPUBLIC CC §§ 507, 517 and 522 (general regime) and § 597 (sales regime); ESTONIA LOA § 222; GERMANY CC §§ 439 and 441; NETHERLANDS CC arts. 7:20-22 and 7:24-25; SLOVAKIA CC § 597). In POLAND, the sales-specific rules are complemented by the general rules on non-performance.

3. Under AUSTRIAN and HUNGARIAN law, however, there is only a general regulation on non-conformity applicable for all contracts for consideration. Under HUNGARIAN law only the rules for legal non-conformity are sales-specific (CC §§ 369-370).

4. Cf. further the Notes to IV.A.–4:201 (Termination by consumer for lack of conformity) for the sales-specific remedies for lack of conformity.

II. Overview of remedies for the seller

5. If the buyer fails to pay the price the seller has several remedies available.

6. To start with, the seller has a right to ask for performance, that is payment of the price (CISG art. 62; PECL art. 9:101; AUSTRIA CC § 918(1); BELGIUM CC art. 1184; CZECH REPUBLIC Ccom arts. 366 and 453; ENGLAND and SCOTLAND Sale of Goods Act s. 49; ESTONIA LOA § 108(1); FINLAND SGA §§ 51 and 52; GERMANY CC § 433(2); LATVIA CC art. 1587; NETHERLANDS CC art. 3:296; NORWAY SGA § 51; SLOVAKIA Ccom arts. 366 and 453; SLOVENIA LOA § 496; SPAIN CC arts. 1101 ff, 1096 and 1124; SWEDEN SGA § 51).

7. The parties' obligations are typically concurrent conditions; thus, unless agreed otherwise, the seller may refuse to deliver the object of sale if the buyer fails to pay the purchase price on time (AUSTRIA CC § 1062; BELGIUM CC art. 1612; CZECH REPUBLIC CC § 591; ENGLAND and SCOTLAND Sale of Goods Act s. 28; ESTONIA LOA § 111; FINLAND SGA § 10; FRANCE CC arts. 1612-1613; GERMANY CC § 320; LATVIA CC art. 2033; NORWAY SGA § 10; POLAND CC art. 488(2); SLOVAKIA CC § 591; SLOVENIA LOA § 455; SWEDEN SGA § 10). Under some systems this follows from the applicability of the general rules of contract law (NETHERLANDS cf. CC art. 6:262; SPAIN CC art. 1466).

8. The seller may also ask for damages (CISG arts. 74-77; AUSTRIA CC § 918(1); CZECH REPUBLIC CC § 519 and Ccom art. 367; ENGLAND and SCOTLAND Sale of Goods Act s. 37(1); ESTONIA LOA § 115; FINLAND SGA §§ 51 and 57; GERMANY CC §§ 433(2), 280(1); LATVIA CC art. 1779; NETHERLANDS CC arts. 6:74 ff; NORWAY SGA § 51; POLAND CC art. 491(1); SLOVAKIA CC § 519

and Ccom arts. 367 and 368; SLOVENIA LOA §§ 239(2), 378 and 380; SPAIN CC art. 1101; SWEDEN SGA § 51).

9. Finally, the seller may ask for termination (CISG art. 64; AUSTRIA CC § 918(1); BELGIUM CC arts. 1184 and 1654, CZECH REPUBLIC CC § 517(1); ENGLAND and SCOTLAND Sale of Goods Act s. 48; ESTONIA LOA § 116; FINLAND SGA §§ 51, 54 and 55; FRANCE CC art. 1654; LITHUANIA CC art. 6.345; NETHERLANDS CC arts. 6:265 ff and for consumer sale CC art. 7:22; NORWAY SGA § 51; POLAND CC art. 491(1); SLOVAKIA CC § 517(1) and Ccom art. 367; SLOVENIA LOA § 103; SPAIN CC arts. 1101, 1124 and 1503-1506; SWEDEN SGA § 51).

10. Under many systems the seller may only terminate if the seller has fixed an additional reasonable period for performance, and the buyer does not pay within that period (CISG art. 64(1)(b); AUSTRIA CC § 918(1); CZECH REPUBLIC CC § 517(1); ESTONIA LOA § 116(2) 5); FINLAND SGA § 54(2); GERMANY CC § 323(1); NORWAY SGA § 54(2); POLAND CC art. 491(1); SLOVAKIA CC § 517(1); SWEDEN SGA § 54(2)). Under some systems the same holds true unless there was a fixed period for performance or the buyer has unambiguously indicated that he would not perform his obligation (NETHERLANDS CC arts. 6:81-83; SLOVENIA LOA §§ 105 and 106). Under other systems the court is given the power to determine an additional time for performance (FRANCE CC art. 1655; SPAIN CC art. 1124(3)).

11. The gravity of the breach is also influential under some systems. The seller may terminate if the delay constitutes a fundamental breach of contract (CISG art. 64(1)(a); BELGIUM CFI Brussels 27 September 1996, Res Jur. Imm. 1997, 177; CFI Ypres 27 June 1995, AJT 1995-96, 4, Antwerp 3 June 1998, Limb. Rechtsl. 1998, 223; Bergen 23 November 1994, JT 1995, 321; ESTONIA LOA § 116(1); FINLAND SGA § 54(1); FRANCE Cass.civ. I, 4 January 1995, Bull.civ. I, no. 14; D. 1995, 405; NORWAY SGA § 54(1); SPAIN CC art. 1124 and case law requiring a "breach that frustrates the purpose of the contract" (see *Carrasco Perera*, ZEuP 2006, pp. 552 ff; SWEDEN SGA § 54(1)). Under ENGLISH law the refusal to pay the price must be material. In SCOTLAND a court warrant is preferred (*Bell*, Principles of the Law of Scotland[10], § 128).

12. The seller may also be barred from terminating if the goods have already come into the buyer's possession. If so, the seller may only terminate the contract if he has reserved the right to do so or if the buyer rejects the goods (FINLAND, NORWAY and SWEDEN SGA § 54(4)). Similarly under AUSTRIAN commercial sales, if the seller has handed over the goods and deferred payment he cannot terminate the contract (EVHGB § 8 no. 21).

13. Under some systems, however, the seller's right of termination is more generous under sales law than according to general contract law for sales concerning specific goods. Thus the termination of the contract takes place automatically and without summons, to the benefit of the seller, after the expiration of the time agreed for payment (BELGIUM and FRANCE CC art. 1657). Concerning movable goods that need not be registered to constitute transfer of property, which is still in the same condition as when delivered to the buyer and neither 6 weeks have elapsed since the claim for payment became due nor 60 days have elapsed since delivery, in the NETHERLANDS the seller may exercise the specific right of revindication under CC arts. 7:39 ff, provided that the requirements to terminate the contract under CC art. 6:265 have been met; specific provisions protecting a subsequent buyer's rights apply, preventing the execution of the right in such a situation.

14. In SPAIN there are special provisions for specific types of sale. In instalment sales of goods the Instalment Sales Act 1998 art. 11 requires non-performance of at least two

instalments before there can be rescission. Under CC art. 1504, the seller may not have the sale of an immovable terminated for the mere failure to meet the agreed time for performance, and the buyer is entitled to pay in so far the seller has not served a notarial or judicial notice of termination.

III. Exclusion or limitation of the seller's liability

15. Under all systems the regulation of remedies under consumer sales is mandatory in favour of the consumer as a result of the requirements in Consumer Sales Directive art. 7(1).

16. However, some systems provide for more specific regulations with respect to remedies. For instance, under GERMAN law, even though the remedies regulation in general is mandatory in favour of the consumer (CC § 475(1)), this does not apply to the right to damages (CC § 475(3)). Similarly under SWEDISH law, the parties may agree that the seller's obligation to pay damages shall not extend to losses in commercial activities (Consumer Sales Act § 32(3)).

17. Under a few systems any clause purporting to alter the order of remedies provided (first repair or replacement, then a price reduction or termination) to the detriment of the consumer is null and void in consumer contracts (ESTONIA LOA § 237(1); FRANCE Consumer Code art. L. 211-17; HUNGARY CC § 306(5)). In the NETHERLANDS it is unclear whether such a derogation would be null and void, or merely avoidable, which under CC art. 3:40 would be the normal consequence of derogations to the detriment of a protected party, but difficult to reconcile with the Consumer Sales Directive (cf. Mon. NBW B-65b (*Loos*), no. 3). Under BELGIAN law, legal literature accepts clauses that set the hierarchy of remedies aside and leave the choice of remedies up to the consumer. Clauses which alter the order of remedies set forth in consumer sales law and limit the choice of remedies of the consumer are, however, not accepted.

18. In SPAIN, waiver of remedies is allowed, unless the debtor was aware of the lack of conformity or there was some fraud in the non-performance (CC arts. 1102 and 1485).

Section 2: Modifications of buyer's remedies for lack of conformity

IV.A.–4:201: Termination by consumer for lack of conformity.

In a consumer contract for sale, the buyer may terminate the contractual relationship for non-performance under Book III, Chapter 3, Section 5 (Termination) in the case of any lack of conformity, unless the lack of conformity is minor.

COMMENTS

A. Normal remedies of buyer for non-conformity

This section contains two modifications of the buyer's normal remedies under Book II, Chapter 3. Both relate to remedies for non-conformity – i.e. where the goods do not conform to the contract. Other types of non-performance on the part of the seller, such as delayed performance or no delivery at all, fall under the general regime of remedies for non-performance of obligations in Book III, Chapter 3.

There are some general restrictions on the availability of remedies. For example, Book III, Chapter 3, Section 2 has provisions on cure of a non-conforming performance by the person who is bound to perform – in this case the seller. The effect is to introduce a certain hierarchy of responses by the buyer into the remedial structure: the buyer must normally first give the seller an opportunity to cure the non-conformity before resorting to any remedy other than a temporary withholding of payment. Book III also has an Article (III.–3:107: Failure to notify non-conformity) which for non-consumer cases requires the person entitled to performance – in this case the buyer – to notify the other party within a reasonable time of a lack of conformity if remedies for the non-conformity are to be retained. For commercial sales this is supplemented by IV.A.–4:302 (Notification of lack of conformity) of the present Chapter. It must also be borne in mind that the general rule in III.–1:103 (Good faith and fair dealing) may have the effect of precluding a buyer, whether or not a consumer, from exercising a remedy which would otherwise be available. For example, if a buyer inexcusably failed to notify the seller of a defect for an altogether unreasonable length of time with the effect that the seller was seriously prejudiced by the delay then, quite apart from the specific rules on notification, the buyer might be precluded by the general rule on good faith and fair dealing from founding on the non-conformity.

B. Overview of buyer's remedies for lack of conformity

The first Article of Section 2 provides an overview of the remedies available to the buyer, subject to the qualifications noted above, in the case of a lack of conformity. It does so by referring to the applicable remedies under Book III, Chapter 3, while making it clear that in a few respects these remedies may be modified by the present Chapter. In the context of a contract for sale the available remedies are as follows.

Remedying the lack of conformity. The buyer may, subject to the restrictions noted above (and particularly the provision on first allowing the creditor an opportunity to cure the non-conformity voluntarily), enforce performance by having the seller ordered to remedy the lack of conformity free of charge by repair or replacement. The details of this right are elaborated

in III.–3:302 (Enforcement of non-monetary obligations), which contains certain restrictions on the availability of the remedy. The choice between repair or replacement is the seller's.

Withholding performance. In the event of a lack of conformity, the buyer can withhold performance under III.–3:401 (Right to withhold performance of reciprocal obligation). This remedy does not by itself cure, or provide compensation for, the lack of conformity. It rather serves as a means of exerting pressure in order to obtain other remedies. The buyer can refuse to pay until the non-conformity is remedied. This remedy can be used even if the seller has been given an opportunity to cure the non-conformity (see III.–3:204 (Consequences of allowing debtor opportunity to cure) paragraph (1).

Termination of the contractual relationship. The buyer may, subject to the restrictions noted above, terminate the contractual relationship with the seller under the rules in Book III, Chapter 3, Section 5 (Termination). The effect is that if there is a fundamental non-performance, or a reasonably anticipated fundamental non-performance, by the seller of the latter's obligations under the sales contract the buyer can escape from the contract, refuse to pay and safely buy the goods elsewhere without any fear that the seller will insist on the buyer taking delivery and paying for the goods. This right is extended for consumers by IV.A.–4:201 (Termination by consumer for lack of conformity) so that in a consumer contract for sale the buyer may terminate for any non-conformity unless the lack of conformity is minor. This is a very considerable relaxation in favour of consumers of the normal requirement that a non-performance be fundamental. It is also possible that the buyer merely terminates part of the contractual relationship in accordance with III.–3:506 (Scope of right to terminate).

Price reduction. The buyer is entitled to a price reduction, again subject to the restrictions noted above, The details of this remedy are elaborated in Book III, Chapter 3, Section 6.

Damages. The buyer may, again subject to the restrictions noted above, claim damages for the lack of conformity. In this context, it is important to note that the buyer may always claim damages for any loss not remedied by the seller's cure (see expressly III.–3:204 (Consequences of allowing debtor opportunity to cure) paragraph (3).

C. Extended right to terminate

The present Article extends the right of a consumer buyer to terminate the contractual relationship with the seller. Normally under Book III, Chapter 3 only a fundamental non-performance (defined in the Annex of definitions) would justify termination. This Article enables the consumer buyer to terminate for any lack of conformity, provided it is not minor.

While this may seem rather drastic, it should not be overlooked that the provisions on the seller's right to cure mean that the buyer can generally not terminate immediately (see III.–3:202 (Cure by debtor: general rules) and III.–3:204 (Consequences of allowing debtor opportunity to cure)).

Generally, it can be said that the threshold for a minor lack of conformity is below that of a fundamental lack of conformity. A minor lack of conformity constitutes a lack of conformity of slight importance, or a defect which is relatively small in relation to the overall value of the product. It should be presumed that small scratches and other purely cosmetic defects are normally considered to be minor. Furthermore, minor malfunctions in technical equipment

that are of no major importance to the buyer should generally not give rise to termination. As a rule, it must be determined in each individual case how the value or the usability is influenced through the lack of conformity in question. If the usability is influenced in a major way, the criterion for termination is fulfilled even if the lack of conformity only constitutes a marginal reduction in the value. A fact speaking against a more than minor lack of conformity is when the usability can be restored through minor efforts. Generally, a per se less important lack of conformity will become non-minor if it is difficult to remedy. Finally, the fact that the seller has without valid reasons refused to remedy the lack of conformity under III.–3:202 (Cure by debtor: general rules) might influence the question of whether or not the lack of conformity is minor, since the seller has then already been given an opportunity to avoid the termination of the contractual relationship.

NOTES

I. Specific remedies for lack of conformity of the goods

1. Many countries provide a specific regime for the remedies for non-conforming goods (i.e. defective performance), as opposed to the remedies for non or late delivery (AUSTRIA CC §§ 922-933b; CZECH REPUBLIC CC §§ 507 (general contract law) and 597 (sales contract); DENMARK SGA §§ 42 ff; FINLAND SGA §§ 30-40; GERMANY CC § 437; GREECE CC arts. 540 ff; LITHUANIA CC art. 6.334; NETHERLANDS CC art. 7:21-24; NORWAY SGA §§ 30 ff; POLAND CC arts. 560-576, SLOVENIA LOA § 468; SPAIN CC arts. 1101, 1486; SWEDEN SGA §§ 30 ff).

2. Some countries differentiate between non-conforming delivery, which is sanctioned under general contract law, and a guarantee against hidden defects, which is a sales-specific regime. For these two regimes different remedies apply (BELGIUM and FRANCE CC arts. 1610-1611 (non-conforming delivery) and 1644-1647 (guarantee against hidden defects); ITALY CC art. 1492; SPAIN CC art. 1486(1)). However, in ITALY, with regard to the relation between general sales law and consumer sales law the remedies for the two regimes have been merged by Consumer Code art. 135, bridging CC art. 1492 and Consumer Code art. 130.

3. In contrast, under other systems there is a uniform remedies regime (PECL; CISG; ENGLAND and SCOTLAND; ESTONIA). However, also under those systems there is still differentiation in some respect between different types of non-performance. For instance, under ENGLISH law Sale of Goods Act s. 51 speaks of damages for non-delivery, while SGA s. 53 speaks of a remedy for breach of warranty. Under the CISG it is indicated that some remedies only apply ”if the goods do not conform to the contract”, namely in the case of repair, replacement and a price reduction (arts. 46(2) and (3) and 50). The situation is similar under ESTONIAN law as the uniform remedies regime is modified in sales law, mainly by introducing specific rules regarding the application of remedies and specific remedies such as the claim for specific performance through repair or replacement or a price reduction (LOA §§ 222 and 224) for the case where the goods do not conform to the contract.

4. Under some systems there is special consumer regulation concerning remedies for non-conforming goods. Due to the implementation of the Consumer Sales Directive, many Member States have chosen to enact a free-standing remedies regime exclusively applicable to consumer sales of non-conforming goods (BELGIUM CC art. 1649quinquies; CZECH REPUBLIC CC § 622; ENGLAND and SCOTLAND Sale of Goods Act Part VA; FRANCE Consumer Code arts. L. 211-9 ff; ITALY

Consumer Code art. 130; POLAND Consumer Sales Act art. 8; SPAIN ConsProtA arts. 116 ff).

5. Special regulation under commercial sales in this respect only exists under CZECH law where there is a free-standing remedies regime for commercial sales under Ccom arts. 365-369. Under CZECH commercial sales non-conformity is only a special case of default, as opposed to non-conformity under the civil code which constitutes a special regime for defective goods (*Bejček/Eliáš/Raban*, Kurz obchodního práva[3], 106; *Knappová*, Civil Law II[3], 102). In the SPANISH Commercial Code arts. 336, 342, there is a special regime of remedies for lack of conformity: basically, the originality lies in shortening the time available for claims and in imposing on the buyer a strong duty to check the goods before or immediately after delivery.

II. Withholding performance

6. Under some systems this right is regulated sales-specifically (FINLAND SGA § 42 and Consumer Protection Act chap. 5 § 17; NORWAY SGA § 42 and Consumer Sales Act § 28; LITHUANIA CC art. 6.208; SPAIN CC arts. 1466, 1502; SWEDEN SGA § 42 and Consumer Sales Act § 25). On the other hand, such a right may also be regulated on a general level (PECL art. 9:201; CZECH REPUBLIC CC § 560 and Ccom art. 326; ESTONIA LOA § 111; HUNGARY CC § 306(4); NETHERLANDS CC art. 6:262; POLAND CC art. 488(2); SLOVAKIA CC § 560; SLOVENIA LOA § 101). Under FRENCH law, there is such an explicit right for the seller, which is however considered to be a general contract law rule (CC arts. 1612-1613).

7. In some countries there is an implied (or legal) right to withhold performance (BELGIUM the general legal principle *exception non adimpleti contractus*; ENGLAND *Treitel*, 759; SCOTLAND *McBryde*, Law of Contract in Scotland, 20-47 and 20-62 f); SPAIN implied in CC arts. 1100 in fine and 1124), *Díez-Picazo*, Fundamentos II[4], 692).

III. Price reduction

8. Most systems provide for a general right to a price reduction (Consumer Sales Directive art. 3(2); CISG art. 50; PECL Art. 9:401(1); AUSTRIA CC § 932(4); BELGIUM CC art. 1644 and (for consumer sales) art. 1649quinquies; CZECH REPUBLIC CC §§ 507 and 597(1) and (for consumer sales) § 622; DENMARK SGA §§ 42 and 43(1); ESTONIA LOA §§ 112 (general remedy) and 224 (sales-specific particulars concerning a price reduction); FINLAND SGA § 38 and the Consumer Protection Act chap. 5 § 19; FRANCE CC art. 1644; GERMANY CC § 441(1); HUNGARY CC § 306(1) b); ITALY CC art. 1492(1); LATVIA CC art. 1625; LITHUANIA CC art. 6.334; NORWAY SGA § 38; POLAND CC art. 560(1) and Consumer Sales Act art. 8(4); SLOVAKIA CC §§ 507 and 597; SLOVENIA LOA §§ 468(1) and 478; SPAIN CC art. 1486; SWEDEN SGA § 38 and Consumer Sales Act § 28).

9. Under some systems the remedy of a price reduction is only available in consumer sales (ENGLAND and SCOTLAND Sale of Goods Act s. 48C; NETHERLANDS CC art. 7:22(1)(b)). Nevertheless, under ENGLISH law Sale of Goods Act s. 53(3)) a similar calculation of damages is laid down: "the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty". Under DUTCH law the same result can be achieved through a partial termination of the contract, which leads to the acceptance of a lower quality or quantity in exchange for a price reduction (CC arts. 6:265 and 6:270).

10. Under a number of systems some exceptions are established regarding the right to a price reduction. In some systems there is no right to a price reduction for auction sales (ESTONIA LOA § 224); FINLAND, NORWAY and SWEDEN SGA § 37(2)). Under LATVIAN law CC arts. 1618 and 1619 the buyer has no right to a price reduction after one year has passed from the conclusion of the contract or when a specific guarantee was given. In GERMANY the buyer must give the seller an additional reasonable period for performance before he may resort to a price reduction (CC § 441).

11. Under some systems, the mode of calculation is explicitly regulated. In line with the CISG it is prescribed that the price is to be reduced in the same proportion as the value of the goods actually delivered had at the time of delivery compared to the value that conforming goods would have at that time (CISG art. 50; PECL art. 9:401(1); ESTONIA LOA § 112(1); FINLAND SGA § 38; NETHERLANDS CC arts. 6:270 and 7:22(1); NORWAY SGA § 38; POLAND CC art. 560(3); SPAIN CC art. 1486 in fine and ConsProtA art. 122. Other systems provide for a similar solution, save for the fact that the time of the conclusion of the contract is decisive for the calculation (GERMANY CC § 441(1); SLOVENIA LOA § 478). Additionally, under some systems it is added that the price reduction is to be calculated on a discretionary basis if this is necessary (ESTONIA § 112(1); GERMANY CC § 441(3)).

12. Other systems provide for an appropriate or adequate reduction (Consumer Sales Directive art. 3(2); BELGIUM CC art. 1644; CZECH REPUBLIC CC §§ 507 and 597(1) and (in consumer sales) § 622; ENGLAND and SCOTLAND Sale of Goods Act s. 48C(1)(a); HUNGARY CC § 306(1) b)) or a proportionate reduction (DENMARK SGA §§ 42 and 43(1)). Under POLISH law CC art. 560(3) the reduction is to be made in proportion to the value of the goods if they would be free from defects, taking into account the existing defects. In LATVIA the purpose of demanding a price reduction for the item is to reduce the price or obtain another counteracting performance to an extent to which less would have been paid or performed concerning the item, had the discrepancies been known (CC art. 1625). Under HUNGARIAN law the basis of the price reduction has to be the purchase price bargained for and not the real value of the goods at the time of the conclusion of the contract. Moreover, the case law clarifies that a price reduction does not mean a reimbursement of the repair costs, though the repair costs can be taken into account when calculating the amount of the reduction (BH 1988. 182. and BH 1995. 212.).

IV. Damages

13. Under many systems, there is sales-specific regulation of the buyer's right to damages (CISG arts. 74 ff; BELGIUM CC art. 1645; DENMARK SGA §§ 42(2) and 43(3); ENGLAND and SCOTLAND Sale of Goods Act s. 48E(6), 51(1), 52(3), and 53(1)(b); ESTONIA LOA § 225 (amending the general regulation in § 115); FINLAND SGA § 40; FRANCE CC arts. 1611 and 1645; ITALY CC art. 1494; NORWAY SGA § 40; SLOVENIA LOA § 468(2) and (3); SPAIN CC arts. 1486(2), 1487 and 1488(2); SWEDEN SGA § 40 and Consumer Sales Act art. 30). Nevertheless, in SPAIN the restrictive special rule (that only a seller who knows of the hidden defects is liable in damages) has become obsolete since the beginning of the past century (TS 6 May 1911, jur. Civ. T. 121, no. 53.

14. Under other systems, the right to obtain damages is regulated under the general law of obligations (AUSTRIA § 933a; CZECH REPUBLIC CC §§ 510 and 600; ESTONIA LOA § 115; GERMANY CC §§ 280 and 281; NETHERLANDS CC art. 6:74 ff. However, in the NETHERLANDS, a specific provision applies in the case of damages in consumer sales where the damage falls under the regulation of product liability (CC

arts. 6:185 ff). In that case, the seller is normally excluded from liability (CC art. 7:24(2)).

V. Termination by buyer

15. Under consumer sales the standard for termination deviates from the general regime in some systems. The consumer may then terminate unless the lack of conformity is minor (Consumer Sales Directive art. 3(6); BELGIUM CC art. 1649quinquies; FINLAND Consumer Protection Act chap. 5 § 19; FRANCE Consumer Code art. L. 211-10(5); NORWAY Consumer Sales Act § 32; POLAND Consumer Sales Act art. 8(4); SPAIN ConsProtA art. 121. In ENGLAND and SCOTLAND the consumer's right to termination is not limited at all in relation to the gravity of the lack of conformity. In ESTONIA LOA § 223(2) provides that in the case of a consumer sale a fundamental non-performance may, in addition to general provisions, occur if a replacement or repair results in unreasonable inconvenience to the buyer.

IV.A.–4:202: Limitation of liability for damages of non-business sellers

(1) If the seller is a natural person acting for purposes not related to that person's trade, business or profession, the buyer is not entitled to damages for lack of conformity exceeding the contract price.

(2) The seller is not entitled to rely on paragraph (1) if the lack of conformity relates to facts of which the seller, at the time when the risk passed to the buyer, knew or could reasonably be expected to have known and which the seller did not disclose to the buyer before that time.

COMMENTS

A. General

This Article limits the liability of non-professional sellers by capping the amount of (contractual) damages due. This limitation only applies in the event of a lack of conformity, as is made clear by the location and the wording of the rule. It therefore introduces a separate rule for sales law, which may be more favourable to the seller than the normal criterion of III.–3:703 (Foreseeability). While this Article will predominantly apply in the case of a sale between two private persons, it also covers the case of a private person selling to a business.

B. Non-professional seller

The definition of the non-professional seller runs parallel to that of a consumer under Annex 1. Accordingly, this Article applies to a natural person not acting to any extent for purposes related to that person's trade, business or profession. In contrast, it does not matter in which capacity the buyer buys the goods. The buyer can therefore be another private person, i.e. a 'consumer', or a business.

C. Damages limited to the amount of the contract price

In order to protect the non-professional seller against excessive claims for damages, the amount of damages is limited to the contract price. This cap on damages can be justified as follows. A far-reaching obligation to pay damages may become excessively onerous to a private seller, sometimes even disrupting the whole financial situation. This is especially true in the, albeit rare, situation where a non-professional seller sells goods to a business, where the seller could, in theory, face a far-reaching claim for damages.

> *Illustration 1*
> Two private persons conclude a sales contract for a second-hand caravan. The buyer, B, tells the seller that he is buying the caravan for travelling from Sweden to Spain for the European football championship. Unfortunately, the caravan breaks down in Germany, after having successfully crossed the bridge and Denmark. The amount of damages could for instance include the repair of the caravan itself, accommodation, alternative transportation to Spain or compensation for tickets that could not be used etc. However, since the seller is not a professional, he will at a maximum be liable for damages equal to the contract price.

Therefore it has been decided to restrain the non-professional seller's obligation to pay damages exceeding the contract price. Even if such a fixed standard may sometimes be inflexible, it was preferred to have a clear-cut rule rather than an open standard. In this way a

private party will always know the exact extent of the risk taken, in contrast to having other standards like, for instance, the costs for repair.

Arguably, the arguments brought forward above also apply in respect of a delay in delivery. However, it should be kept in mind that any seller should know whether it is possible to deliver on time, whereas a seller may not envisage the consequences of a lack of conformity.

D. Exception

The cap on damages is subject to an important restriction in paragraph (2), which has a similar function as IV.A.–4:304 (Seller's knowledge of lack of conformity). In both cases, the seller is not entitled to rely on the protective rules, if the seller knew or should have known of the lack of conformity and did not communicate it to the buyer. In such situations, the seller is not worthy of the extra protection offered in paragraph (1).

Illustration 2
The facts are the same as in illustration 1. If the seller already knew about the defectiveness of the caravan without telling the buyer, he will be liable for damages in the normal way even if they exceed the contract price.

NOTES

Protection of the non-professional seller against excessive remedies

1. Under most systems there is no such explicit protection for the non-professional seller against excessive damages (e.g. SCOTLAND). In FRENCH law, however, a non-professional seller who did not know of the defects in the goods, is only obliged to return the price received after termination and compensate the costs related to the contract paid by the buyer. No additional damages can be awarded (CC art. 1646). The position is similar under the general law on sales in SPAIN (CC art. 1486), although this rule no longer makes sense except for consumer sellers.
2. Moreover, NORDIC law provides a possibility to adjust the amount of damages if the sum is unreasonable regarding the breaching party's possibilities to foresee and prevent the damage as well as with regard to the other circumstances at hand (FINLAND, NORWAY and SWEDEN SGA § 70(2)). An adjustment can especially be applicable where the seller is a private person and the buyer a professional suffering considerable loss (cf. SWEDEN *Ramberg*, Köplagen, 700)). The adjustment represents a specific application of the general principle of fairness in NORDIC contract law. Under DUTCH law the non-professional status of the seller may play a role when the court is asked to mitigate the damages under CC art. 6:109. However, courts are required to apply this instrument restrictively (Asser (-*Hartkamp*), Verbintenissenrecht I[11], no. 494).

Section 3: Requirements of examination and notification

IV.A.–4:301: Examination of the goods

(1) The buyer should examine the goods, or cause them to be examined, within as short a period as is reasonable in the circumstances. Failure to do so may result in the buyer losing, under III.–3:107 (Failure to notify non-conformity) as supplemented by IV.A.–4:302 (Notification of lack of conformity), the right to rely on the lack of conformity.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit, or redispatched by the buyer before the buyer has had a reasonable opportunity to examine them, and at the time of the conclusion of the contract the seller knew or could reasonably be expected to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

(4) This Article does not apply to a consumer contract for sale.

COMMENTS

A. General

The buyer should examine the goods delivered by the seller as quickly after delivery as is reasonably possible in order to discover any potential lack of conformity. A failure to do so may indirectly, by preventing timely notification of a non-conformity, cause the buyer to lose rights in respect of the relevant lack of conformity.

This requirement to examine ensures that problems are found and sorted out as soon as possible, which allows for commercial sales transactions to be processed rapidly. Not only does this Article therefore promote the needs of the commercial sector – in particular legal certainty – but it also reflects ordinary commercial practice.

B. Modalities of the requirement to examine the goods

Paragraph (1) requires the buyer to examine the goods 'within as short a period as is reasonable in the circumstances'. In some cases, the buyer may have to examine the goods immediately upon delivery, while in other cases, it will be sufficient if examination takes place shortly after delivery (for the notion of "reasonable", see Annex 1; ultimately, the courts will have to determine what is reasonable in a given case).

This Article does not specify how the buyer has to examine the goods delivered. For one thing, such specific procedures for the examination may have been agreed between the parties or may follow from usages or trade practice. In the absence of such indications, the proper procedure will depend on the goods delivered. The buyer may have to take samples, for instance in bulk deliveries, or even have to organise tests in other cases.

Illustration 1
R, a retail chain selling textiles and clothing, bought a few hundred leather jackets from D, a wholesale dealer. The leather jackets were delivered on March 18 to the

central warehouse, where they were sorted and packed for distribution to the stores. After distribution to the stores on March 26, the first complaints were received on April 5. In fact, half of the leather jackets turned out to be defective, which was visible to the naked eye (material of a poor quality, wrong colours, poor workmanship). In this situation, R has not complied with the duty to examine since, at least under a commercial contract, it would have been required to inspect the goods upon delivery, for instance through taking samples.

Paragraphs (2) and (3) take into account two situations where the buyer cannot examine, or have the goods examined, upon delivery: they provide exceptions to the strict time requirements of the main rule of paragraph (1). Even though the risk has passed in both cases (see IV.A.–5:202: (Carriage of the goods) and IV.A.–5:203: (Goods sold in transit)), the buyer is not in a position to examine the goods, since they are not yet to hand. As a result, the buyer may, in the case of the carriage of goods, defer the examination until the goods have arrived at their destination. Secondly, if the goods are redirected or redispatched while still in transit, and without the buyer having had a possibility to examine them, the buyer may defer the examination until the goods have arrived at their new destination. This rule does not apply, however, if the seller neither knew nor could have been expected to know of such a redirection or redispatch.

C. Failure to examine the goods

While paragraph (1) does not set out the direct legal consequences of a failure by the buyer to examine the goods, it is made clear that such a failure may result in the buyer losing, under III.–3:107 (Failure to notify non-conformity) as supplemented by IV.A.–4:302 (Notification of lack of conformity), the rights to rely on a lack of conformity which, because it was not discovered, was not notified in time. In fact, it is therefore the latter provisions which actually sanction the failure to examine the goods.

Illustration 2
During the process of delivery of fresh edible snails the buyer is informed that the truck was delayed at the border. Upon final delivery, (a) he takes a quick look at the goods and discovers that some of the snails have started to smell; (b) he takes a couple of samples and discovers that the snails have started to decay. In both cases, he notifies the seller that the snails are of poor quality. This example makes it clear that an examination as such has no real consequences since only notification matters. In case (a) the buyer does not even examine properly; but as long as there really was a lack of conformity the timely notification is sufficient to retain his rights. If the superficial ‘examination’ had produced no results, but a thorough examination would have, then the buyer ought to have discovered (and subsequently notified) the lack of conformity.

D. Consumer contract for sale

This Article does not apply in consumer contracts for sale, as is explicitly stated in paragraph (4). As a result, consumers are not required to examine the goods upon delivery. This is consistent with the fact that they also are not affected by the provisions on notification of non-conformity in III.–3:107 (Failure to notify non-conformity) and IV.A.–4:302 (Notification of lack of conformity) (see paragraph (4) of the former Article and Paragraph (1) of the latter).

NOTES

I. Duty to examine upon handing over the goods

1. Under non-consumer sales in some systems the buyer is under an express duty to examine the goods or cause them to be examined (CISG art. 38(1); FINLAND SGA § 31; HUNGARY CC § 283(1); LITHUANIA CC art. 6.337; NORWAY SGA § 31; POLAND CC art. 563; SLOVENIA LOA § 461(1); SWEDEN SGA § 31). Under POLISH law CC art. 563(1) this duty only applies if it is customary in the given relationship.

2. Under many systems, such a duty only exists under commercial sales (AUSTRIA Ccom §§ 377 and 378; CZECH REPUBLIC Ccom art. 427; DENMARK SGA § 51; ESTONIA LOA § 219(1); GERMANY Ccom § 377; LITHUANIA CC art. 6.374; SLOVAKIA Ccom art. 427(1); SPAIN Ccom art. 336). In some systems the seller can demand that the buyer examines the goods under commercial sales (PORTUGAL CC art. 471 § único; SPAIN Ccom art. 336 *in fine*).

3. Under ENGLISH and SCOTTISH law Sale of Goods Act s. 34 there is no general duty on a buyer to examine goods, but the buyer has the right to request such an examination upon delivery. Nevertheless, it is still in the buyer's interests to carry out an examination, since following the delivery of goods, the buyer may be deemed to have 'accepted' them upon the occurrence of one of a number of events. One such event is the "lapse of a reasonable time ... without [the buyer] intimating to the seller that he has rejected them" (Sale of Goods Act s. 35(4)).

4. Under other systems, the buyer is under no express duty to examine the goods. Nevertheless, it is generally still in the buyer's own interest to carry out an examination. Otherwise he may lose his rights to remedies if he fails to notify the seller of defects he should have noticed, or fails to respect applicable time-limits (BELGIUM; CZECH REPUBLIC cf. CC §§ 500(1) and 504; FRANCE; GREECE CC arts. 536 and 537; ITALY CC art. 1495; LATVIA; NETHERLANDS CC art. 7:23(1); PORTUGAL).

5. Under BELGIAN and FRENCH law the two principal regulations concerning liability, the non-conforming delivery and the guarantee for hidden defects are distinguished by the acceptance of the buyer. By explicitly or tacitly acknowledging that the delivered thing conforms to the contract and contains no visible defects, only the actions due to hidden defects are left. It is therefore in the interest of the buyer who receives the things, but not a legal obligation, to inspect the goods and to notify the seller in case of non-conformity. If he does not do so, the seller can allege that the things are accepted as conforming by the buyer. According to CC art. 1642 the seller is not liable for apparent defects which the buyer could have discovered himself. By accepting the delivered thing (explicitly or tacitly), the buyer recognizes not only that the delivered thing is in conformity with the sold thing but also that it is free of noticeable defects. A noticeable defect is a defect that can be noted by a normal person on the basis of an attentive examination and that may not elude a careful buyer's notice. In this the capacity of the buyer is taken into account and it is assumed that non-professional buyers are capable of lesser scrutiny. But even when a professional buyer deals with a professional seller, he is not expected to subject the thing to all possible tests. If the buyer complains about non-conforming goods, he has to enter a protest as soon as possible and take all reasonable storage measures to prevent the thing from undergoing the slightest alteration. If the buyer uses, changes or disposes of the thing without any complaint, a tacit acceptance will be deduced. If he protests and in spite of this changes or alienates the thing, he will bear the risk and the onus of proof.

6. Generally, under consumer sales, the buyer is under no obligation to examine the goods. However, as under the general sales regulation, to examine the goods is often in the consumer's own interest. For instance, under NORDIC consumer sales there is no express duty to examine the goods. Nevertheless, the SWEDISH preparatory works provide that the consumer should normally make at least a superficial examination quite soon after having received the goods, but that a thorough examination or testing the different functions of the goods cannot be required (Prop 1989/90:89, 114)). In POLAND the seller is not liable if the consumer ought reasonably to have known about the defect (Consumer Sales Act art. 7).

7. Under HUNGARIAN law the buyer does not have to examine the qualities (properties) of the goods certified or guaranteed by the seller (CC § 283(2)).

8. Under NORDIC law a buyer is not under a duty to examine goods concerning legal defects (FINLAND, NORWAY and SWEDEN SGA § 41). This is explained by the fact that there is no such existing trade practice, compared with what is customary concerning factual defects (SWEDEN *Ramberg*, Köplagen, 444).

II. Speed of examination

9. Normally, it is required that the examination takes place speedily after the delivery. Under some systems it is required that the examination takes place immediately (AUSTRIA Ccom § 377; ESTONIA LOA § 219(1); GERMANY Ccom § 377) or as soon as practicable (CZECH REPUBLIC Ccom art. 427(1); FINLAND SGA § 31; NORWAY SGA § 31; SLOVAKIA Ccom art. 427(1); SLOVENIA LOA § 461(1); SWEDEN SGA § 31). The buyer is to carry out the examination within a reasonable time (CISG art. 38(1); LITHUANIA CC art. 6.337). Moreover, under many systems it is explicitly provided that the examination is to take place in accordance with trade customs etc. (DENMARK SGA § 51; FINLAND SGA § 31; LITHUANIA CC art. 6.337; NORWAY SGA § 31; POLAND CC art. 563(2); SLOVENIA CC § 461(1); SWEDEN SGA § 31).

III. Examination where carriage of goods or sale in transit is involved

10. Under some systems, special regulation is provided as to sales contracts where carriage of goods is involved. Generally, in such a case, the buyer is not obliged to examine the goods until they have arrived at their destination (CISG art. 38(2); CZECH REPUBLIC Ccom art. 427(2); DENMARK SGA § 51(2); ESTONIA LOA § 219(2); FINLAND SGA § 31(2); ITALY CC art. 1511 (specifically regarding the notice of defects); NORWAY SGA § 31(2); POLAND CC art. 545(2); SLOVAKIA Ccom art. 427(2); SWEDEN SGA § 31(2)).

11. If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract and the seller knew or ought to have known of the possibility of such redirection or redispatch, an examination may be deferred until after the goods have arrived at the new destination (CISG art. 38(3); CZECH REPUBLIC Ccom art. 427(2); ESTONIA LOA § 219(3); FINLAND SGA § 31(3); NORWAY SGA § 31(3); SLOVAKIA Ccom art. 427(2); SLOVENIA LOA § 461(3); SWEDEN SGA § 31(3)).

IV.A.–4:302: Notification of lack of conformity

(1) In a contract between two businesses the rule in III.–3:107 (Failure to notify non-conformity) requiring notification of a lack of conformity within a reasonable time is supplemented by the following rules.

(2) The buyer in any event loses the right to rely on a lack of conformity if the buyer does not give the seller notice of the lack of conformity at the latest within two years from the time at which the goods were actually handed over to the buyer in accordance with the contract.

(3) If the parties have agreed that the goods must remain fit for a particular purpose or for their ordinary purpose during a fixed period of time, the period for giving notice under paragraph (2) does not expire before the end of the agreed period.

(4) Paragraph (2) does not apply in respect of third party claims or rights pursuant to IV.A.–2:305 (Third party rights or claims in general) and IV.A.–2:306 (Third party rights or claims based on industrial property or other intellectual property) .

COMMENTS

A. General

Because rules on notification have an application to sales, leases of goods and services there is a general provision in III.–3:107 (Failure to notify non-conformity). As applied to sales this has the effect that the buyer may not rely on the lack of conformity unless buyer notifies it to the seller within a reasonable time, specifying the nature of the lack of conformity. The reasonable time runs from the time when the goods are supplied or from the time, if it is later, when the buyer discovered or could reasonably be expected to have discovered the non-conformity. However, the seller is not entitled to rely on the buyer's failure to notify if the failure relates to facts which the seller knew or could reasonably be expected to have known and which the seller did not disclose to the buyer. These rules do not apply where the buyer is a consumer: in such a case there is no specific requirement of notification and only the general rule on good faith and fair dealing applies.

The thinking behind these general rules is that the buyer has to indicate any discoverable lack of conformity to the seller, who can then follow up the complaint and ultimately solve the problem. The notification requirement thus aims to resolve quickly any dispute due to non-conforming goods. The requirement applies to any lack of conformity and therefore covers both material and so-called legal defects in the goods.

It should also be mentioned that the rules on prescription in Book III will generally have the effect that the buyer will lose the right to found on a non-conformity three years after the time of delivery of the goods or, if later, the time when the buyer knew of or could reasonably be expected to have known of, the non-conformity. See III.–7:101 (Rights subject to prescription), III.–7:201 (General period), III.–7:203 (Commencement) and III.–7:301 (Suspension in case of ignorance). Regardless of what the buyer knew or should have known there is prescription after ten years from the due time of delivery (III.–7:307 (Maximum length of period)). These rules on prescription apply to consumer and non-consumer buyers alike.

B. Absolute time period of two years

The present Article supplements these general rules by a special rule for contracts for sale between businesses. It is a rule of a different type from the general notification rules. It does not depend on what the buyer knew or could reasonably be expected to have known. It is not therefore a sort of more specific version of the rule on good faith and fair dealing in the exercise of remedies. It is an automatic cut-off rule, more akin to the rule on the maximum length of prescription. Its effect is that, even if excusably ignorant of the non-conformity, the buyer loses the right to rely on it if it is not notified to the seller within two years from the time at which the goods were handed over. This rule is heavily influenced by the CISG which provides (art. 39(2)) that:

> In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

The starting point of the two-year period under paragraph (2) is when the goods are actually handed over to the buyer, meaning when the buyer actually receives the goods and not, for instance, when the goods are handed over to a carrier. This point in time was chosen for reasons of clarity and since only when the buyer has the goods in actual possession can the buyer discover any lack of conformity present.

The rationale of this absolute time-limit is to safeguard the seller against claims brought long after the delivery of the goods. An absolute time-limit allows for a better calculation of costs concerning possible risks stemming from claims from the buyer. Besides, legal certainty is promoted since the seller will know that all transactions are definitely settled after the lapse of a certain period. Furthermore, the costs of legal proceedings increase as time passes, as it becomes more complicated to investigate the causes of a defect and to establish whether it existed at the time of delivery. On the other hand, the interests of the buyer require sufficiently long time-limits for a lack of conformity to become apparent.

The two-year time-limit under paragraph (2) can be changed by express agreement. As the rule applies only to contracts between businesses the limits on derogation in relation to consumer contracts for sale have no application. Accordingly the period can be shortened or lengthened by agreement between the parties.

C. Effect of contractual guarantee

Paragraph (3) clarifies that if the parties have agreed that the goods must remain fit for a particular purpose or for their ordinary purpose during a fixed period of time, the period for giving notice under paragraph (2) does not expire before the end of the agreed period. This reflects the closing words of the CISG art. 39(2) – "unless this time-limit is inconsistent with a contractual period of guarantee". A buyer – even if not a consumer buyer – should not lose continuing rights before they have expired.

D. Exception for third party rights or claims

Paragraph (4) exempts rights arising out of third party claims or rights under IV.A.–2:305 (Third party rights or claims in general) and IV.A.–2:306 (Third party rights or claims based on industrial property or other intellectual property) from the two-year time-limit of paragraph

(2). Therefore, subject to the normal rules on good faith and fair dealing, the only relevant time-limit is the period of prescription established by Book III, Chapter 7.

E. Consumer contract for sale

It is worth emphasising again that this Article does not apply to consumer contracts for sale but only to contracts between businesses. For consumers therefore, subject to the normal rules on good faith and fair dealing, the only relevant time-limit is the period of prescription established by Book III, Chapter 7.

NOTES

I. General duty to notify lack of conformity

1. A buyer's duty to notify the seller of a lack of conformity can be found under many systems (CISG art. 39(1); CZECH REPUBLIC CC §§ 504 and 599 and Ccom art. 428; BELGIUM CC art. 1642; DENMARK SGA § 52(1); ESTONIA LOA § 220(1); FINLAND SGA § 32(1); HUNGARY CC § 307; ITALY CC art. 1495; LITHUANIA CC art. 6.348; NETHERLANDS CC art. 7:23(1); NORWAY SGA § 32(1); POLAND CC art. 563; PORTUGAL CC art. 916; SLOVAKIA CC §§ 504 and 599 and Ccom art. 428; SLOVENIA LOA §§ 461 and 462; SWEDEN SGA § 32(1)). Cf. also the Notes on prescription periods under IX. since the difference is not always clear-cut.
2. The buyer must generally notify the seller within a reasonable time after he has discovered the lack of conformity or ought to have discovered it (CISG art. 39(1); FINLAND SGA § 32(1); HUNGARY CC § 307; LITHUANIA CC art. 6.348; NETHERLANDS CC art. 7:23(1); NORWAY SGA § 32(1); SWEDEN SGA § 32(1)). The buyer must notify the defect to the seller without undue delay after he had the possibility to examine the thing (CZECH REPUBLIC and SLOVAKIA CC §§ 504 and 599 and Ccom art. 428).
3. Under some systems there are short fixed time-limits running from the discovery of the lack of conformity. For non-consumer sales, the buyer is obliged to notify the seller within 8 days after discovering the lack of conformity (ITALY CC arts. 1495(1) and 1497(2); SLOVENIA LOA §§ 461(1) and 462). Under POLISH law the buyer must notify the seller about the defect within one month from its discovery, and if the inspection of the thing is customary in the given circumstances, within one month from the time when he could have discovered it when observing due diligence (CC art. 563(1)). Under PORTUGUESE law the buyer has to notify the seller within two months from the detection of the defect (CC arts. 918 and 919). In SPAIN there is no duty to promptly notify the seller of the lack of conformity, but the buyer loses the remedies for non-performance if notice of the defects has not been served on the seller within four or thirty days, according to the kind of irregular performance (Ccom arts. 336 and 342). Although these time limitations were probably thought of as prescription rules by the old legislator, court doctrine has promptly shifted the sense of the rules, making them work only as notice time (TS 20 November 1991, RAJ 1991 no. 8469, TS 23 December 1996, RAJ 1996 no. 9373).
4. Generally under all systems the duty to notify varies if the defects are hidden or obvious, since obvious defects must generally be notified speedily. For instance, under ESTONIAN law the moment when the defects should have been discovered depends on whether these are hidden or apparent: during the examination the buyer is expected to discover only apparent defects; as the buyer can reasonably expect that the seller's

delivery conforms to the contract he is generally not under a duty to specifically search for the defects or engage professionals to do so (NC CC 3-2-1-50-06). Similarly under SLOVENIAN law, if both parties are present at the examination, apparent defects are to be notified immediately (LOA § 461(2)). Under some systems, however, a differentiation is made between hidden and manifest defects when it comes to notification in the sense that the buyer is only under the obligation to notify obvious defects or that different time-limits apply. Under a few systems the buyer is only obliged to notify the seller concerning manifest defects immediately after delivery (BELGIUM CC art. 1642; FRANCE Cass.civ. I, 26 June 2001, CCC 2001, no. 156, note *Leveneur*, if the buyer accepts delivery without mentioning an apparent lack of conformity he loses his right to claim a remedy). Under SPANISH commercial sales, different time-limits apply for obvious and hidden defects.

5. Under other systems, the buyer is not obliged to notify the seller (at least concerning hidden defects). He may however be obliged to bring a court claim within a specific period, cf. further under VII. Moreover, under the COMMON LAW a failure to notify a lack of conformity within a reasonable time after delivery will preclude the remedy of termination (ENGLAND and SCOTLAND Sale of Goods Act s. 35(4)).

6. Nevertheless, that the buyer may exercise his remedies without being subject to a notification duty is not always unconstrained. Under GREEK law the exercise of any remedy must be in compliance with good faith, otherwise it may be abusive (CC art. 281). However, the courts have been hesitant in declaring the exercising of remedies in the context of sales to be abusive (A.P.17/1995 EllDik 38, 41; Ef Thessalonikis 781/1999 Arm 1999, 800).

II. Notification under commercial sale

7. Under some systems, a duty to notify the seller is only to be found under commercial sales (AUSTRIA Ccom § 377; GERMANY Ccom § 377; SPAIN Ccom arts. 336 and 342). Moreover, under commercial sale, the buyer is often under a stricter obligation to notify quickly. Under some systems, the buyer is obliged to notify immediately or without delay (GERMANY Ccom § 377; POLAND CC art. 563(2); SLOVENIA LOA §§ 461(1) and 462). Under PORTUGUESE commercial sales the buyer must notify within 8 days from the delivery (Ccom art. 471). Under SPANISH commercial sales, the buyer is obliged to notify obvious defects immediately if the goods are examined by the buyer at the time of delivery, and notification within four days if the goods are packed (Ccom art. 336). Hidden defects must be notified within 30 days from the time of delivery (Ccom art. 342).

III. Notification under consumer sale

8. The Consumer Sales Directive art. 5(1) provides the Member States with an option to oblige the consumer, in order to benefit from his rights, to inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity. Such a duty to notify under consumer sales can be found under a number of systems (DENMARK SGA § 81; ESTONIA LOA § 220(1); FINLAND Consumer Protection Act chap. 5 § 16; ITALY Consumer Code art. 132; NETHERLANDS CC art. 7:23(1); NORWAY Consumer Sales Act § 27(1); POLAND Consumer Sales Act art. 9; SLOVAKIA CC § 626; SLOVENIA Consumer Protection Act art. 37a(1); SPAIN ConsProtA art. 123(4) presumes that the notification has been made within the legal period; SWEDEN Consumer Sales Act § 23). A similar duty can be found under HUNGARIAN law, with the exception that the consumer will not lose his rights completely, but only be liable for the damage caused by his omission or delay (CC § 307(2)). Under BELGIAN consumer sales the seller and the consumer

may agree upon a period of time within which the consumer has to inform the seller of a lack of conformity (BELGIUM CC art. 1649quarter § 2).

9. Under NORDIC consumer sales notice may be given to someone who has an agreement with the seller to repair or restore the goods, instead of to the seller (DENMARK SGA § 84; NORWAY Consumer Sales Act § 27(3); SWEDEN Consumer Sales Act § 33(2)). Similarly, under FINNISH law notification may be lodged not only with the final seller, but also with the intermediary trader and a previous seller in the same chain of contracts (Consumer Protection Act chap. 5 § 16(1)).

IV. Notification of legal defects

10. Under some systems, the buyer's duty to notify the seller in case of legal defects is especially regulated or deviates from the general notification requirements. Under the CISG there is a special notification procedure in art. 43. Moreover, only positive knowledge of the third party right on the part of the seller excludes the application of the notification bar in art. 43(1). Under POLISH law the buyer from whom a third party vindicates claims for the thing sold is obliged to notify the seller about the fact immediately and to summon him to participate in the case (CC art. 573). In SPAIN if the goods are taken from the buyer by a third party on the basis of a final court judgment, the buyer has to notify the seller at the moment the buyer knows about the claim instituted by the third party (CC arts. 1481, 1482; for the procedural issues, *Durán Rivacoba*, Evicción y saneamiento, 157 ff) (*Lacruz Berdejo and Rivero Hernández*, Elementos II(1), 44; *Badenes Gasset*, El contrato de compraventa, 588). Under DUTCH law a legal defect does not constitute a non-conformity, and hence CC art. 7:23 does not apply if the goods are burdened with a legal defect. Instead, the more general regulation in CC art. 6:89 applies, containing a similar duty to notify 'within an *adequate* period' after the moment he has or should have discovered the defect. Since CC art. 6:89, as well as art. 7:23, is directed more against physical defects, the provision is to be applied cautiously (Asser (-*Hijma*), Bijzondere Overeenkomsten I[6], no. 543, 559)).

V. Modalities of notification

11. Generally, there are no special requirements as to form concerning the notice of defects. As a consequence, the notice may be given either orally or in written form. However, under POLISH law it is specifically provided that in order to observe the time-limits for the notification of the defects in the thing sold it is sufficient to dispatch a registered letter before the lapse of those time-limits (CC art. 563(3) and Consumer Sales Act art. 9).

12. If the notification is sent by mail, however, there is a presumption under many systems that the notification is valid if the buyer dispatches it in a timely fashion (CISG art. 27; FINLAND SGA § 82; GERMANY Ccom § 377(4); NORWAY SGA § 82; SWEDEN SGA § 82). Under SLOVENIAN law if the notification was sent on time by registered mail, telegram or in any other reliable manner and it arrives with a delay or not at all, the buyer is nevertheless deemed to have notified the seller (LOA § 464(2)). Under CZECH law there is no such presumption, hence a notification has to reach the seller at the latest on the last day of the notification period (CC §§ 504, 599 and 626).

13. Under many systems it is merely prescribed that the buyer must notify the seller of the lack of conformity. This includes that the buyer specifies the nature of the lack of conformity, so that the seller can judge if there is an actual lack of conformity at hand and which remedies might be appropriate. Under CISG art. 39(1) it is expressly regulated that the buyer must specify the nature of the lack of conformity. Other

systems go even further than this. When notifying the seller of the defects, the buyer must precisely describe the defect and invite the seller to examine the goods (ESTONIA LOA § 220(3) (commercial sales only); SLOVENIA LOA § 464(1)). In LITHUANIA the buyer is bound to notify the seller of the breach of any condition of the contract specifying the quality, quantity, range, completeness, containers and packaging of the items (CC art. 6.348).

VI. Legal consequences of a failure to notify

14. Under most systems, the buyer loses his remedial rights against the seller altogether concerning the defect in question if he fails to notify in a timely fashion. This principle may be expressed in many ways. It may be established that the buyer loses the right to rely on a lack of conformity of the goods (CISG art. 39(1); ESTONIA LOA § 220(3) no. 1; ITALY CC art. 1495(1)); that the buyer must inform the seller in order to benefit from his rights (Consumer Sales Directive art. 5(1)(2); POLAND CC arts. 563(1) and 573); or that he may not invoke that the goods are not in conformity unless he notifies the seller (NETHERLANDS CC art. 7:23(1); FINLAND, NORWAY, SPAIN Ccom art. 342 and SWEDEN SGA § 32(1)). Another common approach is that if the buyer fails to notify in good time, it is presumed that he approves of the lack of conformity and thus accepts the goods as they are (AUSTRIA Ccom § 377; GERMANY Ccom § 377(2) and (3)). In the NETHERLANDS, according to the prevailing opinion, the buyer additionally loses the right to claim avoidance of the contract for fundamental mistake (cf. Mon. NBW B-65b (*Loos*), no. 32, 71) or to claim damages under tort law insofar as the facts give rise to such a claim (cf. HR 21 April 2006, NedJur 2006, 272 (*Inno Holding Baarn B.V./gemeente Sluis*)).

15. Under a few systems, however, the buyer does not lose his rights altogether. Under the CISG art. 44 if the buyer fails to notify within a reasonable time after he has discovered or ought to have discovered the lack of conformity, he still retains his right to reduce the price or claim damages, except for loss of profit, if he has a reasonable excuse for his failure. However, it should be noticed that this exception has been very rarely used in practice (cf. *Sivesand*, The Buyer's remedies for Non-Conforming Goods, 172 f). A similar exception can be found in ESTONIA, LOA § 220(3)). Under HUNGARIAN law CC § 307 the buyer will only be liable for the damage caused by his omission or delay. Similarly under LITHUANIAN law if the buyer fails to notify the seller about the lack of conformity, the seller has the right to refuse to meet, fully or in part, the buyer's demands as to the remedy provided that he proves that following the breach of the obligation by the buyer his demands can no longer be met or that meeting the demands would result in unreasonable costs for the seller compared to those which the seller would have incurred if the buyer had duly notified the seller of the breach of contract (CC art. 6.348). Under HUNGARIAN law, the applicable prescription and preclusion periods do not apply to a claim for damages. Here the general prescription period of five years applies (CC § 324(1)).

16. Under ENGLISH and SCOTTISH law, although there is no actual duty to notify, only termination is lost after the lapse of a reasonable time. Hence, the buyer still has the right to ask for damages.

VII. Fixed time-limits for lack of conformity running from delivery

17. Under some systems, a specific time-limit is applicable usually running from the delivery or handing over of the goods within which the buyer must notify the seller. Generally, such a time-limit is not applicable if the seller knew about the defect or otherwise acted contrary to good faith The length of the time period varies between the different systems. The time-limit may amount to six months (CZECH REPUBLIC CC

§§ 504 and 599; SLOVENIA LOA § 462(2)), one year (POLAND CC art. 568(1)) or two years (CISG art. 39(2); DENMARK SGA § 54; NORWAY SGA § 32(2); SLOVAKIA CC §§ 599, 620 and 626; SWEDEN SGA § 32(2)). Also under HUNGARIAN law, CC § 308/A, there is a preclusion period of 1 year or 3 years in the case of goods designated for long-term use. In several other countries, a similar result is reached through a sales-specific prescription period running from delivery, cf. under IX. In other countries, there are no actual time-limits, only general prescription periods (cf. under IX.) and/or a general duty to notify the seller about the lack of conformity (cf. under I.).

18. Under LATVIAN law, there is no general time-limit to be found, only specific time-limits for different remedies. Hence, the right to termination expires after six months, and the right to a price reduction after one year has passed from the day the contract was entered into or the date a specific guarantee was given (CC arts. 1616, 1618 and 1619).

19. Some countries provide for longer time-limits in consumer sales. In consumer sales the time-limit is two years after delivery (CZECH REPUBLIC CC §§ 620(1) and 626(1); ESTONIA LOA § 218(2) (in respect of the defects discovered during that period the notification can hence take place within 2 years and 2 months from delivery); SLOVENIA Consumer Protection Act art. 37b and one year after delivery in the case of second-hand goods (SLOVENIA Consumer Protection Act art. 37b. Under SWEDISH consumer sales, the time-limit has recently been extended to three years (Consumer Sales Act § 23(3)). Under NORWEGIAN consumer sales, the time-limit amounts to five years if the goods or part of the goods are intended to last for a considerably longer period of time than two years in the case of normal use (Consumer Sales Act § 27(2)). Under POLISH law the Consumer Sales Act art. 10 lays down a time-limit of two years from delivery and if the goods are replaced this period starts anew. In SPAIN the legal framework is as follows: in non-consumer sales, there is a time limit of six months, which has to be deemed as a prescription time limit, unless the aliud pro alio rules apply, in which case the prescription period extends to fifteen years. In commercial sales (sales for the purpose of resale), the buyer has also to comply with the time-limit of 4 or 30 days to serve notice of the lack of conformity, unless - though dubious - *aliud pro alio* rules apply. In consumer sales, the consumer is subject to a two months notification duty (running as from the day the buyer became aware of the lack of conformity) and to a three years prescription period, running from the date of delivery. Additionally, in consumer sales and in sales of residential or commercial buildings (but not in others) there is a period of two years (consumer sale) and three/ten years (immoveable sale) within which the lack of conformity must be manifested.

20. Under other systems, a special remedial regime has been introduced under consumer sales, in order to comply with the Consumer Sales Directive. The time-limit here amounts to two years (Consumer Sales Directive art. 5(1); BELGIUM CC art. 1649quarter § 1; FRANCE Consumer Code art. L. 211-12; ITALY Consumer Code art. 132(1)). Under BELGIAN law in the event of repair, replacement or negotiations between seller and consumer with a view to an amicable settlement, the period of two years during which any lack of conformity must become apparent is suspended or interrupted (CC art. 1649quarter § 1). Generally, the consumer is however not barred from resorting to the general regime of liability either before or after the expiry of this two-year period.

21. Under some systems, the time-limits do not apply regarding legal defects (CISG art. 43; NORWAY SGA § 41(1); SLOVENIA LOA §§ 488-495; SWEDEN SGA § 41(1)).

Under POLISH law the time-limit concerning legal defects only expires after the lapsing of one year from the time when the buyer learned of the defect. If the buyer learned of the defect only as a result of a third party suit, the time runs from the day on which the decision delivered in the dispute with the third party has acquired legal force (CC art. 576(1)). Under HUNGARIAN law, the general prescription period of five years applies concerning legal defects, CC § 324(1).

VIII. Default or mandatory rules

22. Generally, under non-consumer sales, the regulation on notification periods and time-limits are default rules. There are however exceptions, for instance under CZECH law all rules on lack of conformity are generally mandatory, including the notification periods, with the exception of commercial sales (CC §§ 499-510 and 596-600). Under GERMAN law, the parties may not agree upon a shorter prescription period than one year through standard contract terms (CC § 309 no. 8 lit. b ff). Under DUTCH law, an extension of a statutory expiration period is not possible (Asser (-*Hartkamp*), Verbintenissenrecht I[11], no. 692; Asser (-*Hijma*), Bijzondere Overeenkomsten I[6], no. 553). The reduction of notification periods and time-limits can in many cases be regarded as an unfair contract term according to general contract law. For instance, under ITALIAN law any agreement which imposes prescription periods so strict that they would render the exercise of the rights of the parties excessively difficult are declared null and void (CC art. 2965).

23. Under consumer sales, however, due to the Consumer Sales Directive, the regulations on notification periods and time-limits are generally mandatory. The parties may therefore only agree upon time-limits longer than two years, or notification periods longer than two months. The Directive only provides for a possibility to restrict the time-limit to one year in the case of second-hand goods in art. 7(1) no. 2. This possibility has been used under several systems, where the parties are hence free to agree upon such a restriction of the time-limit (BELGIUM CC art. 1649quarter § 1; CZECH REPUBLIC CC § 626(3); GERMANY CC § 475(2); HUNGARY CC § 308(4); ITALY Consumer Code art. 134(2); POLAND Consumer Sales Act art. 10; SPAIN ConsProtA art. 123(1).

24. Under LITHUANIAN law, in consumer sales any contractual provision which restricts the rights of the consumer can be declared null and void by the court if it is unfair to the consumer (CC art. 6.188).

IX. Related issues: periods of prescription for claims based on lack of conformity

25. In the area of prescription periods, there is much diversity between the different systems concerning the length as well as the starting point of the prescription period (cf. also PECL Chapter 14). Moreover, some systems provide for sales-specific prescription periods, whereas others rely on the prescription periods of general contract law.

26. Under some systems, the period of prescription runs from delivery or the passing of the risk. For movable goods the period may amount to six months (AUSTRIA CC § 933; HUNGARY CC § 308; GREECE CC art. 554), one year (ITALY CC art. 1495(3); POLAND CC art. 568(1)), two years (GERMANY CC § 438(1) no. 3; LITHUANIA CC art. 6.338; PORTUGAL Decree-law no. 67/2003 art. 5(1)), three years (ESTONIA CCGPA § 146(1); NORWAY Prescription Act (*Lov om foreldelse av fordringer/Foreldelsesloven*, 1979), five years (DENMARK Prescription Act 1908), ten years (FRANCE (commercial sales) Ccom art. L. 110-4, Com. 27

November 2001, Bull.civ. I, no. 187; JCP 2002.II.10021, note *Jourdain*; SWEDEN Prescription Act, *Preskriptionslagen* (1981:130) § 2) or even thirty years (FRANCE CC art. 2262, see Cass.civ. III, 16 November 2005, Bull.civ. III, no. 222, D. 2006, 971, note *Cabrillac*). Leading to a similar result, under ENGLISH law Limitation Act 1980 art. 5 there is a six-year prescription period running from the date of breach. Under HUNGARIAN law the general rules on prescription (CC §§ 324-327) apply, among them also the rules on the suspension of prescription. Pursuant to CC § 326(2), if the buyer is prevented from pursuing his remedies due to an excusable reason (impediment), he may pursue his remedies for 3 months after the impediment has ceased to exist. I.e. if the lack of conformity has not become apparent within the prescription period of 6 months, the buyer will still be entitled to pursue his remedies within 3 months from when the lack of conformity became apparent.

27. Under other systems, the prescription period runs from the moment in time when the buyer notifies the seller of the non-conformity. Also here the length varies between one year (SLOVENIA LOA § 480), two years (NETHERLANDS CC art. 7:23(2)) and three years (CZECH REPUBLIC and SLOVAKIA CC § 508 in conjunction with § 101). Moreover under CZECH and SLOVAK commercial sales, the prescription period is four years (Ccom art. 397). Under SLOVENIAN law, however, this is not a genuine prescription period, since the buyer loses his rights (so-called preclusion) if he does not start judicial enforcement within 1 year after notification, LOA § 480(1). The time period cannot stand still or be interrupted and start all over again.

28. Under still other systems, the prescription period starts running from when the lack of conformity became manifest, or upon detection. The period may be two years (FRANCE CC art. 1648), three years (FINLAND Prescription Act (*Laki Velan Vanhentumisesta* 15 August 2003/728), or five years (SCOTLAND Prescription and Limitation (Scotland) Act 1973 art. 6(3)). The PECL establish a general period of prescription of three years (art. 14:201). This period generally starts to run from the time when the debtor has to effect performance (art. 14:203(1)). However, the period of prescription is suspended according to art. 14:301 for as long as the creditor does not know, and could not reasonably have known, of the facts giving rise to the claim. This exception would, for instance, apply in the case of hidden defects. Finally, PECL art. 14:307 provides for a long stop period of 10 years, after the lapse of which the debtor's remedies are cut off. Under SPANISH law the period in which to exercise the remedies for hidden defects in the goods is six months (CC art. 1490). Although the provision indicates that the period starts running from the time of delivery, the case law deviates on this approach and has indicated that the period starts when the buyer knows about the hidden defects (TS 23 July 1994, RAJ 1994 no. 6587 *Lacruz Berdejo and Rivero Hernández*, Elementos II(2), 57; *Martínez de Aguirre Aldaz*, Derecho de Obligaciones, 498). The TS has repeatedly established that all these specific actions are not incompatible with the general remedies for non-performance under CC art. 1124, whose period of prescription (*de la Cuesta Rute*, Contratos Mercantiles V(2), 179) amounts to 15 years (general prescription period for personal actions). A different approach is taken with regard to commercial sales, where the need for security in commercial transactions advises against having very long periods in which to claim non-conformity. Under NORWEGIAN law, there is also a complimentary rule establishing that the period of prescription does not elapse earlier than one year after the creditor has gained or should have gained actual knowledge of the claim, an exception which, for instance, will apply to hidden defects (Prescription Act art. 10 no. 1).

29. Under BELGIAN law lack of conformity concerning delivery is subject to the general period of prescription which amounts to 10 years, running from the day of the

conclusion of the contract (CC art. 2262bis). For a hidden defect the buyer must claim within a short period of time as from the day of the discovery of the defect (BELGIUM CC art. 1648). Both the duration and the starting point of the period are determined by a judge taking into account all the circumstances of the case. These concern, for example, the nature of the thing sold, the nature of the defect, the customs, the quality of the parties, but also the parties' actions both in and out of court, like the appointment of a judicial expert. Concerning the duration of the period the courts generally accept that serious negotiations with a view to obtaining a friendly settlement suspend the short period. The short period starts running once again the moment it becomes clear that a friendly settlement is impossible. The period is then determined from the breaking off of the proven negotiations.

30. Under some systems the period of prescription in consumer sales is longer than the general period of prescription. Under ITALIAN law the prescription period for an action based on defects in the goods which have not been wilfully hidden by the seller can be commenced within 26 months from the delivery of the goods (Consumer Code art. 132(4)). Under HUNGARIAN law, the period of prescription amounts to two years from delivery (CC § 308). In SPAIN the prescription period is three years from delivery (ConsProtA art. 123(3)). In contrast, FRENCH law establishes a more unfavourable prescription period for consumer sales, namely two years from the delivery (Consumer Code art. L. 211-12). However, a consumer can claim on the ground of general sales law when the action on the implementation of the Consumer Sales Directive has prescribed (Consumer Code art. L. 211-13).

IV.A.–4:303: Notification of partial delivery

The buyer does not have to notify the seller that not all the goods have been delivered, if the buyer has reason to believe that the remaining goods will be delivered.

COMMENTS

A. General

This provision aims to solve a potential problem associated with the wide definition of non-conformity in IV.A.–2:301 (Conformity with the contract). Since a deficiency in quantity is treated as a lack of conformity under that provision there is a danger that a non-consumer buyer would have to pay for goods which were not received if the seller was not notified of the shortfall within a reasonable time. This article aims to protect the buyer from such a result subject to certain preconditions.

B. No notification required

Under the Article, the buyer is not required to notify the seller of the shortfall in the delivery if the buyer has reason to believe that the seller will deliver the remaining goods. If the buyer, however, is not sure about that the rest of the goods will be delivered, notification to the seller is still required if the buyer wishes to retain rights to rely on the non-performance. This solution can be justified as the seller should know that not all the goods have been delivered, especially if the buyer has good reason to believe this. In this case, the seller therefore needs no notification in order to be informed about the problem.

> *Illustration 1*
> The buyer has ordered three tons of oranges, which the seller promised to deliver by lorry. One lorry breaks down; the other delivers half the batch of oranges. The buyer is informed about the delay. The buyer has reason to believe that the seller will still deliver the missing part and will not lose any rights by failing to notify at that stage.

In this context, price may serve as an indicator. In the case of an overall price, the buyer will, in every likelihood, not expect further delivery; whereas in the case of a unit price, it may be different. Other indicators could be invoices or similar statements relating to the delivery.

An example of circumstances speaking against further delivery is the case of an invoice from the seller that concerns the whole contracted quantity, but a few units are missing.

> *Illustration 2*
> The buyer has bought 100 tons of bananas from the seller. The shipment arrives, but it consists of only 90 tons. The invoice refers to the delivery of 100 tons. The buyer has no reason to believe that the seller will still deliver the missing 10 tons, since the invoice shows that the seller thought that the whole quantity had been delivered.

Furthermore, the circumstances of a given case may reveal that a part of the delivery has disappeared during transport, for instance because a box has been broken open. In these and similar circumstances, the buyer does not have reason to believe that a further delivery is forthcoming.

C. Consumer contract for sale

Although consumer contracts for sale are not expressly excluded from the Article they will in fact not be affected by it as a consumer buyer is, in any event, not required to notify in order to retain remedies. See III.–3:107 (Failure to notify non-conformity) paragraph (4) and IV.A.–4:302 (Notification of lack of conformity) paragraph (1). Moreover a consumer buyer who has justifiably assumed that the seller was going to deliver the missing quantity would not be acting contrary to good faith and fair dealing in not notifying the seller of the shortfall.

NOTES

Notification of partial delivery in relation to notification of lack of conformity

1. Under many systems, the buyer is under an obligation to notify the seller concerning any lack of conformity in order to preserve his rights. If a deficiency in quantity is treated as a lack of conformity (as is the case under these Principles cf. IV.A.–2:301 (Conformity with the contract), this would mean that the buyer would have to pay for goods he has not received if he fails to notify the seller thereof in good time. In order to protect the buyer from such a result, some countries provide for an exception to the obligation to provide notice.

2. Under NORDIC law it is provided that if it can be assumed that the seller is of the opinion that he has fulfilled the contract as a whole in spite of the fact that not all the goods have been delivered, the provisions concerning conformity apply (FINLAND, NORWAY and SWEDEN SGA § 43(2)). This provision aims at substantiating the borderline between a partial delay in delivery and non-conformity in the goods. The difference between the provisions concerning delay and non-conformity lies in the buyer's duty to inspect the goods and notify the seller in the latter case, where non-compliance may lead to the buyer losing his rights against the seller. The prerequisites in SGA § 43(2) are to be judged objectively. For example, the bill from the seller may concern the whole contracted quantity, but a few units are missing. Furthermore, the circumstances may reveal that a part of the delivery has disappeared during transport, for instance because a box has been broken open or the packing was damaged. If such or similar circumstances are not at hand, it is assumed that the seller knew that he had only performed part of his obligations. The provision is not to be interpreted so that it is presumed what opinion the seller actually had, especially if the buyer has justifiably assumed that the seller was going to deliver the missing quantity and has therefore waited before giving notice (SWEDEN *Ramberg*, Köplagen, 465 f)).

3. Under ITALIAN law terms of decadence and prescription that limit the guarantee for vices and lack of qualities do not apply in such a case since it relates to the seller's obligation to deliver (*Bianca*, La vendita e la permuta, 411). In CZECH and SLOVAK commercial sales if it is clear from a shipping document, a document upon the delivery of the goods or a statement by the seller that the seller is to deliver a smaller quantity (part) of the goods, the provisions on lack of conformity do not apply. The seller is rather in delay concerning the proper and due time for the delivery of the goods (Ccom art. 422(2)). However, under CZECH general sales partial delivery which is not in compliance with the documents is considered as a defect and therefore has to be notified (*Knappová*, Civil Law II[3], 105). Under SLOVENIAN law, two standpoints can be found in the legal literature; either there are no sanctions for the buyer's failure to notify, or he can be liable for damage caused to the seller

(SLOVENIA *Cigoj*, Komentar, 1476). In SPAIN the rules on lack on conformity do not apply to partial delivery, as flows from CC arts. 1469-1471. According to Ccom art. 330, the buyer who "accepts" partial performance is not entitled to refuse the delivered goods as not complying with the contract.

4. In SCOTTISH law, intimation of non-conformity is a general requirement but the courts take a commercially realistic view of what is required, in the absence of some provision in the contract itself (*McBryde*, Law of Contract in Scotland, 20-107).

IV.A.–4:304: Seller's knowledge of lack of conformity

The seller is not entitled to rely on the provisions of IV.A.–4:301 (Examination of the goods) or IV.A.–4:302 (Notification of lack of conformity) if the lack of conformity relates to facts of which the seller knew or could reasonably be expected to have known and which the seller did not disclose to the buyer.

COMMENTS

A. General

Both IV.A.–4:301 (Examination of the goods) and IV.A.–4:302 (Notification of lack of conformity) require the non-consumer buyer to ensure that possible problems with regard to the conformity of the goods are found, indicated and sorted out as quickly as possible upon pain of the loss of the buyer's rights. However, the seller is not entitled to rely on these provisions, which restrict liability for lack of conformity, if the seller knew or should have known of the lack of conformity and did not tell the buyer.

B. Knowledge of the lack of conformity

The crucial question under this Article is whether the seller actually had, or should have had, knowledge of certain facts relating to a potential lack of conformity. While the former variant (positive knowledge of the seller) will burden the buyer with a difficult question of proof, the second variant (what the seller could reasonably be expected to have known) introduces a more objective test. In this context, regard must be had to the economic reality of today's retail business. Final sellers increasingly simply serve as a mere 'point of sale' for highly specialised, mass-produced goods. They will not have taken part in the design and manufacture of these goods and will often lack essential information about the product.

Nonetheless buyers are entitled to expect at least a certain minimum of expertise on the part of the seller. The latter can be expected to be reasonably well informed about the goods sold, not least because the seller will usually handle complaints even if they are passed on to the manufacturers. By and large, the question of what the seller can reasonably be expected to have known will have to be decided on a case-by-case basis.

In addition, the seller needs to disclose these facts to the buyer. However, this rule cannot be construed so as to require the seller to provide an objective and impartial assessment of the goods to be sold, possibly even involving alternatives by competitors and the like.

C. Impact on the buyer's remedies

If the seller is not entitled to rely on the examination and notification requirements under this Section, the buyer does not lose the rights to rely on the relevant lack of conformity by virtue of IV.A.–4:302 (Notification of lack of conformity). There is a virtually identical rule in III.–3:107 (Failure to notify non-conformity) paragraph (3). Moreover the buyer would not in these circumstances be adversely affected by the rules of III.–1:103 (Good faith and fair dealing), given that it is the seller who has acted contrary to good faith and fair dealing. However, the general rules on prescription will still apply. The result is that the buyer can bring a claim as long as it has not expired.

D. Consumer contracts for sale

Although consumer contracts for sale are not expressly excluded from this Article, in fact it has no application to them as consumers are not affected by the two provisions mentioned in it.

NOTES

Relevance of seller's knowledge of lack of conformity for the examination and notification requirements

1. Under most systems, the examination and notification requirements do not apply if the seller knew about the defect and did not inform the buyer thereof, or if the seller otherwise acted contrary to good faith, etc. The same applies to sales-specific limitation periods.

2. The obligation to examine the goods or to notify the seller do not apply if the lack of conformity relates to facts of which the seller knew or could reasonably be expected to have known and which the seller did not disclose to the buyer (CISG art. 40; ESTONIA LOA § 221(1) 1); LITHUANIA CC art. 6.348; SLOVENIA LOA § 465).

3. In AUSTRIA and GERMANY if the seller has fraudulently concealed a lack of conformity, the seller may not invoke the buyer's duty to notify under commercial sales; moreover, the longer general period of limitation applies in place of the sales-specific two-year period (CC § 438(3) and Ccom § 377(5)). Under POLISH law the rights to warranty for physical and legal defects do not expire if the seller insidiously concealed the defect (CC arts. 568(2) and 576(2)). Under PORTUGUESE law notice is not needed if the seller acted with *dolus* (*Romano Martinez*, Direito das Obrigações[2], 141). The buyer does not lose his rights due to a failure to notify the seller in a timely fashion or to examine the goods if the seller has acted with gross negligence or against good faith (FINLAND, NORWAY and SWEDEN SGA § 33). Under DANISH law the buyer is not obliged to notify if the seller has acted fraudulently or if he has acted with gross negligence and this causes the buyer considerable loss (SGA §§ 53 and 54). Under ITALIAN law no notice of a defect is necessary if the seller has hidden the existence of the defects (CC art. 1495(2)). Under SLOVENIAN law the rights of the buyer are exceptionally not precluded if he could not enforce them on account of the seller's deceit (LOA § 480(1)).

4. In the NETHERLANDS if the seller knew about the defects but did not inform the buyer thereof, the period to notify only commences when the buyer has actually discovered the defect (CC art. 7:23(1)). Under CZECH law if the seller has knowledge of the lack of conformity, he is obliged to notify the buyer. If he does not do so, the buyer has a right to a reduction in the price and in the case of the thing being useless, a right to terminate the contract (CZECH REPUBLIC CC §§ 596 and 597). Under SLOVAKIAN law if the seller does not inform the buyer of a lack of conformity known to him, this is of importance for a potential decision of the court as to damages in favour of the buyer (*Svoboda*, Komentár a súvisiace predpisy, 513). In FRENCH law, the seller's knowledge of the defect allows the buyer to be awarded damages compensating him fully (CC art. 1645). Case law has established that a professional seller is irrebuttably presumed to be aware of hidden defects (a line of case law initiated by Cass.civ. I, 19 January 1965, D. 1965, 389).

5. Under SPANISH law this is an unregulated issue (see *Fenoy Picón*, El sistema de protección del comprador, 264-280). The case seems not to be problematic. As the

purpose of the notice is to warn the seller of the existence of a lack of conformity, this function becomes superseded by the factual knowledge of the breach by the seller. However, according to the factual circumstances the buyer's acceptance without refusal might be construed as novation or confirmation. In SCOTTISH law, the focus is upon the seller's liability for fraud rather than upon the buyer's remedies for non-conformity (*Gow*, Mercantile and Industrial Law of Scotland, 74).

6. Similarly, in some countries it is expressly regulated that the seller may not exclude liability for non-conforming goods if he has acted in bad faith.

CHAPTER 5: PASSING OF RISK

Section 1: General provisions

IV.A.–5:101: Effect of passing of risk

Loss of, or damage to, the goods after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

COMMENTS

A. General

The present Chapter addresses the question of who has to bear the risk of the goods being lost or damaged in a fortuitous event, i.e. due to no fault of either party. This article governs the question of whether the buyer needs to pay the full price for the goods despite their accidental loss or damage (for further aspects of risk, see Comment C).

B. Consequences of the passing of risk under these rules

The present rules address only the aspect of risk obliging the buyer to pay the price if the goods are lost or damaged after the risk has passed. This aspect of risk relating to the buyer is called the risk of counter-performance or, more specifically, the risk of payment. In other words, is the buyer obliged to perform even if the goods are not received at all, or only in a damaged state?

> *Illustration 1*
> A buys china from B, a shopkeeper. B hands the china over to A and the parties agree that A will settle the account the next day. That night the china is smashed due to an earthquake. The next day A returns the shattered pieces of china to B and refuses to pay the price. B rightly claims that A should pay because the risk had passed to A under IV.A.–5:102 (Time when risk passes) when the china was handed over.

It does not matter whether the goods have been lost or damaged completely or merely partially. Thus, the buyer has to pay the full price, provided that the risk has passed. It is a different question altogether whether the seller is discharged from the obligation to deliver, or still has to deliver what is left (see III.–3:104 (Excuse due to an impediment) and III.–3:302 (Enforcement of non-monetary obligations) paragraph (3)(b) and Comment C below).

C. Different types of risk in sales

On the other hand, it can be asked whether the seller still has to deliver in spite of the impediments to performance, i.e. the fact that the goods have either perished or been damaged. This aspect of risk relating to the seller is called the risk of performance, which is already covered by III.–3:104 (Excuse due to an impediment). If the risk has passed, the buyer must pay but the seller is excused from the obligation to deliver the goods. If the risk has not passed, the seller is either excused or must deliver other goods. The question is whether the

case is one of excused non-performance - which depends on whether it is possible to perform the obligation under the contract. This in turn is likely to depend on whether the contract was one for the sale of those specific goods, of goods from a specified bulk (which cannot be transferred if the bulk has been destroyed) or of generic goods.

Illustration 2
A, a retailer, sells the remaining TVs of an older model already out of production in bulk to B, a small shop owner, who wants to resell them at low cost. At the time of the conclusion of the contract, it is clear that the TVs are all stored in a specific warehouse. However, the TVs are lost in a fire that burned down the warehouse where A had stored them. A is excused from delivering the TVs, and paying damages to B, since the non-performance is excused under III.–3:104 (Excuse due to an impediment). It would have been different if the contract required the seller to deliver generic goods, i.e. a TV of a model still in production which can readily be obtained from another source.

Illustration 3
The facts are the same as in illustration 2. If the seller is to blame for the fire, say one of his employees had dropped a lighted cigarette, he is liable to the buyer in damages.

Lastly, the present rules also address another important aspect of risk, that of lack of conformity. Technically speaking, the question of who is liable for defective goods does not fall under the classical notion of risk in sales law (i.e. the accidental demise of, or damage to, goods before the actual handing over). However, these two concepts can, at times, conflict with each other, see IV.A.–5:102 (Time when risk passes) Comment C.

D. Act and omission of the seller

The rules on the passing of risk come into play only in the case of fortuitous events resulting in the loss of or damage to the goods, i.e. events that neither party could foresee. The present Article reflects this important principle by providing for an exception relating to the seller's conduct. If the seller is responsible for the loss of or damage to the goods, the buyer is not deprived of rights against the seller regarding that loss or damage.

Illustration 4
The facts are the same as in illustration 1. After the contract is concluded it is agreed that B is to arrange for transportation of the china to A's place of business. B engages an independent carrier to transport the goods. During the transportation the china is totally destroyed since B has packed it in an insufficient manner. Even though the risk passed under IV.A.–5:202 (Carriage of the goods) paragraph (2) with the handing over to the carrier, A is not obliged to pay the price, since the damage was caused by B's actions.

As a rule, the seller will be liable in contract or under the law on non-contractual liability for damage for the act or omission resulting in the loss of, or damage to, the goods. The seller will be liable for acts and omissions by persons for whom the seller is responsible, e.g. employees (for the relationship with the rules on lack of conformity, see IV.A.–5:102 (Time when risk passes) Comment D below).

NOTES

I. Events that fall within the notion of risk

1. It is common understanding that the risk of loss or damage is limited to an event that is accidental or fortuitous. Under most legal systems the reference to the requirement that the loss or damage must be accidental leads to the result that if the seller is responsible for the loss of or damage to the goods, then the risk provisions do not apply. This principle is explicitly regulated under some systems (CISG art. 66; ESTONIA LOA § 218(3); FINLAND, NORWAY and SWEDEN SGA § 12).

2. Most systems do not specify which events fall under the notion of risk, or only mention damage to or the destruction of the goods (BELGIUM; CZECH REPUBLIC CC § 590; ENGLAND and SCOTLAND; ESTONIA LOA § 214(1); FRANCE; HUNGARY CC § 99; LATVIA CC art. 2023; LITHUANIA CC art. 6.329; PORTUGAL CC art. 796; SPAIN CC arts. 1182, 1452). Other systems also mention the loss of the goods (CISG art. 66; POLAND CC art. 548; SLOVAKIA CC § 517(3)). This often also includes seizure or theft of the goods (POLAND uchwała SN of 23 May 1997 , OSNC 1997, no. 119; SWEDEN *Herre,* Konsumentköplagen[2], 123)). Generally, under many systems, the scope of the events falling within the notion of risk is therefore only specified in the case law. Thus under ENGLISH and SCOTTISH law, for example, it includes destruction, partial or total (*Anderson & Crompton v. Walls & Co.* (1870) 9 M 122); damage (*Head v. Tattersall* (1871-72) LR 7 Ex. 7; *Knight v. Wilson* 1949 SLT (Sh.Ct.) 26); and deterioration (*Pommer & Thomsen v. Mowat* (1906) 14 SLT 373; *Sterns Ltd. v. Vickers Ltd.* [1923] 1 KB 78).

3. Other systems provide for a more concrete regulation, for instance NORDIC law. Here the risk is described as the goods deteriorating or being destroyed, lost or diminished (FINLAND, NORWAY and SWEDEN SGA § 12). DANISH law speaks of the destruction or diminishing of the goods (SGA § 17(1)). Similarly under CZECH commercial sales where Ccom art. 368(2) lays down that the risk means the loss, destruction, impairment or devaluation of the thing, regardless of the cause. Also under AUSTRIAN law, CC § 1048 contains three different cases or 'types' of risk that can affect the object sold: (1) withdrawal from commerce by prohibition; (2) accidental complete destruction; and (3) partial destruction resulting in a decrease in value exceeding half of the value of the original. Withdrawal includes seizure of assets (ZBl 1919/244); goods are only deemed to be banned from commerce if there is a permanent impediment to trade. A merely temporary prohibition does not lead to a suspension of the obligations but to default (Schwimann (-*Binder),* ABGB IV[4], §§ 1048-1051, no. 5, ban on export. Destruction has to be accidental as opposed to causation by or other accountability of the buyer. (Schwimann (-*Binder),* ABGB IV[4], §§ 1048-1051, no.4, above all natural catastrophes such as fires, earthquakes, storms, floods, torrential rain, avalanches, mud slides; Klang (-*Wahle*), ABGB IV(2)[2], 52 (§§ 1048-51), theft and robbery as well). Partial destruction in CC § 1048 introduces the notion of subsequent laesio enormis with respect to the area of risk: the value of the object in question has to have decreased by more than half of the original (*Koziol and Welser*, Bürgerliches Recht II, 148; cf. express rule on laesio enormis (*Verkürzung über die Hälfte*) in CC § 934). If such partial destruction results in a decrease in value exceeding half of the value of the original the rules on risk will apply (CC § 1048, e.g. a sudden drop on the stock exchange market, see Rsp 1926/209, 1931/244; Klang (-*Wahle*), ABGB IV(2)[2], §§ 1048-1051, 56 f, points out that the buyer can still insist on the contract as long as he pays since the rule has been enacted in favour of the buyer). If the value is not decreased by a half CC § 1049 applies: the seller has to bear the risk

of deterioration since the contract remains in existence. In other words, he still has to perform and make up the partial destruction. But if restitution in kind is impossible or unfeasible the seller has to reduce the purchase price accordingly in order to maintain the subjective equivalence of the obligations (Rummel (-*Aicher*), ABGB I[2], §§ 1048-1051, no. 7; Schwimann (-*Binder)*, ABGB IV[4], §§ 1049, no. 1).

II. Relation between passing of risk and rules on delivery and conformity

4. The passing of risk does not exonerate the seller from his obligation to deliver or for liability for non-conforming goods. Under some systems it is specifically provided that risk does not pass if the buyer invokes the right to termination or a replacement of the goods (NETHERLANDS CC art. 7:10(3); SLOVENIA LOA § 436(2)). Under DUTCH law this exception applies only if, at the time of delivery, there is a case of non-conformity under CC art. 7:17 and the requirements of the remedy of replacement or termination are met (Parl. Gesch. Boek 7, 99-100; Asser (-*Hijma*), Bijzondere Overeenkomsten I[6], no. 512-513)). In SPANISH law it is explicitly stated (CC art. 1488) that the lack of conformity places upon the seller the post-delivery risk, even where the loss of the asset was due to a fortuitous event.

5. Under other systems, the passing of the risk is the decisive moment for assessing if a lack of conformity is at hand (CISG art. 36; CZECH REPUBLIC Ccom art. 425(1); DENMARK SGA § 44; ESTONIA LOA § 218(1); FINLAND, NORWAY and SWEDEN SGA § 21). In POLAND the seller is not liable under the warranty for physical defects which have arisen after the risk has passed to the buyer unless the defects have arisen due to a cause which was inherent earlier on in the thing sold (CC art. 559).

6. In certain situations there might be a conflict between the risk provisions, on the one hand, and the conformity regulations, on the other. Under ENGLISH and SCOTTISH law this applies where the risk is transferred before delivery, since conformity is to be tested at the time of the supply (i.e. delivery) of the goods by the seller to the buyer. It has been suggested that in that case the conformity of the goods with the contract should be tested at the time when the property is transferred, as a form of constructive delivery; thereafter the buyer must take the risk of deterioration or worse, unless that is the fault of the seller (*Adams/Atiyah/MacQueen*, Sale of Goods[11], 147 f). Also under systems where a lack of conformity is to be assessed at the time of the passing of the risk, there might be a clash between the conformity and risk rules if the risk passes before the goods actually come into the buyer's possession, especially when delivered to the first carrier (CISG art. 67(1); ESTONIA LOA § 209(4); FINLAND, NORWAY and SWEDEN SGA § 7(2)). In such cases it might for instance be difficult to assess whether the goods were damaged during transportation, or if they were already not in conformity at the time when the risk passed, that is when the goods were delivered to the carrier (cf. SWEDEN *Ramberg,* Köplagen, 222).

III. Connection of burdens and benefits with risk

7. It is an undisputed legal principle that the benefits and burdens of the goods are for the owner. Nevertheless, at what moment the benefits and burdens are transferred from the seller to the buyer differs greatly between the different systems.

8. Under the systems where risk passes with the property, the benefits and burdens are transferred with the property (BELGIUM CC art. 544; FRANCE CC art. 1138; PORTUGAL CC art. 1305). A similar result is reached if the benefits and burdens pass at the time of the conclusion of the contract (SPAIN CC art. 1468). Under ENGLISH and SCOTTISH law, the matter seems to be unclear, since regulation is lacking and case law scarce. ENGLISH legal doctrine indicates that the fruits and

burdens should follow with the property rather than the person who bears the risk or the person in possession (Benjamin (-*Guest*), Sale of Goods[6], § 6-024)).

9. Under many systems the benefits and burdens are explicitly linked to the passing of the risk (GERMANY CC § 446(1); GREECE CC art. 525; LATVIA CC art. 2025). Other systems connect benefits and burdens with the delivery (AUSTRIA CC § 1050; NETHERLANDS CC art. 7:14; POLAND CC art. 548(1)). In practice the difference will be minor, since the moment of delivery and the passing of risk normally coincide under those systems.

10. However, under other systems the agreed time for delivery is decisive, not the actual delivery (FINLAND SGA § 79; NORWAY SGA § 79; SLOVENIA LOA § 437; SWEDEN SGA § 79) with reference to the yields accruing from the goods. A similar regulation applies under ESTONIAN law concerning benefits (LOA § 216(1)). However, the burdens are linked to the actual delivery, i.e. to the passing of risk (LOA § 216(2)).

IV.A.–5:102: Time when risk passes

(1) The risk passes when the buyer takes over the goods or the documents representing them.

(2) However, if the contract relates to goods not then identified, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

(3) The rule in paragraph (1) is subject to the Articles in Section 2 of this Chapter.

COMMENTS

A. General

This Article contains the main rule of the passing of risk, i.e. that the risk passes when the buyer takes over the goods or documents representing them. Paragraph (2) sets out an important requirement for the passing of risk: as long as goods have not been clearly identified to the contract of sale, risk cannot pass. Put differently, the loss of or damage to goods not clearly identified always rests with the seller. The buyer can therefore still request the delivery of new goods without having to pay the price of the lost or damaged goods. Lastly, paragraph (3) makes clear that the general rule on the passing of risk is subject to several exceptions in Section 2, IV.A.–5:201: (Goods placed at the buyer's disposal), IV.A.–5:202: (Carriage of the goods) and IV.A.–5:203: (Goods sold in transit).

Since the provisions on the allocation of risk are, by and large, default rules (in accordance with the general principle of party autonomy) the parties are free to agree otherwise. In particular, the parties may agree that the risk passes earlier, e.g. retrospectively or upon the conclusion of the contract, or after taking over the goods. The parties may also provide separately for specific types of risk.

B. The main rule: taking over the goods or documents

As a rule, the risk of the loss of or damage to the goods passes from the seller to the buyer when the buyer takes over the goods or the documents representing them. Thus, there is a link between control over the goods, either physically or indirectly (i.e. by means of the documents representing them), and the allocation of risk. At the same time, this rule in paragraph (1) corresponds to IV.A.–3:104 (Taking delivery) sub-paragraph (b), which obliges the buyer to take delivery by actually taking over the goods or documents representing the goods.

This taking-over rule is justified for various reasons. To start with, any owner of goods assumes the risk that they may perish accidentally. Since it is the party with physical control over the goods who is in the best position to protect them from damage, this party also assumes that risk prior to the performance of a sales contract. Besides, the party in possession of the goods is in the best position to insure them.

The link between the passing of risk and the taking over of the goods, or the documents representing them, is of particular significance when, in the course of a sales transaction, ownership and control over the goods are separated. If, for instance, a sales contract contains a retention of title clause, ownership of the goods remains with the seller until the buyer pays the price, although risk is transferred to the buyer from the time the goods are taken over.

C. Lack of conformity and rules on the passing of risk

While it has been pointed out that the rules on risk are, at least from a technical point of view, distinct from those relating to lack of conformity (see IV.A.–5:101 (Effect of passing of risk) Comment B), it cannot be overlooked that there is a certain interdependency.

According to IV.A.–2:308 (Relevant time for establishing conformity) paragraph (1), the seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity only becomes apparent after that time. The passing of the risk is here the decisive moment for assessing whether there is a lack of conformity. If there is a lack of conformity at the time when the risk normally passes to the buyer, the seller's liability does not pass to the buyer, thus the rules on non-conformity override the risk provisions. Nevertheless, a complicated situation might arise if the risk passes before the goods actually come into the buyer's possession, especially when they are delivered to the first carrier in accordance with IV.A.–5:202 (Carriage of the goods) paragraph (2). In such cases it may for instance be difficult to assess if the goods were damaged during transportation, or if they were already not in conformity at the time when the risk passed (that is when the goods were delivered to the carrier). In the former case, the seller would not be liable for the damage in accordance with IV.A.–5:202 paragraph (2), whereas in the latter case the seller would be responsible according to the provisions on non-conformity.

Illustration 1
A, a shop owner, and B, a retailer, conclude a contract for the sale of 20 boxes of china and contract that the goods will be transported by an independent carrier to A's shop. While unpacking the goods A notices that the china is damaged in five of the boxes. In this case, the damage could have been in existence before the goods were handed over to the carrier, but it could also have occurred during transportation.

D. Identification of the goods

Paragraph (2) reflects a central property law principle, i.e. that of specificity, which is also of importance for the passing of risk. In practice, this requirement of identification is of particular relevance for the passing of risk in sales involving carriage under IV.A.–5:202 (Carriage of the goods). This is one reason why IV.A.–2:204 (Carriage of the goods) paragraph (2) obliges the seller to give the buyer notice of consignment in the case of the carriage of the goods).

Goods may be identified to a contract of sale in several ways. Separation, marking and packaging of the goods are the most obvious; the importance of identification in the context of carriage has already been stressed in IV.A.–2:204 (Carriage of the goods) paragraph (2). Whether goods have been duly identified to the contract before they were lost or damaged will often be a question of proof, especially when it cannot be established when the event causing the loss or damage occurred.

Illustration 2
A purchases from B, a wholesale distributor, 20 TVs in order to furnish the rooms of his small country hotel. The parties agree that A is to pick up the goods on March 25. Generally, the risk would pass at that date according to IV.A.–5:201 (Goods placed at buyer's disposal) paragraph (1). However, if B has not separated A's order from the same type of TVs in his warehouse, the risk will not pass until he does so.

Identification of the goods can take place as soon as the contract is made. However, goods may often not be identified to the sales contract until the seller tenders delivery to the buyer. The significance of this late identification, as it were, becomes apparent in two situations. First, risk passes to the buyer as a consequence of the delay in taking over the goods, given that the seller has actually tendered the goods at the right place and time (IV.A.–5:201 (Goods placed at the buyer's disposal)). Secondly, if goods are transported in bulk the risk does not pass before the seller has notified the buyer of the consignment (see IV.A.–5:202 (Carriage of the goods)).

Illustration 3
The facts are the same as in illustration 2. A fails to pick up the goods at the agreed time. On March 28 B's warehouse is destroyed by fire overnight. Generally, the risk would have passed on March 25 according to IV.A.–5:201 (Goods placed at the buyer's disposal) paragraph (1). However, if B has not separated A's order from the same type of TVs in the warehouse, the risk has not passed according to this provision and A can require the delivery of new goods.

E. Exceptions

The general rule of this Article is subject to a number of exceptions, which are addressed in Section 2: IV.A.–5:201 (Goods placed at the buyer's disposal) addresses cases of mora creditoris; while IV.A.–5:202 (Carriage of the goods) and IV.A.–5:203 (Goods sold in transit) set out rules relating to the risk in the event of the transportation of the goods.

NOTES

I. Point in time when risk passes from the seller to the buyer

1. The European legal systems differ with regard to the point in time when risk passes from the seller to the buyer. The division reflects the different systems regarding the transfer of property. Thus, property law and the system of passing the risk are closely related.

2. Under many systems, risk passes to the buyer together with the property (BELGIUM CC art. 1138; ENGLAND and SCOTLAND Sale of Goods Act s. 20(1); FRANCE CC art. 1138; ITALY CC art. 1465 (in the case of consensual contracts transferring property); PORTUGAL CC art. 796). Generally under those systems, property is transferred at the time of the conclusion of the contract (BELGIUM and FRANCE CC art. 1583). A similar result is achieved if the conclusion of the contract is decisive for the passing of risk (LATVIA CC art. 2023). In SPAIN passing of the risk and transfer of property are split, according to the rules laid down, respectively, in CC arts. 1452 and 1462; for the risk (of a specific item) to pass to the buyer, *perfection* of the contract suffices. Nevertheless, in commercial sales, the risk passes to the buyer when the items are put at the buyer's disposition (Ccom art. 333) This is explicitly provided for under ENGLISH and SCOTTISH law, which connects risk with property and explicitly disassociates it with delivery (Sale of Goods Act s. 20(1)). Nevertheless, all the previous legal systems provide exceptions to the main rule that risk passes with the property. If the sale concerns generic or unascertained goods that have not been identified in the contract, then the risk will only pass at a later point in time, usually with delivery as the event that identifies the goods, cf. further under II. Moreover, a

retention of title clause may have the effect of delaying the passing of risk, cf. under III.

3. Under other systems, the risk passes with the delivery/transfer of possession of the goods to the buyer. Under these legal systems, as a matter of law, property passes not just with the conclusion of the sales contract; but regarding movable goods also delivery will be required. Connecting the passing of risk with the delivery is the case in CISG art. 69(1); AUSTRIA CC §§ 1064 and 1051; DENMARK SGA § 17(1); CZECH REPUBLIC Ccom art. 455; ESTONIA LOA § 214(2); FINLAND SGA § 13(1); GERMANY CC § 446; GREECE CC art. 522; HUNGARY CC §§ 117(2) and 279(2); LITHUANIA CC art. 6.320; NETHERLANDS CC art. 7:10; NORWAY SGA § 13(1); POLAND CC art. 548; SLOVENIA LOA § 436(1); SPAIN (commercial sales only) Ccom art. 331 and 333; SWEDEN SGA § 13(1). A similar result is achieved under systems where the passing of property is decisive for the passing of risk, but where property as a general rule passes upon delivery (CZECH REPUBLIC and SLOVAKIA CC §§ 133(1) and 590). There are, however, several exceptions to this main rule. Under those systems connecting risk with the delivery the risk may however pass before the delivery if the buyer delays in taking over the goods. Quite a number of systems also provide for consumer sales that the risk passes when the goods actually come into the buyer's possession.

II. Identification of the goods

4. The risk of loss or damage must relate to specific or specified goods, in other words the buyer must be deemed to undertake the risk relating to identified goods. This principle applies under all legal systems.

5. Under systems where the risk generally passes with the property upon the conclusion of the contract, by way of an exception the risk does not pass until the goods have been determined or individualised (BELGIUM CC arts. 1585-1586; ENGLAND and SCOTLAND Sale of Goods Act s. 16; FRANCE CC art. 1585 (for sales of goods to be measured or weighed CC art. 1586 a contrario); ITALY CC art. 1378; LATVIA CC art. 2023(1) and (2); PORTUGAL CC arts. 408(2) and 539). The same applies to future goods which have not yet been produced (FRANCE; PORTUGAL CC art. 408(2)).

6. Under systems where the risk generally passes upon delivery, the identification of the goods normally poses no problems. Nevertheless, the same problem may arise in the case where the sales contract involves the carriage of the goods by an independent carrier (cf. under IV.A.–5:203 (Goods sold in transit)), or where the buyer delays in taking delivery (cf. under IV.A.–5:202 (Carriage of the goods)). In such cases, the risk only passes if the goods are clearly identified to the contract, usually by markings on the goods, by shipping documents, by notice given to the buyer or otherwise (CISG arts. 67(2) and 69(3); CZECH REPUBLIC Ccom art. 458; FINLAND SGA § 14; GREECE CC art. 290; HUNGARY CC § 304; LITHUANIA CC art. 6.320; NETHERLANDS CC art. 7:10(1); NORWAY SGA § 14; SLOVAKIA Ccom art. 458; SLOVENIA LOA § 437; SPAIN CC art. 1452(2) and (3); SWEDEN SGA § 14). The same applies under GERMAN law, implied in the general requirement in CC § 447 that the goods sold have to be delivered to the carrier.

III. Special issues

7. There is also a specific regulation for the passing of risk under sales contracts that are dependant upon a condition. Pending a suspensive condition the risk remains with the seller (e.g. in SLOVENIAN law expressly in LOA § 516 and in SPAIN for commercial sales, Ccom art. 334.3); in the case of a resolutory condition the risk

passes to the buyer upon delivery. Under some systems, a retention of title has the effect of delaying the passing of risk (BELGIUM CC art. 1182; FRANCE Com. 19 October 1982, Bull.civ. IV, no. 321; PORTUGAL STJ 22 February 1983, BolMinJus 324, 578; STJ 5 March 1996, CJ 1996 I, 119; *Galvão Telles*, Obrigações[7], 473; *Varela* (1995), 88)). Under GREEK law, however, if the contract of sale includes a retention of title clause, the buyer bears the risk from the time the goods are handed over to him (CC art. 532).

8. Some systems provide a specific regulation for sales concluded on a sale-or-return basis. Under NORDIC law, the buyer will bear the risk from delivery until the goods are returned to the seller in such cases (DENMARK SGA § 60(2); FINLAND, NORWAY and SWEDEN, SGA § 16). The opposite solution can be found under other systems where the goods are purchased subject to the condition that they are first tested or examined. Here, the risk is to be borne by the seller until the buyer declares that he approves of the goods or until the deadline by which the buyer was obliged to return the goods has expired (LATVIA CC art. 2024(5); SLOVENIA LOA § 516).

9. In GREEK law if a sale takes place in a public auction, the risk passes not from delivery but from the knock-down, i.e. the successful bid (CCP art. 1017(3)). Yet another exception concerns the sale of the estate of a deceased person (inheritance) sold as a whole. In this case the risk passes at the time of the conclusion of the sales contract (GERMANY CC § 2380; GREECE CC art. 1951).

IV.A.–5:103: Passing of risk in a consumer contract for sale

(1) In a consumer contract for sale, the risk does not pass until the buyer takes over the goods.

(2) Paragraph (1) does not apply if the buyer has failed to perform the obligation to take over the goods and the non-performance is not excused under III.–3:104 (Excuse due to an impediment) in which case IV.A.–5:201 (Goods placed at buyer's disposal) applies.

(3) Except in so far as provided in the preceding paragraph, Section 2 of this Chapter does not apply to a consumer contract for sale.

(4) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General

This Article contains an important exception for consumer contracts for sale from the main rule in IV.A.–5:102 (Time when risk passes) and the special rules in Section 2, as risk does not pass before the buyer actually takes over the goods. This means, for example, that the risk does not pass upon the mere transfer of documents representing the goods. There is an exception to this rule for consumers if the consumer buyer has failed to perform the obligation to take over the goods and this non-performance is not excused (paragraph (2)). Paragraph (3) contains a general clarification that the provisions in Section 2 do not apply under a consumer contract for sale.

Basically, the aim of the rule is to avoid burdening the consumer unduly with unforeseen risks, which he or she will neither be able to anticipate nor be likely to have taken out insurance against. This provision goes beyond the scope of the Consumer Sales Directive, where the matter of risk is explicitly not dealt with. Due to the importance of this principle to the consumer and the high risk that sellers would contract out of it through standard terms, this provision is mandatory in favour of the consumer (paragraph (4)).

B. Goods placed at the consumer's disposal

Under the general regulation, normally if the buyer delays in taking over the goods, the risk will pass to the buyer from the time when the goods should have been taken over, provided that the buyer was aware that the goods were available for collection (IV.A.–5:201 (Goods placed at buyer's disposal) paragraph (1)). The present Article modifies this rule for consumer contracts for sale by establishing that the risk does not pass until the buyer actually takes over the goods, unless the buyer's failure to take over the goods is not excused under III.–3:104 (Excuse due to an impediment).

Illustration 1

A, a consumer buyer, has bought a car from S, a car dealer. The parties agree on a certain date when A is to pick up the car from the seller's place of business. A does not remember the appointment and fails to pick up the car on the agreed date. During that same night, the car is stolen from the seller's premises. The risk is on the buyer, since the failure was not excused.

Illustration 2
The facts are the same as above. On the agreed date A is on his way to pick up the car when he has a traffic accident and ends up in hospital with severe injuries. When the car is stolen, the risk rests with the seller, since A's failure is excused under III.–3:104 (Excuse due to an impediment).

The modification for consumers is even more important in respect of IV.A.–5:201 (Goods placed at buyer's disposal) paragraph (2), which addresses cases where the seller makes the goods available at a place other than his place of business. Even though no failure to take over the goods is required, the present Article introduces such a requirement in paragraph (2).

C. Carriage of goods in a consumer contract for sale and passing of risk

Under the general regulation where carriage of goods is involved, the main rule in IV.A.–5:202 (Carriage of the goods) paragraph (2) is that the risk passes when the goods are handed over to the carrier. In a consumer contract for sale, however, risk only passes when the goods are actually handed over to the buyer. As a consequence, if the consumer does not receive the goods because these have been lost or destroyed, he or she does not have to pay for them. Moreover, the seller is delaying in the delivery and all remedies for delay are therefore available.

Illustration 3
A, a consumer, buys a fridge just across the border of his native country. According to the agreement, the seller will take care of the transportation of the fridge to A's residence. The seller charges a cross-border delivery service for the transportation. However, the lorry carrying, amongst other goods, the fridge for A, is involved in a traffic accident, in which all the goods are damaged beyond use. Since A has not yet taken over the goods, the risk does not pass. As the risk was still with the seller, he is in delay when not delivering the fridge to A on time.

Such a result will provide an incentive for the seller to exercise the utmost care in arranging transportation and in choosing a carrier. The seller will also be in a better position to calculate the price by integrating the economic cost of the transportation risks in long-term financial arrangements or to obtain a favourable insurance, which often may be blanket cover. A consumer, on the other hand, would encounter more obstacles in pursuing claims against third parties or in pressing an insurance claim. Lastly, it should be pointed out that in many cases a seller involved in consumer transactions will operate its own fleet of delivery vehicles. If so, according to the general rule the risk does not pass anyway before the goods are taken over by the consumer.

NOTES

Special risk regulation under consumer sales

1. Under most systems, the regulation for consumer and non-consumer sales is identical. However, under quite a number of systems, it is also provided that the seller bears the risk while the goods are under transportation. This is an exception to the well-established principle that the buyer bears the risk after the goods have been handed over to the first carrier, cf. IV.A.–5:203 (Goods sold in transit). Thus, under some systems, when goods are transported to the buyer the risk only passes in consumer

sales when the goods actually come into the buyer's possession (ENGLAND and SCOTLAND Sale of Goods Act s. 20(4); ESTONIA LOA § 214(5); FINLAND Consumer Protection Act chap. 5 § 3(2); GERMANY CC § 474(2); HUNGARY CC § 278(2); NETHERLANDS CC art. 7:11; NORWAY Consumer Sales Act § 14; SLOVAKIA CC § 614(3); SWEDEN Consumer Sales Act §§ 6 and 8). However, under DUTCH law the parties may derogate by individually negotiated terms from this specific provision (CC art. 7:6(1)). According to SWEDISH preparatory works and legal literature, the goods must be delivered to the consumer's home and, for instance, deposited in his letter-box or received by him or some other household member. It is not sufficient that the goods are left outside the entrance of the consumer's apartment. If the buyer has to collect the goods at some other place, for instance at the post office, the goods are delivered when they are actually collected from there (*Herre*, Konsumentköplagen, 112 f).

2. In SPAIN some authors consider that the risk passes to the buyer in a consumer sale at the moment when the goods are delivered; they argue that the goods must be in conformity at that moment (see *Orti Vallejo*, Los defectos de la cosa en la compraventa civil y mercantil, 98; *Morales Moreno*, ADC 2003, 1628). Also in FRENCH legal literature this approach has been advocated (*Huet*, Responsabilité du vendeur et garantie contre les vices cachés, no. 267).

3. Under NORDIC consumer sales, this principle also applies to the situation where the buyer is to collect the goods. Also here the risk does not pass until the goods actually come into the buyer's possession (FINLAND Consumer Protection Act § 5:3(2); NORWAY Consumer Sales Act § 14; SWEDEN Consumer Sales Act § 6 and 8).

Section 2: Special rules

IV.A.–5:201: Goods placed at buyer's disposal

(1) If the goods are placed at the buyer's disposal and the buyer is aware of this, the risk passes to the buyer from the time when the goods should have been taken over, unless the buyer was entitled to withhold taking of delivery under III.–3:401 (Right to withhold performance of reciprocal obligation).

(2) If the goods are placed at the buyer's disposal at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at the buyer's disposal at that place.

COMMENTS

A. General

This Article provides an exception to the main rule of IV.A.–5:102 (Time when risk passes) according to which the risk passes when the buyer takes over the goods. Under this Article, in a non-consumer contract for sale the risk passes when the goods are made available to the buyer and the buyer fails to take over the goods. The starting point is that the buyer is obliged to take over the goods under the contract. If the buyer fails to comply with this obligation, the risk passes subject to certain conditions.

Paragraph (1) applies to cases where the buyer has to pick up the goods at the seller's place of business. In this case, the risk passes only if the buyer is aware of the goods being available for collection and still fails to pick them up in breach of an obligation under the contract.

Paragraph (2) works as a catch-all clause for all other cases (i.e. the seller has to deliver the goods to the buyer or the buyer has to pick up the goods from another place such as a warehouse). In this case, the risk passes at the time when the goods are placed at the buyer's disposal, provided that the buyer is aware of the goods being so placed.

B. Goods made available at the seller's place of business

The risk passes to the buyer under paragraph (1) if three conditions are met. First, the goods have been placed at the buyer's disposal at the seller's place of business. Thus, the buyer is supposed to pick up the goods from the seller, which is also the default rule of IV.A.–2:202 (Place and time for delivery). Secondly, the seller has to actually make the goods available to the buyer, that is must tender the goods as agreed in the contract. In particular, this requires the identification of the goods within the meaning of IV.A.–5:102 (Time when risk passes) paragraph (2). And, thirdly, the buyer must have failed to take delivery as required by the contract.

Not only does this rule prevent the buyer from postponing the passing of the risk by not taking delivery from the seller (the so-called *mora creditoris*), but it also sanctions the buyer for having frustrated the seller's attempt to perform the obligation to deliver. While the seller can, in principle, force the buyer to take over the goods, in practice the normally preferred remedy would be to sue the buyer for the price. The passing of risk in such a situation provides a

further incentive for the buyer to take over the goods, since the full price will be payable even if the goods are lost or damaged during the period of the delay.

It is fair to absolve the seller from the risk that the goods may perish accidentally if the seller has attempted to comply with the obligations under the contract. As just pointed out, this consequence also serves as an additional incentive for the buyer to comply with the obligation to take delivery. In fact, the buyer may suffer a triple detriment upon the failure to take over goods that are subsequently accidentally lost or damaged: loss of the goods; payment of the price; and a possible liability in damages for breach of contract (if non-performance of the obligation to take delivery has caused the seller any incidental loss).

C. Goods made available at a place other than the seller's place of business

If the seller has to make the goods available at a place other than the seller's place of business the risk passes to the buyer when delivery is due. However, the passing of risk in this case is subject to two conditions. First, the seller has to make the goods available to the buyer (see Comment B above). Secondly, the buyer must be aware of this place of performance and the fact that the goods are made available there. *Mora creditoris* is, however, not required for the passing of risk. In other words, it is irrelevant whether the buyer, by failing to take over the goods, fails to perform an obligation under the contract.

> *Illustration 1*
> A, a retailer, sells goods to B. They agree that the goods will be made available to B at a certain date directly at the place of production, a factory, which is close to B's place of business. The risk passes on the agreed date, given that A has informed B that the goods have been made available at the factory.

In sum, paragraph (2) constitutes a catch-all clause for the passing of risk when goods are placed at the buyer's disposal at any place other than the seller's place of business. It therefore covers both cases where the seller has to deliver the goods to the buyer, and cases where the buyer has to pick up the goods from another place, such as a warehouse or a factory. However, it does not apply in the situations involving transportation covered by IV.A.–5:202 (Carriage of the goods) and IV.A.–5:203 (Goods sold in transit).

D. Consumer contract for sale

This Article does not apply to consumer contracts for sale except to the extent provided for in IV.A.–5:103 (Passing of risk in a consumer contract for sale) paragraph (2) – that is, where the consumer buyer has failed to perform the obligation to take over the goods and that failure is not excused. See the Comments to that Article.

NOTES

Passing of risk when the buyer is in default in taking over the goods

1. It is a common principle to all the legal systems that the risk shifts to the buyer if he fails to take over the goods in good time when they are placed at his disposal. This principle is however regulated in different ways under the different systems.

2. Under many systems it is regulated on a general level that the risk passes to the creditor when there is a default in the performance (CZECH REPUBLIC CC § 522 and Ccom art. 372; GERMANY CC § 324(2); HUNGARY CC § 302; ITALY CC art. 1207(1); PORTUGAL CC art. 815; SPAIN CC art. 1452(3); Ccom art. 333). Under GREEK law there are no explicit provisions regarding this issue, only the general principle providing that when the creditor defaults in performance, the liability of the debtor is limited only to *dolus* and gross negligence (CC art. 355). Nevertheless, it is established through case law that the buyer, by refusing to take over the goods, defaults in one of his obligations and therefore bears the risk (A.P. 790/1958 NoB 1959, 422). A similar situation can be found under SPANISH law where there is no express obligation of the buyer to accept delivery of the goods. Nevertheless, through case law in combination with legislation it can be concluded that the obligation of delivery has been fulfilled and that the creditor is in *mora* ((CC art. 1176 and TS 15 October 1987, RAJ 1987 no. 4469).

3. Other systems provide for sales-specific provisions. This mainly applies to systems where the risk passes upon delivery. All in all, the regulations are fairly similar, or at least lead to similar results. In general it is provided that the risk passes if the buyer does not accept the goods, fails to take delivery, or if the goods are not delivered on time and this is due to the buyer's default, or similar (CISG art. 69(1); CZECH REPUBLIC Ccom art. 455; AUSTRIA CC § 1048; ESTONIA LOA § 214(3); FINLAND SGA § 13(2); LITHUANIA CC art. 6.320; NETHERLANDS CC art. 7:10(2); NORWAY SGA § 13(2); SLOVAKIA CC § 522 and Ccom art. 372; SLOVENIA LOA § 437; SWEDEN SGA § 13(2)).

4. Under some systems further conditions are expressly laid down. It might be required that the buyer commits a breach of contract through his failure to take over the goods (CISG art. 69(1); CZECH REPUBLIC Ccom arts. 370 and 455) or that the delay was due to the buyer's act or omission (FINLAND, NORWAY and SWEDEN SGA § 13(2)). Under CZECH and SLOVAKIAN law the risk may also pass if the buyer fails to cooperate with the seller (CC § 522).

5. When delivery is delayed, ENGLISH and SCOTTISH law place the risk with the party, either the seller or buyer, whose fault has caused the delay. In that case the risk extends to any loss that would not have occurred but for such fault (ENGLAND Sale of Goods Act s. 20(2); SCOTLAND *Pommer & Thomsen v. Mowat* (1906) 14 SLT 373).

6. Moreover, if the goods are to be kept at the buyer's disposal at some other location than the seller's place of business, the risk will pass when the time for delivery is due and the buyer is aware of the fact that the goods have been placed at his disposal (CISG art. 69(2); CZECH REPUBLIC Ccom art. 456; ESTONIA LOA § 214(1) in conjunction with § 209(1); FINLAND SGA § 13(3); HUNGARY CC §§ 278(1) and 302; NORWAY and SWEDEN SGA § 13(3)).

7. For this principle to apply the seller must often fulfil other conditions in order for the risk to pass; in particular in the case of a sale of unascertained goods he must duly identify them to the contract (cf. Notes II of IV.A.–5:102 (Time when risk passes)). Under some systems it is specifically regulated that the seller must notify the buyer that the goods have been duly identified (CZECH REPUBLIC Ccom art. 458; ESTONIA LOA § 209(1); LITHUANIA CC art. 6.320; SLOVENIA LOA § 437) or ask the buyer to collect the goods in case no date for collection has been agreed upon (AUSTRIA CC § 1048). Under POLISH law, according to CC art. 551(1), the seller may place the goods in safe-keeping at the cost and at the risk of the buyer in case the latter is delayed in taking over the goods.

8. This solution does not apply to NORDIC consumer sales. Here the general rule prevails, namely that the risk passes when the goods actually come into the buyer's possession, even if the consumer has committed a breach of contract through not collecting the goods in good time from the seller, cf. under IV.A.–5:103 (Passing of risk in a consumer contract for sale).

9. Under those systems where the risk passes with the property, i.e. mostly upon the conclusion of the contract, generally there is no corresponding sales-specific rule, since the risk has typically already passed before the buyer delays in taking over the goods. Nevertheless, those systems provide for a corresponding rule where the *seller* delays in delivering the goods. Under some systems, if the seller is urged to deliver the goods (*mis en demeure*) the risk passes to the seller (BELGIUM and FRANCE CC art. 1138(2)). Similarly under LATVIAN law where CC art. 2024(4) establishes that the risk is borne by the seller if he has delayed the delivery.

IV.A.–5:202: Carriage of the goods

(1) This Article applies to any contract of sale which involves carriage of goods.

(2) If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract.

(3) If the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.

(4) The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passing of the risk.

COMMENTS

A. General

This Article deals with the passing of risk in the event of the carriage of the goods. Basically, the risk passes to the buyer when the goods are handed over to the carrier, and not, as required by the main rule of IV.A.–5:102 (Time when risk passes), when the buyer takes over the goods.

This provision has to be read in the light of the rules on carriage contained in Chapter 2, Section 2. According to IV.A.–2:201 (Delivery) paragraph (2), the seller delivers by handing over the goods to the carrier, and by transferring to the buyer any document which is necessary to take over the goods from the carrier; in addition, IV.A.–2:204 (Carriage of the goods) sets out several obligations on the part of the seller in relation to the carriage of the goods.

B. Carriage of the goods and passing of the risk

Under a sales contract involving the carriage of goods from the seller to the buyer, the risk generally passes when the seller hands over the goods to the carrier, and not when the buyer eventually receives the goods. If the parties have not agreed on a particular place for handing over the goods (paragraph (2)), the risk passes upon handing over the goods to the first independent carrier. In general, the goods will be deemed to have been handed over for transportation when the goods have been placed at the carrier's area of control.

> *Illustration 1*
> A sells ten computers to B. The parties agree that A is to arrange for the transportation of the goods to B's place of business. A engages an independent carrier to transport the goods. The risk passes when the goods are handed over to the carrier.

If, however, the seller has to hand over the goods at a particular place (paragraph (3)), the risk passes when the goods are handed over to the carrier at that place. This is generally only the case if the buyer is supposed to organise the transportation. The buyer may then, for instance, name an airport or a port where the goods are to be handed over to the carrier. As a consequence, if the seller hands over the goods to the carrier at the wrong place the risk will not pass.

Illustration 2
The facts are the same as under illustration 1. The parties agree that the seller is to hand over the goods to the carrier, an international logistic company at a certain airport. Due to a mistake, A delivers the goods to the carrier at the domestic airport, instead of at the international airport as agreed. Since A has not complied with the requirements under paragraph (3) of this provision, the risk has not passed.

The rule that the risk passes when goods are handed over to the carrier forms an exception to the main rule, according to which the risk passes when the buyer takes over the goods. It is based upon the idea that the risk in general should pass when the seller has done everything possible to deliver the goods. It is also based on the assumption that the carriage of the goods is for the buyer's benefit. It is also customary in international trade to consider the carrier as an 'extension' of the buyer. The rule is not justified in terms of control, because after delivery to the carrier neither the seller nor the buyer has physical control of the goods. On the contrary, in practice after dispatch the seller will usually be the party who can control the goods, or at least the disposition of the goods. It should be pointed out, however, that if the goods are damaged in transit, the buyer may have a claim against the carrier; and that normally the buyer will have the benefit of insurance cover. The buyer will either arrange this directly (e.g. in an FOB contract) or the seller will be obliged to arrange it on the buyer's behalf (as is the case under a CIF contract).

Paragraph (4) makes it clear that the fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passing of the risk. It is of no consequence which party is in possession of the documents; the actual handing over to the carrier is the decisive element. Questions as to the transfer of ownership, such as those arising from retention of ownership clauses, are also unimportant for the passing of the risk.

This provision only applies if the parties have not agreed otherwise. The parties are free to regulate the matter of risk as they wish, for instance by agreeing that the risk is not to pass until the goods are actually taken over by the buyer.

C. The carrier as an independent entity from the seller

The carrier envisaged in the first paragraph is an independent carrier. Whether a freight forwarder should also be included under the notion of a carrier may be uncertain, due to the different roles which a freight forwarder plays. However, in cases where the goods are taken by a freight forwarder with the purpose of having the goods transferred to the buyer, this rule does apply. If the seller undertakes the transportation without using an independent carrier the risk will not pass until goods have been handed over to the buyer.

Illustration 3
A buys construction materials from Z, a large manufacturer of red bricks. The parties agree that one of Z's employees will bring the materials to A's building site. In this case the risk will not pass until the material is delivered to the building site.

D. Consumer contract for sale

See the Comments to IV.A.–5:103 (Passing of risk in a consumer contract for sale).

NOTES

I. Sales contracts involving carriage

1. If the contract of sale involves the carriage of the goods, under many systems the risk passes from the seller to the buyer when the goods are handed over to the carrier (for the notion of a carrier cf. below under II.). Accordingly, the place of performance must be a place other than the buyer's place of business or habitual residence, because in that case the seller does not perform (and the risk does not pass) until he delivers the goods at that place. In any case, the place of destination must not coincide with the place of performance, irrespective of where that is.

2. It is not always clear whether a contract involves carriage in the sense required for the risk to pass. Generally, however, the contract does not involve carriage if the seller transports the goods himself. Under NORDIC law it is explicitly provided that the risk does not pass until the goods are actually handed over to the buyer if the goods are transported by the seller, or if the transportation takes place within the same locality or within an area where the seller normally arranges the transportation of similar goods (FINLAND, NORWAY and SWEDEN SGA § 7(1) and (2)). Moreover, it is clarified with respect to the trade terms 'free at', 'delivered to' or 'delivered free' at a particular place, that under those terms the goods are not considered to have been handed over until they have arrived at the place mentioned after the respective delivery term (FINLAND, NORWAY and SWEDEN SGA § 7(3)). Under DANISH law there is similar regulation in SGA § 65). In AUSTRIA it is required that the recipient has either determined or authorized the mode of dispatch. It is generally acknowledged (*Koziol and Welser*, Bürgerliches Recht I[10], 237) that the buyer is said to consent tacitly to dispatch by rail (OGH in HS 5345) or mail, by air or ship (OGH in EvBl 1990/34). Under ENGLISH and SCOTTISH law the seller must be authorised or required to send the goods to the buyer (Sale of Goods Act s. 32(1)).

II. The notion of carrier

3. Most systems do not provide for any special notion of a carrier. Nevertheless, some systems provide that the risk is transferred upon delivery to the transport provider, freight forwarder or the person indicated to send the goods (GERMANY CC § 447(1); PORTUGAL CC art. 797 and Ccom art. 383). It is also generally required that the carrier is independent from the seller (ENGLAND Benjamin (-*Guest*), Sale of Goods[6], § 5-098 and *Goode,* Commercial Law 262-263; SWEDEN *Ramberg*, Köplagen, 191 f). The carrier may therefore not be part of the seller's organisation.

III. Passing of risk in a sale involving carriage

4. The principle that the risk passes with delivery to the carrier emerges in multiple ways in the European legal systems. This principle is first and foremost important under systems where the risk passes upon delivery. Unless otherwise agreed, delivery takes place and the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer (CISG art. 67; AUSTRIA CC § 429; CZECH REPUBLIC CC § 594 and Ccom art. 457; ENGLAND and SCOTLAND Sale of Goods Act s. 32(1); ESTONIA LOA § 214(2) in conjunction with § 209(4) no. 2; FINLAND SGA § 7(2); GERMANY CC § 447(1); GREECE CC art. 524; HUNGARY CC § 278(2); NORWAY SGA § 7(2); POLAND CC art. 544; PORTUGAL CC art. 797 and Ccom art. 383; SLOVAKIA CC § 594, as well as §§ 133 and 590; SLOVENIA LOA §§ 436(1) and 452;SPAIN (commercial sales) see TS 3 October 1997, 21 February 1972 and 8 September 1972 and cf. Ccom art. 338 and

VICENT CHULIÁ, *Compendio crítico de Derecho Mercantil*, II, 1990, p. 141; SWEDEN SGA § 7(2)). There might also be a general regulation regarding risk and transportation. For instance under FRENCH commercial sales the goods travel at the risk of their owner during transportation, that is the buyer when the goods sold are identified (Ccom art. L. 132-7).

5. If the seller has chosen the carrier, under some systems there are explicit minimum requirements as to the transportation (cf. the Notes to IV.A.–2:204 (Carriage of the goods)). If these requirements are not met, and the goods are damaged due to the choice of transportation, the risk will remain with the seller (FINLAND, NORWAY and SWEDEN SGA §§ 8 and 12). If the goods are lost or damaged during transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages (ENGLAND and SCOTLAND Sale of Goods Act s. 32(2)).

6. Under a few systems there are exceptions to the general rules regarding the carriage of goods. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place (CISG art. 67(1); CZECH REPUBLIC Ccom art. 457; HUNGARY CC § 278(2)). Where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual practice to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit; and if the seller fails to do so, the goods are at his risk during such sea transit (ENGLAND and SCOTLAND Sale of Goods Act s. 32(3)).

7. For the risk to pass under this article, it is furthermore required that the goods have been duly individualised. Moreover, under quite a number of systems, it is also provided that the seller bears the risk while the goods are under transportation in consumer sales.

IV.A.–5:203: Goods sold in transit

(1) This Article applies to any contract of sale which involves goods sold in transit.

(2) The risk passes to the buyer at the time the goods are handed over to the first carrier. However, if the circumstances so indicate, the risk passes to the buyer as from the time of the conclusion of the contract.

(3) If at the time of the conclusion of the contract the seller knew or could reasonably be expected to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

COMMENTS

A. General

This Article applies to the sale of goods in transit, that is goods that are already travelling from point of departure to their destination.

> *Illustration 1*
> A buys 100 barrels of cotton from B. B dispatches the goods to A. While the goods are still in transit A sells the goods to C. The latter bears the risk for the damage from the time of the delivery to the carrier.

B. Sale of goods in transit and the passing of risk

As a rule, the risk in the case of a sale of goods in transit passes from the time the goods are handed over to the first carrier. Therefore the buyer of goods in transit assumes the risk for a time before the conclusion of the sales contract. This retrospective effect can be justified as follows. First, it is customary practice in this kind of commercial transaction that the final buyer undertakes the whole transportation risk, usually by taking out insurance. Secondly, this type of sale is based on documents representing or relating to the goods, such as insurance and disposition documents, which the buyer may examine before entering into the contract of sale.

The rule in article 68 of the CISG is as follows.

> The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

The present Article uses the same ingredients but brings the solution of the CISG into line with commercial practice by making the exception of the first sentence of article 68 CISG the rule. The risk may, however, still pass upon the conclusion of the contract if the circumstances so indicate, for example in the absence of insurance against transportation risks.

C. Exception

The main rule in paragraph (2) does not apply if the seller of the goods in transit knew, or should have known, that the goods have been lost or damaged on their journey and did not inform the subsequent buyer. In such a case the seller is in bad faith and must bear that particular risk.

Illustration 2
The facts are the same as in illustration 1. When the cotton arrives at the port of destination C discovers that during the voyage part of the cotton has been damaged. Normally this loss is borne by C, who may seek to press an insurance claim. If A, when entering into the contract of sale with C, knew or ought to have known that the cotton was damaged and did not disclose that information to C, then that loss is borne by A.

D. Consumer contract for sale

Since such sales transactions are almost exclusively commercial transactions, consumer contracts for sale

NOTES

Sale of goods in transit

1. The majority of legal systems provide explicit regulation regarding risk when it comes to sale of goods in transit. Under some systems the risk passes at the time of the conclusion of the contract, if not the circumstances indicate that the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the transport documents (CISG art. 68; FINLAND SGA § 15; LITHUANIA CC art. 6.320; NORWAY SGA § 15; SWEDEN SGA § 15). There is an exception to this rule, namely if, at the time of the conclusion of the contract of sale, the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, then the loss or damage is at the risk of the seller. A similar rule can be found under PORTUGUESE law, which provides that the buyer bears the risk from the time of the conclusion of the contract, but this is considered not to apply if the seller knew that the goods had already perished and did not disclose this fact to a buyer in good faith (CC art. 938). Under SPANISH law there is neither a statutory rule nor court decision on this point, and the general regime has to be applied; the present is a case in which delivery through *solo consensu* (CC art. 1463) makes full sense: the seller assigns to the buyer the contractual right against the factual possessor (carrier). Commentators on CISG art. 68 have not found any precedent or corresponding rule in Spanish law (see *Caffarena*, Diez-Picazo La Compraventa Internacional de mercaderías, 1997, art. 68).
2. Under other systems the risk is rather linked to the delivery to the carrier in such cases. The risk passes upon delivery to the first carrier (CZECH REPUBLIC Ccom art. 460; ESTONIA LOA § 214(4); ITALY CC art. 1529; SLOVAKIA Ccom arts. 457 and 460). However, under some of these systems the cases where the seller was aware of the damage and did not disclose this to the buyer are explicitly excluded (CZECH REPUBLIC Ccom art. 460; ESTONIA LOA § 214(4)). Under ITALIAN law it is explicitly provided that this principle only applies concerning the documentary sale of insured goods in transit (CC art. 1529). GERMAN case law indicates that the buyer of

goods in transit bears the risk from the time when redirections are given to the carrier (BGH 27 March 1968, BGHZ 50, 32).

3. Under the Sale of Goods Act 1979 s. 33, which applies in both ENGLAND and SCOTLAND, where the seller agrees to deliver goods at the seller's own risk at a place other than that where they are when sold, the buyer must nevertheless (unless otherwise agreed) take any risk of deterioration in the goods necessarily incident to the course of transit. This does not extend, however, to risks which arise as a result of the defective state of the goods when the transit starts (*Adams/Atiyah/MacQueen*, Sale of Goods[11], 357.

CHAPTER 6: CONSUMER GOODS GUARANTEES

IV.A.–6:101: Definition of a consumer goods guarantee

(1) A consumer goods guarantee means any undertaking of a type mentioned in the following paragraph given to a consumer in connection with a consumer contract for the sale of goods:

(a) by a producer or a person in later links of the business chain; or
(b) by the seller in addition to the seller's obligations as seller of the goods.

(2) The undertaking may be that:

(a) apart from misuse, mistreatment or accident the goods will remain fit for their ordinary purpose for a specified period of time, or otherwise;
(b) the goods will meet the specifications set out in the guarantee document or in associated advertising; or
(c) subject to any conditions stated in the guarantee,

(i) the goods will be repaired or replaced;
(ii) the price paid for the goods will be reimbursed in whole or in part; or
(iii) some other remedy will be provided.

COMMENTS

A. General

This Article provides the definition of a 'consumer goods guarantee'. The first paragraph indicates who may be the provider and recipient of the guarantee. The second paragraph lists different variants, or basic examples, of consumer goods guarantees by describing what a consumer goods guarantee may actually contain.

The application of the rules contained in Chapter 6 is limited to consumer contracts for sale, as they were specifically designed to answer the needs of consumer contracts for sale. The main reason for this policy choice lies in the specific function that the guarantee plays in relation to consumer contracts for sale, which is distinct from the function assumed in other categories of sales. Under commercial sales a guarantee by the producer is often coupled with a reduction of the buyer's rights against the seller. Consumer contracts for sale, on the other hand, are to a large extent governed by rules of a mandatory character, and the guarantee cannot influence (in a negative way) the rights of the buyer. At the same time, guarantees, used as marketing tools aiming at tying the consumer to a particular brand, may very often mislead the consumer as to his or her actual rights. This may lead to a situation where, instead of improving the position of the consumer, a guarantee actually impairs it.

B. Choice of terminology

In the first place, the term 'consumer goods guarantee' refers to the object of the transaction, which has two consequences. On the one hand, it indicates the boundaries of this Chapter by linking the guarantee both to consumers and goods. In this context, it should be noted that the present rules, while defining 'goods' in Annex 1 and IV.A.–1:201 (Goods), do not provide specific rules for consumer goods. However, the rules in the present Chapter are applicable to

goods sold in the course of a consumer contract for sale, as defined in IV.A.–1:204 (Consumer contract for sale).

Next, defining the guarantee by reference to the object of the transaction indicates a very strong connection between the guarantee and the object that it accompanies. This is reconfirmed by IV.A.–6:102 (Binding nature of the guarantee) paragraph (2), which establishes that, as a default rule, the guarantee is attached to, and thus follows, the consumer goods.

C. Undertaking

The present rules do not take a stand with respect to the legal form of the consumer goods guarantee. In this respect, they follow the approach adopted by the Consumer Sales Directive, which also uses the expression of 'undertaking', without defining its meaning. The legal qualification of the consumer goods guarantee may depend on many factors, the most important being the will of the party who offers a consumer goods guarantee. Depending on the situation, a guarantee may take the form of a contract, a contractual clause or a unilateral promise. While the legal qualification of the guarantee is of the utmost importance, defining it may have an undesired, restrictive result.

Accordingly, the choice of the legal form of the consumer goods guarantee is left to the parties. If the parties do not make that choice explicitly, the legal form should be established by means of interpretation.

D. Parties related to the consumer goods guarantee

The first consumer buyer of the goods furnished with the consumer goods guarantee always obtains the status of the guarantee holder, and is thus able to invoke the consumer goods guarantee. As a default rule under IV.A.–6:102 (Binding nature of the guarantee), the consumer goods guarantee is attached to the goods. Therefore every subsequent owner of the goods is also entitled to invoke it.

The consumer goods guarantee may be provided by the seller, by the producer, or by any other person in later links in the business chain (which reflects the wording of IV.A.–2:303 (Statements by third persons). The position of a seller and a producer offering a guarantee is different, as the seller is already bound under the conformity regime. If the seller decides to offer a guarantee it is an undertaking additional to the obligations arising from the conformity requirements, whereas a guarantee by the producer is self-standing. According to IV.A.–6:102 (Binding nature of the guarantee), the question of who is the guarantor does not affect the binding nature of the consumer goods guarantee. The wording of the present Article highlights the distinct nature of the consumer goods guarantee provided by the seller and of that provided by the producer (or any other person in later links in the business chain); but at the same time, it allows for an effective and refined common regulation throughout Chapter 6.

In practice, the most common guarantees will be those provided by the producers and the sellers of the goods. However, there is no reason for limiting the number of prospective guarantors, since including other possible guarantors makes the regulation more effective and responsive to market realities.

E. The content of the consumer goods guarantee

Paragraph (2) indicates various variants, or basic examples, of consumer goods guarantees and their contents. Under paragraph (1) the guarantee need only be of a type mentioned in paragraph (2). There may, of course, be many different versions of guarantees falling within these types and the third type concludes with the general expression: "some other remedy will be provided". To this extent the variants in paragraph (2) leave room for expansion.

Sub-paragraph (a) presents the most neutral of the three variants. In this context, the guarantor promises what the consumer is already entitled to expect under the conformity regime set out in Chapter 2, Section 3. In other words, the ordinary purpose is that referred to in IV.A.–2:302 (Fitness for purpose, qualities, packaging) sub-paragraph (b). The goods should be fit for their ordinary purpose for a specified period of time. The guarantor may specify the period of time; otherwise, the default period laid down in IV.A.–6:104 (Coverage of the guarantee) applies.

Sub-paragraph (b) mirrors the definition of the guarantee established by the Consumer Sales Directive. This is the most common solution in consumer contracts for sale; it assumes that the guarantor establishes certain specifications with regard to the goods, either in the guarantee itself or in the associated advertising. The content of the consumer goods guarantee is determined by the guarantee document and the associated advertisement jointly (see also Comment F below). The guarantor is free to make these specifications, subject to certain transparency conditions under IV.A.–6:103 (Guarantee document). The most common elements that should be covered by the specifications of the guarantor are listed in IV.A.–6:104 (Coverage of the guarantee). The default specifications in this latter provision apply if, and to the extent that, the guarantor fails to specify what is covered by the guarantee offered.

In contrast to the two previous variants, sub-paragraph (c) approaches the consumer goods guarantee from a remedial perspective. The remedies include repair, replacement, reimbursement of the purchase price in whole or in part, as well as other possible remedies (which reflects the solution adopted by the Consumer Sales Directive). The concluding words mean that the list does not lay down any limits for the guarantor in relation to the potential remedies. The guarantor may provide one or all of the listed remedies, a remedy different from those listed under sub-paragraph (c), or indeed a combination of the listed remedies. If the guarantor does not indicate which remedies are available to the guarantee holder or who is entitled to choose a remedy, the guarantee holder may choose between repair, replacement, or reimbursement of the price paid (see IV.A.–6:104 (Coverage of the guarantee) and cf. also Comment D to that Article). If the guarantor offers the guarantee holder certain remedies, the transparency requirements of IV.A.–6:103 (Guarantee document) have to be observed in any case.

F. Associated advertising

As indicated in paragraph (2)(b), the actual scope and content of the consumer goods guarantee may be determined by the conditions set out both in the guarantee document and in the associated advertising. Statements in advertising may contain promises that amount to guarantees (e.g. "Guaranteed for five years") but a mere statement of fact ("This car will do 35km to the litre") does not by itself amount to a guarantee. If the consumer goods guarantee is determined exclusively by advertising, the same rules apply as in the case of a regular guarantee (assessment of the guarantee content in accordance with default rules, the right of the consumer to request a guarantee document, etc.).

Where the guarantee document and the associated advertising are equally important in determining the content of the guarantee, possible discrepancies between them should be solved through the interpretation which is the most favourable to the consumer in the given circumstances (cf. II.–8:103 (Interpretation against supplier of term or dominant party)).

G. Consumer goods guarantee free of charge and against payment

The definition of the Consumer Sales Directive indicates that the guarantee must be provided free of charge. In fact, this means that the price of the guarantee should be included in the purchase price. Since the Directive does not apply to guarantees that are offered against direct payment ('given without extra charge') a significant (and growing) number of guarantees offered to consumers remain outside the scope of its influence. At the same time, the Directive limits this restriction only to the offering of the guarantee. It therefore gives the guarantor the possibility to impose two other types of costs on consumers: the cost of invoking and that of performing the guarantee (cf. IV.A.–6:104 (Coverage of the guarantee) sub-paragraph (d)). In addition, the exclusion of guarantees against payment offers guarantors a very easy route to escape the application of the rules of the Directive, for example by charging a trifling sum for the guarantee.

Market practice shows that guarantors very often offer instruments called 'extended guarantees' or 'insurance policies' with respect to the goods sold that in fact constitute guarantees provided against payment. Another common practice is for the guarantor to offer a free guarantee for a relatively short period of time and to invite the consumer to pay extra in order to have it prolonged.

For these reasons, the present rules do not differentiate between guarantees that are, or appear to be, free of charge, and guarantees against extra payment. However, if the guarantor decides to offer a consumer goods guarantee that imposes any kind of liability for direct payment on the consumer, this must be clearly communicated to the consumer (see IV.A.–6:104 (Coverage of the guarantee) sub-paragraph (d)). If the guarantor remains silent as to the costs related to the guarantee, there is a presumption that the costs for the guarantee are included in the purchase price and that there are no additional payments relating to it.

NOTES

I. Where are (consumer) guarantees regulated?

1. There is great variety between the different systems when it comes to the regulation of consumer guarantees. Under a few systems there were already concrete regulations on (consumer) guarantees before the implementation of the Consumer Sales Directive, whereas for most systems such guarantees were previously a novelty. Moreover, there is also considerable deviation as to where the new regime as required under the Directive has been adopted.
2. For instance, under SLOVENIAN and HUNGARIAN law there was already a system of obligatory guarantees for certain types of goods before the Consumer Sales Directive was implemented. This regime has been retained and exists next to the regime on voluntary guarantees. Under SLOVENIAN law there is a very wide range of products which can only be sold with (obligatory) guarantees concerning proper functioning in principle for 1 year (Consumer Protection Act § 15b and the Regulation

of the Minister for trade (Official Journal no. 73/2003)). If the seller fails to provide the buyer with the guarantee or the latter does not have the obligatory content or form, the buyer has the same rights ex lege and the seller is punishable (by fines in accordance with the Consumer Protection Act §§ 77-78). Thus the system of obligatory guarantees runs parallel to the seller's liability for defects (at least in consumer sales). Voluntary guarantees are far less important and only marginally regulated, the most important provision being Consumer Sales Act § 18(4) (if the guarantee is not obligatory and the seller has publicly promised a guarantee the buyer has the same rights as in the case of obligatory guarantees). In HUNGARY guarantees (*jótállás*) are regulated in CC § 248 in a somewhat ambiguous way, since they can be either legal (mandatory) or commercial (voluntary, contractual). It is generally not specific to consumer contracts, though the provision on the guarantee document (CC § 248(3)) is only applicable in the case of consumer contracts. In addition to voluntary commercial guarantees, there are special pieces of legislation on legal (mandatory) guarantees with regard to certain products and services. This is the case concerning durable consumer goods (Government decree 151/2003. (IX. 22.)); repair and maintenance services to consumers (Government decree 249/2004. (VIII. 27.)); and concerning the construction of houses (Government decree 181/2003. (XI. 5.)).

3. In the NORDIC COUNTRIES there was also already some previous regulation of guarantees. This issue is regulated in connection with the general regime on lack of conformity in FINLAND (Consumer Protection Act chap. 5 § 15a) and SWEDEN (Consumer Sales Act § 21(1)). Consequently, the guarantor will be liable in accordance with the regulation of liability for lack of conformity if the goods deteriorate within the applicable guarantee period and the consumer has access to all the remedies prescribed by law, cf. further Notes V under IV.A.–6:103 (Guarantee document). However, in SWEDEN the formal requirements on the guarantee document laid down by the Directive are regulated in the Marketing Act § 13. Also in DENMARK and NORWAY additional requirements already existed in the Marketing Act (DENMARK Marketing Act § 12; NORWAY Marketing Act § 9c).

4. Under some other systems, the regulation can be found in the civil code (BELGIUM CC art. 1649bis §2, 6; CZECH REPUBLIC CC § 620(5); GERMANY CC § 443; NETHERLANDS CC art. 7:6a; PORTUGAL CC art. 921; SLOVAKIA CC §§ 502 and 620-621). Similarly under ESTONIAN law the necessary regulation can be found under the LOA § 230. In GERMANY CC § 443 contains general rules on guarantees, whilst CC § 477 adds specific rules for consumer guarantees.

5. In other systems the regulation can be found in a consumer-specific instrument (AUSTRIA Consumer Protection Act § 9b; ENGLAND and SCOTLAND the Sale and Supply of Goods to Consumers Regulations 2002 s. 15; FRANCE Consumer Code art. L. 211-15; GREECE Consumer Protection Act art. 5(3)-(6); ITALY Consumer Code art. 128(2); LATVIA Consumer Protection Act art. 16; POLAND Consumer Sales Act art. 13(1); SPAIN ConsProtA art. 125).

II. Definition of the guarantee in consumer sales

6. The Consumer Sales Directive defines a guarantee in art. 1(2)(e) as any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising.

7. As a result of the implementation of the Consumer Sales Directive most of the legal systems have adopted a definition of the consumer guarantee based on the definition presented by the Directive (BELGIUM CC art. 1649bis § 2, 6; ENGLAND and

SCOTLAND Sale and Supply of Goods to Consumers Regulations 2002 s. 2; ESTONIA LOA § 230; ITALY Consumer Code art. 128(2)(c)). In SPANISH law the guarantee is only described as an additional undertaking (ConsProtA art. 125; cf. also the Exposición de Motivos).

8. In GERMANY CC § 443 distinguishes two types of guarantees: (1) guarantees concerning the characteristics of goods (*Beschaffenheitsgarantie*) and (2) guarantees concerning the durability of goods (*Haltbarkeitsgarantie*). In both cases, the guarantee is binding, and the buyer can claim performance against whoever has provided the guarantee (the seller or third party). In the case of the second category there is a presumption that a defect that appears during the time mentioned in the guarantee allows the buyer to enforce his rights expressed in the guarantee (CC § 443(2)). In PORTUGAL there is a definition of a guarantee *(garantia de bom funcionamento*) in CC art. 921.

9. In some legislations the definition of the guarantee, although loosely based on the concept presented by the Directive, provides a more elaborated description of this instrument. In LATVIA a guarantee is defined as a confirmation by the manufacturer, seller or service provider that the goods or services, or component parts thereof will maintain the use, safety and operational qualities for a specified period of time, and that the manufacturer, seller or service provider undertakes additional obligations that are not provided for in the Consumer Protection Act or other regulatory enactments (Consumer Protection Act art. 16(1)). In the NETHERLANDS the notion of a guarantee in consumer sales contracts is incorporated in CC art. 7:6a. In such a contract, a statement is considered to be a guarantee if the consumer is entitled to certain rights or claims when the promised qualities are lacking (CC art. 7:6a(1)), irrespective of whether such a promise is recorded in a document which is enclosed with the good that was sold, or that it follows from advertising (CC art. 7:6a(5)(a)). In SLOVENIA the closest to the definition of the guarantee is established in LOA § 481(1): “If the seller of any machine, engine, apparatus or similar goods classed as so-called technical goods hands over a guarantee document to the buyer, by which the producer guarantees the proper functioning of the goods during a specific period, counting from delivery, and the goods do not function properly, the buyer may demand from either the seller or the producer a repair within an appropriate period or a replacement, should the seller/producer fail to do so”.

10. Under some systems, the regulation of consumer guarantees is linked to the conformity regime. If the seller has assumed liability for the fitness or for some other characteristics of the goods for a fixed period, the goods are deemed to be defective if they deteriorate during this period as referred to in the guarantee (FINLAND Consumer Protection Act chap. 5 § 15a; SWEDEN Consumer Sales Act § 21(1)). Furthermore, in the SWEDISH Marketing Act § 13, the guarantee is mentioned as follows: “A trader, who while marketing the goods through a guarantee or other similar undertaking offers to be responsible for a certain period of time for a product or a part thereof or for a quality of the product [...].” A similar regulation can be found under SLOVENIAN law concerning obligatory guarantees (which exist next to voluntary guarantees). The system of obligatory guarantees is parallel to the seller’s liability for defects (Consumer Protection Act § 15b and Regulation of the Minister for Trade (Official Journal no. 73/2003)). Also under CZECH law consumer guarantees are linked to the conformity regime. Under CC § 620(5) it is established that: “A guarantee exceeding the scope of the guarantee pursuant to this Code may be given by the seller’s statement to that effect in the guarantee certificate; in such case, the seller shall specify the terms (conditions) and the scope of the guarantee’s prolongation in the guarantee certificate”.

11. Another legislative technique is used in NORWAY, where the Marketing Act § 9c contains a negative definition of a guarantee. It is prohibited to use the word guarantee or similar expressions when trading in goods, services or other performances in the course of business if the receiver is not given additional rights to those rights which he or she already had, or if such rights are limited. Similarly in DENMARK where the term guarantee may only be used in a consumer context if it provides the consumer with substantially better rights compared to his legal rights (Marketing Act § 12(1)).

12. Under GREEK law legislation on commercial guarantees and after-sales services was already introduced as part of consumer protection measures at the beginning of the 1990s. Detailed provisions on commercial guarantees can be found in the Consumer Protection Act art. 5(3)-(6).

13. In HUNGARY the meaning of a guarantee (*jótállás*) is regulated in CC § 248 in a somewhat ambiguous way, since it can be either legal (mandatory) or commercial (voluntary, contractual).

14. Additionally, there are legislations which do not present an express definition of the guarantee, like FRANCE or SLOVAKIA, where although the CC does not contain any express definition of a guarantee, it might be understood as the liability of the seller that the object of sale will retain its qualities for a specified period of time. In POLAND the Consumer Sales Act only describes in art. 13(1) the way in which the guarantee is offered: without extra payment, by means of declaration contained in a guarantee document or in an advertisement which relates to consumption goods. It also specifies that a declaration that does not include the duties of the guarantor does not create a guarantee.

III. Parties to the guarantee

15. According to the Consumer Sales Directive art. 1(2)(e) the guarantee is an undertaking by a seller or producer to the consumer. The Directive defines the seller as any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession (art. 1(2)(c)) and the producer as the manufacturer of consumer goods, the importer of consumer goods into the territory of the Community or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the consumer goods (art. 1(2)(d)).

16. Some legislations clearly identify potential parties of a guarantee. Under GERMAN law CC § 443 the parties are the buyer and the seller or a third party. In the NETHERLANDS this is the consumer and the issuing party. Moreover, CC art. 7:6a explicitly indicates that the guarantee may be issued by the seller or producer, but it is generally accepted that the guarantee may also be issued by a party other than the seller or producer (cf. Mon. NBW b-65b (*Loos*), no. 19). Similarly in SLOVENIA in cases of (obligatory and voluntary) guarantees both the seller and the producer (and, according to the case law, if the latter is not present, also the importer) are liable as guarantors to the buyer (LOA § 481). In ENGLAND and SCOTLAND the guarantor is a person who offers a consumer guarantee to a consumer (Sale and Supply of Goods to Consumers Regulations 2002 s. 2) and the consumer is any natural person who is acting for purposes which are outside his trade, business or profession.

17. Other national legislations approach the question of the parties more generally. Under some systems the parties are merely defined as the professional and the consumer (AUSTRIA Consumer Protection Act § 9b; DENMARK Marketing Act § 12). In POLAND Consumer Sales Act art. 13(1) refers to the guarantor (without further definition) and the buyer. Similarly in SPAIN where the ConsProtA art. 125(1). Also in FRANCE the Consumer Code does not define who is the debtor of the commercial

guarantee and only speaks of the buyer (cf. Consumer Code art. L. 211-15). Under CZECH law the parties of the guarantee are not expressly defined. From the wording of the relevant regulation (CC §§ 616 and 619-620) it can be assumed that the parties to a guarantee are the buyer and the seller. Moreover, also guarantees provided by the producer are considered to be provided by the seller. This means that the seller has to provide the buyer on his request with the certificate of guarantee; if there is voluntary guarantee this has to be stated in written in the certificate of guarantee (CC § 620(5)). In SWEDEN the Consumer Sales Act § 21(1) provides no express definition of the parties apart from the general definition of a consumer and a professional provided in § 1. Nevertheless, concerning the guarantor, the provision applies if the seller, or somebody else on his behalf, provides the guarantee. According to the preparatory works, the latter notion is to be interpreted in a wide sense. It is therefore not necessary that the guarantor and the seller are subject to a direct contractual relationship. Instead the decisive criterion should be that the seller and the guarantor appear to form a unit from the consumer's point of view, for instance if the consumer at the time of the conclusion of the contract receives a written guarantee from the producer or a third party (Prop 1989/90:89, 111). In the legal literature, this has been criticised as being rather far-reaching, for instance in the case where the packaging of the goods contains a guarantee certificate from the producer, instructing the buyer to instigate his claims directly against the producer and not against the seller (*Herre*, Konsumentköplagen[2], 263). In FINLAND Consumer Protection Act chap. 5 § 15(a)(2) provides that if the guarantee was provided by a person other than the seller, either at the previous level of the supply chain or on behalf of the seller the goods shall also be considered defective under normal terms and conditions (these are laid down in chap. 5 § 15(a)(1)). However, according to the norm in question, the seller shall not be liable for a guarantee given by a previous level of the supply chain for a defect for which he would not otherwise be liable under Consumer Protection Act Chapter 5, if the seller shows that he has clearly notified the buyer before the conclusion of the sale.

IV. Legal form of the guarantee

18. The Consumer Sales Directive gives no clarification as to the legal form of the guarantee. It describes the guarantee as an 'undertaking' (art. 1(2)(e)), without providing any further explanation as to the meaning of this expression.

19. This approach is followed by some systems (BELGIUM CC art. 1649bis § 2, 5; ITALY Consumer Code art. 128(2)(c); FRANCE Consumer Code art. L. 211-15(2)). Also in FINLAND; GERMANY; SPAIN; and SWEDEN the legal form of the guarantee is not expressly regulated. Under SWEDISH law the guarantee is generally only defined as an undertaking from the guarantor under which he takes responsibility for the correctness of certain circumstances concerning one or more characteristics of the goods (*Herre*, Konsumentköplagen[2], 257).

20. Other systems are more precise in this respect. Under some systems the guarantee is classified as a unilateral contract between the parties (ESTONIA LOA § 230; NETHERLANDS CC art. 7:6a). Under ENGLISH law, all guarantees are contractual in nature: the seller, supplier or manufacturer makes an offer of the substance of the guarantee, which is accepted by the customer. Acceptance of the offer of the guarantee, however, may tacitly be inferred from the acceptance of the goods themselves, so that this requirement becomes merely formal in nature. In SCOTS law, guarantees may also be contractual in nature, although it is possible to view some guarantees as unilateral promises. A unilateral promise is a separate type of obligation from a contract, and is binding without acceptance. A unilateral promise must be made in formal writing in order to be valid, unless it is made in the course of business,

which will be so in the case of consumer guarantees (cf. *MacQueen and Thomson*, Contract Law in Scotland, 63-69; *Hogg*, Obligations[2]). Sale and Supply of Goods to Consumers Regulations 2002 s. 15(1) classifies a consumer guarantee as a "contractual obligation", but says nothing about the nature of any acceptance of such a contractual obligation by the consumer. It can be argued either that the terms of s. 15(1) are intended to give effect to such contractual guarantees without the need for any acceptance, or that the offer of a guarantee contract is tacitly accepted by the consumer (as outlined above). In POLAND under the Consumer Sales Act art. 13(1) a guarantee is created by a declaration by the guarantor. There are no further specifications as to its legal nature. However, under the part of the CC which applies to non-consumer sales, depending on the circumstances a guarantee could be classified either as a contract, a contractual stipulation or an unilateral promise. In SLOVAKIA according to CC §§ 502 and 620-621 in non-commercial sales in general and in consumer sales a guarantee is binding upon the seller either as a statutory guarantee or as a contractual or declaratory guarantee. The guarantees established by contract or by an unilateral declaration bind the seller if they give the buyer more rights than the CC or specified statutes (CC § 39). The same applies under CZECH law (cf. *Knappová*, Civil Law II[3], 106). In SLOVENIA the legal nature of a guarantee is not clear; in cases of an obligatory (statutory) guarantee it arises from the Consumer Protection Act, therefore the guarantor's statement (guarantee promise) or the handing over of the guarantee document to the consumer are in fact not relevant.

V. Guarantee – associated advertising relationship

21. According to the Consumer Sales Directive associated advertising constitutes a part of the guarantee contents (arts. 1(2)(e) and 6(1)). Generally, the binding nature of the advertising is consented to; the solution of the Directive has been simply transposed in many legal systems (AUSTRIA Consumer Protection Act § 9b(1); BELGIUM CC art. 1649septies; ENGLAND and SCOTLAND Sale and Supply of Goods to Consumers Regulations 2002 s. 2; FRANCE Consumer Code L. 211-6; GERMANY CC § 443; ITALY Consumer Code art. 133(1); POLAND Consumer Sales Act art. 13(1); SLOVAKIA CC § 620(5); SPAIN ConsProtA art. 125(1).

22. Some systems provide more elaborate rules on advertising. In NORWAY advertising constitutes a part of the guarantee (Consumer Sales Act § 18(3)), but additionally the Advertising Act § 9c(2) provides that, upon marketing a guarantee, information is to be provided about significant limits to the guarantee. Moreover, if the advertisement gives information about the guarantee, it must also give information about the longest period for giving notice according to the relevant acts/according to the law. In the NETHERLANDS a statement in the advertising amounts to a guarantee if it entitles the consumer to certain rights or claims when the promised qualities are lacking (CC art. 7:6a(1)). As follows from CC art. 7:6a(5)(a) the fact that the statement is not included in the guarantee document, but is made in advertising, does not matter. If both a document exists in which rights or claims are given to the consumer, and a statement made in advertising amounts to a guarantee, the rights and claims in the document may be invoked if the goods do not have the qualities that were guaranteed in the advertisement (CC art. 7:6a(4)). In FINLAND the Market Court has ruled in a number of decisions that the word 'guarantee' may not be used in marketing if the guarantee promised fails to provide consumers with a benefit that they would not directly receive under the law since the term 'guarantee' gives rise to particular expectations for consumers as to the quality of the goods and the legal protection afforded in association with their purchase. The guarantee may represent the object of an advertisement for a product provided that the guarantee offered entails an effective

benefit which is additional with regard to the legal protection (cf. the Consumer Agency and Ombudsman Guidelines on Liability for Defects, Guarantees in the Contract for the Sale of Consumer Goods, 7).

23. In SLOVENIA even after the implementation of the Consumer Sales Directive, the Consumer Protection Act does not include the relevant advertising in the content of the guarantee. However, if a guarantee is being advertised, it is also binding, irrespective of whether the guarantor has actually handed over a guarantee document (Consumer Protection Act § 18(4)). In SWEDEN the relationship between marketing and a guarantee has not been explicitly regulated. Marketing Act § 13a only reads: "A trader, who *while marketing* the goods through a guarantee or other similar undertaking offers to be responsible for a certain period of time for a product or a part thereof or for a quality of the product, shall ....". The question whether an advertisement constitutes a guarantee was dealt with in ARN 1992/93 ref. 16, where the Board decided that an advertisement stating that a certain outdoor paint had a durability of at least ten years could not be regarded as a guarantee. Also under CZECH law this is not explicitly regulated, but in accordance with CC § 616(2) the goods sold must be of the quality and possess the utility values expected on the basis of advertisements by the seller, the producer or his agent.

VI. Guarantees against payment

24. The Consumer Sales Directive only applies to guarantees provided to the consumer without extra charge (art. 1(2)(e)). Most of the legal systems accept this solution (FINLAND Consumer Agency and Ombudsman Guidelines on Liability for Defects, Guarantees in the Contract for the Sale of Consumer Goods, 7-8; ITALY Consumer Code art. 128(2)(c); POLAND Consumer Sales Act art. 13(1)). Although not regulated expressly, this solution is also accepted in NORWAY, based on the Advertising Act § 9c, which states that in consumer sales a guarantee must give the buyer better rights than those provided for by law. The sales acts all lay down that a lack of conformity is to be remedied at the expense of the seller. Thus, it must be concluded that when a seller remedies a lack of conformity for which he or she is liable in accordance with a guarantee, the seller must do so at his or her own cost. A similar situation exists in BELGIUM.

25. Sometimes, the law is silent as to the applicability of the rules on guarantees to guarantees against payment and in practice such a legal construction is classified differently, for example: additional insurance or a maintenance contract and does not fall under the guarantee regulation (DENMARK, ENGLAND and SCOTLAND; FRANCE; SPAIN; SWEDEN), or is simply offered (SLOVENIA).

26. Some systems also expressly regulate guarantees provided against payment (CZECH REPUBLIC CC § 620(5); NETHERLANDS CC art. 7:6a, Bijl. H.TK 2000-2001, 27809, no. 6, 3). Also under GERMAN law CC § 443 covers guarantees against payment (cf. MünchKomm (-*Westermann*), BGB, § 443 no. 5). The same applies for CZECH law where it is common that the length of the guarantee period is extended against payment (extended guarantee). In such a case the provisions on statutory guarantee are simply valid for the longer agreed period.

IV.A.–6:102: Binding nature of the guarantee

(1) A consumer goods guarantee, whether contractual or in the form of a unilateral undertaking, is binding in favour of the first buyer, and in the case of a unilateral undertaking is so binding without acceptance notwithstanding any provision to the contrary in the guarantee document or the associated advertising.

(2) If not otherwise provided in the guarantee document, the guarantee is also binding without acceptance in favour of every owner of the goods within the duration of the guarantee.

(3) Any requirement in the guarantee whereby it is conditional on the fulfilment by the guarantee holder of any formal requirement, such as registration or notification of purchase, is not binding on the consumer.

COMMENTS

A. General

Once the guarantor has decided to furnish goods with a consumer goods guarantee and the goods are sold to the consumer, the guarantee becomes binding. This rule applies irrespective of the legal form in which the consumer goods guarantee is offered to the consumer. A consumer goods guarantee has been defined in the preceding Article as an "undertaking". The undertaking may be contractual. It may be given by the seller as part of the contract for sale of the goods (which will then technically be a mixed contract for sale and guarantee) or it may be given in a separate contract. Such a separate contract may be one in which the seller gives an "extended guarantee" in exchange for an additional payment or it may be a similar contract with the producer or another guarantee provider (the seller acting as the guarantor's representative in concluding the contract). In such cases the buyer's acceptance will have been given, either to the contract for sale or to the separate guarantee contract. Very commonly, however, the undertaking will be a unilateral undertaking by the producer. In such a case the undertaking, if intended to be legally binding without acceptance, will be so binding in accordance with the general rules in Book II (see II.–1:103 (Binding effect) paragraph (2)). Paragraph (1) of the present Article strengthens this normal rule. Something which purports to be a unilateral guarantee will be binding without acceptance notwithstanding any provisions to the contrary made in the guarantee document or in the associated advertising. In effect, a person who gives a unilateral undertaking within the definition of a consumer goods guarantee is conclusively presumed to intend it to be legally binding without acceptance. Paragraph (1) of this Article constitutes one of the few mandatory provisions on consumer goods guarantees in this Chapter.

B. Transferability of the consumer goods guarantee

As a default rule, the consumer goods guarantee is transferred to every subsequent owner of the goods for the remaining duration of the guarantee. The legal basis on which the subsequent owner receives the ownership of the goods is not relevant – it could be, for example, a sale, barter, gift or succession.

If the guarantor does not specify otherwise, the new owner of the goods obtains the rights arising from the consumer goods guarantee automatically. However, the guarantor is able to either limit the applicability of the consumer goods guarantee to the first buyer, or restrict its transferability. The restriction may, for instance, come in the form of a requirement to notify

that the goods have been transferred, or a stricter requirement to obtain permission from the guarantor in order to transfer the consumer goods guarantee to another person.

This form of control may be irrelevant to many guarantors. Nevertheless, it is a highly sensitive area for guarantors offering guarantees based on the buyer's profile (e.g. whether the buyer of a car is 20 or 50 years of age). Therefore, it is important to grant the guarantor flexibility in this regard. In any case, the limitation must be expressly contained in the guarantee document in order to be valid.

C. Formal requirements

As clearly indicated in paragraph (1), the consumer goods guarantee is binding without acceptance. In addition, paragraph (3) establishes that the binding force of the consumer goods guarantee cannot be conditional on formal requirements being met. Any sort of formal requirements imposed by the guarantor on the buyer, such as registration and notification of the sale, do not influence the binding force of the guarantee, and cannot prevent it from entering into force.

> *Illustration 1*
> A buys a suitcase. He is informed by the seller that the suitcase is accompanied by a producer's guarantee and the guarantee document is stored inside the suitcase. A does not need to use the suitcase for the next two months. After that he finds out that the producer required the registration of the sale within 7 days after the purchase in order to activate the guarantee.

This provision is not intended to restrict guarantors from using devices like registration or notification, which can be useful for their own data gathering purposes. It only prohibits them from making the consumer goods guarantee conditional on the fulfilment of such requirements.

D. Relationship with Book II

It is already the case under Book II that a unilateral promise or undertaking can be binding without acceptance (see II.–1:103 (Binding effect) paragraph (2). According to II.–4:301 (Requirements for a unilateral act) the promise or undertaking must be communicated to the promisee or to the public. In this respect, the present Article deviates from the rules in Book II, i.e. even if the buyer does not know about the existence of the product guarantee, it still binds the guarantor. This deviation is probably, however, more apparent than real because guarantees are used as selling points and in most cases the consumer will be told about the guarantee or it will be addressed to the public in advertisements or promotional literature.

NOTES

I. Binding nature of the guarantee

1. The Consumer Sales Directive art. 6(1) clearly provides that a guarantee is legally binding on the offeror under the conditions laid down in the guarantee statement and the associated advertising. In many legal systems, in accordance with general contract law, the guarantee has a binding character even if this is not expressly established in the concrete regulation (cf. for instance SWEDEN Prop 2001/02:134, 61 f).

2. However, the binding character of the guarantee is directly regulated in many other systems (AUSTRIA Consumer Protection Act § 9b(1); BELGIUM CC art. 1649bis §2; ESTONIA LOA §§ 155(1) and 230(1); ENGLAND and SCOTLAND Sale and Supply of Goods to Consumers Regulations 2002 s. 15(1); FINLAND cf. SGA § 21(2) and Consumer Protection Act chap. 5 § 15a; ITALY Consumer Code arts. 128(2)(c) and 133(1); LATVIA Consumer Protection Act art. 16(2); NORWAY Consumer Sales Act art. 18(3); SPAIN ConsProtA art. 125(1). In LATVIA the rules that establish the binding nature of the guarantee also indicate very precisely who bears liability under the guarantee in a particular case: "The guarantee issued by any manufacturer, seller or service provider is to be binding on its issuer in conformity with the conditions of the guarantee document and the information included in advertisements for the relevant goods or services. If the manufacturer is not an undertaking (company) registered in Latvia, the seller or the authorised representative of the manufacturer shall be responsible for ensuring the guarantees given by the manufacturer" (Consumer Protection Act art. 16(3)). In SLOVAKIA CC §§ 502 and 620-621 establish that in non-commercial sales in general and in consumer sales the guarantee is binding upon the seller either as a statutory guarantee or as a contractual or declaratory guarantee. The guarantees established by contracts or unilateral declarations bind the seller if they give the buyer more rights than the statutory regime. Similarly in the CZECH REPUBLIC, cf. CC § 619(1) in connection with §§ 616(2) and 627(3)).

II. Transferability of the guarantee

3. The Consumer Sales Directive does not address the problem of the transferability of a guarantee. Most legislations do not deal directly with this issue either. Under some systems however, the accepted solution is that the guarantee is transferable to the subsequent owner, subject to any condition in the guarantee document stating otherwise (BELGIUM CC art. 1615 and *Biquet-Mathieu and Wery*, La nouvelle garantie, 168; FRANCE Cass.civ. III, 7 March 1990, Bull.civ. III, no. 72). In the NETHERLANDS the guarantee is considered as a 'qualitative right' under CC art. 6:251, which implies that if the goods themselves are transferred, the guarantee automatically follows. However, the guarantor may prevent the transfer of the guarantee if it so determines at the moment when the guarantee is issued. In SCOTS and ENGLISH law rights, including those deriving from a guarantee, may freely be assigned by a consumer to another party, unless (i) this is prohibited by the terms of the guarantee itself, or (ii) the contract is affected by the rule relating to personal contracts (ENGLAND) or *delectus personae* (SCOTLAND). These common law rules are of similar effect, the English rule being that contractual rights may not be assigned by a creditor where it is clear that the debtor intended performance in favour of the original contracting party alone, styled as a 'personal contract'; the Scots doctrine being applicable to any contract in which the choice by party *A* of the other party *B* was influenced by specific qualities possessed by *B*, in which case assignation may not be effected without *A*'s consent. Neither common law rule is likely to apply to a consumer sales contract, unless, perhaps, the consumer assigns the guarantee to a non-consumer (ENGLAND, *Treitel*, The Law of Contract[10], 639-641; SCOTLAND *Stair*, The Laws of Scotland XX, para. 859).

4. In FINLAND a guarantee is given for a specific product and remains valid even if the product changes ownership. A guarantee may be transferred together with the good to which it refers. However, the purpose of the use of the good may not significantly change. The seller may also require the receipt of a written notice upon a change of ownership relating to the good guaranteed (cf. the Consumer Agency and Ombudsman Guidelines on Liability for Defects, Guarantees in the Contract for the Sale of

Consumer Goods, 8). Also under GERMAN law there is no explicit rule on the transferability of the guarantee. However, the normal rules on the transfer of rights in CC §§ 398 ff will apply. This has been recognised by the courts concerning the buyer's rights against the seller (e.g. the right to repair: BGH 24 October 1985, BGHZ 96, 146, 147). However, transferability can be excluded by contract, cf. CC § 399, and this seems to occur in guarantee contracts. The courts have even accepted standard terms excluding transferability and have held that they were not unfair (e.g. BGH 7 October 1981, NJW 1982, 178, 180).

5. In contrast in the CZECH REPUBLIC according to case law the rights stemming from liability for defects do not pass to subsequent owners; if the guarantee provide for transferability, that provision is null and void for breaching the mandatory rules on liability for defects (it is possible to extend the scope and length of a guarantee, but only among parties – extension to third persons is not possible; moreover that situation cannot be considered as a contract *in favorem tertii*, CC § 50). Transferable is only a claim (cess) (for repair, replacement etc.) arising after the first buyer (original contracting party) notifies the original seller (NS ČR 33 Odo 329/2004). Contrary, part of the legal doctrine considers rights from liability for defects to follow the object and therefore to be transferable (*Knappová*, Civil Law II[3], 107).

6. In SPAIN there is neither default nor mandatory rule as to the transferability of the guarantee. The solution will entirely depend on the wording of the guarantee document, because this additional undertaking only obliges "in the conditions settled in the document of guarantee" (ConsProtA art. 125(1)).When the guarantor is the manufacturer, one may think that the guarantee embodies a promise to anyone who buys the item during the life span of the guarantee (*Díaz Alabart and Alvarez Moreno,* Garantía, p. 198).

IV.A.–6:103: Guarantee document

(1) A person who gives a consumer goods guarantee must (unless such a document has already been provided to the buyer) provide the buyer with a guarantee document which:

(a) states that the buyer has legal rights which are not affected by the guarantee;

(b) points out the advantages of the guarantee for the buyer in comparison with the conformity rules;

(c) lists all the essential particulars necessary for making claims under the guarantee, notably:

- the name and address of the guarantor;

- the name and address of the person to whom any notification is to be made and the procedure by which the notification is to be made;

- any territorial limitations to the guarantee; and

(d) is drafted in plain, intelligible language; and

(e) is drafted in the same language as that in which the goods were offered.

(2) The guarantee document must be in textual form on a durable medium and be available and accessible to the buyer.

(3) The validity of the guarantee is not affected by any failure to comply with paragraphs (1) and (2), and accordingly the guarantee holder can still rely on the guarantee and require it to be honoured.

(4) If the obligations under paragraphs (1) and (2) are not observed the guarantee holder may, without prejudice to any right to damages which may be available, require the guarantor to provide a guarantee document which conforms to those requirements.

(5) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General

This Article deals with the elements that enable the consumer to make use of the consumer goods guarantee in practice. The person who offers the guarantee is under an obligation to provide the consumer with a guarantee document, which meets the transparency requirements of this Article as to the content as well as to the presentation of the guarantee.

First of all, paragraph (1) aims at ensuring that the content of the guarantee is readily understandable (sub-paragraph (d)) and that its relation to the conformity regime is made clear (sub-paragraphs (a) and (b)). Moreover, it defines the information necessary to enable the consumer to make a claim against the guarantor (sub-paragraph (c)). Paragraph (2) regulates the form in which the guarantee is to be presented to the buyer. The remainder of the Article deals with the consequences of infringing the transparency requirements.

Due to the importance of this provision in order for the consumer to be able to invoke his or her rights, the Article is mandatory and may not be deviated from to the detriment of the consumer.

B. Consumer goods guarantee in relation to remedies for lack of conformity

In order to avoid situations where the guarantee misleads the consumer with regard to the remedies for lack of conformity, the Article introduces two requirements with respect to the content of the guarantee document. First, it has to inform the consumer that the buyer has legal rights for lack of conformity which are not affected by the guarantee (this is identical to Article 6(2) of the Consumer Sales Directive). Secondly, the guarantee document should indicate the advantages, if any, of the consumer goods guarantee as compared to the conformity regime. This may, for instance, be a more favourable regulation of the burden of proof of non-conformity (cf. IV.A.–2:308 (Relevant time for establishing time of conformity) paragraph (2) and IV.A.–6:107 (Burden of proof)).

These requirements will also discourage guarantors from providing guarantees with no additional, or even less, protection than provided under the conformity regime. Thus, these two elements should enable a correct assessment of the guarantee and its benefits to be made by the consumer.

C. Information necessary for making claims

In order to render the consumer goods guarantees effective, the guarantee document must contain all the information necessary to enable claims to be made under the guarantee. The list of elements required elaborates on the rules provided by the Consumer Sales Directive.

In particular, the present Article mentions the name and address of the guarantor, the name and address of the person to whom notification is to be made, and the procedure by which the notification is to be made. The guarantor is not obliged to remedy any non-conformity in the goods personally. However, the document has to indicate clearly to whom, where and how the failure of the goods should be notified. If notification is to be made to an entity other than the guarantor, the guarantee document must indicate the correct name and address.

D. Territorial limitations

The guarantor should inform the guarantee holder about the territorial scope of the guarantee, i.e. whether the guarantee can be invoked in a country other that the one in which the product was purchased (see paragraph (1)(b)(c)). This obligation is equally important in the case of local branches, where a given product is produced and sold only in a particular country and the consumer should know about the limitations related to this fact, as well as in the case of multinational chains of distribution. The legal form under which they function (not one multinational organisation, but chains of independent distributors) may render invoking the guarantee in a country other than the country of purchase impossible.

E. Language of the consumer goods guarantee

Paragraph (1)(d) refers to the intelligibility of the language used in the guarantee document. This is an elaborated version of Article 6(3) of the Consumer Sales Directive, which relates to the possibilities to read and understand the guarantee document. To that end, the language of the guarantee must be comprehensible to the average consumer (the plain and intelligible language requirement).

The Article does not reproduce art. 6(4) of the Consumer Sales Directive, whereby the Member States may require that the guarantee be drafted in one or more languages of the official languages of the Community. Moreover, these rules have refrained from introducing a requirement that the consumer may require a guarantee document in the same language as the goods were offered, since such a solution could cause many problems in practice.

Illustration 2
A Polish consumer on holiday in Ireland buys a hair-drier. All the assistants in the shop are Polish and therefore the transaction is concluded in Polish. In such a case it is not reasonable that the Irish producer of the hair-drier is obliged to predict such a situation and provide a guarantee in Polish.

F. The consumer goods guarantee document

Paragraph (2) requires the guarantee to be made available on paper or in another durable medium. This solution departs from the Consumer Sales Directive, which only requires that the guarantee is to be made available to the buyer upon request. The reasons for this deviation are very practical: first, the consumer would have to know about the right to request the guarantee in order to exercise it; secondly, in the case of long-lasting goods accompanied by a long-term guarantee it is essential for the consumer to have a guarantee document, and third: attaching the guarantee to the goods is already a common practice.

Apart from the traditional paper guarantee, this includes a guarantee in an electronic form, i.e. sending the guarantee by email or publishing the guarantee on the Internet. In any case, the guarantee document must be available and accessible to the consumer.

G. Infringement of the content requirements

The mere fact that the guarantee document does not contain the required elements, or even that it is not made available to the consumer at all, does not affect the binding nature of the consumer goods guarantee. In such a case, the guarantee holder is entitled to specific performance and to damages.

Obtaining a guarantee document that adequately explains the content of the guarantee is essential to the consumer. Traditionally, the infringement of the guarantee transparency requirements was seen as a domain of public law, the Consumer Sales Directive being the best example of such an approach. Without proposing radical changes, these rules give the consumer a right to request a properly constructed guarantee document. The right to specific performance does not affect the right to damages for loss incurred as a result of the non-performance of the obligations under the Article (seeking legal assistance, translating the guarantee document, etc.).

NOTES

I. The guarantee's form requirement

1. The Consumer Sales Directive provides that only at the request of the consumer will the guarantee be made available in writing or feature in another durable medium available and accessible to him (art. 6(3)). This solution has been copied, sometimes with slight modifications, in a number of legal systems. In the majority of systems no

alterations have been made (AUSTRIA Consumer Protection Act § 9b(3); BELGIUM CC art. 1649septies § 3; ESTONIA LOA § 231(1) and (2); ITALY Consumer Code art. 133; GERMANY CC §§ 126b and 477(2); NETHERLANDS CC art. 7:6a(3); SPAIN ConsProtA art. 125(2). In ENGLAND and SCOTLAND (Sale and Supply of Goods to Consumers Regulations 2002 s. 15(3)) the wording of the Directive is supplemented by a specification that the guarantee shall be made available within a reasonable period of time. Moreover, a guarantee given in SCOTLAND, which is both gratuitous and unilateral in nature, is required to be in writing, unless it is provided in the course of business (Requirements of Writing (Scotland) Act art. 1(2)(a)(ii)). In the CZECH REPUBLIC (CC § 620(3)) and in SLOVAKIA (CC § 620(4)) the seller, at the buyer's request, is obliged to give the latter a written guarantee (a letter of guarantee). Where the nature of goods allows, it is sufficient to issue a confirmation of the sale (a receipt) to the buyer, containing information as in the letter, in place of the letter of guarantee. In FINLAND Consumer Protection Act chap. 5 § 15b(2) provides that at the request of the consumer the guarantee shall be given in writing or in electronic form so that it cannot be unilaterally altered and that it remains accessible to the buyer. In consumer sales in NORWAY according to the Advertising Act § 9d the guarantor shall inform the consumer of the guarantee and of the consumer's right to receive the terms of the guarantee. A request made by the consumer to make the guarantee available in writing or in another durable medium available and accessible to him or her shall be met by the seller.

2. Some systems go beyond the requirements of the Consumer Sales Directive and demand that the guarantee document is to be made available together with the goods sold. In LATVIA the guarantee must be in writing and it shall be freely accessible before the purchase of goods or the receipt of service (Consumer Protection Act art. 16(2)). In POLAND the guarantor is obliged to hand over the guarantee document to the buyer together with the goods sold (Consumer Sales Act art. 13(2)). Similarly in FRANCE it is required that the guarantee is made available in writing to the buyer (Consumer Code art. L. 211-15(1)). In SLOVENIA at the time of the conclusion of the contract the guarantor shall hand over to the buyer a guarantee document with installation instructions and a list of authorized repair shops (Consumer Protection Act § 16(1)). In SWEDEN, according to the Marketing Act § 13, the guarantee and information on how to invoke it shall be provided in a document or in another readable and durable medium accessible to the buyer. Therefore it should be up to the professional to hand over the guarantee as a document or in another durable form, regardless of whether the buyer has asked for this (Prop 2001/02:134, 64). In HUNGARY CC § 248(3) states that additional requirements may be laid down under the legislation on mandatory guarantees.

II. Content of the guarantee document

3. According to the Consumer Sales Directive (art. 6(2)) the guarantee must state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods and make clear that those rights are not affected by the guarantee and set out in plain intelligible language the contents of the guarantee and the essential particulars which are necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor. For the requirement to use plain intelligible language, cf. under III.

4. The solutions adopted by the Member States are to a large extent based on the Directive. The requirements of the Directive have been implemented without major alteration under most systems (AUSTRIA Consumer Protection Act § 9b(2); BELGIUM CC art. 1649septies § 2; DENMARK Marketing Act § 12(2); ENGLAND

and SCOTLAND Sale and Supply of Goods to Consumers Regulations 2002 s. 15(2); ESTONIA LOA § 231(1); FINLAND Consumer Protection Act chap. 5 § 15b(1); FRANCE Consumer Code art. L. 211-15; LATVIA Consumer Protection Act art. 16(2); GERMANY CC § 477; NETHERLANDS CC art. 7:6a(2); SLOVAKIA CC § 502(3); SWEDEN Marketing Act § 13a).

5. In some systems certain additional features have been introduced. In AUSTRIA it is provided that if it is not clear from the guarantee document which qualities are guaranteed, then the goods must have the normally presumed qualities (Consumer Protection Act § 9b(2)). In ITALY Consumer Code art. 133(2)(b) includes the additional requirement that the guarantor is obliged to specify the object of the guarantee in the guarantee document. In SPAIN Consumer Sales Act art. 11(3) requires that the guarantee must specify (1) the goods guaranteed; (2) the consumer's rights as entitled by the guarantee; and (3) the consumer's methods of claiming. In the CZECH REPUBLIC the letter of guarantee must contain the seller's full name or designation or commercial (business) name, identification number, seat (in the case of a legal entity) or home address (in the case of an individual) (CC § 620(3)). Where, due to the guarantee provided, it is necessary to explain its content, the seller shall explain this in the letter of guarantee, the scope, conditions (terms) and the period of validity of the guarantee and how the rights based on the guarantee can be exercised. The letter may indicate that another entrepreneur (businessman) is contracted to undertake a required repair (CC § 620(4)). In POLAND the guarantee document shall describe the duties of the guarantor and the rights of the buyer when the goods do not meet the specifications set out in the guarantee document (Consumer Sales Act art. 3(1)). In SLOVENIA the guarantee document shall in particular contain information about the identification of the goods, the statement of guarantee for the quality or proper functioning during the guarantee period (starting from the delivery of the goods), the guarantee period (at least one year, less is only allowed in the case of second-hand goods), the date of delivery of the goods to the buyer, and a period of time after the expiry of the guarantee during which the producer is obliged to ensure maintenance, spare parts and attachable units (at least three times the length of the guarantee period) (Consumer Protection Act § 18). In NORWAY rules concerning the content of the guarantee document, listed in the Advertising Act § 9d, are particularly extensive requiring information about the content of the guarantee including possible limitations and particular conditions, the longest period for giving notice in accordance with relevant and specified acts provided that it is longer than the guarantee period, and that, regardless of the guarantee, the buyer can always claim remedies due to a lack of conformity in the seller's performance as such, in accordance with relevant and specified acts, provided that the guarantee is limited, for example it only concerns a particular part of the performance or only covers some of the costs of remedying the lack of conformity.

III. Language requirements

6. The Consumer Sales Directive provides two different requirements concerning the language of the guarantee. First, art. 6(2) states that the guarantee shall be drafted in plain and intelligible language. As to the language version, it is elaborated in art. 6(4) that within its own territory, the Member State in which the consumer goods are marketed may, in accordance with the rules of the Treaty, provide that the guarantee must be drafted in one or more languages which it shall determine from among the official languages of the Community.

7. The plain and intelligible language requirement has been adopted in the majority of systems (AUSTRIA Consumer Protection Act § 9b(2); BELGIUM CC art.

1649septies § 2; CZECH REPUBLIC CC § 620(4); ENGLAND and SCOTLAND Sale and Supply of Goods to Consumers Regulations 2002 s. 15(2); GERMANY CC § 477; ITALY Consumer Code art. 133(4); NETHERLANDS CC art. 7:6a(2); NORWAY Advertising Act § 9d(1); POLAND Consumer Sales Act art. 3(1); SLOVENIA Consumer Protection Act § 16). In SWEDEN, according to the preparatory works, the requirement in the Marketing Act § 13a to provide the buyer with clear information is considered to correspond to the plain an intelligible language requirement in the Directive (Prop 2001/02:134, 64). Similarly, under FINNISH law Consumer Protection Act chap. 5 § 15(b)(1) requires that the information to be inserted in the guarantee shall be 'clearly noticeable'.

8. Some systems do not make use of the option to indicate in which language the guarantee should be drafted (AUSTRIA; FINLAND; GERMANY; NETHERLANDS; SLOVAKIA; SWEDEN). In the NETHERLANDS the legislator is of the opinion that a limitation to the official EU languages would be too restrictive, especially when selling takes place over the Internet (cf. Bijlage Handelingen II 2000/01, 27809, no. 3, 10). In legal literature it is argued that this governmental view is probably based on the idea that guarantee documents issued in the Netherlands, if not in Dutch, are probably expressed in a language, which can be understood by many of the residents of the Netherlands. This is thought to be naïve, however, given the huge quantities of imported goods from China, Japan, Thailand and Taiwan (cf. Mon. NBW B-65b (*Loos*), no. 19). However, the majority of systems clearly indicate that their own national language should be used for drafting the guarantee document (CZECH REPUBLIC Consumer Protection Act arts. 11 and 13; DENMARK Marketing Act § 12(2); ENGLAND and SCOTLAND Sale and Supply of Goods to Consumers Regulations 2002 s. 15(5); NORWAY Advertising Act § 9d(2); POLAND Consumer Sales Act art. 3(1); SLOVENIA Consumer Protection Act § 16; SPAIN ConsProtA art. 125(2). In ITALY the guarantee must be available in Italian and if printed in several languages, the Italian version shall not be printed using fonts which are less evident than those used for other languages (Consumer Code art. 133(4)). In BELGIUM Commercial Practice Act art. 13 and FRANCE the language problem is dealt with on a general level.

IV. Infringement of the form and content requirements

9. As is laid down in art. 6(5) of the Consumer Sales Directive an infringement of the content or form requirements does not affect the validity of the guarantee in question, and the consumer can still rely on the guarantee and require it be honoured. The majority of systems have adopted this solution (AUSTRIA Consumer Protection Act § 9b(4); BELGIUM CC art. 1649septies § 4; CZECH REPUBLIC CC § 620(4); ESTONIA LOA § 231(3); FINLAND Consumer Protection Act chap. 5 § 15b(3); FRANCE Consumer Code art. L. 211-15(4); GERMANY CC § 477(2); ITALY Consumer Code art. 133(5); LATVIA Consumer Protection Act art. 16(2); SLOVAKIA CC § 502 (3)).

10. In DENMARK infringements can be prohibited by the courts and, moreover, the guarantor is liable for damages in accordance with general legal principles (Marketing Act § 20(1) and (2)). In SWEDEN in the preparatory works it is pointed out that art. 6(5) of the Directive is considered to be self-evident and therefore there is no need to introduce express legislation since Swedish law already fulfils the requirements that the guarantee shall be binding upon the offerer (Prop 2001/02:134, 65). If the seller intentionally or negligently does not comply with these requirements, he will be liable for damages to the consumer according to the Marketing Act § 29. In SLOVENIA if a guarantee document does not have the obligatory contents, the holder of the guarantee

nevertheless has these rights and the guarantee is deemed not to have been handed over which will result in a penalty for a minor offence (Consumer Protection Act §§ 18(3) and 77(1)).

11. In the NETHERLANDS, as there is no form requirement, if the 'guarantee' does not provide rights when the guaranteed qualities are not provided, it is not a guarantee in the sense of CC art. 7:6a. However, the statements by which a quality is 'guaranteed' without such rights attached to them will be taken into account when it is determined what the consumer may reasonably expect of the good, i.e. whether or not the good is in conformity with the contract (CC art. 7:17(2), cf. Mon. NBW B-65b (*Loos*), no. 19). Similarly in POLAND an infringement of the form requirement laid down in Consumer Sales Directive art. 3(1) (the plain and intelligible language requirement) does not affect the validity of the guarantee. However, if the guarantee document does not set out the obligations of the guarantor then it is not a guarantee (Consumer Sales Act art. 13(1)). According to the wording of art. 125(3) of the SPANISH General Consumer Protection Act, the prescribed content is of the essence of the guarantee. However, as the issuing of this guarantee is a non-compulsory duty, the lack of any "necessary" (sic) element cannot bring about the consequence of depriving the defective guarantee of any effect. In any case it is better for the buyer to receive than not to receive an additional guarantee that goes beyond the legal rights granted by law. The situation does not change when the conditions of art. 126 are met. According to this rule, the issue and delivery of the guarantee is mandatory in consumer sales when the item sold is of "durable" condition. Again, it would not have made sense to deprive the document of its force as an additional promise in favour of the buyer. Facing this "lacuna", the better solution for the present problem is promoting an implied solution like that set out in the present article: the legitimate party may seek specific performance, claiming for the correct issuing of the guarantee.

12. In ENGLAND and SCOTLAND the Sale and Supply of Goods to Consumers Regulations 2002 s. 15(6) permits the rectification of a breach of the requirements as to the nature of guarantees by the "enforcement authority" rather than by the consumer. The enforcement authority is defined as "the Director General of Fair Trading, every local weights and measures authority in Great Britain ..." (s. 2). Such rectification is by way of an injunction (ENGLAND) or specific implement (SCOTLAND). In NORWAY the Marketing Council (*Markedsråd*) and the Consumer Ombud *(Forbrukerombud*) shall enforce the provisions of the Advertising Act, cf. § 10. Furthermore, the seller is most likely to be liable in damages for any infringements of these provisions, in accordance with general tort law principles (cf. *Krüger*, Norsk kjøpsrett[4], 150). Under CZECH law the observance of the provisions of the Consumer Protection Act is under the control of the Czech Trade Inspection which can enforce the duty of a seller to inform (in written form) the consumer duly and in Czech on the extent, conditions and ways of asserting rights from liability for defects by infliction of a fine (Consumer Protection Act art. 23(1)).

V. Extra protection offered by the guarantee

13. The Consumer Sales Directive does not require that the guarantee grants the consumer extra rights compared to the statutory regime. The only restriction that is imposed in art. 6(2) is that the guarantee cannot affect or limit the statutory rights of the consumer. Most of the systems follow this approach.

14. There are a few exceptions, however. In SPAIN according to the preparatory works the guarantee must provide the consumer with extra rights (see *Fenoy Picón*, El sistema de protección del comprador, 106 ff), and this approach was upheld in the final text (art. 125.3 d)). In NORWAY (Marketing Act § 9c) and ESTONIA

(Consumer Protection Act art. 10) it is prohibited to use the word guarantee or similar expressions in consumer sales when selling goods, services etc. in the course of business if the receiver is not given additional rights to those rights which he or she already had or if such rights are limited. Similarly in DENMARK the term guarantee may only be used in a consumer context if it provides the consumer with substantially better rights compared to his legal rights (Marketing Act § 12(1)).

15. This problem is regulated in a distinct way in SWEDEN where, concerning consumer sales, the seller will always be responsible according to the provisions regarding lack of conformity under the Consumer Sales Act, since these are mandatory rules. Consequently, the consumer has access to all the remedies prescribed by law. It is not therefore possible for the seller to limit the guarantee, for instance to repair and replacement. This also applies if the guarantee is applicable for a period exceeding the time-limits in the Consumer Sales Act (three years). To apply the mandatory consumer protection in the Consumer Sales Act also to guarantees given voluntarily was justified due to systematic reasons. It was considered unsuitable and too complicated if different remedies should apply depending upon whether the professional was responsible under a guarantee or under the rules provided by law (*Agell*, SvJT 1991, 420). This has however been criticised in legal writing as going too far, since providing a guarantee is voluntary and this measure dissuades traders from providing guarantees at all (see e.g. *Herre*, Konsumentköplagen[2], 252).

IV.A.–6:104: Coverage of the guarantee

If the guarantee document does not specify otherwise:

(a) the period of the guarantee is 5 years or the estimated life-span of the goods, whichever is shorter;

(b) the guarantor's obligations become effective if, for a reason other than misuse, mistreatment or accident, the goods at any time during the period of the guarantee become unfit for their ordinary purpose or cease to possess such qualities and performance capabilities as the guarantee holder may reasonably expect;

(c) the guarantor is obliged, if the conditions of the guarantee are satisfied, to repair or replace the goods; and

(d) all costs involved in invoking and performing the guarantee are to be borne by the guarantor.

COMMENTS

A. General

This Article defines the default coverage of the consumer goods guarantee on the basis of certain aspects of the conformity regime. It deals with four essential elements of the content of the consumer goods guarantee: duration, the conditions of the guarantee, the guarantor's obligations and the costs of invoking and performing the guarantee. Not only does this default content give assurance to the consumer, but it also stimulates activity on behalf of the guarantor who remains free to define the terms of the own guarantee in any other way.

As to the relation in general between the conformity regime and a consumer goods guarantee, the borderline between the two will not always be crystal clear. Generally, if the parties have agreed that the seller will undertake obligations towards the buyer additional to those under the contract for sale (or, where the guarantee is part of the same contract) additional to those under the sale part of the contract, then by definition the seller has given a consumer guarantee. Ultimately, this question will have to be decided by interpreting the terms of the guarantee.

B. Default coverage of the consumer goods guarantee

Duration of the consumer goods guarantee. If the guarantor does not specify the duration of the guarantee, the guarantee should be applicable for five years or the estimated life-span of the goods if that is shorter. The estimated life-span of the goods is to be established by means of interpretation. The elements that should be taken into account when making this assessment are the reasonable and justified expectations of the consumer, based on objective factors like the price of the goods and the reputation of the particular seller or producer.

Illustration 1

B, a consumer, buys an expensive sailing jacket. Upon purchasing the garment B received a 'lifetime guarantee' concerning the jacket. Eight years later B notifies the seller that the jacket is no longer waterproof, since the material on the shoulder parts has deteriorated. B requests repair or replacement under the guarantee. The retailer contests the claim stating that the guarantee should reasonably be valid for a period of 4-5 years, depending upon usage. However, since the guarantee granted is of a very far-reaching nature and for such an expensive jacket a longer life-span than stated by

the retailer can be expected, the consumer is entitled to have the jacket repaired and made waterproof again.

Although this rule seems to grant the consumer very extensive rights, it should be kept in mind that it is merely a default rule. Besides, the overwhelming number of guarantees provided specify the duration of the guarantee; in fact, the duration often constitutes even the major element of the guarantee.

What triggers the guarantor's obligations? If the guarantee document does not provide otherwise the guarantor's obligations become effective if, for a reason other than misuse, mistreatment or accident, the goods at any time during the period of the guarantee become unfit for their ordinary purpose or cease to possess such qualities and performance capabilities as the guarantee holder may reasonably expect. The implied requirements under IV.A.–2:302 (Fitness for purpose, qualities, packaging) that the goods must be fit for a particular purpose and in conformity with samples or models are excluded as they would excessively burden the guarantor. In fact, they assume direct contact between the guarantor and the buyer.

Guarantor's obligations. If the guarantee document does not provide otherwise, sub-paragraph (c) provides that it includes an undertaking to repair or replace the goods if the conditions of the guarantee are met. In accordance with the normal rule on alternative obligations in III.–2:105 (Alternative obligations or methods of performance) the choice between repair or replacement is initially the guarantor's. If the item under guarantee can be easily and cheaply repaired it would clearly be unreasonable to give the consumer the choice of a replacement item.

Cost of invoking and performing the consumer goods guarantee. All the costs connected with invoking and performing the consumer goods guarantee are to be borne by the guarantor. The guarantor may deviate from this rule by indicating in the guarantee document that some costs are to be borne by the guarantee holder. However, such costs may not be disproportionately high. This particular provision aims to ensure that the consumer will not be surprised by an undisclosed liability for costs.

Illustration 2
The guarantee document provides that if the guarantee holder moves, he or she has to bear the increased costs if the remedies performed by the seller become more onerous. This could be, for instance, the increased costs of transportation connected with repair or replacement of the goods.

Illustration 3
The guarantee document may, for example, indicate that the guarantee holder has to bear the costs of a yearly inspection of the goods amounting to €10. Such an inspection is to assure proper and undisturbed functioning of the goods, as was guaranteed.

It should be noted that this provision only applies to the costs of invoking the guarantee. However, this rule is consistent with the fact that guarantees against payment fall under the scope of this Chapter (cf. IV.A.–6:101 (Definition of a consumer goods guarantee) Comment G).

NOTES

I. Duration of the default guarantee

1. In the Consumer Sales Directive there is no regulation of the default duration of the guarantee. This is also the situation in most of the legal systems. In SPAIN, the Consumer Law lays down a prescription period of six months, but the duration of the guarantee is left open to the parties.

2. Under a few systems however, regulation can be found in this respect. In SLOVENIA the minimum duration for obligatory guarantee is one year (Regulation OJ 73/2003 art. 3). Similarly in POLISH non-consumer sales, if the parties have not indicate a duration, the default duration is one year from the day on which the thing was released to the buyer (CC art. 577(2)). In many systems, although the default duration of the guarantee is not prescribed by law, there are some factors that either indicate or influence the default duration. In GREECE several guidelines are provided in order to establish the duration of the guarantee. Thus, it is suggested that the duration should be commensurate with the estimated life-span of the product. Especially for high-tech products the estimation of the duration must be based on the period of time during which the product will remain state of the art (Consumer Protection Act art. 5(3)). In the NETHERLANDS if the parties (that is: the guarantor) neglect(s) to determine the period, which may especially occur in the case of a guarantee that stems (only) from advertising, the construction of the guarantee contract will determine its duration. In doing so, the *Haviltex* formula will be used: the reasonable expectations of the parties, given, among other things, the societal circle to which the parties belong and the knowledge of the law that may be expected of such parties (cf. HR 13 March 1981, NedJur 1981, 635 (*Ermes/Haviltex*)). This formula is to be applied with regard to guarantees as well (cf. HR 22 December 1995, NedJur 1996, 300 (*Hoog Catharijne*)). In NORWAY in consumer sales the period may never be shorter than the longest period in the Consumer Sales Act for the same or similar goods (cf. the Marketing Act § 9c(1)). In DENMARK according to the Marketing Act § 12(1), the term guarantee may only be used in a consumer context if it provides the consumer with substantially better rights compared to his legal rights. According to the Consumer Ombudsman, this will for instance mean that generally concerning the sale of new goods the guarantee period must be substantially longer than the two-year notification period provided by law (cf. *Kristensen/Lando/Møgelvang-Hansen/Schützsack,* Nya regler om forbrugerkøb, 60). In SLOVAKIA in general non-commercial sales a default guarantee period might be established in a specific statute or a regulation (see CC § 502).

II. Default cover of the guarantee: defect and remedies

3. The Consumer Sales Directive provides no specifications concerning either default defects covered by the guarantee or default remedies. The only mention of the cover of the guarantee is contained in the definition of the guarantee (art. 6(1)(e)), which states that if the goods do not meet specifications set out in the guarantee statement or in the relevant advertising, the guarantor will reimburse the price paid, replace the goods or handle consumer goods in any other way. Such an approach is reflected in most of the legal systems.

4. In some systems, although there is no direct regulation, there are certain guidelines. In GREECE, for example, it is provided that the guarantee must be consistent with good faith and should not be devoid of significance by excessive exemption clauses

(Consumer Protection Act art. 5(3)). In the NETHERLANDS if the parties (that is: the guarantor) neglect(s) to determine what defects the guarantee is to cover, the construction of the guarantee contract will determine its content and coverage. The construction of the guarantee will take place using the Haviltex formula (see under I.). Moreover, given the fact that the guarantee must state in a clear and comprehensible manner what is covered by it, a failure to indicate what the guarantee covers may lead the courts to interpret the guarantee as covering the whole good or all of the goods (interpretation *contra proferentem*), cf. CC art. 7:6a(2). In NORWAY if the defects covered by the guarantee in consumer sales are fewer than under the regime for lack of conformity in the Consumer Sales Act, such a limitation is invalid since the consumer's rights may only be extended and not limited by a guarantee (cf. Marketing Act § 9c(1)). In POLISH non-consumer sales CC art. 577 establishes that in the case of doubt, the guarantor is obliged to rectify the physical defects of the thing. In ESTONIA LOA § 231(4) includes a presumption that unless the guarantee document provides otherwise the guarantee entitles the buyer to claim, free of charge, a repair or replacement of the goods if any defect is discovered during the guarantee period. In SLOVENIA it is expressly established that the content of a guarantee is the proper functioning of the goods during a guarantee period which applies to both obligatory (statutory) and voluntary guarantees (LOA § 481).

5. In SWEDEN, the consumer will have access to all remedies prescribed by law for lack of conformity in the Consumer Sales Act, i.e. repair, replacement, a price reduction, termination and damages. Similarly under CZECH and SLOVAK law, the guarantee established by an agreement or a declaration by the seller may not be narrower than the statutory guarantee, meaning that the buyer will at least have access to the normal remedies for lack of conformity (CZECH REPUBLIC CC § 620(5); SLOVAKIA CC § 502(2)).

6. In ENGLAND and SCOTLAND the Sale and Supply of Goods to Consumers Regulations 2002 s. 159(1) provides that the consumer guarantee takes effect as a contractual obligation owed by the guarantor, implying that all appropriate contract remedies are available to the beneficiary of the guarantee.

III. Costs of invoking and performing the guarantee

7. The Consumer Sales Directive provides that the guarantee means any undertaking, given free of charge (art. 1(2)(e)). The Directive does not however refer to the costs connected with the performance under the guarantee and does not specify directly that the guarantee should be performed free of charge, as in the case of conformity (art. 3(4)).

8. This issue remains unregulated in some of the systems. Other legislations, however, tackle this problem to a different degree. In ESTONIA there is a presumption that the guarantee gives the buyer the right to claim a repair of replacement free of charge (LOA § 231(4)1)). In ITALY the guarantee shall not entail any additional costs (*costi supplementari*) for the consumer (Consumer Code art. 128(2)(c)). In SLOVENIA the seller shall bear the costs of a repair, spare parts, the transportation of the goods, and all other costs in connection with invoking a guarantee (Consumer Protection Act § 19). In the NETHERLANDS whether or not the costs of invoking and performing the guarantee are to be paid by the consumer is a matter of the contract's construction using the Haviltex formula (cf. Note I2 to this Article). In POLAND the buyer is obliged to deliver the thing, at the cost of the guarantor, to the place indicated in the guarantee or the place where the thing was released to him when giving him the guarantee, unless it follows from the circumstances that the defect should be rectified at the place where the thing was at the time when the defect was discovered. The

guarantor shall discharge his obligations and deliver the thing to the person entitled in the guarantee at his cost (CC art. 580(1) and (2)). Under SWEDISH consumer sales, the provisions concerning lack of conformity and the remedies thereof will also be applicable to the guarantee (Consumer Sales Act § 21(1)). Therefore, the consumer will not have to bear any costs while invoking the guarantee (cf. Consumer Sales Act § 26).

9. In DENMARK and NORWAY this is an unregulated issue. However, the Sales Acts provide that a lack of conformity is to be remedied at the cost of the seller, and since the regulation of the guarantee must give the consumer better rights than provided by law the guarantor will hence be obliged to bear the costs. Similarly under CZECH law the guarantee may not limit the rights under the statutory regime, thus the general regulation will apply (CC §§ 598 and 620(5)). Also in FINLAND, according to Consumer Protection Act chap. 5 § 18(1) the seller shall remedy the defect without cost to the buyer. As a consequence, a repair under the guarantee may not impose any costs on the buyer. However, the law does not prevent chargeable service and repair agreements in connection with the sale of goods, provided that such agreements differ in content from the guarantee.

IV.A.–6:105: Guarantee limited to specific parts

A consumer goods guarantee relating only to a specific part or specific parts of the goods must clearly indicate this limitation in the guarantee document; otherwise the limitation is not binding on the consumer.

COMMENTS

A. General

This Article concerns the situation when, viewed from the consumer's point of view, the coverage of the consumer goods guarantee is not as broad as may be expected. A guarantee for a specific part or parts of the goods is usually given with respect to goods that contain various parts that differ with respect to their complexity, or parts that, due to their nature, are guaranteed in a specific way. Different parts of the goods may, for example, have a different durability or may require different maintenance of a specific nature. It also occurs quite often that some parts of the goods are not included in the guarantee at all.

Illustration 1
It is common that parts like bulbs, batteries, etc. are excluded from the scope of the guarantee.

Illustration 2
A guarantee document may specify that the basic guarantee for the entire goods is for 2 years. However, the plastic elements are guaranteed only for 1 year, whereas the metal elements are guaranteed for a period of 10 years.

B. Effectiveness of the limitation

In order to prevent confusion as to the factual coverage of the guarantee, all variations or exclusions of the guarantee coverage must be indicated clearly in the guarantee document. If there is no clear indication of the limitation, it is ineffective.

Illustration 3
B, a consumer, buys a computer to which a 3-year guarantee is attached. Two years after purchase, it is no longer possible to recharge the rechargeable battery. The consumer requests a new battery, invoking the guarantee. The seller contests this request and pleads that the battery is a "consumable" and therefore does not fall under the guarantee.

Since it is not self-evident that a battery of this type is to be regarded as a consumable item and the seller has not indicated any limitation as to the scope of application of the guarantee, the seller is obliged to replace the battery.

NOTES

Guarantee on specific parts only

1. The Consumer Sales Directive does not mention specifically that the guarantee document must make it clear to the consumer that the guarantee covers only specific

parts of the guarantee. However, the Directive requires the guarantee document to state the contents of the guarantee (art. 6(2)). Therefore, if the guarantee is confined to only a part of the goods, or if different guarantees are given for different parts of the goods, this must be indicated in the guarantee document.

2. Most systems follow this path and do not regulate the issue specifically. Generally, however, it is required that such a limitation must be made clear in the guarantee document in line with the plain and intelligible language requirement in order to be valid (cf. e.g. NORWAY Marketing Act § 9d(1)(e) and SLOVENIA Consumer Protection Act § 18). In the NETHERLANDS a failure to indicate the cover provided by the guarantee may lead the courts to interpret the guarantee as covering the whole good or all of the goods (interpretation *contra proferentem*), given that it must be stated in a clear and comprehensible manner what is covered by the guarantee (cf. CC art. 7:6a(2); Mon. NBW B-65b (*Loos*), no. 19).

3. Under SWEDISH law, however, Consumer Sales Act § 21(1) establishes that the seller may undertake responsibility for the goods or a part of the goods. Such limitations are common where the goods partly consist of articles of consumption, for which the seller does not wish to be liable under the guarantee period (*Herre*, Konsumentköplagen^{2}, 247). If no restrictions are made, the guarantee will apply to all parts of the goods (Prop 1989/90:89, 108).

IV.A.–6:106: Exclusion or limitation of the guarantor's liability

The guarantee may exclude or limit the guarantor's liability under the guarantee for any failure of or damage to the goods caused by failure to maintain the goods in accordance with instructions, provided that the exclusion or limitation is clearly set out in the guarantee document.

COMMENTS

A. General

If special maintenance is required for the proper functioning of the goods, the instructions concerning maintenance should be provided to the buyer regardless of whether or not there is a guarantee attached to the goods (cf. IV.A.–2:302 (Fitness for purpose, qualities, packaging) sub-paragraph (e)). The guarantor may, however, offer the consumer goods guarantee subject to the condition that the guarantee holder will take special care of the goods, or will use or treat the goods in a specific way.

Illustration 1
The consumer goods guarantee may, for example, require the guarantee holder to undertake a periodical motor vehicle service at authorised garages, to have the goods repaired only at authorised repair points, or to use materials of a specific quality in order to maintain the goods.

B. Maintenance instructions

Presentation of the instructions. If the guarantor offers a consumer goods guarantee subject to the condition that the guarantee holder will use, treat or maintain the goods in a specific way, the relevant instructions must reach the consumer. There are many ways in which the guarantor may present the maintenance instructions to the guarantee holder. The instructions may be attached to the goods, for example printed on the box in which the goods are sold, or come in the form of an instruction guide (provided that the guarantee document refers to these instructions). It is also possible that the maintenance instructions may simply be included in the guarantee document itself.

The instructions have to be adequately explained to the consumer, i.e. in a way that leaves no doubt as to their meaning (cf. also IV.A.–6:103 (Guarantee document) paragraph (1)(d)).

Limiting liability via instructions. If the non-observance of the maintenance requirements is to result in a limitation or exclusion of the guarantor's liability under the guarantee, this has to be clearly indicated in the guarantee document. Merely attaching instructions to the goods or including them in the guarantee document does not have the effect of limiting the guarantor's liability in the case of non-observance by the guarantee holder.

Scope of the instructions. The maintenance instructions may exceed the normal scope of the maintenance instructions for consumer goods. As stated above, they may require the guarantee holder to take special care of the goods. The conditions have to be reasonable and introduced for a justified reason. This requirement must be specially underlined if the guarantor suggests using a specific brand of products for the maintenance of the goods in question. Besides, the instructions cannot limit the scope of the normal use of the goods or

impose excessive costs on the guarantee holder. In any case, all the additional maintenance costs, like the costs of yearly check-ups must be indicated in the guarantee document in accordance with IV.A.–6:104 (Coverage of the guarantee) sub-paragraph (d)).

The liability of the guarantor is not excluded or limited in the case of non-observance of the maintenance instructions if the same defect would have appeared even if the guarantee holder had observed the instructions. If it is not clear from the circumstances, it should be up to the guarantor to prove that the observance of the instruction would have made a difference.

Illustration 2
B, a consumer, buys a second-hand car with a guarantee attached from A, a car dealer. After one year the car breaks down. When B attempts to invoke the guarantee, A refuses the claim under the guarantee since B has not had the car serviced at an authorised garage as required by the guarantee conditions. Since in this case it is clear that for the defect in question it is irrelevant if the prescribed service had taken place at an authorised garage or at another garage, it is unreasonable to apply this condition.

NOTES

Maintenance instructions

1. The Consumer Sales Directive does not mention maintenance instructions specifically and merely lays down that the guarantee document shall state the contents of the guarantee (art. 6(2)), which implies that if there are maintenance instructions specifically designed for the guarantee, they should be incorporated in the guarantee document. Similarly, most of the systems do not deal directly with maintenance instructions.
2. Under ITALIAN law Consumer Code art. 133(2)(b) provides that the guarantee shall incorporate its object and the necessary elements to make it possible to use it. In SLOVENIA unless maintenance instructions are against good faith and thus void as unfair contract terms (cf. Consumer Protection Act § 22), clauses excluding the guarantor's liability in the case of the use, treatment or maintenance of the goods against the explicit instructions of the seller are admissible and often utilized. The maintenance instructions do not have to be included in the guarantee document, but the seller has to deliver them together with the goods, if proper use of the goods is impossible without the instructions. In FINLAND the guarantee shall be as widely valid as the guarantee terms and conditions specify. The terms of the guarantee may exclude any lack of conformity attributable to the buyer, such as a failure to follow the instructions or incorrect handling of the goods. According to the Consumer Protection Act chap. 5 § 15a(1), liability for defects shall not arise if the deterioration was due to an accident, inappropriate handling of the goods or another circumstance attributable to the buyer. Likewise in SWEDEN, a guarantee does not apply if the seller shows that it is probable that the deterioration was caused by an accident or a similar event or neglect, abnormal use or a similar act or omission on the part of the buyer (Consumer Sales Act § 21(2)). With "similar act or omission" is meant, for example, that the consumer does not follow instructions from the professional regarding service or care, without this amounting to neglect. For instance, concerning vehicles it is common to prescribe a yearly service for the guarantee to be valid. Such service obligations, however, must not be unreasonably burdensome for the consumer. This could for

instance be the case if possibilities to use the goods are so restricted that the guarantee is almost misleading or if the costs for the prescribed service are unreasonable (see Prop 1989/9:89, 110). Such a common clause was evaluated by the Market Court in MD 1992:13, where the seller had provided a guarantee for a car and its equipment to be valid for one year or a maximum of 30,000 km. The seller also granted a prolonged guarantee valid for up to three years or 100,000 km, provided that the consumer had all the servicing carried out according to the service manual at a garage authorised by the seller. The court stated that the prolonged guarantee was more beneficial than the consumer's legal rights. The fact that the guarantee obliged the consumer to follow a certain cause of action did not per se render the condition unreasonable. In ARN 1991/92 ref. 42 the Board came to the opposite conclusion. Here the consumer claimed that certain defects in the car purchased should fall under the seller's "second-hand guarantee". The seller denied this claiming that the consumer had not had the vehicle serviced at an authorised garage, as required in the guarantee conditions. The Board found it unreasonable to invoke such a clause, since it had been proven that for the defect in question it would have made no difference if the service had been carried out at an authorised garage or at another garage.

IV.A.–6:107: Burden of proof

(1) Where the guarantee holder invokes a consumer goods guarantee within the period covered by the guarantee the burden of proof is on the guarantor that:

(a) the goods met the specifications set out in the guarantee document or in associated advertisements; and

(b) any failure of or damage to the goods is due to misuse, mistreatment, accident, failure to maintain, or other cause for which the guarantor is not responsible.

(2) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General

One of the major advantages of a consumer goods guarantee is the presumption that any defect becoming apparent within the duration of the guarantee is automatically covered by that guarantee. Due to the importance of this presumption, this Article is mandatory and may not be deviated from to the detriment of the consumer. This solution differs from the general regulation on non-conformity in IV.A.–2:308 (Relevant time for establishing conformity) paragraph (2) where only a lack of conformity becoming apparent within six months from the time when the risk passes to the buyer is presumed to have existed at that time, unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.

B. Burden of proof

The guarantor can escape liability under the consumer goods guarantee only by showing that the goods do in fact meet the specifications set out in the guarantee document or in the associated advertising. Alternatively, the guarantor may show that any failure of or damage to the goods is due to misuse, mistreatment, an accident, failure to maintain, or any other cause for which the guarantor is not responsible. In other words, the guarantor has to prove that either the defect at hand was not covered by the guarantee, or that it occurred after the guarantee had expired, or that other circumstances have occurred which exclude the liability (mainly damage caused by the consumer or by a fortuitous event).

Illustration 1

B, a consumer, buys a cellular phone from A with a one-year guarantee attached. According to the guarantee conditions the guarantee is not valid if the deterioration is due to external damage. Within the guarantee period the phone ceases to work and B therefore demands a repair free of charge. A refuses to repair the phone, claiming that it has been dropped, referring to scratches on the cover. B's explanation is that the scratches originate from a change of aerial. In this case, the evidence adduced by the seller is not sufficient to rebut the explanation provided by the buyer. B may therefore invoke the guarantee. If A had given better evidence of the probability of external damage as well as its influence on the functions of the goods in question the outcome may have been different.

However, it should be kept in mind that the guarantor does not begin to bear the burden imposed by this Article until the buyer has at least shown that the goods are not working, or something similar.

NOTES

Reversal of the burden of proof

1. The Consumer Sales Directive does not establish a reversal of the burden of proof in the case of consumer guarantees. However, it should be kept in mind that the Directive establishes such a reversal for the first six months concerning claims for lack of conformity in art. 5(3).

2. As for guarantees in particular, this issue is not subject to specific regulation in most of the systems and as a consequence the ordinary rules concerning the burden of proof will apply, namely that the burden lies upon the party bringing a claim. However the present issue will probably be determined in SPAIN by the rules of the legal regime for lack of conformity; if the law presumes that the lack of conformity was latent when the defect manifests itself during the six months after the sale (ConsProtA art. 123(2)), the shifting of the burden of proof should not be overcome by the mere fact that the consumer made additional claims based upon the commercial guarantee, where the relief sought will be identical or similar to the legal remedies.

3. However, in a number of systems such a reversal of the burden of proof is expressly established. In SWEDEN the Consumer Sales Act § 21(1) establishes that if the seller, or somebody else on his behalf, through a guarantee or similar commitment undertakes responsibility for the goods or a part of the goods or for their quality for a certain period of time, a lack of conformity is presumed if the goods, during that period of time, deteriorate in a sense covered by the commitment. This presumption does not apply, however, if the seller shows that it is probable that the deterioration was caused by an accident or a similar event or negligence, abnormal use or a similar act or omission on the part of the buyer (Consumer Sales Act § 21(2)). The same applies under FINNISH law (cf. Consumer Protection Act chap. 5 § 15a). Also under GERMAN law CC § 443(2) provides for a reversal of the burden of proof. However, the buyer must still prove that he has the right to invoke a guarantee and that the lack of conformity falls under the applicable duration of the guarantee.

4. In some systems the reversal of the burden of proof applies although this is not expressly established by law. Under DANISH law there is a general presumption of the reversal of the burden of proof during the whole guarantee period (cf. *Kristensen/Lando/Møgelvang-Hansen/Schützsack*, Nye regler om forbrugerkøb, 59). In the NETHERLANDS one of the most important rights given in a guarantee in practice is the reversal of the burden of proof as to the question whether or not there is a lack of conformity (cf. *Van Rossum*, Rechtskarakter van een garantie, 15). Such an approach is also accepted by the legal doctrine in ESTONIA, where the guarantee usually reverses the burden of proof regarding the cause of the defects – if not stated otherwise in the guarantee the buyer is not required to prove that the non-conformity existed during the delivery of the goods (as is normally required in the case of claims under the sales contract); the buyer is merely required to prove that the non-conformity appeared during the guarantee period and the person who provided the guarantee is then usually required to prove that the non-conformity was due to misuse or mistreatment (*Kõve*, Näidised ja kommentaarid II, 333).

IV.A.–6:108: Prolongation of the guarantee period

(1) If any defect or failure in the goods is remedied under the guarantee then the guarantee is prolonged for a period equal to the period during which the guarantee holder could not use the goods due to the defect or failure.

(2) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General

This Article addresses the situation when the consumer is deprived of the possession of the goods as a result of their defectiveness or failure. If, during the period covered by the guarantee, the goods fail and it is necessary to remedy them (primarily through repair), there are two consequences for the consumer. First, the guarantee holder will, in most cases, be deprived of the possession of the goods and, as a result, cannot use or benefit from them. Secondly, the duration of the consumer goods guarantee keeps on running, despite the fact that the goods have failed to function as guaranteed and the guarantee holder cannot use them. This solution will also promote speedy action from the guarantor, since the guarantee will otherwise be prolonged. Especially for defects appearing at the end of the guarantee period, this regulation will provide the consumer with additional security. Due to the high risk of guarantors excluding the application of this principle, this Article is mandatory and may not be deviated from to the detriment of the consumer.

B. Prolongation of the guarantee period

According to the solution presented by this Article, the duration of the consumer goods guarantee is prolonged by the time during which the goods could not be used due to their failure. The period during which the consumer could not use the goods covers the period from the moment of the discovery of the failure of the goods until the moment of receiving back the remedied goods. In essence, the guarantee period is therefore merely interrupted rather than starting afresh. The guarantee period can be prolonged several times, if the goods have to be remedied (repaired or replaced) on more than one occasion.

Illustration
B buys a TV with an attached two-year guarantee. On June 15 the TV stops working. B notifies the seller and the TV is sent in for repair. B receives the TV back on July 15. The duration of the guarantee will be prolonged by one month.

NOTES

Prolongation of the guarantee period

1. The Consumer Sales Directive does not deal with the question of the prolongation of the guarantee period. This is also the case in most of the legal systems.
2. However, under some systems a concrete regulation can be found. In ESTONIA LOA § 231(4) sent. 1) lays down that unless the guarantee provides otherwise, it is presumed that in the case of a replacement, the replaced product shall have a new guarantee with the same duration. It is further presumed that in the case of a repair the

guarantee period is prolonged for the period of the repair (LOA § 231(4) sent. 3)). In FRANCE, according to Consumer Code art. L. 211-16, there is a prolongation of the guarantee if the good is immobilised for more than seven days. In HUNGARY this issue is regulated on a general level within the context of the remedies for defective performance which is also made applicable, where appropriate, to guarantees by CC § 248(5). Accordingly, CC § 308(3) lays down that the time-limit for asserting rights against the obligor (seller) is interrupted in the case of a repair and replacement and restarts when the obligee can make use of the goods once again. Also under CZECH law general rules will apply since the guarantee may not be less favourable than the statutory regime. Here, the period from the time when the right arising from liability for defects was exercised until the time when the buyer is obliged to take over the goods after repair has been completed shall not count as part of the guarantee period. The seller shall issue to the buyer a receipt (confirmation) stating when the buyer exercised his right, as well as the information on the repair and its duration. (CC § 627(1)) In the case of an exchange (replacement), the guarantee period shall start to run anew from the time when the buyer takes delivery of the new thing. The same shall apply in the event of an exchange of a component to which the guarantee applied (CC § 627(2)). In SLOVENIA in the case of minor repairs the guarantee period is prolonged for the amount of time the buyer was unable to use the goods. In the case of a replacement or significant repairs the guarantee period is renewed (LOA § 483). In SWEDEN concerning a repair and replacement, the preparatory works establish an analogous application of the general time-limit (three years) to start running from the day when a cure was completed in cases where the same defect again appears (Prop 1989/90, 123; cf. ARN 1996-0976, from 1 July 1996).

PART B. LEASE OF GOODS

CHAPTER 1: SCOPE OF APPLICATION AND GENERAL PROVISIONS

IV.B.–1:101: Lease of goods

(1) This Part of Book IV applies to contracts for the lease of goods.

(2) A contract for the lease of goods is a contract under which one party, the lessor, undertakes to provide the other party, the lessee, with a temporary right of use of goods in exchange for rent. The rent may be in the form of money or other value.

(3) This Part of Book IV does not apply to contracts where the parties have agreed that ownership will be transferred after a period with right of use even if the parties have described the contract as a lease.

(4) The application of this Part of Book IV is not excluded by the fact that the contract has a financing purpose, the lessor has the role as a financing party, or the lessee has an option to become owner of the goods.

(5) This Part of Book IV regulates only the contractual relationship arising from a contract for lease.

COMMENTS

A. General

Scope of application. This Part of Book IV deals with contracts for the lease of goods and the rights and obligations arising from them. The contract is not itself the lease. It is a juridical act which gives rise to the lease (cf. II.–1:101 (Meaning of "contract" and "juridical act)). The lease is the legal relationship between the lessor and the lessee, involving obligations and corresponding rights on both sides, which is created and regulated by the contract. This Part of Book IV applies to what can be regarded as the "core" field of contracts for the lease of assets other than immovables, namely contracts granting a temporary right of use of goods against remuneration. Goods are defined (in Annex 1) as corporeal movables, including ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases. No doubt other types of contract may be found with some but not all of these elements or similar elements or functions to those referred to in the present Article, but it is not recommended that this Part of Book IV be given the widest possible scope of application. A menu of specific contracts can never be exhaustive or cover every possible contract. Neither is it possible to draw sharp lines between different specific contracts. There will be contracts with elements of two or more types. A negative definition of a contract for lease, excluding the application of other principles is hardly possible or desirable. One exception has been made: this Part of Book IV does not apply to contracts where the parties have agreed that ownership is transferred after a period with right of use, (paragraph (3)).

B. Contractual relationship only

Contractual relationship not proprietary rights. This Part of Book IV deals only with the contractual relationship arising from a contract for the lease of goods. It is not concerned exclusively with the relationship between the original lessor and lessee: Chapter 7 deals with

new parties and subleases. However, it is concerned only with contractual rights and obligations. It does not deal with proprietary questions. In national law, protection and priority in relation to third parties may be decisive for distinguishing leases from other legal relationships which involve the use of goods, for example the right of usufruct that is employed in several jurisdictions. In most cases these rights will be more comprehensive than the right based on a contract for lease and for that reason fall outside the scope of application of this Part of Book IV. In other cases national law must determine to what extent this Part is applicable to such rights.

C. Right of use

Benefits and physical control. The essential meaning of "use" of goods is so evident in everyday language that it is difficult to give a definition that is not circular. A right of use implies that the lessee may enjoy the benefits that normally flow from having physical control of the goods: driving a car, sailing a boat, digging with an excavator, wearing a suit, watching programmes on a TV, etc. The lessee can do more than a pledgee or a person looking after the goods, but less than the owner, who may destroy the goods or make changes to them or establish rights related to the goods (the lessee's rights concerning changes to, or the sublease of the goods will be dealt with later). The more exact limits within which the lessee may utilise the goods must be determined by the individual agreement, the purpose of the lease and the default rules in this Part (Chapter 5).

Fruits. This Part of Book IV makes no distinction between the right to use the goods and the right to "fruits". For goods, as opposed to immovable property, this distinction is normally of little relevance. Whether or not the lessee may keep natural fruits like the foal of a leased horse or the tomatoes from a leased tomato plant must be determined from the purpose of the lease and other circumstances. It has not been deemed useful to formulate a default rule. Fruits understood as income from a new lease are possible if the lessee may sublease the goods, an issue that will be dealt with in Chapter 7.

Consumable goods, fungible goods, aggregates. The right to consume goods belonging to another person or to return objects other than those originally made available is usually seen as something different from "use", in everyday language as well as in legal language. This Part does not apply to contracts concerning such rights. On the other hand, there seems to be no reason to exclude leases of aggregates of goods, for example a set of tools for computer repairs. To what extent the lessee may replace parts of the aggregate will depend on the individual agreement and the circumstances.

Intellectual property rights. The purpose of leasing a book or a DVD (etc.) is normally to get access to the contents – reading the verses, listening to the music, watching the film etc. This Part deals with the individual copy of the work, not with questions regarding intellectual property rights. If, however, the law on intellectual property should require an illegal copy to be returned immediately or to be destroyed or at least not used by the lessee, this has consequences also for the lease agreement, as the item cannot be used for the purpose for which it was intended.

D. Temporary right

The right of use is not permanent. The lessee's right under a contract for lease is not permanent. A contract permanently dividing the interests in the goods in a way that gives one

party a right of use while the other party is left with a right of payment should not be regarded as a contract for lease. However, this Part contains no maximum lease period and the difference between a right of use under a contract for a very long period on the one hand and a permanent right of use on the other may be rather formal (cf. Chapter 2). For leases of goods this will probably not be a problem of practical significance in any case.

E. Goods

Meaning of "goods". The meaning of the word "goods" is determined by a series of definitions (see Annex 1): "Goods means corporeal movables. It includes ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases." "Movables means corporeal and incorporeal property other than immovable property." "Immovable property' means land and anything so attached to land as not to be subject to change of place by usual human action." "Corporeal, in relation to property, means having a physical existence in solid, liquid or gaseous form."

Movables. This Part applies to movables and not to immovable property. Objects that form part of immovable property, as well as fixtures and accessories to immovable property, should be regarded as immovable property in this respect, unless such property is leased with a view to separating it from the immovable property. Hence a contract concerning the right to utilise a pipeline or a cable fixed to an immovable does not fall within the scope of this Part.

Corporeal movables. This Part applies to leases of corporeal movables only, i.e. movables with a physical existence. In practice, it will be movables in solid form, but it has not been found necessary to make exceptions for liquids or gases. Electricity, information and data are not covered by the definition of goods, neither are financial instruments, even in the form of negotiable documents.

Ships, aircraft etc. The word "goods" includes "ships, vessels, hovercraft or aircraft" (see Annex) and this Part applies to leases of such objects. In most, if not all, jurisdictions, there are registers for several of these objects, registers that also allow for the registration of rights attaching to such objects. Rights relating to ships, aircraft etc. are to a certain extent governed by rules similar to rules on immovable property, which is also registered. It has not been found necessary to exclude ships, aircraft etc. from the scope of application of this Part, nor to include special rules on leases of such objects. For leases of ships and aircraft of some size, there are standardised contract terms, and in any case the parties to the contract will make individual agreements covering all important aspects of the contractual relationship. This Part of Book IV is non-mandatory where the lessee is not a consumer. However, there are lease contracts, typically concerning smaller boats for leisure purposes, where standardised terms are not relevant and individual agreements often less elaborated. For such leases there is no reason to have special rules.

F. In exchange for money or other value

Gratuitous contracts excepted. This Part applies only where the right of use is provided in exchange for money or other value. Contracts concerning gratuitous use of goods have traditionally been regarded as a contract type different from the contract for lease and the typical interests involved in such a relationship are not the same as for leases. These contracts are dealt with in Book IV.H. (Donation). However, where remuneration is owed and it is not purely symbolic, this Part of Book IV applies. Contracts with a low rent are not excepted from

the scope of application of this Part, but the fact that the rent is low may in some circumstances be relevant (for example in deciding the standard of quality of the goods that may reasonably be expected by the lessee).

Money or other value. In most cases the lessee is obliged to pay money, but this Part applies also where the right of use is provided in exchange for other value, such as work, services, ownership or use of property etc. The rules in Chapter 5 concerning payment apply with appropriate adaptations in such cases. Leases with remuneration in value other than money are so rare that it has not been found advisable to burden the text with special rules. Sometimes the right of use must be seen as an element of another contract, e.g. an employment contract, and in such cases this Part does not apply.

G. Contracts for lease and contracts for sale

Sales rules have priority. This Part does not apply to contracts where the parties have agreed that ownership is to be transferred after a period with right of use, cf. the third paragraph of the present Article. If the parties have already agreed on the transfer of ownership, and this transfer is not just an option for one or other of the parties, the contract falls under the definition of a contract for sale in IV.A.–1:202 (Contract for sale). The agreed transfer of ownership may take place at once or after a certain period, normally on the condition of full payment of the price. The most important example is a sale with reservation of title. It sometimes happens that lease terminology is used in agreements of this kind; the lessee becomes owner when the agreed rent is paid in full. The contract is still covered by the definition of a contract for sale. The language of such contracts (hire-purchase, conditional sale, sale with retention of title) may differ without corresponding real differences in the obligations undertaken by the parties, and it would be arbitrary to apply lease rules for the period up to transfer of ownership just for some of the contracts. In general, it is not always clear to what extent the applicability of rules concerning one type of contract excludes the applicability of rules concerning other types of contracts. Sometimes the rules may be applied in combination, each to different elements of the same contract; in other cases, obligations characteristic of one specific contract are just accessory elements in a contract that is governed by the rules of another type of contract. This may depend on the circumstances of the case, see also II.–1:107 (Mixed contracts). However, for lease contracts a clarification should be made in relation to the sale contracts mentioned here. The question remains whether the use of lease terminology should mean that lease rules apply *by agreement*. This is a question of interpretation of the individual agreement, but in most of these cases the use of lease terminology can simply be seen as a matter of form.

Lessee's option to buy. A mere option for the lessee to buy the goods, either at the end of the lease period or at any other point in time, does not make the contract a contract for sale under the definition in IV.A.–1:202 (Contract for sale), and neither does it exclude the contract from the lease definition. This is the case even if it can be proved that the lessee has an intention to use the option, as long as this is not a contract term. The same holds true where the price is so low that it would be obviously irrational *not* to use the option; this Part of Book IV still applies.

Sale and lease back. Sometimes one person (A) sells goods to another person (B) with the purpose of leasing the goods from that person. Depending on the circumstances, B's right may be regarded as a security right and A's right as ownership, cf. Book IX (Proprietary Security Rights in Movable Assets). Also as between A and B, the contracts for sale and for

lease may be seen as simulations, again depending on the circumstances, and if so, this Part of Book IV will not apply. In other cases, this Part of Book IV should apply for the part of the contract concerning the lease.

H. Contracts where goods are supplied for the particular lease ("financial leasing" etc.)

The contracts. It is quite common that the lessor has a role more of credit provider than ordinary lessor: the prospective lessee finds a supplier who can provide goods conforming to the lessee's specification; the goods are then bought by another party, typically a financial institution, who leases the goods to the lessee; a rent and a minimum lease period are fixed such that the cost of the goods, plus interest, may be recovered by the lessor at the end of the lease period. The lessee may have a right to buy the goods at expiry of the lease period at a nominal price or a right to continue the lease at a substantially lower rent. Such contracts are often referred to as "financial leasing contracts" (cf. the following paragraph). Similar transactions may be defined in national legislation under various names. One should be aware that the English term "leasing", as well as more or less analogous terms in other languages, is frequently used for transactions that have only some of the characteristics here mentioned or important additional traits.

The Unidroit Convention. The Unidroit Convention on International Financial Leasing was adopted in Ottawa 28 May 1988 and entered into force on 1 May 1995, following three ratifications. To date (2007), the Convention has been ratified by ten states (Belarus, France, Hungary, Italy, Latvia, Nigeria, Panama, Russia, Ukraine and Uzbekistan). According to art. 1 the Convention applies to international lease contracts (contracts "granting to the lessee the right to use the equipment in return for the payment of rentals") where (a) the lessee controls acquisition of the goods (the lessor buys the goods on specifications by the lessee and on terms approved by the lessee, from a supplier selected by the lessee; and the lessee specifies the goods and selects the supplier "without relying primarily on the skill and judgement of the lessor"); (b) the goods are acquired by the lessor in connection with the lease agreement and this is known to the supplier; (c) the rent is "calculated so as to take into account in particular the amortisation of the whole or a substantial part of the cost".

Essential rules of the Unidroit Convention. The essence of the regulation of the Convention is the following.

(a) The lessor's rights against creditors are protected (art. 7).

(b) The lessor, in the capacity of lessor, is protected against claims from third parties resulting from "death personal injury or property damage" (art. 8(1)(b)).

(c) The supplier's duties under the supply agreement are also "owed to the lessee as if it were a party to that agreement" (art. 10).

(d) The lessor "warrants" against third party rights in the goods (art. 8(2)).

(e) All maintenance and repairs lie on the lessee and the goods must be returned in the original condition, normal wear and tear excepted (art. 9).

(f) In the case of non-conformity or delay, the lessor must accept termination (or rejection of delivery) and, prior to acceptance of the goods, withholding of rent, but is not required to pay damages, except for loss resulting from the lessee's reliance on the lessor's skill and judgement or the lessor's intervention in the choice of supplier or in specifications (art. 12 and art. 8(1)).

(g) There are provisions on damages etc. relating to termination as a result of the lessee's non-performance (art. 13).

(h) There is regulation of the right to transfer ownership of the goods or the right of use (art. 14).

The Unidroit Convention and this Part of Book IV. The contracts described in the Unidroit Convention form one group of lease contracts containing elements of credit and security. The lease form is chosen by the parties. Little seems to be won by defining these contracts as contracts of their own kind, different from lease contracts and thus falling outside the scope of application of this Part. Defining the contracts as sale contracts would certainly be contrary to the wishes and intentions of the parties, and there is not sufficient reason to go against such intentions. This Part of Book IV should apply in general. Nevertheless, some special rules must be included as it would be unsatisfactory to have all of the lease rules apply as default rules to a – more or less – distinct and important group of contracts where some of the general rules do not fit. Such special rules are included in IV.B.–2:103 (Tacit prolongation), IV.B.–3:101 (Availability of the goods), IV.B.–3:104 (Conformity of the goods during the lease period), IV.B.–4:104 (Remedies channelled towards supplier of the goods) and IV.B.–5:104 (Handling the goods in accordance with the contract) and reference is made to Comments to these Articles.

I. Lease contracts and service contracts

Right of use combined with services. The right of use of goods may be combined with services from the party providing the right of use. There is a wide spectrum of possible combinations. At one end of the spectrum, work to be done by the lessor in the form of maintenance and repairs is an integral part of a great many lease contracts and such work is normally not considered a "service" at all. This Part of Book IV will apply. At the other end of the spectrum, there are contracts where the "use" of goods has no independent character and is merely accessory, such as the passenger's "use" of a car or a boat under a transportation contract. The categorisation is more doubtful where for example a party has the right of use of advanced industrial equipment and the owner provides a mechanic to take care of the equipment throughout the period of use.

Applicability of this Part of Book IV. A general rule on mixed contracts is found in II.–1:107 (Mixed contracts). Rules applicable to each relevant category may apply to the same contract, unless (among other things) one part of the mixed contract "is in fact so predominant that it would be unreasonable not to regard the contract as falling primarily within one category". Both sets of rules may apply where the services to be performed and the right of use are only loosely connected and there is no practical risk of incompatible regulation, for example where surfing lessons are included in the lease of a surfboard. In other cases, different sets of rules cannot easily be combined as they may regulate more or less the same elements of the contract, and rules may be conflicting. In such cases, one part of the contract may often be regarded as predominant. Where the owner or the owner's representative has control of the use of the goods, the service element will normally be dominant. A contract

concerning a bus with driver will for example normally imply that the driver decides *how* to drive, while the client decides *where* to drive and *when*. This should not be regarded as a lease. A parallel distinction between "nautical" control and "commercial" control is well known from charter parties. Where the control aspect does not give sufficient indication, the extent and intensity of the service element and the qualifications required to provide such a service should be weighed in the balance. Furthermore, the value of the different elements of the contract may be relevant.

J. The parties

Lessor need not be the owner. In most cases the lessor is the owner of the goods. There may be situations, however, where the lessor may rightfully enter into a contract for lease without being the owner. Such may be the case for the holder of a usufruct right, a right acknowledged in several jurisdictions. Further, where the lessee can sublease the goods, the lessee in the role of sub-lessor is not the owner of the goods.

Lease-and-lease-back etc. In principle, one person (A) may lease the goods to another person (B) and then lease the goods back from B. Such transactions are now and then seen for immovable property, but are probably of small practical interest as far as goods are concerned.

NOTES

I. Contractual nature

1. In most civil law countries, a lease has traditionally been regarded as a contractual and merely obligatory relationship, see for AUSTRIAN law, Rummel (-*Würth*), ABGB I³, §§ 1092–1094, nos. 1 ff (see, however, for some proprietary remedies, Schwimann (-*Binder*), ABGB V³, § 1096, no. 117); for FRENCH law, *Huet*, Contracts spéciaux, nos. 21112 ff; for GERMAN law, MünchKomm (-*Schilling*), BGB III[4], Pref. to § 535 nos. 6 ff. In GREEK law, a lease is a bilateral contract (CC art. 574), which creates obligations and does not confer real rights. However there are several provisions (such as CC art. 614) which render the contractual rights active not only *inter partes*, but also *erga omnes*. A lease is a contract in SPANISH law, cf. the heading of CC Title VI of Book IV. The nature of the lessee's use has been debated; the majority view seems to be that the lessee only has a right through the conduct of the lessor, and that the lessee's right is not a proprietary right, despite any possibility of entering it into the Land Register (*Lete del Rio*, Derecho de Obligaciones II, 332). In CZECH law, the lease is regarded as a simple contractual relationship between the lessor and the lessee (cf. Švestka/Jehlička/Škárová/Spáčil (-*Novotný*), OZ[10], § 1171), but it nevertheless resembles proprietary rights in a number of aspects (e.g. CC § 680(2): every owner of the leased goods is bound by the lessee's rights, and CC § 126(2): the lessee may proceed against third party interferences). A lease only creates an obligatory relationship in HUNGARIAN law also. For many years a "right of lease" could be transferred, but not the ownership itself, and to a certain extent this remains the situation even after the transition in 1989/90 (cf. § 42 of the Act LXXVIII of 1993 on the Lease of Apartments and Other Premises and their Alienation; see also *Besenyei*, A bérleti szerződés[2], 14-15; see also on the proprietary rights of a registered lessee before 1940, Szladits (-*Újlaki*), Magyar magánjog IV, 502). For DENMARK, NORWAY and SWEDEN, see notes to IV.B.–7:101 (Change in ownership and

substitution of lessor). In the UNITED KINGDOM, it is debatable whether or not a lease of goods creates property rights. It has often been speculated that the lessee acquires a proprietary interest in the leased good via possession (*Palmer*, Bailment[2], 81–82, 86–87; *AL Hamblin Equipment Pty Ltd v. Federal Commissioner of Taxation* (1974) 131 CLR 570, 581–582 per *Mason* J), in particular because of the possibility that the lessee will be protected against interference by third parties with knowledge, once in possession of the goods (*Port Line Ltd v. Ben Line Steamers Ltd* [1958] 2 QB 146, 151 per *Diplock* J). The question has never been directly addressed in UNITED KINGDOM law (*Birks*, English Private Law I, para. 4.195).

II. Right of use

2. In several jurisdictions, a distinction is made between a right of use and a right of use and fruits of the thing: AUSTRIAN CC § 1091 (distinction between *Miete* for use and *Pacht* where the object can be used only through hard work; cf. Schwimann (-*Binder*), ABGB V[3], § 1091 nos. 1 ff); ESTONIAN LOA § 339 ("commercial" leases include the right to fruits); GERMAN CC § 535 (*Miete*) and art. 581 (*Pacht*); GREEK CC arts. 619 and 638 (special rules for leases of fruit-bearing things); for HUNGARIAN law, see Introduction, B9; ITALIAN CC art. 1571 (*locazione*) and art. 1615 (*affitto* for "productive" things); LATVIAN CC art. 2112; POLISH law distinguishes between *najem* (right of use) and *dzierżawa* (right of use and fruits), rules on *najem* are applicable also to *dzierżawa* (CC art. 694); for SWISS law, see BSK (-*R.Weber*), OR I[3], Pref. to Art. 253-274g, no. 4. In SPANISH law, the lessee may have a right of "use" or a right of "use and enjoyment", but these two types of lease contract are not treated differently in law (cf. *Albaladejo*, Derecho Civil II[12], 622). For some jurisdictions, it is explicitly said that the lessee's right may include the fruits: CZECH CC § 663 (cf. Knappová *(-Salač)*, Civil Law II[4], 240); DUTCH CC art. 7:202; LITHUANIAN CC art. 6.488 (unless otherwise provided for by the contract); SLOVAK CC § 663; SLOVENIAN LOA § 587(2) (unless otherwise agreed or customary). At common law in ENGLAND, the progeny of livestock born during the lease period may belong to the lessee unless the contract provides to the contrary. The same is true of livestock leased under a hire-purchase contract. See *Tucker v. Farm and General Investment Trust Ltd.* [1966] 2 QB 421, and *Chitty* on Contracts II[29], nos. 33-063 and 38-385). In several jurisdictions, the distinction seems to be of no relevance, at least not for leases of goods; this seems to be the case for example in BELGIAN, FRENCH, DANISH, FINNISH, MALTESE, NORWEGIAN, PORTUGUESE, SCOTTISH and SWEDISH law.

III. Temporary right

3. Legal definitions of a contract for lease regularly include a reference to the temporary character of the contract (see also notes to IV.B.–2:102 (End of lease period)): AUSTRIAN CC § 1090 (a certain period; lease contracts may not last forever, see Schwimann (-*Binder*), ABGB V[3], § 1092, no. 88); CZECH CC § 663; DUTCH CC art. 7.201; for ENGLAND, WALES & NORTHERN IRELAND, see *Chitty* on Contracts II[29], no. 33-063; for SCOTLAND, see *Walker*, Principles of Scottish Private Law III[3], 398; FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 1709 (*certain temps*); for GERMAN law, see MünchKomm (-*Schilling*), BGB[4], Pref. to § 535, no. 5; GREEK CC art. 574 (cf. also art. 610 on lifetime leases); HUNGARIAN CC § 423; ITALIAN CC art. 1571; LATVIAN CC art. 2112; LITHUANIAN CC art. 6.477(1); MALTESE CC art. 1526; POLISH CC art. 659(1); SLOVAK CC § 663; SLOVENIAN LOA § 587(1); SPANISH CC art. 1543 (the lease must be for a determined time, i.e. a determined or determinable period, cf. *Bercovitz*, Manual de

Derecho Civil, 169; the intention is to prevent perpetual bonds on property, cf. TS 26 October 1998, RAJ 1998, 8237 for SWISS law, see BSK (-*R.Weber*), OR I³, art. 253, no. 1. There are exceptions, though; for example the definition in ESTONIAN LOA § 271 does not refer to the temporary character of the contract.

IV. Goods

4. See Comment E9, above, concerning the distinction between leases of immovable property and leases of movables. For practical purposes, rules on the lease of movable property are important primarily for corporeal movables. For some jurisdictions, it is held that a *right* or "immaterial goods" may be the object of a lease: AUSTRIAN CC § 1093; DUTCH CC art. 7:201(2); for FRENCH and BELGIAN law, see Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 128; *La Haye and Vankerckhove*, Le Louage de Choses I², no. 58; GREEK CC art. 638 (on fruit-bearing property, cf. *Georgiadis*, Enochiko Dikaio, Geniko meros , § 23, no. 6, fn. 3; *Georgiadou*, art. 638, no. 2); for HUNGARIAN law on contracts for use and profit (*haszonbérlet*), see Gellert(-*Besenyei*), A Polgári Törvénykönyv Magyarázata[6], 1726; for ITALIAN law, see *Cian and Trabucchi*, Commentario breve[8], art. 1571, no. IV7; LATVIAN CC art. 2113 (tangible property and rights).

5. As for the possible lease of consumable goods, formulas differ. For some jurisdictions, lease rules apply explicitly only to durable goods (AUSTRIAN CC § 1090, LITHUANIAN CC art. 6.477(2)). For HUNGARIAN law, it is held that only durable goods may be leased, *Besenyei*, A bérleti szerződés[2], 23. For other jurisdictions, it is said that lease rules apply only to non-consumable goods in principle, but that exceptions are possible (see for FRENCH law, Rép.Dr.Civ. (*Groslière*), v° Bail, no. 133; for ITALIAN law, *Cian and Trabucchi*, Commentario breve[8], art. 1571, no. IV3). Then there are jurisdictions which do not exclude consumable goods, even if consumption of the goods may not feature amongst the lessee's rights: for BELGIAN law, see *La Haye and Vankerckhove*, Le Louage de Choses I², no. 66; for CZECH law, see Holub *(-Balík, Piková, Pokorná)*, Civil Code II[2], 1031; DUTCH CC art. 7:224 (same object must be returned); for GERMAN law, see MünchKomm (-*Schilling*), BGB[4], § 535, no. 68 (e.g. fruits are leased for decoration); for GREEK law, see *Filios*, Enochiko Dikaio I[2], § 25 B II; for SLOVAK law (*Lazar*, OPH II, 146; Svoboda (-*Górász*), Komentár a súvisiace predpisy, art. 663, 610; rules on leases do not apply where use of the goods will lead to consumption of the goods); SPANISH CC art. 1545 (not lease of goods where goods are consumed through their use); for PORTUGUESE law, see *Romano Martinez*, Direito das obrigações[2], 175 (same object must be returned). This rule will generally follow from the obligation to return the goods at the end of the lease period.

6. It seems that in most jurisdictions, the general rules on lease of goods also apply to contracts for the lease of ships or aircraft. There are, however, special rules on such leases in several countries. In both CZECH and SLOVAK law, general provisions on leases of goods apply also to ships and aircraft. There are, however, special rules on commercial leases of a means of transportation (see CZECH Ccom arts. 630–637; SLOVAK Ccom arts. 630–637). For ESTONIAN law see LOA §§ 291(1) and 312(1). For GERMAN law see CC § 578a for lease of registered ships. In GREEK law, a ship or an aircraft may be the object of a lease contract. The lease of aircraft is specifically regulated by the Code of Air Law (arts. 80–82) and the provisions of the CC (arts. 574 ff) apply to matters which fall outside the Code. The Code of Private Maritime Law regulates only the contract of affreightment and the contract for lease is regulated by the Civil Code. For details and discussion, see for ship leases *Deloukas*, Maritime Law[2], 253–254, 259; *Georgakopoulos*, Maritime Law, 166 ff, and for aircraft leases

Chatzinikolaou-Aggelidou, The aircraft as an object of transactions[3], 230 ff. The general rules in POLISH law on leases of goods apply also to ships and aircraft; for special rules on contracts concerning both ship and crew, see the Sea Code 2001. In PORTUGUESE law, the general rules of the Civil Code apply, cf. Ccom art. 482. There exists special legislation as well, e.g. Decree on Contract of Affreightment. In SPANISH law, the general rules on leases in the CC apply to leases of ships or aircraft, but analogy with the rules on freight contracts in the Commercial Code has been recommended for the lease of ships (*Gabaldón*, Navegación maritíma, 455).

V. In exchange for money or other value

7. Remuneration is usually regarded as a prerequisite for a lease contract: AUSTRIAN CC § 1090, § 1092 (for a fixed price); CZECH CC § 663; DUTCH CC art. 7:201(1) (determinable remuneration); ESTONIAN LOA § 271; FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 1709; GERMAN CC § 535(2); GREEK CC art. 574; HUNGARIAN CC § 423; ITALIAN CC art. 1571; LATVIAN CC art. 2112; LITHUANIAN CC art. 6.477(1); MALTESE CC art. 1526(1); POLISH CC art. 659(1), cf. Radwański (-*Panowicz-Lipska*), System Prawa Prywatnego VIII, 14; PORTUGUESE CC art. 1022, cf. *Romano Martinez*, Direito das obrigações[2], 167; SLOVAK CC § 663; SLOVENIAN LOA § 587; SPANISH CC art. 1543 (the contract is a lease only if there is a certain and determinable rent; TS 2 May 1994, RAJ, 1994, 3557); SWISS LOA art. 253; for ENGLAND, see *Chitty* on Contracts II[29], no. 33-063 (with reference to *McCarthy v. British Oak Insurance Co Ltd* [1938] 3 All ER 1) and for SCOTLAND, *Walker*, Principles of Scottish Private Law III[3], 398.

8. It seems generally accepted that the rent need not be monetary; for AUSTRIA, see Schwimann (-*Binder*), ABGB V³, § 1092 nos. 66 ff; OGH 24 Mar 1998 SZ 71/55; for BELGIAN law, see *La Haye and Vankerckhove*, Le Louage de Choses I², no. 825; for GERMAN law, see Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 535 no. 49. In GREEK law, the rent is usually paid in money, but may also consist in any other value (e.g. work, services, other fungible objects etc.) (*Georgiadis*, Enochiko Dikaio, Geniko meros , § 23, no. 8; see also Georgiades and Stathopolous (-*Rapsomanikis*), art. 574, no. 17). To the same effect for DUTCH law, see Asser (-*Abas*), Bijzondere overeenkomsten IIA[8], no.17. This is also the rule in ESTONIAN law, even if it is not stated explicitly, in CZECH law (see Knappová *(-Salač)*, Civil Law II[4], 240), and HUNGARIAN law (Gellert(-*Besenyei*), A Polgári Törvénykönyv Magyarázata[6], 1675 and 1686–1687). For a similar rule in FRENCH law, see Rép.Dr.Civ. (*Groslière*), v° Bail, no. 467; for ITALIAN law, see Alpa and Mariconda, Codice civile commentato IV, art. 1571, no. 12; LATVIAN CC art. 2119; LITHUANIAN CC art. 6.487(3); MALTESE CC art. 1533(1). In POLISH law, rent may be monetary, non-monetary or both, cf. CC art. 659(2) and Radwański (-*Panowicz-Lipska*), System Prawa Prywatnego VIII, 14. It is held for SLOVAK law that remuneration may be in money or other value (Svoboda (-*Górász*), Komentár a súvisiace predpisy, art. 663; *Lazar*, OPH II, 146). In SPANISH law, the rent need not be in the form of money; rent may be paid in kind, by services or even repairs (*Albaladejo*, Derecho Civil, II[12], 627; *Bercovitz*, Manual, Contratos, 170; *Díez-Picazo and Gullón*, Sistema II[9], 331; *Sánchez Calero*, Curso de Derecho Civil II[4], 378). For SWISS law, see BSK (-*R. Weber*), OR I[3], § 257 no. 3. In the UNITED KINGDOM, both at common law and under statute, the rent may be either money or some other valuable advantage, see Supply of Goods and Services Act 1982, s. 6(3) (ENGLAND, WALES & NORTHERN IRELAND) and s. 11G(3) (SCOTLAND). The valuable advantage may, for example, take the form of work done by the lessee for the lessor, whether with or without the leased goods

(*Derbyshire Building Co. Pty Ltd. v. Becker* (1962) 107 CLR 633) or an 'exchange bailment'.

VI. Leases and sales

9. In the NORDIC countries, a lease is regarded as a sale in relation to rules on credit sales if the intention is that the lessee will become owner of the goods (DANISH Credit Contract Act § 6(2); FINNISH Instalment Sales Act § 1(3); FINNISH Law on Consumer Protection chap. 7 § 3 no. 2; NORWEGIAN Credit Sales Act § 3 no. 1 lit. c, SWEDISH Instalment Sales Act § 1(3) and SWEDISH Consumer Credit Act § 3(2)); see for a discussion e.g. *Persson*, Förbehållsklausuler, 298–312. For CZECH law, such leases are regarded as sales with reservation of title (CZECH CC § 601) or financial leases if the lessee (the buyer) bears the risk of accidental damage; thus an agreement that ownership will pass should not be decisive (but detailed court practice is missing). There are rules covering contracts called "purchase of a leased thing" in CZECH Ccom arts. 489–496. The rules concentrate on the sales part of the transaction, and the lessee's right to buy may be part of the original contract for lease or agreed upon later. For details see *Štenglová/Plíva/Tomsa*, Commercial Code[11], 1211–1218. In PORTUGUESE law, a contract for *locaçaõ-venda* ("lease-sale") implies that the contract for lease is automatically transformed into a contract for sale when the full rent is paid, cf. PORTUGUESE CC art. 936(2) and *Galvão Telles*, Manual, 398. SLOVAK law has special rules concerning commercial lease contracts which include a right for the lessee to purchase the goods (SLOVAK Ccom arts. 489–496); lease law applies to the lease element of the contract and sales law to the purchase element. Under UNITED KINGDOM law, a 'hire-purchase' agreement implies a lease of the goods to the lessee, accompanied by an option to return or to purchase the goods at some time or other (*Chitty* on Contracts II[29], no. 38-270). Under IRISH law, the same 'hire-purchase' agreement implies a lease of the goods to the lessee, under which the lessee may buy the goods or under which property in the goods will pass to the lessee if the terms of the agreement are complied with (Consumer Credit Act 1995 s. 2). The agreement may be in the form of one or more agreements, which will be considered for the purposes of the Act as a single (hire-purchase) agreement at the time the last agreement is made.

VII. Leases with a financing purpose

10. The UNIDROIT Convention on International Financial Leasing (Ottawa 1988) came into force on 1 May 1995 and has been ratified by nine states (Belarus, France, Hungary, Italy, Latvia, Nigeria, Panama, Russia and Uzbekistan). The characteristics of the contracts governed by the Convention are these (art. 1): they are lease contracts where the lessor buys goods on specifications made by the lessee and on terms approved by the lessee; the goods are acquired by the lessor in connection with the lease agreement, and this is known to the supplier; the rent is "calculated so as to take into account in particular the amortisation of the whole or a substantial part of the cost". The essence of the regulation in the Convention is set out in Comment H19 above. A draft model law on leasing was submitted to the General Assembly of UNIDROIT on 30 November 2006. In UNIDROIT's presentation of the model law, it is stressed that the model law is targeted in particular at developing countries and countries in transition, and the preamble points out that the "model for legislators in the general context of contract law as opposed to the specific area of that law reserved to leasing" is the Unidroit Principles of International Commercial Contracts.

11. AUSTRIAN law has no special private law rules on leases with a financing purpose. So-called *Finanzieriungsleasing* is described as one of several types of lease contracts,

characterised *inter alia* by specification of the goods by the lessee, risk on lessee as in a sale, maintenance on lessee, liability for non-conformity directed against supplier (see in general Schwimann (-*Binder*), ABGB V³, § 1090, nos. 71 ff and 82; *Fischer-Czermak*, Mobilienleasing, 48 ff and 163 ff). Some options to buy the goods could make the contract a sale (*Fischer-Czermak*, loc. cit. 162).

12. Lease contracts with a financing purpose are well known in DENMARK, but there is no legislation on these contracts. There is, however, case law concerning various aspects of financial leases, and the contracts are discussed in legal literature, see for all e.g. *Gade*, Finansiel leasing and *Andersen and Werlauff*, Kreditretten, 256–279. In DUTCH law, acquisition of ownership is regarded as an important element of financial leases, and this may lead to application of the rules on hire-purchase (DUTCH CC art. 7A:1576h–x), a sub-category of instalment sales (DUTCH CC art. 7A:1576–1576g).

13. ESTONIAN LOA chap. 17 (§§ 361–367) includes several articles on leasing, described as a contract for lease where the lessor undertakes to acquire an object from a seller determined by the lessee (art. 361). The rules correspond generally with the UNIDROIT Convention. A corresponding regulation is found in LITHUANIAN CC chap. XXX (arts. 6.567–6.574).

14. In FRENCH law, *crédit-bail* is defined in the Monetary and Financial Code art. L 313-7 as an operation where (*inter alia*) equipment, supplied for this transaction, is leased to a professional with a right for the lessee to buy the equipment. The code deals mainly with public law aspects of such operations (and barely makes *crédit-bail* a *contrat nommé*; *Huet*, Contrats spéciaux, no. 23002). Other long-term lease contracts where the goods are acquired by the lessor at the lessee's demand, but where the lessee has no right to buy, have been named *location financière* (*Huet*, Contrats spéciaux, no. 21801). General rules on leases apply to a wide extent (*Huet*, Contrats spéciaux, no. 23002). See also *Bénabent*, Contrats spéciaux[6], nos. 881 ff and Rép.Dr.Com. (-*Duranton*), v° Crédit-bail nos. 38 ff. For comparable legislation (arrêté royal no. 55, 10 November 1967) and similar discussions under BELGIAN law, see *La Haye and Vankerckhove*, Louage de chose I², nos. 30 ff; *Philippe*, Le Leasing[2], nos. 030, 050). For LUXEMBOURG, see decision of the Cour Supérieure de Justice (Appel commercial) of 25 May 1977 (Pas. luxemb. 23 [1975–1977], 533, note by *Mousel*, JT 1977, 694), lease not sale if the lessee is not bound to buy.

15. In GERMAN law, financial leasing contracts are regarded as atypical lease contracts. Characteristics are, *inter alia*, that the lessee specifies the goods and owes the full amortisation of their value (MünchKomm (-*Habersack*), BGB[4], Leasing, no. 1), by paying rent or by other performance (Derleder/Knops/Bamberger (-*Mankowski and Knöfel*), Bankrecht, § 14 nos. 6 ff). Risks (*Sach*- and *Preisgefahr*) are by agreement transferred to the lessee and the latter has no remedies for lack of conformity against the lessor. As a counterpart, the lessor's remedies against the supplier are assigned to the lessee (*Abtretungskonstruktion*); the legal relationship between lessee and supplier is restricted to these remedies and is not regarded as a contractual relationship (Staudinger (-*Stoffels*), BGB (2004), Leasing, nos. 9–15; *Oetker* and *Maultzsch*, Vertragliche Schuldverhältnisse², 734 ff). The notion of financial leasing contracts in GERMAN law is wider than under the UNIDROIT Convention (Kramer (-*Ebenroth*), Neue Vertragsformen², 194).

16. The GREEK Law on Financial Leasing Contracts, as subsequently modified, regulates some aspects of leasing contracts between financial institutions and professional lessees. Characteristics are, *inter alia*, that the goods are selected by the lessee; the lessee bears the expenses of maintenance and repairs, as well as the risk of accidental

damage to the goods; the lessor cannot be held liable for non-conformity of the goods, but assigns to the lessee his claims against the supplier; the lessee has the right at the expiration of the leasing contract to either purchase the leased goods or renew the leasing contract for a fixed period of time (see *Georgiadis*, New Contractual Forms of Modern Economy[4], 33 ff). There is no legislation on (domestic) financial leasing in HUNGARY, except a lengthy definition of financial leasing in Appendix 2 to the Act CXII of 1996 on Credit Institutions and Financial Enterprises (relevant in deciding if an activity is subject to authorisation by the Financial Supervisory Authority or not), see also a rather similar statutory definition of financial leases in the Act C of 2000 on Accounting. On financial leases regarded as contracts of transfer of ownership, see Gellert (-*Besenyei*), A Polgári Törvénykönyv Magyarázata[6], 1677; *Besenyei*, A bérleti szerződés[2], 18; on financial leases regarded as contracts with elements of sale and lease, BH 1999.468. Legf. Bír. Gf. I. 30.985/1989; see also BH 1996. 257. Legf. Bír. Pf. V. 20. 531/1995 (must be decided from case to case); elements of credit, risk of loss decisive: BH 1998. 496 Legf. Bír. Gfv. I. 31. 135/1997; see also BH 1994. 97. Gf. I. 33. 682/1992; BH 1998. 242. Legf. Bír. Gfv. X. 33. 402/1996 (financial lease as instalment sale).

17. There is no contract legislation on leases with a financing purpose in NORWAY, but the lessor's right under a contract for lease implying (in real terms) total amortisation of the cost is to a certain extent regarded as a security right in the goods (Mortgages and Pledges Act §§ 3-22; Rt 2001, 232; *Skoghøy*, Panterett, 115–122).

18. POLISH law distinguishes a contract of lease (CC arts. 659–692) and a contract of leasing (CC arts. 709^{1}–709^{18} – added 26 July 2000). Under a contract of leasing the financing party assumes an obligation to acquire goods from another party and allows the user to use those goods for a rent at least equal to the remuneration paid for the acquisition of the goods. After the leasing period the user may have an option to buy the goods.

19. SLOVAK law has no special legislation on leases with a financing purpose. Contracts with relevant characteristics (goods supplied according to the lessee's choice, risk and maintenance duties borne by the lessee, transfer of ownership after a lease period) are regarded as mixed contracts (or innominate contracts) with elements of lease, sale and credit, cf. Patakyová (-*Blaha*), Commercial Code, art. 489. Recent CZECH court practice obviously also prefers the innominate contract approach (Supreme Court 30 Cdo 2033/2002).

20. In SPAIN, financial leasing is known as from the Royal Law Decree 15/1977. With the Royal Law Decree 1669/1980 the regulation was extended to immovable assets. The substantive rules are in Additional Disposition 7 of the Law 26/1988, and there are other minor and tax regulations. The leasing contract is registrable in the movable goods registry but registration is not compulsory (Law 29/1998). The theoretical nature of this relationship has been highly disputed, ranging from disguised sale to a mixed sale-lease contract (see *Diaz Echegaray* in *Alberto Bercovitz* (dir.) Contratos Mercantiles, I, 2007, pp. 898 ff).

21. In SWEDEN, rules on financial leasing have been proposed by a governmental committee, but the proposal has not led to legislation so far (SOU 1994: 120). For existing legislation and case-law, see e.g. *Möller*, Civilrätten vid financiell leasing; *Håstad*, Den nya köprätten[5], 300–307.

22. For SWISS law, it has been said that financial leasing contracts should be regarded as mixed contracts with more elements of a lease than of a sale (*Honsell*, OR-BT[7], 417). A consensus over definitions has not been reached, but elements such as transfer of

risk, maintenance by lessee and amortisation of value have been mentioned (BSK (-*Schluep and Amstutz*), OR I³, Pref. to arts. 184 ff nos. 81, 84).

23. Under ENGLISH law, equipment or finance leasing contracts are described as a type of bailment, but essentially amount to long-term financing contracts. Such contracts arise where the lessee selects the equipment to be supplied by a manufacturer or dealer and the lessor provides the funds, acquires title to the equipment and allows the lessee to use the goods for all (or most) of their expected useful life. The usual risks and benefits of ownership are substantially transferred to the lessee. During the initial lease period, the rent is calculated to amortise the lessor's investment and financial charges. During the common secondary lease period, the lessee may opt to continue the lease at a nominal rent or the equipment may be sold and a proportion of the sum returned to the lessee as a rebate on the rental payments. The common law rules of contract apply. See *Chitty* on Contracts II[29], no. 33-081.

VIII. Leases and services

24. The distinction between lease contracts and service contracts is sometimes commented upon for national law. The common approach seems to be that there are *either* two contracts (one lease contract and one service contract), *or* the parties' intention, the dominating element etc. is decisive. See for example for AUSTRIAN law Schwimann (-*Binder*), ABGB V³, § 1090 nos. 10, 34, 104 ff, for service contracts see nos. 41, 47 (the intention of the parties, the economic purpose and the main object of the contract); for BELGIAN law, *La Haye and Vankerckhove*, Le Louage de Choses I², nos. 15 ff (dominant element; contract for a crane with an operator may be a lease); for FRENCH law, *Huet*, Contrats spéciaux, no. 21124 (dominant element, also mixed application of lease rules and service rules possible); for GERMAN law, (Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], Pref. to § 535, no. 16 (use of machines in a fitness centre regarded as a lease), MünchKomm (-*Schilling*), BGB[4], Pref. to § 535, no. 20 (contract for a machine that is to be controlled by the owner is not a lease); for HUNGARIAN law, BH 2005. 357. Legf. Bír. Gfv. IX. 30. 018/2005 (contract on integrated hospital information system regarded as mixed contract combining elements of service, lease and financial lease contracts). See also the general rule on mixed contracts in ESTONIAN LOA § 1(1); there is, however, a mixed contract only when there are obligations distinct from the ordinary obligations of a lease (general maintenance is not a service). For CZECH law, see *Pelikánová*, Commercial Code IV, 513; in commercial relations, Ccom art. 275, according to which all interconnected contracts are regarded as separate. In SPAIN the question has been raised where courts have had to deal with the extent of the obligations borne by the provider of parking facilities to third parties (cf. *Espiau-Muñerat*, Revista Derecho Privado 1996, pp. 787 ff).

25. In the UNITED KINGDOM, the mixed application of supply of service and supply of goods rules is possible. Thus, a contract for the hire of goods remains such whether or not services are included and a contract for the supply of services remains such whether or not goods are also hired: see Supply of Goods and Services Act 1982, ss. 6(3) and 12(3) (ENGLAND, WALES, & NORTHERN IRELAND) and s. 11G(3) (SCOTLAND).

IX. The parties

26. It is commonly held that the lessor need not be the owner of the goods, see for example AUSTRIAN CC § 1093, cf. Schwimann (-*Binder*), ABGB V³, § 1092, no. 22; for BELGIAN law, see *La Haye and Vankerckhove*, Le Louage de Choses I², no. 121; for CZECH law, see Švestka/Jehlička/Škárová/Spáčil (-*Novotný*), OZ[10], 1173 (the

lease is binding on the owner); for DUTCH law, see Asser (-*Abas*), Bijzondere overeenkomsten IIA[8], no. 18; for FRENCH law, see *Huet*, Contrats spéciaux, no. 21132; for GREEK law see *Georgiadis*, Enochiko Dikaio, Geniko meros, § 23, no. 7; A.P. 108/2003 EllDik 2003, 976; 272/1981 NoB 29, 1492; for ITALIAN law, see *Cian and Trabucchi*, Commentario breve[8], art. 1571, no. II2; LATVIAN CC art. 2115; LITHUANIAN CC art. 6.477(4); MALTESE CC art. 1530; for POLISH law, see *Pietrzykowski*, Kodeks cywilny II[4], art. 659, Nb. 9, 199; for PORTUGUESE law, see *Romano Martinez*, Direito das obrigações[2], 173; for SLOVAK law, see Svoboda (-*Górász*), Komentár a súvisiace predpisy, art. 663; for SPANISH law, *Bercovitz*, Manual de Derecho Civil, 171; for SWISS law, see BSK (-*R.Weber*), OR I³, art. 253, no. 9.

IV.B.–1:102: Consumer contract for the lease of goods

For the purpose of this Part of Book IV, a consumer contract for the lease of goods is a contract for the lease of goods in which the lessor is a business and the lessee is a consumer .

COMMENTS

A. Consumer rules and structure of the draft

Consumers and contracts for the lease of goods. Contracts for lease to which consumers are parties require special attention. Consumers typically have less bargaining power and less information concerning the leased goods, the law and the circumstances of the contract than businesses. Rules protecting consumers' interests as contracting parties are common both in national law and Community legislation. Consumers may be parties to lease contracts as lessors, as lessees or both. Constellations in which the consumer is lessor and the business is the lessee ("consumer-to-business") are probably not very frequent as far as goods are concerned and it has been deemed unnecessary to include particular rules for these situations. Lease contracts where both parties are consumers ("consumer-to-consumer") are more common, but consumer protection rules are not needed here either, as the typical element of inequality of the parties is not present. It should, however, be considered whether certain rules may create problems where both parties are non-professionals. Consumer protection rules should apply to contracts where the lessor is a business and the lessee is a consumer. This is comparable to consumer protection rules already in existence in national law, Community legislation and other parts of these model rules.

General principles and consumer contracts. Several consumer protection rules are found in general parts of these model rules that apply to several or even all contracts between businesses and consumers. Examples are rules on non-discrimination and information duties at the pre-contractual stage, the right to withdraw from certain contracts, and rules on unfair terms. Some of these rules apply to contracts between businesses as well. It is not necessary to repeat general protection rules in this Part of Book IV.

Consumer protection in this Part of Book IV. The consumer rules of this Part of Book IV are found in the relevant chapters according to their content. Two alternative structures were considered but rejected. One was to gather all special rules concerning consumers in one chapter. This would have had the advantage of making it easier to get an overview of consumer protection. However, it would also have had negative effects, in so far as obliging the reader to consult both the relevant substantive chapter and the consumer chapter in order to get the full picture. A second alternative was to have a separate set of principles for consumer contracts for lease, setting out all the applicable rules, whether deviating from or identical to the rules concerning business-to-business leases (and consumer-to-consumer leases). This would have allowed the consumer to consult just one set of principles. Rules dealing with consumer contracts for lease in particular are, however, rather few, and a separate set of principles would have implied extensive repetition of general provisions. It must also be borne in mind that it would have been necessary for the consumer to consult general parts of the model rules in any case, it not being feasible to gather under one heading absolutely all rules that might affect a consumer contract for lease.

Mandatory rules. Consumer protection rules may not normally be derogated from by the parties to the detriment of the consumer. Where, however, the consumer has notified the other party of a non-performance, the parties are free to make a settlement concerning the effects of the non-performance within the ordinary frame of freedom of contract applicable also to consumer contracts. In other words, the consumer may not as a rule waive rights *beforehand* (see II.–1:102 (Party autonomy). Further, the parties are in most cases free to decide whether or not to enter into a contract and to agree on what is to be leased, when, for how long and at what price. Some restrictions, though, follow from rules on information duties, unfair terms etc. The mandatory rules found in this Part of Book IV mainly concern the effects of non-performance. This holds true also for IV.B.–1:103 (Limits on derogation from conformity rights in a consumer contract for lease), a provision limiting the possibility to include terms which waive or restrict the rights resulting from the lessor's obligation to ensure that the goods conform to the contract.

B. Definition of consumer contract for lease

Consumer contract definition for the purpose of this Part of Book IV. Under Annex 1, both "consumer" and "business" are defined. These definitions apply for the purposes of the present definition of a consumer contract for lease. The definition covers only business-to-consumer contracts, not consumer-to-business or consumer-to-consumer contracts; cf. Comment A. The provision in IV.A.–1:204 (Consumer contract for sale) has a corresponding definition for that situation.

Consumer. Under the definition in Annex 1 a consumer is a "natural person", i.e. legal persons (associations, companies, public law entities etc.) are not consumers. Further, the person must act "primarily for purposes which are not related to that person's trade, business or profession". The lessee's intended use of the goods is irrelevant as long as the lease is not for trade, business or professional purposes. If, for example, the lessee intends to sublease the goods, the lease remains a consumer contract for lease as long as the sublease is not primarily related to the lessee's trade, business or profession.

The lessor. The lessor may be a natural or a legal person. The lessor does not have to be a full-time professional, but the activities must be of a kind that would normally be qualified as a "business".

NOTES

I. EU legislation

1. Present EU legislation on consumer contract law is fragmented and not fully consistent. Some of the legislation is of a general character, e.g. the Unfair Contract Terms Directive (93/13), while other parts of legislation concern specific contracts, e.g. the Consumer Sales Directive (99/44). The latter deals with lack of conformity of the goods, but not with delay, and not all effects of lack of conformity are covered. There is no instrument dealing with the contract for lease in particular.
2. The EU legislation on consumers' rights is by its character mandatory, i.e. as a rule the protection given to the consumer's interests cannot be excluded. On the other hand, amicable settlements of conflicts must normally be allowed. Such principles are expressed explicitly in art. 7(1) of the Consumer Sales Directive: "Any contractual

terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer."

3. A more general rule is found in the Unfair Contract Terms Directive. Terms that are not individually negotiated and that are *unfair* are not binding on the consumer (art. 3(1), cf. art. 6(1)). One term in a list of terms that "may be regarded as unfair" (art. 3(3)) concerns exclusion or limitation of liability: "(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him". As will be seen, this is not an absolute prohibition of limitations to or exclusion of remedies.

II. Definition of consumer contract

4. There is no uniform definition of consumer contracts in Community legislation. In particular, there are nuances regarding contracts for mixed purposes (partly for professional purposes, partly for non-professional purposes (on either side). An initiative has been taken to harmonise the definitions of "consumer" and "professional", cf. Green Paper on the Review of the Consumer Acquis (COM (2006) 744 final). Normally, Community legislation on consumer contracts applies to business to consumer contracts, and not to contracts where both parties are consumers.

III. National law

5. EU legislation on consumer contracts is implemented in national legislation in various ways. As the relevant EU legislation has the character of "minimum" directives, some jurisdictions have more extensive consumer protection. One example is the "total" regulation of consumer sales in FINLAND, NORWAY and SWEDEN, i.e. a general regulation of the contractual relationship, not only the issues dealt with in the Consumer Sales Directive (FINNISH Law on Consumer Protection chap. 5, NORWEGIAN and SWEDISH Consumer Sales Act). In SPAIN there is a general Act that encompasses most rules on consumer contracts (Consumer Protection Act of 16 November 2007). The regulation of consumer sales in these countries may not, as a general rule, be derogated from to the detriment of the consumer. The SWEDISH Consumer Sales Act § 32(3) allows agreements excluding liability for the consumer's loss related to trade or profession; liability under the NORWEGIAN Consumer Sales Act does not include the consumer's loss related to trade and business, see § 52(2)(b). These countries have "total" legislation on some service contracts as well where the same model is found (FINNISH Law on Consumer Protection chap. 8, NORWEGIAN Consumer Craft Services Act and Housing Construction Act, SWEDISH Consumer Services Act). This legislation does not cover lease of goods. In CZECH law, consumer contracts are defined as "sales contracts, services contracts and other contracts whose parties are a consumer on one side and a supplier on the other side" (CC § 52(1)), i.e. a contract for lease may easily qualify as a consumer contract. The definition of "supplier" corresponds to EU legislation; the definition of "consumer" is not restricted to natural persons. CC § 55(1) states that "provisions of consumer contracts cannot be derogated from to the detriment of the consumer and that, especially, the consumer cannot waive his statutory rights or otherwise undermine his legal position"; the scope of the rule is discussed, see Švestka/Jehlička/Škárová/Spáčil (-*Hulmák*), OZ[10], 376. See also CC § 56, forbidding limitation of liability against

consumers for defects and damage. The general rules on leases under DUTCH law are influenced by the provisions on consumer sales, but a distinction between consumer leases and other leases is not made. Consumers are generally protected against unreasonable non-negotiated contract terms (CC arts. 6:231–247). For financial leases, there are protective rules under the Statute on consumer credit (*Huls*, Wet op het consumentenkrediet).

6. In some countries parts of the general rules on non-performance of sales are made mandatory in consumer sales, even to a greater extent than required by the Consumer Sales Directive. Examples are the AUSTRIAN ConsProtA § 9 and GERMAN CC § 475 (both with a reservation for agreements limiting liability for damages, in so far as the agreement is not contrary to rules on unfair standard terms). In AUSTRIA this technique is also used for lease contracts, as the provision just referred to comprises remedies regarded as special rules concerning non-conformity, i.e. rent reduction (Schwimann (-Binder), ABGB V³, § 1096, no. 5) and termination (loc. cit. § 1117 no. 3).

7. Certain rules of the FRENCH Consumer Code apply to lease contracts, especially those concerning price-information or the obligation to provide information and advice; a legal person cannot have the quality of being a consumer (see *Collart Dutilleul and Delebecque*, Contrats civils et commerciaux[7], no. 422). Rules on abusive contract clauses also apply (see in detail, JClCiv (-*Cayron*), arts. 1708–1762, fasc. 660, nos. 44–49). The same model is found in PORTUGUESE and SPANISH law; general rules e.g. on information are applicable also to leases, see PORTUGUESE and SPANISH Consumer Protection Acts. However, in SPAIN the special regulation on Residential Leases (1994) should be considered as quasi-consumer regulation, though this provision also applies to consumer-consumer lease contracts. Some special rules on consumer leases are found in LITHUANIAN CC arts. 6.504 ff. There are rules on extraordinary termination of consumer leases in SWISS LOA art. 266k and ESTONIAN LOA § 322. The GREEK Law on the Protection of the Consumers, art. 2, which regulates general terms of transactions and unfair contract terms, applies to consumer contract for lease contracts; according to art. 1(4) both natural and legal persons can have the quality of a consumer if they are the final recipients of a product or service.

8. In the UNITED KINGDOM, the Consumer Credit Act 1974 (amended by the Consumer Credit Act 2006) imposes specific rules on ‘consumer hire agreements’. Consumer hire agreements are defined in s. 15(1) (as amended) as being any lease of goods to an individual which is not a hire-purchase contract and which is capable of subsisting for more than three months. These agreements are regulated where they are not exempted agreements (ss. 16(6), 16A and 16B); agreements entered into wholly or predominantly for the purposes of business and under which the lessee is required to make lease payments exceeding £25 000 are exempted. In the case of regulated ‘consumer hire agreements’, the Act requires that information be provided to the lessee prior to concluding a regulated agreement (s. 55); controls the form and content of such agreements (ss. 60–61); imposes a duty on the lessor to supply copies of the agreement on request (ss. 62–64); allows the lessee a right to cancel within a certain ‘cooling off’ period (ss. 64, 67–73) and the right to terminate at any time 18 months after the making of the agreement (s. 101); and imposes a duty of notice on the lessor before certain actions may be taken to enforce the terms of the contract (s. 76); amongst other things. The Act imposes similar rules on ‘consumer credit agreements’ (including hire-purchase agreements). The Supply of Goods and Services Act 1982 applies to all leases, but provides for more stringent protection for consumer lessees (as defined in the Unfair Contract Terms Act 1977, s. 12 with respect to ENGLAND,

WALES and NORTHERN IRELAND and s. 25(1) with respect to SCOTLAND) in so far as remedies and exclusion of liability are concerned. In all cases the burden of proof lies on the lessor/creditor to prove that the lessee/debtor does not deal as a consumer.

9. In IRELAND, the Consumer Credit Act 1995 imposes certain conditions on 'consumer hire agreements' where the lease subsists for more than three months. Such agreements must be in writing, contain certain information, provide for a ten-day 'cooling off' period and be signed by the consumer (s. 84). If these provisions are not complied with, the lessor risks not being able to enforce the contract at all. The consumer is also entitled to terminate the contractual relationship at any time, by giving three months notice (or less if specified otherwise in the contract) (s. 89). The same Act precludes a lessor from excluding or limiting liability with regard to title and quiet possession (absolutely), and with regard to correspondence with description and/or sample, quality and fitness for purpose (unless the exclusion is fair and reasonable) (s. 88). It should be noted that whilst the definition of a consumer is similar ("a natural person acting outside his trade, business or profession", s. 2) judicial interpretation has tended to be more restrictive in IRELAND than in the UNITED KINGDOM (cf. *Cunningham v. Woodchester*, unreported, HC, 16 November 1984 in IRELAND and *R. & B. Customs Brokers Co. Ltd. v. United Dominions Trust Ltd.* [1988] 1 WLR 321 in the UNITED KINGDOM). However, this IRISH case was based on the definition of a consumer used by the Sale of Goods and Supply of Services Act 1980 (s. 3) and not the more recent definition found in the Consumer Credit Act 1995 s. 2(1).

10. A range of models is applied for implementing the Unfair Contract Terms Directive in different countries (general clauses covering all contracts, general clauses for all consumer contracts, general clauses only for non-negotiated terms, binding lists of unfair terms, non-binding lists of unfair terms). Examples of application of such rules to consumer leases may be found in case law and are also discussed in legal literature. It has not been found necessary to refer to such examples here. According to the SWISS LOA art. 256(2) agreements deviating from art. 256(1) (transfer of object in suitable condition for the predetermined use and maintain in such condition) to the detriment of the lessee are null and void if they are included in pre-formulated general business conditions. This rule applies also for consumer contracts for lease. As a consequence of this provision the lessee's rights in case of defects (*Mängelrechte*) cannot be excluded or restricted in standard contract forms.

IV. Financial leases in particular

11. It is not unusual that consumers lease goods for financing purposes. In such cases the models of financial leasing etc. may be influenced by consumer protection rules. In AUSTRIAN law, the Consumer Protection Act § 9 may make it impossible for example to limit the lessor's liability for lack of conformity (*Fischer-Czermak*, Mobilienleasing, 253 ff, in special 255). For CZECH law, the general rule in CC § 55 against derogation to the detriment of a consumer (see note *III5*) would create problems if the general lease rules were to apply to financial leases. In ESTONIAN law, there is no difference between consumer and non-consumer contracts concerning remedies for lack of conformity in financial lease contracts. The FRENCH Consumer Code applies to *location-vente* contracts, i.e. contracts for lease with an option to buy, as credit operations (art. L. 311-2). In a consumer contract, a clause that puts all risks in connection with the goods on the lessee would be abusive (*Huet*, Contrats spéciaux, nos. 23007 ff, *Bénabent*, Contrats spéciaux[6], no. 895). According to the GERMAN CC § 500, certain rules on consumer credit contracts are also applicable to financial

leasing contracts between a professional and a consumer (e.g. right to withdraw, right to terminate). Concerning remedies for lack of conformity, there is in general no difference between consumer and non-consumer contracts (MünchKomm (-*Habersack*), BGB[4], Leasing, no. 35). However, the consumer lessee's objections against the supplier may be turned against the lessor (*Einwendungsdurchgriff*, see Staudinger (-*Stoffels*), BGB (2004), Leasing, nos. 262 ff). Consumer sales rules are not applicable to consumer financial leasing contracts (MünchKomm (-*Habersack*), BGB[4], Leasing, nos. 38 ff, see also BGH 21 December 2005, NJW 2006, 1066, see also *Stoffels*, LMK 170499: the typical construction of assignment of remedies is no circumvention of the rules on consumer sales; where assignment fails, the remedies of lease law apply between the lessee and the lessor). The GREEK Law on the Protection of the Consumers is applicable to financial leasing, as for the purpose of this law "consumer" is broadly defined as the final recipient of a product or service (art. 1(4)); accordingly terms included in leasing contracts are subject to the control of their legality according to art. 2 on unfair contract terms. Under the NORWEGIAN Credit Sale Act § 29 (and a regulation), consumer leases of movables that in fact secure a credit or have this function can always be terminated with one month's notice, given that the lease period will be at least three months. The agreement may give the lessor a right to charge "general" rent for the period which has lapsed in such a case instead of the agreed rent. The SWISS Consumer Credit Act applies to some lease contracts, concerning e.g. right to termination and remedies against the lessor (see BSK (-*Schluep* and *Amstutz*), OR I[3], Pref. to art. 184 ff, no. 110; *Roth*, AJP 2002, 968, 975, 976; *Honsell*, OR-BT[7], 420 ff). In the UNITED KINGDOM, the Consumer Credit Act 1974 imposes similar rules to those listed above for 'consumer hire agreements' to 'consumer credit agreements' (including hire-purchase agreements). Once again the agreement must be a regulated agreement (s. 8(3)). In addition, certain terms (concerning description, quality, fitness for purpose, sample, etc.) are implied into hire-purchase contracts by the Supply of Goods (Implied Terms) Act 1973 (ss. 9-11). None of these terms may be restricted or excluded as against a person "dealing as a consumer" (Unfair Contract Terms Act 1977 s. 6(2)). Breach of one of these conditions entitles a consumer to elect to terminate or affirm the contract and claim for damages (Supply of Goods (Implied Terms) Act 1973 s. 11A in ENGLAND, WALES and NORTHERN IRELAND and s. 12A(2) in SCOTLAND). In IRELAND, similar protection to that mentioned above with respect to consumer hire agreements is afforded to consumer hire-purchase agreements (defined in s. 2) by the Consumer Credit Act 1995. See further, ss. 58–83.

IV.B.–1:103: Limits on derogation from conformity rights in a consumer contract for lease

In the case of a consumer contract for the lease of goods, any contractual term or agreement concluded with the lessor before a lack of conformity is brought to the lessor's attention which directly or indirectly waives or restricts the rights resulting from the lessor's obligation to ensure that the goods conform to the contract is not binding on the consumer.

COMMENTS

General

Mandatory rules in consumer contracts for lease. The parties to a consumer contract for lease are in most cases free to decide whether or not to enter into a contract and to agree on what is to be leased, when, for how long and at what price. On the other hand, the consumer's rights resulting from the lessor's non-performance may not, as a rule, be waived beforehand, cf. Comment A, the last paragraph to IV.B.–1:102 (Consumer contract for the lease of goods) and Comment B to IV.B.–3:102 (Conformity with the contract at the start of the lease period). The purpose of the present Article is to specify that derogation to the consumer's detriment cannot be achieved indirectly, for example by describing the goods in a way that it is, in real terms, a derogation from the lessor's obligation to ensure that the goods conform to the contract.

Illustration 1
X wishes to lease a suit for a wedding and contacts Y, a professional who leases wedding suits. The contract is concluded after X has seen a sample suit and measures have been taken. The contract includes a term in which the lessee accepts that size and colours may vary, depending on the availability of suits in Y's shop on the relevant date. This term is not binding on X, as its effect is to waive the rights resulting from the lessor's obligation to ensure that the goods conform to the contract.

NOTES

See notes to IV.B.–1:102 (Consumer contract for the lease of goods) on the mandatory character of consumer protection rules. The present Article has parallels in IV.A.–2:309 (Limits on derogation from conformity rights in a consumer contract for sale) and in the Consumer Sales Directive art. 7(1).

IV.B.–1:104: Limits on derogation from rules on remedies in a consumer contract for lease

(1) In the case of a consumer contract for the lease of goods the parties may not, to the detriment of the consumer, exclude the application of the rules on remedies in Book III, Chapter 3, as modified in Chapters 3 and 6 of this Part, or derogate from or vary their effects.

(2) Notwithstanding paragraph (1), the parties may agree on a limitation of the lessor's liability for loss related to the lessee's trade, business or profession. Such a term may not, however, be invoked if it would be contrary to good faith and fair dealing to do so.

COMMENTS

A. Mandatory rules on remedies

Agreements excluding or restricting remedies. According to III.–3:105 (Term excluding or restricting remedies), the general rule is that remedies for non-performance may be excluded or restricted by a term in the contract, with the qualification, though, that such a term may not "be invoked if it would be contrary to good faith and fair dealing to do so". For consumer contracts for lease (as defined in IV.B.–1:102 (Consumer contract for the lease of goods)) the main rule should be the opposite: agreements to the detriment of a consumer should not be allowed. Consumer protection is based mostly on the rules on remedies, while the parties are normally free to agree on performance: what is to be leased, at what price and for how long (but see IV.B.–1:103 (Limits on derogation from conformity rights in a consumer contract for lease)). An alternative could be to rely on general rules on unfair terms. This might, however, mean that the outcome would depend on the circumstances of the particular case. Making the rules on remedies mandatory offers a greater legal certainty in consumer contracts. The parties may, however, agree on derogations from the rules on remedies as long as the agreement is not to the detriment of the consumer. Further, an exception should be made for agreements limiting the lessor's liability for losses related to the lessee's trade, business or profession, cf. paragraph 2. Agreements settling claims based on non-performance are also allowed, as discussed in the following paragraph.

Settlement agreements. What may undermine consumer protection is agreements made *beforehand*, i.e. before the consumer lessee knows of non-performance. The typical imbalance between the business lessor and the consumer lessee with regard to bargaining power and information could, if derogations were allowed, lead to the exclusion of or restrictions to remedies in situations where the lessee has no real choice or is blind to the consequences of the derogation. This holds true both for the initial contract and later amendments. However, where the lessee is aware of non-performance and invokes one or more remedies, the parties should be free to agree on a settlement. In this situation, the lessor is already bound by the contract, and it is normally much easier for the lessee to appreciate the consequences of a settlement than those resulting from a prior agreement. Admittedly, there may be cases where a consumer for various reasons accepts a settlement which a business party would have rejected, but this must be dealt with under the general rules on validity. It would be going too far to restrict all possibilities of settling an actual claim. It is not always easy to distinguish settlement agreements from agreements excluding or restricting remedies. In most cases an agreement concerning non-performance cannot be made prior to the lessee's notification of the non-performance, unless it is clear that the lessee, without having notified, nonetheless knows that there is non-performance. A settlement agreement can typically not comprise future non-performance (as where the lessee is offered compensation "once and for all").

B. Application to lessee's remedies

Relevant remedies of lessee. It must be discussed with regard to each type of remedy whether or not a rule making the remedy mandatory is called for. As for the lessee's right to *enforce specific performance* of the relevant obligation, this remedy is already limited by general rules in order to avoid imposing an unreasonable burden on the debtor, cf. III.–3:302 (Enforcement of non-monetary obligations). Normally, a business lessor has no need to limit even more the lessee's right to enforcement of specific performance. On the other hand, it may be said that enforcement of specific performance is in many cases a rather cumbersome remedy to pursue, in particular for a consumer, and that a limitation to this remedy would often be of small practical importance. However, in the situations where the remedy is most needed, for example where repair of the goods by someone other than the lessor is hard to obtain, the consumer should be protected against derogations in the contract. The best practicable solution seems to be that the remedy generally cannot be excluded by contract in consumer leases. The lessee's *right to withhold performance of the reciprocal obligation* will protect the lessee from granting unsecured credit to the lessor and further give the lessor an incentive to perform. In particular the former of these effects is important to a consumer lessee. There is reason to believe that possible derogations from this right would lie precisely in those situations where the remedy was most needed. A consumer may not always appreciate beforehand the effects of a derogation clause. Both the lessee's right to *terminate the contractual relationship* and the lessee's *right to reduce the rent* are at the heart of the reciprocity of the contractual obligations: non-performance of the lessor's obligations has direct consequences regarding the lessee's obligations under the contract. Termination of the contractual relationship can sometimes be a drastic measure, entailing grave consequences for the lessor. It is, however, hard to see that there should be a legitimate need on the part of the lessor for derogation from a consumer lessee's right to terminate in the case of fundamental non-performance, or to limit the effects of such a termination. As for *rent reduction*, derogations are hardly justifiable in consumer leases; they would imply that the lessee was obliged to pay full rent for a counterperformance of reduced value. The remedies just discussed should be mandatory, in the sense that they cannot be derogated from to the detriment of the consumer. The lessee's claim for damages, however, raises some particular problems, cf. next comment.

Limitation of liability for certain losses. The lessee is entitled to damages for loss caused by the lessor's non-performance, III.–3:701 (Right to damages), and the damages must as a rule "put the creditor as nearly as possible into the position in which the creditor would have been if the obligation had been duly performed" (III.–3:702 (General measure of damages)). The loss must, however, be foreseeable: "The debtor in an obligation which arises from a contract or other juridical act is liable only for loss which the debtor foresaw or could reasonably be expected to have foreseen at the time when the obligation was incurred as a likely result of the non-performance, unless the non-performance was intentional, reckless or grossly negligent", III.–3:703 (Foreseeability). Even with this foreseeability test the lessor may want to limit liability for losses related to the lessee's trade, business or profession. Such losses may occur for example where the breakdown of a leased car causes the lessee to return late from a holiday. The loss is foreseeable, but it is still different from the typical losses suffered in consumer relationships and more difficult to calculate from the lessor's point of view. Agreements limiting liability for these kinds of losses should be allowed. The term cannot be invoked, however, if it would be contrary to good faith and fair dealing to do so. The term can, for example, normally not be invoked if the non-performance was intentional, reckless or grossly negligent.

Non-business lessor. The definition in IV.B.–1:102 (Consumer contract for the lease of goods) does not include contracts between two non-businesses (consumer-to-consumer) or contracts between a non-business lessor and a business lessee (consumer-to-business). It should be considered whether or not there is a need for special rules on remedies in contracts where the lessor is a consumer (i.e. where the lessor is a natural person acting primarily for purposes which are not related to that person's trade, business or profession). There seems to be no reason to derogate from the general rules on remedies implying a temporary or permanent loss of income for the lessor, i.e. withholding of rent, reduction of rent and termination. These are remedies resulting from the reciprocity of the obligations and restricting the lessee's right to pursue them would mean an unacceptable imbalance in the contractual relationship. Normally, a non-business lessor will not have relied on the income from the lease to an extent that makes such remedies unreasonable. As for the lessee's right to enforce specific performance, including by remedying a lack of conformity, this may in some cases entail considerable costs for the lessor, in particular for a non-business lessor often dependent on professional assistance from third parties. However, specific performance cannot be enforced where performance would be unreasonably burdensome or expensive, and this flexible rule makes it possible to take the lessor's situation into consideration. Thus, no particular rule for non-business lessors seems to be necessary. Liability for damages may in some cases be burdensome for a non-business lessor, in particular where the lessee is a business which has suffered losses related to the trade, business or profession. In IV.A.–4:202 (Limitation of liability for damages of non-business sellers), there is a rule limiting – with some exceptions – the liability of a non-business seller to the contract price. It does not, however, seem appropriate to include such a rule for lease contracts. Where the lease period can be terminated by notice, the total rent amount may be very small compared with the loss normally to be expected as a result of non-performance, and the rule could put the other party in a most unsatisfactory position. The parties are free, within the general frame of good faith and fair dealing, to agree on limitations of liability, cf. III.–3:105 (Term excluding or restricting remedies). Further, the prerequisite of foreseeability, III.–3:703 (Foreseeability) and the lessee's duty to reduce the loss, III.–3:705 (Reduction of loss) will work in favour of the non-business lessor as much as the business lessor. In some cases, a non-business lessor may invoke the excuse of impediment, cf. III.–3:104 (Excuse due to an impediment), even if a business lessor would not be in a position to do so in a corresponding situation (e.g. where the non-business lessor could not reasonably have been expected to have taken the impediment into account or to have overcome its consequences). The conclusion is that there is not sufficient need to include special rules on remedies against non-business lessors.

C. Application to lessor's remedies

The Article covers the lessor's remedies as well as the lessee's, as is made plain by the reference to Chapter 6 of this Part.

Standardised damages, fees etc. Remedies are now and then agreed on in the contract as standardised damages, for example a fixed sum of money per day for delayed return of the goods or fixed "prices" for damaged parts of the goods. Other clauses may have the same effect: a "cancellation fee" may for example be compared to damages for fundamental non-performance. In such cases, the agreed remedy amounts to a derogation to the detriment of the consumer to the extent that the effect of the agreed clause in the particular case is less favourable to the consumer than would have been the effect of the remedies described in this Part of Book IV. It is not considered necessary to add a rule allowing for agreed remedies that

are *typically* equal to or more favourable to the consumer than the rules contained in this Part of Book IV, even if the remedy is less favourable in the particular case.

Other remedies. The rules on the lessor's right to *enforce specific performance* of the lessee's obligations are flexible. For non-monetary obligations the rules are found in III.–3:302 (Enforcement of non-monetary obligations). These rules exclude for example enforcement of specific performance where performance would be impossible or unreasonably burdensome. It has not been found appropriate to allow agreements derogating from such limitations of the lessor's right. As for monetary obligations, there are rules specifically designed for lease contracts in IV.B.–6:101 (Limitation of right to enforce payment of future rent). These rules are flexible, referring to a great extent to reasonableness, and there should be no legitimate need to derogate from the rules to the detriment of a consumer. Agreements extending the lessor's right to *terminate* the contractual relationship, e.g. contract terms to the effect that any delay in payment or any use which does not accord with the contract is regarded as fundamental non-performance, can have unexpected and unreasonable effects, and there is hardly a strong need to apply such clauses in consumer contracts for lease.

D. Non-mandatory rules on performance

Quality, quantity and price. It follows from the principle of freedom of contract that the parties, consumers as well as business parties, are free to agree on what goods are to be leased, their quantity and quality and the rent to be paid. Rules concerning these issues (cf. Chapters 3 and 5) are default rules intended to supplement the individual agreement. This is also the case for consumer leases: the lessee may well agree to lease goods of substandard quality or to pay more than the market price. Consumer protection is concentrated on remedies, cf. Comment A, in addition to rules on pre-contractual information, the right to withdraw etc.

Descriptive terms restricting remedies. Sometimes the terms of a contract are formulated as general descriptions of the performance while the real effect is to restrict remedies. This may be the case if the lessee agrees to "accept" the goods as they are at the time when the contract is made or declares "knowledge" of the quality of the goods. Such terms may for example serve as a warning that the goods are not new, and that traces of earlier use of the goods must be expected. However, if the goods are in a condition worse than the lessee would reasonably expect under the circumstances, despite the above-mentioned contractual term, there is a lack of conformity and the ordinary rules on remedies apply to a consumer contract for lease (and often to other leases as well). Mandatory rules on remedies can of course not be circumvented just by the use of other words. This issue is dealt with in IV.B.–1:103 (Limits on derogation from conformity rights in a consumer contract for lease) (see Comments to that Article). As a guideline, specific descriptions and warnings may be accepted while broad reservations regarding quality and quantity may be without effect.

NOTES

1. See notes to IV.B.–1:102 (Consumer contract for the lease of goods).
2. In SPAIN consumer rights are as a principle excluded from waiver in the contract (ConsProtA art. 10). In non-consumer contracts, parties cannot surrender their rights to

compensation where the non-performance or the lack of conformity were due to the fraud of the other party (CC art. 1107).

3. According to the AUSTRIAN ConsProtA § 6(1), clauses shifting the burden of proof to the consumer (no. 11) and clauses on excessive interest rates in cases on late payment (no. 13) are not binding. An agreement making the lessee liable for casual damage would in effect be contrary to the rule in the ConsProtA § 6, under which the lessee's remedies for lack of conformity cannot be excluded by contract out (see *Fischer-Czermak*, Mobilienleasing, 315).

4. According to the ESTONIAN LOA § 322 the lessee may, without liability for loss, always terminate the lease by giving thirty day notice if it is (in broad terms) a lease between a consumer lessee and a business lessor. General rules in LOA §§ 35–45 on unfair standard terms also apply to lease contracts.

5. The FRENCH Consumer Act art. L. 132-1 on abusive terms also applies to lease contracts. See for example Cass.civ. 17 March 1998, Bull.civ. 1998.I, no. 116: in the case of a lease of a vehicle a clause shifting the risk of accidental damage or *force majeure* to the lessee was regarded as an abusive term.

6. In GERMAN law, the lessee is protected by rules concerning non-negotiated terms (CC §§ 305–310) against e.g. terms making the lessee liable for casual damage or terms expanding the lessee's vicarious liability (Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 538, no. 7; Schmidt-Futterer (-*Langenberg*), Mietrecht[9], § 538, no. 17; BGH 1 April 1992, NJW 1992, 1761), or terms deviating from the rules on termination to the detriment of the lessee (Schmidt-Futterer (-*Blank*), loc. cit. § 543 no. 209; MünchKomm (-*Schilling*), BGB[4], § 543, no. 75).

7. According to art. 2(7) of the GREEK Law on the Protection of the Consumers, terms allowing the supplier to terminate the contract with no specific or significant cause (no. 5), or to terminate a contract for an indefinite period without setting a reasonable term (no. 6), terms shifting the burden of proof to the consumer (no. 27), and terms imposing an excessive financial burden on the consumer in the case of non-performance (no. 30) are regarded as abusive and thus not binding. Under HUNGARIAN law, a consumer lessee is protected by the general rule against unfair non-negotiated terms in consumer contracts, see CC § 209/A (2).

8. The prohibition of abusive clauses under POLISH law also applies to lease contracts (POLISH CC art. 385^3).

9. The general provisions of SLOVAK CC § 53 on unfair terms apply to lease contracts. In SPANISH law, consumer contractual protection cannot be derogated from by agreement (ConsProtA art. 10). Although the whole body of law related to unfair terms in consumer contracts (ConsProtA arts. 82 ff) normally applies to lease contracts, it is noteworthy that the most outstanding protection regime is in the Urban Lease Act, and that this regime applies even where the lessor is not a professional.

10. In SWISS law, certain rules concerning contracts for lease may not be derogated from to the detriment of the consumer, partly where the terms are non-negotiated (LOA art. 256(2)), but partly also in individual agreements (LOA art. 267(2), art. 257d, cf. BSK (-*R. Weber*), OR I³, art. 257d, no. 1).

11. Under ENGLISH law, the Unfair Contract Terms Act 1977 deals specifically with exemption clauses in lease contracts. As against an individual "dealing as a consumer" (s. 12(1)(a) and (b)), a business (s. 1(3)) cannot exclude or restrict liability in respect of the failure of the leased goods to correspond with their description or with a sample, or in respect of their quality or fitness for particular purposes (s. 7(2)). As far as title and quiet possession are concerned, these may only be restricted or excluded in so far

as it is reasonable to do so (s. 7(4)). The Unfair Terms in Consumer Contracts Regulations 1999 also apply to contracts for lease in so far as the terms are not individually negotiated. Terms which are "contrary to the requirement of good faith" and cause "a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer", are not binding on the consumer (reg. 5(1)). Both the Act and the Regulations apply equally to SCOTLAND. In IRELAND, the Consumer Credit Act 1995 deals with exemption clauses in a comparable way: s. 79 ensures that any term attempting to restrict or exclude the rights or liability implied by law into contracts of hire-purchase (and contracts of hire, s. 88) involving consumers is void (in the case of title and quiet possession) and is void unless "fair and reasonable" (in the case of correspondence with description or sample and in respect of quality and fitness for purpose).

12. For CZECH law, the definition of 'consumer contracts' (CC § 52) applies whether the consumer is a lessor or a lessee. The rules on business leases (CC §§ 721–723) do not apply where the lessor is a consumer. See also DUTCH CC art. 6:233(a) on unreasonable contract terms.

CHAPTER 2: LEASE PERIOD

IV.B.–2:101: Start of lease period

(1) The lease period starts:

(a) at the time determinable from the terms agreed by the parties;

(b) if a time frame within which the lease period is to start can be determined, at any time chosen by the lessor within that time frame unless the circumstances of the case indicate that the lessee is to choose the time;

(c) in any other case, a reasonable time after the conclusion of the contract, at the request of either party.

(2) The lease period starts at the time when the lessee takes control of the goods if this is earlier than the starting time under paragraph (1).

COMMENTS

A. Lease period and contract

Performance during a period of time. It is a characteristic trait of the contract for lease that the obligations under it are performed over a period of time. During this *lease period* the lessor has an obligation to make the goods available for the lessee's use and the lessee has corresponding obligations to pay the rent and take care of the goods. The lease period does not necessarily start immediately on the conclusion of the *contract*, and the contractual relationship may also continue after the lease period has ended. The contract for lease is different from contracts where the obligations are performed "momentarily", like sales contracts, but it differs also from many contracts where the obligations are performed over time. The lessor's main performance consists in making the goods available for the lessee's use *for a period of time* and the remuneration is normally calculated for a certain period or per time unit. It is not a question of paying for work done or a quantity supplied, as in many service contracts.

Model of regulation. The present Chapter defines the lease period by fixing the start of the lease period in the present Article and the end of the lease period in the following Article. Defining the lease period means introducing a notion required for regulation; the obligations of the parties are thus decided only indirectly by the present Chapter. Rather, the lease period is an important element of rules found in other chapters: normally the lessor has an obligation to make the goods available for the lessee's use during the lease period, normally the rent must be paid for the lease period, normally the lessee must take care of the goods during the lease period, etc. An alternative model would be to regulate each issue separately, independently of the notion of a lease period, with provisions on the time at which performance can be claimed, provisions on the time when the duty of care starts, provisions on the time when the goods must be returned, etc. In national legislation the notion of a lease period is common, in most cases the length or the end of the lease period being fixed. Provisions on the start of the lease period are more unusual.

B. Non-mandatory character

The rules are non-mandatory. In the main, the rules of the present Chapter are non-mandatory. However, it would be contrary to fundamental principles to bind the parties to a contract for an indefinite period without the possibility to terminate the relationship. This also applies to agreements concerning the lease period, but it has not been found necessary to spell it out in the present Chapter. Paragraph (1) of IV.B.–2:103 (Tacit prolongation), on rent for a period after tacit prolongation of certain contracts, cannot be derogated from to the detriment of a consumer in a consumer contract for lease. Consumer contracts for lease are further discussed under Comment G.

C. Start of lease period

Significance. The start of the lease period signifies the point in time from which the lessor is obliged to make the goods available for the lessee's use and from which the lessee is obliged to pay the rent. Depending on the agreement and the circumstances, it may be that the lease period starts although the lessee has not accepted the goods and even if the goods are not made available as a result of the lessor's non-performance.

D. Time determinable from the contract

Time determinable from terms agreed by the parties. In many cases the start of the lease period is agreed upon explicitly by the parties – in a written document or in some other form, cf. II.–1:106 (Form). It may be a precise date or hour, but the time can also be fixed in other terms, e.g. linked to a future event. In other cases, the beginning of the period can be determined from the circumstances, e.g. where it is obvious that the lessee will receive the goods immediately.

Start within a time frame. There may be situations in which no fixed start time for the lease period can be determined, even if it is agreed that the lease period is to begin within a specified time frame or by a certain time. The rule in III.–2:102 (Time of performance) paragraph (2) is that performance may be effected by the debtor "at any time within that period" unless the circumstances show that the other party is to choose the time. In other words, the party owing performance has the choice if the circumstances do not show otherwise. In more specific provisions for a certain type of contract, such as lease contracts, it is better to clarify which party has the choice as a default rule. It is not possible to say that one of the parties *typically* needs the benefit of choice more than the other. In many cases the lessor must acquire the goods and make them ready for the lessee's use. On the other hand, the lessee will often have to make some preparations for receiving the goods. The default rule in paragraph (1)(b) of the present Article is that the lessor determines the start of the lease period within the agreed interval. It should be noted, however, that the lessee has no onerous burden of proof in showing that the choice lies on the other side. In many cases it is a matter of taste whether one considers the start of the lease period to be determinable from the contract or whether it is a question of choice by one of the parties within a specified time frame.

Illustration 1
A plans to go to Paris next week and leases a car for that purpose. The parties agree that A will pick the car up at the lessor's business place. The circumstances indicate that the lease period starts when A picks up the car some time during the following week.

E. Time not determinable from the contract

Start within a reasonable time. Where no time or time frame for the start of the lease period is determinable from the terms agreed by the parties, the lease period starts at the request of either party within a reasonable time after the conclusion of the contract. This corresponds to III.–2:102 (Time of performance) paragraph (1), with the difference that the start of the lease period must be *requested*. Without this prerequisite, there would be a risk of starting the lease period before both parties are aware of it, e.g. in a case where the goods have been made available for collection by the lessee. Even if the request is made a reasonable time after the conclusion of the contract, it may be that the other party still needs reasonable time after the request has been made in order to prepare to make the goods available or to take control of the goods. What is reasonable depends on the kind of goods leased, the intended length of the lease period, whether the goods are available at the conclusion of the contract etc., cf. also "reasonable" in Annex 1. Should the case be that no party requests the start of the lease period and no such start time is given by the terms of the contract, the outcome must depend on the circumstances. If the lessee takes control of the goods, this is decisive (second paragraph of the present Article). It may also be that the contract has fallen away – the lessee no longer needs the goods and the lessor does not insist on performance.

F. The lessee takes control of the goods

The lease period starts when the lessee takes control of the goods. The lease period starts when the lessee takes control of the goods, even if this happens earlier than the time specified as the start of the lease period, e.g. earlier than the time fixed by the agreed terms or, if no such time follows from the terms, the time that would be considered reasonable. In most cases such early acceptance is based on an explicit agreement to start the lease at this point in time. The second paragraph of the present Article states a default rule for situations where there is no such agreement. The rule is non-mandatory and the parties may agree – or it may follow from the circumstances – that the lease period is to start at a later point in time. It is not sufficient for an early start of the lease period that the lessor has done what is necessary to make the goods available (e.g. by making the goods available for the lessee to pick up), if the lessee does not take physical control of the goods. This may be the case even where the goods are brought to the lessee. The term "take control" in the present Article refers only to the passing of the goods from the lessor to the lessee and does not in itself imply any approval of the conformity of the goods. It should also be noted that the lessee has no duty to accept early performance (III.–2:103 (Early performance) paragraph (1)).

> *Illustration 2*
> The lessor brings the leased tractor to the lessee's farm and leaves it there one week earlier than the agreed start of the lease period. The lessee is not at the farm and finds the tractor on returning home a couple of days after the agreed start of the lease period. The lessee has not taken control of the goods and the lease period starts at the time previously agreed.

Lessee's obligations affected by early acceptance of the goods. The general principle in III.–2:103 (Early performance) paragraph (2) is that a party's acceptance of early performance by the other party does not affect the time fixed for the performance of the party's own obligation. Paragraph (2) of the present Article represents a deviation from this principle as acceptance of an earlier start of the lease period has consequences for the lessee's obligations as well. The lessee's obligation of care is performed continuously and performance should start from the moment control of the goods is taken. The rent should also accrue from acceptance of the goods. Whether or not the *time of payment* is affected depends on the

agreement. If rent is payable for example every seven days, early acceptance will have an effect on the time of payment. The situation may be different if rent is to be paid on certain dates, for example at the end of each calendar month.

Effects on length of lease period. Early acceptance of the goods will have no direct consequences on the length of an indefinite lease period. In other cases the effects of early acceptance will depend on the circumstances. If it is agreed that the lease period will end at a certain hour or date, early acceptance of the goods will normally not imply any change to this and the lease period will then be longer than originally agreed. If, on the other hand, the lease period is agreed to be so many days (hours, years), early acceptance will normally mean that the lease period *ends* earlier as well, and that the length of the period is not affected.

G. Consumer contracts for lease

No need for consumer rules. The rules of the present Article are of a general kind and should not give rise to any need for special regulation of consumer leases. This is true also for sub-paragraph (b) of the first paragraph, which leaves it to the lessor to determine the exact start of the lease period within an agreed time frame unless the circumstances indicate otherwise. There is no reason to believe that this rule will lead to abuses. Cases where the lessor has this option for an unreasonably long period must be dealt with under general rules on unfair terms.

NOTES

Start of lease period

1. It is not common in national law to include a provision concerning the start of the lease period. If the time cannot be determined from the terms agreed by the parties, there are default rules on time of performance. See notes to III.–2:102 (Time of performance).

2. The text of the AUSTRIAN CC has no rules on the time and place of making the leased goods available. It is held that the lessor has to hand over the leased goods at the beginning of the lease relationship (*Apathy and Riedler*, Bürgerliches Recht III^{2}, no. 8/19). No distinction is drawn between the start of the contractual relationship and the start of the lease period. The rule in CC § 904(1) is general: if the parties have not agreed on a certain time, the creditor can demand performance immediately (that is, without unnecessary delay). General rules apply in CZECH law. Unless otherwise agreed, the lessor must perform on the first day after the lessee's request (CC § 563) or without undue delay after the lessee's request (Ccom art. 340(2). If a time frame is set for the start of the lease period, the lessor will normally have the choice according to general rules (CC § 561). In THE NETHERLANDS there is no specific rule on the start of the lease period. So only general rules on the performance of obligations will apply. According to these, if a time has been set for performance, it is presumed only to prevent a claim for performance at an earlier time, not earlier performance by the debtor (CC art. 6:39(1)). Where no time for performance has been set, the obligation may be performed and claimed immediately (CC art. 6:38). In DANISH law, the lessor must make the goods available at the agreed time or, if no time is agreed upon, at the lessee's demand (*Gade*, Finansiel leasing, 101). For FRENCH law, it is simply said that the lessee is allowed to enter into possession at "the agreed date" (*Malaurie*/*Aynès*/*Gautier*, Contrats spéciaux VIII^{14}, no. 680, *Huet*, Contrats spéciaux,

no. 21161, *Collart Dutilleul and Delebecque*, Contrats civil et commerciaux[7], nos. 493, 429, with further references). If no time is agreed, delivery should take place on the next day established by usage for the beginning of leases of that kind of goods. If such usage does not exist, it appears that delivery should take place immediately. But the judge has the power to fix the date of delivery (Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 174: *libre pouvoir d'appréciation*). According to the ESTONIAN LOA § 276(2) the goods must be delivered at the agreed time; if no such time is agreed upon the general rules in LOA § 82(3) apply. According to the GERMAN CC § 535(1) sent. 1, the lessor is obliged to allow the use during the *Mietzeit*. If no day is agreed, the handover must be done immediately at the agreed start of the contractual relationship (*Blank and Börstinghaus*, Miete-Komm², § 535, no. 194; this also follows from the general rule in CC § 271(1). It is observed that the point in time at which the leased goods must be left to the lessee does not necessarily correspond with the beginning of the lease relationship; the time of making the goods available will follow from the contract or other agreements (Schmidt-Futterer (-*Eisenschmid*), Mietrecht[9], § 535, no. 3). In GREEK law the general rule under CC art. 323 applies: if the time of performance can be determined neither by the contract nor the circumstances of the case the creditor (here: the lessee) is entitled to demand and the debtor (here: the lessor) must render performance immediately. The start of the lease period is in principle not determined by the delivery of the leased object to the lessee: delay in delivery may not postpone the start of the lease period, but instead generates liability for non-performance on the part of the lessor. Similarly, early delivery may not bring about the early start of the lease; if early delivery takes place without remuneration, the contract concluded between the parties is a loan for use (*Filios*, Enochiko Dikaio I[2], § 25 E II). For HUNGARIAN law, the general rule is performance at the time agreed and otherwise on request (CC § 280). A general rule on time for performance is found in the ITALIAN CC art. 1183, and this rule applies also for leases. According to SPANISH law, the goods must be made available at the time and place agreed by the parties. If no such time is agreed upon, it can be determined according to the characteristics and the nature of the goods, and the usage of the place. In POLISH law, it follows from general rules that the lessor must transfer the goods immediately after being called upon to do so by the lessee, if nothing else is agreed, cf. CC art. 455 and Bieniek (- *Ciepła*) II, 242, Radwański (-*Panowicz-Lipska*), System Prawa Prywatnego VIII, 25. It has been held for SWEDISH law that the lessor, by analogy with the Sales Act § 9(1), must make the goods available within a reasonable time, if nothing else can be determined from the agreed terms or the circumstances (*Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 194).

IV.B.–2:102: End of lease period

(1) A definite lease period ends at the time determinable from the terms agreed by the parties. A definite lease period cannot be terminated unilaterally beforehand by giving notice.

(2) An indefinite lease period ends at the time specified in a notice of termination given by either party.

(3) A notice under paragraph (2) is effective only if the time specified in the notice of termination is in compliance with the terms agreed by the parties or, if no period of notice can be determined from such terms, a reasonable time after the notice has reached the other party.

COMMENTS

A. Definite or indefinite lease period

Two main types. Generally speaking, there are two main types of agreements concerning the lease period: leases for a *definite period* of time and leases for an *indefinite period*. A lease for an indefinite period can be terminated by giving *notice of termination*. Normally, a lease for a definite period cannot be terminated unilaterally beforehand by either one of the parties giving notice.

Combinations. Combinations of definite and indefinite lease periods are common. The parties may agree, for instance, that the lease period will end in any case at a fixed point in time, but that one or other of the parties may terminate the lease prior to this date by giving notice. One also finds agreements such that the lease period may end for example at the expiry of each year (every second year, third year etc.), but only if notice of termination has been given by one or other of the parties by a certain date. This may be regarded as a lease for an indefinite period under which notice of termination may be given only at certain intervals.

B. Non-exhaustive regulation

Rules on ordinary termination. The expiry of a definite lease period and termination by giving notice according to the rules of the present Chapter amount to ordinary termination of the lease period. A party does not need to have a special reason to give notice and has no duty to explain to the other party why notice is given. Termination of the contract, and thus also the lease period, may in other cases be the result of *non-performance*. This is dealt with in other chapters. Termination can result from other general rules as well, e.g. rules on changed circumstances. Some national systems have general rules allowing each party to terminate long-term contracts "for an important reason". There is no general provision on such extraordinary termination under this Part of Book IV. Neither has it been found necessary to include rules on extraordinary termination in the case of the lessee's death. Such rules are found in some jurisdictions, but under this Part general rules on termination by notice and on specific performance will apply.

No protection against ordinary termination. This Chapter contains no provision allowing the courts to avoid or set aside a notice of termination on the grounds that it is unreasonable. In national legislation it is quite usual to have rules concerning leases of dwellings and even business premises protecting the lessee against termination of the contract by the lessor. This is, however, not the case when it comes to the lease of goods.

Non-mandatory character. The parties may derogate from the rules of this Article, They may, for example, give one party a right to terminate a definite lease period by giving a specified period of notice.

C. Definite lease period

Time determined from the contract. A time for expiry of the lease period may be determinable from the contract. An agreement on a definite lease period may have various forms. The simplest form is to agree that the lease period ends on a future day or at a certain hour of day. It is also possible to agree upon the *duration* of the lease period, so many hours, days etc. counted from the start of the lease period. Expiry of the period may further be defined as a future *event* that will normally occur sooner or later. The event might for example be the fulfilment of the lessee's *purpose* of leasing the goods, e.g. where equipment is leased for a specific building project. A contract for a person's lifetime is a contract for a definite period. If the parties have agreed that the lease period will end upon the occurrence of an event that is *not* certain to happen, this agreement is effective, in the sense that the lease period expires on the occurrence of the event (resolutive condition). However, in relation to the second sentence of paragraph (1) of the present Article, stating that a definite period cannot be terminated beforehand by giving notice, a period ending on the occurrence of an uncertain event cannot be considered an agreement to a definite lease period (see *below*).

> *Illustration 1*
> A and B agree that A has a right to use B's car until B is back from holiday. The lease period ends at a certain point in time, even though there always is a risk that B could have an accident and never return.

> *Illustration 2*
> C leases scaffolding for a construction project. The lease period ends when the project is completed or has reached a stage where the scaffolding is no longer needed.

A definite lease period ends without notice. If expiry of the lease period is fixed by or determinable from the contract, the period ends at this time without any prior notice. The lessee has no right to use the goods after the end of the lease period and continued use will normally amount to non-performance of an obligation on the part of the lessee. Continued use may, however, lead to tacit prolongation of the lease period (see Comments to IV.B.–2:103 (Tacit prolongation)).

Definite lease period cannot be terminated unilaterally beforehand. Where expiry of the lease period can be established from the contract, the parties have in most cases intended that there be no right to terminate the lease unilaterally before that time by giving notice. This is the default rule in the second sentence of the first paragraph of the present Article. The parties may, on the other hand, agree that the lease period is to end at a fixed time *or* by notice given by either party. Agreements to this effect may take various forms, e.g. that notice may be given only for certain reasons or only by one of the parties.

Notice of termination if end of lease period is an uncertain event. The parties may have agreed that the lease period will end upon the occurrence of a future event that is not certain to occur (something that may or may not happen). If the agreed event occurs, the lease period will end (Comment C first paragraph). In these cases, however, both parties should have the

right to terminate the lease period by giving notice of termination. If not, the lease period could in principle be permanent, which is not acceptable. This means that the lease period is not seen as definite in this respect.

Illustration 3
A, a building contractor, leases a machine to B. The parties agree that B will return the machine if A gets the town hall contract that has been tendered for. If A gets the contract, the lease will end without notice. Both parties have, however, a right to end the lease period unilaterally by giving notice as it is not certain whether A will obtain the contract or not.

No maximum period. There is no provision on the maximum length of the lease period. Such rules are found in some national systems. It is not always clear what the background to such rules on maximum lease periods is. They may be inspired by related restrictions concerning leases of immovables whose purpose is, for example, to secure certain ownership structures, preventing feudal ownership etc. The rules may also originate from a wish to clarify the systematic and practical line between leases and transfer of ownership. It might further be noted that a principle of disallowing permanent contractual relationships, without exit clauses, is of limited significance if very long lease periods are permitted. A lease of goods for 100 years or 1000 years is of course equal to a permanent contract. On the other hand, fixing a maximum length for lease periods would be somewhat arbitrary; it is not easy to find criteria based on legal, economic or practical arguments as to what the maximum length should be. If the length of the lease period makes the contract obviously unreasonable, recourse should be had to more general principles of immorality, hardship etc., cf. II.–7:301 (Contracts infringing fundamental principles). It must also be mentioned that IV.B.–6:101 (Limitation of right to enforce payment of future rent) and the more general provisions in III.–3:301 (Enforcement of monetary obligations) limit the extent to which performance can be enforced. According to this principle, the performance of a more or less permanent contract may be transformed into a monetary settlement.

D. Indefinite lease period

Definition. A lease period that does not end at a time fixed by or determinable from the contract is an indefinite lease period. This definition in itself bears no significance except for the rule in paragraph (2) of the present Article that either party may terminate the lease period by giving notice. As stated in Comment C9, the lease period is seen as indefinite in this respect even if it is agreed that the lease period will cease on occurrence of an uncertain event.

Right to terminate the lease period by giving notice. Either party has the right to terminate an indefinite lease period unilaterally by giving notice, cf. paragraph (2) of the present Article. An agreement preventing one or other party from terminating an indefinite lease period would be contrary to general principles, see Comment C10. Should the parties agree that a notice of termination will only have effect after a significant lapse of time, the same questions arise as for agreements for very long definite lease periods.

Notice General rules on notice are found in I.–1:109 (Notice). There are no requirements of form for a notice of termination: it may be given in writing or otherwise. Form requirements may, however, follow from the contract. A notice becomes effective when it reaches the addressee. Normally, the lease period does not end immediately, but only after an agreed lapse of time or after a reasonable time. The calculation of this interval starts when the notice

has reached the addressee, cf. paragraph (3) of the present Article. The notice may specify a lapse of time longer than that required by the contract.

Illustration 4
It follows from the contract that either party may terminate the lease period with one week's notice. Notice of termination is mailed on Friday and reaches the lessor on a Monday. The lease period ends the following Monday.

Illustration 5
It is agreed that either party may terminate the lease period at the end of the following calendar month by giving notice. A notice of termination is mailed on 31 January and reaches the addressee at 2 February. The lease period ends on 31 March.

Illustration 6
As illustration 5, but it is specified in the notice that it takes effect from 30 April. The lease period ends on 30 April.

Period of notice of agreed or reasonable length. The lapse of time between the giving of notice and the end of the lease period may be specified in the contract or otherwise determinable from the terms agreed by the parties. See illustrations 4, 5 and 6 above. If no such time can be determined from the terms, the period of notice must be reasonable. According to Annex 1, "what is 'reasonable' is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices". More specific factors are listed in IV.E–2:302 (Contract for indefinite period) concerning notice of termination in commercial agency, franchise and distribution contracts. The factors there listed are to some extent relevant for contracts for lease as well: the time the contractual relationship (here, the lease period) has lasted, reasonable investments made by either party, the time it will take to find alternatives, and usages. For lease contracts, in particular, regard should in addition be had to the period according to which the rent is calculated. The period for calculation of rent often reflects the time horizon of the contract. A fishing boat at a hotel is leased by the hour, a car by the day, a truck by the week, etc. If rent is agreed for very long periods (several months, a year), it may be that other circumstances indicate that a shorter period of notice must be allowed. Likewise, it may be that the rent period is too short to indicate the period of notice, for example where day rates are agreed in a ship lease. Another factor relevant to contracts for lease is the character of the goods leased. A reasonable period of time for giving notice to terminate will typically not be the same in a contract for the lease of a bathing suit at a holiday resort as for, say, equipment for building construction. The examples also illustrate that the purpose of the lease must be taken into account.

E. Consumer contracts for lease

Unreasonably long lease period. A maximum length for the lease period is not specified by this Part of Book IV, cf. Comment C, last paragraph. Consumer contracts for lease will normally not be entered into for very long periods, but there may be exceptions, for example where a contract is functionally an alternative to sale and the lease period equals the expected useful lifetime of the goods. The problems with setting a maximum period are the same for consumer contracts for lease as for contracts for lease in general, cf. Comment C, last paragraph.

Extraordinary right to terminate lease period? It is explained in Comment C, last paragraph that IV.B.–6:101 (Limitation of right to enforce payment of future rent) and III.–3:301 (Enforcement of monetary obligations) limit the right to enforced performance: future rent cannot be claimed if the lessee wants to return the goods and it would be reasonable for the lessor under the circumstances to take the goods back. The lessor can still claim damages for the loss caused by the lessee's non-performance, but the lessor must take reasonable steps to reduce the loss, cf. III.–3:705 (Reduction of loss), including leasing or selling the goods to another customer. Thus, the lessee will still have to put the lessor "as nearly as possible into the position in which the creditor would have been if the obligation had been duly performed", III.–3:702 (General measure of damages), but the cost for the lessee will in most cases be substantially reduced compared with the ordinary payment of rent over a long period. These rules in combination work in fact as a right of termination, and in consumer contracts for lease the rules on remedies cannot be derogated from to the detriment of the consumer, cf. IV.B.–1:104 (Limits on derogation from rules on remedies in a consumer contract for lease). In deciding whether or not it is reasonable to take the goods back, it must normally have some weight that the lease is a consumer lease. There may, however, be cases under these rules where a consumer will have to pay substantial amounts under a contract for lease when the lessee wants to terminate, for example for goods that are no longer needed or that the lessee for one reason or other cannot afford to lease any more. An additional rule allowing a consumer to terminate the lease for certain "important reasons" etc. has though not been deemed necessary. It would be contrary to the fundamental principles of freedom of contract and market mechanisms to try to eliminate all risks and all liability involved in most contracts. Terms concerning the lease period and the right to terminate the lease are often decisive with regard to the rent paid. A higher rent can in some cases be the "insurance premium" that must be paid for the right to terminate the contractual relationship early. Rules on extraordinary termination should not distort this type of ordinary risk distribution in a contract, even where the lessee is a consumer.

Automatic prolongation etc. It may be agreed by the parties that a contract for lease for a fixed period will be prolonged for a new fixed period unless the lessee indicates otherwise within a certain deadline. If this deadline is very early, and there is no requirement that the lessee be reminded of the deadline, it may happen that the lessee does not react in time, with the result that the lease period is prolonged for a fixed period. Clauses of this kind are included in the "grey list" of terms that may be unfair under II.–9:410 (Terms which are presumed to be unfair in contracts between a business and a consumer) paragraph (10(h). See also the Unfair Terms Directive (93/13). The protection given by the general principles on unfair terms are deemed sufficient, and no provision covering such clauses is included in this Part of Book IV.

Consumer credit and right to terminate lease. The Consumer Credit Directive (87/102) applies to "hiring agreements" where "these provide that the title will pass ultimately to the hirer" (art. 2(1)(b)). Under the Directive the consumer has a right to "discharge his obligations under a credit agreement before the time fixed by the agreement" and, in this event and according to national law, "shall be entitled to an equitable reduction in the total cost of the credit" (art. 8). It is explained in Comment G14 to IV.B.–1:101 (Lease of goods) that contracts for lease where the parties have agreed that ownership is to pass to the lessee are covered by the definition of contracts for sale and fall outside the scope of application of this Part of Book IV. A rule corresponding to art. 8 of the Consumer Credit Directive is thus not included here.

NOTES

I. Lease for a definite or indefinite period

1. Some jurisdictions only allow leases for a definite period. If the parties have not agreed on a definite period, the duration of the lease is established by law. In other jurisdictions the lease may be made for a definite period or an indefinite period.

2. According to the ITALIAN CC art. 1571, a lease is by definition for a definite period (*Cian and Trabucchi*, Commentario breve[8], art. 1574, no. I1). The parties may agree upon the duration of the contract for lease (art. 1574). If they have not done so, the contract is *regarded* as being for certain periods stipulated by the code, for movables it is the period used for calculation of the rent. In these cases, i.e. where the parties have not agreed upon the duration, the contractual relationship will not end without one of the parties having given notice – with a period that is agreed or established by usage – before expiry of the lease period thus stipulated by the law (art. 1596(2)). The SPANISH CC only recognises leases for a definite period. A definite term is said to be the opposite of a perpetual or indefinite term (*Díez-Picazo and Gullón*, Sistema II[9], 331) and the latter are regarded as being against the obligatory character of a lease (TS 7 June 1979, RAJ 1979, 2344, and many others). The parties have to fix a certain and definite period or have to refer to a future event that is certain to occur (TS 21 May 1958, RAJ 1958, 2094). At the expiry of the period the lease ends without notice (if it is not prolonged by continued use, see notes to IV.B.–2:103 (Tacit prolongation) about CC art. 1566). Where the parties do not agree as to a definite time limit, the contract does not become indefinite as to time, but legal rules as to duration apply, CC art. 1581). A similar system is found in the PORTUGUESE CC art. 1026: if a lease period is not agreed upon, the duration of the contractual relationship is equal to the period for which the rent is paid The contractual relationship ends at the expiry of the period (art. 1051 number 1.a), and a notice of termination is not necessary. See also MALTESE CC art. 1567: a lease of goods is, in the absence of agreement to the contrary, deemed to be made for "the period for which the rent has been calculated" (art. 1532).

3. In jurisdictions that also accept leases for an indefinite period, the general rule is that the parties are allowed to agree on a definite period, and that such a definite lease period ends without notice. This is often laid down in legislation: AUSTRIAN CC § 1113; BELGIAN CC art. 1737 (if in writing); CZECH CC § 676(1); DUTCH CC art. 7:228(1); ESTONIAN LOA § 309(1); FRENCH CC art. 1737 (applicable also to leases of goods, *Malaurie/Aynès/Gautier*, Contrats spéciaux VIII[14], no. 601); GERMAN CC § 542(2); GREEK CC art. 608(1); HUNGARIAN CC § 430(1); LATVIAN CC art. 2165; LITHUANIAN CC art. 6.479 and art. 6.496; POLISH CC art. 659(1)); SLOVAK CC § 676(1); SLOVENIAN LOA § 614(1); SWISS LOA art. 255(2). In other jurisdictions it follows from general principles that a contract may be made for a fixed period, and that this is valid also for leases of goods as long as no exception is made.

II. Terminating the lease within the agreed period

4. The general rule seems to be that a party cannot, unless otherwise agreed, and subject to rules on termination for extraordinary reasons, unilaterally terminate the contractual relationship within the period if the contract is made for a definite period. This could be said to follow *e contrario* from the legislation mentioned in note II2 or could be seen as a default construction of a term stipulating a definite period. See for

AUSTRIAN law Rummel (-*Würth*), ABGB I³, § 1113, no. 1, *Stabentheiner*, Mietrecht, no. 79 (parties are bound for the agreed period; if there is no other agreement, neither party can terminate); CZECH CC § 677(1); for DUTCH law, see Hoge Raad 10 August 1994, NedJur 1994, 688 (Aerts/Kneepkens); ESTONIAN LOA § 309(2), cf. § 313 on extraordinary termination; for FRENCH law Cass.civ. 22 February 1968, JCP 1969.II15735, note *R.D.* (if the lease is for a definite period, the lessor is denied the possibility of giving notice of termination), CA Paris, 13 October 1973, GazPal 1975.1.somm., 155 (if the lessee gives notice before the expiry of a fixed lease, the lessor has a right to payment of the rent until the agreed time of expiry); for GREEK law, *Filios*, Enochiko Dikaio I[2], § 40 Γ II (lessee must pay until agreed end of lease period even if the goods are returned earlier); for GERMAN law Emmerich and Sonnenschein (-*Rolfs*), Hk-Miete[8], § 542, no. 58; for ITALIAN law Cass. 15 October 1971, no. 2919, Giur.it. 1972, I, 1, 292; for HUNGARIAN law, *Besenyei*, A bérleti szerződés[2], 42 ff (only extraordinary termination, in cases of non-performance and some cases of new parties); PORTUGUESE CC art. 1055 no. 2, for SWISS law, BSK (-*R. Weber*) OR I[3], Art. 255, no. 2 (ordinary notice of termination excluded). In SPANISH law, and apart from cases of non-performance, a residential lessee has a right to withdraw before the agreed time when the contract lasts for more than five years (Urban Leases Act 1994 art. 11).

5. It is widely accepted that the parties may agree that one or other of the parties may terminate the contractual relationship within the period even if the contract is made for a definite period. See e.g. for AUSTRIAN law Rummel (-*Würth*), ABGB I³, § 1113, no. 2; for FRENCH law, Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 542; for GERMAN law, Emmerich and Sonnenschein (-*Rolfs*), Hk-Miete[8], § 542, no. 56. POLISH CC art. 673(3) allows clauses that specify circumstances under which the lease may be terminated within the fixed period (Bieniek (-*Ciepła*) II, arts. 673, 258, *Radwański and Panowicz-Lipska*, Zobowiązania – część szczegółowa[3], 82; likewise CZECH law: cf. CC § 667(1) and the Supreme Court practice – e.g. 20 Cdo 2685/99 and 26 Cdo 2876/2000 SLOVAK CC § 676(1).

6. Even if the parties do not stipulate that termination before the end of the lease period is possible, such a right may sometimes be implied. In the UNITED KINGDOM (including SCOTLAND), 'regulated consumer hire agreements' allow the lessee the right to terminate after 18 months minimum by giving notice (see Consumer Credit Act 1974 s. 101). Note that this right only applies to those lessees whose contracts involve hire payments of less than £1500 per year (s. 101(7)(a), though the monetary limit may be amended under s. 181) and who are not hiring for certain business purposes (s. 101(7)(b)). Certain lessors may also be exempted from this provision by the Director General of Fair Trading (s. 101(8)). A similar right applies to consumer hire-purchase agreements (s. 99), as long as the lessee makes up the difference between the rent already paid and half the total hire-purchase price (s. 100). In IRELAND, more extensive provisions in the Consumer Credit Act 1995 allow the lessee to terminate the lease at any time by giving three months notice (or less if the contract so specifies) (s. 83). The right to terminate is also available within the context of consumer hire-purchase agreements (s. 63), with the same proviso that the lessee make up the difference to half of the total hire-purchase price (or less if specified by the contract) or that the lessee purchase the goods by paying the full purchase price less a reduction for early payment (ss. 52 and 53).

III. Various stipulations of a definite period

7. Where legislation provides for the ending of the lease at the expiry of an agreed period, expressions corresponding to "definite" or "fixed" are common: AUSTRIAN

CC § 1113 (*ausdrücklich oder stillschweigend bedungener Verlauf der Zeit*); BELGIAN CC art. 1737 (*term fixé*); CZECH CC § 676(1) (translation: "period for which the lease has been agreed"); DUTCH CC art. 7:228 (*bepaalde tijd*); ESTONIAN LOA § 309(1) (*tähtajaline üürileping*, translation: "lease contract entered into for specified term"); FRENCH CC art. 1737 (*terme fixé*); GERMAN CC § 542(2) (*bestimmte Zeit*); GREEK CC art. 608(1) (translation: "specified term"); ITALIAN CC art. 1596 (*tempo derminato*); LATVIAN CC art. 2165 (translation: "specified term"); LITHUANIAN CC art. 6.479 (translation: "fixed-term"); MALTESE CC art. 1566 (*term expressly agreed upon*); POLISH CC art. 659 (*czas oznaczony*, specified period of time); SLOVENIAN LOA § 614 (translation: "stipulated period"); SLOVAK CC § 676(1) (translation: "period for which the lease was concluded"); SPANISH CC arts. 1565 and 1543 (*tiempo determinado*); SWISS LOA art. 255(1) (*befristetes Mietverhältnis, vereinbarte Dauer*).

8. It is generally accepted that the period may be defined by naming a future point in time or by specifying a fixed duration. In these cases the exact time of expiry is known or can be computed in advance. It is less obvious that naming a future event should suffice as a stipulation of a definite period if the exact time of the occurrence of the event is not known. For AUSTRIAN law it is said that objective determinability of the definite period is sufficient; a lease for a lifetime or until a (even uncertain) future event is made for a definite period; the period can also be deduced from the purpose of the contract, the needs of the lessee or the period can depend on another legal relationship of the parties (Rummel (-*Würth*), ABGB I³, § 1113, no. 3). To the same effect for DUTCH law, see Rueb/Vrolijk/Wijkerslooth-Vinke (-*de Wijkerslooth-Vinke*), Huurrecht, art. 7:721, no. 53. A certain future event is sufficient in CZECH law (Supreme Court 31 Cdo 513/2003); whether or not an uncertain event is enough to define a fixed period is debatable, cf. also CC § 37(1) on time determination. In ESTONIAN law, the parties may agree on a fixed period or a period defined by a certain future event. In FRENCH law also, the period may be defined by reference to a certain future event (*Malaurie/Aynès/Gautier*, Contrats spéciaux VIII[14], no. 667 with reference to Cass.civ. 3er, 18 January 1995, Bull.civ. 1995.III, no. 16: *événement certain*). In GERMAN law an event that is certain to occur is regarded as *bestimmte Zeit*; if the event is uncertain, it still counts as a resolutive condition, cf. CC § 163, but the lease period is not definite in this case (Emmerich and Sonnenschein (-*Rolfs*), Hk-Miete[8], § 542, no. 54, cf. no. 55: a contract for lease for the lessee's lifetime is a contract for a definite period). The specified term of GREEK CC art. 608(1) may be defined by a specific date, a fixed period of time, the fulfilment of the lease's purpose, the occurrence of a future event that is certain to take place (*Antapasis*, art. 608 nos. 5, 6; *Filios*, Enochiko Dikaio I[2], § 25 E I 2; *Georgiadis*, Enochiko Dikaio, Geniko meros, § 27, no. 4; *Kornilakis*, Eidiko Enochiko Dikaio I, 192–193). Under HUNGARIAN law, the parties are free to set the duration of the contract for lease by reference to circumstances described in their contract – instead of specifying a future date or the exact length of the lease (HUNGARIAN CC § 430(1)). For a discussion of uncertain events as resolutive condition, see *Filios*, Enochiko Dikaio I[2], § 25 E I 3; Georgiades and Stathopoulos (-*Antapasis*), art. 608, no. 12. The LATVIAN CC art. 2165 expressly mentions that a contract "limited only to a goal to be reached" ends when the goal has been reached. In POLISH law a contract for lease is concluded for a definite period of time if the lease is to expire at a future event that may be reasonably expected to surely occur; Supreme Court judgment from 30 October 1990. In SLOVAK law, the lease period may be agreed with reference to a specific future date or as a unit in time, but it is also possible to determine the duration of the lease period by a future event. If the occurrence of the event is certain in time the lease is regarded as being made for a

definite period. If the lease is made for a lifetime or limited in time by an uncertain future event (the lease is subject to a resolutive condition) it is regarded as a lease for an indefinite period. (Svoboda (-*Górász*), Komentár a súvisiace predpisy, art. 663, 610). The period can also be specified by reference to the purpose of the contract; in this case the period of lease is regarded as definite (*Lazar*, OPH II, 146). As mentioned in note II2, for SPANISH law, the parties may refer to a future event that is certain to occur (TS 21 May 1958, RAJ 1958, 2094). The agreed period in the sense of SWISS LOA art. 255 is not only any unit in time or a specific date, but also an event (HandKomm OR (-*Permann*), art. 255, no. 2) that is certain to occur (loc. cit. art. 266 no. 2, BGE 56 II, 190: a contract for a lifetime is concluded for a definite period). If the occurrence of the agreed event is uncertain, then the lease is subject to a resolutive condition, but is still regarded as a lease for a definite period even if the event cannot be expected to occur in the unforeseeable future (BSK (-*R. Weber*), OR I[3], art. 255, nos. 4 ff). Only if it becomes clear that the event will not occur is the lease transformed into a contract for an indefinite period (loc. cit.).

IV. Maximum period

9. Four systems can be found concerning maximum periods for lease contracts: 1) no maximum period; 2) no explicit maximum period, but permanent leases inadmissible; 3) explicit maximum period and reduction to maximum period if the agreed period is longer; 4) maximum period and transformation into contract for indefinite period or right to extraordinary termination if the agreed period is longer.

10. AUSTRIAN law has no maximum period for lease contracts; the wording *gewisse Zeit* in CC § 1090 is interpreted in the sense that the lessee must be bound for at least some time; any binding in time of the lessee suffices to fulfil the criteria (Rummel (-*Würth*), ABGB I[3], § 1090, no. 4). Similarly, there is no maximum period under HUNGARIAN law, but a "perpetual" lease – a lease *ad infinitum* – i.e. which has no limit in time and is not terminable, is inadmissible, see Gellért (-*Besenyei*), A Polgári Törvénykönyv Magyarázata[6], 1675, *Besenyei*, A bérleti szerződés[2], 40.

11. In FRENCH law, a lease cannot be permanent, cf. CC art. 1709; there is, however, no explicit maximum period for leases of movables (*Huet*, Contrats spéciaux, no. 21145). In SPANISH law a permanent lease is regarded as inadmissible (*Díez-Picazo and Gullón*, Sistema II[9], 331). According to the SWISS LOA arts. 2 and 27 a permanent lease is inadmissible; a lease is regarded as permanent when it has no limit in time and is not terminable. An excessively long binding period is partially void and has to be reduced to an admissible extent (BSK (-*R. Weber*), OR I[3], art. 255, no. 8). In some codes the lease is described as being temporary or for a certain time, and this could be understood as excluding permanent leases (MALTESE CC art. 1526; SLOVAK CC § 663). CZECH law does not stipulate a maximum lease period, but e.g. an inadequately long lease period may be regarded as an indefinite period and thus terminable upon notice of the default length (cf. Švestka/Jehlička/Škárová/Spáčil (-*Jehlička*), OZ[10], 1189 and Supreme Court 28 Cdo 2187/2001). In DUTCH law, there is no maximum period for leases or prohibition against permanent leases, but the rule on *imprévision* (CC art. 6:258) allows the judge to adjust or terminate the contract (*Rueb/Vrolijk/Wijkerslooth-Vinke*, De huurbepalingen verklaard, 3).

12. According to the ITALIAN CC art. 1573, a contract for the lease of goods cannot be stipulated for a period exceeding thirty years. If a contract is stipulated for a longer period or permanently, it is reduced to the duration of thirty years. The parties cannot agree on a clause providing the possibility for the lessee to renew the contract if the period is going to exceed thirty years (*Cian and Trabucchi*, Commentario breve[8], art. 1573, no. I3, Cass. 56/2900). Corresponding rules are found in PORTUGUESE CC

art. 1025 (*Menezes Leitão*, Obrigações III[4], 302). According to the LITHUANIAN CC art. 6.479, a definite or indefinite lease period may not exceed one hundred years; nothing is said with regard to agreements for longer lease periods.

13. The ESTONIAN LOA § 318 stipulates that either party may cancel a lease after thirty years if the contract is entered into for more than thirty years (with an exception for contracts for the lifetime of a party). According to the GERMAN CC § 544, either party has a right to extraordinary termination after thirty years if the lease is agreed for a longer period (Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 544, no. 5). There is an exception for contracts for the lessor's or the lessee's lifetime. According to the GREEK CC art. 610, a lease can be terminated after the lapse of thirty years by notice in conformity with the provisions on leases for an indefinite period, if the contract was concluded for a period longer than thirty years or for the lifetime of one of the parties. The POLISH CC art. 661 allows leases to be concluded for a defined period longer than ten years, however after ten years have passed the lease is to be regarded as concluded for an indefinite period of time.

V. Right and need to give notice

14. It is held for DANISH law that either party may terminate the lease period with reasonable notice, subject to the terms of the contract, *Gade*, Finansiel leasing, 265. FRENCH CC art. 1736 allows for either party to terminate the contract by notice with a period according to local usages (*Huet*, Contrats spéciaux, no. 21199). The rule in GERMAN CC § 542(1) is that either party may terminate a contract that is not made for a definite period by giving notice according to statutory provisions. For ENGLISH law, it is held that the question whether a contract with no provision for its determination may be terminated by reasonable notice, depends on construction of the agreement (*Chitty* on Contracts II[29], no. 13-026). SCOTTISH law holds that contracts for lease for an indefinite duration are subject to termination by reasonable notice by either party (*Walker*, Principles of Scottish Private Law III[3], 398). According to the SLOVAK CC § 677(1), a lease for an indefinite period can only be terminated by notice, unless otherwise agreed; no reason is required (Svoboda (-*Fíger*), Komentár a súvisiace predpisy, arts. 677, 622). In SPAIN, court doctrine allows for the parties to set an indefinite duration for the lease. Where this is done, both parties are entitled to terminate the lease at any time, subject to previous notice (TS 9 July 1979, RAJ 1979/ 2935, TS 15 October 1984, RAJ 1984/4862, TS 26 October 1998, RAJ 1998/8237). For SWEDISH law, a right to terminate with reasonable notice has been based on an analogy from the Commissions Act § 46 (*Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 194); cf. NJA 1992, 168. See also AUSTRIAN CC § 1116; CZECH CC § 677(1); DUTCH CC art. 7:228(3); ESTONIAN LOA § 311; GREEK CC art. 608(2); HUNGARIAN CC § 431(1); LATVIAN CC art. 2166; LITHUANIAN CC art. 6.480; POLISH CC art. 673(2); SLOVENIAN LOA § 616(1); SWISS LOA art. 266a.

VI. Period of notice

15. In some systems the rule is that the period of notice must be that agreed upon by the parties or else a period in line with usage (FRENCH CC art. 1736, ITALIAN CC art. 1596(2)).

16. In other systems default rules on the period of notice for termination are included in legislation: the rule in GERMAN CC § 580a is that notice may be given each day with effect from the end of the following day if the rent is measured per day. If the rent is measured by a longer time, notice may be given at the latest the third day before the day the contract is to end. For registered ships the rule is the same as for other movables if the rent is measured per day. If the rent is measured per week, notice must

be given at the latest on the first workday of a week with effect from the following Saturday. Other examples are AUSTRIAN CC § 1116 (24 hours); CZECH CC § 677(2) (one month for leases of goods; the parties may agree that no period is required, Supreme Court 28 Cdo 1313/2001); DUTCH CC art. 7:228(2) (at least one month); ESTONIAN LOA § 312 (for contracts for an unspecified term: three months for registered ships and aeroplanes and three days for other movables); GREEK CC art. 609 (depends on the agreed period of rent calculation); HUNGARIAN CC § 431(1) (fifteen days); LATVIAN CC art. 2166 (notice for a lease contract with monthly or weekly rent payment must be given one month or one week in advance); LITHUANIAN CC art. 6.480 (one month); POLISH CC art. 673(2) (three months in advance at the end of a calendar quarter if rent is payable for periods longer than one month; one month before end of a calendar month if the rent is payable per month; three days in other cases); SLOVAK CC § 677(2) (one month for leases of goods); SLOVENIAN LOA § 616(2) (eight days if no other period follows from contract, special legislation or local practice); SWISS LOA art. 266f (three days) and art. 266k (special rule for consumer goods, 30 days if the lease is to last for at least three months, see HandKomm OR (-*Permann*), art. 266k, nos. 1 ff).

VII. Right to extraordinary termination

17. In some countries, continuous contractual relationships may be terminated for "an important reason" (etc.) and this then applies also to leases. The rule in AUSTRIAN CC § 1117 on contracts for lease is regarded as an expression of a general rule that continuous contractual relationships can be ended for an important reason (Schwimann (-*Binder*), ABGB V³, § 1117, no. 2); ESTONIAN LOA § 313 allows for termination of a lease "with good reason" (i.e. where the party "cannot be presumed to continue performing the contract taking into account all the circumstances and considering the interests of both parties"); the general rule on termination for *wichtiger Grund* in GERMAN CC § 314 is concretised for leases in CC § 543(2)(sent. 1). According to the SWISS LOA art. 266g a lease can be terminated for an important reason. In SPANISH law the only provision on this matter is the Urban Leases Act art. 9, which under some strict conditions gives the lessor the right to terminate where the immovable is needed for personal or family purposes.

IV.B.–2:103: Tacit prolongation

(1) Where a contract for the lease of goods for a definite period is tacitly prolonged under III.–1:111 (Tacit prolongation) and where the rent prior to prolongation was calculated so as to take into account amortisation of the cost of the goods by the lessee, the rent payable following prolongation is limited to what is reasonable having regard to the amount already paid.

(2) In the case of a consumer contract for the lease of goods the parties may not, to the detriment of the consumer, exclude the application of paragraph (1) or derogate from or vary its effects.

COMMENTS

A. Tacit prolongation in general

Under III.–1:111 (Tacit prolongation) any contract which provides for continuous or repeated performance of obligations for a definite period may be tacitly prolonged if the obligations continue to be performed by both parties after that period has expired and the circumstances are not inconsistent with the parties' tacit consent to such prolongation. The contract then becomes a contract for an indefinite period and the contractual relationship can be terminated by either party by giving a reasonable period of notice (III.–1:109 (Variation or termination by notice) paragraph (2)).

B. Application to contracts for the lease of goods

This provision will find frequent application in relation to contracts for the lease of goods. The lessor may continue to make the goods available to the lessee after the end of the lease period: and the lessee may continue to observe the terms of the contract and keep and handle the goods as if the lease continued. Rent may continue to be paid and accepted. Of course, if the circumstances indicate that the lessee is just late in returning the goods, or perhaps that the lessee has left them to be collected in the wrong place and the lessor has failed to pick them up, then there will be no tacit prolongation. The time element will be important also. If the lessee has retained the goods for a only a very short time then that will count against tacit prolongation, but if the lessee has kept them for such a period that the lessor (if unwilling to continue the lease) could have been expected to react strongly to their continued retention then that will count in favour of tacit prolongation. It also follows from the general rule on tacit prolongation that it is excluded if either party has made it clear to the other before it takes effect that there is no consent to a prolongation of the lease. No formal notice is required. Prolongation as an effect of continued use of the goods is based on the presumption of the other party's consent, and prolongation will not result if the circumstances are inconsistent with such consent.

Illustration 1
When A leased B's digger for 20 days at a daily rate, A was informed that B needed the machine for B's own purposes immediately after this period. At the end of the period, A by e-mail apologises that the digger will be returned some days late. Even if B does not answer this message, continued use for some days will not lead to prolongation, as the combination of A's knowledge of B's plans for the machine and A's own explanation concerning the continued use shows that consent cannot be presumed.

The prolongation is seen as an unbroken continuation of the original lease period. This means that there is an intermediate period where continued use will be treated as non-performance of the lessee's obligations if the lease period is *not* prolonged, but as ordinary use if prolongation takes effect.

The continued use of the goods is based on the same contract as the former use. It is not a new contract. This also implies that the terms of the contract are unchanged, except for the terms concerning the lease period (and an exception which will be explained in the following paragraphs). The rent to be paid depends on the contract. Where the rent is set at a fixed amount per week, month etc., the same amount must be paid after prolongation. In other cases there may be a regulation clause, e.g. giving the parties a right to index regulation each year. Such a clause will also be effective after prolongation.

The effect on third parties will be the same as the effect of an expressly agreed prolongation. Whether, for example, a security provider is released at the end of the original lease period will depend on the terms of that security provider's undertaking, as interpreted in accordance with the normal rules on interpretation.

None of the above is specific to contracts for the lease of goods.

C. Special rule for case where the cost of the goods is already amortised.

Under some contracts for the lease of goods, the rent is calculated so as to take into account the amortisation of the cost of the goods during the agreed lease period. These contracts are often three-party transactions involving a lessor, a lessee and a supplier of goods, where the lessor is a financial institution. However, the rent may also be calculated in this way in some two-party contracts. The contract may stipulate that the lessee has an option to buy the goods at the end of the lease period or a right to prolong the lease period at a substantially reduced rent. Where prolongation – or the terms of such prolongation – is not regulated by the individual contract, the rent for the prolonged lease period should not be unreasonable, given the amount already paid. In most cases this implies a substantial reduction in rent if the whole cost of the goods has already been paid. This rule is expressed in paragraph (1) of the present Article. It is mandatory, in the sense that it cannot be derogated from to the detriment of a consumer in a consumer contract for lease (paragraph (2).

NOTES

I. Overview

1. Several European legal systems have provisions on tacit prolongation or renewal of a lease. The common feature is that continued use of the goods without objection from the lessor leads to a prolonged or new lease period without a need for explicit agreement. The details vary, concerning both the requisites for and the effects of prolongation.
2. Provisions on prolongation or renewal, in most cases for an indefinite period, where the use continues without objection from the lessor can be summarised as follows: AUSTRIAN CC § 1114 (tacit renewal if use continues without objection); BELGIAN

CC art. 1738 (wording changed 1991, now only immovable property); DUTCH CC art. 7:230 (prolongation for an indefinite period in case of continued use with (tacit) permission of the lessor); ESTONIAN LOA § 310 (the lessor must object within two weeks after having learnt of the continued use); FRENCH CC art. 1738 (new lease governed by rules on leases not in writing if use continues after a written lease has expired and no notice to quit is given; applicability to movables debated, see (*Huet*, Contrats spéciaux, nos. 21202 and 21802, fn. 27 and *Malaurie/Aynès/Gautier*, Contracts spéciaux VIII[14], no. 601); GERMAN CC § 545 (prolonged if neither party protests within two weeks, the lessor's two weeks running from the time of getting knowledge of the continued use; the wording was amended in 2001, but not the substance, Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 545, no. 1); GREEK CC art. 611 (renewal if the lessee continues to use the leased object with the knowledge of and without objection from the lessor); HUNGARIAN CC § 431(2) (lessor must object within fifteen days; no formal requirement, see Gellért (-*Besenyei*), A Polgári Törvénykönyv Magyarázata[6], 1694); ITALIAN CC art. 1597 (renewal for indefinite period if use continues without objection); LITHUANIAN CC art. 6.481 (ten days, see also art. 6.481 on termination); MALTESE CC art. 1536 (lease renewed for a period corresponding to period for which the rent is agreed, if use continues without objection); POLISH CC art. 674 (presumption of prolongation for indefinite period if use continues with lessor's consent); PORTUGUESE CC art. 1056 (renewal for new period if use continues without objection for one year; only for lease of immovables); SLOVAK CC § 676(2) (court petition for surrender of the goods must be filed by the lessor within thirty days); SLOVENIAN LOA § 615) (new lease if use continues without opposition); SPANISH CC art. 1566 (continued use for 15 days leads to renewal for another fixed period; applicability to leases of movables is debated, see *Díez-Picazo and Gullón*, Sistema II[9], 337; *Bercovitz*, Manual de Derecho Civil, 181, TS 21 February 1985, RAJ 1985, 737); SWISS LOA art. 266 (if a lease for a definite period continues *stillschweigend*, it becomes a lease for an indefinite period, *Honsell*, OR-BT[7], 207).

II. The notion of tacit renewal

3. In some countries the rules on tacit prolongation are seen as *objective rules*, or consequences of law, working independently of the parties' will. This is the situation in GERMAN law. As the prolongation does not depend on the parties' will, a mistake of either party as to the consequences is irrelevant (CC § 119, see for example Palandt (-*Weidenkaff*), BGB[66], § 545, no. 10). To the same effect, see CZECH CC § 676(2). Tacit renewal (prolongation for an indefinite period) is also an objective rule under HUNGARIAN law.

4. In several countries the behaviour of the parties is deemed to be a declaration of intention, and the provisions on prolongation are then rebuttable presumptions of such will. This can be illustrated by the AUSTRIAN CC § 1114, according to which there is a tacit renewal (*stillschweigende Erneuerung*) of the lease contract if the use is continued and the lessor does not object. The conduct of the lessor is interpreted as a declaration of contractual intention with certain content (so-called *normierte Willenserklärung*, OGH 30 August 2002, JBl 2003, 182; see also *Stabentheiner*, Mietrecht, nos. 80, 26). According to DUTCH law, the prolongation takes place "unless an other intention is shown". If the lessee stays on with the (tacit) permission of the lessor, it is for the lessor to prove that the intention was different. The lessee cannot invoke this legal presumption if the continued use was not known to the lessor or if the lessor protested the continued use (Rueb/Vrolijk/Wijkerslooth-Vinke (-*de Vries*), Huurrecht, art. 7:230, no. 4). Under ESTONIAN law also, each party's

behaviour can be regarded as a declaration of contractual intention (*vaikiminsi tahtevaldus*). A further illustration is the *tacite reconduction* found in the FRENCH CC arts. 1738 and 1739 which is regarded as a presumption of the will of the parties (Rép.Dr.Civ. (-*Groslière*), v° Bail, nos. 659 and 665, on the foundations in detail *Amar-Layani*, D. 1996, Chron., 143 and 144); the simple absence of opposition by the lessor is not sufficient (Cass.civ. 1 February 1949, RTD civ 1950, 72, note *Carbonnier*). See also on the ITALIAN CC art. 1597, Rescigno (-*Giove*) , Codice Civile I[5], arts. 1596–1597, no. 2, 1958. In SPANISH law the tacit renewal provision of CC art. 1566 contains neither a presumptive rule nor a rule related to interpretation of the parties' will: in so far as the parties have not impeded the continuance, a mistake of fact or law as to the meaning of that conduct does not matter.

5. The expression *relocatio tacita* is foreign to ENGLISH law (although tacit relocation is a familiar concept in SCOTTISH law in relation to leases of immovable property). No special rule for the situation of continued use after expiration of the contract can be found in English law. Moreover, there seems to be no case law directly dealing with this situation for contracts on movables (although there is case law on similar situations for leases of land, see *Roberts v. Hayward* (1828 3 C. & P. 432) – critical remarks *Chitty* on Contracts I[29], no. 2-074, and *Western Electric Ltd v. Welsh Development Agency* [1983] Q.B. 796). Under special circumstances inactivity can be seen as an offer, although the hurdle in this respect seems to be a high one (*Chitty*, loc. cit. para. 2-005) and most of the potential cases would probably be seen as a mere breach of the lessee's duty to return the goods, leading to damages for wrongful detention (*Chitty* on Contracts II[29], no. 33-080: "measure of damages is the full market rate of hire for the whole period of the detention if the hirer has made beneficial use of the chattel"; for a potential remedy on excessive benefits in restitution, see *Chitty* on Contracts I[29], no. 29-145). But nevertheless, the discussion about "silence" or "tacit" reflects to a certain extent the scope of solutions in the Civil Law jurisdictions. Some of the cases of non-return and ongoing use of the leased object by the lessee may be covered by the tort of conversion according to s. 2(2) of the Torts (Interference with Goods) Act 1977. The ongoing use could be seen as a definite act of conversion. Whether the bailor must demand the return of the goods before being able to rely on the mentioned provision is not clear (*Chitty* on Contracts II[29], nos. 33-010 ff, fn. 60). For NORWEGIAN law, it has been said that a possible rule on *relocatio tacita* should not apply to leases of ships, *Falkanger*, Leie av skib, 423.

III. Tacit prolongation only where the lease is for a definite period?

6. In several jurisdictions, the rules on tacit prolongation apply only for leases for a definite period. This follows explicitly from AUSTRIAN CC § 1114 (Rummel (-*Würth*), ABGB I³, § 1114, no. 4), CZECH CC § 676 (cf. Supreme Court 28 Cdo 2253/2003), ESTONIAN LOA § 310, GREEK CC art. 611, HUNGARIAN CC § 431(2), LITHUANIAN CC art. 6.481, SLOVAK CC § 676, SLOVENIAN LOA § 615, SWISS LOA art. 266 (BSK (-*R. Weber*), OR I[3], art. 255, no. 5).

7. Some provisions exclude tacit prolongation in cases where a notice of termination is given. This will normally mean that there can be no tacit prolongation of leases for an indefinite period, as such leases are ordinarily terminated by notice. See for example BELGIAN CC art. 1739, FRENCH CC art. 1739, SPANISH CC art. 1566. The interpretation of ITALIAN CC art. 1597 is not quite clear in this respect (*Cian and Trabucchi*, Commentario breve[8], arts. 1596–1597, no. II3). However, if a party who has given notice of termination later has a change of mind, it may follow from general contract law that the parties' conduct is sufficient for the conclusion of a contract (the discussion in ITALIAN law is illustrative, see Cass. 23 August 1990/no. 8621, Giur.it.

1991, I, 1, 692, Cass. 12 August 1988/no. 4936, Giust.civ.Mass. 1988, fasc. 8/9, Rescigno (-*Giove*), Codice Civile I[5], arts. 1596–1597, no. 2, 1958).

8. In GERMAN jurisprudence and legal literature there is no doubt that CC § 545 is applicable to leases for an indefinite period (BGH 26 March 1980, NJW 1980, 1577, 1578, for the former CC § 568), even where the contractual relationship is brought to an end by extraordinary notice of termination given by the lessor (Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 545, no. 2, *Gitter*, Gebrauchsüberlassungsverträge, 53, with critical remarks on this point *Medicus*, Schuldrecht II[11], no. 215). The POLISH CC art. 674 explicitly says that both forms of leases are covered.

IV. Continued use

9. The *quality* of the continued use leading to tacit prolongation is sometimes discussed. For GERMAN law it is held that it must involve *use*, not merely a failure to return the goods (Handkommentar-BGB² (-*Eckert*), § 545, no. 3). Use by a sub-lessee is sufficient (BGH 9 April 1986, NJW-RR 1986, 1020), and tacit prolongation may be the result even when the lessee did not know that the lease period had expired (Emmerich and Sonnenschein (-*Emmerich*), Hk-Mietrecht[8], § 545, no. 7). For FRENCH law it is said that the lessee must remain in possession of the object and that use must be continued as if the lease period had not expired (*Amar-Layani*, D. 1996, Chron., 143 and 144).

10. In many countries the duration of use is specified, either directly or indirectly, in the latter case by specifying a time for the lessor's objection to the use (see note I2). Even if no period is specified, a short delay only in returning the goods may be irrelevant (see for FRENCH law, Rép.Dr.Civ. (-*Groslière*), v° Bail , no. 662; for GREEK law, Georgiades and Stathopoulos (-*Antapasis*), art. 611, no. 8).

V. Lessor's knowledge of continued use

11. The lessor's knowledge of the continued use may be a prerequisite for tacit prolongation, either directly or indirectly. It may be an indirect condition of prolongation in so far as the lessor, to avoid prolongation, must object within a certain time after learning of the use (see for example ESTONIAN LOA § 310, GERMAN CC § 545, GREEK CC art. 611; see also for DUTCH law, note *II4*). In SPANISH law acquiescence is needed (CC art. 1566), but it has been held, though not unanimously, that there is a presumption of acquiescence to prolongation if the lessor does not request return of the goods (*Díez-Picazo and Gullón*, Sistema II[9], 337). In PORTUGUESE law, the requirement is "no opposition" from the lessor (CC art. 1056). According to the POLISH CC art. 674, the lessor's consent (direct or indirect) is a prerequisite for the presumption of prolongation. In other provisions, where knowledge is not mentioned (see for example CZECH CC § 676, FRENCH CC art. 1738, HUNGARIAN CC § 431, SLOVAK CC § 676), the solution is not obvious. It is sometimes held that knowledge is requisite (see for FRENCH law, Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 663; for HUNGARIAN law, the time limit of fifteen day for objections to a prolongation has been regarded as a prescription period, cf. Gellért (-*Besenyei*), A Polgári Törvénykönyv Magyarázata[6], 1694, probably implying a requisite of knowledge).

VI. Objection to prolongation

12. All systems seem to allow a party to prevent prolongation by objecting to the continued use or indicating in some other way that prolongation or renewal is not desired. A court petition is required according to the SLOVAK CC § 676(2), but in

most cases no formalities are required. The question of *when* the objection must be expressed is sometimes discussed. For AUSTRIAN law it is held that there must be a close link in time between the objection and the expiry of the lease period (OGH 9 October 1986, JBl 1987, 659 note *Böhm*, Rummel (-*Würth*), ABGB I³, § 1114, no. 4). The objection can, however, be expressed even before the lease period expires (OGH 15 December 1992, JBl 1993, 587, note *Watzl*: requesting return two months before expiry still fulfils the stated close link in time). The situation in GERMAN law is similar (see Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 545, no. 8). For GREEK law it has been maintained that the objection must be made within a reasonable time after the expiry of the lease period (*Georgiades*, Enochiko Dikaio, Geniko meros, § 28, no. 12; cf. Georgiades and Stathopoulos (-*Antapasis*), art. 611, no. 13b). Under HUNGARIAN law, the objection must be made within fifteen days of expiry of the lease period, HUNGARIAN CC § 431 (2).

VII. New lease period for a definite or indefinite period

13. In some countries, tacit prolongation leads to a new definite lease period, although not necessarily of the same length as the expired period. The interpretation of AUSTRIAN CC § 1115 is that the lease is prolonged for a new definite period of the same length as the period for which the rent is calculated (*Stabentheiner*, Mietrecht, no. 81, OGH 9 April 1992, JBl 1993, 584, Rummel (-*Würth*), ABGB I³, § 1115, no. 2, *Apathy and Riedler*, Bürgerliches Recht III[2], no. 8/66). Essentially the same solution is found in ITALIAN CC arts. 1597 and 1574; MALTESE CC arts. 1536 and 1532 and SPANISH CC. According to the CZECH CC § 676(2), the new period is of the same length as the former period, but leases for more than one year are prolonged only for one year. The rule is the same under SLOVAK law, CC § 676(2), (Svoboda (-*Fíger*), Komentár a súvisiace predpisy, arts. 676, 620).

14. The most common solution seems to be a prolongation or renewal for an indefinite period, whether this is expressed positively in the provisions (see note *II2*) or not (as in FRENCH law, see Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 671, with further references; the rule is the same in ESTONIAN law).

VIII. Other terms of the contract

15. When the consequences for other terms of the contract are dealt with at all, the common view seems to be that these terms remain unchanged: AUSTRIAN CC § 1115 (Rummel (-*Würth*), ABGB I³, § 1115, no. 1: except parts having no direct connection with the lease contract); DUTCH CC art. 7:230 (as a consequence of the prolongation); FRENCH CC art. 1738 (Cass.soc. 29 January 1959, Bull.civ. 1959.IV., no. 135, except for *clauses occasionnelles*, see Cass.civ. 15 June 1960, Bull.civ. 1960.III, no. 232); GERMAN CC § 545 (BGH 29 April 2002, NJW 2002, 2170, 2171); GREEK CC art. 611 (Georgiades and Stathopoulos (-*Antapasis*), art. 611, no. 17; CA Athens 1548/85 EllDik 26, 710); ITALIAN CC art. 1597; MALTESE CC art. 1536; SLOVAK CC § 676; SLOVENIAN LOA § 615. For POLISH law, see Bieniek (-*Ciepła*), Komentarz do Kodeksu Cywilnego, 258.

16. It is sometimes said explicitly that a guarantee from a third party is not extended to cover the prolonged lease period: FRENCH CC art. 1740 (guarantee to be distinguished from joint responsibility, Cass.civ. 28 October 1889, D.P. 1899.1, 129); ITALIAN CC art. 1598; MALTESE CC art. 1538; SLOVENIAN LOA § 615; SPANISH CC art. 1567; likewise for GERMAN law, Staudinger (-*Emmerich*), BGB (2006), § 545, no. 16 and for GREEK law *Antapasis*, art. 611, no. 18.

CHAPTER 3: OBLIGATIONS OF THE LESSOR

IV.B.–3:101: Availability of the goods

(1) The lessor must make the goods available for the lessee's use at the start of the lease period and at the place determined by III.–2:101 (Place of performance).

(2) Notwithstanding the rule in the previous paragraph, the lessor must make the goods available for the lessee's use at the lessee's place of business or, as the case may be, at the lessee's habitual residence if the lessor, on the specifications of the lessee, acquires the goods from a supplier selected by the lessee.

(3) The lessor must ensure that the goods remain available for the lessee's use throughout the lease period, free from any right or reasonably based claim of a third party which prevents or is otherwise likely to interfere with the lessee's use of the goods in accordance with the contract.

(4) The lessor's obligations when the goods are lost or damaged during the lease period are regulated by IV.B.–3:104 (Conformity of the goods during the lease period).

COMMENTS

A. General

Characteristic obligations. Under a lease contract, the lessor makes goods available temporarily for the lessee's use against remuneration. The lessee's use typically implies physical control of the goods. Further, the goods must normally be returned to the lessor at the end of the lease period. As the contract is made for a period of time, questions arise concerning maintenance of the goods and repairs during this period. To the extent that the goods are not to deteriorate, the obligation to maintain and repair the goods must be borne by one of the parties or distributed between them. All this means that the lessor typically has obligations concerning (1) the availability of the goods at the start of the lease period, (2) the availability of the goods during the lease period, (3) the conformity of the goods at the start of the lease period, (4) the conformity of the goods during the lease period to the extent that this is not a part of the lessee's obligations, and (5) the return of the goods at the end of the lease period. In the present Article, availability of the goods at the start of the lease period and during the lease period are dealt with.

B. Time of performance

Start of the lease period. The lessor must make the goods available at the start of the lease period. The time at which the lease period starts may be determined from IV.B.–2:101 (Start of lease period). In the situations dealt with in paragraph (1) of that Article the lease period starts even if the goods are not available to the lessee at the relevant point in time, or the lessee has not accepted the goods. These are questions of non-performance of the lessor's or the lessee's obligations. Where the lessee has taken control of the goods earlier than the time that would follow from IV.B.–2:101 paragraph (1), the lease period starts on acceptance of the goods (see paragraph (2) of that Article).

C. Place of performance

Reference made to general rules. The first paragraph of the present Article refers to III.–2:101 (Place of performance). This reference is made only for clarity's sake.

Place of performance in lease contracts. The place of performance is often agreed upon expressly by the parties or can be determined from the agreed terms. If this is not the case, it is stated in III.–2:101 (Place of performance) that the place of performance should be the debtor's – that is the lessor's – place of business at the time of conclusion of the contract. If the lessor has more than one place of business, performance is to take place at the one that "has the closest relationship to the obligation". In lease contracts, the relevant place of business will often be the place where it is most convenient for the lessee to pick up the goods, provided that the lessor's business at that place includes leasing activities.

> *Illustration 1*
> A lessee orders by telephone a car to be leased for one week in Rome. The lessor has several places of business in Rome, and the car is ordered through a general office serving all these places of business. If the lessee e.g. arrives in Rome by aeroplane, and this is made known to the lessor, one may presume that the relevant place of business is the one at the airport of arrival. If the lessee, for example, is resident in Rome, one may presume that the relevant place of business is the one located nearest the habitual residence of the lessee.

Goods acquired from a supplier selected by the lessee. The rule in paragraph (2) applies to situations in which the lessor acquires the goods on the lessee's specifications from a supplier selected by the lessee. Typically, these are contracts of a kind often referred to as "financial leases". The goods are normally not brought to the lessor's place at all in these situations, and the general rule in III.–2:101 (Place of performance) would not be the best one. The parties may agree that the goods are made available for the lessee at the supplier's place. However, as the default rules of this Part of Book IV deal only with the contractual relationship between lessor and lessee, the fall-back rule for these contracts should be that the goods are made available at the lessee's place of business.

D. Availability of the goods

Availability at the start of the lease period. Normally, the contract requires that the lessee obtain physical control of the leased goods. The lessor must do what is needed to enable the lessee to obtain such control and the lessee must co-operate by accepting the goods. In this respect there is a parallel to contracts for the sale of goods. A simple handing over of the goods is illustrative: the lessor offers the goods and the lessee accepts them at once. Control over the goods may also be transferred by giving the lessee a key or a code; the goods may be made available by the lessor at some agreed place for the lessee to pick up; the goods may be transported by an independent carrier who is instructed to deliver the goods to the lessee, perhaps against documents made available by the lessor; etc. As use of the goods is the purpose of the lease contract, and as the lessor will still be the owner of the goods, at least during the lease period, there is no need to regulate situations where the goods are to remain in the hands of the lessor. It could be, however, that the lessee already has physical control over the goods at the start of the lease period, as is occasionally the case in a sale.

Acceptance by employees etc. The goods may be accepted by someone on behalf of the lessee, typically by the lessee's employees. Depending on the agreement and the

circumstances, the goods must also be regarded as made available for the lessee where they are given directly to a sub-lessee. It has not been found necessary to regulate explicitly this special situation.

Availability during the lease period. The lessor's obligations also include keeping the goods available for the lessee's use throughout the lease period. This normally implies that it will amount to non-performance if the lessor makes use of the goods for the lessor's own purposes or lets third parties use the goods if such use hinders the lessee's use in accordance with the contract. Further, it will be non-performance if the lessor sells or otherwise disposes of the goods if such disposition collides with the lessee's use. Where the rights of the lessor's creditors affect the lessee's use, this also amounts to non-performance by the lessor. These observations relate to the contract between lessor and lessee. The extent to which the lessee's rights have priority over creditors' and other third parties' rights in the goods will be commented upon in Chapter 7.

E. "Risk"

Availability and conformity. Normally, the lessor has not only an obligation to keep the goods available for the lessee, in the sense that the lessor's dispositions and personal use of the goods must not interfere with the lessee's use according to the contract (cf. the preceding paragraph), but also an obligation to keep the goods in conformity with the contract by performing maintenance and repairs. The latter obligation is regulated by IV.B.–3:104 (Conformity of the goods during the lease period). This obligation includes repair of goods that are damaged by chance. If the damage is total – the goods are "lost" – it may be that the lessee has no right to enforce performance, cf. III.–3:302 (Enforcement of non-monetary obligations), but other remedies for non-performance may still be available. Theft of the goods should be dealt with in the same way as total loss; theft is not a question of a third party's right in the goods. One could ask if the goods are "available" to the lessee if they are totally damaged or lost. To make it clear that damage to or loss of the goods is dealt with as a question of non-conformity and not as a question of availability, a reference is made in the fourth paragraph of the present Article to IV.B.–3:104. The difference is important in particular in contracts where the lessee has the full burden of maintenance and repairs, by contract or by law. In such contracts, damage or loss will not lead to non-performance of the lessor's obligation to keep the goods in conformity with the contract, while interference with the lessee's use caused by third party rights or by the lessor's dispositions or personal use of the goods is still non-performance of the obligation to keep the goods available.

No passing of risk. For sales, there are rules on "passing of risk", including an explanation of "risk" in IV.A.–5:101 (Effect of passing of risk): "Loss of, or damage to, the goods after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller." Corresponding rules are not needed for lease contracts. Damage to or loss of the goods is dealt with as a question of non-conformity, cf. the preceding paragraph. It would be incongruous to regulate the consequences for rent payment independently of other remedies for non-performance. See also Comment B to IV.B.–5:104 (Handling the goods in accordance with the contract) on "risk" and the lessee's obligation to return the goods.

F. Non-availability due to need for repairs by lessor etc.

No exception for repairs etc. The lessor is in many cases obliged to carry out repairs and maintenance work on the goods during the lease period. The lessor also has a right to perform

certain actions with regard to the goods, whether or not this is part of the lessor's obligation. The lessee's obligation to tolerate such measures is regulated in IV.B.–5:108 (Repairs and inspections of the lessor). The lessor's work on the goods may affect the lessee's use, and the goods may even be totally unavailable for the lessee while the work takes place. This is non-performance of the lessor's obligation to keep the goods available for the lessee's use. At first sight this can seem inconsequent: actions that the lessor has a right to take, result in non-performance, i.e. non-availability. The explanation is found in the definition of "non-performance". "Non-performance" covers any failure to perform, for whatever cause. However, the remedies available to the lessee will vary according to the cause of the non-performance. If repairs are necessary due to non-performance of the lessee's obligations, e.g. the obligation of care, the lessee cannot seek a remedy in the courts with regard to the consequent suspension of availability, cf. III.–3:101 (Remedies available) paragraph (3) (creditor may not resort to remedies "to the extent that the creditor caused the debtor's non-performance "). If, on the other hand, the non-availability is made necessary for other reasons, the lessee has a right to rent reduction, withholding of rent, damages as the case may be, and even termination should the non-performance be fundamental. Ordinary maintenance by the lessor, typically made necessary by accidents or normal use, will give the lessee a right to rent reduction – a remedy in line with the purpose of balancing the performances of the parties – but not to damages, as these measures cannot be avoided.

Illustration 2
A leased washing machine breaks down and must be taken to the lessor's premises to be repaired. The repairs take one week. The washing machine is old and the breakdown was caused by normal deterioration. The lessee may claim a reduction in the rent for one week but not damages, as the repairs could not be avoided.

Illustration 3
The facts are the same as in Illustration 2, except that the work takes three weeks because the lessor carelessly damaged other parts of the machine while repairing it. The lessee may claim a reduction in the rent for three weeks and damages covering expenses for the use of launderettes during the two last weeks.

Illustration 4
The facts are the same as in Illustration 2, except that the breakdown was caused by the lessee's careless use of the machine. No remedies are available to the lessee with regard to the unavailability of the machine.

G. Third parties' rights or claims

Rights or claims that interfere with the lessee's use. The lessee's use must not be affected by third parties' rights. Some third party rights will not affect the lessee's use of the goods at all. A third party's security right will typically not affect the use as long as the lessor is not in a position where the security right becomes effective. This is different in contracts for sale, where the buyer does not have to tolerate any rights of this kind. If the lessor was not the owner of the goods and had no right to enter into a lease contract, the true owner's right will typically affect the lessee's use. Whether a later sale or a second lease of the same goods will affect the lessee's use, depends on the rules on priority of the lessee's rights over third parties' rights. To what extent the lessee must accept transfer of ownership, when the use is not affected, is dealt with in IV.B.–7:101 (Change in ownership and substitution of lessor).

Rights or claims that are likely to interfere with the lessee's use. The existence of a third party right that is likely to interfere with the lessee's use amounts to non-performance by the lessor. The lessee does not have to wait until the goods are in fact taken away. A security right can create a threat to the lessee's use if the lessor becomes insolvent or the creditors have taken steps to utilise the security right. Also a third party claim that is contested by the lessor may interfere with or threaten to interfere with the lessee's use. It will depend on the circumstances whether this kind of claim is sufficiently grounded to create a threat to the lessee's use. It must be "reasonably based". Allegations that are clearly unjustified are irrelevant. The lessee should not, however, be obliged to tolerate being involved in disputes between the lessor and third parties.

H. Contract and default rules

Non-mandatory rules. The parties may derogate from the provisions of the present Chapter unless otherwise provided. In normal situations the parties agree amongst themselves the basic elements of the contract: which object is to be leased, for how long and at what price. Often the parties also specify the required quantity and quality of the goods, where and when the goods are to be delivered, the distribution of obligations concerning maintenance and repairs etc. The rules of the present Chapter are merely supplementary in so far as they do not apply to issues sufficiently regulated by the parties. At the same time the rules of the present Chapter are objective rules applicable to the contract for lease – in the supplementary fashion just described – without any act of inclusion or acceptance and independently of the parties' will.

Consumer leases. Consumer protection rules may not normally be derogated from by the parties to the detriment of the consumer. On the other hand, the parties are in most cases free to decide whether or not to enter into a contract and to agree on what is to be leased, when, for how long and at what price, cf. Comment A to IV.B.–1:102 (Consumer contract for the lease of goods). It is specified in IV.B.–1:103 (Limits on derogation from conformity rights in a consumer contract for lease), however, that the parties may not describe the goods in a way that it is, in real terms, a derogation from the lessor's obligation to ensure that the goods conform to the contract. See Comments to that Article.

NOTES

I. Overview of the lessor's obligations

1. The structure of legislation on contracts for lease varies among the jurisdictions. Sometimes the obligations of the lessor – or of both parties – are enumerated in general provisions, in many cases in "introductory" provisions. In other jurisdictions there is no such overview. The extent to which the obligations of the lessor are divided into separate obligations or treated more or less as one overarching obligation (making the goods available for the lessee's use) also varies. The difference between the GERMAN and the FRENCH Civil Codes is illustrative. The highest level of abstraction is found in the GERMAN CC: the main obligation is to allow use of the goods; making the goods available and maintaining them are regarded as the means of fulfilling this obligation (CC § 535(1) sent. 1). The lessor is obliged to allow the lessee the use of the leased goods during the lease period (*Mietzeit*). Therefore the lessor has to hand over the leased goods (*Gebrauchsüberlassungspflicht*), may not disturb the agreed use and must prevent disturbance from third parties, in so far as this is possible

and reasonable (*Gebrauchserhaltungspflicht*, see *Larenz and Canaris*, Schuldrecht II(1)[13], § 48, no. II, 219; *Brox and Walker*, Schuldrecht BT[31], § 11, no. 1). Sentence 2 of CC § 535(1) specifies that the lessor has to turn the leased goods over to the lessee in a state suitable for the agreed use and must maintain the goods in that state during the lease period (*Instandhaltungspflicht*; for an overview of the principal obligations of the lessor see for example *Oetker and Maultzsch*, Vertragliche Schuldverhältnisse[2], 278). Sentence 3 of the same provision mentions the obligation of the lessor to bear costs and charges connected with the leased goods, which is regarded as a repetition of the obligation to allow the agreed use (Schmidt-Futterer (-*Eisenschmid*), Mietrecht[9], § 535, no. 570) or as clarification of the idea that the contract for lease does not lead to a new distribution of these costs (*Blank and Börstinghaus*, Miete[2], § 535, no. 376). On the other hand, the FRENCH CC art. 1719 enumerates the principal obligations of the lessor (the obligations are specified in arts. 1720–1727): to deliver the leased goods to the lessee (no. 1), to maintain the leased goods in a state fit for the use for which the have been leased (no. 2), to secure a peaceful enjoyment by the lessee for the duration of the lease (no. 3; a special provision for plantations is found in no. 4). This enumeration follows a chronological order (*Huet*, Contrats spéciaux, no. 21160, *Malaurie*/*Aynès*/*Gautier*, Contrats spéciaux VIII[14], 427). The enumeration has been described as deceptive in two ways: first, it is not complete (missing the guarantees and the security); second, it suggests that the obligations are parallel and independent of each other. In reality there is only one essential obligation of the lessor: to ensure that the lessee has the peaceful enjoyment of the goods. All other obligations can be regarded as being just different means of contributing to this objective (cf. *Bénabent*, Contrats spéciaux[6], no. 334-3).

II. Obligation to make the goods available (transfer of physical control)

2. To the extent that the issue is regulated or discussed in national law, it seems to be generally agreed that making the goods available implies giving the lessee physical control over the goods. In AUSTRIAN law (CC § 1096), the lessor has to hand over the leased goods, together with accessories, to the physical possession (*physischer Besitz*) of the lessee at the beginning of the lease relationship (*Apathy and Riedler*, Bürgerliches Recht III[2], no. 8/19, Rummel (-*Würth*), ABGB I[3], § 1096, no. 1, 3). Under DUTCH CC art. 7:203, the goods must be put at the lessee's disposal; physical control is not required (Rueb/Vrolijk/Wijkerslooth-Vinke (-*Huydecooper*) , Huurrecht, art. 7:203, no. 4). According to the ESTONIAN LOA § 276(1), the lessor is required to deliver the goods, together with accessories, to the lessee, i.e. to transfer the possession of the goods, which means physical control of the goods or the means to enable control, cf. Law of Property Act arts. 33(2) and 36. In FRENCH law, the lessor has to put the goods at the disposal of the lessee (*Huet*, Contrats spéciaux, no. 21161: *possession physique*). This act of putting at disposal is fundamental and cannot be excluded by contract, because it is imposed by the nature of the contract for lease (Cass.civ. 11 October 1989, Bull.civ. 1989.I, no. 317). The goods must be free of any other *occupation* (Cass.civ. 16 January 1980, Bull.civ. 1980.III, no. 13), but it may be stipulated that the lessee has to suffer certain inconveniencies without a remedy (*Bénabent*, Contrats spéciaux[6], no. 334-4). The lessor has to deliver accessories which are necessary for normal use (*Huet*, Contrats spéciaux, no. 21162) and has to bear the costs of delivery (loc. cit. 653). In GERMANY, the lessor is obliged to ensure that the lessee has the use of the leased goods; thus the lessor must leave or hand over the leased goods to the lessee. In general it is not clear if this demands transfer of possession in the sense of CC § 854 (*Besitzverschaffung*, BGH 22 October 1975, BGHZ 65, 137, 139 ff: no prerequisite in general, making accessible is sufficient). For

movables, the "handing over" demands in case of doubt the physical handing over, that is *unmittelbarer Besitz*, but other agreements are possible (Emmerich and Sonnenschein, (-*Emmerich*), Hk-Miete[8], § 535, no. 7). Under GREEK law the lessor is obliged to provide the lessee with the use of the leased object (CC art. 574) and to hand it over to the lessee in a condition fit for the agreed use (CC art. 575); it suffices that the leased goods become available to the lessee (Georgiades and Stathopoulos (-*Rapsomanikis*), art. 575, no. 1). In HUNGARIAN law, according to the definition of a contract for lease in CC § 423, the lessor is obliged to provide the lessee with the use of the leased object. Pursuant to CC § 424 (2), the lessor must ensure that the leased object is free from any third party right that would prevent or limit the lessee's use of it. In ITALIAN law, as a general rule, the obligation of the lessor to make the goods available (CC art. 1575 no. 1 - *consegnare* the leased goods to the lessee) presupposes an act on the part of the lessor that comprises all acts, material and judicial, which are necessary for the commencement of use by the lessee. If the details of this obligation are not stipulated by the contract, default rules apply (CC arts. 1182, 1183). Together with the goods, accessories must also be delivered (Cass. 61/229). If the goods are in the *detenzione* of a third person, the lessor is obliged to get *detenzione* and transfer it to the lessee (Cass. 55/2181). The provision in CC art. 1575 no. 1 does not apply to financial leasing contracts which stipulate that the supplier is to make the goods available (see *Cian and Trabucchi*, Commentario breve[8], art. 1575, no. I). See also CZECH CC § 664; HUNGARIAN CC § 423; LATVIAN CC art. 2130; LITHUANIAN CC art. 6.483(1); MALTESE CC art. 1539; POLISH CC art. 662(1) (lessor must transfer the goods in a suitable condition; the lessor should also make available all accessories required for normal use of the leased goods, *Pietrzykowski*, Kodeks cywilny II[4], art. 662, Nb. 1, 207); PORTUGUESE CC art. 1031 lit. a; SLOVAK CC § 664 (obligation to make the goods, together with accessories, available in a condition fit for the agreed use or normal use; Svoboda (-*Górász*), Komentár a súvisiace predpisy, arts. 664, 611). SLOVENIAN LOA § 588; SPANISH CC art. 1554 no. 1; SWISS LOA art. 256(1).

III. Time of performance

3. See Notes to IV.B.–2:101 (Start of lease period).

IV. Place of performance

4. It seems that national legislation normally has no separate provisions on the place where leased goods should be made available. One explanation could be that legislators have mainly been preoccupied with immovables (where the place is no problem). General rules may apply, see CZECH CC § 567(1) (place of business or residence of the debtor); ESTONIAN LOA § 85(1) (agreed place, or place determined by nature of the contract, or the place where the goods are at the conclusion of the contract); GREEK CC art. 320 (agreed place, place determined by circumstances, otherwise the debtor's place); ITALIAN CC art. 1182 (place where the goods are when obligation arises); or POLISH CC art. 454 (debtor's place).

V. Availability during the lease period

5. In AUSTRIAN law, the lessor must make the goods available for the lessee's use in accordance with the contract and ensure that they remain available for such use; this obligation is seen as a unity and CC § 1096 contains parts of it (Rummel (-*Würth*), ABGB I³, § 1096, no. 1). According to § 1096(1) sent. 1, the lessor must not interfere with the lessee's agreed use or enjoyment of the leased goods; the lessor must allow the agreed use and abstain from all activities which the lessee need not tolerate; the

lessor must perform all acts necessary to ensure that the lessee has the use of the goods (Rummel, loc. cit. no. 7). The lessor must prevent interference with the agreed use originating from third persons (OGH 20 May 1970, JBl 1970, 523; *Apathy and Riedler*, Bürgerliches Recht III[2], no. 8/21). Third parties must not be given rights that are likely to interfere with the lessee's use. The lessor must take the steps necessary to avoid interference by third persons, even if this involves financial burdens for the lessor (Rummel, loc. cit. no. 9). In DUTCH law, the obligation to make the object available is likewise combined with an obligation to leave it at the disposal of the lessee for the duration of the contract (DUTCH CC art. 7:203).

6. Under DANISH law, the lessor has an obligation to maintain the goods and to ensure that third parties' rights do not interfere with the lessee's use (*Gade*, Finansiel leasing, 113–125).

7. According to the ESTONIAN LOA § 276(1), the lessor must deliver the goods in a condition suitable for contractual use and ensure that the goods are maintained in such condition throughout the lease period. This means that the goods must have the characteristics agreed upon and be free from defects that restrict or preclude their use during the lease period. The lessor must, upon demand, remove defects or obstacles or take over a dispute with a third party, except for defects and obstacles for which the lessee is responsible and which must be removed at the lessee's cost, LOA § 278.

8. According to the FRENCH CC art. 1719 no. 3, the lessor is obliged to ensure the lessee's peaceful enjoyment of the goods for the duration of the lease. Normally this obligation is split up into two components (some authors include a third component: the guarantee of the lessor against hidden defects, see Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 234). The first component is that the lessor must abstain from acts which interfere with the lessee's use (*Bénabent*, Contrats spéciaux[6], no. 336). This is regarded as an obligation not to do (*Collart Dutilleul and Delebecque*, Contrats civils et commerciaux[7], no. 496) or as a prolongation of the obligation to deliver (loc. cit. 497), and constitutes the dynamic element of a lease, an essential obligation of the contract (*Huet*, Contrats spéciaux, no. 21164). The second element concerns protection against interference from third persons (arts. 1725 to 1727). If factual interference, without a claim to have a right to the leased goods, makes the lessee's use impossible, this is covered by the "guarantee" of the lessor (*Bénabent*, loc. cit.; *Groslière*, loc. cit. no. 297; *Huet*, Contrats spéciaux, nos. 21164, 660: to assure enjoyment is an obligation of result). Where the lessee's use has been (partially) disturbed by an action relating to ownership (legal problems), the lessee is entitled to a proportionate reduction in rent, if the lessor has been notified of the interference and of the impediment (art. 1726; but in most cases simple legal problems do not lead to any loss for the lessee, see *Groslière*, loc. cit. no. 304). The lessee may withdraw from a legal action by third parties claiming rights in the goods, by naming the lessor and making the lessor a party to the action (art. 1727). Another specification of quiet enjoyment is mentioned in art. 1723: the lessor may not change the form or the destination of the leased object (see *Groslière*, loc. cit. nos. 264 ff). For BELGIAN law, see *La Haye and Vankerckhove*, Le Louage de Choses I[2], nos. 619 ff.

9. In the GERMAN CC, the principal obligation of the lessor is found in § 535(1) 1. sent.: the lessor is obliged to grant the lessee the use of the leased goods during the lease period. This is not merely an obligation to hand over and to leave the goods to the lessee (MünchKomm (-*Schilling*), BGB[4], § 535, no. 71); ensuring use of the goods goes beyond this. The lessor must ensure the contractually agreed use for the lessee during the whole lease period (Schmidt-Futterer (-*Eisenschmid*), Mietrecht[9], § 535, no. 1). This obligation implies that the lessor is obliged to tolerate the contractually agreed

use by the lessee and to prevent loss or disturbance of the use caused by third persons (*Oetker and Maultzsch*, Vertragliche Schuldverhältnisse[2], 279 ff, Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 535, no. 13).

10. In GREEK law the lessor is obliged to allow the lessee to use the leased goods for the whole term of the lease (CC art. 574). This obligation entails not only positive action but also omissions on the part of the lessor (e.g. abstaining from acts that would disturb the lessee's use and preventing third parties from disturbing such use) (*Georgiadis*, Enochiko Dikaio, Geniko meros, § 24, no. 5; *Kornilakis*, Eidiko Enochiko Dikaio I, 195). Greek law – which distinguishes between factual defects (CC art. 576(1)), agreed qualities (CC art. 576(2)) and legal defects (CC art. 583) – classifies third party claims under legal defects. More specifically, a legal defect exists when the stipulated use of the leased object is either entirely or partially taken away from the lessee through the right of a third party. Contrary to contracts for sale (CC art. 514), the notion of legal defect in the contract for lease presupposes that the object is taken away from the lessee (CC art. 583); the mere existence of a third party right does not suffice if it does not affect the use of the leased object. The coming danger of the object being taken away does not suffice either (Ca Thessaloniki 570/1966 Arm 21, 116). Only when third party rights impede the stipulated use are they considered to be legal defects of the leased goods (*Filios*, Enochiko Dikaio I[2], § 27 Γ I; *Georgiadis*, Enochiko Dikaio, Geniko meros, § 25 nos. 12–13; *Kornilakis*, Eidiko Enochiko Dikaio I, 220–221; Georgiades and Stathopoulos (-*Rapsomanikis*), art. 583, no. 2).

11. According to the ITALIAN CC art. 1575 no. 3 the lessor is obliged to guarantee the lessee's peaceful enjoyment during the lease period. Factual and legal interferences with use are distinguished (CC art. 1585). The lessee has to inform the lessor promptly of any claim from third parties; the lessor must take over litigation, and the lessee is discharged from the proceedings by indicating the identity of the lessor (art. 1586); see Rescigno (-*Giove*), Codice Civil I[5], arts. 1585 and 1586, 1947 ff.

12. According to the SPANISH CC art. 1554 no. 3 the lessor is obliged to ensure the lessee's quiet enjoyment of the goods during the whole period of the contract (*Albaladejo*, Derecho Civil, II[12], 639). This has been characterised as the principal obligation of the lessor (*Bercovitz*, Manual de Derecho Civil, 175). The lessor may not change the form of the goods (art. 1557) and has to abstain from all conduct which interferes with the lessee's possession. With regard to acts of third persons, Spanish law also distinguishes between factual and legal interferences. According to art. 1559 the lessee is obliged to inform the lessor about any interference. The lessor is not responsible for mere factual interference with use by third persons (art. 1560); but the lessee has a direct action against the disturber (art. 446). It is not regarded as factual interference if a third person has acted by virtue of a corresponding right (art. 1561(2)). See further *Díez-Picazo and Gullón*, Sistema II[9], 335.

13. Under SWEDISH law, the common view seems to be that the lessor has an obligation to maintain the goods, even where the goods are damaged without fault on the side of the lessor, but this view is challenged by *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 194–197. The lessor has no such obligation if the goods are lost or become totally damaged. The lessor must not alienate the goods without reserving the lessee's right. See *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 194–197 with further references.

14. In SWISS law, the lessor has an obligation to maintain the goods, LOA art. 256. This obligation implies that the lessor must ensure the usability of the goods during the whole lease period (BSK (-*R. Weber*), OR I[3], art. 256, no. 2). Further, the lessor must abstain from interfering with the use and must prevent interference by third parties

where appropriate (BSK (-*R. Weber*), OR I[3], art. 256, no. 1). If a third person has sued the lessee, the lessee can demand that the lessor take over the proceedings (art. 259a); the lessor is correspondingly obliged to do so.

15. According to the POLISH CC art. 662, the lessor must sustain the goods in a condition suitable for use throughout the lease period. The lessor is liable for legal interferences by third parties, but not factual interference.

16. According to the SLOVAK CC § 664, the lessor must maintain the leased goods in the state agreed by the parties or in a state allowing the normal use of the goods. This obligation relates to the quality as well as to the quantity of the leased goods (Svoboda (-*Górász*), Komentár a súvisiace predpisy, art. 664, 611). Another aspect of the lessor's obligation is that the lessee is to be protected against disturbances by third persons, and this includes an obligation on the lessor to take necessary legal steps if a third person vindicates rights over the leased thing incompatible with the lessee's rights (CC § 684).

17. Under UNITED KINGDOM law, the obligation to ensure the availability of leased goods throughout the lease period is regulated by the Supply of Goods and Services Act 1982. In ENGLAND, WALES and NORTHERN IRELAND, s. 7(2) implies into all contracts for the hire of goods a warranty that the lessee will enjoy "quiet possession" of the goods for the period of hire. An exception is however made for "disturbance" of quiet possession by the lessor, or by a third party with a charge or encumbrance over the goods made known to the lessee prior to conclusion of the contract. Non-performance with regard to this implied warranty gives the lessee the right to damages reflecting the extent of the injury to the lessee's (possessory) interest in the goods and may be set off in diminution or extinction of the rent payments due (*Chitty* on Contracts II[29], no. 33-073). Further, if the lessor wrongfully retakes possession of the goods, the lessee may seek the exercise of the court's discretion to order specific delivery of the goods (s. 3 of the Torts (Interference with Goods) Act 1977). It will generally not give the lessee a right to terminate the lease (see *Chitty* on Contracts II[29], no. 33-074 and *Treitel*, The Law of Contract[11], 804–805 more generally). It should be noted that the law also imposes an implied condition that the lessor holds the right to transfer possession of the goods for the period of the lease (Supply of Goods and Services Act 1982 s. 7(1)). Liability for non-performance of obligations implied by law may be excluded or restricted by a party acting in the course of business (Unfair Contract Terms Act 1977 s. 1(3)) only in so far as the exclusion or restriction fulfils the requirement of reasonableness (Unfair Contract Terms Act 1977 s. 7(4)). Section 11H(1) and (2) of the Supply of Goods and Services Act 1982 contain the corresponding provisions concerning title and "quiet possession" in SCOTLAND. In this case however the implied term as to quiet possession is not classified as a warranty or a condition, the distinction bearing a different meaning under Scottish law. Attempts to exclude or restrict liability for non-performance of the statutory obligations to ensure quiet possession have effect only in so far as incorporation of such terms is fair and reasonable (Unfair Contract Terms Act 1977 s. 21(1)(b)). In IRELAND, the corresponding implied warranty (which covers charges and encumbrances, as well as quiet possession) is to be found in s. 88 of the Consumer Credit Act 1995. Further, a term attempting to exempt the agreement from these implied provisions is void (s. 79(2)).

18. See also CZECH CC § 664 (maintain the leased goods in the state agreed by the parties or in a state allowing the normal use of the goods) and § 684 (protect the lessee against third parties asserting rights in the goods); LITHUANIAN CC arts. 6.485,

6.486; MALTESE CC art. 1539 litra c; PORTUGUESE CC art. 1037; SLOVENIAN LOA § 592 (material defects) and § 599 (legal defects).

IV.B.–3:102: Conformity with the contract at the start of the lease period

(1) The lessor must ensure that the goods conform with the contract at the start of the lease period.

(2) The goods do not conform with the contract unless they:

(a) are of the quantity, quality and description required by the terms agreed by the parties;

(b) are contained or packaged in the manner required by the terms agreed by the parties;

(c) are supplied along with any accessories, installation instructions or other instructions required by the terms agreed by the parties; and

(d) comply with the following Article .

COMMENTS

A. Conformity at the start of and throughout the lease period

Conformity. The condition of the goods regarding quality and quantity is normally a crucial issue in any lease contract. The lessee's use of the goods and the benefits gained by this use depend heavily on the condition of the goods. The word "conformity", together with its antonym "lack of conformity", is used to denote the relationship between the lessee's justified expectations under the contract and the factual state of the goods. The condition of the goods, in terms of both quality and quantity, can be determined by the parties in their individual agreement. Default rules on conformity of the goods at the start of the lease period are found in the present and the following Article. The rules are parallel to the rules for contracts for sale (Book IV.A.).

Distinguishing conformity at the start of the lease period and during the lease period. The lessor typically has obligations concerning the condition of the goods both at the start of the lease period and during the lease period. This is a significant difference in comparison with sales contracts, where conformity as a rule is established upon delivery (the time when risk passes). One might ask whether it is necessary to distinguish between the lessor's obligation concerning conformity at the start of the lease period and the obligation concerning conformity during the lease period. A distinction should be made for at least two reasons. First, the requirements concerning the condition of the goods are normally not exactly the same during the lease period as they are at the start of the lease period. This is obvious in contracts where the obligation to repair and maintain the goods is shared between the parties. Even where the lessor is obliged to keep the goods in the original condition throughout the lease period, the lessee must normally tolerate some discrepancies due to ordinary wear and tear. Second, the remedies for non-performance can be influenced by differences in factual situations: during the lease period it is quite possible that non-conformity is caused by factors beyond the lessor's control and even by the lessee's own non-performance.

B. Conformity at the start of the lease period

Individual agreement and default rules. The parties normally agree at least on the basic requirements of quantity and quality of the leased goods. In some cases the goods are described in great detail, either directly in one or more contract documents or by referring to certain technical standards etc. In other cases the goods are not described at all beyond the identification of a certain thing or of goods of a certain kind. It may, however, be possible to determine the quantity and quality of the goods to some extent by taking into consideration the lessor's knowledge of the lessee's intended use of the goods and other circumstances.

Sometimes one has to look at default rules – objective law regulating the contract where the parties have not agreed otherwise. The default rules may be more or less specific. In their most general form the default rules refer to reasonableness and other abstract principles. For lease contracts, the present Article refers to the individual agreement, while some default rules are found in the next Article, even if referred to already in the present Article. In addition, the general rules in Book II and Book III apply. It should be noted that it is not necessary – and not always possible – to distinguish strictly between individual requirements and requirements in default rules.

Illustration 1
Lessee A agrees to lease a computer that lessor B will build based on the specifications of A's IT expert. When the computer is delivered, A discovers that it has insufficient capacity for the intended use. As the computer has been built in accordance with the specifications, it conforms to the contract and there is no non-performance.

Illustration 2
The construction business enterprise A agrees with B, a professional provider of construction equipment, to lease a building fence for a particular building site. Even if the contract has no specifications, it can be determined from the contract that B must deliver a fence that is long enough for this building site, and as B knows that the site is located in the centre of the town, it must conform to public requirements regarding traffic, pedestrians etc.

Elements of agreed condition of the goods. The present Article, which has a parallel for sales contracts in IV.A.–2:301 (Conformity with the contract), describes the elements of the agreed condition of the goods. The expression "quality, quantity and description", cf. paragraph (2)(a), is wide enough to cover all aspects of the agreement concerning the condition of the goods. Paragraph (2)(b) specifies that the goods must be contained and packaged in the manner required by the contract. These requirements may be relevant for contracts for lease as well as for contracts for sale, typically when the lessee picks up the goods and trusts that they are protected by proper packaging (cf. Illustration 3 to the following Article concerning default rules). Accessories and instructions are dealt with under paragraph (2)(c); these elements may be specified in the parties' agreement. Paragraph (2)(d) refers to the default rules in the following Article. This means that, technically, the present Article includes requirements based both on the individual agreement and the default rules.

No provision concerning specifications etc. For sales contracts, IV.A.–3:102 (Determination of form, measurement or other features) deals with situations in which the buyer is to determine the form, measurements and other features of the goods and fails to provide such specifications. Under certain conditions, the specifications may be made by the seller and these specifications will then be binding for the buyer. It has not been found necessary to include a corresponding provision for leases, as the situation is less practical here than it is for sales contracts.

Relevant point in time for establishing conformity. This Article fixes the relevant point in time for establishing conformity with the contract, namely the start of the lease period. Further, it follows from the Article that the condition of the goods *prior* to the start of the lease period, for example at the time when the agreement was concluded, is *not* relevant for establishing conformity with the contract – that is, of course, unless the parties have agreed

otherwise. It is explained in Comment A that the distinction between requirements at this point in time and the requirements for the subsequent lease period may be of importance. A lack of conformity which was present at the start of the lease period, but which was unknown to both parties ("hidden defect"), is treated as a lack of conformity at the start of the lease period even if the effects become apparent only later. Thus, this may be non-performance of the lessor's obligations even in a contract placing the obligation of maintenance on the lessee.

Agreements on quality etc. compared with exemption clauses. Rules on conformity and rules on remedies for non-conformity are closely related. The present Article obliges the lessor to ensure that the goods meet the requirements of the contract to be in conformity with the contract. Lack of conformity is non-performance of the lessor's obligations. This could also be put another way: the lessee is entitled to remedies for non-performance if the goods do not meet the requirements of the contract. The model chosen in this Part of Book IV, operating with conformity as the link between the requirements of the contract on one hand and remedies on the other, is the same as in other Parts of Book IV and in many national systems. Sometimes, it may be difficult to distinguish between an exemption clause and a description of the goods. If the goods are described only vaguely, or if the lessor is explicitly given a wide range of choice concerning what kind of goods are to be leased and the quality of the goods, this may have the same effect as a contract term limiting the lessor's liability. As a rule, this Part of Book IV is non-mandatory, even where remedies for non-performance are concerned, and the distinction between an exemption clause and a description is not important. In consumer contracts, however, rules on remedies are designed to be mandatory. In these cases, a line must be drawn between description of the goods and derogation clauses. This is a problem common to several types of contract; it is hardly possible to give general guidelines as to how the line should be drawn. Further, giving the lessor a wide range of choice in defining the quality and quantity of the goods may be regarded as an unfair term, cf. Book II, Chapter 9, Section 4 and the Unfair Contract Terms Directive with annex.

Illustration 3
Lessor A and lessee B agree that B will, starting next month, lease a car of a certain brand and model with ten seats. However, it is a term of the contract that B is to have no remedies if the car provided does not conform to the contract. If the contract is a consumer contract, this is an invalid exemption clause, cf. IV.B.–1:104 (Limits on derogation from rules on remedies in a consumer contract for lease).

Illustration 4
The situation is the same as in Illustration 1, but this time there is a term allowing the lessor to provide a car of another brand or model or with fewer seats. Depending on the circumstances (the lessee's needs, the planned use of the car etc.) this term may be treated as an exemption clause which is invalid in a consumer contract, cf. IV.B.–1:104 (Limits on derogation from conformity rights in a consumer contract for lease).

NOTES

See Notes to following Article.

IV.B.–3:103: Fitness for purpose, qualities, packaging etc.

The goods do not conform with the contract unless they:

(a) are fit for any particular purpose made known to the lessor at the time of the conclusion of the contract, except where the circumstances show that the lessee did not rely, or that it was unreasonable for the lessee to rely, on the lessor's skill and judgement;

(b) are fit for the purposes for which goods of the same description would ordinarily be used;

(c) possess the qualities of goods which the lessor held out to the lessee as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods;

(e) are supplied along with such accessories, installation instructions or other instructions as the lessee could reasonably expect to receive; and

(f) possess such qualities and performance capabilities as the lessee may reasonably expect.

COMMENTS

Default rules on conformity

General. The present Article has default rules that supplement the individual agreement regarding the condition of the goods at the start of the lease period. Some of the provisions are closely connected to the individual agreement (particular purpose, sample or model), while others are more general (fit for ordinary purposes). Corresponding rules on sales contracts are found in IV.A.–2:302 (Fitness for purpose, qualities, packing etc.).

Fit for particular purposes. Where the lessee has leased the goods for particular purposes and the purposes are known to the lessor, the goods should be fit for these purposes unless otherwise agreed. Often, the lessor is a business and the lessee is a person without any special knowledge of the kind of goods in question. The lessor is then expected to either supply goods fit for the purposes or else warn the lessee that the goods are not fit for the purposes. However, this applies only where the lessee may reasonably rely on the lessor's expertise. The lessee cannot rely on the lessor's expertise if the particular purposes are not sufficiently made known to the lessor. The situation may also be such that the lessor's knowledge of the lessee's purposes is not sufficiently detailed. The lessee is typically in a better position to know about the intended use of the goods. Further, it may be that the lessee has more expertise concerning the particular kind of goods than the lessor. If both the lessor and the lessee are amateurs, and the lessee has no reason to expect more, the lessee can consequently not rely on any expertise on the lessor's side.

Illustration 1

A leases a small car from B, in order to drive from Amsterdam to Brussels. This qualifies as ordinary use of a small car, and does not constitute a particular purpose. However, when driving back from Brussels to Amsterdam, A is to tow another car. The small car is not capable of towing another car. If A has made the towing purpose known to B, and B has not informed A to the contrary, the car is required by the contract to fulfil this purpose.

Fit for ordinary purposes. A more general rule is found in sub-paragraph (b): the goods must be fit for the purposes for which goods of the same kind would ordinarily be used. This is, together with sub-paragraph (f), a requirement of "ordinary standard". The basic requirement is that the goods can be used for their ordinary purpose. It must also be possible to obtain the normal benefit and results of use without extraordinary costs or difficulties. The goods must further comply with relevant legislation or other public or private requirements concerning for example safety. Technical standards etc. may be relevant. The provision refers to the ordinary purposes of use for goods of the "same description", irrespective of the actual contract. However, the reference to an ordinary standard must be seen in connection with the circumstances of the particular case. The requirements may vary according to the agreed rent, the agreed lease period, time available to prepare delivery, etc.

Sample or model. Where the lessor has held out a sample or a model prior to conclusion of the contract, the leased goods must normally conform to the quality of this sample or model, cf. sub-paragraph (c). The lessor may, however, have informed the lessee of differences to be expected, and the circumstances may also allow for certain discrepancies, e.g. a different colour.

Illustration 2
B leases a computer from A. The model demonstrated at the business premises of the lessor has a 19-inch screen, but the leased computer comes with a 15-inch screen. It does not conform to the contract, as the computer screen should be equal to that demonstrated at the premises of the lessor.

Packaging etc. The goods must be packaged or contained in an adequate way, cf. sub-paragraph (d). This may be of importance for the lessee in connection with transport, storage and return of the goods. If goods of the relevant kind are normally contained or packaged in a certain manner the lessor has an obligation to make the goods available contained or packed in this manner – or to a higher standard. This applies even if there are terms in the individual agreement regarding packaging. When there is no standard manner of containing or packing the goods, the standard required to preserve and protect the goods is decisive. These rules are of particular importance for contracts in which the burden of maintenance falls on the lessee.

Illustration 3
When the lessee arrives at home with the 48 crystal glasses leased for a wedding party, six of them are broken. The glasses were transported in the lessee's car with normal care taken. No instructions for transport were given. The glasses should have been packed so as to protect them from breakage in normal conditions of transport. The glasses did not conform to the contract.

Accessories and instructions. The accessories, instructions etc. which the lessee may reasonably expect, cf. sub-paragraph (e), depend on the circumstances. Instructions for maintenance may be needed if the goods are leased for a long period, but not if the goods are leased just for a few days or hours. The accessories necessary for normal use and safety must sometimes come with the goods, while the circumstances may indicate that accessories required for the lessee's particular purposes must be provided by the lessee.

Illustration 4
A copier is leased for two years and is installed by the lessor. The lessee can expect that the first toner cartridge is in place – but not necessarily included in the agreed rent

– so that the copier is ready for use. Subsequent replacements must be ordered by the lessee. However, the situation may be different if the copier uses generic cartridges, not usually supplied by the lessor; in such cases it may be that the lessee cannot expect the copier to be installed with a cartridge.

Illustration 5
X leases a cabin cruiser for three weeks. The lessee can reasonably expect that there is a fire extinguisher on board when the boat is made available for the lessee's use.

What the lessee may reasonably expect. A general provision is included in sub-paragraph (f): the goods must possess such qualities and performance capabilities as the lessee may reasonably expect. This rule overlaps with several of the other rules of the present paragraph, but it expresses a general principle that may supplement the former limbs. Together with the rule in sub-paragraph (b), it expresses the requirement of "ordinary standard". The rule in sub-paragraph (f) is closely connected to the rule in II.–9:108 (Quality): if the quality cannot be determined from the terms agreed by the parties, from a rule of law or from usages or practices, "the quality required is the quality which the recipient could reasonably expect in the circumstances".

NOTES

I. Overview

1. Legislation in European jurisdictions varies regarding the condition of the leased goods at the start of the lease period. The starting point is that the goods must conform to the individual agreement. Some, but far from all, jurisdictions also have explicit provisions as to objective requirements on quality etc. Questions of conformity are usually addressed in connection with the lessor's obligation to make the goods available for the lessee's use, cf. notes to IV.B.–3:101 (Availability of the goods).

II. Provisions explicitly dealing with objective standards

2. Requirements of conformity concerning the quality and quantity of the goods at the start of the lease period are mainly parallel with corresponding rules for sales contracts. In CISG art. 35(1) it is stated that the seller must deliver goods "which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract". Article 35(2) then has default rules – objective rules – on conformity. The most general requirement is that the goods must be "fit for the purposes for which goods of the same description would ordinarily be used". The same structure is found in national legislation on sales law based on CISG. For consumer sales there are corresponding rules in Directive 1999/44/EC art. 2.

3. According to the FRENCH CC art. 1720(1), the lessor has to deliver the goods in a good state of repair in all respects, see also BELGIAN CC art. 1720(1)); regard must be had to usages and the nature of the goods (Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 184, with further references.); in practice the standard stipulated in the law (to deliver in a good state of repair) is often excluded by contract (*Huet*, Contrats spéciaux, no. 21163, 656, *Collart Dutilleul and Delebecque*, Contrats civil et commerciaux[7], nos. 493, 429 ff). In DUTCH law, there is a defect, implying non-performance of the lessor's obligations, if the object does not provide the enjoyment that a lessee may expect of a well-maintained object of the kind concerned (CC art. 7:204 (2)). See also

ITALIAN CC art. 1575 no. 1 (in a good state of repair); MALTESE CC art. 1540(1) (in a good state of repair in every respect). It has been pointed out that these standards are higher than those stipulated in sales law (see Rescigno (-*Giove*), Codice Civile I[5], art. 1575, no. 3) and higher than for the maintenance of the goods (*Groslière*, loc. cit. no. 193). The provision in the ITALIAN CC art. 1575 no. 1 is (in spite of the objective formula) understood as a concept referring to the agreed use (*Catelani*, Locazione[3], 196; *Cian and Trabucchi*, Commentario breve[8], art. 1575, no. II1). For BELGIAN law it is said that the obligation to maintain the goods in a state fit for contractual use implies delivering them in the same state (*La Haye and Vankerckhove*, Le Louage de Choses I[2], no. 575). According to the POLISH CC art. 662(1), the lessor should transfer the goods in a condition suitable for the agreed purpose, *Pietrzykowski*, Kodeks cywilny II[4], art. 662, Nb. 2, 207. If no particular purpose is known to the lessor, the goods should be of "average quality" (general rule from CC art. 357).

4. UNITED KINGDOM law deals explicitly with the condition of leased goods in the Supply of Goods and Services Act 1982. As a consequence, common law rules as to the quality and fitness of leased goods have become practically redundant (see *Chitty* on Contracts II[29], no. 33-068). Sections 8–10 (concerning ENGLAND, WALES and NORTHERN IRELAND) and ss. 11I–11K (concerning SCOTLAND) set out the terms, regarding correspondence with description or with a sample and quality or fitness for a particular purpose, which will be implied by law into a contract for hire. Under these provisions, the goods must correspond to their description (if leased by reference to a description); be of satisfactory quality (in so far as concerns fitness for all the purposes for which such goods are normally supplied, appearance and finish, freedom from minor defects, safety and durability, as set out in s. 18(3) (see *Chitty* on Contracts II[29], no. 33-070, fn. 371); be reasonably fit for any particular purpose made known to the lessor expressly or by implication; and conform to the sample (if leased by reference to a sample). The above terms are implied by law as conditions in England, Wales and Northern Ireland (theoretically giving the lessee the possibility of terminating the lease on breach). As against a consumer, a lessor contracting in the course of business may not exclude or restrict liability with regard to the above (Unfair Contract Terms Act 1977 s. 7(2) in England, Wales and Northern Ireland and s. 21(1)(a)(i) in Scotland). In other cases, exclusion or restriction of liability will have effect only to the extent that it satisfies the requirement of reasonableness in England, Wales and Northern Ireland (Unfair Contract Terms Act 1977 s. 7(2)) and only if it is fair and reasonable to incorporate such a term in Scotland (Unfair Contract Terms Act 1977 s. 21(1)(a)(i)). Similar terms are implied into hire-purchase contracts by the Supply of Goods (Implied Terms) Act 1973 (ss. 9–11), regardless of the amount financed and the status of the lessee. The Unfair Contract Terms Act 1977 further renders ineffective (absolutely or subject to certain conditions) any attempt to exclude these terms or the liability of the lessor for breach of such terms (cf. *Chitty* on Contracts II[29], no. 38-346). In IRELAND, terms regarding correspondence with description or with a sample and quality or fitness for a particular purpose, will also be implied into a contract for lease by law (Consumer Credit Act 1995 s. 88). A term of a lease which attempts to exempt application of s. 88 will be void and unenforceable unless it can be shown that it is fair and reasonable (s. 79(3)). Terms excluding or restricting liability with reference to these implied terms may also be struck out by the court.

5. The provision in the SPANISH CC art. 1554 no. 1 is silent as to the standard required at the time of delivery of the leased goods. In the legal literature it is held that the lessor must deliver the goods in a state fit for the use they are destined for; that is the same state as for maintenance (art. 1554 no. 2). The law presumes that the lessee has

received the goods in a good state, if nothing else is expressed, and the burden of proof shifts to the lessee to prove non-conformity (art. 1562). Also TS 25 June 1985, RAJ 1985, 3313). CC art. 1553 makes a reference to the sales rules for the concept of, and remedies for, hidden defects.

III. Standard set by agreed use

6. Some legislation requires that the goods must meet the standard necessary for the agreed use: AUSTRIAN CC § 1096 (in useful state, cf. *Apathy and Riedler*, Bürgerliches Recht III[2], no. 8/19); ESTONIAN LOA § 276 (suitable condition for the agreed use); GERMAN CC § 535(1) sent. 2 (suitable condition for the agreed use, cf. MünchKomm (-*Schilling*), BGB[4], § 536, no. 4); GREEK CC art. 575 (condition suitable for the agreed use); see also SWISS LOA art. 256(1) and note *II3* concerning POLISH CC art. 662(1). For SWEDISH law, it is held that the goods must be fit for the agreed use, *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 194.

7. Under UNITED KINGDOM law, where the lessor leases goods "in the course of a business" and the lessee "expressly, or by implication, makes known … any particular purpose for which the goods are being [leased]", there is "an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied" (except where it would be unreasonable for the lessee to rely on the lessor's skill and judgement). This provision is implied by s. 9(4)–(7) of the Supply of Goods and Services Act 1982 into contracts for lease in ENGLAND, WALES and NORTHERN IRELAND (see further, *Chitty* on Contracts II[29], no. 33-071). The same provision is extended to SCOTLAND by s. 11J(5)–(8) of the Supply of Goods and Services Act 1982. An equivalent provision is implied into hire-purchase contracts by s. 10(3) of the Supply of Goods (Implied Terms) Act 1973. IRELAND implies similar provisions into contracts for lease under s. 88 of the Consumer Credit Act 1995 and into consumer hire-purchase contracts under s. 76(3) of the same Act, but only where the lessee is a consumer.

IV. Mixed approach

8. Some jurisdictions have a mixed subjective and objective approach: SLOVENIAN LOA § 592 (agreed or customary use); LITHUANIAN CC art. 6.483(1) (in a state corresponding to the conditions of the contract and designation of the property, lessor can inform of defects at conclusion of the contract); see also PORTUGUESE CC arts. 1027 and 1032 sent. 1; SLOVAK CC § 664 (fit for agreed use, or if no particular use is agreed, normal use (Svoboda (-*Górász*), Komentár a súvisiace predpisy, arts. 664, 611); cf. CC § 496(2) with default rule on average quality); the rule is the same for CZECH law, cf. CC § 664. Under HUNGARIAN law, there are general rules on conformity in CC §§ 277–311/A. The Consumer Sales Directive (1999/44/EC) was also implemented by amendment of these rules, affecting not only the rules on the sale and supply of goods, but also the rules on the lease of goods. The general requirements apply also to lease contracts, both at the time of delivery of the goods and during the whole period of lease; the HUNGARIAN CC § 424 (1) – as a special rule for contracts for lease – extends the applicability of the general requirements in § 277 to the entire duration of the lease.

IV.B.–3:104: Conformity of the goods during the lease period

(1) The lessor must ensure that throughout the lease period, and subject to normal wear and tear, the goods:

(a) remain of the quantity, quality and description required by the contract; and

(b) remain fit for the purposes of the lease, even where this requires modifications to the goods.

(2) Paragraph (1) does not apply where the rent is calculated so as to take into account the amortisation of the cost of the goods by the lessee.

(3) Nothing in paragraph (1) affects the lessee's obligations under IV.B.–5:104 (Handling the goods in accordance with the contract) paragraph (1)(c).

COMMENTS

A. General

Models. Regarding the condition of the goods during the lease period, different models are possible: the lessor may be obliged, throughout the lease period, to keep the goods more or less in the same condition as that required at the start of the period. The opposite solution is to impose these obligations on the lessee. In principle, it could also be that neither party has obligations concerning maintenance and repairs, the situation then being that the lessee must tolerate deterioration or damage during the lease period and the lessor must accept the condition in which the goods are recovered at the end of the lease period. Intermediate solutions are more common: in such cases, the lessee must usually perform some maintenance and repair and the lessor must do the rest. The situations vary a lot. Typically, the obligation of maintenance etc. may be borne by the lessor alone in contracts for very short periods (some hours or days), while – at the opposite end of the scale – all work is left to the lessee where the lease period covers the entire economic lifespan of the goods and the contract for lease in fact has the same function as a contract for sale. The present Chapter is based on a mixed model where the obligations regarding maintenance etc. are distributed between the parties. The rules must be accompanied by a test of reasonableness, taking into account the circumstances of each case. A particular rule is included for contracts where the rent is calculated so as to take into account the amortisation of the cost of the goods, i.e. the intention is that the goods are leased to only one lessee. In these cases, the lessor should have no obligation to repair or maintain the goods, cf. paragraph (2) and Comment C, second paragraph.

Conformity and availability. It is noted in Comment E to IV.B.–3:101 (Availability of the goods) that loss of or damage to the goods – including theft – is regarded as a question of conformity and dealt with in the present Article.

Repairs, maintenance, wear and tear, duty of care. Some activities are normally required to keep up the standard and functioning of leased goods. For most contracts for lease it is therefore necessary to establish, by individual agreement or by default rules, to what extent each of the parties – lessor and lessee – must carry the practical and economic burden of such activities. There exist a wide range of possible options. Use of a leased gold bracelet hardly involves any costs at all, even if the lease lasts for years, while use of a leased machine for heavy outdoor construction work may entail considerable costs each day. In national legislation, as in contracts for lease and in everyday language, different expressions are used – expressions which normally have no precise meaning. Roughly, 'repairs' typically denotes

measures taken to re-establish the normal condition after some damage to the goods, breakdown of vital parts etc., while 'maintenance' typically refers to ordinary activities – often at certain intervals – that are necessary to avoid deterioration and damage. By 'wear and tear' is normally meant ordinary and often inevitable traces of use that are typical for most goods that are not new any more, even if they are treated with care and properly maintained. The latter expression is found in the present Article, while the expressions 'repairs' and 'maintenance' are not used or defined in the provision. The activities are described in a way which does not necessitate a clear distinction between 'repairs' and 'maintenance'. It should also be noted that it is not always possible to distinguish an obligation of maintenance from the obligation to handle the goods with care or even from the daily operation of some devices. Necessary oiling of parts of a machine illustrates this as well. It is not necessary to distinguish between maintenance and care for the purposes of the present Article.

B. Lessor's obligation

Obligation to keep the goods in the original condition. The starting point concerning the lessor's obligations is found in the first paragraph of the present Article: the lessor must ensure that the goods remain fit for the purpose and remain of the quality and quantity initially required. This means that the lessor must repair any damage to the goods and do what is necessary to maintain the original standard and functioning of the goods – with the exceptions noted below. The lessee must accept that the lessor's activities in this respect are likely to have some consequences for the normal use of the goods, cf. IV.B.–5:108 (Repairs and inspections of the lessor).

Fit for purposes – the dynamic aspect. At the start of the lease period the goods must normally be fit for the lessee's particular purposes, if known to the lessor, and for the purposes for which goods of the same kind would ordinarily be used. Conformity during the lease period means that the goods remain fit for such purposes, even under changed circumstances. Typically, public security requirements may change during the lease period. Unless the parties have agreed otherwise, the lessor should be obliged to keep the goods fit for the relevant purposes. Sometimes this may imply repairs; in other cases the situation may be such that the goods can no longer be used at all.

> *Illustration 1*
> A farmer has leased a tractor for two years. After six months public safety requirements are amended, so that all farm tractors must now have a new type of steel frame protecting the driver. If the lessor will not – or cannot – install such a frame, this is non-performance of the obligation under the present Article.

Wear and tear. The lessee must accept normal wear and tear for the kind of goods in question The meaning of this expression is dealt with in Comment A, last paragraph. Normal wear and tear will typically not affect the functioning of the goods at all or at least not significantly. An example might be scratches to the paintwork of a construction machine. Minor deteriorations occurring during the intervals between regular maintenance work can also be regarded as normal wear and tear.

> *Illustration 2*
> A pair of alpine skis is leased for the season. At the end of the season, the steel edges of the skis are not as sharp as they were at the beginning of the lease period, to some

extent reducing their performance capabilities. The skis still conform to the contract as long as the use is not significantly affected.

Lessor's obligation negatively defined. Besides tolerating normal wear and tear the lessee may also be obliged to perform some activities necessary to maintain the standard and functioning of the goods, cf. the third paragraph of the present Article and comments below. In addition, the lessee must handle the goods with care and in some exceptional cases intervene to take care of the lessor's interests, cf. IV.B.–5:104 (Handling the goods in accordance with the contract) and IV.B.–5:105 (Intervention to avoid danger or damage to the goods). Unless otherwise agreed, the lessee has no other obligations to repair or maintain the goods than those stated in these provisions. The exceptions to the lessor's obligation to keep the goods in the same condition as they were in at the start of the lease period are thus exhaustive and the lessor's obligation as stated in the first paragraph is negatively defined.

C. Lessee's obligation

General. The second and third paragraphs of the present Article are formulated as exceptions to the lessor's obligation stated in the first paragraph. The first exception applies where the rent is calculated so as to take into account the amortisation of the cost of the goods, typically in a lease for financing purposes, cf, the following paragraph. The second and more general exception refers to the obligation of the lessee stated in IV.B.–5:104 (Handling the goods in accordance with the contract) paragraph (1) (c) to preserve the normal standard and functioning of the goods. The lessee's obligation – and the corresponding exception to the lessor's obligation – will be commented upon here.

Leases with full amortisation of the cost. In many cases, a contract for lease is more or less functionally equivalent to a contract for sale. This is typically the case where it is intended that the cost of the goods will be amortised through one lease contract, the lease period then regularly covering the entire expected economic lifespan of the goods. Important examples are three-party transactions of the type covered by the Unidroit Convention on International Financial Leasing. The lessor has the role of a financing party and acquires the goods on the lessee's specifications from a supplier chosen by the lessee. The lessor's ownership of the goods serves the purpose of securing the claim for full payment of the rent for the entire lease period. As the full interest in the quality and functioning of the goods is vested in the lessee, it is usual to leave all maintenance to the lessee. On the other hand, the lessor normally cannot allow the lessee to let the goods deteriorate, as the value of the goods during the lease period is important for the lessor's security interest in the goods. The lessee should, therefore, have a positive obligation to keep the goods in the condition they were in at the start of the lease period, subject to normal wear and tear for the kind of goods, cf. IV.B.–5:104 (Handling the goods in accordance with the contract) paragraph (2). These observations are relevant not only to the three-party transactions referred to, but also to two-party transactions, often quite similar to conditional sales, with the exception that it is not agreed that ownership will pass. The criterion for relieving the lessor of the obligation of maintenance etc. (second paragraph of the present Article) and for placing a corresponding burden on the lessee (IV.B.–5:104 paragraph (2)) should be the calculation of the rent, not whether it is a three-party or a two-party transaction. The formula chosen is amortisation of "the cost", meaning the total cost of the goods. Expressions like "the substantial part" of the cost (as the formula is in the Unidroit Convention) have been avoided as they are ambiguous (is more than half of the cost sufficient or must it be almost the total cost?). If the parties want to achieve the same regulation for a contract where only a part of the cost is amortised through rent payments (leases with "residual value" etc.) they must include this in their individual agreement. It should also be

noted that the regulation in the second paragraph of the present Article and in IV.B.–5:104 paragraph (2) implies that the lessee will bear the "risk" in case of damage to the goods by chance, theft of the goods etc., as the lessor has no obligation to repair or replace the goods, cf. also IV.B.–3:101 (Availability of the goods) paragraph (4), and the lessee has a positive obligation to keep the goods in the condition they were in at the start of the lease period, subject to wear and tear.

Measures ordinarily to be expected. For lease contracts other than those discussed in the preceding paragraph, the lessee's obligation concerning maintenance etc. is defined in IV.B.–5:104 (Handling the goods in accordance with the contract) paragraph (1)(c), and a corresponding exception is included in the third paragraph of the present Article. The activities falling under the lessee's obligation include such measures as must ordinarily be expected to become necessary during the lease period. What is to be expected depends on the character of the goods, the intended use of the goods and the length of the lease period. Taking the lease of a car as an example, no measures are to be expected, apart from refilling with fuel, if an ordinary car is leased for a weekend. If the car is leased for several months or for years, on the other hand, ordinary service checks, change of oil etc. must be expected, perhaps even a change of tyres. Repairs, such as installing a new windscreen or replacing parts of the engine, are not to be expected even within the scope of a long lease period. The situation may be different where a machine or vehicle is leased for rough or taxing use over a period of some weeks – in such cases, even a change of parts may be a measure to be expected. Whether or not the measures must ordinarily be expected is decisive in each case. Statistics may show that there are defects now and then in goods of the kind leased and that repairs are necessary in such cases. These are not, however, measures that must ordinarily be expected. The same is true for accidental damage to the goods, cf. the windscreen example.

Preserving normal standard and functioning. The measures to be taken by the lessee are such measures as are necessary to preserve the normal standard and functioning of the goods. Upgrading and renewal of the goods are not covered by the lessee's obligation. Repairs made necessary by damage to the goods are not measures required to preserve the normal standard and functioning of the goods. Thus, these measures are normally excluded from the lessee's obligation as not ordinarily to be expected, cf. the preceding paragraph. It is irrelevant whether the damage is caused by a third party or by the lessee. In the latter case it may be that the lessor can claim damages, but the obligation to repair remains on the lessor's side.

Test of reasonableness. The measures referred to in IV.B.–5:104 (Handling the goods in accordance with the contract) paragraph (1)(c) and indirectly in the third paragraph of the present Article are only included in the lessee's obligation – and excluded from the lessor's obligation – to the extent that it is reasonable, taking into account the duration of the lease period, the purpose of the lease and the character of the goods. This test of reasonableness is required as a result of the wide spectrum of contracts covered by the provision. One example of the need for such a test might be a situation in which ordinary maintenance must be performed at certain intervals and the goods are leased just for short periods by subsequent lessees. Here it may be unreasonable to hold the particular lessee, at the time maintenance becomes due, responsible for the costs.

Co-operation with lessor. The lessee's obligations under IV.B.–5:104 (Handling the goods in accordance with the contract) paragraph (1)(c) may sometimes imply alterations to the goods that should not be made without consulting the lessor. As a rule, the lessee has a right to do what is necessary under that provision. Should the situation be, however, that a

reasonable lessee would understand that the lessor might have preferences concerning the measures to be taken, it follows from the lessee's general obligation of co-operation (III.–1:104 (Co-operation) that the lessor must be consulted if possible.

NOTES

I. Overview

1. In some jurisdictions the rule is that only the lessor has obligations of maintenance and repair of the leased goods. In other jurisdictions the obligations of maintenance and repair are divided between lessor and lessee. In addition it should be noted that the lessee's duty of care in using the goods cannot always be distinguished clearly from maintenance of the goods.

II. Lessor alone has obligations of maintenance and repair

2. According to the AUSTRIAN CC § 1096(1) the lessor is obliged, at the lessor's own expense, to maintain the leased object in a useful state (the code does not differentiate between maintenance and the standard at the start of the lease period; at the outset no duty to maintain is on the lessee). The lessor's obligation to maintain is limited to what is possible and economically feasible. The obligation to maintain is independent of the lessor's fault and can be excluded by contract or transferred to the lessee (*Apathy and Riedler*, Bürgerliches Recht III^{2}, no. 8/20, Rummel (-*Würth*), ABGB I^{3}, § 1096, nos. 5 ff). If the goods become unfit for use due to an extraordinary event (fire, war, etc.) the lessor is not obliged to restore them (CC § 1104).

3. Under DANISH law, the lessor has an obligation to maintain the goods throughout the lease period (*Gade*, Finansiel leasing, 113–116).

4. According to the GERMAN CC § 535(1) 2. sent. the lessor must maintain the leased object during the lease period in a state which enables the contractually agreed use to be made of the goods. If the agreed use makes repairs necessary, the obligation of the lessor also includes carrying out those repairs (see MünchKomm (-*Schilling*), BGB^{4}, § 535, no. 108). If the leased goods are destroyed without any fault of the lessor, the lessor is not obliged to restore them (Palandt (-*Weidenkaff*), BGB^{66}, § 535, no. 37). The parties can contract out of the obligation to maintain (MünchKomm, loc. cit. no. 114). The responsibility for minor repairs in principle also lies on the lessor but in practice is often placed upon the lessee by standard contract forms (with limitations) or explicit agreement (MünchKomm, loc. cit. nos. 130 ff).

5. According to the GREEK CC art. 575, the lessor is obliged to keep the leased object suitable for the agreed use during the whole term of the lease. This obligation entails: (a) measures of maintenance and (b) repairs in case of damage to the goods (*Filios*, Enochiko Dikaio I^{2}, § 26 Δ II). Correspondingly, CC art. 591(1) provides that the lessor is obliged to reimburse the lessee for any necessary expenses, i.e. expenses required to keep the goods suitable. However, expenses directly connected with the exploitation and use of the leased goods (e.g. refilling a leased car with fuel) must be borne by the lessee. The lessee cannot demand reconstruction of a leased object that is totally destroyed by accident; in such a case the lease is terminated (*Georgiadis*, Enochiko Dikaio, Geniko meros, § 24, no. 10, fn. 7; Georgiades and Stathopoulos (-*Rapsomanikis*), arts. 590–592, no. 4). Furthermore, according to CC art. 592 the lessee is not liable for wear and tear brought about by the stipulated use; again this is a provision which indicates that the expenses of covering maintenance and repair as

required by the agreed use fall on the lessor. These obligations of the lessor can be excluded by contract.

6. Under NORWEGIAN law, it is held that the lessor has an obligation to maintain the goods, with a possible exception for long-term leases, see *Falkanger*, Leie av skib, 347–349, *Hagstrøm and Aarbakke*, Obligasjonsrett[2], 383.

7. According to the SPANISH CC art. 1554 no. 2, the lessor must carry out all repairs during the lease period which are necessary to keep the goods fit for the destined use (*Díez-Picazo and Gullón*, Sistema II[9], 334), whether they have become necessary by the mere passing of time, ordinary use by the lessee or an accidental event or *force majeure* (TS 9 March 1964, RAJ 1964, 1365). The lessor is only obliged to remedy damage, not to reconstruct (TS 16 December 1986, RAJ 1986, 7447). According to some authors, repairs caused by ordinary daily usage must be borne by the lessee, and special legislation has provided some support for this thesis (i.e. Urban Leases Act art. 21(4)), cf. *Bercovitz*, Manual de Derecho Civil, 174. The PORTUGUESE CC art. 1036 refers to "urgent" repairs or other expenses, but seems to imply that repairs and expenses are the responsibility of the lessor. The article provides that if the lessor does not undertake repairs or cover other expenses, and these were urgent, the lessee may carry out such repairs with a right to reimbursement of expenses.

8. The previously common view in SWEDISH law – that the lessor had an obligation to maintain the goods during the lease period – has met with opposition: *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 194–197 (although the authors hold that the lessee may reduce the rent in case of deterioration or damage to the goods). The lessee only has an obligation of care (op. cit.).

9. Under UNITED KINGDOM law, unless special obligations are undertaken within the context of the contract, the lessee is not responsible for fair wear and tear (*Blackmore v. Bristol & Exeter Ry* (1858) 8 E & B 1035), nor is the lessee under any obligation to do repairs (*Sutton v. Temple* (1843) 12 M & W 52), except those which are naturally incidental to the due performance of the obligation to take reasonable care. Further, the lessee has no right to deliver the goods to a third party for repair, unless such a right has been expressly agreed in the contract (see *Chitty* on Contracts II[29], no. 33-079). The express reference to "durability" in s. 18(3) of the Supply of Goods and Services Act 1982 as among the factors to be taken into account in deciding whether or not goods are of a "satisfactory quality" (s. 9(2)) seems to confirm the idea that the terms implied by the Act continue to apply to the leased goods after possession has been transferred to the lessee (see *Chitty* on Contracts II[29], no. 33-072). There is some suggestion then that "satisfactory quality" (allowing for normal wear and tear) will be the standard of maintenance demanded of the lessor. The lessee under a hire-purchase contract is not responsible for fair wear and tear, unless the contract specifies the contrary. However, most hire-purchase contracts require the lessee to keep the goods in good order, repair and condition. The courts have held such clauses to imply a duty to keep the goods in such a condition as they may reasonably be expected to be in if the hirer looks after them properly (*Brady v. St. Margaret's Trust Ltd* [1963] 2 QB 494). See further *Chitty* on Contracts II[29], no. 38-285. Under SCOTTISH law, the lessor is liable for all major repairs and maintenance, and for any exceptional outlays incurred by the lessee, provided they were necessary, not due to the fault of the lessee, and notice is given by the lessee as soon as reasonably possible (*Bell*, Principles of the Law of Scotland[10], § 145). By contract or by custom the lessee may be liable for ordinary running costs.

10. See also CZECH CC § 664 (the lessor must maintain the goods in a condition appropriate to the agreed or normal manner of use), § 721 (business leases, also rule

on substitute goods) and CZECH Ccom art. 633(1) (lessee must maintain a leased means of transportation); HUNGARIAN CC § 424 (minor costs of maintenance to be borne by the lessee); MALTESE CC art. 1539 litra b (exception in arts. 1540, 1556 only for urban tenements); SLOVAK CC § 664 (cf. *Lazar*, OPH II, 150).

III. Maintenance obligations also on lessee

11. According to the FRENCH CC art. 1719 no. 2, the lessor is obliged to maintain the goods so that they are fit for the use for which they have been leased. The lessor has to carry out all repairs which become necessary during the lease period and which are borne by the lessee (FRENCH CC art. 1720(2), *réparations locatives*). Court cases concerning which repairs are to be borne by the lessee are numerous (*Malaurie*/*Aynès*/*Gautier*, Contrats spéciaux VIII[14], no. 681). For immovables, FRENCH CC art. 1754 contains a specific list of repairs to be borne by the lessee, and the basic idea of this provision is also applicable to movables (*Bénabent*, Contrats spéciaux[6], no. 339). Generally speaking the repairs to be borne by the lessee are those corresponding to the current use of the goods (*Bénabent*, loc. cit. nos. 334–335 and 339). On the other hand, all repairs of importance and connected with the structure of the goods fall to the lessor (Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 196: see also no. 384 and *Huet*, Contrats spéciaux, no. 21166). For example, the lessee of a car has to bear costs for fuel, oil and a puncture, but a breakdown of the engine must be borne by the lessor; the lessee of an animal must feed and take care of it; but an operation should be covered by the lessor (*Bénabent*, loc. cit. nos. 339, 247). According to the CC art. 1755, the lessee does not have to carry out repairs, even if they are of the kind usually borne by the lessee, if they have become necessary by "force majeure", dilapidation or old age of the goods. The lessor is not obliged to reconstruct the goods when they are destroyed by accident (CC art. 1722). In other cases, the reason why repairs are necessary is of no relevance; if a third party damages the leased goods by delict, the lessor still has an obligation to maintain (Cass.civ. 25 February 2004, Bull.civ. 2004.III, no. 36). For similar discussion in BELGIAN law, see *La Haye and Vankerckhove*, Le Louage de Choses I[2], nos. 588 ff. DUTCH law distinguishes between repairs in general and minor repairs. The latter are the responsibility of the lessee According to the CC art. 7:217. As usual, the article is not mandatory.

12. According to the ITALIAN CC art. 1575 no. 2, the lessor is obliged to maintain the leased goods in a state fit for the agreed use, and it is stated in CC art. 1576(1) that the lessor is to do all necessary repairs during the lease period, apart from minor maintenance. According to the CC art. 1576(2), concerning movables, the lessee must bear the costs of conservation and ordinary maintenance of the goods, subject to contrary agreement. The obligation to maintain ends when the goods are totally or partially destroyed (*Provera*, Locazione. Disposizioni generali, art. 1576, nos. 3, 201, with further references).

13. In SWISS law, the lessor is obliged to maintain the leased goods (LOA art. 256(1) in a state suitable for the agreed use. According to the LOA art. 259, the lessee must, corresponding to local usages, remove any minor lack of conformity during the lease period at the lessee's own expense, if this can be done by cleaning or small repairs necessary for ordinary maintenance. Concerning derogation in non-negotiated terms, see BSK (-*R. Weber*), OR I[3], art. 259, no. 4).

14. According to the POLISH CC art. 662(1) the lessor must keep the goods fit for the agreed purpose. However, there is no obligation to restore the goods if they are destroyed by a casual event (CC art. 662(3). Minor repairs resulting from ordinary use must be borne by the lessee (CC art. 662(2)).

15. See also ESTONIAN LOA § 280 (“minor” defects must be borne by the lessee, i.e. “defects [that] can be removed by light cleaning or maintenance which is in any case necessary for the ordinary preservation of the thing”; for commercial leases also the lessee must carry out “customary small repairs” and replacing of “equipment and tools of low value if, due to their age or use, they have become unusable” (LOA § 345) and “feeding and caring for leased animals” (LOA § 347)); LITHUANIAN CC art. 6.492 (capital repairs on the lessor) and art. 6.493 (obligation of the lessee to maintain in a proper state and make “current” repairs); SLOVENIAN LOA § 589(3) (“costs for minor repairs caused by the customary use of the thing and the costs of use itself shall be charged to the lessee”).

IV. Leases with a financing purpose

16. It is stated for several countries that agreements are usual, under which the lessee has obligations of maintenance and repair in so-called finance leasing contracts, often justified by the lessor’s interest in keeping up the value of the goods as a security: for AUSTRIAN law, *Fischer-Czermak*, Mobilienleasing, 66; for BELGIAN law, *Philippe*, Le Leasing[2], no. 070; for CZECH law, Švestka/Jehlička/Škárová/Spáčil (-*Novotný*), OZ[10], 1179 ff; for DANISH law, *Gade*, Finansiel leasing, 117–119; ESTONIAN LOA § 363(2); for FRENCH law on *crédit-bail*, Ripert and Roblot (-*Delebecque and Germain*), Droit Commercial II[17], no. 2422; see also Rép.Dr.Com. (-*Duranton*), v° Crédit-bail, no. 135; for GERMAN law, Staudinger (-*Stoffels*), BGB (2004), Leasing, nos. 210 ff; MünchKomm (-*Habersack*), BGB[4], Leasing, no. 76; for GREEK law, *Georgiadis*, New Contractual Forms of Modern Economy[4], 67–68; LITHUANIAN CC art. 6.571(2)(4); for LUXEMBOURG, Cour Supérieure de Justice (Appel commercial) of 25 May 1977 Pas. luxemb. 23 (1975–1977), 533, note by *Mousel*, Journal des Tribunaux 1977, 694; POLISH CC art. 709[7]; in SWISS law, there is discussion (see *Honsell*, BT-OR[7], 420, *Tercier*, Les Contrats spéciaux[3], nos. 6928 ff (result: lessee); different BSK (-*Schluep* and *Amstutz*), OR I[3], Pref. to arts. 184 ff, nos. 93, 104 (lessor)). In SPANISH law, current clauses in leasing contracts place all risks of damage to the assets on the lessee and also place on the lessee the duty to repair and keep the assets fit for their purpose and in usable condition. Normally, the clauses absolve the lessor of any duty in these respects, and subrogate the lessee in the rights and claims against the seller (*Diaz Echegaray*,- Bercovitz, Contratos Mercantiles I[3], pp. 910-913). In the UNITED KINGDOM, the usual risks and rewards of ownership are substantially transferred to the lessee under a finance leasing contract, including the risks of loss, destruction, depreciation, obsolescence and malfunctioning. The lessee also bears the costs of maintenance, repairs and insurance. Finance leasing contracts with non-consumers inevitably exclude the terms implied by the Supply of Goods and Services Act 1982 (with the reasonableness requirement generally fulfilled, see *R. & B. Customs Brokers Co. Ltd. v. United Dominions Trust Ltd.* [1988] 1 WLR 321, at 331–332). See further, *Chitty* on Contracts II[29], no. 33-081.

IV.B.–3:105: Incorrect installation under a consumer contract for the lease of goods

Where, under a consumer contract for the lease of goods, the goods are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as a lack of conformity of the goods if:

(a) the goods were installed by the lessor or under the lessor's responsibility; or

(b) the goods were intended to be installed by the consumer and the incorrect installation was due to shortcomings in the installation instructions.

COMMENTS

A. Installation and lack of conformity

Overview. The purpose of this Article is to make the rules on lack of conformity applicable to situations where the goods are installed incorrectly after the goods have been made available to the lessee and the installation is done by the lessor or by the lessee according to the lessor's instructions. A parallel rule is found in the Consumer Sales Directive and in IV.A.–2:304 (Incorrect installation under a consumer contract for sale). For lease contracts the rule will apply to situations where installation is done at the beginning of the lease period as well as situations where the installation is done later, typically in the course of repairs or improvements to the goods. "Installation" should be read in its broadest sense, as covering both assembly of the parts made available to the lessee, the fitting of the goods to other objects and subsequent adjustments (e.g. connecting a leased washing machine etc.) and the replacing or supplementing of parts.

Installation by the lessor. The installation may be done by the lessor or under the lessor's responsibility, for example where a safety seat is installed in a car or additional memory is installed on a leased computer, in both cases either at the beginning of the lease period or later on. If the installation is incorrect (the safety seat is not properly attached, the new memory does not function), this is deemed to be a lack of conformity under the contract, and the remedies for lack of conformity apply. There is then no need to discuss whether or not the installation should be seen as an "accessory" obligation, the non-performance of which would lead to consequences other than non-performance of the ordinary obligations under the contract. Normally, the negative effects caused by the installation are also to be dealt with under the rules on lack of conformity, as for example where ordinary car seats are torn up during installation of a safety seat or where additional memory installed on a computer causes a conflict with other functions.

Installation by the lessee. If installation is to be by the lessee, the lessor is normally not liable for incorrect installation. An exception is made under sub-paragraph (c) for situations in which incorrect installation is due to shortcomings in the installation instructions. Instructions that should have been provided by the lessor may be totally lacking or the instructions may be incomplete or misleading. In the absence of this Article it might be argued that the lessor is liable only for damages. The Article applies even where someone else, for example a household member, a friend or a professional, performs the installation for the lessee, as long as the incorrect installation is a direct result of shortcomings in the installation instructions.

The installation must be under the contract. The present Article applies only where installation is done under the contract, either as an obligation on the lessor or as an intention that installation is to be by the lessee. If installation becomes necessary because of repairs that

are part of the lessee's obligations under the actual contract or because of improvements initiated by the lessee (with or without the lessor's consent, as the case may be), general rules should apply even where the lessee engages the lessor to perform the work or where new parts are bought from the lessor with installation instructions. This should not be seen as non-performance of obligations under the lease contract.

NOTES

General

1. See in general notes to IV.A.–2:304 (Incorrect installation in a consumer contract for sale). See also notes to IV.B.–1:102 (Consumer contract for the lease of goods) concerning the implementation of EU consumer protection rules in the field of leases. National law concerning installation and lease contracts in particular seems to be uncommon.

IV.B.–3:106: Obligations on return of the goods

The lessor must:

(a) take all the steps which may reasonably be expected in order to enable the lessee to perform the obligation to return the goods; and

(b) accept return of the goods as required by the contract.

COMMENTS

A. Separate obligation to take goods in return

Lessor's obligation. The lessor's obligation to accept the goods at the end of the lease period corresponds to the lessee's obligation to return the goods. The obligation implies for example informing the lessee of details concerning the place for return of the goods and accepting the goods. Normally, it is in the lessor's own interest to have the goods returned. Co-operating to make the performance of the lessee's obligation possible is, however, seen as an obligation in its own right, and if the lessor does not accept return of the goods, this amounts to non-performance on the lessor's side. It is not only in the lessor's interest that the goods are returned; it may be essential for the lessee as well to dispose of the goods and of the responsibility for keeping them. For environmental and security reasons goods should not normally been left unattended.

Right not to accept the goods? The situation may be that the lessee wishes to return goods that are not in the condition the lessor might expect, as a result of non-performance of the lessee's obligations of care and maintenance. The question of whether the lessor may refuse to accept the goods and resort instead to remedies for delay must be answered on the basis of general rules on non-performance and remedies. It has not been found necessary to deal with this issue in the present Article.

B. Remedies

Remedies for non-performance. If the lessor fails to perform the obligation to accept the goods, general rules on remedies for non-performance apply. In this situation the practical remedy is damages for loss caused by the lessor's non-performance.

Protection of the goods etc. In addition to general rules on remedies for non-performance, III.–2:111 (Property not accepted) applies. This means that the lessee has obligations to protect and preserve the goods if the lessor does not accept them and further that the lessee may deposit, sell or dispose of the goods, as the case may be, and claim damages for loss incurred by such actions.

NOTES

General

1. A general reference is made to the notes to III.–1:104 (Co-operation) concerning the obligation to co-operate. National laws on contracts for the lease of goods do not explicitly regulate the obligation to accept the return of the goods. It depends on the general approach under the relevant national law whether or not the lessor's co-

operation in relation to return of the goods is regarded as a separate obligation. The parallel issue for sales contracts is taking delivery. According to the CISG art. 60, the buyer is obliged to co-operate and to take delivery, and corresponding rules on sales are found in several jurisdictions.

2. In ENGLAND there is a wide statutory power conferred on lessees to sell the goods if a lessor is in breach of the obligation to accept return of the goods (ss. 12 and 13 of the Torts (Interference with Goods) Act 1977). See further, *Chitty* on Contracts II[29] nos. 33-092–33-097.

3. In SPAIN a special provision has probably been deemed as unnecessary. General rules apply, and the lessor who fails to comply with the duty to accept the return of the goods incurs *mora credendi* (CC art. 1176).

4. The only claim by the lessor on return of the goods recognised in SCOTTISH law is one for damages (*Stair*, The Laws of Scotland, Reissue 'Leasing and hire of movables', para. 49; *Gloag and Henderson*, The Law of Scotland[11], para. 13.11), implying an obligation to accept the return.

CHAPTER 4: REMEDIES OF THE LESSEE: MODIFICATIONS OF NORMAL RULES

IV.B.–4:101: Lessee's right to have lack of conformity remedied

(1) The lessee may have any lack of conformity of the goods remedied, and recover any expenses reasonably incurred, to the extent that the lessee is entitled to enforce specific performance according to III.–3:302 (Enforcement of non-monetary obligations).

(2) Nothing in the preceding paragraph affects the lessor's right to cure the lack of conformity according to Book III, Chapter 3, Section 2.

COMMENTS

A. Application of ordinary rules

The general rules in Book III. General rules in Book III, Chapter 3 on non-performance and remedies apply also to non-performance of obligations under a contract for the lease of goods. Some derogations or additions are needed due to the characteristic traits of lease contracts but rules already found in Book III, Chapter 3 are not repeated. Not all of these remedies are available in every case of non-performance of an obligation by the lessor. For example, termination of the lease will be available under Book III, Chapter 3, Section 5 only if the non-performance is fundamental.

Lessee's remedies only. The present Chapter deals with the lessee's remedies only. Provisions on the lessor's remedies for non-performance of the lessee's obligations are found in Chapter 6.

Enforcing specific performance. It follows from III.–3:302 (Enforcement of non-monetary obligations) that the creditor is entitled, subject to certain prerequisites, to enforce specific performance of the debtor's non-monetary obligation, including the remedying free of charge of a performance that is not in conformity with the contract. A lessee has this right where the goods are not made available at all, where only some (or some part) of the goods is made available, where the quality of the goods does not conform to the contract, where third parties' rights interfere with the lessee's use of the goods, where the goods become unavailable for the lessee's use during the lease period, and where the lessor does not accept the goods at the end of the lease period. The lessee may further be entitled to enforce specific performance of other obligations undertaken by the lessor in the individual contract. Specific performance may, depending on the circumstances, entail making available unique goods under the contract, replacing goods, repairing non-conforming goods, eliminating third party rights and accepting goods that are returned by the lessee.

There are several exceptions to the creditor's right to enforce specific performance, cf. III.–3:302 (Enforcement of non-monetary obligations) paragraph(2) and (3). Specific performance cannot be enforced where performance would be unlawful or impossible, unreasonably burdensome or expensive, or of such a personal character that it would be unreasonable to enforce it. For lease contracts the exception of unreasonably burdensome performance holds particular interest as the leased goods still belong to the lessor and often will be returned at the end of the lease period for the lessor's own use or for new lease contracts. The lessor may

have good reasons to object to more or less irreversible modifications to the goods even where such modifications are not unreasonably expensive.

> *Illustration 1*
> X leases an antique bride's crown to wear on her wedding day. The crown has been in the lessor Y's family for centuries. By mistake, Y gives X incorrect information on the size of the crown, and it does not fit. This amounts to a lack of conformity under the contract, but the lessee is not entitled to have the crown altered, whether by the lessor or someone else, as it would be unreasonable to make changes to an heirloom like this, irrespective of any loss of economic value that might result from the change.

Withholding performance. According to III.–3:401 (Right to withhold performance of reciprocal obligation), a party who is to perform "at the same time as, or after, the debtor performs has a right to withhold performance of the reciprocal obligation until the debtor has tendered performance or has performed". This rule applies also where the other party has performed, but the performance is not in conformity with the contract. Further, the above-mentioned Article states that the performance which may be withheld is "the whole or part of the performance as may be reasonable in the circumstances". Withholding performance is also allowed where the creditor "reasonably believes that there will be non-performance by the debtor when the debtor's performance becomes due". Thus the rule is made applicable even in certain cases where the withholding party is to perform first.

A distinction should be made between the rule on withholding performance and rules on the time for performance: in many cases it is agreed, or there is a presumption, that the parties are to perform simultaneously. In such cases, waiting for the other party's performance is not, strictly speaking, a remedy for non-performance. The party's performance is simply not due. The right to withhold performance – in the strict sense – has two main purposes, namely to protect the withholding party against granting credit and to give the other party an incentive to perform. The first of these purposes – protection against granting credit – has various aspects, depending on the type of contract and on the circumstances. If a lessee pays the rent before the goods are made available the lessee takes the risk of ending up with an unsecured claim in the lessor's insolvency proceedings. However, withholding performance with the aim of securing claims arising from the other party's non-performance can also be seen as protection against granting credit: a party having for example a right to claim damages for non-conforming performance should not be obliged to perform the full amount, and in so doing take the risk that the other party will not be able to pay the damages. This may also provide a guideline for the test of reasonableness in III.–3:401 (Right to withhold performance of reciprocal obligation): the party should normally be allowed to withhold so much as is needed to secure the party's remedies for non-performance.

The provision in III.–3:401 (Right to withhold performance of reciprocal obligation) establishes no right to withhold performance after the other party has performed and therefore does not cover the situation where the aggrieved party wants to withhold performance in order to secure remedies for non-performance at a stage where the other party has performed, as for example where the performance was late and the aggrieved party may claim damages for consequential loss. This is a question of set-off, cf. Chapter 6 of Book III.

As will be discussed below, rent reduction is seen as a remedy for non-performance, not as a question of whether rent has been incurred or not. Hence, suspending rent payment because of non-performance is a question of withholding performance (or of set-off, as the case may be).

Rent is in most cases payable at the end of certain intervals or at the end of the entire lease period, cf. IV.B.–5:102 (Time for payment). If the goods are not available for the lessee's use at the time for payment or the goods still do not conform to the contract, the lessee may withhold the whole payment or parts of it. Where the goods have been delayed, but have already been made available at the time established for payment, the lessee may – according to the rules in Book III, Chapter 6 – set off a claim for rent reduction or for damages against the lessor's claim for payment, cf. the two preceding paragraphs.

Termination of the contractual relationship for fundamental non-performance. The lessee may terminate the contractual relationship if the lessor's non-performance is fundamental, cf. III.–3:502 (Termination for fundamental non-performance) paragraph (1). A definition of fundamental non-performance is found in paragraph (2) of that Article, where the general criterion is the following (sub-paragraph (a)): the non-performance is fundamental if it "substantially deprives the creditor of what the creditor was entitled to expect under the contract …". According to sub-paragraph (b), intentional or reckless non-performance is fundamental if it gives "the creditor reason to believe that the debtor's future performance cannot be relied on". In contracts for lease the prospects of future performance will typically be crucial in judging whether non-performance is fundamental under sub-paragraph (a), and whether or not non-performance is intentional or reckless under sub-paragraph (b).

According to III.–3:506 (Scope of right to terminate), termination will in many cases affect only a part of the contractual relationship where the obligations under the contract "are to be performed in separate parts or are otherwise divisible", if there is a "ground for termination … of a part to which a counter-performance can be apportioned". As applied to leases, this rule will often overlap with the rules on rent reduction. However, there may be cases where the lessee will prefer partial termination in order to put a decisive end to the lessee's own obligations.

> *Illustration 2*
> T runs activity holidays. She has concluded a contract with a firm, L, for the lease of 12 mountain bicycles, at so much per bicycle, for a week for the use of a party of clients. On delivery of the bicycles on the first morning one of them is found to be unfit for use. L has no more suitable bicycles in stock but says that it will obtain one within the next three days. This is no use to T who cannot have one client without a bicycle for that length of time. T would prefer to obtain a bicycle immediately from another firm and be free of any possible obligation to L in relation to the defective bicycle. T can terminate the lease in relation to the one defective bicycle.

Rent reduction According to III.–3:601 (Right to reduce price), non-performance may give a creditor a right to a proportionate reduction in the price. This rule should obviously apply to contracts for lease in situations where the goods are made available for the lessee's use, but at a reduced value because of quality defects, third party rights etc. However, for periods where the goods are not available for the lessee's use at all, it may be questionable whether any rent has been incurred. Under this Part of Book IV, the rent reduction rule is meant to apply also to periods in which the goods are not available. There are two reasons for this. First, this rule makes it unnecessary to make a sharp distinction between lack of conformity and non-availability. It may well be that the goods are made available to the lessee, but in a condition entirely unfit for use. In other situations the value of the goods may be substantially reduced for a period, even if the lessee can still make some use of the goods. The right to rent

reduction is flexible enough to permit reduction to zero. Second, application of the rent reduction rule makes the system of remedies more consistent and simple, as there is no need to distinguish between "off-hire" periods and rent reduction. It must be added that other solutions may follow from the individual contract. A rule on rent reduction is included in IV.B.–4:102 (Rent reduction) to avoid misunderstandings on this and other points concerning the application of the general rules on price reduction.

Illustration 3
A leased computer breaks down one month after it has been made available to the lessee. The computer is brought to the lessor for repair, which takes one week. Rent is paid in advance every month. The lessee has a right to reduce the rent by one fourth of the monthly rent and can set off this amount against the rent for the following month.

According to III.–3:601 (Right to reduce price) paragraph (1), the price reduction "is to be proportionate to the decrease in the value of what was received by virtue of the performance at the time it was made compared to the value of what would have been received by virtue of a conforming performance". If the rent is agreed for certain periods, the agreed rent will normally indicate the proportionate reduction in value for periods where the goods have not been available. In other cases the reduction in value must be established using other criteria.

Damages and interest. Rules on damages for loss caused by non-performance and on interest for delay in payment of money are found in Book III, Chapter 3, Section 7. These rules also apply to lease contracts. Reference to interest is made in the present Article, even though the lessor's obligations are normally non-monetary.

If the lessee terminates the contractual relationship for fundamental non-performance the general measure for calculation of loss is the following: the lessee must be put "as nearly as possible into the position in which the creditor [here: the lessee] would have been if the obligation had been duly performed", III.–3:702 (General measure of damages). For lease contracts for an indefinite period, it should be noted that the lessor is not bound for a longer time than the required period for notice of termination. The lessee must accept that the lessor could have given notice of termination at the time the lessee terminated the contractual relationship.

Cure of non-performance. The lessor must in many cases be given a chance to cure non-performance, typically by remedying lack of conformity. The rules in Book III, Chapter 3, Section 2 apply.

B. Modification of general rules in relation to right to have lack of conformity remedied

Need for rules on lessee's own remedying of lack of conformity. In Book III, Chapter 3, there are no rules explicitly dealing with the creditor's right to have a lack of conformity remedied and recover the costs from the debtor. In most cases this is a matter of damages: the cost of remedying the lack of conformity is part of the loss that the creditor can claim damages for, cf. III.–3:702 (General measure of damages). The situation may even be such that the debtor is not liable for the loss that can be *reduced* by such remedying, cf. III.–3:705 (Reduction of loss). In contracts for lease there is an additional problem: the goods do not belong to the lessee, and it must be decided to what extent the lessee may be permitted to have work done to the leased goods. For this reason a provision on the lessee's right to have the

lack of conformity remedied is introduced in the present Article. According to the first paragraph, the lessee may have the lack of conformity of the goods remedied and may recover reasonable expenses incurred, to the extent that the lessee is entitled to specific performance. This rule limits the lessee's right to remedy the lack of conformity both with regard to the kind of work that may be done and with regard to the costs that may be recovered.

Work that may be done. The lessee may not claim specific performance – and therefore may not remedy a lack of conformity – where such performance would be unreasonably burdensome or expensive, cf. III.–3:302 (Enforcement of non-monetary obligations) paragraph (3)(b). "Unreasonably burdensome" may cover situations where the lessor has good reason to object to work necessary to remedy the lack of conformity.

Unreasonable costs. The lessee is not entitled to enforcement of specific performance – or to have a lack of conformity remedied – if it would be unreasonably expensive, cf. III.–3:302 (Enforcement of non-monetary obligations) paragraph (3)(b). This rule applies whether the remedying is to be done by the lessor, by the lessee or by a third party. Should the lessee be willing to bear some of the costs, and claim refund only of reasonable costs, the lessee may have the work done, if it would not be unreasonable for other reasons, cf. the preceding paragraph. The first paragraph of the present Article allows for recovery of expenses "reasonably incurred". This rule overlaps with the rule on limitations to the right to specific performance where the work will lead to unreasonable expenses in any case. However, the rule also applies where the lessee has chosen an unnecessarily expensive means of remedying the lack of performance, even if the costs are not disproportionate *per se*.

Lessee's obligation of care. The lack of conformity may be remedied by the lessee or the lessee's employees or by a third party. The lessee must handle the goods with care, cf. IV.B.–5:104 (Handling the goods in accordance with the contract). If the lessee plans to have work done on the goods by someone who lacks the necessary qualifications, the lessor may object, as this will normally be unreasonable from the point of view of the lessor. The lessor can also claim damages for loss caused by the lessee's carelessness in this respect.

Lessor's right to cure unaffected. The lessor normally has a right to cure if the lessee wants to exercise a remedy for non-performance, cf. Book III, Chapter 3, Section 2. In such cases, the lessor must be allowed the opportunity to remedy the lack of conformity before the lessee does so.

NOTES

I. Non-performance and remedies in general

1. The general rules in Chapter 3 of Book III apply also to lease contracts. The corresponding rules in national law – concerning e.g. non-performance as a unitary concept, excused non-performance and cumulation of remedies – differ and these differences are of course found in national law on contracts for lease as well. A general reference is therefore made to the notes to Chapter 3 of Book III. The following notes refer to contracts for lease in particular.

II. Enforce specific performance

2. For general information on enforcing specific performance, see notes to III.–3:302 (Enforcement of non-monetary obligations). In some countries the creditor has, as a rule, a right to enforce specific performance, although with important exceptions; in other countries enforcement of specific performance is a discretionary remedy. In accordance with III.–3:302, exceptions from the right to specific performance may be grouped as (i) cases of impossibility or unlawfulness, (ii) cases where specific performance is unreasonable, (iii) cases where performance is of a personal character or depends on a personal relationship. Note that in ENGLAND and IRELAND, the remedy of specific performance will always be at the discretion of the court and is generally only available where damages are not adequate, quantifiable, or appropriate (see *Treitel*, The Law of Contract[11], 1019–1040 and *Keane*, Equity and Law of Trusts, §§ 16.01 ff respectively). In SCOTLAND, the approach to the remedy is closer to the continental approach, but has nevertheless been significantly influenced by English law in this area to the extent that grant of the right is subject to equitable control and many of the rules restricting use of this remedy now apply in Scotland.

3. The effects of *impossibility* (or unlawfulness) of performance may differ: the contract may be void, enforcement of specific performance may be denied, and there may be effects concerning liability for damages as well. The information here is concentrated on enforcement of specific performance. For AUSTRIA, see in general Rummel (-*Würth*), ABGB I³, § 1096, no. 6. According to the AUSTRIAN CC § 1112, the lease is terminated automatically if the goods are destroyed, i.e. the leased object perishes totally (Koziol (-*Iro*), ABGB, § 1112, no. 1) or is finally lost (OGH 4 November 1980, EvBl 1980/70: destruction of an excavator; for an example of final loss, see OGH 17 June 1919, SZ 1/45). The rule is interpreted restrictively and does not apply if the lessor has an obligation towards the lessee to restore the leased object; such a duty can also result from requirements of good faith; as long as the reconstruction is legally and economically possible, the lessee can claim performance of the lessor's obligation (OGH 22 June 1994, SZ 67/112). CC § 1112 can be regarded as a special rule within lease law for subsequent impossibility and is therefore regarded as an expression of what is economical and reasonable (*Riss*, Erhaltungspflicht, 187, 191). Under CZECH law, the lease is terminated if the goods are totally destroyed, CC § 680(1). Where the lessor is a business, the rule in CC § 721 on substitute goods may also apply to such cases. Under DUTCH law, remedying of a defect cannot be claimed if it is impossible or requires expenditure which in all reasonableness cannot be required of the lessor, or if the defect was caused by the lessee or concerns a minor repair, CC art. 7:206(1). According to the FRENCH CC art. 1722, the lease is terminated automatically if the leased object is destroyed entirely by a fortuitous event during the lease period (loss of the object is also mentioned in CC art. 1741 as a cause of termination); in cases of partial destruction, the lessee may choose termination or price reduction. The courts have extended the rule to cases where the object is destroyed by the fault of one of the parties; although there will be a difference concerning liability for damages (*Huet*, Contrats spéciaux, no. 21157). For goods, interpretation of the contract may show that the lessor is obliged to replace destroyed goods (*Huet*, Contrats spéciaux, no. 21155). The MALTESE CC art. 1571 also has a rule on termination by operation of law in case of total destruction of the object. Under GERMAN law, if the leased object is totally destroyed the general rules on impossibility apply, which means that the lessee cannot claim specific performance (see Palandt (-*Weidenkaff*), BGB[66], § 535, no. 37 and MünchKomm (-*Schilling*), BGB[4], § 535, no. 112). The lessor is not obliged to invest insurance compensation in the reconstruction of leased goods (Schmidt-Futterer

(-*Eisenschmid*), Mietrecht[9], § 536, no. 499). The general rule of GREEK CC art. 380 on impossibility of performance leads to termination of the lease by operation of law when the goods are totally destroyed by a fortuitous event. Depending on the circumstances, claiming repair of partially destroyed goods may be contrary to good faith (CC arts. 288, 281), destruction then being treated as total (CA Athens 1022/2002 EllDik 43, 1485; 5178/1992 EllDik 34, 1097; *Filios*, Enochiko Dikaio I[2], § 26 Δ II; *Georgiades*, Enochiko Dikaio, Geniko meros, § 24, no. 10, fn. 7; *Kornilakis*, Eidiko Enochiko Dikaio I, 217; Georgiades and Stathopoulos (-*Rapsomanikis*), art. 575, no. 14 and arts. 590–592, no. 4). Under SWISS law, a claim for performance is limited by objective impossibility (LOA arts. 97 and 119; BSK (-*R. Weber*) OR I[3], § 259b, no. 4). Under HUNGARIAN law, the lease is also terminated by operation of law if the goods are destroyed, CC § 430(2). In ITALY, the obligation to maintain ends when the thing is totally or partially destroyed and the rules on subsequent impossibility apply (CC arts. 1463–1466; *Provera*, Locazione. Disposizioni generali, art. 1576, nos. 3, 201 ff). Deteriorations, even substantial, must be repaired. In cases of partial destruction the lessee may choose to reduce the rent or to terminate the contractual relationship (art. 1464; Scialoja and Branca, loc. cit. 203). In SPANISH law, the lessor's obligation is extinguished and the lease comes to an end if the goods perish or have been lost without the lessor's fault, cf. CC art. 1568, referring to arts. 1182 and 1183; TS 17 March 1952, RAJ 19532, 499; TS 3 March 1951, RAJ 1951, 604. Note that the lease also comes to an end if the leased goods are lost due to the *culpa* of the lessor. In such cases, the lessee is entitled to claim damages (*Bercovitz*, Manual de Derecho Civil, 182). The lessor is only obliged to remedy damage, not to reconstruct. This rule is not clearly fixed anywhere, but stems from consideration of the irrational cost specific performance would have in this case. It is noteworthy that CC art. 1556 does not mention specific performance among the remedies available to the lessee. According to the SLOVAK CC § 680(1) the lease is terminated if the goods are totally destroyed, irrespective of the cause of destruction. If the leased thing perishes totally, the lessor has no obligation to reconstruct the leased object; even where the leased thing is restored, the lease is not renewed (*Lazar*, OPH II, 156). According to the POLISH CC art. 662(3), if the leased goods have been destroyed as a result of circumstances for which the lessor is not liable, the lessor has no obligation to restore the goods and the lease comes to an end. If the lessor is responsible for impossibility, the lessee may claim damages. Under ENGLISH law, where provision is not made in the contract for lease (*force majeure* or hardship clauses), a lease which becomes impossible to perform (cf. *Taylor v. Caldwell* (1863) 3 B&S 826) through no fault of the lessee is discharged. Both parties are discharged of their obligations from the date of impossibility, without incurring any liability for breach. The financial consequences of frustration are taken care of by the Law Reform (Frustrated Contracts) Act 1943: a frustrated contract may either be unwound where sums have been paid (s. 1(2)) or restitution awarded to the party who has provided a valuable non-monetary benefit (s. 1(3)). In NORTHERN IRELAND, the same provisions are contained in s. 1(2) and 1(3) of the Frustrated Contracts Act (Northern Ireland) 1947. In SCOTLAND, if a contract is frustrated, the obligations of the parties under the contract cease but there may be an equitable adjustment of the rights of the parties under the principles of unjustified enrichment (*Cantiere San Rocco SA v. Clyde Shipbuilding & Engineering Co. Ltd.* 1923 SC (HL) 105). In IRELAND, the common law of frustration still applies.

4. Situations where performance by the lessor would be *unreasonably burdensome* are also sometimes regulated or commented upon particularly for lease contracts. For AUSTRIAN law it is said in general that the lessor's obligation of maintenance is

limited where performance would be unreasonable or inefficient from an economic point of view (Rummel (-*Würth*), ABGB I³, § 1096, no. 6, *Riss*, Erhaltungspflicht, 173 ff). The burden of proof in these instances is on the lessor (*Riss*, loc. cit.). If the goods become entirely or partially unusable by an extraordinary event, the lessor is not obliged to restore them (CC § 1104; Rummel (-*Würth*), ABGB I³, § 1104, no. 3). This can be seen as a special rule on changed circumstances within lease law (*Riss*, Erhaltungspflicht, 197). For DUTCH law, see note II3. In FRENCH law, it is regarded as partial loss, and thus a cause for termination (or price reduction, see previous note) if the object has deteriorated to a degree where the cost of repairs would be disproportionate (*Huet*, Contrats spéciaux, no. 21166, Cass.civ. 12 June 1991, Bull.civ. 1991.III, no. 169, *Collart Dutilleul and Delebecque*, Contrats civils et commerciaux[7], no. 468). The lessor is not obliged to reconstruct, even if the cost is covered by an insurance company (*Bénabent*, loc. cit. no. 355). Where the deterioration is merely the result of the lessor's non-performance of the obligation to maintain the object, the lessor must still perform (Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 210, *Bénabent*, Contrats spéciaux[6], nos. 334-5 and 355). If the agreed use becomes unlawful this is also seen as partial destruction. The lessor's loss of property in the object may also lead to termination (*Bénabent*, loc. cit. no. 355). GERMAN law now has a provision in CC § 275(2) that corresponds to PECL art. 9:102(2)(b) (see explicitly Palandt (-*Heinrichs*), BGB[66], § 275, no. 26). For lease contracts (as before the *Schuldrechtsmodernisierung*), the so called limit of sacrifice applies (*Opfergrenze*, Palandt (-*Heinrichs*), loc. cit. no. 28) but has its basis now in CC § 275(2) (BGH 20 July 2005, NJW 2005, 3284, following MünchKomm (-*Schilling*), BGB[4], § 535 no. 110). The cost of repairs must not be manifestly disproportionate bearing in mind the benefit of the repairs for the lessee, the worth of the leased object and the achievable earnings (BGH, loc. cit.). The issue of defects and impossibility remains as before (*Emmerich*, JuS 2006, 81, 82). If, in case of partial destruction, reconstruction is not reasonable for the lessor for financial reasons, the rule on changed circumstances applies (CC § 313; Schmidt-Futterer (-*Eisenschmid*), Mietrecht[9], § 535, no. 90). For ITALIAN law, the rules on subsequent impossibility (see previous note) also take into account economic criteria (*Provera*, Locazione. Disposizioni generali, art. 1576, nos. 3, 201). The same applies for GREEK law (see previous note). In SPAIN, the lessor is only obliged to remedy damage, not to reconstruct (TS 16 December 1986, RAJ 1986, 7447). The general rules in POLISH CC art. 357^1 on extraordinary change of circumstances apply also to lease contracts.

III. Withholding performance of the reciprocal obligation

5. A general reference is made to the notes to III.–3:401 (Right to withhold performance of reciprocal obligation) concerning the rules on withholding performance of the reciprocal obligation in cases of non-performance of the other party's obligations. For lease contracts, a distinction must sometimes be made between the situations before and after the goods are made available to the lessee.

6. A general rule on the right to withhold reciprocal performance in cases of non-performance is found in CZECH CC § 560. To the same effect, see DUTCH CC art. 6:262. The general rule in GERMAN CC § 320 applies also to lease contracts, both in cases of delay and of lack of conformity. In the latter case a claim for rent reduction may be combined with withholding of (parts of) the remaining rent to put pressure on the lessor (BGH 7 May 1982, BGHZ 84, 42, 45). For all see MünchKomm (-*Schilling*), BGB[4], Pref. to § 536, nos. 15 ff, Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 536, nos. 34 ff. The right to withhold rent is always connected with a claim for removal of non-conformity and has to be directed against the person

responsible for such removals (BGH 19 June 2006, LMK 2006, 189.670, note *Blank*). The general rule on withholding performance in POLISH CC art. 488 applies also to lease contracts (Radwański (-*Panowicz-Lipska*), System Prawa Prywatnego VIII, 9). In SCOTLAND, the principle of mutuality allows the lessee to withhold performance of a reciprocal obligation in response to the lessor's breach as long as there is a link between the breach and the performance withheld (*Bank of East Asia Ltd. v. Scottish Enterprise* 1997 SLT 1213). The consequence is suspension of the contractual obligations until the breach has been cured. There is no precise equivalent amongst the available remedies in ENGLAND and NORTHERN IRELAND. However, the same result may be achieved in practice. Where there is a contractual breach giving rise to a right to terminate and the lessee elects to terminate (see further notes on termination below), the lessee is entitled to claim damages and, where there is a total failure of consideration (e.g. the equipment leased does not function), restitution. It is submitted that where the lessee would be entitled to restitution, on termination, of monies paid prior to the breach, the lessee should also be relieved of liability to pay sums which have become due prior to termination (*Treitel*, The Law of Contract[11], 850). In this sense, the lessee may refuse to tender performance of the reciprocal obligation. Under PORTUGUESE law, the lessee may suspend the payment of rent, totally or partially, if the goods are not made available or there is a lack of conformity (*Pires de Lima and Antunes Varela*, Código Civil Anotado II[3], 375). In SLOVAK law, non-performance of the lessor's obligation may entitle the lessee to withhold the rent (Svoboda (-*Švecová*), Komentár a súvisiace predpisy, arts. 673, 618), even partially, cf. SLOVAK CC § 674. There is no general rule as to the right of withholding in the SPANISH regulation of the lease contract. An incidental application, however, may be found in CC art. 1588, which allows the lessee to stop payments when the lack of use due to repairs lasts for more than forty days. According to the general rules, the lessee may withhold payment so long as the lessor is in breach of the duty to make necessary repairs; however, scholars hold the opinion that minor non-performances do not give rise to the right to withhold (see Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-*Lucas Fernandez*), Código Civil II, 1097).

7. For AUSTRIAN law it has been argued that the lessee cannot withhold the whole rent if the greater part of the leased object is being used (Rummel (-*Würth*), ABGB I³, § 1096, no. 10a, cf. no. 2). It is held that the *ex lege* rent reduction in the sense of CC § 1096 excludes a right to withhold in the sense of CC § 1052 (OGH 29 March 2004, SZ 2004/47, Koziol (-*Iro*), ABGB, § 1096, no. 9 at the end); see for strong arguments in favour of withholding rent in addition to rent reduction, Schwimann (-*Binder*), ABGB V³, § 1096, no. 97; cf. also *Riss*, Erhaltungspflicht, 232. It is debatable whether the lessee can withhold rent with reference to the general rule in SWISS LOA art. 82 (on order of performance) or whether art. 259d (rent reduction in cases of non-conformity during the lease period) is a *lex specialis* (see for all BSK (-*R. Weber*), OR I³, art. 259d, no. 8).

8. For GREEK law, authors have argued that the general rule of CC art. 374, which covers cases of non-performance, as well as of improper performance (*exceptio non rite adimpleti contractus,* for which see *Stathopoulos,* § 17, no. 62), applies to lease contracts (*Dacoronia,* The plea of 374 CC as to the lease of a thing, 218 ff; *Filios,* Enochiko Dikaio I[2], § 29 Δ I; *Georgiadis,* Enochiko Dikaio, Geniko meros, § 25, no. 20). However, case law does not accept its application, as it has held that the lessee, if partially hindered in using the leased goods, is entitled only to rent reduction and not to withholding of the rent (A.P. 1557/1983 EEN 51, 624) and furthermore that the application of CC arts. 373 ff is excluded by the specific provisions on leases (A.P. 83/2002 ChrID 2002, 214).

9. In FRENCH law, the lessee is in principle not allowed to resort to the general rule on withholding performance in cases of non-performance of the lessor's maintenance obligations, i.e. non-performance during the lease period. Exceptions to this principle can be made if it is impossible or almost impossible to use the object or there is a prolonged refusal by the lessor to perform necessary repairs (*Huet*, Contrats spéciaux, no. 21179, *Collart Dutilleul and Delebecque*, Contrats civils et commerciaux[7], no. 488, *Bénabent*, Contrats spéciaux[6], nos. 334-5, 241). For the comparable discussion in BELGIAN law see *La Haye and Vankerckhove*, Le Louage de Choses I[2], nos. 400 and 830, 559: suspension of rent payments only in exceptional cases, such as important impediments to use due to lack of maintenance; in general suspension must conform to rules on good faith. The rule in ITALIAN CC art. 1460 on withholding performance in principle applies also to contracts for lease (see *Provera*, Locazione. Disposizioni generali, art. 1571, 17). However, the prevailing part of doctrine and jurisprudence allows withholding of rent only where performance by the lessor is missing in its entirety (*Cian and Trabucchi*, Commentario breve[8], art. 1587, no. V5). The situation seems not altogether clear (see for example Cass. 11 February 2005, 2855/2005, Giust.civ.Mass. 2005, fasc. 4).

IV. Termination of the contractual relationship

10. Termination of a lease normally has effect only for the future, see e.g. for AUSTRIAN law, Rummel (-*Würth*), ABGB I³, § 1117, no. 1, § 1118, no. 2; for FRENCH law *Bénabent*, Contrats spéciaux[6], no. 356; for GERMAN law, MünchKomm-BGB[4] (-Schilling), loc. cit. § 542 no. 8; see also CC § 543(1); for GREEK law, CC art. 587 sent. 1; for ITALIAN law Rescigno (-*Pellegrini*), Codice Civile I[5], § 1458, no. 3; for SPANISH law *Díez-Picazo and Gullón*, Sistema II[9], 338.

11. In GERMAN law, a long-term contractual relationship may be terminated without a period of notice if there is an important reason, CC § 314, and non-performance of contractual obligations can, as the case may be, provide sufficient reason for termination. This principle is concretised for leases in CC § 543(2)(1). A similar rule is found in AUSTRIAN law: the lessee may terminate the lease without a period of notice if the lease object or a considerable part of it is not (or no longer) fit for the agreed use (CC § 1117). This is an expression of the general rule that continuous contractual relationships can be ended for an important reason (Schwimann (-*Binder*), ABGB V³, § 1117, no. 2). According to the SWISS LOA art. 259b litra a, the lessee may give notice of termination with immediate effect if a defect reduces the suitability of a movable for its predetermined use. This rule is a *lex specialis* to LOA art. 266g (termination of a lease for an important reason, see BSK (-*R. Weber*), OR I³, art. 266g, nos. 3 ff). See also ESTONIAN LOA § 313 and Comment D to IV.B.–2:102 (End of lease period).

12. CZECH CC § 679(1) contains a rule on termination of the lease for non-performance, termination here implying the lease contract ceases to exist with effect from the beginning. A subsidiary rule of CC § 517(1) on termination for delay may also apply. The right to terminate the lease cannot be contracted out (Švestka/Jehlička/Škárová/Spáčil (-*Jehlička*), OZ[10], 1191). According to the general rule in DUTCH CC art. 6:265, a contract may be terminated for non-performance of sufficient importance. A rule allowing for termination for non-performance of obligations under a lease is found in FRENCH CC art. 1741. According to general contract law, a court must decide whether there is sufficient reason for termination (CC art. 1184), see *Huet*, Contrats spéciaux, no. 21208 (see also note *IV14* below). Parties often agree on a resolution clause, but such clauses are interpreted restrictively (*Bénabent*, Contrats spéciaux[6], no. 356, *Collart Dutilleul and Delebecque*, Contrats

civils et commerciaux[7], no. 490). GREEK CC art. 585 allows for termination of a lease where the goods are totally unavailable or only partially available for the lessee's use. Concerning the requirement of setting a reasonable time-limit for performance, see CC art. 585 sents. 1 and 2. For an exception to the right of termination in cases where the obstacles to use are insignificant or unimportant, see *Georgiades*, Enochiko Dikaio, Geniko meros, § 25, no. 28; A.P. 633/2003 ChrID 2003, 519 cmt. by *E. Nezeriti*; cf. also *Kornilakis*, Eidiko Enochiko Dikaio I, 249). For HUNGARIAN law, general rules on termination of contracts are found in CC §§ 319–323; for leases, CC § 424 allows for *ex nunc* termination in cases of lack of conformity or conflicting third party rights. A general rule allowing termination for non-performance (that must not be of merely minimal importance) is also found in ITALIAN CC art. 1453, cf. 1455. A rule on termination of leases due to considerable non-conformity of the leased object is found in CC art. 1578. According to the MALTESE CC art. 1570, a lease may be terminated for reasons of non-performance. According to the POLISH CC art. 664(2), the lessee may terminate the lease if the goods cannot be used for the agreed purpose because of lack of conformity and the lessor fails to repair them. PORTUGUESE CC art. 1050 allows for termination of a lease in cases where the lessee is prevented from using the goods and where the goods have dangerous defects; it is held that this is not an exhaustive list of grounds for termination (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 387). In SLOVAK law, the lessee may terminate the lease for non-performance, see CC § 679(1); for termination where third parties' rights interfere with the lessee's use, see Svoboda (-*Fíger*), Komentár a súvisiace predpisy, arts. 684, 625. Under SPANISH law, termination is also one of the remedies for non-performance of obligations under a lease contract, see CC arts. 1556 and 1568, the latter with a reference to the general rule in art. 1124.

13. Under ENGLISH law, the right to terminate depends both on the nature of the contractual term breached and (where innominate terms are concerned) the consequences of breach. The breach of a condition will always give rise to an option to terminate. The breach of a term which is neither a condition nor a warranty (i.e. an innominate term) will give rise to an option to terminate if the breach is both 'serious and substantial'. In SCOTLAND, the breach must merely be 'material', meaning that it must go to the root of the contract. In both cases, these breaches are called 'repudiatory'. An anticipatory breach of contract which is repudiatory has the same effect as an actual breach throughout the UNITED KINGDOM (*Hochster v. de La Tour* (1853) E&B 678, QB; *Universal Cargo Carriers Corp. v. Citati* [1957] 2 QB 401), entitling the innocent party to elect to immediately terminate the contractual relationship. In none of these cases is termination on repudiatory breach automatic. The innocent party may elect to terminate or may instead affirm the contract and claim damages. An election to terminate following breach must generally be notified and has only prospective effect. A termination clause is often inserted into commercial contracts but recently such clauses have been interpreted strictly (*Rice (t/a The Garden Guardian v. Great Yarmouth Borough Council*, unreported, CA, 26 July 2000). IRISH law is similar.

14. For some jurisdictions (*inter alia* AUSTRIA, GERMANY, GREECE, HUNGARY, SLOVAKIA, SPAIN), the lessee may terminate the lease without intervention from the court; for other jurisdictions (*inter alia* FRANCE, ITALY, MALTA) such intervention is required.

V. Rent reduction

15. See notes to IV.B.–4:102 (Rent reduction).

VI. Claiming damages and interest

16. See notes to III.–3:701 (Right to damages) for general rules on contractual liability in different jurisdictions. In several jurisdictions there are, in addition to the general rules, particular rules concerning liability for loss caused by defects (lack of conformity) in leased objects.

17. The basis of a claim by the lessee for damages in cases of lack of conformity in AUSTRIAN law is CC § 933a (Schwimann (-*Binder*), ABGB V³, § 1096, nos. 110 f.), i.e. fault liability (see also note 3 above) and no strict liability for defects present at the time of conclusion of the contract (*Riss*, Erhaltungspflicht, 239 fn. 780). The lessor is further liable for losses caused by an omission to repair as soon as possible (see OGH 4 March 1993, SZ 66/26, where delay seems to be the relevant criterion). Under CZECH law, the general rule in CC § 420 applies (fault liability; see also the special rule concerning leases of a means of transportation, CZECH Ccom art. 631(2)). Fault liability is the main rule in DANISH law, also for leases, cf. *Gade*, Finansiel leasing, 147–151; *Bryde Andersen and Lookofsky*, Obligationsret I[2], 315. A rule on damages for loss caused by a defect that was known to or is imputable to the lessor, is found in DUTCH CC art. 7:208 (on art. 7:209 and the possibility of derogating from the liability rule, see *Rueb/Vrolijk/Wijkerslooth-Vinke*, De huurbepalingen verklaard, 7. According to the ESTONIAN LOA § 278 no. 3, the lessee has a claim for damages in cases of lack of conformity; cf. the general rules on excused non-performance (§ 103) and compensation for damage (§ 115). The general rule in FRENCH law is that the lessor is liable for non-performance with the exception of *force majeure*, see notes to III.–3:701 (Right to damages). Liability for defects of a leased object is dealt with in CC art. 1721: the lessor is normally liable for defects which affect the use or cause damage; for defects arising during the lease period, this rule must be seen in connection with the lessor's obligation of maintenance (*Huet*, Contrats spéciaux, nos. 21170 ff). For the corresponding rule in BELGIAN law, see *La Haye and Vankerckhove*, Louage de choses I², nos. 660 ff. The main rule in GERMAN contract law is liability based on fault, meaning wilful or negligent non-performance, and this is the starting point if the leased goods are delayed or performance of repairs and maintenance is delayed, see CC §§ 280, 286 and 276 and the particular rules for leases in CC § 536a(1) second and third alternatives. For a lack of conformity already present at the time of conclusion of the contract there is a strict liability. According to the CC § 536a(1) first alternative, even if it was not possible for the lessor to know of the non-conformity (Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8,] § 536a, no. 3: risk of hidden defects is on the lessor). This rule is applied accordingly where goods are to be produced (BGH 29 April 1953, BGHZ 9, 320). The rule also covers losses caused as a consequence of the defect (BGH 21 February 1962, NJW 1962, 908: bodily injury and loss of income). In GREEK law the lessee is entitled to damages in the following cases: (1) the agreed quality of the leased goods is lacking at the time of conclusion of the contract for lease (CC art. 577 sent. 1, strict liability, CA Athens 2647/1997 EllDik 39, 650); (2) lessor had or ought to have had knowledge of factual or legal defects existing at the conclusion of the lease contract (CC arts. 577 sent. 2 and 583 sent. 1, fault-based liability); (3) a later lack of conformity (legal or factual defects, lack of agreed quality) due to the lessor's fault (CC arts. 578(1), 583 sent. 1); or (4) the lessor does not remedy (CC arts. 578(2), 583 sent. 1). The right to compensation covers any damage causally linked to the defect or the lack of the promised quality (i.e. positive damage and loss of profit), as well as further damage caused to the legal goods of the lessee as a consequence of the defect, e.g. bodily injury (*Georgiades*, Enochiko Dikaio, Geniko meros, § 25, no. 25; *Kornilakis*, Eidiko Enochiko Dikaio I, 227;

Georgiades and Stathopoulos (-*Rapsomanikis*), arts. 577–578, no. 8). A particular rule on liability for loss caused by defects (*vizi*) in leased goods is found also in ITALIAN CC art. 1578(2): if the lessor, without fault, was unaware of the defect when the goods were delivered, liability is avoided, cf. *Alpa and Mariconda*, Codice civile commentato IV, art. 1578, no. 6. It is held that the rule covers not only damage as a consequence of the defect but also loss as a consequence of the deprivation or diminution of the use (*Provera*, Locazione. Disposizioni generali, arts. 1578, 216 f.). According to the MALTESE CC art. 1546 the lessor is liable for damage caused by hidden defects existing at the time of the contract, but only if the lessor knew of the defects or had "a reasonable suspicion thereof". Liability for delayed maintenance is governed by MALTESE CC art. 1542 (see also art. 1544). For SLOVAK law, see the general rule in SLOVAK CC § 420 on fault liability. According to the SPANISH CC art. 1556, the lessee can claim compensation for loss in case of non-performance by the lessor. It is held that this rule is applicable also to cases of hidden defects in the leased goods (*Díez-Picazo and Gullón*, Sistema II[9], 333 and 335). Consequential losses seem to be covered by CC art. 1553, according to which the rules on elimination of defects in sales law (CC arts. 1474 ff) are applicable to leases (subject to the necessary adjustments, see *Lacruz Berdejo*, Derecho de obligaciones II-2, p. 133² also *Albaladejo*, Derecho Civil, II[12], no. 12, 640). Liability is dependent on the lessor's fault (*Lacruz*, loc. cit.). For SWEDISH law, a presumption of fault has been recommended (*Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 202–203). For lack of conformity during the lease period, fault is presumed under SWISS LOA art. 259e, cf. HandKomm OR (-*Permann*), art. 259e, no. 5. Under UNITED KINGDOM and IRISH law, all non-excused breaches by the lessor will automatically give rise to a claim in damages, contractual liability being strict. In ENGLAND defects in title and in conformity (with description, sample, satisfactory quality, and fitness for particular purposes) of the goods are treated as breaches of conditions under the Supply of Goods and Services Act 1982. The lessee therefore has a right to elect to terminate or to affirm the contract and claim damages. This remedy is only limited by s. 10A of the same Act, which specifies that where the lessee is not a consumer and the breach is so slight that it would be unreasonable to treat it as repudiatory, the breach will be treated as a breach of warranty (giving rise to a claim in damages only). A breach of the implied warranty concerning quiet possession will give rise to a claim in damages only. The position is similar in SCOTLAND although the distinction between conditions and warranties is not used and the availability of the remedy of termination depends on whether the breach was material. In IRELAND too, defects in conformity (with description, sample, merchantable quality, and fitness for particular purposes) of the goods are treated as breaches of conditions under the Consumer Credit Act 1995. A consumer lessee therefore has a right to elect to terminate or affirm the contract and claim damages. A breach of the implied terms as to charges and quiet possession gives rise to a claim in damages only. The UNITED KINGDOM rule is that damages for late or non-payment do not include interest. This rule is modified by the Late Payments of Commercial Debts (Interest) Act 1998, s. 1(1) and (2), but only with regard to two parties acting in the course of business. In ENGLAND s. 35A of the Supreme Court Act 1981 also gives the court a discretionary right to award interest on debts or damages. This provision applies to all contracts, but is subject to a number of limitations. In IRELAND, it appears that the court may order interest on damages for contractual breach to be paid from the date of judgment or from the date on which notice of interest accrual is given (Ireland (Debtor's) Act 1840), but there is no general duty on the lessee to pay interest on unpaid sums during the period of delay.

VII. Lessee's own remedying of non-conformity – general rules

18. Where the lessee does work on goods belonging to the lessor this is sometimes seen as a case of benevolent intervention in another's affairs (*negotiorum gestio*), even if the work is done predominantly in the lessee's own interest (see PEL/*von Bar*, Ben. Int., 64 and 67). According to the AUSTRIAN CC § 1097 second sentence a lessee who makes disbursements which the lessor was obliged to make (or useful disbursements) is regarded as an intervener in another's affairs (cf. CC § 1036). The work does not have to be urgent; the lessee can even act against the wishes of the lessor (OGH 26 April 1961, EvBl 1961/295). It is sufficient that the expenditures were useful from an *ex-ante* perspective (OGH 31 Mar 1989, JBl 1989, 527), a final benefit for the lessor being no prerequisite for the claim (OGH 17 September 1974, EvBl 1975/122). A (mandatory) rule allowing the lessee to remedy a lack of conformity where the lessor is in default, and to recover reasonable costs, is found in DUTCH CC art. 7:206(3). In FRENCH law, where the main rule is that the lessee needs a court order before performing work on the goods, it is also held that the rules on benevolent intervention in another's affairs may justify the lessee making necessary repairs (*Huet*, Contrats spéciaux, no. 21168; Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 223).

19. Some jurisdictions explicitly allow the lessee to remedy lack of conformity, and claim reimbursement, without reference to the rules on benevolent intervention in another's affairs. Thus According to the ESTONIAN LOA § 279(3) the lessee may remedy if the lessor is late "or if the defect or obstacle only restricts the possibility of using the thing for the intended purpose to an insignificant extent". According to the GERMAN CC § 536a(2) the lessee can remedy non-conformity and recover the costs as damages if the lessor is late in remedying (no. 1) or if immediate remedying is necessary for preservation or restoration of the goods (no. 2). The alternative in no. 1 requires delay, which normally presupposes a reminder (see CC § 286 sect. 2, in particular nos. 3 and 4, Schmidt-Futterer (-*Eisenschmid*), Mietrecht[9], § 536a, nos. 116 f.). For *other* disbursements, CC § 539(1) refers to the rules on benevolent intervention in another's affairs, including the requirement of an intention to benefit another. According to the GREEK CC art. 578(2), the lessee can remedy non-conformity and claim the costs as damages if the lessor is late in remedying. The lessor is also obliged (CC art. 591) to reimburse the lessee for any necessary expenses, i.e. expenses required to keep the goods suitable, while useful expenses, i.e. expenses which result in an increase in value of the leased goods, are reimbursed according to the provisions on benevolent intervention. If there is no urgent need, the lessee is entitled to remedy the lack of conformity only after having notified the lessor (CC art. 589) and only if the latter is late in remedying (CC art. 578(2)) (*Georgiades*, Enochiko Dikaio, Geniko meros, § 24 nos. 10–11). Under HUNGARIAN law, the general rules on remedies for defective performance apply. According to the CC § 306 (3), the creditor, in this case the lessee, is entitled to repair the leased goods or have them repaired at the expense of the lessor, if the lessor does not undertake or does not accomplish the repairs within a reasonable time. It is stated in ITALIAN CC art. 1577(2) that the lessee may perform urgent repairs, with a right to reimbursement, provided that the lessor is notified. The consequences of an omission to notify are debated (*Alpa and Mariconda*, Codice civile commentato IV, art. 1577, no. 4: no consequence or application of CC art. 1227). According to the POLISH CC art. 663, if the lessor does not repair defects that make the goods unfit for the agreed purpose the lessee may have the defects repaired and claim reimbursement of expenses. According to the SLOVAK CC § 669, the lessee may perform repairs that were to be made by the lessor. The lessee has a claim for reimbursement if repairs were made with the lessor's consent or where the lessor

has not carried out the repairs in good time despite notification. If repairs were made without the lessor's consent or without notifying the lessor, the lessee's claim is limited to the lessor's enrichment (Svoboda (-*Švecová*), Komentár a súvisiace predpisy, arts. 669, 615). There is a similar rule in CZECH law.

20. The main rule in several jurisdictions is that the lessee's own remedying of non-conformity is allowed only after a court order. Thus, in FRENCH law the ordinary rules apply (CC art. 1144, Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 223). The lessor must be late; and the lessee requires the authorisation of a court to carry out remedies; under these conditions the lessee has a claim for reimbursement of expenditure (*Bénabent*, Contrats spéciaux[6], nos. 334-5, 240 f.). A court order is generally also required by SWISS LOA art. 98, but in contracts for lease the lessee can within certain limits have non-conformity remedied without a court order (LOA art. 259b(b), see Guhl (-*Koller*), OR[9], § 44, nos. 41 and 42). In SPAIN, the lessee cannot normally resort to self help and perform the lessor's unperformed obligation to repair, even if the lessee gives the lessor due notice and the lessor still fails to do the repairs. According to the court doctrine (see Bercovitz (-*Rodriguez Morata*), Comentarios a la Ley de Arrendamientos Urbanos, 512), and the Law on Urban Leases (art. 21.3), the lessee is only entitled to claim specific performance or rescission for breach, being only allowed to resort to self help where the repairs are urgent.

VIII. Right to enforcement of specific performance as limit

21. It is sometimes explicitly stated in national law that the right of the lessee to have non-conformity remedied, against reimbursement, presupposes that the lessor (still) has an obligation to remedy the non-conformity in question (for AUSTRIAN law, Rummel (-*Würth*), ABGB I³, § 1096, no. 2; for GERMAN law, (indirectly) *Blank and Börstinghaus*, Miete-Komm², § 536a, no. 36; for FRENCH law, *Huet*, Contrats spéciaux, no. 21168; for ITALIAN law, *Alpa and Mariconda*, Codice civile commentato IV, art. 1577, no. 5). It is not always clear whether this refers to the right to reimbursement or to the right to have the work done as well.

IX. Lessor's right to cure not affected

22. General comments on the debtor's right to cure are found in the comments to Book III, Chapter 3, Section 2. Regarding the lessor's right to cure where the lessee wishes to remedy the non-conformity, it seems that the lessee does not necessarily have to give the lessor a chance to cure under AUSTRIAN law, as the lessee can take such steps without notifying the lessor and without the lessor even having knowledge of the work (Schwimann (-*Binder*), ABGB V³, § 1097, no. 1). Nevertheless, under certain circumstances the lessee may be held liable for the negative effects of an omission to notify (Schwimann, loc. cit. no. 15: higher costs for the lessee than for the lessor; see also on legal defects, no. 8). Similar results seems to follow from CZECH CC § 668. In ESTONIAN law (main rule), DUTCH law, GERMAN law, GREEK law, and FRENCH law, a certain delay is required before the lessee acquires a right to act. In FRENCH law, a court order is required in addition (see above), and this normally implies that the lessor has had a chance to cure. According to the SWISS LOA art. 259b(b), the lessor's knowledge is a precondition, and in legal writings it is said that a time limit given by the lessee is indispensable (Guhl (-*Koller*), OR[9], § 44, no. 41), thus giving the lessor a chance to cure.

X. No right to remedy non-conformity

23. Since specific performance is a discretionary equitable remedy under ENGLISH law, the lessee has no legal right to independently remedy non-conformity and

subsequently recoup expenses. The lessee may however elect to affirm the contract on breach and claim damages to cover the costs of remedying the non-conformity.

IV.B.–4:102: Rent reduction

(1) The lessee may reduce the rent for a period in which the value of the lessor's performance is decreased due to delay or lack of conformity, to the extent that the reduction in value is not caused by the lessee.

(2) The rent may be reduced even for periods in which the lessor retains the right to perform or cure according to III.–3:103 (Notice fixing additional time for performance), III.–3:202 (Cure by debtor: general rules) paragraph (2) and III.–3:204 (Consequences of allowing debtor opportunity to cure)).

(3) Notwithstanding the rule in paragraph (1), the lessee may lose the right to reduce the rent for a period according to IV.B.–4:103 (Notification of lack of conformity).

COMMENTS

Rent reduction

Clarification of the general rule. The first paragraph of the present Article clarifies the general rule on price reduction (III.–3:601 (Right to reduce price)) for the purposes of lease contracts. Firstly, the lessee may reduce the rent as a consequence of delay or lack of conformity, i.e. for periods during which the goods are still not available and for periods during which non-conforming goods are accepted by the lessee. Secondly, it is made clear that rent may be reduced for the entire period during which the value of the lessor's performance is diminished. This means that the lessee may reduce the rent even for periods where the lessor has still not had a chance to cure a lack of conformity, for example by way of repairs. Whether or not it was possible for the lessor to cure is relevant to a claim in damages, but not to rent reduction. However, to the extent that the lessee caused the decrease in value, the lessee cannot reduce the rent. This rule, stated in III.–3:101 (Remedies available) paragraph (3), is included in the present provision, as the wording might otherwise be regarded as too wide.

Derogation from general rules. The second paragraph of the present Article, in combination with the wording of the first paragraph, makes it clear that the lessee may reduce the rent even if the lessee has given notice allowing the lessor an additional period for performance. Under the general rule in III.–3:103 (Notice fixing additional time for performance) paragraph (2), the creditor may withhold performance during the additional period "but may not resort to any other remedy". It seems appropriate to modify this rule for lease contracts, where the lessee's performance is normally directly related to a period of time. For this reason, the lessee may also reduce the rent there and then during the period allowed for cure. According to the general rule found in III.–3:204 (Consequences of allowing debtor opportunity to cure), the creditor may withhold performance during this period "but may not resort to any other remedy". The result of these modifications is a difference in process or timing rather than substance. Under the general rules the lessee can always withhold payment of rent during the period allowed for performance or cure and then reduce it later when the period has elapsed.

Illustration 1
The engine of a leased boat breaks down. The lessor wants to replace the engine, and this can be done in one week. The lessee did not intend to use the boat much during the relevant week anyhow and cannot resort to termination of the contractual relationship. As the boat cannot be used at all while the engine is being replaced, the lessee can claim a rent reduction equal to one week's rent.

Late notification. The third paragraph of the present Article refers to the notification rule in IV.B.–4:103 (Notification of lack of conformity), according to which the lessee, in case of late notification, may lose the right to rely on non-performance for a period corresponding to the unreasonable delay in notification.

NOTES

I. Non-performance and rent reduction

1. Rent reduction as a consequence of non-performance of the lessor's obligations is known to numerous jurisdictions throughout Europe. The scope and content of rent reduction rules vary. There is a close relationship between a claim for rent reduction and the content of the lessor's obligations. If a certain disturbance of the lessee's use of the goods does not amount to non-performance of the lessor's obligations, there is normally no rent reduction. Comparative notes on the lessor's obligations are found in Chapter 3.

2. In several jurisdictions there are general rules on rent reduction in cases of lack of conformity. According to the AUSTRIAN CC § 1096(1) sent. 2, the lessee is entitled to a proportionate reduction in the rent for periods where the goods are faulty and thus not (fully) fit for the agreed use. The rule applies where the goods are not available for the lessee's use or the use is disturbed, even where the physical condition is not affected (*Stabentheiner*, Mietrecht, no. 61). The effect of the rule is that the lessor bears the risk where use is affected by a casual event (Rummel (-*Würth*), ABGB I^{3}, § 1117, no. 2); the fault of the lessor is not a prerequisite. For similar results under DANISH law, see *Gade*, Finansiel leasing, 136–137. Rules on rent reduction are found in CZECH CC § 673 (the goods cannot be used in the agreed or normal manner), § 674 (the goods can be used only to a limited extent), and § 721 (corresponding rule for business leases). In DUTCH law, the lessee has a right to reduce the rent from the day that the lessor had sufficient information to take measures (or the day when the lessee informed the lessor of the defect) and up until the day the defect is remedied, CC art. 7:207(1). According to the ESTONIAN LOA § 296, the lessee may reduce the rent for any period where the goods have not been in conformity with the contract or not available for the lessee's use. The general principles of price reduction in LOA § 112 apply as to the extent of the reduction (Estonian Supreme Court decision no. 3-2-1-84-05. RT III 2006, 39, 326). In GERMAN law the lessee is entitled to rent reduction where the goods presented a lack of conformity when they were made available to the lessee or where such a defect arises during the lease period, CC § 536(1), regardless of fault on the part of the lessor. The rule also applies where a promised quality is or becomes lacking (CC § 536(2)) or where use is affected by a third party right (CC § 536(3)). An insignificant lack of conformity will be disregarded (CC § 536(1) last sentence). The relevant lack of conformity may relate to circumstances other than the condition of the goods; it may also be a legal, factual or economic condition that interferes with the lessee's use (Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete^{8}, § 536, nos. 3 and 14; BGH 23 September 1992, NJW 1992, 3226, 3227: obstacles to use by public authorities). According to the GREEK CC arts. 576(1) and (2) and 583 sent. 1, the lessee has a right to rent reduction for lack of conformity (legal or factual defects, lack of agreed quality), either at the start of the lease period or later. Fault is not a requirement, and the rule also applies when repairs and maintenance affect the lessee's use (*Filios*, Enochiko Dikaio I^{2}, § 39 B II 2). Under HUNGARIAN law,

general rules on price reduction for non-conforming performance, CC § 306(b), also apply to lease contracts. For a discussion of the right to rent reduction under NORWEGIAN law, including for periods during which the lessor repairs the goods, see *Falkanger*, Leie av skib, 438–439. In POLISH law, the lessee has a right to an appropriate reduction in the rent if lack of conformity makes the goods unfit for the agreed use, CC art. 664(1). There is no fault requirement, Bieniek (-*Ciepła*), Komentarz do Kodeksu Cywilnego, art. 664, 260. According to the SLOVAK CC § 674, the lessee has the right to an adequate reduction in rent in cases of lack of conformity not caused by the lessee. A claim for rent reduction, regardless of fault, because of reduced usability follows also from SWISS LOA art. 259d. The rule applies even where the lessor has no influence over the situation (BSK (-*R. Weber*), OR I[3], art. 259d, no. 1).

3. In other jurisdictions legislation on rent reduction is less general. Rules on rent reduction may be found in FRENCH CC art. 1722 (partial destruction of the leased object by fortuitous event), CC art. 1724 (repair work lasting for more than forty days) and CC art. 1726 (disturbance due to legal action concerning ownership). It is, however, held that rent reduction may also be claimed in (other) cases of non-conformity (Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 251, *Huet*, Contrats spéciaux, no. 21271, 670 with reference to sales). For BELGIAN law see *La Haye and Vankerckhove*, Le Louage de Choses I[2], nos. 424, 438, 1127. According to the ITALIAN CC art. 1584, if repair work lasts for more than one-sixth of the duration of the lease and, in any case, for more than twenty days, the lessee is entitled to a reduction of the rent in proportion to the duration of the entire period of repairs and to the extent of his impaired enjoyment. A rule on proportionate rent reduction in cases of non-conformity at the time the goods were made available to the lessee is found in CC art. 1578(1), and this rule applies correspondingly to non-conformity during the lease period. Where the usability of the goods is affected by external events, rules on supervening partial impossibility (CC art. 1463) can lead to a corresponding rent reduction (see *Alpa and Mariconda*, Codice Civile commentato IV, art. 1581, no. 2). The application of the latter rule seems, however, to be disputed (see *Cian and Trabucchi*, Commentario breve[8], art. 1587, no. V5, but compare for example Cass. 11 February 2005, 2855/2005, Giust.civ.Mass. 2005, fasc. 4). New judgments seem to allow application of CC art. 1584 *per analogiam* and to allow a general right to rent reduction in cases of non-performance (see Cass. 13 July 2005, no. 14739, Giust.civ.Mass. 2005 fasc. 7/8). According to the MALTESE CC art. 1545, the lessee has a claim for rent reduction (abatement) if there are "faults or defects which prevent or diminish the use of the goods", and the rules also applies where "such faults or defects … have arisen after the stipulation of the contract". Other rules on rent reduction are found in CC art. 1548(2) (repair work lasting for more than forty days), art. 1551 (use disturbed by third party actions concerning rights in the goods) and art. 1571(2) (partial destruction by fortuitous events). SPANISH CC art. 1558(2) allows for rent reduction in cases of urgent repair work lasting longer than forty days. The code seems to contain no general rule for the case of limited usability not imputable to one of the parties. According to the TS, such circumstances do not lead to the extinction of the contract, but to a proportional reduction in the rent (TS 26 December 1942, RAJ 1942, 1547). It is held that the rule in CC art. 1558(2) on rent reduction is to be extended to disturbances to use that are independent of the lessor's will (*Díez-Picazo and Gullón*, Sistema II[9], 336).

II. Implementation of rent reduction

4. In AUSTRIAN law rent reduction takes place *ex-lege*; no declaration or lawsuit is necessary (*Stabentheiner*, Mietrecht, no. 60). The lessee may claim back rent already paid, under the conditions of CC § 1431 (payment of a non-existing debt, *Stabentheiner*, loc. cit.). Under DUTCH law, the reduction of rent has to be claimed in court to prevent improper use of the (general) option for partial termination out of court (CC art. 6:265 CC). According to the ESTONIAN LOA § 112(2), a price reduction requires a declaration to the debtor; a refund may be claimed for money already paid (§ 112(3)). Under GERMAN law rent reduction also takes place as a result of law, without a declaration of the lessee, Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 536, no. 30 (but see also CC § 536c(2)(1): limitation of the lessee's right in case of late notification). Rent already paid can be claimed back under CC § 812(1) sentence 1 alt. 1 (MünchKomm (-*Schilling*), BGB[4], § 536, no. 27). The lessee has no claim, though, if excess rent is paid for a longer time with knowledge of the lack of conformity and without any reservations (BGH 18 June 1997, NJW 1997, 2674). In GREEK law there seems to be no unanimity as to the implementation. It has been asserted that rent reduction takes place *ex lege* (*Mantzoufas*, Enochikon Dikaion[3], § 44 II 2, 339–340; *Toussis*, Enochiko Dikaio, § 67, 217); that it is exercised by the lessee's unilateral declaration addressed to the lessor (*Filios*, Enochiko Dikaio I[6], § 30b B); and that it may be exercised either extra-judicially or via lawsuit (*Georgiadis*, Enochiko Dikaio, Geniko meros, § 25, no. 22; Georgiades and Stathopoulos (-*Rapsomanikis*), art. 576, no. 12). Rent already paid can be claimed back according to the provisions on unjustified enrichment (Georgiades and Stathopoulos (-*Rapsomanikis*), art. 576, no. 10). According to the POLISH CC art. 664(1), the lessee may only demand reduction of future rent and may not claim back rent already paid. According to the SLOVAK CC § 675, the lessor must notify the lessor of a claim for rent reduction without undue delay and no later than six months after the claim arises. There is a similar rule in CZECH law. The nature of the rent reduction is controversial in SWISS law (BSK (-*R. Weber*), OR I³, art. 259d, no. 3: *Gestaltungsrecht* or *ex-lege* reduction). In several countries explicit statements concerning the start of rent reduction are not easily found.

III. No explicit right to rent reduction

5. Under UNITED KINGDOM and IRISH law, there is no explicit legal right to rent reduction as a remedy. The *actio quanti minoris* of the civil law is unknown to common law. It would be more natural in these cases to see the remedy of rent reduction as a form of damages for non-performance of the contract. If the goods are defective, the lessee may recover damages equal to the difference between the value of the goods actually delivered and the value which the goods would have had if they had been in accordance with the contract. Further, where performance is incomplete and the price can easily be apportioned, it seems that the lessee may treat the contract as apportionable and pay only for the units delivered (e.g. *Dawood Ltd. v. Heath Ltd.* [1961] 2 Lloyd's Rep. 512, Q.B.). Finally, the aggrieved party may also set off claims arising out of the same transaction against sums that party would otherwise have to pay (*Beale*, Remedies, 50–52).

IV.B.–4:103: Notification of lack of conformity

(1) The lessee cannot resort to remedies for lack of conformity unless notification is given to the lessor. Where notification is not timely, the lack of conformity is disregarded for a period corresponding to the unreasonable delay. Notification is always considered timely where it is given within a reasonable time after the lessee has become, or could reasonably be expected to have become, aware of the lack of conformity.

(2) When the lease period has ended the rules in III.–3:107 (Failure to notify non-conformity) apply.

(3) The lessor is not entitled to rely on the provisions of paragraphs (1) and (2) if the lack of conformity relates to facts of which the lessor knew or could reasonably be expected to have known and which the lessor did not disclose to the lessee.

COMMENTS

A. Notification within a reasonable time

Purpose. The lessee must notify the lessor of a lack of conformity within a reasonable time. Notification may be necessary to give the lessor a chance to cure the lack of conformity, and in any case the lessor has a legitimate interest in knowing whether or not the lessee will make a claim based on non-performance. This is important in particular for reductions in rent. The lessor should have the opportunity to earn the full rent by remedying the lack of conformity. With regard to damages, the situation may be such that the lessor's non-performance is excused for a period if the lessor could not have known of the lack of conformity, but even in this respect there is a need for a rule on notification to avoid doubt. The lessor should also be given a chance to cure or to take other measures before the lessee is allowed to terminate the contractual relationship for fundamental non-performance.

Reasonable time. Notification may always be given within a reasonable time after the lessee has become, or could reasonably be expected to have become, aware of the lack of conformity. What is a reasonable time will depend on the circumstances, for example the kind of goods leased, the parties involved, the lease period, the actual phase of the contract, and the nature of the lack of conformity. A notification can be too late even if it is given immediately after the lessee has become aware of the lack of conformity if the lessee could reasonably have been expected to have become aware of it earlier. It has not been deemed necessary to include a provision concerning the lessee's examination of the goods. A duty to examine would only refer to the situation at the start of the lease period, but the notification rule also relates to a lack of conformity arising during the lease period. In any case, where the lack of conformity could have been discovered by normal examination, this should be taken into consideration when establishing what the lessee should reasonably have been aware of. When the lease period has come to an end, the general rule in III.–3:107 (Failure to notify non-conformity) applies, cf. paragraph (2) of the present Article. The difference between the two provisions lies in the cut-off effect, cf. Comment B.

Informing of lack of conformity. The lessee must give sufficient information to enable the lessor to identify the lack of conformity. Without such information the notification cannot serve its purpose. Often it is sufficient to explain the incorrect functioning, as the lessee cannot be expected to know why the goods do not function properly.

B. Effect of late notification

Cut-off effect. The effect of late notification is that the lessee cannot resort to remedies – typically rent reduction – for the lack of conformity in question for a period corresponding to the unreasonable delay. The lessee may, however, still resort to remedies with regard to the period which follows and of course with regard to other occurrences of lack of conformity for which notification is given in time. It has been found too harsh to leave the lessee without *any* remedies for the lack of conformity, including subsequent periods, as the lack of conformity continues to be a non-performance of the lessor's obligations. Also it has been considered preferable not to cut off remedies for the entire period prior to notification; this would lead to a loss of remedies for a period longer than the actual delay. The question of remaining remedies for subsequent periods does not arise when the lease period has not come to an end, and in this situation the general rule in III.–3:107 (Failure to notify non-conformity) applies.

No absolute time limit. For some types of contracts there are absolute time limits for notification of a lack of conformity, implying a cut-off effect for remedies irrespective of whether the creditor in the relevant obligation had – or could have – discovered the lack of conformity. Thus, in a contract for sale between two businesses, there is an absolute limit of two years from – in practice – delivery in IV.A.–4:302 (Notification of lack of conformity) paragraph (2). No such absolute limit is found in this Part of Book IV. In a contract for lease lack of conformity is an issue both at the start of the lease period and during the entire lease period. Each instance of lack of conformity must be notified within a reasonable time.

C. Notification of remedy

Specific performance and termination for non-performance. According to III.–3:302 (Enforcement of non-monetary obligations) paragraph (4) and III.–3:508 (Loss of right to terminate), a party may lose the right to enforce specific performance or the right to terminate the contractual relationship if enforced performance is not sought or notice of termination not given within a reasonable time after the party has become, or could reasonably be expected to have become, aware of the non-performance. These rules apply in addition to the rule in paragraph (1) of the present Article. Specific performance, along with remedying of a lack of conformity, and termination for non-performance, are remedies which directly affect the lessor's performance. They must therefore be claimed within a reasonable time. A "neutral" notification according to paragraph (1) will not give the lessor sufficient information in this respect. A claim for performance or a notice of termination may be given in the first notification of lack of conformity, but the situation may also be such that there is still time after the first notification to claim performance or to give notice of termination.

Other remedies. There are no separate rules on notification regarding withholding of rent, claims for rent reduction or damages if notification of lack of conformity is given according to paragraphs (1) and (2) of the present Article. The lessee may, however, lose such claims according to general rules on good faith and faire dealing and prescription.

D. Exception to cut-off effect

Knowledge and non-disclosure. Comment A1 describes the purposes of the notification rule: the lessor needs information concerning the facts discovered by the lessee and concerning the lessee's assessment of the performance. If the facts to which the lack of conformity relates to are already known to the lessor, or the lessor can reasonably be expected to know the facts, notification is not necessary regarding these facts. The lessor still needs to

know however whether or not the lessee wants to pursue remedies (it might also be that the lessee approves of the goods). This interest is protected by the notification requirement, but only in so far as the lessor has disclosed the relevant facts to the lessee. There is no good reason to protect the lessor through a notification rule if the lessor knew that the performance did not conform to the contract but failed to disclose this information to the lessee. A corresponding provision is found in III.–3:107 (Failure to notify non-conformity) paragraph (3).

NOTES

I. Overview

1. For notification as a prerequisite to enforcement of specific performance and to termination for non-performance, see notes to III.–3:302 (Enforcement of non-monetary obligations) paragraph (4) and III.–3:508 (Loss of right to terminate). See also notes to III.–3:107 (Failure to notify non-conformity). The importance of notification may vary according to the nature of the obligation and the non-performance. Where an obligation is one of means (i.e. an obligation to use best efforts, not an obligation to achieve a specific result) the lessor's knowledge of the actual situation, for example a need for repair of the goods, is typically a precondition for non-performance. Also where liability is based on fault, knowledge of the situation is typically necessary. But notification may be a prerequisite for remedies even where there is an obligation to achieve a specific result and where there is liability without fault.

II. Notification and cut-off effect in lease contracts

2. In AUSTRIAN law, late notification may lead to loss of the lessee's right to rent reduction and of the lessee's right to terminate (OGH 17 December 1985, RdW 1986, 208, see also Koziol (-*Iro*), ABGB, § 1097, no. 1) but the lessee does not lose a claim for specific performance (OGH 29 Jun 1971 MietSlg 23.209, obiter) or a claim for reimbursement of the costs of having non-conformity remedied (OGH 15 September 1972, EvBl 1972/74, Schwimann (-*Binder*), ABGB V³, § 1097, no. 15). Payment of full rent with knowledge of counterclaims may be regarded as a waiver of rent reduction (Rummel (-*Würth*), ABGB I³, § 1096, no. 11). Further, the right to terminate may be regarded as waived if it is not invoked without undue delay (Schwimann (-*Binder*), ABGB V³, § 1117, no. 13). Under CZECH law, there is a notification requirement for rent reduction, CC § 675 (for more detail see Knappová *(-Salač)*, Civil Law II[4], 245 and Supreme Court 20 Cdo 2295/99), cf. also special rules for business leases, CC § 721(2) and for leases of a means of transportation, Ccom art. 635(2). If notification is given in time, rent reduction may be claimed with retroactive effect. A claim for damages or specific performance is not available without a request from the creditor, CC § 563, cf. Ccom art. 340(2), and the lessee may not withhold the rent without notifying the lessor (Švestka/Jehlička/Škárová/Spáčil (-*Škárová*), OZ[10], 996). Prior notification seems to be no formal requirement for termination under CC § 679. For DANISH law, it has been argued that late notification of lack of conformity at the *start* of the lease period may prevent the lessee from claiming rent reduction, withholding rent and claiming damages, but not from claiming specific performance. There is however no cut-off effect of late notification of lack of conformity during the lease period, see *Gade*, Finansiel leasing, 160–161. In DUTCH law, there is a general obligation for the lessee to report a defect to the lessor (CC art. 7:206(3)). Some

claims have their own notification-rules, for instance the claim for cure (remedying the defect) requires an express request by the lessee, and the claim for rent reduction requires adequate notification. The right of the lessee to remedy the defect (CC art. 7:206 (3)) and some kinds of damage compensation require a default, brought about, in principle, by a written warning. For the latter requirement there are many statutory and case-law exceptions (CC art. 7:208). In ESTONIAN law, late notification results in extra time for the lessor's cure, LOA § 282(3). Notification is required According to the FRENCH CC art. 1726 for rent reduction where the lessee's use is affected by third parties' rights, but the lessee may show that late notification was without importance, as where the lessor had the information anyhow or where the lessor could not have remedied the lack of conformity (Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 303). The lessor's obligation to maintain the goods is not dependent on formal notification (*mise en demeure*, see CC art. 1146, Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 220). It may, however, under the circumstances be necessary to make the lessor aware of the need to maintain the goods (Cass.civ. 15 July 1963, D. 1964, 5, Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 208) or to make clear what the claim of the lessee is (Cass.civ. 21 February 1984, Bull.civ. 1984.I, no. 68). According to the GERMAN CC § 536c(1) the lessee has a duty to notify a lack of conformity arising during the lease period. The same is true of the need to protect the goods and claims of third parties. To the extent that late notification has impeded the lessor's remedying of the non-conformity, the lessee's claim for rent reduction or damages may be reduced, and the lessee cannot terminate without giving the lessor a chance to cure (CC § 536c(2)). Other remedies are unaffected, such as a claim for specific performance, withholding of rent (see Schmidt-Futterer (-*Eisenschmid*), Mietrecht[9], § 536c, nos. 35 and 37), a claim for reimbursement of costs for remedying non-conformity (CC § 536a(2)) and claims based on non-contractual liability; late notification can in these cases be regarded as contributory negligence (Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 536c, no. 10). After notification the lessee is once again entitled to rent reduction (Emmerich and Sonnenschein, loc. cit. § 536c no. 11). For GREEK law, it has been argued that a failure to notify can lead to loss of the rights to rent reduction and termination for non-performance (*Kafkas*, Enochiko Dikaio I[7], arts. 585–586 § 4 and art. 589 § 7; *Toussis*, Enochiko Dikaio, § 69, 229; contra *Zepos*, Enochikon Dikaion II[2], § 7 IV, 212 and fn. 2). Under HUNGARIAN law, the general rule in CC § 307 applies (notification as soon as possible in the circumstances; late notification may result in liability for damage caused by the delay, not loss of remedies; in consumer contracts notification within two months is always timely). According to the ITALIAN CC art. 1577, the lessee must notify the lessor of the need for repairs not falling under the lessee's obligations. The lessor's obligation to perform repairs and the lessor's liability for non-performance are dependent on knowledge of the need for repairs (see *Alpa and Mariconda*, Codice civile commentato IV, art. 1577, no. 1 and *Cian and Trabucchi*, Commentario breve[8], art. 1577, no. II1). Failing to give notification of third parties' claims may lead to liability for the lessee but not to loss of remedies (*Alpa and Mariconda*, loc. cit. art. 1586 no. 1, *Cian and Trabucchi*, Commentario breve[8], art. 1586, no. 3). According to POLISH law, notification is a prerequisite for rent reduction, cf. Notes to IV.B.–4:102 (Rent reduction). Termination also presupposes that the lessor has been given a chance to remedy the lack of conformity, cf. CC art. 664(2) and Radwański (-*Panowicz-Lipska*), System Prawa Prywatnego VIII, 27. Further if the lessee does not notify the lessor of a lack of conformity, the goods are presumed to be in conformity with the contract, cf. CC art. 675(1). Under SLOVAK CC § 668(1), the lessee must notify the lessor without undue delay of the need for repairs that are to be made by the lessor. If in breach of this duty, the lessee

loses the rights to withhold rent, reduce rent or terminate the contract without notice (Svoboda (-*Górász*), Komentár a súvisiace predpisy, 614). Lack of notification of the need for repairs may also lead to a loss of claims for reimbursement of expenditure by lessee on these repairs; in this case the lessee may only demand reimbursement limited to the lessor's enrichment (see CC § 669). In SPANISH law the lessee must inform the lessor as soon as possible of claims and disturbances by third parties and also of the need for repairs (CC art. 1559). Such notification is a prerequisite for remedies for non-performance of the obligation to repair (*Bercovitz,* Manual de Derecho Civil, 179). SWISS law does not recognise a cut-off effect for late notification in lease contracts (Guhl (-*Koller*), OR[9], § 44, no. 37; BG 22 October 1981, BGE 107 II 426, 429: different from sales law), but the lessor's knowledge of non-conformity is a prerequisite for certain remedies (*inter alia* SWISS LOA art. 259b litra a for termination, art. 259b litra b for self-help, art. 259d for rent reduction). The way in which the lessor learns of non-conformity is irrelevant (BSK (-*R. Weber*), OR I[3], § 257g, no. 7). Standard contract forms my not establish a cut-off effect for late notification (BSK, loc. cit. no. 9). Under UNITED KINGDOM and IRISH law, where the lessee chooses to affirm the contract despite lack of conformity or the lack of conformity is not such as to give rise to the right to terminate, the lessee must inform the lessor of the lack of conformity and allow the lessor a reasonable time to remedy the breach. Notice is not required where the lessor has knowledge or is deemed to have knowledge of the lack of conformity.

IV.B.–4:104: Remedies to be directed towards supplier of the goods

(1) This Article applies where:

(a) the lessor, on the specifications of the lessee, acquires the goods from a supplier selected by the lessee;

(b) the lessee, in providing the specifications for the goods and selecting the supplier, does not rely primarily on the skill and judgement of the lessor;

(c) the lessee approves the terms of the supply contract;

(d) the supplier's obligations under the supply contract are owed, by law or by contract, to the lessee as a party to the supply contract or as if the lessee were a party to that contract; and

(e) the supplier's obligations owed to the lessee cannot be varied without the consent of the lessee.

(2) The lessee has no right to enforce performance by the lessor, to reduce the rent or to damages or interest from the lessor, for late delivery or for lack of conformity, unless non-performance results from an act or omission of the lessor.

(3) The provision in paragraph (2) does not preclude:

(a) any right of the lessee to reject the goods, to terminate the lease under Book III, Chapter 3, Section 5 (Termination) or, prior to acceptance of the goods, to withhold rent to the extent that the lessee could have resorted to these remedies as a party to the supply contract; or

(b) any remedy of the lessee where a third party right or reasonably based claim prevents, or is otherwise likely to interfere with, the lessee's continuous use of the goods in accordance with the contract.

(4) The lessee cannot terminate the lessee's contractual relationship with the supplier under the supply contract without the consent of the lessor.

COMMENTS

A. Overview

"Financial leasing" and remedies. This Article applies mainly to contracts that correspond to the contracts dealt with in the Unidroit Convention on International Financial Leasing (Ottawa 1988). In these transactions the lessor has the role of a financing party, and the parties regularly seek to channel some of the lessee's remedies towards the supplier of the goods, past the lessor. This is the same rule established by the Unidroit Convention. Other special rules concerning the contracts described in the Convention are found in IV.B.–2:103 (Tacit prolongation) paragraph (4), IV.B.–3:101 (Availability of the goods) paragraph (2), IV.B.–3:104 (Conformity of the goods during the lease period) paragraph (2), and IV.B.–5:104 (Handling the goods in conformity with the contract) paragraph (2). The criteria for applying special rules are not the same for every one of these provisions, as different aspects of the contracts justify different rules. It is not a requirement for the application of this Article that the entire cost be amortised by rent payments. Thus the Article also applies to certain leases with so-called residual value.

B. Scope of application

Prerequisites. The Article applies where certain prerequisites are met. These prerequisites depend partly on the factual situation in which the contract is concluded and partly on the

terms of the individual contract. The prerequisites are cumulative; it is therefore not sufficient that only some of them are met.

Goods supplied for the particular lease. The Article applies only where the lessor has acquired the goods on the basis of specifications provided by the lessee, from a supplier selected by the lessee. For practical purposes this means that the goods are acquired solely for the lease contract in question. This reflects the role of the lessor in such contracts: the lessor is typically a financing institution without supplies of goods for lease purposes and without any interest in purchasing goods that are not already intended for a particular client. The goods are normally meant for a single lease contract and not for several subsequent contracts with different lessees.

Specification of goods. The goods must have been acquired on the basis of specifications provided by the lessee. This means that the goods are acquired for the purposes and needs of the lessee, and that the lessor cannot unilaterally specify the goods to be acquired and their qualities. This element in particular justifies the fact that liability for lack of conformity is channelled past the lessor. It is not necessary that the specifications be drawn up by the lessee exclusively. Nor is it necessary that the lessee has had the last word in all respects. The lessee may have consulted an independent expert, the supplier, and even the lessor, but the specifications must be drafted for the lessee and to satisfy the lessee's own purposes. The lessor is of course free to abstain from the transaction if the specifications drawn up by the lessee are thought to be inappropriate.

Selection of supplier. The supplier must be selected by the lessee. Once again, this is a result of the characteristic role of the lessor in these contracts. In ordinary contracts for lease the lessor will decide where to source goods for the lease business. It is not necessary that the lessee choose freely, independently of the lessor. The lessor will normally want to approve the supplier, as the supply contract is made between the lessor and the supplier. It is not unusual that the supplier co-operates with a financing institution that will offer contracts for lease to the supplier's customers. Thus it can be said that the supplier has selected the lessor. However, with regard to the *lease* contract, the supplier is still selected by the lessee. This, too, is part of the justification for channelling liability to the supplier, past the lessor.

Specification of goods and selection of supplier. The rules apply only where the lessee has not primarily relied on the lessor's skill and judgement in specifying the goods and selecting the supplier. This is another element of the justification for relieving the lessor of some of the normal liability under the lease contract. As already mentioned in the two preceding paragraphs, the lessor may want to approve the specification of the goods and the selection of the supplier, and the lessor may also give advice in this matter. It is only when the lessee has *primarily* relied on the lessor's skill and judgement that the contract for lease will fall outside the scope of the present Article. If that is the case, the lessor has an active role not typical of the transactions dealt with here, and there is a presumption that the general lease rules apply.

Other elements of the transaction. The lessor may have given advice concerning other elements of the transaction, besides the specification of goods and the selection of a supplier, for example concerning the costs of the transaction, lease period and profile of rent payments, tax and accounting effects, etc. This is not incompatible with application of this Article.

Approval of the terms of the supply contract. The lessee must have approved the terms of the supply contract. This is essential, as the supply contract will to a great extent determine the lessee's rights in the case of non-performance. Normally, however, the parties to the supply contract will be only the lessor alone and the supplier and the terms will be agreed by these two parties. It is not a prerequisite that the lessee have any influence on the terms; approval is sufficient. There are no formal requirements concerning the lessee's approval of the terms of the supply contract and proof of approval may be provided by any means, (cf. II.–1:106 (Form). In most cases the parties will prefer to have the lessee's approval in writing.

Supplier's obligations owed to lessee. The rules contained in the present Article apply only where the supplier's obligations under the supply contract are owed to the lessee as a party to the contract or as if the lessee were a party to the supply contract. This is why the lessor may be partly relieved of liability for non-performance. In the Unidroit Convention, the lessee's rights under the supply contract are a *result* of the application of the Convention (or rather the national law implementing the Convention). Here, another solution is chosen: the lessee's rights under the supply contract are a *prerequisite* for applying the rules of the present Article. The supplier's obligations may be owed to the lessee as a result of a rule of law (national law) or as a result of the contract itself, where a stipulation in favour of the lessee as a third party is included.

Rules of law. If a rule of law, applicable to the relationship between supplier and lessee, provides that the supplier's obligations under the supply contract are owed to the lessee as if the lessee were a party to the contract, then the prerequisite for application of the present Chapter is met. It has not been deemed necessary to examine national law to establish whether or not such rules exist (apart from rules implementing the Unidroit Convention). It should be mentioned that rules on "direct action" found in some jurisdictions are normally subject to certain limitations, so that the supplier's obligations are not owed to the lessee entirely as if the lessee were a party to the contract.

Contract with lessee. The lessee may be a party to the supply contract, together with the lessor, to the effect that the supplier's obligations are owed to the lessee. Whether or not this is the case must be established by ordinary interpretation of the contract.

Stipulation in favour of the lessee as a third party. The supplier and the lessor may stipulate in the supply contract that the supplier's obligations are owed to the lessee as if the lessee were party to the contract, cf. the general rules on stipulation in favour of a third party in Book II, Chapter 9, Section 3. If it is further agreed that the supplier's obligations cannot be varied without the consent of the lessee (cf. the following paragraph), the rules of the present Article will apply (provided the other prerequisites are also met).

Supplier's obligations cannot be varied without lessee's consent. It is not sufficient that the supplier's obligations under the supply contract are owed to the lessee; it must also be ensured – whether via application of a rule of law or under the contract – that these obligations may not be varied without the lessee's consent. In particular, this qualification is important with regard to a stipulation in favour of the lessee as a third party in the contract between lessor and supplier, as the contracting parties may in many cases remove, revoke or modify the third party's right, cf. II.–9:303 (Rejection or revocation of benefit), unless otherwise agreed.

C. Effects

Channelling liability past the lessor. The effect of the present Article is such that liability for non-performance on the part of the lessor is, to a certain extent, channelled past the lessor. Some of the normal remedies cannot be pursued against the lessor, and in such instances the lessee is left with the sole option of pursuing the supplier. The remedies will mainly depend therefore on the supply contract, rather than the lease contract. The precise scope of the supplier's liability to the lessee is not expressed in the present Article, such liability being a prerequisite for applying the Article at all.

Overview. In the case of late delivery, including non-delivery, and lack of conformity the lessee has no right to performance from the lessor, to reduce the rent, or to damages. Such non-performance is normally caused by the supplier. The lessor must, however, accept rejection of the goods, termination of the contractual relationship under the lease contract, or withholding of rent prior to acceptance of the goods, as the case may be, but only to the extent that the lessee may resort to these remedies as a party to the supply contract. In such cases, the lessor will normally have a corresponding right to terminate the lessor's own contractual relationship with the supplier under the supply contract or to recover from the supplier loss caused by late payment. Where non-performance is the result of an act or omission of the lessor, remedies against the lessor will be available according to the general rules.

Purpose of the rules. The reasoning behind these rules is based on the special role of the lessor in the transaction, normally that of a financing institution. The supplier controls availability and conformity of the goods, and the lessor's main interest is to recover what is generally in real terms a credit granted to the lessee. If the ordinary lease rules were to apply, the lessor would be liable to the lessee and would then have to recover from the supplier any loss caused by the supplier. The effect of the rules contained in the present Article is such that the lessee must pay the rent to the lessor and may then recover any loss sustained from the supplier. The lessee will thus to a certain extent bear the risk of the supplier's insolvency and take the burden of litigation, something that can be justified by the lessee's having selected the supplier.

Specific performance. The lessee cannot enforce specific performance by the lessor, whether in the form of claiming the goods in cases of late delivery or in the form of remedying a lack of conformity by substitution or repair. Normally the lessee can enforce specific performance by the supplier, based on the supply contract.

Reduction of rent. The lessee cannot reduce the rent for late delivery or lack of conformity (prior to acceptance of the goods rent may, however, be withheld). In ordinary leases, the lessee may reduce the rent to zero for periods where the goods have not been made available at all and reduce the rent proportionally where the goods do not conform to the contract. Under the contracts dealt with here, the lessee will have to pay the rent and then claim rent reduction or damages from the supplier.

Damages and interest. The lessee cannot claim damages (or interest, if relevant) from the lessor. Damages obtained from the supplier under the supply contract may, however, compensate the loss.

Termination of the contractual relationship with the lessor. The lessee may terminate the lease if such termination would be allowed under the supply contract. Termination may take place before or after acceptance of the goods. If the lease is terminated, the lessor will not receive future rent, while the lessee cannot claim the goods or must return the goods if they have already been accepted. The lessor may in turn terminate the lessor's contractual relationship with the supplier under the supply contract, and is thus relieved of the obligation to pay for the goods, or granted the right to claim for recovery of sums already paid, in addition to other losses incurred. Should the supplier be unable to pay, the goods may serve as security for the lessor.

Withholding of rent, rejection of goods. Prior to acceptance of the goods, the lessee may withhold rent because of late delivery or the tender of non-conforming goods, to the extent that the supply contract allows for payment to be withheld in such situations. The lessee may also reject non-conforming goods if this is allowed under the supply contract. After acceptance of the goods, however, rent may not be withheld because of lack of conformity of the goods.

Hidden lack of conformity. The effects of these rules can be illustrated by a case of a hidden lack of conformity. In the case of a lack of conformity of which the lessee could not have been expected to be aware on acceptance of the goods, rent may not be withheld. The reason given is that the lessor, typically a financing party, would be left with a claim against the supplier for rent unpaid by the lessee, but no way of securing this claim as long as the lessee is allowed to keep the goods under the lease contract. However, the lessee may terminate the lease, if termination is allowed under the supply contract. The lessor may then take back the goods and terminate the lessor's relationship with the supplier under the supply contract, the goods serving as security for claims against the supplier. The lessee may not reduce the rent because of a hidden lack of conformity or claim damages from the lessor, for the same reasons. Such remedies would also leave the lessor with an unsecured claim against the supplier.

Non-performance resulting from lessor's act or omission. If late delivery or lack of conformity results from an act or omission of the lessor, the general rules on remedies for non-performance apply, and the lessee may resort to any remedy relevant, including rent reduction, withholding of rent, even after acceptance of the goods, and a claim against the lessor for damages.

Third parties' rights. The rules contained in the present Article do not relieve the lessor of liability for non-performance resulting from a right or a reasonably based claim of a third party which is likely to prevent or otherwise interfere with the lessee's use of the goods in accordance with the contract. The general rules apply, irrespective of the non-performance being related to the supplier or the lessor: the lessor may have bought goods that did not belong to the supplier, or it may be that dispositions of the lessor or rights of the lessor's creditors interfere with the lessee's use.

Lessee's termination of the lessee's relationship with supplier under supply contract. The rules of the present Article apply only where the supply contract imposes obligations on the supplier with regard to the lessee (as a party to the supply contract or as if the lessee were a party to that contract). There is thus a legal relationship between the lessee and the supplier. This means that the lessee can also terminate this legal relationship where termination is

foreseen by the contract or is permitted under the general rules on non-performance. A limitation is made in the fourth paragraph of the present Article: the lessee may not terminate the relationship with the supplier under the supply contract without the consent of the lessor. The lessor will typically want to have some say in situations where the lessee's obligation to pay rent is terminated and the goods are returned to the supplier. Termination may also lead to disputes concerning the lessor's rights under the supply contract. It is therefore appropriate that termination take place only with the lessor's consent. The lessee may in any case resort to the right to terminate the *lease* if the lessor's consent is for some reason denied.

NOTES

I. Scope of application

1. For definitions and a description of contracts often referred to as leasing, financial leasing, financial leases etc., see notes to IV.B.–1:101 (Lease of goods).

II. Excluding remedies against lessor for delay or lack of conformity

2. In AUSTRIAN law, remedies against the lessor can be excluded if and in so far as the lessee is authorised to claim such remedies in the name of the lessor against the supplier or the corresponding rights have been assigned to the lessee (Schwimann (-*Binder*), ABGB V³, § 1090, no. 82). However, the lessee may reject the goods because of lack of conformity (Rummel (-*Würth*), ABGB I³, § 1090, no. 32); under certain conditions the lessee may withhold rent (Schwimann (-*Binder*), ABGB V³, § 1090, no. 85); and termination for an important reason cannot be excluded (Schwimann (-*Binder*), ABGB V³, § 1090, no. 96; *Fischer-Czermak*, Mobilienleasing, 259). The lessee is left with the remedies that the lessor would have under sales law (*Fischer-Czermak*, Mobilienleasing, 258). For the consequences of the execution of these sales law remedies on the contract for lease see Schwimann (-*Binder*), ABGB V³, § 1090, no. 86.

3. Where rules in line with the UNIDROIT Convention have been codified, they include both exclusions of the lessor's liabilities – with certain exceptions – and a right for the lessee to pursue claims against the supplier. See ESTONIAN LOA chap. 17 (§§ 361–367); LITHUANIAN CC arts. 6.567–6.574; POLISH CC art. 709.

4. Exclusion of the lessor's liability and assignment of the lessor's claims against the supplier and the limits to such agreements under DANISH law are discussed in *Gade*, Finansiel leasing, 167–197.

5. In FRENCH *crédit-bail* contracts, exclusion of the lessor's liability and assignment of the lessor's claims against the supplier are usual and in principle possible. For details and discussion, see Rép.Dr.Com. (-*Duranton*), v° Crédit-bail nos. 114, 112, 192 ff; *Bénabent*, Contrats spéciaux[6], nos. 898 ff; *Huet*, Contrats spéciaux, no. 23006. For corresponding rules in BELGIAN law, see *Philippe*, Le Leasing[2], no. 070

6. In GERMAN law, the exclusion of remedies against the lessor and assignment to the lessee of the lessor's remedies against the supplier are in principle possible. The obligation to make the goods available cannot be excluded by contract, and the lessee must have a right to withhold rent, to terminate the contract, and to claim damages (Staudinger (-*Stoffels*), BGB (2004), Leasing nos. 188 ff, MünchKomm (-*Habersack*), BGB III[4], Leasing, nos. 65 ff; *Oetker* and *Maultzsch*, Vertragliche Schuldverhältnisse², 737). Concerning the lessee's pursuing the lessor's remedies under the contract of sale,

see MünchKomm (-*Habersack*), BGB[4], Leasing, nos. 79 ff; Staudinger (-*Stoffels*), BGB (2004), Leasing nos. 213 ff.

7. In GREEK law, exclusion of the lessor's liability and assignment of the lessor's claims against the supplier (for damages, rent reduction, termination of the contract) are usual and in principle possible. The lessor's liability as an importer of the goods cannot be excluded by contract, in which case the liability is governed by the provisions on the liability of the producer (art. 6(3) and (12) of L. 2251/1994). For details see *Georgiadis*, New Contractual Forms of Modern Economy[4], 67–68, 71–73. An agreed waiver of legal rights against the lessor for lack of conformity is normal in SPANISH leasing contracts. As a compensation, the lessor usually assigns the lessee its own rights vis à vis the supplier. This subrogation poses serious problems when the lessee tries to terminate the supply contract for gross lack of conformity. Sometimes case law refuses this attempt (TS 26 June 1989, RAJ 1989/4786). Sometimes it requires that the claim be brought against both supplier and lessor (TS 25 June 1997, RAJ 1997/5210). Sometimes it has upheld the lessee's claim, but pointing out that the final outcome of this subrogation is also the termination of the lease contract, as a subordinate agreement (TS 26 February 1996, RAJ 1996/1264).

8. In SWISS law, limitation of the lessor's liability and assignment of the lessor's claims against the supplier are in principle possible, but not without certain exceptions, see BSK (-*Schluep* and *Amstutz*), OR I[3], Pref. to arts. 184 ff nos. 100, 103; *Tercier*, Les contrats spéciaux[3], no. 6918. It has been observed that the UNIDROIT Convention is more favourable to the lessee (Kramer (-*Stauder*), Neue Vertragsformen[2], 104).

9. In SCOTTISH law the lessor is liable to the lessee for the quality of the goods supplied under the Supply of Goods and Services Act 1982 but normally this liability is excluded in finance leases, such exclusions being subject to the fairness and reasonableness test of the Unfair Contract Terms Act 1977 s. 21 (note however the controversial case of *G.M. Shepherd Ltd. v. North West Securities Ltd.* 1991 S.L.T. 499, holding that a finance lease was an innominate contract into which the implied terms under the common law of hire were not added). There are no cases of these kinds of exclusion being held unreasonable. The lessee can only have a claim against the supplier if it has a *jus quaesitum tertio* under the contract between supplier and lessor. In the absence of an express provision, this seems unlikely as the intention of the parties is to keep the sale and the lease legally apart (see *Gloag and Henderson*, The Law of Scotland[11], para 13.15).

III. Liability for third parties' rights

10. For several jurisdictions, exclusion of liability for third parties' rights interfering with the use seems possible: for AUSTRIAN law, *Fischer-Czermak*, Mobilienleasing, 258 ff; for GERMAN law, MünchKomm (-*Habersack*), BGB III[4], Leasing, no. 104; for SWISS law, BSK (-*Schluep and Amstutz*), OR I[3], Pref. to arts. 184 ff, no. 101. For a different solution, see ESTONIAN LOA § 362(1).

IV. Lessee's right to terminate the relationship under the supply contract

11. For several jurisdictions, the lessor's right to terminate the contractual relationship under the supply contract may also be assigned to the lessee who may then terminate without the lessor's consent: for AUSTRIAN law, Schwimann (-*Binder*), ABGB V[3], § 1090, nos. 85 and 86; for FRENCH law on *crédit-bail*, Rép.Dr.Com. (-*Duranton*), v° Crédit-bail, no. 122 (but duty to inform the lessor); for GERMAN law, MünchKomm (-*Habersack*), BGB[4], Leasing, nos. 86, 91, 95; for SWISS law, *Tercier*, Les contrats spéciaux[3], nos. 6915 ff; Kramer (-*Stauder*), Neue Vertragsformen[2], 106. For a different

solution (consent of the lessor), see ESTONIAN LOA § 365(2); LITHUANIAN CC art. 6.573(1); POLISH CC art. 709^8(4). For SPAIN, see above.

CHAPTER 5: OBLIGATIONS OF THE LESSEE

IV.B.–5:101: Obligation to pay rent

(1) The lessee must pay the rent.

(2) Where the rent cannot be determined from the terms agreed by the parties, from any other applicable rule of law or from usages or practices, it is a monetary sum determined in accordance with II.–9:104 (Determination of price).

(3) The rent accrues from the start of the lease period.

COMMENTS

A. Reference to the contract and default rules

The contract. Normally, the parties have agreed on the rent to be paid. The rent may be agreed as an amount for the entire lease period. More often though the rent is agreed as an amount per interval of time (rent per hour, day, month, etc.). In some cases the amount to be paid is not spelt out in the contract, but can be determined via a reference to price lists etc. In particular for long term leases, there may be rent regulation clauses of various kinds, for example a clause allowing one or each of the parties a right to claim adjustments to rent based on an index.

Default rule. Occasionally, the rent cannot be determined from the contract, even if it is agreed that a rent is to be paid. In such cases the rent must be determined by the rules in II.–9:104 (Determination of price). If the rent cannot be determined from agreed terms, from any other applicable rule of law or from pertinent usages and practices, "the price payable is the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price". Often there will be no sharp distinction between the agreement and the pertinent usages and practices established by the parties, or between common usages and practices and the rent normally charged ("market price"). If the rent cannot be determined from such criteria, the lessee must pay a rent that is reasonable. According to the definition in Annex 1, what is "reasonable" is to "be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices". Hence there is a certain overlap between reasonableness and the guidance that can be garnered from usages and practices.

B. Rent from the start of the lease period

Accrual and payment. Where rent is agreed for certain intervals, the period during which the rent accrues must be established. This must be done irrespective of the time agreed for payment, which may be at certain intervals or may not.

Accrual from the start of the lease period. Rent in principle accrues even for parts of the lease period during which the goods have not been available for the lessee's use. Unavailability must be dealt with as a question of rent reduction (or partial termination, which will lead to the same result). The consequence of this is that the rent accrues from the start of the lease period, not from the time when the goods are made available, even where

performance is late. The lessee can in most cases claim reduction of the rent to zero for the period of delay. If the delay was caused by the lessee, however, there is no claim for rent reduction, cf. III.–3:101 (Remedies available) paragraph (3).

NOTES

I. Obligation to pay rent

1. In general, the obligation to pay for the right of use of the goods is a characteristic trait of the lease contract. An agreement on gratuitous use of goods is normally not regarded as a lease (though it falls under the general category of bailments in ENGLISH law). Correspondingly, the obligation to pay rent is included explicitly in legislation in several countries: Austrian CC §§ 1090, 1092, 1100 ff; Belgian CC art. 1728(2); CZECH CC art. 671(1); DUTCH CC art. 7.212; ENGLAND, WALES, and NORTHERN IRELAND Supply of Goods and Services Act 1982, s. 6(3) and SCOTLAND Supply of Goods and Services Act 1982, s. 11G(3); Estonian LOA §§ 271, 292(1); French CC art. 1728(2); German CC § 535(2); Greek CC arts. 574, 595; Hungarian CC §§ 423 and 428(1); Italian CC art. 1587(1); Latvian CC art. 2141; Lithuanian CC art. 6.487; Maltese CC arts. 1526(1), 1533; POLISH CC arts. 659(1), 669(2); Portuguese CC arts. 1022 and 1038(a); SLOVAK CC § 671; Slovenian LOA §§ 587(1), 602; SPANISH CC arts. 1543 and 1555(1); Swiss LOA art. 257.

II. Determined or determinable rent as requirement

2. In several systems it is a more or less general requirement for a valid contract that the price must be determined by the parties or at least be determinable from the contract (see notes to II.–9:104 (Determination of price)). This requirement is often made explicit for lease contracts in particular. It implies that determination of future rent may not be left to the courts. See AUSTRIAN CC § 1090, cf. Schwimann (-*Binder*), ABGB V³, § 1092, nos. 66 ff; for BELGIAN law, *La Haye and Vankerckhove*, Le Louage de Choses I², no. 825; DUTCH CC art. 6:226 (obligations have to determinable), cf. Asser (-*Abas*), Bijzondere overeenkomsten IIA[8], no. 16; for FRENCH law, *Huet*, Contrats spéciaux, no. 21143; for ITALIAN law, *Alpa and Mariconda*, Codice civile commentato IV, art. 1571, no. 14; for POLISH law, *Pietrzykowski*, Kodeks cywilny II[4], art. 659, Nb. 22, 394; for PORTUGUESE law, *Pires de Lima and Antunes Varela*, Código Civil Anotado II[3], 370; for SPANISH law, TS 2 May 1994, RAJ 1994, 3557 and Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-*Lucas Fernandez*), Código Civil II, 1095; SWISS BGE 119 II 347 (15 September 1993). If the object has already been used payment may be owed under the rules on unjustified enrichment (for AUSTRIAN law, see Rummel (-*Würth*), ABGB I³, §§ 1092–1094, no. 14) or as a contractual obligation (for SWISS law, see Guhl (-*Koller*), OR9, § 44, no. 12, *faktisches Vertragsverhältnis*, *Honsell*, OR-BT[7], 203, *Huguenin*, OR-BT², no. 471, *mietvertragsähnliches Verhältnis*).

III. Fixing a rent that is "usual", "reasonable" etc.

3. Other systems allow the courts to supplement the contract by fixing a rent or, in some systems, to appoint independent experts to fix the rent. It may be a rent that is "usual" (CZECH CC § 671(1); SLOVAK CC § 671(1)) or "reasonable" (UNITED KINGDOM, by analogy with contracts for services, Supply of Goods and Services Act 1982, s. 15, *Chitty* on Contracts II[29], nos. 33-076 and 33-047); for SWEDEN, see *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 197, analogy to sales law), or such

criteria in combination (GERMAN CC §§ 612(2) and 632(2) per analogy, determination by the lessor According to the CC §§ 315 and 316 is a last resort, Emmerich and Sonnenschein (*-Emmerich)*, Hk-Miete[8], Pref. to § 535, no. 29). See also ESTONIAN LOA § 28(2) (general rule, price generally charged, or else reasonable price); GREEK CC arts. 371–373, 379 (general rules); LATVIAN CC art. 2123 (rent in previous contract or else fixed by discretion); LITHUANIAN CC art. 6.487(2) (determination by independent experts); MALTESE CC art. 1534 (current price, if any, or valuation by independent experts).

III. Accrual of rent

4. The question concerning the time from which rent accrues is closely connected to the rules on reduction of rent, and a general reference is made to the notes to IV.B.–4:102 (Rent reduction).

IV. Rent in the form of money or other value

5. See notes to IV.B.–1:101 (Lease of goods).

IV.B.–5:102: Time for payment

Rent is payable:

(a) at the end of each period for which the rent is agreed;
(b) if the rent is not agreed for certain periods, at the expiry of a definite lease period; or
(c) if no definite lease period is agreed and the rent is not agreed for certain periods, at the end of reasonable intervals.

COMMENTS

A. Time for payment

End of period for which rent is agreed. The parties normally agree on the time for payment. If the time of payment is not fixed by or determinable from the terms agreed by the parties, it is determined by the default rules found in the present Article. Where the rent is agreed for certain periods, for example a certain amount per month, the rent must be paid at the end of each month. The rent may be agreed for the entire definite lease period. In such cases the rent must be paid at the end of the lease period (it might be considered that this is also a period for which the rent is agreed, and that there is overlap between (a) and (b) in the first paragraph of the present Article). The default rule may admittedly lead to rather cumbersome results where the rent is agreed for very short periods (hours, days), but the parties are free to agree on another time for payment even after conclusion of the contract.

End of reasonable intervals. Where no definite lease period is agreed and the rent is not agreed for certain periods, the rent must be paid at the end of reasonable intervals. Guidelines for judging reasonableness are found in the definition of "reasonable" in Annex 1.

B. Place of payment

Lessor's place of business. The place of payment may be fixed by or determinable from the terms agreed by the parties. If not, III.–2:101 (Place of performance) determines the place of payment. As a rule, money is to be paid at the creditor's place of business as at the time of conclusion of the contract. If the creditor has more than one place of business, the place of payment is the place of business with the closest relationship to the obligation. Money must be paid at the creditor's habitual residence if there is no business address. In practice, the lessor instructs the lessee to transfer money to a specified bank account in the country of the place of business or habitual residence, as the case may be.

NOTES

I. Time for payment

1. The common rule throughout the European legal systems is that rent is payable at the time determined by the terms agreed by the parties. This is often stated explicitly in legislation, sometimes also with a reference to usages in particular, see for example AUSTRIAN CC § 1100; DUTCH CC art. 7:212; PORTUGUESE CC art. 1039; SPANISH CC arts. 1555(1) and 1574; SWISS LOA art. 257c. Rules on time for payment in the absence of agreement or usages vary to some extent.

2. In some systems the default rule is that rent is payable at the end of periods for which the rent is agreed or, if no such periods are agreed, at the end of the lease period, for DANISH law, *Gade*, Finansiel leasing, 198–199; ESTONIAN LOA § 294; GERMAN CC § 579(1) first and second sentence; GREEK CC art. 595; for NORWEGIAN law, see *Falkanger*, Leie av skib, 429; for SWEDISH law, see *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 197–198. In SCOTTISH law the general presumption is that rent is payable in arrears (*Stair*, The Laws of Scotland, Reissue 'Leasing and hire of movables', para. 46); in the absence of contractual provision or custom, the rent would in principle be payable at the end of the rental period.

3. The time for payment of rent, in the absence of agreement or usages, may be fixed in relation to certain periods: According to the Austrian CC § 1100, rent must be paid at the end of every half year if the lease period is one year or longer. If the lease period is shorter than one year, the rent must be paid at the end of the lease period. The same rule is found under SLOVENIAN LOA § 602(2). Under CZECH law, the rent must be paid at the end of each month of the lease, CC § 671(2). A special rule applies to leases of a means of transportation, Ccom art. 634(2): the rent must be paid at the end of the lease period, or at the end of each calendar month if the lease period exceeds three months. According to the SLOVAK CC § 671(2), the rent must be paid at the end of each month of the lease. This is the rule also in SWISS LOA art. 257c (if the lease period exceeds one month).

II. Payment in advance

4. In some systems, rent must be paid in advance, unless otherwise agreed, see HUNGARIAN CC § 428(1) (periodically in advance)); LATVIAN CC art. 2142(2) (six months in advance for contracts for a year or more, or else at the end of the lease period); POLISH CC art. 669(2) (in advance for the entire period if the lease period is up to one month; monthly in advance if the period is longer, but no later than on the tenth day of the month).

III. Place of payment

5. A reference is made to the Notes to III.–2:101 (Place of performance). In some systems the general rule is that money must be paid at the creditor's place, thus for rent payments this means the lessor's place. In other systems, the creditor (here the lessor) must accept that money be paid at the debtor's place, sometimes with the distinction that the debtor must transfer the money to the creditor (the creditor must suffer the loss of a delay in transit). It seems that these rules are normally applied also to lease contracts.

6. According to the PORTUGUESE CC art. 1039, rent must be paid at the lessee's domicile if nothing else follows from agreement or usages.

7. If there is no agreement on the rent, According to the SPANISH CC art. 1574, art. 1171 applies (place of the goods at the constitution of the obligation, else debtor's place). The provision has raised doubt and led to contradictory case law. However, most of the authors prefer the solution of the lessee's place (*Albaladejo*, Derecho Civil II[12], 641; *Bercovitz*, Manual de Derecho Civil, 170).

IV.B.–5:103: Acceptance of goods

The lessee must:

(a) take all steps reasonably to be expected in order to enable the lessor to perform the obligation to make the goods available at the start of the lease period; and
(b) take control of the goods as required by the contract.

COMMENTS

A. Separate obligation to accept the goods

Obligation to co-operate and to take control of the goods. The lessee has a separate obligation to co-operate in order to enable the lessor to make the goods available (III.–1:104 (Co-operation)) and then to take control of the goods. This obligation is a parallel to the lessor's obligation to accept the goods at the end of the lease period. Reference is made to IV.B.–3:106 (Obligations on return of the goods) and the comments to that Article.

B. Remedies

Protection of the goods etc. The lessor can resort to ordinary remedies for non-performance of the lessee's obligations under the present Article. In addition there are rules in III.–2:111 (Property not accepted) on preservation of the goods etc., cf. Comment B to IV.B.–3:106 (Obligations on return of the goods).

NOTES

Obligation to co-operate and to take control of the goods

1. A general reference is made to the notes to III.–1:104 (Co-operation) concerning the obligation to co-operate; see also notes to IV.B.–3:106 (Obligations on return of the goods).
2. According to the CISG art. 60 the buyer is obliged to co-operate and to take delivery, and corresponding rules on sales are found in several jurisdictions.
3. Corresponding rules in national law on contracts for lease are not common. According to the ITALIAN CC art. 1587(1), the lessee must take control of the goods, but it is debated whether or not this is a contractual obligation, the non-performance of which entails remedies (*Alpa and Mariconda*, Codice Civile commentato IV, art. 1587 nos. 2 and 3). HUNGARIAN legislation in force does not expressly regulate the lessee's obligation to take delivery of the goods, whereas the draft of the new CC (published in 2006) contains such an obligation in § 5:311(1). However, legal literature affirms that the lessee is obliged to take delivery (accept) the goods. See *Besenyei*, A bérleti szerződés[2], 30-31. In a case where the lessee returned the leased goods to the lessor one month earlier than the expiry of the lease period, the Supreme Court ordered the lessee to pay the rent for the last month nonetheless. (BH 1996/640. Legf. Bír. Pfv. II. 23. 285/1995.) On the basis of this decision, *Besenyei* argues that the lessee is under an obligation to take delivery of the goods. The DUTCH CC does not expressly regulate the lessee's obligation to take control of the goods, but this obligation may be inferred from the lessee's general obligation to exercise the care of a good lessee (CC art. 7:213). It has been argued that the lessee has an obligation to accept the goods, at least

in long-term leases, under NORWEGIAN law, *Falkanger*, Leie av skib, 229. Under SCOTTISH law, the lessee must take possession of the goods leased, or will be liable in damages for non-acceptance (*Walker*, Principles of Scottish Private Law III[3], 399). Under a hire-purchase contract in the UNITED KINGDOM, the lessee is under a duty to accept delivery of the goods leased. If the lessee does not do so, the lessor may bring an action in damages for the whole of future unpaid instalments less the value of the goods at the time they are refused and a discount in respect of early return of the goods (see *Chitty* on Contracts II[29], no. 38-283). In SPANISH law there is no rule on this issue, and general rules on *mora creditori* apply.

4. For some jurisdictions it is explicitly said that the lessee is not obliged to take control of the goods: for Austria see Schwimann (-*Binder*), ABGB V[3], § 1094, no. 1; for Germany see Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 535, no. 52 (*Annahmeverzug*, but not *Schuldnerverzug*). For GREEK law, it is unanimously held that the lessee is not obliged to take control of the goods (see *Filios*, Enochiko Dikaio I[6], § 32; *Kornilakis*, Eidiko Enochiko Dikaio I, 203; Georgiades and Stathopoulos (-*Rapsomanikis*), art. 575, no. 3; CC arts. 349 ff on creditor's default apply).

IV.B.–5:104: Handling the goods in accordance with the contract

(1) The lessee must:

(a) observe the requirements and restrictions which follow from the terms agreed by the parties;

(b) handle the goods with the care which can reasonably be expected in the circumstances, taking into account the duration of the lease period, the purpose of the lease and the character of the goods; and

(c) take all measures which could ordinarily be expected to become necessary in order to preserve the normal standard and functioning of the goods, in so far as is reasonable, taking into account the duration of the lease period, the purpose of the lease and the character of the goods.

(2) Where the rent is calculated so as to take into account the amortisation of the cost of the goods by the lessee, the lessee must, during the lease period, keep the goods in the condition they were in at the start of the lease period, subject to any wear and tear which is normal for that kind of goods.

COMMENTS

A. Proper handling of the goods

Obligation to handle the goods in accordance with the contract. It is characteristic of contracts for lease that the lessee's right – as opposed to the owner's right – to benefit from the goods by use or by disposition is "positively" limited, i.e. the lessee may only use and dispose of the goods within the limits that follow from the contract. The lessee further has a general obligation to handle the goods with care. This obligation can be seen as including everything that the lessee is obliged to do, not to do, or to tolerate concerning the goods during the lease period. The present Article refers to the individual agreement in paragraph (1)(a) and then states a general obligation of care in handling the goods in paragraph (1)(b). Obligations with regard to maintenance etc. are dealt with in paragraph (1)(c). A special rule on contracts where the rent is calculated so as to amortise the entire value of the goods is contained in paragraph (2).

B. Restrictions and requirements following from the contract

Express terms, purpose of use etc. The parties may have agreed on specific restrictions on and requirements for handling of the goods, including maintenance, safety measures, areas of use, cleaning etc. Even if there are few express terms, restrictions and requirements may follow more or less directly from the purpose of the contract.

Illustration 1
B is going to move from one apartment to another and leases a small van for that purpose. The van must not be used for transporting stones from B's quarry.

Handle the goods with care. The lessee has a general obligation to handle the goods with care. It is impossible to define in detail and exhaustively what this obligation implies. What is required will depend on the circumstances, including the length of the lease period, the purpose of the lease and the character of the goods. The lessee's acts and omissions must be judged against what a reasonable lessee would have done in the circumstances. Regard must also be had to obligations of repair and maintenance: if the consequences of the lessee's lack

of care must be carried by the lessee and not by the lessor, this should influence the intensity of the lessee's obligation of care in handling the goods.

Maintenance etc. The obligations to repair and maintain the goods during the lease period are discussed in the Comments to IV.B.–3:104 (Conformity of the goods during the lease period). As mentioned there, the lessee's obligation to maintain the goods should be complementary to the lessor's obligations. The obligations on the lessee stated in paragraphs (1)(c) and (2) of the present Article condition the lessor's obligation of maintenance, see also IV.B.–3:104 paragraph (3). Any obligations placed on the lessee under paragraph (1)(c) are consequently excluded from the lessor's obligations under IV.B.–3:104. Reference is therefore made to the Comments to that Article.

Leases with full amortisation of the cost. The second paragraph of this Article includes special rules on contracts where the rent is calculated so as to take into account the full amortisation of the cost of the goods. The provision is formulated as a specified application of the first paragraph. In these cases the lessee must keep the goods in the condition they were in at the start of the lease period, subject to normal wear and tear. The reason is that these contracts for lease in real terms have the same function as contracts for sale. The rule covers both three-party transactions (often referred to as "financial leasing" etc.) and two-party long-term leases. Details are dealt with in Comment C to IV.B.–3:104 (Conformity of the goods during the lease period).

"Risk" and lessee's obligation to return the goods. Loss of, or damage to, the goods can raise questions concerning the lessee's obligation to return the goods. In such cases it is not a question of non-performance of the lessor's obligations, but of non-performance of the lessee's obligations. The rules on the lessee's obligations to return the goods, including the rules on the condition of the returned goods, should ideally be a mere function of the rules concerning the lessee's obligations of care, maintenance and repair. In other words, if the lessee has performed the obligations concerning care, maintenance and repair, the returned goods should generally conform to the rules on the condition of returned goods. The lessee is not, however, responsible for the consequences of loss or damage *not* caused by non-performance of the lessee's obligations concerning care, maintenance and repairs (unless the contract states otherwise). In such cases then, the lessor must accept that the goods cannot be returned or that they can only be returned in damaged condition. There is no need here to formulate this as the "owner's risk", as it is sometimes done. On the other hand, where the lessee has a positive obligation to keep the goods in the condition they were in at the start of the lease period, the lessee must bear the consequences of accidental damage to the goods, either by repairing the goods or by paying damages, subject to relevant excuses based on impediment, cf. III.–3:104 (Excuse due to an impediment). Regarding contracts where the rent is calculated so as to amortise the entire cost of the goods, the expected value of the goods at the end of the lease period is usually low, cf. the exception for normal wear and tear in the second paragraph of the present Article. This will for practical purposes limit the lessee's liability when the goods are lost by accident.

Agreements on "risk". It is not unusual to find contract clauses to the effect that the lessee must bear the "risk" while in possession of the goods. This is typically the case in contracts for lease covering the entire economic lifespan of the goods, or contracts where the intention is to make the lessee owner of the goods at the end of the lease period. Similar clauses can, however, also be found in other contracts. The meaning of such clauses must be determined by interpretation in each case. Whether the clause deals with the lessor's obligations, the

lessee's obligations or both can hardly be determined on a general basis. It is recommended that the parties agree on something more specific than the distribution of "risk".

NOTES

I. Requirements and restrictions following from the contract

1. In several systems, a reference is made to the purpose of the contract, either negatively, restricting the lessee's right to use the goods, or positively, defining the lessee's obligation regarding the handling of the goods: AUSTRIAN CC § 1098; CZECH CC § 665 (agreed use or use conforming to the nature and destination of the goods; sometimes even duty to use the goods). ESTONIAN LOA § 276(2), cf. § 344 (commercial leases) and § 363 (financial leasing); HUNGARIAN CC § 425(1) (use the goods according to the terms of the contract and according to the destination of the goods; i.e. for the purposes goods of the same kind would ordinarily be used for); LATVIAN CC art. 2151. For some systems it is said explicitly that the purpose of the lease may also be presumed given the circumstances, usages, the nature of the goods etc.: BELGIAN CC art. 1728 (cf. *La Haye and Vankerckhove*, Le Louage de Choses I[2], nos. 792 ff); FRENCH CC art. 1728, ITALIAN art. 1587(1) cf. *Alpa and Mariconda*, Codice Civile commentato IV, art. 1587, nos. 8 ff; LITHUANIAN CC art. 6.489(1); MALTESE CC art. 1554(a); POLISH CC art. 666(1); PORTUGUESE CC art. 1038(c); SLOVAK CC § 665 (agreed use or use conforming to the nature and destination of the goods; sometimes even duty to use the goods, Svoboda (-*Górász*), Komentár a súvisiace predpisy, 612); SLOVENIAN LOA § 600(2); SPANISH CC art. 1555-2 (to use the thing with the ordinary diligence, according to the intended use and, when lacking any agreed use, according to the nature of the asset and to general usage).
2. Some systems have rules on remedies for use at odds with the contract; what is at odds with the contract must be decided on the basis of legislation, the contract itself and usages. See CZECH CC § 679(3) (termination); GERMAN CC §§ 538, 541 and 543(2), cf. Staudinger (-*Emmerich*), BGB (2006), § 541 nos. 2–4; GREEK CC art. 594 (termination and damages), see Georgiades and Stathopoulos (-*Rapsomanikis*), art. 594.
3. Under UNITED KINGDOM law, the leased goods may only be used for the purpose for which they were leased (*Palmer*, Bailment, 1270–1275; *Burnard v. Haggis* (1863) 14 CB (NS) 45 and *Walley v. Holt* (1876) 35 LT 631; and in SCOTLAND, *Bell*, Principles of the Law of Scotland[10], § 143). Where the lessee uses the goods for a purpose not contemplated by the contract, the lessee is liable both in contract and in tort or delict for any loss caused by such use. However the right to use the goods confers on the lessee the authority to do anything "reasonably incidental to its reasonable use", unless there is express provision to the contrary in the contract. See further, *Chitty* on Contracts II[29], no. 33-077.

II. Obligation of care

4. An obligation for the lessee to handle the goods with care is expressed in legislation in several countries, see for example CZECH CC § 670; DUTCH CC art. 7:213 (as a good lessee); ESTONIAN LOA § 276(2) (with prudence and according to the intended purpose), cf. § 344 (commercial leases) and § 363 (financial leasing); FRENCH CC art. 1728 (*user de la chose louée en bon père de famille*; cf. *Huet*, Contrats spéciaux, no. 21183); GREEK CC art. 594 (translation: "with care and as agreed", see

Georgiadis, Enochiko Dikaio, Geniko meros, § 24 nos. 46–47; Georgiades and Stathopoulos (-*Rapsomanikis*), art. 594, nos. 2–4); HUNGARIAN CC § 4(4) (general principle on a standard of care "to be expected in the given circumstances"); ITALIAN CC art. 1587(2) (*osservare la diligenza del buon padre di famiglia*, cf. *Alpa and Mariconda*, Codice Civile commentato IV, art. 1587, nos. 4 ff); LATVIAN CC art. 2150 (translation: "properly and as a good manager"); MALTESE CC art. 1554(a) ("make use of the thing as a *bonus paterfamilias*"); to the same effect, PORTUGUESE CC art. 1038(d); SLOVENIAN LOA § 600(1) (translation: "use the thing with the diligence of a good businessperson or with the diligence of a good manager"); SPANISH CC art. 1555(2) (use the thing as a *diligente padre de familia*); SWISS LOA art. 257f (*die Sache sorgfältig gebrauchen*, cf. BSK (-*R.Weber*), OR I[3], § 257g, no. 1). Under POLISH law the lessee should use the goods in a manner specified in the contract and, if the contract does not provide any guidelines, in a manner which corresponds to the nature or designation of the goods.

5. A obligation of care is commonly held to exist even without express legislation, see for example for AUSTRIAN law, Rummel (-*Würth*), ABGB I[3], § 1098, no. 1; for DANISH law, *Gade*, Finansiel leasing, 213–214; for GERMAN law, Staudinger (-*Emmerich*), BGB (2006), § 535 nos. 93–96; for ENGLISH and N. IRISH law, *Sanderson v. Collins* [1904] 1 KB 628, CA; for NORWEGIAN law, see *Falkanger*, Leie av skib, § 25, in particular 232–235; for SCOTTISH law, *Campbell v. Kennedy* (1828) 6 S 806 (*Bell*, Principles of the Law of Scotland[10], § 145). According to the POLISH CC art. 667, the lessee's neglecting the goods amounts to non-performance. For SWEDISH law, see *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 198.

III. Liability for damage or deterioration

6. An obligation of care may follow indirectly from the lessee's liability for damage to or deterioration of the goods, sometimes even to the extent that the burden of proof lies on the lessee to show that there is no negligence on the lessee's part, see for example ESTONIAN LOA §§ 334(2), 358 (commercial leases) and 347(2) (animals in particular); FRENCH CC art. 1732, cf. Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 347, *Huet*, Contrats spéciaux, no. 21190; ITALIAN CC art. 1588; SPANISH CC art. 1563, cf. *Lacruz Berdejo and Rivero Hernández*, Elementos II[2], no. 437, 121; for NORWEGIAN law, see *Falkanger*, Leie av skib, 226 and 283–288; SLOVAK CC § 670; for SWEDISH law, see *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 204–205.

7. At ENGLISH common law, the lessee is bound to take reasonable care of the goods hired, but is not liable for damage to the goods if not negligent in causing the damage (see *Chitty* on Contracts II[29], no. 33-076, with reference *British Crane Hire Corp. Ltd. v. Ipswich Plant Hire Ltd.* [1975] QB 303, at 311–312). Under SCOTTISH law, the lessee is not liable for loss due to natural causes, pure accident, theft or other causes for which the lessee is not responsible, nor for ordinary depreciation or fair wear and tear (*Walker*, Principles of Scottish Private Law III[3], 400). A special clause may vary the lessee's normal liability, but this will be subject to statutory controls found in the Unfair Contract Terms Act 1977.

IV. Obligation of maintenance etc.

8. See notes to IV.B.–3:104 (Conformity of the goods during the lease period).

IV.B.–5:105: Intervention to avoid danger or damage to the goods

(1) The lessee must take such measures for the maintenance and repair of the goods as would ordinarily be carried out by the lessor, if the measures are necessary to avoid danger or damage to the goods, and it is impossible or impracticable for the lessor, but not for the lessee, to ensure these measures are taken.

(2) The lessee has a right against the lessor to indemnification or, as the case may be, reimbursement in respect of an obligation or expenditure (whether of money or other assets) in so far as reasonably incurred for the purposes of the measures.

COMMENTS

Measures ordinarily to be taken by the lessor

Purpose of the rule. The lessor often has an obligation to repair and maintain the goods during the lease period, see IV.B.–3:104 (Conformity of the goods during the lease period). Normally, the lessor will also have an interest in having the goods properly maintained and protected against damage even where the measures are not covered by a contractual obligation. Sometimes it is not possible or at least not practical for the lessor to take action, for example where the goods are located far from the lessor's business place or where repairs must be done immediately. This might be the case, for example, where repairs to the keel of a sailing boat are urgently required but the lessee has taken the boat to faraway waters, or where there is an urgent need to secure the counterweights of a building crane. According to the present Article, the lessee has an obligation to take measures to avoid danger or damage to the goods. To a certain extent one could rely on the rules on benevolent intervention in another's affairs (Book V), but the position here is that the lessee should have a contractual obligation to intervene.

Limitation of lessee's obligation. The obligation is limited in several respects: the intervention must be necessary to avoid danger or damage to the goods; it must be impossible or impractical for the lessor to take care of the matter; and it must not be impossible or impractical for the lessee to act.

Indemnification and reimbursement. The right to indemnification or reimbursement is a parallel to the corresponding right under Book V (Benevolent Intervention in Another's Affairs), Chapter 3. The rules in Book V may provide guidance in answering other questions concerning intervention and the consequences. The present Article should also be read along with the lessee's obligation to notify the lessor of any damage or danger to the goods, cf. IV.B.–5:107 (Obligation to inform).

Lessee's right to have a lack of conformity remedied. The lessee's obligation to intervene must not be confused with the lessee's right to have a lack of conformity remedied, see IV.B.–4:101 (Lessee's right to have lack of conformity remedied). The lessee has a right to have a lack of conformity remedied even where there is no danger to the goods. On the other hand, the lessee must respect the lessor's right to cure the lack of conformity.

NOTES

Obligation to intervene

1. A contractual obligation on the lessee to intervene to avoid danger or damage to the goods is known in some systems. A similar rule for the lease of immovable property in the NORWEGIAN Landlord and Tenant Act § 5-5 may also apply to the lease of movables (see for the situation prior to this act, *Falkanger*, Leie av skib, 231). An obligation to intervene may also follow from the general rule in CZECH CC § 419. In ENGLAND, the lessee must take reasonable care to protect leased goods against any imminent danger (*Brabant & Co. v. King* [1895] AC 632) and foreseeable hazards, including theft, fire, floods, or vandalism by third parties (*Birks*, English Private Law II, para. 13.49). See further *Chitty* on Contracts II[29], no. 33-048. In SCOTLAND the lessee is bound to take reasonable care for the safety of the article hired, the degree of care required being such as a diligent and prudent person would use in caring for that person's own property (*Gloag and Henderson*, The Law of Scotland[11], para. 13.07). It is held for SWISS law that the lessee is obliged to remove damage to the goods in cases of emergency (BSK (-*R. Weber*), OR I[3], § 257g, no. 1).
2. For most systems, there are no explicit provisions implying an obligation to intervene. According to the SPANISH CC art. 1559, the lessee is only under a duty to warn the lessor of any danger threatening the goods.
3. In several systems, the lessee has a *right* to remedy a lack of conformity and have reasonable expenses recovered, thus having a right to perform work that is included in the lessor's obligations, see notes to IV.B.–4:101 (Lessee's right to have lack of conformity remedied). Further, the lessee normally has an obligation to take care of the goods, sometimes expressed indirectly as a liability for damage or deterioration, see notes to IV.B.–5:104 (Handling the goods in accordance with the contract). The question then arises, whether or not the obligation of care may go so far as to imply that the lessee must undertake work generally falling under the lessor's obligations (with a right to recover costs). There seems to be no single answer to this question throughout the jurisdictions. For GERMAN law it has been argued that an obligation to intervene may be seen as a result of a tacit mandate or as a duty to make use of the lessee's right to "self help" under CC § 536a(2)(2), see MünchKomm (-*Schilling*) BGB[4] § 535, no. 192 and § 536a, no. 30. On the other hand, it is also said that the obligation of care does not imply an obligation to repair (Staudinger (-*Emmerich*), BGB (2006), § 535, no. 96, but see also op. cit. § 536a, no. 25 on lessee's possible duty to remedy lack of conformity). For GREEK law the lessee is entitled to and not obliged to perform repairs (Georgiades and Stathopoulos (-*Rapsomanikis*), arts. 590–592, no. 2); it has, however, been argued that the lessee's obligation of care and of appropriate use of the goods may include an obligation to avert danger (*Filios*, Enochiko Dikaio I[2], § 37 A, B III, with reference to GREEK CC arts. 173, 200, 288). For ITALIAN law, it is held that the lessee may have an obligation to perform urgent repairs, cf. *Cian and Trabucchi*, Commentario breve[8], art. 1587, no. III1, Rescigno (-*Giove*), Codice civile I[5], art. 1587, no. 2. For DUTCH law, it is not impossible that an obligation to carry out urgent repairs might be construed as a consequence of CC art. 7:213, the general obligation to act as a good tenant.

IV.B.–5:106: Compensation for maintenance and improvements

(1) The lessee has no right to compensation for maintenance of or improvements to the goods.

(2) Paragraph (1) does not exclude or restrict any right the lessee may have to damages or any right the lessee may have under IV.B.–4:101 (Lessee's right to have lack of conformity remedied), IV.B.–5:105 (Intervention to avoid danger or damage to the goods) or Book VIII (Acquisition and Loss of Ownership in Movables).

COMMENTS

Improvements etc. to the goods by lessee

Introduction. Actions taken by the lessee, or on behalf of the lessee, may lead to improvements to the goods, or at least enhance the value of the goods compared with a situation in which no such action is taken. The present Article deals with the question of possible compensation for costs or for value added. As a rule, the lessee has no right to such compensation, but there are several exceptions.

Performance of lessee's obligation of maintenance etc. Depending on the individual agreement and on IV.B.–5:104 (Handling the goods in accordance with the contract), the lessee may have an obligation to maintain the goods. In most cases maintenance will preserve the value of the goods and often the work will also lead to improvements, e.g. when worn parts are replaced with new parts. The lessee has no right to compensation for such actions, unless otherwise agreed.

Improvements made with lessor's consent. The lessee may have the goods improved by having work done or by replacing or supplementing parts etc. with the consent of the lessor. The parties may agree on compensation to be paid (or deducted from the rent) at once or at the end of the lease period, perhaps including the calculated depreciation of the improvements. Where a claim for such compensation cannot be based on the contract, including the circumstances of the consent given by the lessor, the present Article states that the lessee is not entitled to compensation. This rule should encourage the parties to consider the question of compensation when the agreement on improvements is made. A default rule giving the lessee a right to compensation would be more complicated, as several factors would have to be considered, such as the lessee's costs and the value and depreciation of the improvements. If the lessee terminates the contractual relationship for fundamental non-performance of the lessor's obligations, the fact that the benefit of any such improvements is withdrawn from the lessee may form part of the loss covered by a claim for damages. Should the contractual relationship be terminated by the lessor for fundamental non-performance of the lessee's obligations, the residual value of improvements may be taken into account as gains to be offset against the lessor's loss (*compensation lucre cum damno*).

Improvements made without lessor's consent. If the improvements are made without the lessor's consent, and they are not part of the lessee's obligations under the contract, there is even less reason to compensate the lessee. This should be the rule whether or not the lessee is allowed to make the relevant alterations to the goods without the prior consent of the lessor.

Lessee has remedied lack of conformity. The lessee may, under certain conditions, remedy a lack of conformity and recover the costs from the lessor, cf. IV.B.–4:101 (Lessee's right to have lack of conformity remedied). The present Article does not detract from the lessee's rights under this rule.

Lessee's intervention. Under Article IV.B.–5:105 (Intervention to avoid danger or damage to the goods). the lessee must in some cases perform maintenance and repairs to avoid danger or damage to the goods even if these measures should ordinarily be taken by the lessor. The present Article does not affect the lessee's right to indemnification or reimbursement under that Article.

Property law rules. There may be situations in which the lessee's obligations under the contract for lease concerning return of the goods are fulfilled even if improvements are "reversed", for example by replacing a new part with the old one. However, this may sometimes be contrary to the rules on accession, cf. Book VIII, Chapter 5 and the policies behind theses rules. Under these rules, the result may be that the lessor may keep the improvements by compensating the lessee. The present Article does not derogate from such rules.

NOTES

I. Interplay of different sets of rules

1. Only contractual claims for compensation for the lessee's improvements to the goods will be dealt with here. It should be borne in mind that these rules must be supplemented in several – perhaps most – systems with rules of property law concerning combination, processing etc. (see Book VIII, Chapter 5). Rules on unjustified enrichment (Book VII) and rules on benevolent intervention in another's affairs (Book V) may in some systems also supplement contract law in this respect.
2. The lessee's right to remedy a lack of conformity against recovery of costs may sometimes in real terms imply compensation for improvements. See notes to IV.B.–4:101 (Lessee's right to have lack of conformity remedied) concerning these rules. A similar situation may occur if the lessee performs an obligation to intervene to avoid danger or damage to the goods, see notes to IV.B.–5:105 (Intervention to avoid danger or damage to the goods).

II. Lease law referring to rules on benevolent intervention

3. In some systems, there are references in lease law to rules on benevolent intervention in another's affairs or a modified version of these rules. According to the Austrian CC § 1097(2) a lessee is regarded as a benevolent intervener in another's affairs in relation to expenses concerning the goods that are included in the lessor's obligations or are useful. This is seen as so called "applied" benevolent intervention, which *inter alia* means that no intention to benefit another is required. On the requirement of advantage to the lessor of expenses that were not included in the lessor's obligations, see *Apathy and Riedler*, Bürgerliches Recht III[2], no. 8/35; for AUSTRIAN CC § 1097 in connection with § 1037 see Schwimann (-*Binder*), ABGB V[3], § 1097, no. 11. GERMAN CC § 539 (1) refers to the rules on benevolent intervention in another's affairs concerning expenses related to the goods if recovery cannot be claimed under the rules in CC § 536a(2) on the lessee's remedying of lack of conformity. The lessee

may further claim compensation for unjustified enrichment, and this may even include compensation for improvements which the lessee was obliged to make, if the lessor benefits from a premature termination of the lease (Staudinger (-*Emmerich*), BGB (2006), § 539, nos. 11–18). Installations made by the lessee may be removed, CC § 539(2); the right for the lessor to keep the installations against payment, CC § 552(1), does not apply to movables (Staudinger (-*Emmerich*), BGB (2006), § 539, no. 23). For Greek law, see CC art. 591(2): useful expenses must be reimbursed in conformity with the provisions governing benevolent intervention. The lessee has the right to remove an installation added to the goods. Hungarian CC § 427(3) entails a claim for reimbursement of necessary expenditures and refers to the rules on benevolent intervention for other expenditures; the lessee must remove changes to which the lessor has not consented, § 425(3).

III. Lessor's consent to improvements as a central requirement

4. In other systems, the main rule is that compensation may be claimed only for improvements to which the lessor has consented, sometimes with modifications to this main rule. For DANISH law, it is held that the lessee cannot claim compensation for improvements made without the lessor's consent, *Gade*, Finansiel leasing, 272. Under Estonian LOA § 286(1), if improvements or alterations were made with the lessor's consent, the lessee may claim reasonable compensation for a considerable increase in the value of the goods; for other expenses (requirement of consent is questionable), the lessee is compensated pursuant to the provisions regarding benevolent intervention. Such compensation is not a remedy for non-performance (Estonian Supreme Court Civil Chamber's decision from 23 February 2006, civil matter no. 3-2-1-3-06; RT III 2006, 8, 74). Consent must not be refused "if the improvements and alterations are necessary in order to use the thing or manage the thing reasonably". See also more detailed rules for commercial leases, LOA § 359. In ITALIAN law, a difference is made between improvements to the goods and additions, CC arts. 1592 and 1593 (for the difference see *Alpa and Mariconda*, Codice Civile commentato IV, art. 1592–1593, no. 2). As a principle the lessee has no claim for reimbursement of improvements or additions (*Alpa and Mariconda*, loc. cit. no. 1, *Cian and Trabucchi*, Commentario breve[8], art. 1592, no. I1). The lessee may, however, claim compensation (for expenses or value, whichever is the lower amount) for improvements if the lessor has consented to the improvements (*Cian and Trabucchi*, Commentario breve[8], art. 1592, no. III1: implied consent or simple tolerance is not sufficient). Even without such consent, the lessee may offset the value of the improvements against the lessor's claim for damages for loss or damage, unless loss or damage is caused by gross negligence, CC art. 1592(2). Additions to the goods may be removed by the lessee, but the lessor may choose to keep them against compensation, CC art. 1593(1). If the addition cannot be removed without harm to the goods and amounts to an improvement, the rules on improvements apply. To the same effect (with variations concerning calculation), see MALTESE CC art. 1564. According to the LITHUANIAN CC art. 6.501(1) the lessee may claim compensation for necessary expenses if improvements are made with the lessor's consent. Improvements made without consent may be removed if this can be done without harm to the goods and the lessor does not want to compensate for them, CC art. 6:501(2). The lessee has no claim for compensation for inseparable improvements made without consent, CC art. 6:501(3). According to the Swiss LOA art. 260a(3) the lessee may claim a corresponding compensation for improvements if the goods have a significant added value due to renovation or modification agreed to by the lessor. If these requirements are not met the lessee's expenses are not compensated (see Guhl (-*Koller*), OR[9], § 44,

no. 234: also no claim under unjustified enrichment). According to the SLOVAK CC § 667(1), the lessee may require reimbursement of costs if the lessor has agreed to provide such reimbursement. If the lessor has consented to the modifications but not to any reimbursement, the lessee may claim reimbursement only of the relevant value. There is a similar rule in CZECH law, cf. also the special rule of Ccom art. 633 concerning leases of a means of transportation: the lessee must maintain the object at the lessor's expense. Under ENGLISH law, the lessee has no authority to deliver the goods to a third party for repair, except where the circumstances show implied authority from the lessor. In such circumstances, the repairer acquires a lien over the goods (*Chitty* on Contracts II[29], no. 33-079). The same is true of a lessee under a hire-purchase contract (*Chitty* on Contracts II[29], no. 38-387). In SCOTTISH law likewise the obligation of maintenance and repair falls on the lessor rather than the lessee and only if the lessee has authority, or if the repair was necessary, not due to the lessee's fault, and notice is given as soon as possible to the lessor, does the latter have any liability to reimburse the former. The lessee also cannot create a lien over the goods in favour of a third party repairer (see *Stair*, The Laws of Scotland, Reissue 'Leasing and hire of movables', para. 41; *Gloag and Henderson*, The Law of Scotland[11], paras. 13.05, 13.11).

IV. Other solutions

5. In DUTCH law, the lessee has a claim under the rules of unjustified enrichment where the improvements were approved by the lessor, CC art. 7:216(3). Such a claim is not recognised in the SCOTTISH law of unjustified enrichment, where the improver of another's property can recover only if able to show a bona fide but erroneous belief at the time of the improvement that the improver was the owner of the property (*Gloag and Henderson*, The Law of Scotland11, para. 25.17). LATVIAN CC art. 2140 refers to general rules in arts. 866 ff concerning reimbursement of necessary and useful expenditures to "a property". In POLISH law, the lessor may either keep the improvements against remuneration or demand that the lessee removes them, CC art. 676. This provision is *lex specialis* and the lessee may not demand remuneration under the rules of unjustified enrichment *Pietrzykowski*, Kodeks cywilny II[4], art. 676, Nb. 3, 414. In PORTUGUESE law, a lessee who makes improvements to the goods (if the rules on urgent repairs do not apply) is in the same position as a possessor in bad faith. CC art. 1046 implies that useful improvements may be compensated for (cf. CC arts. 1273 and 1275). The lessee may also remove the improvements if this can be done without harm to the goods. SLOVENIAN LOA § 604(5): "The lessee may take any additions added to the thing if such can be separated without damaging the thing; however the lessor may keep them by compensating the lessee for their value upon return" (translation). Under SPANISH law, the lessee may remove improvements if this can be done without harm to the goods, but there is no right to compensation, CC art. 1573, referring to art. 487 concerning usufruct. For SWEDISH law, it is held that the lessee, "according to common rules", may claim compensation for costs necessary to avoid loss of or damage to the goods, but not for other costs (*Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 198).

IV.B.–5:107: Obligation to inform

(1) The lessee must inform the lessor of any damage or danger to the goods, and of any right or claim of a third party, if these circumstances would normally give rise to a need for action on the part of the lessor.

(2) The lessee must inform the lessor under paragraph (1) within a reasonable time after the lessee first becomes aware of the circumstances and their character.

(3) The lessee is presumed to be aware of the circumstances and their character if the lessee could reasonably be expected to be so aware.

COMMENTS

Obligation to inform

General. The present Article concerns the obligation of the lessee to inform the lessor of damage and danger to the goods arising during the lease period, and likewise of third party rights, that become known to the lessee. The purpose of the rule is to make it possible for the lessor to defend the lessor's own interests. Non-performance of the lessee's obligation to inform may give rise to remedies, even if the lack of notification does not lead to actual loss. The lessor has a legitimate interest in relying on the lessee to give notification in these situations.

Illustration 1
The lessee notices that a leased car leaks brake fluid. This constitutes an immediate danger to the car (and to the driver as well as to third parties). The lessee is obliged to inform the lessor. The same will be the case if the lessee notices that the level of brake fluid has decreased considerably, without being able to spot any leak.

Illustration 2
The lessee has rented a boat for a trip up a river. Due to heavy rain the river becomes a torrent and the lessee does not dare to continue and needs help and perhaps the assistance of another boat in order to get back. In such a case the lessor should be informed.

Third party claims and rights. The obligation to inform also encompasses situations in which the lessee learns that a third party has a claim or right to the object. An example might be a case in which someone claims to be the rightful owner of the goods and wants to recover them.

Information within reasonable time. The lessee must provide such information a reasonable time after the lessee first becomes aware of the damage, claim etc., and that the circumstances require the lessor's attention (paragraph (2)). An obligation to do the impossible cannot be imposed. The lessee cannot therefore be obliged to notify something of which the lessee could reasonably be expected to be aware but was not in fact aware. However, the burden on the lessor of proving knowledge is eased by the rule in paragraph (3) that the lessee is presumed to be aware if the lessee could reasonably be expected to be aware.

Non-conformity not relevant. The lessee must inform the lessor according to this Article even if the danger or damage does not affect the lessee's use or in any way amount to non-performance of an obligation under the contract.

NOTES

I. Obligation to inform

1. An obligation on the lessee to inform the lessor of facts that may require action from the lessor is found in various forms in national law. The rules may concern third party claims, physical damage to the goods (or a danger of such damage), or both. The character of this obligation is not always clear. In some systems, the obligation is coupled with liability for damages where information is not given in time. An obligation to inform may also be seen as a part of the general obligation to handle the goods with care, but it may further be regarded as an independent contractual obligation. In the following, no attempt has been made to decide the character of the obligation in national law. Rules on notification as a precondition for remedies are not dealt with here, see III.–3:107 (Failure to notify non-conformity) and IV.B.–4:103 (Notification of lack of conformity).

2. An obligation to inform the lessor of both physical damage and danger and of claims by third parties is found in several systems: DUTCH CC arts. 7:222 (defects) and 7:211 (third party claims); ESTONIAN LOA § 282 (damages as sanction); GERMAN CC § 536c (damages as sanction); GREEK CC art. 589 (damages as sanction); ITALIAN CC art. 1577(1) for repairs (damages as sanction, *Alpa and Mariconda*, Codice civile commentato IV, art. 1577 nos. 1 and 2) and ITALIAN CC art. 1586(1) for third party claims; MALTESE CC art. 1565 ("any encroachment or damage affecting the thing let"); for NORWEGIAN law, see *Falkanger*, Leie av skib, 230; POLISH CC art. 665 (third party claims) and art. 666(2) (necessity of repairs; no duty to notify of factual danger to the goods); PORTUGUESE CC art. 1038(h); SPANISH CC art. 1559 (damages as sanction).

3. According to the AUSTRIAN CC § 1097(1) the lessee must notify when repairs by the lessor become necessary. An obligation to notify of claims by third parties may be deduced from the more general obligation of the lessee to take care of the goods. Under SCOTTISH law, the lessor is only liable for repairs if notice is given by the lessee as soon as reasonably possible (*Bell*, Principles of the Law of Scotland[10], § 145). It seems likely that this is also true of UNITED KINGDOM contracts for lease in general.

4. FRENCH CC art. 1726 deals with the obligation to notify if the lessee's use is affected by an action relating to ownership and liability in damages for non-compliance (Rép.Dr.Civ. (-*Groslière*), v° Bail, nos. 301 and 302). It is also held, however, that the lessee must notify of the need for repairs (*Groslière*, loc. cit. nos. 220 and 221). For BELGIAN law, see *La Haye and Vankerckhove*, Le Louage de Choses I², nos. 808 ff (the lessee's obligation to notify is based on his position as a *gardien*).

5. In several systems, the rule seems to be concentrated on physical damage or danger to the goods: CZECH CC § 668 (need for repairs), cf. § 722 for business leases. HUNGARIAN CC § 427(2); LITHUANIAN CC art. 6.493(2); SLOVAK § 668(1) (need for repairs); SLOVENIAN LOA § 596; SWISS LOA art. 257g (damages as sanction).

II. Time for information

6. It is common that the lessee must notify "without delay", "immediately", etc.: Austrian CC § 1097(1); CZECH CC § 668(1) and § 722(2), both: without undue delay; DUTCH CC art. 7:222; Estonian LOA § 282(1); German CC § 536c(1); Greek CC art. 589; Lithuanian CC art. 6.493(2); Maltese CC art. 1565; Polish CC art. 665 and art. 666(2), both "immediately"; SLOVAK CC § 668(1) (without undue delay);

Slovenian LOA § 596(1); SPANISH CC art. 1559 (cf. TS 10 June 1987, RAJ 1987, 4272). For Italian law, it is explained that the notification must be given at such a time and in such a way as to avoid unnecessary or further deterioration or damage to the goods (*Alpa and Mariconda*, Codice civile commentato IV, art. 1577, no. 1). For Swiss law the time within which notification must be given depends on the circumstances of the case, i.e. the knowledge of the lessee, the kind of damage and the extent of the damage (BSK (-*R.Weber*), OR I³, § 257g, no. 3).

III. Positive knowledge, negligence

7. It is not always clear to what extent the liability of the lessee requires positive knowledge of the facts or whether negligence is sufficient. For example, gross negligence seems to be the requirement in GERMAN law (the lessee may not overlook what everybody would see, BGH 4 April 1977, NJW 1977, 1236, 1237, Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 536c, no. 3), while positive knowledge is required under SWISS law (BSK (-*R.Weber*), OR I³, § 257g, no. 3). Negligence is sufficient under GREEK law (Georgiades and Stathopoulos (-*Rapsomanikis*), art. 589, no. 5).

IV.B.–5:108: Repairs and inspections of the lessor

(1) The lessee, if given reasonable notice where possible, must tolerate the carrying out by the lessor of repair work and other work on the goods which is necessary in order to preserve the goods, remove defects and prevent danger. This obligation does not preclude the lessee from reducing the rent in accordance with IV.B.–4:102 (Rent reduction).

(2) The lessee must tolerate the carrying out of work on the goods which does not fall under paragraph (1), unless there is good reason to object.

(3) The lessee must tolerate inspection of the goods for the purposes indicated in paragraph (1). The lessee must also accept inspection of the goods by a prospective lessee during a reasonable period prior to expiry of the lease.

COMMENTS

A. Necessary repairs etc.

The lessee must tolerate repairs. The rule in paragraph (1) reflects the lessor's maintenance and repair obligations. The lessee must tolerate such work provided that, where possible, reasonable notice of it has been given. The lessee has, however, the right to rent reduction for periods during which the goods are not available for the lessee's use or where use of the goods has been affected by the work, see the discussion in Comment F to IV.B.–3:101 (Availability of the goods). Non-availability of the goods is a non-performance of the lessor's obligations even if the lessor has a right to perform the repairs etc. Correspondingly, the lessee has an obligation to tolerate the work in the sense that the lessee cannot prevent the work being done. The lessee's obligation to tolerate such work is, however, restricted to work and repairs which are necessary to preserve the goods, remove defects, and prevent danger. The lessee does not have to tolerate other work or repairs (unless there is no good reason to object, see Comment B). Otherwise it would be too easy for the lessor to interfere with the exclusive right of use of the lessee.

B. Other work

Obligation not to obstruct other work without good reason. The lessee's right under a contract for lease constitutes an exclusive right of use. The lessor in principle has no right to use the goods or take them away. This also applies to third parties. However, it would be unreasonable to completely bar the lessor from performing other work, e.g. updates to computers. The lessee therefore has an obligation to tolerate this kind of work where there is no good reason to protest. In deciding whether the lessee has good reason to object to such work, one must take into consideration both the consequences the work may have on the lessee and the lessor's interest in having the work done before the expiry of the lease.

C. Inspections

Inspections by lessor and by prospective lessees. Naturally, the lessee must tolerate inspection of the goods for the purposes indicated in paragraph (1). The lessee must also tolerate inspections by prospective lessees during the final period of the lease. In practice, this obligation will probably only arise in leases of durable and expensive goods (boats, cars, etc.).

NOTES

I. Necessary repairs etc.

1. It seems to be generally accepted that the lessee must tolerate performance of work on the goods which the lessor is obliged to perform under the contract. It is sometimes said explicitly that the lessee must tolerate work that is necessary for the preservation of the goods etc., irrespective of the lessor's obligation to perform such work, see for example for AUSTRIAN law, Schwimann (-*Binder*), ABGB V³, § 1098, nos. 10 ff, see also *Koziol* (-*Iro*), ABGB, § 1098, no. 4; CZECH CC § 668(2); DUTCH CC art. 7:220(1), cf. *Rueb/Vrolijk/Wijlkerslooth-Vinke*, De huurbepalingen verklaard, 43; ESTONIAN LOA § 283(1); PORTUGUESE CC art. 1038(e); SLOVAK CC § 668(2); SWISS LOA art. 257h(1); SPANISH CC art. 1559 and Urban Lease Act art. 21 (necessary repairs), Urban Lease Act art. 22 (improvements). In SCOTTISH law the lessor's obligation to maintain the thing in sufficiently good order for the lessee to be able to continue to use it throughout the lease period entails an obligation and a right to repair, although by custom certain minor or running repairs fall on the lessee, e.g. fitting new tyres on a car in a long-term lease (*Stair*, The Laws of Scotland, Reissue 'Leasing and hire of movables', para. 41).
2. In many systems, the right to rent reduction is general and also covers interference with the lessee's use due to maintenance and repairs by the lessor. There are, however, systems where the lessee has only a limited right to rent reduction in such cases, see Notes to IV.B.–4:102 (Rent reduction).
3. Rules allowing not only rent reduction but termination of the lease as a result of interference with the lessee's use due to repair work etc. are also found: LITHUANIAN CC art. 6.492; SLOVENIAN LOA § 590.

II. Other work

4. In some jurisdictions, the lessee must to some extent tolerate modernisation of the goods or other work, i.e. work that is not necessary and not included in the lessor's obligations. Under AUSTRIAN law, a test of balance of interests applies both for necessary work and for other work (see references in note I1). Estonian LOA § 284 has detailed rules: a lessee must tolerate improvements and alterations, unless the work and effects are unfairly burdensome. There are rules on prior notification, and the lessor must take the lessee's interests into account. The lessee may claim compensation for expenses and may in some cases terminate the lease; rent reduction and damages are not precluded. For GERMAN law, it is indicated by some authors that the lessee must tolerate modernisations, see (MünchKomm (-*Schilling*), BGB[4], § 535, nos. 97, 99, Schmidt-Futterer (-*Eisenschmid*), Mietrecht[9], § 535, no. 59 (CC § 554(2) does not apply to movables). For GREEK law, the lessee is obliged to tolerate improvements and alterations to the leased goods only in exceptional cases, when required by good faith and business usages (*Georgiadis*, Enochiko Dikaio, Geniko meros, § 24, no. 55). According to the Swiss LOA art. 260(1), the lessor may renovate or modify the object if the work may reasonably be imposed upon the lessee and if notice of termination has not been given. ITALIAN CC art. 1582 forbids changes to the goods which diminish the lessee's use; other work seems to be allowed, *Alpa and Mariconda*, Codice civile commentato IV, art. 1582, no. 4. Under the SPANISH Urban Lease Act art. 22, the lessee cannot prevent improvements intended by the lessor, which cannot reasonably be delayed until the end of the lease, but the lessee has the right to terminate the lease as well as to claim for price reduction.

5. Some systems do not allow modernisation etc. of the goods by the lessor. According to the French CC art. 1723, the lessor may not change the form of the thing leased during the lease period. CC art. 1724 applies exclusively to urgent repairs and is not applicable to improvements to the goods (for see Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 261, for BELGIUM see *La Haye and Vankerckhove*, Le Louage de Choses I², no. 679). See to the same effect, MALTESE CC art. 1547 and SPANISH CC art. 1557. According to the Slovenian LOA § 591(1) the lessor may not make any changes to the goods that interfere with the lessee's use. Under Lithuanian CC art. 6.492(4), capital repairs that are not urgent may be authorised by the court.

III. Inspections by lessor or by prospective lessees

6. It seems to be generally accepted that the lessee must tolerate inspections concerning work which must be tolerated. See as examples of positive regulation, Estonian LOA § 283(2) and Swiss LOA art. 257h(2).

7. In some systems, the lessor has a more general right to inspect the goods, see for example CZECH CC § 665(1); Hungarian CC § 425(2)(a); Lithuanian CC art. 6.489(5); PORTUGUESE CC art. 1038(b); SLOVAK CC § 665(1)(2).

8. There are also examples of legislation allowing inspections in preparation for a new lease contract (or a sale): Estonian LOA § 283(2), HUNGARIAN CC § 433(1); Lithuanian CC art. 6.489(5); Swiss LOA art. 257h(2).

9. In other systems, the lessor's right to inspect the goods has been developed in case law and doctrine. For Austrian law, see *Apathy and Riedler*, Bürgerliches Recht III[2], no. 8/31, for example, concerning visits by prospective buyers, see OGH 11 March 1961, EvBl 1961/223. For French law it is held that the right to necessary repairs under CC art. 1724 implies a right to access, see *Huet*, Contrats spéciaux, no. 21167; for Belgian law, see *La Haye and Vankerckhove*, Le Louage de Choses I², nos. 687 ff (also control of lessee's performance); for DUTCH law, see *Rueb/Vrolijk/Wijkerslooth-Vinke*, De huurbepalingen verklaard, 43, with reference to DUTCH CC art. 7:220(1). For GERMAN law, see Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 535, no. 56, with reference to GERMAN CC § 242 (inspections in individual cases and for particular reasons). For GREEK law, see *Filios*, Enochiko Dikaio I[2], § 39 A (the lessee must tolerate inspections only in exceptional cases according to good faith). For ITALIAN law, inspections for control and by prospective lessees and buyers may be possible, see for details *Cian and Trabucchi*, Commentario breve[8], art. 1587, no. V8; *Provera*, Locazione. Disposizioni generali, art. 1585, 237.

IV.B.–5:109: Obligation to return the goods

At the end of the lease period the lessee must return the goods to the place where they were made available for the lessee.

COMMENTS

A. Obligation to return the goods

The obligation. The lessee has only a temporary right to use the goods, and at the end of the lease period the goods must be returned to the lessor. The parties may derogate from this rule, for example by giving the lessee a right to buy the goods at the end of the lease period or a right to prolong the lease period.

Time for return of the goods. The time for return of the goods is at the end of the lease period. The time at which the lease period ends follows from IV.B.–2:102 (End of lease period).

B. Place for return of goods

Place where the goods were made available. The goods must be returned to the place where they were made available for the lessee's use. As a rule, the goods are made available at the lessor's place of business, cf. IV.B.–3:101 (Availability of the goods) paragraph (1). The rule in the present Article is a deviation from III.–2:101 (Place of performance), which fixes the debtor's place of business as the place for performance of obligations other than paying money. In a contract for lease it will normally be more convenient to return the goods to the lessor's place of business. The lessor may have facilities for storing the goods; the goods will be repaired here before they are leased to another person; the goods will be made available here under a new lease contract; etc. If it has been agreed that the goods will be made available for the lessee's use at a place other than the lessor's place of business, this will also be the place to which the goods should be returned according to this rule. Even where the goods were made available at a place different to that originally agreed, this will be the place for return of the goods. It might be discussed whether the lessee is obliged to accept this: the place originally agreed upon is the place to which the lessee expects to return the goods. Nevertheless, if the lessee has accepted the goods at a different place, it should normally be possible to return the goods to the same place. In this way the rule is also simpler and less ambiguous.

NOTES

I. Obligation to return the goods

1. In legislation on lease contracts, it is common to include the lessee's obligation to return the goods; the provisions are not listed here.
2. In some systems, it is said explicitly that the lessor may demand the goods directly from a sub-lessee: Estonian LOA § 334(5), cf. § 358(1) for commercial leases; GERMAN CC § 546(2); GREEK CC art. 599(2); Polish CC art. 675(2) (sub-lessee or other person to whom the lessee has transferred the goods); SWISS court practice allows a direct claim for return by the lessor against the sub-lessee (BSK (-*R.Weber*), OR I³, art. 267, no. 1).

3. In particular, the extent to which the lessee may withhold the goods because of counterclaims etc. is sometimes regulated (a question that is not regulated in this Part of Book IV but left to general rules): under AUSTRIAN CC § 1109, the lessee must return the goods irrespective of counterclaims or security rights in the goods; under Estonian LOA § 334(3), the lessee of a movable may withhold until expenses are reimbursed; the latter solution is accepted in DUTCH case law as well, cf. Hoge Raad 4 April 1997, NedJur 1997, 608 (Pilgram/Vastgoed).

II. Place of return

4. The place of return is mostly the lessor's place (unless otherwise agreed): for AUSTRIAN law, see Koziol, (-*Iro*), ABGB, § 1109-1110, no. 3; ESTONIAN LOA § 334(6) (the place at which the goods were delivered). Under FRENCH law the place of return is in principle governed by CC art. 1247: the place of the goods at the time of performance of the obligation; in practice the contract often stipulates the place of the lessor and it is said that this may be presumed also without agreement (*Huet*, Contrats spéciaux, no. 21195; for BELGIUM see *La Haye and Vankerckhove*, Le Louage de Choses I², no. 1240: place of return is the place where the lessee received the goods). For GERMAN law it is held that movable goods must be returned to the place of the lessor (Emmerich and Sonnenschein, (-*Rolfs*), Hk-Miete[8], § 546, no. 15). In GREEK law the prevailing view is that, in regard to movables, the place of return is the lessor's place (*Filios*, Enochiko Dikaio I[6], § 35 B 2; *Georgiadis*, Enochiko Dikaio, Geniko meros, § 27, no. 49). According to the ITALIAN CC art. 1590(4), movables must be returned to the place where they were made available to the lessee, normally the lessor's place (*Alpa and Mariconda*, Codice civile commentato IV, art. 1590, no. 3). According to the POLISH CC art. 454, the goods are to be returned to the lessee's place. Under the SLOVENIAN LOA art. 604(2) goods must be returned to the place where the goods were made available to the lessee. Under SWISS law, the goods must be returned to the place where they were at the time of the conclusion of the contract, unless otherwise agreed (LOA art. 74(2)(2), BSK (-*R.Weber*), OR I³, art. 267, no. 1). Under ENGLISH law, the lessee must return the goods to the lessor (or a nominee) at the expiration of the hire period and must bear the costs of returning the goods (*British Crane Hire Corp. Ltd. v. Ipswich Plant Hire Ltd.* [1975] QB 303, 311–313), but no specific place for return is specified by law. For CZECH law, the general rule of the debtor's (i.e. the lessee's) place applies, with the exception of leases of a means of transportation, Ccom art. 637: the place where the object was accepted by the lessee. In SCOTTISH law general principles (*Gloag and Henderson*, The Law of Scotland[11], para. 3.29) imply that the lessee must restore the goods at the lessor's place of business unless otherwise stated.

III. Condition of the goods

5. Rules concerning the condition of the goods on return are common. Such rules will not be dealt with here. Under this Part of Book IV, the required condition of the goods at the end of the lease period is regarded as a function of the lessee's obligation of maintenance and care etc.

6. In some systems, a description of the goods and their condition at the time they were made available to the lessee (e.g. in an inventory) may play a certain role at the return of the goods, see for example AUSTRIAN CC §§ 1109 and 1110; ESTONIAN LOA § 334(1); FRENCH CC art. 1730; ITALIAN CC art. 1590(1); PORTUGUESE CC art. 1043(2); SPANISH CC art. 1562.

IV. Lessor's right to reject the goods

7. It is held for ITALIAN law that the lessor may refuse to accept the goods if they are not in the required condition, apart from minor variations (*Alpa and Mariconda*, Codice civile commentato IV, art. 1590, no. 7).

8. For Austrian law it is held that the lessor cannot refuse the proffered return even if the goods are damaged; the lessor's claim for damages must be pursued under CC § 1111 (OGH 3 November 1987 SZ 60/229). To similar effect under GERMAN law, see BGH 10 January 1983, BGHZ 86, 204, 209; Emmerich and Sonnenschein (-*Rolfs*), Hk-Miete[8], § 546, no. 9; and for GREEK law, see *Georgiadis*, Enochiko Dikaio, Geniko meros, § 24, no. 51, fn. 71; Georgiades and Stathopoulos (-*Rapsomanikis*), art. 599, no. 2; A.P. 907/1996 EllDik 38, 117; Ca Athens 3401/2002 EllDik 44, 849. SCOTTISH law only envisages a claim for damages by the lessor (*Stair*, The Laws of Scotland XIV 'Leasing and hire of moveables', para. 49; *Gloag and Henderson*, The Law of Scotland[11] ,para. 13.11).

CHAPTER 6: REMEDIES OF THE LESSOR: MODIFICATIONS OF NORMAL RULES

IV.B.–6:101: Limitation of right to enforce payment of future rent

(1)Where the lessee has taken control of the goods, the lessor may not enforce payment of future rent if the lessee wishes to return the goods and it would be reasonable for the lessor to accept their return.

(2) The fact that a right to enforce specific performance is excluded under paragraph (1) does not preclude a claim for damages.

COMMENTS

A. Application of normal rules on remedies

Where the lessee fails to perform an obligation under the contract the lessor may be entitled, depending on the circumstances, to any or several of the remedies conferred by Book III, Chapter 3, as modified by the present Chapter. The general rules are partly supplemented, and partly derogated from, by the provisions of this Chapter.

Enforced specific performance of non-monetary obligations. Some of the lessee's obligations are non-monetary, for example the obligation to maintain the goods and the obligation to return the goods at the end of the lease period. The main rule, following from III.–3:302 (Enforcement of non-monetary obligations), is that the lessor is entitled to enforce specific performance of such obligations. Several exceptions are, however, mentioned in the Article referred to: specific performance cannot be enforced where performance would be unlawful or impossible; where performance would be unreasonably burdensome or expensive; or where performance would be of such a personal character that it would be unreasonable to enforce it.

Enforced specific performance of monetary obligations. The creditor is entitled to enforce performance of monetary obligations according to III.–3:301 (Enforcement of monetary obligations). This general rule has, however, important exceptions in cases where the other party is unwilling to receive performance. See Comment B.

Withholding performance when goods are not made available. It follows from III.–3:401 (Right to withhold performance of reciprocal obligation) that a creditor who is to perform simultaneously or after the other party may withhold performance until the other party has tendered performance or has performed. If it is clear that there will be non-performance by the other party, even a creditor who is to perform first may withhold performance. These rules apply to contracts for lease as well as other contracts. The withholding of performance serves two purposes, namely to protect the withholding party from granting credit and to give the other party an incentive to perform. If the lessee is to pay rent before or at the start of the lease period, the lessor may withhold the goods in the sense that they are not made available to the lessee. In some cases the lessee may have other obligations that are to be performed before the goods are made available, for instance to make specifications or to provide necessary certificates for use of the goods.

Withholding performance when goods have been made available. The lessor's obligation to keep the goods available for the lessee's use is a continuous obligation. However, the performance of this obligation cannot be withheld after the goods have been made available to the lessee. The contract for lease implies that the lessee is given physical control of the goods, and to take the goods back would be to reverse a part of the performance, not to withhold it. Whether or not a lessor who has for some reason regained physical control of the goods may keep the goods because of non-performance of the lessee's obligations will depend on the rules in Book VIII (Acquisition and Loss of Ownership in Movables). The lessor is entitled to withhold performance of other obligations, for example the lessor's obligation to repair the goods, as a remedy for the lessee's non-performance.

Termination for fundamental non-performance. The lessor is entitled to terminate the obligations of both parties under the contract if the lessee's non-performance is fundamental, cf. the rules in Book III, Chapter 3, Section 5. Fundamental non-performance is defined in III.–3:502 (Termination for fundamental non-performance) paragraph (2) and may relate both to monetary obligations (typically late payment of rent) and non-monetary obligations (typically the obligation to handle the goods with care).

Termination implies that the lessor no longer wants performance by the lessee and that the lessor is no longer obliged to perform the corresponding obligations. As the lessor's obligation to ensure that the goods remain available for the lessee's use is also terminated, the lessor is entitled to have the goods returned. This follows from IV.B.–5:109 (Obligation to return the goods).

Damages. The lessor is entitled to damages for loss caused by the lessee's non-performance, unless the non-performance is excused, cf. III.–3:701 (Right to damages). Non-performance of the obligation to pay rent will in most cases not be excused, but exceptions may occur, e.g. payment delayed due to a bank strike. Regarding non-monetary obligations, such as the obligation to handle the goods with care or the obligation to return the goods at the end of the lease period, excuses may be more relevant in practice.

Damages may be claimed for actual loss as well as for future loss, and for both economic and non-economic loss, cf. III.–3:701 (Right to damages) paragraph (3). As a rule the creditor is entitled to a sum that "will put the creditor as nearly as possible into the position in which the creditor would have been if the obligation had been duly performed", cf. III.–3:702 (General measure of damages). If the lease is terminated the lessor is normally entitled to the rent for the remaining lease period, or put more precisely: the rent for the remaining time of a fixed leased period or for the time until the lessee could have terminated the lease by giving notice in the case of an indefinite lease period. The lessor must reduce the loss by taking reasonable steps, cf. III.–3:705 (Reduction of loss), typically by entering into a new lease contract. Further, the lessor may suffer loss because the goods are damaged or reduced in value for other reasons as a result of non-performance of the lessee's obligations to handle the goods with care or to maintain the goods.

The termination may in some cases mean that the lessor is left with a benefit that must be taken into consideration when recoverable loss is calculated. As already mentioned, the lessor must take reasonable steps to reduce the loss, typically by leasing the goods to another lessee. If the lessor chooses to use the goods for the lessor's own purposes instead of entering into a new lease, the value of this benefit should be seen as a reduction of the loss. Unless otherwise

agreed, the lessee is not entitled to compensation for improvements made to the goods, cf. IV.B.–5:106 (Compensation for maintenance and improvements). If, however, the lease is terminated and the improvements make it possible to achieve a higher rent than would otherwise be the case, this will reduce the loss. Accordingly, the improvements should also be taken into account if the lessor chooses to utilise the goods for the lessor's own purposes.

Option to buy the goods. Some contracts give the lessee an option to buy the goods at the end of the lease period or even earlier. If the rent is calculated so as to take into account the amortisation of the cost of the goods, the option to buy can often be exercised at a nominal price. Also where rent payments amortise less than a substantial part of the value, the rent already paid may influence the price at which the option can be exercised. If the option to buy is lost because the lease is terminated as a result of the lessee's non-performance, the lessor may be left with a benefit that the lessor would not have possessed had the option been exercised. However, as long as there is no agreement that ownership will pass, it remains hypothetical to say that the lessee would have exercised the option if the lease had not been terminated. The result is that the lessee will only be compensated for the benefit obtained by the lessor in so far as the lessor disposes of the goods up until the end of the agreed lease period.

> *Illustration 1*
> The lessee has leased a machine for three years with an option to purchase at a nominal price on the expiry of the lease period. After two and a half years, the lessee cannot pay the rent any more, and the lessor terminates the lease. It turns out that the goods have a much higher value than the option price at the end of the original lease period. The lessor's loss is reduced by the possibility of leasing or using the goods for the remaining half-year, but not by the difference between the value of the goods and the option price.

Interest. The lessor is entitled to interest on any sum of money that is paid late, and the lessee cannot invoke excuses. The relevant interest rate is "the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due", cf. III.–3:708 (Interest on late payments). Interest is added to the capital every twelve months, cf. III.–3:709 (When interest to be added to capital). For loss not covered by the interest, the lessor is entitled to damages according to the general rules on damages, cf. III.–3:708 paragraph (2).

Rules on remedies non-mandatory except for consumer contracts for lease. The rules of the present Chapter may be derogated from by agreement, except in the case of consumer contracts for lease, where the rules cannot be derogated from to the detriment of the consumer, cf. IV.B.–1:104 (Limits on derogation from rules on remedies in a consumer contract for lease). The parties may agree on prerequisites for remedies, e.g. on conditions for termination, and on the effects of the remedies. The parties may for example agree that a party who fails to perform an obligation is to pay a specified sum to the other party. Such an agreement is valid, although an excessive sum may in some instances be reduced, cf. III.–3:712 (Stipulated payment for non-performance).

B. Special rule in this Article for recovery of future rent

Under III.–3:301 (Enforcement of monetary obligations) performance of obligations to pay sums due can as a rule be enforced. However, where the other party does not want

performance, or further performance, the situation may change and the obligation to pay sums due may, under certain conditions, be replaced by an obligation to pay damages.

Where the lessor has not yet made the goods available for the lessee's use and it is clear that the lessee will be unwilling to take control of the goods, the rules of Book III are adequate without adaptation. The starting point is that the lessor may proceed with performance and recover sums due. Enforced performance of the lessee's obligation to accept the goods is in principle possible, but is rather impractical in most cases. The lessor may also handle the goods according to the rules in III.–2:111 (Property not accepted). In both cases the lessor may enforce payment of rent that is due and continue to do so throughout the lease period. There are, however, important exceptions to these rules.

If the lessee is unwilling to receive performance, the lessor may not proceed to tender performance in cases where a substitute transaction may be made without significant effort or expense (III.–3:301 (Enforcement of monetary obligations) paragraph (2)(a)). A substitute transaction will typically be a new lease contract. The lessor is entitled to have reasonable expenses covered but may fear that the lessee will not be able to pay. The lessor is therefore not obliged to make a substitute transaction if the expenses are significant.

The lessor may not proceed to tender performance and enforce payment of sums due if this would be unreasonable under the circumstances (III.–3:301 (Enforcement of monetary obligations) paragraph (2)(b)). It may be the case that performance will incur unnecessary costs where the lessee can no longer make use of the goods. The lessor should for example not be allowed to enter into a contract for the supply of goods with a view to tendering performance if it is clear that the lessee is unwilling to receive performance.

Where the lessee has taken control of the goods, the situation is different. The lessor may enforce payment of the rent that is due, at intervals throughout the lease period as the case may be. However, even in this situation an exception should be made and, as the matter is not covered by (III.–3:301 (Enforcement of monetary obligations), a special rule is necessary.

If the lessee wishes to return the goods and it is reasonable for the lessor to accept return of the goods, the obligation to pay rent for the future period should be replaced by an obligation to pay damages. What is reasonable will depend on the situation of the parties, the kind of goods leased, the proportion of the agreed lease period remaining, etc. For a business lessor there are in many cases few problems with accepting return of the goods, and the goods can in many cases be leased to new customers. In other situations, the lessor may have entered into the contract for lease so as to dispose of the goods for a certain period, and accepting return of the goods in such cases may cause practical problems and expenses. It may also be unreasonable to accept return of the goods even if the costs can be recovered from the lessee.

Illustration 1
Lessee X has leased a horse for a four-week holiday. After one week X falls ill and cannot use the horse or look after it. Lessor Y, whose business is to lease horses, must agree to take the horse back and to claim damages instead of the weekly rent.

Illustration 2
Lessor X, who lives in Piraeus, is stationed for one year in the organisation's branch office in Norway. X owns a cabin cruiser and leases the boat to Y for one year before

leaving for Norway. After a couple of months Y is tired of being seasick and wants to return the boat. X no longer has a place for the boat and at this time of year it is difficult to find a new lessee. X may still enforce payment each month under the contract.

C. Damages

The lessor can claim damages if performance of the obligation cannot be enforced because of a rule restricting such enforcement (III.–3:303 (Damages not precluded) and paragraph (2) of the present Article). The damages "will put the creditor as nearly as possible into the position in which the creditor would have been if the obligation had been duly performed", in terms of losses suffered and gains not obtained, cf. III.–3:702 (General measure of damages). In these situations the general rule on reduction of loss applies, cf. III.–3:705 (Reduction of loss). To what extent a substitute transaction will reduce the loss depends on the circumstances. If the lessor can supply goods to any new customer, the lessor may recover loss of gains, even if the goods are leased to a new customer for the same rent. The idea behind allowing the lessee the right to refuse performance is partly that the lessor may save costs by not proceeding with the performance, and partly that payment may be settled at once as damages in lieu of future performance.

NOTES

I. Non-performance and remedies in general

1. The general rules in Book III, Chapter 3 apply also to lease contracts. The corresponding rules in national law – concerning e.g. non-performance as a unitary concept, excused non-performance and cumulation of remedies – differ, and these differences are of course also found in national law on lease contracts. A general reference is therefore made to the notes to Book III, Chapter 3.

II. Enforcement of performance

2. Rules on enforced performance of monetary obligations are found in (III.–3:301 (Enforcement of monetary obligations)), see notes to that Article.

3. The general rules in III.–3:302 (Enforcement of non-monetary obligations) on the right to enforce performance of non-monetary obligations also apply to lease contracts, and reference is made to the notes to that Article. There are, however, some rules in national law dealing with enforcement of the lessee's non-monetary obligations in particular. Only such rules will be commented upon here.

4. Under GERMAN CC § 541, the lessor has a procedural remedy (*Unterlassungsklage*) to stop the lessee from using the goods in a way not conforming with the contract if the use continues even after a warning from the lessor. A warning is, however, not necessary in some cases where it would have no purpose (Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 541, no. 4). In AUSTRIAN law the lessor has procedural remedies under general law in the case of use at odds with the contract (Rummel (-*Würth*), ABGB I³, § 1098, no. 1) and the lessor may also make use of remedies as a possessor and as an owner (Koziol (-*Iro*), ABGB, § 1098, no. 3). The situation is similar in ESTONIAN law and in GREEK law (for the latter, see *Georgiadis*, Enochiko Dikaio, Geniko meros, § 25, no. 53). The right to choose between enforcement of the contract and termination is present in several jurisdictions (e.g. DUTCH CC art. 3:296; FRENCH CC art. 1184, ITALIAN CC art. 1453) and is

included in the lease provisions of the MALTESE CC (art. 1570), PORTUGUESE CC (art. 1041) and SPANISH CC (art. 1556). Under ENGLISH and N. IRISH law, the court may order specific performance under a claim in conversion (s. 3, Torts (Interference with Goods) Act 1977). Thus, the lessee is precluded from wrongfully detaining the goods or using the goods in a way inconsistent with the lessor's right of property in the goods. (Sufficient encroachment on these rights is necessary for an action in conversion: *Marcq v. Christie, Manson & Woods Ltd.* [2003] EWCA Civ 731, [13]–[24]). Detention of the goods after a request by the lessor for return of the goods may also be construed as conversion. In the case of 'regulated consumer hire agreements' and 'regulated consumer hire-purchase agreements' under the Consumer Credit Act 1974 (s. 92(1)), the lessor is not allowed to enter the lessee's premises to take possession of the goods without an order of the court. If the lessor ignores this rule, the lessee may apply to the court for an order that the whole or part of any sum paid to the lessor in respect of the goods be repaid and that the obligation to pay the whole or part of any sum owed is extinguished (s. 132(1)). Under HUNGARIAN law, the lessor may demand that use contrary to the contract or the purpose of the goods stops (CC § 425(2)(b)). The lessee is obliged to restore the goods if they have been transformed without the lessor's consent (CC § 425(3)). According to Gellért (-*Besenyei*), A Polgári Törvénykönyv Magyarázata[6], 1683, all transformations of the leased property require the prior consent of the lessor. In one of its judgments, the Supreme Court held that in the case of transformations of the leased property without the consent of the lessor, the latter is only entitled to *restitutio in integrum*, but not to termination with immediate effect (BH 1993. 49, Legf. Bír. Gf. IV. 32. 817/1991).

III. Withholding of performance

5. It seems to follow from general rules that the lessor, in cases of non-performance of the lessee's obligations, may withhold the goods before they are made available to the lessee, but not afterwards. These rules are sometimes commented upon for lease contracts explicitly (for AUSTRIAN law, see *Riss*, Erhaltungspflicht, 226; for GERMAN law, see Schmidt-Futterer (-*Blank*), Mietrecht[9], § 543, no. 149; for SWISS law, see BSK (-*R.Weber*), OR I³, § 257f, no. 2). Performance of other obligations, e.g. maintenance, may be withheld because of the lessee's non-performance (see e.g. for FRENCH law, *Huet*, Contrats spéciaux, no. 21179, 680).

IV. Termination for non-performance

6. The general rules in Book III, Chapter 3, Section 5 on termination of the contractual relationship also apply to leases, and a reference is made to the notes to that Section. Only rules concerning contracts for lease in particular will be dealt with here.

7. As for *grounds* for termination, harmful use and late payment may, on certain conditions, be grounds for termination according to the AUSTRIAN CC § 1118. It is debatable whether or not the provision is exhaustive (see Schwimann (-*Binder*), ABGB V³, § 1118, nos. 15, 17 ff, Rummel (-*Würth*), ABGB I³, § 1118, no. 3). Under CZECH law, the lessor may terminate the lease contract (with effect *ex tunc*) on the basis of a sublease in violation of the contract (CC § 666(2)), harmful alterations to the goods (CC § 667(2)), or harmful use of the goods (CC § 679(3)). The general rule on termination for non-performance (CC § 517(1)) may also apply. ESTONIAN LOA §§ 315 and 316 contain rules on termination in cases of use contrary to the contract and cases of delayed payment, cf. also the general rule in LOA § 116(2) on fundamental non-performance. GERMAN CC § 543 (cf. § 314) allows either party to terminate a lease without notice for an important reason, in particular in specified cases of lack of care, entrustment of the goods to third parties, and late payment. Further, in SWISS

law, either party may terminate extraordinarily for an important reason, LOA art. 266g, here with notice as fixed by law. There are special rules on termination because of the lessee's bankruptcy (LOA art. 266h), late payment (LOA art. 257d), and lack of care (LOA art. 257d). According to the BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1729, use contrary to the purpose of the goods or in a way that may result in damage to the goods may, depending on the circumstances, give the lessor a right to terminate. Late payment may lead to termination under general rules (*Huet*, Contrats spéciaux, no. 21178). In ITALIAN law, important non-performance may lead to termination of the contract, cf. for lease contracts in particular, cf. *Alpa and Mariconda*, Codice civile commentato IV, art. 1587, no. 7. In GREEK law, use contrary to the contract, lack of care and late payment may give reason to termination by giving notice (GREEK CC arts. 594, 597). Rules on extraordinary termination because of delayed payment, non-conforming use, or subleasing without consent are found in HUGANRIAN CC § 428(2), § 425(2) and § 425(4). Under MALTESE CC art. 1555(1), use contrary to the purpose of the goods or in a way that may result in damage to the goods may, according to the circumstances, give the lessor a right to terminate. See also CC art. 1570 on termination in cases of non-performance of either party's obligations. According to the POLISH CC art. 672, the lessor may terminate the lease if rent is delayed for two periods. The lessor may also terminate if the lessee uses the goods in a manner inconsistent with the contract or designation of the goods and despite a warning from the lessor does not cease to use them in such a way (CC art. 667(2)). Thirdly the lessor may terminate if the lessee neglects the goods (CC art. 667 (2) CC). A particular rule on late payment is found in PORTUGUESE CC art. 1048, cf. art. 1041(1): the lessee may prevent termination by paying within eight days (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 386). According to the SLOVAK CC § 679(3), the lessor may terminate the lease at any time if the lessee uses the leased thing or admits use of the leased thing in a way resulting in rise of damage or in danger of a considerable damage. Termination is also available where the lessee does not pay rent for three months (if the rent period is shorter than three months) or fails to make a rent payment until the following rent payment is due (where the rent period is longer than three months. The lessor may also terminate if the lessee subleases the thing contrary to the contract for lease (CC § 666(2)) or if considerable danger threatens the leased goods due to modifications made without the lessor´s consent (CC § 667(2); *Lazar*, OPH II, 155. According to the SPANISH CC art. 1556 (cf. art. 1555), the lessor may terminate the lease for non-performance of the obligation to pay rent or the obligation to use the goods with care and in conformity with the contract or custom. The normal rules on termination for repudiatory breach apply in the UNITED KINGDOM and IRELAND. However, in the case of breach by the lessee under a 'regulated consumer hire agreement' or a 'regulated consumer hire-purchase agreement' under the Consumer Credit Act 1974, the lessor must serve a 'default notice' on the lessee, allowing 14 days for compliance, before enforcing certain rights (including the right to terminate) (ss. 87-89). Similar provisions are in force in IRELAND under the Consumer Credit Act 1995: the lessor may not terminate the contract following breach by the lessee before giving notice and allowing the lessee 21 days to remedy the situation (s. 54(2)).

8. In some systems, termination must as a rule be decided by a court, see notes to III.–3:502 (Termination for fundamental non-performance), but even in these systems contract clauses allowing automatic termination may be permitted, see for lease contracts in particular, *Huet*, Contrats spéciaux, nos. 21178 and 21209.

V. Damages

9. The general rules in Book III, Chapter 3, Section 7 on damages and interest also apply to lease contracts, and a reference is made to the notes to that Section.

10. The contract for lease normally implies that the lessee uses and has physical control over goods belonging to another person, and the question often arises of liability for *deterioration of or damage to the goods*. This is regularly regarded as a question of non-performance of the lessee's obligation to use the goods (only) in conformity with the contract and to handle the goods with care. The burden of proof may lie on the lessee, as it is often difficult for the lessor to prove the causes of deterioration and damages while the goods were under the lessee's control. Rules on vicarious liability for the acts of third persons permitted by the lessee to use the goods are often found; some of these rules are of particular interest to leases of immovable property, but may be relevant to leases of goods as well. According to the AUSTRIAN CC § 1111, the lessee is liable for damages and deterioration caused by the lessee's own fault or the fault of family members etc. (Schwimann (-*Binder*), ABGB V[3], § 1111, no. 8). It follows from the general rule in CC § 1298 that the lessee must prove that the loss was not caused by fault. See primarily to the same effect, ESTONIAN LOA § 334(2). According to the CZECH CC § 683 (1), the lessee is liable for damage or inadequate wear of the leased thing resulting from use inconsistent with the contract. The lessee is vicariously liable for persons allowed access to the goods by the lessee, but not for fortuitous events. Special rules are found in CC art. 722 (business leases) and Ccom art. 632 (leases of a means of transportation). In DUTCH law, the lessee is liable in damages for non-performance, and with the exception of damage by fire, all damage is presumed to be imputable to the lessee (CC art. 7:218, cf. art. 7:219 on vicarious liability for persons allowed to use the goods. In GERMAN law, the lessee's liability for non-performance of the obligations concerning use of the goods is based on the general rules in CC §§ 276, 280 and 249 on liability for fault, but the discussion is often linked to the rule in § 538 stating that the lessee is *not* liable for deterioration of and changes to the goods caused by use consistent with the contract (see e.g. Emmerich and Sonneschein (-*Emmerich*), Hk-Miete[8], § 538). Liability for performance entrusted to another, cf. CC § 278, extends to persons whom the lessee has allowed to come into contact with the goods (Staudinger (-*Emmerich*), BGB (2006), § 538, no. 6). It is up to the lessee to prove that there was no fault, if the lessor succeeds in proving that the damage or deterioration was not there already at the start of the lease (Staudinger (-*Emmerich*), BGB (2006), § 538, no. 13). Fault liability for damage caused by lack of care or by use inconsistent with the contract is the rule under GREEK CC art. 594, whether or not termination follows (*Kornilakis*, Eidiko Enochiko Dikaio I, 237; Georgiades and Stathopoulos (-*Rapsomanikis*), art. 594, no. 10); the burden of proof is on the lessee (CA Athens 1139/2000 EllDik 43, 226; 3799/1998 EllDik 40, 182; *Filios*, Enochiko Dikaio I[6], § 33 II). Concerning vicarious liability for sublessees and other third parties, see CC art. 593. Under SWISS law, the lessee is liable for fault. The lessee may have to prove that there was no fault if the lessor proves that the damage was caused by the lessee (LOA art. 97; see further BSK (-*R.Weber*), OR I[3], § 267 nos. 4 and 5). According to the FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 1732, the lessee is liable for damage to or deterioration of the goods during the lessee's use unless it is proved that the deterioration or damage was caused without the lessee's fault (see the even stricter liability for fire in CC art. 1733, applicable also to movables, Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 423). The lessee is vicariously liable for household members and sub-lessees (see further *Huet*, Contrats spéciaux, nos. 21190–21193). Under HUNGARIAN law, the lessee is liable

for any damage resulting from use inconsistent with the contract or the purpose of the goods, see § 425(1). The lessor may claim compensation (damages) – in addition to termination with immediate effect, CC § 425(2). In ITALIAN law, the lessee is responsible for deterioration and damage to the goods, fire included, during the lease period, unless it is proved that the deterioration or damage was due to a cause not attributable to the lessee, CC art. 1588(1). This implies that it must be proved that the damage or deterioration was caused without the lessee's fault (*Cian and Trabucchi*, Commentario breve[8], art. 1588, no. I1). The liability extends to loss caused by persons permitted by the lessee to use the goods, CC art. 1588(2). In MALTESE law, the lessee is also liable unless it is proved that the damage or deterioration is caused without the lessee's fault (CC art. 1561; see also the rule in art. 1562 on damage caused by fire), and the lessee is vicariously liable for family members etc. (art. 1563). In PORTUGUESE law, the lessee is liable for damage or deterioration that is not caused by ordinary use or by casual events, but the burden of proof is on the lessee (CC art. 1044, cf. art. 1043). According to the SLOVAK CC § 683 (1), the lessee is liable for damage or excessive wear of the leased thing resulting from use inconsistent with the contract. The lessee is vicariously liable for persons allowed access to the goods (e.g. family members, household members, sub-lessees, guests), however, the lessee is not liable for *casus* (Svoboda (-*Fíger*), Komentár a súvisiace predpisy, 625). The lessee's liability under SPANISH CC art. 1556 (cf. art. 1568) includes loss caused by lack of care or use inconsistent with the contract or custom. For SWEDISH law, the lessee must prove that damage was not caused by the lessee's fault (*Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 204–205). Under UNITED KINGDOM law, the onus of proof is on the lessee to show that loss of or damage to the goods while in the lessee's possession was not caused by any failure on the lessee's part to take reasonable care (*Chitty* on Contracts II[29], no. 33-049, with reference to *Brook´s Wharf & Bull Wharf Ltd. v. Goodman Bros* [1937] 1 KB 534, 538–539 and in SCOTLAND: *Walker*, Principles in Scottish Private Law III, 399). The lessee will not be liable for damage or loss caused by the fault of persons, other than the lessee's own employees, to whom the lessee properly entrusts the goods (*Smith v. Melvin* (1845) 8 D 264). Where damages are available, the lessee will be liable for the diminution in value of the goods or for the actual value of the goods (if they have been lost). Damages for consequential loss are only available where this was within the reasonable contemplation of the parties at the time the lease was made (*Chitty* on Contracts II[29], no. 33-050, with reference to *Anderson v. NE Ry* (1861) 4 LT 216).

11. Some rules are found in national law regarding liability for the lessee's continued use after the expiry of the lease period (where there is no prolongation of the period). According to the CZECH CC § 723, on business leases, the lesse must pay the rent, along with an additional statutory delay payment. ESTONIAN LOA § 335 states that the lessee must pay the rent agreed or the rent that is usual; this does not preclude a claim for compensation for further loss. According to the GERMAN CC § 546a(1), the lessor may claim the agreed rent or the rent that is normally paid for such goods. It is a precondition that return of the goods is possible (Staudinger (-*Emmerich*), BGB (2006), § 546a nos. 22–27). Damages for additional loss is not excluded, CC § 546a(2). For a comparable rule in GREEK law, see Georgiades and Stathopoulos (-*Rapsomanikis*), art. 601; and in SWISS law, see BSK (-*R.Weber*), OR I³, § 267, no. 2. In HUNGARIAN law, the lessee is obliged to pay damages for delayed return of the leased goods after the expiry of the lease period (BH 1982. 528. Legf. Bír. Gf. III. 30 176/1981); see Gellért (-*Besenyei*), A Polgári Törvénykönyv Magyarázata[6], 1688. In a case where the contract of lease was void, the Supreme Court ordered the party

who used the leased property on the basis of the void contract to pay a "fee for use". See BH 1987. 364. Legf. Bír. Gf. I. 31 456/1986. According to the ITALIAN CC art. 1591, a lessee must pay the agreed rent in cases of delayed return of the goods, and damages for additional loss, as may be. This amounts to a form of minimal damages, available without the lessor having to prove any loss (*Cian and Trabucchi*, Commentario breve[8], art. 1591, no. III1). A rule to the same effect is found in PORTUGUESE CC art. 1045, but here the liability is fixed as double the agreed rent if the lessee is late both in returning the goods *and* in paying the rent. SLOVAK CC § 723(1) applies to business leases of goods, and states that the lessee must pay the agreed rent in case of delayed return of the goods, in addition to a "charge".

VI. Special rules for case where lessee wishes to return goods

12. In some systems, a reduction of the lessee's obligation to pay rent for the rest of the lease period is to some degree accepted even if premature return of the goods is caused by events on the lessee's side. In AUSTRIAN law, rent must be paid even if a casual event on the lessee's side prevents the use or limits the usefulness of the goods. The lessor must, however, deduct what is saved or gained because of this, the lessor may also under the circumstances have to make a substitute transaction (AUSTRIAN CC § 1107, see Schwimann (-*Binder*), ABGB V[3], § 1107 nos. 1 and 4, Koziol (-*Iro*), ABGB, § 1107, no. 1). The rule is rarely applied, perhaps because the lessee is allowed to sublease the goods. Refused consent to assignment of the lessee's right may also under the circumstances lead to a reduction of the lessee's liability (cf. AUSTRIAN CC § 1295(2), see *Schwimann*, loc. cit. § 1107 no. 3). According to the ESTONIAN LOA § 296(3), the lessee must pay rent for periods during which the goods cannot be used because of circumstances depending on the lessee, but sums saved and benefits gained by the lessor are deducted from the rent. In GERMAN law too, the point of departure is that rent must be paid even if use of the goods is prevented by causes on the lessee's side, CC § 537(1). If the lessee proposes an acceptable new lessee for the rest of the period on unchanged terms and the lessee has an outstanding interest in returning the object, the lessor may have to accept the substitution, at least for leases of immovable property (see in general, Staudinger (-*Emmerich*), BGB (2006), § 537, no. 1). As the underlying rule is CC § 242, the same principle should be relevant also to leases of goods. In GREEK law, whatever the lessor has gained by alternative use may be deducted from the rent (CC art. 596), and it is held that the same applies where the lessor by fault omits to utilise the goods (Georgiades and Stathopoulos (-*Rapsomanikis*), arts. 595–596, no. 7). For SWEDISH law, it is held that the lessee has a right to "cancellation", in consumer leases perhaps even without having to indemnify the lessor (*Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 197–198). According to the SWISS LOA art. 264, the lessee may be discharged by proposing an acceptable substitute lessee. If not, the lessee must pay the rent for the rest of the lease period if the goods are returned prematurely, with a reduction, however, for sums which it is possible for the lessor to save or gain through early return of the goods. See in general, BSK (-*R.Weber*), OR I[3], art. 264.

13. Under ENGLISH and IRISH law, where there is an anticipatory repudiatory breach by the lessee (i.e. an anticipatory breach which gives the lessor the right to terminate), the lessor may elect to terminate and claim damages or to affirm the contract. In the former case, damages may be claimed immediately (*Hochster v. De la Tour* (1853) 2 E&B 678). In the latter case, the lessor may choose to tender performance in the hope that the lessee will withdraw his repudiation. If an actual breach occurs, the lessor will have a claim in damages. If the breach is sufficiently serious, the lessor may also elect to terminate at this later date. The rules on specific performance of monetary

obligations (in the form of an action for an agreed sum) are less strict than for specific performance. However, the lessor will not be able to secure performance by the lessee against the lessee's wishes where damages would be an adequate remedy. Where, on the other hand, the contract is frustrated through no fault of the lessee, all obligations on both sides are discharged and the lessee is under no further obligation to pay rent. SCOTTISH law is to the same effect.

14. In other systems, there seems to be no reduction of the lessee's obligations in such situations. This follows from general rules in CZECH law. This is true also for DUTCH law, with the possible exception of the application of rules on reasonableness and fairness (CC arts. 6:248 and 6:258) and on creditor's fault (CC art. 6:102(2)). In FRENCH law, it seems that rent must be paid for the rest of the period even if the lessee wishes to return the goods (Cass.civ., 10 January 1990, Bull.civ. 1990.III, no. 7; *Bénabent*, Contrats spéciaux[6], no. 354; Cass.civ. 3e, 3 April 2001, Loyers et copr. 2001, no. 167, note *Vial-Pedroletti*). For BELGIAN law it is said that the fact that it is not possible to use the goods because of events on the lessee's side is of no impact whatsoever (*La Haye and Vankerckhove*, Le Louage de choses I², no. 425). In SPAIN this situation has been highly disputed under the old Urban Leases Act 1944. According to art. 56 of this law, the lessee who repudiates the contract ought still to pay the remainder of the rent for the agreed time, even where the goods have been returned to the lessor. Nevertheless, case law decided that this compensation would amount in most cases to a super-compensation and unjust enrichment for the lessor, and accordingly would diminish the incentives to make reasonable efforts to mitigate the resulting loss (see Bercovitz (-*Carrasco*), Comentarios a la Ley de Arrendamientos Urbanos, p. 246). Under the new law, the TS 20 March 2004 (RAJ 2004/2710, CCJC 68 § 1815, note by *Carrasco*) upheld the rationale given by the Appellate Court in order to apply the compensation rule laid down in art. 11 (one month of rental payment for each remaining year of the lease period) as a general rule of limitation of liability when the lessee rejects the contract and gives back the asset.

IV.B.–6:102: Reduction of liability in consumer contract for the lease of goods

(1) In the case of a consumer contract for the lease of goods, the lessor's right to damages may be reduced to the extent that the loss is mitigated by insurance covering the goods, or to the extent that loss would have been mitigated by insurance, in circumstances where it is reasonable to expect the lessor to take out such insurance.

(2) The rule in paragraph (1) applies in addition to the rules in Book III, Chapter 3, Section 7.

COMMENTS

A. Insurance and leases

No obligation to take out insurance covering contractual liability. No obligation to insure the goods is included in this Part of Book IV, whether on the side of the lessor or the lessee. Such obligations are often found in contract terms. Normally, a party to a contract will prefer to take out insurance covering the party's liability against the other party, e.g. liability under the contract for damage to or loss of the goods. (Sometimes a party will want insurance covering liability against third parties as well, e.g. liability for damage caused by the goods, liability for pollution etc.) It has not been deemed necessary to include an obligation to provide insurance of this kind. Further, it may be in the interests of one party to the contract that the other party has insurance covering that other party's liability under the contract. The reason for this is typically a fear that the liable party will be unable to pay damages. For business-to-business contracts, as well as for consumer-to-consumer contracts, the evaluation of the other party's ability to perform the obligations under the contract and meet claims arising from non-performance is one element in the complex decision to enter into a contract with that person. For business-to-consumer contracts a mandatory rule on insurance on the side of the business could be discussed. This is, however, a general issue which concerns several contract types, not contracts for lease in particular, and such a rule is not included in this Part of Book IV.

No obligation to insure the goods. It is a characteristic element of the contract for lease that the lessee has control over and care of goods belonging to another person. Non-performance of the lessee's obligations may lead to liability for loss resulting from damage to or destruction of the goods. In many cases this loss – and the corresponding liability – is mitigated by ordinary insurance covering physical damage to the goods. It would hardly be possible to establish as a general rule that normal insurance should always be provided by the owner or always by the user. The cost – and even the availability – of insurance may vary according to the character of the goods, the length of the lease period, the planned use, the professionalism of the parties etc. As a rule then, it should be left to the parties to agree on the question of insuring the goods.

B. Consumer contracts for lease

Lessee's reasonable expectations. It seems impossible even for consumer contracts for lease to say that insurance should be provided by one of the parties in all cases. Consumer protection is, however, required to the extent that a lack of insurance coverage should not come as a surprise to the consumer. In situations where the consumer had reason to believe that the goods were insured by the lessor, and therefore did not take out insurance, the lessee's liability for loss or destruction of the goods should be reduced correspondingly. It may be that this result can be based on general rules on relevant loss and reduction of loss, but it seems

appropriate to express it explicitly for consumer contracts for lease, where the question is most likely to arise in practice.

Existing insurance or expected insurance. Reduction of the lessee's liability should be available in two different situations. If the loss is in fact covered, partially or totally, by existing insurance, this may lead to reduced liability whether the existence of insurance coverage was reasonably to be expected or not. If the loss is *not* covered by insurance, liability may be reduced to the extent that the loss would have been mitigated had the lessor taken out insurance where such an action could reasonably have been expected. It must be determined from the circumstances whether the lessor could reasonably have been expected to provide insurance and, if so, in what form. The answer is obvious if the lessor is obliged by the contract to insure the goods. The lessor may also be expected to take out insurance where this is mandated by law. In other situations, regard must be had to insurance coverage that is commonly provided. The character of the goods and the length of the lease period may also be relevant.

Illustration 1
Consumer A leases a rather new car for the weekend from B, a business. The lessee drives too fast and loses control of the vehicle, which is severely damaged when it hits a road fence. Since it is usual to insure new cars against such loss, and the lessee was offered no short-term insurance when entering into the contract, the lessee's liability may be reduced by an amount corresponding to normal insurance coverage even if the car was not insured.

Coverage of insurance. Under the default rules of this Part of Book IV, the lessee is not liable for destruction or loss of the goods by fortuitous events: repair in such cases will normally go beyond the lessee's obligations under IV.B.–5:104 (Handling the goods in accordance with the contract), and the lessee is not obliged to return the goods in a condition better than that which follows from the obligation to maintain etc. The parties may, however, have agreed to impose more extensive obligations of maintenance and repair on the lessee. Further, the goods may be damaged as a result of non-performance of the lessee's obligation to handle the goods in accordance with the contract. It must also be determined from the circumstances to what extent it may be expected that insurance provided by the lessor will cover loss caused by the carelessness or negligence of the lessee.

C. Contracts for lease other than consumer contracts

General rules apply. The rule in paragraph (1) of the present provision applies in addition to the general rules in Book III, Chapter 3, Section 7 on damages, see paragraph (2) of the present provision. Situations may vary to a considerable degree, and it is not advisable to try to establish one rule for all cases concerning the effects or availability of insurance. Neither should the rule in paragraph (1) give rise to conclusions *a contrario*.

NOTES

Insurance and lease contracts

1. In national law, questions concerning insurance and leases are dealt with sporadically. In GERMAN law, the lessee's liability for damage not caused intentionally or by gross

negligence may be limited if the cost of insurance of the goods is borne by the lessee, directly or indirectly (see Staudinger (-*Emmerich*), BGB (2006), § 538, no. 9). In FRENCH law, there is no obligation to insure leased goods. It may lead to reduction of the lessee's liability if the lessor gives the false impression that risks are covered by insurance (*Huet*, Contrats spéciaux, no. 21196). Under ENGLISH law, the lessee owes no obligation to the lessor to insure the leased goods (*Lockspeiser Aircraft Ltd. v. Brooklands Aircraft Ltd.*, unreported, 7 Mar 1990), but such a duty may arise through agreement, trade custom or other special circumstances (*Birks*, English Private Law II, § 13.51). The lessee may choose to insure the goods however, and if a payment is made, may retain so much as would cover the lessee's own (possessory) interest, holding the balance on trust for the lessor (*Chitty* on Contracts II[29], no. 33-025). The position is similar under SCOTTISH law. It is commented upon in BELGIAN law that contract clauses stating that the lessor will insure the goods often include the relinquishing of the insurer's recourse against the lessee (*La Haye and Vankerckhove*, Le Louage de choses I², nos. 1041, 1043 ff). ITALIAN CC art. 1589 has rules on the reduction of the lessee's liability for destruction of the goods by fire when the goods are insured by the lessor. According to the GREEK CC art. 600, if insured goods are damaged by fire, the lessee is liable only if fault is proven. See for a discussion of possible reliance on usual insurance coverage under NORWEGIAN law, *Falkanger*, Leie av skib, 413. In SPAIN there is no particular rule. The lessor has no duty to insure. If the lessor does insure and the insurer compensates the resulting loss, it enjoys a subrogation claim against the lessee, who is presumed to have caused the damage (CC art. 1563).

CHAPTER 7: NEW PARTIES AND SUBLEASE

IV.B.–7:101: Change in ownership and substitution of lessor

(1) Where ownership passes from the lessor to a new owner, the new owner of the goods is substituted as a party to the lease if the lessee has possession of the goods at the time ownership passes. The former owner remains subsidiarily liable for the non-performance of the obligations under the contract for lease as a personal security provider.

(2) A reversal of the passing of ownership puts the parties back in their original positions except as regards performance already rendered at the time of reversal.

(3) The rules in the preceding paragraphs apply accordingly where the lessor has acted as holder of a right other than ownership.

COMMENTS

Contracts for lease and change in ownership. Generally, a party to a contract may assign the right to performance under the contract (III.–5:105 (Assignability: general rule)), but the party will not be discharged of contractual obligations without the other party's assent (III.–5:302 (Transfer of a contractual position)). For lease contracts, a change in ownership of the leased goods raises some special questions. The lessor's position as owner of the goods (or holder of a comparable right) and as a party to the contractual relationship arising from the contract for lease are closely connected. In order to perform the obligations under the contract the lessor must be able to make the goods available for the lessee's use and in most cases must also be able to carry out work on the goods in the form of maintenance and repairs. This normally presupposes that the lessor is the owner of the goods. Rules are needed concerning the consequences of a change of ownership regarding both the contractual relationship between the lessee and the original lessor and the relationship between the lessee and the new owner.

Contractual rights and protection of possession. The rule under this Article is that a new owner is substituted as a party to the contractual relationship arising from the lease contract. Even without this rule the lessee's possession of the goods may be protected to a certain extent under the rules on transfer of ownership, see Book VIII. To the extent that the lessee's possession is protected against a new owner this can be regarded as a "negative" obligation on the side of a new owner, an obligation to tolerate the lessee's use; while a substitution as a party to the contractual relationship implies that the new owner has "positive" obligations under the contract.

B. Models and policy issues

Lessor's right to dispose of the goods. It follows indirectly from the present Article that the lessor is allowed to dispose of the goods, by transferring ownership or otherwise. Such a change in ownership is not regarded by itself as a non-performance of the lessor's obligations, and the lessee cannot object to the transfer of ownership or stop it by claiming specific performance. This is also the situation for a change in ownership resulting from a forced sale or from actions by the lessor's general creditors. If, however, the change in ownership is likely to interfere with the lessee's use of the goods in accordance with the contract, this amounts to non-performance of an obligation under the contract, cf. IV.B.–3:101 (Availability

of the goods) paragraph (3). Given that the new owner is normally substituted as a party to the contractual relationship and the former lessor remains liable for the performance of the obligations under the contract, a change of ownership will in most cases not interfere with the lessee's use. The situation may be different if the goods are sold after the conclusion of the contract but prior to the lessee's taking possession of the goods, or where rules on registration of rights result in a change of ownership without a duty on the new owner to respect the lease contract.

Enforceability against new owner. As for the relationship between the lessee and a new owner of the goods, there are two possible main models: there may be no relationship at all, or the lessee's right may have some protection in relation to other interests in the goods, including the interests of a new owner. Both models are found in national law. As long as the rules are transparent and relatively simple, prospective lessees or buyers of goods as well as security right holders and the lessor's general creditors can adjust their behaviour to the consequences of the rules. Arguments pointing to one model as the most fair or most economically efficient are hardly sustainable. The model chosen here, protecting a lessee who has taken possession of the goods, is likely to create fewer situations of non-performance and conflict than a model where the lessee has no protection against third parties at all. A change in ownership will not automatically lead to non-performance of the obligations under the lease contract, and a prospective buyer or lender of money is warned by the fact that the owner of the goods is not in direct possession. The same kind of reasoning justifies the rule that a new owner is substituted as a party to the contractual relationship under the lease contract. If a new owner were only to have the passive duty of respecting the lessee's possession and use of the goods the rule could still lead to non-performance of the obligations under the contract for lease in many cases. Another reason for choosing this model is that some contracts for lease have more or less the same function as a contract for sale. A contract for lease may be chosen primarily to establish a security right in the goods, in particular where the contract confers on the lessee full use of the goods for their entire economic lifespan. In such cases the protection of the lessee should not differ too much from the protection afforded a buyer. If the lessee is to be protected in some contracts for lease of this type, the simplest solution is to apply the same rule to all leases. Otherwise it can be difficult to find exact criteria for differentiating between contracts.

New owner in good faith. A buyer of the goods with knowledge of the lease has normally accepted the substitution as a party to the contractual relationship with the lessee, and the price agreed is normally influenced by this knowledge. As the rule in the present Article applies only when the lessee has possession of the goods, the buyer in most cases knows or ought to know of the lease. The owner's lack of direct control of the goods should alert the buyer to the fact that other interests in the goods may exist, and the buyer can make further investigations. If the buyer does not know of the lease despite the fact that the lessee has possession of the goods, the unexpected existence of the contract for lease will often amount to non-performance of an obligation under the sales contract, cf. IV.A.–2:305 (Third party rights or claims in general). The lessee's right is still protected, but the lessee must accept a reversal of the substitution of the buyer as a party to the contractual relationship, (see below). The individual contract for lease is decisive as to the terms regulating the rights and obligations between the new owner and the lessee. There may be cases where the terms of the contract are less favourable to the lessor than the buyer expected, even if it was known that a lease existed. It has not been found necessary to introduce an exception to the lessee's protection for these situations. Depending on the sales contract, the buyer is entitled to remedies against the seller, including termination of the contractual relationship and a

retransfer of the goods to the seller, entailing a reversal of the change in ownership. A lessee lacking possession of the goods is not protected, irrespective of the buyer's knowledge. In this situation, the sale of the goods amounts to non-performance of an obligation under the lease contract, unless the buyer voluntarily takes on the obligations of lessor, perhaps as a result of an agreement between buyer and seller. A possible claim by the lessee against a buyer in bad faith is regulated by the rules in Book VI.

Protection against the lessor's general creditors. The rule in the present Article also applies where ownership is transferred to a new owner as a result of the lessor's general creditors satisfying their claims, through bankruptcy proceedings or individually. Protection against the lessor's general creditors can be justified in a situation where the lessee has possession of the goods. Rules of national bankruptcy law have priority over the present rules, however, and may lead to other results. In particular this is the case when it comes to rules on avoidance in bankruptcy.

C. The lessee has possession of the goods

New owner as lessor. If the lessee has possession of the goods at the time ownership passes the new owner is substituted as a party to the relationship under the lease contract, see the first sentence of the first paragraph of the present Article. This means that the lessee has rights and remedies against the new owner to the same extent as against the former owner, including enforcement of specific performance. The new owner, as a result of the substitution as party to the contractual relationship, has the rights under the contract for lease and can collect the rent. It must be decided according to the rules in Book VIII (Acquisition and Loss of Ownership in Movables) at what time ownership passes. The rules in that Book also define the prerequisites of the lessee's possession. The present Article applies where the new owner's right is derived from the former owner's right ("ownership passes from the lessor to a new owner") and thus not where the new owner has acquired rights in good faith under a transaction with a possessor not being the owner.

> *Illustration 1*
> X leases to Y five containers for industrial waste for a period of one year and the containers are brought to Y's premises at the start of the lease period and remain there. After six months, X sells the containers to Z without informing Z of the lease contract. Z is substituted as a party to the contractual relationship under the contract for lease and must tolerate that Y uses the containers for the rest of the lease period. Z must also repair one of the containers, which is damaged after eight months, as this falls under the lessor's obligations under the lease contract. On the other hand, Z can claim payment of rent directly from Y.

Former owner's liability. The former owner remains subsidiarily liable for non-performance of the obligations under the contract for lease as a personal security provider, cf. the second sentence of the first paragraph of the present Article. The former owner may be discharged only with the lessee's assent, cf. III.–5:302 (Transfer of contractual position). Several of the lessor's obligations under a contract for lease cannot be performed by a person not being the owner of the goods or not having at least the owner's consent. Under these circumstances, the best practicable solution is to make the former owner subsidiarily liable as a personal security provider. For the purposes of Book IV.G.(Personal Security), the former owner becomes a provider of a dependent personal security, i.e. the former owner's obligation secures the new owner's obligations owed to the lessee. Before demanding performance from the former owner, the lessee must have made appropriate attempts to obtain performance from

the new owner, IV.G.–2:106 (Subsidiary liability of security provider) paragraph (2). In practice, the only performance possible for the former owner is payment of money, either as performance of a claim for money or as damages for non-performance of a non-monetary claim.

Illustration 2
The facts are the same as in Illustration 1. Due to Z's weak financial situation, the damaged container is not repaired, and Y has to lease an extra container elsewhere. Y's claim for damages from Z receives no answer. Y can claim damages from X.

Reversal of the passing of ownership. The passing of ownership may be reversed, and then the parties are put back in their original position, see the second paragraph of the present Article. It follows from the rule in paragraph (1) that the former owner has the position of a lessor when ownership passes back. The point of the second paragraph, however, is to clarify that the new owner (who is now no longer an owner) is discharged. The rule will typically apply when the contractual relationship under the sales contract is terminated, perhaps for the very reason that the lease contract was an unexpected burden on the buyer, implying a substantial non-performance of the seller's obligations. The right to terminate could lose much of its effect if the buyer were held liable to the lessee even after termination. The rule also applies where the seller agrees to termination of the contractual relationship, irrespective of the buyer's right to terminate. The term 'reversal' is chosen in order to indicate that there must be a close connection, as to both time and motivation, between the first and the second change in ownership. If the new owner, after some time, re-sells the goods to the former owner there is no reason why the main rule in the first paragraph should not apply. A qualification is made concerning performance already rendered at the time of reversal. It would in many cases be too complicated to put the parties back into their original positions regarding such performance. Obliging the lessee to compensate for or return performance rendered by the new owner during the period of change of ownership up until reversal, leaving the lessee with recourse to the original lessor, would further entail an unacceptable risk on the side of the lessee.

Illustration 3
The facts are the same as in Illustration 1, except that after two weeks the new owner Z terminates the contractual relationship under the sales contract for fundamental non-performance, on learning of the lease between X and Y. Z has no liability under the lease contract and Y has no claim against Z even if it later turns out that X is unable to perform the obligation to repair the damaged container.

D. The lessee does not have possession of the goods

Possible claims against the new owner. The rule under paragraph (1) of the present Article applies only when the lessee has possession of the goods at the time ownership passes. If the lessee does not have such possession no claim against the new owner can be based on this provision. However, there may be a stipulation in the sales contract in favour of the lessee as a third party to the effect that the lessee has the same rights and claims against the new owner as the lessee has under the contract for lease with the former owner. A seller of goods will often be interested in including a stipulation like this in the sales contract in order to avoid non-performance of obligations under the lease contract. A possible claim under the rules on non-contractual liability against a new owner in bad faith depends on the provisions in Book VI (Non-contractual Liability arising out of Damage caused to Another). Where ownership of the goods is transferred before the lessee has possession of the goods and the new owner does

not agree to be bound by the lease contract, this will normally amount to non-performance of an obligation under the lease contract, and the lessee may pursue the ordinary remedies for non-performance against the lessor, i.e. the former owner.

Illustration 4
X leases to Y five containers for industrial waste for a period of one year. Before the containers are made available to Y, X sells the containers to Z. The containers are brought to Z's premises. Z is not substituted as a party to the lease contract. Y can terminate the contractual relationship with X under the lease contract for fundamental non-performance and may also claim damages from X.

E. Registration of rights

Priority of rules on registration. For some categories of goods, typically aircraft and ships, there are registers of rights in the goods. Registration may have effect with regard to good faith acquisition of rights, protection of rights, and priority between conflicting rights. Such rules have priority over the rules of the present Article. This follows directly from the rules concerned, and it has not been found necessary to state this explicitly in the present Article.

F. Lessor is not owner

The rules apply accordingly. This Part of Book IV applies also where the lessor is not the owner of the goods but has some other right to enter into a lease contract, cf. Comment J to IV.B.–1:101 (Lease of goods). The lessor may for example be the holder of a usufruct right. The rules in the present Article apply accordingly if the lessor's right in the goods is transferred to someone else. The rules also apply if a lessor has subleased the goods and then transfers the original lease contract. This follows from the third paragraph of the present Article.

NOTES

I. Protection of lessee's right

1. In most jurisdictions, an important distinction is made between proprietary rights in goods and non-proprietary (obligatory) rights. This distinction relates among other things to the position of the holder of the right in goods when ownership of the goods passes, as a result for example of a sale of the goods or of the owner's general creditors satisfying their rights. See for these issues in general, the Introduction to Book VIII (Acquisition and Loss of Ownership in Movables) and notes to the relevant Articles there. Traditionally, the lessee's right has been regarded as a non-proprietary right, implying in principle that the lessee has only a claim against the lessor for performance, not a right that must be respected by a new owner. The rules are, however, complex, and the lessee is in many cases protected at least to a certain extent against a new owner. This is the case first of all for leases of immovable property, but also to some extent for leases of goods.
2. The situation may be that the new owner of the goods must tolerate the lessee's possession of the goods for the rest of the lease period or until the new owner terminates the lessee's right by notification. This means that the new owner has a "negative" obligation not to interfere with the lessee's use of the goods. Whether or not the new owner – without agreement to this effect – must perform also the

contractual obligations of maintenance etc. ("positive" obligations) is in principle a different question. If the new owner – without agreement – is bound by the lease contract, and thus has both negative and positive obligations, this may be characterised as a rule on transfer by operation of law of the entire contractual position. Such a rule may be combined with a right of extraordinary termination of the contractual relationship for the new owner.

3. Special rules apply to goods which must or may be registered, in particular ships and aircraft. The effect of registration regularly relates to the protection of registered rights against colliding interests in the goods. These rules will not be dealt with here.

II. Ex lege transfer of the relationship under the lease contract

4. For AUSTRIAN law, it is held that CC § 1120 implies an *ex lege* transfer of the relationship under the lease contract if the lessee has possession of the goods when ownership is transferred (Schwimann (-*Binder*), ABGB V[3], § 1120, no. 13; Rummel (-*Würth*), ABGB I[3], § 1120, no. 1). The original lessor remains bound as a co-debtor (Schwimann, loc. cit. § 1120 no. 14). In principle, the new owner may terminate the lease by normal notice (Schwimann, loc. cit. § 1120 no. 41; Rummel (-*Würth*), loc. cit. § 1120 no. 5), but with reference to CC § 1401(1) it is argued that for movables the original lease period is upheld (*Apathy and Riedler*, Bürgerliches Recht III[2], no. 8/79). In DANISH and NORWEGIAN law, it is held that the lessee's right is protected against a new owner (and the owner's general creditors) at least in cases where the lessee has taken control of the goods (*Gade*, Finansiel leasing, 387–388; *Falkanger and Falkanger*, Tingsrett[6], 622; *Lilleholt*, Godtruerverv[3], 201). It is not quite clear to what extent the new owner is bound by the "positive" contractual obligations (*Falkanger*, Leie av skib, 596–604; *Krag Jespersen*, FS Brækhus; *Gade*, Finansiel leasing, 389–390). In DUTCH law, the transfer of ownership includes ex lege the transfer of the contractual position under the lease contract to the new owner, with the exception of clauses that do not concern the use of the goods against the agreed rent (agreements of a strictly personal kind). According to the HUNGARIAN CC § 432(2), the buyer (the new owner) of the leased object is not entitled to terminate a lease for a definite period before the expiry of the period, except in the case of a misrepresentation by the lessee regarding the length or any other essential term of the lease. The new owner is bound by the lease contract for a definite period. The principle that a sale does not break a lease is found in the draft of the new Civil Code as well (§ 5:322(2) and (3)), and the draft introduces a new rule under which the former owner remains liable as a solidary surety provider. In ITALIAN law, a new owner has to "respect" the lease, but only as a lease for an indefinite period, if the lessee has control of the goods, CC art. 1600 (cf. *Cian and Trabucchi*, Commentario breve[8], art. 1600, no. I1). MALTESE CC art. 1574 states that a new owner cannot "dissolve" the lease unless such a right was reserved in the lease contract. In POLISH law, a new owner becomes a new lessor (CC art. 678). The new owner may always terminate the lease by giving notice unless the contract for lease is in writing and with an authenticated date, and, in addition, the goods have been made available to the lessee. According to the PORTUGUESE CC art. 1057 an acquirer of the lessor's rights succeeds the lessor in rights and obligations under the lease (*Romano Martinez*, Direito das obrigações III[4], 205; *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 400–401). According to the CZECH CC § 680(2) and (3) and SLOVAK CC § 680(2) and (3), the contractual position is transferred to the new owner, but the new owner (as well as the lessee) may terminate the lease with a normal period of notice (but see CZECH Supreme Court 26 Cdo 866/2002 – "an obligation of the former lessor which goes beyond the framework of the lease relationship, as e.g. the

obligation to tolerate the change of the substance of the leased goods, does not pass to the new owner"). The rule under SLOVENIAN LOA §§ 610, 612 and 613 seems to be that a new owner is bound by the contract for lease if the lessee has possession or the new owner knows of the lease (the former owner remains solidarily liable to the lessee), but the new owner may terminate the lease by giving notice. In SPANISH law, a new owner may terminate the lease, cf. CC art. 1571, but it does not end automatically as a result of a sale (Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-*Lucas Fernandez*), Código Civil II, 1139). In residential leases, the lessee keeps the rights under the lease contract against the new owner, at least for a period of five years (Urban Leases Act arts. 13 and 14), and beyond this time, where the lease is registered in the land register. Although the general law (but not the Urban Leases Act arts. 8 and 14) is silent as to this issue, the transfer of property amounts to an automatic assignment of the contractual rights, and the original lessor does not remain bound as surety. However, it still remains dubious whether this subrogation becomes also compulsory for the lessee, who accordingly is not entitled to terminate the lease (see Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-*Lucas Fernandez*), Código Civil II, 1139-1140). According to the SWISS LOA § 261, the lease is transferred to a new owner *nach Abschluss des Mietvertrags*, but the new owner may terminate the lease by giving notice. It has been held that *Abschluss des Mietvertrags* refers to delivery (BSK (-*R.Weber*), OR I[3], § 261, no. 2).

III. Protection of lessee's possession only

5. In GERMAN law, the lessee's possession is protected under CC § 986(2), but for goods there is no *ex lege* transfer of contractual obligations (different for lease of immovable property, CC § 566), cf. MünchKomm (-*Schilling*), BGB[4], § 566 nos. 2 and 3; *Gitter*, Gebrauchsüberlassungsverträge, para. 3 B VI 3, 48. In GREEK law, the new owner is not subrogated as lessor into the lease contract, which still binds the original parties. The lessee is protected against the new owner as a possessor (CC arts. 1095, 463) and retains the rights provided by CC art. 583 with regard to legal defects as against the lessor (*Filios*, Enochiko Dikaio I[2], § 51 Γ; different for lease of immovable property, see CC arts. 614–615: subrogation of the new owner when the contract bears an authenticated date and it has not been agreed otherwise therein; right to terminate if it is so agreed or if the contract does not bear an authenticated date). In ENGLAND, in cases, at least, where the lessee has taken possession of the leased goods, the lessee may be protected against eviction from the goods by a purchaser or other alienee of the lessor, where that alienee knew of the pre-existing hire and its terms (*Birks*, English Private Law II, § 13.61 with reference to *Port Line Ltd v. Ben Line Steamers Ltd.* [1958] 2 QB 146, 151 per Diplock J). However, the existence of a lessee's proprietary right is still highly debatable.

IV. No protection against new owner

6. It is held that the FRENCH CC art. 1743 (purchaser may not evict the lessee who has an authentic lease or one whose date is indisputable) is applicable only to immovable property, and that a lessee of goods is not protected (*Huet*, Contrats spéciaux, nos. 21206 and 21800; Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 599). The rule has been criticised (see *Huet*, Contrats spéciaux, no. 21800 for references). For corresponding rules in BELGIAN law, see *La Haye and Vankerckhove*, Le louage de chose I², nos. 1224 ff. In SWEDISH law, the lessee's right is not, in principle, protected as a proprietary right. It may be, however, that the lessee's right is protected against a new owner with knowledge of the lease, and protection of the lessee has been advocated for financial leases (*Håstad*, Sakrätt[6], 426–427; cf. SOU 1994: 120, 440–442; see further

Hellner/Hager/Persson, Speciell avtalsrätt II(1)[4], 208–210). The same classical rules of eviction exist in the SPANISH CC for leases subject to neither the Urban Leases Act nor the Rural Leases Act (CC art. 1571); knowledge of the existence of the lease does not affect the right to eviction of the new acquirer; but registration of the leases in the land register does. In SCOTTISH law the general principle is that contracts do not run with moveables: the purchaser of an article acquires no title to sue on contracts which the seller may have made in relation to that article, and is not bound by them (*Gloag and Henderson*, The Law of Scotland[11], para. 8.13). While the lessee could not be dispossessed without consent or a court order, the personal right under the lease contract is against the seller only and is not good against the purchaser or the seller's creditors (*Reid*, The Law of Property in Scotland, para. 5(5)).

IV.B.–7:102: Assignment of lessee's rights to performance

The lessee's rights to performance of the lessor's obligations under the contract for lease cannot be assigned without the lessor's consent.

COMMENTS

Lessee's rights not assignable

Exception from the general principle. According to III.–5:105 (Assignability: general rule), all rights to performance are assignable except where otherwise provided by law. The rule in the present Article is an exception to the general principle, as the lessee's rights to performance of obligations under the contract for lease cannot be assigned without the lessor's consent. There are two different reasons for this exception, both of them related to the lessee's obligation of care, maintenance etc. Firstly, the lessor may rely on the lessee's personal qualifications in many lease contracts. The lessor may have interests in the goods beyond the mere economic value and hence does not want to see the goods left in the hands of persons who do not have the professional or personal ability to handle the goods appropriately. There may also be situations where the lessor remains liable as an owner towards third parties for damage caused by the goods. This makes the interest in having control over who is using the goods even more acute. Secondly, several of the obligations regarding care, maintenance etc. can only be performed by a person having physical control of the goods. An assignment of the lessee's rights under the contract without a corresponding substitution of the assignee as a debtor could therefore imply a problematic division of the contractual position as lessee. A general rule allowing for the substitution of a third party as lessee without the lessor's consent is not acceptable. One alternative could be to differentiate the rule and accept assignment in contracts for lease where the lessor's interests are predominantly of an economic character, but such a rule would be more complicated. It is thought better to leave it to the parties to include a right of assignment in their contract where this right is required by the lessee and is acceptable to the lessor. An agreed right to assignment can be fine-tuned, including for example a requirement that the lessor's consent must not be withheld without good reason.

NOTES

I. Right to assignment without consent

1 In AUSTRIAN law, assignment of the lessee's right is in principle possible without the lessor's consent, as the right of use is not regarded as personal. It is, however, debated what effects an assignment has against the lessor (obligations owed directly to new lessee or not), see Schwimann (-*Binder*), ABGB V³, § 1094, no. 26; *Apathy and Riedler*, Bürgerliches Recht III², no. 8/45; Koziol (-*Iro*), ABGB, § 1098, no. 9; Rummel (-*Würth*), ABGB I³, § 1098, no. 15. FRENCH CC art. 1717 allows assignment of the lessee's rights; it is recommended that the former lessee is regarded as discharged of the obligations if the lessor accepts payment from the new lessee (*Huet*, Contrats spéciaux, nos. 21803 and 21207; Rép.Dr.Civ. (-*Groslière*), v° Bail, nos. 488 ff); for the same results for BELGIAN law, see *La Haye and Vankerckhove*, Le Louage de Choses I², no. 1221. Assignment without consent is accepted also in GREEK CC art. 593 combined with arts. 455 ff (see *Dacoronia*, Sublease of a thing, 26–28); MALTESE CC art. 1614.

II. Assignment requires lessor's consent

2. For CZECH law, it is held that the right to sublease the goods (CC § 666(1)) is a special rule, and that assignment is allowed only with the lessor's consent (see Švestka/Jehlička/Škárová/Spáčil, OZ[10], 937). Under DANISH law, the lessee's rights are not assignable without the lessor's consent, see *Gade*, Finansiel leasing, 219–220. The same is true for DUTCH law (CC arts. 7:270 and 7:307 *a contrario*). According to the ESTONIAN LOA § 290, the lessee's transfer of the "rights and obligations" under the contract for lease requires the lessor's consent (rules also on period of solidary liability of former and new lessee). GERMAN CC § 540 states that the use of the leased object cannot be transferred to others without the lessor's consent, and it is held that this rule applies to assignment of the lessee's rights under the contract as well; the lessee has a right to extraordinary termination if consent is withheld without important reason (Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 540, nos. 22 ff). Consent is required in HUNGARIAN law, CC § 426(1); ITALIAN law, CC art. 1594(1); LATVIAN law, CC art. 2115; LITHUANIAN law, CC art. 6.491; NORWEGIAN law, *Falkanger*, Leie av skib, 215; PORTUGUESE CC art. 1038(f); SWEDISH law, *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 198–200 (with possible right of extraordinary termination by the lessee if consent is withheld); and SWISS law, Guhl (-*Koller*), OR[9], § 44, no. 83. Under ENGLISH and N. IRISH law, a distinction is drawn between the assignment of contractual rights and the assignment of contractual liabilities. In theory, assignment of the contractual rights under a lease is possible. In practice, however, the right to assign the benefits of the contract will generally be excluded. Where consent of the lessor and the assignee is obtained, both contractual benefits and liabilities may be transferred. This process is known as 'novation'. Novation involves the creation of a new contract where an existing party (the lessee) is replaced by a new party (the assignee). Consent may be expressed or inferred by conduct, but must be clearly established on the evidence. (See summary of novation in *The Tychy (No 2)* [2001] 1 Lloyd's Rep 10, at 24, per David Steel J). The statutory assignment of contractual rights alone is possible under the Law of Property Act 1925 s. 136(1). Assignment of the contractual rights to possess and use leased goods must be made in writing, with express notice (in writing) given to the lessor. Under SCOTTISH law, the lessee may not assign the benefit of a contract for lease unless contractually permitted to do so (*Walker*, Principles of Scottish Private Law III[3], 400, with reference to *Lamonby v. Foulds* 1928 SC 89, 95).

3. In SPAIN the legal situation is as follows. Ordinary leases are not assignable by the lessee, because nobody may subrogate a third party into its duties; a separate assignment of the right to use or of the right to have the thing repaired has no economic sense. Urban residential leases cannot be assigned to a third party without the lessor's consent (Urban Leases Act art. 8); but commercial leases are assignable (Urban Leases Act art. 32) and the lessor, who is deprived of the right to oppose the assignment, gets as compensation the right to increase the rent by up to 10%.

IV.B.–7:103: Sublease

(1) The lessee may not sublease the goods without the lessor's consent.

(2) If consent to a sublease is withheld without good reason, the lessee may terminate the lease by giving a reasonable period of notice.

(3) In the case of a sublease, the lessee remains liable for the performance of the lessee's obligations under the contract for lease.

COMMENTS

A. Right of use and the lessee's personal qualities

General. The importance of the lessee's personal qualities varies considerably from contract to contract. The lessee is liable as a party to the contract even if other persons use the goods. In some cases, however, the lessor's interest is not merely a matter of economic rights against the lessee (see also Comment A to the preceding Article). The lessor may for example fear damage to unique goods or wish to avoid time-consuming repair work or conflict with the lessee as a result of careless or unqualified use. An owner leasing a precious heirloom to a relative to wear at a wedding is unlikely to accept that the lessee hand the object over to some other person, unknown to the owner. On the other hand, a business enterprise leasing bicycles to tourists will as a rule not put much weight on the lessee's personal qualities. The parties may agree on who may use the goods or the qualifications required to make use of the goods, e.g. that a car must not be driven by a person without a driver's licence. It may also follow from the circumstances that the lessee will not use the goods personally, e.g. where a machine is leased by a large business enterprise. Normally, the situation will be that the goods are used under the lessee's control, whether it is by the lessee personally or the lessee's family members, employees etc. It is not considered necessary to express this in a separate provision.

B. Sublease

Sublease only with consent. If the lessee enters into a contract with a third party making the goods – partly or wholly – available for this party's use against remuneration, it is a sublease. The lessee should not be allowed to sublease the goods without the lessor's consent, unless agreed otherwise at the time of conclusion of the contract or at a later date. The sublease typically implies that the goods will no longer be under the lessee's control, as the sub-lessee is independent in relation to the lessee. The lessor may have objections to such a lack of control over and supervision of the use of the goods, notwithstanding the fact that the lessee remains liable as a party to the original lease contract. Further, the lessor may see the sublease as not conforming with the purpose of the lease contract: the lessee was given a right to use the goods; now the lessee benefits not from the use, but from the income raised by the sublease transaction. In some cases a sublease may even be in competition with the lessor's own lease business.

Withholding of consent and extraordinary right of termination. The lessee can have a legitimate interest in subleasing the goods, for example where the contract for lease is made for a long period and the lessee can no longer use the goods due to changed circumstances. Subleasing may be the only way to benefit from the goods – goods for which the lessee must still pay rent. At the outset the consequences of such a development must be borne by the lessee. However, if the lessor has no good reason to withhold consent to a sublease, the

balancing of the parties' interests should lead to an extraordinary right for the lessee to terminate the relationship with the lessor under the lease contract. This is the rule stated in the second paragraph of the present Article. The lessee may terminate the relationship by giving reasonable notice, thus being freed from the obligations under the contract for the remaining period. The lessor has no claim for damages for early termination. On the other hand, the lessee's termination is not a remedy for non-performance. The lessor is under no obligation to consent to a sublease, with or without good reason. Some typical objections to a sublease are mentioned under Comment B, justifying the general requirement of consent. If, in a particular case, such objections are not relevant or are of only limited importance, it may be that there is not sufficiently good reason to withhold consent to a sublease under this rule. The relative weight of the inconveniences to the lessor compared to the benefits to the lessee of a sublease should also be taken into account.

C. Sublease, assignment of rights and transfer of the contractual position

Sublease distinguished from assignment and transfer. A sublease does not bring new parties into the contractual relationship between lessor and lessee. Obligations and rights under the contract for lease still lie between lessor and lessee. The situation is different where the lessee wants to assign the rights under the contract or wishes to transfer the entire contractual position, obligations and rights included, to another person. These questions are dealt with in IV.B.–7:102 (Assignment of lessee's rights to performance).

Lessor remains liable in case of sublease. For pedagogical reasons, it is stated in the third paragraph of the present Article that the lessee, in the case of a sublease, remains liable for performance of the lessee's obligations under the lease contract.

NOTES

I. Right to sublease without lessor's consent

1. In AUSTRIAN law, the main rule is that the lessee may sublease the goods without the lessor's consent, cf. CC § 1098; Schwimann (-*Binder*), ABGB V³, § 1098, no. 82. To the same effect, see CZECH CC § 666(1), cf. opposite rule for leases of a means of transportation, Ccom art. 632(2); FRENCH (and BELGIAN) CC art. 1717; GREEK CC art. 593 (the lessee is entitled to sublease, unless otherwise stipulated in the individual contract); MALTESE CC art. 1614(1), POLISH CC art. 668(1) (the lessee may sublease all or some of the goods leased or enable a third party to use them on the basis of a gratuitous contract, unless the lease agreement directly forbids a sublease); SLOVAK CC § 666; SLOVENIAN LOA § 605; SPANISH CC art. 1550, provided that subleasing is not prohibited by the contract (the contrary in residential leases, Urban Leases Act art. 8). In SWISS law, consent is required, but consent may nonetheless be withheld for certain reasons, LOA art. 262; BSK (-*R.Weber*), OR I³, § 262, no. 1. A similar rule is found in ESTONIAN LOA § 288 (see also the rule in § 288(4) on increased rent as a condition for consent) and LITHUANIAN CC art. 6.490. According to the DUTCH CC art. 7:221, the lessee is entitled to sublease the goods unless the lessee "has reasons to suppose that the lessor would have reasonable objections to the other party having use of the goods".

II. Consent required for sublease

2. In several countries, the lessee cannot sublease without the lessor's consent: for DANISH law, *Gade*, Finansiel leasing, 219–220; ESTONIAN LOA § 288(1); GERMAN CC § 540 (Emmerich and Sonnenschein (-*Emmerich*), Hk-Miete[8], § 540, no. 1); HUNGARIAN CC § 426(1); ITALIAN CC art. 1594(2); NORWAY, see *Falkanger*, Leie av skib, 215; SWEDEN, see *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 199. In ENGLAND, the lessee may not sublease the goods without the actual or "ostensible" consent (*The Pioneer Container* [1994] 2 AC 324, PC) of the lessor. Authority to sublease may be inferred from the parties' knowledge of ordinary commercial practices (see *Chitty* on Contracts II[29], no. 33-026). Where the lessee subleases without such consent, the lessor may have an action in tort for conversion both against the third party and the lessee. If the goods are lost or damaged as a result of the sublease, the lessor may have an action in tort for negligence against the third party. In SCOTLAND, the lessee may not sublease the goods unless contractually permitted to do so (*Walker*, Principles of Scottish Private Law III[3], 400, with reference to *Lamonby v. Foulds* 1928 SC 89, 95).

III. Right to extraordinary termination if consent is withheld

3. Several jurisdictions have rules according to which the lessee is given a right to extraordinary termination of the lease if the lessor's consent to sublease is withheld without sufficiently good reason: ESTONIAN LOA § 288; GERMAN CC § 540; LITHUANIAN CC art. 6.490(2).

IV. Lessee remains liable

4. It seems to be generally accepted that the lessee remains liable for the performance of the obligations under the contract, see for example for BELGIAN law, *La Haye and Vankerckhove*, Le Louage de Choses I², no. 258; for CZECH law, Švestka/Jehlička/Škárová/Spáčil (-*Jehlička*), OZ10, § 1183; for FRENCH law, Rép.Dr.Civ. (-*Groslière*), v° Bail, no. 528, Huet, Contrats spéciaux, no. 21136; ITALIAN CC art. 1595(1); for SLOVAK law, Svoboda (-*Górász*), Komentár a súvisiace predpisy, art. 666; SPANISH CC art. 1550 (*Díez-Picazo* and Gullón, Sistema II9, 340). The lessee's liability for the sublessee's use is sometimes mentioned explicitly, see for example ESTONIAN LOA § 288(5); HUNGARIAN CC § 426(2) (see also § 426(3) on granting of use to other persons without lessor's consent); GERMAN CC § 540(2); GREEK CC art. 593; LITHUANIAN CC art. 6.490(6); POLISH CC art. 668; SLOVENIAN LOA § 605(2); SWISS LOA art. 262(3). In POLISH CC art. 668(2) it is also stated explicitly that a sublease (or similar relationship) expires at the termination of the lease.

V. Direct action

5. In some countries, it is accepted that the lessor has rights directly against the sub-lessee, for payment of rent or for other performances. These rules will not be dealt with here, but see as an example FRENCH CC art. 1753 (applicable to leases of immovable property) and for case law and discussion, *Huet*, Contrats spéciaux, no. 21136, 625, *Groslière*, loc. cit. nos. 531 and 532; cf. different results for BELGIAN law, *La Haye and Vankerckhove*, Le Louage de Choses I², nos. 278 ff. See also GREEK CC art. 599(2) (right of the lessor to claim return of the leased object from the sub-lessee at the end of the lease period), as well as LITHUANIAN CC art. 6.490(7) on the right of the sublessee to submit claims on behalf of the lessee. See also note *I2* to IV.B.–5:109 (Obligation to return the goods) on the lessor's right to claim return of the goods from the lessee. In ENGLAND, where the lessor has given actual or

ostensible consent to a sublease, a direct lease relationship will arise between the lessor and the sub-lessee, provided the sub-lessee received the goods knowing another "is interested in the goods" (*The Pioneer Container* [1994] 2 AC 324, at 336–338, 340–342). Thus, "all the terms agreed between the [lessee] and the [sub-lessee], in so far as these are applicable to the relationship of the [lessor] and the [sub-lessee], apply as between the [lessor] and the [sub-lessee]" (*Sandeman Coprimar SA v. Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, at [62]; see further *Palmer*, Bailment[2], 1329). In SPAIN, the sublessee is bound by the terms of the main contract as to the scope and limits of permitted use; furthermore, the main lessor has the right to proceed directly against the sublessee for the payment of the rent, where the sublessor is in default (CC arts. 1551, 1552).

PART C. SERVICES

CHAPTER 1: GENERAL PROVISIONS

IV.C.–1:101: Scope

(1) This Part of Book IV applies:

(a) to contracts under which one party, the service provider, undertakes to supply a service to the other party, the client, in exchange for a price; and

(b) with appropriate adaptations, to contracts under which the service provider undertakes to supply a service to the client otherwise than in exchange for a price.

(2) It applies in particular to contracts for construction, processing, storage, design, information or advice, and treatment.

COMMENTS

A. Scope

A contract for services is defined in Annex 1 as "a contract under which one party, the service provider, undertakes to supply a service to the other party, the client". However, the main application of this part of Book IV is to contracts imposing an obligation on a party to supply a service in exchange for remuneration (paragraph (1)(a). It applies only "with appropriate adaptations" to gratuitous contracts for services (paragraph (1)(a). A later Article (IV.C.–2:101 (Price)) provides that if a business supplies a service it is entitled to a price. However, this is just a default rule: the parties can contract out of it and agree that the service is to be provided gratuitously.

An obligation to supply a service is imposed if a party (the service provider) is bound to perform work undertaken according to the specific needs and instructions of another party (the client). The work will require in any event the supply of labour and may also involve the input of materials and components. The outcome of a service can be, but need not be, a tangible immovable structure, a corporeal movable or an incorporeal thing. Services falling within the scope of application of this Part are, for instance, provided by architects, banks, building and civil engineering contractors, carpenters, consultants, doctors, dry cleaners, estate agents, fashion designers, gardeners, garages, information technology providers, interior decorators, lawyers, plumbers, researchers, storers, trainers and many others.

Paragraph (2) lists the types of service contracts which are covered more specifically in later Chapters of this Part. The general rules on service contracts are applicable to such contracts, but some of these rules are particularised or modified in the specific Chapters.

B. Generality

A significant feature of the present Part, compared to many national laws, is its generality. It does not draw distinctions at the primary level of classification between storage contracts and other service contracts, or between contracts for the provision of intellectual services or

material services. It does, however, expressly exclude certain types of contract. See the following Article.

C. Relation to Parts I to III

This Part deals with service contracts and the rights and obligations arising out of them. The rules of Parts I to III apply generally to contracts and the rights and obligations arising out of them. These general rules apply to service contracts and do not have to be repeated in this Part. However, they may be particularised or modified by the rules in the present Part, having regard to the particular context of the supply of a service.

D. Default rules

The application of the principle of party autonomy in II.–1:102 (Party autonomy) is particularly important in relation to service contracts because many such contracts are in practice governed by carefully drawn up contract terms – very often based on standard terms developed for a whole industry or sector. The result is that the application of default rules may be rather infrequent in relation to certain types of service contract.

There are few exceptions in this Part to the general rule of party autonomy. Some later Articles are by their nature not susceptible to exclusion or derogation by the parties. This is the case for scope provisions and definition provisions, which exist for internal purposes. Apart from such Articles, the only provisions which are mandatory are a number of provisions in the Chapter on Treatment which are designed to protect essential interests of the patient.

NOTES

1. A separate set of contract law rules applicable not only to services involving the supply or modification of an immovable structure or movable thing but also to mere intellectual services – and apart from the obvious general contract law provisions – is only to be found in ENGLAND (Supply of Goods and Services Act 1982). Although storage (bailment) contracts are considered to be a separate category of contracts, they are also subject to the general requirements of ss. 13-17 of the Supply of Goods and Services Act 1982; cf. s. 12(3). The services part of the 1982 Act does not apply in SCOTLAND, where the common law is based upon the Roman law concept of *locatio operis faciendi*; this is however to be distinguished from the contract of employment (*McBryde*, Law of Contract in Scotland, para. 9.23). The situation is only slightly different in FRANCE and BELGIUM where all services are generally subject to the rules on the contract for work (*contrat d´entreprise* or *louage d´ouvrage* CC arts. 1779 and 1787 ff), with the exception however of mandate (CC arts. 1984 ff) and storage (CC arts. 1915 ff) services. The concept of the contract for work is very wide: it covers any contract by which one party agrees to perform work for another party on an independent basis. It includes not only services having as their object immovable structures and movable things but also intellectual services (Cass.civ. III, 28 February 1984, Bull.civ. III, no. 51). This means that the general provisions on the contract for work (CC arts. 1710, 1779 and 1787 ff) also apply to design, information, and treatment services.
2. In many systems storage services (or contracts for deposit) are dealt with separately from other services: see AUSTRIAN CC §§ 957 ff and Ccom §§ 415 ff; GERMAN CC §§ 688 ff and Ccom §§ 467 ff); GREECE CC arts. 822 ff; ITALY CC arts. 1766

ff; THE NETHERLANDS CC arts. 7:600 ff; POLAND CC arts. 835 ff and 853 ff, PORTUGAL CC arts. 1185 ff and Ccom arts. 403 ff) and SPAIN CC arts. 1758 ff. SCOTTISH law again follows Roman law in recognising contracts for deposit (*Stair*, The laws of Scotland VIII, 'Deposit').

3. As regards the qualification of services other than storage or deposit, many systems distinguish between contracts for work involving material services and pure contracts of service involving only the provision of intellectual or similar services. The systems of AUSTRIA, GERMANY, GREECE, ITALY, THE NETHERLANDS, POLAND, PORTUGAL AND SPAIN – unlike the systems of France and Belgium – distinguish in different ways material services from intellectual services. In Austria and Germany, for instance, most material and intellectual services (apart from storage services) are subject to the provisions on contracts for work (*Werkvertrag*) (Austrian CC §§ 1165 ff; German CC §§ 631 ff). It is debated in Austria, however, whether this qualification fits treatment services better than the qualification of pure service contracts *(Dienstvertrag)*. This issue is not debated in Germany where treatment services are indeed qualified as pure service contracts, a qualification which can also cover information services. The situation in Austria appears to be similar to that in Greece where all services (again, with the exception of storage) are subject to the rules on contracts for work (see CC arts. 681 ff), but where some seem to prefer the rules on labour contracts (see CC arts. 648 ff) to apply to treatment contracts. A different point of view is taken in The Netherlands, Portugal, Spain and Italy where mere intellectual services and material services (other than storage services) are qualified differently. In The Netherlands the general provisions on *opdracht* (CC arts. 7:400 ff) are applicable to intellectual services, with additional provisions to be found in CC 7:7.5 on treatment services. On the other hand, services involving the supply or modification of an immovable structure or movable thing are covered by the provisions of CC arts. 7:750 ff *(aanneming van werk)*. In Portugal the latter services fall within the scope of the contract of *empreitada* (CC arts. 1207 ff) whereas an intellectual service is considered to fall under the scope of the contract of *mandato* (CC arts. 1157 ff). Likewise, in Spain, CC art. 1544 distinguishes material contracts for work (*contratos de obra*) from mere intellectual contracts for services (*contratos de servicio*). A similar distinction is made in Italy, where material services *(contratto d´opera* or *appalto)* are distinguished from intellectual services *(contratto d´opera intellectuale)*, although general provisions on material services (CC arts. 2222 ff and 1655 ff) may also be relevant for intellectual services (CC arts. 2229 ff)) SCOTTISH law sometimes distinguishes the contract of supply of work and materials from contracts purely for work or services (*McBryde*, Law of Contract in Scotland, para. 9.24; cf. Supply of Goods and Services Act 1982 s. 11A(3)).

4. In FINLAND and SWEDEN, specific legislation exists governing consumer service contracts (Finland, see Chapter 8 of the Consumer Protection Act on certain consumer service contracts; Sweden, see Consumer Services Act). If the contract is not a consumer contract, sales law applies in Finland and Sweden by way of analogy when this is considered appropriate.

5. For more detailed notes, and further references, on the classification of different types of service contracts in European national systems, see PEL SC, Notes to art. 1:101.

IV.C.–1:102: Exclusions

This Part does not apply to contracts in so far as they are for transport, insurance, the provision of a security or the supply of a financial product or a financial service.

COMMENTS

The contracts excluded by this Article are of great importance to practice, but there are powerful reasons for not including them. Contracts for insurance and guarantee are governed by their own sets of provisions in these model rules. Contracts for financial services and transport are of a specialised nature and are subject to, or likely to be subject to, initiatives at EU level. The words "in so far as" leave room for the rules on mixed contracts to operate (see II.–1:107 (Mixed contracts)). This means, for example, that a contract for the performance of a maintenance service on a movable and the transport of the movable would be within the scope of this Part so far as the maintenance service was concerned.

The exclusions in this Article are without prejudice to the general exclusions in Book I. One such exclusion is employment relationships. Employment contracts raise highly political issues relating to the protection of employees. They also have many specific features and particularities which would make it difficult to include them within the general rules on service contracts.

NOTES

1. Although there are no general rules for service contracts in the SPANISH law, all of the types of contract mentioned in this article are specifically regulated: the transport contract in Ccom arts. 349 ff and in the Ground Carriage Act 1987, the insurance contract in the Insurance Contract Act. Security contracts are ruled by the provisions of CC arts. 1822 ff. Supply contracts are regulated only by administrative law (Public Sector Contracts Law art. 9).

IV.C.–1:103: Priority rules

In the case of any conflict:

(a) the rules in Part IV.D. (Mandate) and Part IV.E. (Commercial agency, franchise and distributorship) prevail over the rules in this Part; and

(b) the rules in Chapters 3 to 8 of this Part prevail over the rules in Chapter 2 of this Part.

COMMENTS

This Article is intended to resolve any doubts about the relationship between different sets of provisions. The special rules for mandate contracts (which are contracts for the provision of a particular kind of service) and the rules on commercial agency, franchise and distributorship prevail over the general rules in this Part. (As between mandate and these other contracts, the rules for these other contracts prevail (see IV.E.–1:201 (Priority rules)). The general rules for all service contracts in Chapter 2 apply to the specific types of service contract covered in the subsequent Chapters (as well as to other innominate service contracts), but as the rules for those special types of contract are more specific they prevail over the general rules in Chapter 2.

CHAPTER 2: RULES APPLYING TO SERVICE CONTRACTS IN GENERAL

IV.C.–2:101: Price

Where the service provider is a business, a price is payable unless the circumstances indicate otherwise.

COMMENTS

A. General idea

This Article imposes an obligation on the client to pay a professional service provider a price for the service the latter agrees to perform. Depending on the type of service, there are various methods of determining the price to be paid under a service contract. For some services it is customary to agree on the payment of a fixed price.

> *Illustration 1*
> A building constructor is commissioned by the local authorities to build an extension wing to the town hall. The parties agree that the work will be carried out for the total sum of € 800,000.

In other cases the service provider may be paid on the basis of an agreed tariff, such as an hourly rate.

> *Illustration 2*
> The owner of a house asks a painter to paint all ceilings, walls and doors of the house. The parties agree that the painter will be paid €12.50 per hour of work done.

> *Illustration 3*
> A meat trader agrees with a storer that the latter will store a shipment of Argentinean beef for the price of € 35.00 per ton per week.

Sometimes the agreement will be that no price is payable unless a result is obtained.

> *Illustration 4*
> A solicitor agrees with the victim of a work accident that she will try to obtain financial compensation from the victim's employer for all loss suffered as a result of the accident. The parties agree that the solicitor will be paid a percentage of the compensation obtained and that she will not be paid for the legal services rendered if no compensation is obtained.

It may happen that the parties do not state a price in the contract. The reason for this may be that – as is the case with some services – it is not possible to determine the price prior to the conclusion of the contract. The fact that the parties failed to determine a price does not mean that there is no service contract. The service provider will simply be entitled to payment of the price in accordance with the general rule in II.–9:104 (Determination of price). This provides that the price payable is the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price. This will

result either in a fixed price or in a price to be determined on the basis of a generally charged tariff.

Illustration 5
A doctor agrees to perform a vasectomy on a patient. The parties did not discuss the financial aspects of the operation.

In this example, the doctor may charge the patient for the operation, but will have to observe the generally applicable tariffs.

Illustration 6
An architect agrees to design a new office for a law firm. When the design is completed, the architect finds a builder who is prepared to carry out the work for € 1,500,000.

In this example, the architect may charge the law firm for the design services, even if the parties did not explicitly agree in advance on payment. Assuming that it is general practice that an architect is paid 10 per cent of the price to be paid for the construction of the designed building, the fee for the design service will be € 15,000.

B. Only unless otherwise agreed

This is only a default rule. The parties can contract out of it. A business can agree to perform a service gratuitously. However, the mere fact that no price is stated in the contract will not be sufficient for such contracting out.

NOTES

I. Overview

1. Service providers are generally entitled to payment of a price for services rendered, even if the parties to the service contract did not agree to that in express wording: AUSTRIA CC § 1152, ENGLAND Supply of Goods and Services Act, 1982 s. 15(1), FINLAND ConsProtA chap. 8 § 25, FRANCE CC art. 1710, ITALY CC art. 1655, THE NETHERLANDS CC arts. 7:750(1), 7:764, PORTUGAL CC art. 1154, SPAIN CC art. 1544. For SCOTTISH law see *McBryde*, Law of Contract in Scotland, para. 9.44. Occasionally, entitlement to payment of a price is subject to the requirement that the service is generally considered to be done only for remuneration: GERMANY CC §§ 632(1), 689, GREECE CC art. 682(1), or subject to the requirement that the service provider acts in the exercise of a business: The Netherlands CC arts. 7:405(1), 7:601(1)), Portugal CC arts. 1158, 1186. Express wording or some indication of an implied intention of the parties as regards the service provider's entitlement to a price is sometimes needed with respect to storage services rendered in non-commercial relations: AUSTRIA CC § 969, France CC art. 1917, Italy CC art. 1767, Spain CC art. 1760. Sometimes separate rules exist for commercial storage services, stating that the service provider is entitled to payment of a price in principle: Austria (Ccom § 420), Germany (Ccom § 467(2)), Portugal (Ccom art. 404), Spain (Ccom art. 304).

2. If the service provider is entitled to payment of a price and if the parties neither agreed on the amount of that price nor on the manner of its determination, the price is calculated either with the help of the criterion of a reasonable price: AUSTRIA CC § 1152, ENGLAND Supply of Goods and Services Act 1982, s. 15(1), FINLAND ConsProtA chap. 8 § 25, THE NETHERLANDS CC art. 7:752(1), or with reference to what is customary: Austria Ccom § 420, GERMANY CC § 632; Ccom § 467(2), ITALY CC art. 1657, PORTUGAL Ccom art. 404(1), SPAIN Ccom art. 304, or with reference to both criteria: Greece CC art. 682(1), The Netherlands CC arts. 7:405(2), 7:601(2), SCOTLAND *McBryde*, Law of Contract in Scotland, para. 9.45. Sometimes it is relevant to ask what is customary at the place of the service provider: Austria CC § 969, or at the place where the service is to be performed: Germany BGH, BB 1969, 1413, or what is usually charged by the service provider for similar services: The Netherlands CC art. 7:752(1), Portugal CC art. 883 read with art. 1211. When determining what is a reasonable or customary price, tariffs and fees established by special regulations or by competent authorities or authorised associations are sometimes considered to be an important factor: Austria, Germany, Greece, Italy, Portugal and Scotland (*McBryde*, Law of Contract in Scotland, para. 9.46). If the matter cannot be resolved by the application of these criteria, it is sometimes left to the courts to determine the price: France (Cass.civ. III, 12 December 1972, Bull.civ. III, no. 674; Cass.civ. I, 4 October 1989, Bull.civ. I, no. 301), Italy CC art. 1657.

II. Entitlement to price

3. According to the AUSTRIAN CC § 1152, the service provider is entitled to payment of a price in the event that the parties did not expressly or impliedly agree on such payment. As for storage services subject to the Austrian CC § 969 states that a price may be demanded for the service only when so provided expressly or tacitly. In case of commercial storage services the storer is entitled to payment of a price on the basis of Ccom § 420.
4. Under ENGLISH law if the parties did not agree on payment of a price, the client's obligation to pay a price follows from Supply of Goods and Services Act 1982, s. 15(1).
5. In FRANCE, if the parties did not agree on payment of a price for a service under a contract for work, the contract is nevertheless valid and a price must be paid (CC art. 1710; Cass.civ. I, 24 November 1993, Bull.civ. I, no. 339, RD imm. 1994, 248; Cass.civ. III, 20 February 1996, Bull.civ. III, no. 9). As to deposit, this case law is considered to be applicable as well, notwithstanding the fact that CC art. 1917 states that such services are presumed to be rendered gratuitously in principle.
6. If the parties to a contract for work under GERMAN law did not explicitly or indirectly agree on the price of the service, CC § 632(1) provides that they are deemed to have agreed that a price is to be paid if the work that is to be done is considered be done only for remuneration. As to storage services, CC § 689 is to the same effect. In case of commercial storage services the storer is entitled to payment of a price on the basis of Ccom § 467(2).
7. If the parties to a contract for work under GREEK law did not agree on payment of a price, a price may nevertheless be due on the basis of CC art. 682(1). This Article states that payment is deemed to be tacitly agreed if, under usual circumstances, the service is performed solely for remuneration.
8. A price is due for services qualified as *appalto* under ITALIAN law, even in the event that parties did not agree on the subject matter (CC art. 1655). Pursuant to CC

art. 1767 a storage service is presumed to be gratuitous, except for those cases in which from the professional quality of the storer or other circumstances, a different intention may be assumed.

9. In the Netherlands, if a service can be qualified as *aanneming van werk*, following CC art. 7:750(1), the client must pay a price. This is even so when the parties did not explicitly agree on a price. The same goes for services qualified as *overeenkomst inzake geneeskundige behandeling* (CC art. 7:764). No price is due, however, for services qualified either as *opdracht* (cf. TM, p. 987) or as *bewaarneming* (cf. TM, Parl. Gesch. InvW 7, p. 394), unless the service provider acts in the exercise of a business (see for *opdracht* CC art. 7:405(1) and for *bewaarneming* CC art. 7:601(1)).

10. Definitions of the contract of specific work under POLISH law (CC art. 627), the building contract (CC art. 647) and the storage contract (CC art. 853) indicate that these contracts are concluded against remuneration. Rules on the contract of specific work provide rather detailed regulation concerning the price (CC arts. 628–632). The price can be fixed directly, or the parties may only indicate in the contract the basis for its calculation (CC art. 628(1)). If the contract is qualified as a mandate (CC art. 735) or as a safe-keeping, the service provider is entitled to the remuneration unless it follows from the contract or from the circumstances that the service is to be provided without remuneration (CC art. 836).

11. According to the PORTUGUESE CC art. 1154, if the contract can be qualified as *prestação de serviços*, the service provider is entitled to payment of a price. CC art. 1155 identifies three types of *prestação de serviços*, two of which are subject to an additional rule as regards the service provider's entitlement to a price: in the event of services qualified either as *mandato* (CC art. 1158) or as *depósito* (CC art. 1186) the contract is presumed gratuitous, unless the service provider carries out the service as a profession in which case the contract is presumed onerous. In the event of commercial storage services, it is presumed that a price must be paid (Ccom art. 404).

12. In SCOTTISH law the entitlement to remuneration is implied at common law (*McBryde*, Law of Contract in Scotland, para. 9.44).

13. According to the SPANISH CC art. 1544, a price must be paid for services under a contract for work. As to deposit, the contract has a gratuitous character, unless agreed otherwise (CC art. 1760). On the contrary, Ccom art. 304 states that in the event of a commercial storage service a price is due unless agreed otherwise.

III. Determination of price

14. The price to be paid to the service provider under an AUSTRIAN contract for work must be a reasonable price according to CC § 1152. Guidelines and regulations concerning fees do exist (see Rummel [-*Krejci*], ABGB I^2, §§ 1165, 1166, no. 108). The latter are not binding but serve as an indication as to the concept of reasonableness referred to in CC § 1152. As for storage services falling within the scope of the Austrian CC, the price must be calculated '*nach dem Stande des Aufbewahrers*' (CC § 969) whereas a customary price is to be paid for commercial storage services (Ccom § 420).

15. The price to be paid by the client under a contract for the supply of a service in ENGLISH law must be reasonable both under common law (*Greenmast Shipping Co. SA v. Jean Lion et Cie (The Saronikis)* [1986] 2 Lloyd's Rep 277) and according to the Supply of Goods and Services Act 1982, s. 15(1). In case of storage services provided outside the scope of a contract, the service provider is entitled to expenses reasonably incurred in the keeping of the things, *China Pacific SA v. Food Corp. of India (The Winson)* [1982] AC 939. In *The Saronikis* case the typical market price was

emphasised as an important element to be taken into account when calculating the reasonable price for the service.

16. As to FRENCH service contracts falling within the scope of contracts for work, if the parties have not determined the criterion on the basis of which the price is to be determined, it is left to the courts to determine the price, although the service provider must prove that the amount of the invoice is justified by the work performed (Cass.civ. III, 12 December 1972, Bull.civ. III, no. 674; Cass.civ. I, 4 October 1989, Bull.civ. I, no. 301). As to deposit, this case law is considered to be applicable as well.

17. If the service provider under a GERMAN contract for work is entitled to payment of a price, despite the fact that parties did not agree on a price, the price has to be determined primarily by taking into account official scales of charges and fees. If there are no official tariffs available, the usual price has to be paid. This is the price which would be payable at the time of conclusion of the contract for similar services at the place where the service is to be accomplished, according to the general views of the parties involved (BGH, BB 1969, 1413). In the case of storage services falling under the scope of the German CC, the price is to be determined by observing the official rate or – if there is none – the customary rate (cf. MünchKomm [-*Hueffer*], BGB, § 689 no. 5). Only if a customary price cannot be determined, the general provisions of CC §§ 315 and 316 apply and the storer may determine the price. For commercial storage services the remuneration in accordance with local custom is to be paid on the basis of Ccom § 467(2) together with Ccom § 354. The commercial storer may also ask for reimbursement of expenses (Ccom § 474).

18. As to the calculation of the price due under a GREEK contract for work on the basis of CC art. 682(1), it must include payment for the work done and the expenses incurred. Payment for the work done corresponds to the customary payment for similar work. This might be determined with reference either to a set of standards of payment or to a reasonable price. In addition the principles of CC arts. 371-373 and CC art. 379 apply. They state that if the determination of a performance has been entrusted to one of the contracting parties or to a third party, it is in case of doubt considered that the determination must be made by reference to equitable criteria.

19. Under ITALIAN law, if the parties to a contract qualified as *appalto* did not agree on payment of a price, the price to be paid is to be calculated on the basis of existing tariffs or customs. Tariffs to refer to are prices determined by special regulations or by competent authorities or authorised associations. Where such tariffs or customs are missing, the manner of determination of the price is left to the courts (CC art. 1657).

20. If the service provider is entitled to payment of a price and if the price has not been determined under DUTCH law, the following rule applies in case the service can be qualified either as *opdracht* or *overeenkomst inzake geneeskundige behandeling* (CC art. 7:405(2)) or as *bewaarneming* CC art. 7:601(2): the price must be calculated by the service provider according to custom; if such a customary calculated price does not exist, a reasonable price is due. As to services qualified as *aanneming van werk*, CC art. 7:752(1) is drafted in a slightly different way but amounts to the same effect. The main rule of the Article is that a 'reasonable' price is due if the parties did not determine the price in advance. In calculating such price, the prices the service provider usually charges at the time of conclusion of the contract, as well as the expectations raised by the service provider with regard to the price, are to be taken into account. Costs incurred by the provider for the execution of services are to be compensated if these costs are not included in the price (CC arts. 7:406(1) and 7:601(3)).

21. If the parties did not agree on the price under POLISH law, the manner of determination of the price depends on the type of the service contract, and refers either to the normal remuneration or to the work done. In the case of the contract of specific work, if the parties did not fix the price or indicate the basis for its calculation, it is deemed, in case of doubt, that they meant the ordinary remuneration for a work of that kind. If the remuneration cannot be determined in that way either, the remuneration due is to correspond to the justified input of labour and other outlays by the person accepting the order (CC art. 628(1)). In the case of the mandate contract, if there is no mandatory tariff and if the amount of remuneration has not been agreed on, the remuneration due is to correspond to the work done (CC art. 735(2)). If a contract is qualified as a safe-keeping contract, and the amount of the remuneration for the safe-keeping is not specified in the contract or in the tariff, the keeper is entitled to the remuneration usually accepted in the given relationships unless it follows from the contract or from the circumstances that the undertaking was to keep the thing safe without remuneration (CC art. 836).

22. If the service is qualified as *empreitada* in PORTUGUESE law (a specific type of *prestação de serviços*, see CC art. 1155) and if the price has not been fixed at the time of conclusion of the contract, the provision on price determination under the law of sales applies (CC art. 883 by force of CC art. 1211): if the price is not fixed by an administrative authority, the price is to be the market price usually asked by the service provider. If it is not possible to determine the price according to this criterion, the courts will decide according to equity (CA Lisboa, 25 June 1984, CJ 1984 III, 166. Cf. *Romano Martinez*, Direito das Obrigações[2], no. 365). As regards another type of *prestação de serviços*, namely *depósito:* if no price has been agreed, professional tariffs apply. If there are no such tariffs, the courts will adjudicate the price based on equity. If no price was agreed for commercial storage services, Ccom art. 404(1) provides that the price is to be set on the basis of local mercantile uses (cf. *Pires de Lima/Antunes Vaarela*, Código Civil anotado, p. 757).

23. In the absence of contractual provision, the price in SCOTTISH law is to be either *quantum meruit*, the customary rate or what is reasonable (*McBryde*, Law of Contract in Scotland, para. 9.45).

24. Under SPANISH law, the price that is due for services under contracts for work does not necessarily have to be calculated at the moment of conclusion of the contract but can be determined by the parties (or by a third party) at a later stage on the basis of the material and the labour used (see TS 31 May 1983, RJ 2952; *Carrasco Perera/Cordero Lobato/González Carrasco*, Derecho de la Construcción y la Vivienda[4], p. 295). According to Ccom art. 304 the price for commercial storage services is determined in accordance with the usages of the place where the storage contract was concluded.

IV.C.–2:102: Pre-contractual duties to warn

(1) The service provider is under a pre-contractual duty to warn the client if the service provider becomes aware of a risk that the service requested:

(a) may not achieve the result stated or envisaged by the client,

(b) may damage other interests of the client, or

(c) may become more expensive or take more time than reasonably expected by the client.

(2) The duty to warn in paragraph (1) does not apply if the client:

(a) already knows of the risks referred to in paragraph (1); or

(b) could reasonably be expected to know of them.

(3) If a risk referred to in paragraph (1) materialises and the service provider was in breach of the duty to warn of it, a subsequent change of the service by the service provider under IV.C.–2:109 (Unilateral variation of the service contract) which is based on the materialisation of the risk is of no effect unless the service provider proves that the client, if duly warned, would have entered into a contract anyway. This is without prejudice to any other remedies, including remedies for mistake, which the client may have.

(4) The client is under a pre-contractual duty to warn the service provider if the client becomes aware of unusual facts which are likely to cause the service to become more expensive or time-consuming than expected by the service provider or to cause any danger to the service provider or others when performing the service.

(5) If the facts referred to under paragraph (4) occur and the service provider was not duly warned, the service provider is entitled to:

(a) damages for the loss the service provider sustained as a consequence of the failure to warn; and

(b) an adjustment of the time allowed for performance of the service.

(6) For the purpose of paragraph (1), the service provider is presumed to be aware of the risks mentioned if they should be obvious from all the facts and circumstances known to the service provider, considering the information which the service provider must collect about the result stated or envisaged by the client and the circumstances in which the service is to be carried out.

(7) For the purpose of paragraph (2)(b) the client cannot reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client, in which case II.–1:105 (Imputed knowledge etc.) applies.

(8) For the purpose of paragraph (4), the client is presumed to be aware of the facts mentioned if they should be obvious from all the facts and circumstances known to the client without investigation.

COMMENTS

A. General idea

The primary purpose of this Article is to impose a duty to warn on the parties prior to the conclusion of the service contract. This duty relates to typical risks that may occur after the conclusion of the contract once the services process has started. Occurrence of these risks would go to the very heart of the contract. The service provider is to warn the client about the risks that are identified in paragraph (1), and the client is to warn the service provider about the risks mentioned in paragraph (4).

Illustration 1
A supplier of computer networks is requested by the management of a hospital to install a tailor-made network on the basis of a design made on behalf of the hospital. If the supplier were to follow the design exactly, the computer network would not serve the intended purposes.

This is an example of a risk against which the service provider may have to warn, subject to the test of paragraph (6), which is explained below.

Illustration 2
A civil engineering constructor offers to excavate a piece of land and to remove the excavated soil to a nearby depot by truck. The constructor offers to perform the service for a fixed price within a fixed period of time. The offer is based on the constructor's assumption that the subsoil of the land is sufficiently condensed to support the constructor's large and heavy excavators without additional measures. This assumption is made known to the client. Geo-technical data on neighbouring land seem to confirm the constructor's point of view, but the client has specific knowledge of the fact that the subsoil of his land contains large pockets of soft and unstable clay. Extra measures are required to support the excavators, which will slow down the service and will make the service more costly.

This is an example of a risk which may give rise to a duty on the client to warn, subject to the test of paragraph (7), which is explained below.

These mutual duties to warn have in common that the parties only have to warn each other if the risks are obvious to the party subject to the duty, or if they are actually discovered by that party. This principle is reflected in paragraph (1) in conjunction with paragraph (6) as regards the service provider's duty to warn and in paragraph (4) in conjunction with paragraph (7) as regards the client's duty to warn.

An additional requirement that needs to be fulfilled under paragraph (4) in order to impose on the client a duty to warn, relates to the unusual character of the risk. This additional requirement is to prevent the client from being under a duty to warn if the risk mentioned in paragraph (4) is considered to be obvious to the service provider as well. This can be illustrated by using a modification of *Illustration 2* above:

Illustration 3
A civil engineering constructor offers to excavate a piece of land and to remove the excavated soil to a nearby depot by truck. The constructor offers to perform the service for a fixed price within a fixed period of time. The offer is based on the constructor's assumption that the trucks will be able to approach and leave the land via a shortcut through a residential area. The client knows that the local authorities will not allow heavy trucks to drive through that area, which will slow down the service and will make the service more costly.

The mirror image of this approach can be found in paragraph (2) which negates the service provider's duty to warn in the event that a risk is either known to, or obvious to, the client.

Illustration 4
A hairdresser is asked by a customer to dye her hair. The hairdresser proposes to perform the service by using 'Inecto' hair dye. The hairdresser does not inform the customer that some customers in the past suffered from an allergic reaction to the use of 'Inecto' hair dye. The customer in question did experience such an allergic reaction some years ago, when another hairdresser treated her with 'Inecto'. However, the customer does not mention that earlier experience to the hairdresser.

The additional purpose of this Article – closely linked to its primary purpose – is to stimulate the parties to exchange important information prior to the conclusion of the contract. This information particularly relates to the wishes and needs of the client for which the service is required as well as to important circumstances in which the service is to be performed.

Illustration 5
A specialised lift contractor is asked to supply and install four lifts in an office building under construction at a fixed price. In order to be able to make the offer, the contractor needs to study the plans of the building, showing the specifications as regards the lifts. The contractor will also need to know at what time during the building process the lifts are to be installed and what other contractors will be present on the building site at that time in order to take into account possible interferences with the job.

This information needs to become available to the extent that it enables the service provider to offer a tailor-made service to the client and to explain the most important characteristics of the service offered. This is the point where the connection with the service provider's pre-contractual duty to warn becomes relevant, for the extent of *that* duty depends on risks that are obvious or are discovered by the service provider given the information the service provider should have collected in order to make an informed offer to the client as regards the service that can be supplied. A modification of *Illustration 1* may explain this.

Illustration 6
A supplier of computer networks is requested by the management of a hospital to make an offer for installing a tailor-made network on the basis of a design made on behalf of the hospital. The supplier studies the design for the purpose of preparing the offer. If this investigation brings to light that the hospital will not be able to use the computer network for the intended purposes, due to a failure in the design, the supplier must warn against that risk.

The risks to be discovered also relate to risks inherent in the service that are independent of the client's needs and the circumstances surrounding the future performance of the service.

Illustration 7
A doctor is asked to perform a vasectomy on a patient. The doctor will have to warn the patient that he will not be infertile immediately after the operation. The doctor will have to do so, whether or not the patient has told the doctor that the operation is to be performed for the purpose of becoming infertile and irrespective of the question whether the patient has a steady relationship with a female partner.

Once the client has been offered the service and has been warned against the risks mentioned in paragraph (1), the client will be able to make an informed decision on the conclusion of the

service contract. Moreover, having received the offer the client will be able to perform the pre-contractual duty to warn under paragraph (4). This is in fact what the client should do in the example given in *Illustration 2* above. In that example, the client must share the client's special knowledge with the civil engineering contractor prior to the conclusion of the contract.

A service is usually offered to a particular client and tailor-made to satisfy the needs of that client.

> *Illustration 8*
> A company specialised in the development of industrial software is asked to design a computer program that will enable the client, a medical laboratory, to compare medical test results.

However, it is also possible that standard services are offered to the public in general.

> *Illustration 9*
> A garage offers to remove and change standard exhaust pipes at the fixed price of € 50.

The situation in *Illustration 9* will probably not lead to an extensive exchange of information between the service provider and a potential client, something which will most likely happen in the situation in *Illustration 8*. Nevertheless, if a rather standard service is offered to a group of clients, the duties under the present Article remain imposed on the service provider. These duties will still have to be fulfilled, bearing in mind the average purposes, conditions, circumstances, characteristics, and risks that are relevant to the average client being a member of this group.

Non-performance of a pre-contractual duty to warn under paragraph (1) or (4) will sometimes lead to the aggrieved party avoiding the contract for mistake or claiming damages for loss caused by the mistake, or both. Other remedies may also be available. The rules of paragraphs (3) and (5) supplement the normal rules on remedies. They deal with the frequently occurring situation that non-disclosure of information prior to the conclusion of the service contract causes the service to become more expensive and to take more time once the information is revealed after the conclusion of the contract.

Paragraph (3) protects the client from being confronted with a claim for compensation for extra costs and extension of time if the service provider failed to fulfil the duty to warn under paragraph (1). It prevents the service provider from unilaterally varying the terms of the contract under IV.C.–2:109 (Unilateral variation of the service contract) on the basis of the materialisation of a risk of which the client should have been warned in advance. This does not apply however if the service provider proves that the client would have entered into the contract even if warned about the risk prior to the conclusion of the contract. If the service provider succeeds in proving that, the provisions of IV.C.–2:109 will apply.

Paragraph (5) allows the service provider to claim damages and extension of time if the client failed to warn under paragraph (4).

B. Interests at stake and policy considerations

Imposing pre-contractual duties to warn on parties to a service contract raises several issues that need to be considered.

The first issue is whether pre-contractual duties to warn are to be imposed on the parties to a service contract at all. One may argue that a duty should not be imposed on a party unless that duty was freely assumed, either impliedly or expressly, at the time of conclusion of the contract. Another argument against such duties would be that they would put too much of a burden on the parties' negotiations prior to the conclusion of the service contract. On the other hand it can be assumed that both the client and the service provider will in any event be involved in a process of information exchange whenever they negotiate the conclusion of a service contract. The client will explain what is needed and the service provider will give details about the most important characteristics of the service which can be provided. Only such an exchange of information will enable the service provider to make an offer to the client, which will allow the latter to make an informed decision on the conclusion of the service contract. In the light of the information received from the other party, each party may find out that the other party is making an erroneous assumption as to the benefits that can be derived from the contract. The imposition of a duty to warn in such situations will hardly impose extra costs. It may even be beneficial to the party issuing the warning in view of the fact that a warning may prevent future disputes, which might arise once the aggrieved party finds out that the contract was concluded under a wrong assumption. The standard economic reasoning for a pre-contractual an obligation to inform is that the costs of collecting information, its supply to the other party, as well as its digestion by that other party are less than the costs of wrong decisions (the chance of a wrong decision times the damage caused by that decision, which is the difference between what a party expected to get and what it actually obtained).

A second issue is what should trigger an obligation to warn, having regard for the information that is exchanged during the negotiations. One may be inclined to draw a parallel with the approach taken to the service provider's contractual obligation to warn. There, the analysis of arguments leads to the solution that the obligation is to be triggered by inconsistencies in the information or directions supplied by the client if it is expected that following the information or directions may lead to a risk that would go to the very heart of the contract from the client's perspective. That approach may be taken here too, both as regards the service provider's and the client's pre-contractual an obligation to warn. On the other hand, one may question whether the parallel can indeed be drawn, for the contractual obligation is to be considered not only in the framework of a contract already negotiated and concluded, but also in the perspective of a service that is either in process or already completed. It is then obvious that triggering the contractual obligation to warn is related to fundamental risks that may compromise the desired outcome of the service process. It could be argued that this is not what a pre-contractual an obligation to warn should be about and that, instead, triggering such duties should be related to the desired outcome of the process of negotiating the contract.

Assuming that pre-contractual duties to warn are to be imposed on the parties to a service contract and that it is possible to establish in which situation they are to be imposed, a third issue has to be resolved. This issue involves the question how alert the parties should be during the pre-contractual information exchange in order to be able to signal assumptions on the part of the other party that may give rise to a pre-contractual duty to warn. Here, the same questions and arguments that are raised for the contractual obligation to warn may be put forward. Do the parties need to focus on wrong assumptions of the other party? Do they have

to search for such assumptions? If that were to be accepted, the process of information exchange would become very costly. These costs might even be incurred in vain, if the negotiations do not result in a contract. And even if they do result in a contract, they will have made the service more costly in any event. On the other hand, an extended pre-contractual duty to investigate one another's assumptions would prevent parties from entering into a contract that later on turns out to be less profitable than expected prior to the conclusion of the contract.

A fourth issue involves the question whether a pre-contractual duty to warn is to be imposed on a party if the other party is more competent than the average party or if it already knows of the problem to which the warning should refer. This question is particularly relevant in the context of services, where clients are frequently assisted by someone else who has – or is deemed to have – the capacity of a professional and competent adviser. The issue is also raised with respect to the contractual obligation to warn of the service provider. One argument would be that imposing a pre-contractual duty to warn in such circumstances would not only be unnecessary but also become very costly. On the other hand, it implies that one has to make a choice between an unnecessary warning and the occurrence of disappointment that is not discovered in time.

The previous issues give rise to a fifth and final issue. Parties will only be able to analyse information and give appropriate warnings on the basis of it if such information has actually been exchanged during contract negotiations. The question to be answered is, therefore, whether a pre-contractual duty to exchange information (going beyond the general pre-contractual information duties imposed in Book II, Chapter 3) is to be imposed on the parties, and what the content of that information should be. This question is closely related to the first issue raised above, questioning the need to adopt mutual pre-contractual obligations to warn. There it has been argued that pre-contractual exchange of some information is a *conditio sine qua non* if parties contemplate the conclusion of a service contract. This will particularly be the case if the service required is not standard. The information will relate to both the client's needs and to the solutions the service provider can offer to fulfil these needs. It is doubted whether parties will be able to contract with one another without such information. By the same token, it is doubted whether they would need more information in order to consider one another's assumptions, which may eventually result in a warning causing additional information exchange.

C. Preferred option

The present Article imposes pre-contractual duties to warn on both parties to a service contract. It is better to have such an Article and to limit carefully the extent of the duties it imposes than to have no provision at all. Furthermore, the duties are firmly embedded in the development of pre-contractual duties to inform, a development that has taken place and is still taking place in the jurisdictions investigated and in European private law. This development is already reflected in Book II, Chapter 3 and in the provisions on mistake in Book II, Chapter 7. It has, however, been considered necessary to deal with these duties in an Article in the present Part, in addition to those more general provisions. In service contracts pre-contractual information exchange is of crucial importance. Clear rules are needed, which are adapted to the particular context of the interrelationship between the information exchange prior to the contract and the performance of the service subsequent, to conclusion of that contract.

As to the question what kind of problems should trigger the parties' pre-contractual duty to warn, the Article follows the contractual counterpart of the obligation of the service provider under IV.C.–2:108 (Contractual obligation of the service provider to warn). This is based on the assumption that fundamental risks which – if they occur on conclusion of the contract – would compromise the desired outcome of the service process, are risks a party would want to know of prior to the conclusion of the contract. If that party were not to know of such risks at that time and if the risks occurred later on, the party would most likely argue that it would not have entered the contract or would have done so only on fundamentally different terms. An example of such a risk is given in *Illustration 1* above.

As to the questions how alert the parties should be during the pre-contractual information exchange and whether they should be on the lookout for wrong assumptions, the Article does not expect the parties to make investigations. The duty is only to warn of what the party is aware of. There is a logical difficulty in imposing a duty to warn of something of which one is not aware. However, the service provider is presumed, under paragraph (6), to be aware of risks if they should be obvious from all the facts and circumstances known to the service provider, considering the information supplied by the client and the circumstances in which the service is to be carried out. The approach implies that the service provider will have to examine carefully the client's information, including the more general information about the client's needs, because it will be the basis of any tailor-made offer. In doing this, the service provider will have to think of risks that are inherent in the service and that are independent of either what the client's needs are or the circumstances in which the service is to be provided. Wrong assumptions of the client, which will not escape the service provider's attention on studying the information as thoroughly as is necessary to prepare the offer, have to be mentioned to the client. Any active inspection aimed at discovering wrong assumptions is therefore not required.

> *Illustration 10*
> An engineer is requested by a factory to make an offer for adapting a production machine following specific functional, technical, and production requirements provided by the factory. The engineer studies the requirements for the purpose of preparing his offer. Only if this investigation at the same time brings to light that, due to an inconsistency in the functional and technical requirements, the adapted production machine will not be able to meet the production requirements, must the engineer warn the factory against that risk.

As to the client's pre-contractual duty under paragraph (4), a similar approach is adopted. The client is presumed under paragraph (8) to be aware of the relevant facts if they should be obvious from all the facts and circumstances known to the client without investigation. Again, this implies that the client will have to analyse the service provider's information contained in the latter's offer carefully, given that contractual obligations will be incurred once the offer is accepted. Wrong assumptions of the service provider, which will not escape the client's attention on studying the offer as thoroughly as is necessary to make an informed decision as to the acceptance of the offer, have to be mentioned to the service provider. Again, any active inspection aimed at discovering wrong assumptions of the service provider is not required.

> *Illustration 11*
> A management training agency is requested by a company to make a fixed-price offer for a three-day training of the company's financial staff. The company wants an 'all-in' service, meaning that the fixed price offered not only covers training fees and

additional training costs, but also catering and accommodation costs. Having received the offer of the agency, it becomes clear to the company that the agency has made a computation mistake to its own detriment.

In this example, the client has become aware that if the service provider is not told about the computation mistake, the supply of the service will become more costly for the latter. The client therefore must warn the agency.

The same approach is adopted for the purpose of establishing whether a party's competence or knowledge is such as to negate the other party's duty to warn. First, as regards the client's duty to warn, paragraph (4) states that the duty only concerns an 'unusual' risk. The word 'unusual' is used in order to negate the client's pre-contractual duty to warn in the event of foreseeable facts and circumstances, which the service provider should take into account – as stated in paragraph (1) in conjunction with paragraph (6) – on studying the client's information as thoroughly as is necessary to prepare the tailor-made offer.

Illustration 12
A meat trader agrees with a storer that the latter will store a shipment of beef. The trader does not inform the storer that meat will perish if it is not stored in frozen condition. There is no breach of the duty to warn as this is a usual and obvious risk.

Paragraph (7) gives an additional clarification to the question whether and, if so, to what extent the client's own competence or the competence of any other person assisting the client at the pre-contractual stage can be taken into account in determining whether the client can reasonably be expected to know of a risk. The principle adopted is that the client's competence by itself is insufficient to support the prima facie conclusion that the client can reasonably be expected to know of a risk at the pre-contractual stage. The same goes when someone else advises the client: The competence of that other person does not automatically lead to the conclusion that the client can reasonably be expected to know of the risk at the pre-contractual stage. This is particularly to protect the interests of Small and Medium-sized Enterprises (SME's) and consumers that are advised – often for free – by their relatives or friends. The situation becomes different, however, if a client specifically hires a professional adviser for the specific purpose of acting as an agent during the pre-contractual stage of the service contract. Any knowledge or competence of such an agent will be imputed to the client under paragraph (7) in conjunction with II.–1:105 (Imputed knowledge etc) and may amount to knowledge or reason to know of the client, which will then negate the service provider's pre-contractual duty to warn under paragraph (2).

Finally, it is implied in paragraph (6) of the present Article that the service provider should collect information prior to the conclusion of the contract about what the client wants. As explained above (see Comments A and B), this involves information the exchange of which is already inherent in service contract practice.

The duties imposed by this article are related to the pre-contractual duty to inform under Book II, Chapter 3 and the similar duty that is implied in the provisions on mistake in Book II, Chapter 7.

D. Relation to other chapters of this part

The pre-contractual exchange of information between a service provider and client, as required under the present Article, will not always be relevant to the same extent to all types of services. Differences can be noted which are caused by the characteristics related to each type of service. An important aspect that has to be taken into account is that the client cannot always objectively expect to obtain certainty in advance as regards both the quality and the cost of the result that will be achieved through the service to be performed. The question whether or not it is possible to provide such certainty in advance depends on the ability to both identify and control all the factors capable of influencing the result of the service and its cost. In general terms these factors are: (1) the particular needs of the client, (2) the service provider's solution that fits these needs, and (3) the surrounding circumstances in which that solution is to be applied in order to meet the client's needs. Pre-contractual exchange of information regarding these aspects *only* becomes relevant if one or more of these aspects are neither identified nor controlled sufficiently prior to the conclusion of the contract and – in the unfortunate event they present themselves after the conclusion of the contract – if they cause a substantial increase in the costs or a decrease in quality of the outcome of the service. The most prominent example of this is probably to be found in the field of construction contracts, given the particularities of a construction process, which will be discussed below after the following illustration:

> *Illustration 13*
> A regional authority requests a civil engineering contractor to make an offer for the construction of a flyover on the basis of a design prepared by the authority's planning department. The flyover is to be constructed in the vicinity of a motorway junction.

First, and this is also shown in the illustration, in construction one can see a strong interrelationship between the abstract factors referred to earlier. The solution to be applied by the contractor very much depends on the client's specific needs, given the particular surrounding circumstances in which the new building or other immovable structure has to be realised. This further explains why there is no such thing as a standardised construction service. Secondly, in theory it is possible to identify and control the result of the construction process in advance, provided the client's needs and the surrounding circumstances in which the building is to be built are thoroughly mapped and checked in advance, usually by means of a design that is supplied by or on behalf of the client to the contractor. Thirdly, given the ability of the parties to control the output of this technical process, they are also able to calculate and check in advance the total costs that will be incurred. This explains why it is very common in construction contracts to agree on a fixed price for the construction service. Fourthly, parties clearly have an interest in identifying and controlling both the quality and the costs of the result of the construction process as much as possible in advance: if they refrained from doing so as regards one or more of the aspects referred to above, they run the risk of facing considerable problems after the contract has been agreed on. For instance, they might find out that the real costs of the building exceed the agreed price. Also, the quality of the outcome or the timely performance of the construction project are likely to be endangered as a result of the contractor's solution being insufficiently attuned to the client's needs given the surrounding circumstances in which the building is to be realised.

Taken together, the above particularities are the reasons why it is common in construction to map out in detail – in advance – the client's needs and the technical solution to meet these needs, attuned to the surrounding circumstances in which that solution is to be applied by the contractor. The particularities further explain why there is a clear distinction between the pre-

contractual stage on the one hand and the contract stage on the other. Finally, the particularities show why pre-contractual exchange of information as required under the present Article is regarded to be most relevant. In order to be able to offer both a tailor-made solution and a fixed price for the construction of the building required by the client, the contractor needs to know in advance what the specific needs of the client and the particular surrounding circumstances are in which the construction service is to be performed.

A parallel can be drawn between the construction of a new building or other immovable structure and the situation in which a service is centred on an existing movable or incorporeal thing, which is the case in the event of a processing service or a storage service. However, as will be explained below, that parallel exists only to a certain extent. The parallel will be drawn for processing contracts, but the analysis is also applicable to storage contracts. Where appropriate, a parallel with other particular service contracts will be drawn.

As regards the processing of an existing movable or incorporeal thing, there is an interrelationship between the needs of the client, the processor's solution that fits these needs, and the surrounding circumstances in which that solution is to be applied by the processor in order to meet the client's needs. The following illustration shows this:

Illustration 14
A craft upholsterer agrees with a client to upholster the seats of six antique armchairs belonging to the client by using a special type of fabric selected by the client.

There is, however, a crucial difference with construction, in the sense that – apart from the particularities of the thing that is to be processed – there are hardly any influential surrounding circumstances in which the processing service is to be carried out. The costs and the results of the service entirely depend on the particularities of the thing, given the client's needs. Particularly if both that thing and the client's needs are rather standard, the absence of surrounding circumstances likely to influence the outcome of the service process will make it likely that the client's needs can be satisfied by supplying a standardised processing service, as is shown in the following examples:

Illustration 15
A car owner requests a garage to replace the exhaust pipe of his car.

Illustration 16
A dry cleaner agrees to dry clean a raincoat for a client.

In such cases, the duties under the present Article will likewise be limited to an exchange of standard information. Given that the processor, in many of these situations, is probably also able to offer a fixed price immediately after the client's needs are known and that the processor is sometimes even able to do so without performing a superficial inspection of the thing to be processed, the pre-contractual exchange of information will be very similar to the one preceding the conclusion of a sales contract. This type of processing contract – and the scenario that is described for the conclusion of such contracts – also resembles contracts involving the supply of factual information under Chapter 7, an example of which is given in the following illustration:

Illustration 17
A pension fund agrees with the online data services department of the stock exchange that it will have continuous access to electronic information as regards the actual value of shares traded at the stock exchange.

The situation will become different, however, if the processing service is no longer standard, given the particularities of the client's needs and the thing that is to be processed. Pre-contractual exchange of information will then become more relevant and will probably be necessary if the processor is to be able to offer a fixed price. This will, for instance, be the case in the following example:

Illustration 18
An engineer is requested by a factory to make an offer for changing a production machine following specific functional, technical, and production requirements provided by the factory.

The situation may be very similar in the case of design contracts, as is illustrated in *Illustration 8*.

There is also another gradual difference between the construction of a new building or other immovable structure and the processing of an existing movable or incorporeal thing (this is, for instance, also where the parallel between processing contracts and storage contracts ends), for it will not always be possible to identify and control in advance the aspects that will influence the result of a processing service – either standard or tailor-made – due to which pre-contractual exchange of information regarding these aspects will become less useful. This will particularly be the case if pre-contractual exchange of information is not essential for calculating a fixed price that is to be paid for the processing service. In this situation, however, there will still be a clear distinction between the pre-contractual and the contractual stage of the processing service.

Illustration 19
The owner of a seventeenth century painting, which has been exposed to smoke and other damaging conditions for centuries, agrees with a specialist restorer to try to bring back the original colours of the painting without damaging it.

The position may be similar for contracts involving the supply of evaluative information under Chapter 7.

Illustration 20
A company involved in a difficult legal dispute requests a law professor to investigate the documents related to the dispute and to assess the company's chances of winning the dispute in court.

The distinction will become blurred if the factors that influence both the results *and* the costs of the processing service can no longer be identified and controlled in advance and the pre-contractual exchange of information will – again – become less useful for that purpose. Given that the processor in such a situation will probably not offer the performance of the service at a fixed price, the parties will hardly notice the passing of the pre-contractual stage of such a service.

Illustration 21
During an archaeological excavation, the shattered remains of a large collection of Roman pottery are discovered. The State contracts a specialised company to try to restore the collection.

This type of processing contract – and the scenario that is sketched out for the conclusion of such contracts – resembles contracts involving the treatment of persons under Chapter 8.

Illustration 22
A patient has suffered from an ongoing headache for several weeks and eventually decides to contact a doctor.

E. Remedies

If the service provider's pre-contractual failure to warn causes the service not to achieve the result stated or envisaged by the client (subparagraph (1)(a)), the latter will probably seek resort to a remedy under Book III, Chapter 3 on the basis of the service provider's non-performance of the main obligation under IV.C.–2:106 (Obligation to achieve result). As explained in Comment A to that Article, however, the obligation of that Article is not imposed on the service provider in every service contract. Another option may be to try to claim damages on the basis that the service provider failed to perform a *contractual* obligation to warn. That second route would also be an option for the client in the event that the risk mentioned in subparagraph (1)(b) occurs. A third option for the client – in the event that either the risk under subparagraph (1)(a) or under subparagraph (1)(b) is the result of the failure to warn – would be to try to avoid the contract on the basis of mistake. This option will sometimes be hypothetical, given that it may be impractical or unprofitable to stop a service process and invoke the rules on the effects of avoidance.

On the other hand, whether or not the client exercises the right to avoid the contract, damages may still be recovered under II.–7:214 (Damages for loss) for loss caused by the mistake. If the risk mentioned in subparagraph (1)(c) occurs, the client does not need to resort to a remedy but can simply block the service provider's claim on the basis of paragraph (3), unless the service provider can prove that the client would have entered into the contract even if warned about the risk prior to the conclusion of the contract.

If the client fails to perform the duty to warn under paragraph (4), the service provider may either not achieve the result the client has in mind or damage other interests of the client in performing the service. In this case, the client might try to resort to a remedy on the basis that the service provider did not perform the obligations under the contract. Here, however, the client's failure to warn will prevent the client from resorting to a remedy for the service provider's non-performance to the extent that that failure caused the non-performance (see III.–3:101 (Remedies available) paragraph (3)). It is noted, however, that, after the conclusion of the contract, the service provider may come under a contractual obligation to warn under IV.C.–2:108 (Contractual obligation of service provider to warn) which concerns the same risk the client failed to warn about prior to the conclusion of the contract. In that case, the non-performance of that contractual obligation will give rise to remedies as explained in the Comments to that Article, in the event that they jointly caused the result envisaged by the client not to have been achieved.

If the client does not warn the service provider under paragraph (4), the latter may try to avoid the contract for mistake. This will, however, probably be as hypothetical as the client's option to avoid the contract in the case of the service provider's failure to warn under paragraph (1), for the risk that occurs due to the client's failure to warn is that the service has become more expensive and time consuming.

The service provider will probably want to carry on with the service and earn the fruits of the contract as long as there is compensation for the loss sustained. The service provider is unlikely to be able to seek damages for mistake under II.–7:214 (Damages for loss) if payment of a fee based on an hourly rate was agreed on at the time of conclusion of the contract, for in that case no loss will be suffered. However, if payment of either a fixed price or a fee based on a 'no result, no pay' basis was agreed on, II.–7:214 will become relevant. However, given that the situation described is in fact similar to what may occur if the client fails to perform a *contractual* obligation to co-operate, the service provider may also seek resort under paragraph (5) of the present Article. This means that the service provider can claim both compensation for the loss occurred and extension of time to perform the service.

NOTES

I. Overview

1. Pre-contractual duties to inform have firmly developed in many European jurisdictions and are still developing. This development has influenced European law, given that several EU Directives impose pre-contractual duties to inform on suppliers of goods and services, particular in the context of consumer contracts. See for instance Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31; Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ 1987 L 42/48; Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158/59; Directive 94/47/EC of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ 1994 L 280/83; Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19; Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 2000 L 178/1. These developments are reflected in Book II, Chapter 3, Section 1 of which deals with pre-contractual information duties. In addition to general contract law provisions on mistake of fact or law, pre-contractual duties of service providers to inform have further been developed by the courts in some of the countries investigated, particularly in FRANCE, GERMANY, THE NETHERLANDS and SPAIN. The exact basis of such duties is not always firmly established. This does not appear to be regarded as a major problem in legal doctrine, given that various legal concepts seem appropriate for providing such a basis, notably the concept of good faith and *culpa in contrahendo*. Some of the countries investigated have specific statutory provisions providing a basis for explicit pre-contractual duties to inform in the framework of services: FINLAND (chap. 8 and chap. 9 § 13(1) and § 13(3) (16/1994) of the Consumer Protection Act), France (ConsC arts. L. 111-1 and L. 114-1) and The Netherlands (CC arts. 7:754, 7:753(2) and 7:748). The pre-contractual duty of the service provider involves the supply of

information on both the characteristics and risks of the service offered, if and to the extent that it is foreseeable for the provider that such information may influence the client's decision to enter into the contract.

II. Pre-contractual duties to inform

2. Under ENGLISH law, a party induced to enter into a service contract by a pre-contractual 'statement' of another party can claim damages under various headings: in the tort of deceit, if the statement was made fraudulently; in the tort of negligence, if the claimant can establish the conditions for the existence of a duty of care under *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465, or under the provisions of the Misrepresentation Act 1967 (cf. *Chitty* on Contracts I[29], no. 1-072). The latter Act also entitles the aggrieved party to rescind the service contract. English law is reluctant, however, to accept pre-contractual liability outside the scope of 'statements'. The general rule is that mere non-disclosure of information does not constitute misrepresentation, for there is, in general, no duty on a party to a contract to disclose material facts that would be likely to affect the other party's decision to conclude the contract (cf. *Chitty* on Contracts I[29], no. 6-013). Exceptions to this rule are limited and involve (1) contracts *uberrima fidei*, or situations (2) where there is a fiduciary relationship between the parties, (3) where failure to disclose distorts a positive representation, or (4) where a person is considered guilty of misrepresentation by conduct (cf. *Chitty* on Contracts I[29], nos. 6-013 ff, 6-079 ff, and 6-135 ff). Further development of pre-contractual duties to inform are said to be hampered by the fact that English law has not committed itself to overriding general principles of good faith and *culpa in contrahendo* (cf. *Chitty* on Contracts I[29], nos. 1-019 and 1-076).

3. As regards services provided to consumers, under FINNISH law, chap. 8 § 2 (16/1994) of the Consumer Protection Act provides that contract terms derogating from the provisions of that chapter to the detriment of the consumer are void unless otherwise provided. Chap. 9 § 2 (16/1994) of the ConsProtA, applicable to construction services provided to consumers, is to the same effect. Given these basic rules, it then follows from chap. 8 § 13(1) that a service is considered to be defective if it does not conform to the information that the service provider has given on the service or on other circumstances relating to the quality or use of the service before the conclusion of the service, and which can be deemed to have had an effect on the decision-making of the client. The rule of chap. 8 § 13(1) is extended in § 13(3) to non-disclosure of information on circumstances the service provider should have been aware of and which the client could justifiably have been expected to be notified of. Chap. 9 § 14(1) and § 14(3) on construction services are to the same effect.

4. Pre-contractual duties to inform in FRENCH law are widely applied (*Fabre-Magnan*, De l´obligation d´information dans les contrats, nos. 285 ff) and can first of all be derived from CC art. 1110 *(erreur)* and from CC art. 1116 *(dol)*, both allowing a misinformed party to nullify the service contract on fulfilment of certain requirements. Additional pre-contractual duties to inform, however, have long been accepted by the courts outside the scope of these general provisions (cf. *Ghestin*, La formation du contrat[3], no. 623; *Larroumet*, Les obligations. Le contrat, no. 376), with not much contemplation on the exact basis of such duties (cf. *Larroumet*, Les obligations. Le contrat, no. 376; *Girot*, User Protection in IT Contracts, p. 262). Further pre-contractual duties to inform may follow, for some suppliers of services, from specific statutory provisions (*Ghestin*, La formation du contrat, nos. 608, 612 and 619) and for all suppliers from ConsC arts. L. 111-1 and L. 114-1. Pre-contractual duties to inform, as developed by the courts, have been categorised and developed into a system by legal doctrine (see for instance *Ghestin*, La formation du contrat, no. 594; *Fabre-*

Magnan, De l´obligation d´information dans les contrats, no. 281-284), but the distinctions drawn do not always seem to be observed by the courts. It is undisputed, however, that both the courts and legal doctrine acknowledge a duty of the service provider to supply information at the pre-contractual stage. Such information relates to the characteristics and the risks of the service offered, provided that it is foreseeable for the service provider that this may influence the client's decision to enter into the contract (cf. *Ghestin*, La formation du contrat, no. 643). Case law is abundant on the obligation to warn the client. For example a travel agency is bound to inform the traveller about the requirement of visas, vaccinations and insurance policies (Cass.civ. III, 3 November 1983, JCP 1984.II.20147). An architect must inform the client that the land he plans to buy is unsuitable for construction (Cass.civ. III, 25 March 1981, Bull.civ. III, no. 73).

5. In GERMAN law the basic rule under general contract law is to be found in CC § 119 allowing a party to avoid a service contract on the basis of mistake of fact or law. In practice, however, the courts will more frequently be asked to consider claims for damages in the context of *culpa in contrahendo*. Such claims will be allowed, provided that it can be established that the required standard of care was not observed, having regard to the rule of CC § 276 (cf. Palandt [-*Heinrichs*], BGB, § 276, nos. 65-103). Pre-contractual duties to inform in the framework of services contracts may also follow from specific statutory provisions (*Barendrecht and Van den Akker*, Informatieplichten van dienstverleners, no. 21). Although the courts occasionally attempt to approach the subject matter of pre-contractual duties to inform in a manner consistent for all types of services (see for instance BGH VersR 1996, 471), it is hard to discover an all-embracing system in this respect. Nevertheless, several authors agree, on the basis of an analysis of case law and legal doctrine, that the duty requires a service provider to supply information on both characteristics and risks of the service offered, if and to the extent that it is foreseeable for the provider that this may influence the decision of the client to enter into the contract. On the other hand, this does not seem to require the service provider to investigate in detail all the needs and circumstances of every possible client (cf. *Abegglen*, Aufklärungspflichten in Diensleistungsbeziehungen, p. 172; *Borgmann and Haug*, Anwaltshaftung, pp. 89, 90 and 95; *Ganter*, WM 1996, p. 703; *Haug*, Die Amtshaftung des Notars, no. 470).

6. The main rule under general DUTCH contract law is that mistake of fact or law will only enable the party concerned to nullify the service contract (CC art. 6:228 and CC art. 3:44(1) in conjunction with (3)). Although an additional claim for damages will sometimes be possible as well (cf. HR 2 February 1993, NedJur 1995, 94), Dutch case law and legal doctrine have explored several other legal concepts which could support pre-contractual duties to inform of a party to a service contract, thus enabling the other party to seek remedies other than avoidance of the contract. Although dogmatic difficulties are acknowledged in this respect, pre-contractual duties to inform are widely accepted in the framework of services (see for an overview: *Barendrecht and Van den Akker*, Informatieplichten van dienstverleners, nos. 90-109; *Girot*, User Protection in IT Contracts, pp. 233 ff). For some services, the duty also follows from specific statutory provisions. As regards services qualified as *aanneming van werk*, the duty of the service provider can be based on CC art. 7:754 and on CC art. 7:753(2), whereas CC art. 7:748 provides a basis for services qualified as *overeenkomst inzake geneeskundige behandeling*. See also CC art. 7:501 *(reisovereenkomst)*. Analysis of case law and legal doctrine shows that the service provider's pre-contractual duty involves the supply of information on both characteristics and risks of the service offered, if and to the extent that it is foreseeable for the provider that such information may influence the client's decision to enter into the contract (cf. *Barendrecht and Van*

den Akker, Informatieplichten van dienstverleners, nos. 114-269). It is doubted whether this would require the service provider to investigate in detail all needs and circumstances of every possible client (cf. *Barendrecht and Van den Akker*, Informatieplichten van dienstverleners, nos. 122-126).

7. The POLISH CC does not contain rules pertaining to a pre-contractual obligation to warn; the obligation is established after the conclusion of the contract. It is questionable whether a court would uphold the existence of a pre-contractual obligation to warn, drawn from the obligation of loyal contracting. Avoidance for error may, however, sometimes be possible (CC art. 84(1)).

8. Although giving slightly more recognition than English law to ideas of good faith and *culpa in contrahendo*, SCOTTISH law is similarly reluctant to accept pre-contractual liability outside the scope of 'statements' (*MacQueen and Thomson*, Contract Law in Scotland, paras. 2.89-2.96).

9. Pre-contractual duties to inform of the service provider are not dealt with as such in the SPANISH CC. According to the general principle of good faith (CC art. 1258), however, a party negotiating a contract has to fulfil certain pre-contractual duties towards its counterpart, including the duty to inform (cf. *Echebarría Sáenz*, El contrato de franquicia, p. 243). It appears to be debated whether the failure of a party to disclose information at the pre-contractual stage is to be considered in the context of either pre-contractual duties, or as a matter of the validity of the contract or as a question of extra-contractual liability (cf. *Echebarría Sáenz*, El contrato de franquicia, p. 211). Pre-contractual non-disclosure of information may cause misrepresentation on the other party which affects the validity of the contract. The remedy for the aggrieved party may be the avoidance of the contract with the right to restitution and damages (CC art. 1300). The provider of the service should warn the client if there is a risk that the service may not achieve the envisaged result or damage another interests of the client. In such a case, the provider of the service has the obligation to notify the client of the existing risk, in order to avoid the frustration of the contract's purpose by modifying the content of the service (TS 30 December 2002, RJ 2003/333).

IV.C.–2:103: Obligation to co-operate

(1) The obligation of co-operation requires in particular:

(a) the client to answer reasonable requests by the service provider for information in so far as this may reasonably be considered necessary to enable the service provider to perform the obligations under the contract;

(b) the client to give directions regarding the performance of the service in so far as this may reasonably be considered necessary to enable the service provider to perform the obligations under the contract;

(c) the client, in so far as the client is to obtain permits or licences, to obtain these at such time as may reasonably be considered necessary to enable the service provider to perform the obligations under the contract;

(d) the service provider to give the client a reasonable opportunity to determine whether the service provider is performing the obligations under the contract; and

(e) the parties to co-ordinate their respective efforts in so far as this may reasonably be considered necessary to perform their respective obligations under the contract.

(2) If the client fails to perform the obligations under paragraph (1)(a) or (b), the service provider may either withhold performance or base performance on the expectations, preferences and priorities the client could reasonably be expected to have, given the information and directions which have been gathered, provided that the client is warned in accordance with IV.C.–2:108 (Contractual obligation of the service provider to warn).

(3) If the client fails to perform the obligations under paragraph (1) causing the service to become more expensive or to take more time than agreed on in the contract, the service provider is entitled to:

(a) damages for the loss the service provider sustained as a consequence of the non-performance; and

(b) an adjustment of the time allowed for supplying the service.

COMMENTS

A. General idea

The parties to a contract are under a general obligation to co-operate to the extent that this can reasonably be expected for the performance of the obligations under the contract III.–1:104 (Co-operation). Paragraph (1) of the present Article particularises this obligation for the purposes of service contracts.

The client must, under paragraph 1(a) and (b), supply appropriate information and directions. These may involve information and directions promised to the service provider at the time of conclusion of the contract. Depending on the type of service, such information and directions may be expected to specify the client's expectations as regards the result to be achieved through the service. An example of this is given in the following illustration.

Illustration 1
A trader of vegetables agreed with a storer that 10 tons of vegetables are to be stored at a fixed price per ton per week. After the conclusion of the contract, the client must supply additional specifications to the storer as regards the type of vegetables and the manner of handling and preserving them.

The information and directions may also provide further details as to the circumstances in which the service is to be carried out.

Illustration 2
A management consultant agreed to investigate the logistics department of a large food production factory and to advise on a possible reorganisation of the department. Once the contract is concluded, the consultant needs to receive additional information from the factory as regards the age, education, job descriptions, and career development of the employees working in the department. She also needs to be informed about internal and external work processes.

Further information or directions may subsequently be required if the service provider encounters difficulties which prevent the achievement of the result envisaged by the client and which cannot be solved by the service provider without such information and directions.

Another particularisation of the client's general obligation to co-operate in the context of service contracts can be found in subparagraph (1)(c). It involves the obtaining of permits or licenses needed to allow the service to be performed lawfully. The obligation is imposed on the client if explicit wording to that effect is used in the contract. An obligation to that effect can also be implied if the service provider cannot obtain the permit or license required.

The obligations of the client under subparagraphs 1(a), (b), and (c) are subject to a necessity test. They arise only so far as necessary to enable the service provider to perform obligations under the contract. An example of a case where this test is deemed to be fulfilled, is provided in the following illustration:

Illustration 3
A company specialised in removing graffiti from concrete walls is hired by a bank to clean the walls of the bank's head office. The contract states that the bank will take care of all licences and permits required. After two days of cleaning, the cleaning company is instructed by local authorities to stop working because no permit has been granted. The cleaning company awaits instructions from the bank on how to proceed with the service.

Subparagraph 1(d) requires the service provider to give the client a reasonable opportunity to monitor the service process as it proceeds. This will give the client the opportunity to perform promptly the obligation to notify under IV.C.–2:110 (Client's obligation to notify anticipated non-conformity) if the client becomes aware that the service provider will fail to achieve the result envisaged by the client. It will also enable the client to give directions under IV.C.–2:107 (Directions of the client).

Illustration 4
An aged couple contracted with an architect to design the reconstruction of their mansion, which will enable them in the future to live and sleep downstairs. The architect is to present his ideas and plans to the couple on a regular basis during the design process.

Subparagraph (1)(e) imposes an obligation on both parties. It may well be that the client has to perform specific obligations to co-operate throughout the service process, which then

amounts to an iterative process of intertwined performances of both parties. Obviously, such a process will only lead to the result envisaged by the client if both parties co-ordinate the performances of their respective obligations. Again, however, this obligation to co-ordinate is subject to the application of the necessity test referred to above.

> *Illustration 5*
> The owner of a house wants to sell his house and contracted with an estate agent to find a buyer for that purpose. In order to be able to perform the service, the parties will have to make practical arrangements together in order to enable the estate agent to assess the value of the property and to allow potential buyers to visit the house for inspection at a time convenient to all parties involved.

Failure to perform any of the obligations under paragraph (1) will allow the aggrieved party to resort to the normal remedies for non-performance of a contractual obligation. In addition to the service provider's normal remedies, paragraphs (2) and (3) of the present Article contain further rules which may assist the service provider in the event of the client's non-performance of an obligation to co-operate.

If the client does not supply the information or directions required under subparagraph (1)(a) or (b), the effect will often be to prevent the service provider from knowing the client's expectations, preferences and priorities and hence from being able to achieve the result envisaged by the client. However, depending on the type of service contracted for, it may still be possible to proceed on the basis of the expectations, preferences and priorities the client could reasonably be expected to have. If this is the case, the service provider may try to earn the fruits of the contract by proceeding on that basis provided that the client is notified of this intention.

> *Illustration 6*
> A road constructor is carrying out the reconstruction of a road on the basis of a design provided by the regional planning authorities. The design requires that the subsoil of the road's foundation consist of a layer of sand of at least one metre. The information supplied to the constructor by the authorities warrants the presence of such a layer. After the road works have started, the presence of a vast amount of soft clay is discovered. The authorities fail to give the necessary directions to the constructor as to how to proceed. The constructor notifies the authorities that he will excavate the clay and replace it with sand.

This rule of paragraph (2) does not prejudice the service provider's right to resort to any of the normal remedies for non-performance of an obligation.

If the client resumes co-operation after a period of passivity – whether or not in response to a warning given by the service provider – or if the service provider pursues the performance of the contractual obligations under paragraph (2), it is likely that the service will have become more costly for the latter and that more time will be needed to achieve the result required. This will not cause problems if payment of a fee based on an hourly rate was agreed on at the time of conclusion of the contract. However, if payment of either a fixed price or a fee based on a 'no result, no pay' basis was agreed on, the service provider would incur a loss due to the client's failure to co-operate.

Illustration 7
A factory agrees with a specialised engineer that the latter will adjust a machine owned by the factory at a fixed price. The job will take about two weeks. The parties also agree the date when the service will have to start. When the engineer wants to start work on the agreed date, factory employees tell him that he will not have access to the machine yet, 'but that access will be granted soon'. The engineer has to keep himself available for the service, but loses time and money.

In this example, the service provider may claim compensation for the loss suffered as a result of the client's non-performance of the obligation to co-operate under paragraph (3) of the present Article. Such a claim may include an extension of time to perform the service.

B. Interests at stake and policy considerations

A particularisation of the obligation to co-operate as regards service contracts raises several issues that have to be taken into account.

First of all, one might question the need to have specific obligations to co-operate in the present Part. Although the obligation to co-operate appears to be particularly relevant to service contracts, it might be argued that the general rule in III.–1:104 (Co-operation) is enough. On the other hand, one might argue that that rule is too general and that commercial practice needs more specific guidance in the context of a service contract.

A second issue to be dealt with concerns the extent to which the client in particular is to co-operate under a service contract. One might question whether the general criterion under III.–1:104 (Co-operation) ('to the extent that this can reasonably be expected for the performance of the debtor's obligation') is precise enough in the context of service contracts. The obligation to co-operate under many service contracts is distinctly more intense than it is in most other contracts, because each party depends heavily on the other party's co-operation to achieve its objectives. This is an argument in favour of stating an intense obligation to co-operate actively and loyally in order to achieve the objectives in view of which the contract was concluded. On the other hand, one might question whether a client should enable the service provider to earn the fruits of the contract even if the latter is perfectly able to do so without the client's support.

A third issue involves the need to state a rule that can now be found in subparagraph (1)(d) of the Article, imposing an obligation on the service provider to enable the client to follow and check the service process. One might argue that such an obligation is not required, given that – as in any contract – it is the service provider's sole responsibility to achieve the result required. On the other hand, notwithstanding that the client will have remedies if the result is not achieved, it would be in the client's interest to be able to check the service on a regular basis whilst it is still being carried out. First of all, it would enable the client to establish the extent to which further co-operation is to be supplied. Moreover, the client would be enabled to anticipate a possible breach of the service provider's obligations and, if appropriate, to give directions. By the same token, such a prevention of failure to achieve the result required, or limitation of its consequences, would also be in the interest of the service provider.

A fourth and final issue relates to the remedial effect of the non-performance of the client's obligation to co-operate in the context of a service contract. One might question whether the

rules stated in paragraphs (2) and (3) are needed, given that the service provider may resort to any of the normal remedies under Book III, Chapter 3. On the other hand, it might be doubted whether it is practical to invoke any of these remedies in the event of non-performance of an obligation to co-operate under a service contract. Resort to a remedy would indeed serve the interests of a seller under a sales contract if a buyer were to refuse to take delivery of the things sold. However, if a service provider is hindered in performing the service agreed on, this will probably happen in the middle of performance which costs time and money and which cannot readily be abandoned. Moreover, the service provider will probably not want to walk away in practice, and would probably prefer a rule that would allow the service to be continued and compensation to be claimed for costs and delay incurred as a result of the client's failure. In this way the service provider could earn the fruits of the contract without having to go to court. On the other hand, the client has an interest in not being tied to the service provider any longer if the client does not want to be.

C. Preferred option

It is thought to be practical to deal explicitly with the most important and typical aspects of the obligation to co-operate under a service contract both in paragraph (1) of the present Article and in related Articles of Chapters 3 to 8 of this Part. This enables commercial practice to determine how the general obligation to co-operate under III.–1:104 (Co-operation) is to be applied in the context of a service contract. Moreover, the client's specific obligations to co-operate under a service contract are at the very heart of this Part, together with the service provider's main obligations. The importance of their interrelationship is reflected in many of the Articles of the present Chapter.

As regards the ambit of the client's obligation, there is common ground for adopting the principle of necessity in subparagraphs (1)(a), (b), and (c). That principle is recognised throughout the legal systems investigated. It should be noted also that under subparagraph (1)(a) the client need answer only 'reasonable' requests.

> *Illustration 8*
> A fashion designer is carrying out a design contract for an international fashion company. The designer is dependent on regular instructions from an employee of the company as to how to proceed. The fashion designer rings the employee in the middle of the night to receive further instructions. The instructions are necessary but not urgently necessary. These phone calls are unanswered. The client is not in breach of the obligation to co-operate merely by failing to answer such calls. The requests are not reasonable requests.

The service provider's obligation to enable the client to follow and check the performance of the service whilst it is carried out is stated in subparagraph (1)(d) for various reasons, some of which have been mentioned above. What is essential to many service contracts is that the service is performed on the basis of the client's specific needs and wishes and that the client has an interest in determining whether these particular wishes are being fulfilled. The client will not always be able to check this once the service has achieved a particular result. And even if this were possible, it would be a waste of money and time for both parties if the result achieved deviates from the result contracted for. If the latter can be prevented by allowing the client to check the service process regularly – which is already common for some service contracts – both parties will benefit. In the same way, the performance of this obligation will enable the client to exercise relevant rights and perform relevant obligations under later rules of this Part.

The rules stated in paragraphs (2) and (3) are needed in addition to the normal remedies to which the service provider can resort. The service provider's interests are better protected by those rules. There will be no need to take the unprofitable position of having to walk away from the contract and seek resort to court. The rules will allow the service provider to continue the service and to earn the fruits of the contract. The interests of the client are sufficiently protected because the client can always invoke the right to terminate the contractual relationship under IV.C–2:111 (Client's right to terminate). That Article is in fact a direct expression of the client's right to cease co-operation.

D. Remedies

If a party fails to perform the obligation to co-operate, the normal remedies for non-performance of an obligation are available. Nothing more needs to be said regarding a non-performance by the service provider. However, some observations can be made as regards the client's failure to co-operate under the present Article.

If the client does not supply any co-operation *at all* this will usually prevent the service provider from performing the main obligations under the contract and for that reason the service provider may raise the defence of III.–3:101 (Remedies available) paragraph (3) (namely that the client caused the non-performance) against any claims put forward by the client. This is, for instance, what the dentist may do in the following example:

> *Illustration 9*
> Although a patient has agreed with a dentist to undergo treatment on a particular afternoon, he physically refuses to be treated once he is lying in the dentist's chair.

In addition, in such examples – when the client's failure to co-operate is not excused – all the normal remedies for non-performance of an obligation are in principle open to the service provider. However, in the context of a service contract there may be occasions where a claim for a specific performance of the client's obligation to co-operate will be excluded. For example, a dentist could not get an order compelling a patient to submit to treatment.

If the client fails to perform the obligation to co-operate in the first instance, but resumes co-operation later on, much of what has been said above on remedies will still be applicable. In practice, however, the service provider will probably not want to resort to a remedy under Book III, Chapter 3 but will instead try to claim extra payment and extension of time under paragraph (3) of the present Article.

It is also possible that the client performs the obligation to co-operate in a *defective* manner. The client may, for instance, supply incorrect or inconsistent information, which leads the service provider in the wrong direction and may have several consequences: (1) the result envisaged by the client at the time of conclusion of the contract may not be achieved; (2) other interests of the client may be damaged, or (3) the service may become more expensive or may take more time than agreed on in the contract.

> *Illustration 10*
> A supplier of computer networks is requested by the management of a hospital to install a tailor-made network on the basis of a design made on behalf of the hospital.

The design, however, is defective. If the supplier were to follow the design exactly, the computer network would not serve the intended purposes.

If it is assumed that the service provider was not in breach of an obligation to warn (on which, see above), this example is to be resolved as follows. In situations (1) and (2), the client is not in a position to resort to any of the remedies under Book III, Chapter 3 because the client caused the non-performance. In situation (3), the client's defective co-operation gives the service provider the right to resort to any of the remedies set out in Book III, Chapter 3, provided the non-performance of the client's obligation is not excused. But again, it would probably be more practical for the service provider to claim extra payment and extension of time under paragraph (3) of the present Article.

NOTES

I. Overview

1. Frequently occurring examples of the client's obligation to co-operate under a service contract are to be found in AUSTRIA and GERMANY, BELGIUM and FRANCE, ENGLAND and SCOTLAND, THE NETHERLANDS, PORTUGAL and SPAIN. They relate to: the supply of information and directions, necessary for the service provider to perform the service; co-operating with the service provider for the purpose of obtaining licenses and permits; and co-ordinating the work of the service provider with activities of co-contractors.

2. The obligation of the service provider to give the client a reasonable opportunity to determine whether the service provider is performing the obligations under the contract is particularly recognized in AUSTRIA, BELGIUM, ENGLAND, FRANCE, GERMANY, ITALY THE NETHERLANDS, PORTUGAL and SCOTLAND.

II. The client's specific obligations to co-operate under a service contract

3. In AUSTRIAN law (CC § 1168) the client's obligation to co-operate under a contract for work encompasses an obligation to supply information to the service provider to the extent that this is necessary for the performance of the service in accordance with the client's expectations (see for construction services: ÖNORM A 2060 2.6). Co-ordination of the work of various co-contractors is considered to be part of this obligation as well (see for construction services: ÖNORM B 2110 5.14).

4. Contracts for work in BELGIAN law impose an obligation on the client to supply the service provider with the information that is necessary for the latter to perform the service (cf. *Goossens*, Aanneming van werk, nos. 989 and 998; *Jansen*, Defects liability, pp. 133-136 and pp. 147-156 with references to standard forms of contracts). This obligation includes the obligation to give directions to the service provider to the extent that this is necessary for the performance of the service (cf. *Jansen*, Defects liability, p. 168), as well as an obligation to co-ordinate the activities of the various service providers with whom the client has entered into a contract (cf. *Goossens*, Aanneming van werk, nos. 1002 ff; *Jansen*, Defects liability, pp. 184-185). In the context of construction services, these latter obligations also follow from statutory law, see art. 4 *Loi sur la protection du titre et de la profession d´architecte*. Construction services usually also impose an obligation on the client to obtain permits and licenses (cf. *Goossens*, Aanneming van werk, no. 986; *Jansen*, Defects liability, p. 174).

5. The client under an ENGLISH contract for the supply of a service has an obligation to inform the service provider to the extent that this is necessary to enable the latter to perform the service: *Roberts v. Bury Improvement Commissioners* (1869-70) LR 5 C.P. 310; *J. & J. Fee Ltd. v. The Express Lift Co. Ltd.* (1994) 10 Const LJ 151 (cf. *Jansen*, Defects liability, pp. 133-136 and pp. 147-156 with references to standard forms of contracts). An obligation to give further directions only exists to the extent that such directions are necessary. The obligation is limited by the principle that stresses the service provider's independent position: the service provider must carry out the service, within the framework of the client's expectations, as the provider thinks fit: *Clayton v. Woodman & Son Ltd.* [1962] 2 QB 533 (cf. *Jansen*, Defects liability, p. 169). The client's obligation to co-ordinate the work of the service provider with the activities of other parties is recognised for construction services, but is absorbed by the obligation of the client to give undisturbed access to the site (cf. *Jansen*, Defects liability, pp. 185-186; see also PELSC art. 2:102). The obligation to obtain permits and licenses required for the service is also recognised in the particular context of construction services: *Porter v. Tottenham Urban DC* [1915] 1 KB 776 (cf. *Jansen*, Defects liability, p. 174).

6. The FINNISH ConsProtA chap. 9 § 31 on construction services imposes an obligation on the client to co-operate in different ways. Specified obligations are also found in the General Conditions for Building Contracts YSE 1998, chap. 1, ss. 5-8.

7. FRENCH contracts for work (*louage d´ouvrage*) impose an obligation on the client to supply the service provider with the information that is necessary for the latter to perform the service: CA Paris 22 June 1983, *SA Olivetti/I.G.I.R.S.* and CA Paris 30 June 1983, *Passeport/Soc. Kienzle Informatique*, D. 1985, IR 43, note *Huet*; CA Colmar 15 May 1992, RD imm. 15(2) 1993, p. 228; Cass.civ. III, 7 May 1996, *SCI Saint-Lary Soulan vacances/Cie Mutuelle du Mans et autres*, RD imm. 18(4) 1996, p. 579, note *P. Malinvaud* and *B. Boubli* (cf. *Jansen*, Defects liability, pp. 133-136 and pp. 147-156, with references to standard forms of contracts). This obligation includes an obligation to give directions to the service provider (cf. *Jansen*, Defects liability, p. 168) and to co-ordinate the performance of the service provider with activities of co-contractors: Cass.civ. III, 6 November 1984, *Soc. C.F.E.M.*, RD imm. 7(2) 1984, p. 156 (cf. *Jansen*, Defects liability, p. 184). An obligation to obtain permits and licenses is also incumbent on the client, particularly in the context of construction services: Cass.civ. III, 5 November 1980, *Chazelet*, JCP 1981.IV.32 (cf. *Jansen*, Defects liability, p. 174).

8. The general obligation to co-operate of any client, which can be derived from GERMAN CC § 293, has been particularised for contracts for work (*Werkvertrag*) in CC §§ 640 and 642. In the context of such services, the client must provide the service provider with the information the latter needs in order to perform the service in accordance with the client's expectations: BGH 29 November 1971, NJW 1972, p. 447 (cf. *Jansen*, Defects liability, pp. 133-136 and pp. 147-156, with references to standard forms of contracts). This obligation includes a further obligation to give directions, and to co-ordinate the activities of other contracting parties of the client with the activities of the service provider (*Jansen*, Defects liability, pp. 168 and 185). The client in a contract qualified as *Werkvertrag* will generally have to obtain the permits and licenses required for the service (CA Munich 14 February 1978, BauR 1980, p. 275; cf. *Jansen*, Defects liability, p. 174).

9. If the service can be qualified as *aanneming van werk* under DUTCH law, the client has an obligation to inform the service provider about the client's expectations as regards the service, and the requirements that must be observed by the service

provider. The obligation is incumbent on the client to the extent that the supply of information is necessary to enable the service provider to perform the obligations under the contract (cf. *Jansen*, Defects liability, pp. 133-136 and pp. 147-156, with references to standard forms of contracts). An obligation to co-ordinate the activities of other contracting parties of the client in connection with the service provider's performance of the service, is usually derived from this obligation to inform (*Jansen*, Defects liability, p. 185). Generally speaking, the client has no additional obligation to assist the service provider with directions, unless such obligation has explicitly been agreed between the parties or can be derived from good faith, having regard to the circumstances of the case (HR 4 December 1970, *Bouchette and Van Limburg*, NedJur 1971, 204, note *G.J. Scholten*). This decision is not opposed to recognising an obligation of the client to give directions necessary for the service provider's performance of the obligations under the contract (*Jansen*, Defects liability, p. 168). The client to a contract qualified as *aanneming van werk* will generally have to obtain the permits and licenses required for the service (Asser (-*Kortmann*), Bijzondere Overeenkomsten III[7], no. 559), but if the contract leaves a considerable amount of freedom to the service provider (freedom as to how to carry out the functional specifications of the client), the obligation may become incumbent on the service provider (*Jansen*, Defects liability, p. 174).

10. The obligation to co-operate in any type of contract follows from the general rule of the POLISH CC art. 354 according to which the creditor is obliged to co-operate in the discharge of the obligation in accordance with its contents and in a manner complying with its socioeconomic purpose and the principles of community life, and if there are customs established in that respect, also in a manner complying with those customs. The client should take into account the justified interest of the other party and refrain from doing anything which could complicate, stop or frustrate the performance of the obligations under the contract (Bieniek [-*Wiśniewski*] I[6], p. 21). This negative obligation is always imposed on the client. A positive obligation exists only if it follows from the nature of the obligation or the contract itself. In other cases the service provider cannot demand co-operation from the client, even if it would be justified by the service provider's interest or social reasons (Radwański [-*Brzozowski*], System Prawa Prywatnego VII[2] , p. 340). The rules on the contract of specific work contain direct references to the client's obligation to co-operate. If co-operation on the part of the client is required for the doing of the work and such co-operation is lacking, the service provider may set the client an appropriate time limit with the sanction that after the lapse of that time limit the service provider will be entitled to renounce the contract (CC art. 640).

11. The client's specific obligations to co-operate under a PORTUGUESE service contract follow from the general principles of good faith: CC arts. 762 and 813. These obligations include the supply of plans and instructions which comprise the information the service provider needs to perform the service. They further entail co-operation necessary to obtain permits and licenses (cf. *Romano Martinez*, Direito das Obrigações[2], no. 344).

12. As with English law, an obligation to co-operate including dealing with requests for information and giving directions is mainly recognised in SCOTTISH law in the context of construction contracts and the industry's major standard forms, for which see *Stair*, The Laws of Scotland III, 'Building contracts' paras. 10-12, 41-45 (with updates). It has been said that "as a general rule … where both parties have agreed that something shall be done which cannot effectually be done unless both parties concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part, even though there may be no express words to that

effect" (*Mackay v. Dick and Stephenson* (1881) 8 R (HL) 37 at 40, per Lord Blackburn).

13. As is the case with any type of contract, the specific obligations to co-operate of the client under SPANISH service contracts follow from general principles of good faith (CC art. 1258). With respect to construction services, the typical co-operation obligations of the client are stated in art. 9(2) of the Construction Act 1999 (LOE) and consist of the supply of all documents and information necessary to allow the execution of the construction service and to get all necessary licenses and administrative permits.

III. The service provider's obligation to co-operate

14. The service provider has an obligation under an AUSTRIAN contract for work to allow the client to check the performance of the service whilst it proceeds: Rummel [-*Krejci*], ABGB I^2, art. 1170, no. 5. See also ÖNORM A 2060 2.11 in the context of construction services. As to treatment services *(Behandlungsvertrag)*, KAKuG § 5a no. 1 constitutes the right of the patient to view records corresponding to the obligation set forth in KAKuG § 10.

15. Under a BELGIAN contract for work the service provider must allow the client to check the performance of the service. This has particularly been established in the context of construction services (cf. *Jansen*, Defects liability, pp. 192-199).

16. The service provider under ENGLISH law must allow the client to determine, in the course of the service process, whether or not the provider performs the service in conformity with the contract: this has particularly been established in the context of construction services (cf. *Jansen*, Defects liability, pp. 192-199, with references to standard forms of contracts).

17. In FRANCE a service provider must allow a client under a contract for work to check the service process. Particularly in the context of construction services, this is generally accepted (cf. *Jansen*, Defects liability, pp. 192-199, with references to standard forms of contracts).

18. Under a GERMAN contract for work the service provider must allow the client to check the performance of the service whilst it proceeds (cf. *Jansen*, Defects liability, pp. 192-199, with references to standard forms of contracts).

19. It follows from the ITALIAN rule under CC art. 1662 that the provider of a service qualified as *appalto* must allow the client to examine the service process (Cass. 18 January 1980, no. 434, Rep.Foro it., V° Appalto, c. 1:115, no. 13; Cass. 10 May 1965, no. 891, Riv.giur.edil., 1965, I, p. 945, with comment by *E. Favara*, Limiti del controllo del committente sull´opera dell´appaltatore. Art. 21 of the Medical Deontological Code imposes an obligation on the provider of treatment services to put all medical reports at the disposal of the client.

20. An obligation to allow the client to check the service process is imposed on service providers both in contracts qualified under DUTCH law as *aanneming van werk* (cf. *Jansen*, Defects liability, pp. 193-199, with references to standard forms of contracts), as well as in contracts qualified as *opdracht* (CC art. 7:403(1)). In case of treatment services qualified as *overeenkomst inzake geneeskundige behandeling*, CC art. 7:456 gives the client the right to view medical records and to obtain a copy of the documents included in the records, unless the privacy of a third party is at stake.

21. The service provider's obligation to co-operate follows from the general rule of the POLISH CC art. 354 mentioned above. In the contract of specific work, the service provider is obliged to respect the client's right to control the performance of the

contractual obligations (Radwański [-*Brzozowski*], System Prawa Prywatnego VII^2 , p. 337*).* In the case of mandate the service provider is obliged to inform the client about the activities undertaken in order to perform the service, in case the client would like to give some additional instructions as to the performance (Radwański [-*Ogiegło*], System Prawa Prywatnego VII^2, p. 447*).*

22. Under PORTUGUESE law, the service provider's obligation to allow the client to determine in the course of the process, whether the service is in accordance with the contract follows from CC art. 1209(1): CA Porto, 15 June 1973, BolMinJus 229, 235.

23. In SCOTTISH law the main example of a service provider's obligation to co-operate is again found in the context of construction contracts (*Stair*, The Laws of Scotland III, 'Building Contracts' para. 46.

IV.C.–2:104: Subcontractors, tools and materials

(1) The service provider may subcontract the performance of the service in whole or in part without the client's consent, unless personal performance is required by the contract.

(2) Any subcontractor so engaged by the service provider must be of adequate competence.

(3) The service provider must ensure that any tools and materials used for the performance of the service are in conformity with the contract and the applicable statutory rules, and fit to achieve the particular purpose for which they are to be used.

(4) In so far as subcontractors are nominated by the client or tools and materials are provided by the client, the responsibility of the service provider is governed by IV.C.–2:107 (Directions of the client) and IV.C.–2:108 (Contractual obligation of the service provider to warn).

COMMENTS

A. General idea

The supply of a service can be described as a process by which the service provider performs work undertaken according to the particular wishes and needs of the client, in order to achieve a particular result. The work undertaken requires in any event the supply of labour and could also involve the input of tools, materials, and components. This Article imposes obligations on the service provider with respect to the service process itself, particularly as regards the selection of tools, materials, and components to be supplied under the service contract. It further states rules in the event that subcontractors are involved in carrying out the service. Paragraph (2) is to be read in connection with IV.C.–2:105 (Obligation of skill and care). The obligation under this paragraph is to be performed with the care and skill required under that Article. Paragraph (3), however imposes strict obligations on the service provider, which cannot be performed by merely acting with care and skill.

Paragraph (1) allows as a principle the service provider to subcontract obligations under the service contract, either in part or in whole. This may be done without the client's consent, unless personal performance is actually required by the contract. Whether or not personal performance is required depends on the circumstances of the case and is left to the court to determine. In the following illustration an example is given of a case where personal performance would be required.

> *Illustration 1*
> A fashion company enters into a contract with a famous fashion photographer. The company instructs the photographer to make photographs of the latest fashion line of the company for the purpose of illustrating their catalogue. The photographer decides to shoot the indoor pictures himself but to subcontract the outdoor shooting to another professional photographer.

The obligation imposed on the service provider by paragraph (2) implies that any subcontractors selected should be capable of performing the service or part thereof subcontracted. The fact that the service provider subcontracted part of the service does not relieve the service provider from obligations under the contract, subject to the rule of paragraph (4), as follows from III.–2:106 (Performance entrusted to another).

Paragraph (3) imposes obligations on the service provider regarding the quality of the tools, materials, and other components to be used in the course of the service. There is a strict obligation to select tools, materials, and other components of such quality as is needed to ensure that the result the client wishes to obtain through the service will actually be achieved.

The service is to be performed on the basis of the wishes and needs specified by the client. The client may want the service or part of it to be performed by specific subcontractors, in which case the client will nominate them to the service provider.

Illustration 2
The Ministry of the Interior awards a contract for the investigation of corruption practices in the civil service to a specialised consulting agency. The Ministry insists that part of the investigation – the analysis of the credibility of existing internal reports dealing with the subject matter – is to be carried out by a specialised research institute.

The client may further wish that the service be carried out with the help of tools, materials, and other components to be supplied by the client.

Illustration 3
A house owner agrees with a painter that the latter will paint all the doors of the house with special paint bought by the owner of the house.

If the service is carried out by nominated subcontractors or with the help of tools, materials, and components supplied by the client, it may happen that the result the client envisages will not be achieved. In that case, the service provider's liability is to be established under paragraph (4) in conjunction with the rules in IV.C.–2:107 (Directions of the client) paragraph 2, given that both the nomination of a subcontractor as well as the actual supply of tools, materials, or other components by the client are thought to be equal to the issuing of a direction by the client. The Article on directions by the client also provides rules for the situation where the client directs the service provider to use inadequate tools, materials, or other components – i.e. selected, though not actually supplied by the client himself – whether or not to be obtained by the service provider from a nominated subcontractor.

The contract may oblige the service provider to transfer the ownership of what is produced. To the extent that ownership is to be transferred for a price or in exchange for something else the contract would be one of sale or barter and the obligations of the parties would be regulated by Book IV.A. The provisions of that Book would regulate such matters as conformity of the things with the contract and freedom from third party rights or claims.

Illustration 4
A client enters into a contract with a computer shop. The purpose of the contract is to change the mainframe of the client's personal computer and to install on that computer the latest version of a well-known anti-virus software program.

In such cases, interpretation of the contract will lead to the conclusion that the parties have impliedly agreed on transfer of ownership of the structure or thing produced as a result of the service. The same goes for the supply of materials, components, and all other things – corporeal or incorporeal – inherent to the service. There is a mixed contract – partly for the supply of a service and partly for the sale of goods or other assets. In accordance with II.–

1:107 (Mixed contracts) the rules of this Part apply to the service component. The rules on sale apply to the obligations of the parties under the sale component. The rules governing the actual transfer of ownership of movable things can be found in the Book on the transfer of moveable goods and in national rules on the transfer of immovable property.

B. Interests at stake and policy considerations

The main issue is whether explicit rules are needed stating obligations which are self-evidently imposed on a service provider and which might also be derived from the main obligation under the contract. In addition, it is difficult to see what remedies the client may resort to if the service provider fails to perform these obligations. Such a failure will probably coincide with a failure of the service provider to achieve the result envisaged by the client, in which case the latter would rather invoke a remedy on the basis of the non-performance of the service provider's main obligation stated in IV.C.–2:106 (Obligation to achieve result). On the other hand, that obligation (to achieve the result) will not always be imposed on every service provider in every case. This would imply that the obligations under the present Article may still be useful in order to enable the client to resort to a remedy.

It could further be argued that it is useful to regulate the quality of the input into the service process because it gives the service provider incentives to prevent the result envisaged by the client from not being achieved. It would stimulate the service provider to select competent subcontractors and to use adequate tools, materials, and components.

Rules dealing with the quality of the service provider's input into the service process would also make it easier for the client to take precautionary actions. It is typical for a service contract that the client is able to check and follow the service process whilst it proceeds. The present Chapter contains various provisions to support this ability. Such an interaction may lead to the client's discovery that the service provider failed to select competent subcontractors, or failed to select adequate tools, materials, or components. This may even disclose the risk that the result envisaged by the client will not be achieved. Rules imposing an obligation on the service provider as regards the quality of the input into the service process would then enable the client to anticipate the breach of the latter's main obligation by taking precautionary actions. The client might notify the service provider or give a direction. The client might also demand an adequate assurance of due performance under III.–3:505 (Termination for inadequate assurance of performance). This would be advantageous for both parties as disputes about quality will be solved as early as possible in the process and not at the final stage, when it probably will be much more costly to accomplish changes.

C. Preferred option

The ability of a service provider to achieve the result envisaged by the client often depends on the ability to select competent subcontractors and to use tools, materials, and components of good quality and fit for their purpose. If, subsequently, the desired result is not achieved because the service provider failed to select such subcontractors, tools, materials, or components, the client will not always be able to resort to a remedy on the basis of the allegation that the service provider failed to perform the obligation under IV.C.–2:106 (Obligation to achieve result). The reason is that this obligation is not imposed on every service provider in every case. If it is not, the client will have to invoke non-performance of another obligation in order to be able to resort to a remedy. This may be one of the obligations imposed on the service provider by in the present Article.

Illustration 5
The owner of a seventeenth century painting, which has been exposed to smoke and other damaging conditions for centuries, concludes a contract with a specialist restorer under which the restorer is obliged to try to bring back the original colours of the painting without damaging it. The restorer uses a steel brush that is too stiff to do the job and subsequently damages the painting.

In this example, the client will not be able to claim on the basis of failure to achieve a result because the obligation is only to attempt restoration. However, the client will be able to claim on the basis of paragraph (3) of the present Article.

Furthermore, by making the obligations explicit – as is done in the present Article – the service provider is stimulated to achieve the result envisaged by the client. This will particularly be the case if the latter can anticipate the failure to achieve such a result – which is inherent in the ability to check and follow the service process as it proceeds – by invoking the failure to select either, competent subcontractors or adequate tools, materials, and components.

Particular problems may arise when the client has instructed the service provider to use particular tools, materials, and components – whether or not to be obtained from a nominated subcontractor – that turn out to be inadequate.

Illustration 6
A storer has agreed with a client to store liquid nitrogen. The storer is instructed to use a particular machine for keeping the nitrogen at the right temperature. This machine, however, turns out to be defective and as a result the nitrogen can no longer be used for certain industrial purposes.

This issue is dealt with in the Articles on directions by the client and the service provider's contractual obligation to warn.

D. Remedies

If the service provider is obliged to achieve a particular result and fails to do so because of non-performance of one or more of the obligations imposed by this article, it is in the client's interest to invoke non-performance of the service provider's main obligation. The burden of proof on the client will then be limited. In this scenario, it is not likely that the client will invoke non-performance of an obligation under the present Article as this would mean a heavier burden of proof. An example of a case where the client will most likely claim on the basis of non-performance of the main obligation is given in the following Illustration.

Illustration 7
A garage manager agreed with a car owner to replace the exhaust pipe of the latter's car. The materials used by the mechanic to connect and attach the exhaust pipe to the car are not strong enough. As a result, the pipe comes down after a few days.

Moreover, a claim that would in effect seek double compensation for the same damages would in any event be barred.

An obligation to achieve a result will, however, not be imposed on every service provider in every situation. If it is not imposed, the client may be led to invoke non-performance of an obligation of the service provider under the present Article.

NOTES

I. Overview

1. The service provider in a contract for work is unconditionally allowed to subcontract parts of the contractual performance in AUSTRIA, GERMANY, and PORTUGAL. The right to subcontract can, on the other hand, also be dependent on the intentions of the parties to the contract and to other circumstances of the case, particularly the degree to which the service is inherently personal: Austria (CC § 1153), Germany (CC § 613), BELGIUM, ENGLAND, ITALY (CC art. 1180), THE NETHERLANDS (CC arts. 6:30(1), 7:404 and 7:751), SCOTLAND, SPAIN (art. 17(6) of the Construction Act). This principle also exists in FRANCE on the basis of CC art. 1237, but is less relevant for services contract law as a result of art. 3 of the *Loi du 31 Décembre 1975* on subcontracting, which imposes an obligation on service providers in general to ask the client's permission before entering into a subcontract. The latter approach is also followed in Italy for services qualified as *appalto* (CC art. 1656) and in many standard forms of contracts used in construction services practice. References with respect to the specific obligation of the service provider under a storage contract not to subcontract the performance of the storage service without the client's consent are to be found in the notes to the Chapter on such contracts. In all these countries it is established law that the service provider remains responsible towards the client for the part of the service entrusted to the subcontractor.
2. The following countries recognise that the supplier of a service must in principle use tools and materials of good quality and fit for their intended purpose: BELGIUM, ENGLAND, FINLAND, FRANCE, GERMANY, ITALY and THE NETHERLANDS, SCOTLAND. The responsibility of the service provider for tools or materials may however be limited in AUSTRIA, Belgium, England, Germany and in The Netherlands and Scotland if inadequate quality requirements were specified by the client.

II. Performance of the service through subcontractors

3. If the service is to be qualified as an AUSTRIAN *Dienstvertrag,* the service provider cannot subcontract the service unless the intentions of the parties to the contract and the circumstances of the case demonstrate otherwise (CC § 1153). Under a *Werkvertrag,* on the other hand, the service provider is not excluded from entrusting parts of the performance of the service to subcontractors. The rule of CC § 1165 merely states that the service provider must carry out the work personally or to have it carried out under his personal responsibility. The general rule of CC § 1313a is relevant in this respect as well in the sense that it establishes the contractual responsibility of the service provider for the performance of his staff as if this were his own performance. In the particular context of construction services, the client has a right to reject a subcontractor for good reasons under ÖNORM A 2060 2. 10. 1.3.
4. If the parties concluded a BELGIAN contract of *louage d´ouvrage,* the service provider may subcontract the service to the extent that the intentions of the parties are not opposed to this. The concrete intentions of the parties are dependent on the circumstances of the case, in particular the degree of *intuitu personae*, the nature of the

part of the service entrusted to the subcontractor and the abilities of the latter (cf. *Goossens*, Aanneming van werk, 1215 ff). The service provider remains responsible for the part of the service carried out by the subcontractor (CC art. 1797).

5. In ENGLAND, whether or not a service contract can be carried out through the employment of a subcontractor depends on the proper inference to be drawn from the contract itself, the subject matter of it, and other material surrounding circumstances: *Davies v. Collins* [1945] 1 All ER 247. Dependent on the circumstances of the case, the obligation may be too personal to allow performance by a subcontractor. If subcontracting is permitted, the service provider nevertheless remains responsible towards the client for the performance of the subcontractor: *Stewart v. Reavell´s Garage* [1952] 2 QB 545 (cf. *Chitty* on Contracts I[29], nos. 20-079 ff). In the context of construction services, standard forms of contract may have limited the service provider's freedom to subcontract (cf. *Jansen*, Defects liability, pp. 215-216).

6. The question in FRANCE, whether or not the service provider may subcontract performance of the service, is answered with the general rule of CC art. 1237: the debtor may not subcontract without the creditor's consent if the latter has an interest in personal performance by the debtor. Hence the concrete intentions of the parties, particularly the degree of *intuitu personae*, are considered relevant. See however art. 3 of the *Loi du 31 Décembre 1975* on subcontracting, which imposes an obligation on service providers in general to ask the client's permission before entering into a subcontract. The service provider remains responsible towards the client for the part of the performance that is entrusted to the subcontractor on the basis of CC art. 1797 and art. 1 of the *Loi du 31 Décembre 1975* on subcontracting, as well as Cass.civ. III, 13 March 1991, Bull.civ. III, no. 91.

7. If the service is to be qualified as a GERMAN *Dienstvertrag*, the service provider must perform the service personally (CC § 613). A similar rule does not exist for services qualified as *Werkvertrag*. In the context of construction services, however, standard forms of contracts impose an obligation on the service provider to ask the client's permission for subcontracting (cf. *Jansen*, Defects liability, pp. 215-216). The general rule is that the service provider remains responsible for the part of the service entrusted to subcontractors (CC § 278; BGHZ, 13, 111).

8. The rule that follows from general law of obligations in ITALIAN law (CC art. 1180) is that the debtor may not subcontract without the creditor's consent if the latter has an interest in personal performance by the debtor. In case the contract can be qualified as *appalto*, the service provider is only allowed to subcontract the service if this is permitted by the client (CC art. 1656). It can be implied from the rule stated in CC art. 1670 that the service provider remains responsible towards the client for the part of the service carried out by the subcontractor.

9. The general principle on the right of a contracting party to entrust part of his performance to a subcontractor under DUTCH law can be derived from CC art. 6:30(1): subcontracting is possible in principle, unless this would conflict with the express or implied intentions of the parties to the main contract, having regard to their mutual interests. The creditor, for instance, may have an interest in personal performance by the debtor (Parl. Gesch. 6, TM, p. 158). The second general principle, stated in CC art. 6:76, is that the debtor remains responsible for the part of the performance entrusted to the subcontractor. CC art. 7:751 upholds these general principles for services qualified as *aanneming van werk*, whereas CC art. 7:404 does the same with respect to services qualified as *opdracht*. As regards services that can be qualified as *bewaarneming*, see for the second principle also CC art. 7:603(3). This latter provision, however, contains a more lenient provision (than CC art. 6:76) for

those cases where the storage was supplied gratuitously and the storer was more or less forced to hand over the thing for sub storage for reasons that cannot be attributed to the storer. See for standard forms of contracts narrowing down the first principle in the context of construction services: *Jansen*, Defects liability, p. 215.

10. The general rule of the POLISH CC (art. 356(1)) is that the creditor may demand a personal performance only if that follows from the contents of the act in law, from statutory law, or from the nature of the performance. Rules relating to services contracts contain a few references to the personal performance of the obligations under the contract. In the case of the contract of specific work, where performance depends on the personal qualifications of the service provider the contract is dissolved as a result of that person's death or inability to work (CC art. 645(1)). The position of subcontractors in building contracts is regulated in CC art. 647^1. In such a contract the parties will define the scope of work to be performed personally by the contractor and through subcontractors (CC art. 647^1(1)). The contractor may conclude a contract with subcontractors only with the consent of the client. The client is assumed to consent in the absence of an objection in writing within 14 days from being presented with the subcontract (CC art. 647^1(2)). Furthermore, if the subcontractor wishes to conclude a contract with further subcontractors, the consent of the client and the contractor are required (CC art. 647^1(3)). The person who concludes a contract with the subcontractor as well as the client and the contractor have solidary liability for payment of the remuneration for the building works done by the subcontractor (CC art. 647(5)). In the case of a safe-keeping contract the keeper cannot deposit the thing for safe-keeping with another person unless forced by circumstances to do so. In such a case the keeper is obliged to immediately notify the depositor where and with whom the things have been deposited, and is then liable only for a lack of due diligence in choosing the substitute (CC art. 840(1)). The substitute is liable also to the depositor. If the keeper is liable for the acts of the substitute, their liability is solidary (CC art. 840(2)).

11. In PORTUGAL, if the service can be qualified as *empreitada*, the service provider is allowed to use subcontractors but remains responsible nevertheless for the conformity of the part of the service entrusted to the subcontractor: STJ 15 January 1992, BolMinJus, 413.

12. In line with the general principles of SCOTTISH contract law, a service provider may delegate the work to others unless the contract involves *delectus personae* (*McBryde*, Law of Contract in Scotland, paras. 9.40, 12.44).

13. With respect to construction services under SPANISH law, Construction Act arts. 11(2)(e) and 17(6) state that the service provider can only subcontract parts of the service within the limits imposed by agreement, and remains responsible for the conformity of these parts.

14. In the context of construction services, the SWEDISH AB 04, art. 5:12, does not restrict the possibility of the service provider to entrust parts of the service to subcontractors. The provision states, however, that the service provider remains responsible for these parts. As regards processing services, a similar solution is achieved on the basis of § 4 of the Consumer Services Act, stating that the service provider must perform the service in a professional manner (see also *Olsen*, Konsumentskyddets former, p. 95).

III. Quality of tools and materials used in the course of the service

15. The provisions of the AUSTRIAN CC on *Werkvertrag* do not contain specific provisions on the obligation of the service provider with respect to the quality of tools

and materials to be used for the service. A provision referring to the quality of materials is Ccom § 360, which is to be applied in case of doubt and which imposes an obligation on the service provider to supply materials of average kind and quality. The provision is only applicable in commercial contracts in principle, but the prevailing opinion applies this provision analogously to non-commercial contracts as well (cf. *Koziol and Welser*, Bürgerliches Recht I[13], 217). The responsibility of the service provider for the quality of tools and materials used in the course of the service process can be limited in the event that inadequate specifications were imposed by the client (CC § 1168a).

16. The service provider under a BELGIAN contract qualified as *louage d´ouvrage* has an obligation to use tools (cf. *Goossens*, Aanneming van werk, nos. 969 ff) and materials of good quality and fit for their intended purpose, although the latter obligation does not seem to be as strict as in FRENCH law: Cass. 6 October 1961, *S.P.T.L. Algemene Bouwonderneming Léon van Eeghem/Haesaert*, RW 1961-62, col 783 at 798-799, and RCJB, 1963, note *A. Lagasse*, p. 5 (cf. *Jansen*, Defects liability, pp. 248, 251 and p. 347). If the client has specified inadequately the quality of tools and materials to be used, this may limit the responsibility of the service provider (cf. *Jansen*, Defects liability, pp. 422-427).

17. The service provider under an ENGLISH contract for the supply of a service warrants that the materials used will be of good quality and reasonably fit for the purpose for which they are used unless the circumstances of the contract are such as to exclude any such warranty. Such circumstances could involve the specification by the client of inadequate quality requirements to be observed by the service provider: *G. H. Myers & Co. v. Brent Cross Service Co.* [1934] 1 KB 46 at 55; Samuels v. Davis [1943] KB 526; *Ingham v. Emes* [1955] 2 QB 366 at 374; *Young & Marten Ltd. v. McManus Childs Ltd.* [1969] 1 AC 454; *Gloucestershire County Council v. Richardson* [1969] 1 AC 480. See also Supply of Goods and Services Act 1982 s. 4(2)(A) and s. 4(5) (cf. *Jansen*, Defects liability, pp. 247-250 and pp. 422-427).

18. According to FINNISH law, chap. 8 § 12(3) (16/1994) of the Consumer Protection Act (38/1978) the service provider must supply material conform to ordinary good quality, unless agreed otherwise.

19. Under FRENCH law, the service provider in a contract for work is under an obligation to select materials of good quality and suitable for the purpose for they will be used: Cass.civ. III, 19 November 1986, RD imm. 1987, 457 (cf. *Jansen*, Defects liability, pp. 248 and 250). It is doubted, however, whether inadequate quality requirements imposed on the service provider by the client will exculpate the service provider: Cass.civ. III, 7 March 1990, Bull. III, no 69; RD imm. 1990, 375 (cf. *Jansen*, Defects liability, pp. 427-434).

20. Tools and materials used in the performance of a GERMAN contract for work must be of good quality and fit for their intended purpose (cf. *Jansen*, Defects liability, pp. 248-251). But the responsibility of the service provider as regards the quality of the service may be limited if inadequate quality requirements were specified by the client (CC § 645(1) and BGH 14 March 1996, BauR 1996, p. 702; cf. *Jansen*, Defects liability, pp. 422-427).

21. If the supply of a service can be qualified as *appalto*, under ITALIAN law, the service provider generally warrants the quality of the materials used: D. Rubino, Dell´appalto, pp. 51 ff.

22. The obligation of the service provider to use tools and materials of good quality and fit for their particular purpose follows from general DUTCH contract law (CC art. 6:77; HR 5 January 1968, NedJur 1969, 174; HR 13 December 1968, NedJur 1969, 174). As

regards services qualified as *aanneming van werk* the obligation is particularised in CC art. 7:760(1). If the client imposes inadequate requirements on the service provider as to the quality of tools and materials to be used, this may affect the client's ability to obtain a remedy (CC art. 6:77; CC art. 7:760(2) and (3)) (cf. *Jansen*, Defects liability, pp. 422-427).

23. The provisions of the POLISH CC do not contain specific rules relating to the quality of tools and materials to be used in the course of the service. The obligation to use tools and materials of an adequate quality may be derived from a general rule that governs performance of obligations (CC art. 355), which demands diligence generally required in the relationships of the given kind. The due diligence of the debtor within the scope of the economic activity is assessed with the consideration of the professional nature of that activity (higher standard of care) (CC art. 355(2)).

24. According to the PORTUGUESE CC art. 1210(2), if the service can be qualified as *empreitada* and if the contract does not specify the quality of the materials to be supplied under the contract, the service provider must supply materials of at least average quality.

25. The service provider's responsibility for the fitness of tools and materials in SCOTLAND depends upon the contract terms and the provider's general duty of care and skill (*McBryde*, Law of Contract in Scotland, para. 9.37-9.39). Further, under the Supply of Goods and Services Act 1982 s. 11D goods supplied under a contract for work and materials must be of satisfactory quality.

26. In the event that construction services are supplied, under SPANISH law, art. 17(6) of the Construction Act imposes responsibility on the service provider for damage caused to the building work as a result of inadequate materials used in the course of the service.

27. As regards construction services, SWEDISH AB 04, art. 1:9, states as the main rule that the service provider must provide all material necessary for the performance of the service. AB 04, art. 2:1, imposes an obligation on the service provider to perform the work in a professional manner and it is thought that this obligation includes an obligation not to use defective material. A similar obligation for the supplier of a processing service can be found in Consumer Services Act § 4, stating that the service provider shall perform the service in a professional manner (cf. *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 94).

IV.C.–2:105: Obligation of skill and care

(1) The service provider must perform the service:

(a) with the care and skill which a reasonable service provider would exercise under the circumstances; and

(b) in conformity with any statutory or other binding legal rules which are applicable to the service.

(2) If the service provider professes a higher standard of care and skill the provider must exercise that care and skill.

(3) If the service provider is, or purports to be, a member of a group of professional service providers for which standards have been set by a relevant authority or by that group itself, the service provider must exercise the care and skill expressed in those standards.

(4) In determining the care and skill the client is entitled to expect, regard is to be had, among other things, to:

(a) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the service for the client;

(b) if damage has occurred, the costs of any precautions which would have prevented that damage or similar damage from occurring;

(c) whether the service provider is a business; ;

(d) whether a price is payable and, if one is payable, its amount; and

(e) the time reasonably available for the performance of the service.

(5) The obligations under this Article require in particular the service provider to take reasonable precautions in order to prevent the occurrence of damage as a consequence of the performance of the service.

COMMENTS

A. General idea

Supplying a service is in fact equivalent to a process during which a service provider takes all kinds of decisions for the purpose of achieving a specific result, stated or envisaged by a client. These decisions involve the carrying out of labour which is – with the exception of pure intellectual services – usually carried out by the application of materials and components by means of tools. The service provider's strict obligations as regards the *selection* of these tools, materials, and components, are all dealt with in the preceding Article. That Article further states rules as regards the selection of subcontractors. The present Article imposes obligations on the service provider with respect to the carrying out of the service process itself. These obligations relate to the decisions the service provider must take as regards the *application* of the tools, materials, and components, in the course of the labour process.

The central obligations imposed on the service provider by paragraph (1) presuppose that, whenever carrying out a service, the service provider will first of all have to observe the requirements to be found in the contract itself. In addition, there may be statutory requirements or other binding provisions which have to be followed.

Illustration 1

A company specialised in removing asbestos isolation material, agrees with the owner of an old factory to clean that factory from asbestos. The company will have to

observe all legal provisions related to health and safety at work whilst carrying out the said contract.

Paragraph (1)(a) imposes an obligation on the service provider to carry out the service with the care and skill generally to be observed in the circumstances of the case. In doing so, the intention of the service provider must be to achieve the result stated or envisaged by the client. Whether an *obligation* to achieve that result is to be imposed on the service provider, depends on the interpretation of the contract, taking into account IV.C.–2:106 (Obligation to achieve result). The present Article merely imposes an obligation on the service provider to make every reasonable effort for the achievement of the particular result.

Illustration 2
A doctor agrees to treat a patient suffering from severe pneumonia. The intention of the doctor is to cure the patient and he will have to do his best to achieve that result. But he cannot guarantee that the treatment will indeed cure the patient.

An important aspect of the obligation under the present Article will often be careful collection of information about circumstances in which the service is to be performed, adequate planning of the performance in the light of those circumstances and the taking of care to ensure that they are taken into account while the service is being performed.

Illustration 3
An oil production plant hired a specialised contractor to repair pipes that were damaged due to regular pressure. Before starting the actual repair work, the contractor will not only have to establish the way in which other parts of the installation influence the functioning of the pipes, but will also have to find out how the functioning of the pipes affects the functioning of other parts of the installation.

Illustration 4
A management consultant agreed to investigate the logistics department of a large food production factory and to advise on a possible reorganisation of the department. Once the contract is concluded, the consultant can be expected to gather information as regards the ages, education, job descriptions and career developments of the employees working at the department; and about the internal and external work processes that take place at the logistics department.

Illustration 5
A farmer contracts the harvesting of a maize crop out to a company that specialises in providing labourers and machinery for that purpose. The company will have to establish whether the soil can support tractors despite the recent heavy rainfall.

Illustration 6
A geo-technical surveyor is requested to investigate the subsoil conditions of a particular piece of land and to advise on the necessity of extra foundation works, for the purpose of a building that is to be erected on that piece of land. The surveyor fails to take into account the geo-technical influence of a nearby tidal river and gives the client the wrong advice.

The standard of care to be demonstrated by the service provider depends on the circumstances of the case. The Article, however, further specifies the required standard of care for some

important and frequently occurring situations. Paragraph (2) deals with the situation in which the service provider professes to be capable of performing the service with a higher standard of care and skill than the standard generally required. If that is the case, the higher standard is the one to be observed, as is shown in the following illustration:

Illustration 7
A law firm specialises in giving legal advice on proposed mergers and takeovers. It is the firm's only field of business. The firm has a high reputation among other law firms and must live up to that reputation.

If the service provider is a member of a group of professional service providers which has set its own disciplinary standards to be observed, paragraph (3) requires that these standards will also have to be observed by the service provider. Such standards will usually have been set by a relevant authority – usually a national authority – which can either be a public authority or a private entity.

Illustration 8
A contract is concluded between a client and a shop which specialises in body piercing. The shop will have to observe the disciplinary standards set out by the National Association of Body Decoration.

Finally, the criteria provided for in paragraph (4) are to be taken into account in determining the standard of care and skill to be demonstrated by the service provider. They are not to be regarded as the only criteria that have to be looked at, but they are thought to be the most relevant ones.

The obligations which this Article imposes on the service provider all relate to the particular result to be achieved through the service process. That result can be thought of as the accomplishment of the client's explicit and implicit wishes and needs. It is implied in these wishes and needs that the service process will – apart from the achievement of the said result – not lead to personal injury or damage to property.

Illustration 9
A storer agrees with a fireworks trader to store fireworks. The safety policy of the storer is not very strict: employees smoking cigarettes are able to walk past the open containers in which the fireworks are kept. As a result an explosion occurs and several residents living nearby are killed and several adjacent buildings and cars are seriously damaged.

Because of the importance of this point, paragraph (5) expressly requires reasonable precautions to be taken by the service provider to prevent the occurrence of damage as a consequence of the performance of the service. "Damage" means any type of detrimental effect (Annex): it therefore includes loss and injury. In the case of construction and processing contracts a particular application of this rule is that the service provider must take reasonable precautions to prevent damage to the thing being made or processed.

B. Interests at stake and policy considerations

It is undisputed that an obligation should be imposed on the service provider to carry out the service with the care and skill generally to be observed in the circumstances of the case and

that it must at least be the intention of the service provider to achieve a result stated or envisaged by the client. The crucial issue is whether the service provider has a further obligation to actually achieve that result through the service. That issue is considered in Comment B to the following Article.

A related issue is whether the service provider must still carry out the service with the required care and skill if there is an obligation to achieve a particular result. One might argue that failure to carry out the service with due care and skill will then probably coincide with a failure to achieve that result, in which case the client will invoke a remedy on the basis of the non-performance of that primary obligation. There would then be no need for a separate obligation to carry out the service with care and skill, given that it would be superfluous to allow the client to resort to a remedy for the non-performance of that obligation if the client could also claim for non-performance of the primary obligation.

It could be argued that it is useful to impose the obligation of care and skill on the service provider in any event, because that gives the service provider incentives to prevent the result from not being achieved. Imposing the obligation, even in the case where the service provider has an obligation to achieve a particular result, would also make it easier for the client to take precautionary actions. The client is in the position to do so, given that he can check and follow the service process as it proceeds, and discover problems at an early stage. Imposing the obligation of care and skill, even if the service provider is under an obligation to achieve a particular result, would then enable the client to anticipate the breach of that obligation. The client could give a direction or a notification and could demand an adequate assurance of due performance. Both parties will profit from these precautionary actions if they enable problems to be identified and disputes to be resolved at an early stage.

C. Preferred option

The present Article imposes an obligation on the service provider to carry out the service with the care and skill generally to be exercised by a reasonable service provider in the circumstances of the case. This is the fundamental obligation imposed on a service provider in all legal cultures, unless there is reason to impose the stricter obligation to actually achieve the result stated or envisaged by the client. The present Article is needed for cases where the latter obligation is not imposed on the service provider.

Even a service provider who is subject to the stricter obligation to achieve the required result will still be under an obligation to carry out the service with the required care and skill for the reasons explained above.

D. Remedies

It is possible that the service provider is not only under an obligation to carry out the service with due care and skill, but also under an obligation to achieve the result stated or envisaged by the client. If that is the case, and if the result is not achieved, it is in the client's interest to invoke the non-performance of the latter obligation. The burden of proof imposed on the client will then be limited.

The obligation to achieve a particular result will, however, not be imposed on every service provider in every situation. If it is not imposed, this might cause the client to invoke the non-performance of an obligation of the service provider under paragraphs (1) to (4) of the present

Article. The client may resort to any of the remedies of Book III, Chapter 3 if the service provider fails to perform the obligation stated in paragraph (5) of the present Article. The most likely remedy will be damages.

NOTES

I. Overview

1. It is established law in the countries investigated that any service provider owes the client an obligation to perform the service with reasonable care and skill. This obligation usually follows from general contract law provisions dealing with good faith: AUSTRIA (CC §§ 1297, 1299), BELGIUM (CC art. 1135), FRANCE (CC arts. 1135 and 1137), GERMANY (CC § 242), GREECE (CC art. 330), ITALY (CC art. 1176(2)), POLAND (CC art. 355(1)), PORTUGAL (CC art. 762(20)), SPAIN (CC art. 1104), although specific provisions in services contract law can be found as well, sometimes applying only to specific types of contract: Austria (CC § 964), England (Supply of Goods and Services Act 1982 s. 13), FINLAND (ConsProtA chap. 8 § 12(2)), France (CC art. 1927), Germany (CC § 690 and Ccom § 475), Greece (ConsProtA art. 8, see also CC arts. 686 and 823), Italy (CC art. 2236), THE NETHERLANDS (CC arts. 7:401, 6:27, 7:453 and 7:602), Portugal (CC art. 1208), SWEDEN (Consumer Services Act § 4). In SCOTLAND the obligation is implied generally at common law (*McBryde*, Law of Contract in Scotland, para. 9.37). Generally speaking, the standard of care to be observed by the service provider depends on the skills of a reasonably competent representative of the relevant trade or profession and is further determined by the generally accepted (technical) standards and customs of that profession.

II. The obligation of care of the service provider

2. There are no specific provisions to be found in the AUSTRIAN CC on the standard of care to be observed by service providers in general. Each service provider, however, has to observe a standard of care on the basis of the general provisions of CC § 1297 and CC § 1299. The exact standard of care to be observed depends on the circumstances of the case and will be determined following the usual degree of care and attention necessary for the performance of the service in question (cf. OGH, SZ 34/153=JBl 1962, 322; OGH, JBl 1982, 245=EvBl 1981/159). A specific provision exists for storage services: CC § 964 imposes an obligation on the service provider to act with reasonable care.

3. In case of a contract for work under BELGIAN law, the service provider has an obligation to take safety precautions in order to prevent material damage and safety risks which may occur as a direct consequence of the performance of the service. This obligation is said to follow from CC art. 1135 (cf. *Goossens*, Aanneming van werk, nos. 917, 955 and 961).

4. In ENGLISH law, there is an implied term that the service provider will carry out the service with reasonable care and skill, cf. Supply of Goods and Services Act 1982 s. 13; *Chitty* on Contracts I[29], no. 13-031. Although storage services are considered to be a separate category of contracts, they too are subject to the general requirements of Supply of Goods and Services Act 1982 s. 13 (cf. s. 12(3)). The degree of care and skill required of the service provider is that which is to be expected of a member of the profession of ordinary skill and competence, cf. *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582. Cf. for *contract of bailment: Morris v.*

C.W. Martin & Sons Ltd. [1966] 1 QB 716. The service provider is must also comply with applicable regulations governing safety standards and practices, cf. *Wilson v. Best Travel Ltd.* [1993] 1 All ER 353.

5. According to FINNISH law (ConsProtA chap. 8 § 12(2)) the service provider must perform the contractual obligations with professional care and skill, taking into account the interests of the client, and in accordance with the requirements set out by law, decree or official decision.

6. In a contract for work under FRENCH law, it has to be determined whether the service provider merely has an obligation to act with reasonable care and skill *(obligation de moyens)* or whether there is an obligation to accomplish a particular result *(obligation de résultat)*. Generally speaking, the former obligation is usually imposed in the case of mere intellectual services, whereas the latter obligation relates to services involving the supply of an immovable structure or movable thing (cf. *Malaurie/Aynès/Gautier*/Contrats spéciaux VIII[14], no. 742). Despite the fact that some service providers are under a higher obligation to accomplish a particular result, it nevertheless follows from CC art. 1135 that *any* service provider must observe the standards and customs relevant to the profession, even if the contract is silent about them. Moreover, it follows from CC art. 1137 that any party performing a contract must observe the normally expected standard of care. In the case of a service provider, comparison is made with a reasonably careful and skilled service provider. For deposit see also CC art. 1927 and Cass.civ. I, 28 May 1984, Bull.civ. I, no. 173.

7. There are no specific provisions to be found in the GERMAN CC on the standard of care to be observed by service providers in general while performing the service. Each service provider, however, must perform the service in accordance with the standard of care which can be expected and which is to be determined primarily according to the generally accepted standards and customs of the profession. This general obligation of any service provider follows from the general provision of CC § 242. Specific provisions are applicable, however, in the context of storage services. A service provider who supplies a gratuitous storage service must take such care as the owner of the thing would take (cf. CC § 690). In a commercial storage service, the service provider has an obligation to act with reasonable care (cf. Ccom § 475).

8. IN GREECE the general obligation of care owed by any service provider when carrying out the service follows from CC art. 330 and from ConsProtA art. 8. The standard of care owed by the particular service provider depends on the skills of a reasonably competent representative of that profession, which are further determined by the generally accepted standards and customs of that profession. If the service can be qualified as a contract for work the service provider has an obligation of care on the basis of CC art. 686. In storage services, CC art. 823 requires the service provider to exercise the same care as an owner, unless the service is for remuneration in which case the general rule of CC art. 330 applies.

9. According to the general provision of ITALIAN CC art. 1176(2), a service provider must perform the obligations under the contract with the diligence and knowledge, required by the profession (confirmed for services qualified as *appalto* in *Mangini*, Il contratto di appalto[2], p. 134; *Marinelli*, Giust.civ., 1982, ii, p. 116). It follows from CC art. 2236 that a more lenient obligation is imposed on the supplier of a service qualified as *contratto d´opera intellectuale* when the performance of the service is of particular difficulty.

10. In the NETHERLANDS, if the service can be qualified as *opdracht*, the service provider must act as a reasonably skilled and a reasonably acting service provider would act: cf. CC art. 7:401 and HR 9 June 2000, NedJur 2000, 460. This obligation is

also imposed on the service provider whose service can be qualified as *overeenkomst inzake geneeskundige behandeling*; cf. CC art. 7:453 and HR 9 November 1990, NedJur 1991, 26 (Speeckaert/Gradener). As regards services qualified as *bewaarneming*, the same obligation is imposed on the service provider; cf. CC art. 7:602 and CC art. 6:27. The obligation is not stated in the DUTCH CC for services qualified as *aanneming van werk*, but follows nevertheless from HR 26 April 1991, NedJur 1991, 455 (Benjaddi/Neve).

11. It follows from the general provision of the POLISH CC art. 355(1) that any service provider must act with the diligence generally required in a service contract. CC art. 355(2) adds to this that the professional capacity of the service provider is to be taken into account, leading to a higher standard of care (*M. Sośniak*, Należyta staranność).

12. In PORTUGAL any service provider has an obligation to perform the service in accordance with the state of the art and the technical standards generally accepted in the profession. This obligation follows from the general provision of CC art. 762(2); cf. CC art. 1208 for services qualified as *empreitada*. It includes the specific obligation to take safety precautions while performing the service; cf. *Romano Martinez*, Direito das Obrigações[2], no. 350.

13. The obligation of care to be observed by any service provider follows from the general provision of the SPANISH CC art. 1104. The provider of the service must act with the care and skill that a reasonable service provider would demonstrate under the given circumstances in accordance with the state of the art in the profession.

14. In the case of the supply of a service to a consumer, § 4 of the SWEDISH Consumer Services Act states that the provider must perform the service in a professional manner, safeguard the consumer's interests with due care and consult the consumer to the extent that this is necessary and feasible. The same standard applies to non-consumer contracts, but the parties are free to agree on the quality and standards they like, cf. *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 95.

IV.C.–2:106: Obligation to achieve result

(1) The supplier of a service must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that in the case of a result envisaged but not stated:

(a) the result envisaged was one which the client could reasonably be expected to have envisaged; and

(b) the client had no reason to believe that there was a substantial risk that the result would not be achieved by the service.

(2) In so far as ownership of anything is transferred to the client under the service contract, it must be transferred free from any right or reasonably based claim of a third party. Articles IV.A.–2:305 (Third party rights or claims in general) and IV.A.–2:306 (Third party rights or claims based on industrial property or other intellectual property) apply with any appropriate adaptations.

COMMENTS

A. General idea

A client who concludes a service contract generally wants to obtain a particular result. The ability of a service provider to achieve that result, however, depends on a number of factors which will not always be under the control of the service provider. This can be illustrated by the following examples:

Illustration 1
A patient suffering from a severe form of cancer enters into a contract with a specialised doctor in order to be cured through medical treatment.

Illustration 2
A law firm is engaged by a victim of alleged medical malpractice for the purpose of obtaining financial damages from the doctor through legal action.

Whether a service provider has promised to achieve a particular result – for example to cure the patient from cancer, or to obtain damages in a lawsuit on his client's behalf – is a matter of interpretation of the contract. The same goes for the question what that particular result to be achieved consists of. The purpose of the present Article is to assist the process of interpretation in those cases where the contract does not regulate the matter expressly.

The rule under the Article is that the service provider is under an obligation to achieve the particular result in the following two situations: (1) before conclusion of the contract, the client expressly requires the service provider to achieve the result, and the service provider does not dispute that the service will be able to achieve that particular result, and (2) at the time the contract was concluded, the parties did not expressly discuss the matter, but a reasonable service provider would expect the client to expect the result to be achieved.

If the client states the particular result, it will already be clear to the service provider what it is that the client expects. If the result is not stated, the particular result *envisaged* by the client must be determined. In that case the result to be achieved is the result that is in the mind of the objective, average reasonable client. Clearly, an average competent service provider must know what is in the mind of such a client.

Illustration 3
A motorcycle is brought to a garage for the purpose of changing the tyres. If the type of tyres to be supplied is not specified, the average reasonable client may expect new tyres of the same type as the old ones. The client may not expect the motorcycle to be fit for off road journeys, if it is objectively clear from the type of motorcycle and from the type of tyres to be changed that such journeys were not possible prior to changing the tyres.

If it is clear what the particular result is that is to be achieved, application of the Article still depends on the client's having no reason to believe that there was a substantial risk that the result would not be achieved by the service. Obviously, the parties to the contract may have differing views. An average and reasonable client may very well believe that the service will lead to the envisaged result without any risk, whereas the average competent service provider in the same situation may not always have that belief, as is illustrated in the following example:

Illustration 4
A supplier of computer networks is asked by a hospital to install a tailor-made network, following a design prepared on behalf of the hospital. The hospital sincerely believes that the design is perfect, but it is not. If the supplier were to follow the design exactly, the hospital would not be able to use the computer network for the purposes it has in mind. The supplier does not trust the design handed over by the client.

If the parties have differing views on whether the result can be achieved without any risk, the Article nevertheless applies and the obligation to achieve the particular result is imposed on the service provider. If the average competent service provider would expect the achievement of the result to be endangered by the occurrence of some substantial risk, he must warn the client about that risk (see IV.C.–2:102 (Pre-contractual duties to warn) and IV.C.–2:108 (Contractual obligation of the service provider to warn)). Once so warned, a reasonable client could no longer have the belief that there is no substantial risk that the result will not be achieved by the service.

A reasonable client may expect a constructor, a designer, a storer, as well as a supplier of factual information to achieve the particular result through the performance of the service requested. That is the reason why the obligation to achieve such a result is imposed upon these service providers in principle by the later Chapters in this Part. The obligation is not imposed as a principle on a processor, a supplier of evaluative information or a provider of medical treatment. Dependent on the circumstances of the case, however, interpretation of the contract on the basis of the rules of the present Article could lead to the conclusion that these service providers too are under an obligation to achieve the particular result envisaged by the client. This is clearly the case in the example given in the following illustration:

Illustration 5
A garage is asked by a car owner to remove and change the standard exhaust pipe of a standard car.

Finally, whenever a contract is interpreted in the sense that the service provider must achieve a particular result, other Articles imposing obligations – either under the present Chapter, or under the relevant specific Chapter of this Part – nonetheless remain applicable.

Paragraph (2) deals with a particular application of the general rule in paragraph (1). Where the ownership of something is transferred to the client under, or as a result of, the service contract, the client can reasonably expect that such ownership will be free from any right or reasonably based claim of a third party. Sometimes this result will be achieved through the direct application of the rules on sale. This will be the case if, for example, the contract is one for construction and sale (see II.–1:107 (Mixed contracts) and IV.A.–1:102 (Goods to be manufactured or produced)) or if it is categorised as a mixed contract for sale and the performance of a service (for example, selling and fitting a car tyre). Paragraph (2) of the present Article extends the sale solution to cases where the ownership is transferred without there being, technically, a sale. For example, a fitted part may become the property of the client by accession under the rules on the transfer of property.

B. Interests at stake and policy considerations

The question addressed by this Article is probably the most important issue in the context of service contracts. Two different approaches are generally recognised.

The first approach is to establish the service provider's liability on the basis of failure to perform the service with the required care and skill. In this approach, the idea is that the obligation imposed upon the service provider is an obligation of means, implying that the provider must strive for the achievement of the result envisaged by the client. In the event that such result is not achieved, the client must prove that the service provider failed to perform the service with due care and skill. Conversely, the service provider is allowed to prevent liability by proving that the service was performed with due care and skill.

The second approach is to establish the liability of the service provider on the basis of the mere fact that the service did not achieve the result stated or envisaged by the client at the time of conclusion of the contract. In this approach, the idea is that the obligation imposed upon the service provider is an obligation of result, implying that it is not enough merely to attempt to achieve the required result. If the result is not achieved, the client has to establish that fact. The service provider may escape liability by proving that the non-performance of the obligation was caused by the client or excused by an impediment but cannot prevent liability by proving that the service was performed with due care and skill.

It is difficult to make a choice between the two approaches for all types of service contracts. The client's interests are obviously protected best by the second approach. But the difficulty is that, although it may be appropriate to impose an obligation of result on most service providers, it would be harsh to impose such an obligation on some of them, given their inability to fully control the outcome of the service process, even if they make every effort to achieve the result envisaged by the client. Imposing an obligation of result on such service providers would not only be a danger to their interests, but would also make their services much more expensive for the client, given that the service provider would have to buy insurance for the coverage of uncontrollable risks. Where insurance cover cannot be obtained or can be obtained only at very high costs, this might cause service providers to withdraw from the market, leading to the disappearance of such services altogether.

C. Preferred option

The solution which is chosen in this Article reflects the idea that the probability that the result envisaged by the client can be achieved should be decisive for the obligation to be imposed upon the service provider. This means that neither the first nor the second approach sketched out under Comment B has been adopted for all services contracts. It is preferred to have a more flexible solution, which makes it possible to take into account the particularities of each type of service. Hence, if it is probable that the service can achieve the required result, an obligation to do so is imposed on the service provider (in the absence of a contractual provision to the contrary). If there is no such probability, the obligation is not imposed. Liability will then have to be established on the basis of the rules under the other Articles of this Chapter, in particular under the preceding Article .

In order to establish in each particular case whether it is probable in advance that the result envisaged by the client can indeed be achieved, it is necessary to determine whether the service provider ought to be able to identify and control the following three important factors – as well as the interrelationship that exists between them – in order to achieve that result: (1) the (particular) needs of the client, (2) the services provider's (tailor-made) solution that fits these needs, and (3) the circumstances in which the service is to be performed. In some services dealt with later in this Part, the service provider is deemed to have this ability. An obligation to achieve the particular result is imposed upon these service providers as a principle.

D. Remedies

If the service provider is under an obligation to achieve the result stated or envisaged by the client and fails to achieve that result, the client may resort to any of the remedies set out in Book III, Chapter 3, provided that the non-performance is not excused under III.–3:104 (Excuse due to an impediment) and that the client complies with any requirements as to notification - e.g. under III.–3:107 (Failure to notify non-conformity).

It is possible that the service provider is prevented from achieving the result by the client's failure to warn under IV.C.–2:102 (Pre-contractual duties to warn) paragraph (4) or failure to co-operate under IV.C.–2:103 (Obligation to co-operate) (1)(a), (b), (c) or (e), or as a result of following a direction of the client under IV.C.–2:107 (Directions of the client) paragraph (1). This would give the service provider a defence under III.–3:101 (Remedies available) paragraph (3) on the ground that the client had caused the non-performance. However, if the service provider was under a duty to warn the client that the result might not be achieved due to the client's incorrect or inconsistent information or directions, and failed to perform that duty, the issue becomes different. In that case the client's information or directions are no longer to be regarded as the only cause of the fact that the service provider has not achieved the result. The service provider will then not be able to bar the client's claim on the basis of III.–3:101 paragraph (3) or prove that the non-performance was due to an impediment beyond the service provider's control. The client may then in principle resort to any of the normal remedies.

Failure by the client to warn of an *anticipated* failure to achieve the required result under IV.C.–2:110 (Client's obligation to notify anticipated non-conformity) will not bar the client's claim for non-performance of the obligation under the present Article, because the failure to notify did not cause the service provider's non-performance. The client may then too resort to

any of the normal remedies: failure by the client to notify of an anticipated non-performance gives the service provider certain rights but does not cut off the client's remedies.

NOTES

I. Overview

1. If the contract does not regulate the question whether or not the service provider has to achieve a particular result through the service, the legal qualification of the service type itself is not sufficient to answer that question in: BELGIUM, ENGLAND, FINLAND, FRANCE and THE NETHERLANDS and SCOTLAND. In these countries, an obligation to achieve a particular result may be implied from the circumstances of the case, for instance if the client relies on the skill and judgement of the service provider (England and Scotland); if the client refrains from giving detailed instructions thus leaving it to the provider to decode how to carry out the service (Belgium, The Netherlands, England, Scotland); if the service has as its object an immovable structure or movable thing and does not involve particular difficulty or particular hazard (France); or if the achievement of a particular result is something that the client may reasonably expect (Finland). In other countries, however, these circumstances are considered irrelevant to the question whether the service provider has an obligation to achieve a particular result and the answer primarily depends on the legal qualification of the service: AUSTRIA (CC § 1167*)*, FRANCE (to the extent that the service involves construction of immovable structures; cf. CC art. 1792), GERMANY (CC § 633), GREECE (CC arts. 688 and 689), PORTUGAL (CC art. 1208).

II. Obligation to achieve result

2. In AUSTRIA it is a general rule that whenever a party expressly or impliedly agrees to achieve a particular result, failure to achieve that result constitutes non-performance of the obligation (CC §§ 922 ff). This general rule in particularised in CC § 1167 for contracts for work. Cf. also CC § 961. The service provider cannot escape liability by arguing that the service has been performed with reasonable care and skill (cf. *Koziol and Welser*, Bürgerliches Recht II[12], p. 247). If the service provider is not sure whether or not the service will be able to achieve the result, the client must be so informed at the time of conclusion of the contract: the provider must make it clear that responsibility is limited to performance of the lesser duty of reasonable care and skill (cf. Rummel [-*Krejci*], ABGB I[2], arts. 1165-1166, no. 56).

3. In a contract for work under BELGIAN law the service provider only has a duty to achieve a particular result if the client is considered to rely on the skill and judgment of the service provider. The client is not considered to rely on the service provider if the former imposes detailed instructions as to how to carry out the service (cf. Cass. 26 February 1976, Entr. Et dr. 1985, p. 263, note *M.A. Flamme and Ph. Flamme*. See also *Goossens*, Aanneming van werk, no. 40 and *Jansen*, Defects liability, pp. 265-266).

4. In ENGLISH law there is no rule in ss. 13 ff of the Supply of Goods and Services Act 1982 imposing an obligation on the service provider to achieve a particular result through the service. But the Act does not prejudice any rule of law which imposes a stricter obligation on the supplier (s. 16(3)). There is ample case law showing that where the client relies on the skill and judgement of the service provider, there is likely to be an implied term that the latter is to achieve a particular result through the service: *Duncan v. Blundell* (1820) 3 Stark 6, 171 ER 749; *Hall v. Burke* (1886) 3

TLR 165; *Jones v. Just* (1886) LR 3 QB 197; *Lawrence v. Cassel* [1930] 2 KB 83; *Samuels v. Davis* [1943] 1 KB 526; *Hancock v. B.W. Brazier (Anerly) Ltd.* [1966] 1 WLR 1317; *Greaves & Co. Ltd. v. Baynham Meikle & Partners* [1975] 1 WLR 1095 (cf. *Chitty* on Contracts I[29], no. 13-031). Generally speaking, a client is considered to rely on the skill and judgement of the service provider if it is left to the service provider to decide how to achieve the required result. There will be less reliance if the client imposes detailed instructions as to how to perform the service (cf. *Jansen*, Defects liability, pp. 261-264).

5. According to FINNISH ConsProtA chap. 8 § 12(2) sentence 2 the service must conform to what the consumer generally has reason to expect in the case of such a service. If the service does not conform to the consumer's reasonable expectations, it is deemed to be defective (cf. ConsProtA chap. 8 § 12(4)).

6. If the contract is for work, under FRENCH law it has to be determined whether the service provider merely has an obligation to act with reasonable care and skill *(obligation de moyens)* or must achieve a particular result *(obligation de résultat)*. Generally speaking, the former obligation is usually imposed in case of mere intellectual services, whereas the latter relates to services involving the supply of an immovable structure or movable thing, provided that the service promised does not involve particular difficulty or hazard (cf. *Malaurie/Aynès/Gautier*, Contrats spéciaux VIII[14], no. 742; *Huet*, Contrats spéciaux[2], nos. 32259 ff and the abundant case law quoted). An obligation to achieve a particular result is imposed on the service provider, however, irrespective of the involvement of any particular difficulty or hazard in the case of construction services (cf. CC art. 1792).

7. According to the GERMAN CC § 633 the service provider under a contract for work has to achieve a result that is fit for the specific purpose made known to the provider at conclusion of the contract, as well as fit for the normal purpose of such a service. To that extent, the service must have the qualities which are common for services of the same kind and which the client, from the nature of the service, may expect (cf. CC § 633(2); BGH 26 November 1959, 31 BGHZ, 224; BGH, NJW 1998, 3707). The duty to achieve a specific result is not imposed upon the service provider if the contract is qualified as *Dienstvertrag* (cf. BGH 4 June 1970, BGHZ 54, 106).

8. If the contract can be qualified as a contract for work under GREEK law the service provider is under a duty to achieve a particular result through the service (cf. CC arts. 688 and 689).

9. In case of a service qualified as *aanneming van werk* the position of DUTCH law is rather similar to ENGLISH and BELGIAN law. This means that the service provider has an obligation to achieve a particular result unless the client has given precise instructions (Asser (-*Kortmann*), Bijzondere Overeenkomsten III[7], no. 514; *Van den Berg*, Samenwerkingsvormen in de bouw, nos. 69-70; *Jansen*, Defects liability, pp. 267-270). As regards services qualified as *bewaarneming* the service provider has an obligation to achieve a particular result (*Rutgers*, Bewaarneming, no. 5; *Paquay*, RM Themis 1994, p. 494; cf. art. 7:605(4)).

10. Under POLISH law, the service provider is obliged to achieve the specific result always, if the contract is classified as an obligation of result (for example a contract for specific work). In such a case achieving the specific result is one of the conditions of fulfilling the contract.

11. The service provider under PORTUGUESE law has an obligation to achieve a particular result through the service only if the service can be qualified as *empreitada* (cf. CC art. 1208). The service provider cannot escape liability by arguing that the

service has been performed with reasonable care and skill (cf. CC art. 798 and 799; CA Lisboa, 27 November 1981, CJ 1981, V, 164).

12. In SCOTLAND the general obligation of the service provider is to use care and skill rather than provide a result. The parties may however provide for this in their contract (although courts have been reluctant to interpret these as imposing absolute obligations), or it may be implied if the client makes known both a particular purpose and reliance on the provider's special skill in this regard, or if the provider designs or selects a system or materials for installation (*McBryde*, Law of Contract in Scotland, paras. 9.37-9.39; *Stair*, The Laws of Scotland III, 'Building Contracts' para. 37 (with update)).

13. In SPANISH law, when the service contract establishes an obligation which can be fulfilled only by achieving a specific result (CC art. 1544: *contrato de obra*), this result generally is described explicitly in the terms of the contract. In the absence of a specific description the result to be achieved is the one envisaged by the parties, either inferred from the context of the obligation or stemming from the general good faith obligation (CC art. 1258) and usages (TS 30 January 1997, RJ 1997/845). It is a matter of construction whether the special purpose intended by the creditor is a risk borne by the debtor; were this the case, the contract ought to be deemed as a contract of work; in the contract of services, the creditor bears the risk of failure to achieve the purpose where this failure is not due to the debtor's negligence. In the area of plastic surgery, providing information about the results that may be expected is an obligation of the supplier, therefore the result envisaged by the client depends on the information received and the client should be aware of the possibilities of achieving the desired result (SAP Cáceres, 24 September 2001, BDA JUR 2001\317424). The duty to transfer property is always a duty to achieve a result; the transferor is therefore liable for eviction, even if not aware of the lack of title.

IV.C.–2:107: Directions of the client

(1) The service provider must follow all timely directions of the client regarding the performance of the service, provided that the directions:

(a) are part of the contract itself or are specified in any document to which the contract refers; or

(b) result from the realisation of choices left to the client by the contract; or

(c) result from the realisation of choices initially left open by the parties.

(2) If non-performance of one or more of the obligations of the service provider under IV.C.–2:105 (Obligation of skill and care) or IV.C.–2:106 (Obligation to achieve result) is the consequence of following a direction which the service provider is obliged to follow under paragraph (1), the service provider is not liable under those Articles, provided that the client was duly warned under IV.C.–2:108 (Contractual obligation of the service provider to warn).

(3) If the service provider perceives a direction falling under paragraph (1) to be a variation of the contract under IV.C.–2:109 (Unilateral variation of the service contract) the service provider must warn the client accordingly. Unless the client then revokes the direction without undue delay, the service provider must follow the direction and the direction has effect as a variation of the contract.

COMMENTS

A. General idea

The client will generally translate wishes and needs into directions to be observed by the service provider when carrying out the service. These directions could involve the nomination of subcontractors, the selection of specified tools, materials, and components and the manner in which the service is to be performed, including the application of the tools, materials, and components through labour. They might contain functional requirements, specifying the outcome that will eventually have to result from the service process.

> *Illustration 1*
> A building constructor agrees to build a new office for an investment bank. The constructor receives instructions from the client to cover the walls of the meeting room of the bank's board of directors with 18 mm wooden panels (meranti), to be obtained from supplier X and to be fixed by means of contact glue of type Y by subcontractor Z.

Such directions will usually be laid down in the contract itself, or in the documents and drawings the contract refers to. Paragraph (1)(a) imposes an obligation on the service provider to follow these directions. It is also possible that the contract allows the client to issue such a binding direction at a later stage under paragraph (1)(b), by making a choice left to the client by the contract, or under paragraph (1)(c), following a choice that may be made by either party at a later stage (c).

Paragraph (1) further requires directions to be given reasonably and in good time. Whether a direction is so given depends on the circumstances of the case. The steps that have already been taken by the service provider for the purpose of performing the obligations under the contract will have to be taken into account.

If the service is carried out following the client's directions, it may happen that the result the client intends will eventually not be achieved. In that case the service provider's liability is to be established under paragraph (2) of the present Article, which follows the same principle underlying various other provisions of this Chapter dealing with similar forms of defective co-operation of the client. That principle accepts the liability of the client for defective co-operation in principle, subject to the exception of the service provider's failure to warn. An example of a case where a service provider failed to warn in this respect, is to be found in the following illustration:

> *Illustration 2*
> A supplier of computer networks is asked by a hospital to install a tailor-made network, following a design prepared on behalf of the hospital. The network as designed is fit for the purpose the hospital has in mind, namely to allow a maximum of 150 staff members to use the network at the same time. Whilst the installation service is carried out, the hospital instructs the supplier to make 250 workplaces throughout the hospital available for entering the network, without instructing the supplier to enlarge the access capacity of the network. When the network is completed, it shuts down 15 times a day due to an overload of simultaneous access attempts.

Some directions are refinements of choices already made in agreement between the parties.

> *Illustration 3*
> A garage agrees to paint the car of a customer yellow for a fixed price. Once the contract is concluded and the service is to be performed, the customer chooses from a range of colours the exact type of yellow.

A client who wishes to leave the framework of such choices is allowed to do so. But in that case, the rules on variation of the contract will apply, according to paragraph (3). This can be explained on the basis of a modification of *Illustration 3*.

> *Illustration 4*
> A garage agrees to paint the car of a customer yellow for a fixed price. When the car is being painted, the customer instructs the garage to paint a black horizontal banner on both sides of the car.

Given that there is often an imprecise borderline between a direction that is issued within the boundaries of the existing contractual framework on the one hand, and a direction, which is outside that framework on the other, the service provider has to warn the client if of the view that this borderline is crossed.

B. Interests at stake and policy considerations

One issue is whether a client ought to be allowed to give directions while the service process is already on its way. It could be argued that it is essential for the client to be able to do so. In some situations it will be impossible or impracticable to foresee every detail of both the service process and the result that is to be achieved through that process at the conclusion of the contract. Often it is much easier to take decisions about such details when the process is already on its way and the contours of the result are visibly present. Also, if it becomes clear that achievement of the result becomes a problem due to unexpected developments, which cannot be controlled by the service provider, the client will most likely want to be able to

decide how the latter is to proceed with the service. Hence the client can contribute – by way of giving directions – to the achievement of a successful result.

But the downside of this is that directions may run contrary to the expectations of the service provider, who will have organised the work in accordance with the directions laid down in the contract itself and a reasonable interpretation of what is needed to accomplish the agreed outcome through the service. Directions may conflict with measures taken by the service provider, or even with the way parts of the result of the service have already been achieved.

Another issue involves the responsibility for any unfortunate consequences resulting from carrying out a direction. If the service provider observes a direction, which is incorrect or inconsistent with previous directions having regard to the result envisaged by the client, it is likely that the provider will not achieve that result. This means that directions might conflict with the obligations of the service provider under other Articles of this Chapter, and especially with the obligation to achieve the result which is imposed on some service providers. One might argue, as a general principle, that the client should presumably be responsible for the consequences of his directions to the service provider. In following these directions, the latter does nothing but perform the agreed obligations. But on the other hand, the service provider is in a much better position to assess the consequences of the directions given by the client. It is the provider who carries out the service, and who will usually have much more technical and other professional knowledge than the client. Channelling some of the responsibility to the service provider would therefore seem to be reasonable as well.

C. Preferred option

The present Article allows the client to give directions to the service provider in the course of the service process. The arguments set out in Comment B support this choice.

If a direction would lead to a change of the service, the service provider will have to notify the client of that, in order to trigger the operation of the rules under IV.C.–2:109 (Unilateral variation of the service contract) which might allow additional payment.

If the result of following an incorrect or inconsistent direction is that the service provider does not achieve the result envisaged by the client or otherwise fails to perform an obligation under the contract, the client may seek a remedy for the non-performance of the service provider's obligation. The service provider is then allowed to establish that the non-performance was caused by the incorrectness or inconsistency of the client's direction. The service provider will not be allowed to invoke the client's responsibility if the incorrectness or inconsistency of the direction was obvious to the provider or was actually discovered by the provider.

Mere selection by the client – through a direction – of generally adequate tools, materials, and components – whether or not to be obtained from a nominated subcontractor – which turn out to be unfit for their purpose in the particular case concerned due to an incidental production failure is not to be regarded as a direction which caused non-performance of the service provider's obligations. This can be explained by giving an illustration that is a further modification of *Illustrations 3* and *4*.

Illustration 5
A garage agrees to paint the car of a customer yellow for a fixed price. The customer specifies the type and colour of the car paint to be supplied by the garage. This type of paint is generally suitable for painting cars. However, due to an incidental production failure, the garage buys a can of paint, which does not do the job properly.

The main reason why the client's specification cannot be considered to have caused the non-performance follows from the general idea that decisions of the client in these typical situations do not restrict the freedom of the service provider to select *adequate* tools, materials, or components. Moreover, the service provider will have remedies against the supplier. An exception to this principle could arise in the event that the input – unfit due to an incidental production failure – is to be obtained from a nominated subcontractor who then limits liability towards the service provider to a further extent than the limitation the latter can resort to under the contract with the client. The exception will particularly be needed if the service contract does not allow the service provider to object to the nomination.

NOTES

I. Overview

1. The service provider under a contract for work often has an obligation to follow directions given by the client in the course of the service process, whether or not the parties have agreed on the subject matter in express wording: AUSTRIA (CC § 1168a), BELGIUM, FRANCE, GERMANY (CC § 242), GREECE (CC art. 685), ITALY (CC art. 1661), THE NETHERLANDS (CC arts. 7:402(1), 7:754, 7:760(3)), POLAND (CC art. 641(2), PORTUGAL (CC art. 1208), SPAIN (in the context of construction services: Construction Act art. 11. Express wording in the contract on the obligation of the service provider is needed in ENGLAND, given the prevailing principle that the service provider has the responsibility of deciding how to perform the service (*Clayton v. Woodman & Son Ltd.* [1962] 2 QB 533). This latter principle is considered to be important elsewhere as well, but there seems less reluctance to allow the client to give directions in the course of the service process necessary for the appropriate performance of the contractual obligations, even if the contract is silent about this. SCOTTISH law has not given this matter much consideration except in the context of construction contracts (see *Stair*, The Laws of Scotland III, 'Building Contracts' para. 42), but would probably otherwise follow English law.
2. If the client supplies inadequate materials or directions to the service provider, as a result of which the latter does not perform the service in accordance with the express or implied terms of the contract, the service provider under a contract for work may in principle escape liability in AUSTRIA (CC § 1168a), BELGIUM, ENGLAND, FRANCE, GERMANY (CC § 645), GREECE (CC art. 691), ITALY, THE NETHERLANDS (CC art. 7:760(2) and (3)), POLAND (CC art. 641(2)) and PORTUGAL. This result may be altered if the service provider is in breach of an obligation to warn.

II. The obligation of the service provider to follow the client's directions

3. The obligation of the service provider to perform the service in accordance with instructions issued by the client follows indirectly from the AUSTRIAN CC § 1168a in the case of a contract for work.

4. If a service is supplied under a contract for work under BELGIAN law there is an obligation on the supplier to follow directions of the client (cf. *Goossens*, Aanneming van werk, nos. 797 ff). This obligation only relates to instructions which are issued in time and within the framework of the contract, taking into account the characteristics of the service to be supplied, and having regard to the reasonable expectations of the service provider and the interests of both parties to the contract (*Goossens*, Aanneming van werk, nos. 801-802).

5. In ENGLISH law the prevailing principle is that the service provider is free to decide how to perform the obligations under the contract. But the parties can word the contract so as oblige the service provider to follow the client's directions (*Clayton v. Woodman & Sons Ltd.* [1962] 1 WLR 585 (CA); cf. *Jansen*, Defects liability, pp. 159-167, with regard to service contracts having as their object the construction or processing of immovable structures and movable things and with ample examples of express wording in standard forms of construction contracts).

6. Under FRENCH law, although the service provider is considered to have an independent responsibility as to how to carry out the service, the client is nevertheless allowed to give directions in the case of a contract for work (cf. *Mazeaud*, Principaux contrats[5], no. 1332; *Jansen*, Defects liability, p. 158).

7. The obligation of the service provider to follow the client's directions is undisputed in GERMAN law with respect to contracts for work (cf. BGH 25 January 1996, NJW 1996, 1346; *Jansen*, Defects liability, p. 159). The obligation is considered to be implied in the contract on the basis of the general provision of CC § 242 whenever this is necessary to ensure the appropriate performance of the service. The latter remains, however, the responsibility of the service provider. The service provider does not have to follow directions of the client if they are given after the conclusion of a contract for storage but may decide, within the framework of the express and implied contractual obligations, how to store the thing (cf., MünchKomm [-*Hueffer*], BGB, § 692 no. 2).

8. It follows from the GREEK CC art. 685 that the service provider owes an obligation towards the client to carry out the service in accordance with the client's directions in the case of a contract for work.

9. In ITALY, if the service is qualified as *appalto,* the obligation of the service provider to perform the service in accordance with the client's directions follows from ITALIAN CC art. 1661.

10. The obligation of the service provider to observe directions of the client under a contract for work follows indirectly from the DUTCH CC arts. 7:754 and 7:760(3)) and is generally accepted (cf. *Jansen*, Defects liability, p. 159). The obligation also exists in case the service is to be qualified as *opdracht* (cf. CC art. 7:402(1).). In the latter case the client must give directions in time and within the boundaries of the framework of the contract. The characteristics of the particular *opdracht* of the service provider may limit the obligation as well (Parl. Gesch. TM, InvW 7, p. 324), particularly if a direction would be in conflict with his professional ethics, professional codes of conduct and the independent position he may have to take towards the client (Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 61).

11. In this case the most relevant contract under POLISH law is the contract of specific work. According to the letter of the law, the way in which the contract is performed is in principle left to the service provider. However, the client has a right to control the method of performance – its correctness and accordance with the contract (CC art. 636(1)). As a rule the service provider is not bound by the client's instructions (Radwański [-*Brzozowski*], System Prawa Prywatnego VII[2], pp. 336-337). In practice however, the scope of the client's possibilities to interfere is normally wider.

Sometimes the possibility to give instructions is seen as an entitlement of the client (Radwański [-*Brzozowski*], System Prawa Prywatnego VII^2, p. 340).

12. In PORTUGAL the obligation of the service provider to follow the client's directions in case of services qualified as *empreitada* is considered to stem from CC art. 1208 (cf. CA Coimbra, 1 June 1993, BolMinJus 428, 689).

13. In SCOTLAND construction contracts normally give the client power to issue instructions through an architect or engineer, and so long as these are within the scope of the contract the service provider must comply. The authority to issue such instructions may be implied (see *Stair*, The Laws of Scotland III, 'Building Contracts' para. 42).

14. In SPAIN with respect to construction services, the obligation of the service provider to follow directions given by or on behalf of the client follows from Construction Act art. 11.

III. Effect of inadequate directions

15. According to AUSTRIAN CC § 1168a, the service provider is not liable in principle for the consequences of inadequate materials or instructions supplied by the client (cf. Rummel [-*Krejci*], ABGB I^2, § 1168a, no. 30).

16. If the supply of the service under a contract for work under BELGIAN law is delayed as a result of the client's instructions, the service provider is not liable in principle (cf. *Goossens*, Aanneming van werk, no. 801). The same applies if the client supplies inadequate materials (cf. *Jansen*, Defects liability, p. 423) or inadequate directions (Cass. 8 November 1974, Entr. et dr. 1976, p. 237, note *P. Libert*; cf. *Jansen*, Defects liability, p. 466).

17. If the client supplies inadequate materials or directions to the service provider, under ENGLISH law the latter will not generally be liable for non-performance (cf. *Jansen*, Defects liability, pp. 423 and 466, particularly with respect to services having as their object the construction or processing of immovable structures and movable things. See for instance *Lynch v. Thorne* [1956] 1 WLR 303. Nomination of subcontractors by the client may in particular circumstances enable the service provider to escape liability for non-performance: *Gloucestershire County Council v. Richardson* [1969] 1 AC 480 (cf. *Jansen*, Defects liability, pp. 453-458).

18. The supply by the client of inadequate materials to the provider of a service under a contract for work in FRENCH law has been considered as a ground for exculpation of the service provider (cf. Cass.civ. III, 17 July 1972, JCP 1973.II.17392), although it seems to follow from a later decision that the service provider must warrant the quality of the materials supplied by the client: cf. Cass.civ. III, 7 March 1990, Bull.civ. III, no. 69 and RD imm. 12(3) 1990, p. 375. Contrary to that decision is a later decision from the first chamber: Cass.civ. I, 20 June 1995, RD imm. 17(4) 1995, p. 751 (cf. *Jansen*, Defects liability, pp. 432-434). Inadequate directions by the client may also enable the service provider to escape liability, on the basis that the client's inadequate direction amounts to actual interference by a competent client. (*Jansen*, Defects liability, pp. 473 ff).

19. In GERMANY, the service provider will not be liable in principle for non-performance of a service under a contract for work if that non-performance is the consequence of the client's supply of inadequate materials or directions (cf. CC § 645; BGH 29 November 1971, NJW 1972, 447; *Jansen*, Defects liability, p. 423 and pp. 464-466). The mere nomination by the client of subcontractors is in itself not sufficient to enable the service provider to escape liability for non-performance (cf. BGH 14 March 1996, BauR 1996, p. 702; *Jansen*, Defects liability, p. 451).

20. The service provider under GREEK law is not, in principle, liable under a contract for work if non-performance is the result of carrying out the service in accordance with the client's inadequate directions or using inadequate materials supplied by the client (cf. CC art. 691).

21. If the service is qualified as *appalto* under ITALIAN law and if the service provider is bound to follow inadequate instructions of the client, the service provider will not in principle be liable for the consequences (cf. Cass. 28 May 1958, no. 1781, Foro it. Mass. 1958, c. 361).

22. In a contract for work under DUTCH law a non-performance as a consequence of inadequate materials supplied by the client will not lead to liability of the service provider in principle, following the rule of CC art. 7:760(2). This rule also applies if the non-performance is the consequence of the client's inadequate instructions (cf. CC art. 7:760(3); *Jansen*, Defects liability, pp. 423 and 466-467).

23. POLISH law clearly regulates this situation for the contract of specific work. First, the service provider has an obligation to immediately notify the client if the material delivered by the client is not suitable, or if there are any other circumstances, which may prevent the proper performance of the work (CC art. 634). Further, if the work is destroyed or damaged due to defects of the material delivered by the client or as a result of the work having been done in accordance with the client's instructions, the service provider may demand the agreed remuneration or its appropriate part for the work done, if the client has been warned of the danger of destruction or damage (CC art. 641(2)). There are similar rules specifically for building contracts. (CC arts. 651 and 655).

24. If the service is qualified as *empreitada,* under PORTUGUESE law, inadequate input by client, such as directions, tools and materials, may give rise to contributory negligence resulting in the exclusion or mitigation of the service provider's liability (cf. CA Porto, 21 January 1977, CJ, 1977, I, 73; *Romano Martinez*, Direito das Obrigações[2], no. 443; *Sá Gomes,* Breves notas sobre o cumprimento defeituoso na empreitada, 614). The service provider remains liable for the performance of subcontractors nominated by the client when these subcontractors are acting under the supervision of the service provider (cf. STJ 15 January 1992, BolMinJus, 413; *Sá Gomes*, Breves notas sobre o cumprimento defeituoso na empreitada, 1998, 615).

25. In SCOTTISH construction contract forms, failure of the contractor to comply with the client's lawful instructions enables the latter to get the work done by another at the contractor's expense (*Stair*, The Laws of Scotland III, 'Building Contracts' para. 42).

IV.C.–2:108: Contractual obligation of the service provider to warn

(1) The service provider must warn the client if the service provider becomes aware of a risk that the service requested:

(a) may not achieve the result stated or envisaged by the client at the time of conclusion of the contract;

(b) may damage other interests of the client; or

(c) may become more expensive or take more time than agreed on in the contract

either as a result of following information or directions given by the client or collected in preparation for performance, or as a result of the occurrence of any other risk.

(2) The service provider must take reasonable measures to ensure that the client understands the content of the warning.

(3) The obligation to warn in paragraph (1) does not apply if the client:

(a) already knows of the risks referred to in paragraph (1); or

(b) could reasonably be expected to know of them.

(4) If a risk referred to in paragraph (1) materialises and the service provider did not perform the obligation to warn the client of it, a notice of variation by the service provider under IV.C.–2:109 (Unilateral variation of the service contract) based on the materialisation of that risk is without effect.

(5) For the purpose of paragraph (1), the service provider is presumed to be aware of the risks mentioned if they should be obvious from all the facts and circumstances known to the service provider without investigation.

(6) For the purpose of paragraph (3)(b), the client cannot reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client, in which case II.–1:105 (Imputed knowledge etc.) applies.

COMMENTS

A. General idea

This Article imposes a contractual obligation to warn on the service provider which is very similar to the duty under IV.C.–2:102 (Pre-contractual duties to warn). The obligation is supplemented by the obligation in paragraph (2) to take reasonable measures to ensure that the client understands the content of the warning. A warning is writing is generally not required. Which measures are adequate depends on the circumstances of the case.

Again, the obligation to warn relates to typical risks which might occur in the course of the service and which would go to the very heart of the contract. The risks are identified in paragraph (1). The service provider will only have to warn on becoming aware of the risks but will not be under an obligation to warn if the client already knows of the risks or could reasonably be expected to know of them. That principle is reflected in paragraph (3) in conjunction with (5) and (6). Under paragraph (5) the service provider is presumed to be aware of the risks mentioned if they should be obvious from all the facts and circumstances known to the service provider without investigation.

The obligation under the present Article differs from the pre-contractual duty to warn. The extent of the pre-contractual duty to warn is dependent on risks that are obvious or actually discovered by the service provider, given the information the service provider ought to have

collected in order to make an informed offer to the client as regards the service that can be supplied. The information to be collected by the service provider particularly relates to the relevant wishes and needs of the client, as well as to important circumstances in which the service is to be performed. It may very well be the case that such information – *prior to* the conclusion of the contract – will not give rise to a duty to warn under IV.C.–2:102 (Pre-contractual duties to warn) paragraph (1). The reason for that may be that the risks are neither obvious nor discovered in the process of preparing an offer for the required service. But they may subsequently become obvious or may even be actually discovered *after* the conclusion of the contract, for two reasons.

One reason could be that the service provider will now have to look at the information, supplied before the conclusion of the contract, from a different perspective. That perspective is no longer the preparation of an offer, but the actual carrying out of the service in order to achieve the result envisaged by the client. Risks that were previously undetected, could now become obvious, particularly if the service provider collects additional information as part of the performance of the service. Another reason could be that the client has supplied additional information, directions, permits or licenses after the conclusion of the contract. If the service provider analyses these additional data in the context of the information previously supplied, the risks might become obvious or might be actually discovered.

Having regard to the purpose of the analysis of the information and directions sketched out above, the service provider is not bound to actually check whether observing the information or directions might give rise to one or more of the risks referred to in paragraph (1) but should be normally attentive given the purpose of the analysis. That principle is reflected in paragraph (5).

If the service provider does not perform the obligations under paragraphs (1) and (2) leading to the occurrence of one of the risks mentioned in paragraph (1)(a) or (b), the client may resort to the normal remedies under Book III, Chapter 3. In addition to the client's right to resort to these remedies, paragraph (4) of the present Article contains a further rule protecting the client, in the event that the failure to warn results in the risk mentioned in paragraph (1)(c). That rule is particularly relevant if payment of either a fixed price or a fee based on a no result, no pay-basis was agreed at the time of conclusion of the contract. It prevents the service provider from claiming compensation for the extra cost incurred, as well as an extension of time, under the following Article.

B. Interests at stake and policy considerations

The main issue is whether an obligation to warn is to be imposed on a service provider at all. It could be argued that the service provider should only have to act in conformity with the client's wishes and specifications stated at the time of conclusion of the contract, and with other directions supplied by the client. The argument would be that the service provider should respect the wishes of the client and live up to freely assumed contractual obligations. On the other hand, it could be argued that the service provider is in a much better position than the client to discover mistakes in the client's directions. Before carrying out the service, the provider will normally have to analyse the client's wishes in order to determine what exactly has to be done. The same will go for directions issued later on. In doing so, the provider might discover all sorts of gaps, ambiguities, inconsistencies, and mistakes which might cause problems if they were followed without clarification or correction in advance.

Warning the client in such situations will hardly impose extra costs on the service provider. It may even be beneficial, given that it would prevent future disputes.

This leads to a second issue. What should trigger the obligation to warn, having regard to the content of the information and directions either supplied by the client or collected by the service provider? Is a mere gap, an ambiguity or a similar form of uncertainty sufficient to give rise to the obligation? Or should the obligation require some inconsistency or incorrectness? An argument for accepting an obligation to warn in the first situation is that the ambiguity or uncertainty brings about the need for a choice, and that it will not be much of an effort for the service provider to consult the client before taking the decision. On the other hand, it would be highly impractical for the service provider to have to consult the client on every choice to be made in the course of the service process. This would also be inconsistent with the system of the preceding Article, which gives both the service provider and the client the possibility to make such choices. So that would be an argument not to accept an obligation to warn in case of a mere gap as to the content of the information or directions.

A third issue is how attentive the service provider should be in analysing the information and instructions, in order to be able to signal a problem that gives rise to an obligation to warn. Is it necessary to focus on gaps, ambiguities, inconsistencies, and mistakes? Is it necessary to search for them? An argument against that proposition would be that an obligation to inform is more costly when the service provider is expected to actively search for possible problems in the information and directions. On the other hand, in many cases the client would be better off if the service provider had such an extended obligation and better able to take advantage of the latter's expertise. But the service provider will not know where gaps or mistakes may be hidden and such a more extensive obligation will therefore be an important burden.

Another issue is whether there should be an obligation to warn if the client already knows of the problem or if the service provider believes that the client already knows of the problem, for instance because the client is more competent than the average client, or is assisted by someone else who has – or is deemed to have – the capacity of a professional and competent adviser. Imposing an obligation to warn on the service provider would then not only be unnecessary but would also become very costly for the client. But a choice has to be made between an unnecessary warning and the occurrence of a risk that is not discovered in time. In general, the costs of a warning will be insignificant in comparison with the costs of coping with any risk which occurs.

C. Preferred option

The present Article imposes an obligation to warn on the provider of a service. The arguments for doing this have been addressed in Comment B. This obligation has a firm basis in the jurisdictions that have been investigated. (See the Notes below.)

The obligation is triggered by inconsistencies in the information or directions supplied by the client, if it is expected that following the information or directions might lead to a risk that would go to the very heart of the contract from the client's perspective.

The system chosen in most countries is that the service provider only has to warn for inconsistencies actually discovered or for other obvious inconsistencies. This system is attractive because it imposes no extra costs on the service provider. A diligent service

provider will have to examine the client's information and directions carefully, because they are the very basis for the service. Inconsistencies that will not escape attention when the information and directions are studied as thoroughly as is necessary to carry them out have to be mentioned to the client. Any active inspection aimed at discovering inconsistencies is therefore not required.

Paragraph (5) provides that the service provider is presumed to be aware of the risks mentioned if they should be obvious from all the facts and circumstances known to the service provider without investigation. The approach adopted here is similar to the concept of 'reason to know' acknowledged in American law (see: Restatement (2nd) Contracts § 19, comment b) where it is clarified as follows. A person has reason to know a fact, if the person has information from which a reasonable person would infer that the fact does or will exist based on all the circumstances, including the overall context and ordinary expectations. 'Reason to know' must be distinguished from knowledge. Knowledge means an actual conscious belief in or awareness of a fact. Reason to know need not entail a conscious belief in or awareness of the existence of the fact or its probable existence in the future. Reason to know is also to be distinguished from 'should know'. 'Should know' imports an obligation to ascertain facts; the term 'reason to know' does not entail or assume an obligation to investigate, but is determined solely by the information available to the party. Under American law, the amount of knowledge expected from the service provider depends on the situation. The person is charged with commercial knowledge of any factors in a particular transaction that in common understanding or ordinary practice are to be expected, including reasonable expectations from usage of trade and course of dealing and widespread business practice. If a person has specialised knowledge or superior intelligence, reason to know is determined in the light of whether a reasonable person with that knowledge or intelligence would draw the inference that the fact does or will exist.

The same approach is adopted for the purpose of establishing whether the client's competence or knowledge is such as to negate the obligation to warn under paragraph (3) in conjunction with (6). The latter provision gives an additional clarification on the question whether, and to what extent, the client can reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field. The principle underlying the rule is that mere competence of the client is insufficient to support the *prima facie* conclusion that the client can reasonably be expected to know of a risk. The same goes for the situation where someone else advises the client. Mere competence of that other person does not automatically lead to the conclusion that the client can reasonably be expected to know of the risk. This is particularly to protect the interests of SME's and consumers who are – often for free – advised by family or friends. The situation becomes different, however, if a client specifically hires a professional adviser for the specific purpose of acting as an agent under the service contract. Any knowledge or competence of such agent will be imputed to the client under paragraph (6) in conjunction with II.–1:105 (Imputed knowledge etc) and this could then negate the obligation to warn of the service provider under paragraph (3).

The burden of proving that the service provider has an obligation to warn is eased to some extent by the presumption in paragraph (5).

This Article contains default rules in principle. However, given the character of the obligation to warn and its basis in good faith, one should not interpret a service contract too easily in the sense that the client has renounced the protection granted under the obligation to warn. It

should be noted that the underlying duty of good faith and fair dealing under III.–1:103 (Good faith and fair dealing) cannot be excluded or restricted by contract.

D. Remedies

If the obligation to warn is not performed and the service does not achieve the required result (paragraph (1)(a) there are in fact two obligations the service provider failed to perform: (1) the main obligation and (2) the ancillary obligation under this Article. With regard to the main obligation, the client's supply of incorrect or inconsistent information or directions will normally prevent resort to any remedy because the client will have caused the non-performance. However, in the present situation the client's act is not the only cause of the unfortunate end-result. A secondary cause is the service provider's failure to warn. This justifies the conclusion that the client's remedies remain available. Non-performance of the service provider's main obligation is not excused under III.–3:104 (Excuse due to an impediment) because the impediment was not beyond the service provider's control: a warning could and should have been given. With regard to the non-performance of the service provider's ancillary obligation to warn, the only reason why the client would probably want to claim a remedy on this basis is to obtain damages. Such a claim will be barred, however, if the client also claims damages on the basis of the non-performance of the service provider's main obligation. The client could not claim double compensation.

If the service provider does not perform the obligation to warn and the risk of paragraph (1)(b) occurs – other interests of the client are damaged – a claim for non-performance of the service provider's main obligation would not provide relief to the client. The client could however seek a remedy for non-performance of the obligation to warn. The main remedy will be damages. In that case the client's supply of incorrect or inconsistent information or directions could be regarded as a contribution to the non-performance or its effects and might therefore reduce the damages payable. (III.–3:704 (Loss attributable to creditor))

Finally, if the service provider fails to warn and the risk referred to in paragraph (1)(c) occurs – the service becomes more expensive or may take more time to perform than agreed on in the contract – the client will not be the one seeking a remedy. In practice it will be the service provider who will try to seek compensation for the loss, particularly if the service was to be performed for a fixed price or on a no result, no pay basis. This is the type of situation for which the rule of paragraph (4) is stated, although the rule is also relevant when the service provider failed to warn for the possible occurrence of any other risk mentioned in paragraph (1). The rule of paragraph (4) prevents the service provider from seeking compensation under IV.C.–2:109 (Unilateral variation of the service contract). It is similar to its pre-contractual counterpart under IV.C.–2:102 (Pre-contractual duties to warn). The difference is, however, that when the service provider fails to warn under IV.C.–2:102, a claim for compensation for extra cost and extension of time is still available under IV.C.–2:109 if the service provider proves that the client would have entered into the contract, even if aware of the risk in question. A similar rule has not been adopted in paragraph (4) of the present Article, given that it is intended for the situation where the contract has already been concluded

The rule therefore is that paragraph (4) stops the service provider from claiming compensation of cost and extension of time under IV.C.–2:109 (Unilateral variation of service contract) if extra cost and delay are indeed the consequence of a failure to warn under paragraphs (1) and (2). But there is always the alternative possibility that the service provider tries to claim damages directly for the client's non-performance of the obligation to co-operate. Here,

however, the service provider's claim would be affected by the rule of III.–3:704 (Loss attributable to creditor), given that the service provider's failure to warn contributed to the effects of the client's non-performance of the obligation to co-operate. In order to get to a solution that is consistent with the application of the rule under paragraph (4) of the present Article, it would be logical to apply the rule of III–3:704 to the detriment of the service provider.

NOTES

I. Overview

1. Case law and textbooks dealing with contracts for the supply of services generally acknowledge the importance of this ancillary obligation. Its relevance is particularly recognised if the client asked for a service specifically tailored to the client's wishes and needs – especially when they are abundant, detailed, and technical – and more particularly if the result envisaged by the client greatly depends on the control of the interrelationship between these wishes and needs, the solution devised by the service provider to meet these needs, and the circumstances in which that solution is to be applied in order to achieve the result required. This explains why the obligation to warn is considered to be particularly relevant in construction contracts and design contracts. Its relevance is further recognised in the framework of contracts for the processing or storage of a thing, information contracts, or treatment contracts, to the extent that the above characteristics are present. It is less relevant in contracts concerning a rather standardised processing, storage, information, or treatment service.

2. The obligation to warn of the service provider follows from the general obligation to carry out the service with reasonable care and skill in all countries investigated. This means that the obligation can be seen as a particularisation of (IV.C.–2:105 Obligation of skill and care) and the reader is referred to the notes on that provision. In some countries, however, the obligation can additionally be found in specific provisions, particularly those on contracts for work: AUSTRIA (CC § 1168a), FINLAND (Consumer Protection Act, Chapter on Certain Consumer Services Contracts, chap. 8 § 14), GREECE (CC arts. 685, 691 and 699), ITALY (CC art. 1663), THE NETHERLANDS (CC arts. 7:752(2), 7:753(3), 7:754 and 7:755), POLAND (CC arts. 634, 641(2) and 651), SPAIN (CC art. 1590). The obligation to warn can also be seen as an aspect of the general duty to act in accordance with good faith and fair dealing stated in III.–1:103 (Good faith and fair dealing). In all countries investigated, the obligation to warn the client is owed whenever the inadequacy of materials or directions supplied by the client should be obvious to the service provider, given the expertise that may be expected from the service provider. Expertise of the client is not relevant for the purpose of establishing the obligation to warn in concrete cases: Austria, ENGLAND, FRANCE, Germany, Greece, The Netherlands.

3. A service provider who fails to perform the obligation to warn is liable to the client for the consequences of that failure. The supply of inadequate materials or directions may, however, give rise to contributory negligence of the client in AUSTRIA, ENGLAND, FRANCE, GERMANY, GREECE, PORTUGAL and THE NETHERLANDS, in which case the expertise of the client can be a relevant factor: France, The Netherlands.

II. The contractual obligation to warn

4. In a contract for work in AUSTRIAN law the service provider has an obligation to warn the client following CC § 1168a. It is stated in this Article that the obligation is owed in case of obvious defects in the material furnished by the client or obviously incorrect directions issued by the client. The criterion of 'obvious' has to be assessed in the light of CC § 1299 (cf. Klang [-*Adler and Höller*], ABGB V[3], § 1168a, nos. 407 ff.; JBl 1966, 562, JBl 1987, 44, 622). The service provider will only have to analyse the client's input to the extent that this is justified by economic considerations, given that the criterion points to an easy-to-establish inadequacy for experts (*Iro*, ÖJZ 1983, 505, 507; Illustration JBl 1973, 151). The obligation to warn does not cease to exist if the client is to be seen as an expert (Rummel [-*Krejci*], ABGB I[2], § 1168a, no. 32).

5. In a contract for work under BELGIAN law the service provider owes an obligation to the client to warn if the latter supplies inadequate materials or directions. This obligation emanates from the obligation to perform the service with reasonable care and skill (cf. *Jansen*, Defects liability, pp. 290-291; *Goossens*, Aanneming van werk, nos. 872 ff). The obligation only exists if the inadequate input from the client should have been obvious to a competent service provider (cf. Trib.Anvers, 12 February 1970, RW 1969-1970, col 1393; *Jansen*, Defects liability, pp. 299-301).

6. The obligation to warn of the provider of services under ENGLISH law stems from the implied obligation of any service provider to carry out the service with reasonable care and skill (cf. *Duncan v. Blundell* (1820) 3 Stark 6, 171 ER 749; *Pearce v. Tucker* (1862) 3 F & F 136, 176 ER 61; *Brunswick Construction Ltd. v. Nowlan* (1983) 21 Build LR 27; *Lindenberg v. Canning* (1993) 9 Const LJ 43; *Worlock v. SAWS and Rushmoor Borough Council* (1982) 22 BLR 66 (CA); *Jansen*, Defects liability, pp. 288-289). The obligation is imposed where it would have been obvious to a competent service provider that the service could not be carried out properly as a result of the inadequate input supplied by the client (cf. *Lindenberg v. Canning* (1993) 9 Const LJ 43), although additional expertise of the service provider is considered to be relevant as well (cf. *Jansen*, Defects liability, pp. 300-301). No suggestion was found in the relevant cases that the client's expertise is a factor to be taken into account when determining whether or not an obligation to warn exists.

7. Under the FINNISH ConsProtA chap. 8 § 14 the service provider must without delay inform the client if the service is likely to be considerably more expensive than would reasonably be accepted or evidently not appropriate from the client's point of view.

8. In FRANCE, if the contract is one for work, the service provider must warn the client if the latter supplies inadequate materials or directions. This obligation stems from the obligation of the service provider to perform the service with reasonable care and skill (cf. Cass.civ. III, 5 June 1968, D. 1970, p. 453, note *Jestaz*; *Malaurie/Aynès/Gautier*, Contrats spéciaux VIII[14], nos. 750 ff; *Jansen*, Defects liability, pp. 290-291). The obligation is owed whenever inadequate input from the client should have been obvious to a competent service provider (cf. *Jansen*, Defects liability, pp. 300-301), irrespective of the client's expertise (cf. Jansen, Defects liability, p. 302).

9. Under GERMAN law the service provider owes an obligation to warn the client if the client supplies inadequate materials and directions. The obligation is said to follow from the general obligation of the service provider to carry out the service with reasonable care and skill (*Jansen*, Defects liability, pp. 291-292). The service provider will have to warn whenever inadequate input from the client should have been obvious to a competent service provider (cf. *Jansen*, Defects liability, pp. 300-301). The client's expertise is not relevant in this respect (cf. BGH 10 July 1975, BauR 1975, p. 420; *Jansen*, Defects liability, p. 302).

10. It follows from the GREEK CC arts. 685, 691 and 699 that the service provider owes an obligation to the client under a contract for work to warn if the client supplies inadequate materials or instructions, provided that the inadequacy is objectively detectable. The fact that the client, or any professional assisting the client, should or could have noticed the inadequacy, does not release the service provider from the obligation to warn.

11. It follows from the ITALIAN CC art. 1663 that, in case of services qualified as *appalto*, the service provider must warn the client if the latter supplies inadequate materials. Following the general obligation of the service provider to carry out the service with the required care and skill, the service provider owes an obligation to warn with respect to any inadequate input from the client in the service process which the service provider should have noticed taking into account the service provider's expertise and diligence (cf. *Voltaggio Lucchesi*, Giust.civ. 1959, I, p. 1780; Trib. Torino, 24 August 1979, Rep.Foro it., 1980, V° Appalto).

12. The obligation of the service provider under a contract for work in DUTCH law developed from the general obligation to carry out the service with reasonable care and skill (cf. *Van den Berg*, Samenwerkingsvormen in de bouw, no. 69; Asser (-*Kortmann*), Bijzondere Overeenkomsten III[7], no. 537; *Jansen*, Defects liability, p. 285; HR 25 November 1994, NedJur 1995, 154 (Bouwbedrijf Stokkers/Vegt Vloeren)). The obligation has recently been enacted in CC art. 7:754 which states that the service provider must warn the client in the course of the service about any errors in the contract, in so far as the provider knew or should have known of these errors. When applying the latter criterion, the expertise of the client is deemed to be irrelevant (cf. HR 18 September 1998, NedJur 1998, 818 (*KPI/Leba*)). Relevant factors are, however, the obviousness of the inadequacy of the input of the client, given the required intensity of the analysis of that input and given the expertise that may be expected from, or is claimed by, the service provider (cf. Asser (-*Kortmann*), Bijzondere Overeenkomsten III[7], no. 538). The service provider is not under an obligation to warn if the client has the same knowledge as the service provider with respect to facts that are considered relevant for the obligation and if the client, although supported by an expert and despite this knowledge, failed to carry out any further investigation that ought to have been undertaken on the basis of these facts (cf. HR 8 October 2004, JOL 2004, 506). The obligation to warn stated in CC art. 7:754 covers inadequacies in materials supplied by the client, as well as errors or defects in plans, drawings, calculations and instructions provided by the client for the purpose of performance of the service. Additional obligations to warn about price risks are further stated in CC arts. 7:752(2), 7:753(3) and 7:755. The obligation to warn is also imposed on the service provider in case the service is qualified as *opdracht* and follows from the general obligation to carry out the service with reasonable care and skill (cf. CC art. 7:401).

13. In a contract for work under POLISH law, the service provider's obligation to warn the client about the supply of inadequate materials follows from CC art. 634. Likewise, the service provider owes an obligation to warn in case inadequate directions are issued by the client: cf. CC art. 641(2) and the decision of the Supreme Court 22 April 1986 (II CR 531/80, OSNCP 1981, z. 9, poz. 174. A similar obligation exists under building contracts (CC art. 651).

14. If the service is qualified as *empreitada*, under PORTUGUESE law, the service provider owes an obligation to the client to warn in case of inadequate materials or directions supplied by the latter. This obligation follows from the general obligation to carry out the service with reasonable case and skill (cf. *Romano Martinez*, Direito das

Obrigações[2], nos. 354 and 443; *Pires de Lima and Antunes Varela*, Código Civil Anotado II[3], 796 art. 4).

15. In SCOTLAND as in England the obligation of the service provider to warn stems from the implied obligation of any service provider to carry out the service with reasonable care and skill, although there is not much Scottish case law on the point (*McBryde*, Law of Contract in Scotland, para. 9.37; *Stair*, The Laws of Scotland III, 'Building Contracts' para. 35; *Wagner Associates v Joseph Dunn (Bottlers) Ltd* 1986 SLT 267). In the construction context, the contractor must comply with the requirements of the contract, and it is not usually the contractor's concern that the building may be completely unsuitable for the employer's purposes (*Stair*, The Laws of Scotland III, 'Building Contracts', para. 34).

16. In SPAIN the service provider's obligation to warn follows from the general obligation to carry out the service with reasonable care and skill (cf. CC art. 1258 and several decisions of the Supreme Court: TS 14 June 1976, RJ 1976/2753; TS 27 January 1977, RJ 1977/121; TS 14 November 1984, RJ 1984/5554). A specific obligation to warn in a contract for work follows from CC art. 1590 if the client supplies inadequate materials. The obligation is owed in the event of obvious inadequacy given the diligence which can be required from the service provider (cf. *F. Martinez Mas*, La recepción en el contrato de obra, p. 20).

III. Consequences in case of breach of the obligation to warn

17. In AUSTRIA the service provider is liable for failure to warn the client about the consequences of the supply of inadequate tools or materials (CC § 1168a). But under certain circumstances the liability of the service provider can be reduced on the basis of contributory negligence on the part of the client (*Iro*, ÖJZ 1983, 505, 510 ff).

18. If the service provider fails to warn under a contract for work under BELGIAN law, the consequences of carrying out the service on the basis of inadequate materials or directions supplied by the client will be attributed to the service provider entirely (Cass. 15 December 1995, Entr. et dr. 1997, p. 177, particularly at 195 *in fine*. Cf. *Jansen*, Defects liability, pp. 487-488).

19. Under ENGLISH law, following less recent case law, the consequences of the service provider's failure to warn are attributed to the latter in their entirety (cf. *Duncan v. Blundell* (1820) 3 Stark 6, 171 ER 749; *Pearce v. Tucker* (1862) 3 F & F 137; *Brunswick Construction Ltd. v. Nowlan* (1983) 21 Build LR 27). More recent case law, however, allows the service provider to raise contributory negligence of the client as a defence, in the event that the client's inadequate directions have contributed to the occurrence of the non-performance (cf. *Lindenberg v. Canning* (1993) 9 Const LJ 43). This latter approach is also supported by The Law Commission, Contributory negligence as a defence in contract, no. 219, para. 3.41, p. 23 and para. 4.15(4), p. 34; cf. *Jansen*, Defects liability, pp. 502 ff.

20. Under the FINNISH ConsProtA chap. 8 § 14 the service is considered defective if the contractor fails in the duties to warn.

21. Under a contract for work in FRENCH law the consequences of carrying out the service on the basis of inadequate materials or directions supplied by the client will be attributed to the service provider entirely (cf. Cass.civ. III, 19 March 1969, Bull.civ. III, no. 243; *Jansen*, Defects liability, pp. 486-489). However, if the service provider failed to warn a client known to be competent, it is possible to mitigate the damages claim of the client on the basis of contributory negligence (Cass.civ. I, 2 July 1991, Bull.civ. I, no. 228; Cass.civ. III, 20 November 1991, Bull.civ. III, no. 284; *Jansen*, Defects liability, pp. 498 ff).

22. Under GERMAN law, the service provider is liable for failing to warn the client and thereby causing the service not to be performed in accordance with the contract (CC §§ 633, 645). But the service provider's liability can be mitigated on the basis of the client's contributory negligence (CC § 254) given the latter's inadequate input in the service process, unless the service provider actually knew this would lead to non-performance of the service (cf. BGH 18 January 1973, NJW 1973, p. 518; *Jansen*, Defects liability, pp. 491-493). It is undisputed that damages and costs that would have incurred anyhow, must be borne by the client (cf. BGH 29 October 1970, BauR 1971, 60).

23. A service provider who fails to perform the obligation to warn under a contract for work in GREEK law is liable to the client for the consequences. The provider may, however, fall back on the rule of CC art. 300 and raise the client's contributory negligence, given the fact that the client contributed to the damage by supplying inadequate materials or directions.

24. Under ITALIAN law, the service provider is liable to the client for the consequences of a failure to warn (cf. *Stair*, The Laws of Scotland III, *Mangini*, Il contratto di appalto[2], p. 134; *Voltaggio Lucchesi*, Giust.civ 1959, I, p. 1780; Trib. Torino, 24 August 1979, Rep.Foro it., 1980, V° Appalto).

25. Failure to perform the obligation to warn under the DUTCH CC art. 7:754 will invoke the service provider's liability towards the client. It follows from an *obiter dictum* in HR 18 September 1998, NedJur 1998, 818 (KPI/Leba) that the service provider, in order to mitigate the claim for damages, may bring up contributory negligence of the client (cf. CC art. 6:101) consisting of the supply of inadequate materials, plans or directions. It is at this stage that the expertise of the client is to be taken into account. It is generally accepted that damages and costs which would have been incurred anyhow must be borne by the client (*Jansen*, De toepassing van de "Sowiesokostenregel" door de Raad van Arbitrage voor de Bouw, p. 253). Failure to perform the obligations to warn stated in CC art. 7:752(2), CC art. 7:753(3) and CC art. 7:755 will prevent the service provider from claiming payment of the extra costs incurred.

26. In POLISH law the service provider is liable to the client for the consequences of a failure to warn: cf. CC arts. 634 and 641(2) and the decision of the Supreme Court, 22 of April 1986 (II CR 531/80, OSNCP 1981, z. 9, poz. 174.

27. Under PORTUGUESE law the service provider is liable to the client for the consequences of failure to perform the obligation to warn, although inadequate input provided by the latter may give rise to contributory negligence, resulting in the exclusion or mitigation of the service provider's liability (cf. CA Porto, 21 January 1977, CJ, 1977, I, 73; *Romano Martinez*, Direito das Obrigações[2], no. 443; *Sá Gomes*, Breves notas sobre o cumprimento defeituoso na empreitada, p. 614).

28. There is no SCOTTISH case law on this subject, and the courts would probably be inclined to follow the relevant English law (above).

29. The service provider must bear the consequences of failure to warn under SPANISH law. This follows particularly from CC art. 1590 in case of failure to warn for the inadequacy of materials supplied by the client under a contract for work.

IV.C.–2:109: Unilateral variation of the service contract

(1) Without prejudice to the client's right to terminate under IV.C.–2:111 (Client's right to terminate), either party may, by notice to the other party, change the service to be provided, if such a change is reasonable taking into account:

(a) the result to be achieved;
(b) the interests of the client;
(c) the interests of the service provider; and
(d) the circumstances at the time of the change.

(2) A change is regarded as reasonable only if it is:

(a) necessary in order to enable the service provider to act in accordance with IV.C.–2:105 (Obligation of skill and care) or, as the case may be, IV.C.–2:106 (Obligation to achieve result);
(b) the consequence of a direction given in accordance with paragraph (1) of IV.C.–2:107 (Directions of the client) and not revoked without undue delay after receipt of a warning in accordance with paragraph (3) of that Article;
(c) a reasonable response to a warning from the service provider under IV.C.–2:108 (Contractual obligation of the service provider to warn); or
(d) required by a change of circumstances which would justify a variation of the service provider's obligations under III.–1:110 (Variation or termination by court on a change of circumstances).

(3) Any additional price due as a result of the change has to be reasonable and is to be determined using the same methods of calculation as were used to establish the original price for the service.

(4) In so far as the service is reduced, the loss of profit, the expenses saved and any possibility that the service provider may be able to use the released capacity for other purposes are to be taken into account in the calculation of the price due as a result of the change.

(5) A change of the service may lead to an adjustment of the time of performance proportionate to the extra work required in relation to the work originally required for the performance of the service and the time span determined for performance of the service.

COMMENTS

A. General idea

The performance of the obligations under a service contract frequently extends over a long period of time. Often it becomes apparent that the terms of the contract no longer fit the changing situation. There may be unforeseen difficulties which have to be worked around. The client's needs and wishes may change. The parties can always change the terms of the contract by agreement but in the particular context of a service contract there may be a need for some unilateral power to change the service provider's obligations, subject to an equitable adjustment of the price and other relevant terms. This Article deals with this situation. It enables either party to change the terms relating to the service to be provided and, in effect, requires the other party to accept that change. However, as a unilateral power to change the terms of a contract is a potentially powerful and undesirable weapon, there are stringent restrictions built into the article.

The situation which arises when a service provider wishes to change the service is similar to the situation of benevolent intervention but differs in that the service provider may be acting

largely in the service provider's own interests. Also, the contract sets an initial framework which has to be taken into account.

The client has several protections under the Article. First, the change must be reasonable. In determining whether it is reasonable, paragraph (1) states that the interests of both parties need to be weighed and balanced. Secondly, a client who is not willing to accept a change may walk away from the contract in any event using the right to terminate under IV.C.–2:111 (Client's right to terminate). This is made clear by the opening words of paragraph (1). The client is also protected from variations due to circumstances of which the service provider ought to have given a pre-contractual warning. See paragraph (3) of IV.C.–2:102 (Pre-contractual duties to warn). Finally, the client is protected by the restricted definition in paragraph (2) of what is regarded as reasonable.

The interests of the service provider who objects to a change are protected by the reasonableness requirement and are further protected by the provisions of paragraphs (3), (4), and (5) as explained below.

Paragraph (2) identifies various situations in which a change of the contract is regarded as reasonable.

Paragraph (2)(a) deals with the situation where the service provider is prevented from performing the main obligation under the contract *at all* due to a cause that has nothing to do with the failure of either party to perform a duty or obligation prior to or after the conclusion of the contract.

> *Illustration 1*
> An engineer is ordered to repair the defective part of a conveyor belt. The purpose of the job is clearly to get the conveyor belt moving again. While performing the service, the engineer discovers that the repair of the specific part will not bring the conveyor belt back into operation, given that another part of the belt is defective as well. When the parties entered into the contract, however, they did not agree on the repair of this other defective part. Moreover, this latter defect was not something that could be expected to be noticed by the engineer at the time of conclusion of the contract. Repair of the second defect will cost extra and also delay the service. The engineer may change the service and repair the other defective part.

Paragraph (2)(b) identifies a second situation in which a change of the contract by the service provider is regarded as reasonable. If the client gives the service provider a direction which would lead to a variation of the contract, the service provider must warn the client that that would be the result. If the client does not revoke the direction, the service provider may vary the contract accordingly and the variation is deemed to be reasonable.

> *Illustration 2*
> A real estate agent is asked by a growing law firm to find a suitable office building in the area of Berlin. The law firm would like to locate itself within a maximum distance of 5 kilometres from the German capital. After a few weeks, the firm directs the agent to look for a possible location 'in either Berlin, Munich or Frankfurt'. The agent informs the law firm that this sudden switch of preference will lead to an increase in the required search activities, and that it will cost extra to carry out the adjusted

service. The client does not revoke the direction. The agent may vary the contract accordingly.

A third situation is the one referred to in paragraph (2)(c). The client may need to initiate a change of the contract in response to a risk about which the service provider has given a warning. In so far as that change is a reasonable response to the warning, it is deemed to be a reasonable variation of the terms of the contract.

Illustration 3
A geo-technical surveyor is asked by a client to investigate the subsoil conditions of a piece of land which the client would like to use for the erection of a building. The client designates the exact area to be investigated. While performing the investigation, the surveyor discovers the presence of a small stream below the surface of the land investigated. The origin of the stream is located somewhere outside the area designated for investigation. The surveyor warns the client that further investigation of the stream is needed in order to find out its effects on a possible future building. This further investigation, however, is outside the scope of the present service contract. Hence the client expands the surveyor's task under the contract. That is deemed to be a reasonable variation.

There is a fourth situation in which a change of the contract is deemed to be reasonable. This is where there has been a change of circumstances which would justify a variation of the service provider's obligations under III.–1:110 (Variation or termination by court on a change of circumstances). The reference to this Article is made in order to provide flexibility while preventing the service provider from shifting all kinds of risks to the client – besides the ones that fall within the boundaries of the situations already described above. It has to be established that performance of the contractual obligations has become excessively onerous because of a change of circumstances which should not be for the service provider's account.

All the situations set out above are subject to paragraphs (3), (4), and (5) of the present Article, providing rules for the consequences of a reasonable change of the contract.

Paragraphs (3) and (4) deal with adjustment of the price. The rule of paragraph (3) basically states that the new price has to be reasonable and has to be calculated in accordance with the method used to determine the original price. A change of a contract may result in either an increase or a decrease of the price. If the change of the contract would lead to extra work for the service provider, the remuneration would increase accordingly. In addition, it has to be taken into account that the service provider may have other than financial interests at stake, for instance because there are contracts with other clients and insufficient time and staff to perform the extra work that results from the change. If the change of the contract implies a reduction of the service, the rule of paragraph (4) states that the parties will have to take into account the expenses spared as a result of the reduction, the loss of profit for the service provider, and the options the service provider has available to use earning capacity otherwise.

Paragraph (5) deals with the consequences of the change of the contract on the time for performance, if the change results in an increase of the work to be performed under the contract. An extension of time will then have to be granted to the service provider to the extent that extra time is needed to carry out the changed service, taking into account the time for performance agreed upon for the initial service.

B. Interests at stake and policy considerations

A change of the service to be supplied under a service contract is a frequently occurring situation. Changes initiated by the client are usually not a problem, provided that the service provider gives a warning to the client as regards the consequences of such initiatives.

Changes of the service become an issue, however, if they are rooted in undesired circumstances that are outside the control of the parties. One could question whether it is then desirable to have a rule that forces either the one party or the other to accept the change of the service. The alternative would be to leave changes to the agreement of the parties. The main objection to a unilateral power to vary is of course that a forced change of the service could lead to a non-voluntary change of the mutual obligations under the contract. On the other hand, if these obligations have become unbalanced due to the event that gives rise to the change of the service, general contract law does not oppose the changing of the contract, provided that this is done having regard to concepts of fairness and reasonableness.

This brings up the related issue whether it is necessary to have a separate rule for service contracts stating that a change of circumstances in accordance with III.–1:110 (Variation or termination by court on a change of circumstances) is deemed to justify a unilateral change of the service, allowing the service provider to ask for extra payment and extension of time under paragraphs (3), (4), and (5) of the present Article. One could argue that such a rule is not needed, given that III.–1:110 already provides a solution. On the other hand, one could argue that the latter provision needs particularisation in the context of service contracts, especially since III.–1:110 would require the party instigating the change to rely on the courts, which would have discretionary powers here. This is rather impractical in the case of a service contract which is already being performed.

C. Preferred option

It is thought wise to have a rule that allows for unilateral variation of the service in a number of situations, provided that the power to vary is limited and that the interests of the parties are kept in balance. The rules of the Article try to do this. The interests of the client in particular are safeguarded by the various restrictions built into the Article. It is worth bearing in mind that the client always has the right to terminate the contractual relationship under IV.C.–2:111 (Client's right to terminate) even if a proposed change of the service is considered to be reasonable.

It is thought that the rule in paragraph (2)(d) of the present Article is needed in order to allow the service provider – in the event of a change of circumstances – to ask for extra payment and extension of time under paragraph (3), (4), and (5). It is true that III.–1:110 (Variation or termination by court on a change of circumstances) provides a general remedy in the event of an exceptional change of circumstances, but that Article is intended to apply only to exceptional cases and requires an application to a court. Going to court is a final and radical option, which would take a considerable amount of time. In the meantime, the service provider is still in the middle of the performance of a service contract which is costing extra money and time. It seems reasonable to protect the service provider's interests by allowing recovery for these extras directly under paragraph (2). This might also give an incentive to the client to reconsider the future of the contractual relationship given that the client has the escape route of termination.

NOTES

I. Overview

1. In many of the countries investigated (BELGIUM, ENGLAND, FINLAND, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, POLAND, PORTUGAL, SWEDEN) general contract law concepts and provisions exist on the basis of which a service contract can be changed in answer to unforeseen external cost-increasing circumstances, causing the equilibrium between the costs and benefits of performing the obligations of the parties to be seriously disrupted: Belgium and France *(imprévision)*, England *(frustration)*, Germany (CC § 313), Greece (CC art. 388), Italy (CC art. 1467), The Netherlands (CC art. 6:258) and Portugal (CC art. 437). Successful application of these concepts and provisions, however, will be possible in very limited situations only or will hardly be possible at all. In SCOTLAND frustration of contract discharges the parties' obligations; the contract can only be adjusted by parties' agreement. In addition to such general contract law provisions, particular rules exist in the countries investigated in order to deal with unforeseen external cost-increasing circumstances in the framework of particular services contracts. Greece (CC arts. 696-697), Italy (CC art. 1664), The Netherlands (CC arts. 7:406, 7:753 and 7:601(3)) and Poland (CC art. 632). These additional rules are particularly needed in the event that parties agreed on payment of a fixed price for the initial service, which is why many of these provisions relate to cost-increasing circumstances occurring in the supply of construction and processing services. It appears that these additional rules are less severe for the service provider than the general contract law concepts and provisions. A specific provision for consumer services exists in Sweden (Consumer Services Act § 38).

2. An express unilateral right of the client to change the service exists in BELGIUM and FRANCE services pertaining to the construction of an immovable structure (CC art. 1793), in THE NETHERLANDS work (CC art. 7:755) and in ITALY (CC art. 1661) and PORTUGAL (CC art. 1216) for construction and processing services, although agreement of the parties is sometimes needed in Portugal (CC arts. 1214-1215). As for consumer services in SWEDEN, the unilateral right indirectly follows from art. 38 of the Consumer Services Act. In GERMANY the unilateral right of the client is not undisputed for contracts for work (CC § 632), although the law allows price adjustment to the service provider in the event of substantial and unexpected extra work induced by the client. This is also the solution in Belgium and France for all contracts for work outside the scope of the specific rule of CC art. 1793. In ENGLAND and SCOTLAND the unilateral right of the client to change the contract must follow from express wording in the contract. In all countries investigated (Belgium, England, Finland, France, Germany, Italy, The Netherlands, Portugal, Sweden), the client must, in principle, pay the service provider for extra work resulting from a change of the service as ordered by the client. The requirements that need to be fulfilled, however, in order for the service provider to be able to pursue this payment claim, may differ (see particularly the strict rule of CC art. 1793 in Belgium and France as regards construction services).

II. External cost-increasing circumstances

3. If the parties agreed on payment of a fixed price then, under BELGIAN law, the general rule under contracts for work is that the service provider must bear the consequences of external cost-increasing circumstances (*Goossens*, Aanneming van werk, no. 619). Case law and legal doctrine, however, firmly accept that the service

provider is entitled to price adjustment when confronted with conditions unexpected at the time of conclusion of the contract, causing considerable difficulties in the performance of the service and leading to serious disturbance of the balance of the contract (*Goossens*, Aanneming van werk, nos. 682 and 688 ff). Case law generally acknowledges that the entitlement to price adjustment can be based on general contract law provisions on the construction of contracts (CC art. 1163), whereas legal doctrine seeks its basis in the doctrine of *imprévision* (*Goossens*, Aanneming van werk, nos. 685-686).

4. If cost-increasing external consequences occur in the course of a service process, the question to be answered under ENGLISH contract law is whether or not performance of the service may considered to be frustrated. Frustration occurs if a contract is impossible to perform because its object is no longer attainable due to something beyond the control of either party, or where to require performance would be to render the obligation something radically different from what was undertaken by the contract (*Chitty* on Contracts I[29], nos. 24-007 ff). The fact, however, that unforeseen events make a contract more onerous than was anticipated do not frustrate it (cf. *Davis Contractors v. Fareham Urban DC* [1956] AC 696; *Tsakiroglou & Co. Ltd. v. Noblee, and Thorl GmbH* [1962] AC 93). In case performance of the contractual obligations becomes more difficult or onerous, frustration may be accepted if it can be argued that, assuming the consequences of the unforeseen cost-increasing circumstances are to be borne by the service provider, the obligations of the parties will radically change from their original intentions. If frustration is accepted in a case like this, the service provider is not entitled to adjustment of the price. The doctrine of frustration operates to discharge the contract and the legal consequences of a frustrated contract will be that the parties are relieved of all obligations under the contract. If the parties wish to suspend or vary a service contract that is frustrated they must do so by entering into a new contract in clear and unambiguous terms. If the service provider is allowed to carry on with the service process after the frustrating event, then, unless a new contract is made, the work is not done pursuant to the initial contract. Nevertheless, a fair remuneration must be paid for any work done, on the basis of *quantum meruit* or *restitution* (*Chitty* on Contracts I[29], no. 24-096). Frustration cannot be argued in a case where – often the case in English contract law practice – the parties have made specific provisions in the contract for what might otherwise have been a frustrating event (*Chitty* on Contracts I[29], no. 24-056).

5. According the main rule in the FINNISH Consumer Protection Act, Chapter 8 on Certain Consumer Services Contracts (chap. 8 § 6) the service provider must ask for permission to undertake extra cost-increasing work which is appropriately undertaken in the same connection. If the client cannot be reached within a reasonable period, the extra work may be done only if the costs charged for the work are minor. Should the service provider notice that there is a need for extra work that cannot be postponed without causing hazard to health or property the service provider must, without delay, notify the client of that fact.

6. The doctrine of *imprévision* is accepted in FRENCH law in exceptional circumstances only (see *Starck/Roland/Boyer*, Obligations II[6], no. 1222). The doctrine is applied, however, by administrative courts to contracts concluded with public entities. Given the restricted application of the doctrine, the provider of a service under a contract for work is not entitled to adjustment of the agreed fixed price in the event of external cost-increasing circumstances, even if these circumstances were unexpected at the time of conclusion of the contract (cf. *Bénabent*, Contrats spéciaux[6], no. 563; Cass.civ. III, 6 May 1998, Bull.civ. III no. 94). As regards construction contracts for a fixed price, this rule is stated in CC art. 1793. In what appears to be an isolated case, price

adjustment was allowed in a situation where the service provider encountered difficulties unverifiable at the moment of the conclusion of the contract, leading to unexpected extra work (Cass.civ. III, 17 May 1995, Mon.TP 18 August 1995, p. 28).

7. In GERMANY the general contract law rule relevant for external cost-increasing circumstances in the framework of services is to be found in CC § 313. Under a contract for work the occurrence of external cost-increasing circumstances cannot give rise to adjustment of the price in case the initial price has been fixed by the parties. But this principle can nevertheless be set aside if the requirements of CC § 313 are met (cf. BGH VersR 1965, 803).

8. External cost-increasing circumstances occurring in the service process may first of all be regarded as an issue of unforeseen change of circumstances in GREEK law. This concept is rooted in good faith and is dealt with by CC art. 388. The service provider is allowed to ask the court to reduce the obligations or to terminate the contractual relationship in whole or in part in the event that unforeseen circumstances have caused the performance of the service to become excessively onerous. In addition to this general provision, specific provisions apply to contracts for work dealt with in CC arts. 681 ff. If the parties have concluded the contract on the basis of a fixed price, the service provider bears the risk for the cost of subsequent extra work and additional labour which was not calculated in advance (subject to a change of the service ordered by the client). In such a case any rise in the price of the materials or wages will also be for the risk of the service provider. If the parties have explicitly agreed the service on a cost estimation and if the service provider has guaranteed that cost estimation, the service provider is not entitled to price adjustment on the occurrence of cost-increasing circumstances (CC art. 696). In no guarantee has been provided, the client will have to bear the consequences, although CC art. 697 allows the client to terminate the contractual relationship if the financial consequences of the cost-increasing circumstances are substantial. It is stated in CC art. 696 that it is to be applied subject to the general provision of CC art. 388.

9. The relevant provision in the ITALIAN CC is art. 1467 on unforeseen circumstances. The provision entitles the service provider to ask the court to terminate the contractual relationship on the ground of excessive onerousness of the performance of the service. The rule is particularised for construction and processing services qualified as *appalto* (CC arts. 1655 ff). According to CC art. 1664, a claim for price adjustment is available on grounds of an increase of costs for material, staff and production due to unforeseeable events (cf. Cass., 17 July 1976, no. 2845, Rep.Foro it., 1976, V° Appalto, c. 115, no. 8. The limit of normal risk of consequences of unforeseeable events to be borne by the service provider is set at an increase of more than 10 per cent of the initial price (Cass., 5 February 1987, no. 1123, Rep.Foro it., 1987, V° Appalto, c. 144, no. 47; Cass., 25 September 1953, no. 3042, Rep.Foro it., 1953, V° Appalto, c. 109, no. 16).

10. In addition to the rather strict provision of the NETHERLANDS CC art. 6:258 on unforeseen circumstances, CC art. 7:753(1) provides a rule for contracts for work in the event that cost-increasing circumstances occur after the conclusion of the service contract. If these circumstances cannot be attributed to the service provider, and if the service provider did not have to take these circumstances into account when calculating the price for the service, the court may be asked to adjust the price initially agreed. A further requirement is to be found in CC art. 7:753(3), stating that the service provider cannot ask the court for price adjustment if the client was not properly warned of the need for such an adjustment. Costs incurred and damage suffered by the service provider in the framework of the performance of other types of services are to

be compensated if these costs are not included in the price following CC art. 7:406 (services qualified as *opdracht* and *overeenkomst inzake geneeskundige behandeling*, with the exception of damage that can be attributed to the service provider) and CC art. 7:601(3) (services qualified as *bewaarneming*).

11. If, under POLISH law, the supply of a material service is qualified as a contract for work (CC arts. 627 ff) and if the parties agreed on payment of a fixed price, the issue of external cost-increasing circumstances is to be considered on the basis of CC art. 632. According to paragraph 1, the service provider cannot demand an increase of the price, even if it was impossible at the time of conclusion of the contract to foresee the amount of work or the cost of the work to be carried out. The consequences of this rule are mitigated, however, by paragraph 2. This provides that if the performance of the service contract in case of unforeseen cost-increasing circumstances would cause a considerable loss, the court may adjust the price or terminate the contractual relationship.

12. In PORTUGAL, if the parties to a service contract did not agree on a price revision clause, unforeseen external cost-increasing circumstances can only lead to adjustment of the price on the basis of the general contract law provision on change of circumstances (CC art. 437) which is rooted in the concept of good faith.

13. The SCOTTISH doctrine of frustration is very similar to that of English law (above), save that the adjustment of the parties' positions in respect of incomplete performances is carried out by way of the common law of unjustified enrichment (*McBryde*, Law of Contract in Scotland, chap. 21).

14. A service provider may be entitled to payment for extra work in the framework of a service supplied to a consumer on the basis of § 38 of the SWEDISH Consumer Services Act. Having regard to that provision, a situation that would probably amount to an external unforeseen cost-increasing circumstance would be where the service provider carries out the service in accordance with § 8 of the Consumer Services Act. This provision states that if, in the course of performing the service, it appears that other work is needed which, by reason of its relationship with the service, ought to be performed simultaneously with such service, the service provider must notify the consumer and request instructions. If the consumer cannot be reached, the service provider is allowed to perform the additional work but only if the price for the extra work is insignificant, or where there are special grounds for assuming that the client would have opted for carrying out the extra work. Furthermore, the provision includes the situation where the service provider is obliged to perform any additional work which cannot be postponed without exposing the consumer client to a risk of serious damage.

III. Change of the service ordered by the client

15. Changes ordered by the client under a contract for work in BELGIAN law will either fall under the application of general contract law rules or, in the event of services pertaining to the construction of an immovable structure, under the specific provision of CC art. 1793 (*Goossens*, Aanneming van werk, nos. 652 and 666). As regards the former category, it is disputed whether or not the client can change the service without the provider's consent (*Goossens*, Aanneming van werk, nos. 809-814). If the service provider demands adjustment of the price on the grounds of a change of the service induced by the client, such demand is to be assessed following the normal rules on formation of contracts and on evidence (*Goossens*, Aanneming van werk, nos. 653 ff). The specific provision of CC art. 1793 is less problematic in the sense that it allows the client to change the construction service unilaterally (*Goossens*, Aanneming van

werk, no. 678). The provider of the construction service, however, may only demand adjustment of the price on demonstrating that the changed order was issued in writing and that, following the order, the price adjustment was approved by the client (*Goossens*, Aanneming van werk, nos. 658 ff).

16. In ENGLAND the general rule is that the parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement (*Chitty* on Contracts I[29], no. 23-033). A service provider will generally not be able to claim payment for extra work. Express wording in the contract may give the client the power unilaterally to vary the obligations of the parties to the contract (*Chitty* on Contracts I[29], no. 23-038). If the client exercises that power and if the contract provides for the payment of extra work done, the service provider may claim payment for that work under the contract.

17. Under FRENCH law, if the service provider can demonstrate that extra work has been carried out, not being work resulting from unexpected circumstances, and that the extra work has been ordered by the client, the general rule for all contracts for work is that the service provider is entitled to adjustment of the price (*Bénabent*, Contrats spéciaux[6], no. 564). Whether the client agreed to the extra work is a matter to be resolved on the basis of the ordinary rules on formation of contracts and on evidence. This general rule is particularised by CC art. 1793 for services related to the construction of an immovable structure. In order for the service provider to be entitled to adjustment of the price, written approval by the client of both the extra work and the price adjustment are required. There is case law, however, allowing price adjustment without approval of the client in the event that the equilibrium of the contract has been disturbed as a result of the client's changed order (see Cass.civ. III, 24 January 1990, D. 1990, 257, note *Bénabent*; Cass.civ. III, 8 March 1995, Bull.civ. III, no. 73; Cass.civ. III, 20 January 1999, Bull.civ. III, no. 16; Def. 1999, 1128, note *Périnet-Marquet*).

18. As regards contracts for work under GERMAN law it is not undisputed whether the client is allowed to order a unilateral change of the service (*Jansen*, Defects liability, p. 165; *Goossens*, Aanneming van werk, no. 812). Nevertheless, a service provider who carries out extra work without an additional agreement supplementing the initial contract may be entitled to payment for the extra work under CC § 632, provided the extra work is substantial, unexpected, and induced by the client (cf. BGH 8 January 2002, X ZR 6/00, not published).

19. In ITALY the client has a unilateral right to change the service if the service qualifies as *appalto* (CC arts. 1655 ff) on the basis of CC art. 1661. In the case of changes ordered by the client, compensation is due to the service provider (*Rubino and Iudica*, Dell´Appalto[3], p. 161; *Giannattasio*, L´appalto, p. 184).

20. In contracts for work under DUTCH law the client may in principle order a change of the service. In that case the service provider may increase the price following the rule of CC art. 7:755, but only if the client has been told in due time that the price will have to be increased as a result of the order, unless the client should have understood this without such warning. Changes ordered by the client under a service contract qualified as *opdracht* are dealt with by CC art. 7:402(1). Such orders, like any other direction given by the client, must be given in time and within the boundaries of the framework of the contract. The characteristics of the particular *opdracht* may limit the duty of the service provider to follow the order as well (Parl. Gesch., p. 324), particularly if such an order would be in conflict with professional ethics, a professional codes of conduct or the independent position the service provider may have to take towards the client (Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 61). Changes ordered under

opdracht are paid for according to the general rules on price for such services, which are stated in CC art. 7:405(2).

21. In general, POLISH law does not provide for any possibility to change a contract unilaterally.

22. In PORTUGAL, in the case of construction and processing services, changes in the service must be agreed upon by the client (CC art. 1214), unless the changes are necessary: in the latter case, if the parties disagree on the subject matter, the court is to decide whether the change is necessary (CC art. 1215). If as a consequence of such changes the price is increased by more than 20 per cent, the service provider is entitled to equitable compensation. If the client orders a change of the service, the service provider must follow the order as long as the change neither amounts to an increase of 20 per cent of the price initially agreed, nor to a substantial change of the nature of the work originally ordered (CC art. 1216).

23. In SCOTTISH law parties may agree to vary or altogether replace (novate) their contract (*McBryde*, Law of Contract in Scotland, paras. 25.01-25.28). Work done under a frustrated contract may be paid for by way of an unjustified enrichment or a *quantum meruit* claim if there is no contractual provision (*McBryde*, Law of Contract in Scotland, paras. 21.47-21.48).

24. In SPAIN, the general contract provisions rule also in the area of a service contract and according to the CC art. 1256 a contract is binding and obligatory for the parties. Therefore *prima facie* it is forbidden to introduce unilateral modifications. Nevertheless, the Supreme Court recognises that a sudden change of circumstances that could not be foreseen by the parties at the moment of concluding the contract and that affects seriously the equity of the contract, may result in variation of its terms by the court, due to the principle of *rebus sic stantibus* (TS 11 June 1951, RJ 1951/1649). In any case, the contract itself may contain internal rules of modification of the terms in case of a change of circumstances. The supplier of the service has to follow the instructions on the method of execution of the service given by the client that could specify the character of the service and modify it (SAP Baleares 8 April 2002, BDA JUR 2002 /153765). The *ius variandi* of the terms of the contract by the client is justified by an analogical application of the possibility of desisting from the contract provided by the CC art. 1594 (*Bercovitz*, Contratos Mercantiles I^3, p. 672), but in any case, the client must not change unilaterally the essence of the contract and the supplier of the service should not suffer any economical prejudices as a consequence of those changes, due to the general contract principle of good faith (CC art. 1258). The price established for the service may not vary, according to the general rule that states that prices are unchangeable (CC arts. 1471 and 1593; *Bercovitz*, Contratos Mercantiles I^3, p. 672), as it is an essential element of the contract. Nevertheless, if the change introduced to the contract by the client signifies an increase of the amount of work for the provider of the service or a need for more materials, the rule of indemnity implies a proportional increase of the price. The Supreme Court though does not consider it as a change, but rather a complement of the consent on the price expressed in the contract (TS 10 May 1997, RJ 1997/3831). In any case, the increase of the price requires the consent of the client: if the price established is a fixed amount, the change of the economic circumstances does not imply the provider's right to raise the price without the client's authorisation (CC art. 1593). Nevertheless, a tacit consent is valid as well (TS 18 April 1995, RJ 1995/3420).There are no specific rules of calculating the price if the service is reduced. The provider of the service should warn the client if there is a risk that the service may not achieve the envisaged result or damage another interests of the client. In such a case, the provider of the service has the obligation to

notify the client of the existing risk, in order to avoid the frustration of the contract's purpose by modifying the content of the service (TS 30 December 2002, RJ 2003/333). The modifications of the contract on the framework of the construction are regulated by the Building Regulation Act in its articles 9.2.b) and 12.3.d): the director of the construction has to communicate to the developer any changes to be made on the first project elaborated by the parties as a consequence of the development of the works and the developer has to authorise those changes.

25. A service provider will be entitled to payment for extra work in the framework of a service supplied to a consumer on the basis of § 38 of the SWEDISH Consumer Services Act in the event that the extra work has been ordered by the consumer client and was unforeseeable at the time of conclusion of the contract.

IV.C.–2:110: Client's obligation to notify anticipated non-conformity

(1) The client must notify the service provider if the client becomes aware during the period for performance of the service that the service provider will fail to perform the obligation under IV.C.–2:106 (Obligation to achieve result).

(2) The client is presumed to be so aware if from all the facts and circumstances known to the client without investigation the client has reason to be so aware.

(3) If a non-performance of the obligation under paragraph (1) causes the service to become more expensive or to take more time than agreed on in the contract, the service provider is entitled to:

(a) damages for the loss the service provider sustains as a consequence of that failure; and

(b) an adjustment of the time allowed for performance of the service.

COMMENTS

A. General idea

This Article deals with the situation where the client becomes aware during the performance of the service that the service provider is going to fail to achieve the required result. The client has an obligation to notify the service provider of that fact. This is an aspect of the obligation to co-operate.

This situation must be distinguished from the situation which arises when the client becomes aware of a non-conformity after the period for performance of the service has ended. There is then a requirement to notify the service provider within a reasonable time if the client is not to lose remedies. This is an aspect of the duty to exercise remedies in good faith and is dealt with by the general provision in III.–3:107 (Failure to notify non-conformity). Article III.–3:107 does not apply to consumers: in their case only the general rule on good faith and fair dealing and the rules applicable to particular remedies or particular situations apply.

The justification for the obligation imposed by this Article is fairness to the service provider. Correct performance of the contractual obligations may still be possible, provided that the risk is brought to the attention of the service provider.

> *Illustration 1*
> A client has entered into a contract with a lawyer for the purpose of bringing a case to court. The court of first instance dismisses the client's case. The lawyer tells the client that it is possible to appeal within 6 weeks of the date of the court's decision. After 3 weeks, the client reads the court's decision and finds out that the appeal must be made within 4 weeks of the date of the decision.

The client will only have to notify, however, if the client becomes aware of the likely non-conformity, taking into account the presumption in paragraph (2). The client is not bound to investigate whether or not the service provider is carrying out the service in accordance with the obligations imposed. But if the client actually follows what is happening in the service process, as a consequence of the communication that will sometimes necessarily have to take place, the client should be normally attentive.

If the client does not perform the obligation under paragraph (1), the service provider may be prejudiced. This is where paragraph (3) becomes relevant. A further possibility is that the client notifies the service provider before the service process has finished, but does so too late.

> *Illustration 3*
> A client has entered into a contract for a fixed price with a builder for the purpose of designing and building a house with two floors. The client has asked the builder to design a large window in the roof of the house. The client needs that large window for his hobby: artistic painting. When the builder presents the first basic design to the client, the paper shows no window in the roof. The client does not mention this to the builder, who continues with the service by making a more detailed design and by submitting that design to the local authorities for the purpose of obtaining building permission. At that stage, the client tells the builder that he has noticed the absence of the large window. The builder can adjust the design, but he will have to make extra technical calculations. Moreover, he will have to restart the procedure of asking for building permission.

The service provider might still be able to perform the main obligation under the contract, but it is likely that the service will have become more costly and that more time will be needed to achieve the required result. This will not cause problems if payment of a fee based on an hourly rate was agreed upon at the time of conclusion of the contract. But if payment of either a fixed price or a fee based on a no result, no pay basis was agreed, the service provider would incur a loss due to the client's late notification. The service provider may then claim compensation for that loss or extension of the time to perform the service or both (paragraph (3)).

B. Interests at stake and policy considerations

The question is whether it is necessary to impose an obligation on the client to notify the service provider of anticipated non-performance while the service is still underway. It is true that the interests of both parties to the service contract are met when the client signals that performance of the service may not lead to the outcome required. But it is also true that it is the service provider's job to achieve that result, and that it may be considered undesirable to burden the client with taking care of problems which should be dealt with by the service provider. Moreover, imposing an obligation to notify on the client in the course of the service process raises the question whether and to what extent the client must also investigate the performance of the service in order to discover failures that could be the object of notification.

C. Preferred option

If the client discovers in the course of the service process that there is a risk that the required result might not be achieved, it would be inefficient to allow the client to refrain from notifying the service provider. The client will generally have ample opportunity to find out that there might be a problem with the performance of the service. At the same time, the service provider has the prime responsibility for the performance of the service. The service provider should not be allowed to shift that responsibility to the client, by stating that the latter failed to discover a risk of non-performance in the course of the service process. It is thought inefficient to actually impose a duty to investigate on the client. The responsibility of the service provider can only be mitigated by the non-performance of the client's obligation to notify of a likely failure to achieve the required result. This latter obligation is only imposed on the client if the client becomes aware of the failure. It would not make sense to impose an

obligation to notify something of which the client was unaware. That would be an obligation to do the impossible. However, the client is presumed to be aware of a failure or a risk of failure if from all the facts and circumstances known to the client without investigation the client has reason to be aware of it. This latter approach is similar in effect to the concept of 'Reason to Know' that is acknowledged in American law (see: Restatement (2nd) Contracts § 19, comment b). In the context of the client's obligation to notify under the present Article, it implies that the client will have to give notice of any failure that leaps to the eye whenever the service process is checked or followed. It also implies that if, for instance, the client decides not to take advantage of an opportunity to check the process of the performance under IV.C.–2:103 (Obligation to co-operate) paragraph (1)(d), there will be less possibility for the service provider to allege that the client had reason to know of a non-performance and must be presumed to have been aware of it.

D. Remedies

The consequences of a non-performance of the obligation to notify an anticipated failure to achieve the required result are set out in paragraph (3) of the Article. If the client fails promptly to notify the service provider that the latter will fail to achieve the result stated or envisaged by the client, causing the service to become more expensive or to take more time than agreed on in the contract, the service provider is entitled to claim both compensation for the loss incurred and extension of time to perform the obligations under the contract. The service provider would be entitled to damages anyway under the general rules on remedies for non-performance of an obligation but the right is restated here for the sake of completeness.

There are in Book III various provisions which might result in a remedy not being available or being lost or diminished if the creditor does not give notice to the debtor. See e.g. III.–1:103 (Good faith and fair dealing) paragraph (3); III.–3:101 (Remedies available) paragraph (3); III.–3:107 (Failure to notify non-conformity); III.–3:302 (Enforcement of non-monetary obligations) paragraph (4); III.–3:508 (Loss of right to terminate); III.–3:704 (Loss attributable to creditor). These provisions are not affected by the present Article. The present Article does not itself, however, provide for a client to lose any remedies as a result of a failure to notify of an anticipated failure to achieve the required result.

NOTES

I. Overview

1. The situation where the client becomes aware, while the service is proceeding, of a likely failure to achieve the required result appears to be rarely distinguished from the situation where the client becomes aware of a non-conformity after the service has been performed. These notes therefore deal with failure to notify in general. In fact it is failure to notify after the service has been performed (dealt with here in III.–3:107 (Failure to notify non-conformity)) which attracts most attention in the national laws.
2. An express duty of the client to notify the service provider in the event of defects discovered in the service is only to be found in FINLAND in the framework of consumer services (ConsProtA chap. 8 and chap. 9 § 16(1)). A duty to give notice can be implied indirectly on the basis of general concepts stemming from good faith in FRANCE, GERMANY, THE NETHERLANDS (CC art. 6:89), PORTUGAL (CC art. 334) and SPAIN (CC art. 1258). The equitable doctrine of *laches* appears to be to the same effect in ENGLAND although the doctrine is considered relevant only if a

remedy is pursued in equity. Discussion of such a duty in SCOTLAND has denied its existence. For some services, notably under contracts for work, implied duties to notify at the time of acceptance of the result of the service are specifically recognized: France (construction and processing services), Germany (CC § 640(2)), The Netherlands (CC art. 7:758(3)), POLAND (CC art. 563) and Portugal (CC art. 1219(2)). In England, Finland, France, Germany, The Netherlands, Poland, Portugal and Spain failure by the client to notify the service provider in the case of discovered defects may prevent the client from seeking resort to remedies. In Germany, however, failure to notify defects at the time of acceptance of the result of a service under a contract for work will cause the client to lose some remedies only.

II. The duty to notify of the client

3. Apart from the rules on limitation of actions the most relevant doctrine in ENGLISH law is the equitable defence of *laches* (cf. *Chitty* on Contracts I[29], nos. 29-140 ff). The essence of the doctrine is that the claimant must be reasonably diligent in seeking an equitable remedy and in consequence not prejudice the position of the defendant (cf. *Chitty* on Contracts I[29], no. 29-140).

4. According to FINNISH ConsProtA chaps. 8 and 9 § 16(1) , the consumer client must notify the service provider within a reasonable period from the time the client noticed or should have noticed the defective service.

5. In FRANCE the client's duty to notify the service provider in case of a defective service may arise under the general principles of tacit renunciation. The duty of the client is indirectly acknowledged in the framework of services related to the construction or processing of an immovable structure (CC art. 1792). The client must notify the contractor at the time of reception of the work of apparent defects, although the notion of apparent defects has been construed in case law in a manner protecting the interests of the client to a far reaching extent (cf. Cass.civ. III, 3 November 1983, GazPal 1984, 2, 577, note *Liet-Veaux*; see also *Jansen*, Defects liability, pp. 399 ff).

6. In GERMANY a duty of the client to notify the service provider in the event of a defect in the service may be acknowledged on the basis of *Verwirkung*. This concept has been developed in German law as a particularisation of the principle of *venire contra factum proprium* and is nowadays based on the concept of *Treu und Glauben* (CC § 242). *Verwirkung* may be invoked if a party, due to the passing of time and the specific circumstances of the case, may reasonably assume that the other party will no longer exercise a right to which that party is entitled. An additional requirement is that the party has acted on the basis of its reasonable assumption (BGH NJW 1980, 880). If the service can be qualified as a contract for work, the client's duty to notify indirectly follows from CC § 640(2) in the sense that the client may be under a duty to reserve rights at the time of acceptance of the result that has been accomplished by the service provider. The duty is limited to defects in the service the client actually knows of.

7. The duty to notify of the client, in the event that the service provider does not supply the service in accordance with the contract, follows indirectly from the general contract law provision in the DUTCH CC art. 6:89. According to this provision, the client must inform the service provider within due time as soon as the client discovers or should reasonably have discovered the breach of the service contract. In contracts for work CC art. 7:758(3) is to the same effect although the duty of the client can then only arise as from the time upon which acceptance of the (modified) thing or structure, resulting from the service process, occurs.

8. The client's duty to notify in case the service provider breaches the service contract follows from POLISH CC art. 563. The duty is to be performed within one month

from discovery of the breach. According to CC art. 563(1), in the event that it is customary to inspect the service process, the client must notify the service provider within one month after the passing of the period during which the client could have discovered the breach by observing due diligence.

9. In PORTUGAL general contract law imposes an obligation upon the client to promptly notify the service provider in the event that a defect in the service is noticed (CC art. 334; cf. *Romano Martinez*, Direito das Obrigações[2], no. 343). In case of construction or processing services evident defects are presumed to be known by the client according to CC art. 1219(2). Furthermore, evident defects are those which the client in due diligence should have noticed (CA Porto, 17 November 1992, CJ 1992, V, 224).

10. SCOTTISH law has a doctrine of *mora* barring the exercise of rights if an invasion thereof was done with the knowledge of and without objection from the right-holder. The plea was not sustained in a case where the party did not intervene while the other party was carrying out work even though it may have been obvious that the work and expenditure would be useless without a further invasion of the first party's rights (*Earl of Kintore v Pirie* (1903) 5 F 818).

11. Under SPANISH law the duty of the client to notify the service provider in the event that defects in the service are noticed or should have been noticed, given the due diligence to be observed by the client, stems from the general contract law provision on good faith (CC art. 1258). The duty is particularly recognized in the framework of construction and processing services (cf. *Martinez Mas*, La recepción en el contrato de obra, p. 73).

III. Consequences of failure to notify

12. The effect of limitation under ENGLISH law is merely to bar the client's remedy and not to extinguish the right (cf. *Chitty* on Contracts I[29], no. 29-129). If a party can raise the equitable defence of *laches*, the other party will be barred from pursuing the remedy.

13. A consumer client who fails to notify under FINNISH ConsProtA chap. 8 § 16(1) (16/1994) cannot invoke the defect. Notwithstanding the failure to notify, however, the consumer client may invoke the defect following § 16(2) if (i) the service provider's conduct has been grossly negligent or incompatible with honour or good faith; (ii) the defect is based on the fact that the service does not conform to the requirements issued in provisions for the protection of health and property; (iii) the defect is based on the fact that the result of the service is otherwise hazardous to health or property. § 16(2) on construction services is to the same effect, and includes the client's right to invoke defects based on the fact that the service does not conform to the requirements set for it in the Product Safety Act.

14. In the event that tacit renunciation of a party is demonstrated, that party will no longer be able to exercise its rights under FRENCH law (cf. *Ranieri*, Verwirkung et rénonciation tacite, p. 427 at 440). Likewise, if the client of a construction or processing service involving an immovable structure fails to notify the service provider of defects apparent at the time of reception of the work, the client can no longer invoke the provider's liability for such defects (*Jansen*, Defects liability, pp. 399 ff). The rule is said to be applied to all service contracts and not only to construction contracts (*Huet*, Contrats spéciaux[2], nos. 32331-32332).

15. If, under GERMAN law, a party is able to establish *Verwirkung*, the other party can no longer exercise the right to which it is entitled. In a contract for work, a client who does not perform the duty to notify under CC § 640(2) loses all rights and remedies

granted by GERMAN CC § 633 and CC § 634. The client will still be able, however, to claim damages under CC § 635 according to case law (BGHZ 61, 369 at 371) unless it is apparent that the client has renounced the right to pursue damages (cf. *Jansen*, Defects liability, pp. 405-406).

16. If the client fails to notify the service provider under the general contract law provision of the DUTCH CC art. 6:89, the client will not be able to seek resort to a remedy. As regards services under contracts for work CC art. 7:758(3) is to the same effect.

17. Failure to notify according to POLISH CC art. 563 will put a bar to the client's normal remedies under the contract.

18. If the client does not promptly notify the service provider on the basis of PORTUGUESE CC art. 334, the latter is excluded from liability for defects in the service (cf. *Romano Martinez*, Direito das Obrigações[2], no. 343).

19. *Mora* is merely a bar in SCOTTISH law, not an extinction of the right.

20. Under SPANISH law, the client must notify in order not to lose any of the remedies under the contract as regards the defective service.

IV.C.–2:111: Client's right to terminate

(1) The client may terminate the contractual relationship at any time by giving notice to the service provider.

(2) The effects of termination are governed by III.–1:109 (Variation or termination by notice) paragraph (3).

(3) When the client was justified in terminating the relationship no damages are payable for so doing.

(4) When the client was not justified in terminating the relationship, the termination is nevertheless effective but, the service provider has a right to damages in accordance with the rules in Book III.

(5) For the purposes of this Article, the client is justified in terminating the relationship if the client:

(a) was entitled to terminate the relationship under the express terms of the contract and observed any requirements laid down in the contract for doing so;
(b) was entitled to terminate the relationship under Book III, Chapter 3, Section 5 (Termination); or
(c) was entitled to terminate the relationship under III.–1:109 (Variation or termination by notice) paragraph (2) and gave a reasonable period of notice as required by that provision.

COMMENTS

A. General idea

Paragraph (1) of this Article gives the client the right to terminate the contractual relationship at any time. This is quite distinct from any right there may be to terminate for fundamental non-performance or the equivalent under Book III, Chapter 3. The client's right to terminate under the present Article does not depend on any non-performance by the service provider. The client under the present Article has the option of termination whenever the client would like to walk away from the contract for any reason, whether or not there is an alleged non-performance on the side of the service provider.

Illustration
A house owner has entered into a contract with an architect for the purpose of designing an extension to the house. After a few weeks, the house owner decides he no longer wants to have the extension and terminates his contractual relationship with the architect.

Termination under this Article is therefore not to be regarded as a remedy. It is basically a recognition of the fact that the client may no longer want the service to be performed even though the service provider is adequately performing the obligations under the contract.

The client, however, will have to pay the price for walking away from the contract. Firstly, the normal restitutionary rules will apply. What has been transferred under the contract will have to be returned. The service provider will be entitled to the value of any services rendered or any other non-transferable benefits conferred on the client. This is the effect of paragraph (2) and it is the same whether or not the client had other grounds for termination. Secondly, where the client was not justified under paragraph (5) in terminating the relationship the client

will have to pay damages to the service provider to ensure that the service provider will not lose by virtue of the client's exercise of the right to terminate without cause (paragraph (4)). The situations in which the client would have been justified in terminating under paragraph (5), and will consequently not be liable to pay damages for terminating (paragraph (3)), are (a) where termination was allowed by the express terms of the contract and the client observed any requirements set out in the contract (such as giving a prescribed period of notice) (b) where the client was entitled to terminate the relationship under Book III, Chapter 3, Section 5, which deals with termination for fundamental non-performance or the equivalent and (c) where the client was entitled to terminate the relationship under III.–1:109 (Variation or termination by notice) paragraph (2), which deals with contracts of indefinite duration, and gave a reasonable period of notice as required by that provision. (Termination of the relationship arising under a contract of indefinite duration by giving an *inadequate* period of notice would come under the present Article and would give rise to a right to damages.) Paragraph (4) applies the normal rules on damages. This means that the service provider is entitled to be put as nearly as possible into the situation which would have prevailed if the contractual obligations had been duly performed. The compensation payable is to cover the loss which the service provider has suffered and the gain of which the service provider has been deprived. In other words, the client must reimburse both the costs already incurred by the service provider as a consequence of carrying out the service and any profit lost as a consequence of the termination.

B. Interests at stake and policy considerations

The main issue is whether the client should be allowed to terminate without cause. It could be asked what is so special about service contracts that the client should be entitled to unilaterally bring the contractual relationship to an end for no reason. The normal rule is that, unless conferred by the contract, such a right exists only for contracts concluded for an indefinite period. (See III.–1:109 (Variation or termination by notice) paragraph (2).)

On the other hand, circumstances may change after the conclusion of the service contract and may give the client a legitimate interest in terminating. It is true that this situation could also arise under any other type of contract – for instance a sales contract – but in such a case a party sometimes has other options to deal with the new situation, without having to terminate the contractual relationship. A buyer could for instance still buy the things but subsequently resell them. Reselling the finished – though unwanted – result of a completed service, however, will not always be practically possible. Also, a client will not always be sufficiently protected either by ordering a change of the contract under the provisions permitting this or by renegotiating the contract. Hence termination could be regarded as a useful instrument, particularly if the service provider's financial interests are also sufficiently protected.

C. Preferred option

The client's right to terminate the contractual relationship is accepted in principle in paragraph (1) of the present Article. The arguments in favour of that position have been set out above and have been put forward in various legal systems. The client's right is balanced by the rules in paragraphs (4) and (5) allowing the service provider financial compensation for the consequences of an unjustified termination. This approach is followed in many legal systems.

The actual results under the system adopted in the Article will in most cases be the same as the results which would be reached by saying that the client had no right to terminate without

cause. If that other approach were adopted the client could still in practice repudiate the contract and withdraw co-operation. The client would then have to pay damages, on exactly the same basis, for non-performance or anticipated non-performance of the client's contractual obligations. The difference between the two systems lies in specific performance. Under the alternative system the client would, in some unusual types of case, have to accept performance of an unwanted service. This could happen if the service was not of such a personal nature that it would be unreasonable to enforce specific performance of the client's obligation to co-operate and if the service provider had such a legitimate interest in continuing performance that it would be reasonable to allow the service provider to recover payment for the unwanted service. (See III.–3:301 (Enforcement of monetary obligations) and III.–3:302 (Enforcement of non-monetary obligations.) The approach adopted in the present Article places the client's interest in not having to accept a service which is no longer wanted above the service provider's interest in being able to continue to provide it, while recognising that the service provider is always entitled to restitution of anything provided under the contract and full monetary compensation for any loss caused by an unjustified termination. Even if there were to be no right to enforce specific performance of the client's obligations under a service contract, the approach adopted in the present Article would be preferable because it is more likely to promote respect for the law. It openly confers a right to terminate on paying compensation, rather than pretending that there is no such right but covertly giving it by pointing out that the client can choose to fail to perform the obligations under the contract.

D. Other relevant provision

The provisions on notice in Book II include a provision to the effect that notice becomes effective when it reaches the addressee, unless it provides for a delayed effect. I.–1:109 (Notice) paragraph (2). So the client can either cancel immediately or give a period of notice. The notice may be given by any means appropriate to the circumstances. (I.–1:109(3)).

The effects of termination under III.–1:109 (Variation or termination by notice) paragraph (3) are as follows. Where the parties do not regulate the effects of termination, then:

> (a) it has prospective effect only and does not affect any right to damages, or a stipulated payment, for non-performance of any obligation performance of which was due before termination;
>
> (b) it does not affect any provision for the settlement of disputes or any other provision which is to operate even after termination; and
>
> (c) in the case of a contractual obligation or relationship any restitutionary effects are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.

The restitutionary effects include payment (by reference to the contractual rate) for any services which had already been rendered by the time of termination but for which payment had not yet fallen due. (III.–3:512 (Payment of value of benefit)). As termination has prospective effect only, any payments which had fallen due by the time of termination would still remain due.

NOTES

I. The right of the client to terminate the service

1. It is established law in the countries investigated, particularly in relation to contracts for work, that the client may cancel the service at any time: AUSTRIA (CC § 1158(4) in connection with CC §§ 1159, 1162, 1162b and 1168), BELGIUM (CC art. 1794) and FRANCE (CC art. 1794), GERMANY (CC § 649), GREECE (CC art. 700), ITALY (CC arts. 2227 and 1671), THE NETHERLANDS (CC arts. 7:408(1) and 7:764(1)), POLAND (CC art. 644), PORTUGAL (CC arts. 1156 and 1170), SPAIN (CC art. 1594 and cf. TS 13 May 1993 RJ 1993/3546, TS 4 February 1997, RJ 1997/675, TS 9 March 1999, RJ 1999/1408), SWEDEN (consumer services; § 42 of the Consumer Services Act; under non-consumer contracts, the client has a similar, but more limited, right. *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 101). In ENGLAND and SCOTLAND the client is free to repudiate the contract at any time but that is regarded as an anticipatory breach of contract. The philosophy is different but the results are not dissimilar.

II. Consequences of termination by the client

2. If the client ends the service, the client must compensate the service provider. This is an established principle, at least for contracts for work, in all countries investigated. There are various ways of calculating the amount of the compensation. One way is to give the service provider a right to be indemnified for all costs actually incurred as a result of the partial performance of the service and to be compensated for the benefit which could have been obtained from the cancelled service: BELGIUM and FRANCE (CC art. 1794), ITALY (CC arts. 2227 and 1671), SPAIN (CC art. 1594), SWEDEN (consumer services; Consumer Services Act §. 42, unless the purpose of the contract has been frustrated due to certain circumstances). Another way is to take as a starting point the price which the client agreed to pay the service provider and to deduct from this all money which the service provider was able to save as a result of the termination of the service: THE NETHERLANDS (CC arts. 7:411(2) and 7:764(2)), POLAND (CC art. 644). This deduction can sometimes include the benefit which the service provider actually gained as a result of the cancellation, or which the service provider could have gained, but deliberately failed to do so, by using the earning capacity for other services instead: AUSTRIA (CC §§ 1162b and 1168), GREECE (CC art. 700), GERMANY (CC § 649). In ENGLAND and SCOTLAND repudiation of the contract by the client entitles the service provider to damages for loss, including loss of profit, in accordance with the normal rules applying to anticipatory breach.

III. Further information

3. For national notes on a country by country basis see PEL SC pp. 305 to 307.

CHAPTER 3: CONSTRUCTION

IV.C.–3:101: Scope

(1) This Chapter applies to contracts under which one party, the constructor, undertakes to construct a building or other immovable structure, or to materially alter an existing building or other immovable structure, following a design provided by the client.

(2) It applies with appropriate adaptations to contracts under which the constructor undertakes:

(a) to construct a movable or incorporeal thing, following a design provided by the client; or

(b) to construct a building or other immovable structure, to materially alter an existing building or other immovable structure, or to construct a movable or incorporeal thing, following a design provided by the constructor.

COMMENTS

A. General idea

A contract for construction is defined in Annex 1 as "a contract under which one party, the constructor, undertakes to construct something for another party, the client, or to materially alter an existing building or other immovable structure for a client". However, this Chapter does not apply to all construction contracts in precisely the same way. The present Article, which is a "scope" provision rather than a "definition" provision, sets out its primary area of application and those cases where it applies "with appropriate adaptations".

This Chapter covers services whose aim it is to bring about a new structure or thing. The core area of application is the building of immovable structures, based on a design by an architect hired by the client or a design otherwise provided by the client.

Illustration 1
The building of houses, offices, roads and other infrastructure are examples of activities falling under this Chapter.

The rules are drafted in such a manner, however, that they can also be applied, with any appropriate adaptations, to the construction of movable or incorporeal things.

Illustration 2
The construction of tailor-made machinery, software and websites are examples of this.

The rules can also be applied to the construction element in mixed contracts, including 'design and construct' contracts, where the constructor is also responsible for the design of the structure. On mixed contracts generally, see II.–1:107 (Mixed contracts) and on contracts for construction and sale, see IV.A.–1:102 (Goods to be manufactured or produced).

B. Interests at stake and policy considerations

This Article covers the scope of application of the rules on construction. The main policy issue is whether the rules should only cover the building of immovables or also the formation of other structures and things. A limited scope of application would be supported by the argument that extensive case law exists on building contracts, so that there is a firm basis for codification in this field. However, many activities which are very similar economically – in the sense that they are also oriented towards creating an object and require very similar interaction processes between the parties in order to achieve this – would then be excluded from the application of this Chapter: the building of ships, airplanes and machinery or the construction of software, databases, websites and the like.

C. Preferred option

In the present Article, the solution chosen is that of a main scope of application for the rules on construction, that is, building contracts regarding immovables. Outside this scope, the rules are applicable with 'appropriate adaptations' to other construction activities. This solution reflects the idea that such activities are very similar economically, require very similar interaction processes between the parties in order to effectuate the envisaged structure and therefore can be governed by similar rules. At the same time, the solution acknowledges that the law regarding such activities is less well established, that these activities relate to many different objects and that the relevant business practices may vary considerably. Thus, although it is very likely that the rules can be applied without modification to those situations, the rules may need to be adapted to these specific situations by the courts.

The rules of this Chapter may apply to the construction of software. An appropriate modification may be warranted for the conformity rule, in situations where the software is highly innovative, for instance. If the construction of the software entailed substantial risk, a court may find that the 'fitness for purpose' test is too harsh for the provider of the software A court may try to find an appropriate solution by looking to the result stated or envisaged by the client or by applying the general rule on the standard of care and skill required of a service provider.

D. Relation to other parts of the model rules

Construction contracts, and the rights and obligations arising from them, are governed by the general rules in Books I to III, by the rules on service contracts contained in Chapter 1 of the present Part of Book IV and by the specific rules of the present Chapter.

The question of mixed contracts is dealt with generally in II.–1:107 (Mixed contracts). The rules on mixed contracts are intended to apply not only to contracts which are partly for services and partly for something else but also to contracts which are wholly service contracts but which are partly for a construction service and partly for another service. The rules in the present Chapter will apply to the construction part of the service.

E. Design by the client or the constructor

The main area of application is delimited further by presupposing that what is to be constructed is designed by the client or by an agent of the client, such as an architect. In these situations, the structure to be made is defined by the client to a greater or lesser extent and the choices made by the client are part of the initial contract or become binding on the constructor

by way of directions. In these situations, the client generally bears the risk of mistakes in the design, unless the constructor has a duty to warn.

If the structure is only described in a more general manner and the constructor is to design the structure before the construction work begins, the rules of the present Chapter apply with appropriate adaptations. Generally, however, no adaptations will be necessary for such 'turnkey' or 'design and construct' contracts. In these contracts, the constructor will bear more responsibility for the result. That, however, is exactly what the present rules lead to. According to these rules, the responsibility for the design shifts to the constructor because the contract only describes the construction in general terms and it is the constructor who has the responsibility to ensure that the design is such that the structure becomes fit for its purpose. In situations where the designer and the constructor are one and the same person or entity, the rules of Chapter 6 (Design) are not applicable to the 'design' part of the work undertaken by the constructor. These rules are only applicable when the designer and the constructor are different persons or entities.

F. Construction work on existing immovables or processing?

The rules of this Chapter also apply to contracts whereby the constructor is to perform construction work on an existing building or other immovable structure, following a design provided by the client. In general, processes applied to existing structures and things are covered by the rules on processing. So, maintenance work on buildings, such as painting, repairs to sewage systems and wiring and the cleaning of windows, is classified as processing. Extensive reparations, however, such as the removal and renewal of an entire roof structure or restoration work on old buildings with a value similar to the value of the building prior to the restoration, constitute construction work covered by the present Chapter because it is more similar to construction than to processing.

The exact borderline between construction and processing may, in some situations, be difficult to determine. At this borderline, however, the rules regarding processing and construction are very similar. Processing services which are similar to construction work on existing immovables will consist mainly of repairs. Contracts involving important repairs to buildings will generally be successful, so that a reasonable client will have no reason to believe that the result will not be achieved by the service provider. Thus, the repairer will generally be under an obligation to achieve a specific result, as would also be the case for the constructor under the regime of the present Chapter.

NOTES

I. Overview

1. ENGLISH, SCOTTISH, SWEDISH and FINNISH law have no codified rules regarding construction activities, see *Hudson*, Building and Engineering Contracts[11], no. 1-001, *Chitty* on Contracts II[29], no. 37-001, *Stair*, The Laws of Scotland III, 'Building Contracts'; *Connolly*, Construction Law, chap.1, and *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 122. In ENGLAND and SCOTLAND, however, note the relevant provisions of the Housing Grants, Construction and Regeneration Act 1996, Part II. Sweden and Finland, however, do have rules regarding consumer contracts, SWEDISH Consumer Services Act § 1 and

chaps. 8/9 of the FINNISH Consumer Protection Act. Most other European jurisdictions have codified rules that cover all construction activities, see CC arts. 7:750 ff (THE NETHERLANDS), CC arts. 1710 and 1787 (BELGIUM), CC arts. 1787 ff (FRANCE), CC art. 1544 (SPAIN), CC arts. 1655-1677 (ITALY), CC §§ 631 ff (GERMANY), CC § 1151(1) (AUSTRIA), CC § 681 (GREECE). In ITALY and PORTUGAL, see CC art. 1207 and STJ 29 September 1998, CJ 1998 III, p. 34 intellectual work is not covered by the same rules, however. Some countries have additional rules for construction of immovables, DUTCH CC arts. 7:765 ff (only for consumer contracts), FRENCH CC arts. 1792-1793, SPANISH CC arts. 1588 to 1600 and POLISH CC arts. 647-658.

2. In all countries dealt with, building contract law is covered to a large extent by standard conditions, which have to be agreed on by the parties to be relied on directly but which also influence case law indirectly. See for details under National Systems. International conditions are provided by FIDIC (Féderation International des Ingenieurs Conseils) http://www.fidic.org and ICE (Institution of Civil Engineers) http://www.ice.org.uk standard contract terms.

II. Scope of the rules on construction

3. The AUSTRIAN CC § 1151(1) defines the contract for work (*Werkvertrag*). That contract is commonly defined as an achievement of a certain result. The result has to be understood in the broadest sense possible in order to cover a wide range of activities: manufacture, treatment, amending, restitution, or improvement of a corporeal thing, but also creation of non-corporeal works as well (writing of a play, data processing program), see Rummel [-*Krejci*], ABGB I^2 , arts. 1165, 1166, no. 9.

4. The BELGIAN CC art. 1710 defines a contract for work *(louage de services).* More specific rules are given in arts. 1787 ff for contracts that relate to the construction of material and immaterial objects.

5. There is no specific legal regime for construction under ENGLISH law. Writers tend to concentrate on the creation of immovable property, *Hudson,* Building and Engineering Contracts[11], no. 1-001 and *Chitty* on Contracts II[29], no. 37-001. The Housing Grants, Construction and Regeneration Act 1996 ss. 104-105 define a construction contract in terms relating entirely to buildings and other immoveable structures, although it also includes agreements to perform architectural, design or surveying work and advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations. The Act also applies in SCOTLAND.

6. Chapter 8 of the FINNISH Consumer Protection Act covers work or other performance relating to movables, immovables and other structures, including production of movables. Chapter 9 covers construction of immovables. Other construction contracts are covered by general contract law.

7. A contract for work under FRENCH law (*louage d´ouvrage, contrat d´entreprise*) regulated by CC arts. 1787 ff is a contract by which one party (the *entrepreneur*) undertakes to perform a work independently. This general contract concerns every kind of work both material and intellectual (Cass.civ. III, 28 February 1984, Bull.civ. III, no. 51). The CC contains specific provisions concerning the building construction contract (CC arts. 1792-1793).

8. Construction activities fall under the scope of the law on the contract for work (*Werkvertag*) in the GERMAN CC §§ 631 ff. These rules apply not only to construction but also to works at facilities of the client (e.g. installations, cleaning of a

house), work at things which were handed over by the client (e.g. cleaning of clothes, reparation of a car), handcraft, intellectual works, processing work and others.

9. The GREEK CC art. 681 defines a contract for work, which could be of material or immaterial nature. When the contract for work involves the supply of services, specific rules apply in the context of consumer contracts (Act 2251/94, art. 8).

10. A construction contract falls within the scope of application of the provisions on the *contratto d´appalto* regulated in ITALIAN CC arts. 1655-1677. The *appalto* is a contract whereby a party undertakes to perform a work or a service. There is an often-debated borderline dividing an activity on tangible materials (to which provisions on *appalto* apply) and one on immaterial ideas (governed by rules on intellectual work). The contract of engineering is governed by the provisions on *appalto* even where only an intellectual activity is required (preliminary studies, drafting of a project, advice on technical and administrative matters, etc.).

11. The DUTCH CC art. 7:750 describes a contract for work on goods as a contract relating to a work of a physical nature. Subchapter 2 (CC arts. 7:765 ff) contains specific rules for construction of houses ordered by a consumer.

12. A building contract is regulated by the POLISH CC arts. 647-658. It is treated as a special kind of contract for specific work (CC art. 656 envisages corresponding application of provisions on the contract for work to the effects of the delay by the constructor of the beginning of the building work or the finishing of the object or performance of building work in a manner which is defective or inconsistent with the contract, to the warranty for the defect of the object built, and to the client's right to renounce the contract before the object is completed). Nevertheless, the building contract constitutes a separate type of contract (judgment of the Supreme Court of 12 December 1990, I CR 750/90 (OSNCP 1992 no. 5, poz. 81), although historically it derives from the contract for work (judgment of the Supreme Court of 12 February 1991, III CRN 500/90, OSNCP 1992, no. 7-8, poz. 137). The position of the parties to a building contract is also determined by the provisions of the administrative building law, which imposes certain obligations on both – the contractor and the client. Non-observance of such obligations may cause civil law consequences. Applicability of the administrative building law provisions constitutes the criterion, which distinguishes the contract for work from the building contract. Provisions on the building contract apply also to contracts for repair of a building or a construction (CC art. 658).

13. The contract for work *(empreitada)* is regulated by PORTUGUESE CC art. 1207 and following, but the trend of recent case law is that provisions on the contract for work do not apply to immaterial works: STJ 2 February 1988, BolMinJus 374, p. 449; STJ 17 June 1998, CJ 1998 II, p. 116; STJ 29 September 1998, CJ (STJ) 1998 III, p. 34.

14. Contracts for work *(contratos de obra)* are regulated together with services contracts by the SPANISH CC art. 1544. Construction contracts, but not of movables, are further regulated in CC arts. 1588 to 1600, see *Díez-Picazo and Gullón*, Sistema II[9], pp. 433 ff. On the classification of contracts for work, TS 6 November 1982, RJ 1982/6530. The most important legal source regarding construction contracts is the new Building Regulation Act

15. Construction work for immovables is covered by general SWEDISH contract law and standard conditions, see *Hellner*, Speciell avtalsrätt II, first book, p. 122. Consumer services with respect to movables are regulated in the Consumer Services Act. They include work on movables (lösa saker), KTjL art. 1 second sentence, and work on immovables, buildings or other constructions on land, in water and other stationary

objects. Consumer Services Act § 2 exempts production of movables, except when the consumer supplies a major part of the material.

III. Standard terms

16. The norms of the AUSTRIAN Standards Institute [*Österreiches Normungsinstitut;* www.on-norm.at deal with contractual and technical aspects of various types of construction contracts. Important examples of such norms are ÖNORM A 2060 (*Allgemeine Vertragsbestimmungen für Leistungen*/General conditions for contracts – Works contract) and ÖNORM B 2110 (*Allgemeine Vertragsbestimmungen für Bauleistungen/*General conditions of contracts for works of building and civil engineering construction).

17. The most commonly used general conditions under ENGLISH law are the *Joint Contracts Tribunal (JCT)* forms of the Royal Institute of British Architects, and the *Institute of Civil Engineers (ICE)* standard form, *Hudson*, Building and Engineering Contracts[11], nos. 1007-1008 and *Chitty* on Contracts II[29], no. 37-002. International contracts may be covered by the FIDIC models. There are SCOTTISH editions of most of these forms, as well as a number of indigenous models (*Stair*, The Laws of Scotland III, 'Building Contracts' paras. 10-12 (with update)); *Connolly*, Construction Law, chap. 2.

18. In FINLAND the most frequently used standard forms are General Conditions for Building Contracts, YSE 1998, and Conditions Concerning Sub-Contracts, RT 16-10205, see *Liuksiala*, Rakennussopimukset.

19. The most important standard conditions for the public sector in FRANCE are found in the *Cahier des clauses administratives générales applicables aux marchés publics de travaux* (CCAG-Travaux), enacted by the Decree no. 76-87 of the 21 January 1976. In the private area such standard conditions do exist as well, see the AFNOR norm NF P 03-001.

20. *Verdingungsordnung für Bauleistungen* (VOB) is the most important source of standard conditions in GERMAN law Part A deals with procurement, Part B contains standard conditions and Part C the technical norms *(DIN-Normen).*

21. The use of standard contract terms is common practice in GREECE, particularly in the area of building construction.

22. In practice, use is made of national standard contract terms, in the NETHERLANDS, the most important of which are the *Uniforme Administratieve Voorwaarden voor de uitvoering van werken (UAV 1989).* Construction of houses for consumers is usually covered by the *Algemene Voorwaarden voor Aannemingen in het bouwbedrijf (AVA 1992)* For design and construct contracts the *Uniforme Administratieve Voorwaarden voor geïntegreerde contractvormen (UAV-GC 2000)* are now available.

23. In POLAND, there are a few typical variations of the building contracts. These are: (1) contract of a general performance of the building, concluded by the client or the general executor of the project with the party that accepts position of the prime contractor, (2) contract of realisation of the building investment, concluded by the client with a so-called general executor of the project, (3) contract of a performance of building or assembling works concluded by the prime contractor with a subcontractor, (4) contract of a part-performance, concluded by the prime contractor with a so-called part-subcontractor, in cases when the main functions of the prime contractor are executed by the client, (5) contract of investment substitution, (6) so-called developer contracts (Rajski [-*Strzępka*] System Prawa Prywatnego, VII^{2}p. 398).

24. Contracts are sometimes based on FIDIC and ICE standard contract terms in PORTUGUESE law. Most times, however parties base some clauses of the contract on the REOP. Although this is a statute on public construction, even in private contracts parties opt to incorporate them in the contract, see *Romano Martinez*, Direito das Obrigações[2], no. 296.

25. In SPAIN contracts of construction which are concluded with the Public Administration are subject to the provisions of the Public Sector Contracts Act 2007.

26. The most frequently used standard contract form in SWEDEN is the AB 92 *(allmänna bestämmelser för byggnads-, anläggnings- och installationsentreprenader)*, see *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 122. Another important standard contract is the ABS 95 *(Allmänna bestämmelser för småhusentreprenader)* used between a constructor and a consumer, who has received governmental financial support for the contract work. In such cases, the Consumer Services Act is not applicable. The ABS 95 can however be said to be a mixture between AB 92 and the Consumer Services Act.

IV.C.–3:102: Obligation of client to co-operate

The obligation of co-operation requires in particular the client to:

(a) provide access to the site where the construction has to take place in so far as this may reasonably be considered necessary to enable the constructor to perform the obligations under the contract; and

(b) provide the components, materials and tools, in so far as they must be provided by the client, at such time as may reasonably be considered necessary to enable the constructor to perform the obligations under the contract.

COMMENTS

A. General idea

This Article sets out specific instances of the general obligation to co-operate in III.–1:104 (Co-operation), as already particularised for services in general in IV.C.–2:103 (Obligation to co-operate). From the latter Article, it is already clear that the client must answer reasonable requests for information by the constructor, for instance regarding the existing situation. Moreover, directions – such as drawings or other specifications to be delivered by an architect – should be given in good time. The same holds for permits and licences. The constructor is to enable the client to follow the construction process in order to determine whether the constructor is performing the obligations under the contract. The parties are also to co-ordinate their efforts.

The present Article mentions two additional issues for which the co-operation of the client is essential. The client must provide access to the construction site and, in so far as the client is to provide components, materials and tools, must provide these in time.

Illustration

The owner of a farm wants a constructor to build a shed on his premises. The constructor is to use the wood from the old shed, which the owner will tear down himself. The owner must give the constructor access to the place where the shed is to be built and must deliver the wood in time.

B. Interests at stake and policy considerations

Access to the input provided by the client, and to the construction site, are particular examples of essential co-operation. If such access is not given in good time, the construction process may be delayed, and the constructor may be precluded from using the workforce and other resources optimally. The issue is whether the constructor or the client is to have the primary responsibility for organising these efforts.

C. Preferred option

Both specific instances of co-operation mentioned in this Article are essential elements of a well co-ordinated construction effort. Placing this burden on the client is a solution that is sufficiently supported by construction law in various jurisdictions. There are no indications that such duties are contested in other jurisdictions. The client usually is in the best position to ensure that these elements of the co-operation are taken care of.

D. Other issues for co-operation

Apart from the topics mentioned in the Article, there are other issues for co-operation. When undertaking construction activities, the parties may find it useful to design procedures for some aspects of co-operation. In standard conditions, it is common to have a detailed procedure for handing over of the structure, for inspection of the end result, for complaints resulting from this inspection, for discussing the progress of the project and for recording the outcomes of such discussions. Whether such elaborate procedures are useful and which procedures are pertinent depends on the size of the construction project and the ability of the parties to meet the procedural requirements. The costs of designing and implementing these procedures should be weighed against the expected benefits. Keeping written records of all the essential communications that take place is costly, but may lead to important savings in dealing with quality problems and other potential disputes later on.

Procedures for directions, variations, inspections, acceptance and handing over of the structure are very common in the standard conditions, but this is not yet the case with provisions regarding disputes, with the exception of arrangements regarding the court or arbitration tribunal that should deal with disputes and the law applicable. In the construction industry, and also in the software business, there is an increasing awareness of the necessity to solve disputes early and in an efficient manner. This is reflected in the development of the concept of 'Partnering' and in the establishment of 'Dispute Review Boards' for larger construction projects. Stimulating co-operation through the development of such procedures, or resorting to them when disputes arise, may be very useful.

NOTES

I. Overview

1. All jurisdictions accept a rather extensive obligation to co-operate of the client.
2. The obligation to co-operate arises from implied terms in ENGLAND (see *Hudson*, Building and Engineering Contracts[11], no. 1-186 and *Chitty* on Contracts II[29], nos. 37-067 and 068) and SCOTLAND (*Stair*, The Laws of Scotland III, 'Building Contracts', paras. 52-59), from a specific rule for construction contracts in GERMANY (art. 642 para. 2 and CC art. 643) and AUSTRIA, (CC art. 1168 para. 2), or from general good faith, see art. 6:248 DUTCH CC, art. 1134 BELGIAN CC, art. 1258 SPANISH CC, art. 1375 ITALIAN CC (see also the general principles of correctness in performance of CC Article 1175) and arts. 762, 813 para. 2 PORTUGUESE CC.
3. In the SCANDINAVIAN countries and in POLAND the situation is less clear, but there are many specific rules on co-operation, see art. 3:12 and 17 SWEDISH AB 92 and chap. 9 § 31 of the FINNISH Consumer Protection Act, as well as FIDIC Conditions Clause 42. In FRANCE, the duty to co-operate of the client is more limited, but there may be duties in good faith, see CC art. 1134(3).
4. An obligation to give access is an implied term in ENGLAND (see *Hudson*, Building and Engineering Contracts[11], no. 4-150 and *Chitty* on Contracts II[29], no. 37-067) and SCOTLAND (*Stair*, The Laws of Scotland III, 'Building Contracts', para. 53). Other countries derive it from good faith or the duty to co-operate: BELGIUM (*Goossens*, Aanneming van werk, no. 987), GERMANY (CC art. 242 and art. 642), SPAIN (CC art. 1258), PORTUGAL (*Romano Martinez*, Direito das Obrigações[2], no. 344) and POLAND (see art. 635). Many standard conditions mention it as well, for instance in SWEDEN (AB 92 art. 3:14) THE NETHERLANDS (UAV 1989 art. 5-1, sub b and

AVA 1992 art. 3(1)), AUSTRIA (ÖNORM B 2110 5. 9. 1). See also FIDIC Conditions Clause 42.

II. Obligation to co-operate in general

5. If the client does not co-operate, AUSTRIAN CC art. 1168(2) grants the constructor a right to rescind the contract under certain conditions. Positive obligations to co-operate can be found in ÖNORM B 2110, which contains many provisions stipulating an indirect obligation to co-operate, for instance a duty to ensure a proper co-operation between contractors, especially to co-ordinate their work, para. 5.14. The contractor is under a similar obligation *vis-à-vis* suppliers and sub-contractors.

6. A duty of the client to enable the work to be realised or to make this easier is generally assumed in DUTCH law. It is based on good faith (CC art. 1134), see *Goossens*, Aanneming van werk, nos. 979 ff.

7. The doctrine of implied terms results in both parties having a positive obligation to do all that is necessary to enable the other party to perform, and to refrain from hindering the other's performance in ENGLISH law (*Hudson,* Building and Engineering Contracts[11], no. 1-186 and *Chitty* on Contracts II[29], nos. 37-067 and 37-068). The same holds true in SCOTTISH law (*Stair*, The Laws of Scotland III, 'Building Contracts', para. 52.

8. Chapter 9 § 31 of the FINNISH ConsProtA deals with delays due to failure to co-operate by the consumer-client, entitling the constructor to compensation and other remedies. Also, the General Conditions for Building Contracts YSE 1998 art 8 defines the client's general duty to co-operate.

9. The duty to co-operate of the client is limited to delivering the information necessary for the performance of the work under FRENCH law. If the client conceals this information, this can be regarded as contributory negligence and may lead to the partial exoneration of the constructor (Cass.civ. I, 17 March 1969, D. 1969, 532, knowledge of the client of particular characteristics of the soil), but there may be other duties in good faith, see CC art. 1134(3).

10. The GERMAN CC art. 642 entails a general duty to co-operate and contribute to the work for the client. The client may have to provide the material, get official permissions, deliver the design, and provide technical support (e.g. electricity, water). Article 6 no. 6 VOB/B also states that it is a lack of co-operation if another service supplier hired by the client does not provide the work on which the constructor has to build its contribution. Under the CC the duty to co-operate is not enforceable (BGH NJW 1954, 229). But the constructor may ask for compensation for the fruitless keeping ready of facilities and may terminate after setting an additional period of time, see CC art. 642(2), art. 643 and art. 9 VOB/B. If the lack of the client's contribution is of such intensity that it is unreasonable to continue the contractual relationship, the contractor may rescind immediately and demand damages because of non-performance (BGH NJW 1954, 229).

11. A general duty to co-operate may, in ITALIAN law, be deduced from the general principles of correctness in performance (CC art. 1175) and of good faith both at the pre-contractual (art. 1337) and contractual stage (art. 1375).

12. In the NETHERLANDS, the client's duty to co-operate is not codified but standard conditions deal with the contractor's duty to provide access to the client or persons acting on the client's behalf to exercise the right to supervision of the work (cf. art. 6-20 and 6-22 *UAV 1989*) and to be represented at the construction site at all times in order to receive and carry out directions given by or on behalf of the client (cf. art. 6-19 *UAV 1989*).

13. Both of the parties are under an obligation to co-operate in POLISH law which follows from the general rules of contract law (CC arts. 354 and 355). Additionally, parties to a building contract are obliged to co-operate in all phases of the building process, which follows from CC arts. 651 and 655 (Rajski [-*Strzępka*] System Prawa Prywatnego, VII,[2] p. 407).

14. No express provision exists on the duty to co-operate in PORTUGAL. It follows however from the general principles of good faith in CC arts. 762, 813(2). It includes the supply of the terrain, the plan, materials, tools, instructions, and co-operation to obtain administrative licenses, see *Romano Martinez,* Direito das Obrigações[2], no. 344.

15. In SPAIN, the obligation of the parties to co-operate, even when not expressly codified or agreed by the parties in their contracts, is to be enforced because it stems from good faith, usages and the law (CC art. 1258). Construction Actart. 9(2) imposes specific obligations on the client. Some of those are within the framework of co-operation: to deliver documents and information to allow the performance by the constructor and to authorise variations; to get all necessary licenses and administrative permits; to subscribe the mandatory insurance (art. 19).

16. Under SWEDISH law, the AB 92 does not contain any general obligation for the parties to co-operate. The provisions are instead rather detailed, for instance art. 3:12 laying upon the client the responsibility to coordinate his own work and work of other side-contractors with the constructor. Moreover, the parties are obliged to attend building meetings, which should address questions relevant to both parties and be held when necessary, art. 3:17.

III. Obligation to give access

17. Under the AUSTRIAN ÖNORM B 2110 the client has to provide for working and storage facilities at, access roads or railroads to, and gas, water, and electricity supplies for, the construction site in as far that is required to enable the contractor to perform the contractual obligations (5. 9. 1).

18. The duty to enable the constructor to carry out the work is a general principle of BELGIAN law regarding construction, see *Goossens*, Aanneming van werk, no. 987.

19. There is an implied term requiring the client to give possession of the site within reasonable time under ENGLISH law (*Hudson,* Building and Engineering Contracts[11], 1995, no. 4-150 and *Chitty* on Contracts II[29], no. 37-067) and under SCOTTISH law (*Stair,* The Laws of Scotland III, 'Building Contracts', para. 53).

20. The client is generally considered to have an obligation to give access to the constructor under FRENCH law (*Huet,* Contrats spéciaux[2], no. 32329; *Picod,* JCP éd. G 1988, I no. 3318).

21. Under GERMAN law the client has to give access to his territory if necessary. This obligation results from CC art. 242 (good faith) as well as CC art. 642.

22. Under DUTCH law, the client's duty to give access to the construction site is implied in UAV 1989 art. 5-1, sub b and AVA 1992 art. 3(1).

23. The POLISH CC does not contain in so many words an obligation to give access in the case of a building contract; it may be however derived from, for example, CC art. 636, which applies to the building contract on the basis of CC art. 656 para. 1.

24. Giving access to the terrain is part of the obligation to co-operate under PORTUGUESE law, see *Romano Martinez,* Direito das Obrigações[2], no. 344.

25. Although in SPANISH law there is no special legal provision on this point, the client-proprietor is obliged to grant the constructor the instrumental possession *(posesión*

instrumental o servil) of the place where the construction work is to take place. This duty stems from the general principle according to which creditor is obliged to make the debtor's performance possible (TS 21 November 2002, RJ 2002/10269).

26. In SWEDISH law the constructor has a right to use the construction site in a way that is necessary for carrying out the contract work, in consultation with the client, Swedish AB 92 art. 3:14.

IV.C.–3:103: Obligation to prevent damage to structure

The constructor must take reasonable precautions in order to prevent any damage to the structure.

COMMENTS

A. General idea

The general rule for all service contracts in IV.C.–2:105 (Obligation of skill and care) already requires the constructor to comply with the statutory and disciplinary rules applicable to the activity (paragraph (1)(b)), and to take reasonable precautions in order to prevent the occurrence of damage as a consequence of the performance of the service. During the construction activity, the constructor must also take reasonable precautions against foreseeable damage to the structure.

Illustration

The constructor of a building is to protect the structure against external harm such as weather conditions and theft. This may require the building site to be covered in a way that protects it against rain and wind. If valuable materials are present on the site, the site may have to be fenced or even guarded.

B. Interests at stake and policy considerations

When construction activities take place, the risk of damage to the structure is usually higher than when the building is completed and in use. The structure is generally more easily accessible, more exposed to the elements and less stable than a completed building. Protection is therefore needed. The issue is: who is to provide protection, the constructor or the client?

Because the constructor will normally supervise the site where construction takes place, or at least the structure, and will also be accessing the structure regularly and frequently, the constructor is usually in the best position to take protective measures.

More generally, the constructor is usually in the best position to take safety measures and measures limiting a negative impact of the activity on goods and on third parties. Construction, by its nature, is a process which easily leads to damage to goods or even personal injury. The constructor will have to protect the constructors own materials and workforce anyhow, and protecting other goods and people is therefore not burdensome. Insurance cover is widely available. In exceptional cases, the client may be in a better position to take safety measures, and the parties may then wish to deviate from this default regime.

C. Preferred option

According to this Article, the constructor is the one who has the principal responsibility for safeguarding the structure during construction, for the reasons set out under B.

NOTES

I. Overview

1. First, it may be useful to note how different jurisdictions solve the general question of the obligation of skill and care imposed on the constructor.

2. Some jurisdictions use a general obligation to carry out the work with reasonable (professional) skill, notably ENGLAND (see *Hudson*, Building and Engineering Contracts[11], no. 4-124, *Chitty* on Contracts II[29], no. 37-069, Supply of Goods and Services Act 1982, s. 13), SCOTLAND (*Stair*, The Laws of Scotland III, 'Building Contracts' paras. 34-36), SWEDEN (AB 92 art. 2:1 and Consumer Services Act § 4) and THE NETHERLANDS (*Jansen*, Defects liability, pp. 252-253).

3. Most jurisdictions, however, have a strict liability for the result of the construction efforts, and use a standard of care liability only for damage to the work, to other goods, or to persons, as well as in respect of other structures than immovables, see FINLAND (ConsProtA chap. 8 § 12 and chap. 9 § 13), FRANCE (*Malaurie/Aynès/Gautier*, Contrats spéciaux VIII[14], no. 740 and *Collart Dutilleul and Delebecque,* Contrats civils et commerciaux[7], nos. 727 ff), SPAIN *Carrasco Perera/Cordero Lobato/González Carrasco*, Derecho de la Construcción y la Vivienda[4], 353 para. 2 LOE, ITALY (CC art. 1176 and *Mangini*, Il contratto di appalto[2], p. 134), GERMANY (BGH NJW 1998, 3707, art. 13 no. 1 VOB/B and CC art. 633), AUSTRIA (CC art. 1299, Rummel [-*Krejci*], ABGB I[2], arts. 1165, 1166, no. 86 and ÖNORM A 2060), 2.10, GREECE (CC art. 685(1)), PORTUGAL (CC art. 1208, Urban Constructions Decree Law art. 15, CC art. 762(2)) and POLAND (CC art. 355).

4. The constructor's duty to prevent damage to the structure is established in SWEDEN, AB 92 art. 5:4, In other countries there is a more general duty to prevent damage to goods and persons, see ENGLAND (*Hudson*, Building and Engineering Contracts[11], nos. 1-273 ff), SCOTLAND (*Stair*, The Laws of Scotland III, 'Building Contracts' para. 149), FINLAND (ConsProtA chap. 8 § 20, chap. 8§ 21 and chap. 9 § 20 (but with some restrictions)), THE NETHERLANDS (art. 6-6 and art. 6-16 *UAV 1989*, art. 5, para. 1, *AVA 1992)* SPAIN (preamble and LOE art. 3 b.3*)*, GERMANY (BGH VersR 1969, 927; BGH NJW 83, 113; CA Karlsruhe VersR 1985, 297; Staudinger [-*Peters*], BGB [2003][13], art. 635 nos. 6-7), AUSTRIA (ÖNORM B 2110, 5.13 and 5.41.2), PORTUGAL (RGEU arts. 15 ff, and art. 135), and POLAND (CC art. 652). This duty even tends to go in the direction of a strict liability in FRANCE (see with regard to this *obligation de sécurité: Le Tourneau and Cadiet*, Droit de la responsabilité et des contrats (2002/2003), no. 1827, and *Malaurie/Aynès/Gautier*, Contrats spéciaux VIII[14], no. 748 (against), but case law is not clearly established).

II. General standard of care

5. The AUSTRIAN CC art. 1299 requires the usual degree of care and attention that is necessary for the task in question, see JBl 1962, 152; SZ 34/153, JBl 1962, 322; SZ 35/130, EvBl 1963/164; JBl 1982, 245, EvBl 1981/159; *Gschnitzer*, Schuldrecht, Besonderer Teil und Schadensersatz[2], 482, and Schwimann [-*Harrer*], ABGB VI[3], art. 1299, no. 2. If the mode of construction is not contractually agreed, the contractor has to perform pursuant to the usage, local custom and technical rules, see Rummel [-*Krejci*], ABGB I[2], arts. 1165, 1166, no. 86 and ÖNORM A 2060, 2.10.

6. In BELGIUM art.1135 CC (contractual good faith) is a basis for such obligations, see *Goossens*, Aanneming van werk, 2003, nos. 955 ff.

7. In ENGLAND, there is a general 'workmanship' obligation, to carry out the work with reasonable skill, (*Young & Marten Ltd. v. McManus Childs Ltd.* [1969] 1 AC 454, see *Hudson,* Building and Engineering Contracts[11], no. 4-124 and *Chitty* on Contracts II[29], no. 37-069). Where a service is supplied in the course of a business, there is an implied term that it will be carried out with reasonable skill and care, Supply of Goods and Services Act 1982, s. 13.

8. For minor work on immovables delivered to consumers, FINNISH law requires the service to be carried out with professional skill and care, taking into account the interests of the client, see ConsProtA chap. 8 § 12. For other construction work the requirements of good building practice and the reasonable expectations of the consumer are relevant, see ConsProtA chap. 9 § 13.

9. Under FRENCH law, the constructor of a corporeal thing is generally under an obligation of result with respect to the construction itself. Other *entrepreneurs* may be under an *obligation de moyens,* however. Additional responsibilities may also arise, in relation to the conservation of the thing on which the construction work is performed, or the safeguarding of other goods, see *Malaurie/Aynès/Gautier,* Contrats spéciaux VIII[14], no. 740 and *Collart Dutilleul and Delebecque,* Contrats civils et commerciaux[7], nos. 727 ff.

10. GERMAN law does not focus on the quality of the construction activity itself, but more on the outcome of the work. The construction work has to be fit for its normal purpose (BGH NJW 1998, 3707). The work is defective if it is not built according to the general standard of technique (*Regeln der Technik*), see art. 13 no. 1 VOB/B and CC art. 633 (BGH BauR 1981 577, 579).

11. The constructor must, under GREEK law, exercise the care required in the respective trade or business, CC art. 330. Moreover, CC art. 685(1) states that a contractor is bound to use with care materials supplied by the client, to render account in respect thereof and to return to the client any left over.

12. In ITALY the constructor is required to perform with the diligence and knowledge which are inherent to the exercise of the professional activity in question (ITALIAN CC art. 1176). The constructor is entitled to perform in a position of autonomy and thus has to abide by the general standard of care which is typical of the profession, see *Mangini,* Il contratto di appalto[2], p. 134; *Marinelli,* Giust.civ. 1982, II, p. 116).

13. Under DUTCH law, the constructor has to process the things in a competent manner, carrying out the work with reasonable skill. Cf. *Jansen,* Defects liability, pp. 252-253.

14. The constructor, in POLISH law, must observe the generally required standard of care, higher in the case of professionals, see CC art. 355.

15. In PORTUGAL the constructor is under an obligation to produce a flawless and fit for purpose work in conformity with the contract (CC art. 1208). In building construction the best standards of construction practice must be observed, Urban Constructions Decree Law art. 15. This is complemented by duties of information, security, secrecy, etc., stemming from the principle of good faith, see CC art. 762(2) and *Romano Martinez,* Direito das Obrigações[2], no. 350.

16. In SCOTTISH law the contractor's general obligation is one of care and skill, which includes the selection and installation of materials that are fit for purpose (*Stair,* The Laws of Scotland III, 'Building Contracts' paras. 34-36; Supply of Goods and Services Act 1982 ss.11A(3), 11D). A more general term of fitness for purpose may be expressed or implied in the particular circumstances of the case.

17. The contract for work imposes an obligation of result under SPANISH law. However, this obligation of result is complemented by the LOE with specific obligations to be

observed by the constructor during the construction process. These are intended to guarantee that the constructor will achieve the expected result, see LOE art. 11(2). The constructor is obliged to carry out the construction work in accordance with the designed project, applicable legislation and the instructions of the technicians in order to achieve the quality required in the project.

18. In SWEDEN the contractor must perform the work in a professional manner, AB 92 art. 2:1 and Consumer Services Act § 4. Regarding consumers, the professional must also consider the interests of the consumer and consult him or her to the extent necessary and possible, Consumer Services Act § 4.

III. Prevention of damage to the existing part of the structure and to other persons and goods

19. It is a general principle of law in AUSTRIA that the contractor has to perform the contractual obligations without causing any damage to other persons and goods. Liability may be contractual in relation to contractual partners (based on the contractual obligation of skill and care) or non-contractual in relation to third parties (according to the law of delict; S. ÖNORM B 2110 contains more detailed provisions in that regard: the contractor is obliged to secure the construction site (5.13) and is liable vís-a-vís third parties for certain damage caused by the construction activity (*Schaden Dritter,* 5.41.2).

20. The liability will be based on the tort of negligence under ENGLISH law, see *Hudson,* Building and Engineering Contracts[11], nos. 1-273 ff.

21. In FINLAND, in relations with consumers, the constructor is liable for damage in relation to personal injury and property, see ConsProtA chap. 8 §§ 20-21 and chap. 9 § 20, but with some restrictions.

22. A part of the legal doctrine in FRANCE is of the opinion that the *entrepreneur* and more particularly the constructor are under an *obligation de sécurité* (*Le Tourneau,* Cadiet, Droit de la Responsabilité, no. 1827). On the other hand some are against this idea (*Malaurie/Aynès/Gautier*, Contrats spéciaux VIII[14], no. 748). The case law is not clearly established. Additional responsibilities may also arise, in relation to the conservation of the thing on which construction work is performed, or the safeguarding of other goods, see *Malaurie/Aynès/Gautier*, Contrats spéciaux VIII[14], no. 740 and *Collart Dutilleul and Delebecque,* Contrats civils et commerciaux[7], nos. 727 ff.

23. The constructor has secondary obligations, under GERMAN law, arising from the principle of good faith (CC art. 242) to act with consideration regarding the property of the client (BGH VersR 1969, 927; BGH NJW 83, 113) and may not endanger the client's life or health (CA Karlsruhe VersR 1985, 297). The constructor also has to compensate the client for damages sustained by third parties, e.g. neighbours (Staudinger [-*Peters*], BGB [2003], § 635 nos. 6, 7).

24. In ITALY, the constructor is liable for any damage caused to third parties from the performance of the work. Only in those situations in which the constructor has no room to decide and acts as a *nudus minister* of the client, or when the damage to the third party was caused by a decision taken by a director of the work, nominated by the client, is there room for liability of the client, *Danovi,* Foro pad. 1991, IV, 2, pp. 99-110).

25. In the NETHERLANDS the contractor must carry out the work in such a manner that the client and others are not unnecessarily hindered and that damage to persons, goods or the environment is limited as much as possible (art. 6-6 *UAV 1989,* art. 5, para. 1, *AVA 1992*). The contractor further has to provide order and safety at the construction

site, as well as sufficient illumination for a proper execution of the work (art. 6-16 *UAV 1989*).

26. With regard to the prevention of damage on a building site there is a specific regulation in POLISH law. If the contractor has taken over site from the client the contractor is liable, until the time of handing over the work, for any damage occurring on that site (CC art. 652).

27. In PORTUGUESE law, during the execution of works of any sort, measures must be taken not only to avoid damage to property but also to guarantee the security of the public and the workers, and to safeguard, so far as possible, the normal circulation of traffic on public roads. See arts. 15 ff, and Urban Constructions Decree Law art. 135.

28. The liability in SCOTTISH law depends upon general principles of negligence in the law of delict (*Stair*, The Laws of Scotland III, 'Building Contracts' para. 149; *Connolly*, Construction Law, chap. 6).

29. Under SPANISH law, in the preamble of the LOE, it is stated that the enactment of the new statute responds, among other things, to the demands of society regarding the quality of buildings. This refers not only to safety and protection against fire, but also to other aspects such us protection against noise, thermal insulation or accessibility for handicapped persons, see also LOE art. 3 b 3. However, the LOE only deals with the consequences of material damage and not of personal injury. LOE art. 19(1) imposes on the constructor the obligation to take out insurance for material damage caused by the construction work.

30. The constructor is liable under SWEDISH AB 92 art. 5:4 for damage to any part of the contract work not yet delivered. The constructor is also obliged to effect an all-risks insurance, art. 5:22(2).

IV.C.–3:104: Conformity

(1) The constructor must ensure that the structure is of the quality and description required by the contract. Where more than one structure is to be made, the quantity also must be in conformity with the contract.

(2) The structure does not conform to the contract unless it is:

(a) fit for any particular purpose expressly or impliedly made known to the constructor at the time of the conclusion of the contract or at the time of any variation in accordance with IV.C.–2:109 (Unilateral variation of the service contract) pertaining to the issue in question; and

(b) fit for the particular purpose or purposes for which a structure of the same description would ordinarily be used.

(3) The client is not entitled to invoke a remedy for non-conformity if a direction provided by the client under IV.C.–2:107 (Directions of the client) is the cause of the non-conformity and the constructor performed the obligation to warn pursuant to IV.C.–2:108 (Contractual obligation of the service provider to warn).

COMMENTS

A. General idea

This is one of the central rules on construction. The constructor is to guarantee the fitness for purpose of the structure. When the structure is not fit for its purpose, the constructor will have to prove that the cause of that was beyond the constructor's control. The rule is a specific application and refinement of IV.C.–2:106 (Obligation to achieve result). The client may expect that the result will be achieved.

The structure must conform to a particular purpose made known to the constructor at the time of conclusion of the contract. If such a particular purpose is made known to the constructor at a later time, the constructor is obliged to make sure the structure will be fit for that particular purpose if the content of the contract is changed in accordance with IV.C.–2:109 (Unilateral variation of the service contract).

Furthermore, the structure must be fit for the purpose or purposes for which a structure of the same description would normally be used. Without indications to the contrary, the client may reasonably expect that the structure will be fit for such a normal purpose. If the constructor is not able to render the structure fit for such a purpose, the client should be so informed.

Illustration 1
A client and a shipbuilder agreed on a contract for the construction of a large sailing ship. The client may expect a sufficiently large sailing ship to be seaworthy. If the client made known to the shipbuilder that he wishes to use the ship for trips with groups consisting of a maximum of ten people, he may expect the ship to offer sufficient sleeping and sitting space for ten persons, albeit perhaps in shifts.

Similarly, the structure does not conform to the contract if a part or component is not fit for its particular or normal purpose, even though the whole structure may be fit for its purpose. Of course, such a partial non-conformity would only lead to an adjusted remedy.

B. Interests at stake and policy considerations

Liability with regard to the quality of the outcome is an important issue for both parties. When the liability for the quality is strict, the constructor will have to remedy defects even when every relevant quality criterion was met regarding the assessment of the existing situation, the input and the process of construction. The only escape is to show that specific defences apply. When there is no liability for 'fitness for purpose', the central issue will be whether the constructor satisfied the quality criteria set for the activities. In practice, the difference between the two approaches should not be overstated, especially when the burden of proving that the duties were performed is on the constructor. In that case, the question is rather which defences are allowed under both regimes.

An advantage of the former approach is that the quality of the outcome may be easier to discuss and to establish than the quality of the processes and interactions that led to that outcome. It may, for instance, be hard to reconstruct the events that preceded the apparent defect in the outcome and to what extent the constructor exercised care with respect to these events. So, the legal and other administrative costs of the stricter liability system are likely to be lower. Another issue to take into account is the possibility of insurance. In most countries, there is 'construction all risk' coverage available with regard to the risks of construction of buildings. In France, this coverage is even obligatory for most building projects.

The costs of stricter liability and insurance will be reflected in the price. So, accepting the former system will lead to somewhat higher prices of construction. There may be only an effect on the initial price, however. Under a fault liability for defects, the client will in many cases let the constructor repair the defects anyhow, because the client will wish to obtain a structure that is fit for its purpose. Thus, the client will in most cases pay the extra price for remedying, even if this is under the heading of costs for extra work and not under the heading of an element of the initial price intended for coverage of the stricter liability.

Whether liability for the fitness for purpose of the outcome or an obligation of means is the more acceptable system will also depend on the frequency of constructors not being able to attain the result envisaged. When it is normally relatively easy for the constructor to construct a structure that is fit for its purpose, stricter liability is more acceptable than in situations where it is rather uncertain whether a structure will be fit for its purpose. Taking normal precautions in most circumstances may prevent major defects. This may be different for highly innovative structures or things, such as entirely new and tailor-made machinery or software, but in such situations special contractual arrangements will be necessary anyhow, and the parties can adjust the liability regime to these specific needs. In many construction projects, the problem will rather be that some small defects are virtually unavoidable. The main issue there is probably who is generally in the best position to prevent as many of these defects as possible. Furthermore, it is a matter of how the various solutions work in terms of costs of sorting out whether the constructor is liable and, if not, of negotiating for extra work.

A related issue is the extent of control the constructor has over the construction process. If the client or experts hired by the client make decisions on the design and on the other input, the constructor may have less influence on the final outcome. Whether this should lead to diminished liability will depend to some extent on the care expected from the constructor with respect to input and instructions from the client. This issue is generally covered by the constructor's obligation to warn; see IV.C.–2:108 (Contractual obligation of the service provider to warn).

C. Comparative overview

The principle that the final outcome of the construction process (the structure) should be fit for its purpose or – which amounts to the same thing – should not contain defects is a central idea in French, Spanish, German, Austrian and Greek law. In these countries, the constructor has an obligation to construct a structure that is fit for its intended use, which may be either the purpose for which it is generally considered to be used or a specific purpose for this specific structure. Therefore, in these countries the principle of perfect final result is accepted: the constructor is under an *obligation de résultat.* This implies that the constructor will be liable unless the constructor proves that the client's specifications were the cause of the problem and amount to an impediment beyond the constructor's control, excusing the bad performance as *force majeure*. Whether *force majeure* can be proved of course heavily depends upon the way in which the concept is interpreted.

Although English courts now apply the 'fitness for purpose' test to the building of houses and some other structures, the traditional rule in English law is different. If the client provides the constructor with more or less detailed instructions, the constructor is not under an obligation to produce a structure which is fit for its purpose, but is only bound to prove that the work was carried out in accordance with the plans and specifications in a workmanlike manner, using proper materials. If the constructor proves that the instructions were followed conscientiously and that proper care was exercised, the constructor will not be liable if the structure is not fit for its purpose. Where the client, however, relies on the constructor's skill and judgement, such as in a contract to build a house for use by the client, there will be an implied warranty that the house will be reasonably fit for its purpose. In Belgium, the Netherlands and Sweden, the systems are in between the English and the 'obligation of result' system.

Under the English system, the constructor can avoid liability by proving that the work was carried out in accordance with the quality requirements set in the contract. With respect to those issues on which the contract is silent, the constructor has to prove that high-quality materials were used and processed in a good and workmanlike manner, which includes warning the client against apparent defects in instructions or other input from his side. Swedish, Spanish, Portuguese, German and Dutch law give the constructor the possibility of proving that the defect is caused by contractual requirements or other decisions for which the client is responsible, unless the constructor had to warn the client against the possible defects resulting from this. The French system is different in that it allows a defence based on decisions for which the client is responsible only when the client knew or had reason to know the unsuitability of the decision – a rule that is seldom applied. All systems are similar in that they allow a defence in real *force majeure* cases, which, however, are extremely rare.

D. Preferred option

Although the results may in the end be very similar, depending largely on the way the concept of *force majeure* is understood, the interpretation of the duty of a careful constructor and the burden of proof in this respect, the two approaches fundamentally differ from each other. Therefore, an explicit choice between the two approaches has to be made.

A solution may be to distinguish between traditional contracts and 'design and build' contracts. In the latter type of contract, the constructor is able to control to a large extent the achievement of a perfect final result and it will also be much easier to establish that the defect

occurred due to a circumstance that was beyond the constructor's control. On the other hand, in a traditional building contract the decisions made by the client – and, in particular, by the client's architect – may diminish the constructor's ability to achieve the perfect final result too much to put such a heavy liability on the constructor. However, with regard to the extent of control left to the constructor, probably no fundamental difference exists between a traditional building contract on the one hand and a design and build contract on the other. Certainly, the constructor's freedom is more restricted in a traditional building contract, where important decisions are usually taken by the client, whereas in a 'design and build' contract, such decisions will usually be taken by the constructor. Nevertheless, the constructor's freedom in a traditional building contract may be far greater if the client does not take these decisions, whereas the constructor's supposed freedom under a 'design and build' contract may be limited considerably by a client's interference.

Therefore, the amount of influence the client may exercise on the outcome of the construction process is not necessarily related to the choice of a modern or traditional model, but to the extent of the control of the constructor over the choices that are to be made. Making the amount of influence exercised by the other party the decisive criterion is problematic, however. It is difficult to determine the right borderline, and such a criterion would therefore lead to considerable uncertainty.

If a choice between the two systems has to be made, the fitness for purpose rule seems to be preferable. If the structure is unfit for its purpose, the constructor is generally in a much better position to explain the reasons for this than the client. Moreover, the constructor will generally be in the best position to repair the defect perceived, irrespective of who has to bear the costs in the end. Finally, in most countries insurance is available which covers the main risks of construction.

The burden on the constructor will also depend on what must be proved in order to escape liability. In this respect, the system followed here is that the constructor can be discharged by proving that the defect is caused by decisions made by the client. Such decisions may either be contained in the contract or in subsequent directions, unless the constructor had a duty to warn. In this manner, liability is linked to the extent of control the constructor has over the process. Finally, liability may be avoided if an impediment beyond the constructor's control was the cause of the non-performance, and if the constructor could not reasonably be expected to have taken the impediment into account at the time of conclusion of the contract, or to have avoided or overcome the impediment or its consequences; see III.–3:104 (Excuse due to an impediment).

This Article can be seen as an application of IV.C.–2:106 (Obligation to achieve result). For construction, the general rule is that the constructor must achieve the specific result stated by the client: 'fitness for purpose'.

It should be noted that a contract for the construction and sale of goods or other assets within the scope of Book IV.A. will be regarded as primarily a contract for the sale of those goods or assets. (IV.A.–1:102 (Goods to be manufactured or produced) The construction rules will apply only so far as necessary to regulate the construction elements in the contract and only to the extent that they do not conflict with the sales rules. (II.–1:107 (Mixed contracts)) The sales rules on conformity and remedies for non-conformity will therefore apply. This prevents conflicts between two sets of rules.

According to subparagraph (2)(a), the structure must be fit for the particular purpose made known to the constructor at the time of the conclusion of the contract or at the time the contract was changed in accordance with IV.C.–2:109 (Unilateral variation of the service contract). There is no exception, as there is in the case of sales (IV.A.–2:302 (Fitness for purpose, qualities, packaging etc.) paragraph (a)), for those situations where the client did not rely, or where it was unreasonable for the client to rely, on the constructor's skill and judgement. In a construction case the client will normally rely, and will be entitled to rely, on the constructor having or being able to acquire the necessary skills and competence to make the structure fit for that purpose if the constructor does not make known to the client that this is not the case. In other words, if the constructor keeps silent when confronted with the particular purpose the client has for the structure, the constructor more or less guarantees that the necessary skills and competence will be available.

The national laws on construction support this solution. There, such a defence is not common. In construction situations, it will generally be less burdensome for the constructor to state expressly that the fitness of a structure for a particular purpose is not guaranteed, because the parties will communicate frequently. It is different in important categories of pure sales transactions, such as consumer transactions and trading, where the parties will not communicate so frequently.

As in the Article on sales, the present Article also refers to the normal purpose of a structure of the kind in question. In construction cases, a specific purpose will often be made known to the constructor. This may happen during the negotiations preceding the contract or at the time of later variations or directions. In the latter case, the purpose made known to the constructor will generally be a more specific one.

The burden of proof that the structure is not fit for its purpose is on the client. The client will not have much difficulty in proving communication about the structure's normal purpose. Proving that a specific purpose has been communicated to the constructor will be less easy, but it is reasonable to require this of the client. With respect to claims under paragraph (4), the burden of proof is on the constructor.

The rules in this Article are default rules. They apply only unless otherwise agreed.

NOTES

I. General

1. The European jurisdictions generally accept strict liability for failure to meet the specifications of the structure expressed in the contract, ENGLAND (*Hudson*, Building and Engineering Contracts[11], no. 4-080), SWEDEN (AB 92, art. 4:7 and 5:6), FINLAND (in consumer construction projects regarding immovables, ConsProtA chap. 9 § 13), THE NETHERLANDS (cf. Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 513), SPAIN (TS of 30 January 1997, Aranzadi Civil 845), ITALY (L´appalto, Rassegna di giurisprudenza commentata, directed by *A. Jannuzzi*, I, Milano, p. 310), AUSTRIA (ÖNORM A 2060).

2. On top of this, some countries have a fitness for purpose requirement, at least for some contracts or for some (generally important) defects: ENGLAND (where the client relies generally on the constructor and in a contract to build a residential house, see *Hancock v. B.W. Brazier (Anerly) Ltd.* [1966] 1 WLR 1317, Court of Appeal, *Hudson*, Building and Engineering Contracts[11], no. 4-105 and *Chitty* on Contracts II[29], no. 37-071), FRANCE (*Collart Dutilleul and Delebecque*, Contrats civils et commerciaux[7], pp. 81, 97, 99-100 and *Huet*, Contrats spéciaux[2], nos. 32246 and 32276), SPAIN (*Martinez Mas*, La recepción en el contrato de obra, p. 87), ITALY (CC arts. 1667-1669; Cass. 7 October 1970, no. 1834, Giust.civ.Mass., p. 979), GERMANY (BGH NJW 1998, 3707), AUSTRIA (CC arts. 922 ff and 1167), GREECE CC (arts. 688, 689, but fault is required with regard to the award of damages), PORTUGAL (CC art. 1208 and CA Lisboa, 27 November 1981, CJ 1981, V, 164), and POLAND (CC arts. 556, 568, 637, 638). Others only require the service to be performed professionally SWEDEN (AB 92 art. 2:1 first paragraph and Consumer Services Act § 4 for consumers), THE NETHERLANDS (Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 513) and England (*Hudson*, Building and Engineering Contracts[11], no. 4-105, *Chitty* on Contracts II[29], no. 37-071, for other structures).

II. Fitness for purpose

3. The AUSTRIAN CC arts. 922 ff contain basic rules on a legal warranty of performance valid for all types of contracts for consideration. Basically, this regime is one of liability without the requirement of fault on the part of the contractor: art. 1167 is a special provision on warranty for defects in the field of contracts of work, specifying the remedies. Art. 928 exempts obvious defects from warranties but should not apply in cases of contract of work. Rummel [-*Krejci*], ABGB I[2], art. 1167, no. 6, arguing that art. 928 deals with the situation at the point of conclusion of the contract ('Augen auf, Kauf ist Kauf'). ÖNORM A 2060 repeats and clarifies the regime of legal warranty.

4. Fault is a requirement for liability of the constructor in BELGIAN law, see *Jansen*. Defects liability, pp. 265 ff.

5. In ENGLAND, the question whether there is an obligation to construct a building fit for its purpose depends on the contract, *Viking Grain Storage v T.H. White*, (1985) 33 BLR 10, Court of Appeal, – simple contract to supply and erect a grain storage building, no architects employed by client, held constructor liable when unfit for its purpose. When detailed instructions are given by the client, there is an obligation to follow the instructions but no general fitness for purpose obligation, *Hudson*, Building and Engineering Contracts[11], no. 4-080. Where the client relies generally on the constructor, there is likely to be an implied term that the work carried out by the constructor will on completion be reasonably fit for its purpose, *Duncan v. Blundell* (1820) 3 Stark 6, 171 ER 749 ("Where a person is employed in a work of skill the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed and he should know whether it will or not; of course it is otherwise if the party employing him chooses to supersede the workman's judgment by his own", per Bayley J., see also *Hudson*, Building and Engineering Contracts[11], no. 4-081, *Chitty* on Contracts II[29], no. 37-071. It is clear law that a contract to build a residential house includes a implied warranty that the house will be reasonably fit for its purpose, i.e. human habitation, *Hancock v. B.W. Brazier (Anerly) Ltd.* [1966] 1 WLR 1317, Court of Appeal, *Hudson*, Building and Engineering Contracts[11], no. 4-105.

6. In consumer construction projects regarding immovables, the performance of the constructor is defective under FINNISH law if it does not in content, quality or other characteristics conform to what can be deemed agreed, the ConsProtA chap. 9 § 13.

Regarding defective work or other performance relating to movables, immovables and other structures, the service provider has the option to prove that the service has been provided with professional care and skill, ConsProtA chap. 12 § 4.

7. Under FRENCH law, the quality of the materials and the way they are processed have to be such that they render the final construction fit for its purpose; *Collart Dutilleul and Delebecque,* Contrats civils et commerciaux[7], pp. 81, 97, 99-100; *Huet*, Contrats spéciaux[2], nos. 32246 and 32276. This relates to three types of defect: 1. defects which compromise the solidity of the work or render it unsuitable for its purpose (CC art. 1792); 2. defects which compromise the functioning of the equipment separable from the work; 3. defects reported by the client at the moment of the reception of the work (CC art. 1792-6). On other defects, what French lawyers call "*dommages intermédiaires"*, the legal regime of guarantee is not applicable, but the general provisions on contractual liability are. They require a fault.

8. The construction work has to be fit for its normal purpose under GERMAN law (BGH NJW 1998, 3707). The work is defective if it is not built according to the general technical standard. This is not explicitly laid down in the CC but only in VOB/B art. 13 no. 1. Nevertheless this principle is to be applied for CC art. 633 as well (BGH BauR 1981 577, 579). An important means to determine the general technical standard are the DIN-Normen (published by the Deutsche Institut für Normung e.v.), the guidelines by the German society of engineers (VDI-Richtlinien).

9. GREEK law starts from the position that the contract for work is primarily a contract directed towards the production of a certain result. That alone indicates that the contractor is accountable for the quality of the final result. The contractor is liable for defects in the work (CC arts. 688, 689). Fault is required only with regard to the award of damages, but not for other remedies, See A.P. 620/1995 EEN 1996, p. 536.

10. Under ITALIAN law the constructor has to deliver a structure which is in conformity with the contractual provisions and made following the rules of the art. In the case of defects or non-conformities which do not affect the stability and solidity of the structure, the constructor is liable pursuant to CC arts. 1667 and 1668. In the case of a defect which endangers the stability of the structure, the constructor is liable under CC art. 1669. Both liabilities constitute, together, typical manifestations of the general and ordinary liability of the constructor in relation to the outcome of the construction process (Cass. 7 October 1970, no. 1834, Giust.civ.Mass., p. 979). A structure is thus regarded as defective when, even if normally conform to the contractual agreement, it does not respect the relevant rules of art (*Januzzi*, L´appalto: rassegna di giurisprudenza commentata I, p. 310). Therefore a structure may not conform and be defective, or conform but be defective, or not conform and not defective (*Rubino-Sammartano,* Foro pad. 1986 I, 1, pp. 43-47). If a specific use was agreed upon and the structure is fit for a normal use, but not for this unusual one, there is a case of non-conformity.

11. There is no fitness for purpose rule, merely an obligation to materialise a work that meets the level of quality specified in the contract, under DUTCH law, Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 513; *Jansen*, Defects liability, pp. 265 ff. Many authors have argued that this obligation is to be regarded as an *obligation de résultat*, see for instance Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], nos. 509 ff, but only for conformity with the contract, not general fitness for purpose, Cf. *Van den Berg*, Samenwerkingsvormen in de bouw, nos. 69-70; *Jansen*, Defects liability, p. 271.

12. In POLAND the work has to be performed 'correctly' and in a manner consistent with the contract. If the contract does not specify otherwise, the constructor is liable for

defects and the rules on sales apply respectively (POLISH CC arts. 556, 568, 637, 638). Physical defects are defined as: defects, which reduce the value or utility of the work with respect to the purpose stipulated in the contract or resulting from the circumstances or the destination of the work; defects which mean that the work does not have the properties which the constructor assured the client it would have; and defects resulting from the fact that the work was released to the client in an incomplete condition (CC art. 556 para. 1). A legal defect, in the case of a building contract, occurs if the work is the property of a third party or if it is encumbered with a right of a third party (CC art. 556 para. 2).

13. The work must be flawless and fit for purpose under the PORTUGUESE CC art. 1208. This is an obligation of result: the constructor is liable for defects in the work, even in the absence of fault. Fault is presumed: CC arts. 798, 799. CA Lisboa, 27 November 1981, CJ 1981, V, 164. In building contracts the contractor is liable for defects of construction or soil towards the client and third parties acquiring the structure or a part of it (CC art. 1225).

14. In SCOTTISH law the contractor must select and install materials that are fit for purpose (*Stair*, The Laws of Scotland III, 'Building Contracts' paras. 34-36; Supply of Goods and Services Act 1982 ss.11A(3), 11D). A more general term of fitness for purpose of the whole construction may be expressed or implied in the particular circumstances of the case, especially where the contractor has also supplied the design (*Stair*, The Laws of Scotland III, 'Building Contracts' para. 37; *Connolly*, Construction Law, chap. 4.67-4.71).

15. In SPANISH law the construction work is not in conformity when the structure is not fit for the purpose or purposes for which a structure of the same description would normally be used; *Martinez Mas*, La recepción en el contrato de obra, p. 163) and thus the expectations of the client are frustrated. The Supreme Court has repeatedly stated that for there to be liability for a defective construction it is enough that the construction is not fit for its purpose (TS 17 February 1986, RJ 1986/683). The TS of 30 January 1997 (RJ 1997/845) points out that the obligation of the constructor is to execute and deliver the construction work and assure that it is adequate, correct, and the one agreed. Doctrine and jurisprudence regard the general fitness for purpose test as the criterion for conformity. It may be concluded that if the structure must conform to a particular purpose, the client must have informed the constructor of such circumstance.

16. According to the SWEDISH AB 92, the constructor can be said to be strictly liable for remedying defects emerging during the two-year guarantee period, arts. 4:7 and 5:6. In AB 92 the general rule is that the work performed must conform to what is agreed upon in the contractual documents and other documents and other instructions submitted before the ending of the contracting time aimed at specifying and clarifying the contract documents. If there is no special agreement on the level of quality of a certain part of the work, the work must be performed in accordance with the standard of the contract works in general, AB 92 art. 2:1 first paragraph. Concerning consumer contracts, Consumer Services Act § 4 states that the contractor must perform the service professionally.

IV.C.–3:105: Inspection, supervision and acceptance

(1) The client may inspect or supervise the tools and materials used in the construction process, the process of construction and the resulting structure in a reasonable manner and at any reasonable time, but is not bound to do so.

(2) If the parties agree that the constructor has to present certain elements of the tools and materials used, the process or the resulting structure to the client for acceptance, the constructor may not proceed with the construction before having been allowed by the client to do so.

(3) Absence of, or inadequate, inspection, supervision or acceptance does not relieve the constructor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to inspect, supervise or accept the structure or the construction of it.

COMMENTS

A. General idea

This Article deals with the options of the client to control what the constructor does in order to perform the obligations under the contract. Reasonable supervision and inspection are allowed. The parties may agree that certain input, elements of the process, or parts of the final structure have to be presented to the client for acceptance. If they do so agree, the constructor must wait for the client's answer before proceeding with the construction.

The general approach is that all these measures are deemed to serve the interests of the client only. This means that the client has no obligation or duty to inspect or supervise. The client's failure to do so does not relieve the constructor from any obligations even if the contract provides for inspection or supervision. A provision that certain matters must be accepted by the client before the constructor can proceed is also seen as an extra check for the client. The constructor's position is, however, protected to some extent by the rules on failure to notify in III.–3:107 (Failure to notify non-conformity).

Illustration 1

The client of a provider of tailor-made machinery for a production facility is entitled to supervise and inspect the work of the constructor. He may also require the constructor to submit parts of the machinery for testing. If the constructor delivers machinery that is not fit for its purpose, however, he cannot defend himself by indicating that the client should have discovered the defect during an appropriate inspection or while supervising the construction process. Acceptance by the client is no defence either, because acceptance is deemed to take place in the interest of the client. The constructor may however, show that the allegedly defective performance was a result of a direction by the client, or of a variation of the contract.

B. Interests at stake and policy considerations

The client will often want to monitor the input, process and results of construction activities during construction. Inspections, or even constant supervision of the activity, may cause some disturbance to the constructor, but when well timed and organised they usually can be carried out with minimal costs to the constructor. When there are important choices to be made by the constructor, the client may want the constructor to submit the choices and ask for agreement. Similarly, the client may wish the constructor to present certain input, elements of the process

or results for approval before the constructor proceeds to the next stages of construction. But what are the consequences of inspection, supervision or acceptance for the liability of the service provider?

Inspections – or supervision as a more intensive type of monitoring – are beneficial to the constructor as well. Costs may be saved by early discovery of potential defects or of changes in preferences of the client which might have led to repair or to variations. When inspections are carried out by well-informed clients, or by experts hired by the client, the constructor will probably even take advantage of their knowledge and use it to reach superior results against lower costs. In some construction activities, the roles of the constructor and the supervisor may even be reversed. The constructor then is just the one who carries out the detailed instructions by the supervisor; the supervisor provides the expertise.

The position of the client needs careful consideration in this respect. The supervision provided or hired by the client will lead to some overlap in expertise. Both the supervisor and the constructor will, for instance, spend time considering the advantages and disadvantages of certain alternatives. This overlap is essential and intended, because the interaction will presumably lead to better results, but it also leads to extra costs. There will be a point where the doubling of expertise starts to become detrimental to the client's interests. On the other hand, situations may develop where the experts rely excessively on each other to solve a particular problem. Hiring a supervisor, for instance, may lead to the constructor's relying on the supervisor's expertise for every minor decision, which will drive up the costs of supervision and not substantially diminish the costs on the part of the constructor, whose contract may be at a fixed price. And when the constructor relies on the supervisor to solve an issue, whilst the supervisor expects the constructor to deal with it, the client may suffer in the end. The client may be confronted with a defect, and will have difficulties attributing the responsibility for this defect.

What is needed here, therefore, is a clear division of responsibilities, or at least a procedure that leads to that state of affairs. The rule adopted should prevent an unnecessary overlap of the efforts of the parties involved, but also cover situations where no party is responsible. At the same time, the rule should facilitate valuable types of co-operation between constructor, supervisor and client.

With respect to the acceptance of certain elements by the client, the situation is somewhat different. The client may want the constructor to submit choices. The constructor, on the contrary, may want to obtain the client's approval in order to be protected against future claims, especially in cases where there is uncertainty as to the quality of particular alternatives.

C. Comparative overview

In all countries, inspection or supervision is a right of the client, subject to qualifications designed to prevent unnecessary disturbance of the activities of the constructor. In no EU country is the client under a duty to inspect or supervise the construction activity regularly. In most countries supervision is very common in larger construction projects. In other countries (e.g. France and Spain), even in small construction projects an architect is likely to be in charge.

Even if the parties agreed that the client is to supervise or inspect, this is generally thought to be purely in the interest of the client. In most jurisdictions (England, Sweden, France, Italy, Germany, Austria, Portugal), the highest courts have ruled that inadequate supervision by the client is no reason to diminish the

constructor's liability regarding defects, or standard conditions provide for this (Sweden). In other countries, the legal position is still unclear (Greece). In the Netherlands, case law has gone in a different direction, but this approach is heavily criticised.

D. Preferred option

The EU systems seem to agree on the position with regard to inspection and supervision. As a rule, supervision or inspection is a right of the client even if it has been explicitly agreed that it must take place. Inadequate inspection or supervision should not lead to a shift in liability for defects. This means that, under the default rule, there is no room for a shift of responsibilities from constructor to client (or the supervisor hired by the client).

In practice, the system provided by the present rules will be flexible enough to cover the situation where the client – or, more likely, the supervisor – is the more knowledgeable person and the constructor relies on this knowledge. When the constructor relies on the supervisor, and the supervisor actually takes the decisions on behalf of the client, the rules on directions will apply and will shift much of the responsibility to the client, who in turn will be able to take action against the supervisor if the supervisor acted negligently.

> *Illustration 2*
> An architect hired by a client tells the builder of a house how to construct a part of the roof. The architect provides the solution. This will count as a direction under IV.C.–2:107 (Directions of the client). The liability of the constructor will now be limited to liability under IV.C.–2:108 (Contractual obligation of the service provider to warn).

There is a difference in consequences between a direction and acceptance. Directions lead to a shift in responsibilities; acceptance – as defined in paragraph (2) as a decision during the construction process – does not. In practice, it may be very difficult to distinguish between the two situations. The constructor may even strategically use this difference and try to redirect liability in situations where that is undesirable.

> *Illustration 3*
> A constructor is uncertain which of two possible solutions for part of the roof will be better; one looks slightly more promising, but is also slightly more expensive. He puts the issue before the architect hired by the client. After some deliberation, they jointly choose one solution. The solution chosen turns out to be inferior. If this is considered to be a direction by the client, the client will have to prove that the constructor should have warned against the probable inferiority whereas if this is regarded as acceptance, the constructor will be liable for the defect.

The distinguishing criterion is which of the parties – the constructor or the client (or the client's representative), actually made the choice. Was it the constructor who had the biggest influence on the decision? Or was it the client or the supervisor who made the choice? Sometimes it will be very difficult to reconstruct the communication that took place between the parties and to establish what each party knew at what moment in time. A guideline may be to determine which party was the most knowledgeable about the issue in question. In some

cases, the courts may have to decide that it was a joint decision by people with equal knowledge. Application of III.–3:704 (Loss attributable to creditor) may then provide a solution: the constructor will not be liable for loss suffered by the client to the extent that the client contributed to the non-performance or its effects.

The rules contained in this Article are again default rules. The parties may opt for a regime according to which insufficient inspection, inadequate supervision or acceptance wholly or partially relieves the constructor from liability. As indicated above, the mere fact that the contract provides for inspection, supervision or acceptance is not sufficient to warrant such consequences. The presumption is that inspection, supervision and acceptance are agreed upon solely in the interests of the client. When a change in the distribution of risks is intended, this consequence should be contracted for explicitly.

NOTES

I. Overview

1. All jurisdictions accept a right of the client to supervise the construction process or to inspect the structure, to be exercised in a reasonable manner, without unnecessary interference with the construction activities. In most countries, this is even considered to be self-evident. Explicit references to such a right were found for ENGLAND (*Hudson*, Building and Engineering Contracts[11], nos. 2-182 ff), for SWEDEN (AB 92 art. 3:5 first paragraph), for THE NETHERLANDS (*Van den Berg*, Samenwerkingsvormen in de bouw, no. 112; *Van den Berg*, Verdeling van aansprakelijkheden en risico's bij moderne bouwcontractvormen, p. 83; art. 3-2 *UAV* 1989*)*, for ITALY (CC art. 1662 and Cass., 18 January 1980, no. 434 Rep.Foro it., V° Appalto, c. 115, no. 13), for GERMANY (VOB/B art. 4 no. 1 para. 2, where even a duty of the constructor to disclose information may exist, see VOB/B art. 4 no. 1 para. 2 sent. 2), for AUSTRIA (ÖNORM A 2060 2.11), and for PORTUGAL (CC art. 1209(1)).
2. In most countries, there is no positive duty to inspect the structure at the time it is finalised and delivered to the client, not even when an acceptance procedure is envisaged, see for THE NETHERLANDS Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 562, for ITALY CC art. 1665, for AUSTRIA Rummel [-*Krejci*], ABGB I[2], art. 1170, no. 5. The exceptions where a duty to inspect is assumed are BELGIUM (*Goossens*, Aanneming van werk, no. 1018), PORTUGAL (CC art. 1218) and POLAND (for contracts between businesses and when inspection is customary, see CC art. 563(2)). But this may be a matter of what is called a duty and what remedies exist, because in most jurisdictions the client who does not inspect the structure may lose rights, in particular with regard to manifest defects.
3. In ENGLAND (*Hudson*, Building and Engineering Contracts[11], no. 5-021) and GERMANY (Staudinger [-*Peters*], BGB [2003], § 640 no. 1) liability is unaffected by inspection or its absence. Most jurisdictions, however, attach consequences to inadequate inspection. Many countries exclude liability for manifest defects, if they are not notified to the constructor at the time of final inspection or shortly thereafter, see AB 92 art. 7:13 (SWEDEN), CC art. 758(3) (THE NETHERLANDS), CC art. 692 (GREECE) and CC art. 1219(2) (PORTUGAL). FRENCH case law reversed the burden of proof, presuming that the defect is hidden at the moment of the reception of the work, using the normally diligent client (and not an architect or a third adviser, see

Cass.civ. II, 19 May 1958, JCP 1958.II.10808, note *B. Starck*; Cass.civ. III, 14 May 1985, D. 1985, 439, note *Rémery*) at the moment of the reception as the criterion, see Cass.civ. III, 23 November 1976, Bull.civ. III, no, 415. For AUSTRIAN law, the position is uncertain. The standard for the discoverability of defects varies. GREEK law (CC art. 692) seems to be the most favourable for the constructor, requiring an inspection that lives up to the standards of an expert who has the necessary expertise to detect defects of a given construction, followed by PORTUGAL, where evident defects are those the duly diligent client should have noticed and hidden defects are those not detectable by due diligence, even of an average technician proficient in that field (CA Porto, 17 November 1992, CJ 1992, V, 224). In other countries, the diligence of the client is the focus, whereas the standard may be subjective, referring to the degree of expertise of the client, the way the supervision is organised and the nature and seriousness of the defect, see Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 566 (The Netherlands), and *Goossens*, Aanneming van werk, nos. 178-1083 (Belgium) or be more objective, see for France Cass.civ. III, 3 November 1983, GazPal 1984, 2, 577, note *Liet-Veaux* and for SPAIN LOE art. 17. In Italian law, the literature is divided between the objective approach, (see *Stolfi*, Appalto, p. 58) and a more subjective one (see *Giannattasio*, L´appalto, p. 197).

4. Under ENGLISH law, inadequate performance of an agreed duty to supervise is not available as a defence for the constructor, *Kingston-upon-Hull Corp. v. Harding [*1892] 2 QB 494, Court of Appeal, see also *Hudson*, Building and Engineering Contracts[11], nos. 5-021, 5-022, 5-0245, opposing the application of contributory negligence. The same is true for SWEDEN, see AB 92 arts. 3:2 and 3:5, first paragraph, for GERMANY (BGH NJW 1973, 518; CA Cologne BauR 1996, 548, BGH NJW 1999, 893), for AUSTRIA (ÖNORM A 2060 2.11.4 and 2.27.1, *Dittrich and Tades*, ABGB[35], 1168a E 111 and Rummel [-*Krejci*], ABGB I[2], art. 1168a, no. 34), and most likely for FRANCE, where the liability is shifted to the supervisor, GREECE, where CC art. 691, is not interpreted in that manner in doctrine or case law, PORTUGAL (cf. art. 1209 para. 2 CC and CA Porto, 10 April 1970, BolMinJus 196, 299) as well as for ITALY, where some scholars assume that a check during the performance sets the contractor free to the extent of what has been verified as regular and conform to contractual provisions; *Vitale*, Dell´appalto, p. 388. In THE NETHERLANDS, however, the *Raad van Arbitrage* and art. 12-3 of the *UAV 1989* allow contractors to be released from liability for defective work if it can be established that either the client or the client's agent might have been capable of noticing the defective work at any stage of the construction process but failed to do so, but this approach has been criticised, see *Van den Berg*, Samenwerkingsvormen in de bouw, no. 116, and especially *Jansen*, Defects liability, pp. 378-392.

II. Right to supervise and inspect during the performance of the service?

5. AUSTRIAN ÖNORM A 2060 establishes a right to supervise (2.11) the construction activities at the construction site. The contractor has to enable a supervision of the sub-contractors as well. Supervision includes a right to check the relevant documentation of the building process; the client has to inform the contractor about doubts raised in the supervision.

6. In ENGLAND, the client has the right to supervise the construction process or to inspect the structure. Architects and engineers may be under a duty to perform these activities in relation to the client, see *Hudson*, Building and Engineering Contracts[11], nos. 2-182 ff. There is no apparent authority or doctrinal statement to the effect that the constructor has to allow this, because it would seem too obvious. This is also true in SCOTLAND (*Stair*, The Laws of Scotland III, 'Building Contracts' para. 137).

7. The FINNISH Consumer Protection Act does not contain provisions on inspection or supervision but the General Conditions YSE 1998 arts. 59-62 contains rules on the client's supervision.

8. The client can supervise the work, but is not obliged to do so, under FRENCH law. Most of the time in building construction practice a person is appointed to supervise the work and to coordinate the construction process between the different constructors. This person is the *maître d´œuvre,* very often a function given to the architect.

9. The client does have the right (but not an obligation) of supervision according to the GERMAN VOB/B art. 4 no. 1 para. 2. The constructor is obliged to tolerate any supervision and even has to disclose information (VOB/B art. 4 no. 1 para. 2 sent. 2). According to the VOB/B the client may have access not only to the building site but also to the workshop of the constructor in which preparatory work is undertaken. The client also has access to documents. The border-line is drawn where business secrets are endangered: business secrets are those facts in respect of which the constructor has an objective economic interest that they will not be made known. The client, furthermore, may not impede the constructor's work.

10. The right to supervise is not codified, but follows from the cooperative nature of the construction contract, in GREEK law. The right to inspect is assumed by Ef. Thessalonikis 1864/1999 Arm 1999, 8 p. 1054.

11. The ITALIAN CC art. 1662 establishes an option for the client to examine the constructor's activity while performing, paying all costs, see also Cass., 18 January 1980, n. 434, Rep.Foro it., V° Appalto, c. 115, no. 13. The examination should not cause unnecessary difficulties to the constructor (Cass., 10 May 1965, no. 891, RGE, 1965, I, p. 945, comment of *E. Favara*, Limiti del controllo del committente sull´opera dell´appaltatore).

12. The right to supervise is considered to be self-evident under DUTCH law. There is normally no duty to supervise, unless the contract provides otherwise, although there may be exceptional circumstances under which such a duty could arise, see HR 4 December 1970, NedJur 1971, 204 *(Bouchette and Van Limburg)*; *Van den Berg*, Samenwerkingsvormen in de bouw, no. 112; *Van den Berg*, Verdeling van aansprakelijkheden en risico´s bij moderne bouwcontractvormen, p. 83; *Jansen*, Defects liability, p. 380; UAV art. 3-2 1989. This Article, however, provides that if the client does not want to supervise the work, the contractor must be so informed in writing before the execution of the work commences. If, as a result of the decision not to supervise the work, the demands on the contractor exceeds what can reasonably be expected, the contractor is entitled to extra payment, see cf. Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 718. An obligation to inspect probably does not exist, see Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 562, but failure to inspect can have consequences for the client, because CC art. 7:758 para. 3 provides that the constructor is not liable for defects that the client could reasonably have discovered at the time of delivery and CC art. 7:758 para. 1 implies a certain amount of inspection at that time.

13. The right to supervise during the performance of the service is not directly mentioned in the POLISH CC. However, it may be deduced form CC art. 636 para. 1, which applies on the basis of CC art. 656 para. 1. According to CC art. 363 para. 1 if the work is defective or not in conformity with the contract the client may ask the contractor to rectify it and set an appropriate time limit, after the lapse of which the client may terminate the contractual relationship or entrust another person with the rectification or completion of the work.

14. The PORTUGUESE CC art. 1209 para. 1 says that the client may supervise the execution of the work as long as this does not interfere with the regular flow of the construction process. The only interests protected by supervision are the client's: CA Porto, 15 June 1973, BolMinJus 229, 235. This is a strict rule, see *Antunes Varela*, Código Civil anotado, vol. II, p. 793.

15. In SPAIN, supervision of the construction work is not a legal obligation for the client. It is not contained in the new LOE, nor in the regime of the CC. The client has a right to supervise but not an obligation.

16. The SWEDISH AB 92 art. 3:5 first paragraph states that the client may supervise the contract work as the client deems suitable. This supervision must so far as possible be performed in a way which does not impede the contractor's work.

III. Obligation to inspect the finalised structure?

17. The AUSTRIAN CC contains no duty to inspect or to point out defects. The client, however, can inspect the work before acceptance, see Rummel [-*Krejci*], ABGB I^2, art. 1170, no. 5, EvBl 1959/107. ÖNORM A 2060 2.24 mentions quality inspections and operational tests, and art. 2.25 deals with test runs that are contractually agreed upon. Acceptance (art. 2.26) is a tool to determine when the contractor has performed (art. 2.26.1) and to trigger the passing of risk (art. 2.26.10). In the case of a formal acceptance (as opposed to an informal one), there is mention of a record in which, *inter alia*, defects are to be noted (art. 2.26.5), but it is not entirely clear what the legal consequences of acceptance are as a possible waiver of rights. Art. 2.26.8 says that 'if the client accepts the work despite essential defects the rules on legal warranties apply', which implies a need to check for, and notify, non-essential defects at the point of acceptance, since the regime on legal warranties differentiates between essential and non-essential defects (for a definition see art. 2.27.4).

18. The client is required under BELGIAN law to inspect the result of the construction activities, and to accept the result if the work has been done adequately, see *Goossens*, Aanneming van werk, no. 1018.

19. The FINNISH Consumer Protection Act does not contain provisions on final inspection. Detailed provisions can be found in the General Conditions YSE 1998, arts. 70-74.

20. The client is not under an obligation to inspect the construction at the end of the work under FRENCH law. It is only his interest to inspect the work, but he can accept the work without inspecting it. In practice the client will inspect the work before the acceptance, because the consequences of such an acceptance are important: transfer of risks, impossibility for the client to seek the liability of the contractor for manifest defects (Cass.civ. III, 1 February 1984, RD imm. 1984, 314; Cass.civ. III, 9. October 1991, Bull.civ. III, no. 231).

21. As the acceptance of the work according to the GERMAN CC art. 640 also means that the client considers the work to have been done according to the contract the client has the right to inspect the work in detail and try it out. VOB/B art. 12 no. 5 para. 2 prescribes a period of 6 working days for construction works. This period is rather short and may be longer for other works, e.g. Computer software (CA Cologne BB 1993 enclosure 13 to issue 19 page 12). The client is not obliged to use the possibility of inspection but is obliged to accept the work if it was done according to the contract and is finished and if acceptance is not impossible, which according to CC art. 646 may be the case for immaterial works as well as works which have always remained in the possession of the client, such as a teeth-prosthesis. VOB/B art. 12 requires the

constructor to send a demand for acceptance, which has to be undertaken within 12 working days, but partial acceptance is allowed.

22. The GREEK CC art. 692 provides that after acceptance of the work by the client, the contractor is released from liability for defects unless such defects could not be discovered by a proper survey on delivery of the work or were fraudulently concealed by the contractor.

23. The ITALIAN CC refers to a right of the client to check the finished work (art. 1665). Inspection is necessary in order not to lose guarantees for defects and non-conformities (*Stolfi*, Appalto, p. 52). The constructor must put the client in a position where the client can test the finished work (Cass., 15 December 1955, Giust.civ, 1956, I, p. 1096, with comment of *Voltaggio Lucchesi*, Verifica dell´opera appaltata e presunzione di accettazione). Where, despite the constructor's offer of an opportunity for inspection, the client does not inspect without justified reasons, the work is considered accepted, as is the case when the client does not inform the contractor about the results of inspection within a short period of time.

24. An obligation to inspect probably does not exist in DUTCH law, see Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 562, but failure to inspect can have consequences for the client, because DUTCH CC art. 7:758(3) provides that the constructor is not liable for defects that the client could reasonably have discovered at the time of delivery and CC art. 7:758(1) implies a certain amount of inspection at that time.

25. The existence of the duty to inspect depends on the nature of the contractual relationship under POLISH law. If the contract is concluded between businesses, inspection is obligatory (art. 563(2)). Otherwise, it is seen as a duty only if the inspection is customary in the given relationship (art. 563(1)).

26. The PORTUGUESE CC art. 1218 obliges the client to inspect the work before accepting it, in order to verify if it is in conformity with the contract and lacks defects. The client has the burden of inspecting the work; failure to inspect it resulting in full acceptance.

27. In practice in SCOTLAND construction contract forms generally provide that the contract works are not completed until done to the approval or satisfaction of the employer, the architect or engineer to the project, or a third party. Approval will usually entail inspection but this is a matter of practice rather than legal right (*Stair*, The Laws of Scotland III, 'Building Contracts' para. 38).

28. Two different steps must be distinguished in SPANISH law (*Carrasco Perera/Cordero Lobato/González Carrasco*, Derecho de la Construcción y la Vivienda[4], 327 ff) : 1) delivery of the construction work and 2) reception of the construction work. Material delivery of the work consists in putting the work at the disposal of the client. Reception of the work consists in the client accepting its characteristics and qualities). Delivery may take place before, at the same time as, or after reception of the work, and does not imply tacit acceptance. With reception the party accepts the work, unless it has defects. If such is the case, the client can refuse reception but has to indicate in writing the reasons for refusal (LOE art. 6(3)). Unless otherwise agreed, reception is to take place within 30 days after the construction work is finalized. Finalisation is to be communicated to the client by means of a certificate. The period of 30 days starts from the moment the client receives the certificate. There is tacit reception when after 30 days the client does not communicate the existence of defects, and also when the client pays the price without giving notice of any non-conformity of the work, or when the client takes possession and makes use of the construction work without giving notice of a defect

IV. Liability for defects not noticed during inspection

29. In AUSTRIAN law, an acceptance without reservation cannot be deemed a waiver of the rights based on defects that were neither apparent nor known to the client unless there is an express or factual approval, see Klang (-*Adler-Höller*), ABGB V[3], art. 1167, no. 398. CC art. 928 exempts an obvious defect from warranties, but it is disputed whether this provision applies in the context of contracts of work, see Rummel [-*Krejci*], ABGB I[2], art. 1167, no. 6 (against) and *Gschnitzer*, Schuldrecht, Besonderer Teil und Schadensersatz[2], 239 (in favour). However, the client can still reserve rights upon acceptance, see *Dittrich and Tades*, ABGB[35], art. 1167 E 86.

30. In BELGIAN law liability for defects after acceptance is limited to hidden defects. These depend on the type of defect, and on the qualifications of the client, see *Goossens*, Aanneming van werk, no. 178-1083.

31. Liability in ENGLISH law is unaffected by whether or not there has been an inspection, see *Hudson*, Building and Engineering Contracts[11], no. 5-021.

32. In FRANCE, case law reversed the burden of proof, presuming that the defect is hidden at the moment of the reception of the work, using the test of the normally diligent client (and not an architect or a third adviser, see Cass.civ. II, 19 May 1958, JCP 1958.II.10808, note *B. Starck*; Cass.civ. III, 14 May 1985, D. 1985, 439, note *Rémery*) at the moment of the reception as the point of reference, see Cass.civ. III, 23 November 1976, Bull.civ. III, no. 415. The evaluation is made *in abstracto* and the actual competence of the client is of no relevance. This standard is applied rather strictly in case law. The defect must be visible, the causes (the origin) of the defect must be identified and the consequences (the damage) must be foreseeable, see Cass.civ. III, 3 November 1983, GazPal 1984, 2, 577, note *Liet-Veaux*. But the contractor can prove that the client had effective knowledge of the defect, even if it is hidden (Cass.civ. III, 20 October 1993, Bull.civ. III, no. 122). Even if the client gives a mandate to a professional (e.g. an. architect) to receive the building, the evaluation of the obviousness of the defect is made in the same way (Cass.civ. III, 17 November 1993, Bull.civ. III, no. 146).

33. If the work was accepted but the client did not notice the defect, the constructor can still be held liable in GERMAN law. Important is whether the client really knew about the defect. It is irrelevant whether the client ought to have noticed it or not as there is no duty of inspection (see above). The main consequence of acceptance is a shifting of the burden of proof: instead of the constructor having to prove the non-existence of a defect, the client has to prove the existence of it, see Staudinger (-*Peters*), BGB (2003), art. 640 no. 1.

34. The GREEK CC art. 692 regarding approval of the work, releases the constructor from liability for defects after acceptance, unless they could not be discovered by a proper inspection or were fraudulently concealed by the contractor. In general, if the client accepts the work without inspection, the client bears the risk of detectable failures. Given the fact that acceptance of the work may be explicit or tacit, the latter presumed from acceptance without reservation of rights, the distinction between manifest and non-detectable defects is central to the rights and obligations of the parties. The only direction the code gives for the definition of a manifest defect stems from the premise that a defect is manifest if it can be ascertained by due inspection.

35. The constructor is not liable if the client does not inspect the completed construction or performs an inadequate inspection under ITALIAN law. A manifest defect is a defect that can easily be detected at the moment of delivery. The inspection of the completed work can be carried out by the client or by a trusted technician. According

to one view, the criterion is the knowledge of a person with medium technical diligence (*Stolfi,* Appalto, p. 58; *Voltaggio Lucchesi*, Vizi, p. 44; *Albano*, Foro it. 1956, I, 219; Cass., 16 February 1955, no. 452, Foro it., 1956, I, c. 219 with comment Albano, CA Genova, 30 March 1951, Rep.Foro it., 1951, V° Appalto, c. 97, no 51). Another view considers that the point of reference varies: inspection by an inexperienced client triggers the criterion of the knowledge that can be expected from an inexperienced person; if the client is a technician of the art or is assisted by a professional supervisor the identification of defects has to be established in relation to the medium expertise of a technician of the art (*Giannattasio*, L´Appalto, p. 197; *Rubino and Iudica*, Dell´appalto[3], p. 251; *Mirabelli*, Dei singoli contratti, p. 464; Cass., 27 April 1957, no. 1423, Rep.Foro it., 1957, V° Appalto, c. 118, n. 36; CA Milano, 12 February 1957, Rep.Foro it., 1957, V° Appalto, c. 119, no. 42; CA Firenze, 28 May 1954, Rep.Foro it., 1954, V° Appalto, c. 116, no. 22).

36. The DUTCH CC art. 7:758(3), implies an exemption of liability for any defects the client should have discovered at delivery. By accepting the work without reservations, the client loses the right to claim damages or other remedies for any defect that is not hidden. Cf. *Jansen*, Defects liability, p. 398. A defect is 'hidden' if the client could not have noticed the defect at *or before* the acceptance of the work or if the defect manifests itself only after acceptance of the work. Whether or not a defect should have been noticed before or at acceptance of the work, depends on (1) the degree of expertise of the client, (2) the way the supervision is organised and (3) the nature and seriousness of the defect. Cf. Rb Roermond 10 January 1985, BR 1986, p. 145; Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 566. From a client who cannot be considered to be an expert, only a reasonable degree of attentiveness may be expected. Cf. *van Wijngaarden and Chao-Duivis,* Hoofdstukken Bouwrecht[4], no. 113, with references to case law of the *RvA*. If, on the other hand, the client is assisted by a professional supervisor, a defect can only be considered 'hidden' if it could not have been revealed by a normally careful and skilful supervision during the execution of the construction. Cf. *van Wijngaarden and Chao-Duivis,* Hoofdstukken Bouwrecht[4], no. 111, with references to case law of the *RvA*. If the supervision did not take place on a planned basis but merely incidentally, a defect will more readily be considered hidden. Cf. *RvA* 7 January 1980, no. 9329, BR 1980, p. 395, note *Thunnissen* (standing case law). If in fact supervision did not take place at all, a defect will indeed be considered to be hidden. Cf. *RvA* 3 April 1981, no. 9979, BR 1981, p. 625, note *Thunnissen*. Thus, the risk of not noticing a defect in the construction partly shifts towards the client if the client exercises the right to supervise, and less intensive supervision increases the odds that a defect is considered 'hidden'.

37. If it was possible to notice the defects observing due diligence, the client loses the right to found on them under POLISH law (CC art. 563). If the defect is only discovered later, the client should notify immediately the contractor (CC art. 563).

38. In PORTUGAL evident defects are presumed to be known by the client, even in the absence of an inspection (CC art. 1219 para. 2). Evident defects are those which a duly diligent client should have noticed (CA Porto, 17 November 1992, CJ 1992, V, 224). Hidden defects are those not detectable by due diligence, even of an average technician proficient in that field. Generally, the constructor's liability for evident defects ceases on acceptance by the client.

39. SCOTTISH forms of construction contract commonly provide for a defects liability period (often of a year's duration) after practical completion of the project, during which time the contractor remains liable to remedy any emerging defects in the work (*Stair*, The Laws of Scotland III, 'Building Contracts' para. 46).

40. The SPANISH LOE art. 17 regulates the responsibility of the constructor for hidden defects (those not noticeable during inspection applying a simple diligence). It establishes three different periods of guarantee of ten, three and one year, which start from the moment the construction work is accepted: ten years for defects in the foundations, supports, walls and other structural elements of the building; three years for defects in the structure or installations which lead to non- compliance with the habitability requirements; and one year (only for constructors) for defects in finishing.

41. The SWEDISH AB 92 makes a distinction between hidden and manifest defects. A hidden defect is a defect existing at the time of the final inspection, which was not, and could not reasonably be expected to have been, noticed then, art. 7:13. All other defects are manifest defects. According to the general rule in art. 7:13 the contractor can only be made liable for defects noticed and recorded in the inspection protocol. However, the provision states that this rule does not apply to hidden defects and all kinds of defects can be reported in writing to the contractor within a period of three month after the final inspection, whether or not they should have been noticed at the inspection.

V. Inadequate performance of agreed duty to supervise: defence or contributory negligence?

42. It is expressly stated in AUSTRIAN ÖNORM A 2060 that supervision by the client does not exempt the constructor from liability (arts. 2.11.4 and 2.27.1). Case law and doctrine similarly assume that supervised contractors do not have their liability removed or reduced because of contributory negligence on the part of the client based on insufficient supervision (*Dittrich and Tades*, ABGB[35], 1168a E 111 and Rummel [-*Krejci*], ABGB I[2], art. 1168a, no. 34).

43. Inadequate performance of an agreed duty to supervise is not available as a defence for the constructor in ENGLISH law, *Kingston-upon-Hull Corp. v. Harding [*1892] 2 QB 494, Court of Appeal. This includes noticing defective work and not informing the constructor of it, *This East Ham Corp. v. Bernard Sunley & Sons Ltd.* [1966] AC 406, *Hudson*, Building and Engineering Contracts[11], nos. 5-021, 5-022, suggesting that the constructor must expressly ask for approval of defective work and receive express approval in order to be absolved from liability. There are no cases in which a contractor used the defence of contributory negligence, *Hudson*, Building and Engineering Contracts[11], no. 5-0245 and such a defence is there opposed.

44. The master of works can be liable if the contractual obligation of supervision and coordination is not properly performed in FRENCH law. The client cannot be held liable (i.e. contributory negligent) for failure to supervise correctly the construction, since this is not an obligation of the client.

45. The client has the right to supervise but is not obliged to do so under GERMAN law. Therefore the constructor does not obtain any rights from inadequate performance of the supervision. The constructors liability for defects cannot be reduced because of contributory negligence of the client (BGH NJW 1973, 518; CA Cologne BauR 1996, 548, BGH NJW 1999, 893).

46. Support – albeit very limited – for recognising an obligation to supervise may be provided by GREEK CC art. 691, which states that a contractor may not be held liable for defects in the work which can be attributed to the fault of the client manifested by directions or in any other way, but the Article is not interpreted in that manner in doctrine or case law.

47. The right to check the progress of work can be exercised during the performance, when the client feels the need to, under ITALIAN law. Leading scholars such as

Giannattasio, Dei singoli contratti, p. 442; *Mangini*, Il contratto di appalto, pp. 148, ff see it as having a different nature from the right to a final inspection. Because it is a right and not an obligation, non-exercise does not lead to a loss of the right. Some scholars assume that a check during the performance relieves the contractor from liability to the extent of what has been tested as regular and conform to the contract. *Vitale*, Dell´appalto, p. 388. Case law seems to share the first opinion CA Torino, 17 July 1959, Giust.civ.Mass., 1959, p. 814.

48. In DUTCH case law the *Raad van Arbitrage* allows contractors to be released from liability for defective work if it can be established that either the client or the client's agent might have been capable of noticing the defective work at any stage of the construction process but failed to do so. Cf. *Van den Berg*, Samenwerkingsvormen in de bouw, no. 115. Although this approach has been heavily criticised by some Dutch authors, see *Van den Berg*, Samenwerkingsvormen in de bouw, no. 116, and especially *Jansen*, Defects liability, pp. 378-392, the approach has been 'codified' in art. 12-3 of the *UAV 1989*. A failure to supervise correctly, where supervision has been agreed upon, will therefore constitute a full defence for the contractor.

49. According to the POLISH CC art. 655 if the structure is destroyed or damaged as a result of the work being done in accordance with the client's instructions, the contractor may demand the remuneration agreed upon or an appropriate part of it if the contractor warned the client of the danger of destruction or damage, or if in spite of observing due diligence the constructor could not have found it

50. PORTUGUESE law regards supervision as a right, not a duty. Supervision does not exclude the constructor's liability, even if defects were evident or the bad execution of the work was obvious (CC art. 1209 para. 2). CA Porto, 10 April 1970, BolMinJus 196, 299.

51. Since the contractor is strictly bound to complete the works in accordance with the contract, SCOTTISH law is probably the same as English law (41, above). There is some old authority that where defective work has been approved by the employer's representative, the employer is barred from making claims; but this is difficult to reconcile with the general rule that the representative cannot authorise deviations from the contract (*Stair*, The Laws of Scotland III, 'Building Contracts' para. 46)

52. Under SPANISH law also supervision of the construction work is not a legal obligation for the client, see under note 15.

53. The general rule in the SWEDISH AB 92 art. 3:2, is that the contractor alone is responsible for the execution of the contract work. Furthermore, art. 3:5, first paragraph, states that the client may supervise the contract work as the client deems suitable, but that such supervision does not limit the contractual liability of the contractor.

IV.C.–3:106: Handing-over of the structure

(1) If the constructor regards the structure, or any part of it which is fit for independent use, as sufficiently completed and wishes to transfer control over it to the client, the client must accept such control within a reasonable time after being notified. The client may refuse to accept the control when the structure, or the relevant part of it, does not conform to the contract and such non-conformity makes it unfit for use.

(2) Acceptance by the client of the control over the structure does not relieve the constructor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to inspect, supervise or accept the structure or the construction of it.

(3) This Article does not apply if, under the contract, control is not to be transferred to the client.

COMMENTS

A. General idea

This Article deals with the actual handing over of the structure at the time the structure is sufficiently completed. Paragraph (1) contains the idea that the constructor takes the initiative for the transfer of control and that the client is to accept control, unless there are serious defects. Minor defects and defects that can be repaired in a short period of time do not prevent the constructor from transferring control. The client may refuse control if the defects make the structure unfit for use.

The transfer of control is detached from rights related to non-performance. To that extent, paragraph (2) provides that acceptance by the client of the control over the structure may not be construed as a waiver of any rights related to non-performance. The client's position as to remedies for non-performance only becomes less strong when the client does not notify the constructor of defects within a reasonable time after becoming aware of them.

Paragraph (2) does not, however, deny the constructor the possibility of bringing to the attention of the client situations that might lead to complaints regarding the way the constructor performed.

Illustration 1
A constructor of a building wishes to transfer the control of the building to the client. He notifies the client. The client is obliged to take over control, unless the building is unfit for use. The client does not have to refuse to take over control for fear of losing rights with respect to non-performance. The present Article expressly provides that the client keeps such rights notwithstanding acceptance of control over the structure.

B. Interests at stake and policy considerations

With respect to the handing over of the structure, several issues arise which are best discussed separately. The first issue is that the constructor has an interest in transferring the control over the structure to the client because duties and liabilities connected to the safeguarding of the structure translate into costs, for instance the costs of insurance. The client has an obvious interest in obtaining control, so that the structure can be used for its purposes. The client will also need to know when control is transferred, for purposes of security and insurance. The

transfer of control is a burden on the client, however, if the structure cannot yet be used for its purpose because it is not finished yet or if there are serious defects.

Another point is the right to payment. Under most contracts, and under the default rule contained in the following Article, at least a substantial part of the price will be due at the time the structure, or the control over it, is handed over. The constructor has an obvious interest in collecting the money, whereas the client may want to postpone payment in order to keep the constructor under pressure to perform or for other reasons.

When the structure is completed, it is in the constructor's interest to be informed about what else will be expected. The constructor will want to know whether the client is satisfied with the result and, if not, what the client perceives to be defects which need to be remedied. At some time, the constructor also wishes to be certain that no additional effort is expected, except perhaps the remedying of any future defects. For the client, it may also be important to bring additional wishes to the attention of the constructor. The sooner this is done, the higher the probability that the constructor will be prepared to fix the problem without delay or extra charge. In this respect, the client will want to inspect the structure thoroughly. But the time and money that need to be invested in inspection compete with other preferences of the client. So the intensity of inspections undertaken will vary greatly across clients. The problem is similar to the ones arising in the context of monitoring before the handing over of a structure that were discussed in the Comments to the preceding Article. Early detection of problems is still important. Added to this, there is now the desire of both parties to end their co-operation and to be able to use their resources on other projects.

If not adequately inspecting the structure means that the client risks losing rights relating to non-performance, this is a powerful extra incentive for inspection. But the optimum level of inspection will be hard to determine. Because of the difficulties the courts will have in establishing what level of inspection is reasonable, some clients will inspect very thoroughly and will issue many complaints in order to cope with the resulting uncertainty. Other clients may think they have inspected sufficiently, but lose their rights because the courts decide differently. The constructor may also strategically use such rules. There may be an incentive to hide defects. Generally speaking, the constructor has superior expertise, and during the construction process will have gathered even more information regarding potential defects. If this presupposition holds, it will be more efficient to urge the constructor to disclose this information than to have the client searching for potential defects while not knowing where to look.

C. Preferred option

In the present Article, acceptance and the transfer of control are separated. Transfer of control is a part of the obligations of the constructor. The time when or within which it is to take place is determined by the contract or the general rules on time of performance. (III.–2:102 (Time of performance)). The client is to accept control within a reasonable time span after having been informed by the constructor of the latter's wish to transfer. It is the constructor who determines whether the structure is sufficiently completed in order to transfer control. In many cases, the right time to transfer control is when the structure is completed in every respect and every defect is remedied. A partly finished structure may already be very useful to the client, but the client is not obliged to accept control as long as the structure still has essential defects and cannot be used for the client's purposes. This situation is captured in paragraph (1), by referring to fitness for use. The idea is that small defects, which are more or

less inevitable in large construction projects, and minor elements of the construction work which still need to be finished are no obstacle to transfer of control.

Thus, the date on which control is transferred is not necessarily the date on which the constructor has performed all the obligations under the contract. It may very well be that some elements of the performance are not yet ready.

Illustration 2
The control over a house is transferred to the client. The constructor still has to finish the painting part of the job and to construct the parking bays in front of the building. Thus, the constructor has not yet fully performed the contractual obligations. Whether the remaining part of the obligations will be performed in time is a matter of interpretation of the contract or of application of the general rule on time of performance.

In principle, the rules for final acceptance and inspection are the same as for the intermediate ones on which the preceding Article focuses. No investigation of any kind is required. The client is just expected to be as attentive as could be expected from a comparable client in that situation. The client is not obliged to inspect the structure, not even to take a look at it. But the interests of the constructor are protected because there is the opportunity to bring elements to the attention of the client, so that the client will risk losing remedies through inaction and failure to notify.

If the client does not accept the control over the structure when bound to do so, the constructor of a corporeal movable may be able to invoke III.–2:111 (Property not accepted). In particular, the constructor may deposit the structure with a third party, or even sell it, though only after reasonable notice to the client. The rules regarding these remedies should be applied, however, taking the interests of the client into account. Usually, the client in a construction contract will have chosen the construction of a specific structure because it is not available on the market for existing goods. When the structure is sold to another person, the client will often again have to hire another person to construct the object. The costs and delay involved will generally be substantial. This has to be reflected in the appropriate means of giving notice (explicitly and in writing, in most cases) and in the reasonable time for the notice.

NOTES

I. Overview

1. Most jurisdictions have a system where the constructor takes the initiative for transfer of control to the client, with the client having to accept within a reasonable time (in which inspection may take place), unless refusal is warranted by serious defects. If no explicit acceptance takes place within that period of time, there is usually implicit acceptance. The rights as to defects may also be reserved, see SWEDEN (AB 92 art. 7:15), THE NETHERLANDS (CC art. 758), FRANCE (CC art. 1792-6), SPAIN, (*Carrasco Perera/Cordero Lobato/González Carrasco*, Derecho de la Construcción y la Vivienda[4], 328 ff) ITALY (Cass., 11 January 1975, no. 1787, Rep.Foro it., 1976, V° Appalto, c. 116, n. 17; Cass., 27 July 1987, no. 6489, Rep.Foro it., 1988, V° Appalto, c. 137, no. 49, and Giust.civ., 1988, I, p. 2357), GERMANY (CC §§ 638, 641, 644),

AUSTRIA (CC § 1048, Klang [-*Adlerand Höller*], ABGB V[3], art. 1168a, no. 406; *Karesek*, ecolex 1996, 836; Rummel [-*Krejci*], ABGB I[2], art. 1168a, no. 10), GREECE (cf. CC art. 694) and PORTUGAL (CC art. 1218, CC art. 1218(4), CC art. 1218(5)). The term delivery is sometimes used for the unilateral act of offering transfer of control by the constructor, which then requires acceptance by the client in SPAIN (*Martinez Mas*, La recepción en el contrato de obra, p. 40) and ITALY, and sometimes for the completion of the bilateral procedure of offering transfer of control and (explicit or tacit) acceptance (see for instance The Netherlands CC art. 758 and SWEDEN AB 92 art. 7:15)

.*II. Procedure of handing over of the structure: delivery and acceptance*

2. Acceptance and delivery tend to be identified in the AUSTRIAN CC § 1048, see Klang [-*Adler and Höller*], ABGB V[3], § 1168a, no. 406. The systems of ÖNORM B 2110 and the CC differ. Pursuant to the CC the ordering party can refuse to accept the work even on grounds of non-essential defects, subject only to a ban on chicanery *(Schikaneverbot)*. '*Übernahme*' is understood as consisting of both the actual handing over and the acceptance of the work as performance pursuant to the contract. Decisive is the taking over of the work into the ordering party's sphere of influence and disposition. There may be a whole procedure of acceptance, e.g. in the field of installations or plants, see *Karesek*, ecolex 1996, 836. Rummel [-*Krejci*], ABGB I[2], § 1168a, no. 10.

3. The general principles on performance of contractual obligations apply in ENGLISH law, 1995, nos. 4-003 ff). Acceptance is no bar to a claim for damages (*Hudson*, Building and Engineering Contracts[11], nos. 5-007).

4. According to the FINNISH General Conditions for Building Contracts YSE art 71, the handover inspection must e.g. state whether the finished result is in accordance with the provisions of the contract.

5. In FRENCH law the relevant moment is the acceptance of the work, because it triggers a large number of consequences regarding the future claims of the client. The acceptance can be simple, i.e. accepting the work as is. But the acceptance can be made with reservations, CC art. 1792-6.

6. The GERMAN CC § 640 requires the client to accept the structure if it is in accordance with the contract. The acceptance cannot be refused in case of a minor defect. If the client accepts the structure, knowing it is defective, the client loses some rights.

7. The GREEK CC does not clearly distinguish the notions of delivery, approval and acceptance. For example, according to art. 694 payment of the contractor is due on delivery of the work and the risk passes also on delivery of the work, whereas the prescription period starts on acceptance of the work.

8. The simple delivery and obtaining control of the construction does not correspond to acceptance of the work under ITALIAN law. Where there is no explicit acceptance, a presumption of acceptance operates when the client acts in a way not compatible with the intention not to accept or accepting with a reserve (Cass., 11 January 1975, no. 1787, Rep.Foro it., 1976, V° Appalto, c. 116, no. 17; Cass., 27 July 1987, no. 6489, Rep.Foro it., 1988, V° Appalto, c. 137, no. 49, and Giust.civ., 1988, I, p. 2357).

9. According to the DUTCH CC art. 7:758, the constructor will notify that the structure is ready to be delivered and the client has then to inspect and accept, possibly with reservations, or refuse under notification of the defects that prevent acceptance.

10. In POLAND, according to the opinion of the Supreme Court (judgment of the Supreme Court of 5. 3. 1997, II CKN 28/97, OSNC, nos. 6-7, poz. 90) if the contractor has notified the end of the building work, the client is obliged to accept it. The acceptance protocol should contain statements of the parties concerning the quality of the work and any defects together with the time for their removal, or concerning the client's choice of another remedy. The constructor's obligation to deliver is mirrored by the obligation to accept and pay the price on the side of the client. The obligation to accept is independent of the approval of the quality of the performance, because whether the constructor has properly performed the work may be questioned. This opinion of the Supreme Court has been heavily criticised in the legal writing (Radwański [-*Strzępka*] System Prawa Prywatnego VII[2], p. 409), which claims that the client does not have a duty to accept a building constructed in a way contrary to the constructor's obligations.

11. The first step under PORTUGUESE law is inspection (CC art. 1218), followed by a notice of its results to the constructor (CC art. 1218(4)). If notice is not given in due time, acceptance is presumed (CC art. 1218(5)). If this notice does not mention any defects, it is taken as silent acceptance. If defects are mentioned, the result is non-acceptance and the consequences of defective performance. Acceptance may also be express. Transfer of property and the immediate duty to deliver work occurs upon: (1) acceptance if a movable is concerned; (2) accession of materials to the land, in the case of a building construction where the landowner is the client (CC art. 1212). Cf. *Romano Martinez*, Direito das Obrigações[2], nos. 403 ff.

12. In SCOTLAND construction contract forms generally provide for two stages of completion: (i) practical, when the employer can take possession of and use the works; (ii) final, after expiry of a defects liability period, during which time the contractor remains liable for defects in the works. Each stage is certified by the employer's representative, and the final account between the parties is not settled until the final certificate indicating approval and satisfaction is issued. Approval will usually entail inspection (*Stair*, The Laws of Scotland III, 'Building Contracts' para. 39; *Connolly*, Construction Law, chaps. 4.135 et esq.).

13. Delivery, under SPANISH law, consists in the constructor putting the work at the disposal of the client. Acceptance of the work consists in the client accepting the characteristics and qualities of the work (*Carrasco Perera/Cordero Lobato/González Carrasco*, Derecho de la Construcción y la Vivienda[4], 334)). Acceptance of the construction work is an obligation established in LOE art. 6. In order for the client to accept with all guarantees, the client must have inspected the structure. Otherwise the client may accept without noticing non-hidden defects and thus lose remedies.

14. The SWEDISH AB 92 art. 7:15 states that the contract works are delivered after acceptance at the final inspection. The final inspection is essential according to AB 92, since the approval at the inspection leads to delivery of the contract work, art. 7:15.

IV.C.–3:107: Payment of the price

(1) The price or a proportionate part of it is payable when the constructor transfers the control of the structure or a part of it to the client in accordance with the preceding Article.

(2) However, where work remains to be done under the contract on the structure or relevant part of it after such transfer the client may withhold such part of the price as is reasonable until the work is completed.

(3) If, under the contract, control is not to be transferred to the client, the price is payable when the work has been completed, the constructor has so informed the client and the client has had a chance to inspect the structure.

COMMENTS

A. General idea

This Article determines the time at which the price generally should be paid. This is the time of the transfer of control. If the transfer of control is to take place but the client does not accept control, the price becomes payable as well; see IV.C.–3:106 (Handing-over of the structure) paragraph (1), second sentence read in conjunction with the present Article.

Illustration 1
The constructor of a private road has put the road at the disposal of the client in conformity with IV.C.–3:106 (Handing-over of the structure). The payment of the price is now due. The client may only refuse to pay the price if entitled to refuse to accept control under that Article, that is, if non-conformity makes the road unfit for use. If there are minor defects to be remedied the client may withhold a small part of the price under paragraph (2) until the work is done.

B. Interests at stake and policy considerations

The time of payment of the price is unproblematic if the contract is completely performed at the time of transfer of control. In construction projects, however, it is quite common for there to be some defects at the time of delivery. This may be a matter of delays in the delivery of some elements of the structure or of defects that show up in the final stage of the construction process. The system of IV.C.–3:106 (Handing-over of the structure) is that these defects do not prevent the transfer of control to the client. Under this system, the structure will often not yet be completed at the time of transfer of control. This will induce the client to withhold payment partially, because the client will want the constructor to finalise the structure. The constructor, however, will feel entitled to payment because the greater part of the work has been completed and there will be some loss of power over the client when control over the structure is transferred to the client and the client starts to use it.

The general rule in the legal systems is that payment is due at the time of the transfer of control (Netherlands, Belgium, Spain and Greece) or the moment of acceptance (France, Italy, Germany, Portugal, Finland). England and Austria opt for the moment of completion of the structure.

C. Preferred option

The time of payment is certainly an issue to which the parties should give attention when drafting a construction contract. As a default rule, the moment of transfer of control is a better

solution than the moment of acceptance, because there may be discussions about defects, which can be difficult to solve. The client is protected because control does not have to be accepted if the structure does not conform to the contract and such non-conformity makes it unfit for use (see the preceding Article). The solution where payment is due at the time of the transfer of control may be problematic because in most projects the client will want to withhold part of the payment if the work is not entirely finished. If the parties did not take this into account in their contract – for instance by giving the client the right to withhold 10 per cent of the price for a period of six months – the client may wish to invoke paragraph (2) and withhold such part of the price as is reasonable until the work is completed. The general provision in III.–3:401 (Right to withhold performance of reciprocal obligation) is not sufficient because, in the present situation, the client could withhold payment only if the client reasonably believed that the constructor would not complete the work. (See paragraph (2) of that Article.)

Illustration 2
A website built for a client is not entirely free of defects at the time control is transferred to the client. The client starts using the site. According to paragraph (1) of the present Article, the client is to pay the price. Paragraph (2) however, allows the client to withhold a percentage of the price until the constructor's obligations are fully performed.

Paragraph (3) of the Article deals with the comparatively rare situation where control is not to be transferred to the client. For example, the constructor is obliged to construct a prototype just to see how easy or difficult it will be to make it. The client wants to be able to inspect the process and the result but has no interest in having the prototype handed over. For this unusual type of case the normal rule is obviously inappropriate and paragraph (3) provides that the price is payable when the work has been completed, the constructor has so informed the client and the client has had a chance to inspect the structure.

NOTES

I. Overview

1. In ENGLAND (see *Hudson,* Building and Engineering Contracts[11], no. 4-140) and AUSTRIA (CC § 1170) payment is due at the moment of completion of the structure. In SCOTLAND final payment is generally due on final completion certified by the employer's representative (*Stair,* The Laws of Scotland III, 'Building Contracts' paras. 39, 65). Most countries opt for the moment of delivery: THE NETHERLANDS (CC art. 7:758, following the general principle of reciprocity), BELGIUM (see *Goossens,* Aanneming van werk, nos. 768 and 821), SPAIN (CC art. 1599), GREECE CC art. 694 or the moment of acceptance: FRANCE (see *Collart Dutilleul and Delebecque,* Contrats civils et commerciaux[7], no. 732), ITALY (CC art. 1665), GERMANY (CC § 641), PORTUGAL (CC art. 1211) and FINLAND (for consumer construction contracts, the client will pay on demand of the constructor, but not before delivery and before the client has had a reasonable period to examine the performance, see Section 8.25.1 and 9.25.1 Consumer Protection Act).

II. Moment of payment of the price

2. In AUSTRIA payment is due at the moment of completion of the structure, see CC § 1170.

3. The price has to be paid at the moment of delivery under BELGIAN law, see *Goossens*, Aanneming van werk, nos. 768 and 821.
4. Generally, under ENGLISH law, payment does not have to be made until the whole of the contractor's contractual obligations have been performed, subject to the doctrine of substantial performance, see *Hudson*, Building and Engineering Contracts[11], no. 4-140.
5. In FINLAND, in consumer construction contracts, the client will pay on demand of the constructor, but not before delivery and before the client has had a reasonable period to examine the performance, see FINNISH ConsProtA chap. 8 § 25(1) and chap. 9 § 25(1).
6. The relevant moment in time is the acceptance of the work under FRENCH law, see *Collart Dutilleul and Delebecque*, Contrats civils et commerciaux[7], no. 732.
7. For the remuneration of the work (if not otherwise contracted), the time of acceptance is decisive in GERMAN law (CC § 641).
8. According to the GREEK CC art. 694 payment of the contractor is due on delivery of the work.
9. Unless the parties have agreed otherwise, the moment of acceptance is the decisive moment for payment of the price under ITALIAN law. (CC art. 1665).
10. The price is due, under DUTCH law, at the moment of delivery, which is completed at the moment of (explicit or tacit) acceptance, see CC art. 7:758, following the general principle of reciprocity.
11. Unless the parties decided otherwise, payment is due under POLISH law upon the acceptance of the structure (CC art. 455) as it follows from the nature of the obligation. However, if, in the absence of a different stipulation in the contract, the contractor demands acceptance of the work done partially, as it is completed, the client is obliged to do so and pay an appropriate part of the remuneration (CC art. 654).
12. In PORTUGAL the price has to be paid at the moment of acceptance of the work, see CC art. 1211.
13. In SCOTLAND final payment is generally due on final completion certified by the employer's representative (*Stair*, The Laws of Scotland III, 'Building Contracts' paras. 39, 65; *Connolly*, Construction Law, chaps. 4.341 et esq.). In practice, payment is often staged, with use of interim certification (*Stair*, The Laws of Scotland III, 'Building Contracts' paras. 62-64; *Connolly*, Construction Law, chap. 4.342-346).
14. The price is to be paid at the moment of delivery under SPANISH law (CC art. 1599).

IV.C.–3:108: Risks

(1) This Article applies if the structure is destroyed or damaged due to an event which the constructor could not have avoided or overcome and the constructor cannot be held accountable for the destruction or damage.

(2) In this Article the "relevant time" is:

(a) where the control of the structure is to be transferred to the client, the time when such control has been, or should have been, transferred in accordance with IV.C.–3:106 (Handing-over of the structure);

(b) in other cases, the time when the work has been completed and the constructor has so informed the client.

(3) When the situation mentioned in paragraph (1) has been caused by an event occurring before the relevant time and it is still possible to perform:

(a) the constructor still has to perform or, as the case may be, perform again;

(b) the client is only obliged to pay for the constructor's performance under (a);

(c) the time for performance is extended in accordance with paragraph (6) of IV.C.–2:109 (Unilateral variation of the service contract);

(d) the rules of III.–3:104 (Excuse due to an impediment) may apply to the constructor's original performance; and

(e) the constructor is not obliged to compensate the client for losses to materials provided by the client.

(4) When the situation mentioned in paragraph (1) has been caused by an event occurring before the relevant time, and it is no longer possible to perform:

(a) the client does not have to pay for the service rendered;

(b) the rules of III.–3:104 (Excuse due to an impediment) may apply to the constructor's performance; and

(c) the constructor is not obliged to compensate the client for losses to materials provided by the client, but is obliged to return the structure or what remains of it to the client.

(5) When the situation mentioned in paragraph (1) has been caused by an event occurring after the relevant time:

(a) the constructor does not have to perform again; and

(b) the client remains obliged to pay the price.

COMMENTS

A. General idea

This Article deals with the liability for external causes of harm to the structure. According to IV.C.–3:104 (Conformity), the constructor is liable when the structure is not fit for its purpose (and the defect is not attributable to the client because it is caused by a direction for which no duty to warn existed). In theory, III.–3:104 (Excuse due to an impediment) could apply. But that Article requires that the impediment was outside the debtor's sphere of control, that it could not be taken into account and that it was insurmountable. That the sphere of control of the constructor includes protecting the structure against outside harm is provided for in IV.C.–3:103 (Obligation to prevent damage to structure).

Before delivery – the transfer of control over the structure pursuant to IV.C.–3:106 (Handing-over of the structure) – the risks identified in paragraphs (3) and (4) remain with the

constructor, subject to the limitations in these paragraphs. After the transfer of control, the liability regime changes; the client becomes responsible for external harm (paragraph (5)).

Illustration 1
During construction, an office building is severely damaged by a storm. Assuming that the constructor has done everything that can reasonably be expected to prevent the harm, the constructor will have to rebuild the building. The time span for performance will be adjusted. Materials delivered by the client that were lost will have to be provided by the client again or paid for by the client.

B. Interests at stake and policy considerations

Nowadays, the topic of risk is only of limited practical interest. The causes for non-performance will usually be attributed to one or the other party. In construction contracts, each party will generally bear the consequences of its own choices if the outcome of the contractual co-operation is not satisfactory. Residual risk will be limited. Damage caused by natural disasters such as landslides and flooding is likely to occur less frequently in the future, because national authorities in the EU have been taking preventive measures for years. Still, the responsibility for external harm to the structure has to be distributed over the parties. This will have to change in time. Whilst it is reasonable that the constructor bears much of the risk when in the best position to take preventive measures, there will be a time when the client has to take over responsibility.

External harm may have various consequences. One issue is whether the constructor has to do again what has already been done in performing the contractual obligations. Another issue is what happens to any materials or components provided by the client but lost due to the external harm. Is it to be supplied by the constructor or again, by the client? And what about the payment of the price by the client?

EU countries differ with respect to risk distribution in the period before the constructor has finished the structure. Some countries are more lenient to the debtor than others. This is discussed in the Notes to III.–3:104 (Excuse due to an impediment). The present Article follows the system of that Article.

With respect to materials provided by the client the general rule in most countries is that the constructor is only under a duty to guard these with the care that is appropriate in the circumstances. The natural corollary of this is that, in the case of an unfortunate event not related to non-performance of one of the duties of the constructor, the client has to supply the materials again, and still has to pay the price and is not entitled to compensation from the constructor. Such is the system in England, Sweden, the Netherlands, Belgium, France, Italy, Germany, Austria, Greece and Portugal.

There is no significant difference between the systems relating to risk distribution after the completion of the construction contract. It will be clear that prevention against external harm then is to be taken care of by the client. But the constructor remains responsible for the non-performance of obligations under the contract, which may include an obligation to make the structure resistant to particular causes of external harm.

Illustration 2
The duty to deliver a structure fit for its purpose will normally entail several measures to make it less susceptible to external harm. A building should normally be protected against rain, storm and lightning. It should not have exterior parts that are easy to remove by thieves.

The third issue the Article deals with is when the first type of distribution of responsibilities switches to the second one. In most countries, risk passes at the time the control of the structure is transferred (England, Sweden, the Netherlands, Belgium, France, Germany, Austria). In some countries ownership is decisive (Portugal).

C. Preferred option

Many events that were once considered unforeseeable or insurmountable are now within the reach of affordable preventive measures. As a consequence, the constructor will have far-reaching obligations under IV.C.–3:103 (Obligation to prevent damage to structure) to protect the structure against the consequences of external events. But unexpected events may still occur, and the constructor is not accountable for them. Before delivery, this is dealt with by III.–3:104 (Excuse due to an impediment).

If the non-performance is not excusable under that Article, the constructor has to perform again. The constructor is then considered not to have performed yet, so the rules on non-performance apply. If the non-performance is excusable, however, the client will not have a right to specific performance or damages, and termination of the contract may be the result. The client will also have to pay the price, which may be reduced, however; see III.–3:601 (Right to reduce price). According to subparagraph (3)(c) of the current Article, the time of performance will need to be extended since the constructor, due to the unfortunate event, can no longer perform in time. The idea is that the time of performance will be extended proportionally.

The situation is different when an excusing impediment has made performance completely and permanently impossible. In that case, the obligations of both parties will be extinguished. See III.–3:104 (Excuse due to an impediment), in particular paragraph (5).

After completion of the structure, there will be a time from which the structure is no longer within the constructor's sphere of control. In the case of external harm to the structure, the constructor will still be liable for non-performance of obligations to protect the structure but is not liable if the damage cannot be traced back to non-fulfilment of one of these obligations.

With regard to the time of switching, this Article follows the system of most EU countries: the time of the transfer of control is normally decisive. In those comparatively rare cases where control is not to be transferred, the time when the work has been completed and the client has been informed of this is the relevant time.

NOTES

I. Overview

1. The general rule is that the contractor is liable for deterioration on non-delivered parts of the contract work, see ENGLAND (*Brecknock Co. v. Pritchard (1976) 6 T. R. 750, 101 ER 807*, *Hudson*, Building and Engineering Contracts[11], nos. 4-248, 5-001), SCOTLAND (*Gloag and Henderson*, The Law of Scotland[11], para. 11.06), SWEDEN (AB 92 art. 5:4, first paragraph and Consumer Services Act § 39), FINLAND (ConsProtA chap. 9 § 6(1), General Conditions YSE 1998, Chapter 3), THE NETHERLANDS (CC art. 7:758 para. 2, Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 521), BELGIUM (CC art. 1788), FRANCE (CC art. 1788, but with special provisions for the contract of sale of a building to be built), SPAIN (CC arts. 1589 and 1590, see also TS 10 May 1997, RJ 1997/3831, Europea de Derecho, N. 3006028509), ITALY (CC arts. 1672 and 1673), GERMANY (CC art. 644), AUSTRIA (CC art. 1168a, ÖNORM B 2110 5.41, see also ÖNORM A 2060 2.26.10), GREECE (CC art. 698) and PORTUGAL (CC art. 1228 para. 1; STJ 24 October 1995: BolMinJus, 450, 469).
2. In the majority of European jurisdictions the risk of deterioration of materials falls on the client, if the client supplies these, see for SWEDEN *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 100, AB 92 art. 5:5, THE NETHERLANDS (CC compare art. 7:757), FRANCE CC art. 1789, with reversal of burden of proof to the detriment of the constructor, see Cass.req. 19 June 1886, D.P. 1886, 1, 409; Cass.civ. I, 7. October 1963, D. 1963, p. 748; Cass.civ. III, 17 February1999, CCC 1999, no. 67 with note L. *Leveneur*, ITALY CC art. 1673, Cass., 1 February 1950, no. 271, Giust.civ, 1950, II, p. 37, with comment of D. Rubino, Il perimento fortuito dell´opera, prima dell´accettazione nel contratto d´opera. GERMANY CC § 644(1), AUSTRIA CC § 1168a sent. 2, GREECE CC art. 698 and PORTUGAL CC art. 1228(1). In SPAIN, pursuant to CC arts. 1589 and 1590 the constructor is to bear the risk if the construction work is lost before delivery both when the constructor has provided the construction material and when it has not, subject to the possibility of a warning about the defective quality of the material.

II. General system of risk

3. The AUSTRIAN CC allocates the risk according to the spheres from which the risk stemmed [*Koziol and Welser*, Bürgerliches Recht I[13], 409; *Gschnitzer*, Schuldrecht, Besonderer Teil und Schadensersatz[2], 250 ff]. Art. 1168a operates if the work is destroyed by accident before it has been accepted. The contractor is then not entitled to demand the price and the risk of loss of the material is upon the party who furnished it. The contractor also has to bear a risk materializing in the 'neutral' sphere since there is an obligation to achieve the result. ÖNORM B 2110 has a similar system in 5.41, see also ÖNORM A 2060 2.26.10.
4. In BELGIAN law risk passes at the moment of delivery if the contractor has supplied the materials, see CC art. 1788.
5. The constructor is generally liable for work until it has been accepted or should have been accepted under ENGLISH law, *Brecknock Co. v. Pritchard (1976)* 6 T. R. 750, 101 ER 807, *Hudson*, Building and Engineering Contracts[11], nos. 4-248, 5-001. In large contracts this moment is normally indicated by an architect's certificate.
6. In consumer construction contracts under FINNISH law, the constructor bears the risk before delivery of elements being destroyed, lost or damaged for a reason not attributable to the client, see Chapter 9 art. 6(1) Consumer Protection Act.

7. If the material is furnished by the constructor, the FRENCH CC art. 1788 states that risk is for the constructor if the thing has not been delivered and the client is not urged *(en demeure)* to receive the construction. This means that the risks are transferred to the client at the time of the delivery of the construction. This is the application of the rule *res perit domino* for movables, but not for immovables. If the client is the owner of the land the property is transferred at the time of the accession of the construction to the land, but the risks remain with the constructor until delivery. The *Cour de cassation* said explicitly that, for immovables, art. 1788 determines only the burden of risks, independently of the question of the passing of ownership (Cass.civ. III, 23 April 1974, D. 1975, 287, with note *J. Mazeaud*). The risks are not just those of the constructed work, but also the risks of the contract: the contractor cannot claim any remuneration and is obliged to pay back any down payment to the client (Cass.civ. III, 27 January 1976, Bull.civ. III, no. 34). Special provisions exist for the contract of sale of a building to be built. For this contract the transfer of risks depends on the date of the passing of the property. The law of 3 January 1967 provides two sorts of contracts: the *vente à terme* and the *vente en état futur d´achèvement*, between which the parties can choose. In the first contract the transfer of property occurs on the day of completion of the building, but it produces effects retroactively at the date of the conclusion of the contract (CC art. 1601-2). In the second contract, the passing of the property occurs immediately according to the performance of the construction (CC art. 1601-3), as for the *contrat d´entreprise*.

8. In GERMANY the constructor has to bear the risk for any fortuitous event prior to delivery (CC art. 644). The only exception is the accidental destruction or deterioration of materials which were supplied by the client. The emphasis lies here really on “fortuitous events”, i.e. the impact of this event can even with utmost diligence not be averted (BGH NJW 1997, 3018; 1998, 456). Therefore, even extreme weather conditions do not fall under the scope of this rule. The VOB/B does not provide any greatly different solutions in arts. 7, 12 no. 6. Events like strikes generally lead only to a prolongation of the construction time.

9. The GREEK CC art. 698 states that until delivery the risk attaching to the work is to be borne by the contractor. If the client was put on notice to accept, the risk is to be borne by the client. The client bears the risk of accidental destruction or deterioration of materials supplied by the client.

10. In ITALY the constructor bears the risk if the work becomes impossible due to a fact not attributable to the client. In the case of partial impossibility the client may only be asked to pay for the part already performed, so far as it is useful, in proportion to the price agreed for the entire work (CC art. 1672). Secondly, the constructor bears the risk if, for a cause which is not attributable to any of the parties, the work is destroyed or damaged before it is accepted by the client or before the client is late in verifying it. The constructor loses any entitlement to remuneration for work already performed and also bears the risk of loss of the material, in those situations in which the constructor supplied it (CC art. 1673). In those cases in which the client supplied the material, the risk is on the client, as far as the material is concerned, and for the rest it is on the constructor.

11. On the basis of the DUTCH CC art. 7:758, the risk of deterioration or destruction of the work before delivery lies on the contractor, whether the contractor only provides the labour or also the materials. Cf. *Van den Berg*, Samenwerkingsvormen in de bouw, nos. 76-77; Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 521.

12. In POLAND a constructor who has taken over the building site from the client by protocol, is liable, until the structure is handed over, for damage occurring on that site (CC art. 652).

13. The general rule in PORTUGAL when an unexpected event or "act of god" destroys or damages property is that the owner bears the risk. (*Res suo domino perit*) (CC art. 1228 para. 1; STJ 24 October 1995: BolMinJus, 450, 469. It is not applied though when the constructor is in delay: the risk is then on the constructor (CC art. 807 and 1228 para. 2) unless it can be proved that the damage or destruction would have occurred anyway even if the work had been delivered in due time. Whenever the creditor is in delay in accepting the work, the risk is immediately transferred to the creditor, *Mesquita,* RLJ 128 [1996], 154. The constructor bears the risk of damage to or destruction of materials and tools applied to the construction. Cf. *Romano Martinez,* Direito das Obrigações[2], no. 419.

14. In SCOTTISH law the general principle is *res perit domino* (*McBryde* paras. 9.50-9.51). When a building in the course of construction is accidentally destroyed, the unfinished building is the property of the owner of the ground on the principle of accession, and the loss falls on the owner with the builder having a claim for payment for work and materials (*Gloag and Henderson*, The Law of Scotland[11], para. 11.06). This may be shifted by contract. The location of risk to and concomitant insurance of the works is generally determined by express provision in the SCOTTISH standard forms of construction contract (*Stair,* The Laws of Scotland III, 'Building Contracts' para. 92; *Connolly,* Construction Law, chaps. 4.194 et esq.). The doctrine of frustration may however apply to discharge construction contracts altogether but this is very rare (*Stair,* The Laws of Scotland III, 'Building Contracts' para. 96).

15. The SPANISH CC regulates risk in construction contracts in arts. 1589 and 1590. Art. 1589 states that when the constructor undertakes the obligation to provide the construction material, it bears the risk if the construction work is lost before delivery, unless the client was in delay in receiving the work. (TS 3 May 1993, RAJ 1993/3400). The client is in delay when the agreed time to receive the work has passed and the reception of the work has not taken place due to causes attributed to the client. Pursuant to CC art. 1590, if the constructor only undertakes the obligation to execute the work but not to provide the construction material, it has also to bear the risk of losing the material before delivery, unless the client was in delay in receiving the work or the loss is due to the poor quality of the construction material, provided the constructor has warned the client of such circumstance. Case law confirms that the constructor bears the risk until the construction work is delivered (TS 10 May 1997, RAJ 1997/3831). The rules on risk are concerned with cases of force majeure or accidental damage and not cases where the loss is due to the constructor's fault, which are to be regulated by the general norms on contractual liability (CC arts. 1124 and 1101).

16. The general rule in SWEDEN is that the contractor is liable for the loss or deterioration of non-delivered parts of the contract work, AB 92 art. 5:4, first paragraph. The rules on consumer services are mainly identical with the regime in the AB 92. Accordingly, Consumer Services Act § 39 states that the consumer is not obliged to pay for work or material which the professional has performed or supplied, if the work or material is accidentally lost or damaged before delivery.

III. Risk as to materials and goods provided by other party

17. The AUSTRIAN CC art. 1168a sentence 2 states that the risk of loss of the material is upon the party who furnished it.

18. Under FRENCH law, if the material is furnished by the client, the risks of the constructed work burden the client in principle. The CC art. 1789 says that the contractor is liable only for fault. But according to case law, it is up to the contractor to prove the absence of fault, Cass.req. 19 June 1886, D.P. 1886, 1, 409; Cass.civ. I, 7 October 1963, D. 1963, p. 748; Cass.civ. III, 17 February 1999, CCC 1999, no. 67 with note L. *Leveneur*. This solution has been criticised by some writers (*Mazeaud,* Principaux contrats[5], no. 1350; L. *Leveneur*, note cit) because it seems unfair to impose the risk of loss due to indeterminate reasons on the contractor or the contractor's insurers instead of the client, who is still the owner, or the client's insurers.

19. If the client supplies the constructor with the material and it is destroyed by a fortuitous event, the client has to bear the risk under GERMAN law (CC art. 644 para. 1)

20. The GREEK CC art. 698 says that the client bears the risk of a fortuitous destruction and deterioration of materials supplied by the client, see also CC art. 699: If by reason of a defect in the materials supplied by the client, or of the method of performance determined by the client, the work has been destroyed or damaged before delivery or its performance has become impossible the contractor is entitled (provided the client's attention has been drawn to such risk in time) to claim remuneration in respect of the work performed and reimbursement of the expenses incurred which have not been included in the contractor's remuneration.

21. Following the ITALIAN CC art. 1673, II co, the risk of loss or deterioration of material supplied by the client is on the client. The remaining risk is on the constructor. Case law accepts that the general principle that the owner bears the risk (*res perit domino*) applies: (CC art. 1465, Cass., 1 February 1950, no. 271, Giust.civ, 1950, II, p. 37, with comment of *D. Rubino*, Il perimento fortuito dell´opera, prima dell´accettazione nel contratto d´opera).

22. In THE NETHERLANDS, with regard to the structure itself, the owner bears the risk of deterioration or destruction, be it the contractor or the client, unless fault can be proved, see CC art. 7:757 in conjunction with art. 6:75.

23. According to the POLISH CC art. 655 if the object undergoes destruction or damage as a result of the materials, machines or facilities supplied by the client, the constructor may demand the remuneration agreed upon or an appropriate part of it if the client was warned of the danger of destruction of, or damage to, the object or if, in spite of observing due diligence, the constructor could not have found the defects in the materials, machines or facilities supplied by the client.

24. Generally, the owner of the materials bears the risk under PORTUGUESE law (CC art. 1228(1)). If materials are provided by the constructor, the constructor bears the risk. If materials are provided by the client, the constructor is obliged to execute the construction and the client is obliged to provide replacement materials.

25. In SCOTTISH law the general principle is *res perit domino* (above, 14). This may be shifted by contract.

26. Under the SPANISH CC arts. 1589 and 1590, the constructor is to bear the risk if the construction work is lost before delivery both when the constructor has provided the construction material and when it has not. However, in the latter situation, the constructor can shift the risk to the client, if the former warns the client about the defective quality of the material.

27. The general rule is that the owner of the things or material has to bear the risk in SWEDISH law, see *Hellner/Hager/Persson,* Speciell avtalsrätt II(1)[4], p. 100. The

other party can only be held liable if on the basis of negligence, AB 92 art. 5:5. As for a consumer service, the same principles mainly apply as in the AB 92. The consumer bears the risk in relation to material supplied by the consumer, see *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 100. Cf also Consumer Services Act § 32.

CHAPTER 4: PROCESSING

IV.C.–4:101: Scope

(1) This Chapter applies to contracts under which one party, the processor, undertakes to perform a service on an existing movable or incorporeal thing or to an immovable structure for another party, the client. It does not, however, apply to construction work on an existing building or other immovable structure.

(2) This Chapter applies in particular to contracts under which the processor undertakes to repair, maintain or clean an existing movable or incorporeal thing or immovable structure.

COMMENTS

A. General idea

A contract for processing is defined in Annex 1 as "a contract under which one party, the processor, undertakes to perform a service on an existing movable or incorporeal thing or to an immovable structure for another party, the client (except where the service is construction work on an existing building or other immovable structure)". This is the same, in definition form, as the rule on scope in the present Article.

Processing may be further described as the performance of a service on an existing thing, in order to effect or prevent a change in it. Usually, but not always, the objective will be an improvement in the thing or an increase in its value.

Illustration 1
A car has broken down and is repaired by a garage.

This is a simple example of work on an existing thing. A contract for such work falls clearly within the scope of this Chapter.

To enable the obligation to be performed, the thing will normally – though not necessarily – be brought into the care of the provider of the service (the processor). Like storage, processing will therefore often go together with the handing over of the thing to the provider of the service. In contrast to storage, the thing is not handed over for safeguarding, but to be worked on by the provider of the service. In performing the service, many things may go wrong, thus damaging the thing. The risk of such damage occurring is the main issue in processing contracts.

When the contract concerns the processing of immovable property, the property will of course not be handed over. The client will, however, have to hand over to the processor the control over the immovable property or part of it. This will often be done by giving access to the property. The main issue for the work on immovable property, again, is the risk of damage, in this case not only to the thing itself but also to other things located at or near the thing.

B. Interests at stake and policy considerations

The main policy issue is why some types of contracts are to be covered by the concept of processing. Contracts for work on existing things are traditionally covered by the same rules as construction contracts. However, those rules were designed to regulate the creation of a new thing instead of its alteration or maintenance and are not always very apt for dealing with the specific problems of processing. The fact that the processor takes control over the thing implies that one of the main risks to be guarded against is that the thing is damaged during the performance of the service.

C. Preferred option

The preferred option is to have separate rules for processing contracts but to give them a broad scope. So the Chapter applies to all contracts whereby a party is to perform a service on an existing thing. Paragraph (2) specifies that it applies in particular to contracts whereby the processor is to repair, maintain or clean an existing thing. The Chapter, however, also applies to modern types of services, e. g. a contract by which a software program is to be reprogrammed or a computer system is to be maintained. It also applies to purely commercial contracts, e. g. where the packaging of things produced by a client is outsourced to a professional packaging or wrapping service provider.

D. Relation to other provisions

The relation between the rules on processing and the rules on construction is a close one as the services rendered are rather similar. For this reason, the rules in the Chapters on construction and processing have been closely aligned. Nevertheless, it may be difficult to qualify a specific contract as either a processing or a construction contract.

> *Illustration 2*
> A thatcher replaces the existing roof of a cottage by new thatch. This is a rather traditional example of a contract for work on an existing thing, but its qualification is not as simple as it seems.

The replacement of an old roof of a building by a new one may be regarded as repair of the old building, in which case the service would be qualified as processing, but it may also be regarded as the building of a new thing (the new roof) on top of an existing structure (the rest of the building). In the latter case, the exchange of the roof would be qualified as construction. Even though this qualification seems to make less sense than qualification as a processing contract, construction work on existing immovable property is traditionally considered to be governed by the rules on construction. To avoid these specific qualification problems, IV.C.–3:101 (Scope) in the construction Chapter explicitly provides that the rules on construction apply, with appropriate adaptations, to contracts by which the service provider undertakes to materially alter an existing building or other immovable structure. The second sentence of paragraph (1) of the present Article excludes such cases from the present Chapter. Consequently, the rules on processing do not apply.

Under Article 2 of the Consumer Sales Directive (Directive 1999/44/EC, *OJ* 1999, L 171/12), the rules on consumer sales also apply if the seller, in addition to selling a thing, undertakes to install or assemble the thing. Under the present Chapter the installation or assembly of the thing would be considered a processing service. However, the rules on processing and sales have been closely aligned, especially with regard to the applicable remedies.

E. Scope of application of the rules

The following illustrations may provide more insight into the borderline between processing and other services.

Illustration 3
A piece of furniture is made to look antique by applying specialised techniques.

The Chapter applies. It does not matter that the service appears to be directed to producing a deterioration. A service is being performed on the item.

Illustration 4
A car has broken down and is towed to a garage.

The towing of the car does not do anything to change the condition of the car. No work is done *on* the car. This situation is not within the Chapter.

Illustration 5
A car is to be demolished.

The condition of the car will definitely be changed. Work is to be done on the car. It does not matter that the work on the car is not meant to improve or even to maintain the condition of the car. The rules on processing apply.

Illustration 6
A surveillance company supervises the building in which a factory is located.

Although the control over the building is – partly – handed over to the surveillance company, the building is not worked on by the surveillance company. Therefore, the rules on processing do not apply.

The rules of the present Chapter apply with appropriate adaptations to the processing parts of mixed contracts such as those where, in addition to a sale, processing services are rendered.

Illustration 7
A man buys a wardrobe in flat-pack form. As he is manually incompetent, the parties agree, as part of the same contract, that the seller will put the wardrobe together, in return for extra money.

The rules on processing will apply to the assembly part of the contract.

Illustration 8
A woman buys some 4 m planks from a do-it-yourself shop. She wants to use the planks to construct a small wooden shed. As part of the same contract the shop agrees to saw the planks into 2m lengths. The employee of the shop carelessly makes some of the cuts at 1.80 m.

The rules on processing will apply to the sawing part of the contract.

Illustration 9
A chimney sweep is contracted to sweep the chimney of a house.

This might be considered a borderline situation because the building as such does not change much by the work. Yet the house is to be worked on. The contract is for a type of cleaning and is covered by the rules in this Chapter.

NOTES

I. Overview

1. In most systems, processing services are covered by the general rules on the contract for work *(Werkvertrag, contrat d´entreprise)*, even though that contract type usually primarily focuses on the *creation* of goods – more specifically, the creation of buildings or immovable structures. The rules on the contract for work apply to processing services that are performed on movable goods and immovable property alike, and in some countries also on intangible things such as software programs. Mostly, they are also applied to gratuitous services, either directly or by way of analogy.

2. Processing is covered by the rules on contract for work in AUSTRIA (CC §§ 1165 ff), FRANCE (CC arts. 1787 ff), GERMANY (CC §§ 631-650), GREECE (CC art. 681-702), ITALY (CC arts. 1655-1677) and POLAND (CC arts. 627 ff); in practice, the same holds true for THE NETHERLANDS (CC arts. 7:750-764), PORTUGAL (CC arts. 1207 ff) and SPAIN (CC arts. 1544 ff). In ENGLAND, the contract is governed by the general requirements of the Supply of Goods and Services Act 1982 and, often, may be qualified as bailment (cf. *Miller/Harvey/Parry*, Consumer and Trading Law, p. 179). In SCOTLAND the contract is governed by the general principles of the law of contract, although there may be elements of *location custodiae*, as when a car is left in a garage for repair (*McBryde*, Law of Contract in Scotland para. 9.52). In SWEDEN and FINLAND specific legislation governs consumer contracts (Consumer Services Act, respectively Chapter 8 of the Consumer Protection Act on certain consumer service contracts). If the contract is not a consumer contract, in Sweden sales law is applied by way of analogy when this is considered appropriate.

3. The rules on processing contracts are normally applied both when the object of the contract is a movable and when it is an immovable, e. g. a building. This has been explicitly regulated in SWEDEN (Consumer Services Act art. 1, sent. 2), but is considered to be self-evident in most other systems. In FRANCE, the Cour de Cassation decided that in the case of repair of a roof on a building, the rules on the contract for work are to be applied (and not those on construction), unless the whole roof is replaced (Cass.civ. III, 9 November 1994, Bull.civ. III, no. 184). An exception is FINLAND, where, for consumer contracts, specific rules have been developed regarding processing services on immovable goods (cf. Chapter 9 Consumer Protection Act).

4. In most legal systems, the rules on processing are applied either directly or by way of analogy to gratuitous services. The situation is different in GERMANY, ITALY, FINLAND and SWEDEN, where application of the rules on the contract for work is explicitly limited to contracts for remuneration.

II. Place in existing laws

5. In AUSTRIA processing contracts are covered by the wide ambit of the contract for work (CC arts. 1165 ff), which require the processor to achieve a specific result. Cf. Rummel [-*Krejci*], ABGB I[2], §§ 1165-1166, no. 9; *Koziol and Welser*, Bürgerliches Recht II[12], p. 242; cf. also, explicitly for the contracts for repair and maintenance, Rummel [-*Krejci*], ABGB I[2], arts. 1165-1166 nos. 56 and 65. If the processor (explicitly) only promises to *try* to achieve a result, the contract is a *freier Dienstvertrag*, for which no statutory rules have been developed.

6. In ENGLISH law, processing contract may be qualified as a contract of bailment, cf. *Miller/Harvey/Parry*, Consumer and Trading Law, p. 179, albeit that bailment as such is not necessarily based on a contractual relationship, cf. *Chitty* on Contracts II[29], no. 33-002. A processing contract is subject to the general requirements of ss. 13-17 of the Supply of Goods and Services Act 1982 to the extent that a service is carried out; cf. art. 12 (3). *Miller/Harvey/Parry*, Consumer and Trading Law, pp. 85-86, 151, 153, state that when materials are used in the performance of the contractual obligations, ss. 1-5a apply to that part of the contract, including the requirement that these materials are fit for purpose (s. 4(5)); if the materials used are dissipated by their use, common law provides the same standard of quality, cf. *Ingham v. Emes* [1955] 2 QB 366. In SCOTLAND the contract is governed by the general principles of the law of contract.

7. For consumer contracts, processing contracts are generally covered by Chapter 8 of the FINNISH Consumer Protection Act on Certain consumer service contracts.

8. Under FRENCH law this contract falls under the scope of application of the more general *contrat de louage d´ouvrage et d´industrie*, often called *contrat d´entreprise* (contract for work, CC arts. 1787 ff).

9. In the GERMAN CC §§ 631-650 on the contract for work apply to a processing contract, as the contract concerns a clearly outlined object of the service (rather then a general activity), cf. BGH NJW 2000, 1107; BGH NJW 2002, 595.

10. Any activity that involves processing is considered to be a service and is regulated by the contract for work in the GREEK civil code (arts. 681-702).

11. A processing contract falls within the scope of application of the provisions on the *contratti d´appalto* regulated in the ITALIAN CC arts. 1655-1677, the *appalto* being a contract whereby a party undertakes to perform a work or a service.

12. Processing will normally be qualified as *aanneming van werk* (contract for work) under the DUTCH CC arts. 7:750-764, cf. *den Boer and Wildenburg*, TvC 1993, p. 294. Since the rules on the contract for work are not very apt for processing contracts, parties normally make use of standard contract terms, which often have been drafted after negotiations with consumer organisations.

13. Normally processing would be classified as a contract of specific work under the POLISH CC art. 627. In some cases also the rules on building contracts could apply on the basis of CC art. 658, according to which these rules apply to contracts for repairs to a building or structure.

14. Normally, a processing contract is considered in PORTUGAL to be a contract for work (CC arts. 1207 ff); the processor is then under an obligation of result. However, qualification may be problematic. Activities such as finishing works in a new structure (e. g. paperhanging) have been regarded as a contract for work (CA Coimbra, 20 June 1990, BolMinJus 398, 593) but also as a contract for services (STJ 25 September 1991, BolMinJus 409, 764).

15. In SPAIN processing contracts are not covered by the rules on service contracts but by those on construction contracts (CC arts. 1544 ff) if the main obligation for the service provider is to come up with a final outcome in conformity with the expectations of the client. When such is not the case, the rules on service contracts (CC arts. 1583 ff) do apply, leading to a mere obligation of means.

16. Rules for consumer services can be found in the SWEDISH Consumer Services Act, which cover work on movables and immovables alike (cf. Consumer Services Act art. 1, sent. 2). Apart from this it is an unregulated area. However, the Sales Act can be used by way of analogy when appropriate.

III. Application to movables and immovables?

17. In AUSTRIAN law, the rules on the contract for work apply irrespective of the type of property that is the object of the contract, as they apply to the construction of a building, the repair of a thing and the programming of software alike. Cf. Rummel [-*Krejci*], ABGB I[2], §§ 1165-1166; *Koziol and Welser*, Bürgerliches Recht II[12], p. 242.

18. The Supply of Goods and Services Act 1982 under ENGLISH law applies to services on movables and immovables, as long as a service is carried out; cf. art. 12 (3).

19. In the case of repair or renovation of a consumer's house, not Chapter 8 but Chapter 9 of the FINNISH Consumer Protection Act on Sale of building elements and construction contracts applies, cf. Chapter 9, Section 1 (3) Consumer Protection Act.

20. The rules on the contract for work in principle apply irrespective of the type of property that is the object of the contract under FRENCH law. However, the borderline with construction contracts is difficult to draw (yet important for its far-reaching consequences). To give an example: the Cour de Cassation decided that repair of a roof is to be considered a construction contract if the structure of the roof is replaced, and a contract for work otherwise, cf. Cass.civ. III, 9 November 1994, Bull.civ. III, no. 184.

21. The GERMAN CC § 631(2) provides that both the creation and the change of something can be the object of a contract for work, as well as another service if a certain result is to be achieved. A division as to the type of property that is the object of the contract is not made.

22. The rules on the contract for work apply irrespective of the type of property that is the object of the contract under GREEK, ITALIAN and DUTCH law.

23. In POLAND the rules on the contract for specific work apply to the contract of specific work to be performed on immovables and movables alike. However, if the administrative rules of building law are applicable to a given contract, then it is classified as a building contract (CC art. 647).

24. In SCOTLAND the principles apply to movables and immovables alike. Under the Housing Grants, Construction Contracts and Regeneration Act s.105 construction operations include repair, maintenance and cleaning (internal and external) of buildings.

25. The SWEDISH Consumer Services Act covers work on movables and immovables alike (cf. art. 1, 2nd sentence). This means for instance that construction, repair, painting, wall-papering, laying out a garden and digging work is covered by the same regime, see *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], pp. 86 ff.

IV. Application to gratuitous processing services

26. According to the prevailing opinion in AUSTRIAN law, gratuitous processing contracts are not covered by the rules on the contract for work but by the rules on

mandate. However, the rules on the contract for work are generally applied by way of analogy if and in so far as this may be considered appropriate. Cf. Rummel [-*Krejci*], ABGB I[2], §§ 1165-1166 no. 100; *Koziol and Welser*, Bürgerliches Recht II[12], pp. 243-244.

27. The Supply of Goods and Services Act 1982 in ENGLISH law only applies if there is a contract and the supplier of the service acts in a professional capacity, cf. *Miller/Harvey/Parry*, Consumer and Trading Law, p. 153. The client must perform at least *some* kind of obligation, otherwise consideration for the contract is lacking. Cf. *McKendrick*, Contract Law[4], p. 74. Yet, the rules on bailment may apply to gratuitous processing contracts, cf. *Chitty* on Contracts II[29], no. 33-029.

28. The FINNISH Consumer Protection Act does not apply to gratuitous contracts, as may be deduced from Chapter 1, Section 5, where the definition of business is restricted to cases where the party concluding the contract with the consumer offers the services for consideration.

29. Under FRENCH law the same rules apply in principle to gratuitous processing services, cf. *Huet*, Contrats spéciaux[2], no. 32113. Yet, the parties are presumed to have agreed upon a remuneration for the processor, cf. Cass. civ., III 17 December 1997, Bull. civ. III, no. 226.

30. In GERMANY the rules on the contract for work only apply if the client undertakes, even if only tacitly, to pay a price (cf. CC §§ 631(1), 632; Staudinger [-*Peters*], BGB [2003], § 632 no. 1; Palandt [-*Sprau*], BGB, § 631 no. 12).

31. Under ITALIAN law, in order to qualify a processing contract as a *contratto d´appalto*, the work has to be performed in exchange for a sum of money (CA Palermo 31 October 1947, Foro. Sic., p. 22).

32. In principle, the same rules will apply to gratuitous processing services under DUTCH law. However, the standard of care will probably be lower than for a service provided for a remuneration.

33. In POLAND the contract for specific work is to be performed against remuneration (CC art. 627). If the parties did not agree on the price a number of rules indicate how to calculate the due remuneration (CC arts. 628-630). Also the building contract is classified as a remunerative contract (CC art. 647).

34. Given the recognition of gratuitous contracts and unilateral promises in SCOTTISH law, there is nothing to prevent the application of these concepts to processing contracts. The distinction between gratuitous and onerous transactions and resultant liabilities where a person is put in possession of goods to work upon them has been minimised in modern Scottish law (*McBryde*, Law of Contract in Scotland, para. 9.54).

35. The SWEDISH Consumer Services Act does not apply to gratuitous services. This limitation is not expressly provided in the text, but can be derived especially from the provisions concerning price, *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 251.

IV.C.–4:102: Obligation of client to co-operate

The obligation to co-operate requires in particular the client to:

(a) hand over the thing or to give the control of it to the processor, or to give access to the site where the service is to be performed in so far as may reasonably be considered necessary to enable the processor to perform the obligations under the contract; and

(b) in so far as they must be provided by the client, provide the components, materials and tools in time to enable the processor to perform the obligations under the contract.

COMMENTS

A. General idea

The obligation to co-operate mentioned in the Article is the general obligation under III.–1:104 (Co-operation) as expanded for service contracts by IV.C.–2:103 (Obligation to co-operate). The client is to enable the processor to perform the service the client has asked for. This means, first, that the client must provide the processor with the thing to be worked on; and secondly, that, if the parties agreed that materials, tools or components are to be supplied by the client, they must be supplied in good time so as not to hold up the performance of the service.

Illustration 1
A car owner agrees with a garage for the car to be serviced the next day. The client is to take the car to the garage at the agreed time and place.

Illustration 2
A client is no longer able to regularly clean his house, and requests the services of a cleaning company. The parties agree that the client will provide the cleaning materials, brooms and mops. The client is to make sure that sufficient materials and tools are available in good time.

B. Interests at stake and policy considerations

It might be argued that these rules are unnecessary - first because there are already provisions on the obligation to co-operate in other Articles (III.–1:104 (Co-operation) and IV.C.–2:103 (Obligation to co-operate)) and secondly because meeting these requirements clearly is in the client's own interest. Performance will be held up until the client does meet them. However, there is an argument for particularising aspects of the client's obligation to co-operate in relation to processing contracts. And the processor will often have an independent interest in the client meeting these requirements, as the price may have been calculated in accordance with the duration of performance and it may not be possible to use the workforce for another job. The Article takes that interest into account.

C. Preferred option

The preferred option is to include an Article making more specific certain aspects of the general obligation to co-operate so far as the *client* is concerned. The most important specification, which is particular to processing contracts, is that the client must hand over the thing or the control of it to the processor in order for the service to be performed on that thing. If immovable property is to be worked on, or if the processor is required to collect the thing, the client must give the processor access to it. In all cases, the client must perform the

obligation in time to enable the processor to perform the processor's obligations under the contract.

NOTES

I. Overview

1. The client is under an implied obligation to hand over the item to be worked on (or control over it) or give access to it on time in ENGLAND and SCOTLAND (cf. *Mackay v. Dick* (1880-81) 6 App. Cas. 251, at p. 263), GERMANY (cf. CC § 642(1), BGH BGHZ 11, 80, 83) and POLAND (CC art. 640). A similar duty may arise from good faith in GREECE (CC art. 288), ITALY (CC art. 1175 and 1375) and PORTUGAL (CC art. 762 para. 2 and 813 para. 2). A comparable result is achieved for consumer contracts in SWEDEN (Consumer Services Act arts. 45, 46) and FINLAND (Chapter 8, section 29 para. 3 of the Consumer Protection Act), where the processor may terminate for failure to co-operate if the client does not enable the processor to perform the service. In AUSTRIA (cf. CC § 1168), FRANCE (cf. *Huet*, Contrats spéciaux[2], no. 32328-32329) and THE NETHERLANDS (CC arts. 6:58 ff), the rules on *mora creditoris* and contractual provisions lead to the same result.

II. Client's obligation to hand over or give access to the item to be worked on

2. In AUSTRIA the client is normally not obliged to hand over the item to the processor or to give access to it on time, but failure to do so leads to *mora creditoris*. Cf. Rummel [-*Krejci*], ABGB I[2], §§ 1165-1166 no. 113; § 1168 no. 33. In such a case, the processor may cancel the contract after having set a reasonable period of time for the client to perform (CC § 1168); in case of cancellation under this provision, the client would still be required to pay the price for the service. Cf. Rummel [-*Krejci*], ABGB I[2], § 1168 nos. 33, 35-36.
3. In ENGLAND the client is under an implied obligation to hand over the item if such an implied term is *necessary* to give business efficacy to the contract and the term is so obvious that 'it goes without saying'. Cf. BP Refinery (Westernport) Pty Ltd. v. Shire of Hastings 52 ALJR 20, 26. These conditions will normally be met, for the processor cannot perform the service unless the client performs this particular obligation to co-operate. Cf. *Mackay v. Dick* (1880-81) 6 App. Cas. 251, at p. 263. SCOTTISH law is the same.
4. In consumer contracts in FINLAND the processor may terminate the contractual relationship if the client fails to co-operate in the delivery of the item as required for the rendering of the service (Chapter 8, section 29 (3) of the Consumer Protection Act. From this, an obligation to hand over the item or the control over it may be deduced if and in so far as this is necessary for the proper performance of the service. For contracts leading to, e. g., the repair or renovation of a house, Chapter 9, section 31 of the Consumer Protection Act leads to the same result.
5. Under FRENCH law the client is required to hand over the item that is to be worked on, or to give access to it, at such a time as is necessary for the performance of the service. Cf. *Huet*, Contrats spéciaux[2], nos. 32328-32329.
6. Under the GERMAN CC § 642(1), the client is required to give the necessary co-operation; in a processing contract, this includes at least the obligation to hand over the item (or control over it) or give access to it on time. This is regarded as a

contractual *obligation* and not just a matter of *mora creditoris*. Cf. BGH BGHZ 11, 80, 83.

7. Under GREEK law, an obligation to hand over item on time may be deemed to arise from the general provision on good faith (CC art. 288).

8. In ITALY a general duty to co-operate may be deduced from the general principles of correctness in performance (CC art. 1175) and of good faith (CC art. 1375). Under these provisions, the client would be required to provide the processor on time with the item or the control over it.

9. The client, in THE NETHERLANDS, has to enable the processor to perform the obligations under the contract. This duty to co-operate, following from the rules on *mora creditoris* (CC arts. 6:58 ff) and good faith and fair dealing, is often explicitly or impliedly regulated in standard contract terms. From this general duty to co-operate, a duty to hand over the item or the control over it may be derived when such is needed for the fulfilment of the processor's obligations. Cf. Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 558.

10. A duty to co-operate exists as a general rule concerning performance of obligations under POLISH law (CC art. 354). In the contract for specific work, the client's duty to co-operate is specially underlined in CC art. 640, according to which, if co-operation on the part of the client is required for the making of the work and such cooperation is lacking, the service provider may set the client an appropriate time limit with the sanction that after an ineffective lapse of that time the processor will be entitled to renounce the contract. In such a case the service provider may also demand remuneration, but the client may deduct what the service provider has saved by not making the work (CC art. 639). The service provider may ask for damages, based on the general rule of CC art. 471. In the case of building contracts the client is obliged to hand over or give access to the building site and the agreed machines and devices (Radwański [-*Strzępka*], System Prawa Prywatnego VII[2,] p. 407).

11. Although not expressly provided for in PORTUGUESE law, the client's obligation to hand over the item is ascertainable from CC art. 762 para. 2 and 813 para. 2 regarding good faith in the execution of a contract. Cf. *Romano Martinez*, Direito das Obrigações[2], 342.

12. Under the SWEDISH Consumer Services Act arts. 45, 46, the professional has a right to suspend its work, and to terminate the contractual relationship, if the consumer's failure to render assistance constitutes a delay which is of material significance to the professional. From this, indirectly a duty to co-operate follows.

13. The SPANISH CC does not have any specific rules on processing contracts. Art. 1544 distinguishes only between the contract for work and the service contract, according to the terms of the obligation: the first obliges the supplier to achieve a particular result, while the second imposes only a duty of acting with the skill and care reasonably expected by the client. Therefore, a processing contract should be considered as a subtype of one of those contracts depending on the character of the obligation. The general obligation of co-operation stems from the CC art. 1258 (good faith) and it includes all the operations that are necessary so that the processor may fulfil the obligation. If the client impedes the processor's performance by a lack of co-operation, this is regarded by the Supreme Court as a cause for termination of the contract (TS 21 November 2002, RAJ 2002\10269). The materials may be provided either by the client, or by the supplier of the service, depending on the terms of the contract. If the character of the service implies that the materials should be provided by the client, this obligation may be derived from the CC art. 1258 as well.

IV.C.–4:103: Obligation to prevent damage to thing being processed

The processor must take reasonable precautions in order to prevent any damage to the thing being processed.

COMMENTS

A. General idea

A significant risk for the client is that the processor may damage the thing being worked on. The present Article contains a specification of the obligation of skill and care imposed on any service provider. See IV.C.–2:105 (Obligation of skill and care) paragraph (5). The processor must take reasonable precautions to prevent unnecessary damage to the thing being worked on, whether such damage is caused by the processor, by third parties or by other external causes. "Damage" means any type of detrimental effect: it includes loss and injury. (Annex 1).

Illustration 1
A cleaning company is contracted to clean an office building daily between 6 and 8 p. m. After having finished an individual office, the employee of the cleaning company is to lock the doors of that office in order to prevent theft.

Illustration 2
A cabinetmaker is requested to restore a precious Chinese folding screen. In the cabinetmaker's workshop, the folding screen is to be placed in such a manner that it will not be damaged by an opening door.

B. Interests at stake and policy considerations

When an existing thing is worked on, there is an almost inherent risk of damage to the thing. Because the processor will normally have control over the thing, the processor is usually in the best position to take protective measures. More generally, the processor is usually in the best position to take safety measures and measures limiting any adverse impact of the activity on property and other people. The main policy issue is the extent of the obligation on the processor. Damage is to be prevented as much as possible, but there is a limit to the protective measures the processor can be expected to take: damage cannot always be prevented, or only at very high costs. It would not be reasonable nor economic to require the processor to take all possible precautionary measures.

C. Preferred option

The preferred option is to require reasonable precautions to be taken to prevent damage occurring to the thing being worked on. See further the Comments to IV.C.–2:105 (Obligation of skill and care). Paragraph (5) of that Article imposes a general obligation to take reasonable precautions to prevent the occurrence of any damage as a consequence of the performance of the service.

The obligation under this Article may be overridden by the terms of the contract if, in particular, the contract requires damage to be caused by, or as an incidental effect of, the processing. Such may be the case if the initial infliction of damage is necessary in order to subsequently improve the thing, but may also be the actual purpose of the contract.

Illustration 3
Confidential records are handed over to be shredded.

Destruction of the records could be seen as the infliction of damage on the thing, but liability is of course excluded because that damage is intended by both parties.

Illustration 4
A table is handed over to a furniture maker to be revarnished. Prior to the application of new varnish, the old varnish is removed and the table is sandpapered.

Although the removal of the varnish and the sandpapering temporarily worsen the condition of the table, it is clear that this procedure is needed to enable the furniture maker to revarnish the table properly. There is no obligation to take any measures to prevent such temporary damage.

The processor's obligation extends to the taking of reasonable steps to prevent damage arising from external causes.

Illustration 5
A museum has Egyptian artefacts restored. The restorer is to protect the artefacts against humidity, wind and changes in temperature, and to guard them from theft by his staff or third parties.

NOTES

I. Overview

1. It is undisputed in all systems that the processor has an obligation to prevent damage to the item on which the service is executed. This follows in most systems from an explicit or implied contractual term to use due diligence and care (AUSTRIA, cf. CC § 1169; ENGLAND, cf. *Brabant & Co. v. King* [1895] AC 632, at. p. 641; SCOTLAND: *Hinshaw v. Adam* (1870) 8 M 933) or the general provision of good faith (GERMANY, cf. CC §§ 241, 242, BGH NJW 1983, 113). In consumer contracts in FINLAND (cf. ConsProtA chap. 8 § 12(2) and chap. 9 § 13(2) under 5) and SWEDEN (cf. Consumer Services Act art. 32), damage to the item being worked on will be considered a defect of the service if the client would have had reason to expect that the performance of the service would not lead to such damage. In England and Scotland, in the case of damage to the item, a reversal of the burden of proof occurs, cf. *Levison v. Patent Steam Carpet Cleaning Co. Ltd.* [1978] QB 69, (CA); *Hinshaw v. Adam*, above.

II. Obligation to prevent damage to item being processed

2. Under AUSTRIAN law the processor is required to safeguard the client's interests. To that extent, the processor is under duties of diligence and care (CC art. 1169 and must care for the things being worked on in the same diligent way as a storer would have to, cf. OGH, SZ 2/11.
3. As a processing contract may generally be qualified as bailment in ENGLISH law, the processor is required to prevent damage to the item handed over by the client, cf.

Brabant & Co. v King [1895] AC 632, at. p. 641. In case of damage, the processor must prove all the known circumstances in which the loss or damage occurred; failure to do so leads to liability; cf. *Levison v Patent Steam Carpet Cleaning Co Ltd.* [1977] 3 All ER 498, [1978] QB 69, Court of Appeal. In practice, this leads to a reversal of the burden of proof.

4. Section 32 of the FINNISH Consumer Protection Act entitles the client to compensation for damage to the thing while it is in the possession or under the supervision of the processor, unless the processor proves the occurrence of damage was not due to negligence on the processor's part.

5. The loss of or damage to the thing is governed by the FRENCH CC art. 1789, leading to a fault-based liability of the processor; yet, the processor bears the burden of proof that due care was taken *(obligation de résultat attenué)*, cf. Cass. civ. I, 14 May 1991, D. 1991, 449, note *J. Ghestin* (standing case law). The processor has especially to prove that normal precautions were taken for the protection of the thing processed.

6. In GERMANY the processor is under an obligation to act with consideration regarding the property of the client, cf. CC §§ 241, 242 (BGH VersR 1969, 927; BGH NJW 1983, 113). There is no difference between the care required as to the item that is the object of the contract, and other goods of the client.

7. The processor has obligations to prevent the processing from causing damage under ITALIAN law. Cf., more specifically for construction, *Marando*, Resp.civ. e prev. 1998, pp. 33-56.

8. Under DUTCH law the processor is liable for any damage occurring to the thing that can be attributed to its actions, cf. CC arts. 6:74 ff (general contract law). An explicit obligation not to damage the client's good is recognised in standard contract terms, cf. art. 5, para. 4, VNI-Installatievoorwaarden.

9. In POLAND, if damage to the work occurs due to any reason covered by the contractual liability of the processor, the work does not conform and the processor is liable. If however the work is destroyed or damaged due to defects of the material delivered by the client or as a result of the work having been made in accordance with the client's instructions, the person who received the order may demand the agreed remuneration or the appropriate part for the work made, provided that the client was warned of the danger of destruction of, or damage to the work (POLISH CC art. 641 para. 2).

10. According to the PORTUGUESE CC art. 1228, it must be ascertained if the damage is imputable to processor; if so the processor is liable for that damage. However, in CA Porto, 21 October 1991, BolMinJus 410, 874, is was made clear that sometimes not a contractual, but a tortious claim is to be made. In this particular case, a client delivered his car to a garage for repair. The car mechanic applied an oil pump that was inadequate for that engine, resulting in the total destruction of the engine. The court held that the damage, although resulting from the non-performance of a contract for work, was to be indemnified in tort since the act causing the damage was forbidden and faulty under the law of torts.

11. In SCOTTISH law, if work is to be done on an item and it is returned damaged, prima facie the processor is liable (*McBryde*, Law of Contract in Scotland, para. 9.37). The onus is on the processor to show that reasonable care was taken (*McBryde*, Law of Contract in Scotland, para. 9.56).

12. In SPAIN the framework for the precautions to be taken by the processor is the ordinary diligence and care that should be taken by the debtor according to the character of the contractual obligation (CC art. 1104). It may derive as well from the

principle of good faith (CC art. 1258). The processor is liable for any damage caused to the client's property by the processor's negligence, fault or delay (CC art. 1101 - contractual liability).

13. According to the SWEDISH Consumer Services Act art. 32 the service provider is presumed liable for damage to the things while in its possession, or otherwise subject to its control. For commercial contracts, the general rules on tort will be applicable, presuming liability for goods in the possession of the service-provider, but otherwise limiting liability to proven causation, *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 118.

IV.C.–4:104: Inspection and supervision

(1) If the service is to be performed at a site provided by the client, the client may inspect or supervise the tools and material used, the performance of the service and the thing on which the service is performed in a reasonable manner and at any reasonable time, but is not bound to do so.

(2) Absence of, or inadequate inspection or supervision does not relieve the processor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to accept, inspect or supervise the processing of the thing.

COMMENTS

A. General idea

The client may, but is not obliged to, watch the processor executing the contract when the service is performed on the client's premises. If the client does not exercise the right to watch the performance of the service, or does so inattentively, this does not have negative consequences.

> *Illustration 1*
> A security company is requested to install a security camera system on the outside of an office building. The client is entitled to supervise the installation of the cameras. When attaching the cameras to the building, the security company accidentally uses the wrong type of screws. As a consequence, the cameras become detached and fall down damaged beyond repair.

The client's failure to notice the use of the wrong screws when supervising the installation of the cameras does not exempt the processor in whole or in part from liability.

B. Interests at stake and policy considerations

The client has an interest in inspecting the performance of the service, for during the inspection the client may notice that the processor is not fulfilling obligations under the contract. In that case, the client would be able to intervene by giving the processor a direction or by insisting on specific performance. On the other hand, conflicting interests of the processor – especially the risk of disclosure of trade secrets – and of third parties – especially the right to privacy – may be at stake.

A second issue is what is to happen if the client was entitled to inspect or supervise, but did not do so, or if the client actually did inspect or supervise, but did so inadequately. One could think that in such a case the client forfeited the right to claim damages for non-performance as the non-performance could have been noticed earlier. On the other hand, one could argue that there is no reason why the client should lose rights when, after all, it was the processor whose non-performance led to damage.

C. Preferred option

The system preferred here is that the client has no duty to inspect, and that an absence of inspection or inadequate inspection does not relieve the processor from any obligations. If the client noticed a defect and did not notify the processor within a reasonable time consequences might follow but they would follow from the failure to notify.

As the interest of the client in inspection and supervision of the performance of the service, the processor's conflicting interest concerning the risk of the disclosure of trade secrets and the interests of third parties need to be balanced, the right to inspection and supervision in processing contracts is restricted to cases where the service is performed on the client's premises.

Inspection and supervision are a mere *right* of the client. It is not considered an obligation of the client in any legal system, and it is not considered as such under this Article either. Therefore, it does not seem justified to deprive the client of any rights if the client *could* have discovered the non-performance, but in fact did not do so, for instance because the client did not inspect at all. Even inadequate inspection should not lead to such a result, for that would provide an incentive not to inspect at all.

The present Article to a large extent mirrors the similar Article in the Chapter on Construction. The Article differs from that provision in two respects. Firstly, given the weight of the processor's interests in defending trade secrets and the right of third parties (other clients of the processor) to their privacy, the right to inspection and supervision in processing contracts is restricted to cases where the service is performed on the client's premises. Secondly, a specific provision as to the presentation of elements in the process to the client for acceptance is not needed for processing contracts and has therefore been left out. Given the default character of the present Article, the parties may of course include such a provision in their contract.

NOTES

I. Overview

1. The client is not obliged to inspect, but is entitled to do so, in AUSTRIA (cf. Rummel [-*Krejci*], ABGB I^2, § 1170 no. 5), GREECE (CC art. 692), ITALY (CC art. 1662). A right to inspect the service probably does exist in GERMANY (analogous application of construction law) and may also exist in SWEDEN at least in some cases. Such a right does not exist in ENGLAND or SCOTLAND.

II. Right to inspect

2. The AUSTRIAN CC contains no duty to inspect or to point out defects. The client, however, *can* inspect the work before acceptance, a right that cannot be denied. Cf. Rummel [-*Krejci*], ABGB I^2, § 1170 no. 5.
3. The Supply of Goods and Services Act 1982 does not recognise an implied term entitling the client to inspect the service under ENGLISH law. It is unlikely that under common law such a right would exist, since inspection is not a necessary condition to give business efficacy to the contract and a term allowing it does not 'go without saying'. Therefore, the conditions for an implied term to that extent, set out in *BP Refinery (Westernport) Pty Ltd. v. Shire of Hastings* 52 ALJR 20, 26, would not be met.
4. In GERMANY the client has the right, but not an obligation, to inspect or supervise the performance of the service under § 4 no. 1(2) VOB/B. The VOB/B is applicable to

construction contracts, but there is no reason not to apply the provision to processing contracts.

5. Under GREEK law there is no duty to inspect but rather a right the client may exercise (CC art. 692).

6. The ITALIAN CC art. 1662 establishes an option for the client to examine the processor's activity while performing the contract, provided that the client pays for the costs of such inspection and that the inspection does not cause needless difficulties to the processor, cf. Cass., 10 May 1965, no. 891, RGE, 1965, I, p. 945, comment of E. Favara, Limiti del controllo del committente sull´opera dell´appaltatore. Absence or inadequate inspection during the performance of the obligations under the contract does not lead to the loss of remedies, cf. CA Torino, 17 July 1959, Giust.civ.Mass., p. 814.

7. An obligation and possibly even a right to inspect does not exist in DUTCH law, see Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 562. However, it is thought that if the client does inspect or supervise the service during its performance, defects sometimes should be discovered. A failure to inform the processor of the defects at that time would then lead to a loss of remedies, cf. Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 569.

8. In the POLISH law the manner in which the contract of specific work is to be performed is in principle left for the service provider to decide. The client has only a right to control the performance from the point of view of its correctness and accordance with the contract (CC art. 636(1)) (Radwański [-*Strzępka*], System Prawa Prywatnego VII[2], pp. 336-337).

9. SCOTTISH common law recognises no right like that in this Article.

10. There is no duty on the client to supervise the execution of the service in SPANISH law. In a contract for work, the manner in which the service should be performed is generally left to be decided by the supplier (*Alberto Bercovitz*, Contratos Mercantiles, p.671). Therefore, the processor is liable in any case for the defects that may result from the work and the lack of inspection by the client of the service being carried out is irrelevant (CC art. 1591 and art. 17 of the Building Regulation Act). There is no express provision about a right of the client to supervise the work. Nevertheless, the client has a right to give instructions to the provider of the service (SAP Baleares 8 April 2002, JUR 2002/153765), but must not hinder the performance of the service, as that would be a cause for termination of the contract (TS 21 November 2002, RAJ 2002 /10269).

11. In SWEDISH and FINNISH law, for commercial services, the client will have a duty to inspect the work after the passing of risk, cf. the Sales Act art. 31, which is applied by analogy. Whether there is a right to inspect while the service is being performed, will depend upon the circumstances, whether the inspection hinders the service-provider in its performance and if the performance of the service will take a long time or not.

IV.C.–4:105: Return of the thing processed

(1) If the processor regards the service as sufficiently completed and wishes to return the thing or the control of it to the client, the client must accept such return or control within a reasonable time after being notified. The client may refuse to accept the return or control when the thing is not fit for use in accordance with the particular purpose for which the client had the service performed, provided that such purpose was made known to the processor or that the processor otherwise has reason to know of it.

(2) The processor must return the thing or the control of it within a reasonable time after being so requested by the client.

(3) Acceptance by the client of the return of the thing or the control of it does not relieve the processor wholly or partially from liability for non-performance.

(4) If, by virtue of the rules on the acquisition of property, the processor has become the owner of the thing, or a share in it, as a consequence of the performance of the obligations under the contract, the processor must transfer ownership of the thing or share when the thing is returned.

COMMENTS

A. General idea

This Article deals with the return of the thing or the control of it to the client. Firstly, when the processor has completed the service – and, if need be, has informed the client – the client must enable the processor to return the thing.

> *Illustration 1*
> A garage owner has repaired a car. When the repair is completed, the garage owner rings the client informing him that the car is ready. The client is to go to the garage and collect the car.

However, the client is not required to accept the return of the thing if it becomes clear that the service was not rendered correctly and the defects are so serious that the client would be entitled to terminate the contractual relationship for fundamental non-performance.

> *Illustration 2*
> A handyman has repaired a washing machine. When the handyman delivers the washing machine at the client's house and does a final test run, the washing machine does not function at all. As this clearly constitutes a fundamental non-performance, the client may refuse the return of the washing machine.

Equally, the client may request the return of the thing at any time. If the client orders the return of the thing before the service has been performed, this may amount to a termination of the contractual relationship under IV.C.–2:111 (Client's right to terminate), which means that the processor is still entitled to receive the price for the service.

> *Illustration 3*
> Arthur is the owner of a sophisticated mobile radio, with which supposedly transmissions from all over the world can be received. At some point, only the FM wave functions. So Arthur takes the radio to the shop for repair. One week later, the Olympics start. Arthur, a sports fan, demands the return of the radio, even though the

repair has not yet taken place. The radio is to be returned, yet Arthur remains obliged to pay the price for the service that was requested.

Where, in the course of the performance of the service the processor has become the owner of the thing, the processor must return ownership of the thing to the client together with the thing itself.

B. Interests at stake and policy considerations

The processor who has possession of the thing must take proper care of it and prevent it from being damaged. The processor therefore has an interest in being freed from these obligations when the service is finished. The client may want the thing returned, either after being told about completion of the service or before it is performed. The present Article deals with these interests, as well as with the consequences of the return of the thing: does acceptance of the return of the thing imply acceptance of any defects in the service or damage to the thing?

A different problem may arise if the processing has resulted in the processor becoming the owner of the thing or a share in it. The present Article must remedy that when the thing is returned to the client.

C. Preferred option

As the processor may have an interest in being freed from the obligation to take proper care of the thing once the service has been rendered, the present Article introduces an obligation of the client to accept the return of the thing. However, as the client is not to refuse the return of the thing (unless in the case of fundamental non-performance), mere acceptance of the thing implies nothing more than that the client performs this obligation. In other words, the mere acceptance of the thing should not be interpreted as acceptance of a non-reported defect. Moreover, in processing contracts, especially when a movable has been worked on at the premises of the processor, packaging of the thing in order to enable safe transportation is not uncommon. In such circumstances, there does not seem to be a compelling reason to oblige the client to inspect the thing immediately or at the processor's premises when it is returned to the client.

Where performance of the contractual obligations led to the transfer of ownership, that transfer is to be undone when the thing is returned to the client. To that extent, the present Article introduces an obligation on the processor to accomplish also a retransfer of ownership. The provision, of course, only applies if ownership did in fact pass. Whether such is the case, is a matter for the Book on the Transfer of Movables.

The present Article is the functional equivalent of the Article on the handing over of the structure in the Chapter on Construction and the Article on the return of the thing in the Chapter on Storage. In this respect, these Chapters have in common that they all primarily deal with tangible things that are in the possession of a service provider and need to be transferred to the client. The Articles mentioned serve to facilitate such transfer.

Occasionally, the law of property may mean that the processor becomes owner or part owner of the thing. When the thing is returned, ownership of the thing or share must be returned free from rights of third parties that did not exist when the thing was handed over to the processor.

NOTES

I. Overview

1. If the client accepts the outcome of the service without protesting against a defect in the service that could have been noticed by inspection at the end of the service, e. g. by examining the thing processed, then the processor can no longer be held liable in FRANCE (cf. Cass.civ. III, 16 December 1987, Bull.civ. III, no. 208), GERMANY (CC § 640(1) and (3)), GREECE (CC art. 692), ITALY (CC art. 1665 para. 3 and 4, Cass. 1 May 1967, no. 809, Rep.Foro it., 1967, V° Appalto, c. 103, n. 59), THE NETHERLANDS (CC art. 7:758(1) and (3)) and, if the client is a commercial party, in FINLAND and SWEDEN (by way of analogous application of the Sales Act art. 31).

2. On the other hand, the mere acceptance of the return of the thing processed, or the control over it, is not regarded as an acceptance of the proper performance of the service in AUSTRIA (cf. Klang [-*Adler and Höller*], ABGB V[3], § 1167, 398), ENGLAND (cf. Hudson nos. 5-021, 5-022, commenting on the construction case *East Ham Corp. v. Bernard Sunley* [1966] AC 406, House of Lords), FINLAND (if the client is a consumer, Consumer Protection Act Chapter 8, Section 16) and SWEDEN. However, in Finland (ConsProtA chap. 8 § 16) the client is required to notify the processor of the existence of a defect within a reasonable time after the client notices or should have noticed that defect; in POLAND, the period is one month after the return of the thing or, in the case of a hidden defect, after the moment when the client notices or should have noticed that defect (CC art. 563(1)). Notification of a discovered hidden defect by a commercial party is to take place immediately after the discovery (cf. art. 563(2)).

II. Acceptance of the return of the thing: consequences for claim for non-performance

3. An obligation for the client to accept the work does not exist, but a refusal to accept the work leads to *mora creditoris* if the work conforms to the contract under AUSTRIAN law. Cf. Rummel [-*Krejci*], ABGB I[2], §§ 1165-1166, no. 111. An acceptance without reservation cannot be deemed a waiver of the rights based on defects that were neither apparent nor known to the client, unless there is an express or factual approval. Cf. Klang [-*Adler and Höller*], V[3], § 1167, no. 398.

4. The fact that the client accepts the return of the thing (or the control over it) cannot be construed as an acceptance of the conformity of the work under ENGLISH law. Only in the case of express approval of the result by the client is the processor absolved from liability. Cf. Hudson nos. 5-021, 5-022, commenting on the construction case *East Ham Corp. v. Bernard Sunley* [1966] AC 406, House of Lords, which is to the same effect.

5. The FINNISH ConsProtA chap. 8 § 16 requires the client to notify a defect within a reasonable time after it has been noticed or should have been noticed. The mere acceptance of the return of the thing without protest therefore does not, by itself, lead to the immediate loss of remedies. Moreover, in certain cases the client may claim the application of a remedy even after the 'reasonable period' has expired.

6. The client is under an obligation to accept the return of the thing (or the control over it) under FRENCH law. At that point, the client is required to verify whether the service is in conformity with the contract. Acceptance without protest against defects that are or should have been recognised by the client at that time (manifest defects) amounts to an acceptance of these defects, exonerating the processor from liability. Cf.

Cass.civ. III, 16 December 1987, Bull.civ III, no. 208; *Huet*, Contrats spéciaux[2], nos. 32330-32332.

7. In GERMANY the client is required to accept delivery of the work if the service has been performed correctly; acceptance may not be refused for minor defects (CC § 640(1), sent. 1 and 2). The client is not required to inspect the service when it is completed, but when the client, although required to do so, does not take delivery within a reasonable period determined by the processor, the client is deemed to have accepted the work (CC § 640(1), sent. 3). Acceptance of a work with defects the client knows of, is deemed to be a waiver of the rights arising out of non-performance unless the client reserves the rights at acceptance (para. 3). After acceptance, the client bears the burden of proving the existence of the defect, cf. Staudinger (-*Peters*), BGB (2003), § 640, no. 1.

8. According to the GREEK CC art. 692 the processor after inspection is exonerated from liability for defects unless these could not be ascertained with a dutiful inspection or the processor maliciously kept them secret.

9. The ITALIAN CC art. 1665 para. 1 gives the client the right to verify the completed work. A defect which could be detected during an inspection at such time must be mentioned to the processor; failure to do so leads to the loss of any action against the processor (CC art. 1665 para. 4). Cf. Cass., 1 May 1967, no. 809, Rep.Foro it., 1967, V^{o} Appalto, c. 103, no. 59. Where the client does not inspect without justified reasons, the work is considered accepted unconditionally (CC art. 1665(3)), leading to the loss of guarantees for any defects and non-conformities that should have been detected at such an inspection, cf. *Stolfi*, Appalto, p. 52. Notification of hidden defects must take place within sixty days from their discovery, CC art. 1667(2).

10. In THE NETHERLANDS failure to inspect the work within a reasonable period of time amounts to an unconditional acceptance of the work, cf. CC art. 7:758(1) sent. 1, which implies exemption of liability for any defects the client should have discovered at delivery, cf. CC art. 7:758(3), AVA 1992 art. 8(1), and, yet only implicitly, AVA 1992 art. 12, are to the same extent.

11. According to the POLISH CC art. 643 the client is obliged to accept the return of the work, which the service provider releases in accordance with the contract. This means that the work has to be done according to the contract and offered at the place and time as indicated in the contract or by the default rules of CC arts. 454 and 455. If these conditions are not met, the client is not obliged to accept the work. Claims of the client may be based on the general rules on the non-performance or on the rules concerning warranty for defects in the sales contract. (Radwański [-*Brzozowski*], System Prawa Prywatnego VII[2], p. 358).

12. In SCOTTISH law the client would have to have had reasonable time for an opportunity to inspect the returned goods before the client would be deprived of the right to reject the processor's performance (*McBryde*, Law of Contract in Scotland para. 20.121).

13. Under SPANISH law the returning of the processed thing is governed by the general provisions on the delivery under the contracts with a *dare* obligation (liability for any damage which has occurred as a result of the delay, bad faith or negligence of the debtor: CC arts. 1094, 1101) and the rules on handing over the structure in the contract for work. Therefore, the delivery should be followed by an acceptance of the result of the work expressed by the client (art. 6 Building Regulation Act). The client may refuse the thing if it is not fit for use and the purpose of the contract expressed in the terms of the obligation has been frustrated; as the obligation has not been performed in accordance with the contract, the thing is useless to the client and there is no duty to

accept it (6.3 LOE and CC art. 1124). Nevertheless, if the work has been performed correctly, the refusal of acceptance by the client produces *mora creditoris.* The acceptance of the delivered thing by the client relieves the processor from liability for obvious defects which could be noticed by an ordinary person (application by analogy of CC art. 1484; *Alberto Bercovitz*, Contratos Mercantiles; p. 700). The time of the delivery should be fixed by the parties in the contract. The LOE art. 6.4 provides for the contract for work that if the parties do not agree otherwise, the structure must be handed over for acceptance by the client within thirty days from the day the work is finished.

14. In consumer services in SWEDEN, the client is not obliged to inspect (*Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p 110.) For commercial services, the client does have a duty to inspect the work when the thing is returned, cf. Sales Act art. 31, which is applied by analogy. Normally an obligation to notify exists only if the client actually detects a defect in the performance, not if it merely should have been detected. Failure to notify discovered defects leads to the loss of remedies.

IV.C.–4:106: Payment of the price

(1) The price is payable when the processor transfers the thing or the control of it to the client in accordance with IV.C.–4:105 (Return of the thing processed) or the client, without being entitled to do so, refuses to accept the return of the thing.

(2) However, where work remains to be done under the contract on the thing after such transfer or refusal the client may withhold such part of the price as is reasonable until the work is completed.

(3) If, under the contract, the thing or the control of it is not to be transferred to the client, the price is payable when the work has been completed and the processor has so informed the client.

COMMENTS

A. General idea

The central question in this Article is when the client has to pay for the service rendered or to be rendered. The normal rule under the Article is that this is when the processor has performed the service and returns the thing to the client.

Illustration 1
An electrician has repaired a client's electrical appliance. Upon return of the appliance, the client is to pay the agreed price.

The client is not to frustrate the processor's right to payment by unjustifiably refusing the return of the thing. The client may, however, refuse the return of the thing if the service clearly has not been performed properly.

Illustration 2
When the electrician returns the appliance, electric wires are sticking out of it on all sides. Obviously, it has been repaired very sloppily. The client need not accept the return of the thing and therefore does not yet have to pay the price for the service rendered.

Illustration 3
A washing machine has been repaired by an engineer. When the engineer delivers the washing machine at the client's house and does a final test run, the washing machine does not function at all. The client may refuse the return of the washing machine and does not yet have to pay the price for the service.

B. Interests at stake and policy considerations

Under Book III the normal rule is that when obligations can be performed simultaneously the parties are bound to perform simultaneously. (III.–2:104 (Order of performance)) In processing contracts, however, performance of the processor's obligation will normally take some time. This implies that normally the parties cannot perform simultaneously. The party who is required to perform first therefore runs the risk of performing without having any certainty about the other party's intention to perform the reciprocal obligations. A choice has to be made whether the uncertainty is to be placed on the processor or on the client.

In most countries the normal situation is that, unless the parties have agreed otherwise, the client is obliged to pay when the service is completed and the thing is returned; in practice, this means that the processor's obligation to return the thing is performed simultaneously with the client's obligation to pay. In a few countries the client is even allowed a reasonable period to examine the thing after its delivery before having to pay.

C. Preferred option

In processing contracts, usually the service is provided before the processor requests payment, although it is not uncommon that the order is reversed. In the present Article, the general trend is followed, stating – by way of a default rule – that the client is only obliged to pay when the service has been completed, either because the processor so notifies to the client or because the client requests the return of the thing. However, the client is to be prevented from frustrating the coming into being of his obligation to pay by failing to accept the return of the thing. Therefore, the present Article sets out that the processor is also entitled to the remuneration if the client unjustly refuses to accept the return of the thing, i.e. when the processor did not deliver a fundamental non-performance.

One consequence of the rule in paragraph (1) is that the price may have to be paid even when minor defects remain to be corrected. In such a situation the client is entitled under paragraph (2) to withhold a reasonable amount until the work is completed.

Paragraph (3) deals with the situation where there is to be no return of the thing, or control over it, to the client. This will be the case where the work, such as cleaning work on a building, is done on premises or on a site under the client's control at all times. In such a case the price is payable when the work is completed.

A processing contract may be a long-term contract. This is especially true for maintenance contracts. In such a contract, which may be concluded for a definite or an indefinite period of time, it is common for the parties to agree upon payments during the performance of the contractual obligations, for instance before or after a specific period has started or ended. A specific provision to this extent is not deemed necessary here, as parties will agree upon such payments when needed.

NOTES

I. Overview

1. Remuneration is normally due when the service is completed in FRANCE, GERMANY, THE NETHERLANDS and POLAND. In AUSTRIA, ENGLAND, SWEDEN and, in a consumer case, in FINLAND the client is even entitled to a reasonable period to examine the performance after delivery.

II. Time when payment is due

2. Unless the parties have agreed differently, the price is due when the service is completed and the client has had a chance to inspect the result of the work under AUSTRIAN law, cf. Rummel [-*Krejci*], ABGB I^{2}, § 1170 no. 5; *Koziol and Welser*, Bürgerliches Recht II^{12}, p. 244.

3. Under ENGLISH law, where the processor contracts to work on the client's property and no time for payment has been fixed, the client must pay as soon as the processor has completed the work and given the client a reasonable opportunity of seeing that the work has been properly done, *Hughes v. Lenny* (1839) 5 M & W 183, 151 ER 79, as quoted in *Chitty* on Contracts I[29], no. 22-053; see also *Collins*, The Law of Contract[3], p. 342. If the work is delivered in parts and no time for payment has been fixed, the processor may sometimes be entitled to claim payment for the parts of the work already completed, *Roberts v. Havelock* (1832) 3 B & Ad 404, 110 ER 145, as quoted in *Chitty* on Contracts I[29], no. 22-053. However, in the interest of protection of the client (especially if a consumer), sometimes an 'entire obligation' is imposed upon the processor, i.e. an obligation which must be substantially performed before any payment falls due, cf. *Bolton v. Mahadeva* [1972] 1 WLR 1009.

4. The FINNISH Consumer Protection Act chap. 8 § 25 provides that if no time has been agreed for the payment of the service price, the processor is entitled to payment when the service is delivered, i.e. when the thing or the control thereover is returned to the consumer, and the consumer has had a reasonable period of time to examine the performance of the service.

5. Payment is normally due under FRENCH law when the service is completed, cf. *Huet*, Contrats spéciaux[2], no. 32335.

6. Unless agreed otherwise, payment is due under GERMAN law when the item is returned to the client (CC § 641(1)), cf. *Schlechtriem*, Schuldrecht, Besonderer Teil[5], no. 367.

7. In THE NETHERLANDS, unless agreed otherwise, payment is due when the service is completed in accordance with the contract and the item is returned to the client. Cf. Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], no. 607.

8. In POLAND, if the parties did not agree otherwise, the remuneration is due at the moment of completion of the service (art. 642(1)). If the work is delivered in parts and the remuneration was calculated for each part separately, remuneration is due at the completion of each part of the performances (art. 642(2)).

9. In SCOTTISH law, although there appears to be no general rule about the time when payment is due, the processor may retain possession of the goods worked upon until paid for the contract work (the repairer's lien). The client must not have been disentitled from creating the lien. See *McBryde*, Law of Contract in Scotland, paras. 20.74-20.85.

10. In SPAIN the price should be paid when the thing is transferred to the client, if the parties do not agree otherwise (CC art. 1599). If the result does not conform totally to the contract and there are defects to be corrected, the client may demand repairs, but there is no specific provision in Spanish law that would entitle the client to withhold a part of the price until the work is completed. The only provisions on withholding performance are those for the sale contract in the CC arts. 1466 and 1467 (allowing the seller not to perform if the other party has not paid).

11. Under consumer service contracts in SWEDEN, unless agreed otherwise, the consumer must pay upon request after the processor has completed the service, Consumer Services Act § 41(1). If the consumer in due time has requested a receipt, payment is not due until the receipt is provided, Consumer Services Act § 41(2). The same principles will mainly be applicable to non-consumer service contracts, *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 102.

IV.C.–4:107: Risks

(1) This Article applies if the thing is destroyed or damaged due to an event which the processor could not have avoided or overcome and the processor cannot be held accountable for the destruction or damage.

(2) If, prior to the event mentioned in paragraph (1), the processor had indicated that the processor regarded the service as sufficiently completed and that the processor wished to return the thing or the control of it to the client:

(a) the processor is not required to perform again; and
(b)the client must pay the price.

The price is due when the processor returns the remains of the thing, if any, or the client indicates that the client does not want the remains. In the latter case, the processor may dispose of the remains at the client's expense. This provision does not apply if the client was entitled to refuse the return of the thing under paragraph (1) of IV.C.–4:105 (Return of the thing processed).

(3) If the parties had agreed that the processor would be paid for each period which has elapsed, the client is obliged to pay the price for each period which has elapsed before the event mentioned in paragraph (1) occurred.

(4) If, after the event mentioned in paragraph (1), performance of the obligations under the contract is still possible for the processor:

(a) the processor still has to perform or, as the case may be, perform again;
(b) the client is only obliged to pay for the processor's performance under (a); the processor's entitlement to a price under paragraph (3) is not affected by this provision;
(c) the client is obliged to compensate the processor for the costs the processor has to incur in order to acquire materials replacing the materials supplied by the client, unless the client on being so requested by the processor supplies these materials; and
(d) if need be, the time for performance is extended in accordance with paragraph (6) of IV.C.–2:109 (Unilateral variation of the service contract).

This paragraph is without prejudice to the client's right to terminate the contractual relationship under IV.C.–2:111 (Client's right to terminate).

(5) If, in the situation mentioned in paragraph (1), performance of the obligations under the contract is no longer possible for the processor:

(a) the client does not have to pay for the service rendered; the processor's entitlement to a price under paragraph (3) is not affected by this provision; and
(b) the processor is obliged to return to the client the thing and the materials supplied by the client or what remains of them, unless the client indicates that the client does not want the remains. In the latter case, the processor may dispose of the remains at the client's expense.

COMMENTS

A. General idea

Sometimes the thing handed over to be worked on is damaged or destroyed without any fault or other cause attributable to either the client or the processor. In this case, the damage to or destruction of the thing is to be borne by the client. It is, however, unclear whether the client still has to pay for the service.

In this Article, a distinction is made between the situation where the processor had already informed the client that service was completed and the situation where that had not yet been done. In the former situation, the client bears the consequences of the unfortunate event, and must still pay the price for the service rendered, even though the benefits can no longer be enjoyed.

> *Illustration 1*
> A DVD player is being repaired. When the job is completed, the processor informs the client by phone. Before the DVD player is collected, the processor's workshop is struck by lightning; in the subsequent fire, the DVD player is damaged. The processor is not required to try to repair the DVD player again. The client, however, is required to pay the price for the service rendered.

In the latter situation, a further distinction is to be made, viz. whether performance of the service is still possible or not. If performance is still possible, the processor must still perform; if the service had already been completed but the client had not yet been so informed the processor has to perform again. The processor will be paid only for this performance. Extra costs resulting from performance after the unfortunate event must be compensated for by the client, and if the processor needs extra time to be able to perform the service, an extension of the time originally agreed upon for the performance is to be allowed.

> *Illustration 2*
> A DVD player is repaired by a processor. Before the processor has had time to inform the client, a fire breaks out. Because of water damage, the DVD player no longer works, but the processor can repair the machine. The processor is required to do so, and only receives payment for the second repair.

If performance is no longer possible, the processor is not entitled to payment, and must return the thing or what remains of it to the client if the client gives notice of a wish to receive the thing or what remains of it.

> *Illustration 3*
> The DVD player is damaged so severely by the fire that repair is no longer possible. In this case, the processor is to return the remains of the DVD player to the client if the client so wishes, but does not have the right to payment.

A specific situation exists in the case of a long-term processing contract. In such a contract, the parties will often have agreed upon payment per period. The client is still required to pay for the periods that have ended, even if future performance is no longer possible.

> *Illustration 4*
> A company renders daily cleaning services. When the building where the service is performed has collapsed as a result of an earthquake, further performance is no longer possible. The cleaning services that have been rendered before the building's collapse are still to be paid for by the client.

B. Interests at stake and policy considerations

Nowadays, the topic of risk is of only limited practical interest. The causes for non-performance will mostly be attributed to one or the other party. Residual risk will be limited.

Damage caused by natural disasters like landslides or flooding, for instance, will occur less frequently, because processors will have taken precautionary measures – failure to do so when such measures should have been taken implies non-performance by the processor – and public authorities will have taken preventive measures as well. Yet, where such damage does occur and no duty of care or other obligation on the processor was breached, the question needs to be answered who should bear the consequences of the unfortunate destruction or deterioration of either the thing that was worked on or the materials supplied by the client. In this respect, the question also arises whether the processor may still claim performance of the client's obligation to pay the price when the thing has been destroyed or damaged due to an accident for which the processor cannot be held liable.

C. Preferred option

If such an unfortunate event occurs before the processor has indicated to the client that the service has been completed and that the thing is ready to be returned to the client, the consequences of the occurrence of the unfortunate event are dealt with by III.–3:104 (Excuse due to an impediment). If the non-performance is not excusable under that Article, the processor has to perform again if that is still possible. The processor is then considered not to have performed yet: so the rules on non-performance apply. If the non-performance is excusable, however, the client will not have the right to specific performance or damages, and termination of the contractual relationship may be the result. The client will also have to pay the price. According to subparagraph (4)(d) of the current Article, the time needed for performance will have to be extended, since the processor, due to the unfortunate event, can no longer perform in time. The idea is that the time for performance will be extended proportionally. The situation is different when performance has become impossible. Then, termination may be the optimal solution.

After completion of the service, the situation changes, provided that the processor has notified the client that the service has been completed and that the thing is ready to be returned to the client. In the case of external harm to the thing, the processor is still liable for non-performance of the processor's obligations; see paragraph (1). The processor is not liable, however, if the damage cannot be traced back to non-performance of one of the processor's obligations. In other words, in accordance with case law and legal doctrine throughout Europe, the risk of unfortunate destruction or deterioration of the thing or the material supplied by the client is on the client. The same applies if the client had notified the processor that the client wished the thing to be returned, but had not yet collected it. The reason for this is that the only reason why the processor still had the thing is that the client had not yet collected it. In both cases, it is deemed to be fair that the client bears the consequences of failure to collect the thing.

The subject of the present Article is the same as that of the articles on risk in the Chapters on construction and storage. However, unlike the situation under a construction contract, but as in the situation under a storage contract, the client is the owner of the thing and of the materials supplied by the client. So the situation where the risk is completely on the processor does not occur in processing contracts. Moreover, as to the transfer of the risk a slightly different moment is chosen: whereas the moment of the transfer of control is normally decisive in a construction contract, in the present Chapter the decisive moment is when the processor notifies the client that the processor regards the service as sufficiently completed and wishes to return the thing or the control of it to the client. The reason for this is that, as from that moment, it is up to the client as owner to prevent the accidental destruction or damage by simply performing the obligation to accept the return of the thing. The outcome is

different only if the client was entitled to refuse the return of the thing under IV.C.–4:105 (Return of the thing processed) paragraph (1).

Paragraph (3) deals with the situation in which the parties have agreed upon payment per period that has elapsed. Such payments will normally be agreed upon in the case of processing contracts concluded for an indefinite period of time, *e. g.* maintenance contracts, but may also be agreed upon in other contracts that need a considerable period of time before completion. The paragraph provides that a price which has become due remains due, irrespective of whether performance is still possible (paragraph (4)) or not (paragraph (5)).

Paragraph (4) sets out than when performance is still possible, the processor is required to perform – or perform again. The processor is entitled to payment only for the new performance. However, the final sentence of the paragraph makes clear that if further performance has become of no use to the client, the client may terminate the contractual relationship. In that case, the consequences as to the price will be dealt with under IV.C.–2:111 (Client's right to terminate). Clearly, this provision does not apply if, prior to the unfortunate event, the processor had notified the client that the processor regarded the service as sufficiently completed and wished to return the thing to the client. As paragraph (2) states, in this particular case the processor does not have to perform again, but the client still must pay the price for the service rendered. Paragraph (5), finally, provides that if performance is not or no longer possible, the processor is not required to complete performance and the client does not have to pay the price for the service that did not lead to a positive outcome. Paragraphs (4) and (5) therefore impose the so-called *Preisgefahr*, i.e. who has to suffer the financial consequences in the case of an unfortunate event, on the processor. The processor, however, may – by demanding payment per period – burden the client with that risk.

It will be for the processor to prove the unfortunate nature of the event which has caused the destruction or deterioration of the thing or the materials supplied by the client in order to escape liability. The processor will further have to prove entitlement to the price or a part of it.

The parties may, of course, modify the rules in this Article.

NOTES

I. Overview

1. In processing contracts, following the general principle that the owner bears the risk of damage or destruction (*res perit domino*), the risk of accidental destruction or deterioration of the thing being processed is generally on the client, as the owner. The processor is normally only then liable if at fault; yet will have to prove the fortuitous nature of the destruction or deterioration of the thing, since the processor is often under an obligation of result or an obligation of means with a reversal of the burden of proof (AUSTRIA, CC § 1168a; FINLAND, ConsProtA chap. 8 § 12(4); FRANCE, art. 1789 CC; GERMANY, CC § 644(1); GREECE, CC art. 698; ITALY, CC art. 1673; The NETHERLANDS, Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], nos. 516-517 and CC (old) art. 7A:1642; POLAND, CC art. 641 para. 1; PORTUGAL, CC art. 1228 para. 1 and STJ 24 October 1995, BolMinJus, 450, 469;

SWEDEN, Consumer Services Act art. 32 and 39 and *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 100). As to the consequences of the fortuitous deterioration or destruction of the thing for the client's main obligation, art. 7:757 para. 2 of the DUTCH CC explicitly provides that the client need not pay the price if and in so far as the thing was under the control of the processor.

II. General system of risk

2. Under the AUSTRIAN CC § 1168a, the risk of fortuitous destruction of the thing is on the client. Cf. *Koziol and Welser*, Bürgerliches Recht II[12], p. 250.

3. In FINLAND the risk of fortuitous destruction or deterioration of the thing rests on the client, as owner. However, under the Consumer Protection Act Chapter 8, s. 12 para. 4, the processor must prove that the service was performed with reasonable care and skill, i.e. must prove the absence of negligence.

4. In FRANCE, the principle *res perit domino* applies, which implies that the fortuitous destruction or deterioration of the thing burdens the client. The CC art. 1789 provides that the processor is liable only in case of fault but must prove the fortuitous nature of the event (reversal of the burden of proof), cf. *Malaurie/Aynès/Gautier*, Contrats spéciaux VIII[14], no. 781.

5. As the thing was provided by the client, the processor is not liable under GERMAN law for destruction or deterioration of the materials by fortuitous events. Cf. CC § 644(1). According to the Bundesgerichtshof, an event is only fortuitous if its impact cannot even with the utmost diligence be averted (BGH NJW 1997, 3018; BGH NJW 1998, 456).

6. The position is similar under the GREEK CC art. 698.

7. It follows from the ITALIAN CC art. 1673 that, since the client supplied the thing, the client will have to bear the risk; the same follows from the general principle in CC art. 1465: *res perit domino*. Cf. Cass., 1 February 1950, n. 271, CC, 1950, II, p. 37, with comment of *D. Rubino*, Il perimento fortuito dell´opera, prima dell´accettazione nel contratto d´opera.

8. Under the DUTCH CC (old) art. 7A:1642, it was stated explicitly that if the client is required to provide the thing, the processor is only liable for the destruction or deterioration of the thing in case of negligence; the rule was thought to be an application of the principle *res perit domino*, cf. Asser [-*Kortmann*], Bijzondere Overeenkomsten III[7], nos. 516-517. The new CC does not contain a provision to this extent any more, but there is no reason to assume that the law has changed in this respect. CC art. 7:757 only deals with the consequences as to the processor's right to payment; para. 2 provides that the client is not required to (also) pay the price if and in so far as the thing was under the control of the processor.

9. In POLAND the risk of accidental loss or damage to the material for the performance of the work lies on the person who supplied the material (CC art. 641(1)).

10. The general rule in PORTUGAL when an unexpected event or 'act of god' occurs is *res suo domino perit* (CC art. 1228(1); STJ 24 October 1995, BolMinJus, 450, 469).

11. The general rule in SCOTTISH law is *res perit domino*, but the processor may have the onus of proving that work was done before the risk materialised (*McBryde*, Law of Contract in Scotland, para. 9.50-9.51).

12. The SPANISH CC art. 1589 provides that the supplier of the service has to bear the consequences of a fortuitous event before the delivery of the thing if the work is damaged or destroyed and the processor provided the materials, except for the case when the client is in *mora accipiendi* (TS 3 May 1993, RAJ 1993/3400). Moreover,

the processor not only is not entitled to claim the price, but also remains obliged to execute the work (*Alberto Bercovitz*, Contratos mercantiles; p. 689 and TS 15 June 1994, RAJ 1994/4925). However, if the work cannot be finished due to the lack of materials or any other specific circumstances, the obligation is extinguished because of the impossibility of performance and the client has to pay the value of the work that has not been destroyed and the value of the materials if they are useful for the client (CC art. 1595 II). The processor has a right to remuneration only in cases of *mora accipiendi* and bad quality of the materials provided by the client, if the processor has warned the client of that circumstance (*Bercovitz*, Comentarios al Código Civil, 1590 CC). Nevertheless, the rule on the risk in case of a fortuitous event is a dispositive rule and the parties may agree otherwise in the terms of the contract (*Alberto Bercovitz*, Contratos mercantiles; p.688). In case of a partial performance and when the obligation is divisible, the processor should be paid for the part of the work that remains and may be useful for the client (*Alberto Bercovitz*, Contratos mercantiles; p. 690). The parties may establish that the work is to be done by parts. In that case, the processor has a right to be paid proportionally every time a part of the work is delivered (CC art. 1592). Therefore, the processor is entitled to remuneration for the work done before the fortuitous event has happened.

13. SWEDISH law takes the view that there are two aspects of risk in this case. Firstly, there is the question what happens if the result of the service is lost, that is if the work already done has to be performed again, or if material provided in order to perform the service is destroyed. Accordingly, Consumer Services Act § 39 states that the consumer is not obliged to pay for work that the professional has performed or material supplied, if the work or material fortuitously deteriorates before delivery. Here, the risk is on the processor, until the service has been finished, Consumer Services Act §§ 12 and 39. If the service is on an object which has been handed over to the processor seller, or for another reason is in the processor's possession, the service is not regarded as finished until the object has come into the consumer's possession. For instance, if the seller is to provide a new roof to the consumer's house and during a storm the half-finished roof gets blown away, the consumer does not have to pay the costs for the extra work and extra material required, since the damage occurred while the risk was on the processor, *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 103. In contrast, if the consumer has supplied the material, the consumer must also bear the risk, see *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 103. Secondly, there is the question who is to bear the risk if the object on which the service is performed is damaged. As a general rule, since the thing is owned by the client, the client has to bear the risk, cf. *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 103. However, concerning existing goods belonging to the consumer which deteriorated while in the possession of the processor or otherwise under the control of the latter, it is presumed that the processor is liable, Consumer Services Act § 32. The professional can only escape liability by demonstrating that the damage was not caused by negligence.

IV.C.–4:108: Limitation of liability

In a contract between two businesses, a term restricting the processor's liability for non-performance to the value of the thing, had the service been performed correctly, is presumed to be fair for the purposes of II.–9:405 (Meaning of "unfair" in contracts between businesses) except to the extent that it restricts liability for damage caused intentionally or by way of grossly negligent behaviour on the part of the processor or any person for whose actions the processor is responsible.

COMMENTS

A. General idea

The present Article creates a relatively safe haven for a specific type of limitation clause in processing contracts. If in a contract between two businesses the processor's liability is limited to the value of the thing before the service is performed, that clause is presumed to be fair for the purposes of the rules on unfair contract terms (II.–9:405 (Meaning of unfair in contracts between businesses)). Only to the extent that the clause restricts liability for damage caused intentionally or by grossly negligent behaviour – i.e. such reckless behaviour that it is tantamount to intentional infliction of damage – does the presumption not hold true.

> *Illustration 1*
> A mechanic repairs the tyre of a car, owned by a lease company. The mechanic forgets to bolt the wheel on the car properly. As a result, the wheel comes off at a bend and the car hits a tree. The driver is not hurt, but the car is a complete write-off. Furthermore, the lease company is held liable by the municipality which owns the tree. The lease company claims damages, but is confronted with a standard term limiting damages to the amount of the value of the car at the time the car was repaired.

Under the present Article, as both the garage owner and the lease company act in the course of their business, the limitation clause is presumed to be fair. Had the client been a private individual, or had the garage owner acted intentionally or had the damage been caused by way of grossly negligent behaviour of the mechanic, the presumption would not have applied, and the limitation clause would have to be tested against II.–9:405 (Meaning of unfair in contracts between businesses).

B. Interests at stake and policy considerations

The main question is whether this Chapter should contain a specification of the general provisions on unfair contract terms, indicating that certain clauses are deemed or presumed to be fair in a processing contract. A further question would be whether such a clause should also be upheld in a relation to damage caused intentionally or by grossly negligent conduct. It could be argued that such specification would be helpful. On the other hand, it could be said that it would take away the flexibility of the general rules. Moreover, one could argue that a rule for processing contracts is more acceptable in commercial contracts than in consumer cases.

C. Preferred option

The legal systems at present are divided as to the acceptability of limitation clauses. In this Chapter, an intermediate solution is found by the introduction of so-called safe havens for

commercial processing contracts. In such contracts, a clause restricting the processor's liability for non-performance to the value of the thing had the service been performed correctly, is *presumed* to be fair. The presumption, however, does not apply in relation to damage caused intentionally or by grossly negligent conduct. In this respect, it is remarked that even though it can be argued that a clause excluding or limiting liability may sometimes be fair and needed, it cannot be argued convincingly that a clause limiting or excluding liability even in those cases should *always* or even *normally* be considered to be fair. Therefore, clauses excluding liability for damage caused intentionally or by way of grossly negligent conduct need to be excluded from the present Article.

The client may prove that, despite the presumption in this Article, in the particular case the clause cannot be considered fair. This will be difficult, as the Article aims at providing practice with hard and fast rules for one of the most important types of exclusion or limitation clauses in processing contracts. That goal cannot be achieved if proof of the opposite is easily accepted.

The presumption applies only in *commercial* cases. In consumer cases, the damage inflicted by non-performance on the part of the processor is normally fairly limited. Usually, both the extent of the damage and the risk of its occurrence are not so extreme that that this cannot be borne by the processor. There is, therefore, insufficient reason to introduce a safe haven for consumer cases. This does not mean that a clause limiting liability in a consumer case cannot be accepted; whether the clause is valid is to be determined in accordance with the general rules on unfair contract terms as they apply to consumer contracts.

The present Article is also related to III.–3:105 (Term excluding or restricting remedies). According to that provision it may be contrary to good faith and fair dealing to invoke a contractual exclusion or restriction of a remedy. In so far as a clause is valid under the present Article, its application may be blocked by III.–3:105 if, under the specific circumstances of the case, it would be contrary to good faith and fair dealing to invoke it.

The present Article is similar to equivalent articles in the chapters on storage and design.

NOTES

I. Overview

1. Limitation of liability to the amount of the fee received by the processor is in principle allowed, subject to the general rules on unfair contract terms, in ENGLAND and SCOTLAND (cf. Unfair Contract Terms Act 1977 ss. 2, 16 and 17), ITALY (CC art. 1469-bis) and THE NETHERLANDS (CC art. 6:237 under f). The same holds true for GERMANY; however, such a clause, used in standard contract terms, is there considered invalid under general rules on unfair contract terms when the fee would not reach the amount of the damage by far (CC §§ 138, 307(2) no. 2); exclusion or limitation of liability for hidden defects is not allowed in GERMANY (CC § 639) and The Netherlands (CC art. 7:762) if these defects were known to the processor and not disclosed to the client. In SWEDEN, such clauses are normally not considered unreasonable, as long as the client has access to other remedies. In ENGLAND, if damage occurs to the thing while it is in the hands of the processor, the processor may

invoke an exemption or limitation clause only if the processor proves the circumstances in which the damage occurred, cf. *Levison v. Patent Steam Carpet Cleaning Co. Ltd.* [1978] QB 69. In FINLAND, a clause limiting the processor's liability is not allowed if the client is a consumer (ConsProtA chap. 8 § 2). Finally, in PORTUGAL, legal doctrine is divided as to the validity of limitation clauses (cf. *Varela*, Das Obrigações em geral II[6], p. 134). in FRANCE these clauses are in principle valid and general contract law applies.

II. Limitation of the processor's liability to the processor's fee or to a fixed amount

2. In ENGLISH and SCOTTISH law the general rules in the Unfair Contract Terms Act 1977 apply. See *Levison v. Patent Steam Carpet Cleaning Co. Ltd.* [1978] QB 69. A clause limiting damages to the value of the processed good was held to be unreasonable and therefore ineffective in a consumer case where the processing of a roll of film containing wedding photographs led to the loss of most of the photographs, cf. *Woodman v Photo Trade Processing* (1981) 131 NLJ 933. Under the Scottish part of UCTA 1977, the onus rests on the party wishing to rely on the clause to establish its fairness and reasonableness (s.24(4)).

3. Limitation of the processor's liability is not allowed under FINNISH law if the client is a consumer, cf. ConsProtA chap. 8 § 2.

4. A clause limiting damages to a maximum corresponding to the amount of fees the processor received under the contract, is in principle valid under FRENCH law. However, full compensation of the damage can be sought in case of intentional or grossly negligent non-performance (CC art. 1150). Moreover, regarding an essential obligation of the contract, such limitation of liability seems to be an invalid term, because it allows the professional to choose either to perform or not. This had in the past led to invalidation on the ground of lack of consideration *(cause)*, Cass.com., 22 October 1996, D. 1997, 121 note *Sériaux* (*Chronopost* case).

5. In GERMANY limitation of the processor's liability in standard contracts to the fee for the work is prohibited if the fee would not reach the amount of the damage by far (CC §§ 138, 307(2) no. 2). CC § 639 adds that a limitation or exclusion of liability for hidden defects is not allowed if these defects were known to the processor and not disclosed to the client, nor if the processor had given a guarantee for the conformity of the work.

6. In GREECE the parties may exclude liability for negligence, though any agreement that limits or excludes liability for intention or gross negligence is null (CC art. 332). Thus, limitation is envisaged only with regard to the degree of fault and not with reference to the fees or otherwise. Nevertheless, freedom of contract prevails and the parties may limit the ceiling of liability accordingly.

7. Parties may, under ITALIAN law, modify the system of the legal guarantee for defects of the work; cf. *Januzzi*, L´appalto Rassegna di giurisprudenza commentata I, p. 362. However, parties cannot derogate from the principle established in CC art. 1229: any agreement which excludes or limits liability of the debtor in case of fraud or grave fault is null. Furthermore, under CC art. 1469-bis, clauses limiting or restricting the processor's liability or the consequences of the non-performance are presumed to be unfair.

8. In THE NETHERLANDS a limitation to the amount of the fee or a fixed amount is in principle allowed, with the usual limitations: no limitation for gross negligence by the processor or managing staff under DUTCH law (HR 20 February 1976, NedJur 1976, 486, *Pseudovogelpest*); presumption of unfairness if the client is a consumer and the

limitation is included in standard contract terms, CC art. 6:237 sub f). CC art. 7:762 adds that a limitation or exclusion of liability for hidden defects is not allowed if these defects were known to the processor or to the person(s) in charge of the management of the actual performance if these defects were not disclosed to the client.

9. In principle limitation of liability is allowed in POLAND, with the exception of exclusion of a liability for damage caused intentionally (CC art. 473 para. 2). If the liability is limited to a fixed amount, one may consider if the parties did not agree on a contractual penalty (CC arts. 483 and 484). A limitation in a consumer contract is deemed to be unfair if it excludes or limits essentially liability of the service provider for non-performance or improper performance of the obligations under the contract (CC art. 385^3 para. 2).

10. Liability limitations are certainly void in PORTUGAL in case of *dolus* or gross negligence, according to CC art. 809. Doctrine is divided on the issue of limitation in case of negligence (limitation allowed: *Pinto Monteiro*; limitation void even in case of minor negligence: *Varela*, Das Obrigações em geral II^6, p. 134; l). The same goes in the case of standard contracts: Article 18 sub d) DL no. 446/85. Case law is divided. Limitation of liability is usually not upheld regardless of the degree of fault.

11. Nowadays in SWEDEN most standard agreements do not rule out the right to damages altogether, but limit the amount of damages in relation to the contract price. For example IML 2000 limits the liability to 50 per cent of the price, NL 01 and AB 04 respectively to 15 per cent, except for damage due to gross negligence. Normally such limitation clauses are not considered unreasonable, as long as the client has access to other remedies. Whether the limitation to a fixed amount is allowed, will depend upon the relationship between the amount compared to the contractual work as a whole.

12. In SPAIN the parties may establish clauses of limitation of liability. Nevertheless, liability derived from fraudulent conduct may not be limited, according to the CC art. 1102. Therefore any clause which purports to exempt the debtor form liability in case of a fraud is invalid, whether the parties are private persons or businesses. In the case of negligence, the CC art. 1103 does not provide explicitly for the invalidity of exemption clauses. Therefore, *a contrario*, they are valid (*Serra Rodriguez*, Las claúsulas abusivas en la contratación, p.105). Nevertheless, the Supreme Court assimilates gross negligence to fraud (TS 2 July 1875, Jur Civ 271) and states that clauses of limitation of liability can neither relieve the debtor from liability nor limit the debtor's liability for gross negligence or fraud (TS 2 July 1992, RJ 1992/6502). This opinion is followed also by the writers on commercial law (*Garrigues*, Curso de Derecho Mercantil II, p.233 and *de la Cuesta Rute*, Contratos Mercantiles II, p.445), as the invalidity of clauses exonerating the debtor from liability in case of a fraud or gross negligence in the commercial law may be inferred by analogy from the Ccom art. 620 and from art. 3.4 of the Ground Carriage Regulation (in a transport contract, there can be no limitation of liability in the case of a fraud).

CHAPTER 5: STORAGE

IV.C.–5:101: Scope

(1) This Chapter applies to contracts under which one party, the storer, undertakes to store a movable or incorporeal thing for another party, the client.

(2) This Chapter does not apply to the storage of:

(a) immovable structures;

(b) movable or incorporeal things during transportation; and

(c) money or securities (except in the circumstances mentioned in paragraph (7) of IV.C.–5:110 (Liability of the hotel-keeper)) or rights.

COMMENTS

A. General idea

A contract for storage is defined in Annex 1 as "a contract under which one party, the storer, undertakes to store a movable or incorporeal thing for another party, the client". This, in definition form, is the same in substance as the scope provision in paragraph (1) of the present Article. Three exclusions from the scope of the Chapter are listed in paragraph (2).

Storage takes place when a person (the client) places things elsewhere and leaves them in the care of somebody else (the storer) to be kept or stored, generally with a view to later use or disposal. Storage is characterised by the fact that the client hands over things to the storer, with the mutual intention of the parties to ultimately have the things returned to the client.

Illustration 1
A client hands over 1,500 oranges to be stored at a warehouse.

This is the 'classical' example of storage. Of course it falls within the scope of this Chapter.

In a storage contract the storer only needs to make sure the thing can ultimately be returned to the client in the same condition as it was in when it was handed over to the storer, or in such a condition as the client could reasonably expect the thing to be in when returned. When the storer does not properly store the thing, the client runs the risk that the thing is damaged during storage.

This Article describes the scope of application of the Chapter. It mainly applies to the storage of *movable* things. However, as it is possible to store other things, such as information on a computer server, the scope of application of the Chapter is not limited to purely physical things, as is clarified by the reference to incorporeal things in paragraph (1). Where, apart from storage, another service is rendered, the provisions in Book II on mixed contracts (II.–1:107 (Mixed contracts)) ensure that the rules of the present Chapter apply to the part of the contract that involves storage, but these rules may be modified so as not to conflict with the rules governing the other service.

Illustration 2
An Internet service provider (ISP) offers its clients access to the Internet, e-mail facilities and the possibility of storing files on its server.

The present Chapter applies to the storage of files on the ISP's server, but the rules of the present Chapter may be adapted to accommodate the fact that other services are offered too.

B. Interests at stake and policy considerations

The main policy issue is whether a contract of storage can be concluded consensually or only by the actual handing over of the thing. The latter approach is in accordance with the Roman-law background of the storage contract and relates to the second main issue to be dealt with: traditionally, storage was a gratuitous contract. As the storer was not to receive any benefit from the contract, a strict rule on constitution was justified. Before the storer came under a legal obligation, there had to be not only a promise to care for the thing but also actual acceptance of it being handed over. However, such a formal way of concluding storage contracts is somewhat problematic in a commercial setting, where the client has an interest in being able to demand that the thing be taken into the storer's custody. As a consequence, it seems better to accept a more flexible way of concluding storage contracts, at least if the traditional concept of storage as a gratuitous contract is abandoned.

Another traditionally important issue to be decided is whether this Chapter should apply to gratuitous storage, to storage for a price or to both and whether, if the latter option is chosen, specific rules are needed to accommodate the fact that both gratuitous and remunerated contracts are governed by the storage rules, e. g. more stringent rules if the contract is for a price, or more lenient rules if the contract is to be performed by the storer for nothing.

A third issue is whether the rules on storage should apply to all things or only to some. For the storage of particular types of things, notably money, securities and rights, legislatures have developed specific rules. Should the present Chapter govern the storage of these types of things or should the existing specific rules be upheld? Similarly, international treaties deal with things being stored in the course of the performance of a transportation contract. Does this mean that storage in combination with transportation should be left outside the scope of the present Chapter? Finally, there is the question whether so-called surveillance contracts – in which immovable property is guarded or otherwise taken into the care of a professional service provider – should be governed by these rules or, alternatively, be subject only to Chapter 1 (General Provisions).

A difficult question is whether the Chapter should apply to contracts by which a client parks a car in a privately owned car park. Is the client storing the car or simply renting a space?

Another question is whether the Chapter should apply to contracts by which a client hands over things to be stored in a safety deposit box. An argument against qualification as a storage contract would be that the service provider does not know what is being taken into custody. Therefore, the service provider cannot take specific precautionary measures to prevent damage to the thing. General precautionary measures, such as to prevent theft and fire, can be taken. The service provider can guarantee that the safety deposit box will be returned in the state in which it was received it and that nobody has opened it in the meantime. However, that

does not necessarily qualify the contract as a storage contract: a landlord, or lessor may also be under an obligation to take such measures.

C. Preferred option

The requirement of the actual handing over of the thing is no longer needed and is not in line with the developments in the newer civil codes nor with the needs of commercial practice. The present Chapter therefore accepts consensus as the method of conclusion of the contract.

As is the general approach to gratuitous services, this Chapter applies not only to commercial and remunerated contracts, but also – albeit with appropriate modifications – to gratuitous storage contracts. In practice, this means that the gratuitous nature of the service may be taken into account when determining whether or not the storer is liable, as the fact that storage is provided free of charge may influence the extent of care that may be expected from the storer, and the reasonable expectations of the client as to the condition in which the thing will be returned.

> *Illustration 3*
> The owner of a yacht has it stored during winter. In spring, he finds out that the yacht is stolen. If the service is performed gratuitously, the storer's obligation to exercise due care does not include the obligation to have the place of storage guarded, whereas such an obligation may exist if storage was not gratuitous.

Storage during actual transportation is usually provided for in treaties and special laws on transportation contracts. Specific legislation also exists for the storage of money, securities and rights. Such storage is excluded from the scope of application of the present Chapter in order to prevent interference with these treaties and specific legislation, which are adapted to the needs of these atypical kinds of storage. However, an exception is made if money or securities are handed over for storage in a hotel safe.

This Chapter also does not apply to the storage of immovable things as this type of storage is of a different nature, e. g. the thing is not stored at the storer's place of business, but remains on site. As the rules in this Chapter are not aimed at taking the specificities of such contracts into account and storage of immovable property is not recognized in Belgium, Germany, Poland and Spain, the scope of this Chapter does not cover the 'storage' of immovable property. The rules on service contracts in general will apply to such contracts. Of course, the exclusion of the applicability of the present Chapter to such contracts does not stand in the way of analogous application.

As to the applicability of the present Chapter to the 'storage' of cars parked in a car park, a dividing line may be drawn where the car park is, in some manner, guarded. When such is the case, the contract is to be considered a storage contract, as the operator of the car park is in a position to prevent damage to the car and to take precautionary measures.

> *Illustration 4*
> A client parks his car in a multi-storey car park, which is secured at both the exit and the entrance with a barrier; the exit barrier only opens when the client produces the ticket he received at the entrance and has paid the price for the use of the car park. The contract concluded by the parties is a storage contract.

Illustration 5
A client parks his car in a privately owned car park. The price for the use of the car park is to be paid when entering the car park. As is clear before the client enters the car park, there is no check whatsoever whether the person leaving with a car is the same as the person who entered with the car. The contract concluded by the parties is not a storage contract.

The present Chapter applies when a client hands over things to be stored in a safety deposit box. It does not matter that the storer cannot take specific precautionary measures to prevent damage to the thing as its nature is not known: general precautionary measures, for instance to prevent theft and fire can be taken. Moreover, in the case of the storage of sealed things, the storer does not know what the container stored contains either; nevertheless, such a contract is generally seen as a contract for storage. That being the case, there is no convincing reason why the contract to make use of a safety deposit box should not be considered storage. The fact that the storer does not know what is being kept of course influences what the client may expect under the contract and, therefore, influences the extent of the storer's obligations under this Chapter.

Illustration 6
A client has a sixteenth-century painting stored in a large safety deposit box. As the storer does not know that he is storing such a painting, he cannot be required to use specific installations rendering a stable temperature and humidity level. However, the storer can be expected to prevent theft from the safe by, e. g., providing a closed-camera circuit.

The Chapter contains special rules for hotel-keepers, to acknowledge the fact that the 1962 Convention on the Liability of Hotel-Keepers concerning the Property of their Guests and national legislatures implementing the Convention regulate the matter specifically.

The Chapter may apply even where the storage contract constitutes only a minor part of the whole relationship between the parties.

Illustration 7
A client hands over his coat at the guarded cloakroom of a theatre.

If the safekeeping of the coat is seen as a separate contract the rules of this Chapter apply. Even if the theatre's obligation as to the storage of the coat could be seen as a mere additional obligation under the contract entitling the client to attend a play at the theatre, the rules of this Chapter apply to some extent to the storage of the coat. See below on mixed contracts.

The Chapter applies to the storage of animals, but it is clear that such contracts will usually entail more obligations for the storer than is normally the case in a storage contract. Some such contracts may be a mixture of storage and maintenance or processing.

Storage for commercial purposes is often combined with other activities, for instance stock administration, combining things into parcels destined to go to one client, packaging things and the like. And the performance of another service, e. g. processing, may involve storage. The question arises whether the rules on storage should also apply when these other services

are the primary object of the contract, i.e. when storage of the thing may be seen as merely a prerequisite to the fulfilment of the main obligation under the contract (for instance, an obligation to process or transport the thing). The preferred option in many countries (Austria, Belgium, England, France, Germany, the Netherlands and Spain, and probably also in Italy and Portugal) is to apply the storage rules to the storage part of the contract with appropriate modifications. This is also the solution adopted under the rules on mixed contracts in II.–1:107. However, in any case where the storage element is manifestly only an incidental element of a contract which is primarily of another kind, the storage rules will apply only so far as necessary to regulate the storage element and only so far as they do not conflict with the rules applicable to the dominant part of the contract. Mandatory rules applicable to the dominant part will apply. See II.–1:107 (Mixed contracts) paragraph (2).

Illustration 8
A computer repairer is to repair the software on a computer and needs to save the computer files on the hard disk temporarily on a durable medium.

This Chapter applies with appropriate modifications to the storage of the computer files. This implies that the durable medium used must be fit to return the files in the same condition as they were in when they were moved from the computer.

NOTES

I. Overview

1. The storage contract is known in all legal systems. In most of them, the contract is regulated in the Civil and Commercial Codes; in ENGLAND, storage is, like many other services, covered by the rules on bailment. In SCOTLAND the common law of deposit, based on the Roman *depositum*, applies, but has developed with assistance from rules on *locatio conductiae* and *locatio operis faciendi* to meet modern commercial conditions.

2. In ROMAN law, the storage contract was a so-called *real contract*, meaning that the contract was concluded not by mere consensus between the parties, but by the actual handing over of the thing that was to be stored. In the codifications of the 19th and early 20th century, this remained the case. At present, the storage contract is still a *real contract* in AUSTRIA (CC art. 957, first sentence), BELGIUM (CC art. 1919), FRANCE (CC art. 1919), GERMANY (CC § 688), Italy (CC art. 1766), POLAND (CC art. 835 and 853) and PORTUGAL (CC art. 1185), albeit that the handing over may be fictitious in a case where the item already is in the hands of the storehouse. Somewhat unclear is the situation in SPAIN, where CC art. 1758 requires handing over of the thing for the conclusion of the contract, but the Spanish *Tribunal Supremo*, already on 29 December 1928, accepted that the handing over of the thing could be symbolic as well *(tradition ficta)*. In a ruling from 16 April 1941, the TS appears to have moved back to its more traditional case law. Yet, some of these legal systems do recognise the possibility of a binding precontract, at least obliging the storehouse to accept the thing for storage when the client offers the thing to the storehouse for that purpose. The situation is the same in ENGLAND, where bailment requires possession of the thing, but a contract of custody for reward may be concluded. The concept and terminology of real contracts is largely obsolete in SCOTLAND, despite its Roman

law roots: see, in the context of loan, *Graham-Stewart v Feeney* 1995 GWD 35-2048. Cf. *Stair*, The Laws of Scotland VIII, 'Deposit'.

3. In some of the newer codes, the contract has become a consensual contract; cf. HUNGARY (CC art. 462), THE NETHERLANDS (CC Art. 7:600), POLAND (CC arts. 835 and 853). The same goes for SWITZERLAND (LOA art. 472). In the Civil Code of the RUSSIAN FEDERATION, a distinction is made between storage by a commercial or professional party, and storage by others. In the first case, the contract is consensual, otherwise the contract is concluded only when the thing is handed over to the storehouse; in both cases, often form requirements must be upheld, cf. CC arts. 886-887. Moreover, in the case of commercial storage, some of the older commercial codes also accept consensus in stead of actual handing over of the thing as the method of conclusion of the contract, cf. Ccom art. 467.

4. In the Civil Codes, storage traditionally was regulated as a gratuitous service, e. g. art. 1917 of the FRENCH and BELGIAN Civil Codes. In the AUSTRIAN CC of 1811, however, the possibility of a remunerated storage contract was explicitly recognised (§ 969), as was also done in the GERMAN CC of 1896 (§ 688). The law has further developed in the direction of a remunerated contract, as the POLISH CC (art. 853), the RUSSIAN CC (art. 896) and the DUTCH CC (art. 7:601) explicitly provide that a professional storehouse is entitled to remuneration. In *commercial codes*, such as the Austrian and GERMAN Ccom and the SPANISH Ccom, the storage contract is always for remuneration. In ENGLAND, bailment – which need not be contractual – can be gratuitous or for remuneration. In SCOTLAND deposit may be gratuitous or for remuneration, the distinction possibly affecting only the liability of the depositary (*McBryde*, Law of Contract in Scotland, para. 9.54-9.55). When for remuneration the contract is sometimes labelled 'custody' (*locatio conductiae*) rather than deposit (*Stair*, The Laws of Scotland VIII, 'Deposit'., para. 3).

5. Storage of immovable goods is possible in AUSTRIA, but not in BELGIUM, GERMANY, POLAND and SPAIN. Storage of incorporeal goods and rights is not possible in Austria, Germany and Spain. Deposit is limited to corporeal moveables in SCOTLAND (*Stair*, The Laws of Scotland VIII, 'Deposit' paras. 4-7). Specific legislation exists for the storage of money and securities in Austria, Germany and Greece, but the rules on storage – with some modifications – do apply in France. In the case of car parking contracts, the rules on storage apply in Spain. In Austria, Belgium, France and Germany, where the car is parked in a guarded place, the contract is storage, otherwise it is considered to be rent. In ENGLAND, such a contract is qualified as bailment only when the client also hands over the keys of the car, thus giving possession to the storehouse. The contract to use a safety deposit box is again a rental contract in Austria, Germany, THE NETHERLANDS, but most likely qualifies as a storage contract in France. Finally, the rules on storage do not apply in the case of 'storage' of animals in France, but they do apply in Germany.

6. When the storehouse is obliged not only to take care of the thing but also to undertake measures of administration exceeding the normal obligation of care, in AUSTRIA a mixed contract is concluded to which both the rules of storage and mandate apply. In FRANCE, the rules on storage apply along with the rules on the contract for work. In THE NETHERLANDS and SPAIN, the type of other services to be provided determine which rules, besides those on storage, apply to the contract.

7. When storage is an *additional* obligation under another contract, the obligation to take care of the thing applies accordingly in AUSTRIA, BELGIUM, ENGLAND, FRANCE, GERMANY, THE NETHERLANDS, SCOTLAND and SPAIN and probably also in ITALY and PORTUGAL; liability usually follows the rules

governing the main obligation under the contract. In France, in such a case exemption of liability is allowed if the storer clearly indicates that it will not look after the thing; e. g., the mere fact that a client hangs a coat on the coat rack of a restaurant does not lead to the conclusion of a contract of storage, especially not if the restaurateur informs the client that the coat will not be looked after, cf. Cass.civ. I, 1 March 1988, Bull.civ. I, no. 57.

II. Place in existing laws

8. Storage is regulated in the AUSTRIAN CC §§ 957-969. The Ccom deals with commercial warehousing (§§ 416-424).

9. The contract of storage is regulated in the BELGIAN CC arts. 1915-1963.

10. A storage contract may be qualified as a contract of bailment in ENGLISH law, cf. *Miller/Harvey/Parry*, Consumer and Trading Law, p. 179, albeit that bailment as such is not necessarily based on a contractual relationship, cf. *Chitty* on Contracts II[29], no. 33-002; *Charlesworth/Dobson/Schmitthoff*, Charlesworth's Business Law[16], p. 545. A storage contract is subject to the general requirements of ss. 13-17 of the Supply of Goods and Services Act 1982.

11. Consumer storage contracts are not covered by Chapter 8 of the FINNISH Consumer Protection Act on Certain consumer service contracts, cf. ConsProtA chap. 8 § 1(2).

12. In FINNISH law there are old rules still in force in the Commercial Code (*Handels Balken*) from 1734, Chap. 12, s. 2, according to which "… goods held in charge should be kept as one's own". Modern regulations are found in the Consumer Protection Act, chaps. 6:23 and 8:32 and Act 1988/688 on Business Right to Sell Stored Goods.

13. The contract of storage is regulated by the FRENCH CC arts. 1915-1963. It is defined as the contract by which one party receives something belonging to the other party with the obligation to keep it safely and give it back.

14. The storage contract is regulated in the GERMAN CC §§ 688-700. There are special rules for commercial storage contracts, such as for the storage of goods (Ccom §§ 467-475h, applicable only if the storing and safekeeping is part of the operation of a commercial enterprise).

15. Storage is regulated in the GREEK CC arts. 822-833.

16. Storage is regulated in the ITALIAN CC arts. 1766-1797.

17. The storage contract is regulated in the DUTCH CC arts. 7:600-609.

18. The contract of *safe-keeping* is regulated in the POLISH CC arts. 835 ff. Art. 835 states that the keeper has an obligation to keep the thing in an undeteriorated condition. The (remunerated) contract of *storage* is regulated in arts. 853 ff; the storehouse is then always a professional.

19. The contract of storage is regulated in the PORTUGUESE CC and Ccom arts. 1185 ff.

20. Storage contracts are regulated by the common law (based on Roman law) in SCOTLAND.

21. The storage contract is regulated in SPANISH Ccom arts. 1758-1780. These rules apply when the provider of the service receives a thing which belongs to another person with the obligation to look after the thing and to return it, cf. *Sierra*, Comentario del Código Civil, p. 1028. When the storehouse is a professional party, the things that are to be stored are merchantable and the storage is undertaken as a commercial activity, Ccom arts. 303-310, apply, cf. Ccom art. 303.

22. Storage is generally an unregulated area in SWEDEN. However, the provisions in the Consumer Services Act will apply to consumer transactions, with the exception of the storage of living animals (cf. Consumer Services Act para. 1(3)).

III. Handing over required for conclusion of contract?

23. Storage is a so-called real contract in AUSTRIA, implying that handing over of the thing is required for conclusion of the storage contract, cf. CC art. 957, first sentence; Rummel [-*Schubert*], ABGB I[2], § 957 no. 1; *Koziol and Welser*, Bürgerliches Recht II[12], p. 183. Yet, the parties may conclude a binding precontract, cf. CC § 957, second sentence, and § 936; Rummel [-*Schubert*], ABGB I[2], § 957 no. 1.

24. Similarly in BELGIUM the contract of storage is not concluded before the thing is handed over factually or fictitiously. Fictitious handing over of the thing suffices when the storehouse already has the thing under its control (CC art. 1919).

25. Handing over is required for the creation of the relationship of bailment under ENGLISH law, cf. *Chitty* on Contracts II[29], nos. 33-002 to 33-003. See e. g. *Ashby v. Tolhurst* [1937] 2 KB 242, no handing over of possession in a case where a car was parked in a car park and the keys were not handed over, therefore no bailment. However, a contract of custody for reward may already have been concluded, obliging the client to hand over the possession of the thing to the storehouse.

26. Traditionally, the contract of storage is considered to be a real contract in FRENCH law, i.e. handing over of the thing is necessary for the formation of the contract, cf. CC art. 1919. Handing over of the thing is not required if the thing is already in the possession of the storehouse, cf. *Huet*, Contrats spéciaux[2], no. 33105. However, the parties may conclude a binding precontract; such a precontract produces the same effects as the storage contract itself, cf. *Huet*, Contrats spéciaux[2], no. 33129. In practice, storage has therefore a consensual character, cf. *Huet*, Contrats spéciaux[2], no. 33136.

27. Handing over of the thing is not required for conclusion of the contract under GERMAN law; cf. Palandt [-*Sprau*], BGB, § 688 nos. 1, 3.

28. Storage is a real contract in ITALIAN law, requiring handing over of the thing to the storehouse, cf. CC art. 1766. Sometimes, a fictitious delivery will suffice if the thing is already at the disposal of the storer, cf. Cass.civ.sez. III, 25 September 1998, no. 9596, Orland c. Fabbri, Giust.civ.Mass. 1998, 1943.

29. Under the old DUTCH CC, handing over of the thing was required for conclusion of the contract. Under the present CC, that is no longer necessary, cf. art. 7:600; *de Klerk-Leenen and Wessels*, Bijzondere overeenkomsten, note 3.1 to CC art. 7:600, with references.

30. The contract of safe keeping contract is a real contract in POLISH law, while the contract of storage is a consensual contract (Radwański [-*Napierała*], System Prawa Prywatnego VII[2], pp. 616 and 641).

31. Delivery of the thing is essential for the formation of the storage contract in PORTUGUESE law, i.e. the contract is a real contract, cf. CC art. 1185; *Antunes Varela*, Das Obrigações em geral II[6], 304.

32. Storage is traditionally a contract requiring delivery of possession of the thing deposited for its constitution in SCOTTISH law (*Stair*, The Laws of Scotland VIII, 'Deposit' para. 8), but this is not emphasised in modern treatments of contract law such as *McBryde* or *MacQueen & Thomson.* The possession must be such as to give the depositary control of the thing deposited.

33. Both under the SPANISH CC art. 1758 and under Ccom art. 305, the storage contract is a 'real contract', which is concluded only when the thing is handed over to the storehouse. The handing over may be material or, if the storehouse is already in the possession of the thing, fictitious, cf. TS 29 December 1928, and TS 16 April 1941. Nevertheless, it is under debate whether the mere promise to store a thing already may amount to a storage contract. Cf. *Serrera*, El contracto de depósito mercantil, p. 22, with references. A precontract to conclude a storage contract is, however, binding upon the storehouse.

34. In HUNGARY (CC art. 462) and SWITZERLAND (LOA art. 472), the contract of storage is consensual.

IV. Application of rules to gratuitous services

35. A contract of storage can be either for a price or gratuitous in AUSTRIA, cf. CC § 969; Rummel [-*Schubert*], ABGB I^{2}, § 957 no. 1 and to CC § 969 no. 1; *Koziol and Welser*, Bürgerliches Recht II^{12}, p. 183. Commercial warehousing excludes gratuitous contracts. The fact that a storage contract is gratuitous does not affect the care required of the storehouse, cf. Rummel [-*Schubert*], ABGB I^{2}, § 964 no. 1.

36. Storage is traditionally a gratuitous contract in BELGIUM (CC art. 1917).

37. In ENGLAND the rules of bailment apply irrespective of the existence of a contract, in particular it can arise without the payment of consideration by the client. Yet, the obligations of the storehouse will in many cases not be as strict (i.e. the assessment of what is 'reasonable care' may be affected by the gratuitous nature of the contract):, cf. *Chitty* on Contracts II^{29}, nos. 33-002, 33-029 ff.

38. Originally storage was a gratuitous contract in FRANCE (cf. CC art. 1917). Therefore, normally the same rules apply to remunerated as to gratuitous storage contracts, albeit that in the case of a gratuitous contract, the amount of care required by the storehouse will be lower than in a storage contract where the storehouse receives a remuneration, cf. CC art. 1928 para. 2; Cass.civ. I, 12 December 1984, Bull.civ. I, no. 335; *Huet*, Contrats spéciaux^{2}, nos. 33109, 33145.

39. The GERMAN CC provisions apply to gratuitous services, cf. Palandt [-*Sprau*], BGB, § 689 no. 1, albeit that for a gratuitous storage contract the storehouse is only liable if it has not acted with the care one would use for one's own goods, cf. CC § 690.

40. The rules on storage contracts in ITALY apply equally to gratuitous contracts, but the degree to which fault liability is evaluated in the case of a gratuitous service is less strict, cf. CC art. 1768 para. 2 and CC art. 1783.

41. In THE NETHERLANDS the rules on storage apply to remunerated and gratuitous services alike. Even though it is possible that the standard of care that may be expected of the non-professional storehouse is lower, the obligation to return the thing in its original state is not affected by the gratuitous nature of the contract. The one exception is where substorage is allowed – that is: if substorage was needed to protect the client's interests and for reasons that cannot be attributed to the storehouse. If, and only if, such is the case, the storehouse is not liable for the actions of the substorehouse, as it would be under CC art. 6:76, cf. CC art. 7:603, para. 2 and 3.

42. A contract for storage under the POLISH CC art. 853 ff is always remunerated; a contract for safe-keeping (CC arts. 835 ff) not necessarily.

43. In SCOTLAND storage contracts may be gratuitous or for remuneration (*McBryde*, Law of Contract in Scotland, para. 9.54-9.55). When for remuneration the contract is sometimes labelled 'custody' (*locatio conductiae*) rather than deposit (*Stair*, The Laws of Scotland VIII, 'Deposit'., para. 3).

44. In SPAIN the storage contract is gratuitous unless otherwise agreed, cf. CC art. 1760.

V. Application or exclusion of storage rules in specific cases

45. Storage may relate to movable or immovable goods in AUSTRIA (CC § 960); *Koziol and Welser*, Bürgerliches Recht II[12], p. 183. Incorporeal goods and rights cannot be the object of a storage contract, unless they are incorporated in physical objects (e. g. securities). However, storage of securities is covered by a specific law *(Depotgesetz)*. Cf. Rummel [-*Schubert*], ABGB I[2], § 957 no. 5, to CC § 961 no. 1; *Koziol and Welser*, Bürgerliches Recht II[12], p. 185. When a car is parked for a price in a guarded parking place, a storage contract is concluded, cf. OGH, SZ 43/84; when the parking place is not guarded, the relationship is a rental contract, cf. OGH, EvBl 1976/21; Rummel [-*Schubert*], ABGB I[2], § 957 no. 3. The contract to use a safety deposit box is again a rental contract, cf. OGH, SZ 50/25.

46. Storage is only possible for movables in BELGIUM (CC art. 1918). Where a parked car is guarded or placed in a secured place (e. g. a parking garage), a storage contract is concluded, otherwise the rules on rent apply, cf. *Herbots*, Bijzondere overeenkomsten, p. 270. Decisive is whether the parking place is under the surveillance of a professional operator and whether the owner of the car may expect the car to be under surveillance.

47. In ENGLAND, unless the client not only parks the car but also hands over the keys, the contract is not a storage contract but a contract of license under which the owner of the car park is not under an obligation to look after the car. Cf. *Ashby v. Tolhurst* [1937] 2 KB 242.

48. The contract to park a car in a guarded parking place is generally considered to be a storage contract under FRENCH law, cf. Cass.civ. I, 2 November 1966, D. 1967.319, note *Pélissier*, RTD civ 1967.411, obs. G. Cornu. Where the operator of the car park is not required to look after the car, a contract of rent is concluded, cf. Cass.civ. III, 26 October 1977, Bull.civ. III, no. 362. The 'storage' of something in a safety-deposit box was traditionally considered to be a contract of rent, but nowadays is often seen as a proper storage contract, cf. *Huet*, Contrats spéciaux[2], no. 33116. 'Storage' of an animal is covered by the rules on storage, cf. *Huet*, Contrats spéciaux[2], no. 33117. 'Storage' of immovable goods is covered by the rules on the contract for work (*louage d´ouvrage* or *contrat d´entreprise*); cf. *Huet*, Contrats spéciaux[2], nos. 33117, 33126-33127. 'Storage' of money is in principle covered, albeit with modifications, cf. *Huet*, Contrats spéciaux[2], nos. 33502-33507. Case law is used to apply the provision of the CC on deposit to regulate several aspects of the bank-account contract.

49. In GERMANY storage is only possible for movable goods (including animals), cf. BGH BGHZ 34, 349, but not for rights or immovable goods, cf. Palandt [-*Sprau*], BGB, § 688 no. 2. The rules on storage apply to car park contracts when a car is parked on a guarded parking place, cf. BGH BGHZ 63, 333. The 'storage' of something in a locker is considered to be a contract of rent as the supplier of the locker does not have access to the interior of the locker and therefore cannot care for the thing (RG, RGZ 141, 99). Storage of securities is regulated in specific legislation.

50. Specific legislation exists in GREECE for general warehouse services (Law 3077/1954), and for the 'storage' of money.

51. Storage of goods in a rented safety-storage box is covered by the rules on rental contracts under DUTCH law, cf. Geschillencommissie Bankzaken 6 August 2001, TvA 2002, p. 115. Storage of *immovable* goods is possible, cf. *Wessels*, WPNR 1990, no. 5982, p. 749-750; *Rutgers*, Bewaarneming.

52. The rules on safe-keeping contracts only apply to movable goods under the POLISH CC art. 835. According to the prevailing opinion in legal literature, the same holds true for the contract of storage, cf. *Bieniek*, Komentarz, p. 453.

53. Specific rules exist for the storage of agriculture and industrial products under PORTUGUESE law (Statutes Decreto no. 206 of 7 November 1913 and Decreto no. 783 of 21 August 1914).

54. The SCOTTISH rules on storage do not apply to incorporeals and intangibles (*Stair*, The Laws of Scotland VIII, 'Deposit' para. 4), but a depositary is normally depositary of the thing deposited and its contents, even if the container is sealed (ibid, para. 6). Fungibles such as money may be deposited where the depositary is obliged to return them *in forma specifica*, for example as the contents of a box or a purse (ibid, para. 7). The case of car parking may depend on the degree of control over the vehicle given to the store-keeper (*McBryde*, Law of Contract in Scotland, , paras. 9.57, 9.59). There are special rules imposing a slightly higher degree of liability for innkeepers and livery stable keepers, based on the Praetorian Edict *nautae, caupones, stabularii* (D.4.9.1), making such parties liable for loss of clients' property by theft or the wrongful act of third parties unless it can be proved to have resulted from the owner's negligence. Livery stable keepers do not include keepers of motor garages (*Gloag and Henderson*, The Law of Scotland, paras. 15.07-15.08). Hotel proprietors are innkeepers but their position is mainly regulated by the Hotel Proprietors Act 1956, for which see notes to IV.C.-5:110.

55. The SPANISH CC art. 1761 provides that only movable things can be the object of a storage contract. The rules therefore do not apply to 'storage' of immovable goods or of incorporeal goods, cf. TS 16 April 1941. The rules on storage apply to the contract of parking, cf. *Serrera*, El contracto de depósito merchantil, pp. 34 ff.

56. In SWEDEN the provisions of the Consumer Services Act do not apply to immovable goods. Moreover, Consumer Services Act § 1(3) excludes the application of the law to the storage of living animals.

57. Storage is in Switzerland only possible for movable goods, cf. OR art. 472.

VI. Application to other duties to store

58. When the storehouse is not only obliged to take care of the thing but also to undertake measures of administration exceeding the normal obligation of care, a mixed contract is concluded; both the rules of storage and mandate apply, cf. AUSTRIAN CC § 960; Rummel [-*Schubert*], ABGB I^2, § 960 no. 2. Storage may also be an additional obligation under another contract. The obligation to take care of the thing then applies accordingly, Rummel [-*Schubert*], ABGB I^2, § 960 no. 3.

59. Storage, especially gratuitous storage, often takes place in addition to something else under BELGIAN law, e. g. in addition to a sale, cf. Cass. 2 May 1964, Pas., 1964, I, 932; or processing, cf. Rb Brussel 3 November 1964, JT 1965, 676.

60. The scope of the rules on bailment cover a wide range of services in which a thing is handed over into the possession of another under ENGLISH law. These rules govern storage contracts, but also processing contracts. As a consequence, the rules on bailment apply to situations where storage is but a subsidiary contractual obligation, cf. *Andrews v. Home Flat Ltd.* [1945] 2 All ER 698 (landlord providing storage space for tenant's goods); *Charlesworth/Dobson/Schmitthoff*, Charlesworth's Business Law^{16}, p. 545.

61. In FRANCE when services other than storage are provided, the rules on the contract for work (CC art. 1989 ff) are applied along with the rules on storage contracts, cf.

Huet, Contrats spéciaux[2], no. 33117. When a service provider, in the course of a contract for work, assumes an obligation to guard a thing, the rules on storage contracts may be applied either directly or by way of analogy; cf. *Huet*, Contrats spéciaux[2], nos. 33117, 33120. Liability will then normally follow the rules of the main contractual obligations, cf. *Huet*, Contrats spéciaux[2], no. 33120.

62. If storage – necessarily including an obligation to look after the thing – is an additional obligation under another contract, in principle the rules governing that contract also govern the storage obligation; the rules on storage may be applied in addition to these rules, with the exception of the lower liability scheme of GERMAN CC § 690. In the case of – even gratuitous – storage in the cloakroom of a theatre – but not in a restaurant, cf. BGH NJW 1980, 1096 – or in a case where storage is necessary or compulsory (*e. g.* in a swimming pool), such an obligation does exist; in any case where storage tokens are given or a price for the storage is to be paid, the storage rules may apply, cf. Palandt [-*Sprau*], BGB, § 688 no. 6. Limitation of liability is possible according CC § 276, but the storehouse must articulate it in clear easily readable words, cf. Palandt [-*Sprau*], BGB, § 688 no. 7.

63. In ITALY the owner of a garage was considered liable for the theft of a car that was parked outside his garage in order to be repaired, cf. Tribunale Roma 20 February 1958, Gius. 1998, 2015.

64. When a contract is concluded in which the storage of goods is an important element, the DUTCH CC art. 6:215 requires the court to simultaneously apply the rules of the storage contract and those of the other specific contract, e. g. transportation. Only if the 'storage' of the thing is completely subordinate to the main obligations arising from the contract is qualification as a storage contract not possible, cf. Pitlo [-*du Perron*], VI[9], p. 292; *de Klerk-Leenen and Wessels*, Bijzondere overeenkomsten, note 5 to the Introduction to CC Title 7.9. Such is the case, Du Perron argues, if a car is brought to a garage in order to be repaired. He concludes, pp. 292-293, that in such a case the rules on storage may not be applied 'in their entirety'.

65. In POLAND the duty to keep something safe may constitute an integral part of other typical, nominate contracts. It exists when a party, performing an obligation arising from another contract (sale, leasing, carriage) holds a thing and is obliged to release it (Radwański [-*Napierała*], System Prawa Prywatnego VII[2], p. 620). The duty to keep something safe can also be established by accidentalia negotii of certain contracts, such as lease (CC art. 670), precontracted deliveries of agricultural produce (CC arts. 613 and 1615) or contracts of forwarding (CC art. 794 para. 1) (*Grzybowski*, RPEiS 1967 (1), 41). The Supreme Court in its judgment of 11.13.1957 1 CR 183/57, OSN 1959, poz. 43 stated that the rules on safe-keeping apply accordingly in a situation, when the creditor did not collect the thing timely. The rules on safe-keeping apply also to: a quasi contract between a court enforcement officer and a caretaker in the enforcement proceeding on movables (Code of the civil procedure, arts. 856-862), a safe-keeping of things found (CC arts. 184-185), a safe-keeping of a thing by a pledgee (CC art. 318) and in some other situations created by administrative decisions or court judgments (Radwański [-*Napierała*], System Prawa Prywatnego VII[2], pp. 621-623).

66. An ancillary obligation to store a thing or keep it safe may emerge from other contracts under PORTUGUESE law, e. g. contract for work, leasehold, transportation, etc., cf. CA Porto, 11 May 2000, www.dgsi.pt.

67. Mixed contracts are found in SCOTTISH law, e.g. if the store-keeper is also to carry out work on the thing deposited, the contract has elements of *location operis faciendi* (*Stair*, The Laws of Scotland VIII, 'Deposit' para. 3).

68. Under SPANISH law the rules on storage may apply even to contracts of a mixed nature, to the part of the contract imposing the obligations to store. This is the case even when the obligation to store is not the main one. For example, to the contract of parking the rules on storage are applied, cf. *Serrera*, El contracto de depósito merchantil, pp. 34 ff.

IV.C.–5:102: Storage place and subcontractors

(1) The storer, in so far as the storer provides the storage place, must provide a place fit for storing the thing in such a manner that the thing can be returned in the condition the client may expect.

(2) The storer may not subcontract the performance of the service without the client's consent.

COMMENTS

A. General idea

The fact that the storer takes control over the thing implies the main risk involved in the performance of the service on behalf of the client: the risk that the thing is damaged in storage. The rules in this Chapter aim at minimising that risk by imposing quality standards on the storer. This is especially important as regards the place of storage. The present Article deals specifically with the latter aspect. It states that when the storer provides the location for storage – which normally is the case – that location must be safe for storage of the thing. The Article indicates what may be expected of the storer in the process of the performance of the service. The Article is also in the storer's interests, as it provides guidance as to what is expected in order to prevent liability.

> *Illustration 1*
> A client wants to have cocoa beans stored. The storer must make sure that the location where the cocoa beans are stored is suitable for such storage taking account of such factors as the level of humidity and the temperature. If necessary, in order to perform the service correctly, the storer must see to it that the location is adjusted to enable safe storage.

The Article further states that the storer (or the storer's staff) must perform the contractual obligations without subcontracting; in other words, performance cannot be left to a third party, unless the client has agreed to such substorage.

> *Illustration 2*
> As the storer's warehouses are fully packed, the storer cannot properly store the cocoa beans he has agreed to store. The storer wants to have the storage done by a competing firm, whose services he commonly makes use of when he lacks storage capacity. Such substorage is allowed only if the client consents to it.

B. Interests at stake and policy considerations

The main issue is whether this Article is necessary. It is logical to require the storer to provide a safe location for storage. On the other hand, as long as the storer is able to return the thing in the condition the client may reasonably expect it to be, there does not seem to be much reason to burden the storer with yet another obligation. It could therefore be argued that such an obligation should not be imposed upon the storer.

A different issue is whether substorage should be allowed in the case of a storage contract. For storage, there are three reasons why subcontracting without the client's consent perhaps should not be allowed. Traditionally, a storage contract is said to be based on a relation of

trust between the parties, leading to the personal nature of such a contract. It should be noted that this argument has lost most of its importance over the years, as even in non-commercial storage a fiduciary relationship is only occasionally needed: whether patient records are stored by one storer or by another is of hardly any relevance as long as the patient's privacy and the confidentiality of the records are safeguarded. A more relevant objection to allowing substorage is that the client may have a need to know where the thing is actually stored, for instance to be able to get it back fast ('just-in-time-deliveries'). Finally, the client's insurance may not cover substorage. One could argue, however, that an exception should be made for 'emergency cases', as substorage then is in the client's best interests because the thing would otherwise be damaged or destroyed.

C. Comparative overview

Case law in England and the Netherlands explicitly states that the storer is required to provide a location which is fit for the proper storage of the thing. In other legal systems, an obligation to that extent is considered to be implied; failure to provide such a location will lead to damages for failure to return the thing in accordance with the client's reasonable expectations as to its condition.

In most legal systems, substorage is traditionally permitted only with the client's consent, as it is thought that the contract requires the client's trust in the *person* of the storer. Nevertheless, a minority view in these systems holds that personal considerations are no longer so important, especially not in the case of storage by a professional party; this view therefore denies that substorage without the client's consent should be prevented.

A problem may arise if, in the case of an emergency, the storer is required to have the thing temporarily stored elsewhere and there is no time to contact the client. In some countries, notably Spain and the Netherlands, substorage is allowed in such a case without the client's consent.

D. Preferred option

Given the importance of a location suited for the storage of the thing, an obligation to provide such a location is needed. The advantage of such an obligation is that the client, instead of having to wait for the return of the thing or having to demand adequate assurance of performance, may simply claim specific performance of the obligation on learning that the thing is not stored in a location suited for its storage.

Substorage without the client's consent should not be allowed. The traditional idea that a storage contract is of a personal nature is no longer a convincing argument. Nowadays, the main reasons for not allowing substorage by way of a default rule are the fact that the client's insurance may not cover substorage, and the practice of 'just-in-time deliveries', which require the client to be able to demand the immediate return of the thing. This practice applies especially to modern commercial storage contracts where stocks are often kept to a minimum in order to cut down on expenses. In such a case, the client may need to have direct access to what is in store to supplement stock at the place of business. To that extent, the client will need to know the exact location of the thing. This will already be difficult when the storer has more than one storage location. However, a default rule allowing substorage would compromise the client's legitimate interests too much. Therefore, under the present Article,

subcontracting is not allowed for storage unless agreed otherwise. Such derogating contractual agreements will often be made if the storer uses outsourcing methods.

In the case of an emergency situation, substorage may be the only means to preserve the thing. The obligation to hand the thing over to a third party for storage then follows from the storer's obligation to take reasonable measures to prevent unnecessary deterioration, decay or depreciation of the thing. A specific provision stating that substorage is allowed in such a case is not needed.

NOTES

I. Overview

1. From the storehouse's obligation to take good care of the thing, it follows that the storehouse must store the thing in a location fit for that purpose. This has been explicitly decided in ENGLAND, cf. *Searle v. Laverick* (1873-74) LR 9 QB 122; *Brabant & Co. v. King* [1895] AC 632 and THE NETHERLANDS, cf. HR 28 November 1997, NedJur 1998, 168 (*Smits/Royal Nederland*), but holds true for all legal systems. Where the storehouse has not provided a proper place for storage, it will not be able to prove the absence of negligence on its part, as was made clear in FRANCE in a case of storage of a horse; in this particular case, the storehouse could not prove that the doors of the horse's box were sufficiently solid and was therefore held liable for the injuries to the horse, cf. Cass.civ. I, 2 October 1980, Bull.civ. I, no. 240.

2. Substorage needs the client's consent in most legal systems as it is generally perceived that personal considerations are involved in the client's choice of the storehouse, cf. AUSTRIA, Rummel [-*Schubert*], ABGB I^{2}, § 965 no. 2; ENGLAND, *Edwards v. Newland & Co.* [1950] 2 KB 534; *Metaalhandel JA Magnus BV v. Ardfields Transport Ltd.* [1988] 1 Lloyd's Rep 197; GERMANY, cf. CC § 691, Ccom § 472(2), THE NETHERLANDS, CC art. 7:603; cf. also art. 895, first sentence, of the Civil Code of the RUSSIAN FEDERATION. A general exception to the need to ask for the client's consent seems to be accepted where substorage is urgently needed to preserve the thing, yet it is thought that as soon as it is possible to inform the client, the storehouse must do so. Yet, a different view is advocated as well, as it is argued that personal considerations in the case of storage by a professional party are no longer considered to be very important, cf. FRANCE, *Huet*, Contrats spéciaux^{2}, no. 33111; in England, this has been argued by *Charlesworth/Dobson/Schmitthoff*, Charlesworth's Business Law^{16}, p. 546. Where consent to the substorage is given by the client, the storehouse is liable only if the choice of the substorehouse was bad in Germany, cf. Palandt [-*Sprau*], BGB, § 691 no. 1, as the substorehouse there is not seen as an auxiliary person for whose actions the storehouse is liable. By contrast, in The Netherlands (CC arts. 6:76 and 7:603 para. 3) and the Russian Federation (CC art. 895(3)), the storehouse is responsible for the actions of the substorehouse in the same way as for its own actions and of those of its staff, although in The Netherlands, the liability regime is somewhat more lenient when storage was gratuitous and the storehouse was more or less forced to hand over the thing for substorage for reasons that cannot be attributed to the storehouse (CC art. 7:603(3)).

II. Location

3. Storage in a location which is not proper for storage of the thing leads to liability under AUSTRIAN CC § 964 if the storehouse therewith breaches the obligation to take due care of the thing.

4. The storehouse must take reasonable care to see that the place where the things are kept is fit for the purpose of storage under ENGLISH law, cf. *Searle v. Laverick* (1873-74) LR 9 QB 122; *Brabant & Co. v King* [1895] AC 632. Moreover, the storehouse must prove that the things were properly protected from theft and that the storehouse has taken all reasonable precautions against theft, cf. *Brook's Wharf & Bull Wharf Ltd. v. Goodman Bros* [1937] 1 KB 534. Cf. *Chitty* on Contracts II[29], no. 33-045.

5. If the location for storage was unsuitable for storage of the things, the storehouse will not be able to prove that the carelessness or negligence of the client was the cause of the defect, and will therefore be held liable for deterioration or destruction of the things under FRENCH law; cf. *Huet*, Contrats spéciaux[2], nos. 33143, 33147.

6. The storehouse is required to take care of the things under GERMAN law. To that extent, it must store the things in a suitable location, cf. Palandt [-*Sprau*], BGB, § 688 no. 4.

7. The storehouse must provide a location which is fit for the proper storage of the things under DUTCH law, cf. HR 28 November 1997, NedJur 1998, 168 (Smits/Royal Nederland) (storage of cheese powder). To that extent, the storehouse's obligation of care implies that it must provide adequately functioning cooling rooms and that it will be liable to the client under art. 6:74, 75 and 77 if the cooling installation malfunctions, even if the malfunctioning of the machine is due to inadequate installation by a certified processor of such machines.

8. In POLAND there is no express regulation of this question. However, there are rules which indicate that the location must allow a correct performance of the contractual obligations. In the safe-keeping contract, the keeper must keep the thing in the manner determined in the contract and, if it is not agreed upon, in a manner which results from the nature of the thing kept and other circumstances (CC art. 837). The keeper is also authorised (and even obliged) to change the place and the manner of safe-keeping of the thing specified in the contract if that proves to be necessary for its protection against loss and deterioration (CC art. 838). In the storage contract, the storehouse is obliged to observe due diligence in preventing the loss or deterioration of, or damage to, the things accepted for the storage (CC art. 855(1)), which indicates that the storehouse should choose a location suitable for the performance of the service.

9. In SCOTTISH law the store keeper's duty of care is 'such diligence as the person entrusted uses, or men ordinarily do in their own affairs' (*Stair*, Institutions I[5], 13,2), and liability has been established when e.g. cars were left in unsuitable locations overnight (*Miller v. Howden*, 1968 SLT (Sh.Ct.) 82; *Verrico v. Hughes & Son Ltd.*, 1980 SC 179).

10. There is no specific provision in SPANISH law regarding the location where the activity is to be executed. The storehouse must keep the things in a place which allows it to carry out its activity with due diligence (CC arts. 1094 and 1104), which is of a qualified nature if the storehouse is a professional. *Bercovitz*, Comentarios al Código Civil, 2033 explicitly indicates that the obligation to guard includes an obligation to watch, if not directly the things in storage, at least the place where the things are located. The storer must watch over the thing in such a way that it may be returned to

the client in the same condition as when it was left by the client (*Martín Santisteban*, El depósito y la responsabilidad del depositario, 2002, p. 54).

III. Subcontracting

11. Under AUSTRIAN law, subcontracting is only allowed if the client consents to the subcontracting or, in the case of an emergency, if substorage is necessary to preserve the thing; consent may be given tacitly. Cf. Rummel [-*Schubert*], ABGB I[2], § 965 no. 2.

12. Under ENGLISH law the storehouse normally does not have the authority to subcontract the storage of the things without the client's consent, since personal considerations are involved in the client's choice of the storehouse, cf. *Edwards v. Newland & Co.* [1950] 2 KB 534; *Metaalhandel JA Magnus BV v. Ardfields Transport Ltd.* [1988] 1 Lloyd's Rep 197; a different view is also advocated, arguing that personal considerations in the case of commercial storage are no longer so important, cf. *Charlesworth/Dobson/Schmitthoff*, Charlesworth's Business Law[16], p. 546.

13. Traditionally, under FRENCH law, given the original benevolent character of the storage contract, a storage contract was often regarded as strictly personal, so that subcontracting was not allowed. Nowadays a different view is taken where a remuneration has been agreed upon and the storehouse is a professional party, cf. *Huet*, Contrats spéciaux[2], no. 33111.

14. Substorage is allowed under GERMAN law only with the client's consent, cf. CC § 691, Ccom § 472(2). In this case, the third party is a substitute storehouse and not an auxiliary person, i.e. the storehouse is only liable for a bad choice of third party. Cf. Palandt [-*Sprau*], BGB, § 691 no. 1.

15. In THE NETHERLANDS, in principle, substorage is not allowed without the consent of the client,. An exception is made if substorage is needed to protect the client's interests and for reasons that cannot be attributed to the storehouse. If, and only if, such is the case, the storehouse is not liable for the actions of the substorehouse, as it would be under CC art. 6:76, cf. CC art. 7:603, para. 2 and 3. The storehouse is responsible for the actions of the substorehouse in the same way as for its own actions and of those of its staff (CC art. 6:76 and art. 7:603, para. 3). However, the latter paragraph contains a more lenient provision for those cases where the storage was gratuitous and the storehouse was more or less forced to hand over the thing for substorage for reasons that cannot be attributed to the storehouse.

16. In the case of the safe-keeping contract under POLISH law the keeper cannot deposit the thing for safe-keeping with another person unless forced by the circumstances to do so. Such circumstances include situations which make it impossible for the keeper to continue to keep the thing (sudden illness of the keeper, destruction of the location, change of the keeper's residence, etc) (*Bieniek*, III(2)[6], p. 382). In such a case the keeper is obliged to immediately notify the depositor where and with whom the thing has been deposited, and a the keeper who complies with this requirement is only liable for a lack of due diligence in choosing the substitute (CC art. 840 para. 1). The substitute is liable also to the depositor. If the keeper is liable for the acts of the substitute, their liability is joint and several (CC art. 840 para. 2).

17. There do not appear to be any SCOTTISH decisions on this question.

18. Under SPANISH law there is no specific provision for storage subcontracting, but since storage is a service contract, the general rules for mandate, applicable for all service contracts, may be applied as well. According to the CC art. 1721 , the representative may designate a substitute if the principal has not forbidden it explicitly.

IV.C.–5:103: Protection and use of the thing stored

(1) The storer must take reasonable precautions in order to prevent unnecessary deterioration, decay or depreciation of the thing stored.

(2) The storer may use the thing handed over for storage only if the client has agreed to such use.

COMMENTS

A. General idea

The Article contains a specification of the standard of care required of the storer: the storer must take reasonable precautions to prevent unnecessary damage to the thing accepted for storage, whether such damage is caused by the storer or the storer's staff, by third parties or by other external causes.

Illustration 1
A museum has Egyptian artefacts stored. The storer is to protect the artefacts against humidity, wind and changes in temperature.

Unless agreed otherwise, the obligation to exercise due care and to take precautionary measures does not require the storer to examine the thing regularly during storage, e. g. in order to discover potential diseases if perishable things are stored. Such an examination may, however, be required if the storer received information to that effect.

Illustration 2
A storer is requested to store onions. If the storer has reason to expect the occurrence of diseases after the onions have been handed over for storage, he must, in so far as this is reasonable, examine them.

The second paragraph deals with the question whether the storer may make use of the thing stored. It states that such use is only allowed if the client has agreed to such use. In some cases, the thing stored will lose all or some of its value if it is not regularly used. In such a case, agreement may be implied; failure to use the thing would then even constitute a breach of the storer's obligation to prevent deterioration or depreciation of the thing.

Illustration 3
A racehorse is kept in a stable not belonging to the owner of the horse. Whether or not the parties have explicitly agreed to this, the stable owner is both allowed and required to ride the horse regularly in order to keep the horse fit. Unless the client agrees thereto, the storer is not entitled to enter it into horse races, as such is not needed to keep the horse in good condition.

B. Interests at stake and policy considerations

The storer is usually in the best position to take protective measures to prevent damage to the thing while in storage. Damage must be prevented as much as possible, but there is a limit to what protective measures the storer can be expected to take: damage cannot under all circumstances be prevented, or only at very high costs. It would not be reasonable or economic to require the storer to take all possible precautionary measures.

Another issue is whether the storer may use the thing handed over for storage. Generally, the storer will not be allowed to do so without the client's consent, but this may be different when use of the thing is needed to prevent the thing from deteriorating. It could be argued that in such a case, consent to its use may be considered to be implied. On the other hand, one could also argue that if the client had agreed to such use, the client would have lent the thing to the 'storer'; if the client did not state such intention, the storer is only allowed to indeed take care of the thing, not to use it.

C. Comparative overview

In all legal systems, the storer's obligation of care requires the storer to undertake all reasonable measures to maintain the thing or prevent deterioration thereof. In Poland, this rule is mandatory even in a commercial contract; in Sweden, this is the case only if the client is a consumer. The storehouse is not liable if it could not have prevented the damage to the thing by exercising due care. In determining the extent of the care that may be expected, the price for storage is to be taken into account. In all legal systems reported, the burden of proof that the damage to the thing was not caused by a lack of care is on the storer.

Use of the thing by the storer without the client's consent is generally not permitted. However, in many legal systems an exception is made if use is actually needed to preserve the thing. In these systems, the use of the thing follows from the storer's obligation to take care of the thing.

D. Preferred option

The storer is to take proper care of the client's interests when storing the thing. This implies that any measure, in so far as can reasonably be expected from the storer, must be taken to prevent *unnecessary* deterioration or decay of the thing during the period of storage. The storer must avoid any damage to the thing that can be avoided relatively easily.

The present Article may be seen as a particularisation of IV.C.–2:105 (Obligation of skill and care). That Article, which applies to all service contracts, must be taken into account in determining the obligations of a storer. Its provisions need not be repeated here.

An express provision that the storer may use the thing only if the client has agreed to such use is useful as it implies that, as a default rule, the use of the thing is generally not reconcilable with the nature of the contract. However, in a case where use of the thing is needed to prevent unnecessary deterioration or decay of the thing or of its value, consent may be considered to have been given tacitly. Moreover, in such a case, the storer will often be under an express or implied obligation to make use of the thing.

In the case of so-called irregular storage (irregular deposit) of generic things, the storer is not required to return the original things, but may sometimes be allowed to replace them with other things of the same quality and quantity. Where storage of such generic things is agreed upon, consent to the use of the thing may sometimes be implied. In fact, the contract may be then a mixed contract of storage and hire, loan or even sale. To such a contract, the rules on storage apply, with appropriate modifications, to the part of the contract that involves storage.

Similarly, if the client has impliedly or explicitly consented to the use of the thing – e. g. because use of the thing is needed for its preservation – the contract is probably of a mixed nature. This will often be a mixture of storage and loan, but may also be a mixture of storage and processing.

Illustration 4
A racehorse is kept in a stable not belonging to the owner of the horse. The stable owner is both allowed and required to ride the horse regularly in order to keep the horse fit.

In this case, the contract concerns a mixture of storage as the main object of the contract and maintenance as a type of processing as an ancillary obligation under the contract. In this case, the maintenance of the horse consists in riding it. The mixed nature of the contract implies that, with appropriate modifications, the present Chapter applies to the part of the contract that involves storage and the Chapter on Processing applies, with appropriate modifications, to the part of the contract that involves maintenance; cf. II.–1:107 (Mixed contracts). As both the storer and the processor are under an obligation to take precautionary measures to prevent damage or injury to the horse this will most likely not lead to practical differences.

When a storage contract is performed for nothing or for a merely symbolic price, the gratuitous or almost gratuitous nature of the contract may influence what the client may expect of the storer.

Illustration 5
At the price of € 0.20, a client stores his motor scooter in a garage before he goes shopping. When the client comes back, the scooter is missing. As the service was performed almost gratuitously, the garage owner's obligation to exercise due care does not include the obligation to have the garage guarded, but he is to introduce a way of preventing theft, e. g. by issuing tickets that may serve as proof of storage.

NOTES

I. Overview

1. The obligation of a storehouse to exercise due care is widely known in legal systems throughout the European Union. That obligation requires the storehouse to take all measures provided by the contract to ensure the preservation of the things and, where the contract does not provide (all) terms, to take all measures that correspond to the customs of trade and the nature of the obligation, including the qualities of the stored goods, unless the necessity of taking these measures is excluded by the contract. The obligation is recognised either as an element of the obligation of (alleviated) result, as in FRANCE (cf. Cass.civ. I, 11 July 1984, Bull.civ. I, no. 230; Cass.civ. I, 28 May 1984, Bull.civ. I, no. 173), or as an independent main obligation, e. g. in AUSTRIA (cf. CC § 961), FINLAND (CC 1734, 12:2, Supreme Court Cases KKO 1951 II 71, 1961 II 94), ENGLAND, THE NETHERLANDS (cf. Article 7:602; HR 30 September 1994, NedJur 1995, 45, Diepop Bossche Vrieshuizen/Nouwens), POLAND (contract of safe-keeping CC arts. 385, 837–839, storage CC arts. 855 para. 2, 857, 859), SCOTLAND (*Stair*, The Laws of Scotland VIII, 'Deposit' para. 13; *McBryde*, Law of Contract in Scotland, paras. 9.56-9.58), SPAIN (CC arts. 1094 and 1104), SWEDEN

(Consumer Services Act § 4), RUSSIAN FEDERATION (CC art. 891). This implies that the storehouse must take precautionary measures to enable safe storage of the things, such as providing adequate refrigerators, regulating the temperature in the cells, checking the persistence and intensity of refrigerating energy, etc. Cf. ITALY, Cass.civ.sez. III, 18 July 1996, no. 6489, Soc. De Lucia c. D´Addio, Contratti (I) 1997, 141 with note of *Natale*. Generally, a lower amount of care is required in the case of a gratuitous contract, cf. BELGIUM (CC art. 1927); GERMANY (CC § 690); GREECE (CC art. 823); Spain (CC art. 1094 and 1104).

2. The storehouse is not liable if it could not have prevented the damage to the things by exercising due care, cf. AUSTRIA (CC § 964). In determining the amount of care that may be expected, the price for storage is to be taken into account, cf. BELGIUM (KHz. Antwerp 15 September 1970, RW 1970-1971, 620). In all reported legal systems, the burden of proof that damage to the things is not caused by a lack of care is on the storehouse, cf. Austria (OGH, SZ 10/87; OGH, SZ 56/143 = EvBl. 1984/11); FRANCE (Cass.civ. I, 11 July 1984, Bull.civ. I, no. 230; Cass.civ. I, 28 May 1984, Bull.civ. I, no. 173); *Houghland v. R.R. Low (Luxury Coaches) Ltd.* [1962] 1 QB 694; *Levison v. Patent Steam Carpet Cleaning Co. Ltd.* [1978] QB 69; THE NETHERLANDS (T&C/Masterminds, to CC art. 7:605, note 5), SCOTLAND (*Stair*, The Laws of Scotland VIII, 'Deposit' para. 13; *McBryde*, Law of Contract in Scotland, paras. 9.56-9.57).

3. Use of the things by the storehouse without the client's consent is not permitted in AUSTRIA (CC § 958); BELGIUM (CC art. 1930); FRANCE (CC art. 1930); THE NETHERLANDS (CC art. 7:603 para. 1); POLAND (CC art. 839); SPAIN (CC art. 1767). In Austria, it is added that if use is permitted, not a storage contract but a loan contract is concluded, whereas if consent is given later, the storage contract is by operation of the law changed into a loan contract, cf. Rummel [-*Schubert*], ABGB I^2, § 958 no. 1; § 959 no. 1. In Spain, the contract would then be qualified as exchange or *commodious* (CC art. 1768). In many legal systems, an exception is made if use is actually needed to preserve the thing; the example of the need to ride a horse is often given to illustrate this point; cf. ENGLAND *Coldman v. Hill* [1919] 1 KB 443; France cf. *Huet*, Contrats spéciaux^2, no. 33107, 33154; The Netherlands (CC art. 7:603, para. 1); Poland (CC art. 839); abide RUSSIAN FEDERATION (CC art. 892); SCOTLAND (*Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Co*, 1925 SC 796).

II. Protection of the things

4. The storehouse's obligation of care requires the storehouse to undertake all reasonable measures to maintain the things or prevent deterioration thereof under AUSTRIAN law. Cf. OGH, EvBl 1984/11; Rummel [-*Schubert*], ABGB I^2, § 957 no. 2; *Koziol and Welser*, Bürgerliches Recht II^{12}, p. 183. The amount of care that is required of the storehouse depends on the circumstances of the case, cf. Rummel [-*Schubert*], ABGB I^2, § 964 no. 2. The storehouse is not liable if it could not have prevented the damage to the things by exercising due care; it cannot be required to take such measures as would save the things but sacrifice its own interests, cf. CC art. 964. The burden of proof that the damage to the things is not caused by a lack of care is on the storehouse, cf. OGH, SZ 10/87; OGH, EvBl 1984/11; Rummel [-*Schubert*], ABGB I^2, § 965 no. 3. In a commercial case, Ccom § 388 explicitly allows for a right to sell the things in case of deterioration.

5. In BELGIUM the storehouse is required to care for the things as it would care for its own goods, cf. CC art. 1927, i.e. as a 'good housefather'; in case of a remunerated storage contract, a higher level of diligence is required, cf. CC art. 1928. The

storehouse is required to take reasonable measures to prevent theft of the things, but the type of measures that can be expected also depend on the price for the storage, cf. Kh. Antwerp 15 September 1970, RW 1970-1971, 620.

6. In ENGLAND, in the case of storage services which are provided for reward, a storehouse acting in the course of a business is obliged, under both the common law (cf. *Coggs v. Bernard* (1703) 2 Ld Raym 909, 92 ER 107) and the Supply of Goods and Services Act 1982 (s. 13), to perform the service with reasonable skill and care (the storehouse also has a duty in tort to take reasonable care of a client's goods). The storehouse bears the burden of proving that there was no negligence, cf. *Houghland v. R.R. Low (Luxury Coaches) Ltd.* [1962] 1 QB 694; *Levison v. Patent Steam Carpet Cleaning Co. Ltd.* [1978] QB 69. To that extent, it must, among other things, prove it had taken reasonable precautionary measures to prevent unnecessary deterioration or destruction of the things, cf. *Sutcliffe v. Chief Constable of West Yorkshire* [1996] RTR 86 and to protect the things against imminent danger, cf. *Brabant & Co. v. King* [1895] AC 632 at 641) and that it has a proper system for looking after the things and was not negligent in selecting employees, cf. *Bullen v. Swan Electric Engraving Co.* (1907) 23 TLR 258.

7. According to the old FINNISH rule on custodial liability in the Commercial Code Chap. 12, s. 2 "… goods held in charge should be kept as one's own". If the goods are damaged without negligence "there is no liability". The modern regulations found in the Consumer Protection Act and Sale of Goods Act are based on a reversed burden of proof. In order to avoid liability the custodian must show that any damage to the property has not been caused by the storer's negligence.

8. The care required from a storehouse under FRENCH law is that of a 'bon père de famille', CC art. 1927; yet it is up to the storehouse to prove it has lived up to that standard, cf. Cass.civ. I, 28 May 1984, Bull.civ. I, no. 173; Cass.civ. I, 11 July 1984, Bull.civ. I, no. 230. Therefore, in practice, a reversal of the burden of proof occurs: the storehouse will have to prove that the carelessness or negligence of the client is the cause of the defect; cf. *Huet*, Contrats spéciaux[2], nos. 33143, 33147. In a case of a fire due to unknown causes, the storehouse was held liable for not having taken sufficient precautions, cf. Cass. com., 10 February 1959, Bull. civ. III, no. 72.

9. The commercial storehouse is entitled under GERMAN law to carry out itself the work necessary for the preservation of the things. If, after the things have been received, their condition has changed in a way which is likely to lead to them being lost or damaged or causing damage to the warehouse keeper or if such a change is likely, the storehouse must without delay inform the client or, if a warrant has been issued, the last known legitimated holder of the warehouse warrant, and ask for instructions. If the storehouse cannot obtain instructions within a reasonable period, it must take such measures as seem to be appropriate. In particular, it may have the things sold, cf. CC § 471. In the case of a gratuitous storage contract the storehouse is only liable if it has not acted with the care one would use for one's own goods, cf. CC § 690.

10. With regard to the contract of storage, the GREEK CC art. 823 requires that a storehouse is bound to exercise the same care as it bestows on its own affairs, unless the storage is for remuneration, in which case the storehouse will be responsible for any fault (CC art. 330).

11. In the performance of the obligation to preserve the things in a good condition (and to give them back as they were handed over), the service provider may need to take precautionary measure under ITALIAN law. E. *g.* in the case of storage of food, it must provide refrigerators, regulating the temperature in the cells, checking the

persistence and intensity of refrigerating energy, etc., cf. Cass.civ.sez. III, 18 July 1996, no. 6489, Soc. De Lucia c. D´Addio, Contratti (I), 141 with note of *Natale*. The storehouse is expected to actively prevent any decay or deterioration of the things even by acting beyond the conditions agreed upon, cf. Ccom art. 1770 para. 2.

12. In THE NETHERLANDS the storehouse's obligation to take due care of the things and to return them in the original condition includes an obligation to store them in a safe manner and, therefore, to take precautionary measures to prevent unnecessary deterioration or decay, cf. *Paquay*, RM Themis 1994, p. 493-494. *Rutgers*, Bewaarneming, no. 12; HR 30 September 1994, NedJur 1995, 45 (*Diepop Bossche Vrieshuizen/Nouwens*, in a case of storage of fruit by a professional storehouse). Therefore, a stored animal must be fed (T&C/Castermans, to CC art. 7:602, note 2) and looked after (Pitlo [-*du Perron*], VI[9], p. 295), a piano must be sheltered from humidity and dehydration (T&C/Castermans, to DUTCH CC art. 7:602, note 2), and, in case of frost, a car must be provided with antifreeze (Asser-Kleijn, no. 7). The obligation to exercise due care further implies an obligation for the storehouse to insure against theft, fire and – if customary – other unfortunate accidents, cf. Pitlo [-*du Perron*], VI[9], p. 295; *de Klerk-Leenen and Wessels*, Bijzondere overeenkomsten, to CC art. 7:602, note 3; Rb Dordrecht 19 April 1989, NedJur 1990, 178 (Error Free/Kasteel). However, as the subsequent obligation to return the thing in its original state (CC art. 7:605(4)) is considered to be an obligation of result, in practice, the burden of proof of the breach of the standard of care is reversed, cf. T&C/Castermans, to CC art. 7:605, note 5.

13. In the contract of safe-keeping under POLISH law the keeper is obliged to keep the thing in an undeteriorated condition (CC art. 835). So the thing must be kept in a manner determined in the terms regulating the obligation, or in a manner which results from the nature of the thing and from the circumstances (CC art. 837). If it is necessary for the protection of the thing against loss or deterioration the keeper is authorised or even obliged to sell the thing (CC art. 838). If it is necessary for preserving the thing in an undeteriorated condition, the keeper is allowed to use the thing without the consent of the depositor (CC art. 839). In the case of the storage contract, the storehouse is obliged to take appropriate conservation measures. This obligation is deemed to be so important that the parties cannot agree otherwise; cf. CC art. 855 para. 2. The storehouse is obliged to secure the things and the rights of the depositor, if the things are in a condition that suggests loss, deterioration or damage (CC art. 857), and if the things are perishable and it is not possible to wait for the instructions of the depositor, the storehouse is entitled or even obliged to sell the things (CC art. 859). Generally, the keeper in the case of the contract of safe-keeping is liable for not observing due diligence (CC art. 472), and may escape from liability by proving that the damage was due to circumstances for which he or she is not liable (CC art. 471). Liability of the keeper is modified in the case of depositing the thing with another person. If the keeper forced by the circumstances to do this and if the depositor is immediately informed with whom and where the thing has been deposited, then the keeper is liable only for lack of due diligence in choosing the substitute (CC art. 840 para. 1). The burden of proof concerning lack of fault in choosing the substitute lies with the keeper, otherwise liability is risk based "like for his own actions" (CC art. 474), and liability of the keeper and the substitute is solidary (CC art. 840 para. 2, sent. 2). If the keeper proves that there was no fault in choosing the substitute, the liability rests on the substitute (CC art. 840, para. 2 sent. 1). In the case of the storage contract, the storehouse is liable for the loss or deterioration of, or damage to, the things accepted for the storage, during the period between their acceptance and their return to the person entitled, unless the keeper proves that the

damage could not have been prevented even by observing due diligence (CC art. 855 para. 1). The storehouse is not liable for decrease in value within the limits specified in the relevant provisions of law, and in the absence of such provisions, within the limits accepted customarily (CC art. 855 para. 3). The redress cannot exceed the ordinary value of the things, unless the damage results from the intentional guilt or gross negligence of the storehouse (CC art. 855 para. 4).

14. Under PORTUGUESE law the storehouse must adopt all methods necessary to conserve the stored thing, avoiding danger, loss and interference from third parties, using the diligence of an average man. Cf. *Antunes Varela*, Obrigações em geralII[6], p. 759. In doing so, the storehouse must avoid damage to other goods and third parties. If the storehouse knowingly accepts the storage of inflammable products or of an ill animal, the storehouse will be liable in tort towards third parties in case of explosion or contamination of other animals if it did not avoid those possibilities. Cf. *Antunes Varela*, Obrigações em geral. II[6], p. 776.

15. In SCOTTISH law the store keeper is obliged to take reasonable care of the thing stored while it is in storage, the obligation being to show 'such diligence as the person entrusted uses, or men ordinarily do, in their own affairs' (*Stair*, Institutions I[5], 13,2). This may include a duty of reasonable inspection to check that the goods are not being damaged (*Gloag and Henderson*, The Law of Scotland, para. 15.10). The keeper is liable in damages if the thing is returned damaged or is lost unless the keeper can prove that the loss happened otherwise than through the keeper's fault (*Stair*, The Laws of Scotland VIII, 'Deposit', para. 13; *McBryde*, Law of Contract in Scotland. paras. 9.56-9.58).

16. The main obligation for the storehouse under SPANISH law is to preserve the things in storage, by protecting them and using the care required by the nature of the things. To that extent, it must carry out the activities needed to ensure the preservation of the things, cf. *Sierra*, Comentario del Código Civil, pp. 1038-1039. It must act in conformity with the agreement reached and, in the absence of such term, with the diligence of a *bonus paterfamilias*, cf. CC arts. 1094 and 1104. In the case of a commercial storage contract, the storehouse is under a higher standard of care: Ccom art. 306, para. 2 has the effect that the storehouse is liable if the things in storage suffer damage due to the storehouse's intentional or negligent behaviour and to defects resulting from the nature of the things if, in the latter case, the storehouse did not do what was necessary to prevent or cure such damage and did not warn the client.

17. Under the SWEDISH Consumer Services Act § 4, the storehouse is required to perform the service in a professional manner. This obligation includes using an adequate method of storage. A term limiting or excluding the obligation is void, cf. Consumer Services Act § 9. Under that provision, even in the absence of negligence, the service is deemed to be non-conform if the non-conformity is the result of an accident or other similar event, cf. ARN 25 May 1992, 1991-5176 (damage to a stored sofa and armchairs by rats in a case where the storehouse had regularly had the things examined and the parties had agreed that it was up to the client to have the things insured). However, when a consumer left her wallet for three hours in the pocket of a jacket in a guarded cloakroom in a restaurant, the restaurant was not liable for the theft of the wallet if the jacket was still in the cloakroom, cf. ARN 9 October 1997, 1997-2289.

III. Use by storehouse

18. Use of the things by the storehouse is not permitted in AUSRIAN law (CC § 958). Where use is permitted, a loan contract is concluded, cf. Rummel [-*Schubert*], ABGB

I[2], § 958 no. 1. If during storage the client permits the storehouse to make use of the things, then as of that moment or, if the consent to make use of the things was not requested by the storehouse, as of the moment that the storehouse makes use of the thing, the contract is qualified by law as a loan contract, cf. CC § 959; Rummel [-*Schubert*], ABGB I[2], § 959 no. 1 and *Koziol and Welser*, Bürgerliches Recht II[12], p. 183.

19. In BELGIAN law the storer may not use the things without the client's tacit or explicit consent, cf. CC art. 1930.

20. In ENGLAND, in the case of gratuitous storage the storehouse is not entitled to use the things for its own advantage without the consent of the client unless such use is necessary for their preservation, cf. *Chitty* on Contracts II[29], no. 33-031; *Coldman v Hill* [1919] 1 KB. The same principle would seem to apply to storage contracts for consideration, cf. *Charlesworth/Dobson/Schmitthoff*, Charlesworth's Business Law[16], p. 549.

21. The storehouse is not allowed to use the stored goods under FRENCH law (CC art. 1930). This is different if the use is necessary to preserve the value or condition of the thing stored, e. g. riding a horse; cf. *Huet*, Contrats spéciaux[2], nos. 33107, 33154.

22. Normally, the storehouse is not allowed to use the things under GERMAN law, unless this is necessary for their preservation, cf. Palandt [-*Sprau*], BGB, § 688 no. 4.

23. Under the DUTCH CC use of the things by the storehouse is permitted only if the client has agreed to such use or if use is needed to preserve or restore the things (CC art. 7:603, para. 1).

24. The keeper is not allowed under POLISH law to use the thing without the consent of the client, unless that it is necessary to preserve it in a non-deteriorated condition (CC art. 839). The storehouse is in principle not allowed to use the things.

25. In SCOTLAND, in general, the store-keeper acquires no rights of use over the thing deposited without the client's consent (*Stair*, The Laws of Scotland VIII, 'Deposit' para. 17). Inappropriate use by the store-keeper leads to liability for damage or loss caused (*Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Co* 1925 SC 796).

26. Under the SPANISH CC art. 1767, the storehouse is forbidden to use the things in storage without the client's consent. Art. 1768 adds that if the client does give consent, the contract is deemed to be a contract of loan or *comodatus*; consent must further be proved by the storehouse. Ccom art. 309 is to the same effect. However, it is different if the use of the thing is necessary for its adequate preservation. More generally, some authors argue that if use of the things is compatible with the obligation of care or if the consent to use the things is meant to reward the storehouse, then it is to be allowed, cf. *Bercovitz*, Comentarios al Código Civil, p. 2047.

IV.C.–5:104: Return of the thing stored

(1) Without prejudice to any other obligation to return the thing, the storer must return the thing at the agreed time or, where the contractual relationship is terminated before the agreed time, within a reasonable time after being so requested by the client.

(2) The client must accept the return of the thing when the storage obligation comes to an end and when acceptance of return is properly requested by the storer.

(3) Acceptance by the client of the return of the thing does not relieve the storer wholly or partially from liability for non-performance.

(4) If the client fails to accept the return of the thing at the time provided under paragraph (2), the storer has the right to sell the thing in accordance with III.–2:111 (Property not accepted), provided that the storer has given the client reasonable warning of the storer's intention to do so.

(5) If, during storage, the thing bears fruit, the storer must hand this fruit over when the thing is returned to the client.

(6) If, by virtue of the rules on the acquisition of ownership, the storer has become the owner of the thing, the storer must return a thing of the same kind and the same quality and quantity and transfer ownership of that thing. This Article applies with appropriate adaptations to the substituted thing.

(7) This Article applies with appropriate adaptations if a third party who has the right or authority to receive the thing requests its return.

COMMENTS

A. General idea

One of the main characteristics of a storage contract is that the thing ultimately is to be returned to the client by the storer, in principle unaffected by its storage. A storage contract basically states that both parties have, in normal situations, the right to enforce the return of the thing and that the mere fact that the client has accepted the return of the thing does not mean acceptance that the storage has been done in conformity with the contract. Therefore, by accepting the return of the thing the client does not lose the right to terminate the contractual relationship (leading to extinction of the obligation to pay the price) or to damages.

> *Illustration 1*
> Cocoa beans were stored in a warehouse. Upon the request of the client, the storer returns the cocoa beans. The fact that the cocoa beans were not stored properly and have become mouldy does not entitle the client to refuse their return. However, the client remains entitled to claim damages and to terminate the contract on the ground of fundamental non-performance.

The use of the word "return" in this Article does not imply that the storer has to take the thing to the client. The general rule is that a non-monetary obligation (such as the obligation to return the thing) has to be performed at the debtor's place of business. If the debtor has more than one place of business the relevant place is the place having the closest relationship to the obligation. (III.–2:101 (Place of performance)) So the place of return will normally be the place where the thing is stored. Of course, this will often be regulated by the terms of the contract.

If the client, because of the damage inflicted upon the thing by the storer refuses to accept the return of the thing, the client is in breach of the obligation to that effect. Paragraph (4) introduces a specific remedy for the storer: escaping from the obligation to continue storing the thing by selling the thing to a third party. Under deduction of the price for storage, the storer must pay the proceeds of the sale to the client. The storer may only do so after having warned the client of that sanction.

The client may request the return of the thing at any time, even if the contractual period for storage has not yet lapsed. If the client requests the return of the thing before the service has been performed, this may amount to termination of the contract under IV.C.–2:111 (Client's right to terminate), which means that the storer is still entitled to receive the contract price.

Illustration 2
Carlos holds 10,000 DVD players in storage for Eric, the owner of a number of retail shops. Due to an unexpected increase in demand, the stocks in Eric's shops are sold out. Even though the parties agreed that Carlos would store the DVD players for a period of two months, Eric may claim the instantaneous return of the DVD players, but he must pay the price for storage of the DVD players for the entire contract period.

If, during storage, the thing has borne fruit, the storer must return the fruit together with the thing itself.

Illustration 3
A farm is struck by lightning. The farmer succeeds in saving his cows, one of which is pregnant at the time. As the cowshed was destroyed, the cows are kept at a neighbouring farm. After the cowshed has been rebuilt, the farmer claims back his cows and the calf that was born in the meantime.

B. Interests at stake and policy considerations

The storer is required to store the thing in accordance with the contract, which entails costs for the storer; moreover, continued storage of the thing may prevent the storer from concluding or performing other storage contracts for lack of storage capacity. Moreover, the storer has an interest in being able to demand acceptance of the return of the thing by the client, as acceptance of the return of the thing or an unjustified refusal to accept return by the client has the effect that payment becomes due. Similarly, the client has an interest in having the thing returned whenever it is needed. The present Article deals with these interests, as well as with the consequences of the return of the thing: does acceptance of the return of the thing imply acceptance of any defects in the service or damage to the thing?

Another question is whether the client needs personally to demand the return of the thing (and go and collect it). In practice, it will often happen that the client has sold the thing to a third party and is no longer interested in its return. The third party does have an interest in the return of the thing, but does not have a contract with the storer. In some cases, the law of property may have resulted in ownership passing to the third party. Then the question arises whether the storer is entitled to withhold the thing until payment has been made for the storage. Moreover, the storer will need sufficient proof that the third party is indeed entitled to claim the return of the thing in order to prevent the client from claiming non-performance of the storer's obligation to return the thing.

A different problem may arise if the thing is commingled with other things of the same kind belonging to the storer or other clients of the storer and, therefore, can no longer be identified as belonging to a particular client. In such a case, the law of property may bring about the transfer of ownership of the thing. Unless the client has – explicitly or impliedly – consented to such a mode of storage, storing generic things in such a manner that the client loses ownership will not be in accordance with the contract. (See IV.C.–5:105 (Conformity)). However, it is not uncommon for the parties to agree either expressly or impliedly to such a mode of storage. For such cases, it must be asked what thing the storer needs to return to the client and how the ownership of that thing is transferred or retransferred.

C. Comparative overview

When no period was determined for the duration of the storage, the thing – together with any fruits it may have borne during storage – is to be returned when the client or the storer so demands. When a period for storage was fixed in the contract, the client may nevertheless demand earlier return in most legal systems, provided that the client compensates the storer for the earlier return of the thing. When the agreed period for storage has ended, the storer may demand acceptance of the return of the thing. In some legal systems, the client may be forced by court order to accept earlier return of the thing if the situation is such that the storer cannot be required to store the thing any longer as this has become impossible or immensely difficult.

When the client does not accept the return of the thing, in Austria the storer is entitled to have the thing stored by a third party at the cost of the client or to continue storage; in the latter case, the storer's liability is reduced and the client will be accountable for all the damage that results from the failure to accept the return of the thing. In Germany, non-acceptance of the thing by the client may occasionally amount to non-performance, but in any case leads to the applicability of the doctrine of *mora creditoris*. Under this doctrine, the client is not under a 'real' obligation to co-operate, but cannot invoke a non-performance on the part of the storer if, following the failure to co-operate, the thing is lost or deteriorates and the loss or deterioration cannot be attributed to the storer's conduct. In Spain, the storer may ask the court to order consignment of the thing with a third party. Alternatively, the storer may sell the thing in Austria, in England and Sweden. In France, Germany, the Netherlands and Spain, such a right does not exist; the storer may, of course, invoke other remedies, e. g. claim damages or demand specific performance of the obligation to accept the return of the thing.

D. Preferred option

The storer has a legitimate interest in being freed from the obligation to safely store the thing after the contractual period for storage has ended, and may moreover have an interest in ending storage of the thing, as there may be a need to make room for the storage of other things. Therefore, paragraph (2) is intended to enable the storer to force the client to accept the return of the thing. Paragraph (4) contains a solution for the situation in which the client fails to perform the obligation to accept the return of the thing: if the storer has sufficiently warned the client and the client nevertheless refuses to accept the return of the thing, the storer may sell the thing and – subtracting the costs of selling the thing and the price for storage – pay the proceeds to the client. The provision is the logical complement to the forced return of the thing under paragraph (2). However, given the fact that the client is not free to refuse the return of the thing, mere acceptance of the return of the thing cannot be construed as a waiver of any of the client's rights as regards non-performance of the storer's obligations.

The thing is in principle to be returned to the client. However, the client may not want to receive the thing, but may want to allow a third party to claim the return of the thing. This will often be the case in commercial storage contracts where the thing is sold during storage. Under the present Article the storer is both authorised and obliged to hand over the thing to such a third party. However, the storer does not lose the right to withhold the thing until either the client or the third party pays the price for storage, as the storer should not be worse off as a consequence of the transfer of ownership.

The present Article does not deal with the question whether the storer has become the owner of things handed over for storage because they have been commingled with other things stored by the storer. However, when such a mode of storage has been agreed upon, the client is not entitled to receive the same goods back. Instead, the client is entitled to receive goods of the same kind, quantity and quality. Moreover, the client is entitled to becoming the owner of the replacement goods. How ownership is transferred, is again a matter for the law of property.

Illustration 4
A farmer harvested 15,000 kilograms of grain. As he lacks storage capacity himself, he has the grain stored in a huge silo operated by a professional storer of grain. As the farmer knows and accepts, the silo does not contain compartments, implying that the grain cannot be separated from the grain handed over for storage by other farmers. When the farmer requests the return of the grain, the storer may return 15,000 kilograms of grain of the same kind and quality and transfer ownership thereof. This does not constitute non-conformity under IV.C.–5:105 (Conformity) as the farmer, when the contract was concluded, knew that the grain would be commingled with grain delivered by other farmers and therefore accepted the method of storage of the grain and the resulting loss of ownership thereof during storage.

The present Article encompasses the obligation of the storer to actually return the thing. After the return of the thing, the client will usually be able to determine whether or not the service has been performed correctly and will then be required to inform the storer thereof within a reasonable time. More importantly, as the client bears the burden of proving that the damage to the thing occurred prior to its return, the client in fact has an interest in reacting quickly and in investigating the thing upon its return for apparent defects: proof of the prior existence of the damage becomes very difficult as time goes by.

Under a later Article (IV.C.–5:106 (Payment of the price)) the price becomes due when the storer returns the thing. Consequently, the obligation to return the thing and the obligation to pay the price for the storage are normally to be performed at the same time. Where and as long as the client refuses to pay, the storer may withhold performance of the obligation to return the thing in accordance with III.–3:401 (Right to withhold performance of reciprocal obligations), as is explicitly regulated in IV.C.–5:106 (Payment of the price). This applies even when a third party holding sufficient title to the thing claims the return of the thing, as the right to withhold the thing exists as long as the client (or the third party) has not paid the price for storage.

Both parties are in need of the other party's co-operation in order to establish the return of the thing. Paragraphs (1) and (2) of the present Article include an obligation for each party to contribute to the return of the thing. Non-performance of such an obligation entitles the other party to claim damages or to demand specific performance. However, these remedies offer

insufficient relief if the client is negligent in the performance of the obligation to take the thing back and the storer has an immediate need to end the storage. To remedy that, III.–2:111 (Property not accepted) provides a particular remedy for the storer, i.e. to sell the thing and to pay the proceeds, less the costs incurred in selling the thing and, of course, the price for the storage. Paragraph (4) explicitly refers to that provision. However, before being allowed to exercise this right, the storer is required to give the client a reasonable warning of the intention to do so. By such a warning, the client is alerted to the possible consequences of the failure to accept the return of the thing; and is then given a final chance to perform the obligation to accept the return of the thing, thus preventing the loss of ownership over it. The notion of a reasonable warning implies that the storer must take reasonable measures to ensure that the client understands the content of the warning.

The present Article does not deal with the question *whether* or *how* ownership has been transferred because the thing has been sold to a third party or was commingled with other things stored by the storer. Such questions are left to the law of property. Of course, as is provided in IV.C.–2:106 (Obligation to achieve result) paragraph (2), the thing that is returned must be free from any right of a third party that did not exist prior to the conclusion of the contract.

The law of property is also to determine when the third party has sufficient right or authority to receive the thing. This will usually be the case if the third party produces a store warrant issued by the storer when the thing is stored.

NOTES

I. Storehouse's obligation to return the thing within reasonable time after request

1. When no period was determined for the duration of the storage, the thing stored is generally to be returned when the client so demands, cf. AUSTRIA, CC § 963; BELGIUM, CC art. 1944; ENGLAND Supply of Goods and Services Act 1982 s. 14(1); FINLAND Ccom chap. 12, s. 6; FRANCE, CC art. 1944; GERMANY, CC § 695; THE NETHERLANDS, CC art. 7:605, para. 1; SCOTLAND (*Stair*, The Laws of Scotland VIII, 'Deposit' para. 14). Yet, in Germany, in the case of a commercial storage contract concluded for an indefinite period of time, the period of notice for ending the contractual relationship is one month, unless there are special reasons for allowing an immediate termination, cf. Ccom § 473. When a period for storage has been determined, the client can nevertheless demand earlier return in most legal systems, provided that the storehouse is compensated for the early return; cf. Austria, CC § 962; Belgium, CC art. 1944; France, CC art. 1944 and cf. *Huet*, Contrats spéciaux[2], no. 33161; GERMANY, CC §. 695; RUSSIAN FEDERATION, CC art. 904. This may be different in England and The Netherlands. In any case, as is clearly stated in GERMAN doctrinal works, the storehouse must be given a reasonable time to perform the obligation to return, and the client's demand must be made at a reasonable time (e. g. during normal office hours), cf. Palandt [-*Sprau*], BGB, § 695 no. 1. Under SPANISH law, the storer must return the thing as soon as requested to do so by the client (CC art. 1766).

II. Client's obligation to accept return

2. When no time for storage has been agreed upon, the storehouse may at any time ask the client to accept the return of the thing stored: the client must be allowed a reasonable period of time to accept the return, cf. AUSTRIA, CC § 963; FRANCE, *Huet*, Contrats spéciaux[2], nos. 33140, 33162; GERMANY, CC § 696; ITALY, Ccom art. 1771 para. 2; THE NETHERLANDS, CC art. 7:605 para. 1; POLAND, CC art. 354. When the parties have agreed upon a definite period of storage, the storehouse is normally required to store the thing for the duration agreed between the parties. When the agreed time for storage has ended, the storehouse may demand that the thing be taken back, cf. Austria, Rummel [-*Schubert*], ABGB I[2], § 961 no. 4; France, *Huet*, Contrats spéciaux[2], nos. 33140, 33162; Germany, CC § 696; The Netherlands, CC art. 7:605 para. 1;; implicitly also England, cf. *Chitty* on Contracts II[29], no. 33-043. In The Netherlands, CC art. 7:605 para. 2 authorises the storehouse to obtain a court order for earlier return in case of important reasons. These include situations where further storage is either impossible or very arduous for the storehouse, cf. *Rutgers*, Bewaarneming, no. 17. Austrian law is to the same effect if, due to unforeseen circumstances, the storehouse is no longer capable of taking care of the thing or can do so only at a loss, cf. CC art. 962. When the client does not accept return, in Austria the storehouse is entitled to have the thing stored by a third party at the cost of the client or to continue storage; in the latter case, the storehouse's liability is reduced and the client will be accountable for all damage that result from the failure to accept the return, cf. Austria, Rummel [-*Schubert*], ABGB I[2], § 961 no. 4. In Germany, non-acceptance of return by the client may occasionally amount to non-performance, but in any case leads to *mora creditoris*, cf. Palandt [-*Sprau*], BGB, § 696 no. 1. In SPAIN, the storehouse may ask the court to order consignment of the thing to a third party, cf. CC art. 1776.

III. Storehouse's right to sell on failure to accept return

3. If the client does not accept the return of the things stored when required to do so, in AUSTRIA (CC §§ 389, 417(1) and 373) and ENGLAND (ss. 12, 13 of the Torts (Interference with Goods) Act 1977 and Schedule 1, Part 1, para. 4(1) the storehouse may sell the things. In England, the client requires a court order if there is a dispute with the client over any payment claimed by the storehouse, cf. *Chitty* on Contracts II[29], nos. 33-052. In FINLAND the storehouse has under certain strictly defined conditions the right to sell stored goods (Act on Business Rights to Sell Stored Goods 1988/688 arts. 3-6).

4. In FRANCE, GERMANY, THE NETHERLANDS, SCOTLAND and SPAIN, such a right does not exist; the storehouse may, of course, invoke other remedies, e. g. claim damages or demand specific performance of the obligation to accept the return of the thing. In The Netherlands, a demand for specific performance of the obligation to take the thing back immediately may be made in summary proceedings, cf. *Rutgers*, Bewaarneming, no. 17; *de Klerk-Leenen and Wessels*, Bijzondere overeenkomsten, to CC art. 7:605, note 2.

IV. Fruits

5. Where the thing stored has borne fruits during storage, the storehouse must provide the client with these fruits when the thing is returned, cf. AUSTRIA, CC § 961; BELGIUM, CC art. 1936; FRANCE, CC art. 1936; SCOTLAND (*Stair*, The Laws of Scotland VIII, 'Deposit' para. 14; SPAIN, CC arts. 1766 and 1770 and Ccom art. 306.

V. Further information

6. For further national notes, arranged on a country by country basis, see PEL SC pp. 566 to 570.

IV.C.–5:105: Conformity

(1) The storage of the thing does not conform with the contract unless the thing is returned in the same condition as it was in when handed over to the storer.

(2) If, given the nature of the thing or the contract, it cannot reasonably be expected that the thing is returned in the same condition, the storage of the thing does not conform with the contract if the thing is not returned in such condition as the client could reasonably expect.

(3) If, given the nature of the thing or the contract, it cannot reasonably be expected that the same thing is returned, the storage of the thing does not conform with the contract if the thing which is returned is not in the same condition as the thing which was handed over for storage, or if it is not of the same kind, quality and quantity, or if ownership of the thing is not transferred in accordance with paragraph (6) of IV.C.–5:104 (Return of the thing stored).

COMMENTS

A. General idea

The present Article states that a storage contract, unless of course the parties agreed otherwise, implies an obligation of result: normally, if the thing is not returned in the same condition as it was in when it was handed over to the storer, the contract has not been performed correctly. The present Article thus enables the client to establish the storer's liability.

> *Illustration 1*
> A shipment of DVDs is stored in a warehouse. When the client claims their return, it turns out that they are damaged. The storer is, in principle, liable for non-conformity of the service.

However, the storer may still prove that the fact that the thing is not returned in its original condition is due to *force majeure*. Moreover, the detrimental consequences of this strict liability of the storer are, to a large extent, redressed by the storer's possibility of limiting liability in a commercial storage contract to the value of the stored thing.

The nature of the thing handed over for storage may imply that the thing may or has to be returned in a different condition. The thing then is to be returned in the condition that the client could reasonably expect it to be in upon return, be it in a better or a worse condition than it originally was.

> *Illustration 2*
> Bananas that are already ripe are stored. The mere fact that the bananas have coloured brown when they are returned does not mean that the storer is liable, since the brown colouring of overripe bananas is a natural process.

> *Illustration 3*
> Cheese is stored in order to mould. The storer only needs to preserve the cheese and is not required to do anything with the cheese but to store it safely. From the nature of the thing handed over for storage it follows that the cheese cannot be returned in the

same condition as it was in when it was handed over. Instead, it will be returned in a better and more valuable condition.

Illustration 4
Because a town's refuse dump is closed due to a strike, the rubbish is temporarily stored. Given the natural decay of the rubbish, the storer is not obliged to return the rubbish in the same condition as it was in when it was handed over to the storer.

B. Interests at stake and policy considerations

While in most services contracts the service provider is merely under an obligation of best efforts (obligation of means) and obligations of result are mainly limited to secondary obligations, on the basis of a storage contract the client may normally expect a concrete result, i.e. that the thing will be returned in the condition it was in when it was handed over for storage. In this sense, storage implies the safekeeping of the thing. However, in some cases it follows from the nature of the thing stored that return of the thing in its original condition cannot reasonably be expected. An important example is the storage of perishable things, such as fruit.

The question then arises whether the *default rule* should be that the storer is under an obligation to return the thing in its original condition unless that cannot reasonably be expected given the nature of the thing, or that there should only be an obligation to use best efforts to bring this about. In practice, the difference is primarily a matter of proof: does the client only have to prove that the thing was not handed back in its original condition, allowing the storer to prove that due care was exercised and that the change of the condition of the thing could not have been prevented, or is it up to the client to prove not only the change in the condition of the thing, but also negligence on the part of the storer?

C. Comparative overview

In some legal systems, notably Belgium, France, England, Germany and Italy, the storer is required to return the thing to the client in the condition the client may expect; the risk of natural deterioration or decay of the thing is to be borne by the client, but it is up to the storer to prove that loss of, or damage to, the thing was not due to any negligence on the storer's part. In other legal systems, notably Austria, the Netherlands and Spain, the starting point is that the thing is to be returned in its *original* condition, together with all the increases (fruits), but here, too, the risk of natural deterioration or decay of the thing is to be borne by the client, and again the burden of proof of non-negligence is on the storer. In practice, the two approaches lead to the same result, requiring the storehouse to prove that it cannot be held liable for any loss of or damage to the thing.

D. Preferred option

Storage is to take place in accordance with the contract; if the thing is not stored accordingly, the storer is liable for any resulting damage. Moreover, the storer is normally required to return the thing in its original condition (paragraph (2)) – which would qualify as an obligation of result – whereas paragraph (3) states that only an obligation to return the thing in as good a condition as could be expected exists if return of the thing in its original condition could not be expected given the nature of the thing handed over for storage. Paragraph (4) deals with the situation where, in conformity with the contract, the thing stored is commingled with other things of the storer or of third parties, and the storer is required to return another thing of the same kind, quality and quantity and, if need be, to transfer ownership. Since

paragraph (2) contains the main rule and paragraphs (3) and (4) the exceptions, the burden of proof that either paragraph (3) or paragraph (4) applies is on the party who wishes to rely on it. In most cases, that party will be the storer; however, in *Illustration 3*, that party is the client.

NOTES

I. Overview

1. In most legal systems reported, the storehouse is required to return the things to the client in the condition the client may expect; natural deterioration or decay of the things is to be borne by the client, but it is up to the storehouse to prove that loss of, or damage to, the things was not due any negligence on its part. Cf. BELGIUM, Cass. 29 February 1996, RW 1998-1999, 1385 (Faillissement V./N. V. E.); FINLAND (Ccom Chap. 12 s. 2); FRANCE, CC art. 1933; ENGLAND, *Coldman v Hill* [1919] 1 KB 443; GERMANY, Palandt [-*Sprau*], BGB, § 695 no. 1; ITALY, Cass. 8 August 1997, no. 7363, Soc. S. Andrea c. Soc. Velo, Giust.civ.Mass. 1997, 1373. In AUSTRIA, CC § 961; THE NETHERLANDS, CC art. 7:605 para. 4; SCOTLAND *Stair*, The Laws of Scotland VIII, 'Deposit' para. 14; and SPAIN, cf. CC arts. 1766 and 1770, Ccom art. 306, the starting-point is that the things are to be returned in their *original* condition, together with any increases (fruits), but here, too, natural deterioration or decay of the things is to be borne by the client, and again the burden of proof is on the storehouse. In effect, the two approaches lead to the same result, requiring the storehouse to prove that any loss of, or damage to, the things cannot be imputed to the storehouse.

II. Condition of the thing upon return; burden of proof in case of damage

2. The storehouse is required to return the thing to the client in the state in which it was received, together with the fruits, cf. AUSTRIAN CC § 961. Return of the thing in a changed condition therefore normally means that the performance is not in conformity with the contract. The fact that the client did not supervise the performance of the service, does not lead to contributory negligence, cf. OGH, SZ 5/18. However, if the client knew the mode of storage, the client cannot argue afterwards that that mode was insufficient, cf. OGH, EvBl 1976/21. The storehouse is not liable if it could not have prevented the damage by exercising due care cf. CC § 964. The burden of proof that the damage was not caused by a lack of care is on the storehouse, cf. OGH, SZ 10/87; OGH, EvBl 1984/11; Rummel [-*Schubert*], ABGB I^2, § 965 no. 3.

3. Under BELGIAN law the storehouse is liable if it does not return the thing, unless it proves *force majeure* and that it has not made an error in storing the thing, cf. Cass. 29 February 1996, RW 1998-1999, 1385 (*Faillissement V./N. V. E.*). The mere fact that the thing was stolen, does not constitute *force majeure* by itself, cf. Kh. Hasselt 6 February 1996, RW 1999-2000, 446. The storehouse must rather prove that it had taken all reasonable measures that could be expected, cf. *Herbots*, Bijzondere overeenkomsten, Actuele problemen, 1980, pp. 272-273. The thing is to be returned in the condition it is in at the time of return, cf. CC art. 1933; natural deterioration or decay is to be accepted by the client.

4. The liability of the storehouse is fault-based, not strict, under ENGLISH law. However, the burden of proof is on the storehouse to prove that loss of, or damage to, a thing while in its possession was not due any negligence on its part, cf. *Coldman v. Hill* [1919] 1 KB 443; *Houghland v. R.R. Low (Luxury Coaches) Ltd.* [1962] 1 QB

694. To that extent, the storehouse must prove all the circumstances known to it in which the damage occurred, cf. *Levison v. Patent Steam Carpet Cleaning Co. Ltd.* [1978] QB 69.

5. Art. 1932 of the FRENCH CC requires the storehouse to return to the client the same thing that was received; if the thing has produced fruits, the storehouse must return these as well, cf. art. 1936 CC. The storehouse may not require the client to prove ownership of the thing, unless it suspects that the thing was acquired by theft; cf. *Huet*, Contrats spéciaux[2], no. 33150. The thing must be returned in the condition it is in at the moment of the restitution (art. 1933 CC), implying that ageing and wear and tear not imputable to the storehouse are to be borne by the owner. However, in practice, a reversal of the burden of proof occurs: the storehouse must prove that it exercised due care and that the deterioration of the thing is not due to a lack of maintenance on its side, cf. Cass.com., 10 February 1959, Bull.civ. III, no. 72 (garage) (fixed line of case law); cf. *Huet*, Contrats spéciaux[2], no. 33147.

6. Under the GERMAN CC the thing has to be returned in the condition that may be expected. If the storehouse cannot return it or can return it only in a damaged form, it is liable for non-performance; to escape liability, the storehouse must prove that the damage or loss was not caused negligently, cf. Palandt [-*Sprau*], BGB, § 695 no. 1.

7. With regard to the contract of storage, the GREEK CC art. 823 provides that a storehouse is bound to exercise the same care as it bestows on its own affairs, unless the storage is for remuneration, in which case the storehouse will be responsible for any fault (CC art. 330).

8. Under ITALIAN law the thing is to be returned to the client as it was at the time it was handed over. The obligation is considered to be an obligation of result. The storehouse avoids liability only by proving that deterioration or decay, etc., was due to sudden and unforeseeable circumstances falling outside its control, cf. ITALIAN CC art. 1218. The mere proof that the things were stored with the diligence of a good father of a household, as CC art. 1768 prescribes, does not suffice. Cf. Cass.civ.sez. III, 8 August 1997, no. 7363, Soc. S. Andrea c. Soc. Velo, Giust.civ.Mass. 1997, 1373; Cass.civ.sez. III, 12 June 1995, no. 6592, Giro c. Melioli, Giust.civ.Mass. 1995, fasc. 6.

9. The storehouse is under an obligation to return the thing in its original state under the DUTCH CC art. 7:605 para. 4. This is considered to be an obligation of result, cf. *Paquay*, RM Themis 1994, p. 494; *Rutgers*, Bewaarneming, no. 12. In practice, this means a reversal of the burden of proof: the storehouse must prove that it has not breached the duty of care, in which case the non-performance of the obligation to return the thing in its original state cannot be attributed to the storehouse, cf. Nieuwenhuis/Stolker/Valk (-*Castermans*), T & C Burgerlijk Wetboek, to CC art. 7:605, note 5.

10. In the case of a safe-keeping contract under POLISH law, the keeper should return the thing in an undeteriorated condition (CC art. 835). Rules on the storage contract specify that the storehouse is not liable for deterioration of the things not exceeding the limits specified in the relevant provisions of law, and in the absence of such provisions, within the limits accepted customarily (CC art. 855 para. 3). The keeper and the storehouse must prove that the damage occurred despite observing due diligence.

11. Under PORTUGUESE law the storehouse is in principle under an obligation of result to return the thing to the client in the same condition as when it was handed over.

12. In SCOTTISH law the store-keeper must restore the thing deposited with its fruits and accessories. The burden of proving restoration is on the store-keeper, who is liable for

all loss suffered by the client as a result of failure to restore (*Stair*, The Laws of Scotland VIII, 'Deposit' para. 14). There is no discussion of the problem of goods which by their nature deteriorate over time.

13. The basic obligation of the storehouse under SPANISH law is the custody of the thing in storage in order to return it to the client in the same condition as when it was handed over, plus any fruits and accessories, cf. CC arts. 1766 and 1770 and Ccom art. 306. There is no provision dealing with the situation where the nature of the thing implies that it is to be returned in a worse condition; in the absence of a contractual agreement, the storehouse can only invoke and prove *force majeure*, i.e. a fortuitous event or the intervention of a third party or the client to escape liability, cf. CC art. 1183; *Bercovitz*, Comentarios al Código Civil, p. 2045 . Regarding the storage of things that are fungible by nature, such as money, under SPANISH law the contract may be qualified as an irregular storage contract (not regulated by the Civil Code but admitted by the authors, cfr. *Martín Santisteban*, El depósito y la responsabilidad del depositario, pp. 82 and ff), where, due to the nature of the thing, the storer is only obliged to restore a thing of the same kind, quality and quantity as the one received.

14. The SWEDISH Consumer Services Act § 15 provides that if the service is storage, the consumer can require that the storage is performed in a professional manner (i.e. in accordance with Consumer Services Act § 4). A term limiting or excluding the obligation is void, cf. Consumer Services Act § 9. Under that provision, even in the absence of negligence, the service is deemed to be non-conform if the non-conformity is the result of an accident or other similar event, cf. ARN 25 May 1992, 1991-5176.

IV.C.–5:106: Payment of the price

(1) The price is payable at the time when the thing is returned to the client in accordance with IV.C.–5:104 (Return of the thing stored) or the client, without being entitled to do so, refuses to accept the return of the thing.

(2) The storer may withhold the thing until the client pays the price. III.–3:401 (Right to withhold performance of reciprocal obligation) applies accordingly.

COMMENTS

A. General idea

The central question in this Article is when the client is to pay for the service rendered or to be rendered. The Article states that the price is normally due when the thing is returned to the client.

> *Illustration 1*
> Oranges were stored in a warehouse. Upon request of the client, the storer returns the oranges. Payment becomes due when the client accepts the return.

However, as the client is not entitled to refuse the return of the thing, the client should not by doing so be able to frustrate the storer's right to payment. To prevent this, the Article states that the right to payment also emerges when the client refuses to accept the return of the thing. This does not, however, mean that the client always has to pay the price for storage. If the client terminates the contract for fundamental non-performance, the obligation to pay the price is extinguished: if the client has already paid, restitution of the payment may be demanded.

The rule in the Article is only a default rule. The parties are free to derogate from this provision, and will often do so, especially in the case of a storage contract for a relatively long period of time.

> *Illustration 2*
> Oranges are stored in a warehouse. The parties have agreed upon payment for each month during which the oranges are stored, to be paid at the beginning of the month. In accordance with the contractual agreement of the parties, payment is due at the beginning of the relevant month.

B. Interests at stake and policy considerations

The general rules in Book III start from the assumption that both parties will perform their obligations simultaneously. In storage contracts, which by definition imply that the storer must perform the main obligation for a reasonably long period of time, simultaneous performance would mean that the client is also under a continuous obligation to perform, i.e. to pay. This, of course, would not be very practical. This implies that normally either the storer or the client is required to perform first. The party who must perform first has no certainty about the other party's intention to perform. A choice must be made whether the uncertainty is to be placed on the storer or on the client. An in-between position could be reached if the client were to pay part of the price after a period of storage has ended or before a new period starts. In this way, the risk on the party that is to perform first is reduced.

C. Comparative overview

In most legal systems, payment for storage is due when the storage ends, although in any legal system the parties may agree to a different time for payment and often do so. Especially in the case of commercial storage, a contractual arrangement to the extent that payment is due per period of storage is more common.

In the case of non-payment by the client, in most legal systems the storer may invoke the right of retention or otherwise withhold the thing. However, such a right to withhold the thing does not exist in Austria and in England.

D. Preferred option

In the present Article, the general trend in the European legal systems – that payment is due when the storer returns the thing – is followed. Thus the storer is to perform first. However, to prevent the storer from having to bear the risk of non-performance by the client completely, the storer is given a specific right to withhold the thing. Moreover, as the Article only contains a default rule, the parties may agree to a different time for payment to become due. In the case of a contract for an indefinite period of time, which will occur primarily in commercial storage contracts, the parties will normally make different arrangements as to the time when the price for the storage is to be paid.

NOTES

I. Time when payment is due

1. The contractual agreements, if any, are decisive as to the time when payment is due. In the absence of agreement, payment is due when storage has ended in AUSTRIA, cf. Rummel [-*Schubert*], ABGB I^2, § 969 no. 1; GERMANY, CC § 699; POLAND, CC art 455 (Radwański [-*Napierała*], System Prawa Prywatnego VII^2, p. 629) and SPAIN, CC art. 1780. However, especially in the case of commercial storage, a contractual arrangement that payment is due per period of storage is more common, cf. FRANCE, *Huet*, Contrats spéciaux^2, no. 33137; GERMANY, CC § 699. This is probably also the case in THE NETHERLANDS. When storage for a determined of time has been agreed upon and the client demands the return of the thing before that period has ended, then the storehouse is normally entitled only to a reasonable part of the price in Austria, cf. OGH, JBl 1974, 622.

2. Under SPANISH law, the storage contract is *prima facie* gratuitous, unless the parties agree otherwise (CC art. 1760); although a commercial storage is always presumed to be an onerous contract (Ccom art. 304). Apart from any agreed payment for the storage, the client is obliged to reimburse the storer for any expenses incurred in order to maintain the thing in its original condition.

II. Storehouse's right of retention in case of non-payment

3. In case of non-payment by the client, the storehouse may invoke a right of retention (*i.e.* withhold the thing) in BELGIUM (art. 1948 CC); FINLAND (CC Chap. 12 s. 8); FRANCE (art. 1948 CC); GERMANY (CC §§ 273, 320(1)); THE NETHERLANDS (CC arts. 6:262, 6:52 and 3:290 ff); POLAND (CC art. 488 para. 2 and art. 859^3); SCOTLAND (*Stair*, The Laws of Scotland VIII, 'Deposit' para. 15) and SPAIN (CC

art. 1780). The storehouse does not have such a right in AUSTRIA, cf. Rummel [-*Schubert*], ABGB I[2], § 967 no. 3 and § 969 no. 1; nor in ENGLAND *Chitty* on Contracts II[29], no. 33-051.

III. Further information

4. For national notes arranged on a country by country basis, see PEL SC pp. 574 to 575.

IV.C.–5:107: Post-storage obligation to inform

After the ending of the storage, the storer must inform the client of:

(a) any damage which has occurred to the thing during storage; and

(b) the necessary precautions which the client must take before using or transporting the thing, unless the client could reasonably be expected to be aware of the need for such precautions.

COMMENTS

A. General idea

This Article imposes a specific obligation on the storer to give the client two different types of information. Firstly, if for some reason the thing was damaged during storage, the storer must inform the client of that. This is especially important if there is a chance that the client would not notice the damage immediately and would run the risk of greater damage if prompt action were not taken.

Illustration 1

A computer company has stored a hospital's electronic patient records. During storage, a major power cut has damaged the computer company's mainframe computer, damaging some of the records. The hospital will only be able to notice the damage if it specifically looks for information which is stored in the damaged files. The computer company is obliged to inform the hospital of the damage. After having been warned, the hospital can try to access backup files it may still have. If the hospital is not duly warned, the chances increase that such backup files will have been deleted.

Secondly, the storer may be under a duty to warn the client that precautions need to be taken before the thing is transported or used by him. Such a warning is, however, not necessary if the client can be expected to be aware of the need to take precautions.

Illustration 2

A woman has her furniture, including a refrigerator, temporarily stored because she has moved out of her old house but has not yet got entry to her newly built house. As the storer knows, a refrigerator should not be used for two or three days after it is moved from one place to another. The storer has, in principle, an obligation to warn the client of this when the refrigerator is handed back, unless the client could reasonably be expected to be aware of it already. As this is most likely the case, the storer will most probably not be under an obligation to warn the client.

B. Interests at stake and policy considerations

During storage, all sorts of things may happen to the thing, including damage. Often, such damage will be noticed by the client at the time or shortly after the thing is returned. However, certain types of damage may be hidden to the client while the storer may be aware of them, either because of professional expertise or because of awareness of the event causing the damage. If the storer does not inform the client, the damage to the thing may increase considerably as the client may fail to take the necessary measures to control the damage. On the other hand, imposing an obligation upon the storer to inform the client of damage that

occurred during storage implies that the storer may have to report the storer's own non-performance of a contractual obligation.

A second question is whether the storer should have an obligation to warn against dangers when using or transporting the returned thing. One could argue that when the storer has properly taken care of the thing and returns the thing undamaged, the storage obligations have been fully performed. On the other hand, one could argue that it follows from the storer's obligation to take due care and to act in accordance with good faith and fair dealing that the storer must warn the client if aware of such dangers, even if these dangers have nothing to do with the performance of the service. An in-between solution would be that a duty to warn only emerges if the client would have no reason to be aware of the need to take these precautions.

C. Comparative overview

In most legal systems, an obligation to inform the client of the condition of the thing and the necessary precautions that the client must take before using or transporting the thing may occasionally follow from the storer's obligation of care or from the principle of good faith. In Spain, such an obligation is explicitly provided for in the case where the client is a consumer. Moreover, in several legal systems, e. g. Austria, England and Spain, the storer must inform the client about any damage that occurred to the thing during storage.

D. Preferred option

If damage occurred during storage, the client must be informed thereof, either upon return of the thing or before that. If duly informed, the client may be able to take appropriate measures to prevent further damage from occurring. Such is the case even if this means that the storer must inform the client of a non-performance, thus opening up the possibility of liability. It should, however, be noted that if the storer properly informs the client and the client takes appropriate measures in time, the extent of the damage may be limited. This would mean that the storer would be liable to pay damages to a lower amount, either because not all foreseeable damage has occurred or because the occurrence of part of the damage should have been prevented by the client, which would mean that that part of the damage is to be attributed to the client rather than to the storer.

The storer is, of course, only required to inform the client of such damage and of such dangers that the storer can be aware. When the thing handed over was sealed, the storer is not allowed to break the seal and cannot investigate it. Consequently, in the case of the storage of sealed things, obligations under this Article must be restricted to those cases where the seal was broken or where the damage can be noticed even though the seal has not been broken.

> *Illustration 3*
> A firm is preparing to move from one building to another. It has confidential records and office materials stored in a sealed wooden container. The storer may not investigate the container's contents and therefore cannot report the fact that an employee's fishbowl, stored in the container, was broken during transport. However, the storer must inform the client that the wooden container and its contents were destroyed by a fire in the warehouse where the container was stored.

The storer is under an obligation to warn the client that the client needs to take precautionary measures before transporting or using the thing if the storer is aware of dangers connected

with its transportation or its use by the client, even if these dangers are inherent to the fact that the thing was stored or is transported by the client. The reason for such an obligation is that the storer may be aware of the dangers but the client may not. However, it would not be fair or reasonable to burden the storer with an obligation to warn against dangers the client can reasonably be expected to know of.

Both the obligation to inform under paragraph (1) and the obligation to warn under paragraph (2) operate at or after ending of the storage. The provision may be applied if the storage is temporarily suspended while the contract is still in force but, more importantly, also when the contractual relationship has come to an end for whatever reason.

NOTES

1. An obligation to inform about the condition of the thing or risks that may occur or have occurred as a consequence of storage is accepted in AUSTRIA, cf. *Koziol and Welser*, Bürgerliches Recht II[12], p. 183; Rummel [-*Schubert*], ABGB I[2], § 964 no. 2. There is no specific provision on this matter under SPANISH law, although such an obligation for the storer may be inferred from the principle of good faith (CC art. 1258). Such an obligation may follow in GERMANY and THE NETHERLANDS from the obligation to take the interests of the client into account or from good faith, cf. CC art. 241 para. 2 and CC arts. 7:602, 6:2 and 6:248; probably the same holds true for FRANCE, especially if the storehouse is a professional party. Moreover, in Austria (cf. Rummel [-*Schubert*], ABGB I[2], art. 964 no. 2), ENGLAND (cf. *Coldman v. Hill* [1919] 1 KB 443) and Spain (cf. CC arts. 1102 and 1103), the storehouse must inform the client about any damage that has occurred to the thing during storage. In POLAND, in the case of a contract for safe-keeping, not informing the client about important events affecting the goods may sometimes be qualified as contrary to CC art. 56 (Radwański [-*Napierała*], System Prawa Prywatnego VII[2], p. 629). According to the rules on the storage contract (CC art. 858) the storehouse is obliged to inform the client about events important from the point of view of the client or relating to the condition of the thing accepted for storage, unless such a notification is not possible. There is no discussion of these matters in SCOTTISH law.

IV.C.–5:108: Risks

(1) This Article applies if the thing is destroyed or damaged due to an event which the storer could not have avoided or overcome and if the storer cannot be held accountable for the destruction or damage.

(2) If, prior to the event, the storer had notified the client that the client was required to accept the return of the thing, the client must pay the price. The price is due when the storer returns the remains of the thing, if any, or the client indicates to the storer that the client does not want those remains.

(3) If, prior to the event, the storer had not notified the client that the client was required to accept the return of the thing:

(a) if the parties had agreed that the storer would be paid for each period of time which has elapsed, the client must pay the price for each period which has elapsed before the event occurred;

(b) if further performance of the obligations under the contract is still possible for the storer, the storer is required to continue performance, without prejudice to the client's right to terminate the contractual relationship under IV.C.–2:111 (Client's right to terminate);

(c) if performance of the obligations under the contract is no longer possible for the storer the client does not have to pay for the service rendered except to the extent that the storer is entitled to a price under subparagraph (a); and the storer must return to the client the remains of the thing unless the client indicates that the client does not want those remains.

(4) If the client indicates to the storer that the client does not want the remains of the thing, the storer may dispose of the remains at the client's expense.

COMMENTS

A. General idea

Sometimes the thing handed over for storage is damaged or destroyed without any fault or other cause attributable to the storer. Under the previous Article, the client must be informed of this when the thing is returned to the client. If the storehouse proves that the damage was caused by an impediment beyond its control, it is not liable for the damage. In that case, the damage to, or destruction of, the thing is to be borne by the client. It is, however, not clear whether the client still has to pay for the storage service.

In this Article, a distinction is made between the situation where the storer had already informed the client that the client was required to accept the return of the thing or the client had asked its return and the situation where the storer had not yet indicated that. In the former situation, the client bears the consequences of the unfortunate event: the client must still pay the price for the service rendered, even although the benefit of the thing can no longer be enjoyed.

Illustration 1

A shipment of 1,000 DVD players is stored at a warehouse for two months. When the two months have passed, the storer requires the client to take the DVD players back, as the storage facility is needed for storage of other things. Before the DVD players are collected, the warehouse is struck by lightning; in the resulting fire, the DVD players are damaged. The storer need only return the remains of the DVD players if

the client is still interested in them, but the client is required to pay the price for the service that was rendered.

In the latter situation, a further distinction must be made as to whether performance of the service is still possible or not. If prolonged storage is still possible (and reasonable), the storer is to continue storing the thing, unless the client terminates the contractual relationship.

Illustration 2
A shipment of 1,000 DVD players is stored at a warehouse for two months. Before the contractual period has ended, a fire breaks out. Because of water damage, the DVD players are damaged, but not destroyed. The storer must continue storage, unless the client terminates the contractual relationship.

If storage is no longer possible, the storer is not entitled to payment and must return the thing or what remains of it to the client if the client wants to receive the thing or what remains of it.

Illustration 3
The DVD players are damaged to such an extent that they are of no further use. In this case, the storer must return the remains of the DVD players to the client if the client so requests, but does not have the right to payment.

As storage contracts usually are long-term contracts, the parties will often have agreed upon payment per period. The client is still required to pay for the periods that have ended even if future performance is no longer possible.

Illustration 4
A shipment of 1,000 DVD players is stored at a warehouse for two months. The parties have agreed upon monthly payment, to be paid after the relevant month has ended. When exactly one month has passed, a fire breaks out, destroying the entire shipment. The client need only pay for the first month of storage.

B. Interests at stake

The question to be answered here is who should bear the consequences of the unfortunate destruction or deterioration of the thing. In most cases, the causes for non-performance will be attributed to one or the other party. Damage caused by natural disasters such as landslides and flooding, for instance, will occur less frequently because storers will have taken precautionary measures – failure to do so when such measures should have been taken implies a non-performance by the storer – and public authorities have taken preventive measures as well. Yet, where such damage does occur and no obligation of the storer was breached, the question needs to be answered.

In this respect, the question also arises whether the storer may still claim performance of the client's obligation to pay the price when the thing has been destroyed or damaged due to an incident for which the storer cannot be held liable.

D. Preferred option

The practical relevance of the present Article is relatively low. Many events that were once considered unforeseeable or insurmountable are now within the reach of affordable preventive

measures. As a consequence, the storer will have far-reaching obligations to protect the thing against the consequences of external events. However unexpected events for which the storer cannot be held accountable may still occur.

Paragraph (1) states when the Article applies. The essence is that there must be some unforeseen event and that the storer must not be accountable for the destruction or damage caused.

If the client or the storer had already indicated that the thing was to be returned, but the client had not yet collected the thing, the client bears the consequences of the unfortunate event, and must still pay the price for the service rendered. For the only reason why the storer still had the thing was that the client had not yet collected the thing; in such cases, it is deemed to be fair that the client bears the consequences.

In the situation where the desire to have the thing returned had not yet been communicated to the other party, the consequences of the unfortunate event are covered by the principles of III.–3:104 (Excuse due to an impediment). If the non-performance is not excusable under this Article and prolonged storage is still possible (and reasonable), the storer is to continue storing the thing, unless the client terminates the contractual relationship. If the storer continues storing, the storer is entitled to the contractual price; if the client terminates, the storer is entitled to the value of the services already rendered. (IV.C.–2:111 (Client's right to terminate) paragraph (2)). Where the parties had agreed upon payment per period, the client need only pay for the periods that passed before the unfortunate event took place. If storage is no longer possible or reasonable, the storer is not entitled to payment and is to return the thing or what remains of it to the client if the client wants to receive the thing or the remains. However, as storage contracts usually are long-term contracts, the parties will often have agreed upon payment per period.

Contrary to the situation under a construction contract, and unless the thing is commingled with other things, the client is normally the owner of the thing. So the situation where the risk is completely on the storer normally does not occur under a storage contract. The risk of the loss of the thing itself is on the owner of the thing *(res perit domino)*. Total loss of the thing, therefore, will normally have to be borne by the client, who is the owner. The present Article is primarily concerned with the effect of destruction or damage on the obligation to pay the price.

NOTES

1. The consequences of *force majeure* on the performance of the obligations under a storage contract do not attract much attention in legal systems. In storage contracts, the risk of fortuitous destruction or deterioration of the thing is generally on the client, who is the owner of the thing. However, the storer will have to prove the fortuitous nature of the destruction or deterioration of the thing, since there is an obligation of result. For the rest, the matter appears to be left generally to the rules on *force majeure* or impossibility of further performance. Only in Germany has some attention been paid to the question whether the destruction of the thing leads to the storer losing the right to payment.
2. SPANISH law also lacks specific rules on the question of risk under storage contracts. Therefore the general provisions are applicable. According to those, the storer may

escape from liability only by proving the fortuitous nature of the event and that it occurred before the storer incurred delay (CC art. 1182; *Martín Santisteban*, El depósito y la responsabilidad del depositario, p. 118).

IV.C.–5:109: Limitation of liability

In a contract between two businesses, a term restricting the storer's liability for non-performance to the value of the thing is presumed to be fair for the purposes of II.–9:405 (Meaning of unfair in contracts between businesses), except to the extent that it restricts liability for damage caused intentionally or by way of grossly negligent conduct on the part of the storer or any person for whose actions the storer is responsible.

COMMENTS

A. General idea

The present Article creates a relatively safe haven for a specific type of limitation clause in storage contracts: if in a contract between two businesses the storer's liability is limited to the value of the thing before storage, that clause is presumed to be fair for the purposes of II.–9:405 (Meaning of unfair in contracts between businesses) which deals with unfair contract terms in contracts between businesses.

> *Illustration 1*
> A company specialising in improving foodstuffs harvested 15,000 kilograms of genetically modified grain. As the company lacks storage capacity, the grain is stored in a huge silo operated by a professional storer of grain. At the time of storage, genetically modified grain is not approved for consumption or distribution in the food chain. Due to the somewhat negligent behaviour of an employee of the storer, the grain is accidentally mixed with normal grain and sold as seed for new crop. When the error is noticed, the harvest of 2,000 farmers is destroyed; the farmers claim damages from the producer of the genetically modified grain on the basis of public regulations, which state that the producer of grain is strictly liable for any damage caused by the grain before approval for distribution in the food chain. When the producer claims damages from the storer, the storer invokes a standard term restricting liability to the market value of the grain at the time it was stored.

As both the producer of the grain and the storer act in the course of their business, the limitation clause is presumed to be fair.

The presumption of fairness does not apply to the extent that the term restricts liability for damage caused intentionally or by way of grossly negligent behaviour on the part of the storer or any person for whose actions the storer is responsible.

> *Illustration 2*
> A large oil company has 10,000 barrels of oil temporarily stored at a storage location, owned by a commercial refinery. The standard terms of the storer form part of the contract and include a clause limiting the refinery's liability to the value of the oil at the time of storage. An employee of the refinery, against regulations, smokes a cigarette and carelessly throws away the stub. The stub causes the oil barrels to explode, leading to an inferno at the refinery.

As in this case the employee's actions may be considered to constitute grossly negligent behaviour, the presumption of the present Article does not apply; whether the clause is

regarded as unfair in relation to such situations is to be determined under the general rules on unfair contract terms in contracts between businesses.

B. Interests at stake and policy considerations

There are general rules on unfair contract terms in Book II, Section 4. This does, however, lead to case-by-case appreciation of exemption and liability clauses, causing uncertainty as to the validity of such clauses. As a result, parties will have an interest in litigating the question whether or not the clause can be invoked. It would certainly benefit commercial practice if more guidance could be given in this matter. The question then arises whether the present Chapter should contain a specification of the general provision, indicating that particular clauses are presumed to be fair in a storage contract. A further question would be whether such a clause would also be upheld in a case where damage was caused intentionally or by way of grossly negligent conduct. On the other hand, introducing such a rule would take away some of the flexibility of the general rules on unfair contract terms. Moreover, one could argue that one should distinguish between commercial contracts and consumer contracts, in the sense that a general rule is more acceptable in commercial contracts than in consumer contracts.

C. Preferred option

At present, the legal systems are divided as to the acceptability of limitation clauses. In this Chapter, an in-between solution is followed by the introduction of a so-called safe havens for commercial storage contracts. In such contracts, a clause restricting the storer's liability for non-performance to the value the thing had before storage is *presumed* to be fair and reasonable. The presumption, however, is not generally applied. Firstly, it does not apply to the extent that the clause restricts liability for damage caused intentionally or by way of grossly negligent conduct. In this respect, it cannot be argued convincingly that a clause limiting or excluding liability even in those cases should *always* or even *normally* be considered to be fair. Therefore, clauses excluding liability for damage caused intentionally or by way of grossly negligent conduct must be excluded from the present Article. Whether such clauses are effective or not is to be determined on the basis of the general rules on unfair contract terms.

Secondly, the client may prove that, despite the presumption in this Article, in the case at hand the clause cannot be considered fair. Such proof will be difficult, but that is no bad thing. The Article aims at providing practice with hard and fast rules for one of the most important types of exclusion or limitation clauses in storage contracts. That goal would be achieved if proof of the opposite were easily accepted.

Thirdly, the presumption only applies to *commercial* cases. In consumer cases, the damage inflicted by a non-performance on the part of the storer is normally fairly limited. Usually, both the extent of the damage and the risk of its occurrence are not so extreme that they cannot be borne by the storer. There is, therefore, insufficient reason to introduce a safe haven for consumer cases. This does not mean that a clause limiting liability in a consumer case cannot be accepted; whether the clause is effective is to be determined in accordance with the general rules on unfair contract terms.

NOTES

I. Limitation of liability in case of damage caused intentionally or by gross negligence

1. Exemption or limitation of liability of the contracting party itself or its managerial staff is generally considered to be void if the damage was caused intentionally or by grossly negligent behaviour, cf. AUSTRIA, CC § 879(1); BELGIUM, Herbots 1980, p. 275; FINLAND (e.g. Supreme Court Cases KKO 1993: 166, 1995:71, 2001:17); FRANCE, *Huet*, Contrats spéciaux[2], no. 33158; GERMANY, Palandt [-*Sprau*], BGB, § 688 no. 7; GREECE, CC art. 332; ITALY, CC art. 1229; THE NETHERLANDS, HR 30 September 1994, NedJur 1995, 45 (*Diepop/Nouwens*); PORTUGAL, CC art. 809; SPAIN, CC arts. 1102 and 1103; SWEDEN, Bernitz, Standardsavtalsrätt, p. 88. Under POLISH law there is no possibility to exclude liability for a damage caused intentionally (CC art. 473 para. 2), however, it is possible to exclude liability for a damage resulting from a gross negligence (judgement of the Supreme Court of 6. 10. 1953, II C 1141/53, OSN 1955, no. 1, poz. 5). Moreover, the Polish CC perceives as unfair clauses which: exclude liability for death or personal injury (CC art. 385^3 para. 1), or which exclude or limit in a significant way the liability of the professional for non-performance or improper performance of the contractual obligations (CC art. 385^3 para. 2).

II. Limitation in commercial cases

2. In some legal systems, exclusion clauses in standard contract terms are considered void even in a commercial case, and limitation clauses are at least viewed with suspicion, cf. GERMANY, CC § 307(2); ITALY, CC art. 1469-bis; PORTUGAL, art. 18 sub d DL no. 446/85. In other legal systems, it is even thought that any exclusion clause is to be considered void, and limitation clauses are viewed with suspicion, cf. FRANCE, *Huet*, Contrats spéciaux[2], no. 33158; possibly also BELGIUM, Herbots 1980, p. 275; Portugal, Appeal Court Oporto 6 October 1987, CJ 1987, IV, p. 231. By contrast, in AUSTRIA, ENGLAND, SCOTLAND, FINLAND and SWEDEN, exclusion or limitation of liability is normally allowed, cf. Austria, Rummel [-*Schubert*], ABGB I[2], § 964 no. 3; ENGLAND, *Alderslade v. Hendon Laundry Ltd.* [1945] KB 189; Sweden, Bernitz, Standardsavtalsrätt, p. 88. Yet, in England the clause may be invoked only if the storehouse can prove all the circumstances known to it in which the loss or damage occurred, cf. *Levison v. Patent Steam Carpet Cleaning Co. Ltd.* [1978] QB 69. In THE NETHERLANDS, it is thought that such clauses have to be scrutinised carefully if storage is for a price, but that they may be justified by specific risks attached to the storage, for instance storage of a vulnerable good in which the storehouse is not specialised, cf. Pitlo [-*du Perron*], VI[9], p. 296. This is even true if the clause is included in a contract concluded with a consumer, cf. Hof Den Bosch 12 November 1990, NedJur 1991, 537, TvC 1991, p. 128 (*Herrny/Hubertushuis*).

III. Limitation in consumer cases

3. In a consumer case, exemption or limitation of liability is not valid in England, cf. s. 3(2)a Unfair Contract Terms Act 1977; SPAIN, ConsProtA art. 86(7); SWEDEN, cf. Consumer Services Act §§9, 31; ARN 1991-5176 of 25 May 1992. Such a clause may very well be valid in The Netherlands, cf. Hof Den Bosch 12 November 1990, NedJur 1991, 537, TvC 1991, p. 128 (*Herrny/Hubertushuis*); and in Austria, as KSchG, art. 6 para. 2 no. 5 only bans limitation clauses that were not the

object of negotiations between the parties. In SCOTLAND a fairness and reasonableness test will apply (Unfair Contract Terms Act 1977 s. 17).

IV. Further information

4. For further notes, see PEL SC pp. 597 to 599 and the Notes to Book II, Section 4 on unfair contract terms.

IV.C.–5:110: Liability of the hotel-keeper

(1) A hotel-keeper is liable as a storer for any damage to, or destruction or loss of, a thing brought to the hotel by any guest who stays at the hotel and has sleeping accommodation there.

(2) For the purposes of paragraph (1) a thing is regarded as brought to the hotel:

(a) if it is at the hotel during the time when the guest has the use of sleeping accommodation there;

(b) if the hotel-keeper or a person for whose actions the hotel-keeper is responsible takes charge of it outside the hotel during the period for which the guest has the use of the sleeping accommodation at the hotel; or

(c) if the hotel-keeper or a person for whose actions the hotel-keeper is responsible takes charge of it whether at the hotel or outside it during a reasonable period preceding or following the time when the guest has the use of sleeping accommodation at the hotel.

(3) The hotel-keeper is not liable in so far as the damage, destruction or loss is caused by:

(a) a guest or any person accompanying, employed by or visiting the guest;

(b) an impediment beyond the hotel-keeper's control; or

(c) the nature of the thing.

(4) A term excluding or limiting the liability of the hotel-keeper is unfair for the purposes of Book II, Chapter 9, Section 4 if it excludes or limits liability in a case where the hotel-keeper, or a person for whose actions the hotel-keeper is responsible, causes the damage, destruction or loss intentionally or by way of grossly negligent conduct.

(5) Except where the damage, destruction or loss is caused intentionally or by way of grossly negligent conduct of the hotel-keeper or a person for whose actions the hotel-keeper is responsible, the guest is required to inform the hotel-keeper of the damage, destruction or loss without undue delay. If the guest fails to inform the hotel-keeper without undue delay, the hotel-keeper is not liable.

(6) The hotel-keeper has the right to withhold any thing referred to in paragraph (1) until the guest has satisfied any right the hotel-keeper has against the guest with respect to accommodation, food, drink and solicited services performed for the guest in the hotel-keeper's professional capacity.

(7) This Article does not apply if and to the extent that a separate storage contract is concluded between the hotel-keeper and any guest for any thing brought to the hotel. A separate storage contract is concluded if a thing is handed over for storage to, and accepted for storage by, the hotel-keeper.

COMMENTS

A. General idea

The Article deals with the general liability of hotel-keepers for loss of, or damage to, things brought to the hotel by guests staying at the hotel. It does not deal with cases where there is a special storage contract between the guest and the hotel (paragraph (6)) Such cases are quite common.

Illustration 1

A Viennese hotel offers its guests the possibility of storing valuables in the hotel safe. A hotel guest hands over her passport, money and air ticket to the hotel-keeper for safekeeping in the hotel safe.

Illustration 2
A hotel guest stays in a hotel in Rome for three nights. As, on the day of his departure, his plane does not leave until 18.00 hrs., he asks the hotel-keeper whether he can leave his luggage at the hotel. The hotel-keeper offers to store the luggage in a special room.

According to paragraph (6), the two cases described above do not fall within the scope of the present Article, but under the rest of this Chapter. This also applies for the storage of money in the hotel safe, as follows from the last sentence of the paragraph.

A separate storage contract is not normally concluded for things stored in a hotel room, even if the thing is locked into a safe contained in the room, as the hotel is not in a position to supervise the contents of such a safe. The present Article nevertheless provides that the hotel-keeper is to be treated as a storer with regard to the things the guest has brought to the hotel. This means that the obligations mentioned in the previous Articles apply so far as possible. Treating the hotel-keeper as a storer only applies in relation to a thing 'brought to the hotel' by the hotel guest. It follows from paragraph (2) that a thing is considered to have been brought to the hotel if it is brought by a guest to the guest's hotel room or if it is outside the hotel but the hotel-keeper otherwise accepted responsibility for it.

Illustration 3
A hotel guest has brought a suitcase into her room and has left her car, with the permission of the hotel-keeper, in the hotel's secured parking place. Both the suitcase and the car have been brought to the hotel. Had the car been parked in the public street, the hotel-keeper would have been responsible for the car and its contents.

Moreover, the hotel-keeper is also responsible for the guest being able to take things from and bring things to the room. Therefore, things are also considered to have been brought to the hotel in the period that precedes or follows the moment the client has checked in and gone to the room, and has checked out and left.

Illustration 4
A guest wants to check into a hotel. A pickpocket steals his wallet in the hotel lobby. The hotel is liable if it did not take appropriate measures to prevent such theft in the hotel.

The hotel is, of course, only liable if it could or should have prevented anything occurring to a thing brought to the hotel.

Illustration 5
A wallet is stolen from the room of a guest. The hotel-keeper is not liable if the wallet was stolen by a visitor who had entered the room with the guest's consent, but is liable if a chambermaid took the wallet.

Illustration 6
A fire breaks out in a hotel. The hotel staff quickly extinguish the fire but one room is completely destroyed, together with the things brought into it by the guest. Unless the damage can somehow be attributed to a failure on behalf of the hotel-keeper (e. g. because not enough fire-preventing measures were taken), the hotel-keeper is not liable for damages.

Illustration 7
A hotel guest brought overripe bananas to his room. The fact that the bananas will rot unless the guest immediately eats them follows from the nature of the thing brought to the hotel. The hotel-keeper will not be liable if the bananas indeed rot, nor if that causes damage to other things belonging to the guest.

B. Interests at stake and policy considerations

The present Chapter primarily deals with contracts where storage is the main object of the contract. Often, storage goes together with the performance of another service. If there is only one contract, the general rule on mixed contracts (II.–1:107 (Mixed contracts)) has the effect that the rules of this Chapter apply to the storage part of the contract, with any appropriate modifications. A typical situation in which a combination of services exist is when valuables are stored in a hotel safe or when luggage is temporarily stored in a special room after the guest has checked out. One could argue that the storage rules could be applied, though modified to take into account that storage is only an ancillary obligation under the contract, which has the provision of accommodation as its main obligation. On the other hand, one could also argue that in such a case, the parties have in fact concluded two separate contracts: one for accommodation – a contract which is governed by Chapter 2 (Rules Applying to Service Contracts in General) only – and a storage contract as to the storage of the valuables or the luggage. One could, however, doubt whether the storage rules should apply to the hotel-keeper who upon the guest's request stores the guest's money in the hotel safe, as the present Chapter does not generally apply to the storage of money (IV.C.–5:101 (Scope)). On the other hand, the reason for the non-applicability of the storage rules to the storage of money is that normally specific regulations apply to such contracts. These rules, however, do not apply to the situation where, in the course of a contract with a hotel-keeper, money is stored in the hotel safe.

In the contracts with a hotel-keeper, a second issue may arise: is the hotel-keeper responsible for damage to the guest's things while the guest is staying at the hotel? The question is difficult to answer as regards the things the guest brought into the room: the hotel-keeper does not have control over the things that are kept in the room. From this it follows that for such things the hotel-keeper does not act as a storer. One could, therefore, argue that the present Chapter should not govern the liability of a hotel-keeper. On the other hand, the hotel-keeper's liability for things brought to the hotel by a guest has traditionally been regulated in the same or a very similar manner as the liability of a storer. Moreover, as the hotel-keeper normally provides cleaning services and therefore does have access to the room, even if the guest has locked it, there is a serious chance that any damage that is inflicted on a thing brought to the hotel is in fact inflicted by the hotel-keeper or hotel staff. The situation, therefore, is not so different from real storage. One could therefore argue that the present Chapter should contain a provision on the liability of a hotel-keeper, regulating the matter in a manner similar to the storer's liability.

If a specific provision were to be included, one could argue that a hotel-keeper should only be liable for damage to the things brought to the hotel if the guest informed the hotel-keeper of the damage promptly after discovering it: if the guest does so only after returning home, it is far more difficult for the hotel-keeper to prove that the damage was caused by somebody for whose actions the guest was responsible; moreover, the guest also deprives the hotel-keeper of the possibility of reducing the damage. This would imply that the guest should lose the right to claim damages when the hotel-keeper is not informed without undue delay.

Another question could be whether the hotel-keeper should have less freedom than other storers to limit or exclude liability. An argument in favour of this might be that the amount of damages would almost always be relatively low – especially if it were regarded as contributory negligence for a guest not to keep valuables in the hotel safe when offered the possibility of doing so. An argument in favour of a less stringent liability is that a hotel-keeper, unlike a storer, often does not have the thing under direct control and may be able to do little to prevent damage, deterioration or loss.

C. Comparative overview

On 17 December 1962, under the auspices of the Council of Europe, the Convention on the Liability of Hotel-Keepers concerning the Property of Their Guests was adopted. The Convention has been ratified by twelve of the present EU Member States (Belgium, Cyprus, France, Germany, Ireland, Italy, Lithuania, Luxemburg, Malta, Poland, Slovenia and the United Kingdom). The Convention has been signed, but not or not yet ratified by three countries (Austria, Greece and the Netherlands). A total of ten countries (the Czech Republic, Denmark, Estonia, Finland, Hungary, Latvia, Portugal, Slovakia, Spain and Sweden) have neither signed nor ratified the Convention (status at 11 May 2007).

As the Convention has been ratified by many of the reported legal systems, it is not surprising that the rules on the liability of hotel-keepers are more or less the same in many legal systems in the European Union. Even in countries which have not yet ratified, the rules are more or less the same. As a result of the Convention, in many of the existing codifications, hotel- and innkeepers are by statutory provision considered to be storers as regards the luggage, clothes and other objects brought to the hotel or inn by the client. In the case of damage to or loss of such things, the hotel-keeper can escape liability only by proving that the damage was not caused by hotel staff or another person who came to the hotel.

Things handed over to the hotel-keeper or hotel staff are considered to have been brought to the hotel. The Convention leaves it up to the national systems how to treat the hotel-keeper's liability for the client's car and its contents, and for animals brought to the hotel: Article 7 of the Annex to the Convention excludes these from the scope of the hotel-keeper's liability and Article 2 (e) of the Convention allows the parties to the Convention to decide differently. In Belgium, Article 7 of the Annex is followed; in England, only the liability for the client's car and its contents is excluded. By contrast, if the car is parked in a designated area, the hotel-keeper is liable in Austria, Germany and the Netherlands.

In the Netherlands, all rules governing the hotel-keeper's liability are default rules and no statutory limitations exist. In other legal systems, the hotel-keeper may not limit liability if the keeper or hotel staff is the cause of the damage or the thing has been handed over into the care of the hotel-keeper. In other cases, the hotel-keeper's liability is limited: in Austria to € 1,100 for most objects and to € 550 in the case of precious objects, money or securities. In England and Scotland, under the Hotel Proprietors Act 1956, the hotel-keeper is liable for an amount no greater than £50 for one thing or a total of £100 per guest. In Belgium, France and Italy, the ceiling is set at 100 times the amount of the price of accommodation for one night. In Germany, the same ceiling exists, with a minimum of € 600 and a maximum of € 3,500; in the case of money, securities and other precious things such as fur not used as clothes, a maximum of € 800 applies. In France, liability for damage to or loss of objects placed in the client's car, parked in a closed parking place belonging to the hotel, is limited to 50 times the

amount of the daily accommodation. Further exclusions or limitations of liability are normally considered to be void in Austria, Belgium and Italy.

Probably as a counterbalance to the hotel-keeper's liability, in Austria, England, France, Germany, the Netherlands, Scotland and Spain the hotel-keeper is awarded a specific right of retention of the thing brought to the hotel until all charges have been paid by the client and for which the hotel would be held liable in the case of damage; a similar right exists in Sweden, where specific legislation regarding the hotel-keeper's liability otherwise does not exist.

D. Preferred option

For those things that actually *are* taken into the hotel-keeper's custody, there is no reason to deviate from the rules on storage at all. Therefore, in such a situation, the present Article does not apply: a separate storage contract is concluded. As specific legislation regulating the storage of money does not apply to the storage of money in a hotel safe during the guest's stay at the hotel, the present Chapter should apply to such storage as well. The present Article therefore explicitly states that its rules do apply to the storage of such things. This is in conformity with the Convention on the Liability of Hotel-Keepers concerning the Property of Their Guests, which contains provisions on the liability of hotel-keepers for theft of money brought into their hotels.

Such a specific contract is not concluded concerning the things brought into the guest's room. Yet, even though hotel-keepers are, as regards the luggage a client leaves in the hotel room, not storers in the actual sense of the word, there is a close resemblance to the issues at stake in storage contracts. The reason for the application of the storage rules is that because of the open character of these places – implying that not only the staff, but also other guests and third parties may enter and leave the hotel – the client runs the risk of theft or property damage, while not being in a position to establish who is responsible. To remedy that, hotel-keepers are urged to take precautionary measures to prevent theft or damage, the aim of the rules being that hotel-keepers have to assure the safety of the things their clients bring into their establishments. This implies that the present Chapter should indeed regulate the liability of hotel-keepers in a manner similar to storage contracts.

The hotel-keeper has a legitimate interest in being informed about damage in time, but there is no particular incentive for the guest to speedily inform the hotel-keeper. To provide such an incentive for the guest, the Article states that the guest loses the right to damages if the hotel-keeper is not informed without undue delay.

> *Illustration 8*
> A guest's suitcase is stolen in the hotel lobby; the hotel-keeper did not take sufficient precautions and can therefore be held liable. The guest decides not to tell the hotel-keeper immediately, as she does not want to cause a scene before she has received the contents of her safety deposit box, where her passport and plane ticket are stored. Three hours later, when these are returned to the guest, she complains about the missing suitcase. Had the guest promptly informed the hotel-keeper, the hotel-keeper might have tried to catch the thief. The guest's failure to inform the hotel-keeper promptly means that the hotel-keeper can no longer be held liable.

It is different, however, if damage was caused intentionally or by way of grossly negligent behaviour on the part of the hotel-keeper or hotel staff: in such a case, the guest must of

course inform the hotel-keeper of the claim, but there is insufficient reason to protect the interests of the hotel-keeper to the detriment of interests of the guest.

Illustration 9
A guest succeeds in proving that a chambermaid has stolen his wallet. The fact that the guest told the hotel-keeper about the theft only at the time when he was able to prove the chambermaid had taken the wallet does not deprive him of his right to damages.

The hotel-keeper may, in principle, limit or exclude liability in the same manner as a storer may. However, in a contract with a hotel-keeper, the relevant damage almost always pertains to the personal belongings of the guest, even if the guest is a travelling salesman. Given the fact that the amount of damages that would have to be paid is almost always relatively low, limitation or exclusion of the hotel-keeper's liability should not be possible if the damage was caused intentionally or by way of grossly negligent behaviour of the hotel-keeper or hotel staff. Paragraph (4) therefore provides that a term excluding or limiting the liability of the hotel-keeper even in such cases is deemed to be unfair for the purposes of the rules on unfair contract terms in Book II, Chapter 9. Those rules are mandatory.

E. Relation to the Convention on the Liability of Hotel-Keepers concerning the Property of Their Guests

The present Article closely follows the Convention by copying the annex to that Convention, except the provisions on the limitation of liability. As to that exception: the Convention allows parties to the Convention to impose different limitations. Given the general rules on unfair contract terms in Book II, Chapter 9, it seems sufficient in the present Article to include a specific provision banning limitation and exclusion clauses that apply to damage caused intentionally or by way of grossly negligent behaviour on the part of the hotel-keeper or his staff.

NOTES

I. Application of storage rules to hotel-keepers

1. In some legal systems, the rules on storage contracts are applied by statutory provision to the liability of hotel-keepers. Cf. AUSTRIA, CC § 970(1), BELGIUM, CC arts. 1952 ff, FRANCE, CC art. 1952; GERMANY, CC §§ 701 ff; ITALY, CC arts. 1783-1786; THE NETHERLANDS, CC art. 7:609; SPAIN, CC art. 1783. The hotel-keeper can escape liability only by proving that the damage is not caused by the keeper or hotel staff or another person who has come to the hotel, cf. Austria, Rummel [-*Schubert*], ABGB I^2, § 970 no. 13; ENGLAND, *Shacklock v. Ethorpe Ltd.* [1939] 3 All ER 372; SCOTLAND, *Gloag and Henderson*, The Law of Scotland, para. 15.09; Spain, CC art. 1784. In Austria, the liability of the hotel-keeper is extended to the proprietor of a swimming pool (CC § 970(3)) and to rental contracts regarding private rooms or guesthouses, provided that the risk of an 'open house' exists, but not to hospitals, restaurants, boarding schools etc.; cf. Rummel [-*Schubert*], ABGB I^2, § 970 no. 2. In Italy, the rules applicable to hotel-keepers similarly apply to nursing homes, bathing establishments, boarding houses *(pensioni)*, trattorias, sleeping carriages and others, cf. CC § 1786. Goods handed over to the hotel-keeper or hotel staff are considered to have been brought into the hotel, cf. Austria, CC § 970(2); ENGLAND, *Charlesworth/Dobson/Schmitthoff*, Charlesworth's Business Law^{16}, pp. 551-552. The

same holds true for cars and their contents if they are parked in a designated area in Austria, CC § 970(2); France, CC art. 1953(3) and The Netherlands, Reehuis, Parlementaire geschiedenis van het nieuwe Burgerlijke Wetboek, Boek 7, 1991, p. 411; but not in England, *Charlesworth/Dobson/Schmitthoff,* Charlesworth's Business Law[16], pp. 551-552; Belgium, CC art. 1954 quater; in Belgium, the same provision excludes the hotel-keeper's liability for the animals brought to the hotel.

2. In BELGIUM, the client must report the damage immediately after becoming aware of it, otherwise all rights will be lost unless the damage has been caused negligently by the hotel-keeper or hotel staff, cf. CC art. 1954bis. The same holds true for AUSTRIA, where in addition a formal claim must be brought before the court within 30 days, cf. CC § 967; *Koziol and Welser,* Bürgerliches Recht II[12], p. 189.

3. Liability of hotel-keepers is regulated separately in the POLISH CC arts. 846-852. The general rule (CC art. 846 para. 1) is that the persons who run hotels and similar establishments for profit are liable for the loss of, or the damage to, the things brought in by persons availing themselves of the services of the hotel or a similar establishment unless the damage resulted from the nature of the thing brought in, or *force majeure,* or was caused solely by a fault of the guest or his or her employee or visitor.

4. FINLAND is one of the countries which has not ratified the Convention on the Liability of Hotel-Keepers. Liability thus follows general contractual principles (see *Sisula-Tulokas,* Hotel Liability).

5. Although the SPANISH CC seems to require the client to notify the hotel-keeper of the introduction of things brought to the hotel, according to the authors, an express notification is not an essential requirement for the application of the CC art. 1783: a mere introduction of the objects, as long as it is not hidden, suffices (*Martín Santisteban*, El depósito y la responsabilidad del depositario, p.165). However, if the client does not follow the instructions given by the hotel-keeper as to the vigilance to be exercised in relation to the object introduced, the latter is not liable for any loss or damage which occurs (SAP Zaragoza 10 July 2001, AC 2001/1804).

II. Specific limitations to the hotel-keeper's liability

6. When the hotel-keeper or staff is the cause of the damage or the thing has been handed over into the care of the hotel-keeper, the hotel-keeper cannot limit liability in AUSTRIA, cf. OGH, SZ 55/7; BELGIUM, cf. CC art. 1953 para. 2; FRANCE, CC art. 1953 para. 2; GERMANY, CC § 702; ITALY, CC art. 1784; possibly also ENGLAND, *Charlesworth/Dobson/Schmitthoff,* Charlesworth's Business Law[16], p. 552. The hotel may require valuable objects to be handed over and may decline liability otherwise in Austria, OGH, EvBl 1977/245. In other cases, the hotel-keeper's liability is limited in Austria to € 1.100 for most objects and to € 550 in the case of precious objects, money or securities, cf. CC art. 970a. In England and SCOTLAND, under the Hotel Proprietors Act 1956, the hotel-keeper is liable for no greater amount than £50 for one article or a total of £100 per guest. In Belgium, France, Italy, the ceiling is set at 100 times the amount of the daily accommodation, cf. CC art. 1953 para. 3, CC art. 1953 para. 3, CC art. 1783 para. 3. In GERMANY, the same ceiling exists, with a minimum of € 600 and a maximum of € 3.500; in the case of money, securities and other precious things such as fur not used as clothes, a maximum of € 800 applies, cf. CC § 702. In FRANCE, liability for damage to or loss of objects placed in the client's car, parked at a closed parking place belonging to the hotel, is limited to 50 times the amount of the daily accommodation, cf. CC art. 1953 para. 3. Further exclusions or limitations of liability is are void; cf. Austria, CC § 970a;

Belgium, CC art. 1954ter; Italy, CC art. 1785. In POLAND liability of the hotel-keeper in the case of the loss of or damage to the things brought in is limited to 100 times the payment for one night's lodging; however liability for one thing cannot exceed 50 times the value of such payment (CC art. 849 para. 1). These limitations do not apply if the hotel-keeper accepted the things for safe-keeping or refused to accept them, although was obliged to do so, as well as in a case, when the damage results from the intentional fault or gross negligence of the hotel-keeper or hotel staff (CC art. 849 para. 2).

7. Under SPANISH law, the only situations calling for the exemption the hotel-keeper from liability are when the loss or damage was caused by *force majeure* or an armed robbery (CC art. 1784).

III. Specific right to withhold return of goods for hotel-keeper

8. As a counterbalance to the hotel-keeper's liability, the hotel-keeper is awarded a specific right of retention of the things brought to the hotel until all charges have been paid by the client and for which the hotel would be held liable in case of damage, cf. AUSTRIA, CC § 970c; ENGLAND, *Charlesworth/Dobson/ Schmitthoff,* Charlesworth's Business Law[16], p. 552; FRANCE, CC art. 2102 para. 3; GERMANY, CC § 704; THE NETHERLANDS, CC art. 7:609 para. 3; POLAND, CC 850; SCOTLAND, *Gloag and Henderson*, The Law of Scotland, para. 37.24.

9. SPANISH law establishes only a right to retain the thing by the storer until the client pays the expenses incurred in order to maintain the thing in its original condition (CC art. 1780), but there is no such rule regarding the costs of keeping the thing and this problem has not been treated by the case law.

IV. Further information

10. For national notes on a country by country basis see PEL SC pp. 609–613.

CHAPTER 6: DESIGN

IV.C.–6:101: Scope

(1) This Chapter applies to contracts under which one party, the designer, undertakes to design for another party, the client:

(a) an immovable structure which is to be constructed by or on behalf of the client; or
(b) a movable or incorporeal thing or service which is to be constructed or performed by or on behalf of the client.

(2) A contract under which one party undertakes to design and to supply a service which consists of carrying out the design is to be considered as primarily a contract for the supply of the subsequent service.

COMMENTS

A. General idea

The act of designing can be described as the initial stage of a process in which conceptual or detailed (technical) ideas are put on paper by one party (the designer) for another party (the client). The second stage of the process consists in the realisation of these ideas, usually by a constructor under a separate construction contract. However, design may be part not only of construction projects but also of, e. g., industrial projects, software, fashion or logistics schemes. The present Chapter basically applies to the design of new immovable structures but can also be applied to the design of movable or incorporeal things and to the design of a service.

Illustration 1
A well-known brewery requests a designer to design a drinking glass for a new type of beer. The present Chapter applies.

The rules of this Chapter also apply to contracts under which the designer, apart from the design activity, has to carry out other services. In that situation, this Chapter applies only to the design part of the contract. (See II.–1:107 (Mixed contracts)). If the contract obliges the designer to carry out the design as well, for instance by constructing a new structure or by processing an existing movable or intangible thing, paragraph (2) provides that the contract is to be regarded as primarily one for supplying the subsequent service. This means that the rules applicable to the subsequent service will prevail in any case of conflict: the design rules will be applied only subsidiarily and only so far as necessary to regulate the design parts of the contract (II.–1:107 paragraphs (2) and (3)).

Illustration 2
A designer and a client concluded a contract under which the designer is to design and construct a building. The rules of the present Chapter do not apply if and in so far as its rules conflict with the provisions of the Chapter on Construction. If the latter Chapter is silent on a particular issue, the rules of this Chapter may however apply so far as necessary.

B. Interests at stake and policy considerations

The main question is whether the Chapter should cover only the traditional design contracts (in the field of construction) or also other types of design activity, such as software design, fashion design and, more generally, the design of any type of movable thing.

Another question is whether the Chapter should apply only to design contracts or also to design contracts in combination with another service contract (e. g. construction and processing). The extensive approach by which the rules of the present Chapter are applicable to the design part of a mixed contract would have the advantage of providing for a similar regulation for two rather similar activities. Indeed, in a certain aspect, the design activity on the one hand and the carrying out of the design on the other hand are not very different for these activities are both oriented towards creating a structure.

On the other hand, the limited approach – by which a mixed contract involving the activity of designing is entirely governed by the provisions for the subsequent activity – has the advantage of avoiding borderline issues and will probably limit litigation. This may also be justified by the fact that, in practice, the quality of the design – and therefore the liability of the designer – is assessed after the design has been carried out. The rules on the subsequent service, carried out by the author of the design, will then suffice.

C. Comparative overview

In most of the European legal systems, there is no specific statutory law on design contracts. Usually, design contracts are dealt with in rules on more general contracts, such as service contracts (or contracts for work), construction contracts or assignment contracts. However, the design contract is also extensively dealt with in standard terms, which are frequently used in most European countries. In Belgium and France, standard terms are of less importance because there is mandatory statutory law dealing with the legal status and liability of architects but in the Netherlands, England, Germany, Scotland and Sweden standard contract terms are often of greater significance than the rather general rules on contract law (though only to the extent that the contracting parties actually agreed on the standard contract terms).

D. Preferred option

The option preferred here is to apply the design rules primarily to the case where the design is for the construction of an immovable structure but to apply the rules also to other design activities, such as the design of movable or incorporeal things: fashion, websites or art design. This is provided for in paragraph (1). The underlying idea of this extensive scope of application is that all design activities involve rather similar processes and can therefore be governed by the same rules.

As regards mixed contracts involving design and another service, the general rules on mixed contracts in II.–1:107 (Mixed contracts) apply. The rules of this Chapter apply to the design part of such mixed contracts and the rules applicable to the other service (e. g. supervision of the actual carrying out of the design by another service provider, marketing and publicity services) will apply to the other part of the contract. However, if the other service consists of the carrying out of the design, paragraph (2), when read with II.–1:107 paragraphs (2) and (3), gives priority to the provisions governing the subsequent service. The provisions for design will only apply in the event that the provisions for the other service do not contain rules concerning a particular issue and only so far as there is no conflict with those other rules.

Illustration 3
A new cooling system for the production of flat screens for televisions is being designed and applied by a service provider under a single contract. The provisions of the Chapter on Processing apply and prevail over the provisions on design.

So, for example, the Processing rules on limitation of liability and conformity will apply and not the Design rules. However, the design rules on keeping records will apply since the rules on processing do not provide for keeping records of design documents.

Where the contract is for design, construction and sale of a movable, the combined effect of paragraph (2) of the present Article and the rule in IV.A.–1:102 (Goods to be manufactured or produced) may be that the sales rules will be those which apply, particularly in relation to conformity and remedies for non-conformity. The rationale for this is that in such a case the design and construction are simply means to an end: the client is interested in the end product.

The contractual duties of a designer often include supervision of the service to be undertaken subsequently. This is, of course, especially the case with an architect or engineer who undertakes to supervise the building or construction work carried out on the basis of the design. However, this may also apply to a software designer who supervises the actual production of the designed software program. The rules in this Chapter are, however, not based on the presumption that the duty to supervise is implied in the duty to design. Although it is true that supervision can be performed in connection with a design service, in practice supervision is also supplied as a separate service. This is the reason why this Chapter does not contain rules on supervision. Supervision services will be subject to the rules of Chapter 2 (Rules Applying to Service Contracts in General).

NOTES

I. Regulation of design contracts

1. In most of the legal systems there is some regulation of design contracts. However this is not always expressly provided for in a civil code, nor is it always explicitly stated. It can implicitly follow from legal terms or derive from other kind of regulation. The countries that have regulated the design contract in their civil code are the following, AUSTRIA, BELGIUM, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, POLAND, PORTUGAL and SPAIN. In Austria and Belgium the design contract is qualified as a service contract. In Belgium however, the design contract can also be defined as a building contract. In France the design contract is called *contrat d´entreprise* or *louage d´ouvrage* (and sometimes *mandat*). This also goes for Portugal, where the *empreidata* is similar to *le contrat d´entreprise*. Polish and Dutch contract law have the similarity that the design contract is qualified as an assignment contract, or *overeenkomst van opdracht.* In some other countries the design contract is placed in the category of contracts for work, see Germany and Greece. In German law a distinction has been made in case law between the regulation for a design and an architect contract. In Italy design contracts are regarded as contracts for an intellectual service. Spanish law does not know a specific rule or definition for the design contract; it falls under the scope of the general construction contract for which the Spanish Building Act is of great importance. Besides the Civil

Code regulation, in Belgium and France deontological rules are significant, codified in the *Déontologische Norm* no. 2 and le *Code de Déontologie des Architectes*. Thus, in most of the legal systems the design contract is embedded in the civil code in one way or another. In England the regulation of design and build contracts is rather extensive but separate legislation on design contracts does not exist. However there are many statutory provisions applicable to design contracts, such as the Supply of Goods and Services Act 1982, the Defective Premises Act 1997, the Building Act 1984 and the Damages Act 1996. In the Construction (Design and Management) Regulations 1994 some obligations have been imposed on the designer concerning health and safety. The last of these also applies in SCOTLAND, which is otherwise somewhat dependent on the general principles of contract law. Part III of the Housing Grants, Construction and Regeneration Act 1996 contains rules on architects. Furthermore, the Architects Act 1997 and The Architects' Qualifications (EC Recognition) Order 1988 provide deontological rules for architects. In the Building Act 2003 general rules are established for the architect as well. In the Building Act 2003 general rules are established for the architect as well. In SWEDEN design contracts are governed by general contract law.

II. Importance of standard terms

2. In general, in the field of construction law, standard terms are of great importance. In international construction contracts the FIDIC (Fédération Internationale Des Ingenieurs-Conseils) conditions are commonly used. Most of the national systems know standard contract terms. In THE NETHERLANDS, for example, there are widely used standard terms for design contracts involving architects and constructors. These standard terms are in practice far more important than the Dutch Civil Code. For design contracts, especially the SR 1997 (*Standaardvoorwaarden 1997 Rechtsverhouding opdrachtgever-architect*), RVOI 2001 (*Regeling van de verhouding tussen opdrachtgever en adviserend ingenieursbureau*) and DNR 2005 (*De Nieuwe Regeling 2005, Rechtsverhouding opdrachtgever-architect, ingenieur en adviseur*) are applicable. The position is similar in ENGLAND, where the law regulating the services of architects is mainly based on standard contract terms such as the Standard Forms of JCT (Joint Contracts Tribunal) Contract (for building contracts), the SFA/99 (Standard Form of Agreement for the Appointment of an Architect) and the ICE (Institution of Civil Engineers) Form of Contract. There are SCOTTISH editions of these forms (see e.g. *Stair*, The Laws of Scotland III, 'Building Contracts' para. 128 (with updates)). Concerning health and safety regulations, the Construction (Design and Management) Regulations 1994 are applicable in both England and Scotland. Concerning health and safety regulations, the Construction (Design and Management) Regulations 1994 are applicable. SWEDEN too makes use of many standard terms for design contracts. Here the ABK 96 (*Allmänna bestämmelser för konsultuppdrag inom arkitekt och ingenjörsverksamhet av år 1996*), the AB 04 (*Allmänna bestämmelser för byggnads-, anläggnings- och installationsentreprenader*), the BKR Regulations and the Building Regulations (BRR) can be applied. The situation in FINLAND is very similar. Of importance are e.g. KSE 1995, General Conditions for Consulting, YSE 1998, General Conditions for Building Contracts and RT 10-10836, Small Houses, Designers Consumer Contract, Scope of Works. Also the Consumer Protection Act is used as a set of standard contract terms. In GERMANY the *Honorarordnung für Architekten und Ingenieure* (HOAI) is applicable to architects' contracts. In AUSTRIA the *O-Norm* is used as a standard contract term and in SPAIN the *Basic Norms on Construction* can be used for design contracts as well. On the other hand, in POLAND and PORTUGAL national standard conditions on design contracts do not exist. In

Poland the contracting parties themselves have the ability to make use of self-regulation and in Portugal sometimes the ICE Form of Contract are used. In FRANCE and Belgium the mandatory statutory laws on the liability of the designer are far more important that standard contract terms. In DENMARK the *standard condition of sale, work and delivery* and the FIDIC are being used. In GREECE the Consumer Protection Act 2251/1994 is being used.

III. Further information

3. For further information on a country by country basis, see PEL SC pp. 633 to 638.

IV.C.–6:102: Pre-contractual duty to warn

The designer's pre-contractual duty to warn requires in particular the designer to warn the client in so far as the designer lacks special expertise in specific problems which require the involvement of specialists.

COMMENTS

A. General idea

This Article imposes a specific duty on the designer to inform and to warn the client before the contract is concluded. This duty is a particularisation of the pre-contractual duty of any service provider to warn under IV.C.–2:102 (Pre-contractual duties to warn), which states that both contracting parties are to exchange information about the service to be provided. Because the designer will base the performance of the design service upon the wishes and needs of the client, the designer will have to warn the client in time id any failures or inconsistencies are noticed. This means that the designer will have to point out to the client which additional experts may be needed in order to carry out the design optimally. As the designer may not have all the expertise required to achieve the result the client has in mind, the designer will have to warn the client if such expertise is needed. Failure to warn may lead to the result envisaged by the client not being achieved by the designer.

> *Illustration 1*
> A designer recognises that special analysis of the soil is needed and that he is not able to carry out such analysis himself. Before the contract is concluded, the designer warns the client and recommends the employment of a geodesist.

B. Interests at stake and policy considerations

The main question here is whether, apart form the general pre-contractual duty to warn, the designer should have a specific duty to inform the client when he lacks the special expertise to deal with problems that require the involvement of specialists. In favour of such a duty it can be argued that design is a very complex activity, often requiring knowledge about many fields and that it is reasonable to expect the designer to inform the client of any need there may be to engage further experts.

> *Illustration 2*
> In order to design the body of a car, the designer needs to be knowledgeable not only about aesthetics and aerodynamics, but also about the functioning of the engine and legal requirements concerning safety. If the designer does not have all this expertise, it is reasonable to expect the client to be warned before the contract is concluded of the need to hire specialists.

On the other hand, it could be argued that, if at the time of the conclusion of the contract the designer does not have all the expertise necessary, it is up to the designer to hire specialists during the performance of the service. This will in any case be required in order to supply a design fit for its purpose. However, the client may want to know before deciding to conclude the contract whether the designer has the necessary expertise, as this will probably save time and costs.

C. Comparative overview

The pre-contractual duty of the designer to warn is not commonly accepted in the European legal systems. An express rule on this duty could not be found. The pre-contractual duty to warn is usually derived from other general duties such as good faith, the contractual duty to inform and the contractual duty to warn the client (Belgium, France, Germany and Spain). Sometimes it is also established in case law (the Netherlands and Portugal), but it has not been found in enacted law.

D. Preferred option

It seems preferable to place a duty on the designer to inform the client in so far as the designer lacks special expertise regarding specific problems which require the involvement of specialists. Exchange of information needs to take place before the conclusion of the contract. This will allow the client to make an informed decision about the designer. Furthermore, it will allow both contracting parties to decide whether any specialists needed will be engaged by the client or by the designer.

The duty of the designer to warn – whether pre-contractual or contractual – has become one of the central issues in general construction law and related areas. Many disputes are eventually dealt with by deciding whether the designer was under a duty to warn the client or not. This rule, when read along with the general pre-contractual duty to warn under IV.C.–2:102 (Pre-contractual duties to warn), is intended to help to resolve such questions. The sanctions for breach of the duty are those laid down in that Article.

If the designer does warn the client before a contract is concluded that additional expertise will be needed, then it will be up to the client to decide how to react. In some cases the client may decide not to conclude a contract at all.

> *Illustration 3*
> A house owner wishes to have a design for the installation of solar panels and approaches an ordinary architect. The architect warns the client that he has no expertise in this specialised area but could do the plans for any structural alterations necessary. He supplies the names of some specialists. On making further enquiries the client discovers that the design and installation of a system would be much more expensive than thought and decides not to proceed with any contract.

If the client does decide to proceed with the contract it may be expected that the parties would resolve the question of whether the employment and payment of specialists is to be part of the designer's functions under the contract or if it is to be left to the client to conclude separate contracts with the necessary specialists. This would clearly have a significant bearing on the price. In practice the designer would take care not to undertake any obligation which would imply the possession of expertise which has already been expressly disclaimed. For these reasons, and because the post-warning situations could be very varied, it is not thought that a default rule on who has to engage specialists is necessary or desirable.

NOTES

1. There is not much in the way of express regulation of this question in the national laws. Some countries have no regulation, some have an implicit regulation and in some there are rules which could possibly be used as the basis of a pre-contractual duty to warn.

2. In AUSTRIAN architectural law a pre-contractual duty of the designer to warn does not exist. In BELGIUM a pre-contractual duty to inform is commonly recognised: a pre-contractual duty to warn however cannot be found. Verbeke [-*Deketelaere and Schoups*], Handboek Bouwrecht, p. 418). In FRANCE the designer is under a contractual obligation to inform the client, but there is no such pre-contractual duty. In GERMAN contract law in CC § 241(2) and § 311(2) no. 1 rule of equity has been established which controls the pre-contractual phase in contract law, including the pre-contractual duty to warn. The position is similar in SPAIN. In ENGLAND the duty to warn of the designer is accepted even in the pre-contractual stage of the parties' relationship (*Hudson*, Building and Engineering Contracts[11], p. 542, no. 4-100). There are some countries in which the pre-contractual duty to warn might be established from the general principle of good faith. So in GREECE, ITALY and PORTUGAL the pre-contractual duty to warn is implicitly covered by good faith. In Italy a breach of that duty (CC art. 1337) may lead to pre-contractual liability (CC art. 1338). And in Portugal case law has explicitly acknowledged the principle of good faith in the pre-contractual phase in design contracts (STJ 17 June 1998, BolMinJus 1978, 351). It is the same in THE NETHERLANDS where in case law a pre-contractual phase between contracting parties has been established. (HR 18th June 1982 *(Plas/Valburg)* NedJur 1983, 723) However, a pre-contractual duty to warn has not been explicitly established in this matter. The pre-contractual duty to warn has not been explicitly described in the existing codes and regulations in Dutch law.

3. In SCOTLAND an architect's professional duty to the client may entail providing advice amounting to warnings, e.g. on comparative shortcomings of a design, costs, suitability of a site (*Stair*, The Laws of Scotland III, 'Building Contracts' paras. 131-135). In the FINNISH Consumer Protection Act, chap. 8, s. 14 there is a general duty to inform the consumer.

4. SPANISH law lacks a similar rule on a necessary pre-contractual warning. Nevertheless, the general provision of the CC art. 1270 is applicable, as the designer is obliged by the good faith duty (CC art. 1258) and the lack of warning, if the other party had concluded the contract trusting in the abilities of the designer, is considered a wilful misconduct that makes the contract void.

IV.C.–6:103: Obligation of skill and care

The designer's obligation of skill and care requires in particular the designer to:

(a) attune the design work to the work of other designers who contracted with the client, to enable there to be an efficient performance of all services involved;

(b) integrate the work of other designers which is necessary to ensure that the design will conform to the contract;

(c) include any information for the interpretation of the design which is necessary for a user of the design of average competence (or a specific user made known to the designer at the conclusion of the contract) to give effect to the design;

(d) enable the user of the design to give effect to the design without violation of public law rules or interference based on justified third-party rights of which the designer knows or could reasonably be expected to know; and

(e) provide a design which allows economic and technically efficient realisation.

COMMENTS

A. General idea

The present Article is a specification for design contracts of the general obligation of skill and care that is imposed upon any service provider under IV.C.–2:105 (Obligation of skill and care). According to paragraph (a), the designer is to attune the design to the work of other designers with whom the client has contracted so as to enable there to be an efficient performance of all the services involved.

Illustration 1
An aesthetic designer is engaged to design a new type of sports car for a well-known car manufacturer. While doing the work, the designer will have to attune the work to the technical design for the car, which is supplied by another designer hired by the client.

According to paragraph (b), attuning of the design to the work of other designers may include integrating their work.

Illustration 2
While designing a new sports centre, the main construction designer will have to integrate into the design the work done by other designers such as those designing the air conditioning system and the floor coating.

According to paragraph (c), the designer is to include the necessary information for the interpretation of the design that is needed to perform the subsequent service.

Illustration 3
A fashion designer is requested to design a new men's clothes fashion line. After completion of the design, the designer will have to give all the information to the client which is reasonably necessary to enable the client, or another party on the client's behalf, to start producing the clothes.

The designer must either focus on a user of average competence or on a specific user made known to the designer at the time of conclusion of the design contract. If special needs of a particular user of the design are made known after the conclusion of the contract, the rules of IV.C.–2:107 (Directions of the client) apply, i.e. such a direction would probably have to be accepted by the designer, but additional costs would have to be borne by the client.

For the design to be fit for its purpose it will have to be in accordance with public law provisions and will have to respect private rights, as established in paragraph (d) of the present Article.

Illustration 4
A timetable for public transport is being designed. The designer has to take into account the fact that buses are not to exceed speed limits.

Illustration 5
An architect is requested to design a house which is to be built on land that is subject to a servitude or other right of a third party. The architect will have to take this fact into account when designing the house.

The designer is to have reasonable knowledge of public law rules as well as of third-party rights. It is not the designer's responsibility to obtain permits or licences, unless agreed otherwise, but the designer has to make the design in accordance with public law provisions. There will often be some uncertainty about whether work based on the design will be granted permission. Political decisions in particular cannot be foreseen. A reasonable service provider is not expected to foresee what cannot reasonably be foreseen.

A very important issue in design concerns economical and technically efficient planning. A corresponding duty is stated in paragraph (e). This provision implies the duty to stay within the cost estimate of the client, not to make any mistakes in the calculation of the costs and not to include any parts or steps in the process of the subsequent service that are unnecessary.

Illustration 6
A municipality wants to have a low-cost bus station designed. The designer, who would prefer to include modern but expensive materials in the design, must pay attention to not exceeding the client's cost limits.

B. Interests at stake and policy considerations

The designer is – like any other service provider – under the general obligation of skill and care laid down in IV.C.–2:105 (Obligation of skill and care). It may be asked whether additional, specific duties are needed for design contracts.

On the one hand it could be argued that the general rules are flexible enough and comprehensive enough to cover all that needs to be covered. On the other hand it could be argued that there are special features of the design contract which make some extra specification useful even if it is not essential. It could avoid disputes and save expense to have a checklist of the most important obligations of the designer regarding the care and skill required. Standard terms often specify such obligations but there are cases where standard terms are not used and where default rules could be useful.

C. Preferred option

Although a general rule on the obligation of skill and care already exists, it is thought useful to add some necessary elements which are typical for the obligation of skill and care to be expected from designers. The particular duties imposed by the present Article will induce the designer to make a design which meets the wishes and needs of the client. The paragraphs of this Article describe the most important tasks a designer has to carry out during the design process. One idea behind this Article is to encourage a very close relationship between the client and the designer. They are dependent on each other for the creation of a design that is in conformity with the contract.

This Article must be read in conjunction with the general provision in IV.C.–2:105 (Obligation of skill and care).

NOTES

I. Designer's obligation of skill and care

1. In all European legal systems a general obligation of skill and care applicable to designers has been established. Mostly this obligation does not only concern the designer but every contracting party. In ENGLAND, for example, a service must be performed with professional workmanship. The implied duty of the designer is to carry out the contractual obligations with reasonable care and skill. This means 'the standard required of the ordinary skilled and competent practitioner in the profession concerned' (*James,* Construction law[2], pp. 148-149; *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, at 587). This duty is usually laid down in standard contract terms. See for example (JCT, ICE, SFA99). The duty is also recognised in the Supply of Goods and Services Act 1982 and in case law. The Defective Premises Act 1972 s.1 also provides for such a general duty. (See generally *May,* Keating on Building Contracts[6], p. 347. The position is not dissimilar in POLAND. According to the CC art. 355 para. 1, the designer as a professional must perform with due diligence. The Supreme Court has clarified (SN 25 September 2002, I CKN 971/100, Lex no. 56902) that the due diligence of the professional does not mean any exceptional diligence, but a diligence adjusted to the acting party, the subject and the circumstances in which obligations are to be performed.
2. In FRANCE the designer is in principle under an obligation of result: therefore the duty of care is of no relevance in principle. The architect must furthermore apply *les règles de l´art* (*Malinvaud,* Dalloz Action Construction, no. 36). Therefore in general FRENCH contract law the garantie de bonne exécution has been established.
3. Sometimes the principle of good faith and usages imply the duty of care of the designer In GERMAN contract law the duty of care is based on the good faith provision in CC § 242. The Building and Technical Regulations (*Regeln der Baukunst und Technik*) must also be followed by the designer. The latter duty is considered to be a minimum standard for the care to be performed by the designer (*Niestrate*, Die Architektenhaftung[2], p. 14). For determining the standard of technique that is required the *DIN-Normen* (DIN standards) and the *VDI-Richtlinien* (VDI guidelines) are important. Especially when new materials and techniques will have to be used in the design or construction, the architect should be extra careful and should therefore be in full agreement with the client on this matter (*Niestrate*, Die Architektenhaftung[2], pp. 14-15). In SPAIN also good faith is the usual basis of the designer's duty of care.

Spanish law however also contains an explicit standard of care in CC art. 1104. In PORTUGAL too, good faith is the basis of the duty of care (CC art. 762 para. 2).

4. In AUSTRIA (CC §§ 1279 and 1299), GREECE (CC art. 330), ITALY (CC art. 1176 para. 2), THE NETHERLANDS (CC art. 7:401, SR 1997 art. 13 para. 4, DNR 2005 art. 11 para. 1a and 2), PORTUGAL (CC art. 1208) a general standard of care is also included; SCOTLAND (*Stair*, The Laws of Scotland III, 'Building Contracts' para. 135). A designer must exercise the skills of a reasonably competent representative of that profession. In BELGIUM a general duty of care of the designer is not established in the CC, but the Reglement van Beroepsplichten. Art. 1 para. 3 requires that the designer performs the service with due competence and efficiency and according to the state of the art. In SWEDEN the standard conditions provide for a good professional practice (ABK 1996 art. 4:1, AB 04 art. 2:1 (2) and BSF 1998:39). The situation is much the same in FINLAND. According e.g. KSE 1995 3.11. the consultant in the capacity of an expert must perform the assigned task in a professional and objective manner in compliance with good technical practice and attempt to achieve the objectives jointly agreed upon. According to the Consumer Protection Act, chap. 8, s. 12, a service must be provided with professional skill and care. The general duty of care is usually based on the principle of due diligence and performance in accordance with the *leges artis*. The requirements of the design being in conformity with the state of the art are accepted in every legal system researched. Each country however has its own specifications. In SPAIN the service must be performed according to the *leges artis* and in a professional way. The duty of care in the specific profession of a designer is commonly measured by the standard of a reasonably competent representative of that profession.

II. Specific rules on the duty of care

5. There are some specific rules on the duty of care which occur in most of the legal systems. These are the duty to make a design that is in compliance with the public and private legal and regulatory rules. Thus the designer will have to take account of the legislation applicable to the design activity. This specific duty of care is established in the legislation of BELGIUM (Reglement van Beroepsplichten art. 17), FRANCE (implicitly follows from general contract law), England (JCT clause 6.1), ITALY (according to the disciplinary rules) and THE NETHERLANDS (SR 1997 art. 11 and DNR 2005 art. 11) and Spain (LOE art. 10 and 11 para. 2).

6. The duty of the designer to make a design that is technically, financially and professionally feasible is also generally established. So in FRANCE the designer has to take into account the available budget and in Italy the disciplinary rules require the technical and professional preparation of the design. In THE NETHERLANDS the SR 1997, art. 11 and DNR 2005 art 11, require the designer to make a technically and financially feasible design and to have full competence to perform the service.

7. Other duties are also found. In the PORTUGUESE Architects' Statutes (Estatuo da Ordem dos Arquitectos, Decreto-Lei no. 176/98), art. 49 para. 1, the designer is required to perform the service with due professionalism, efficiency, loyalty, knowledge, creativity and talent. Under the SPANISH Building Code art. 10 para. 2, the designer has to comply with applicable knowledge-based and professional requirements. The ITALIAN disciplinary rules are rather detailed and include duties to carry out the duty in conformity with existing regulations, in conformity with the contract and with respect to the general interest of society, to carry out technical and professional preparation and to safeguard the client's best interests. Another common duty is the duty of the designer to examine the existing circumstances and

surroundings and the condition of the soil. In BELGIUM and FRANCE this too stems from general contract law.

8. In BELGIUM the Reglement van Beroepsplichten (art. 17) imposes a duty on the designer to observe professional secrecy. In ENGLAND the Supply of Goods and Services Act 1982 requires the designer to operate in a good and workmanlike manner and to use materials of good quality. The duty may normally be discharged by following established practice. In GERMANY the *Honorarordnung für Architekten und Ingenieure* (HOAI) art. 15 contains very specific regulations on several matters. (*Locher,* Das private Baurecht[5], pp. 181-185). Besides rules on the remuneration of the designer, there are rules on what the specific duties of the architect are concerning the preparation of the design activity and cooperation during the putting out to tender of the design. Some of the specific duties mentioned are the choice of specialists to be made by the architect, the duty to inform the client on new materials to be used in the construction, the duty to provide information about the licences required for the construction, and the duty to provide information about financial and fiscal aspects of the design (*Niestrate*, Die Architektenhaftung[2], pp. 103-113).

9. In SPAIN the standard of care required in carrying out the obligation of design in a construction process is regulated by the norms on the profession (leges artis). The architect will be liable for failure to carry out the obligations in accordance with the current techniques on construction (TS 26 February 2004, RJ 2004/1647). In the Spanish Building Code art. 10 para. 2, is provided that the designer should "hold the pertinent academic and professional degrees in architecture and engineering, whichever applies" and should meet "the conditions established for practising the profession in question". Further the designer should prepare the project in accordance with the legislation in force and under the terms of the contract and should submit the project with all the necessary approvals.

III. Further information

10. Further notes, arranged on a country by country basis, can be found in PEL SC pp. 657–661.

IV.C.–6:104: Conformity

(1) The design does not conform to the contract unless it enables the user of the design to achieve a specific result by carrying out the design with the skill and care which could reasonably be expected.

(2) The client is not entitled to invoke a remedy for non-conformity if a direction provided by the client under IV.C.–2:107 (Directions of the client) is the cause of the non-conformity and the designer performed the obligation to warn under IV.C.–2:108 (Contractual obligation of the service provider to warn).

COMMENTS

A. General idea

The effect of the Article is that the design must be fit for its purpose. Design is to be seen as the starting point for a subsequent service, such as construction or processing. If the design is not fit for its purpose, the subsequent service cannot be carried out in a way which will meet the client's expectations.

This Article provides further specification, for design services, of the obligation to achieve the required result. The reasonable client may expect a designer to achieve the particular result through the performance of the service requested. Paragraph (1) states that the design is not in conformity with the contract unless it enables the client to achieve a specific result by carrying out the design, according to the standard of care required.

> *Illustration 1*
> An architect's firm has been requested to make a design for the restoration of a historical building. The facade with its fabulous step gable is to be integrated in the design. However, the step gable is not included, and this means that the subsequent service of the constructor will not be in conformity with the client's wishes. The designer did not perform the obligation under the present Article.

> *Illustration 2*
> In the same example, the design turns out to have perfectly integrated the step gabled facade of the building, but the constructor does not renovate the facade in the way set out in the design. Here, the designer did meet the obligation under the present Article, even though the result envisaged by the client has not been achieved.

The rule in the Article is a default rule, applying unless the parties agree otherwise.

If the design is defective, as a result of which the subsequent service cannot be carried out in conformity with the requirements of the subsequent contract, the designer and the subsequent service provider may have solidary liability, particularly if the subsequent service provider failed to perform an obligation to warn of the risk. This means that the client can claim damages from both.

When the design is not in conformity with the contract due to a direction of the client and the designer did not fail to perform an obligation to warn, the client is not entitled to invoke a remedy for the non-conformity. This follows from paragraph (2).

Illustration 3
An architect is requested by a housing company to design a new apartment building in the centre of the city, with sufficient parking space in the basement of the building. During the design process the client instructs the designer to change the initial design of the basement so as to ensure that the residents will have more room for storage. The designer warns the client that this will result in fewer parking spaces, but the client is determined. When the design is completed, it appears that there is not enough room for all the residents' cars. Since the designer warned the client of the risk, the client is not entitled to invoke a remedy for this non-conformity of the design.

B. Interests at stake and policy considerations

Design liability is an important issue for both parties. The difficult question is the basis on which the liability of the designer should be established. This may either be a failure to exercise the design activity with the care and skill required, or the fact that the design service did not achieve the result that was expected by the client.

When liability for the defective design is established on the latter basis, the designer will have to remedy defects even when the designer met every relevant requirement regarding the assessment of the existing situation, the input of tools and materials in the design process and the skilful and careful carrying out of the design process. The only escape would be to show that one of the specific defences applied. This is the French approach, or the fitness-for-purpose test. When there is no fitness-for-purpose liability, the basic question will be whether the designer met the quality requirements in the course of the design process. In the first instance, one might argue that these two approaches are each other's opposites and that the designer's interests are best protected in the second approach. In practice, the differences may not be too big, however, especially when the burden of proving that all design process requirements have been met is put on the designer. In that case, the question would rather be which defences are allowed under both regimes. This question would be particularly relevant to those design defects the occurrence of which is difficult to prevent and to control by the designer. The French approach would seem more client-friendly as it gives the client the choice of suing one of the service providers involved in the whole project.

Problems may arise when the fitness-for-purpose test does not apply. It would seem to be inconsistent to hold the designer liable for more than the subsequent service provider. Choosing the French approach would then raise the question whether the scope of application of the present Article should be limited to contracts for designs to be realised by subsequent service providers that are under a similar fitness-for-purpose obligation.

An advantage of the French approach would be that the quality of the outcome of the design activity might be easier to establish and to discuss than the quality of the overall design process itself that leads to such an outcome. It may, for instance, be hard to establish which inadequate choices in the design process preceded the occurrence of the apparent defect in the outcome of that process. Likewise, it will be difficult to establish the amount of care the designer showed whilst making these choices. Hence, it appears that the legal and other administrative costs of the liability system that is based on the French approach will probably be lower.

One might argue that the French approach may work better in connection with a compulsory insurance system, as the designer would have to pre-finance the whole amount of compensation if held liable to the client. In addition, it would seem appropriate to ensure that the subsequent service provider participates in the insurance system as well. However, the costs of liability insurance may increase the price the client has to pay for the design service. Under the alternative liability system, where the designer is under a duty of care and skill only, the client will in many cases allow the designer to remedy the design defects anyhow because the client wishes to obtain a structure that is fit for its purpose. This means that the client will also pay an extra price for the remedying, be it under the heading of a price for extra work and not under the heading of an element of the initial price destined for the coverage of the strict liability.

The choice of an acceptable designer's liability system will also depend on the frequency with which the designer is not able to achieve the result the client has in mind. Normally, where it will be relatively easy for the designer to create a design that is fit for its purpose, rather stringent liability is more acceptable than in situations where it is uncertain whether a design fit for its purpose will be accomplished.

> *Illustration 4*
> An architect has been engaged by a municipality to design an underground station. As solid soil conditions are needed for such a construction the designer has thoroughly examined the subsoil. The subsoil turns out to be too swampy. In this situation, it will be difficult for the designer to create a design that will be fit for its purpose. Therefore stringent liability is not appropriate.

Taking normal precautions may under most circumstances prevent major defects. This may not be the case for innovative structures, where the occurrence of design defects is difficult to prevent and control beforehand. One might argue that for such situations, provided that the liability rule is of a default nature, parties can modulate their duties and obligations and come up with special contractual arrangements adjusting the liability regime to their specific needs.

The European legal systems are divided on the issue of conformity. Some countries have a fitness-for-purpose liability system; others have a liability system based on negligence. Yet others have a mixed system with elements of both approaches.

D. Preferred option

The present Article takes the fitness-for-purpose approach.

The reason for this choice is that it is easier for the client to prove that the outcome of the design process is not in conformity with the result envisaged, than to prove that the designer made inadequate choices in the course of the design process, as a result of which a defect occurred. It will be hard to reconstruct what occurred during the design process and what went wrong. Furthermore, if the design is not fit for its purpose, the designer will be in the best position to correct the failure in the design (in order to arrive at an improved version of the defective design), so that the constructor is able to repair the defective building. Improvement of the design can best be done by the original designer.

Given that, in general, the designer is expected to be able to create a design that is fit for its purpose, the approach adopted seems the more acceptable one. However, this rather stringent

system of liability may sometimes create problems for the designer. For instance, when the client instructs the designer to use rather innovative structures for the design, the risk of defects in the design cannot be prevented or controlled beforehand. It may also be difficult for the designer to determine how the subsoil conditions, on the basis of which the building that is to be designed will be constructed, will be influenced by the actual construction of the building. This means that the designer is not always able to establish beforehand how the design and the conditions of the soil are to be attuned to one another. If the designer has conducted a state-of-the-art investigation and nevertheless overlooks something, the design will be defective and the designer will be liable under the present Article. In these difficult cases, the fitness-for-purpose test is a heavy burden on the designer, who will be held liable for the outcome of the design even though everything possible has been done to control that outcome. In this case, parties may safeguard the interests of the designer by explicitly deviating in the contract from the stringent liability system. The designer may also insert a limitation clause in the contract with the client. This choice of approach may have as a consequence that a compulsory insurance system is needed to cover the main risks of the designing process.

NOTES

I. Conformity of the design

1. The obligation to perform the designing service in conformity with the client's expectations and the contract is a frequently occurring rule in the legal systems studied. In some countries it is established in the national Civil Code. So FRANCE has a rule (CC art. 1792) that requires the design to be in accordance with the needs and wishes of the client. The designer has the duty to render a design in conformity with the result envisaged by the client while concluding the underlying contract. Thus in France the fitness for purpose system is used to establish the designer's liability. A similar rule can be found in ITALY (CC art. 1176 para. 2), POLAND (CC arts. 556, 568, 737 and 638) and PORTUGAL (CC art. 1208, and cf *Moitinho de Almeida*, BolMinJus 228 (1973), pp. 10 ff), where it is also stated that the design must be in conformity with the contract. In GREECE it is general contract law that the design has to conform to the expectations of the client and be of the required quality, which is an obligation of result. When the required result is not met, this presupposes liability.

2. In SWEDEN, FINLAND, THE NETHERLANDS, ENGLAND, SCOTLAND, SPAIN and the rules on conformity of the design are often set out in standard contract terms but the underlying legal position is that the designer is under an obligation to use the required degree of care and skill, an obligation of means. According to the AB 04 art. 2:1 (Sweden), the design has to conform to the contract but the designer is under an obligation of means. According to KSE 1995 art. 3.21 (Finland) the conditions require the performance to be of good technical practice and attempt to achieve the objectives jointly agreed upon. In the SR 1997 art. 11 and DNR 2005 art. 11 (The Netherlands) the designer is under an obligation of means to meet the requirements of the client. In English law both the RIBA conditions and the Supply of Goods and Services Act 1982 provide rules on the conformity of the design. The RIBA conditions require the design to be suitable for its purpose, and so does the Supply of Goods and Services Act 1982, ss. 2-5. However, in general the designer is only expected to come up to the standard of the ordinary skilled person exercising and professing to have that special skill. This is liability based on negligence. Of course, the parties may agree on a stricter liability, such as fitness for purpose; in appropriate cases a term to this effect may be implied (*Greaves & Co. Ltd. v. Baynham Meikle & Partners* [1975] 1 WLR

1095.). The general position is the same in Scotland (*Stair*, The Laws of Scotland III, 'Building Contracts' para. 135). In AUSTRIA, under general rules applicable to all types of contract (CC art. 922), the designer is liable when fault is established. SPAIN, too, knows a system of liability based on negligence, in which proof of the designer's fault is needed in order to establish liability (TS 31 December 2003, RJ 2003/337. See also art. 10.2 of the Building Regulation Act)). According to the DANISH Standard conditions of sale, work and delivery, the liability of designers is based on the principle of negligence. In order to avoid liability, the designer will have to present a work in conformity with the state of the art. When the designer has made sure that the client's choice was an informed one, the designer will not be liable for giving effect to this choice, even if it turns out that the design chosen was unsuitable.

3. BELGIUM has a mixed system. Regarding the producing of plans, the duty to inform and advise the client, and the supervision of the works, the architect is under an obligation of means. It will have to be proved that the architect has not made all the necessary efforts that a similar architect in the same circumstances would have. Regarding the requirements of solidity, waterproofing and isolation (the essential elements of the design) the designer has an obligation of result. The mere fact that the design fails to ensure these essentials presupposes the architect's liability. In the Deontologische norm no. 2 it is stated that the architect's final design has to enable the constructor to perform his construction activity in good competence (art. 9). Further the design needs to be in conformity with the client's construction program and all the technical requirements. It depends upon the underlying contract whether the design is in conformity or not.

II. Further information

4. For further notes on a country by country basis, see PEL SC pp. 668 -670.

IV.C.–6:105: Handing over of the design

(1) In so far as the designer regards the design, or a part of it which is fit for carrying out independently from the completion of the rest of the design, as sufficiently completed and wishes to transfer the design to the client, the client must accept it within a reasonable time after being notified.

(2) The client may refuse to accept the design when it, or the relevant part of it, does not conform to the contract and such non-conformity amounts to a fundamental non-performance.

COMMENTS

A. General idea

This Article is based on the idea that the designer takes the initiative for the transfer of the design and that the client should accept the design unless there are serious design defects. The act of acceptance implies that the client confirms that the designer has performed the obligations in accordance with the contract. This may be done either explicitly by means of a statement or implicitly by the actual taking of the design. Minor defects and defects that can be remedied in a short period of time do not allow the client to refuse acceptance of the design. Only when defects amount to a fundamental non-performance (as defined in Annex 1) is the client allowed to refuse to accept the design.

Illustration 1
An architect has been engaged to design an underground car park. After the design has been finalised, the architect offers the design to the client. By accepting the design, the client confirms that the architect has performed the obligations under the contract.

B. Interests at stake and policy considerations

With respect to the handing over of the design, an important issue is whether the client should be allowed to reject the design in all cases. Acceptance of the design by the client is a confirmation of the fact that the design has been performed according to the contract. This is an important event for the designer; the transfer of the design to the client implies that the designer – in general – will be paid for the service. At least a substantial part of the price to be paid according to the contract will be due. This may justify a specific regulation on this topic.

The handing over of the design furthermore enables the client to check whether the design is in conformity with expectations. The client may not reject the design, unless the non-conformity of the design is a fundamental non-performance. Remedying a defective design may take some time and will raise costs, but the sooner defects are discovered, the easier it will be for the designer to correct them. Therefore, a regulation on the issue of handing over the design seems helpful. All of the legal systems studied contain some regulation of this matter.

However, it could be argued that a rule on acceptance of the design is not necessary. It might be better to have the contracting parties regulate themselves how and when the design is to be handed over to the client.

C. Preferred option

It is considered preferable to have a specific provision on acceptance of the design. The client is to accept it within a reasonable period, when the designer considers that it is fit for carrying out. This does not have to concern the design in total but may concern an independent part of the design which has already been finalised. As the designer knows the design best, the designer is to take the initiative in deciding whether the design is ready for acceptance by the client. This choice is based on the general idea of co-operation between the parties. The co-operation of the client in accepting the design or a part of it is essential to the performance of the contractual obligations. This acceptance of the design has an important meaning, as it is an act of approval that the design has been performed in conformity with the contract. However, the client is allowed to reject the design, though only in some cases. There is only room for rejection when the defects in the design or relevant part of the design constitute a fundamental non-performance. Acceptance of the design by the client enables the client to check whether the designer has performed the contract well.

NOTES

1. Specific rules on handing over the design are not common in Europe. There are many rules on handing over the structure in construction cases, but not on the handing over of the design. Where handing over is mentioned in the laws (and various terms are used) it is often regarded as marking the end of the designer's obligations under the design contract and the start of a guarantee period or period of prescription.
2. In BELGIUM the rule is that when the design is ready for handing over, the client must accept it. Only when the design is fully handed over do the designer's contractual obligations come to an end (CC art. 1234). This activates the ten-year liability period of the designer. See Verbeke [-*Deketelaere and Schoups*], Handboek Bouwrecht, p. 434. In ENGLAND the design has to be partially or fully handed over when it is in compliance with the contract. (*Hudson*, Building and Engineering Contracts[11], pp. 682-683). In FRANCE the handing over of the design and the acceptance of the design by the client have the effect that the liability period of ten years starts running. (*Liet-Veaux and Thuillier*, Droit de la construction[11], p. 286). Both contracting parties have to be present at the handing over of the design, for the client declares acceptance of the design with or without reservation. This follows from the CC art. 1792-6. Visible defects must be pointed out at the time of the handing over. Hidden defects in the design may become manifest in the one-year period of guarantee and the architect will be liable to remedy them.
3. In GERMANY intellectual work is, according to the case law of the Bundesgerichtshof, capable of being literally 'handed over'. That applies to designs. HOAI § 15 (*Leistungsbild*) (*Locher*, Das private Baurecht[5], pp. 192 and 193). The key stage is the reception of the design, combined with the statement that the client acknowledges the performance of the designer as being in conformity with the contract (CC art. 640 and *Niestrate*, Die Architektenhaftung[2], p. 51). The reception requires the completion of the work. According to the HOAI, the design is not completed until all the duties following the Leistungsbild have been fulfilled. The handing over of the design implies that the time of performance for the architect comes to an end. When the client does not accept the design when obliged to do so, the architect is entitled to terminate the contract according to the CC arts. 642 and 643 (*Niestrate*, Die Architektenhaftung[2], p. 220).

4. In the GREEK CC the handing over is mentioned only in art. 694 which provides that payment is due. In THE NETHERLANDS the designer's contractual obligations end when the design activity is completed (SR 1997 art. 19 (1) and (2)). From the time of completion, the period of liability of the designer starts running for five years. The client must approve the architect's design before the successive stage in the construction process may start (SR 1997, art. 47 (2) and (3). In POLAND the client is obliged to receive the design when it is released by the designer in accordance with the contract (CC art. 643). If it is not in accordance with the contract, the client is not obliged to accept the work. See Radwański [-*Brzozowski*] System Prawa Prywatnego VII^2, p. 341. In PORTUGAL handing over of the design implies that the client may accept the work, which frees the designer from liability. Further rules on this handing over may be agreed upon by the contracting parties. In that case the service provider is obliged to follow the client's instructions (CC art. 1161 para. a). There is no specific rule in SCOTLAND. In SPAIN, according to LOE art. 6 the acceptance of the work means that the client accepts the design with its characteristics and qualities at that moment. In SWEDEN and FINLAND the rules on handing over and acceptance concentrate on the construction rather than the design.

5. As the design contract is not specifically regulated under SPANISH law, the rules on handing over provided by the Building Regulation Act in relation to the construction as a whole, rather than to the design, could apply. Pursuant to those rules, the acceptance (explicit or tacit) by the client has to be expressed within thirty days after the construction has been finished, unless the parties agreed otherwise (art. 6.4 of the Statute on Building). The client may refuse to accept the construction if it has not been finished yet or if it does not conform to the contract (art. 6.3). However, these rules probably appear too stringent to be applied outside the handing over of buildings.

IV.C.–6:106: Records

(1) After performance of both parties' other contractual obligations, the designer must, on request by the client, hand over all relevant documents or copies of them.

(2) The designer must store, for a reasonable time, relevant documents which are not handed over. Before destroying the documents, the designer must offer them again to the client.

COMMENTS

A. General idea

The designer is under an obligation to hand over all the documents concerning the design to the client, or copies of them, on request by the client. This obligation normally arises after the performance of all other contractual obligations – i.e. after the client has accepted and paid for the design. The designer may withhold performance of the obligation to hand over the documents until the client pays (III.–3:401 (Right to withhold performance of reciprocal obligation)).

If the client does not ask for the documents after having paid, the designer is obliged to store them for a reasonable time. Some standard terms for design contracts mention a period of ten years. The periods of prescription are relevant in this respect. After ten years most claims against the designer are cut off, even in the case of hidden defects: in the case of personal injury, however, the maximum period is thirty years (III.–7:307 (Maximum length of period). In any case, when the designer no longer wishes to keep the documents they must be re-offered to the client before being destroyed.

The Article refers to "relevant" documents. These will include the detailed design, designs used to receive permission from a public authority, certificates and expert opinions.

B. Interests at stake and policy considerations

The main question is whether the designer should be obliged to keep the relevant documents for a particular period.

Such an obligation would safeguard the interests of the client, who might need the documents for practical purposes, such as enabling a contractor to realise the design or alter the structure at a later stage, or facilitating a sale of the structure. On the other hand it might be in the interests of the designer to keep the documents, for example to protect intellectual property rights.

C. Preferred option

The reason for imposing an obligation on the designer to keep records is that the interests of the client are regarded as more important in this respect than the interests of the designer. The designer suffers hardly any disadvantage when obliged to store documents for a period. The client has a greater benefit from obtaining the records than the designer has from keeping them. Furthermore, the designer need only supply copies and can use the originals for the purpose of future tasks or for intellectual property purposes. Also, the rule is only a default rule. The parties can make other arrangements in the contract.

NOTES

1. Most of the legal systems studied have no rules on this question, leaving it to the parties to settle in the contract. However, there are rules in GERMANY, THE NETHERLANDS and PORTUGAL.
2. In GERMANY the architect has an obligation to offer the design documents to the client. (*Locher,* Das private Baurecht[5], p. 243). This obligation prescribes in 3 years (CC § 195). Under HOAI § 15-9 the designer has a duty to document the final results of the contract.
3. In THE NETHERLANDS the standard terms in SR 1997 include an obligation to store documents relating to the contract (art. 42). The period of storage is 10 years from the date on which the designer's contractual obligations were otherwise fully performed. If the client wishes, the designer can place copies at the client's disposal (para. 3). The designer is freed from the obligation to store when the documents are offered to, and accepted by, the client (paragraph 4). In De Nieuwe Regeling 2005 there is a similar rule (art. 11 sub 11 to 13). Under the CC art. 7:412 the client's right to claim the records prescribes in 5 years.
4. Also in FINLAND the standard terms KSE 1995, chap. 6 regulates the safekeeping of documents. The consultant must retain the original documents received from the client and the documents the consultant has drafted for a period of 10 years.
5. In PORTUGAL the designer has an obligation to keep records of the design (CC art. 1161 para. (d)).
6. Under SPANISH law, as design contracts are not specifically regulated and are considered a subspecies of construction contracts, the obligation to hand over all the relevant documentation regarding the contract executed is not a duty of the designer, but of the director of the construction (*director de obra*). According to art. 7 of the Building Regulation Act, after the performance the director of the construction must deliver to the client the original design with all the modifications added in order to proceed with the administrative procedures. Spanish law lacks any regulations on storing the documentation not handed over, as art. 7 imposes an obligation, not a right of the client. The documentation regarding the construction constitutes the Building Book (*Libro del Edificio*) which must be kept by the owners and users of the building, in order to transfer it to later users (art. 16).

IV.C.–6:107: Limitation of liability

In contracts between two businesses, a term restricting the designer's liability for non-performance to the value of the structure, thing or service which is to be constructed or performed by or on behalf of the client following the design, is presumed to be fair for the purposes of II.–9:405 (Meaning of unfair in contracts between businesses) except to the extent that it restricts liability for damage caused intentionally or by grossly negligent conduct on the part of the designer or any person for whose actions the designer is responsible.

COMMENTS

During the design process much can go wrong. If, as a result, the design becomes defective, the client may as a consequence suffer damage, often exceeding the price agreed for the designer. The designer will want to anticipate this by limiting or excluding liability. There are provisions in Book II, Chapter 9 on unfair contract terms which may in certain cases make such limitation clauses ineffective. However, these rules are of necessity general as they have to apply to all contracts. The purpose of the present Article is to provide more clarity for the particular situation of design contracts by establishing that a limitation clause within the scope of the Article is presumed to be fair if it is used in a commercial contract, except to the extent that it restricts liability for damage caused intentionally or by way of gross negligence on the part of the designer. The presumption applies if liability is restricted to the value of the structure, thing or service which is to be made or performed following the design.

Illustration 1

An architect is engaged by a private company to design a new air terminal for the national airport. As this is an enormous assignment and the risk of damage is high owing to the public function of an air terminal, the architect manages to achieve a contractual limitation of liability to an amount less than the value of the air terminal once it has been constructed. After the air terminal has been built and has been in use for several months, a part of the roof collapses, causing huge damage, the costs of which exceed the designer's limitation of liability. Although it is a commercial contract (both parties acted in the course of their business), the agreed limitation of liability is not presumed to be fair. Whether the general rules on unfair contract terms apply must be decided without the aid of the presumption.

B. Interests at stake and policy considerations

It may be questioned whether the general rules on unfair contract terms are sufficient and whether a specific regulation for design contracts is needed. The issues are the same as in relation to processing and storage contracts. On the one hand it can be argued that there is a loss of flexibility in having a particularised rule. On the other it can be argued that there is greater certainty and more guidance.

C. Preferred option

It is preferred to have a separate Article on the limitation of liability for design contracts, in addition to the general provisions on unfair contract terms. Since this issue has been regulated in different ways in the European legal systems, the provision on the limitation of liability in this Chapter only concerns a specific type of limitation clauses in design contracts, which is needed to give guidance. It only concerns commercial contracts between two professional

contracting parties, limiting the designer's liability to the value of the structure, thing or service to be designed. In the field of commercial contracts hard and fast rules are required. In other situations – i.e. when at least one of the contracting parties is not a professional (especially when the client is a consumer) – it is thought preferable to let the general rules apply.

A clause restricting the designer's liability for non-performance to the value of the structure (service or thing) is presumed to be fair and reasonable. However, this presumption does not hold in relation to intentional damage or damage due to gross negligence. Whether or not such clauses are effective must be determined on the basis of the general rules on unfair contract terms.

It should be noted that even if a term is regarded as fair under the Article reliance on it in a particular case may still be blocked by III.–3:105 (Term excluding or restricting remedies) if invoking the term would in the circumstances be contrary to good faith and fair dealing.

NOTES

1. BELGIAN law provides for professional liability of the designer for a period of ten years (CC art. 1792, Reglement van Beroepsplichten art. 15). The liability is covered by a ten-year insurance. After ten years the designer's liability ceases to exist (CC art. 2270). The designer is not allowed to contractually limit this liability, for the regulation is regarded as a matter of public order. Furthermore it is not possible to suspend or stop the ten-year period (Verbeke [-*Deketelaere and Schoups*], Handboek Bouwrecht, p. 850).
2. Provisions limiting or excluding a designer's liability are generally valid under DANISH law, unless the client proves that the designer has caused the damage intentionally or by gross negligence. Under the Standard conditions of sale, work and delivery the designer is not liable for consequential loss, loss of profit or other indirect loss (Clause 14.3). The same is true for DUTCH law with the proviso that standard conditions (*Rechtsverhouding opdrachtgever-architect, ingenieur en adviseur* DNR 2005) not only exclude liability of the designer for consequential loss, loss of profit and other indirect loss (clause 14), but also restrict it to the value of the service which is to be performed with a maximum of € 1.000.000 (clause 15).
3. In ENGLAND and SCOTLAND design contracts often contain exclusion or limitation clauses. The normal rules on unfair contract terms apply. The Architect's Standard Contract provides for a blank fixed limit, to be completed in each individual contract. One of the most important standard form agreements for the limitation of the architect's liability is the RIBA Code of Conduct (arts. 3.2.2, 4.1.7 and 4.2.5).
4. Under the FRENCH CC art. 1792-5 a contractual clause which limits or excludes the liabilities under CC art. 1792 is void. (CC art. 1792-6 provides a one-year guarantee against visible defects. CC art. 1792-3 provides a two year guarantee of proper functioning.)
5. In GERMAN law a complete exclusion of an architect's liability is not permitted. However, limitation of liability is possible. Liability is often limited to the amount of insurance cover, with an exclusion for gross negligence or fault. Clauses limiting liability for damage to the building itself are prohibited (CC § 309(8)). Clauses making the liability of the architect subsidiary to the liability of the contractors are void (CC

§ 309(7)). If a limitation clause of a permitted type does not contradict the principle of good faith or the law on standard contracts, it will be upheld (*Niestrate*, Die Architektenhaftung[2], p. 184).

6. The general rule of the POLISH CC art. 473 para. 2 applies to designers. According to this there is no possibility of excluding liability for damage caused intentionally. However, it is possible to exclude liability for damage resulting from gross negligence (judgment of the Supreme Court of 6. 10. 1953, II C 1141/53, OSN 1955, no. 1, poz. 5).

7. In PORTUGAL standard contract terms limiting liability for loss of life, pecuniary torts and definitive non-performance are considered to be void in any case of fraud, recklessness or gross negligence (Decr.-Lei no. 446/85 art. 18). Doctrine is divided on the issue of limitation in case of negligence (*Antunes Varela*, Das Obrigações em geral II[6], p. 134). Limitation of liability is generally not upheld regardless of the intensity of fault (CA Oporto, 6 October 1987, CJ 1987, IV, p. 231).

8. The designer is fully responsible under SPANISH law for damage caused by a design that does not comply with the contract clauses (art. 10.2 of the Building Regulation Act), as well as for the damage resulting from an incorrect, insufficient or inexact design (art. 17). In practice, designers conclude a civil liability insurance contract, which will cover the claims of clients. The only cases when the designer will not be liable are: force majeure or when the damage was caused by the victim of the damage or by a third party (art. 17). The parties may establish clauses of limitation of the liability. Nevertheless, under Spanish law liability derived from fraudulent and intentional conduct cannot be limited, according to the CC art. 1102. In the case of negligence, the CC art. 1103 does not provide explicitly for the invalidity of exemption clauses. Therefore, *a contrario*, they are valid (*Serra Rodriguez*, Las claúsulas abusivas en la contratación, p.105). Nevertheless, the Supreme Court assimilates gross negligence to fraud (TS 2 July 1875, jur. Civ. 271;TS 2 July 1992, RJ 1992/6502).

9. In SWEDEN standard contract terms contain limitation clauses, limiting the liability for damages to a certain percentage of the price for the work, for example 15 per cent in art. 5:11 of the AB 04 (standard contract terms for construction works). The designer will be liable for a greater amount if the insurance cover is higher. A party cannot exclude liability for intentional breach or gross negligence. The designer must have an all-risk insurance against damage caused to the works, AB 04 art. 5:22.

CHAPTER 7: INFORMATION AND ADVICE

IV.C.–7:101: Scope

(1) This Chapter applies to contracts under which one party, the provider, undertakes to provide information or advice to another party, the client.

(2) This Chapter does not apply in relation to treatment in so far as Chapter 8 (Treatment) contains more specific rules on the obligation to inform.

(3) In the remainder of this Chapter any reference to information includes a reference to advice.

COMMENTS

A. General idea

This Article determines the scope of application of the rules on the particular type of service contract which involves the provision of information or advice. To avoid the constant repetition of the expression "information or advice" paragraph (3) provides that references to "information" in the rest of the Chapter include references to "advice". The concept of information in the rest of the Chapter therefore encompasses factual information, evaluative information and recommendations. Information is considered factual when it concerns material facts and the provision of the service thus merely involves the description of an observable situation. Information is evaluative when it involves a subjective judgement on the side of the provider and the evaluation of material facts. A recommendation involves the provision of advice, i.e. the suggestion to take a particular decision or, more generally, to embark on a particular course of action.

This threefold classification of information is not only necessary because it helps in determining the scope of application of the rules of this Chapter; since providing information involves heterogeneous activities, the regimes governing the types of information vary in some respects. As will be seen in the following Articles, there are specific provisions to regulate these different situations. Moreover, the performance of information contracts frequently requires the provision of a combination of different types of information. If such is the case, each type of information is governed by its specific rules.

> *Illustration 1*
> A lawyer giving legal advice will generally provide factual information about statutes and case law, an evaluation of these facts, such as a personal interpretation and their application to the situation at hand and, finally, formulate a recommendation. The rules on factual information will apply to the information about statutes and case law; the rules on evaluative information will apply to the lawyer's personal interpretation of the facts; the rules on recommendations will apply to the formulation of the advice itself.

The provisions of this Chapter are intended to apply primarily to contracts whose main objective is to provide information. However, according to the general rules in II.–1:107 (Mixed contracts) the provisions of this Chapter also apply to obligations to inform arising from contracts whose objective is not only to provide information, but also to provide another

service or indeed something else altogether. Such an obligation to inform can be either a main obligation or an ancillary one. The provisions of this Chapter do not regulate the entire contract but are applicable only to the part of the contract which relates to the supply of information. Where the provision of information is so incidental and ancillary that it would be unreasonable to regard the contract as not being primarily of another kind, the rules of this Chapter will apply in a subsidiary way – that is to say, only so far as necessary to regulate the information part of the contract and only so far as they do not conflict with the rules governing the primary part of the contract (II.–1:107 (Mixed contracts)).

Illustration 2
A service contract is concluded between a bank and a client. According to the contract, the bank is to provide a considerable variety of services to the client, including investment advice. The provisions of this chapter only regulate the obligations relating to information and not to the other services provided by the bank.

The Chapter applies not only to contracts where information is to be provided for remuneration but also, with any appropriate adaptations, to contracts where it is to be provided free. This follows from IV.C.–1:101 (Scope) paragraph (1)(b).

The Chapter on Treatment contains specific rules on the obligation of the treatment provider to inform the patient. These rules regulate in particular the content of the information to be provided to the patient in order to allow the patient to give informed consent to the treatment proposed. Paragraph (2) of the Article makes it clear that these rules prevail over the rules in the present Chapter. However, the rules of the present Chapter may apply to aspects of the obligation to inform not regulated by the Treatment Chapter.

Illustration 3
A doctor failed to inform his patient of a risk of the treatment suggested, disclosure of which had to be made according to IV.C.–8:105 (Obligation to inform). The patient claims damages and has to prove that the non-performance of the obligation to inform caused the damage suffered. The causation can be proved following the provisions of IV.C.–7:109 (Causation): the patient only has to substantiate that, in the absence of the non-performance, a reasonable patient in the same situation would seriously have considered taking an alternative subsequent decision.

B. Interests at stake and policy considerations

The first policy issue is whether it is necessary to have specific rules governing information contracts. Might the provisions of Chapter 2 (Rules Applying to Service Contracts in General) be sufficient to regulate such contracts? The traditional approach is to include information contracts in the general regulation of service contracts. The modern approach, however, takes into account the specificity of contracts related to information and, more generally, intellectual services. The peculiarity of intellectual services, compared with material services, is often stressed. Thus it appears necessary, or at least useful, to have special regulations.

The second issue is whether it is possible to include advice activities in the category of contracts regulated by the Chapter. The main argument in favour of including them is that, in practice, the formulation of a recommendation, which is characteristic of the work of an adviser, very often involves the supply of information as well. Advice might even be considered as a particular kind of information.

C. Preferred option

In European laws, contracts for the provision of information are generally regarded as service contracts and provisions regarding work contracts or service contracts regulate this activity. In general, there are no specific legislative provisions governing information contracts. Solutions tend to be found in case law, which has in the last decades become abundant. Nowadays, common European principles can be derived from case law, especially with regard to information supplied by doctors, lawyers, banks, investment advisers and insurance advisers. The exception to this approach can be found in Italian law, which has specific rules for intellectual services. However, this category is broader than information contracts.

The regulation of the provision of information and that of advice is very similar according to positive law in several European jurisdictions. With the exception of some particular rules, the European legal systems do not distinguish between the two concepts.

The preferred option is to build on this modern approach, even if it is generally found in case law rather than in codes, and regard the provision of information and advice as worthy of particular regulation. Certainly there can be no doubt about the importance of the activity. Most provisions can apply to all kinds of information, but some particular provisions are designed to govern specific types of information.

There appears to be no good reason to disapply the general rules on mixed contracts. So the Chapter will regulate the obligations to inform arising from contracts dealing also with other matters. The rules will apply either in parallel or, where the provision of information is merely incidental and ancillary, in a subsidiary way. Therefore, ancillary obligations to inform will generally not be under a different regime than obligations to inform arising under contracts having information as the main objective.

D. The distinction between information and advice

Information and advice are in some respects similar and can be seen as points of a continuum. Advice can be seen as a specific type of information. Essential to the concept of advice is that it contains a recommendation to the client on a specific course of action. The aim of advice is to enable the client to make a reasoned choice from among alternatives. To that extent, advice aims at providing a person with the information which can reasonably be considered necessary for the making of a decision. It will generally include information about possible alternative courses of action and the risks of following them.

Another way of looking at the difference is that in a relationship where there is an obligation to advise, the responsibility for the quality of the choice is in a sense shifted to the adviser. The relationship between an adviser and the client is no longer a normal relationship at arm's length, but a closer relationship in which the adviser is bound to serve the interests of the client, even in the presence of conflicting interests. In some countries, a contract for advice is sometimes qualified as a fiduciary relationship implying fiduciary duties on the side of the provider. This is not the case when the provider is merely under the obligation to supply factual information.

Advice is information organised and limited in a specific way, normally by the needs of the client who wants to solve a problem. In order to find the best solution for this problem, the client needs information about possible solutions, especially about their advantages and

disadvantages. The information is therefore organised around the alternatives which might possibly meet the needs of the customer and is also limited by these alternatives and needs. Moreover, in order to establish the needs of the customer, the adviser has to explore them. This may be stated somewhat differently by saying that an adviser undertakes not only to give information, but also to help the client to take a decision. These elements are not always present in cases where the agreement is simply for the supply of information.

In this Chapter, the main criterion of distinction between information and advice is whether a recommendation is to be given or not. When no recommendation is to be given the service is to be considered mere information, either factual or evaluative. Moreover, when the information provider is to recommend a specific course of action, the service is considered to be advice. In this Chapter, contracts are considered to be advice contracts 'when the provider expressly or impliedly undertakes to provide the client with a recommendation to enable the client to make a subsequent decision.' The criterion is important since IV.C.–7:104 (Obligation of skill and care) paragraph (2) and IV.C.–7:107 (Conflict of interest) state specific obligations which bind only advisers.

However, in some cases where no recommendation is given expressly, the service provided may still be qualified as advice; for example, when the information supplied is sufficiently detailed and involves the mentioning of the consequences to which each possible course of action could lead, even in the absence of an explicit formulation of a recommendation.

> *Illustration 5*
> A professor of law gives legal advice to a client, explaining the possible legal arguments to raise in a lawsuit, without advising a specific course of action. The professor only explains the possible alternatives and the risks involved. Even if no explicit recommendation is given, such a legal consultation constitutes advice and the contract concluded between the parties is an advice contract. The adviser is under the specific obligations arising from this contract.

In other cases, a recommendation cannot be seen as advice. This is the case, for example, when a recommendation is given to the public in general and is therefore not adapted to the needs of a specific client.

NOTES

I. Definition of information and advice

1. There is in general no legal definition of information or advice. Legal doctrine commonly distinguishes the two concepts. Information is often defined as the statement of a factual situation. It differs from advice which includes an express or implied proposal to act. This can be noticed in AUSTRIA (*Koziol*, Haftpflichtrecht II[2], 186 ff), ENGLAND (*South Australia Asset Management Corp. v. York Montague Ltd.* [1997] AC 191*; United Bank of Kuwait Plc. v. Prudential Property Services Ltd. [1997] AC 191; Nykredit Mortgage Bank plc. v. Edward Erdman Group Ltd.*, [1997] 1 WLR 1627), FRANCE (*Terré/Simler/Lequette*, Les obligations[8], no. 258; *Savatier*, D. 1972, Chron. 157; *Veaux*, Contrat de conseil, fasc. 430; *Delebecque*, Contrat de renseignement, fasc. 795), THE NETHERLANDS (*Barendrecht and van den Akker*, Informatieplichten van dienstverleners), POLAND (*Lewaszkiewicz-Petrykowska*:

Uwagi o zawodowym obowiązku udzielania informacji, no. 21, pp. 47-54) and SPAIN (*Cervilla Garzón*, La prestación de Servicios Profesionales, p. 246). In GERMANY a threefold classification is often given – information, recommendation, advice - (Palandt [-*Sprau*], BGB[60], § 675, no. 33). This threefold classification is also found in PORTUGAL (*Sinde Monteiro*, Responsabilidade por conselhos, p. 15 - a recommendation being regarded as more than mere information but as less intense or directive than advice). In GREECE, ITALY, SCOTLAND and SWEDEN there seems to be no accepted definition of information or advice.

II. Regulation of contracts for information and advice

2. In no legal system studied is there particular regulation of contracts for information and advice.

3. The contract for the provision of information or advice is generally regulated by the rules on contracts for services, BELGIUM (Civ. Brussels, 6 February 1991, JT 1991, 661) ENGLAND (Supply of Goods and Services Act, Section 13, same solution under the common law), FRANCE (CC arts 1779-1799) GERMANY (CC § 611), THE NETHERLANDS (CC arts. 7:400 ff), PORTUGAL (CC art. 1154). In ITALY there are particular rules for intellectual services as opposed to material services (CC arts. 2229-2238). In SWEDEN there is no general legislation in this area. However, at least in consumer contracts, guidance can be found in different Acts with a more limited scope, such as the Act on Financial Advice to Consumers *(Lag (2003:862)* or in art. 16 of the Real Estate Agents Act and in art. 13 of the Insurance Agents Act .

4. In SCOTLAND the matter is regulated by the common law of contract. In FINLAND the situation is very much the same (Real Estate Agents Act 200/1074, ss. 8-11, Insurance Agents Act 2005/570 s. 22, Consumer Protection Act chap. 6a, Securities Marketing Act 1989/495 chap. 6).

5. As SPANISH law lacks specific rules on advice contracts as well, they are regulated by the provisions on service contracts contained in the CC (*Bercovitz*, Contratos Mercantiles[3],p.697).

III. Further information

6. For further notes arranged on a country by country basis, including some discussion of non-contractual liability for information or advice, see PEL SC pp. 707–714.

IV.C.–7:102: Obligation to collect preliminary data

(1) The provider must, in so far as this may reasonably be considered necessary for the performance of the service, collect data about:

(a) the particular purpose for which the client requires the information;
(b) the client's preferences and priorities in relation to the information;
(c) the decision the client can be expected to make on the basis of the information; and
(d) the personal situation of the client.

(2) In case the information is intended to be passed on to a group of persons, the data to be collected must relate to the purposes, preferences, priorities and personal situations that can reasonably be expected from individuals within such a group.

(3) In so far as the provider must obtain data from the client, the provider must explain what the client is required to supply.

COMMENTS

A. General idea

The supply of information involves a large number of actions on the side of the information provider. An information contract entails several obligations. Before the information is supplied, the provider has to know what kind of information the client needs. The first obligation of the information provider is therefore to ascertain the needs of the client. The present Article provides a particular regulation of this obligation, which in practice is very important for the provision of the service. In so far as it may reasonably be considered necessary for the performance of the service, the information provider must ascertain the purposes, preferences and priorities of the client. Moreover, according to paragraph (1) subparagraph (d) the information provider will have to ascertain the situation of the client if this is necessary for the performance of the contractual obligations.

Paragraph (2) limits the obligation of the information provider to collecting data about the purposes, preferences, priorities and the specific situation of the client if the service is offered to a group of people. If such is the case, the information provider will be able to determine the purposes, priorities and preferences of the clients objectively, by reference to the standard of the normal member of the group. This paragraph also concerns standardised information, whose content is determined in advance by the provider. In such a case, the information provider has a more limited obligation to investigate the needs of the clients and can base the information supplied on the situation of the group of potential clients who will need the information.

> *Illustration 1*
> A company offers a mobile telephone service which provides the weather forecast, weather reports and a warning system for skiers and climbers in the French Alps. The service is not provided for the Italian and Swiss Alps. Thus, the information provider is only bound to collect information about the circumstances that apply to climbers and alpinists in the French Alps.

Paragraph (3) imposes on the provider the obligation to explain what is needed from the client.

Illustration 2
An international publisher requests a lawyer to give pre-publication advice, viz. to determine whether a biography the publisher intends to publish contains items that may lead to claims for breach of privacy. The lawyer needs to know the citizenship and domicile of the persons involved and the countries in which the book will be distributed. Determination of the applicable law is essential since legal systems may diverge on the definition of privacy and the criteria for its breach. The lawyer is to inform the publisher what kind of information is needed and the publisher is obliged to give that information on the basis of the obligation to co-operate.

B. Interests at stake and policy considerations

The first question is the extent of the data to be collected by the information provider about the purposes, preferences and priorities of the client. This depends on the kind of service offered and on the type of clients involved. It is in the interest of both parties to have a complete exchange of information before the performance of the service begins, in order to allow its correct performance. However, having to supply too much information may increase the costs for the client. Limiting the extent of information may reduce some of these extra costs.

The second question to answer is whether the information provider is to assess the circumstances under which the contract is to be performed *in concreto*, i.e. by reference to each particular client, or *in abstracto*, i.e. by reference to a reasonable client in the same situation. There is little doubt concerning information meant to be tailor-made to the needs of a particular client. However, the duty contained in this Article may lead to problems with regard to standardised information and, more generally, with regard to information to be provided to a group of persons. Often, the information to be supplied is determined in advance by the provider, who does not take into account the needs of a particular client. Standardised information is very frequent in non-contractual relationships. However, people often enter into contracts in order to receive services which are socially desirable. In such a case, the obligation for the information provider to collect information about the purposes, the priorities and the preferences of the clients should be more limited. Moreover, when an obligation exists with regard to standardised information, it is desirable that the information provider assess the circumstances in which the service is to be performed objectively, not subjectively. In other words, the more the information is supposed to be tailor-made to the needs of a particular client, the more the circumstances in which the service is to be performed need to be assessed *in concreto*. In contrast, the more the information is standardised, the more such circumstances can be efficiently assessed *in abstracto*.

The obligation to assess the circumstances in which the service is to be performed is widely accepted in the European legal systems. When the information to be provided is not standardised, the information provider has to deliver information tailored to the specific needs and situation of the client. This obligation requires the provider to make a preliminary assessment before providing the service. This obligation is generally deduced from the general provisions on the standard of care. The supply of a service which is not tailored to the needs and situation of the particular client is, in such a case, not given in conformity with the standard of care.

C. Preferred option

The preferred option is to impose an obligation to collect preliminary data but to limit the amount of data to be collected to what may reasonably be considered necessary for the proper performance of the service. This criterion allows the parties and the judge, in assessing liability, to determine the amount of preliminary data to be collected by the information provider or to be exchanged by the parties on a case-by-case basis. In doing this, one will need to turn to a subjective standard when the object of the contract is to supply tailor-made information and to an objective standard with regard to standardised information, i.e. information whose content is determined in advance by the provider.

As a consequence, with regard to standardised information it is up to the client to choose a service provider who offers a service which corresponds with the client's needs. Providers of this kind of information are not under the obligation to collect data about the needs of each particular client before performing the service. They offer to the public a specific service and it is up to the client to determine what is needed, before requesting the service. Thus, the data to be collected relate to the purposes, preferences, priorities and personal situations which could reasonably be expected in relation to persons in the relevant group.

NOTES

1. In AUSTRIA there seems to be an obligation for the provider to ask the client for information about the client's situation. On the other hand, the client is also under an obligation to co-operate. If the client fails to perform this obligation the damages due are reduced pursuant to CC § 1304 (contributory negligence).
2. Under ENGLISH and SCOTTISH law a contract for advice, at least, would usually be considered to contain an implied term that the client will answer such questions as might reasonably be put by the adviser.
3. Under FINNISH law the information provider has a general obligation to fulfil the commission carefully (see Supreme Court Cases KKO 1998: 57; 1999: 19; 1999:80 and 2001:128 and *Hemmo*, Sopimusoikeuden oppikirja, p. 154). More specific obligations are found in various special acts, e.g. the "know your customer" principle in the Security Markets Act 1989/495 chap. 4 on investment services, s. 3a and the Insurance Agents Act 2005/570 s. 22.
4. In FRANCE it is in principle up to the information provider to collect any necessary preliminary data (Cass.com. 1 December 1992, Bull. no. 391, a professional salesman must collect information about the needs of the client; Cass.civ. I, 7 April 1998, Bull.civ. I, no. 150; CCC 1998, no. 97 with note *L. Leveneur*; Cass.civ. I, 17 February 1998, Bull.civ. I, no. 61 for the fitter). It is up to the provider to ask the client for appropriate information. The client also must inform the provider and concealment of essential elements may amount to contributory negligence (Cass.civ. I, 27 June 1995, JCP éd. N 1996.II, p. 1213, with note *Sanséau*). The solution is very general, since the *Cour de cassation* decided that every fault of the client could limit the damages due by the adviser (Cass.civ. I, 30 January 1996, Defr. 1996, p. 361, obs. *J.-L. Aubert*).
5. The rules on contributory negligence in GERMAN law apply if the client fails to do something that is part of the client's own responsibility (BGH 17 October 1991, WM 1992, 62, 66; BGH 17 November 1994, WM 1995, 212, 214), especially if the client fails to inform the adviser of all necessary facts (BGH 20 June 1996, WM 1996, 1832, 1835 ff).

6. In ITALIAN law an obligation to collect relevant preliminary data may be deduced from a variety of articles: CC art. 1175 requiring a correct behaviour from both parties in performing; CC art. 1337 on good faith at the pre-contractual stage, and CC art. 1375 on good faith at the contractual stage.

7. As a rule, an obligation for the client to inform the information provider does not exist under DUTCH law (Cf. *Barendrecht and van den Akker,* Informatieplichten van dienstverleners, no. 61). This obligation is, however, sometimes acknowledged in the patient-doctor relationship (CMT 31 October 1996, Stcrt. 1996, 221.) However, failure to give the necessary information may lead to *mora creditoris* if the failure can be imputed to the client. If the client does give information, the adviser may, in principle, rely upon that information in so far as it is of a factual nature, unless the information given is superficial or incomplete, in which case the adviser is obliged to do further research (i.e. to put new questions to the client) (Cf. *Barendrecht and van den Akker,* Informatieplichten van dienstverleners, nos. 126, 343).

8. In POLAND the duty to ascertain the needs of the client may be deduced from the general rules on the performance of obligations, which require loyal contracting (CC art. 354 para. 1). The obligation of the client to co-operate arises from CC art. 354 para. 2. More specifically, in the case of a contract of specific work the client's obligation to co-operate is confirmed by CC arts. 639 and 640.

9. The client is obliged under PORTUGUESE law to supply the provider with such data as are necessary to enable the advice or information to be supplied (CC art. 1667 a)). This is a default rule. If the data supplied are insufficient, the information provider will have the defence of contributory negligence (CC art. 570), but bears the burden of proof (CC art. 572).

10. In SPAIN the client's obligation to co-operate in informing the service provider may be deduced from the principle of good faith in its objective variant: Ccom art. 57 and CC arts. 7, 1258. The client's obligation to inform is however codified for those contracts where utmost good faith is required. In the case of insurance relationships the client is compelled (Insurance Act art. 16) to inform the service provider regarding the existing situation at the time the contract is concluded and of any other situation arising during the contractual period which may have an impact on the agreement, although in case of conflict it is for the provider of the service to prove that it was not properly informed (TS 5 July 1990, RAJ 1990/5776).

11. The information provider has a general obligation to fulfil the commission carefully under SWEDISH law (See *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 217). Within this general obligation, there is normally an obligation to collect preliminary data from the client, as far as this is relevant to the provider's ability to fulfil the commission carefully. This is also the case under various special acts, for example, art. 13 of the Act on Insurance Brokers, requires the insurance agent to clarify the client's need of insurance. In the Financial Advice to Consumers Act art. 5(1), the adviser must take the client's interest duly into account. Moreover, the advisor must adjust the advice to the wishes and needs of the client, and only recommend solutions suitable for the client. The client has a general duty of loyalty towards the information provider (See *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], p. 225). This may possibly include a duty to give the information necessary for the information provider to perform the obligations under the contract.

IV.C.–7:103: Obligation to acquire and use expert knowledge

The provider must acquire and use the expert knowledge to which the provider has or should have access as a professional information provider or adviser, in so far as this may reasonably be considered necessary for the performance of the service.

COMMENTS

A. General idea

It is up to the information provider to acquire and use the expert knowledge necessary for the proper performance of the obligations under the contract.

> *Illustration 1*
> A rich businessman, who has financial interests in various countries and members of his family living abroad, requests the advice of an estate planning lawyer with a view to minimising taxes for his heirs. In order to be able to give the advice, the lawyer must be knowledgeable and collect information about inheritance tax law, marital law, succession law and international private law in the jurisdictions connected with the case.

The phrase 'may reasonably be considered necessary for the performance of the service' primarily refers to the result expected by the client and agreed upon by the parties. In other words, the input necessary depends on the output agreed upon. Defective input will generally lead to defective output, and thus to liability of the information provider on the basis of the provisions regulating the output. However, the collection and use of particular expert knowledge is an obligation in itself. Failure to perform it may lead to independent sanctions.

The main goal of this provision is therefore to allow the client to react as soon as the client becomes aware of the information provider's use of improper, incomplete or defective expert knowledge; the client does not have to wait until the performance of the service has been completed.

B. Interests at stake and policy considerations

There is no doubt that a professional information provider needs to acquire and make use of the expert knowledge necessary for the performance of the service. The main issue is the amount of knowledge needed in order to live up to the standard of care required. What should be the extent of the obligation? What criterion should be used to determine that extent?

Requiring too much expertise from all information providers will lead to costs which will often be unnecessary for the provision of a good service. In some cases, this may even discourage providers from performing the service requested, because it may become too risky for them: they may too easily be held liable. On the other hand, if information providers are allowed to provide services regarding matters in which they are not sufficiently competent, the client may be seriously harmed. A middle course needs to be found.

The way to establish the extent of expert knowledge information providers need to have and to apply can be difficult to determine. In the sciences, the reference to the state of the art of the discipline at the moment of the provision of the service can be considered to be a

guideline. This is probably not possible for other fields or practices. In such cases, reference may be made to the prevailing opinions in the community in which the information provider works or to deontological principles.

C. Preferred option

The preferred option is to impose an obligation but to limit it, first, by referring to the expert knowledge to which the provider has or should have access as a professional information provider or adviser and then by using the criterion of "in so far as may reasonably be considered necessary for the performance of the service". This will enable courts to take into account the particular circumstances of each case and to refer to the general obligation of skill and care under IV.C.–2:105 (Obligation of skill and care) and to the particular obligation of skill and care for information providers and advisers under IV.C.–7:104 (Obligation of skill and care) paragraph (1)(b).

Where the information to be provided is factual information, the obligation under the present Article will often be overridden by the obligation under paragraph (2) of IV.C.–7:105 (Conformity) to provide correct information. This means that the contractual obligation of the information provider will not be performed if the expert knowledge passed on to the client is incomplete or incorrect, regardless of the fact that the provider has acted with reasonable care and skill in researching the expert knowledge.

Illustration 2
A client requests a law firm to make an inventory of the current law on employer liability. The law firm consults the LEXIS database. If some relevant cases are lacking in that database, due to which the information provided to the client is not correct or is simply incomplete, the firm has not performed its contractual obligation, regardless of the fact that it acted with reasonable care and skill in collecting expert knowledge and in deciding to consult the LEXIS database.

NOTES

I. Overview

1. This obligation is generally derived from the general provisions on the skill and care required of the information provider. However, legal systems do not agree on how much expert knowledge is necessary to enable the contractual obligations to be performed in conformity with the required standard of care. In BELGIUM, ENGLAND, FRANCE, THE NETHERLANDS, ITALY, SCOTLAND and SWEDEN the information provider is required to have regard only to factual and established expert knowledge. GERMANY, however, sometimes imposes an obligation to foresee a future evolution and therefore to take into account the probable incorrectness of the state of the art (BGH 30 September 1993, IX ZR 211/92; NJW 1993, 3323, legal adviser).

II. Obligation to acquire and use expert knowledge

2. In BELGIUM the district Court of Brussels stated that a lawyer, although bound to collect professional information carefully, is not liable merely for interpreting an ambiguous legal provision differently from the judge (Civ. Brussels, 21 February 1963, RGAR 1963, no. 7135).

3. In ENGLAND a physician is expected to have the professional knowledge of a reasonably skilled professional in the relevant field (*Sidaway v. Board of Governors of the Bethlem Royal Hospital* [1985] AC 871).

4. An information provider or adviser is under an obligation to have or acquire relevant expert knowledge under FRENCH law. For example a legal adviser must know the current law at the moment of the provision of the service (Cass.civ. I, 15 October 1985, Bull. no. 257; RTD civ 1986, 759 Huet). The provider must ascertain that the information is not out-of-date (Cass.com. 30 January 1974, D. 1974, 428 with note *Tendler*). The provider who does not accomplish the researches necessary for the security of the client will fail to perform the contractual obligations (Cass.civ. I, 3 May 1983, D. 1983, 559, note *J.-L. Aubertt*, for a notary). A legal adviser is not obliged to foresee a reversal of the case law (Cass.civ. I, 25 November 1997, Bull.civ. I, no. 328; Defr. 1998, 354 obs. *J.-L. Aubertt*; RTD civ 1998, 367, obs. J. Mestre (notary). Already ruled by Cass.com. 12 July 1993, Bull.civ. IV, no. 298). In any case, legal uncertainty does not relieve the provider from the obligation to advise; therefore the client must be told of the uncertainty (Trib. civ. Seine, 22 April 1953, JCP éd. N 1953.II.7656; CA Amiens, 29 January 1959, JCP éd. N 1959.II.11212; Cass.civ. I, 9 December 1997, Bull.civ. I, no. 362; Defr. 1998, p. 354, obs. *J.-L. Aubertt*, notary). A lawyer is liable for not advising the client against suing when the claim will certainly be dismissed (Cass.civ. I, 29 April 1997, Bull.civ. I, no. 132; JCP 1997.II.22948 with note *R. Martin*; CCC 1997, no. 111, with obs. L. *Leveneur*).

5. The information provider must have the expert knowledge expected by a professional of the same type under GERMAN law. A legal adviser must know the positive law, even the solution of cases criticised by legal doctrine (BGH 29 March 1983, NJW 1983, 1665, solicitor). The adviser is also under an obligation to keep up to date and study the decision of the BGH as soon as they are published in legal journals (BGH 20 December 1978, NJW 1978, 887). In assessing the extent of knowledge a legal adviser should have, German case law is more demanding than other legal systems. A legal adviser must conform to the case law of the Supreme Court, even if these rulings are fiercely criticised in the professional literature and it cannot be ruled out that case law will be changed (BGH 29 March 1983, NJW 1983, 1665 (solicitor); BGH VersR 1993, 1413, tax consultant; BGH 27 October 1994, VersR 1995, 303, NJW 1995, 330, notary public). The court held a lawyer liable for an incorrect legal opinion, even though a three-person panel of professional judges had followed that opinion (BGH NJW 1983, 820). Even the invocation of an expert legal opinion – the one of a university professor – is not sufficient to release the lawyer from liability (BGH NJW 1993, 1179). The court has also held a lawyer liable because he relied on an old case of the court, without considering the possibility of a reversal of the line of the case law (BGH 30 September 1993, IX ZR 211/92; NJW 1993, 3323).

6. In ITALY the information provider has to keep up with the “state of the art” and has to be aware of scientific solutions unanimously accepted in the relevant field of knowledge or practice. Knowledge of such solutions is indispensable for professionals who want to be active in a particular intellectual field (Cass. 18 June 1975, no. 2439, Giur.it., 1976, I, 1, 953; Cass. 29 March 1976, no. 1132, Giur.it., 1977, I, 1, 1980). This principle is valid for every single professional category. A lawyer, for instance, is liable in case of ignorance of the rules of law to be applied and, in general, when negligence and incompetence compromise the good outcome of a trial. Only in those situations in which interpretation of a case is arguable, or the rules to apply are doubtful and under discussion, may liability be excluded to the extent that there is no fraud or serious fault (CC arts. 2236 and 1176).

7. In the law of THE NETHERLANDS the provider of a service must apply the care of a *reasonably skilled* and reasonably acting provider of such a service. This criterion was explicitly accepted in HR 9 November 1990, NedJur 1991, 26 (*Speeckaert/Gradener*, liability of a doctor), and applies to all providers of services. Cf. also HR 26 April 1991, NedJur 1991, 455 (*Benjaddi/Neve*, liability of a bailiff for bad advice). This means that the provider must possess or obtain the professional knowledge which a reasonably skilled provider may be expected to have. (*Michiels van Kessenich-Hoogendam*, Beroepsfouten[3], no. 18). A recent Dutch case shows the practical consequences of the obligation for a legal adviser to have professional knowledge. In this case, a firm had paid a former employee a large amount of money by way of a "golden handshake" in order to have the employee consent to the termination of his employment contract. Later it became known that the former employee, while employed, had accepted payments from an important supplier of the employer, without his employer's knowledge. The client, who had engaged a lawyer to assist him in a criminal case against the former employee, asked the lawyer how to claim back the money he had paid to the former employee. The lawyer advised his client to wait, for tactical reasons, until the former employee was criminally charged with the case and then to initiate legal proceedings alongside the criminal lawsuit. The client followed the advice and waited for the criminal charges to be brought to court. However, when the criminal charges were finally brought to court, the time limits for claiming the money paid by the employer had already lapsed, and the claim was dismissed. The employer then sued the lawyer on the grounds that he was liable for bad advice. The lawyer defended his position by arguing that he had acted as the employer's criminal lawyer only and that he, as a criminal lawyer, could not have known that the money was only to be claimed back through a specific procedure. The District Court of Leeuwarden found that the advice itself was wrong (CFI Leeuwarden, 14 August 2002, case number HAZA 01-728). Moreover, the Court found that if the lawyer's argument that he was only employed as a criminal lawyer and that he could not have known of the specific procedure were true, the lawyer should have refrained from giving advice altogether and should have referred the client to a civil lawyer. This case shows that a lawyer is always under the obligation to have or to collect professional knowledge in order to give legal advice. Ignorance of legal matters is never an excuse for a lawyer. A lawyer who is aware of not having sufficient knowledge in a specific area should abstain from acting and refer the client to a lawyer competent in that area. It still remains to be determined, however, how much knowledge the lawyer should have.

8. In POLAND the obligation to have or acquire the relevant expert knowledge may be derived from the obligation to act with due diligence (CC art. 355) and the obligation of loyal contracting (CC art. 354). The level of knowledge to be expected in a given contract depends on the qualifications and professional experience of the service provider, the case, and the circumstances in which obligations are to be performed (judgment of the Supreme Court of 25. 9. 2002, I CKN 971/00, Lex no. 56902). In the case of professionals the standard of knowledge and experience is set higher (CC art. 355 para. 2). For example, in its decision of 14. 08. 1997 (II CZ 88/97, OSNC 1998/3/40) the Supreme Court has stated that the party contracting with an advocate may expect that the advocate will act with a full knowledge of the law.

9. SCOTTISH law holds the professional adviser to the standards of knowledge to be reasonably expected of a member of the profession in question, given the state of the art at the time of providing the information or advice (*Hunter v. Hanley 1955 SC 200*).

10. In SPAIN it is of paramount importance in the so-called liberal professions that the service provider has up to date professional knowledge. The professional is expected

to be aware of the state of the science at the time the service is provided. See, for the legal advice contract, SAP Madrid 30 June 2003, JUR 2003/248779, and for the medical profession, SAP Zaragoza 24 April 2000, AC 2000/1292.

11. Some professions in SWEDEN (such as accountants and practising lawyers) have a special high standard of care of their own. The professional must comply with these standards. For instance, a lawyer can be expected not to overlook rules and easily found cases (NJA 1957 p. 621). A specialist has normally a higher standard of care than the generalist (cf. NJA 1981 p. 1091). The same principles are applied in FINNISH law (see e.g. Supreme Court Cases KKO 1999:19, 1999:80 and 2001:128).

IV.C.–7:104: Obligation of skill and care

(1) The provider's obligation of skill and care requires in particular the provider to:

(a) take reasonable measures to ensure that the client understands the content of the information;

(b) act with the care and skill that a reasonable information provider would demonstrate under the circumstances when providing evaluative information; and

(c) in any case where the client is expected to make a decision on the basis of the information, inform the client of the risks involved, in so far as such risks could reasonably be expected to influence the client's decision.

(2) When the provider expressly or impliedly undertakes to provide the client with a recommendation to enable the client to make a subsequent decision, the provider must:

(a) base the recommendation on a skilful analysis of the expert knowledge to be collected in relation to the purposes, priorities, preferences and personal situation of the client;

(b) inform the client of alternatives the provider can personally provide relating to the subsequent decision and of their advantages and risks, as compared with those of the recommended decision; and

(c) inform the client of other alternatives the provider cannot personally provide, unless the provider expressly informs the client that only a limited range of alternatives is offered or this is apparent from the situation.

COMMENTS

A. General idea

This Article provides further specification of the information provider's obligation of skill and care. It is the core of the regulation of information contracts.

The information provider is under an obligation to provide clear and understandable information, to act with reasonable care and skill with regard to evaluative information and to inform the client about risks. Moreover, the information provider who provides the client with a recommendation, i.e. the adviser, is under the obligation to mention alternatives.

Since the purpose of the information provided is to enable the client to make an enlightened subsequent choice, the information must be understandable and, if in writing, legible. According to paragraph (1)(a), the provider is to take reasonable measures to ensure the client understands the information. The more the provider gives the client the impression that the information is expressly tailored to the client's individual needs, the heavier the obligation in this respect. If, however, only a very limited service is given, especially if the information is given in a standardised form without actual contact between the parties, the provider's obligation to make sure a particular client understands the information is more limited.

Paragraph (1)(b) is the core of the Article. It provides that the information provider is to "act with the care and skill that a reasonable information provider would demonstrate under the circumstances when providing evaluative information".

Illustration 1

An adviser advises a client to make a particular long-term investment. After ten years, it turns out that another investment would have been more profitable for the client.

The adviser is not liable, unless it is shown that he or she did not act with reasonable care and skill.

According to paragraph (1)(c), the information provider is to inform the client about the risks involved in the various courses of action available. The obligation to inform about risks exists when the client is expected to make a subsequent decision on the basis of the information received. It is generally accepted that the information provider has to inform the client about the risks involved in the latter's subsequent decision. This is considered to be one of the essential features of the obligation to inform.

When the information provider provides the client with a recommendation, i.e. in the case of advice contracts, special provisions are to be found in paragraph (2). The adviser's main obligation is to recommend a specific course of action from among the alternatives available. In order to do so, subparagraph (a) states that the adviser is to make a skilful analysis of the information gathered and, on the basis of that analysis, recommend a particular course of action to the client. In the analysis, the adviser must take into account all the alternatives at hand and the risks they involve. These alternatives may include not doing anything at all.

Illustration 2
A patient can decide not to undergo treatment; a client of a lawyer can decide not to sue; an adviser on company strategy can advise against the merger with another company. If not doing anything is the best alternative for the client, the adviser should so advise the client.

Subparagraphs (b) and (c) impose on the adviser an obligation to inform the client of the alternatives available. However, as a rule the information provider is not under an obligation to mention alternatives to the client. Even when the adviser is in a position to provide one of the alternatives personally, the client should be informed about the alternatives the provider cannot supply, unless the information provider expressly informs the client that only a limited range of alternatives is offered or this is apparent from the situation.

Illustration 3
An insurance broker does business with only a limited number of insurance companies, and recommends to his client the best alternative from among the insurance policies offered by those companies. He is obliged to disclose this situation to the client. This is also the solution of the EU Directive on insurance brokerage.

B. Interests at stake and policy considerations

Several issues arise from this provision. If the existence of an obligation to give clear and understandable information is not debated, the other obligations of the information provider involve difficult choices and the reconciling of conflicting interests.

With regard to paragraph (1)(b), the issue is to determine whether the information provider is under an obligation of best efforts only or under an obligation to guarantee the result as envisaged by the parties by providing evaluative information (for discussion of the issue regarding factual information, see Comment B to IV.C.–7:105 (Conformity)). It is in principle difficult for the information provider to guarantee the exactness of evaluative information. This is usually the case when the information is not yet available or concerns a future event.

For every kind of forecast or prediction it is difficult for the information provider to guarantee the exactness of the information.

Illustration 4
A weather forecast agency predicts sunshine for the next day. However, a storm rages that day. The agency is not liable if it acted with the care of a professional of the same profession.

Illustration 5
A bank willing to lend money to a company requires a mortgage on a building belonging to the debtor. The bank requests a valuation of the building. The valuer is not under an obligation to guarantee the bank that it will effectively receive the valuation amount in case of enforcement of the guarantee. The bank must take the risks of market developments. The valuer's obligation is only to perform a valuation with reasonable care and skill.

Besides the supply of information about future and unknown events, i.e. predictions, more generally the question arises whether the information provider ought to be under an obligation of best efforts in all cases in which the information is not factual, but evaluative. When information has to be processed by the provider in order to perform the contractual obligations, it is usually unfair to impose on the provider a guarantee of the correctness of the information.

Illustration 6
An estate agent is requested to provide information about the value of a villa. In order to do so, the estate agent has to process many factual data (surface, neighbourhood, recent sale prices of similar estates in the area …). This involves several hazards, and the agent cannot guarantee that the client will find a buyer at the valuation price given. The agent is under an obligation of best efforts, and is liable only if the required standard of care was not met.

As in the case of the provision of evaluative information, the adviser cannot guarantee that the result expected by the client will be achieved if the client acts on the recommendation. In other words, it is not possible to require from a professional adviser that the course of action advised is the best one for the client.

With regard to the obligation to mention the risks, the main issue is to assess precisely the extent of the risks that the information provider is to disclose. Since the information is provided in order to allow its recipient to take a subsequent decision, it seems logical to link the risks directly with the subsequent decision in such a way that only the risks that could reasonably be expected to influence the client's decision are to be disclosed. Since the information provider does not necessarily know what kind of risk might influence the decision of the client, it might be said that this solution places the provider in a position of uncertainty. It might be suggested that it would be better to specify in advance the risks to be disclosed. However, this solution would be possible only in relation to some types of information; for example in relation to the risks of certain medical treatments, where clear statistics exists, it might be possible to require the disclosure of those risks which turn up in statistics with a particular frequency. This solution would, on the other hand, be difficult to apply to other areas where such a calculation of frequency cannot be made and where it is impossible to

regulate any particular situation. For this reason, it may be preferable to have a more general provision.

The question whether the adviser should be under an obligation to mention alternatives is not really an issue, as this principle is widely accepted. The main question is to determine whether the adviser should be bound to mention alternatives the adviser cannot provide personally. This situation occurs when the adviser also provides other kinds of services. This is frequently the case in the field of insurance advice. An argument in favour of such an obligation would be the faith placed in the adviser by the client, who may not know that the adviser may not be the best qualified person to execute the service. For this reason an adviser is, in principle, obliged to mention alternatives. This may in particular be the case if a specialisation has been developed within a particular profession. It is generally accepted that the standard of care a doctor has to meet may require the doctor (e.g. a general practitioner) to refer patients to another doctor (e.g. a specialist). On the other hand, in some situations the provider of a good or service is not obliged to refer to a competitor who can deliver better goods or services.

The duty to provide clear and understandable information is generally accepted in all European legal systems as part of the general standard of care required from the information provider. The case law is generally to the effect that the information provider is merely under an obligation to make the best efforts to provide correct information. Strict liability or obligations of result are generally not found in this area.

Several techniques are used in European jurisdictions to determine the risks to be disclosed: a priori determination, causation reasoning and standard-of-care reasoning. Apart from the type of legal reasoning applied, legal systems also diverge with regard to the determination of the extent of the risks that have to be mentioned. Especially concerning medical treatment, some legal systems impose on the provider the duty to inform the other party about all possible risks, even those that materialise exceptionally. This is, for example, the case for French law. In other legal systems there is no *a priori* statement of the risks which have to be disclosed. The risks to be disclosed are those that may influence the decision of the client (Germany, Austria). In yet other systems, the determination is made by applying a normal standard-of-care reasoning; the risks to be disclosed are the ones that a reasonably competent and skilful professional would have disclosed (England). Reference is made to professional literature and codes of ethics to determine what a reasonable professional would have disclosed.

No common position is to be found in European legal systems with regard to the obligation to mention alternatives. If the principle of this duty seems to be widely accepted for the adviser, there is divergence with regard to the information provider who does not provide a recommendation. The most important divergence probably concerns the duty of the adviser to mention alternatives that the adviser is not able to provide personally.

D. Preferred option

With regard to evaluative information, in this Article the obligation of best efforts is opted for. The information provider must provide the service with reasonable care and skill.

In paragraph (1)(c), causation reasoning is followed in order to determine the extent of the risk to be disclosed. The information provider only has to mention risks the awareness of which could reasonably influence the other party’s choice. Specific provisions exist with

regard to information about risks in the treatment Chapter (IV.C.–8:105 (Obligation to inform)). However, according to paragraph (2) of this Article, the regime of the duty of the service provider to inform about therapeutic risks is governed by the provisions in the present Chapter.

The obligation to mention alternatives is imposed only on the adviser, not on the information provider who does not give a recommendation to the client. Concerning alternatives the adviser cannot personally provide, paragraph (2)(c) states an in-between solution, providing that in principle the adviser is to mention such alternatives. However, the adviser can exclude the obligation to mention such alternatives by explicitly stating that the advice given concerning only alternatives the adviser can personally provide or a limited range of alternatives provided by others. This statement must be given, as soon as the adviser comes into contact with the client. Moreover, sometimes it is obvious that the professional will only advise the client about alternatives the adviser can personally provide. If this is the case, there is no need to make the statement mentioned above.

Illustration 7
A private individual requests a loan for the acquisition of a piece of an estate. The bank will only advise the potential client on the various types of loans it can offer him. The bank is not obliged to advise in favour of loan contracts offered by other banking institutions.

This Article contains default rules. The parties may agree that the information provider is to guarantee the exactness of the information even in providing evaluative information or advice. The standard of care can also be lowered by contractual stipulation. Frequently a client chooses not to be informed about the risks of a specific course of action.

Illustration 8
A patient decides not to be informed about the risks and the alternatives of the treatment recommended. In other words, the patient entirely trusts the physician and, in fact, asks the latter to take the decision in his place. This wish must be followed by the treatment provider and, as a consequence, his duty to inform is alleviated.

NOTES

I. Overview

1. As a principle, in ENGLAND, FINLAND, FRANCE, GERMANY, THE NETHERLANDS, PORTUGAL, SCOTLAND, SPAIN and SWEDEN, the obligation of the information provider is an obligation of means. According to this the mere fact that the information provided is wrong or turns out to be wrong does not lead to liability on the part of the provider. It will be necessary to prove that the provider did not act with reasonable care and skill. As an exception in FRANCE some cases (e.g. CA Paris 22 November 1996, Juris-Data no. 024274) and authors (*Delebecque*, Contrat de renseignemen, fasc. 795, no. 83; *Veaux*, Contrat de conseil, fasc. 430, no. 116) are of the opinion that the provider is under an obligation of result in providing factual and verifiable information. In GERMANY such is the case when the information contract is qualified as a *Werkvertrag.* For a comparative analysis of this issue, see *Pinna*, The Obligations to Inform and to Advise, nos. 107-123.

2. When the obligation is of means, the standard of care is generally the one of the reasonably skilled professional taking reasonable care. This depends on the circumstances of the case and the nature of the information provided. Reference to the standards of the profession is made. In ITALY, a further alleviation of the obligation is to be found when the performance of the service is of particular difficulty (CC arts. 1176(2) and 2236). If such is the case the information provider is only liable in case of fraud or gross negligence. In SWEDEN, the degree of specialisation of the provider is taken into account to modulate the standard of care.

3. Although the existence of the information provider's obligation to disclose risks is generally accepted, the nature and the extent of the risks to be disclosed has led to an important dispute in doctrine and case law. In determining this, the solutions adopted by European legal systems diverge substantially. They diverge both with regard to the method followed in solving the issue and with regard to the final solution, i.e. the extent of risks that have to be disclosed. For a comparative analysis of this issue, see *Pinna*, The Obligations to Inform and to Advise, nos. 180-197.

4. The obligation to mention alternatives is generally accepted in some fields of practice, especially in medical information.

5. The obligation to mention alternatives that the service provider cannot provide is generally acknowledged in the medical field, with the exception of GERMANY (BGH 22 September 1987, IV ZR 238/86). In other fields of practice, the main solution takes into account the role played by the information provider. Especially if the provider gives the impression of being an independent adviser or of acting independently will there be an obligation to mention alternatives the provider cannot supply personally. A provider who does not intend to do so, must disclose the lack of independence. Most legal systems analyse this issue as one of conflict of interest.

II. Obligation of means or obligation of result

6. The nature of the obligation stemming from the contract depends upon the construction of the contract itself in ENGLAND. Although the general starting-point is that it is an obligation of means ("reasonable skill and care" under Supply of Goods and Services Act 1982, art. 13), given the nature of the contract it will often be interpreted as containing a warranty that the information is correct, so that the obligation is in practice one of result. Information providers who wish to avoid such an obligation can exclude it (subject to the Unfair Contract Terms Act 1977). In the case of advice the courts will be far more reluctant to read any warranty as to result into the contract, see e.g. *Thake v. Maurice* [1986] QB 644 in which the court held that a doctor performing a sterilisation operation had not given a contractual warranty that the patient would become permanently sterile, although he did demonstrate to the claimants (husband and wife) how the ends of the vas were to be cut and tied back.

7. Some cases in FRANCE have stated that the obligation to inform is an obligation of result and the obligation to advise is an obligation of means. The consequence of this is that wrong information is sufficient to lead to the liability of the provider (CA Paris 22 November 1996, Juris-Data no. 024274). However, the main line of the case law is in favour of the characterisation of the obligation as an obligation of means also when information is provided, i.e. wrong information must be the consequence of a faulty performance of the obligation to lead to liability of the provider (*Delebecque*, Contrat de renseignement, fasc. 795, no. 72). The *Cour de cassation* ruled that the client must establish that the provider did not act with the required diligence to collect exact information (Cass.com. 30 January 1974, D. 1974, 428 with note *Tendler*. For the appeal case, CA Lyon 27 October 1971, JCP 1972.II.17012, with note *R. Savatier*; D.

1972, 327 with note *Tendler*. For other cases, see CA Rennes 21 May 1974, Banque 1974, 848; RTD com 1974, 566 obs. Cabrillac, Rives-Lange). In a case of 1988 the *Cour de cassation* stated as a general principle that a bank is under a mere obligation of means in providing information (Cass.com. 10 October 1988, Bull. July, 1988, 931, no. 303; RD banc 1989, no. 12, p. 66, obs. Crédot, Gérard). In the case in question a client who wanted to acquire shares of a company asked his bank for information about the company and its creditworthiness. Following the receipt of such information he did buy the shares and a few months later the company went bankrupt. The client could not recover the loss from the bank, because no fault on the part of the bank could be established. (For other cases see *Delebecque*, Contrat de renseignement, fasc. 795, nos. 75 ff). However, in other cases wrong information has been regarded as sufficient to indicate fault on the part of the provider (Cass.com. 14 March 1978, D. 1979, 549 with note *Tendler*). In another case concerning the information exchanged between two banking institutions, the *Cour de cassation* ruled that providing wrong information was sufficient to lead to liability. (Cass.com. 9 January 1978, D. 1978 IR 308, obs. *Vasseur*; Cass.com. 9 June 1980, D. 1981 IR 192 obs. *Vasseur*; Cass.com. 24 November 1983, D. 1984 IR 707 obs. *Vasseur*). In legal doctrine it is considered that, concerning information accessible to everyone, the provision of wrong information leads directly to the liability of the provider (*Delebecque*, Contrat de renseignement, fasc. 795, no. 83). In other words in such cases the provider of information is under an obligation of result. More generally a part of the doctrine considers that the obligation to provide information which is verifiable should be in principle an obligation of result (*Veaux*, Contrat de conseil, fasc. 430, no. 116). The reason is that there is no hazard in the performance of such an obligation and the debtor should guarantee a result. This is the general criterion of the determination of an obligation of result in FRENCH law (See especially, *Tunc* 1945, and generally *Terré/Simler/Lequette*, Les obligations[8], no. 586). In any case it is easier for the client to establish fault on the part of an information provider than on the part of an adviser. Indeed it is easy to know when the information is wrong, while the judgement of the quality of advice is always subjective. Finally the recent case law of the *Cour de cassation* concerning ancillary obligations to inform and especially the burden of proof seems to go in the direction of the recognition of an obligation of result (see *infra*). On the other hand, for the obligation to advise, the general rule is that advice is not bad advice merely because it does not produce the result expected by the recipient. The *Cour de cassation* ruled that the adviser is under an obligation of means and not of result (Cass.com. 14 March 1978, D. 1979, 549 with note *Tendler* – for a commercial information office). The comparison between the advice expressed by the adviser and the result obtained in practice is not the criterion of the liability of the adviser (Cass.civ. III, 30 March 1982, Bull.civ. III, no. 67. A construction engineer who advised a client on the possibility of obtaining a building permit was not liable merely because no permit was granted: CA Paris 18 November 1988, D. 1989. IR 11. A legal consultant, who advises a client in favour of suing, does not give bad advice merely because the client does not win the case). The second consequence of this principle is that the adviser can ask for the remuneration of the work done even if the result is not obtained (Cass.com. 12 April 1988, Bull.civ. IV, no. 125. A consulting engineer in patents can ask for fees even if during his researches he found a similar patent already registered). On the other hand the adviser is liable for breach of the contract if the adviser has committed a fault (Cass.civ. I, 21 December 1964, Bull.civ. I, no. 585 – organisational adviser. CA Paris 22 November 1988, JCP 1989.II.21330 with note *G. Raymond* – recruitment adviser). In some exceptional cases the adviser has to guarantee the advice (obligation of result). This is the case when the adviser is at the same time a building constructor in

the meaning of arts. 1792 and 1792-1 CC and if the advice leads to a defect in the construction. In this situation the adviser-constructor is under an obligation of result, because art 1792, which introduces a strict liability, is applicable (See for example, CA Paris 29 January 1987, D. 1988, somm. 115; RGAT 1987, 233 obs. *J. Bigot* – liability of a construction technical control agency which did not report the inadequacy of a roof).

8. In GERMANY contracts for information can fall under the contract for services (obligation of means) or the contract for work (obligation of result). Normally a contract for information can be considered as a contract for services (see e.g. for accountants: BGHZ 54, 106, 107 f.; BGH 1 July 1971 – VII ZR 295/69, WM 1971, 1206, BGH 6 December 1979 – VII ZR 19/79, VersR 1980, 264, 265; BGH 3 February 1988 – IVa ZR 196/86, WM 1988, 763, 764; Palandt [-*Thomas*], BGB[60], § 631 no. 18; *Gräfe/Lenzen/Rainer*, Steuerberaterhaftung[2]. nos. 123 ff, 127 ff; BGH 6 November 1980 – VII ZR 237/79, WM 1981, 92). Only rarely will a contract for information be a contract for work. This will be the case if an actual piece of work is to be carried out by the service provider – e.g. an attorney writing a legal opinion (BGH NJW 1965, 106), or an accountant drafting a contract on the basis of advice regarding the most advantageous tax-model for an enterprise (CA Cologne OLGZ 80 no. 105). In some German cases regarding liability for incorrect information liability is based on CC §§ 276 and 278, which are the general grounds for contractual liability for loss caused by negligence (BGH 12 February 1979, WM 1979, 548; NJW 1979, 1595 - contractual liability of a bank for wrong information regarding the creditworthiness of a client.). The motivation of this case is however ambiguous because the court asserted that, in application of these provisions, the bank was under an obligation "to supply objectively correct information". That could mean that, as in some FRENCH creditworthiness cases, a fault is present as soon as the information delivered is incorrect. In other words, the practical consequence of this is that the obligation of means has become an obligation of result.

9. The mere fact that the analysis on which advice is based is wrong does not mean that the adviser is liable under DUTCH law. The adviser is in that sense not under an obligation of result. Cf. *Barendrecht and van den Akker,* Informatieplichten van dienstverleners, no. 347.

10. In POLAND, when the contract may be classified as one of the nominate contracts the line is easy to draw: the contract of specific work is classified as an obligation of result, while the mandate contract is an obligation of means. In a case of mixed contracts or innominate contracts classification of a given contract as embodying obligations of means or obligations of results depends on the contents of the contract and qualifications of the service provider.

11. The obligation to inform and to advise is an obligation of means in PORTUGAL. If the information is incorrect, but the standard of care was not breached, the adviser is not liable. (*Sinde Monteiro*, Responsabilidade por conselhos, 387, Código Civil Anotado I, ad art. 485.)

12. In SCOTTISH law the obligation to inform and advise is one of professional skill and care (*Stair*, The Laws of Scotland XV, para. 359 et seq). For example, a solicitor is not liable simply for making an error in providing advice, so long as he or she acted with the skill and care of a reasonably competent member of the profession.

13. Under SPANISH law, in principle, the information provider must act with the care and skill of a reasonable professional in the same situation. Because the service provider is under an obligation of means, it is in principle up to the client to prove that the service provider did not act according to the standard of care required. The Supreme Court

regards the obligation of medical practitioners to inform as an essential requirement of the *lex artis ad hoc* (TS 2 October 1997, RJ 1997/7405; TS 13 April 1999 RJ 1999/2583). In other decisions the *Tribunal Supremo* considered the obligation to be part of the obligation of means assumed by the professional (TS 25 April 1994, RJ 1994/3073 AC 1994/3; TS 11 February 1997, RJ 1997/940). However, when the information regards objective facts a higher standard of care is to be observed since the professional is under the obligation to provide truthful and correct information and to verify such information, the obligation being a real obligation of result (See the opinion of *M. Casals and J. Feliu*, note under TS 7 June 2002, www.asociacionabogadosrcs.org/doctrina/). Regarding the legal advice contract, the courts point out that it is impossible to enumerate all the specific items of information to be given to the client, as the content of the *lex artis ad hoc* differs depending on the specific case; however, as the obligation in this contract is one of means and not of result, the professional must comply with the required standard of diligence and the information given must suffice so that the risk of the legal operation may be transferred to the client (SAP Tenerife 20 January 2006, AC 2006/655).

14. The mere fact that the analysis on which the advice is based is wrong does not mean that the adviser is liable in SWEDEN. The adviser is in that sense not under an obligation of result. Normally, one can distinguish between the result of the commission as a whole, where only significant discrepancy from the expected standard is considered as a lack of conformity, and special measures where the requirements are much higher (See *Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], pp. 217 ff). As an example, a lawyer can be expected not to overlook rules and easily found cases, but will not be liable merely because a case is lost due to the fact that the lawyer was not as skilled as the client had hoped (Cf. NJA 1957 p. 621, where a lawyer had overlooked a case which was referred to in a well known legal book and was found liable for damages). In many cases the result of the commission can vary considerably since the advice given is always subjective, for example a stockbroker's investment advice or an official valuer's estimation of the value of a real estate (*Kleineman*, SvJT 1998, p. 190). In those cases the liability for the result will only arise in extreme cases and the adviser has a wide margin when it comes to the result, (cf. NJA 1987 p. 692 concerning evaluation of the market price of real estate).

III. Determination of the standard of care

15. In AUSTRIA the required standard of care depends on the circumstances of the case, mainly the contractual relationship and the necessary diligence according to the objective standard set out in CC art. 1299 (*Koziol*, Haftpflichtrecht II[2], p. 183; SZ 49/47; ÖRZ 1981/15; JBl 1982, 534, EvBl 1982/3).

16. In ENGLAND the standard is an objective one – that of a reasonable information provider or adviser. (Supply of Goods and Services Act 1982, art. 13, and in common law *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582.)

17. In FRANCE if the obligation of the provider is an obligation of means, the standard of care is that of the "*bon père de famille*" (CC art. 1137). In case of a professional, comparison is made with a reasonably skilled professional exercising reasonable care.

18. In theory, no special rules on this question exist in GERMANY. In determining whether or not the adviser is liable, it needs first to be established that the advice was incorrect. This implies that the client (or the third party who relied on the advice) needs to show that the facts were misrepresented. Then the court has to be convinced that the adviser knew or should have known that the advice was incorrect (Cf. *Müssig*, NJW 1989, 1698). The criterion for liability does not differ according to the service

provided: there is liability if the adviser did not live up to the standard of care that could be expected. However, what that standard is will be determined primarily according to the standards of the relevant profession (Cf. BGH 29 November 1994, VI ZR 189/93, VersR 1995, 659). If it results from the contract that the advice ought to protect the principal from certain risks and these risks materialise as a consequence of the poor quality of the advice, then the adviser is liable for the damage (Cf. BGH 26 June 1997, IX ZR 233/96, VersR 1997, 1489). For a legal adviser, this implies that the advice must conform to the case law of the supreme courts, even if these rulings are fiercely criticised in the professional doctrinal works and it cannot be ruled out this case law will be changed (Cf. BGH 29 March 1983, VI ZR 172/81, NJW 1983, 1665 (solicitor); BGH VersR 1993, 1413 (tax consultant); BGH 27 October 1994, IX ZR 12/94, VersR 1995, 303, NJW 1995, 330 (notary public)). An advice on possible investments needs to be correct, complete, understandable and careful (BGH 6 July 1993, XI ZR 12/93, NJW 1993, 2433, MDR 1993, 861, BB 1993, 1903, ZIP 1993, 1148).

19. The standard of care to be met in ITALY is the one specified in CC art. 1176, para. 2, according to which the professional care and skill has to be evaluated with regard to the kind of activity performed. The intellectual professional avoids incurring liability by performing the service with *exacta diligentia,* that is to say, the diligence required by the art. The care and skill required by this provision are of a high standard because of the particular interests involved, and, more generally, because the client has to rely on the professional's knowledge and skills. It still remains to be determined what is the content of professional diligence. The professional has to be aware of accepted scientific and practical solutions; knowledge of these solutions is indispensable for professionals who want to be active in a particular profession (Cass. 18 June 1975, no. 2439, Giur.it., 1976, I, 1, 953; Cass. 29 March 1976, no. 1132, Giur.it., 1977, I, 1, 1980). This principle is valid for every single professional category. The CC contains an exception to the provision of art. 1176 para. 2, regarding professionals providing intellectual services. When the performance of the service is of particular difficulty, the provider is liable only in the case of fraud or gross negligence according to art. 2236. The *Corte di cassazione* states explicitly that art. 2236 is an exception to the general rule determining the standard of care (Cass. 11 August 1990, no. 8218). The doctrinal interpretation of this provision goes in the direction of the limitation of its scope of application only to the performance of services that require a greater expertise than normally required by the same category of professionals (*Bianca*, Diritto civile V, no. 18; *Cattaneo*, La responsabilità, p. 72; *Perulli*, Contratto d´opera e professioni intellettuali, pp. 611 ff). Therefore, a reduction of the standard of care exists only in rare situations. The discussions during the drafting of the CC showed the interests which need to be reconciled: firstly, not to reduce the initiative of the professional because of a liability too easily engaged; secondly, not to allow the professional not to be diligent just because the performance of the service in question is particularly difficult. The Supreme Court continues to reconcile these two purposes in the assessment of serious fault by deciding that non-compliance with basic knowledge of the profession is a serious fault (Cass. 26 March 1990, no. 2428, concerning medical liability. In the court's opinion there could be particular difficulty only in the case of new clinical cases not yet treated by practice.). Every professional has to ascertain the particular difficulty of a case and if necessary has to inform the client of this situation and advise the client to consult a specialist (See, e.g., Cass. 26 March 1990, loc. cit.).

20. The criterion in the NETHERLANDS is whether or not a reasonably skilled professional acting reasonably, in the given circumstances – including the information that has or should have been collected – could not have given the information or

advice which was in fact given. Cf. HR 26 April 1991, NedJur 1991, 455 (Benjaddi/Neve). Unless the adviser has confessed – preferably in advance – to a substandard level of expertise, the adviser must at least provide advice of good average quality, meaning the quality that can reasonably be expected of a reasonably skilled professional acting reasonably. Cf. *Barendrecht and van den Akker,* Informatieplichten van dienstverleners, no. 349. The above is clear for advice, but there is no good reason to judge differently for contracts to provide plain information.

21. In POLAND the relevant rule is CC art. 355. It requires acting with the diligence generally required in the particular type of relationship. The due diligence of a professional is to be assessed by reference to the professional nature of the activity (CC art. 355 para. 2). The Supreme Court has clarified (Judgment of the Supreme Court of 25. 9. 2002, I CKN 971/100, Lex no. 56902) that the due diligence of the professional does not mean any exceptional diligence, but a diligence adjusted to the acting party, the subject and the circumstances in which the obligations are to be performed.

22. In PORTUGAL an adviser must act with the diligence of a good *paterfamilias* (art. 487/2 CC). A professional is bound by the standard of care of a good professional: cf. CA Lisboa, 27 July 1998, CJ, 1998, 4, 130. There is a duty to follow directions of the client as well as a duty to give account (art. 1161 CC). The adviser must acquire the facts needed to formulate an opinion and make an accurate technical application of them, in conformity with the *leges artis* to be appreciated in the light of the most recent information available at the time the opinion was issued. *Sinde Monteiro*, Responsabilidade por conselhos, p. 388. Standard of care of attorneys: art. 83/1c) d) *Estatuto da Ordem dos Advogados*. Standard of care of doctors: 26 *Código Deontológico*.

23. The standard is an objective one in SCOTLAND (*Hunter v. Hanley 1955 SC 200*).

24. The due diligence to be observed under SPANISH law by the provider of a service is that imposed by the “lex artis” which regulates the service provider’s profession. In giving both information and advice, the provider must act with the care and skill that a reasonable information provider would demonstrate under the given circumstances in accordance with the *lex artis* of the profession. It is a qualified standard of care if compared with the general diligence of the good father (art. 1104, para. 2 CC) as a result of the relationship of confidence arising in services contracts where the client relies on the expertise of the professional and expects the professional to execute the service so as to comply with the client’s interests under the contract. In accordance with art. 1104, para. 1, the due diligence required by the nature of the obligation is also modulated by the circumstances of the parties, and the time and place where the obligations are to be performed. (TS 11 March 1991, RJ 1991/2209; SAP Segovia 13 April 2000, AC 2000/1005, concerning a solicitor).

25. There is no fixed standard of care in SWEDEN and FINLAND; this will depend on the situation and the parties. However, some professions have a special standard of care of their own. In the Swedish Act on Financial Advice to Consumers a standard of care for sound advice practice is introduced, see art. 5 (1). The meaning of this standard will be decided through a general assessment of trade organisations’ agreements, directions, general advice, case law etc. (*Lycke/Runesson/Swahn*, Ansvar vid finansiell rådgivning, p. 106). A corresponding rule is found in the FINNISH Security Markets Act s. 4. In other cases it must firstly be established which norm the professional has breached. Secondly, it must be decided whether the breach was so serious that the deviation should be considered as negligent (*Kleineman*, SvJT 1998, p. 189). A specialist has however normally a higher standard of care than the

generalist, which is shown in NJA 1981 p. 1091, where a lawyer in a case regarding expropriation had only claimed that the compensation should be index-bound to a certain date. However, it would have been possible to make this claim until a later date, which would have been more favourable to the client. The HD found that the lawyer had acted negligently since he was regarded as a specialist in this field, and he was found liable for damages (See *Kersby*, JT 1997-98, p. 157).

IV. Obligation to mention risks and alternatives

26. It has been established by AUSTRIAN case law that the adviser is under a duty to mention alternatives and risks (OGH 23 February 1999, 4 Ob 335/98p, JBl 1999, 531, physician).

27. In BELGIUM a physician has to inform the patient about any risks of the operation which are relevant to the patient's choice (art. 8 of the act of 22 August 2002 on the rights of the patient).

28. In ENGLISH law there is in principle an obligation to mention risks that the ordinary client might reasonably regard as relevant (*Sidaway v. Board of Governors of the Bethlem Royal Hospital* [1985] AC 871; for a physician). There is generally no obligation to mention alternatives. In doctrine, see *Hodgin*, Professional Liability, p. 516 (risks which the ordinary client might reasonably regard as relevant).

29. In FRANCE it is a part of the information provider's obligation to inform the client about risks. For example a notary must inform the client of the uncertainty of the case law (Cass.civ. I, 9 December 1997, Defr. 1998, p. 353, obs. *J.-L. Aubertt*). The notary must inform a buyer of the risk that the tax administration will exercise its pre-emptive right (Cass.civ. I, 8 January 1986, Bull.civ. I, no. 104). A construction engineer must inform the client of the risks involved in the construction process (Cass.civ. III, 4 May 1976, no. 184; D. 1977, 34, annotation *J. Mazeaud*). The doctor who has a secondary obligation to advise must make the patient aware of the risks, even exceptional risks, of the operation (Cass.civ. I, 7 October 1998, JCP 1998.II.10179 with concl. *Sainte Rose* and annotation *P. Sargos*; CCC 1998, no. 160, annotation *Leveneur*; D. 1999, 145; RTD civ 1999, 111 obs. *Jourdain*). (Nowadays art L. 1111-2 Code de la santé publique). When the risks are too important compared to the necessity of the operation the doctor has an obligation to refuse to perform it. This special obligation, which is very different from the obligation of advice or information, has been discovered by the Cour de cassation in application of the Code of medical ethics (Cass.civ. I, 27 May 1998, Bull.civ. I, no. 187; Resp. civ. et assur. 1998, no. 276; D. 1998, 530 note *Laroche-Gisserot*). It is included in the definition of the advice itself that the adviser has to mention the alternatives. The obligation of the provider is to inform the recipient about the advantages of a specific course of action and then to guide the client to take a decision and explain why (confirmed for medical information, art L. 1111-2 *Code de la santé publique*).

30. As a general rule in GERMANY, the information provider is obliged to inform the client both of the risks involved and the alternatives at hand. Failure to inform amounts to a non-performance of either primary or secondary obligations and may lead to liability. However, liability may be reduced if the client culpably neglects to mention information which the client knows or should have known are relevant to the advice (Cf. BGH 11 February 1999, IX ZR 14/98, MDR 1999, 571, VersR 1999, 1417). The content and the extent of the obligation to inform depend on a number of circumstances, some of which relate to the client and others to the object of the advice. According to the BGH the circumstances of the case at hand are decisive (Cf. BGH 6 July 1993, XI ZR 12/93, NJW 1993, 2433, MDR 1993, 861, BB 1993, 1903, ZIP

1993, 1148). In general, circumstances relating to the client which are almost always considered to be relevant are the client's knowledge and experience of the area of the advice and willingness to take risks. With regard to the object of the advice, the relevant circumstances tend to differ according to the object at hand. In the doctor-patient-relationship, the right to self-determination is thought to form the basis of the obligation to inform the patient of the risks involved, of the necessity of the advised procedure and of the existence or non-existence of alternatives. (See for instance *Kullmann*, VersR 1999, 1190.) Information on possible detrimental consequences is not necessary if these consequences occur only in very rare cases and it is unlikely that a reasonable patient would seriously take them into account in deciding whether or not to consent to the treatment (Cf BGH 9 December 1958, VI ZR 203/57, BGHZ 29, 46). However, exceptions to this rule exist, a major one being the obligation to inform about rare risks which, if they materialised, would have very serious consequences for the patient (Cf. BGH 7 July 1992, VI ZR 211/91, VersR 1993, 228). If the procedure is not of absolute medical necessity, but is merely to reassure the patient's mind, the doctor needs to make that clear to the patient. When alternatives to the advised treatment exist, the obligation to inform the patient includes the mentioning of risks which are thought to exist by a respectable school of thought but have not yet led to an established scientific opinion (Cf. BGH 21 November 1995, VI ZR 329/94, NJW 1996, 776). A doctor is not obliged to inform the patient of risks which could only occur in case of errors in the treatment (Cf. BGH 20 October 1961, VI ZR 39/61, VersR 1962, 155; BGH 19 March 1985, VI ZR 227/83, NJW 1985, 2193, VersR 1985, 736). An attorney is obliged to inform the client about the risk involved in the litigation (BGH NJW 1984, 791; BGH 6 February 1992, NJW 1992, 1159). On the other hand, a bank is not obliged, on the sale of stock options, to inform the client of alternatives or risks if the client is familiar with the market (BGH 04 February 1992, quoted by *Canaris*, Bankvertragsrecht[2], no. 1881).

31. In many situations in ITALY the obligation to inform about risks has been acknowledged. The amount of information to be given about risks depends on the mental conditions and the education of the client (Cass. 6 December 1968, no. 3906, Giust.civ.Mass. 1968, 2051, medical information). In the case of aesthetic surgery, the client has to have the maximum awareness of the risks of the intervention (Cass. 8 April 1997, n. 3046, Foro it., 1997, I, c. 1801).

32. A duty to mention alternatives in THE NETHERLANDS will probably not exist in the case of a contract for information, unless the information would not be considered complete or in conformity with the contract otherwise. Such would be the case if the client explicitly asked for information regarding all available alternatives, which would imply a rather sophisticated contract, closely resembling an advice contract. With regard to advice, the following could be mentioned. The adviser needs to make clear that all the options have been examined, but it is, in the end, the client who has to make the choice whether or not to follow the advice. In order to do so, the client will need all the information on risks and alternatives the adviser can give. Therefore, the duty to mention alternatives and risks seems to be a logical consequence of the obligation to advise, since the client is to know why the recommended course of action is in fact recommended. Cf. *Barendrecht and van den Akker*, Informatieplichten van dienstverleners, no. 354. *Michiels van Kessenich-Hoogendam*, Beroepsfouten[3], no. 16, states that the client is entitled to an honest, complete and clear description of the state of affairs. It is not disputed that risks should be mentioned. Cf. *Michiels van Kessenich-Hoogendam*, Beroepsfouten[3], no. 17. In so far as the mentioning of alternatives adds to the clarity of the risks at stake, it is generally accepted there is such a duty as well. Cf. *Barendrecht and van den Akker*, Informatieplichten van

dienstverleners, no. 355. One 'alternative' should always be mentioned: what will happen if the client chooses to do nothing at all. This is clear for a doctor's advice to a patient, since the patient's right to self-determination is at stake, but also applies to other obligations to advise. Cf. *Barendrecht and van den Akker,* Informatieplichten van dienstverleners, nos. 354-356.

33. In POLAND an obligation to mention risks and alternatives can be deduced from the obligation to act with due diligence (CC art. 355) and the general rules on the performance of obligations (CC art. 355).

34. The information provider is bound under PORTUGUESE law to cover broadly the several problems posed by the service, especially regarding disputed questions, while employing the sources available, so that the client will be able to safely take a decision based on the information and the advice provided. Cf. *Sinde Monteiro,* Responsabilidade por conselhos, p. 388. This obligation covers the risks and alternatives regarding the topic. Cf. *Sinde Monteiro,* Responsabilidade por conselhos, p. 393. See also the conduct codes for Attorneys *(Estatuto da Ordem dos Advogados),* art. 83.1.c) and for physicians *(Código deontológico)* art. 38.

35. In SCOTLAND the information provider's duty of care includes an obligation to warn of risks, for example in relation to a proposed medical intervention (e.g. *Moyes v Lothian Health Board* 1990 SLT 444, *McFarlane v Tayside Health Board* 2000 SC (HL) 1).

36. In SPANISH law, the obligation to advise (unlike the obligation to inform) obliges the debtor to mention alternatives. According to *Gomez Calle* (Los deberes precontractuales de informacion, p. 120), for an advice obligation to exist the provider must have undertaken such an obligation expressly or the obligation must be implied because of the relationship of confidence which arises between the parties. In other cases, it is the nature of the client's interests (health, freedom), which imposes the obligation on the provider to disclose all alternatives and make a recommendation. However, the fact that an information provider is a professional does not necessarily imply an obligation to advise the client. For instance, a bank is under an obligation to provide the client with updated information concerning different investment possibilities, but it does not seem appropriate to require the bank to indicate which of the possibilities is the better one. Requiring the bank as a professional to do so would result in imposing on the bank an obligation to carry out a deep research into the needs and patrimonial circumstances of the client (*E. Gomez Calle*, op. cit. loc. Cit). However, the Spanish Lawyers Code of Conduct in its art. 13 provides that the solicitor should give his or her opinion on the legal matter and inform the client about the predictable result. The advice contract is not specifically regulated under Spanish law. However, the writers consider that the appropriate dispositions of the Civil Code on the service contract are applicable, *mutatis mutandis* (*Bercovitz*, Contratos Mercantiles[3], p.696). As the case law considers that in this type of contract the obligations of the provider are of means, not of result (TS 7 February 2000, RJ 2000/283) which, consequently, transfers the risk of the success of the operation to the client, a provider's duty to inform about the risks and alternatives may be inferred from the principle of good faith (CC art. 1258) and the obligation of applying *lex artis ad hoc*.

37. Under SWEDISH and FINNISH law the information provider should normally and at least to a certain extent inform about alternatives and risks. This would however also depend upon whether or not the other party is a consumer. Normally at least the scope of the duty to mention risks is limited through the competence and knowledge of the buyer. In the SWEDISH NJA 1994 p. 598 (concerning a bank acting as a tax adviser),

the Supreme Court stated that the duty to mention risks must always be judged depending on the situation and especially on the knowledge of the buyer. In the FINNISH case KKO 2007:72 a bank taking care of the financial arrangements in a transaction concerning immoveable property was held to have a duty to inform the buyer of a note secured by a mortgage on the property. In KKO 2001:121 an estate agent was held to be under an obligation to inform the buyer of plans for a new railway line near the house.

V. Alternatives the service provider cannot provide

38. The obligation of advisers to mention alternatives that they cannot provide themselves does not concern all categories of advisers. Indeed, some advisers are independent or must be independent, and some are not. This difference has been explicitly made in several cases, especially in ENGLAND. In one case, the Court of Appeal noted that in insurance services there are tied-agents and independent advisers. In the case in question, the agent was a company representative who was required not to recommend other companies' products. The Court ruled that the agent was only under a duty to advise the client against buying the products of the company he represented where such a purchase would not be in the client's interest; his duty did not extend to recommending other companies' products (*Gorham v. British Telecommunications plc.* [2000] 1 WLR 2129.). The position of an independent adviser would certainly have been different, as is shown by the reasoning in the case.

39. In FRANCE it has been held that a professional seller is not obliged to carry out a comparative assessment in favour of competitors (Cass.com., 12 November 1992, D. 1993, somm., p. 237, obs. Tournafond; RTD civ 1993, p. 116, obs. Mestre). But an adviser who claims to be independent must mention alternatives he or she cannot provide personally. This is regarded as a rule concerning conflict of interest.

40. In the case of medical treatment in GERMANY there is no duty to mention alternatives of better personnel or better means as long as the treatment offered comes up to the necessary medical standard (BGH 22 September 1987, IV ZR 238/86).

41. In ITALY this issue is closely related to the issue of the influence of personal interests of the service provider in the case at hand (see infra). In general, the information provider is not required to inform about alternatives which could be supplied by third parties. However, such alternatives must be mentioned if the provider claims to be an independent adviser. For instance a purportedly independent broker cannot hide behind such a facade the activity of promoting contracts with some specific insurance companies.

42. In his book on the position of the solicitor under DUTCH law, *Sanders*, De advocaat met raad en daad, p. 29) clearly states that the solicitor's interest in carrying out the recommended course of action should in any case not play any role in the advice. More generally, *Michiels van Kessenich-Hoogendam*, Beroepsfouten[3], no. 18, states the adviser is not allowed to be led by his or her own interests. It is debated whether or not the adviser has the duty to advise a client to turn to a more specialised colleague. For a doctor, this is generally accepted, cf. *Michiels van Kessenich-Hoogendam*, Beroepsfouten[3], no. 23; *Barendrecht and van den Akker,* Informatieplichten van dienstverleners, no. 392. However, for providers of other kinds of advice, it is doubted whether it would be wise to impose such a duty. An argument in favour of such a duty would be the faith entrusted in the adviser by the client, who might not know the adviser is not the best qualified person to execute the advice. On the other hand, a provider of a service usually does not have the obligation to point out that a competitor can perform the service better. Imposing an obligation to include this in the advice

might therefore be considered odd. See for hesitations both *Michiels van Kessenich-Hoogendam,* Beroepsfouten[3], no. 23 and *Barendrecht and van den Akker,* Informatieplichten van dienstverleners, nos. 392-393. These authors (at no. 394) recommend an in-between position, namely that such a duty ought to be imposed if within the group of professionals executing the service, the service usually is performed by specialised professionals. This is to be assumed, they argue, if within the service, specialisms exist.

43. In POLAND an obligation to mention alternatives the service provider cannot provide can be deduced from the obligation to act with the due diligence (CC art. 355) and the general rules on the performance of obligations (CC art. 355). Moreover, in the case of the contract of specific work, if there any circumstances which may prevent it being properly carried out, the person receiving the order is obliged to immediately notify the service provider about that fact (CC art. 634).

44. Duties of referral exist under PORTUGUESE law for professionals if their skills fall below the expected standard of care. Codes of conduct will usually be the source of such obligations: e.g. doctors have a duty of referral if specialised skills are demanded (arts. 29 and 112 *Código deontológico*).

45. Doctors must inform the patient, according to the SPANISH TS of 25 April 1994, RJ 1994/3073 if the material, instruments or tools which are to be used to provide the service may turn out to be insufficient. The information must be given in such a way as to allow the patient or the family to have recourse to other medical providers (also in TS 7 May 1997, RJ 1997/3874). The obligation to refer to other professionals involves a conflict of interests: the interests of the client (who expects to be provided with the best alternative) against the interests of the professional (who does not want to give clients to competitors in the market). When the interests of the client deserve higher protection (health, freedom) the information provider is obliged to recommend another professional (SAP Segovia 13 April 2000, AC 2000/1005 - where the Court of appeal expressly argues that the sickness of the lawyer is not a defence since the professional should have referred the client to another lawyer).

46. In SWEDEN the adviser is probably not bound to inform about services provided by others. Where banks are acting as financial advisers, it is common practice only to promote alternatives provided by the bank in question. The financial adviser here seems to have as a primary task to sell the products provided by the bank, (*Pålsson and Samuelsson*, SvJT 1999, p. 554). However, according to the Act on Financial Advice for Consumers, art. 5 (1), the adviser is obliged to take due care of the interests of the client, which includes informing the consumer whether the adviser can only recommend the products of one provider or can give a broader picture of the products supplied by the market as a whole and sometimes even pointing out to the consumer that the consumer may need more advice from another source, SOU 2002:41, p. 122.

IV.C.–7:105: Conformity

(1) The provider must provide information which is of the quantity, quality and description required by the contract.

(2) The factual information provided by the information provider to the client must be a correct description of the actual situation described.

COMMENTS

A. General idea

Paragraph (1) states the obvious – namely that the information provider is obliged to provide information of "the quantity, quality and description required by the contract". What the contract requires will depend on its terms and may involve a question of interpretation. There is normally little difficulty in relation to the quantity and description of the information required. So far as the quality of the information is concerned, in the case of evaluative information or advice there will normally be no obligation to achieve a specific result envisaged by the client, such as perhaps a completely accurate valuation or prediction. This will follow from the application of IV.C.–2:106 (Obligation to achieve result) because of the inherent risks involved in evaluations and predictions. The contract, properly interpreted, may impose no obligation at all relating to the quality of the information to be provided, in which case the obligation of skill and care will be the only relevant obligation in this respect. The obligation will simply be one of means, not result. Alternatively, the normal default rule on quality may apply, in which case the quality required is that "which the recipient could reasonably expect in the circumstances". (II.–9:108 (Quality)). This will normally be something within the range of what would be provided by a competent information provider exercising the normally required degree of skill and care.

As a consequence, in the case of bad performance of an obligation to provide evaluative information or advice the liability of the information provider will often be determined by reference to the default rules on the obligation of skill and care. In the case of absence of performance or incomplete performance, the present Article applies.

> *Illustration 1*
> A publisher contracts with a lawyer to give pre-publication advice as to whether two manuscripts might infringe rights to privacy. The lawyer is under an obligation to supply the service requested, viz. to determine whether the books contain items that may lead to claims for breach of privacy. This is an obligation of result. The lawyer is liable if he does not perform the contractual obligations or if he performs them only partially, e.g. by providing advice regarding only one of the manuscripts, or if he provides advice of the wrong description, e.g. advice on defamation instead of advice on breach of privacy rights. On the other hand, after the service has been provided the way in which it was provided is assessed by reference to the due standard of skill and care.

Paragraph (2) introduces a particular provision with regard to factual information as opposed to evaluative information or advice. In the case of factual information, the information provider is to guarantee, on principle, the correctness of the information provided. There is an obligation to achieve this result when the information is merely factual.

Illustration 2
A lawyer is contracted to provide information about the latest case law of the Supreme Court on a particular issue. If the information is wrong, e.g. if a recent reversal of the line of the case law is not mentioned, the provider is in breach of contract, whether the incorrectness of the information is the consequence of the negligence of the information provider in collecting or supplying that factual information or not.

B. Interests at stake and policy considerations

The main issue here is whether the provider who supplies factual information is to be obliged to guarantee its correctness or will be liable only if it is proved that there was a failure to come up to the required standard of skill and care. In Comment B to the preceding Article, it was explained that it was difficult to accept that the information provider who supplies evaluative information should be liable merely because the information is incorrect. One reason is that evaluative information may amount to a prediction, which in itself means uncertainty. Moreover, evaluative information, when it is not a prediction, is in itself an opinion, whose correctness is not verifiable. It is also arguable that the correctness check cannot be applied to an opinion. These arguments do not apply when the information provider is to supply information of a purely factual nature, i.e. when the service concerns facts which can be collected and verified with certainty. If the information is factual, it is generally easy for it to be checked and its provision does not involve any uncertainty. In such a case, the client will expect to receive correct information, not wrong and misleading information.

European legal systems do not expressly follow the distinction that is made in this Chapter between factual and evaluative information. However, in many jurisdictions it appears that a breach of the obligation of skill and care is more easily found when objective information is provided. Moreover, in situations concerning the mere provision of factual information, an important trend in legal literature is of the opinion that the information provider should guarantee its accuracy.

C. Preferred option

The preferred option is that in the case of factual information the information provider is to guarantee the correctness of the information. The reason is that there is no uncertainty involved in the performance of such an obligation, and the information is easy to check. The contracting parties can expect achievement of an accurate result. Indeed, when factual information is obtained contractually, the customer will generally rely on its exactness. As a consequence, the information provider is liable when the client proves that the factual information provided is incorrect. The information provider can be relieved of liability only by proving that the incorrectness of the information is due to an excusing impediment within the meaning of III.–3:104 (Excuse due to an impediment). The information provider, on the other hand, is not excused by proving that the service was performed with reasonable care and skill.

Paragraph (2) is a particularisation of IV.C.–2:106 (Obligation to achieve result) because a reasonable client requesting objective information would have no reason to believe that there is a substantial risk that the information provided would be incorrect.

D. Distinction between evaluative and factual information

The question may arise whether the information to be provided is factual or evaluative.

Illustration 3
Information exchanged between banks on the creditworthiness of clients is a delicate issue. When creditworthiness only concerns the financial situation of the debtor at the time of the provision of the information, the information provider guarantees the correctness of that information: it is considered to be factual. However, when future creditworthiness is concerned, the information is considered to be evaluative, i.e. it concerns the processing of actual information to predict the future situation of the debtor and its capacity to reimburse his debts. In such a case, the information provider is merely under the obligation to act with reasonable care and skill.

Even if the information provided is factual, that information may not always give a precise answer to the client's problem. An example is a lawyer's knowledge of positive law. If there are uncertainties about the interpretation of a court case or of a statute, the information provider must inform the client of that. Difficulties in interpretation are in themselves facts that must be disclosed.

Illustration 4
A tax adviser is requested to explain the criteria for exemption from plus-value taxes on the resale of houses by non-residents. It appears that the tax authorities and the courts do not treat the improvements made to houses in the same way. The tax adviser in answering must make this difference in opinion clear to the client.

However, even if purely factual information was to be provided it is sometimes impossible for the provider to guarantee its correctness. Even if the information requested by the client exists, it cannot always be collected in its entirety or be verified. If this is the case, the provider is to notify the client that the exactness of the information cannot be guaranteed. The provider is to notify the client on becoming aware of this circumstance. Sometimes the provider is in the position to inform the client before the performance of the service begins. In other situations, the uncertainty about the reliability of the information collected is known only after verification, and therefore after the performance of the service has started. Such is the case concerning information about the creditworthiness of a merchant. The provider is relieved of this obligation to notify only when it is self-evident that the exactness of the information cannot be guaranteed. Here IV.C.–2:102 (Pre-contractual duties to warn) and IV.C.–2:108 (Contractual obligation of the service provider to warn) apply.

Illustration 5
A detective agency is engaged by a woman to assess the fidelity of her husband. After several weeks of surveillance and investigation, the detective agency does not find any evidence of infidelity. Even if this is the provision of factual information, it is evident that the agency is not liable merely because it did not discover the truth. The betrayed woman must prove that the agency acted negligently.

The Article contains default rules. The parties are free to decide precisely on the nature and the content of their obligations. The existence of default rules is, however, of relevance in information contracts, because in practice such contracts are often concluded orally and the parties do not precisely describe the obligations of the information provider.

NOTES

1. See the Notes to the preceding Article.

IV.C.–7:106: Records

In so far as this may reasonably be considered necessary, having regard to the interest of the client, the provider must keep records regarding the information provided in accordance with this Chapter and make such records or excerpts from them available to the client on reasonable request.

COMMENTS

A. General idea

The purpose of the rule is two-fold. The first purpose is to give the client the opportunity to check what the information provider has done under the contract and, more precisely, the steps taken in performing the contractual obligations. In order to evaluate the way the service has been performed, the client may need to know the way in which the information provider organised the performance.

Illustration 1
The managing director of a company engages an auditors' firm to make a valuation of a target company for the purpose of its acquisition. Since there are several methods in corporate finance for determining the value of a company, the client is entitled to request the auditors to disclose the method applied to determine the value of the company and the elements taken into account.

The second purpose of this Article derives from the consideration that, when dealing with liability for non-performance of an obligation to inform and to advise, the burden of proof is of great importance. This Article is an attempt to solve the issue of burden of proof. With regard to the non-performance, the allocation of the burden of proof is not stated explicitly in the Article, but can be derived from it. Since the information provider is under an obligation to account for what has been done, there will in effect be an obligation to prove that the contractual obligations were performed and the way in which they were performed. Such an obligation may also become relevant in the case of litigation. At this stage, the information provider is bound to supply evidence of the way the contractual obligations were performed. On the other hand, this provision does not impose on the information provider an obligation to prove that there was no failure to perform any obligation arising from the contract; the obligation is merely to provide the elements necessary to assess this.

Illustration 2
The managing director of a company engages an auditors' firm to make a valuation of a target company for the purpose of its acquisition. On the basis of this valuation, the target company is purchased. Shortly after the acquisition, the value of the company turns out to be much lower than the price paid and the value assessed by the auditors. In the litigation between the client and the auditor, the latter is to inform the court about the elements of the valuation and the method applied.

B. Interests at stake and policy considerations

The issue whether or not to shift the burden of proof is a controversial one. Placing that burden on the client without further consideration will result in a situation in which clients will want to file claims they cannot substantiate. It will indeed be very difficult for a client to

prove that the information requested was not received. Very often the information is delivered orally and no written evidence exists. Even if the information was supposed to be supplied in writing, it may still be problematic for the client to prove that the contract was not performed. On the other hand, even if the client received the information or the advice in writing, it may be difficult to prove a failure of the provider to perform the contractual obligations if the client does not have information on how the information provider carried out the task.

On the basis of these arguments, one may argue that the burden of proof should be imposed upon the information provider. However, this would not justify a complete reversal of the burden of proof. The negative proof *(probatio diabolica)* argument supports a shift of the burden of proof with regard to effective performance of the contractual obligations and with regard to the way they have been carried out. This argumentation does not justify a reversal of the burden of proof on whether there has been a failure of performance. In fact, as soon as the client has information on all the elements needed to evaluate the performance of the service, the burden of proving that the information provider did not perform the obligation of skill and care may appropriately be placed on the client. Moreover, placing the burden of proof entirely on the information provider may place the provider in a very unfavourable situation and, as a consequence, may lead to a refusal to perform the service requested. This is the case especially if the burden of proof is completely shifted and the provider is under the obligation to prove that the performance was in conformity with the required standard of skill and care.

Finally, there is also an argument of legislative policy that might favour a shift of the burden of proof. This is related to the preventive role this may have when the provider has to prove performance of the obligation. Facilitating the assessment of the liability of the information provider is a tool to force the information provider to effectively supply the information the client needs to decide whether the contractual obligation has been duly performed. Legal systems have been very sensitive to this argument especially with regard to medical information and advice and the issue of informed consent.

C. Preferred option

For the reasons given above, the Article imposes on the information provider an obligation to keep records regarding the information provided to the client and make them available to the client on reasonable request. In effect, therefore, the provider is under an obligation to give account for the performance of the service. In particular, it is up to the provider to prove that the information was supplied and to make clear how the information was collected and processed. The proof of incorrect performance of the service remains on the client.

The Article can be applied differently depending on whether the provision of information is the main object of the contract or merely an ancillary obligation. The obligation to keep records and make them available does not generally involve extra efforts when the provision of information is the main obligation. If this is the case, the provider will often give account simultaneously with providing the service.

Illustration 3

A client receives legal advice from a lawyer. It is a written document of 50 pages. It turns out that the course of action recommended is not the best one for the client and leads to a substantial loss of money. To recover damages, the client will have to prove that the advice was not based on a skilful analysis of the information gathered.

In this case, the client has all the elements needed to try to prove that the provider did not perform the obligation of skill and of care.

On the other hand, with regard to ancillary obligations, the performance of the obligation will more often require a particular action on the side of the information provider. In such a case, the client usually receives only the outcome of a complex effort on the part of the provider, i.e. information or a recommendation, without details about the reasons and the elements considered in the process up to the conclusion. Moreover, ancillary obligations to inform are usually fulfilled orally.

Illustration 4
A patient claims he did not receive adequate information from his physician and that, as a consequence, his consent to the treatment cannot be classified as informed consent. Since it is impossible for him to indicate what information he did receive as it was delivered orally and since he cannot explain why he was advised to undergo that treatment, the physician has to produce the relevant records concerning the giving of the information.

This Article seems to be in conformity with the actual practice of many providers of information services. The Article will probably have the practical consequence of inducing information providers to pre-establish a written document. This written document will prevent disputes and litigation on proof issues.

Illustration 5
A civil-law notary, after having provided advice for the drafting of a contract that the client does not wish to follow, requires from the client a letter of confirmation stating that the client received the information and the advice and decided to choose a different course of action. By this means the notary has proof of the fulfilment of the obligation to inform and advise.

The Article contains a default rule. Contracting parties may agree to relieve the information provider of the obligation to keep records and make them available. This stipulation may be of use in case of confidentiality, such as when the information provided includes particular know-how. In such a case the client may prefer there to be no records in the hands of anyone else.

NOTES

I. Overview

1. The general rule is that it is up to the client who seeks a remedy to prove that the provider of a service did not perform the obligations under the contract with reasonable care and skill. With regard to information duties this solution is disputed. While some legal systems (such as the ENGLISH) tend to follow the traditional solution, others, using different techniques and different grounds, reverse the burden of proof at least in some cases (FRANCE, GERMANY, ITALY, THE NETHERLANDS, SPAIN). In some European directives regarding consumer

protection there is a particular provision reversing the normal burden of proof in relation to duties of information. A comparative panorama can be found in *Pinna*, The Obligations to Inform and to Advise, nos. 152-167.

II. Burden of proof on breach of duty

2. Under AUSTRIAN law the issue is dealt with by interpreting the provisions of the CC concerning the issue of the burden of proof in the performance of contractual and legal obligations (On this issue, see, especially, *Welser*, Schadenersatz statt Gewährleistung, pp. 52-74). The interpretation of these Articles originated a very important doctrinal debate, the outcome of which for our topic is that the burden of proof in the case of breach of duty remains with the creditor of the obligation to inform and to advise. The most general of all rules is that a person making a claim has to substantiate all the prerequisites of the claim and, especially, has to prove fault if that is alleged (art. 1296 CC). In the field of claims arising from the breach of a contractual or legal obligation, art. 1298 CC introduces an important exception to that rule. According to this Article, "a person who asserts that he has been prevented from the performance of a contractual or legal obligation without any fault on his part must bear the burden of proof thereof […]". In other words, this provision contains a reversal of the burden of proof. Only the question of fault is affected; the claimant still has to substantiate the damage itself, especially the degree or amount, and the cause of it. The issue was raised whether this provision, reversing the burden of proof on breach of duty, had to be applied only to obligations of result or also to obligations of means. Since the duty of the information provider and the adviser are mainly qualified as obligations of means in Austrian law, the answer to this question is crucial to the allocation of the burden of proof in informational duties. Doctrine was not unanimous on the answer to be given (Restricting the application of art. 1298 to obligations of result, see Rummel [-*Reischauer*] ABGB II^2, art. 1298, nos. 2, 3. In favour of the large application of this Article, including obligations of means, see *Koziol*, Haftpflichtrecht I^2, p. 334). Case law did not take a clear position on this issue, and in 1990 the *Oberster Gerichtshof* ruled that art. 1298 does not apply in cases of obligations of means (OGH 15 February 1990, 8 Ob 700/89). Two years later, concerning the liability of a notary public, the same Court ruled the exact opposite (OGH 10 December 1992 8 Ob 664/92). This new line of the case law has been confirmed with regard to informational duties in a case regarding the pre-contractual duty of a lawyer to inform the client (OGH 18 December 1996, 6 Ob 2174/96. Cf. for the liability of a bank, OGH 8 November 2000, 9 Ob 219/00).

3. In ENGLAND, in line with general law, the client retains the burden (*Whitehouse v. Jordan* [1981] 1 WLR 246).

4. Since 1997, FRENCH law explicitly states that it is up to the provider of the service to prove that there was no breach of any duty and, positively, that the information and advice required was supplied to the other party. This solution has been applied to professionals under ancillary obligations to inform and advise; this has been the case so far for doctors (The leading case of the new line of the case law is, Cass.civ. I, 25 February 1997, Bull.civ. I, no. 75; Defr. 1997, p. 751; CCC 1997 no. 76, with obs. *L. Leveneur*, RTD civ 1997, p. 924 obs. *J. Mestre*. Now codified, art L. 1111-2 Code santé publique), lawyers (Cass.civ. I, 29 April 1997, Bull.civ. I, no. 132; JCP 1997.II.22948 with note *R. Martin*; CCC 1997, no. 111, with obs. *L. Leveneur*), notaries (Cass.civ. I, 3 February 1998, Bull.civ. I, no. 44; JCP N, 1998, 701 with note *Pillebout*; Defr. 1988, 743 with note *Aubert*; RTD civ 1998, 381 with obs. *Jourdain*), insurers (Cass.civ. I, 9 December 1997, Bull.civ. I, no. 356.), bailiffs (Cass.civ. I, 15 December 1998, Bull.civ. I, no. 364; GazPal 1999, 1, 208 with note *Loyer*), and even

professional sellers (Cass.civ. I, 15 May 2002, Bull.civ. I, no. 132). The burden of proof has been reversed and is not allocated according to the general principle *actori incumbit probatio*. According to the *Cour de cassation*, the party who is legally or contractually under a particular obligation to inform has to substantiate the performance of this obligation. In France, a purely legal argument was put forward in favour of this solution. This argument can be found in the interpretation of art. 1315 of the French Civil Code. *M. Fabre-Magnan* asserted that the ancillary obligation to inform is an obligation of result (*Fabre-Magnan*, De l´obligation d´information dans les contrats, nos. 541 ff).

5. In GERMANY in principle it is the client on whom the burden of proof rests as to whether or not the information was given and whether or not the information was correct. Proof that information has *not* been given is almost impossible to provide. The courts therefore insist that the adviser has to substantiate the claim that the necessary information was given. The client needs only to prove the incorrectness of that substantiation (Cf. BGH 21 January 1986, IVa ZR 105/84, NJW 1986, 2570 (tax consultant); BGH 5 February 1987, IX ZR 65/86, NJW 1987, 1322 (solicitor); *Haug*, Die Amtshaftung des Notars, nos. 827-828, p. 259 (notary public)). As regards medical cases, the *doctor* has to prove the receipt of informed consent (Cf. BGH 26 June 1990, VI ZR 289/89, VersR 1990, 1238), allowing only limited space to prove the consent would have been given if the information had been given (BGH 16 April 1994, VI ZR 260/93, NJW 1994, 2414). In other cases, the client might even rely on the rule of *res ipsa loquitur*, reversing the burden of proof altogether (Cf. BGH 19 December 1996, IX ZR 327/95, NJW 1997, 1235, VersR 1997, 588 (tax consultant)). It must be noted, however, that these alleviating procedural rules especially apply to secondary obligations such as the obligation to inform completely and on time.

6. According to ITALIAN case law, the burden of proof concerning the non-performance of ancillary obligations to inform and to advise rests with the client who claims compensation from the professional (CA Milano 30 April 1991, Foro it. 1991, I, 2855). Several authors, however, strongly criticised this solution especially concerning medical treatment. The argument is that it is up to the physician to prove that the patient accepted the contract and the treatment. Since it is considered that the information has an influence on the essential prerequisites for the consent of the patient, the physician, in proving the existence of this consent, has to prove that he or she supplied the information that was required (*Nannini*, Il consenso al trattamento medico, p. 468; *Perulli*, Contratto d´opera e professioni intellettuali, p. 486).

7. In principle, the burden of proof lies on the client in THE NETHERLANDS. In cases where the client is to prove a negative fact – the non-receipt of certain information, the courts may decide that the provider of the service is under a duty to substantiate the claim that the information was given. The client can than invalidate the presumption of conformity by proving the substantiation is in fact incorrect (Cf. *Giesen*, Bewijslastverdeling, pp. 21-24. Giesen then argues this may lead to the making of notes by the provider of the service, and criticises the conclusions that may be deduced from the absence or presence of such notes).

8. According to a general rule in POLISH law, the burden of proof relating to a fact rests on the person who attributes legal effects to that fact (CC art. 6). The client must prove that the damage was caused by the service provider (the factual circumstances due to which the damage occurred) and the amount of the damage (Bieniek [-*Rudnicki*] I, p. 30). The client does not have to prove fault of the service provider, as according to CC art. 471 it is the service provider who must prove that the non-performance or improper performance is due to circumstances for which the provider is not liable.

9. In PORTUGAL, in an obligation of means, the burden of proof lies with the client (art. 487 CC), though *prima facie* evidence *(res ipsa loquitur)* may shift the burden of proof to the adviser in some circumstances.

10. The burden of proof of negligence will fall on the client in SCOTTISH law, although if the client establishes a prima facie case of negligence the burden may be transferred to the adviser, and the law has also recognised a doctrine of *res ipsa loquitur* where the accident is of such a type as does not ordinarily happen if proper care and skill are shown (*Gloag and Henderson*, The Law of Scotland, para. 27.13).

11. With regard to the obligation to inform and to advise under SPANISH law, even if this is analysed as an obligation of means, courts have accepted a reversal of the burden of proof. It is very difficult for the client, who does not have access to the information held by the provider of the service, to prove the negative, that is to say, that the information was not received. (For medical information, see *de Ángel Yágüez*, Responsabilidad civil por actos medicos, pp. 69 ff. In general, see *Yzquierdo Tolsada*, La responsabilidad civil del profesional liberal, pp. 400 ff). Courts have settled that it is for the service provider to prove that the information has been given (SAP Zaragoza 11 December 1998, AC 1998/2449). According to the Court of Appeal of Las Palmas, the client would be required to do the impossible if compelled to demonstrate the inadequacy of the service provided because the client has access neither to the archives of the service provider nor to any other technical means to reach that information (SAP Las Palmas, 1 September 1998, AC 1998/1774). This is especially the case regarding medical services. The medical treatment provider must prove compliance with the obligation to inform (See TS 28 December 1998, RJ 1998/10164; TS 13 April 1999, RJ 1999/2583; TS 19 April 1999, RJ 1999/2588.). The treatment provider possesses the information, and can therefore prove that the information was given more easily than the patient can prove the reverse. According to the *Tribunale Supremo,* if the treatment recommended could engender the realisation of important risks, the patient should have been informed of such risks and should have given consent to the treatment in an explicit and clear manner (which was not proven by the physician) in order to exempt the physician from liability. The medical treatment provider is thus liable in the absence of proof that the information required was given to the patient (TS 31 July 1996, RJ 1996/6084). Despite rare cases in which the Courts decided the opposite (See, e.g., TS 12 July 1994, RJ 1994/6730), Spanish law accepts the reversal of the burden of proof on the performance of the obligation to inform. The solution found by courts is now generally implemented by the law itself. The recent Spanish law on civil procedure obliges courts to have regard to the difficulty of proving something when they assess the burden of proof (art. 217.7, Ley de Enjuiciamiento Civil 1/2000).

12. The burden of proof is not regulated in SWEDEN and FINLAND, but it is reasonable to assume that it will generally rest on the client. However, this is up to the court to decide depending upon the circumstances of the case and the burden of proof will often rest upon the party who most easily can bring the evidence (See *Ramberg*, Köplagen, pp. 115 ff). Through case-law it has therefore been established that it is mostly up to the adviser to ensure that the client really has understood the meaning of the advice given, and also to prove that this was actually the case (See *Ramberg*, Köplagen, pp. 115 ff). In the SWEDISH Act on Financial Advice to Consumers, the obligation to document the commission rests upon the adviser. In case the adviser ignores this obligation, the consumer's version of the circumstances at hand when the advice was given will be the starting point while judging possible negligence on behalf of the adviser, unless the latter in another way can demonstrate that the assertions of the client are incorrect. Since the adviser has an obligation to fulfil the commission

carefully, it normally makes no difference whether there is faulty advice or none at all, if this results in a failure to perform the obligation. However in some cases the adviser will not be held liable for refraining from giving advice, namely when it comes to highly complicated and subjective advice. This is illustrated through NJA 1992 p. 502 where a client sued his accountant for not having advised him to perform a complicated tax transaction which would have saved him a great deal of money. However the HD stated that there is no existing duty to advise about "problem-solving of a complicated construction or which is difficult to calculate concerning the outcome in relation to tax law."

13. The recent tendency of shifting the burden of proof in the matter of performance of the obligations to inform and to advise can also be noticed in the law of the European Union. The Directive of 23 September 2002 concerning the distance marketing of consumer financial services gives Member States the possibility, in implementing the directive into domestic law, of placing the burden of proof in the matter of performance of the obligation to inform on the provider of the financial service, i.e. the debtor of such an obligation (art. 15(1) of the Directive 2002/65/EC, OJ L271, 9 October 2002, pp. 16-24). An identical provision can be found in art. 11(3)a of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect to distance contracts, OJ L144, 4 June 1997 pp. 19-27.

IV.C.–7:107: Conflict of interest

(1) When the provider expressly or impliedly undertakes to provide the client with a recommendation to enable the client to make a subsequent decision, the provider must disclose any possible conflict of interest which might influence the performance of the provider's obligations.

(2) So long as the contractual obligations have not been completely performed, the provider may not enter into a relationship with another party which may give rise to a possible conflict with the interests of the client, without full disclosure to the client and the client's explicit or implicit consent.

COMMENTS

A. General idea

This Article provides that the adviser – i.e. the information provider who undertakes to provide the client with a recommendation – is under an obligation of loyalty. In advising the client, the adviser is to act in the best interest of the client and in the case of a conflict between the provider's own interest and that of the client, the latter must prevail. This provision does not apply to information providers who limit themselves to providing their clients with factual or evaluative information without recommending a particular course of action. Taking into account the obligation of loyalty, paragraph (1) imposes on the adviser an obligation to disclose any conflict of interest that might influence the performance of the provider's obligations under the contract. If the adviser fails to disclose a situation of conflict of interest, this amounts to non-performance of an obligation, thus allowing the client to resort to a remedy such as damages or, if the non-performance is fundamental, termination of the contractual relationship.

Illustration 1
Insurance advisers frequently advise clients in favour of products that they provide themselves or that generate a particular advantage for them, such as extra fees. For example, the insurance broker who has privileged relations with only a few insurance companies will be very much inclined to advise in favour of products offered by these insurance companies and not by those of other companies, even if their products are more suitable to the needs of the client. Such a situation will have to be disclosed to the client.

Illustration 2
A bank advises one of its clients to invest in the shares of a company on the ground that the company is financially sound and that it would make a good investment, without disclosing that the company in question is in debt to the bank. The bank has its own interest in advising such an investment, which will financially benefit it. In this case, there is a conflict of interest that has to be disclosed (see *Woods v. Martins Bank Ltd.* [1958] 3 All ER 166; [1959] 1 QB 55).

Paragraph (2) prevents the adviser from entering into a relation with another party that has an interest conflicting with that of the actual client. The adviser may only do so after full disclosure of the potential conflict of interest to the actual client and the client's consent. The giving of consent may be explicit or implicit.

B. Interests at stake and policy considerations

The question whether the information provider is bound to act in the best interest of the client and to disclose a potential conflict of interest is very controversial. There are two questions. First, is such an obligation needed and, secondly, should all or only some information providers be bound by such an obligation?

The consequence of the imbalance of competence and knowledge between the parties to an information contract is that the position of the client is usually very weak. It is, therefore, necessary to prevent the information provider from not performing the contract in conformity with the interest of the client. The personal interest of the information provider should not determine the content of the service provided. The interest of the client is to have the possibility of appreciating the service received in the light of full knowledge of the situation. Information provided by an independent provider will involve less insecurity and risk for the client than information provided by a provider in a situation of conflict of interest. In other words, imposing the obligation to disclose a potential conflict of interest allows the client to decide whether or not to run the risk to take a decision on the basis of information given by a provider in a situation of conflicting interests.

However, the risk that the client runs seems to be less important when the information provided is factual. The more the information tends to be evaluative or even leads to a recommendation, the more the risks the client runs matter. Indeed, evaluation of the quality of the information is easier in the case of factual information. However, when it concerns expressing an opinion or giving a recommendation on a particular course of action, the client is dependent on the information provider.

C. Preferred option

According to paragraph (1), the adviser is under an obligation to disclose such a situation to the client. The motivation behind this provision is that the adviser is under a general duty to act in the best interest of the client. When personal interests of the adviser are involved, there is a risk that these affect the interests of the client. Disclosure will allow the client to evaluate the risks of letting a provider in the situation of conflict of interest perform the service. If such interests are not disclosed, the client may resort to the remedies available for non-performance of an obligation. Such is the case even if it has not been proved that the adviser did not act in conformity with the required standard of skill and care or gave incorrect advice; it is sufficient to prove that, at the time of the performance, the adviser was in a situation of conflict of interest and that the damage suffered is caused by the service provided.

Such a provision is considered essential with regard to contracts concerning the provision of advice. Such contractual relations are generally based on confidence and can often be regarded as fiduciary relationships. For this reason, the line is drawn between, on the one hand, the provision of advice – where a conflict of interest must be disclosed – and, on the other hand, the provision of factual and evaluative information – where the provider is not bound to disclose a situation of conflict of interest.

NOTES

I. Overview

1. The disclosure of conflict of interest situation can be derived from the duty of good faith and fair dealing. However very little case law is available on the issue with regard to contracts for the provision of an advice or more generally evaluative information. For particular professions, statutory and deontological rules introduce such a duty: lawyers, physicians and sometimes financial service providers (*Fisch*, Professional services). However, a common solution for this type of contracts does not exist.

II. Conflict of interest in advice and information contracts

2. Under ENGLISH law there is a duty to disclose conflicts of interest. In *Woods v. Martins Bank Ltd*. [1959] 1 QB 55 a bank advised one of its clients to invest in the shares of a company on the grounds that the company was financially sound and that it would make a good investment, without disclosing that the company in question had a debt to the bank. The bank had an interest in recommending such an investment. There was a conflict of interest, and the bank should have disclosed this situation. More generally, in common law countries, the issue is solved by determining whether the advice contract involves fiduciary duties. In some cases, the answer is negative because the client should have known that the adviser was not independent, thus avoiding a duty to disclose conflicts of interest. (*Goldsworthy v. Brickell* [1987] Ch. 378, at 405).

3. In FRANCE there is not an explicit general provision regarding conflict of interest of the adviser. Doctrinal works regarding advice contracts do not deal with this issue. The provisions concerning the lawyer-client relations state that a conflict of interest is forbidden unless there is a full disclosure (art. 55 law 31 December 1971; art. 155 paragraph 3 Decree 27 November 1991). However no clear definition is given of what a conflict of interest is. Case law is very rare, because disputes are resolved by the *batônnier* of the local bar institution. The *Cour de cassation* has ruled that there is a conflict of interest when the lawyer is not independent (Cass.civ. I, 18 March 1997, Bull.civ. I, no. 95). The same can be said for the financial adviser, art L. 533-4 6° Code monétaire et financier: these service providers must avoid conflicts of interest, be loyal to their client and act in their best interests. (*Adde,* CA Paris 27 September 1996, Banque et Droit 1997, no. 51, p. 38, obs. H. De Vauplane). French law does not know a general principle of prohibition of conflict of interest, even in advice services. However, an author considers that such principle does exist whenever the contractual relation is based on confidence. (*Ripert*, La règle morale[4], no. 48).

4. In ITALY, because of the asymmetry of knowledge between the parties, the party requiring the intellectual service is protected. Therefore, the professional provider of intellectual services is asked to disclose any conflict of interest. The code of conduct of lawyers, in art. 10, deals with this issue. Art. 4 of the medical deontological code states clearly that the exercise of a medical profession is founded on freedom and independence. Art. 6 clarifies that a doctor cannot abuse his or her personal status. For instance, a doctor who is also in charge of public positions cannot use them to acquire personal advantages.

5. In THE NETHERLANDS it is recognised that conflicts of interest may be caused by the fact that the provider may have a financial interest in the way in which the information or advice is provided. For example, the provider's remuneration may be influenced by the content of the information or advice provided, or by the duration of

the time necessary to provide it. In *Barendrecht and van den Akker*, Informatieplichten van dienstverleners, nos. 380-386, it is argued that a general duty to disclose such interests should only arise if the existence of that financial interest or the way it would be calculated would not be apparent to the client. In the case of advice, other conflicts of interest may appear due to the fiduciary nature of such contracts. For example, the adviser may wish to execute the service the client is advised to choose, or may be paid by the party whose services are recommended. In *Barendrecht and van den Akker*, Informatieplichten van dienstverleners, nos. 389 and 397 it is argued that such conflicts should be disclosed, but they usually are not. The authors also state that it is the duty of the adviser to warn the client if the adviser has an interest of which the client cannot reasonably be aware and which could prevent the adviser from giving objective and correct information or advice.

6. POLISH law does not regulate this subject and the approach is suggested by the ethical principles of professional behaviour. The normal practice in the case of conflict of interest in, for example, a law firm, would be to either refer the client to another law firm (firms do co-operate in this respect) or simply reject the client's offer.

7. PORTUGUESE codes of conduct (e.g. 83/1 a) b) *Estatuto da Ordem dos Advogados*) and some statutes impose some specific duties to disclose conflicts of interests. As a last resort, good faith (arts. 227, 762 CC) can be used as the basis of such a duty.

8. Conflict of interest is a well-recognised concept in SCOTTISH law and professional practice, for example preventing solicitors from acting for two or more parties whose interests conflict, subject to some exceptions and requirements of disclosure (*Stair*, The Laws of Scotland XIII, para. 1188).

9. In SPAIN all codes of conduct include reference to the obligation of the provider of the service to look after the interest of the client loyally and with due diligence. It is contrary to this obligation to represent interests which are contrary to the client's interest. For example, under the Lawyers Code of Conduct art. 13 (4): the lawyer cannot defend interests which are opposed to the lawyer's own interests or those of other clients. If the interests of two clients are in conflict, the lawyer must decline to represent them, unless both clients authorize the lawyer to represent one of them. However, the lawyer could intervene in the interests of both clients as a mediator or in the elaboration of contractual documents, in so far as the lawyer maintains a strict objectivity. There are also detailed provisions on conflicts of interest in the Labour Consultants Code of Conduct, arts. 5.8 and 11: in the Estate Agents Code of Conduct, arts. 11 and 13; and under the Financial and Tax Consultants Code of Conduct.

10. This question is not touched upon much in literature in SWEDEN (concerning financial advice cf. however *Lycke/Runesson/Swahn*, Ansvar vid finansiell rådgivning, pp. 59 ff). However, both parties have an obligation to act loyally towards each other. The same principle is found in FINNISH law. In the Swedish Act on Financial Advice to Consumers, the adviser also has an obligation to act with due care in accordance with the consumer's interests, art. 5. This requirement includes an obligation to put the interests of the consumer before other, maybe conflicting, interests. The adviser must therefore inform the consumer about the basis of which the advice is given, for instance that the adviser may only recommend solutions from one provider. See also the Finnish Security Markets Act, chap. 4, s. 4, and the Real Estate Agents Act, s. 9.

11. For insurance brokerage, the EU Directive of 9 September 2002 includes the obligation to disclose conflicts of interest (art 12 of Directive 2002/92/EC of 9 September 2002 on insurance mediation, OJ L9 15 January 2003, p. 3.). Indeed, an insurance broker having privileged relations with only a few insurance companies will be very much inclined to advise in favour of products offered by these insurance

companies and not by others, even if their products are more suitable to the needs of the client.

IV.C.–7:108: Influence of ability of the client

(1) The involvement in the supply of the service of other persons on the client's behalf or the mere competence of the client does not relieve the provider of any obligation under this Chapter.

(2) The provider is relieved of those obligations if the client already has knowledge of the information or if the client has reason to know of the information.

(3) For the purpose of paragraph (2), the client has reason to know if the information should be obvious to the client without investigation.

COMMENTS

A. General idea

This Article deals with the possibility that the information provider might invoke the client's competence as a defence for excluding or at least limiting liability. According to this provision, the mere fact that the client has some knowledge in the field in which the information is provided is not a defence for the provider. The fact that the client is assisted by another competent professional is not a defence either.

The only defence for the information provider is to prove that the client had concrete knowledge of precisely the information that was not provided and should have been provided. This defence also exists when the client had reason to know the information in question. A client has reason to know the information when such information should be obvious without investigation.

> *Illustration 1*
> An experienced CEO of a multinational group requests the advice of his lawyers with regard to the plan to acquire the shares of companies quoted on foreign markets. The advisers do not inform the client about the obligation to pay higher plus-value taxes on reselling abroad. The fact that the client is an experienced businessman, with knowledge about stock market operations, is not a defence relieving the advisers of liability. The advisers would have to show that the client knew of this fact or that it should have been obvious without investigation.

The reference to the absence of investigation stresses the fact that the duties of the information provider are not modulated according to the existence of an obligation of the client to acquire information. The existence of such an obligation may involve contributory negligence, as will be explained in Comment E.

B. Interests at stake and policy considerations

If the client is competent or has the assistance of other information providers, the question arises whether that assumed competence influences the information that is to be provided.

Assuming that the obligation of the information provider is not alleviated by the competence of the client or the assistance of another information provider would have the advantage of legal certainty and clarity: the information provider would know that there was always an obligation to inform the client fully. Such a rule may also be regarded as very client-orientated. Several other arguments may be put forward in favour of this option. First of all,

even a partly competent client may not always be the best judge of his or her own affairs. The client, appreciating that problem, might even have asked for the service for exactly that reason. Secondly, the contrary solution would incite the information provider to be passive in the presence of a professional or assisted client. A third argument, which primarily relates to the situation in which the information is the main object of the contract, is that if the client had wanted less than full information, the contract could have so provided. A fourth argument rather relates to the situation in which the obligation to inform and to advise is an ancillary obligation. In such a situation, with regard to the 'borrowed' knowledge of the third information provider, it should be mentioned that the client runs the risk of the two information providers blaming each other; both stating they thought the other information provider had already given the information.

However, on the other hand the modulation of the content of the obligation according to the competence of the client seems more economical. Gathering and supplying information adds to the costs of the service, whereas – if the client is competent – these extra costs are probably incurred unnecessarily.

C. Comparative overview

The solutions adopted in the Member States of the European Union seem to clash at this point. Under French law, case law since 1995 has taken the position of not allowing the obligation of the information provider to be affected by the fact that the client is competent in the relevant field or is being or has been informed by a third information provider, unless it is proved that the client had knowledge of the concrete information. French doctrine summarises this line of the case law by stating that the obligation to inform and to advise is not relative, according to the competence of the client, but absolute. German case law has consistently ruled that an information provider does not need to inform the client about what the client already knows. But here and in other countries, it is less clear whether the mere competence of the client or the presence of other information providers influences the duties of the information provider.

Case law can be found especially in the field of financial information. According to the traditional line of the case law in many European legal systems, the supplier of financial services is not bound to inform the competent client, especially the one who is experienced in operations on the stock exchange market. This solution will probably partially change as a consequence of the future implementation of EU Directive 2002/65 on distance marketing of consumer financial services, which introduces informational duties. The Directive follows the traditional definition of the consumer, i.e. the natural person who acts for purposes outside his or her trade, business or profession. By rejecting a definition of 'consumer' containing reference to the criterion of competence in the field of the contract at hand, the Directive excludes defences on the basis of the client's competence, thus implying that informational duties arising from the Directive are to be performed regardless of this fact.

D. Preferred option

An intermediate position is preferred. In principle, the information provider has to provide full information even if the client is assisted by a third information provider or has some degree of competence.

Illustration 2

A solicitor consults a civil-law notary concerning a personal inheritance matter. The civil-law notary, in charge of the formalities of the settlement of the estate does not inform the solicitor of the time limit for deciding on acceptance or refusal of the succession. The time limit elapses without decision and the solicitor is then considered to have renounced the succession. The fact that the client is a lawyer is no defence for the civil-law notary.

As a rule, the obligation to inform and to advise remains unaffected by the presumed competence of the client or by the fact that information is provided by others. However, the economical argument in favour of limiting the obligation is taken into account if the client has not merely theoretical but also concrete knowledge of the information the provider is to supply, or the information provider could reasonably expect the client to have such concrete knowledge.

Illustration 3

A lawyer, acting for his private purpose, requests a civil-law notary to draft a contract for the purchase of an apartment along lines suggested by him, stating that he has already sorted out all the issues concerning tax law and civil law. In this case, the civil-law notary can reasonably rely on the lawyer's statement and the lawyer cannot claim damages for not having been fully informed and advised not to choose such a course of action. The reason is that the civil-law notary can assume his client has the concrete knowledge mentioned above.

In such a case, none of the parties is served by requiring the information provider to collect the information anyway and to supply that information to the client, which costs both time and money. As the alleviation of the duty to inform is the exception to the rule, it is up to the information provider to prove the exception applies. The mere fact of the client's competence or the presence of another information provider is not sufficient reason to assume that the client was aware of the concrete information.

NOTES

I. Overview

1. Very little information is available on this issue. The reason is that the answer to this question depends on the way the content of the main duty of the information provider is assessed. For legal systems which adopt an objective assessment of the information to be provided the ability of the client has no influence. Such is the case in FRANCE. On the other hand, legal systems which determine the extent of information to be provided by reference to the actual situation of the recipient regard the ability of the client as having a great influence on the standard of care and therefore give a defence to the information provider. Such solution is more generally accepted in FINLAND, GERMANY, ITALY, THE NETHERLANDS, PORTUGAL, SPAIN and SWEDEN. However, most of the solutions in case law concern financial services. In this field also in France the ability of the client is a defence for the provider.

II. Influence of the ability of the client on the service to be provided

2. The *Cour de cassation* in FRANCE used to take into consideration the competence of the client to modulate the intensity of the obligation of the adviser (Cass.civ. I, 7 February 1990, Bull.civ. I, no. 37; Cass.civ. I, 2 July 1991, Bull.civ. I, no. 228; Defr. 1991, p. 1272, obs. crit. *J.-L. Aubertt*). The obligation to advise was said to be relative, depending on those circumstances. From 1995 on the Supreme Court has changed the line of the case law and the obligation to advise has become absolute. The obligation of the adviser is no longer lightened because the client has already another adviser (Cass.civ. I, 10 July 1995, Bull.civ. I, no. 312 ; Defr. 1995, p. 1413, obs. *J.-L. Aubertt*) or because the client has competence in the relevant field (Cass.civ. I, 28 November 1995 and 30 January 1996, Defr. 1996, p. 361, obs. *J.-L. Aubertt*). The change of approach started with notaries, but now also applies to solicitors and other legal advisers (Cass.civ. I, 29 January 1997 (second part of the case), Bull.civ. I, no. 132 ; JCP 1997.II.22948 with note *R. Martin*; CCC 1997, no. 111, with obs. *L. Leveneur*; Cass.civ. I, 24 June 1997, Bull.civ. I, no. 214 ; JCP 1997.II.22970, with note *E. du Rusquec*; CCC 1997, no. 162, with obs. *L. Leveneur*). This is however not the case for the seller when the buyer is a professional (Cass.civ. I, 3 June 1998, RTD civ 1999, p. 89, obs. *J. Mestre*), nor for stock market operations (Cass.com. 18 February 1997, Bull.civ. IV, no. 51).

3. In GERMANY a bank selling stock options is not obliged to inform the client of alternatives or risks if the client is familiar with the market (BGH 4 February 1992, quoted by *Canaris,* Bankvertragsrecht[2], no. 1881).

4. In THE NETHERLANDS it is thought that if the client is competent in the relevant field or has other advisers, it cannot be excluded that the adviser could have relied upon the client's apparent knowledge of the risks and alternatives. In that case, the absence of information from the adviser might be excused (*Barendrecht and van den Akker,* Informatieplichten van dienstverleners, no. 364-367).

5. The service provider in POLAND should evaluate the ability of the client and adjust the service provided to it. This requirement can be deduced from the rules which set the standard of due diligence (CC art. 355), and the general rules on performance of obligations, which require co-operation of the parties (CC art. 354).

6. In PORTUGAL, according to legal doctrine, the less the competence of the lay client, the more thorough should be the information provider's diligence (*Sinde Monteiro,* Responsabilidade por conselhos, p. 387).

7. In SPAIN there is a specific pronouncement on this issue regarding the obligation to inform for a medical provider: the medical provider may be exempted from the obligation to inform the patient only when the latter has already received the same treatment for the same sickness or when the patient is a specialist in the field. The protection specifically granted to consumers under art. 12 of the Statute on Consumers (which states that the client is to be informed by the provider of the service) will not apply when the provider and the client are specialists in the same field (*Cervilla Garzón,* La prestación de Servicios Profesionales, p. 255).

8. Normally in SWEDEN and FINLAND the scope of the adviser's duty to provide information and mention risks is limited by the competence and knowledge of the client. In SWEDISH a case of a bank acting as tax adviser the HD ruled that the duty to mention risks must always be judged depending on the factual circumstances and especially on the knowledge of the client (NJA 1994 p. 598). In another case it was held that there was no obligation on a stockbroker to inform the client about the risks

involved in the trade in index options, when the client was a businessman with good knowledge of financial markets and stock trading (NJA 1995 p. 693).

IV.C.–7:109: Causation

If the provider knows or could reasonably be expected to know that a subsequent decision will be based on the information to be provided, and if the client makes such a decision and suffers loss as a result, any non-performance of an obligation under the contract by the provider is presumed to have caused the loss if the client proves that, if the provider had provided all information required, it would have been reasonable for the client to have seriously considered making an alternative decision.

COMMENTS

A. General idea

The existence of a causal link between a non-performance of a contractual obligation by the provider and damage to the client is an essential element of the liability of the information provider and the availability of the remedy of damages. The determination of a causal link involves specific issues with regard to contracts for the provision of information. It is often difficult for the client to substantiate the existence of a causal link between the non-performance of the information provider's obligations and the damage suffered. In order to enable the client to substantiate a causal link, this Article introduces a modification of the burden of proof. The client can establish the existence of a causal link by proving that, if there had been proper performance, it would have been reasonable for the client to have seriously considered making a decision other than the one actually taken.

The phrase 'alternative decision' is to be interpreted broadly. It includes not only a completely different decision, but also the hypothesis of a decision having the same nature, though different conditions.

> *Illustration 1*
> A client acquires company A on the basis of wrong advice of a market analyst. In order to claim damages, the client does not have to prove that he would not have taken the decision he took nor that he would have taken the same decision though on different financial terms. The existence of a causal link between the wrong advice and the damage is presumed by the proof that a reasonable investor would have seriously considered either not investing in or acquiring another company or acquiring company A at a lower price.

This Article introduces two presumptions. The first operates a modification of the object of proof. The client is not required to prove causation on the basis of the particular client test – i.e. what the client *would* have done – but on the basis of a reasonableness test – i.e. what it would have been reasonable to have done if correctly informed. The second alleviates the object of proof. The client is not required to prove that a reasonable client would have taken a different decision; it is sufficient that a reasonable client would have seriously considered taking another decision.

The information provider can rebut the two presumptions in the same way. In order to establish the absence of the causal link, the information provider needs to show that, even if there had been due performance, the client would have taken the same decision.

B. Interests at stake and policy considerations

The requirement of causation is frequently a key issue in claims for damages for non-performance of obligations under an information contract. The main issue is to determine whether the basic principles of causation are still to be applied or whether it is necessary to alleviate the requirement in favour of the client.

The argument in favour of alleviation of the usual burden of proof allocation with regard to causation can be explained as follows. The client requested information or advice to make a sound decision. It is therefore likely that the client will base a decision on the information supplied and will follow the advice given. For the same reason, it may be assumed that the client would have relied on correct information or followed correct advice or at least would have hesitated to take the decision actually taken on the incorrect recommendation of the provider. The result of this reasoning is that, in such a case, the information provider has to prove it would not have mattered if the information or the advice had been correct because the client's decision would have been the same as the one taken. If the provider cannot prove that, the causal link between the non-performance and the damage the client suffered is taken as established.

More practically, leaving the burden of proof of the existence of a causal link on the client would lead to a very difficult situation for the client. It would be necessary to prove that, if the provider had fulfilled the obligation correctly, the damage would not have occurred, which is usually impossible.

However, reversing or considerably alleviating the burden of proof on the client will place the information provider in an unfavourable position. It will be very difficult indeed to prove that the client, properly informed or advised, would have taken the same course of action. Thus, according to the solution chosen each party will face difficulties in establishing evidence.

Finally, the solution depends on a policy decision with regard to compensation for the client. The fact that professional information providers are often insured – which is sometimes a1946mandatory requirement – might justify alleviation of the causation requirement to allow speedy compensation of the damage suffered by the client, who is generally not insured agains4 the consequences of such a breach.

C. Comparative overview

Alleviation of some sort of the burden of proof concerning a causal link between the non-performance by the information provider and the damage suffered by the client can be found in several Legal systems. The techniques used to achieve this result, however, differ. In Germany and Austria, especially with regard to medical information and advice, there is a partial modification of the object of proof in the application of the *Entscheidungskonflikt* ('conflict of decision') theory. In France, Belgium and Spain, courts turn to an unorthodox application of the loss-of-a-chance theory. In other words, courts consider that the client has lost the chance to take a decision on the basis of all the information needed.

D. Preferred option

The Article provides an alleviation of the client's burden of proof with regard to causation. The client does not have to prove that a different decision would have been taken if correct advice had been given, but merely that in such a case the client would have seriously

considered taking another decision, thus avoiding the damage. Such a solution is very similar to the German *Entscheidungskonflikt* theory.

This Article applies an objective standard-client test, not the particular-client test. The existence of causation is assessed objectively, with particular regard to the situation of a reasonable client, not the one of the client in question. Following the standard-client test further facilitates the assessment of a causal link between the breach of duty and the damage.

> *Illustration 2*
> A company engages a firm of auditors to give advice in connection with a takeover. The auditors advise the client in favour of the takeover not noticing and therefore not mentioning in their advice the considerable risk that antitrust authorities would refuse to approve the acquisition due to the future monopolistic nature of the company. After the acquisition, it turns out that the European Commission is willing to approve the acquisition on the condition that the buyer resells 60 per cent of the assets of the target company. In order to receive compensation for the damage suffered, the client only has to prove that, if correctly informed of the risk that materialised, the company would have hesitated to go ahead with the takeover. It is then up to the adviser to prove that the client would have acquired the target company even if correctly informed.

By introducing a presumption with regard to the proof on causation, the Article implicitly excludes the application of the theory of the loss of a chance, applied in some legal systems to facilitate the assessment of the causal link in the case of breach of an information duty and, therefore, compensation for the damage suffered. In applying the loss-of-a-chance theory as a surrogate for the proof of causation, courts compensate for the fact that the client lost the chance to take a decision on the basis of all the information needed. The consequence of this is that the client cannot be awarded compensation corresponding with the entire damage suffered. Damages correspond only to a percentage of the entire damage suffered. The percentage is determined according to the existence of chances to take a different decision and avoid the detrimental consequences of the decision actually taken. In practice, this leads to complex assessments of damages, which often require the appointment of experts.

The system of the present Article leads to full compensation for the damage suffered or to no compensation at all. Partial compensation – as following the loss-of-a-chance theory – is avoided. In other words, this Article is based on the consideration that non-performance by the provider is either the cause of the entire damage or not the cause of the damage.

NOTES

I. Overview

1. If the principle remains that the claimant has to prove the existence of a causal link between the non-performance and the damage suffered (ENGLAND, FINLAND, FRANCE, GERMANY, ITALY, THE NETHERLANDS, PORTUGAL, SCOTLAND, SPAIN, SWEDEN), many of these legal systems, at least in some areas, have alleviated the burden of proof, having recourse to different techniques. In France, the theory of the loss of a chance is used to palliate the absence of proof on causation.

In Germany, the theory of *Entscheidungskonflikt* requires a limited proof on the side of a patient in case of incorrect or incomplete information or advice.

II. Burden of proof on causation

2. Generally the client retains the burden of proof of causation under ENGLISH law. When the claim is based on medical negligence, the patient must prove not only the breach of the duty to inform but also that had the duty been broken he or she would not have chosen to have the operation (*Chatterton v. Gerson* [1981] QB 432.). However, in cases of breach of fiduciary duty the burden of proof seems to be reversed. In an old Privy Council case it was held that where the breach is a non-disclosure of material information, the burden of proof as to causation is reversed *(Brickenden v. London Loan and Savings Co.* [1934] 3 DLR 465 at 469). See also *Ferris* [1983] 9 DLR 183 where a solicitor breached his fiduciary duty in advising a lender when already acting for the borrower. In *Brickenden*, Lord Thankerton said that "when a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor. Once the court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant." This solution, however, finds its ground in the specificity of a fiduciary relationship. The reversal of the burden of proof on causation is consistent with the draconian nature of the fiduciary duty. In determining the issue of liability, it is irrelevant to consider the issue of causation between the breach of duty and the alleged loss. Liability will be imposed where the fiduciary has placed himself or herself in a position of conflict or potential conflict. It is immaterial that the breach did not cause any loss.

3. Causation between the breach of a duty to inform or to advise and the damage must in principle be proven by the client under FRENCH law (Cass.civ. I, 10 July 2001 Resp. civ. et assur. 2001 no. 321; with regard to bad tax advice given by a lawyer, the client must prove that the damage suffered is the consequence of the breach of duty.) The Court adopts the *équivalence des conditions* theory, which means that the breach of duty to inform or advise is the cause of the damage if the client proves that, correctly informed or advised, he or she would have decided in favour of another course of action. This means that the client has to prove beyond doubt that the damage suffered would not have occurred. The client cannot usually provide this proof. For this reason a part of the case law found another way to allow compensation, using the loss of a chance theory. The client is entitled to compensation for having lost the chance to take a decision with sufficiently enlightened advice (Cass.civ. I, 7 February 1990, Bull.civ. I, no. 39; RTD civ 1991, p. 112 with obs. *Jourdain*; CE 5 January 2000, *Consorts Telle*; 5 January 2000, *Assistance Publique-Hôpitaux de Paris,* JCP 2000.II.10271, with note *J. Moreau*). The consequence of this reasoning is that the doubt about the decision of the client taking another decision is sufficient to find a connection between the breach of duty of the provider and the damage. This solution is criticised by a part of the doctrine and the case law. Quoting a case of 1982 some authors assert that the loss of a chance can only be of use for the determination of the *quantum* of the damage and not as a surrogate for causation (Cass.civ. I, 17 November 1982, Bull.civ. I, no. 333; JCP 1983.II.20056 with note *Saluden*; D. 1984, p. 305 with note *Dorsner-Dolivet*. See also, *Fabre-Magnan*, De l´obligation d´information dans les contrats, nos. 605 ff). There are however dissident opinions (*Huet*, RTD civ 1986, 119; G. *Durry*, RTD civ 1967, 181; 1969, 797). It is disputed whether this solution is applicable also

to information and advice duties. According to the cases of 1990 and 2000 quoted above it seems that the loss of a chance theory remains applicable and could lead to the establishment of a partial causation. The consequence of such a partial causation leads to a partial compensation of the damage as well. For example the damage compensated to a student victim of an accident who cannot attend an examination does not coincide with the benefits of passing the examination, because success is not certain (Cass.civ. II, 17 February 1961, GazPal 1961, 1, 400). The same can be said for the situations in question. Since it is not certain that, correctly informed or advised, the client would have adopted the best solution, it is impossible to compensate the loss of benefit that such course of action would have brought about. Assessing loss is very difficult and there are no clear directions on how to proceed. This is certainly the major inconvenience of the loss of a chance theory. Very often in practice courts appoint experts to determine the amount of damage to be compensated.

4. In GERMAN medical law, if it has been proved that the provider breached a duty and the client substantiates that he or she might have decided differently if given the correct information or advice, the burden of proof is shifted. This solution is accepted case law for medical information and advice (BGH 26 June 1990, NJW 1990, 2928; VersR 1990, 1238; BGH 11 December 1990, NJW 1991, 1543; JZ 1991, 673; BGH 7 April 1992, VersR 1992, 960; NJW 1992, 2351; BGH 14 June 1994, VersR 1994, 1302; NJW 1994, 2414; BGH 17 March 1998, VI ZR 74/97, NJW 1998, 2734). It is the so-called *Entscheidungskonflikt* ('conflict of decision'). Liability is in any case excluded if the doctor convincingly indicates that, if the necessary information had been given, the patient would have consented to the procedure advised and the patient cannot plausibly show that he or she would have been in doubt whether or not to consent (See, e.g., BGH 17 March 1998, VI ZR 74/97, NJW 1998, 2734). In such a case, the provider proves it would not have mattered for the client's decision if the information or the advice had been correct, as the decision would have been the same anyway. If the provider cannot prove that, the causal link between the breach of duty and the damage the client has sustained is taken as proved. The technique of the *Entscheidungskonflikt* is of interest when the consequences of the lack of information or advice about risks would have serious effects on the situation of the other party. If such is not the case even if a breach of duty is present, the causal link cannot be established. Indeed, if the chance of the risk materialising and the effects of it would not be serious, providing the information could hardly influence the client's decision, for he or she would probably have taken the risk anyway. As a consequence of this there is no *Entscheidungskonflikt*. The opposite is also true. In some cases, it is not necessary to partially reverse the burden of proof on causation in application of the theory of the *Entscheidungskonflikt*, because it is clear that the patient correctly informed of the risks would have taken another decision and avoided the damage. BGH 30 January 2001, NJW 2001, 2798. In this case the physician did not inform the patient about the risk of impotence. The *Bundesgerichtshof* first asserted that the patient would have found himself in a real conflict of decision if sufficiently informed, but it also asserted that the patient would have decided against the operation if he had known of the risk of impotence. There is no need to argue of the hesitation of a correctly informed patient, while there is the certainty that he would have taken another decision. Outside medical law, the theory of *Entscheidungskonflikt* is generally not applied and the client still has to substantiate how he or she would have reacted if the right advice or information would have been provided (BGH 16 February 1995, NJW-RR 1995, 619, for a case of liability for wrong information provided by an accountant).

5. According to the general rules on contractual and tortious professional liability in ITALY, the proof of the causal link between the breach of duty and the damage rests in principle on the client (Cass. 18 June 1975, no. 2439, Foro it. 1976, I, 745; Cass. 8 May 1993, no. 5325).

6. In principle, the burden of proof lies on the client in THE NETHERLANDS. Cf. *Giesen*, Bewijslastverdeling, p. 49; *Barendrecht and van den Akker*, Informatieplichten van dienstverleners, no. 446-447. This implies that the client must prove that if informed or advised properly, he or she would have made another decision. However, it is hardly ever possible to prove this unconditionally, since there remains almost always a possibility that the client would not have acted upon the information or advice, and would have decided otherwise. *Giesen*, Bewijslastverdeling, p. 49, concludes that this division of the burden of proof leads to a structural problem for the client to prove the case. Especially for medical cases, it is more or less accepted that the patient would have acted upon the information or advice, especially if the illness the patient suffered from was life-threatening and an effective cure is available. The German doctrine of '*Entscheidungskonflikt'* more or less is copied in the Netherlands. *Barendrecht and van den Akker*, Informatieplichten van dienstverleners, no. 449-450, argue that this doctrine could be extended outside medical situations, starting from the presumption that a reasonably acting and informed client would have followed the information or advice. This is even stronger in those situations where the client especially asked to be informed or advised, as is the case where a contract for the provision of information or advice has been concluded. In the case of safety measures, the causal link between the breach of such measures and the damage that occurred is presumed to exist, leading to a shift of the burden of proof. Cf. *Giesen*, Bewijslastverdeling, pp. 66 ff, 79 ff. The *Hoge Raad* seems to be inclined to extend this rule to other situations where an act – including an omission, such as the failure to inform or advise [properly] – brings a risk into being and that risk materialises. Cf. HR 26 January 1996, NedJur 1996, 607 (Dicky Trading II), a case in which a notary was held liable for a failure to warn of the risks involved in a transaction. The causal link was deemed to be established since the failure to warn had increased the risk of damage and that risk had materialised. Cf. *Giesen*, Bewijslastverdeling, p. 67; *Barendrecht and van den Akker*, Informatieplichten van dienstverleners, no. 447. Yet, the HR recently explicitly declined in general and broad terms to extend this rule to cases where a duty to inform a patient of a risk was breached and that risk subsequently materialised. The Hoge Raad argued that the duty to inform is meant to enable the patient to make an informed decision on whether or not to consent to the suggested treatment. The duty to inform is therefore not as such meant to protect the patient from the occurrence of a medical risk, but only to prevent the risk of the loss of the opportunity to properly choose. Cf. HR 23 November 2001, case C99/259HR.

7. According to a general POLISH rule, the burden of proof relating to a fact rests on the person who attributes legal effects to that fact (CC art. 6). The client must prove that the damage was caused by the service provider (the factual circumstances due to which the damage occurred) and the amount of the damage (Bieniek (-*Rudnicki*) I, p. 30).

8. In PORTUGAL The client bears the burden of proof of causation. The most followed criterion in case law is the adequate causation, in the negative formulation of Enneccerus-Lehmann (STJ, 3 December 1992, BolMinJus, 422, 365; STA 21 April 1994, BolMinJus 436, 421).

9. In SCOTTISH law the client generally has the burden of proving causation. But in medical cases about failure to warn, the client may recover damages for the loss suffered even if unable to prove that the operation would have been avoided had the knowledge been available (*Gloag and Henderson*, The Law of Scotland, para. 27.10; cf *Hogg*, (2005) 9 Edinburgh LRev, 156; *Mason and Brodie*, (2005) 9 Edinburgh LRev, 298; *Stair*, The Laws of Scotland, Reissue Medical Law, paras. 260-262).

10. Under SPANISH law it is in principle up to the client to prove that the provider of the service has not acted with the required due diligence (lack of information), that the client it has suffered damage and that there is a causal link between the lack of due diligence and the damage suffered. Courts have shifted the burden of proof on breach of the obligation to inform or advise to the provider of the service since it is easier to prove the positive (that the information has been provided) than for the client to prove the negative (that the information has not been provided). However, the client retains the burden of proof on causation and thus has to give evidence that the non-observance of the standard of care regarding the obligation to inform constituted the cause of the damage suffered - that is, that if properly informed or advised the client would have taken another decision or done otherwise. Regarding medical services, the lack of information makes the medical provider liable for the damage inflicted. TS 31 July 1996 (RJ 1996/6084) reads as follows: "if treatment was to be considered a high risk obligation, with foreseeable negative results, the patient should have been informed regarding such risks and should have consented to the treatment in an explicit and clear manner, in order to exempt the doctor from liability. The medical treatment provider is thus liable for the damage inflicted". Therefore, only when the patient gives an informed consent based on the information or advice given by the professional does the risk shift to the patient. The situation varies with regard to the risks to be disclosed concerning curative and non-curative medicine. In the latter case, also atypical risks must be disclosed.

11. In SWEDEN and FINLAND it is principally up to the client to prove that he or she would have acted differently if given correct information. In the Swedish case NJA 1991 p. 625 a real estate agent had given the client incorrect information concerning taxation on a capital gain. The question was now if the client had suffered economic loss and how the damages should be calculated. The HD stated: "If incorrect information concerning the possibility to postpone tax for capital gain shall lead to a right to compensation in damages, principally the client has to show that he would not have sold the real estate at this point in time if he had received correct information." (See *Kleineman*, SvJT 1998, p. 199). The loss of a chance theory is not accepted under Swedish law.

CHAPTER 8: TREATMENT

IV.C.–8:101: Scope

(1) This Chapter applies to contracts under which one party, the treatment provider, undertakes to provide medical treatment for another party, the patient.

(2) It applies with appropriate adaptations to contracts under which the treatment provider undertakes to provide any other service in order to change the physical or mental condition of a person.

(3) Where the patient is not the contracting party, the patient is regarded as a third party on whom the contract confers rights corresponding to the obligations of the treatment provider imposed by this Chapter.

COMMENTS

A. General idea

This Article presents the notion of a treatment contract. The treatment activity consists in all the processes applied to a person in order to change his or her physical or mental health. The main example of a treatment contract is one for medical treatment. However, that is not the only example. Accordingly Annex 1 defines a contract for treatment as "a contract under which one party, the treatment provider, undertakes to provide medical treatment for another party, the patient, or to provide any other service in order to change the physical or mental condition of a person".

Illustration 1
A patient suffering from the flu goes to a doctor. The doctor takes the various steps in the treatment procedure and prescribes drugs that may cure the illness, i.e. change the physical condition of the patient.

There will usually be "treatment" whenever a health-care professional takes the necessary steps to effectively change or maintain the condition of a patient or – where this is not or no longer possible – to mitigate the effects of chronic or incurable ailments.

Illustration 2
A patient who has incurable, terminal cancer is given palliative care. This treatment mitigates the pain suffered by the patient and comes within the scope of the Article.

Treatment may consist in making efforts to cure a certain ailment, in taking steps to prevent ailments from materialising in the future (preventive medicine) or in administering painkillers in the case of a deadly disease. It may also consist in changing the physical or mental condition of a person where there is no need from a strictly medical point of view to do so (aesthetic surgery, sterilisation, etc.).

Illustration 3
A person who is planning to travel to an area where malaria is prevalent has an appointment with a health-care provider well before his departure. He is given

appropriate medication. This situation concerns preventive medicine, and this Chapter applies.

The present Chapter also applies, with appropriate modifications, in situations where the treatment provider performs another service in order to change the physical or mental condition of the patient, such as providing information regarding treatment, referring to another health-care provider or institution, etc. (paragraph (2)).

Paragraph (3) states that the provisions of this Chapter also apply to contracts concluded by a third party on behalf of a patient and that that patient has the right to demand performance by the treatment provider. Although usually the patient is the contractual party, it may happen that the patient is *not* the contractual party. This is, for instance, the case when a treatment provider is employed by a party who has some legal connection with the patient, such as treatment providers employed by the patient's employer or by an insurance company.

Illustration 4
A woman applying for a life insurance policy gets a check up in a clinic contracted by the insurer. The woman is contractually protected vis-à-vis the clinic under this Chapter.

Paragraph (4) extends the application of these rules, by way of analogy, to some borderline situations where the provider of another service provides treatment to a person.

Illustration 5
A person goes to the hairdresser's to have his hair cut. This is a process that changes a person's physical (aesthetic) condition (though not his health). Although this Chapter does not cover such a situation, the provisions may apply by way of analogy.

Illustration 6
The hairdresser notices that the client has a severe case of dandruff (diagnosis) and recommends a special shampoo (therapy) to cure it. Although this Chapter does not cover such a situation, the provisions may apply by way of analogy.

B. Interests at stake and policy considerations

This Article covers the scope of application of the rules in this Chapter. The most common application will be that of a patient entering into a contract with a treatment provider in order to receive treatment. However, an important policy issue is whether the Chapter should apply to situations where a clear contractual link is lacking. On the one hand, it may be argued that for conceptual reasons only treatment provided after a treatment provider and a patient concluded a contract should fall within the scope of this Article. On the other hand, not broadening the scope of these rules to the aforementioned situations would amount to discrimination, not treating identical situations alike, without any practical reason. In fact, it often happens that the patient and the person or entity concluding the treatment contract are not the same. This is the case when treatment is provided to minors lacking contractual capacity or incompetent adults. It is also the case when an employer, an insurance company, a hotel or a similar organisation enters into a contract with a treatment provider in order to provide treatment for employees, insured persons and hotel guests. In such a situation, there

are two levels: the 'client'-treatment provider relationship and the patient-treatment provider relationship.

Illustration 7
A passenger of a cruise ship feels ill during the cruise. The ship's doctor, employed by the company, treats the passenger. In this situation, the passenger/patient was treated by a doctor whose contractual relationship is with the company, not with the patient. The present Chapter applies nevertheless.

Another question to be answered is whether there can be a contractual relationship between a patient and a public hospital. Such a contractual relationship would contribute to a unified legal regime of the obligation to treat, bringing out the advantages of clarity, certainty and protection of the patient as a consumer. However, from a political and economic point of view, such an option would meet with heavy resistance in many countries, as many hospitals are public hospitals, and as such ruled by administrative law.

Besides, some conceptual arguments tend to classify relationships between hospitals and patients as different from contracts, rather as 'mass factual relationships'. The law on non-contractual liability for damage or administrative law deals with liability as regards the liability of public entities.

Another policy issue concerns the scope of the rules on treatment, especially with regard to borderline situations. In fact, improving the physical or mental health of a person is a broad definition of the activity, likely to cover treatment activities such as grooming, hairdressing and body piercing as well. Apart from fitting the normal scope of treatment, broadening the scope of this Chapter to such activities would result in an increase in the quality of those services as well as in the extended protection of the client of such services. This may especially be relevant in situations where performance of such services may have similar consequences for the health of the patient as medical treatment. On the other hand, restricting the scope of the Chapter entails that treatment can be narrowed down to standard medical practice. This would be more in line with what traditionally is regarded as treatment, and has the advantage of focusing on the main issue, medical treatment, or at least the issue that has the greatest impact on society and the economy. Besides, incorporating the aforementioned services would result in fierce resistance from the medical community.

C. Comparative overview

In most European countries, the contract for treatment falls into the existing categories of contracts for services (Germany, Spain, and Portugal), or contracts for work (France). In some legal systems it is not clear if treatment is qualified as a contract for work or services or if it is a specific innominate *sui generis* contract (Austria and Greece). The only country regulating the contract for treatment as a nominate contract in the CC is The Netherlands.

In the United Kingdom, the relationship between a patient and a public hospital is regarded as non-contractual, rather disciplined by the law on non-contractual liability for damage. In Finland and Sweden the relationship is not contractual and specific regulation for medical healthcare, in particular the no-fault patient insurance scheme applies.

D. Preferred option

In principle, the Chapter applies only in so far as there is a contractual relationship between a treatment provider and the patient. However, if under national law the relationship cannot be qualified as a private law contract, the present Chapter does not apply; administrative courts may, irrespective of its private law nature and of their own accord, apply the rules of this Chapter by analogy.

The scope of application is extended to treatment provided on behalf of a person who is not a contractual party; see paragraph (3). The underlying reason is the protection of patients and treating like situations alike. In exceptional circumstances, where treatment must be performed immediately to serve the best interests of the patient and the patient cannot express agreement to the contract the rules on benevolent intervention in another's affairs may apply.

In situations where a service is provided in order to change the physical or mental health of a person outside the scope of medical treatment, this Chapter applies by way of analogy; see paragraph (2); The underlying reasoning relates to the functional character of the rules and to the provision of normative guidelines for adjudicating legal problems emerging from the sector of unconventional medicine, which is becoming more and more important from an economic point of view. Likewise, this Article serves the objectives of patient protection and public interest in the quality of health care.

NOTES

I. Overview

1. With the exception of THE NETHERLANDS, none of the other legal systems has a specific regulation of treatment contracts in its civil code (sec. CC art. 7.7.5). The contractual nature of the duties inherent to the obligation to treat is accepted in AUSTRIA, FRANCE, GERMANY, ITALY, SPAIN and PORTUGAL, though the duties of the treatment provider may also derive from the law on non-contractual liability for damage. In these countries the nature of the contract varies: in Austria and Greece it is debated whether it should be qualified as a contract for work, a contract for services or an innominate contract. In Germany, Spain and Portugal it is considered to be a contract for services. In the UNITED KINGDOM, though there are treatment contracts, in practice most medical treatment is performed in the national health service and is regulated by the law on non-contractual liability for damage and specific public regulation. In FINLAND and in SWEDEN medical treatment is not considered to be a contractual relationship, and public law regulations apply. Separate administrative courts entertain jurisdiction over disputes related to medical treatment carried out in public hospitals in France, Italy, Spain and Portugal. In addition to private law sources, medical treatment is also regulated by public law, medical ethics and conduct codes and standards in all countries. The impact of consumer law regulation is reported in England, Scotland, Greece and Spain. In most countries the legal regime of medical treatment derives from the general principles of contract, non-contractual liability for damage and public regulation. Though not much information is available from the analysed countries, services similar to medical treatment, such as non-conventional medicine, and other services whereby the physical or mental condition of a person is changed outside the framework of medical treatment, appear to be addressed by the general principles of services law.

II. Scope of the rules on treatment in the national laws

2. AUSTRIA has a Law of Doctors (Ärztegesetz 1998) and a Law of hospitals (Krankenanstaltengesetz 1954). The prevailing opinion understands the treatment contract as a so-called free employment contract; cf. (*Völkl-Torggler*, JBl 1984, p. 74). Others classify it as a mere contract for work. Yet a slightly different definition can be found in recent case law. 'The treatment contract has to be qualified as an agreement – not defined in the Code – pursuant to which a doctor owes the patient a professional treatment, living up to the objective standards of a certain branch, but without guaranteeing a certain success or result.'(*Dittrich and Tades*, ABGB[35], § 1151 E 25 referring to SZ 57/98, RdW 1992, 8=EvBl 1993/3). The ABGB starts from a clear-cut division between contracts of work and contracts of employment under the heading of 'contracts for services'. CC § 1151 sets forth a short definition of both notions, followed by the rules regarding the employment contract (CC §§ 1153 ff); the contract for work is dealt with in CC §§ 1165 ff. The advocates of the so-called free employment contract argue that a doctor cannot owe a result (a cure) but only an effort, just like an employee. But since the position of doctors is not entirely the same as that of employees not all rules on employment contracts are to apply. Doctors are not part of a hierarchical organisation; they rather work autonomously. However, other elements are the same. For those reasons the treatment contract is classified as a free employment contract indicating that this is not exactly the same as a regular employment contract (*Völkl-Torggler*, JBl 1984, p. 74). The prevailing opinion argues that treatment differs from the contract of work in a few substantial items and contains elements of the employment contract. The resulting so-called free employment contract is not regulated in the CC, the author calls it a *contractus sui generis* created by doctrine. Basically, all the provisions designed at protecting the employee do not apply. Nonetheless, there is some uncertainty left as to which rules of the employment contract apply. *Völkl-Torggler*, JBl 1984, p. 74, points out the legal uncertainty and therefore opts for adopting the contract of work approach (p. 83). Irrespective of the regime to be applied rules tackling the specific issues arising in the context of treatment are somewhat missing. Since treatment contracts really fit neither the codified rules on contracts for work nor the rules on free employment contracts recourse to case law can often provide the only satisfactory solution.

3. In ENGLISH and SCOTTISH law, treatment is not subject to special regulation. The duties of treatment-providers to their clients may derive from contract or tort or delict. The duties in each are co-extensive. In contract, those who provide a service in the course of a business have an obligation both under the common law and under statute to exercise reasonable care and skill in performance, Supply of Goods and Services Act 1982, s.13 (England only). In cases turning on non-contractual liability the same duty is derived from case-law on negligence, see e.g. *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, 586, (fractured hip during electro-convulsive therapy, some doctors would have used muscle relaxant to guard against such risk, some not, doctor not liable as acted according to a responsible body of professional opinion, thus with 'reasonable care and skill'). Cases on medical liability are generally framed in tort or delict and legal writing deals with the issues largely in texts on these subjects (in Scotland see e.g. *Stair*, The Laws of Scotland, Reissue Medical Law, paras. 136-280), the main reason being that medical services are typically provided within a public framework which does not include a contractual relationship.

4. FINLAND has an Act on the Status of Patients (no. 785/1992) and a Patient Injury Act (no. 585/1986)]. The cardinal ideas in the Finnish system are: strengthening of the

patients' freedom rights, procedural guarantees of their legal protection and enhancement of the individual's social rights. (Cf. *Lahti*, Towards a comprehensive legislation governing the rights of patients, p. 208; Pahlman et. al., Three years in force: has the Finnish act on the status and rights of the patients materialized? Medicine and Law, p. 1).

5. In FRANCE the most important act regarding treatment is the Code de la Santé Publique (cited from now on as CSP), as recently amended by the law of 4 March 2002 on the rights of patients and the quality of health system. Other applicable rules are the general rules of the CC on contract and the rules on the service contract *(contrat d´entreprise)*, arts. 1779 ff. Regarding informed consent, provisions can also be found in the Civil Code, art. 16-3. The Code of medical ethics (decree 6 November 1995) is also applicable, not only in disciplinary tribunals but also in the ordinary courts (See Cass.civ I, 27 May 1998, Bull.civ. I, no. 187; Resp.civ. et assur. 1998, no. 276; D. 1998, 530 note *Laroche-Gisserot*, in which the Court applied this Code determining the duties of a surgeon. In the situation in question it was held that the surgeon was under the obligation to refuse the treatment asked by the patient.) There is however still room for regulation of a treatment contract by case law. Many of the most important rules governing a treatment contract have been "discovered" by the *Cour de cassation* and the *Conseil d´Etat*, in applying the very general provisions on service contracts, especially the determination of the standard of care. Most of these rules are now codified by the law in the Code de la Santé Publique.

6. The contract for medical treatment under GERMAN law is considered as a contract for services regulated by CC arts. 611-630, according to the overwhelming majority of doctrine and case law: BGH 9 December 1974, BGHZ 63, 306, 309; BGH 18 March 1980, BGHZ 76, 249, 261; BGH 10 March 1981, NJW 1981, 2002; BGH 25 March 1986, BGHZ 97, 273; CA Düsseldorf 31 January 1974, NJW 1975, 595; CA Zweibrücken 10 March 1983, NJW 1983, 2094; CA Cologne 17 September 1987, VersR 1988, 1049; CA Braunschweig 9 August 1979, VersR 1980, 853, 854; CA Koblenz 17 December 1980, VersR 1981, 689; CA Cologne 7 March 1979, VersR 1980, 434; CA Munich 27 February 1981, VersR. 1981, 757, 758; CA Koblenz 7 January 1993, NJW-RR 1994, 52; LG Cologne 31 July 1979, VersR 1980, 491; *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 39; Staudinger (-*Richardi*), BGB [2005], § 611; Palandt (-*Putzo*) BGB, § 611; MünchKomm (-*Müller-Glöge*), BGB, § 611 and MünchKomm (-*Soergel*), BGB, § 631. The treatment provider's main obligation does not consist of achieving a certain cure or treatment result (BGH loc.cit.); Cf. *Gehrlein*, Leitfaden zur Arzthaftpflicht, p. 3, rather of providing conscientious and dutiful treatment according to the standards of accepted, approved and up to date medical science (*Gehrlein*, Leitfaden zur Arzthaftpflicht, p. 3). However, according to the Federal Court, the relationship between a treatment provider and the patient is not to be considered as a normal private law contract, as factors such as the dignity of the human being and the special trust relationship must be taken into account: BGH 9 December 1958, BGHZ 29, 46, 52 f = NJW 1959, 811, 813; BGH 4 July 1984, BGHZ 32, 367, 379 = NJW 1984, 2639. Therefore treatment contracts deviate in some respects from the normal regime of services contracts. It must also be noted that the nature of liability for treatment is always one of private law, not public law if a public hospital is involved, and as such common courts entertain jurisdiction over such claims: *Gehrlein*, Leitfaden zur Arzthaftpflicht, p. 2.

7. Under GREEK law liability with regard to the supply of medical services may be either contractual or delictual. The provisions on the liability of the service supplier in the Consumer Act are also applicable. There is no indication to what extent standard contract terms are being used in treatment contracts. The supply of medical services is

not dealt with as such in the civil code. The latter provides only for service contracts in abstract terms. The code provisions that may be applicable to the agreement between patient and doctor are those with regard to the employment contract (CC arts. 648-680) and the contract for work (CC arts. 681-792). It is maintained that the employment contract provides the most adequate legislative framework to cover the usual agreement between patient and doctor, though there are instances in which the contract of work provisions are deemed to be more appropriate (*Androulidaki-Dimitriadi*, The duty to inform the patient, pp. 106 ff). However, it has been argued that the employment contract and the contract for work fall short of meeting all the particularities of the contract for the provision of medical treatment. Therefore, it is argued that the agreement between patient and doctor does not fall squarely into an employment contract or a contract for work framework. Instead, it is rather a *sui generis* contract for the provision of medical services, to which the provisions of the previous two set of contracts apply by analogy, alongside other rules such as those in codes of ethics (*Androulidaki-Dimitriadi*, The duty to inform the patient, p. 110). From 1994 a new liability regime applies to the provision of medical services. The Act 2251/94 on Consumer Protection provides in article 8 rules concerning the liability of the service supplier. The suitability of the provisions on the liability of the service supplier to regulate the medical profession has been subjected to criticism. However, it still does not seem to have triggered significant case law to justify such concerns (*Georgiadis*, The liability of service supplier, pp. 143-155); for doctors particularly at pp. 151-152; (*Foundedaki*, Medical liability in civil law, pp. 179-204). According to the above provision, the supplier of services is liable for all damage caused due to the service. The consumer needs to prove the damage and the causal link between damage and the provision of the service, whereas the professional supplier of the service needs to prove that he or she was not at fault in providing the service. Thus, the doctor will have to prove not only that he or she was not negligent but also that the services were lawful, i.e. that it was according to the rules, the contract and the duty of care (*Foundedaki*, Medical liability in civil law, p. 188). On the other hand, the client needs to prove the causal link between the provision of medical services and the damage. It is however well known that proof of a causal link in cases of medical negligence is particularly difficult (*Foundedaki*, Medical liability in civil law, p. 191). However, in practice a patient is less likely to claim on the basis of contract than on the basis of non-contractual liability for damage (CC arts. 914 ff) [A.P. 1270/1989 EllDik 1991, 765; Court of Appeals of Athens 197/1988 EllDik 1988, 1239]. Finally, some aspects of the provision of medical services and the exercise of the medical profession are regulated in a code of conduct and ethics of the medical profession (25.5/6/7/1955) and a code for the exercise of the medical profession (1565/1939) (*Foundedaki*, Medical liability in civil law, p. 183).

8. The contract for treatment in ITALY is mainly regulated by provisions on the intellectual professions (CC arts. 2229-2238) together with provisions on autonomous work (CC arts. 2222-2228), where there is compatibility. Moreover, the medical deontological code provides for disciplinary rules and measures.

9. In THE NETHERLANDS the most important rules on treatment are codified in the Medical Treatment Contract Act (known as the WGBO) which is included in the DUTCH CC art. 7.7.5. This implies that the treatment contract is treated as a species of the contract of services in general. (CC arts. 7.7.1 and 7.7.5.) Cf. *Sluyters and Biesaart*, De geneeskundige behandelingsovereenkomst,p. 6. In so far as the rules of the treatment contract do not directly apply to para-medical treatment, the rules on services in general are to be applied. The rules on treatment might, however be applied

by way of analogy (*Sluyters and Biesaart,* De geneeskundige behandelingsovereenkomst, p. 6).

10. In POLISH law the treatment contract is normally classified as a civil law contract similar to the contract of mandate (CC art. 750), which indicates an obligation of means. The civil code establishes only a framework for construction of such a contract as most of the obligations arising from such a contract are regulated in special acts, for example: the act on the profession of a doctor and dentist of 5. 12. 1996 (Dz. U. of 2002, nr 21, poz. 204 with changes, the act of 19. 8. 1994 on protection of mental health (Dz. U. of 1994, no. 111, poz. 535 with changes), or the act on medical care institutions of 30. 8. 1991 (Dz. U. 1991, no. 91, poz. 408 with changes). To the civil law liability of the treatment provider rules of the civil code apply.

11. In PORTUGAL article 64 of the Constitution grants citizens universal access to healthcare and sets the framework for the organisation of the national healthcare system, which is regulated by Lei 48/90 of 21/08. In addition, Portugal is a party to the CHRM, which produces direct effects in Portuguese law. Treatment contracts are not specifically regulated by the law. If treatment is performed in a public hospital of the National Healthcare System (the main treatment providers), administrative law applies. If it is carried out in private hospitals or by private practitioners, civil law applies (services contract and the law on non-contractual liability).

12. The provision of treatment is classified in SPAIN as a service contract, regulated in the CC arts. 1583-1587. The Spanish Supreme Court has established the main obligations for the treatment provider. In the TS of 25 April 1994 (RJ 1994/3073) the court gives content to the obligation of means. The treatment provider must (a) apply all available means according to the medical science in the concrete situation so as to comply with the *lex artis ad hoc* (TS 7 May 1997 , RJ 1997/3874); (b) inform the patient, or if applicable the patient's family, about the diagnosis, proposed treatment, prognosis, risks which may materialize and finally about the means (material, instruments or tools) used to provide the service; and when these means may turn out to be insufficient, inform the patient to allow recourse to another medical provider (c) continue with the treatment service until the patient is allowed to leave the medical centre and inform the patient on the risks which may materialize (d) In case of a chronic illness, inform the patient about the necessary care to be observed in order to prevent the deterioration of the health situation or its repetition. The most important rules on treatment are codified in the General Act on Healthcare of April 25th 1986 *(Ley General de Sanidad).* There are many other statutory regulations on specific medical fields and administrative rules to develop such statutory provisions.

13. The SWEDISH rules on medical treatment can be found in the Medical Care Act (1982:763), HSL. According to art. 1:2, first para, the goal is to provide good health and medical care to the same standards for the whole population. Furthermore the health care is to be provided with respect for the equal value of all humans and for the dignity of the individual: those who have the greatest need are to be given priority in medical care, HSL art. 1:2, second para. Concerning the professionals providing medical care, the Act (1998:531) on exercising a profession within the area of health service and medical care applies. The general rule in art. 2:1 provides that the medical personnel must perform their work in accordance with science and reliable experience. A patient must be given competent and careful health service and medical care, fulfilling these requirements. The treatment must so far as is possible be designed and executed in consultation with the patient. The patient is to be treated with consideration and respect. Similar rules are also to be found in the Act on dental care

(1985: 125). The medical Deontological Code of 1990 includes obligations for the medical service provider.

IV.C.–8:102: Preliminary assessment

The treatment provider must, in so far as this may reasonably be considered necessary for the performance of the service:

(a) interview the patient about the patient's health condition, symptoms, previous illnesses, allergies, previous or other current treatment and the patient's preferences and priorities in relation to the treatment;

(b) carry out the examinations necessary to diagnose the health condition of the patient; and

(c) consult with any other treatment providers involved in the treatment of the patient.

COMMENTS

A. General idea

This Article states the steps the treatment provider is to take in order to assess the condition of the patient and to determine adequately the phases of treatment. In order to be able to meet the core obligation to treat, the treatment provider is required to investigate the health status of the patient. This will typically consist of *anamnesis* (information received from the patient), requiring the co-operation of the patient, and of *diagnosis*, i.e. the interpretation of the symptoms of the patient, possibly involving analyses or examinations that the patient has undergone.

During diagnosis, the symptoms and the data gathered by the treatment provider will be interpreted according to his or her technical knowledge and experience, and the result will be the identification of the cause of the ailment. This is the first step in the treatment provider's obligation to treat. After having received the information, the treatment provider needs to diagnose the ailment.

B. Interests at stake and policy considerations

A correct diagnosis is crucial for the success of treatment. A diagnosis which is based on the assessment of the existing health situation, i.e. a probability judgement of the condition of the patient, will provide the basis for the development of an adequate treatment strategy. The diagnosis itself is based on data gathered, followed by an analysis of that data. Medicine can never be 100 per cent exact, and a diagnosis is but a judgement based on scientific probability. Assessment of the existing physical condition of a patient and the subsequent diagnosis must thus conform to the standard of care of the average competent treatment provider.

It is debated, however, whether an incorrect diagnosis can be a ground for liability. It is widely held that an incorrect diagnosis does not constitute a breach of the standard of care, as it would be an error of judgement due to the existence of several possible causes of the ailment. It is often argued that only a blunt mistake in appreciating simple medical data and in interpreting that data, constitutes a breach of the standard of care.

Another issue is how far-reaching this obligation should be. A thorough diagnosis demands time and resources. Overdiagnosis will be lengthy, expensive, unnecessary and risky. Many diagnostic techniques, in particular invasive diagnostic procedures, present risks. They may also be a waste of limited health-care resources.

Illustration 1
During the process of diagnosis, physicians conclude that the patient most probably suffers from tuberculosis. There is, however, a very slight chance that he suffers from Hodgkin's disease, a malignancy of lymph tissue. The physicians decide that the patient should undergo an invasive diagnostic technique, mediastinoscopy, which presents the risk of injury to the vocal cords. The risk materialises in this case. The patient, apart from arguing the fact that he did not consent to the examination, argues that the diagnostic examination was disproportionate to the condition he was in.

On the other hand, incomplete diagnosis will very often contribute to a defective performance of treatment, as not enough data was available in order to enable a standard quality treatment.

C. Preferred option

A reasonableness test is the preferred criterion for assessing how thoroughly the treatment provider must execute the diagnosis. This is in line with the provision in IV.C.–8:104 (Obligation of skill and care). The treatment provider must, in so far as this may reasonably be considered necessary, interview the patient, carry out examinations and consult with other treatment providers in order to assess the underlying health status of the patient. Arguments excluding or limiting the establishment of liability for a defective diagnosis do not seem to be persuasive. Liability exists in so far as the treatment provider failed to carry out the examinations reasonably considered necessary, or the diagnosis judgement was sub-standard.

This reasonability test seems the most adequate approach to how thorough the diagnosis should be and consists in balancing the following factors: (a) standards and guidelines of approved, sound medical practice; (b) economic efficiency in healthcare resources allocation and (c) risk–benefit analysis.

Under this Article, the treatment provider, in so far as may reasonably be considered necessary, is to consult with other treatment providers involved in the treatment or previous treatment of the patient, in order to obtain important information on clinical history, allergies, medication, other treatment the patient is receiving, etc., so as to acquire more data relevant to the diagnosis.

NOTES

I. Overview

1. A duty to perform an adequate diagnosis exists in all countries analysed, though the strictness of the standard of care that the treatment provider must employ in the diagnosis varies. In ENGLAND, FRANCE, GERMANY, ITALY, SCOTLAND, SPAIN, THE NETHERLANDS and PORTUGAL diagnosis must be carried out according to the standard of care of an average, dutiful treatment-provider. In DENMARK, FINLAND and SWEDEN, the standard of care of diagnosis is higher: in Finland the standard is that of an experienced treatment-provider and in Denmark and Sweden that of a specialist treatment-provider. In England, Scotland, The Netherlands, and Portugal, the treatment-provider enjoys a large discretion in the choice of the diagnostic methods. In these countries, due to the evaluative nature and uncertainty of

diagnosis, it is considered that there are only liability consequences for an imperfect diagnosis if the treatment-provider deviated from acceptable medical standards or respectable medical opinion. In Germany, a fundamental mistake in diagnosis may have as a consequence a shift of the burden of proof to the treatment-provider.

II. Liability for a defective diagnosis

2. In DENMARK provided that the treatment was carried out in a public hospital, the patient can be compensated irrespective of any diagnosis fault committed by the treatment provider. According to art. 2(1) of the Patient Insurance scheme, avoidable injury caused by diagnosis can be compensated by applying either one of two rules: the specialist rule or the equipment rule. According to the first rule, injury is deemed avoidable if the optimal use of the best specialist skill would have prevented it. According to the second rule, any failure of medical equipment used to perform diagnosis or treatment objectively triggers compensation for the injury suffered. Cf. *Erichsen*, Medicine and Law 2001, p. 359; *Von Eyben* Domstols afgørelser after patientforsikringsloven, 31; *Grünfeld*, De nordiske patientforsikrings ordninger-ligheder og forskelle, p. 70.

3. In ENGLAND and SCOTLAND the doctor would be liable for a defective diagnosis if it amounts to a failure to exercise reasonable care and skill. *(Maynard v. West Midlands RHA* [1985] 1 All ER 635), *Moyes v Lothian Health Board* 1990 SLT 444).

4. In FINLAND injury caused by diagnosis is compensated under art. 2(1) of the Finnish Patient Injury Law if an experienced treatment provider could have conducted the diagnosis in such a way that the injury would have been avoided. Cf. *Lahti*, Towards a comprehensive legislation governing the rights of patients, 211.

5. A treatment provider can be held liable in case of a mistake in diagnosis in GERMANY. The standard of care in diagnosis is influenced by the diagnosis media available (BGHZ 72, 132; BGH NJW 1982, 697; 1994, 801; *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 50 III; *Gehrlein*, Leitfaden zur Arzthaftpflicht, p. 38). Due to the fact that the patient must prove causation, normal diagnosis mistakes are irrelevant in practice (*Gehrlein*, Leitfaden zur Arzthaftpflicht, p. 38). However, in case of a fundamental mistake in diagnosis the burden of proof shifts to the treatment provider. Cf. *Gehrlein*, Leitfaden zur Arzthaftpflicht. BGH NJW 1996, 1589; 1992, 2962; 1988, 1513; VersR 1981, 1033; CA Saarbrücken 26 August 1998, NJW-RR 1999, 176. A fundamental mistake in diagnosis is one which is seriously disconform to sound, accepted medical practice. One example of a fundamental diagnosis mistake is that of a physician who failed to understand the patient's need of urgent cancer therapy from a histologic examination (BGH NJW 1989, 2318). In another case, the doctor failed to diagnose a bacterial infection despite the manifestation of obvious symptoms (CA Karlsruhe VersR 1989, 195). Long distance diagnosis is forbidden (*Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 50 VI; BGH VersR 1959, 589; 1961, 1039; 1971, 1123; 1975, 283; BGH DMW 1983, 1571; CA Hamm VersR 1980, 291.) unless in emergency or other exceptional circumstances (*Gehrlein* 2000, 39; BGH NJW 1979, 1248). Excessive diagnosis is addressed in the same way as a mistake in diagnosis (Cf. *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 50 III; CA Zweibrücken VersR 1991, 427), as it involves increased risks for the patient.

6. Under GREEK law if a patient suffers damage to health due a defective diagnosis, on the basis of which the patient acted or did not act, then the provider of medical services is liable for that damage. (For an omission to diagnose, see A.P. 1063/2000).

7. In FRANCE if diagnosis is not in conformity with the treatment provider's obligation to provide attentive, diligent care according to accepted sound medical practice, the

treatment provider can be liable, cf. CA Paris 13 December 1996, GazPal 1998, 1, somm, 69, note *H. Vray*.

8. In ITALY surgical activity also includes a preliminary diagnostic and prognostic phase. In fact, the first obligation a treatment provider has to fulfil is collecting the information about the existing health situation of the patient (*Alpa*, Riv.it.med.leg. 1999, fasc. 1 (February), p. 26). For this, the provider needs the collaboration of the patient. Therefore, in those cases in which the patient is in a state of incapacity, the doctor will have to seek the help of relatives or friends and in any case the family doctor. Since this is the beginning of the performance of the obligations under a treatment contract, a treatment provider who does not perform a correct diagnosis will be liable for non-performance of those obligations.

9. A diagnosis must be based on adequate research and adequate information in THE NETHERLANDS. A failure to adequately research cannot be justified by external factors such as a bad organisation of the unit, lack of staff etc. The doctor may restrict the research to those examinations which may reasonably be considered to be required. If the patients have serious complaints or symptoms a duty to examine more scrupulously may arise as long and in so far as there is no sufficient explanation for these complaints or symptoms available. The doctor is not required to investigate the presence of an improbable risk without indications of such a risk manifesting itself. An incorrect diagnosis may amount to a non-performance even if it was based on sufficient research. Such will be the case if the doctor has not taken the possibility of a danger seriously enough. However, the mere fact that, with the benefit of hindsight, the diagnosis turns out to have been wrong, does not lead to liability. Such would, for instance, not be the case if the doctor‘s conclusions were scientifically sound, which may be the case with very rare disorders or disorders that are difficult to diagnose. Moreover, any diagnosis – as does the *anamnesis* – calls for a certain element of evaluation: in order to be absolutely certain about a diagnosis, it may be necessary to perform certain operations that may be risky or otherwise unwelcome. In such a case, a certain degree of incertitude is to be accepted, as long as the risk that comes along with the incertitude is acceptable, taking all circumstances into account. With regard to the choice of diagnostic methods, a large discretion is allowed to the doctor provided that the course followed is in compliance with generally accepted medical-technical views. Cf. HR 9 November 1990, NedJur 1991, 26, *Speeckaert/Gradener; Gevers*, De rechter en het medisch handelen[3], p. 18.

10. A diagnosis is listed as one of the activities of the doctor under POLISH law. (The Act on the Profession of a Doctor, art. 2 para. 1). The diagnosis should be made in accordance with the current medical knowledge, available methods of diagnosing, rules of the professional ethics and due diligence (art. 4). Therefore if the diagnosis is defective the doctor may be held liable.

11. The treatment provider can be held liable in case of defective diagnosis under PORTUGUESE law: CA Coimbra, 4 April 1995; CJ XX-1995, II, 31; STA 17 June 1997; AD XXXVII-1998, 436, 435; Faure and Koziol (-*Sinde Monteiro and Veloso*), Cases on Medical Malpractice, p. 175 if the *leges artis* are not met. *Esperança Pina*, A Responsabilidade dos Médicos[3], p. 102, suggests that the standard of care in this case is not that of the average competent doctor, rather consisting of the evaluation of the methods employed in the given circumstances.

12. Interpreting the symptoms of the patient is one of the services provided by the treatment provider and must be fulfilled in accordance with the requirements of the "*lex artis ad hoc*" under SPANISH law. Therefore, when a diagnosis is provided without observing due diligence, the doctor may be held liable. However, a wrong

diagnosis does not necessarily imply by itself that the treatment provider will be liabile: according to the Supreme Court, some damage caused by the negligence of the doctor must be proven in any case, in order to trigger liability (TS 20 June 1997, RJ 1997/4881).

13. According to the SWEDISH Patients Injury Act (hereinafter PL) compensation is granted if it is predominantly probable that the damage was caused by a wrong diagnosis, PL § 6 at 3. This is the case if factually recognisable signs of disease or damage are ignored or incorrectly interpreted, so that treatment does not take place or goes in the wrong direction. A prerequisite is however, that an experienced specialist would have come to the right conclusion if he or she had had the same basis for a diagnosis, see *Sverne and Sverne,* Patientens rätt[3], pp. 91 ff.

IV.C.–8:103: Obligations regarding instruments, medicines, materials, installations and premises

(1)The treatment provider must use instruments, medicines, materials, installations and premises which are of at least the quality demanded by accepted and sound professional practice, which conform to applicable statutory rules, and which are fit to achieve the particular purpose for which they are to be used.

(2) The parties may not, to the detriment of the patient, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

This Article addresses the obligations of the treatment provider regarding the instruments, medicines, materials, installations and premises used for the treatment. One of the characteristics of contemporary medical practice is technological evolution. Medical science and practice are more and more dependent on sophisticated technological devices, presenting specific risks. Although the efficiency of treatment has significantly improved, the chance of an unpredictable adverse event remains and in some respects may even have increased (cf. *G. Viney*, (ed.), *L´indemnisation des accidents médicaux,* L.G.D.J., Paris, 1997, p. 108).

The medical products used, including devices, instruments and drugs, must conform to approved professional standards and should be adequately inspected, monitored and maintained. Treatment providers must avoid using obsolete or malfunctioning devices, materials and installations.

B. Interests at stake and policy considerations

The materials, instruments, devices, installations and products used during treatment are essential for the performance of the treatment contract. They must be of at least standard quality, and must be adequately maintained and operated in order to insure the safety of patients. This input brings, especially in modern high-technology based medicine, an increase in the potential benefits of treatment, but sometimes also an increase in the risks because of the complexity or inherent hazardousness of such input.

Defective input is, according to statistical data, a common cause of failure to perform properly the obligation to treat. Quite often in hospital settings, such defective input is a latent source of potential errors.

> *Illustration 1*
> A patient undergoes an X-ray examination. Radiation exposure should be between 50 and 200 millirem, but due to a defect in the X-ray machine, the patient was exposed to 1 rem, a very high and potentially harmful dose of radiation. In this case, a medical device malfunctioned, and the patient may have sustained injury resulting from the examination.

The installations where treatment is carried out can also contribute towards non-performance: a good example is ‘nosocomial’ infections, infections endemic in hospital premises. Some of these pathogenic agents are drug resistant. Patients who are subject to invasive diagnosis or

treatment as well as prolonged hospitalisation are often prone to contract such infections. Measures can be taken in order to reduce the impact of nosocomial diseases in a hospital, but they can never be eliminated: minimising time between admission and surgical procedures, choosing appropriate surgical prophylaxis, isolation facilities, screening procedures, effective hospital cleaning and disinfection. In Britain, approximately 15 per cent of all patients admitted to hospitals contract hospital-related infections. In France, the probability of contracting a serious infection after complex surgery is 33 per cent; in Denmark, however, only 2 per cent.

> *Illustration 2*
> A patient who underwent heart surgery contracts a nosocomial, drug-resistant infection in spite of all the aseptic measures taken. The patient sustains an illness as a consequence of the defective nature of the installations used for the performance of the treatment.

The main policy question in relation to this Article is the intensity of the duty of care of the treatment provider while employing this sort of input. On the one hand, it can be argued that the treatment provider should be liable only if there is a breach of the duty of care while employing this kind of input, i.e. not operating, servicing or maintaining the input in conformity with applicable regulations, equipment instructions or approved practise, or not meeting the required standard of care. This is the traditional view on medical malpractice, which stresses the importance of the deterrent effect of fault-based liability.

On the other hand, it is sometimes held that the treatment provider should be strictly liable, as there should be an obligation to ensure the safety of the patient. According to this position, the treatment provider has an obligation of result regarding the safety of the patient, meaning that it must shield the patient from harm from defective or insufficient choice, servicing, maintenance, operation or design of medical equipment, devices and installations.

A middle position establishes a presumption of fault on the part of the treatment provider, allowing the provider to prove that it has acted according to the required standard of care and applicable regulations or approved medical practice in order to avoid harm to the patient.

C. Comparative overview

The duty of the treatment provider concerning the use of adequate input such as instruments, medicines and materials exists in all analysed legal systems, though the consequences of the breach of this duty varies. In The Netherlands and Portugal the treatment provider is held liable in so far as it breached the standard of care while using or administering this input. The same is true in France, Germany and Spain, though the burden of proof of breach of this duty may shift to the treatment provider. In Denmark, Finland and Sweden, liability is strict.

The duty of the treatment provider to use adequate installations is also recognised in all countries, and is of particular importance in the case of hospital-acquired infections. However, in Germany, France and Spain the burden of proof of breach of the duty may shift to the treatment provider. In Denmark, Finland and Sweden injury caused by preventable infections is compensated.

D. Preferred option

The preferred option is a strict liability of the treatment provider regarding the materials, instruments, devices, products and installations used in performing the treatment obligations. This input must be fit for its purpose.

Given the complexity of, and inherent risk associated with, much of that input a strict liability seems appropriate. The complexity of such devices and the possibility of a technical or human malfunction while operating them render such a strong liability a necessity. There is also a significant risk of an unexpected random failure of the equipment, especially if it is very sophisticated or complex.

This approach is in the interests of patients as it makes it easier to obtain compensation for treatment injury: it is not necessary to establish fault on the part of the treatment provider. To some extent, it is also in the interests of healthcare professionals as there is no need to establish that a particular professional is to be 'blamed' for the occurrence of the injury. The presence of defective equipment in a treatment providing institution is regarded as something which can be adequately controlled and prevented only at the level of the system or institution. This is a shift from personal to collective or organisational liability.

Moreover, empirical studies suggest that the deterrent effect of fault-based liability at the individual level in relation to defective input is ineffective. Studies point out that integrated proactive measures (surveillance and checking of material, equipment, devices and products) are more suitable to prevent such medical accidents.

In the aftermath of several tragedies related to defective input in treatment (HIV and Hepatitis B/C contaminated blood; Thalidomide-related handicaps, etc.) as well as the high statistical incidence and impact of the materialisation of some input risks (e.g. in France more people are affected by nosocomial infections than by car accidents), public opinion became very sensitive regarding the issue. Understandably, policy-makers are very keen on this approach as it is a more adequate way of achieving efficient compensation for such injuries and preventing mass litigation and the difficult financial consequences that can emerge from it.

With regard to paragraph (2) it should be noted that the prohibition on contracting out does not exclude derogations to the benefit of the patient. This could be particularly important in an emergency where the choice may be between using inadequate instruments and materials or allowing the patient to die or suffer irreparable harm. In such a case, of course, the patient could consent to the use of the best instruments or materials available.

NOTES

I. Overview

1. In all countries the treatment provider has a duty to use adequate material, instruments, devices, products and premises while carrying out treatment on patients, though the consequences of the use of defective input media by treatment providers differs significantly in the different countries. In THE NETHERLANDS, the healthcare provider is liable if it breaches its standard of care while using defective materials and

instruments. The regime is similar in PORTUGAL, though the burden of proof that due care was used shifts to the treatment provider in so far as high-risk equipment is employed. In GERMANY, the treatment provider can be held liable if it used defective input. In addition, if the injury could have been prevented, the burden of proof shifts to the treatment provider. In FRANCE and in SPAIN the law moved towards imposing a shift of the burden of proof to the treatment provider, who will have to prove that it took due care in the use of medical devices, instruments and input. This shift is now consolidated in French law, though in Spain the law is still not defined regarding this aspect. Finally, in DENMARK, FINLAND and SWEDEN, if defective equipment is used, the treatment provider is strictly responsible (the *Equipment Rule*). In Denmark, the underlying causes of the defectiveness are not relevant.

2. Other specific objective liability regimes exist in several countries concerning vaccine accidents, use of contaminated blood and blood products and hospital-acquired infections. Concerning this category of infections, in DENMARK, FINLAND and SWEDEN preventable infections are compensated. In GERMANY the burden of proof that all hygienic measures were taken shifts to the treatment provider. The burden of proof is also shifted to the treatment provider in FRANCE and in SPAIN, though the only valid defence of the treatment provider is the endogenous origin of the infection, i.e., that the patient carried the pathogenic agent, a difficult burden to discharge.

II. Materials, instruments and tools

3. In DENMARK, in the public sector, any injury caused by defective equipment is compensated under the "equipment rule" of Patient Insurance Act § 2(1)(b). The criterion is totally objective, and the underlying causes of the defectiveness are not relevant to compensation. Cf. *Grünfeld,* De nordiske patientforsikrings ordninger-ligheder og forskelle; *Erichsen,* Medicine and Law 2001, p. 362. Avoidable infections can be compensated according to the specialist rule of Patient Insurance Act § 2(1)(a) or the alternative treatment rule of § 2(1)(c). Unavoidable, unendurable infections that the patient cannot be expected to tolerate are compensated according to the "reasonableness rule" of § 2(1)(d). Cf. *Grünfeld,* De nordiske patientforsikrings ordninger-ligheder og forskelle.

4. Treatment providers can be held liable for the use of medical products and devices under section 2 of the UK Consumer Protection Act 1987. A special vaccine damage scheme (Vaccine Damage Payments Act 1979) imposes strict liability on the entity administering the vaccine.

5. In FRANCE, the use of medical devices and products is considered as an *obligation de sécurité de résultat,* which results in an irrefutable presumption of fault of the treatment provider (strict liability). Regarding the use of defective medical devices, see: Cass.civ. I, 9 November 1999: D. 2000, 117, note *P. Jourdain*; JCP 2000.II.10251, note *P. Bruin*; Cf. *Lambert-Faivre*, Droit du dommage corporel[5], nos. 594 ff; *Castelletta,* Responsabilité médicale[2], p. 108); (*Tabouteau,* La sécurité sanitaire[2], p. 257. Art. L.1142-1 CSP. There are some doubts whether the *obligations de résultat de sécurité* developed by case law regarding the use of defective equipment are still valid after the changes in the law of 4 March 2002. Cf. (*Jourdain,* La réforme de l'indemnisation des dommages médicaux, p. 92. The same solution is used regarding products used, such as pharmaceutical products (Cass.civ. I, 7 November 2000, Bull.civ. I, no. 279; JCP 2001.I.340 no. 23, *G. Viney*). The FRENCH system is very sensible to the problem of compensation of nosocomial infections. The awareness and surveillance of the national healthcare system, as well as the fact that such

infections cause more accidental deaths than vehicle, working and domestic accidents certainly contribute to that sensibility. Hence, case law has tended to impose a presumption of fault in the case of nosocomial infections based on an *obligation de résultat* (Cass.civ., 29 June 1999, Staphilocoques dorés, JCP 1999.II.10138 rapport Sargos: "*Attendu qu´un médecin est tenu, vis-à-vis de son patient, en matière d´infection nosocomiales, d´une obligation de sécurité de résultat, dont il ne peut se libérer qu´en rapportant la preuve d´une cause étrangère*."; Cass.civ. I, 21 May 1996, D. 1997, Somm. P. 287 (arrêt Bonicci); CE 9 December 1988, arrêt Cohen; CE 1 mars 1989, arrêt Bailly; CE 14 juin 1991, arrêt Maalem. Cf. (*Lambert-Faivre*, Droit du dommage corporel[5], no. 723); (*Castelletta*, Responsabilité médicale[2], p. 109); (*Jourdain*, La réforme de l'indemnisation des dommages médicaux, p. 90)). The only defence that the treatment provider can oppose is the endogenous character of the infection, i.e., that the infective pathogenic agent was carried by the patient, which is quite difficult to prove. After the law of 4 March 2002, this case law has been confirmed art. L. 1142-1 CSP. The only difference is that the responsible person can only be a hospital or a clinic and not the individual physician.

6. Injury caused by the use of defective equipment is compensated according to FINNISH art. 2 (1,2) PSL and infections according to art. 2 (1,3) FPL. Cf. *Mikkonen*, Medicine and Law, p. 347.

7. In case of injuries caused by the use of defective input, the treatment provider can be held liable under GERMAN law. If that injury could have been prevented, the burden of proof shifts to the treatment provider (BGH NJW 1978, 584; CA Hamm NJW 1999, 1787; *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 109; *Gehrlein*, Leitfaden zur Arzthaftpflicht, p. 52). In case of injury caused by nosocomial infections, the burden of proof shifts to the treatment provider, who must prove that it employed all necessary hygienic measures to prevent such infections in the premises (BGH NJW 1991, 1541; 1999, 3408).

8. The health provider is responsible for the adequacy of the materials, instruments and tools used for the performance of the treatment under the law of THE NETHERLANDS. This was first accepted by the *Hoge Raad* in the case of *Cadix/Aluminium* (HR 13 December 1968, NedJur 1969, 174) and has been codified in CC art. 6:77. If the inadequacy of the materials, instruments and tools lead to a non-performance, the health provider is liable for that.

9. Under POLISH law equipment in hospitals must be of at least average quality. This does not mean, however, that the average quality is always sufficient, and in some cases requirements concerning quality should be set on a higher level. Non-fulfilment of these requirements constitutes fault on the part of the hospital or the doctor. In the case of a doctor a lack of sufficient knowledge is also considered as a fault (*Nesterowicz*, Prawo i Medycyna 2000, 163).

10. Under SPANISH law the means used to provide medical services must be of average quality in accordance with the current status of the medical science, and appropriate to the specific circumstances of the case. TS 26 May 1997, RJ 1997/4114: the medical institution is under the obligation to maintain the medical instruments and installations in good condition. In TS of 1 July 1997, RJ 1997/5471 and TS 21 July 1997, RJ 1997/5523 the Supreme Court imposes an objective liability. It considers the medical institution as objectively liable in accordance with the General Consumers Act because the patient was a consumer (art. 3 ConsProtA) who was provided with a medical service (arts. 147 and 148 ConsProtA) and suffered damage which gave rise to objective liability (arts. 147 and ff ConsProtA). When the products or services provided to patients by treatment providers do not comply with the levels of purity

presumed in the General Consumers Act, the risks are to be assumed by the medical institution. TS 25 April 1994, RJ 1994/3073: in the case that the materials, tools or instruments turn out to be insufficient to provide the treatment, the medical provider must inform the patient to allow recourse to another medical provider.

11. The patient may obtain compensation according to the SWEDISH PL art. 6, first para, art. 2, if it is predominantly probable that the injury was caused by defects in a medical technical product or hospital equipment used for examination, care, treatment or other similar measure or the improper use thereof. According to HSL art. 2e, the personnel, location and equipment necessary to provide good health care must be at hand where health and medical care is carried out.

12. In PORTUGAL an obligation of security exists if the materials, instruments and tools are dangerous by their very nature. The treatment provider is presumed liable unless it proves that all care was used to prevent injury (CC art. 493 para. 2; *Figueiredo Dias and Sinde Monteiro*, Responsabilidade médica na europa ocidental, p. 38; Faure and Koziol (-*Sinde Monteiro and Veloso*), Cases on Medical Malpractice, p. 176).

IV.C.–8:104: Obligation of skill and care

(1) The treatment provider's obligation of skill and care requires in particular the treatment provider to provide the patient with the care and skill which a reasonable treatment provider exercising and professing care and skill would demonstrate under the given circumstances.

(2) If the treatment provider lacks the experience or skill to treat the patient with the required degree of skill and care, the treatment provider must refer the patient to a treatment provider who can.

(3) The parties may not, to the detriment of the patient, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

The treatment provider has, as a service provider, an obligation of skill and care under IV.C.–2:105 (Obligation of skill and care). This Article provides some further guidance. It uses the objective standard of a reasonable treatment provider exercising and professing care and skill.

The objective standard can be modulated by specific subjective or concrete factors, such as the specialisation of the treatment provider, the circumstances or the agreement of the parties. Thus, the criterion for assessment of the standard required is that of the reasonably competent professional, acting in conformity with the guidelines, Directives and protocols set by the current state of the medical science, under the concrete circumstances in which treatment must be performed *(lex artis ad hoc).*

Illustration 1
A patient has broken her leg when she fell during a hike. She is treated at a hospital. The doctor, a general practitioner attached to the hospital, is to treat the patient with the skill and care of a reasonable general practitioner. He treats the patient, after having judged the data from an X-ray examination, by putting on a splint.

Illustration 2
The same doctor is called later at night to accompany ambulance personnel and to help the victim of a car crash on the spot. No X-ray device is available. In this case, the circumstances (time, place, lack of means) significantly decrease the demands as regards the skill and care required from the doctor.

Specialised medical skills and experience will raise the standard of care required from the health-care professional. The more specialised or experienced a health-care professional is, the greater the skill which can be expected to be demonstrated. Inexperience is no defence, as even a starting health-care professional is expected to have at least average skill and competence.

Illustration 3
A patient, whose particular type of skin rash was wrongly diagnosed by a general practitioner, receives inadequate treatment. After some time, she decides to consult a dermatologist, who diagnoses a rare skin disease and prescribes adequate therapy. This

specific knowledge of skin diseases may not be expected from a general practitioner, but it would be expected from a dermatologist.

The treatment provider must meet the standard of the average reasonable health-care professional. Whenever a treatment provider acknowledges that he or she is not skilled enough, or does not have the specialised skill fit for the treatment of the concrete ailment of the patient, there is an obligation to refer the patient to a specialist in that field, or alternatively, to consult with such a professional.

An "unconventional" or "alternative" health professional (e.g. an acupuncturist) has to live up to the normal standard of care expected in that field and what may reasonably be expected of the treatment provider given the normal care that the patient may expect and what care could have been expected in regular medicine.

B. Interests at stake and policy considerations

This is a key provision in establishing liability for non-performance of the treatment provider's obligations. There are two contrasting approaches to this problem in Europe. The traditional negligence approach holds the treatment provider liable only in so far as it did not duly perform the obligation of skill and care. According to the second approach, the compensation of the patient does not depend on any such non-performance, and compensation is provided or backed up by a special compensation scheme.

In the case of negligence, several interests are at stake in defining and interpreting the standard of care. A very stringent standard of care will trigger lower activity levels, as the treatment provider will perform treatment more thoroughly, as well as the engagement of treatment providers in defensive medicine, avoiding the use of any risky techniques, even if, after a cost–benefit balance these seem to be more in the interests of the patient. Another economic consequence is the inflation of insurance premiums, the cost of which will eventually spread to the final costs of health care. On the other hand, a less stringent standard of care would make it more difficult for a patient to obtain compensation, a fact that could result in unfairness, professional impunity and costly consequences for the patient or the welfare system. Besides, the overall quality of health care might potentially decrease, unless other accountability mechanisms (disciplinary or penal) are reinforced.

Another important discussion relates to the modulation of the standard of care when inexperienced health professionals are concerned. It is traditionally held that the standard of care is an objective threshold that cannot be lowered. If a healthcare professional cannot comply with the minimum standard of care due to inexperience, the patient should be referred to an experienced health professional. On the other hand, it is held that, in the field of medicine, experience only comes with practice, and as the training of health-care professionals benefits society at large, society should internalise the risks inherent to their training.

Extending liability beyond fault, in situations where treatment accidents are concerned, presents many problems of both a legal and economic character that only with difficulty can be solved in the field of traditional liability law. A system can be developed in which such treatment accidents can be compensated, shifting the treatment risks away from the patient or welfare system. However, it would not be reasonable or fair to impose them on the treatment

providers. Though comparative research shows that several countries have successfully implemented compensation of treatment accidents independent of any breach of a duty of care, these compensation schemes are implemented either through insurance law or through administrative law, sometimes replacing liability law for most practical purposes.

C. Comparative overview

In Austria, England, France, Germany, Greece, Italy, The Netherlands, Scotland, Spain, Portugal the treatment provider owes the patient the care and skill of a reasonable treatment provider of average competence. This is an objective standard of care. In Denmark, Finland and Sweden, where no-fault patient insurance schemes operate, the standard of care is more stringent: patients will obtain compensation if the injury sustained could have been prevented had the patient been treated by a specialist treatment provider.

It is unanimously held that the standard of care is not lowered below the general standard if the treatment provider is inexperienced. If the treatment provider is a specialist, the standard of care is raised in Austria, England, Germany, The Netherlands, Scotland, Spain and Portugal, but not in France and Italy. In Denmark, Finland and Sweden the general standard of care is already that of a specialist treatment provider.

In medical experimentation, the standard of care does not change in France, Germany, Italy, The Netherlands, Scotland, Spain and Sweden. The standard of care is, in practice, more stringent in Austria, England and Greece, and strict liability exists in Portugal. In the case of unconventional treatment, the treatment provider appears to be bound by the general standard of care.

The patient bears the burden of proof of the breach of this duty in Austria, England, France, Germany, Greece, Italy, The Netherlands, Portugal, Scotland and Spain. In Italy, Germany, Greece, The Netherlands, Portugal and Spain the burden of proof can be alleviated or shifted to the treatment provider in exceptional circumstances. In Denmark, Finland and Sweden, due to the non-adversarial nature of the no-fault patient insurance schemes, the circumstances concerning the injury sustained by the patient are investigated *ex officio* by the patient insurance consortium.

D. Preferred option

This Article establishes, as a general principle, a fault-based liability system for treatment contracts, apart from the obligations under IV.C.–8:103 (Obligation regarding instruments, medicines, materials, installations and premises). The main reason is that a non-fault system demands complex political decision-making and a financial mechanism to back it. A system compensating treatment accidents regardless of fault, where the costs of accidents could be spread and reduced, can only reasonably be addressed by specific insurance or social solidarity fund schemes, beyond the scope of liability law.

This does not preclude the implementation of voluntary or statutory insurance or social schemes in order to compensate some treatment accidents on a strict liability or no-fault basis. Additionally, specific statutes or regulations of the national healthcare systems may impose a different approach beyond this general principle.

Fault thus consists in non-conformity with the required standard of care. The standard of care set by this provision is a carefully balanced objective or abstract standard, though it can be modulated by some subjective or concrete factors, such as experience, circumstances and magnitude of the risks involved.

The standard of care required from an experienced health-care professional should not be below that required from an average competent health-care professional. This introduces more certainty and a higher level of patient protection. It should be noticed, however, that, although inexperienced health-care professionals are not exempted from the general standard of care, society as a whole benefits from their training, and so society and the healthcare system should internalise the consequences of mishaps caused by those inexperienced healthcare professionals. This is reflected in some other provisions in this Chapter which provide to some extent for collective and organisational liability instead of personal liability. See IV.C.–8:103 (Obligations regarding instruments, medicines, materials, installations and premises) and IV.C.–8:111 (Obligations of treatment-providing organisations). Likewise, paragraph (2) of this Article recognises the problem of inexperienced practitioners by providing for the patient to be referred to a treatment provider having the necessary experience or specialised skill.

NOTES

I. Overview

1. In AUSTRIA, ENGLAND, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, SCOTLAND, SPAIN, PORTUGAL, the treatment provider is held liable in so far as it breached its duty of care to the patient. This duty of care is benchmarked by an objective standard set by the law. The standard of care consists of the care that a reasonable averagely skilled healthcare provider would employ in that circumstance. In addition, the healthcare provider is bound to respect the standards of medical practice *(leges artis)*. While in England compliance with the standard of care is benchmarked by the execution of the treatment in a fashion that could be accepted by a respectable body of medical opinion (even though a minority opinion), in Austria, France, Germany, Greece, Italy, The Netherlands, it is benchmarked by the compliance with medical standards and regulations. In a contrasting way, in DENMARK, FINLAND, SWEDEN, *no-fault* patient insurance schemes set up the compensation regime, which will compensate injured patients in so far as the treatment was carried out below the care that would be expected from a specialist treatment provider, or in Denmark and Sweden if, in hindsight, an alternative treatment technique existed, and had it been employed, would probably not have caused the injury to the patient.
2. It is unanimously considered that the standard of care cannot be lowered below the level of the average treatment provider.
3. Regarding the increase of the standard in case of specialised medical treatment, there are several solutions. In AUSTRIA, ENGLAND, GERMANY, THE NETHERLANDS, SCOTLAND, SPAIN, PORTUGAL, the standard of care is raised if the treatment provider is a specialist. It is raised to the standard of a reasonable averagely skilled specialist treatment provider. On the other hand, in FRANCE and ITALY, the standard of care is not raised by expertise. It is unclear if expertise raises the standard of care in GREECE. In DENMARK, SWEDEN the standard for all

medical treatment is that of a specialist treatment provider, and in FINLAND that of an experienced treatment provider.

4. In the different countries analysed, the law provides different solutions to the standard of care in medical experimentation. In FRANCE, ITALY, SCOTLAND, SPAIN and SWEDEN the standard of care set by the law does not change. In THE NETHERLANDS the standard is the same, though the treatment provider would not be responsible for the materialisation of an unforeseen risk. In AUSTRIA, ENGLAND and GREECE, especially due to the influence of ethics committees, the standard of care is, in practice, more stringent. In GERMANY the standard of care is not raised, though a cost-benefit analysis must be carried out and have a positive outcome so that the clinical trial is allowed. In addition, insurance is compulsory. Finally, in PORTUGAL there is strict liability and compulsory insurance in case of experimental treatment.

5. In AUSTRIA, ENGLAND, FRANCE, GREECE, ITALY, THE NETHERLANDS, PORTUGAL, SCOTLAND AND SPAIN, the patient bears the burden of proof of the breach of standard of care by the treatment provider, the causal link between the treatment and the injury. In England, the patient must discharge the burden of proof even if the treatment provider deviated from approved medical practice. In Italy, GERMANY, Greece, Portugal and Spain the burden of proof can be facilitated or shifted in exceptional circumstances. In The Netherlands the treatment provider has a duty to help the patient to substantiate the claim in a court of law. In DENMARK, FINLAND and SWEDEN the patient insurance consortium investigates and handles claims of its own motion.

6. Though information on this issue is scarce, in FRANCE, THE NETHERLANDS and PORTUGAL, the standard of care expected from an unconventional treatment provider is the general standard of care of a conventional medical treatment provider.

7. DENMARK, FINLAND, ICELAND and NORWAY operate no-fault patient insurance schemes. In FRANCE, there is strict liability in some cases, and there is a compensation mechanism for serious treatment accidents, irrespective of fault, under the principle of solidarity. In SPAIN there is an ongoing shift towards objective liability regarding medical injury in hospitals. In ITALY there is an almost strict liability for routine treatment. In PORTUGAL liability is strict if high-risk equipment is used, or in case of experimental treatment. In the UNITED KINGDOM and THE NETHERLANDS the adoption of a no-fault compensation system has been debated by the competent public authorities, though in the UK the decision was not to adopt it.

II. General standard of care

8. The AUSTRIAN law on doctors expresses the required standard of care in wide and vague terms. § 49(1) refers to a diligent treatment whereby the doctor has to act according to the insights of science, experience, and existing regulation in order to protect both the sick and the healthy. The following paragraphs state that a doctor has to practice his or her profession personally and directly, however, allowing for the possibility of assistance under direction or transfer to specialists. In general, everyone has to comply with the ordinary degree of care and attention (CC § 1297). Now CC § 1299 raises that (standard) level of diligence up to the usual degree of care and attention that is necessary for the task in question. The criterion for establishing what amounts to a bad treatment consists of a comparison of the actual behaviour and the course of action of a reasonable and diligent expert. In other words, the treatment in question is assessed against the background of (hypothetical) standards of a profession. What exactly these standards are depends on the circumstances of the case,

mainly the contractual relationship and the necessary diligence according to CC § 1299. Nonetheless, one can establish beyond feasible doubt that a doctor is not obliged to live up to the highest standards of the profession but merely has to possess the knowledge of an average expert in the field. Case law, Codes of Conduct and expertise can help in assessing the skills and expertise required by the medical profession.

9. In DENMARK in public medical practice, the patient is entitled to compensation for treatment injury regardless of fault, according to PIA art. 2, provided that the injury was avoidable. See the Notes to the preceding Article.

10. In ENGLAND and SCOTLAND there is an objective standard (*Glasgow Corp. v. Muir* [1943] AC 448 at 457. The standard of care is objective and impersonal in the sense that it eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Breach of duty is tested by the 'standard of the ordinary skilled man exercising and professing to have that special skill' (*McNair J.* in *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, 586, developing the Scottish case of *Hunter v. Hanley* 1955 SC 200). This test does not demand an optimal level of care from the professional, just the ordinary skill of an average practitioner. Thus the treatment provider will not be held liable in so far as he or she acted 'in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular area (…) a man is not negligent merely because there is a body of opinion who would take a contrary view' (*Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, 586). The doctrine of *Bolam* was confirmed by further case law: *Whitehouse v. Jordan* [1981] 1 WLR 246; *Maynard v. West Midlands RHA* [1985] 1 All ER 635. Cf. *Kennedy and Grubb*, Medical Law[3], p. 416); *Brazier*, Medicine, patients and the Law, p. 71; Markesinis and Deakin (-*Grubb*), Tort Law, p. 268 , developing the Scottish case of *Hunter v. Hanley 1955 SC 200*. The conformity with the standard of care, the generally accepted medical practice, is evaluated by healthcare professionals. This is criticised, as 'experts may blind themselves with expertise'. Cf. Montrose, Is negligence an ethical or a sociological concept?, p. 259. This author considers that treatment providers should be held liable for failure to take precautions against risks known to the profession, or reasonable risks. Since *Bolitho v. City and Hackney HA* (1993) 13 BMLR 111, expertise can be overruled if the court decides that treatment, in spite of being executed according to generally accepted practice, unreasonably and unnecessarily puts the patient at risk. Cf. *Kennedy and Grubb*, Medical Law[3], p. 441.

11. Under the FINNISH Status and Rights of Patients Act (1992/785) § 3 patients have a right to good quality healthcare and medical care. The care has to be arranged so that the patient's human dignity is not violated and the patient's convictions and privacy are respected. According to art. 2(1) of the FINNISH PIA, compensation is allowed to a patient suffering from an avoidable injury, providing that an experienced healthcare provider would have acted otherwise and would thereby probably avoided the injury. Cf. *Pichler*, Arzthaftungsdynamik, p. 338.

12. Since 1936 the FRENCH *Cour de cassation* considers that a doctor is in principle under an obligation of means, Cass.civ 20 May 1936, *arrêt Mercier*, D.P. 1936 1, 88 concl. *P. Matter*; rapp. *L. Josserand*; note *E.P.*; S. 1937, 1, 321, note *A. Breton*: "the contract between the doctor and his patient involves for the doctor, the obligation, not to cure the patient, but to give him a treatment, not ordinary but conscientious, scrupulous and, if there are no exceptional circumstances, conform to the knowledge of the science". Since that date the case law always uses the same expression to describe the obligation of the doctor but recently the "knowledge of the science" has

become “the actual knowledge of the science”. It seems that this has no consequences: the *Cour de cassation* only stresses the obligation for the doctor to keep informed of the evolution of medical science.

13. The criterion under ITALIAN law by which the activity of the treatment provider is judged is professional diligence (CC art. 1176 para. 2). The doctor has to exercise a diligence which is superior to that of the ordinary person (CC art. 1176 para. 1). Therefore, the doctor’s performance will be compared to that of a professional with a medium preparation and attention. Like all professionals, the treatment provider will have to keep up to date and adapt to scientific clinical progress. The criterion of this higher standard of diligence is however mitigated by CC art. 2236, which, in relation to particularly difficult problems, makes the professional answerable only for fraud or grave fault. Moreover, a restriction derives from the identification of an obligation of means (and not of result) upon the provider. The distinction between an obligation of means and an obligation of result regards the ‘measure’ of the liability (*Alpa,* Riv.it.med.leg. 1999, fasc. 1 (February), p. 19). The question is whether it is sufficient to have employed the necessary means required by the professional diligence, or if in any case there has to be the integral satisfaction of the interest of the creditor. Briefly, the question is whether the criterion of evaluation of the behaviour is represented by the best endeavours or by a specific result. While doctrine has refused such a distinction, introduced under the influence of the FRENCH doctrine and case law (*Giorgianni*, Nov.Dig.it 1965, vol. XI, pp. 581), case law has accepted it in relation to specific cases such as doctors. While some doctrine continues to repudiate such distinction (*Vincenzo and Sviluppi*, Danno e resp. 2000, fasc. 12 (December), pp. 1173-1175; *Carusi*, Rass.dir.civ. 1991, pp. 485 ff; *Fortino*, La responsabilità civile, p. 42 ff), some part of the scholarship considers the distinction useful in relation to the burden of proof.

14. Under GERMAN law liability for treatment injury can be either contractual, as the contract for medical treatment is considered as a contract for services regulated by the CC §§ 611-630, or non-contractual under CC § 823(1). Cf. *Laufs and Uhlenbrück,* Handbuch des Arztrechts[2], no. 97. A treatment provider is held liable in so far as it committed a treatment error. A treatment error is equivalent to breach of the required standard of care, which is objective (Gruppenfahrlässigkeit). According to this standard, the treatment provider must act according to the care expected from the skills and abilities expected from its profession. The standard is thus that of an average treatment provider of its profession, acting according to accepted medical practice. Cf. *Gehrlein,* Leitfaden zur Arzthaftpflicht, p. 32; *Laufs and Uhlenbrück,* Handbuch des Arztrechts[2], no. 99. The required standard of care is set in court with the help of medical expertise (BGH NJW 1999, 1778; 1999, 863; 1995, 776).

15. Under GREEK law the standard of care is defined with reference to the qualities that a reasonably skilled representative of the profession is expected to possess. Medical treatment must abide by the generally accepted rules of medical science and medical practice. A doctor must provide a *lege artis* treatment, though in most cases the obligation is not one of result, but rather one of means. Katerina Foundedaki, 182, 185-6; see generally CC arts. 330 and 914; also art. 8 of the Consumer Protection Law 2251/1994; and art. 24 of the code for the exercise of the medical profession (1565/1939)].

16. The leading case on the determination of the standard of care under DUTCH law is the case of Speeckaert/Gradener, HR 9 November 1990, NedJur 1991, 26. In this case it was established that the criterion is “the care that may be expected of a reasonably skilled and reasonably acting specialist”. CC art. 7:453 is to the same extent. The

article reads as follows: 'The provider of the service, in the execution of his business, has to comply with the care of a good provider of the service, and acts in accordance with the responsibility he bears, arising from his professional standard.' From the wording of the article, it may appear that not the care of a *reasonably* skilled professional, but the (higher) skill of a *good* professional is the criterion. However, according to parliamentary history, introduction of the criterion 'good provider of the service' was not meant to change existing case law on this point. Cf. H.TK. 1989-1990, 21 561, no. 3, p. 33. See also *Sluyters and Biesaart,* De geneeskundige behandelingsovereenkomst, p. 57. However, if the present standard of the profession is deemed below what is acceptable, the court may impose a higher standard. The standard of care is influenced by the protocols, guidelines, standards and codes of conduct that have been drafted by organisations of providers of the service. The *Hoge Raad* recently decided that when a doctor ignores the procedures introduced in a protocol that was agreed upon by the group of doctors to which the doctor in question belongs, and when the departure from the protocol was not based on a concrete evaluation of the patient's best interests, the doctor has in fact breached the standard of care. Cf. HR 2 March 2001, NedJur 2001, p. 649 note *F.C.B. van Wijmen* and JMBV (Medisch Centrum Leeuwarden e.a./H.)

17. In POLAND the standard of care for doctors is set according to CC art. 355 para. 2. It is very much underlined that due to the subject of their performance, which is a human being, and the possible irreversible consequences of the defective treatment, a higher standard of care should be required. (*Nesterowicz,* Prawo i Medycyna 2000, 163). On the other hand the CA Warsaw, in its judgment of 3. 3. 1998 (1 Aca 14/98, Wokanda 10/1998, stated that the general high standard of care required from doctors does not mean imposing obligations which are practically impossible to perform and accepting a risk-based liability.

18. In PORTUGAL liability is fault-based (CC arts. 483 and 798 ff). The treatment provider must act like a competent, wise and sensible qualified treatment provider (objective/abstract criterion) according to the circumstances (subjective/concrete criterion): *lex artis ad hoc*. Cf. CC art. 487 para. 2; CA Lisboa, 27 October 1998; STA 13 July 1993; Faure and Koziol (-*Sinde Monteiro and Veloso*), Cases on Medical Malpractice, p. 176; *Figueiredo Dias and Sinde Monteiro*, Responsabilidade médica na europa ocidental, p. 23; *Álvaro Dias,* Procriação Assistida e Responsabilidade Médica, 29.

19. The "*lex artis ad hoc*" is the criterion to determine the required standard of care for the medical service provider under SPANISH law (TS 23 May 2006, RJ 2006/3535). The diligence required by the *lex artis* is the average skill that a competent medical treatment provider would observe in a similar case in accordance with the rules of the profession, although taking into consideration the specific circumstances surrounding the case (nature of the obligation, time and place where the obligations are to be fulfilled, characteristics of the provider). (TS 11 March 1991, RJ 1991/2209). All medical service providers must act with the average skill and competence as determined by the "*lex artis ad hoc*". The majority of the doctrine says that the obligation of due diligence is to be established with minimum terms of generality, flexibility and objectivity and not in an individualised manner (*Martín,* Responsabilidad médica, p. 285). The general standard of care required in the provision of medical treatments (*lex artis*) is to be considered in accordance with the specific circumstances of the case (*lex artis ad hoc*): nature of the obligation, means available to carry out the treatment, time and place where the obligations are to be fulfilled, characteristics of the provider. The same approach is taken by CC art. 1104 regarding the diligence of the good father. Regarding the lack of skill or experience to

treat the patient, the Medical Code of Conduct in its art. 34.2 provides that *if the doctor believes it appropriate*, he or she should recommend another treatment provider who in his or her opinion is more suitable for the patient's case.

20. According to the SWEDISH PL art. 6, compensation from the patient damage insurance cover is payable for personal injury of a patient if it is predominantly probable that the injury was caused by: examination, care, treatment or other similar measure, if the injury could have been avoided either through another execution of the chosen measure or through the choice of another available procedure that according to a later judgement from a medical point of view would have satisfied the need of medical care in a less risky way; defects in a medical technical product or hospital equipment used for examination, care, treatment or other similar measure or the improper use thereof; wrong diagnosis; the transfer of contagion leading to infection, connected to examination, care, treatment or other similar measures; accidents connected to examination, care, treatment or other similar measures or during the transportation of the patient or connected to fire or other damage to the premises or equipment or prescription or distribution of medicines against regulations and instructions. As for the first and the third situations, the standard of care of an experienced specialist or other experienced practitioner is applicable. PL art. 7 contains some exceptions to the general rule, namely that no compensation will be given if the injury was a consequence of a necessary procedure for diagnosing or treating a disease or injury that without treatment would be directly life threatening or would lead to a major disability, or if the injury was caused by medicine in other cases than mentioned in art. 6 (6). Such injury caused by medicine is covered by the medicine insurance, the counterpart to the PL when it comes to compensation of damage caused by medicines.

III. Modulation of the standard of care

21. The AUSTRIAN CC § 1299 introduces an objective standard as regards the question of fault whereas – basically – one has to judge upon the subjective skills of a person. As a result an expert might be held liable even if not to blame for he or she did not possess the knowledge necessary for the task. The reasoning is that everybody should be able to assume that an expert has the skills and expertise necessary for the task or profession. Against that background it becomes clear that the standard of care cannot simply be lowered just because the patient knew of that factor (and as an implied requirement, consented to the treatment). As soon as a doctor fails to live up to the standard of care that is required from the respective branch of the medical profession the doctor is liable.

22. The standard set up by the DANISH PIA in the "specialist rule" is that of the best specialist medical care.

23. A specialist physician is bound by a more stringent duty of care under ENGLISH law, i.e. the specialist must act with the diligence of an average competent specialist in that field of medicine (Lord Scarman in *Maynard v. West Midlands RHA* [1985] 1 All ER 635; *De Freitas v. O'Brien* [1995], 6 Med LR 108). On the other hand, normally inexperience is not a valid defence (*Nettleship v. Weston* [1971] 2 QB 691; *Wilsher v. Essex Area Health Authority* [1987] QB 730). In the latter case, Glidewell LJ pointed out that inexperienced junior doctors must seek the help of more experienced colleagues. However, often injury to patients occurs because of problems in supervision of intern doctors (*R. v. Adomako & Sullman & Holloway & Prentice* [1994] QB 302). Cf. *Kennedy and Grubb*, Medical Law[3], p. 418.

24. The standard set in FINNISH law is that of an experienced treatment provider.

25. In FRANCE the standard of care is always the same in spite of the difference of competence of the doctor. The criterion established in 1936 is always applied in the same way. The contracting parties can however agree on a different standard of care. If it can hardly be lowered because of the prohibition of limitation terms, it can be raised or even replaced by the promise of a result. But it seems that such terms are not usual in practice.

26. The general practitioner, the specialist physician and the hospital physician must each follow the standard set for their respective areas under GERMAN law. (*Gehrlein*, Leitfaden zur Arzthaftpflicht, p. 33; BGH NJW 1998, 814; BGH NJW 1991, 1535; BGH NJW 1996, 779; BGH NJW 1987, 1479; BGH NJW 1984, 655; BGH NJW 1997, 3090; BGH NJW 1991, 1535).

27. The average skilled doctor sets the standard of care required under GREEK law. For obvious reasons, in the medical services a standard of care below that level is unacceptable. The standard of care is not lowered in case of an inexperienced doctor despite the fact that the patient may be aware of that fact. Moreover the standard of care may not be lowered in case of experimental treatment. The latter only imposes a heavier duty on the doctor to inform the patient fully about the nature of the treatment and the risks associated with it and to obtain a fully informed consent. Also, even if a doctor has exceptional skills or is an authority in the field the standard of care seems not to be raised to the height of these exceptional individual standards. In such a case the standard of care will remain that of a reasonably skilled representative who might be an expert or a specialist in a particular field, depending on the circumstances.

28. In ITALY the same standard of care, the minimum set forth in the CC art. 1176, applies to all practitioners.

29. Under PORTUGUESE law the standard of care may be increased if a doctor is a specialist. Cf. Faure and Koziol (-*Sinde Monteiro and Veloso*), Cases on Medical Malpractice, p. 176; CA Évora, 3 October 1996.

30. Under DUTCH law inexperience is not an excuse: each doctor has to live up to the standard of care of the profession. Cf. Asser [-*Hartkamp*], Verbintenissenrecht I[11], no. 336; Parlementaire Geschiedenis VI, pp. 618 ff. It has even been said that from an inexperienced doctor one might expect a *higher* degree of care when compared with an experienced doctor who performs an operation that is somewhat routine. Cf. *Stolker*, Aansprakelijkheid van de arts voor mislukte sterilisaties, p. 54. On the other hand, if a *more* experienced doctor is involved, occasionally the standard of care may be raised if because of experience the doctor must be considered as a specialist. In that case, the criterion is 'the reasonably acting and reasonably skilled *specialist*', as follows from HR 9 November 1990, NedJur 1991, 26 (Speeckaert/Gradener).

31. In POLAND the general standard of care is not rigid and its specification in a given case depends on the qualifications of the doctor (a general practitioner or a high class specialist), and on the hospital (a small hospital in a countryside or a highly specialised clinic). However, a certain minimum standard must be observed by all the treatment providers (*Nesterowicz*, Prawo Medyczne[7] p. 47).

32. The general duty in SCOTTISH law is the objective one of the practitioner of ordinary skill and competence, and a recently-qualified doctor cannot claim inexperience as a defence (*Stair*, The Laws of Scotland, Reissue Medical Law, para. 177).

33. Courts and doctrine coincide in qualifying the obligation to provide treatment as an obligation of means under SPANISH law (TS 25 April 1994, RJ 1994/3073). The diligence required is the diligence imposed by the norms which regulate the medical profession *(lex artis)*, adapting them to the concrete circumstances of the person involved, time and place where the obligation is to be performed, means to execute the

service and so on (situation *ad hoc*). Therefore, the medical service provider has to comply with the "*lex artis ad hoc*".

34. The standard of care applicable to obtain compensation from the SWEDISH PL is objective and hence the patient's knowledge of the inexperience is irrelevant.

IV. Standard of care in medical experimentation

35. In AUSTRIA severe criteria have to be met in order to get permission to test on human beings. Ethic commissions make sure that the research clinics abide by the rules and that other aspects of the treatment are discussed as well. In that regard the standard of care is somewhat 'raised' since controls are tough. These days, state-of-the-art issues are overshadowed by the obligation to inform .

36. The standard of care in ENGLAND is the normal standard, though in practice regulation is stricter due to the influence of Ethics committees. Though the Royal Commission on Civil Liability and Compensation for Personal Injury [1978], sections 1339-1341, recommended strict liability for experimental treatment, no progress was observed in the law. The normal procedure in such claims is an *ex gratia* payment to the patient. Cf. *Kennedy and Grubb*, Medical Law[3], p. 1736.

37. The standard of care in FRANCE is always the same. The criterion established in 1936 is always applied in the same way.

38. In GERMANY § 40 of the *AMG* provides for compulsory insurance for experimental treatment. Besides the normal standard of care, the treatment provider must perform a positive cost-benefit balance. The hospital is liable if it fails to control and monitor the experiment. Cf. *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 130.

39. The standard of care may not be lowered in case of experimental treatment in GREECE. There is a heavier duty on the doctor to inform the patient about the nature of the treatment and the risks associated with it and to obtain a fully informed consent.

40. The doctor would still be bound to perform as a 'reasonably skilled and reasonable acting' doctor under DUTCH law. This would mean that the decision to use an experimental treatment would be scrupulously considered. However, it is not impossible that the standard of care *in effect* is to some extent *lowered* if the decision to go ahead with the procedure was sound, since a 'reasonably skilled and reasonable acting' doctor would not know all the dangers related to the treatment either and might, therefore, not be able to foresee and prevent a risk to the treatment from materialising.

41. Only doctors with relevantly high qualifications may direct a medical experimentation in POLAND. (The act on the profession of a doctor, art. 23); hence the standard of care in the case of medical experimentation is set on a higher level than the standard of care in a normal treatment.

42. In PORTUGAL strict liability, covered by compulsory insurance, is imposed in case of experimental treatment, (PORTUGAL art. 14/1, DL 97/94, 9/4). Cf. *de Oliveira*, O direito do diagnóstico pré-natal[2], p. 199.

43. The *lex artis* ad hoc regarding experimental treatment will indicate the required standard of care in SPAIN. Therefore, current regulations on experimental treatments such us the General Medicines Act are to be complied with.

44. In SWEDEN the medical personnel must perform the treatment in accordance with science and reliable experience, which means that they in some cases could be punished in a disciplinary ruling if this criteria is not fulfilled. However, for compensation the standard of care is the same in all cases. As stated in PL art. 1:4 the patient can receive compensation if there was another method of treatment, in this case

not experimental, that could have been used to avoid the damage. If however there is no established treatment, experimental treatment will probably be accepted.

V. Burden of proof allocation

45. According to general rules of evidence the patient has to prove both the existence of a defective treatment (resulting in a damage) and the causal link between damage suffered and the doctor's conduct under AUSTRIAN law. In other words, the patient has to establish that the damage to health was caused predominantly by the doctor's conduct. The doctor can then prove the absence of fault.

46. In DENMARK the insurance consortium investigates the claim of its own motion. art. 14(8) PFL; *Grünfeld*, De nordiske patientforsikrings ordninger-ligheder og forskelle, 67.

47. The patient bears the burden of proof of breach of duty of care under ENGLISH and SCOTTISH law (*Hunter v. Hanley 1955 SC 200*, even if the treatment provider deviated from approved practice, though in the latter case the patient's case will be much stronger. Cf. *Kennedy and Grubb*, Medical Law[3], p. 453.

48. In FINLAND the insurance consortium investigates the claim of its own motion. Cf. art.11(b) PSL; *Lahti*, Towards a comprehensive legislation governing the rights of patients, p. 210.

49. It is, in principle, up to the patient to prove the fault of the doctor under FRENCH law. When the obligation of the provider is characterised as an obligation of result, the burden of proof is always on the patient, but the object of the proof is lighter. It is up to the patient to prove the damage suffered, but in practice this does not lead to serious problems, in contrast to the question of causation. It is up to the patient to prove the causation. But, in practice the issue is very complicated and very often an expert is appointed to establish this.

50. ITALIAN case law tends to render proof of medical negligence easier by means of presumptions (Trib. Roma, 10 October 1992, Giur.it., 1992, I, 2, c. 337; Cass. 16 November 1988, no. 6220, Rep.Giur.it., 1988, V° Professioni intellettuali, no. 49; Cass. 21 December 1978, no. 6141, Foro it., 1979, I, c.4). In fact, when the treatment is easy to perform, in order to prove the non-performance the patient only has to outline the bad outcome and the causal link. In the case of routine treatments fault is presumed when something goes wrong. It is up to the treatment provider to prove the contrary, namely that there has been adequate and diligent performance and that the outcome is the result of an event which was unforeseen and unforeseeable by using the normal standard of care (*Ferrando,* Riv.crit.dir.priv. 1998, p. 86). When the performance is of particular difficulty, CC art. 2236 avoids automatic liability in case of an unsatisfactory result. In fact, the treatment provider will have to prove the complex nature of the treatment, while the patient will have to prove which aspects of the treatment were unsuitable. (*Grazia,* Giur.it. 2000, I, fasc. 10 (October), pp. 1817-1819, note to Cass. 21 January 2000, no. 632).

51. If the basis of liability is non-contractual the patient will have to prove the fault of the doctor under GREEK law. However, given a prima facie medical error, fault is presumed. In case of serious medical error it will be very difficult for the doctor to rebut this presumption. In the case of contractual liability the burden of proof of fault is reversed. That means that the doctor will have to prove the absence of fault. If contractual and non-contractual liability are concurrent, in both cases the beneficial contractual rule of reversal of the burden of proof must apply. In effect, both in contractual and non-contractual liability the patient will have to prove the unlawful act, the damage and the causal link between damage and unlawful act, whereas the

doctor will have to prove the absence of fault. Though, it seems that the Consumer Act restates the allocation of the burden of proof as described above, in effect a closer look reveals that the position is more complicated. According to paragraphs 3 and 4 of article 8 of the Act, the patient will have to prove the damage and the causal link between damage and the provision of the service, whereas the doctor would have to prove the absence of fault. According to the theoretical criticism, the deficiency of the provision is twofold: first, it imposes a very onerous obligation upon the doctor, since the latter will have to prove not only the absence of fault as personal guilt but also that the service was not unlawful, that a duty was not breached. On the other hand, the patient will need to prove the causal link between the provision of the service and the damage caused. Apart from any other complications that may arise from the fact that the rule does not focus on the adequate cause of the damage which is the medical error but on the provision of the medical service and the different interpretations this may cause, the duty of the patient as such to prove the causal link is extremely onerous due to the intrinsic difficulties such a proof presents in case of medical errors.

52. If a claim is disputed, art. 150 (ex art. 177) of the Rome Treaty applies, according to which the claimant bears the burden of proof to sustain the claim, unless another distribution of the burden of proof follows from the law or is dictated by the requirements of reasonableness and equity. However, the doctor has to supply sufficient information to substantiate the rejection of the patient's claim, in order to provide the patient with a starting-point to prove the claim. Cf. HR 20 November 1987, NedJur 1988, 500, note WLH (Timmer/Deutman); HR 7 September 2001, NedJur 2001, 615 (R. and B./Stichting Ignatius Ziekenhuis). In order to fulfil this 'duty to substantiate', the doctor must – as precisely as possible – give an account of what has happened during the treatment, and hand over the relevant medical data. The patient can then prove the claim by proving or making plausible that the facts stated or data provided by the doctor are incorrect. Cf. HR 7 September 2001, NedJur 2001, 615 (R. and B./Stichting Ignatius Ziekenhuis). This principle could also apply to the question of causation. Cf. *Giesen*, Bewijslastverdeling, pp. 49 and 110. What and how much data and detail the doctor must provide is also dependent on the time that has passed since the treatment: the doctor cannot be expected to remember every detail of an operation that took place years ago. This has been recognised by the Hoge Raad in its ruling of 7 September 2001, NedJur 2001, 615 (R. and B. v. Stichting Ignatius Ziekenhuis).

53. The patient must prove the basis of the claim, including the fault of the doctor, under POLISH law. The doctor should prove that the treatment obligations were fulfilled properly and that he or she acted according to the state of medical knowledge (*Nesterowicz*, Prawo Medyczne[7], pp. 51-52)

54. In PORTUGAL, in the case of contractual liability, while the debtor's fault is in principle presumed (CC art. 799 para. 2), an obligation to treat is usually considered to be an obligation of means, and as such the presumption of fault of the debtor does not apply, cf. CA Coimbra, 4 April 1995; CJ XX-1995,II, 31. The obligation to treat may be considered as an obligation of result in the following circumstances: by agreement of the parties; by operation of a legal provision or depending upon the nature of the obligation (prosthesis, routine surgery, aesthetic interventions. There is an obligation of result in case of organisational fault of a hospital (STA 17 June 1997; AD XXXVII-1998). *Res ipsa loquitur* may shift the burden of proof to the treatment provider (CC arts. 349 ff). Cf. *Figueiredo Dias and Sinde Monteiro*, Responsabilidade médica na europa ocidental, p. 23; Faure and Koziol (-*Sinde Monteiro and Veloso*), Cases on Medical Malpractice, p. 176.

55. Under SPANISH law, the patient normally has to prove the negligent behaviour of the treatment provider and the causal link between the medical act and the damage suffered. It is very difficult for the patient to prove these things, since the information on the treatment is maintained and kept by the medical provider. On a case by case basis, courts have therefore applied less strict evidence requirements by accepting mere circumstantial evidence or applying judicial presumptions of fact The medical provider is also bound to produce relevant medical records to the patient and when this is not done the courts presume that there is negligence and a causal link and it is for the medical service provider to prove the contrary (*Vilalta and Méndez,* Responsabilidad Médica, p. 18). The Consumer General Protection Act 2007 provides a more objective system. The patient may have recourse to the provisions of LCU arts. 147 and 148. Under LCU art. 147, acts or omissions by a service provider which cause damage to a client will give rise to liability on the part of the provider, unless it is proved that the provider has complied with the applicable regulatory provisions and has shown the diligence required for the type of activity provided. LCU art. 148 establishes a specific regime of liability in areas where the consumer is especially protected, such as medical treatment, and where the character of the services provided implies that specific levels of efficiency and safety must be attained.

56. As for the SWEDISH PL, it is the duty of the insurance consortium to investigate the case. While establishing the causal link between the treatment and the damage, it is sufficient that it is more probable that the damage was caused by the treatment than by something else, *Hedman*, Ansvar och ersättning vid medicinsk verksamhet, p. 85. However, when it comes to fulfilling the requirements for compensation, the patient bears the risk, and in this aspect the burden of proof rests upon the patient. Finally, it is important to remember that the PL does not require a breach of the standard of care for the patient to obtain compensation. It is for example sufficient that the damage could have been avoided through the choice of another method of treatment, even if the treatment actually chosen was performed perfectly. As for claiming damages according to the Damages Liability Act (SKL), the patient has the burden of proof for all categories mentioned above.

VI. Standard of care in unconventional treatment

57. A differentiation is generally not made under FRENCH law.

58. In THE NETHERLANDS the *Hoge Raad* ruled that patients who turn to a regular doctor who also provides ‘alternative’ medicine, may expect that such a doctor does not neglect what is necessary for a medically sound diagnosis and treatment. The ‘alternative doctor’ therefore has to live up to the normal standard of care. HR 6 December 1996, NedJur 1998, 543, note *F.C.B. van Wijmen* (B./Inspecteur Gezondheidszorg Utrecht en Flevoland). See also *Roscam Abbing*, Alternatieve beroepsuitoefening, p. 287, with references to case law of disciplinary courts. For providers of other medical services, the notion of ‘a reasonably acting and reasonably competent’ provider applies, either on the basis of CC art. 7:453 if the contract is to be qualified as a treatment contract, or on the basis of CC art. 7:401 in so far as the more general rules on services in general apply. In essence, the notion in both articles amounts to the same. The criterion is the reasonably acting and reasonably competent provider of that specific service.

59. Assuming that the unconventional treatment is provided by a doctor, the same standard of care applies under POLISH law. In such a case, if the risks associated with the treatment are higher, the doctor is obliged to inform the patient about it and obtain a written consent of the patient for the treatment.

60. As unconventional treatment is not regulated by law in PORTUGAL there is a risk that the standard of care would be assessed by courts in the light of sound conventional medical practice. However, a reform proposal (Projecto de Lei no 27/IX, 23 May 2002, BE, not approved), art. 11/4 suggested that the standard of care ought to be assessed within the *leges artis* of the actual unconventional discipline.

61. In SCOTLAND where the doctor has no normal practice to go by, the general test of *Hunter v. Hanley 1955 SC 200* continues to apply, and the duty is to reach a rational and responsible decision in a careful and measured way after weighing up all the possibilities (*Stair*, The Laws of Scotland, Reissue Medical Law, para. 173).

VII. No-fault compensation etc.

62. As noted above, there is under DANISH law a no-fault compensation system for treatment performed in public hospitals.

63. In the UNITED KINGDOM the Royal Commission on Civil Liability and Compensation for Personal Injury [1978] decided against recommending the introduction of a no-fault compensation system in the UK, leaving open the possibility that the decision could be reviewed in the future in the light of the experience of such systems in other countries.

64. The FINNISH PSL establishes a no-fault system.

65. In FRANCE a part of the legal doctrine is in favour of imposing an obligation of result on the doctor in particular situations at least (*Mellenec*, Rev.dr.sanit.soc, 271. Especially, *Penneau*, Faute et erreur en matière de responsabilité médicale, no. 392). The arguments taken into consideration are the progress of medical science, the use of sophisticated devices and the need to compensate the victims. These arguments led the case law to impose in some situations an obligation of result on a doctor or a hospital. (Cass.civ I, 4 January 1974, Bull.civ. no. 4; RTD civ 1974, 822 obs. *Durry*). For easy operations very often performed, such as an injection, see Cass.civ I, 17 June 1980, Bull.civ. I no. 187, RTD civ 1981, 165 obs. Durry; CE 23 February 1962, *Meier*, Leb. p. 122; CE 22 December 1976, *Dame Derridj*, JCP 1978.II.18792, note J.-M. Auby. For diseases contracted in the hospital, see above. For the quality of a prosthesis, see Cass.civ I, 15 November 1972, D. 1973, 342; RTD civ 1974, 160, obs. *Durry*; Cass.civ I, 22 November 1994, RTD civ 1995, 375 obs. *Jourdain*; for a denture. A debate is taking place on whether or not it is desirable to compensate the "*aléa thérapeutique*". This can be defined as damage which is foreseeable but uncertain in its incidence and not preventable by the doctor. For example, there is always a tiny chance of contracting AIDS in spite of rigorous screening at blood transfusion centres; there is always a chance that anaesthesia will go wrong even in the absence of any fault on the part of the doctor. Should the patient be compensated in these situations in which the doctor committed no fault? The legal doctrine is divided and the positive law does not have a general approach to this issue. If the "*aléa thérapeutique*" is compensated in the case of transmission of AIDS by blood products (Cass.civ I, 12 April 1995, JCP 1995.II.22467, note P. *Jourdain*; CCC 1995, chr. no. 9, L. *Leveneur*; D. 1996, 610, note Lambert-Faivre; CE 26. 05. 1995, N´Guyen, Jouan, cons. Pavan, JCP 1995.II.22468, note J. Moreau; RFDA 1995, 748, concl. S. Daël.), the other situations are less clear. More generally, the *Conseil d´Etat* (the supreme administrative Court) ruled in 1993: "When a medical act, necessary to the diagnosis or the treatment of the patient, involves a known risk but the realisation is exceptional and if there is no reason to consider that the patient is particularly exposed, the hospital public service is liable if the performance of the medical act is the direct cause of the damage which has no connection with the initial situation of the patient or the

foreseeable evolution of it and is of an extreme seriousness" (CE, Ass., 9 April 1993, *Bianchi,* D. 1993, 313, concl. H. Legal; JCP 1993.II.22061, note *J. Moreau*). By that case the *Conseil d´Etat* established the conditions of compensation of the *aléa thérapeutique*. Those conditions are quite restrictive. The *Cour de cassation* has rejected this same position (Cass.civ I, 8 November 2000, Bull.civ. I, no. 287; JCP 2001.II.10493, rapp. *Sargos*, note *Chabas*), Even if lower civil Courts did follow the position of the *Conseil d´Etat* (CA Paris 15 January 1999, JCP 1999.II.10068, note *L. Boy*). The solution is now to be found in article L. 1142-1 II of the Code de la santé publique. In the hypothesis of the *Bianchi* case, the damage is compensated not by the treatment provider but by health insurance *(réparation du préjudice au titre de la solidarité nationale).*

66. There is no objective liability of the doctor under ITALIAN law (*Alpa,* Riv.it.med.leg. 1999, fasc. 1 (February), p. 24), although in the case of routine medical procedures the liability is very close to being objective.

67. A no-fault system exists in ICELAND: Act on Patient Insurance no. 111/2000

68. In 1989, the then National council for public health advised against introducing a Swedish-type no-fault system in THE NETHERLANDS. It was argued that it would be too costly and that it could lead to a lesser commitment of the health provider if claims were made not against the health provider but against a public authority. Moreover, it was argued that such a system led to standardised compensation instead of full damages. Cf. Bijl. H.TK. 2001-2002, no. 14 (Parliamentary proceedings regarding the governmental discussion paper 'Choosing with care' *(Met zorg kiezen)*, pp. 26-27. Since then opinion has slowly become more favourable towards the no-fault system. In 1990, *Aerts*, De Zweedse no-fault verzekering ter vergoeding van medische schade, pp. 271-272, considered the advantages of a no-fault-system to be evident, since it gives patients easier access to damages and it leads to a simple, orderly and speedy procedure, as well as being cost-efficient system. In 1994, in the course of the parliamentary proceedings on a law on the right to complain for clients in the care sector, it was agreed that research regarding the consequences of a no-fault-system was needed. In a 1995 report by the National Ombudsman on the infection of haemophiliacs with HIV, a no-fault compensation system was held appropriate for defective blood products. The Minister for Public Health, supported by a 1997 report from the then Board on Blood Transfusion, announced in 1999 that she did not think that there was justification on principle to introduce a no-fault system only for the victims of defective blood products. She therefore requested *ZorgOnderzoek Nederland* (ZON) to do comparative legal research on the advantages and disadvantages of such a system and of the existing system. Cf. Bijl. H.TK. 2000-2001, 27 436, no. 1, pp. 13-14. The report of ZON has not yet been published. On 26 March 2002, the Second Chamber of Parliament accepted a motion, claiming that such a system could lead to a fairer and affordable system of compensation, that requested the government to examine various variants of a no-fault-system and to report back to Parliament before the summer of 2002. Cf. Bijl. H.TK. 2001-2002, 27 807, no. 8 and H.TK. 60-4082.

69. NORWAY has a no-fault compensation system (Lov 15 juni 2001 no. 53 om erstatning ved pasientskader).

70. Until 2001 (when the Constitutional Tribunal repealed POLISH CC art. 419) compensation regarding medical accidents in a situation when there was no possibility to attribute fault to the doctor or to the hospital could be granted on the basis of rightness. At the moment it is uncertain whether the new CC art. 417^2 could be used as the basis for liability for medical accidents on the basis of rightness

(*Filar/Krześ/Marszałkowska-Krześ/Zaborowska,* Odpowiedzialność lekarzy i zakładów opieki zdrowotnej, p. 57).

71. There is strict liability in PORTUGAL in the case of experimental treatment (art. 14/1, DL 97/94, 9/4). Cf. *de Oliveira*, O direito do diagnóstico pré-natal[2], p. 199; use of equipment hazardous by nature (e.g. X-Ray equipment).

72. In SPAIN there is a move towards imposing objective liability in accordance with the General Consumers Act. (TS of 1 July 1997, RJ 1997/5471 and TS 21 July 1997, RJ 1997/5523) This approach is very generally accepted when there is a medical institution involved, in order to guarantee that the patient is indemnified. The majority of the doctrine rejects such objectivity when the claim is against the doctor or medical treatment provider personally.

73. The SWEDISH system is in principle a no-fault system. It is for example sufficient that the damage could have been avoided through the choice of another method of treatment, even if the treatment actually chosen was performed perfectly.

IV.C.–8:105: Obligation to inform

(1) The treatment provider must, in order to give the patient a free choice regarding treatment, inform the patient about, in particular:

(a) the patient's existing state of health;
(b) the nature of the proposed treatment;
(c) the advantages of the proposed treatment;
(d) the risks of the proposed treatment;
(e) the alternatives to the proposed treatment, and their advantages and risks as compared to those of the proposed treatment; and
(f) the consequences of not having treatment.

(2) The treatment provider must, in any case, inform the patient about any risk or alternative which might reasonably influence the patient's decision on whether to give consent to the proposed treatment or not. It is presumed that a risk might reasonably influence that decision if its materialisation would lead to serious detriment to the patient. Unless otherwise provided, the obligation to inform is subject to the provisions of Chapter 7 (Information and Advice).

(3) The information must be provided in a way understandable to the patient.

COMMENTS

A. General idea

This Article deals with the treatment provider's obligation to inform the patient or whoever takes decisions on the patient's behalf. Information is to be disclosed in order to allow the patient an informed choice regarding treatment and obtain informed consent.

With regard to the patient's autonomy, the treatment provider is under an obligation to disclose, in a clear and understandable way, all the information regarding the patient's health status and his or her illness as well as the proposed treatment. The information about the proposed treatment that must be disclosed to the patient consists of several elements. The patient must be informed of the risks of the proposed treatment, about alternative treatment techniques as well as the risks of them and, finally, the prognosis of the patient's health if the patient decides to agree to the proposed treatment, to do without it or to do without any treatment. In particular, the consequences of not having treatment, as well as the potential benefits to be expected from treatment must be made very clear to the patient. Thus, the patient will be in a position to make an informed choice as regards the treatment strategy.

Illustration 1
A patient considers undergoing laser eye surgery in order to correct myopia. The ophthalmologist informs her of the risks and potential benefits of having surgery performed, in particular the (low but existent) risks of blindness, as well as those of refraining from surgery (myopia will gradually advance, lenses will be thicker, risk of eventual total loss of sight). He informs the patient of alternative treatment, like traditional eye surgery, but points out that the risks are higher and the post-surgery period more difficult. The patient is now in a position to make an informed choice on whether or not to undergo surgery.

B. Interests at stake and policy considerations

The patient has a right to be informed, to make an informed choice in regard to treatment, and to consent in regard to his or her bodily security and right to self-determination. The treatment provider has an obligation to inform, but how thorough must the information be? A very thorough obligation to inform is costly, as its performance takes more time, fewer patients can be treated and expenses rebound against the patient or the healthcare system.

It can be argued that all risks must be disclosed, however slight the chance of their materialisation. However, it might be excessive to require the treatment provider to inform the patient of very unlikely possibilities. In any treatment, there exist known risks the materialisation of which is rare. Disclosing them to the patient might deter the patient from undergoing a treatment which would be beneficial. Too much information that the patient cannot reasonably process may lead to situations where the patient cannot make an informed choice or makes an unreasonable decision.

> *Illustration 2*
> The medical literature mentions only one case where the use of a certain drug in combination with another specific drug resulted in toxic delirium. As this is a very rare adverse reaction, there is no need to inform the patient of it.

Another relevant factor is urgency. The more urgent the treatment is, the less information needs to be provided. When a patient needs immediate treatment, information will be scarce in the pre-treatment phase; when immediate treatment is not required, the extent of the information to be disclosed will be greater. Another criterion, the necessity criterion, requires that the obligation to inform will be more stringent when (from a purely medical point of view) treatment is less necessary.

Another debate concerns the scope of the alternatives to be mentioned, in particular as to the mentioning of unconventional treatment alternatives. Unconventional treatment (such as acupuncture, homeopathy, osteopathy, Chinese traditional medicine, etc.) is becoming more and more popular, presenting in some circumstances effective alternatives that conventional medicine cannot offer. The question is whether the traditional health-care provider is under a duty to inform the patient about unconventional treatment alternatives. It may be argued that the duty to inform only applies to alternatives offered by the same scientific field, and that an MD cannot be expected to know the therapies existent in other treatment techniques. On the other hand, as a healthcare professional is not he or she expected to have a broad knowledge of all sound treatment techniques? Then again, what constitutes a *sound* treatment technique if it is not accepted in medical practice?

A related issue concerns the form in which information is to be provided. It is common hospital practice to provide a patient with a form containing general information, in correct medical jargon, and space for the patient's signature, who thus gives consent. However, should the information not be tailored to the specific patient and be conveyed personally by the treatment provider in a way which the patient can understand?

> *Illustration 3*
> A virtuoso opera singer is informed that a certain treatment entails a 0,1 per cent possibility that the vocal cords will be slightly injured, thus causing the loss of the ability to sing in the correct pitch in some octaves. A manual worker needing the same

treatment is not informed of that risk. If provided with a form explaining the most significant risks of the treatment, stated in medical jargon, the patient would probably not understand exactly the stakes involved. Also, such standardized information would not point out a risk that would not be relevant to a normal patient, but whose materialisation would be detrimental to this opera singer.

C. Preferred option

The preferred option is to provide that only risks which may reasonably influence the patient's decision on treatment must be disclosed. It is presumed that such risks will influence the patient's decision if their materialisation would lead to serious detriment to the patient (death, disfigurement, permanent disability). This presumption does not exclude other criteria for the determination of the relevant information to be disclosed, such as the rate of the risk's materialisation, subject to standard rules regarding the burden of proof. Thus, the obligation to inform consists in telling the patient what he or she reasonably needs to know in order to make an informed choice. Also, the less urgent treatment is, the more detailed the information must be, as some time can be allocated for the exploration of alternatives and weighing the risks and benefits.

The patient's interests regarding autonomy are safeguarded, as well as the hospital's and the professional's interests regarding organisation of time. This also reduces the risk that a patient is deterred from undergoing treatment owing to information overload.

Serious and sound relevant alternatives, even if offered by unconventional medicine, are to be disclosed to the patient in so far as the standard of care so requires. This approach gives patients the possibility of choosing between different alternatives available.

The treatment provider is to present the information in a personalised, direct way. The information should be adapted to the situation of that specific patient and expressed in a way which is understandable by the patient. If information is provided through a form stated in medical jargon, however thorough the content of the information may be, an average patient will not be able to understand it. On the other hand, if tailor-made information is disclosed personally, by a health-care professional, in a briefing session and in language understandable to the patient, then that patient will be adequately informed. The treatment provider must make a reasonable effort to help the patient understand the information. This is the best way of respecting the patient's autonomy.

NOTES

I. Overview

1. The treatment provider's obligation to inform the patient about the patient's existing state of health, the nature of necessary treatment, its potential benefits, risks, alternatives and the consequences of refraining from any treatment is recognised in all of the analysed countries: AUSTRIA, ENGLAND, FINLAND, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, PORTUGAL, SCOTLAND, SPAIN and SWEDEN.
2. In all analysed countries the treatment provider is under an obligation to inform the patient of the risks posed by the treatment. However, there are different solutions

about which risks must be disclosed. In ENGLAND the treatment provider is traditionally bound to disclose the information that an average, reasonable physician should disclose, though after *Bolitho v. City and Hackney HA* [1997] 4 All ER 771 the treatment provider is considered to be bound to inform the patient about all significant risks. In FRANCE all risks must be disclosed. In ITALY, THE NETHERLANDS, PORTUGAL, SPAIN the treatment provider must inform the patient of foreseeable and serious risks. In GERMANY the treatment provider must inform the patient of frequent risks, as well as of rare risks which, if they materialised, would seriously affect that specific patient.

3. In AUSTRIA, FINLAND, THE NETHERLANDS and SWEDEN the treatment provider is under a duty to inform about all realistic alternatives. In GERMANY the treatment provider enjoys a freedom of choice of the treatment, and the scope of the duty to inform about alternatives to the proposed treatment depends upon the urgency of starting the execution of the treatment.

4. The burden of proof of having informed the patient falls on the treatment provider in AUSTRIA, FRANCE, GERMANY, ITALY, PORTUGAL and SPAIN. In ENGLAND the burden of proof falls upon the patient if the claim is brought on grounds of the tort of negligence, though it is unclear who bears the burden of proof if the claim is brought on grounds of the tort of battery. In SCOTLAND the onus of proof is on the treatment provider to establish that the patient consented in cases of assault (treatment without patient's consent) but in negligence claims in general the onus is on the patient (*Stair*, The Laws of Scotland, Reissue Medical Law, para. 249). In THE NETHERLANDS, though as a general principle the patient bears the burden of proof, through interpretation the burden of proof can be shifted. In addition, the treatment provider is under a duty to help the patient substantiate the claim. In DENMARK, FINLAND and SWEDEN, due to the facilitated access to compensation under the no-fault patient insurance schemes, a breach of the duty to inform the patient is not of much relevance. In addition, in the no-fault schemes, the case is investigated by the patient insurance consortium. Finally, as noted above, in Denmark and Sweden, if an alternative treatment existed, and had it been carried out instead of the one that caused the injury, the patient is entitled to compensation, irrespective of having been informed or not of the risks of the chosen treatment.

II. Obligation to inform in general

5. The obligation to inform plays an important role in the area of medical treatment under AUSTRIAN law. The courts tend to impose an increasingly stricter liability for failing to inform the patient: the Supreme Court ruled that doctors could be held liable despite a state-of-the-art treatment if they did not inform their patients about all the risks inherent in such a procedure (OGH 6 Ob 126/98f.).

6. In ENGLISH law, in cases based on negligence, the duty to inform is considered as part of the general standard of care, the test being whether a responsible body of doctors would have considered that the information should have been given. See for example, *Sidaway v. Board of Governors of the Bethlem Royal Hospital* [1985] AC 871. In order to avoid liability on grounds of the tort of battery (see below), the doctor must inform only about the *nature* of the treatment. It is thus not necessary to inform about attendant risks.

7. In FINLAND art. 6 of the Constitution assures the right to self-determination. The patient has a right to be informed about his or her state of health, the significance of the treatment, as well as alternatives to it. Cf. Section 5 of the Act on the Status and Rights of Patients (no. 785, 17 August 1992). Cf. *Pahlmann* et al., Three years in

force: has the Finnish act on the status and rights of the patients materialized? Medicine and Law, 3; *Lahti*, Towards a comprehensive legislation governing the rights of patients, 207. Information must be provided in a way the patient can understand. The breach of a duty to inform is not relevant in compensation claims, as avoidable injury is compensated regardless.

8. In FRANCE the treatment provider must inform the patient about his or her state of health, any examination proposed, the proposed treatment, its advantages, consequences and normally predictable, frequent or serious risks, the alternatives and the consequences of not having treatment. Cf. art. L. 1111-2 CSP. This obligation was discovered by case law before its codification. It is generally admitted that the codification simply implement the solutions found in case law (*Pinna*, The Obligations to Inform and to Advise, no. 194; *Pinna*, Lex Medicinae, 2004, p. 83).

9. The obligation to inform is one of the pillars of the GERMAN medical liability system. Liability can be non-contractual under CC § 823 (BGH NJW 1980, 1905) or can arise from non-performance of a contractual obligation to inform (BGH NJW 1990, 2929). The patient must be informed about the illness, its seriousness, the process of treatment, its risks and side effects, so that the patient can decide whether or not to undergo the proposed treatment (*Gehrlein*, Leitfaden zur Arzthaftpflicht, p. 125; *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 63; BGH NJW 1972, 335; BGH StV 1998, 199)

10. Under GREEK law there is an obligation to inform the patient of risks and alternatives so that the patient can give informed consent to the treatment in question. This is of paramount importance in the contract for the provision of medical services because such services invariably lead to a significant involvement with the personality and physical integrity of a human being. Failure of the doctor to comply with this obligation does not render the provision of the treatment service faulty, but it rather creates an independent source of liability (*Androulidaki-Dimitriadi*, The duty to inform the patient, pp. 119 and 131). The issue whether the obligation to inform is a primary obligation or a secondary obligation of the treatment contract does not seem to have been dealt with in the practice in any significant way but has been discussed in academic writing (*Androulidaki-Dimitriadi*, The duty to inform the patient, p. 130). Failure to perform the obligation to inform indicates that the treatment lacks the necessary informed consent. Disregarding whether the patient would or would not have consented to the treatment, in case the treatment has been performed in a state of the art manner, a claim for damages for failing to inform the patient arises independently and separately. Notwithstanding that the patient may lack a cause of action on the basis of a medical error, the non-performance of the obligation to inform forms an independent claim. In effect, the successful medical treatment does not cure the earlier non-performance. But the opposite also seems to be true, failure to inform does not seem to render the provision of state of the art medical treatment wrongful. If on the other hand the medical treatment did not live up to the required standards, the patient may claim damages for non-performance of both obligations, namely the obligation of skill and care and the obligation to inform.

11. Under ITALIAN law the obligation to inform is an autonomous and specific obligation of the treatment provider. Its violation is per se a source of liability (*Santosuosso,* Sentenze e rapporto tra medici e pazienti, 4, 53). The obligation to inform plays a fundamental role in doctor-patient relationships, having a direct impact on the consent of one of the parties. The patient (normally devoid of relevant technical knowledge) cannot control the activity of the professional to whom he or she entrusts delicate personal interests. Therefore, the treatment provider has to inform the patient

about the treatment, the connected difficulties, the consequences, the possible risks, so as to enable the patient to by balance advantages and disadvantages and decide whether to proceed or not. Information must be tailored to the patient and the nature of the ailment (*de Caprio*, Riv.it.med.leg 1998, fasc. 6 (December), I, p. 922; *Fiori*, Riv.it.med.leg 1998, fasc. 6 (December), I, p. 1150).

12. The DUTCH CC art. 7:448, para. 1, 1st sentence, obliges the doctor to inform the patient in a clear manner and, if requested, in writing. The obligation to inform covers the intended examination, the proposed treatment and the developments in the examination, the treatment and the medical condition of the patient. This general obligation to inform is elaborated in para. 2. The doctor should be led by what the patient reasonably needs to know with regard to: the nature and the purpose of the examination or treatment deemed necessary and the required procedures; the consequences and risks that can be expected; other methods of examination or treatment that need to be considered and the state of and the prospects for the patient's health as far as the examination or treatment are concerned. It is clear the doctor is obliged to inform the patient both of the risks of the treatment and the alternatives to it. However, the duty is limited to what the patient reasonably needs to know, which differs from one individual case to another. Cf. *Roscam Abbing*, Het recht op informatie, p. 20; *Sluyters and Biesaart*, De geneeskundige behandelingsovereenkomst, p. 20; *Sluyters*, Gezondheidsrecht, ad CC art. 7:448, note 3. The information is to be given to enable the patient to make a sound decision. The doctor will have to make sure *this* patient understands the information that is being given. Therefore, the information has to be tailored to the individual patient and has to be given in plain language when this is necessary to ensure the patient understands what is being said. Cf. *Sluyters and Biesaart*, De geneeskundige behandelingsovereenkomst, p. 18.

13. Generally, in POLAND, the patient has a right to information about his or her health condition (art. 19 of the act on the medical care institutions) and this right corresponds to the doctor's obligation to provide information to the patient (art. 31 of The act on the profession of a doctor). The doctor is obliged to inform the patient or the patient's statutory guardian in an understandable way about the patient's health condition, the diagnosis, the proposed and possible diagnostic methods, the treatment methods, the predictable consequences of their use or non-use, the results of the treatment and the prognosis (art. 31 para. 1). The doctor may provide this information to other persons only with the consent of the patient (art. 31 para. 2). On the request of the patient the doctor does not have to provide the information to the patient (art. 31 para. 1.) The doctor is obliged to provide information to persons over 16 (art. 31 para. 5). If the patient is under 16 the doctor is obliged to provide information in the scope and form necessary for the correct conduct of the diagnostic and therapeutic process. In such a case the doctor should take into account the opinion of the patient (art. 31 para. 7). If the patient is under 16, unconscious or incapable of understanding the meaning of the information, the doctor should inform the patient's statutory guardian, and – if there is no statutory guardian or there is no possibility to contact him or her – the factual guardian of the patient (art. 31 para. 6).

14. Under PORTUGUESE law the treatment provider must inform the patient on the objective, nature, consequences, benefits, costs, risks and alternatives of diagnosis and treatment, as well as of delay or refusal of the proposed treatment. If a recent technique is proposed, that fact must be disclosed to the patient. Information must be provided in simple and clear language tailored to the patient. Art. 5 CHRM, ratified by Decreto 1/2001 (Presidente da República), DR 2, 1 série A, 3/1; art. 157 CP; Base XIV, 1, e, Lei 48/90, 24/8; art. 38 CD. The objective is to uphold human dignity and

allow the patient an informed choice regarding treatment. Cf. *Dias Pereira*, BFD LXXVI (2000), p. 442; *Dias Pereira*, O consentimento informado, p. 227; Faure and Koziol (-*Sinde Monteiro and Veloso*), Cases on Medical Malpractice, p. 175; *de Oliveira*, O direito do diagnóstico pré-natal[2], p. 92; Figueiredo Dias (-*Costa Andrade*), Comentário conimbricense do Código Penal, art. 157.

15. On the duty of medical practitioners to inform in SCOTTISH law see *Stair*, The Laws of Scotland, Reissue Medical Law, paras. 181, 242-263.

16. A general obligation for medical treatment providers to inform is formulated in the SPANISH General Act on Healthcare of April 25th 1986 (Ley General de Sanidad), developed by the Patient's Autonomy Statute (Ley 41/2000) that in its arts. 4-6 states that the users of the health service and their families (if the patient gives the consent to inform the family) have the right to be provided with comprehensive, complete and continuous oral and written information about their medical situation, including diagnosis, prognoses and possible alternative treatments. This regulation is based on previous provisions of a constitutional nature: the right to healthcare (art. 43) the right to dignity (art. 10.1), the right to live, the right to physical and moral integrity (art. 15) and the right to be informed (art. 20). Specific obligations to inform have been included in specific Acts and administrative provisions on different medical fields. See *Ley* 30/1979 (organ removal and transplantation), *Ley* 14/2006 (assisted reproduction), *Ley* 14/2007 (human embryos, foetus donation, use of tissues and organs or parts of them); *Ley* 29/1980 (clinical autopsy). The Supreme Court considers that the obligation for doctors to inform is an essential requirement of the "*lex artis ad hoc*" (TS 2 October 1997, RAJ 1997/7405; 13 April 1999, RAJ 1999/2583) and part of the obligation of means assumed by the professional (TS 25 April 1994, AC 1994/3073 ; TS 11 February 1997, RAJ 1997/940). See also TS 7 May 1997, RAJ1997/3874. Courts have not yet reached a clear position on the causation problem which arises when the non-fulfilment of the duty to inform would not have changed the patient's intention. See as to this problem *Dominguez Luelmo*, Derecho sanitario y responsabilidad médica, 157 ff and *Galán*, Responsabilidad civil médica, 251 ff).

17. In SWEDEN patients are entitled to individually adapted information about their health condition and the treatment methods available. Compensation for a breach of the duty to inform is not possible under the PL if no compensation can be claimed for faulty treatment. Possibilities of compensation under the Tort Act are limited: cf NJA 1990, 442.

III. Obligation to inform about risks

18. In ENGLISH law it has been concluded that the physician must disclose all information about significant risks which the patient needs in order to determine which course he or she should adopt. (Lord Woolf MR in *Pearce v. United Bristol Healthcare NHS Trust* (1999) 48 BMLR 118; in the aftermath of the impact of *Bolitho v. City and Hackney HA* [1997] 4 All ER 771. Cf. *Kennedy and Grubb*, Medical Law[3], p. 694.

19. In GERMANY a treatment provider must inform the patient about the risks of complications, side effects, and the consequences of failure if their seriousness can affect the decision of the patient whether or not to undergo treatment. Frequently materialising risks must be disclosed, as well as rarely materialising risks which could seriously affect that specific patient (BGH NJW 1980, 1333; BGHZ 77, 74, NJW 1980, 1901; BGH NJW 1992, 1241; *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 64).

20. Under the FINNISH act on Patient's Rights s. 5, a patient must be given information about his or her state of health, the significance of the treatment, various alternative forms of treatment and their effect and about other factors related to the patient's treatment that are significant when decisions are made. Healthcare professional should try to give the information in such a way that the patient can understand it. If the healthcare professionals do not know the language used by the patient or if the patient because of a sensory handicap or speech defect cannot be understood, interpretation should be provided if possible.

21. Under FRENCH law the obligation to inform covers the risks of the treatment: indeed this is usually the essence of this obligation. The *Cour de cassation* has ruled that a doctor must mention even risks whose materialisation is exceptional if the materialisation would involve serious consequences (Cass.civ I, 7 October 1998, JCP 1999.II.10179, concl. J. Sainte-Rose and note P. Sargos; CE Sect., 5 January 2000, *Consorts Telle* ; 5 January 2000, *Assistance Publique-Hôpitaux de Paris,* JCP 2000.II.10271, with note J. Moreau). This solution is now to be found in Article L. 1111-2 CSP. See, however, *Pinna,* Lex Medicinae 2004, p. 83.

22. The patient is entitled, under ITALIAN law, to be informed about the risks of the treatment offered (CFI Milano, 14 May 1998, Resp.civ. e prev. 1998, fasc. 6 (dicembre), p. 1625, with note of *B. Magliona*). The patient must be informed about serious potential dangers to his life deriving both from an intervention and a non-intervention. The obligation embraces foreseeable risks, not anomalous outcomes, which almost constitute a fortuitous event. The treatment provider has to find a balance between the obligation to give full information and the need to avoid putting a patient off the treatment merely because of some remote possibility. The obligation to inform includes also specific risks in determinate alternative choices. The patient, thanks to the technical-scientific help of the treatment provider, can opt for the one or the other, by means of a conscious evaluation of related risks and advantages (*Alpa,* Riv.it.med.leg. 1999, fasc. 1 (February), p. 30).

23. In THE NETHERLANDS the view is taken that to be able to make a sound decision, the patient needs to be informed about the normal, foreseeable risks of the treatment. Cf. *Stolker*, Aansprakelijkheid van de arts voor mislukte sterilisaties, p. 48; *Sluyters*, Gezondheidsrecht, ad CC art. 7:448, note 3. Generally speaking, the duty to inform is more stringent in the following situations: if the nature of the risk is more serious; if the general incidence-expectation of the risk is higher; if the intended procedure is of a lesser degree of urgency or necessity; if one or more alternatives exist; if the risk is less known to the public at large; if the materialisation of the risk can, under the given circumstances, be expected and if the treatment is experimental or irregular. Cf. *Dekkers*, De patiënt en het recht op informati, p. 119; taken from *Sluyters and Biesaart*, De geneeskundige behandelingsovereenkomst, p. 22; *Legemaate*, Verantwoordingsplicht en aansprakelijkheid in de gezondheidszorg, p. 100. There is no obligation to inform of risks which are public knowledge. Cf. *Kastelein*, TvG 1998, p. 138. With regard to the frequency of risks, an obligation to inform exists in any case where the chance of materialisation is over 5 per cent. Cf. *Kastelein*, TvG 1998, p. 138. *Stolker*, Aansprakelijkheid van de arts voor mislukte sterilisaties, p. 53 mentions percentages varying from 5 to 8 per cent. However, the trend is to lower the percentage below which no obligation to inform exists: *Legemaate*, Advocatenblad 1999, pp. 197-200, mentions a percentage of only 1 per cent. Moreover, the obligation *also* exists if materialisation of the risk would have radical consequences. Cf. *Stolker*, Aansprakelijkheid van de arts voor mislukte sterilisaties, p. 54. If the procedure is not medically necessary or experimental, the obligation to inform is far-reaching. It is also stricter if the patient indicates a wish not to run any risks or puts relevant questions to

the doctor. Cf. *Legemaate*, Advocatenblad 1999, p. 98. In this respect, *Barendrecht and Van den Akker*, Informatieplichten van dienstverleners, no. 212, draw attention to the fact that most people are inclined to avert risks, even if materialisation of the risks is relatively rare. This suggests that there ought to be a duty to mention even small risks since people apparently are influenced profoundly by such information in deciding whether or not the give consent to a proposed treatment.

24. In POLAND the doctor is obliged to inform the patient, in an understandable way, about the risks connected with the treatment (The act on the profession of a doctor art. 31 para. 1), in order to allow the patient to make a well-informed decision about giving consent for the treatment (Judgment of the Supreme Court of 17. 12. 2004, II CK 303/04, OSP 2005, no. 131, poz. 11). If the risks are high the doctor is obliged to obtain written consent from the patient (art. 34 para. 1).

25. The treatment provider must inform the patient of serious risks as well as frequent risks of the proposed treatment under PORTUGUESE law. All significant risks must be disclosed, as well as the risks of delaying or refusing treatment. A risk is deemed significant if it is serious, frequent, unnecessary from a medical point of view, or if the attitude or physical characteristics of the patient increases the magnitude of the risk (obesity, addictions, heart problems, etc.) Cf. CA Lisboa, 4 July 1973; *Dias Pereira*, BFD LXXVI (2000), 446; *Dias Pereira*, O consentimento informado, p. 244; *de Oliveira*, O direito do diagnóstico pré-natal[2], 67; Figueiredo Dias (-*Costa Andrade*), Comentário conimbricense do Código Penal, art. 157, p. 397.

26. In SCOTTISH law the patient should be warned of the nature and extent of any substantial medical risk associated with the treatment (*Moyes v Lothian Health Board* 1990 SLT 444).

27. Doctrine and jurisprudence differentiate between typical and atypical risks under SPANISH law (TSJ Navarra 27 October 2001, RJ 2001/1079). In principle, only those risks which are foreseeable and which frequently materialise in a specific situation (typical risks) need to be disclosed. Risks which are unforeseeable or exceptional (atypical risks) need not be disclosed. However, there has been some criticism of this simplistic division on the ground that some risks which are not typical should be disclosed if they could influence the decision of the patient whether to continue the treatment or not. It has been held that in a highly risky operation the mother of the minor should have been informed accordingly (TS 23 April 1992 RJ 1992/3323). The absence of disclosure implies that the medical providers assumed the risks of the operation themselves. Cf. TS 25 April 1994, RJ 1994/3073, TS 11 February 1997, RJ 1997/940, TS 28 December 1998, RJ 1998/10164.

28. In SWEDEN the provisions in this area are intentionally vague, due to the fact that medical treatment always involves risks, and the duty to inform can thus lead to a situation of conflict between the doctor and the patient and hinder the doctor from giving adequate treatment (*Johansson and Thoren*, FS Sturkell, p. 136). Therefore the obligation to inform must be assessed on a case to case basis, taking into account the patient's views, the patient's state of health, the treatments available and the gravity of the disease. Even if the patient has not been sufficiently informed about risk, this does not automatically mean that he or she is entitled to compensation. Cf. RH 1999:115.

IV. Obligation to inform about alternatives

29. Under AUSTRIAN law there is no need to inform about all the possible alternatives; information about the adequate treatments and the pros and cons of those alternatives is sufficient. Cf. *Dittrich and Tades*, ABGB[35], art. 1299, E 234, 236). In practice some hospitals use illustrated information leaflets to inform their patients. These brochures

describe and explain the different operations in detail. Then doctors discuss the issues raised in the leaflets one by one with their patients, offering a possibility for further questions. Finally, the patient declares by signing that he or she has understood the information and has been able to ask all the questions he or she wanted to. Thus, the leaflets serve a twofold purpose. First, they guarantee sufficient information. Secondly, doctors might use them as evidence in possible lawsuits.

30. In FRANCE the treatment provider is obliged to mention alternatives (CSP art. L. 1111-2). Specific case law on this issue was not found.

31. In principle, the physician has the freedom of choice of the treatment under GERMAN law (BGH NJW 1982, 2121 NJW 1988, 763; BGH NJW 1988, 1516). However, the less urgent the treatment is from a medical point of view, the more far-reaching is the obligation to inform. In this type of case, the obligation to inform may encompass alternatives to the proposed treatment. Cf. *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 64.

32. Under ITALIAN law the treatment provider has to tell the patient about the possible alternatives (art. 30 of the medical Deontological Code) in order to enable him or her to decide what is best. Even in case of grave error in the therapeutic process, the information provided to the patient has to be absolutely complete (*Conti*, Riv.it.med.leg 1998, fasc. 6 (December), I, 1171). This is essential, especially before taking further clinical decisions which may present dramatic alternatives.

33. In THE NETHERLANDS the doctor is obliged to mention all realistic alternatives, including those he or she personally does not favour. Cf. *Legemaate*, Verantwoordingsplicht en aansprakelijkheid in de gezondheidszorg, p. 100.

34. In POLAND the doctor has an obligation to inform about the available treatment methods and the predictable consequences of using them or not using them. (The act on the profession of a doctor, art. 31 para. 1).

35. The treatment provider must, under PORTUGUESE law, inform the patient about the availability and comparative advantages of alternatives to the proposed treatment: Figueiredo Dias (-*Costa Andrade*), Comentário conimbricense do Código Penal, art. 157, p. 458; *Dias Pereira*, O consentimento informado, p. 257.

36. In SCOTTISH law the patient should be informed of any other reasonably practicable options unless there are very clear medical reasons for denying the person that choice (*Moyes v Lothian Health Board* 1990 SLT 444).

37. In SPAIN too the patient should be informed about alternative treatments. See further, note 50 below.

38. In SWEDEN the treatment provider must inform the patient of any alternative treatment which is in accordance with medical science and reliable experience (HSL art. 3a).

V. Burden of proof

39. In AUSTRIA the burden of proving that the patient has been given sufficient information is on the provider. Cf. (*Dittrich and Tades*, ABGB[35], § 1299, E 239, 240). The provider can prove either that the patient was sufficiently informed or that he or she would have consented to the treatment anyway. That demonstration is subject to quite strict requirements. However, the patient has to demonstrate that he or she would have been faced with a serious conflict of decisions if informed properly. It is not sufficient that he or she simply argues that the treatment would have been rejected.

40. Breach of the duty to inform is irrelevant to compensation of injury under the DANISH PF. All relevant information and evidence is acquired *ex officio* by the Patient Insurance Consortium.

41. In negligence the client bears the burden of proof, according to standard rules of civil procedure under ENGLISH law. In the tort of battery, the position is unclear, see *Kennedy and Grubb*, Medical Law[3], p. 582, stating that consent as a defence to battery should be proved by the defendant and supporting that view with case law from various Commonwealth countries.

42. Breach of the duty to inform is irrelevant to compensation of injury under the FINNISH PSL. All relevant information and evidence is acquired *ex officio* by the Patient Insurance Consortium.

43. Under FRENCH law it is up to the treatment provider to prove that the obligation to inform was duly performed (Cass.civ I, 25 February 1997, Bull.civ. I, no. 75, Defr. 1997, p. 751, CCC 1997 no. 76, with obs. L. *Leveneur*, RTD civ 1997, p. 924; CE Sect., 5 January 2000, *Consorts Telle*; 5 January 2000, *Assistance Publique-Hôpitaux de Paris*, JCP 2000.II.10271, with note *J. Moreau*). This view had previously been proposed by *Fabre-Magnan*, who asserted that the obligation of information was an obligation of result Cf. De l´obligation d´information dans les contrats, nos. 541 ff. The opposite solution would have obliged the patient to prove a negative fact, the lack of information, which is almost impossible to do. The solution now favoured has a very strong preventive role, instigating the doctor to effectively perform the obligation to inform. It is up to the patient to prove the damage suffered, but in practice this does not lead to serious problems. It is also up to the patient to prove causation. A lack of information is the cause of the damage only if the victim proves that, had he or she been correctly informed, the treatment would have been refused, because the victim has to prove beyond doubt that the damage would not have occurred. Of course this fact is most of the time impossible to prove. To protect the patient and compensate the damage, the case law appeals to the theory of the loss of a chance *(perte d´une chance)*. The *Cour de cassation* does not require the proof of the performance of the obligation to inform by a written act and says that this proof can be done by any means, even by testimony (Cass.civ I, 29 May 1984, Bull.civ. I, no. 179; Cass.civ I, 4 April 1995, D. 1995. I.R. p. 120; and after the reversal of the line of the case law concerning the burden of proof, Cass.civ I, 14 October 1997, Bull.civ. I, no. 278; JCP 1997.II.22942, rapp. *Sargos*; RTD civ 1998, 100, obs. *J. Mestre*; RDSS 1998, 68, note *Harichaux*). It is obvious that in the absence of a written document it will be very difficult for the provider to prove the performance of the obligation. Such rules are now codified in Article L. 1111-2 CSP (On this issue, see *Pinna*, The Obligations to Inform and to Advise, nos. 158-165).

44. In GERMAN law the physician bears the burden of proof that he or she disclosed all the relevant information to the patient, and that the patient consented to the treatment (BGH NJW 1992, 2351).

45. The burden of proof falls on the provider of the service under ITALIAN law. The doctor has to prove that he or she informed the patient in a complete and exhaustive way about all risks connected to the treatment.

46. In principle, in THE NETHERLANDS, the burden of proof lies on the client. In cases where the client has to prove a negative fact – the non-receipt of certain information, the courts may decide that the provider of the service is under a duty to substantiate the claim that the information was given. In the case of treatment contracts, the situation is slightly different. From CC art. 7:466 para. 2 it follows that consent to treatment is presumed to have been given if the treatment is a ‘minor procedure’.

Giesen, Bewijslastverdeling, p. 37, correctly concludes from this provision that in other situations consent may *not* be presumed to have been given and must be proved to have been given. From that it follows that the burden of proof is on the *doctor:* he or she will have to prove that informed consent has been given. Distributing the burden of proof in another way would deprive CC art. 7:466, para. 2, of its meaning, *Giesen* argues. However, consent may sometimes be tacitly implied, cf. Rb Rotterdam 20 August 1993, NedJur 1995, 18 (Algemeen Psychiatrisch Ziekenhuis 'De Grote Rivieren'/X). With regard to the causal link between the breach of the duty to inform and the damage, in principle, the burden of proof lies on the client. Cf. *Giesen*, Bewijslastverdeling, p. 49; *Barendrecht and Van den Akker*, Informatieplichten van dienstverleners, nos. 446-447. For medical cases, it is, however, accepted that the patient would have acted upon the information or advice, especially if the illness was life-threatening and an effective cure is available. In other words, the German doctrine of 'Entscheidungskonflikt' is more or less adopted. As regards the proof of the *damage* that is caused by the breach of the duty to inform, the Hoge Raad is more restrictive. It recently decided that the duty to inform is meant to enable the patient to make an informed decision on whether or not to consent to the suggested treatment. A breach of that duty brings the risk that the patient cannot exercise the right to self-determination, i.e. the risk that the patient makes a choice he or she would not have made otherwise. The duty to inform is therefore not as such meant to protect the patient from the occurrence of a medical risk, but (only) to prevent the risk of the loss of the opportunity to properly choose. Cf. HR 23 November 2001, case C99/259HR, *Landelijke Jurisprudentienummer* (LJN) AB 2737, and case C00/069HR, LJN AD 3963, published on www.rechtspraak.nl.

47. In POLAND the burden of proof that the required information has been provided lies on the doctor. The Supreme Court has clearly stated that in its judgment of 17. 12. 2004 (II CK 303/04, OSP 2005, no. 131, poz. 11.) The doctor should prove not only that the information was given to the patient, but also that it complied with the statutory requirements.

48. The healthcare provider bears the burden of proof of information and consent under the PORTUGUESE CC art. 340 para. 2; *Dias Pereira*, BFD LXXVI (2000), 454; *Figueiredo Dias and Sinde Monteiro*, Responsabilidade médica na europa ocidental, p. 39; Figueiredo Dias (-*Costa Andrade*), Comentário conimbricense do Código Penal, art. 157, p. 458).

49. In SCOTLAND the onus of proof is on the treatment provider to establish that the patient consented in cases of assault (treatment without patient's consent); but in negligence claims in general the onus is on the patient to establish the grounds of the action; the treatment provider may be able to defend it by proving that information was provided and consent given (*Stair*, The Laws of Scotland, Reissue Medical Law, para. 249).

50. The medical service provider must prove compliance with the obligation to inform under SPANISH law (TS 28 December 1998, RJ 1998/10164; TS 13 April 1999, RJ 1999/2583 and TS 19 April 1999, RJ 1999/2588). The medical provider possesses the information, thus it is easier for him or her to prove that the information was given than for the patient to prove the negative. Cf TS 31 July 1996, RJ 1996/6084. The obligation to inform the patient must be performed prior to obtaining his or her consent to the treatment and should include: the information about the consequences, the typical risks, the risks related to the personal or professional life of the patient and the contra-indications of the intervention (art. 10 of the Patient's Autonomy Statute).

51. The duty to inform is not essential for obtaining damages under SWEDISH law, as mentioned above. Therefore there is not much information available on this topic. However in NJA 1990 p. 442 and in RH 1999:115, the courts found a breach of the duty to inform, mainly because the doctors could not say for sure that they had informed the patients sufficiently. A long time had passed and the doctors had performed many operations and could therefore not tell exactly how they had informed the patients. The courts therefore followed the patients' opinion that they had not been properly informed. However, in disciplinary rulings the patient has the burden of proving the lack of information. See *Hedman*, Ansvar och ersättning vid medicinsk verksamhet, p. 58 f. The patient always has to prove the damage. See here the reasoning of the court Cf. RH 1999:115, where the court dismissed the patient's statement that he would not have gone through with the operation, considering the seriousness of his medical condition and the low probability of complications.

IV.C.–8:106: Obligation to inform in case of unnecessary or experimental treatment

(1) If the treatment is not necessary for the preservation or improvement of the patient's health, the treatment provider must disclose all known risks.

(2) If the treatment is experimental, the treatment provider must disclose all information regarding the objectives of the experiment, the nature of the treatment, its advantages and risks and the alternatives, even if only potential.

(3) The parties may not, to the detriment of the patient, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

This Article describes the extent of the obligation to inform when experimental or unnecessary treatment is concerned. Experimental treatment consists in treatment which is still in a research stage and may be of benefit to the patient, treatment which departs from approved practice and may be of benefit to the patient or treatment of a kind which has not been yet fully developed and does not meet the standard of approved medical practice. In this type of treatment, there are unexpected risks as the treatment technique is still in an experimental stage or its risks are not yet fully known.

Illustration 1
A patient suffering from an incurable illness is invited to participate in the clinical trial of a drug that has not yet been tested before on humans. This drug can potentially have a beneficial effect on the patient. This is a case of experimental treatment.

Illustration 2
A patient suffering from cancer is informed that there is a novel technique, not yet fully tested, that can potentially be life-saving. This is also a situation of experimental treatment.

Unnecessary treatment here means treatment which is not intended to improve the physical health of the patient; it is rather treatment which a patient can choose to have for other reasons. Examples might be plastic surgery, sterilisation or active organ donation. This does not mean, however, that such treatment may not have therapeutic effects from a medical point of view.

Illustration 3
A 23-year-old woman had a car accident, and as a result acquired severe burns on her cheeks. Two years after the accident, the woman consults a plastic surgeon to have the burns removed. This is a case of unnecessary treatment, in the sense that there is no reason, from a strictly medical point of view, for the woman to undergo surgery.

This illustration shows how difficult it is to define the term 'unnecessary treatment', as having the burns removed may have a positive effect on a person's mental health, as the appearance of the burns may have caused loss of self-confidence as well as adverse social circumstances detrimental to the woman's mental health.

B. Interests at stake and policy considerations

Patients are particularly in need of protection in experimental treatments. Thus, there is a need of a reinforced information regime. The argument here is that two cost-benefit analyses are to be made, not just one. The first concerns the personal risk-benefit assessment, i.e. the balance between the potential benefits to the patient's health and the risks involved in the experimental treatment. The second is the 'altruistic' risk-benefit analysis, i.e. the balance between the benefits to medicine and other patients and the risks the patient will run. The patient undergoing experimental treatment has an interest in being informed about the nature of the experimental treatment, the relevance of the trial to medical science and the potential benefit, if any, to his or her health. It is also important for the patient to be informed about the possibility of being placed in the control group if there is one, i.e. a group that will be administered a placebo instead of the drug being tried. The patient has also a manifest interest in being informed about any health risks in the experiment. On the other hand, it may be in the medical researcher's interest to disclose as little information as possible for research secrecy's sake.

> *Illustration 4*
> A patient suffering from an incurable illness is invited to participate in the clinical trial of a drug that has not been tested before on humans. The patient will be interested in being informed about the nature and objective of the experiment, the risks involved in the experimental treatment, the potential benefits to his health as well as to the advance of medicine, and the chances that he will be assigned to the control group, and thus will not be exposed to the risks nor enjoy the potential benefits of the trial. On the other hand, the researcher and the promoter of the experimental treatment will not want to disclose too much information on the technical and scientific aspects of the experimental treatment.

In relation to novel treatment techniques, the patient will be interested not only in the normal information as regards the proposed treatment, but also in information on alternatives and on the risks involved in such techniques. The patient needs information to enable him or her to ascertain whether the benefits of the novel treatment technique outweigh its risks compared to the risks and benefits of treatment techniques already accepted by medical practice.

It is often argued that, in unnecessary treatment, the duty to inform is more stringent as there is no urgency in its performance and it differs from the risk-benefit analysis in normal medical treatment where, if all risks are disclosed and regardless of the low probability of their materialisation, there is a possibility that the patient overestimates that risk *vis-à-vis* the potential benefits of the treatment needed. It is argued that if treatment is unnecessary from a strictly medical point of view, all risks should be disclosed as the patient has the option of foregoing treatment without significant detriment to his or her health. This is the necessity criterion, pushing for a specific, more stringent duty to inform. Likewise, according to the urgency criterion, the absence of any need for immediate treatment means that there is plenty of time for protracted decision making and engaging in a more thorough risk–benefit assessment.

C. Preferred option

Like the laws of all the countries analysed, the Article opts for requiring fuller disclosure in the case of experimental or unnecessary treatment. This Article adapts the intensity of the duty to inform of the preceding Article to circumstances where the treatment to be performed

is experimental (including in this term novel techniques not yet fully tested) or is unnecessary from a strictly medical point of view. The rule in this Article is mandatory in favour of the patient (paragraph (3).

NOTES

I. Overview

1. If treatment is of an experimental nature, the patient must be informed of the experimental nature of the treatment and given an explanation of the potential risks. In ENGLAND, lack of information about the experimental nature of the treatment renders the treatment provider liable in the tort of battery. In GERMANY, ITALY, FRANCE and SPAIN the duty to inform is more stringent, including an exhaustive disclosure of the risks, as well as information on the aims and benefits of the clinical trial. In addition, in Germany the patient must be informed about the cost-benefit analysis and of the existence of compulsory insurance. In PORTUGAL, where strict liability exists, full disclosure is demanded. In France, if the treatment is unnecessary from a strictly medical point of view, the treatment provider must fully disclose to the patient all potential risks, no matter how minor they are. Similarly, in Germany, the less urgent or needed treatment is, the more extensive is the information to be disclosed.

II. Obligation to inform in case of unnecessary and experimental treatment

2. Under ENGLISH law, if a patient undergoes experimental treatment, he or she must be informed of this. Otherwise the treatment provider will be held liable under the tort of battery. Cf. *Kennedy and Grubb*, Medical Law[3], p. 1710.

3. According to the FRENCH CSP art. L.1122-1, the patient must give express written consent to an experimental treatment. This article also details the particular information which the patient must receive. Concerning unnecessary treatment, such as cosmetic surgery, case law holds that the patient must receive complete disclosure of all risks involved, even if the consequence of their realisation is minor and the frequency of their realisation is exceptional. Cass.civ I, 17 February 1998, Bull.civ. I, no. 67; RTD civ 1998, 681 *Jourdain*, for a case stating that the inconveniences of the cosmetic treatment must also be disclosed.

4. Under GERMAN law the patient must be informed of the experimental nature of treatment and its risks, as well as of the regime of the compulsory insurance. Data on the objective of the experiment, such as its benefits to the community and a risk-benefit assessment must be disclosed (*Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], nos. 65, 130). Both in experimental and unnecessary treatment, the scope of the duty to inform is more far reaching the less urgent the treatment is, according to the *Kriterium der Dringlichkeit* (BGH NJW 1982, 2121; *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 64).

5. In ITALY as regards experimental treatments, the patient has to give consent in writing in a free and conscious way, after prior and exhaustive information not only on the aims, benefits, and connected risks, but also on the patient's right to withdraw consent at any stage.

6. If the procedure is of an experimental nature, the duty to inform is more stringent than normal under DUTCH law. Cf. *Legemaate*, Verantwoordingsplicht en aansprakelijkheid in de gezondheidszorg, p. 100.

7. There are special rules in POLISH law concerning the obligation to inform in the case of an experimental treatment (The act on the profession of a doctor, art. 24). Before the treatment, the patient should be informed about the aims and methods of the experiment, the expected benefits, the risks and the possibility of withdrawing at any stage (art. 24 para. 1). The doctor is obliged to inform the patient if an immediate disruption of the experiment could cause danger for the health or life of the participant (art. 24 para. 2). The participant must consent in writing (art. 25).

8. Full disclosure is compulsory in PORTUGUESE law. Strict liability is imposed in the case of experimental treatment, covered by compulsory insurance (DL 97/94, 9/4 art. 14/1,). Cf. *de Oliveira*, O direito do diagnóstico pré-natal[2], p. 199.

9. The matter has not been directly considered in SCOTTISH law but it is thought that in principle the patient should be informed and have given consent before experimental treatment would be lawful (*Stair*, The Laws of Scotland, Reissue Medical Law, pares 243, 246-248).

10. The SPANISH Act 29/2006 on Medicines *(Ley del Medicamento)*, arts. 58-62 relates to the experimental investigation of a substance or medicine, when applied to human beings, in order to find its appropriateness for future medical treatments. Art. 60 para. 4 requires the prior consent (in writing or in front of witnesses) of the patient, after being given information about the nature, importance and risks of the experiment. The medical treatment provider must ensure that the patient understands the information provided. Moreover, the patient's consent may be revoked at any time, without any obligation to justify it. In the case of persons who are not able to consent, permission must be given by their legal representatives, although it will also be necessary to obtain the consent of the person under representation if this person is able to comprehend the importance and risks of the experiment. By Royal Decree 223/2004 the requirements for clinical testing experiments are further developed. Any damage caused to the patient subject to the experimental investigation during the treatment or in one year after it finishes, must be indemnified, even when no negligence or fault is found (art. 8 RD 223/2004 and *Gómez Jara*, La responsabilidad profesional sanitaria, p. 139)

IV.C.–8:107: Exceptions to the obligation to inform

(1) Information which would normally have to be provided by virtue of the obligation to inform may be withheld from the patient:

(a) if there are objective reasons to believe that it would seriously and negatively influence the patient's health or life; or

(b) if the patient expressly states a wish not to be informed, provided that the non-disclosure of the information does not endanger the health or safety of third parties.

(2) The obligation to inform need not be performed where treatment must be provided in an emergency. In such a case the treatment provider must, so far as possible, provide the information later.

COMMENTS

A. General idea

This Article covers the exceptions to the obligation to inform. The first exception, in paragraph (1)(a), is the so-called therapeutic exception. In some circumstances, disclosure to a patient may result in serious consequences for his or her life, health and treatment. For example, the truth may, given the patient's known disposition, cause a dangerous shock liable to provoke mental instability.

Illustration 1
A patient is suffering from a severe cardiac disease. She needs to undergo bypass surgery. The situation is very delicate, and any shock or strong emotion entails the risk of a fatal stroke. The treatment provider decides to withhold information from the patient about her health status and to perform surgery. This is a situation of therapeutic exception to the duty to inform.

It should be noted that the therapeutic exception will not, by its very nature, apply in the case of the information required to be disclosed under IV.C.–8:106 (Obligation to inform in the case of unnecessary or experimental treatment).

The second exception, in paragraph (1)(b), concerns the 'right not to know'. Respect for the patient's autonomy implies that the patient has the right to decline to be informed, unless disclosure is necessary in order to protect the health status of third parties or the public interest, as is often the case with genetic and infectious diseases.

Illustration 2
A patient is admitted to a hospital, suspected of having cancer. The patient states expressly that he does not want to be informed of anything; he just wants to be treated in whatever way the treatment provider finds most appropriate. The patient is entitled not to be informed.

Paragraph (2) of this Article provides for yet another exception. If, owing to an emergency or temporary mental impairment of the patient, it is impossible to inform him or her and if it is not possible to obtain informed consent from someone entitled to take decisions on the patient's behalf, treatment may be carried out. However, the treatment provider must inform the patient (as required by IV.C.–8:105 (Obligation to inform)) as soon as possible. Subsequent treatment depends on renewed information and consent.

B. Interests at stake and policy considerations

The therapeutic exception is a debated topic. According to the Hippocratic paradigm, the patient had but a passive role in treatment, being guided blindfolded as it were by the physician throughout treatment. No information whatsoever was provided, as it would only harm and confuse the patient. As health care became more easily accessible in developed countries and patients became better informed, this paradigm started to collapse in the twentieth century and the principle of patient autonomy developed.

It is often argued that no information should be withheld from the patient, as it enhances the patient's autonomy and self-determination. However, the role of the mind and suggestion in the success of treatment should not be underestimated; according to psychology, information can needlessly interfere with treatment or cause needless suffering. However, empirical studies suggest that treatment providers often abuse the vagueness of the therapeutic exception to shirk the duty to inform the patient. Other specialists argue that the therapeutic exception should only exist in so far as the life or health of the patient is at risk, and even then only in very serious circumstances, such as psychiatric or cardiac illnesses where the impact of the information might lead to shock causing the patient's death or serious deterioration of the patient's state of health.

On the one hand, the autonomy of the patient demands that health care professionals inform patients adequately. On the other hand health-care professionals, owing to the time and effort needed to provide information, professional pride and other cultural and economic factors, are reluctant to inform the patient. This 'tug-of-war' explains the tendency of treatment providers to evade the burden of providing information by invoking the therapeutic exception freely.

The right not to know is another corollary of patient autonomy. The decision of the patient not to want to know must be respected. It is argued that the treatment provider is allowed to disclose information to the patient against the patient's will if otherwise the health of third parties or public health would be jeopardised.

> *Illustration 3*
> A patient is diagnosed as having hepatitis B after being admitted to hospital because of a persistent flu and yellow skin. The patient declares she does not want to be informed, invoking her right not to know. As hepatitis B can be transmitted through sexual intercourse, the attending physician decides to inform the patient nevertheless in order to protect the health of the patient's sex partner or partners.

In situations where the patient is unconscious and treatment must be performed immediately, it is not possible to provide information. The literature and case law overwhelmingly agree that informing the patient can be deferred to a later time.

C. Preferred option

The preferred option is that the therapeutic exception under paragraph (1)(a) should only be invoked if the treatment provider has very serious and decisive arguments to support it, in situations where the information would have a negative impact on the patient's life or health. This is especially the case with cardiac or mental diseases, where the shock and emotional stress resulting from the information might entail serious risks to the life or health of the

patient. It should be noted, however, that the information should not be withheld from the patient's close family or parties authorised to take decisions on the patient's behalf. Another limit to the therapeutic exception is that it no longer applies when the objective circumstances on which the decision to withhold information from the patient was based cease to exist. In this case, the patient should be informed *a posteriori*.

The right not to know – paragraph (1)(b) – is recognised in so far as the lives, health and safety of third parties as well as public interest are not endangered by non-disclosure. The justification for this option lies in the autonomy of the patient.

Finally, if a patient is not able to consent to urgent treatment owing to unconsciousness or sensory impairment, the provision of information can be postponed until a later time when the patient is able to receive it, after treatment. People or institutions legally entitled to take decisions on behalf of the patient should be promptly informed. This is justified by practical considerations and it is a preliminary condition for consent to be given, as follows from IV.C.–8:108 (Obligation not to treat without consent) paragraph (3).

D. Burden of proof

The treatment provider will have to prove that exceptions to the obligation to inform existed and, in the case of paragraph (1)(a), to substantiate the existence of the objective conditions leading to the decision to withhold information under the therapeutic exception.

NOTES

I. Overview

1. The doctrine of therapeutic exception is not recognized in ENGLAND, as treatment providers are allowed to exercise appropriate discretion while choosing which information to disclose, according to the information that would be disclosed by a reasonable average treatment provider. In AUSTRIA, FRANCE, PORTUGAL and SCOTLAND treatment providers can withhold information from the patients, if that information would be detrimental to the health or life of the patient. The same principle applies in GERMANY, GREECE and SWEDEN, though the therapeutic exception only applies in exceptional cases and is interpreted in a very strict fashion. In THE NETHERLANDS the therapeutic exception is accepted if the information would cause serious detrimental consequence to the patient, but the physician must consult with another physician in order to ascertain whether or not to disclose that information to the patient. Finally, in SPAIN, if the treatment provider invokes the therapeutic exception, the family of the patient should be informed instead of the patient.

II. Therapeutic exception

2. AUSTRIAN case law indicates that the extent to which a doctor has to inform the patient has to be assessed against the well-being of the patient in the first place. Only afterwards do considerations as to the right to self-determination come into play. It follows from that that the doctor has to evaluate the patient's personality in order to establish whether there is a risk of unsettling the patient. Such a risk might lead to a rejection of the treatment and ultimately to severe adverse consequences. Applying

those considerations to very timid persons could even lead to minimum information of risks. The new understanding of the duty to inform leads to another issue worth discussing: the dangers inherent in giving too detailed information to the patient. Even though that might sound absurd at first sight the arguments put forward do make sense. A patient might be made insecure by the overflow of information and might not be willing to consent to an operation for fear of remote consequences mentioned by the doctor. That in return burdens the doctor with a nearly impossible mission: on the one hand to inform about all the typical risks and on the other to convince the patient to consent to the treatment.

3. The doctrine of therapeutic privilege is not necessary in ENGLAND, as the doctor is allowed to exercise appropriate discretion in choosing what information to disclose (*Kennedy and Grubb*, Medical Law[3], p. 701).

4. According to the FINNISH Act on Patient's Rights s. 5 information must not be given against the will of the patient or when it is obvious that it would cause serious hazard to the life or health of the patient.

5. Under FRENCH law, the Code of medical ethics (Decree 6 November 1995, art. 35(2) and (3)) allows the doctor to conceal a bad diagnosis or prognosis if the recovery of the patient requires it. More precisely it is ruled that, in the interest of the patient and for legitimate reasons, a patient can be kept in ignorance of a serious diagnosis or a prognosis, with the exception of those diseases which involve a risk of infection. A fatal prognosis cannot be revealed without circumspection but a person close to the patient must be informed, unless the patient has forbidden this in advance.

6. In GERMANY the treatment provider can only withhold information on the basis of the therapeutic exception, and then exceptionally, if that information can seriously endanger the life or health of the patient. The case law of the BGH is very strict and inflexible on this issue. Cf. *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 65; BGHZ 29, 46, 56 = NJW 1959, 811 = JR 1959, 418; BGHZ 29, 176, 182.

7. A therapeutic exception is possible depending on the particular circumstances of the case under GREEK law. Though there seems to be strong evidence to support an unmistakable obligation of the doctor to inform and an equivalent right of the patient to be fully informed, there also seems to exist space for a therapeutic exception. This can be the case where from all the circumstances it becomes clear that to inform the patient would either result to a significant deterioration in the patient's health or render the treatment ineffective. This may be the case particularly in psychological treatment. In cases of physical treatment, one could envisage such an exception only in very limited circumstances.

8. The therapeutic exception is accepted in THE NETHERLANDS (CC art. 7:448, para. 3). However, the exception is restricted to cases where the information would clearly have serious detrimental effects for the patient. Before withholding the information the doctor must consult another doctor. If this is in the patient‘s interest, the provider of the service needs to give the information to a person other than the patient. The information is given to the patient as soon as the detrimental effects subside. The need to consult another doctor has met with criticism in legal doctrine, e.g. *Sluyters and Biesaart*, De geneeskundige behandelingsovereenkomst, p. 28.

9. In POLAND, in exceptional situations, when the prognosis is bad for the patient, the doctor may limit the information about the patient's health and the prognosis, if according to the doctor's judgement not revealing the information is in the best interest of the patient. In such a case the doctor should inform the statutory guardian of the patient or a person nominated by the patient to receive the information. However, on a request of the patient the doctor is obliged to give the patient the required

information (art. 31 para. 4). In such a case the patient's right to information prevails over the judgement of the doctor about what is beneficial for the patient.

10. Therapeutic privilege can be invoked as a defence under PORTUGUESE law in so far as disclosure would have been clearly harmful to the patient (*de Oliveira*, O direito do diagnóstico pré-natal[2], p. 97). This is the case when disclosure would be a risk to the life of the patient, or would cause serious damage to physical or psychical health (CP art. 157, this provision is used in the civil law). *Dias Pereira*, O consentimento informado, 290 holds that therapeutic privilege should be interpreted in a restrictive way and recognised only when some cardiac or psychiatric illness could be aggravated by disclosure.

11. SCOTTISH law has long recognised a principle of therapeutic privilege 'albeit in a low profile way' (*Stair*, The Laws of Scotland, Reissue Medical Law, para. 263). Cases accept that it may in exceptional situations be sound medical practice not to subject a patient to alarm, anxiety or distress if that would render the treatment more difficult. But it seems not to go so far as to allow the treatment provider to substitute his or her judgement for the patient's.

12. In SPAIN if the information could cause grave damage to the health of the patient, the doctor is relieved from the obligation to inform, but not from the obligation to inform the patient's family, close friends or legal representative (Patient's Autonomy Statute, art. 5.4). In such situations, the provider is confronted with a conflict between the patient's right to health and the right to freedom. The former prevails (*Cervilla Garzón*, La prestación de Servicios Profesionales, p. 49). However, this conclusion cannot be presumed when the patient is in a terminal situation *(diagnóstico fatal).* The doctor is obliged to inform the patient about the terminal situation unless the patient has expressly indicated a wish not to be informed about it or unless the information could cause serious damage to the health of the patient or could endanger the treatment (*Peces*, Cuadernos de Derecho Judicial, 1994 T. XVIII, p. 128; *Sánchez Caro*, La Ley 1993 (3), pp. 946 ff). If the patient expresses a wish not to be informed, this wish should be respected. Nevertheless, this right is limited by the characteristics of the case, the treatment and the interest of the third parties. Therefore, a patient's wish not be informed should be respected, but a consent to treatment should be obtained anyway (art. 9.1 Patient's Autonomy Statute). Spanish law lacks provisions on the need for *information* in case of emergency, as it could be included in the cases when the patient's health may be damaged. However, art. 9.2 of Patient's Autonomy Statute expressly relieves the doctor from seeking the *consent* of the patient to proceed with the treatment in case of emergency.

13. In some rare cases information can be kept from the patient in SWEDEN if it would counteract the treatment. According to the Ethical Council the right to self-determination for the patient is very important, but more important is life itself.

IV.C.–8:108: Obligation not to treat without consent

(1) The treatment provider must not carry out treatment unless the patient has given prior informed consent to it.

(2) The patient may revoke consent at any time.

(3) In so far as the patient is incapable of giving consent, the treatment provider must not carry out treatment unless:

(a) informed consent has been obtained from a person or institution legally entitled to take decisions regarding the treatment on behalf of the patient; or

(b) any rules or procedures enabling treatment to be lawfully given without such consent have been complied with; or

(c) the treatment must be provided in an emergency.

(4) In the situation described in paragraph (3), the treatment provider must not carry out treatment without considering, so far as possible, the opinion of the incapable patient with regard to the treatment and any such opinion expressed by the patient before becoming incapable.

(5) In the situation described in paragraph (3), the treatment provider may carry out only such treatment as is intended to improve the health condition of the patient.

(6) In the situation described in paragraph (2) of IV.C.–8:106 (Obligation to inform in case of unnecessary or experimental treatment), consent must be given in an express and specific way.

(7) The parties may not, to the detriment of the patient, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

This Article deals with one of the obligations of the treatment provider under a contract for the provision of treatment. It therefore presupposes the existence of such a contract. The obligation is a negative one but a crucially important one – not to carry out treatment without the informed consent of the patient. The obligation is a corollary to the obligation to inform. There would be no point in giving the patient all the required information if treatment could then be imposed on the patient in any event. The obligation protects the patient's right to self-determination. It is such a self-evident obligation in cases involving capable and conscious patients that it is difficult to think of examples where it would be deliberately ignored.

Illustration 1
Having concluded a contract for the treatment of his prostate cancer, a patient is informed that there is a 10 per cent chance of impotence after prostate surgery. The patient decides not to have surgery but to have drug treatment instead. It is obvious that the treatment provider cannot proceed with surgery without the patient's consent.

The contractual obligation not to proceed without the informed consent of the patient is reinforced by the fact that there would usually be non-contractual and possibly criminal liability for invading a person's bodily integrity without that person's consent. Here, however, we are concerned only with the contractual obligation.

Another issue covered by this Article is the right of the patient to withdraw consent at any time (paragraph (2)). Even if the patient has previously provided consent for treatment, and treatment has already started, the patient can decide to withdraw consent at any given time. Consent does not usually require a specific form and may be withdrawn freely at any time (CHRB art. 5 (General Rule)). This is a corollary of patient autonomy: regardless of the consequences, the directions of the patient must be followed.

Illustration 2
After prostate surgery, it appears that the patient has prostate cancer. He consents to radiotherapy and chemotherapy – which prove to have nasty side effects. After two months of reduced life quality due to constant discomfort because of vomiting, nausea, hair loss, etc., the patient decides to withdraw his consent to these treatments. He is free to do so.

The rule also deals with circumstances where the patient is not able to express consent (paragraph (3)); in such a case, a third party entitled to decide on behalf of the patient may give consent to the treatment. Depending upon the legal system concerned, this third party may be the parent of a minor, a guardian, a family counsellor or an administrative or judicial body. Specific procedures may exist in some jurisdictions. Also treatment may be given without consent or going through the necessary procedural steps if the treatment must be provided in an emergency. However, in all these cases the wishes of an incapable patient must be taken into account so far as possible, as well as any views expressed by the patient prior to the onset of incapacity. Such views may have been expressed in a formal document such as an advance Directive. Paragraph (5) provides that, if a third party must give consent on behalf of an incompetent patient, this consent can only be given to necessary treatment, not to optional or unnecessary treatment. Only treatment necessary to improve the health situation of the incompetent patient is allowed.

Illustration 3
A 12-year-old child has an illness that can be treated by surgery. There are some risks involved, but also substantial benefits. Under the relevant national law it is up to the child's parents to give consent, but at this age the child already can understand the question and decide. In some jurisdictions, it can be necessary for a court or another judicial or administrative body to make the decision on behalf of the incompetent patient. The opinion of the incompetent patient must be taken into account, though it is not binding.

Advance Directives, so-called living wills and previously expressed wishes must be taken into account whenever the patient will no longer be able to provide, or withdraw, consent to treatment. A patient can issue a set of instructions containing its preferences regarding its self-determination in case it loses at a later moment the capacity to decide Cf. CHRB art. 9 (Previously Expressed Wishes).

Illustration 4
Before undergoing a very delicate and high-risk operation, a patient declares that he refuses to be given life support if, as a consequence of the operation, he falls into a coma which appears to be permanent. The treatment provider must bear this preference in mind when deciding what to do.

The Article establishes a specific, more stringent regime for experimental treatment in paragraph (6), establishing that consent must be expressed and specific.

B. Interests at stake and policy considerations

The patient has the right, derived from his or her autonomy, to have treatment performed only in so far as he or she consented to it. Likewise, it is in the treatment provider's best interests to obtain consent, usually in the form of a document, in order to have a defence in the case of potential malpractice claims in the future. There is no controversy regarding the necessity of the patient's consent to treatment in normal circumstances.

The interests of patients who lack the capacity, because of either a permanent or temporary impediment, to decide and give consent must be safeguarded, as they are vulnerable. From a bioethics point of view, they should be given extended protection in order to prevent abuse or mistreatment: the treatment should be carried out only for their direct benefit (see CHRB arts. (Protection of persons not able to consent) and 7 (Protection of persons who have a mental disorder). Direct benefit will consist in treatment that will, from an objective medical point of view, improve or maintain the state of health of the vulnerable patient, thus excluding optional or unnecessary treatment such as cosmetic surgery or sterilisation. Treatments such as euthanasia should not be allowed. This may, however, be too restrictive in end of life situations (e.g. dysthanasia), and so the rule should be open-ended enough to encompass the latest developments in bioethics.

> *Illustration 5*
> A patient has been in a coma for a long period. He is kept alive by means of a life-support system. There are no reasonable prospects for recovery. Should this patient be kept on artificial life support for the rest of his life? This poses a complex ethical and legal problem. It is usually decided by the ethics committee of a hospital.
>
> *Illustration 6*
> A 15-year-old girl is prescribed the contraceptive pill. Such treatment can be considered unnecessary from a medical point of view.

In situations where the incompetent patient is not totally unable to understand the information provided, and to process it and decide on the basis of it, the accepted view in bioethics is that his or her wish or opinion be taken into account. A problematic issue is, however, the extent to which the opinion of such patients should be taken into account. Recorded statements of the patient's wishes before the onset of incapacity pose the same problems.

It is also accepted in bioethics that consent to scientific research must be given expressly and specifically, and be documented (CHRB art.16 (v) (Protection of persons undergoing Research)). Consent should not be implied; it must be specific as regards that particular type of experimental treatment and be adequately documented in the clinical records, preferably in the patient's handwriting. It may, however, be argued that the requirement of written consent is too formal from a contract law point of view. Competent patients should be able to give their consent to clinical trials according to more stringent conditions aimed at protecting them.

Finally, there is a controversy about the right of the patient to refuse or withdraw from treatment. On the one hand, the patient's autonomy and right to self-determination should not be jeopardised. On the other hand, it is argued that the mission of the health-care provider is

to heal, and therefore to impose treatment on the patient against his or her will if treatment will benefit the patient. So it is often argued by health-care practitioners and some sectors in society that treatment providers should override irrational, potentially self-destructive decisions of the patient which would be contrary to any objective medical recommendation.

C. Preferred option

Whenever capable patients are concerned, it is broadly accepted that their consent is essential for the treatment to be performed upon them. This is obviously right. So the general principle in paragraph (1) establishes that the treatment provider has an obligation not to perform treatment unless the patient has expressed his or her consent, after being provided with the necessary information. The expression of consent is the final phase of informed consent, and establishes the informed choice of the patient regarding treatment.

Consent does not require a specific form, and it can be withdrawn at any time (paragraph (2)) irrespective of whether, from an objective medical point of view, the decision is wrong or irrational. Although withdrawal may have a serious detrimental impact on the patient's health, this position is the only one coherent with the patient's right to self-determination in health matters. This right to withdraw from or to refuse treatment can, however, be limited by *lex specialis* of a public law nature in particular situations, such as compulsory vaccination, mental health regulations, compulsory treatment of highly infectious diseases which pose a public health problem (tuberculosis, leprosy, SARS, etc.) and other circumstances where the public interest prevails over individual rights.

According to paragraph (3), if the patient is incapable of giving consent, persons or institutions legally entitled to take decisions on behalf of the patient may give consent instead. Consent is to be given according to local rules and procedures applicable to such situations. Treatment may always provided where this is necessary in an emergency. In so far as the patient has a limited ability to understand the circumstances in which treatment is to be performed, the patient's views and opinion about the treatment must be, so far as possible, be taken into account (paragraph (4)). Although in this case the opinion of the patient is not binding, it is relevant in so far as reasonable. The rule is open-ended in this aspect, as the relevance of the opinion of the patient can vary according to the concrete situation. The same reasoning applies to the decisions and preferences stated by patients before becoming incapable of giving informed consent.

The protection of vulnerable patients requires that the rule allows treatment to be performed on them in so far as it is presumed to be necessary for the improvement of their state of health. This prevents the potential abuse or mistreatment of patients who are in especially vulnerable situations (paragraph (5)). End-of-life issues are outside the scope of the civil law, and should be dealt with by public law regulation.

Regarding paragraph (6), although consent in a case of experimental treatment must follow a more stringent regime in order to protect patients, a written form is not deemed necessary unless it is required under public law rules or regulations. Consent in these circumstances must be express, specific for that experimental treatment and carefully documented (IV.C.–8:109 (Records)).

Finally, the parties may not, to the detriment of the patient, exclude the application of this Article or derogate from or vary its effect (paragraph (7)). The mandatory nature of the rule is justified by the fact that it is related to the protection of patients.

NOTES

I. Overview

1. In the case of patients who are capable of giving informed consent it is universally accepted that the treatment provider must not proceed to treatment without the patient's consent.
2. In the case of patients below the age of legal capacity (which differs from country to country) consent must, and may, normally be given by their legal representative, normally a parent. However, the opinion of an adolescent minor is taken into account, according to the minor's intellectual capacities and maturity in FINLAND, GERMANY, SWEDEN. In FRANCE, in the latter situation, consent must be obtained from the minor and not from the legal representative. The same applies in PORTUGAL, where the age of consent to medical treatment is 14, in SCOTLAND where it is 16 (although a child below that age can give consent if in the opinion of the treatment provider the patient is *in fact* capable of giving informed consent to the treatment in question) and in THE NETHERLANDS, where the age of consent is 16. In ENGLAND, only a court of law is competent to decide on behalf of the minor in case of some unnecessary types of treatment, such as sterilisation.
3. In the case of adults who are incapable of giving informed consent, there is no clear solution in ENGLAND where sometimes the treatment provider is allowed to take decisions on behalf of the patient or in ITALY. In FRANCE, SPAIN and THE NETHERLANDS the legal representative of the patient, or the closest of kin if none is appointed, is entitled to give consent on behalf of the patient. In SCOTLAND a legal guardian with the necessary powers can give consent and if there is no legal guardian there are special procedures and safeguards to enable the treatment to be given without consent.
4. In FINLAND, FRANCE, ITALY, PORTUGAL and SCOTLAND consent from the patient or a legal representative is not necessary in an emergency. In THE NETHERLANDS and SPAIN consent is presumed.
5. No consensus appears to exist in the analysed countries about the effect of advance directives, living wills and previously expressed wishes. In THE NETHERLANDS and PORTUGAL they must be taken into account, but are not binding on the treatment provider.

II. Consent and incapable patients

6. In ENGLAND parents can act as a proxy in the best interests of a minor child (Children Act 1989). Cf. *Re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33, 41. Regarding adults, no formal proxy exists which causes legal problems. In Re F (Mental Patient: Sterilisation) [1990] 2 AC 1 the House of Lords granted the doctor performing treatment on an incompetent adult the status of 'quasi-proxy'. In some forms of treatment, the court has the exclusive right to decide on behalf of the incompetent patient (minor or adult) (Cf. *Re D. (A Minor) (Wardship: Sterilisation)* [1976] 1 All ER 326).

7. According to the FINNISH Act on the Rights of the Patient, s. 6, the legal representative or a family member or other close person has to be heard before making an important decision concerning treatment if an adult patient because of mental disturbance or mental retardation or other reason cannot decide on the treatment. If this matter cannot be assessed, the patient has to be given a treatment that can be considered to be in accordance with the patient's interests. The opinion of a minor patient has to be assessed if it is possible with regard to the patient's age or level of development. If the minor patient cannot decide, the patient has to be cared for in mutual understanding with the patient's guardian or legal representative (ARP s. 7).

8. In FRANCE, the obligation on the treatment provider not to proceed without consent still exists when the patient is mentally incompetent. (CC art. 16-3). However, the content and the presentation of the information must be adapted to the particular intellectual situation of the patient. Regarding patients who are legally incapable to enter into a contract, such as minors, art. L. 1111-4(5) provides that the consent of the patient must be obtained if the patient is intellectually capable of taking a decision. If such is not the case, members of the patient's family may take the decision.

9. In ITALY the treatment provider cannot act (unless in cases of extreme situations) without the consent of the patient (of full age, capable of understanding and deciding) or without the consent of those who have parental authority in the case of minors (for a complete overview see *Santosuosso*, Il consenso informato). In fact, in so far as the patient is incapable, the legal representative has to express the informed consent (art. 32 Const.). The same principle is also expressed by the deontological code, which requires the treatment provider to obtain the consent from a person who is formally entrusted to decide. Problems arise with old people. In some situations one could argue that the patient is not in a condition to fully understand the information given, even if in principle still capable. In adopting the traditional division of the process of giving informed consent (information, understanding, capacity of understanding and deciding, freedom, conscious choice), one immediately understands that in the geriatric field problems arise in relation to various levels (*de Caprio,* Riv.it.med.leg 1998, fasc. 6 (December), pt. 1., p. 910). It may be difficult to evaluate and take into account, in the right measure, the capacity and competence of a subject of whom one has still to respect the auto determination. This issue is strictly connected to the issue of the living will, and the possibility of giving anticipated directions (see *infra*).

10. In GERMANY if the patient is a minor, consent is provided by the parents (CC §§ 1626 I; 1627; 1629 I) or legal proxy (CC § 1909) Cf. BGH NJW 1984, 1807; 1989, 1538; *Gehrlein,* Leitfaden zur Arzthaftpflicht, 153. In the case of adolescents, their opinion must be taken into account in so far as they can understand the nature, risks and consequences of treatment (BGHZ 29, 33; BGH NJW 1972, 335; *Katzenmaier*, Arzthaftung, p. 339.

11. The normal age of consent applies in GREECE. The legal representatives replace the incapable person for the purpose of expressing consent. Informed consent is required for all procedures in the course of a treatment. However, in the case of minor procedures which do not interfere with the physical and mental integrity of the patient and where a separate procedure of obtaining consent would impede the efficiency of the doctor's task, consent may be presumed. This is reinforced if the patient has already provided informed consent with regard to major procedures of the treatment.

12. In THE NETHERLANDS a distinction needs to be made between *legally* incompetent patients (minors, persons under legal guardianship) and patients who are *physically* incompetent to give consent. With regard to the first category, the following can be said. According to CC art. 1:233, a person under the age of 18 who is not married nor

a registered partner, and has never been married or a registered partner, is a minor. According to CC art. 1:234, a minor is not capable of concluding contracts without the legal representative's permission, unless the law states differently. With regard to treatment contracts, the law indeed states differently. According to CC art. 7:447(1), a minor of 16 or 17 years old is capable of concluding a treatment contract pertaining to his or her own person. As a result, his or her consent is necessary according to the lead provision of CC art. 7:450(1). Moreover, this implies that the consent of others, such as parents, is not required. If the patient has reached the age of 12, but not the age of 16, the patient's consent is also necessary, as follows from CC art. 7:450(2). However, in this case the patient's consent is in principle not enough: the legal representative needs to give consent as well. However, the legal representative's consent is *not* necessary if the procedure is necessary to avoid serious detrimental effects for the patient, and if, even though the legal representative refuses the consent, nevertheless continues to want the procedure to take place (CC art. 7:450(2)). If the patient has not yet reached the age of 12, his or her consent is not necessary, as follows *a contrario* from CC art. 7:450(1) and (2). In that case, the doctor needs the consent of the legal representative (CC art. 7:450 in conjunction with art. 7:465). From a case, decided by the District court of Rotterdam (Rb Rotterdam 20 August 1993, NedJur 1995, 18, Algemeen Psychiatrisch Ziekenhuis 'De Grote Rivieren' v. X), it follows that the representative's consent may be tacitly implied. The court ruled that from the fact that a minor of 15 years old voluntarily stayed for almost 4 months in a psychiatric hospital with her parents' knowledge but without their express consent, it could be deduced that the parents presumably gave their consent to the treatment. If the patient is incapable of expressing consent (the second category), the doctor needs the consent of the legal or 'mandated' representative or, if none has been appointed, the patient's partner or a member of the patient's family (CC art. 7:450 in conjunction with art. 7:465(3)).

13. In POLAND if the patient is a minor or incapable of giving a conscious consent, the consent of the statutory guardian is required or, if the patient does not have a statutory guardian, the consent of the guardianship court (art. 32(2)) or the factual guardian (art. 32(3)). In the case of completely incapacitated persons the consent should be given by the statutory guardian. If the patient has enough discernment to be able to express an opinion regarding the treatment, the patient's consent is also required (art. 32(4)). If the patient is over 16 the patient's consent is required (art. 32(5)). If a minor who is over 16, an incapacitated person or a mentally handicapped person, who has sufficient discernment, disagrees with the treatment, apart from the consent of the statutory or the factual guardian or in the case when they do not want to give their consent, the consent of the guardianship court is required (art. 32(6)). The consent of the abovementioned persons may be given orally or by any behaviour which beyond any doubt expresses consent to undergo the treatment (art. 32(7)). If the incapable patient does not have a statutory or factual guardian, or communication with them is not possible, the consent of the guardianship court is required (art. 32(8)).

14. In PORTUGAL the age of consent is 14 years (CP art. 38(3)). The parents can provide proxy consent, as of CC arts. 1878 ff.

15. In SCOTLAND a person aged 16 or over can give consent. A person under the age of 16 can consent to treatment if, in the opinion of the doctor, he or she is capable of understanding the nature and possible consequences of the treatment (Age of Legal Capacity (Scotland) Act 1991 ss. 1(1) and 2(4)). If a child under 16 does not, in the opinion of the doctor, have that level of factual capacity then the legal representative, normally a parent, is the person qualified to give consent. In the case of adults who lack the capacity to give consent, consent may be given by a guardian or welfare

attorney (a mandated representative) with the necessary powers or by a person appointed by a court for that purpose. If there is no such person available then the medical practitioner primarily responsible for the patient's treatment has authority (subject to a system of certificates and safeguards and exceptions) to do what is reasonable in the circumstances to safeguard or promote the physical or mental health of the patient. In rare cases it may happen that the responsible medical practitioner thinks that a certain treatment would be in the interests of an incapable patient but the guardian or welfare attorney refuses consent, perhaps from dubious motives. There are provisions to enable such situations to be resolved, via second medical opinions and court orders if necessary, in the patient's interests. See generally the Adults with Incapacity (Scotland) Act 2000, ss. 47 to 50 and *Stair*, The Laws of Scotland, Reissue Medical Law, paras. 264-280.

16. The treatment provider in SPAIN, in the case of patients who according to the treatment provider's criterion are not capable of understanding the information because of their mental or physical state, is under an obligation to inform the patient's family or legal representative. Patient's Autonomy Statute art. 5.3, LGS art. 10.6(b) (*Cervilla Garzón*, La prestación de Servicios Profesionales, p. 280).

17. For children, in SWEDEN, the consent of the parents is necessary until the child reaches an age where he or she is mature enough to take responsibility for his or her own situation. This is expressed in *Föräldrabalken* (FB) the Book on Parents art. 6:11, which states that concurrently with the child's growing age and development more and more consideration must be taken of the child's own opinion and wishes. The parents are however responsible for the child until the age of 18 years and must ensure that any necessary medical treatment is provided. In practice these rules operate in such a way that the normal child who has reached the teens takes more and more responsibility for his or her own medical care. (*Sverne and Sverne*, Patientens rätt[3], p. 38.) A special situation arises in relation to teenage pregnancies. It is considered that the girl always has the right to choose abortion on her own. The medical personnel furthermore have no right to inform the parents if the girl refuses. They must however inform the girl adequately and offer to inform the parents for her. (*Sverne and Sverne*, Patientens rätt[3], pp. 38 ff).

III. Consent in emergency situations

18. Under FINNISH law (APR s. 8), a patient has to be given treatment necessary to ward off a hazard imperilling the patient's life or health even in case it is impossible to assess the patient's will because of unconsciousness or other reason. However, if the patient has earlier steadfastly and completely expressed his/her will concerning treatment must not be given against the patient's will.

19. Under FRENCH law treatment can always be carried out in an emergency when neither the patient, nor members of the family, can promptly consent (CSP L. 1111-4).

20. In ITALY in any case of emergency and danger to the life of a person who cannot express a contrary will, the treatment provider has to provide assistance and indispensable care. The behaviour of a treatment provider who has the possibility to calmly evaluate the case is judged in a different way from that of one forced to take decisions in an emergency (*Conti*, Riv.it.med.leg. 1998, fasc. 6 (December), I, 1174). In this latter case, the doctor did not have enough time to carry out all the necessary examinations and consultations.

21. In THE NETHERLANDS in any case of emergency, consent is still necessary, but is presumed to have been given. Cf. *Roscam Abbing*, Het recht op informatie, p. 25; Pitlo [*-du Perron*], VI[9], p. 273.

22. Treatment without the consent of the patient is allowed in POLAND if the patient requires immediate medical assistance and cannot express consent, and there is no possibility to contact the patient's statutory or factual guardian (art. 33(1)). In such a case, if possible, the doctor should consult another doctor (art. 33(2)), and the special circumstances should be mentioned in the patient's records (art. 33(3)). If, during an operation or a medical or diagnostic treatment, certain circumstances appear, and not taking them into account may cause death, grave bodily injury or severe health disorder and there is no time to obtain the consent of the patient or the statutory guardian, the doctor is entitled, without such consent, to change the scope of the operation or method of the treatment or diagnostics so as to take the new circumstances into account. If possible, the doctor should consult another doctor in such a case (art. 35(1)). The circumstances should be mentioned in the medical record of the patient and the patient, the statutory or factual guardian and the guardianship court should be informed about them (art. 35(2)).

23. Consent is not necessary in PORTUGAL in an emergency situation, if a delay in treatment would be life-threatening or would lead to an aggravation of the patient's health condition: CP art. 156(2). From a civil law point of view, this is considered as benevolent intervention: Cf. *Dias Pereira*, O consentimento informado, p. 353.

24. In SCOTLAND it is accepted that treatment can be given without consent in an emergency (*Stair*, The Laws of Scotland, Reissue Medical Law, paras. 267-268; cf. ibid, para. 248).

25. In SPAIN, according to art. 9.2 sub a of the Patient's Autonomy Statute , informed consent by the patient is required unless there is an emergency situation where there is an immediate and serious risk to the patient's physical or psychic integrity and it is impossible to obtain the patient's consent. This solution is based on the theory of presumed consent. According to this doctrine, the doctor must presume that the patient, if able to do so, would have given consent to the treatment. Some authors argue that the doctor must intervene without consent when there is only one possible treatment, but not in cases where several alternatives are possible. In the latter case, the doctor must obtain informed consent from the family or legal representative of the patient (*Cervilla Garzón*, La prestación de Servicios Profesionales, p. 279).

26. In SWEDEN there are some exceptions concerning the consent of the patient, especially when it comes to operations. Firstly the operation can be performed in case of emergency when the patient is very ill or gravely injured and cannot give consent because unconscious or in a similar state. If there is time, the patient's family should be asked about the hypothetical opinion of the patient concerning the treatment (*Hedman*, Ansvar och ersättning vid medicinsk verksamhet, pp. 24 ff). The same applies if the patient is otherwise incapable of expressing consent: consent will then be presumed.

IV. Advance directives, living wills and previously expressed wishes

27. In FRANCE the patient can designate a person (member of the family, friend, habitual treatment provider), who will be informed and will be able to consent to treatment when the patient cannot express a choice (CSP art. L. 1111-6).

28. In ITALY there is no common view as to the value to attribute to advance directions of the patient. There are extreme views which deny any relevance to such documents, putting the accent on the fact that the consent has to be up to date. On the other hand there are those who believe that such advance directives are indeed binding because they are the expression of the autonomy of the patient. It still seems to be the prevailing view that the decision of the patient, expressed in documents containing

advance directives, does not bind the treatment provider (*de Caprio*, Riv.it.med.leg. 1998, fasc. 6 (December), I, p. 914).

29. In THE NETHERLANDS if a patient of 16 years of age or older cannot express consent, the doctor and the patient's legal or mandated representative or mentor have to follow the patient's written decision to refuse treatment expressed at a time when the patient was capable of expressing consent. However, the doctor can deviate from that decision if, in his or her opinion, good grounds to do so are present (CC art. 7:450(3)). From this article it follows that in principle, consent is necessary. If no written decision is available, the consent from an informal representative is required (CC art. 7:465).

30. Under POLISH law the doctor should follow any advance directive of the patient, even if that may cause death or suffering for the patient.

31. Living wills must be taken into account by the treatment provider in PORTUGAL, but are not binding (CHRM art. 9).

32. In SPAIN, if the aim behind the obligation to inform is to allow the patient to consent, with complete knowledge of the facts, to any medical intervention on the patient's body, it is logical to think that any previous indications of the patient's views (given before becoming incapable of giving a valid consent) regarding the treatment must be taken into account. However, it could also be argued that at that moment the patient may not have had all the information necessary to decide whether or not to give consent.

IV.C.–8:109: Records

(1) The treatment provider must create adequate records of the treatment. Such records must include, in particular, information collected in any preliminary interviews, examinations or consultations, information regarding the consent of the patient and information regarding the treatment performed.

(2) The treatment provider must, on reasonable request:

(a) give the patient, or if the patient is incapable of giving consent, the person or institution legally entitled to take decisions on behalf of the patient, access to the records; and

(b) answer, in so far as reasonable, questions regarding the interpretation of the records.

(3) If the patient has suffered injury and claims that it is a result of non-performance by the treatment provider of the obligation of skill and care and the treatment provider fails to comply with paragraph (2), non-performance of the obligation of skill and care and a causal link between such non-performance and the injury are presumed.

(4) The treatment provider must keep the records, and give information about their interpretation, during a reasonable time of at least 10 years after the treatment has ended, depending on the usefulness of these records for the patient or the patient's heirs or representatives and for future treatments. Records which can reasonably be expected to be important after the reasonable time must be kept by the treatment provider after that time. If for any reason the treatment provider ceases activity, the records must be deposited or delivered to the patient for future consultation.

(5) The parties may not, to the detriment of the patient, exclude the application of paragraphs (1) to (4) or derogate from or vary their effects.

(6) The treatment provider may not disclose information about the patient or other persons involved in the patient's treatment to third parties unless disclosure is necessary in order to protect third parties or the public interest. The treatment provider may use the records in an anonymous way for statistical, educational or scientific purposes.

COMMENTS

A. General idea

According to this Article, the treatment provider has an obligation to create, keep and keep up to date adequate records concerning the clinical history of the patient. This obligation aims at ensuring the correct performance of treatment, securing elements that may be important as evidence and promoting accountability. The reference to "adequate records of the treatment" assumes that the records will cover the anamnesis, the present health status of the patient, the way the illness developed, the therapeutic procedures followed, the medication, the obtaining of consent, the treatment performed, the names of the health-care professionals involved, etc. One reason for having an obligation to keep adequate records is that a patient may be seen by a number of different people at different stages and it is important that at each stage the treatment provider should know what has happened at earlier stages.

Illustration 1

A patient is admitted to a hospital after a skiing accident. Upon admission, a record will be created, and the time of admission noted down. The patient is taken to a physician in the emergency ward who is responsible for the assessment of the health status of patients and who refers them to specialists if necessary. The physician makes an initial diagnosis concluding that the patient has suffered a femoral fracture. The

physician makes an initial diagnosis, concluding that the patient has suffered a femoral fracture. The physician notes down this information. The patient is taken to the orthopaedic ward, where a specialist orthopaedist proceeds to make a more thorough diagnosis. The orthopaedist confirms the initial diagnosis and orders an X-Ray examination. The X-Ray examination is done, the radiation exposure is recorded and the radiologist's name noted down. Next, the orthopaedist examines the X-ray films, which are attached to the records. She informs the patient that the leg is to be immobilised by means of a splint for one month and that she will prescribe anti-inflammatory and painkilling drugs to be taken during the first three days. The splint is put on by a nurse. The patient leaves the hospital, and is to return after one month. All these data are noted down in the clinical record, which also contains an account of the materials used and their costs for the processing of the invoices.

The Article also covers the patient's right to have full access to the records and to require the treatment provider to give reasonable assistance with their interpretation (paragraph (2). This last point is important as records may use medical terms or abbreviations.

Paragraph (3) contains a specific presumption for treatment contracts. It applies when a patient has suffered injury and claims that it is a result of poor treatment. If the patient asks to see the medical records and the treatment provider does not provide them as required, it is presumed that the treatment provider failed to perform the obligation of skill and care and that there is a causal link between this non-performance and the injury. It is then up to the treatment provider to prove the reverse.

Records are to be kept for a reasonable time, according to paragraph (4), depending upon their usefulness.

The treatment provider is bound to secrecy concerning the records (paragraph (6)), with exceptions for cases where disclosure is necessary for the protection of third parties or the public interest. Likewise, anonomized data can be used for statistical, teaching or scientific purposes.

B. Interests at stake and policy considerations

Records are very important in order to be able to check the adequate performance of the contractual obligations. Apart from their methodological usefulness in the provision of treatment, records serve other purposes. They are important in the process of disclosure of information to the patient, especially in circumstances where the patient will want to evaluate the provision of the treatment. The medical records may also constitute the only source of information on which to base a lawsuit over malpractice, and will be of capital importance if a patient wishes to seek a second opinion or to be treated by another health-care professional.

It is generally recognised that the patient has the right to have access to his or her medical records as well as to obtain co-operation (even in the case of a claim against the treatment provider) from the treatment provider in their interpretation, according to applicable procedural rules. The records will be very important in order for the patient to assess the quality of treatment, and if necessary, essential elements in the substantiation of legal claims in case of non-performance of the obligations under the treatment contract.

It is debated whether the patient should have access to the entire record or only to the objective information included in it - that is, with the exception of notes of a personal, subjective nature. The latter may be highly prejudicial to the health-care provider in the context of a lawsuit. Another debate is whether the patient should have open access to the records or access only through a physician. It is argued, on the one hand, that a normal patient will not be able to understand the records and that full disclosure may not be to the advantage of the patient. On the other hand, it is argued that the patient should be granted full disclosure of all the records regarding his or her treatment and that involvement of a health-care professional and suppression of subjective notes by the treatment provider derive from a lack of transparency, paternalism and corporatism in health care.

Records may also be important in the future, serving as a basis for treatment to be performed on a patient. They may even be useful for several generations into the future (e.g. as regards genetic traits presenting a risk).

The issue of the quality of the records is very important. First of all, how detailed should the records be? Secondly, how accurate should they be? It is in the interest of the patient that they be thorough and accurate. Lack of thoroughness or accuracy may lead to non-performance of the contractual obligations.

> *Illustration 2*
> A patient is diagnosed as having a severe insufficiency of the renal function; her left kidney needs to be removed. The surgeon operating on the patient removes the right kidney owing to lack of clarity of the record created by the physician responsible for the diagnosis. In this case, the poor quality of the records contributed to the non-performance of the contractual obligation.

Even though accuracy is important, there is a price to pay: extensive record-keeping can be a difficult task for the treatment provider for time-management, organisational and budgetary reasons, whereas the possible gain for the patient may not always very clear.

> *Illustration 3*
> A patient is treated for a toothache. The treatment itself takes 15 minutes, recording its details will take 30 minutes if every wad of cotton used in the administering of the treatment is to be accounted for. If such were the case, the costs of the health-care provision of health care would skyrocket.

So far as sanctions are concerned, records are *the* decisive element in the context of a claim for non-performance of the obligation of skill and care. In such circumstances, it may be argued that the treatment provider should be expected to provide the patient with sufficient information. If no records, or only incomplete records, are produced it may be argued that non-performance of the obligation should be presumed. This provides a powerful sanction for the keeping of adequate records. The lack or incompleteness of the medical record may be said to justify the reversal of the burden of proof in a liability claim. It may be argued, however, on the other hand that it is unrealistic to expect the treatment provider to act in such a way, as it would be against his interests.

A debated topic is the intensity of the obligation of the treatment provider to answer reasonable questions concerning the records. This obligation may affect the organisation of an

institution, taking time away from more important duties. On the other hand, such information is important for the patient.

Another issue is during what period the treatment provider is to keep the records. It would be burdensome to keep records for a very long time, and there are costs involved in keeping them as well as providing information related to the records. So it is not to the advantage of the treatment provider to require the records to be kept for a lengthy period. On the other hand, it would be in the patient's interest that they are kept for as long as possible, in order to enable future reference to be made to them or in order to judge the quality of treatment when an injury manifests itself after a long time. In some circumstances, the period would be very long indeed (as regards genetic information, for instance). A balance should be struck.

The treatment provider is under an obligation to keep the records secret. While this does not apply to third parties entitled to decide on behalf of the patient, doubts arise whether the treatment provider should be allowed to use or disclose data for statistical, educational or scientific purposes. On the one hand, the treatment provider and society have an interest in the development of medical science; on the other the patient's privacy and the privacy of other persons involved in the treatment (e.g. data obtained from family or friends that are needed for the treatment of the patient) are important considerations.

It is debated whether the treatment provider should be allowed in some circumstances to breach privacy and disclose information to third parties. It is argued that in situations where privacy could affect the life or health of third parties in a detrimental way, or in situations of public interest, those interests prevail over the patient's privacy. Examples might be the potential transmission of infectious diseases to third parties, or the suspicion of a criminal act being related to treatment performed on a person.

Problems may also arise in cases where an insurance company or an employer enters into a treatment contract with a doctor on behalf of the patient. The disclosure of medical data may be seriously disadvantageous to the patient.

C. Preferred option

The obligations to keep and maintain adequate records and make them available to the patient are recognised in the legal systems analysed, as is the obligation of confidentiality. The differences are in the subsidiary aspects of the obligations, such as the extent of disclosure required, the sanctions, and the exceptions to the obligation of confidentiality. The preferred option is to follow this general approach and to oblige the treatment provider to create adequate records, of a quality and thoroughness of which conform to the standard of care of the profession. It is also thought appropriate to oblige the treatment provider to disclose the records to the patient and to enable the patient (or a court of law or the relevant institution investigating and deciding upon malpractice claims) to interpret them. This is the general principle.

The presumption in paragraph (3) prevents a situation where the patient would be precluded from assessing the quality of treatment, and possibly from substantiating a claim, because the treatment provider had not performed the obligation to keep records or withheld information. Without records, it is virtually impossible for the patient to successfully claim a remedy for non-performance of the obligation of skill and care under these rules. This rule also has a

deterrent role, as it prevents the treatment provider from being lax as regards the obligation to keep records where it serves purposes other than securing evidence.

The treatment provider need only answer *reasonable* questions from the patient regarding the records. This prevents wasting the treatment provider's time and effort, while providing the patient with the information needed in order to evaluate the quality of performance of the obligations under the treatment contract.

As regards the time during which the treatment provider is to keep the records, the obligation under paragraph (4) varies according to the circumstances. Ten years is set as the reasonable minimum period, but a treatment provider may be required to keep the records for a longer time. In exceptional circumstances, where it may be important to keep the records for a longer time, the treatment provider is obliged to keep them. It is of no importance whether their prolonged keeping is of medical interest or otherwise serves the patient's interests or the general interest.

> *Illustration 4*
> An employee of a construction company is hospitalised because of a possible exposure to asbestos. The physician examining the patient cannot find evidence of any detrimental effects at that time. However, exposure to asbestos may lead to the development of malignant mesothelioma (a specific type of lung cancer attributed solely to sustained exposure to asbestos) decades later. Thus, the employee has an interest in the records being kept for a very long period, in order for him to be able to prove that exposure took place in the past, information which he will need to file a claim against his employer.

When the treatment provider ceases its activities, the records must either be deposited with another treatment provider or competent organisation or delivered to the patient or his heirs or representatives. This solution is a balanced one, and is justified by the possible importance of that information for the patient or relevant third parties even after an eventual action is time-barred.

Finally, it seems reasonable to allow the treatment provider to use or disclose the information contained in the records for statistical, educational or scientific purposes, in so far as they are used in an anonymous way. The treatment provider can also disclose information in order to protect third parties or the public interest in limited exceptional cases. The limit consists of the protection of the life or health of third parties that would otherwise potentially be endangered if disclosure did not take place. Disclosure is, however, not allowed to protect paternalistic interests of third parties, as these are not serious enough to warrant the sacrifice of secrecy, and such a breach might cause serious detriment to the patient (e.g. the loss of a job if data are disclosed to the employer).

The provisions of paragraph (1) to (4) are mandatory. Of course, the patient or the person or the institution entitled to take decisions on behalf of the patient may opt not to exercise or to waive the rights under paragraphs (2) or (4) but that is a different matter.

NOTES

I. Overview

1. It is accepted in all the analysed countries that the treatment provider is under an obligation to create and keep adequate clinical records about the treatment. It is regulated by specific public law regulations in: AUSTRIA, ENGLAND, FINLAND, FRANCE, SCOTLAND and SWEDEN.

2. In FRANCE, ITALY and SWEDEN, if the treatment provider does not keep records, disciplinary sanctions may follow. In AUSTRIA, GERMANY, THE NETHERLANDS, PORTUGAL and SPAIN the consequence of not keeping records is the facilitation of the patient's burden of proof, or even a shift of the burden of proof to the treatment provider. In ENGLAND the treatment provider is under a procedural duty to disclose all information relevant for litigation. In GREECE it is an autonomous ground for a liability claim.

3. In all of the analysed legal systems, the patient has a right of access to the clinical records. However, in some systems some of the information can be withheld from the patient. Evaluative information and personal remarks can be withheld from patients in GERMANY and PORTUGAL: the patient is only entitled to access to objective data and facts logged on the records. In UNITED KINGDOM data likely to cause serious harm to the physical or mental health of the patient is exempted from the duty to disclose. Following a similar reasoning, in Portugal patients can only have indirect access to the clinical records through a physician. In THE NETHERLANDS information that could breach the privacy of third persons is not disclosed.

4. In all the analysed legal systems clinical records are considered as confidential information. In ENGLAND and SCOTLAND the duty of confidentiality emerges from a general duty of confidentiality in the common law. Also in GREECE it emerges from the general right of personality enshrined in the Constitution. In GERMANY the confidentiality in the treatment-provider/patient relationship emerges from criminal law. In FINLAND, FRANCE and SPAIN the secrecy of clinical records emerges from statutes regulating healthcare. In THE NETHERLANDS a specific provision exists in the CC.

5. While in FRANCE no exceptions to the duty of confidentiality appear to exist, in other legal systems confidentiality can be waived in certain specific circumstances. (a) Serious public interest in disclosure outweighing the right to privacy of the patient is accepted in ENGLAND, FINLAND, GERMANY, THE NETHERLANDS, SCOTLAND and SPAIN. (b) A threat to the life or health of third parties is recognised in England, The Netherlands, Spain, Italy and Germany. (c) Disclosure to other healthcare professionals for operational reasons is accepted in Germany; The Netherlands and Spain. (d) Legal representatives of minors and incompetent patients can get access in England, Italy, The Netherlands and Spain. (e) Anonymous use of data for medical research is recognised in Germany and The Netherlands. (f) Authorisation by the patient of disclosure.

II. Duty to keep records

6. In the field of public hospitals the KAKuG regulates the duty to keep records in AUSTRIA. § 10(1) regulates what the records should contain; imposes an obligation to keep the files for at least 30 years and states who is responsible for keeping the records. Likewise, the law on doctors regulates the issue in § 51, imposing a duty to keep the records for at least 10 years (para. 3). In sum, keeping written records is an

important ancillary duty of the doctor which entails the patient's right to view them as well.

7. Doctors must keep records as a part of the care owed to the patient in ENGLAND: National Health Service (General Medical Services) Regulations 1992, Schedule 2, para. 36. Cf. *Kennedy and Grubb*, Medical Law[3], p. 990.

8. The duty to keep records is established in the FINNISH Act on Patient's Rights Chap. 4.

9. An obligation to create clinical records exists in FRANCE (CSP art. R. 1112-2). This article also details the types of information which must be included in the clinical record. The treatment providers may, with the consent of the patient, store clinical records with trusted third parties, Art. L. 1111-8 CSP.

10. According to unanimous case law and literature, the treatment provider has an ancillary duty, emerging from the treatment contract, of creating complete and dutiful records of treatment measures in GERMANY *(Dokumentationspflicht)*. Cf. BGHZ 72, 132, 137; *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], 443. Records must cover all of the phases of treatment: anamnesis, diagnosis, therapy, medication, information given, surgery logs.

11. The provider of the service is under an obligation to keep records of the medical history of the patients in GREECE. It is a secondary obligation under the contract of treatment. To the obligation of the doctor corresponds a right of the patient to access these records. Recent legislation on the protection of the individual from databases – implementing a European directive- reinforces the right of the patient to have unlimited access to such records.

12. All medical operations, clinical data and observations on the patient have to be recorded in ITALY. The giving of informed consent is a precise stage in the relationship between doctor and patient. It requires, like other stages, an accurate and documented procedure (*Flores and Buzzi*, Resp. civ. e prev., 1998, fasc. 1 (February), p. 1297). It has to be configured not as an act, but as a process: it cannot be only a subscription by the patient of a form, not necessarily understandable (*Portigliatti Barbos*, Riv.it.dir.proc.pen. 1998, p. 894).

13. According to the DUTCH CC art. 7:454(1), the doctor is obliged to keep records of the medical condition and the treatment of the patient – even if the patient does not want some data to be recorded. Cf. *Sluyters and Biesaart*, De geneeskundige behandelingsovereenkomst, p. 63. The patient does not have a right to have data corrected. However, on the patient's request, the doctor does have to record statements, made by the patient, with regard to the records, and to which procedures of a far-reaching nature the patient has given consent. Cf. CC arts. 7:451 and 7:454 para. 2, respectively. See further *Van Wijmen*, Geneeskundige behandelingsovereenkomst, p. 168. Moreover, on request of the patient, the health provider is required to lay down in writing to which procedures of an important nature the patient has consented (CC art. 7:451). In such a document the patient or the health provider may also indicate to which procedures the patient has *not* consented. The health provider is free to include other notes in the records. The limitation of the patient's right to demand a written recording to procedures of an important nature is meant to prevent an excessive formalisation of the relations between the health provider and the patient too much. Cf. *Sluyters*, Gezondheidsrecht, note to CC art. 7:451.

14. Under POLISH law the doctor is obliged to keep individual medical records of the patient (Act on the profession of a doctor, art. 41(1). Additionally, the medical care

institutions are obliged to keep records of the patients (Act on the medical care institutions, art. 18).

15. The doctor is under an ancillary duty to keep adequate records under the PORTUGUESE CC arts. 573 and 575. Cf. *Dias Pereira*, O consentimento informado, p. 328; *Figueiredo Dias and Sinde Monteiro*, Responsabilidade médica na europa ocidental, p. 42.

16. Doctors must keep records as a part of the care owed to the patient in SCOTLAND (*Stair*, The Laws of Scotland, Reissue Medical Law, para. 324).

17. In SPAIN an obligation to keep clinical records of the patient's medical history is provided by art. 14 of the Patient's Autonomy Statute.

18. There is in SWEDEN an obligation for the health and medical service as well as for the dental service to keep records (Law on patient records (1985:562), art. 1). Records must be kept of treatment and examination, and there are detailed rules on the content.

III. Consequence of not keeping records

19. In AUSTRIA a non-performance of the obligation to keep records has consequences as regards the question of evidence. Since the patient's position is adversely affected by the non-performance the patient will be granted a facilitation of evidence in order to re-establish balance. In addition to that the provider might face penalties of an administrative nature. Both the KAKuG and ÄrzteG are public law statutes and might therefore trigger public law sanctions.

20. Under ENGLISH law the treatment provider is under a duty to disclose all relevant information in litigation: CPR rule 31, Cf. *Kennedy and Grubb*, Medical Law[3], p. 1021.

21. There is no treatment of this question in case law or legislative act in FRANCE. This is a disciplinary offence. In application of general contract law, the treatment provider is in breach of an obligation and will be liable to pay compensation for damage sustained by the patient if any.

22. The ITALIAN penal Code states an obligation of medical report in art. 365.

23. Under GERMAN law one of the aims of the obligation to keep adequate records is conservation of evidence and as a consequence failure to perform this obligation can affect the burden of proof of negligence and causation. The burden may be lightened or shifted to the treatment provider: BGH NJW 1972, 1520; BGH NJW 1978, 2337; BGH NJW 1983, 332; BGH NJW 1985, 2193; BGH NJW 1987, 2300; BGH NJW 1988, 762; *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 446.

24. In GREECE the doctor is under an obligation to keep records. Non-performance of that obligation may give the patient a claim for damages.

25. In THE NETHERLANDS a non-performance of the obligation to keep records gives rise to disciplinary sanctions. It may also have consequences with regard to liability. The *Hoge Raad* decided in 1987 that the doctor has to supply sufficient information to justify his or her rejection of the patient's claim, in order to provide the patient with a starting-point to prove the claim. Cf. HR 20 November 1987, NedJur 1988, 500, note WLH (Timmer/Deutman). If the doctor has lost or destroyed the original records or simply failed to keep record in a satisfactory way, the non-acceptance of the patient's claim cannot be justified. As a result, the burden of proof will shift to the doctor, who will probably be unable to meet it due to the absence of records. Cf. *Giesen*, Bewijslastverdeling, p. 40. However, the *mere* fact that a medical advice is not registered in the medical records does not necessarily lead to the conclusion that the advice has or has not been given. Whether the absence of the mentioning of the advice

leads to negative consequences for the doctor, therefore depends on the circumstances of the case: in HR 10 April 1998, NedJur 1998, 572 note F.C.B. van Wijmen, the *Hoge Raad*, following the Court of Appeal's evaluation of the situation, found that there was insufficient reason to shift the burden of proof to the doctor. What and how much data and detail the doctor must provide, also depends on the time which has passed since the treatment: the doctor cannot be expected to remember every detail of an operation which took place years ago. This has been recognised as well by the *Hoge Raad* in its ruling of 7 September 2001, NedJur 2001, 615 (R. and B. v. Stichting Ignatius Ziekenhuis).

26. In POLAND not keeping the records may trigger the liability of the persons obliged.

27. Lack or incompleteness of records may lead to a shift of the burden of proof to the treatment provider under the PORTUGUESE CC art. 344 para. 2.

28. Failure to keep records has not been a basis of action in SCOTTISH cases.

29. In practice, under SPANISH law the absence of medical reports will lead courts to presume liability of the medical treatment provider because of the damage inflicted to the patient (TS 2 December 1996, RJ 1996/8938). There may also be administrative sanctions (doctor as a civil servant, institutions within the Public Health Service) for non-compliance with a statutory obligation.

30. If the medical personnel in SWEDEN do not keep records or, as is more usual, do not fulfil the requirements as to the content of the records they can be subjected to disciplinary sanctions.

IV. Patient's right to have access to the records

31. The AUSTRIAN KAKuG§ 5a Z 1 provides for the right of the patient to view records corresponding to the obligation set forth in art. 10. The law on doctors regulates that issue in art. 51 together with the obligation to keep records (see above).

32. Patients are entitled to access to medical records under the provisions of the UNITED KINGDOM Data Protection Act 1998, Access to Medical Reports Act 1988, and Access to Health Records Act 1990. However, data likely to cause serious harm to the physical or mental health of the subject is exempted from disclosure (s.5 (1)). Cf. *Kennedy and Grubb*, Medical Law[3], p. 1023; *Stair*, The Laws of Scotland, Reissue Medical Law, paras. 326-333. Note also the Freedom of Information Act 2000 and the Freedom of Information (Scotland) Act 2002.

33. The key provision in FRENCH law is CSP art. L.1111-7. The obligation to disclose such information to the patient is provided by article L. 1112-1 para. 1.

34. In ITALY the doctor has to make relevant medical records available to the patient or to the legal representatives or doctors and institutions indicated by the patient in writing (Medical Deontological Code art. 21). Especially where the doctor works in a team there is a de-personalisation of the relationship and therefore there is a demand for enhanced information for the client. This means that the client must have access to the information and the doctor must disclose all information necessary. See *Alpa*, Riv.it.med.leg. 1999, fasc. 1 (February), p. 27.

35. The right of access to medical records in GERMANY can be based on CC §§ 259, 260, 810. Disclosure is limited to objective scientific concrete data in the records (Medication, surgery logs, examinations, ECG, EEG, etc.). Personal records or subjective evaluations recorded by the doctor are exempted from disclosure. Cf. *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 449.

36. According to the DUTCH CC art. 7:456, the patient has the right to view the records and to obtain a copy of the documents included in the records, unless the privacy of a

third party is at stake. A therapeutic exception to the right to view the records has *not* been accepted. Cf. *Sluyters and Biesaart*, De geneeskundige behandelingsovereenkomst, pp. 93-94; *Van Wijmen*, Geneeskundige behandelingsovereenkomst, p. 170. The access is to be provided free of charge. In principle, the treatment provider is required to co-operate with a second request for access, which normally is to be provided free of charge again, unless, in the circumstances of the case, this would be unreasonably onerous for the treatment provider, given the costs the treatment provider incurs in order to comply with the request. Cf. Rb. Eindhoven 23 May 2002, Prg 2002, 5903 (psychiatrist Van der Beek v. patient S.).

37. In FINLAND the patient's general right to check his or her own clinical records is regulated in the Personal Data File Act ss. 26-28.

38. The patient or the patient's statutory guardian has a right of access to the patient's medical records under the POLISH Act on the medical care institutions, art. 18(3) (1).

39. In PORTUGAL access to clinical records is only possible indirectly, through the mediation of a physician Lei 67/98 of 26/10 art. 18 (3)(1) and Lei no. 94/99 of 16/7. This does not contravene art. 10 para. 3 CHRM. Only objective records must be disclosed, subjective remarks from the physician are excluded. Cf. *Sinde Monteiro*, Responsabilidade por Conselhos, p. 427; *Dias Pereira*, O consentimento informado, p. 332.

40. It is the right of the patient (whom failing that of his or her family, close friends or legal representatives) in accordance with the SPANISH Patient's Autonomy Statute, art. 18 to access the clinical history and to receive a clinical discharge report when the patient is discharged from a medical centre (art. 20). The Royal Decree 1030/2006 on the organisation of the medical services regarding the National Health System gives patients a right to receive proper information and clinical documentation (art. 10). imposes on the "Service of medical information and documentation" an obligation to provide a patient, upon request, with a copy of his or her medical records.

41. The patient has a general right to read his or her own records in SWEDEN. Because of this right, the medical personnel are obliged to formulate the records clearly and to as large an extent as possible in a way understandable to the patient (Law on patient records (1985:562), art. 5).

V. Secrecy of clinical records

42. There is a duty of confidentiality in ENGLISH law: *A-G v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 AC 109. Remedies may consist of an injunction or damages: W. v. Egdell [1989] 1 All ER 1089, *W. v. Egdell* [1990] Ch 359. Cf. *Kennedy and Grubb*, Medical Law[3], p. 1047.

43. According to the FINIISH APR s. 13, the information in patients' medical records is confidential.

44. Clinical records are considered to be confidential information under FRENCH law (CSP art. L. 1112-1(5)).

45. In ITALY the doctor has to protect the privacy of personal data and documents regarding people even when they are entrusted to codes or computer systems. Health information is considered highly sensitive. Only specialised institutes can collect such data, with the consent of the patient, and they can be disclosed only upon the request of a professional (usually the family doctor). In scientific publications of the clinical data and observations relating to a single patient the treatment provider has to guarantee that the patient cannot be identified.

46. The doctrine on confidentiality in a medical setting was developed by the criminal law in GERMANY (StGB arts. 203, 204). The treatment provider is under a duty to keep secret the data gathered in the patient-doctor relationship. Cf. *Laufs and Uhlenbrück*, Handbuch des Arztrechts[2], no. 506.

47. The above Article on the secrecy of clinical records and the relevant exceptions corresponds to GREEK law. The right to privacy of the clinical records stems from the wider constitutionally protected right to personality (see CC art. 57).

48. The secrecy of clinical records has been recognised in the DUTCH CC art. 7:457. The provision requires the health provider to keep information about the patient confidential and not to give third parties access to or copies of documents included in the records, unless this has been approved by the patient. If and in so far as the health provider is authorised to provide information, to give access or to give copies of documents, that right is restricted in so far as necessary for the protection of the privacy of others.

49. In POLISH law the medical care institution is obliged to protect the data collected in the medical records (Act on the medical care institutions, art. 18(2)). In addition, the doctor owes a duty to keep secret all the data related to the patient acquired as a result of performance of the doctor's obligations (Act on the profession of a doctor, art. 40).

50. There is a general obligation of confidentiality in SCOTTISH law which is applicable in the medical treatment context (*Stair*, The Laws of Scotland XVIII, para. 1451-1492; *Stair*, The Laws of Scotland, Reissue Medical Law, paras. 282-323). Disclosure may be prevented by interdict or remedied by claims for damages or enrichment.

51. In SPAIN the obligation to keep medical records confidential is based upon the relation of confidence that arises between the patient and the medical treatment provider, who has access to information regarding the patient's private life. The obligation of secrecy is included in the Spanish medical code of conduct of 1990. Moreover, the Personal Data Protection Statute (Ley 15/1999) provides that data regarding health are especially protected. Only authorised persons may access such data. According to art. 43, the obligation is inherent to the medical profession and aims at guaranteeing the security of the patient. This obligation is mandatory for every doctor and covers all information that reaches the doctor while providing the treatment, not only information directly given by the patient, but also other information (art. 44). The doctor must ensure that the support staff know about the obligation of secrecy and that they comply with the obligation. Confidentiality turned into a statutory obligation when codified by the General Act on Healthcare of 1986, arts. 10.1 and 10.3, and developed by the Patrient's Autonomy Statute, art. 7. Part of the doctrine argues that the obligation to keep confidentiality is a question of public order. Thus, it is not in the interest of the patient but in the interest of society that the doctor has to maintain secrecy. According to this approach, medical secrecy is to be kept even when it goes against the will of the patient. Most of the doctrine argues that the obligation of secrecy is grounded in the protection of the right to privacy and intimacy of the patient, as well as in the constitutional right to dignity and privacy (art. 10.1). Thus, the patient could authorise the doctor not to keep information confidential, in so far as such behaviour does not have a negative impact on third parties. The latter is the most accepted theory because it allows the doctor not to comply with the obligation of secrecy when other interests deserve higher protection.

VI. Exceptions

52. In ENGLAND there are some exceptions to the duty of confidentiality, such as disclosure in the framework of parental responsibility in treatment of children: *Re Z (A*

Minor) (Freedom of Publication) [1997] Fam 1; public interest in disclosure *X Health Authority v. Y* [1988] 2 All ER 648 (QBD); danger to the health of others: *W. v. Egdell* [1989] 1 All ER 1089, *W. v. Egdell* [1990] Ch 359. Cf. *Kennedy and Grubb*, Medical Law[3], p. 1076.

53. In the FINNISH APR s. 13, the exceptions are regulated strictly and in detail.

54. There seem to be no exceptions in FRANCE.

55. There are some circumstances where the duty is waived in GERMANY. This can be the case of duties to notify health authorities when established by law, military doctors, anonymous data in medical research, insurance doctors, suspects of child abuse, other doctors and medical staff, or protection of another person's life or health (e.g., disclosing the sexual partner in the case of AIDS infection: CA Bremen MedR 1984, 112; CA Hamburg NJW 1989, 1551).

56. In ITALY, apart from specific law provisions (mandatory certifications, reports, notifications, etc.), a just cause of disclosure is: a) a request or authorisation of the patient, with a previous specific information on the consequences and opportunity of such a disclosure; b) the need to safeguard the life or health of the patient or third parties, in the case where the patient is not in a position to give consent because of physical impossibility, incapacity to act or incapacity to understand and decide; c) the need to safeguard the life or health of third parties, even against the expressed wish of the patient, but with a previous authorisation of the Authority responsible for the protection of personal data.

57. In THE NETHERLANDS also there are a few exceptions. The first exception is if the therapeutical exception regarding the obligation to inform applies (CC art. 7:448 para. 3) and the patient's interests require the health provider to give the information to a specific third party (CC art. 7:448(3) sent.2 and CC art. 457(1)). Secondly, persons who are directly involved in the performance of the obligations under the contract and a person who replaces the health provider are not to be considered a 'third party' for whom the secrecy exists, in so far as they need the secret information in order to perform their tasks (para. 2). The health provider therefore does not need the patient's consent to provide these persons with information or to give them access to the documents or copies of documents included in the records. Para 3 contains a third exception, which applies with regard to the person(s) whose consent to the treatment is required on the basis of CC art. 7:450 (in the case of minors and legal guardians of mentally incapable persons) or CC art. 7:465 (family of a person who is not or is no longer able to evaluate the situation but is not represented by a legal guardian). Such persons have access to the information or records, unless the health provider would be acting contrary to the required standard of care by giving access. Furthermore, in case law it is accepted that the secrecy of the records does not apply if there are sufficiently concrete indications that such secrecy would damage other weighty interests, and these interests outweigh the interest in keeping the records secret. Cf. HR 20 April 2001, NedJur 2001, 600 with note W.M. Kleijn and F.C.B. van Wijmen (Adriaensen/St. Sint-Elisabethshuis). One such opposite weighty interest is the fear that the patient was not *compos mentis* when having a testament drawn up. However, that fear must be substantiated by sufficiently concrete indications to that effect. Cf. HR 20 April 2001, NedJur 2001, 600 with note W.M. Kleijn and F.C.B. van Wijmen (Adriaensen/St. Sint-Elisabethshuis). Another such opposite weighty interest is the right of a health provider to mount a defence against a claim for malpractice instigated by the patient. Yet, if such a claim has been dismissed irrevocably, the health provider no longer has sufficient interest in viewing the medical records of the (former) patient. Cf. Hof Amsterdam 16 December 1999, KG 2000, 50. Finally, CC art. 7:458 para. 1 provides

that without the patient's consent information may be provided to third parties for statistical or scientific research in the field of public health, provided that (a) it is not reasonably possible to ask for permission to do so and the patient's privacy is not disproportionately damaged by the execution of the research, or (b) it is not possible to ask for permission given the nature of the research and the health provider has taken care that the data provided cannot be traced back to the patient. Moreover, para. 2 adds that the provision of information on the basis of this article is allowed only if the research is in the public interest, it cannot be executed without the required information and the patient has not explicitly objected to such provision. If information is provided in accordance with para. 1, this is to be included in the patient's records (para. 3).

58. In POLAND the medical care institution may give access to the records only to persons indicated in art. 18 para. 3 of the Act on the medical care institutions, which include for example another medical care institution if it is necessary for continuation of the treatment, courts, prosecutors, certain public offices or insurance institutions. Access to the medical records is also granted (art. 18 para. 4) to universities and research institutions, for research purposes. In such a case, however, names and other data that could allow identification of the patient should not be disclosed. The doctor is released from the duty to keep the records secret (art. 40 para. 2 of the Act on the profession of a doctor) if (1) the law so provides (2) the patient or the patient's statutory guardian agrees to the disclosure; in such a case the patient or the guardian should be informed about any negative consequences of disclosure, (3) maintaining secrecy could cause danger to the life or health of the patient or other people, (4) the medical examination was conducted at the request of certain public institutions; in such a case the doctor is allowed to inform only the institution, (5) there is a necessity to provide information to another doctor, (6) it is necessary for teaching purposes or (7) the information is to be used for scientific purposes.

59. For when confidential information may be lawfully disclosed under SCOTTISH law see *Stair*, The Laws of Scotland, Reissue Medical Law, paras. 307-321. Examples include sharing amongst the health-care team, disclosure for clinical audit, disclosure required by law or authorised by the patient's consent, disclosure required in connection with litigation. There are also rules on disclosures relating to children under 16 or to adults with incapacity. Best practice rules exist on disclosure to appropriate authorities where the treatment provider becomes aware that the patient is a victim of familial neglect or abuse.

60. In SPAIN medical secrecy is grounded in the patient's interest in privacy and intimacy. This interest may conflict with others which in the specific circumstances deserve higher protection. On this basis, the doctor may not be under an obligation to maintain confidentiality in the following circumstances: when the patient authorises the doctor to disclose; with regard to the family or legal representative of the patient when the patient is incapable of communicating with the doctor; with regard to medical personnel who co-operate with the doctor (nurses, support staff); when the law imposes the obligation on the doctor to disclose the information: expedition of medical certificates, obligation to report criminal behaviour (Penal Procedural Law art. 262), cooperation in judicial proceedings; when there are reasons of public welfare: such is the case with epidemics or contagious diseases; scientific and academic research (LGS art. 61), provided the identity of the patient is kept secret; and when the interest of the doctor deserves higher protection, for example, when the doctor has to prove in a judicial proceeding that the treatment was carried out with the due diligence, but not when the doctor merely wants to claim the price for the treatment. The Spanish Medical Code of Conduct also mentions exceptions to the

obligation of secrecy – under art. 45 the doctor could use the medical records in medical publications, provided this is done in such a way that the patient cannot be identified; under art. 46 the doctor is not in breach of the obligation of secrecy if compelled to disclose the information by legal imperative, although the doctor must still be cautious and must assess whether there are still some particulars which should not be disclosed; under art. 48 if the doctor discovers during the treatment that a minor or any incapable person have been subject to physical or mental assault, the doctor should do what is needed to protect such persons, even by communicating the situation to the competent authorities.

IV.C.–8:110: Remedies for non-performance

With regard to any non-performance of an obligation under a contract for treatment, Book III, Chapter 3 (Remedies for Non-performance) and IV.C.–2:111 (Client's right to terminate) apply with the following adaptations:

(a) the treatment provider may not withhold performance or terminate the contractual relationship under that Chapter if this would seriously endanger the health of the patient; and

(b) in so far as the treatment provider has the right to withhold performance or to terminate the contractual relationship and is planning to exercise that right, the treatment provider must refer the patient to another treatment provider.

COMMENTS

A. General idea

The normal remedies for non-performance of an obligation provided by Book III, Chapter 3 apply in the case of obligations under a contract for treatment. The remedies include withholding of performance, damages, price reduction and termination of the contractual relationship for fundamental non-performance. The remedy of enforcing specific performance would also be available in theory but would be of restricted application in practice because of the personal nature of the obligations under a treatment contract. It could not be used, for example, to force a patient to undergo treatment (by enforcing the obligation to co-operate) but could be used by the patient to enforce an obligation to provide treatment if the patient so wished.

The right provided by IV.C.–2:111 (Client's right to terminate) also applies in the context of a contract for treatment and enables the patient to terminate the contractual relationship at any time.

This Article contains two adaptations of the normal rules. The treatment provider may not withhold performance or terminate the contractual relationship or if doing so would cause serious harm to the health of the patient. Even if the treatment provider exercises these rights, there is an obligation to refer the patient to another treatment provider. In practice the only situations in which the treatment provider would be likely to withhold performance or terminate the contractual relationship would be where the patient was not performing the obligation to co-operate or had repudiated the contract by stating in advance that there would be no payment.

B. Interests at stake and policy considerations

It is debated whether the treatment provider should be allowed to terminate the contractual relationship or withhold performance if the patient fails to perform reciprocal obligations under the contract – normally the obligations to co-operate and pay. On the one hand, it is argued that this right should not be exercised if that fact would, from an objective point of view, seriously endanger the health situation of the patient. On the other hand, not allowing the treatment provider to terminate the relationship or to withhold performance would excessively bind the treatment provider to the contract, not even allowing termination for a repudiation or fundamental non-performance by the patient. This could seem particularly hard

in those cases, such as cosmetic surgery, where termination would not affect the patient's health.

In several legal systems, there are restrictions on the treatment provider's right to terminate the contractual relationship. It is generally accepted that the patient can terminate the relationship at any time and with no reason.

C. Preferred option

The preferred option is to limit but not remove the treatment provider's remedies of withholding performance or terminating the contractual relationship. The treatment provider is not allowed to exercise these remedies if the health of the patient would be seriously endangered by the consequences, i.e. the suspension or cessation of medical care administered by that specific treatment provider. The physical integrity of the patient is considered to be more important than the contractual freedom of the treatment provider and as such prevails. Even where the treatment provider is allowed to withhold performance or terminate, there is an obligation to refer the patient to another provider. The patient should not simply be left without anywhere to go.

No adaptations are considered necessary in relation to the patient's right to terminate the contractual relationship at any time under IV.C.–2:111 (Client's right to terminate). The normal restitutionary effects will follow. This means, among other things, that the patient would normally have to pay for any examinations or tests already carried out. The patient would not be allowed to obtain these for nothing and take them to another treatment provider. Under IV.C.–2:111 paragraph (3) the client who terminates without any ground to do so may be liable to pay damages for any loss suffered by the service provider. However, in the case of a treatment contract there is unlikely to be any such liability for damages because performance of the contractual obligation to treat would have been dependent in any event on the client's consent.

NOTES

I. Overview

1. While in FRANCE general contract law governs the question of termination by the treatment provider, in THE NETHERLANDS, and SWEDEN termination is restricted, and only allowed for important reasons. In Sweden this is the case of the lack of cooperation from the patient with the treatment provider while treatment is carried out. In addition, in The Netherlands the end of the fiduciary relationship between the treatment provider and the patient, fundamental disagreement about the treatment and geographical mobility of the patient are considered serious reasons for termination. In SPAIN termination is possible, but the treatment provider must give a term of notice to the patient, and cannot stop carrying out the treatment until the patient has found another treatment provider.
2. All the systems analysed agree that the patient can terminate the contractual relationship at any time, without needing to justify the termination. In SPAIN, however, though the termination is always effective immediately, if the patient did not give the treatment provider an adequate term of notice, good faith demands that the patient indemnifies the treatment provider.

II. Termination by the treatment provider

3. In FRANCE general contract law applies.

4. Termination of the contractual relationship by the health provider is possible in THE NETHERLANDS only for 'important reasons' (CC art. 7:460*)*. Termination is, for instance, possible if the provider of the service has developed personal feelings for the patient which hinder a proper performance of the contractual obligations, if the provider of the service retires from the profession, if the patient has moved outside the geographical area covered by the physician (especially if the physician is a General Practitioner) or if the necessary fiduciary relationship between the parties is lost due to a fundamental disagreement about the treatment. Cf. *Sluyters*, Gezondheidsrecht, ad art. 7:460.

5. In POLAND the doctor may not withdraw from providing the treatment if this could cause death, grave bodily injury or severe health disorder (Act on the profession of a doctor, art. 38(1)). If the doctor is about to withdraw, he or she is obliged to inform the patient sufficiently early about this intention and indicate to the patient a real possibility of obtaining treatment from another doctor (art. 38 (2)). If the doctor acts as an employee, he or she may refuse to treat or withdraw from providing the treatment only for important reasons, after obtaining the consent of the employer. The doctor must indicate the fact of withdrawal and the reasons for it in the medical records of the patient. Based on similar principles a doctor may refuse treatment which is contrary to his or her conscience (art. 39).

6. In SCOTLAND general contract law applies but this must be seen in context. Most medical treatments are carried out under the national health service. Termination of a private doctor/patient relationship would not leave the patient without the normal right to treatment under the national health service. Moreover a sudden cessation of treatment likely to place the patient in danger or cause the patient suffering would probably give rise to contractual or non-contractual liability for failure to exercise the required degree of skill and care.

7. The provisions of the SPANISH CC regarding the contract of services do not say whether the professional may cancel the relationship with the client. The rules on the contract of mandate (CC art. 1733) are deemed appropriate to apply to these cases by way of analogy. The medical service provider must notify the patient of the intention to bring the relationship to an end but is obliged to continue providing the service until the patient is able to adapt to the new situation (e.g. find another specialist to continue the treatment) in accordance with CC art. 1737 (mandate). Such a rule derives from the type of activity carried out by medical service providers. The Medical Code of Conduct establishes in art. 10 that when the patient refuses to follow a treatment the doctor deems necessary or when the patient requires the doctor to provide a treatment deemed inadequate or unacceptable by the doctor due to scientific or ethical reasons, the latter is exempted from the obligation to provide assistance.

8. In SWEDEN if the patient refuses a certain kind of measure, for instance refusing blood transfusion at an operation, then the doctor is entitled to refuse to perform the operation (*Sverne and Sverne*, Patientens rätt[3], p. 20).

III. Termination by the patient

9. In FRANCE the consent to the treatment can be withdrawn at any time (NCH article L. 1111-4 para. 3).

10. Termination of the contractual relationship by the patient is regulated in the DUTCH CC art. 7:408 para. 1 (in the Chapter on Services in General). It provides that the client

may terminate the relationship at any time. The parties may not derogate from this provision to the detriment of the patient (cf. art. 7:413 para. 2).

11. In principle, the patient is allowed to terminate the treatment at any time in POLAND.

12. In SCOTLAND normal contract law applies but the facts that the consent of the patient is required for any intervention and that specific performance would be unavailable mean that the patient has considerable freedom to repudiate a treatment contract without liability.

13. In SPAIN the service contract concluded between doctor and patient is regarded as similar to the contract of mandate (CC art. 1733), a contract where mainly the interest of the patient is protected. Therefore, if the interest of the patient in continuing the relationship disappears, he or she can bring it to an end. Part of the doctrine justifies this prerogative in the theory of the "prevalent interests" whilst other authors argue that it is justified by the principle of confidence (CC art. 1732 para. 1). There is no need to justify the termination but the professional has to be informed about the decision. Notification of termination may be given expressly or tacitly (e.g. when the patient has recourse to another specialist to treat the same illness). If the professional is not aware of the termination because the patient has not given notice, and thus continues providing treatment, the patient must pay for such treatment. The declaration of termination is always effective, with or without notification, although in some cases good faith requires the patient to notify the doctor or pay compensation.

14. Generally the patient may cancel at any time in FINLAND and SWEDEN. There are however exceptions, for instance in the case of compulsory institutional care for the mentally ill or addicts.

IV.C.–8:111: Obligations of treatment-providing organisations

(1) If, in the process of performance of the obligations under the treatment contract, activities take place in a hospital or on the premises of another treatment-providing organisation, and the hospital or that other treatment-providing organisation is not a party to the treatment contract, it must make clear to the patient that it is not the contracting party.

(2) Where the treatment provider cannot be identified, the hospital or treatment-providing organisation in which the treatment took place is treated as the treatment provider unless the hospital or treatment-providing organisation informs the patient, within a reasonable time, of the identity of the treatment provider.

(3) The parties may not, to the detriment of the patient, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

It commonly happens in some countries that health-care professionals without an employment contract with or a functional link to a hospital are allowed by that hospital to administer treatment on its premises. This situation may result in uncertainty about the legal rights of patients. The idea underlying this Article is that a treatment-providing organisation, such as a hospital or an asylum, should make its own position clear and should inform the patient of the identity of the treatment provider. If the treatment provider cannot be identified the organisation will be treated as the treatment provider.

Illustration

A patient has light surgery in a hospital. A doctor within the premises of the hospital attends him. The surgery leaves an ugly scar. The patient seeks an explanation, but the hospital declines any responsibility as the patient did not conclude the contract with the hospital, but with an independent doctor acting within its premises. The patient demands to be informed about the identity of the doctor, but the hospital administration has no information and the patient cannot remember the doctor's name, as he was convinced that he was an employee of the hospital. This Article applies.

B. Interests at stake and policy considerations

Many cases of failure to perform obligations under treatment contracts arise in the context of a complex treatment-providing organisation, such as a hospital or an asylum. Health-care professionals who are not employed by the organisation very often perform treatment on its premises, and uncertainties may arise because of that. Similarly, non-performance of the treatment obligations is often caused by problems in the administration and organisation of such institutions or by defects in their equipment or premises.

From the patient's point of view, it would be highly desirable if there was no need to be bothered by organisational issues of which he or she could not reasonably be expected to be aware. On this view, the patient should be able to bring a claim for non-performance against the hospital or asylum regardless of whether that hospital or asylum is the contracting party itself or only the place where the independent treatment provider operates. It can be argued that, for the sake of certainty and patient protection, such a regime would be desirable. The difficulties of identifying the professional involved and sorting out responsibilities if various

causes contributed to the non-performance make it extremely difficult for the patient to bring a claim. So a rule imposing central liability on the organisation could directly benefit patients. Another advantage of such a rule might be to enhance prevention, as the hospital or other similar institution would engage itself actively in the organisation and supervision of the activities of its professionals. The financial problems posed by such a regime to small treatment-providing organisations could possibly be overcome or alleviated by compensation funds pooling.

On the other hand it is argued that such a stringent regime would have serious financial consequences for hospitals which to a great extent rely on freelance health-care professionals. Insurance premiums would probably rise.

Another position is that such a rule should not operate automatically, but only if the liable freelance professional cannot be identified in a similar way to what is provided by Article 3(3) of Directive 85/374/EEC of the European Council regarding liability for defective products.

C. Preferred option

Implementing full-fledged central liability of treatment providing organisations is not deemed desirable; such central liability would have too high an economic impact on small hospitals. Moreover, this would lead to conceptual problems regarding the extension of liability to an institution which was not a party to the contract, albeit that it benefited from that contract and permitted the contractual party to act within its premises.

However, in balancing the interests involved, it seems not unreasonable to provide that the patient who suffers from a non-performance of obligations under the contract is entitled to some assistance from the treatment-providing organisation in identifying the party liable for the non-performance. The preferred option is therefore to oblige the treatment-providing organisation to indicate, at the patient's request, who is the contracting party. If it fails to provide the patient with the identity of the individual treatment provider within a reasonable time after being so requested, it is regarded as being the contracting party and may be held liable for non-performance.

Moreover, the patient is entitled to know who the contractual counterpart is before the contract is being performed. Paragraph (1) of the present Article therefore requires the treatment providing organisation to make clear to the patient that it is not the contractual party, and that treatment will be performed by an independent, autonomous healthcare professional acting within its premises.

NOTES

I. Overview

1. Rules of the type provided in the Article, or going further and imposing central liability, are found in only some systems. Most countries have no such rules. In some countries the problems do not arise because of the way the health care system is organised.

2. In THE NETHERLANDS, a provision of the CC establishes a central liability of hospitals, i.e. if treatment is carried out in a hospital that hospital is liable for injury caused to a patient, even if that hospital is not the contractual party. If the injury is caused by an independent healthcare professional who has a contract with the patient, the hospital in whose premises treatment is performed is liable for the damages suffered by the patient. This is also the case in SPAIN and in public hospitals in FRANCE and ITALY. In AUSTRIA and GREECE the hospital is not liable for the acts of independent practitioners working in its premises, unless the institution contributed to the non-performance of the treatment obligations. In FINLAND and SWEDEN it is not important to know who is responsible for the damage, as it is the patient insurance consortium which compensates patients. In addition, in this country, hospitals only allow their own employees to act within their premises.

II. Central liability of hospitals

3. In AUSTRIA one has to distinguish between contracts for treatment concluded with doctors and ones between the patient and a hospital. In the latter case, the treating doctors are employed by the hospital and in no contractual relationship with the patient themselves. Thus they are considered assistants in performing the obligations pursuant to § 1313a. The hospital, or rather the legal entity running the business is contractually liable for any faults committed by its employees in relation to the patient. The treating person (doctor, assistant, nurse, etc.) can only be held liable delictually which will not be very relevant for the aggrieved patient since he or she will rather seek damages from the more powerful party, that is the legal entity behind the hospital. If the treating doctor is not employed by the hospital, the patient concludes a contract with the doctor who then uses the facilities of a hospital to carry out the operation. It is quite clear that the doctor is now primarily the person who is contractually liable. The interesting question is to what extent the doctor is responsible for misconduct on the part of employees of the hospital who provide necessary assistance. Here, it is accepted that those persons assisting the treating doctor are to be seen as his or her assistants as well according to § 1313a.

4. Two situations have to be distinguished in FRANCE. If the doctor acts in the framework of a hospital, the latter is liable only if there is a labour contract with the doctor (Cass.crim. 5 March 1992, Bull.crim. no. 101; JCP 1993.II.22013, note F. Chabas; RTD civ 1993, 137, obs. P. *Jourdain*). In this situation the patient concluded a medical contract directly with the hospital. On the other hand if the doctor acts as a liberal professional, he or she is the only person responsible, even if the medical act has been performed in a hospital. The doctor is also liable for the fault of any auxiliary he or she chooses (anaesthetist, nurse, etc.) The solution is different if the treatment takes place in a public hospital. The latter is in any case liable for the malpractice of the doctors. The fault of the doctor is always a fault of the administrative service *(faute de service)* and the personal fault of the doctor is not detachable from his or her functions (For more information about these concepts of administrative law, see *Chapus*, Droit administratif général I[11], nos. 1523 ff).

5. The question whether and to what extent treatment institutions, such as hospitals and private clinics, bear the responsibility for a medical fault is not a straightforward one under GREEK law. A lot depends on the agreement between the parties, i.e. patient and doctor and the institution, and the relevant circumstances (*Foundedaki*, Medical liability in civil law, p. 200). If the patient concludes on a personal basis a contract for the provision of medical services with a doctor who is an external associate of the institution where the service is carried out, the institution is liable for the provision of the adequate infrastructure and paramedical care. Thus, it cannot be held liable for any

medical fault. The same view is held with regard to doctors that are not just external associates but employees of the institution in question, in case the patient enters into an agreement with the doctor on a personal basis. However, case law seems inclined to acknowledge liability of the hospital for medical fault in the previous types of cases on the basis of CC art. 922 (A.P. 241/1954 EEN 21, 949; A.P. 1893/1984 NoV 33, 1955; A.P. 1270/1989, EllDik 1991, 765). On the other hand, if the patient enters into an agreement for the provision of medical services with an institution, without a personal agreement with a particular doctor, the institution undertakes the whole liability, i.e. for medical and other associated services. The institution is liable for the fault of its medical staff on a contractual (CC art. 334) as well as delictual (CC art. 922) basis. Also, if the patient can opt for a particular doctor and the doctor agrees to act, then there is in addition a contractual bond between patient and doctor.

6. In ITALY the first question is whether there is a direct liability of the organisation towards the patient. A second question is whether such a liability is contractual or non-contractual. The questions are closely related. If it is a case of contractual liability, due to the contractual relationship between the patient and the hospital, it is a case of direct liability. This is true both when it is a private hospital (on the basis of CC art. 1228) and when it is a public one. In this latter case, the liability is inherent to the provision in CC art. 2049, and is related to special provisions governing the Public Administration. As regards the nature of the liability, while there is no doubt about the contractual nature in the case of a private hospital or other organisation, there has been debate about the nature of the liability in the case of a public one. The most recent case law tends to favour contractual liability (*Alpa*, Riv.it.med.leg. 1999, fasc. 1 (February), p. 40). Even where it is impossible to identify the doctor who should have fulfilled the duty to inform, there is a direct responsibility of the Public Administration for the illicit act of the employee (Cass. 24 September 1997, no. 9374, Riv.it.med.leg., 1998, fasc. 4-5 (October) I, with note *F. Introna*, Consenso informato e rifiuto ragionato. L´informazione deve essere dettagliata o sommaria?, pp. 825-830). This occurs as long as a link of causality between the behaviour of the employee and the damage to the patient has been proved.

7. If the performance of the obligations under the treatment contract takes place in a DUTCH hospital (see below) the legal person on whose premises the service is executed is liable for the faults of the person who performs the obligations. Liability can be based on either of the following grounds. 1. If the hospital (the legal person) is the *contracting* party (and thus ‘the provider of the service’ under CC art. 7:446), it is liable for faults of the person who actually performs the contractual obligations: according to CC art. 6:76, a party is responsible for the acts of a person whose services it uses in the performance of the obligation. Liability is then based on the normal rules regarding non-performance and it does not matter whether the person who actually performs is employed by the hospital or not. 2. If the hospital is not a party to the contract (because the contract is concluded by a doctor in person, who is then to be considered ‘the provider of the service’), the hospital is liable as though it were a party to the contract. Liability of the hospital is then directly based on CC art. 7:462, para. 1, which states that if in the process of performance of obligations under the treatment contract activities take place in a hospital that is not a party to the contract, the hospital is jointly and severally liable for a failure in the performance as if the hospital were a party to the contract. Therefore, due to CC art. 7:462, para. 1, for the patient it is not very important to know with whom he or she has concluded the treatment contract: in either case the patient can hold the hospital liable for the faults committed by a doctor. CC art. 7:462 therefore gives the patient a ‘central address’ to which a liability claim can be directed. Because of that, the hospital’s liability is called the ‘central liability’.

Cf. *Hondius*, Ontwikkelingen in de civielrechtelijke aansprakelijkheid van arts en ziekenhuis, pp. 64-65; Pitlo [-*du Perron*], VI[9], pp. 278-279; *Sluyters*, TvG 1996, p. 7; *Legemaate*, Verantwoordingsplicht en aansprakelijkheid in de gezondheidszorg, 1996, p, 45-46. It should be noted that the notion of 'hospital' includes a nursing home, a home for the mentally handicapped, an abortion clinic or a dental institution (CC art. 7:462, para. 2), but not a private clinic, cf. *Hondius*, Ontwikkelingen in de civielrechtelijke aansprakelijkheid van arts en ziekenhuis, p. 65. Hondius rightly criticises this. If the hospital is the contracting party, the doctor who committed the fault may be held personally liable if his or her actions amount to an unlawful act within the meaning of CC art. 6:162 (which will probably be the case). If the doctor is the contracting party, his or her personal liability is of course based of non-performance of the contractual obligations.

8. On the basis of the SPANISH CC art. 1903, para. 4 *(culpa in vigilando or in eligendo)*, the medical institution is responsible for the behaviour of the medical treatment providers who act in the framework of the institution, even when there is no contractual relationship between the patient and the institution. The medical centre is directly (and not subsidiarily) liable, thus it is not necessary for the claimant to sue the medical provider. There is a presumption of fault on the institution, which may be rebutted by proving that the institution acted with due diligence (TS 21 September 1993 RJ 1993/6650; TS 11 March 1995 RJ 1995/3133; TS 11 March 1996 RJ 1996/2415; TS 15 October 1996 RJ 1996/7110; TS 7 April 1997, RJ 1997/2742). The current tendency moves towards imposing an objective liability on the medical centres in order to guarantee that the victim will be indemnified.

9. Since all professional actors within the health and medical service are obliged to be insured under the FINNISH Patient's Injury Act s. 4 and the SWEDISH PL art. 12, it is not so important who is responsible for the damage, since in the end, it is the insurance company which pays. Even in the rare cases when this duty to be insured has been neglected, the patient can still get compensation from the Patient Insurance Association (*Sverne and Sverne*, Patientens rätt[3], p. 88). Generally, hospitals let only their own personnel act within their premises. The hospital will always be liable for its own personnel.

PART D. MANDATE CONTRACTS

CHAPTER 1: GENERAL PROVISIONS

IV.D.–1:101: Scope

(1) This Part of Book IV applies to contracts and other juridical acts under which a person, the agent, is authorised and instructed (mandated) by another person, the principal:

(a) to conclude a contract between the principal and a third party or otherwise directly affect the legal position of the principal in relation to a third party;

(b) to conclude a contract with a third party, or do another juridical act in relation to a third party, on behalf of the principal but in such a way that the agent and not the principal is a party to the contract or other juridical act; or

(c) to take steps which are meant to lead to, or facilitate, the conclusion of a contract between the principal and a third party or the doing of another juridical act which would affect the legal position of the principal in relation to a third party.

(2) It applies where the agent undertakes to act on behalf of, and in accordance with the instructions of, the principal and, with appropriate adaptations, where the agent is merely authorised but does not undertake to act, but nevertheless does act.

(3) It applies where the agent is to be paid a price and, with appropriate adaptations, where the agent is not to be paid a price.

(4) It applies only to the internal relationship between the principal and the agent (the mandate relationship). It does not apply to the relationship between the principal and the third party or the relationship (if any) between the agent and the third party.

(5) Contracts to which this Part applies and to which Part C (Services) also applies are to be regarded as falling primarily under this Part.

(6) This Part does not apply to contracts pertaining to investment services and activities as defined by Directive 2004/39/EC, OJ L 145/1, as subsequently amended or replaced.

COMMENTS

A. General

The present Article indicates the scope of the Part on Mandate Contracts. The first paragraph makes it clear that the Part applies to three types of situation. The first such situation is direct representation, where the agent is authorised and instructed to directly affect the legal position of the principal in relation to a third party, typically by concluding a contract between the principal and the third party. The second situation is indirect representation, where the agent is authorised and instructed to conclude a contract with a third party, or do another juridical act in relation to a third party, on behalf of the principal but in such a way that the agent and not the principal is a party to the contract or other juridical act. And the third situation is brokerage and similar activities, where the agent is authorised and instructed to take steps which are meant to lead to, or facilitate, the conclusion of a contract between the principal and a third party or the doing of another juridical act which would affect the legal position of the principal in relation to a third party, but without actually concluding a contract or doing the other juridical act for the principal. A typical example of this last situation would be an estate agent who is asked to find a buyer for a property, or a property for a buyer, but not to actually

conclude a contract. The reason for including this last type of contract is that it is very closely linked to the other types and to exclude it could enable principals to deprive agents of protections provided by this Part.

Because the scope of the Part extends beyond direct and indirect representation, the word "representative" would not here be appropriate to designate the party who acts for the principal. The term "mandatary" could have been used but as that is sometimes associated exclusively with those acting gratuitously and is, in any event, not a common word in everyday speech, it has not been chosen. A compound term such as "representative or intermediary" or "representative or broker" could have been used but that would have been cumbersome. The term "agent" has therefore been chosen. In ordinary language the term "agent" also covers agents who are instructed to do non-juridical acts, such as making enquiries, which have nothing to do with the conclusion of contracts. So it is only certain types of agent who are within the scope of this Part. Essentially it is concerned with mandates for representation, negotiation or intermediation in relation to the conclusion of contracts or the doing of other juridical acts.

The location of the provisions which now appear in this Part was debated within the Study Group. One argument was that they belonged most appropriately as a Chapter in the Part on Service Contracts, because they were essentially concerned with contracts for the provision of representation or intermediation services. Another argument was that they were sufficiently distinctive to merit separate treatment. Mandates were very often unilateral acts. The focus of the provisions was more on what was authorised and instructed than on what the mandatary as a service provider undertook to provide. In relation to contracts for representation there was something special about the situation where one person could affect another's legal position. The second argument prevailed.

The fact that contracts for the provision of representation, negotiation or intermediation services are dealt with in a separate Part does not, however, mean that their character changes. They are still contracts for the provision of services. An estate agent or an employment agency or a solicitor, for example, provides services. So provisions elsewhere in the DCFR which refer to the provision of services (as is the case for example with many of the pre-contractual information duties in Book II, Chapter 3) will, unless otherwise stated, apply to such contracts.

B. Authorisation and instruction

The characteristic elements of a mandate contract are that the agent is both allowed (authorised) and required (instructed) to conclude a contract between the principal and a third party or to do any of the other acts covered by the Article.

In the case of direct representation, the fact that the agent is authorised to act on behalf of the principal implies that the exercise of a mandate and the legal consequences in the external relationship are based on the free will of the principal: by authorising the agent the principal consents to the agent concluding a contract on the principal's behalf or otherwise affecting the principal's legal position. The authorisation also implies that where the agent respects the limits indicated in the mandate and acts in accordance with the provisions in this Part, the agent may not be held liable for concluding a contract with the third party which turns out to be detrimental to the principal: the principal assumes that risk.

The fact that the agent is also required to act on behalf of the principal indicates that the agent is under a legal obligation to at least attempt to complete the mandated task. By concluding the mandate contract the agent therefore undertakes an obligation to act.

C. Application to contracts without obligation to act

The rules on mandate normally apply to contracts by which the agent is not only authorised, but also required to act on behalf of the principal. Paragraph (2) extends the scope of this Part to contracts in which the agent is authorised but not required to act on behalf of the principal. Obviously, this provision is of relevance when the agent indeed acts on behalf of the principal.

D. Application to remunerated and gratuitous contracts

Paragraph (3) indicates that the present Part applies to all mandate contracts by which the agent is to be rewarded but also applies to gratuitous mandate services. Adjustments may be necessary in order to take into account that the agent was acting gratuitously. In the case of gratuitous mandate contracts, one could for instance imagine that the standard of care and skill expected under IV.D.–3:103 (Obligation of skill and care) will be lower and the obligation to inform the principal of the progress of the performance of the mandate contract and the obligation to give account are more restrictive than would be the case for a remunerated mandate contract. Moreover, IV.D.–2:103 (Expenses incurred by agent) paragraph (2) in particular applies where the parties have agreed upon the mandate contract being performed gratuitously.

Paragraph (6) excludes the application of these rules to investment services contracts.

E. External relationship not covered

Paragraph (4) provides that this Part is concerned with the contractual obligations between the principal and the agent only. This Part does not relate to the question whether or not the 'prospective' contract with the third party is valid or invalid: that question is governed by Book II, Chapter 6 on Representation. As is indicated in II.–6:101 (Scope) (paragraph 3), Chapter 6 of Book II only deals with the relationship between the principal and the third party (external relationship); it explicitly leaves the internal relationship between the principal and the representative to the Part on Mandate (see II.–6:101 Comment C).

F. Prospective contract or other legal effects

This Part will typically apply to mandates for direct representation in which the representative is mandated to conclude a contract on behalf of the principal, the second contract being referred to as 'the prospective contract', as defined in IV.D.–1:102 (Definitions) subparagraph (d). However, occasionally the representative will not be mandated to conclude a contract, but to otherwise affect the legal relations of the principal.

Illustration

A lawyer is instructed to file a lawsuit against another party for damages in tort. In this particular situation, when filing the lawsuit the representative actually does intend to affect the legal relations of the principal with the third party, but not by concluding a contract with that third party. Such mandate contracts are covered by the present Part.

G. Mixed contracts

Many mandate contracts will involve also the provision of services – for example, information or advice services or investigatory services. Paragraph (5) provides that such cases are to be regarded as falling primarily within this Part. The effect is to bring into operation paragraph (4) of II.–1:107 (Mixed contracts) so that the rules applicable to mandate contracts apply to the contract and the rights and obligations arising from it. However, the services rules will apply with any appropriate adaptations so far as is necessary to regulate the services elements and provided they do not conflict with the rules applicable to mandate contracts.

H. Investment services and activities not covered

Paragraph (6) indicates that mandate contracts are nevertheless exempted from the application of this Part if they pertain to investment services and activities. The reason for the limitation of the scope of the Part in this respect is that these mandate contracts are regulated by specific legal instruments, which are of a very different nature and to a large extent introduce public law requirements and supervision. These mandate contracts therefore differ so much from ordinary mandate contracts that application of the provisions of this Part would be restricted to extraordinary situations for which the public law regulation would not provide a solution, which would make the application of this Part merely accidental. In case there were such a need, a court could of course apply this Part by way of analogy, but these rules do not claim application by themselves.

I. Contracts for the administration of affairs not covered

Traditionally, contracts for the general administration of affairs are covered by provisions on mandate contracts. In the case of these 'general mandate contracts', the agent is not necessarily instructed to conclude, negotiate or facilitate a prospective contract, but merely to administer the affairs of the principal. Such contracts can therefore not be considered mandate contracts in the sense of this Part; they fall within the scope of the Part on service contracts and may occasionally be governed more specifically by the Chapter on storage (Book IV.B, Chapter 5) and possibly by the Chapter on processing (Book IV.B, Chapter 4). However, in the performance of such a contract, the service provider often has to affect the legal relations of the principal, e.g. when property belonging to the principal must be sold to safeguard the principal's interests. Where in the course of a contract of administration the service provider is required to buy or sell goods, or do any other juridical acts on behalf of the principal, the present Part may be applied by virtue of the rules on mixed contracts.

NOTES

I. Rules applicable to mandate contracts for direct representation

1. The AUSTRIAN legal system draws a distinction between the different activities of the direct and the indirect representative. Direct representatives have power to bind and entitle their principals contractually. They act 'in the name of' their principal. The mandate for direct representation covers cases where the third party knows that the counterparty is dealing as a representative for a named principal. Indirect representatives deal with the outside world as parties but internally owe the duties of an agent to their (disclosed) principals. The Civil Code deals expressly only with the

mandate for direct representation, namely in CC §§ 1002 et seq. Where the representative acts within the scope of the express or apparent authority as defined by CC §§ 1027-1029, 1033 and Ccom § 56, the acts bind the principal and the third party directly and the representative drops out. The general rules established by the Civil Code are often modified by canons of professional ethics – the conduct rules (Berufsordnungen) of solicitors and notaries, e.g. statutory tariffs regulating the remuneration. The commercial regulations of Ccom §§ 383 et seq. and 407 et seq. also deal with the mandate for direct representation.

2. In BELGIUM the legal relation between the parties to a contract for representation is governed by the legal rules on mandate (with some particularities), i.e. the legal relation between the principal and the commission-agent (*Samoy*, Middellijke vertegenwoordiging, 182; *Van der Perre and Lejeune*, Droit commercial I, no. 42), between the principal and the prête nom (CA Brussels 22 Feb 1927, Pas. 1928, II, 153 and Rev. prat. not. 1928, 648; *de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 476; *Deckers*, Le mandat, 13; *Paulus und Boes*, Lastgeving, 23; *Samoy*, Middellijke vertegenwoordiging, 94-95) and between the principal and the mandatary acting in his or her own name (Cass. 17 Apr 1848, Pas. 1848, I, 387 and BJ 1848, 758; CA Brussels 10 Dec 1958, JT 1959, 225; CA Brussels 28 Jan 1820, Pas. 1820-21, II, 30; *de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 436; *Laurent*, 61; *Paulus und Boes*, Lastgeving, 134; *Samoy*, Middellijke vertegenwoordiging, 305; *Tilleman*, Lastgeving, 277; *Van der Perre and Lejeune*, Droit commercial I, no. 166; *Wéry*, Le mandat, 152 and 259).

3. In the BULGARIAN law of obligations, a differentiation is made, on the one hand, between a mandate contract (*Договор за поръчка*) and a unilateral legal act of authorisation (*Пълномощно*), and, on the other hand, between direct representation (*Пряко представителство*) and indirect representation (*Косвено представителство)*. According to some commentators, so called "indirect representation" is not an actual representation, but a separate legal institute different from direct representation (*Horozov*, SP 1996/6, 26, 32; *Stavrou*, TP 2006, 325, 343). The general mandate contract is regulated in arts. 280-292 of the Law on Obligations Act. According to the legal definition in LOA art. 280, a mandate is a contract "under which the agent assumes the obligation to perform, on behalf of the principal, the acts for which he is assigned by the latter". Although in the relevant rules it is not explicitly stated, it is unanimously considered in legal writings (*Vassilev, L.*, Obligazionno pravo, 20; Mevorah/Lidji/Farhi, Komentar III, 17; *Vassilev, B.*, Spezialna chast, 92) and in case law (Supreme Court, Judgment no. 31, 4 Apr 1995, Civil Case 2453/1993, V; Supreme Court, Judgment no. 1511, 6 Oct 1995, Civil Case 2551/1994, V) that by virtue of a mandate contract the agent is mandated only for legal assignments, i.e. conclusion of contracts or performance of other juridical acts that affect the legal sphere of the principal. The agent can act either in the name of the principal (direct representation) or in his or her own name (indirect representation), but in any case acts on behalf of the principal. The same rules (LOA arts. 280-292) are applicable to both direct and indirect representation. In order to act in the name of the principal and to affect directly the principal's legal position, the agent has to obtain, from the principal, authority for representation. This authority is granted by means of a unilateral legal act of the principal under which the principal authorises the agent to act in the principal's name and to affect the principal's legal sphere (*Vassilev, L.*, Grajdansko pravo^2, 368). The legal act of authorisation is also regulated in LOA arts. 36-43, which articles are applicable to direct representation as well.

4. The most important DANISH statutory rules on agency law are Part II of the Contracts Act on agency, the Factors Act and the Commercial Agents and Travellers Act. These

rules are general rules governing all kind of civil agency not governed by special ruling.

5. The relevant rules in ENGLISH law are the common law rules of agency, which are of a general nature and apply to a wide variety of agents (estate agents, travel agents, insurance brokers, company directors etc). An agency relationship refers to the branch of law under which 'one person, the agent, may directly affect the legal relations of another, the principal, as regards yet other persons, called third parties, by acts which the agent is said to have the principal's authority to perform on his behalf, which, when done are in some respects treated as the principal's' (Bowstead (*-Reynolds and Graziadei*), Agency[18], no. 1-003). Because the agent has the power to affect the principal's legal relations with third parties, the internal agency relationship, i.e. the relationship between the agent and the principal, is regarded as a fiduciary relationship. In addition to normal contractual obligations, the agent is also bound by fiduciary obligations, imposed by equity. An agent who merely negotiates the terms of a contract for a principal, such as a solicitor, is also regarded as an agent and the traditional common law rules will therefore apply.

6. In ESTONIA contracts governing the internal relationship between the agent and the principal are regulated by the rules on contracts for services (mandate). The Estonian Law of Obligations Act contains a separate part on 'Contracts for Provision of Services' (part 8, §§ 619-916). There are two general types of the 'services contracts': the (general) contract for services (sometimes also translated as 'mandate contract' or 'authorisation agreement') and the contract of works. These two main types are distinguished by the nature of the obligations rising under the contract. Under the contract of works, the service provider is under a duty to guarantee the result envisaged by the contract, whereas under the (general) services contract the service provider is only under a duty of care. Any agreement on a provision of services that is not a contract of works (i.e. by which the service provider does not guarantee a specific result) comes under the contract for services. The LOA does not specify which services come under the (general) contract for services. In principle, any agreement by which representation or intermediation is provided comes under the scope of the general contract for services. Specific forms of representation or intermediation may, however, come under the scope of a specific services contract such as the contract of agency (*Handelsvertretervertrag*), brokerage contract (*Maklervertrag*) or a commissionaire agreement. The general rules of the contract for services apply also for its sub-types as far as their regulation does not contain a more specific provision.

7. The FINNISH Contracts Act contains general rules on mandate contracts in chapter 2. These rules are applicable when the authorisation includes a mandate to conclude contracts on behalf of the principal. The Law of Contract applies to all such contracts, unless otherwise provided in another Act. Further, chapter 18 of the Commercial Code includes general rules on authorisation concerning the relation between the principal and the agent. These rules, too, are only applicable if not otherwise provided in another Act. The Commercial Agents and Salesmen Act, based on EC directive (86/653/EEC), is applicable when the agent has undertaken continuously to promote the sale or purchase of goods on behalf of the principal by obtaining offers for the principal or by concluding sales or purchase contracts in the name of the principal. In addition, there are rules on specific types of authorisation in legislation, e.g. chapter 15 of the Code of Judicial Procedure, the Attorneys Act, the Real Estate Agent Act and the Insurance Agent Act. Otherwise the general principles of Contract Law are applicable as well as analogous interpretation of other legislation in the area of

Contract Law. Of general importance are, for instance, the Sales of Goods Act and the Consumer Protection Act.

8. Mandate contracts are governed by the FRENCH CC arts. 1984-2007. Some contracts involving mandate are the subject of special rules, particularly for estate agents (Law 2 Jan 1970), commercial agents (Ccom arts. L. 134-1 s.), insurance agents (Insurance Code arts. L. 520-1 s.), barristers and solicitors (L. 31 Dec. 1971).

9. GERMAN law has a number of groups of rules which are to be applied, depending on the characteristics of the contract at hand. (a) The first such group is on Mandate (*Auftrag*, CC §§ 662-674). By accepting a mandate the mandatary (*Beauftragter*) enters into an obligation to do something for the principal (*Auftraggeber*) without remuneration (CC § 662). The provisions on mandate are thus not restricted to constellations in which the task of the mandatary is to conclude a contract or execute a juridical act; the task envisaged can essentially be anything. As a mandate by definition is a contract under which the mandatary acts without being paid for, the importance of CC §§ 663-674 primarily results from the fact that other provisions in the Civil Code make reference to them. (b) The most important contract in the sense just mentioned is the agency contract (*Geschäftsbesorgungsvertrag*, CC § 675), i.e. a contract for services by which one party undertakes to look after the interests of the other party for a remuneration. CC § 675 will thus cover the (practically much more important) contracts in which the agent is paid for the actions taken on behalf of the principal (e.g. lawyer, estate manager, administrator of property etc.). CC § 675 does not stipulate the specific rules applicable to a *Geschäftsbesorgungsvertrag*, but rather says that CC §§ 663, 665-670, 672-674 and, under certain circumstances, § 671(2) (i.e. rules on mandate) apply. In addition, the provisions on either contracts for services (CC §§ 611 et seq.) or contracts for works (CC §§ 631 et seq.) apply. (c) CC §§ 675a-676h contain specific provisions for special types of banking contracts (largely introduced because of EC directives).

10. Mandate for direct representation (άμεση αντιπροσώπευση, amesi antiprosopeusi) is regulated in the GREEK CC arts. 211 et seq. In order for the principal to be bound by the juridical acts of the agent, the latter must have acted in the name of the principal, i.e. to have disclosed to the third party both the existence and the identity of the principal. The disclosure may be express or tacit, i.e. it may be indicated from the surrounding circumstances (tacit mandate) (Supreme Court decision no. 752/1987, NoV, 1426; CA Athens decision no. 9826/1989, EllDni 1991, 1631). That is the situation where the agent reveals the existence but not the identity of the principal (*Kerameus and Kozyris*, Introduction^2, 70). The Greek term for 'procuration' or power of attorney (πληρεξουσιότητα, plirexousiotita) signifies both the juridical act by which a person confers agent authority to another, and the authority conferred thereby. According to CC art. 216, a mandate is to be conferred by a deed drawn up for this purpose. A mandate is to be given by means of a declaration addressed to the attorney or a third party with whom the deed is concluded (CC art. 217).

11. In the HUNGARIAN CC, the rules of representation (external relationship – authority of agents) can be found among the general rules on obligations (arts. 219-225). For this reason, the technique of representation is not bound to any special contract type. If one party represents the other, the contract is usually qualified as agency (CC arts. 474-483) but employees bound by an employment contract may also represent the employer towards third parties. In this last case, the rules of labour law apply (Act XXII of 1992 on the Code of Labour (CL)). The rules of the 'agency' contract type do not focus on services for representation but apply to all contracts where the debtor (agent) has the obligation to do something according to the instructions and according

to the interests of the creditor (principal) without the duty to 'create a result achievable by work'. CC art. 474(1)-(2) establish that '[u]pon an agency contract the agent has the obligation to carry out the matters entrusted to him. An agent must fulfil the agency according to the instructions and interests of the principal'. See Supreme Court Pfv. V. 20. 876/1994, in BH1995. 571; Supreme Court Pfv. VIII. 21.147/2006, in BH2007. 86; Supreme Court Mfv. II. 11.035/2001, in BH2003. 386; Supreme Court Mfv. I. 10.945/2001, in BH2003. 213; Supreme Court Legf. Bír. Gfv. X. 32.294/1995, in BH1997. 302; Supreme Court M. törv. II. 10 978/1991, in BH1992. 736; Supreme Court Gf. II. 30 521/1986, in BH1987. 174; CA Csongrád Megyei Bíróság 1. Gf. 40 079/1999/2, in BDT2000. 185; CA Fővárosi Ítélőtábla 5. Pf. 21 230/2005/3, in BDT2007. 1598.

12. In IRELAND, the primary rules are to be found in the terms of the agency contract. The normal rules of construction will apply to give effect to the intentions of the parties, when interpreting this contract. Further, at common law, the law of agency imposes various rights and obligations on the parties to the agency contract. In particular, an agent is given three basic rights: to remuneration, to an indemnity and to a lien. The common law traditionally regarded agents as independent businesses and took the view that the agent was in the stronger position than the principal. Hence, the principal was in need of protection. As a result, the common law imposed on agents extensive duties, partly because of the fiduciary nature of the agency relationship. In addition, many representation/agency contracts are also subject to the EC (Commercial Agents) Regulations 1994 (SI No. 33/1994) and 1997 (SI No. 31/1997), which partly codify and partly modify the common law and were passed to implement the EC Directive on self-employed commercial agents (Directive 86/653/EEC, [1986] OJ L 382/17).

13. In ITALY if the agent's main obligation under the contract is to represent the principal, the rules governing mandate apply, and in particular CC arts. 1388 et seq. The rules governing the contract of mandate (*mandato*) also specifically apply, i.e. CC arts. 1703 et seq. See Cass. no. 5582/1993, Foro It. Mass., 1993, 4070, no. 6; Cass no. 1329/1983, Foro It. Mass., 1983, 4070, no. 2.

14. In the NETHERLANDS rules on mandate contracts have been established in the CC arts. 414-424. According to CC art. 7:414, mandate contracts imply that the agent undertakes an obligation to the principal to perform one or more juridical acts in the name and on account of this principal (*Van der Grinten*, Lastgeving, no. 5; *Haak and Zwitser*, Opdracht aan hulppersonen, 153-154.). If no specific rules on certain legal issues that relate to mandate contracts have been established, the general rules that apply to contracts for professional services apply (CC arts. 7:400-413).

15. In POLAND, the internal relationship between the agent and the principal is regulated by the rules on the contract of mandate (CC arts. 734-750) while the relationships between the agent and third parties are regulated by CC arts. 95-109. The representation under the contract of mandate may be both direct (the agent acting in the principal's name) or indirect (the agent acting in the agent's own name). If the parties have not agreed otherwise the representation is presumed to be direct (CC art. 734(2)).

16. The rules of agency in SCOTLAND are general in nature and apply to a wide range of situations and agents (for example, solicitors, estate agents, directors of companies). An agent has been described as 'a person who has authority to act for and on behalf of another (called the principal) in contracting legal relations with third parties; and the agent representing the principal creates, alters, or discharges legal obligations of a contractual nature between the latter and third parties' (*Smith*, Laws of Scotland, 774)

but in ordinary language the word "agent" is also employed to cover agents without authority – i.e. those (such as inquiry agents or, often, estate agents or law agents) who are authorised and instructed to do something for the principal other than affect the principal's legal position. The word "mandate" is traditionally reserved for a gratuitous contract of agency.

17. In SLOVAKIA the external relationship is covered by the General Provisions of the Civil Code (Act 40/1964 Coll. as amended). CC § 22(1) defines a representative as "anyone who is authorised to act for another person in the latter's name". This regulation is applicable both to contractual and legal representation and to civil and commercial relations. Regarding the regulation of the internal relationship between the principal and the agent, a distinction should be made between civil and commercial relationships. Ccom §§ 566-576 provide that the agent undertakes either to arrange a certain business matter by effecting certain legal acts in the name of and on account of the principal, or to arrange another matter at the principal's request, and the principal undertakes to pay remuneration for the services. Specific contracts are the Mandate Contract (CC §§ 724-732: the agent (or mandatary) undertakes to arrange a certain matter or to perform some other activity for the principal (or mandant) and its subtype Contract for Procurement of a Thing (CC §§ 733-736: the agent undertakes to procure a certain thing for the principal; "thing" is used in the meaning of "matter"). These contracts may cover both direct and indirect representation. A mandate may also come under the scope of the commercial representation contract (Ccom). The rules on mixed contracts are applicable in the case of intermediation (e.g. a brokerage contract mixed with an obligation to represent; see Supreme Court decision, No. 72/2004, legal decisions book 5, 16, 5 Cdo 65/03). The Act on Advocacy (586/2003 Coll as amended) contains rules for advocates.

18. Mandate is regulated in the SPANISH CC arts. 1709-1739. There is not a substantial distinction between mandate and representation; furthermore, the mandate is "naturally" a representation contract (CC art. 1717, *Diez-Picazo*, La representación, 65 ff), though indirect representation is also allowed as a possible content of the mandate (CC art. 1717 II) and similarly for a commercial mandate (commission) (Ccom arts. 245-247). The mandate rules serve as a basic model for most of the special regulations concerning the accomplishment of services on another's behalf. The main reason for that is that the mandate contract in Spanish law is not as such a contract with a content limited to the instruction of a third party to do "juridical" acts: the juridical nature of the agent's behaviour is not of the essence of the contract (CC art. 1709). So there exists a wide "grey area" in which mandate and service contracts overlap with each other (*Lacruz Berdejo and Rivero Hernández*, Elementos II(2)[4], 224, 228). Anyway, the mandate rules prevail, because legal provisions on services contracts scarcely exist in Spanish law.

19. SWEDISH law does not distinguish a particular set of contract law rules specifically relevant for the supply of services. In addition to general contract law rules, only a few old and general rules on mandate contracts for direct representation can be found in chapter 18 of the Swedish Commercial Code (HB). When appropriate, the Act regarding Factors (KommL), the Commercial Agency Act (HaL), the Sale of Goods Act (KöpL) and the Consumer Services Act (KTjL) can be used by way of analogy. More specific rules can be found in e.g. the Estate Agents Act (FmL) and the Financial Advisory Services to Consumers Act (Lag (2003:862) om finansiell rådgiving till konsumenter). The external relationship between the agent and the third party is governed by rules in Part II of the Contracts Act (AvtL).

II. Rules applicable to mandate contracts for indirect representation

20. The AUSTRIAN Ccom §§ 383 et seq. (commission agents) and Ccom §§ 407 et seq. (forwarder) apply to the contract between the agent (commercial agent/forwarder) and the principal. If the internal relationship between the principal and the agent rests on a mandate, the regulations of CC §§ 1002 et seq. apply for the contract between the agent and the principal (see Rummel (-*Strasser*) ABGB I³, § 1002, no. 8) though the underlying contract in the case of an indirect representation is not a contract of representation pursuant to CC § 1002 (*Bevollmächtigungsvertrag*).

21. For BELGIUM see Note 2 above.

22. In the BULGARIAN law of obligations, the same rules (LOA arts. 280-292) are applicable to both direct and indirect representation. Apart from these rules, there are also applicable to indirect representation some provisions on benevolent intervention (LOA arts. 60-62), commercial agency (Ccom arts. 32-48), the commission contract (Ccom art. 348-360) and the forwarding contract (Ccom arts. 361-366) (*Stavrou*, TP 2006, 325, 343).

23. In DENMARK when the agent is required or allowed to conclude the prospective contract in the agent's own name, the principal will not be bound towards the third party (unless the principal accepts the contract concluded).

24. In ENGLAND, at common law, the agent is not required to disclose to the third party that he or she is acting *in the name and on behalf of* the principal. When the existence of the principal is not revealed to the third party, it is referred to as an 'undisclosed agency'. In such circumstances, there is nevertheless an agency relationship between the principal and the agent since the principal authorises the agent to act for the principal on the basis that the agent will act in the agent's own name. The consequences of an undisclosed agency are as follows: the internal aspects of the internal relationship are the same: the principal appoints the agent to represent the principal; the agent is a fiduciary and the principal owes the agent commissions and indemnity for expenses etc. There is, *a priori*, no external feature since the agent does not create privity between the principal and the third party since the agent acts as a principal towards the third party. Initially, the contract is therefore between the agent and the third party. The principal still authorises the agent to represent the principal towards third parties but the principal remains hidden. Providing that the agent has actual authority to act on behalf of the principal towards the third party, the principal can intervene on the contract with the third party (*Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 1 All ER 213), i.e. can sue and be sued, but only if the agent acted with the principal's prior authority (*Keighley Maxsted v Durant* [1901] AC 240). The effects of an undisclosed agency are as follows. (a) Because the principal is not disclosed, the agent acts in his or her own name and is therefore liable on and can enforce the contract made with the third party. Vice versa, the third party can enforce the contract against the agent. This is so, provided that the principal has not intervened. (b) Technically, the law considers that the agent has contracted with the third party but the principal can also intervene on the contract. However, once the existence of the principal is revealed to the third party, the third party can elect whom to enforce the contract against. Once a choice has been made, the third party cannot try to enforce the contract against the other (*Clarkson Booker Ltd v Andjel* [1964] 3 All ER 260). (c) The principal can intervene on and enforce a contract made by the undisclosed agent with prior authority of the principal (*Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 1 All ER 213). The principal's right of intervention is subject to certain restrictions in order to protect the interest of the third party: (i) The principal cannot intervene if the contract expressly (*UK Mutual Steamship Assurance*

Association v Nevill [1887] 19 QBD 110) or impliedly excludes such intervention (*Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 1 All ER 213). The difficulty is to see whether the contract impliedly excludes the intervention of the principal. As the privy council decision in *Siu Yin Kwan* shows, the fact that the agent signed the contract as the 'insured' does not prevent the principal from intervening in the contract. It seems that if the agent is identified in the contract as a contracting party, this does not prevent the principal from intervening. (ii) The principal cannot intervene if personal factors are important (e.g. the third party wanted to contract with the agent or would not contract with the principal).

25. As a rule, in ESTONIA, such a contract would be the 'commissionaire agreement' (*komisjonileping*), regulated in LOA §§ 692-702. The commissionaire agreement is a specific type of the (general) contract for services; therefore, in addition to specific rules contained in LOA §§ 692-702, the general rules applicable for the (general) contract for services (LOA §§ 619-634) apply to the relationship between the agent and the principal. If the specific rules of the commissionaire agreement do not apply, the contract would be a (general) contract for services, for which the law does not distinguish between acting in one's own name and acting in the name of the principal.

26. In FINLAND commission trades and other mandates by which the agent acts in the agent's own name but on behalf of the principal and concludes contracts are not regulated in legislation, but governed merely by general principles of contract law and by analogous interpretation of the rules applicable to the other types of mandate contract.

27. The rules of the 'commission contract' (agent with usually undisclosed principal, who is acting in the agent's own name) will apply in FRANCE. This is regulated by Ccom arts. L. 132-1 s. The rules of the 'command contract' (purchase agent acting for an undisclosed principal, specifically in the case of sale of goods) can also apply in this specific case. To simplify, the relations between the principal and the 'commission agent' are mainly regulated by the specific rules of the mandate contract, and the relations between the 'commission agent' and the third party are then governed by the specific rules relating to the contract that they have concluded between them.

28. The GERMAN Ccom §§ 383-406 provides a set of rules on commission agents, i.e. persons who professionally undertake to buy and sell goods or securities in their own name for the account of another (Ccom § 383(1)). Apart from Ccom §§ 383-406, there are no rules specifically tailored to contracts for indirect representation, and thus the rules generally applicable to mandate contracts apply (MünchKomm (-*Häuser*), HGB, § 383 no. 28).

29. In GREEK civil law the applicable rule of CC art. 212 to mandates for direct representation is a rule of interpretation: if it is impossible to ascertain that a person acted in the name of another it shall be considered that such person has acted in his or her own name. That rule refers to the external aspects of the relationship *vis-à-vis* third parties, whereas the internal relationship between the principal and the agent may be based on a contract such as mandate (CC arts. 713-729). The notion of a mandate for indirect representation is in fact no mandate in the meaning of the rules of mandate for direct representation (CC arts. 213 et seq.) at all, since the effects of the juridical act of the agent who acts in his or her own name flow directly to the agent rather than to the undisclosed principal (*Kerameus and Kozyris*, Introduction^{2}, 70; Georgiadis and Stathopoulos (-*Doris*), Art. 211, no. 24). The agent merely incurs an obligation from the internal relationship based on a contract such as mandate to convey these effects to the principal through a separate juridical act, as in the mandate for indirect representation no relation is created between the undisclosed principal and the third

party (Supreme Court decision no. 752/2003, NoV 2004, 238; CA Athens decision no. 12756/1987, EllDni 1989, 1195).

30. In HUNGARY if the agent concludes a contract in the agent's own name but for the principal, the rules of the contract type 'commission agency' apply (CC arts. 507-513). CC art. 507 establishes that '[u]nder a commission agency contract the commission agent is obliged to conclude a sales contract in the agent's own name, in favour of the principal in return for a commission'. CC art. 513(1) prescribes that '[a] contract in which a commission agent assumes an obligation to conclude a contract other than a sales contract shall also be deemed a commission agency contract'. According to CC art. 513(2), '[u]nless otherwise provided by this Chapter, the regulations governing agency must be applied to commission agency'. See Supreme Court Pfv. V. 20. 876/1994, in BH1995. 571.

31. In IRELAND where an agent concludes a contract in the agent's own name this is referred to as an 'undisclosed agency' and the principal is described as an 'undisclosed principal'. Alternatively, an agency may be disclosed (i.e. the third party knows that the agent is acting for another, either named or unnamed). At common law, an agent is not required to disclose to the third party that the agent is acting *in the name and on behalf of* the principal. The distinction between disclosed and undisclosed agencies is important in terms of the legal effects of the agent's actions on the principal and other third parties. But, in terms of the relationship between the agent and the principal, the distinction between disclosed and undisclosed agency is not relevant – i.e. the same law of agency applies. Under the doctrine of undisclosed agency, where an agent contracts with a third party without disclosing the agency, the contract is initially between the agent and the third party and each may enforce the contract against the other. However, if the third party discovers the undisclosed principal's existence, the third party may enforce the contract against either the agent or the principal. Moreover, provided that the agent acted with actual authority, the undisclosed principal can intervene and enforce the contract against the third party. This doctrine operates as an important exception to the doctrine of privity of contract. Therefore, where an undisclosed agent buys a painting in his or her own name, but on the account of the principal, the principal (a complete stranger to the third party) can intervene and enforce the contract with the third party. There are limitations, at common law, to the principal's right of intervention. For example, (i) an undisclosed principal can only intervene if the principal was in existence and had the legal capacity to make the contract at the time it was made; (ii) an undisclosed principal can only intervene if the agent had *actual* authority to conclude the contract *(Keighley Maxsted & Co v Durant* [1901] AC 240); (iii) an undisclosed principal cannot intervene if such intervention is prohibited by the contract, either expressly or impliedly; (iv) an undisclosed principal may be prevented from intervening if it can be shown that the third party contracted with the agent for personal reasons; (iv) in some cases, it has been said that an undisclosed principal cannot intervene where the third party has personal reasons for not contracting with the principal (e.g. *Said v Butt* [1920] 3 KB 497).

32. In ITALY the contract by which the agent is required to represent the principal in his or her own name but for the principal's account is regulated by CC art. 1705(1), according to which 'an agent acting in the agent's own name acquires the rights and assumes the duties arising from transactions made with third persons, even if the latter had knowledge of the mandate'. However, the principal may replace the agent by exercising directly rights arising from the execution of the contract concluded between the agent and the third party, since these claims are considered as automatically transferred to the principal. A distinction has to be made with respect to real rights (rights *erga omnes*): if the agent acquires a movable item, the agent can take action to

demand the property of the good, whereas if the agent acquires immovable property in his or her own name and on the principal's account , the agent must transfer the ownership to the principal immediately (CC art. 1707; cf. also Cass. no. 202/1974, Foro It., 1974, I, 2739; Cass. no. 2301/1994, Giust. civ., 1994, I, 1887). Prior to this the principal may not vindicate the asset because the principal cannot be considered the owner of the immovable.

33. In THE NETHERLANDS the contract according to which one party, the agent (*commissionair*), undertakes an obligation to the other party, the principal (*committent*), to buy or sell movables, shares, or securities in the agent's own name and at the expense of the principal is recognised. However, this type of contract is not a specific type of mandate contract.

34. The POLISH rules on mandate cover both direct and indirect representation.

35. SCOTTISH law recognises the concept of the agent who acts for the undisclosed principal (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', nos. 147-163; *Meier v Küchenmeister* (1881) 8R 642 at 646, per Lord Young). This allows an agent to act in the agent's own name and conclude a contract on behalf of the principal without disclosing to the third party either the existence or the identity of the principal. The principal can 'intervene' in that contract at a later stage in order to enforce the contract against the third party (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', nos. 150-151). After the principal has been disclosed, the third party must elect to sue either the principal or the agent, but cannot sue both (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', nos. 155-156). The principal's right to intervene is unlimited, and is not triggered by factors such as non-performance by the agent or the agent's insolvency. The concept is subject to certain limiting factors, for example, the principal's ability to act in this way may be excluded as a matter of interpretation of the contract with the third party (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', no. 153). A more debatable restriction is that which prevents the principal from acting in this way where the concealment is a deception (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', no. 154).

36. In SLOVAKIA the general regulation of the mandate contract can be found in CC §§ 724-732 and of the contract for procurement of a thing in CC §§ 733-736. The contract for arranging the sale of a thing, under which the agent is bound to take from the principal a certain thing determined for sale and to make the necessary arrangements for its sale, is specifically regulated in CC §§ 737-741. In this case, the agent acts in the agent's own name and on account of the principal. Under the commission agent contract, the commission agent undertakes to conduct in the agent's own name but on account of the principal a certain business affair for the latter, and the principal undertakes to pay the agent a commission. This type of contract is regulated in Ccom §§ 577-590.

37. In SPANISH law, representation is regulated as a substantial effect of the mandate as such. In fact, the main body of rules as to representation law ought to be drawn from the chapter on mandate. However, indirect representation is also contemplated as a voluntary effect of the mandate. If this is the case, the mandate brings about as a rule no direct relationship between the principal and the third party (CC art. 1717 and Ccom 245-247).

38. The SWEDISH Act regarding Factors provides a set of rules on commission agents, i.e. persons who professionally undertake to buy and sell goods, securities and personal property in their own name for the account of another. The Act regarding Factors is also used by way of analogy in cases of commission in a broad sense. Thus,

agents of different kinds and stevedores are inter alia considered to be commissionaires if they act in their own name. See Tiberg and Dotevall, Mellanmansrätt[9], 87.

III. Rules applicable to contracts to represent in conclusion of juridical act other than a contract or to do non-juridical acts or a mixture of acts

39. In AUSTRIA the same rules apply when the agent is not required to conclude a contract but to execute another juridical act (OGH EvBl 1953/136; OGH GesRZ 1980, 95; Rummel (-*Strasser*), ABGB I³, § 1002, no. 40). In the case of mixed contracts, the rules governing the underlying contract or the performance of this other service apply.

40. In BELGIUM the rules on mandate apply as well when the agent is not required to conclude a contract but to execute another juridical act (*Tilleman*, Lastgeving, 64; *Wéry*, Le mandat, 81 ff; in particular for a lawyer who is required to bring a claim into court, see *Herbots*/*Stijns/Degroote/Lauwers/Samoy*, TPR 2002, 57, no. 884; *Tilleman*, Lastgeving, 25). In relation to mixed acts the rules on the qualification of mixed contracts) apply. *Claeys*, Samenhangende overeenkomsten en aansprakelijkheid, 203; *Foriers and Glansdorff*, Contrats spéciaux, 594; *Samoy*, Middellijke vertegenwoordiging, 34-35; *Tilleman*, Lastgeving, 14; *Wéry*, Le mandat, 105-107) if the representative's main obligation under the contract concerns the conclusion of a juridical act as representative of the principal and if the obligations concerning the performance of other non-juridical acts are only accessory. The rules of the dominating legal relation (mandate) apply in accordance with the 'absorptive theory' (e.g. Labour Court Antwerp 23 Nov 1989, Pas. 1990, II, 110). If on the contrary the obligations concerning the performance of non-juridical acts are dominating, the rules on 'hiring of services' (*huur van werk*) apply, also in accordance with the absorptive theory (e.g. CA Luik 18 Jun 1981, RGEN 1982, 286). If neither the juridical acts, nor the non-juridical acts are dominating, the rules of both contracts apply cumulatively, as far as possible, in accordance with the 'cumulative theory' (e.g. the rules on mandate, combined with the rules on a building contract (e.g. CA Bergen 22 Jan 1990, Pas. 1990, II, 145)). If a cumulative application is impossible because of contradictory rules, the contract will be qualified as a contract sui generis, to which only the general contract law applies.

41. The same rules in BULGARIA (LOA arts. 280-292) are applicable to both the mandate contract for the conclusion of a prospective contract and for the performance of a juridical act other than a contract.

42. In DENMARK when the agent's main obligation under the contract is not to represent the principal but to perform another service, the scope of the duties of the agent will be governed by the agreement concluded between the principal and the agent. If under this representation in legal steps is to be undertaken by the agent, Part II of the Contracts Act on agency will apply.

43. In ENGLAND providing that the agent has been authorised by the principal to perform a given task, e.g. an architect representing the principal at the reception of the house, the architect still performs a task on behalf of the principal and is therefore still regarded as an agent and the rules of agency will consequently apply.

44. In case of the so-called mixed contract in ESTONIAN law, the different parts of the contract may be governed by different sets of rules (LOA § 1(2)). As far as the contract contains an obligation to represent the principal, that part of the contract would be governed by the rules of the specific contract of services (e.g. the rules of the contract of works) and also by the rules of the (general) contract of services as far as there is an obligation to represent the principal.

45. In FINLAND as long as the authorisation contains a mandate to represent the principal, the mentioned rules on mandate contracts are applicable. The rest of the contract between the parties should be governed by separate rules applicable to the specific activity in question.

46. The rules for the mandate contract in FRANCE will apply to mandates to do other juridical acts since they cover the conclusion of any legal act in the name and for the account of the principal, whether it is a contract or other juridical act.

47. In GERMANY the rules applicable to mandate contracts pertaining to the conclusion of a prospective contract apply also to contracts to represent in the conclusion of other juridical acts.

48. With regard to the object of mandate GREEK legal theory distinguishes between juridical and non-juridical acts. It is accepted that only in case of juridical acts is the institution of mandate required, whereas non-juridical acts are as a rule not subject to mandate. That means that the external relationship created by mandate is only needed when the object of the internal relationship which is based on a contract of mandate (CC arts. 713 et seq.) is a juridical act. If the agent's main obligation is to represent the principal at the moment of the reception of a work which constitutes a juridical act, the rules of mandate apply to the external relationship and the rules of mandate to the internal relationship (decision no. 12086/1988, legal journal, 1989, 125). The same rules that apply when the object of the mandate is a contract are applicable when the agent is required to execute another juridical act. That means that in such cases the rules of mandate (GREEK CC arts. 211-235) apply to the external aspects of the relationship. With regard to the internal relationship the applicable rules depend on the contract which binds the parties, such as mandate (CC arts. 713-729). In case of procedural acts an attorney may be granted the express authority to perform such acts for the principal. The power of an attorney to represent a litigant is known in the Greek procedural system as judicial mandate and is regulated in CCP arts. 94-105.

49. In HUNGARY the same rules apply when the agent is to execute another legal act than the conclusion of a contract (Supreme Court Pfv. V. 20. 876/1994, in BH1995. 571).

50. In IRELAND where an agent has authority or power from the principal to affect the principal's legal relations with others, whether in contract or otherwise, the same general law of agency will apply.

51. In ITALY when the agent is granted the authority to represent the principal in the execution of a juridical act other than a contract, the general rule is that the mandate should have the formal requirements of the act which has to be concluded. According to CC art. 1392 '[a] mandate has no effect unless it is conferred with the formalities prescribed for the contract which is to be made by the agent'. If the agent is required to bring a claim in court, the rules governing legal representation apply (in particular CPC arts. 83 and 84) which consists in the defensive activity carried out by the attorney in court proceedings. According to CPC art. 83 the attorney representing the principal in court must have a power-of-attorney, which may be granted either by means of a public deed or of a private act, provided that the signature is certified by a notary. If a power-of-attorney is granted in the same document of the judicial brief the signature shall be certified by the attorney. According to Art. 84 CPC the attorney may perform all acts of the proceeding and receive all the communications pertaining thereto. However, unless specifically authorised by the principal, he cannot dispose of the rights which are subject matter of the litigation. So far as mixed contracts are concerned, according to the principle of party autonomy, under ITALIAN law the parties to a contract may regulate their relationship as they prefer, even by entering

into a contract which is not specifically regulated by the law ('unnamed contracts'). Mixed contracts, characterised by the concurring presence of the elements of two or more different types of contracts, may be included among the unnamed contracts above. In this case, according to some scholars, mixed contracts are regulated by the provisions governing the type of contract whose elements are prevalent. According to the prevailing opinion, however, the different sets of rules governing each type of contract involved jointly apply.

52. In the NETHERLANDS service providers in general are covered by the rules that apply to contracts for professional services, CC arts. 7:400-413. If the performance of juridical acts is not the main element of the contract, there is no mandate contract. For instance, if an architect occasionally performs juridical acts on behalf of the client, not the mandate contract but the general contract for professional services applies (*Van der Grinten*, Lastgeving, no. 5). This also applies to contracts with lawyers or notaries (Castermans/Krans, Tekst & Commentaar BW[7], no. 3088).

53. The rules on the mandate contract apply to other contracts of service in POLAND (CC art. 750) unless the parties have decided to exclude them. CC arts. 95-109 (regulating relations between the agent and the third parties – liability etc.) always apply and cannot be excluded by contracting parties.

54. In SCOTLAND the rules applying to the conclusion of contracts by an agent apply also to the doing of other juridical acts.

55. In SLOVAKIA the rules on mandate also apply when the agent is not required to conclude a contract but to execute another juridical act. The scope of the Mandate Contract (and its subtypes) is so broad that it also includes arranging other matters than the conclusion of a contract by the agent. The same applies to commercial contracts.

56. The wording in the SPANISH CC art. 1709 provides for a broad scope as to the object of mandate relationships. It says that one of the parties undertakes the obligation to perform a service or to do something on behalf of the other party. The TS (STS 27 Nov 1992) and the literature (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII[1], 905; *Lete del Río*, Derecho de obligaciones III[4], 401; *Lasarte Álvarez*, Principios de derecho civil III[7], 344) have specified that it refers to juridical acts. The conclusion of a prospective contract is one of the possible juridical acts. Lete del Río indicates that this is the factor that differentiates mandate from other types of services contracts (*Lete del Río*, Derecho de obligaciones III[4], 401).

57. In SWEDEN the same set of rules applicable to mandate contracts for direct representation is applicable, with appropriate adaptations, to contracts to represent in conclusion of a juridical act other than a contract.

IV. Rules applicable to general mandate contracts?

58. The rules of the BULGARIAN LOA arts. 280-292 are applicable to general mandate contracts. These rules are considered to be general provisions. Apart from them, there are special provisions for some specific types of mandate contract – for commercial representation Commercial Act (CA) arts. 21-51; for the commission contract Ccom arts. 348-360; for the forwarding contract Ccom arts. 361-366; for insurance agents Insurance Code (IC) art. 162; for advocates Bar Association Act (BAA) art. 36. In so far as no specific provisions exist for these types of mandate contract, the general mandate provisions, with appropriate adaptation, are applicable (Ccom art. 348(2), art. 361(2); Supreme Court, Judgment no. 20, 5 Jun 1995, Civil Case 800/1994).

59. In DENMARK when two parties are involved in a case before a court, they will usually be assisted by lawyers (*advokater*). *Advokater* are procedural agents and not

parties themselves. According to Danish law (the Administration of Justice Act), an *advokat* has no authority to settle an agreement without the consent of his principal.

60. The ENGLISH law of agency recognises two categories of agents: general and special agents. The distinction is relevant on the question of the nature and the extent of the authority granted by the principal. A general agent will have authority to act for the principal in a particular trade or class of transactions. A special agent will only have authority to act in one given transaction. The distinction nowadays seems less important in relation to the notion of usual or customary authority. In addition to the express actual authority of the agent as defined by the terms of the contract (express actual authority), the agent also has an implied actual authority to bind the principal. One category of implied authority is that of usual or customary authority: an agent appointed to a position will have all the authority which an agent in that position would usually have, unless the principal expressly excludes it from the contract (*Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711). The courts decide what amounts to the usual authority of a particular kind of professional by referring to expert evidence as to the practice of a particular trade or profession.

61. As a rule in ESTONIA, a contract by which the agent is not required to conclude a contract but to execute another juridical act would be the (general) contract for services (the service provided under the contract for services can be the conclusion of the contract or the performance of any other (juridical) act. In the rare cases where the agent is not merely under a duty of care in executing the juridical act but (also) guarantees its proper execution, the contract is a contract of works. LOA Est § 635(2) stipulates that specific rules governing the (general) contract for services are (additionally) applicable to a contract of works where the object of the contract is the execution of a transaction (i.e. of a juridical act).

62. In FINLAND the general mandates are mainly governed by the same legislative basis as mandates intended for single transactions. Nevertheless, it may have interpretative importance in application of general principles if the mandate is general. The Commercial Agents and Salesmen Act includes specific rules on continuous representation.

63. The rules for the mandate contract in FRANCE will apply to general mandate contracts (CC art. 1987).

64. The same constellation of rules applicable to mandate contracts pertaining to the conclusion of a prospective contract apply to general mandate contracts in GERMANY.

65. In HUNGARY the rules on mandate contract apply to the situation of a general mandate. See Supreme Court Pfv. VIII. 21.147/2006, in BH2007. 86; Supreme Court Gf. II. 30 521/1986, in BH1987. 174; CA Fővárosi Ítélőtábla 5. Pf. 21 230/2005/3, in BDT2007. 1598.

66. In IRELAND, the law of agency recognises two categories of agents: general and special agents. A general agent will have authority to act for the principal in a particular trade or class of transactions. A special agent will only have authority to act in one given transaction. The distinction may be relevant to the question of the nature and the extent of the authority granted by the principal. However, this distinction is no longer as significant as it once was. Otherwise, general and special agents are bound by the same general rules of agency.

67. In the NETHERLANDS service providers in general are covered by the rules that apply to contracts for professional services (CC arts. 7:400-7:413). In the case of mandate contracts, the rules established in CC arts. 7:414-7:424 apply. If the agent is

not required to conclude a contract but to execute another juridical act, the rules on mandate contracts apply.

68. In SCOTTISH law agents providing services of a specific nature are governed by the law of agency. There is a distinction between 'general' agents and 'special' or 'limited' agents (*Gloag*, The Law of Contract[2], 150; *Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', nos. 55-56). General agents (e.g. solicitors) are employed to carry out all the business of the principal, or all the business of the principal of a particular type. Special or limited agents are employed to carry out a particular transaction. The main force of this distinction is that only general agents can operate with apparent or ostensible authority. The specific example of the architect who has a very limited authority simply to represent the principal at the moment of reception of the house is likely to be classed as a special agent. Other than the exclusion of special agents from the category of agents who may act with apparent authority, special agents are bound by the same general rules of agency as apply to any other agent. In Scotland an agent instructed to raise a claim in court is likely to be a solicitor, to whom the normal rules of agency apply. If the claim is to take place in the higher courts, namely the Court of Session or House of Lords, then the principal may be represented either by a solicitor advocate (a solicitor who has passed specific exams which give to rights of audience in the higher courts) or an advocate. The advocate's contract has traditionally been classed as one of gratuitous mandate rather than agency (see generally *Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', nos. 26-28). It was thought to be impossible to place a value on the services rendered by such professionals. The advocate would, of course, receive a fee, but this was classed as an honorarium (*Batchelor v Pattison and Mackersy* (1876) 3 R 914).

69. The SPANISH civil code refers to general mandate contracts in art. 1712 (*mandato general*). The general mandate comprises all the principal's affairs, as opposed to special mandate contracts (*mandato especial*), which concern one or more of the affairs of the principal. General mandate contracts in CC art. 1712 are to be differentiated from what the civil code calls "*mandate in general terms*", regulated in CC art. 1713. A mandate in general terms regards the nature of the acts which are to be concluded, which according to CC art. 1713 are the acts of administration, but not acts which are concerned with the acts to dispose of the goods of the principal. Acts of administration are those which are meant to maintain the quality of the administered assets or to obtain the normal benefits produced by the assets (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII[1], 921).

70. In SWEDEN the same set of rules applicable to mandate contracts for direct representation also applies to the situation where the agent has been given a general mandate.

V. Rules applicable to contracts for administration of the principal's affairs

71. In AUSTRIA the rules on the mandate for direct representation also apply to the situation of a 'general mandate' (CC § 1006; RAO § 9). When the authority is meant for a series of juridical acts (CC § 1006; §§ 383 et seq. and 407 et seq. regulate the rights and obligations of commercial agents and forwarders. (Schwimann (-*Apathy*) ABGB V[3], no. 1.)

72. The BELGIAN CC art. 1987 distinguishes a specific mandate (only concerning a specific affair or a multiplicity of affairs of the principal) on the one hand, and a general mandate (concerning all affairs of the principal) on the other hand (see *Herbots*/*Stijns/Degroote/Lauwers/Samoy*, TPR 2002, 57, no. 882; *Tilleman*, Lastgeving, 142-148; *Wéry*, Le mandat, 89-90). The rules on mandate apply to both.

73. In BULGARIA the agent may be authorised and instructed to perform general administration of the principal's affairs, with the exception of juridical acts that have to be performed by the principal personally (e.g. marriage, divorce suit, testament) (Mevorah/Lidji/Farhi, Komentar III, 20). Different rules are applicable depending on the legal capacity of the principal. When the principal is not a merchant, the general mandate contract rules (LOA arts. 280-292) are applicable and the agent can be granted a general power of attorney to act in the name of and on behalf of the principal (LOA arts. 36-43). When the principal is a merchant, there are special rules for both the internal contractual relationship between the agent and the principal-merchant and the power of attorney of the commercial agent (Ccom arts. 21-48). In so far as no specific provisions exist for this internal relationship, the general mandate contract provisions, with appropriate adaptation, are applicable. There are three different types of commercial agents that can perform general administration of the principal's business affairs: the commercial procurator (Ccom arts. 21-25), the commercial representative (Ccom arts. 26-31) and the commercial agent (Ccom arts. 32-48). The commercial procurator is a natural person commissioned and authorised by a merchant (principal) to manage its enterprise in exchange for remuneration (Ccom art. 21(1)). He or she is authorised to perform any acts or transactions related to carrying out the principal's business activities, to represent the principal, and to authorise third parties to perform specific acts (Ccom art. 22). The procurator may not alienate or encumber any real property of the principal, except when expressly authorised by the principal. The parties may only restrict the authorisation of the commercial procurator to the business of a single branch; other restrictions have no legal effect for third parties (Ccom art. 22). The commercial representative can be either a natural person or a legal entity, commissioned and authorised by a merchant to perform, in exchange for remuneration, the acts stipulated in the power of attorney. By contrast with the commercial procurator, the limits of authority of the commercial representative are defined by the principal (Gerdjikov, Komentar na Turgovskiya zakon I, 111; *Goleva*, Turgovsko pravo I, 78; *Kazarov*, Turgovsko pravo[4], 135). Unless otherwise stipulated, the commercial representative is deemed to be authorised to perform all acts related to the merchant's usual business (Ccom art. 26). For alienating or encumbering real property of the principal, accepting bills of exchange, obtaining a loan, or for a court representation, the commercial representative needs explicit authorisation. Any other restrictions on his power of attorney can have legal effects for a third party only if this party knew or should have been aware of such restrictions (Ccom art. 26). The internal relationship between the commercial representative and the principal is regulated by either a mandate contract or a labour contract (Gerdjikov, Komentar na Turgovskiya zakon I, 121). The commercial agent is a merchant: a natural person or a company, who independently and in the course of his own business is assisting the business of another merchant. The commercial agent may be authorised to perform transactions and conclude contracts in the name of the merchant or in the agent's own name but always on behalf of the merchant (Ccom art. 32).

74. In DENMARK no specific rules govern the situation where the agent is given a general mandate.

75. The agency rules in ENGLAND also apply to contracts for the administration of the principal's affairs. The principal may authorise the agent to do whatever is necessary for the task at hand, so the rules of representation also apply to services of administration of the principal's affairs. Whether the agent can dispose of the goods belonging to the principal will depend on the extent of the authority granted within the contract. If the principal has not given the agent express authority to dispose of

property, the principal can still be bound by the act of the agent under the notion of apparent authority.

76. Generally the law of ESTONIA does not distinguish between a general mandate and contracts where the agent is required to execute a specific juridical act. However, such arrangements could fall under the specific regulation of the contract of agency LOA (§§ 670-691). If the agent acts in the agent's own name, the contract would be the commissionaire agreement. In addition to the rules contained in LOA §§ 692-702, certain specific rules governing the contract of (commercial) agency apply to the relationship between the commissionaire and the principal (LOA § 692(3)).

77. In FINLAND when the general mandate is based on contract, the mentioned rules on mandate contracts are in principle applicable.

78. The rules on representation under FRENCH law apply to services of administration of the principal's affairs, but where there is a general mandate, the powers of the agent are restricted as to the type of legal acts which may be accomplished. These are only acts necessary for the preservation of the subject matter of the contract or its management (CC art. 1987). On the other hand, the agent with a general mandate may not sell or dispose of the goods belonging to the principal (CC art. 1988). For that purpose, it will be necessary to obtain a specific authority to sell or dispose of the subject matter (even though academic writers do accept certain exceptions, particularly in the case of perishable goods).

79. In GERMANY the same rules applicable to mandate contracts pertaining to the conclusion of a prospective contract apply to contracts for the administration of the principal's affairs. If need be, the agent may dispose of goods entrusted to the agent. Unless there are contractual arrangements, no specific conditions apply. Of course, the agent has to act without negligence when disposing of the goods (there is no specific provision to this end, but CC § 662 in conjunction with CC § 280 apply and may give the principal the right to claim damages).

80. According to the GREEK CC art. 216 the mandate is to be conferred by a deed drawn up for this purpose (power of attorney). The general mandate to represent the principal for a series of juridical acts can be either explicit or be concluded from the general and abstract formulation of the deed or from the nature of the internal relationship based on a contract such as mandate. By a contract of mandate the agent undertakes to conduct the affair in question (CC art. 713), which can require the execution of a series of juridical acts (Georgiades and Stathopoulos (-*Karasis*), Art. 713, no. 15).

81. In HUNGARY the same rules of agency apply to contracts for administration of the principal's affairs.

82. In IRELAND where an agent has authority or power from the principal to affect the principal's legal relations with others, whether in contract or otherwise, the same general law of agency will apply. Therefore, where an agent is appointed for the administration of the principal's affairs, the law of agency will apply.

83. The same rules apply under ITALIAN law both to a general and to a specific mandate. However, the following distinction may be made: if the agent is granted the authority to conclude specific acts, the authority includes not only those specific acts, but also all the acts necessary to conclude the preceding ones (CC art. 1708). These different acts may consist in factual or juridical activities, if complementary to perform the mandate. When a general mandate is granted, the agent can conclude all the acts of ordinary administration even if not exactly specified in the contract. In this case, in order to validly conclude acts of extraordinary administration a special mandate granting the authority to the agent is necessary towards third parties.

84. In the NETHERLANDS the rules on mandate contracts also apply to general mandates. The mandate may be for the doing of one or more specific juridical acts, but the mandate may also be described in a general way (Castermans/Krans, Tekst & Commentaar BW[7], no. 3088). Therefore, it seems that the rules on mandate also apply to services of administration of the principal's affairs.

85. In POLAND the rules on the mandate contract apply to other contracts of service (CC art. 750), including the contract to manage the principal's affairs.

86. In SCOTLAND the general rules of agency apply to the situation of a general mandate. A 'general' agent is authorised to transact all the principal's business of a particular kind (*Gloag*, The Law of Contract[2], 150; *Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', nos. 55-56). The general agent can be contrasted with the 'limited' or 'special' agent employed to complete a particular transaction. The same general rules of agency apply to both types of agents, apart from the fact that the special agent cannot act with apparent or ostensible authority.

87. The rules on the SLOVAKIAN Mandate Contract also apply to a general mandate. The general provisions of the Civil Code on representation under a Power of Attorney (external effects) only stipulate the condition that the Power of Attorney must be conferred in writing if it concerns more than one specific legal act.

88. In SPAIN the mandate may be issued as a particular or general mandate (CC art. 1712). The general mandate "embraces every affair (*negocio*) of the principal". The distinction is important in commercial matters (Ccom art. 281), because there are special rules concerning people who run alien business as a general administrator *(factores mercantiles*). In civil matters the distinction between general and special mandate does not have any importance in practical law.

89. In SWEDEN there are no specific rules concerning contracts for administration of the principal's affairs. The same set of rules applicable to mandate contracts for direct representation applies to the situation where the agent has been given a general mandate. If a contract for administration of the principal's affairs is made general and at the same time irrevocable it may not also be exclusive, because a person can only put himself under "curatorship" within a determined and limited sector of that person's sphere of interests (see *Grönfors and Dotevall*, Avtalslagen[3], 134).

VI. Authority to dispose of goods

90. In AUSTRIA mere entrusting of the possession of goods does not confer apparent authority upon the receiver to dispose of them. There must be something more, e.g. the fact that the agent is a person having a usual authority to dispose of goods (auctioneer or broker), or the transfer of additional indicia of title or mandate to sell. A commission agent, e.g., is an agent entitled with the possession and control of goods and securities to be sold for the principal (Ccom §§ 373-406 et seq.; Straube (-*Griss*), HGB I³, § 383, no. 4; OGH in Arb 9466).

91. In BELGIUM a mandate in general terms only gives authority to perform acts of administration. To have authority to dispose of goods belonging to the principal, an express mandate is necessary, specifying the act(s) of disposing as falling within the authority of the agent.

92. Under ENGLISH law, the question whether the agent can dispose of the goods belonging to the principal will depend on the extent of the authority granted within the contract. There is no problem if the principal has given the agent express authority to dispose. However, even if the principal has not done so, the principal can still be bound by the act of the agent under the notion of apparent authority.

93. Whether, under ESTONIAN law. the agent who administers a principal's affairs has the authority to dispose of the principal's goods is a question that has to be answered according to the general rules that govern the authority of agents, i.e. the external relationship between the agent and the third parties (General Part of the Civil Code Act §§ 115-131). Here, the Estonian law distinguishes, as the German law, between the mandate (*Vertretungsmacht*) and the right to dispose (*Verfügungsmacht*). In most cases this distinction only has theoretical importance. However, the authority to dispose of goods of the principal may also derive from the contract forming the internal relationship between the agent and the principal.

94. In FINLAND the agent is, in general, entitled to dispose of goods only if this has been agreed. Such an authorisation is, however, often based on legislation or on a mandate given by a court (e.g. to trustees of bankruptcy estates or administrators of an estate of someone deceased).

95. In GERMANY, the same constellation of rules applicable to mandate contracts pertaining to the conclusion of a prospective contract apply to contracts for the administration of the principal's affairs. If need be, the agent may dispose of goods. Unless there are contractual arrangements, no specific conditions apply. Of course, the agent has to act without negligence when disposing of the goods (there is no specific provision to this end, but CC § 662 in conjunction with CC § 280 apply and may give the principal the right to claim damages).

96. In GREEK law under the notion of administration of the principal's affairs falls also the disposal of goods belonging to the principal such as the sale or renting of a house. The mandate for the purpose of administration of the principal's affairs such as the disposal of goods can be also conferred to a broker, who is not considered to be agent of his principal if no mandate is granted to him (Supreme Court decision no. 58/1975, NoV 1975, 879; Georgiadis and Stathopoulos (-*Karasis*), Art. 703, no. 12).

97. In ITALY, unless otherwise agreed by the parties, the agent does not have the authority to dispose of goods of the principal. This means that in the case of an estate agent in charge of renting the apartment of a principal, the estate agent cannot put the apartment on sale without the principal's specific mandate.

98. In SCOTLAND the question whether the agent has authority to dispose of the goods of the principal depends on the extent of the authority granted. A general power to administer would not normally be interpreted as conferring a power to dispose. Mere entrusting of the possession of goods does not confer apparent authority to the receiver to dispose of them.

99. In SLOVAKIA for the specific contract subtype "a contract for arranging the sale of a thing", the CC §§ 737-741 provide that the agent is bound to take from the principal a certain thing determined for sale and to make the necessary arrangements for its sale. In this case, the agent acts in the agent's own name and on account of principal.

VII. Rules applicable to gratuitous mandate contracts

100. In AUSTRIA the same rules apply to gratuitous and remunerated mandates for direct representation (CC § 1004). Ccom § 396 (para. 1) and § 409, HVertrG §§ 8, 24 et seq., and RATG §§ 1 ff, § 19 deal with the question of remuneration. In the absence of agreement, lawyers are entitled to remuneration according to the RATG; commission agents, forwarders and commercial agents are entitled to remuneration in accordance with local custom or, in the absence of such custom, to reasonable remuneration. Their right to commission can only be extinguished in very limited circumstances (e.g. when it is established that the contract between the third party and the principal will not be executed for a reason for which the principal is to blame).

101. In general, in BELGIAN law, the same rules apply no matter whether the agent is compensated or not, except with regard to the contractual liability of the agent, which is less severe for a non-remunerated agent than for a remunerated agent (CC art. 1992; *Wéry*, Le mandat, 143).

102. The general mandate contract is in principle a gratuitous contract, if not agreed otherwise, in BULGARIA (LOA art. 286; Vassilev, L., Obligazionno pravo, 20; Mevorah/Lidji/Farhi, Komentar III, 51; Vassilev, B., Spezialna chast, 131). The special types of mandate contract are in any case non-gratuitous contracts (Vassilev, L., Obligazionno pravo, 40; Vassilev, B., Spezialna chast, 131). They are regulated by distinct provisions – for the commission contract Ccom arts. 348-360; for the forwarding contract Ccom arts. 361-366; for the commercial agent Ccom arts. 32-48. The general non-gratuitous mandate contract is regulated by the rules for the general mandate contract (LOA arts. 280-292).

103. As for the 'ordinary agent' no specific rules of remuneration will apply according to DANISH legislation. In contrast the Factors Act and especially the Act of Commercial Agents and Travellers contain a detailed non-mandatory regulation of the agent's right to commission. Where a contract for which, in principle, the intermediary (factor, commercial agent, broker etc) is entitled to receive commission is not performed, the agent's claim for commission will lapse if the principal can prove that the failure to perform is not due to circumstances within the control of the principal. Most instances of non-performance will naturally be due to the particular third party's incapability to perform obligations under the contract and thus the risk of the third party's insolvency will be on the agent.

104. In ENGLAND an agency can be created by agreement, whether it is remunerated or not. An agent who acts gratuitously can still affect the principal's relations with third parties. A gratuitous agent is therefore also subject to fiduciary obligations. However, when the agent is gratuitous, 'the internal position between the agent and the principal is imperfectly enforceable' (Bowstead (-*Reynolds and Graziadei*), Agency[18], para. 6.026). Since there is no contractual liability, the agent cannot be liable for failing to do what the agent undertook under no consideration. However, the agent can still be liable in tort since the gratuitous agent owes a duty of care to the principal. The agent can therefore be liable, in tort, for a failure in due care and diligence. The standard of care for gratuitous agents is however lower than that for paid agents since the standard of care is that care that the agent would have taken in the agent's own affairs (*Chaudry v. Prabhakar* [1988] 3 All ER 718).

105. Generally the rules applying to an ESTONIAN contract governing the internal relationship between the agent and the principal do not differ according to whether the contract is gratuitous or not. The general assumption is that the professional agent is entitled to a price for the services rendered. Special rules for gratuitous contracts exist only as far as the entitlement of the agent for reimbursement of expenses is concerned.

106. In FINLAND there are no specific written rules on gratuitous representation. In principle, the general rules are applicable. The requirements to be met when carrying out the mandate are, however, generally lower if the representation is gratuitous.

107. The FRENCH Civil Code's provisions regarding the mandate contract (CC arts. 1984-2007) apply both to remunerated and gratuitous mandates (CC art. 1986), although the liability of the agent will be diminished if there is no remuneration (CC art. 1992(2)).

108. According to the legal definition in the GERMAN CC § 662, a 'mandate' is a gratuitous contract, and the general rules on mandates (CC §§ 663-674) are based on this assumption. By way of the reference in CC § 675(1), remunerated contracts are subject to the same rules as gratuitous contracts (mandates), with the following

exceptions (i.e. those provisions among CC §§ 663-674 not listed in CC § 675(1)): (a) CC § 664: Under a remunerated contract, it is generally admissible for the agent to have the representation performed through a third person. Under gratuitous contracts, CC § 664 declares this to be inadmissible ('when in doubt'), as mandates are often based on a relationship of personal trust between the parties. It has, however, been held that an analogous application of CC § 664 to remunerated contracts is possible in situations in which a relationship of personal trust exists between the parties. (b) CC § 671 governs the right to revoke a mandate and gives each party the right to revoke the contract at any time, although the agent has to revoke in a manner that will allow the principal to reasonably arrange for the business to be taken care of otherwise. Should the agent not live up to this obligation by revoking at an inappropriate time, the agent is liable for damages. (c) CC § 671 is generally inapplicable to remunerated contracts; the question of revocation is governed by the rules on contracts for services or works. CC § 671(2), however, is applicable whenever the remunerated contract allows the agent to revoke the contract at any time (CC § 675(1)).

109. In GREEK law, the award of a price depends on the internal relationship which binds the agent and the principal. If the internal relationship is based on a contract of mandate, the agent undertakes to conduct without remuneration the affair entrusted to the agent by the principal (CC art. 713). An exception to the rule of gratuitous mandate is explicitly regulated in the Code of Attorneys, which provides for the obligatory remunerated mandate between the lawyer and the principal. Regarding intermediation, a person who promises a fee for the procurement of a contract or for information of the opportunity of making a contract is bound to pay the fee only if the contract is concluded in consequence of such procurement or indication. If, in consequence of such procurement or indication, an agreement containing a promise of contract was concluded but the final contract is frustrated, only one half of the fee may be demanded (CC art. 703(1)). If the contract is concluded subject to a condition, the fee may not be demanded until the condition is fulfilled (CC art. 704).

110. In general, in HUNGARY the same rules apply whether the agent is remunerated or not. CC art. 478(1) provides that '[t]he principal shall pay an appropriate fee, unless the circumstances, or the relationship between the parties suggest that the agent has assumed the agency without any consideration'. However, according CC art. 483(3), '[i]f the agency is cancelled without substantial grounds, the damages that are caused shall be indemnified, unless the agency is gratuitous and the period of notice is sufficient for allowing the principal to handle the matter.'

111. The position in IRELAND is essentially the same as that for England, described above.

112. Under ITALIAN law there is a general presumption of onerousness with respect to representation (CC art. 1709). This means that unless otherwise provided by the parties the agent is entitled to a compensation. In general terms, the rules are the same even if no price is agreed by the agent and the principal. However, in case of remunerated representation the agent's liability for breach of contract is valued more seriously than in case of gratuitousness (CC art. 1710(1)), because the economic and financial consequences for the principal are graver when a consideration is payable to the agent. See Cass. no. 3233/1982, Foro. It. Mass., 1982, 4, 4070.

113. In the NETHERLANDS in the case of professional agents, the principal will have to pay remuneration. In the case of non-professional mandate contracts, for instance in the case of occasional, one-off juridical acts (e.g. one agrees with a friend to arrange an appointment with a service station regarding the repair of the friend's car), the agent may not be entitled to representation and the mandate is gratuitous. It will

depend on the exact content of the agreement between both parties whether the rules on mandate contracts apply. According to CC art. 7:405 it seems that the non-professional agent is only entitled to representation if this has been explicitly established. If the gratuitous mandate may be defined as a mandate contract, the same rules apply as to normal mandate contracts. However, according to literature one should be careful with treating gratuitous mandates as mandate contracts. This often depends on the internal agreements between the two contracting parties. See *Van der Grinten*, Lastgeving, no. 10.

114. The same rules on the mandate contract apply in POLAND regardless of whether the service is provided for remuneration or gratuitously.

115. In SCOTTISH law a distinction is made between remunerated representation (agency) and gratuitous representation (mandate). The rules of mandate were discussed by the Scottish institutional writers Stair (Institutions I[10], 12), Erskine (III, 3, 31-38) and Bell (Principles of the Law of Scotland[10], 216-218). Mandatars (agents who are not remunerated) may previously have been subject to a higher standard of care compared to agents (agents receiving remuneration) but this no longer seems to be the case (*Stair*, Institutions I[10], 12, 10; Erskine, III,3,36-37; *Bell*, Principles of the Law of Scotland[10], 218, 212; *Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', no. 23; *Stiven v Watson* (1874) 1 R 412; *Copland v Brogan* 1916 SC 277).

116. A mandate may be gratuitous or remunerated in civil relations in SLOVAK law. Commercial contracts (mandate and commission agency contracts) are always remunerated. The provisions on liability for non-conformity of performance do not apply to a gratuitous mandate.

117. In SPAIN the provisions in the civil code apply, with appropriate modifications, to both gratuitous and remunerated mandate contracts: (CC art. 1709 ff). CC art. 1711 indicates that mandate contracts are presumed to be gratuitous, unless the parties provide otherwise. The difference between the regimes of gratuitous and remunerated contracts is explicitly emphasised in CC art. 1726, which indicates that the responsibility of the agent for fault will be determined by the courts depending on whether the mandate is remunerated or not.

118. In SWEDEN the rules applicable to mandate contracts for direct representation are applicable, with appropriate adaptations, to gratuitous mandate contracts.

IV.D.–1:102: Definitions

In this Part;

(a) the 'mandate' of the agent is the authorisation and instruction given by the principal as modified by any subsequent direction;

(b) the 'mandate contract' is the contract under which the agent is authorised and instructed to act, and any reference to the mandate contract includes a reference to any other juridical act by which the agent is authorised and instructed to act;

(c) the 'prospective contract' is the contract the agent is authorised and instructed to conclude, negotiate or facilitate, and any reference to the prospective contract includes a reference to any other juridical act which the agent is authorised and instructed to do, negotiate or facilitate;

(d) a mandate for direct representation is a mandate under which the agent is to act in the name of the principal, or otherwise in such a way as to indicate an intention to affect the principal's legal position;

(e) a mandate for indirect representation is a mandate under which the agent is to act in the agent's own name or otherwise in such a way as not to indicate an intention to affect the principal's legal position;

(f) a 'direction' is a decision by the principal pertaining to the performance of the obligations under the mandate contract or to the contents of the prospective contract that is given at the time the mandate contract is concluded or, in accordance with the mandate, at a later moment;

(g) the 'third party' is the party with whom the prospective contract is to be concluded, negotiated or facilitated by the agent;

(h) the 'revocation' of the mandate of the agent is the recall by the principal of the mandate, so that it no longer has effect.

COMMENTS

A. General

As with any set of rules, in this Part specific legal concepts are used in order to set out the rules contained in these provisions. The most important concepts used in this Part are defined in the present Article. The Article itself does not contain any substantive rules.

B. Some related concepts defined elsewhere

Book II Chapter 6 on Representation contains definitions of concepts – including "authority" and "representative" - that are relevant to the external relationship between a principal and a third party, see II.–6:102 (Definitions).

C. Definitions in this Article

The definitions in this Article are, it is hoped, self-explanatory. The only one which requires explanation is the definition of "third party".

The concept of 'third party' as such is not defined under II.–6:102 (Definitions). Paragraph (5) of that Article merely provides that where the representative (as a representative) concludes the prospective contract between the principal and himself or herself in a personal capacity, for the purposes of Book II, Chapter 6, the representative is to be regarded as the 'third party'. The same would apply under paragraph (1)(g) of this Article.

The word “agent” is not defined here. It is a very general term which embraces anyone who acts for another. (See the Annex.) This Part deals with only certain types of agent – namely those acting under mandates for direct representation, those acting under mandates for indirect representation and those acting as brokers or intermediaries. The common factor is that they are engaged in relation to the conclusion of other contracts or the doing of other legal acts.

NOTES

As the national Notes throughout this Part will make clear, the definitions in the present Article correspond to similar techniques and concepts in most national systems.

IV.D.–1:103: Duration of the mandate contract

A mandate contract may be concluded

(a) for an indefinite period of time;
(b) for a fixed period; or
(c) for a particular task.

COMMENTS

A. General idea

This Article provides a classification of mandate contracts from the point of view of their duration. Three types of contracts are distinguished: contracts for an indefinite period, contracts for a fixed period and contracts for a particular task. In the mandate contract it may be indicated that the contractual relationship is to terminate at a specific moment in time irrespective of the individual will of the parties, i.e. a contract for a definite period. That specific moment for termination may be a fixed date agreed upon by the parties (sub-paragraph (b)) but may also be the moment at which the particular task that the agent has to fulfil has been achieved (sub-paragraph (c)). Where no such specification exists, the mandate contract is concluded for an indefinite period of time (sub-paragraph (a)).

B. Mandate for a fixed period: tacit prolongation

Under III.–1:111 (Tacit prolongation) any contract which provides for continuous or repeated performance of obligations for a definite period may be tacitly prolonged if the obligations continue to be performed by both parties after that period has expired and the circumstances are not inconsistent with the parties' tacit consent to such prolongation. The contract then becomes a contract for an indefinite period and the contractual relationship can be terminated by either party by giving a reasonable period of notice (III.–1:109 (Variation or termination by notice) paragraph (2).) This provision may find application in relation to contracts for mandate but, as the general rules suffice, no special regulation in this Part is required.

C. Specificities of mandate contracts for a particular task

Contracts for a particular task are regarded in the present Part as contracts for a definite period because the parties agree that their mandate relationship terminates when the particular task the agent was to fulfil has been achieved. However, differing from mandate contracts for a definite period in which a fixed date is agreed, in contracts for a particular task it may be uncertain when the envisaged result will be achieved or even whether it will be finally achieved. This implies that in the case of a mandate contract for a particular task, the parties may de facto be linked in a mandate relationship for an indefinite period.

NOTES

I. General

1. These three types of mandate contracts are known in all legal systems although, as will be seen later, not all attach the same consequences to the different types.

II. Tacit prolongation

2. In BELGIUM there is no specific rule on tacit prolongation regarding the contract of mandate. General rules of contract law will apply.

3. In BULGARIA there is no explicit provision stating that continued performance after the elapse of the definite period is considered an implicit extension of the contractual duration. The parties are free to stipulate so in their contract. A special rule is applicable to the commercial agency contract: if, after the elapse of the definite period both parties continue to perform their contractual obligations, the contract is considered concluded for an indefinite period of time (Ccom art. 47(4); *Kassabova*, TP 2006, 159, 169-170).

4. In ENGLAND there does not seem to be any agency case dealing with this specific issue. However, relying on contract law principles, if the parties continue to perform the contractual obligations after the period has elapsed, the contract is treated as having tacitly been renewed. It is not clear whether the contract would be deemed to be for a fixed or an indefinite duration. This would depend on the circumstances surrounding the case and its interpretation by the courts.

5. In ESTONIA if the parties continue performance of the obligations under the mandate contract after the period for which the contract was concluded has elapsed, they may be treated as having tacitly agreed upon the extension of the duration of the mandate relationship. In such cases the mandate contract would be treated to be tacitly agreed to be for an indefinite period.

6. In FRANCE there is no specific rule regarding the mandate contract on this point; general rules will apply (extension of the duration of the contract if both the principal and the agent act as if the contract had not ended; 'gestion d'affaires' if only the agent does so).

7. If the law on service contracts is applicable to a remunerated *Geschäftsbesorgungsvertrag* by virtue of GERMAN CC § 675(1), CC § 625 provides that the relationship is considered as extended for an indefinite period of time if performance by the agent continues and the principal knows about it. In other constellations, the parties might be viewed as having tacitly derogated from the contractual time limit.

8. In HUNGARY if the parties have continued performance of the obligations under the mandate contract after the original period for which the contract was concluded has elapsed, they are treated as having tacitly agreed upon the extension of the duration of the mandate relationship.

9. In IRELAND where a fixed term agency has terminated due to effluxion of time and performance continues, it is usually treated as an indefinite agency, terminable by notice.

10. In the NETHERLANDS if the contractually agreed period for performance of the obligations under the mandate contract has elapsed, the contracting parties are treated as having concluded a contract for an indefinite period (Asser (-*Kortmann*), De Vertegenwoordiging I[8], no. 96; *Van der Grinten*, Lastgeving, no. 51).

11. In POLAND continued performance does not lead to automatic prolongation of the agreement.

12. In SCOTLAND the agency relationship may continue on the tacit agreement of the parties where it was general in nature, in other words where the agent is classed as a general agent. It may not so continue where the original agency relationship was

entered into for a specific purpose which has now been achieved (*Bell*, Commentaries I[7], 526; *Gow*, Mercantile and Industrial Law of Scotland, 537).

13 In SLOVAKIA there is no explicit regulation on this issue. The continued performance may be regarded as an implicit agreement of the parties to extend the contract.

14. The principle of tacit prolongation has been upheld in SPANISH law for agency contracts (art. 24.2 Agency Law) and the analogy would seem to hold for other similar cases.

15. In SWEDEN if the parties continue performance of the obligations under the mandate contract after the definite period of performance has elapsed, they are considered to have tacitly agreed upon an extension of the mandate relationship. If nothing else follows from the contract or from the circumstances, the extension is considered as being for an indefinite period of time.

IV.D.–1:104: Revocation of the mandate

(1) Unless the following Article applies, the mandate of the agent can be revoked by the principal at any time by giving notice to the agent.

(2) The termination of the mandate relationship has the effect of a revocation of the mandate of the agent.

(3) The parties may not, to the detriment of the principal, exclude the application of this Article or derogate from or vary its effects, unless the requirements of the following Article are met.

COMMENTS

A. General idea

This Article makes it clear that the principal is free to revoke the mandate given to the agent at any time by giving notice of revocation (paragraph (1)).

The parties may not agree to exclude this right of the principal, unless the exceptional circumstances set out in IV.D.–1:105 (Irrevocable mandate) are met.

B. Notice of revocation always effective

As a general rule, the principal is free to decide that the agent is no longer to be authorised to act on the principal's behalf. The principal may revoke the mandate at any time by giving notice to the agent, even if the mandate contract was concluded for a fixed period or a particular task.

C. Revocation by termination of the mandate relationship

If the relationship terminates, the mandate of the agent also comes to an end. As follows from Chapters 6 and 7, termination may take place by notice, but also when the mandated task is completed or when a fixed period expires or when the agent dies. Termination therefore does not always imply that notice of termination is given.

D. Revocation is not a breach of the principal's obligation to co-operate

The revocation of the mandate implies that the principal effectively prevents the agent from performing the obligations under the mandate contract and thereby from earning any stipulated remuneration. As such, this could be considered as a non-performance by the principal of the obligation to co-operate (with the possibility of the agent claiming specific performance of the right to continue to affect the legal effects of the principal). However, as paragraph (1) explicitly gives the principal the right to revoke the mandate, this cannot be seen as the proper consequence of the revocation. The present Article, in this respect, therefore derogates from the general obligation to co-operate under III.–1:104 (Co-operation).

E. Conditions to be observed only relevant to liability in damages

Revocation of the mandate of the agent implies termination of the mandate relationship. The conditions that are to be fulfilled by the principal when terminating the relationship, namely to have an extraordinary reason to revoke which justifies immediate termination and to observe a reasonable period of notice, are to be observed when the principal wants to revoke. These

conditions are not necessary for a revocation to be effective, but are relevant as to the determination of the liability in damages of the principal.

NOTES

1. In AUSTRIA the principal can revoke the granted authority at any time, CC § 1020. It is not relevant whether the agent acted in the principal's name or in the agent's own name if the contractual relationship between indirect agent and principal is that of a mandate in terms of CC §§ 1002 et seq. If the principal concludes the prospective contract personally, the agent is entitled to a proportional part of the price, to incurred expenses and to indemnity for any losses sustained.
2. According to the BELGIAN CC art. 2004, a principal can always revoke the authority to represent *ad nutum*, i.e. without a motive and without a period of notice (*de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 460-462; *Tilleman*, Lastgeving, 301-305; *Wéry*, Le mandat, 267-273). No formal requirements apply. As a unilateral juridical act, the revocation does not have to be accepted by the agent to be effective (*de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 462-463; *Tilleman*, Lastgeving, 281 and 290-291). The revocation will only be effective at the moment the (revoked) agent takes note or ought to have taken note of the revocation (see for a specific application: CC art. 2006). According to CC art. 2005, the revocation can only be invoked towards third-parties after they have taken note of it.
3. In BULGARIA the principal has the right to revoke the mandate at any time (LOA art. 288; *Vassilev, L.*, Obligazionno pravo, 29). This revocation is followed, as a legal effect, by the end of the contractual relationship (*Vassilev, L.*, Obligazionno pravo, 29; *Goleva*, Obligazionno pravo^2, 239; Mevorah/Lidji/Farhi, Komentar III, 170). The relationship is considered ended from the moment when the agent gets to know about or could have been aware of the revocation (LOA art. 290; *Vassilev, L.*, Obligazionno pravo, 30). This unilateral withdrawal from the principal's side does not deprive the agent of remuneration (if such has been stipulated) or the reimbursement of expenses (LOA art. 288(1)).
4. In ENGLAND the principal can revoke the agent's actual authority at any time regardless of whether the agent was disclosed (acted in the principal's name) or was undisclosed (acted on behalf of principal but in the agent's own name) This is so unless the grant of authority is irrevocable.
5. In ESTONIA the parties can agree (for their internal relationship) that the mandate relationship cannot be terminated (other than by termination for a fundamental breach). The principal may conclude the prospective contract personally even in the case of an irrevocable mandate, but the parties can agree otherwise. For the external relationship a general rule applies that the parties may exclude revocability of the authority (the power of attorney), but even in such case the law allows for revocation upon an important ground as a mandatory rule (§ 126(3) General Part of Civil Code Act).
6. The FRENCH Civil Code gives the principal the possibility of terminating the agency *ad nutum*, in other words at any time (there is no need of a notice of reasonable length), without specific reason and without any right to compensation (CC art. 2004). The precise moment at which termination occurs is not regulated by statute law, but case law considers that the mandate ends when the agent is aware of the revocation by the principal (Cass.civ. 3^e, 28 Feb 1984, JCP éd. G 1984, IV, 146). The termination may even occur as a result of notice to the agent of the appointment of a new agent for

the same transaction (CC art. 2006). The principal does, however, have to inform any possible third party contractors of such revocation in order to give them binding notice (CC art. 2005).

7. In GERMANY a gratuitous mandate may be revoked by the principal at any time (CC § 671(1)). The unilateral revocation of a remunerated *Geschäftsbesorgungsvertrag* by the principal is, on the contrary, generally not allowed, as CC § 675(1) does not refer to CC § 671(1). Under remunerated mandate contracts, the principal may merely terminate the contractual relationship according to the rules provided by the law on contracts for services or contracts for works. The rules on contracts for services allow termination by the principal but provide for a termination period which depends on the time frame according to which the service provider is paid (CC § 621). Contracts for services under which payment is not made after particular time periods can be terminated at any time. Additionally, the principal has the right to terminate irrespective of any termination period where there is an important reason which makes it unacceptable to continue (CC § 626). Furthermore, termination is possible at any time even without an important reason where the contract calls for services 'of a higher kind which are usually assigned on the basis of particular trust' (CC § 627(1)). This will often be the case where a contract for representation is concluded.

8. In IRELAND the principal can revoke the agent's authority and terminate the agency at any time (though this may constitute a breach of contract), unless the agency is irrevocable.

9. In the NETHERLANDS, in the case of a revocable mandate, the principal is allowed to end or revoke the mandate (CC art. 7:408(1) and 7:422(1)). See also CFI 's-Hertogenbosch, NJ 1988, 550 and HR 17 Nov 1978, NJ 1979, 96.

10. In POLAND the principal may revoke the mandate at any time by giving notice (CC art. 746). The agent is entitled to partial remuneration and reimbursement of expenses. If the mandate was revoked without a valid reason, the principal is also liable for the losses incurred by the agent. The principal's right to revoke for valid reasons is a *ius cogentis* provision and the parties may not derogate from it (Radwański/Panowicz-Lipska (-*L. Ogiegło*), System Prawa Prywatnego VIII).

11. In SCOTTISH law the principal may revoke the mandate unilaterally unless this is excluded by the contract (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', no. 183) or unless the mandate is irrevocable because both parties have an interest in its performance (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', no. 25).

12. In SLOVAKIA the principal is always entitled to revoke a mandate for representation without any conditions. The authority of the agent ends if the principal revokes it. Until the moment the agent knows or must have known of the revocation of authority, the agent's acts in law have legal consequences as if the authority continued to be effective. If an agent informs a third party that the agent has authority to perform specified acts for a certain principal, the revocation of this authority may be put forward as a defence by the principal only if the principal informed the third party of the revocation before the agent's negotiations with this third party, or if the third party knew of the revocation at the time of the negotiations (CC § 33(b)(4) and (5)). If the mandate has been terminated by revocation, the principal is obliged to compensate the agent for all expenses incurred before the revocation and for the damage suffered and if any remuneration is due for work that agent performed, for such work or part thereof. This also applies when completion of mandated negotiations was frustrated accidentally through no fault of the agent (CC §732).

13. In SPAIN the CC art. 1733 states that the principal may revoke the mandate at any time. See also Ccom art 279. The rationale is that the mandate relationship is based on the confidence of the principal in the agent, and only the principal may evaluate when this confidence is no longer there (*Lete del Río*, Derecho de obligaciones III[4], 413; *Lasarte Álvarez*, Principios de derecho civil III[7], 345). Revocation can be explicit or implicit. Implicit revocation implies the carrying out of an act which unambiguously indicates an intention to revoke – for example when the principal concludes the prospective contract personally (STS 4 Jan 1991) or appoints another agent to carry out the task entrusted to the agent (CC art. 1735). Revocation will be effective from the moment the agent knows about it. This requirement is imposed in CC art. 1735 for implicit revocation and in CC art. 1738 for explicit revocation (*Lasarte Álvarez*, Principios de derecho civil III[7], 345). Acts concluded by the agent without knowledge of the revocation are valid and have effect regarding third parties who have contracted with the agent in good faith (CC art. 1738). Notice of revocation will lead in any case to the termination of the relationship, but, if the principal abuses the right, that is, when the purpose is to damage the interests of the agent or when the revocation is based on illegal reasons, then the agent can claim an indemnity (*Lete del Río*, Derecho de obligaciones III[4], 413). The STS 3 March 1998, RJA 1998/1129 held that the principal was not entitled to freely terminate the mandate where a price for the services and a definite time have been agreed. In any case, the agent cannot seek specific performance, and damages is the only relief available. See for further discussions, Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-*Gordillo Cañas*), Código Civil II, 1584-1585.

14. In SWEDEN the principal is free to revoke the granted authority at any time without giving reason for such revocation (*Bengtsson*, Särskilda avtalstyper I[2], 153). This may be a breach of contract towards the agent.

IV.D.–1:105: Irrevocable mandate

(1) In derogation of the preceding Article, the mandate of the agent cannot be revoked by the principal if the mandate is given:

(a) in order to safeguard a legitimate interest of the agent other than the interest in the payment of the price; or

(b) in the common interest of the parties to another legal relationship, whether or not these parties are all parties to the mandate contract, and the irrevocability of the mandate of the agent is meant to properly safeguard the interest of one or more of these parties.

(2) The mandate may nevertheless be revoked if:

(a) the mandate is irrevocable under paragraph (1)(a) and:

(i) the contractual relationship from which the legitimate interest of the agent originates is terminated for non-performance by the agent; or

(ii) there is a fundamental non-performance by the agent of the obligations under the mandate contract; or

(iii) there is an extraordinary and serious reason for the principal to terminate under IV.D.–6:103 (Termination by principal for extraordinary and serious reason); or

(b) the mandate is irrevocable under paragraph (1)(b) and:

(i) the parties in whose interest the mandate is irrevocable have agreed to the revocation of the mandate;

(ii) the relationship referred to in paragraph (1)(b) is terminated;

(iii) the agent commits a fundamental non-performance of the obligations under the mandate contract, provided that the agent is replaced without undue delay by another agent in conformity with the terms regulating the legal relationship between the principal and the other party or parties; or

(iv) there is an extraordinary and serious reason for the principal to terminate under IV.D.–6:103 (Termination by principal for extraordinary and serious reason), provided that the agent is replaced without undue delay by another agent in conformity with the terms regulating the legal relationship between the principal and the other party or parties.

(3) Where the revocation of the mandate is not allowed under this Article, a notice of revocation is without effect.

(4) This Article does not apply if the mandate relationship is terminated under Chapter 7 of this Part.

COMMENTS

A. General

Under the preceding Article the general rule is that mandates are freely revocable at any time. However, there may be situations where either the agent or other parties have a legitimate interest in the irrevocability of such a mandate. This question is dealt with in the present Article. It sets out the circumstances in which a mandate, in derogation of the normal situation as set out in IV.D.–1:104 (Revocation of the mandate) may be irrevocable.

B. Possible situations for irrevocability

The fundamental right to revoke a mandate is based on the right of the principal not to be made bound by a prospective contract (or other juridical act) if the principal no longer wishes to become bound. However, in certain cases there are also legitimate interests of other parties at stake. These interests may conflict with the principal's interest not to be bound by a prospective contract or other juridical act.

This provision differentiates two situations in which the interests of other parties justify the existence of an irrevocable mandate. In the first case, the mandate serves to execute a legitimate interest of the agent. Irrevocability may be needed to safeguard that interest. The irrevocability thus exists towards the agent. In the second case, the mandate is to serve the interests of several 'principals' and irrevocability is needed to safeguard the interests of the principals towards each other. These situations have in common that they are the result of an underlying relationship between the principal and the agent or other interested parties.

C. Mandate given in the interest of the other party

In the type of case covered by paragraph (1)(a), the underlying relationship may give rise to an irrevocable mandate where the mandate serves an interest of the agent.

> *Illustration 1*
> A bank is willing to award a credit contract to a consumer, provided that it is secured by a mortgage on the house of the consumer. In the credit contract the consumer agrees to give an irrevocable mandate to the bank to establish the mortgage.

D. Mandate given in the interest of several 'principals'

In the situation covered by paragraph (1)(b) several parties agree that in the interest of an efficient and effective representation of their interests or in the interest of solving a common problem, a mandate is to be given to one of them or to a third party to act as an agent on behalf of all of them. In this case, on the basis of their common relationship, the 'principals' are bound towards each other not to revoke the mandate. In the relationship between each principal and the agent, this may lead to the irrevocability of the mandate.

> *Illustration 2*
> A group of music composers (principals) agree that in their common interest an organisation of music composers (agent) will be mandated to act on their behalf with regard to the exploitation of their intellectual property rights.

> *Illustration 3*
> Two co-owners of a car mandate each other to sell the car to an interested third party. Here, both co-owners may act independently on their own behalf and that of their fellow co-owner.

In these examples, irrevocability does not follow from the relationship between the co-owners. Therefore, the parties must agree thereupon.

> *Illustration 4*
> A buyer and a seller (principals) disagree as to whether the delivered goods conform to the contract. They appoint an arbitrator (agent) to decide who is right.

In this illustration the common interest of the principals consists of solving their conflicting interests and the solution is to be achieved by a third party. If this is the case, the agent necessarily must be somebody else. It follows from the nature of the relationship between these parties that the mandate of the agent must be irrevocable: a party who is dissatisfied with the intermediate decision of the arbitrator should not be able to revoke the arbitrator's mandate and thus escape from a negative outcome of the dispute. As the arbitrator is 'to affect the legal relations of the principal', the contracts between the arbitrator and the two principals fall under the definition of a mandate contract.

E. Exceptions to irrevocability

Only when the reason for irrevocability of the mandate under the underlying relationship no longer exists may the principal revoke the mandate of the agent. In this sense, the 'irrevocability' is relative.

Irrevocability in the interests of agent. Even when the mandate is irrevocable and the period of irrevocability has not yet elapsed, the agent is still required to act in accordance with the mandate, to act in the best interests of the principal and to act in accordance with the standard of care that may be expected. The irrevocability of the mandate should not go so far as to prevent the principal from terminating the mandate relationship for fundamental non-performance by the agent of the obligations under the mandate contract (paragraph (2)(a)(ii)). The mandate can also be revoked if the relationship from which the legitimate interest originates is terminated for non-performance by the agent (paragraph (2)(a)(i). Finally, the principal may revoke the mandate if there is a serious and extraordinary reason to terminate the mandate relationship (paragraph (2)(a)(iii)).

Irrevocability in the interests of other principals. If the principals agree that the mandate may be revoked (paragraph (2)(b)(i)) or if the underlying contractual relationship has terminated (paragraph (2)(b)(ii)) or if the agent commits a fundamental non-performance (paragraph (2)(b)(iii)), the principal is free to revoke the mandate of the agent. The principal may also revoke the mandate if there is a serious and extraordinary reason to terminate the mandate relationship (paragraph (2)(b)(iv)). In these latter cases, the agent is to be replaced without undue delay by another agent in conformity with the contract between the principal and the other party or parties.

F. Consequences of irrevocability

To the extent that the mandate is irrevocable, a notice of revocation by the principal remains without effect (paragraph (3)). It does not end the authority of the agent to represent the principal, and therefore the mandate relationship is not terminated.

G. Termination under Chapter 7 leads to revocation of mandate

If the mandate relationship terminates because one of the situations under Chapter 7 occurs, i.e. the contract is concluded, the fixed period expires or the relationship is terminated because the agent dies, the rules on irrevocability no longer have effect. This is also the case when the principal dies and the successors of the principal or the agent terminate the contractual relationship on the basis of an extraordinary and serious reason.

NOTES

1. In AUSTRIA though an agent's authority is normally revocable at any time (CC § 1020) without prejudice to the right to damages for breach of contract, there is an exception if the authority is coupled with an interest outside the contract for mandate, the irrevocability is stipulated and the contract is for a definite period of time. In such a case the authority is irrevocable (Schwimann (-*Apathy)*, ABGB V[3], § 1020, no. 7; Straube (-*Griss*), HGB I[3], § 383, no. 13).

2. The parties can validly agree upon irrevocability of the contract for representation in BELGIUM (*de Page and Dekkers*, Traité élémentaire de droit civil belge V[2], 463-464; *Foriers and Glansdorff*, Contrats spéciaux, 640-641; *Wéry*, Le mandat, 275-283).

3. In BULGARIA the general rule is that the principal can revoke the mandate at any time (LOA art. 288(1)), but the parties can explicitly stipulate otherwise. Irrevocability of the mandate can also be implied, e.g. if both the principal and the agent or the principal and a third party have a legitimate interest in the mandate (Mevorah/Lidji/Farhi, Komentar III, 170). Legal doctrine distinguishes between absolute and relative irrevocability of the mandate and the authority (Mevorah/Lidji/Farhi, Komentar III, 171). In case of absolute irrevocability, the principal's withdrawal from the mandate or the authority does not have any legal effect. In case of relative irrevocability, the principal can end the mandate and the authority with unilateral notice to the agent, but will be liable for damages. According to legal writings, the irrevocability of the mandate contract is always relative (Mevorah/Lidji/Farhi, Komentar III, 171).

4. According to DANISH law the parties can validly agree that the mandate cannot be revoked. There are no statutory rules on this matter. According to case law a general mandate (general power of attorney) cannot be irrevocable.

5. In ENGLAND, it is possible in certain circumstances for the parties to agree that authority cannot be revoked, but this is only where the notion of agency is used as a legal device for a different purpose from that of normal agency, i.e. to confer an interest or a security on the agent. In such situations, the agent is regarded as using agency not for the benefit of the principal but for the agent's own benefit (Bowstead (-*Reynolds and Graziadei*), Agency[18], 555-556). There are essentially two situations where the agent's authority may be irrevocable. First, the authority of the agent cannot be revoked when the agent's authority is coupled with an interest, e.g. if the principal owes money to the agent and appoints the agent to sell property in order to pay the debt to the agent. However, this is only valid when the interest exists at the time that the principal gives the agent authority; the mere right to earn commission is not regarded as an interest (*Doward, Dickson & Co v Williams & Co* (1890) 6 TLR 316). Second, when a mandate is given to secure a proprietary interest of, or some obligation owed to, the donee, it cannot be revoked without the consent of the donee (Powers of Attorney Act 1971, s. 4).

6. In ESTONIA, the parties can agree that the contract cannot be terminated (other than for a fundamental breach). The principal may conclude the prospective contract personally even in the case of an irrevocable mandate, but the parties can agree otherwise.

7. In FINLAND, it is generally thought that an irrevocable grant of authority is not possible.

8. In FRANCE, the rule entitling the parties to freely terminate the mandate or agency is a matter of mandatory public policy and the parties cannot validly agree that the agency is irrevocable. In practice, there are clauses in contracts entitled

'irrevocabilité', but these are interpreted as simply giving rise to compensation for the agent (Civ. 1ère 5 Feb 2002, Bull. civ. I, n° 40), and do not prevent the principal from carrying out the transaction personally (Civ. 1ère 16 Jun 1970, D. 1971, 261).

9. Under GERMAN law, which strictly distinguishes between the authority and the contractual relationship between agent and principal, this is largely a matter of the law of authority (as the parties want to make sure that the agent can continue to conclude contracts with the third party) – CC § 168 implicitly anticipates that the parties may exclude revocability of the authority and the courts have long upheld this possibility (since RGZ 109, 333).

10. In GREEK law an irrevocable mandate for representation can be agreed on if the mandate also concerns the interest of the agent or of a third party (CC art. 724). According to CC art. 218 an irrevocable grant of a mandate can be agreed only if the mandate also concerns the interest of the agent or of a third party (Georgiadis/Stathopoulos/Doris, Art. 218-221 GCC nr. 9). In such cases of irrevocable mandate a revocation by the principal is void and the agent is entitled to conclude the prospective contract for which the representation was granted (Supreme Court decision no. 197/1983, EEN 1983, 714). In the area of intellectual property rights there are specific rules with regard to the contracts entrusting the administration of copyright to an 'organisation of collective administration'. In such contracts an analogous application of the principal of free revocation of the mandate (CC art. 724) is not accepted. A free revocation does not comply with the nature of those contracts which require stability and continuance of the contractual relationships between the parties.

11. The HUNGARIAN CC art. 223(2) establishes that '[a] mandate shall be valid until withdrawn, unless otherwise provided; its withdrawal that concerns a bona fide third person shall be operative only if he has been informed thereof. The right of withdrawal cannot be validly waived'. Concerning the authority of the agent, CC art. 483(4) establishes that '[a]ny limitation or exclusion of the right of cancellation shall be null and void; however, the parties shall be entitled to agree on the limitation of the right of cancellation with regard to continuous agencies'. In case of commission agency, CC art. 512(2) provides that '[a]ny limitation or exclusion of the right of rescission shall be null and void'.

12. In IRELAND agency may be irrevocable where e.g. (i) the agent is given a 'power with an interest', that is, where an agent is given power and has a personal interest, as where the principal owes the agent money, and appoints the agent to sell property of the principal and thereby raise funds to pay the debt; or (ii) where a power of attorney is expressed to be 'enduring' or irrevocable under the Powers of Attorney Act, 1996. It should be noted regarding (i) where the agent is given 'power with an interest', that this is not a 'true' agency but agency being used as a device. In these cases it is intended that the agent use the 'power' not for the benefit of the principal but for the agent's own benefit.

13. In ITALY, the parties can validly agree on an irrevocable mandate. However, even in this case the principal may revoke the mandate, but, unless there is a just cause, is liable for damages vis-à-vis the agent (CC art. 1723(1)). Representation contracts which are also in the interest of the agent or of a third party (*in rem propriam*) are considered irrevocable *ex lege* (CC art. 1723(2)).

14. In the NETHERLANDS, the parties may agree that the agent will act in the agent's own name and with exclusion of the principal's authority to act personally. If this is agreed, even as regards third parties the principal is not entitled to conclude the prospective contract; the exclusion of the principal's power to conclude the

prospective contract can however only be invoked if the third party knew or should have known of the exclusion (CC art. 7:423(1)). Specific provisions apply if the agent is an organisation which has as its statutory purpose to act on behalf of the joint interests of principals by exercising their rights collectively (CC art. 7:423(2)). Such organisations exist specifically in the area of intellectual property rights.

15. In POLAND the principal's right to revoke may be limited, but the principal will always retain the right to revoke the contract due to "important reasons" (CC art. 746(3)).

16. SCOTTISH law does recognise an irrevocable mandate, known as a procuratory in rem suam (e.g. Premier Briquette Co Ltd v Gray 1922 SC 329; Stair, Institutions I10, 12, 8). It arises where the authority has been granted to the agent to achieve an outcome in which the agent has an interest. This concept has benefited from very little analysis in Scottish legal writing. It is described as 'absolute,' suggesting that it may not be revocable even in cases of material breach by the agent (Black, para. 551; Gow, Mercantile and Industrial Law of Scotland, 536). In cases where the agent has no interest in performance, there would seem to be nothing to prevent principal and agent from agreeing between themselves that the agency will be irrevocable.

17. In SLOVAKIA the principal cannot validly waive the right to revoke the authority granted (CC § 33(b)(3)), nor validly agree that the relationship under a contract for representation may not be terminated; an irrevocable granting of authority is void.

18. In SPAIN, the parties can validly agree on an irrevocable mandate (CC art. 1733; STS 31 October 1987; 11 May 1993, 19 Nov 1994, and 20 Jul 1995; see also Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII^{2}, 514; *Lete del Río*, Derecho de obligaciones III^{4}, 414). However, even in this case the principal may revoke the mandate, but, unless there is a just cause, is liable for damages vis-à-vis the agent. Representation contracts which are also in the interest of the agent or of a third party (*in rem propriam*) are considered irrevocable (any purported revocation being ineffective) when the irrevocability serves the underlying protected interest as a device to reach the purpose intended by the parties (SSTS 20 April 1981, RJA 1981/1658, 3 September 2007, RJ 2007/4709; 30 January 1999, RJA 1999/331; *Diez-Picazo*, La representación, pp. 305 ff; Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-*Gordillo Cañas*), Código Civil II, 1585).

19. In SWEDEN there are no special rules on irrevocable grants of authority. A mandate is considered to be revocable in nature since the commission is a type of contract that rests on personal trust. An irrevocable grant of authority is, however, considered allowed to the extent it is due to another underlying legal relationship between the parties and aims at a determined part of the principal's financial sphere and circumstances (*Bengtsson*, Särskilda avtalstyper I^{2}, 54 and *Grönfors and Dotevall*, Avtalslagen^{3}, 134). A general mandate can always be revoked.

CHAPTER 2: MAIN OBLIGATIONS OF THE PRINCIPAL

IV.D.–2:101: Obligation to co-operate

The obligation to co-operate under III.–1:104 (Co-operation) requires the principal in particular to:

(a) answer requests by the agent for information in so far as such information is needed to allow the agent to perform the obligations under the mandate contract;

(b) give a direction regarding the performance of the obligations under the mandate contract in so far as this is required under the mandate contract or follows from a request for a direction under IV.D.–4:102 (Request for a direction).

COMMENTS

A. General idea

This provision is a specification of the general rule in III.–1:104 (Co-operation) which imposes on the parties an obligation to co-operate with each other when this can reasonably be expected for the performance of the other party's obligations. Under the present Article, the obligation to co-operate requires the principal, in particular, to provide the agent with information and directions in order to allow the agent to perform the obligations under the mandate contract.

B. Reasonable requests by agent for information

This provision does not impose on the principal an obligation to voluntarily provide information to the agent. The principal may not always know what information the agent needs. The principal is only obliged to answer requests by the agent for information when it is reasonable to expect that such information will enable the agent to perform the obligations under the mandate contract.

C. Obligation to give directions

According to the present provision, the principal is obliged to provide "subsequent" directions to the agent as to the performance of the obligations under the mandate contract or the content of the prospective contract in two cases: when such an obligation is imposed in the mandate contract, and when the agent is obliged to ask for a direction, (as regulated in IV.D.–4:102 (Request for a direction) paragraph (1)). If the agent is obliged to ask for a direction in order to find out the position of the principal on the issue pertaining to the performance of the obligations under the mandate contract or the content of the prospective contract, it is a logical consequence that the principal is obliged to answer such requests.

D. Consequences of failure to provide answers to request for information

If the principal is under a contractual obligation to answer the requests of the agent, the failure to provide such answers would constitute a non-performance of the obligation. The principal could be required to compensate the agent for any damage sustained as a result (e.g. the loss of the profit of the performance of another contract, as the performance of this particular contract has taken more time than expected). However, such damages do not solve the agent's

problem completely, as the agent does not know how to further perform the obligations. It could therefore be useful to allow the agent to proceed and base performance on the expectations, preferences and priorities a normal principal would have.

In so far as the principal's interests are not communicated to the agent and the agent could not be expected to be aware of these interests otherwise, the agent cannot be expected to take them into account. Not taking these interests into account therefore does not lead to non-performance of the obligations under the mandate contract by the agent. This therefore constitutes a defence for the agent.

E. Consequences of failure to provide directions

The consequences of a failure to provide directions are regulated extensively under IV.D.–4:103 (Consequences of failure to give a direction).

NOTES

I. Duty to inform agent when asked

1. In AUSTRIA, each party to the contract for mandate is to act dutifully and in good faith. The principal is to provide the agent (commercial; Straube (-*Griss*), HGB I[3], § 384, no. 5; forwarder: Krejci, 308) with the necessary documentation relating to the goods concerned. The principal has to inform the agent of the content of the prospective contract to be negotiated and to obtain for the agent any information necessary for the performance of the obligations under the contract for mandate. The principal is thus required to volunteer information, independent of the principal being a consumer or entrepreneur.
2. In BELGIUM, the principal is required to inform the agent, if this information is necessary for the agent to fulfil the mission. Like every other party to a contract, the principal is bound by a duty to perform the contractual obligations in good faith (CC art. 1134(3)) and more specifically to a duty of collaboration. A specific application of the duty of collaboration is the duty to enable the agent to fulfil the mission. This entails the obligation to hand over all information and all documents necessary to fulfil the mission (*Wéry*, Le mandat, 220).
3. In BULGARIA according to legal writings, the principal has the right to give directions to the agent for the performance of the obligations under the mandate contract (*Vassilev, L.*, Obligazionno pravo, 24; *Goleva*, Obligazionno pravo2, 237). Since the general rules on the mandate contract do not contain a specific provision on this subject, the general rules on the performance of obligations apply. These rules require the parties to perform their contractual obligations in conformity with good faith and not to obstruct the other party in performing its obligations in the same manner (LOA art. 63(1)). If information and directions from the principal are necessary for the proper performance of the obligations of the agent, the principal has to co-operate. A duty to give all relevant information regarding the performance of the agent's obligations is explicitly provided only for the principal-merchant towards the agent-commercial agent (Ccom art. 34(1); Gerdjikov, Komentar na Turgovskiya zakon I, 159; *Kassabova*, TP 2006, 159, 163).3.
4. In DENMARK, under a rule covering all types of civil contracts, the principal, prior to the conclusion of the contract of representation, is required to inform the agent of the

principal's interests and needs as regards the proper performance of the contractual obligations or the content of the prospective contract to be negotiated or concluded by the agent. If the principal fails to fulfil this basic obligation, the agent will not be liable in damages for any loss caused by the negligence on the part of the principal. The principal must spontaneously provide the agent with all necessary information.

5. In ENGLAND, when the principal appoints an agent, the principal wants the agent to perform certain tasks. The needs and the interests of the principal will be apparent from such tasks and the instructions the principal will have given the agent pursuant to the contract (actual express authority). The instructions of the principal must be as precise as possible. Once again, the distinction between contractual and non-contractual agents must be made. When the agency is contractual, the agent is under an obligation to carry out the instructions that the principal has given as to the performance of the required tasks. When the principal gives clear and unambiguous instructions, the agent must perform such instructions as defined or be liable for breach of contract (*Turpin v Bilton* (1843) 5 Man & G 455). If the principal fails to give the agent clear and unambiguous instructions, the agent will not be liable if the agent acts fairly and honestly on a reasonable interpretation of the instructions and the principal will be bound by the agent's interpretation even if such interpretation was not the one the principal envisaged (*Ireland v Livingstone* (1872) LR 5 HL 395). However, nowadays, because of easy methods of communications, there is probably a duty on the agent to obtain clarification of instructions (Reynolds, 101; *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* ([1972] AC 741). If that is the case, it seems that the principal is not required to volunteer information but must do so when asked by the agent. When the agency is not contractual, the agent is consequently under no duty to act, and so cannot be liable for doing nothing. However, a failure to act may give rise to a liability in tort (*Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465; *White v Jones* [1995] 2 AC 207; *Henderson v. Merrett Syndicates Ltd. (No. 1)* [1995] 2 AC 145).

6. In ESTONIA, the law does not contain a specific rule which stipulates that the principal, prior to the conclusion of the contract, is required to inform the agent of interests and needs as regards the performance of the contract.

7. In FINLAND, it is a general principle that a party has a duty of disclosure before entering into a contract. The principal ought to give sufficient information to the agent in order to ensure that the agent is able to complete the contractual performance in the required way (ACAgentsS § 8). It depends on the circumstances whether the information should be given voluntarily or not (e.g. which of the parties knows the area of activity better). When the principal is a consumer, the agent is generally required to take the initiative in investigating the interests and needs of the principal more than in pure business relations.

8. There is in FRANCE no specific obligation on the principal to provide information, whether spontaneously or at the request of the agent. The same principles apply under the Civil Code and under consumer law, except with regard to the relationship between the commercial agent and the principal, which is 'subject to an obligation of fair dealing and a reciprocal duty of information. The commercial agent shall perform its mandate as a proper professional, and the principal shall enable the commercial agent to perform its mandate' (Ccom art. L.134-4). Otherwise, the law contains no specific obligations for the principal to spontaneously provide information.

9. In GERMANY, the principal is not required to inform – either when asked or spontaneously – the agent of interests and needs as regards the performance of the contractual obligations or the content of the prospective contract to be negotiated or

concluded by the agent. However, as the agent only has to take into account interests of the principal that can be known of, the principal takes the risk that the contract concluded or arranged will not meet the principal's (hidden) interests. The principal would to that extent be barred from claiming non-performance by the agent. However, the agent can be under an obligation to warn the principal. In German case law, such obligations have been assumed in expertise cases, in particular where relationships between banks and their customers were involved.

10. In GREECE, good faith requires that the principal informs the agent of the principal's interests and needs regarding the performance of the mandate. A principal who fails to do so cannot claim a deviation from the limits set in the mandate (CC art. 717). The principal can either provide information voluntarily or when asked to do so.

11. In HUNGARY the clear consent of the agent requires that the agent has the necessary information about the interests and needs as regards the performance of the contract or the content of the prospective contract to be negotiated or concluded. In this sense, CC art. 205(2) establishes that '[i]t is fundamental to the validity of a contract that an agreement is reached by the parties concerning all essential issues as well as those deemed essential by either of the parties. The parties need not agree on issues that are regulated by statutory provisions'. Moreover, the parties are under an obligation to cooperate, including the obligation to inform each other of all important circumstances affecting performance of the contract (CC art. 277(4)-(5)). On the basis of CC art. 474(2), '[a]n agent must fulfil the principal's instructions and represent his interests regarding the authority conferred upon him'. Naturally, the agent cannot be liable for the failures and damages caused by the lack of information that the principal should have given, but according to CC art. 476, '[i]f the principal issues imprudent or incompetent instructions, the agent shall call the principal's attention to the matter. If the principal insists on the instructions despite the warning, he shall be liable for the damages sustained on account of the instructions'.

12. In ITALY, under the provisions regulating the mandate there are no specific rules governing the principal's duty to inform the agent of the principal's interests and needs, whether as volunteered information or when asked. However, on the basis of CC art. 1719 ('In the absence of an agreement to the contrary, the principal is bound to furnish the mandatory with the means necessary to perform the mandate and to fulfil the obligations which the mandatory has undertaken in his own name') it can be argued that the principal has to provide the agent with all relevant information which is necessary for the execution of the mandate. With respect to the more specific issue concerning the existence of a duty of information *prior* to the conclusion of the contract, it should be noted that the general rules of the Civil Code on precontractual liability apply also to representation agreements. According to CC art. 1337, 'the parties, in the conduct of negotiations and the formation of the contract, shall conduct themselves according to good faith'; in addition, according to the general clause of good faith, '[t]he debtor and the creditor shall behave according to rules of fairness' (CC art. 1175). Furthermore, CC art. 1338 provides that 'a party who knows or should know the existence of a reason for invalidity of the contract and does not give notice to the other party is bound to compensate for the damages suffered by the latter in relying, without fault, on the validity of the contract'. There are no particular rules of consumer protection on this specific issue; however, if the principal is a consumer his or her position will be evaluated differently by the courts. Since the consumer may not be in a position to establish what information is relevant for the agent (a professional) in order to perform the mandate (information asymmetries), it is mostly the agent who has a duty to inquire as to the exact interests of the principal.

13. In SCOTLAND the position is similar to that described for England in Note 4 above.

II. Consequences of failure to inform agent

14. In AUSTRIA, a principal who fails to inform the agent as required cannot found on any resulting non-performance by the agent. The agent is required to warn the principal of this consequence.

15. In BELGIUM, an agent who is not able to fulfil the mission because of a lack of information which should have been provided by the principal can claim damages (in general: *Wéry*, Le mandat, 224).

16. In DENMARK, it is part of the principal's obligation towards the agent to answer a request for information by the agent. In carrying out this obligation the principal must act in accordance with good faith and fair dealing. If non-performance of the contract is due to failure of the principal to provide information, the agent cannot be held responsible. The agent must warn the principal of such consequences. However, the consequences will mostly appear when it comes to an evaluation of the prospective contract.

17. In ENGLAND, the principal must answer the requests for information by the agent. Should the principal fail to answer such queries, then the agent will not be liable for any consequences following such failures, or for the reasonable interpretations the agent has made of the instructions.

18. In ESTONIA, if the principal's failure to answer the request of the agent leads to negative consequences for the principal, the principal will most likely not be in a position to found on any non-performance by the agent if the latter has acted with the normal diligence. Whether a duty to warn exists can only be determined according to the specifics of the case.

19. FRENCH law is silent on the consequences of a failure to provide information, but it is undoubtedly the case that a refusal to reply to questions raised by the agent would exclude the liability of the agent where the mandate failed or was improperly performed. The agent could, however, remain liable to any third party contractor (see Cass. 1re civ., 13 Nov 1997, Bull. Civ. I no. 308). There is no obligation for the agent to inform the principal of the consequences of the refusal to provide the information requested.

20. In FINLAND, if the principal fails to inform the agent, the omission may reduce or eliminate the agent's liability in cases where the prospective contract (or the performance of the agent otherwise) does not correspond to the (undisclosed) needs of the principal. Further, if the agent suffers losses due to the non-disclosure of the principal, the agent may be entitled to damages (including loss of profit where the mandate contract is valid).

21. In GERMANY, the position is as stated in note 9 above.

22. Under GREEK law, if the principal does not provide information although is asked to do so, the agent has the right to refuse to perform the mandate and the principal is placed under notice according to CC art. 351 (Georgiadis/Stathopoulos/Karasis III, Art. 713 GREEK CC nr. 19). Furthermore, the principal cannot found on any non-performance of the mandate in so far as this is due to the failure to provide information (CC art. 717). The agent is not required to warn the principal of such consequences. However, in the case of the obligatory remunerated mandate between a lawyer and a principal, good faith (CC art. 288) requires the lawyer to warn the principal of the consequences.

23. In HUNGARY, in the case of failure to provide information, the general rules of obligations apply, especially CC art. 277(4)-(5), which places the parties under an obligation to co-operate in the performance of contractual obligations, including the obligation to inform each other of all important circumstances affecting performance. Co-operation is especially important in the case of agency, as CC art. 477(1)-(2) provides that '[t]he agent shall inform his principal of his activities and the state of affairs upon request or, if necessary, even without a request, particularly if employment of another person has become necessary or if the instructions need to be changed due to the occurrence of new circumstances. The agent shall be entitled to depart from the principal's instructions only if it is essential for the principal's interest and if there is no time to notify the principal in advance. In such a case the principal shall be notified without delay'. Furthermore, according to CC art. 476, '[i]f the principal issues imprudent or incompetent instructions, the agent shall call the principal's attention to the matter. If the principal insists on the instructions despite the warning, he shall be liable for the damages sustained on account of the instructions'.

24. In IRELAND, at common law, there is no express duty to inform placed on principals. However, an agent is required to follow the lawful instructions of the principal. It has been held that where instructions are ambiguous an agent will not be held liable where the agent acts on a reasonable interpretation of the instructions *(Ireland v Livingstone* [1872] LR 5 HL 395), though an agent should seek clarification, where possible *(Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 772 *per* Lord Salmon; *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at 517 *per* Goff LJ).

25. In ITALY, the principal is required to answer requests for information by the agent on the basis of the good faith principle and on the basis of the duty of co-operation between the parties to a contract. A principal who fails to answer such requests is barred from eventually seeking damages against the agent if the damage could have been prevented, had the principal responded to the agent's requests for information. In general terms, the agent is not required to warn the principal of such consequences. However, if the principal is a consumer, the agent has a more intensive duty to investigate the principal's interests, which would often mean that if the principal neglects to answer a first request, the agent would ask for the required information again and eventually warn the principal of the consequences of silence (usually in the form of a 'disclaimer').

26. In the NETHERLANDS according to literature, the principal may be obliged to provide the agent with information which is necessary for the performance of the obligations under the mandate contract. However, there is no specific duty for the principal to inform the agent. Usually, the contracting parties will agree in the individual mandate contract on the principal's duty to inform the agent. Furthermore, the principal may have certain duties to inform the agent based on the principle of reasonableness and fairness. See *Van der Grinten*, Lastgeving, no. 17.

27. The POLISH CC contains no specific rules on the principal's duty to provide information to the agent.

28. In SCOTTISH law the principal is subject to very few duties towards the agent, in contrast to the numerous duties which the agent must fulfil towards the principal. At common law, there is no general duty on the principal to act towards the agent in good faith (although such a duty will apply in situations of commercial agency governed by the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053, reg. 4(1)). Whilst no obvious expression of the principal's duties at common law exists, individual duties are identifiable in the case-law concerning the agent's duty of care

(*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 87). Thus, a delay by the principal in giving instructions, or the giving of defective instructions, constitutes a breach of the agent/principal contract which will result in the principal losing the right to damages from the agent for defective performance (*Mackenzie v Blakeney* (1879) 6 R 1329). Looked at from the principal's perspective, this could constitute a duty to provide clear instructions.

29. According to the SLOVAKIAN General Law of Obligations, the creditor (here the principal) is in default when the creditor, contrary to the contract, fails to cooperate with the debtor (here the agent) to enable the latter's performance. Furthermore, Ccom § 568(2) provides that the principal is bound to provide to the agent with all necessary things and information for performing the latter's obligation to arrange a certain matter, unless it ensues from the matter that the agent is to obtain what is necessary personally.

30. In SPAIN the principal has to determine how the mandate is to be performed by giving the directions and instructions which the principal deems necessary for the successful performance of the mandate (*Lasarte Álvarez*, Principios de derecho civil III[7], 346). Beyond that there are no rules as to the duty to inform the agent. Properly speaking, the mandate is a unilateral contract and the principal's obligations only arise as indemnity duties when the contract is ended (CC arts. 1728, 1729). This basic scheme is modified where the agent acts on a commercial basis. In this case, the general rules on bilateral contracts apply. Accordingly, the duty to inform should be deduced from the general duty to act in good faith (CC art. 1258).

31. In SWEDEN the principal has a duty to be loyal and co-operate towards the agent. This includes a duty to answer requests for information in order for the agent to be able to perform according to the contract. The scope of this duty is somewhat uncertain due to a lack of precedents (see HaL § 7; *Hesser*, 64; *Ramberg*, 246; *Hellner*, 114).

III. Consequences of failure to inform agent

32. In AUSTRIA due to the duty of care, the principal is to obtain for the agent the information necessary for the performance of the obligations under the mandate contract. If the principal fails to inform the agent of, the principal cannot argue that there has been non-performance by the agent. The agent is required to warn the principal of this consequence.

33. In BELGIUM if the agent is not able to fulfil the mission because of a lack of information, the agent can claim damages (in general: *Wéry*, Le mandat, 224).

34. In BULGARIA when the agent, in order to perform the contractual obligations, needs information or directions from the principal, the latter has a duty to co-operate. This is not an actual obligation, which can be enforced, but rather a legal burden or requirement (*Тежест*, *Obliegenheit*). Therefore if the principal does not assist, either voluntarily or at the agent's request, there is no breach of contractual obligations, but a case of *mora creditoris* (LOA art. 95; *Goleva*, Obligazionno pravo2, 110; Апостолов, Облигационно право[2], 331). In such a case, the agent can terminate the contractual relationship and claim expenses due to *mora creditoris* (LOA art. 98; *Goleva*, Obligazionno pravo2, 111; Кожухаров, Облигационно право[2], I, 352; Supreme Court, Judgment no. 209, 4 Jul 1999).

35. In DENMARK it is part of the principal's obligation towards the agent to answer a request for information by the agent. In carrying out this obligation the principal must act in accordance with good faith and fair dealing. If non-performance of the contractual obligations is due to failure of the principal to provide information, the

agent cannot be held responsible. The agent must warn the principal of such consequences. However, the consequences will mostly appear when it comes to an evaluation of the prospective contract.

36. In ENGLAND the principal must answer requests for information by the agent. Should the principal fail to answer such queries, then the agent will not be liable for any consequences following such failures, or for the reasonable interpretations the agent has made of the instructions.

37. In ESTONIA if the principal's failure to answer the request of the agent to give information as to principal's interests leads to negative consequences for the principal, the principal will most likely not be in a position to argue that the agent is in breach of its duties and has not performed with the normal diligence. Even if the breach exists, the agent can avoid liability as the breach is attributable to the principal (LOA § 101(3)). Whether a duty to warn exists can only be determined according to the specifics of the case.

38. In FINLAND if the principal fails to inform the agent, the omission may reduce or eliminate the agent's liability in cases where the prospective contract (or the performance of the agent otherwise) does not correspond to the (undisclosed) needs of the principal. Further, if the agent suffers losses due to the non-disclosure of the principal, the agent may be entitled to damages (including loss of profit where the mandate contract is valid).

39. In FRANCE the law is silent on the consequences of a failure to provide information, but it is undoubtedly the case that a refusal to reply to questions raised by the agent would exclude the liability of the agent where the mandate failed or was improperly performed. The agent could, however, remain liable to any third party contractor (see Cass.civ. 1re, 13 Nov 1997, Bull. civ. 1997 I, no. 308). There is no obligation for the agent to inform the principal of the consequences of the refusal to provide the information requested.

40. In GERMANY as the agent only has to take into account those interests of the principal that the agent can be aware of, it lies in the principal's best interest to provide all necessary information to the agent. Should the principal fail to do so and the contract concluded or arranged does not meet the principal's (hidden) interests, the principal is to that extent barred from claiming non-performance by the agent.

41. In GREECE if the principal does not provide information when asked to do so, the agent has the right to withhold performance of the obligations under the mandate contract and the principal is placed under notice according to CC art. 351 (Georgiadis/Stathopoulos/Karasis III, Art. 713 GREEK CC nr. 19). Furthermore, the principal is not entitled due to the failure to provide information to claim a deviation from the limits set in the mandate (CC art. 717). The agent is not required to warn the principal of such consequences. However, in the case of the obligatory remunerated mandate between a lawyer and a principal, good faith (CC art. 288) requires the lawyer to warn the client of the consequences.

42. In HUNGARY in the case of a failure to provide information, the general rules of obligations apply, especially CC art. 277(4)-(5), which place the parties under an obligation to cooperate in the performance of contractual obligations, including the obligation to inform each other of all important circumstances affecting performance. The agent is not liable for any consequences which result from the fact that the principal did not provide information about an important circumstance. Furthermore, according to CC art. 476, '[i]f the principal issues imprudent or incompetent instructions, the agent shall call the principal's attention to the matter. If the principal

insists on the instructions despite the warning, he shall be liable for the damages sustained on account of the instructions'.

43. In IRELAND while there is no express duty to inform placed on principals, it has been held that where a principal fails to answer queries from the agent, the agent will not be liable for any consequences following from such failures, or for the reasonable interpretations the agent has made of the instructions from the principal *(Ireland v Livingstone* [1872] LR 5 HL 395).

44. In ITALY the principal is required to answer requests for information by the agent on the basis of the good faith principle and on the basis of the duty of cooperation between the parties to a contract. If the principal fails to answer such requests the principal is barred from eventually seeking damages against the agent if the damage could have been prevented, had the principal responded to the agent's requests for information. In general terms, the agent is not required to warn the principal of such consequences. However, if the principal is a consumer, the agent has a more intensive duty to investigate the principal's interests, which would often mean that if the principal neglects to answer a first request, the agent would ask for the required information again and eventually warn the principal of the consequences of silence (usually in the form of a 'disclaimer').

45. In the NETHERLANDS it seems that if non-performance of obligations under the mandate contract by the agent is due to the principal's failure to provide information, the agent is not liable for this non-performance.

46. Since the POLISH CC contains no specific provisions on the duty to provide the agent with any information, there are also no rules on the consequences of a failure to provide such information. If the agent does not carry out the contract properly because the principal refused to reveal required information, the agent will not be liable for breach of contract.

47. In SCOTLAND a delay by the principal in the provision of instructions, or the giving of defective instructions, constitutes a breach of the principal/agent contract, which will result in the principal losing the right to damages from the agent for defective performance (*Mackenzie v Blakeney* (1879) 6 R 1329).

48. In SLOVAKIA in civil relations, the agent can ask for compensation for damages (e.g. adjustment of the price when payment of the price is related to the achievement of the client's expected result). The agent may also always terminate the contractual relationship. The agent is not required to warn the principal of such consequences. In commercial relations, the agent may demand from the principal the performance of the obligations to provide information and/or compensation for damages. As for the possibility to terminate the contractual relationship: an agent can only terminate the contract in case of a fundamental breach by the principal and if the agent informs the principal without undue delay.

49. In SPAIN there are no special rules on this point. The natural consequence, however, is that the agent is not liable for any harm suffered by the principal as a result of the principal's own failure to provide information. Where the mandate is a bilateral contract, and the agent has an economic interest in carrying out the affair and being paid, damages may be appropriate.

50. In SWEDEN if the principal fails to answer a request for information from the agent and the agent suffers damage due to this fact, such failure could amount to a non-performance for which the principal could be liable to pay damages to the agent unless the principal can show that the failure is not due to negligence (HaL § 34).

IV.D.–2:102: Price

(1) The principal must pay a price if the agent performs the obligations under the mandate contract in the course of a business, unless the principal expected and could reasonably have expected the agent to perform the obligations otherwise than in exchange for a price.

(2) The price is payable when the mandated task has been completed and the agent has given account of that to the principal.

(3) If the parties had agreed on payment of a price for services rendered, the mandate relationship has terminated and the mandated task has not been completed, the price is payable as of the moment the agent has given account of the performance of the obligations under the mandate contract.

(4) When the mandate is for the conclusion of a prospective contract and principal has concluded the prospective contract directly or another person appointed by the principal has concluded the prospective contract on the principal's behalf, the agent is entitled to the price or a proportionate part of it if the conclusion of the prospective contract can be attributed in full or in part to the agent's performance of the obligations under the mandate contract.

(5) When the mandate is for the conclusion of a prospective contract and the prospective contract is concluded after the mandate relationship has terminated, the principal must pay the price if payment of a price based solely on the conclusion of the prospective contract was agreed and

(a) the conclusion of the prospective contract is mainly the result of the agent's efforts; and

(b) the prospective contract is concluded within a reasonable period after the mandate relationship has terminated.

COMMENTS

A. General idea

This Article provides that a professional agent is normally entitled to a price for the services rendered, even if the parties neglected to explicitly regulate the matter. This does not apply however if it can be proved that the principal expected the contract to be gratuitous and that it was reasonable in the circumstances to think so. The Article further provides that, as a default rule, payment of the price is due only after the mandated task (e.g. the conclusion of a prospective contract) has been completed and the agent has so informed the principal (paragraph (2).

Paragraph (3) regulates the payment of the price where the agent has not managed to complete the mandated task during the mandate relationship but the parties have agreed on a payment for services rendered. Such payment is due when the agent has given an account to the principal.

Paragraphs (4) and (5) concern the consequences as to the right to payment for the agent when, despite the efforts made by the agent in concluding the prospective contract, it is eventually concluded by the principal or another agent appointed by the principal. Under paragraph (4) the prospective contract is concluded during performance, whereas under paragraph (5) the prospective contract is concluded when the mandate relationship is no longer in force. Paragraph (4) indicates that the agent retains the right to be paid, whether

fully or partially, if the conclusion of the prospective contract can be attributed in full or in part to the agent's performance of the obligations under the mandate contract. Under paragraph (5) the agent has to show that the contract was mainly the result of the agent's efforts. In addition, the contract must have been concluded within a reasonable period after the relationship is terminated.

B. Price for professional party

Traditionally, the mandate relationship was considered to be of a gratuitous nature. However, the gratuitous nature is in modern practice no longer self-evident. Especially where professional agents are involved, the performance of the mandate – i.e. the service the agent provides – is nowadays normally for a price. This provision in the first half of paragraph (1) reflects the normal situation in practice: an agent who has entered the mandate contract in a professional capacity is entitled to payment, unless the parties have agreed otherwise.

C. Unless principal may reasonably expect no charge

Paragraph (1) also provides, however, an exception to the normal rule. No price will be payable if the principal expected the agent to perform the contract gratuitously and it was indeed reasonable to have such an expectation.

> *Illustration 1*
> A hotel (agent) advertises that a tour could be arranged without any indication as to the price for its service. A client (principal) thought it would be arranged for free (just as a service). Even though the hotel is acting in its professional capacity, it is rather common that these services are offered free of charge, unless the hotel explicitly mentions the opposite. Under these conditions, the hotel guest could reasonably expect that the hotel would be willing to perform this service gratuitously because it is interested in getting positive reports from guests or has hopes of being able to sell other (paid) services.

D. When price payable

Specific rule provided. Under III.–2:102 (Time of performance) paragraph (1) when the parties have not agreed differently, performance of an obligation, and therefore also payment by the principal, is due 'within a reasonable time after the conclusion of the contract'. This does not give the parties much guidance in the case of a mandate relationship, which may, but not always does imply that the agent is to perform the obligations within a certain period of time. In fact, many mandate relationships are long-term contracts or their performance by the agent at least may take some time, if it is successful at all. This Article provides a specific rule as to the time of performance of the obligation of the principal to pay the agent. According to paragraph (2), the price becomes due only after the agent has performed successfully the main obligations under the mandate contract and has given account of that to the principal under IV.D.–3:402 (Accounting to the principal) paragraph (1).

Price for services rendered agreed upon. In the case where the parties had agreed upon payment of a price for services rendered, the agent is also entitled to payment if the mandate relationship has terminated but the mandated task has not been completed (e.g. a prospective contract is ultimately not concluded). In such a case, the agent has already rendered some services. In that case, paragraph (3) provides that the price is payable when the agent has

given account of what has been done in the performance of the obligations under the mandate contract under IV.D.–3:402 (Accounting to the principal) paragraph (3).

Balance of interests. This solution is justified because it best satisfies the interests of both parties. It provides a good incentive for the agent to give account of the way the mandate has been carried out, as no payment will be due otherwise. Requiring the agent to give account first means that the principal is able to evaluate whether or not the agent has properly performed the obligations under the contract. Moreover, this rule has the benefit of establishing a moment when the price becomes due which is clear to both parties at that moment, as the parties have been in contact with each other. This rule therefore stimulates communication between the parties.

E. Price when prospective contract is not concluded by agent

Agent entitled to payment. Paragraph (4) deals with the question whether, where the mandate is for the conclusion of a prospective contract, the agent is entitled to be paid if the prospective contract is concluded by the principal personally or by another agent in contracts in which no exclusivity was granted to the agent. When the agent was not allowed exclusivity, payment should be due only for the services rendered. This provision contains an in-between solution according to which the agent is entitled to the price, or part of it, if the services rendered have contributed to the conclusion of the prospective contract.

> *Illustration 2*
> A principal mandates an agent to sell the principal's car. The agent negotiates with a third party, but the third party refuses the offer made by the agent. The third party then contacts the principal directly and they conclude the sales contract. In this case, as the services of the agent have undoubtedly contributed to the conclusion of the sales contract, the agent would be entitled to the price (in full or in part).

No exclusivity granted. The situation which is described in paragraph (3) is to be differentiated from the situation in which the agent was awarded exclusivity but the principal nevertheless concluded the prospective contract personally or had it concluded by another agent. In such a case the principal is in breach of contract and is liable in damages. If that is the case, the agent would have to be put as nearly as possible into the position which would have prevailed if the principal had respected the exclusivity clause. This would imply that the principal would have to compensate the loss which the agent has suffered and the gain of which the agent has been deprived. In other words, the agent would receive the expectation interest.

F. Price if prospective contract is concluded after termination, but is mainly the result of the efforts of the agent

Agent entitled to payment. Paragraph (5) deals with the situation where (a) the mandate is for the conclusion of a prospective contract (b) the principal's obligation to pay arises only on the conclusion of the prospective contract ("no result, no pay") (c) the mandate relationship is terminated and (d) the principal or somebody acting on the principal's behalf subsequently concludes the prospective contract. In this situation the agent retains the right to payment if the contract concluded was mainly the result of the agent's efforts in the performance of the mandate and if it is concluded within a reasonable time after the mandate relationship is terminated.

Balance of interests. In this type of contract, there is a substantial risk that the principal will try to evade the obligation to pay by terminating the mandate relationship just before the principal concludes the prospective contract. In order to protect the interests of the agent, the principal should therefore be required to pay the price even though the mandate relationship had already terminated. On the other hand, it does not seem fair to require the principal, under all circumstances, to pay the full price if the agent did not conclude the prospective contract after all. Therefore the obligation to pay remains only when certain conditions are fulfilled. This is therefore a balanced solution where the interests of both the agent and the principal are safeguarded.

Illustration 3
A principal mandates an agent to sell the principal's car. The agent negotiates with a third party and comes to an agreement, subject to approval by the principal. The principal does not give the approval, terminates the mandate relationship, and subsequently concludes the sales contract on (almost) the same terms with the third party.

Illustration 4
A principal mandates an agent to sell the principal's car. They agree on a mandate contract with a duration of 3 months. The agent negotiates with a third party and comes to an agreement, subject to approval by the principal. The principal waits until the 3 months period has ended and subsequently concludes the sales contract on (almost) the same terms with the third party.

In both cases it is clear that the principal has terminated the contractual relationship (Illustration 3) or waited for the fixed date to expire (Illustration 4) in order to prevent the agent from concluding the contract with the third party.

Illustration 5
A principal mandates an agent to sell the principal's car. The agent negotiates with a third party. The principal, not satisfied with the progress the agent makes, terminates the mandate relationship and appoints another agent. The new agent ends the negotiations successfully and concludes the sales contract.

In this case, the first agent's efforts have contributed to the conclusion of the prospective contract, but they did not mainly result in the conclusion of the contract with the third party: the services of the second agent were equally necessary. In this case, the agent is not entitled to payment of the price.

Similar to regime for commercial agency contracts. It should be noted that paragraph (4) is worded in a similar manner as IV.E.–3:302 (Commission after the agency has ended), where the commercial agent under certain conditions is entitled to commission for contracts concluded after the commercial agency has terminated.

NOTES

I. Professional agent entitled to price

1. In AUSTRIA if there is a custom or usage of the particular trade regulating the payment of remuneration, there is a presumption, in the absence of any express or implied agreement to the contrary, that the parties contracted for the payment of the remuneration in accordance with this custom or usage (CC § 1004; Apathy, § 1004 Rz 1). Solicitors are to be remunerated for their services (RATG and the subsidiary regulations of CC §§ 1002 et seq.). The commercial regulations (Ccom §§ 345, 354, 396 et seq.; HVertrG §§ 8, 24 et seq.) provide similar rules for cases when there are no express contract provisions.
2. According to the BELGIAN CC art. 1986, a mandate is as a rule non-remunerated, unless the parties agreed expressly or impliedly to the contrary. A tacit clause on remuneration is presumed in favour of a professional agent (*Tilleman*, Lastgeving, 103; *Wéry*, Le mandat, 211).
3. In BULGARIA as a general rule, mandate is a gratuitous contract. According to LOA art. 28, "the principal shall pay remuneration to the agent only if it has been negotiated". It makes no difference whether the agent acts in a professional capacity or in the course of a business – the remuneration is due only if it is explicitly or implicitly stipulated. Special provisions for some types of mandate contract provide for compulsory remuneration, e.g. Ccom art. 36(1) for the commercial agent, Ccom art. 356(2) for the commission contract, Ccom art. 361(1) for the forwarding contract and BAA art. 36 for a contract between an advocate and a client. A common feature of these special mandate contracts is that the agents act in the course of their business. In legal doctrine the mandate contract with an agent acting in a professional capacity is presumed to be non-gratuitous (Mevorah/Lidji/Farhi, Komentar III, 52).
4. In DENMARK, there are no rules providing that the professional agent is entitled to a price for the services if the contract is silent about this. However, many contracts contain clauses by which the professional agent is entitled to claim a price.
5. In ENGLAND, there is a presumption in a commercial contract that when the principal requests a professional agent to act, the agent will be remunerated for the services. It is however a simple presumption and it can therefore be rebutted (*Miller v Beale* (1879) 27 WR 403).
6. In ESTONIA, the rule that the agent who acts as a professional party is entitled to a price is expressly stipulated for the (general) contract for services: 'In the case where the amount of remuneration payable has not been agreed upon in the contract for services, remuneration shall be paid if it can be reasonably presumed that the service would only be performed for remuneration, above all if the service provider performed the service for the purposes of his professional activities.' (LOA § 627(1)). The same principle applies to the brokerage contract (LOA § 664-665), contract of agency (LOA § 680(1)) and the commissionaire agreement (LOA § 701(1)), all of which are non-gratuitous by definition.
7. In FINLAND, the agent is, unless otherwise agreed, entitled to a reasonable remuneration (Ccom § 18:5 and analogous interpretation of the SaleGA § 45). The real estate agent is, however, only entitled to the remuneration if the sales contract is executed, unless otherwise agreed between the principal and the agent (REstateAA § 20). The ACAgentsS §§ 10 and 11 contain specific rules on remuneration and its amount.

8. Under FRENCH law, in principle, the mandate is supposed to be a contract without any payment (CC art. 1986), but case law has decided that where the agent is in business and the contract is silent, the agent is entitled to remuneration (Cass. 1ère civ., 10 Feb 1981, Bull. civ. I no. 50.; Cass. 1re civ., 6 Jun 1998, Bull. civ. I no. 211). This will be determined by the judge, depending on the extent of the services rendered. In certain cases, the statutes do specifically allow remuneration (e.g. commercial agents: Ccom art. L.134-5(3)), whereas in other cases the statutes will indicate otherwise (e.g. estate agents: L. 2 Jan 1970 art. 6).

9. In GERMANY the professional agent is entitled to a price for the services if the contract keeps silent about this on two separate counts: under the law on contracts for services (CC § 612(1)) and for works (CC § 632(1)), which applies in the framework of CC § 675. A price is deemed to be agreed upon if, under the circumstances, the service or work can only be expected to be rendered for a price. Under the rules on mandates, no specific provision for the situation addressed exists. However, a dated court decision has relied on an analogous application of CC § 1835(3), thus granting the mandatary a price if the act(s) performed under the mandate form part of the mandatary's profession (RGZ 149, 121, 124). This approach is also followed by a number of scholars, but usually under the additional condition that the act performed was not specifically anticipated when the contract of mandate – which in general requires the mandatary to act gratuitously – was concluded (Seiler, § 670 para. 21).

10. In GREECE, the question as to the price does not arise due to the gratuitous character of mandate. In the case of the obligatory remunerated mandate between lawyer and client, an agreement regarding the remuneration of the lawyer is always required for the validity of the contract (Kapodistrias, Art. 713 GREEK CC nr. 20; Georgiadis/Stathopoulos/Karasis, Art. 713 GREEK CC nr. 10). In the case of intermediation, if the contract keeps silent about the remuneration of a professional broker, CC art. 705 is applicable: 'A remuneration shall be deemed to have been tacitly agreed if the intervention or the indication is in the usual circumstances only made for a remuneration or if the task has been assigned to a professional broker. If the amount of remuneration has not been fixed, the remuneration due is determined by the rates in force or in the absence of such rates the remuneration which is usual in the locality' (the locality of the conclusion of the contract of brokerage: Georgiadis/Stathopoulos/Karasis, Art. 705 GREEK CC nr. 2; Supreme Court decision no. 710/1986, EEN 1987, 148). A contractual agreement contrary to this rule is permitted (Supreme Court decision nr. 1565/1986, NoV 1987, 1044).

11. According to the HUNGARIAN CC art. 478(1), '[t]he principal shall pay an appropriate fee, unless the circumstances, or the relationship between the parties suggest that the agent has assumed the agency without any consideration'.

12. In IRELAND in general, an agent is only entitled to remuneration if that has been agreed with the principal. In a commercial context, it is rare that an agent would agree to act gratuitously. Importantly, the agreement as to remuneration can be express or implied. A right to remuneration will be implied on the same basis that other terms can be implied into contracts. For instance, such a right would probably be implied where the agent is acting in the course of a profession or business (*Miller v Beale* [1879] 27 WR 403), and would more easily be implied where the services have been provided.

13. In ITALY, the general rule is that if the contract keeps silent the agent is entitled to payment. If the agent is a professional the presumption is even stronger.

14. In the NETHERLANDS as there is no specific stipulation on the agent's remuneration in the case of a mandate relationship, the rules on the general contract for professional services apply. If the agent performs the service in the course of a profession, the

principal is held liable to pay remuneration (CC art. 7:405(1)). However, the contracting parties may agree differently (*Van der Grinten*, Lastgeving, no. 9). The contracting parties are allowed to jointly determine the payment of the agent. It will often occur that the exact remuneration is not been specified in the contract. Therefore, if the agent is entitled to payment, but the contracting parties have not specified the exact remuneration, the principal is held liable to pay remuneration as usually charged, or if there is no such measure, fair remuneration (CC art. 7:405(2)). For instance, customs that apply in certain branches of trade have to be taken into account (*Van der Grinten*, Lastgeving, no. 17). An agent who is not a professional party cannot make a claim to any remuneration for the services (*Van der Grinten*, Lastgeving, no. 17).

15. The agent, under POLISH law, is entitled to remuneration even if the mandate contract is silent on this matter, unless the parties have agreed that the service will be performed without remuneration (CC art. 735). The CC makes no distinction between professional and other agents in this respect.

16. In SCOTLAND, if the agent is a professional party and the contract is silent on the issue of remuneration, a rebuttable presumption in favour of remuneration exists. Case law suggests that such remuneration is due where the work involved constitutes the agent's livelihood (*Mackersy's Executors v St Giles Cathedral Managing Board* (1904) 12 SLT 391; *Campbell v Campbell's Exrs* (1910) 47 SLR 837). The court will consider evidence of established custom and trade in order to decide whether remuneration is due, and, if so, how much. Where the agent is not a professional person, remuneration is due on a *quantum meruit* basis (*Kennedy v Glass* (1890) 17 R 1085). These general rules apply *inter alia* to a solicitor, who need not stipulate for payment, because the mere employment is sufficient to allow remuneration to be claimed at the ordinary rate (Begg, 117).

17. The SLOVAKIAN CC § 730 provides that the principal only has to pay remuneration when it was agreed on or when it is customary in particular with regard to the agent's profession. If the agent's professional activities include making such arrangements, it is presumed that some remuneration has been agreed on (Ccom § 566(2)).

18. In SPAIN the mandate contract is presumed to be gratuitous unless the parties have agreed otherwise (CC art. 1711; confirmed in STS 30 April 1993). The agent has to prove that there is an agreement between the parties, explicit or tacit, as to the remunerated character of the contract (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII^2, 453). There is an exception to this rule: if the agent exercises professionally the type of activities which are the object of the mandate contract, then the mandate is presumed to be remunerated (CC art. 1711(2)). See also, Ccom art. 277. However, the agent needs to prove that that the activities are indeed those which are exercised in the agent's daily professional activities (SSTS 7 Apr 1979, 21 Feb 1995). If there is no price agreed, then it will be established in accordance with professional tariffs, usages, or eventually the determination of the court (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII^2, 454).

19. According to the SWEDISH HB 18:5 the agent is entitled to a reasonable price. If the parties have not agreed on a price it follows by analogy from KöpL § 45 that the price is what is reasonable considering the circumstances. In certain categories of agents business practice has developed. Thus, trade agents, commissionaires and real estate agents are entitled to a percentage commission on contracts concluded with a third party (see HaL § 9, FmL § 21 and KommL § 27).

II. When payment of price due

20. In AUSTRIA, in the absence of an express agreement, payment of the price is due when the task is fulfilled (Apathy, § 1004 Rz 5). Rendering of accounts is no precondition. Where the commercial regulations apply, payment of the price is due on results (Ccom §§ 383, 409).

21. As a rule in BELGIUM the payment of the price is due at the moment of accounting by the agent. An exception is made for long term contracts for representation or contracts with successive performances. For these contracts, parties can agree on intermediate payments (RPDP, v° Le mandat, no. 737; *Tilleman*, Lastgeving, 111; *Wéry*, Le mandat, 214).

22. In BULGARIA there is no specific provision regulating when the remuneration stipulated in the mandate contract is due. When the mandate contract is silent, local custom is applicable. In the absence of a custom, the remuneration is due when the agent has performed the contractual obligation, i.e. has concluded the prospective contract or performed the juridical act on behalf of the principal (Mevorah/Lidji/Farhi, Komentar III, 54). Unless otherwise stipulated in the contract, rendering of an account is not a necessary precondition for payment of the remuneration (Supreme Court, Judgment no. 922, 7 Oct 1993, Civil Case 2050/1993, V). According to the special rule of Ccom art. 38 the remuneration of the commercial agent is due in monthly payments (Gerdjikov, Komentar na Turgovskiya zakon I, 156). The parties can agree on a different term of payment, but no later than the end of the month which follows the three-months-period during which the prospective contract was concluded (Ccom art. 38).

23. In DENMARK, unless otherwise expressly agreed upon between the parties, the payment of price and reimbursement will fall due as soon as the agent has fulfilled the mandate for representation. A claim for reimbursement will normally be needed to fix the exact amount of the expenses.

24. In ENGLAND when the agent is entitled to receive commission on the happening of a given result or event the agent must show that the result or event in question has actually occurred and that the agent was the effective cause of it.

25. In ESTONIA a specific rule applies for a contracts for services which obliges the service provider (the agent) to execute a juridical act: the remuneration is payable after the execution of the juridical act (if not agreed otherwise).

26. In FINLAND, unless otherwise agreed, the payment is usually due in reasonable time after the fulfilment of the agent's contractual obligations and after a demand by the agent. The price is not payable until an account is given, if such is required. The agent is usually not entitled to an advance payment. This is, in general, not the case in long-term mandates where periodical payments may take place. The ACAgentsS §§ 10 and 11 contain detailed rules concerning the time of payment.

27. In FRANCE when the contract is silent, the remuneration is due at the end of the mission, although the Civil Code does not specify the exact moment of this payment. Frequently, the agency contract specifies that remuneration is due only if the mission has been successfully completed. French case law seems to consider that an agent who does not successfully perform the contract may not receive any remuneration (despite CC art. 1999(2), which considers that payment may always be due to the agent except where the agent has been guilty of a failure – but authors do not agree on this point). However, if the termination of the mandate is caused by reasons that are independent of the parties, the French courts consider that the remuneration normally due may then be limited to the part of the contractual obligations which have already been performed

or the agent may only receive an indemnity. An indemnity may also be due to the agent when the contract could not be performed because of the principal's or a third party's failure.

28. Payment of the price is due under GERMAN law after the service has been rendered (CC § 614) or the work has been finished and (possibly tacitly) accepted by the other party (CC § 641(1)).

29. In GREECE in case of intermediation, payment of the price is due after the conclusion of the prospective contract as a result of the intervention or indication of the broker.

30. In general, according to the HUNGARIAN CC art. 478(4), '[f]ees shall be payable at the time a contract is extinguished'. Contrary to the general rules, in case of commission agency, '[t]he commission agent shall be entitled to receive a commission only if the sales contract has been performed' (CC art. 511(1)).

31. IRISH case law has addressed some particular questions as to when remuneration is earned or payable (leaving many other questions yet to be addressed). For example, it has been held that where a commission is earned by an agent on bringing about a result, the agent will only be entitled to payment if the agent is the *effective cause* of that result *(Millar, Son & Co v Radford* [1903] 19TLR 575; *Judd v Donegal Tweed Co Ltd* [1935] 69 ILTR 117; *Stokes & Quirke Ltd v Clohessy* [1957] IR 84). Another question which has been addressed by case law is, where an agent is to be remunerated by commission, whether the principal may prevent the agent from earning commission, for instance, by refusing to perform a contract negotiated, or concluded, by the agent. In the absence of any express provision in the agency agreement, this depends on whether an appropriate term may be implied into the agency contract. For example, in *Cusack v Bothwell* [1943] 77 ILTR 18, an auctioneer was instructed to find a buyer for lands at a certain price. The agent was to receive a commission of 5 per cent. He introduced a buyer but the seller refused to sell and pay the commission. The court awarded the auctioneer a sum equivalent to 5 per cent because he had done what was required of him. This ruling goes against some earlier English case law (see e.g. *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 and *French & Co v Leston Shipping Co Ltd* [1922] 1 AC 451) but appears to be supported in more recent case law (*Alpha Trading Ltd. v Dunnshaw-Patten Ltd.* [1981] QB 290).

32. In ITALY, the agent, unless otherwise agreed by the parties, has a reporting obligation to be performed without delay towards the principal (CC art. 1712 and 1713). In particular, upon conclusion of the mandate the agent must communicate to the principal the performance of the contractual obligations, and must further report on the activities carried out and render to the principal all and any profits acquired in the performance of the obligations. The agent must also state the expenses incurred in the performance. Only then does the agent have the right to claim the payment of the price and reimbursement of expenses.

33. In the NETHERLANDS, payment of the price is due after the service has been performed.

34. In POLAND too, unless the parties have agreed otherwise, payment of the remuneration is due after the service has been rendered by the agent (CC art. 744). However, the agent is entitled to receive some money in advance if a need to incur expenses arises (CC art. 743).

35. In SCOTLAND it is difficult to identify a general rule on the point at which remuneration becomes due. The issue will probably be determined as a matter of interpretation of the contract (*Gow*, Mercantile and Industrial Law of Scotland, 533). If the contract stipulates that the agent's remuneration is dependent on achieving a result, remuneration is payable if the result is achieved and if it is attributable to the agent's

efforts. Otherwise, the matter is likely to be governed by general practice in a particular trade or profession. It is clear, for example, that a solicitor need not necessarily wait until the work to be carried out has been completed before issuing an account to the principal. Interim fees are possible, provided that the principal's consent to these is obtained (Paterson, no. 9.04.9). Although the solicitor may debit such fees from the principal's account, this may be done only with the principal's consent or at least where the principal has been informed (Solicitors (Scotland) Accounts Rules 2001 rule 6(1)(d)). The interim fee must be fair and reasonable in the light of the work carried out to date (Paterson, no. 9.04.4).

36. The SLOVAK CC provides that in the case of a mandate contract, payment of the price is due one day after the mandate was performed or the contractual relationship was terminated and the agent called on the principal to pay; in the case of a contract for procurement of a thing, after procuring the thing without undue delay; and in the case of a contract for arranging the sale of a thing, once the entrusted thing has been sold. The Ccom stipulates that the agent is entitled to the remuneration once the activity stipulated in the mandate has been duly carried out, regardless of whether it has led to the expected result or not (unless the mandate contract provides otherwise) and the commission agent is entitled to remuneration when the duties are fulfilled (Ccom § 587(2)).

37. In SPAIN the price is due from the moment the mandate has been performed. There is no need to wait until the agent has given account to the principal of the activities performed (STS 9 Jul 1991; Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII[1], 917; *Valenzuela*, in Cuesta-Contratos Mercantiles, I, 2001, p. 288).). This is only an accessory obligation which can be performed later on. Performance does not imply success. The agent has a right to payment even when the performance did not lead to the aim pursued by the principal, unless the agent acted negligently in the performance of the obligations (STS 29 Jan 2001; Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII[2], 453). A proportional payment may be justified even in cases where the agent performs partially, because the principal has a partial benefit (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII[2], 453).

38. In SWEDEN unless otherwise agreed or flowing from accepted practice in a particular line of business, payment is due when the task is fulfilled. If the agent has a duty to give account of the task the principal is not obliged to pay until such account is given.

III. Adjustment of excessive price by court

39. In AUSTRIA a court can, in case of avoidance of the contract (on the grounds of error, lesion, usury, violation of *bonos mores*), adjust the price (CC § 1336; CC § 879 applies for commercial transactions (Krejci, 37 f.)).

40. According to established BELGIAN case law, a court can, upon request of one of the parties, set aside the principle of pacta sunt servanda and reduce the salary of the agent when the court considers the salary to be excessive in proportion to the performances (see Supreme Court 14 Oct 2002, RW 2003-04, 1297; Supreme Court. 19 Sep 1985, RW 1985-86, 2638; Supreme Court 6 Mar 1980, Pas. 1980, I, 832, concl. CHARLES 1982, 519, note E. DIRIX; *Tilleman*, Lastgeving, 113-123; *Wéry*, Le mandat, 216). The court must consider the salary excessive in proportion to the performance. There are no further specific conditions (e.g. that the principal abused the inferior position of the agent (*Tilleman*, Lastgeving, 114)). In order to decide if the salary is reasonable in proportion to the performances, the court can take into account e.g. the time spent on the execution of the contract for representation, the complexity of the mandate, the liability risk and the expenses incurred by the agent (*Tilleman*, Lastgeving, 114-116).

41. In BULGARIAN law the general contract law rules are applicable. The price stipulated in the mandate contract can be adjusted by a court when it has become excessive after the conclusion of the contract as a result of unforeseen circumstances. The contract has then become excessively burdensome for one of the parties and to insist on performance according to its terms would not be in conformity with good faith and justice (Ccom art. 307). If these conditions are not fulfilled, the court is not entitled to adjust the stipulated price (Mevorah/Lidji/Farhi, Komentar III, 53).

42. In DENMARK according to section 36 of the Contract Act (the 'general clause' in contract law) the court can adjust the price and other conditions of the contract: 'An agreement may be amended or set aside wholly or partly if it would be unreasonable or contrary to proper conduct to allow it to stand. The same applies to other legal acts. (…) [R]egard will be had to the circumstances prevailing at the formation of the contract, contents of the contract and subsequent events'. This principle is frequently invoked and widely accepted by the court, especially in consumer cases.

43. Technically, ENGLISH courts cannot at the request of a party adjust the price. In fact, if the right to remuneration arises from an express agreement, the courts will not interfere even if the exact amount of remuneration is left to the principal's discretion (*Kofi Sunkersette Obu v Strauss (A) & Co Ltd* [1951] AC 243) where the contract stipulated that the agent's remuneration was left to the principal's discretion. However, there are some exceptions to this rule of non-interference from the courts. For instance, if the agent performs services which are outside the obligations for which the contract makes express provision, the courts can exceptionally imply that a reasonable remuneration be paid. Moreover, if the contract expressly or impliedly stipulates that a 'reasonable sum' should be paid to the agent, the courts can determine what a 'reasonable sum' should be (*Way v Latilla* [1937] 3 All ER 759). Furthermore, if the contract remains silent, the courts can imply a term following the normal rules of construction. The courts will only imply a term to that effect in the contract if they are satisfied that the parties intended the agent to be remunerated (*Reeve v Reeve* (1858) 1 F&F 280). Payment to be made must be reasonable according to the circumstances (usually on a quantum meruit basis; see however *Withy Robinson (A firm) v Edwards* (1985) 277 Estates Gazette 748; to compare and contrast with *London Commercial and Land Co Ltd v Beazer Lands Ltd* [1990] CLY paragraph 107). The courts can also infer that payment was intended from a trade usage or a custom of the area of the agent. However, no term can be implied where the term would contradict the express term of a contract (*Kofi Sunkersette Obu v Strauss (A) & Co Ltd*, [1951] AC 243).

44. Generally, in ESTONIA, agreements on the price for the performance of contractual obligations cannot be controlled or adjusted by the courts. The courts have no jurisdiction to rule on the equilibrium of the mutual rights and obligations of the parties and adjust agreements on the contract price, with the general exception of *clausula rebus* in LOA § 97.

45. Adjustment of the price in FINLAND is possible in accordance with Contracts Act § 36 under the condition that the mandate contract is unfair or its application would lead to an unfair result. In determining what is unfair, the entire content of the contract is taken into consideration, along with the positions of the parties, the positions prevailing at and after the conclusion of the contract, and other factors.

46. A FRENCH court may adjust the price (Cass. req., 12 Dec 1911, DP 1913, 1, 129), but the principal must demonstrate why the remuneration which was promised is excessive by reference to the service effectively rendered by the agent (Cass. 1re civ., 24 Sep 2002, CCC, 2003 no. 3). Such judicial adjustment is not possible after any

discharge has been given to the agent or where the remuneration has been agreed on completion of the mandate.

47. A GERMAN court may, upon request of one of the parties, adjust the price under brokerage contracts according to CC § 655, but only if the brokerage contract called for the solicitation of a contract for services and the price agreed upon by the parties to the brokerage contract is disproportionately high.

48. In GREECE in the case of a brokerage contract if the agreed remuneration of the broker is disproportionately high it may be reduced by the Court to the appropriate level at the request of the debtor (CC art. 707). The debtor can either bring an action for the adjustment of the price or raise an objection to the action of the broker demanding payment of the price (Supreme Court decision no. 206/2004, NoV 2004, 1744). The objection for adjustment of the price to the appropriate level can be raised at every stage of the trial because the rule of CC art. 707 is considered to be a rule concerning *ordre public* (CA Thessaloniki decision no. 2880/2002, Arm 2003, 1423). Criteria for the proportional measure of the remuneration are the work of the broker, the expenses if these are not separately paid, the method of intermediation, the time invested and the benefit that the principal has gained (Georgiadis/Stathopoulos/Karasis III, Art. 707 GREEK CC nr. 1; CA Athens decision no. 3790/1985, EllDni 1985, 943; CFI Athens decision no. 16004/1983, EllDni 1984, 1603).

49. In general in HUNGARY, the price determined by the parties cannot be adjusted by a court. Nevertheless, according to CC art. 201(2), '[i]f at the time of the conclusion of the contract the difference between the value of a service and the consideration due, without either party having the intention of bestowing a gift, is grossly unfair the injured party shall be allowed to contest the contract'. CC art. 241 provides that '[t]he court may amend a contract when it is injurious to any substantial rightful interest of one of the parties in consequence of a circumstance arising in the long-term relationship of the parties following the conclusion of the contract'.

50. In IRELAND there is no general provision for an adjustment of the price. There is a specific provision for the adjustment (or taxation) of solicitors' fees however.

51. In general, in ITALY, the determination of the price is subject to party autonomy. However, upon request of the parties, a judge may be called to fix the price in the absence of any specific agreement of the parties. CC art. 1709 provides a hierarchical list of criteria to follow in the determination of the price the agent is entitled to. Unless otherwise agreed by the parties, the price can be determined by reference to the professional fees if the agent acts as a professional, or by reference to usages. In the absence of these criteria, the price can be determined by a judge on the basis of an equitable judgment, having regard to the nature, the quantity and the quality of the activity executed by the agent. If the evidence produced by the professional is incomplete or insufficient as to the amount and lacking any tariffs or usages, the judge determines the compensation on the basis of the kind of activity performed and of the profits thereby achieved by the principal (CC arts. 1709 and 2225; Supreme Court 18 Sep 1995, no. 9829, Arch. civ., 1996, 477).

52. In the NETHERLANDS a payment for the agent that is extremely high or low is not against the law (*Van der Grinten,* Lastgeving, no. 17).

53. In POLAND in the case of an extraordinary change of circumstances, the price may be adjusted by the court (CC art. 357). This is a general provision that may be applied to all contracts; there are no specific provisions on adjustment of the remuneration under a mandate contract.

54. There is no general power vested in a SCOTTISH court to adjust an agent's contractually agreed remuneration. Where the contract is silent, a court can be called

upon to assess a reasonable fee or a fee which would be usual in a particular trade or profession (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 109). In the specific case of solicitors, courts are empowered to adjust the fee charged. This process, known as 'taxation,' involves the assessment of a reasonable fee based on the circumstances of the case by an independent auditor attached to the court (*Begg*, 163-177; *Paterson & Ritchie*, no. 185, footnote 28). The process can be instigated by either solicitor or client. The auditor has considerable discretion and may increase the account, although this will happen only rarely (*Begg*, 175; *Reeve v Dykes* 7 S 732). The court will not normally interfere with the auditor's taxation except on questions of principle (*Begg*, 176).

55. In SLOVAKIA it is not possible to have an excessive price adjusted by a court. If the price was so excessive that it constituted a serious breach of bona mores, there could be the exceptional possibility to declare the contract void.

56. In SPAIN there is no rule on this point and, in general, no adjustment can be made to the remuneration due under an the agency contract. Exceptions exist only in regulated professions, such as that of a barrister.

57. In SWEDEN according to AvtL (Contract Act) § 36 a court can adjust the price if it is found to be unreasonably high considering the circumstances at the time of or occurring after the formation of the contract or due to other circumstances. The rule is accepted by the courts in consumer relations in particular. In business-to-business relations the courts have adopted a restrictive approach.

IV. Contingency fee allowed?

58. In AUSTRIA, the parties can agree to a price calculated on a 'no result, no pay' basis (Strasser, § 1004 Rz 9; Krejci, § 879 Rz 209; Straube (-*Griss*), HGB I[3], § 383, no. 13; Schütz, 407 HGB Rz 45).

59. In BELGIUM, the parties can agree on a 'no result, no pay' price (*Paulus und Boes*, Lastgeving, 115; RPDB, 782; *Wéry*, Le mandat, 213). Only lawyers are forbidden to calculate on this basis.

60. In BULGARIA payment on a "no result, no pay" basis is generally allowed, with an exception for advocates' remuneration in criminal cases (Regulation of Minimum Amounts of the Advocates' Fees, art. 17).

61. The principle of 'no result, no pay' is valid according to DANISH law.

62. In ENGLISH law, the parties can agree to a 'no result, no pay' clause. In fact, this is the norm for estate agents since a normal estate agency contract is considered to be unilateral in nature (*Luxor v Cooper* [1941] AC 108, per Lord Russell of Killowen, no. 124). This means that, usually, the mandated task is not completed until a binding contract for the sale of a property has been concluded.

63. In ESTONIA, the parties can agree to a price calculated on a 'no result, no pay' basis

64. In FINLAND, in general the parties can agree to a price calculated on a 'no result, no pay' basis. Estate agents are only entitled to remuneration if the prospective contract is concluded, unless otherwise agreed (REstateAA § 20).

65. In FRANCE there is complete freedom of contract and the parties can agree on payment on a 'no result, no pay' basis. This is, in fact, the solution imposed on estate agents who are not entitled to any remuneration if the contract envisaged has not been concluded.

66. There is no rule to the contrary in GERMAN law. A specific exception applies to legal services: according to § 49b(2) of the Federal Act on the Regulation of Attorneys it is illegal to agree on a 'contingency fee'.

67. In the case of intermediation a payment on a no result, no pay basis is regulated in GREEK CC arts. 703 and 704. According to CC art. 703(1), '[a] person who has promised remuneration to somebody for the latter's intervention or for the indication by him of an occasion for the conclusion of a contract shall only be bound to pay the remuneration if the contract was concluded as a result of such intervention or indication. If an agreement containing a promise of contract was concluded but the final contract has been frustrated only one half of the remuneration is due.' From that rule it is implied that causality must be proved between the procurement or indication and the conclusion of the contract (Supreme Court decision no. 701/1995, EEN 1996, 601; CA Pireos decision nr. 855/1993, EllDni 1994, 1708). According to CC art. 704, '[i]n case of a contract subject to a suspensive condition the remuneration of the broker shall be paid if the condition has been fulfilled. In case of a contract concluded subject to a resolutive condition the remuneration shall be payable upon the conclusion of the contract.'

68. In HUNGARIAN law parties are free to agree to a price calculated on a 'no result, no pay' basis. Special rules are established for the commission agency where the agent concludes a contract in the agent's own name but for the account of the principal: according to CC art. 511(1), '[t]he commission agent shall be entitled to receive a commission only if the sales contract has been performed'.

69. In IRELAND in line with the principle of freedom of contract, parties are free to agree as they wish and therefore a price can be calculated on a 'no result, no pay' basis. In some professions, there may be regulatory rules on pricing. For example, in contentious work, solicitors cannot set their fee based on a percentage of damages awarded, though they can work on a 'no foal, no fee' basis.

70. In ITALY, in general terms the issue of payment of a price is subject to party autonomy. However, in some cases special rules apply in favour of the agents (e.g. commercial agents and attorneys at law).

71. In the NETHERLANDS according to the CC art. 7:426 the "no result, no pay" rule applies to mediation contracts (cf *Graan Management B.V./PeHa Holding c.s.* (NJ 2003, 518)). This implies that if the realisation of the contract fails, the commissionee is not entitled to payment. However, contracting parties may deviate from this basis. Although this reasoning applies to mediation contracts it seems also important to mandate contracts since the payment of the agent in mandate contracts is often related to the realisation of the transaction that is subject to the mandate. The agent is not entitled to remuneration if the transaction is not accomplished. The remuneration is usually related to the transaction's 'price' (*Van der Grinten*, Lastgeving, no. 17).

72. In POLAND the parties may agree on a "no result, no pay" clause on the basis of freedom of contract. Such clauses are forbidden in certain codified ethical rules of legal professions, but those sets of rules are not law.

73. In SCOTLAND it is common for principal/agent contracts to provide that agents are only entitled to remuneration where they achieve a specific result (*Gow*, Mercantile and Industrial Law of Scotland, 533). Many estate agents' contracts take this form. Solicitors too commonly enter into so-called 'no result, no pay' agreements. Although this principle tends to be expressed in the context of the solicitor's litigation work, it is clear that it is not limited to litigation (*Paterson & Ritchie*, no. 9.05.2).

74. In SLOVAKIA for mandate contracts, "no result, no pay" is allowed (CC and Ccom). In the contract for arrangement of the sale of a thing, this is the essential characteristic of the contract type.

75. In SPANISH Law, the parties can agree on a 'no result, no pay' price (art. 272 Ccom and art. 19 Agency Law).

76. Payment on this basis is also allowed according to SWEDISH law.

V. Payment if principal concluded prospective contract personally

77. In AUSTRIA, if the principal concludes the prospective contract personally, the agent is entitled to a proportional part of the price, to reimbursement of expenses incurred and to damages for losses suffered.

78. A distinction has to be made in BELGIAN law. If the only purpose of the clause of irrevocability is to guarantee exclusivity (and remuneration) to the agent, then the principal is entitled to conclude the prospective contract personally and will have to indemnify the agent by paying the price on which they agreed. If the clause of irrevocability is on the contrary a modality to deprive the principal of the right to conclude the prospective contract personally, then the principal must leave the matter entirely to the agent (Foriers, 90; Wagemans, 193).

79. In BULGARIA in legal doctrine the conclusion of the prospective contract by the principal is interpreted as a revocation of the mandate (Mevorah/Lidji/Farhi, Komentar III, 176). In such a case, the agent is entitled to payment of the remuneration agreed upon in the contract (LOA art. 288(1)).

80. A DANISH contract for representation does not deprive the principal of the right to conclude the prospective contract personally. This will apply whether the agent is entitled to act in the agent's own name or in the name of the principal. The agent is entitled to the price whether the agent or the principal concludes the prospective contract. According to the Danish Act on Estate Agents the parties can agree to a clause according to which the agent is entitled to the price even if the principal concludes directly the contract with a third party presented by the agent.

81. In ENGLAND when an estate agent is granted an exclusivity by being appointed 'sole agent', if the principal then appoints another agent who earns the commission that the first agent should have earned, then the sole agent is entitled to damages (*Milsom v Bechstein* (1898) 14 TLR 159). When the agent is appointed as an 'exclusive agent' or the agency is described as a 'sole selling agency' (*Brodie Marshall & Co (Hotel Division) v Sharer* [1988] 1 EGLR 21), then the principal is also prevented from selling the property as the irrevocability then is in the interest of the agent. Should the principal nevertheless do so, the principal would be liable for commission to the agent (*Snelgrove v Ellringham Colliery Co* (1881) 45 JP 408).

82. In FINLAND in general the agent is not entitled to a price for prospective contracts concluded by the principal, unless otherwise agreed. According to ACAgentsS § 10 the agent is entitled to a commission where the transaction has been concluded as a result of the agent's action as well as where the agent has been entrusted with a specific geographical area or group of clients and the transaction has been concluded with a party belonging to that area or group of clients.

83. In GREECE the consequence of an exclusivity clause is that in case of breach of that contractual obligation the principal is liable for damages for any loss suffered by the exclusive broker due to violation of the clause of exclusivity (CFI Athens decision no. 4029/1982, EllDni 1984, 848).

84. In general, according to HUNGARIAN CC art. 478(2), '[t]he agent shall be entitled to demand remuneration even if his actions brought no results.' For this reason, the price is due to the agent regardless of who concluded the prospective contract effectively.

85. In IRELAND in *Murphy, Buckley & Keogh Ltd v Pye (Ire) Ltd* [1971] IR 57, the seller of a factory appointed auctioneers as 'sole agents' in the sale. However, the seller arranged a sale himself without telling the auctioneers. The auctioneers claimed a

commission but lost in the High Court. It was held first, that the sole agents had not effected a sale and hence were not entitled to commission. Secondly, it was held that although the auctioneers were the sole agents this did not prevent the seller from effecting a sale himself, merely from appointing any other agents. Hence, where an agent is appointed 'sole agent' to effect a contract, the principal commits a breach if a second agent is appointed; if the second agent then concludes a contract, the first agent would be entitled to damages, equal to the amount of lost commission for breach of that term (see e.g. *Bentall, Horsley and Baldry v. Vicary* [1931] 1 KB 253). Moreover, it has been held that where an agent is appointed with 'the sole right to sell', the principal is in breach of contract if the principal sells in person *(Brodie Marshall & Co v Sharer* [1988] 19 EG 129).

86. The ITALIAN CC art. 1748(2), governing commercial agency, states that '[t]he commission is due also for the transactions entered into by the principal with third parties that the agent had previously acquired as principals for transactions of the same kind or pertaining to the area or category or group of principals reserved to the agent, unless otherwise agreed'. Accordingly, even if the contract grants an exclusive right to the agent, the principal keeps the right to conclude the affairs personally in the relevant geographical area; however the agent keeps the right to receive the full price agreed under the contract without any reduction. See Supreme Court 22 Aug 2001, no. 11197, Contratti, 2001, 1106, with comments by Venezia.

87. In the NETHERLANDS it seems that in the situation where the mandate contract ends because the principal has concluded the prospective contract personally, CC art. 7:411(2) applies. According to this article, the agent is entitled to full payment taking into consideration the specific circumstances. However, more specific rules on this topic have not been established.

88. The POLISH Civil Code contains no provisions regulating this issue.

89. In SCOTLAND where the principal has granted 'exclusive rights' to the agent, if the principal subsequently concludes a contract with a third party directly, this could constitute a breach of the principal/agent contract. The case of the *procuratory in rem suam* also requires special consideration in this context, given the potential for the principal to conclude such a contract on terms which are inconsistent with the agent's interests. Because very little authority on the *procuratory in rem suam* exists, it is not possible to provide a definitive answer to this question. It is suggested, however, that the principal would not be entitled to conclude such a contract without first obtaining the agent's consent.

90. In SLOVAKIA agents are entitled to their remuneration if they have duly performed their activities. Conclusion of the prospective contract by the principal may not be a ground for refusing to pay the price or a proportional part of it. More precise regulation is in Ccom §§ 652-672 with regard to the Commercial Representation Contract.

91. This is regarded in SPAIN as an implicit revocation by the principal. As a consequence, the contractual relationship terminates from the moment the agent is informed. The effects of the revocation as to the right of payment are not regulated in the civil code, most likely because the typical situation when the civil code was written regarded gratuitous contracts. However, the CC art. 1733 indicates that the principal may revoke the contract at any time. The mandate needs to be performed for the right to payment to arise (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII^2, 453). If the principal concludes the contract personally then the principal is not obliged to pay the remuneration but will be obliged to pay the expenses (CC art. 1728), the damages suffered by the agent as a result of the performance of the

obligations under the mandate contract (CC art. 1729) and the damages suffered by the agent as a result of the unilateral termination. It seems that parties must have agreed upon the existence of a right of payment to continue even though the contractual relationship has otherwise terminated.

92. In SWEDEN the agent is entitled to compensation for the work and effort put into the performance of the obligations under the mandate contract. This is regardless of whether it is the principal or the agent who concludes the prospective contract. A real estate agent is according to FmL (Estate Agents Act) § 21 only entitled to compensation if the conclusion of the contract is due to the efforts of the real estate agent. A real estate agent who has been appointed as an exclusive agent is entitled to compensation even if the contract was concluded without the agent's efforts.

VI. Price in case prospective contract concluded after termination of mandate relationship

93. Special provisions exist only regarding the principal-merchant and the commercial agent (BULGARIAN Ccom art. 40). The commercial agent is entitled to a compensation upon termination of the contract when the principal continues to enjoy benefits from the clientele established by the agent, unless: (a) during one year after the end of the contract the agent does not claim for such compensation; (b) the termination is on account of the agent's fault; (c) the agent has substituted another person as the agent in the contractual relationship (Ccom art. 40(1),(3)). The compensation is to be equal to the agent's annual remuneration, estimated on the ground of average remuneration for the entire duration of the contract with the principal, but no longer than 5 years (Ccom art. 40(2)).

94. According to the DANISH Act on Estate Agents the parties can agree to a clause according to which the agent is entitled to the price even if the principal concludes directly the contract with a third party presented by the agent.

95. In ENGLAND unless the contract expressly provides for such a possibility, no commission is payable after termination (*Nayler v Yearsley* (1860) 2 F&F 41). However, more recently, it seems that in case of repeat orders, commission may be payable after termination if, on construction of the contract, it is the intention of the parties (*Sellers v London Counties Newspapers* [1951 1 KB 784).

96. In ESTONIA if the contract is concluded after termination of the mandate relationship, the agent is not entitled to a price except in case of the brokerage agreement, provided that the agent (the broker) can show that the conclusion of the contract was attributable to the information and services rendered by the broker (LOA § 661(3)). In case of other agreements under which representation or mediation of an agreement is owed a general rule applies under which the agent is entitled to a price proportionate to the services rendered, if the relationship was terminated prematurely and the termination is attributable to the principal (LOA § 629(1)). In cases where the termination is attributable to the agent, the agent is entitled to a proportionate price only if the services rendered prior to termination are of interest to the principal (LOA § 629(3)). This would mainly be the case if the principal is able, based on the agent's actions, to conclude the intended contract personally after termination of the mandate relationship.

97. In FINLAND, the agent is generally entitled to the agreed fee if the termination is not based on a non-performance of the agent. If a concluded prospective contract or some other action is a prerequisite for the fee, the agent is usually not entitled to remuneration if such contract or other action has not been concluded or taken at the time of termination. The agent is entitled to a compensation for expenses.

98. In FRANCE where the contract is not concluded due to the attitude of the principal and where the agent has sufficiently performed the contractual obligations, the agent may be entitled to payment of the price. Thus, an estate agent will be entitled to remuneration if the contract has been entered into between the principal and a third party introduced by the agent (Cass. 1ère civ., 17 Nov 1993, Bull. civ. I no. 323).

99. Under brokerage contracts in GERMAN law (CC § 652(1)), the termination of the contractual relationship between principal and broker does not affect the broker's right to demand payment of a price if the prospective contract with a third party is later concluded: The broker is entitled to a price when the contract between principal and third party was concluded due to the services that were rendered by the broker while the brokerage contract was still in force, and the fact that the prospective contract was only concluded after termination of the brokerage contract is of no relevance (BGH, NJW 1966, 2008; Palandt [-*Sprau*], BGB[66], § 652 no. 47).

100. In HUNGARY, in general, the salary of the agent does not depend on the conclusion of the contract because according to CC art. 478(2), '[t]he agent shall be entitled to demand remuneration even if his actions brought no results.'

101. In IRELAND remuneration may be payable after termination of the agency, depending on the terms of the agreement.

102. In POLAND there are no specific rules on this matter.

103. In SCOTLAND as a general rule, and in the absence of contractual agreement to the contrary, the right to commission normally falls on termination of the agency (*Gardner v Findlay* (1882) 30 SLR 248). However, an agent is entitled to commission where a contract is concluded which is attributable to the agent's efforts (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 112; *Walker, Donald & Company v Birrell, Stenhouse & Co* (1883) 11 R 369). Thus, the agent may retain an entitlement to commission even where, at the moment of conclusion of the contract between principal and third party, the agent is no longer involved.

104. In SLOVAKIA where the principal concludes the contract directly, the agent is entitled to the price only if the conclusion of the contract is the result of the agent's effort (see Ccom § 651 for the Brokerage Contract; Ccom § 671 for the Commercial Representation Contract).

105. In SPAIN, with some adjustment, an analogical application of the commercial agency rules (arts. 12 and 13 Agency Law) may be proposed.

106. In SWEDEN the agent is entitled to compensation for the work and effort put into the performance of the obligations under the mandate contract. According to KommL § 27 and HaL § 10 a commissionaire or a trade agent has a right to compensation (*efterprovision*) even if the prospective contract was concluded after termination of the mandate relationship. This is the case when the prospective contract was concluded due to the efforts of the commissionaire or trade agent.

IV.D.–2:103: Expenses incurred by agent

(1) When the agent is entitled to a price, the price is presumed to include the reimbursement of the expenses the agent has incurred in the performance of the obligations under the mandate contract.

(2) When the agent is not entitled to a price or when the parties have agreed that the expenses will be paid separately, the principal must reimburse the agent for the expenses the agent has incurred in the performance of the obligations under the mandate contract, when and in so far as the agent acted reasonably when incurring the expenses.

(3) The agent is entitled to reimbursement of expenses under paragraph (2) as from the time when the expenses are incurred and the agent has given account of the expenses.

(4) If the mandate relationship has terminated and the result on which the agent's remuneration is dependent is not achieved, the agent is entitled to reimbursement of reasonable expenses the agent has incurred in the performance of the obligations under the mandate contract. Paragraph (3) applies accordingly.

COMMENTS

A. General idea

In the traditional view of a mandate relationship as a gratuitous service, it is logical that expenses should be reimbursed. However, nowadays, mandate relationships are typically remunerated contracts. The present Article regulates the reimbursement by the principal of the expenses incurred by the agent in the performance of the obligations under remunerated mandate contracts. Paragraph (1) indicates that, as a general rule, the price agreed by the parties in mandate contracts includes the expenses that the agent has to incur in the performance of the mandate. In cases where the parties agree that the expenses are to be paid separately or where there is no price to be paid, paragraph (2) establishes that the principal has to pay only the reasonable expenses, i.e. in so far as the agent acted reasonably when incurring the expenses.

B. Expenses included in the agreed price

Typically, the parties make explicit contractual arrangements as to the reimbursement of the expenses. This provision regulates the situation where the contract is for a price and the parties remain silent about the matter of expenses. Paragraph (1) states that the principal – whether a consumer or a business – may reasonably rely on the price encompassing both the profit the agent seeks to gain from performing the contractual obligations and all the costs the agent will incur in carrying out the mandate.

If the default rule did not consider the expenses included in the price, the agent would have no incentive to perform as efficiently as possible, as higher expenses would automatically have to be reimbursed by the principal. If the agent wishes to have the expenses reimbursed separately, this ought to be made clear to the principal by a provision in the contract. The chosen default rule therefore also promotes communication between the parties.

C. Reasonable expenses only

If the expenses are not included in the price, i.e. when on the basis of an express contractual agreement the expenses are to be paid separately or when the mandate is gratuitous, the

principal is required to reimburse the agent for the expenses incurred, but only if the agent acted reasonably when incurring the expenses (paragraph (2)) .

D. When expenses payable

If and in so far as the agent is entitled to reimbursement of the expenses, the reimbursement only becomes due when the agent has given account of the performance of the mandate, as paragraph (3) of the Article expresses. The reasoning behind this is that the principal need only reimburse the agent for the expenses that were incurred reasonably, and the principal can only evaluate the reasonableness when the agent has provided the means of doing so. The present rule therefore has the advantage that the principal is given an effective instrument to obtain sufficient information in order to evaluate the reasonableness of the expenses incurred.

E. Expenses still due when no entitlement to price because result not achieved

Where the mandate relationship is terminated before the result is achieved on which payment of remuneration is dependent (typically the conclusion of the prospective contract), the agent is left without payment, unless the parties had agreed upon payment for services rendered. In this respect, the agent is required to reach the envisaged result (typically the conclusion of the prospective contract) or lose the right to payment. This should, however, not mean that the agent then also has to bear the expenses incurred in attempting to carry out the mandate. For that reason, paragraph (4) explicitly provides that the agent is entitled to recovery of the expenses. This provision also prevents an a contrario reasoning on the basis of paragraph (1) of the Article.

NOTES

I. Expenses presumed to be included in price

1. In AUSTRIA in the case where the (commercial) agent is entitled to a price and the contract keeps silent about the reimbursement of expenses, the agent may claim both a price and a reimbursement of the expenses made (CC § 1014 Rummel (-*Strasser*), ABGB I³, no. 3; Straube (-*Griss*) HGB I³, § 396, no. 1, 9-14; Straube (-*Schütz*) HGB I³, § 409, no. 6).
2. In BELGIUM because the obligation to pay a salary and the obligation to repay the expenses cover different items, in case of silence of the contract about the reimbursement of expenses, the agent is nevertheless entitled to both a price and the reimbursement of expenses.
3. In BULGARIA as a general rule, the mandate is a gratuitous contract. A clear distinction is made between the obligation of the principal to pay the remuneration (if stipulated) (LOA art. 286) and his obligation to reimburse the expenses incurred as a result of performance of the mandate (LOA art. 285). For special non-gratuitous mandate contracts, there is no presumption that the expenses are included in the price and explicit provisions regulate the reimbursement of costs apart from payment of the remuneration (e.g. Ccom art. 39 for the commercial agent, Ccom art. 356(2) for the commission contract and Ccom art. 361(2) for the forwarding contract).
4. In DENMARK normally the price agreed upon between the principal and the agent will be presumed to cover the expenses. In other words, the agent is not entitled to

claim *extra* remuneration for the expenses incurred in performing the obligations under the contract.

5. In ENGLISH law, agents have a right, in addition to the right to be remunerated for their services, to claim reimbursement of expenses incurred in performing the obligations under the contract. However, many professional agents such as auctioneers and estate agents are not usually entitled to expenses in addition to remuneration (Murdoch, 14148, as cited by Bowstead (-*Reynolds and Graziadei*), Agency[18], no. 7.061).

6. For non-gratuitous mandate contracts the ESTONIAN LOA § 628(2) stipulates the presumption that the price covers the agent's expenses.

7. In FINLAND it depends on the circumstances (e.g. nature of the contract, parties, the area of business practice etc.) whether the expenses are included in the price or not. In most cases typical expenses are considered to be included in the price. According to Commercial Agents and Salesmen Act art. 18, the commercial agent is entitled to a special compensation for costs incurred by measures necessary for the proper execution of the mandate contract. No compensation shall, however, be payable if the costs are incurred as the result of the customary activities of the commercial agent. The regulation in Commercial Agents and Salesmen Act may, in this respect, have some wider importance through analogies.

8. FRENCH law distinguishes clearly between remuneration and reimbursement, which is subject to distinct rules. Where the contract is silent, the provision for remuneration does not include the reimbursement of expenses incurred, which are always due (CC art. 1999). For some cases there are specific rules; the remuneration of a real estate agent always includes the expenses incurred in order to perform the task.

9. As the GERMAN CC § 675(1) also makes reference to CC § 670, this would speak for the expenses not to be covered by the price (to which the agent is always entitled within the sphere of CC § 675(1)). However, some authors point out that CC § 670 should not be applied when the agent can claim a price (which should be considered to cover expenses), and accordingly argue that – if in doubt – expenses should be construed to be covered by the price under any remunerated contract (*Heermann*, in: Münchener Kommentar zum BGB[4], § 675 no. 20; Palandt [-*Sprau*], BGB[66], § 675 no. 8). Under a brokerage contract, the situation is explicitly regulated by CC § 652(2) stipulating that the broker cannot demand reimbursement of expenses unless otherwise agreed.

10. The obligation of reimbursement of expenses is explicitly regulated in the GREEK CC art. 722.

11. In the case where the agent is entitled to a price and the contract is silent about the reimbursement of expenses, the HUNGARIAN CC art 479(1) applies according to which '[c]osts that arise in connection with the handling of a matter shall be borne by the principal. The agent shall not be obliged to advance any costs.' Contrary to the general rules of agency, in the case of commission agency, '[t]he commission shall include the expenses usually involved with consignment, but it shall not include expenses related to carriage' (CC art. 511(2)). Nevertheless, '[t]he commission agent shall be entitled to demand reimbursement for those of his necessary and useful expenses that are not included in the commission; however, he shall be entitled to demand those substantiated expenses otherwise included in the commission only if the sales contract has not been performed due to reasons within the sphere of interest of the principal' (CC art. 511(3)).

12. In IRELAND an agent's claim to (i) remuneration and (ii) an indemnity for expenses are treated as separate rights at common law. Therefore, an agent may be entitled to

claim both remuneration and an indemnity, separately and cumulatively. However, a contract can provide otherwise. So, for example, it could be agreed that an auctioneer's advertising costs would be included in any commission earned.

13. In ITALY the price the agent is entitled to has nothing to do with the reimbursement of expenses. Unless otherwise specified in the contract, any and all reimbursements are due in addition to the price agreed by the agent and the principal.

14. In the NETHERLANDS the reimbursement of expenses of the agent is governed by CC art. 7:406. According to this article, the principal is liable to compensate the agent for the expenses that are related to the performance of the service, unless these expenses are included in the agent's remuneration (CC art. 7:406(1)). In professional mandate contracts, the principal for the most part will not have to compensate for these expenses because they are included in the agent's remuneration. Often the reimbursement of expenses occurs in case of gratuitous mandate contracts. In that case, the expenses to be reimbursed have to be fair. These expenses do not include only out of pocket expenses. The agent may also, for example, claim expenses for the use of his or her own car (*Van der Grinten*, Lastgeving, no. 17).

15. In POLAND unless the parties have agreed otherwise, the agent has the right to reimbursement of expenses, regardless of whether the service is remunerated or not. If the parties have not agreed otherwise, the expenses are not included in the price.

16. In SCOTLAND this matter is likely to be governed by custom or practice in the particular commercial context. There appears to be no general rule. In the case of a solicitor, where the contract is silent, there is no presumption that the expenses are included in the price. In other words, the solicitor is entitled to claim both the price and reimbursement of expenses.

17. In SLOVAKIA in the case of a mandate contract, the agent may claim both a price and reimbursement of expenses incurred, whereas in the case of a contract for procurement of a thing, contract for arranging the sale of a thing and commission agent contract, it is presumed that the expenses are included in the remuneration (CC § 728, Ccom § 572). The principal is bound to reimburse the agent for all expenses that the agent necessarily and purposefully incurred when performing the obligation, unless it follows from the nature of the expenses that they are included in the agent's remuneration (Ccom § 572).

18. In SPAIN the obligation to pay a price or fee and the obligation to reimburse the expenses cover different issues. Therefore in case of silence of the contract about the reimbursement of expenses, the agent is nevertheless entitled to both a price and the reimbursement of expenses (CC art. 1728). The matter is regulated expressly for the commercial commission, arts. 277 and Ccom 278.

19. In SWEDEN normally the price is presumed to cover the expenses (*Hesser*, 58 and *Hellner*, 211). Sometimes, however, the agent can claim reimbursement of expenses in addition to the price (HB 18:5 and Tiberg and Dotevall, Mellanmansrätt[9], 34). A distinction could be made between expenses of a common nature which are to be considered to be included in the price and unforeseen expenses which are not included (*Bengtsson*, Särskilda avtalstyper I[2], 170). If the contract is silent, the question of reimbursement of expenses could be determined by reference to accepted practice, when applicable, in a particular line of business or the circumstances of the particular case.

II. Right to reimbursement of expenses if no price or not included in price

20. In this situation, in AUSTRIA, the agent is entitled to reimbursement of reasonable (necessary and useful) expenses incurred in performance of the obligations under the contract (CC § 1014).

21. According to the BELGIAN CC art. 1999, the agent is entitled to reimbursement of the expenses incurred in performance of the mandate (*de Page and Dekkers*, Traité élémentaire de droit civil belge V[2], 423-431; *Foriers and Glansdorff*, Contrats spéciaux, 625-626; *Tilleman*, Lastgeving, 123-124; *Wéry*, Le mandat, 203 et seq.). CC art. 1999 states furthermore that if the agent is not in breach, the principal cannot refuse to reimburse the expenses, even if the mandate failed. Neither can the principal reduce the amount of the expenses under the pretext that they could have been lower. As a rule, the principal therefore cannot escape the (integral) reimbursement of the expenses by stating that the mandate could have been accomplished in a cheaper way.

22. In BULGARIA even when the remuneration has not been stipulated in a general mandate contract, the principal is obliged, upon a request from the agent, to reimburse the expenses incurred in the course of performance of the contract together with interest (LOA art. 285). Unless otherwise agreed upon in the contract, the commercial agent is entitled to reimbursement of usual costs incurred in the course of the activity (Ccom art. 39). The commissioner (Ccom art. 356) and forwarder (Ccom art. 361(2), referring to Ccom art. 356(2)) are entitled to reimbursement of expenses for the performance of the obligations under the contract.

23. In DENMARK according to general acknowledged custom, the agent is entitled to reimbursement of the ordinary expenses incurred in performance of the contractual obligations. Normally the claim for reimbursement will be accepted by the court only when the agent has acted reasonably in the effort to perform the obligations. A principal who wishes to avoid paying the expenses has the burden of proving that the agent did not act reasonably.

24. In ENGLISH law, the agent has, generally, a right to be reimbursed for all expenses incurred in the execution of the task. In addition, the agent has a right to claim indemnity which covers all liabilities incurred or payments made by the agent whilst performing the agency duties. The agent's right to indemnity therefore covers *all* payments which the principal and the agent are liable to make (e.g. *Adams v. Morgan & Co. Ltd.* [1924] 1 KB 751). The right of the agent to claim expenses or indemnity varies depending on whether the agency is contractual or not (see generally Bowstead (-*Reynolds and Graziadei*), Agency[18], nos. 7-058 and 7.059). When the agency is contractual, unless expressly excluded in the contract, a term – express or implied – will define the conditions of reimbursement of expenses of the agent. The agent cannot claim (a) expenses incurred for an unauthorised transaction which has not been ratified by the principal; (b) expenses incurred when performing the principal's illegal instructions providing that the agent knows that it is illegal or where the transaction itself is unlawful (e.g. *Re Parker* (1882) 21 Ch D 408, *Ex p Mather* (1797) 3 Ves 373, *Smith v. Lindo* (1858) 5 CBNS 587, *Adamson v. Jarvis* (1827) 4 Bing 66, 130 ER 693); (c) expenses incurred in relation to wagering transactions (Gaming Act 1892, s 1); or (d) expenses incurred by being negligent, insolvent, by acting in breach of duty or by defaulting (e.g. *Lage v. Siemens Bros & Co Ltd* (1932) 42 Ll Rep 252). When the agency is not contractual, the claim of the agent does not cover the full indemnity since it is restitutionary in nature and consequently narrower than for contractual agencies. In such cases, the agent's claim is restricted to the reimbursement of payments for which the principal has the ultimate liability, which were made by the agent under compulsion of law and from which the principal obtains a benefit by the

discharge of a liability (*Brook´s Wharf & Bull Wharf Ltd. v. Goodman Bros* [1937] 1 KB 534), Bowstead (-*Reynolds and Graziadei*), Agency[18], no. 7.059.

25. For the (general) contract for services under ESTONIAN law, the service provider (in this case, the agent) is entitled to reimbursement for 'reasonable' expenses unless such expenses are covered by the price (LOA § 628(2)). Where the contract is gratuitous, reimbursement of expenses can therefore always be claimed. For non-gratuitous contracts LOA § 628(2) stipulates the presumption that the price covers the expenses which are usually incurred by performance of such contract and the expenses which the service provider would have incurred even without entering into the contract. Specific rules apply for the contract of agency: an agent may demand reimbursement of reasonable expenses if so agreed upon or if this is usual under the circumstances, regardless of whether the agent has the right to receive an agency fee (§ 684 LOA).

26. In FINLAND the agent is, unless otherwise agreed, entitled to a compensation for reasonable expenses (Ccom chapter 18 art. 5). The burden of proof usually lies on the agent.

27. The agent is entitled to reimbursement of expenses under FRENCH law (CC art. 1999).

28. In GERMANY where the mandate contract is gratuitous, the agent is entitled to reimbursement of the expenses incurred in performance of the contractual obligations (CC § 670).

29. In GREECE the right of the agent to reimbursement of the expenses incurred in performance of the contractual obligations depends on the internal relationship based on the contract of mandate. According to CC art. 722 a principal is bound to reimburse the agent for everything the latter has spent to achieve an orderly performance of the mandate. The parties can deviate from that rule and agree to a restriction or enlargement of the required expenses (Kapodistrias, Art. 722 GREEK CC nr. 23; CFI Chalkida decision no. 563/2002, NoV 2003, 1271).

30. In a case of agency, according to the HUNGARIAN CC art. 479(1), '[c]osts that arise in connection with the handling of a matter shall be borne by the principal. The agent shall not be obliged to advance any costs'. Contrary to the general rules of agency, in the case of commission agency, '[t]he commission shall include the expenses usually involved with consignment, but it shall not include expenses related to carriage' (CC art. 511(2)). Nevertheless, '[t]he commission agent shall be entitled to demand reimbursement for those of his necessary and useful expenses that are not included in the commission; however, he shall be entitled to demand those of his substantiated expenses otherwise included in the commission only if the sales contract has not been performed due to reasons within the commission agent's control' (CC art. 511(3)).

31. In IRELAND at common law, an agent is entitled to be indemnified against any reasonable expenses and liabilities, necessarily incurred on behalf of the principal in performance of the agency duties when acting within the scope of the actual authority, or, if actions are later ratified, or if the agency is one of necessity (see Notes under IV.D.–3:201 (Acting beyond mandate). Where the agent's actions are unauthorised, no right to indemnity arises. Where the agency is contractual the right to indemnity will be an implied term of the contract; where the agency is gratuitous the right will be restitutionary. The right to indemnity does not cover any expenses or liabilities incurred due to the agent's own fault, nor any expenses or liabilities with regard to acts that the agent knew to be unlawful or illegal (*Re Parker* [1882] 21 Ch D 408). The right to indemnity may also cover payments made by an agent even where there was no legal obligation to pay, where there is strong moral and professional pressure to pay (*Rhodes v Fielder, Jones and Harrison* [1919] 89 LJKB 15).

32. The agent is entitled under ITALIAN law to reimbursement of expenses incurred in performance of the contractual obligations (CC art. 1720). The principal has to reimburse any advances on the expenses made by the agent as well as the interest accrued thereupon since the day of payment (e.g. an advance on the final price owed by the principal as purchaser to the third party).

33. In POLAND the principal is obliged to reimburse all expenses incurred by the agent (as long as they are "reasonable") regardless of whether the service is remunerated, and the expenses are presumed not to be included in the remuneration (CC art. 742).

34. In SCOTLAND the agent is entitled to be reimbursed expenses so far as these are properly incurred (*Gow*, Mercantile and Industrial Law of Scotland, 534; *Annan v Marshall* (1887) 25 SLR 94). It is an implied term of the contract entered into between a solicitor and principal that authorised, or impliedly authorised, outlays incurred in pursuing the principal's case will be reimbursed (*Paterson & Ritchie*, no. 4.04; *Begg*, 120-1).

35. In SLOVAKIA unless otherwise agreed, the principal must provide to the agent, at the latter's request, the appropriate funds for the performance of the mandate in advance and reimburse the agent subsequently for all necessary and expedient expenses incurred in performing the mandate, even if the result was not attained. After performance of the mandate, the agent must present an account of costs or expenditure to the principal (CC § 728 and Ccom).

36. Under SPANISH law the agent is entitled to reimbursement of expenses (CC arts. 1728, 1729). Moreover the principal is obliged to advance a payment to the agent if the agent asks for this in order to be able to perform the mandate contract. If the principal does not make this advance payment, then the principal will be obliged to reimburse the agent for the costs incurred by the latter to perform the contractual obligations (CC art. 1728). The principal does not have to pay the costs if the agent is liable for the non-successful performance of the contract.

III. Reasonable expenses only

37. In AUSTRIA the agent has to act reasonably when incurring expenses and bears the burden of proving this (OGH SZ 7/29; 11/239; 29/40; OGH EvBl 1963/309). The commercial regulations provide similar rules if there is an express promise (Ccom § 396(2) for commission agents, Ccom § 440 for forwarders, HVertrG § 13 for special expenses of commercial agents).

38. In BELGIUM if expenses were incurred because of a fault of the agent (e.g. superfluous, exaggerated or ill-timed expenses), the court can reduce or refuse these expenses (*Tilleman*, Lastgeving, 124; *Wéry*, Le mandat, 206-207, no. 163). CC art. 1999 asserts that only clearly exaggerated expenses can lead to a reduction or a refusal. The legislator wanted to exclude discussions on small possible savings (*de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 425-426; *Tilleman*, Lastgeving, 124). The principal bears the burden of proof (*Wéry*, Le mandat, 206).

39. In BULGARIA only necessary expenses justified by the contractual performance have to be reimbursed (*Vassilev, L.*, Obligazionno pravo, 27). The agent bears the burden of proof regarding the existence and amount of the expenses (Mevorah/Lidji/Farhi, Komentar III, 159). There are special rules for the commercial agent: if such an agent is a professional agent acting independently in the capacity of a merchant, all underlying expenses connected with the business (e.g. office rent) are on the agent's own account, unless otherwise stipulated. The commercial agent is entitled, however, to reimbursement of usual costs incurred in the course of the activity for performance

of the obligations under the contract with the principal (Ccom art. 39; Gerdjikov, Komentar na Turgovskiya zakon I, 158-159).

40. In DENMARK normally the claim by an agent for reimbursement of expenses will be accepted by the court only when the agent has acted reasonably in trying to perform the agency obligations. If the principal does not want to pay the expenses, the burden of proving that the agent did not act reasonably lies on the principal.

41. In ENGLAND as mentioned earlier, for the agent to be entitled to claim indemnity, the agent must have acted reasonably (see *Pettman v Keble* [1850] 9 CB 701), i.e. must not have acted beyond the authority conferred, negligently or unlawfully.

42. In ESTONIA in cases where the agent is entitled to reimbursement of expenses, the agent bears the burden of proof that they were reasonably incurred.

43. In FINLAND the agent is, unless otherwise agreed, entitled to reimbursement of reasonable expenses (Ccom § chapter 18 art. 5). The burden of proof usually lies on the agent.

44. According to the FRENCH CC art. 1999, even where the principal has proved that the agent could have incurred less expenditure in the performance of the mandate, the expenses must be reimbursed. The only limit is where there has been a breach of the contract or negligence: where the expenses incurred are such that there has been a mismanagement. The agent could then be ordered to indemnify the principal in that respect. Damages will therefore compensate the payment of the excessive expenses. The principal has to prove the existence of such mismanagement.

45. The agent is entitled, under GERMAN law, to reimbursement of those expenses that the agent 'could consider to be necessary under the circumstances' (CC § 670). The agent has to prove the facts on the basis of which the expenses were considered to be necessary (e.g. a direction the principal gave) (Palandt [-*Sprau*], BGB[66], § 671 no. 7).

46. In GREECE the agent is obliged, if there is no agreement to the contrary, to incur only the necessary expenses required for the performance of the mandate taking into consideration the aim and the extent of the mandate, the interests of the principal and all the conditions which will lead to the successful performance of the mandate (CC art. 722; Georgiadis/Stathopoulos/Karasis, art. 723 GREEK CC nr. 4-5). If the agent brings an action for the reimbursement of expenses, the agent bears the burden of proving the extent and the necessity of the expenses incurred in order to achieve an orderly execution of the aim of the mandate. If the principal counterclaims that the expenses were not necessary the principal bears the burden of proving this claim (CA Athens decision no. 8183/1989, EllDni 1991, 210).

47. As the HUNGARIAN CC art. 277(4) prescribes that '[t]he obligor shall act to perform the contract in the manner that can generally be expected in the given situation, while the obligee shall promote performance in the same manner', only reasonable expenses are to be reimbursed by the principal.

48. In IRELAND at common law, an agent is entitled to be indemnified against any reasonable expenses and liabilities, necessarily incurred on behalf of the principal in the performance of the duties when acting within the scope of actual authority, or, if actions are later ratified, or if the agency is one of necessity.

49. In ITALY the principal is not obliged to reimburse expenses which derive from irresponsible behaviour of the agent (who thereby acted in breach of contract). On the other hand, the principal cannot refuse reimbursement for the sole reason that the concluded contract turns out to be unsuccessful: the principal's refusal to pay is justified only in the case of negligent conduct by the agent. According to the general rules on evidence, the claimant has to prove the facts the claimant relies on.

Consequently, the onus of proof that the agent acted reasonably and diligently is borne by the agent who seeks reimbursement of expenses.

50. In the NETHERLANDS generally, the expenses to be reimbursed have to be fair. This implies that the agent is entitled to reimbursement of expenses if they were reasonably incurred for the performance of the mandate contract. (*Van der Grinten*, Lastgeving, no. 17).

51. Under POLISH law only reasonable expenses required to properly carry out the mandate contract have to be reimbursed (CC art. 742).

52. In SCOTLAND an agent is only entitled to recover expenses which have been properly incurred (*Gow*, Mercantile and Industrial Law of Scotland, 534; *Annan v Marshall* (1887) 25 SLR 94). A solicitor is not entitled to recover expenses which are either unreasonable or manifestly unnecessary unless they have been expressly authorised by the principal (*Begg*, 121).

53. In SLOVAKIA the agent is entitled to reimbursement of reasonable expenses. The relevant question is whether the agent acted reasonably, necessarily, and purposefully. The agent has to render a statement of account to the client. The client may prove that the agent did not act reasonably.

54. A "reasonableness" cap to the right to reimbursement is unknown in the SPANISH law

55. In SWEDEN the agent is entitled to reimbursement of expenses under the condition that the expenses were necessary when performing the contract or that the agent has reasonably considered the expenses to be necessary (*Bengtsson*, Särskilda avtalstyper I^2, 170). If the agent ought to have been aware that the expenses were unnecessary the agent will not be able to claim reimbursement.

IV. Time when reimbursement of expenses due

56. In AUSTRIA in the absence of an express agreement, payment of expenses is due immediately when the expenses are incurred (CC § 1014 Rummel (-*Strasser*), ABGB I^3, no. 7; OGH Miet 33.117; 35/10; 36.073; 45.044; ImmZ 1992, 263). Rendering of accounts is not a precondition. Where the commercial regulations apply, reimbursement of the expenses is due when the account is rendered (Ccom § 384).

57. In BELGIUM as a rule the reimbursement of expenses is due at the moment of accounting by the agent, i.e. at the end of the contract for representation. An agent is permitted to ask for an immediate reimbursement, in case of deficiency (*Wéry*, Le mandat, 205).

58. In BULGARIA reimbursement of expenses is due at the request of the agent (LOA art. 285). The principal is obliged to reimburse even when the mandate relationship has been terminated as a result of withdrawal by the principal or when the performance has become impossible (LOA art. 288).

59. In DENMARK unless otherwise expressly agreed upon between the parties, the payment of price and reimbursement will fall due as soon as the agent has fulfilled the contract of representation. A claim for reimbursement will normally be needed to fix the exact amount of the expenses.

60. In ENGLAND reimbursement is due as soon as the agent can prove that the expenses have been incurred and that such expenses comply with the conditions defined earlier.

61. The reimbursement is due, in ESTONIA, once the expenses have been incurred (LOA § 113(3)).

62. In FINLAND unless otherwise agreed, payment is usually due within a reasonable time after the fulfilment of the agent's contractual duties and after a demand by the

agent. The payment need not take place until an account is given, if such is required. The agent is usually not entitled to an advance payment. This is, in general, not the case in long-term mandates where periodical payments may take place. The Commercial Agents and Salesmen Act arts. 10 and 11 contain detailed rules concerning the time of payment.

63. In FRANCE the agent may claim immediate reimbursement of expenses incurred. In effect, the law provides that the principal must pay the agent interest in respect of the sums which have been incurred for the performance of the mandate as soon as such expenses have been incurred (CC art. 2001). It should be noted that since the law is silent on the subject, the indemnification of losses incurred by the agent in performance of the mandate will occur at the end of the mandate.

64. In GERMANY reimbursement of expenses is due once the expenses have been incurred.

65. The reimbursement of expenses in GREEK law (CC art. 722) is due after the performance of the mandate or after the termination of the contractual relationship (Georgiadis/Stathopoulos/Karasis, Art. 722 GREEK CC nr. 5).

66. In IRELAND in the absence of express agreement, it seems that the expenses are due as soon as the agent can prove that they have been incurred and that they are lawful and reasonable.

67. The agent, under ITALIAN law, unless otherwise agreed by the parties, has a reporting obligation to be performed without delay towards the principal (CC arts. 1712 and 1713). In particular, upon conclusion of the mandate the agent must communicate to the principal the performance of the contract, report on what has been done and render to the principal all and any profits acquired in the performance of the contract. The agent should also demonstrate the expenses sustained for the performance of the contract. It is only then that the agent has the right to claim remuneration and reimbursement.

68. In the NETHERLANDS it seems that payment of the expenses is due at the moment the agent renders an account of the performance. If the principal fails to pay, the agent may be entitled to interest according to CC art. 6:119(1) (*Van der Grinten*, Lastgeving, no. 17).

69. In POLAND the agent is entitled to the recovery of the expenses after the service has been performed.

70. In SCOTLAND there is no rule which governs the point at which agents are, in general, entitled to reimbursement of expenses. The issue may be governed by custom and practice in a particular trade. This issue is governed by specific rules in the case of solicitors, who are entitled to interim fees subject to obtaining the prior consent of the client (*Paterson & Ritchie*, no. 9.04.09). Such fees may be debited from the balance of funds held by the solicitor on the client's account provided again that the client's consent is obtained (Solicitors (Scotland) Accounts Rules 2001 rule 6(1)(d); *Paterson & Ritchie*, no. 9.04.4). An interim fee must be fair and reasonable in the light of the work which has been carried out to date (*Paterson & Ritchie*, no. 9.04.4).

71. In SLOVAKIA in the case of a mandate contract, in civil relations expenses should be reimbursed after the matter is finished and the account is given; in commercial relations the agent is entitled to the remuneration once the activity stipulated in the mandate has been duly carried out, regardless of whether it has led to the expected result or not. Under a commission agent contract, the reimbursement of expenses is due at the same time as the remuneration.

72. In SPAIN the agent may claim immediate reimbursement of expenses incurred. The law provides that the principal must pay the agent interest in respect of the sums which have been incurred for the performance of the mandate as soon as such expenses have been incurred (CC art. 1728 III).

73. In SWEDEN unless agreed otherwise the payment of the price as well as the expenses are due in arrears (*Hellner*, 225). If the agent has a duty to give an account of the performance, the principal is not obliged to pay until such account is given.

V. Right to advance for expenses

74. In AUSTRIA the agent is entitled to an advance to cover expenses which will have to be incurred in order to perform the mandate (CC § 1014; Straube (-*Griss*) HGB I³, § 396, no. 14; Straube (-*Schütz*) HGB I³, § 409, no. 10). The same rule applies to commission agents (Ccom § 396(2)) and forwarders (Ccom § 409).

75. In BELGIUM the agent is entitled to an advance (*de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 425; *Wéry*, Le mandat, 206).

76. In BULGARIA upon a request from the agent, the principal has to supply all means necessary to perform the mandate (LOA art. 285). In legal doctrine it is considered that the principal is obliged to give the agent an advance for covering expenses for the contractual performance. The agent has the right to refuse performance until the advance has been paid (*Vassilev, L.*, Obligazionno pravo, 27).

77. In DENMARK the agent is not entitled to an advance to cover expenses unless this is agreed upon with the principal.

78. In ENGLAND there does not appear to be any specific case law on this topic. Provided that the principal has agreed to provide the agent with an advance on the reimbursement of expenses, this should be possible.

79. The ESTONIAN LOA § 628(4) provides for the (general) contract for services that the service provider (the agent) has the right to demand an advance payment in a 'reasonable amount' of the remuneration and the expenses to be reimbursed before commencing performance (if the parties have not agreed otherwise).

80. In FINLAND in general the agent is not entitled to an advance to cover the expenses, if not otherwise agreed.

81. In FRANCE the agent is not entitled to an advance to cover expenses and cannot require any advance. The parties may, of course, provide for this in a specific clause of the contract. It should be recalled that the agent is entitled to immediate repayment of expenses incurred.

82. In GERMANY the agent is entitled to an advance to cover necessary expenses (CC § 669).

83. In GREEK law, in the case of a mandate contract a principal is bound to pay in advance the expenses required for the performance of the mandate (CC art. 721). A principal who refuses to pay in advance is placed under notice according to CC art. 351: 'A creditor shall be placed under notice if upon being invited by the debtor the creditor has not proceeded with the completion or has not cooperated for the conclusion of an act without which the debtor cannot furnish the performance.'

84. According to the HUNGARIAN CC art. 479(1), in general, the agent is not obliged to advance any costs.

85. In IRELAND the common law right to be indemnified for expenses operates *ex post*, so that any claim to cover expenses in advance would have to be provided for in the contract.

86. In ITALY the principal has to supply the agent with the means necessary to conclude the affair or the prospective contract, unless otherwise agreed (CC art. 1719). This obligation of the principal may also include the obligation to give the agent an advance to cover the expenses that the agent will need to incur in order to perform the obligations under the contract.

87. In the NETHERLANDS generally, the agent is entitled to wages and reimbursement of expenses made during the performance of the mandate. There is no information available on whether the agent is also entitled to an advance.

88. In POLAND the agent is entitled to receive an advance for future expenses (CC art. 743). The principal is only obliged to give an advance if the agent asks for it.

89. In SCOTLAND there appears to be no specific rule governing the agent's entitlement to an advance to cover payment of expenses. The issue may be governed by custom and practice in a particular trade. In the case of a solicitor, the principal is bound, if required by the solicitor, to supply funds for expenses (*Begg*, 120). There is nothing to prevent such a request being made in advance.

90. In SLOVAKIA in civil relations, unless otherwise agreed, the principal must pay to the agent presumed expenses at the latter's request (CC § 728). In commercial relations, if it may be anticipated that substantial expenses would be incurred in arranging a certain matter on the principal's behalf, the agent may request an appropriate advance payment (Ccom § 571(2)). According to the rules on the commission agent contract, the agent is not entitled to an advance, but the parties may agree otherwise.

91. In SPAIN, the agent is entitled to get advances needed for performance (CC art. 1728 I).

92. In SWEDEN the principal is not obliged to pay any expenses in advance, unless the parties have agreed to do so or it follows from the circumstances (*Hellner*, 224).

CHAPTER 3: PERFORMANCE BY THE AGENT

Section 1: Main obligations of agent

IV.D.–3:101: Obligation to act in accordance with mandate

At all stages of the mandate relationship the agent must act in accordance with the mandate.

COMMENTS

A. General idea

The agent is performing a service for the principal. The service to be provided is determined by the authorisation and instruction of the principal, i.e. the mandate granted to the agent. The agent is therefore required to act in accordance with this mandate. The principal determines how the agent is to perform the contractual obligations and, where a prospective contract is to be concluded, what its contents are to be.

B. Authorisation, instruction and subsequent directions

The mandate granted to the agent, which consists of the authorisation, initial instruction and any subsequent directions of the principal, provides the information pertaining to the performance of the mandate and to the contents of any prospective contract which is to be concluded. This means that the agent undertakes the obligation to act in accordance with the power granted by the principal (authorisation) and within the guidelines given by the principal, both at the time the contract is concluded and subsequently during the performance (instruction and subsequent directions).

NOTES

I. Act in accordance with mandate

1. In BELGIUM the agent is – in general – under a duty of care (*de Page and Dekkers*, Traité élémentaire de droit civil belge V[2], 407). They must act as a *bonus pater familias* (*Paulus und Boes*, Lastgeving, 90; *Wéry*, Le mandat, 148). For specific aspects of the agent's duties, there is a duty to guarantee the result, e.g. the duty to follow imperative instructions of the principal or the prohibition on exceeding the limits of the authority granted.
2. In BULGARIA the obligation to perform in accordance with the mandate and within the power of attorney (if granted) is the main obligation of the agent (BULGARIAN LOA art. 281; *Vassilev, L.*, Obligazionno pravo, 23-25; Mevorah/Lidji/Farhi, Komentar III, 117).
3. In ENGLAND it is essential, in every agency relationship, that the agent acts in accordance with the authority given by the principal (express or implied). See Bowstead (-*Reynolds and Graziadei*), Agency[18], no. 6.002.

4. In GERMANY the agent has to act in accordance with the mandate and has to exercise due care in doing so (Palandt [-*Sprau*], BGB[66], § 662 no. 9). Under very narrow circumstances, the CC § 665 entitles the agent to deviate from the mandate if the agent may assume that the principal would under the given circumstances agree with the deviation and generally only after informing the principal and waiting for instructions (see *Seiler*, in: Münchener Kommentar zum BGB[4], § 665 no. 9 indicating that CC § 665 also covers deviations from the mandate contract itself, although this provision only speaks of deviations from 'instructions').

5. In IRELAND at common law, an agent is obliged to follow the lawful instructions of the principal, which would include acting within the authority given. Where an agent exceeds the authority given, this is a breach of contract.

6. In the NETHERLANDS the agent is bound to act in accordance with the mandate and is under the general duty of care incumbent on all service providers (CC, art. 7:401).

7. In SLOVAKIA this is a general contractual obligation.

8. The agent, under SPANISH law, cannot act beyond the limits established by the principal in the mandate contract (CC art. 1714). The basic obligation of the agent to act within the limits of the mandate comprises: (a) carrying out the legal acts which are the object of the contract; (b) exercising due diligence; (c) acting within the limits established by the principal; and (d) following the instructions of the principal on how to carry out the mandate (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII[2], 460-461). The limits within which the agent has to act are not established by the law but by the principal; these limits are to be determined by interpreting the will of the principal (STS 2 Feb 1976). It is therefore a problem of interpretation of the will of the principal. It is for the agent to interpret what the will of the principal is (STS 30 Jan 1963), by following the rules on interpretation (the truthful intention of the principal, in light of the nature and finality of the mandate). If the agent acts beyond the mandate but, as a result, the principal has a better position than the one the principal initially wanted, then this is not to be considered as going beyond the limits established by the mandate (CC art. 1715). This refers both to an economic advantage but also to avoiding damage to the patrimony of the principal (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII[1], 926).

9. In SWEDEN according to HB 18:2 the agent has to act in accordance with the power granted. Regarding the internal relationship there is no general rule governing the agent's responsibility in the case of acting beyond the mandate (*Bengtsson*, Särskilda avtalstyper I[2], 157) but this would be a breach of contract.

II. Agent free to act in own name or in name of principal

10. In AUSTRIA if the contract does not provide otherwise, the agent is not free to decide whether to act in the principal's name or in the agent's own name.

11. In BELGIUM in the absence of express instructions, a (civil law) agent is presumed to have been instructed to act in the name of the principal. The principal and the agent are mutually bound to an obligation of loyalty. A first aspect of this obligation of loyalty under Belgian law is the 'transparency requirement'. This requirement obliges the agent to reveal the identity of the principal at the moment of the conclusion of the contract by acting in the name of the principal (*Samoy*, Middellijke vertegenwoordiging, 305-306; *Wéry*, Le mandat, 151). In the absence of express instructions, a (commercial law) commission-agent on the contrary is – according to trade customs – presumed to be instructed to act in the agent's own name (*Foriers and Glansdorff*, Contrats spéciaux, 611; RPDB., v° Commission, no. 132; *Samoy*,

Middellijke vertegenwoordiging, 511; *Van der Perre and Lejeune*, Droit commercial I, no. 92; *Van Ryn & Heenen*, 21).

12. In BULGARIA, unless agreed otherwise, the agent is not free to decide whether to act in the agent's own name or in the name of the principal. In order to act in the name of the principal and to directly affect the principal's legal position, the agent has to obtain an authority for representation from the principal (power of attorney), given separately from the conclusion of the mandate contract. This authority is granted by means of a unilateral legal act of the principal giving the agent the power to act in the principal's name and to affect the principal's legal sphere (*Vassilev, L.*, Grajdansko pravo[2], 368). Without authority for representation, the agent is only allowed to act in the agent's own name. The default rule is that the commission agent and the forwarding agent always act in their own names (Ccom art. 348(1), art. 361(1)).

13. In DENMARK if the matter has not been regulated by the parties the agent is free to decide whether to act in the principal's or in the agent's own name.

14. In ENGLAND there does not appear to be any authority on this issue. Whether the agent is to act in the agent's own name (undisclosed) or in the name of the principal (disclosed) seems a crucial term in the contract, especially from the viewpoint of the principal. Considering the fiduciary nature of an agency relationship, if the principal does not make it clear whether the agent is to disclose the agency or not, it seems that the agent would not be entitled to decide independently whether to disclose the agency or not to third parties.

15. In ESTONIA the agent is free to decide whether to act in the principal's name or in the agent's own name if the parties have not decided the matter in the mandate contract.

16. In FINLAND the agent is not allowed to decide independently whether to act in the agent's own name or in the principal's name. Unless agreed otherwise, the mandate entitles the agent to act solely in the principal's name.

17. In FRANCE the agent is not free to decide whether to act as agent or as 'commission' agent (indirect mandate). Where there is a difficulty, the agent has every interest in requesting the principal to confirm which type of agency has been agreed, because if there is a dispute, the judge will have to decide which of the two types of agency should apply, depending on the terms of the contract and the evidence. If it appears that the agent has made a mistake concerning the type of agency, the agent will be liable for the consequences.

18. In GERMANY if the parties have not regulated whether or not the agent is to act in the agent's own name or in the name of the principal, the agent is free to decide how to act.

19. In GREECE if a mandate contract is silent about the authority of the agent to act in the principal's name or in the agent's own name the agent is free to decide on that matter (CA Pireos decision nr. 278/1988, NoV 1989, 1451). In case of a contract of commission the nature of that contract requires that the agent act in the agent's own name.

20. In HUNGARY the agent can act in the principal's name only if the principal has authorised that (CC art. 222).

21. In IRELAND there is no direct case law on this point. At common law, an agent must obey the principal's lawful instructions. It has been held that where instructions are ambiguous (e.g. where it is not clear from the principal's instructions whether the agent is to act in the agent's own name or in the name of the principal) an agent will not be held liable if the agent acts on a reasonable interpretation of the instructions *(Ireland v Livingstone* [1872] LR 5 HL 395), though an agent should seek

clarification, where possible *(Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 772 *per* Lord Salmon; *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at 517 *per* Goff LJ).

22. In ITALY if the parties have not regulated whether the agent should act in the agent's own name or in name of the principal, and if a solution to the issue cannot be derived from an interpretation of the contract, the agent can decide how to act. Depending on whether the agent acts in the agent's own name or in the name of the principal, the liability incurred towards the third parties will be different. Usually, the agent acts in name of the principal. In this case the effects of the contract are produced directly in the juridical and financial sphere of the principal. The contract by which the agent is required to represent the principal in the agent's own name but for the principal's account is regulated by CC arts. 1705 and 1706, according to which the agent acquires the rights and assumes the duties arising from transactions made with third persons, the principal can claim movables acquired for the principal's account by the agent without prejudice to the rights of the third persons as a result of good faith possession, and if the things acquired by the agent consist of immovables or movables inscribed in public registers, the agent is under an obligation to transfer such things to the principal. In case of non-performance, the provisions relating to the enforcement of the obligation to enter into a contract apply.

23. In the NETHERLANDS the agent has to derive authority to act in the principal's name from the mandate contract. In professional mandate contracts the agent will usually be supposed to act in the agent's own name (HR 11 March 1977, NJ 1977, 521).

24. In POLAND if the contract is silent on whether the agent should act in the agent's own name or in the name of the principal, the agent should act in the name of the principal (CC art. 734(2)).

25. In SCOTLAND if the principal fails to stipulate whether the agent is to act in the name of the principal or in the agent's own name, the agent is probably not entitled to decide this issue independently. On ordinary principles of interpretation, a mandate to act as a representative of a principal (i.e. to "affect the legal position of the principal in relation to a third party") would normally be construed as a mandate to do so overtly and in such a way as to affect the legal position of the principal directly. However, much would depend on usages and practices in particular fields of activity. The agent is under an obligation to act in good faith towards the principal and, in the absence of guidance from the contract or binding usages or practices, to decide whether to act in the representative's own name or in the principal's without first seeking the principal's instructions would probably amount to a non-performance of this obligation.

26. In SLOVAKIA this question is not regulated directly. If the parties have not decided whether the agent is to act in the agent's own name or in the name of the principal, the agent may not make this decision independently (CC § 32). Unless it ensues from a certain act in law that someone acts on behalf of another person, the person acts in the agent's own name. Mandate and commission agent contracts in commercial relations are not concluded without clear indication in whose name the agent is obliged to act. If the agent has to effect legal acts in the name of the principal, a written granting of authority is required (Ccom § 568).

27. In SPAIN the agent is not free to decide whether to act as agent or as commissioner in its own name. In any case of doubt, direct representation is compulsory (see CC art. 1725). However, the commercial agent not specially instructed may decide how to act (Ccom art. 245).

28. In SWEDEN if the parties have not regulated whether the agent is to act in the agent's own name or in the name of the principal and it does not follow from other

circumstances, the agent is free to decide the matter. However, an agent who chooses to act in the agent's own name runs the risk of being considered a party to the prospective contract as it is presumed that when you act in your own name you also act on your own behalf and account (*Ramberg & Ramberg*, 50).

III. Liability of agent acting in own name in breach of contract

29. In AUSTRIA the agent is liable for non-performance if the agent acted in the agent's own name whereas the contract required acting in the principal's name.

30. In BELGIUM if the agent acts in the agent's own name whereas the contract required acting in the principal's name, the agent is liable for non-performance of the obligation of loyalty and in particular the transparency requirement (*Samoy*, Middellijke vertegenwoordiging, 306; *Wéry*, Le mandat, 152 and 259). A principal who suffers damage by this non-performance, can claim damages (e.g. CA Brussels 28 Jan 1820, Pas. 1820-21, II, 30).

31. In BULGARIA when the agent is authorised and instructed to act in the name of the principal and nevertheless acts in the agent's own name, this is considered a breach of the mandate contract (Mevorah/Lidji/Farhi, Komentar III, 19). The agent is liable in damages to the principal for any loss caused by this deviation from the mandate (*Vassilev, L.*, Obligazionno pravo, 25), unless the deviation was necessary for the protection of the interests of the principal and it was impossible to obtain the principal's consent (LOA art. 282).

32. In DENMARK if the agent acts in the agent's own name whereas the contract required acting in the principal's name, this constitutes a non-performance. The principal will be entitled to claim damages for any loss suffered as a consequence of the agent's deviation from the contract. Normally the principal will be entitled to terminate the contractual relationship, pleading that the agent has failed to perform in a proper way (lack of trust).

33. In ENGLAND the agent who acts in the agent's own name when asked by the principal to act in the principal's name, is committing a breach of contract and is liable for it. An agent who has acted in breach of authority will not be entitled to claim remuneration or expenses. Whether the principal is entitled to terminate the agency depends on whether the breach is regarded as repudiatory. The question seems to have created controversy amongst academics. At the centre of the debate is the question whether in such a situation, the agent can still bind the principal to the third party on the basis of the doctrine of undisclosed agency. In such a situation, the agent has acted in breach of authority and since undisclosed agency only applies when the agent acts within the authority granted (*Keighley, Maxsted & Co. v. Durant & Co.* [1901] AC 240), it seems that the principal cannot be bound by the acts of the agent.

34. In ESTONIA any deviation from what is required by the contract would lead to a breach. In specific situations, deviation from the directions of the principal will not amount to a breach by the agent. In case of non-performance by the agent, the principal may choose which remedies to pursue (legal remedies for non-performance of an obligation are regulated in the general part of the LOA, see LOA §§ 100-126). Such remedies include specific performance, damages, price reduction or the right to terminate the contractual relationship (if the breach is essential).

35. In FINLAND the agent is liable for non-performance and the principal can claim damages. The principal is entitled to terminate the contractual relationship if the non-performance is essential. Price reduction is, in general, possible as well.

36. In FRANCE the agent who acts in the agent's own name instead of the name of the principal will incur liability for non-performance, where loss or damage was incurred

by the principal. The principal may decide to unilaterally terminate the mandate (which is always possible, even in the absence of any breach) and the principal may reduce both the remuneration and the repayment of expenses incurred by the agent (CC art. 1999(2) *a contrario*).

37. In GERMANY the agent is liable to the principal because of non-performance of an obligation under the contract. The principal can claim damages under CC § 280.

38. In GREECE if the mandate contract includes the explicit requirement that the agent is to act in the principal's name and the agent acts in the agent's own name, the agent may be liable for a defective performance of the mandate (Georgiadis/Stathopoulos/Karasis, Art. 717 GREEK CC nr. 2-5). According to CC art. 717, '[a] representative may only deviate from the limits set in the mandate if he found himself in the impossibility to notify the principal and it is at the same time obvious that the principal would have allowed the deviation if he had knowledge of the circumstances that prompted such deviation.' The principal can in case of an unjustified deviation of the limits set in the mandate deny the performance and claim damages due to a defective performance of the mandate on the part of the agent (CC art. 714). The principal can also refuse the reimbursement of the expenses regarding the defective performance of the mandate (Georgiadis/Stathopoulos/Karasis, Art. 717 GREEK CC nr. 5). On the other hand, the principal has the discretionary power to approve the deviation from the limits of authority set in the mandate (Kapodistrias, Art. 717 GREEK CC nr. 13; Georgiadis/Stathopoulos/Karasis, Art. 717 GREEK CC nr. 5)

39. According to the HUNGARIAN CC art. 277(1), '[c]ontracts shall be performed as stipulated, at the place and time set forth and in accordance with the quantity, quality, and range specified therein'. If the agent acts in the agent's own name whereas the contract required acting in the principal's name, it is a kind of non-performance according to the circumstances. In a case of non-performance, if it is possible, the principal can demand correct repetition of the performance (CC art. 311/A). Moreover, CC art. 478(2) establishes that 'the principal shall be entitled to reduce the remuneration or refuse to pay it if he is able to prove that success was not achieved in part or in whole for a reason for which the agent is responsible.' The agent is liable for damages resulting from non-performance (see CC arts. 310 and 318(1)).

40. In IRELAND at common law, an agent must obey the principal's lawful instructions. And where the agency is contractual, the agent is liable for breach of contract if the agent fails to act as instructed. Therefore, where an agent is instructed to act in the principal's name and in fact acts in the agent's own name, the agent will be liable for breach of contract. The remedies available following a breach of contract depend on a number of factors including the classification of the term breached and, sometimes, the seriousness of the consequences of the breach. For example, where the term breached is a condition of the contract, the innocent party i.e. the principal can terminate the contractual relationship and sue for damages for any resultant loss. Whereas, if the term breached is only a warranty, the innocent party (i.e. the principal) cannot terminate the contractual relationship but damages for loss may be sought. Moreover, it seems that an agent who has committed a serious breach of contract loses the right to remuneration and expenses.

41. In ITALY in general terms the agent who does not perform the contractual obligations correctly is liable for non-performance. Accordingly, if the agent acts in the agent's own name whereas the contract required acting in the principal's name, the agent acts in breach of contract and the principal is entitled to exercise the remedies provided for by the law (i.e. seek either performance or termination). However the remedy of

termination is not available if the non-performance of one of the parties has slight importance with respect to the interest of the other (CC art. 1455). In any case of breach, 'the party performing the contract can choose to demand either performance or dissolution of the contract, saving, in any case, compensation for damages' (CC art. 1453). Accordingly, and depending on the specific circumstances of the case, the principal may claim damages, if any, for breach of contract, if the agent acts in the agent's own name whereas the contract required acting in the principal's name (CC art. 1460).

42. In the NETHERLANDS, an agent who is in breach of contract towards the principal is liable in damages according to the general CC art. 6:74(1).

43. In POLAND the agent is liable for any loss to the principal under the normal rules on contractual liability (breach of contract) (CC art. 471).

44. In SCOTLAND if an agent acts in the agent's own name where the contract requires acting in the principal's name, this would constitute a breach of the agency contract. As a result, the principal would be entitled to claim damages from the agent. If the breach constituted a material breach, the principal would have the right to terminate the agency for non-performance and claim damages.

45. In SLOVAKIA in civil relations, everybody is liable for damages caused by breaching their legal or contractual obligations, unless they prove they did not inflict the breach. In commercial relations, the general rule is that whoever breaches an obligation arising from a certain contractual relationship must provide compensation for damage thus caused to another party, unless it is proven that the said breach was caused by circumstances excluding the liability.

46. If an agent acted in the agent's own name, when the contract provided for execution in the principal's name, this would constitute in SPANISH law an infringement of contractual duties (CC art. 1718). Probably, also, the principal may claim recovery of the acquired asset as an equitable holder (CC art. 1717 III).

47. In SWEDEN if the agent acts in the agent's own name whereas the contract required acting in the principal's name the agent could be held liable for non-performance. A principal who suffered loss due to this non-performance would be entitled to damages. The principal is also entitled to terminate the contractual relationship if the non-performance is fundamental.

IV. Liability of agent acting in name of principal in breach of contract

48. In AUSTRIA where a party contracts ostensibly as agent, but in excess of actual or ostensible authority ('falsus procurator'), and with the result that no principal is bound by the contract, the party will, as a rule, incur personal liability (CC §§ 1019 et seq.), but the nature and extent of that liability will depend on the circumstances of the case. Within the scope of commercial transactions, CC §§ 1019 applies for such a falsus procurator as well (Ccom-CC §1019 Krejci (-*Schauer*), no. 1. The principal may cure the defective contract by approving subsequently or by accepting the advantages of this contract.

49. In BELGIUM when the contract requires the agent to act in the agent's own name, then the agent has an obligation to keep the existence and identity of the principal secret from the third party (see for the contract of prête nom: *Foriers and Glansdorff,* Contrats spéciaux, 611; see for the commission contract: CA Luik 6 Nov 2001, JT 2002, 544 and JLMB 2002, 1575; Comm. C. Brussels 1 Feb 1911, TBH 1911, 201; Comm. C. Antwerp 14 Jun 1856 and CA Brussels 17 May 1858, Pas. 1859, II, 168 and BJ 1859, 406; *Foriers and Glansdorff,* Contrats spéciaux, 611; RPDB, v° Commission, no. 132; *Samoy*, Middellijke vertegenwoordiging, 191-194; *Van der*

Perre and Lejeune, Droit commercial I, no. 92; *Van Ryn & Heenen*, 21). An agent who nevertheless acts in the name of the principal, violates this secrecy obligation and therefore risks a contractual liability claim for non-performance (see for the contract of prête nom: *Poncet*, 135; see for the commission contract: *Fredericq*, 269; *Samoy*, Middellijke vertegenwoordiging, 192; *Van Ryn & Heenen*, 21 and 22).

50. In BULGARIA when the agent acts in the name of the principal when obliged to act in the agent's own name, this constitutes a breach of the mandate contract and the agent is liable for any loss caused to the principal (*Vassilev, L.*, Obligazionno pravo, 25). General rules on the non-performance of contractual obligations are applicable (LOA art. 79-94). The external relationship with the third party is regulated by LOA art. 42 concerning acts performed without authority for representation. For commission contracts, a special rule is applicable: all legal effects of a contract concluded by a commission agent with a third party in the course of performance of a commission contract occur in the legal sphere of the agent, regardless of whether the agent communicated the name of the principal to the third party (Ccom art. 349(1)).

51. In DENMARK if the agent acts in the name of the principal whereas the contract required acting in the agent's own name, this constitutes a non-performance. The principal will be entitled to claim damages for any loss suffered as a consequence of the agent's deviation from the contract. Normally the principal will be entitled to terminate the agency on the ground that the agent has failed to perform in a proper way (lack of trust).

52. In ENGLAND if the agent was required to act in the agent's own name but has acted in the principal's name, the agent has acted in breach of authority and should be liable for that breach towards the principal. This breach is serious and therefore would probably be regarded as repudiatory, allowing the principal to terminate the contractual relationship and claim damages.

53. In ESTONIA any deviation from contractual obligations would lead to a breach and the normal remedies would be available see LOA §§ 100-126. Such remedies include specific performance, damages, price reduction or termination (if the breach is essential).

54. In FINLAND the agent is liable for non-performance and the principal can claim damages. The principal is entitled to terminate the contractual relationship if the non-performance is essential. Price reduction is, in general, possible as well.

55. In FRANCE the agent who acts in the name of the principal instead of in the agent's own name will incur liability for any failure in the performance of the contract, where loss or damage was incurred by the principal. The principal will, in effect, be personally liable towards the third party, contrary to the principal's intention to have the commission agent act in the agent's own name, which may cause loss to the principal.

56. In GERMANY the agent is liable to the principal because the agent failed to perform an obligation under the contract. The principal can claim damages under CC § 280.

57. In GREECE if the mandate contract includes an explicit requirement that the agent act in the principal's name and the agent acts in the agent's own name, the agent may be liable for a defective performance of the mandate (Georgiadis/Stathopoulos/Karasis, art. 717 Greek CC nr. 2-5). According to CC art. 717, '[an] agent may only deviate from the limits set in the mandate if he found himself in the impossibility to notify the principal and it is at the same time obvious that the principal would have allowed the deviation if he had knowledge of the circumstances that prompted such deviation.' The principal can in case of an unjustified deviation of the limits set in the mandate deny the performance and claim damages due to a defective performance of the

mandate on the part of the agent (CC art. 714). The principal can also refuse reimbursement of the expenses regarding the defective performance of the mandate (Georgiadis/Stathopoulos/Karasis, Art. 717 GREEK CC nr. 5). On the other hand, the principal has the discretionary power to approve the defective performance of the mandate by approving the deviation from the limits of authority set in the mandate (Kapodistrias, Art. 717 GREEK CC nr. 13; Georgiadis/Stathopoulos/Karasis, Art. 717 GREEK CC nr. 5).

58. In HUNGARY if the agent did not have authority to act in the principal's name but did so whereas the contract required use of the agent's own name, in the internal relationship, it is a kind of non-performance according to the circumstances. If it is possible, the principal can demand correct repetition of the performance (HUNGARIAN CC art. 311/A). Moreover, 'the principal shall be entitled to reduce the remuneration or refuse to pay it if he is able to prove that success was not achieved in part or in whole for a reason for which the agent is responsible' (CC art. 478(2)). The agent is liable for damages resulting from non-performance. CC art. 310 prescribes that '[a]part from guarantee rights, creditors shall be entitled to demand reimbursement for damages resulting from lack of conformity under the rules of indemnification'. Moreover, 'the provisions of tort liability shall be applied to liability for breach of contract and to the extent of indemnification, with the difference that such indemnification may not be reduced, unless otherwise prescribed by legal regulation' (CC art. 318). Moreover, according to CC art. 221(1) and (2), 'A person who transgresses the scope of his authority to represent in good faith or who has concluded a contract in the name of another person without having the right to represent and the person in whose name he has proceeded does not approve his action, such shall pay compensation to the other contracting party for damages incurred in result of the conclusion of the contract.' 'A mala fide false agent shall be liable for full recompense.'

59. In IRELAND acting contrary to the requirements of the contract would be a breach of contract and the normal consequences of such a breach would follow.

60. In ITALY in general terms the agent who does not perform correctly is liable for non-performance. Accordingly, if the agent acts in the principal's name whereas the contract required use of the agent's own name, the agent acts in breach of contract and the principal is entitled to exercise the remedies provided for by the law. Accordingly, and depending on the specific circumstances of the case, the principal may claim damages for the loss, if any, caused by the breach of contract. If the damages do not exceed the price, a price reduction can be a prompt and factual remedy for the principal (CC art. 1460).

61. In the NETHERLANDS the agent is liable because this is a breach of contract (CC art. 6:74).

62. In POLAND too the agent is liable for any loss suffered by the principal under the normal principles of contractual liability (CC art. 471).

63. In SCOTLAND if an agent acts in the name of the principal when instructed to act in the agent's own name, this constitutes a breach of the agency contract. As a result, the principal would be entitled to claim damages from the agent. If the breach is material, then the principal has the right to terminate the agency for non-performance and claim damages.

64. In SLOVAKIA if a person acts in someone else's name without authorisation, this means that, in the internal relationship between the agent and the principal, there is a breach of a contractual obligation.

65. In SPAIN , if the agent acts in the principal's name whereas the contract required acting in the agent's own name, the agent acts in breach of contract and the principal is entitled to exercise the remedies provided for by the law for such breach. Moreover, as the agent lacked any authority to act in another's name, the principal is not bound by the contract, unless ratification occurs (CC art. 1259).

66. In SWEDEN if the agent acts in the principal's name whereas the contract required acting in the agent's own name the agent could be held liable for non-performance. A principal who suffers loss due to this non-performance is entitled to damages. The principal is also entitled to terminate the agency if the non-performance is fundamental.

IV.D.–3:102: Obligation to act in interests of principal

(1) The agent must act in accordance with the interests of the principal, in so far as these have been communicated to the agent or the agent could reasonably be expected to be aware of them.

(2) Where the agent is not sufficiently aware of the principal's interests to enable the agent to properly perform the obligations under the mandate contract, the agent must request information from the principal.

COMMENTS

A. General idea

The agent is authorised and instructed, i.e. mandated, by the principal to affect the principal's legal position. When the agent accepts the mandate granted by the principal, the agent undertakes the obligation to act in accordance with the mandate (IV.D.–3:101 (Obligation to act in accordance with mandate)) but also the obligation under the present Article to act in the interests of the principal. In order to do so, the agent will need to know the interests of the principal. This provision indicates that the agent must act in accordance with those interests of the principal of which the agent should be aware, either because these have been communicated by the principal or because the agent could be expected to know of them otherwise.

Illustration 1
A principal mandates a solicitor to appeal a court decision with which the principal fundamentally disagrees. In this case, the interests of the principal are sufficiently clear and no further information is needed for the solicitor to be able to perform the task.

Illustration 2
A principal authorises and instructs an agent to buy "a vintage car". As the agent does not have more information, it will be necessary to ask the principal what the maximum price is to be and whether there are specific types of vintage cars, or cars of a specific period (e.g. the 1920s or 1950s) in which the principal is particularly interested.

B. Agent's obligation to obtain necessary information on the principal's interests

Most of the principal's interests are explicitly communicated to the agent. Other interests should be known to the agent because they could be inferred from the contract, the authority, the instructions, the subsequent directions of the principal and any other sources of information. In some cases, however, the agent may have to seek further information from the principal about the principal's interests. The agent may, for example, have to ask the principal direct questions pertaining to the content of the prospective contract and the principal's preferences and priorities. For these reasons, the agent may be expected to take active steps to obtain information from the principal in order to be able to carry out the mandate properly.

NOTES

I. Act in accordance with communicated interests of principal

1. In AUSTRIA an agent owes fiduciary duties to prefer the principal's interests to the agent's own interests. These duties are based on the contract between principal and agent (CC §§ 1009 S 1 and 1013 S 2; Ccom §§ 384(1) and 408; for commercial agents: OGH in ecolex 1992, 317)). The commission agent has to make proper efforts to discharge the tasks, e.g. to buy or sell as soon as possible for a good price. The commercial agent is required to take other interests of the principal into account when performing the act, e.g. the duty not to disclose confidential information (Griss, § 384 no. 3 (commission agents); Hügel/Viehböck, 204 (commercial agents); Schütz, § 408 Rz 2-5)
2. In BELGIUM there are no specific rules in this field, but it is likely that the obligation of fair dealing in the performance of the agency obligations will require that the agent take account of all the interests of the principal of which the agent was aware.
3. In BULGARIA the mandate contract establishes a fiduciary relationship between the parties. The principal trusts the personal skills, qualifications and features of the agent and expects the agent to perform the mandate with proper care for the principal's interests (*Vassilev, L.*, Obligazionno pravo, 20; *Goleva*, Obligazionno pravo2, 237). Hence, every mandate contract is considered concluded under the implied condition that the agent is obliged to act in accordance with the interests of the principal, in the best possible manner under the existing circumstances (Mevorah/Lidji/Farhi, Komentar III, 120).
4. In DENMARK if the agent is aware of facts concerning the prospective contract the existence of which are unclear or unknown to the principal, the agent must contact the principal to make sure that the principal is aware of the position and the possible consequences arising from these facts.
5. In ENGLAND as previously mentioned, since the agent acts on behalf of the principal, the agent is in a fiduciary position towards the principal. Therefore, as a fiduciary, the agent must always act in the best interest of the principal when performing the agency duties. Fiduciary duties arise in equity and apply regardless of whether the agency is gratuitous or not. The principal will have communicated the principal's interests to the agent. Failing this, the agent who is not sufficiently aware of the interests of the principal should ask clarification.
6. In ESTONIA the law does not prescribe which specific interests the agent must consider. LOA § 621(3) merely stipulates that in the case where adherence to the instructions of the principal would be likely to cause unfavourable consequences for the principal, the agent shall comply with the instructions only after having called the principal's attention to such consequences and if the principal fails to modify the instructions.
7. In FINLAND the agent is required to take all relevant and foreseeable interests of the principal into account.
8. In FRANCE there are no specific rules in this field, but it is likely that the obligation of fair dealing in the performance of the agency will require that the agent take account of all the interests of the principal of which the agent was aware.
9. In GERMANY when acting under the mandate contract, the agent must take the financial and economic interests of the principal into account. A possible particular expertise of the agent is important in determining this obligation, which may require the agent to warn or inform the principal.

10. In GREECE the agent is required to take into account the principal's legal, economic, ethical and social benefit (Georgiadis/Stathopoulos/Karasis, Art. 713 GREEK CC nr. 15).

11. According to the HUNGARIAN CC art. 474(2), '[a]n agent must fulfil the agency according to the instructions and interests of the principal.' Moreover, CC art. 477(1) prescribes that 'The agent shall inform his principal of his activities and the state of affairs upon request or, if necessary, even without a request, particularly if the employment of another person has become necessary or if the instructions need to be changed due to the occurrence of new circumstances'. For this reason, the agent has to act in compliance with all the interests of the principal known to the agent.

12. In IRELAND beyond any duties imposed by the contract, the law imposes a variety of duties on an agent, largely with a view to protecting the principal. In general, agents stand in a fiduciary position to their principals and hence quite onerous duties are imposed on agents in this position. Fiduciary duties derive from equity and arise independently of any contract. They are imposed on the fiduciary automatically, as a matter of law, by virtue of the position held. Agents are normally subject to fiduciary duties because agents have the power to affect the legal position of their principals in relation to third parties and principals normally place trust and confidence in the agent in the exercise of that power. In the past, fiduciaries of all types tended to be treated similarly. More recently, in England, and arguably in Ireland, there has been a tendency to reduce the force of fiduciary duties between parties in an essentially commercial relationship, with the result that the relationship of agency does not necessarily give rise to a fiduciary relationship, or, the scope of the fiduciary duties, although they arise in equity, can be modified by contract (e.g. *Carroll Group Distributors* v *G & J F Burke* [1990] ILRM 285 at 288, per Murphy J). The core duties of a fiduciary are those of loyalty and fidelity. These core duties have several aspects and an agent's fiduciary duties can be divided into four headings: to avoid conflicts of interest; not to make a secret profit; not to accept a bribe; and to account. Because these duties arise from the fiduciary nature of the relationship, independently of any contract, they may survive the termination of the contract, unless expressly or impliedly excluded by the contract. Where an agent is in breach of these fiduciary duties, a variety of remedies is available: proprietary or personal, at common law or in equity.

13. In ITALY the agent is required to act in the principal's best interest, so that the agent has to do all that is possible to satisfy the principal's expectations. This could lead the agent, when performing the contractual obligations, to take into account further interests than those directly involved in the affair. However, any interests which are in conflict with those of the principal and may prejudice the satisfaction of the principal's expectations may not be taken into account by the agent unless the principal authorises this.

14. In the NETHERLANDS, generally, the agent is to observe due care (CC art. 7:401). For instance, the agent is required to obey timely and well considered directions of the principal (CC art. 7:402(1)) and keep the principal informed of what is being done regarding the performance of the service (CC art. 7:403(1)). Furthermore, the agent is accountable to the principal (CC art. 7:403(2)) (*Van der Grinten*, Lastgeving, no. 14).

15. The POLISH CC does not contain rules more specific than the general duty of every contracting party to act in good faith, with due care and to take into consideration the other party's interests (CC art. 355).

16. In SCOTLAND the relationship of agent and principal is described as a fiduciary one, characterised by trust and good faith. The agent is therefore subject to far-reaching

duties towards the principal (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', paras. 84-101). At its most basic level, this duty would require the agent to act in accordance with the communicated interests of the principal.

17. In SLOVAKIA in civil relations, there is a general duty to act in accordance with the contract and good faith. In commercial relations, the agent is bound to perform the activity undertaken in accordance with the principal's instructions and interests of which the agent is aware or must be aware and to inform the principal of all circumstances ascertained while arranging the matter and which may result in a change of the principal's arrangements or instructions (Ccom § 567(2)). The commission agent must protect the principal's known interests, and keep the latter well informed of all circumstances that may lead to a change in the instructions (Ccom § 579). The advocate is obliged to protect and assert the principal's rights and interests (Act on Advocacy § 18).

18. In SPAIN the agent has to act in the interests of the principal (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII^2, 472), in accordance with the will of the principal. The obligation to act in the interests of the principal does not justify deviation from mandatory instructions of the principal. The interests of the principal will govern the performance of the agent as regards the application of the non-mandatory instructions. If the agent uses the power granted by the principal to pursue an interest which contradicts the interests of the principal, this is seen as an abuse of power (STS 5 Feb 1964; Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII^2, 465). According to Ccom art. 255, the agent should ask the principal for guidance, when no special instructions were given. But, if it is not possible to resort to the principal for instructions, the agent should act as if the affair were its own.

19. In SWEDEN the mandate relationship is considered to be a fiduciary relationship and it follows from general contract law and the duty of loyalty and care that the agent must always act in the best interest of the principal. The parties have a precontractual as well as a contractual duty to inform each other of important issues. Thus, the principal has a duty to communicate interests and needs and the agent must act in accordance with the communicated interests of the principal.

II. Professional insurance required?

20. In AUSTRIA the canons of professional ethics require the agent to take out insurance for professional liability (e.g. CCBE 3.9).

21. The BELGIAN CC does not contain an obligation to take out insurance for professional liability. The agent is therefore not required to take out insurance for professional liability, unless special rules for certain professions (e.g. legal) apply.

22. In BULGARIA agents are not obliged to take out insurance for professional liability, except for advocates (BAA art. 50(1)) and insurance agents (IC art. 165(2)).

23. In DENMARK normally the agent is not required to take out insurance for professional liability. In certain trade and commercial relationships custom may have developed an obligation for the agent to take out this kind of insurance. In specific areas (e.g. solicitors and accountants) insurance is mandatory.

24. In ENGLAND there does not seem to be any specific authority on this, but most professional agents will probably be required to take out insurance for professional liability. Solicitors have to for instance.

25. In ESTONIA generally the agent is not required to take out insurance for professional liability. However, special conditions apply for some professional agents such as lawyers.

26. In FINLAND generally, the agent is not required to take out insurance for professional liability. However, real estate agents, insurance brokers and lawyers (only members of the bar) are required to have professional liability insurance.

27. The FRENCH Civil Code does not contain an obligation to take out insurance for professional liability since the agency is, in principle, not remunerated. On the other hand, certain specific rules require professional agents to take out insurance, e.g. estate agents (Law 2 Jul 1970, art. 3-3°), insurance agents (Insurance Code art. L. 530-1), barristers and solicitors (Law 31 Dec 1971, art. 27).

28. In GERMANY the agent is not required to take out insurance for professional liability, unless special rules for certain professions (e.g. legal) apply.

29. In GREECE in the case of a mandate contract, the agent is not generally required to take out insurance for professional liability due to the gratuitous character of the mandate.

30. In HUNGARY the agent is not required to take out insurance for professional liability except for some special cases, e.g. attorneys at law (Act XI of 1998 on Attorneys art. 10(2)).

31. In IRELAND an agent *per se*, is not required to take out professional liability insurance. However, certain professionals are so required. For instance, every solicitor must as a pre-requisite to private practice in the State possess professional liability insurance from an insurer recognised by the Law Society (Solicitors Acts 1954-1994).

32. In ITALY as a general rule, there is no duty on the agent to take out insurance for professional liability. However, depending on the specific professional area of the agent, the taking of insurance is widespread in practice (e.g. lawyers, accountants).

33. In the NETHERLANDS generally, the agent is not required to take professional liability insurance. However, for professional service providers, such as architects, engineers, lawyers, and accountants, several specific laws require them to be sufficiently insured for their professional liability.

34. In POLAND certain professionals are required to have insurance for civil liability (e.g. lawyers, stock brokers).

35. In SCOTLAND whilst agents who are members of distinct professions are, in fact, obliged to carry professional indemnity insurance (e.g. solicitors), it is not possible to say that, as a general rule, every agent who is also a member of a profession is similarly obliged to take out such insurance. The answer to this question will vary depending upon the profession in question.

36. In SLOVAKIA as a general rule, there is no duty on the agent to take out insurance for professional liability. However, depending on the specific professional area of the agent, the taking of insurance is widespread in practice (e.g. advocates, accountants).

37. In SPAIN, professional insurance is not required as a general rule.

38. In SWEDEN some categories of agents are required to take out insurance for professional liability, such as lawyers, real estate agents and insurance agents (e.g. FmL § 6).

III. Agent's obligation to inquire about interests of principal

39. In AUSTRIA the agent's duty of care requires that the agent make proper efforts to discharge the agency tasks (CC § 1009 Rummel (-*Strasser*), ABGB I³, no. 14; OGH wbl 1987, 212; RdW 1983, 106), to communicate to the principal all the necessary information and to inquire what the principal's interests and needs are as regards the content of the prospective contract; otherwise the agent is liable for the loss the principal suffers (CC § 1009 Rummel (-*Strasser*), ABGB I³, no. 9, 14; CC § 1012

Rummel (-*Strasser*) I³, no. 18. The professional agent has to meet an even higher standard of care. For example, lawyers are obliged to give detailed information about the legal consequences of proposed acts (CC § 1009 Rummel (-*Strasser*), ABGB I³, no. 10; OGH AnwBl 1991, 51; RdW 1990, 340). Commercial agents owe the diligence of a prudent businessperson (Ccom § 347).

40. In BULGARIA there is no explicit rule obliging the agent to inquire about the interests of the principal. Such an obligation can, however, follow from the obligation to act in the best possible manner in accordance with the interests of the principal.

41. In DENMARK if the agent is aware of facts concerning the prospective contract the existence of which is unclear or unknown to the principal, the agent must inform the principal. The agent may be held responsible for any failure in this respect.

42. In ENGLAND the principal will usually indicate, in the instructions, what is needed. Should such instructions be unclear, the agent must seek clarification. Failing to do so, a reasonable interpretation will bind the principal. Moreover, the agent, as a fiduciary, must always act in the best interest of the principal. If the agent, when negotiating a prospective contract on behalf of the principal, is not certain whether such a contract serves the interests of the principal, the agent should probably voice these concerns. However, if the agent only has authority to negotiate on behalf of the principal, the latter will not be bound by the agent's negotiations until the contract is concluded. Should the agent fail to act in the interest of the principal by not checking whether actions serve the principal's interests, the agent will be in breach of fiduciary obligations and liable to the principal.

43. In ESTONIA the duty to act in the interest of the principal (LOA § 620(1)) will require the agent, in most cases and in particular where the agent possesses particular expertise, to actively acquire the information that is necessary to establish the interests of the principal in order to comply with the standard of diligence of a good agent (LOA § 620(2)).

44. In FINLAND in general the agent has to pay attention to the interests of the other party. This duty includes an obligation to ensure in a sufficient way that the performance corresponds to the interests of the principal. Should the failure be due to negligence of the agent, the agent is liable for any loss the principal suffers.

45. In FRANCE there is no specific obligation for the agent to inquire about the specific requirements of the principal, but in certain marginal cases, the failure to do so could be considered as negligence or breach of contract, involving the agent's liability (e.g. Cass.civ. 1re, 3 Jun 1997, no. 95-17111). On the other hand, the professional agent has a duty to inform the principal about the contract which the agent envisages concluding (e.g. CA Versailles, 11 Feb 1993, JCP éd. G 1993, IV, 1262).

46. In GERMANY an obligation to inquire can exist under certain circumstances, in particular where the agent possesses particular expertise. The CC § 666 imposes a (very general) obligation to inform the principal where 'necessary'. If this obligation is breached, it can lead to a claim for damages under CC § 280(1).

47. In GREECE in a contract of mandate the agent is required to inquire about the principal's interests and needs. The agent is specifically required to ask explanations for unclear instructions or to notify the principal about all the circumstances that require a deviation from the instructions (CC art. 717; Georgiadis/Stathopoulos/Karasis, Art. 717 GREEK CC nr. 3). Furthermore, the agent must provide information to the principal about the affairs entrusted to the agent (CC art. 718). Failure to do so amounts to non-performance and establishes the right to damages for any loss due to such failure (CC art. 714; Georgiadis/Stathopoulos/Karasis, Art. 718 GREEK CC nr. 2).

48. According to the HUNGARIAN CC art. 477(1), '[t]he agent shall inform his principal of his activities and the state of affairs upon request or, if necessary, even without a request, particularly if employment of another person has become necessary or if the instructions need to be changed due to the occurrence of new circumstances'. Moreover, CC art. 476 prescribes that '[i]f the principal issues imprudent or incompetent instructions, the agent shall call the principal's attention to the matter. If the principal insists on the instructions despite the warning, he shall be liable for the damages sustained on account of the instructions'. In this respect the general rules of obligations also apply, especially CC art. 277(4), according to which '[t]he parties shall be under obligation to cooperate in the performance of a contract. The obligor shall act to perform the contract in the manner that can generally be expected in the given situation, while the obligee shall promote performance in the same manner'. The agent is liable for any loss resulting from non-performance (CC art. 310). See Supreme Court Pfv. VIII. 22.351/2005, in EBH2006. 1410.

49. In IRELAND it is arguable that in order to obey instructions, or to exercise reasonable skill and care, or avoid conflicts of interest, an agent might, before and during performance of the contract, have to inquire about the principal's interests and needs as regards the content of the proposed contract to be negotiated or concluded by the agent. Failure to do so could result in a breach of duties.

50. In ITALY before and during the agent's performance of the contract, the latter is required to inquire what the principal's interests and needs are, since this is functional to the satisfaction of the principal's interests and therefore to the correct performance of the agent's obligation. A failure in doing so would amount in most cases to a breach of the duty of care and may therefore consist in a breach of contract. Consequently, the principal may claim damages for any loss arising out of the breach and seek termination of the contractual relationship, provided that the breach is not irrelevant.

51. In the NETHERLANDS the agent in general is obliged to inform the principal about the activities regarding the fulfilment of the assignment (CC art. 7:403(1)). There does not seem to be a specific obligation to inquire about the principal's exact needs and wishes.

52. In POLAND the agent has no duty to inquire about the interests of the principal.

53. In SCOTLAND the agent is bound to perform in accordance with the instructions (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 84; *Gow*, Mercantile and Industrial Law of Scotland, 530) and is also bound to act in the best interests of the principal (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 97). Such duties are far-reaching, and it is likely that they would extend to requiring the agent to request information from the principal where such information was required for the proper performance by the agent of the obligations under the agency contract. Failure to do so would probably constitute a breach of the agent's fiduciary duty for which the principal would be entitled to recover damages.

54. In SLOVAKIA there is no specific duty to inquire, but such a duty may be considered as implied in the duty of the agent to act in accordance with the interests of the principal and to inform the principal about all issues that may have an influence on the principal's directions (Ccom § 567(2)).

55. In SPAIN this duty is expressly provided for in Ccom art. 255.

56. In SWEDEN the agent is considered to have a duty to inquire about the principal's interests and needs in order to be able to perform in accordance with the mandate contract. The agent also has a duty to inform the principal of matters and circumstances of which the agent becomes aware and which are of importance for the performance (*Ramberg*, 246-247; *Hellner*, 225; HaL § 5; KommL § 7).

IV.D.–3:103: Obligation of skill and care

(1) The agent has an obligation to perform the obligations under the mandate contract with the care and skill that the principal is entitled to expect under the circumstances.

(2) If the agent professes a higher standard of care and skill the agent has an obligation to exercise that care and skill.

(3) If the agent is, or purports to be, a member of a group of professional agents for which standards exist that have been set by a relevant authority or by that group itself, the agent must exercise the care and skill expressed in these standards.

(4) In determining the care and skill the principal is entitled to expect, regard is to be had, among other things, to:

(a) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the obligations;
(b) whether the obligations are performed by a non-professional or gratuitously;
(c) the amount of the remuneration for the performance of the obligations; and
(d) the time reasonably available for the performance of the obligations.

COMMENTS

A. General idea

This Article sets out general criteria to determine the standard of skill and care expected of an agent. It is similar in content to IV.C.–2:105 (Obligation of skill and care) for service contracts.

B. Determination of standard of care for agents

The default rule is not that the agent guarantees that a result will be achieved (for example that the prospective contract will be concluded or that a buyer for a property will be found): in the absence of provision to the contrary in the contract the obligation is only to perform in accordance with the skill and care that the principal is entitled to expect. Paragraph (4) provides an indicative list of factors to be taken into account in determining the standard of skill and care that the principal is entitled to expect from the agent.

C. Specific standard of care

Paragraphs (2) and (3) deal with situations in which the agent is obliged, in view of the specific circumstances, to observe a specific standard of skill and care. Paragraph (3) refers to the case in which the agent professes a higher standard of skill and care, whilst paragraph (4) refers to the standard of skill and care expected of agents who belong to a certain group of professional agents. Obviously, the standard of skill and care that may be expected from an agent falling under paragraphs (2) or (3) will also have to be measured against the criteria set out under paragraph (4), taking into account the (purported) higher expertise of such an agent.

NOTES

Standard of care for agents

1. In AUSTRIA an agent must exhibit such a degree of skill and diligence as is appropriate to the performance of the duties accepted. In carrying out the duties with

reasonable care, the agent must act with the care and diligence of a person of ordinary prudence in the line of the employment. Thus the agent is under a duty of care, not under a duty to guarantee the result expected by the principal. Even a professional agent does not guarantee that what is done will have the expected effect. The professional agent only warrants that the allotted task will be carried out with the skill generally possessed by fellow professionals (CC § 1299; CC § 1012 Schwimann (-*Apathy*), ABGB V³, no. 2). Solicitors, notaries and tax advisers are liable for blameworthy ignorance of the law (CC § 1012 Schwimann (-*Apathy*), ABGB V³, no. 2). Commercial agents must exhibit the diligence of a prudent business person (Ccom §§ 347 and 394, § 5 HVertrG).

2. In BULGARIA the agent has to perform the obligations under the mandate contract with the diligence of "a good householder" (*diligentia boni patris familias)* (LOA art. 281), i.e. the care that a reasonable person would consider necessary to be taken under the same circumstances (Апостолов, Облигационно право[2], 248). This is the standard of diligence for both gratuitous and non-gratuitous contracts and it is higher than the diligence used by an agent for his or her own affairs (*Vassilev, L.*, Obligazionno pravo, 24). The standard is even higher for professional agents: they are required to act with the care of "a prudent businessman" (Ccom art. 33(1) for commercial agents, Ccom art. 350(1) for commission agents and Ccom art. 361(1), referring to Ccom art. 350(1), for forwarding agents; *Kazarov*, Turgovsko pravo[4], 413).

3. In BELGIUM, apart from the exceptional case where the agent does not execute the mandate at all, the agent is – in general – under a duty of care (*de Page and Dekkers*, Traité élémentaire de droit civil belge V[2], 407). In relation to specific aspects of the agent's tasks, there may nevertheless be a duty to guarantee the result, e.g. the duty to follow imperative instructions of the principal or the prohibition against exceeding the limits of the authority granted. The agent must act as a *bonus pater familias* (*Paulus und Boes*, Lastgeving, 90; *Wéry*, Le mandat, 148).

4. In DENMARK the parties can agree to a 'best-efforts-clause', but normally a clause like this does not involve a duty to guarantee the result expected by the principal.

5. In ENGLAND the default rule is that the agent must perform with due care and skill. As long as the agent acts *bona fide* and in the best interest of the principal, the agent cannot guarantee the result expected by the principal. The standard of care is determined by reference to what is usual for an agent in the particular line of business or professional activity. In *Metropolitan Toronto Pension Plan v Aetna Life Assurance Co of Canada* ((1992) 98 DLR (4th) 582) it was stated that 'if he is an agent following a particular trade or profession (…) he must then show such skill as is usual and requisite in the business for which he receives payment' (Ibid, at 597 per *Rosenberg J.*). To establish whether or not the agent has met the required standard of care, one usually looks at the terms of the contract and the specific circumstances of a given case. The standard of care of a professional agent is higher than that of a gratuitous agent (*Chaudry v Prabhakar* [1988] 3 All ER 718).

6. As a default rule in ESTONIA, the agent is under a duty of care (LOA § 620 for the general contract for services; the same rule also applies for specific contracts of mandate such as the contract of agency, brokerage agreement and commissionaire agreement). The parties may, of course, agree that the agent guarantees the result expected by the principal; in that case, the contract for mandate is a contract for works by type. If the agent is under a duty of care, the standard of care is determined according to LOA § 620 (as a default rule). It distinguishes between the professional and the non-professional service provider. Generally, the service provider (the agent)

is obliged to perform the services to the maximum benefit of the principal in the light of and according to the agent's best knowledge and abilities and must prevent any damage to the property of the principal (subjective standard). The service provider who is a professional is obliged to apply the generally recognised skills of the relevant profession (objective standard).

7. In FINLAND the agent is under a duty of care during the whole performance but, unless otherwise agreed, is not under a duty to guarantee the result expected by the principal. The standard of care varies. It depends, among other things, on such factors as the area of activity in question, the professional character of the agent's activities, etc. The standard is usually highest in consumer agreements. In certain areas of activity the standard has been specified in regulations, e.g. for lawyers (CConduct), estate agents (REstateAA) and commercial agents (Commercial Agents and Salesmen Act). The duty of care cannot be set aside.

8. In FRANCE depending on the situation, the agent may be subject to an obligation of means or may be obliged to achieve a specific result. This will depend on the nature of the conditions affecting the success of the agency. Where the agent is subject to an obligation of means, the judge will require reasonable performance of the normally prudent and diligent agent, without taking account of the specific personal capacities of the agent. Where the agent has not reasonably performed the contract, the agent will be liable to the principal.

9. The agent is required to exercise due care under the general rule of GERMAN CC § 276. Liability thus occurs when the agent has breached this standard of care intentionally or negligently (CC § 276(1)).

10. In GREECE in the case of a contract of mandate, the agent is obliged to a diligent performance of the mandate. According to CC art. 714, an agent is responsible for any fault, which means that the agent is also liable for every kind of negligence. The required standard of care is found in CC art. 330: 'A debtor shall be responsible for any default in the performance of his obligation resulting from fraud or negligence imputable to the debtor or to his legal agent. There is negligence when the care required in the carrying out of business was not furnished'. In the case of brokerage or intermediation, good faith requires a diligent performance of the brokerage contract (CC art. 288). The broker is not under a duty to guarantee the result expected by the principal.

11. In HUNGARY, the agent is not normally under a duty to guarantee the result expected by the principal, because CC art. 478(2) establishes that '[t]he agent shall be entitled to demand remuneration even if his actions brought no results'. Contrary to the general rules, in the case of a commission agent, '[t]he commission agent shall be responsible to the principal for performance of all of the obligations that are undertaken by his contracting partner in the contract' (CC art. 509(2)). CC art. 511(1) sets forth that '[t]he commission agent shall be entitled to receive a commission only if the sales contract has been performed'. The general rules of the law of obligations determine the standard of care, especially CC art. 277(4): '[t]he obligor shall act to perform the contract in the manner that can generally be expected in the given situation, while the obligee shall promote performance in the same manner.'

12. In IRELAND as a default rule, all agents are required to act with reasonable care. (This is one of the duties which arise at common law). Where the agency is contractual, a term to exercise reasonable care will normally be implied in the contract, at common law. Where services are provided in the course of a business, a term to exercise reasonable care is implied by statute (Sale of Goods and Supply of Services Act 1980, s.39). Where the agency is non-contractual, the duty to exercise reasonable

skill and care arises in tort only. Hence, a contractual agent may be subject to concurrent duties in contract and tort unless either is modified or excluded by the contract. It appears that an agent's contractual and tortious duty of care can be limited or excluded by the agency contract. However, clear words are needed to exclude liability for negligence. The standard of care required is what is reasonable in the circumstances. This will vary depending on the particular facts of the case. In general, the supplier of services, such as agency services, is expected to exercise 'the ordinary skill of an ordinary competent man exercising that particular art'. Where a supplier of a service claims any particular skill, expertise or specialism, that claim may raise the standard of care expected of the service provider. There are various authorities illustrating what is reasonable in a particular trade or profession, in particular circumstances. For example, it has been held that the general duty owed by a solicitor to the client is to show the degree of care to be expected in the circumstances from a reasonably careful and skilful solicitor (*Roche v Peilow* [1986] ILRM 189 *per* Henchy J at 196-7). Usually a solicitor will meet this standard if the solicitor follows a common practice among the members of the profession (*Daniels v Heskin* [1954] IR 73). But where the common practice has inherent defects, which ought to be obvious to any person giving the matter due consideration, the fact that the practice is shown to have been widely and generally adopted does not make the practice any the less negligent (*O'Donovan v Cork County Council* [1967] IR 173 at 193). The standard of reasonable care may be lower where the agency is gratuitous, though not necessarily *(Chaudrhy v Prabakhar* [1988] 3 All ER 718).

13. In ITALY as a default rule, the agent has a duty of care towards the principal. The agent has to act in the principal's best interest and try to meet the principal's expectations with respect to the prospective contract. The agent does not have a duty to guarantee a specific result and accordingly cannot be held liable for non-performance when the activity turns out to be unsuccessful or when the contract turns out not to be a beneficial one. The required standard of care is due diligence or reasonable care. Whether or not the agent acted diligently has to be established on a case-to-case basis having regard to the specific circumstances, and depending on whether or not the agent is a professional (in the latter case the standard of care is higher). See Cass., 23 Dec 2003, no. 19778, Mass. Foro Italiano, 2003, 4070, no. 19; Cass., 08 Aug 2003, no. 11961, Mass. Foro Italiano, 2003, 4070, no. 20; and Cass., 25 Feb 2000, no. 2149, Mass. Foro Italiano, 2000, 4070, no. 9.

14. In the NETHERLANDS generally, the agent is to observe due care (CC art. 7:401). For instance, the agent is required to obey timely and well considered directions of the principal regarding the assignment (CC art. 7:402(1)) and keep the principal informed of activities regarding the performance of the service (CC art. 7:403(1)). Furthermore, the agent is accountable to the principal regarding the performance of the assigned task (CC art. 7:403(2)) (Van der Grinten, Lastgeving, no. 14). If the agent is, or purports to be, a member of a group of professional agents, the agent must exercise the care and skill of 'a reasonably competent and reasonably acting member of this group' and if a relevant authority has set standards for such a group of agents, the agent must exercise the care and skill expressed in these standards (Asser-Kortmann, 5-III, nr 60).

15. The agent is required to exercise due care under the general rule of POLISH CC art. 355. The professional agent is expected to act with the skill, knowledge and care that may reasonably be expected from professionals (art. 355(2)).

16. In SCOTLAND the agent's normal duty of care has traditionally been described as similar to that of 'a prudent man in managing his own affairs' (Erskine, III,3,37; *Bell*, Commentaries I[7], 516; *Bell*, Principles of the Law of Scotland[10], no. 221). This can be

contrasted with the lower duty which applies to a gratuitous agent, who need only show reasonable care (*Kay v. Simpson* (1801) Hume 328; *Grierson v. Muir* (1802) Hume 329). The standard is, however, higher in the case of a professional agent. Such an agent must meet the standard of a reasonably careful and competent member of that profession (*Cooke v Falconer's Agents* (1850) 13 D 157, per Lord Fullerton at 172; *Beattie v. Furness-Houlder Insurance (Northern) Ltd* 1976 SLT (Notes) 60. In the case of solicitors see Rennie, nos. 3.02 et seq.). The agent's duty of care may vary depending upon the particular trade or activity in question, on a prior course of dealing between the parties, or on the circumstances of the case (*Hastie v Campbell* (1857) 19 D 557 per Lord President McNeill at 561, and per Lord Curriehill at 564 and 565; *Alexander Turnbull & Co v. Cruikshank and Fairweather* (1905) 7 F 101). The conduct of the principal is also relevant to the agent's duty of care. Delay by the principal or the giving of defective instructions may mean that the principal loses the right to sue the agent (*Mackenzie v. Blakeney* (1879) 6 R 1329). The principal may also be required to reimburse the agent for any expenses incurred by the agent as a result of the principal's actions (*Dougall v. National Bank of Scotland* (1892) 20 R 8). Only agents acting as *del credere* agents guarantee the result expected by the principal. This is thought to be relatively rare (see Bell, Principles of the Law of Scotland[10], no. 286; *Lloyd's Exrs v. Wright* (1870) 7 SLR 216). In the normal case, agents do not give such guarantees.

17. In SLOVAKIA in civil relations, the standard of care is determined as "a duty to act according to the agent's ability and knowledge." In commercial relations, the agent is bound to proceed with professional care when arranging a certain matter on the principal's behalf (Ccom § 567(1)) and the commission agent is bound to negotiate the principal's affairs with professional care in accordance with the principal's instructions (Ccom § 578).

18. In SPAIN the diligence expected from an agent is the diligence of the *bonus paterfamilias* (CC art. 1104). The level of diligence is to be determined in each case according to the particular circumstances: the nature of the affair, the skill required by commercial and professional usages, simple rules of prudence, and so on (CC arts. 1719 CC and Ccom 255). The agent typically has an obligation of means (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII[2], 472).

19. In SWEDEN the agent has a general duty of care, based on general contract law rules, during the performance of the commission. The duty also includes a duty to conclude the task within a reasonable period of time. The duty of care depends on the character of the commission and the mandate contract. One can distinguish a difference between the requirements of the work in its entirety and the responsibility for specific measures. Regarding work in its entirety the principal can only claim non-performance when the work considerably deviates from the standard which can be expected. The requirements for specific measures on the other hand are often high. In particular this concerns measures regulated by law such as observance of time limits or to examine public registers when this is called for. Also, high requirements apply on accuracy as regards information based on facts provided by the agent. If the agent is a professional the duty of care is higher. A professional agent is required to timeously inform the principal about important issues and also to make sure the principal understands and is able to evaluate the information. The agent is also required to act in accordance with good business practice when applicable. See HB 18:1, KommL § 7 and HaL § 5.

Section 2: Consequences of acting beyond mandate

IV.D.–3:201: Acting beyond mandate

(1) The agent may act in a way not covered by the mandate if:

(a) the agent has reasonable ground for so acting on behalf of the principal;

(b) the agent does not have a reasonable opportunity to discover the principal's wishes in the particular circumstances; and

(c) the agent does not know and could not reasonably be expected to know that the act in the particular circumstances is against the principal's wishes.

(2) An act within paragraph (1) has the same consequences as between the agent and the principal as an act covered by the mandate.

COMMENTS

A. General introduction to Section

This Section does not deal with the external consequences of the fact that the agent has acted beyond the mandate. Whether or not a contract with a third party has been concluded by the agent by acting beyond the mandate, is determined by Book II, Chapter 6 (Representation). Nor does it deal with the question whether the principal may avoid being bound to the prospective contract by a timely limitation or revocation of the authority of the agent. That, too, is governed by Book II, Chapter 6 (Representation). This Section, as has already been made clear by IV.D.–1:101 (Scope) paragraph (4), deals only with the internal consequences of an acting by the agent beyond the scope of the mandate. Where the agent does so act, a prospective contract with the third party may or may not be valid, as there may have been (apparent) authority under Book II, Chapter 6 (Representation). In the internal relationship between the agent and the principal, however, the fact that the agent has acted beyond the mandate will normally imply that the agent has failed to perform the contractual obligations towards the principal and will therefore be liable for the non-performance, unless this Section provides otherwise.

B. General idea of Article

Normally, as has been seen, the agent must act in accordance with the mandate, i.e. the authorisation and instruction given by the principal. If the agent acts outside the boundaries determined by the principal, then the agent is normally liable for non-performance of the contractual obligations. Hence, in the event of new developments the agent is required to contact the principal and ask for guidance. However, there may be situations in which the agent has to take immediate action in order to safeguard the interests of the principal but has no time to contact the principal. In such a case, the agent is allowed to act beyond the mandate if certain requirements are met. This is the situation regulated in the present Article.

C. Conditions for acting beyond mandate

Paragraph (1) provides that the agent may act beyond the mandate (without incurring liability for so doing) only when certain cumulative requirements are met. These requirements are meant to limit the agent's discretion to act beyond the mandate to those situations where no reasonable principal could be expected not to agree to grant permission, taking into account

all the circumstances that the agent is aware of or could reasonably be expected to be aware of, including the principal's expressed or implied interests.

First, the agent needs to have a reasonable ground for acting beyond the mandate, which means in practice that the agent can only do so if this is necessary to safeguard the principal's interests, e.g. if it is necessary to accept an offer which expires before the agent is able to contact the principal. Secondly, the agent must not have a reasonable opportunity to discover the principal's wishes in the particular circumstances. Finally the agent must not know that the act in the particular circumstances is against the principal's wishes (or be in a situation where such knowledge could reasonably be expected).

D. Relation to benevolent intervention

The present Article starts from the idea that if the agent complies with the criteria which would allow action to be taken as a benevolent intervener - in which no contractual relationship exists - under the rules of V.–3:106 (Authority of intervener to act as representative of the principal), then the agent is also deemed to be in a situation in which acting beyond the mandate is permissible. Accordingly the conditions that the agent has to meet in order to be able to act beyond the mandate are basically the same as are required under Book V to act as a benevolent intervener (see V.–1:101 (Intervention to benefit another)). These are as follows. (a) The benevolent intervener has reasonable ground for acting on behalf of the principal. (b) The benevolent intervener does not have a reasonable opportunity to discover the principal's wishes. (c). The benevolent intervener does not know and could not to know that the intervention is against the principal's wishes. If these requirements are met, under V.–3:106 (Authority of intervener to act as representative of the principal) the benevolent intervener may conclude a contract or otherwise affect the legal relations of the principal.

Obviously, the third requirement will cause some difficulty when applied to mandate relationships, as the principal may argue that the agent ought to have known that the intervention is against the principal's wishes, as the mandate granted to the agent itself indicates that the principal does not want the agent to go any further. However, this may not always be true. Especially when unforeseen circumstances manifest themselves, a situation may arise which the parties had not taken into consideration when the power was granted. In such a situation, the agent may need to exceed the mandate in order to achieve the result as indicated in the mandate contract.

E. Obligation to act beyond mandate not regulated

The question whether or not the agent may be required to act beyond mandate is not regulated in this Article. Whether or not that is the case, must be determined from IV.D.–3:102 (Obligation to act in interests of principal) and IV.D.–3:103 (Obligation of skill and care).

NOTES

Exceeding mandate allowed in certain circumstances?

1. In AUSTRIA the agent is not allowed to exceed the authority granted even if this seems to be in the interest of the principal (Strasser, § 1016 Rz 23a).

2. The BELGIAN CC art. 1989 provides that the agent may not exceed the limits of the authority granted. (See *Wéry*, Le mandat, 145). If the agent exceeds the limits of authority, there may be liability for non-performance of a contractual obligation. To exceed the limits of authority in itself is nevertheless not sufficient to hold the agent contractually liable. The principal must prove the existence of loss and causality. Often the principal will not suffer any loss, because the principal is not bound by the contract concluded by the agent with the third party in the case of an unauthorised performance (*de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 406-407; *Wéry*, Le mandat, 145). However, the obligation to respect the limits of authority is not absolute. The agent is allowed to perform all acts necessarily related to the entrusted mission, with the exception of acts of disposing. Those acts are considered to be part of the mission (CFI Brussels Feb 1990, RRD 1990, 517; Jassogne, 608; Kluyskens, 631; *Wéry*, Le mandat, 145). In some cases the agent even has the duty to perform acts of this kind (CFI Brugge 6 Jul 1874, BJ 1874, 1307; *Wéry*, Le mandat, 145).

3. In BULGARIA as a general rule, the agent must perform within the limits of the mandate determined by the principal or be liable for any loss incurred as a result of the deviation (*Vassilev, L.*, Obligazionno pravo, 24). Nevertheless, the agent is allowed to exceed the limits of the mandate under two conditions: first, the deviation is necessary for the protection of the principal's interests, and second, it is impossible to obtain the principal's consent (LOA art. 282). The agent bears the burden of proving the existence of these conditions (*Vassilev, L.*, Obligazionno pravo, 24). Special provisions exist for the commission agent: if the agent has bought goods for a higher price or sold goods for a lower price than stipulated, the principal must immediately be informed, and if the latter does not reject the prospective contract immediately, it is presumed to be ratified (Ccom art. 351(2)). The principal may not reject the prospective contract if the commission agent bears the price difference (Ccom art. 351(3)) or proves that it was impossible to contract under the stipulated price conditions and that the action taken has prevented the principal from significant loss by contracting for a different price (Ccom art. 351 (4)).

4. In DENMARK the agent is liable for non-performance if the agent exceeds the limits of the authority granted. According to Danish law there is little room for the agent to exceed the mandate even if this seems to be in the interest of his principal.

5. In ENGLAND the agent will be liable for damages for exceeding the limits of the authority granted. This is because one of the first fiduciary duties of the agent is to perform under the terms of the contract and not exceed the authority (*Turpin v Bilton* (1843) 5 Man & G 455). This general rule is very strictly applied by the courts: provided that the instructions are clear and unambiguous, the agent must follow them to the letter or be liable for damages (*Volkers v Midland Doherty Ltd* (1985) 17 DLR (4^{th}) 343). The agent is not entitled or required to exceed the authority even if such an action is perceived to be in the principal's best interests (*Fray v Voules* ((1859) 1 E&E 839). However, the strictness of the rules can be mitigated. If the authority granted allows this, the agent can exercise a certain discretion (e.g. *Re Newen* ([1903] 1 Ch 812)).

6. In ESTONIA as a general rule, the agent is liable for non-performance if the limits of the mandate are exceeded. However, the agent is allowed and in certain circumstances even obliged to deviate from the instructions of the principal if this is perceived to be in the best interests of the principal. This is the case if adherence to the instructions would be likely to cause unfavourable consequences for the principal (LOA § 621(3)). In such cases, the agent must inform the principal and wait for further instructions as a

rule. The agent is only entitled to deviate from the instructions without consulting the principal if the circumstances do not allow for delay (LOA § 621(2)-(3)).

7. In FINLAND the agent is liable for non-performance if the limits of the mandate are exceeded. In general, this applies even when it is in the interests of the principal. However, if exceeding the authority is clearly necessary to protect the interests of principal, the agent is, in general, allowed to exceed the authority granted (Ccom § 18:10).

8. In FRANCE the agent is not authorised to exceed the limits of the authority granted, even if this seems to be in the interest of the principal and even in case of emergency. However, the principal may ratify the agent's acts.

9. In GERMANY the agent may exceed the limits of the mandate if this is perceived to be in the interest of the principal and if it could be assumed that the principal would tolerate this step if aware of the circumstances. The agent is required to inform the principal about the impending acts in excess of authority, unless hesitation might result in danger (CC § 665).

10. In the case of a mandate contract in GREEK LAW an agent may deviate from the limits set in the mandate only if it is impossible to notify the principal and obvious that the principal would have allowed the deviation if aware of the circumstances that prompted such deviation (CC art. 717). The agent must prove that these requirements exist. Exceptionally, good faith (CC art. 288) may require the agent to exceed the limits of authority if the principal would have permitted or imposed such a deviation from the limits set in the mandate (Georgiadis/Stathopoulos/Karasis, Art. 717 GREEK CC nr. 4). In case of an unjustified deviation from the limits set in the mandate the principal can claim damages due to a defective performance of the mandate on the part of the agent (CC art. 714). However, the principal has the discretionary power to approve the unjustified deviation from the limits of authority set in mandate (Georgiadis/Stathopoulos/Karasis, Art. 717 GREEK CC nr. 5).

11. In HUNGARY if the agent exceeds the limits of authority, this is normally a kind of non-performance and the agent will normally be liable for any loss resulting from the non-performance. CC art. 477(2) provides that '[t]he agent shall be entitled to depart from the principal's instructions only if it is essential for the principal's interest and if there is no time to notify the principal in advance. In such a case the principal shall be notified without delay'. In the internal relationship, if the agent exceeds the limits of the authority granted, this might sometimes be considered as a case of benevolent intervention according to CC art. 484, which sets forth that '[a] person proceeding in a matter on behalf of another person without being authorised thereto by agency or otherwise shall be obliged to handle the matter as required by the interest and probable intent of the person in whose favour he has intervened'.

12. In IRELAND an agent must obey the principal's lawful instructions. Where the agency is contractual, the agent is liable for breach of contract for failings to act as instructed. Therefore, an agent must follow, but not exceed, the limits of the authority. Where an agent exceeds the authority this can be remedied where the principal later ratifies the agent's conduct (in which case the agent is treated as if was authorised in the first place). Alternatively, where an agent exceeds the authority this can be remedied under the doctrine of agency of necessity, which is rather similar to benevolent intervention. Under this doctrine a person may have authority to act on behalf of another in certain cases if faced with an emergency in which the property or interests of that other person are in imminent jeopardy and it becomes necessary, in order to preserve the property or interests, so to act. Agency of necessity can operate to extend an agent's authority or to give authority to someone not already an agent. There

are four preconditions for agency of necessity to arise: (1) it must be shown that A could not get instructions from P; (2) A must have acted in P's interests and *bona fide*; (3) A's actions must be reasonable; and (4) there must have been some necessity or emergency which caused A to act as he did. The traditional example of an agent of necessity is the master of a ship who acts in an emergency to save the ship or the cargo (*Hawtayne v Bourne* [1841] 7 M&W 595 at 599, *per* Parke B). Developments in modern communications mean that the first requirement will rarely be satisfied (see *The Choko Star* [1989] 2 Lloyd's Rep 42; and *Surrey Breakdown Ltd* v *Knight* [1999] RTR 84). Therefore, the doctrine is of limited application today. Where the requirements for creation of agency of necessity are fulfilled, two consequences follow. First, the agent has power to bind the principal to transactions entered into with third parties, and secondly, the relationship of principal and agent is constituted between the principal and the agent if it did not already exist, so that the agent is entitled to the rights of an agent.

13. In ITALY, the agent may not exceed the limits of the authority granted. With respect to the internal relationship between the agent and the principal, if the agent exceeds the limits of authority this may or may not constitute a breach of contract depending on the specific circumstances of the case. In some cases this behaviour could satisfy the best interests of the principal, e.g. in the case of new circumstances which were unknown and unforeseeable by the principal at the time the authority was granted, provided that these cannot be reported to the principal for instructions, and provided that it can reasonably be held that the principal, if aware of the circumstances, would have granted a wider authority to the agent. The agent is then allowed to exceed the limits of authority and may even be *required* to exceed them. However, in most cases exceeding the limits of authority amounts to a breach of contract.

14. In the NETHERLANDS there is no special rule on the question whether an act of the agent not covered by the mandate may nevertheless be regarded as covered. Dutch law leaves the answer to this question to the requirements of reasonableness and equity (CC, art. 6:248).

15. In POLAND the agent may act contrary to the way the mandate was agreed to be carried out if (1) contacting the principal is not possible and (2) considering the circumstances it is reasonable to believe the principal would have agreed to the different performance. If those conditions are not met, the principal may still approve a contract in excess of the limits of authority. The agent is liable for all the loss caused to the principal under the normal rules on contractual liability (CC art. 471).

16. In SCOTLAND the agent will be liable to the principal for breach of the agency contract if the agent exceeds the authority granted. There is no general rule which allows the agent to exceed authority if this is perceived to be in the interests of the principal.

17. In SLOVAKIA the situation where an agent exceeds authority is not specifically regulated for the internal relationship; the general rules on liability for loss caused by non-performance of a contractual obligation should be applied.

18. SPANISH law does not generally allow the agent to exceed the limits of the mandate (CC arts. 1714 and Ccom 256). The principal is not bound to the third party where those limits are exceeded, whether or not the third party was aware of that (CC art. 1727).

19. In SWEDEN the agent is liable for non-performance if the agent exceeds the limits of authority. If required by the circumstances, the agent has a duty to deviate from the limits of authority and act as is necessary considering the circumstances. The agent

should seek the principal's instructions prior to such deviation unless the matter is of immediate urgency. See AvtL 25 § and KommL § 8.

IV.D.–3:202: Consequences of ratification

Where, in circumstances not covered by the preceding Article, an agent has acted beyond the mandate in concluding a contract on behalf of the principal, ratification of that contract by the principal absolves the agent from liability to the principal, unless the principal without undue delay after ratification notifies the agent that the principal reserves remedies for the non-performance by the agent.

COMMENTS

A. General idea

Under the preceding Article, the agent may under strict conditions act beyond the mandate. Where not allowed to do so, the agent may be liable for non-performance of the contractual obligations.

This provision regulates the consequences as to the liability of an agent who acts beyond the mandate if the principal subsequently ratifies the contract concluded by the agent. The ratification by the principal implies that the liability of the agent for having acted beyond the mandate is excluded. If the principal nevertheless wants to retain the right to exercise remedies for non-performance, this must be explicitly indicated without undue delay.

B. Conditions for acting beyond mandate not met

If the agent acts beyond the mandate in circumstances not covered by the preceding Article it may still be the case that the principal is prepared to accept the contract so concluded.

> *Illustration*
> A principal asks an agent to purchase from the principal's regular supplier of cheese and tomatoes 1000 kilos of cheese for a price of €750. The principal intends to use the cheese in the production of pizzas. The agent informs the supplier of these instructions. The supplier then tells the agent of a special offer available for tomatoes. The agent knows that this would normally be considered a very good deal and buys a quantity of tomatoes. To keep relations with the regular supplier smooth, the principal ratifies the contract with the supplier, even though the principal intended to buy the tomatoes from another supplier at an even lower price.

In this Article, it is assumed that the ratification does indeed indicate that the principal tolerates the agent's actions – in which case the principal would not be interested in a possible claim against the agent for acting beyond the mandate – but it is left to the principal to indicate otherwise.

C. Retention of remedies

If the principal ratifies the prospective contract even though the agent acted beyond the mandate, the liability of the agent is, in principle, excluded. In order not to burden the agent with too much uncertainty, the principal would have to notify the agent without undue delay of an intention to retain remedies for non-performance.

NOTES

Consequences of ratification of prospective contract for liability of agent

1. In BULGARIA a person in whose name a contract has been concluded without authorisation may ratify it (LOA art. 42(2)). There is no explicit rule for ratification by the principal of prospective contracts concluded and juridical acts performed beyond the mandate. In legal doctrine it is considered that the ratification absolves the agent from liability to the principal, unless the principal, explicitly or implicitly, has reserved remedies for the non-performance by the agent (Mevorah/Lidji/Farhi, Komentar III, 157).
2. In ESTONIA the law does not contain a clear provision on the circumstances in which ratification of a transaction performed by the agent beyond the scope of the mandate can release the agent from liability towards the principle. This should be determined according to the specifics of the case. It can however be presumed that at least in cases where the ratification is declared to the agent this can be interpreted as a release from the liability under the mandate agreement.
3. In FRANCE there is no specific provision on this topic. The Civil Code just provides that the principal will be engaged by the contract only if the principal ratifies it (art. 1998); nothing is said about the consequences. Ancient case law considers that the agent will not be liable if the principal ratifies the prospective contract, unless the principal lets the agent know that the possibility of claiming damages is being retained (Cass.civ., 9 mai 1853, D.P. 1853 I, 293).
4. The consequences of the ratification of the prospective contract are addressed in the GERMAN CC § 684 as part of the rules on benevolent intervention. Generally, the ratification will absolve the agent from liability for having acted outside the limits of the mandate contract. It is a different question whether the ratification also absolves the agent from liability that arises not from the fact that the mandate has been exceeded, but from the fact has the agent has violated another standard of care when doing so – this depends on the interpretation of the ratifying act (Palandt [-*Sprau*], BGB[66], § 684 no. 42.
5. In IRELAND where a principal ratifies the previously unauthorised actions of an agent, the effect is retrospective and it is as if the agent was authorised at all times.
6. There are no specific POLISH CC provisions regulating the consequences for the agent of ratification of the agent's actions by the principal.
7. In SCOTTISH law the principal's ratification of the agent's unauthorised actions binds the former in contract with the third party, with retrospective effect, binding the principal from the moment the agent entered the contract. There appears to be no case where a ratifying principal has also reserved or made a claim against the agent for resultant losses.
8. In SLOVAKIA the consequences of ratification for the internal relationship between the principal and the agent are not covered. There are no known cases dealing with this problem.
9. In SPAIN, ratification renders the agent's act binding to the principal (CC art. 1259). The law is silent as to whether the ratification also amounts to a waiver of claims based on the agent's non-performance. Probably the rule stated in the present article should apply.
10. In SWEDEN, according to general contract law rules, the principal may ratify the prospective contract if the agent has acted in excess of authority when concluding it.

Ratification does not deprive the principal of the right to hold the agent liable for breach of contract.

Section 3: Mandate normally not exclusive

IV.D.–3:301: Exclusivity not presumed

The principal is free to conclude, negotiate or facilitate the prospective contract directly or to appoint another agent to do so.

COMMENTS

A. General idea

The present Article starts from the presumption that the principal remains free, despite the mandate contract with an agent, to conclude, negotiate or facilitate the prospective contract personally or to appoint another agent to do so. The parties may, however, agree otherwise by awarding the agent exclusivity.

B. Conclusion of prospective contract by principal or by another agent in case of irrevocable mandate

According to IV.D.–7:101 (Conclusion of prospective contract by principal or other agent), the conclusion of the prospective contract by the principal or another agent appointed by the principal will terminate the mandate relationship if the mandate was solely for the conclusion of a specific contract. That will have the effect of a revocation of the mandate (IV.D.–1:104 (Revocation of the mandate) paragraph (2). In the case where the agent is awarded an irrevocable mandate, this usually implies that the agent is also awarded exclusivity. This then implies that the principal may no longer conclude the prospective contract personally or by means of another agent.

This may, however, not always be the case.

> *Illustration*
> The successors of the former owner of a car decide that the car is to be sold for a good price. They mandate two of them to execute their decision independently of each other, agreeing that the car is to be sold for a price of more than €10,000 and that the first who sells the car accordingly receives payment of 1% of the sale price, whereas the other will not be rewarded. As one of the successors has a fickle nature and might all of a sudden change his mind, the successors decide to make both mandates irrevocable. In this case, the irrevocability is not combined with exclusivity.

It is therefore necessary to determine whether the parties to the underlying legal relationship, when agreeing on an irrevocable mandate, have intended to grant the agent exclusivity. However, this will normally be the case.

NOTES

I. Exclusivity not presumed

1. In AUSTRIA the parties to the contract for mandate can validly stipulate that the principal is not allowed to appoint another agent (CC § 1011).

2. In BULGARIA since there is no explicit rule to the contrary, exclusivity clauses are considered to be valid (Mevorah/Lidji/Farhi, Komentar III, 28). For commercial agents there is a special rule: if the principal has appointed a commercial agent for a certain region, he is not allowed to authorise another one for the same territory (CA art.46(2)).

3. In BELGIUM the parties can agree to a clause by which the agent is awarded exclusivity (*Wéry*, Le mandat, 277-278).

4. In DENMARK the parties can validly agree that the principal is not allowed to appoint another agent. An exclusivity-clause of this character will be respected in practice and in court.

5. In ENGLAND exclusivity clauses are possible, especially for estate agents. When an estate agent is granted an exclusivity by being appointed 'sole agent', if the principal then appoints another agent who earns the commission that the first agent should have earned, then the sole agent is entitled to damages (*Milsom v Bechstein* (1898) 14 TLR 159).

6. In ESTONIA the parties can agree to a clause by which the agent is awarded exclusivity.

7. In FINLAND the agent may, in general, be awarded exclusivity, unless the public interest (e.g. the Competition Law) provide otherwise.

8. In FRANCE the mandate may be exclusive.

9. In GERMANY the parties can validly stipulate that the principal is not allowed to appoint another agent. Case law has applied restrictions in the field of brokerage contracts (CC § 652) containing an exclusivity clause, which are subjected to control under CC § 307(2) when contained in standard conditions.

10. In GREECE in the case of intermediation the parties can validly agree to a clause by which the broker is awarded exclusivity. According to that clause the conclusion of the contract is limited to the exclusive broker and a conclusion of the same brokerage contract with third parties is prohibited (Georgiadis/Stathopoulos/Karasis, Art. 703 GREEK CC nr. 21). The consequence of such a clause is that in case of breach of that contractual obligation the principal is liable in damages for loss caused to the exclusive broker by the violation of the clause of exclusivity (CFI Athens decision no. 4029/1982, EllDni 1984, 848). No specific rules of consumer protection are applicable, but if the principal in a brokerage contract can be considered as a consumer according to art. 1 of the law nr. 2251/1994 (Government Gazette A 191/16.11.1994) about consumer protection, the clause of exclusivity may fall under the notion of abusive standard clauses (art. 2; Pitsirikos, p. 35).

11. In HUNGARY the parties to the contract for representation can validly stipulate that the principal is not allowed to appoint another agent, but in this respect CC art. 207(3) applies: 'Should a person waive his rights in part or in full, such a statement cannot be broadly construed'. In case of a consumer contract, according to CC art. 207(2), '[i]f the contents of a consumer contract cannot be clearly established …, the interpretation that is more favourable to the consumer shall be authoritative'.

12. In IRELAND, in line with the principle of freedom of contract, and following *Murphy, Buckley & Keogh Ltd v Pye (Ire) Ltd* ([1971] IR 57), the parties can validly stipulate that an agent is awarded exclusivity.

13. In ITALY the parties to a contract for representation may validly stipulate that the principal is not allowed to appoint another agent (i.e. exclusivity clause). Indeed, it is a typical clause in most distribution contracts.

14. In the NETHERLANDS the principal is allowed to give the agent exclusivity regarding the mandate. In that case, the principal is not allowed to appoint another agent (*Van der Grinten*, Lastgeving, no. 13).

15. In POLAND exclusivity may be granted to the agent on the basis of freedom of contract. It will not be presumed.

16. It is possible in SCOTTISH law for the contract between the principal and the agent to stipulate that the agent is an exclusive agent. However, exclusivity is not the general rule and would require an express clause to this effect in the contract (*Graham v United Turkey Red Co Ltd* (1882) SC 533).

17. In SLOVAKIA the parties can validly stipulate that the principal is not allowed to appoint another agent. For the commercial representation contract, specific regulation of the exclusivity clause can be found in Ccom § 665 (exclusive commercial representation).

18. Like an agency contract subject to the SPANISH Agency Law, any kind of mandate may be agreed as exclusive

19. In SWEDEN exclusivity is not presumed but the parties can agree to an exclusivity clause.

II. Principal entitled to conclude prospective contract personally

20. In AUSTRIA apart from the possibility of an irrevocable mandate, the principal is entitled to conclude the prospective contract personally. The mandate contract does not take away this right. It is the same with commercial agents. The employment of an agent on the terms that a commission is payable on results does not deprive the principal of the freedom to take any step which results in the agent being deprived of the opportunity to earn commission, unless there is an express promise or trade custom to the contrary, or unless a promise to the contrary must be implied to give efficiency to the contract or otherwise to give effect to the intention of the parties. This can be explained on the basis that a person (the principal) is entitled to freedom of action in dealing with property and conducting business affairs. The principal can in fact revoke the granted authority at any time. It is not relevant whether the agent acted in the principal's name or in the agent's own name if the contractual relationship between indirect agent and principal is that of a mandate in terms of CC §§ 1002 et seq. If the principal concludes the prospective contract personally, the agent is entitled to a proportional part of the price, to incurred expenses and to reimbursement of any losses suffered.

21. In BELGIUM as the principal can always revoke the authority to represent, the principal is entitled to conclude the prospective contract personally. The conclusion of the contract by the principal is considered to be a tacit revocation (*de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 462).

22. In BULGARIA as a general rule, the authorisation of an agent to conclude a certain contract does not deprive the principal of the right to conclude the contract personally or to appoint another agent to conclude the contract; the same goes for other juridical acts (Mevorah/Lidji/Farhi, Komentar III, 28). Ccom art. 46(2) provides an exception for commercial agents (see under 1). If the principal concludes the prospective contract personally, the principal thereby implicitly revokes the mandate (Mevorah/Lidji/Farhi, Komentar III, 176).

23. In DENMARK a contract for representation does not deprive the principal of the right to conclude the prospective contract personally. This will apply whether the agent is entitled to act in the agent's own name or in the name of the principal. The agent is

entitled to the price whether the agent or the principal concludes the prospective contract.

24. In ENGLAND a distinction must be made according to the type of exclusivity which has been granted. When the agent is appointed as a 'sole agent', this does not preclude the principal from negotiating the contract personally (*Bentall, Horsley & Baldry v Vicary* [1931] 1 KB 253). In such a case, the agent will not be entitled to commission if the principal contracts directly with the third party. When the agent is appointed as an 'exclusive agent' or the agency is described as a 'sole selling agency' (*Brodie Marshall & Co (Hotel Division) v Sharer* [1988] 1 EGLR 21), then the principal is prevented from selling the property personally. Should the principal nevertheless do so, the agent would still be entitled to the agreed commission (*Snelgrove v Ellringham Colliery Co* (1881) 45 JP 408).

25. In ESTONIA as a rule, the contract of mandate will not deprive the principal of the right to conclude the prospective contract personally. The parties may of course agree otherwise. Specific rules apply for commercial agents. LOA § 675(2) stipulates that if the principal has nominated an agent for a certain area or for specific clients, it is presumed that the agent has an exclusive right to conclude contracts in that area or with the clients (unless agreed otherwise in writing).

26. In FINLAND in general the mandate contract does not deprive the principal of the possibility to act personally. The parties are, however, allowed to agree that the principal is not entitled to conclude a prospective contract. This may also follow from exclusivity of the agent's mandate.

27. In FRANCE granting an agency does not, in principle, deprive the principal of the right to enter into the envisaged contract directly and personally, whether the agent is to act in the name of the principal or in the agent's own name. If the contract is directly entered into by the principal, the agent will be entitled to repayment of expenses incurred up to that date. As regards the envisaged remuneration, this is not due, in principle, where the mandate has not been fulfilled, e.g. where the contract has not been concluded for any reason independent of the wishes of the parties (Cass. com., 21 Dec 1981, Bull. Civ. IV no. 450). The situation will be different where the contract is not concluded due to the attitude of the principal and where the agent has sufficiently performed the contract. Thus, an estate agent will be entitled to remuneration if the contract has been entered into between the principal and a third party introduced by the agent (Cass. 1ère civ., 17 Nov 1993, Bull. civ. I no. 323).

28. GERMAN courts have held that it is impossible to grant an authority which excludes conclusion of contracts by the principal (BGHZ 3, 358; BGHZ 20, 364), and the literature agrees (Schramm, § 167 para. 114). Therefore, even in the case of an exclusivity clause, the principal may still conclude the prospective contract personally. If the principal does so, under a brokerage contract the agent is entitled to a price when the contract is concluded due to the service rendered by the broker (CC § 652(1)).

29. In GREECE in case of a mandate contract the principal is not deprived of the right to conclude the prospective contract personally (Georgiadis/Stathopoulos/Doris, Art. 211 GREEK CC nr. 11). In this respect it is irrelevant whether the agent is entitled to act in the agent's name or in the name of the principal. If the principal concludes the contract the question whether the agent is entitled to the price depends on the internal relationship on which the mandate is based. In case of a true mandate contract that question does not arise at all due to the gratuitous character of mandate. In case of intermediation the principal also has the right to conclude the contract without the intervention of the broker (CA Athens decision no. 12896/1988, NoV 1989, 1226). In such a case the broker is not entitled to payment according to CC art. 703 which

obliges the principal to pay remuneration only if the contract was concluded as a result of the broker's intervention or indication (Georgiadis/Stathopoulos/Doris, Art. 703 GREEK CC nr. 21). If an irrevocable mandate has been granted it is accepted that the person represented is still entitled to conclude the prospective contract or to execute the prospective other juridical act personally because irrevocability does not mean exclusivity (Georgiadis/Stathopoulos/Doris, Art. 218-221 GCC nr. 13).

30. In HUNGARY if the principal did not expressly renounce the right to conclude the prospective contract personally (without the intervention of the agent), the principal is entitled to do so. In general, according to CC art. 478(2), '[t[he agent shall be entitled to demand remuneration even if his actions brought no results.' For this reason, the price is due to the agent irrespective of who concluded the prospective contract effectively.

31. In IRELAND whether the principal is entitled to conclude the prospective contract personally depends on the nature of the agency contract and, in particular, the terms of the agent's appointment. For example, in *Murphy, Buckley & Keogh Ltd v Pye (Ire) Ltd* [1971] IR 57, the seller of a factory appointed auctioneers as 'sole agents' in the sale. However, the seller arranged a sale without telling the auctioneers. The auctioneers claimed a commission but lost in the High Court. It was held that although the auctioneers were the sole agents this did not prevent the seller from effecting a sale personally, merely from appointing any other agents. Hence, where an agent is appointed 'sole agent' to effect a contract, the principal commits a breach if a second agent is appointed; if the second agent then concludes a contract, the first agent would be entitled to damages, equal to the amount of commission lost, for breach of that term (*Bentall, Horsley and Baldry v Vicary* [1931] 1 KB 253). Moreover, it has been held that where an agent is appointed with 'the sole right to sell', the principal is in breach of contract if the principal sells in person *(Brodie Marshall & Co v Sharer* [1988] 19 EG 129).

32. The possibility for the principal to conclude the prospective contract directly is expressly recognised in ITALIAN CC art. 1748(2): 'The commission is due also for the transactions entered into by the principal with third parties that the agent had previously acquired as principals for transactions of the same kind or pertaining to the area or category or group of principals reserved to the agent, unless otherwise agreed'. Accordingly, even if the contract grants an exclusive right to the agent, the principal keeps the right to conclude the affairs in the relevant geographical area; however the agent keeps the right to receive the full price agreed under the contract without any reduction. Also the fact that the contract is irrevocable does not affect the fact that the principal is entitled to conclude the prospective contract personally. The irrevocability does not imply that the principal renounces the right to act directly to conclude the contract. This may be inferred from the text of CC art. 1724 which provides that '[t]he appointment of a new mandatory for the same transaction, or the completion of the transaction by the principal, implies a revocation of the mandate and takes effect from the day on which the agent has been notified thereof'.

33. In the NETHERLANDS though the principal remains free vis-à-vis third parties to conclude the contract personally (cf HR 29 September 1989, NJ 1990, 307 and CC art. 7:423(1)) for an exception), the parties to a mandate contract may stipulate that such an act constitutes a breach of contract within their internal relationship.

34. In POLAND the principal retains the right to conclude the contract personally even if exclusivity is granted, since one may not limit one's own legal capacity to conclude contracts and if the contracts concluded by the principal were to be void, it would

endanger third parties' interests. However, breach of an exclusivity clause would be a breach of contract and would entitle the agent to a claim for damages.

35. In SCOTTISH law the grant of authority to an agent does not involve the divesting or limitation by the principal of any legal capacity or freedom to act. As a result, the principal would remain entitled to conclude a contract personally notwithstanding the authorisation of the agent to carry out that task. It makes no difference to the answer to this question whether the agent acts in the name of the principal or in the agent's own name. Whether the agent would remain entitled to a price might depend on the factual scenario. If the agent was unaware that the principal had concluded such a contract, and had expended efforts concluding a contract, for example, for the same goods from another source, there would be no reason why the agent would not be entitled to a fee in the normal way. The fee might take the form of commission on the contract which the agent had concluded on the principal's behalf, unaware that the principal had already bought other goods. Alternatively, if the agent was either made aware by the principal that a contract had already been concluded, or became aware that this was the case, the agent might be prevented from concluding a contract, and thus from earning either fee or commission. Depending upon the terms of the contract between the principal and the agent, this might constitute a breach on the part of the principal, for which the agent could claim damages. The applicable measure of damages would be the expectation interest, or the net profit which the agent would have expected to gain from proper performance of the contractual obligations.

36. In SLOVAKIA the mandate contract does not deprive the principal of the right to conclude the prospective contract personally.

37. In SPAIN the principal can always revoke the authority to represent, being therefore entitled to conclude the prospective contract personally. The conclusion of the contract by the principal is considered to be a tacit revocation (Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-*Gordillo Cañas*), Código Civil II, 1589)

38. In SWEDEN a mandate contract does not deprive the principal of the right to conclude the prospective contract personally (*Adlercreutz*, 203).

III. Exclusivity clause allowed, but no effect on validity of prospective contract in case of breach by principal

39. In AUSTRIA if the principal is in principle entitled to conclude the prospective contract personally, the parties can validly stipulate that the principal is not allowed to do so. Such a stipulation would make the principal liable for damages but would not deprive the principal of the possibility to transact with a third party.

40. In BELGIUM the parties to the contract for representation can validly stipulate that the principal is not allowed to conclude the prospective contract personally, by inserting a clause of irrevocability (*de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 463). If the clause only aims to award the agent an indemnification, the principal can still conclude the prospective contract. The clause obliges the principal only to indemnify the agent, e.g. by paying the agreed remuneration. If the clause, on the contrary, aims to deprive the principal of the right to conclude the contract, the principal can no longer conclude the contract personally (*de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 463; Foriers, 90; Wagemans, 193).

41. In BULGARIA the parties are free to stipulate that the principal is prohibited from concluding the prospective contract personally. If the principal nevertheless concludes the prospective contract, this constitutes a breach of the mandate contract and the principal is liable for the loss suffered by the agent (Mevorah/Lidji/Farhi, Komentar III, 28). Apart from this compensation, as the conclusion of the prospective contract

under such circumstances is considered to be an implicit revocation of the mandate contract, the agent is entitled to receive stipulated remuneration and reimbursement of expenses incurred (LOA art. 288).

42. In DENMARK the parties to the contract for representation can validly agree to a clause according to which the principal is not allowed to conclude the prospective contract personally. According to the Danish Act on Estate Agents the parties can agree to a clause according to which the agent is entitled to the price even if the principal concludes the contract directly with a third party presented by the agent.

43. In ENGLAND whether the principal is entitled to conclude the prospective contract personally or not depends on the type of exclusivity that the agent has been given in the agency contract. In addition, it is thought that outside such exclusive agency, it is still possible for provisions to be made in the contract that commission is payable when the principal concludes the prospective contract personally (*Tredinnick v Browne* (1921) cited in *Bentall, Horsley & Baldry v Vicary*.

44. In ESTONIA the parties can validly stipulate that the principal is not allowed to conclude the prospective contract personally.

45. In FINLAND the parties are allowed to agree that the principal is not entitled to conclude a prospective contract. This may also follow from exclusivity of the agent's mandate.

46. In FRANCE the parties may decide to prevent the principal from entering into the envisaged contract personally, but such prohibition will not affect the validity of the contract entered into. The parties are not only free to provide that the remuneration of the agent will be due (this is a standard clause in contracts with French estate agents), but they may go further by providing for liquidated damages (except where there is a specific legal prohibition: see the Decree of 20 Jul 1972, art. 76 applicable to estate agents).

47. In GERMANY if the principal concludes the prospective contract although an exclusivity clause provides otherwise, this does not affect the validity of the contract concluded, as it is legally impossible to grant an authority which excludes conclusion of contracts by the principal (BGHZ 3, 358; BGHZ 20, 364; *Schramm*, in: Münchener Kommentar zum BGB[5], § 167 no. 114). In the case of brokerage contracts, if the principal concludes the contract personally with a third party presented by the agent, the agent is entitled to the price (CC § 652(1)).

48. In GREECE in case of intermediation the parties can validly stipulate that the broker is awarded exclusivity with regard to the conclusion of the contract. In such a case the principal does not have the right to conclude the contract personally. If the principal violates that clause of exclusivity it is considered in such a case that the contract is concluded due to the intervention of the broker (fictitious causality between intervention and conclusion of the contract) and the principal is obliged to pay remuneration (Georgiadis/Stathopoulos/Karasis, Art. 703 GREEK CC nr. 21).

49. In HUNGARY if the principal is in principle entitled to conclude the prospective contract personally, the parties to the contract for representation can validly stipulate that the principal is not allowed to do so (i.e. the parties agree to a clause by which the agent is awarded exclusivity in this respect).

50. In IRELAND whether the principal is entitled to conclude the prospective contract personally or not depends on the type of exclusivity that the agent has been given in the contract.

51. In ITALY according to the principles of freedom of contract and party autonomy, the parties may agree upon any clause they deem fit, provided that it is not in conflict with

mandatory rules and is not *contra bonos mores*. In the exercise of party autonomy it cannot be excluded that the parties validly stipulate that the principal is not allowed to conclude the prospective contract personally.

52. In the NETHERLANDS the contracting parties seem to be allowed to agree upon a clause in the contract according to which the principal is not allowed to conclude the prospective contract personally (CC art. 7:423(1)). See also Castermans/Krans, Tekst & Commentaar BW[7], no. 3098.

53. In POLAND even if the parties have agreed in the mandate contract that the agent will be granted exclusivity, the contract concluded by the principal will not be void. However, the principal will be liable for the breach of the mandate contract.

54. In SCOTLAND it would be open to the principal and the agent to insert a clause in the contract which would bind the principal not to conclude the contract personally. Should the principal breach this clause, the principal would be liable to the agent in damages. The contract concluded by the principal with the third party in breach of this clause would, however, be valid.

55. In SLOVAKIA the parties can validly stipulate that the principal is not allowed to conclude the contract personally. Such a stipulation would make the principal liable for damages if it were breached but would not prevent the conclusion of a valid contract with a third party.

56. In SPAIN the parties may decide to prevent the principal from entering into the envisaged contract personally, both by stipulating an exclusivity clause or by rendering the mandate irrevocable, but such prohibitions will not affect the validity of the contract entered into. Normal remedies for non-performance apply.

57. In SWEDEN the parties can agree to insert a clause stipulating that the principal is not allowed to conclude the prospective contract.

IV.D.–3:302: Subcontracting

(1) The agent may subcontract the performance of the obligations under the mandate contract in whole or in part without the principal's consent, unless personal performance is required by the contract.

(2) Any subcontractor so engaged by the agent must be of adequate competence.

(3) In accordance with III.–2:106 (Performance entrusted to another) the agent remains responsible for performance.

COMMENTS

General idea

In principle, the agent may entrust the performance of the agent's obligations under the mandate contract to a third party. This Article particularises the rule in III.–2:107 (Performance by a third person), which makes performance by a third party possible unless the contract requires personal performance. When a third party is involved in the performance of the contract, the party that entrusts the performance to this third party is still responsible for the performance under III.–2:106 (Performance entrusted to another). The rules of the present Article do not change this; they merely add an obligation for the agent - to select adequately the subcontractors involved in the performance of the service. The Article is in conformity with the corresponding provisions in the Book on Service Contracts, IV.C.–2:104 (Subcontractors, tools and materials) paragraphs (1) and (2).

NOTES

I. Subcontracting allowed but agent liable for performance by subcontractor

1. In AUSTRIA an agent cannot, except with the express or implied assent of the principal, delegate the authority, and the principal will not be bound by the act or contract of a sub-agent whose appointment is not thus sanctioned (CC § 1010; Ccom § 384 (Straube (-*Griss*), HGB I[3], § 384, no. 4; *Schütz*, § 407 nos. 27-31); Ccom § 407 (*Strasser*, § 1009 no. 8 and § 1010 ABGB; Straube (-*Griss*), HGB I[3], § 384, no. 4; *Schütz*, § 407 no. 28; *Krejci*, 306f)). The normal effect of delegation is that the sub-agent is responsible to the agent; there is no privity of contract between a principal and sub-agent merely because delegation has been authorised. The agent remains liable to the principal (for non-performance and compensation) for the sub-agent's breaches of duty when the sub-agent is appointed without the principal's knowledge (*Strasser*, § 1010 nos. 4, 5; Koziol/Welser, 364). The agent remains liable to the principal for *culpa in eligendo* (for a poor choice of a sub-agent when the sub-agent is appointed with the principal's knowledge (*Strasser*, § 1010 no. 4; *Apathy*, § 1010 no. 5)). The sub-agent has no direct claim towards the principal for payment of the price.
2. In BELGIUM for the majority of the authors, subcontracting is permitted if the agency contract is silent on the issue, unless the contract is *intuitu personae* to a high degree (*Wéry*, Le mandat, 182-185). According to CC art. 1994(1), in the legal relation between the parties to the original contract for representation (i.e. the original principal and the original agent), a distinction is made depending on whether subcontracting is permitted or forbidden. The permission to subcontract can be express or implied

(*Foriers and Glansdorff*, Contrats spéciaux, 612-613; Foriers, 476 and 478; *Van der Perre and Lejeune*, Droit commercial I, no. 117). If subcontracting is permitted, the original agent obtained authority to subcontract and can therefore choose between personal performance or a performance by another person. If the choice is to subcontract, the agent concludes a new contract for representation with the sub-agent to act in the name and on behalf of the original principal. The original agent does not guarantee the good performance by the sub-agent towards the original principal, unless in case of *culpa in eligendo* (choice of a clearly incapable or insolvent sub-agent). If subcontracting is forbidden, the original agent has no authority to subcontract. The original agent exceeds the limits of the authority by concluding a new contract for representation and remains liable for the sub-agent's acts. According to CC art. 1994(2), the original principal has in any case a direct claim towards the sub-agent. If subcontracting is permitted, this direct claim is based on the effect of representation. The original agent has granted authority to the sub-agent to act in the name and on behalf of the original principal; not only does the original principal have a direct claim towards the sub-agent, but also the other way around (*Claeys*, Samenhangende overeenkomsten en aansprakelijkheid, 281; *de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 415; Foriers, 476; Laurent, 494). But there is no direct action in the technical meaning; the rules on non-invocability of defences, typical for a direct action, therefore do not apply (Foriers, 63). If subcontracting is forbidden, the authority to represent the original principal fails. The original agent has exceeded the limits of the authority by concluding a new contract for representation with the sub-agent. Therefore only a legal relation between both the agents is effected (Foriers, 478). The direct claim of the original principal cannot be based any longer on the effect of representation, but must originate from other rules of the general contract law. Some authors try to explain the direct claim by stating that the sub-agent, by accepting the subcontracting, has become a party to the original contract for representation by unilateral action of the will (Supreme Court 17 Sep 1993, Arr. Cass. 1993, 705, Pas. 1993, I, 700, RW 1993-94, 752, RHA. 1994, 23, note and TBH 1994, 533, note C. DIERYCK; Dirix, 56; *Foriers and Glansdorff*, Contrats spéciaux, 618). For other authors, the sub-agent is liable by accepting the subcontracting without checking the authority to subcontract of the original agent. The direct claim sanctions the prohibition of subcontracting (Dekkers , 720). This analysis leads to the conclusion that only the original principal has a direct claim against the sub-agent, but not the other way round (Foriers, 478).

3. In BULGARIA as a general rule, the mandate contract is considered to be *intuitu personae* (*Goleva*, Obligazionno pravo2, 238; *Vassilev, L.*, Obligazionno pravo, 24; Supreme Court, Judgment no. 942, 7 Apr 1978, Civil Case 2668/1977, I) and the agent has to personally perform the contractual obligations (LOA art. 283(1)). Nevertheless, subcontracting is allowed when: (a) it has been permitted by the principal; or (b) it is necessary to protect the principal's interests and without it the principal would incur damage (LOA art. 283(2)). Having appointed a subcontractor, the agent is obliged to immediately communicate this to the principal (LOA art. 283(3)). If subcontracting is allowed, the agent will only be liable for *culpa in eligendo*, namely for the appointment of an unskilled and an incompetent person. If subcontracting is not allowed, the agent will be liable for actions of the subcontractor in the same manner as for the agent's own actions (LOA art. 283(4); *Vassilev, L.*, Obligazionno pravo, 25). As to direct claims of the principal towards the subcontractor and vice versa, legal doctrine considers that these are only possible if the agent acted in the name of and on behalf of the principal when subcontracting (Mevorah/Lidji/Farhi, Komentar III, 134-143).

4. The main rule in DANISH law is that a contract according to which the agent has agreed to represent a principal is *personal*. In certain sectors, e.g. representation by lawyers or real estate agents, practical reasons may validly legitimate that an employee or a staff member of the firm to which the designated agent belongs, takes over the representation. However, the parties can validly stipulate that the agent is not allowed to appoint another agent. An exclusivity clause of this character will be respected in practice and in court. It follows that subcontracting normally will presuppose that the parties in the contract of representation have agreed upon this as a possibility. If subcontracting is allowed by the contract, but the contract is silent on whether the original agent will remain liable, the original agent will still be liable with respect to the non-performance of the obligations under the contract for representation. Unless otherwise agreed upon in the contract, the sub-agent will not have a direct claim towards the principal for payment of (a part of) the price, because the principal does not have a contractual relationship with the sub-agent.

5. In ENGLAND a contract of agency is a personal contract since the personal characteristics of a given agent are important, the general position under the fiduciary obligations is that the agent must not delegate by appointing a sub-agent unless there is express or implied authority to do so. The agent is entitled to delegate where (a) delegation is the usual practice in the trade the agent is involved in (*Solley v Wood* ((1852) 16 Beav 370); (b) the act delegated is purely ministerial such as digging a grave or ringing a bell (*St Margaret's Rochester Burial Board v Thompson* ((1871) LR 6 CP)) or giving a notice to quit (*Allam & Co. Ltd. v. Europa Poster Services Ltd.* [1968] 1 All ER 826); (c) the act delegated is strictly necessary (*De Bussche v. Alt* (1878) 8 Ch. D 286); (d) delegation is necessary due to unforeseen circumstances; (e) at the time of the creation of the agency agreement the principal was aware of the agent's intentions to delegate and the principal did not object. Even when delegation is authorised, the main agent remains liable to the principal for the acts of the sub-agent (*Mackersys v Ramsays, Bonars & Co* ((1843) 9 C&F 818)). To know whether the sub-agent can have a direct claim for commission against the principal raises the question of whether there is privity arising between the principal and the sub-agent. This depends on the precise facts of a given case. In general, just because the agent has authority to delegate, that does not mean that privity is created between the principal and the sub-agent. The rule nowadays is that privity between the sub-agent and the principal requires precise proof (*Calico Printers' Association v Barclays Bank* ((1931) 145 LT 51); *de Bussche v Alt* ((1878) 8 Ch D 286), where privity was created between the sub-agent and the principal, is now regarded as an exception; see also *Prentis Donegan & Partners Ltd v. Leeds & Leeds Co Inc* ([1998] 2 Lloyd's Rep 326 per Rix J at 334). Because there is only privity between the sub-agent and the principal in an exceptional case, none of the normal consequences of an agency relationship apply: the principal is not liable for remuneration to the sub-agent (*Schmaling v Tomlinson* ((1815) 6 Taunt 147)). Similarly, the principal cannot recover money from the sub-agent (*Calico Printers Association v Barclays Bank Ltd* ((1931) 145 LT 51, CA)). Even if there is no direct agency relationship between the sub-agent and the principal, the sub-agent may still owe a duty of care to the principal in tort under the general principles of negligence (*Henderson v Merrett Syndicates Ltd* ([1994] 3 WLR 761)). Moreover, the sub-agent still owes fiduciary duties to the principal and will be liable to the principal if a secret profit is made from the position (*Powell & Thomas v Evans Jones & Co*[1905] 1 KB 11).

6. In ESTONIA as a default rule, it is presumed that the agent is obliged to perform the obligations in person; nevertheless, the agent is entitled to use the assistance of third parties in performing (LOA § 622). If the parties ruled out the possibility to

subcontract, the agent will be liable for the acts of the sub-agent and the sub-agent does not have a direct contractual claim towards the principal. In the (rare) cases where the agent is not under a duty of care but guarantees a result, a different rule applies: it is presumed that a contractor is not required to perform the obligations arising from the contract in person (LOA § 635(3)).

7. In FINLAND in general, the agent is not allowed to have the contract performed by another party. Subcontracting is possible only when the mandate is not personal (the parties have agreed on subcontracting, or the circumstances show that the agent is entitled to subcontract). The original agent remains liable in contract towards the principal. The direct claim is generally not applicable.

8. The FRENCH CC art. 1994 allows the agent to freely appoint any other person to accomplish all or part of the mandate. No permission is required from the principal, unless the agency agreement was clearly entered into taking account of the personal nature of the agent. The agent is not, however, relieved from obligations by having recourse to a third party: where there is no authority to subcontract the obligations, the agent remains fully liable for the acts of the sub-agent. On the other hand, where the agent has been authorised to subcontract the obligations, the Civil Code will only render the agent liable towards the principle for a possible inappropriate choice of sub-agent, where the sub-agent is 'unable to perform or insolvent'. However, case law has extended the liability of the agent in the latter case towards the principal by considering that the agent, having been authorised to subcontract, remains subject to an obligation of supervision as regards the sub-agent for the proper performance of the mandate (Civ. 1ère 29 May 1980, Bull. civ. I, no. 163). The sub-agent may act directly against the principal for payment of remuneration or repayment of expenses (Civ. 1ère 27 Dec 1960, Grands arrêts de la jurisprudence civile, 11ème éd. Dalloz , no. 268), notwithstanding the fact that CC art. 1994 only provides for a direct right of action of the principal against the sub-agent. This action is possible in all cases, whether the substitution of a sub-agent has been authorised or not.

9. If the contract is a 'mandate contract' under GERMAN law (i.e. gratuitous), 'when in doubt' the agent is not allowed to subcontract (CC § 664(1)), because mandates are often based on a relationship of personal trust between the parties. Under a remunerated contract according to CC § 675(1), it is generally admissible for the agent to have the representation performed through a third person. It has, however, been held that sub-contracting under remunerated contracts is not possible in situations in which a relationship of personal trust exists (RGZ 78, 310, no. 313; BGH, *Neue Juristische Wochenschrift* 1993, 1705.). The original agent remains liable in contract (CC § 664(1)). The sub-agent does not have a direct claim towards the principal for payment of the price, but only a claim towards the agent as the contracting partner.

10. In GREECE unless the contract provides otherwise, an agent is not entitled to substitute another in the performance of the mandate, except if forced by the circumstances or if a substitution is usual (CC art. 715). If an agent has proceeded with the substitution without being entitled to do so, the agent is responsible for faults of the substitute (CC art. 716(1)). If the agent has appointed a substitute while being entitled to do so, the agent is liable only for the faulty choice of the substitute and for the instructions given to the substitute (CC art. 716(2); Supreme Court decision no. 25/1995, EEN 1995, 158). In both cases of substitution, either permitted or not, the principal may directly bring actions against the third party which the agent has against the third party (CC art. 716(3)). From that rule it is concluded that the relationship between the principal and the agent is treated as an assignment of claims, in which the principal holds the position of the assignee and the agent the position of the assignor

(Kapodistrias, Art. 715-716 GREEK CC nr. 24). Due to the gratuitous character of mandate the question if the sub-agent has a direct claim towards the principal for payment of the price does not arise. However that question does arise in case of obligatory remunerated mandate between the lawyer and the principal. In such case it is accepted that the sub-agent lawyer has a direct claim towards the principal for remuneration only if such a substitution is permitted or is usual according to CC art. 715 (Supreme Court decision no. 296/1983, EEN 1983, 803; CA Patra decision no. 235/1993, Achaiki Nomologia 1994, 110).

11. According to HUNGARIAN CC art. 475(1), '[t]he agent shall proceed in person; he shall, however, be entitled to employ other persons if the principal has agreed thereto or if it is implied by the nature of the agency. An agent shall be liable for the persons he employs as if he himself had carried out the matter entrusted to him'. Moreover, CC art. 475(2)-(4) establish that '[t]he agent shall also be entitled to employ other persons if it is required in order to protect the principal from sustaining injury. In such cases, the agent shall not be liable for the persons employed if he is able to prove that he has acted in a manner that can generally be expected in the particular situation in respect of choosing, instructing, and supervising such persons. If the agent has not been authorised to employ other persons, he shall be liable for damages that would not have occurred without the employment of such person. If a person employed by the agent has been selected by the principal, the agent shall not be responsible for this person if he is able to prove that he has acted in a manner that can generally be expected in the particular situation with regard to instructing and supervising the person'. Because of the lack of contract between the sub-agent and the principal, the sub-agent does not have a direct claim towards the principal for payment of the price.

12. In IRELAND one of the agent's three duties which arise, at common law, is the duty to perform personally. Since an agent is often chosen for his or her personal qualities the general rule is that the agent must perform personally and cannot delegate performance (*delegatus non potest delegare*) unless delegation is authorised by the principal. In practice, delegation is quite common. For example, in relation to a company where the authority to act on behalf of the company is vested in the board of directors, the board usually delegates authority to individual directors, who in turn delegate to senior executives, who in turn delegate to junior executives and other employees. Accordingly, a long chain of delegation and authorisation can link the individual acts of a junior employee (such as a shop-assistant) back to the board of directors, thereby legally binding the company. Where delegation is authorised and the agent (A) employs a sub-agent (S), the agency agreement must be construed in order to determine whether the relationship of principal and agent is created between the principal (P) and S. The key is the agent's authority: is A authorised to create privity of contract between P and S? Just because the agent has authority to delegate to S, does not mean that there is authority to create privity of contract between P and S. Generally, where delegation is authorised S will be the agent of A, so that there will be no legal relationship between P and S; A will remain liable to P for performance of the duties *(Lockwood v Abbey* [1845] 14 Sim 437; *Calico Printers' Association v Barclays Bank Ltd* [1931] 145 LT 51). However, A can be authorised to create privity between P and S, as in *De Bussche v Alt* [1878] 8 Ch D 286, where P engaged A to sell a ship in India, China or Japan. A had no offices in Japan and so obtained P's consent to the appointment of a sub-agent, S, who had a presence in Japan. The Court of Appeal found that the delegation was authorised and that A was given express authority to create privity between P and S. In such circumstances, S has a direct contract link with P, and therefore could pursue P directly for the price, for instance.

13. In ITALY, in general terms, the agent may have the contract performed by another party, provided that certain circumstances are met. The CC art. 1717(1) provides that '[an] agent who, in the performance of the mandate, substitutes others to himself without authorisation or when not necessary for the nature of the task to be performed, is responsible for the activities of such substitute'. It is therefore not forbidden for the agent to grant authority to another (sub)agent to execute the original contract of representation. However, this is only possible if the following conditions are met: firstly, the submandate must not prejudice the principal's interests; secondly, this possibility must not be excluded by the original contract of mandate. In consideration of the specific circumstances of the case and having regard to the specific kind of activity to execute, in some cases it could also be considered necessary for the agent to appoint a subcontractor. See Supreme Court 05 Aug 2004, no. 15000, Mass. Foro italiano, 2004, 4070, no. 4; T. Roma, 20-03-2000, Giur. it., 2001, 104. In spite of the sub-mandate, the original agent remains liable for the execution of the contract vis-à-vis the principal. This means that the original agent is liable for breach of contract if the subcontractor fails to perform the mandate as a consequence of defective instructions given by the original agent (CC art. 1717(3)). As a rule, the sub-agent does not have a direct claim towards the principal for payment of the price. Indeed, the principal may not be considered in breach of contract by paying only the original agent. See Supreme Court 02 Oct 1991, no. 10263, Mass. Foro italiano, 1991, 4070, no. 11.

14. In the NETHERLANDS mandate contracts may include the agent's *personal* service performance (CC art. 7:404). However, the agent may be allowed to delegate (parts of) the performance of the mandate contract to a sub-agent. Such delegation is allowed if the mandate allows the agent to have others perform the mandate contract under the agent's responsibility (CC art. 7:404). In this situation, the legal act that is the subject of the mandate contract is not performed in name of the agent, nor in name of the principal. If the contracting parties have not made an explicit agreement on this delegation in the mandate contract, the mandate's nature is a decisive factor. Furthermore, reasonableness and fairness are important as well (*Van der Grinten*, Lastgeving, no. 15). The agent who delegates (parts of) the mandate to a sub-agent remains fully liable for the acts of this sub-agent (CC art. 6:76) if the sub-agent fails in complying with the mandate (*Van der Grinten*, Lastgeving, no. 16).

15. In POLAND under the contract of mandate the agent may appoint a subagent only if (a) the mandate contract allows the subagent to be appointed, (b) it is a custom to appoint a subagent for the task given by the principal and (c) the agent is forced by specific circumstances to use a subagent (CC art. 738).

16. In SCOTLAND in accordance with the maxim *delegatus non potest delegare*, delegation is, as a general rule, excluded (*Robertson v Beatson, McLeod & Co Ltd* 1908 SC 921; *Knox & Robb v Scottish Garden Suburb Co Ltd* 1913 SC 8721 (distinguishing *Black v Cornelius* (1879) 6 R 581)). This is an application of the general rule of contract law that where a contracting party has been chosen for a particular skill, the choice of that party rules out performance by another party. The general rule is subject to many exceptions (*Gow*, Mercantile and Industrial Law of Scotland, 530) and two of the institutional writers suggested that, where the task was one which did not involve any particular skill, delegation was possible (*Stair*, Institutions I^{10}, 12, 7; Erskine, III,3,34). Delegation is permitted where this is consistent with practice in a particular trade (Erskine, III,3,34; *Bell*, Commentaries I^{7}, 517). Whether the original agent remains liable depends upon whether, in actual fact, sub-contracting has occurred or whether, instead, the new agent has merely been substituted for the old one. The latter is a form of novation, and would require the

consent of the principal. If this consent has been properly obtained, the obligations of the original agent would not survive. If the consent of the principal was not obtained, then only sub-contracting would be possible. In this case, the obligations of the original agent would survive. Where novation rather than sub-contracting has occurred, the principal will have expressly agreed to be liable for the new agent's fees (Robertson v Beatson, McLeod & Co Ltd 1908 SC 921 at 928, per Lord McLaren). Where, by contrast, the principal has not consented to the delegation of the work, the original agent will be absolutely liable for the fees of the new agent (Erskine, III,3,34).

17. In SLOVAKIA the general rules for direct representation provide that the agent may grant to another person authority to act in the agent's place in the name of the principal (a) if this is expressly authorised by the terms of the power of attorney or (b) if the agent is a legal entity. The principal is directly bound by acts in law undertaken by the substitute agent. See CC § 33(a). In case of a contract for procurement of a thing, the agent has the right to procure the thing through another person in order to achieve the result (CC). In commercial relations, the agent is bound to arrange an agreed matter personally only if it is stipulated in the mandate contract (Ccom § 568). Under a commission agent contract, unless the contract provides otherwise, the agent may make use of other persons to perform the obligations arising from the contract with the principal if the agent is unable to perform these obligations personally. The agent remains liable for their performance.

18. The SPANISH CC art. 1721 allows the agent to freely appoint any other person to accomplish all or part of the mandate, unless the contract excludes this. Despite the silence of the law, there is probably another restriction where the agency agreement was clearly entered into taking account of the personal condition of the agent. The agent is not, however, relieved from obligations by virtue of sub-contracting to the third party: where there is no authority to subcontract the obligations, the agent remains fully liable for the acts of the sub-agent. On the other hand, where the agent has been authorised to subcontract the obligations, the Civil Code will only render the agent also liable towards the principal for a possible inappropriate choice of sub-agent, where the sub-agent is 'unable to perform or is insolvent'. This note does not deal with the question of a transfer of the agent's whole contractual position to another agent, with the consent of the principal, which is a different question.

19. According to SWEDISH law a person representing a client in court is not allowed to subcontract this task without specific consent from the client. The same is considered to apply regarding other commissions based on trust. However, it is to some extent considered allowed to subcontract a minor and limited part of the task without prior explicit consent from the client. In particular, this applies when the agent lacks expert knowledge or if measures are to be performed at a different locality. The agent possesses a greater freedom to perform the task in the case of company representation. If the agent has subcontracted the task or a part of it the agent still remains liable in contract for damage caused by the sub-agent's negligence.

II. Nomination by principal of specific person designated to perform the contract

20. In AUSTRIA the principal can require the agent to have the contract for mandate carried out by a specific person, if the parties agree on this. It is just a matter of construction of the contract. The principal has to make this wish known to the agent before the conclusion of the contract.

21. In BELGIUM the original principal can give permission to subcontract, with indication of the sub-agent's name.

22. In BULGARIA the principal is allowed not only to permit subcontracting, but also to specify third persons who may be appointed by the agent as subcontractors (Mevorah/Lidji/Farhi, Komentar III, 135). Under the mandate contract between a law firm (the agent) and a client (the principal), the latter is entitled to ask for appointment of a particular advocate to perform the assigned legal task (BAA, art. 77(2)).

23. In DENMARK, if the parties contractually agree upon having the representation carried out by a specific person, this agreement is a valid and for the parties binding disposition. In principle, the wish to have a particular person as an agent may be communicated by means of a direction. The principal, however, must be prepared to renegotiate the contract for representation. If the principal's wish does not match the general policy of the agent, e.g. a company, the direction may legally be refused.

24. In ENGLAND the principal is free to choose a specific person for the carrying out of the work entrusted to the agent. The principal can do so provided that this wish is clearly indicated before the agency contract is created; it is probably not sufficient to communicate such a wish as a direction.

25. In ESTONIA a principal can require the agent to have the mandate carried out by a specific person. This is relevant where the agent (i.e. the agent as the party to the contract, forming an internal relationship) is a legal person (if the agent is a natural person, it is presumed that the agent has to perform in person). In case of a legal person, any employee or any other person acting permanently in the undertaking of that legal person can be nominated to perform the contract. If the principal wants a particular person to perform the contract, this wish must be made known to the agent before the conclusion of the contract.

26. In FINLAND the parties can agree that the mandate contract will be carried out by a specific person. Such agreement may also be based on mutual consensus. When this is not agreed (in advance or during the mandate period), the agent in general is not obliged to follow the principal's directions concerning the specific person who will do the work.

27. In FRANCE the principal can require that the mandate be performed by a specific person and the principal may validly prohibit expressly the agent from subcontracting or, on the contrary, appoint the sub-agent personally (CC art. 1994). In principle, such a possibility would be expressed on conclusion of the agency agreement, but it is probably possible that an agreement could be reached on this at a later stage during performance of the mandate, if clearly expressed and where this decision does not involve any difficulty or additional cost for the agent.

28. In GERMANY, if the agent is a legal person, then all the principal can demand is that *this* agent performs the contract and not a person outside this legal person (GERMAN CC § 664). The wish to have the representation carried out by a specific person from 'inside' the agent does not pertain to the question *who* performs, but *how* the performance has to take place. In this respect, the agent is free to decide, unless: (a) the principal has demanded handling of the matter by one specific person when concluding the contract, as in this case the obligation under the contract (CC § 662) is so defined and thus binding on the agent; (b) the principal subsequently issues a direction (CC § 665), which the agent has to follow – if the direction is unacceptable, the agent can always terminate the relationship (CC § 671(1)).

29. In GREECE the principal can require that the contract for mandate will be carried out by a specific person. It is irrelevant in this respect whether the principal has expressed such a desire before the conclusion of the contract or by means of a direction.

30. In HUNGARY there is no obstacle to a request of the principal that the contract for representation will be carried out by a specific person. Agency is imbued with *intuitus*

personae, as is expressed in CC art. 475(1): 'The agent shall proceed in person; he shall, however, be entitled to employ other persons if the principal has agreed thereto or if it is implied by the nature of the agency'. At the moment of the conclusion of the contract for representation, the wish that the contract be carried out by a specific person can be relevant in respect of the content of the agent's consent. CC art. 205(2) establishes that '[i]t is fundamental to the validity of a contract that an agreement is reached by the parties concerning all essential issues as well as those deemed essential by either of the parties'. After the conclusion of the contract, the principal may require that the contract for representation be carried out by a specific person, but the consent of the agent is needed; a simple instruction of the principal is not enough to change the content of the contract in this respect. Usually, such problems do not occur as the principal can easily terminate the relationship at any time.

31. In IRELAND the principal can nominate a specific person to perform the contract.

32. In ITALY the principal can indicate a specific person to perform the task in substitution for the agent (or exclude this possibility outright). If the principal has not made such a wish known to the agent before the conclusion of the contract it may be communicated by means of a direction thereafter, provided that this is not in contrast with the activity already performed in good faith by the original agent. If, on the contrary, the principal authorises the substitution without specifying the person to carry out the contract of representation, the agent is entitled to choose a person and is liable towards the principal in case of fraudulent or negligent choice (*culpa in eligendo*). See CC art. 1710.

33. In the NETHERLANDS the principal can require that the mandate will be performed by a specific person. If so, this person is obliged to personally perform the activities under the mandate contract. See CC art. 7:404.

34. The agent is obliged to follow the principal's guidelines to both how and by whom the mandate is to be carried out (POLISH CC art. 736).

35. In SCOTLAND if the principal wanted the contract for representation to be carried out by one specific person, then it would be possible for a term to that effect to be inserted into the contract for representation. It would then become one which would fall within the general class of contracts affected by *delectus personae*. In other words, the choice of that one person because of a particular skill would rule out performance by another party. Given the importance of this requirement, it is likely that it would require to be inserted into the contract as a specific contractual term and that it could not be communicated by a direction only. This latter view is also supported by the fact that the exceptions to the general prohibition against delegation appear to be larger than the rule itself.

36. In SPAIN the principal can require the agent to have the mandate carried out by a specific person, if the parties agree on this. It is just a matter of construction of the contract, and it deserves no special mention.

III. Subcontracting if specific person was designated to perform the mandate contract

37. In AUSTRIA if the authority to represent has been granted to the agent with consideration to a specific person, this agent cannot, except with the express consent of the principal, delegate the authority (CC § 1010; Ccom §§ 384 and 407).

38. In BELGIUM if the authority to represent has been granted to the agent with consideration to a specific person, this would seem to be a case of implied prohibition to subcontract. Note that subcontracting is not involved if the contract for

representation is executed by a 'préposé' of the agent or by an organ of a corporation-agent. The 'préposé' and the organ identify with the agent (*Wéry*, Le mandat, 179).

39. In BULGARIA if a specific person is designated by the principal to perform the mandate contract, the agent is not allowed to subcontract the performance to another person. If the agent nevertheless does so, the agent commits a breach of contract and may be held liable for damage caused. The agent is not liable for actions of the subcontractor designated by the principal, unless the latter has become notoriously incapable to perform after the designation (Mevorah/Lidji/Farhi, Komentar III, 136).

40. In DENMARK if the contract calls for a specific person to represent the principal, this specific person is not allowed to let another person represent the principal.

41. In ENGLAND the general rule is that an agent may not delegate authority unless there is express or implied authority to do so (*De Bussche v Alt* (1878) 8 Ch D 286). Such authority would be difficult to imply if a specific person had been designated to perform the obligations under the contract.

42. In ESTONIA the service provider (the agent), though obliged to perform in person, or the specific person required to perform the contract by the principal, is entitled to use the assistance of third parties in performing the contract (LOA § 622). Therefore, only specific duties and not the mandate as a whole can be transferred.

43. In FINLAND, if the principal and the agent have agreed that all possible actions, whether technical in nature or not, are undertaken by a specific person, the agent is not entitled to pass any of the tasks on to another person.

44. In FRANCE if the agency agreement has been concluded based on personal qualities of the agent or if it contains an express appointment of a sub-agent by the principal, the agent must comply with the wishes of the principal. The agent would be contractually liable to the principal if the agent subcontracted all or part of the mandate to a third party not approved by the principal (improper performance of the mandate). In any event, the agent would be liable to the principal for any mismanagement by the sub-agent (vicarious liability, CC art. 1994(1)).

45. In GERMANY if the contract called for performance by the specific person *only* (a matter of interpretation of the contract), the agent or that specific person may not have the contract for representation carried out by another person under the responsibility of the specific person.

46. In GREECE the agent or the specific person is entitled to have the contract for mandate carried out by another person under the responsibility of the specific person. In such a case the specific person is responsible for a fault of the person employed (CC art. 334; Georgiadis/Stathopoulos/Karasis, Art. 715-716 GREEK CC nr. 1; Supreme Court decision no. 25/1995, EEN 1995, 158).

47. In HUNGARY if the authority to represent has been granted to the agent with consideration to a specific person, the agent or that specific person is not entitled to have the contract for representation carried out by another person under the responsibility of the specific person, because CC art. 475(1) provides that '[t]he agent shall proceed in person; he shall, however, be entitled to employ other persons if the principal has agreed thereto or if it is implied by the nature of the agency. An agent shall be liable for the persons he employs as if he himself had carried out the matter entrusted to him'. CC art. 475(3) establishes that '[i]f the agent has not been authorised to employ other persons, he shall be liable for damages that would not have occurred without the employment of such person'. However, according to CC art. 475(2), '[t]he agent shall also be entitled to employ other persons if it is required in order to protect the principal from sustaining injury. In such cases, the agent shall not

be liable for the persons employed if he is able to prove that he has acted in a manner that can generally be expected in the particular situation in respect of choosing, instructing, and supervising such persons'.

48. In IRELAND in general, an agent may not delegate authority unless the agent has express or implied authority to do so (*De Bussche v Alt* [1878] 8 Ch D 286).

49. In ITALY if the authority to represent has been granted to the agent with consideration to a specific person, this usually excludes the possibility for the agent or that specific person to have the contract for representation carried out by another person. However, this also depends on the kind of mandate. If it is reasonable, for instance, that a certain activity be performed by the specific agent with the aid of auxiliaries, this would not be considered to be contrary to the choice of the principal.

50 In the NETHERLANDS according to CC art. 7:404(2), contracting parties may agree that a person other than the agent will perform the mandate activities, for instance in case of illness of the agent.

51. There are no specific POLISH CC provisions on this subject. However, if the contract is carried out by a different person than previously agreed, the agent may be liable for breach of contract.

52. In SCOTLAND if the contract provided that the work was to be carried out by a specific individual, then if the work was carried out by another individual, this would be a breach of the contract which might result in an award of damages for the principal. Much would, however, depend on the interpretation of the contract. A provision that the work was to be carried out by X would not normally be construed as precluding X from being assisted by assistants of a kind normally used in the trade or profession concerned.

53. In SPAIN, this is a question of construction of the will of the principal. When the "delegation" only amounts to the appointment of auxiliaries, no problem arises.

Section 4: Obligation to inform principal

IV.D.–3:401: Information about progress of performance

During the performance of the obligations under the mandate contract the agent must in so far as is reasonable under the circumstances inform the principal of the existence of, and the progress in, the negotiations or other steps leading to the possible conclusion or facilitation of the prospective contract.

COMMENTS

A. General idea

During performance of the obligations under the mandate contract the agent must keep the principal informed about the performance. This Article opts to impose on the agent – who is aware of all relevant information and who may be in need of sufficiently detailed instructions – the obligation to actively keep the principal informed rather than requiring the principal – who may not know what to ask or what information the agent would be in need of – to ask for information.

B. Volunteer information in so far as is reasonable under the circumstances

An obligation for the agent to keep the principal informed all the time would be unreasonably burdensome for the agent. It is simply not feasible to keep the principal informed about every detail of the agent's actions. Moreover, an obligation which would be too far-reaching could even be counterproductive as the principal might be inclined to intervene with the details of the agent's services and thus slow down the actual fulfilment of the mandate (typically the conclusion of the prospective contract) and the emergence of the agent's right to payment. Accordingly, in the text of the present Article, the obligation of the agent is limited by the requirement of 'reasonableness'. The agent is under an obligation to volunteer the information which would allow the principal to be in a better position to give directions as to the performance of the mandate. This would enhance the chances that the performance (and, in a case of representation) the content of the prospective contract) is in accordance with the true needs of the principal.

NOTES

1. In AUSTRIA due to the duty of care the agent has to report the existence of, progress in or absence of negotiations to keep the principal constantly informed; otherwise the agent is liable for damages (Strasser, § 1012 Rz 18; SZ 27/211; Straube (-*Griss*), HGB I[3], § 384, no. 6; Schütz, § 408 Rz 24). It is not relevant whether the agent acted in the principal's or in the agent's own name, if the contractual relationship between principal and indirect agent is that of a mandate in terms of CC § 1002.
2. The duty to account (BELGIAN CC art. 1993) obliges the agent to inform the principal about the results of the performance (*Wéry*, Le mandat, 162-163). This duty applies also to the indirect agent. Account should be given as soon as possible (*Wéry*, Le mandat, 163).

3. In BULGARIA the agent is obliged to notify the principal about the performance of the mandate (LOA art. 284(1)). It seems that the information has to be supplied not only upon a special request from the principal, but also voluntarily. According to legal writings, the agent is under the obligation to supply the principal with relevant information about the progress of the actions intended to conclude the prospective contract and about the conclusion itself (*Goleva*, Obligazionno pravo2, 238).

4. In DENMARK although there does not seem to be a rule stating that the agent is obliged to give notice to the principal of the conclusion of the prospective contract, it is considered a normal and natural obligation for the agent to inform the principal as soon as the conclusion of the contract has taken place. In this respect it is irrelevant whether or not the agent is entitled or required to act in the name of the principal or in the agent's own name. If the contract for representation orders the agent to inform the principal of the conclusion of the contract, the agent must fulfil this obligation within the agreed time. If no exact time for this information is agreed upon in the contract for representation the customary rule will probably be that the information must be given within a reasonable (short) time after the conclusion of the contract. In case the information is given too late the principal may, in principle, cancel the contract for representation. However, it will not be considered good practice on the part of the principal to cancel the contract for representation before having informed the agent that time for giving the information in question has run out.

5. In ENGLAND following the agent's obligation to use due skill and care when fulfilling the obligations towards the principal, the agent is also under an obligation to keep the principal informed of all relevant developments. An agent, for instance, must inform the principal of any contracts entered into on the principal's behalf (*Johnson v Kearley* [1908] 2 KB 514). On failing to inform the principal with reasonable dispatch, the agent will be guilty of a breach and may be liable for damages to the principal.

6. The ESTONIAN LOA § 624(1) provides that the service provider (the agent) is obliged to inform the principal of all relevant (important) facts relating to performance of the obligations under the contract, above all of facts which may cause the principal to modify the instructions, and, at the request of the principal, must provide the principal with information on the performance.

7. In FINLAND the agent is required to inform the principal of the existence of, progress in or absence of, negotiations for the conclusion of the prospective contract (Ccom § 18:1), irrespective of whether the agent is required to act in the agent's own name or in the name the principal. The intensiveness of such a duty of disclosure is, however, substantially dependent on circumstances.

8. In FRANCE the agent and the commission agent are under a general obligation to provide accounts, which, according to legal academic writing, includes all information concerning the performance or failure of the mandate. No time limit is imposed by law to provide such information. A failure to inform the principal could be considered as a breach of contract by the agent (see Civ. 1ère 11 Jul 1983, Bull. civ. I, no. 202 ; Com. 5 Jul 1962, Bull. civ. III, no. 344).

9. The GERMAN CC § 666 requires the agent to inform the principal about the state of affairs (but only upon request of the principal) and, more generally, to give the 'necessary information'. There is no general rule when the obligation must be fulfilled; it depends on the circumstances (Sprau, § 666 para. 2). If the conditions of CC § 280(1) are fulfilled (notably fault by the agent), the principal has a claim for damages if the obligation to inform is breached (Sprau, § 666 para. 1).

10. In the case of a gratuitous mandate contract under GREEK law, an agent is bound to furnish information to the principal about the conduct of the entrusted affairs (CC art.

718), which includes all necessary information about the conclusion of the prospective contract or of the fulfilment of the task entrusted to the agent. The time within which this must be done depends on each case, but it has to be as soon as possible. The consequence of not informing the principal in due time is that the principal will have a claim for damages for any loss caused by such failure (Georgiadis/Stathopoulos/Karasis, Art. 718 CC nr. 2).

11. In HUNGARY the agent is required to inform the principal of the existence of, progress in or absence of negotiations for the conclusion of the prospective contract within a reasonable time. The agent is liable for damages resulting from defective performance (see CC art. 310 and 318(1)).

12. In IRELAND the common law does not comprise detailed rules as to the agent's duties, as are outlined in the black letter rules. Instead the agent's duties are described in more general terms and illustrated by case law. An express duty to inform the principal about progress does not exist at common law, but would probably come within the agent's duty to exercise reasonable skill and care, or the wider fiduciary duties owed to the principal.

13. According to the ITALIAN CC art. 1712(1), 'the agent shall without delay give the principal notice that the mandate has been performed'. The ratio of this rule consists in the possibility for the principal to evaluate the activity of the agent (see Supreme Court 9 Feb 2004, no. 2428, Mass. Foro. Italiano, 2004, 4070, no.1). The agent has to inform the principal of the conclusion of the contract 'without delay'. The law does not provide for a specific term within which the agent is required to inform the principal about the conclusion of the prospective contract. Accordingly the meaning of 'without delay' depends on the particular circumstances of the case and on the usages, if any, in the specific business sector. See Supreme Court 25 Nov 2002, no. 16575, Mass. Foro It., 2002, 4070, no. 15; Supreme Court 18 Mar 1997, no. 2387, Contratti, 1997, 559, with comments by Zappata; Supreme Court 06 Feb 1982, no. 693, Mass. Foro. Italiano, 1982, 4070, no. 9; and Supreme Court 18 Jun 1982, no. 3732, Arch. civ., 1982, 981. If not informed in due time of the conclusion of the contract the principal may claim damages against the agent, if any loss is caused by the delay.

14. In the NETHERLANDS according to the CC art. 7:403(1), the agent is bound to inform the principal about the progress of the agent's activities regarding the mandate contract. Furthermore, the agent is bound to immediately notify the principal of the completion of the contract if the principal is unaware thereof. The scope of this duty to inform the principal depends on the specific agreements in the individual mandate contract. If these specific agreements are lacking, the mandate's nature and the circumstances of the case are important. According to literature, providing the principal with brief information will generally be sufficient (*Van der Grinten*, Lastgeving, no. 14).

15. The agent is obliged to inform the principal about progress under the POLISH CC art. 740; the principal should be provided with all the "necessary" information.

16. In SCOTLAND the question whether the duty to act with skill and care would extend as far as obliging the agent to keep the principal informed of the progress of performance is not clear. Certainly, it is unlikely that the agent would be bound to keep the principal constantly informed. It is suggested that the duty of skill and care may bind the agent to provide the principal with updates on the progress of performance at reasonable intervals. But much would depend on usages in particular lines of activity.

17. In SLOVAKIA in civil relations, where the principal so requests, the agent is obliged to present all information regarding progress in the performance of the mandate (CC §

727). In commercial relations, the agent is required to inform the principal of all circumstances which may result in a change of the agent's management of the matter and the instructions (Ccom § 567(2)). The commission agent must inform the principal of the negotiations in the manner stipulated in the contract or as requested by the principal (Ccom § 579(2)).

18. In SPANISH law, giving or providing an account to the principal is an explicit legal duty of the agent, during and after carrying out the affair (CC art. 1720). In the Spanish language, this expression also encompass the giving of accurate information (*León*, Comentario, p. 1550).

19. In SWEDEN the agent is required to inform the principal of the existence and progress of negotiations for the conclusion of the prospective contract upon the principal's request. If the principal suffers any loss due to the agent's untimely information and this is due to the agent's negligence the principal has a right to damages for non-performance. See HB 18:1, KommL § 7, HaL § 5 and *Bengtsson*, Särskilda avtalstyper I^2, 164.

IV.D.–3:402: Accounting to the principal

(1) The agent must without undue delay inform the principal of the completion of the mandated task.

(2) The agent must give an account to the principal:

(a) of the manner in which the obligations under the mandate contract have been performed; and

(b) of money spent or received or expenses incurred by the agent in performing those obligations.

(3) Paragraph (2) applies with appropriate modifications if the mandate relationship is terminated in accordance with Chapters 6 and 7 and the obligations under the mandate contract have not been fully performed.

COMMENTS

A. General idea

The agent is required to inform the principal of the completion of the task which the agent was instructed and authorised to perform – typically the conclusion of the prospective contract and to give account of the manner in which contractual obligations have been performed. This information is meant, first of all, to enable the principal to assess whether or not the obligations were performed properly (i.e. in accordance with the mandate, in the interests of the principal and with the due standard of care). On the other hand, the agent also has an interest in performing the obligations under this Article, as their performance is a prerequisite for payment of the price (IV.D.–2:102 (Price) paragraphs (2) and (3)) or reimbursement of expenses (IV.D.–2:103 (Expenses incurred by agent) paragraph (3)). Where the mandated task is not to conclude a contract but to find a person (e.g. a potential buyer or seller or tenant or employee or employer) with whom the principal may wish to conclude a contract it is even more important that the principal should be informed promptly when one is found so that the principal will be able to take the matter forward.

B. Without undue delay

The agent must inform the principal without undue delay of the completion of the mandated task (e.g. the conclusion of the prospective contract). This is important especially in cases where the agent is not awarded exclusivity and the principal could also conclude the prospective contract personally.

Illustration

A principal has commissioned an agent with the sale of her pied-à-terre for a price of €200,000. She has informed the agent of the fact that she is aware of the interest of neighbours in the purchase of the house and that she may decide to sell them the house herself. The agent, who realises that the house is in popular demand and that it will be necessary to work fast in order to obtain a price for services rendered, succeeds in selling the house after two days of work only. If the agent does not report this success without undue delay, there is a substantial risk that the principal will sell the house herself as well. In that case, the house would be sold twice, leading to liability for the principal for non-performance of obligations under either the first or the second sales contract.

C. Giving account if mandate relationship is terminated before tasks have been completed

The obligation to give account on how the obligations were performed is particularly relevant if the agent has not been successful in completing the tasks – for example, concluding the prospective contract or finding a potential buyer; in such cases the agent may not volunteer information as to the manner in which the obligations were performed because the agent may not be going to receive payment in any case. The termination (for any reason) of the mandate relationship in cases where the agent has not been successful in completing the instructed tasks (such as finding a potential buyer or concluding the prospective contract) does not exclude the obligation to give account to the principal on the manner in which the obligations under the mandate contract have been performed and the money spent or received or expenses incurred by the agent in performing those obligations.

D. Giving account during mandate relationship

It is certainly not in the interest of either party that the agent is required to inform the principal of every step taken in the performance of the obligations under the mandate contract. Such a general obligation would, in fact, make the performance unreasonably burdensome for the agent without any substantial gain for the principal. It may, however, be different in the situation where the parties had anticipated that the prospective contract would be concluded, for instance when negotiations appeared to be leading to the conclusion of such a prospective contract. Under these circumstances, it may follow from IV.D.–3:102 (Obligation to act in interests of principal) and IV.D.–3:103 (Obligation of skill and care) that the agent is required to inform the principal promptly about the collapse of these negotiations. Similarly, it may follow from these Articles that the agent is required to inform the principal of the (lack of) progress in the performance of the obligations under the mandate contract when the principal inquires about this progress and such a request for information could be considered reasonable.

NOTES

I. Obligation to inform about completion of mandated task

1. In AUSTRIA the agent has to inform the principal about the conclusion of the prospective contract immediately or be liable for damages (Strasser, § 1012 Rz 18; Ccom § 384; Apathy, § 1009 Rz 4). The agent has the duty to provide to the principal the records of transactions effected as agent. This duty subsists notwithstanding termination of the authority. Commission agents and forwarders have to report the finished performance of the contract immediately (Ccom § 384 (Straube (-*Griss*), HGB I[3], § 384, no. 6; Schütz, § 408 Rz 24)).
2. In BELGIUM when an important event ('un fait *majeur*') occurs, the agent must take the initiative to inform the principal. In the absence of a fait majeur, the principal may ask for information at any time, without an obligation for the agent to inform the principal spontaneously (*Wéry*, Le mandat , 160-162). This duty is part of the general duty to give account and also exists for the indirect agent.
3. In BULGARIA the agent is under an obligation to communicate to the principal the progress of the performance of the mandate, including the conclusion of the prospective contract (LOA art. 284(1). There is no general rule regulating time limits

for this information duty. Commercial agents are required to immediately inform the principal about every concluded prospective contract (Ccom art. 33(1)).

4. In DENMARK although there does not seem to be a rule stating that the agent is obliged to give notice to the principal of the conclusion of the prospective contract, it is considered a normal and natural obligation for the agent to inform the principal as soon as the conclusion of the contract has taken place.

5. In ENGLAND even an agent who has no power to enter into a contract with the principal, must nevertheless keep the principal informed of all relevant information. For instance, an estate agent must notify the principal of all the offers received up until a contract is exchanged with a third party (*Keppel v Wheeler* [1927] 1 KB 577). The contract may stipulate precise times at which the agent must pass relevant information to the principal. If the contract does not expressly stipulate such times, the agent must do so as and when relevant with reasonable dispatch. Failing to do so, the agent will be in breach and may therefore be liable for damages.

6. The ESTONIAN LOA § 624(1) provides that the service provider (the agent) is obliged to inform the principal of all important facts relating to performance of the contract, above all of facts which may cause the principal to modify his instructions, and, at the request of the principal, shall provide the principal with information on performance of the contract. That would include information on the progress of negotiations. As a general rule, LOA § 82(3) provides that '[i]f the time for the performance of an obligation is not set and is not determinable from the nature of the obligation, the obligor shall perform the obligation within a reasonable period of time (…) after an obligation has arisen (…), taking into particular account the place, manner and nature of the performance of the obligation.' The consequences of not informing the principal in due time would be the same as with any other breach by the service provider: the principal could choose between the general remedies for non-performance of an obligation provided for in LOA § 101(1).

7. In FINLAND the agent is required to inform the principal within a reasonable time about the conclusion of the prospective contract and more generally about the fulfilment of the tasks (Ccom § 18:1). The consequences of not doing so depend on the harm caused to the principal. In general, the principal is entitled to compensation for loss suffered due to negligent omission on the part of the agent.

8. In FRANCE the agent and the commission agent are under a general obligation to provide accounts, which, according to French legal academic writing, includes all information concerning the performance or failure of the mandate. No time limit is imposed by law to provide such information. A failure to inform the principal could be considered as a breach of contract by the agent (see Civ. 1ère 11 Jul 1983, Bull. civ. I, no. 202 ; Com. 5 Jul 1962, Bull. civ. III, no. 344).

9. The GERMAN CC § 666 requires the agent to inform the principal about the state of affairs (but only upon request of the principal) and, more generally, to give the 'necessary information'. There is no general rule when the obligation must be fulfilled; it depends on the circumstances (Sprau, § 666 para. 2). If the conditions of CC § 280(1) are fulfilled (notably fault by the agent), the principal has a claim for damages if the obligation to inform is breached (Sprau, § 666 para. 1).

10. In GREECE in the case of a gratuitous mandate contract an agent is bound to furnish information to the principal about the entrusted affairs (CC art. 718), which includes all necessary information about the conclusion of the prospective contract or of the fulfilment of the task entrusted to the agent (including the existence or absence of negotiations). Within how much time the agent is required to inform the principal depends on each case, but it has to be as soon as possible. The consequence of not

timeously informing the principal is that a claim for damages may be available (Georgiadis/Stathopoulos/Karasis, Art. 718 GREEK CC nr. 2).

11. According to the HUNGARIAN CC art. 477(3), '[t]he agent shall notify the principal as soon as he fulfils his agency'. The agent is required to inform the principal of the conclusion of the prospective contract and more generally of the fulfilment of his task within a reasonable time.

12. For IRELAND see Notes under IV.D.–3:401 (Information about progress of performance).

13. In ITALY the agent is required to inform the principal about the existence of progress in or absence of negotiations. This obligation derives from the general duty to inform the principal about every circumstance which is relevant to the conclusion of the prospective contract. Since the duty to inform is not specifically regulated by the law but derives from the general duty of good faith, no specific term is set for the fulfilment of the information obligation. The timeliness of the information is evaluated on the basis of the specific circumstances and the principle of good faith. The principal may claim damages from the agent if any loss is caused by the delay.

14. For the NETHERLANDS see Notes under IV.D.–3:401 (Information about progress of performance).

15. In POLAND the agent is obliged to provide the principal with a report and account after the contract has been concluded. There are no specific rules as to when those documents should be provided or whether the agent is liable for failure to provide them or to inform the principal about the conclusion of the contract immediately.

16. In SCOTLAND it is likely that a failure to inform the principal of the conclusion of a contract within a reasonable time would be a breach of the agent's duties of skill and care which would result in the agent's liability to the principal in damages.

17. In SLOVAKIA in civil relations, the agent is required to inform the principal of the conclusion of the prospective contract, as it is part of the obligation to give a report on the progress of the performance. In commercial relations, informing the principal is a condition for entitlement to the price (Mandate). After execution of a certain affair, the commission agent must provide the principal with a report and an accounting (Ccom § 584(1)).

18. In SPAIN the agent has a duty to give account to the principal on how the contract has been performed (CC art. 1720(2)). There is no specific rule relating to the conclusion of the prospective contract, probably because this is a self evident application drawn from the main obligation of the agent.

19. In SWEDEN the agent is required to inform the principal of the conclusion of the prospective contract as well as more generally of the fulfilment of the mandated task "within a reasonable time" or "without delay" (HB 18:1; KommL § 7; HaL § 5).

II. Duty to give account of performance of obligations under mandate contract

20. In AUSTRIA the agent is required to give account to the principal of the manner in which the agent has performed the obligations under the contract for mandate; otherwise the principal could not be aware of possible breaches of contract (Apathy, § 1012 Rz 5).

21. In BELGIUM a first aspect of the agent's duty to give account (CC art. 1993) is the duty to give account of the way the mandate has been performed (*Wéry*, Le mandat, 160-162). This rule also applies to a commission contract (Supreme Court 21 Jun 1968, Arr. Cass. 1968, 1285, Pas. 1968, 1212 and RHA 1972, 309; *de Page and*

Dekkers, Traité élémentaire de droit civil belge V[2], 371; Foriers, 68; Pand. b., v° Commission (contrat de), no. 166; RPDB, v° Commission, no. 151; *Samoy*, Middellijke vertegenwoordiging, 186-188; *Van der Perre and Lejeune*, Droit commercial I, no. 128-129; Van Ryn & Heenen, 24), a prête nom-contract (*Samoy*, Middellijke vertegenwoordiging, 95) and a mandatary acting in the agent's own name (*de Page and Dekkers*, Traité élémentaire de droit civil belge V[2], 436; *Paulus und Boes*, Lastgeving, 134; *Samoy*, Middellijke vertegenwoordiging, 306; *Tilleman*, Lastgeving, 277-278; *Van der Perre and Lejeune*, Droit commercial I, no. 166; *Wéry*, Le mandat, 152 and 259).

22. Giving account of the performance is one of the main obligations of the agent in BULGARIAN law. (LOA art. 284(2)). It may consist of: (a) calculation of expenses for performance of the mandate contract; (b) transfer from the agent to the principal of all legal effects of the prospective contract and other juridical acts; and (c) delivery to the principal of all goods and documents, received by the agent in the course of the contractual performance. The content of the obligation differs depending on the type of representation. In the case of direct representation, the agent has acted in the name of and on behalf of the principal and all legal effects of the concluded contracts and other performed juridical acts occur directly in the legal sphere of the principal. In this case, giving account only means giving an account of expenses and delivery of goods and documents. When the agent has acted in the agent's own name and on behalf of the principal, the agent is under the obligation to transfer all rights and obligations under the concluded prospective contracts to the principal (*Goleva*, Obligazionno pravo2, 238; *Vassilev, L.*, Obligazionno pravo, 26; *Horozov*, SP 1995/3, 37, 38-43).

23. In DENMARK the agent must exercise due diligence to inform the principal about the manner in which the obligations under the contract for representation have been performed.

24. In ENGLAND as part of the obligation to exercise due skill and care when performing the agency duties, the agent must keep the principal informed of all the material facts. The agent must do so promptly so that the principal can react accordingly: *Proudfoot v Montefiore* (1867) LR 2 QB 511.

25. The ESTONIAN LOA § 624(2) provides that upon performance of the services, the service provider (the agent) is obliged to give account to the principal with an overview of the expenditure and revenue relating to performance of the services together with the documentation, which is the basis for the account.

26. In FINLAND the agent is generally required to give account of the manner in which the obligations have been performed (Ccom § 18:1), irrespective of whether the agent has acted in the agent's own name or in the name the principal.

27. In FRANCE the agent must render an account to the principal in connection with the performance of the agency duties (CC art. 1993). This obligation may only be avoided where the parties expressly or impliedly decide to do so (e.g. in a family context). The agent must keep the principal informed of the performance of the mandate, the difficulties encountered, the state of advancement of any research and the outcome, whether positive or negative. The commission agent, who acts in the agent's own name and for the account of the principal, is, in principle, subject to the same obligation to account (customary rule, except in certain cases; see Collart Dutilleul & Delebecque, no. 664).

28. In GERMANY the agent is required to give account to the principal of the manner in which the obligations have been performed (CC § 666).

29. In GREECE in the case of a gratuitous mandate contract an agent is bound to furnish information to the principal about the entrusted affairs and to render account to the

principal upon termination of the relationship (CC art. 718). The lawyer is also obliged to keep the client informed about the progress of the case being handled (CFI Pireos decision no. 607/1985, ArchN 1985, 328).

30. According to the HUNGARIAN CC art. 477(1), '[t]he agent shall inform his principal of his activities and the state of affairs upon request or, if necessary, even without a request, particularly if employment of another person has become necessary or if the instructions need to be changed due to the occurrence of new circumstances'. Moreover, '[a]t the time the contract is extinguished, the agent shall be obliged to settle his accounts and give the principal everything that has been acquired for the purpose of fulfilling his agency or as a result of doing so, except for what he has lawfully used in the course of his agency' (CC art. 477(2)). The obligation of the agent to give account to the principal also covers the manner in which the obligations under the contract for representation have been performed. The agent is liable for damages resulting from defective performance (see CC art. 310 and CC 318(1)).

31. For IRELAND see Notes under IV.D.–3:401 (Information about progress of performance).

32. In ITALY the agent is required to give account to the principal of the manner in which the obligations under the contract for representation have been performed (CC art. 1713).

33. In the NETHERLANDS according to CC art. 7:403(1), the agent is obliges to inform the principal about the progress of the agent's activities regarding the mandate contract (*Van der Grinten*, Lastgeving, no. 14).

34. In POLAND the agent is obliged to give an account after carrying out the mandate contract or after the contact is terminated by either side (CC art. 740). The remuneration will be due after the account has been given.

35. In SCOTTISH law, the agent's duty of good faith has been expressed as follows. 'An agent is bound to maintain the most entire good faith, and make the fullest disclosure of all facts and circumstances concerning the principal's business.' (Principles of the Law of Scotland[10], no. 222). This duty is probably sufficiently wide to oblige the agent to provide the principal with an account of the manner in which the obligations under the contract have been performed. What is clear is that the agent is bound to provide the principal with a record of all transactions entered into by the agent on the principal's behalf (*Gow*, Mercantile and Industrial Law of Scotland, 531).

36. In SLOVAKIA in civil relations, the agent is obliged to give a report. In commercial relations, giving account of the way the agent has performed is a condition for entitlement to the price. As for the commission agent contract, after execution of a certain affair the agent must provide the principal with a report and the related accounting of the results of the arrangements made. In the report, the agent must name the person with whom the contract was concluded.

37. In SPANISH law, accounting to the principal is an explicit legal duty of the agent, during and after carrying out the affair (CC art. 1720) The accounting should cover the outcome and the economic balance of the service made (CC arts. 1720 and Ccom 263).

38. In SWEDEN the agent is required to give account of the manner in which the obligations under the mandate contract have been performed. This is applicable regardless of whether the agent has acted in the agent's own name or in the name of the principal (HB 18:1, KommL § 7).

III. Duty to give account of money spent or received in performance of obligations under mandate contract

36. In AUSTRIA the agent is required to give account of any money spent or of any money received in the performance of the obligations under the mandate contract (CC § 1012, Ccom § 384(2); Ccom § 408 (Straube (-*Griss*), HGB I[3], § 384, no. 7; Schütz, § 408 Rz 13); HVertrG § 5).

37. Under BELGIAN law the second aspect of the agent's duty to account (CC art. 1993) is the duty to submit accounts showing all incomings and outgoings (*Wéry*, Le mandat, 163-171).

38. In BULGARIA the duty to give account also entails giving account of money spent or received in the course of performance of the obligations under the mandate contract (Mevorah/Lidji/Farhi, Komentar III, 126-133).

39. In DENMARK whether the agent is required to give account for money spent during the course of the performance of the task depends on the wording of the contract for representation. When the contract is silent about these matters, it is a common (customary) rule that the agent will periodically produce a statement of account on the amount of money spent.

40. In ENGLAND the agent is under a general duty to account to the principal for all property or money received from the principal or from a third party for the principal's account and any money spent while performing the agency obligations. This is another fiduciary duty and is therefore applied strictly by the courts. The agent must keep accurate accounts of all the transactions entered into on behalf of the principal during the agency relationship. It is especially important that the accounts keep the agent's money and the principal's totally separate. The agent must be able to produce such accounts at all times. In the case of *Gray v Haig* ((1854) 20 Beav 219), Romilly MR held that when the agent fails to keep an accurate account of all transactions, the court may feel 'compelled (…) to presume everything unfavourable to him' (Ibid, per Romilly MR at 226). The agent must also be able to produce all records and documents relating to the affairs of the principal and such records must be available even after termination of the relationship (*Yasuda Fire & marine Insurance Co of Europe Ltd v Orion marine Insurance Underwriting Agency Ltd* [1995] QB 174). On termination, the agent is required to surrender to the principal all books, accounts, documents etc given by the principal or that the agent prepared during the agency relationship. This obligation is subject to the lien that an agent may have over such documents in order to secure payment from the principal. This general fiduciary duty to account to the principal is a personal one and arises independently of any contract between the principal and the agent. The contract between the agent and the principal may modify the extent of the duty but clear words are needed. Fiduciary duties apply to paid and gratuitous agents alike but the standard of care owed by a gratuitous agent may be lower than that of a paid agent (*Chaudry v Prabhakar* [1989] 1 WLR 29).

41. The ESTONIAN LOA § 624(2) provides that upon performance of the services, the service provider (the agent) is obliged to give account to the principal with an overview of the expenditure and revenue relating to performance of the services together with the documentation, which is the basis for the account.

42. In FINLAND the agent is generally required to give account of the money spent or received in the performance of the obligations under the mandate contract (Ccom § 18:1).

43. In FRANCE the agent is required to render an account for all sums received and expended in the performance of the mandate. No specific form is required by statute or

by case law, but the agent must in all events record all sums held 'even though he may have received sums which are not due to the principal' (CC art. 1993). The agent should comply with accounting rules, particularly if a professional agent. Rendering accounts also means returning to the principal all sums which are due to the principal and any sums that the principal remitted to the agent to perform the mandate, as well as sums received from any third party (Civ. 1ère 8 Jul 1975, Bull. civ. I, no. 226). The agent would commit the crime of fraud (*abus* de *confiance*) if the agent applied such sums or other property to the agent's own benefit. CC art. 1996 provides also that the agent is liable to pay interest on any sums used for the agent's own purposes and the sums which are due to be remitted to the principal as of the date where the agent has received formal notice to do so.

44. Under the GERMAN CC § 666 the agent must give account for all sums received and expended in the performance of the mandate. The form of the accounting is governed by CC §. The obligation to give account also exists where there is no claim for reimbursement (BGHZ 109, 260, no. 266).

45. In GREECE in the case of a gratuitous mandate contract the agent is obliged to give account of any money spent or of any money received during the performance of the mandate (CC art. 718). In case of a failure of the agent to render account to the principal, a claim for damages due to such a failure can be established or the principal can refuse to reimburse the agent's expenses (Georgiadis/Stathopoulos/Karasis, Art. 719 GREEK CC nr. 2). An agent must return to the principal everything the agent had received for or has acquired from the performance of the mandate (CC art. 719). If an agent has used money belonging to the principal for the agent's own benefit, the agent must pay interest on that money as from the date the use began (CC art. 720).

46. According to the HUNGARIAN CC art. 479(2) '[a]t the time the contract is extinguished, the agent shall be obliged to settle his accounts and give the principal everything that has been acquired for the purpose of fulfilling his agency or as a result of doing so, except for what he has lawfully used in the course of his agency'. Furthermore, '[u]pon termination of contract the principal shall exonerate the agent from obligations assumed against third persons on the basis of the agency and shall reimburse his necessary and useful expenses' (CC art. 479(3)).

47. In IRELAND a duty to account for monies is part of an agent's fiduciary duties. In this regard, an agent must account to the principal for all property (including monies) of the principal received in the course of the agency. The agent must therefore keep the agent's own monies and property separate from those of the principal, unless mixing is authorised. As part of this duty, an agent must keep complete records of transactions entered on the principal's behalf and make them available for inspection to the principal *(Pearse v Green* [1819] 1 Jac & W 135). A court may make adverse inferences where the agent fails in this regard (*Gray v Haig* [1855] 20 Beav 219). On termination of the agency, the agent must deliver up to the principal all books, accounts and other documents provided by the principal or created in the course of the agency unless the agent is entitled to exercise a lien over them (*Gibbon v Pease* [1905] 1 KB 810). Moreover, because the duty to account arises from the fiduciary nature of the relationship, independently of any contract, it survives the termination of the agency, unless expressly or impliedly excluded by the contract (*Yasuda Fire and Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174).

48. In ITALY the agent is required to give account of the money spent or received in the performance of the contract for representation (CC arts. 1713 and 1714). As a rule, it makes no difference whether or not the contract for representation is for a price and

whether or not the agent claims reimbursement of expenses. Of course, if the agent claims reimbursement of expenses it will be necessary to prove the expenses.

49. In the NETHERLANDS according to CC art. 7:403(2), the agent is held to account for the money spent or received during the performance of the obligations under the mandate contract. According to literature, the principal may make ask for a specification of costs and delivery of documentary evidence, which will enable the revenues and expenditures to be evaluated (*Van der Grinten*, Lastgeving, no. 14).

50. In SCOTLAND although the agent is under a duty to give account of any money spent or received in the performance of the obligations under the contract, it is possible for this accounting to be verbal only where this is consistent with the contract (*Russell v Cleland* (1885) 23 SLR 211).

51. In SLOVAKIA, in civil relations, the agent is bound to present an account (a statement of costs and expenditure) to the principal; this obligation generally corresponds with the obligation of the principal to reimburse the agent's expenses, but the parties can agree otherwise (CC § 727). In commercial relations, it is relevant whether the agent claims reimbursement of expenses; if the expenses are included in the price, it is not necessary to give an account. On the other hand, if the agent obtained payment in advance for substantial expenses, the agent will probably give an account of spending. Under the commission agent contract, after execution of a certain affair, the agent must provide the principal with a report and the related accounting of the results of the arrangements made; this is a condition for entitlement to remuneration (commission) and reimbursement of expenses.

52. Under SPANISH law the agent must give account for all sums received and expended in the performance of the mandate; see STS April 1982, RJA 1982/1932 and Ccom art. 263.

53. In SWEDEN after performance of the obligations under the mandate contract the agent is required to give account of money spent and of money received during the performance (HB 18:1; KommL § 7; HaL § 5; *Hellner*, 223; *Bengtsson*, Särskilda avtalstyper I^2, 164).

IV.D.–3:403: Communication of identity of third party

(1) An agent who concludes the prospective contract with a third party must communicate the name and address of the third party to the principal on the principal's demand.

(2) In the case of a mandate for indirect representation paragraph (1) applies only if the agent has become insolvent.

COMMENTS

A. General idea

The present Article obliges an agent who has concluded a contract with a third party for and on behalf of the principal, to communicate the name and address of the third party to the principal, on the principal's demand, in a situation where the principal is not aware of that name but needs to know the name in order to exercise rights against the third party. This is one of those obligations which is intended to survive the termination of the mandate relationship as it may often fall to be performed some time after the prospective contract has been concluded. The effect of paragraph (2) is that this obligation is very largely confined to agents acting under mandates for direct representation.

Illustration 1
A representative buys a car from a third party in the name and on behalf of the principal. As the car is defective, the principal wishes to exercise her remedies under the sales contract. The representative is required to inform the principal of the name and address of the seller of the car.

B. Limited obligation to communicate name and address in case of indirect representation

In the case of indirect representation – a situation where the agent has acted on behalf of the principal but in such a way that the agent is the party to the juridical act done – no contractual ties exist between the principal and the third party.

Illustration 2
An agent has bought a car from a third party in the agent's own name but on behalf of the principal. As the car is defective, the principal wishes to exercise her remedies under the sale contract. As she does not have a sale contract with the seller of the car but only a mandate contract with the agent, she will have to exercise her remedies against the agent. It is up to the agent to subsequently sue the seller of the defective car on the basis of the sale contract.

However, if the agent becomes insolvent the principal has an option to take over the agent's rights under the contract with the third party. See III.–5:401 (Principal's option to take over rights in case of agent's insolvency). In this situation the principal has the right to obtain the third party's name and address.

NOTES

I. Obligation to inform about identity of third party in case of direct representation

1. In BELGIUM an obligation to inform the principal about the identity of the third party would seem to be regarded as a logical consequence of the agent's duty of loyalty and duty to give account to the principal (CC art. 1993).
2. In BULGARIA in view of the fact that the agent is obliged to inform the principal about the performance of the mandate, the former appears to be under an obligation to also communicate personal data of the third party with whom the prospective contract has been concluded.
3. In ENGLAND the agent must act for the best interest of the principal and must pass on to the principal any material information, i.e. information which is important to the principal. This would no doubt include the identity of the third party.
4. In ESTONIA the law does not prescribe a specific obligation to inform the principal about the identity of a third party. Such an obligation can however, at least in cases of a direct representation, be derived from the general obligation of the agent to inform the principal of all important facts related to the performance of the obligations under the mandate contract (LOA § 624(1)).
5. There are no specific rules or cases on this point in FRENCH law. The duty to give account to the principal (CC art. 1993) possibly includes the duty to inform the principal about the identity of the third party, as the principal must be informed about all important points of the contract with the third party.
6. The general information duty in the GERMAN CC § 666 requires the agent to inform the principal about the name and address of the party with whom the prospective contract has been concluded (*Seiler*, in: Münchener Kommentar zum BGB[4], § 666 no. 5).
7. In IRELAND the common law does not comprise detailed rules as to the agent's duties, as are outlined in the black letter rules. Nevertheless, an agent's common law duty to obey instructions would probably include a duty to communicate the identity of any third party on the principal's demand.
8. In the NETHERLANDS the general rule that applies here is CC art. 7:403 on the general duty to inform the principal. According to CC art. 7:420(3) this general rule does not imply that the agent is obliged to inform the principal about the identity of the third party, however. Only in the situations mentioned in CC art. 7:420(1) and (2), does the agent have to inform the principal about the identity of the third party – for instance, if the agent, who has concluded a contract with a third party in the agent's own name, does not fulfil the agent's obligations towards the principal. See Castermans/Krans, Tekst & Commentaar BW[7], no. 3091-91.
9. A duty to inform about the identity of the third party is not regulated in the POLISH CC provisions on mandate. The parties may decide to include such a duty in the contract; otherwise the agent is not obliged to do so.
10. While there is no specific duty in SCOTTISH law corresponding to the rule in the Article, its content is obviously of practical significance and is embraced within the agent's fiduciary or good faith duty to disclose to the principal all facts and circumstances concerning the latter's business (*Bell*, Principles of the Law of Scotland[10], § 222).

11. In SLOVAKIA after execution of a certain affair, the commission agent (indirect representation) must provide the principal with a report in which the agent names the person with whom the contract was concluded.

12. SPANISH law is silent as to this subject matter, due probably to the self evident nature of the rule.

13. In SWEDEN in order for the principal to be able to exercise rights under the prospective contract with the third party, the agent has a duty to inform about the identity of the third party.

II. No obligation to inform about identity of third party in case of indirect representation

14. In BELGIUM a commission-agent has, as a rule, a right of secrecy as to the third party's identity towards the principal (RPDB, v° Commission, no. 133; *Samoy*, Middellijke vertegenwoordiging, 188-190; *Van Ryn & Heenen*, 21). This right of secrecy however is not absolute. According to jurisdiction, in certain exceptional cases, the right of secrecy can be overruled by the principal's legitimate interest to know the third party's identity (CA Gent 18 May 1876, Pas. 1876, II, 372; Comm. C. Brussels 1 Feb 1911, TBH 1911, 201; RPDB, v° Commission, no. 134; *Samoy*, Middellijke vertegenwoordiging, 189-190). The bankruptcy of the commission-agent is one of these exceptional cases.

15. In BULGARIA both direct and indirect representatives appear to be obliged to communicate personal data of the third person to the principal.

16. There is no such thing as indirect representation in ENGLISH law. The closest notion is that of undisclosed agency. However, even in such a case, the agent must still act for the best interests of the principal. Therefore there would still be an obligation on the agent to pass the identity of the third party to the principal if requested.

17. In ESTONIA in the case of indirect representation the obligation to inform about the identity of a third party can be derived from the general obligation of the agent to inform the principal of all important facts related to the performance of the mandate agreement (LOA § 624(1)). Such duty requires the agent to disclose information if the principal has a justified interest in the disclosure. In a case of indirect representation such interest could exist only if knowledge of the identity of a third party would be necessary in order to exercise the rights acquired by the agent under the contract with the third party and against such party for the benefit of the principal, e.g. in case of the commission agent (s. LOA § 700(1) 3) which provides that the commission agent is liable for the performance of the contract with the third party if the agent does not disclose the identity of the third party to the principal).

18. In FRANCE despite the lack of any specific rule on this point, there is no duty to inform about the identity of the third party in case of indirect representation ('commission contract') in practice.

19. According to the GERMAN Ccom § 384(2) and (3), a duty to inform the principal about the name and address of the contracting partner also arises in cases of indirect representation, namely for commission agents (BGH, WM 1984, 931).

20. In IRELAND where the agency is undisclosed (the closest situation to indirect representation) the same duties apply and hence an agent's common law duty to obey instructions would probably include a duty to communicate the identity of any third party on the principal's demand.

21. For the NETHERLANDS see Note 8. There is no specific rule on indirect representation.

22. There is no rule to this effect in SCOTTISH law.

23. There is no rule as to this issue in SPANISH law. Whether the agent should or should not give notice of the identity of the third party will depend on the nature of the relationship.

24. In SWEDEN in case of civil commission the agent has a duty to inform about the identity of the third party. In case of trade commission the agent has no duty to inform about the identity of the third party unless the principal is to take over claims against the third party due to e.g. delay of the third party or bankruptcy of the agent (KommL § 7).

CHAPTER 4: DIRECTIONS AND CHANGES

Section 1: Directions

IV.D.–4:101: Directions given by principal

(1) The principal is entitled to give directions to the agent.

(2) The agent must follow directions by the principal.

(3) The agent must warn the principal if the direction:

(a) has the effect that the performance of the obligations under the mandate contract would become significantly more expensive or take significantly more time than agreed upon in the mandate contract; or

(b) is inconsistent with the purpose of the mandate contract or may otherwise be detrimental to the interests of the principal.

(4) Unless the principal revokes the direction without undue delay after having been so warned by the agent, the direction is to be regarded as a change of the mandate contract under IV.D.–4:201 (Changes of the mandate contract).

COMMENTS

A. General idea

This Article indicates that the principal is the 'master of the contract': the agent is required to follow directions given by the principal after the contract is concluded, even if the agent disagrees with them (paragraph (2)). However, where the agent thinks that the direction is detrimental to the interests of the principal, the agent must warn the principal accordingly (paragraph (3)). Paragraph (4) requires the agent to wait to see whether the principal, after having been warned that the given direction may be detrimental, wants to revoke it. If the principal nevertheless holds the agent to the direction, there is a change in the mandate contract – a matter regulated in IV.D.–4:201 (Changes of the mandate contract).

B. Principal's right to give subsequent directions

The mandate of the agent consists of the authorisation, initial instructions and subsequent directions of the principal, i.e. the decisions of the principal given during the mandate relationship as to the performance of the obligations under the mandate contract or the contents of the prospective contract (see IV.D.–1:102 (Definitions)). The principal is therefore entitled to give subsequent directions (paragraph (1).

The right of the principal to provide directions voluntarily is to be differentiated from the situation in which the principal has an obligation to give directions under IV.D.–2:101 (Obligation to co-operate) paragraph (2)(b). This obligation arises when the contract so provides, or when the principal is requested by the agent to give a direction (IV.D.–4:102 (Request for a direction).

C. Agent's obligation to follow subsequent directions

The agent is obliged to act in accordance with the mandate granted (IV.D.–3:101 (Obligation to act in accordance with mandate)). The mandate of the agent consists of the initial authorisation and instructions and any subsequent directions. Accordingly, the agent is obliged to follow the subsequent directions of the principal.

D. Obligation to warn in case of unreasonable direction

Paragraph (3) has the effect of imposing on the agent an obligation to warn the principal if a direction is unreasonable. "Unreasonable" is here a shorthand way of referring to directions perceived by the agent to be contrary to the interests of the principal – in particular those which have the effect that the performance of the agent's obligations would become significantly more expensive or take significantly more time than agreed upon in the mandate contract or those which are inconsistent with the purpose of the mandate contract or may otherwise be detrimental to the interests of the principal (paragraph (3)(a) and (b) respectively).

Illustration

If an agent is first authorised to sell a house owned by the principal for a price of €400,000 or more, but the principal later changes the limit to €450,000, which is above the market price, it will take the agent more time to sell the house and there is a serious risk that it will not be possible to conclude the prospective contract.

E. Upholding an unreasonable direction leads to change in the contract

If the principal, on being warned that a direction is unreasonable, does not revoke it within a reasonable time, then it is to be considered a change to the mandate contract. The consequences of such a change are regulated in IV.D.–4:201 (Changes of the mandate contract).

F. Warning excludes liability of the agent

Whether the direction in fact makes it more difficult to achieve the result envisaged by the principal or not is not the agent's concern, as long as the agent warns the principal of this possible consequence of a direction perceived not to be in the interest of the principal. Obviously, an agent who has duly warned the principal of the consequences of following the direction cannot be held liable for non-performance if the end result does not meet the principal's expectations: that merely shows that the agent was correct in the warning. It would be different if the agent, on the basis of the obligation to exercise due skill and care, could be required in the given circumstances to terminate the mandate relationship.

NOTES

I. Principal's right to give direction

1. In BULGARIA there is no explicit rule granting the principal the right to give directions to the agent. Nevertheless, in legal doctrine such a right is derived from the counter obligation of the agent to act in accordance with the principal's instructions. These instructions may be given either at the time of conclusion of the mandate contract or subsequently (*Goleva*, Obligazionno pravo2, 237; *Vassilev, L.*,

Obligazionno pravo, 24). Subsequent directions may neither significantly alter the given mandate nor make its performance more burdensome for the agent (Mevorah/Lidji/Farhi, Komentar III, 119).

2. In ENGLAND since the agent acts not on the agent's own behalf but on behalf of the principal, the latter will give instructions to the agent. Such instructions must be reasonable.

3. In FRANCE the principal has the right to give directions during the course of performance of the contract, according to French legal academic writing.

4. The principal's right to give directions to the agent is expressly laid down in the GERMAN CC § 665.

5. In IRELAND there is no such express right at common law but in effect this right exists because an agent must obey the principal's lawful instructions.

6. In the NETHERLANDS according to CC art. 7:402(1), the agent is bound to obey timely and well considered directions regarding the performance of the contractual obligations. This stipulation seems to imply that the principal is allowed to give the agent directions.

7. In SCOTTISH law the focus lies on the agent's duty to follow the principal's instructions, on which see below, rather than on the principal's right to provide instructions. It goes without saying that the principal has a right to provide instructions.

8. In SLOVAKIA the principal's right to give directions is in all related contract types implied in the agent's duty to follow the principal's directions.

9. In SWEDEN the principal has a right as well as a duty to give directions in order for the agent to be able to perform in accordance with the mandate contract.

II. Agent's obligation to follow direction

10. In AUSTRIA the agent has to comply with reasonable instructions (CC § 1009; Ccom § 385(1); Ccom § 408 (Strasser, § 1009 Rz 14; Straube (-*Griss*), HGB I^3, § 385, no. 1; Schütz, § 408 Rz 7.)). The agent must inform the principal if the agent does not or will not follow the direction (OGH in EvBl 1959/261; Strasser, § 1009 Rz 16; ZAS 1985, 170), especially when the agent, by following the direction, may not achieve the result envisaged by the principal (OGH in EvBl 1959/261; Strasser, § 1009 Rz 16; ZAS 1985, 170). The agent has to wait for the principal's decision and comply with the new instructions or terminate the mandate relationship (Apathy, § 1009 Rz 4; Straube (-*Griss*), HGB I^3, § 385, no. 1). In case of imminent danger the agent may disregard the directions (Apathy, § 1009 Rz 13; Straube (-*Griss*), HGB I^3, § 385, no. 2.). A professional agent's qualifications may set a limit to the principal's right to give directions, e.g. concerning the solicitor's tactics during legal proceedings (OGH in ZBl 1928/3; Strasser, § 1009 Rz 14; Apathy, § 1009 Rz 13).

11. In BELGIUM as a part of the agent's general duty to perform the mandate properly, the agent is required to follow the principal's instructions (*Wéry*, Le mandat, 144). A distinction is made between an imperative and a facultative mandate. In case of an imperative mandate, the principal has given precise instructions on the way the obligations under the contract for representation have to be performed. Imperative instructions must be followed carefully. As a rule no deviation is permitted. Only unforeseen circumstances can permit, or even oblige, the agent to deviate from the instructions (*de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 405; *Paulus und Boes*, Lastgeving, 90; *Wéry*, Le mandat, 146). A facultative mandate is silent on the way the obligations under the contract for representation have to be

performed. Such a mandate must be performed in the best interests of the principal, taking into account the nature of the act, the circumstances of the case and any applicable customs.

12. In BULGARIA as a general rule, the agent is obliged to follow the directions of the principal. However, in some cases the agent is entitled to refuse to comply with new directions and even to terminate the mandate contract, e.g. if the agent has a reasonable ground to disagree with the instructions or if they are too burdensome or even dangerous (*Goleva*, Obligazionno pravo2, 237; *Vassilev, L.*, Obligazionno pravo, 24; *Kassabova*, TP 2006, 159, 162). The agent is also allowed to refuse performance of illegal or immoral directions (Mevorah/Lidji/Farhi, Komentar III, 22).

13. In DENMARK in general, the agent must follow (legal) directions given by the principal on how to perform the obligations under the contract. This is a consequence of the agent's being 'subordinate' to the principal. An agent who does not want to follow the instruction given by the principal must immediately give the principal notice to this effect.

14. In ENGLAND the agent must always act in the principal's best interest. As a result, the agent is under a general duty to follow the instructions given by the principal. However, the agent is not obliged to follow instructions which would require the agent to act illegally (see *Cohen v Kittell* (1889) 22 QBD 680). Moreover, the agent is under a duty to warn the principal of any risks and dangers inherent in such instructions. The duty of a professional agent to obey instructions can also be limited by rules of conduct of a given profession: it may be that the agent cannot be required to perform acts which are contrary to such rules (*Hawkins v Pearse* (1903) 9 Com Cas 87). An agent who fails to follow legal instructions can be liable for damages for breach of contract (*Turpin v Bilton* (1843) 5 Man & G 455). The rule is strict and the agent will be liable for not following the instructions even if the agent thought this action was in the best interest of the principal (*Volkers v Midland Doherty Ltd* (1985) 17 DLR (4^{th}) 343). However, the rule of strict performance can be limited if an actual implied authority allows the agent some discretion. If there is such an actual implied authority, the agent may have a duty to warn the principal of any risks or dangers which are inherent in the instructions, i.e. that the principal may suffer loss if the agent follows such instructions. The agent may also have a fiduciary obligation to warn the principal (*Clark Boyce v Mouat* [1994] 1 AC 428).

15. Under the ESTONIAN LOA § 621(1) the agent is generally bound by the instructions of the principal. It will not make a difference if the agent, by following the direction, may not achieve the result envisaged by the principal. However, the principal is not allowed to give specific instructions concerning the manner or conditions of performance of the duties of the agent in the case where the agent is expected to perform duties based on specific professional skills or abilities (LOA § 621(1)). In that case, the agent is free to decide on the specifics of the performance. In all other cases the agent may deviate from the instructions of the principal only if adherence to the instructions of the principal would be likely to cause unfavourable consequences for the principal (in which case the agent must comply with the instructions only after having called the principal's attention to such consequences and if the principal fails to modify the instructions; LOA § 621(3)).

16. In FINLAND the agent is required to follow the principal's reasonable directions, but this depends on the circumstances (type of mandate etc.). In general, the agent is not required to follow directions if they are unreasonable, illegal or against good practice (e.g. if the directions are harmful for a third party). In some cases, e.g. where the principal is a consumer and in the case of lawyers, the agent is not generally entitled to

follow unreasonable directions. A lawyer is required, or at least entitled, to withdraw from the mandate relationship if the principal continuously gives unlawful or unreasonable directions (CConduct § 15). The agent should inform the principal if the agent is not going to follow the directions.

17. In FRANCE in the case of an agency contract, the agent is obliged to comply with the instructions given by the principal, whether given at the time of conclusion of the contract or subsequently. If the instructions given by the principal to the agent result in a possible failure of the performance of the mandate, the agent is nonetheless required to follow such instructions, but in the case of a professional agent, the latter will be required, in order to satisfy the duty of advice, to inform the principal about such risks. The sole limit is when the directions given by the principal are contrary to law.

18. In GERMANY the agent is required to follow directions by the principal (CC § 665) and must always inform the principal before deviating from directions, unless time does not permit this as 'danger' is ahead. The agent will only be allowed to ignore directions if it may be assumed that the principal would tolerate this step if aware of the circumstances. If the principal (after having been advised and warned) insists on a direction that the agent considers to be inappropriate (or even stupid), the agent has the choice between following it or terminating the mandate relationship. The may not impose another assessment of the situation upon the principal.

19. In the case of a mandate contract, GREEK legal theory and court practice distinguish between binding and indicative directions. The agent is obliged to strict compliance with binding directions from the principal, even if the former has doubts about the necessity of those directions or if the performance of the mandate requires the specific knowledge and experience of the agent (Kapodistrias, Art. 713 GREEK CC nr. 33; CA Athens decision no. 10148/1987, EllDni 1988, 353). With regard to indicative directions, the agent is free to make decisions, express doubts about the necessity of the directions and give advice to the principal (Kapodistrias, Art. 713 GREEK CC nr. 34). Furthermore the agent is required to deviate from the limits set in the mandate, if such a deviation is required by good faith (Georgiadis/Stathopoulos/Karasis, Art. 717 GREEK CC nr. 4). The duty of the agent to notify the principal about deviation from the limits set in the mandate is regulated in CC art. 717: 'An agent may only deviate from the limits set in the mandate if he found himself in the impossibility to notify the principal and it is at the same time obvious that the principal would have allowed the deviation if he had knowledge of the circumstances that prompted such deviation.' From that rule it is implied that if it is possible for the agent to notify the principal about the intended deviation, the former is required to wait for further directions from the latter for the performance of the mandate. If it is impossible for the agent to notify the principal about the deviation from the directions, the agent is required after the performance of the mandate to inform the principal about the necessity of the deviation and the impossibility of notification (CC art. 718); otherwise, the principal may claim damages (CC art. 714; CA Athens decision no. 10148/1987, EllDni 1988, 353).

20. According to the HUNGARIAN CC art. 474(2), '[a]n agent must fulfil the principal's instructions and represent his interests regarding the authority conferred upon him'. CC art. 476 establishes that '[i]f the principal issues imprudent or incompetent instructions, the agent shall call the principal's attention to the matter. If the principal insists on the instructions despite the warning, he shall be liable for the damages sustained on account of the instructions'. Moreover, CC art. 477(2) establishes that '[t]he agent shall be entitled to depart from the principal's instructions only if it is essential for the principal's interest and if there is no time to notify the principal in

advance. In such a case the principal shall be notified without delay'. In case of commission agency, CC art. 508 establishes that '[i]f the commission agent concludes a sales contract under better conditions for the principal as defined in the commission agency contract, the benefit originating therefrom shall be due to the principal. If the commission agent makes a sale for a price below the one specified in the commission agency contract, he shall reimburse the principal for the difference, unless he is able to prove that the sales contract could not have been concluded at the stipulated price, that by making the sale he saved the principal from losses, and that he was not able to notify the principal in time. If the commission agent substantially departs from the conditions stipulated in the commission agency contract, the principal shall be entitled to reject the sales contract, unless the commission agent has effected purchase at a higher price than stipulated but agreed to reimburse the difference.'

21. In IRELAND at common law, an agent must obey the principal's lawful instructions. Moreover, a professional agent may be under a duty to warn the principal of any risks or dangers inherent in the instructions given.

22. In ITALY, as a rule, the agent is required to follow the directions given by the principal. In cases where a departure from the directions may be justified (e.g. if the agent, by following the principal's directions, may not achieve the result envisaged by the principal), the agent must inform the principal of the intention and explain the reasons justifying a departure from the principal's instructions. In particular, the agent has to inform the principal of the (new) circumstances that may justify the extinction or an alteration of the obligations under the contract of representation (CC art. 1710(2)). See Supreme Court 11 Dec 1995, no. 12647, Foro it., 1996, I, 544; Supreme Court 18 Mar 1997, no. 2387, Corriere giur., 1997, 903, with comments by Stella.

23. In the NETHERLANDS according to CC art. 7:402(1), the agent is bound to obey timely and well considered directions regarding the performance of the contract.

24. In POLAND the agent should follow the directions of the principal. If there are no directions given, the agent is free to choose how to best carry out the obligations. However, it is not clear whether the principal may give binding directions only when the contract with the agent is concluded or at any time.

25. In SCOTLAND, in a gratuitous mandate, the agent's most fundamental duty was said to be to follow the principal's instructions (*Erskine*, III,3,35; *Bell*, Principles of the Law of Scotland[10], no. 220). Erskine also indicated that an agent was bound to obey the principal's instructions even if the agent considers that an alternative course of action would be 'more rational.' (*Erskine*, III,3,35). In modern agency law, as in gratuitous mandate, the agent's principal duty is to follow the principal's instructions (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 84). It is likely therefore that the agent would not have the right to depart from the principal's instructions simply because the agent considered that they were unlikely to achieve the desired object of the agency relationship. Failure to follow the principal's instructions would be a breach by the agent rendering the agent liable to the principal in damages. The agent will not, however, be liable to the principal for any losses suffered by the principal as a direct result of the ambiguity of the principal's instructions (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 84; *Ireland v Livingston* (1872) LR 5 HL 395).

26. In SLOVAKIA the agent is required to follow the principal's directions. In civil relations, the agent may diverge from the principal's instructions only if it is required by the latter's interest and if the agent cannot obtain the principal's consent in time. Otherwise the agent will be liable for damages (CC § 725). In commercial relations, the agent may depart from the principal's instructions only if it is necessary and in the

interest of the principal, and if it is impossible to receive the principal's approval in time, except if it is prohibited by the mandate or by the principal (Ccom § 567(3). The agent has to inform the principal about all of the issues that may have an influence on the principal's directions (Ccom § 567(2)). The commission agent may depart from the principal's instructions only if it is in the interest of the principal and if the agent unable to obtain the latter's consent in time.

27. In SPAIN the agent must, as a rule, follow the instructions of the principal (CC art. 1719). These can be given at the time the contract is concluded or later on (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII[2], 461 and 473). According to the STS of 26 May 1964, instructions can be mandatory, which means that the agent is compelled to follow them and cannot deviate from them even when acting in the interests of the principal would require such deviation, or non-mandatory, which are those which leave much discretion to the agent to act according to the interests of the principal. In cases of the latter type, where a departure from the directions may be justified with a view to the achievement of the commission, the agent must inform the principal of the intention to deviate and explain the reasons justifying a departure from the principal's instructions (Ccom art. 255 II). In particular, the agent has to inform the principal of the new circumstances that may justify the extinction or an alteration of the obligations under the contract of representation

28. In SWEDEN the agent is required to follow the principal's directions but only if they are reasonable. All circumstances of the case should be considered when determining whether directions are reasonable or not. The principal's directions must be in accordance with good business practice. Directions contrary to law are considered unreasonable *(Tiberg and Dotevall*, Mellanmansrätt[9], 117).

III. Obligation to warn

29. For AUSTRIA see Note 10 above.

30. In BELGIUM when an important event (un fait majeur) intervenes, the agent is obliged to inform the principal in advance to enable the principal to change or revoke the instructions (*de Page and Dekkers*, Traité élémentaire de droit civil belge V[2], 405; *Paulus und Boes*, Lastgeving, 90; *Wéry*, Le mandat, 146-147). A professional agent may not follow the instructions blindly. When the performance of the mandate according to the principal's instructions entails a risk, the agent has a preliminary duty of advice and information (CFI Bergen 9 May 1996, RGAR 1998, n° 12.911; CFI Antwerpen 6 Oct 1992, RW 1994-95, 885; *Herbots*/*Stijns/Degroote/Lauwers/ Samoy*, TPR 2002, 57, n° 906); *Wéry*, Le mandat, 147).

31. In BULGARIA every mandate contract is considered to be concluded under the implied condition that the agent must act in accordance with the interests of the principal in the best possible manner under the existing circumstances (Mevorah/Lidji/Farhi, Komentar III, 120). Hence, the agent is deemed obliged to warn the principal if the agent thinks observance of the given directions will not result in conclusion of the prospective contract or will bring about significant expenses or extra time, etc., and to ask for new instructions (Mevorah/Lidji/Farhi, Komentar III, 121). If the principal does not revoke the directions, the agent has two options: (a) to continue the contractual performance following the directions; (b) to terminate the mandate contract (*Goleva*, Obligazionno pravo2, 237).

32. In DENMARK in general, the agent must follow (legal) directions given by the principal on how to perform the contract. The agent may, of course, query the wisdom of a direction. If the principal insists, the agent must at any rate warn the principal of the consequences of upholding the direction. If the task proves to be (essentially) more

difficult than initially envisaged by the parties, the agent will normally be entitled to claim a higher price; the terms of the contract will likely be renegotiated under such circumstances. If no such renegotiation takes place, the agent must warn the principal that the costs will be higher if the new instructions are to be followed.

33. In ENGLAND the agent is not obliged to follow instructions which would require the agent to act illegally. Moreover, the agent is under a duty to warn the principal of any risks and dangers inherent in such instructions, especially if the agent can be said to have some discretion due to an actual implied authority. The agent may also have a fiduciary obligation to do so (*Clark Boyce v Mouat* [1994] 1 AC 428). Finally, the obligation of a professional agent to follow instructions may be limited by the professional rules of conduct of the given profession of the agent.

34. In ESTONIA in all cases where the agent wishes to deviate from the instructions of the principal, the agent must so inform the principal and wait for the principal's decision, unless a delay would be likely to cause unfavourable consequences for the principal and if it may be presumed under the circumstances that the principal will approve of the deviation.

35. In FINLAND if the directions are still within the limits of the agreed mandate, the agent is generally required to follow them, even if it makes the fulfilment of the contract somewhat more difficult. However, the agent is not required to follow unreasonable directions. Unless expressly agreed otherwise or when the circumstances do not show otherwise, the agent is not entitled to an additional price for extra work. The question of price is, however, somewhat unclear and depends highly on circumstances. The agent is usually required to inform the principal that the price will be higher (as described above, this often means that the agreement has to be altered).

36. In FRANCE if the principal's instructions might lead to the failure of the mandate, the agent is nonetheless required to follow such instructions, but has to inform the principal in order to comply with the duty to give advice as a professional agent. On the basis of a general obligation of fair dealing, which applies to the agent, the latter should inform the principal of any possible additional expense involved by new instructions, and ensure that the parties agree on such additional expenses. The French courts have accepted that the remuneration set out in the agency contract may be revised if the mandate carried out does not correspond to the remuneration initially envisaged.

37. In GERMANY the agent must warn the principal if a direction is problematic. The existence and scope of such an implied duty depend upon the circumstances of the case, primarily on the particular expertise of the agent: Courts have imposed a duty to warn e.g. on attorneys and banks (see Palandt [-*Sprau*], BGB[66], § 665 no. 9).

38. In GREECE in case of a gratuitous mandate contract, the agent is required to follow the directions given by the principal even if that would make the task more difficult to fulfil and would cause more expenses for the principal. However, the agent is required by good faith (CC art. 288) to warn the principal that the expenses will be higher if the directions are followed. If the agent decides not to comply with the directions of the principal the former is obliged to inform the latter of non-compliance with the directions. Due to the gratuitous character of the mandate, the question of the right of the agent to a higher price arises only in the case of services of agency offered by a lawyer. In such a case, the lawyer is required by good faith (CC art. 288) to warn the principal that there is no obligation to follow the principal's directions and that if they are followed the price will be higher.

39. In HUNGARY CC art. 476 establishes that '[i]f the principal issues imprudent or incompetent instructions, the agent shall call the principal's attention to the matter. If

the principal insists on the instructions despite the warning, he shall be liable for the damages sustained on account of the instructions'. Furthermore, '[t]he agent shall be entitled to depart from the principal's instructions only if it is essential for the principal's interest and if there is no time to notify the principal in advance. In such a case the principal shall be notified without delay' (CC art. 477(2)).

40. In IRELAND at common law, a professional agent may be under a duty to warn the principal of any risks or dangers inherent in the instructions given.

41. In ITALY the agent has to inform the principal promptly if the agent intends not to follow the directions received in order to obtain the principal's authorisation. According to the good faith principle the agent has to warn the principal that the price will be higher if the directions are followed. The agent would otherwise be liable for non-performance because of exceeding the limits of the mandate (CC art. 1711). See T. Milano, 16-02-1989, Giur. it., 1989, I, 2, 628.

42. In the NETHERLANDS if the agent is reasonably unwilling to perform the mandate contract according to the principal's directions, the agent may terminate the contractual relationship for serious cause if the principal nevertheless keeps to the directions (CC art. 7:403(2)). However, there is no specific duty of the agent to warn the principal.

43. In POLAND a duty to warn for bad directions could be derived from the general duty of taking due care in contractual relations (CC art. 355).

44. In SCOTLAND an obligation to warn in the circumstances indicated in paragraph (3) of the Article would follow from the agent's duty of good faith and obligation of skill and care. If the principal insisted on the direction, the result would depend on the contract, on the nature of the direction and on the application of general rules. Often the agent would be not only bound, but also content, to follow the direction - e.g. if the contract provided for payment for any extra work or expenses or if the direction, although detrimental to the interests of the principal, would not increase work or expenses. But if the agent perceived the direction as an unacceptable attempt by the principal to change the contract (e.g. by demanding considerably more work for the same fixed price) then the position would usually resolve itself into renegotiation or termination.

45. In SLOVAKIA the rule that the agent must act in the interest of the principal and the good faith principle should be the ground for the agent's duty to warn the principal if the instructions are bad. If the principal does not change the instructions, the agent will be obliged to follow them, or terminate the relationship. Advocates are obliged to follow the principal's directions unless they are unlawful, in which case the advocate must inform the client.

46. In SPAIN the agent must warn the principal if the following of a direction is problematic. As far as this direction has and could not have been contemplated by the parties when agreeing on the price, the agent will be entitled to compensation for additional expenses. However, in no case is the agent entitled to proceed against the principal's upholding of the old instructions (Ccom art. 256). The agent is not bound to follow instructions when that ought to be regarded as a change in the content of the mandate. Finally, the agent may in such a situation withdraw due to good cause (CC art. 1735).

47. In SWEDEN the agent is required to follow the principal's directions as long as these are not unreasonable. Hence, the agent has to follow directions even if these make the task more difficult. The agent is entitled to a higher price (additional price) in case the direction involves additional work or if a rise in price is due to circumstances on behalf of the principal and which the agent could not have foreseen at the time of

conclusion of the contract. A duty to warn the principal follows from the main duty to act in the interest of the principal.

IV. Principal may revoke direction

48. In AUSTRIA the principal is entitled to revoke the direction when informed of the consequences (Strasser, § 1009 Rz 14; SZ 4/51; Stanzl, 815; Straube (-*Griss*), HGB I[3], § 384, no. 3; Schütz, § 408 Rz 11).

49. In BELGIUM the principal may revoke the instructions (*Wéry*, Le mandat, 161).

50. In BULGARIA there is no explicit rule. As the principal is considered "master of the mandate contract", the principal would appear to be entitled to revoke given directions at any time.

51. In DENMARK if the agent has not yet revealed the new instructions towards any third party, the principal is entitled to revoke the direction.

52. In ENGLAND if there is an obligation on the agent to warn the principal of the potential dangers for the principal if the agent follows the instructions strictly, the principal is free to follow the advice of the agent and to modify the instructions accordingly.

53. In ESTONIA the principal is entitled to revoke the direction when warned by the agent.

54. In FINLAND the principal is entitled to revoke the directions.

55. In FRANCE the principal may, having been informed of additional costs or detrimental effects, cancel the instructions previously given to the agent.

56. In GERMANY the principal may at any time revoke the direction. Otherwise, there would not be a need for an obligation to warn.

57. In GREECE in case of a gratuitous mandate contract, apart from an irrevocable grant of directions, the directions that the principal has given to the agent are revocable until the performance has been completed (Georgiadis/Stathopoulos/Karasis, Art. 717 GREEK CC nr. 4). The same applies in case of intermediation.

58. The HUNGARIAN CC art. 476 provides that '[i]f the principal issues imprudent or incompetent instructions, the agent shall call the principal's attention to the matter. If the principal insists on the instructions despite the warning, he shall be liable for the damages sustained on account of the instructions.'

59. In IRELAND a principal may revoke any directions.

60. In ITALY as a rule, the principal is entitled to revoke the directions given to the agent if informed of new consequences that have an impact on them. According to CC art. 1723, '[t]he principal can revoke the mandate but if it was agreed that the mandate should be irrevocable, he is liable for damages, unless revocation is made for a just cause. A mandate which is given also in the interest of the agent or of third persons is not extinguished by revocation by the principal, unless it is otherwise agreed or unless there is a just cause for such revocation; it is not extinguished by the death or supervening incapacity of the principal'. A just cause for revocation may lie in malicious and negligent behaviour of the agent (CC art. 1218) or the fact that the agent does not respect the instructions received by the principal (CC art. 1711).

61. In POLAND the principal is free to give directions when the contract is concluded. It is not clear whether the principal may give new directions or change given directions after the agent has begun to act.

62. In SCOTLAND the principal could revoke a direction and one situation where this might be done would be where the agent had drawn attention to the fact that it could have detrimental effects.

63. In SLOVAKIA there is no specific rule, but in principle, the possibility to revoke the direction depends on the progress of the performance and on the possible effects to third parties.

64. In SPAIN, though there is no special rule, it is clear that the instructions to be followed are the ones addressed at the time of the contract as well as new instructions given by the principal (*León*, Comentario, p. 1549).

65. In SWEDEN the principal may revoke a direction by a new direction unless such new direction is unreasonable. The agent is entitled to a higher price (additional price) in case the new direction involves additional work.

IV.D.–4:102: Request for a direction

(1) The agent must ask for a direction on obtaining information which requires the principal to make a decision pertaining to the performance of the obligations under the mandate contract or the content of the prospective contract.

(2) The agent must ask for a direction if the mandated task is the conclusion of a prospective contract and the mandate contract does not determine whether the mandate is for direct representation or indirect representation.

COMMENTS

A. General idea

Under this Article the agent is obliged to ask for directions from the principal in two main situations: (1) when the agent needs a decision of the principal pertaining to the performance of the obligations under the mandate contract or the content of the prospective contract and (2) when the agent needs the direction of the principal as to whether the mandate is for direct or indirect representation.

B. Direction as to performance of obligations or as to contents of prospective contract

The situation regulated here is where the agent has received information either from the principal or from another source, which indicates that it may not be possible to perform the mandate (typically to conclude the prospective contract) as stated or envisaged by the principal at the time of conclusion of the contract, or that the conclusion of the prospective contract may become significantly more expensive or take significantly more time than agreed upon in the mandate contract. The same would of course apply if the conclusion of the prospective contract could damage other interests of the principal of which the agent knows or could reasonably be expected to know. In this respect, it would not matter whether the danger stems from a defect or inconsistency in the mandate of the agent (be it in the mandate contract itself or a subsequent direction) or from the occurrence of other expected or unexpected events. One such event could be the development of the negotiations with the third party. It can easily be envisaged that during such negotiations the agent may realise that in order to conclude the prospective contract, it would be necessary to act beyond the mandate. Where there is time to contact the principal, the agent is required to do so in order not to breach the contractual obligations, as on the one hand the agent may not exceed the mandate, but on the other hand is required to act in the best interests of the principal. Paragraph (1) of this Article indicates what the agent then has to do: ask for a direction. The principal subsequently is required to give such a direction under IV.D.–2:101 (Obligation to co-operate) paragraph (2)(b).

C. Direct or indirect representation

Typically the parties to a mandate contract calling for the conclusion of a contract by the agent for the principal indicate expressly or implicitly whether the agent is to act in the agent's own name or in the name of the principal. If that is the case, the agent will be required to act in such manner, as follows from IV.D.–3:101 (Obligation to act in accordance with mandate). It should be remarked that even if the parties have not expressly indicated how the agent is to act, this may follow from custom or usage. In such a case, the parties will have implicitly chosen to follow the rules dictated by custom or usage.

The present Article clearly indicates that it is the principal who decides how to be represented, i.e. by way of direct or indirect representation. The principal may indicate that when the mandate contract is concluded or afterwards by way of a direction, cf. IV.D.–4:101 (Directions given by principal) paragraph (1). When the principal does not (expressly or tacitly) indicate how the agent is to act, the agent must ask for clarification on this point (paragraph (2)).

NOTES

I. Agent's obligation to ask for direction if direction needed for performance of mandate contract

1. In BELGIUM when an important event (*un fait majeur*) intervenes, the agent is obliged to inform the principal in advance to enable the principal to change or revoke the instructions (*de Page and Dekkers*, Traité élémentaire de droit civil belge V[2], 405; *Paulus und Boes*, Lastgeving, 90; *Wéry*, Le mandat, 146-147).
2. In BULGARIA an agent who thinks that the prospective contract cannot be concluded at all or under the conditions determined by the principal, is obliged to ask for further directions, unless there is not enough time for this (Mevorah/Lidji/Farhi, Komentar III, 120-121).
3. In ENGLAND there does not seem to be any specific case dealing with this specific situation. English law only seems to cover the situations when authority given by the principal is ambiguous. In such a situation, any reasonable interpretation of such authority done in good faith by the agent will be binding on the principal, even if this is not what the principal had intended (*Ireland v Livingston* [1872] LR 5 HL 395). It is suggested that since nowadays it is easier to obtain clarification, an agent who fails to do so would be liable (Bowstead (-*Reynolds and Graziadei*), Agency[18], no. 3.016). In relation to the specific scenario at hand, considering that the agent is under an obligation to exercise skill and care when performing the mandate, and act for the best interest of the principal, should the agent fail to ask directions when direction was needed, the agent would no doubt be in breach of such obligations.
4. In ESTONIA no such specific duty is prescribed by law. As far as the agent is under a duty to act in the best interest of the principal (LOA § 620(2)), such duty could require the agent to ask, in specific situations, for directions if the interests of the principal are unclear. The agent is under the duty to warn the principal and ask for directions if an existing direction could have an apparent adverse effect to the interests of the principal (LOA § 621(3)).
5. In FRANCE there is no specific duty for the agent to ask for directions, but it may result from the general duty to comply with the mandate contract in accordance with the interest of the principal and without making mistakes (CC art. 1992).
6. The GERMAN CC § 665 requires the agent to ask for direction when contemplating any deviation from the mandate contract or from directions previously received.
7. In HUNGARY according to the CC art. 477(1), 'The agent shall inform his principal of his activities and the state of affairs upon request or, if necessary, even without a request, particularly if employment of another person has become necessary or if the instructions need to be changed due to the occurrence of new circumstances'.

8. In IRELAND the common law does not comprise detailed rules as to the agent's duties, as are outlined in the black letter rules. An express duty to ask for directions does not exist at common law, but would probably come within the agent's duty to exercise reasonable skill and care, or the wider fiduciary duties owed to the principal. Further, an agent is obliged to obey the principal's instruction's and where instructions are ambiguous (e.g. where it is not clear from the principal's instructions whether the agent is to act in the agent's own name or in the name of the principal) it has been held that an agent will not be held liable for acting on a reasonable interpretation of the instructions (*Ireland v Livingstone* [1872] LR 5 HL 395), though an agent should seek clarification, where possible (*Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 772 *per* Lord Salmon; *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at 517 *per* Goff LJ).

9. In the NETHERLANDS there are no specific rules that apply to this situation but the general articles on due care (CC art. 7:401) and giving directions (CC art. 7:402) may apply and may require a request to be made in the circumstances indicated.

10. The POLISH CC provisions on mandate contain no such duty. If no directions are given the agent is free to choose how to best carry out the agreement.

11. In SCOTLAND there appears to be no specific rule of law requiring the agent to ask for directions in this particular situation. However, the agent's most fundamental duty is to carry out the undertaking, according to the instructions, with the requisite degree of skill and care (*Gow*, Mercantile and Industrial Law of Scotland, 530 and *Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', paras. 84-87). It is likely that an agent would be found to have breached this duty if the agent failed to request instructions in a situation where a direction is required.

12. In SLOVAKIA the agent's duty of care implies an obligation to ask for direction if it is needed for performance.

13. In SPAIN, though there is no special rule, the duty in question follows from the implied duty to act in the best interest of the principal.

14. In SWEDEN it follows from general contract law rules that the agent has a duty to ask for a direction if needed for the performance of the mandate contract. In particular this is the case if the agent feels compelled to deviate from the principal's previous instructions (see KommL § 8).

II. Agent's obligation to ask for direction whether to act in own name or in name of principal

15. In BELGIUM there is no duty for the agent to ask for directions on whether to act in the agent's own name or in the name of the principal. In the absence of express instructions, a (civil law) agent is presumed to have been instructed to act in the name of the principal (*Samoy*, Middellijke vertegenwoordiging, 305-306; *Wéry*, Le mandat, 151). In the absence of express instructions, a (commercial law) commission-agent on the contrary is – according to trade customs – presumed to have been instructed to act in the agent's own name (*Foriers and Glansdorff*, Contrats spéciaux, 611; RPDB, v° Commission, no. 132; *Samoy*, Middellijke vertegenwoordiging, 511; *Van Ryn & Heenen*, 21).

16. In BULGARIA the agent needs a power of attorney to act in the name of the principal (see Notes under IV.D.–3:101 (Obligation to act in accordance with mandate). Granting this authority is deemed to be an instruction to the agent to act in the name of the principal (*Vassilev, L.*, Obligazionno pravo, 22). In case of reasonable doubt, the requirement to perform with the care of "a good householder" obliges the agent to ask whether to act in the agent's own name or in the name of the principal.

17. In ENGLAND there does not seem to be any specific case law on this example. As mentioned earlier, this issue is crucial. It is therefore thought that, if it is not clear whether the agent is to act in the agent's own name or in the name of the principal, the agent should ask the principal to clarify. Failing to do that, the agent would probably be found to be in breach of the obligation of due care and skill. If the agent cannot get in touch with the principal, it seems that the agent should act as another reasonable agent in a similar trade would do. Since disclosed agency seems more common than undisclosed agency, it would probably be regarded as reasonable for the agent to act in the name of the principal.

18. In ESTONIA no such specific duty is prescribed by law. As far as the agent is under a duty to act in the best interest of the principal (LOA § 620(2)), such duty could require the agent to ask, if no such direction exists and the interests of the principal are unclear, for directions as to whether to act in the agent's own name or not.

19. In FRANCE there is no specific duty for the agent to ask for directions on whether to act in the agent's own name or in the name of the principal, but the agent is not free to decide whether to act as agent or as 'commission agent'. When this is unclear, the agent has every interest in requesting the principal to confirm which type of agency has been agreed, because if there is a dispute, the judge will have to decide which of the two types of agency should apply, depending on the terms of the contract and the evidence. If it appears that the agent has made a mistake concerning the type of agency which has been put in place, the agent will be liable for the consequences (CC art. 1992).

20. In GERMANY if the mandate contract does not determine whether the mandate is for direct or indirect representation, it is up to the agent to make the choice (*Seiler*, in: Münchener Kommentar zum BGB[4], § 662 no. 19). Absent special circumstances, there is no duty to ask the principal.

21. In HUNGARY the agent can only act in the name of the principal if the agent has a power of attorney to do so.

22. In POLAND the representation under the mandate contract is presumed to be direct unless the parties have agreed otherwise.

23. In SCOTLAND whether the agent acts in the principal's or in the agent's own name is a fundamental issue and, as such, it is not likely that the agent has the power to make this decision without recourse to the principal. It is suggested therefore that, in any case of doubt and in the absence of a governing usage or practice in a particular field of activity, an agent in this situation would be bound to request a direction from the principal.

24. In SLOVAKIA in civil relations, without a grant of authority to act in the name of the principal, the agent must act in the agent's own name or ask for directions. In commercial relations, the contract is not concluded without specifying whether the agent is to act in the principal's or agent's name.

25. In SPAIN, though there is no special rule, the obligation in question can be derived from the implied duty to act in the best interest of the principal

26. In SWEDEN if the parties have not regulated whether the agent is to act in the agent's own name or in the name of the principal and it does not follow from other circumstances, the agent is free to decide the matter. However, if the agent chooses to act in the agent's own name there is the risk of being considered a party to the prospective contract as it is presumed that when you act in your own name you also act on your own behalf and account (*Ramberg & Ramberg*, 50).

IV.D.–4:103: Consequences of failure to give a direction

(1) If the principal fails to give a direction when required to do so under the mandate contract or under paragraph (1) of IV.D.–4:102 (Request for a direction), the agent may, in so far as relevant, resort to any of the remedies under Book III, Chapter 3 (Remedies for Non-Performance) or base performance upon the expectations, preferences and priorities the principal might reasonably be expected to have, given the information and directions that have been gathered.

(2) Where the agent bases performance upon the expectations, preferences and priorities the principal might reasonably be expected to have, the agent has a right to a proportionate adjustment of the price and of the time allowed or required for the conclusion of the prospective contract.

(3) If the principal fails to give a direction under paragraph (2) of IV.D.–4:102 (Request for a direction), the agent may choose direct representation or indirect representation or may withhold performance under III.–3:401 (Right to withhold performance of reciprocal obligation).

(4) The adjusted price that is to be paid under paragraph (2) must be reasonable and is to be determined using the same methods of calculation as were used to establish the original price for the performance of the obligations under the mandate contract.

COMMENTS

A. General idea

This provision sets out the consequences if the principal does not give a direction, even though required to do so under the contract or if the agent asks for a direction under IV.D.–4:102 (Request for a direction).

The Article proposes different systems of remedies depending on the situation. The remedy for not giving a direction as to the question whether the agent is to act in the agent's own name or in the name of the principal (IV.D.–4:102 (Request for a direction) paragraph (2)), is given in paragraph (2) of the present Article: the agent is free to choose how to act. The agent may also withhold performance.

B. Choice of remedies

As regards the remedies for the non-performance by the principal of the obligation to give directions when the agent is in need of such directions in order to continue performance, two possible set of remedies can be chosen, as stated in paragraph (1). On the one hand the agent may invoke the application of the general remedies for non-performance of an obligation. On the other hand, if the agent chooses to continue performance, there is a right to adapt performance to the expectations, preferences and priorities the principal may reasonably be expected to have, given the information and directions that have been gathered, and claim a proportionate adjustment of the price and of the time allowed or required for the conclusion of the prospective contract.

Illustration

A principal instructs an agent to negotiate the purchase of a certain sculpture, without indicating clearly a maximum price for the sculpture. The parties agreed that the agent would have two weeks for performing the task. After one week, the agent has found a

third party, the owner of the sculpture, willing to sell it for €10,000. The agent informs the principal of this and asks what answer is to be given to the third party. The principal however remains silent for another week.

Under the present Article the agent may claim damages if, as a result of the delay in the principal answering the request for a direction, the contract can no longer be concluded (Book III, Chapter III, Section 7). The agent may also terminate the mandate relationship for non-performance in so far as the non-performance of the obligation to give the direction amounts to a fundamental non-performance under III.–3:502 (Termination for fundamental non-performance)). The agent may also assume that the principal agrees to the purchase price if this could reasonably be expected in the circumstances of the case, taking into account the express and implied wishes of the principal as these may be known to the agent (paragraph (1). The agent may claim extra time for performance of the mandate (paragraph (2). If the price has to be renegotiated because of the principal's failure to give a direction, the agent has a right to extra remuneration (paragraph (2).

NOTES

I. Remedies for failure to give direction

1. In BELGIUM the law on mandate is silent on this question. General contract law (precontractual duties to inform and the duty to execute the contract in good faith (CC art. 1134(3)) can oblige the principal to give directions to the agent, if the directions are necessary to fulfil the mission.
2. In BULGARIA there are no specific rules regulating remedies for failure of the principal to give directions; general contract rules are applicable. When the agent needs information or directions from the principal in order to perform the contractual obligations, the latter has no actual obligation to give directions, but rather a requirement or mere burden (*Тежест*, *Obliegenheit*) to give assistance. Therefore, if the principal does not give the necessary instructions, neither voluntarily nor upon request, there is no breach of contractual obligation, but a case of *mora creditoris (Забава на кредитора)* (LOA art. 95; *Goleva*, Obligazionno pravo2, 110; Апостолов, Облигационно право[2], 331). If this is the case, the agent can terminate the contract and claim the expenses due to *mora creditoris* (LOA art. 98; *Goleva*, Obligazionno pravo2, 111; Кожухаров, Облигационно право[2], I, 352).
3. In ENGLAND there is no specific rule dealing with this particular point.
4. In ESTONIA there is no specific rule on this point but there is a general duty to cooperate with the other party in good faith in order to achieve due performance of the agreement (LOA § 23(2)). If the principal fails to provide instructions when bound to do so and this leads to non-performance of the mandate, the representative will be able to avoid liability as the non performance would be attributable to the principal (LOA § 101(3)).
5. FRENCH law is silent on this, but it is undoubtedly the case that a refusal to reply to questions raised by the agent would exclude the liability of the latter where the mandate failed or was improperly performed. However, the agent could remain liable to any third party contractor (see Cass.civ. 1re, 13 Nov. 1997, Bull.civ. 1997 I, no. 308).
6. Should the principal fail to give the required directions, the GERMAN CC § 665 entitles the agent to perform the mandate in accordance with the preferences the agent

may assume the principal to have under the given circumstances. As far as this changed performance of the mandate contract could not have been contemplated by the parties when agreeing on the price, the agent will be entitled to compensation for additional expenses (CC § 670).

7. In the NETHERLANDS there are no specific rules that apply in this situation other than CC art. 7:402.

8. There are no specific POLISH CC provisions (neither a duty to ask for a direction nor a duty to give such directions).

9. In SCOTLAND if the principal provides defective instructions the agent is not liable to the principal for any losses suffered as a direct result of the ambiguity of the instructions (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 84; *Ireland v Livingston* (1872) LR 5 HL 395). In a situation where the agent does not possess adequate instructions and is unable to obtain clarification, it is suggested that the agent should proceed on the basis of what a reasonable principal would have instructed. In this way the agent will avoid being liable for any losses suffered by the principal. Scottish law contains no specific mechanism allowing an adjustment of the price in the agent's favour in this situation. This might only be possible in situations where, either in terms of the contract or at common law, the agent is entitled to payment of a reasonable fee.

10. For civil relations, the consequences of the creditor's delay are regulated in the SLOVAKIAN CC § 522 (duty to reimburse the agent's expenses occurred during the time of delay; civil liability for damages). For commercial relations, see the general rules on remedies for non performance (Ccom § 344 et seq.)

11. In SPAIN, if there are no instructions from the principal, the agent is to act in accordance with the diligence of the good father of a family (*bonus paterfamilias)* (CC art. 1719(2)).

12. In SWEDEN if the principal fails to give a direction when obliged to, this constitutes a non-performance. The agent is entitled to damages and termination if the non-performance is fundamental. Furthermore, the agent is not in breach of contract if the agent takes action or is passive due to the principal's failure to give directions. This follows from general contract law.

II. Remedy for failure to indicate whether to act in own name or in name of principal

13. In BULGARIA when it is not stipulated in the mandate contract whether the representation is direct or indirect and the principal does not answer the request for more clarity on this matter, the agent can either perform the mandate in the agent's own name or terminate the relationship. The agent needs a power of attorney to act in the name of the principal.

14. In ENGLAND, in the absence of any case law dealing with this specific issue, a possible solution would be that the agent should act according to customs of the relevant trade or profession.

15. In ESTONIA if the mandate agreement does not provide whether the agent is to act in the agent's own name or not and the interests of the principal are unclear the agent is entitled to ask for instructions from the principal. If no instructions are provided, the agent must act according to the presumed interests of the principal, if the agent exercised due care in identifying such interests (LOA § 620(2)) and has acted accordingly the will not be in breach of any duties and has performed the mandate in accordance with the agreement.

16. Under GERMAN law, it is always up to the agent to choose between acting in the agent's own name or in the name of the principal.

17. In POLAND, since the representation is presumed to be direct, the principal has no duty to indicate whether the agent should act in the agent's own name or in the name of the principal.

18. In SCOTLAND where the principal fails to provide instructions on whether the agent is to act in the principal's or the agent's own name, it is suggested that, in the absence of governing usages in the field of activity concerned, the agent would be best advised to act in the principal's name (i.e. in such a way as to affect the principal's legal position directly), this being the more common method of acting. In the case of serious doubt the agent may even be best advised to refuse to act.

19. In SLOVAKIA if the principal does not grant authority to act in the principal's name, it is presumed that the agent has to act in the agent's own name.

20. In SPAIN, apart from the right to withdraw, the agent has to act as agent in alieno nomine, because this is the residual rule.

21. In SWEDEN the principal has a duty to answer requests for information in order for the agent to be able to perform according to the contract. If the principal fails to do so such failure is considered to be a non-performance and the principal could be liable to pay damages to the agent in case the agent suffers any loss (HaL §§ 7 and 34).

IV.D.–4:104: No time to ask or wait for direction

(1) If the agent is required to ask for a direction under IV.D.–4:102 (Request for a direction) but needs to act before being able to contact the principal and to ask for a direction, or needs to act before the direction is given, the agent may base performance upon the expectations, preferences and priorities the principal might reasonably be expected to have, given the information and directions that have been gathered.

(2) In the situation referred to in paragraph (1), the agent has a right to a proportionate adjustment of the price and of the time allowed or required for the performance of the obligations under the mandate contract in so far as such an adjustment is reasonable given the circumstances of the case.

COMMENTS

A. General idea

This Article deals with the situation where immediate action is required by the agent in order to prevent detrimental consequences for the principal. The situation is so urgent that the agent has no time to ask or wait for a direction from the principal. If such is the case, the agent is entitled under this Article to continue performing on the basis of the expectations, preferences and priorities the principal may reasonably be expected to have, given the information and directions that have been gathered. The agent may subsequently claim a proportionate adjustment of the price and of the time allowed or required for the performance of the obligations under the mandate contract (typically, the conclusion of the prospective contract) in so far as such an adjustment is reasonable given the circumstances of the case.

In the situation in which the principal does not indicate whether the representation is to be direct or indirect and the agent does not have time to ask for clarification on this point, then the agent may determine whether to act in the agent's own name or in the name of the principal.

B. Relation to rule on acting beyond mandate

In the situations covered by this Article, the agent may have to act beyond the scope of the mandate. As indicated under IV.D.–3:201 (Acting beyond mandate), the agent is only allowed to act beyond the scope of the mandate when certain conditions, enumerated in that Article, are fulfilled. The conditions would be satisfied in the circumstances envisaged by the present Article.

NOTES

Agent's right to act if no time to ask or wait for direction

1. In BULGARIA as a general rule, the agent is obliged to ask the principal for approval and new directions for every deviation from the mandate. Nevertheless, in some cases the agent is entitled to act without such approval or further directions (LOA art. 282; see Notes under IV.D.–3:201 ((Acting beyond mandate). Furthermore, the agent can sometimes entrust the performance of the mandate to a third person without permission (LOA art. 283(2); see Notes under IV.D.–3:302 (Subcontracting).

2. In ENGLAND there does not seem to be any case law dealing with this particular area. If the agent has no time to ask for direction before acting, provided that he acts reasonably in the circumstances and in the best interest of the principal, there would be little risk of liability for breach of the agency contract.

3. In FRANCE there is no specific rule on this point, but according to French legal academic writing, the agent has a duty to act with diligence in order to comply with the directions given by the principal. From this point of view, the agent may take the initiative if this is necessary in order to answer to the principal's interests (*Collart-Dutilleul & Delebecque*, no. 645 ; *Pétel*, no. 248).

4. In situations in which postponement of action would result in 'danger' to the principal's interests, the GERMAN CC § 665 entitles the agent to perform the mandate in accordance with the preferences the agent may assume the principal to have under the given circumstances. As far as this changed performance of the mandate contract has and could not have been contemplated by the parties when agreeing on the price, the agent will be entitled to compensation for additional expenses (CC § 670).

5. In IRELAND, the doctrine of agency of necessity may operate to give an agent power to act in 'emergency situations' where communication with the principal is not possible.

6. In the NETHERLANDS according to CC art. 7:401, the agent is obliged to act with due care. In urgent situations, this duty seems to imply that the agent may acts at the agent's own discretion when the principal's directions are lacking. However, this will depend on the circumstances of the specific case.

7. In POLAND there is no duty to ask for a direction. However, the agent may only act contrary to given directions if there is no possibility to contact the principal and it is reasonable to believe the principal would have changed the direction if the principal knew about the state of affairs (e.g. an unforeseen change in the market price).

8. In SCOTLAND where the agent has insufficient time to ask for a direction from the principal, and harm to the principal's interests would follow from inaction or delay, it is suggested that the agent is likely to avoid liability by assuming that the principal's direction would accord with that of a reasonable principal with the known needs and preferences of the actual principal, and acting accordingly. If the agent is a 'general agent', employed to carry out all the principal's business, or all business of a particular kind, the agent is assumed to be authorised to do whatever is necessary to serve the principal's interests (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para 55).

9. In SLOVAKIA this right may be covered by the provisions on the possibility to diverge from the principal's directions (see Notes under IV.D.–4:101 (Directions given by principal)).

10. In SPAIN the agent is required to act with the diligence of the good father of a family if the agent does not have access to the instructions of the principal (CC art. 1719(2) and 255 Ccom art 255)Having no time to call for direction, the agent should act according to the best interest of the principal, assessed in the light of the best knowledge of the agent. As to the expenses, see CC art. 1729.

11. In SWEDEN in cases where the agent is required to ask for a direction but immediate action is required by the agent in order to prevent detrimental consequences for the principal, the agent is required to act as the circumstances require (KommL § 8). This also follows from general contract law and the fact that the agent is contractually obliged to act in the interest of the principal.

Section 2: Changes of the mandate contract

IV.D.–4:201: Changes of the mandate contract

(1) The mandate contract is changed if the principal:

(a) significantly changes the mandate of the agent;

(b) does not revoke a direction without undue delay after having been warned in accordance with paragraph (3) of IV.D.–4:101 (Directions given by principal).

(2) In the case of a change of the mandate contract under paragraph (1) the agent is entitled:

(a) to a proportionate adjustment of the price and of the time allowed or required for the performance of the obligations under the mandate contract; or

(b) to damages in accordance with III.–3:702 (General measure of damages) to put the agent as nearly as possible into the position in which the agent would have been if the mandate contract had not been changed.

(3) In the case of a change of the mandate contract under paragraph (1) the agent may also terminate the mandate relationship by giving notice of termination for an extraordinary and serious reason under IV.D.–6:105 (Termination by agent for extraordinary and serious reason), unless the change is minor or is to the agent's advantage.

(4) The adjusted price that is to be paid under paragraph (2)(a) must be reasonable and is to be determined using the same methods of calculation as were used to establish the original price for the performance of the obligations under the mandate contract.

COMMENTS

A. General idea

The obligations under a mandate contract are not performed instantaneously. The relationship remains in force for a period of time, definite or indefinite. For that reason, the principal must be allowed to give subsequent directions as to the performance of the obligations or the contents of the prospective contract. By doing so the principal may change the content of the mandate contract. According to this provision there is a change to the mandate contract when the principal significantly changes the mandate of the agent or when the principal does not revoke a direction without undue delay after having been warned that the direction was unreasonable. Under these conditions, the actions (or, as regards the revocation of the direction, the lack of action) of the principal may be seen as a material change of the contract. Under the present Article, such a change comes about automatically, but it does have important consequences. The present Article sets out what these consequences are.

B. Significant change in mandate

A change to the contract occurs when the principal extends or limits the mandate of the agent in a significant way.

Illustration 1

An agent is authorised to sell a house for no less than €400,000. The principal subsequently orders the agent to sell the house for at least €350,000. As a consequence of this direction, the agent's mandate is extended. Similarly, if the principal for the

future tells the agent to sell the house only for at least €450,000, the mandate of the agent is limited. In both cases, the mandate contract is changed under paragraph (1), which in accordance with paragraph (2) may have consequences for the price and the time for performance.

C. No revocation of unreasonable direction

A change of the contract also occurs where the principal refuses to revoke without undue delay a direction which the agent has warned will have the effect that the conclusion of the prospective contract would become significantly more expensive or take significantly more time than agreed upon in the mandate contract, or where the principal refuses to revoke a direction which the agent has warned is inconsistent with the purpose of the mandate contract or may otherwise be detrimental to the interests of the principal.

Illustration 2
If an agent is first authorised to sell a house owned by the principal for a price of €400,000, but the principal later authorises the agent to sell the house only for €450,000, which is above the market price, it will take the agent more time to sell the house and there is a serious risk that it will not be possible to conclude the prospective contract. If the principal, after having been warned of this by the agent, nevertheless holds the agent to the 'unreasonable' direction, this is regarded as a change of the mandate contract.

D. Proportionate adjustment of price and time of performance or damages

When the mandate contract is concluded, both parties have agreed upon a service to be performed in exchange (usually) for a price. The price and the time for performance may have been based upon the cost, time and effort that performance will require from the agent. Therefore, an increase in the content and magnitude of the agent's obligations cannot be without effect on the time the agent has for the performance of the contract and the price which ought to be payable when the mandated task has been accomplished (typically, when the prospective contract is concluded). Consequently, paragraph (2)(a) entitles the agent to extra time for performance and an adjustment of the price. Under paragraph (2)(b) the agent could instead choose damages to put the agent as nearly as possible into the position in which the agent would have been if the mandate contract had not been changed. These provisions may, of course, have no application if the matters are already regulated by the contract – for example, if it provides for a flexible time for performance and payment according to the hours of work spent on the performance.

Especially when the change consists of a limitation of the initial mandate, the agent's interests may be endangered in a different way. The following illustration may clarify this.

Illustration 3
A principal mandates an estate agent to sell the principal's house for no less then €250,000. The agent negotiates with a third party, a well-to-do artist, who seems willing to pay the requested sum. The principal, however, subsequently limits the agent's power by requiring the agent to negotiate a sales contract for the price of €200,000 with a fourth party, who is less wealthy than the third party with whom the agent was negotiating, but with whom the principal has a personal relationship.

The limitation of the mandate awarded to the agent may make it more difficult to conclude a contract, as the only possible candidate is now the third party indicated by the principal. This may require a change of the price for the service. Moreover, if the contract is indeed concluded with the fourth party, the sales price will be lower than was originally envisaged. In the case of contracts of this type, it is not unusual that the price for the services of the agent will be proportionate to the sale price. The limitation of the mandate will therefore directly affect the remuneration to be paid by the principal. In a situation such as this, damages may be a more suitable solution. As the change of the contract cannot be seen as the non-performance of an obligation by the principal since the principal is entitled to limit the power of the agent, an express provision entitling the agent to damages is required here.

E. Termination for extraordinary and serious reason

Where the principal severely limits the mandate but does not completely revoke it, this is to be regarded as a change of the mandate contract under the present Article. However, the change may give the agent reason to believe that it will not be possible to accomplish the mandated task – for example, to conclude the prospective contract. If that is the case, the agent has a good reason to fear that the services provided will be to no avail. As the entitlement to a price normally only comes into being when the mandated task has been completed, the agent then has an extraordinary and serious reason to terminate the mandate relationship. Paragraph (3), in combination with IV.D.–6:105 (Termination by agent for extraordinary and serious reason) gives such a right. As a result, the difference between the situation where the mandate is revoked (leading to the automatic termination of the mandate relationship) and that where it is limited, is not so big as it may seem at first glance.

F. No entitlement to termination if change is minor or to agent's advantage

Whereas it seems justified to allow the agent to terminate the mandate relationship for extraordinary and serious reason if the mandate is significantly changed, this is not the case where the change is minor. Nor is there any justification for allowing termination when the change actually improves the agent's chances of accomplishing the mandated task – for example, concluding the prospective contract – or is otherwise to the agent's advantage. This is the case when the mandate of the agent is extended. In such a case, the agent should not be able to escape from the mandate contract for the mere reason that the content of the mandate contract has changed. Paragraph (3) therefore provides that the change of the mandate contract is these cases does not constitute an extraordinary and serious reason for termination.

NOTES

I. Change of mandate by principal

1. BULGARIAN contract law distinguishes between the mandate contract and the power of attorney. The mandate contract presupposes mutual consensus of the parties and regulates their internal relationship. The power of attorney is a unilateral act of the principal to authorise the agent to perform in the principal's name. As a general rule, contracts may be amended, terminated, avoided, or revoked only by mutual consent of the parties or on grounds provided in the law (LOA art. 20bis(2)). Since there is no provision permitting unilateral alteration of the mandate contract, the mandate contract can be changed only by mutual consent of the parties. However, the principle of

freedom of contract (LOA art. 9) allows the parties to stipulate that the principal is permitted to unilaterally change the contract and also to define the limits of this alteration (Mevorah/Lidji/Farhi, Komentar III, 119). Furthermore, the principal is entitled to make any alterations in the power of attorney of the agent at any time, as this is a unilateral juridical act.

2. In ENGLAND doctrinal writing indicates that 'the principal's control over the agent is based on his powers not to grant authority, to limit the authority and to withdraw and revoke the authority' (Bowstead (-*Reynolds and Graziadei*), Agency[18], no. 6.009). However, whether a significant change of power of the agent can be done unilaterally is doubtful: Reynolds states that actual authority of the agent can only be modified by consent of the principal and the agent (Bowstead (-*Reynolds and Graziadei*), Agency[18], no. 10-002).

3. In FRENCH law, there is no clear distinction between change of power and change of direction. The principal can change the directions given to the agent at any time during the mandate relationship, as the mandate contract is concluded for the principal's benefit. But if the requested services are seriously modified, the agent may claim for a higher price.

4. Under GERMAN law, the principal may not unilaterally change the mandate contract – any change, significant or insignificant, has to be accepted by the agent (as it might lead to a modification of the agent's rights and obligations under the contract). Should the agent not agree to the proposed change, the principal can revoke the mandate (CC § 671 (1)).

5. In IRELAND while an agent must follow the principal's lawful instructions, the principal cannot unilaterally alter the terms of the agency contract. Any variation of the terms must be supported by fresh consideration, in the absence of a variation clause in the original contract.

6. In the NETHERLANDS there is no specific rule for this situation. According to CC art. 7:402, the principal is allowed to give directions to the agent and the agent who is unwilling to perform the contract according to these directions may end the mandate contract.

7. The POLISH Civil Code does not allow the principal to change the contract after it has been concluded unless the agent agrees. The principal may terminate the contract but not change it. If the agent was ordered to buy a painting for a set amount and the principal decides to change this amount, the contract should be terminated and a new mandate contract should be concluded unless the agent agrees to carry out the modified contract.

8. In SCOTLAND as the terms of the agency contract will be agreed from the point of formation, the principal will not be entitled unilaterally to make changes to the agency contract. Of course, one of the terms of the contract (whether express or implied by law) will normally be that the principal has the power to give directions as to how the obligations under it are to be carried out. So a distinction has to be drawn between a permissible direction and an impermissible change.

9. In SLOVAKIA there is no special regulation and accordingly the normal rules apply and one party is unable to unilaterally change the contract. .

10. In SPAIN the agent may refuse performance of instructions that imply an imbalance in the contractual position of the parties to the detriment of the agent or instructions that imply a modification of the object of the contract (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII[2], 472-473).

11. In SWEDEN if the principal significantly changes the power of the agent, such change could amount to an important and valid reason entitling the agent to cancel the contract if it cannot reasonably be expected that the contract shall continue (*Hesser*, 29; KommL § 51; HaL § 26).

II. Unilateral change of mandate contract via direction

12. In BULGARIA the principal is entitled to give directions that result in unilateral change of the mandate contract only when: (a) they are within initially stipulated limits for alteration; or (b) they do not change the mandate significantly and do not make its performance too burdensome for the agent (Mevorah/Lidji/Farhi, Komentar III, 119; *Vassilev, L.*, Obligazionno pravo, 24).

13. In FRANCE the agent is required to comply with the instructions of the principal, even when the agent has warned the principal and the latter has not changed the instructions (see Notes under IV.D.–4:101 (Directions given by principal). There is no change of mandate contract in that case. The principal can modify the directions at any time during the agency, as the mandate contract is concluded for the principal's benefit.

14. Under the GERMAN CC § 665, the principal may only give directions as long as they stay within the agreed framework of the mandate contract; it is not possible to unilaterally change the contract by way of a direction (*Seiler*, in: Münchener Kommentar zum BGB[4], § 665 no. 12). A direction may, however, clarify the agent's obligations under the mandate, and the line between a mere clarification and a unilateral change (extension) might often be difficult to draw. In case the direction given exceeds the contractual limits, the agent acting under a gratuitous contract (CC § 662) may either ignore the direction (*Seiler*, ibid., § 665 no. 13), upon which the principal may revoke the mandate according to CC § 671(1), or the agent might opt to revoke under CC § 671(1).

15. In HUNGARY the principal remains always the master of the affair and can change the directions at any time (Supreme Court Pfv. VIII. 20.107/2006, in BH2006. 321).

16. In the NETHERLANDS the principal may give the agent directions. These directions should be timely and sound. Furthermore, the principal's right to give directions is limited by the scope of the mandate. The mandate contract may also imply that the principal is not allowed to give further directions. See CC art. 7:402(1) and TM, Parl. Gesch. InvW 7, p. 324.

17. In POLAND it is not clear whether the agent is bound by the principal's directions given after the mandate contract has been signed.

18. In SCOTLAND, as above, it is suggested that a distinction has to be drawn between permissible directions and impermissible changes. A direction which would bring about a significant change to the agent's obligations to the agent's detriment would not normally be within the permissible range and would be perceived as an attempted unilateral change of the contract.

19. In SLOVAKIA there is no special regulation; it depends on the content of the mandate contract and the provisions of general contract law. The possibilities to change the contract are very restricted.

20. SPANISH law has no rule as to adjustments of the price of the service in the light of a direction. However, according to the remission to the commercial usages made by CC arts 1711(2) and Ccom art 277, an adjustment of the price may be reasonable if the service becomes more onerous.

21. In SWEDEN the agent is required to follow the principal's directions as long as these are considered to be reasonable.

III. Consequences of unilateral change of mandate contract

22. In BULGARIA since there are no specific provisions, the consequences of a unilateral change of the mandate contract are governed by general contract law and contractual stipulations. If the principal alters the mandate contract within the stipulated limits, the parties are free to negotiate adjustment of the price and/or the time for performance. If the principal does not have the right of unilateral change of the contract and nevertheless gives directions that significantly alter the mandate, this is considered to be a unilateral termination of the old mandate contract and an offer for conclusion of a new contract. The agent may reject the offer (Mevorah/Lidji/Farhi, Komentar III, 119). If the principal has not exceeded the stipulated limits but the mandate contract has become too burdensome for performance, this is considered to be a sufficient reason for termination of the contractual relationship by the agent by means of a unilateral notice of termination (LOA art. 289).

23. In ENGLAND it is thought that if this amounts to a serious breach by the principal, the agent will be entitled to treat the breach as repudiatory, terminate the relationship and claim damages.

24. In FRANCE if the principal changes the instructions, the agent may claim for a proportionate adjustment of the price or may simply decide to renounce the mandate. On the basis of a general obligation of fair dealing, the agent should inform the principal of any possible additional expenses and ensure that the parties agree on such additional expenses. The French courts have accepted that the remuneration set out in the agency contract may be revised if the mandate carried out does not correspond to the remuneration initially envisaged.

25. In GERMANY if the direction given by the principal results in a change of the gratuitous mandate contract and the agent chooses to follow the direction, the agent may claim reimbursement of expenses resulting from the change under CC § 670. Under remunerated mandate contracts (CC § 675(1)), the applicable law on contracts for works or services will require an (at least implied) agreement between the parties for the price to be adjusted.

26. In HUNGARY the unilateral change of the mandate contract can be a ground of unilateral termination for the other party.

27. In IRELAND a unilateral change in the term of the agency contract is not effective unless supported by fresh consideration and may constitute a breach of contract, allowing the innocent party to repudiate the contract and sue for any damages.

28. In the NETHERLANDS the agent need not obey the principal's directions if they were not given timeously or if they were not sound because such directions may cause breach of contract of the agent. See TM for art. 7.7.1.3, Parl. Gesch. InvW 7, 324.

29. In POLAND the principal may not change the scope of the mandate contract by a unilateral act.

30. In SCOTLAND an attempt unilaterally to make a significant change to the agency contract would be ineffective. To be effective the change would have to be agreed by both parties. If the agent did not accept the change and the principle refused to renegotiate but also refused to be bound by the original contract this is likely to amount to a material breach, or anticipatory breach, on the principal's part, entitling the agent to terminate the relationship and claim damages. It could happen that an agent's acceptance of a significant change, without express mention of price, resulted

in a new contract with an implied term that payment would be on a *quantum meruit* basis (cf. *Head Wrightson Aluminium Ltd v Aberdeen Harbour Commissioners* 1958 S.L.T. (Notes) 12).

31. In SPAIN, the agent is entitled to put the contract to an end, without needing to justify this by reference to changes made by the principal (CC art. 1736)

32. In SWEDEN the agent is entitled to a price which is reasonable considering the circumstances. A unilateral change of power could lead to an adjustment of the price and time for performance of the contract.

CHAPTER 5: CONFLICTS OF INTERESTS

IV.D.–5:101: Self-contracting

(1) The agent may not become the principal's counterparty to the prospective contract.

(2) The agent may nevertheless become the counterparty if:

(a) this is agreed by the parties in the mandate contract;

(b) the agent has disclosed an intention to become the counterparty and

(i) the principal subsequently expresses consent; or

(ii) the principal does not object to the agent becoming the counterparty after having been requested to indicate consent or a refusal of consent;

(c) the principal otherwise knew, or could reasonably be expected to have known, of the agent becoming the counterparty and the principal did not object within a reasonable time; or

(d) the content of the prospective contract is so precisely determined in the mandate contract that there is no risk that the interests of the principal may be disregarded.

(3) If the principal is a consumer, the agent may only become the counterparty if:

(a) the agent has disclosed that information and the principal has given express consent to the agent becoming the counterparty to the particular prospective contract; or

(b) the content of the prospective contract is so precisely determined in the mandate contract that there is no risk that the interests of the principal may be disregarded.

(4) The parties may not, to the detriment of the principal, exclude the application of paragraph (3) or derogate from or vary its effects.

(5) If the agent has become the counterparty, the agent is not entitled to a price for services rendered as an agent.

COMMENTS

A. General idea

The present Article starts from the same idea as II.–6:109 (Conflict of interest): the presumption that there is a conflict of interests when the agent concludes a contract with himself or herself in a personal capacity. The agent is therefore not allowed to do so. The main differences between the Articles are not of a substantive nature, but follow from their different focus: whereas II.–6.109 deals with the external relationship between the principal and the third party, the present Article deals with the internal relationship.

Where the agent was not allowed to act as the third party, but has nonetheless done so, the act is not in conformity with the best interests of the principal and the agent is therefore liable for non-performance. However, there are situations where this may be different. Paragraph (2) deals with this matter. For consumers, a more restrictive approach is taken in paragraph (3). This more restrictive rule is mandatory to protect the consumer's interest (paragraph (4)). Paragraph (5) deals with the consequences as regards the payment of the price.

B. Main rule: agent may not act as third party

One of the main obligations of the agent is to act in accordance with the interests of the principal (IV.D.–3:102 (Obligation to act in interests of principal)). In the situation in which

the agent is at the same time the third party to the prospective contract (a situation also known as 'self-contracting'), a conflict of interests may arise.

> *Illustration*
> A principal mandates an agent to sell a precious Ming vase. The agent is himself interested in the purchase of the vase. Whereas the agent, as a buyer, will want to pay as little as possible, in his function as the agent of the principal, he is required to achieve as high a sale price as possible. These interests clearly collide.

An exception to the main rule is however possible when a conflict of interest is deemed or may be assumed not to exist. These cases are regulated in paragraph (2).

C. Self-contracting if agreed in mandate contract

A first exception to the ban on self-contracting is the situation where the contract itself indicates that the agent is entitled to act as the third party. Consent may be express or implied.

D. Self-contracting if agent discloses intention to become counterparty

The risk of a conflict of interests is to a large extent minimised if there is full disclosure of the fact that the agent wishes to act as the third party to the prospective contract, as in that case the principal is aware that the agent has potentially conflicting interests. Such a principal will be alerted to look critically into the question whether the prospective contract is beneficial. Accordingly, when the agent has disclosed the intention of being the third party and the principal does not object, the principal may be assumed to have given consent. In this situation, there is not sufficient reason not to allow the agent to be also the third party to the contract.

E. Self-contracting if intention not disclosed

The fact that the agent did not disclose the intention of acting as the third party should not prevent the agent from nevertheless doing so if either the principal otherwise knew or must have known that the agent would act as the third party. There is no substantial difference between those cases where it was the agent who disclosed the conflict and cases where the principal found out or was informed by another party of the fact that the agent would become the counterparty to the prospective contract if in both of these types of cases the principal did not object to that situation.

F. Self-contracting if content of the prospective contract excludes risk of conflict of interests

Where the content of the prospective contract is very clearly determined in the mandate contract a conflict of interests is excluded. In such cases, the contract offered to the third party is more or less non-negotiable. The agent is then no longer in a position to further his or her own interests to the detriment of the principal as the terms of the prospective contract cannot be altered. If that is the case, there is not much risk that the interests of the principal would be jeopardised.

G. Self-contracting if principal is consumer

A principal-consumer may not be in a position to clearly evaluate whether the agent's own interests have led to a contract which is sub-optimal. In order to protect the principal from

hasty decisions or even from giving consent by adhering to standard contract terms, this Article demands that consent must be given expressly, in writing or otherwise.

In order to properly protect the interests of the consumer and also to protect the trust in professional providers of mandate services, a more restrictive provision is needed where it comes to contracts between a business and a consumer. However, it is not in the interest of the consumer to completely exclude the possibility of the agent becoming the principal's counterparty to the prospective contract. The interests of the principal are sufficiently safeguarded with full disclosure of the identity of the agent and express consent by the principal for the particular transaction (paragraph (3)(a)). This implies that the principal cannot by way of agreeing to standard contract terms be forced to accept the agent becoming the counterparty to the prospective contract.

A conflict of interests is also deemed to be excluded in contracts between a business and a consumer when the content of the prospective contract is so precisely determined in the mandate contract that there is no risk that the interests of the principal may be disregarded (paragraph (3)(b)).

NOTES

I. Main rule: self-contracting not allowed

1. In BELGIUM the majority defends a general prohibition of self-contracting: the representative is forbidden to be a party to the prospective contract, unless with the principal's knowledge and permission. This prohibition is based on the risk of a conflict of interests. In case of a breach, the contract is (relatively) null and void (nullité relative, Supreme Court 18 Mar 2004, RW 2004-05, 303, note *A. SMETS*; Supreme Court 24 Sep 1981, Pas. 1982, I, 125; Supreme Court 7 Dec 1978, Arr. Cass. 1978-79, 407 and Pas. 1979, I, 408; *de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 410-412; Ekelmans, 9-10; *Foriers and Glansdorff,* Contrats spéciaux, 607-610; Foriers, 64-65; *Samoy*, Middellijke vertegenwoordiging, 47-49; Wagemans, 177; *Wéry*, Le mandat, 154-158).
2. In BULGARIA self-contracting is explicitly banned only in cases of direct representation. LOA art. 38(1) forbids the (direct) representative to negotiate in the name of the principal with either himself or another person he represents, unless the principal has given consent.
3. Under the rules on mandate in GERMANY (CC § 662 et seq.) and *Geschäftsbesorgungsvertrag* (CC § 675(1)), the contract is decisive, the law being silent on this question. The matter is to some extent decided by the rules on authority (CC § 181), which generally rule out self-contracting (*Insich-Geschäft*).
4. In the NETHERLANDS according to CC art. 416(1), *Selbsteintritt* is allowed only if the juridical acts to be performed by the agent under the mandate contract have been precisely established, so that the interests of the principal and the agent do not conflict (Castermans/Krans, Tekst & Commentaar BW^7, no. 3089; *Van der Grinten*, Lastgeving, no. 31).
5. In SCOTLAND as a general rule, an agent is under a duty not to get into a position in which the agent's own interests would conflict with those of the principal (*Huntingdon Copper and Sulphur Co Ltd v Henderson* (1877) 4 R 294 at 307, per Lord Mure). Self-

contracting is therefore only permitted subject to stringent conditions, commented on below (*McPherson's Trustees v Watt* (1877) 5 R (HL) 9; *Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 97).

6. In SPAIN self-contracting is not explicitly regulated in a general way for mandate contracts. There are however some specific rules that forbid this type of practice. CC art. 1459 does not allow the agent to buy the principal's goods under the agent's administration. See also Ccom art 267. It seems that the legislator did not want to allow this type of situation. However, recent decisions allow self-contracting in cases in which the principal has given consent or when the possibility of a conflict of interests is excluded (STS 24 Sep 1994, 15 Mar 1996 and 12 Feb 1999). (*Lacruz Berdejo and Rivero Hernández*, Elementos II(2)[4], p.15).

7. The main rule in SWEDISH law is that self-contracting is not allowed. A commissionaire is allowed to be a party to the prospective contract only if this right follows from the contract or from trade custom in a particular line of business. A real estate agent is prohibited to be a party to the prospective contract (KommL §§ 40-45; FmL § 13).

II. Conditions under which self-contracting is allowed

8. Where the AUSTRIAN Civil Code applies, the agent must not, without first obtaining the informed consent of the principal, get into a position where the duty to the principal conflicts or may conflict with the agent's own interests or the interests of another principal. An agent is not allowed to be the third party, except if this self-contracting is only advantageous for the principal and involves no risks for the principal (OGH in ÖBA 1992, 274; SZ 69/90; ZfRV 1997, 246; NZ 1995, 305; NZ 1997, 95; SZ 69/90; RdW 1998, 548), e.g. when there is a current price for the goods. In all these cases, the agent must conclude the prospective contract by express words, so that it is transparent and not easy to escape from by unilateral action at the agent's discretion (OGH in RdW 1986, 39; ZfRV 1997, 246). There is special commercial regulation for self-contracting in Ccom §§ 345, 405 and 412(1) (Dullinger, RZ 1986, 204ff; § 25 GmbHG; Wünsch, FS Hämmerle; Strasser, § 1009 Rz 21).

9. For BELGIUM, see Note 1 above.

10. In BULGARIA, in general, self-contracting is only possible with the consent of the principal (LOA art. 38(1)). Ccom art. 358 provides an exception for commission agents: they may conclude the prospective contract on their behalf if it concerns the sale of goods or securities at market or commodity exchange price.

11. In DANISH legislation rules on self-contracting are inadequately treated. The notion appears in the Factors Act sections 40-45 governing the extent and terms under which a factor may take the buyer's place in a sales factoring situation and the seller's place in a purchasing situation (*contracting for own account*). Sections 40-45 take account of the fact that it is difficult to deal honestly with oneself and lay down that self-contracting is consistent with the Factors Act only when both parties have agreed upon it or when it is consistent with *custom*. These rules most likely apply to all kinds of representation governed by Danish law.

12. In ENGLAND the agent can be a party to the contract as long as the principal has full knowledge of the extent of the agent's interests in the transaction and agrees to the transaction. The agent's duty of disclosure is full and must be very precise so that the principal knows all the possible consequences before giving consent. The burden of proving that the duty has been complied with is on the agent. The agent will not be able to evade the rule of no conflict of interest by dealing with the principal through a third party (*McPherson v Watt* ((1877) 3 App Cas 254)

13. In ESTONIA self-contracting is regulated both for the internal relationship between the agent and the principal as well as for the external relationship. For the internal relationship, LOA § 623(1) (applicable for the (general) contract for services) provides that in case of entry into a transaction, the agent may be the third party or the principal of the third party to the transaction only if the possibility of a conflict of interests is precluded. This would be the case where the content of the second contract is so precisely determined in the contract for mandate that a conflict of interests between the principal and the agent is excluded. LOA § 623(2) further provides that the agent must inform the principal of any direct or indirect interest in the prospective transaction.

14. There are no general rules on self-contracting in FINLAND. The agent is usually not entitled to be a party to the prospective contract, unless otherwise agreed. However, when it is clear that no conflict of interests arises, self-contracting is allowed (e.g. when the price of the prospective contract is based merely on an objective valuation). Further, an estate agent is entitled to self-contract if the client is informed in advance (REstateAA § 8).

15. In FRANCE on the basis of a general obligation of fair dealing, which is imposed on the agent (see Pétel, no. 172 s.), and in order to reduce the risk of any misuse of power, the agent may not become a party to the contract negotiated for the principal. The sanction is voidability of the contract; the contract may be avoided by the principal (Civ. 1ère 29 Nov 1988, Bull. civ. I, no. 341). The rule is not, however, one of mandatory public policy. The principal may authorise the agent to become a party to the contract. In addition, the regulations on stockbrokering companies allow them to be parties to the contract in certain cases (Ccom art. L. 131-7). The prohibition on the agent becoming a party to the contract is not established in a general manner by the Civil Code in the chapter relating to agency, but has been deduced by the courts from art. 1596 relating to the particular case of auction sales. It is applied rigorously, even where the price or consideration for the contract is that envisaged by the principal, and even where the agent acts through an intermediary (Civ. 1ère 12 Dec 2000, Bull. civ. I, no. 319 ; Civ. 1ère 29 Nov 1988, Bull. civ. I, no. 341). The general view is that the prohibition on the agent becoming a party to the contract also applies to the commission agent in commercial matters (Huet, no. 31149).

16. Under the GERMAN rules on mandate (CC §662 et seq.) and *Geschäftsbesorgungsvertrag* (CC § 675(1)), the contract is decisive (the law being silent on this question). The matter is to some extent decided by the rules on authority (CC § 181), which rule out self-contracting (*Insich-Geschäft*). The law on commercial commission agents explicitly allows self-contracting (*Selbsteintritt*), provided that the principal has not otherwise instructed the agent (Ccom § 400).

17. According to the GREEK CC art. 235(1) an agent may not execute in the name of the (person) represented a deed with himself or herself personally unless the deed had been authorised (explicitly or tacitly) by the principal or if it constitutes exclusively the performance of an obligation (Georgiadis/Stathopoulos/Doris, Art. 235 GREEK CC nr. 1). A contract with oneself which has not been executed in the form of a notarial deed is invalid (CC art. 235(2)). If the agent violates these rules and acts as the third party the concluded contract is void (CA Thessaloniki decision no. 2977/1989, EllDni 1991, 1345).

18. If the agent has to act in the name of the principal, according to the HUNGARIAN CC art. 221(3), '[an] agent shall not proceed if the opposite or otherwise interested party is himself or a person whom he also represents. The agent, if a legal person, shall also be allowed to proceed in a case of conflicting interests with the express consent of the person represented'. In case of commission agency, CC art. 510(1) provides that '[t]he

commission agent can himself conclude a sales contract with the principal.' In all cases, the general rules of obligations apply, especially CC art. 277(5): '[t]he parties shall be under obligation to inform each other of all important circumstances affecting performance of the contract'. Moreover, '[t]he agent shall inform his principal of his activities and the state of affairs upon request or, if necessary, even without a request, particularly if employment of another person has become necessary or if the instructions need to be changed due to the occurrence of new circumstances' (CC art. 477(1)) .

19. In IRELAND an agent's fiduciary duties include the duty to avoid conflicts of interest. It has been stated: 'It is a rule of universal application, that no one, having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.' (Lord Cramworth LC in *Aberdeen Rly Co v Blaikie Bros* [1854] 1 Macq 461 at 471). Where the duty applies, there is a breach if, for instance, an agent instructed to buy property, sells the agent's own property to the principal (e.g. *Armstrong v. Jackson* [1917] 2 KB 822); or if an agent instructed to sell property, buys it personally (e.g. *McPherson v Watt* [1877] 3 App Cas 254), unless all the circumstances are disclosed to the principal and the principal consents to the transaction (*North & South Trust Co v Berkeley* [1971] 1 WLR 470 at 484-485; *Gibson v Jeyes* [1801] 6 Ves 266). Where an agent buys the principal's property or sells the agent's own property to the principal, the agent must also show that the price was fair and that that there was been no abuse of the position of agent (*McPherson v Watt* [1877] 3 App Cas 254).

20. In ITALY as a rule, there is no strict prohibition of self-contracting. Self-dealing is governed by CC art. 1395, which is located among the general rules on contracts: 'a contract which the agent makes with himself, whether acting in his own behalf or as the agent of another party, is voidable, unless specifically authorised by the principal or unless the content of the contract is established in such a way to preclude the possibility of a conflict of interests'.

21. In the NETHERLANDS, according to CC art. 416(1), *Selbsteintritt* is allowed only if the juridical acts to be performed by the agent under the mandate contract have been precisely established, so that the interests of the principal and the agent do not conflict (Castermans/Krans, Tekst & Commentaar BW[7], no. 3089; *Van der Grinten*, Lastgeving, no. 31). If the principal practises a profession, however, the principal's written approval is required under the sanction of voidability (CC art. 416(3); Castermans/Krans, Tekst & Commentaar BW[7], no. 3090; *Van der Grinten*, Lastgeving, no. 33).

22. In POLAND self-contracting is allowed only if the principal has agreed or if there is no danger to the principal's interests.

23. Agents have, in SCOTTISH law, a fiduciary duty towards their principals. This relationship is characterised by trust and loyalty and has several different aspects. The issue has received much attention from academics in the context of the solicitor-principal relationship. If a solicitor makes a contract on behalf of the principal to which the solicitor is a party, then that contract is voidable at the instance of the principal (*McPherson's Trs v Watt* (1877) 5 R (HL) 9). The onus rests on the solicitor to show why that contract should not be declared void (*Rigg's Exx v Urquhart* (1902) 10 SLT 503 per Lord Stormonth-Darling at 504). However, the transaction may not be voidable if the solicitor can prove that the transaction was fair and honest when entered into; that there was no undue influence; or that the principal gave fully informed consent to the transaction following disclosure to the principal of all the

material facts within the solicitor's knowledge (Paterson, no. 172). In the case of estate agents, this question is governed by both 'soft law' and actual legislation. Several codes of practice exist, most notably the Ombudsman's Code of Practice for Estate Agents and the Estate Agency Affairs Board Code of Conduct. The former contains a general duty to avoid conflicts of interest which '…might not be in the best interests of the principal' (Ombudsman's Code of Practice, rule 9d). An estate agent seeking to buy property owned by a principal or sell property owned by the agent to a principal is under a duty, before negotiations begin, to provide all relevant facts in writing to that principal and as soon as possible to the principal's solicitor (Ombudsman's Code of Practice, rule 9b and 9c; see also the Estate Agency Affairs Board Code of Conduct, art. 4.2). The main piece of legislation relevant to estate agents, the Estate Agents Act 1979, contains a similar obligation (section 21(1)).

24. According to the general rules relating to Representation, no one may act as an agent for another person if his interests conflict with the interests of the person represented (SLOVAK CC § 22(2)). The commission agent must protect the principal's interests known to him, and keep the latter well informed of all the circumstances that may lead to a change in the principal's instructions (Ccom § 579(1)). The issue is explicitly regulated for the Commission Agent Contract on Procurement of Securities' Sale: the agent may perform his obligation by selling his own security to the principal or by buying the principal's security himself, provided that this has been allowed in (written) contract (Act on Securities and Investment Services (Act 566|2001Coll.), § 33(2)).

25. For SPAIN see Note 6 above.

26. In SWEDEN the parties can by contract allow self-contracting. An agent is allowed to be a party to the prospective contract only if this right follows from the contract or from trade custom in a particular line of business. If the agent enters into the prospective contract as a party, the agent is obliged to notify the principal about this fact and the duty to act in the principal's interest remains. See KommL §§ 40-45; *Ramberg*, 254; *Tiberg and Dotevall*, Mellanmansrätt[9], 99).

III. No price in case of self-contracting

27. In AUSTRIA the self-contracting agent is not entitled to a price for services rendered or to reimbursement of expenses made. It is in this respect not relevant whether the agent, before becoming a party to the prospective contract, has entered into failed negotiations with a third party (Strasser, § 1009 Rz 21; Straube (-*Griss*), HGB I[3], § 405, no. 1; Schütz, § 412 Rz 2).

28. In BELGIUM according to *de Page and Dekkers*, Traité élémentaire de droit civil belge V[2], there is no longer a question of a contract for representation, in case of self-contracting. There is only the prospective contract, the former object of the contract for representation (*de Page and Dekkers*, Traité élémentaire de droit civil belge V[2], 412). Recent authors on the contrary consider the permitted self-contracting as a simple modality to execute the contract for representation. Therefore the rights and duties of the contract for representation (e.g. the principal's duty to pay a salary and to reimburse the expenses) remain (*Wéry*, Le mandat, 158).

29. In BULGARIA, in a case of self-contracting the commission agent is entitled to receive half of the remuneration stipulated in the commission contract (Ccom art. 358(1)).

30. DANISH law in all probability will not entitle the self-contracting agent to claim a price for services or to claim reimbursement of expenses incurred, even if the agent has conducted failed negotiations with a third party.

31. In ENGLAND provided that all the relevant conditions of remuneration are complied with, there is no reason why the self-contracting agent should not be entitled to commission. Such an interpretation seems possible relying on *Wilson v Short* ((1848) 6 Hare 366 and *Robinson v Mollett* (1874) LR 7, HL).

32. The ESTONIAN LOA § 623(3) provides that a transaction entered into by the principal with the service provider (the agent) upon the performance of a contract of services does not restrict the right of the service provider (the agent) to receive remuneration and reimbursement of expenses if the provisions of § 623(1) have been adhered to.

33. In FINLAND there is no clear general rule on this point. Unless otherwise agreed, the agent is normally entitled to remuneration. However, this depends on the circumstances. An estate agent is not entitled to a price for the performance in a case of self-contracting (REstateAA § 20).

34. In FRANCE if the principal authorises the agent to be a party to the contract, it would appear that French case law allows the agent to be entitled to payment in respect to what is due under the mandate. French academic legal writing considers in fact that, in that situation, the initial agency remains in place and a second contract is entered into with the agent who has become a party to the contract (Collart Dutilleul & Delebecque, no. 646). This position would not apply, however, if parties decided to first terminate the agency in order to enable the conclusion of the other contract between them (Huet, no. 31149). The French courts do not require any prior condition such as the failure of the transaction with a third party, and it is simply the wish of the principal to accept that the agent become a party to the contract which will determine the position.

35. In the case of self-contracting, the GERMAN Ccom § 403 nevertheless entitles the commission agent to a price for the services and reimbursement of expenses.

36. In GREECE if the agent is allowed to be the third party, the answer to the question of entitlement to remuneration or reimbursement of expenses depends on the internal relationship which underlies the mandate. In the case of a gratuitous mandate relationship the agent is not entitled to a price in any event. With regard to the reimbursement of expenses CC art. 722 is applicable: '[a] principal shall be bound to reimburse the agent for everything the latter has spent to achieve an orderly performance of the mandate.'

37. If the agent has to act in the name of the principal, according to the HUNGARIAN CC art. 221(3), the agent 'shall not proceed if the opposite or otherwise interested party is himself or a person whom he also represents. The agent, if a legal person, shall also be allowed to proceed in a case of conflicting interests with the express consent of the person represented'. Because of this prohibition, the agent cannot be entitled to a price or to reimbursement of expenses. In the case of commission agency, CC art. 510(1) provides that '[t]he commission agent can himself conclude a sales contract with the principal'. In this case, paragraph (2) of this same article establishes that '[t]he commission agent's claim for commission shall not be affected if the sales contract with the principal is concluded by the commission agent himself'. According to CC art. 511(2), '[t]he commission shall include the expenses usually involved with consignment, but it shall not include expenses related to carriage'. In all other cases CC art. 478(1) applies, according to which '[t]he principal shall pay an appropriate fee, unless the circumstances, or the relationship between the parties suggest that the agent has assumed the agency without any consideration' and the first phrase of CC art. 479(1) which establishes that '[c]osts that arise in connection with the handling of a matter shall be borne by the principal'.

38. For IRELAND, Bowstead and Reynolds list a number of circumstances where no remuneration is payable, including where the transaction is unauthorised; in cases of misconduct or breach of duty; and in respect of unlawful transactions (Bowstead (-*Reynolds and Graziadei*), Agency[18]). There is no mention, in this litany of circumstances, of where the agent is allowed to be the third party. Moreover, given that self-contracting is permissible and not necessarily in breach of any fiduciary duty, provided there is full disclosure etc., it would appear that remuneration and reimbursement of expenses are due in such circumstances (*Wilson v Short* [1848] 6 Hare 366; *Robinson v Mollett* [1874] LR 7).

39. In ITALY a self-contracting agent is still entitled to a price for the services provided and reimbursement of expenses incurred.

40. In the NETHERLANDS if self-contracting is allowed, the agent remains entitled to remuneration (CC art. 7:416(4)). If it is not allowed, however, the agent usually is deprived of the right to payment. Self-contracting which is not allowed is a breach of contract, but the principal may determine to maintain the mandate contract. In that case, the principal may (partially) postpone payment (CC art. 6:262) or deduct the agent's remuneration from the principal's claim for compensation for the agent's breach of contract (Castermans/Krans, Tekst & Commentaar BW[7], no. 3090; *Van der Grinten*, Lastgeving, no. 34).

41. There are no POLISH CC provisions that would deprive the agent of the remuneration or limit it in any way in case of self-contracting.

42. In SCOTLAND if the requirements for self-contracting are adhered to, and the contract is not voidable, then there is no reason why the agent should not be entitled to a price for the services and reimbursement of expenses incurred in the normal fashion.

43. In SLOVAKIA there is no explicit regulation, but if the contract is not void, the agent will be entitled to a price.

44. In SPAIN a self-contracting agent is probably still entitled to a price for the services provided and to reimbursement of expenses incurred.

45. In SWEDEN an agent is entitled to a price which has to be as favourable to the principal as the prevailing price at the time of the self-contracting notification (KommL § 42).

IV.D.–5:102: Double mandate

(1) The agent may not act as the agent of both the principal and the principal's counterparty to the prospective contract.

(2) The agent may nevertheless act as the agent of both the principal and the counterparty if:

(a) this is agreed by the parties in the mandate contract;

(b) the agent has disclosed an intention to act as the agent of the counterparty and the principal

(i) subsequently expresses consent; or

(ii) does not object to the agent acting as the agent of the counterparty after having been requested to indicate consent or a refusal of consent;

(c) the principal otherwise knew, or could reasonably be expected to have known, of the agent acting as the agent of the counterparty and the principal did not object within a reasonable time; or

(d) the content of the prospective contract is so precisely determined in the mandate contract that there is no risk that the interests of the principal may be disregarded.

(3) If the principal is a consumer, the agent may only act as the agent of both the principal and of the counterparty if:

(a) the agent has disclosed that information and the principal has given express consent to the agent acting also as the agent of the counterparty to the particular prospective contract; or

(b) the content of the prospective contract is so precisely determined in the mandate contract that there is no risk that the interests of the principal may be disregarded.

(4) The parties may not, to the detriment of the principal, exclude the application of paragraph (3) or derogate from or vary its effects.

(5) If and in so far as the agent has acted in accordance with the previous paragraphs, the agent is entitled to the price.

COMMENTS

A. General idea

This rule follows the same rationale as IV.D.–5:101 (Self-contracting): there is presumed to be a conflict of interests when the agent also acts as agent of the third party. The risk of a conflict of interests generally precludes the agent from representing properly both the principal and the third party to the prospective contract. The general rule is therefore that the agent is not allowed to do so.

However, there are exceptions to this general rule. Paragraph (2) deals with this matter. For consumers, a more restrictive approach is taken in paragraph (3). This more restrictive rule is mandatory to protect the consumer's interest (paragraph (4)). Paragraph (5) deals with the consequences as regards the payment of the price.

B. Main rule: double mandate not allowed

As the case is with self-contracting, a conflict of interests may arise between the interests of the principal and those of the agent if the latter represents both the principal and the third party with whom the prospective contract is to be concluded. This situation is of special

relevance in mandate relationships, in which the agent's main obligation is to act in the interest of the principal. The option chosen is to forbid this practice as a general rule, unless a conflict of interests is excluded.

C. Exceptions to general rule if conflict excluded

The ratio of the present Article follows that of IV.D.–5:101 (Self-contracting). By way of exception a double-mandate is allowed when a conflict of interests between the principal and the agent is excluded. This approach protects the interests of the principal, since it prevents the agent from advancing the interests of the third party while disregarding those of the principal. This is for example the case when the principal consents to the double representation, or when the prospective contract is so precisely defined in the mandate contract that a conflict of interests is excluded.

D. Double mandate if principal consumer

The Article grants extra protection to the interests of a principal who is a consumer. In such a case the principal's consent in writing is required if the agent wants to represent the third party. In cases where the consumer is not informed of the fact that the agent acts as agent of the third party, or is informed in a standard contract term only, the consumer may be caught unaware or even feel betrayed when the party entrusted with the negotiation of a contract appears to have used, or abused, that position by defending the conflicting interests of the other party to the prospective contract.

E. Payment in case of double mandate

The agent should be entitled to payment in cases of permitted double representation. In this situation, the agent has done everything required under the contract and the services provided have led to the conclusion of the prospective contract. As the agent was allowed to act as the agent of the third party, the interests of the principal were not in jeopardy. Under these conditions, there seems to be no reason why the agent should not receive payment.

NOTES

I. Main rule: double mandate not allowed

1. In BELGIUM serving two principals seems to be allowed (Supreme Court 18 Mar 2004, RW 2004-05, 303, note A. Smets (implicit confirmation); Beltjens, no. 53; Ekelmans, 16; *Samoy*, Middellijke vertegenwoordiging, 48-49). Some authors require nevertheless that both principals are informed, expressly or tacitly (e.g. through the agent's profession; *Wéry*, Le mandat, 158-159).
2. In BULGARIA although there is no explicit prohibition on double mandate, in legal writings it is considered inadmissible for the agent to act on behalf of both parties to the prospective contract simultaneously (Mevorah/Lidji/Farhi, Komentar III, 120). This conclusion is deduced from the requirement that the agent acts in accordance with the interests of the principal in the best possible manner under the existing circumstances. There are some special provisions on this matter. First, LOA art. 38(1) forbids direct representatives from negotiating in the name of the principal with another person also represented by them, unless the principal has given consent. Second, BAA art. 43(3) contains special rules for advocates with regard to

representation of counterparties. Third, commercial procurators, commercial agents and commercial agents are under a general prohibition of acting in competition with the principal, including representing the principal's competitors (Ccom art. 29 and art. 44).

3. In GERMANY acting as the agent to a third party is considered to be analogous to an 'Insich-Geschäft' (self-contracting); the law on authority (CC § 181) therefore declares it to be generally inadmissible. The law on brokerage is less strict: CC § 654 indicates that a double mandate is only inadmissible if it runs contrary to the brokerage contract, thus making it permissible where the contract does not (expressly or impliedly) provide otherwise (BGHZ 61, 17; Palandt [-*Sprau*], BGB[66], § 654 no. 4).

4. In the NETHERLANDS serving two masters is only allowed if there is no conflict of interests between the principal and the third party (CC art. 7:417(1); Castermans/Krans, Tekst & Commentaar BW[7], no. 3090-3091; *Van der Grinten*, Lastgeving, no. 35). See also CA Leeuwarden, 28 Dec 1994, NJ 1996, 117.

5. In SCOTLAND as a general rule, an agent is under a duty not to get into a position in which the agent's interests would conflict with those of the principal (*Huntingdon Copper and Sulphur Co Ltd v Henderson* (1877) 4 R 294 at 307, per Lord Mure). Acting for two principals may put the agent in breach of this rule. However, double mandate is possible in certain contexts as commented on below.

6. In SPAIN the opinion has been put forward that the self-contracting prohibition does not apply when the agent acts both for the principal seller and for the principal who gave a mandate to buy (*Castro*, El autocontrato, RGLJ 1927, p. 391). Yet the question remains doubtful, and, given the silence of the law, every situation may depend upon the possibility of an eventual conflict of interests.

7. In SWEDEN it is unclear whether double mandate is allowed.

II. Double mandate allowed if agreed by or disclosed to principal

8. In AUSTRIA the agent may generally not also act as agent of the third party, as the agent may in case of conflicting interests be in breach of duty to one principal by acting with the intention of furthering the interest of another. Where the agent is of a type known to act for many parties (e.g. an estate agent or a lawyer who draws up a contract) it may be held that the situation is assented to by the principals (CC § 879) and that there is no breach of duty (Strasser, § 1009 Rz 22; Koziol/Welser, 194; Krejci, 212; Schütz, § 408 Rz 8 (Doppelvertretung)).

9. For BELGIUM, see Note 1 above.

10. In BULGARIA direct representatives may act on behalf of the counterparty to the prospective contract if the principal has given consent (LOA art. 38(1)). Advocates may act as an agent of both counterparties if the parties consent and do not have contradictory interests (BAA art. 43(3)).

11. According to section 15 of the DANISH Real Estate Agency Act an estate agent is not allowed to represent both the seller and the buyer before the conclusion of the contract between the parties has taken place. Section 15 is a mandatory rule for a special (although important) situation. The prohibition cannot without reservation be extended to cover other types of representation.

12. In ENGLAND similarly to the duty imposed on the agent to disclose when the agent's own personal interests may conflict with those of the principal, the rule of disclosure prevents the agent from getting into a position where the interests of one principal might conflict with the duty to the other principal in the same transaction. This will arise when a solicitor acts for the vendor and the buyer of a property. In such a case

where there is a high probability that the interests of the respective principals will conflict, the agent can only act providing that informed consent has been obtained from the two principals (*Clark Boyce v Mouat* ([1994] 1 AC 428). Informed consent in this case was held to mean consent given in the knowledge that there is a conflict between the parties and that, as a result, the solicitor may be disabled from disclosing to each party the full knowledge which the solicitor possesses in relation to the transaction or may be disabled from giving advice to one party which conflicts with the interest of the other (Brown, 116). The same obligation applies regardless of whether the agent acts gratuitously. For the financial sector, the rules appear to be more stringent, but it seems that it will depend on the size of the corporations involved. For big corporations, there is a risk that one department may act for a principal and another department may work for another principal whose interests will conflict with the first one. In order to avoid this kind of conflict, financial institutions will use what are called 'Chinese walls' to ensure that confidential information from one department of a company will not leak to the other. The House of Lords had to consider the efficacy of such Chinese walls in protecting confidential information in the case of *Bolkiah v KPMG* [1999] 2 AC 222 If the same agent acts for two potentially conflicting principals in two separate transactions, there does not seem to be a problem: *Kelly v Cooper* ([1993] AC 205). In this case the contract was held to contain an implied term that the agent would be allowed to act for more than one principal at a time whose interests might conflict and that the agent could keep confidential information received whilst acting for competing principals.

13. The conflict of interest provision in the ESTONIAN LOA § 623(1) applies both in cases of self-contracting and in cases where the agent (also) acts as an agent to the third party: this is only allowed if the possibility of a conflict of interests is precluded.

14. In FINLAND there is no regulation in this respect. In literature, a double mandate is considered disallowed and a prospective contract between two or more clients represented by the same agent is effective only if expressly accepted by the principal. In case there is no acceptance, the prospective contract is found to be voidable (*Hemmo*, Sopimusoikeus I[2], 460-464). Should the principal agree on double mandate, the agent is, in general, allowed to act for two clients. A disclosure by the agent is not sufficient unless the principal clearly accepts the double mandate.

15. In FRANCE the hypothesis of a double mandate is not envisaged by the legislation on agency, but the situation is sometimes regulated by specific legislation (e.g. art. 2 of the Decree of 26 Dec 1971 concerning Notaries, and art. 155(1) Decree of 27 Nov 1991, concerning Avocats). The hypothesis is accepted without difficulty for insurance agents (Req. 26 Nov 1928, S. 1929, 1, 94; CA Paris 8 May 1981, GP. 1981, 2, 801). Academic legal writers cannot agree about this question, and French courts have adopted a prudent position. In general, the double mandate is accepted, provided that it is implemented with complete transparency (see, for example, the case concerning an estate agent: Civ. 1ère 13 May 1998, Bull. Civ. I, no. 169; RTD Civ. 1998, 927). It may be supposed that in the absence of transparency in the case of the double mandate, the contract entered into with a third party could be avoided at the instance of the principal (contract voidable and not void). This would be on the basis of the failure of performance of the agent to satisfy its obligation of fair dealing (see *Malaurie, Aynès & Gautier*, no. 566). An action for negligence could also be envisaged against the agent.

16. The parties may agree to deviate from GERMAN CC § 181 and allow a double mandate. No form requirements apply. CC § 181 *ad fine* furthermore declares a double mandate to be admissible where the legal act performed by the agent 'consists

exclusively in the fulfilment of an obligation', e.g. an already existing legal obligation to execute said act – in this case, no conflict of interest is possible, as the agent merely does what the principal was already obliged to do before the agent got involved.

17. According to the GREEK CC art. 235(1) an agent may not execute in the name of the person represented a deed in the capacity as agent of a third party except if any such deed had been authorised (explicitly or tacitly) by the person represented or if it constitutes exclusively the performance of an obligation (Georgiadis/Stathopoulos/Doris, Art. 235 GREEK CC nr. 1).

18. If the agent has to act in the name of the principal, according to the HUNGARIAN CC art. 221(3), '[a] agent shall not proceed if the opposite or otherwise interested party is himself or a person whom he also represents. The agent, if a legal person, shall also be allowed to proceed in a case of conflicting interests with the express consent of the person represented'. If the agent does not act in the name of the third party, he may act also as an agent to the third party but he has the obligation to inform the principal about this fact (CC art. 277(5)). Moreover, CC art. 474(2) provides that '[a]n agent must fulfil the principal's instructions and represent his interests regarding the authority conferred upon him'. Also CC art. 477(1) establishes that '[t]he agent shall inform his principal of his activities and the state of affairs upon request or, if necessary, even without a request, particularly if employment of another person has become necessary or if the instructions need to be changed due to the occurrence of new circumstances'. In case of commission agency, CC art. 510(1) provides that '[t]he commission agent can himself conclude a sales contract with the principal'. As it follows from these principles, it is not relevant in this respect whether the principal and/or the third party is a consumer or not.

19. In IRELAND as part of the fiduciary duty owed to the principal, an agent must not allow personal interests to conflict with those of the principal. English authority provides that this duty may be excluded by an express or implied term of the contract (e.g. *Kelly v Cooper* [1993] AC 205; *Henderson v Merrett* [1995] 2 AC 145). Whether an Irish court would allow such exclusion remains to be seen. The majority of cases concern an agent taking up a position of conflict with the principal. Interesting questions have arisen where an agent takes a position where the duty to one principal may conflict with the duty to another principal. In the English case of *Kelly v Cooper* an estate agent, A, acted for two principals, P and X, who owned two adjacent properties. They both instructed A to sell their properties. A showed both properties to T, who agreed to buy X's property. T subsequently made an offer to P to buy his property. P, unaware that T had already agreed to buy X's property, accepted the offer. When P discovered that T had agreed to buy X's property, he argued that had he known that fact he would have been able to negotiate a higher price for his property because it was clear that T wanted both properties. P argued that A was in breach of his fiduciary duties in failing to disclose that T had agreed to buy X's property and in placing himself in a position where his duties to his two principals would conflict. He claimed damages for loss of the chance to negotiate a higher price. The Privy Council held that where an agent acts in pursuance of a contract, the scope of his fiduciary duties is determined by the contract. Since it was well known that estate agents might act for more than one principal, the agency contract in this case contained an implied term that the agent would be permitted to act for more than one principal, whose interests might compete, and to keep confidential information received whilst acting for other principals. On the facts, the contract could not include a term preventing the agent acting for other principals. This decision has wide implications because situations where an agent acts for more than one principal are increasingly common, as with financial advisors and solicitors, especially as firms become larger. In *Clarke*

Boyce v Mauot ([1994] 1 AC 428), the Privy Council went a step further when it held that a solicitor was entitled to act for both parties in *the same transaction* even where their interests might conflict, provided the informed consent of both parties was obtained. The recognition, by English courts, of the ability of parties to contract out of the 'no conflict rule' reflects modern commercial practice. Nevertheless, critics point to the danger of leaving everything to express and implied terms of the contract, thereby denying the importance of fiduciary obligations.

20. In ITALY as a rule, the agent may act on behalf of two or more principals. However, if the principals have opposing interests which may lead to a conflict of interests the consent of the first principal is required (priority rule). As a consequence, if the agent who acts for a principal intends to act also for a third party, the agent must notify the first principal of this circumstance in order to receive the principal's authorisation. If the authorisation is not granted, the agent should refuse the mandate.

21. In the NETHERLANDS serving two masters is only allowed if there is no conflict of interests between the principal and the third party (CC art. 7:417(1); Castermans/Krans, Tekst & Commentaar BW[7], no. 3090-3091; *Van der Grinten*, Lastgeving, no. 35). If the principal does not act in the course of a business, the principal's written approval is required before the agent is allowed to serve two masters (CC art. 7:417(2); *Haak and Zwitser*, Opdracht aan hulppersonen, 161). If in this case the agent serves two masters without having received the principal's written approval, the agent will be in breach of contract (Castermans/Krans, Tekst & Commentaar BW[7], no. 3091; *Van der Grinten*, Lastgeving, no. 36).

22. In POLAND double mandate is allowed only if the principal has agreed or if there is no danger to the principal's interests.

23. SCOTTISH solicitors are prohibited from acting for two different parties whose interest's conflict (Begg, 363; Solicitors (Scotland) Practice Rules 1986, rule 3). Provided however that no conflict arises, there is no bar to acting for two parties. The rules on conflict of interest are complex and are not explored in full here. The issue is governed by both the Code of Conduct for Scottish Solicitors 2002, rule 3 and the Solicitors (Scotland) Practice Rules 1986. The former provides that, in choosing to act for two parties, solicitors must have regard to any possible risk of breaches of confidentiality and impairment of independence arising in the future (Code of conduct for Scottish solicitors 2002, rule 3). A different kind of agent, a 'broker', also has a limited ability to act for two principals. The term 'broker' has been defined as '…a limited agent who is employed in making bargains or contracts between other persons in matters of trade, commerce, and navigation'. (Encyclopaedia of the Laws of Scotland 1926, para 553). It is accepted that a broker may be the agent of both parties (Encyclopaedia of the Laws of Scotland 1926, para 553). The various estate agency codes which regulate the actions of their members all contain provisions on conflicts of interest (Ombudsman's Code of Practice, rule 9a; Estate Agency Affairs Board Code of Conduct, art 4.1.4 and the National Association of Estate Agents Rules of Conduct, rule 10).

24. In SLOVAKIA the advocate is obliged to refuse to perform legal services for a person if he or she has performed legal services for another person (client) in the same or a related matter and the client's interests conflict with the interests of the person concerned.

25. In SWEDEN the parties can agree on a double mandate. It may also follow from usages. There are cases where a double mandate is allowed. An example is an auctioneer's office which acts as an agent for both the seller and the buyer; both the

seller and the buyer paying a commission of a certain percentage of the sales price to the commissionaire (see *Håstad*, 302).

III. Right to price if double mandate allowed

26. In BULGARIA there are no explicit rules. Legal doctrine considers it unallowable for the agent to receive remuneration from both parties to the prospective contract (Mevorah/Lidji/Farhi, Komentar III, 120).

27. In FINLAND if the prospective contract is valid, the agent is in general entitled to charge a fee and reimbursement of expenses. A real estate agent, however, is entitled to charge only one price if the agent represents both parties to a purchase (Real Estate Agent Act art. 20).

28. In FRANCE in the case of a transparent double mandate, the agent would normally be entitled to double remuneration and to obtain repayment of all expenses in accordance with the terms of each agency contract entered into. If the double mandate is not transparent, there are cases where the agent would certainly be held to be liable and the damages would be set off against any remuneration and repayment which may be due to the agent. This situation has not, however, been clearly defined by French case law and litigation is exceptional.

29. In GERMANY if the double mandate was permissible, the agent is entitled to the price. For brokerage contracts, the CC § 654 explicitly declares that neither price nor reimbursement of expenses may be claimed if the double mandate was contrary to the brokerage contract, thus indicating that in cases of permissible double mandate the broker maintains the right to claim the price.

30. In IRELAND given that double mandate may be permissible and not necessarily in breach of any fiduciary duty, provided there is full disclosure etc., it would appear that remuneration and indemnity are payable in such circumstances.

31. In the NETHERLANDS if double mandate is allowed, the agent is entitled to the remuneration. If double mandate is not allowed according to CC art. 7:417(1)-(2), for instance if the principal has not given written approval, the agent is not entitled to the price (CC art. 7:417(3); Castermans/Krans, Tekst & Commentaar BW[7], no. 3091; *Van der Grinten*, Lastgeving, no. 37; *Haak and Zwitser*, Opdracht aan hulppersonen, 163).

32. There are no POLISH CC provisions that would deprive the agent of the remuneration or limit it in any way in case of double mandate.

33. In SCOTLAND if acting for both parties is permitted the normal rules on remuneration apply.

34. In SLOVAKIA in the case of commercial representation, the agent cannot claim entitlement to a commission and agreed compensation for costs if the agent acted, as a commercial agent or as a broker, for the party with whom the principal has concluded the business deal (Ccom § 659(3); see § 647(1) for the Brokerage Contract).

35. In SWEDEN the agent is entitled to a price for the services as well as reimbursement of expenses. This is regardless of whether the double mandate is disclosed or not and it may lead to a double remuneration.

CHAPTER 6: TERMINATION BY NOTICE OTHER THAN FOR NON-PERFORMANCE

IV.D.–6:101: Termination by notice in general

(1) Either party may terminate the mandate relationship at any time by giving notice to the other.

(2) For the purposes of paragraph (1), a revocation of the mandate of the agent is treated as termination.

(3) Termination of the mandate relationship is not effective if the mandate of the agent is irrevocable under IV.D.–1:105 (Irrevocable mandate).

(4) The effects of termination are governed by III.–1:109 (Variation or termination by notice) paragraph (3).

(5) When the party giving the notice was justified in terminating the relationship no damages are payable for so doing.

(6) When the party giving the notice was not justified in terminating the relationship, the termination is nevertheless effective but the other party is entitled to damages in accordance with the rules in Book III.

(7) For the purposes of this Article the party giving the notice is justified in terminating the relationship if that party:

(a) was entitled to terminate the relationship under the express terms of the contract and observed any requirements laid down in the contract for doing so;
(b) was entitled to terminate the relationship under Book III, Chapter 3, Section 5 (Termination); or
(c) was entitled to terminate the relationship under any other Article of the present Chapter and observed any requirements laid down in such Article for doing so.

COMMENTS

A. General idea

This Article provides, first, that a notice of termination by either party has the effect of terminating the mandate relationship (paragraph (1)). In accordance with the general rules on notices in Book I, the termination is effective when the notice of termination reaches the other party or, if the notice so provides, when a period indicated in the notice has elapsed (I.–1:109 (Notice) paragraph (3)). The effects of termination are governed by the general rules in Book III, Chapter 1 on the effects of termination of a contractual relationship by notice. This means that termination has prospective effect only, subject to the restitution of certain benefits (III.–1:109 (Variation or termination by notice) paragraph (3)), but does not affect provisions for the settlement of disputes or other provisions intended to survive the termination of the mandate relationship.

The notice leads to the termination of the mandate relationship, whether or not the party giving notice had a right to terminate the relationship under the express terms of the contract or under the rule on termination for fundamental non-performance or under any other rule in the present Chapter, such as the rule on termination of a relationship of indefinite duration by giving notice of reasonable length. If there is such a right to terminate and if the requirements for such termination are observed (i.e. if the termination is justified within the meaning of

paragraph (7)) no damages are payable for terminating the relationship (paragraph (5). However, if there is no right to terminate under the express terms of the contract or under the provisions on fundamental non-performance or the equivalent or under any other rule of this Chapter, the aggrieved party will be entitled to damages (paragraph (6)). This applies also if the requirements for exercising such an other right to terminate were not observed – for example, if a reasonable period of notice is required but only an inadequate period of notice is given. As the mandate relationship is ended, the aggrieved party is not entitled to claim specific performance of the obligations under the mandate contract, i.e. cannot force the party wrongfully terminating the mandate relationship to continue performance. The aggrieved party can however ask for specific performance of obligations relating to the settlement of disputes and other obligations which are intended to survive termination of the mandate relationship. This follows from the general rule in III.–1:109 (Variation or termination by notice) paragraph (3)(b).

According to paragraph (2) a notice of revocation of the mandate of the agent is to be treated as a notice by the principal terminating the mandate relationship.

B. Notice of termination effective, unless mandate irrevocable

Notice of termination in principle always effective. A notice of termination leads in any case to the termination of the mandate relationship, whether or not the party has a right to terminate under any other rule.

Relationship to general rule in Book III. The general rule under III.–1:109 (Variation or termination by notice) paragraph (1) is that a contractual relationship can be terminated by notice by either party "where this is provided for by the terms regulating it". The present Article is an example of such a term. It is a default rule. The parties may include a different term in the mandate contract – for example, one providing that termination by notice will take place only after a period of a prescribed length. Given the nature of a mandate contract, however, such a term would be unusual as it would not be in the interests of the principal.

The character of mandate relationships, with their strong foundation in trust and confidence, suggests that the parties should not be compelled to continue the relationship once one of them has shown an intention to terminate it. If, for example, the agent were to be obliged to continue performance for a period after giving notice, it might be asked whether the agent would in fact be very active in facilitating, negotiating or concluding the prospective contract during that period. Similarly, there is a strong argument for not placing a principal in a situation where another person can affect the principal's legal position after a notice of immediate termination of the relationship has been given. There is not after that time a strong basis in trust and confidence for a compulsorily continued mandate relationship.

No termination in case of irrevocable mandate. There is, however, one exception to the rule that the notice of termination is always effective, whether or not the conditions for termination have been met. This is the case where the mandate is irrevocable under IV.D.–1:105 (Irrevocable mandate). If termination of an irrevocable mandate were possible, the consequences of irrevocability could be easily circumvented by giving notice of termination. This is exactly what is not intended in the case of irrevocability. The present paragraph (3) therefore excludes the effectiveness of a notice of termination in the case of an irrevocable mandate.

C. Non-compliance with normal requirements for termination only relevant to liability in damages

There are some situations where a party to a mandate relationship has a right under other rules to terminate it by notice without being liable to pay damages for so doing. Paragraph (7) lists the relevant situations for present purposes. One such situation is where the contract itself confers an express right to terminate, perhaps after giving a reasonable period of notice. Another is where there has been fundamental non-performance (or the equivalent) by the other party of obligations under the contract. See Book III, Chapter 3, Section 5 (Termination). Other situations are provided for in the present Chapter. So far as the principal is concerned the relevant provisions are IV.D.–6:102 (Termination by principal when relationship is to last for indefinite period or when mandate is for a particular task), which applies where the mandate relationship is not irrevocable and the mandate contract was concluded for an indefinite period or for a particular task, and IV.D.–6:103 (Termination by principal for extraordinary and serious reason). Under both provisions notice must be given. Under the first a notice period of reasonable length must be observed and under the second there must be an extraordinary and serious reason to terminate the contractual relationship immediately. For the agent, IV.D.–6:104 (Termination by agent when relationship is to last for indefinite period or when it is gratuitous) and IV.D.–6:105 (Termination by agent for extraordinary and serious reason) contain similar provisions. If the requirements of these provisions are observed, there is no liability in damages for the party who wants to terminate (paragraph (5)). If they are not observed, termination is still effective under the present Article according to the terms of the notice of termination but damages will be payable by the party giving notice (paragraph (6)).

D. Revocation of mandate of the agent implies termination of mandate relationship

Revocation of the mandate of the agent leads to the termination of the mandate relationship by the principal. By revoking the mandate, the principal takes away the core of the content of the mandate relationship and as a result the whole of the mandate relationship consequently comes to an end. For that reason, paragraph (2) provides expressly that revocation of the mandate of the agent is regarded as termination by notice under paragraph (1).

The fact that the principal is allowed to revoke the mandate and thereby terminate the mandate relationship does not mean that the revocation is always ‘free of charge’. As revocation of the mandate is treated as a termination, the rules of Chapter 6 apply. This implies that termination is in any case effective, but where the agent has not been guilty of fundamental non-performance or the equivalent and the principal does not have an extraordinary and serious reason to revoke or has not observed a notice period of reasonable length in terminating a contractual relationship of indefinite duration, the principal would be required to pay damages under paragraph (5) of the present Article.

When the principal concludes the prospective contract personally or by means of another agent this implicitly revokes the agent’s mandate to conclude that contract on the principal’s behalf (cf. IV.D.–1:104 (Revocation of the mandate) paragraph (2)). Under paragraph (2) of the present provision, revocation is treated as termination by notice. Since in the situation in which the principal concludes the prospective contract personally or by means of another agent the principal in effect terminates the contractual relationship without being entitled to

do so under any of the provisions mentioned, the principal would be obliged to pay damages in accordance with III.–3:702 (General measure of damages).

E. Calculation of damages

Where the principal terminates the mandate relationship without being justified in doing so under paragraph (7) and where damages are consequently payable, the general rules on the calculation of damages come into operation. Under III.–3:702 (General measure of damages) the agent is entitled to be put as nearly as possible into the position in which the agent would have been if the principal's obligations under the mandate contract had been duly performed. In this respect it should be noted that, if the mandate contract has been concluded for an indefinite period or for a particular task, then – unless the parties have validly derogated from IV.D.–6:102 (Termination by principal when relationship is to last for indefinite period or when mandate is for a particular task) – the principal may at any time terminate the mandate relationship by giving notice of reasonable length. In that case, the damage sustained by the agent is not the fact that the agent could not conclude the prospective contract, but the fact that the notice period was not observed and, therefore, that the agent has lost the chance of being able to conclude the prospective contract in the remaining period in which the mandate contract would have been in force. In these cases, the effect of III.–3:702 is to substitute a monetary sum for the reasonable notice period. Damages will be payable in lieu of a reasonable period of notice. Where the contract was concluded for a definite period then the damages would be for the loss of the chance of concluding the prospective contract in the remainder of the period.

F. Restitutionary effects of termination

The restitutionary consequences of termination are dealt with under paragraph (4). The effect of that paragraph is that the general rules in Book III, Chapter 3, Section 5, sub-section 4 apply. These rules require a party who has received any benefit from the other's performance of the obligations under the contract to return the benefit. If the benefit is transferable it must be returned by transferring it. If the benefit is not transferable its value must be paid. (III.–3:510 (Restitution of benefits received by performance)). As any benefit received by the performance of the agent, in so far as it has already been rendered, cannot normally be transferred, the principal will have to pay the value of any performance which has been received but for which payment was not yet due at the time of termination. If payment had been due at the time of termination then it would remain due because termination has only prospective effect.

The method of calculating the payment due is laid down in III.–3:512 (Payment of value of benefit). Where a price is payable under the contract, the basic rule is that the payment due is that proportion of the price which the value of the actual performance (received but for which payment was not due at the time of termination) bears to the value of the promised performance (III.–3:512 paragraph (2). Where a price per hour or day of work by the agent was payable under the contract the payment due will be calculated by reference to that price. Where, however, the price was due only if the prospective contract was concluded it will usually be difficult to argue that the agent is entitled to any restitutionary payment. The comparison then would be between what was promised (a result) and what was provided (no result). What this means is that if, in such "no result, no pay" cases, the agent terminates the relationship without justification before the result is achieved then the agent will receive nothing. If the principal terminates the relationship without justification before the result is achieved then the agent will receive nothing by way of a restitutionary payment but will be

entitled to damages for the loss of the chance of concluding the prospective contract. If the agent had been on the point of concluding the prospective contract then these damages should approach or even equal the amount of the commission which would have been due.

NOTES

I. Termination by notice

1. In AUSTRIA an agent's authority can be terminated at any time by the express revocation of it by the principal (CC § 1020). The question of termination of the contractual relationship is the same as that of termination of authority. There are no special commercial rules, so the common rules apply for the termination of a commission business or forwarding (see CC §§ 918 et seq., 1020, 1022, 1024 and 1447).

2. In BELGIUM the principal can always revoke for any or no reason the authority to represent. The conclusion of the contract by the principal personally is considered to be a silent revocation (*de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 462).

3. In BULGARIA if one of the parties ends the mandate, the contract ends when the other party gets to know (including by receiving a notice) or could have become aware of the ending (LOA art. 290; *Vassilev, L.*, Obligazionno pravo, 30). There is no general rule about the length of a notice period; the parties are free to stipulate it in their contract. Special rules exist for the length of a notice period for some types of mandate contracts (e.g. Ccom art. 47(1)).

4. In ENGLAND it is clear that the principal can terminate the authority and the agent can renounce the authority at any time and that such a revocation/renunciation will be valid, even if in breach of contract, in which case the guilty party is liable for damages. The rules for unilateral termination are as follows: one must distinguish the rules for the internal relationship (principal/agent) and the external relationship (principal/third party). Internally, the principal must give notice to the agent for the authority to end: *Re oriental Bank Corpn ex p Guillemin* (1884) 28 Ch D 634, *Simpson (Robert) Co v Godson* (1937) 1 DLR 454. In spite of this, one must mention two old decisions: *Smith and Jenning's case* (1610) Lane 97 and *Anon.* (1700) 12 Mod 409, 88 ER 1415 (as cited by *Brown*, 218) which show that revocation can be implied by an act of the principal which is inconsistent with the continuation of the agent's authority which comes to the agent's notice. Moreover, for some agents (e.g. estate agents) no notice is required: *Nelson (EP) & Co v Rolfe* (1950) 1 KB 139. In relation to the external relationship, revocation of authority is only valid towards the third party when the third party has actual notice of the revocation and therefore until then, the principal can still be bound under apparent authority. There is no obligation on the principal to provide a notice period to the agent, but equally, it is clear that no contract is meant to last for ever. If the parties to a contract for an indefinite duration have not provided for a notice, the courts may imply a reasonable notice: *Martin-Baker Aircraft Co v Murison* (1955) 2 QB 556.

5. In FRANCE the general rule is revocation *ad nutum*, i.e. at any time, without specific reason and without any right to compensation (CC art. 2004). A specific notice need not be sent to the agent, except when the termination occurs as a result of the appointment of a new agent for the same transaction (CC art. 2006).

6. A termination of the mandate relationship according to GERMAN CC § 671(1) takes effect when the notice reaches the agent, CC § 130(1) (*Seiler*, in: Münchener Kommentar zum BGB[4], § 671 no. 3).

7. In HUNGARY even if the revocability of the contract for representation is restricted, the principal can withdraw the powers of representation from the agent at any time during the execution of the contract and is entitled to conclude the prospective contract (or to execute the prospected other juridical act) personally. In the case of commission agency, CC art. 512(2) provides that '[a]ny limitation or exclusion of the right of rescission shall be null and void'. According to CC art. 223 para (2), 'A power of representation shall be valid until withdrawn, unless otherwise provided; its withdrawal that concerns a bona fide third person shall be operative only if he has been informed thereof.' See Supreme Court Pfv. IX. 22.281/2005, in EBH2006. 1426.

8. In IRELAND as a general rule, either party may terminate the contractual relationship (although such termination may amount to a breach of contract), in accordance with any notice period in the contract, or, if the contract is silent, on reasonable notice.

9. In the NETHERLANDS the principal can at any time end the mandate relationship according to CC art. 7:408(1). There are no specific rules on notice but if the relationship is to last for an indefinite period, either party may terminate it by giving notice of reasonable length. The principal, however, may in general end the mandate relationship without giving notice of reasonable length at any time according to CC arts. 7:408(1) and. 7:422(1), a rule that is mandatory (CC, art. 7:422 (2)), whereas the agent may only do so for extraordinary and serious reason (CC art. 7:402)

10. In POLAND the mandate relationship ends when notice of termination reaches the other party (CC arts. 746 and 61).

11. In SCOTLAND although the principal must communicate the fact of revocation of the agent's authority to the agent (Gow, Mercantile and Industrial Law of Scotland, 536, relying on English authority, Re Oriental Bank Corporation, ex p Guillemin (1884) 28 Ch D 634), the principal need not provide the agent with a period of notice on the expiry of which the revocation takes effect unless either (a) this is agreed in terms of the principal/agent contract, or; (b) in the circumstances, the absence of reasonable notice would be 'gravely prejudicial' to the agent (*Gow*, Mercantile and Industrial Law of Scotland, 536, relying on English authority, *Martin-Baker Aircraft Co v Murison* [1955] 2 QB 556).

12. In SLOVAKIA in civil relations, the principal and the agent are always entitled to terminate the relationship. Until the revocation of authority becomes known to the agent, the agent's juridical acts have legal consequences as if the authority continued to be effective. If the agent terminates the relationship, the agent is nevertheless bound to perform an immediately required juridical act if necessary to prevent detriment to the rights of the principal; acts thus performed have the same legal effects as if the representation had continued, unless they conflict with the arrangements made by the principal (CC § 33b). In commercial relations (B2B), the agent may terminate the contractual relationship, and the termination will take effect at the end of the month following the month during which the notice was delivered to the principal, unless a later date ensues from the notice (Ccom § 575(1)). The principal may also terminate the mandate partly or fully at any time; unless the term of notice stipulates otherwise, the notice will take effect as of the day on which the agent has or could have learned about it (Ccom § 574(1)-(2)).

13. In SPAIN the principal may terminate or revoke at any time (CC art. 1733). If revocation damages the interests of the agent or if the revocation is based on unlawful reasons, the agent will have the right to indemnity (*Lete del Río*, Derecho de

obligaciones III[4], 413). Termination is however effective in any case, from the moment the agent is informed (CC art. 1735 and 1738). The agent may also terminate the relationship, subject to certain conditions: (1) the agent has to inform the principal (CC art. 1736(1)); (2) the agent has to indemnify the principal if the latter suffers damage, unless the agent terminates because continuing with the mandate will cause serious detriment to the agent (e.g. illness of the agent, refusal of the principal to pay an advance or an unfriendly relationship between the parties) (CC art. 1736(2)); (3) the agent has to continue performance until the principal can take the measures necessary to adapt to the new situation (CC art. 1737). As is the case for the principal, notice of termination by the agent is effective in any case.

14. In SWEDEN if a notice period is agreed upon in the contract, the contractual relationship ends when such period has elapsed. If no such period has been agreed upon the relationship ends with immediate effect when the notice reaches the other party (unless the notice refers to another specific date). This follows from general contract law principles.

II. Revocation of mandate is considered to be termination

15. In AUSTRIA an agent's authority can be terminated at any time by the express revocation of it by the principal (CC § 1020). The question of termination of the contractual relationship is the same as that of termination of authority. There are no special commercial rules, so the common rules apply for the termination of a commission business or forwarding (see CC §§ 918 et seq., 1020, 1022, 1024 and 1447).

16. In BELGIUM the revocation can be express or implied. The conclusion of the prospective contract by the principal himself is considered to be a silent revocation (*de Page and Dekkers*, Traité élémentaire de droit civil belge V[2], 462).

17. In BULGARIA the principal has the right to revoke the mandate at any time by unilateral notice to the agent (LOA art. 288; *Vassilev, L.*, Obligazionno pravo, 29). This revocation terminates the contractual relationship (*Vassilev, L.*, Obligazionno pravo, 29; *Goleva*, Obligazionno pravo2, 239; Mevorah/Lidji/Farhi, Komentar III, 170) from the moment when the agent gets to know or could have become aware of the revocation (LOA art. 290; *Vassilev, L.*, Obligazionno pravo, 30).

18. In ENGLAND when the principal revokes the agent's authority, this amounts to termination of the agent/principal relationship.

19. The FRENCH Civil Code gives the principal the possibility of terminating the agent's authority *ad nutum*, i.e. at any time, without specific reason and without any right to compensation (art. 2004). The termination may even occur as a result of notice to the agent of the appointment of a new agent for the same transaction (CC art. 2006). The principal does, however, have to inform any possible third party contractors of such revocation in order to give them binding notice (CC art. 2005).

20. Whether revocation of the authority granted to the agent also results in termination of the mandate relationship is a question of interpretation of the revocation notice: GERMAN CC § 168 addresses the reverse situation and stipulates that the authority ends when the underlying legal relationship (e.g. a mandate contract) ends, but no general rule about the effect of a revocation of authority for the mandate relationship exists.

21. In HUNGARY even if the revocability of the contract for representation is restricted, the principal can withdraw the powers of representation from the agent at any time during the execution of the contract and is entitled to conclude the prospective contract (or to execute the prospected other juridical act) personally. In general, the revocation

of a power of representation is not considered to be termination of the agency relationship.

22. In IRELAND since agency is a consensual relationship it can be terminated if either party withdraws consent. Where the principal withdraws consent, the principal is said to 'revoke' the agent's authority. No formality is required for a revocation. Revocation is effective even if in breach of contract. Thus, for instance, the authority of an agent appointed for a fixed term may be revoked before expiry of the term and the revocation will be effective to terminate the agent's actual authority. However, while the agency relationship may be effectively terminated, other liabilities may arise. For example, the agent may continue to have apparent authority, thereby binding the principal with third parties. Moreover, revocation before the expiry of a fixed term may give rise to liability for breach of contract (e.g. damages for loss of opportunity to earn commission) on the principal's part, unless justified by a prior breach by the other party. Where an agent is appointed for an indeterminate period the agency can be terminated in accordance with any provision in the agreement for termination by notice. In the absence of any express term, it will normally be implied that the agency can be terminated, by either party, on reasonable notice.

23. In the NETHERLANDS the principal is allowed to revoke the agent's mandate. However, there are restrictions if the mandate is irrevocable according to CC art. 7:422(2) (Castermans/Krans, Tekst & Commentaar BW[7], no. 3096; *Haak and Zwitser*, Opdracht aan hulppersonen, 157; CFI Roermond 11 Feb 1999, NJ 1999, 607; HR 29 Sep 1989, NJ 1990, 307).

24. In POLAND there are no specific provisions on this matter. Since the agent may not carry out agency duties after the revocation it should be considered equal in effect to termination.

25. In SCOTLAND, the entire revocation of the agent's mandate would be equivalent to the termination of the agency relationship. (Cf *Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', paras. 25 and 183).

26. In SLOVAKIA the provisions on termination of authority (external level) should be applied to the termination of the agency relationship (internal level); the CC § 731 implies a strong link between revocation of authority and termination of the mandate relationship. Revocation of power definitely terminates the contractual relationship. The same applies to commercial relations.

27. In SWEDEN a revocation of power is considered to be a termination of the agent's assignment, provided that the agent knows of the revocation.

III. Consequences of termination for payment of the agent

28. In AUSTRIA, if the principal terminates the relationship, the agent is entitled to a proportional part of the remuneration or price, to reimbursement of any expenses incurred and to damages for losses suffered (Strasser, § 1020 Rz 2-8e and 3 1021 Rz 15-26). The common Civil Code rules apply to the termination of a commission business or forwarding (see CC §§ 918 et seq., 1020, 1022, 1024 and 1447).

29. In BELGIUM the revocation has effect *ex nunc* and has no retroactive effect. The principal is obliged to reimburse the past expenses and losses of the agent and to pay a salary *pro rata* (*Tilleman*, Lastgeving, 304-305; *Wéry*, Le mandat, 215 and 273).

30. In BULGARIA unilateral withdrawal of the principal does not deprive the agent of remuneration (if such has been stipulated) and reimbursement of expenses (LOA art. 288(1)). The commission agent is entitled to receive remuneration and reimbursement of expenses for prospective contracts concluded on behalf of the principal until the end

of the contractual relationship (Ccom art. 360). Unilateral termination by the principal does not eliminate the commercial agent's right to remuneration if the principal continues to enjoy benefits from the clientele established by the agent, except if the termination is due to the agent's fault (Ccom art. 47(3) referring to art. 40).

31. In ENGLAND termination does not affect any rights that the agent had accrued before termination, i.e. commission, indemnity, right to sue for breach etc. If termination by the principal amounted to a breach, the agent will still be entitled to sue for this breach and claim damages. Once the agent has received notice of the termination, any act that the agent does afterwards is not binding on the principal and will not give rise to commission, indemnity etc.

32. In FRANCE if the termination is based on the fact that the mandate can no longer be performed for reasons that are independent of the parties, the French courts consider that the remuneration normally due may then be limited to the part of the contract which has already been performed (Cass.com., 21 Dec 1981, Bull.civ. 1981 IV, no. 450). If the mandate has not been performed for reasons of *force majeure*, it is thought that the remuneration will not be due. In any event, the agent will be entitled to repayment of expenses already incurred. There are, however, several limits to the absence of compensation of the agent in the case of termination of the mandate, e.g. in case of misuse by the principal of the right to freely terminate the agency (Cass.civ. 1re, 2 May 1984, Bull.civ. 1984 I, no. 143), in case of termination of a fixed-term agency (the termination must be based on a proper ground; see Cass.civ. 1re, 28 Jan 2003, Bull.civ. 2003 I, no. 27) and in case the agency contract provides for compensation in the event of unilateral termination (Cass.civ. 1re, 6 Mar 2001, Bull.civ. 2001 I, no. 56). A special category is formed by the agency 'd'intérêt commun' ('of common interest'), which has been distinguished by the courts since the end of the 19th century. In this case, the mandate is freely terminable, but the agent must be compensated for the losses suffered in making specific efforts to develop the business or the custom in performance of the mandate.

33. According to HUNGARIAN CC art. 478(4), 'Fees shall be payable at the time a contract is extinguished.'

34. In IRELAND termination of the agency does not affect existing liabilities. For instance, an agent is entitled to any commission earned and, to any indemnity due in respect of liabilities incurred, before termination. An agent may also be entitled to commission on contracts performed after termination of the agency where they were entered into prior to termination. Termination without notice will be justified where the other party has been guilty of a serious breach of contract. In other cases, termination without notice, or with less than the full notice required by the agreement, will terminate the agent's authority but may give rise to liability for breach of contract where the agency is contractual. Usually, this will be a claim against the principal by a dismissed agent. An agent is dismissed in breach of contract may claim damages in respect of the loss of the opportunity to earn commission had the contract been performed. As with any claim for breach of contract, the claimant will have to show that the loss is not too remote and will have to mitigate the loss.

35. In the NETHERLANDS although the principal may end the agency at any time without giving notice of reasonable length, that does not alter the fact that the agent is entitled to wages according to CC art. 7:411(2). Obviously, the individual circumstances should be taken into account.

36. In POLAND the agent is entitled to receive partial remuneration and compensation for all incurred expenses. The agent is entitled to claim for the loss only if the contract was terminated without "important reasons" (CC art. 746).

37. In SCOTLAND termination by the principal will be without prejudice to the agent's accrued rights in respect of remuneration and/or commission, relief, and damages for breach of contract (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 114; *Gow*, Mercantile and Industrial Law of Scotland, 536). As a general rule, however, the agent is not entitled to commission on orders received after the principal has terminated the agency relationship (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 114; *Black*, para. 518). The principal is also bound to relieve the agent for any losses suffered where revocation prevents the agent from completing unfinished transactions (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 183).

38. In SLOVAKIA in civil relations, where the mandate has been revoked by the principal, the principal is obliged to compensate the agent for all expenses incurred before revocation, for damages suffered and if any remuneration is due for work that the agent performed, for such work or part thereof. The same probably applies in case of termination by the agent. In commercial relations, the agent is entitled to reimbursement of expenses and to a proportionate part of remuneration for duly rendered services before the day the notice takes effect.

39. In SPAIN, the right to terminate the agency does not make the principal free from the obligation to reimburse incurred expenses or the liability to pay damages for any loss suffered by the early termination (STS 3 March 1998, RJA 1998/1129). The STS 3 march 1998, RJA 1998/1129 held that the principal was not entitled to freely terminate the mandate where a price for the services and a definite time had been agreed.

40. In SWEDEN where the principal terminates the relationship, the agent is entitled to payment for work already performed.

IV. Notice of termination always brings about termination

41. In BULGARIA unilateral notice of termination from one of the parties to the other one always ends the legal relationship. However, the prerequisites for lawful unilateral ending of the relationship are different for the principal and for the agent. The former, as "master of the contract", is entitled to give a notice at any time (LOA art. 288), whereas the latter may only end the relationship for a "serious reason" (LOA art. 289; *Vassilev, L.*, Obligazionno pravo, 29-30). Unless agreed otherwise, the commission agent is not allowed to unilaterally end the agency, except if the principal has breached the contract (Ccom art. 359(1)). The commercial agent and the principal are permitted to unilaterally end their relationship on equal terms (Ccom art. 47(1), (2)).

42. In ENGLAND when one party gives notice of termination but fails to comply with a period of notice required by the contract, this usually amounts to a repudiatory breach; normal common law rules of contract apply (*Atlantic Underwriting Agencies Ltd. v. Compagnia di Assicurazione di Milano SpA* [1979] 2 Lloyd's Rep 240). So, at common law, a repudiation only has the effect of ending the contractual relationship if it is accepted by the other. It is therefore up to the agent to accept the repudiation or not. If the agent does not, the contractual relationship remains alive. However, in practice, it is in the agent's interest to accept the repudiation and end the relationship if the agent wants to claim damages for breach.

43. In FRANCE the rule entitling the parties to freely terminate the agency is a matter of mandatory public policy. The parties cannot validly agree that the agency will be irrevocable. In practice, there are clauses in contracts entitled 'irrevocabilité', but these would be interpreted as simply giving rise to compensation for the agent (Cass.civ. 1re, 5 Feb. 2002, Bull.civ. 2002 I, no. 40), and would also not prevent the principal from carrying out the transaction personally (Cass.civ. 1re, 16 Jun 1970 D. 1971, 261).

44. According to the GERMAN CC § 671(2), a revocation of the mandate by the agent is also valid if it has been declared in violation of the requirements of this provision (Palandt [-*Sprau*], BGB[66], § 671 no. 3). The principal is, however, entitled to damages.

45. According to the HUNGARIAN CC art. 483(1), (2) and (4), 'The principal shall be entitled to abrogate the contract with immediate effect at any time; the principal, however, shall be obliged to uphold the obligations already assumed by the agent. The agent shall also be entitled to abrogate the contract at any time; however, the period of notice must be sufficient for allowing the principal to handle the matter. In the event of the principal's grave breach of contract, abrogation can have immediate effect. Any limitation or exclusion of the right of cancellation shall be null and void; however, the parties shall be entitled to agree on the limitation of the right of cancellation with regard to continuous agencies.' For commission agency, CC. art. 512 prescribes that 'Prior to the conclusion of a sales contract, the principal shall be entitled to terminate the contract by notice with immediate effect, and the commission agent by fifteen-days' notice. Any limitation or exclusion of the right of rescission shall be null and void.'

46. In IRELAND as a general rule, either party may terminate the agency relationship (although such termination may amount to a breach of contract), in accordance with any notice period in the contract, or, if the contract is silent, on reasonable notice. An ineffective termination would usually amount to a repudiation or anticipatory breach.

47. In the NETHERLANDS the principal may in general end the relationship without giving notice of reasonable length at any time according to CC arts. 7:408(1) and. 7:422 (1), a rule that is mandatory (CC, art. 7:422 (2)), whereas the agent may only do so for extraordinary and serious reason (CC art. 7:402)

48. There is no similar rule in the POLISH Civil Code. Parties may only terminate the contractual relationship if entitled to do so.

49. In SCOTLAND where the principal's notice of termination is served in circumstances which do not comply with the terms of the agency contract, the notice will have no immediate terminating effect (on the assumption that it is not given for fundamental breach by the agent). By requiring a period of notice the parties would have contracted out of the normal rule that the principal could terminate at any time. However, an ineffective notice of termination would usually amount to a repudiation by the principal (in effect a declaration that the principal no longer wished to be bound by the contract) which would give the agent the option of terminating the relationship and claiming damages. It would usually be in the agent's interest to exercise this option as the relationship would be precarious and unsatisfactory once the principal's notice has been given. The same would apply in reverse if the agent purported to terminate the relationship but did not observe a period of notice required by the contract.

50. In SLOVAKIA the notice period for the agent's termination in commercial relations must be observed if the parties have not agreed otherwise; the contract is terminated by the end of the notice period. In other cases, the notice has immediate effect; the only limitation may be the obligation of the commercial agent to take preventive measures if needed.

51. In SWEDEN a notice leads to the ending of the contract (with immediate effect or after a notice period).

V. Notice period not observed: right to damages

52. In BELGIUM if the contract provides for a notice period and this period is not upheld, the agent may have a right to damages on the basis of breach of contract.

53. In BULGARIA when the agent wants to unilaterally end the mandate contract for a "serious reason", the agent is obliged to notify the principal in due time; otherwise, he may be held liable for damages incurred by the principal (LOA art. 289).

54. In ENGLAND as explained, if the principal fails to give the required period of notice, the agent will usually be entitled to treat this as an anticipatory breach, terminate the relationship and claim damages for breach.

55. In FRANCE if a notice period provided for in the contract was not upheld, the agent may have a right to damages on the basis of breach of contract.

56. According to the GERMAN CC § 671(2), the principal is entitled to damages if the agent has revoked the mandate contract in an untimely manner.

57. According to the HUNGARIAN CC art. 483(3), 'If the agency is cancelled without substantial grounds, the damages that are caused shall be indemnified, unless the agency is gratuitous and the period of notice is sufficient for allowing the principal to handle the matter.' According to the decision of the Supreme Court Nr. 3/2006 on the Uniform Application of Law, the CC 483(3) applies also to the principal and 'If a remunerated agency is cancelled without substantial grounds with immediate effect, the damages of the agent that are caused shall be indemnified by the principal'. See CA Jász-Nagykun-Szolnok Megyei Bíróság 4. Gf. 16-00-000016/12, in BDT2002. 577.

58. In IRELAND failure to observe a notice period or provide reasonable notice is a breach of contract for which damages may be payable.

59. In the NETHERLANDS if the contractual requirements as to a notice period are not observed by the principal, the agent is entitled to remuneration according to art. 7:411; if it is the agent who does not observe the requirements and does not have an extraordinary and serious reason for this, the contractual relationship will not terminate.

60. In POLAND the parties may not terminate the contractual relationship if not entitled to do so.

61. In SCOTLAND, as noted above, where the principal serves notice of termination without cause, but without observing the requirements for an effective notice laid down in the agency contract, the agent will usually be entitled to treat this as a repudiation and will then have the option of terminating the relationship and claiming damages. It should be noted that the failure to observe the notice period would not be itself a non-performance of an obligation. A requirement of a certain period is just that – a requirement and not an obligation – and the sanction for non-compliance is the ineffectiveness of the notice.

62. In SLOVAKIA the notice period for the agent's termination in commercial relations must be observed

63. In SWEDEN if the parties have agreed upon a notice period and such period is not upheld by a party, this constitutes non-performance for which the other party could claim damages.

IV.D.–6:102: Termination by principal when relationship is to last for indefinite period or when mandate is for a particular task

(1) The principal may terminate the mandate relationship at any time by giving notice of reasonable length if the mandate contract has been concluded for an indefinite period or for a particular task.

(2) Paragraph (1) does not apply if the mandate is irrevocable.

(3) The parties may not, to the detriment of the principal, exclude the application of this Article or derogate from or vary its effects, unless the conditions set out under IV.D.–1:105 (Irrevocable mandate) are met.

COMMENTS

A. General idea

Following the approach in III.–1:109 (Variation or termination by notice), the present Article provides the principal with a means to terminate a mandate relationship concluded for an indefinite period by giving notice of reasonable length. The Article follows the generally accepted principle that nobody can be contractually bound to another eternally. But this Part also extends this right of the principal to terminate by notice to those cases in which the contract has been concluded for a particular task. The justification for such solution is that this type of contract may give rise to a relationship where the parties are bound to each other eternally since it is uncertain when or if the envisaged result will be achieved.

B. Termination by notice of reasonable length when contract for an indefinite period

The principal is allowed to bring a mandate relationship entered into for an indefinite period to an end (even in the absence of an extraordinary and serious reason) provided that the principal notifies the decision to terminate a reasonable time in advance in order to grant the agent some time to adapt to the new situation.

Whether a period is reasonable would have to be determined in the light of the relevant circumstances. These would include the time the contract has lasted, the efforts and investments which the agent has made in performing the contract, the time it may take the agent to obtain another contract, and any relevant usages or practices.

C. Termination contract for a particular task

A mandate relationship entered into for a particular task terminates when the particular task is completed (e.g. when the prospective contract is concluded). It is therefore not a contract concluded for an indefinite period but rather one for a definite period, despite the fact that the exact date of expiry is not known exactly. Under IV.D.–6:101 (Termination by notice in general), a principal who terminates a contract for a definite period before the agreed date of expiry (i.e. the specific date or the date when the envisaged result is achieved) is in principle liable in damages, unless there is some other legitimate reason for early termination.

However, under the present Article a principal is entitled to terminate a mandate relationship entered into for a particular task by giving notice of reasonable length and to do so without liability for damages. Although this type of contract could be classified as for a definite

period, its specific characteristics are deemed to justify the right to terminate at any time by giving notice. Indeed, since it is uncertain when the envisaged result will be achieved or even whether it will be finally achieved, the parties may be de facto linked to the contract for an indefinite period, in particular in the situation where the agent fails to conclude the prospective contract without breaching the obligations under the mandate contract – in which case the mandate relationship cannot be terminated for non-performance either. However, the principal is not allowed under this Article to terminate the contract immediately: it is essential to give notice of reasonable length to the agent in order to provide some time for adjustment to the new situation.

Illustration
A principal entrusts an estate agent with the task of selling the principal's house without specifying a time within which this is to be done. After a year and a half the house has still not been sold, even though the principal has twice given the estate agent a direction to reduce the price. At that moment, the number of sales of houses has dropped significantly and it does not appear that the housing-market will soon recover. For these reasons, the principal finally decides not to pursue the attempt to sell the house.

In this situation the principal can terminate the mandate relationship, without incurring liability for damages for so doing, by giving a reasonable period of notice.

D. No termination if irrevocable mandate

For obvious reasons paragraph (2) of the Article provides that the principal's right to terminate under paragraph (1) does not apply in the case of an irrevocable mandate.

E. Mandatory character of the rule

The principal's right to terminate the mandate relationship for an indefinite period of time or a particular task is mandatory in favour of the principal – whether the principal is a consumer or a business. If the parties could not terminate a mandate relationship entered into for an indefinite period of time, the contract would in fact be concluded for eternity, and this is considered to be contrary to public policy or good morals in many legal systems. Moreover, if the parties could exclude the right to terminate the mandate relationship, this would undoubtedly lead to a stretching of the notion of 'extraordinary and serious reason' under the following Article, thus enabling the principal to escape from the contract, but without even having to observe a notice period of reasonable length. For these reasons, the parties are not allowed to derogate from this Article to the detriment of the principal. This idea is expressed in paragraph (3).

NOTES

I. Termination by principal

1. For AUSTRIA, this question is submerged in the principal's general right to terminate. See Note 1 to preceding Article.
2. According to the BELGIAN CC art. 2004, a principal can always revoke the authority to represent ad nutum, i.e. without a motive and without a term or amount of notice (*de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 460-462; *Foriers and*

Glansdorff, Contrats spéciaux , 639; *Tilleman*, Lastgeving, 301-305; *Wéry*, Le mandat, 267-273). It is irrelevant whether the contract for representation is non-remunerated (e.g. Supreme Court 28 Jun 1993, Pas. 1993, I, 628, R. Cass. 1993, note I. DEMUYNCK and RW 1993-94, 1425, note A. VAN OEVELEN). As a unilateral juridical act, the revocation does not have to be accepted by the representative to be effective (*de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 462-463; *Tilleman*, Lastgeving, 281 and 290-291). The revocation must be notified to the representative and will only be effective when the representative takes note or ought to have taken note of the revocation. No formal requirements apply to the notification (*Tilleman*, Lastgeving, 283-285; *Wéry*, Le mandat, 272). According to CC art. 2005, the revocation can only be invoked towards third-parties after they have taken note of it (*Wéry*, Le mandat, 272). The revocation has effect ex nunc: the representative loses the authority for the future. Contracts concluded prior to the revocation remain valid (*Tilleman*, Lastgeving, 298-299; *Wéry*, Le mandat, 273). The absence of retroactivity also means that the principal is obliged to reimburse the past expenses and losses of the representative and to pay a salary pro rata (*Foriers and Glansdorff*, Contrats spéciaux, 640; *Tilleman*, Lastgeving, 304-305; *Wéry*, Le mandat, 215 and 273).

3. As a general rule, the principal can revoke the mandate relationship with the agent at any time and without any reason (BULGARIAN LOA art. 288(1)). This rule is applicable to both gratuitous and non-gratuitous contracts and to contracts for an indefinite or a fixed period (*Vassilev, L.*, Obligazionno pravo, 29; *Goleva*, Obligazionno pravo2, 239). The principal can end the contract either explicitly by a unilateral notice to the agent or implicitly by the conclusion of the prospective contract by the principal himself or another agent (Mevorah/Lidji/Farhi, Komentar III, 176). The internal mandate relationship is considered terminated from the moment when the agent gets to know or could become aware of the revocation (LOA art. 290; *Vassilev, L.*, Obligazionno pravo, 30). The agent does not lose his right to remuneration (if such has been stipulated) and reimbursement of expenses (LOA art. 288(1)).

4. Apart from the special (mandatory) rules of The Commercial Agents and Travellers Act, DANISH law contains no specific rules on termination of a contract between a principal and the representative when the contract for representation has been concluded for an indefinite period of time and does not end by the conclusion of the prospective contract. If the parties have not agreed otherwise, the principal is entitled to bring the contract to an end at any time by giving a termination notice to the representative. Under these circumstances the representative is not entitled to claim compensation even if the period of representing the principal had been expected to last for a longer time. The representative may claim compensation for the expenses incurred during the period of the representation.

5. In ENGLAND under the general principle of revocation, the principal may revoke the agent's authority by giving notice before the authority has been fully exercised (*Hampden v Walsh* ((1876) 1 QBD 189)). This rule of 'unfettered revocation' (Brown, 216) applies even where the agency is described as irrevocable (*Vynior's case* (1609) 8 Co Rep 81b). In case of an indefinite duration contract, the principal must give notice of the revocation to the agent since the agent's authority does not end until receipt of actual notice of the revocation (*Re Oriental Bank Corpn, ex p Guillemin* ((1884) 28 Ch D 634)). Once the agent knows about the revocation, any future acts are ineffective and the agent loses the right to future remuneration and indemnity. However, if the notice by the principal is a breach of contract, the agent will be entitled to damages. If the agent is an employee, it may also be possible to claim for compensation for unfair dismissal or for a redundancy payment. For contracts entered into for a particular task, it is accepted that the contract is often unilateral in nature, i.e. that the agent is under

no obligation to perform the task and that the principal is bound to pay only when the agent has actually performed the task. In such cases the agent accepts the risk that the principal may withdraw at any time until the agent has performed the required task and therefore bears the risk of not being paid should that occur: *Luxor (Eastbourne) Ltd* v *Cooper* [1941] AC 108 (estate agency case). Even though this seems to be the normal interpretation of estate agency contracts, this is subject to express or implied terms to the contrary as is clear from *Alpha Trading Ltd. v Dunnshaw-Patten Ltd.* [1981] QB 290 where a collateral contract was implied to restrict the principal's freedom to withdraw at any time. In the case of a fixed term contract an attempted termination before the expiry of the term constitutes a repudiatory breach, entitling the agent to claim damages (e.g. *Turner* v *Goldsmith* [1891] 1 QB 544). This is so, unless termination is justified by an earlier breach committed by the other party: *Boston Deep Sea Fishing and Ice Co* v *Ansell* (1888) 39 Ch D 339, CA.

6. In ESTONIA the principal may, as far as the internal relationship to the representative is governed by the (general) contract for services terminate the contract at any time, no special cause for termination is needed (LOA § 630(1)). In case of termination, the representative is entitled to the price for the services rendered until the termination (LOA § 195) and to the costs incurred so far as these are not covered by the price for the services rendered (LOA § 628(2)). If the contract is concluded for a definite period of time, it may be terminated prior to the expiry of that period only on material grounds (LOA § 631), i.e. if the party wishing to terminate the agreement cannot be expected to continue performance. If the contract is entered into for the life of one party or for a period longer than five years, the principal has the right to terminate the contract once five years have passed from the date of conclusion of the contract by giving at least six months' advance notice (LOA § 630(3)).

7. In FINLAND if the contract requires specific personal trust (e.g. mandates for legal services), the principal is entitled to cancel the mandate contract at any time without any reason for the termination. In these cases, the representative is usually entitled to charge a fee only for the tasks already fulfilled. Otherwise the right of termination should be considered in light of the type of the mandate and other circumstances. The principal is generally entitled to cancel the mandate contract with a reasonable period of notice, unless the contract is concluded for a definite period of time (Commercial Agents and Salesmen Act §§ 22-23). The REstateAA contains provisions concerning termination of the mandate relationship in cases where the contract has become unreasonably disadvantageous for the principal (§ 6). The representative is generally entitled to the agreed fee if the termination is not based on a non-performance of the representative. If a concluded prospective contract or some other action is a prerequisite for the fee, the representative is not usually entitled to remuneration if such contract or other action has not been concluded or taken at time of termination of the mandate contract. The representative is entitled to compensation for expenses incurred.

8. In FRANCE the principal can terminate the contract *ad nutum*, i.e. at any time, without a specific reason and without any liability to pay compensation (CC art. 2004). The termination may even occur as a result of notice to the agent of the appointment of a new agent for the same transaction (CC art. 2006). The principal does, however, have to inform any possible third party contractors of such revocation in order to give them binding notice (CC art. 2005). Regarding the remuneration of the representative, if the mandate has not been performed for reasons of force majeure, it is thought that no remuneration will be due. If the mandate has been partly fulfilled before its cancellation, the French courts consider that the remuneration normally due may then be limited to the part of the contract which has already been performed

(Com. 21 Dec 1981, Bull. civ. IV, no. 450). In any event, the agent will be entitled to reimbursement of expenses already incurred. The possibility for the representative to claim damages depends on the circumstances of the cancellation and the type of mandate contract. Courts have long distinguished a special type of agency ('d'intérêt commun': 'of common interest'), which is freely terminable, but requires compensation of the costs the agent has made in specific efforts to develop the business or the custom in performance of the mandate. Other grounds for claiming damages are misuse by the principal of the right to freely terminate (Civ. 1ère 2 May 1984, Bull. civ. I, no. 143), termination of an agency contract for a fixed term (Civ. 1ère 28 Jan 2003, Bull. civ. I, no. 27. – Cass. 3e civ., 27 Apr 1988, Bull. civ. III no. 80) and termination of an agency contract containing a clause providing for compensation in the event of unilateral termination (Civ. 1ère 6 Mar 2001, Bull. civ. I, no. 56).

9. In GERMANY a gratuitous mandate relationship may be terminated at any time (CC § 671(1)). Termination of a remunerated relationship (*Geschäftsbesorgungsvertrag*) is governed by the law on contracts for services or contracts for works. The rules on contracts for services allow termination by the principal as well as the representative (CC § 621). The termination period depends on the time frame according to which the service provider is paid. Contracts for services under which payment is not made after particular time periods can be cancelled at any time. Additionally, either party has the right to terminate irrespective of any termination period where there is an important reason which makes it unacceptable for the party to continue the contract (CC § 626). Furthermore, termination is possible even without an important reason where the contract calls for services 'of a higher kind which are usually assigned on the basis of particular trust' (CC § 627(1)). This will often be the case where a contract for representation is concluded.

10. In GREECE in case of a gratuitous mandate relationship the principal is entitled to revoke the mandate at any time. An agreement to the contrary is void, except if the mandate also concerns the interest of the agent or of a third party (CC art. 724). . If the revocation takes place before completion of the mandate it results in cancellation of the contract. If it takes place after a part of the mandate has been performed, the revocation concerns only the future performance of the mandate (*ex nunc*). A contractual agreement of restrictions or requirements for the exercise of the right of revocation can be concluded only if the mandate also concerns the interest of the agent or of a third party (Kapodistrias, Art. 724 GREEK CC nr. 3-22). The revocation of the representative results in the cessation of the power to represent the principal. Due to the gratuitous character of the contract of mandate the question regarding the entitlement of the agent to a price does not arise. The principal is only obliged to reimburse the expenses that the agent has incurred prior to the revocation of the mandate. However that question arises in the case of the obligatory remunerated mandate between lawyer and client regulated in art. 170 of the Code of Attorneys (legislative decree nr. 3026/1954). If revocation of the mandate was unjustified, the principal should perform all contractual obligations to the lawyer, such as payment of remuneration. If revocation was justified, the principal should only pay remuneration or expenses incurred prior to the revocation of the mandate (Kapodistrias,Art. 724 GREEK CC nr. 31; Supreme Court decision no. 1/1987, EEN 1987, 783).

11. According to the HUNGARIAN CC art. 483(1), '[t]he principal shall be entitled to abrogate the contract with immediate effect at any time; the principal, however, shall be obliged to uphold the obligations already assumed by the agent'. CC art. 478(3) establishes that '[i]f the contract is terminated before the agency has been fulfilled, the agent shall be entitled to demand an appropriate fraction of the fee for his activities'. It is not relevant in this respect whether the principal is a consumer. In the case of

commission agency, according to CC art. 512, '[p]rior to the conclusion of a sales contract, the principal shall be entitled to terminate the contract by notice with immediate effect, and the commission agent by fifteen-days' notice. Any limitation or exclusion of the right of rescission shall be null and void'. Also in this case CC art. 511(1) applies, according to which '[t]he commission agent shall be entitled to receive a commission only if the sales contract has been performed'.

12. In IRELAND, where an agent is appointed for an indeterminate period the agency can be terminated in accordance with any provision in the agreement for termination by notice. In the absence of any express term, it will normally be implied that the agency can be terminated, by either party, on reasonable notice.

13. According to the ITALIAN CC art. 1723(1) 'the principal can revoke the mandate, but if it was agreed that the mandate should be irrevocable, he is liable for damages, unless revocation is made for a just cause'. The general principle concerning termination by the principal is that of the free revocability of the authority granted to the representative, while the irrevocable mandate is considered an exception to this general rule. If the representative is entitled to a price, CC art. 1725 provides that 'the revocation of a non-gratuitous mandate given for a specified period of time or for a specified transaction renders the principal liable for damages if the revocation was made before the expiration of the time limit or before the completion of the transaction, unless there is just cause for the revocation'. Accordingly, the principal's freedom to revoke an onerous mandate is subject to the following alternative conditions: reasonable notice or just cause. In the absence thereof the principal must pay damages to the representative.

14. In the NETHERLANDS the principal is in general allowed to terminate the relationship at any time without having to give reasonable notice (CC arts. 7:408(2) and 7:422). It is only in the exceptional case that parties have agreed a mandate contract that is to be performed in the interest of the agent or of third party that the relationship cannot be ended freely by the principal.

15. In POLAND the principal is always entitled to revoke the mandate due to "important reasons". The contracting parties may not derogate from this rule (CC art. 746(3)). The principal's right to terminate the contract on other grounds may be excluded.

16. In SCOTLAND the principal is entitled to end an agency of unlimited duration at any time (unless the agency is irrevocable as explained below). (*Stair*, Institutions I[10], 12, 8; *Erskine*, III,3,40; *Gow*, Mercantile and Industrial Law of Scotland, 536; *Walker v Somerville* (1837) 16 S 217). This is not so where the contract is a fixed term one, where termination by the principal before the expiry of the agreed term will constitute a breach of contract (*Black*, para. 551). The principal's right to terminate may also be excluded as a matter of construction of the agency contract (*Galbraith and Moorhead v Arethusa Ship Co Ltd* (1896) 23 R 1011). Although the authorities are ambiguous on this point, it seems that the principal must communicate the termination to the agent (*Erskine*, III,3,40). The principal is, nevertheless, bound to relieve the agent of any losses the agent suffers where termination prevents the agent from completing a transaction, and indeed, termination may only be possible once the agent has been so relieved (*Erskine*, III,3,40). Termination is subject to the agent's other accrued rights such as payment of remuneration or commission, or damages for breach of contract (*Gow*, Mercantile and Industrial Law of Scotland, 536; *Galbraith and Moorehead v Arethusa Ship Co Ltd* (1896) 23 R 1011).

17. In SLOVAKIA the principal is always entitled to terminate the contractual relationship without any conditions (CC § 33b). The question of termination of the contract is the same as that of termination of authority (see Notes under IV.D.–6:101

(Termination by notice in general). Where the mandate has been terminated by revocation, the principal is obliged to compensate the agent for all expenses incurred before revocation and for the damage suffered and if any remuneration is due for work that the agent performed, for such work or part thereof. In commercial relations, the client may also terminate the mandate partly or fully at any time. Unless the term of notice stipulates otherwise, the notice takes effect as of the day on which the agent has or could have learned about it. The agent is entitled to compensation of expenses and to a proportionate part of the remuneration for duly rendered services before the day when the notice takes effect (Ccom § 574).

18. In SPAIN the principal may terminate the relationship at any time (CC art. 1732). Some legal authors argue that in the case of a remunerated mandate contract termination implies that the principal has to pay damages to the agent, on the basis of the doctrine of abuse of right or the principle of good faith in CC art. 1258 (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII^2, 512). However, according to Lete del Río, the principal will have to indemnify the agent if the principal terminates in order to damage the interests of the agent or if the termination is based on unlawful reasons (*Lete del Río*, Derecho de obligaciones III^4, 413). It is doubtful whether cases of implicit revocation in which the principal concludes the contract personally or by means of another agent are to be regarded as lawful reasons or reason within the limits of the good faith principle. For the case law, see *Díaz-Regañón*, La resolución unilateral del contrato de servicios, 2000, pp. 75 ff).

19. In SWEDEN when the contract has been concluded for an indefinite period of time, the principal may terminate the contractual relationship at any time without cause and usually with immediate effect. The agent can only claim reasonable compensation for work already performed under the contract (*Bengtsson*, Särskilda avtalstyper I^2 153; *Hesser*, 30).

II. No termination if mandate is irrevocable

20. For BELGIUM see Notes under IV.D.–1:105 (Irrevocable mandate).

21. In BULGARIA even when the mandate contract is said to be irrevocable the principal can unilaterally end it at any time (see Notes under IV.D.–1:105 (Irrevocable mandate).

22. In ENGLAND, as mentioned earlier, the concept of 'irrevocable agency' is somewhat complicated and very specific. The agent's authority will be irrevocable in two instances: (1) when it is coupled with an interest belonging to the agent, i.e. that 'the authority is given for the purpose of being a security' (*Smart v Sandars* [1848] 5 CB 895, 918 per Wilde CJ) so that security and authority are closely connected with one another, or (2) when a power of attorney is given to secure an interest, or some obligation, to the donee; the consent of the donee is then required for the authority to be revoked (Power of attorney Act 1971, s 4).

23. For FRANCE see Notes under IV.D.–1:105 (Irrevocable mandate).

24. In IRELAND an agency may be irrevocable where e.g. (i) the agent is given a 'power with an interest', that is, where an agent is given power and a personal interest, as where the principal owes the agent money, and gives authority to sell property and thereby raise funds to pay the debt; or (ii) where a power of attorney is expressed to be 'enduring' or irrevocable under the Powers of Attorney Act, 1996.

25. In the NETHERLANDS if the mandate deals with performing a legal act in the interest of the agent or a third party, the contracting parties can agree that the principal is not allowed to terminate the relationship (CC art. 7:422(2)). In this case, the

mandate is irrevocable. See *Van der Grinten*, Lastgeving, no. 49; Castermans/Krans, Tekst & Commentaar BW[7], no. 3096-3097.

26. POLISH law does not recognise irrevocable mandate.

27. In SCOTLAND where the agency is, in effect, an irrevocable mandate, or *procuratory in rem suam*, the principal is not entitled to terminate without the consent of the agent (*Black*, para. 551).

28. In SLOVAKIA irrevocable mandate is not allowed.

III. Mandatory nature of rule

29. For BELGIUM, See Notes under IV.D.–1:105 (Irrevocable mandate).

30. For BULGARIA see Notes under IV.D.–1:105 (Irrevocable mandate).

31. ESTONIAN law distinguishes between the internal relationship (arising from the mandate contract) and external relationship (the authority). For the external relationship the agent can be issued an irrevocable authority. The law however provides that as a mandatory rule such authority can be revoked upon important reason. For the internal relationship the parties can agree that the termination of the mandate agreement is excluded (the termination provisions are default rules; LOA § 5).

32. For FRANCE see Notes under IV.D.–1:105 (Irrevocable mandate).

33. The parties cannot validly exclude the principal's right to terminate the mandate relationship under the GERMAN CC § 671(1), unless the conclusion of the (gratuitous) mandate contract also served the interests of the agent and those interests are as important (*gleichwertig*) as those of the principal (BGH, WM 1971, 956; Palandt [-*Sprau*], BGB[66], § 671 no. 2).

34. In the NETHERLANDS the provision that the principal is at all times allowed to terminate the relationship (CC art. 408(1)) is a mandatory rule for most mandates according to CC art. 7:422(2). However, in the cases where irrevocable mandates are recognised by the law, the contracting parties can agree that the principal is not allowed to terminate (CC art. 7:422(2)). See *Van der Grinten*, Lastgeving, no. 49; See Castermans/Krans, Tekst & Commentaar BW[7], no. 3096-3097.

35. POLISH law does not recognise irrevocable mandate.

36. In SLOVAKIA irrevocable mandate is not allowed.

IV.D.–6:103: Termination by principal for extraordinary and serious reason

(1) The principal may terminate the mandate relationship by giving notice for extraordinary and serious reason.

(2) No period of notice is required.

(3) For the purposes of this Article, the death or incapacity of the person who, at the time of conclusion of the mandate contract, the parties had intended to perform the agent's obligations under the mandate contract, constitutes an extraordinary and serious reason.

(4) This Article applies with appropriate adaptations if the successors of the principal terminate the mandate relationship in accordance with IV.D.–7:102 (Death of the principal).

(5) The parties may not, to the detriment of the principal or the principal's successors, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

The present Article introduces a right for the principal to immediately terminate a mandate relationship without having to observe a notice period and without having to pay damages. This right can be exercised when there is an extraordinary and serious reason which justifies termination. Termination is by notice by the principal to the agent of the decision to terminate the mandate relationship. Extraordinary and serious reasons to terminate a mandate relationship may arise in very different circumstances. Paragraphs (3) and (4) mention two situations which are classified as extraordinary reasons to terminate. This rule has a mandatory character.

B. No exhaustive list of extraordinary and serious reasons

This provision refers in paragraph (3) and (4) to two situations which are to be regarded as extraordinary reasons which justify termination: the death or incapacity of the person who, at the time of conclusion of the mandate contract, the parties had intended to perform the agent's obligations under the mandate contract (paragraph (3)) and, for the successors of the principal, the death of the principal (paragraph (4)). This list does not purport to provide an exhaustive enumeration of the reasons that justify immediate termination. Whether a reason qualifies as extraordinary and justifies immediate termination is to be determined on a case-by-case basis.

Termination by the principal for an extraordinary and serious reason may occur when the principal no longer believes that the agent is acting in the principal's best interest and has lost trust in the agent. This may, for instance, occur when the agent has breached an implied or explicit obligation of confidentiality. There may also be an extraordinary and serious reason to terminate for the principal if the result to be achieved by the agent has become pointless for the principal.

Illustration

Marco concludes a mandate contract in which he entrusts Julka with the task of negotiating the purchase of a major bank. The following week a fraud case involving Julka is reported on the front page of all national newspapers. Whether or not the accusations are true, Julka's business reputation is seriously damaged and Marco does not have sufficient trust in Julka being able, at this time, to properly negotiate with the

current owners of the bank. Even though there is no case of non-performance by the agent, under these circumstances the principal cannot be expected to continue allowing the agent to take care of the transaction.

However, there is no provision stating that whenever the principal justifiably loses trust and confidence in the agent, there is a serious and extraordinary reason for termination of the mandate relationship. Such an explicit rule could tempt principals to argue that there would be a loss of confidence and trust just to escape having to respect a notice period or, after the fact, to prevent having to pay damages for wrongfully terminating the mandate relationship with immediate effect. It is thought better to leave the matter for the court to decide on the basis of the general provision in paragraph (1).

C. No notice period

If there is indeed an extraordinary and serious reason which justifies termination of the contract, termination should take immediate effect. In this specific situation the party giving notice is not required to observe any other condition than notifying the other party about the decision to terminate. In particular, no notice period needs to be observed, as follows from paragraph (2). It follows from the general rules on notice in I.–1:109 (Notice), that there is no form requirement regarding the notification.

D. Relation to termination for non-performance

In many cases where the principal has an extraordinary and serious reason to terminate the contractual relationship, there will also be a fundamental non-performance of obligations by the agent allowing the principal to terminate. Termination of the mandate relationship under the present Article does not as such entitle the principal to damages, whereas this will normally be the case when the principal terminates the contractual relationship for fundamental non-performance.

E. Relation to rule on change of circumstances

In some circumstances, III.–1:110 (Variation or termination by court on a change of circumstances) may be applicable. If such is the case parties would be expected to enter into negotiations to adapt the terms of the contract or to terminate the contractual relationship. If negotiations fail it is for the judge to decide between adaptation and termination. Under the present Article (and the corresponding provision in IV.D.–6:105 (Termination by agent for extraordinary and serious reason)) the party who does not want to continue performance can terminate with immediate effect. The party who has an extraordinary and serious reason to terminate is discharged of the burden of trying to negotiate with the other party and of going to court in order to bring the relationship to an end.

F. Mandatory character of the rule

The right to terminate the mandate relationship for extraordinary and serious reason is mandatory, as is expressed in paragraph (4). This cannot reasonably be otherwise if the right to terminate for extraordinary and serious reason is to mean anything in practice, as the parties by way of standard contract terms could effectively exclude its application. This would in fact mean the exclusion of the good faith principle, which underlies the present Article.

NOTES

I. Termination by principal for extraordinary and serious reason

1. According to the BELGIAN CC art. 2004, a principal can always revoke the authority to represent *ad nutum*, i.e. without a motive.
2. The principal is entitled to end the mandate contract at any time and without any reason (BULGARIAN LOA art. 288(1)).
3. In ENGLAND following the principle of free revocation, the principal need not have an extraordinary and serious reason to terminate the relationship by notice. If the principal has such reasons, i.e. the agent taking a bribe or the agent being guilty of a serious breach, this would allow the principal to terminate the relationship summarily and therefore with no need to comply with a notice.
4. In ESTONIA each of the parties to a mandate contract is entitled to terminate the relationship for important reason. No notice period is required (LOA § 631).
5. In FINLAND in general, a contracting party is entitled to terminate the contractual relationship with immediate impact due to an essential breach of contract on the other party's side. Furthermore, Commercial Agents and Salesmen Act art. 25 contains a provision on ending a mandate contract for "important reasons", but all such reasons are, according to the list provided in the article, related to disloyal or other such behaviour of the other party.
6. The FRENCH Civil Code gives the principal the possibility of terminating the agency *ad nutum*, i.e. at any time, without specific reason and without any right to compensation (CC art. 2004).
7. Under GERMAN law, every contract for a continuing obligation can be revoked when there is an 'important ground' for the revocation – a fundamental principle of German law which was developed by the courts and is now expressly laid down in CC § 314(1). CC § 626 as part of the law on contracts for service, which may apply to remunerated mandate contracts by virtue of CC § 675(1), provides a special, but quite similar rule.
8. According to the HUNGARIAN CC art. 483(3), 'If the agency is cancelled without substantial grounds, the damages that are caused shall be indemnified, unless the agency is gratuitous and the period of notice is sufficient for allowing the principal to handle the matter. According to the decision of the Supreme Court Nr. 3/2006 on the Uniform Application of Law, the CC 483(3) applies also to the principal and '[i]f a remunerated agency is cancelled without substantial grounds with immediate effect, the damages of the agent that are caused shall be indemnified by the principal'. See CA Jász-Nagykun-Szolnok Megyei Bíróság 4. Gf. 16-00-000016/12, in BDT2002. 577.
9. In IRELAND where the agency is contractual, breach of a condition of the contract, or of an innominate term where the consequences of the breach are serious, by the agent will enable the principal to terminate the relationship and pursue a remedy in damages. Moreover, where an agent is in breach of fiduciary duties, a variety of remedies is available including termination of the agency, damages in contract or in tort, an account of profits, etc.
10. In the NETHERLANDS the principal is in general allowed to terminate the agency at any time without having to give reasonable notice according to CC arts. 7:408(2) and 7:422. The usual effect of the presence of an extraordinary and serious reason is therefore only to prevent the claim for wages the agent is entitled to according to CC art. 7:411.

11. Under POLISH law the principal may always terminate the agency if "important reasons" occur (CC art. 746).

12. In SCOTTISH law, the principal is entitled to terminate an agency of unlimited duration at any time, and is not required to show an extraordinary and serious reason (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 183; *Gow*, Mercantile and Industrial Law of Scotland, 536). The principal is, of course, entitled to terminate the agency in a case of a material breach on the part of the agent. Beyond cases of breach of contract, certain events may act to frustrate, or terminate, the agency relationship, including the termination of the principal's business, and the death, incapacity or bankruptcy of the principal or agent. In cases of death, incapacity or bankruptcy, the agent may remain entitled to act, as is explored in more detail below.

13. In SLOVAKIA the principal is not obliged to respect any notice period. He can always terminate the contract immediately without any reason.

14. In SPAIN the principal may terminate the mandate relationship at any time without the need to give reasons(CC art. 1733). However, according to the decisions of the TS of 25 November 1993 and 3 March 1988, if the principal terminates a relationship concluded for a definite period before the period has expired, damages are to be paid to the agent, unless the principal has a good reason (*justa causa*) to terminate, based on the (lack of) performance of the agent (Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII^2, 515).

15. In SWEDEN when the contract has been concluded for an indefinite period of time, the principal may terminate the resulting relationship at any time without cause and unless agreed otherwise may usually terminate with immediate effect. The agent can only claim reasonable compensation for work already performed under the contract (*Bengtsson*, Särskilda avtalstyper I^2, 153; *Hesser*, 30). If the contract was for a definite period of time and the principal terminates the relationship without a valid reason, this constitutes non-performance. The agent has no right to continue performance but is entitled to claim damages (*Hellner*, 215).

II. No notice period required

16. According to BELGIAN CC art. 2004, a principal can always revoke the authority to represent *ad nutum*, i.e. without a notice period, unless the parties have agreed upon a notice period in the contract.

17. In BULGARIA the principal is free to end the mandate relationship without observing any notice period. A requirement for such a period only exists for the principal of a commercial agency contract for an indefinite term (Ccom art. 47(1)).

18. In ENGLAND if the agent is guilty of a serious breach, the principal will be entitled to terminate the agency immediately.

19. No notice period is required in ESTONIA (LOA § 631).

20. In FRANCE a notice period is never required for terminating the mandate relationship (except when the parties have agreed to insert a notice period clause in the contract).

21. In GERMANY both CC § 626(1) and CC § 314(1) expressly allow for a revocation without observance of a period of notice.

22. According to the HUNGARIAN CC art. 483(1)-(2), 'The principal shall be entitled to abrogate the contract with immediate effect at any time; the principal, however, shall be obliged to uphold the obligations already assumed by the agent. The agent shall also be entitled to abrogate the contract at any time; however, the period of notice must be sufficient for allowing the principal to handle the matter. In the event of the principal's grave breach of contract, abrogation can have immediate effect.' In case of

commission agency, according to CC art. 512, '[p]rior to the conclusion of a sales contract, the principal shall be entitled to terminate the contract by notice with immediate effect, and the commission agent by fifteen days' notice.

23. In IRELAND where the agent has committed a serious breach of contract or breaches fiduciary duties, no notice period is required.

24. In the NETHERLANDS a notice period is not required.

25. POLISH law requires no notice period when terminating the mandate relationship, unless the parties have agreed otherwise.

26. In SCOTLAND where the principal terminates the agency, whether this is in response to a breach by the agent or not, no period of notice is required (*Gow*, Mercantile and Industrial Law of Scotland, 536).

27. In SLOVAKIA the principal can always terminate the relationship immediately without any reason.

28. In SWEDEN if the principal terminates on the basis of a valid reason, no notice period is required.

III. Specific cases of extraordinary and serious reason

29. In BULGARIA if the parties have agreed on a particular person to perform the agent's obligation and this person dies or becomes incapable, the principal can end the mandate relationship.

30. In ENGLAND there would be automatic termination on the occurrence of any event which brought about frustration of the contract (if the contractual obligations become illegal or impossible to perform).

31. In FRANCE this question does not arise.

32. In GERMANY death or incapacity of a 'specific person' without whom the obligations under the mandate relationship cannot be performed would terminate these obligations due to impossibility (CC § 275(1)) and would likely be viewed as an important reason for termination of the contract as a whole.

33. In IRELAND a contractual agency may be automatically terminated by any event which frustrates the contract. Thus, it will be terminated if performance becomes impossible, for instance, because of the death of either party. Where one of the parties is a company the agency is similarly terminated by the winding up of the company. An agent's bankruptcy will terminate the agency if it makes the agent unfit to continue to act.

34. In the NETHERLANDS serious reasons are changes in the circumstances that are in all fairness likely to cause the immediate termination of the contract. An example of a serious reason is the situation that the principal has lost faith in the agent (*Memorie van Toelichting, Parlementaire Geschiedenis*, Ow 7, p. 325).

35. In POLAND the mandate contract does not end in case of death or loss of legal capacity by the principal. It does end in case of death or loss of legal capacity by the agent (CC art. 748 POLISH).

36. In SCOTLAND there appears to be no specific consideration in the authorities of the situation where the specific person who was to perform the obligations under the agency contract dies or becomes incapable (distinguishing this situation from that where the agent as contracting party dies or becomes incapable).

37. In SLOVAKIA there is no comparable regulation.

38. In SWEDEN a valid reason is said to exist if the agent is liable for fundamental non-performance, if it would be unreasonable to demand that the task continues or if

another important reason to cancel the agreement exists (KommL § 51 and HaL § 26). This may include events of *force majeure* character and also circumstances of a personal nature (e.g. incapacitation of a party).

IV. Termination of irrevocable mandate in case of fundamental non-performance or extraordinary and serious reasons

39. In AUSTRIA even an irrevocable mandate may be terminated in the case of important reasons (loyalty, misrepresentation). The irrevocability is further restricted by case law: revocation is possible when the representative neglects the contractual duties, fails in complying with the duty to represent the interests of the principal or abuses the authority (Strasser, § 1020 ABGB Rz 4). An agreement to the contrary is void.

40. In BELGIUM a clause precluding revocation does not mean that there can be no other grounds to end the contractual relationship. However, much will depend on the interpretation of the relevant clause. A court could interpret a clause excluding revocation as having a broader scope and as also excluding other grounds for ending the relationship (*Wéry*, Le mandat, 278).

41. In BULGARIAN legal doctrine, the irrevocability of the mandate contract is considered relative (Mevorah/Lidji/Farhi, Komentar III, 171). Thus, the principal can end the irrevocable contract at any time with or without extraordinary and substantial reasons or terminate it because of a fundamental non-performance but with different legal consequences. Firstly, when the principal revokes, without serious reason, the irrevocable mandate, apart from payment of stipulated remuneration and reimbursement of expenses, the principal can be held liable for damages incurred by the agent (Mevorah/Lidji/Farhi, Komentar III, 171). On the other hand, in case of a revocation of an irrevocable contract due to extraordinary and serious reasons, under some special rules the principal (client) is obliged to pay the remuneration not in full amount, but only proportionally to the acts performed by the agent (advocate) – BAA, art. 26(2). Furthermore, in case of termination as a result of a fundamental non-performance, the principal is not liable for payment of compensation to the agent, but in accordance with general contract law rules is entitled to claim damages from the latter – LOA art. 88 (1).

42. In DENMARK a clause excluding the possibility of termination of the contract for fundamental non-performance of the representative may be declared invalid in the situation traditionally called ‘breach of basic assumption’: ‘promise may wholly or party be set aside with reference to circumstances after its making’ (Contract Act section 36).

43. In ENGLAND if it is possible to agree to the irrevocability of the contract for representation and the parties have not provided for the irrevocability to end, such irrevocability will only end once the interest of the agent has been satisfied. Note that the rules defined under the Power of Attorney Act 1971 are narrower than the common law rules since it seems possible to revoke the authority under specific circumstances such as death, insanity and bankruptcy as defined by s 5(5).

44. In ESTONIA the irrevocability of a mandate relationship is restricted in the sense that the relationship may still be terminated on material grounds (LOA § 631). If the contract is entered into for the life of one party or for a period longer than five years, the principal has the right to terminate the relationship once five years have passed from the date of conclusion of the contract by giving at least six months’ advance notice (LOA § 630(3)). The common understanding in practice is that even although the ‘material grounds’ justifying the termination may be defined by the contract, the parties cannot exclude termination in cases of fundamental breach.

45. In FRANCE the parties cannot validly agree that the agency will be irrevocable. In any event, as a matter of general principle, French law does not accept that parties may be subject to perpetual obligations, and CC art. 2003 provides that the agency will terminate by the death, insolvency or incapacity of either party.

46. Under GERMAN law, although CC § 314(1) does not expressly say so, the right to revoke based on an important ground cannot be excluded (Heinrichs, § 314 para. 3).

47. In GREECE if an irrevocable mandate has been granted it is accepted that such an authority can be nevertheless revoked if serious grounds (breach of contractual obligations, insolvency of the representative) exist (Supreme Court decision no. 1157/1991, EllDni 1992, 841; CA Thessaloniki decision no. 1381/1979, EllDni 1981, 353) or revocation is required on the basis of good faith (Supreme Court decision no. 1108/1984, EEN 1985, 497). Furthermore, the irrevocability ends if the ground that justifies such irrevocability does not exist any more (Georgiadis/Stathopoulos/Doris, Art. 218-221 GCC nr. 15).

48. According to the HUNGARIAN CC art. 483(4), '[a]ny limitation or exclusion of the right of cancellation shall be null and void; however, the parties shall be entitled to agree on the limitation of the right of cancellation with regard to continuous agencies'. Therefore, even in case of a continuous relationship of representation, the revocability of the contract can only be restricted but not excluded. Concerning the powers of representation, CC art. 223(2) establishes that '[a] mandate shall be valid until withdrawn, unless otherwise provided; its withdrawal that concerns a bona fide third person shall be operative only if he has been informed thereof. The right of withdrawal cannot be validly waived'. In case of commission agency, CC art. 512(2) provides that '[a]ny limitation or exclusion of the right of rescission shall be null and void'.

49. In IRELAND, under section 20 of the Power of Attorney Act 1996, where a power of attorney is expressed to be irrevocable and is given to secure (a) a proprietary interest of the donee of the power, or (b) the performance of an obligation owed to the donee, then, so long as the donee has that interest or the obligation remains undischarged, the power shall not be revoked: (i) by the donor without the consent of the donee, or (ii) by the death, incapacity or bankruptcy of the donor or, if the donor is a body corporate, by its winding up or dissolution.

50. In ITALY irrevocability is not restricted in time. The reason thereof lies in the interests of both the representative and the principal's heirs or successors in obtaining performance of the obligations under the contract, i.e. the interest of the representative to a price, if agreed, and the interest of the heirs or successors to the exact execution of the mandate.

51. In the NETHERLANDS the contracting parties may validly agree on an irrevocable mandate in certain cases according to CC art. 7:422(2) jo. CC art. 3:74(1)-(2). The principal cannot then terminate the relationship if the acts in question are in the interest of the agent or a third party (see CFI Roermond 11 Feb 1999, NJ 1999, 607). However, the judge is allowed to alter such provision because of serious reasons (CC art. 3:74).

52. There is no irrevocable mandate under POLISH law; the principal may always terminate the relationship if "important reasons" occur (e.g. non-performance by the agent or other actions that may lead the principal to lose confidence in the agent).

53. In SCOTLAND whether an irrevocable mandate may be revoked because of fundamental non-performance or for serious or extraordinary reasons is an issue which is virtually unexplored. It appears, however, that the Scottish irrevocable mandate, or *procuratory in rem suam*, is absolutely irrevocable, even in cases where serious and extraordinary reasons apply (*Black*, para. 551).

54. In SLOVAKIA irrevocable mandate is not allowed.

IV.D.–6:104: Termination by agent when relationship is to last for indefinite period or when it is gratuitous

(1) The agent may terminate the mandate relationship at any time by giving notice of reasonable length if the mandate contract has been concluded for an indefinite period.

(2) The agent may terminate the mandate relationship by giving notice of reasonable length if the agent is to represent the principal otherwise than in exchange for a price.

(3) The parties may not, to the detriment of the agent, exclude the application of paragraph (1) of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

In the normal case the mandate relationship will terminate when the agent has concluded the mandated task (typically the conclusion of the prospective contract) on behalf of the principal. There may be situations, however, in which the agent no longer wants to continue to carry out the contractual obligations even though the prospective contract or other task has not been concluded. The present Article enables the agent to terminate the mandate relationship, if the contract is for an indefinite period of time or provides for gratuitous representation, by giving notice of reasonable length.

B. Termination by notice when mandate contract concluded for indefinite period

Following the regime in III.–1:109 (Variation or termination by notice) paragraph (2), the present Article allows the agent, as is the case with the principal, to terminate the agency, if it is for an indefinite period, by giving notice of reasonable length. Agents are not to be compelled to be bound to their principals eternally, but if they want to end a relationship entered into for an indefinite period they do have to give the principal notice of reasonable length. Notification is designed to give the principal enough time to adapt to the new situation, e.g. to find another agent.

C. Termination by notice when agent not entitled to remuneration

Traditionally, the mandate contract was considered to be of a gratuitous nature. This is no longer the case and the normal contract regulated by these rules will not be gratuitous. Nevertheless, some mandate contracts are still gratuitous.

When the mandate contract is not remunerated, some specific provisions apply. IV.D.– 2:103 (Expenses incurred by agent) paragraph (2) explicitly entitles the agent to the reimbursement of reasonable expenses. Moreover, the non-remunerated nature of the mandate contract influences the care that may be expected of the agent, cf. IV.D.–3:103 ((Obligation of skill and care) paragraph (2)(c). However, as a general rule the position of an agent acting gratuitously does not differ much from the position of a remunerated agent. This implies that the obligations resulting from the mandate contract may become too burdensome for the agent. The agent is granted the right to be freed from these obligations by giving notice of the termination of the mandate relationship, provided the period of notice is of reasonable length. This applies even if the gratuitous mandate was for a definite period.

D. Character of the rule

For the reasons explained above in relation to the principal's corresponding right it is generally regarded as contrary to public policy to bind parties to contracts for eternity. Moreover, again for the reasons explained above, it is necessary to make the provision on contracts for indefinite duration mandatory.

Paragraph (2) regarding the right to terminate the relationship arising from a non-remunerated contract contains a default rule from which the parties may derogate.

NOTES

I. Termination by agent of mandate relationship entered into for indefinite period

1. The agent can cancel the mandate contract concluded for an indefinite period of time at any time under the AUSTRIAN CC § 1021, but has to carry on urgent business until the principal can make other arrangements (CC § 1025) and has to indemnify the principal for losses suffered due to the termination of the relationship before the agreed date (except for unforeseen legal and material obstacles).
2. According to the BELGIAN CC art. 2007, the agent has the right to cancel the contract for representation. The cancellation can be given *ad nutum*, i.e. without a motive, but the agent must notify the cancellation to the principal. If the cancellation prejudices the principal, the agent must indemnify the principal. Exceptionally, the agent will be exempt from indemnification, if the agent cannot fulfil the mission to represent without harming his or her own position in a significant way (Dekkers, 735-736; Delahaye, 53-55; *Foriers and Glansdorff*, Contrats spéciaux, 642; *Paulus und Boes*, Lastgeving, 156-159; *Tilleman*, Lastgeving, 285; *Wéry*, Le mandat, 291-296).
3. In BULGARIA provided that there is a substantial reason, the agent can end the relationship under a mandate contract concluded for an indefinite period of time with unilateral notice duly sent to the principal (LOA art. 289). If the does not observe these prerequisites, the agent is liable in damages for any loss incurred by the principal. Unless agreed otherwise, the commission agent is entitled to terminate the agency only in case of a breach of contractual obligations by the principal (Ccom art. 359(1)). A contractual relationship entered into for an indefinite term between the commercial agent and the principal may be terminated by either party with a notice period of one month during the first year, of two months during the second year and of three months thereafter (Ccom art. 47(1)).
4. In DENMARK the agent may at any time cancel the contract for representation where the contract is concluded for an indefinite period of time. In the case of cancellation, the agent is not entitled to claim compensation other than for the expenses incurred during the period of the representation.
5. In ENGLAND in the case of an indefinite duration contract, similarly to the principal being entitled to unilaterally terminate the relationship at any time, the agent can also renounce the authority at any time. Such a renunciation will be valid even if it is a breach of contract. There is however no case law on the matter and doctrine stipulates that the agent renouncing authority will not terminate the agency until the principal accepts such a renunciation (Bowstead (-*Reynolds and Graziadei*), Agency[18], art. 119, no. 10-004, art. 122).

6. In ESTONIA the agent may terminate a mandate relationship entered into for an indefinite period only under the condition that the principal can receive the service or enter into the transaction in another manner; otherwise, the agent must compensate the principal for any damage caused by the termination (LOA § 630(2)).

7. In FINLAND the agent is, in general, entitled to terminate the mandate relationship on giving a reasonable period of notice. A liability to pay damages may arise in specific circumstances, e.g. if it is evident that the termination is substantially harmful for the principal, or when a reasonable period of notice is not given. A lawyer is not entitled to terminate the relationship with the client, except in specific circumstances (CConduct § 15-16). A professional agent has to pay special attention to the interests of the principal, especially when the latter is a consumer.

8. In FRANCE the agent may terminate the mandate relationship at any time by simply notifying the decision to the principal (CC art. 2007). The agent may, however, have to pay compensation to the principal if such termination causes loss to the principal, unless the agent can demonstrate that the continuation of the agency would have involved substantial losses for the agent. The agency agreement may provide for a notice period or compensation in the form of liquidated damages to be paid to the principal in the event of termination.

9. A gratuitous mandate relationship may be terminated at any time under the GERMAN CC § 671(1). Termination of a remunerated relationship (*Geschäftsbesorgungs-vertrag*) is governed by the law on contracts for services or contracts for works. The rules on contracts for services allow termination by the principal as well as the agent (CC § 621). Either party has the right to terminate irrespective of any termination period where there is an important reason which makes it unacceptable for the party to continue (CC § 626). Furthermore, termination is possible even without an important reason where the contract calls for services 'of a higher kind which are usually assigned on the basis of particular trust' (§ 627(1)). This will often be the case where a contract for representation is concluded.

10. In GREECE in the case of representation based on a contract of mandate, an agent is entitled to terminate the mandate relationship at any time provided this right has not been renounced. The termination is without effect if there are serious grounds militating against it. If the termination was notified at an inappropriate time (the time is considered to be inappropriate when it is impossible for the principal to take care of the affairs at the time of the termination; see CFI Thessaloniki decision no. 280/1984, EllDni 1985, 758) without serious ground, the agent is liable to compensate the principal for the loss caused (CC art. 725). If the termination was notified at an inappropriate time but with a serious ground, such as the illness of the agent, the latter is not obliged to pay compensation (Kapodistrias, Art. 725 GCC nr. 5-15).

11. The HUNGARIAN CC art. 483(2)-(3) establishes that '[t]he agent shall also be entitled to abrogate the contract at any time; however, the period of notice must be sufficient for allowing the principal to handle the matter. In the event of the principal's grave breach of contract, abrogation can have immediate effect. If the agency is cancelled without substantial grounds, the damages that are caused shall be indemnified, unless the agency is gratuitous and the period of notice is sufficient for allowing the principal to handle the matter'. In this respect it is not relevant whether the agent is a professional party or whether the principal is a consumer. In the case of commission agency, according to CC art. 512, '[p]rior to the conclusion of a sales contract, the principal shall be entitled to terminate the contract by notice with immediate effect, and the commission agent by fifteen days' notice. Any limitation or exclusion of the right of rescission shall be null and void'. In this respect it is not

relevant whether the agent is a professional party or whether the principal is a consumer.

12. In IRELAND since agency is a consensual relationship it can be terminated if either party withdraws consent. Where an agent withdraws consent, the agent is said to 'renounce' the agency. No formality is required for a renunciation. Where an agent is appointed for an indefinite period of time the agency can be terminated in accordance with any provision in the agreement for termination by notice. In the absence of any express term, it will normally be implied that the agency can be terminated, by either party, on reasonable notice. What constitutes reasonable notice will depend on the facts of the particular case.

13. In ITALY the agent may cancel a contract for representation for an indefinite period of time in case of just cause (CC art. 1727). In the absence of just cause the agent may cancel the contract by giving a reasonable notice to the principal. If a reasonable period of notice is not given the agent is liable for damages vis-à-vis the principal. According to CC art. 1727(2), '[i]n all cases except those of grave difficulty for the agent, the renunciation must be made in such manner and at such times as will enable the principal to make other arrangements'. In sum, the agent may terminate the relationship either for just cause or at will, but is required to give a reasonable notice and try to mitigate the negative consequences for the principal.

14. In the NETHERLANDS according to CC art. 408(2), the agent who has entered into a mandate relationship in the course of a profession, may terminate the relationship by giving notice of reasonable length, if this contract applies for an indefinite period (and does not end because of completion).

15. It is a general rule of POLISH contract law that any contractual relationship entered into for an indefinite period of time (including agency) may be terminated by any party (CC art. 365). This right may be limited but not excluded, since nobody may be forced to remain in a contractual relation forever.

16. In SCOTLAND whether the agent is entitled unilaterally to terminate the relationship depends on the terms of the mandate contract. There are no formal requirements. See *Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para 182. In general contract law a contract of indefinite duration may be terminated by reasonable notice on either side (*McBryde* paras 9.12-9.21). In the gratuitous contract of mandate the agent may renounce the contract, but may be liable in damages for losses to the principal resulting from the timing of the renunciation (ibid, para 25; *Erskine*, III,3,40).

17. In SLOVAKIAN civil relations, the agent may terminate the mandate relationship without any reason. The agent is nevertheless bound to perform any immediately necessary juridical acts to prevent detriment to the rights of the principal. Acts thus performed have the same legal effects as if the representation had continued, unless such acts conflict with the arrangements made by the principal (CC § 33b). In commercial relations, the agent may also terminate the relationship, and the termination will take effect at the end of the month following the month the notice was delivered to the principal, unless a later date ensues from the notice (Ccom § 575(1)). The agent's obligation to perform activities on behalf of the principal expires on the day the notice becomes effective. If the principal may incur damage due to discontinuation of certain activities, the agent must inform the principal of the measures to be taken in order to prevent such damage. If the principal cannot take the measures even by means of other persons, and asks the agent to effect them, the agent is bound to do so.

18. In SPAIN gratuitous mandates or mandates indefinite as to time are freely revocable without liability.

19. In SWEDEN when the contract is for an indefinite period of time, the agent may terminate the relationship at any time without cause and unless agreed otherwise usually with immediate effect. The principal has no right to compensation.

II. Termination by agent of mandate relationship entered into for definite period

20. In AUSTRIA the agent can terminate a mandate relationship entered into for a definite period at any time (CC § 1021), but has to carry on urgent business until the principal can make other arrangements (CC § 1025) and has to indemnify the principal for losses suffered due to the termination of the relationship before the agreed date (except for unforeseen legal and material obstacles).

21. According to BELGIAN CC art. 2007, the agent has the right to terminate the agency relationship.

22. In BULGARIA a mandate relationship for a fixed period of time can be ended unilaterally by the agent under the same prerequisites as a relationship entered into for an indefinite period – as long as there is a serious reason for this and a notice has been duly given to the principal – BULGARIAN LOA art. 289 (Mevorah/Lidji/Farhi, Komentar III, 178; *Goleva*, Obligazionno pravo2, 239). A commercial agency that has been entered into for a definite period may be terminated before its expiration if the party wishing to terminate it compensates the other party for the damage caused – Ccom art. 47 (2).

23. In DENMARK if the contract for representation is concluded for a definite period of time or if the agency would otherwise have ended by the conclusion of the prospective contract, the agent cannot rightfully terminate during the agreed period. The agent may, however, in a case of non-performance on the part of the principal immediately terminate the relationship when the non-performance occurs.

24. In ENGLAND it seems that when the contract is for a specified period of time, the agent can only renounce the authority if it is because of a breach by the principal: termination by either party of a fixed-term relationship before expiry of the term is a repudiatory breach: *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339, CA. If the contract is for a specific task, as mentioned earlier, since the contract is treated as unilateral in most instances, the agent is under no obligation to perform and is therefore under no obligation to provide the principal with notice.

25. Under ESTONIAN law the agent may terminate the mandate relationship that is entered into for a definite period only on material grounds (ESTONIAN LOA § 631), i.e. if it becomes evident that, bearing in mind all the circumstances and the interests of both parties, the party wishing to terminate cannot be expected to continue performance until expiry of the term for termination or the term of the agreement or until the services are performed.

26. In FINLAND it follows from the general principles of contract law that the agent is not entitled to terminate a mandate relationship that has been entered into by a contract concluded for a definite period of time. This does not apply when the principal has been guilty of a fundamental non-performance.

27. The rules under FRENCH law are the same whether the mandate was concluded for a fixed term or an indefinite term, whether or not the mandate has been substantially performed or not. The CC art. 2007 makes no distinction. The agent therefore has the right to cease performance of the mandate. The agent will, nonetheless, have to

compensate the principal for any loss suffered and the agent's remuneration will be reduced *pro rata temporis* or *pro rata* the work performed. In some cases, the right to remuneration may not arise if the mandate has failed due to the agent's decision.

28. In GERMANY a mandate relationship under a contract concluded for a definite period of time may be terminated by the agent under the same conditions as one under a contract concluded for an indefinite period of time. However, the conclusion of a contract for a restricted period of time can arguably be construed as the agent's waiver of the right to termination under CC § 671(1). Whether such an interpretation is feasible depends on the circumstances of the particular case. While the majority of authors are reluctant to accept the conclusion of a time-restricted mandate as an implicit waiver (Grundmann, 457, no. 482; Wittmann, § 671 para. 16), others are open to this idea (notably Seiler, in *Münchener Kommentar zum BGB*, 4th ed., 2004, § 671 para. 6). There is no case law on this question.

29. In GREECE an agent can terminate a mandate relationship under a contract for a definite period on the same conditions as a mandate relationship under a contract for an indefinite period.

30. In HUNGARY the situation is the same.

31. In IRELAND where the contract is for a specified period of time, the agent may renounce the authority and terminate the relationship but this may constitute a breach of contract unless the principal has already committed a breach of contract which allows the agent to terminate.

32. In ITALY if the contract for representation is concluded for a definite period of time the agent may terminate the relationship only for just cause. In the absence of just cause the agent is liable to the principal for damages.

33. In the NETHERLANDS the agent may terminate a mandate relationship entered into for a definite period only in case of serious causes (CC arts. 7:408(2) and 7:402 (2)).

34. In POLAND the agent may terminate the agency relationship at any time. However, if the service was provided against a remuneration, the agent may terminate only in case of "important reasons".

35. In SCOTLAND the agent, like the principal, is entitled to terminate an agency of unlimited duration at any time (*Erskine*, III,3,40; *Gow*, Mercantile and Industrial Law of Scotland, 536). This rule does not apply in cases of fixed term agency contracts where, in the absence of provision in the contract allowing unilateral early termination, termination by one party prior to the agreed expiry will amount to a breach of contract.

36. In SLOVAKIA an agent can terminate a mandate relationship for a definite period under the same conditions as one entered into for an indefinite period of time.

37. In SPAIN, the agent may terminate the relationship at any time. However, the agent is liable to compensate the principal's loss, unless the agent may prove a serious reason for the termination (CC art. 1736).

38. In SWEDEN when the contract is for a definite period of time, the agent may terminate the relationship for a valid cause. The agent cannot be forced to finish the performance. However, the agent will be liable for non-performance if the termination is without cause (*Hellner*, 215).

III. Termination by agent in case of a gratuitous mandate contract

39. In BELGIUM no distinction is made between a remunerated or a non-remunerated contract for representation.

40. The general rule of the BULGARIAN LOA art. 289 concerning unilateral ending of the mandate relationship by the agent is applicable to both gratuitous and non-gratuitous contracts (Mevorah/Lidji/Farhi, Komentar III, 178).

41. In ENGLAND there does not seem to be any rule dealing specifically with this particular question on gratuitous agencies. However, it seems that a gratuitous agent should be entitled to terminate the relationship at any time.

42. In FRANCE the rules are the same whether the mandate is gratuitous or not; the Civil Code makes no distinction.

43. In GERMANY for a gratuitous mandate contract, termination is possible at any time. CC § 671(2) provides for an additional condition (applicable to both gratuitous and remunerated contracts): the agent may only terminate in a manner that will allow the principal to make suitable arrangements for the subject matter the agent attended to, unless there is an 'important reason' (*wichtiger Grund*) for the immediate termination. It is not relevant whether the principal is a consumer.

IV.D.–6:105: Termination by agent for extraordinary and serious reason

(1) The agent may terminate the mandate relationship by giving notice for extraordinary and serious reason.

(2) No period of notice is required.

(3) For the purposes of this Article an extraordinary and serious reason includes:

(a) a change of the mandate contract under IV.D.–4:201 (Changes of the mandate contract);

(b) the death or incapacity of the principal; and

(c) the death or incapacity of the person who, at the time of conclusion of the mandate contract, the parties had intended to perform the agent's obligations under the mandate contract.

(4) The parties may not, to the detriment of the agent, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

The present Article introduces a right for the agent to immediately terminate a mandate relationship, no matter whether the contract has been concluded for a definite or indefinite period, without having to observe a notice period and without having to pay damages. This applies when the agent can invoke an extraordinary and serious reason which justifies termination.

Extraordinary and serious reasons to terminate a mandate relationship may arise in very different circumstances. Paragraph (3) provides a non-exhaustive list: if the principal changes the contract, if the principal dies or becomes incapable and if the person who, at the time of conclusion of the mandate contract, the parties had intended to perform the agent's obligations under the mandate contract, dies or is becomes incapable.

B. No exhaustive list of extraordinary and serious reasons

In many cases the well-founded loss of trust and confidence in the principal will constitute an extraordinary and serious reason for the agent to terminate a mandate relationship. In these cases, the confidence in the other party was necessary for the proper performance of the obligations under the mandate contract. The present Article introduces accordingly a right for the agent to immediately terminate a mandate relationship without having to observe a notice period and without having to pay damages. However, it does not seem to be wise to include a general provision stating that whenever the agent justifiably loses trust and confidence in the principal, there is a serious and extraordinary reason for termination of the mandate relationship. Such an explicit rule could tempt agents to argue that there would be a loss of confidence and trust just to escape having to respect a notice period or, after the fact, to avoid having to pay damages for wrongfully terminating the mandate relationship with immediate effect. It is thought better to leave the matter for the court to decide on the basis of the general provision of paragraph (1).

Illustration

A principal mandates an agent to negotiate the purchase of a major bank. The following week a fraud case implicating the principal is reported on the front page of

all national newspapers. Whether or not the accusations are true, the principal's business reputation is damaged. As the agent is dependent on an unimpeachable business reputation, the agent needs to be able to bring the relationship with this principal to an end as soon as possible. Even though there is no case of non-performance by the principal, under these circumstances the agent cannot be expected to continue performance under the mandate contract.

C. No notice period

If there is indeed an extraordinary and serious reason which justifies termination of the contractual relationship, termination should take immediate effect. In this specific situation the agent should not be required to observe any other condition than notifying the principal about the decision to terminate. In particular, no notice period needs to be observed, as indicated in paragraph (2). There is no form requirement regarding the notification.

D. Relation to rule on change of circumstances

In some circumstances, III.–1:110 (Variation or termination by court on a change of circumstances) may be applicable. If such is the case the parties would be expected to enter into negotiations to adapt the contract or to terminate the relationship. If negotiations fail it is for the judge to decide what is to be done. This would, however, all take a long time, during which there is uncertainty as to the position of the parties. Where the agent can terminate the mandate relationship for an extraordinary and serious reason, this long process and the possible need of an application to the court is avoided.

E. Mandatory character of the rule

The right to terminate the mandate relationship for extraordinary and serious reason is mandatory, as is expressed in paragraph (4), for the reasons given in Comment F to IV.D.–6:103 (Termination by principal for extraordinary and serious reason).

NOTES

I. Termination by agent for extraordinary and serious reason

1. According to the BELGIAN CC art. 2007, the agent has the right to cancel the contract for representation *ad nutum*, i.e. without a motive, by notifying the cancellation to the principal. The Civil Code does not require an extraordinary and serious reason. If the cancellation however prejudices the principal, the agent must indemnify the principal. Exceptionally, the agent will be exempt from indemnification, if the agent cannot fulfil the mission to represent without harming the agent's own position in a significant way.
2. In BULGARIA whereas the principal is entitled to unilaterally end the mandate relationship without any reason, the agent can only terminate the relationship on the ground of "a serious reason" (LOA art. 289; *Vassilev, L.*, Obligazionno pravo, 29-30).
3. In ENGLAND in the light of the principle of free renunciation of authority mentioned earlier, the agent is free to renounce the authority and need not mention any reason for it. If the principal is guilty of a serious breach, the agent will be entitled to treat the breach as repudiatory and therefore terminate the relationship immediately. Apart from instances of breach of contract, there will be events which will frustrate the contract

and therefore will terminate the agency such as death, bankruptcy, insanity etc of the principal.

4. In ESTONIA each of the parties is entitled to terminate the mandate relationship for an important reason. No notice period is required (LOA § 631).

5. The agent may terminate the mandate at any time by simply notifying this decision to the principal (CC art. 2007). The Civil Code does not require an extraordinary and serious reason in any case. The agent may, however, have to pay compensation to the principal if the termination causes loss to the principal, unless the agent can demonstrate that the continuation of the mandate would have involved 'substantial loss' for the agent. The agency agreement may provide for a notice period and/or compensation in the event of termination.

6. Under GERMAN law, every contract for a continuing obligation can be revoked when there is an 'important ground' for the revocation – a fundamental principle of German law which was developed by the courts and is now expressly laid down in CC § 314(1). CC § 626 as part of the law on contracts for service, which may apply to remunerated mandate contracts by virtue of CC § 675(1), provides a special, but quite similar rule.

7. The HUNGARIAN CC art. 483(2)-(3) establishes that '[t]he agent shall also be entitled to abrogate the contract at any time; however, the period of notice must be sufficient for allowing the principal to handle the matter. In the event of the principal's grave breach of contract, abrogation can have immediate effect. If the agency is cancelled without substantial grounds, the damages that are caused shall be indemnified, unless the agency is gratuitous and the period of notice is sufficient for allowing the principal to handle the matter'.

8. In IRELAND where the agency is contractual, breach of a condition of the contract by the principal, or of an innominate term where the consequences of the breach are serious, will enable the agent to terminate the relationship and pursue a remedy in damages.

9. In the NETHERLANDS the agent may terminate the agency without giving notice only in case of a serious cause for termination (CC arts. 7:408(2) and 7:402 (2)).

10. In POLAND the agent may terminate a non-gratuitous mandate relationship only if "important reasons" arise; otherwise the agent can be held liable for in damages.

11. In SCOTLAND, there is no special rule on termination for extraordinary and serious reason falling short of a material breach of contract (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 183; *Gow*, Mercantile and Industrial Law of Scotland, 535-6). Where the principal is in material breach of the agency contract, the agent is, of course, entitled to terminate for that reason. Beyond cases of breach of contract, certain events may act to frustrate and thus terminate the agency relationship, including the termination of the principal's business, and the death, incapacity or bankruptcy of the principal or agent. In cases of death, incapacity or bankruptcy, the agent may remain entitled to act, as is explored in more detail below.

12. SLOVAKIAN law does not recognise termination for important reasons.

13. According to the SPANISH CC arts. 1732 and 1736, the agent may terminate the mandate relationship at any time (*renuncia*), irrespective of whether it has been concluded for a definite or indefinite period. Notification is the only condition imposed. There is no other requirement. The only limit to the freedom to exit is the duty to pay damages for loss suffered by the principal when the termination is not supported by a "just cause" (serious reason). The only sure thing one may say about

this expression is that the Code has weakened the exoneration requirements set up by the *rebus sic stantibus rule.*

14. In SWEDEN when the contract is for an indefinite period of time, the agent may cancel it at any time without cause and unless agreed otherwise usually with immediate effect. When the contract is for a definite period of time, the agent may cancel it for a valid reason. The agent cannot, however, be forced to finish the performance. The agent will be liable for non-performance on terminating without cause and the principal will be entitled to claim damages (*Hellner*, 215).

II. No notice period required

15. In BELGIUM the agent has the right to cancel the contract for representation *ad nutum*, i.e. without notice period.

16. In BULGARIA in order to escape liability for a breach of contract, the agent does not only have to have a serious reason to unilaterally end the relationship, but is also obliged to give a notice of reasonable length (LOA art. 289). Otherwise, the is obliged to compensate the principal for any damage caused.

17. In ENGLAND if the principal is guilty of a serious breach or other important reasons mentioned above, the agent can terminate the contract immediately.

18. In FRANCE no notice period is required.

19. Both the GERMAN CC § 626(1) and CC § 314(1) expressly allow for a revocation without observance of a period of notice.

20. In IRELAND where the principal has committed a serious breach of contract, no notice period is required.

21. In the NETHERLANDS if there is a serious cause for termination (CC arts. 7:408(2) and 7:402 (2)), the agent does not have to observe a notice period when terminating.

22. In POLAND the contract ends when the notice of termination reaches the principal.

23. In SCOTLAND where the agent terminates the agency relationship(e.g. in response to a breach by the principal) , no specific period of notice is required.

24. SLOVAKIAN law does not recognise termination for important reasons. A notice period is required in commercial relations, but parties may agree otherwise.

25. In SPANISH Law, CC art. 1736 does not require any notice period.

26. In SWEDEN if the agent terminates the relationship on the basis of a valid reason, no notice period is required (HaL § 26).

III. Specific cases of extraordinary and serious reason

27. In BULGARIA if the principal has given directions resulting in a unilateral change of the mandate contract and its performance has become too burdensome for the agent, this is considered a sufficiently serious reason for termination of the relationship by the agent with a unilateral notice of termination (LOA art. 289; Mevorah/Lidji/Farhi, Komentar III, 119; *Vassilev, L.*, Obligazionno pravo, 24).

28. Under GERMAN law, the principal is not entitled to change the content of the mandate contract unilaterally, but only as far as the agent agrees – an agreed change can therefore not constitute grounds for termination. The death of the principal generally ('in doubt') does not lead to the termination of the mandate (CC § 672). Death or incapacity of a 'specific person' without whom the agent's obligations under the mandate relationship cannot be performed would terminate these obligations due to impossibility (CC § 275(1)), but would not give the *agent* an important reason to terminate the relationship.

29. For the NETHERLANDS CC Art. 7:402 (2) mentions the case where the agent is upon reasonable grounds not willing to carry out the mandate according to the instructions given, as a case of an extraordinary and serious reason for termination by the agent.

30. There are no examples of "important reasons" in the POLISH Civil Code.

31. In SCOTLAND this question does not arise as termination by a party for extraordinary and serious reasons falling short of material breach is not recognised.

32. SLOVAKIAN law does not recognise termination for important reasons.

33. In SPANISH law, the death, the commencement of insolvency proceeding and the insanity or loss of mental capacity automatically put the mandate to an end, without any required manifestation of will.

34. In SWEDEN a valid reason is said to exist if the agent is liable for fundamental non-performance, if it would be unreasonable to demand that the task continues or if another important reason to cancel the agreement exists (KommL § 51 and HaL § 26). This may include events of *force majeure* character and also circumstances of a personal nature (e.g. incapacitation of a party).

IV. Mandatory rule

35. In BELGIUM the rule that the agent has the right to cancel the contract for representation *ad nutum*, is not mandatory (*Tilleman*, Lastgeving, 335; *Wéry*, Le mandat, 294). An exception is made by some authors for contracts for an indefinite period (*Paulus und Boes*, Lastgeving, 159).

36. In BULGARIAN legal doctrine, any contractual stipulation that obstructs the agent in exercising the right to unilaterally terminate the mandate relationship is deemed null and void (Mevorah/Lidji/Farhi, Komentar III, 178). However, a stipulation to that effect may render the agent liable for damages if the agent terminates in breach of it .

37. For FRANCE the rule stated above in Note 5 is a mandatory rule.

38. Although the GERMAN CC § 314(1) does not expressly say so, the revocability based on an important ground cannot be excluded (Palandt [-*Grüneberg*], BGB[66], § 314 no. 3).

39. The parties may not exclude the agent's right to terminate the relationship because of "important reasons" (CC art. 747(3)).

40. In SLOVAKIA the rules on termination are not mandatory, except in the case of a commercial representation contract.

41. In SPAIN there is discussion about whether the parties can contract out of the agent's right to terminate and further about whether there would be any sense in the principal agreeing to this (Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-*Gordillo Cañas*), Código Civil II, 1591)

41. In SWEDEN the rules concerning a right to cancel on the basis of a valid reason are of a mandatory character (KommL § 51 and HaL § 26).

CHAPTER 7: OTHER GROUNDS FOR TERMINATION

IV.D.–7:101: Conclusion of prospective contract by principal or other agent

(1) If the mandate contract was concluded solely for the conclusion of a specific prospective contract the mandate relationship terminates when the principal or another agent appointed by the principal has concluded the prospective contract.

(2) In such a case, the conclusion of the prospective contract is treated as a notice under IV.D.–6:101 (Termination by notice in general).

COMMENTS

A. Application of general rules on termination

This Chapter deals only with grounds of termination which are specific to mandate and which have not been covered in the preceding Chapter. It does not deal with grounds for termination which are covered by the general rules in Book III and which require no modification for the mandate relationship. Accordingly termination by expiry of a fixed period is not dealt with here but in III.–1:107 (Time limited rights and obligations), which must be read with III.–1:111 (Tacit prolongation). Termination by full performance of the obligations under the mandate contract is regulated by the general rule in III.–2:114 (Extinctive effect of performance). Termination for fundamental non-performance is dealt with in Section 5 of Chapter 3 of Book III.

The present Chapter deals with three more specific types of termination, indicated by the titles of the relevant Articles – IV.D.–7:101 (Conclusion of prospective contract by principal or other agent); IV.D.–7:102 (Death of the principal) and IV.D.–7:103 (Death of the agent).

B. No provision on termination in case of incapacity of principal or agent

In most Member States the supervening incapacity of the principal or that of the agent is also regarded as bringing the mandate relationship to an end. The laws on the legal effects of mental incapacity, however, differ from one country to another. Some countries have special regimes for mandates with a view to incapacity or enduring powers of attorney.

In most Member States the incapacity of the principal is regarded as a cause for termination: Belgium, Cyprus, France, Greece, Hungary, Ireland, Portugal and Sweden. The same is true for Italy, unless the mandate was for the conclusion of a contract pertaining to business activities and the business of the principal remains in operation. In Spain, the incapacity of the principal also leads to the termination of the mandate relationship, unless the contract indicates otherwise or unless the mandate relationship was precisely concluded for the situation that the principal would later be declared incapable. In this case, the mandate relationship remains in force in accordance with the conditions imposed by the principal.

The contractual relationship does not terminate when the principal is declared incapable in Austria, the Netherlands, Poland and Slovakia. It follows that in those legal regimes the

mandate relationship continues between the agent and the curator of the principal. In England, the mandate relationship terminates unless the Enduring Power of Attorney Act applies.

If the incapacity of the principal terminates the mandate relationship, the relevant moment is the moment when the incapacity is declared by a court or specific body in France, Lithuania, Slovakia and Spain. In most other systems the relevant moment is the moment the agent becomes aware of the incapacity. Among these systems it is possible to differentiate two sub-groups. In a first group of systems, the relationship is deemed to be terminated when the agent knows or ought to have been aware of the incapacity of the principal. This is the regime in Belgium, Greece, Hungary, Italy, and Portugal. In a second group of systems, the relevant moment is when the agent is informed of the incapacity. This is the case in Cyprus, Poland, and Scotland. In this second group, the burden of proof regarding whether the agent was aware of the incapacity seems to lie on the person charged with protecting the interests of the incapacitated principal.

The agent has the obligation to continue performance in order to prevent detriment to the interests of the principal or the principal's successors in Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Portugal, Scotland, Slovakia and Spain. In England, the agent has to wait for instructions from the successors of the principal. In most countries, the agent seems only to be obliged to continue running the affairs that were already started before the principal was incapacitated. This is the case in Belgium, Cyprus, Greece, Italy, Portugal, Scotland and Spain. In some of these systems, the agent would also be obliged to take urgent measures. This is the case in Italy and the Netherlands. In Slovakia the agent is only obliged to take urgent measures. In some systems, the obligation to perform these measures is subject to a time-limit: the agent has to continue until the curator can take over the responsibility. This is the case in Germany, Greece, Hungary, and Lithuania. In the Netherlands, the time-limit is specific: one year.

The agent is entitled to payment in Austria, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Scotland, and Slovakia. In the Netherlands, the agent is entitled to payment if and in so far as this is reasonable in view of the circumstances.

In almost all European legislations, the supervening legal incapacity of the agent implies the termination of the mandate relationship. As far as is known, this is different only in Austria and Sweden.

As was said above, the rules on the legal effects of mental incapacity differ greatly from one country to another. Given the fact that the law governing mental incapacity is not covered by these model rules, it is thought that the question whether or not the supervening incapacity of either party to the mandate relationship should lead to the end of the mandate relationship – and what the consequences should be if that happens – is best left to national law.

C. No provision for termination in case of bankruptcy

In all Member States bankruptcy law determines whether or not the mandate relationship terminates by the bankruptcy of either the principal or the agent.

The bankruptcy of the principal terminates the mandate relationship in Austria, Cyprus, England, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Slovakia, Scotland,

Spain and Sweden. The same holds true for Estonia, unless the carrying out of the mandate does not affect the bankruptcy. In Poland, the bankruptcy of the principal does not terminate the mandate relationship. In Portugal, the same is true, as it is thought that such a provision is not needed: where relevant, both the person charged with the bankruptcy and the agent can simply terminate the mandate relationship by giving notice.

In many Member States the public declaration of bankruptcy implies the termination of the mandate relationship. This is the case in Austria, Cyprus, Greece, Slovakia, Spain and Sweden. In other countries, notably Belgium, Estonia, France, Germany, Ireland, Italy, and Lithuania, the mandate relationship only terminates when the agent becomes aware of it.

The declaration of bankruptcy of the agent also leads to the termination of the mandate relationship in the majority of the legal systems. However, in some of these systems there is no termination if the mandate relationship is not related to the bankruptcy. This is explicitly indicated for Austria, Estonia and Ireland. In England, Germany, and Hungary the mandate relationship does not automatically end. This is also the case for the Netherlands, where under bankruptcy law the mandate relationship may, however, be terminated by the person charged with the bankruptcy.

In all Member States bankruptcy law determines whether or not the mandate relationship ends by the bankruptcy of either the principal or the agent. Given the fact that bankruptcy law is not covered by these model rules, it is thought that the question whether or not the bankruptcy of either party to the mandate relationship should lead to the end of the mandate relationship – and what the consequences should be if it is so terminated – is best left to national law.

D. Conclusion of prospective contract by principal or other agent

If the specific mandated task is the conclusion of the prospective contract and it is not the agent but the principal or another agent appointed by the principal who has concluded the prospective contract, the present Article provides that the mandate relationship terminates. In such a situation, the performance of the main obligation under the mandate contract becomes impossible as a result of an act by the principal or another agent appointed by the principal. Such an act is to be regarded, under paragraph (2), as a form of termination of the mandate relationship by notice under Chapter 6. In many cases, this will imply that the principal will be liable for damages for non-observance of the reasonable notice period.

NOTES

1. In BELGIUM the classic example of an implied revocation by the principal is the conclusion of the prospective contract by the principal personally (CA Brussels 26 Jun 1986, Res.Jur.Imm. 1986, no. 6073; *Tilleman*, Lastgeving, 294; *Wéry*, Le mandat, 271). The termination may also occur as a result of notice to the agent of the appointment of a new agent for the same transaction (CC art. 2006).
2. In BULGARIA there is no explicit rule in the sense that the conclusion of the prospective contract by the principal or by another agent, appointed by the principal, is treated as revocation of the mandate. Nevertheless in legal doctrine such behaviour of the principal is interpreted as a case of revocation (Mevorah/Lidji/Farhi, Komentar III, 176). This means that the contractual relationship is terminated when the agent gets to know about or could have been aware of either the conclusion of the prospective

contract or the authorisation of another agent with the same authority. The contract will keep its legal effect when the principal explicitly states that the previous mandate is not revoked (Mevorah/Lidji/Farhi, Komentar III, 176).

3. In ENGLAND the position depends on whether the agent has been granted an exclusivity by the principal or not.

4. Article 2003 of the FRENCH Civil Code, which describes the various situations where an agency will terminate, does not refer to this case. However, it is accepted generally that, on the basis of ordinary rules of contract, the completion of the mandate by the agent or by the principal will result in the termination of the mandate. The termination may even occur as a result of notice to the agent of the appointment of a new agent for the same transaction (CC art. 2006).

5. In GERMANY while there is no specific provision to this end, general rules of contract law may lead to a mandate relationship ending once the purpose of the mandate has been fulfilled (Palandt [-*Sprau*], BGB[66], § 671 no. 4). Case law has confirmed this notion at least for the contractual relationship with an executor of a will (BGHZ 41, 23, 25).

6. In IRELAND it seems likely that, where the mandate is solely for the conclusion of a particular contract, the conclusion of that contract by someone other than the agent would have to result in the termination of the agency (and perhaps also give rise to liability for breach of contract, depending on the terms of the contract).

7. There are no specific rules on this matter in the POLISH Civil Code.

8. In SCOTLAND where the agency was entered into to achieve a specific purpose, and the principal or another agent achieves that purpose, the agency relationship would be brought to an end on the basis that it is now impossible for the agent to achieve the agreed purpose. The agent might remain entitled to payment where the conclusion of the contract which is the purpose of the agency relationship is attributable in part to the agent's efforts, even if the agent is no longer involved at the moment of conclusion (*Macgregor*, The Laws of Scotland, Reissue 'Agency and Mandate', para. 112; *Walker, Fraser & Steele v Fraser's Trustees* 1910 SC 222 at 229, per Lord Dundas; *Walker, Donald & Co v Birrell, Stenhouse & Co* (1883) 11 R 369).

9. In SLOVAKIA the authority as well as the mandate relationship are terminated if the juridical act for which it has been granted is executed (CC § 33(b)(1)(a)).

10. In SPAIN, the appointment of a new agent for the same matter amounts to termination of the former mandate (CC art. 1735). It is accepted also that the conclusion of the intended contract by the principal personally brings about the tacit revocation of the previous mandate (Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-*Gordillo Cañas*), Código Civil II, 1589).

11. In SWEDEN the conclusion of the prospective contract by the principal or by another agent appointed by the principal would not automatically be treated as a revocation of the mandate of the agent. The principal would still be required to revoke the mandate by notice.

IV.D.–7:102: Death of the principal

(1) The death of the principal does not end the mandate relationship.

(2) Both the agent and the successors of the principal may terminate the mandate relationship by giving notice of termination for extraordinary and serious reason under IV.D.–6:103 (Termination by principal for extraordinary and serious reason) or IV.D.–6:105 (Termination by agent for extraordinary and serious reason).

COMMENTS

A. General idea

Under the present Article, the mandate relationship does not terminate if the principal dies. The position of the principal is to be taken over by the successors (i.e. heirs or executors). This approach presumes that the interest of the principal may very well be the same as those of the successors and that they can continue the relationship. Yet, as the interests of the principal may be different from those of the successors, they should be entitled to escape from the mandate relationship without having to observe a notice period. Similarly, as it may become more onerous for the agent to have to deal with the whole of the successors – with possibly conflicting views on the pursuit of their interests – the agent should also be able to escape from the mandate relationship. For these reasons, both the agent and the successors of the principal may give notice of termination of the mandate relationship for extraordinary and serious reasons under IV.D.–6:103 (Termination by principal for extraordinary and serious reason) or IV.D.–6:105 (Termination by agent for extraordinary and serious reason).

B. Conclusion of the prospective contract after termination of mandate relationship due to the death of the principal

It should be noted that IV.D.–2:102 (Price) paragraph (5) remains applicable if the prospective contract is concluded after the mandate relationship has terminated and the conclusion of the prospective contract can be mainly attributed to the performance of the mandate by the agent.

NOTES

I. Death or incapacity of principal

1. In AUSTRIA if the principal dies, the mandate is automatically revoked subject to the statutory regulation of CC § 1022 (except in case of a mandatum post mortem). The mandate relationship ends even if the grant of authority was irrevocable. In many cases this is inconvenient, since the power may have been granted, for example by an elderly person, with this very contingency in mind. The case-law therefore permits a person to create, subject to restrictions, a power of mandate which endures after the principal's death (OGH in JBl 1991, 244; SZ 64/13). In cases where the mandate ends with the principal's death, the agent is required to take the necessary measures to prevent impending unnecessary harm to the interest of the principal or the principal's heirs (CC § 1002; Strasser, § 1002 Rz 21). The agent is liable for failure to take required measures. The agent is reimbursed for the expenses incurred in order to take such measures. According to § 35/1 ZPO solicitors also have to continue to act for such reason. In commercial relations, the mandate is in doubtful cases not

automatically terminated with the entrepreneur's death (Art. 8 Nr. 10 of the 4th EVHGB; Ccom § 52(3)). The mandate survives the principal's incapacity, because the loss of capacity to act (in such a way as to produce legal consequences) is not tantamount to the principal's death (Strasser, § 1020 Rz 28b and § 1018 Rz 6; OGH in SZ 13/71; 24/244; 26/132; EvBl 1968/60; 1992/76). Previous declarations of intent remain effective, if validly made.

2. According to the BELGIAN CC art. 2003, the authority to represent ends by the death or the incapacity of one of the parties. According to CC art. 2008, the termination of the authority will only be effective at the moment the agent has taken note or ought to have taken note of the termination. Acts concluded without knowledge of the termination are valid. When the principal dies, the agent is bound to continue running affairs (CC art. 1991(2)). More precisely, the agent must finish affairs started before the principal's death if any delay in their accomplishment would be harmful (*Wéry*, Le mandat, 301). This provision is strictly interpreted and does not allow the agent to start new affairs (CFI Luik 2 Apr 1930, Pas. 1930, III, 86; *de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 456). An agent who breaches this duty is liable to the principal.

3. In BULGARIA the mandate relationship is ended *ipso jure* by death or legal incapacity of the principal as well as dissolution of the principal legal entity (see LOA art. 287 and the NOTES under IV.D.–7:101; *Vassilev, L.*, Obligazionno pravo, 28; Mevorah/Lidji/Farhi, Komentar III, 163; *Goleva*, Obligazionno pravo2, 239). Since the rule of LOA art. 287 is not mandatory, the parties can stipulate otherwise, including *post mortem* mandate (Mevorah/Lidji/Farhi, Komentar III, 164). Upon termination of the mandate due to death, incapacity or dissolution, the heirs, guardian, trustee or the liquidator of the principal are obliged to immediately notify the agent and undertake the necessary steps to protect his or her interests (LOA art. 291).

4. In DENMARK according to section 21 of the Contracts Act the mandate relationship does not end automatically when the principal dies. Special circumstances, e.g. the agent being instructed to buy personal things for the principal, may lead to termination. Even if such special circumstances are present, a contract concluded by the agent is still effective vis-à-vis the estate of the deceased principal if the third party did not know about the death. When the principal is placed under curatorship, a third party with whom the agent concludes a contract does not acquire a better legal position than if the contract had been concluded by the principal personally (cf. section 22 of the Contract Act). Under circumstances where the mandate relationship ends, e.g. the death of the principal, the agent is obliged (and entitled) to take the necessary steps to protect the interests of the heirs until the estate of the deceased principal takes over (section 24 of the Contract Act). An agent who takes such measures can claim a price for the activities and compensation for the expenses incurred. These rules apply even if the contract for representation was irrevocable.

5. In ENGLAND following the case of *Wallace v Cook* ((1804) 5 Esp 117), the death of the principal automatically terminates the agent's actual authority, unless the authority is irrevocable. The agent cannot therefore sue for remuneration or indemnity for acts performed after the death of the principal even if the agent was not aware of the principal's death (*Pool v Pool* (1889) 58 LJP 67; *Campanari v Woodburn* (1854) 15 CB 400). Once the agent becomes aware of the death of the principal, the agent must stop acting and wait for new instructions from the estate of the principal. If the agent nonetheless continues to act, the agent will be liable for any losses the actions cause the principal's estate (*Re Overweg, Haas v Durant* ([1900] 1 Ch 209)). When the agent does an act on behalf of the principal after the latter's death, the estate is not bound by

the act (*Blades v Free* (1829) 9 B&C 167) but the estate may choose to be bound through ratification of the act. However, the estate is not bound to pay the agent's remuneration unless the estate also ratifies the contract with the agent. In such a case, the estate must however pay a reasonable sum to the agent for services rendered (*Campanari v Woodburn* ((1801) 6 Ves 266; *Lunghi v Sinclair* [1966] WAR 172). Insanity of the principal terminates the agent's actual authority and any transaction that the agent performs is void for lack of authority (*Drew v Nunn* ((1879) 4 QBD 661)).

6. In ESTONIA as a default rule, it is presumed that the contract for services, governing the mandate, will not cease to have effect with the death of the principal (LOA § 632(1)). In exceptional cases where the mandate relationship expires upon the death of the principal, LOA § 632(3) provides that the contract is nevertheless deemed to be in force until such time as the service provider (the agent) becomes aware or ought to become aware of the death of the principal. The placing of the principal under curatorship has no influence on the contract for services that governs the mandate (and to the authority of the agent in an external relationship).

7. In FINLAND the mandate contract including the right to conclude contracts on behalf of the principal continues to have effect after the principal has died, unless circumstances show otherwise (e.g. the prospective contract is pointless after the death of the principal). In other cases the mandate relationship usually ends when the principal dies, unless otherwise agreed between the agent and the estate of the deceased. If the principal is placed under curatorship, the agent is only entitled to take actions which the principal can still undertake personally. The authorisation ends at the time of the placement under the curatorship (LContract § 21-22 and Ccom § 18:8).

8. In FRANCE, in principle, the mandate will terminate with the death or incapacity of the principal (CC art. 2003), even if it includes an irrevocability clause, subject to the existence of any mandate *post mortem*, which is accepted in French law, provided it does not affect mandatory rules of succession. See also the recent law which deals with 'the mandate with posthumous effect' (Law no. 2006-728 of 23 Jun 2006, Chapter 6). The CC does not give any further indication on the exact moment when the mandate will terminate, but art. 2008 provides that all that the agent may have accomplished in ignorance of the death of the principal will be valid. French case law is not, however, very clear on the question of proof of the agent's ignorance of the event. In the event of the death of the principal, the agent is required to complete the mandate if there is an urgent need to do so (CC art. 1991(2)), e.g. if the agent was to sell perishable goods. In the event of the principal being placed under an incapacity, the CC does not provide for any similar rule.

9. In GERMANY the mandate relationship does not normally end automatically when the principal dies or is incapacitated. In cases of doubt, the contract continues to have effect after the principal dies or loses the legal ability to act (CC § 672). If the contract does cease to have effect, the moment when this happens depends on the interpretation of the contract. The agent is required to continue to carry out the representation if discontinuation of activity would result in danger (CC § 672).

10. In GREECE a mandate relationship is dissolved by the death of the principal or of the agent as well as by the placing under curatorship or the bankruptcy of either, except if there is an agreement to the contrary (CC art. 726). The relationship ends when the agent becomes aware of the incident by any means, including information received from the heirs in case of death of the principal or from the principal or the curator in case of curatorship (Georgiadis/Stathopoulos/Karasis, Art. 726-727 GCC nr. 2). In case of curatorship the mandate ends automatically (Kapodistrias, Art. 726 GCC nr.

15). In case of an agreement on continuance after the death of the principal, the prospective contract is concluded in the name of the heirs of the principal who can revoke the power of representation under the same conditions as the principal could have done if alive (Supreme Court decision no. 564/1989, EllDni 1990, 624). If there is no agreement on continuance the principal's heirs are obliged to reimburse the expenses that the agent incurred for the performance of the mandate until the death of the agent (Supreme Court decision no. 57/1995, NoV 1996, 1239). According to CC art. 727, in the cases provided for in CC art. 726, 'if the dissolution of the mandate imperils the interests of the principal the agent his heir or his legal agent shall be under an obligation to continue the conduct of the affairs that were entrusted to him until such time as the principal or his heir or his curator is in a position to take appropriate steps.' From that rule it is implied that if the dissolution of the mandate due to the death or curatorship of the principal imperils the principal's interests the dissolution of the contract is suspended temporarily until the principal or a curator or heir is able to take care of the affairs of the principal. Failure of the agent to continue temporarily the conduct of the affairs can give rise to a claim for damages. An agent who continues temporarily the conduct of the affairs of the principal is entitled to reimbursement of all the expenses incurred for such temporary performance (Kapodistrias, Art. 726 GCC nr. 19). An irrevocable mandate does not end automatically when the principal dies, but continues between the heir of the principal and the agent (Georgiadis/Stathopoulos/Karasis, Art. 726-727 GCC nr. 2). The contract of mandate cannot be continued between the curator of the principal and the agent.

11. According to the HUNGARIAN CC art. 481, '[t]he contract shall be terminated even if the agency has not been fulfilled, if either party dies or, if a legal person, is dissolved, unless the dissolved legal person has a legal successor; the principal becomes partially or fully incompetent or if the agent becomes incompetent'. CC art. 482 establishes that '[i]f the agency is terminated for a reason that is inherent in the person of the principal, termination shall take effect on the date on which the agent credibly acquires knowledge of the cause of termination. In the event of cancellation or the principal's death or loss of legal competency, the agent shall take such measures as are necessary to protect the interests of the principal even after the cancellation of the contract as long as the principal or its legal successor is unable to attend to the business at hand'. The agent is liable for damages resulting from non-performance (see CC arts. 310 and 318(1)). To the remuneration of the agent and to the reimbursement of his expenses, the general rules apply (see CC arts. 478(1)-(2) and 479). The same rules apply for commission agency (CC art. 513(2)).

12. In IRELAND a contractual agency may be automatically terminated by any event, which frustrates the contract. Thus, it will be terminated if performance becomes impossible, for instance, because of the death of either party. Therefore, the death of the principal automatically terminates the agent's actual authority *(Wallace v Cook* [1804] 5 Esp 117). The agent cannot therefore sue for remuneration or indemnity for acts performed after the death of the principal even if the agent was not aware of the principal's death (*Pool v Pool* [1889] 58 LJP 67). Once the agent becomes aware of the death of the principal, the agent must stop acting as the agent and wait for new instructions from the estate of the principal. An agent who nonetheless continues to act will be liable for any losses the actions cause the principal's estate (*Re Overweg, Haas v Durant* [1900] 1 Ch 209). When the agent does an act on behalf of the principal after the principal's death, the estate is not bound by the act (*Blades v Free* [1829] 9 B&C 167) but the estate may choose to ratify such an act. However, the estate is not bound to pay the agent's remuneration unless the estate also ratifies the contract with the agent. An irrevocable grant of authority does terminate on the death of the principal.

13. According to the ITALIAN CC art. 1722(4) the relationship under a contract for representation ends on the death or loss of capacity of the principal; however, if the representation contract is concluded for the conclusion of contracts pertaining to business activities, if the business continues to run, the relationship does not end automatically, without prejudice to the heirs' right to terminate it. The relationship ends when the agent becomes aware of the death or incapacity. All acts executed by the agent before becoming aware of the event causing the termination are valid and enforceable vis-à-vis the principal or the heirs (CC art. 1729). Special rules apply for representation in court proceedings: the death of the principal represented in court by the attorney only acquires a judicial meaning (i.e. entailing the interruption of the proceedings) when the attorney gives notice of it in the forms prescribed by the law. According to CC art. 1728, the agent has to continue the activity in the principal's or the heirs' account, but only if delaying action would lead to a danger for the represented interests. The agent is then not only required to take specific urgent measures, but to continue the execution of the mandate entirely. In case of failure, the agent is liable for breach of contract. However, it should be stressed that CC art. 1728 is an exception to the general rule stated in CC art. 1722(4). An irrevocable representation contract does not end on the death or loss of capacity of the principal (CC art. 1723(2)). Consequently, the agent continues to act on behalf of the principal's heirs and successors.

14. In the NETHERLANDS, as mandate contracts have a personal nature, the mandate ends after the death of the principal (CC art. 422(1)(a)), a provision that is mandatory (CC, art. 7:422 (2) first sentence). In that case, the mandate ends when the agent has knowledge of the principal's death (Castermans/Krans, Tekst & Commentaar BW[7], no. 3096). However, if the mandate is in the interest of the agent or a third party, the parties may stipulate that the death of the principal does not result in the ending of the mandate (CC art. 7:422(2). If the mandate contract ends because of the principal's death or guardianship order, the agent is required to do what may be expected in the contracting party's interests, having regard to the specific circumstances (CC art. 422(3)).

15. In POLAND the mandate relationship does not end on the principal's death (CC art. 747) or loss of legal capacity (declaration of incapacity by the court). In case of expiration of the mandate contract after the death or declaration of incapacity of the principal, the agent should continue to provide services until the principal's successor or incapacitated principal's legal representative decides otherwise (CC art. 747).

16. In SCOTLAND as a general rule, the relationship under a contract of representation is terminated by the death of the principal (Erskine, III,3,40; *Pollok v Paterson* 10 Dec 1811 FC at 376, per Lord Meadowbank; *Kennedy v Kennedy* (1843) 6 D 40; *Lord Advocate v Chung* 1995 SC 32). However, there are many exceptions to this rule. Where the agent continues to act in ignorance of the principal's death, the actings may be ratified by the heirs of the principal (*Stair*, Institutions I[10], 12, 6; Erskine, III,3,41). The institutional writers Stair and Erskine indicate that the agent should be encouraged to continue acting until receipt of reliable intelligence of the death of the principal (*Stair*, Institutions I[10], 12, 6; Erskine, III,3,41); therefore it seems that the mandate relationship does not end until such reliable intelligence has been received by the agent. Furthermore, it seems that an agent may be entitled to continue to carry out the obligations under the contract for representation if informed of the principal's death at a time when a transaction has been begun but not yet completed (*Stair*, Institutions I[10], 12, 6; Erskine, III,3,41). It is thought that the agent would be entitled to carry out all necessary work in order to complete the transaction, and would be entitled to remuneration in the normal manner. Where the issue is mental incapacity of the

principal, the matter is now regulated by the Adults with Incapacity (Scotland) Act 2000 (asp 4). The Act makes special provision for "continuing powers of attorney" which can survive such incapacity but which are subject to special safeguards and regulatory mechanisms. Under section 18 of the Act an ordinary mandate for representation (power of attorney) has no effect during any period when the principal is mentally incapable of dealing with the matters to which the power relates.

17. In SLOVAKIA the relationship under a contract of representation terminates by the death of the principal, unless it has been stipulated otherwise in the contract (CC § 33(b)(1)). If the principal dies, the agent is nevertheless bound to perform any immediately necessary juridical acts to prevent detriment to the rights of the principal. Acts thus performed have the same legal effects as if the representation had continued, unless such acts conflict with the arrangements made by the principal's legal successors or curators (CC § 33(b)(6)). The agent is liable for failure to take such measures. If the agent takes the required measures the agent can claim remuneration (if the contract is remunerated) and expenses from the heirs.

18. According to the SPANISH CC art. 1732(2), the death of the principal terminates the mandate relationship. The agent is however obliged to continue performance if otherwise the interests of the successors of the principal would be in danger (CC art. 1718(2)). Performance of the agent without being aware of the death of the principal is valid and effective with regard to third parties who have contracted with the agent in good faith (CC art. 1738). The commercial code establishes a different regime for mandates of a commercial nature. The death of the principal in a mandate regulated in the commercial code does not imply the termination of the relationship, although the successors of the principal have the right to revoke it (Ccom art. 280).

19. In SWEDEN according to HB 18:8 the mandate relationship should end at the death of the principal. However, this rule is considered to be out-of-date and questionable and according to AvtL (Contract Act) § 21 the relationship does not end automatically when the principal dies. Only special circumstances may end it. Such circumstances could be that the contract relates to matters which concern the principal personally and which lose their meaning after the death of the principal (see *Adlercreutz*, 206).

II. Termination in case of insolvency or bankruptcy of principal

20. In AUSTRIA the mandate relationship ends automatically when the principal becomes bankrupt or is otherwise subject to rules of insolvency law (AUSTRIAN CC § 1024, KO § 26), independent of the agent's awareness of the incident. This is so even if the grant of authority was irrevocable. (Strasser, § 1020 Rz 8a).

21. According to the BELGIAN CC art. 2003, the authority to represent ends in case of apparent insolvency of one of the parties, e.g. bankruptcy, at the moment the incident occurs or takes effect. Nevertheless, the termination will only be effective when the agent has taken note or ought to have taken note of the termination (CC art. 2008). Acts concluded without knowledge of the termination are valid.

22. In BULGARIAN private law, only business persons (natural or legal) can be declared bankrupt by virtue of a court judgment in a special civil proceeding (Ccom art. 607bis). Non-business persons, other than companies, can be declared bankrupt as an exception (Ccom arts. 609-610). In legal doctrine, it is considered that the mandate relationship terminates when the principal is declared bankrupt, because the principal cannot conclude new contracts (Mevorah/Lidji/Farhi, Komentar III, 165).

23. In DENMARK if the principal becomes bankrupt, a third party with whom the agent concludes a contract will not acquire a better legal position than if the contract had been concluded by the principal personally. This follows from section 23 of the

Contract Act, which must be interpreted in connection with section 29 of the Danish Bankruptcy Act. Section 29 lays down that upon pronouncement of the adjudication the principal (and thus the agent of the principal as well) will lose the right to assign or abandon the principal's property, to accept payments etc. The fact that the debtor (and the agent) upon pronouncement of the adjudication order is barred from disposing as regards the estate does not mean that this applies towards third parties as well. Only after the expiry of the day and night on which publication of the bankruptcy has been made in the official gazette will the debtor's (the agent's) loss of power be effective towards the whole world (cf. section 30 of the Bankruptcy Act). Until this point in time, the loss of the power to dispose is effective only against a party who knew or ought to have known of the bankruptcy. This means that a third party who has made a contract with the agent of the debtor in the interval between the pronouncement of the order and its publication will prevail in a question with the estate if the third party acted in good faith as regards the announcement of the adjudication order. Thus the contract is treated as if made before the bankruptcy. The rule in section 30 applies not only to dispositions whereby rights are created against the estate but also to payments to the agent. A party who has made a bona fide payment of a debt to the debtor (the agent) before the publication of the order will thus be discharged as against the bankrupt estate. These rules will apply even if the grant of authority was irrevocable.

24. In ENGLAND the bankruptcy of the principal automatically terminates the authority. Bankruptcy is treated similarly to death. Upon the principal becoming bankrupt, the property of the principal is vested in the trustee in bankruptcy (*Dawson v Sexton* ((1823) 1 LJOS Ch 185)). Because bankruptcy is treated similarly to death, the principal cannot be bound by apparent authority. However, third parties are protected by certain measures (Insolvency Act 1986, s 284(4)–(5)).

25. In ESTONIA the contract for services governing the mandate will cease to have effect upon bankruptcy of the principal, except in the case where there is no connection between the contract and the bankruptcy estate (LOA § 632). LOA § 632(3) provides that the contract is nevertheless deemed to be in force until such time as the service provider (the agent) becomes aware or ought to become aware of the declaration of the principal as bankrupt. The authorisation of the agent (for the purposes of the external relationship) will also expire (General Part of the Civil Code Act § 125(2)). However, third parties in good faith can rely on the authorisation if the grant of the authorisation was communicated to them or if an authorisation document was issued and presented (General Part of the Civil Code Act § 127(1)).

26. In FINLAND the mandate relationship normally ceases to have effect automatically when the principal is declared bankrupt. The ACAgentsS § 24 proscribes, however, that if the assets of the principal are surrendered into bankruptcy, the representation contract shall be deemed to have expired on the date when the bankruptcy application was submitted to a court.

27. In FRANCE in the event of insolvency of the principal (or more generally, 'bankruptcy', according to the case law), the general rules are the same as those concerning the case of death or incapacity of the principal. The mandate will be terminated by such event (CC art. 2003) as soon as the agent has become aware of the event, even if the contract includes an irrevocability clause.

28. In GERMANY in the case of bankruptcy, the mandate relationship terminates (§ 115(1) of the Insolvenzordnung (InsO) for gratuitous mandate relationships and InsO § 116 for Geschäftsbesorgungsverträge). In principle, the termination occurs when the insolvency proceedings are commenced (InsO § 115(1)). InsO § 115(3), however, contains a rule protecting the agent: as long as the agent was without fault unaware of

the commencement of the insolvency proceedings, the mandate/Geschäftsbesorgungsvertrag continues. The mandate relationship also ends when the grant of power was irrevocable, as InsO § 119 explicitly declares any agreement deviating from InsO §§ 103-118 to be null and void.

29. According to the GREEK CC art. 726 a mandate shall be dissolved by the placing under the bankruptcy of the principal (or liquidation if it concerns a legal person). If the principal becomes bankrupt or is otherwise subjected to rules of insolvency law the mandate ends automatically from the time of the publication of the decision which declares the insolvency of the principal. In this respect it is irrelevant if the agent is informed by the principal or when the agent otherwise becomes aware of the insolvency (Georgiadis/Stathopoulos/Karasis, Art. 726-727 GCC nr. 4). In the case of an irrevocable mandate, the mandate ends in case of the insolvency of the principal as it cannot be continued between the trustee in insolvency and the agent (Georgiadis/Stathopoulos/Karasis, Art. 726-727 GCC nr. 4).

30. According to the HUNGARIAN CC art. 481(b), '[t]he contract shall be terminated even if the agency has not been fulfilled, if either party dies or, if a legal person, is dissolved, unless the dissolved legal person has a legal successor', so that the contract for representation does not end automatically when the principal becomes bankrupt or is otherwise subjected to rules of insolvency law. However, according to art. 35(1) of the Bankruptcy Act (Act XLIX of 1991 on Bankruptcy Proceedings, Liquidation Proceedings and Members' Voluntary Dissolution), '[a]t the time of the beginning of the liquidation proceedings, all the debts of the economic entity become expired (due)'. The same rules apply for the commission agency (CC art. 513(2)).

31. In IRELAND the principal's bankruptcy terminates the agency and deprives the agent of authority (although there are a number of rules designed to protect agents and third parties in respect of acts done before they have notice of the bankruptcy; see Bankruptcy Act 1988).

32. In ITALY the same answers for the case of death of the principal apply to the case of opening of insolvency proceedings involving the principal as the insolvent debtor (see CC arts. 1722, 1723 and 1728 and Italian Insolvency Law art. 78; this last provision clearly states that any contract of mandate ends in case of the insolvency of one of the parties).

33. In the NETHERLANDS according to the CC art. 422(1)(a), the mandate relationship ends in case of the principal's insolvency or the applicability of debt rescheduling to the principal. (Castermans/Krans, Tekst & Commentaar BW[7], no. 3096).

34. In POLAND the mandate relationship ends on the day the bankruptcy is declared by the court (art. 102 of the Bankruptcy Law). The agent may claim damages.

35. In SCOTLAND although in general the principal's bankruptcy (sequestration) acts to terminate the agency relationship, this general rule is subject to practical exceptions which aim to facilitate the efficient administration of the principal's assets. The case of *Pollok v Paterson* (10 Dec 1811 FC (369), a case decided by a bench of five judges, suggests that the agent's authority may continue notwithstanding sequestration (the judges relying on *Stair*, 1.12.6; *Erskine*, III,3,41). Sequestration will certainly not have this effect in relation to transactions already commenced (*Bell*, Commentaries I[7], 525-526). Others have suggested that the principal's sequestration merely 'entitles the agent to decline to act further' (*Gow*, Mercantile and Industrial Law of Scotland, 537 relying on *Goudy*, 368).

36. In SLOVAKIA the relationship under the contract for representation ends automatically when the principal becomes bankrupt, but not when the principal is otherwise subjected to the rules of insolvency law. The relationship ends when the

bankruptcy is declared (Act 7{2005 Coll § 52). It is not relevant whether the agent is actually aware of the declaration of bankruptcy; it is presumed that everyone is because it is promulgated by the court in public and published in the official commercial bulletin.

37. In SPAIN, the commencement of the insolvency proceeding of any of the parties extinguishes the mandate (CC art. 1732.3).

38. In SWEDEN bankruptcy of the principal automatically terminates the agency (*Hesser*, 32).

IV.D.–7:103: Death of the agent

(1) The death of the agent ends the mandate relationship.

(2) The expenses and any other payments due at the time of death remain payable.

COMMENTS

A. General idea

According to this provision, the death of the agent brings the mandate relationship to an end. This approach implies that it is by virtue of the personal characteristics of the agent that the principal entrusts the agent with the responsibility to carry out actions on the principal's behalf. Accordingly, the relationship ends if the agent cannot comply with the contractual obligations any longer (paragraph (1).

B. Obligation to pay remains

The successors of the deceased agent will take the agent's place as creditor of the payment obligation. The provisions under IV.D.–2:102 (Price) paragraph (5) and IV.D.–2:103 (Expenses incurred by agent) apply. The effect of the former is that the price will often be payable if the prospective contract is concluded after the mandate relationship has ended due to the death of the agent and the conclusion of the prospective contract can be mainly attributed to the performance of the mandate by the agent.

C. Contract may provide otherwise

There may be cases where the mandate relationship does not depend on the personal qualities of the agent and where the fact that the agent dies does not by itself mean that the obligations under the contract can no longer be performed. If the agent dies, often colleagues or employees can carry out the performance of the obligations. In such a case, automatic ending of the mandate relationship may therefore not be in the interests of any of the parties involved. It is for the parties to explicitly agree on this.

NOTES

I. Mandate relationship ends automatically on death, insolvency or incapacity of agent

1. The mandate relationship ends automatically (*ipso jure*) when the agent dies (AUSTRIAN CC § 1022) or becomes bankrupt or is otherwise subjected to rules of insolvency law in so far as the contract for mandate concerns the bankrupt's estate (CC § 1024; KO § 26; with the exception of the contract for commission, which is not terminated automatically (HVertrG § 26, KO § 26)). If the administrator of the bankrupt's estate insists on the performance of the contract, the principal has a claim for separation and recovery of assets not belonging to the bankrupt's estate (Straube (-*Griss*) HGB I³, § 383, no. 13). If one of the creditors of the commission/commercial agent takes possession of the goods on commission, the principal may bring in an action for recovery of the goods (EO § 37; Straube (-*Griss*) HGB I³, § 383, no. 13). The principal of a commission business is not entitled to exercise the agent's rights towards the third party where the commission agent commits a fundamental non-

performance or if prior to the time for performance it is clear that there will be a fundamental non-performance (CC § 1024 Schwimann (-*Apathy*), ABGB V³, no. 1). The contract for mandate does not end if the agent is placed under curatorship, though the agent cannot act for the principal as long as the incapacity renders the agent unable to perform the agency duties (CC § 1018; Rummel (-*Strasser*), ABGB I³, no. 5). In case of the agent's death, bankruptcy or insolvency the contractual relationship ends when the incident leading to the end occurs or takes effect. If it ends for such reason, the agent's heirs are not required to take the necessary measures to prevent unnecessary harm to the interest of the principal. In cases where another person exercised a profession or a business with the agent or in the agent's service and was authorised by the principal in doing so (e.g. another lawyer of the same law firm), such other person is required to take the necessary measures to prevent unnecessary harm to the interest of the principal.

2. According to the BELGIAN CC art. 2003 the authority to represent ends by the death, the incapacity or the apparent insolvency of one the parties, of which bankruptcy is an example. The mandate relationship probably ends when the incident occurs or takes effect. According to CC art. 2010, the agent's heirs who are aware of the contract for representation are required to notify the agent's death to the principal and to perform in the meantime all urgent and necessary acts, required in the principal's interest by the circumstances (*de Page and Dekkers*, Traité élémentaire de droit civil belge V^2, 454; *Wéry*, Le mandat, 297-298).

3. For BULGARIA see Notes under IV.D.–7:103 (Death of the agent).

4. In DENMARK the contract for representation will end automatically when the agent dies, is placed under curatorship, becomes bankrupt or is otherwise subjected to rules of insolvency.

5. In ENGLAND the death of the agent automatically ends the authority. The basis for such a rule is the fact that the agency is a personal contract (*Farrow v Wilson* [1869] LR 4 CP 744). Should there be joint agents, the death of only one of them is sufficient to end the agency relationship (*Adams v. Buckland* (1705) 2 Vern 514, 23 ER 929). Because of the personal aspect of the contract, there is no possibility for another agent to come in as a substitute of the original dead agent. Insanity of the agent also automatically terminates the actual authority since the agent is no longer capable to represent the principal. Bankruptcy of the agent may end the actual authority, but it is not automatic and will depend upon the terms of the appointment. It may be considered as a frustrating event or a repudiation of the contract depending on the terms in the contract in question (*McCall v Australian Meat Co Ltd* [1870] 19 WR 188; *Hudson v Granger* [1821] 5 B&A). In relation to the agent's cessation of business, the rules are less clear: in *Triffit Nurseries v Salads Etcetera Ltd* [1999] 1 Lloyd's rep 697. affd [2000] 2 Lloyd's Rep 74, the Court of Appeal held that the appointment of a receiver did not automatically end the authority of the agent (see Longmore J ([1999] 1 Lloyd's rep 697 at 700) who stated that 'cessation of business' was an uncertain concept and therefore could not be added to the list of causes of automatic termination.

6. In ESTONIA as a default rule, it is presumed that the mandate relationship will end with the death of the agent (LOA § 633(1)). The same applies in case of bankruptcy, except where there is no connection between the contract and the bankruptcy estate (LOA § 633(2)). The contractual relationship will automatically end. The heirs are obliged to inform the principal of the death of the agent (LOA § 634).

7. In FINLAND the mandate relationship ends automatically when the agent dies and the estate of the deceased does not generally have any specific personal duties towards the

principal. The authorisation does not always end automatically when the agent is declared bankrupt. The bankruptcy estate has, in principle, the right to decide whether the activities of the agent are to be continued. However, the principal is usually entitled to terminate the agency due to the bankruptcy. A commercial agency ends automatically on the date when the bankruptcy application was submitted to a court (Commercial Agents and Salesmen Act art. 24). A curatorship limits the agent's authorisation to those measures the agent is still entitled to take personally.8. In FRANCE the death, insolvency or incapacity of the agent would effectively involve automatic termination of the mandate or agency (CC art. 2003; for a merger or takeover of the agent, see Cass.civ. 3eme, 10 Nov 1998, Bull. civ. 1998 III, no. 212). The rules above apply unless the agency contract contains a clause to the contrary (e.g. Cass.com., 22 May 1967, JCP 1968, II, 15389). CC art. 2010 indicates that in the event of the death of the agent, the heirs must inform the principal of the event, which raises the presumption that the mandate will terminate at that time. The heirs of the agent must also do whatever is in the interest of the principal for the time being. There is no similar rule applicable in the event of incapacity or insolvency of the agent, but it is likely that the mandate will terminate when the principal is informed of the event.

9. In GERMANY, in case of doubt, the mandate ends when the agent dies (CC § 673). In case of curatorship (if depriving the agent of power to perform juridical acts), this would be considered a case of impossibility of contract performance, thus terminating the agent's obligations (CC § 275; Palandt [-*Sprau*], BGB[66], § 673 no. 1). Bankruptcy and insolvency of the agent have no effect on the contract (InsO §§ 115-116 *a contrario*; cf. MünchKomm (-*Häuser*), HGB, § 383 no. 97; Palandt [-*Sprau*], BGB[66], § 671 no. 5). The moment of death/commencement of curatorship is decisive. According to CC § 673, the heirs have to continue to perform the obligations under the contract of representation. If this obligation is breached, the heirs are liable for damages according to CC § 280(1) (Palandt [-*Sprau*], BGB[66], § 673 no. 2).

10. In GREECE a mandate is dissolved by the death of the agent (except if there is an agreement to the contrary) as well as by the agent's being placed under curatorship or becoming bankrupt (CC art. 726). In the case of curatorship the contract of mandate ends automatically (KAPODISTRIAS IV, Art. 726 GCC nr. 15). Both in case of death and curatorship, the contract ends when the principal becomes aware of the incident by any means (Georgiadis/Stathopoulos/Karasis, Art. 726-727 GCC nr. 2). If the agent becomes bankrupt or is otherwise subjected to rules of insolvency law, the mandate relationship ends automatically from the time of the publication of the decision which declares the insolvency of the agent, irrespective of whether the principal is informed of it (Georgiadis/Stathopoulos/Karasis, Art. 726-727 GCC nr. 4). If the dissolution of the mandate due to the death or insolvency or curatorship of the agent imperils the interests of the principal the dissolution is suspended temporarily (the agency being continued by the agent's heir or legal representative, if the agent has died) until the principal or the principal's heir or legal representative is able to take care of the principal's affairs (CC art. 727). Failure of the agent or the agent's heir or legal representative to continue temporarily the conduct of the affairs that were entrusted by the principal can establish a claim for damages for any loss caused by such failure. If the agent or the agent's heir or legal representative continues temporarily the conduct of the affairs of the principal there is a right to reimbursement of all expenses incurred (Kapodistrias, Art. 726 GCC nr. 19).

11. In HUNGARY if the agent dies or becomes incompetent, the relationship under the contract for representation is terminated (CC art. 481). It does not end automatically when the agent becomes bankrupt or is otherwise subjected to rules of insolvency law,

but according to Bankruptcy Act art. 35(1), '[a]t the time of the beginning of the liquidation proceedings, all the debts of the economic entity become expired (due)'.

12. In IRELAND a contractual agency may be automatically terminated by any event, which frustrates the contract. Thus, it will be terminated if performance becomes impossible, for instance, because of the death of either party. Therefore, the death of the agent automatically ends the contract. This is also supported by the fact that the agency is a personal contract (*Farrow v Wilson* [1869] LR 4 CP 744). Insanity of the agent also automatically terminates the actual authority since the agent is no longer capable to represent the principal. An agent's bankruptcy will terminate the agency if it makes the agent unfit to continue to act. Even an irrevocable grant of authority terminates on the death of the agent.

13. According to the ITALIAN CC art. 1722(4), the mandate for representation ends automatically when the representative dies, is placed under curatorship, becomes bankrupt or is otherwise subjected to rules of insolvency law. This happens when the principal is informed of the incident leading to the termination or when the principal becomes anyhow aware of it. According to CC art. 1728(2), '[w]hen a mandate is extinguished by the death or supervening incapacity of the representative, if his heirs or the person who represents or assists him have knowledge of the mandate, they shall give prompt notice to the principal and in the meantime shall take the measures which circumstances may require in the interest of the principal'. The heirs or such other persons are required to promptly notify the principal of the representative's death and to take any circumstances which are necessary in the light of the specific circumstances (e.g. urgent activities). They would be liable for failure to take such measures pursuant to CC art. 1728. They do receive payment and/or reimbursement for the expenses they incur in order to take such measures. The mandate ends even if the grant of authority was irrevocable.

14. In the NETHERLANDS the mandate relationship ends because of the agent's death, guardianship order, the agent's insolvency or the applicability of debt rescheduling to the agent (CC art. 422(1)(b)). If the relationship ends because of the agent's death, the heirs may be obliged to do what may be expected in the contracting party's interests, as far as they have knowledge of the succession and the mandate. Such obligation may apply to those who exercised a profession or business with the agent (CC art. 422(4)). See *Van der Grinten*, Lastgeving, no. 53.

15. In POLAND, unless agreed otherwise, the mandate relationship ends on the death or loss of legal capacity of the agent (POLISH CC art. 748).

16. In SCOTLAND the death of the agent terminates the agency relationship (Stair, Institutions I 10, 12, 6; Erskine, III, 3,40; Gow, Mercantile and Industrial Law of Scotland, 537). This rule reflects the 'personal' nature of the agency relationship (Stair, Institutions I 10, 12, 6). The incapacity of the agent has the same effect (Wink v Mortimer (1849) 11 D 995; Gow, Mercantile and Industrial Law of Scotland, 537). Whether the agent's bankruptcy (sequestration) has a similar effect is a more difficult question, and it may be that this is the case only where the agent's solvency is an implied term of the agency contract (Gow, Mercantile and Industrial Law of Scotland, 537-8, relying on English authority: McCall v Australian Meat Co Ltd (1870) 19 WR 188; Hudson v Granger (1821) 5 B&A).

17. In SLOVAKIA the relationship under a contract for representation ends automatically when the agent dies or is placed under curatorship (in the latter case the contract ends because a person may not act as a representative for another person if the person himself or herself has no capacity to undertake the relevant juridical acts; CC § 22(2))

The relationship does not end automatically when the agent becomes bankrupt, but the administrator of the bankruptcy assets may terminate it.

18. According to the SPANISH CC art. 1732(2), the death of the agent ends the mandate relationship. See also Ccom art. 280. CC art. 1739 states that in this case the successors of the agent must inform the principal of the death of the agent and must act according to what is needed to protect the interests of the principal. According to Lete del Río, this is not possible if the mandate was concluded in view of the personal characteristics of the agent and the successors cannot act as substitutes in the activity (*Lete del Río*, Derecho de obligaciones III[4], 415).

19. In SWEDEN the mandate relationship ends automatically on the death of the agent. The estate of the deceased has no other duty than to provide an account of the work performed by the agent prior to his/her death (HB 18:8 and *Bengtsson*, Särskilda avtalstyper I[2], 156). It is somewhat uncertain whether the mandate relationship ends automatically or not on the bankruptcy of the agent. In case a commissionaire is declared bankrupt, the mandate ends automatically. In other cases, the bankruptcy of the agent may only result in a right for the client to cancel the contract.

II. Termination of mandate relationship in case of death of specific person designated to perform the mandate contract

20. The mandate relationship ends automatically when the specific person with consideration to whom the authority to represent the principal had been granted dies (CC § 1020). When this person is placed under curatorship, the contractual relationship does not automatically end, though the agent cannot act for the principal as long as the incapacity precludes performance of the duties (CC § 1018; Rummel (-*Strasser*), ABGB I[3], no. 5).

21. In BELGIUM the relationship under a contract for representation ends automatically when the specific person with consideration to whom the authority to represent the principal had been granted dies or is placed under curatorship.

22. In BULGARIA here is no explicit rule regulating the legal effect on the mandate relationship of the death of the specific person designated to perform the contract. The parties are free to stipulate this in the contract.

23. This situation has not been resolved in DANISH legislation or case law. The relationship will probably end automatically when the specific person dies or is placed under curatorship.

24. In ENGLAND if a specific person has been appointed to represent the principal, then, given the personal nature of the relationship (*Farrow v Wilson* [1869] LR 4 CP 744), it seems that the same rules as in the case of death, incapacitation or bankruptcy of the agent defined above will apply.

25. In ESTONIA the mandate relationship will not end automatically when the specific person dies or is incapacitated, however the principal will most likely be able to terminate it on 'material grounds' according to LOA § 631.

26. In FINLAND if the mandate is of highly personal nature, the relationship usually ends when the specific person dies or is placed under curatorship.

27. In FRANCE no rule has been established by legislation or case law on this point. One can consider that if the event occurs, the agent would have to carry out the mandate personally or find a replacement since the initial mandate would not be affected by this event (academic opinion: see *Mallet-Bricout*, no. 180). But if the principal has designated the person whom the principal wishes to carry out the mandate, it is likely that the mandate will be treated as having a personal nature and the death or incapacity

of the sub-agent or the specific person will bring the agency to an end. It would obviously be preferable to deal with this specifically in the contract.

28. For GERMANY see Notes under IV.D.–6:103 (Termination by principal for extraordinary and serious reason) and IV.D.–6:105 (Termination by agent for extraordinary and serious reason).

29. In the case of substitution GREEK CC art. 726 is analogously applicable (Georgiadis/Stathopoulos/Karasis, Art. 726-727 GCC nr. 6). According to that rule a mandate will be dissolved by the death of the substitute mandatory (except if there is an agreement to the contrary) as well as by the placing under curatorship of such a substitute.

30. On the basis of the rule of the HUNGARIAN CC art. 481, the contractual relationship is not terminated if the specific person with consideration to whom the authority to represent the principal had been granted dies or is placed under curatorship (and not one of the parties to the contract). However, the principal is entitled to terminate the relationship with immediate effect at any time (CC art. 483). The same rules apply for the commission agency (CC art. 513(2)).

31. In IRELAND because of the highly personal nature of an agency contract, the death of the specific person identified to perform the obligations under the contract will terminate the agency.

32. In ITALY the CC does not contain any specific rules with regard to this matter, but a systematical interpretation of the provisions governing mandate, in light of the fact that in case of sub-representation the original agent remains liable for the performance of the contractual obligations vis-à-vis the principal, leads to the conclusion that the relationship under the contract for representation does not end automatically if the third party dies.

33. In the NETHERLANDS according to CC art. 409(1), a contract for professional services in general ends on the death of the specific person designated to perform the obligations under it. That person's heirs may be obliged to do what may be expected in the contracting party's interests, as far as they have knowledge of the succession and the mandate. Such obligation may apply to those who exercised a profession or business with the agent (CC art. 409(2)). There is no such provision that applies specifically to mandate contracts.

34. POLISH law does not provide a straight answer to this question. Since the mandate relationship ends on the death of the agent it may be assumed that it also ends on the death of the person who was chosen to perform the obligations under the contract. Additionally, it is a general rule that if contractual obligations can no longer be performed, the contractual relation ends (CC art. 475).

35. In SCOTLAND there appears to be no specific consideration in the authorities of this situation, namely where the specific person who was to perform the obligations under the agency contract dies (distinguishing this situation from that where the agent as contracting party dies). It is likely that a court would seek to ascertain whether the 'agent' was in fact the contracting party or the person designated to carry out the work. Only where the specific person was truly the 'agent' would the agency relationship terminate on that person's death. In other situations, the agency relationship would continue. It is likely that the same approach would be adopted in a case of incapacity, i.e. only where the party incapacitated could truly be described as the agent would the relationship terminate.

36. In SLOVAKIA this is not specifically regulated, but on the basis of general provisions on impossibility of performance, it can be argued that when the specifically designated

person dies or is placed under curatorship, performance of the contractual obligations is not possible and thus the relationship terminates (CC § 575). This provision, however, is not applicable to commercial relations; in these cases it is always possible for both parties to terminate the relationship.

37. SPANISH law does not contain any provision as to the present question. But the analogy of the death of the agent is persuasive when the conditions of the dead person were decisive for giving the authority.

38. In SWEDEN the death of the agent usually ends the mandate relationship. The reason for this is that the mandate contract usually and to a high degree based on personal trust. However, in case the task is assigned to a certain company and the client does not attach great importance to the particular person representing the company, the mandate contract does not end automatically on the death of the person carrying out the tasks. The principal is granted a right to cancel the contract (*Bengtsson*, Särskilda avtalstyper I^2, 156).

III. Termination of irrevocable mandate on death of the agent

39. In BELGIUM a clause of irrevocability is no bar to termination on such grounds as death, incapacity, bankruptcy or insolvency of one of the parties. The court can nevertheless judge that the parties have a common will to give the clause of irrevocability a broader scope and also exclude the other grounds to end the contract for representation (*Wéry*, Le mandat, 278).

40. In BULGARIA the death of the agent is always considered to be a ground for termination , irrespective of whether the mandate is irrevocable.

41. In FRANCE the parties may not validly agree for the mandate to be irrevocable (CC art. 2004). As a matter of general principle, French law does not accept that parties are subject to perpetual obligations, and CC art. 2003 provides that the mandate will terminate by the death, insolvency or incapacity of either party.

42. In doubt, the mandate ends when the agent dies (GERMAN CC § 673).

43. The rule of the HUNGARIAN CC art. 481 (termination even if the agency has not been fulfilled, if either party dies) applies, irrespective of whether the revocability of the contract has been restricted.

44. In IRELAND the death of either party does not terminate an irrevocable agency. Such an agency will only terminate once the interest of the agent has been satisfied.

45. In ITALY if the agent dies, the contract ends even if the grant of authority was irrevocable.

46. In the NETHERLANDS, it seems that an irrevocable mandate contract only ends on the death of the agent if the contract was established considering a specific person (CC art. 7:409(1)).

47. Irrevocable mandate is not permitted under POLISH law.

48. In SCOTLAND it is not clear from the very few authorities on the *procuratory in rem suam*, the type of irrevocable agency recognised in Scots law, whether the relationship terminates on the death of the agent. It is likely that the general rules apply, which would dictate that death does, in fact, terminate the relationship.

49. In SLOVAKIA irrevocable mandate is not allowed.

50. In SPANISH law no solution is given. It depends on the cause or rendering irrevocable the mandate whether the right of the agent is devolved to the agent's estate.

IV. Price and expenses in case of death of agent

51. In BELGIUM the principal is obliged to reimburse the past expenses and losses of the agent and to pay a salary *pro rata* to the heirs of the agent.

52. In BULGARIA if the agent dies, the mandate relationship ends. The principal is obliged to reimburse the expenses incurred and a proportional part of the stipulated remuneration (LOA art. 288(1)).

53. In DENMARK the agent is probably entitled to reimbursement of the expenses made, but not to a price.

54. In ENGLAND any obligations accrued prior to the death of the agent are due to the agent's estate.

55. The FRENCH CC art. 2010 indicates that in the event of the death of the agent, the heirs of the agent must inform the principal of the event and must also do whatever is in the interest of the principal for the time being. No other indications are given by the law or case law on how this provision would work in practice, particularly as regards any possible indemnity or remuneration to be paid to the heirs. However, the repayment of expenses would be due to the heirs and if the mandate has been fulfilled they are also entitled to the price.

56. In GERMANY as the relationship merely ends *ex nunc*, a right to payment of price or reimbursement that has already arisen prior to the death can be claimed.

57. In GREECE due to the gratuitous character of mandate the question if the agent is entitled to a price does not arise. That question arises only with regard to the expenses that the substitute has incurred in order to perform the contract of mandate. In such a case the heir in case of death of the substitute or the substitute in case of curatorship is entitled to a reimbursement of expenses. In case of the obligatory remunerated mandate between the lawyer and the principal, the heir of the substitute lawyer is entitled to a price and reimbursement of expenses in case of the lawyer's death (Supreme Court decision no. 1/1987, EEN 1987, 783) or the substitute lawyer personally in case of curatorship.

58. The HUNGARIAN CC art. 478(3) establishes that '[i]f the contract is terminated before the agency has been fulfilled, the agent shall be entitled to demand an appropriate fraction of the fee for his activities'. Moreover, according to CC art. 479(1), '[c]osts that arise in connection with the handling of a matter shall be borne by the principal. The agent shall not be obliged to advance any costs'.

59. In IRELAND following termination, any pre-existing rights, such as right to remuneration and indemnity, continue to exist and are payable to the estate of the agent.

60. In the NETHERLANDS if the mandate is not fulfilled, only a certain part of the agent's wages has to be paid by the principal. In that case, the agent is entitled to reasonable wages according to CC art. 7:411(1). Three circumstances are specifically important to determine a reasonable wage for the agent when the mandate is not fulfilled: the activities that have already been performed under the mandate contract, the principal's profit and the cause that ended the contract (CC art. 7:411(2)).

61. In POLAND the agent's successors may claim for (a part of) the price and all the expenses the agent was entitled to at the moment of the death.

62. In SCOTLAND any sums due to the agent, whether fees or expenses, outstanding at the time of death would be payable to the agent's estate. It is unlikely that the agent's heirs and agents would be entitled to claim the full price where death has prevented full performance on the part of the agent.

63. In SLOVAKIA the agent (the heirs) is entitled to an appropriate price for work that was performed and to reimbursement of expenses made.

64. In SPAIN, as termination for this reason is not retroactive, a right to payment of price or reimbursements that has already arisen prior to the death is not affected.

65. In SWEDEN in case of termination the agent is only entitled to payment for work already performed.

PART E. COMMERCIAL AGENCY, FRANCHISE AND DISTRIBUTORSHIP

CHAPTER 1: GENERAL PROVISIONS

Section 1: Scope

IV.E.–1:101: Contracts covered

(1) This Part of Book IV applies to contracts for the establishment and regulation of a commercial agency, franchise or distributorship and with appropriate adaptations to other contracts under which a party engaged in business independently is to use skills and efforts to bring another party's products on to the market.

(2) In this Part, "products" includes goods and services.

COMMENTS

A. General idea

The rules in this Part of Book IV apply primarily to contracts for the establishment and regulation of a commercial agency, franchise or distributorship. These contracts have many characteristics in common, especially their economic function – the establishment and regulation of a marketing relationship. The rules relating to these common characteristics are to be found in Chapter 2. However, there are also some differences. Therefore, this Part also contains separate Chapters on commercial agency (Chapter 3), franchise (Chapter 4) and distribution (Chapter 5).

The Part applies not only to these contracts, but also with appropriate adaptations to all other contracts whereby an independent business person is to use skills and efforts to bring another party's products on to the market – i.e. to contracts which do not fall exactly within one of the three categories mentioned but which nevertheless have the same economic function of regulating a marketing relationship (vertical agreements; compare Article 2(1) EC Regulation 2790/1999 and Guidelines on Vertical Restraint, no.24) This wider application means that parties cannot avoid the application of the rules contained in this Part (especially the mandatory ones) by labelling, classifying or drafting their marketing relationship contract in such a way as to avoid calling it a commercial agency, franchising or distribution contract.

B. Not advertising contracts

However, the reference to other contracts under which an independent business person is to use skills and efforts to bring another party's products on to the market is not meant to refer to advertising contracts which are contracts of a different nature than the ones under discussion here: an advertising company will never itself sell the other party's products (goods or services) to the public or to another link in the distribution chain, either in its own name (as distributors and franchisees do) or in the name of the principal (as an agent may do). In other words, advertisers are not a link in the chain between producers and final users. Rather, they

provide a service to one of the links which is meant to assist it to be more effective in bringing its products on to the market.

C. Independent business persons; not employees

The concept of independent business person includes both natural persons and legal persons. Indeed, in practice commercial agents, franchisees and distributors (especially the larger ones) are frequently companies which have legal personality according to the applicable national law.

However, it does not include – and therefore the rules contained in this Part do not apply to – persons who bring another party's products on to the market otherwise than as independent business persons. The typical example of a person who is *not* independent is an employee. In other words, nothing in this Part is meant to cover labour contracts.

D. Products

This Article refers to "bringing *products* on to the market". The concept of "products" includes here and throughout this Part both goods and services. (In the same sense Article 1(a) EC Regulation 2790/1999; see also Guidelines on Vertical Restraints (2000/C 291/01, no. 2)).

E. Default rules

The rules in this Part are merely default rules unless otherwise provided (see II.–1:102 (Party autonomy)). The application of that principle is particularly important in relation to the contracts within this Part because most such contracts are in practice governed by carefully drawn up contract terms.

There are a number of exceptions to the general rule of party autonomy. These are clearly stated in the relevant Articles. Their general justification is that the rules in question exist for the protection of the weaker party.

NOTES

I. Overview

1. None of the European legal systems includes a set of specific rules which apply to commercial agency, franchising and distribution contracts. However, under all European systems of law there are specific rules that apply to commercial agency. In addition, under BELGIAN law there is a specific Act that applies to distribution contracts and ITALIAN law includes a specific statute on franchise contracts. In some legal systems the rules concerning commercial agency are applied by way of analogy to franchise and distribution contracts as well. Where this is not the case, general contract law applies or the rules concerning other nominate contracts.

II. Specific rules concerning commercial agency

2. All European legal systems contain specific rules on commercial agency as a result of the transposition of the Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (hereafter: the Directive). These rules are laid down in the AUSTRIAN *Handelsvertretergesetz*

1993 (HVertrG), the BELGIAN *Wet van 13 April 1995 betreffende Handelsagentuurovereenkomsten, B. S. 2 juni 1995/Loi du 13 avril 1995 rélative au contrat d´agence commerciale (M. B. 2 juin 1995),* the UK Commercial Agents (Council Directive) Regulations 1993 (S. I. 1993/3053), as amended by the Commercial Agents (Council Directive) (Amendment) Regulations 1993 (S. I. 1993 No. 3173) and 1998 (S. I. 1998 No. 2868) (applying equally to ENGLAND and SCOTLAND), the FINNISH Act on Commercial Agents and Salesmen (1. 1. 1976) which was replaced by a new Act on 8 May 1992, in arts. L. 134-1–L. 134-17 of the FRENCH C. com., §§ 84-92 c of the GERMAN HGB, the GREEK Presidential Decree 219/1991, in arts. 1742-1753 of the ITALIAN CC, arts. 7:428-7:445 of the DUTCH CC, art. 758- 764 IX of the POLISH CC, the PORTUGUESE DL no. 178/86, the SPANISH *Ley 12/1992, del Contrato de Agencia* (LCA) and the SWEDISH *Lag om handelsagentur* (HaL). See also the notes to Article 2:101.

III. Specific rules concerning franchises

3. Under Italian law there is a specific act that concerns franchises: L n. 129/2004 Norme per la disciplina dell´ affiliazione commerciale. In SPANISH law there is no specific Act regulating franchises, although some specific rules may be found in article 62 of the Statute on Retail Trade (a definition of a franchise, the obligation to register the franchise and the precontractual duties) and in the Royal Decree 2485\1998 that develops the content of this article and provides the rules on the register of franchises.

IV. Application of commercial agency rules by way of analogy to franchises

4. In some legal systems the rules concerning commercial agency are applied by way of analogy to franchises in so far as this is appropriate (AUSTRIA, BELGIUM: *Verbraeken & De Schoutheete* no. 131; GERMANY; FINLAND: *Halila-Hemmo* (1996) *272; Bygglin* (1978)*;* PORTUGAL). See also the notes to the specific provisions in Chapter 4.

5. Due to the lack of specific regulation of franchises in SPANISH law, some of the agency rules may be applicable by analogy, *mutatis mutandis,* to this contract, especially those which relate to business collaborations based on mutual confidence such as articles 2, 5, 9, 10 20-27 LCA (*Domínguez García* in *Alberto Bercovitz,* Contratos Mercantiles, p. 581 and 601).

V. Specific rules concerning distributorships

6. Under BELGIAN law there is a specific act that concerns distributorships: (Loi du 27 juillet 1961 relative à la résiliation unilatérale des concessions de vente exclusive à durée indéterminée (M. B., 29 déc. 1961; Alleenverkoopwet)). Under FRENCH law there are specific rules concerning the pre-contractual obligation to inform included in art. L. 330 C. Com. These rules apply to certain types of distribution contracts.

VI. Application of commercial agency rules by way of analogy to distributorship

7. In some legal systems the rules concerning commercial agency are applied by way of analogy to distributorships in so far as appropriate. (AUSTRIA; GERMANY; FINLAND: KKO 1987:42, *Aalto* (2002) 2-3, 10, *Telaranta* (1993) 25, 149-163; PORTUGAL).

8. See also the notes to the provisions in Chapter 5.

9. Under SWEDISH law, the rules concerning commercial agency may be applied by way of analogy to sole distributorships. The scope of such application by way of analogy is however uncertain, (*Söderlund*, 160 ff).

10. Under SPANISH law, some agency provisions may be applicable by way of analogy to distributorship, especially those concerning indemnity for goodwill, although the case law has not established a unanimous position towards this matter (*J.L. Díaz Echegaray* in *Alberto Bercovitz*, Contratos Mercantiles, p.563).

VII. Other rules

11. Under GREEK law, in so far as is possible the rules concerning other long-term nominate contracts may apply by way of analogy to commercial agency, franchising and distribution contracts. They are the rules concerning lease contracts (*Μίσθωση πράγματος*) 574-618 AK, employment contracts (*Σύμβαση εργασίας*) 648-680 AK, mandate (*Εντολή*) 713-729 AK, Partnership/Community (*Εταιρία*) 741-748 AK, loan (*Δάνειο*) 806-809 AK and deposit contracts (*Παρακαταθήκη*) 822-833 AK).

12. As to franchising contracts, according to BELGIAN, GREEK, DUTCH law the rules of general contract law apply (BELGIUM: *Verbraeken & de Schoutheete*, no. 131). According to FINNISH law apart from the rules on agency also the rules concerning employment law may be applied by way of analogy in so far as appropriate, *Halila-Hemmo 1996, 272; Bygglin 1978*.

13. Under FINNISH, GREEK and DUTCH law the rules of general contract law apply to distribution contracts (THE NETHERLANDS: *Barendrecht & van Peursem*, no. 21).

14. According to *Chitty-Reynolds* it is more likely that under the law of ENGLAND franchise and distribution contracts will be classified as contracts for purchase for resale and the rules concerning those contracts apply accordingly (*Chitty-Reynolds* no. 31-003.) In SCOTTISH law they fall under the general law of contract.

15. Under ITALIAN law the situation is again different. With respect to certain distribution contracts, CC arts. 1559 et seq. concerning *somministratione* may apply by way of analogy (*Baldi* 84 et seq.). Some of these rules which have developed with respect to distribution contracts apply by way of analogy to franchising contracts. In addition, rules can also be inferred from the general rules concerning good faith (*Baldi* 132).

Section 2: Other general provisions

IV.E.–1:201: Priority rules

In the case of any conflict:

(a) the rules in this Part prevail over the rules in Part D (Mandate); and

(b) the rules in Chapters 3 to 5 of this Part prevail over the rules in Chapter 2 of this Part.

COMMENTS

This Article is intended, first, to regulate questions of priority between the rules in this Part and the rules in the Part on Mandate. This is particularly relevant in relation to the rules on commercial agency. A commercial agent may, or may not, have a mandate to conclude, negotiate or facilitate contracts (or other juridical acts) on behalf of the principal. In so far as there is such a mandate the agent will fall both under the rules on commercial agency and the rules on mandate. To a large extent these rules supplement each other but to the extent that there is any conflict the rules on commercial agency, which regulate a more specific situation and which have a stronger protective policy content, prevail. The second sub-paragraph is intended merely to resolve any doubts about the relationship between Chapter 2 and the subsequent Chapters of this Part. The important point is that the general rules for all marketing relationship contracts in Chapter 2 apply to the specific types of contract covered in the subsequent Chapters, subject to any particularisation or adaptation in those Chapters.

CHAPTER 2: RULES APPLYING TO ALL CONTRACTS WITHIN THE SCOPE OF THIS PART

Section 1: Pre-contractual

IV.E.–2:101: Pre-contractual information duty

A party who is engaged in negotiations for a contract within the scope of this Part has a duty to provide the other party, a reasonable time before the contract is concluded and so far as required by good commercial practice, with such information as is sufficient to enable the other party to decide on a reasonably informed basis whether or not to enter into a contract of the type and on the terms under consideration.

COMMENTS

A. General idea

This Article imposes upon each party a pre-contractual duty to provide the other with all the information which the other party needs to make a rational decision as to whether or not to enter into a contract of the type and on the terms under consideration. The information must be given a reasonable time before the contract is concluded. Reflecting the rule on pre-contractual information duties in relation to contracts between businesses for the supply of goods and services (II.–3:101 (Duty to disclose information about goods, other assets and services)) the duty is limited to what is required by good commercial practice. The main consequence of a failure to perform the duty is that the contract will be voidable for mistake.

B. Interests at stake and policy considerations

This duty to provide adequate pre-contractual information is intended to guarantee that each party will have all the relevant and necessary information in order to commit itself with full knowledge of the relevant facts. This is important because commercial agency, franchise and distribution contracts are often concluded for a long period and their conclusion ("entrance fee") and the performance of the obligations under them frequently imply important investments. A party interested in concluding such a contract often has no way of obtaining the relevant information from any source other than the other party.

C. Relation to Book II

Book II, Chapter 3 contains provisions on information duties at the pre-contractual stage. These duties do not specifically focus on the commercial agency, franchise or distribution situations. Indeed most of them are framed in such terms (e.g. businesses supplying goods or services to consumers) that they would not apply to contracts within the scope of this Chapter. This Article is therefore necessary.

Also relevant are the provisions in II.–3:301 (Negotiations contrary to good faith and fair dealing), II.–7:201 (Mistake) and II.–7:205 (Fraud).

The present Article provides a specific rule for the pre-contractual duty to inform in commercial agency, franchise and distribution and similar marketing contracts. This rule may be considered as a special instance for these contracts of the general pre-contractual duty to negotiate in accordance with good faith and fair dealing. In the context of the provisions on fraud, paragraph (3) of II.–7:205 (Fraud) states:

> In determining whether good faith and fair dealing required a party to disclose particular information, regard should be had to all the circumstances, including: (a) whether the party had special expertise; (b) the cost to the party of acquiring the relevant information; (c) whether the other party could reasonably acquire the information by other means; and (d) the apparent importance of the information to the other party.

The present pre-contractual duty to inform is based on policy considerations which are closely related to these four factors.

D. Within a reasonable time

The time requirement included in the present provision aims to guarantee that the other party has sufficient time at its disposal in order to ponder on the basis of the information whether or not to enter the contract under consideration. In assessing whether the pre-contractual information is given within a reasonable time criteria such as the circumstances of the case or any applicable usage will fall to be taken into consideration.

E. Information required

The information which is to be given is such information as is sufficient to enable the other party to decide on a reasonably informed basis whether or not to enter into a contract of the type and on the terms under consideration. This means among other things that the information must be correct, complete and transparent. Depending on the circumstances of the case, especially the type of contract and the branch of trade, the types of information which must be given may include information regarding one's own company and experience, intellectual property rights which are involved, particular features of the commercial sector, market conditions, the structure and extent of the network, remuneration and fees and the terms of the contract.

The provision that only such information need be given as is required by good commercial practice is intended to place reasonable bounds on the scope of the information to be supplied. Contracts should not be open to attempts to avoid them on the ground that some item of information which one party considered relevant (perhaps, for example, information about the personal circumstances or political views of the other party) was not supplied.

For franchise contracts IV.E.–4:102 (Pre-contractual information) provides a detailed list of information which the franchisor must give to the franchisee before the conclusion of the contract. That list is mandatory (see paragraph (3) of that Article).

F. Remedies

The sanction for non-compliance is that the contract may be avoidable under II.–7:201 (Mistake). Paragraph (1)(b)(iii) of that Article specifically refers to the situation where one party caused the contract to be concluded in mistake by failing to comply with a pre-

contractual information duty. All the ordinary rules on mistake apply, including liability those under II.–7:203 (Adaptation of contract in case of mistake) and II.–7:204 (Liability for loss caused by incorrect information).

NOTES

I. Specific statutory rules concerning pre-contractual information

1. FRENCH, ITALIAN and SPANISH law contain specific statutory rules concerning pre-contractual information in the case of franchising contracts. They are laid down in the FRENCH *Loi Doubin* (Ccom art. L-330-3 C), art. 8 of the ITALIAN L 129/2004 and in art. 62 para 3 of the SPANISH Statute on Retail Trade (*Ley de Ordenación del Comercio Minorista)* and art. 3 and 4 of the Royal Decree 2485\1998 respectively. The FRENCH *Loi Doubin* may also apply to certain types of distribution contracts, in so far as they meet the requirements of Ccom art. L-330-3 (*Malaurie & Aynès*, no. 839). Under art. 8 of the ITALIAN Act, a contract can be avoided if the other party provided incorrect information. The FRENCH and SPANISH rules do not include any specific private law remedies. Nevertheless, in Spain breach of the relevant pre-contractual information duty implies extra-contractual liability under CC art. 1902 for any loss caused: not only *damnum emergens* but also *lucrum cessans* (*Domínguez García* in *Alberto Bercovitz*, Contratos Mercantiles, 2007, p. 591). See further the notes to IV.E.–4:102.

II. General statutory rules concerning pre-contractual information

2. In GREECE and in PORTUGAL the general statutory provisions concerning pre-contractual liability apply (GREECE: arts. 197, 198 AK; PORTUGAL: CC art. 227). For GREEK law it means that the parties must disclose any information that may reasonably be expected to influence the decision of the other party. A failure to do so amounts to a serious ground for termination, except when the contract has been performed without any problems. However, as to franchising the rules concerning the doctrine of abuse of rights (art. 281 AK, see *Voulgaris* and *Georgiadis*) may also come into play. Pre-contractual liability is limited to the reliance interest. In some cases a lack of disclosure may give rise to a claim for the annulment of the franchise contract and for damages on the basis of articles 140 et seq. Greek civil code for mistake or on the basis of art. 147 AK for fraud. In other cases a lack of disclosure may give rise to the annulment of the contract on the basis of arts. 178 and 179 AK with regard to acts contrary to *bonos mores,* but the case law has been restrictive, see CA Patras 150/2000 DEE 8-9/2000, 890. For PORTUGUESE law it implies that the parties must inform each other concerning facts relating to the contract and potential events during the performance (*Sinde Monteiro* (1989) 355 ff., *Menezes Cordeiro* (1984) 505).

III. Other sources of an obligation concerning pre-contractual information

3. In other legal systems a pre-contractual obligation to inform follows from good faith. (BELGIUM: *Verbraeken & de Schoutheete*, no. 147; FRANCE: *Fabre-Magnan*, 214; GERMANY: § 242 BGB, the closer the relationship, the more intense the pre-contractual obligation to inform *Martinek/Semler* § 14 nos. 61, 62; ITALY, THE NETHERLANDS: CC art. 6:228, *Asser-Hartkamp* 4-II, no. 158, *Hesselink*, 259; SPAIN, SWEDEN)

4. Under FINNISH law a pre-contractual obligation to inform follows from the doctrine of loyalty. Case law has introduced the pre-contractual obligation to inform in the case

of commercial agency contracts (KKO 1993:130, *Tolonen* (2000) *88*, *Nysten-Haarala* (1998), *126*). As to distribution contracts the rules developed with respect to commercial agency may apply by way of analogy (*Telaranta* (1994) 154). The obligation to give all required information can be derived from the general principle of loyalty (good faith and fair dealing) as well by applying the Commercial Agents Act by way of analogy (KKO 1993:130). Case KKO 1996:27 also dealt with pre-contractual information; however, the issue at stake was whether including an arbitration clause in a franchise contract may be unfair towards the franchisee. According to scholarly opinions the court would have adjusted the contract had there been a grave imbalance between the contracting parties in access to information or had the franchisor given misleading information (*Saarnilehto 1997)*.

5. According to AUSTRIAN case law there is a pre-contractual obligation to inform in the case of franchising contracts (OGH 19. 1. 1989, 7 Ob 695/88).

6. In contrast, under ENGLISH law there is no general duty of disclosure (*Keates v. Cadogan (Earl of)* (1851) 10 CB 591, 138 ER 234, but only an obligation not to make misrepresentations, *Williams v. Natural Life Health Foods Ltd.* [1998] 1 WLR 830, *Boyle* v. *Prontaprint*, unreported, 26 February 2000, CA; *ANC Ltd. v. Clark Goldring & Page Ltd.* [2001] BCC 479. SCOTTISH law is similar although giving slightly more recognition than English law to ideas of good faith and *culpa in contrahendo* (*MacQueen & Thomson*, paras 2.89-2.96).

Section 2: Obligations of the parties

IV.E.–2:201: Co-operation

The parties to a contract within the scope of this Part of Book IV must collaborate actively and loyally and co-ordinate their respective efforts in order to achieve the objectives of the contract.

COMMENTS

A. General idea

Co-operation is essential to commercial agency, franchise and distribution contracts and indeed to most other long-term commercial contracts. Each party heavily depends on the other party's co-operation for attaining its objectives. The obligation spelled out here explicitly recognises that the parties to such contracts are under an intense obligation to co-operate actively and loyally in order to achieve the objectives for which the contract was concluded.

Indeed, many (if not most) of the specific obligations spelled out in this Part may be regarded as special instances of this general intense obligation to co-operate actively and loyally (e.g. specific obligations relating to information, assistance, instructions, supervision, confidentiality et cetera). In addition to these specific rules, this Article makes sure that both parties are, more generally, under this intense obligation to co-operate which may be the source of other specific obligations to be established and further elaborated by the courts and arbitrators.

Although the intensity of the required co-operation may vary among them (it is usually strongest in franchise contracts), the obligation to co-operate in commercial agency, franchise and distribution contracts, and similar contracts establishing and regulating a marketing relationship, is more intense than in other contracts. The general obligation to co-operate in order to give full effect to the contract, which each party to any contract owes to the other according to III.–1:104 (Co-operation), is mainly limited in some contracts (e.g. most sales contracts) to an obligation to allow the other party to perform its obligations and thereby earn the fruits of performance stipulated in the contract, which is similar to the doctrine of *mora creditoris* in many civil law countries.

B. Interests at stake and policy considerations

Although each party may have a short-term interest in exclusively pursuing its own interests, even at the expense of the other party, in the long term both parties benefit from a steady co-operation where each of them not only takes the other party's interests into account but actively helps the other party to realise its goals. Both parties have an interest in actively demonstrating their commitment in the long term in order to pursue the reciprocal advantages deriving from their co-operation. This Article aims to encourage participation in exchange and to promote reciprocity between the parties. In addition, the Article takes into account the fact that during the course of commercial agency, franchise, distribution contracts and similar marketing relationship contracts contingencies may occur which the parties had not foreseen when they concluded the contract, contingencies which do not necessarily justify the application of III.–1:110 (Variation or termination by court on a change of circumstances). It

follows from the present Article that the parties should collaborate in overcoming such contingencies and in adapting to the new situation in such a way that the objectives of the contract can be achieved.

C. Relation to general obligation to co-operate

For contracts within the scope of this Part the duty to co-operate which is contained in III.–1:104 (Co-operation) is particularly intense. It is not sufficient for a party to a commercial agency, franchise or distribution contract to passively allow the other party to perform its obligations and thereby earn the fruits of performance stipulated in the contract (see III.–1:104 Comment A). Rather, the parties should collaborate actively and loyally in order to achieve the objectives for which the contract was concluded. In order to avoid any doubt, this Article says so explicitly.

D. Co-operate actively and loyally

In a commercial agency, franchise and distribution contracts, and similar marketing relationship contracts, a party must do more than merely refrain from obstructing the other party's performance. In such contracts each party must collaborate actively and make a serious effort to achieve the objectives for which the contract was concluded. These objectives include, first of all, those that are common but may also include individual objectives.

However, a party is not under an obligation to act contrary to its own interests. In other words, the obligation to co-operate actively and loyally is meant to achieve win-win situations. Moreover, the obligation to co-operate loyally does not turn the contractual relationship into a fiduciary relationship in the sense of the law of trusts.

The obligation to co-operate implies an obligation for principals, franchisors and suppliers to treat their commercial agents, franchisees and distributors equally. Thus, the principal, the franchisor and the supplier must not discriminate against – i.e. make any unjustified distinction between – their commercial agents, franchisees and distributors, neither during the pre-contractual stage nor during the performance of the contract. Similarly, a commercial agent, a franchisee (e.g. in shop corner franchising) or a distributor, who has contracts with more than one principal, franchisor or supplier, must not make any unjustified distinction between them.

NOTES

Obligation to co-operate

1. According to the case law, legal doctrine, standard contracts and codes of conduct in the Member States, the obligation to co-operate is the main obligation of both parties.
2. Under GERMAN, GREEK, ITALIAN, DUTCH and SPANISH law there are no specific rules for marketing relationship contracts in this respect. However, an obligation to co-operate follows from the general principle of good faith under these legal systems. In most legal systems the obligation to co-operate has not been defined clearly. However, it has been accepted that in the case of long-term commercial contracts, such an obligation is more intense than in other contractual relationships.

(GERMANY: *Handkommentar-BGB*, § 242 BGB no. 14; GREECE: art. 288 AK; ITALY: CC arts. 1175, 1375, Cass. civ., sez. lav., 8-2- 1999, n. 1078, *Contratti*, 1999, 1019; Cass. civ., sez. I, 20-4-1994, n. 3775, *Gius., civ.*, 1994, I, 2159; NETHERLANDS: *Asser-Hartkamp* 4-II, no. 307 ff; POLAND: CC art. 760 in the case of commercial agency; SPAIN: Ccom art. 57, *Móxica Román* , La Ley del Contrato de Agencia (2000), p. 23, in particular concerning commercial agency: art. 9, para 1 (agent) and art. 10, para 1 (principal) LCA, for franchise contracts. However, although the LCA imposes on the agent the obligation of following the instructions of the principal, the limit of that obligation is the independence of the agent (art. 9.2.c LCA).

3. Under FINNISH law the obligation to co-operate was introduced to contract law by legal scholars who were experienced in commercial arbitration. The obligation to co-operate is connected with the general discussion concerning the doctrine of loyalty (*Muukkonen* (1975), *Taxell* (1972) *1977, Ämmälä* (1994), *Häyhä* (1991)*; Mähönen* (2000)). The FINNISH doctrine of loyalty corresponds with the principle of good faith and fair dealing. Both district and appellate courts refer to the loyalty principle in their case reports. However, there is only one case in which the Supreme Court has accepted the principle of loyalty according to scholarly opinions (KKO 1993:130).

4. In SWEDISH law there is no general statutory obligation to co-operate with respect to agency, distribution and franchising contracts. However, according to §§ 5(1) and 7(1) HaL both the commercial agent and the principal must act dutifully and in good faith. This probably includes an obligation to co-operate.

5. In ENGLISH general law an obligation to co-operate is imposed where this is necessary in order to give business efficacy to the agreement (*The Moorcock* (1889) 14 PD 64, Court of Appeal). Beyond this, it is difficult to identify the precise extent of the obligation. However, it has been strongly recognised in employment contracts (*Secretary of State for Employment v. Associated Society of Locomotive Engineers and Firemen (No. 2)* [1972] 2 QB 455) which bear some analogy with long-term marketing relationship contracts. Various commentators have argued that co-operative behaviour in long-term contracts maximises returns and should be underpinned by default law, see e.g. *Baird* (1990) 583. However, as to franchising contracts, express terms providing for ongoing co-operation would appear to be common, see e.g. *Adams/Prichard Jones* Precedent I, which includes obligations on the part of the franchisor to offer to the franchisee both consulting services (Clause 6.12) and general support (Clause 6.19), and on the part of the franchisee, “to work diligently to protect and promote the interests of the Franchisor”, (Clause 7.12), and, “in all matters to act loyally and faithfully toward the Franchisor”, (Clause 7.20). SCOTTISH law and practice is similar.

IV.E.–2:202: Information during the performance

During the period of the contractual relationship each party must provide the other in due time with all the information which the first party has and the second party needs in order to achieve the objectives of the contract.

COMMENTS

A. General idea

Each party must disclose all information in its possession to the other party if this is what the other party needs in order to achieve the objectives of the contract. This obligation includes an obligation to provide the other party with all relevant documentation where this is appropriate. This general obligation is specified further in succeeding Chapters with respect to contracts for commercial agency, franchise and distribution.

B. Interests at stake and policy considerations

Both parties have an interest in being informed concerning facts and developments which are relevant to their performance. It may render their performance easier and more successful. On the other hand, an extensive obligation to inform the other party may be very burdensome and, in any event, very costly. Therefore, the present obligation is limited in two significant respects. First, a party only has to pass on to the other party such information as the first party already has. In other words, parties are not under a duty to investigate in order to be able to inform each other. Second, the obligation is limited to the information which the other party needs in order to achieve the objectives of the contract.

The obligation under this Article may be regarded as based on similar policy considerations as the duty to act in accordance with good faith and fair dealing in performing obligations. See III.–1:103 (Good faith and fair dealing) and Comment B to that Article: "In relationships which last over a period of time (*Dauerschuldverhältnisse*) such as … agency and distributorship agreements … the concept of good faith has particular significance as a guideline for the parties' behaviour." The obligation under this Article could also be regarded as a specific example of the particularly intense obligation to co-operate in marketing relationship contracts.

C. No duty to investigate

This obligation relates to actual knowledge. A party is only under the obligation to disclose the information which it actually has. A party is not under an obligation to make (possibly expensive) investigations in order to obtain the relevant information. In other words, if a party to a commercial agency, franchise or distribution contract, or similar marketing relationship contract comes across information which the other needs in order to achieve the objectives of the contract, it is under an obligation to pass that information on to the other party; it is not free to keep that information for itself.

D. In due time

The information must be given in due time in order to allow the other party to perform its obligations under the contract and, more generally, to achieve the objectives of the contract. When and how often information should be given depends, among other things, on the

contract, the type of information and the other circumstances of the case. In the case of new developments, a party must, in principle, update the information which has been provided within a reasonable period of time in order to allow the other party to adapt to the new situation.

E. No form requirement

There is no general form requirement as to the way in which this information is to be provided. The aim of the Article is merely to oblige parties to communicate.

NOTES

Information to be provided

1. For commercial agency mandatory obligations to inform are laid down in arts 3 1 (b) (commercial agent), 4 2 (a), (b) (principal) and 5 of the Directive, which have been transposed into the national legal systems.
2. As to franchising and distribution contracts, in most legal systems such an obligation can be inferred from the general obligation of good faith or loyalty. (AUSTRIA, FINLAND: KKO 1993:130; GERMANY: § 242 BGB *Küstner/Thume*, no. 1300, 1302, *Martinek/Semler*, § 14 nos. 63, 64, § 19 nos. 60-67; ITALY: CC arts. 1175, 1375, concerning distribution contracts see: Cass. 24 March 1999, n. 2788; NETHERLANDS: *Asser-Hartkamp* 4-II no. 307, *Barendrecht & Van Peursem*, no. 107; PORTUGAL: *Sinde Monteiro* (1989) 355 ff., *Menezes Cordeiro* (1984) 505; SPAIN CC art.1258 and Ccom 57; concerning distribution contracts: *Dominguez García*, Los contratos de distribución comercial: agencia mercantil y concesión comercial, (1997) 1354 ff). Concerning agency contracts, under SPANISH law the obligation of providing reciprocally the necessary information is established by LCA arts. 9.2b and 10.2b. In ENGLAND, the British Franchising Association states that the owner of the franchise is obliged to provide the other party with "assistance in carrying on the business…in relation to the organisation…training of staff, merchandising, management or otherwise…" (Adams, John N., "Franchising: practice and precedents" para 1.102, 3rd ed., (1990), Butterworths). The operating manual, detailing such information, is an essential part of the franchise agreement.
3. In addition, under FINNISH and GERMAN law the rules on commercial agency are applied by way of analogy to distribution contracts as well (FINLAND: *Telaranta* (1994) 154, GERMANY: *Giesler/Nauschütt*, § 5 no. 123, 165, § 8 no. 18, *Küstner/Thume*, no. 1300; *Martinek/Semler*, § 14 nos. 63, 64, § 19 nos. 60-67).
4. Concerning franchising contracts, see also the notes to IV.E.– 4:205 and 4:302. Concerning distribution contracts see also the notes to IV.E.– 5:202 and 5:302.
5. A duty to inform during the contract does not exist as such in SCOTTISH law but may be an express or implied term of the contract.

IV.E.–2:203: Confidentiality

(1) A party who receives confidential information from the other must keep such information confidential and must not disclose the information to third parties either during or after the period of the contractual relationship.

(2) A party who receives confidential information from the other must not use such information for purposes other than the objectives of the contract.

(3) Any information which a party already possessed or which has been disclosed to the general public, and any information which must necessarily be disclosed to customers as a result of the operation of the business is not regarded as confidential information for this purpose.

COMMENTS

A. General idea

Both parties to a commercial agency, distribution, franchise contract or other marketing relationship contract should treat any sensitive information they receive from the other party as confidential. This is especially true where key elements in the exploitation of the business (know-how, financial data et cetera) are disclosed, which often happens especially in franchise contracts. These are business values which are essential to the franchisor's (or supplier's) business concept and which must be kept within the network and saved from competitors.

However, not all information has to be considered as confidential: the information which a party already had or which was already publicly known when this party received it, and any information which is necessarily disclosed to customers when running the business is not to be treated as confidential.

B. Interests at stake and policy considerations

This rule protects the reasonable interest of a party (usually the franchisor, the principal or the supplier) and of the other members of the network in preventing its business method and other secrets from ending up in the hands of competitors.

The policy considerations behind the present rule are similar to those behind II.–3:302 (Breach of confidentiality) which applies only to pre-contractual information received from the other party in the course of negotiations. They are also similar to those behind the general duty of good faith and fair dealing under III.–1:103 (Good faith and fair dealing) and the obligation to co-operate actively and loyally under IV.E.–2:201 (Co-operation).

C. Protection of know-how

In franchise contracts, throughout the duration of the contract, the franchisor must provide the franchisee with the know-how which is necessary to operate the franchise business (IV.E.–4:202 (Know-how)). Moreover, in some other marketing relationship contracts, e.g. in certain specific types of distribution, a similar obligation may follow from the contract. Where one party is under such an obligation to share its know-how with the other, the obligation of confidentiality is of specific importance since it is the only way to guarantee that the know-

how, as a value essential and intrinsic to the development of the franchisor's method of business, remains in the hands of the franchisor and does not benefit competitors.

D. Confidential information

What kind of information is confidential largely depends on the circumstances of the case. Such types of information may include product information, technology, market research, purchase price lists, customers' details et cetera. It is not a necessary requirement that the information should be sophisticated or complex. Information known by the public can never be confidential.

Illustration 1
Franchisor A runs a franchise chain of travel agencies and provides its franchisees with know-how concerning the marketing of holidays to students. This knowledge is not generally known. Therefore, it is to be regarded as confidential information.

Illustration 2
Franchisor A runs a franchise network of travel agencies and provides its franchisees with know-how concerning a specific booking system. Within the travel business this booking system is used generally. Since this knowledge is generally known in this business, it is not to be regarded as confidential information.

E. Contractual and post-contractual

Confidential information is usually a business value which allows the successful exploitation of a business formula or commercialisation of the principal's, the franchisor's, or the distributor's products and which differentiates it from its competitors. If the information falls into the competitor's hands, it loses its value. Therefore, a party is required not to disclose the confidential information during, or after the termination, of the contractual relationship.

F. Information already public

All the information which a party already had in its possession, or which was already known to the public when the party received it, and any information which is necessarily disclosed to customers when properly running the business is not to be treated as confidential (Paragraph 3).

NOTES

I. Confidentiality during the period of the contract

1. In most legal systems there is a confidentiality obligation for the parties in commercial agency, franchising and distribution contracts during the period of the contract. However, the sources of this obligation differ from country to country.
2. In SPANISH law such an obligation for the franchisee is laid down in a statutory provision (art. 4 RD 2485/1998) although according to the legal text, the franchisee has to be explicitly *required* by the franchisor to keep the information confidential. Moreover, the majority of legal authors maintain that due to the principle of good faith a similar obligation of confidentiality is imposed on the franchisor though art. 4 RD does not explicitly require this (see for example: *Hernando Giménez*, El contrato de

franquicia de empresa, 2000, p. 104). This duty is also imposed by art 76 of the Patent Law. The violation of the confidentiality obligation and the disclosure of industrial secrets is a transgression contemplated in art. 13 of the Disloyal Competition Law, although to be considered as disloyal conduct it has to be performed with either *animus lucrandi* or *animus nocendi*.

3. According to other legal systems such an obligation is deduced from the doctrine of good faith. With respect to commercial agency contracts, it follows from good faith under BELGIAN, SPANISH and SWEDISH law (BELGIUM: *Verbraeken & Schoutheete*, no. 87; SPAIN arts. 9, 10 LCA; SWEDEN §§ 5(1) and 7(1) of the HaL, § 7 KommL).

4. As to franchise contracts, under GREEK law such an obligation follows from good faith (art. 288 AK). In addition, arts. 17 and 18 of the GREEK Act 146/1914 on unfair competition apply. They protect the franchisor against disclosure or unfair use (misuse) of the information that a franchisor will customarily disclose to a franchisee. According to SWEDISH law the contract will always contain provisions concerning confidentiality. Such clauses apply, for instance, to the content of the contract and manuals, but not, for instance, to general sales tactics etc. (*Sohlberg*, 57 ff).

5. With respect to franchise and distribution contracts, it follows from good faith according to DUTCH law (*Barendrecht & Van Peursem*, no. 173) and SPANISH law.

6. In GERMANY, § 86 I HGB (*Interessenwahrnehmungspflicht*) prohibits the disclosure of business secrets to third parties (*Koller/Roth/Morck*, § 86 HGB nos. 5, 10; *Münchener Kommentar zum Handelsgesetzbuch*, § 86 HGB no. 57). This rule is applied by way of analogy to franchise and distribution contracts. (*Münchener Kommentar zum Handelsgesetzbuch*, Vor § 84 HGB nos. 16, 21, § 90 HGB no. 6).

7. Under ENGLISH law an obligation of confidentiality follows from general contract law. According to a general equitable principle a recipient of information which it knows or ought to know is confidential should not take unfair advantage of it, *Seager v. Copydex Ltd. (No. 1)* [1967] 1 WLR 923. SCOTTISH law also has a general principle of confidentiality where a reasonable person should in all the circumstances recognise that information received should remain confidential (*Lord Advocate v Scotsman Publications* 1989 SLT 705); the obligation may be imposed by contract (e.g. *Levin v Farmers Supply Association of Scotland* 1973 SLT (Notes) 43).

II. Post-contractual obligation

8. Under GERMAN law this obligation results from § 90 HGB. However, this obligation is less strict than the one during the contractual period, since "all circumstances of the professional standards of a prudent businessman" must be considered (see § 90 HGB; *Koller/Roth/Morck*, § 90 HGB no. 2). Both § 86 I and § 90 HGB are applied by way of analogy to franchisees and distributors (*Münchener Kommentar zum Handelsgesetzbuch*, Vor § 84 HGB nos. 16, 21; § 90 HGB no. 6).

9. The obligation of the principal not to disclose secrets of the commercial agent in the contractual and in the post-contractual period rests on the general idea of § 86 a HGB (*Treuepflicht*) and good faith (§ 242 BGB, *Münchener Kommentar zum Handelsgesetzbuch*, § 86 a HGB nos. 45, 46). The same is true for the franchisor and the supplier (*Koller/Roth/Morck*, Vor § 84 HGB nos. 10, 11; *Martinek/Semler*, § 19 nos. 60-63).

10. In SPAIN, in the case of franchise contracts, the confidentiality obligation is generic and it includes all relevant information that affects the interest of the parties and that has been collected in pursuance of the contractual relationship. This obligation

remains even when the contract is terminated, due to the principle of good faith (*Domínguez García* in *Alberto Bercovitz*, Contratos Mercantiles, p.600).

III. Information already disclosed to the public

11. According to ENGLISH, SCOTTISH and GERMAN law any information that is already available to the public is not confidential (ENGLAND: *Att.-Gen.* v. *Guardian Newspapers* (No. 2) [1990] 1 AC 109, 285, House of Lords; SCOTLAND: *Stair Memorial Encyclopaedia* vol. 18 para 1461; GERMANY: *Münchener Kommentar zum Handelsgesetzbuch*, § 90 HGB nos. 9-10). Also DUTCH authors have defended this (*Barendrecht & Van Peursem*, no. 172).

Section 3: Termination of contractual relationship

IV.E.–2:301: Contract for a definite period

A party is free not to renew a contract for a definite period. If a party has given notice in due time that it wishes to renew the contract, the contract will be renewed for an indefinite period unless the other party gives that party notice, not later than a reasonable time before the expiry of the contract period, that it is not to be renewed.

COMMENTS

A. General idea

This Article provides a rule for a specific situation which can arise at or towards the end of a contract for a definite period. The starting point, which does not need to be stated, is that the contractual relationship will come to an end on the expiry of the definite period.

Parties are free not to renew a contract for a definite period of time after the expiry of its term. However, if one party gives notice to the other in sufficient time that it wishes to renew the contract, the latter party, if it wishes not to renew the contract, has to respond not later than a reasonable time before the end of the contract period. If it fails to respond by that time, the contract will be renewed for an indefinite period.

A contract concluded for a definite period of time would normally end upon the expiry of the period. However, when the parties actually continue performing the contract after the agreed term has expired, an agreement that was concluded for a fixed term does not come to an end upon the expiry of the fixed term. Instead, the contract becomes a contract for an indefinite duration, subject to the same conditions. This is the effect of the general rule in III.–1:111 (Tacit prolongation).

B. Interests at stake and policy considerations

In principle, both parties have an interest in the binding force of their contract. In particular, it is in their interest to be certain that it will last for the period which they have agreed upon. It allows them to determine proper and rational business planning and to evaluate what investments they should make. However, during the course of the performance their interests may change. One party may wish to abandon the contract, e.g. because another contract is more favourable. If the other party agrees there is no problem (consensual ending of the contract) but the other party will usually object. In this rule the interest in legal certainty is upheld by guaranteeing the binding force of a contract for the term which the parties have agreed upon. If a party wishes to retain the right to end the contract at any time it should either provide for that in the contract or conclude a contract for an indefinite period (see IV.E.–2:302 (Contract for an indefinite period)).

The requirement to provide notice of non-renewal – when the other party has given sufficient notice that it wishes to renew the contract – even though a fixed duration for the contract was agreed upon, is based on the notion that, sometimes, the definite period may be very long and that the party giving notice of a wish to renew may build up hope that the contract will be

renewed and will act accordingly. Therefore, a requirement of a counter-notice is not unreasonable. It is not an onerous requirement. The party intending not to renew does not have to give notice of non-renewal in any particular form. The only thing it has to do is to respond in such a way as to indicate that it does not wish to renew. Such a limited obligation to respond to a notice by the other party is not very burdensome and may be expected from a party under an intense general obligation to co-operate. The effect of not giving a timely counter-notice is that the contract will be renewed for an indefinite period. This does not, of course, mean that the parties are bound to each other forever. As in any contract for an indefinite period, either party has the right to unilaterally end the contractual relationship by giving notice (IV.E.–2:302 (Contract for an indefinite period)).

C. Definite period

Parties may have various reasons for concluding a contract for a definite period. One such reason is that the contract cannot be ended unilaterally during the period which the parties have agreed upon. Another reason may be the applicability of other rules. For example, "non-compete obligations" benefit from the block-exemption, and are therefore presumed to be valid from an EC competition law perspective, if they do not exceed a period of five years (EC Regulation 2790/1999, Article 5(a)). As a result, many distribution and franchise contracts are concluded for a period of five years.

D. Notice of renewal and response to non-renewal

A proposal for renewal and a notice by the other party of its decision not to renew may be given by any means appropriate in the circumstances and becomes effective when it reaches the addressee (I.–1:109 (Notice) paragraphs (1) and (3).

A notice by a party who wishes to renew the contract must be given in due time; the responding notice by the other party of its decision not to renew must be given within a reasonable time before the expiry of the contract. What constitutes due time and a reasonable time respectively depends on the circumstances of the case. Obviously, the second period depends, in part, on the first.

F. Continued performance: a new contract for an indefinite period subject to the old conditions

The effect of the general rule in III.–1:111 (Tacit prolongation) is that in the case of continued performance the contract becomes a contract for an indefinite period. But on what conditions? In most cases the same basic obligations on the part of the parties will continue, unless the way in which the parties continue to perform the obligations under the contract shows otherwise. Other (ancillary) obligations, the prolongation of which is no longer appropriate, may be dispensed with at the time of the expiry of the term. Ultimately, this is a matter of interpretation to be determined by the court.

Obviously, as a result of continued performance the parties are not bound to each other forever. As in any contract for an indefinite period, either party has the right to unilaterally end the contractual relationship by giving notice (IV.E.–2:302 (Contract for an indefinite period)).

NOTES

I. No right to end a contract for a definite period unilaterally

1. According to a large majority of the legal systems a contract for a definite period of time cannot be ended prior to the expiry of the period, unless parties have agreed otherwise. In some countries there is an exception: i. e. the possibility to end a contract for a definite period immediately in the case of an urgent and important reason. (POLAND: CC art. 764 II)

2. Under the following legal systems it is not possible to end a contract for a definite period unilaterally, unless the parties have agreed otherwise: ENGLISH law (*Bowstead & Reynolds* §10-042), FINNISH law (*Hemmo* (1997) II 370*)*, FRENCH law: *Fabre-Magnan*, 512; GERMAN law § 620 I BGB (*Münchener Kommentar zum Handelsgesetzbuch*, § 89 HGB no. 9), GREEK law, DUTCH law as to commercial agency CC arts. 7:437, 7:438, concerning distribution see *HR* 21-10-1988, *NJ* 1990, 439; *HR* 10-8-1994, *NJ* 1994, 688. SCOTTISH law (*Gloag & Henderson* para 3.41). In the PORTUGUESE law as to commercial agency this rule is included in art. 26 DL 178/86 and CC art. 1051 (cf. *Pinto Monteiro* (1998) 94), which will be applied by way of analogy to franchise and distribution contracts (*Pinto Monteiro* (2002) 133; *Pestana de Vasconcelos* (2000) 75; *Ribeiro* (2001) 249). In SPANISH law, a contract clause providing for unilateral termination in a contract for a definite period is invalid according to CC art. 1115 and 1256. The party which intends to terminate will be liable for non performance, unless the other party has failed to perform previously or there is an important reason (*Domínguez García* in *Alberto Bercovitz*, Contratos Mercantiles, p. 608). Regarding commercial agency, the LCA art. 26 provides that there is a reason for unilateral termination only in case of a total or partial non-performance by the other party or when the other party is declared insolvent.

3. However, under SWEDISH law contracts concluded for a definite period may be ended unilaterally prematurely. Nevertheless, in such a case the party ending the contract will be liable for damages (KommL § 51 para 2). Concerning distribution, the EÅ 93 establishes a contractual period of two years, which is prolonged by one year unless notice is given six months before the expiry of the contract. In franchise contracts, the contract is normally concluded for a determined period of time, in most cases three or five years, (*Sohlberg*, 67). The most common solution, however, is that the contract is concluded for a definite period of time, but with an additional possibility to end the contract, provided a notice has been given within a certain notice period, (SOU 1986:17, 213). The most common length for such a notice period is six or twelve months, (SOU 1986:17, 72).

II. Notices of non-renewal and of renewal

4. According to ITALIAN law a party must notify the other party that it does not want to renew the contract provided it concerns a commercial agency contract that falls within the scope of the collective economic agreements (*Accordi Economici Collettivi*, *AEC*) of 2002 concerning agency. When the period of contract lasts for more than six months, the principal has to communicate to the agent "at least 60 days before the expiry of the term, his possible readiness to renew or prorogue the mandate". However, non-observance of this provision does not affect the renewal of the contract. It may only be a source of liability for damages (*Baldi* (2001) 226). The SWEDISH model contract concerning distribution EA 93 includes a similar obligation. The EA 93 concerns a contract for a definite period of two years, which is prolonged by one year at a time unless notice is given six months before the expiry of the contract.

5. Under the other legal systems there are no specific obligations to inform the other party of a possible renewal of a contract for a determinate period. However, depending on the circumstances, such obligations may follow, in some systems, from the general obligation of good faith.

III. Tacit prolongation by continued performance

6. If parties continue to perform a contract for a definite period after the expiry of the contract, in the majority of the legal systems the contract will be converted into a contract for an indefinite period.

7. For commercial agency, this rule is laid down in specific statutory provisions (art. 14 Directive, § 20 of the AUSTRIAN *HVertrG*, art. 4 of the BELGIAN *Handelsagentuurovereenkomstenwet*, reg. 14 of the UK Regulations; art. L. 134-11 of the FRENCH Ccom, art. 8 para 2 of the GREEK Law on Commercial Agency 219/1991, art. 1750 para 1 of the ITALIAN CC, art. 7:436 of the DUTCH CC, art. 764 of the POLISH CC, art. 27/2 of the PORTUGUESE DL 178/86, art. 24 para 2 of the SPANISH LCA, § 25(2) of the SWEDISH HaL).

8. This statutory rule is applied by way of analogy to franchise contracts under PORTUGUESE law and probably under SWEDISH law. Under SPANISH law the rule is not clear. Some authors defend the application of the commercial agency rule by way of analogy to franchising as well (*García Herrera* (1995), *Echebarría Sáenz*, El contrato de franquicia, 1995, p.513), whereas others argue that the contract will be renewed as a definite contract for the period initially agreed upon (*Hernando Giménez*, 2000) p. 398). Also under GREEK law it is not clear whether the agency rule may apply by way of analogy to franchise contracts.

9. This statutory rule is applied by way of analogy to distribution contracts (PORTUGAL, SPAIN and, most likely, SWEDEN). In the NETHERLANDS authors differ as to whether the commercial agency rule is applied to distribution contracts by way of analogy (*Barendrecht & Van Peursem*, 145-146, *Van de Paverd*, 78). Also under GREEK law it is not clear whether this rule may apply by way of analogy to distribution contracts.

10. In SCOTTISH law the notion of ‘tacit relocation’, under which continuing to perform a lapsed contract renews it for the same period as the previous contract, is applicable to contracts of lease, partnership and certain forms of mandate or employment. There is no authority for extending it beyond these contracts (*Gloag & Henderson* para 3.41) although there is no reason on principle why it should not be.

IV.E.–2:302: Contract for an indefinite period

(1) Either party to a contract for an indefinite period may terminate the contractual relationship by giving notice to the other.

(2) If the notice provides for termination after a period of reasonable length no damages are payable under IV.E.–2:303 (Damages for termination with inadequate notice). If the notice provides for immediate termination or termination after a period which is not of reasonable length damages are payable under that Article.

(3) Whether a period of notice is of reasonable length depends, among other factors, on:

(a) the time the contractual relationship has lasted;
(b) reasonable investments made;
(c) the time it will take to find a reasonable alternative; and
(d) usages.

(4) A period of notice of one month for each year during which the contractual relationship has lasted, with a maximum of 36 months, is presumed to be reasonable.

(5) The period of notice for the principal, the franchisor or the supplier is to be no shorter than one month for the first year, two months for the second, three months for the third, four months for the fourth, five months for the fifth and six months for the sixth and subsequent years during which the contractual relationship has lasted. Parties may not exclude the application of this provision or derogate from or vary its effects.

(6) Agreements on longer periods than those laid down in paragraphs (4) and (5) are valid provided that the agreed period to be observed by the principal, franchisor or supplier is no shorter than that to be observed by the commercial agent, the franchisee or the distributor.

(7) In relation to contracts within the scope of this Part, the rules in this Article replace those in paragraph (2) of III.–1:109 (Variation or termination by notice). Paragraph (3) of that Article governs the effects of termination.

COMMENTS

A. General idea

A contract is for an indefinite period either when it does not contain any specific duration or when it explicitly states that it is for an indefinite period. The present rule provides that in either case the contractual relationship can be terminated unilaterally by giving notice. In other words, each party has ‘a right to end’ the relationship. A reasonable period of notice is not a requirement for the effective termination of the relationship. However, if the period of notice is not reasonable compensation is payable under the following Article.

Paragraph (3) gives guidance to the parties and the courts in establishing what would be a reasonable period of notice in the circumstances of a particular case. Although the list indicates the factors which are most likely to be of relevance, it is not meant to be exhaustive: depending on the circumstances of the case other factors may be relevant for establishing what period of notice will be reasonable. This Article is based on the assumption that it is impossible to indicate only one or two factors which will be decisive in all cases. The possible uncertainty with regard to the relative weight of each of the factors is mitigated by the presumption indicated in paragraph (4).

For a principal, a franchisor or a supplier who wants to end the contractual relationship there is a minimum period of notice: one month for the first year, two months for the second, three

months for the third, four months for the fourth, five months for the fifth and six months for the sixth and subsequent years. This is a mandatory rule; parties may not derogate from this provision (paragraph (5)).

Of course, the parties are free to agree on longer periods of notice than the ones provided for in paragraphs (4) and (5). However, if they do so the agreed period to be observed by the principal, franchisor or supplier may not be shorter than the one to be observed by the commercial agent, the franchisee or the distributor (paragraph (6)).

Paragraph (7) clarifies the relationship with the general rules on termination by notice in Book III. The provisions of the present Article on reasonable periods replace the provisions in III.–1:109 (Variation or termination by notice) but the general provisions in paragraph (3) of that Article govern the restitutionary and other effects of termination.

B. Interests at stake and policy considerations

On the one hand, there is the interest of the party who wishes to end the relationship which under the contract is to last for an indefinite period. It may wish to do so for various reasons. For example, it may wish to end its activity in this particular geographical area, or it may have found another agent, franchisee or distributor whom it expects to be more effective. In all these cases, without this provision the party who no longer wishes to continue the contractual relationship would nevertheless be linked to the other until the end of time, unless the other party agrees to a termination.

On the other hand, the other party usually has no interest in the ending of the relationship. On the contrary, especially when the performance of the obligations under this contract is its main activity, the contract may be the very basis of its economic existence. Moreover, this party may have made important investments which will only see a return after a period of many years. Also, it may be very difficult for this party to find an equally satisfactory alternative. Therefore, this party may be economically very dependant on the continuation of the contractual relationship.

In this rule these interests are balanced in the following way. A party who wishes to terminate a contractual relationship for an indefinite period will succeed: the notice of termination will be effective. However, the other party's interest in continuing the contractual relationship for a reasonable period is protected, albeit in a monetary way. A party who terminates the relationship without giving reasonable notice will be liable to compensate the other for the loss sustained by not getting a reasonable notice (see IV.E.–2:303 (Damages for termination with inadequate notice)).

This rule not only balances the interests of the parties; it is also in the general interest. First, by establishing that a party has a right to terminate unilaterally it provides legal certainty which diminishes litigation. Secondly, it is economically efficient: if a party (e.g. a franchisor) can derive a greater benefit from a contract with another party (e.g. a new franchisee) than it costs to perform the new contract *and* to properly compensate the aggrieved party (the first franchisee), then termination creates a surplus, since at least one party is better off without anyone being worse off.

The period of notice (and the compensation in lieu of this) is meant to safeguard the interests of the party confronted with unilateral termination by its counterpart. Therefore, the factors mentioned in paragraph (3) mainly focus on that party's position. However, this does not mean that in establishing what notice period would be reasonable in the circumstances, only the interests of the aggrieved party should be taken into account. Not only can the facts of the case relating to each of the factors point to a shorter period of notice (e.g. the absence of investments by the aggrieved party, of a post-contractual competition clause, of difficulties in finding an alternative etc.), but also in the case of facts which point towards a longer period, these factors must be weighed against the interest of the party which wishes to end the relationship.

C. Relation to other provisions

The rules in this Article replace the rule contained in III.–1:109 (Variation or termination by notice) paragraph (2). The scheme is different. Under III.–1:109(2) a reasonable period is a requirement for effective termination. Under the present Article a reasonable period is a requirement only for the avoidance of liability for compensation. The default rules on what is a reasonable period also differ. However, the rules in III.–1:109 paragraph (3) on the effects of termination do apply for the purposes of the present Article. That means that where the parties do not regulate the effects of termination, then:

> (a) it has prospective effect only and does not affect any right to damages, or a stipulated payment, for non-performance of any obligation performance of which was due before termination;
> (b) it does not affect any provision for the settlement of disputes or any other provision which is to operate even after termination; and
> (c) in the case of a contractual obligation or relationship any restitutionary effects are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.

The general provisions on notice in I.–1:109 (Notice) apply. So notice may be given by any means appropriate in the circumstances (paragraph (2)) and becomes effective when it reaches the addressee (paragraph (3)).

D. No "good reason" required for terminating the relationship

This rule does not subject a party's right to end the relationship to an evaluation of the appropriateness of its reasons. Even where the party who gives notice has no good reason the notice is nevertheless effective.

E. Reasonableness of the period of notice

In assessing what is reasonable, the nature and purpose of the contract, the circumstances of the case and the usage and practices of the trade or profession involved should be taken into account.

The list in paragraph (3) of specific factors which may play a role in assessing whether a reasonable period of notice was provided, is not meant to be exhaustive. This means that other factors may also determine what period of notice is reasonable in the circumstances. Conversely, not all these factors play a role in each case. Moreover, not all factors have the same weight in each case. All this remains a matter for the court to consider.

The time the contractual relationship has lasted. In most cases the period during which the contract has lasted will be an important factor. Normally, the longer the contractual relationship has lasted the more a party becomes dependent on it and the more difficult it will be to adapt to a new situation and, as a consequence, the greater its damage in the case of unilateral termination by the other party.

The importance of this factor is reflected in the fact that the minimum notice period for the principal, the franchisor or the supplier in paragraph (5) increases with each year during which the contractual relationship has lasted.

However, although in most cases the assumption is that the longer the relationship has lasted the longer the notice period must be, this factor may, in certain circumstances, also point in the opposite direction. If the contractual relationship has lasted for a long time, in some cases this may have been sufficient for the parties to fully recover their investments. Therefore, this factor may also point to a shorter period of notice.

Reasonable investments made. Frequently, unilateral termination will occur at a moment when a party has not yet seen a return on all the investments which it has made for the purposes of the contract. Unless it is protected by a rather long period of notice which allows it to amortise its investments (or compensated by damages in lieu thereof) it may be confronted with extensive losses. Conversely, if the aggrieved party has not made any important investments this may be a reason to accept a rather short notice period. Therefore, the investments made by the aggrieved party will usually play an important role in assessing the length of a reasonable notice period.

However, not all investments made by the aggrieved party should be taken into account, but only those investments which were reasonable in the circumstances; excessive investments are at a party's own risk. Moreover, in principle only specific investments should be taken into account. General investments, for example investments in a generic showroom which can be sold or let or sublet should in principle not be taken into account.

On the other hand, however, recovery is not limited to investments induced or even requested by the other party. In principle, all reasonable investments may be taken into account.

In principle, in the present system there is no room for complementary damages (i.e. in addition to damages in lieu of the notice period) for the recovery of damages due to useless investments not fully amortised by the notice period, as some European systems are familiar with. Under the present system, such investments are always covered by the notice period (and the damages in lieu thereof). This may in some cases lead to a very long period of notice of more than one year being required if liability for damages is to be avoided.

Within this system, however, there is a possibility that the aggrieved party will be additionally entitled to a goodwill indemnity in accordance with IV.E.–2:305 (Indemnity for goodwill).

The time it will take to find a reasonable alternative. An important function of the period of notice is to allow the aggrieved party to adapt to the new situation, especially to find an alternative, either a new principal, franchisor or supplier, or to commence a different

economic activity. The easier it is for this party to find an acceptable alternative, the shorter the period of notice can be. What counts is a reasonable alternative: it does not necessarily have to provide the same benefits or be exactly in the same trading sector or in the same place.

Here post-contractual non-competition clauses may be of relevance. If the contract contains a valid clause which restrains post-contractual competition, it may be more difficult for the aggrieved party to find an alternative. Consequently, in such a case the reasonable period of notice should in principle be longer. However, to the extent that the aggrieved party's difficulty in finding an alternative economic activity has already been compensated by the compensation which is due under the contract or under the law relating to post-contractual non-competition clauses, that difficulty should again be taken into account here. Consequently, the reasonable notice period may be shorter (and the damages in lieu thereof lower).

Usages. Obviously, the reasonableness of the notice period may vary according to the type of contract (commercial agency, franchise, distribution) and the sector of the trade (e.g. within distribution: beer, cars, petrol). Especially the presence of usages in a particular trade may be of relevance in establishing the reasonableness of a notice. Such usages may sometimes be inferred from codes of conduct, although much depends on the persons and organisations involved in drafting these codes (e.g. only franchisors).

However, on the other hand, there is no presumption that periods of notice will be generally longer for one type of contract than for another, as is the case in some European jurisdictions. On the contrary, the minimum notice periods for the principal, the supplier and the franchisor provided for in paragraph (5) are the same for all contracts concerned.

More generally, although usages may play a role in determining what is reasonable, they will not supersede the reasonableness test. In other words: any unreasonable usage (which may be the result of a monopoly or oligopoly leading to structurally unequal bargaining power) should be disregarded, unless the parties have explicitly agreed otherwise.

F. Presumption of reasonableness

Paragraph (4) contains a presumption that a notice period of one month for each year during which the contractual relationship has lasted, with a maximum of 36 months, is reasonable.

This presumption is rebuttable. The aggrieved party may prove that the presumably reasonable period (including the maximum of three years) is unreasonably short in the circumstances. Conversely, the party which has ended the relationship may prove that the presumed period is unreasonably long.

G. Minimum period

For the principal, the franchisor or the supplier who wishes to end the contractual relationship there is a minimum period of notice (see paragraph (5)): the period is to be no less than one month for the first year, two months for the second, three months for the third, four months for the fourth, five months for the fifth and six months for the sixth and subsequent years during which the contract has lasted. Parties may not derogate from this provision.

H. Agreed longer periods

If the parties agree on longer notice periods than those laid down in paragraphs (3) and (4) then the agreed period to be observed by the principal, franchisor or supplier must be no shorter than that to be observed by the commercial agent, the franchisee or the distributor. In other words, the parties are free to agree on longer notice periods than the ones which are considered to be reasonable. However, they may not do so exclusively for the benefit of the principal, franchisor or supplier. To the extent that they nevertheless do so, such an agreement is invalid.

I. Character of the rule

This is a default rule; the parties are free to agree otherwise. However, the minimum period of notice contained in paragraph (5) is mandatory; any agreement on a shorter period by the parties remains without effect. Moreover, paragraph (6) is also mandatory: the parties may not derogate from this provision.

NOTES

I. Right to terminate (general)

1. Under all legal systems either party may end a commercial agency, franchise or distributorship, provided that a notice has been given.
2. For commercial agency a rule to this effect is laid down in statutory provisions based on art. 15(1) of the Directive. (Art. 15(1) of the Directive: "Where an agency contract is concluded for an indefinite period either party may terminate it by notice."). See: AUSTRIA: § 21(2) of the *HVertrG;* BELGIUM: art. 18 § 1 *Handelsagentuurwet*; FINLAND: art. 23 of the Act on Commercial Agents; FRANCE: Ccom art. L. 134-11; GERMANY: § 89 I HGB; GREECE: art. 8 Law on Commercial agency 219/1991; ITALY: CC art. 1750; NETHERLANDS: CC art. 7: 437; POLAND: CC art. 764 I; PORTUGAL: art. 178/86; SPAIN: art. 24(1) 25.1 LCA; SWEDEN: § 24(2) HaL.; UK: Commercial Agents Regulations 1993 reg. 15.
3. As to franchise and distribution contracts under GERMAN law, the rule concerning commercial agency applies by way of analogy (*Münchener Kommentar zum Handelsgesetzbuch*, § 89 HGB no. 6). However, under GREEK and PORTUGUESE law the rules concerning commercial agency apply by way of analogy only to distribution contracts (*Pinto Monteiro* (2002) 129; *Menezes Cordeiro* (2001) 513; *Ribeiro* (2001) 241; *Pestana de Vasconcelos* (2000) 80; STJ 18/10/1994, BMJ 451 (1995) at 445; STJ 23/09/1997, www.dgsi.pt; STJ 16/05/1996, BMJ 468 (1997) at 428; STJ 4/05/1992, BMJ 427 (1993) at 524).
4. In BELGIAN law a rule to the effect of the present Article is laid down in art. 2 of the *Alleenverkoopwet*, which applies to distribution contracts.
5. As to franchise and distribution contracts under FRENCH and SPANISH law with respect to a distribution contract either party may end the relationship unilaterally, provided a notice period is observed and there is no abuse of the right (FRANCE: Ccom art. L. 442-6 I, Leloup, no. 2065 et seq.). In Spain the right to terminate unilaterally is generally admitted in every contract for an indefinite period (*Domínguez García* in *Alberto Bercovitz*, Contratos Mercantiles, p. 606).

6. However, as to franchise and distribution contracts under DUTCH law the point of departure is that the contractual relationships cannot be ended. However, based on good faith there may be a right to terminate (CC art. 6:248, *Asser-Hartkamp* 4-II, no. 310 ff.). Whether a notice period must be observed and, if so, its length depends on the requirements of good faith.

7. Under SCOTTISH law the general principle of contract law is that a contract of indefinite duration may be terminated by reasonable notice (*McBryde* para. 9.16).

II. Fixed notice period

8. As to commercial agency contracts art. 15(2) of the Directive includes a fixed minimum mandatory notice period. (Art. 15(2) of the Directive: "The period of notice shall be one month for the first year of the contract, two months for the second year commenced, and three months for the third year commenced and subsequent years. The parties may not agree on shorter periods of notice.") However, the Directive leaves it to the Member States to include a minimum mandatory fixed notice period for the fourth, fifth, sixth and subsequent years of the contract as well. (Art. 15(3): "Member States may fix the period of notice at four months for the fourth year of the contract, five months for the fifth year and six months for the sixth and subsequent years. They may decide that the parties may not agree to shorter periods.")

9. The following countries include a fixed mandatory minimum notice period in their legal systems for the first 6 years of the commercial agency: AUSTRIA: § 21 of the *HVertrG;* BELGIUM: art. 18 *Handelsagentuurwet*; FINLAND: art. 23 of the Act on Commercial Agents; GREECE: art. 8 Law on Commercial Agency 219/1991; ITALY: CC art. 1750 III; SWEDEN: § 24(2) HaL.

10. In SPAIN the LCA art. 25.2 in the framework of a commercial agency establishes a minimum notice period of one month for every year that the contractual relationship has lasted. Nevertheless, this minimum notice period will never exceed six months. If the relationship has not lasted for a year, the minimum notice period is fixed at one month.

11. GERMAN law differs in the sense that the notice period is one month for the first year, two months for the second year, three months for three to five years and six months for contractual relationships which lasted more than five years (§ 89 I HGB).

12. THE UK, FRENCH, DUTCH, POLISH and PORTUGUESE laws have opted for art. 15(2) of the Directive. The minimum notice period for both parties is three months for contractual relationships which lasted for three years and longer (UK: Reg. 15(2); FRANCE: Ccom art. L. 134-11; NETHERLANDS CC art. 7:437 II; POLAND: CC art. 764 I; PORTUGAL: art. 28(1) DL 178/86)

13. These minimum rules concerning commercial agency are applied by way of analogy to franchise and distribution contracts under GERMAN law (*Münchener Kommentar zum Handelsgesetzbuch*, § 89 HGB no. 6). They apply to distribution contracts by way of analogy under GREEK and PORTUGUESE law (*Pinto Monteiro* (2002) 129; *Menezes Cordeiro* (2001) 513; *Ribeiro* (2001) 241; *Pestana de Vasconcelos* (2000) 80; STJ 18/10/1994, BMJ 451 (1995) at 445; STJ 23/09/1997, www.dgsi.pt; STJ 16/05/1996, BMJ 468 (1997) at 428; STJ 4/05/1992, BMJ 427 (1993) at 524).

III. Reasonable notice period

14. In a number of countries, franchises or distributorships can be ended unilaterally by giving reasonable notice. (art. 2 of the BELGIAN *Alleenverkoopwet*; FINNISH law Cf. KKO 1982 II 1; under SPANISH law the decisions rendered with respect to distribution contracts can be applied by way of analogy to franchising (STS 11

February 1984 RJ 1984\646, STS 2 December 1992 RJ 1992\9998, STS 23 July 1993 RJ 1993\6280, *STS* 24 February 1993, RJ 1993\1298; *STS* 25 January 1996, RJ 1996\319). There are no specific rules about the notice period in franchises or distributorships; therefore, the general principles of good faith must be applied. A period of notice is reasonable when the other party may avoid any harm as a result of the unilateral decision to terminate (SAP Asturias 13 November 1998, AC 1998\2234).

15. Under FRENCH law with respect to franchise and distribution contracts the notice period to be observed depends on the length of the contract concerned and commercial usages (Ccom art. L. 442-6 I 5). In addition, if the contract involves the distribution of goods under a trademark the notice period should be doubled (Ccom art. L. 442-6 I 5).

16. Under DUTCH law a reasonable notice period must be observed with respect to franchising and distribution contracts, which follows from case law (*HR* 23-12-1994, *NJ* 1995, 263; *HR* 21-4-1995, *NJ* 1995, 437.)

IV. Minimum notice period for the principal, franchisor or supplier

17. According to Art. 15(4) of the Directive the notice period which the principal must observe is not allowed to be shorter than the one observed by the commercial agent if parties agree upon longer notice periods than the minimum notice periods provided for in the Directive. (Art. 15(4) of the Directive: "If the parties agree on longer periods than those laid down in Paras 2 and 3, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent."). Concerning commercial agency a similar rule is included in the following legal systems: (AUSTRIA: § 21(3) HVertrG; BELGIUM: art. 18 § 1 Handelsagentuurovereenkomstenwet; UK: Reg. 15(3); FRANCE: Ccom art. L. 134-11; GERMANY: § 89 II HGB; GREECE: art. 8 Law on Commercial agency 219/1991; ITALY: CC art. 1750; NETHERLANDS: CC art. 7:437(2); POLAND: CC art. 764 I § 2; PORTUGAL: art. 28(1) DL 178/86); SPAIN art. 25(3) LCA.)

18. As to distribution contracts under FINNISH law the notice period must be of such length that it allows the distributor to amortise investments. If a notice period does not allow the distributor to do so, the notice period is considered to be unreasonable and can be assimilated into a reasonable one according to art. 36 of the Contracts Act. The same applies to franchise contracts.

19. With respect to franchise and distribution contracts no such rule has been found in the other legal systems.

V. Consequences of disregarding the notice period

20. See the notes to the following Article.

IV.E.–2:303: Damages for termination with inadequate notice

(1) Where a party terminates a contractual relationship under IV.E.–2:302 (Contract for indefinite period) but does not give a reasonable period of notice the other party is entitled to damages.

(2) The general measure of damages is such sum as corresponds to the benefit which the other party would have obtained during the extra period for which the relationship would have lasted if a reasonable period of notice had been given.

(3) The yearly benefit is presumed to be equal to the average benefit which the aggrieved party has obtained from the contract during the previous 3 years or, if the contractual relationship has lasted for a shorter period, during that period.

(4) The general rules on damages for non-performance in Book III, Chapter 3, Section 7 apply with any appropriate adaptations.

COMMENTS

A. General idea

Under the preceding Article a party can terminate a contractual relationship which is to last for an indefinite time by giving notice. No period of notice is required for the termination to take effect. However, if a reasonable period of notice is not given the other party is entitled to damages. This Article regulates that question.

The aggrieved party's compensatable damage amounts to the expectation interest (paragraph (2)): it should be placed, as far as possible, in the position in which it would have been if a notice of reasonable length had been provided. If reasonable notice had been given the aggrieved party would have had all the usual benefits from the contract during the remainder of its duration (i.e. the reasonable notice period). Therefore, the aggrieved party is, in principle, entitled to compensation for the loss of that benefit.

Paragraph (3) contains a presumption that the yearly benefit is equal to the average benefit which the aggrieved party has received from the contract during the last three years. The idea is to refer to a period of time which is indicative of the business of the aggrieved party. Exceptional circumstances should not be taken as a general measure.

Finally, although, strictly speaking, these are not damages for non-performance of an obligation (the notice ends the contract, even if the period of notice was too short) but rather for not giving a reasonable period of notice, the application of the normal regime on damages for non-performance of an obligation is appropriate here. Therefore, paragraph (4) declares that these rules apply with any necessary adaptations.

B. Interests at stake and policy considerations

The rule that damages are the only remedy is based on considerations of economic efficiency: as long as a party is ready to pay (damages), it should be capable of ending the contract without observing a period of notice. Compelling it to 'wait' until a reasonable period of time has expired, could result in the loss of other opportunities. Therefore, the system adopted here provides the most efficient solution: a party can effectively end a contract, but will have to

pay a ‘price’ (compensation). If the ‘price’ is lower than the benefit it expects from ending the contract, at least one party is better off without anyone else being actually worse off.

The ‘price’ to be paid amounts to full compensation of the interest the aggrieved party had in the observance of the notice period, i.e. all the benefits it would have derived from the contract during the (remainder of) the period of notice. In other words, the expectation interest.

C. Damages the only remedy

Unlike in the ordinary case of non-performance of an obligation, here the aggrieved party (in principle) has only one remedy: damages. There is no obligation to give a reasonable period of notice (and therefore no question of specific performance) but just a requirement to give it if a claim for damages under the present Article is to be avoided. It would be inappropriate to impose an obligation (rather than set out a simple requirement) and to allow specific performance.

The present system provides the parties with the certainty that the notice will effectively end their contractual relationship.

D. Calculation of damages

The general test for the amount of damages is the benefit which the aggrieved party would have obtained during the non-observed period of notice (the expectation interest).

What is meant here is the ‘net’ benefit: if the aggrieved party during that period has to (continue to) incur expenses which cannot be (immediately) avoided (e.g., depending on national labour law, laying off personnel which the aggrieved party cannot reasonably employ in another function or elsewhere), then these will also have to be compensated.

The estimation of benefit is based on the benefit which the aggrieved party has obtained from the contract during the previous 3 years. However, other factors may be taken into account, either in order to raise or to mitigate the amount. One such factor may be the aggrieved party’s right to transfer its contractual position to a third party. If it can ‘sell its business’ to a successor, the benefit from this transfer will be taken into account.

E. Concrete damages

Damages are not calculated in an abstract fashion: what must be compensated is the damage which has been (or will be) effectively suffered by the aggrieved party.

Therefore, although damages should amount to the benefit which the aggrieved party would have obtained during the non-observed period of notice, and although the estimation of the benefit is based, in principle, on the average benefit which the aggrieved party has obtained from the contract during the previous 3 years, liability ultimately depends on the damage which the aggrieved party actually suffers.

Illustration 1
A distributor runs a petrol station. The petrol supplier ends the relationship after four years by giving one month's notice of termination. According to the preceding Article the supplier ought to have given at least four months' notice, which is considered reasonable in this case. To run the petrol station the distributor employs four persons. To make them redundant the distributor must itself observe a notice period of five months. In other words, the distributor must pay their salaries for another five months. The damages which the supplier must pay are 3/12 of the average benefit of the last three years and the sum resulting from the salary costs of the four persons for the forthcoming five months.

F. General rules on damages applicable

The general rules on damages for non-performance apply here as well. They include e.g. rules on foreseeability, loss attributable to the aggrieved party, reduction of loss, and substitute transactions .

NOTES

I. Entitlement to damages for inadequate notice

1. The national legal systems differ as to the consequences of termination without adequate notice.
2. In some systems the aggrieved party is entitled to damages in lieu of a notice period. This can be found in the following legal systems: BELGIAN law (art. 2 *Alleenverkoopwet*, art. 18 *Handelsagentuurwet*), FINNISH law (the general right to damages when the notice period has not been observed was awarded in KKO 1982 II 1); GREEK law; POLISH law (CC art. 764 II § 2; SWEDISH law (KommL § 51(2), HaL § 34(1)).
3. In BELGIAN and DUTCH law, in the case of commercial agency the aggrieved party is entitled to damages in lieu of a notice period, unless the contractual relationship was ended because of important and urgent reasons, which are notified to the other party (art. 18 § 3, art. 19 *Handelsagentuurwet*; CC art. 7:439(1)). Important and urgent reasons are circumstances such that the other party cannot reasonably be required to continue the relationship.
4. In contrast, under FRENCH law there is no entitlement to damages unless the non-observance of the notice period also results in an *abus de droit*. (Ccom art. L 442-6 I 4). In SPANISH law the non-observance of the minimum notice period is considered as any other non-performance of a contractual obligation Therefore the party is entitled to damages only when loss can be proved (STS 28 September 2007, RJ 2007\5311).
5. However, in other systems there is no entitlement to damages, although the notice period will be replaced by one which is proper. (GERMAN law: *Martinek/Semler*, § 10 no. 9; *Münchener Kommentar zum Handelsgesetzbuch*, § 89 HGB no. 62. However, the aggrieved party may end the contractual relationship (without a notice period), since the non-observance of the notice period can be considered an important reason for termination (§ 89 a I HGB, BGH, *BB* 1966, p. 1410; *Münchener Kommentar zum Handelsgesetzbuch*, § 89 a HGB no. 56). In that case the aggrieved party is entitled to damages in accordance with § 89 a II HGB. This provision also applies by way of analogy to franchise and distribution contracts. Also according to

FINNISH law both unfairly long or short periods of notice can be adjusted according to art. 36 of the Contracts Act. There is, however, no case law on such adjustments.

6. In ENGLISH law, where the owner of the franchise has terminated the contract in breach of contract, for example by failing to give the required period of notice, the other party is entitled to damages. "…[A] notice provision would have to be strictly complied with in order to justify a contractual termination…"(Mendelsohn, "Franchising Law", 2nd ed. 2004, para 18.4.1). In SCOTTISH law the remedy for failure to give notice of the length required by the contract will generally be damages.

II. Calculation of the damages

7. The calculation of damages differs from country to country and from contract to contract. Under some legal systems there are specific rules concerning the calculation of the damages, whereas according to others general contract law or the general law of obligations determines the amount of damages. Moreover, in several systems the calculation of damages is a question of fact, not of law.

8. Under the following legal systems there is a specific rule concerning the calculation of damages.

9. Under BELGIAN law the terminating party must pay a sum that equals the remuneration that the other party would have obtained, had a proper notice period been observed (art. 18 § 3 *Handelsagentuurwet).* Also under DUTCH law the terminating party must pay a sum that equals the award a commercial agent would have obtained if the agency had been properly ended. To calculate the amount, the commission earned prior to the termination must be taken into account as well as all other circumstances (CC art. 7:441(1)). The aggrieved party may also claim the actual damages instead, provided that it proves the actual damages.

10. Under ITALIAN law there are authors who argue that the calculation of damages for non-observance of the notice period may be inferred from collective economic agreements (*AEC*) (*Baldi* (2001) 240). Pursuant to such collective agreements the amount of damages corresponds to as many twelfths of the commissions earned in the previous year (1 January-31 December) as the number of months of due notice period, or to a sum which is proportional to this amount, in the case the notice period only had to be partially observed. If the relationship has lasted for less than one year, the calculation has to be done on the basis of the monthly average of the commissions earned during that relationship.

11. As to distribution contracts, concrete damages must be paid under BELGIAN law (art. 3 *Alleenverkoopwet*). Under ITALIAN law, when it is the supplier who ends the relationship, it will have to provide the distributor with the lost net profit that it would have obtained, had the notice period been respected (*Baldi* (2001) 92). Under DUTCH law the elements taken into account to assess the amount of damages are the length of the relationship and the legitimate expectations of the aggrieved party as a result of statements made by the supplier. Moreover, the timing of the termination and its consequences are to be taken into account as well. Sometimes the reasons for termination and the customs in the distributor's branch are also taken into account (*HR* 21 June 1991, *NJ* 1991, 742).

12. Under other legal systems the amount of damages follows from general contract law. Under ENGLISH and SCOTTISH law the measure of damages is as in paragraph (2) of the present Article (*Robinson* v. *Harman* (1848) 1 Ex. 850, 855).

13. Also under FINNISH law general contract law applies to determine the amount of damages. The objective of awarding damages is that the aggrieved party will be in the same position had the contractual obligations been performed properly. Under

GREEK law positive and negative damage are compensated (art. 298 AK), whereas non-material damage is compensated only where this is explicitly provided by a legal provision (art. 299 AK). According to the case law the provisions of the civil code on mandate and, in particular art. 722 AK, apply by way of analogy to calculate damages. The damages cover at least the expenses incurred in the proper performance of the contractual obligations, including expenses incurred in the purchase and storage of stock and advertising (CA Piraeus 1251/1991 Epitheorisi Emporikou Dikaiou 1991, 625; CA Athens 1107719/91; First Instance Court of Athens 1007/1993, Epitheorisi Emporikou Dikaiou 1995, 226). The CA Piraeus considered the application of art. 723 AK, which provides that the principal must compensate the mandatory for any damage suffered in the execution of the mandate which was not due to his fault (CA of Piraeus 1251/91, Epitheorisi Emporikou Dikaiou 1991, 625; see also First Instance Court of Athens 305/1997 Epitheorisi Emporikou Dikaiou 1998, 531).

14. In SPAIN as the non-observance of the minimum notice period is a non-performance of a contractual obligation, the amount of indemnification is calculated according to the general contract rules (the loss proved to be caused by the non-performance). For instance, the STS 16 May 2007, RJ 2007\4616, allowed compensation only up to the amount of the commissions not received during the minimum notice period that should have been respected. However, the mere termination of a commercial agency of indefinite period by the principal, even when the notice period is legally observed, gives the agent the right to claim damages for loss caused by that unilateral decision under LCA art. 29.

IV.E.–2:304: Termination for non-performance

(1) Any term of a contract within the scope of this Part whereby a party may terminate the contractual relationship for non-performance which is not fundamental is without effect.

(2) The parties may not exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

The normal rule is that the parties can provide for termination on any ground they wish. See III.–1:109 (Variation or termination by notice) paragraph (1). Normally therefore they are free to provide that even a minor non-performance of any obligation under the contract will entitle the other party to terminate the relationship. If they have no such provision then only a fundamental non-performance will justify termination (III.–3:502 (Termination for fundamental non-performance). The list of definitions in the Annex provides that:

> A non-performance of a contractual obligation is fundamental if (a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result; or (b) it is intentional or reckless and gives the creditor reason to believe that the debtor's future performance cannot be relied on.

The general idea of the present Article is that, in the case of non-performance of the obligations under a commercial agency, franchise or distribution contract, or similar marketing relationship contract, the contractual relationship may be terminated for non-performance *only* when the non-performance is fundamental.

The normal freedom to stipulate for a right to terminate for any non-performance of an obligation however minor is not appropriate to contracts where parties sometimes make considerable investments in long-term relationships, and where they are frequently dependent on the continuity of such a relationship. Such a relationship may not be terminated by one party on account of the other party's mere non-performance of an obligation unless the non-performance is fundamental as defined above.

Therefore, these long-term commercial relationships may be terminated for non-performance if indeed (i) the non-performance is intentional or reckless and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance, or (ii) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract.

> *Illustration 1*
> An international chain of hamburger restaurants provides its franchisees with a book containing hundreds of pages and thousands of very detailed instructions relating to all aspects of hamburger selling. The franchise contract says that strict compliance with each of these instructions is of the essence of the contract. During a monthly inspection the franchisor discovers that hamburgers in one particular restaurant are on average 2% too hot. The franchisor may not terminate the franchise.

B. Interests at stake and policy considerations

Although the aggrieved party may have a considerable interest in strict compliance with the contract, e.g. because it needs to maintain the good reputation of the product or the trademark (in the case of a principal, a franchisor or a supplier) or because it risks running out of stock (in the case of the commercial agent, the franchisee or the distributor), the other party usually has an equally (or even more) important interest in the continuity of the contractual relationship.

Therefore, the aggrieved party is only allowed to terminate the contractual relationship where the non-performance is intentional or reckless and therefore undermines the relationship or it deprives the aggrieved party of most of the benefit under the contract.

However, if the contract is for an indefinite period either party may always terminate the relationship by giving notice under IV.E.–2:302 (Contract for an indefinite period). Unless it gives reasonable notice the party who wishes to end the contract will have to pay damages to the other party (IV.E.–2:303 (Damages for termination with inadequate notice)).

C. Character of the rule

This rule is mandatory: the parties cannot exclude it by contract. (see paragraph 2).

NOTES

I. In general

1. Under the majority of the legal systems any party may terminate a commercial agency, franchise or distributorship for non-performance in the instances mentioned in the definition of fundamental non-performance. However, these rules are sometimes included in general contract law and sometimes in the rules for specific contracts. For commercial agency contracts, the Directive (art. 16(a)) leaves this issue to the legal systems of the Member States (Art. 16 of the Directive: "Nothing in this Directive shall affect the application of the law of the Member States where the latter provides for the immediate termination of the agency contract: (a) because of the failure of one party to carry out all or part of his obligations; (b) where exceptional circumstances arise.").

II. Specific rules

2. In BELGIAN, POLISH, PORTUGUESE, SPANISH and SWEDISH law a specific rule concerning the termination of a commercial agency is included in the statutory provisions concerning commercial agency contracts. (BELGIUM: art. 20 *Handelsagentuurwet*; POLAND: CC art. 764 II § 1; PORTUGAL: art. 30 DL 178/86; SPAIN: art. 26 LCA; SWEDEN § 26 HaL.) In SPAIN the LCA art. 26 gives a party a right to terminate in case of non-performance (both partial and total) by the other party or when the other party is declared insolvent.
3. In ENGLAND, an attempt to terminate the contract for a non-performance which was not sufficiently serious to justify termination would itself amount to a wrongful repudiation of the contract, and any clause which purported to exclude or restrict the liability of the terminating party would, if it was one of his written standard terms of

business, be invalid under Unfair Contract Terms Act 1977, s. 3., unless it was fair and reasonable. However, it remains permissible for the parties themselves to define what shall amount to a sufficiently fundamental breach to justify termination. They would have to use very clear language to make a minor breach into a „breach of condition" that would justify such termination (see *L Schuler AG v Wickman Machine Tool Sales* [1974] AC 235, HL) but if clear enough language is used, there clause would be effective. See *Lombard North Central plc v Butterworth* [1987] QB 527 (prompt payment „of essence" of contract).

III. Non-specific rules

4. In BELGIAN law only a fundamental non-performance justifies the termination of a commercial agency (*un manquement grave de l´autre partie à ses obligations*). Apart from this possibility, there are also the possibilities which general contract law provides. Under SPANISH law, the LCA art. 26 does not deviate from general contract law (CC art. 1124) in the case of non-performance (*SAP* León 21 November 1996, AC 1996\2169, *Domínguez Gracía*, p. 1317, *Memento*, p. 471). If a distribution contract can be regarded as being subject to the same rules as a commercial agency contract ("identity of reason", CC art. 4) then LCA art. 26 applies by way of analogy. In all other instances general contract law applies.

5. In PORTUGUESE law either party can terminate a commercial agency (i) in the case of a serious or reiterated non-performance that renders the continuation of the contractual relationship impossible or (ii) in the case of unexpected circumstances that render the regular performance of the contractual obligations impossible. However, an adequate term of notice of termination is still required (art. 30 DL 178/86, *Pinto Monteiro* (1998) 106; *Pinto Monterio* (2002) 143). Art. 30 DL 178/86 is applied by way of analogy to franchise and distribution contracts (*Pinto Monteiro* (2002) 142; *Pestana de Vasconcelos* (2002) 85).

6. According to § 26 of the SWEDISH HaL, each party may terminate the contractual relationship immediately if the other party has failed to fulfil contractual or statutory obligations and the non-performance is fundamental for the terminating party and the other party realised or should have realised this. Concerning commission agencies, there is no liability for damages for premature termination if the other party has committed a fundamental breach of contractual duties, KommL § 51(2). Concerning distribution, the rules on commission agencies can probably be used by way of analogy.

7. As to distribution contracts, art. 2 of the BELGIAN *Alleenverkoopwet* determines that in the case of fundamental non-performance the contractual relationship can be terminated.

8. In ENGLAND, the courts require strong reasons to justify termination of franchise contracts and will only permit termination for breach in accordance with contractual terms allowing termination for breach or where the other party has committed a repudiatory breach of contract. (Mendelsohn, Martin, "Franchising Law", para 18.4.1, 2nd ed. (2004), Richmond.)

9. Under some legal systems, termination for important and urgent reasons also includes termination for non-performance. See below.

IV. Termination for important and urgent reasons

10. Under a number of legal systems a commercial agency, franchise or distributorship may be terminated also for important and urgent reasons.

11. In some legal systems termination for important and urgent reasons also includes termination for non-performance.

12. As to commercial agency contracts, such a rule is included in the legal systems of the following countries: AUSTRIA: § 22 *HVertrG* (*vorzeitige Auflösung aus wichtigem Grund*)*;* GERMANY: § 89 I (1), § 89 a I (2) HGB (*Kündigung aus wichtigem Grund*); FINLAND: art. 25 of the Act on Commercial Agents; ITALY: Cass. applies CC art. 2119 by way of analogy to commercial agency contracts: Cass. sez. lav. 2-5-2000, n. 5467, *Disc. comm.*, 2000, 1078, with note by F. di Ciommo, *Diritto alle provvigioni e recesso dell´agente per giusta causa*, Cass. 5-11-1997, n. 10852, *Rep. Foro. It.*, 1997, voce *Agenzia*, n. 25, Cass. 15-11-1997, n. 11376, *Rep. Foro It.*, 1997, voce *Agenzia*, n. 24, Cass. 14-1-1999, n. 368, *Rep. Foro It.*, 1999, voce *Agenzia*, n. 8, Cass. 1-2-1999, n. 845, *Rep. Foro It.*, 1999, voce *Agenzia*, n. 12, Cass. 20-4-1999, n. 3898, *Rep. Foro It.*, 1999, voce *Agenzia*, n.15 (*guista causa*); NETHERLANDS: CC arts. 7:339, 7:440; SWEDEN § 26 HaL.

13. Under AUSTRIAN law. the possibility of termination for urgent and important reasons has generally been accepted for long-term contracts (OGH 1999/11/16 10Ob247/99t). As to franchise contracts see OGH 1987/05/05 4 Ob 321/87, OGH 1987/10/21 1 Ob 641/87, OGH 1989/05/09 4Ob52/89, OGH 1991/04/10 9 Ob A 8, 9/91. As to distribution contracts see: OGH 1996/05/23 6Ob661/95. With respect to distribution contracts the rules concerning commercial agency contracts may apply by way of analogy (OGH 2000/05/25 8Ob295/99m).

14. Under GERMAN law the rule concerning commercial agency contracts is applied to franchising and distribution contracts by way of analogy (*Küstner/Thume*, no. 1789; *Münchener Kommentar zum Handelsgesetzbuch*, § 89 a HGB no. 9). An "important reason" is determined by taking into account all the circumstances of the case and the interests of the parties (*Koller/Roth/Morck*, § 89 a HGB no. 4). All the instances to which Article 1:304 refers, are recognised as *wichtiger Grund* under GERMAN law. (*Koller/Roth/Morck*, § 89 a HGB no. 4; *Münchener Kommentar zum Handelsgesetzbuch*, § 89 a HGB nos. 18, 29, 43).

15. Also under the SWEDISH law concerning all long-term contracts there is a right to terminate the relationship immediately for important reasons, mostly applicable in severe cases of breach of contract by the other party.

16. According to the BELGIAN statutory rules on commercial agency, either party may terminate the contractual relationship because of circumstances which render further future co-operation impossible. (*des circonstances exceptionelles rendent définitivement impossible toute collaboration professionelle entre le commettant et l´agent* art. 19 *Handelsagentuurwet*).

V. Agreed right to terminate

17. Under GERMAN law the rule concerning termination for important and urgent reasons, which includes termination for fundamental non-performance, is mandatory (§ 89a II HGB). That is to say parties cannot deviate therefrom by contract.

18. However, under other legal systems parties may stipulate in their contracts which circumstances justify termination. This is the case under FINNISH law. However, if such a stipulation is unfair, the court can adjust the contract (Article 36 of the Contracts Act). Also under DUTCH law, parties may stipulate circumstances that justify termination. However, such an agreement is subject to good faith. This is also the situation under BELGIAN law with respect to parties to commercial agency and distribution contracts. However, such stipulations are policed by the courts.

19. Under FRENCH commercial agency law, parties are not allowed to stipulate that certain obligations are of the essence and justify the termination of the contractual relationship (Cass. 28 May 2002).

20. In SPANISH law, due to the lack of specific provisions and the practical difficulties in deciding in a particular case which obligations are of the essence, the distribution contracts normally establish when the non-performance is considered fundamental and the termination is justified (*Domínguez García* in *Alberto Bercovitz*, Contratos Mercantiles, p. 614).

IV.E.–2:305: Indemnity for goodwill

(1) When the contractual relationship comes to an end for any reason (including termination by either party for fundamental non-performance), a party is entitled to an indemnity from the other party for goodwill if and to the extent that:

(a) the first party has significantly increased the other party's volume of business and the other party continues to derive substantial benefits from that business; and

(b) the payment of the indemnity is reasonable.

(2) The grant of an indemnity does not prevent a party from seeking damages under IV.E.–2:303 (Damages for termination with inadequate notice).

COMMENTS

A. General idea

Irrespective of whether the contract was for an indefinite or a definite period and irrespective of the way in which the contract ended (whether or not for fundamental non-performance), the mere fact that the contractual relationship comes to an end may lead to a transfer of goodwill. To the extent that such a transfer has actually taken place and indemnification would be reasonable in the circumstances there is a ground for the payment of an indemnity. This Article provides the other party with a remedy.

Goodwill has its own value which must be differentiated from the expectation interest under the contract. Therefore, it should always be refunded irrespective of the way the contractual relationship is ended. Indemnity for the clientele does not depend on any sort of fault. It will cumulate with damages in the case of the premature termination of the relationship without adequate notice (see IV.E.–2:303 (Damages for termination with inadequate notice)).

B. Interests at stake and policy considerations

The entitlement to an indemnity for transfer of goodwill is based on considerations similar to those underlying the law on unjustified enrichment: a party should not be unjustifiably enriched as the result of the termination of a long-term commercial relationship.

C. Generated goodwill

A party which claims an indemnity for the transfer of goodwill has to prove that it has significantly increased the other party's volume of business. In other words, it must prove that the goodwill it had was transferred to the other party as a result of the termination of the contractual relationship. It is crucial that the agent, franchisee or distributor has played an active role in increasing the volume of business of the other party. This means that where the volume has increased as a consequence of a new client from a party's exclusive territory, this party is not automatically entitled to an indemnity.

The most typical example of transfer of goodwill is where the principal, franchisor or supplier has access to lists of clients and other similar data either because the commercial agent, franchisee or distributor has handed such lists over after the termination of the relationship or because the principal, franchisor or supplier otherwise has access to such data (e.g. because the commercial agent, franchisee or distributor has regularly passed such information on to the principal, franchisor or supplier during the relationship.

D. Commercial agency, franchise and distributorship distinguished

In the case of commercial agency contracts the termination of the agency will normally lead to a transfer of goodwill. Therefore, frequently there will be a right to compensation. On the other hand, in the case of franchise the goodwill is rarely the goodwill of the franchisee since, typically, clients are attracted by the image of the brand and the network. In the case of distributorships, sometimes the goodwill (clientele) will be attracted by the supplier's products or its brand (especially in the case of exclusive distribution agreements). However, it may also be the distributor who, like an agent, has created the market for the products. In the latter case, the distributor may be entitled to goodwill compensation after the ending of the relationship.

E. Continuous substantial benefits

The party claiming an indemnity must prove that the generated goodwill stays with the other party and that it is substantial. Normally, the benefits which the other party continues to derive decrease gradually over time. This must be taken into account. Moreover, the general turnover of this specific principal, franchisor or supplier may decrease in time, e.g. because the general market for its products deteriorates. Such a development should also be taken into account. However, the principal, franchisor or supplier is presumed to continue to derive substantial benefits from the generated goodwill even if it sells its business or client list to a third party if it can be shown that the purchaser will use the client base.

F. Reasonable indemnity

A party who claims an indemnity for the transfer of goodwill also has to prove that the indemnity it claims is reasonable in the circumstances. I.–1:104 (Reasonableness) provides that "Reasonableness is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices." Obviously, the reasonableness test leaves some room for interpretation.

For commercial agency, Chapter 2 provides a specific rule on how to calculate goodwill compensation. (IV.E.–3:312 (Amount of indemnity)).

G. Relation to damages for irregular termination

The grant of an indemnity for goodwill does not prevent a party from seeking damages. In other words, damages for termination with inadequate notice and an indemnity for goodwill can, in principle, cumulate.

However, when establishing whether an indemnity for goodwill is reasonable in the circumstances the entitlement of the aggrieved party to damages for irregular termination should be taken into account. In other words, the same loss cannot be compensated twice, once as loss of benefit (damages amounting to the expectation interest) and once as 'loss' of goodwill (indemnity for the transfer of goodwill).

H. Relation to compensation for post-contractual non-competition

If a party, as a result of a valid post-contractual non-competition clause, is not allowed to compete with its former principal, franchisor or supplier, and if, as a result clients who would have moved to it had it started a competing activity now move to its former principal or

franchisor or supplier, the combined effect of termination and the post-contractual non-competition clause may be a transfer of goodwill in the sense of this Article, which gives rise to a right to be indemnified. However, if the impossibility to compete is already compensated by an entitlement for the commercial agent, franchisee or distributor to compensation (compensation for post-contractual non-competition), as will usually be the case, then the commercial agent, franchisee or distributor is not impoverished, and is therefore not entitled to an indemnity for goodwill.

I. Relation to post-agency commission

Under certain circumstances the agent is entitled to commission for contracts concluded by the principal after the agency has ended. If a claim for a goodwill indemnity under the present Article is considered, the entitlement to such commission must be taken into account in two ways. First, if such entitlement exists no indemnity is due for the transfer of the same clientele. Secondly, the fact that no entitlement is due is an indication that no transfer of goodwill has taken place, and that therefore the agent is not entitled to goodwill compensation. In sum, it is very unlikely that a claim by an agent for goodwill compensation under this Article will succeed.

NOTES

I. Indemnity for goodwill

1. In the case of commercial agency, after the termination of the agency the commercial agent is entitled to either indemnity for goodwill (art. 17(2) Directive) or compensation for damages (art. 17(3) Directive). In transposing the Directive into their legal systems the Member States had to choose one of these options. The present Article includes the option of art. 17(2) of the Directive, which is also transposed in the majority of the legal systems. (Art. 17(2) of the Directive states: "(a) The commercial agent shall be entitled to an indemnity if and to the extent that: – he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with customers, and – the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20; (b) The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question; (c) The grant of such an indemnity shall not prevent the commercial agent from seeking damages.")
2. However, the present Article differs from the Directive to the extent that according to art. 18 of the Directive no indemnity is awarded in the case of fundamental non-performance by the commercial agent (art. 18(a) Directive) or when the commercial agent has terminated the relationship without any non-performance on the side of the principal (art. 18(b) Directive). Under the present Article it is also possible to claim indemnity in the case of non-performance by either party. (Art. 18 of the Directive: "The indemnity or compensation referred to in Article 17 shall not be payable: (a) where the principal has terminated the agency contract because of default attributable

to the commercial agent which would justify immediate termination of the agency contract under national law; (b) where the commercial agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities; (c) where, with the agreement of the principal, the commercial agent assigns his rights and duties under the agency contract to another person."

3. Art. 17(2) of the Directive is based on GERMAN law (Commission Report, 1). Under GERMAN case law and literature specific criteria have been developed to establish whether the conditions laid down in Art. 17(2) are fulfilled. Similar criteria are included in IV.E.–3:312 (Amount of indemnity) see also the notes on that Article). Moreover, art. 17(2) b includes a maximum amount of indemnity.

4. Art. 17(2) of the Directive is transposed into the following national provisions: § 24 of the AUSTRIAN HVertG (*Ausgleichsanspruch*); art. 20 of the BELGIAN *Handelsagentuurwet*; art. 28 of the FINNISH Act on Commercial Agents; § 89 b I nos. 1 and 3 of the GERMAN HGB. (However, in addition, § 89 I b no. 2 HGB requires that the commercial agent loses its commission due to the ending of the contract with the customers which the commercial agent acquired.); art. 9 of the GREEK Law on Commercial Agency 219/1991; art. 1751 of the ITALIAN CC; art. 7:442 of the DUTCH CC; art. 764 III of the POLISH CC; arts. 33, 34 and 35 of the PORTUGUESE DL 178/86; art. 28(1), (2) SPANISH LCA; § 28(1) of the SWEDISH HaL.

5. Under UK law parties have the possibility of stipulating that the commercial agent is entitled to indemnity for goodwill after the end of the agency. However, if the parties fail to do so the commercial agent will be entitled to compensation for damages (Reg. 17).

II. Compensation for damages

6. Art. 17(3) of the Directive includes the possibility of compensation for damages. It states: "The commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with the principal. Such damage shall be deemed to occur particularly when the termination takes place in circumstances: – depriving the commercial agent of the commission which proper performance of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the commercial agent's activities, – and/or which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal's advice." This provision of the Directive is based on FRENCH law (Commission Report, 5) and is included in art. L. 134-12 of the FRENCH Ccom.

7. Under FRENCH law the level of compensation is established according to the global sum of the last two years' commission or the sum of 2 years' commission calculated over the average of the last three years. However, a principal may prove that the commercial agent's loss is less. Moreover, there is no maximum level of compensation. (Commission Report, 5 ff). The amount of compensation based on Ccom art. L 134-12 and actual damages do not cumulate (Cass. 25-6-2002).

8. Under UK law the commercial agent is entitled to compensation for damage if the parties fail to stipulate in their contract that the commercial agent is entitled to indemnity (Reg. 17(2)). Initially the French method of establishing compensation is taken as a starting point. However, in some cases less compensation has been provided than the global sum of the last two years' commission or the average sum of 2 years'

commission calculated over the average of the last three years (*Ingmar GB Limited* v. *Eaton Leonard Inc.* [2002] ECC 5, [2001] EurLR 756). However, it has been held subsequently that the French method is not to be followed and the and the United Kingdom method is now laid down by the recent House of Lords decision in *Lonsdale v Howard & Hallam Ltd* [2007] UKHL 32, [2007] 1 WLR 2055, which supersedes all earlier authority. The French practice appears to be based on the assumption that agencies in France change hands at this sort of valuation, whereas there is no such market in the United Kingdom. The courts of the United Kingdom should calculate the compensation payable ''by reference to the value of the agency on the assumption that it had continued'' [2007] UKHL 32 at [21]).

III. Indemnity for goodwill in the case of distribution contracts

9. Under BELGIAN law, art. 3 of the *Alleenverkoopwet* entitles the distributor to an indemnity payment after the termination of the contractual relationship. However, there is no entitlement to indemnity of goodwill if the relationship is terminated because of the non-performance of the distributor. In order to asses the amount of indemnity the following factors must be taken into account: (1) the value of the customers which the distributor acquired and from which the supplier will benefit after the termination; (2) the costs which the distributor incurred and from which the supplier benefits after the termination; (3) the costs involved in employing employees.

IV. Application of the commercial agency rule concerning indemnity for goodwill by way of analogy to franchise or distribution contracts

10. Under AUSTRIAN and FINNISH law, the national rules resulting from the transposition of art. 17(2) of the Directive are applied by way of analogy to franchise and distribution contracts. (See the decisions of the AUSTRIAN OGH: OGH 2000/10/23 8Ob74/00s, OGH 1999/12/15 6Ob247/99p, OGH 1999/03/30 10Ob61/99i, OGH 1998/11/24 1Ob251/98p, OGH 1997/12/17 9Ob2065/96h; FINNISH law: *Halila-Hemmo* (1996) 281.)

11. Under GREEK and PORTUGUESE law the commercial agency rule is applied by way of analogy to distribution contracts (see for GREEK law *Georgakopoulos* (1999) 434; *Georgakopoulos* (1998) 113, Marinos, annotation in First Instance Court of Athens 1097/1999, *Epitheorisi Emporikou Dikaiou* (1999) 49; see for PORTUGUESE law: STS 4-5-1993, (1993-II) *Colectânea de Jurisprudência* 78; STS 22-11-1995, (1995-III) *Colectânea de Jurisprudência* 115, STS 22-11-1995, (1995-III) *Colectânea de Jurisprudência* 115).

12. Under GERMAN law it is unclear whether § 89 b HGB applies by way of analogy to franchise and distribution contracts. A majority of the decisions and legal authors favour application by way of analogy to franchise and distribution contracts (pro: BGH, *BB* 1959, 7; BGH, *NJW* 1983, 1789; BGH, *WM* 1993, 1466; *Koller/Roth/Morck*, Vor § 84 HGB nos. 10, 11; *Küstner/Thume*, no. 1466–1477; *Küstner/Thume*, nos. 1816–1823; *Münchener Kommentar zum Handelsgesetzbuch*, § 89 b HGB nos. 18–24; contra: *Oberlandesgericht Köln*, Entscheidungen zum Wirtschaftsrecht 1986, 1217; *Bechtold*, NJW 1983, 1393; *Kroitzsch*, BB 1977, 1631).

13. Also in other member states authors differ as to whether the rule on commercial agency can be applied way of analogy to franchising. See for ITALY: *Pardolesi, Frignani* (1999) 191; SPAIN: Bogaert/Lohmann, 2000. In GREECE some authors argue that the rules concerning commercial agency can be applied by way of analogy to franchise contracts (*Voulgaris, Georgiadis*). Also in PORTUGAL authors do not agree as to whether an indemnity is payable in the case of franchise contracts (pro:

Alexandre (1991) 368, *Olavo* (1988) 170, *Ribeiro* (1992) 58, *Pestana de Vasconcelos* (2000) 94; contra: (*Cordeiro* (1988) 83).

V. No indemnification for goodwill in the case of franchise and distribution contracts

14. Under ITALIAN law no goodwill is payable in the case of distribution contracts and the same applies according to DUTCH law (*Smit* (1996) 18; *Barendrecht & Van Peursem* 164; *Van de Paverd* (1999) chapters 4 and 5) and SPANISH law.

15. According to FRENCH, ENGLISH, SCOTTISH and SWEDISH law no indemnification for goodwill is payable in the case of franchise or distribution contracts. (For FRANCE see: Leloup, no. 2101).

VI. Entitlement to damages because of non-observance of notice period

16. As stated in note 1, Art. 17(2) c of the Directive establishes that the entitlement to indemnity does not prevent the commercial agent from seeking damages. From the Commission Report it follows that it concerns both damages for non-performance and damages in lieu of a notice period (Commission Report, 5). If the facts of a case justify a claim based on some other ground - non-performance of a contractual obligation, non-contractual liability for damage or unjustified enrichment – the present Article does not prevent the aggrieved party from resorting to such a claim. Art. 17(2 c) of the Directive has been transposed into the following legal systems: (ITALY: CC art. 1751; POLAND: CC art. 764 III § 3).

17. AUSTRIAN law does not include such a rule in the HVertrG nor does DUTCH law. However, in Dutch literature it has been accepted that indemnity may cumulate with the damages both in lieu of a notice period and for non-performance (*Asser-Kortmann*, no. 236).

18. Under BELGIAN law (art. 21 *Handelsagentuurwet*) if the amount of indemnity does not include the total amount of damages incurred by the commercial agent, the commercial agent may claim the difference between the amount of indemnity and the damages in fact incurred, if the commercial agent is able to prove this.

19. Under SPANISH law, the payment of indemnity for goodwill is regulated only in the Agency Law, art. 28. The agent has to prove that due to the agent's activity, the operations with the pre-existent clientele have substantially increased or that a new clientele was created (STS 19 November 2003, RJ 2003\8335). However, some courts infer a right to compensation for goodwill from a long duration of the terminated agency, as it is obvious that the relations were satisfactory for the parties and the benefits were mutual (SAP Asturias 7 February 2005, JUR 2005\92189) The law specifies that the agent has a right to an indemnification when the principal continues to derive benefits from the business due to the contractual activity of the agent and the existence of clauses on post-contractual non-competition, loss of commission and other circumstances affecting the equity of the contractual parties justify compensation for the transfer of the goodwill. The right is enforceable even when the agency terminates because of the agent's death (art. 28.2 LCA). The case law states that this right has a mandatory character; therefore a contractual waiver of the right to compensation for goodwill is invalid (STS 7 April 2003, RJ 2003\2951, STS 27 January 2003, RJ 2003\1137). Nevertheless, the amount of the indemnification must not exceed the average amount of the annual remuneration received by the agent during the last five years of the contract (art. 28.3 LCA). The parties are free to establish clauses calculating the indemnification, although the court may modify the amount according to the specific circumstances (*Raúl Bercovitz Álvarez* in *Alberto*

Bercovitz, Contratos Mercantiles, p. 532; SAP Barcelona 8 June 2005, JUR 2005\176788). Nevertheless, this right may cumulate with a right to claim an indemnification for loss caused as a consequence of a unilateral termination of the agency (art. 29 LCA), unless the principal terminates due to a fundamental non-performance of the agent, the agent assigned the contractual rights and obligation to a third party or when the agent has rescinded the contract (art. 30 LCA) – in those cases the agent has no right to indemnification. Regarding the application of the provisions on commercial agency by way of analogy to other contracts, the case law *prima facie* recognises a right to compensation for goodwill in distribution contracts (STS 12 June 1999, RJ 1999\4292; STS 14 February 1997, RJ 1997\1418). However, this opinion is not followed unanimously by the courts and there are contrary decisions as well (STS 6 November 2006, RJ 2006\9425). Therefore, the application of those provisions must be preceded by a verification if the circumstances in every case allow such analogy, as the clientele in the distribution contract does not belong exclusively to the principal supplier (*Raúl Bercovitz Álvarez* in *Alberto Bercovitz*, Contratos Mercantiles; p.535; STS 10 July 2006, RJ 2006\8323). Moreover, in a distribution contract, a clause of waiver of goodwill compensation is valid (STS 18 March 2002, RJ 2002\2849). In the case of a franchise, the case law is divided as well: there are decisions which admit the application of the LCA art. 29 by analogy LCA (SAP Barcelona 10 June 2004, AC 2004\1100) and those which refuse to apply this article to a franchise (AAP Álava 10 April 2006, AC 2006\899).

IV.E.–2:306: Stock, spare parts and materials

If the contract is avoided, or the contractual relationship terminated, by either party, the party whose products are being brought on to the market must repurchase the other party's remaining stock, spare parts and materials at a reasonable price, unless the other party can reasonably resell them.

COMMENTS

A. General idea

These Comments will refer to commercial agents, franchisees and distributors and their counterparts but the same comments apply to parties to other contracts within the scope of this Part.

If a commercial agent, franchisee or distributor is left with excess stock, spare parts and advertising and other materials after the contract has been avoided or the contractual relationship terminated, the principal, franchisor or supplier must repurchase those objects, and it must do so at a reasonable price. However, if the agent, franchisee or distributor can itself reasonably resell them, the principal, franchisor or supplier is under no obligation to repurchase them and to incur useless transaction and transportation costs.

This rule is normally more relevant to distribution and franchise relationships than to commercial agency, since in the latter no property normally passes. However, where the agent has actually bought advertisement materials or spare parts or other objects from the principal this rule will also protect the agent.

B. Interests at stake and policy considerations

After the premature termination of the contractual relationship, the commercial agent, franchisee or distributor will frequently be left with excess stock, spare parts and materials which will usually no longer be of any value to it. With the termination the agent, franchisee or distributor may even have lost the right to use or resell them (especially in the case of a valid post-contractual non-competition clause). On the other hand, the excess stock, spare parts and materials will normally still be useful to the principal, franchisor or supplier which can either use them itself or sell them to the new or other agents, franchisees or distributors. Therefore, the principal, franchisor or supplier must repurchase them.

As a result of the termination of the contractual relationship the agent, distributor, or franchisee finds itself in a weak bargaining position. Therefore, this Article provides that the principal, franchisor or supplier must pay a reasonable price.

However, an obligation to repurchase stock, spare parts and materials would be inefficient where the agent, franchisee or distributor can itself reasonably resell them. Therefore, in those cases no such obligation exists.

C. Reasonable price

In many cases a reasonable price will be the price for which the principal, supplier or franchisor can resell the objects in question to the new or other agents, franchisees or

distributors. For very old stock this may mean that the price is very low. Another circumstance which may be relevant to establish whether it is a reasonable price, is whether minimum obligations to buy were imposed unilaterally by the principal, franchisor or supplier on the commercial agent, franchisee or distributor.

In principle, it should be practically impossible for the commercial agent, franchisee or distributor to speculate with regard to the price to be paid by the principal, supplier or franchisor by buying unusually large amounts, since normally the commercial agent, franchisee or distributor will only hear of the principal's, supplier's or franchisor's intention to terminate the relationship when the notice is given. However, should it be established that the agent, franchisee or distributor has nevertheless bought unusually large amounts on a falling market, successful speculation should be avoided by taking this fact into account when establishing what amounts to a reasonable price in the circumstances.

Illustration 1
A distributorship for ready to wear designer clothes has been terminated. The distributor still has some clothes in stock from the collections of the present and the previous year. The price which the supplier must pay the distributor, differs from collection to collection. A reasonable price for the collection of the present year probably corresponds to the price which the distributor paid. However, the price which the supplier must pay for the collection of the previous year is probably considerably lower.

D. No obligation to repurchase

There is no obligation for the principal, supplier or franchisor to repurchase stock, spare parts and materials when the agent, franchisee or distributor can itself reasonably resell them. The burden of proof is on the principal, supplier or franchisor. 'Reasonably' means without great effort, for a reasonable price and within a reasonable time.

E. Relation to the period of notice

To the extent that the principal, franchisor or supplier has given the commercial agent, franchisee or distributor, the opportunity (and, where necessary, the right) to use up its remaining stock, spare parts and materials or to resell them to the public or to the new or other agents, franchisees or distributors, the former is not under an obligation to repurchase them.

NOTES

Obligation to repurchase stock, spare parts and materials

1. Many legal systems include a similar rule. However, they differ with regard to their scope of application and the price to be paid.
2. Under GERMAN law such an obligation follows from the *nachvertragliche Treuepflicht* for long-term commercial contracts, which is based on good faith (§ 242 BGB, *Martinek/Semler* § 21 nos. 56-60, BGH, *BB* 1970, 1458). However, there is no such obligation in case the agent, distributor or franchisee ends the relationship, since this would be a case of *venire contra factum proprium* (BHG, *BB* 1970, 1460; *Martinek/Semler*, § 21 no. 59 et seq.).

3. With respect to franchising under ITALIAN law a lower court decided in a way which is similar to the rule in the Article (Pretore di Roma, 11 June 1984, *Sangemini s. p. a.* e *Soc. Acqua minerale Ferrarelle* c. *Schweppes Int. Ltd.* e *Soc. Acqua minerale S. Benedetto*, *Foro it.*, 1984, I, 2909 (with note by Pardolesi) and *Giur. it.* ,1985, I, 2, 711 (with note by Frignani).

4. With regard to distribution, GREEK courts seem to apply the rules concerning mandate, which include a similar rule to the one in the Article, by way of analogy (art. 722 AK, CA Piraeus 1251/1991 Epitheorisi Emporikou Dikaiou 1991, 625; CA Athens 11077/1991; First Instance Court of Athens 1007/1993, Epitheorisi Emporikou Dikaiou 1995, 226). Moreover, if the principal refuses to repurchase the stock, the distributor may continue to sell the stock. The price the supplier must pay is the price the distributor paid to obtain the stock, spare parts and other materials. These rules may be applied by way of analogy to agency and franchising. In SPAIN there is no specific legal provision on the matter. Some scholars consider that in the absence of a contractual obligation on the supplier to repurchase the stock left, the distributor has no right to have it repurchased, as the distributor assumed the risk of the contract (*J.L. Díaz Echegaray* in *Alberto Bercovitz*, Contratos Mercantiles; p. 567; SAP Jaén 13 September 2000, AC 2000\2223). According to other authors such an obligation follows from good faith (*Memento* (2002) 487; *Sánchez Calero* (2000) 178, *Dominguez García* (1997) 1372). However, the price to be paid is the price for which the goods were sold to the distributor (SAP Madrid 16 September 2004 AC 2004\2113) minus the possible depreciation of the goods. (*Dominguez García* (1997) 1372, *Sánchez Calero* (2000). There is no such obligation if the distributor may continue to sell the goods.

5. Further, it must be noted that in some countries franchise contracts usually include a similar obligation (SWEDEN: *Sohlberg*, 75). However, in GERMANY such a term is not common in practice (*Martinek/Semler*, § 21 no. 56).

6. Under the minority of the legal systems there is no such rule. (AUSTRIA, ENGLAND, FINLAND, THE NETHERLANDS, SCOTLAND, SWEDEN (*Söderlund*, 143; *Håstad*, 295). Also the Directive does not include such a rule.

7. Under FRENCH law the supplier only has to repurchase the stock in the case of an abusive termination of the relationship (Cass. Com. 13. 05. 1975, *JCP* 1975.IV, 211; Cass. Com. 26. 10. 1982, *Bull. civ.* IV, 275).

Section 4: Other general provisions

IV.E.–2:401: Right of retention

In order to secure its rights to remuneration, compensation, damages and indemnity the party who is bringing the products on to the market has a right of retention over the movables of the other party which are in its possession as a result of the contract, until the other party has performed its obligations.

COMMENTS

A. General idea

These Comments will refer to commercial agents, franchisees and distributors and their counterparts but the same comments apply to parties to other contracts within the scope of this Part.

As a result of this Article the commercial agent, franchisee or distributor is entitled to refuse to give movables which are owned by the principal, franchisor or supplier back to the principal, franchisor or supplier (or, as the case may be, to the new owner) as long as the principal, franchisor or supplier has not fully paid the remuneration, compensation, damages, and indemnity to which the commercial agent, franchisee or distributor is entitled. This right is of special significance as a means to exercise pressure on the former principal, franchisor or supplier after the contract has expired or has been terminated or ended.

The right of retention is effective not only towards the (former) principal, franchisor or supplier but also towards third parties (e.g. the new owner of the goods).

This rule is normally more relevant to commercial agency relationships, in which normally no property passes, than to franchise and distribution relationships. Nevertheless, where appropriate, this rule may also protect the claims of franchisees and distributors.

B. Interests at stake and policy considerations

This rule intends to protect the interests of the commercial agent, franchisee or distributor when its money claims towards its (former) principal, franchisor or supplier remain unpaid. This Article provides it with some security.

C. Relation to other provisions

The right of retention will be dealt with in Book IX (Proprietary Security Rights in Movable Assets). The right of retention will usually be also a right to withhold performance in the sense of III.–3:401 (Right to withhold performance of reciprocal obligation). That is the case whenever the commercial agent, franchisee or distributor is under a contractual obligation to return the goods it retains. However, contrary to the right to withhold performance, the right of retention is also effective towards third parties.

D. Right of retention

All the ordinary rules relating to the right of retention apply. This means, among other things, that such a right is also effective vis-à-vis third parties. See further Book IX (Proprietary Security Rights in Movable Assets).

NOTES

Right of retention

1. In most legal systems there is a right of retention in such cases. However, the rules differ from country to country.
2. Under PORTUGUESE and SWEDISH law there is a similar specific statutory rule with respect to commercial agency (Art. 35 of the PORTUGUESE DL 178/86, 754 CC, *Pinto Monteiro* (1998) 119; SWEDISH HaL § 15). Under PORTUGUESE law this rule is applied by way of analogy to franchise and distribution.
3. Also in GERMANY there is a specific statutory rule that applies to commercial agency contracts and is applied by way of analogy to franchise and distribution contracts. However, under GERMAN law such a right only exists after the ending of the contract. Moreover, the retention right is restricted to documents provided by the principal. In addition, this right of retention may only concern entitlements to commission and the compensation of expenditures. This rule is applied to franchise and distribution contracts by way of analogy (*Münchener Kommentar zum Handelsgesetzbuch*, § 88 a HGB no. 8). Also § 19 of the AUSTRIAN *HVertrG* includes a right of retention. However, this right is restricted to samples.
4. In other countries a right of retention is inferred from general private or commercial law. Under ENGLISH law the general rules concerning the possessory lien accordingly apply to commercial agency, franchise and distribution (*Bowstead & Reynolds* 7-073, *Goode* 619-621). The same is true of SCOTTISH law (*McBryde* chapter 20 (part 9). Under GERMAN law, apart from § HGB, also the general rules concerning a right of retention apply (§§ 273, 274 BGB, *Zurückbehaltungsrecht* or § 369 HGB *kaufmännisches Zurückbehaltungsrecht*). Depending on the applicable statutory rule, different requirements must be met. Unlike § 369 HGB, §§ 273, 274 BGB require a connection between the right of the commercial agent, franchisee or distributor and the right of the principal, franchisor or supplier. Furthermore, § 369 HGB also gives the retaining party, under particular circumstances, the right to satisfy its claim from the goods which it has kept. Under DUTCH law either party has a right of retention provided there is a sufficient connection between the obligation of the commercial agent, franchisee or distributor on the one hand and the obligations of the principal, franchisor and supplier on the other (CC arts. 6:52, 3:290).
5. The only case where SPANISH law provides a right of retention is in the framework of service contracts: the supplier of a service may retain the movable asset on which work has been done until payment is made (CC art.1600). There is no similar provision in relation to distribution contracts. However, in the case law, an application by analogy to a commercial agency of Ccom art. 276 that establishes for the commission contract a right to retain the goods until the commission is paid, is accepted by the courts (SAP Barcelona 1 March 2005, JUR 2005\117408).

IV.E.–2:402: Signed document available on request

(1) Each party is entitled to receive from the other, on request, a signed statement in textual form on a durable medium setting out the terms of the contract.

(2) The parties may not exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

The function of this Article is twofold: (i) providing the requesting party with information and (ii) facilitating evidence. It does not, however, introduce any formal requirement for the validity of the contract.

B. Interests at stake and policy considerations

Especially in the case of a dispute, the parties will usually need a statement in textual form on a durable medium on which to rely for evidence. In most cases the obligation will not be very burdensome: some textual record of what was agreed upon usually exists. However, it should be kept in mind that this record can be requested either at the conclusion of the contract or during the performance of the obligations under it and even within a reasonable time after the contractual relationship has ended. Therefore, a party must keep a record even some time after the end of the relationship.

C. Terms of the contract

The signed document that a party may request must set out the terms of the contract. This means that if a document is requested after changes have been made to the initial contract, the party requesting the document is entitled to the most recent version of the terms of the contract and not only to the initial one.

D. Signed statement in textual form on a durable medium

The meanings of "signed", "in textual form" and "on a durable medium" are given in I.–1:106 ("In writing" and similar expressions) and I.–1:107 ("Signature" and similar expressions). See also the Comments on those Articles.

E. Character of the rule

This rule is mandatory; any deviation from it by the parties to the detriment of the party who would benefit from it remains without effect.

NOTES

I. Written document

1. This rule corresponds to Art. 13(1) of the Directive which was transposed into the legal systems of the Member States with respect to commercial agency. (Art. 13(1) of the Directive: "(1) Each party shall be entitled to receive from the other on request a signed written document setting out the terms of the agency contract including any

terms subsequently agreed." § 4 of the AUSTRIAN *HvertG*; art. 5 of the BELGIAN *Handelsagentuurwet*; UK: reg. 13; art. 3 of the FINNISH Act on Commercial Agents; art. L.134-2 of the FRENCH Ccom; § 85 of the GERMAN HGB; GREECE art. 8 Para 1b; art. 1742 of the ITALIAN CC; DUTCH CC art. 7:428 para. 3; PORTUGAL: art. 1(2) Decreto-lei 178/86; SPAIN: art. 22 LCA.)

2. Under GERMAN law this rule also applies by way of analogy to franchise and distribution contracts (see *Münchener Kommentar zum Handelsgesetzbuch*, § 85 HGB no. 1).

II. Formal requirements

3. However, according to art. 13 II of the Directive the legal systems of the Member States may provide that a contract in writing is a validity requirement for the contract. (Art. 13(2) of the Directive: "Notwithstanding paragraph 1 a Member State may provide that an agency contract shall not be valid unless evidenced in writing."). According to the case law of the ECJ this is the only formal requirement that national legal systems may provide in the case of commercial agency. (*Barbara Bellone v. Yokohama SpA*, ECJ 30 April 1998, C-215/97, ECR 1998, I-2191; *Centrosteel Srl v Adipol GmbH*, ECJ 13 July 2000, C-456/98, ECR 2000, I-6007, *Francesca Caprini v. Conservatore Camera di Commercio, Industria, Artigianato e Agricoltura (CCIAA)*, ECJ 6 March 2003, C-485/01, ECR 2003, I-2371).

4. According to BELGIAN, FINNISH, GERMAN, DUTCH, SCOTTISH, SWEDISH law there are no formal requirements as to the conclusion of these contracts.

5. However, under FRENCH and ITALIAN law there are form requirements in the case of franchising contracts. Under SPANISH law franchising contracts, due to the lack of any specific provisions, are not subject to any form requirements and the general contractual provisions are applied (CC art. 1278 – liberty of form). However, some authors believe that the LCA art. 22 should rule those contracts as well, by way of analogy (*Domínguez García* in *Alberto Bercovitz*, Contratos Mercantiles,; p. 595).

6. In addition, it must be noted that in some legal systems *del credere* stipulations in commercial agency contracts must be in writing. Moreover, it must also be noted that art. 20(2) of the Directive requires that a restraint of trade clause included in a commercial agency contract is valid only if it is concluded in writing.

CHAPTER 3: COMMERCIAL AGENCY

Section 1: General

IV.E.–3:101: Scope

This Chapter applies to contracts under which one party, the commercial agent, agrees to act on a continuing basis as a self-employed intermediary to negotiate or to conclude contracts on behalf of another party, the principal, and the principal agrees to remunerate the agent for those activities.

COMMENTS

A. General idea

The commercial agent's main task consists of prospecting the market, attracting customers, promoting the sale or purchase of products and negotiating the terms of contracts which will be concluded between the principal and the customer or seller. The agent may also be entrusted with concluding contracts for the principal. The commercial agent always acts independently of and on behalf of the principal. A commercial agency agreement may be concluded for a definite or indefinite period of time.

The principal must remunerate the commercial agent (Section 3). If the parties have stipulated that the agent will not be remunerated, this Chapter applies by way of analogy where appropriate.

A principal who wants to be active in a certain area may conclude a contract with a commercial agent in order to find out whether specific products will be successful in a certain territory or with a certain group of customers. The agent will do all the preparatory work, which enables the principal to conclude contracts more easily, namely without making high investments and running high risks.

The agent may, as a self-employed intermediary, organise its activities as it thinks fit. Although the agent must comply with reasonable instructions given by the principal (IV.E.–3:202 (Instructions), the latter cannot affect the agent's independence.

The relevance of this Article is that it determines whether a certain contractual relationship may be qualified as a commercial agency and, thus, whether the Articles in this Chapter are applicable. This is of special interest in relation to the mandatory rules in several of the Articles.

B. Self-employed intermediary

The concept of a self-employed intermediary is taken from the Directive. Self-employed refers to the fact that the agent in any case acts independently from the principal, that is to say that the commercial agent is not its employee. A commercial agent may be either a legal

entity or a natural person. These rules may in principle apply to commission agents. The concept of intermediary is introduced in order to clarify that the activity of the agent must lead to the conclusion of contracts between two other parties, i. e. the principal and the customer or seller.

Illustration 1
A produces and sells perfume. A enters into a contract with B, according to which B will negotiate contracts of sale with respect to the perfume on A's behalf and on A's account. In the contract it is stipulated that A determines B's working hours. In such a situation B is not a self-employed intermediary.

C. Contracts with customers

The purpose of the agency agreement is that the agent negotiates (and possibly concludes) contracts on behalf of (and in the name of) the principal. Although it is most common that commercial agents are appointed for the sale or purchase of goods, in exceptional cases they may be concerned with the promotion of services. This Chapter applies in both situations. In this Chapter the resulting contract, i. e. the one to be concluded by the principal or in the principal's name, will be referred to as the contract with the customer, the customer being the party (the reseller or service provider) who enters into a contract with the principal.

D. Competition law

Competition law may exceptionally affect the validity of some agency agreements. The European Commission has declared Article 81(1) EC to be applicable to agency relationships whereby the agent bears important financial and commercial risks in relation to the activities for which the commercial agent has been appointed by the principal, the "non-genuine agency agreements" (Guidelines on Vertical Restraints (OJ 2000, C291/01)). The Guidelines state that the question of risk must be assessed on a case-by-case basis with regard to the economic reality of the situation rather than the legal form (nos. 12-17). Nevertheless, the Commission considers that Article 81(1) will generally not be applicable to the agent's obligations.

The provisions included in this Chapter apply to commercial agency contracts only to the extent that they are valid in the light of competition law.

NOTES

I. Transposition of the directive into national legal systems

1. The Directive has been transposed into all the legal systems of the Member States. However, the definition of a commercial agent and the scope of application differ from country to country.

II. Self-employed intermediary

2. In the Directive (art. 1(2)) and in all the legal systems of the Member States the commercial agent is an independent business person, who can be either a natural person or a legal entity (AUSTRIA: § 1(1) HVertrG; BELGIUM: art. 1 *Handelsagentuurwet*; UNITED KINGDOM: Reg. 2(1); FINLAND; FRANCE: Ccom art. L.134-1; GERMANY: § 84 I (1) HGB; GREECE: art. 1 para 2 Law on Commercial Agency; THE NETHERLANDS: CC art. 7:428 I; POLAND: CC art. 758

§ 1; PORTUGAL: art.1 DL 178/86; SPAIN: art. 1 LCA; SWEDEN: § 1 HaL). Under ITALIAN law this is not spelled out by the statutory provisions. However, according to legal authors it is a requirement which has to be met.

III. Contracts with clients may include both service and sales contracts

3. Under AUSTRIAN, BELGIAN, FRENCH, GERMAN, GREEK, ITALIAN, DUTCH, PORTUGUESE and SPANISH law (*Raúl Bercovitz Álvarez* in *Alberto Bercovitz*, Contratos Mercantiles; p.513), the scope of application includes not only the sale of goods but also service contracts (AUSTRIA: § 1(1) HvertG.; BELGIUM: art. 1 *Verbraeken & de Schoutheete* Nr. 74, GERMANY § 84 I HGB; FRANCE: Ccom art. L.134-1; THE NETHERLANDS, CC art. 7:428). Under ITALIAN law there is no explicit reference in the statutory rules; however, its applicability to service agents is defended by legal authors. Under AUSTRIAN law there is an exception: contracts relating to immovables do not fall within the definition (§ 1(1) HvertG.).

4. However, in the Directive, UK, FINNISH and SWEDISH law, the scope of the commercial agency rules is restricted to contracts for the sale of goods. (Art. 1(2) of the Directive; UNITED KINGDOM: Reg. 2(1); FINLAND: art. 2 Act on Commercial Agents; SWEDEN § 1 HaL).

IV. Remuneration

5. The commercial agency rules in the Directive and in the legal systems of BELGIUM, ENGLAND, FINLAND, GREECE, ITALY, THE NETHERLANDS, POLAND, PORTUGAL, SCOTLAND, SPAIN and SWEDEN only apply to commercial agency contracts which provide for remuneration by the principal (art. 2(1) Directive; AUSTRIA: § 1(1) HVertrG; BELGIUM: art. 1 *Handelsagentuurwet*, ENGLAND, SCOTLAND: Reg. 2(2); FINLAND: art. 2 Act on Commercial Agents and Salesmen; GREECE: art. 1 para 2 Law on Commercial Agency; ITALY: CC art. 1742; NETHERLANDS: CC art. 7:428 I; POLAND: CC art. 758 § 1; PORTUGAL: art. 1 DL no. 178/86; SPAIN: art. 1 LCA; SWEDEN: § 1 HaL).

Section 2: Obligations of the commercial agent

IV.E.–3:201: Negotiate and conclude contracts

The commercial agent must make reasonable efforts to negotiate contracts on behalf of the principal and to conclude the contracts which the agent was instructed to conclude.

COMMENTS

A. General idea

The commercial agent must actively negotiate contracts for the principal. The agent may be engaged in negotiations either in its own name or in the principal's name. The agent may also be charged with the conclusion of contracts on the principal's behalf. The agent who is authorised to do so must undertake proper efforts in the performance of this obligation.

B. Interests at stake and policy considerations

Where parties have a commercial agency relationship, the agent is under an obligation to act as an intermediary for the principal by negotiating contracts. The commercial agent must only conclude contracts on the principal's behalf if the parties have so agreed. In both situations the agent is obliged to use its best endeavours.

This provision is protective of the principal. It is meant to avoid negative effects on the principal's business because of the agent's non-compliance with its obligations. The agent should not affect the relationship between the principal and the customers by acting without due care. The principal may lose its good reputation and the customers may refrain from contracting with it and its turnover may decrease. This rule is of special importance where the agent is charged with concluding contracts, because then the transactions entered into by the agent create legal consequences for the principal.

On the other hand, the agent, too, has an important reason to comply with this obligation: its income will be directly or indirectly related to the number and value of contracts concluded between the principal and the customer. Moreover, this obligation is not unreasonably burdensome for the agent: it does not mean that it must always succeed in negotiating and concluding a certain number of contracts. The agent does not fail to perform this obligation merely because a contract is not concluded.

C. Reasonable efforts

The commercial agent must do its best to negotiate and, if the parties so agree, to conclude contracts. Reasonableness in the context of the Article is to be judged by the criteria mentioned in the definition of that term in I.–1:104 (Reasonableness). What is "reasonable" is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices. The agent cannot sit back, wait and incidentally pass on orders to the principal, but must actively search for potential customers and try to convince them to conclude contracts with the principal. The agent cannot guarantee, however, that its negotiations will always be successful. The agent must use its best endeavours.

This objective standard may require adaptations for two reasons. In the first place, a higher or lower standard of activity may be required according to the principal's expectation of the agent's reputation or experience, which is justified given the circumstances of the case. In the second place, it is possible that the contract contains specific requirements regarding the level of activity expected of the agent. Whether or not the agent uses its best efforts may affect its right to commission.

D. Negotiate contracts

The task of the commercial agent who negotiates contracts on behalf of the principal is to prepare transactions by searching for customers and convincing them to enter into a contractual relationship with the principal. The fact that the agent negotiates contracts on behalf of the principal neither creates obligations for the agent towards the (potential) customers nor vice versa. The agent may however be liable vis-à-vis the principal if it does not negotiate properly. The agent may, for instance, have neglected the reasonable instructions given by the principal (IV.E.–3:202 (Instructions). Moreover, mere negotiations are not binding upon the principal and the potential customer. Only if and to the extent that the principal and the customer have actually concluded a contract, will they be bound.

E. Conclude contracts

The principal may charge the commercial agent with the conclusion of contracts on its behalf either on a permanent or incidental basis. The commercial agent is under an obligation to undertake reasonable efforts to do so. This means, for instance, that the agent who has successfully negotiated a contract, should approach the customer within a reasonable time in order to conclude the contract.

Where the agent has the right and the obligation to conclude contracts, the commercial agent must also deal with complaints by customers regarding the products involved. The parties may agree that the agent must also accept payments on the principal's behalf and, if so, under which conditions.

In relation to the conclusion of contracts reference should be made to Part D (Mandate), although in case of conflict the rules in this Chapter prevail (IV.E.–1:201 (Priority rules)).

NOTES

I. Reasonable efforts to negotiate

1. This element is taken from art. 3(2)a of the Directive, where it is stated that the commercial agent must make proper efforts. A similar rule has been transposed into the following national legal systems: AUSTRIA: § 1 para 1 HVertrG; UNITED KINGDOM: Reg. 3 (2) a; FINLAND: art. 5 Act on Commercial Agents; FRANCE: Ccom art. L.134-4; GERMANY: § 86 I HGB; GREECE: art. 4 Law on commercial agency 219/1999; SWEDEN: HaL § 5 (2) a.
2. Under AUSTRIAN law the commercial agent must exercise '*der Sorgfalt eines ordentlichen Kaufmanns*' (§ 5 HVertrG). Also under ITALIAN and SPANISH law, the commercial agent must exercise the due diligence of a good businessman. (SPAIN: art. 9 para 2 sub a LCA, Ccom art. 57, *Moxica*, 98). Under DUTCH law the principal

must observe the diligence of a good principal (*zorg van een goed opdrachtnemer*, CC art. 7:401).

3. In SPAIN if the agent represents more than one principal, the agent must give an even-handed attention to the interest of all the principals, according to the rule of good faith. In order to avoid conflicts it seems advisable to establish in every particular contract a minimum level of operations to be negotiated on behalf of the principal. A failure will amount to non-performance and consequently as a cause for termination (SAP Lugo 4 June 1994, AC 1994\988).

II. To conclude contracts

4. This element has been taken from art. 3(2)a of the Directive which has been transposed in the following statutory provisions. AUSTRIA: § 1 para 2 HVertrG; BELGIUM: art. 1, art. 6 sub 1 *Handelsagentuurwet*; FINLAND: art. 5 Act on Commercial Agents; FRANCE: Ccom art. L. 134-1; GERMANY: § 86 I HGB; GREECE: art. 4 Law on Commercial Agency; ITALY: CC art. 1752; THE NETHERLANDS: CC art. 7:428 I; POLAND: CC art. 758(1); SPAIN: art. 6 LCA (according to the LCA art. 6, the agent may only conclude contracts on behalf of the principal when such faculty has been granted to the agent in conformity with the terms of the contract).

IV.E.–3:202: Instructions

The commercial agent must follow the principal's reasonable instructions, provided they do not substantially affect the agent's independence.

COMMENTS

A. General idea

The agent must comply with the instructions given by the principal. The agent has to follow only instructions which are reasonable in view of the content and the nature of the agreement. In order to be reasonable, instructions must be given in a timely fashion.

However, the principal may never substantially affect the agent's independence. The agent may arrange its activities and use its time as it thinks fit.

B. Interests at stake and policy considerations

The commercial agent may, as an intermediary, bind the principal if it concludes contracts in the principal's name. Therefore, it is important for the principal that the commercial agent closely follows the principal's instructions. Without this obligation, the agent could negotiate (and conclude) contracts on the principal's behalf without following instructions. This would be contrary to the principal's purpose of appointing an intermediary to represent its interests.

While this Article protects the interests of the principal, it also takes into account the fact that the agent has an interest in remaining autonomous. Moreover, the agent does not have to follow any instructions by the principal, only those instructions which are reasonable.

C. Reasonable instructions

The commercial agent is only required to follow those instructions which are reasonable. Reasonableness in the context of this Article is to be judged by the criteria mentioned in the definition in I.–1:104 (Reasonableness). The circumstances of the case and the applicable usages must be taken into account as well as what persons acting as a commercial agent and principal in the same situation would consider reasonable.

The principal usually has its own business policies relating to the conditions of sale such as the prices of the products, the production and delivery terms, the terms of payment and the procedure for dealing with customers' claims. Generally, instructions relating to these policies will be considered reasonable.

> *Illustration 1*
> A principal instructs its commercial agent to see its customers once every week. Such an instruction is unreasonable, since it substantially affects the commercial agent's independence.

NOTES

Reasonable instructions

1. According to art. 3(1)c of the Directive a commercial agent must comply with reasonable instructions given by his principal.

2. In BELGIAN, UK, FINNISH, GREEK, ITALIAN, POLISH, PORTUGUESE, SPANISH and SWEDISH law an obligation for the commercial agent to follow instructions is included in the specific rules on commercial agency. (BELGIUM: art. 6 *Handelsagentuurwet*; UNITED KINGDOM: Reg. 3(2) c; FINLAND art. 5 of the Act on Commercial Agents; GREECE: art. 4 of the Law on Commercial Agency 219/1991; ITALY: CC art. 1746; POLAND: CC art. 760 I § 1; PORTUGAL: art 7 a. DL 178/86, *Pinto Monteiro* (1998) 62, *Pinto Monteiro* (2002) 93, STJ 25/01/2000, AD, 467, 1519; SPAIN: LCA art. 9 para. 2 sub c , *Moxica*, 24; SWEDEN: § 5 II a HaL, *Söderlund* 39).

3. Under AUSTRIAN, GERMAN, FRENCH and DUTCH law such an obligation is not included explicitly in the statutory rules concerning commercial agency. Under AUSTRIAN and GERMAN law this obligation follows from the commercial agent's obligation to behave as a good businessman (AUSTRIA: § 5 HvertG.; GERMANY: § 84 I(2) HGB, § 86 I HGB, § 665 BGB, *Koller/Roth/Morck*, § 86 HGB no. 9; *Martinek/Semler*, § 8 no. 58, BGH, *NJW* 1966, 883). Under FRENCH and DUTCH law such an obligation follows from the general rules concerning mandate (FRANCE: *Leloup* no. 1322-1330 ; Com. 24. 11. 1998, *Bull. civ*. IV, n° 277; *Défr*. 1999, 371 obs. D. Mazeaud; *RTDciv*. 1999, 98 obs. *J. Mestre* ; *ibid*., 646 obs. *P.-Y. Gautier*; *Cont. Conc. consomm*. 1999, no. 56 note *Malaurie-Vignal*; *JCP* 1999.I.143, no. 6 obs. *Jamin*; NETHERLANDS: CC art. 7:402(1)).

4. According to all these legal systems the instructions from the principal may not affect the commercial agent's independence. (BELGIUM: art. 6 *Handelsagentuurwet*; UNITED KINGDOM:: Reg. 3(2) c; FINLAND art. 5 of the Act on Commercial Agents; GERMANY: § 84 I (2) HGB (BGH, *NJW* 1966, 883; *Koller/Roth/Morck*, § 86 HGB no. 9); GREECE: art. 4 of the Law on Commercial Agency 219/1991; ITALY: CC art. 1746; PORTUGAL: art 7 a DL 178/86, *Pinto Monteiro* (1998) 62, *Pinto Monteiro* (2002) 93, STJ 25/01/2000, AD, 467, 1519; SPAIN: art. 9 para. 2 LCA, 24; SWEDEN: § 5 II a HaL, *Söderlund* 39).

IV.E.–3:203: Information by agent during the performance

The obligation to inform requires the commercial agent in particular to provide the principal with information concerning:

(a) contracts negotiated or concluded;
(b) market conditions;
(c) the solvency of and other characteristics relating to clients.

COMMENTS

A. General idea

The obligation to inform is imposed by IV.E.–2:202 (Information during the performance): the agent must disclose all the information in its possession which the principal needs for the proper performance of its part of the contractual obligations. The agent must inform the principal of its specific individual situation, concerning issues such as the transactions which were prepared or concluded and with whom. In addition, the agent also must inform the principal concerning more general issues, such as the market in which the agent operates. The list of required information in this Article is not exhaustive.

B. Interests at stake and policy considerations

While the principal is the party who will be bound by a sales or service contract negotiated by the agent, the principal is not in a position to verify, for instance, the customer's solvency or reputation. It is thus important for the good functioning of the principal's business that the principal is provided with such information. The principal needs to know how many and which contracts have been negotiated regarding its products in order to decide whether it will conclude a certain contract. Information about the market in which the agent operates enables the principal to judge whether the agency will remain worthwhile.

This obligation is not unreasonably burdensome for the agent: the agent only has to communicate the information which is available to it, in so far as this is needed by the principal for the performance of its obligations in relation to the agent and the customers.

C. Information to be provided

The agent must inform the principal of its past, present and future activities, the customers found and the market situation in which it operates. This information is relevant to the need for the principal to perform the obligations under the contracts with the agent and the customer or customers.

Under this obligation the agent must make reasonable efforts to ensure that the information is correct. In this respect information concerning the market must be distinguished from information concerning the agent's own activities. With respect to the former it will be more difficult for the agent to obtain accurate information, since it concerns more variable (unforeseeable) factors. However, concerning the latter, the standard of care may be a higher one in the case of information concerning its own activities.

Contracts negotiated or concluded. Apart from informing the principal of the contracts concluded or negotiated, this obligation includes, amongst other things, the obligation to

transmit third parties' complaints or claims which the agent has received or has become aware of and special demands by customers concerning the products involved.

Market Conditions. These conditions include, among other things, modifications in demands by customers, price developments and the state of competition. The obligation is limited to information relating to the agent's territory.

The solvency of and other characteristics relating to customers. This obligation is limited to the customers' relevant characteristics, the main one being solvency. However, the principal does not need to know all the characteristics relating to customers if the agent may conclude the contract on the principal's behalf. In that case the characteristics of the customers represent a value for the agent, which it is not obliged to share with the principal.

D. No formalities

There is no general form requirement as to the way in which this information is to be provided. The aim of the Article is merely to oblige parties to communicate.

NOTES

I. Information to be provided

1. According to the Directive the '… commercial agent … must communicate to his principal all the necessary information available to him' (art. 3(2)b of the Directive).
2. This obligation is laid down in a specific statutory rule in the following countries. BELGIUM: art. 6 sub 2 *Handelsagentuurwet;* UNITED KINGDOM: Reg. 3 (2) b; FRANCE: art. 1 Décret n 58-1345 du 23-12-1958; GERMANY: § 86 II HGB; GREECE: art. 4 of the Law on Commercial Agency 219/1991; ITALY: CC art. 1746; POLAND: CC art. 760 I § 1; SPAIN: art. 9 para. 2 sub b LCA. Under DUTCH law it follows from the rules concerning mandate (CC arts. 7:401, 7:403, *Asser-Kortmann*, no. 201 ff).

II. Contracts negotiated or concluded

3. Under AUSTRIAN, FINNISH and SWEDISH law it is laid down in statutory law that the commercial agent must inform the principal about the contracts negotiated or concluded (AUSTRIA: § 5 HvertG; FINLAND: art. 5 Act on the Commercial Agent; SWEDEN: § 5 para. 2 HaL). According to authors in the NETHERLANDS this obligation follows from the rules concerning mandate (CC arts. 7:401, 7:403 (*Asser-Kortmann*, no. 201 ff). Also according to GERMAN case law and legal literature the agent must inform the principal with respect to contracts negotiated or concluded (BGH, *NJW* 1966, 882; BGH, *BB* 1969, 1196; OLG Köln, *BB* 1971, 543; *Koller/Roth/Morck*, § 86 HGB no. 7; *Martinek/Semler*, § 8 no. 61; *Münchener Kommentar zum Handelsgesetzbuch*, § 86 HGB no. 50).

III. Market conditions

4. In SPAIN Although the LCA art. 9 does not oblige the agent explicitly to inform the principal of the market conditions, some authors consider that the agent's duties include giving information about the operations being negotiated and about the market conditions (*Raúl Bercovitz Álvarez* in *Alberto Bercovitz*, Contratos Mercantiles,

p.523). BELGIAN and FINNISH literature, GERMAN case law and literature, ITALIAN case law and SWEDISH literature mention market conditions as one of the subjects concerning which the agent has to inform the principal (BELGIUM: Dambre, 1401; FINLAND: *Telaranta* (1993), *Aalto* (2001); GERMANY: BGH, *NJW* 1966, 882; BGH, *BB* 1969, 1196; OLG Köln, *BB* 1971, 543; *Koller/Roth/Morck*, § 86 HGB no. 7; *Martinek/Semler*, § 8 no. 61; *Münchener Kommentar zum Handelsgesetzbuch*, § 86 HGB no. 50; ITALY: Cass. 19-8-1996, n. 7644, *Danno e resp.*, 1997, 256; SWEDEN: *Söderlund*, 38). However, in GERMANY these market conditions are restricted to actual market conditions.

IV. Characteristics of clients

5. The solvency of the client is one of the client's main characteristics. The agent's obligation to inform its principal with regard to the client's solvency is mentioned explicitly in the SPANISH statute concerning commercial agency. Also BELGIAN, FINNISH literature, GERMAN case law and literature, DUTCH case law and literature and SWEDISH authors include the client's solvency as one of the subjects about which the commercial agent must inform its principal (BELGIUM: Dambre, 1401; FINLAND: *Telaranta 1993; Aalto 2001*; GERMANY: BGH, *NJW* 1966, 882, BGH, *BB* 1969, 1196; OLG Köln, *BB* 1971, 543, *Koller/Roth/Morck*, § 86 HGB no. 7; *Martinek/Semler*, § 8 no. 61; *Münchener Kommentar zum Handelsgesetzbuch*, § 86 HGB no. 50; NETHERLANDS: Rb. Amsterdam 27-3-1962, *NJ* 1962, 443, *Asser-Kortmann* no. 202 ff; HR 2-12- 1960, *NJ* 1962, 21; SPAIN: art. 9, para. 2, b LCA; SWEDEN: *Söderlund*, 38).

IV.E.–3:204: Accounting

(1) The commercial agent must maintain proper accounts relating to the contracts negotiated or concluded on behalf of the principal.

(2) If the agent represents more than one principal, the agent must maintain independent accounts for each principal.

(3) If the principal has important reasons to doubt that the agent maintains proper accounts, the agent must allow an independent accountant to have reasonable access to the agent's books upon the principal's request. The principal must pay for the services of the independent accountant.

COMMENTS

A. General idea

The commercial agent has to keep proper accounts, in particular relating to the contracts it has negotiated or concluded (paragraph (1)). The agent has to keep documentation concerning the customers involved in the contracts. Where appropriate, the agent must maintain accounts of payments receivable on the principal's behalf and of the products of the principal. Where the agent represents more than one principal, this obligation to keep accounts also obliges the agent to keep separate accounts for each principal it represents (paragraph (2)). This provision entitles the principal to verify whether the agent actually complies with the obligation to keep proper accounts in paragraph (1), when the principal has reasons to doubt that the commercial agent keeps proper accounts. This may be the case, for instance, when the information provided by the agent is not correct, or the information is not provided in due time or in the case of a sudden decrease in the number of contracts negotiated (paragraph (3)).

B. Interests at stake and policy considerations

For the performance of its obligations under the contract, the principal needs specific information from the agent. Accordingly, it is reasonable to expect the agent to keep proper accounts. Proper accounts also include keeping separate accounts for different principals.

This provision entitles the principal to verify whether the agent actually keeps proper accounts. However, the principal may inspect the agent's books only if the principal has important reasons to believe that the agent does not keep proper accounts. The agent is not obliged to disclose information in the books which it keeps in its relationship with other principals, if the agent complies with its obligation to keep separate accounts (paragraph (2)).

Although this provision seems to favour mainly the principal, it is not unreasonably burdensome for the agent, who as a professional will usually keep proper accounts. Where the agent complies with this obligation to keep accounts, it will be easier for it to comply with the obligation to inform. The agent also needs proper accounts for its own purposes, for instance because it has to know which commission it is entitled to in relation to which contracts and from which principal. After the contract, the commercial agent may require proper accounts in order to prove that the principal cannot terminate the contract for non-performance.

C. Proper accounts

The agent is always obliged to keep books relating to the contracts it successfully negotiates or concludes with customers on the principal's behalf. If the agent has the principal's products at its disposal, the accounts will include an overview of how the agent disposes of them. If the parties have agreed that the agent must accept customers' payments in the principal's name, an overview of all sums received and to be received are also to be included in the agent's books. If the commercial agent represents more than one principal, it must maintain independent accounts for each principal represented.

NOTES

Obligation to keep separate accounts

1. Under SPANISH law, the agent must keep separate books of the accounts with regard to the different principals it represents (art. 9 (2) e LCA). Also according to GERMAN law the commercial agent must keep accounts. This follows from the general rules relating to mandate (§ 666 BGB). The accounts must contain a proper written overview of the income and the expenditures under § 259 I BGB (*Münchener Kommentar zum Handelsgesetzbuch*, § 86 HGB no. 53). Furthermore, § 259 I BGB also requires that the vouchers have to be submitted. If the parties have not agreed upon another arrangement, the commercial agent has to fulfil the obligation regarding monthly accounts by way of analogy to § 87 c I (1) HGB (*Münchener Kommentar zum Handelsgesetzbuch*, § 86 HGB no. 53). An obligation to maintain independent accounts for each principal represented is not required, but is common practice. Also under PORTUGUESE law there is a statutory obligation: art. 7 DL 176/86, *Pinto Monteiro* (1998) 63.
2. Under FINNISH law there are no explicit rules in this respect. However, these rules are implied in the obligation to inform. Also according to DUTCH law authors seem to derive this obligation from the obligation to inform (CC art. 7:403, *Asser-Kortmann*, no. 201). Under ITALIAN law there is no explicit obligation. However, the commercial agent must specify and prove the facts from which its entitlement to remuneration follow, and therefore, in particular the conclusion of the relevant contracts (Cass. n. 5467/00).

3 According to AUSTRIAN, GREEK law there is no explicit obligation for the commercial agent to keep proper and separate accounts.

4. In ENGLAND, the representative must keep proper accounts on behalf of the principal. (Chitty)

Section 3: Obligations of the principal

IV.E.–3:301: Commission during the agency

(1) The commercial agent is entitled to commission on any contract concluded with a client during the period covered by the agency, if:

(a) the contract has been concluded

(i) as a result of the commercial agent's efforts;
(ii) with a third party whom the commercial agent has previously acquired as a client for contracts of the same kind; or
(iii) with a client belonging to a certain geographical area or group of clients with which the commercial agent was entrusted; and

(b) either

(i) the principal has or should have performed the principal's obligations under the contract; or
(ii) the client has performed the client's obligations under the contract or justifiably withholds performance.

(2) The parties may not, to the detriment of the commercial agent, exclude the application of paragraph (1)(b)(ii) or derogate from or vary its effects.

COMMENTS

A. General idea

One of the characteristics of a commercial agency is that the main part of the agent's remuneration typically consists of commission. During the contract period the commercial agent is entitled to commission on contracts concluded during this period if these contracts were entered into as a result of the agent's activity or if these contracts were concluded with customers which the agent has previously acquired for contracts of the same kind (paragraph (1)(a)(i) and (ii)).

However, the agent can also be entitled to commission on contracts which have not been negotiated or concluded by the agent: when the customer belongs to the agent's area or group of customers (paragraph (1)(a)(iii)).

The agent is entitled to commission as soon as the obligations under the contract have or should have been performed (paragraph (1)(b)). The parties may agree that the entitlement to commission arises before performance by either the principal or the customer, for instance when the contract is concluded. However, they may not agree that the entitlement to commission arises at a moment which is later than the customer's performance (paragraph (2)).

B. Interests at stake and policy considerations

In the case of commission-based remuneration the interests of the agent and those of the principal run parallel: both parties aim at a maximum number of successful contracts. If the agent does not find many customers willing to conclude contracts, not only are the gains of the principal directly affected, but also the agent's income is reduced. It is no different when

the agent has made important investments. Thus, commission-based remuneration gives the agent an incentive to use its best efforts to negotiate or conclude as many contracts as possible.

This Article gives the agent, in principle, a right to commission on contracts which are the result of its activities. The agent's interest in earning commission is well protected in case the agent is entrusted with a specific area or group of customers. Then it is, in principle, entitled to commission whether or not its activities have contributed to the contract and whether or not it has an exclusive right to such an area or group of customers: the mere fact that the customer belongs to that area or group is sufficient for its entitlement.

Paragraph (1)(b) provides incentives for the agent to negotiate contacts with reliable customers, since the mere conclusion of the contract does not entitle the agent to commission. Only when the contractual obligations are performed by one of the parties is the agent entitled to commission. However, this does not burden the agent unreasonably. Paragraph (1)(b) also provides that commission is earned in certain specific situations, even though the contractual obligations have not yet been performed. This is the case when the principal should have performed or the customer justifiably withholds its performance. Paragraph (2) determines that, whatever the parties have agreed upon in their contract, the agent's entitlement to commission arises with the customer's performance or the customer's justified exercise of its right to withhold its performance.

C. Result of the agent's efforts

In order to be entitled to commission, the agent must actively negotiate with customers on the principal's behalf, by locating potential customers or groups of customers and trying to persuade them to conclude a contract with the agent or the principal. The negotiating agent must communicate offers to the principal. The mere fact that the agent has mentioned a customer is insufficient to give a right to commission. The agent must have contributed to the conclusion of the contract between the customer and the principal in an identifiable, considerable and useful manner. However, it is not required that the agent has made efforts to acquire the customer with the purpose of concluding a particular contract; the agent is also entitled to commission when it has acquired the customer at an earlier stage for contracts of the same type.

> *Illustration 1*
> A has a mobile telephone network. B, as a commercial agent for A, procures customers who will obtain a mobile telephone subscription to that network. During the period of the agency between A and B, A directly approaches the customers procured by B to subscribe to that mobile phone network. B is also entitled to commission on the contracts with those customers.

D. Customers from a specific geographical area or group

This Article entitles the agent to commission regardless of whether its efforts have led to the conclusion of a contract between the principal and the customer. The fact that the agent is working in a certain territory or with a certain group of customers and that the principal concludes a contract with a customer belonging to this territory or group during the period of the agency, creates for the agent a direct entitlement to commission. In this case the agent does not have to prove that the conclusion of the contract was the result of its actions.

E. Performance of the contract with the customer

The agent's entitlement to commission exists only when its activities have proved to be effective, i. e. when the obligations under the contract have or should have been properly performed. The principal then owes the agent the commission on that particular transaction. This obligation to pay commission does not mean that the agent may immediately claim the agent's commission as the commission is to be paid periodically (see IV.E.–3:304 (When commission is to be paid)). The agent may demand payment only from the expiry of the agreed period (at the latest three months). If the agent claims payment before that period, the principal may justifiably withhold performance until that moment.

F. Amount of commission

This Article leaves it to the parties to agree upon the rate of the commission and the method of calculating it. The parties usually explicitly stipulate in a detailed manner the rate of the agent's remuneration. The parties may agree that the rate of commission will be higher for contracts concluded as a result of the agent's efforts than for contracts concluded with customers belonging to the agent's area or group of customers.

In the absence of any agreement on this matter between the parties the contract is not invalid; a normal or reasonable commission is substituted in accordance with II.–9:104 (Determination of price). Factors which play a role in determining whether the amount of commission is reasonable include: the type and place of transactions, the type of goods or services, their price, the efforts made by the agent et cetera. Also, for instance, the length of the period during which the agent has to wait until it may claim the payment of the commission which it has earned can be taken into account.

G. Character of the rule

The parties may not derogate from paragraph (1)(b)(ii) to the detriment of the commercial agent.

NOTES

I. In general

1. The Article combines arts. 7 and 10 of the Directive. Art. 7 of the Directive determines under which circumstances there is an entitlement to commission, whereas art. 10 establishes when payment of the commission is due. (Art. 7 of the Directive: "(1) A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract: (a) where the transaction has been concluded as a result of his action; or (b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind. (2) A commercial agent shall also be entitled to commission on transactions concluded during the period covered by the agency contract: – either where he is entrusted with a specific geographical area or group of customers, or where he has an exclusive right to a specific geographical area or group of customers, and where the transaction has been entered into with a customer belonging to that area or group. Member States shall include in their legislation one of the possibilities referred to in the above two indents.")

II. Entitlement to commission during the contract

2. Art. 7 of the Directive has been transposed into the following national legal systems: AUSTRIA § 8 (2) HVertrG.; UNITED KINGDOM: Reg. 7 (3); FINLAND: art. 10 of the Act on Commercial Agents; FRANCE: Ccom art. L 134-6; GERMANY: § 87 I, II HGB; GREECE: art. 6(1) Law on Commercial Agency 219/1991; ITALY: CC art. 1748; *Baldi* and *Venezia*, note to Cass. sez. lav., 2-5-2000, n. 5467, cit., 802; THE NETHERLANDS: CC art. 7:431; POLAND: CC art. 761 § 1; PORTUGAL: art 16/3 DL 178/86, *Pinto Monteiro* (1998) 77; SPAIN: art. 12 LCA; SWEDEN: § 9 (1) HaL.

3. The Directive gave the Member States a choice as to whether or not to limit the right to commission to the case where the commercial agent's right to a specific geographical area or group of customers is an exclusive right. The present Article does not include such a limitation. Under the following legal systems the same option has been adopted: AUSTRIA § 8 (2) HVertrG.; FINLAND: art. 10 of the Act on Commercial Agents; FRANCE: Ccom art. L 134-6; GERMANY: § 87 I, II HGB; GREECE: art. 6(1) Law on Commercial Agency 219/1991; ITALY: CC art. 1748; *Baldi* and *Venezia*, note to Cass. sez. lav., 2-5-2000, n. 5467, cit., 802; THE NETHERLANDS: CC art. 7:431; SWEDEN: § 9 (1) HaL.

4. UK, POLISH and SPANISH law have adopted the other option with respect to exclusivity (UNITED KINGDOM: Reg. 7 (3); POLAND: CC art. 761 § 2; SPAIN: LCA art. 12; STS 14 May 2001, RJ 2001\6207. The LCA art. 14 should be interpreted in accordance with the LCA art. 17 (cases when the agent loses the right to commission). Therefore, the agent retains the right to be paid if the contractual obligations are not performed due to a reason attributable to the principal. On the other hand, if the cause of non-performance is not attributable to the principal, the agent has no right to commission.

III. The moment when commission is 'due'

5. In art. 10 the Directive contains a further rule with regard to the moment when the agent becomes entitled to commission. However, in that article the directive uses the concept of commission "due". This is potentially confusing, because normally the moment when an obligation is due indicates the moment from which the creditor can claim performance. Therefore, paragraph (1)(b), which contains the requirements of art. 10 (1) and (2) of the Directive, does not refer to the commission being "due" but continues the idea of entitlement.

6. The same requirements are included in the legal systems of the following countries: AUSTRIA: § 9 HvertG.; UNITED KINGDOM: Reg. 10 (2) and (3); FINLAND: art. 12 Act on Commercial Agents; FRANCE: Ccom art. L.134-9; GERMANY § 87a I, III HGB; GREECE: art. 6(1) Law on Commercial Agency 219/1991; ITALY: CC art. 1748; NETHERLANDS: CC art. 7:343; PORTUGAL: art. 18 DL 178/86; SPAIN: art. 14 LCA; SWEDEN: § 11 (2) HaL.

IV.E.–3:302: Commission after the agency has ended

(1) The commercial agent is entitled to commission on any contract concluded with a client after the agency has ended, if:

(a) either

(i) the contract with the client is mainly the result of the commercial agent's efforts during the period covered by the agency contract, and the contract with the client was concluded within a reasonable period after the agency ended; or

(ii) the requirements of paragraph (1) of IV.E.–3:301 (Commission during the agency) would have been satisfied except that the contract with the client was not concluded during the period of the agency, and the client's offer reached the principal or the commercial agent before the agency ended; and

(b) either

(i) the principal has or should have performed the principal's obligations under the contract; or

(ii) the client has performed the client's obligations under the contract or justifiably withholds the client's performance.

(2) The parties may not, to the detriment of the commercial agent, exclude the application of paragraph (1)(b)(ii) or derogate from or vary its effects.

COMMENTS

A. General idea

Even if the agency has ended, the agent is still entitled to commission in two situations. First, when the contract is concluded within a reasonable time after the agency ended (paragraph (1)(a)(i)). Secondly, when the offer from the customer has reached either the principal or the agent before the end of the agency (paragraph (1)(a)(ii)). This rule merely deals with a transition period: although the parties will not continue the contractual relationship in the future, they still have a relationship in the sense that one party has undertaken activities during the period of the agency for which it would have been remunerated had the relationship not ended.

This Article applies for instance in the case where the agent has negotiated sales contracts for the supply of goods to be ordered and delivered periodically after the termination of the agency or where the principal has concluded contracts the obligations under which will be performed only after the termination of the agency.

B. Interests at stake and policy considerations

In the two situations mentioned above, it is considered reasonable to entitle the agent to commission on the contracts in question. It is assumed that the principal will benefit from the transaction which will be concluded shortly after the ending of the agency relationship. The rule protects the commercial agent's interest in receiving payment for its efforts made before the ending of the relationship.

However, the agent cannot expect to receive commission on transactions concluded a long time after the ending of the agency. This right to commission is limited to a limited number of specific situations. This rule therefore also takes into account the principal's interests.

C. Reasonable period

The parties are free to agree upon a period rather than leave it to the reasonableness test in paragraph (1)(a)(i). Reasonableness in the context of this Article is to be judged by the criteria mentioned in the definition of that term in I.–1:104 (Reasonableness). For instance, the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trade or profession involved must be taken into account. Factors which play a role in order to determine a reasonable period include, for instance, the volume of the transactions and the time it normally takes the principal to conclude a contract negotiated by the agent. A reasonable term is normally no longer than 6 months.

D. Mainly the result of the agent's efforts

The requirements relating to the agent's entitlement after the agency has ended are stricter than those in IV.E.–3:301 (Commission during the agency). The agent has to prove not only that it played an active role in locating customers, negotiating with them and concluding the contract, but also that the conclusion was mainly due to its efforts. However, if the agent proves that the conclusion is primarily due to its actions, the agent may be entitled to commission in two situations – first, when the contract is concluded within a reasonable period after the ending of the agency; secondly, when the customer's offer reached the agent or the principal before the ending of the agency.

E. Performance of the contract with the customer

Another requirement for the existence of the agent's entitlement to commission is that the agent's activities have proved to be effective, i. e. when the obligations under the contract have, or should have been, properly performed. The principal then owes the agent the commission on that particular transaction. This obligation to pay commission does not mean that the agent may immediately claim commission; the commission is to be paid periodically (see IV.E.–3:304 (When commission is to be paid)). The agent may only demand payment from the expiry of the agreed period (at the latest three months). If the agent claims payment before that period, the principal may justifiably withhold performance until that moment.

F. After the agency has ended

This Article applies to situations where the contractual relationship has come to an end for whatever reason. It applies for example where a relationship entered into for a definite period has expired and where a contractual relationship has been terminated unilaterally, whether or not for non-performance.

G. Relation to an indemnity for goodwill and to damages for non-observance of the period of notice

The entitlement to commission after the end of the agency may not cumulate with an Entitlement to an indemnity for goodwill (IV.E.–2:305 (Indemnity for goodwill)) when the agency is terminated. Both rules are based on the same idea of restitution.

However, t(e entitlement to commission may cumulate with an entitlement to damages under IV.E.–2:303 (Damages for termination with inadequate notice).

Illustration 1
After 15 years, A, the principal, ends the agency of B, the commercial agent, by giving two months' notice. B claims the payment of commission according to the present Article, indemnity for goodwill and damages for termination with inadequate notice. A court will grant either (i) the payment of commission according to the present Article and damages for termination with inadequate notice or (ii) indemnity for goodwill and damages for termination with inadequate notice.

H. Character of the rule

The parties may not derogate from paragraph (1)(b)(ii) to the detriment of the commercial agent.

NOTES

I. In general

1. This Article is a combination of arts. 8 and 10 of the Directive. Art. 8 of the Directive determines under which circumstances there is an entitlement to commission after the end of the agency, whereas art. 10 establishes when the commission is "due". (Art. 8 of the Directive: "A commercial agent shall be entitled to commission on commercial transactions concluded after the agency contract has terminated: (a) if the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or (b) if, in accordance with the conditions mentioned in Article 7, the order of the third party reached the principal or the commercial agent before the agency contract terminated.")

II. Entitlement to commission

2. Art. 8 of the Directive has been transposed into the following statutory provisions: AUSTRIA: § 11 (1) HVertrG.; UNITED KINGDOM : Reg. 8; FINLAND: art. 11 Act on Commercial Agents; FRANCE Ccom art. 134-7; GERMANY § 87 III HGB; GREECE: art. 6 para. 2 Law on Commercial Agency; ITALY: CC art. 1748; NETHERLANDS: CC art. 7:431(2); POLAND: CC art. 761 I.

3. Under SPANISH law there is a rule similar to art. 8 of the Directive (art. 13 LCA). However, under the Spanish rule, the contract with the client must have been concluded within three months after the contract ended, rather than within a reasonable period.

III. The moment when commission is 'due'

4. In art. 10 the Directive contains a further rule with regard to the moment when the agent becomes entitled to commission. The same requirements are included in the following legal systems: AUSTRIA: § 9 HvertG.; UNITED KINGDOM: Reg. 10 (2) and (3); FINLAND: arts. 12, 14 the Act on Commercial Agents; FRANCE: Ccom art. L.134-9; GERMANY: § 87a I, III HGB; ITALY: CC art. 1748 para. 3; PORTUGAL: art. 18 DL 178/86; SPAIN: art. 14 LCA; SWEDEN: § 11 (2) HaL.

IV.E.–3:303: Conflicting entitlements of successive agents

The commercial agent is not entitled to the commission referred to in IV.E.–3:301 (Commission during the agency) if a previous commercial agent is entitled to that commission under IV.E–3:302 (Commission after the agency has ended), unless it is reasonable that the commission is shared between the two commercial agents.

COMMENTS

A. General idea

This provision concerns cases in which the two preceding Articles may conflict, i. e. where an agent has been replaced by another agent and both claim their commission on transactions which have been concluded. According to the present rule, usually the first agent is entitled to the commission. However, certain circumstances may lead to the conclusion that the two agents must share the commission on a transaction, in particular when both of them have contributed to it.

B. Interests at stake and policy considerations

Conflicts may arise between the first and the second agent relating to the question of who should receive the commission on a particular transaction. This rule protects the first agent's interest. If the first agent shows that the transaction was mainly due to its efforts and either the contract was concluded shortly after the ending of the agency or the customer's offer reached the first agent or the principal before the ending of the agency, then it is assumed that the transaction is due to the first agent's efforts more than to those of its successor.

However, the entitlements of the first agent can arise only during a short period after the ending of the agency and if all the requirements of IV.E.–3:302 (Commission after the agency has ended) have been met. This rule is therefore not unreasonably burdensome for the second agent. Moreover, it leaves open the possibility that both agents should share the commission.

Finally, this rule takes care of the principal's interest in the sense that the principal will never have to pay commission twice on a certain transaction.

C. Reasonableness of shared entitlement

Whether it is reasonable that the two agents share their entitlement to commission on a particular transaction depends to a large extent upon their respective contributions to the conclusion of the contract. In particular if the second agent's contribution to the conclusion of the contract was substantial, then the first agent's right will not necessarily prevail. If both agents are entitled to commission on the same transaction, each party's share must be reasonable.

NOTES

I. Conflicting rights to commission

1. This rule has been taken from art. 9 of the Directive which has been transposed into the national legal systems as follows: AUSTRIA: § 11(2) HVertrG; BELGIUM: art.

12 *Handelsagentuurwet*; FINLAND: Article 11. 2 of the Act on Commercial Agents; FRANCE: Ccom L. 134-8; GERMANY § 87 I (2), § 87 II (2), § 87 III (2) HGB; UNITED KINGDOM: Reg. 9; ITALY: CC art. 1748 para.*;* NETHERLANDS: CC art. 7:431(3), *Asser-Kortmann*, nos. 208, 213; POLAND: CC art. 761 II; PORTUGAL: art. 17 DL 176/86; SPAIN art. 13(2) LCA.

II. Character of the rule

2. Under ITALIAN, DUTCH law this rule is mandatory (NETHERLANDS CC art.7:445(1), *Asser-Kortmann*, nos. 208, 213). Under the other systems it is a default rule, just as in the Directive.

IV.E.–3:304: When commission is to be paid

(1) The principal must pay the commercial agent's commission not later than the last day of the month following the quarter in which the agent became entitled to it.

(2) The parties may not, to the detriment of the commercial agent, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

The parties may agree upon periodical payments of commission by the principal. The present rule provides a minimum standard: while the parties may agree that the principal must pay at an earlier date, they may not agree that the principal must pay at a later date. If the parties have not agreed on a period for payment, the commission is to be paid every three months. The moment of payment is usually also the moment when the statement of the commission to which the agent is entitled has to be supplied (see IV.E.–3:310 (Information on commission)).

According to this rule, the agent may have to wait in claiming commission for up to three months after it has earned it. The fact that the principal has free use of the money for an extra period can be taken into account when the rate of commission is fixed.

B. Interests at stake and policy considerations

This Article, on the one hand, protects the agent in the sense that the parties may not agree that the principal can pay at a later moment than once every three months, while they remain free to agree on, for instance, monthly payments.

On the other hand, it allows the commission to be paid periodically which is mainly in the interest of the principal. It means that the commission earned on separate contracts is calculated over a certain period (three months) and paid at the end of that period.

C. Relation to other provisions

The general rule is that the time at which an obligation is to be performed depends on the terms regulating the obligation, which failing the obligation must be performed within a reasonable time after it arises (III.–2:102 (Time of performance). The terms regulating the obligation may be derived from the law (III.–1:102 (Definitions) paragraph (5). The present Article is an example of specific legal regulation of the time of performance.

However, the present rule deviates from III.–2:102 (Time of performance) in the sense that it limits the parties' freedom to determine the time of performance in their contract: the parties may not agree that the principal must pay on a later moment than provided for in this Article.

D. Character of the rule

This rule is mandatory: the parties may not agree that the principal must pay later than once every three months.

E. Remedies

The normal remedies for non-performance of a monetary obligation are available. The agent is in particular entitled to claim interest from the moment when the principal has failed to pay the commission which became due, *i. e.* at the end of the period fixed for payment (at the latest three months).

NOTES

Moment when commission is to be paid

1. The Directive employs the concept of commission 'due' in art. 10. This is confusing because normally the moment when an obligation is due indicates the moment from which the creditor can claim performance. Therefore this Article does not use the concept of commission 'due'.
2. Art. 10(3) and (4) of the Directive include: "(3) The commission shall be paid not later than on the last day of the month following the quarter in which it became due. (4) Agreements to derogate from paragraphs 2 and 3 to the detriment of the commercial agent shall not be permitted." A similar rule to that of art. 10(3) and (4) of the Directive has been transposed into the following legal systems. AUSTRIA: § 9 HVertrG; UNITED KINGDOM Reg. 10(3), (4); FRANCE: Ccom art. L. 134-9; GREECE art. 6 para. 3 Law on Commercial Agency 219/1991; ITALY: CC art. 1748; POLAND: CC art. 761 III § 3; PORTUGAL: art. 18 DL 178/86, *Pinto Monteiro* 1998, 80; RP 28/03/2001, JTRP7, www.dgsi.pt.; SPAIN: LCA art. 16 (the parties may stipulate in the contract for payment of the commission before the time provided for by art. 16). SWEDEN: HaL § 11(1).
3. However, under GERMAN law the commission must be paid before the last day of the month in which it became due (§§ 87 a IV, 87 c I HGB). But the minimum requirement – the last day of the month following the quarter in which it became due – is the mandatory rule (FINLAND: art. 14.2 Act on Commercial agents; NETHERLANDS: CC arts. 7:433, 7:434). Under FINNISH and DUTCH law the default rule is that the commission is due on a monthly basis (FINLAND art. 14.1 Act on Commercial agents; NETHERLANDS: CC arts. 7:433. 434).

IV.E.–3:305: Entitlement to commission extinguished

(1) A contract term whereby the commercial agent's entitlement to commission on a contract concluded with a client is extinguished is valid only if and to the extent that it provides for extinction on the basis that the client's contractual obligations are not performed for a reason for which the principal is not accountable.

(2) Upon the extinguishing of the commercial agent's entitlement to commission, the commercial agent must refund any commission already received.

(3) The parties may not, to the detriment of the commercial agent, exclude the application of paragraph (1) or derogate from or vary its effects.

COMMENTS

A. General idea

In principle, each contract concluded by the principal as a result of either the agent's efforts or with a customer from the agent's area entitles the agent to commission once either the principal or the customer has performed the obligations under the contract (see IV.E.–3:301 (Commission during the agency) and IV.E.–3:302 (Commission after the agency has ended). The parties may agree that such an entitlement is extinguished, if the obligations under the contract with the customer are not performed. They may agree that the agent is to repay commission already paid but even if they do not expressly agree this the principal may recover any commission previously paid to the agent (paragraph (2)).

However, the agent cannot lose the right to commission when the principal is accountable for the non-performance (paragraphs (1) and (3)).

B. Interests at stake and policy considerations

The principal has an interest in not paying commission on transactions which have not been successfully brought to a successful end. The present provision recognises that interest because it entitles the principal to recover the commission already paid for such transactions.

The commercial agent is also protected in the sense that the agent cannot lose the right to commission where the principal is responsible for the non-performance.

C. Non-performance of the obligations under the contract with the customer

Extinguishing the agent's right to commission can only occur if the obligations under the contract with the customer are not performed and the non-performance is not due to the principal. This rule may therefore be applicable when it is clear that the customer cannot or will not perform the customer's obligations under the contract or when the principal can be excused non-performance under III.–3:104 (Excuse due to an impediment). If the principal is however accountable for the non-performance, the agent is entitled to commission. As this is an exception on which the principal has to found in order to defeat an existing entitlement it will be for the principal to establish that it applies. It will therefore be for the principal to establish that there has been non-performance of the client's obligations and that this is for a reason for which the principal is not accountable. Although, in accordance with the normal drafting convention, the provision is drafted in the present tense ("are not performed") it is

implied that the time for performance has passed. It would be contrary to good faith and fair dealing for the principal to try to exercise the right to extinguish the commission if there was still time within which the client's obligation could be performed.

D. Character of the rule

Paragraph (1) of this rule is mandatory in the sense that the parties may not deviate therefrom to the detriment of the commercial agent. The second paragraph is a default rule: parties are free to agree otherwise.

NOTES

I. Entitlement to commission extinguished

1. This rule has been taken from art. 11 of the Directive which has been transposed into the national legal systems of the Member States.
2. Art. 11 of the Directive: "The right to commission can be extinguished only if and to the extent that: – it is established that the contract between the third party and the principal will not be executed, and – that fact is due to a reason for which the principal is not to blame. 2. Any commission which the commercial agent has already received shall be refunded if the right to it is extinguished. …" AUSTRIA: § 9 (3) HVERTRG.; UNITED KINGDOM: Reg. 11; FINLAND: art. 13 Act on Commercial Agents and Salesmen; FRANCE: Ccom art. L. 134-10; GERMANY: § 87 a III (2) HGB; GREECE: art. 7 paras. 4-4a-7 Law on Commercial Agency 219/1991; ITALY: CC art. 1748(6); NETHERLANDS CC art. 7:426(2), 7:432(2); the duty to refund commission is covered by the more general rules of *onverschuldigde betaling* (undue payment), CC arts. 6:203-6:211, *Asser-Kortmann*, no. 215, *Nuytinck*, at 7:432, *Smit* (1996) 48-50); POLAND: CC art. 761 IV; PORTUGAL: art. 19 DL 178/86 *Pinto Monteiro* (1998) 80; SPAIN: art. 17 LCA; SWEDEN: § 12 HaL.
3. However, under FINNISH law there is an additional requirement: it must also be clear that the contractual obligations are not going to be performed in the future (Art. 13.2 Commercial Agents Act).

II. Character of the rule

4. Art. 11(3) of the Directive provides: "Agreements to derogate from paragraph 1 to the detriment of the commercial agent shall not be permitted." See also: AUSTRIAN law, GERMANY: § 87a V HGB; ITALY: CC art. 1748 para. 6; NETHERLANDS: CC art. 7:445(1); SWEDEN: HaL § 12.

IV.E.–3:306: Remuneration

Any remuneration which wholly or partially depends upon the number or value of contracts is presumed to be commission within the meaning of this Chapter.

COMMENTS

A. General idea

If the parties have agreed that the agent is entitled to a remuneration which is completely or partially dependent upon the amount or value of the resulting transactions without explicitly referring to it as commission, then the rules on commission will nevertheless apply.

B. Interests at stake and policy considerations

The presumption that any remuneration which depends upon the number or value of contracts amounts to commission is in the commercial agent's interest, because in such cases the protective rules in this Chapter will apply.

C. Basis of remuneration

Although the remuneration is normally calculated on the basis of contracts with customers which have been concluded and the obligations under which have been performed (IV.E.–3:301 (Commission during the agency) and IV.E.–3:302 (Commission after the agency has ended) the parties may agree upon a remuneration which does not depend on the amount or value of the contracts. Moreover, even though the agent will normally mainly or solely be paid by commission, the parties may agree that it will in addition be entitled to a fixed amount of money over a certain period or under certain conditions. Such remuneration may give the commercial agent the security of some income at the beginning of the relationship. At a later stage, the parties may agree on a fixed minimum sum in case the principal does not have any work for the agent, or not as much as usual, as a result of the principal's production capacity or company policies. Such a fixed amount then entitles the agent to a minimum income. It follows from the present Article that the rules on commission in this Chapter do not apply to such a fixed income.

NOTES

Remuneration

1. In most European countries, this rule, which is laid down in Art. 6(2) of the Directive, has been transposed into the national legal system. (Art. 6(2) of the Directive: "Any part of the remuneration which varies with the number or value of business transactions shall be deemed to be commission within the meaning of this Directive." See: BELGIUM: art. 17 *Handelsagentuurwet*; UNITED KINGDOM: Reg. 2; FINLAND: art. 15 Act on Commercial Agents; FRANCE Ccom art. L. 134-5; GREECE: art. 5 Law on Commercial Agency; POLAND: CC art. 758 I § 3; PORTUGAL: art 15 DL 178/86, *Pinto Monteiro* (1998) 73; SPAIN: art. 11 LCA.
2. § 87 b I of the GERMAN HGB includes art. 6 of the Directive. However, it is less detailed than the present Article and art. 6 of the Directive. The German provision merely determines that, in the absence of any agreement regarding remuneration, the

commercial agent is entitled to the remuneration which is customarily allowed. The place where the commercial agent carries out business determines the remuneration (*Koller/Roth/Morck*, § 87 b HGB no. 2). If the commercial agent is unable to prove the customarily allowed remuneration, it is allowed to determine the remuneration in accordance with '*billigem Ermessen*' (§§ 315, 316 BGB, *Koller/Roth/Morck*, § 87 b HGB no. 2; *Münchener Kommentar zum Handelsgesetzbuch*, § 87 b HGB no. 13)

3. However, under AUSTRIAN, ITALIAN and DUTCH law, there is no such statutory rule.

IV.E.–3:307: Information by principal during the performance

The obligation to inform requires the principal in particular to provide the commercial agent with information concerning:

(a) characteristics of the goods or services; and

(b) prices and conditions of sale or purchase.

COMMENTS

A. General idea

During the agency contract, the principal must disclose all the information in its possession which the agent needs for the proper performance of its obligations under the contract (IV.E.–2:202 (Information during the performance)). The principal must inform the agent, in particular, concerning the products to be sold or purchased and the conditions under which the principal will conclude contracts with customers. This implies that the principal must also provide the agent with all relevant documentation where this is appropriate. The list of required information is not exhaustive.

B. Interests at stake and policy considerations

If the agent does not know which products the principal wants to sell or purchase and for which price, it will not find many customers willing to conclude a contract. Therefore, the principal must disclose information relating to the products involved and the conditions under which the principal wants to contract. This duty to provide information is not unreasonably burdensome for the principal: it only has to provide the agent with the information and documentation available to it, in so far as this is required by the agent for the performance of its obligations under the agency contract.

C. Relation to other provisions

This Article may be regarded as a further specification of the obligation to inform under IV.E.–2:202 (Information during the performance) and more generally of the obligation to co-operate under III.–1:104 (Co-operation).

D. Information to be provided

There is no general form requirement as to the way in which this information is to be provided. Depending on the circumstances the principal may, for instance, communicate the information to the agent by means of documents relating to the products, such as leaflets and standard contract forms. Unless otherwise agreed, this documentation must be provided free of charge.

The obligation is not an obligation of result as to the quality of the information: the principal must make reasonable efforts to ensure that the information is correct.

Characteristics of the products. The principal must provide the agent with information concerning all the relevant characteristics of the products involved. If the principal decides that it will purchase or sell other products, it must inform the agent and provide it with all the relevant information regarding the new products. The principal may be obliged to provide relevant documentation, for instance samples and designs.

Prices and sales conditions. Such information may include, for instance, information concerning prices, the terms of payment, the terms of delivery, the principal's commercial policy (for what type of customers the goods are meant) and any modifications to these. This obligation to inform may include the obligation on the part of the principal to provide documentation, such as price lists and printed advertising material.

NOTES

I. Information during performance

1. Under the Directive the obligation to inform has not been elaborated. Art. 4(2) a, b first sentence of the Directive merely states: "A principal must in particular: (a) provide his commercial agent with the necessary documentation relating to the goods concerned; (b) obtain for his commercial agent the information necessary for the performance of the agency contract, …"

2. The legal systems of the following countries contain a rule similar to the one included in the Directive: AUSTRIA § 6 (1) 1 HVertrG; BELGIUM: art. 8 sub 1, 2 Handelsagentuurwet; UNITED KINGDOM: Reg. 4(2) a; FRANCE: Art. 2 Décret n 58-1345, 23-12-1958; GERMANY: § 86 II HGB; GREECE: art. 4 Law on Commercial Agency; ITALY: CC art. 1749(1); THE NETHERLANDS: CC art. 7:430; POLAND: CC art. 760 § II.

II. Characteristics of the goods or services, prices and conditions of sale or purchase

3. In some legal systems the contractual obligation to inform has been specified. Under GERMAN and SPANISH law the duty to provide the commercial agent with documentation is elaborated in the statutory provision itself. The principal must provide the agent with a collection of samples, catalogues, price lists and other documents necessary for its professional activity (GERMANY: § 86 a I HGB; SPAIN: art. 10(2) a LCA).

4. Under DUTCH and SWEDISH law such an elaboration of the obligation to provide information is not included in the statutory provisions themselves. However, reference is made to the items mentioned in the Article in the Parliamentary history of the general statutory provisions. (NETHERLANDS: *MvT*, *Kamerstukken* II 1988/1989, 20842, nos. 3, 4; *Asser-Kortmann* no. 207; *Nuytinck*, comment on arts. 7:430 (sub 2) and CC 7:611; SWEDEN: Prop. 1990/91:63, 63 f).

5. Under GERMAN law the information regarding the characteristics of the products, prices, conditions of sale, and the commission due are not mentioned explicitly in the HGB. However, the courts and legal authors do agree that the principal also has to inform the agent about these issues because this information is essential for the work of the agent (BGH, *BGHZ* 49, 44; BGH, *DB* 1972, 525; *Koller/Roth/Morck*, § 86 a HGB no. 3; *Martinek/Semler*, § 8 no. 72; *Münchener Kommentar zum Handelsgesetzbuch*, § 86 a HGB no. 10-14).

IV.E.–3:308: Information on acceptance, rejection and non-performance

(1) The principal must inform the commercial agent, within a reasonable period, of:

(a) the principal's acceptance or rejection of a contract which the commercial agent has negotiated on the principal's behalf; and

(b) any non-performance of obligations under a contract which the commercial agent has negotiated or concluded on the principal's behalf.

(2) The parties may not, to the detriment of the commercial agent, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

The principal has to inform the agent, who negotiates contracts on its behalf, concerning any follow-up action relating to offers or orders procured by it. The agent is entitled to know whether a transaction has been accepted, accepted subject to conditions or rejected. This provision does not mean that the principal has to provide reasons for refusing a transaction: the mere statement that a particular transaction has been refused without specifying any detail will be sufficient. It does, however, include an obligation for the principal to inform the agent on a more general level whether, as a rule, the principal will refuse a certain type of customer or contract. Where the contract with the customer has been concluded, the agent must be informed regarding any non-performance of the obligations under the contract. The agent is entitled to this information within a reasonable period.

B. Interests at stake and policy considerations

This obligation is important for the negotiating agent because it enables the agent (i) to calculate its commission, (ii) to verify whether refusals have been given systematically, arbitrarily or in bad faith, and (iii) to inform the customers regarding the principal's reaction. It is also relevant for the agent who actually concludes contracts, because the fact that obligations under a contract have not been performed, may either completely remove the agent's right to commission or temporarily prevent the agent from demanding commission (IV.E.–3:301 (Commission during the agency) and IV.E.–3:302 (Commission after the agency has ended). Where appropriate, the performance also determines the agent's *del credere* liability (IV.E.–3:313 (Del credere clause). The agent itself cannot easily obtain information concerning the performance of the obligations under the contract with the customer, because after the negotiations (and the conclusion) the agent is no longer involved in the transaction between the principal and the customer.

This rule also takes the interest of the principal into account. The principal serves its own reputation if the agent can speedily answer a potential customer. Moreover, if the principal informs the agent in due time that it does not want to conclude a certain contract, no right to commission comes into existence. The present rule is not unreasonably burdensome for the principal, who has this information available. The principal knows whether it will accept or reject an order. The rule leaves the principal with reasonable time to decide whether it wants to conclude the contract. The principal will know more about the performance of the contractual obligations than the agent, because after the negotiations on (and the conclusion of) the contract by the agent, it will directly contact the customer and vice versa.

C. Character of the rule

This rule is mandatory; the parties may not deviate from it to the detriment of the commercial agent (paragraph (2)).

NOTES

I. Information on acceptance, rejection and non-performance

1. This rule has been taken from art. 4(3) of the Directive which has been transposed into the legal systems of the Member States. Art. 4(3) of the Directive states: "A principal must, in addition, inform the commercial agent within a reasonable period of his acceptance, refusal, and of any non-execution of a commercial transaction which the commercial agent has procured for the principal." AUSTRIA: § 6 (3) HvertG.; BELGIUM: art. 8 *Handelsagentuurwet*; UNITED KINGDOM: Reg. 4 (3); FINLAND: art. 8 Act on Commercial Agents; FRANCE: Art. 2 Décret n 58-1345, 23-12-1958; GERMANY: § 86 a II (2) HGB. GREECE: Art. 4 Law on Commercial Agency 219/1991; ITALY: CC article 1749; NETHERLANDS: CC art.430(4); POLAND: CC art. 760 II § 2; PORTUGAL: art. 13 b DL 178/86, *Pinto Monteiro* (1998), 71; SPAIN: art. 10, para. 3 LCA).

II. Reasonable period

2. Some legal systems contain a different rule as to the period within which the information must be provided. Under AUSTRIAN and GERMAN law the principal must inform the commercial agent immediately (*unverzüglich)* (AUSTRIA: § 6(3) HvertG; GERMANY: § 121 BGB). Under PORTUGUESE law the principal must fulfil this obligation without delay (art. 13 b DL *sem demora*). According to SPANISH law the acceptance or rejection must be communicated within 15 days and, in the case of non-performance, as soon as possible considering the nature of the transaction (art. 10(3) LCA). The principal has to justify the rejection to the agent, according to RD art. 7(c) 1438/1985). Pursuant to the ITALIAN collective economic agreements of 9 June 1988 for commerce and 16 November 1988 for industry, the period within which the information is to be communicated is 60 days from the moment when the principal receives the order procured by the agent. After the expiry of this period, if the principal does not inform the commercial agent of the refusal, the transaction is deemed to be accepted.

III. Character of the rule

3. Under the directive this rule is mandatory (art. 5 of the Directive). See for transposition into the legal systems of the Member States: AUSTRIA: § 27(2) HvertG.; UNITED KINGDOM: Reg. 5; FRANCE: Art. 3-1 Décret n 58-1345, 23-12-1958; GERMANY: § 86 a III HGB; ITALY: CC art. 1749; THE NETHERLANDS: CC art. 7:445(1); POLAND:CC art. 760 II § 4; SPAIN.

IV.E.–3:309: Warning of decreased volume of contracts

(1) The principal must warn the commercial agent within a reasonable time when the principal foresees that the volume of contracts that the principal will be able to conclude will be significantly lower than the commercial agent could reasonably have expected.

(2) For the purpose of paragraph (1) the principal is presumed to foresee what the principal could reasonably be expected to foresee.

(3) The parties may not, to the detriment of the commercial agent, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

This mandatory rule imposes an obligation on the principal to warn the agent regarding changes in its business which are likely to affect the agent's entitlement to commission. This rule takes into account the fact that, within a commercial agency, circumstances may change. If the principal foresees that its business capacity will diminish to a greater extent than the agent could reasonably expect, this rule obliges it to warn the agent. Because of the difficulty of proving what the principal actually foresaw, paragraph (2) introduces a presumption that the principal foresaw what it could reasonably be expected to have foreseen.

B. Interests at stake and policy considerations

If the principal does not inform the agent regarding, for instance, a decrease in the principal's production, the principal may refuse more orders than the agent would reasonably expect. This warning may be essential for the agent, because the agent's income depends solely, or to a large extent, on the amount of contracts concluded. The warning enables the agent to search for other means of income in time. This provision also avoids the situation where the agent incurs expenses in locating customers and negotiating contracts which the principal will eventually not conclude.

This obligation to warn is also in the principal's own interests. If the agent is warned a sufficient time in advance, it will not negotiate with customers in vain; the customers will not be disappointed and the principal's reputation will not be affected. This obligation is not unreasonably burdensome for the principal, because the principal does not have to provide the agent with the reasons why the volume of transactions will change, nor does the principal have to warn that this may lead to the ending of the agency. The principal must only warn the agent if it foresees a considerable change in volume.

C. Volume of contracts

The volume of contracts is the total amount of contracts during a certain period of time. The principal has to inform the agent both in situations where a decrease in volume is due to factors within the principal's control and where the decrease is due to a change in the market.

D. Reasonableness

The reasonableness of the time within which the warning is given must be assessed in accordance with the criteria mentioned in the definition in I.–1:104 (Reasonableness). Factors to be taken into account include the nature and purposes of the contract, the circumstances of

the case, and the usages and practices of the trade or profession involved. The same goes for the reasonableness of the agent's expectations. A good test to determine the agent's reasonable expectation will in most cases be the average volume of contracts with customers over the previous 5 years, or if the contract has been in existence for less than 5 years, over the whole period.

E. Character of the rule

This rule is mandatory; the parties may not deviate therefrom to the detriment of the commercial agent (paragraph (3)).

NOTES

I. Warning of decreased volume

1. This rule is included in the Directive (art. 4(2) b of the Directive: "A principal must in particular: … (b) obtain for his commercial agent the information necessary for the performance of the agency contract, and in particular notify the commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected." All Member States have transposed it into their national systems: AUSTRIA: § 6(2) HVertrG; FINLAND: art. 8 Act on Commercial Agents; FRANCE: Art. 2 Décret no. 58-1345, 23-12-1958; UNITED KINGDOM: Reg. 4(2) b; GERMANY: § 86 a II (3) HGB; GREECE: art. 4 Law on Commercial Agency 219/1991; ITALY: CC art. 1749(1); NETHERLANDS: CC art. 7:403(3); POLAND: CC art. 760 II § 4; PORTUGAL: art. 14 DL 178/86, *Pinto Monteiro* 1998, 73 ff; SPAIN: art. 10(2) b LCA; SWEDEN § 7 (3) HaL.

II. Reasonable period

2. The following legal systems contain a different rule concerning the period within which the warning must be given. Under PORTUGUESE law the principal must warn the commercial agent immediately (art. 13 c DL 178/86). Under SPANISH law, the principal must fulfil this obligation "as soon as he knows" of the decrease (art. 10(2) b LCA) and under SWEDISH law the principal must fulfil this obligation without unreasonable delay (SWEDEN: § 7 (3) HaL).

III. Character of the rule

3. AUSTRIAN, FINNISH, FRENCH law include a similar default rule (AUSTRIA: art. § 27 (2) HVertrG.; FINLAND, art. 8 Act on Commercial Agents; FRANCE: art. 3-1 Décret no. 58-1345, 23-12-1958).

4. However, under art. 5 of the Directive this rule is mandatory. In the same sense: UNITED KINGDOM: Reg. 5(1); GERMANY: § 86 a III HGB; ITALY: CC art. 1749; NETHERLANDS CC art. 7:445; POLAND: CC art. 760 II § 4.

IV.E.–3:310: Information on commission

(1) The principal must supply the commercial agent in reasonable time with a statement of the commission to which the commercial agent is entitled. This statement must set out how the amount of the commission has been calculated.

(2) For the purpose of calculating commission, the principal must provide the commercial agent upon request with an extract from the principal's books.

(3) The parties may not, to the detriment of the commercial agent, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

The agent has a right to obtain, within a reasonable period, a statement of the commission that the agent has earned. The agent may furthermore request the principal for an extract from the principal's books, in so far as the information which the agent requests concerns the agent's entitlement to commission.

B. Interests at stake and policy considerations

The commercial agent has a right to know the amount of the commission which it has earned. However, the agent is not necessarily aware that a contract which it has negotiated, and possibly concluded in the name of the principal, has actually led to performance of the obligations under it. This information is typically information which the principal has in its books. The principal must therefore provide the agent with regular overviews of the commission which has become due and, in addition, enable the agent to verify this statement by providing the agent with an explanation of the calculation used. The statement, including the calculation method, should place the agent in a position to make its own calculation.

This obligation is not unreasonably burdensome for the principal. The principal has reasonable time to make and to provide the statement of the commission to which the agent became entitled. This obligation does not require much extra effort, because the principal has to make this calculation anyway in order to be able to comply with its own obligation under the agency contract, i. e. to pay commission to the agent.

C. Relation to other provisions

"Reasonableness" is defined in general terms in I.–1:104 (Reasonableness). The statement is a notice in the sense of I.–1:109 (Notice). Therefore, the statement may be given by any means appropriate to the circumstances and becomes effective when it reaches the commercial agent.

D. Reasonable period

The parties may agree upon the moment when the principal has to provide the statement of commission. However, the term must be reasonable. To assess what is reasonable, the nature and purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved must be taken into account. However, normally it will be reasonable for the principal to provide the agent with the commission statement at or before the moment when the commission has to be paid.

E. Character of the rule

This rule is mandatory; the parties may not deviate therefrom to the detriment of the commercial agent.

NOTES

I. Commission statement

1. The present rule differs from the Directive and from UK, GREEK, ITALIAN and SPANISH law to the extent that under these legal systems the principal is required to provide a commission statement no later than the last day of the month following the quarter in which the commercial agent has become entitled to the commission rather than within a reasonable period. (Art. 12(1) of the Directive: "(1) The principal shall supply his commercial agent with a statement of the commission due, not later than the last day of the month following the quarter in which the commission has become due. This statement shall set out the main components used in calculating the amount of commission.' AUSTRIA: § 16(1) HVertrG; UNITED KINGDOM: Reg. 12(1); GREECE art. 7 paras. 5-6 Law on Commercial Agency 219/1991; ITALY: CC art. 1749(2); POLAND: CC art. 761 V § 1; PORTUGAL art. 13 c DL 178/86, Pinto Monteiro (1998) 71; SPAIN: art. 15(1) LCA).

2. In contrast, under DUTCH law the principal must supply the commercial agent with a commission statement every month, unless they agree that the statement will be provided every two or three months. (CC art. 7:433(1)). Under AUSTRIAN law the commercial agent may request a statement of the commission to which it is entitled. As a consequence, the law allows for no delay in the delivery of the statement (§ 16 HVertrG).

II. Extracts from the principal's books

3. According to Article 12(2) of the Directive a commercial agent may request its principal to provide it with extracts from the books, which are available to the principle and which the agent needs in order to check the amount of the commission due. Under AUSTRIAN, UNITED KINGDOM, FRENCH, GERMAN, GREEK, ITALIAN, SPANISH law there is a similar rule (AUSTRIA: § 16 (1) HVertrG; UNITED KINGDOM: Reg. 12(2); FRANCE: art. 3 Décret n 58-1345, 23-12-1958; GERMANY: § 87c II HGB; GREECE art. 7 paras. 5-6 Law on Commercial Agency 219/1991; ITALY, CC art. 1749, Cass. 2-10-1998, n. 9802, in Mass. giur. ital., 1998, col. 9802; PORTUGAL: art. 13(2) DL 178/86, *Pinto Monteiro* (1998), 72; SPAIN: art. 15(2) LCA).

4. Under DUTCH law a commercial agent may require an inspection of the books. However, it cannot demand an extract from the books (CC art. 7:433(2), HR 28-2-1964, NJ 1964, 456 GJS; HR 5-2-1971, NJ 1971, 222 GJS).

III. Character of the rule

5. Under AUSTRIAN, FRENCH, GERMAN, GREEK law there is a similar rule. (AUSTRIA: § 27(1) HVertrG.; FRANCE: art. 3-1 Décret n 58-1345, 23-12-1958; GERMANY: § 87c V HGB; GREECE art. 7 paras 5-6 Law on Commercial Agency 219/1991).

6. However, according to UNITED KINGDOM and DUTCH law this rule is mandatory. (UK: Reg. 12(3); NETHERLANDS: CC art. 7:445)

IV.E.–3:311: Accounting

(1) The principal must maintain proper accounts relating to the contracts negotiated or concluded by the commercial agent.

(2) If the principal has more than one commercial agent, the principal must maintain independent accounts for each commercial agent.

(3) The principal must allow an independent accountant to have reasonable access to the principal's books upon the commercial agent's request, if:

(a) the principal does not comply with the principal's obligations under paragraphs (1) or (2) of IV.E.–3:310 (Information on commission); or

(b) the commercial agent has important reasons to doubt that the principal maintains proper accounts.

COMMENTS

A. General idea

The principal has obligations under IV.E.–2:202 (Information during the performance) and IV.E.–3:307 (Information by principal during the performance) to provide the agent with all the information the agent needs for the proper performance of the obligations under the contract. In order to properly fulfil these and other obligations the principal has to keep proper accounts, in particular relating to any follow-up action with regard to contracts negotiated by the agent on the principal's behalf, the agent's right to commission and the principal's volume of business. The principal must also keep documentation concerning the products involved in the contracts.

If the statement or the extract supplied by the principal in accordance with the preceding Article is incorrect, the commercial agent may have an important reason to doubt that the principal keeps proper accounts. The agent may then request an inspection of the principal's books by an independent accountant.

B. Interests at stake and policy considerations

For the performance of the commercial agent's obligations under the contract, the agent needs specific information from the principal. Accordingly, the principal may reasonably be expected to keep proper accounts. As a professional the principal will usually do so. Where the principal complies with this obligation to keep proper and separate accounts, it will be easier for the principal to comply with its other obligations under this Section. The principal thus also needs proper accounts for its own purposes.

This provision entitles the agent to verify, by means of an independent third party, whether the principal actually keeps proper accounts. The agent is also allowed to have such an inspection carried out, in the case where the principal does not comply with its obligation to provide a commission statement or an extract from the books under IV.E.–3:310 (Information on commission).

This provision takes into account the principal's interests in keeping its administration secret, because the agent is not granted direct access to the principal's books. Moreover, the agent has no general right to inspect the principal's administration. The agent can only do so in a

limited number of situations, i. e. where the agent has important reasons to suspect that the principal has failed to perform its obligations properly. Finally, the inspection of the books by the accountant takes place at the agent's expense.

C. Proper accounts

The principal is always obliged to keep accounts relating to the products involved, the commission due and the follow-up action relating to those contracts which are the result of the agent's activities.

NOTES

Reasonable access to the principal's books

1. Under FINNISH law if the principal does not give the necessary extracts to the agent, a chartered accountant has a right to inspect the accounts to the extent that is required (Art. 20.2 Act on Commercial Agents). Under AUSTRIAN law there is a similar rule when the principal refuses to give the commercial agent access to the principal's books. In such a case the court may then appoint a registered account to check the books (§ 16(2) ff. HVertrG).
2. Under GERMAN law there is a similar rule to Article 2:311(3)(b) included in § 87c IV HGB. However, it must be necessary to establish the amount of commission due.
3. There is no specific provision under SPANISH law for such an obligation on the principal, although the Ccom art. 25 has a general obligation of proper business accountancy.
4. In ENGLISH law the representative has a right to information regarding commission and to extracts from the principal's accounts (Commercial Agents (Council Directive) Regulations 1993, Reg 12).

IV.E.–3:312: Amount of indemnity

(1) The commercial agent is entitled to an indemnity for goodwill on the basis of IV.E.–2:305 (Indemnity for goodwill) amounting to:

(a) the average commission on contracts with new clients and on the increased volume of business with existing clients calculated for the last 12 months, multiplied by:

(b) the number of years the principal is likely to continue to derive benefits from these contracts in the future.

(2) The resulting indemnity must be amended to take account of:

(a) the probable attrition of clients, based on the average rate of migration in the commercial agent's territory; and

(b) the discount required for early payment, based on average interest rates.

(3) In any case, the indemnity must not exceed one year's remuneration, calculated from the commercial agent's average annual remuneration over the preceding five years or, if the contractual relationship has been in existence for less than five years, from the average during the period in question.

(4) The parties may not, to the detriment of the commercial agent, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

This rule aims to provide a method for calculating the amount of indemnity to which the agent may be entitled according to IV.E.–2:205 (Indemnity for goodwill). In order to do so, two steps must be taken. The first step concerns the identification of the new customers and the existing customers whose volume in the principal's business increased considerably.

Then, the agent's average commission that was paid on these customers is calculated for the last twelve months prior to the termination of the agency. Subsequently, the duration of these benefits for the principal must be estimated. Next, the rate if migration must be considered. The rate of migration is calculated on a yearly basis and is reduced for each year with a certain percentage of the commission for the migration rate, and the average interest rate must be taken into account as well (paragraph (2)). The second step concerns the comparison between the amount of indemnity calculated on the basis of paragraphs (1) and (2) and the annual average remuneration over the preceding five years. If the amount of indemnity exceeds the annual remuneration, the latter will be awarded. In other words, paragraph (3) provides for a maximum amount of indemnity.

B. Interests at stake and policy considerations

The policy consideration underlying this rule is that the increased volume of business for the principal represents a benefit for the principal if the agency is terminated for which the agent should be indemnified. The present rule is in the interest of both parties, because it provides legal certainty and avoids extensive transaction and litigation costs for establishing the exact value of the goodwill which has passed between the parties.

In the interest of the commercial agents the calculation method tries to ensure that the agent is indemnified, as much as possible, for the loss of goodwill. On the other hand, the interests of

the principal are taken into account by the fact that the principal's benefits usually decrease over time. Moreover, the provision also contains a maximum for the indemnity, which is also in the interest of the principal.

C. New or old customers

Each new customer acquired would usually entitle the agent to commission and must therefore be taken into account when calculating the amount of indemnity. The income which the agent would have earned from services (and other activities) provided to the customers should not be taken into account when calculating the indemnity.

Whether the agent is entitled to an indemnity for goodwill with regard to contracts concluded with previously acquired customers, depends on whether the commercial agent has substantially increased the volume of business with them. The increase in volume must be such that it equals the acquisition of a new customer in economic terms.

D. Likely future duration of benefits

The principal will not eternally benefit from the agent's activities. In order to determine how long the principal will profit from the continuous advantages which were generated by the agent, an estimation must be made. This estimation depends to a large extent on the market situation and the sector concerned. Usually these benefits last for 2 or 3 years, but they may last for as long as 5 years.

E. Attrition and migration rate

Over time, the principal always loses customers. A customer may conclude just one transaction with a principal without the intention to continue doing so on a regular basis. Also, customers switch to another principal, for instance because the other principal deals in another brand or different products, or they move to another area. The rate of migration is variable and must be evaluated from the particular experience of the agent in question. The rate of migration must be calculated as a percentage of the commission on an annual basis.

F. Discount for early payment by reference to average interest rate

This factor is meant to calculate the present value of the transactions taking into account that there is an accelerated receipt of income.

G. Maximum amount of indemnity

The third paragraph provides a final amendment to the amount of indemnity. It is not in itself a method of calculation, but it includes a limit to the amount of indemnity. The limit is the average annual remuneration. To determine the maximum sum to be paid to the commercial agent, the amount of indemnity calculated on the basis of paragraphs (1) and (2) must be compared to the commercial agent's average annual remuneration. To establish the latter, all forms of payment (not only commission) and all customers (not merely new customers or the ones generating more benefits for the principal) are to be included. If the amount of the indemnity which results from the calculation on the basis of the first two paragraphs is less than the average annual remuneration then the amount of indemnity calculated is awarded. If, however, the amount of indemnity exceeds the annual average remuneration, the latter is granted. In practice, it is quite unusual for this maximum to be reached.

H. Damages

Where the principal terminated the agency with inadequate notice the agent may decide to claim damages for the actual losses which it has suffered as a consequence of the termination of the agency: they may include the loss of clientele, investments made and costs incurred in the performance of the obligations under the agency contract, and payments to third parties, for instance employees or sub-agents. In that case the agent must prove both the loss and the fact that it was caused by the termination with inadequate notice (see IV.E.–2:303 (Damages for termination with inadequate notice)).

I. Character of the rule

This rule is a mandatory rule; the parties may not derogate from it to the detriment of the commercial agent.

NOTES

I. Calculating the amount of indemnity

1. The present article is based on the Report on the application of Article 17 of the Council Directive on the co-ordination of the laws of the member states relating to self-employed agents (86/653/EC) (Presented by the Commission) COM (96) 364 final (hereafter: Report of the Commission) which, in turn, was inspired by German case law.

2. Under GERMAN law the amount of indemnity is calculated as follows. First, the average commission on contracts with new customers is established (§ 89 b I (1) no. 2 HGB) and also the significant increase in volume concerning business with existing customers (see § 89 b I (2) HGB) for the last 12 month before the contractual relationship ended (BGH, *WM* 1991, 826; BGH, *NJW* 1983, 2879; *Münchener Kommentar zum Handelsgesetzbuch*, § 87 b HGB no. 131). The result of this calculation must be multiplied with the number of years the principal is most likely to benefit from these customers in the future (*Münchener Kommentar zum Handelsgesetzbuch*, § 87 b HGB no. 137). To determine which number of years should be considered, all circumstances have to be taken into account. Usually, these benefits last for two or three years, but for long-lasting goods they may last for up to five years (BGH, *NJW* 1985, 860; OLG Frankfurt, *BB* 1973, 212; *Münchener Kommentar zum Handelsgesetzbuch*, § 87 b HGB no. 82). Subsequently the resulting amount of indemnity must be corrected to take account of several factors. The first is the average rate of migration in the territory of the agent (*Abwanderungsquote*, BGH, *Zeitschrift für Wirtschaftsrecht* 1987, 1387; OLG Köln, *Versicherungsrecht* 1968, 966; *Münchener Kommentar zum Handelsgesetzbuch*, § 89 b HGB no. 133). This rate is not estimated, but is calculated on the basis of the migration rates of the last years before the contract ended (*Münchener Kommentar zum Handelsgesetzbuch*, § 89 b HGB no. 133). The second is the average interest rate due to the accelerated receipt of income (the so-called *Abzinsung*, see BGH, *NJW-RR* 1991, 484; *Münchener Kommentar zum Handelsgesetzbuch*, § 89 b HGB no. 139). The third is the average percentage of customers that will most likely conclude only one contract with the principal and refrain from further contracts in the future (so-called "Mehrfachkundenquote", see BGH, *Zeitschrift für Wirtschaftsrecht* 1987, 1387; *Münchener Kommentar* no. 132). The final factor is the reasonableness of the indemnity considering all the circumstances under § 89 b I (1) no. 3 HGB (BGH, *NJW*

1990, 2991; *Münchener Kommentar zum Handelsgesetzbuch*, § 89 b HGB no. 138; see also Note under article 1:108). This correction normally entails a reduction in the agent's amount of indemnity (*Münchener Kommentar zum Handelsgesetzbuch*, § 89 b HGB no. 138). The criteria for establishing reasonableness are e.g. the duration of the contractual relationship and social or personal circumstances (*Münchener Kommentar zum Handelsgesetzbuch*, § 89 b HGB no. 103).

3. From the Report by the European Commission it follows that the Member States apply the rules which are the result of the transposition of art. 17(2) of the Directive in different forms. The AUSTRIAN courts use the GERMAN method of calculating the amount of indemnity. However, the AUSTRIAN courts regularly reach the maximum amount of indemnity, whereas the GERMAN courts never do so (Commission Report, 8).

4. In BELGIUM and SPAIN this is held to be a question which must be established by the courts (*Verbraeken & de Schoutheete*, no. 113; STS 16 November 2000, RJ 2000\9339 and 14 May 2001, RJ 2001\6207). The amount of the indemnity must be based on the specific remuneration established in the contract, excluding accessory provisions like deposit or delivery of the goods to the clients (SAP Albacete, 17 February 2005, JUR 2005\76703). Although there is no obstacle to admitting a contractual regulation of the way of calculating the indemnity for goodwill, the courts may moderate the amount in order to preserve the equity of the contract (SAP Barcelona 8 June 2005, JUR 2005\176788).

5. In the NETHERLANDS and SWEDEN it is assessed whether the requirements of art. 17 (2) of the Directive are met and subsequently a reasonable amount of indemnity is established (*Asser-Kortmann*, no. 239; § 28 (3) HaL, *Söderlund*, 128). In PORTUGAL the courts tend to assess directly whether an amount is reasonable and, if so, to award it (Commission Report, 6).

6. In ITALY, a court continued to apply the rules which prevailed before the provisions based on the Directive came into force. Another ITALIAN court applied the rules laid down in a collective agreement. The amount of indemnity is measured on the basis of the level of commission, the duration of the agency contract and the percentages set out in the collective agreement (Commission Report, 8).

7. In the UNITED KINGDOM the House of Lords has now held that under the Commercial Agents Regulations 1993 the agent is entitled to receive compensation for loss resulting from the termination, which may be calculated by valuing the income which the agency would have generated (*Lonsdale v Howard & Hallam Ltd* [2007] UKHL 32.

II. Maximum amount of indemnity

8. The Directive contains a rule concerning the maximum amount indemnity in art. 17 (2) sub b of the Directive, which states: "The amount of indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question." These rules have been transposed into the following statutory provisions: AUSTRIA: § 24(4) HVERTRG; UNITED KINGDOM: Reg. 17(4); GERMANY: § 89 b II HGB; ITALY: CC art. 1751; NETHERLANDS: CC art. 7:442(2); POLAND: CC art. 764 III § 2; SPAIN: art. 28 (3) LCA, *Moxica* 32; SWEDEN: § 28(3) HaL.

III. Character of the rule

9. Under art. 19 of the Directive", the parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires." This rule is laid down in AUSTRIAN (§ 27 HvertG), BELGIAN (art. 23 *handelsagentuurwet*), GERMAN, ITALIAN (CC art. 1751), DUTCH law (CC art. 7:442, 7:445(2)), POLISH (CC art. 764 V), PORTUGUESE, SPANISH (STS 7 April 2003, RJ 2003/2951) and SWEDISH law.

IV.E.–3:313: Del credere clause

(1) An agreement whereby the commercial agent guarantees that a client will pay the price of the products forming the subject-matter of the contract which the commercial agent has negotiated or concluded (del credere clause) is valid only if and to the extent that the agreement:

(a) is in textual form on a durable medium;
(b) covers particular contracts which were negotiated or concluded by the commercial agent or such contracts with particular clients who are specified in the agreement; and
(c) is reasonable with regard to the interests of the parties.

(2) The commercial agent is entitled to be paid a commission of a reasonable amount on contracts to which the del credere guarantee applies (del credere commission).

COMMENTS

A. General idea

A *del credere* clause is a clause in which the commercial agent guarantees that the customer will pay to the principal the price agreed upon in the contract between the customer and the principal. Such a clause may increase the agent's liability if the customer does not perform. If the parties wish to include a *del credere* clause in the agency contract, they can only do so in textual form on a durable medium. The *del credere* clause may not extend to a general group of (or to all) customers (paragraph (1)(b)). The *del credere* clause may not unreasonably burden the commercial agent (paragraph (1)(c)). Moreover, the agent is entitled to specific compensation for the fact that the agent guarantees the customer's payments. This compensation is due from the moment of the conclusion of the contract between the principal and the client.

B. Interests at stake and policy considerations

A *del credere* clause gives the principal the possibility to control risk in the case of a customer's insolvency. This is important, especially if the agent has the authority to conclude contracts in the name of the principal. However, obviously such a clause may also imply great financial risks for the commercial agent.

In practice, the principal is frequently in a position to force the agent to accept a far-reaching liability for customers' performance. Since it is usually the principal who accepts or refuses a transaction, the agent may accept such liability for fear of losing the right to commission. Therefore, the agent needs protection. The present provision also protects the agent in the sense that the principal must pay separate commission on the contract for which the agent guarantees the payment by the customer.

NOTES

I. Del credere clause

1. BELGIAN, DUTCH, FINNISH, GERMAN, POLISH, PORTUGUESE, SPANISH law include a specific provision concerning a *del credere* clause (BELGIUM: art. 25 *Handelsagentuurwet*; FINLAND: art. 17 of the Act on Commercial Agents;

GERMANY: § 86 b HGB; NETHERLANDS CC art. 7:429; POLAND: CC art. 761 (1,2); PORTUGAL: art. 10 DL 178/86; SPAIN: art. 19 LCA). SCOTTISH law recognises *del credere* agency at common law (*Gloag & Henderson* para 19.17). The requirements concerning those *del credere* clauses included in those provisions will be discussed in the following notes.

2. GERMAN law contains a slightly broader definition of a *del credere* clause. § 86 b I (1) HGB states that the commercial agent can also guarantee the performance of an obligation resulting from a transaction. This can e.g. also contain a guarantee for the delivery of goods (*Koller/Roth/Morck*, § 86 b HGB no. 5).

3. In contrast, the Directive does not contain any provision in this respect, nor do AUSTRIAN, ENGLISH and FRENCH law.

II. In writing

4. According to BELGIAN, DUTCH, FINNISH, GERMAN, POLISH, PORTUGUESE and SPANISH law the *del credere* clause is invalid if it is not in writing. BELGIUM: art. 25 *Handelsagentuurwet*; GERMANY: § 86 b II (2) HGB; FINLAND: art. 17 Act on Commercial Agents; NETHERLANDS CC art. 7:429(2); POLAND: CC art. 761 VII § 1; PORTUGAL: art. 10(1) DL 178/86, *Pinto Monteiro* (1998) 66. SPAIN: art. 19 LCA;) However, under SCOTTISH and SWEDISH law there is no such requirement (*Gloag & Henderson* para 19.17; *Söderlund*, 166).

III. Particular contracts or particular clients

5. Under FINNISH, GERMAN, POLISH and PORTUGUESE law a *del credere* clause may only be agreed upon in relation to either specific contracts or contracts with specific clients. (GERMANY: § 86 b II (1) HGB; FINLAND: art. 17 of the Act on Commercial Agents; POLAND: CC art. 761 VII § 1,2; PORTUGAL art. 10 DL 178/86; *Pinto Monteiro* (1998), 66).

6. In contrast, under BELGIAN, DUTCH, SCOTTISH, SPANISH and SWEDISH law there does not seem to be such a requirement.

IV. A reasonable clause taking into account the interests of the parties

7. In THE NETHERLANDS this is covered by CC art. 7: 429 para 4.

8. In the specific provision in GERMAN law the reasonability with regard to the interest of the parties is not mentioned explicitly. However, it is to be considered under general contract law.

9. FINNISH, SCOTTISH, SPANISH, SWEDISH law do not contain such a requirement.

V. Del credere commission

10. Under GERMAN, FINNISH, PORTUGUESE, SPANISH, SWEDISH law, the commercial agent is entitled to a specific commission in the case of a del credere clause. (This special commission accumulates with the normal one in PORTUGAL) (GERMANY: § 86 b I (1) HGB; *Koller/Roth/Morck*, § 86 b HGB no. 6; FINLAND, Art. 17 Act on Commercial Agents; PORTUGAL: art. 13 f. DL 178/86, *Pinto Monteiro* (1998) 72; Spain: art. 19 LCA; SWEDEN: *Söderlund*, 166.)

11. However, under GERMAN law there are two exceptions to this entitlement: (i), when the principal or the customer have their branch or residence abroad (§ 86 b III (1) HGB) or (ii) if the commercial agent's authorisation for concluding transactions is unlimited (see § 86 b III (2) HGB).

CHAPTER 4: FRANCHISE

Section 1: General

IV.E.–4:101: Scope

This Chapter applies to contracts under which one party (the franchisor) grants the other party (the franchisee), in exchange for remuneration, the right to conduct a business (franchise business) within the franchisor's network for the purposes of supplying certain products on the franchisee's behalf and in the franchisee's name, and under which the franchisee has the right and the obligation to use the franchisor's tradename or trademark or other intellectual property rights, know-how and business method.

COMMENTS

A. General idea

The essential elements which characterize a franchise relationship are: a) granting the right to operate the franchisor's method of business, which mainly includes licensing the use of intellectual property rights and know-how (the business package); b) selling certain types of products (distribution contract); c) the franchisee's independence: in the franchisee's name and on the franchisee's behalf; d) (direct or indirect) financial remuneration for the franchisor.

Franchise contracts should be distinguished from ordinary distribution contracts. They differ because of the following: first, although many franchise contracts have as their object the distribution of products, this is not always the case; secondly, in a franchise contract there is always the right to operate the franchisor's business method (which notably includes transferring the use of intellectual property rights and know-how); more generally, franchise networks are characterised by a much stronger uniformity than ordinary distribution networks. In fact, in the eyes of consumers there is frequently no difference between a daughter company (or subsidiary) and a franchisee.

B. Interests at stake and policy considerations

The relevance of this Article is that it determines whether a certain contractual relationship is to be classified as a franchise. If so, the Articles in this Chapter apply. This is of particular importance in relation to the mandatory rules contained in several Articles.

Providing assistance is not considered an element of a franchising contract under the present Article. This approach differs from the one taken by European competition rules. According to European competition law, certain types of franchise agreements are exempted from falling under Article 81(1) of the EC Treaty, which prohibits agreements which are incompatible with the common market. In order to restrict the application of these exemption benefits, antitrust rules include assistance as an integral component of the business method being franchised. However, the aim of the present provision is that this Chapter applies to a broader range of franchise agreements. Hence, even when assistance is not provided, this Chapter applies.

C. Mixed contracts

Franchising agreements may draw specific elements from several types of contract: for instance, from a licence agreement relating to trademarks; a purchase or lease agreement concerning specific machinery and equipment; a distributorship agreement concerning the actual products to be marketed by the franchisee; a sales agreement to purchase the goods from the franchisor; a lease agreement concerning the premises where the business will be conducted, or an agreement on joint advertising along with the franchisor and other franchisees for the marketing of the products. The rules on mixed contracts will apply (II.–1:107 (Mixed contracts)). The rules applicable to each relevant type of contract will apply to the corresponding part of the franchise contract. Generally speaking the franchise contract as such (i.e. the part governed by this Chapter) will regulate the framework relationship within which the other contracts will operate.

D. Types of franchise contracts

On the basis of the subject-matter of franchising three main types of franchising are usually distinguished: industrial, distribution and service franchising. In the case of an industrial franchise, the franchisee produces goods according to the instructions of the franchisor and sells them under the intellectual property rights of the franchisor, whereas in the case of a distribution franchise, the franchisee simply sells certain goods in a shop which bears the franchisor's business name or symbol. Finally, a service franchise concerns situations where the franchisee offers a service under the business name, symbol or intellectual property rights of the franchisor.

E. Franchise network

A franchise network consists of a franchisor and the group of all franchisees that operate the same business method and the existing liaison among them.

F. Competition law

Competition law may affect franchise contracts. It depends on the stipulations of the franchise agreement at stake and its economic context whether this is the case. In its Pronuptia decision **(***Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*, ECJ 28 January 1986, C-161/84, ECR 1986, 353**)** the ECJ held that the terms of a franchise contract concerning the confidentiality of assistance and know-how, the protection of the intellectual property rights, maintaining the identity and the reputation of the network, do not fall within the ambit of Article 81(1) EC. However, the terms of the contract that concern the partition of the market territorially do fall within the ambit of Article 81(1) EC. Having said that, a franchise agreement may be exempted if it falls within the block exemption laid down in the Commission Regulation EC No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

The provisions included in this Chapter only apply to franchise contracts to the extent that they are valid in the light of competition law.

NOTES

I. Definition of a franchise

1. ITALIAN and SPANISH law include a statutory definition of franchise (ITALY: art. 1. L nr. 129/2004; SPAIN: art. 62 of *Ley de Ordenación del Comercio Minorista, (*Act 7/1996 of 15 January 1996, on Retail Trade).

2. However, European competition law includes several descriptions of franchises. See *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*, ECJ 28 January 1986, C-161/84, ECR 1986, 353; Regulation 4087/88 on the application of Article 85 (3) of the Treaty to categories of franchise agreements (OJ L 359/46) and the Guidelines of Vertical restraints of 2000).

3. Under DUTCH, ITALIAN and SPANISH law the competition law definition as included in Regulation 4087/88 is also used in private law issues. (ITALY: *Pardolesi* (1990) 66, Pretore di Milano, 21 July 1992, *Grimaldi s. p. a.* c. *Magatelli ed Effeci s. a. s.*, *Contratti*, 1993, 173, (note De Nova, *Franchising e apparenza*); NETHERLANDS: HR 25 January 2002, NJ 2003, 31 note J. B. M. Vranken).

4. Under other legal systems definitions of a franchise can be found in case law, literature and model contracts. (FRANCE: *Dutilleul* & *Delebecque,* no. 951).

5. The elements of all these definitions differ. Hereafter it will be considered to what extent the elements included in the present Article are also included in the various legal systems and model contracts.

II. Use of franchisor's tradename, trademark, know-how and business method

6. These elements correspond with those given by European law and a large majority of the legal systems and the model contracts. See:– Art. 3 a, b of Regulation 4087/88, Guidelines on Vertical Restraints 2000 nos. 32, 43, 199 and the *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*, ECJ 28 January 1986, C-161/84, ECR 1986, 353; AUSTRIA: *OGH* 26. 4. 1994, 4 Ob 535/94; ENGLAND: *Adams/Prichard Jones* §1.02; FRANCE: CA *Colmar*, 9. 06. 1982, D. 1982, 553 note Burst. Com. 8. 07. 1997, *D.* Aff. 1997, 960; *RJDA* 1994, n° 795, CA Paris, 7. 06. 1990, D. 1990, IR. 176.; 31. 03. 1993, *RJDA* 1993, n° 613. Com. 19. 02. 1991, *D*. 1992 somm. 391, obs. *D. Ferrier*, *Dutilleul & Delebecque*, no. 952; GERMANY: *Küstner/Thume,* 1590-1594; *Rohe,* 412; ITALY: art. 1 *L. 124/2004, Frignani* (1999) 6; NETHERLANDS: HR 25 January 2002, NJ 2003, 31 note J. B. M. *Vranken, Wessels*, 1991, 12, *Barendrecht & van Peursem*, 11; PORTUGAL: *Pinto Monteiro* (2002) 120; *Coutinho de Abreu* (1996) 63; *Pestana de Vasconcelos* (2000) 21; *Ribeiro* (2001) 143, STJ 14 April 1999, Agravo nº176/99 ; SPAIN: art. 62 para 1 of the Statute on retail sales, *STS* of 27 September 1996, RJ 1996\6646 and STS 4 March 1997, RJ 1997\1642; SWEDEN: definition by the Swedish franchise federation, *Sohlberg*, 32, 41; art. 1 of the ECE, the preamble of the ICC Model Contract and art. 2 of the Unidroit Disclosure Law.

III. To conduct a business in its own name and on its own behalf

7. These elements recur in the case law, legal literature or model contracts of all the legal systems. See: AUSTRIA: *OGH* 26. 4. 1994, 4 Ob 535/94; BELGIUM: *Verbraeken & de Schoutheete* No.139; ENGLAND: *Adams/Prichard Jones* at §1.02; FRANCE: *Dutilleul & Delebecque*, no. 952, 958, Huet, no. 11624; GERMANY: *Küstner/Thume,* 1590-1594; *Rohe,* 412; ITALY: art. 1 L. 129/2004, *Frignani* (1999) 6;

NETHERLANDS: HR 25-1-2002, *NJ* 2003, 31 note J. B. M. *Vranken, Wessels*, 1991, 12, *Barendrecht & van Peursem,* no. 11, *Van der Heiden* (1999) 86; PORTUGAL: *Pinto Monteiro* (2002) 120; *Coutinho de Abreu* (1996) 63; *Pestana de Vasconcelos* (2000) 21; *Ribeiro* (2001) 143, STJ 14 April 1999, Agravo nº176/99 ; SPAIN STS 27 September 1996, RJ 1996\6646, STS 30 April 1998 , RJ 1998\3456, Aguiló Pina (1986) p. 4810, *Hernando Giménez* p. 208, *Echebarría* p. 5; SWEDEN: definition by the Swedish franchise federation. Art. 1 of the ECE.

IV. In exchange for remuneration

8. This element is included in nearly all definitions in the case law, in European competition law and in those formulated by legal scholars or in model contracts. See:– European competition law: Art. 3 b of Regulation 4087/88; AUSTRIA: *OGH* 26. 4. 1994, 4 Ob 535/94; ENGLAND: *Adams/Prichard Jones* at §1.02; GERMANY: *Küstner/Thume,* 1590-1594; *Rohe,* 412; ITALY: art. 1 L. *affiliazione commerciale*, *Frignani* (1999) 6; NETHERLANDS: HR 25-1-2002, *NJ* 2003, 31 note J. B. M. *Vranken, Wessels* (1991) 12, *Barendrecht & van Peursem,* no. 11; PORTUGAL: *Pinto Monteiro* (2002) 120; *Coutinho de Abreu* (1996) 63; *Pestana de Vasconcelos* (2000) 21; *Ribeiro* (2001) 143, STJ 14 April 1999, Agravo no 176/99 ; SPAIN: *STS* 27 September 1996, RJ 1996\6646 and STS 4 March 1997, RJ 1997\1642, *Echebarría* p. 110; SWEDEN: definition of the Swedish franchise federation. Art. 1 of the ECE, the preamble of the ICC Model Contract and art. 2 of the Unidroit Disclosure Law.

V. To conduct a business within the franchisor's network

9. This element is laid down in the majority of the legal systems and in European competition law. See:– Guidelines on vertical restraints, no. 42, 43, 199; AUSTRIA: *OGH* 26. 4. 1994, 4 Ob 535/94; FRANCE: *Huet* no. 11621; ENGLAND: *Adams/Prichard Jones* at §1.02; GERMANY: *Küstner/Thume,* 1590-1594; *Rohe,* 412; ITALY: art. 1 L. 129/2004, *Frignani* (1999) 6; THE NETHERLANDS: HR 25-1-2002, *NJ* 2003, 31 note J. B. M. *Vranken, Wessels* (1991) 12, *Kneppers/Heynert, Barendrecht & van Peursem*, no. 11; PORTUGAL: *Pinto Monteiro* (2002) 120; *Coutinho de Abreu* (1996) 63; *Pestana de Vasconcelos* (2000) 21; *Ribeiro* (2001) 143, STJ 14 April 1999, Agravo no 176/99 ; SPAIN: *STS* 27 September 1996, RJ 1996\6646 and STS 4 March 1997, RJ 1997\1642, art.2 *Real Decreto* 2485/1998, *Echebarría* p. 5; SWEDEN: cf the definition by the Swedish franchise federation).

VI. Written requirement

10. Under ITALIAN law a franchise contract must be in writing: otherwise it is void (art. 3 (1) L. 129/2004).

IV.E.–4:102: Pre-contractual information

(1) The duty under IV.E.–2:101 (Pre-contractual information duty) requires the franchisor in particular to provide the franchisee with adequate and timely information concerning:

(a) the franchisor's company and experience;
(b) the relevant intellectual property rights;
(c) the characteristics of the relevant know-how;
(d) the commercial sector and the market conditions;
(e) the particular franchise method and its operation;
(f) the structure and extent of the franchise network;
(g) the fees, royalties or any other periodical payments; and
(h) the terms of the contract.

(2) Even if the franchisor's non-compliance with paragraph (1) does not give rise to a mistake for which the contract could be avoided under II.–7:201 (Mistake), the franchisee may recover damages in accordance with paragraphs (2) and (3) of II.–7:214 (Damages for loss), unless the franchisor had reason to believe that the information was adequate or had been given in reasonable time.

(3) The parties may not exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

In addition to the general duty for the parties in franchising to provide the other party with pre-contractual information (IV.E.–2:101 (Pre-contractual information duty)), this Article imposes a further duty on the franchisor, since it specifies the types of information which have to be provided. Paragraph (1) contains a list of items which must be disclosed. The franchisee needs to have such information in order to be able to enter the contract with full knowledge of all the relevant facts.

In addition to the remedies granted by the rule on the general duty to provide pre-contractual information, this specific provision establishes the specific remedy of liability in damages (paragraph (2)) in case the franchisor does not provide adequate and timely information on the items specified in the provision even if the lack of information does not give rise to a fundamental mistake.

B. Interests at stake and policy considerations

This duty protects the franchisee's interests. The franchisee has to make important investments without having any other possibility to obtain this qualified information. This specific duty to provide pre-contractual information is aimed at guaranteeing that the franchisee will have all the relevant and necessary information in order to commit itself with full knowledge of the relevant facts.

The main reasons for imposing a duty on the franchisor to provide the franchisee with this information may be summarized as follows. The essential information in a franchise agreement is at the disposal of the franchisor, which owns or has legal rights concerning the intellectual property rights and the know-how regarding the franchise business formula. The franchisee has no other means to collect such information since it is part of the 'business

secrets' of the franchisor and is therefore confidential. Some franchisors try to attract investors by proposing that they enter a non-existent network and by promising them the possibility to operate a formula which is either non-existent or not successful. Whilst the franchisor actively asks the prospective franchisee to disclose the necessary information by means of questionnaires, the prospective franchisee is usually not in a position to direct similar questionnaires to the franchisor. As a result, the franchisee completely depends on what the franchisor wants to disclose. The unilateral imposition of standard clauses which can only be accepted on a 'take it or leave it' basis by the franchisee justifies the latter receiving prior information regarding such terms.

This disclosure rule imposes a burdensome duty on the franchisor. The franchisor may be confronted with situations where it is not certain whether all the necessary information has been provided. It may not be possible either for the franchisor to be aware of all the facts which must be disclosed or to check whether those facts are correct.

C. Adequate information

The franchisor must provide the potential franchisee with the relevant information regarding the franchise business in order to enable the franchisee to conclude the contract with full knowledge of the relevant facts. The listing of the items in paragraph (1) is a minimum requirement: i.e. the franchisor may disclose more information but not less. In particular, relevant information normally includes:

The franchisor's company and experience. The information should include the particulars which identify the franchisor, such as the name or corporate denomination, the registered address and, where applicable, details of inclusion in the register of franchisors, as well as, in the case of a company, the share capital shown in the latest balance sheet, and details on registration in the mercantile register.

In addition, the information should also include essential information regarding the experience of the franchisor in the sector and, more specifically, regarding the franchisor's experience with the particular business formula. In principle, this information should include the date on which the franchise was launched, the main stages in the development of the business formula and the franchise network.

The relevant intellectual property rights. In principle, this information should include a certificate evidencing the granting and current validity of the title of ownership or licence for the use of the trademark and distinctive signs of the franchising company; and of possible legal proceedings against such a company, if any, with express mention in any event of the duration of the licence. The information must also indicate what will be the franchisee's rights over the intellectual property.

Here, and throughout these rules, 'intellectual property rights' includes industrial property rights, copyright and similar rights.

Characteristics of the know-how. The know-how is one of the elements contained in the business package transferred by the franchisor. It includes information concerning the franchisor's business method which is indispensable to the franchisee for the use, sale or resale of the contract products.

Commercial sector and market conditions. In principle, this information should include a general description of the franchise's sector of activity and an account of its most noteworthy features. In particular, it should include essential information regarding the state of competition, the state of demand and price development.

Franchise method. In principle, this information should include a general explanation of the system of business to which the franchise refers, the characteristics of the "know-how" and the assistance to be provided by the franchisor, as well as an estimate of the investments and expenses which are necessary for conducting a typical business. If the franchisor is to provide the potential individual franchisee with sales forecasts or trading results, these should be based on experience or studies and should be sufficiently justified.

Structure and extent of the franchise network. In principle, this information should include the form of the organisation of the franchise network and the number of establishments, distinguishing those exploited directly by the franchisor from those operated by other franchisees, the place where they are located and the number of franchisees which have recently ceased to belong to the network, stating whether such a cessation occurred due to the expiry of the contractual term or due to other causes for termination.

Fees, royalties and other periodical payments. In practice, parties generally agree that financial remuneration comprises two elements: the initial fee and ongoing periodical payments. Before entering into the agreement the franchisees must be aware of the conditions of payment, especially of those periodical fees which will be determined by the franchisor at a later stage. Information should be given regarding the criteria for determining the periodical payments to be made during the whole duration of the contractual relationship.

The terms of the contract. In principle, this information should include the rights and obligations of the respective parties, the duration of the contract, the fee system, the conditions for termination and, if applicable, for the renewal thereof, economic considerations, exclusivity agreements, and restrictions on the free disposal of the business by the franchisee.

D. Character of the rule

This rule is mandatory; the parties are not free to agree otherwise.

E. Remedies

This Article provides the franchisee with the specific remedy of damages (paragraph (2)), when the franchisor does not provide adequate and timely information on the items included in the specific list even if the information does not give rise to a mistake which would provide a ground for avoidance of the contract, unless the franchisor had reasons to believe that the information was adequate or given within a reasonable time.

NOTES

I. Pre-contractual information

1. There is such a duty under nearly all legal systems in the EU.

2. Under FRENCH, ITALIAN and SPANISH law such a duty is laid down in a statutory rule. Under FRENCH law this is the *Loi Doubin* (Ccom art. L. 330-3 and the *Décret n 91-337 du 4 avril 1991*, which elaborates Ccom art. L 330-3). Under ITALIAN law it is laid down in arts. 4, 6 L. 129/2004. Under SPANISH law it is laid down in art. 62, para. 3 of the Retail Trade Act and art. 3 of *Real Decreto* 2485/1998.

3. Under the other legal systems there is no specific statutory duty. Nevertheless, case law and literature in several countries have accepted such a pre-contractual duty under the general doctrine of good faith. (AUSTRIA: OGH 19. 1. 1989, 7 Ob 695/88; BELGIUM *Verbraeken & de Schoutheete* No.147 (b); GERMANY: § 242 BGB (good faith) *Küstner/Thume*, no. 1637-1649; *Martinek/Semler*, § 19 nos. 1-4, Bundesarbeitsgericht, *DB* 1980, 2040; *OLG München*, *BB* 1988, 865; *OLG München*, *NJW* 1994, 667, see also number 3.2 of the Ethikkodex of the German Franchise Association; FINNISH law: KKO 1993:130; THE NETHERLANDS: *Asser-Hartkamp* II, nos. 71, 159, HR 15-11-1957 *Baris/Riezenkamp*, NJ 1958, 67). However, in a decision on 2002, the HR held that there is no general obligation on the basis of good faith for the franchisor to provide the franchisee with information concerning the expected profit.

4. Under GREEK and PORTUGUESE law the general statutory rule concerning pre-contractual liability applies (arts. 197 and 198 of the GREEK Civil Code and art. 227 of the PORTUGUESE Civil Code). In addition, according to PORTUGUESE law in extreme situations, the provisions of art. 253 (Misrepresentation) or art. 282 (Usury) may be applied (*Ribeiro* (1992); *Pestana de Vasconcelos* (2000); *Ribeiro* (2000), 75). Finally, the doctrine of abuse of a right could be applied under GREEK and PORTUGUESE law (GREECE: CC art. 281, *Voulgaris* and *Georgiadis* and art. 334 of the PORTUGUESE civil code).

5. In addition, under FINNISH law the Commercial Agent Act is applied by way of analogy. Also the EurCodeEthics (art. 3(3)) and the Unidroit Model Disclosure Law (art. 3 et seq.) include an explicit pre-contractual obligation to provide information to the franchisee.

6. In contrast, under ENGLISH contract law there is no general duty of disclosure, *Keates v. Cadogan (Earl of)* (1851) 10 CB 591, 138 ER 234, but only an obligation not to make misrepresentations, *Williams v. Natural Life Health Foods Ltd.* [1998] 1 WLR 830, *Boyle* v. *Prontaprint*, unreported, 26 February 2000, CA; *ANC Ltd. v. Clark Goldring & Page Ltd.* [2001] BCC 479. SCOTTISH law is to the same effect: *MacQueen & Thomson*, chap. 2.89 et seq.

II. Contents of the information

7. FRENCH, ITALIAN and SPANISH law include a list concerning the items of information to be provided, which broadly correspond with those in the present Article. In FRANCE a Decree has been adopted (n° 91-337, 4 April 1991, in relation to Ccom art. L. 330-3; for ITALY see art. 3, 4 L. 129/2004; under SPANISH law a list of items is included in art. 3 of *Real Decreto* 2485/1998; *Echebarría* p.213; Art. 6 of the Unidroit Model Disclosure Law contains a more detailed list.

8. Under the other legal systems there are no specific statutory lists. However, the items mentioned in the Article recur in the case law, legal literature and model contracts in

the following countries. GERMANY: *OLG München*, *BB* 2001, 1759; *OLG München*, *BB* 1988, 865; *Flohr*, 18; *Martinek/Semler*, § 19 no. 1-4, the *OLG München*, *BB* 1988, 865, *OLG München NJW* 1994, 667; GREECE: *Georgiadis*; PORTUGAL: *Ribeiro* (2000), 54.

9. In the NETHERLANDS the *Hoge Raad* has held that there is no general obligation for the franchisor to inform the franchisee concerning future turn-over and profit expectations (HR 25-1-2002, NJ 2003, 31, note J. B. M. *Vranken*). Further, concerning this issue there is no consensus among legal authors. Some authors require a more extensive obligation than the general one (*Van der Heiden* (1999) 47-48; *Grosheide* (1994) 382).

10. Under AUSTRIAN law there is only a general duty to disclose all the information necessary to run the franchise business in a satisfactory manner.

III. Remedies

11. If the franchisor fails to provide the franchisee with pre-contractual information, the franchisee usually has recourse to a remedy. However, these remedies differ from legal system to legal system.

12. Under ITALIAN law, if the information provided is incorrect, the franchisee may avoid the contract (art. 8 L.129/2004).

13. Art. L. 330-3 of the FRENCH Ccom. does not provide a specific remedy. From the case law of the Cour de Cassation it follows that if the franchisor has failed to provide the pre-contractual information, the franchise contract will be invalid, provided it has been proved that there is a defective consent on the side of the franchisee (Cass. Com. 2-12-1997, *D.* 1998, somm., 334, obs. D. Ferrier, Cass. Com. 10-2-1998, *D.* 1998 somm. 334). Also under DUTCH law, it will result in invalidity of the contract on the basis of defective consent (CC arts. 3:44, 6:228). In addition, CC art. 6:230 provides the franchisor the possibility to propose an adaptation of the contract.

14. Under SPANISH law, the franchisee has private law remedies as well. Although the Spanish system lacks specific rules concerning precontractual liability, according to some authors the rules on extra-contractual liability in CC art. 1902 should be applied (*M.A. Domínguez García* in *Alberto Bercovitz*, Contratos Mercantiles, p. 591). Therefore any damage caused to the franchisee by the franchisor's non-compliance with the duty gives rise to a liability to compensate. However, there is no consensus among authors concerning the type of remedy. Some argue that the rules on defective consent apply (CC art. 1265 ff, *Hernando*, p. 128 ff). Then, the contract may be avoided and the franchisee is entitled to claim restitution and damages. Nevertheless, the mistake has to affect an important element of the contract: according to the SAP Madrid 6 November 2007, RJ 2008\81, a benefits forecast, although it has to be based on the franchisor's experience or studies, is not a substantial element of the franchise contract. Therefore a mistake concerning this matter does not avoid the contract, as the object of the franchise is not obtaining the benefits, but exploitation of the franchisor's business.

15. Also, under GREEK and PORTUGUESE law the failure of the franchisor to provide pre-contractual information results in the invalidity of the contract. In addition, the franchisee may claim damages under the doctrine of *culpa in contrahendo* (GREECE: arts. 140, 147, 178, 179 AK, with respect to arts. 178, 179 AK, the case law has been restrictive CA Patras 150/2000 Dikaio Epixeiriseon kai Etairion 8-9/2000 890; PORTUGAL: CC art. 227, cf. *Ribeiro* (2000) 75).

16. Under GERMAN law non-performance of the obligation to provide pre-contractual information may result in an obligation to pay damages (culpa in contrahendo),

recovering the *negative Interesse* (including: payments made to the franchisor, investments minus the re-sale-value, interests).

IV. Form requirements

17. Under FRENCH, ITALIAN, SPANISH and the Unidroit Model Disclosure Law the information must be provided in writing. (FRANCE: Ccom art. L.330-3; ITALY: art. 3(1) L. 129/2004; art. 62 para. 3 of the SPANISH Statute on Retail Trade, art. 4 of the Unidroit Model Disclosure Law).

18. Moreover, the information must be provided within a certain period before the conclusion of the franchise contract. However, this precise period differs from country to country. Under ITALIAN law it is 30 days before the conclusion of the franchise contract (art. 4 (1) L. 129/2004), whereas under FRENCH and SPANISH law it is 20 days before signing the contract or the precontract (FRANCE: Ccom art. L-330-3; art. 62(3) of the SPANISH Retail Trade Law) and according to art. 3 of the Unidroit Model Disclosure law it is 14 days before the precontract or the payment.

19. Under the other legal systems there are no form requirements. However in practice it is common for the information to be disclosed in writing. (GERMAN law: *Martinek/Semler*, § 19 no. 15-17; number 3.3. of the German Ethikkodex).

IV.E.–4:103: Co-operation

The parties to a contract within the scope of this Chapter may not exclude the application of IV.E.–2:201 (Co-operation) or derogate from or vary its effects.

COMMENTS

Although in general the obligation of co-operation is non-mandatory there is an exception in the case of franchise contracts. The justification for this exception is the particularly close and collaborative nature of the relationship. Co-operation is of the essence of the relationship.

NOTES

1. See notes to IV.E.–2:201 (Co-operation).

Section 2: Obligations of the franchisor

IV.E.–4:201: Intellectual property rights

(1) The franchisor must grant the franchisee a right to use the intellectual property rights to the extent necessary to operate the franchise business.

(2) The franchisor must make reasonable efforts to ensure the undisturbed and continuous use of the intellectual property rights.

(3) The parties may not exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

Under paragraph (1) of this provision, the franchisor is obliged to grant the franchisee the licence to use the intellectual property rights related to the franchise business. It necessarily implies that the franchisor owns or has legal rights to license these rights and that there are no third parties with better rights over the intellectual property who may disturb the use of the proprietary rights by the franchisee.

Under paragraph (2), the franchisor is bound to undertake reasonable efforts to prevent and to rectify situations where third parties claim that they have a better right over the intellectual property and consequently attempt to disturb the use of the rights by the franchisee.

Whilst paragraph (1) imposes on the franchisor the obligation to attain a certain result, which is to license the use of the property rights to the extent necessary to operate the franchise business, paragraph (2) merely obliges the franchisor to observe due diligence in providing an adequate response when there is an action, claim or proceeding brought or threatened by a third party concerning such intellectual property rights.

B. Interests at stake and policy considerations

The licensing of intellectual and industrial property rights is the cornerstone in the proper functioning of the franchise business method. Consumer recognition of and confidence in the product identified by the trademark is the lifeline of a successful franchise system. In fact, this is the main reason for franchisees to be attracted by the franchisor's system of doing business.

Since it is the selling of products during the entire duration of the franchise which forms the object of the exploitation of the intellectual and industrial property rights it is essential for the franchisee to be provided with the necessary licences in order to be able to benefit from the attraction of the trademark and it is equally crucial that the franchisor ensures the undisturbed and continued use of these rights.

The franchisor is interested in the expansion of its business and image. Therefore the franchisor has to ensure that the members of the network utilise the trademarks and other signs which identify the business and also has to prevent and resolve situations where third parties intend to disturb the use of such rights. The franchisor must be in the lead in any

action, claim or proceeding brought or threatened by a third party with regard to the intellectual property rights involved in the franchise business.

C. Granting intellectual property rights

The exact meaning of the expression "grant …a right to use the intellectual property rights" depends on the intellectual property rules in each legal system. Neither ownership of such rights nor registration is always a prerequisite for being able to assign them or to grant a right to use. Thus, the franchisor may be the owner or merely have the legal rights to grant or transfer the intellectual property rights involved in the franchise relationship.

D. To the extent necessary to operate the franchise business

These words refer to the package of industrial and intellectual property rights relating to trademarks, trade names, shop signs, logos, insignia, utility models, designs, copyrights and related rights, software, drawings, plans or patents held by the franchisor for the operation of the franchise business.

E. Undisturbed and continuous use of intellectual property rights

The franchisor is required to make reasonable efforts to guarantee the undisturbed and continuous use of the relevant intellectual property rights (paragraph 2). In assessing what is reasonable, the nature and purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved should be taken into account. (See the definition in I.–1:104 (Reasonableness).)

The franchisor's intellectual property rights are protected against abuse by the franchisee. Apart from the rules in intellectual property law and the licence agreement, the franchisee is under an obligation to strictly limit the use of the rights to the operation of the franchised business and in the manner provided for by the franchisor (see IV.E.–4:303 (Business method and instructions)). Moreover, the franchisee is to be identified as a mere licensee of such rights.

The obligation to guarantee the undisturbed and continuous use of these rights may have different consequences depending on the national situation: e.g. the obligation to fulfil validity requirements according to national legislation (for example, renewing registration).

F. Character of the rule

This is a mandatory rule; the parties are not free to agree otherwise.

NOTES

I. Granting of intellectual property rights

1. None of the European legal systems include a specific statutory provision of this type. However, in a large majority of the legal systems either the granting of the right to use intellectual property rights or the transfer of intellectual property rights is recognised as an obligation of the franchisor in the case law, legal literature or model contracts.

2. The obligation to grant the franchisee a right to use intellectual property rights exists under the following legal systems: FRENCH law (*Ferrier*, no. 687; *Huet*, no. 11621), GERMAN law (*Giesler/Nauschütt*, § 5 no. 122; *Martinek/Semler*, § 19 no. 10, art. 2.2. of the Ethikkodex of the German Franchise Association), GREEK law (CA Thessaloniki 1043/1998 Dikaio Epixeiriseon kai Etairion 1998 491; First Instance Court of Athens 23373/1998 Dikaio Epixeiriseon kai Etairion 1999 864), NETHERLANDS: Pres. Rb. Arnhem 29-04-1988, BIE 1989, 157-159 (*Quick-sportschoenen*), Hof ‚s-Hertogenbosch 23-05-1989, IER 1989, 93-94 (*Mc Donalds/McMussel,) Van der Heiden* (1999) 32, 38-40). See also art. 1 III B EC Regulation 4097/88; art. 3.1 of the ICC Model Contract; arts. 1, 2.2 of the EurCodeEthics.

3. Under FINNISH law, even though there is no explicit obligation, it is considered to be included in the duty to co-operate. Under ENGLISH law such an obligation is probably considered to be an implied term (*Adams/Prichard Jones* Precedent I, (Clauses 4.1.4, 11.2)). SCOTTISH law is probably the same.

4. Under other legal systems the granting of intellectual property rights is a necessary element to classify a contract as a franchise agreement. Without it, there is no franchise contract, since the contract would not have a *causa*. This is the case in AUSTRIAN law; ITALIAN law: Tribunale di Milano, 30 April 1982, Soc. Standa c. Soc. Arcobaleno Market, Foro it., 1982, I, 2042; PORTUGUESE LAW: *Meneses Cordeiro* (1998) 76; *Ribeiro* (2000) 158; *Pinto Monteiro* (2002) 121; *Pestana de Vasconcelos* (2000) 25, STJ 14 April 1999, Agravo nº 176/99-2; SPANISH law: *STS* of 15 May 1985, RJ 1985/2393. Under Spanish law the franchisor is obliged not only to grant the intellectual property rights to the franchisee, but also to hand over all the necessary information concerning the licences and rights and technical assistance (*know how* included) as well, so that the franchisee may exploit the business successfully (*Dominguez García* in *Alberto Bercovitz*, Contratos Mercantiles, p. 602); art. 2.1 sub a and 2.1. sub c Real Decreto 2485/1998.

II. Undisturbed and continuous use

5. Such an obligation has been defended by Belgian and French authors. (Belgium: Verbraeken & de Schoutheete, no. 152; France: Ferrier, no. 687.) Also in Spain, authors have defended such an obligation, based on the principle of good faith from CC art. 1258 and Ccom 57 (Dominguez García in Alberto Bercovitz, Contratos Mercantiles, p. 602). They suggest the application of CC art. 1474 (concerning sales contracts) or CC art. 1554 concerning lease contracts by way of analogy to franchise contracts. Both the seller and the lessor must provide respectively the undisturbed use of the object sold or rented.

IV.E.–4:202: Know-how

(1) Throughout the duration of the contractual relationship the franchisor must provide the franchisee with the know-how which is necessary to operate the franchise business.

(2) The parties may not exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

One of the franchisor's main obligations is to provide the franchisee with the relevant know-how, by means of operational manuals, or, in the case of general knowledge and experience, through ongoing assistance.

Know-how is to be provided as part of the initial package to enable the franchisee to start the operation of the business, but also during the entire duration of the franchise in so far as necessary to operate the business activities correctly.

According to the present Article the franchisor must provide the franchisee with the necessary know-how during the entire period of the contractual relationship. This implies that if during that period the know-how is changed or updated, the franchisor must provide the franchisee with the updated know-how.

B. Interests at stake and policy considerations

Know-how plays a central role in the franchise system. The franchisor's know-how is, together with the appeal of the trademark, the most interesting value which the franchisor has to offer to a franchisee. As a result, even relatively inexperienced entrepreneurs can start a sophisticated business concept. In addition, the franchisor and the other franchisees have an interest in the franchisee being provided with relevant know-how from the outset in order to maintain the standard and reputation of the whole franchise chain. This guarantees that the same method of exploitation will be used, which ensures the maintenance of the common image and reputation of the network and therefore eventually benefits both parties in franchising. If, within the franchise period, the operational system has to be modified, the franchisee must be made aware of such changes. In that way the franchisee will be able to adapt the operational method and consequently continue the correct operation of the business.

C. Necessary know-how

Know-how is defined by art. 1(f) of EC Regulation No. 2790/1999 as a package of non-patented practical information, resulting from experience and tested by the supplier, which is secret, substantial and identified In this context "secret" means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; "substantial" means that the know-how includes information which is indispensable to the buyer for the use, sale or resale of the contract products; "identified" means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality.

Necessary know-how includes technical information, financial data, advice on site selection and the layout of the premises, the provision of start-up materials and any other specifications specifically relating to the system and the intellectual property rights and the utilisation of them contained in the operating manuals or the agreement.

D. Regularly reviewed know-how

Any modification of the operational method has to be communicated promptly to the franchisee. This is mainly done by updating the operational manuals and assisting the franchisee in adapting to the changes.

E. Protection of know-how

Protection of the franchisor's know-how from misuse by franchisees and competitors is taken care of by the provision which imposes on the franchisee the obligation to follow the business method and instructions (IV.E.–4:303 (Business method and instructions)) and by the confidentiality obligation in the general chapter (IV.E.–2:203 (Confidentiality)).

F. Relation to obligation to inform

The communication of know-how is a very particular manifestation of the franchisor's obligation to inform under IV.E.–4:205 (Information by franchisor during the performance). It is considered to be one of the main obligations for the franchisor since it concerns the indications as to how the business method is to be operated which are vital to allow the franchisee to exploit the franchise business. Such information is confidential because it forms part of the business secrets of the franchisor.

These specific characteristics justify that the obligation to communicate know-how, although, strictly speaking, contained in a more general obligation to inform, is formulated here as a specific obligation in a separate provision.

G. Character of the rule

This is a mandatory rule; the parties are not free to agree otherwise.

NOTES

I. Know-how

1. The content of know-how in the present Article corresponds with the definition given by art. 1 of the EC Regulation 2790/1999 on Vertical Agreements. In ITALY a similar definition is included in art. 1 para 3 L 129/2004. A corresponding definition is also used in BELGIAN, DUTCH, PORTUGUESE and SPANISH case law or by the authors of these legal systems. (BELGIUM: *Verbraeken & de Schoutheete* no. 150; THE NETHERLANDS: HR 25-1-2002, *NJ* 2003, 31 note J. B. M. Vranken; SPAIN: SAP Madrid, 6 November 2007, AC 2008\81, *Hernando Giménez* 245, *Uría* 739, contra *Echebarría Sáenz* (1995) p. 306). A corresponding definition is used by authors in ENGLAND. See Adams, John N. "Franchising: practice and precedents, para 3.118, 3rd ed, (1990), Butterworths. Spanish law lacks a precise definition of *know how*. However, the case law assimilates it to the franchisor's experience and industrial

secrets (unknown to the general public) concerning the sector of the market where the franchise is exploited, including the methods of organisation of the business. *Know how* is regarded as information with a patrimonial value, necessary for the successful exploitation of the franchise (SAP Madrid 6 November 2007, AC 2008\81).

2. Art. 1 of the EC Regulation 2790/1999 on Vertical Agreements defines know-how as follows: '… a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, "secret" means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; "substantial" means that the know-how includes information which is indispensable to the buyer for the use, sale or resale of the contract goods or services; "identified" means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

3. Under the EurCodeEthics and in the comments of the ICC MODEL CONTRACT different definitions are employed. However, within these definitions the common features of know-how are: confidentiality, substantiality and identification.

II. Granting know-how

4. Under none of the legal systems is there an explicit statutory obligation to provide the franchisee with the necessary know-how. However, in a majority of the legal systems such an obligation has been accepted in the case law, legal literature or model contracts.

5. Under some legal systems such an obligation has been accepted as such, for instance under DUTCH law: HR 25-1-2002, NJ 2003, 31 note J. B. M. Vranken; PORTUGUESE law: *Ribeiro* (2000) 167, *Pestana de Vasconcelos* (2000) 27, *Menezes Cordeiro* (1998) 76. In ENGLAND: Adams, John N., "Franchising: practice and precedents", Model Franchise Agreement 1.

6. Under other legal systems it is inferred from the duty to co-operate. FINLAND; GERMAN law: *Flohr*, 108; *Giesler/Nauschütt*, § 5 no. 116; *Martinek/Semler*, § 19 no. 10; GREEK law: Court of Appeal of Thessaloniki 1043/1998 Dikaio Epixeiriseon kai Etairion 1998 491; First Instance Court of Athens 23373/1998 Dikaio Epixeiriseon kai Etairion 1999 864

7. However, under the FRENCH and SPANISH legal systems granting know-how is to be considered a validity requirement. Without this, the franchise contract is void, since there is no *causa* (FRANCE: CA Paris, 7. 06. 1990, D. 1990, IR. 176.; 31. 03. 1993, RJDA 1993, n° 613. Com. 19. 02. 1991, D. 1992 somm. 391, obs. *D. Ferrier; Huet*, no. 11621; SPAIN: SAP Barcelona 10 May 2000, JUR 2000\211264, SAP Barcelona 23 December 2003, AC 2004\433). However, another situation is distinguished as well. When there is know-how, but the franchisor refuses to provide it to the franchisee, the contract can be terminated by the court because of non-performance and damages can be granted. This solution seems to be supported by the SAP Madrid 6 November 2007, AC 2008\81 which considers granting the know how as one of the fundamental obligations of the franchisor. (Com. 24. 05. 1994, Cont. Conc. Consomm. 1994, n° 191 with note *L. Leveneur*).

8. See also art. 9 of the ICC Model Contract, art. 1 of the EurCodeEthics.

IV.E.–4:203: Assistance

(1) The franchisor must provide the franchisee with assistance in the form of training courses, guidance and advice, in so far as necessary for the operation of the franchise business, without additional charge for the franchisee.

(2) The franchisor must provide further assistance, in so far as reasonably requested by the franchisee, at a reasonable cost.

COMMENTS

A. General idea

Providing the franchisee with the right to use the intellectual property rights and with the know-how concerning the franchisor's method is generally not sufficient to allow the franchisee to successfully manage the business. In addition to such information, the franchisee may need assistance from the franchisor on using the information concerned in practice.

Paragraph (1) imposes on franchisors an obligation to assist the franchisees in order to provide them with the necessary support in commencing the operation of the business (initial assistance) and to solve problems which may arise throughout the duration of the relationship regarding the operation of the business concept (ongoing assistance). The franchisor is obliged not only to provide assistance actively but also to respond to the franchisee's demands for assistance when the requested assistance is necessary to enable the franchisee to operate the business correctly.

The content of the obligation to assist is specified in the wording of the Article: assistance is provided in the form of training courses, guidance and advice.

Paragraph (1) makes it clear that the necessary assistance is to be provided without any additional cost for the franchisee. It means that the payment to be made in exchange for assistance is deemed to be included in the payments made by the franchisee for the right to operate the franchisor's business method.

Paragraph (2) concerns the franchisor's obligation to respond to requests from the franchisee for further assistance. The franchisor is obliged to provide such assistance when the request is reasonable. The franchisor can charge the franchisee for the provision of further assistance in so far as the additional cost is reasonable.

B. Interests at stake and policy considerations

This provision is mainly aimed at safeguarding the franchisee's expectations concerning the system which the franchisee has entered. Franchisees need certainty as to the proper way in which to conduct the franchised business, and it is only the franchisor which can provide this.

On the other hand, the obligation to assist and to be responsive to requests for further assistance in so far as they are reasonable is a burden imposed on the franchisor since it requires the franchisor continuously to keep up with the activities of the franchisees and to collaborate actively with the members of the network during the entire period of the franchises in order to guarantee that they operate the business correctly.

However, by providing active assistance to the franchisees, the franchisor guarantees a uniform exploitation throughout the network which is in the interest of all the franchisees, and ultimately of the franchisor as well.

C. Necessary assistance

Assistance is to be considered as a broad concept. It comprises the organisation of training courses, the provision of advice based on general knowledge and experience, e.g. advice on real estate and financial planning and visits to premises, in so far as is required in order to allow the franchisee to adequately operate the franchise business.

Assistance on site may include additional training (usually in an area of weakness or with respect to a newly introduced service, product, method or technique), the identification of the franchisee's successes and weaknesses, the establishment of strategies to attain the goals which have been set, conversations with employees and customers, and technical assistance.

D. Responsive to reasonable requests for further assistance

Standard assistance from the franchisor may not suffice to provide all franchisees with sufficient certainty concerning the method by which to conduct the business. Franchisees may need additional input from their franchisor. Through the present provision franchisees are granted the right to demand further assistance from the franchisor at a reasonable cost, in so far as the requests are reasonable. To assess whether requests are reasonable, the nature and the purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved should be taken into account. (See definition in I.–1:104 (Reasonableness)) Normally, requests which are meant to achieve guidance which serves to meet the specific needs of the franchisee in order to guarantee the adequate operation of the business, will be considered reasonable.

E. Without additional cost

Necessary assistance, along with the intellectual property rights and know-how, are part of the business package which the franchisor must transfer to the franchisee in exchange for direct or indirect financial remuneration. Therefore, such remuneration covers the provision of assistance which is necessary for the operation of the business. Only demands for specific assistance which is not necessary in general terms, but which may be necessary for the particular franchisee in order to meet the franchisee's needs as regards the adequate operation of the business and the maintenance of the quality standards, could lead to extra costs for the franchisee, in so far as the additional cost is reasonable.

NOTES

I. Obligation to provide assistance

1. In all legal systems the franchisor's obligation to provide assistance is considered to be one of the franchisor's main obligations by case law, legal authors or model contracts. (BELGIUM: *Verbraeken & de Schoutheete* No.151; FRANCE: *Dutilleul & Delebecque*, no. 955, *Ferrier*, no. 692, *Huet*, no. 11621; NETHERLANDS: *Van der Heiden* (1999), 58 PORTUGAL: *Ribeiro* (2000) 179 ff, *Pestana de Vasconcelos*

(2000) 32; *Menezes Cordeiro* (1998) 76; SPAIN *SAP* Valencia 21 May 1993 (AC 1993\1024), art. 2.1 sub c *Real Decreto* 2485/1998, *Hernando Giménez* 272 et seq.; under GREEK law the situation appears to be the same as under the present Article.) The franchisor is obliged to provide technical and commercial assistance during the whole duration of the contract, on the request of the franchisee, in order to preserve the patrimonial value of the business (*Domínguez García* in *Alberto Bercovitz*, Contratos Mercantiles, p. 602). As this obligation is substantial, the non-performance is considered fundamental and is a reason for termination of the contractual relationship (SAP Madrid 6 November 2007, AC 2008\81).

2. Under FINNISH, GERMAN and ITALIAN law this obligation follows from the doctrine of good faith or the duty to co-operate. (ITALIAN law: e.g. Lodo Arbitrale, Torino 11 July 1995, *Società X c. Società Y*, unpublished in *Frignani*, 157). In addition, under GERMAN law the rule concerning commercial agency is applied by way of analogy to franchising as well. (GERMANY *Giesler/Nauschütt*, § 5 no. 91; *Küstner/Thume*, no. 1694, *Martinek/Semler*, § 19 no. 10; Number 2.2. of the Ethikkodex of the German Franchise Association).

3. Also ENGLISH authors seem to support an obligation to provide assistance (*Adams/Prichard Jones* 348). In SCOTTISH law the obligation would arise from an implied term if not expressed: *MacQueen & Thomson* ch 3.34 et seq.

4. See also art. 15 of the ICC Model Contract and arts. 1, 2.2 of the EurCodeEthics.

II. Free of extra charge

5. The ICC Model Contract states, in Article 15.5: “The Franchisor shall use its reasonable endeavours to also provide the Franchisee with additional specific training, at the latter’s request, to meet its specific needs at the Franchisee’s sole expense and on the dates and at the locations stipulated by the Franchisor”. Also according to the definition of the EurCodeEthics assistance is free of charge: in exchange for the fee the franchisee is entitled, among other things, to ongoing assistance. Also according to BELGIAN law the price is included in the royalties (*Verbraeken & de Schoutheete* no.158).

IV.E.–4:204: Supply

(1) When the franchisee is obliged to obtain the products from the franchisor, or from a supplier designated by the franchisor, the franchisor must ensure that the products ordered by the franchisee are supplied within a reasonable time, in so far as practicable and provided that the order is reasonable.

(2) Paragraph (1) also applies to cases where the franchisee, although not legally obliged to obtain the products from the franchisor or from a supplier designated by the franchisor, is in fact required to do so.

(3) The parties may not exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

The present Article is meant to establish (under paragraph (1)) that in the case that the franchisee is forced to obtain its goods or services only from the franchisor or from a supplier appointed by the franchisor, the franchisor must guarantee that the orders for the supply of the franchisee are met within a reasonable time, whether the supplier is the franchisor or a third party designated by the franchisor, in so far as the demands for supply are reasonable.

This provision also concerns cases where parties do not explicitly agree on an exclusive purchasing obligation for the franchisee but where the franchisee has recourse, in fact, to no other source of supply than the one provided by the franchisor or by the suppliers designated by the franchisor – e.g. when only the products supplied by the franchisor and suppliers designated by the franchisor meet the quality standards required. According to paragraph (2), the franchisor is also obliged to guarantee the delivery of the products to the franchisee within a reasonable time when there is de facto exclusivity.

B. Interests at stake and policy considerations

It is a very common practice in franchising that parties agree on an exclusive purchasing clause in favour of the franchisor. This obligation means that the franchisee's needs for supply can only be met either by the franchisor or by designated suppliers.

Exclusive purchasing obligations are justified when they aim to assure that the products distributed within the franchise network fulfil the objective quality standards of the franchisor's network. However, such a constraint is likely to have very negative consequences for the franchisee when the franchisor or the designated suppliers refuse to meet the franchisee's orders for supply, restrict the amount to be delivered or delay delivery without any business-related justification. This provision is meant to reduce these negative effects by assuring that the decision whether or not to supply the franchisee is not at the sole discretion of the franchisor or the designated suppliers.

This rule may be deemed a very burdensome obligation since the franchisor is obliged to guarantee that the franchisee is provided within a reasonable time with the supplies ordered, even when the counterpart of the franchisee in the sales contract is not the franchisor but another supplier designated by the franchisor. The rationale of this rule is that when the

franchisee grants exclusivity to the franchisor, the former should obtain some advantage in return.

The obligation is, however, limited to guaranteeing the delivery of *reasonable* orders. The reasonableness test is meant to protect the supplier against orders for supply which demand the delivery of products which are not actually needed to enable the franchisee to operate the business. These are orders which exceed what the franchisee would normally order according to the contract and to the franchisee's actual needs for supply. Furthermore, the franchisor is only obliged to guarantee delivery in so far as it is practicable to do so (for the franchisor or for the designated suppliers) taking into account the suppliers' supply capacity.

A prompt delivery of the products is eventually beneficial for both parties. An adequate supply permits the franchisee to continue with the operation of the distribution business whilst at the same time it prevents temptations, on the side of the franchisee, to purchase competing products in order to fulfil its need for supply. Such a reaction of the franchisee would be certainly risky for the franchisor and the other franchisees because it may alter the uniform quality of the products within the franchise network.

C. Designated suppliers

As a counterpart of the franchisor's prerogative to restrict the franchisees' freedom of business by compelling them to purchase the products from selected suppliers, the franchisor is obliged to guarantee that the designated suppliers provide the franchisee within a reasonable time with the products which the franchisee orders, provided that these orders are reasonable.

D. Practicability

The franchisee is entitled to demand the fulfilment of the supply orders in so far as it is practicable for the franchisor or the designated suppliers to fulfil such demands in view of their actual supply resources. Supply would also be impracticable if the supplier encounters an insuperable obstacle to perform or the fulfilment of such an obligation would cause inconvenience or expenses on the supplier's side which are substantially disproportionate to the demands of the franchisee.

E. Reasonable order

To assess whether an order is reasonable, the nature and the purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved must be taken into account. (See the definition in I.–1:104 (Reasonableness)) In this respect it is particularly relevant whether the franchisee seeks delivery of products of the quality, quantity and modality which is required by the franchise contract and which enable the franchisee to operate the distribution activities adequately, and whether the orders fall within the scope of the franchising contract, i. e. the franchisee is to be provided with the products which are the subject of the franchise. Special market conditions could justify demands for supply which exceed the franchisee's normal requests.

F. De facto exclusivity

Paragraph (2) concerns the situation where the parties have not agreed explicitly upon exclusive purchasing obligations, but where there is an exclusivity *de facto*. Such is the case

when the franchisee has in fact no possibility to be supplied by any other supplier because e.g. the other suppliers do not meet the quality standards imposed by the franchisor or it is not possible to find the products which are the subject of the franchise in the market. Other examples are situations where better prices of the products offered by the franchisor have led the franchisee to purchase exclusively from the franchisor; or where the franchisee has been buying exclusively from the franchisor from the start of their relationship and in fact an exclusive sales relationship is the result.

G. Character of the rule

This is a mandatory rule; the parties are not free to agree otherwise.

NOTES

In general

1. A stipulation that the franchisee may only purchase certain goods from the franchisor or designated sellers is rather common in franchise contracts. (See also Art. 18.1 ICC Model Contract).
2. Only, under BELGIAN law does there seem to be a rule which is similar to the present Article (*Verbraeken & de Schoutheete*, no. 153). For the other legal systems no rules were found in the legislation, case law or literature.
3. Under SPANISH law there is no similar rule, although the case law admits exclusive product supply as a contractual obligation. When the franchisor fails to supply the goods or the goods are defective, the contract may be terminated (SAP Valencia 21 May 1993, AC 1993\1024).

IV.E.–4:205: Information by franchisor during the performance

The obligation to inform requires the franchisor in particular to provide the franchisee with information concerning:

(a) market conditions;
(b) commercial results of the franchise network;
(c) characteristics of the products;
(d) prices and terms for the supply of products;
(e) any recommended prices and terms for the re-supply of products to customers;
(f) relevant communication between the franchisor and customers in the territory; and
(g) advertising campaigns.

COMMENTS

A. General idea

The obligation to inform imposed by IV.E.–2:202 (Information during the performance) is further elaborated by this Article.

The Article includes an obligation for the franchisor to provide information (without being requested by the franchisee) and specifies the types of information that should normally be disclosed. The obligation to inform comprises more than communicating know-how or providing assistance. It refers to all the relevant data concerning the exploitation of the franchised business, such as general information concerning the market, research projects, improvements made to the business method or commercial results. The list of required information is not exhaustive.

In certain circumstances it may be reasonable for the franchisor to charge the franchisee for the specific information to be provided.

B. Interests at stake and policy considerations

Both parties have an interest in being kept informed concerning facts and developments which are relevant to their performance. It can make their performance easier and more successful. The reciprocal exchange of information throughout the franchise network also benefits the whole network: it will lead to a continuous improvement of the business method.

This provision is aimed at guaranteeing that the franchisee who is obliged to conduct the franchise business according to the concept of the franchisor, is provided with all the relevant information regarding the franchisor's business method which will allow the proper performance of the franchisee's obligations. This obligation also serves to meet the interests of the franchisor, since by providing such information the franchisor guarantees that all franchisees operate the business in a uniform manner and meet the quality specifications.

C. Necessary information

The franchisee must be provided in due time with all the information which the franchisee needs for the proper operation of the franchise business (IV.E.–2:202 (Information during the performance)).

In particular, the information to be provided normally includes the disclosure of the following features:

Market conditions. This mainly regards up-dated information concerning the state of competition and the state of demand.

Commercial results of the franchise network. The welfare and success of the franchisor's method requires that all the members of the network operate the system in a uniform manner. It means that the achievement of the expected profit by a franchisee does not only depend on its isolated efforts to operate the franchise outlet but also depends on the business efforts of the other franchisees. Therefore, the individual business activity of each franchisee has an impact on the business results of the other members. The information on whether the other members are achieving positive or negative commercial results is an indicator of whether the system is working adequately.

This obligation imposes indirectly an obligation on each franchisee to inform the franchisor concerning the individual commercial results, but this is in any case the common practice in franchising since the ongoing payments are generally calculated on the basis of the achieved benefits of each franchisee.

Characteristics of the products. Franchisees are intermediaries in the distribution channel since they undertake the obligation to pass on the products of the franchisor to customers. The relevant information regarding such products is in the hands of franchisors. In fact, it is for the franchisor to establish the quality standards which are to be met by the products offered to consumers. An adequate performance of the contractual obligations of franchisees requires adequate and accurate knowledge concerning the products and services offered to third parties during the time the franchisee carries out its task as a distributor. Therefore the franchisor should provide the franchisee with updated information on the characteristics of the goods and services which are to be distributed.

Prices and conditions for the sale of products. Franchise contracts generally contain a provision by which the seller (franchisor) agrees with the buyer (franchisee) on the terms under which the sale of the products is to be carried out. Among them is the sales price. Due to the generally long-term character of franchise agreements, these conditions may change during the course of the relationship. If such is the case it is for the franchisor, as the supplier of the products and consequently the one with access to such an information, to inform the franchisee.

Any recommended prices and terms for the resale of products. In addition to the sales contract concluded between franchisor and franchisee, there is another sales contract. This is the sales contract concluded between the franchisee and the customer for the resale of products. Usually franchisors recommend which prices are to be charged to the customer. The franchisees will typically respect such recommendations in order to ensure a competitive position in the market and a certain harmonisation with the price policy and the advertising campaigns throughout the network which eventually benefits all franchisees.

Relevant communication with customers in the territory. Any contact between the franchisor and customers belonging to the territory where the franchisee's outlet is located

which can be relevant as to the operation of the business by the individual franchisee (e.g. preferences of customers, expected changes in demand) is to be communicated to the franchisee.

Advertising campaigns. The success of franchisees in conducting the business depends on the maintenance of the reputation of the network which is made known to customers through advertising. The franchisor is under an obligation to ensure an adequate advertising strategy and to coordinate the promotion activities of the members of the network (IV.E.–4:207 (Reputation of network and advertising)). Such an obligation necessarily implies giving information to the franchisees regarding the advertising initiatives taken by the franchisor, notably regarding those which do not involve the participation of franchisees on a local level.

D. No formalities

There is no formal requirement as to the way in which this obligation must be performed, e.g.: in writing. Nevertheless, in practice such information will generally be provided in writing.

NOTES

The franchisor's obligation to inform its franchisee

1. Under none of the legal systems is there an explicit statutory obligation for the franchisor to provide information to the franchisee during performance. However, under a majority of the legal systems, such an obligation is considered by legal authors to be included in the obligation to co-operate or to follow from the doctrine of good faith. The items mentioned in the Article recur in the case law and legal literature of a majority of the legal systems. (DUTCH law, *Van der Heiden* (1999) 59 ff; ENGLISH law; FINNISH law; GERMAN law: *Giesler/Nauschütt*, § 5 no. 123, 165, § 8 no. 18; *Martinek/Semler*, § 19 no. 60-67; GREEK law: First Instance Court of Athens 1733/2000 Dikaio Epixeiriseon kai Etairion 7/2000 746 with annotation by *Kostakis*; ITALIAN law: e.g. Lodo Arbitrale, Torino 11 July 1995, *Società X c. Società Y*, published in: *Frignani* (1999) 157; PORTUGAL: *Pestana de Vasconcelos* (2000) 32).
2. In addition, under GERMAN law the law on commercial agency (§ 86 a II HGB) is also applied by way of analogy to franchising (*Giesler/Nauschütt*, § 5 no. 123, 165, § 8 no. 18; *Martinek/Semler*, § 19 no. 60-67).
3. However, under FRENCH law this obligation follows from the obligation to assist, which is based on good faith. (See also: art. 11, 15.7 of the ICC Model Contract.)
4. Under SPANISH law there is no explicit provision as to the obligation of providing information during the performance, but it may be inferred from the franchisor's duty to grant *continuous* technical and commercial assistance to the franchisee which is the fundamental content of the franchisor's performance (SAP Madrid 6 November 2007, AC 2008\81).(SAP Madrid 6 November 2007, AC 2008\81).(SAP Madrid 6 November 2007, AC 2008/81), as provided by the art. 2.1 sub c of Real Decreto 2485/1998. According to *Domínguez García* (in *Alberto Bercovitz*, Contratos Mercantiles, p. 602), it includes especially any commercial information related to studies developed by the franchisor in order to actualise the products, marketing or publicity techniques, commercial campaigns etc. This obligation stems as well from the principle of good faith (CC 1258 and Ccom 57) and the character of the franchise as a contract of collaboration between businesses.

IV.E.–4:206: Warning of decreased supply capacity

(1) When the franchisee is obliged to obtain the products from the franchisor, or from a supplier designated by the franchisor, the franchisor must warn the franchisee within a reasonable time when the franchisor foresees that the franchisor's supply capacity or the supply capacity of the designated suppliers will be significantly less than the franchisee had reason to expect.

(2) For the purpose of paragraph (1) the franchisor is presumed to foresee what the franchisor could reasonably be expected to foresee.

(3) Paragraph (1) also applies to cases where the franchisee, although not legally obliged to obtain the products from the franchisor or from a supplier designated by the franchisor, is in fact required to do so.

(4) The parties may not, to the detriment of the franchisee, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

This provision concerns situations where the franchisee is obliged to purchase the contract products only from the franchisor or from other suppliers designated by the franchisor. This rule establishes that in such cases the franchisor must warn the franchisee when the franchisor foresees an important decrease in the franchisor's supply capacity or in the supply capacity of the authorised suppliers. This obligation does not concern decreases in the supply capacity of the franchisor or authorised suppliers which can reasonably be expected by the franchisee. However, it is concerned with situations where the supply capacity of the suppliers turns out to be significantly less than what the franchisee had reasons to expect.

Paragraph (2) provides that the franchisor is presumed to foresee changes which the franchisor could reasonably be expected to foresee.

Paragraph (3) extends the obligation for the franchisor in franchise relationships where, even though the parties have not agreed on a contractual obligation to exclusive purchasing, the franchisee is, in fact, obliged to buy on an exclusive basis from the franchisor or from authorised suppliers.

B. Interests at stake and policy considerations

An exclusive purchasing obligation implies that the franchisee is not allowed to find sources of supply other than the one provided by the franchisor or the designated supplier. Eventually, this means that the franchisee entirely depends on the supply capacity of the franchisor and the authorized suppliers. Therefore, even when the franchisor or the authorised suppliers cannot supply the products involved in the franchise business, the franchisee cannot approach other suppliers.

This provision aims to protect the franchisee in such situations. It aims to avoid situations where it is not possible for the franchisee to continue operating the business because the suppliers cannot deliver the required supplies due to a decrease in the supply capacity. Due to the franchisor's warning, the franchisee will be able to adapt the new availability of supplies

to the demand of customers. The franchisor must warn the franchisee within a reasonable time, so that the latter may react promptly.

This obligation may be deemed burdensome for the franchisor. However, this strict obligation is justified, since the franchisor is the one who imposes on the franchisee the obligation to purchase exclusively from the selected suppliers. In addition, this obligation is not unreasonably burdensome since the franchisor does not have to provide the franchisee with the reasons why the supply capacity will change and since there are two limits to the obligation of the franchisor: (1) the decrease in the supply capacity must be foreseen (or, taking the presumption into account, at least reasonably foreseeable) and (2) the decrease cannot reasonably be expected by the franchisee.

This obligation to warn is also in the franchisor's interests. If the warning is given a sufficient time in advance, the franchisee will be able to adapt to the new supply availability and find solutions which avoid the disappointment of customers when they are not provided with the products they expect. Consequently the franchisor's reputation will not be negatively influenced.

C. Supply capacity

The supply capacity of the franchisor or of the designated suppliers concerns the availability of products of the type which the franchisee has ordered or usually orders.

D. Designated suppliers

The franchisor is obliged, according to this provision, to warn the franchisee when the franchisor foresees that the supply capacity of the selected suppliers will be significantly less than what the franchisee had reason to expect.

E. Reasonable time

In principle, the warning must be given a sufficient time in advance in order to allow the franchisee to react and adapt to the new supply availability. To assess what is reasonable, the nature and purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved should be taken into account. (See the definition in I.–1:104 (Reasonableness))

F. Significant decrease

The franchisor must warn the franchisee when the supply capacity will be significantly less than expected. It follows that no obligation arises in the case of a minor or temporary obstacle to supply.

G. Expectations of the franchisee

The franchisee will normally expect to be provided with the amount of products purchased from the franchisor or the designated suppliers and which corresponds with the franchisee's needs for supply with a view to an adequate operation of its business.

H. De facto exclusivity

Paragraph (3) equates situations where the parties have explicitly agreed on exclusive purchasing obligations with situations where there is no explicit agreement, but nonetheless there is a situation of actual exclusivity. This is the case when the franchisee has in fact no possibility to buy from other suppliers because no one meets the quality standards imposed by the franchisor or because it is impossible to find the products which are the subject of the franchise in the market.

I. Character of the rule

This is a mandatory rule; the parties are not free to agree otherwise.

NOTES

In general

1. This rule has been taken from the Directive on commercial agency (art. 4(2)b). It can be considered a specific instance of the obligation to provide information and to cooperate. Under the legal systems studied no specific information concerning such an obligation in relation to franchising was found although sometimes, as is considered to be the case in SPANISH law, it may be derived from the generic principle of good faith.

IV.E.–4:207: Reputation of network and advertising

(1) The franchisor must make reasonable efforts to promote and maintain the reputation of the franchise network.

(2) In particular, the franchisor must design and co-ordinate the appropriate advertising campaigns aiming at the promotion of the franchise network.

(3) The activities of promotion and maintenance of the reputation of the franchise network are to be carried out without additional charge to the franchisee.

COMMENTS

A. General idea

Under this provision the franchisor must make reasonable efforts to promote and maintain the network. These efforts include maintaining the good reputation of the intellectual property rights related to the franchise business. In the same manner it requires the observation of due diligence in assuring that the know-how is up-dated and is in conformity with the relevant circumstances. The maintenance of such a common reputation also depends on the extent to which uniformity is preserved. Such uniformity is achieved when all the members within the network follow the common guidelines for conducting the business. All these aspects, pursuant to this provision, fall under the franchisor's control. In addition, the franchisor must actively promote the business.

Paragraph (2) stresses the importance of advertising as a crucial activity in maintaining the good reputation of the network. Since the success of a franchise business largely depends on the appeal of the formula and the trademark, the franchisor must make reasonable efforts to promote the franchise chain through advertising campaigns. The advertising efforts, the costs of which are to be borne by the franchisor (paragraph (3)), point to the activities of design and coordination of the campaigns followed by the members of the network.

This Article does not include advertising campaigns which are initiated by the franchisee as an independent entrepreneur and which are intended to promote the franchisee outlet on a local level.

B. Interests at stake and policy considerations

The reputation and image of the franchisor's method of business with respect to consumers attract businesses which are interested in adopting the same formula in order to have a high possibility of making a profit. The economic profitability of the franchise business for both franchisor and franchisee depends on the maintenance of the good reputation and image of the network towards consumers. Therefore, both parties' activities will be aimed at maintaining the good reputation of the network.

Since the franchisor is in the position to exercise control over the intellectual property rights and know-how related to the business concept and especially over the activities of the members of the network, it is for the franchisor to devote reasonable efforts to promote and maintain the good reputation of the network, especially by guaranteeing a uniform operation of the business formula by the franchisees in the network.

The maintenance of the good reputation of the network necessarily requires an adequate promotional activity to be carried out by the franchisor in co-ordination with all its franchisees to guarantee a common image in the eyes of the public.

This obligation, which may seem very burdensome for franchisors, may not in practice have such a negative impact. What generally occurs is that franchisors are reluctant to grant a great deal of discretion to franchisees in promoting the franchise business. The reason for this is that a uniform and reputable image of the system is normally made known to customers through advertising. Therefore, contracts generally contain clauses whereby the franchisor undertakes the obligation to control promotional activities.

C. Reasonable efforts

The franchisor is required to make reasonable efforts to guarantee the maintenance of the good reputation of the franchise network. To assess what is reasonable the nature and purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved, among other things, should be taken into account. (See the definition in I.–1:104 (Reasonableness))

D. Appropriate advertising campaigns

Appropriate advertising campaigns mainly refer to advertising campaigns on an international, national or regional level which are aimed at promoting the franchisor's business on a general level. The initiative is to be taken by the franchisor, who is furthermore obliged to guarantee that all members of the network uniformly follow the campaigns.

Some of the advertising campaigns may require the participation of franchisees on a local level. The franchisee must participate on a local level in the advertising campaigns launched by the franchisor in so far as these campaigns are reasonable.

E. Without additional cost

Under the Article, the costs of promoting and maintaining the reputation of the network are to be paid by the franchisor. In other words, the price that the franchisee has to pay as a contribution to the advertising campaigns launched by the franchisor is deemed to be included in the periodical payments made by the franchisee. This is designed to prevent uncontrolled and unilateral inflation of royalties in the guise of advertising costs. It therefore aims to protect the franchisee in that the franchisee does not have to pay for the advertising unless the contract explicitly says so and the franchisee was properly informed of this during the pre-contractual stage.

The exception to this rule is for those situations where the franchisee must participate on a local level in the advertising campaigns launched by the franchisor. If that is the case, the costs of local advertising are to be covered by the franchisee provided that the price is reasonable.

NOTES

I. Reasonable efforts to promote and maintain the network's reputation

1. This obligation has been accepted by a large majority of the legal systems. However, its legal basis and character differs from country to country.
2. Under some legal systems such an obligation has been accepted by legal authors. (DUTCH law: *Van der Heiden* (1999) 87, *Kneppers-Heynert*; FRENCH law: *Dutilleul & Delebecque* no. 955, *Ferrier* no. 691; PORTUGUESE law: *Ribeiro* (2000), 161 ff.; SPANISH law: *Hernando Giménez* p.278, *Dominguez García* in *Alberto Bercovitz*, Contratos Mercantiles, p. 602). The situation appears to be the same under GREEK law. See also art. 15.7 of the ICC Model Contract)
3. Under GERMAN law such an obligation may be inferred from the doctrine of good faith (§ 242 BGB, *Giesler/Nauschütt* § 5 no. 143 et seq., BGHZ 136, 295)
4. Under FINNISH law there is no such specific rule; the situation appears to be the same under ENGLISH and SCOTTISH law. ENGLISH law, which does not more than recognise that "…the franchisor must be able to take measures necessary for maintaining the identity and reputation of the network bearing his business name or symbol", and thus measures to that end do not infringe Art 81 of the EC Treaty: (Halsbury's vol. 47, 2001 Reissue, para. 429.

II. Advertising

5. Under none of the legal systems is there such a specific statutory obligation.
6. However, under PORTUGUESE law such an obligation is inferred from the obligation to maintain the reputation of the network (*Ribeiro* (2001) 196). Also under DUTCH law a lower court has recognised such an obligation (*Praktijkgids*, 1998, 105-106).
7. Under BELGIAN law such an obligation is included in the obligation of assistance (*Verbraeken & de Schoutheete* no. 151 (c). In SPAIN the obligation of the franchisor to design and develop campaigns in order to promote the franchised brand, without any additional cost for the franchisee, is recognised by the case law (SAP Girona 11 October 2006, JUR 2007\140527).
8. Most model contracts include an explicit contractual term in this respect. (Arts. 15.6 and 15.7 of the ICC Model Contract; ENGLAND: *Adams/Prichard Jones* Precedent I, Clause 6.4; see for GERMAN law: *Martinek/Semler*, § 19 no. 10; ITALY: *Frignani*, 291;

III. Costs

9. According to BELGIAN law sometimes these costs are regarded as being included in the fee, whereas in other circumstances the franchisee may be charged for this (*Verbraeken & de Schoutheete* no. 158).
10. According to Article 16.1 ICC Model Contract the franchisor must pay a certain percentage of its gross quarterly sales to contribute to the franchisor's promotional activities in relation to the business. It seems that the franchisor must bear the costs of the initial advertising campaign (art. 15.6).

Section 3: Obligations of the franchisee

IV.E.–4:301: Fees, royalties and other periodical payments

(1) The franchisee must pay to the franchisor fees, royalties or other periodical payments agreed upon in the contract.

(2) If fees, royalties or any other periodical payments are to be determined unilaterally by the franchisor, II.–9:105 (Unilateral determination by a party) applies.

COMMENTS

A. General idea

In practice, the parties to a franchise contract generally agree on an initial payment, which is viewed as an admission fee for entry to the franchise network. It is normally a fixed amount which essentially covers the franchisor's initial training and recruitment costs. In addition, parties further agree on periodical payments or royalties, which are to be paid during the whole duration of the contractual relationship, in exchange for the continuous exploitation of the business, ongoing assistance provided by the franchisor and so on. This provision spells out the franchisee's obligation to pay these fees, royalties and periodical payments.

However, where the contract states that such fees are to be determined (at a later stage) by the franchisor unilaterally and the franchisor's determination of the price is unreasonable, a reasonable price is substituted by law in accordance with II.–9:105 (Unilateral determination by a party).

B. Interests at stake and policy considerations

In many franchise relationships periodical fees cannot be established at the moment of concluding the contract for its whole duration. Sometimes it is not even possible to establish an objective mechanism beforehand. In those cases it may be reasonable to accept the validity of a contract which leaves the determination of a term, even one as important as the periodical fee, to one party, very often the franchisor. However, the law must closely monitor the use which the franchisor makes of such a discretionary power, especially in the case of franchise contracts where the franchisee is frequently heavily dependent (as a result of extensive investments) on the continuity of the contractual relationship.

This Article provides the franchisee with strong protection in the case of an abuse by the franchisor of its discretionary power: the legal effect is not the invalidity of the unreasonable term (and maybe as a result the invalidity of the whole contract) but the substitution of a reasonable term by law. If the franchisor does not want to continue the contractual relationship on these reasonable terms, it is left with no other choice but to end the contract. However, in that case it will have to respect the rules contained in Chapter 1. In particular, it will have to give reasonable notice.

Such strong protection is necessary in order to avoid the situation where a franchisor can effectively end the franchise without having to give reasonable notice simply by unreasonably raising the fee, thus forcing the franchisee to end the relationship.

C. Relation to other provisions

This Article applies – specifically concerning fees, royalties or any other periodical payments in franchise contracts – the rule in II.–9:105 (Unilateral determination by a party) concerning the price and any other contractual term in any contract. This Article aims to ensure that any fees, royalties or any other periodical payments which are to be established unilaterally by the franchisor are covered by the policy laid down in that general provision. An additional justification for the presence of this specific Article is that the unreasonable unilateral determination of fees is one of the most recurrent problems in franchise relationships. Therefore, a clear and specific rule is appropriate.

D. Calculation of royalties and periodical payments

Royalties and periodical payments are frequently calculated on the basis of the franchisee's quarterly gross sales. Since these payments are to be made on a periodical basis and during the entire course of the relationship, they are normally increased by the franchisor to adapt the price to inflation and other circumstances (for example, an increase in production costs, an increase in the value of the shares of the franchise company, improvements to the system) and the franchisee. The contract may provide for a mechanism or criteria which determine variations in the amount which is periodically due.

NOTES

I. Payment of fees, royalties or other periodical payments

1. In most legal systems it is accepted by case law, legal authors or model contracts that the franchisee must pay an entrance fee and subsequently royalties or other periodical payments. (BELGIUM: *Verbraeken & de Schoutheete* no. 158; FRANCE: *Ferrier* no. 695, *Huet*, no. 11621; FINLAND; GREECE: *Georgiadis*, 203, *Alepakos*, 936, *Voulgaris*, 902, ITALY: *Frignagni*, 291; NETHERLANDS: *Van der Heiden* (1999) 60 ff; PORTUGAL: *Ribeiro* (2001) 184, *Pestana de Vasconcelos* (2000) 34; SWEDEN (SOU 1987:17, 57). In SPAIN the parties are free to establish any payment system, although the most common one consists of payment of the entrance fee (*pago de entrada*) to the franchisor and periodic payments as agreed, e.g. a payment on the profits obtained(*Dominguez García* in *Alberto Bercovitz*, Contratos Mercantiles, p. 596). See also art. 1 ECE; arts 20, 21 of the ICC Model Contract.

II. Unilateral determination of fees, royalties and other periodical payments

2. If the fees, royalties and other periodical payments are determined unilaterally by the franchisor, in a large number of the legal systems such a price is replaced by a reasonable one if the price determined is unreasonable. (ENGLAND: *Adams/Prichard Jones* §542; GERMANY: § 315 III (2) BGB. The paragraphs regarding unfair contract terms under § 305 BGB are not applicable even if the term regarding the determination is expressed within general terms of business (*Giesler/Nauschütt*, § 9 no. 22, 23; see also § 307 III BGB.)
3. Under FINNISH law any unfair term in a contract may be substituted by reasonable ones under the general clause. (Article 36 of the Contracts Act).
4. Under a minority of the legal systems the contract is void if it includes an unreasonable price unilaterally determined by the franchisor due to the legal prohibition of leaving the establishment of the price to only one of the parties. For SPAIN see CC art.1449 applied by the way of analogy.

IV.E.–4:302: Information by franchisee during the performance

The obligation under IV.E.–2:202 ((Information during the performance) requires the franchisee in particular to provide the franchisor with information concerning:

(a) claims brought or threatened by third parties in relation to the franchisor's intellectual property rights; and

(b) infringements by third parties of the franchisor's intellectual property rights.

COMMENTS

A. General idea

As a counterpart to the franchisor's obligation to make reasonable efforts to ensure the undisturbed use of intellectual property rights regarding the operation of the franchise business, under this provision the franchisee is required to inform the franchisor if the franchisee becomes aware of any claim brought or infringement made by a third party regarding the franchisor's intellectual property rights – it will mainly concern claims and infringements by third parties located in the local market where the franchisee operates. This list of information obligations is not exhaustive.

B. Interests at stake and policy considerations

Both parties have an interest in being kept informed concerning facts and developments which are relevant to their performance. It can make their performance easier and more successful. Reciprocal exchange of information throughout the franchise network also benefits the whole network: it will lead to a continuous improvement of the business method.

However, the present provision moderates the burden of the obligation to inform for franchisees since in most cases only this information is relevant to the proper functioning of the franchising network.

NOTES

The franchisee's obligation to inform the franchisor

1. According to legal authors there is such an obligation in BELGIAN law (*Verbraeken & de Schoutheete*, no. 160). Under FRENCH law, the franchisee has the obligation to contribute to the protection of intellectual property rights; the obligation to inform the franchisor of infringements, claims brought or threatened by third parties can be considered a part of this (*Dutilleul & Delebecque*, no. 955, *Ferrier*, no. 701). With respect to the other legal systems no specific information has been found.
2. Under the SPANISH law there is no specific provision about this obligation. However, such a contractual term is valid. The only provision on this matter in Spanish law concerns leases (CC art. 1559) which obliges the lessee to inform the lessor about any right or claim brought by a third party against the rented goods.

IV.E.–4:303: Business method and instructions

(1) The franchisee must make reasonable efforts to operate the franchise business according to the business method of the franchisor.

(2) The franchisee must follow the franchisor's reasonable instructions in relation to the business method and the maintenance of the reputation of the network.

(3) The franchisee must take reasonable care not to harm the franchise network.

(4) The parties may not exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

The franchisee is under an obligation to conduct its business in accordance with the franchisor's method. This method is communicated to the franchisee through a business package that comprises intellectual property rights, know-how and assistance. The present provision is aimed at guaranteeing a uniform operation of the franchise business and the protection of the franchisor's business values. In other words, the franchisee has not only a right to obtain intellectual property rights, know-how and assistance from the franchisor but also an obligation to use the intellectual property rights, know-how and assistance according to the franchisor's business method.

Moreover, the franchisee must follow the instructions given by the franchisor regarding the method by which to conduct the franchise system, in so far as such instructions are reasonable in order to guarantee the correct functioning of the system.

B. Interests at stake and policy considerations

This rule aims to guarantee that the intellectual property rights, the know-how and the knowledge provided through assistance are followed by all franchisees within the network. Such protection of the network is essential, both for franchisors and franchisees, who depend on the economic strength of the trademark and who share a common interest in protecting the image and reputation of the franchise network.

In addition to the general obligation to follow the franchisor's business method, the franchisee is also required under paragraph (2) to follow indications which may frequently be given by the franchisor during the relationship. The maintenance of the quality standards and uniformity of the franchise network may not be attainable unless the franchisee follows such instructions.

Such an obligation is to be measured against the interest of the franchisee in managing its business as an independent entrepreneur. As such, it is obliged to follow the method and instructions of the franchisor provided that they do not hinder its independence.

C. Instructions

Apart from being reasonable the instructions must also be necessary to guarantee the maintenance of the quality standards required by the franchisor's method; they must not change the method articulated through intellectual property rights, know-how and assistance

and they must not hinder the legal status of the franchisee as an independent entrepreneur – the franchisee may arrange its activities and use its time as it thinks fit.

D. Reasonable care not to harm the franchise network

Although it is in the franchisee's own interests to ensure the reputation of the franchise network, this provision stresses the importance for the welfare of the franchise network to avoid any misbehaviour on the part of franchisees which may result in damaging the image of the franchise system. Consequently, the franchisee is expressly required to take reasonable care not to harm the network.

E. Character of the rule

This is a mandatory rule; the parties are not free to agree otherwise.

NOTES

I. Reasonable efforts to operate according to the franchisor's business method

1. Such an obligation has been accepted in most legal systems by case law or legal authors. (AUSTRIA: *Holzhammer*, 103; *Krejci, Grundriss*, 404; BELGIUM: *Verbraeken & de Schoutheete*, no. 159 (b); FINLAND; FRANCE: *Dutilleul & Delebecque*, no. 955, *Ferrier*, no. 696, *Huet*, no. 11623; GERMANY: *Giesler/Nauschütt*, § 5 no. 160; NETHERLANDS: *Kneppers-Heynert* 15-16, 99-100, *Barendrecht & Van Peursem* 114, Articles 4 and 10 NFV Model Franchise Agreement. Article 10.1 of the ICC Model Contract; Art. 2.3 of the EurCodeEthics.); ENGLAND: Adams, John N. "Franchising: practice and precedents" , Model Franchise Agreement 1, Article 7.7.
2. SPANISH law lacks a specific provision on this matter. Nevertheless, an obligation to operate the franchise may be inferred by way of analogy from the CC art. 1555.2 on leases and from the general duty of diligence and good faith in commercial relations (Ccom art. 57).

II. Obligation to follow instructions

3. Such an obligation is accepted in various legal systems' case law or by legal authors. BELGIUM: *Verbraeken & de Schoutheete* no. 159 (b); FRANCE: *Dutilleul & Delebecque*, no. 955, *Huet*, no. 11623.3 ; art. 10.7 ICC Model Contract; ENGLAND: Adams, John N., "Franchising: practice and precedents", Model Franchise Agreement 1, Article 7.21.
4. Under GERMAN law a majority of the legal authors and the courts apply § 86 HGB by way of analogy to franchising. Under this provision the commercial agent must follow the principal's reasonable instructions (BGH, *NJW* 1984, 2102; *Koller/Roth/Morck*, Vor § 84 HGB no. 10, 11; *Münchener Kommentar zum Handelsgesetzbuch*, § 86 HGB no. 3).
5. Under SPANISH law art. 9.2. sub (c) of the Agency Law which obliges the agent to follow the principal's instructions as long as they do not affect the agent's independence, may be applied by way of analogy. Nevertheless, the franchisor must not interfere in the franchisee's area of exclusive competence: this kind of behaviour

will be considered as a violation of market freedom and commercial good faith (ex art. 5 of the Disloyal Competence Law).

III. Reasonable care not to harm the franchise network

6. Under a number of legal systems such an obligation is recognised by case law and legal authors. (FRANCE: *Dutilleul & Delebecque*, no. 955, *Huet*, no. 11621.1; ITALY: The use of the commercial symbols of the franchisor by franchisees that operate under the common standards may result in discrediting the image connected to them, and may thus damage not only the franchisor, but the whole network. Case law on the liability of a franchisee for damaging the 'commercial image' of the franchisor is rather rare. See e.g.: Tribunale di Milano, 23 November 1994, A. B. Sportsman Club s. r. l. c. Vico s. r. l., in Giur. it., 1996, I, 2, 382 (note *Cipriani*, Sul danno all 'immagine del "franchisor"); PORTUGUESE law: *Ribeiro* (2000) 161 ff.; arts. 10.7, 10.11 of the ICC Model Contract; art. 2.3 of the EurCodeEthics; ENGLAND: Adams, John N., "Franchising: practice and precedents", Model Franchise Agreement 1, Articles 7.38 and 7.55).

7. There is no similar provision under SPANISH law. However, it may stem from the principle of good faith and the requirement of acting with good commercial diligence (Ccom art. 57).

IV.E.–4:304: Inspection

(1) The franchisee must grant the franchisor reasonable access to the franchisee's premises to enable the franchisor to check that the franchisee is complying with the franchisor's business method and instructions.

(2) The franchise must grant the franchisor reasonable access to the accounting books of the franchisee.

COMMENTS

A. General idea

This provision imposes on the franchisee the obligation to allow the franchisor to enter the franchisee's premises to check whether the franchisee is complying with the quality standards of the franchisor's business method and with the instructions given by the franchisor regarding the operation of the franchised business.

Under paragraph (2), the franchisee is also required to allow reasonable access to its accounting books.

B. Interests at stake and policy considerations

Inspection is an effective method for the franchisor to check whether the franchisee manages the franchise business in accordance with the guidelines which are provided by the franchisor and which must be respected by all franchisees in order to maintain the common image and reputation of the network. Thus, it is indirectly beneficial for the other franchisees.

The franchisor is granted the right to have reasonable access to the accounting books of the franchisee in so far as this is required in order to ascertain the actual results of the franchisee in the operation of the business which will allow the franchisor to determine the amount of the ongoing payments to be made by the franchisee.

This right of the franchisor is to be measured against the right of the franchisee to organise its business as an autonomous entrepreneur. Therefore, inspection as a control activity is to be allowed by the franchisee, provided, however, that it is carried out within the limits imposed by the independent status of franchisees.

C. Inspection

Inspection is a control activity exercised by the franchisor concerning the way in which the franchisee carries out the operation of the business. An inspection is carried out by visiting the franchisee's premises in order to check *in situ* whether the franchisee is conducting the business in conformity with the franchisor's method and quality standards and by having access to the franchisee's accounting books.

D. Reasonable access

Reasonableness in the context of the Article is to be judged by the usual criteria (see definition in I.–1:104 (Reasonableness)). Obviously, an inspection should not take place in the middle of the night or five times a week. Reasonable access must take place during normal

working hours and with a normal frequency and, more generally, only in so far and in such a way as is necessary to guarantee that the business is conducted in accordance with the franchisor's business method. Moreover, the inspection of the accounting books is to be done in so far as it is necessary to assess the business results of the franchisee for a determination of the ongoing payments.

NOTES

I. Right to inspect the franchisee's premises

1. Under most legal systems such a right is recognised either by case law or by legal authors or is included in model contracts. (BELGIUM: *Verbraeken & de Schoutheete*, no. 165; FINLAND; FRANCE: *Dutilleul & Delebecque*, no. 955; ITALY: *Frignani*, 117; NETHERLANDS: *Kneppers-Heynert*, 15 et seq., cf. art. 20(1) NFV Model franchise agreement; PORTUGAL: *Ribeiro* (2001) 191; SPAIN: *STS* 4 March 1997 RJ 1997/1642, *Echebarría Sáenz* (1995) 378, *Hernando Giménez*, 280 et seq.; art. 10 para 13 ICC Model Contract; art. 2.3 ECE)
2. Under SPANISH law, the right to inspect the franchisee's premises by the franchisor stems from the obligation of technical and commercial assistance through which the franchisor exercises the right to supervise the franchisee's activity, in order to protect the unified image of the brand. However, the franchisor's right of legitimate control must not go so far as to be an interference that violates the franchisee's independence (by analogy: art. 9.2. sub (c) Agency Law).
3. Under GERMAN law this obligation is inferred from good faith in some circumstances (*Giesler/Nauschütt*, § 5 no. 165; *Martinek/Semler*, § 19 no. 12).

II. Access to the books

4. Under FRENCH law authors recognize such an obligation and consider it to be part of the franchisor's right of inspection. (*Dutilleul & Delebecque*, no. 955).
5. Under GREEK law the franchisee must provide the franchisor with full access to financial data and client files (First Instance Court of Athens 1733/2000 *Dikaio Epixeiriseon kai Etairion* 7/2000 746 with annotation by *Kostakis*). Under BELGIAN law the franchisee must provide the franchisor with the required financial data. However, it is unclear whether the franchisor has access to the franchisee's books. (*Verbraeken & de Schoutheete* no. 165).
6. Under SPANISH law, from the obligation to pay the price in accordance with agreed criteria, commentators tend to infer an obligation to inform and more specifically an obligation to account (Ccom art. 243). As the franchisee must inform the franchisor of the volume of sales or benefits to establish the periodical payments it follows that the franchisor should have a right to verify such information (*Hernando*, p.282). Nevertheless, as the Ccom art. 32.1 provides for accountancy secrecy, the violation of this principle should be consented to by an adequate contractual clause. Moreover, the franchisor is obliged to give prior notice to the franchisee about the books' inspection and to treat any information obtained as confidential; revealing the content of the books may result in liability for the damage caused, ex CC art. 1902.
7. A right for the franchisor to have access to the franchisee's books is included in art. 2.3 of the EurCodeEthics. With respect to the other legal systems, no specific information has been found.

CHAPTER 5: DISTRIBUTORSHIP

Section 1: General

IV.E.–5:101: Scope and definitions

(1) This Chapter applies to contracts (distribution contracts) under which one party, the supplier, agrees to supply the other party, the distributor, with products on a continuing basis and the distributor agrees to purchase them, or to take and pay for them, and to supply them to others in the distributor's name and on the distributor's behalf.

(2) An exclusive distribution contract is a distribution contract under which the supplier agrees to supply products to only one distributor within a certain territory or to a certain group of customers.

(3) A selective distribution contract is a distribution contract under which the supplier agrees to supply products, either directly or indirectly, only to distributors selected on the basis of specified criteria.

(4) An exclusive purchasing contract is a distribution contract under which the distributor agrees to purchase, or to take and pay for, products only from the supplier or from a party designated by the supplier.

COMMENTS

A. General idea

Distribution contracts are contracts concluded between a supplier (who may also be the manufacturer of the products) and a distributor (who may either be a wholesaler or a retailer). The supplier agrees to supply the distributor with products. The distributor commits itself to purchasing, distributing and promoting such products in its own name and on its own behalf.

There are different types of distribution contracts. The type of collaboration between the parties differentiates these contracts from each other. The contract itself addresses what type of exclusivity, if any, is granted. However, exclusivity is not an essential feature of a distribution contract.

Some of the rules in this Chapter apply only to specific types of distribution contracts: exclusive distribution, selective distribution, and exclusive purchase contracts respectively. Different obligations apply depending on the type of exclusivity the parties agree upon. However, these rules may also apply to other distribution contracts (e.g. basic framework agreements) by way of analogy. Furthermore, when the contract provides for bilateral exclusivity, both regarding purchase and supply, all obligations listed in this chapter will apply.

The typical distribution contract involves the purchase of goods from the supplier for sale by the distributor to customers but there may be cases which involve the leasing of goods or the supplying of services. In these Comments references to "sale" and "purchase" are meant to cover such other means of supply.

B. Interests at stake and policy considerations

The underlying notions in this Chapter are (i) that if parties agree on any exclusivity, they normally have a closer relationship, which requires a higher degree of collaboration and loyalty to each other and (ii) that a party who grants exclusivity to the other party does so in order to obtain some advantage in return.

Consequently, a supplier who refrains from dealing with other distributors by granting exclusive or selective distributorship is for instance entitled to give instructions and to check that they are followed (IV.E.–5:304 (Instructions)). As to the distributor, if the distributor agrees to buy a certain type of product exclusively from one supplier, the distributor receives advertising materials in exchange (IV.E.–5:204 (Advertising materials)).

In a limited number of cases the parties' freedom of contract is restricted. This is especially the case where exclusivity is granted unilaterally. These exceptional (mandatory) rules are meant to compensate to some extent for imbalance in bargaining power (see IV.E.–5:203 (Warning by supplier of decreased supply capacity) paragraph 2, concerning exclusive purchasing contracts).

In contracts where no exclusivity has been agreed upon, the parties do not have strong commitments towards each other. As a result, only basic obligations apply. A non-exclusive or a non-selective agreement could be regarded as nothing more than a loose contract to co-operate and to have some points agreed upon when and if the parties decide to buy or sell the products in question.

Distribution contracts which include exclusivity clauses are rather similar to franchise contracts. For this reason, the obligations of the parties in these two different contracts are dealt with in a consistent manner. This prevents any opportunistic classification of the agreements by the parties aimed at circumventing a less favourable regime.

C. Products

The term "products" in these rules refers to both goods and services (IV.E.–1:101 (Contracts covered). The same terminology has been adopted by (European) competition law and is consistent with commercial practice. It is largely for this reason that the Article includes the words "take and to pay for" in addition to "purchase". Some examples of the distribution of services include the distribution of music on the Internet and the distribution of information concerning the financial markets.

D. Continuing basis

A distribution relationship consists of a commercial co-operation between the parties, which may last for a varying, but usually substantial, period of time. This relationship may last even if for some time no sales or service contracts are concluded. A single sales contract or even a mere accidental succession of sales contracts between the same parties would not amount to a distribution contract.

E. In the distributor's name

This Chapter only applies where the party who distributes products to third parties does so in its own name. In other words, the distributor sells the products which it has bought from the supplier. This is the main difference with commercial agency where the commercial agent does not become owner of the products.

F. On the distributor's behalf

In promoting the sale of the products, the distributor pursues its own interest. This implies that commission agents do not fall within the scope of this Chapter.

G. Framework agreement

A distribution contract is a framework agreement (*contrat cadre*), which provides the context for subsequent contracts (*contrats d´application*). A framework contract usually only defines the basic elements of the subsequent contracts, without establishing the specific modalities.

Whereas the *contrat d´application* is usually of short duration and binds the parties to precise obligations, the framework agreement is meant to establish a relationship of ongoing collaboration between the parties. The "application" contracts will usually result from the orders by the distributor to the supplier.

H. Exclusive distribution contracts

In exclusive distribution contracts, the supplier undertakes to supply the products only to one distributor, to the exclusion of other potential distributors, in a specified territory (territorial exclusivity) or to a certain group of customers (exclusive customer allocation). This provides the distributor with some protection against intra-brand competition (i. e. from products of the same brand brought on to the market by other distributors). The extent of this protection depends on the agreement.

The definition in paragraph (2) includes both sole distributorships and exclusive distributorships. In the case of a sole distributorship the supplier is entitled to sell directly to customers, whereas in the case of exclusive distributorship, the supplier also agrees to refrain from direct sales.

Examples of exclusive distribution agreements first appeared in the motor industry. Subsequently, these contracts have become common in virtually all branches of the wholesale and retail sector (agricultural machinery, electrical appliances, furniture, beauty products and computer equipment).

Examples of exclusive customer allocation include differentiation between the business and consumer market, between the day and night-time market, et cetera.

In return for territorial exclusivity or exclusive customer allocation, the distributor usually agrees to buy only the supplier's products (exclusive purchasing contract (see below, Comment J) or not to represent competing products (contractual non-competition clause).

I. Selective distribution contracts

Selective distribution contracts result in closed sales organisations. The supplier limits the distribution of the products to those distributors with the qualifications which correspond most closely to the supplier's sales policy.

The selection may be based on either qualitative or quantitative criteria. Examples of qualitative criteria are: the employment of technically qualified staff, the possibility to display the products separately from others, the maintenance of a sufficiently representative selection or a sufficiently wide stock of products, et cetera. Quantitative criteria are: the number of distributors in relation to the population of the territory to be served and a minimum turnover in the products et cetera.

A supplier will opt for this form of distribution in order to maintain the prestige of its brand or image (jewellery, cosmetics, et cetera), to ensure the efficient and speedy distribution of perishable products (fish), to provide a high level of pre-sales or after-sales services which is required because of the technological nature of the products to be distributed (personal computers, electronics, cars, high-tech equipment, et cetera).

J. Exclusive purchasing contracts

If the distributor undertakes to purchase the products (belonging to a certain market category) from the supplier only, the contract will be classified as an exclusive purchasing contract. The exclusivity may be either total or limited to a certain percentage of the distributor's requirements. It may also result from an obligation to purchase a quantity of products that in fact corresponds to the distributor's needs (*de facto* exclusivity). Normally, exclusive distribution agreements also include an exclusive purchase clause. In exchange for the distributor's control of the sale of the supplier's products in a given territory, the distributor then agrees not to buy the contract products from any other than the given supplier. These types of contracts are recurrent, for example, in the petrol and the beer distribution industries.

K. Mixed contracts

Some contractual relationships have the characteristics of a distribution agreement as well as another contract. This is the case, for example, where a distributor also sells some products in the supplier's name, thus acting as a commercial agent. Or, the distributor may purchase with a view not only to reselling the goods but also to transforming or incorporating them into a product for resale. In such cases the rules on distribution regulate those aspects of the contractual relationship which fall under the scope and definitions rule as set out in this Article (see II.–1:107 (Mixed contracts).

L. De facto distribution contracts and de facto exclusivity

The relationship which provides the framework for consecutive application contracts is the most characteristic element of distribution contracts. If such a relationship *de facto* exists without the parties ever having formally agreed to establish it, either in writing or orally, the rules contained in this Chapter may nevertheless apply, together with the general provisions contained in Chapter 1. This follows from the general rules on the formation of contracts. See II.–4:211(Contracts not concluded through offer and acceptance). Comment A to this Article stresses that a contract may be concluded by conduct alone. In such cases it is not easy to discern when the parties reach an agreement which amounts to a binding contract.

The same holds true for distribution contracts presenting *de facto* exclusivities. Rather than formally imposing exclusivity, the supplier may induce the distributor to obtain all or the major part of the distributor's supplies from the supplier. The latter may do so by granting discounts which are conditional upon total or *quasi*-total loyalty to the supplier's products (loyalty discounts). There may eventually be a tacit agreement on exclusivity or a practice of exclusivity established between the parties. In such a case, the rules in this Chapter on exclusive purchase agreements may apply in spite of the written contract that contains no exclusive purchasing clause. See II.–9:101 (Terms of a contract).

M. Competition law

Distribution contracts may be invalid pursuant to the application of EC and national competition law. In this respect, especially relevant is Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices, and the various exceptions for specific branches of trade (e.g. Commission Regulation (EC) No. 1400/2002 of 31 July 2002 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector). The provisions provided in this Chapter only apply to exclusive distribution, selective distribution and exclusive purchasing contracts to the extent that they are valid in the light of competition law.

NOTES

I. Scope

1. BELGIAN law is the only European legal system which contains specific statutory provisions concerning distribution contracts. (BELGIUM: *Wet 27 juli 1961 betreffende de eenzijdige beëindiging van de voor onbepaalde tijd verleende concessies van alleenverkoop, B. S., 5 oktober 1961, zoals gewijzigd door Wet 13 april 1971, B. S. 21 april 1971*). As to which rules are applied to distribution contracts in the other countries, see the notes to Article 1:101.

II. Definition of distribution

2. Apart from BELGIAN law, there are no statutory definitions of distribution contracts under the legal systems studied. Under the other legal systems distribution contracts are defined by legal authors and case law.

3. According to all these legal systems distribution includes the supply of products on a continuing basis and the sale by the seller of the products to third parties in its own name and on its own behalf. (AUSTRIA: EvBl 1990/96, EvBl 1998/104, EvBl 1991/76; *Krejci*, 402; see *Heller, Löber*, 110; *Hämmerle/Wünsch*, 311; BELGIUM: art. 1 § 2 *Alleenverkoopwet*; FRANCE: *Ferrier* no. 1 et seq., *Huet*, no. 11596; FINLAND; GREECE: distribution contract *σύμβαση διανομής/ simvasi dianomis, Georgakopoulos* 1999 435; ITALY: the term "distribution contracts" refers to different types of contracts that are employed for the distribution of goods and services. Most commonly used in commercial practice are the following: *rivendita autorizzata, concessione di vendita* and *franchising Pardolesi* (1988) 4, *Cagnasso* (1983) 17 ff; THE NETHERLANDS: *distributie contract, Barendrecht & Van Peursem*, 3; *Geel*, 108; *Van den Paverd*, 13; PORTUGAL: *contrato de concessão commercial Pinto Monteiro*, 108 ff.; *Menezes Cordeiro*, 509 ff.; *Pinto Monteiro*, 45;

Brito, 179 ff.; *Coelho Vieira*, 15; STJ 4/05/1993, BMJ 427, 1993, 530; STJ 22/11/1995, BMJ 451, 1995, 454; STJ 5/06/1997, BMJ 468, 1997, 434; STJ 23/01/1997, www.dgsi.pt, JSTJ00032260; SWEDEN: (*återförsäljningsavtal)* (*Håstad*, 295); SPAIN: *contratos de distribución o concesión* STS of 17 May 1999, RJ 1999\4046, *J.L. Echegaray* in *Alberto Bercovitz*, Contratos Mercantiles, p. 544. Notwithstanding some unclear case law (STS 8 November 1995, RJ 1995/8637) that includes the distribution contract as a subspecies of an agency contract, it is necessary to clarify that a distributorship may never be confused with an agency, as they differ substantially in the character of the legal position of the parties: whereas the agent acts on behalf of the principal (art. 1 LCA), the distributor always acts on the distributor's own behalf. As the distribution contract lacks specific regulations under Spanish law, there are no mandatory rules. Therefore the contract terms established by the parties are crucially important. Nevertheless, the provisions on the liberty of competence, derived from Spanish and international law, are binding for the parties to a distribution contract. The distribution contract covers only products generated or distributed by the distributor as, unlike a franchise, the concession does not include immaterial goods (*De la Cuesta*, Contratos Mercantiles, 2001, p. 367).

4. In BELGIAN statute law and AUSTRIAN, GERMAN and PORTUGUESE case law and literature distribution contracts are defined to include only the distribution of goods rather than the distribution of goods or services (AUSTRIA: *Holzhammer*, 104; BELGIUM: art. 1 § 2 *Alleenverkoopwet*; GERMANY: *Küstner/Thume*, no. 1139-1150). Moreover, under GERMAN law there is an additional requirement in order to define a distribution contract: i. e. the distributor's integration into the supplier's sales system (BGH, *NJW* 1971, 30; *OLG Zweibrücken*, *BB* 1983, 1301; *Küstner/Thume*, no. 1142; *Rohe*, 450; § 14 no. 1; *Ulmer*, 206).

5. Under ENGLISH law, distribution contracts will be classified as contracts for purchase for resale and the rules concerning those contracts apply accordingly (*Chitty-Reynolds* no. 31-003). In SCOTTISH law the sale elements of distribution contracts would come under the Sale of Goods Act 1979. The framework element of the contract would be governed by the general rules of contract law, which means that the terms drawn up by the parties, and the rules on interpretation, are of crucial importance.

III. Exclusive distribution, selective distribution, exclusive purchasing

6. The definitions of exclusive agreements adopted in this Article correspond to the ones in Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices.

7. The same distinction is made by GERMAN and DUTCH legal writers and courts (GERMANY: *Martinek/Semler*, § 14 no. 1; *Rohe*, 449 *Küstner/Thume*, no. 1261-1278; *Ulmer*, 138; NETHERLANDS: *Barendrecht & Van Peursem*, 10 et. seq.).

8. FRENCH and SPANISH authors distinguish between exclusive and selective distribution contracts (*Alicia García Herrera*, La duración en el contrato de distribución exclusiva, 2006, p. 156; *Enrique Guardiola Sacarrera*, Contratos de colaboración en el comercio internacional, 1998, p. 122; art. 1. sub d) of the European Commission Regulation 2790/1999;). Under FRENCH law, exclusive distribution contracts also seem to include exclusive purchasing contracts (FRANCE: *Dutilleul & Delebecque*, no. 925, 930, 935, *Huet*, no. 11607 ff; 11615).

9. Also BELGIAN law seems to distinguish only between exclusive and exclusive purchasing agreements. However, BELGIAN law does not seem to distinguish

selective distribution agreements. Art. 1 § 1 sub 3 *Alleenverkoopwet* refers to another category: distribution contracts whereby the supplier imposes important obligations on the distributor and which are of such importance that in the case of ending of the contract, the distributor incurs severe damages.

10. Under GREEK law the same distinction is made as under Article 4:101 i. e. between common distribution contracts (*koines simvaseis dianomis*), selective distribution contracts (*simvaseis epilektikis dianomis*) and exclusive distribution contracts (*simvaseis apokleistikis dianomis*) (*Georgakopoulos* (1999) 435-6) However, also another distinction is made between simple distribution (*apli simvasi dianomis*) and distribution with added legal rights (*simvasi dianomis me prostheto xaraktira dikaioxrisias*).

11. Some ITALIAN legal scholars discern three different types of distribution contracts: (i) sales of a certain amount of products to be determined, plus a clause of unilateral or bilateral exclusivity, (ii) concession of (re)sale of the products within a certain area, (iii) a commitment by the *concedente* to sell its products only to one *concessionario* and (or) by the *concessionario* to buy them from only one *concedente*. (*Oreste Cagnasso-Gastone Cottino,* 133).

Section 2: Obligations of the supplier

IV.E.–5:201: Obligation to supply

The supplier must supply the products ordered by the distributor in so far as it is practicable and provided that the order is reasonable.

COMMENTS

A. General idea

The supplier must consistently meet the supply orders of the distributor. However, parties are free to agree that the supplier is not obliged to meet all the orders placed by the distributor. This follows from the non-mandatory character of this rule. Moreover, the supplier is only bound to supply products in so far as the supplier is in a position to do so, taking into account the supplier's actual possibilities (i. e. productive capacity, stock capacity, et cetera). There is no obligation to supply in the case of impracticability. Lastly, the supplier is not bound by orders placed by the distributor if they are not reasonable.

B. Interests at stake and policy considerations

In most cases supply of the products ordered by the distributor will be in the interest of both parties. The supplier sells the products to the distributor and the latter is able to bring them to the market and to make a profit by reselling them. However, this may not always be the case. The supplier, for various reasons, may be either unable or unwilling to supply the distributor.

This Article obliges the supplier to meet the orders placed by the distributor, unless there are pressing reasons not to do so. The aim is to prevent a supplier from arbitrarily refusing to supply its distributors, and thus to provide the distributor with legal certainty.

However, this Article does not impose a mandatory obligation to supply upon the supplier. The rationale is to preserve the supplier's freedom of contract, so that the supplier is not forced to enter into undesired sales contracts.

The distributor's interest and the general interest are protected by the rules on unfair contract terms (see Book II, Chapter 9, Section 4) and by competition law.

C. Obligation to supply and actual supply contracts

The obligation to supply stems from the framework agreement. This provision does not regulate the terms of the contracts for the actual supply of the goods. Provisions on sales or services provide the specific modalities of the "application" contracts (e.g. the time of delivery, conformity of the products, remedies, et cetera).

Non-performance of obligations under the *application contracts* may have consequences for the distribution relationship. The latter issue is dealt with by, for example, the rules on termination for non-performance in Book III, Chapter 3, Section 5 as modified by IV.E.–2:304 (Termination for non-performance). The effect is that the distributor may terminate the

contractual relationship if the non-performance of obligations under i.e. the contracts which give precise operation to the general obligation under the framework contract, or a series of such contracts, amounts to a fundamental non-performance.

D. In so far as practicable

The distributor is entitled to demand the fulfilment of its orders as long as this is not excessive for the supplier, taking into account the supplier's actual resources. An order will not be regarded as practicable if the supplier encounters insuperable obstacles or fulfilment would cause inconvenience or expenses on the supplier's part to the extent that it would be substantially out of proportion to the distributor's interest for the supplier to fulfil the obligation to supply.

E. Reasonable order

In accordance with the definition in I.–1:104 (Reasonableness) reasonableness depends upon the nature and purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved. Special market conditions can justify orders exceeding the distributor's normal requests (e.g. a larger order for national team football shirts before the World Cup Finals). An order will be unreasonable if it goes beyond the limits of what would be a normal exercise of such a right by a careful and diligent distributor. This occurs, for instance, when the distributor places extra orders at the very last minute, although the distributor had foreseen (or could have foreseen) long before its actual order the forthcoming need for a much larger amount of products and the distributor knew (or should have known) of the limited supply capacity of its supplier. More generally, the distributor should place the order a reasonable time before the distributor foresees a forthcoming extra need.

NOTES

Obligation to supply

1. According to GREEK law the supplier has an obligation to provide the distributor with the goods to be distributed (*Georgakopoulos* (1999) 435). Moreover, according to SPANISH legal authors, the supplier must supply the products (*Fernandez* (1999) 354; *Sanchez Calero* (2000) 177). This also seems to be the case under FRENCH law with respect to bilateral exclusive distribution contracts, *contrats de concession* (*Dutilleul & Delebecque*, no. 942).
2. The SPANISH case law shows that the non-performance of this obligation without a justified reason is a cause for termination of the distributorship by the distributor, due to the frustration of its purpose. Moreover the supplier may not terminate the contractual relationship unilaterally invoking lack of achievement of the established minimum levels of sale, if previously the supplier has failed to supply (SAP Valencia 13 April 2007, JUR 2007/235136 and SAP Almería 17 November 2000, JUR 2001/50696).
3. Under DUTCH law, authors agree that where the supplier has economic power the supplier is not allowed to refuse to supply the goods or services to the distributor (*Barendrecht & Van Peursem*, 63 et. seq., *Geel*, 108; *Van de Paverd*, 21-22)
4. Under GERMAN law pursuant to the doctrine of good faith (§ 242 BGB) the BGH held that the supplier may not refuse the distributor's orders arbitrarily (BGH, *BB*

1958, 541; OLG Bremen, *BB* 1966, 756; *Küstner/Thume*, no. 1289; *Martinek/Semler*, § 14 no. 15). Moreover, if the parties agree that the distributor must purchase a minimum quantity of goods and if they agree upon a competition ban, the supplier must supply (BGH, *BB* 1972, 193; *Küstner/Thume*, no. 1290; *Martinek/Semler*, § 14 no. 15).

5. However, under ITALIAN law there is no general obligation on the side of the supplier to fulfil the orders of the distributor *Pardolesi* (1979) 257. Whether there is such an obligation depends upon the contract concluded by the parties. And, cases in which parties define rigidly the obligation to supply at the moment of the conclusion of the contract, i. e. the supplier will be bound to supply a specific amount of goods at specific intervals of time, are rare *Delli Priscoli*, 797, *Boero*, 308, *Cagnasso*, 37, *Pardolesi*, 230. Nonetheless, a refusal to supply by the supplier would certainly be evaluated with regard to the general principle of good faith in performance of the contract (CC art. 1375).

6. Under AUSTRIAN, ENGLISH, SCOTTISH and FINNISH law in the absence of special legislation the obligation to supply is not defined.

IV.E.–5:202: Information by supplier during the performance

The obligation under IV.E.–2:202 (Information during the performance) requires the supplier to provide the distributor with information concerning:

(a) the characteristics of the products;
(b) the prices and terms for the supply of the products;
(c) any recommended prices and terms for the re-supply of the products to customers;
(d) any relevant communication between the supplier and customers; and
(e) any advertising campaigns relevant to the operation of the business.

COMMENTS

A. General idea

This Article states what information the supplier must make available to the distributor during the contract. It follows from IV.E.–2:202 (Information during the performance) that the parties must supply each other with the information which they have at their disposal and which their counterpart needs for the proper performance of their obligations under the contract. The present provision further specifies certain types of information which are included in the supplier's obligation to inform.

The supplier has to provide some basic information which will enable the distributor to distribute the products effectively. The information concerns the characteristics of the products, the prices and terms for the sale of the products and any recommended prices and terms for the resale of the products. In addition, the supplier must inform the distributor about relevant communication with customers and advertising campaigns that it has started.

B. Interests at stake and policy considerations

The aim of this provision is to ensure that the distributor obtains information which is relevant in order to promote the sales of the products efficiently (e.g. knowing their characteristics and so being in a position to inform customers of them) and competitively (e.g. knowing the recommended prices which other distributors may charge). It is also in the interest of the supplier to inform the distributor about general quality requirements for the distribution of the products it supplies, or about new advertising campaigns. The obligation is not unreasonably burdensome for the supplier, since it only has to communicate information which is available to him and in so far as this is needed by the distributor.

Such further information is required because of the high degree of collaboration between the parties in exclusive distribution, selective distribution and exclusive purchase contracts. Moreover, distribution contracts including any exclusivity are rather similar to franchise contracts. Therefore, they should be treated in a similar way, in order to avoid attempts at opportunistic classification by the parties.

C. Information to be provided

The supplier must actively provide the distributor with the information which it possesses and which the distributor needs to achieve the objectives of the contract. Information includes documentation relating to the products (brochures, leaflets, et cetera) or to advertising campaigns. This obligation continues throughout the whole contractual relationship. It also implies that the supplier has to promptly update the distributor as soon as new relevant

information (e.g. concerning modifications and improvements to the products offered and sold) becomes available. Depending on the circumstances, the obligation to inform includes information of specific types. This Article mentions, in a non-exhaustive list, information regarding the following matters.

The characteristics of the products. In principle, a supplier has to inform the distributor about the products and their use. This enables the distributor to pass such information on to its customers, and to take the general quality requirements et cetera into account. The provision of this product information may include the supply of documentation, guidelines, management and operation manuals and recipes.

The prices and terms for the supply of the products to the distributor. A supplier must communicate its prices to the distributor. Prices referred to in the present paragraph are those relating to the contract between the distributor and the supplier.

The supplier must also inform the distributor about the supplier's terms for the sale of goods and services, including e.g. guarantees and delivery times.

Any recommended prices and terms for the re-supply of the products to customers. A supplier must communicate any recommended prices and terms to the distributor. These prices relate to the contract between the distributor and the final customers. This information is relevant because the distributor is then aware of what others may charge, and, depending on this, it will decide its own price policy in order to be competitive in the market.

The supplier must also inform the distributor about any recommendation as to the terms for the re-supply of the products to customers; e.g. regarding after-sales services, limitation clauses or credit.

Any relevant communication between the supplier and customers. The supplier must inform the distributor about any wishes, preferences or complaints communicated to it by customers within the territory or the specific group exclusively allotted to the distributor and, more generally, about any communication between it and those customers relevant to the distributorship.

Any advertising campaigns relevant to the operation of the business. The supplier must inform the distributor of any advertising campaigns, so that the distributor is able to participate in them and to benefit from them. The performance of this obligation may require the supply of relevant documentation together with samples of promotional material.

D. No formalities

There is no formal requirement for the way in which this obligation must be performed. Nevertheless, in practice such information will normally be given in writing. It may be problematic for the supplier to prove that it properly supplied the distributor with all the required information, when such information is presented otherwise than in a written document.

E. Competition law

The obligation to inform under paragraph (1)(c) only applies to recommended prices which do not amount to price maintenance clauses that are invalid according to competition law.

As an independent merchant, the distributor is free to set the prices charged for the products. However, practice demonstrates the recurrent use of resale price maintenance clauses. These are clauses whereby the distributor of a product undertakes vis-à-vis the supplier to maintain a certain price level when distributing the products. In its group exemption concerning vertical restrictions (Regulation 2790/99), the EU Commission has taken a relatively lenient approach concerning maximum vertical price restrictions.

Maximum prices and recommended prices that do not amount to a fixed or minimum resale price as a result of pressure or incentives created by any of the parties are now exempted. In contrast, other forms of resale price maintenance, e.g. minimum resale prices and minimum margins, are still a serious infringement that could lead to invalidity and to the imposition of fines. If the agreement does not fall under Article 81(1) (e.g. because it is not capable of affecting trade between Member States), the resale price maintenance clause will be legal under EU law, but will still have to be reviewed under the applicable national law.

NOTES

Information during the performance

1. None of the legal systems contains an explicit statutory rule similar to the present Article.
2. However, under FINNISH, GERMAN, ITALIAN and PORTUGUESE law a similar obligation follows from a general duty of good faith or loyalty (GERMANY: § 242 BGB (*Küstner/Thume*, nos. 1300, 1302, *Martinek/Semler*, § 14 no. 63, 64; ITALY: CC arts. 1175 and 1375, Cass. 24-3-1999, n. 2788. Moreover, under GERMAN and PORTUGUESE law the rules concerning commercial agency are applied by way of analogy. (GERMANY: *Küstner/Thume*, no. 1300; *Martinek/Semler*, § 14 nos. 63, 64; PORTUGAL: art. 13 a DL 178/86 on Agency).
3. In the NETHERLANDS as well as in SPAIN legal authors agree upon a supplier's obligation to provide the distributor with information concerning the products to be distributed (*Barendrecht & Van Peursem*, 92) (*Calvo* (1997) 1351). In SPAIN this is said to follow from the characteristics of a distributorship as a confidential and reciprocally loyal relationship in which the achievement of the best possible results is in the interest of both parties (STS 11 July 2007, RJ 2007/5132). In addition, this is said to be justified in view of the dependent situation of the distributor towards the supplier, who possesses the essential information regarding the marketed product. (See also art. 17.1 of the Model distribution contract *Guardiola Sacarrera* (1998) 150). In ENGLAND this aspect has been recognised by legal authors. See Adams, John N. "Franchising: precedent and practice", Model Franchise Agreement 1, Article 6.19.
4. Under GREEK case law it has been established that in the case of exclusive distribution the supplier must provide all the information and expertise needed for the distributor to trade the merchandise effectively and to conduct the business (see *Efeteio Athinon* 9658/1995, DEE 2/1996 at 154).

5. Under FRENCH law, in the case of a *contrat de concession* an obligation to provide information with respect to advertising campaigns follows from the obligation to assist the distributor (*Dutilleul & Delebecque*, no. 942; *Ferrier*, no. 495 et seq.). Under FRENCH law it has been debated extensively whether the supplier may set a fixed price. The prevailing opinion seems to be that the supplier cannot impose a price upon the distributor, but can only recommend such a price. (*Dutilleul & Delebecque*, no. 943, Cass. com. 22 juillet 1986 *D.* 1988 *D.* 1995 som. 85).

IV.E.–5:203: Warning by supplier of decreased supply capacity

(1) The supplier must warn the distributor within a reasonable time when the supplier foresees that the supplier's supply capacity will be significantly less than the distributor had reason to expect.

(2) For the purpose of paragraph (1) the supplier is presumed to foresee what the supplier could reasonably be expected to foresee.

(3) In exclusive purchasing contracts, the parties may not exclude the application of this Article or derogate from or vary its effects.

COMMENTS

A. General idea

The supplier has to warn the distributor within a reasonable time when the supplier foresees major decreases in its supply capacity. The supplier is presumed to foresee such a major decrease when it could reasonably be expected to foresee it (paragraph (2)). In the case of an exclusive purchase agreement, the rule is mandatory (paragraph (3)).

B. Interests at stake and policy considerations

This Article protects the interests of the distributor. The distributor may have become dependant on the product output of a supplier. This especially occurs when the latter offers a unique product (e.g. a patented innovation) or when the product constitutes a necessary item in the distributor's range. The availability of specific models (e.g. brand new ones) and delivery times are elements which are capable of affecting seriously the competitiveness of the distributor.

The present provision requires real collaboration between the parties. The supplier, who is aware of a significant decrease in its supply capacity, must warn the distributor. On the basis of the supplier's warning, the distributor will be able to avoid damage and liability (e.g. in relation to those orders which the distributor has already accepted from customers).

This obligation is not unreasonably burdensome for the supplier. First, the supplier is only required to warn the distributor in the case of a major change in relation to what the distributor had reason to expect. Secondly, the distributor is neither entitled to know the reasons for the decrease nor is the distributor entitled to a warning in relation to a supply capacity it had no reason to expect. Finally, the obligation only arises in the case of actual foresight although, because of the difficulty of proving this, the supplier is presumed by paragraph (2) to foresee what it could reasonably be expected to foresee.

Only in the case of exclusive purchase agreements is this rule mandatory. In those agreements, the distributor is left with no alternative but to order those products from the supplier. The distributor depends entirely upon the supply capacity of the supplier (e.g. the supplier's products are the only or main products with which the distributor deals). Therefore, an important decrease in the supplier's supply capacity would have very serious consequences.

C. Reasonable time

The supplier must warn the distributor concerning the forthcoming decrease in supply capacity within a reasonable time. When assessing what is reasonable, the nature and purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved must be taken into account. (See the definition in I.–1:104 (Reasonableness)). In principle, the supplier must issue the warning as soon as the supplier is aware of the alarming fact. Moreover, the supplier must leave the distributor a certain amount of time to prepare a reaction and to adapt to the customers' demand. The supplier's warning allows the distributor to avoid the acceptance of orders which the distributor will probably not be able to fulfil.

D. Significant decrease

The supplier is under an obligation to warn the distributor only when the supplier foresees that its supply capacity will be significantly lower. No obligation arises in the case of a merely temporary or minor obstacle to supplying. The present obligation applies both when the decrease of the supply capacity is the result of factors within the supplier's control and where the decrease is the consequence of market conditions or other external factors (e.g. a shortage of raw materials or industrial action).

E. Expectations of the distributor

What amounts to the capacity which the distributor had reason to expect depends on the circumstances of the particular case. In the absence of other more decisive factors, the average supplies over the previous years may serve as a yardstick.

F. Character of the rule

In exclusive purchasing contracts, this is a mandatory rule; the parties may not derogate from this obligation. In exclusive and selective distribution agreements, this rule is a default rule; the parties are free to agree otherwise.

NOTES

In general

1. This rule is based on art. 4(2) b of the Directive on commercial agency. None of the European legal systems have explicitly regulated this issue with respect to distribution contracts.
2. According to SPANISH authors such an obligation may follow from the character of the distribution contract, which is a contract characterized by confidentiality and reciprocal loyalty (*Calvo* (1997) 1351). In addition, in the SPANISH Model distribution contract a similar stipulation is included in art. 17(2) of the contract (*Guardiola Sacarrera* (1998) 150).
3. Under ITALIAN law a similar obligation can only stem from general principles of good faith (CC 1375) and fair dealing (CC 1175). With respect to the other legal systems no information was provided.

IV.E.–5:204: Advertising materials

The supplier must provide the distributor at a reasonable price with all the advertising materials the supplier has which are needed for the proper distribution and promotion of the products.

COMMENTS

A. General idea

This Article requires the supplier to provide the distributor with advertising materials. The supplier has to supply only the materials which it has at its disposal and which the distributor requests. However, the distributor is entitled to ask only for advertising materials which are necessary for the proper distribution and promotion of the products.

B. Interests at stake and policy considerations

Providing the distributor with the advertising materials which the supplier possesses will usually be in the interest of both parties. On the one hand, this will contribute to a uniform image of the supplier's products in the eyes of the public and to a more effective campaign. On the other hand, the distributor will be identified in the eyes of the customers as a dealer in certain branded products. However, there may be cases in which the supplier prefers to refrain from supplying advertising materials to certain distributors. This Article aims at preventing any discriminatory behaviour, granting distributors equal treatment.

This provision clearly promotes the interests of the distributor. The distributor is free to choose whether or not to join a promotional campaign launched by the supplier. However, this Article is not too burdensome for the supplier. The supplier is not required to start a promotional campaign merely to please the distributor. In addition, the supplier is not required to search for advertising materials which the supplier no longer possesses, e.g. linked to old promotional campaigns. Moreover, the Article only refers to what is needed in order to promote the sales of the products.

C. Advertising materials

Advertising materials are additional and accessory materials related to the distribution activity, e.g. fittings for the distributor's premises such as posters, chairs, sunshades, signs and special offers.

D. Reasonable price

The distributor who decides to participate in a campaign must have access to the advertising materials at a reasonable price. To asses what is reasonable, the nature and purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved must be taken into account. (See the definition in I.–1:104 (Reasonableness)). It would, for instance, be unreasonable to charge the distributor a price which is completely out of proportion to the cost borne by the supplier for the advertising campaign. The same holds true for a price which is far higher than what other distributors have paid or the price in previous similar campaigns.

NOTES

Advertising materials

1. Under FINNISH law and GERMAN law there is such an obligation. In FINLAND it follows from the general duty to co-operate. In GERMANY it follows from good faith (§ 242 BGB) and from the analogous application of § 86a HGB to distribution contracts (*Genzow*, no. 84; *Küstner/Thume,* no. 1307). According to FRENCH authors such an obligation follows from the supplier's obligation to assist the distributor (*Dutilleul & Delebecque*, no. 942).
2. Under ITALIAN law, there is no explicit obligation on the side of the supplier. However, from the general principle of good faith in performance of the contract (CC art. 1375) and fair dealing (CC art. 1175) such an obligation may be inferred. With respect to the other legal systems, no information was provided.
3. English law does not appear to recognises such an obligation on the franchisor. . Most franchise organisations provide for advertising and that most franchise owners collect contributions for this from those who have bought into the franchise: Mendelsohn, "Franchising Law" para 7.4
4. SPANISH law lacks any provisions on this matter. The existence of an obligation to provide the distributor with sufficient advertising materials, and the question of who bears the cost, depend on the terms of the contract. The case law shows that the cost of the campaigns may be shared by two parties (STS 22 June 2007, RJ 2007/5427). However, if the advertising materials are possessed by the supplier and they are necessary in order to develop proper distribution and promotion of the products, the character of the relationship (and in particular the fact that it requires reciprocal confidentiality and loyalty) and the principle of good faith oblige the supplier to provide the distributor with these materials, in exchange for a price established in the contract. Although distributorships and franchises are different, it must be taken into account that a similar obligation of designing campaigns in order to promote the brand has been recognised by the case law in the framework of franchise (SAP Girona 11 October 2006, JUR 2007\140527).

IV.E.–5:205: The reputation of the products

The supplier must make reasonable efforts not to damage the reputation of the products.

COMMENTS

A. General idea

The supplier is under an obligation not to damage the good reputation of the products which it supplies. This means that the supplier must avoid behaviour which may cause such damage. In certain cases, it must also take the necessary precautions to prevent such damage.

B. Interests at stake and policy considerations

The positive image of the products in the minds of the final customers is one of the elements inducing distributors to promote the sales of such products. This provision requires the supplier not to harm the good reputation that attracted the distributor. Upholding the good reputation of the products should normally be in the interest of both parties. Taking necessary precautions in this respect may be costly.

However, as said, the provisions in this Chapter only apply to exclusive distribution, selective distribution and exclusive purchase agreements. In an exclusive purchasing agreement, the distributor agrees only to buy from one supplier. As a result, the distributor is effectively dependant on the good reputation of the products, somewhat similar to a franchisee. As regards exclusive distribution and selective distribution contracts, the rationale is that the exclusive or selective distributor expects to be in a privileged position with respect to the commercialisation of the products. From this, certain specific default obligations on the part of the supplier will arise. Furthermore, distribution contracts including exclusivities mainly relate to branded products. It is essential for their reputation not to harm the image of the brand.

C. Reasonable efforts

To assess what is reasonable, the nature and purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved should be taken into account (see definition in I.–1:104 (Reasonableness)).

D. Liability of the supplier

The supplier is only liable for a loss of reputation caused by its acts or omissions; e.g. by the supply of poor-quality products. This means that the supplier is not liable in the case of a breakdown of a brand which is exclusively the result of external factors such as the extraordinary success of a competing good or service.

E. Character of the rule

This is a default rule; the parties are free to agree otherwise.

F. Remedies

In the case of non-performance of the supplier's obligation to make reasonable efforts not to seriously damage the reputation of the products the aggrieved party may, in principle, resort to any of the remedies set out in Book III, Chapter 3 (Remedies for non-performance).

NOTES

Reputation of the products

1. No European legal system contains a specific rule as the present Article.
2. According to ITALIAN law, in the case of supply contracts (*somministrazione*) when the supplied party (*somministrato*) undertakes, in exchange for exclusivity, to promote the sales of the products supplied (CC article 1568 para. 2), the supplier must supply products of an adequate quality so as to completely satisfy the clientele obtained by the supplied party. It is disputed whether such an obligation can be inferred from the decision of the Cass. Sez. II civ. 22-2-1999, n. 1469 as to *concessione di vendita*, see the note by C. Maria, *Gius. Civ.*, 2000, fasc. 6 (giugno), pt. 1, 1813-1815 and see also note by R. Christian, *Resp. Civ. e Prev.* 2000, fasc. 2, 363-371). In SPANISH literature it has been argued that such an obligation could be inferred from the general rule of Ccom art. 57 which states that the distributor has to act with proper commercial diligence *De la Cuesta*, p. 365). Under GREEK law such an obligation has also been accepted.

Section 3: Obligations of the distributor

IV.E.–5:301: Obligation to distribute

In exclusive distribution contracts and selective distribution contracts the distributor must, so far as practicable, make reasonable efforts to promote the products.

COMMENTS

A. General idea

This Article requires the distributor to enhance the sales of the contract products. The distributor is under an obligation to make reasonable efforts to promote, develop and extend their market.

The obligation is restricted to cases of exclusive and selective distribution contracts.

B. Interests at stake and policy considerations

Both parties have an interest in achieving the highest possible sales volume. The more the distributor sells, the more profit it makes and the more the supplier profits as well. This provision adds that promoting sales is not only a right of the distributor but also an obligation. In exclusive and selective distribution contracts, suppliers take the risk of having only limited channels of distribution. The exclusive and selective distributors are the channels available for suppliers in order to reach the final market. Suppliers agree to refrain from selling to other distributors (in the same area or within the same group of customers) or to unauthorised distributors, respectively.

However, this obligation is not too burdensome for distributors. First, it only requires the distributor to take reasonable steps. Secondly, it applies only so far as practicable. Thirdly, this obligation is in principle restricted to cases of exclusive and selective distribution agreements. By means of a selective distribution system, the distributor makes higher profits than it would have attained otherwise. Exclusive distribution offers the distributor a monopoly position which is, in some aspects, similar to that of the producer. In both cases, distributors are paid back by a certain degree of protection from intra-brand competition.

C. Reasonable efforts so far as practicable

This provision does not impose an obligation of result. The distributor is only under an obligation to make reasonable efforts to resell the supplier's products. In assessing what is reasonable, the nature and purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved should be taken into account. (See the definition in I.–1:104 (Reasonableness)). The distributor is not obliged to do anything excessive, taking into account the distributor's actual resources.

NOTES

Obligation to promote the sales of the products

1. Although there are no specific statutory provisions under the legal systems in this respect, according to the legal authors and case law of GERMANY, THE NETHERLANDS and SPAIN, there is a similar obligation for the supplier. However, in those countries the supplier's obligation to promote the sales of the goods or services (by advertising campaigns etc) is not restricted to exclusive and selective distribution contracts. (GERMANY: *Küstner/Thume*, no. 1314; *Martinek/Semler*, § 14 no. 13; NETHERLANDS: *Barendrecht & Van Peursem*, 113 ff, *Van de Paverd*, 21 ff.; SPAIN*: Calvo Caravaca* (1997) 1345; *De la Cuesta* (2001) 365).

IV.E.–5:302: Information by distributor during the performance

In exclusive distribution contracts and selective distribution contracts, the obligation under IV.E.–2:202 (Information during the performance) requires the distributor to provide the supplier with information concerning:

(a) claims brought or threatened by third parties in relation to the supplier's intellectual property rights; and

(b) infringements by third parties of the supplier's intellectual property rights.

COMMENTS

A. General idea

This Article indicates what specific information the exclusive or selective distributor is required to provide to the supplier during the contractual relationship. Whenever the distributor is aware of any infringement of, or possible challenge to, the supplier's intellectual property rights (IPR), it has to inform the supplier.

This obligation applies only to exclusive and selective distribution contracts.

B. Interests at stake and policy considerations

The supplier has a clear interest in being informed of any threat to or any infringement of its intellectual property rights. Often the distributor is in a position to provide the supplier with such information. This obligation is not too burdensome for distributors. First, from IV.E.–2:202 (Information during the performance) it follows that the distributor only has to provide information which the distributor possesses. Secondly, exclusive and selective distribution agreements often include the licensing by the supplier of intellectual property rights to the distributor. Therefore, it will be also in the interest of the distributor to inform the supplier of any IPR infringement.

In principle, the present obligation only applies in cases of exclusive and selective distribution contracts. The rationale is that if a supplier agrees not to sell to distributors other than the exclusive or authorised ones that is because of the supplier's trust in them. It may therefore be expected from a loyal distributor that it should provide the supplier with information which the distributor has that may prevent or limit any harm to the supplier (e.g. information concerning an infringement of any IPR rights).

The information required from the distributor is the same type of information as is required from a franchisee. Since there are similarities between these contracts, it is important to deal with them in a similar way in order to avoid problems of classification.

C. Information to be provided

Exclusive and selective distributors must provide information they possess. This obligation lasts throughout the whole contractual relationship. The Article specifically mentions, in a non-exhaustive list, information regarding the following matters.

(a) Claims brought or threatened by third parties in relation to the supplier's intellectual property rights

This information relates to claims and threats regarding trademarks, trade names or symbols, or other industrial property rights).

(b) Infringements by Third parties of the Supplier's Intellectual Property Rights

Exclusive and selective distributors should inform their suppliers if they are aware that third parties do not respect and infringe the supplier's intellectual property rights.

D. No formalities

There is no formal requirement for the way in which this obligation must be performed, e.g. in writing.

NOTES

Obligation to provide information during performance

1. Under none of the legal systems does there seem to be a specific obligation of this type. However, under DUTCH law such an obligation has been defended by authors (*Barendrecht & Van Peursem*, no. 114).
2. In SPANISH literature it has been argued that a distribution contract includes specific obligations which can be derived from the reciprocal obligations of loyalty, good faith and the protection of the party's interests. (*Dominguez García* (1997) 1354 ff). These specific obligations include the obligation for the distributor to inform the supplier periodically concerning the market situation, the perspectives of development, the state and prognosis on future sales, and the requirements of the clients in order to allow the supplier to adapt the quantity and quality of the products to the demands of the clientele. See also art. 10 (1) of the model distribution contract proposed by *Guardiola Sacarrera* (1998) 147.
3. As to claims brought by the third parties or infringements of the supplier's intellectual rights, the distributor's obligation to inform may be established by a contractual term (as there is no specific legal provision on this matter) or be inferred by analogy from a similar obligation established in the Spanish lease system by CC art. 1559 which obliges the lessee to inform the lessor about any right in, or claim against, the leased goods.

IV.E.–5:303: Warning by distributor of decreased requirements

(1) In exclusive distribution contracts and selective distribution contracts, the distributor must warn the supplier within a reasonable time when the distributor foresees that the distributor's requirements will be significantly less than the supplier had reason to expect.

(2) For the purpose of paragraph (1) the distributor is presumed to foresee what the distributor could reasonably be expected to foresee.

COMMENTS

A. General idea

This Article requires the distributor to warn the supplier whenever it foresees a major decrease in its orders in comparison to what the supplier could reasonably expect. The distributor must notify the supplier within a reasonable time.

The obligation is restricted to cases of exclusive and selective distribution agreements.

B. Interests at stake and policy considerations

This Article protects the interest of the supplier. On the basis of the distributor's warning, the supplier is able to adjust its production, and sometimes even its production capacity, to the new situation. This is especially important in those cases where the supplier sells to large distributors such as large retail chains, e.g. a supermarket chain which has become the only distributor of a leading brand on the national food retail market.

However, this obligation is not unreasonably burdensome for the distributor. First, there is no obligation to warn in the case of minor changes. Secondly, the supplier is not entitled to know the reasons why this change occurs. Thirdly, the obligation only arises in the case of actual foresight, although the difficulty of proving this is alleviated by the presumption in paragraph (2).

In principle, this provision only applies to exclusive and selective distribution agreements. The reason is that under such agreements the supplier is largely dependent, for its entire sales, on the distributors' requirements. If they suddenly do not order any products, the supplier will encounter serious economic difficulties, since it is not in a position to bypass its distributors and sell to other distributors (within a certain area or group of customers) or to unauthorised distributors.

C. Reasonable time

The distributor has to warn the supplier within a reasonable time. To assess what is reasonable, the nature and purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved must be taken into account (see the definition in I.–1:104 (Reasonableness)). In principle, the distributor must issue the warning as soon as the distributor is aware of the alarming fact. Moreover, the distributor must leave the supplier a certain amount of time to react and to adapt to the new customer demand (e.g. by limiting its production).

D. Significantly less

The distributor need warn the supplier only when it foresees an important decrease in its orders. No obligation arises in the case of only a minor decrease in orders. This obligation exists irrespective of whether the distributor requires less products as a consequence of factors within the distributor's control or whether this is due to market-related reasons.

E. Expectations of the supplier

What the supplier has reason to expect depends on the circumstances of the case. In most cases, the average quantities ordered over the previous years will be a proper starting point for determining the supplier's reasonable expectations.

NOTES

1. This rule is similar to the one provided by the Commercial Agency Directive (art. 4 (2)b). None of the European legal systems have explicitly regulated this issue for distribution contracts.
2. Under SPANISH law such an obligation may be inferred from the principle of good faith (Ccom art. 57) , as the system lacks an explicit regulation. No doubt the same argument could be made in many other systems.

IV.E.–5:304: Instructions

In exclusive distribution contracts and selective distribution contracts, the distributor must follow reasonable instructions from the supplier which are designed to secure the proper distribution of the products or to maintain the reputation or the distinctiveness of the products.

COMMENTS

A. General idea

This Article requires the exclusive or selective distributor to follow reasonable instructions given by the supplier. The distributor must follow only those instructions which aim to secure the proper distribution of the products or to maintain their good reputation.

The obligation is restricted to cases of exclusive and selective distribution agreements.

B. Interests at stake and policy considerations

This provision strikes a balance between two conflicting interests: (i) the distributor's interest in pursuing its own goals by means of an independent commercial policy and (ii) the supplier's interest in a professional and uniform presentation and distribution of its products in the market.

This Article protects the interest of the supplier, in that it grants the supplier the possibility to instruct its distributors. The maintenance of the good reputation and distinctiveness of the products may not be attainable unless the distributor follows such instructions. In exclusive and selective distribution contracts, the distributors are the only channels through which the supplier can reach the final market (unless the supplier is entitled to undertake direct sales). In the case of selective distribution, giving instructions to the authorised distributors is not only a right of the supplier but also an obligation, in order to maintain the same high quality standards within the selective distribution system.

However, the present Article also takes into account the distributor's interest in remaining autonomous. The point here is that the distributor has an interest in the success of its entire range of products. Co-ordinating its behaviour with the commercial policy of the supplier necessarily implies restricting its freedom of manoeuvre (e.g. the distributor gives up some elasticity in the composition of its range of products). Moreover, the present provision does not require the distributor to follow any instruction by the supplier. The distributor has to comply only with those instructions which are relevant in relation to the operation of the distributorship and which are reasonable. Secondly, the present obligation does not apply to any distributor, but only to exclusive and selective distributors, in exchange for their privileged position in the commercialisation of the contract products.

C. Reasonable instructions

The distributor is only required to follow instructions which are reasonable. To assess what is reasonable, the nature and purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved must be taken into account (see the definition in I.–1:104 (Reasonableness)). Elements to be taken into account to ascertain

whether certain instructions are reasonable include: the interests of the parties, the nature of the instruction given as well as their purpose. To be reasonable, instructions should not alter the equilibrium of the contract.

D. To secure proper distribution

The supplier is entitled to instruct distributors with a view to ensuring the proper distribution of the products. Instructions of this kind for instance relate to the setting up and maintenance of specific commercial premises, the packaging of the products and the maintenance of a suitable number of samples of the products for marketing purposes.

E. To maintain reputation and distinctiveness

Especially in the case of the distribution of branded products it is essential that the reputation and the distinctiveness of the products are maintained. Instructions for that purpose relate, for instance, to the arrangement of – or adhesion to – advertising campaigns, the maintenance of certain facilities for the clientele (i. e. assistance services or advice to the clientele) and the presentation and display of the products.

NOTES

In general

1. None of the legal systems includes specific statutory rules in this respect. However, PORTUGUESE, SPANISH and DUTCH legal authors agree upon a similar obligation to follow instructions in order to maintain the prestige of the brand. (SPAIN: *Calvo* (1997) 1353, *Domínguez García* in Calvo Caravaca/Fernández de la Gándara, 1353, *Fernandez* (1999) 353, J.*L.Echegaray* in *Alberto Bercovitz*, Contratos Mercantiles, p. 552). This obligation is considered to be one of the distributor's main obligations according to PORTUGUESE authors (*Pinto Monteiro* (2002) 108; *Brito* (1990) 179). DUTCH writers argue that it follows from the nature of a distribution contract (*Barendrecht & Van Peursem*, 93, 114, 116; *Geel*, 104).
2. Under GREEK law the distributor must follow any instruction given by the supplier concerning the goods and the selling method. The closer and more qualified the bond between the parties, the more obligations follow from such a relationship. For instance, in an exclusive distribution agreement the distributor must abide by the instructions of the producer-supplier as to the marketing technique for the merchandise, the service of the products, and the stock of products to be maintained (Efeteio Athinon 9658/1995, DEE 2/1996 at 154].
3. Under FINNISH, GERMAN and ITALIAN law it depends on the circumstances of the case whether such an obligation can be derived from good faith (GERMANY: § 242 BGB; ITALY: CC article 1375). Under AUSTRIAN law the situation seems similar to FINNISH and GERMAN law. (OGH 2001/12/07 7Ob265/01y *4 Ob 79/95*, OGH 1995/12/05 4Ob79/95).

IV.E.–5:305: Inspection

In exclusive distribution contracts and selective distribution contracts, the distributor must provide the supplier with reasonable access to the distributor's premises to enable the supplier to check that the distributor is complying with the standards agreed upon in the contract and with reasonable instructions given.

COMMENTS

A. General idea

This Article requires the distributor to allow the supplier to examine whether the distributor is performing its activity in accordance with the contract and with the instructions which have been given. The supplier's access is limited to the distributor's premises.

The obligation is restricted to cases of exclusive and selective distribution agreements.

B. Interests at stake and policy considerations

The present obligation supplements the main obligation of an exclusive or selective distributor, which is simply to make reasonable efforts in order to promote the sales of the products. Inspection is an important instrument to ascertain whether the distributor has complied with the standards agreed upon in the contract and whether the distributor has followed the relevant instructions. This is fundamental in the case of selective distribution systems. In such cases, the distributor's obligation to provide reasonable access to the premises indirectly benefits other distributors as well. In fact, the poor commercialisation of the products may have negative consequences for other distributors of the same products.

However, the supplier's right to inspect may be very intrusive from the perspective of the distributor. For this reason, this obligation in principle is restricted to exclusive and selective distribution contracts, since in those contracts the supplier grants distributors a privileged position in the commercialisation of its products. Moreover, the present obligation is not too burdensome for the distributor. The distributor is only under an obligation to provide reasonable access to the distributor's premises. The right to inspect does not imply a right for the supplier to have access to accounts. There is no reason which would justify such an intrusion. Unlike in commercial agency, no commission is calculated on the basis of the contracts concluded nor are there, as in franchise agreements, any fees to be paid on the basis of volume.

C. Reasonable access

The supplier is entitled to carry out a reasonable inspection. To assess what is reasonable, the nature and purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved must be taken into account (see the definition in I.–1:104 (Reasonableness)). In general, the supplier is permitted to check whether the standards agreed upon and the instructions have been met. Moreover, the supplier's inspection should not obstruct or alter the distributor's commercial activities.

D. Distributor's premises

The supplier's inspection will mainly consist of periodical visits to the distributor's commercial premises, which is the location in which the distributor promotes the sales to its customers (e.g. quality control). This Article does not entitle the supplier to have access to the accounts of the distributor; i. e. the supplier is not entitled to request the distributor to render reports on sales, stock and prospective business.

NOTES

Inspection

1. Under none of the legal systems is there a statutory rule in this respect. However under PORTUGUESE law this obligation is recognised unanimously by the authors. (*Pinto Monteiro* 2002, 109; *Brito* 1990, 179; RP 5/07/1999, www.dgsi.pt, JTRP26.).
2. Under AUSTRIAN law the Commercial Agency Act is applied by way of analogy to distribution contracts and the distributor must allow an inspection at its premises (OGH 1999/08/25 3Ob10/98m, OGH 1999/03/30 10Ob61/99i, contractually agreed: OGH 2000/10/23 8Ob74/00s).
3. Under GERMAN and ITALIAN law concerning any type of distribution contract such an obligation may follow from the principle of good faith depending on the circumstances of the situation (GERMANY: § 242 BGB, *Genzow*, no. 79; *Küstner*/*Thume*, no. 1327; ITALY: CC arts. 1375, *Galgano*, 631). Some SPANISH authors agree upon such a right of inspection and control as a counterpart of enjoyment of the prestige of the brand and in order to prevent any damage to the distributor's reputation (*Domínguez García* (1997) 1353, *De la Cuesta* (2001) 366).

IV.E.–5:306: The reputation of the products

In exclusive distribution contracts and selective distribution contracts, the distributor must make reasonable efforts not to damage the reputation of the products.

COMMENTS

A. General idea

This Article obliges the distributor to avoid any behaviour which could seriously harm the good reputation of the supplier's products. The obligation requires the distributor to take the necessary precautions to avoid such damage.

The obligation is restricted to cases of exclusive and selective distribution agreements.

B. Interests at stake and policy considerations

Maintaining the good reputation of the contract products is normally in the interest of both parties. However, the distributor may lose some interest in dealing with the contract products, if for instance it favours another product that it distributes as well, or if it envisages bringing the contractual relationship to an end. The present provision aims to prevent the distributor from damaging the good reputation of the products. It obliges the distributor to take the necessary precautions to avoid such damage.

In principle the present obligation is restricted to cases of exclusive and selective distribution agreements. First, these types of contracts mainly deal with branded products for which image is of the essence and this image may be very easily damaged; e.g. the reputation of the products could be harmed by inadequate packaging, presentation and display of the products by the distributor. Secondly, the idea of commercialising the products via a few refined sales sites is aimed at reinforcing the image of exclusivity attached to the products. Thirdly, since the supplier grants the distributor the privilege of being the only one or one of the few distributors dealing with certain products, it is fair to expect from the distributor a certain loyal behaviour towards the supplier and the products it trades.

C. Reasonable efforts

In assessing what is reasonable, the nature and purposes of the contract, the circumstances of the case and the usages and practices of the trade or profession involved must be taken into account (see the definition in I.–1:104 (Reasonableness)). For instance, an advertising campaign promoted by the supplier which stresses the quality of the after-sales service could be undermined by the fact that the distributors fail to set up the necessary assistance service.

D. Liability of the distributor

The distributor is only liable for a loss of reputation caused by the distributor's acts or omissions. If the loss of reputation is caused by a third party, or by specific market conditions, the distributor is not liable. This would simply be part of the ordinary commercial risk borne by both parties.

NOTES

The reputation of the products

1. Under none of the legal systems is there a specific statutory rule which includes such an obligation. However, FRENCH and SPANISH legal authors argue that the distributor must maintain the image of the products (FRANCE: *Dutilleul & Delebecque*, no. 943; SPAIN: *Dominguez García* (1997), 1353, *Memento Lefebvre* (2003-2004) 522). In GERMAN law it is accepted that the supplier must maintain the good reputation of the trademark (*Genzow*, no. 85; *Küstner/Thume*, no. 1308). This obligation is founded on good faith (§ 242 BGB). The supplier must take all reasonable measures to ensure and maintain the highest quality of the traded product (*Qualitätssicherungspflicht*). However, the obligation to maintain the good reputation of the trademark is not limited to exclusive purchasing contracts, but is also applicable to all other types of distribution contracts.

PART F. LOAN CONTRACTS

IV.F.–1:101: Scope

(1) This Part of Book IV applies to loan contracts other than those under which:

(a) a business lends to a consumer;

(b) the lender's rights are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right relating to immovable property; or

(c) the purpose of the loan is to acquire or retain property rights in land or in an existing or projected building.

(2) A loan contract is a contract by which one party, the lender, is obliged to provide the other party, the borrower, with credit of any amount for a definite or indefinite period (the loan period), in the form of a monetary loan or of an overdraft facility and by which the borrower is obliged to repay the money obtained under the credit, whether or not the borrower is obliged to pay interest or any other kind of remuneration the parties have agreed upon.

(3) A monetary loan is a fixed sum of money which is lent to the borrower and which the borrower agrees to repay either by fixed instalments or by paying the whole sum at the end of the loan period.

(4) An overdraft facility is an option for the borrower to withdraw funds on a fluctuating, limited basis from the borrower's current account in excess of the current balance in the account. Unless otherwise determined, an overdraft facility has a revolving character in that the borrower can use the facility over and over again.

(5) A contract is not a loan contract merely because it provides for the time of payment of an obligation to pay money to be deferred, unless it requires the borrower to pay interest or any other charge in addition to the price.

(6) The parties may however agree that money due under an existing obligation to pay money will in future be due under a loan contract.

IV.F.–1:102: Main obligation of the lender

(1) The lender is obliged to provide the borrower with credit for the amount, in the manner and for the period determinable from the contract.

(2) If a period of time within which the obligation is to be performed cannot be determined from the terms regulating the obligation, the lender is obliged to make the credit available a reasonable time after the borrower's demand.

IV.F.–1:103: Main obligation of the borrower

(1) Where the credit takes the form of a monetary loan, the borrower is obliged to take up the loan in the manner and for the period determinable from the contract.

(2) If the time the borrower is to take up the loan is not determinable from the contract, the borrower is obliged to take up the loan a reasonable time after the lender's demand.

IV.F.–1:104: Interest

(1) The borrower is obliged to pay interest or any other kind of remuneration according to the terms of the contract.

(2) If the contract does not specify the interest payable, interest is payable unless both parties are consumers.

(3) Interest accrues day by day from the date the borrower takes up the monetary loan or makes use of the overdraft facility but is payable at the end of the loan period or annually, whichever occurs earlier.

(4) Interest payable according to the preceding paragraph is added to the outstanding capital every 12 months.

IV.F.–1:105: Purpose of the credit

If the contract restricts use of the credit to a specific purpose, the borrower is obliged, within a reasonable time after the lender's demand, to provide information necessary to enable the lender to verify its use.

IV.F.–1:106: Early repayment

(1) The borrower is entitled, by paying into the account, to reduce or extinguish at will the amount borrowed under an overdraft facility.

(2) The borrower is entitled to repay a monetary loan, in whole or in part, at any time if under the loan contract the borrower does not have to pay interest or any other kind of remuneration which depends on the duration of the credit.

(3) In the case of any other type of monetary loan, the borrower is entitled to repay the whole or part of the loan at any time. Paragraphs (4) and (5) apply.

(4) Where the loan contract has a duration of more than 1 year, or is of an indefinite duration, and provides for a fixed interest rate the borrower is entitled to repay early in whole or in part under paragraph (3) only on giving the lender at least three months notice.

(5) On early repayment under paragraph (3):

- ***(a) the borrower is not liable to pay interest on the amount repaid for any time after the receipt of the repayment by the lender; and***
- ***(b) the lender is entitled to compensation for any loss caused by the early repayment.***

(6) The compensation due under paragraph (5)(b) includes lost interest and administrative costs but must take into account any interest the creditor can receive by lending out the amount repaid on the market.

PART G. PERSONAL SECURITY

CHAPTER 1: COMMON RULES

IV.G.–1:101: Definitions

For the purposes of this Part:

(a) a "dependent personal security" is an obligation by a security provider which is assumed in favour of a creditor in order to secure a right to performance of a present or future obligation of the debtor owed to the creditor and performance of which is due only if, and to the extent that, performance of the latter obligation is due;

(b) an "independent personal security" is an obligation by a security provider which is assumed in favour of a creditor for the purposes of security and which is expressly or impliedly declared not to depend upon another person's obligation owed to the creditor;

(c) the "security provider" is the person who assumes the obligations towards the creditor for the purposes of security;

(d) the "debtor" is the person who owes the secured obligation, if any, to the creditor, and, in provisions relating to purported obligations, includes an apparent debtor;

(e) a "co-debtorship for security purposes" is an obligation owed by two or more debtors in which one of the debtors, the security provider, assumes the obligation primarily for purposes of security towards the creditor;

(f) a "global security" is a dependent personal security which is assumed in order to secure a right to performance of all the debtor's obligations towards the creditor or a right to payment of the debit balance of a current account or a security of a similar extent;

(g) "proprietary security" covers security rights in all kinds of assets, whether movable or immovable, corporeal or incorporeal; and

(h) the "secured obligation" is the obligation the right to the performance of which is secured.

COMMENTS

A. Personal security

"Personal security" as a general term is not familiar to all European countries. It is to be understood as a broad counterpart to the term "proprietary security". Personal security comprises all those security rights in which a person (whether a natural person or a legal entity) is liable with all that person's assets in order to secure an obligation of another person, the principal debtor. By contrast, proprietary security (often but not necessarily provided by the debtor of the secured claim) exposes the security provider only with respect to the specific encumbered assets to a right for preferential satisfaction of the secured creditor. The contrast to personal security is obvious. This indicates why personal security is very attractive for creditors and plays a very important role in practice. However, as always, that attractiveness for creditors has to be paid for. It is paid for by an equivalent degree of risk for the provider of personal security. The proper protection of providers of personal security is therefore an important feature of any acceptable set of rules on this subject.

There are two main types of personal security – the dependent and the independent personal security. The dependent personal security is the older; its roots go back to Roman law *(fideiussio)*. Centuries of practical experience have resulted in national rules that are relatively well settled, although they vary to some degree between the member states. By contrast, the independent personal security is a phenomenon of modern times which in some countries has not been recognised until very late in the twentieth century and which has only exceptionally been sanctioned by legislators. Most other modern functional types of personal security, such as binding comfort letters and stand-by letters of credit are covered by one or other of those two central institutions. The only exception is co-debtorship for security purposes.

The terms "dependent" and "independent" personal security are not derived from any national legal system. They are used because they express the salient features of the two types. Personal security may either be *dependent* upon major aspects of the secured claim or it may be *independent* of any possibly underlying claim.

In general, the present rules do not deal with the formation or validity of contracts or other juridical acts for the provision of personal security. This is left to the general rules in Book II along with any applicable European or national rules. However, one major exception is to be found in Chapter 4 of these rules on personal securities provided by consumers. The assumption of liability as a security provider is an area where the consumer requires special protection.

Dependent personal security is dealt with in Chapter 2. The rules in that Chapter are supplemented by specific provisions on consumer protection in Chapter 4 which are also applicable where consumers assume other types of personal security. The rules on independent security can be found in Chapter 3, which in fact will essentially be relevant for personal security granted by business and professional security providers. The rules in Chapters 2 to 4 are subject to a few general rules set out in Chapter 1.

B. Dependent personal security

Introductory. The term "dependent personal security" does not seem to be used by any national legal system in Europe. Instead, various names are given to designate the basic institution – e.g. suretyship or guarantee or caution or cautionary obligation. Unfortunately none of these various names can be said to be firmly rooted or universally accepted. For these reasons it was decided to coin the new functional and descriptive term – "dependent personal security".

Nature of security provided. A dependent personal security may take three forms. In the vast majority of cases, the security provider promises to make a payment of money. In some specific cases, the payment of damages is promised. The most important example is the issue of a binding comfort letter.

> *Illustration 1*
> A, the majority shareholder of company Z, sends a letter to the major creditors of Z which is in financial straits saying: "I herewith undertake to settle all present and future indebtedness of company Z in order to save it from bankruptcy." If, contrary to his promise, Z does not abide by his letter, the creditors of Z who have received the above undertaking may sue Z for damages based upon the breach of his undertaking.

A security provider may also promise to make a performance other than the payment of money, such as the delivery of marketable securities or even of other goods.

Nature of secured obligation. The secured obligation may be of any type. In the vast majority of cases, it will be a monetary obligation – repayment of a loan, payment of a purchase price or of rent, payment of damages, etc. These obligations – like all secured obligations – may already have come into existence upon assumption of the security obligation or they may arise in future, such as a claim for damages for non-performance of obligations under a contract just concluded. The secured obligation may be a conditional one. For example, the provider of a personal or a proprietary security may wish to be ensured that, if pursued on the security, recourse against another person is possible. There is no objection to securing such a conditional obligation of a security provider. Indeed this type of security is frequently used in commercial practice. The secured obligation may be a public law obligation. The case law of the European Court of Justice and of national courts furnishes ample support for admitting this variety. (See e.g. *Bundesverband Güterkraftverkehr und Logistik eV (BGL) v. Bundesrepublik Deutschland*, ECJ 23 September 2003, C-78/01, ECR 2003, I-9543 at nos. 6–11; *Berliner Kindl Brauerei AG v. Andreas Siepert*, ECJ 23 March 2000, C-208/98, ECR 2000, I-1741 at p. 1752 s. nos. 36–37; *Préservatrice foncière TIARD SA v. Staat der Nederlanden*, ECJ 15 May 2003, C-266/01, ECR 2003, I-4867 at p. 4893 no. 36, p. 4895 no. 40 and p. 4896 nos. 41 and 43; *Frahuil SA v. Assitalia SpA*, ECJ 5 February 2004, C-265/02, ECR 2004, I-1543 at p. 1554 no. 21.)

Nature of relationship. As a rule, the security provider, especially if not a professional, will not ask or receive any counter-performance for assuming the obligation. By contrast, professional security providers, such as banks or insurance companies, charge a commission for issuing a dependent personal security. Typically, therefore, such security is granted in the framework of a bilateral contract and creates an obligation at least on the part of the security provider. The debtor of the secured obligation as the factual beneficiary of the security is usually indirectly involved in two ways. In the relationship with the creditor, *e.g.* under a credit agreement, which gives rise to the obligation to be secured, the debtor is usually obliged to engage the provider of a personal security which must fulfil certain minimum conditions set by the creditor. On the other hand, the debtor must ask a security provider to assume a security towards the creditor meeting the latter's conditions. Thus, in fact a triangular relationship comes into being. However, the contents and objectives of each of the three sides of this triangle differ. Two sides can easily be classified as well-known types of bilateral contract: The credit relationship between creditor and debtor (usually including the security agreement), and the mandate or service contract between debtor and security provider. What remains, is the third side, that between creditor and security provider: this is the contractual dependent personal security.

Dependency. Sub-paragraph (a) enumerates the most important elements to which the dependency between security and secured obligation relates. Mere correspondence of the terms regulating the two obligations, though, does not suffice to constitute dependency. Rather, the terms of the contract or other juridical act creating the security must establish a connection with the secured obligation.

The all-important element of the definition is "depends upon": the basic type of personal security is characterized by the fact that in almost all respects it depends upon the debtor's

obligation to the creditor which is secured by the provider of the personal security towards the creditor. The only major exception is to be found in the debtor's insolvency: any reduction or discharge of the debtor's obligations does not affect the security provider's obligation (cf IV.G.–2:102 (Dependence of security provider's obligation) paragraph (2) sentence 2) since this would run counter to the fundamental purpose and function of security. The principle of dependency is not limited to personal security but dominates also proprietary security, both in movables and in immovables. However, today this principle is no longer the only maxim of personal and proprietary security; rather it is more and more supplemented by security rights that are independent from any specific secured obligation.

In Chapter 2 on dependent personal security, the principle of dependency informs essential provisions, especially IV.G.–2:102 (Dependence of security provider's obligation) and IV.G.–2:103 (Debtor's defences available to the security provider).

In at least three cases, the European Court of Justice has also recognized the principle of dependency as the characteristic element of suretyships. The surety's obligation does not fall due until maturity of the secured obligation and the surety's obligation may not surpass that of the debtor. These statements were made in order to ascertain whether certain Directives on consumer protection or the Brussels Convention of 1968 on jurisdiction in civil and commercial matters were or were not applicable to suretyships. (See *Préservatrice Foncière TIARD SA* (*above*) at p. 4891 s. no. 29; cf. also p. 4893 no. 34. Earlier in more general form in *Bayerische Hypotheken- und Wechselbank AG v. Dietzinger* (case no. C-45/96) of 17 March 1998, ECR 1998 I 1199 at p. 1221 nos. 18 and 20 and in *Berliner Kindl Brauerei AG* (*above*) at p. 1744 no. 26.)

Reverse dependency. While the dependency of the personal security upon the secured obligation is generally recognized, there may also be reverse dependency. The contract or other juridical act giving rise to a dependent personal security may for some reason be invalid (e.g. due to a legal prohibition or disregard of the protective provisions for consumer dependent securities established in Chapter 4 of these Rules) or avoided (e.g. for mistake). Such invalidity or avoidance may give rise to the issue whether this may have repercussions on the secured obligation. This issue was alluded to in a decision of the European Court of Justice (*Dietzinger* case, above, p. 1221 no. 21). This issue is not dealt with in this Part and will depend on the terms (express or implied) of the contract or other juridical act giving rise to the secured obligation.

Performance of secured obligation must be due. Performance of the secured obligation will not be due if it does not exist. So a dependent personal security depends first of all on the existence of the secured obligation. There cannot be an effective dependent personal security unless the secured obligation exists. The existence of the secured obligation will depend on the validity of the contract or other juridical act from which it arises. This may be affected by various factors.

Some such factors may be the personal qualities of the parties to the juridical act. One of the parties, if it purports to be a legal entity, may not have come into existence. Or a natural person, due to age or sickness, may be legally incapable of juridical acts. Any incapacity of this kind may under the applicable national law have the consequence of invalidating the underlying juridical act and therefore preventing the secured obligation from coming into existence. This rule also protects the security provider: the chances of recovery in a claim for

recourse against a debtor who is incapable would be small. There is one exception to this general rule. According to IV.G.–2:103 (Debtor's defences available to the security provider) paragraph (3) the security provider may not invoke the debtor's lack of capacity or the non-existence of the debtor legal entity if the relevant facts were known to the security provider at the time when the security became effective. For details, reference is made to the Comments to this provision.

Other factors which may affect the validity of the contract or other juridical act from which the secured obligation arises are the various grounds of invalidity (such as mistake, fraud, coercion or threats, or infringement of fundamental principles or mandatory rules) mentioned in Book II, Chapter 7 (Grounds of Invalidity).

In practice more important than existence are the extent of the debtor's obligation which is to be covered by the security and whether or not performance of it is due. "Extent" refers primarily to the amount of money that is usually involved: capital, interest and cost of recovery. However, in the case of a global security the amount of the secured claim may be open-ended and fluctuating, especially if a current account is secured.

Whether performance of the secured obligation is due also depends on its maturity and any other conditions which determine whether it can, at any particular moment, be enforced by the creditor. This will depend on the terms of the contract or other juridical act (or rule of law) from which the secured obligation arises.

The "dependency" of the personal security upon the secured obligation implies that the latter is not identical with the security obligation. There are two separate obligations, owed by two different persons, the security provider, on the one hand, and the debtor of the secured obligation, on the other hand. Neither is it necessary that these two obligations are identical in extent or content. The security obligation can be lower than the secured obligation and due only if certain extra conditions are fulfilled. By contrast, its amount cannot be higher and it cannot be due on less stringent conditions than the secured obligation.

Transfer of right to performance of secured obligation. One consequence of the principle of dependency is that upon transfer of the right to performance of the secured obligation the attendant security also passes to the transferee. For assignments by contract or other juridical act this is provided for by III.–5:115 (Rights transferred to assignee) paragraph (1) since dependent securities are "accessory rights securing the performance." One may assume that the same rule obtains upon legal transfers, unless the contrary is provided.

C. Independent personal security

Introductory. The independent personal security is a close relative to, but in one decisive respect completely different from, a dependent personal security. The one distinguishing feature is the independence of the security provider's obligation to the creditor in contrast to the dependency of the dependent security on the secured obligation. In all other respects the independent and the dependent personal security share the same features and the Comments made above apply.

The detailed rules on independent personal security are to be found in Chapter 3 of these Rules.

Special feature. The decisive special feature of the independent personal security is its independence from any other agreement, especially an underlying contract between the creditor and the debtor. This independence is laid down and specified in sub-paragraph (b). In particular, the existence and extent of the underlying obligation (such as a seller's obligation to deliver or a customer's obligation to pay the price under a contract of sale or for services) are irrelevant for the security provider's obligation.

On the other hand, the validity of the security provider's undertaking itself is an indispensable condition for the security provider's obligation to honour the security. Thus the security provider must have full capacity and the undertaking must have been created without violation of any legal rules or any defects of consent which might give rise to a right of avoidance under Book II, Chapter 7 (Grounds of Invalidity).

The independent character of an independent personal security must be "expressly or impliedly declared". This rule dovetails with IV.G.–2:101 (Presumption for dependent personal security) which establishes a presumption for any personal security being a *dependent* security, "unless the creditor shows that it was agreed otherwise." For letters of credit and stand-by letters of credit, UCP 500 (1993) art. 3 and 4 explicitly and broadly emphasise the independence of the "credit" from underlying contracts or the objects of those contracts, such as goods, services and other performances. More succinctly in the same sense is the UN Convention on Independent Guarantees of 1995 art. 3. Apart from these specific types of an independent personal security, the latter requires an express or implied declaration. An express declaration can usually be found if the title or body of a personal security document contains the words "independent guarantee". An implied declaration of independence can be presumed if an instrument does not make any reference to a secured obligation, as is usual in any dependent personal security; such silence may be treated as an implied declaration of independence.

The provisions of IV.G.–3:101 (Scope) paragraph (1) specify and confirm the independent character of a security. A merely general reference to an underlying transaction does not impair the independence of an independent undertaking. Usually, an independent security refers to an underlying contract (*e.g.*, of sale or services) or another security (*e.g.*, a default security to the security provided by the bank opening a letter of credit; or a "counter security" to the security issued by the security provider on the instruction of the issuer of the counter security) in order to specify the event upon the occurrence (or non-occurrence) of which performance of the security may be demanded by the creditor. Any such *general* reference to an underlying obligation does not affect the independent character of a security, since the decisive point is that the security provider's obligation to perform is independent of the obligation of the principal as debtor under the underlying contract with the creditor.

Advantages and risks of independent undertakings. At least for professional security providers, such as banks and insurance companies, the independence of their security undertakings has clear economic advantages: they can easily calculate their risk and this risk is a reliable basis for calculating their charges for assuming this risk. While it seems to be more advantageous to assume a dependent personal security since this allows the security provider to invoke the debtor's exceptions and defences, the administration of these counter-rights is difficult, time consuming and uncertain as to its success.

On the other hand, it is precisely the independence of such undertakings which creates a risk for the persons who have caused the issuance of such undertakings in favour of the creditor. Demanding performance of an abstract security or of another independent security does not require the creditor to prove any default on the part of the debtor. This has invited abusive presentations of independent security instruments. In order to counter such practices, defensive provisions had to be instituted along the lines of IV.G.–3:104 (Independent personal security on first demand) paragraph (2) and IV.G.–3:105 (Manifestly abusive or fraudulent demand).

D. Security provider

This definition requires hardly any comment. The term "security provider" is neutral. It covers any person who is obliged to the creditor under a personal security, whether the latter is dependent or independent. A special situation may arise if the security provider wishes to secure a potential claim for reimbursement against the debtor. In such a case, the debtor may instruct a fourth party to provide a personal security in favour of the primary security provider. In the case of such a counter security provided by a fourth person to the primary security provider, the roles of the parties change: the primary security provider becomes the creditor of the counter security, who may claim performance of the counter security from the secondary security provider.

E. Debtor

In a dependent personal security, two different persons owe obligations to the creditor: One is the debtor of the secured obligation, the other the debtor of the security obligation. The latter is in these Rules called the "security provider" in order to avoid misunderstanding. By contrast, the obligor of the secured obligation can retain the designation of – principal – debtor.

On the other hand, in an independent personal security, only a security provider and a creditor are legally relevant. Since in these cases a secured obligation is not necessary, neither is a debtor, as defined in sub-paragraph (d) of the Article. The two words "if any" refer to this possible absence of a debtor.

F. Co-debtorship for security purposes

Policy. Co-debtorship for security purposes is, as the name suggests, not a traditional security device but rather a functional one. In order to achieve full protection of those persons who deserve it and to counter creditors' attempts to evade protective provisions for "genuine" security providers, functional devices with security purposes must be covered by these Rules. In some countries, parties sometimes evade mandatory provisions of the national law on personal security (such as a simple or qualified writing) by agreeing on a co-debtorship for security purposes. If, apart from the principal debtor, another person assumes a corresponding obligation towards the creditor, a trilateral relationship comes into being. However, the position of the additional debtor may differ from that of the principal debtor: while the latter requires a credit for a business or professional activity, the additional debtor may, or may not, have any proper interest in the loan granted by the creditor.

Illustration 2a
A young medical doctor D wishes to acquire for his medical office a very expensive instrument and obtains a credit from his bank. D's wife W is also a medical doctor who

also practices in D's medical office. Therefore the bank requires W's co-signature of the credit and security agreement. After D's death in an accident, the bank requests payment of the credit from W who invokes the protective rules for consumer security providers.

Illustration 2b
The facts are as in Illustration 2a, except that W is an artist from a wealthy family.

Must W be treated as a genuine co-debtor or does she deserve to be treated as a mere security provider?

Criteria for distinction. Illustrations 2a and 2b suggest that an important, if not the most important criterion is the economic interest which the two obligors have in the granting of the credit. While D's interest is obvious, that of W obviously varies in the two hypothetical cases. It is nil in Illustration 2b, but is as great as that of D in Illustration 2a. In the latter case, W should be treated as a genuine co-obligor, whereas in the former case W clearly qualifies as a mere security provider. The fact that W even in the second case may indirectly benefit from the credit granted to D since the latter's better financial position indirectly will benefit also W, does not meet the requirements of sub-paragraph (e) of the Article. Decisive is the primary purpose of the assumption of debt (cf. "primarily" for purposes of security). As a co-debtor for security purposes acting primarily for purposes not related to her business or profession, W is in Illustration 2b entitled under IV.G.–1:104 (Co-debtorship for security purposes) to the protection of a consumer according to Chapter 4 of the Rules. In the final analysis, the creditor's contract with the two obligors must be interpreted in light of all the circumstances.

Time of assumption of debt irrelevant. The definition in sub-paragraph (e) does not distinguish whether the second obligation had been assumed at the same time as the other (or, possibly, the main) obligation or subsequently. The time element is here as irrelevant as it is for the provision of true personal (or proprietary) security.

Applicable rules. IV.G.–1:104 (Co-debtorship for security purposes) lays down which rules apply to a co-debtorship for security purposes. Most important is the reference to Chapter 4 of this Part containing rules for the protection of a co-debtor for security purposes who is a consumer.

G. Global security

A type of dependent personal security. Most personal securities are limited in one way or another: they secure either a specific credit with a specific amount; or several credits for which a total limit is specified; or a credit for a specific purpose for which a maximum limit can be calculated, etc. Or the security itself is limited to a specific amount. For independent personal securities, the limitation of the security itself is the only feasible method and is standard practice.

However, dependent personal securities do not always fit this scheme because the credits which they secure may be open-ended. The parties, at the time of contracting the secured credit, may not yet know which kinds of credits are to be secured. The standard example is a personal security for a current account or for all future indebtedness of a debtor, where the number, nature and kinds of claims to be secured is initially not yet known. By contrast,

personal security for a specific claim for which at the time of contracting the security the upper limit is not yet known is not a global security since it is much less risky than the kinds of credit for which a global security is granted.

Global security and lack of maximum amount of security distinguished. The existence of a global security does not depend upon the fact that the parties have or have not fixed a maximum amount for the security. A security is not global because no maximum limit has been agreed for the security. A security is global if the kind, source or time of credits to be secured is left open by the parties.

Applicable rules. Special rules on global security are to be found in several provisions spread over Chapter 2. According to IV.G.–2:102 (Dependence of security provider's obligation) paragraphs (3) and (4) global security is exempted from certain limits which are placed upon open-ended ordinary dependent security rights. IV.G.–2:104 (Coverage of security) paragraph (3) limits the coverage of global security to obligations which were created by contracts between the creditor and the debtor of the global security. The most important protective consequence is incorporated in IV.G.–2:107 (Requirement of notification by creditor) paragraphs (2) and (3) which impose upon the creditor of a global security duties of information in favour of the security provider. Finally, where a consumer assumes a global security additional protective rules apply. If the secured amount had not been fixed by the parties, it must have an agreed maximum amount or such a limitation will have to be determined according to IV.G.–2:102 (Dependence of security provider's obligation) paragraph (3). See IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (a).

H. Consumer

Terminology. The term "consumer" is used here in an unusual context. Normally a consumer is understood as a contracting party who is the buyer of assets or the receiver of services from a professional seller or a professional provider of services or both. By contrast, in these Rules it is the weak party rather than the professional who may be providing financial services by providing personal security, in whatever form. However, the definition of "consumer" in Annex 1 is appropriate enough for present purposes even if nothing is consumed. A "consumer" means "any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession."

Consumers are only natural persons because they are the ones who typically need protection. Legal entities and also groups without legal personality are therefore excluded, even if they do not pursue economic purposes because as groups they are typically more powerful than individuals.

On the other hand, individuals who exercise a trade, business or profession are typically better versed and more experienced than "private" individuals. They can also more easily obtain business or legal advice from trade, business or professional organisations with which most are either associated or to which they can easily have access.

Special protective rules on personal security assumed by consumers are to be found in Chapter 4 of these Rules. Moreover, the rules of Chapter 2 apply to all types of personal security assumed by a consumer.

I. Proprietary security

For the application of this Part, proprietary security is defined very broadly. With respect to security in movables, modern phenomena, such as retention of ownership and the security transfer of ownership are covered, but also functional equivalents, such as financial leasing and hire-purchase. For the purposes of the present Part, proprietary security in immovables is also included.

Proprietary security as such is not covered by this Part. It is comprehensively covered in Book IX. Nevertheless, for the application of some rules of this Part it is necessary to take proprietary security into consideration. This applies in particular to the rules for the situation where there are several security providers.

Proprietary security rights provided, not by the debtor of the secured obligation but by a third person, have some similarity with the granting of a personal security and can even be combined with the latter.

> *Illustration 3*
> At the request of D, his brother T provides both a suretyship to creditor C and a mortgage encumbering his private home. D and T are not successful in their common business and are both declared bankrupt. While C has only a slim chance of recovering the loan from D or from T on the latter's suretyship, the mortgage on T's private home provides a good security.

The relationship between C and T with respect to the mortgage resembles that of a suretyship. But that resemblance is more apparent than real. As mortgagor of his private home, T is liable towards C only up to the limit of the mortgage, but not with all his assets, as he is as surety. On the other hand, the mortgage gives C a preference in enforcing the claim as against all of D's unsecured or less secured creditors.

The preceding discussion illustrates some fundamental differences between personal and proprietary security. Nevertheless, there are also similarities between proprietary security granted by a third party and personal security. However these similarities become relevant not in the primary relationship between secured creditor and third-party security provider, but in the secondary relationship between the third-party security provider and the debtor, especially if the third-party proprietary security provider has had to make payment to the creditor. Then the third party security provider will normally be entitled to claim reimbursement from another security provider or the debtor. These issues will primarily be dealt with by a special Section of the Book on proprietary security; the present Part, however, already contains rules on the internal recourse between the security providers and on the secondary recourse against the debtor.

J. Secured obligation or secured right

It is often convenient to refer to the "secured obligation" and that term is used frequently in this Part. However, strictly speaking it is the creditor's right and not the debtor's obligation which is secured. The security affects the right and not the obligation. A secured right is likely to be more valuable than an unsecured right. The debtor's obligation remains the same whether the creditor's right is secured or unsecured. "Secured obligation" is therefore just a short expression for the obligation covered by the security or, even more correctly, "the

obligation the right to performance of which is secured" and that is made clear by sub-paragraph (h).

NOTES

I. Personal security

1. The term "personal security" is not defined in the legislation of most member states. However, in FRANCE, the rules of the *Grimaldi* Commission, as adopted by Decree-Law no. 2006-346 of 23 March 2006 on Security, expressly use the notion of personal securities *(sûretés personnelles)* (CC new art. 2287-1) (In the following notes the proposals of the *Grimaldi* Commission are mentioned only in so far as they deviate from the present state of FRENCH law or as they clarify it). In BELGIUM, subtitle 6 of the ConsCredA of 1991 (last modified in 2003) is entitled "Personal Securities" and its provisions apply to "securities and if applicable to any other form of personal security" (art. 34; similar formulas in arts. 35 and 36 as well as in arts. 33, 38(2), (3) and 97). The ITALIAN Civil Code distinguishes in several places between personal and proprietary securities (CC arts. 156(4), 1179, 1828(1), 1844(1)). The AUSTRIAN ConsProtA § 25c and 25d use for personal security the more traditional term "intercession".

2. However, the term "personal security" is often used and defined in legal theory (AUSTRIA: *Harrer*, Sicherungsrechte 5-6; however, most writers use the traditional term "intercession", *e.g.* Koziol and Welser II (-*Welser*) 145 ss. and Schwimann/*Mader and Faber* § 1345 no. 3; GERMANY: *Bülow*, Kreditsicherheiten no. 11, nos. 831 ss., nos. 1543 ss., *Lwowski* no. 14, nos. 78 ss., no. 341 ss.; ITALY: *Fragali*, Garanzia 455 s.; NETHERLANDS: *Snijders and Rank-Berenschot*, Goederenrecht nos. 482-483; PORTUGAL: *Almeida Costa* 763; SPAIN: *Carrasco a.o.* 69).

3. In all member states there are different typical and atypical personal security rights (FRANCE: *Simler* no. 6; ITALY: *Giusti* 1 ss., 295 ss., 315 ss.; *Bonelli*, Le garanzie bancarie 1 ss., 23 ss., 37 ss.; PORTUGAL: *Vaz Serra*, Fiança e figuras 19 ss.; *Menezes Cordeiro*, Direito 604 ss., 616 ss.; SPAIN: *Carrasco a.o.* 69 ss., 307 ss., 337 ss., 373 ss., 435 ss.). They are all covered and held together by the concept of "personal security", which is defined by legal writers as any contractual obligation assumed by a third person (security provider) towards the creditor for the purpose of securing the exact performance of another person's (the debtor's) obligation towards the creditor or another event. The "personal security" creates a new obligation of the security provider towards the creditor, which often, although not necessarily, has the same content as the underlying secured obligation of the debtor, if any.

4. In ENGLISH and IRISH law the term 'security' has traditionally been used only in relation to rights over assets (ENGLAND: *Penn and Shea* no. 17-002; IRELAND: *Johnston* 9.01), *i.e.* "real" or "proprietary security". However, at least by some more modern authors it is accepted that the concept of security covers both proprietary security and personal security (ENGLAND: *Goode*, Legal Problems no. 1-06; *Bradgate and White* 321; IRELAND: *White* 511 and 533), the latter term having a meaning comparable to that used in this Part, *i.e.* covering suretyship guarantees, indemnities, stand-by letters of credit and comfort letters (ENGLAND: *Goode*, Legal Problems no. 8-02; *Bradgate and White* 321, 341, 350; IRELAND: *White* 533 ss., 546 s.; cf. nos. 5 ss. and 11 ss. below).

II. Dependent personal security

(a) Origins

5. In all member states the dependent personal security is the classic and usual form of a third party's undertaking to personally secure another person's debt, by assuming a new personal obligation towards the creditor. Whereas its origins are mostly based on the *fideiussio* of Roman law (in a broad historical and comparative perspective cf. *Zimmermann* 114; BELGIUM: *Van Quickenborne* no. 356; FRANCE: *Malaurie and Aynès/Aynès and Crocq,* Les sûretés no. 103; GERMANY: one branch of intercession of the 19th century *ius commune*, Staudinger/*Horn* no. 1 preceding §§ 765 ss.; GREECE: ErmAK/*Zepos* prec. art. 847-870 no. 7; ITALY: *Campogrande* 12; PORTUGAL: *Almeida Costa* 770; SCOTLAND: Stair/*Eden* nos. 805 s.; SPAIN: *Guilarte Zapatero,* Comentarios 2; NETHERLANDS: *Feenstra* nos. 377-394), in ENGLAND the law of suretyship guarantees or dependent personal securities has developed from common law: The earliest predecessor of the surety was the *borh*, whom every man was required to have and who was responsible for the principal's criminal acts (*O´Donovan and Phillips* no. 1-04). However, due to the influence of ROMAN and CANON law on the development of medieval mercantile law and on the system of Equity jurisdiction administered by the ENGLISH chancellors, there are many areas in the law of dependent personal securities which bear significant similarities between ROMAN and COMMON law based systems (*Zimmermann* 144).

(b) European Court of Justice

6. The nature of contracts for dependent personal security has been discussed in cases in the European Court of Justice. Divergent views have been expressed. In *Berliner Kindl Brauerei AG v. Andreas Siepert*, ECJ 23 March 2000, C-208/98, ECR 2000, I-1741 at p. 1752 s. nos. 36–37.In *Berliner Kindl Brauerei*, Attorney-General *Léger*, invoking a French legal dictionary, expressed the view that a suretyship is a unilateral contract. On the other hand, in the later case of *Préservatrice foncière TIARD SA v. Staat der Nederlanden*, ECJ 15 May 2003, C-266/01, ECR 2003, I-4867 at p. 4893 no. 36, p. 4895 no. 40 and p. 4896 nos. 41 and 43 the Court of Justice, invoking "the general principles which stem from the legal systems of the contracting States" regarded a suretyship contract as a "triangular process". Since, however, in fact the Court dealt only with the surety's obligation towards the creditor this may be regarded as a mere *obiter dictum*. By contrast, the last relevant case *Frahuil SA v. Assitalia SpA*, ECJ 5 February 2004, C-265/02, ECR 2004, I-1543 at p. 1554 no. 21 implicitly seems to be based on the idea of a trilateral contract. Here the Italian surety company, after having paid the customs duties sought recourse from the French debtor, the importer of the goods. The Court stated that the French debtor was not a party to the suretyship contract. The Court then inquired whether the transport company which had mandated the surety, had done so "for the account of the importer" (no. 25). If the national courts cannot find that the debtor has become a party to the suretyship contract, the national courts in Italy have no jurisdiction under the exceptional head of Art. 5 no. 1 (for contractual claims) of the Brussels Convention.

(c) Terminology

7. In ENGLAND and IRELAND *guarantee* is used interchangeably with *suretyship*, both terms often being used in a rather inaccurate way; in SCOTTISH law the term *caution* or *cautionry* is more common than *guarantee*. In AUSTRIA and GERMANY the term used to denote a dependent personal security is *Bürgschaft*, in DENMARK *kaution*, in FINLAND *takaus*, in SWEDEN *borgen*, in the NETHERLANDS and the

Dutch speaking part of BELGIUM *borgtocht*, and in FRANCE as well as in the French speaking part of BELGIUM *cautionnement*. In ITALY, PORTUGAL and SPAIN the term 'guarantee' (*garanzia*/*garantia/garantía*) is very broad and refers to warranties and guaranties as well as to all kinds of securities (personal and proprietary). The ROMAN origin of the dependent personal security in ITALY, PORTUGAL and SPAIN is also patent in the terminology of the three countries: The terms used for it are *fideiussione* in ITALY, *fiança* in PORTUGAL and *fianza* in SPAIN. The last mentioned terms are considered to be a specification of the more general concept of 'guarantee'. In all these countries another specification of the term 'guarantee' is used to denominate independent personal securities (ITALY: *garanzie autonome*; PORTUGAL: *garantias autónomas*; SPAIN: *garantías autónomas*: cf. no. 12 below). In GREECE the dependent personal security is denominated as *eggiisi* (εγγύηση, guarantee), whereas the term used for independent personal security is *eggiodosia* (εγγυωδοσία), which usually appears in form of a *eggiitiki epistoli* (εγγυητική επιστολή, guarantee letter).

(d) Obligations of a provider of dependent personal security

8. The obligations of a provider of dependent personal security are strictly determined by the particular connection of the security obligation with the secured obligation (cf. no. 10 below). Due to the accessory character of the dependent personal security, in most cases the obligation of the provider of a dependent personal security is considered as having the same content as the secured obligation (cf. no. 20 below).

9. The provider of dependent personal security may be obliged (a) to pay a sum of money (cf. no. 20 below), (b) to render another performance (cf. nos. 20, 26 s. below) or (c) to pay damages (cf. nos. 21 ss. below).

(e) Main feature: accessory obligation

10. The essential distinguishing features of a contract of dependent personal security are that the security provider's obligation is established in addition to the secured obligation of the debtor, and that the security provider's liability is accessory to the liability of the latter (AUSTRIA: cf. CC §§ 1351, 1363; Schwimann/*Mader and Faber* § 1346 no. 1; BELGIUM, FRANCE and LUXEMBOURG: CC arts. 2011-2013 (since 2006: FRENCH CC arts. 2288-2290); BELGIUM: *Van Quickenborne* no. 18; *R.P.D.B.* no. 1 and no. 6; FRANCE: Cass.civ. 20 December 1983, Bull.civ. 1983 I no. 306 p. 274; LUXEMBOURG: CA Luxembourg 28 October 2003 BankFin 2004, 172; DENMARK: *Pedersen*, Kaution 13; ENGLAND: *Harburg India Rubber Comb Co v. Martin* [1902] 1 KB 778; *Goode*, Legal Problems no. 8-02; FINLAND: LDepGuar § 3; RP 189/1998 rd 29 s., 33; GERMANY: BGH 9 July 1998, NJW 1998, 2972, 2973; GREECE: CC art. 850; *Georgiades* § 3 no. 14; ITALY: CC arts. 1936, 1939; *Giusti* 33; NETHERLANDS: CC art. 7:851; *Blomkwist* nos. 8-12; however, *du Perron and Haentjens* Inleiding no. 5 emphasise that suretyship as a species of co-debtorship does not create an obligation separate from that of the debtor, although the law limits this identity, cf. *idem* Art. 851 no. 1, Inleiding no. 7, art. 851 no. 1; PORTUGAL: CC art. 627(2); *Almeida Costa* 774; SCOTLAND: Stair/*Eden* no. 835; SPAIN: CC arts. 1822, 1824; *Guilarte Zapatero*, Comentarios 14; SWEDEN: *Walin*, Borgen 89; for the accessority principle as a fundamental principle of security rights – both proprietary and personal – in EUROPEAN law see *van Erp* 309). In principle this implies that the personal security is dependent on the validity, terms and extent of the principal obligation (principle of co-extensiveness). There are, however, several exceptions within the national systems (cf. national notes on IV.G.–2:103 (Debtor's defences available to the security provider).

III. Independent personal security

(a) Origins

11. The independent personal security appeared gradually in the business practice of every EUROPEAN country during the last century, but legal acceptance of independent personal securities as personal security rights took place with a different intensity and speed in each of these countries. In FRANCE the independent personal security is defined and very briefly dealt with in CC new art. 2321 (enacted by DL no. 2006-346 of 23 March 2006). The GERMAN legislator decided expressly not to enact rules on independent personal securities in the Civil Code because of the diversity of their possible types (cf. *Hadding, Häuser and Welter* 682 s.). However, the validity of this instrument of security is not doubted (cf. nos. 14 ss. below).

(b) Terminology

12. The term independent guarantee, or an equivalent in the national language, is used in ITALY, PORTUGAL and SPAIN, as well as in FRANCE, BELGIUM and LUXEMBOURG. In these countries qualifying words like *independent*, *abstract* or *autonomous* stress the non-ancillary character of this contract, as distinct from the dependent guarantee (dependent personal security). The GREEK term used – *guarantee letter* – does not contain any such indication. In ENGLAND the term *indemnity* is used. In its broader meaning it describes every obligation imposed on a person by operation of law or by contract to make good a loss suffered by another person – *i.e. inter alia* insurance, guarantee (cf. Halsbury/*Salter* para. 1255, Vol 49, 5th ed, (2008)). In a narrower meaning the expression *contract of indemnity* describes a promise to indemnify another person by way of security. AUSTRIA and GERMANY as well as DENMARK, SWEDEN and the NETHERLANDS use special terms for the dependent personal security (*Bürgschaft*, *kaution*, *borgen* and *borgtocht*, respectively) on the one hand and the independent personal security on the other hand (AUSTRIA and GERMANY: *Garantie*, DENMARK and SWEDEN: *garanti*, NETHERLANDS: *garantie*).

(c) Obligations of a provider of independent security

13. The obligations of a provider of independent personal security vary according to the parties´ determinations in the security agreement as well as to specific rules of the national laws. However, one common element may be underlined: Although here, as well as under a dependent personal security, the security provider can in principle be obliged not only to pay a sum of money, but also to render another performance (cf. no. 20 below) or to pay damages (cf. nos. 21 ss. below), in an independent personal security the liability of the security provider is typically regarded as a liability to make good any losses suffered by the creditor and not to perform an obligation having the same content as the debtor's obligation.

(d) Main feature: independency from a secured obligation overview

14. The essential feature of the independent personal security is that the liability under the latter is (wholly) autonomous of any liability, which may arise as between the debtor and the creditor (AUSTRIA: *Harrer*, Sicherungsrechte 47; BELGIUM: *Simont/Bruyneel* 523; ENGLAND: *Goode*, Commercial Law 799, *Andrews and Millett* no. 1-013; DENMARK: *Pedersen*, Kaution 14; FRANCE: CC new art. 2321 of 2006 (*above* no. 11) "in consideration of an obligation of a third person"; *Simler* nos. 880 ss.; GERMANY: *Bülow*, Kreditsicherheiten nos. 30 ss.; ITALY: Cass. 1 October 1987, plenary decision, no. 7341, Foro it. 1988 I 3021, where, however, the

autonomy of the security from the underlying obligation is defined as 'relative', and not fully; cf. further Cass. 6 October 1989 no. 4006, BBTC 1990 II 553; Cass. 7 June 1991 no. 6496, Fallim 1991, 5007; *Bonelli* 37 ss.; NETHERLANDS: Dutch Business Law nos. 6-45; PORTUGAL: *Almeida Costa and Pinto Monteiro* 18; SCOTLAND: Stair/*Eden* no. 844; SPAIN: TS 27 October 1992, RAJ 1992 no. 8584 and 30 March 2000, RAJ 2000 no. 2314; *Carrasco*, Las nuevas garantías 726 ss.; *Vicent Chuliá* 397; *Sánchez-Calero*, El contrato autónomo 100). In ENGLAND, therefore, it is irrelevant whether the debtor's liability is void (*Wauthier v. Wilson* (1911) 27 TLR 582 (CFI), (1912) 28 TLR 239 (CA); *Yeoman Credit Ltd. v. Latter* [1961] 1 WLR 828. Equally, the extent and the terms of the debtor's obligation are of no significance, and thus the principle of co-extensiveness is not applicable (*Goulston Discount Co. Ltd. v. Clark* [1967] 2 QB 493 at 498). Equally in SPAIN and ITALY, where the independent personal security has been excluded from the scope of SPANISH CC arts. 1824, 1826 and ITALIAN CC art. 1945, which express the ancillary character of the dependent personal security (SPAIN: TS 27 October 1992, RAJ 1992 no. 8584 and 30 March 2000, RAJ 2000 no. 2314; *Carrasco*, Las nuevas garantías 740 ss.; ITALIAN Cass. 31 July 2002 no. 11368, Giust.civ. 2003 3, 2838; Cass. 21 April 1999 no. 3964, Riv. Notar. 1999, 1271).

(e) Theoretical difficulty in some continental countries

15. At first, this abstract nature of the independent personal security caused difficulties of acceptance in FRANCE, BELGIUM, LUXEMBOURG, ITALY and SPAIN. The validity of an independent personal security was very controversial in these "causalist" countries, where a contract without a "legal cause" is *ex lege* void (ITALY: CC art. 1325 no. 2; FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 1131; SPANISH CC art. 1261).

16. In FRANCE and BELGIUM the *causa* is nowadays found in the relationship between the security provider and the debtor; independent personal securities can validly be concluded (BELGIUM: *Wymeersch*, Garanties 95; FRANCE: *Contamines-Raynaud* 413 ss.; *Rives-Lange* 301 ss.). In FRANCE the *causa* has also been found in the underlying relationship between the creditor and the debtor (*Stoufflet* no. 50). According to a recent decision of the FRENCH Supreme Court the *causa* exists even if the person who instructs the granting of a security (instructing party) is not the debtor und has merely an economic interest in the conclusion of the underlying contract, without being a party to it (Cass.com. 19 April 2005, Bull.civ. 2005 IV no. 91 p. 94, Petites Affiches 18 May 2005 no. 98 p. 9). In AUSTRIA, if the problem is discussed at all, the *causa* is found in the combined relationships of the security provider with the principal and of the latter with the creditor (*Koziol*, Garantievertrag 32-35). In PORTUGAL the *causa* is seen in the security function of the contract of independent personal security (STJ 9 January 1997, 402/97 www.dgsi.pt; *Ferrer Correia* 249-250; *Galvão Telles* 288). In ITALY and SPAIN (*Vicent Chuliá* 397) this problem was solved by clearly distinguishing the independence from the lack of *causa*: especially in ITALY, in general terms, the *causa* of the independent personal security is found in the coverage of the risk of non-performance of the underlying obligation (Cass. 6 October 1989 no. 4006, no. 14 above; Cass. 26 June 1990 no. 6499, Giur.it. 1991 I 1 446; Cass. 3 February 1999 no. 920, BBTC 2001 II 666; *Calderale*, Fideiussione 203 ss. for an overview of the prevailing doctrines on the *causa* of independent personal securities; *Portale*, Fideiussione 1062 ss.; *Pontiroli*, Garanzia 350). In GREECE, where there has always been a clear distinction between contracts with and without a *causa*, it is very disputed in literature whether the independent personal security is a contract with a *causa* (*Gouskou* 93; *Psychomanis*

368 ss.; distinguishing *Markou* 16 ss.; *Liakopoulos*, NoB 35, 289) or without it (*Dimitriades* 40 ss.). According to the prevailing opinion (*Georgiades* § 6 no. 86) the independent personal security is a contract with *causa*, the *causa* being the creditor's possibility of immediate satisfaction, *i.e.* without court intervention. This purpose is contained in the contract by virtue of the obligatory reference to a certain secured basic legal relationship (*Georgakopoulos*, EED 21, 256; *Psychomanis* 370; *Gouskou* 104).

(f) Recognition without problems

17. Contrary to some of the "causalist" countries, in GERMANY the validity of the abstract nature of the independent personal securities never was controversial. Personal securities are contractual transactions, which implicate the *causa* in themselves (*Bülow*, Kreditsicherheiten no. 31, no. 57).

(g) Breakthrough in case law

18. In FRANCE independent personal securities were recognised as a contract *sui generis* by the Supreme Court in 1982 (Cass.com. 20 December 1982, Bull.civ. 1982 IV no. 417 p. 348, D. 1983, 365) and by the legislator since 2006 (CC new art. 2321). ITALIAN courts as well as legal writers began already in the late 1970s to recognise independent personal securities as valid security rights (*Portale*, Fideiussione 1043; a first explicit judicial recognition of the validity of independent personal security in ITALY is to be found in Cass. plenary session 1 October 1987 no. 7341, Foro it. 1988 I 3021; cf. further Cass. 6 October 1989 no. 4006, BBTC 1990 II 553). In SPAIN, although this atypical personal security was known and used in practice, courts did not wholly accept their independent nature until 2000 (TS 17 February 2000, RAJ 2000/1162, TS 30 March 2000, RAJ 2000/2314). In GREECE the institution of independent personal security has been known to practice mostly through the so-called guarantee letter, issued by banks. The wording used to describe these instruments caused great confusion, especially among the courts, which at first considered them as dependent personal securities. Although GREEK courts today recognise the autonomous character of this instrument, they still apply the provisions of GREEK CC arts. 847–870 on the dependent personal security, due to the word "security" and the lack of special provisions (A.P. 862/1996, DEE 2, 1087; A.P. 1433/1998, DEE 5, 507). This opinion has been strongly criticised in the literature (among others *Georgiades* § 6 no. 92 with further references) which prefers the term "security-giving contracts" (*Georgiades* § 5 no. 2 fn. 1), considers independent personal securities to be a special contract (cf. GREEK CC art. 361 regarding the freedom of contract) and denies the application of the provisions on dependent personal securities to these contracts. The situation is similar in the NETHERLANDS, where independent personal securities ("*bankgaranties*") were developed in financial practice, but only later were discussed by writers. These authors discussed mainly whether these securities were characterised by an abstract nature or not (*Pabbruwe*, Bijzondere bankgarantie 182-183; *contra Smit*, Hoe abstract 489-491). Nowadays, "bankgarantie" is used as a general term, which can cover different kinds of securities, but mostly independent personal securities (*Pabbruwe*, Bankgarantie no. 3). In PORTUGAL the independent personal security was also introduced by financial practice but its main features have subsequently been accepted by the courts (CA Porto 13 November 1990, CJ XV, V-187; CA Lisboa 11 December 1990, CJ XV, V-135) and in the literature (listed in *Menezes Cordeiro*, Direito 606).

IV. Content of the security provider's obligation

19. The main feature of a contract of personal security is the creation of a new personal obligation of the security provider towards the creditor for purposes of security.

20. The precise content of this obligation of the security provider varies between the legal systems of the member states and depending on the type of personal security in question.

(a) Content of the security provider's obligation to perform equal to principal obligation

21. Especially in the situation of a dependent personal security securing a money debt or a liquidated sum of money, the content of the liability of the security provider is usually understood as an obligation to perform with the same content as the secured obligation (cf. AUSTRIA: Rummel/*Gamerith* §1350 no. 1; ENGLAND: *O´Donovan and Phillips* no. 10-201; FRANCE: *Simler* no. 198; GERMANY: MünchKomm/*Habersack* § 765 no. 77; ITALY: *Giusti* 25 ss.; PORTUGAL: *Vaz Serra*, Fiança e figuras 60; SPAIN: *Carrasco a.o.* 147). Where, however, the secured obligation is for any other performance, such as the obligation of a construction firm to build a house under a building contract, even the security provider under a dependent personal security is according to ENGLISH law not bound to perform in the same way as the original debtor, but only liable for damages for non-performance (cf. no. 22 below). By contrast, in ITALIAN and PORTUGUESE law obligations assumed by the dependent personal security provider to render performances, such as supplying or manufacturing goods are regarded as having the same content as the secured obligation if the personal quality of the debtor (security provider or original debtor) is not of prevalent importance for the creditor (ITALY: *Bozzi*, La fideiussione 218 s.; *Giusti* 27; PORTUGAL: *Vaz Serra*, Fiança e figuras 60).

(b) Liability of the security provider for damages

22. The liability of a security provider may be for damages in various situations: first, the secured debt might be a liability to pay damages. In such a situation the liability of the security provider is typically considered as a liability for damages, too (ENGLAND: *O´Donovan and Phillips* no. 10-203; GERMANY: MünchKomm/*Habersack* § 765 nos. 65 and 79; SPAIN: *Carrasco a.o.* 148). In this case the security provider's obligation is equal to the secured obligation as described above (no. 20).

23. Another situation where a security provider typically may be liable for damages is where the security covers obligations not for the payment of money but for any other performance (cf. AUSTRIA: CC § 1350; Rummel/*Gamerith* § 1350 no. 1; ENGLAND: *O´Donovan and Phillips* no. 10-203; FRANCE: *Simler* no. 911 *e.g.* in the case of a performance guarantee – "*garantie de bonne fin*"). The security provider is typically not able to perform these obligations or the creditor may not be interested in specific performance by the security provider, thus damages are the appropriate remedy. In GERMAN, ITALIAN, PORTUGUESE and SPANISH law this is the case where personal security is provided to secure obligations where the personal performance of the debtor is essential for the creditor (GERMANY: MünchKomm/*Habersack* § 765 no. 79; ITALY: *Giusti* 31 s.; PORTUGAL: *Vaz Serra*, Fiança e figuras 60; SPAIN: *Carrasco a.o.* 148).

24. Also a binding comfort letter is typically understood as creating a liability of the security provider in damages only (cf. ENGLAND: *O´Donovan and Phillips* nos. 1-77 s.; FRANCE: "*garantie indemnitaire*" cf. *Simler* nos. 900 and 1012; GERMANY: "*harte Patronatserklärung*" in Staudinger/*Horn* no. 414 preceding § 765; ITALY: *De*

Nictolis 390, 391; PORTUGAL: *Soares da Veiga* 385; SPAIN: *Carrasco*, Las nuevas garantías 634 s.).

25. In the case of an independent personal security, the liability of the security provider is typically regarded as a liability to make good any losses suffered by the creditor (cf. ENGLAND: *Sutton v. Grey* [1894] 1 QB 285; *O´Donovan and Phillips* no. 1-88; GERMANY: Staudinger/*Horn* no. 194 preceding § 765). The rationale for this is obvious: in the case of an independent personal security, there is no (or at least there need not be a) secured obligation, hence the liability of the security provider cannot be regarded as an obligation to perform under the same terms as the principal debtor's obligation.

26. That the security provider's obligation in these situations is regarded as a liability for damages (and not an obligation to perform, which might appear similar in the case of an obligation to pay an amount of money) is not merely a matter of terminology; rather, in ENGLAND this classification is regarded as decisive since it triggers the creditor's duty to mitigate losses (cf. *O´Donovan and Phillips* no. 10-209).

(c) Obligation of the security provider to procure performance by the debtor

27. In addition to the security provider's liability to perform in case of non-performance of the principal debtor, the security provider is under ENGLISH law also obliged to procure that the principal debtor performs the secured obligation (cf. *Moschi v. Lep Air Services Ltd.* [1973] AC 331; however, this idea has been criticised as outdated by *O´Donovan and Phillips* no. 10-202 citing Commonwealth authorities). Since the security provider typically is not in a position to compel the principal debtor to perform, this liability will usually amount to a liability for damages as described above *sub* nos. 21 ss. (cf. *Andrews and Millett* no. 1-004)

(d) Content of the security provider's obligation subject to agreement by the parties

28. Finally, the contract of personal security being in all member states a contract subject to the general rules of contract law, the specific content of the security provider's obligations is subject to the agreement of the parties. Especially in the case of an independent personal security, where there is often no reference to an underlying secured obligation, it is the nature and terms of the individual contract of independent security that are decisive for the extent of the security provider's obligation (cf. ENGLAND: Halsbury para. 1264, Vol 49, 5th ed., (2008)); FRANCE: *Simler* nos. 122 ss. and 930 ss.; GERMANY: *Lwowski* no. 177; ITALY: *Mastropaolo* 255 ss.; PORTUGAL: *Soares da Veiga* 358; SPAIN: *Carrasco a.o.* 338).

V. Security provider

(a) Definition and terminology

29. In all EUROPEAN countries the personal security provider is a person who, under the contract of security, assumes a new obligation towards the creditor for the purpose of securing an underlying obligation (secured obligation) or for any other security purpose (cf. FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 2011 (since 2006: FRENCH CC art. 2288); AUSTRIA: *Harrer*, Sicherungsrechte 5-6; DENMARK: *Gomard*, Obligationsretten 140 s.; *Pedersen*, Kaution 11 ss.; FINLAND: LDepGuar § 2 no. 1; RP 189/1998 rd 29; GERMANY: *Lwowski* no. 34; ITALY: *Fragali*, Garanzia 455; PORTUGAL: *Antunes Varela* II 475 s.; SPAIN: *Díez-Picazo* II 397; SWEDEN: Ccom chap. 10 § 8; *Walin*, Borgen 24). The terms identifying these persons are mostly derived from specific types of personal security (such as guarantor

in ENGLAND and IRELAND, or cautioner in SCOTLAND). In traditional ENGLISH legal terminology, the term used in relation to the persons liable under different types of personal security in general is either guarantor or surety (cf. the title of *Rowlatt´s* Law on Principal and Surety).

(b) Capacity

30. The requirements for the validity of a security provider's consent are determined by the general rules on capacity (AUSTRIA: CC § 1349, Rummel/*Gamerith*, § 1349 nos. 1-2; FRANCE: *Simler* no. 149; GERMANY: *Lwowski* nos. 37 ss.; ITALY: *Giusti* 94; PORTUGAL: *Almeida Costa* 773). When the debtor is obliged to furnish a provider of personal security, ITALIAN and PORTUGUESE law require, besides the general requirements of capacity, the ability to pay of the provider (ITALIAN CC art. 1943; PORTUGUESE CC art. 633(1)).

(c) Commercial corporations

31. In all member states commercial corporations can also validly provide personal security. In ITALY, if the provider of personal security is a commercial corporation, the lack of express mention of the activity of providing personal security in the articles and memorandum of the corporation does not influence its capacity to validly provide personal security in favour of third parties. In particular according to CC art. 2384 (as amended by the reform of ITALIAN company law, DLgs 17 January 2003 no. 6), limitations of the articles and memorandum of the corporation – even if they have been disclosed – cannot be raised against third parties, unless there is evidence of a specific fraud of the third party against the corporation; mere knowledge that the providing of personal security is outside the corporation's object is not sufficient (cf. First Directive on company law of 1968 art. 9). Also in SPAIN the limits of the company's object cannot be invoked against third parties in good faith (Law on share companies, RDL 1564/1989, art. 129(2) and Law on Limited Liability Companies of 23 March 1995 no. 2, art. 63(2)) and SPANISH case law tends to regard in any case the providing of personal security as an activity within the company's object (TS 14 May 1984, RAJ 1984/2111, TS 12 May 1989, RAJ 1989/4003; *Carrasco a.o.* 115 s.). For FRENCH share companies a distinction is to be made between the obligations of the members of management and those of persons outside of the management. The obligations of the members of management cannot be secured ("*cautionner ou avaliser"*) by the company (Ccom arts. L 225-43 and L 225-91). On the contrary, the company can secure the obligations of persons outside of the management by way of "*cautions, avals, garanties*", provided this has been approved by the board of directors (or of the supervisory board in the case of a dual management system; Ccom art. L 225-35(4) and art. L 225-68(1)). Otherwise the security is ineffective (Cass.com. 29 January 1980, Revue des sociétés 1981, 83). However these requirements do not apply to financial institutions (Ccom art. L 225-35(4) and art. L 225-68(1), Ccom art. L 225-43(2) and art. L 225-91(3)). According to the DANISH Law on share companies (Law no. 324 of 7 May 2000 § 61(1)) a share company cannot be committed for a dependent obligation which falls outside the purpose of the company, if it can prove that the other party knew or should have known this. Such a rule does not prevent a parent company to provide a security for a subsidiary company. In accordance with § 115 of the same Law, a company may not provide a personal security for shareholders, members of the board or managing directors of the company, or for persons, who are very close to it. The personal security is however binding, if the other party was in good faith. The above stated also applies to a limited liability company in accordance with Law of

Limited Liability Companies (Law no. 325 of 7 May 2000) §§ 25 and 49 (*Beck Thomsen* 66).

32. As in DENMARK, almost everywhere it is possible and frequent in practice for a commercial corporation to provide personal security – also in the form of binding comfort letters – to another company of the same group (ENGLAND: *Andrews and Millett* no. 14-014; GERMANY: *Reinicke and Tiedtke*, Kreditsicherung no. 425; ITALY: CFI Torino 11 April 2000, Giur.it. 2001 1445; Cass. 5 December 1998 no. 12325, Giur.it. 1999 2317; PORTUGAL: *Soares da Veiga* 379; SPAIN: *Carrasco* , Las nuevas garantías 629).

(d) Public institutions

33. In GERMANY and ITALY also public institutions may provide personal security according to special statutory provisions expressly enabling them to engage in this activity. The particular nature of the security provider does not affect the applicability of the private law rules to the security (GERMANY: Staudinger/*Horn* § 765 nos. 72 s., *Lwowski* no. 56; ITALY: *Bozzi*, La fideiussione 227 s.). In FRANCE the State and territorial authorities may secure the obligations of whatever type of debtors including private debtors (*Simler* no. 67). A special Law (Law no. 82-213 of 2 March 1982 on rights and liberties of territorial authorities – "*relative aux droits et aux libertés des collectivités locales*") expressly permits the granting of personal securities by territorial authorities in favour of private debtors as long as certain conditions are respected. According to FRENCH court practice in principle these contracts are governed by the rules of private law even if the contract concluded between the creditor and the debtor is of public interest (*Tribunal des Conflits* 16 May 1983, GazPal 1985 I 218).

(e) Spouses as security providers for third persons´ debt

34. In the NETHERLANDS, the capacity of spouses to act as security provider securing the obligations of third persons is limited: A spouse, acting for private purposes, can assume a personal security only with the consent of the other spouse; if this consent is lacking, the other spouse can avoid the security (CC arts. 1:88 lit. (c) and 1:89(1)). Although not a EU member state, it may be remarked that SWITZERLAND knows the same rule (OR art. 494(1)) which recently (Federal Law of 17 June 2005) has been extended also to married security providers who are registered in the commercial register. According to the law of Navarra (Law 1 March 1973 no. 1, art. 61(2)) the personal security provided by one spouse without the consent of the other can only affect the individual property of the contracting spouse, but not the common property of the family.

VI. Debtor

35. In all European legal systems it is accepted that in the case of a dependent personal security the debtor owes the secured obligation on the basis of a legal relationship that differs from that arising under the contract of dependent personal security (ENGLAND: *O´Donovan and Phillips* no. 1-20; FRANCE: *Simler* no. 12; GERMANY: *Bülow*, Kreditsicherheiten nos. 835-836; ITALY: *Bozzi*, La fideiussione 215; PORTUGAL: *Almeida Costa* 770; SPAIN: *Carrasco a.o.* 71). On the other hand, the liability of a security provider under an independent personal security is independent from an underlying obligation, hence the existence of a debtor and the debtor's obligation is not necessary in the case of an independent security (cf. ENGLAND: Halsbury*/Salter* para.1255, Vol 49, 5th ed, (2008)).

36. The debtor, if there is one, can be a private person or a public institution. In some countries, if the debtor of the secured obligation is a merchant or an entrepreneur, special rules may be applicable. Thus in SPAIN and PORTUGAL a dependent personal security is a mercantile security regulated by the commercial code, and not by the civil code, whenever the secured obligation is an obligation of commercial law, *i.e.* if the debtor of the secured obligation is a merchant (SPAIN: TS 20 October 1989, RAJ 1989 no. 6941; TS 7 March 1992, RAJ 1992 no. 2007), the only practical remaining difference is that in commercial guarantees the debtor and guarantor are liable as a solidary joint debtors; PORTUGAL: *Vaz Serra*, Fiança e figuras 29; cf. Ccom art. 101). However, this distinction has little practical relevance and seems to be disregarded by case law (SPAIN: TS 20 October 1989, RAJ 1989 no. 6941; TS 7 March 1992, RAJ 1992 no. 2007). By contrast, in FRANCE the personal security preserves its civil character even if the debtor is a merchant (*Simler* no. 96 ss.).

37. In commercial practice, a debtor is often involved in two separate contracts of personal security at the same time: one (primary) security that was assumed in relation to the debtor's obligation towards the original creditor, and another security in which a second security provider secures any claims for reimbursement that the (primary) security provider may acquire against the debtor under the primary security. Contracts of security of the second type are typically called counter security (cf. ENGLAND: *Goode*, Commercial Law 1020; *O´Donovan and Phillips* no. 13-61; ITALY: *De Nictolis* 25; Cass. 17 May 2001 no. 6757, Giust.civ. 2002 I 729; SPAIN: *Carrasco a.o.* 367 ss.). Counter securities can be used to secure claims for reimbursement arising both under contracts of dependent personal security (cf. ENGLAND: *Goode*, Commercial Law 1020; FRANCE: "*sous-cautionnement*" *Simler* nos. 118 ss.; cf. *Grimaldi* Commission's proposal for a CC new art. 2297; ITALY: for the so-called "*fideiussione del regresso*" or "*fideiussione al fideiussore*" *Giusti* 220; Cass. 13 May 2002 no. 6808, Foro it. 2002 I 2694; SPAIN: *Vazquez Garcia* 478 ss.) and contracts of independent personal security (usually in international commercial practice: FRANCE: *Simler* nos. 914 ss.; ITALY: Cass. 17 May 2001 no. 6757, Giust.civ. 2002 I 729; SPAIN: *Carrasco a.o.* 367).

VII. Co-debtorship for security purposes

38. The first issue that arises is the criterion which has to be used for distinguishing between an "ordinary" co-debtorship on the one hand, and a co-debtorship for security purposes on the other hand. Most legal systems seem to differentiate according to the degree of interest which the co-debtor whose position is at issue has in the economic benefit which the "true" debtor seeks to achieve by incurring the obligation towards the creditor. The lesser this interest is, the more likely this co-debtor will be treated as a mere security provider. The prototype of such a mere security provider (*i.e.*, a co-debtor for security purposes) is a wealthy housewife who has no direct stake in, and only indirectly benefits from, the credit incurred by her husband acting for his business purposes.

39. In the present field, comparison of the legal systems of the member states is difficult due to the fact that some countries have a broad concept of co-debtorship which comprises both initial and subsequent co-debtorship. This is the case in AUSTRIA, GERMANY and recently also the NETHERLANDS.

40. By contrast, especially the ROMANIC countries distinguish between initial and subsequent co-debtorship. True co-debtorship is limited to the co-debtorship which has been assumed contemporaneously by two debtors towards the creditor. Subsequent co-debtorship is regarded by some legislators as a technique of settling a pre-existing debt which the co-debtor owes to the primary debtor and which is settled by a promise

to pay the primary debtor's obligation to the creditor *(délégation imparfaite)*. Under the present Rules this is a possible situation, but it is by no means a necessary condition. The above Article applies if two debtors have incurred obligations towards a creditor on essentially identical terms *(délégation-sûreté)*. By contrast, the time at which they incurred their respective obligations is irrelevant.

VIII. Global security

(a) Definition

41. In the legal systems of all member states, personal securities are not only used as security for specific obligations but can be more widely drafted so as to cover for example all obligations arising out of specific creditor-debtor relationships. In BELGIUM, FRANCE and LUXEMBOURG such securities are known as "*cautionnement pur et simple*" or "*indéfini*" or "*cautionnement général (omnibus)*", in AUSTRIA and GERMANY as "*Globalbürgschaft*" (AUSTRIA: *Harrer*, Sicherungsrechte 26; GERMANY: *Bülow*, Kreditsicherheiten no. 843). In ITALY they are called "*fideiussioni omnibus*" (cf. CC art. 1938); in PORTUGAL "*fiança geral*" (cf. CC art. 628(2)) and in SPAIN "*fianza omnibus*" or "*general*" (cf. CC art. 1825). In ENGLISH legal terminology such securities are called "all accounts" or "all moneys" securities (cf. *O´Donovan and Phillips* nos. 5-79 ss.; *Andrews and Millett* nos. 6-004 s.). According to DANISH terminology these types of securities are called "*alskyldserklæringer*" or "*alskyldskautioner*" (*Pedersen*, Kaution 45 ss.; *Beck Thomsen* 70 s.) and according to FINNISH and SWEDISH terminology "*generell borgen*" (FINLAND: LDepGuar § 2 no. 5; RP 189/1998 rd 30 s.; SWEDEN: *Walin*, Borgen 88 s.).

42. A global security is generally understood as a security covering obligations that are not specifically determined at the conclusion of the contract of security. Thus, global securities are often used to secure future obligations of the debtor or a liability under a current account. As a rule, the security does not expire merely because the debit balance of the account is *nil* at some point of time (cf. ITALY: CC art. 1844(1)). In FRANCE earlier attempts (cf. *Sargos*, GazPal 1988, I, p. 209 no. 4) to reduce the scope of the global security to the "*cautionnement omnibus*" are taken up again in the *Grimaldi* Commission´s proposal for a CC new art. 2302(1) sentence 3.

(b) Applicable rules

43. In most countries recently legislators or courts have tried to increase the level of protection of the provider of a global security. It seems that only in ENGLAND has the validity of continuing dependent securities, such as securities containing "all monies" terms never been doubted. A great variety of contract terms is regularly used in dependent securities (cf. the discussion in *O´Donovan and Phillips* nos. 5-79 ss.; *Andrews and Millett* nos. 6-004 s.), which will normally be effective. The only limitation seems to be that debts originally owed by the debtor to a third party but then assigned to the creditor do not normally increase the obligation of the provider of dependent security (*Kova Establishment v. Sasco Investments Ltd.* [1998] 2 BCLC 83). AUSTRIAN courts and writers are also still rather liberal. The Supreme Court repeatedly accepted a dependent security for "all" future obligations of the debtor (OGH 1 December 1976, ÖRZ 1977, 169 no. 76; also OGH 18 February 1987, ÖBA 1987, 576; critical because of lack of definiteness Schwimann/*Mader and Faber* § 1353 no. 12). It is regarded as sufficient that the amount of the secured obligation is "determinable" (Rummel/*Gamerith and Faber* § 1353 no. 3 and § 1346 no. 2a). Similarly in PORTUGAL, where a dependent security for future obligations is void if

its object is undeterminable, *i.e.*, if the provider of a dependent security secures all obligations without reference to their origin or nature (STJ 29 April 1999, 131/99 www.dgsi.pt; STJ 2 October 2001, 3353/01 www.dgsi.pt; STJ 29 November 2001, 3592/01 www.dgsi.pt; *Mendes* 136).

44. The level of protection is considerably higher in FINLAND and ITALY where limitations in the contract of dependent security are required: According to FINNISH LDepGuar § 5(1) a "general" dependent security must contain a maximum amount and be limited in time. In the absence of such terms the dependent security provider is only liable for obligations that were assumed together with the security or for previous debts that were known to the provider of the dependent security according to § 5(2) (cf. RP 189/1998 rd 36 s.). Similarly, according to ITALIAN CC art. 1938 *in fine* global securities must contain a maximum amount, agreements without this limit being totally invalid (*Giusti* 168). This rule has been introduced by Law no. 154 of 17 February 1992 in order to stop the earlier practice of banks' personal securities for an indeterminate amount (cf. references in *De Nictolis* 207 ss., 332 ss.).

45. In FRANCE protection depends upon the person of the provider of dependent security. A security without a maximum amount *(cautionnement indéfini)* can not be assumed by consumers (ConsC arts. L. 313-7 and L. 341-2), not even if professional debts are secured (for dependent securities with solidary liability: *Madelin* Act art. 47 II(1); in general: ConsC art. L. 341-2). Also according to BELGIAN ConsCredA art. 34(1) a consumer credit can only be secured by a dependent security with specified amount (*Van Quickenborne* no. 196). Apart from these restrictions, global securities are valid in FRANCE, BELGIUM and LUXEMBOURG, provided the secured obligations can be determined (FRANCE: *Simler* no. 202; BELGIUM: *Van Quickenborne* no. 191; LUXEMBOURG: CA Luxembourg 9 July 1996, no. 18403 unpublished). The granting of global securities is, in particular, not considered as being contrary to the requirement of the express engagement of the security provider as prescribed in FRENCH CC art. 2015 – since 2006: CC art. 2292 – (Cass.com. 16 October 1978, JCP G 1978 IV, no. 348). However, from 1983 to 2002 FRENCH court practice tended to restrain the extent of the global security (excluding, contrary to CC art. 2016 (since 2006: CC art. 2293) accessories) if formal requirements were not respected (Cass.civ. 22 June 1983, Bull.civ. 1983 I no. 182 p. 160; Cass.civ. 29 October 2002, D. 2002, 3071). In the NETHERLANDS as well, global securities (usually assumed by banks) are also valid provided the secured obligations can be determined (*Pitlo-Croes* no. 851); however in favour of a non-professional security provider the secured obligation has to be limited by a maximum amount (CC art. 7:858(1)).

46. The legal situation is still different in GERMANY where case law has changed dramatically (on this development Staudinger/*Horn* § 765 nos. 44-57): Global securities had been considered as in general valid, provided the secured obligations were sufficiently determined (*e.g.* to all existing and future obligations resulting from a specific business relation between debtor and creditor: BGH 10 October 1957, BGHZ 25, 318; BGH 5 April 1990, NJW 1990, 1909; BGH 16 January 1992, NJW 1992, 897). However, since 1995 global securities that are established by standard terms of trade are regarded as in general surprising (GERMAN CC § 305c) and generally as an unreasonable disadvantage or injury for the security provider (CC § 307). Invalidity affects only the corresponding term (cf. the leading case of BGH 18 May 1995, BGHZ 130, 19; Palandt/*Sprau* § 765 no. 20; Erman/*Herrmann* § 765 no. 3; cf. also *Horn*, ZIP 1997, 525; *Trapp*, ZIP 1997, 1279). As an exception, the aforementioned principles are not applied if the provider of a dependent security has considerable influence upon the principal debtor, especially as manager of the latter (BGH 18 May 1995, BGHZ 130, 19, 30; BGH 10 November 1998, ZIP 1998, 2145;

BGH 16 December 1999, NJW 2000, 1179, 1182). It is still unclear in how far the assumption of global securities is valid outside the scope of GERMAN CC §§ 305 ff, especially in individually negotiated contracts (cf. Palandt/*Sprau* § 765 no. 7 and Erman/*Herrmann* § 765 no. 3).

47. In GREECE, the issue arises mostly for dependent securities securing the outstanding balance of a current account. The GREEK Supreme Court (1265/1994, DEE 1, 410) differentiated between subsequent new credits and subsequent supplementary credits, which simply increase the amount (limit) of the initial credit. The provider of dependent security is liable, even without having provided security for the (increased) credit limit provided by this supplementary credit (quantity criterion). The liability is restricted, however, to the amount of the initially secured credit (quality criterion). The Supreme Court justified this position in its decision 48/2001 (DEE 2001, 1011 ss., 1012) by asserting that the claims are no longer independent upon integration into the account and the provider of dependent security remains liable for the outstanding balance, regardless of the movements in the account (entering of new claims). This decision is consistent with the prevailing opinion in GREECE on this matter (cf. also A.P.: 412/99, DEE 5, 1031; 984/99, EllDik 1999, 1720 ss.). In SPAIN global personal securities are common in practice. The protective devices developed in case law are the principle of restrictive construction of this kind of guarantee as well as the rule imposing a fixed maximun amount of liability. Moreover – although this is also usually granted in the general term of the contracts – case law also has the basic principle that a debtor cannot be deprived of the right to put an end to the indefinite contract (see *Carrasco* 157 ff).

IX. Consumer

48. Throughout the member states, protection for non-professional market participants by special legal provisions is also in the area of personal security typically connected with the classification of these persons as consumers. In these notes, two questions will be dealt with: first, how is the concept of the consumer defined in the member states (nos. 49 ss. and 53 ss. below); and second, whether it is the security provider or another person who has to be qualified as a consumer in order for the national consumer protection legislation to apply to personal securities given by this security provider (nos. 63 ss. below).

49. Other questions such as the scope of consumer protection legislation in the area of personal securities in the member states or the applicability of general rules and principles of law protecting weaker parties to personal securities are dealt with in the national notes on IV.G.–4:101 (Scope of the application).

(a) The term "consumer" in the legislation of the Member States - the regulatory Framework

50. The definition of the term "consumer" differs between the member states quite considerably. Although most consumer legislation is based on EU-Directives, the principle of minimum harmonisation leaves the member states much room to define the term as they think fit. Even worse: in many states there is no coherent definition of who is a consumer, but the consumer can have different shapes under different laws.

(b) Definitions of consumer security providers

51. Only the DUTCH Civil Code and the FINNISH LDepGuar contain special rules concerning personal securities by consumer security providers. The DUTCH Code has laid down special rules for "dependent personal securities other than in a profession or business" in arts. 7:857–7:863. The scope of application of these rules is determined as

follows: “The provisions of this section apply to dependent personal securities entered into by a natural person who did not act in the course of his or her profession or business, nor acted for the benefit of normal exploitation of the business of a share company or a company with limited liability of which he or she is an officer and in which, alone or with co-officers, he or she holds the majority of the shares” (CC art. 7:857). Another general definition is offered by the FINNISH LDepGuar § 2 no. 6: “A private security provider is a natural person, who assumes the personal security”. This rule, however, is subject to limitations and does not apply if the security provider is a director, board member, member of the administrative committee or another comparable organ, or if the security provider is a responsible shareholder in the debtor company or foundation or in a parent company thereof; further the rule does not apply if the security provider was a founder of the company, or directly or indirectly holds at least a third of the shares in another share company, or has a share of ownership or influence in another company by virtue of the voting right resulting from the shareholding (see RP 189/1998 rd 31 s.).

(c) Comprehensive statutory definitions of a consumer

52. In AUSTRIA, GERMANY, GREECE, ITALY, SPAIN and SWEDEN there are at least comprehensive general definitions of the term “consumer” with effect for all rules concerning consumer protection. But none of these applies specifically to personal securities. AUSTRIAN ConsProtA § 1(1) no. 2 states that a consumer is every person who is not an entrepreneur. On the other hand, the preceding provision of § 1(1) no. 1 defines an “entrepreneur” as “everybody who concludes the transaction for the exercise of its enterprise”. GERMAN CC § 13 defines the consumer as every natural person who concludes a legal transaction for a purpose that cannot be attributed to his or her commercial or independent professional activity. It is the same in the SPANISH ConsProtA art. 3.

53. In ITALY a new Consumer Code has been introduced by DLgs no. 206 of 6 September 2005, consolidating in a single legislative text all the former different laws on consumer rights which have now been repealed (especially CC arts. 1469*bis*-1469*sexies* and the Law on the Rights of Consumers and Users of 30 July 1998 no. 281). The term consumer is now defined by ConsC art. 3(1) lit. a) as any “natural person acting for purposes which are outside his or her business or professional activity, if any”. The new ConsC contains some fundamental, mandatory rights protecting the weak party in a contract. These rights include, among others, the right to adequate information, to transparency, correctness and equal treatment in the contractual relationships regarding services. All contracts entered into by a consumer are governed by its rules, which should be regarded as applicable also to a personal security granted by a consumer (*Alpa* 21). Further, in ITALY new banking legislation has been introduced (cf. DLgs 1 September 1993 no. 385) fundamentally increasing the protection of bank-customers. This regulation shall also be applicable to most personal securities granted by a consumer in favour of a bank (*Chinè*, I contratti di garanzia 324 ss.). In SWEDEN the general definition of a consumer is laid down in Act on Terms of Contracts in Consumer Relations § 2(1) (*Ramberg* 259 ss.).

(d) Criteria for defining the consumer in general

54. Apart from these differences in the legislative technique, the scope of the term “consumer” differs widely. There are, in general, two aspects which are relevant for the classification of a person as a consumer: First, the term has an objective scope, *i.e.* it deals with the issue whether only natural persons or, additionally, certain legal

entities are covered by the notion of consumer. Secondly, the term has a functional scope, *i.e.* a person is regarded as consumer only if acting for certain purposes.

(e) Objective personal scope - only natural persons

55. In DANISH, DUTCH, FINNISH, GERMAN, ITALIAN and SWEDISH law, the term "consumer" is restricted to natural persons (DANISH Law on Certain Consumer Contracts § 1 read with § 3(1) and Contract Law § 38a(2); DUTCH CC art. 7:857; FINNISH LDepGuar § 2 no. 6, specifically for dependent personal security; GERMAN CC § 13; ITALIAN ConsC art. 3(1) lit. a); the ITALIAN Constitutional Court has held that neither the limitation of the notion of consumer to natural persons nor the exclusion of small enterprises or artisans from that notion according to the text of CC art. 1469*bis*, now ConsC art. 3(1) lit. a), are in violation of the principle of equality as laid down in Cost. art. 3: Corte Cost. 30 June 1999 no. 282, Foro it. 1999 I 3118; 22 November 2002 no. 469, Giur.cost. 2002, 6; the same was held in relation to the exclusion of the beneficiary of an accident insurance from the notion of consumer by Corte Cost. 16 July 2004 no. 235, Foro it. 2005 I 992; SWEDISH Act on Terms of Contracts in Consumer Relations § 2(1)).

(f) Including legal entities

56. GREEK and SPANISH law extend consumer protection to legal entities (GREEK ConsProtA art. 1(5) lit. a); SPANISH ConsProtA art. 3. Also in AUSTRIAN law it would seem that a legal entity can be a consumer (*e contrario* ConsProtA § 1(2) sentence 2).

57. By contrast, in many member states there is no generally used definition of the term consumer in the consumer legislation. Thus, the term is sometimes restricted to natural persons, sometimes it also covers legal entities.

58. Although in all FRENCH legislation the consumer is described as a natural person, courts and authors commonly understand it as including certain legal persons without professional purpose, *e.g.* non-profit associations, communities of apartment owners or political parties (FRANCE: CA Paris 5 July 1991, JCP E 1991 Pan. no. 988).

59. According to the ENGLISH Unfair Terms in Consumer Contracts Regulations 1999, a consumer is a natural person only (reg. 3(1)). The ConsCredA is designed for the protection of "individuals". In s. 189 an individual is defined as including "a partnership or other unincorporated body of persons not consisting entirely of bodies corporate" (in the form amended by s. 1 of the Consumer Credit Act 2006 s. 189 defines "individual" as including "(a) a partnership consisting of two or three persons not all of whom are bodies corporate; and (b) an unincorporated body of persons which does not consist entirely of bodies corporate and is not a partnership").

60. In the BELGIAN ConsCredA a consumer is a natural person (art. 1(1)). In the Commercial Practices Act, a consumer is defined as a "natural or legal person" (art. 1(7)). The LUXEMBOURGIAN ConsCredA art. 2 lit. a) defines the consumer as a natural person only; the LUXEMBOURGIAN ConsProtA with rules on unfair contract terms, on the other hand, does not define the term at all. The PORTUGUESE ConsCredA art. 2(1) lit. b) defines the consumer as a "singular person", while the ConsProtA (DL 24/96 of 31 July 1996) uses the expression "that one", which is said to include legal entities (*Duarte* 661).

(g) Functional scope

Acting outside trade or business

61. In accordance with EUROPEAN Directives, in most legal systems consumer protection is dependent on the purpose of a person's dealing. The BELGIAN ConsCredA art. 1(1) defines a consumer as "every natural person who […] is acting for purposes which can be supposed to be outside his business, profession or trade" (similar LUXEMBOURGIAN ConsCredA 1993 art. 2 lit. a)). In the BELGIAN Commercial Practices Act, a consumer is defined as "every natural or legal person who exclusively for non-professional purposes acquires or uses marketed products or services" (art. 1(7)). Equally, the LUXEMBOURGIAN ConsProtA art. 1 opposes "the professional supplier of durable or non-durable consumer goods or services" to the "consumer acting for private purposes." In FRENCH law the consumer is understood as a non-professional, a person without professional purpose (ConsC art. L. 132-1). Since 1995 (Cass.civ. 24 January 1995, D. 1995, 327) consumer protection is according to the Supreme Court generally excluded if a "direct relationship with the exercise of professional activities" exists. This criterion had already been introduced by the Law of 23 June 1989 on doorstep transactions (cf. ConsC art. L. 121-22). The FRENCH Supreme Court continues to apply the criterion of the "direct relationship" (Cass.civ. 5 March 2002, JCP G 2002, II no. 10123), although it is very controversial among the lower courts. There is no direct relationship according to certain courts if the contract is concluded outside of the ordinary professional sphere of the person who deserves protection or, according to other courts, if the contract is set up outside of the interest of the enterprise (cf. further *Paisant*, JCP G 2003, I no. 121, p. 549 ss.). Under the ENGLISH Unfair Terms in Consumer Contracts Regulations 1999 the consumer has to be "acting for purposes which are outside his trade, business or profession" (reg. 3(1)). Under the ITALIAN ConsC art. 3(1) lit. a) the consumer has to act "outside his or her business or professional activity, if any". This definition is interpreted strictly by the Supreme Court (Cass. 25 July 2001 no. 10127, Giust.civ. 2002 I 685; Cass. 14 April 2000 no. 4843, Corr.giur. 2001, 524), whereas sometimes courts of first instance and legal writers regard also as consumers persons who act in matters belonging to their professional or business activity, as long as these matters are outside the ordinary scope of their professional or business activity (CFI Roma 20 October 1999, Giust.civ. 2000 I 2117; *Monteleone* 28).

62. Similarly, according to the PORTUGUESE ConsCredA the consumer has to act for purposes outside his or her commercial or professional activity. Under the ConsProtA the goods supplied, the services provided or the rights transferred by a person with a professional economic activity to the consumer must be allocated to a non-professional use. According to the SWEDISH Law on Terms of Contracts in Consumer Relationships § 2(1) and the DANISH Law on Certain Consumer Contracts § 3 and ContrA § 38a(2) a consumer is defined as "a natural person, who is mainly acting for a purpose which is outside business activities" (SWEDEN: *Ramberg* 258 s.) or "who mainly is acting outside his or her profession" (DENMARK: *Gomard* 29 ss.; *Andersen, Madsen and Nørgaard* 96). Less specific is the AUSTRIAN definition of "non-entrepreneurial activity" (ConsProtA § 1(1) no. 2).

63. GREEK and SPANISH law deviate from Council Directive 85/577 art. 2: in their view protection does not depend on the participation of the consumer in the market "for purposes outside his trade or profession", but on the final receiving of the goods or the services, *i.e.* as long as the consumer is at the end of the economic chain and has no intention to prolong the economic circulation of the goods or services (GREECE: *Skorini-Paparrigopoulou* 80, 82. Under the ENGLISH ConsCredA, protection of the

consumer was not dependent upon that person acting outside his or her trade or business (note that it is the person of the debtor that is relevant for the applicability of the consumer protection provisions under this act in relation to securities provided for agreements regulated under this act, cf. no. 65 below): according to the present sec. 8 para. 2, it was decisive only that the amount of the credit does not exceed GBP 25,000. This rule ceased to have effect according to sec. 2 para 1 lit. b) of the Consumer Credit Act 2006, which came into force in April 2008: all credit agreements with individuals now fall under the ConsCredA regardless of the amount of the credit, subject to certain exemptions. One exemption are credits with an amount exceeding GBP 25,000 entered into by the debtor wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the debtor (s. 16B of the ConsCredA, as introduced by s. 4 of the Consumer Credit Act 2006).

(h) Acting outside independent professional activity

64. The GERMAN CC § 13 fixes a broader functional scope of the term consumer by excluding not all legal acts in the context of a professional activity but only those pertaining to independent professional activity. Therefore an employee who buys working equipment is regarded as a consumer according to GERMAN consumer law (Palandt/*Heinrichs* § 13 no. 3; Ulmer/Brandner/Hensen/*Ulmer* § 24a no. 23). Problems of differentiation arise if an entrepreneur acts since the dependent personal security can be assumed for private or for professional activity. In the absence of any indication in the contract of personal security the differentiation is made according to the entrepreneur's intended purpose as it appears to the other party (Ulmer/Brandner/Hensen/*Ulmer* § 24a no. 24). Even small merchants, farmers, artisans and persons exercising a liberal profession are regarded as entrepreneurs and consequently not as consumers if they act in connection with their profession. This is even true if an employed person concludes a contract for the purpose of establishing a professional activity (BGH 24 February 2005, BGHZ 162, 253, NJW 2005, 1275; this is, however, controversial and there is a contrary provision in CC § 507 for the assumption of a credit for purposes of setting up a profession or business). Acting outside any business or professional purpose is the main feature in the new definition of consumer laid down in art. 3 of the SPANISH ConsProtA.

(i) Whether security provider or debtor has to be a consumer

Consumer security provider

65. The DUTCH Civil Code focuses on the person of the security provider (CC art. 7:857). In GREECE it is asserted that the security provider enjoys consumer protection even if the secured credit is not granted to a consumer, since the dependent character of the personal security does not preclude the need for protection of the security provider, when he is inexperienced and an amateur (*Georgiades* § 3 no. 100). GERMAN case law on consumer protection in personal security transactions also focuses exclusively on the person of the security provider (Staudinger/*Weick* § 13 no. 49; *Bülow*, Kreditsicherheiten nos. 866-890; *Lwowski* nos. 412-420). On the basis of the above mentioned decision of the European Court of Justice (cf. Comment B, e, no. 18 fn. 4, *Dietzinger v. Bayerische Hypotheken- und Wechselbank AG*, ECJ 17 March 1998) the GERMAN Federal Supreme Court previously required for the rules on doorstep transactions that both debtor and security provider must be consumers and that the contract creating the secured obligation and the contract of dependent personal security must fall under the rules on doorstep transactions (BGH 14 May 1998, BGHZ 139, 21 at 24 ss.; Palandt/*Heinrichs* § 312 no. 8, but critical; Erman/*Saenger* § 312 no. 29 with further references and *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 463

ss.). Recently, however, the division which now is exclusively competent for security has held that the personal qualification of the debtor is irrelevant (BGH 10 January 2006, BGHZ 165, 363, 367 s.). The GERMAN provisions on standard terms, though, protect everyone – not only consumers – from unfair or surprising standard terms. However, according to CC § 310(3) that transposes the EU-Directive on abusive contract terms, consumers enjoy special protection vis-à-vis entrepreneurs.

66. Formerly, in FRANCE the person of the debtor was the decisive criterion for consumer protection of the provider of a dependent security (ConsC arts. L. 311-3 ff, 312-3 ff). It was not until the Law *Dutreuil* no. 2003-721 of 1 August 2003 that protective consumer legislation turned on the person of the provider of dependent security, even if the debtor was a professional (ConsC arts. L. 341-1 to L. 341-6). According to the proposals of the *Grimaldi* Commission special protection should be granted equally to all natural persons who assume a dependent security irrespective of the person of the debtor. The only exception would obtain for the application of the principle of proportionality between the amount of the security and the assets and income of the security provider who must not act for a professional purpose *(à titre non-professionnel)*. According to the proposed CC art. 2305 the engagement of the provider of dependent security must not be manifestly disproportionate to the provider's financial capacity and income, unless at the time of the requested performance the provider is able to perform the obligation. However, as a result of the transfer of the protective rules from the Consumer Code to the Civil Code, the natural person who assumes a dependent security for a professional purpose should not be considered as a consumer but as a person requiring special protection.

(j) Consumer debtor of the secured obligation

67. A few member states regard as decisive not the person of the security provider but that of the debtor of the secured obligation. In ENGLAND personal securities are only subject to specific consumer credit legislation if the secured debt is a regulated agreement according to ENGLISH ConsCredA 1974 ss. 8 and 15. The decisive criterion is whether the debtor is an individual protected under the provisions of that Act. To consumers securing obligations which are not regulated agreements (in the meaning of these Acts), the more general consumer legislation applies (ENGLAND: UnfContTA 1977, Unfair Terms in Consumer Contracts Regulations 1999). In ENGLISH law it is nowhere discussed whether for the purposes of the ConsCredA, in addition, the security provider also has to fall within the definition of consumer. However, it seems that, since the wording of ConsCredA s. 189 simply defines the security provider as "the person by whom any security is provided", the security provider does not necessarily have to be a consumer for the Act to apply. The situation appears to be similar for the purposes of the application of the IRISH ConsCredA s. 30(1) lit. b. A similar situation can also be found in BELGIAN law, where ConsCredA arts. 34–37 only apply to personal securities granted in order to secure debts arising from a consumer-credit-agreement – without distinguishing between consumer and other security providers. If the debtor is not a consumer, the credit agreement falls beyond the scope of the ConsCredA. Other consumer protective legislation, such as the Commercial Practices Act may apply.

(k) Alternative between solutions a. and b

68. In ITALY the scope of the legislative provisions on consumer protection together with the criteria developed by case law in the last years seem to lead to the following practical results: Consumer protection legislation will be applicable to personal securities (a) when the security provider acts as consumer; or (b) when the security

provider acts as professional, but the principal debtor is a consumer. This last alternative has been developed by the courts (Cass. 11 January 2001 no. 314, Foro it. 2001 I 1589; Cass. 13 May 2005 no. 10107, Foro it. Mass. 2005, 1203): the accessority of the security to the relationship between debtor and creditor makes it possible to apply the rules of consumer protection of the latter relationship to the former (*Palmieri* 1598; *Falcone* 91; *Ruggeri* 685 s.). Therefore, consumer protection legislation will be not applicable when the security provider acts as a professional in order to secure an obligation of another professional, as in the situation of security provided by the manager of the company in favour of the latter (*Falcone* 92). In the model contract of personal security provided by the Association of Italian Banks (version 11 November 2003), however, it is suggested to restrict the scope of consumer protection to situations where both the security provider and the debtor of the secured obligations act as consumers. This model contract has no binding character though (*Falcone* 91).

X. Proprietary security

(l) Definition

69. The distinction between proprietary and personal security rights is recognized in all European countries. However, a definition of proprietary security is not given in the civil codes, but rather is traditionally left to scholarly writings.

70. In BELGIUM, FRANCE, ITALY, LUXEMBOURG and PORTUGAL the notion of proprietary security right (*sûreté réelle* or *sûreté, garanzia reale*) is sometimes used by the legislators (cf. FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 1188 "*… le bénéfice du terme lorsque par son fait il a diminué les sûretés qu´il avait données par le contrat à son créancier*"; ITALIAN CC arts. 156(4), 506(2), 1179, 1828(1), 1844(1), 2795(2) and (3); PORTUGUESE CC arts. 624, 639, 674(3)).

(m) Proprietary rights granted by third persons

71. In most member states proprietary securities granted by a third party who is not the debtor of the secured obligation are classified as proprietary security rights, although overlappings with the position of the provider of dependent personal security sometimes come to the surface: Rules on dependent personal security are sometimes applicable – by virtue of express legal provision or by analogy – not only to the relationship between the third-party provider of proprietary security and the debtor, but also to the relationship between the third-party provider of proprietary security and the creditor (FINLAND: LDepGuar § 41; RP 189/1998 rd 78 ss.; ITALY: CC arts. 2868-2871 on the effects of land mortgages of a third-party security provider are applicable by analogy to third-party security providers of pledges, *Gorla and Zanelli* 457 ss., 460; PORTUGAL: *Antunes Varela* II 520 fn. 2; SPAIN: *Carrasco a.o.* 478 ss.; for a qualification of the third-party provider of proprietary security as a subject assuming personal liability for the secured debt as an "*obligado sui generis*", whose liability is limited to the specific encumbered asset cf. TS 23 March 2000, RAJ 2000, 2025).

72. In FRANCE, although the term "*cautionnement réel*" seems to refer to a personal security, a third-party proprietary security is considered as a proprietary right as far as the external relationship between the creditor and the security provider is concerned (cf. recently Cass.com. 7 March 2006, Bull.civ. 2006 IV no. 59 p. 59 confirming Cass.ch.mixte 2 December 2005, Bull.civ. 2005 ch.mixte no. 7 p. 17, JCP G 2005 II no. 10183; *Grimaldi* Commission´s proposed art. 2295 "*Le cautionnement réel est une sûreté réelle constituée pour garantir la dette d´autrui*"; *Simler* no. 20). However, it is

possible that the provider of a proprietary security in addition also assumes a personal security (Cass.com. 21 March 2006, Bull.civ. 2006 IV no. 72 p. 71).

IV.G.–1:102: Scope

(1) This Part applies to any type of voluntarily assumed personal security and, in particular, to:

(a) dependent personal securities, including those assumed by binding comfort letters;

(b) independent personal securities, including those assumed by stand-by letters of credit; and

(c) co-debtorship for security purposes.

(2) This Part does not apply to insurance contracts. In the case of a guarantee insurance, this Part applies only if and in so far as the insurer has issued a document containing a personal security in favour of the creditor.

(3) This Part does not affect the rules on the aval and the security endorsement of negotiable instruments, but does apply to security for obligations resulting from such an aval or security endorsement.

COMMENTS

A. Types of personal security covered

Personal security. Paragraph (1) opens with a general formula indicating that this Part covers "any type of voluntarily assumed personal security". Personal security must be contrasted with proprietary security: in the latter case, the security provider's liability towards the creditor is limited to the encumbered asset. By contrast, in any type of personal security the security provider is liable towards the creditor with all assets – up to the agreed maximum amount, if any.

Types of personal security. This general formula is supplemented by an enumeration of three major types of personal security in paragraphs (a) to (c). However, this enumeration is open-ended, as the words "in particular" indicate. This is necessary in order to make sure that special instruments that may be evolved in future will be covered if they meet the general criterion laid down in the opening general term.

Dependent personal security. Paragraph (1)(a) starts out by mentioning dependent personal securities – the "suretyship guarantees" of English law. See the Comments to the preceding Article. A modern type of dependent personal security expressly mentioned in sub-paragraph (a) is that created by a binding comfort letter.

"Binding" comfort letters. Comfort letters are a recent phenomenon primarily of commercial practice fulfilling a security function outside the traditional scheme of instruments of personal security. Security providers as well as creditors have differing reasons (such as accounting, taxes, fees etc.) to avoid using one of the traditional means of creating a personal security which would achieve the same purpose. One may distinguish a commercial and a non-commercial type. Comfort letters of the commercial type are used in many countries in the framework of corporate financing. As a result of individual negotiation, they are couched in very different terms. So-called comfort letters of a non-commercial type and of a different design are also issued in some countries by individuals in connection with the (temporary) admission of aliens. In these letters the issuer, a citizen and inhabitant, promises, on a form supplied by the public authority, to reimburse public authorities for any financial

assistance from public resources that may have to be rendered to the alien during his or her stay in the country.

A preliminary general issue is whether comfort letters are binding. This is partly a question of interpretation to be solved by the rules laid down in Book II, Chapter 8.

Most binding comfort letters, especially those of a commercial type, differ from the usual forms of personal security. The provider undertakes to make payments to the creditor's debtor (usually a company which is a subsidiary of the security provider or a company controlled by the security provider) in order to enable it to perform its obligations to the creditor. Practice converts any breach of this promise, especially in the debtor company's insolvency, to a claim for damages by the creditor against the sender of the binding comfort letter.

By contrast, in the non-commercial type of comfort letter the sender promises reimbursement of the public expenses to the creditor, on the same pattern as in a traditional personal security.

The sender of a binding comfort letter will not usually be willing to make payment for the creditor's claims against the debtor, unless the latter is insolvent. Also, the sender will not be willing to pay more or under less favourable conditions than those of the debtor's obligations. These two criteria imply that the rules of Chapters 1 and those of Chapter 2 on dependent personal security apply to binding comfort letters.

Independent personal security. Paragraph (1)(b) deals with independent personal security, the modern branch of the field. One particular form of independent personal security is that assumed by a stand-by letter of credit.

Stand-by letters of credit. In a "pure" letter of credit a bank promises payment of a sum of money to a creditor if the latter so demands; possibly, the creditor has to present certain documents on which the demand is based. Such letters of credit serve as a primary means of payment for goods sold by the creditor or for another performance, such as work or services.

By contrast, stand-by letters of credit serve a security function. They are issued in order to create a security which may be utilised by the creditor if the conditions fixed for its utilisation are fulfilled. Even a "pure" letter of credit may in reality have been issued for a security purpose; that would bring it under the present Part.

Stand-by letters of credit are subject to Chapters 1 and 3 of this Part.

Co-debtorship for security purposes. Recent protective legislation and court practice in some countries, especially that dealing with consumer security providers, extends to debtors who assume a solidary obligation along with the "principal debtor", provided this assumption of debt is undertaken for security only. Such a collateral debtor deserves indeed the same protection as a security provider. The term "co-debtorship" covers both an initial co-debtorship and a subsequent assumption of a solidary debt after the "principal" debtor had already incurred an obligation. Co-debtorship for purposes of security is governed by IV.G.–1:104 (Co-debtorship for security purposes).

Nature of the secured obligation. One aspect of the secured obligation is already covered by IV.G.–1:101 (Definitions) paragraph (a): the secured obligation may be present or future. The latter rule implies that it may also be conditional; if subject to a suspensive condition, it will arise as soon as the condition materialises. If the secured obligation is subject to a resolutive condition, it is a present obligation.

B. Personal security and insurance

In paragraph (2), the first sentence expressly excludes insurance contracts from the scope of application of the present Rules. In a very broad functional sense third party liability insurance may be regarded as a kind of personal security. However, the general structure of insurance contracts of which those contracts form but a part and the special European rules that are envisaged to govern them exclude even this branch of insurance from the scope of application of this Part.

The same general considerations apply to credit insurance, *i.e.* an insurance taken out by the creditor against loss due to the debtor's insolvency. Although functionally very close to a personal security, credit insurance is everywhere regarded as a pure insurance contract and therefore subject to the relevant rules of this branch of the law.

Functionally even closer to personal security is guarantee insurance since it is taken out by the debtor, usually on the demand of the creditor and in the creditor's favour. Practice and legislation seem to vary considerably from country to country, and this is reflected in differing doctrinal qualifications. These, however, also are highly controversial within some countries, such as Germany and Spain. In France, the Benelux countries, Austria and apparently also in England, guarantee insurance seems to be regarded as a pure insurance contract, insuring the creditor against the debtor's insolvency. In other countries, especially in Germany, Italy and Spain, perhaps also in the Scandinavian countries, the insurer issues on the basis of the insurance contract a (dependent or independent) personal security to the creditor; thus an insurance contract and a personal security are combined. Paragraph (2) sentence 2 restricts the application of this Part to this personal security, to the exclusion of the underlying insurance contract.

C. Personal security and negotiable instruments

Paragraph (3) makes clear that the rules applicable to the aval of negotiable instruments, especially those governed by the Geneva Uniform Laws on Bills of Exchange (arts. 30–32) and of Cheques (arts. 25–27) of 1930 and 1931, respectively, have precedence over the rules of this Part. The same applies to corresponding national laws which are not governed by the aforementioned Geneva Conventions. This is especially true for the form of the aval and the avalist's liability. The same precedence is enjoyed by the English and Irish rules on the security endorsement (sec. 56 Bills of Exchange Act) which differ to some degree from those of the Geneva Uniform Laws.

However, apart from these special rules and the general provisions on negotiable instruments into which those special rules are embedded, paragraph (3) implies that the aval and the security endorsement are two types of personal security; therefore, subsidiarily the rules of this Part apply, as the last half-sentence spells out.

D. Aspects of public law

In practice, personal security, especially in the form of dependent and independent personal securities, plays an important role in economic law. In this respect, various aspects of public law may become relevant.

First, public law rules may establish an obligation, or offer the possibility, to provide personal security, and they may also require specific features for such security. Such public duties and requirements do not, however, affect the legal nature of the personal security that has to be provided. Therefore, the rules of this Part are applicable.

Secondly, personal security may be demanded or provided in order to secure public obligations, such as taxes or customs duties. An example of great practical importance is the international transport of goods under cover of carnets TIR, as regulated by the so-called TIR Convention of 14 November 1975. In essence it provides that border-crossing road transports of goods are exempted from controls and the payment of customs duties if they are made under cover of a carnet TIR. Such carnets are only issued if an approved "guaranteeing association" has provided a carnet TIR. The guaranteeing association is liable, "jointly and severally with the persons" who owe payment of the customs duties (art. 8 para. (1)); this liability is subsidiary to that of the debtors (art. 8 para. (7)).

Again, the rules of this Part are fully applicable. The fact that the secured obligation is governed by public law does not exclude the application of this Part. This is even true for a dependent personal security where the security provider may invoke the debtor's defences, possibly even defences rooted in public law.

Thirdly, the strongest aspect of public law may become visible if the state or another public authority provides a personal security, especially a dependent security. Depending upon the legal and factual circumstances, such a security may be regarded as one of private law and therefore be subject to these Rules. But even if it is regarded as one of public law, these Rules may be relevant. If and in so far as there are no specific rules on personal security of public law, the rules of this Part may be applicable directly or at least by analogy.

E. Freedom of contract

The rules in this Part are mainly default rules. This follows from II.–1:102 (Party autonomy). Only in Chapter 4 (Special Rules for Personal Security of Consumers) are there any mandatory rules.

NOTES

1. The scope of personal securities has to be understood as broadly as possible. Not only typical forms of security (established by legislation or firm case law) but atypical personal securities are also regulated by the rules of this Part.

I. Typical personal securities

(a) Dependent personal security

2. The main typical personal security is the contract of dependent personal security (cf. the national notes on the preceding Article, nos. 5-10).

3. The rules on dependent personal security have been considered as a kind of general law for personal securities. In most member states the rules on dependent personal security are applicable to any kind of personal security if possible according to their nature and unless otherwise agreed (BELGIUM: *Dirix and De Corte* no. 383; FRANCE: Cass.com. 19 November 1985, JCP E 1986 I no. 1551; GREECE: see national notes on preceding Article no. 18; ITALY: *Giusti* 8 s.; NETHERLANDS: *du Perron and Haentjens*, Inleiding no. 6 and HR 25 September 1998, NJ 1998 no. 892 *sub* no. 3.4; PORTUGAL: STJ 23 November 1971, RT no. 1867, 23; *Almeida Costa* 763; *Galvão Telles* 278; SPAIN: *Díez-Picazo* 416; *Lacruz Berdejo* 499).

4. By contrast, the rules on dependent personal security *(Bürgschaft)* of the GERMAN CC §§ 765 ff are in general not applied, even by analogy, to other instruments of personal security, especially not to independent personal securities (Palandt/*Sprau* no. 2 preceding § 765; Erman/*Herrmann* no. 21 preceding § 765; but see also Staudinger/*Horn* no. 197 preceding §§ 765 ss. with some qualifications). Similarly, in PORTUGAL they are generally not applied to independent personal securities (STJ 27 January 1993, BolMinJus no. 423, 483; STJ 11 November 1999, 694/99 www.dgsi.pt; *Cortez* 590) nor to the aval (STJ 4 October 2000, 2228/00 www.dgsi.pt; different: STJ 7 May 1993, 83594 www.dgsi.pt).

(b) Independent personal security

See the national notes on the preceding Article nos. 11-18 and the national notes on IV.G.–3:101 (Scope).

II. Atypical personal securities

(c) Binding comfort letters origins

6. The comfort letter as a personal security right is known in the legal practice of most member states. The comfort letter appeared only recently in the practice of FRANCE, PORTUGAL and SPAIN (FRANCE: Cass.com. 21 December 1987, D. 1989, 112; PORTUGAL: CA Lisboa 15 February 2001, 94458/00 www.dgsi.pt; SPAIN: TS 16 December 1985, RJ 1985/6442, 30 June 2005, RAJ 2005/ 5089; *Carrasco*, CCJC 71 (2006) § 1897 In FRENCH literature, the comfort letter was known under various and equivalent denominations like *"lettre d´intention"*, *"lettre de confort"* or *"lettre de patronage"* (*Simler* nos. 1008 ss.). Since Decree-Law no. 2006-346 of 23 March 2006 the comfort letter is recognised as a security by the legislator and the name of *lettre d´intention* prevails (CC new art. 2322). In DANISH law the term comfort letter *(støtteerklæring)* was first introduced in 1986 by *Harboe Wissum* (UfR 1986 B 340 ss.; *Iversen* 15) and there are only very few DANISH decisions (*e.g.* CA Vestre Landsret 21 March 1989, UfR 1989 A 618). In GREECE, although unknown to practice (there is no case law), they have been dealt with in literature, where they are translated with the term "letters declaring interest" (*Velentzas* 381) or "patronic statements" (*Filios* II/1 §126, 81-82; *Georgiades* § 6 no. 19 refers to both). In GERMANY comfort letters are a well known type of personal security nowadays (*Fleischer*, WM 1999, 666). Several GERMAN courts dealt with comfort letters (CA Düsseldorf 26 January 1989, NJW-RR 1989, 1116; CA Karlsruhe 7 August 1992, WM 1992, 2088; BGH 30 January 1992, BGHZ 117, 127 (applying AUSTRIAN law); CA

München 24 January 2003, DB 2003, 711; CA Berlin 18 January 2002, WM 2002, 1190).

(c) Binding character

7. Whether a comfort letter is legally binding must be ascertained, in view of the great variety of such declarations (GERMANY: examples at *Lwowski* nos. 445-465), by interpretation of the specific instrument (GERMANY: BGH 30 January 1992, BGHZ 117, 127 at 129; CA Berlin 18 January 2002, WM 2002, 1190 at 1191). Whether any legally binding liability (or merely a moral obligation) has been created and what kind of liability has been assumed by the issuer of the comfort letter depends upon the careful interpretation of the wording of the agreement (ITALY: *De Nictolis* 386, 396; Cass. 27 September 1995 no. 10235, BBTC 1997 II 396; PORTUGAL: *Soares da Veiga* 380; SPAIN: *Carrasco* , Las nuevas garantías 636). The same is true in DENMARK and SWEDEN (DENMARK: *Iversen* 151 s.; SWEDEN: HD 25 June 1992, NJA 1992, 375; HD 7 April 1994, NJA 1994, 204; HD 27 October 1995, NJA 1995, 586; *Hellner*, Avtalsrätt 79 s.; *Ramberg* 152 s.). In SPAIN the TS 30 June 2005, RAJ 2005/5089, held as binding a comfort letter with an interpretation strongly supported in the presumption that the issuer has asked the beneficiary to provide credit to the subsidiary, and assuming that any person who ask another to provide credit to a third party assumes liability for such third party's non-performance. On the contrary, in the TS 13 February 2007, RAJ 2007/684, the Supreme Court disqualified the letter as a binding transaction due to the weight given to the statement that the issuer was entitled to release its equity in the subsidiary without getting the consent of the beneficiary.

8. In ITALY, binding comfort letters are declarations that are considered as being legally binding upon the author of the letter (*Costanza*, Lettere di patronage 485 ss.; *Bozzi*, Le garanzie 347 s.; Cass. 27 September 1995 no. 10235, Arch.civ. 1996 I 3007). In GREECE binding comfort letters may either have the character of an independent personal security, thus creating for the sender an autonomous contractual obligation (*Velentzas* 383-384), or they may give rise to liability for *culpa in contrahendo* vis-à-vis the receiver of the letter (*Georgiades* § 6 no. 21). According to both opinions, the claim for compensation in favour of the receiver is not necessarily equal to the amount of the enterprise's debt vis-à-vis the creditor as receiver of the letter. It has been accepted in SWEDEN that depending on its wording, in appropriate circumstances a comfort letter can be regarded as binding, thereby constituting a form of dependent personal security (cf. HD 27 October 1995, NJA 1995, 586; *Gorton*, Suretyship 583 fn. 18). In ENGLAND it is asserted that, even were a letter of comfort to create a binding obligation (compare *Kleinwort Benson Ltd v Malaysia Mining Corp*. [1989] 1 WLR 379, where the letter was held merely to be a statement of intention which had no binding force), the degree of protection might be less than under a security: the creditor will have to establish a sufficient causal connection between the parent company's failure to do what it promised in the comfort letter and the creditor's loss, which might for instance be doubtful if the subsidiary would have become insolvent anyway (*Andrews and Millett* no. 14-015). In FRANCE the comfort letter is according to the Supreme Court regarded now as binding, irrespective of the nature of the liability assumed by the patron (cf. Cass.com. 9 July 2002, Bull.civ. 2002 IV no. 117 p. 126, Revue des sociétés January-March 2003, 124 ss.: a parent company may be bound towards the creditor by merely an obligation of care), contrary to earlier decisions imposing a liability for result (Cass.com. 26 January 1999, D. 1999, 577, note *Aynès*).

(e) Qualification

9. It is not possible to provide a common legal qualification of comfort letters, since the extent and kind of liability supplied by this instrument depend on the concrete agreement of the parties (BELGIUM: *Van Quickenborne* no. 847; FRANCE: The *Grimaldi* Commission´s proposal of a CC new art. 2324 mentioned expressly that the terms vary; but this proposal was not adopted by the CC new art. 2322 (as inserted by DL no. 2006-346 of 23 March 2006); *Simler* nos. 1009 s.; GERMANY: *Reinicke and Tiedtke*, Kreditsicherung 153; GREECE: *Georgiades* § 6 no. 21; ITALY: Cass. 27 September 1995 no. 10235, Arch. civ. 1996 I 3007; *Mazzoni*, Lettere di patronage 564; *De Nictolis* 386; NETHERLANDS: *Wessels* 7; PORTUGAL: STJ 19 December 2001, 2509/01 www.dgsi.pt; *Soares da Veiga* 380; SPAIN: *Carrasco*, Las nuevas garantías 632). The recent FRENCH provision characterises the contents of a comfort letter in a very general way as "support of the debtor in the performance of the obligation towards the creditor" (CC new art. 2322 of 2006). In appropriate circumstances comfort letters may give the creditor similar rights as a contract of dependent or independent personal security (BELGIUM: *Van Quickenborne* no. 848; ENGLAND: *Chemco Leasing SpA v. Rediffusion* [1987] 1 FTLR 201 where, however, the court refused to impose liability on the parent company for the creditor's lack of compliance with an implied term, cf. *Andrews and Millett* no. 14-015; GERMANY: BGH 30 January 1992, cit. at p. 132; *Lwowski* no. 441; ITALY: CFI Milano 17 December 1994, BBTC 1996 II 346; *De Nictolis* 393; NETHERLANDS: *Blomkwist* 15; *Wessels* 7; PORTUGAL: CA Lisboa 15 February 2001, 94458/00 www.dgsi.pt, treated a comfort letter as an independent personal security; *Menezes Cordeiro*, Direito 624; SPAIN: *Carrasco*, Las nuevas garantías 670). The AUSTRIAN Supreme Court qualified a binding comfort letter in one case as an independent guarantee (OGH 23 March 1988, SZ 61 no. 73 at p.365). However, in another case in which an Austrian citizen obliged himself to reimburse the Federal government and other public bodies for expenses made to support a foreigner who, on the basis of this declaration, had been admitted to enter, and stay in, the country, the Supreme Court qualified such a declaration as a suretyship and not an independent guarantee (OGH 23 February 2000, SZ 73 no. 36 at p. 209 s.). In ITALY the similarity between binding comfort letters and the dependent personal security has been stressed, but the prevailing view among the authors is in favour of distinguishing it from the typical dependent personal security (*Di Giovanni* 121 ss.; *Mazzoni*, Le lettere di patronage 480) and the same trend is followed by the courts (Cass. 27 September 1995, no. 10235, cit.). The main difficulty to consider a binding comfort letter fully as a dependent personal security is the absence of an express intention of the parent company to grant security, which is required by ITALIAN CC art. 1937 for the valid creation of dependent personal securities, as well as the nature of the obligation assumed by the promisor, which has not the same content as the principal obligation secured (CA Roma 4 December 1979, BBTC 1981 II 88; *Bozzi*, Le garanzie 350). However, if according to the rules of interpretation, the intention to grant a dependent personal security can be deduced from the wording of the letter, it will have to be considered a dependent personal security (CFI Milano 17 October 1994, BBTC 1995 II 346; for a recent assimilation of a binding comfort letter to a dependent personal security, by way of analogical application to it of CC art. 1938 concerning the necessary maximum amount of the security see CFI Roma 18 December 2002, Giur.mer. 2003, 1661). In FRANCE a binding comfort letter can be considered as a personal security *sui generis (garantie)* mentioned in Ccom art. L 225-35, which seems to differ from a dependent or an independent personal security (Cass.com. 9 July 2002, Revue des sociétés January-March 2003, 124 ss.). In the *Grimaldi* Commission´s proposal, as adopted by Decree-

Law no. 2006-346 of 23 March 2006, the comfort letter *(lettre d´intention)* constitutes a third category of personal security (cf. new chapter III of title I on personal securities and CC new art. 2322 merely giving a definition). If the company which the issuer of a binding comfort letter had promised vis-à-vis the creditor to support becomes bankrupt, the promisor is liable to the creditor for damages for non-performance of this binding promise (AUSTRIA: OGH 23 March 1988, cit. at p.365; *Leitner* 522; GERMANY: BGH 30 January 1992, cit. at 132; CA Berlin 18 January 2002, cit. at p. 1191; Staudinger/*Horn* nos. 441 s. preceding §§ 765 ss.) The issuer of the letter and the supported company are liable as solidary debtors to the creditor, like a surety and the principal debtor (AUSTRIA: *Harrer* 77; *Leitner* 525; GERMANY: BGH 30 January 1992, cit. at p. 132, 134; Staudinger/*Horn* no. 415 preceding §§ 765 ss.; *Bülow*, Kreditsicherheiten no. 1623).

10. According to a DANISH author (*Gomard* 56 fn. 11) a comfort letter cannot in general be considered to be a personal security and in the opinion of one writer (*Iversen* 25 fn. 31) comfort letters can under no circumstances be similar to personal securities.

(f) Stand-by letters of credit generalities

11. Since stand-by letters of credit are mainly used in international commercial transactions they tend to escape a 'pure' national regulation in most countries. This subject matter is usually governed by the *lex mercatoria* (UCP 500 (1993) and ISP98 of the International Chamber of Commerce in Paris) and international conventions (UN Convention on Independent Guarantees of 1995); the influence of this 'trans-national' law is often to be found in national laws.

(g) Qualification

12. Stand-by letters of credit are similar to independent personal securities (GERMANY: *Schütze* nos. 93 ss.; *Zahn, Eberding and Ehrlich* nos. 8/10 ss.; GREECE: *Georgiades* § 6 no. 26; ITALY: *Costa* 270; *Terrile* 591; *Pontiroli*, Garanzie autonome 233 and 249; *Di Meo* 330; NETHERLANDS: cf. *de Rooy* 1115; *Ebbink* 543; PORTUGAL: *Soares da Veiga* 360). Therefore GERMAN courts apply the principles that have been developed for independent personal securities on first demand also to stand-by letters of credit (CA Frankfurt 18 March 1997, WM 1997, 1893). FRENCH opinion considers that the banker's engagement is autonomous from the underlying contract (*Ripert and Roblot* no. 2386-1) and that a stand-by letter of credit is a genuine personal security (*Simler* no. 870 p. 901).

13. Stand-by letters of credit are mainly used in the UNITED STATES and in international trade so that national court practice in Europe is rare (for GERMANY cf., apart from the aforementioned decision, BGH 26 April 1994, WM 1994, 1063). In ENGLAND and SCOTLAND stand-by letters of credit resemble performance bonds and demand securities, which clearly are securities. They have only been considered in very few ENGLISH decisions (cf. *Offshore International SA v. Banco Central SA* [1977] 1 WLR 399 (CFI); *Hongkong & Shanghai Banking Corp. v. Kloeckner & Co. AG* [1990] 2 QB 514). The same principles as in regular letters of credit apply because "in law a standby credit is no different from any other type of credit" (*Jack, Malek and Quest* no. 12.15, 3rd ed. (2000)). In ENGLAND it is highlighted that the differences to demand personal securities "lie in business practice, not in law" (*Goode*, Commercial Law 1018).

(h) Co-debtorship for security purposes

14. See national notes on preceding Article nos. 37-39 and notes on IV.G.–1:106 (Serveral security providers: internal recourse).

III. Credit insurance and guarantee insurance

(a) Credit insurance

15. A *credit* insurance, *i.e.* an insurance taken out by the creditor against the loss due to the debtor's insolvency, may in fact create a kind of personal security, but is in some countries regarded as a pure insurance contract (BELGIUM: *Van Quickenborne* nos. 852–860; DENMARK: H 6 May 1991, UfR 1991 A 523; FRANCE: *Simler* nos. 24 s.; *Cerini*, L´assicurazione del credito interno in Francia 539 ss., 558 ss.; GERMANY: *Meyer* 35, with examples of general conditions of insurance concerning credits on goods in the annex; GREECE: cf. Insurance Law 2496/1997 art. 22(1); ErmAK/*Zepos* no. 35 preceding art. 847-870; *Rokas* nos. 155-156; ITALY: *Cerini*, L´assicurazione del credito interno in Francia 563; *Fanelli* 27 s.; LUXEMBOURG: *Ravarani*, Rapport Luxembourgeois 422; NETHERLANDS: *De Vries* 468; PORTUGAL: Credit and Guarantee Insurance Decree Law 183/88 art. 8, last modified in 1999; STJ 9 March 1995, BolMinJus no. 445 (1995) 552; however, credit insurance is considered as having the function of a dependent or independent personal security: *Menezes Cordeiro*, Direito 614; SPAIN: Law 50/1980 of 8 October 1980 on Insurance Contracts arts. 69-72; *Tirado Suárez* 444 ss.; SWEDEN: *Walin*, Borgen 137 ss.).

(b) Guarantee insurance

16. The *guarantee* insurance is agreed between the debtor and the insurer, which secures vis-à-vis the creditor the payment of the debt in favour of the debtor. This contract is regarded in some countries as an insurance (BELGIUM: *Van Quickenborne* nos. 861-862; FRANCE: controversial, *Simler* no. 25; Larroumet/*François* nos. 16 ss.; SWEDEN: HD 9 September 1999, NJA 1999, 544; *Hellner*, Försäkringsrätt 447; GREECE: cf. Insurance Law 2496/1997 art. 11 read with art. 22(2); the guarantee insurance is classified in the Second Part of this Law as a special branch of insurance against damages; *Rokas* no. 154). In GERMANY the basic relationship between the debtor and the insurance company is considered as a special type of an insurance contract that is mostly governed by standard terms concerning guarantee insurance (cf. CA Koblenz 16 February 1996, VersR 1997, 1486; *Meyer* 118 ss.); on the basis of this contract, a security is issued to the creditor (cf. CA Koblenz, as before; *Beuter* no. 409 at p. 412). In ITALY the guarantee insurance is recognized by several provisions of special statutes (*e.g.* RD no. 827 of 23 May 1924, art. 54 as modified in 1948; RDL no. 210 of 7 August 1931, art. 5; RDL no. 1113 of 7 August 1931, art. 1 ss.; DPR 26 October 1972 no. 633, art. 38*bis*; DPR no. 43 of 23 January 1973, art. 87 and Law no. 348 of 10 June 1982, art. 1), which, however, do not provide a general regulation. A well-established case law regards the guarantee insurance as a dependent personal security, unless differently agreed by the parties (Cass. 1 June 2004 no. 10486, BBTC 2005 II 481 ss.; Cass. 15 March 2004 no. 5239, Assicurazioni 2004, 231 ss.; Cass. 17 May 2001 no. 6757, Giust.civ. 2002, 729; Cass. 18 May 2001 no. 6823, Giur.it. 2001 I 3174; Cass. 26 June 1990 no. 6499, Giur.it. 1991 I 446; Cass. 17 May 1988 no. 3443, BBTC 1989, 429; recently also CA Milano 14 May 2004, BBTC 2004 II 619 ss. note *Barillà*, Il Garantievertrag 633 ss.), whereas scholarly writings show less uniformity on the point and consider this contract sometimes as an insurance (*Stolfi* 67 ss.; *Barbieri* 502), sometimes as an 'atypical' contract to which the rules governing dependent personal security are substantially applicable, unless differently agreed by the parties (*Volpe Putzolu* 245; *La Torre* 103 ss.; *Lipari* 133 ss.; *Vaccà* 167; *Costanza*, L´assicurazione fideiussoria 2418 ss.; *Bozzi*, Le garanzie 65). It has been noticed that commercial practice usually tends to regulate the internal relationship between insurer and debtor according to the rules on insurance contracts and the outside relationship

between insurer and beneficiary of the contract (the creditor) according to the rules on dependent personal security (*Bozzi*, Le garanzie 67 ss.). In PORTUGAL guarantee insurance is regulated by Decree-Law 183/88 (last modified in 1999) arts. 6-14. It is an insurance (STJ 12 March 1996, CJ [ST] IV [1996-1] 143), but it is equivalent to a dependent (CA Oporto 7 May 1998, www.dgsi.pt Processo 9750894) or independent (STJ 9 May 2002, 1014/02 www.dgsi.pt; STJ 28 May 2002, 636/02 www.dgsi.pt) personal security (STJ 19 March 2002, 2832/01 www.dgsi.pt). In SPAIN, however, after much controversy about its legal nature (*Camacho de los Ríos* 81; *Carrasco* Comentario 653), a mixed approach prevailed, according to which the guarantee insurance (cf. Law 50/1980 on Insurance Contracts art. 68) is an insurance contract, from which a security obligation arises (*Carrasco*, Comentario 653) and therefore the rules on personal securities are concurrently applicable with insurance rules (*Embid Irujo* 1863). A similar approach is followed in SWEDEN: the mandatory rules of the Law on Insurance Contracts prevail but the non-mandatory rules may be replaced by the rules on personal securities (*Walin*, Borgen 137-141). Also in ENGLISH law, it is accepted that insurance contracts, where the insured event is the default by a debtor, are equivalent to a personal security contract para. 1022 Vol 49, 5th ed, (2008)).

IV. The aval

(a) Origins

17. The Uniform Laws of Geneva 1930/1931 on bills of exchange and on cheques regulate these special forms of personal security. Almost all Member States are parties to the Uniform Laws of Geneva, except IRELAND and the UNITED KINGDOM. SPAIN, on the other hand, has signed but not ratified the Uniform Laws. However, Law 19/1985 on bills of exchange, promissory notes and cheques has fully adopted its contents, expressly mentioning the Geneva Conventions in its motives.

(b) Qualification

18. In some countries, the rules of the civil codes on dependent personal securities cannot apply to the aval; since the avalist is no provider of dependent security, the relevant rights and obligations are regulated by the provisions on bills of exchange and cheques (BELGIUM: Cass. 3 April 1981, Arr.Cass. 1980-81, 874; *Van Quickenborne* no. 883; GERMANY: BGH 6 April 1961, BGHZ 35, 19, 21; Scholz/*Lwowski* no. 440; Staudinger/*Horn* no. 423 preceding §§ 765 ss.; GREECE: A.P. 1306/1984, EED 37, 87; CA Athens 8840/1984, EED 37, 300; *Georgiades* § 4 no. 67; NETHERLANDS: *Blomkwist* 15; PORTUGAL: STJ 13 October 1998, 779/98 unpublished; STJ 4 October 2000, 2228/00 www.dgsi.pt; while according to the majority view in the literature the aval is characterised by an imperfect autonomy, its pure autonomy is argued by: *Sendim and Mendes* 13). In ITALY and SPAIN, however, despite the autonomous character, which distinguishes the aval from the dependent personal security, it has been recognised that the aval has a limited accessory character due to its security function. Therefore, the rules on dependent personal securities may apply by analogy (ITALY: for CC art. 1948, 1953, 1955: Cass. 11 September 1953 no. 3026, Foro pad. 1953 I 1273; Cass. 8 June 1976 no. 2090, Giust.civ. 1976 I 1225; Cass. 11 September 1997 no. 8990, Giust.Civ.Mass. 1997, 1688; Cass. 7 May 1998 no. 4618, BBTC 2000 II 118; excluded are CC art. 1956 and 1957: Cass. 8 June 1976 no. 2090, cit.; Cass. 23 March 1994 no. 2782, Foro it. 1994 I 3070; *Angeloni* 32; *Bianchi d´Espinosa* 577; *Tedeschi* 533; SPAIN: *García Cortés* 518). In GREECE it is accepted, that an invalid aval may be converted into a dependent personal security, if the parties would have wished to contract a security, had they known the invalidity of the aval (cf. CC art. 182; *Georgiades* § 4 no. 71 fn. 37). By contrast, in PORTUGAL

an aval may not be automatically converted into a dependent personal security for, according to CC art. 628(1), the contract of dependent personal security must be based on an explicit declaration; but the aval giver, according to the interpretation of the parties' intention and declaration, can assume an obligation also as a provider of security (STJ 17 May 1977, BolMinJus no. 267, 149; CA Lisboa 20 April 1993, CJ XVIII, II-138; STJ 9 October 1997, 123/97 www.dgsi.pt). In FRANCE the aval is considered as a dependent personal security with primary liability (*Simler* no. 107; Cass.com. 28 October 1952, JCP G 1953, II no. 7588).

19. The ENGLISH, SCOTTISH and IRISH Bills of Exchange Acts do not specifically provide for a security comparable to the aval. In practice, either a formal security to honour the bill is provided separately or the bill will be endorsed by a "stranger", *i.e.* a person not belonging to the sequence of endorsers (*Jahn* 85); according to the Bills of Exchange Act 1882 s. 56, such an endorser is liable as (any other) endorser to a holder in due course. Although such an endorsement is in substance a security the Statute of Frauds cannot be set up as a defence to the claim (ENGLAND: *G. & H. Montage GmbH v. Irvani* [1990] 1 WLR 667; *Banco Atlantico SA v. British Bank of the Middle East* [1990] 2 Lloyd´s Rep 504).

V. Freedom of contract

20. Contracts of personal security are regarded as part of the law of contract in all member states (cf. ENGLAND: *Moschi v. Lep Air Services Ltd.* [1973] AC 331; DENMARK: *Pedersen*, Kaution 15; FRANCE: *Simler* nos. 122 ss. for dependent personal security and nos. 930 ss. for independent personal security; GERMANY: *Horn*, Bürgschaften nos. 4 and 7; ITALY: *Sacco*, Autonomia contrattuale 796 ss.; *Roppo* 23 ss.; *Piazza* 5; NETHERLANDS: *du Perron and Haentjens*, Inleiding no. 3 with references; PORTUGAL: *Almeida Costa* 770 ss.; SPAIN: *Vicent Chuliá* 375 s.; SWEDEN: *Walin*, Borgen 36 ss.). Consequently, the rights and obligations of the parties under these contracts are determined primarily by the agreement of the parties (cf. ENGLAND: *Moschi v. Lep Air Services Ltd* [1973] AC 331, 339 (HL); ITALY: *Giusti* 6 ss., 10 ss.).

21. Mandatory rules specifically concerning the contract of personal security – which, however, do have a limited scope of application only – are found in the member states typically in matters concerning consumer protection. For these matters, see the national notes on the Articles in Chapter 4. A noteworthy exception relates to specific formal requirements which in some member states exist for personal securities provided both by consumers and non-consumers (cf. national notes on IV.G.–4:104 (Form)).

22 As another consequence of the fact that contracts of personal security are regarded as part of the law of contract in all member states, mandatory rules of general contract law are applicable to these contracts. Therefore, general mandatory contract law rules on matters such as illegality apply also to personal security contracts (cf. ENGLAND: *O´Donovan and Phillips* nos. 4-66 ss.; ITALY: *Bonelli*, Le garanzie bancarie 86 s.; NETHERLANDS: cf. no. 1 above; PORTUGAL: *Almeida Costa* 772; SPAIN: *Roca Trias* 147, 154 ss.).

23. The most important general mandatory rules of general contract law applicable to contracts of personal security are the protective rules of general contract law: throughout the member states, protection in matters such as acting against good morals, mistake, undue influence, duress etc. is usually based on the general mandatory protective rules of contract law and of the law of obligations (cf. AUSTRIA: Schwimann/*Mader and Faber* CC § 1346 nos. 14-31; ENGLAND: *O´Donovan and Phillips* chapter 4; DENMARK: ContrA § 36; *Pedersen*, Kaution 29;

FINLAND: ContrA § 36; FRANCE: *Simler* nos. 132 ss.; GERMANY: Staudinger/*Horn* nos. 71-77 preceding §§ 765 ff; IRELAND: *White* 539; ITALY: Sacco and De Nova (*Sacco*) I 22 ss., II 59 ss.; *Roppo* 399 ss., 779 ss., 811 ss., 825 ss.; *Bussani* 97 ss.; PORTUGAL: *Almeida Costa* 88 ss.; SCOTLAND: Stair/*Clark* nos. 891 ss.; SPAIN: *Roca Trias* 154 ss., 156 ss.; *Carrasco a.o.* 106 s.; SWEDEN: ContrA § 36; *Walin*, Borgen 37; see also national notes on IV.G.–4:101 (Form) nos. 16 ss. and on IV.G.–4:103 (Creditor's pre-contractual duties) nos. 27 ss.).

IV.G.–1:103: Creditor's acceptance

(1) If the parties intend to create the security by contract, the creditor is regarded as accepting an offer of security as soon as the offer reaches the creditor, unless the offer requires express acceptance, or the creditor without undue delay rejects it or reserves time for consideration.

(2) A personal security can also be assumed by a unilateral undertaking intended to be legally binding without acceptance. The rules of this Part apply with any appropriate adaptations.

COMMENTS

A. Creation of security by contract

This Article proceeds from the assumption that a personal security is usually created by contract although exceptionally a unilateral undertaking by the security provider may suffice (paragraph (2)). Deviating from the general rule that a contract is concluded by offer and acceptance, paragraph (1) presumes acceptance "as soon as the offer reaches the creditor". The term "reaches" is defined in I.–1:109 (Notice).

B. Creditor's presumed acceptance

An express rule appears to be desirable since the general rules on contracting do not provide sufficient certainty: According to II.–4:204 (Acceptance) paragraph (2), silence or inactivity does not in itself amount to acceptance; nor does affirmative conduct by the creditor, unless it is known to the security provider (cf. II.–4:205 (Time of conclusion of the contract). Therefore an express rule is desirable and necessary in order to preclude the security provider from later denying being bound by the security since the offer had not been accepted. The main rule of this Article implies that the contract of security is concluded as soon as the security provider's offer reaches the creditor.

This departure from the general rules on contracting is justified since the contract on personal security usually creates an obligation only for the security provider in favour of the creditor. Therefore many legal systems do not insist upon an express acceptance by the creditor. This widely accepted rule is, however, expressed by the present Article only as a rebuttable presumption. The presumption is rebutted if one of the events specified in the second part of the Article occurs.

C. Exceptions

According to the second part of paragraph (1), the presumption of acceptance established by the first part is rebutted if the offer requires express acceptance or if the creditor without undue delay rejects it or reserves time for consideration. The presumption of acceptance by the creditor can be rebutted only by unambiguous declarations of the creditor.

If an express agreement is required, it will be a question of interpretation whether a statement by the creditor amounts to an acceptance. The same is true for a rejection of the offer. The general rules in Book II apply.

If the creditor without undue delay after receipt of the offer of security reserves time for consideration, the creditor must be enabled to examine carefully a complicated security instrument; depending upon the circumstances, the creditor must be allowed the time to consult an advisor.

D. Express acceptance

The ordinary rules on acceptance apply if the offer of security requires an acceptance or if the creditor has effectively reserved time for consideration. Apart from the preceding two cases, the ordinary rules also apply if the creditor, without being "invited" by the security provider to do so, expressly declares acceptance within a time limit fixed by the offeror or else within a reasonable time limit. See also II.–4:207(Late acceptance) and II.–4:208 (Modified acceptance).

E. Security by virtue of debtor's contract with security provider

The preceding rules also apply if the debtor contracts with the security provider and the security is expressed as a term of that contract in favour of the creditor (cf. Book II, Chapter 9, Section 3 (Effects of stipulation in favour of third party)).

F. Creation of security by unilateral undertaking

The fact that a security provider's offer of personal security often is not regarded as calling for an express acceptance invites drawing the consequence that not even any acceptance of the offer is necessary; rather, a mere unilateral undertakign suffices. This corresponds to the general rule established in II.–1:103 (Binding effect), according to which "A valid unilateral undertaking is binding on the person giving it if it is intended to be legally binding without acceptance." A practical example is a binding comfort letter sent by the sole or majority shareholder of a company to all creditors of the latter which is presumed to create a dependent security (IV.G.–2:101 (Presumption for dependent personal security) paragraph (2)).

G. Commencement of security provider's obligation

The Article implicitly fixes the time at which the security becomes binding if the creditor does not declare acceptance. The fixing of this point in time is relevant for securities that may fix their duration by indicating a period only (*e.g.* two years) without indicating a precise date of expiration. Also for the application of IV.G.–1:106 (Several security providers: internal recourse) paragraphs (3) and (6), IV.G.–2:102 (Dependence of security provider's obligations) paragraphs (3) and (4) and IV.G.–2:103 (Debtor's defences available to the security provider) paragraph (3) a precise date must be determined.

NOTES

I. Personal security as contract

(a) Declaration of creditor's acceptance necessary

1. In the BENELUX-countries and in PORTUGAL, the general rules on the formation of contracts apply, in particular the "offer and acceptance" method of the general law of contracts as set out in the respective civil codes. All these countries demand that both the security provider and the creditor expressly agree on the contract of dependent

personal security (BELGIUM: *Van Quickenborne* nos. 104-105; NETHERLANDS: *Blomkwist* no. 13 at p. 24; PORTUGAL: STJ 6 June 1990, no.78761 unpublished; *Mesquita* 29; *Costa Gomes* 343). Reference can be made to the notes to Book II, Chapter.4 on the formation of contract (section 2: offer and acceptance). In FINLAND, according to *Ekström* 39 s. the creditor must expressly accept the offer of the security provider. Also in GREECE, an essential condition for contracting the security is that the creditor has expressly or tacitly accepted it, hence the mere receipt of the offer by the creditor and subsequent silence or inactivity of the creditor do not make the contract binding (Georgiades-Stathopoulos AK/*Vrellis* art. 847 no. 15; A.P. 682/1995, EEN 1996, 586; A.P. 1197/1992, ETrAksXrD 1993, 385). Not only must the creditor accept, but the declaration of acceptance must also reach the offeror/security provider (cf. GREEK CC art. 192). An exception is made for independent personal securities (cf. C below).

2. In ENGLISH law, as a rule, acceptance must be communicated to the security provider; but a detrimental act of the creditor relying on the security provider's promise to the knowledge of the latter can be sufficient (*Jays Ltd. v. Sala* (1898) 14 TLR 461); similarly, in appropriate circumstances communication can even be inferred from silence and inactivity on the part of the creditor (*Pope v. Andrews* (1840) 9 C & P 564, 173 ER 957). Acceptance must be expressly communicated if stipulated for in the offer (*Gaunt v. Hill* (1815) 1 Stark 10, 171 ER 386; *Newport v. Spivey* (1862) 7 LT 328); further, if a time limit is stipulated in the offer, acceptance has to be communicated within that period of time, otherwise within a reasonable time (*Payne v. Ives* (1823) 3 Dow & RyKB 664). If the offer is a bilateral one, *i.e.* it is given in consideration of an express promise by the creditor to enter into a transaction with the debtor, thus establishing a binding and enforceable bilateral agreement between creditor and security provider, it is irrevocable even before the creditor has acted upon it (*Greenham Ready Mixed Concrete v. CAS (Industrial Developments) Ltd.* (1965) 109 SJ 209).

(b) Declaration of creditor's acceptance necessary in specific cases

3. In ITALY, the general rules on the formation of contracts based on the "offer and acceptance" method apply to the formation of dependent personal security, when the security creates obligations binding not only the security provider, but also the creditor (CC art. 1326 ff; *Sacco*, La conclusione dell´accordo 24). In AUSTRIA, the Supreme Court held in one case that an offer of a personal security that had been given by the private security provider on a form supplied by the creditor, in which the creditor had stipulated that express acceptance was necessary, but which had not been given, was void although the creditor had granted the credit to be secured (OGH 7 February 1989, ÖBA 1989, 1021 with approving note *Bydlinski*; cf. *idem*, Kreditbürgschaft 36 s.).

(c) Acceptance by creditor's act or behaviour

4. Pursuant to the principle of DANISH ContrA § 7 a security is binding if the creditor has been informed about it. Consent can also arise from the creditor's silence and inactivity (Andersen, Termn, Edlund a.o./*Pedersen* 435 s.; *Pedersen*, Kaution 18; *Bryde Andersen* 425; *Højrup* 16 s.). According to the BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2015 (since 2006: FRENCH CC art. 2292) as well as ITALIAN CC art. 1937, PORTUGUESE CC art. 628 and SPANISH CC art. 1827(1), the existence of a dependent personal security cannot be presumed, it must expressly be established. But in fact this rule concerns only the offer made by the security provider, who is (usually) the only person assuming an obligation (*Simler* no. 125). In ITALY, the offer made by the security provider can also be expressed by conclusive

acts, provided it is possible to infer from them a clear intention (*Giusti* 90). Nevertheless it must be noticed that special rules on the form of the security provider's declaration are given by the ITALIAN Banking Law (DLgs 1 September 1993 no. 385): according to art. 117(1), the security provider's offer must be in writing (with a copy retained or given back). This rule applies, whether or not the security provider is a consumer (*Lobuono* 52 s.). In FRANCE the acceptance of the creditor can be given impliedly by any unequivocal act, particularly by bringing judicial proceedings against the provider of security (Cass.com. 13 November 1972, GazPal 1973 1, 144). The consent of the creditor may also be implied, *e.g.* by setting up a counter security or by any advance payment in case of a security for an advance payment (*Simler* no. 933).

5. In AUSTRIA, in the context of the formation of a contract the absence of an express acceptance by the creditor is justified in two ways. First, the security provider's binding offer may be regarded as setting a prolonged period for acceptance. This interpretation suggests itself, in particular, where a definite time period for calling upon the security provider had been agreed upon. In this case, the creditor's demand is to be regarded as the acceptance. Second, according to AUSTRIAN CC § 864(1), an offer may be accepted by the offeree acting in accordance with the offer. There may be such a conforming act if the creditor concludes the underlying contract with the debtor in accordance with what had been agreed upon from the beginning by the three parties (Avancini/Iro/*Koziol* 283 no. 3/68; cf. also D below). A DUTCH court has held that the creditor's demand based upon an offered personal security signifies acceptance (CA Amsterdam 17 October 1988, NJ 1990 no.339).

6. In SCOTTISH law there is no definite rule, whether an express acceptance is required or whether the security provider's liability is fixed once the creditor performs towards the debtor (*Wallace v. Gibson* [1895] AC 354). The security provider's obligation may also arise from an undertaking to secure a person's debts which is not addressed to any particular creditor: then anyone who has given credit on the faith of the security is entitled to enforce it, unless the contrary is evident from the terms of the undertaking (*Fortune v. Young* 1918 SC 1).

7. According to GREEK law, the creditor's acceptance of the offer of a dependent personal security must be made explicitly or tacitly (Georgiades-Stathopoulos AK/*Vrellis* art. 847 no. 15; A.P. 682/1995, EEN 1996, 586; A.P. 1197/1992, ETrAksXrD 1993, 385; cf. GREEK CC art. 189). Silence, however, constitutes neither acceptance nor rejection, unless this is provided by law or in a Code of Conduct or if the parties have so agreed or it is dictated by good faith and business usages, especially among merchants (*Georgiades*, General Principles § 32 no. 22; *Perakis* § 48 no. 22). It has been ruled however, that the mere fact of receipt of the offer neither constitutes a tacit acceptance, nor can such an acceptance be derived from the circumstances concerning the status of the parties or the nature of the contract that binds them (CA Thessaloniki 1197/1992, EpTrapDik 1993, 385). On the other hand, independent personal securities are almost always considered to have been accepted tacitly by the creditor, *i.e.* by the bank sending the document containing the independent personal security (*Georgiades* § 6 no. 46). Also in SPAIN, the creditor's acceptance may be informal and even tacit (*Carrasco a.o.* 105; TS 20 January 1999, RAJ 1999 no. 3); this is especially important for the creditor in case the security provider had waived rights (*Guilarte Zapatero*, Comentarios 56).

(d) Security provider's promise as acceptance

8. Under ENGLISH common law, if the security provider offers the security at the request of the creditor, it is not necessary that the creditor should notify acceptance to

the security provider (on the authority of the Canadian decision in *Fraser v. Douglas* (1906) 5 WLR 52; cf. *Andrews and Millett* no. 2-002). A similar view is also taken in AUSTRIA: The creditor's demand to the debtor to procure a security is transmitted by the debtor to the security provider who accepts the creditor's offer by issuing the security (Avancini/Iro/*Koziol* 284 no. 3/69).

(e) Additional requirements

9. ENGLISH law additionally requires contracts which are not under seal to be supported by consideration; that the creditor promises to grant a credit to the debtor or to forbear from suing the debtor for a debt already in existence can constitute sufficient consideration in contracts of security (Chitty/*Whittaker* nos. 44-019–44-023). The same principles apply in IRISH law (*White* 537 ss.), where however it has been held that the fact that the creditor does not sue the debtor is not necessarily a consideration for the security but might as well be a consequence of the obvious fruitlessness of any attempt to enforce the claim against the debtor (*Commodity Broking Co. Ltd. v. Meehan* [1985] IR 12).

II. Beginning of security provider's obligation

10. In ENGLISH law the commencement of the security provider's obligation under the contract of security depends on the nature of the offer: if it is a unilateral offer (which is not made under seal), the provider of security can revoke it until it has been accepted by the creditor (as to what constitutes acceptance see I above); *Daulia Ltd. v. Four Millbank Nominees Ltd.* [1978] Ch 231).

11. Pursuant to DANISH ContrA § 7 a security provider's obligation arises as soon as the creditor has been informed about the offer of security (Karnov/*Lynge Andersen* 5397 fn. 32 s.). According to the law of the BENELUX-countries, the contract of dependent personal security and therefore the security provider's obligation becomes effective with the acceptance by the creditor of the offer to grant the security. According to the emission theory the security contract is concluded in FRANCE, as soon as the creditor dispatches the consent (*Simler* no. 129).

12. Under GERMAN and PORTUGUESE law a contract becomes binding at the moment when the declaration of acceptance of the offeree becomes effective, *i.e.* – if the parties do not act *inter praesentes* – when it reaches the offeror, or in PORTUGAL also when it becomes known to him (cf. GERMAN CC § 130; Palandt/*Heinrichs* § 148 no. 1; PORTUGUESE CC art. 224; *Pires de Lima and Antunes Varela* 214). In GERMANY in the vast majority of dependent personal securities the creditor does not declare acceptance. Nevertheless, the contract of security is validly concluded since according to GERMAN CC § 151 first sentence a contract is concluded by the acceptance of the offer, which, however, need not be communicated to the offeror, if such notification is not to be expected according to common usage. GERMAN courts have held that such a usage exists for offers that are only beneficial for the offeree as is the case of personal securities (cf. especially BGH 12 October 1999, NJW 2000, 276 with further references for dependent as well as for independent personal securities and assumptions of debt; for a binding comfort letter cf. CA Berlin 18 January 2002, WM 2002, 1190, 1191). It has been considered as sufficient that the creditor retains the (written) declaration of the security provider (cf. for dependent personal security BGH 6 May 1997, NJW 1997, 2233; BGH 30 March 1995, WM 1995, 901). The PORTUGUESE CC art. 234 is similar to GERMAN CC § 151. According to that provision, the contract is concluded as soon as the offeree shows an intention to accept the offer, if according to the terms of the offer, the nature or circumstances of the contract or common usage it is not necessary to require a declaration of acceptance by

the creditor. CC art. 234 is considered also to apply to dependent personal securities inserted into a complex financial operation (*Costa Gomes* 365). The acceptance can therefore be inferred from the fact that the bank grants a credit (CA Coimbra 5 July 1989, CJ XIV, IV-50) or retains the declaration of the security provider (STJ 6 June 1990, no.78761 unpublished; STJ 15 December 1998, 747/98 www.dgsi.pt). This rule also applies to independent personal securities (*Pinheiro* 431).

III. Personal security as unilateral contract or promise

13. In ITALY, the dependent personal security being a contract which usually creates obligations for the security provider only, an offer made by the person obligated is considered a binding contract if the offer has not been rejected by the offeree (CC art. 1333) (*Giusti* 71; *Ravazzoni* 255; *Chianale* 276; Cass. 26 May 1997 no. 4646, Giur.it. 1998, 1135). This particular method of formation of the dependent personal security, however, does not affect its contractual nature (*Sacco and De Nova* I 267-268; *Sacco*, La conclusione dell´accordo 23 ss., 28; *Sacco*, Il contratto 36 ss.; Cass. 27 September 1995 no. 10235, Giur.it. 1996 I 1 738; Cass. 3 April 2001 no. 4888, Giur.it. 2001, 2254; Cass. 25 September 2001 no. 11987, Stud.Iuris 2002, 393). The perfection of the security takes place at the moment the declaration reaches the creditor if the latter does not reject it within a reasonable time according to the nature of the business or the usage.

IV.G.–1:104: Co-debtorship for security purposes

A co-debtorship for security purposes is subject to the rules of Chapters 1 and 4 and, subsidiarily, to the rules in Book III, Chapter 4, Section 1 (Plurality of debtors).

COMMENTS

A. General

Delimitation. Co-debtorship for security purposes must be delimited from different, though closely similar agreements in which a third person intending to act merely for security purposes is drawn into a relationship between creditor and debtor. Three basic situations may be distinguished: First, the creditor and the third party agree that the latter should be or become a co-debtor for security purposes. Second, the original debtor and the third party agree in favour of the creditor that the third party should become an additional debtor for security purposes; this is a stipulation in favour of the creditor which entitles the creditor to demand performance from the new debtor as well (cf. Book II, Chapter 9, Section 3 (Stipulation in favour of a third party). By contrast, if the debtor agrees with a third party that the latter should assume the debtor's obligation so that the latter is discharged, this agreement does not bind the creditor unless the creditor agrees. If the creditor does agree, this is a substitution of a new debtor (cf. Book III, Section 2 (Substitution of a new debtor)) and not a co-debtorship. Only in the first two cases is a co-debtorship for security purposes created.

Legal policy. If, in addition to a principal debtor, another person assumes a corresponding obligation towards the creditor in order to *secure* the principal debtor's obligation, a trilateral situation arises which corresponds to that of a (dependent or independent) personal security. The additional security debtor assumes a function which is similar to that of a security provider. This co-debtorship for security purposes is defined in IV.G.–1:101 (Definitions) paragraph (e). While it is certainly not a species of a traditional personal security, it is increasingly realised that functionally it has features of a personal security. For this reason, IV.G.–1:102 (Scope) paragraph (1)(c) includes co-debtorship for the purpose of security in the ambit of this Part.

The present Part regards co-debtorship for security purposes as a distinct legal institution. For this reason, it is mentioned expressly and separately in enumerating the major types of personal security in IV.G.–1:102 (Scope) paragraph (1)(c). It partakes of the features both of co-debtorship and of a personal security. Consequently, this institution generally is governed by the rules on co-debtorship; this respects the intention of the parties who have chosen this particular type of transaction for the purposes which they intend to pursue. However, if and in so far as the parties use a co-debtorship for the purpose of providing security for the creditor, this justifies the application of certain basic rules on personal security, especially Chapter 1.

If the "securing" co-debtor is a consumer, the special protective rules of Chapter 4 apply. In addition, IV.G.–4:102 (Applicable rules) paragraph (1) refers to Chapter 2 on dependent personal security and in the framework of this reference the rules on dependent personal security become applicable and are mandatory in favour of the security provider (IV.G.–4:102 paragraph (2)). The reason for selecting this regime is that the rules on dependent personal security are – generally speaking – the most protective ones for security providers. For details, cf. no. 15 below.

Two types of co-debtorship? Co-debtorship for security purposes may exist from the creation of the main obligation.

> *Illustration 1*
> A husband and wife sign contemporaneously a credit agreement as debtors for financing the husband's business; the wife, a housewife, merely signs at the special request of the creditor and in order to assist her husband.

It may also be created later if a co-debtor for security purposes subsequently accedes to an already existing obligation of an "ordinary" full debtor. Also the reverse situation would be covered, although it rarely occurs in practice.

The consequences of this distinction are more linguistic than real. If co-debtorship does not exist from the creation of the obligation to be secured, there is no plurality of debtors and therefore no co-debtorship; it comes into being only at the time when an (additional) debtorship for security purposes is created. The same is true if the sequence of creation is reversed.

B. Criteria for security purpose

There is no generally recognised criterion for qualifying a co-debtorship as being assumed for the purposes of security. The test must be whether one of the co-debtors clearly has the greater direct interest in the credit extended and therefore is finally to be saddled with it. According to IV.G.–1:101 (Definitions) paragraph (e) there is no co-debtorship for security purposes unless one of the debtors assumes the obligation "primarily" for purposes of security to the creditor. In the final analysis, this depends upon the interpretation of the credit agreement in light of all the circumstances.

A major indication for a co-debtorship with security purposes rather than a full co-debtorship is whether the co-debtor has a personal interest in the performance of the obligations under the contract in which the main obligation is rooted. The fact that the co-debtor's obligation is coterminous with that of the other debtor and that the co-debtor has co-signed the same document as the other debtor cannot be decisive since this would eventually place the result into the hands of the creditor. If doubts remain, it is preferable to assume that the third person has merely assumed a co-debtorship for security purposes. The fact that a housewife as such indirectly may benefit from the success of her husband's business cannot be relevant and does not suffice to saddle her with full liability.

Co-debtorship for security purposes has to be delimited not only from co-debtorship as such, but also from other types of personal security, especially from dependent security. According to IV.G.–2:101 (Presumption for dependent personal security) paragraph (1), any "undertaking to pay, … to the creditor by way of security" is presumed to create a dependent personal security. Therefore the creditor has to show that it was agreed otherwise (IV.G.–2:101 paragraph (1) last half-sentence). Consequently, there will only be a co-debtorship for security purposes if the creditor can show that the parties unambiguously agreed upon this specific type of personal security.

C. Co-debtorship and personal security combined

An additional reason for covering co-debtorship is that in some countries the parties sometimes call the person assuming an obligation for security purposes a "co-debtor and security provider". Since these two obligations involve different consequences, the meaning of the instrument, as intended by the parties, will have to be clarified. One possible construction may be that the security provider was meant to provide a dependent security with solidary liability (cf. IV.G.–2:105 (Solidary liability of security provider)). Another possible construction is that the combined formula is intended to express the security character of the assumption of debt.

D. Applicable rules

For the reasons set out above it is not possible to subject co-debtorship for security purposes to all provisions of this Part because this would disregard the basic differences between co-debtorships for security purposes and dependent as well as independent personal securities and the intentions of the parties who have chosen this particular method of providing security. For this reason, it appears necessary to subject such co-debtorships only to the general rules laid down in Chapter 1 and to the special provisions on consumer personal security laid down in Chapter 4 (which also applies rules from Chapter 2 by reference). For the rest, co-debtorships are governed by the rules on plurality of debtors laid down in Book III, Chapter 4, Section 1.

Applicable rules in Chapter 1. According to the above Article a co-debtorship for security purposes is subject primarily to Chapter 1 of this Part. However, only a few rules of Chapter 1 appear to be directly relevant for a co-debtorship for security purpose.

In applying IV.G.–1:105 to 1:107 (which deal with the position where there are several security providers) a co-debtor for security purposes can easily be put on the same level as one of several security providers. This is true for the relationship *inter se* (IV.G.–1:105), recourse among several security providers (IV.G.–1:106) as well as recourse against the debtor whose obligation is secured (IV.G.–1:107).

IV.G.–1:108 (Subsidiary application of rules on solidary debtors) does not become relevant for a co-debtor for security purposes since IV.G.–1:104 (Co-debtorship for security purposes) itself already declares Book III, Chapter 4, Section 1 to be applicable.

Rules in Chapter 4. A co-debtorship for security purposes is subject also to Chapter 4 of this Part. Chapter 4 contains the special and mandatory rules for consumers who have provided personal security. The application of these rules to co-debtorships for security purposes assumed by a consumer is explained in the framework of Chapter 4.

Rules in Chapter 2. Chapter 4 applies, for the regime for consumer providers of a co-debtorship for security purposes, primarily the rules of Chapter 2 on dependent personal security (cf. IV.G.–4:102 (Applicable rules) paragraph (1)). These rules are declared to be mandatory in favour of the consumer provider of security (IV.G.–4:102 paragraph (2)). In general, these rules are the most protective ones for the security providers. Generally speaking, they are also more protective than the rules on co-debtorship which do not provide for any consumer protection. However, in a few instances, the regime for co-debtors laid down in Book III., Chapter 4, Section 1 is more protective than Chapter 2 of the present Part.

Where a comparison of the two regimes leads to this conclusion, exceptionally the rules of Chapter 2 are disregarded in favour of the general regime for solidary debtors in Book III. The detailed comparisons are to be found in the Comments to the relevant rules of Chapter 2.

NOTES

I. General

1. In most member states it is generally recognized that solidary co-debtorship, *i.e.* a plurality of debtors who are liable for one and the same obligation towards the creditor, reinforces the position of the latter and may therefore have the function of security for the creditor (*e.g.* for PORTUGAL: *Teles de Menezes Leitão* 165; SPAIN: *Díez-Picazo* II 207). All member states seem to agree that, if two persons contemporaneously agree to assume an identical obligation, even though details may differ, they are co-debtors. By contrast, concepts and even effects differ where a person accedes to an obligation which had earlier been assumed by another person. Some countries regard both branches as one institution which is essentially subject to identical rules (*e.g.* GERMANY), whereas other countries regard them as two separate, although closely related, institutions which are subject to more or less different but closely related rules (especially the ROMANIC countries).

II. Initial co-debtorship

2. In most CONTINENTAL EUROPEAN countries the basic institution of solidary co-debtorship is recognized and regulated by legislative rules as a modality of the obligation which is owed from its inception by several debtors; they are solidarily liable towards the creditor for the performance of one single obligation (AUSTRIA: *Mitschuldner zur ungeteilten Hand*, CC § 896; DANISH Promissory Note Act § 2(1) regulates a plurality of debtors without, however, using the term solidary liability. According to Karnov/*Møgelvang-Hansen* 5558 fn. 8 the debtors are solidarily liable towards the creditor *(een for alle og alle for een)*. The term "solidary liability" is used in Law on Bankruptcy § 47 *(solidarisk hæftelse)*; DUTCH CC art. 6:7(1) *(hoofdelijke verbintenis)*; GERMANY: *Gesamtschuld*, CC § 421; BELGIUM, FRANCE and LUXEMBOURG: *codébiteurs solidaires*, CC art. 1216; ITALIAN CC arts. 1292–1313, *obbligazioni solidali*; PORTUGUESE CC arts. 512 ff, Ccom art. 100, *obrigações solidárias*; SPANISH CC arts. 1137 ff, Ccom art. 567, *obligación solidaria*; SWEDISH Promissory Note Act § 2(1) regulates like the DANISH Promissory Note Act § 2 par 1 a plurality of debtors. According to *Walin*, Lagen om skuldebrev 26, this provision assumes a solidary liability (the provision says, that the debtors are liable "one for all and all for one" *(en för alla och alla för en)*. Like in DENMARK the term "solidary liability" does not occur in the SWEDISH Promissory Note Act § 2 par 1 (the terminology *solidariskt ansvar* for several debtors is however used in the SWEDISH Law on Bankruptcy chap. 5 §§ 4 ff). Solidary liability exists even if the co-debtors are not liable on the same terms (ITALIAN CC art. 1293; SPANISH CC art. 1140; PECL Article 10:102 (3)). Towards the creditor each co-debtor is liable for the whole obligation, so that the creditor has the free choice to demand performance from any one of the co-debtors (AUSTRIAN CC § 891; DENMARK: Karnov/*Møgelvang-Hansen* 5558 fn. 8 referring to the Promissory Note Act § 2 concerning plurality of debtors; DUTCH CC art. 6:6(1); FRENCH CC arts. 1200 and 1203; GERMAN CC § 421; ITALIAN CC art. 1292; PORTUGUESE CC arts. 512(1), 518, 519; SPANISH CC art. 1144; SWEDEN: *Walin*, Lagen om

skuldebrev 27; cf. also PECL Article 10:101 (1)); in the internal relationship among co-debtors the obligation is divided into shares, for which statutory law usually establishes a rebuttable presumption that the shares of all co-debtors are equal (AUSTRIAN CC § 896; GERMAN CC § 426(1) sentence 1; ITALIAN CC art. 1298(2); PORTUGUESE CC arts. 516, 524.

3. Some countries differentiate between civil and commercial transactions: While in BELGIUM, FRANCE, LUXEMBOURG, PORTUGAL and SPAIN solidary liability must expressly be agreed by the parties for civil obligations (BELGIUM, FRANCE and LUXEMBOURG: CC art. 1202; PORTUGAL: CC art. 513; SPAIN: CC arts. 1137-1138), for commercial obligations this is in many countries the rule and separate liability must expressly be agreed (*e.g.* FRANCE: Cass.civ. 18 July 1929, D.H. 1929, 556; PORTUGAL: Ccom art. 100; SPAIN: TS 14 February 1997, RAJ 1997/1419). By contrast, in GERMANY and ITALY there is a general presumption in favour of solidary liability (GERMANY: CC § 427; ITALY: CC art. 1294).

4. Solidary co-debtorship for security purposes is more attractive in countries which establish subsidiary liability for dependent personal securities (*e.g.*, AUSTRIAN CC § 1355 f; FRENCH CC art. 2021 ff; GERMAN CC §§ 771 ff; PORTUGUESE CC art. 638; SPANISCH CC art. 1822) than in countries which provide for solidary liability such as ITALY (CC art. 1944(1)).

III. Subsequent cumulative assumption of another person's debt

5. The subsequent cumulative assumption of an already existing debt by an additional debtor is recognized in the various member states in several different forms and is called by different names. However, most of the various forms result in a solidary co-debtorship between the new and the original debtor. This subsequent assumption of another's debt can be considered as a variation of the general category of solidary co-debtorship to which also some specific rules may apply (BELGIUM, FRANCE and LUXEMBOURG: *délégation imparfaite*, CC art. 1275; AUSTRIA, GERMANY and NETHERLANDS: *Schuldbeitritt*, which is mentioned in AUSTRIAN CC § 1347; in the GERMAN and the DUTCH Civil Codes it is not regulated, but is generally recognised, GERMANY: Palandt/*Grüneberg* no. 2 preceding CC § 414; NETHERLANDS: Asser/*Hartkamp* IV 1 no.102; GREEK CC art. 477; ITALIAN CC arts. 1268-1276, for *delegazione*, *espromissione* and *accollo*; PORTUGUESE CC art. 595, for *assunção de dívida*; SPAIN: *Díez-Picazo and Gullón* 591 ss., for *asunción cumulativa de deuda*, *expromisión cumulativa* and *delegación imperfecta*).

6. If this variety of designations and rules is classified according to solutions, three groups can be distinguished: (a) countries in which the cumulative assumption of another person's debt is basically identical with a co-debtorship, except that it comes into being after the first debt had been created: subsequent cumulative co-debtorship; (b) countries which utilise differently named institutions, but which all lead to the practical effect of a subsequent cumulative co-debtorship; and (c) countries in which the cumulative assumption of another person's debt is not only regulated by institutions which differ from co-debtorship, but which also have more or less different practical effects.

(a) Subsequent cumulative assumption of another person's debt: regulated as co-debtorship

7. In AUSTRIA, GERMANY and the NETHERLANDS, the *Schuldbeitritt* consists of an assumption of co-debtorship subsequent to the creation of the primary debt. The new co-debtor assumes solidary liability towards the creditor. The rules governing this

variety of co-debtorship are the general rules of the 'initial' co-debtorship, except that the new co-debtor assumes the original obligation as to its conditions and extent as existing at the time of the assumption of debt (and not as it was at the time of its creation) (AUSTRIA: Koziol and Welser(-*Welser*) 124, 139; Rummel/Mader *(Faber)* § 1347 no. 1; GERMANY: *Reinicke and Tiedtke*, Kreditsicherung 1 ss.; Staudinger/*Horn* nos. 363 and 369 ss. preceding §§ 765 ss.).

(b) Subsequent cumulative assumption of another person's debt: different institutions but identical results

8. In BELGIUM, FRANCE and LUXEMBOURG a subsequent cumulative assumption of another person's debt may be created by *délégation imparfaite* (CC art. 1275; BELGIUM: *Van Oevelen* no. 876; LUXEMBOURG: *Ravarani*, Rapport Luxembourgeois 421): The original debtor "delegates", *i.e.* instructs a third person to pay a debt corresponding to the debtor's own obligation towards the creditor. The delegation is 'imperfect' since the original debtor remains liable together with the new debtor; both debtors are solidarily liable towards the creditor (FRANCE: *Simler* no. 35). It seems that, in spite of a differing name for the institution, the practical result is the same that is reached through the AUSTRIAN/GERMAN version of the subsequent cumulative assumption of debt. In FRANCE the security character of a subsequent assumption of debt (*"délégation-sûreté"*: *Cabrillac and Mouly* no. 473-3) is indirectly confirmed by Law no. 75-1334 of 31 December 1975 on subcontracting. The customer has to provide to the subcontractor a personal security *(garantie)* in form of either a dependent personal security or a subsequent (partial) assumption of debt for the subcontractor's claim against the main contractor.

9. The same can be said for PORTUGAL and SPAIN. In PORTUGAL, the subsequent cumulative assumption of another person's debt implies solidary liability of the new debtor together with the original one, unless the creditor releases the old debtor (CC art. 595(2); STJ 17 October 1975, RLJ no. 109, 281; CA Lisboa 2 November 2000, 69272/00 www.dgsi.pt; *Vaz Serra*, Assunção de dívida 190; *Teles de Menezes Leitão* 170). In SPAIN, the Civil Code regulates only the replacement of the original debtor by another debtor (CC art. 1205, *novación*). However, the cumulative assumption of another person's debt, as well as the cumulative expromission, are admitted by virtue of the freedom of contract as atypical contracts (CC art. 1255; the first important decision was TS 22 February 1946 cited by *Díez-Picazo* II 842; see then TS 7 November 1986, RAJ 1986/6217 ; 15 December 1989, RAJ 1989/8832 ; 22 March 1991, RAJ 1992/2428 ; *Vicent Chuliá* 389). The liability of the original and the new debtor is solidary (TS 15 December 1989 above and 7 December 1971, RAJ 1971 no. 5154).

(c) Subsequent cumulative assumption of another person's debt: different institutions and different results

10. In ITALY the general effect of assumption of another's debt may be achieved by the use of three different legal institutions, namely cumulative delegation, cumulative expromission and subsequent assumption of another person's debt *(accollo cumulativo)*. All these institutions have the same general effect, *i.e.* to provide an additional debtor to the creditor; in this sense they are similar – as to the operative results and economic function – to a dependent personal security (*Casella* 260; *Nicolò* 971) and difficult to distinguish from it (*Rescigno*, Studi 168; *Rescigno*, Delegazione 952 ss.; *Mancini*, La delegazione 483 ss.). However, their legal structures differ. Under a cumulative delegation a third party agrees with the debtor to perform the latter's obligation to the creditor. The cumulative expromission is an agreement

between the third party and the creditor for the assumption of the debtor's obligation by the former, whereas the *accollo cumulativo* is an agreement between the debtor and the third party, through which the latter assumes the debtor's obligation. In all three cases the creditor does not release the debtor, who will remain liable; however, this continued liability is only subsidiary (CC art. 1268(2) for the delegation; for the expromission and the subsequent assumption of another one's debt this provision is generally applied by analogy: *Rescigno*, Studi 67; *Mancini*, La delegazione 500, 512; *Ceci* 292; *Rodotà* 787; Cass. 24 May 2004 no. 9982, Giust.civ.Mass. 2004, 1178). Thus, the original debtor's liability, in these cases, while solidary with the liability of the new debtor (CC art. 1272(1) and 1273(3)), is merely subsidiary: the creditor can demand performance from the original debtor only after having demanded it from the new debtor (CC art. 1268(2) by analogy). However, the creditor has not to bring execution against the new debtor before demanding performance from the original one (see authors and case law mentioned above).

IV. Criteria for security purpose

(a) Initial co-debtorship express agreement of the parties

11. The parties may expressly agree that one of them is to act as co-debtor for security purposes. In ENGLAND, a co-debtor may assume the role of a security provider by virtue of a security agreement with the other debtor: both co-debtors agree internally that one of them is to act as a security provider only, while the whole burden ultimately is to fall on the other debtor (cf. *Goode*, Commercial Law 800; *O´Donovan and Phillips* no. 1-29 s.). This agreement is effective as between the co-debtors from the outset (cf. Halsburypara. 1015, Vol 49, 5th ed, (2008)); the creditor, however, is bound to treat the debtor who has assumed the position of a security provider as a security provider only on becoming aware of this agreement (cf. *Rouse v. Bradford Banking Co. Ltd.* [1894] AC 586); *Goldfarb v. Bartlett* [1920] 1 KB 639). That the co-debtors may in this way unilaterally affect the creditor's position vis-à-vis the debtor who becomes a security provider has met strong criticism in the literature (cf. *Goode*, Commercial Law 800).

12. The AUSTRIAN Supreme Court also recognised an agreement between two solidarily liable co-debtors according to which one of them in future should merely act for security purposes. Since the creditor had not been informed, the new co-debtor for security purposes remained fully liable towards the creditor when the other co-debtor was unable to perform. Upon performance by the co-debtor for security purposes, the creditor's proprietary security rights passed to the performing co-debtor as in the case of performance by a dependent security provider (OGH 28 May 1969, ÖJZ 1969, 551).

(b) Interpretation of contractual terms

13. In deciding whether an instrument creates a dependent suretyship or a solidary co-debtorship, FRENCH courts enjoy a considerable degree of freedom according to NCPC art. 12. In a case where a housewife assumed a loan with which her husband as mere co-debtor financed his business, a first-instance court requalified the loan as a dependent personal security which was void due to lack of the required form (CFI Lons-le-Saulnier 18 November 1997, CCC April 1998 no. 64 with approving note). In another case a claim, although brought on the basis of a dependent security, was allowed as a claim on the basis of co-debtorship (Cass.civ. 22 June 1982, Bull.civ. 1982 I no. 233 p. 199). Where the contract uses the ambiguous term "with solidarity", the appellate court's qualification as co-debtorship was accepted (Cass. 17 November

1999, JCP G 2000 IV no. 1002). In other circumstances, the courts have denied such requalification if the contractual terms were unambiguous (Cass. 10 December 1991, Bull.civ. 1991 I no. 347 p. 227). Two FRENCH cases dealt with terms on AMEX credit cards issued to employees of a company, on the latter's application for use in the services of the company and reimbursed by the latter; according to a term of the contract the employee was to become co-debtor vis-à-vis the issuer of the credit card company. After insolvency proceedings over the assets of the two companies had been opened, the courts upheld the credit card company's claims against the employees, although the form for a dependent personal security had not been observed (Cass. Civ. 22 May 1991, Bull.civ. 1991 I no.162 p. 107) and the creditor had not notified its claim against the company to the latter's insolvency administrator (CA Paris 5 June 1992, JCP E 1993, Pan. no.176).

(c) Objective criteria

14. Without agreement of the parties, in many EUROPEAN legal systems the main criterion for qualifying a co-debtorship as being assumed for security purpose is the absence of a personal interest of the co-debtor as security provider in the performance of the debtor's "secured" obligation to the creditor (BELGIUM, FRANCE and LUXEMBOURG: CC art. 1216; FRANCE: Cass.civ. 21 July 1987, Bull.civ. 1987 I no. 249 p. 182; Cass.civ. 22 May 1991, Bull.civ. 1991 I no. 162 p. 107; *Simler* no. 28: *"co-débiteur non intéressé à la dette"*). The same is true in ITALY; CC art. 1298(1) uses the criterion that the contract is concluded in the "exclusive interest" of one of the contracting parties.

15. GERMAN and AUSTRIAN practice have reached similar results. The GERMAN Federal Supreme Court holds that a co-debtor who has personal interests in the granting of the credit and who may influence the decision about the paying out and the use of the loaned money is a co-debtor without security purposes, whereas a co-debtor who does not enjoy equal rights is a debtor for security purposes only; a merely indirect interest is irrelevant (BGH 14 November 2000, BGHZ 146, 37, 41 s.; BGH 4 December 2001, NJW 2002, 744). In AUSTRIA, in cases of doubt, courts and writers similarly use the co-debtor's economic interest in achieving the purposes of the principal debtor as a criterion: if such economic interest is lacking, the co-debtorship is for security purposes only (OGH 19 July 1988, SZ 61 no. 174, ÖBA 1989, 432 note *Bydlinski*; OGH 4 February 1993, ÖBA 1993, 819 note *Bydlinski*; already OGH 30 June 1960, ÖRiZ 1961, 45; *Bydlinski* 27–28). In special cases, even a merely personal reason, such as assistance to a close, but poor relative in order to enable proper defence in a criminal proceeding, has been recognized as supporting a full-fledged co-debtorship (OGH 19 July 1988, above). By contrast, a merely moral interest in supporting a debt of a dissolved company does not qualify as a cumulative assumption of debt, but is a suretyship (which in this case, due to lack of the required written form, was invalid: OGH 7 April 1976, SZ 49 no. 53). Also under the DUTCH CC it has been concluded that, where one of the two co-debtors is the only beneficiary under a contract, the other co-debtor may recoup any performance rendered to the creditor (Asser*Hartkamp* IV 1 no.117).

(d) Subsequent cumulative assumption of another person's debt

16. In those EUROPEAN countries where specific legal institutions for the subsequent cumulative assumption of debt are known it is generally acknowledged that these institutions may function like, and can then be considered as, a personal security.

17. In GREECE the subsequent cumulative assumption of debt which is the contractual promise of a third party to pay to the creditor the debt of another (cf. CC art. 477),

must be distinguished from the promise of a third party to the debtor to discharge the latter (cf. CC art. 478). Several criteria have been proposed for this distinction, including the security purpose: when it is the purpose of the contract to provide security to the creditor and to reinforce the obligations of the original debtor, the contract is to be qualified as personal security, whereas when the intervening third party has an immediate personal interest in the performance of the debt and this is perceived by the creditor, then the contract is regarded as a subsequent cumulative assumption of debt (*Georgiades* § 7 no. 61 ss.; ErmAK/*Michaelides-Nouaros* art. 477 no. 11; CA Athens 10465/1978, NoB 27, 979). Cases of doubt are resolved, by GREEK literature, as personal security (ErmAK/*Michaelides-Nouaros*, art. 477 no. 11; *Zepos* A 644); by the courts, however, as a subsequent cumulative assumption of debt (CA Athens 4592/1972, ArchN 25, 138). None of these criteria, however, is deemed satisfactory by a minority opinion (cf. *Kallimopoulos* 1523 ss.).

18. In FRANCE, the cumulative assumption of the debt by a new debtor does not primarily serve a security purpose. Rather, it is mostly used as a simplified means of payment: the new debtor by performing to the creditor performs both an obligation assumed towards the initial debtor and the debt of the initial debtor towards the creditor (cf. Malaurie and Aynès/*Aynès and Crocq* no. 323; *Cabrillac and Mouly* no. 473-2). But the subsequent cumulative assumption of debt functions as a security if the parties so agree and if the new debtor has no interest in the performance of the obligation towards the creditor (Larroumet/*François* no. 487; Malaurie and Aynès/*Aynès and Crocq* no. 323; *Cabrillac and Mouly* no. 473-3: "*délégation-sûreté*"; *contra Billiau* no. 7 s.: for in this case the subsequent cumulative assumption of debt disappears). Thus FRENCH court practice admits the validity of the cumulative assumption of debt irrespective of any obligation of the new debtor to the initial debtor (Cass.com. 21 June 1994, Bull.civ. 1994 IV no. 225 p. 176; RTD civ. 1995, 113 note *Mestre*).

19. In ITALY the similarity of the institutions of cumulative assumption of another person's debt with a personal security is increased by the fact that the original debtor's liability is merely subsidiary (see no. 10 above and *Cicala* 288 s.). However, the special feature is that the law itself determines the person of the security provider and that against expectation the original debtor's obligation is reduced to being subsidiary rather than that of the subsequent new debtor. Nevertheless, ITALIAN authors and courts try to distinguish between subsequent assumption of another person's debt, on the one hand, and dependent personal security, on the other hand. They point out the differences in legal structure and in *causa* existing between the two institutions (Cass. 5 March 1973 no. 609, Giust.civ. 1973 I 937; Cass. 24 March 1979 no. 1715, Giur.it.Mass. 1979, 456; Cass. 20 February 1982 no. 1081, Foro it.Mass. 1982, 239). One relevant criterion is whether the contract of subsequent cumulative assumption of debt is gratuitous or not. If it is non-gratuitous, it should be qualified as an assumption of a debt together with the existing debtor and not as a dependent personal security (*Di Sabato* 497). If, on the contrary, the subsequent assumption of debt is gratuitous, the creation of a security is the only purpose of the operation and the new co-debtor has no relevant personal interest in the performance of the obligation; it will be qualified as a dependent personal security (*Rescigno*, Delegazione 953).

20. In PORTUGAL, although the subsequent assumption of debt conceptually differs from the contract of dependent personal security, it is recognised that in practice this distinction may become uncertain (*Almeida Costa* 764) because the co-debtor(s) may pretend to assume in substance a personal security (*Vaz Serra*, Note on acordão de 17. 10. 1975, at 294). According to case law, the distinction is a matter of interpretation of the contract, basically depending on the existence of a personal

interest of the new debtor in the obligation: in this case, the agreement will be qualified as an assumption of debt; otherwise, and if only a personal interest to help the original debtor is to be detected in the agreement, the latter will be regarded as a personal security (STJ 6 May 2004 no. 2294/03; 12 December 1995 no. 8131/93: www.dgsi.pt).

V. Co-debtorship for security purposes: prerequisites and effects

(a) Prerequisites

21. An important attraction of any co-debtorship and therefore also of one for security purposes is a negative one: the validity of such a co-debtorship does not depend upon any formal requirement (cf. the provisions mentioned above no. 2) – as is usually established for a dependent personal security (cf. the court practice cited in national notes to IV.G.–4:104 (Form) no. 20). However, in AUSTRIA which has most strongly adapted the general rules on co-debtorship to purposes of security, this freedom from form requirements has generally been criticised since the risk for co-debtors for security purposes is at least as high as, if not even higher than, that for a provider of a dependent personal security (AUSTRIA: *Bydlinski* 27, 29, 30 with references); for the same reason, also some GERMAN authors plead for the written form (MünchKomm/*Möschel*, no. 13 preceding § 414; *Harke*, ZBB 2004, 147 ss.), but the majority is against it (Palandt/*Heinrichs* no. 3 preceding § 414 with references).

(b) Effects initial co-debtorship

22. In BELGIUM, FRANCE and LUXEMBOURG, the liability of a solidarily liable co-debtor deviates from the merely subsidiary liability of a dependent security provider. Thus even the co-debtor who has no personal interest in the performance of the contract remains liable towards the creditor as a co-debtor (Cass.civ. 21 July 1987, Bull.civ. 1987 I no. 249 p. 182; Cass.civ. 22 May 1991, Bull.civ. 1991 I no. 162 p. 107; *Simler* no. 27). Nor can personal defences of the other co-debtor be raised by the solidary co-debtor (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1208; cf. *Simler* no. 27), also contrary to the rules on dependent personal securities. Further, the solidary co-debtor is not discharged if the creditor by acts or omissions thwarts the co-debtor's right of subrogation to rights against another co-debtor (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2037-since 2006: FRENCH CC art. 2314 – CA Versailles 20 February 1991, JCP G 1992 I no. 3583 (9), note *Simler*). Only in the internal relationship between the co-debtors is the solidarily liable co-debtor, who has no personal interest in the performance of the contract, expressly considered as a provider of dependent personal security (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1216; cf. *Simler* no. 27) and consequently has full recourse against the other co-debtor for all amounts paid to the creditor.

23. In AUSTRIA and GERMANY, the starting point virtually is the same as in the FRANCOPHONIC countries (preceding no. 22). However, in the two GERMANOPHONIC countries, courts and writers have in varying degrees adapted the general rules on co-debtorship in order to serve more properly the special function of the co-debtorship for security purposes (AUSTRIA: short survey in *Bydlinski* 26-30; GERMANY: broad survey in *Bülow*, Kreditsicherheiten nos. 1579-1607). According to court practice, the co-debtor for security purposes is solidarily liable with the other (full) co-debtor (*contra* in GERMANY: *Bülow*, Kreditsicherheiten no. 1598 for consumer co-debtors against prevailing opinion (cf. MünchKomm/*Habersack* no. 15 preceding § 765)). This differs from the ordinary rule on the merely subsidiary liability of the provider of a dependent security (cf. national

notes on IV.G.–2:106 (). Personal defences of the co-debtor which have not been raised by it, cannot be invoked by the co-debtor for security purposes (AUSTRIA: *Bydlinski* 28; GERMANY: *Bülow*, Kreditsicherheiten no. 1603), again contrary to the rules on dependent personal security (cf. national notes on IV.G.–2:103). According to another departure from these latter rules, the co-debtor for security purposes cannot object to the creditor that the latter had prevented or diminished rights on which the co-debtor could have relied upon performance (GERMANY: *Bülow*, Kreditsicherheiten no. 1604), whereas in AUSTRIA the Supreme Court has admitted this exception (OGH 29 April 1992, ÖBA 1993, 64; OGH 14 April 1996, ÖBA 1996, 893). For the internal relationship between the (main) debtor and the debtor acting for security purposes, the general rules on recourse between co-debtors are applicable (GERMANY: *Bülow*, Kreditsicherheiten nos. 1605 s.: the co-debtor for security purposes can fully recover from the (main) debtor, while the latter is not entitled to any recovery).

24. According to the absolutely dominant view in GREECE, the "additional" obligation of the new debtor is solidary (joint and several) with that of the initial debtor and has no accessory character: the obligation of the new co-debtor does not depend upon the obligation of the initial debtor, but evolves separately (*Georgiades* § 7 no. 57; *Theodoropoulos* 58; CA Athens 5557/1993, NoB 41, 1097). Hence, the new debtor, in contrast to the provider of personal security (cf. CC art. 851), is not liable for the principal debt at any given point in time. Also as far as reimbursement is concerned, in the case of a subsequent assumption of debt each co-debtor who has satisfied the creditor is entitled *ex lege* to claim reimbursement from the others (cf. GREEK CC art. 487), even if there is no underlying relationship between the co-debtors (*Zepos* A 313-314). The co-debtor will be deprived of the right to reimbursement only if this can be deduced from a special underlying relationship (*Tampakis* 426; *Kallimopoulos* 1520). On the contrary, in a contract of security, the provider of personal security is entitled to reimbursement only if such right can be deduced from the underlying relationship (*Georgiades* § 7 no. 59). Hence, the plaintiff co-debtor does not have to prove the existence of the underlying relationship in order to exercise the right to reimbursement or recourse, whereas the defendant co-debtor bears the burden of proving the existence of a special underlying relationship denying any right of recourse and has to rebut the presumption of CC art. 487 (*Tampakis* 427; *contra*, *Zepos* A 315 fn. 3); on the contrary, the plaintiff provider of security must prove the existence of an underlying relationship in order to claim reimbursement or recourse (cf. CC art. 858; *Tampakis* 427).

(c) Subsequent cumulative assumption of another person's debt

25. In BELGIUM and FRANCE the prohibition on invoking any defence derived from the relationship between the original debtor and the creditor is one of the reasons for denying the *délégation* the character of a dependent personal security (BELGIUM: *Van Quickenborne* nos. 876–877; FRANCE: *Malaurie and Aynès*, Les obligations no. 1295). In FRANCE many authors plead for an exception if in the absence of an agreed definite amount of the debt the new debtor is obliged to pay the debt of the initial debtor (Malaurie and Aynès/*Aynès and Crocq*, Les sûretés no. 324 relying on Cass.civ. 17 March 1992, JCP G 1992, II no. 21922; *Marty, Raynaud and Jestaz* II no. 435; Planiol and Ripert/*Esmein* no. 269).

26. In GREECE the principle of accessority is to some extent applied and is in cases of subsequent assumption of special importance since the co-debtor assumes the debt in the state and with all the principal debtor's objections as at the time of assumption; the co-debtor may not, however, set off a claim of the principal debtor against the creditor

(cf. GREEK CC art. 472 read with 473(1) and (2), by an extension of the rules on the assumption of debt in order to discharge the original debtor). Also in GERMANY the subsequent assumption of an obligation is only valid if the primary obligation exists; however, its further fate is not necessarily bound up with that of the primary obligation. It is controversial whether the subsequently assumed obligation depends upon and is subsidiary to the primarily assumed obligation (against Staudinger/*Horn* no. 363 preceding §§ 765 ss.; forcefully *pro*: *Schürnbrand* 118-126; against dependency, but for subsidiarity, generally *Bülow*, Kreditsicherheiten nos. 1598, 1602 s.).

(d) Classification dependent personal security

27. According to DANISH authors referring to the Promissory Note Act § 2 concerning plurality of debtors, "a person who assumes an obligation towards a creditor in order to secure the debtor's obligation is not an additional debtor, but a provider of personal security" (Karnov/*Møgelvang-Hansen* 5558 fn. 8; likewise *Ussing*, Kaution 12 s.) Also in the NETHERLANDS, co-debtorship for security purposes and dependent personal security are closely associated with each other, although proceeding from the other side. According to the new CC art. 7:850(3), dependent personal security is subject to the rules on plurality of debtors, except in so far as the code does not establish special rules on dependent personal security!

(e) Independent personal security

28. For several FRENCH authors, the subsequent cumulative assumption of debt constitutes an independent personal security, if the new debtor is obliged to pay a definite sum (Malaurie and Aynès/*Aynès and Crocq*, Les sûretés no. 324 ; Larroumet/*François* no. 326). Furthermore, the prohibition to raise any exceptions from the underlying relationships confirms the independent character of this assumption of debt (*Cabrillac and Mouly* no.473-4; Malaurie and Aynès/*Aynès and Crocq*, Les sûretés no. 324; further references in *Simler* no. 897). However, protective judicial measures can be invoked by a co-debtor in the case of a subsequent cumulative assumption of debt in order to refuse performance, which is contrary to the first demand character of an independent personal security (*Simler* no. 898). *Simler* has carefully pointed out not only some similarities but also several dissimilarities of a subsequent co-debtorship as compared with an independent personal security (*Simler* nos. 897 s.).

(f) Special instrument of security

29. Under GERMAN law the subsequent cumulative assumption of debt for purposes of security is a special instrument of security that is neither a dependent nor an independent personal security. Contrary to the characteristics of a dependent personal security, the co-debtor assumes vis-à-vis the creditor a personal (primary and independent) obligation as of the time of the assumption (cf. *Reinicke and Tiedtke*, Kreditsicherung 1, 5, 14; it may therefore be called a "semi-accessory security"). The issuer of an independent personal security assumes the responsibility that the original debtor will perform (pay a certain amount of money), whether or not this amount is due. Some voices plead for recognising co-debtorship for security purposes as a special institution, combining characteristics of both (*Schürnbrand* 194-198; *Madaus* 327–329, with proposals for specific legislative rules).

30. In FRANCE, such a great authority as *Simler* no. 897 s. seems to tend in the same direction.

VI. Additional rules on plurality of debtors

31. Cf. national notes to IV.G.–1:105 (Several security providers: solidary liability towards creditor) as well as to Chapters 2 and 4.

IV.G.–1:105: Several security providers: solidary liability towards creditor

(1) To the extent that several providers of personal security have secured the right to performance of the same obligation or the same part of an obligation or have assumed their undertakings for the same security purpose, each security provider assumes within the limits of that security provider's undertaking to the creditor solidary liability together with the other security providers. This rule also applies if these security providers in assuming their securities have acted independently.

(2) Paragraph (1) applies with appropriate adaptations if proprietary security has been provided by the debtor or a third person in addition to the personal security.

COMMENTS

A. Context and scope

This Article and the next two Articles form, as the partly identical titles indicate, a complex but coherent set of rules dealing with the special problems which arise if there are several security providers. In this situation, the first issue is the kind of liability that exists between the several security providers towards the creditor. This is dealt with in the present Article. The second issue arises after one of the security providers has made payments to the creditor: can the payer have recourse against the other security providers and for how much? This is dealt with in IV.G.–1:106 (Several security providers: internal recourse). The third issue is whether and for how much the security providers who have satisfied recourse claims by other security providers can have recourse against the debtor. This is dealt with in IV.G.–1:107 (Several security providers: recourse against debtor). All these provisions apply also to a co-debtorship for security purpose, cf. IV.G.–1:104 (Co-debtorship for security purposes).

B. Several providers of personal security

Basic rule. If several persons assume a personal security in favour of a creditor, their liability may be divided or solidary. If the secured obligation amounts to 40.000 and security providers A and B have divided liability, creditor C has a right to 20.000 from each (III.–4:102 (Solidary, divided and joint obligations) paragraph (2); III.–4:104 (Liability under divided obligations)). By contrast, if they are solidarily liable, C may demand the full amount of 40.000 from either A or B (III.–4:102 (Solidary, divided and joint obligations) paragraph (1)), whoever appears to be more solvent, and can leave the payer to seek recourse from the other (III.–4:106 (Apportionment between solidary debtors); III.–4:107 (Recourse between solidary debtors).

The present Article opts for solidary liability. This is the default rule for the liability of two or more debtors to perform the same obligation (III.–4:103 (When different types of obligation arise) and in the present situation will correspond to the expectations of the parties. Each provider of personal security must assume the risk of being held fully responsible; and this is also in the interest of the creditor. The principle of solidary liability of several personal security providers seems to be generally recognised. Of course, the parties may agree to deviate from this general rule.

There is less unanimity with respect to the question whether solidary liability exists, even if the several contracts of personal security have been assumed independently from each other, especially at various times. However, distinctions as to time or occasions neither make sense

nor are they practicable. In reality, all personal security providers are in the same boat and should share the same risk (paragraph (1) sentence 2).

"Same obligation" or "same security purpose". This alternative is based upon the basic distinction in this Part between dependent and independent personal securities. Obviously, the first part of the pair of words refers to dependent securities and the second part to independent securities.

"Within the limits of that security provider's undertaking". This formula has both a quantitative and a qualitative meaning.

As far as quantity is concerned, a personal security provider may have secured parts only of the same obligation; in this case, paragraph (1) only applies, if and in so far as the various part securities cover the same portion of the secured obligation. In the latter case, the two part security providers are liable as solidary debtors (paragraph (1) sentence 1) unless otherwise provided.

Illustration 1a
For a credit of 3 million, A assumes a security for 1,5 million and B for 0.5 million. Up to 0.5 million, A and B are liable solidarily.

Illustration 1b
As in Illustration 1 a, but the debtor has paid 2 million on his debt. The creditor may then demand all of the remaining 1 million from A; or he may demand up to 0,5 million from B and the remaining amount from A; or he may divide his claim in any other proportion as between A and B, but only within the maxima which A and B, respectively, have agreed as their upper limit of liability.

Illustration 2
For a credit of 3 million, A assumes a security with a maximum amount of 3 million and B a security for any amount surpassing the first 2 million. A and B are solidary debtors for any amount that exceeds 2 million.

As far as the quality of the undertaking is concerned, the security provider may have assumed vis-à-vis the creditor not a solidary liability with the debtor but a merely subsidiary liability (cf. IV.G.–2:105 (Solidary liability of security provider) and IV.G.–2:106 (Subsidiary liability of security provider); in particular, according to IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (b) a security assumed by a consumer creates only a subsidiary liability. The merely subsidiary liability of one or more security providers does not affect the liability of any additional security providers.

C. Personal and proprietary security providers

Paragraph (2) deals with the relatively novel issue of a plurality of personal and proprietary security providers.

Illustration 3
C's credit to D is secured by a proprietary security right encumbering the shares of D in company Z and also by a personal security provided by D's friend F.

Most writers start from the principle that the two groups of security providers should be treated equally. The creditor (and not the law) should be free to choose, according to the circumstances, which of the several security providers to turn to first.

The minority view would establish primary liability of proprietary and only subsidiary liability of personal security providers. It is based upon the idea that personal security, since it charges all the assets of a person, is more risky and therefore deserves more protection by attaching only a subsidiary liability to it. However, this view is not convincing. In fact, the limits between the impact of the two types of security are fluid, depending upon the circumstances. On the one hand, proprietary security may cover virtually all the security provider's assets while; on the other hand, a personal security for a low amount may in fact burden only a small portion of the security provider's property.

NOTES

I. Types of liability in case of plurality of providers of personals security

(a) Overview

1. For the existence and shape of solidary liability in the different member states in general reference is made to the national notes on III.–4:102 (Solidary, divided and joint obligations).
2. The liability of several persons providing personal security for the same debt or part thereof may in all national systems take the different forms described in III.–4:102 (Solidary, divided and joint obligations): it may be divided (*pro rata*, several, separate) or solidary (*in solidum*, joint and several). Which of these types is applied under the national systems may depend upon several circumstances, which will be discussed in detail below.
3. The exact shape of the solidary liability of providers of security in the case of a plurality of providers of personal security under the national systems is highly diversified: whereas there may be full solidary liability covering both the external relationship as against the creditor and the internal relationship upon recourse between the providers of security, there may also be a mere external solidarity of the providers of security but divided liability in their internal relationship (for details of the latter, see the national notes on the following Article). The present Article deals only with the external relationship between the creditor on the one side and the providers of security on the other side.

(b) Intention of the parties – solidary liability within the limits of each security provider's undertaking

4. In general, the intention of the parties as found upon proper construction of the contract is the most important factor (ENGLAND: *Andrews and Millett* no. 4-011; GERMANY: Staudinger/*Horn* § 769 no. 7 with further references: agreement of the parties is possible). In the absence of a contractual stipulation, there are presumptions as to the type of liability applicable (see nos. 6 ss. below).
5. It follows from the general emphasis on the agreement of the parties to the security transaction that the liability of each security provider is restricted to that security provider's undertaking and thus the solidarity of several providers of security is

limited to that part of the obligation for which at least two of the security providers have assumed liability (AUSTRIA: CC § 1359 first sentence; Schwimann/*Mader and Faber* § 1359 no. 1; DENMARK: *Pedersen*, Kaution 102; ENGLAND: *Ellesmere Brewery v. Cooper* [1896] 1 QB 75 (CFI); FINLAND: LDepGuar § 31 para 1 read with § 5; RP 189/1998 rd 70; GERMANY: Staudinger/*Horn* § 769 no. 13).

(c) Differentiation between co-securities and independently assumed securities

6. Some countries differentiate between the circumstances of contracting: simultaneously assumed personal securities (co-securities) are treated differently from personal securities that are assumed at different times. In most countries which make that differentiation the liability of co-providers of security is solidary (ENGLAND/IRELAND: *White v. Tyndall* (1888) 13 App.Cas. 263 (HL(Irl))) for all cases of plurality of sureties. In ENGLAND, if the promise is made simultaneously by two or more providers of security, clear words of severance are necessary to render the security providers' liability divided (cf. *White v. Tyndall* (1888) 13 App.Cas. 263 (HL(Irl)); *The Argo Hellas* [1984] 1 Lloyd's Rep 296, 300 (CFI)). The situation is similar in IRELAND (*Donnelly* 420). By contrast, the liability of the providers of security will be separate if they have acted independently or successively without making reference to the other security provider's promise (*Andrews and Millett* no. 4-011).

7. In ITALY solidary liability is the general rule for co-securities; it arises also when the several security providers, in assuming their obligations, did not act simultaneously, but in the view of a common interest. However, it is possible for the parties to agree on the so-called *beneficium divisionis* (CC art. 1946), *i.e.* the right of the security provider who is solidarily liable to limit liability to the proportionate share of the secured obligation only when being called for the payment of the whole obligation by the creditor (CC art. 1947). If securities are assumed by a plurality of security providers without the intention to realise a common interest, the liability of the several security providers is separate; nevertheless, as in the former case, the security provider who first pays the creditor is subrogated to the creditor's rights against the other security providers (Cass. 6 May 2004 no. 685, Riv.Notar. 2005, 333; *Giusti* 210; *Fragali*, Confideiussione 196 s.).

8. In PORTUGAL the rules on solidary debtors (CC art. 518, 527) apply with the necessary exceptions to independently assumed personal securities relating to the same debt, unless the *beneficium divisionis* has been agreed (CC art. 649 para 1). In the case of jointly assumed personal securities, on the other hand, each one of the providers of security can exercise the *beneficium divisionis*. However, each of the providers of security is proportionally liable for the share of the co-provider of security who is insolvent or against whom no demands or executions can be made in PORTUGAL (CC art. 649 paras 2 and 3 read with 640 lit. b).

9. In SPAIN, on the other hand, co-providers of security have a divided liability, unless expressly agreed otherwise. CC art. 1837 para 1 establishes the so-called *mancomunidad* in the following terms: "When there are several providers of security of only one debtor and for one debt only, the obligation of responding therefor shall be divided among all. The creditor can only demand from each surety his corresponding share, unless solidarity has been expressly stipulated" (*Lacruz Berdejo* 537; *Guilarte Zapatero*, Notas sobre la cofianza 891 s.; *Díez-Picazo* 446). Again, these rules are not applicable to independently assumed personal securities.

(d) General presumption in favour of solidary liability regardless of circumstances of contracting

10. In several countries there is a general presumption for solidary liability (AUSTRIA: for dependent personal securities cf. CC § 1359; for independent personal securities cf. Avancini/Iro/*Koziol* nos. 3/124–3/125; DENMARK: Promissory Note Act §§ 2, 61; Andersen, Termn, Edlund a.o./*Pedersen* 437 s.; DUTCH CC art. 7:850 para 3 read with art. 6:6 para 2; Asser/*Hartkamp* no. 95 at p. 78; FINLAND: LDepGuar § 3 para 3; HD 3 Jan. 1996, KKO 1996:1; GERMANY: cf. CC § 769 for dependent personal securities; GREEK CC art. 854; SWEDEN: Law of Commerce Chap. 10 § 11 read with Promissory Note Act § 2; *Ekström* 73).

11. This presumption applies regardless of whether the providers of security have acted jointly and whether they had knowledge of the other securities (GERMANY: BGH 24 Sept. 1992, NJW 1992, 2287; Erman/*Ehmann* § 421 no. 46; Erman/*Herrmann* § 769 no. 1) and leads to the application of the general rules on solidary liability (GERMAN CC §§ 421–425; GREEK CC arts. 482–488). According to GREEK opinion, however, there should be no solidarity where there is more than one personal security with a maximum amount which is lower than the total amount of the secured claim (*Georgiades* § 3 nos. 119-120 and § 4 nos. 3-4).

12. A similar presumption applies in the ROMANIC countries. In FRANCE, BELGIUM and LUXEMBOURG (CC art. 2025 (since 2006: FRENCH CC art. 2302)) each of several providers of security can be called upon to pay the whole debt ("*obligation au tout*"). A solidary liability in the strict sense, however, can be presumed only if the providers of security are merchants (FRANCE: Cass.com. 21 April 1980, Bull.civ. 1980 IV no. 158 p. 123; by contrast, Law no. 94-126 of 11 Feb. 1994 art. 47 para 2 *(loi Madelin)* prohibits solidary liability in the case of indefinite security assumed by a natural person guaranteeing a professional debt of an individual enterprise; BELGIUM: *Declerck-Goldfracht* no. 15). However, the creditor is free to demand partial performance from each security provider separately (BELGIAN, FRENCH CC art. 2027 (since 2006: FRENCH CC art. 2304); *Van Quickenborne* no. 390).

(e) Beneficium divisionis

13. In most of the ROMANIC countries the providers of security can invoke the *beneficium divisionis* (cf. no. 7 above; BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2026 (since 2006: FRENCH CC art. 2303)); according to PORTUGUESE CC art. 649, if the security had been assumed in common) resulting in divided liability of the providers of security (*Van Quickenborne* no. 392). In ITALY the *beneficium divisionis* has to be explicitly agreed upon by the parties (CC art. 1947 para 1), similarly in PORTUGAL, if the personal securities have been independently assumed (CC art. 649 para 1). In the other ROMANIC countries this right is always available unless solidary liability is expressly agreed upon. The situation is similar in SCOTLAND (cf. *Wilson* nos. 28.1, 10.1; *Bell* § 267). The right has to be invoked explicitly (*Van Quickenborne* no. 396) and only the security provider who invokes it benefits from the division (*Van Quickenborne* no. 402). If a co-provider of security is insolvent at the time of invoking the right, the liability of the other providers of security increases proportionally (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2026 para 2 (since 2006: FRENCH CC art. 2303 para 2); ITALIAN CC art. 1947 para 2; *Giusti* 216; PORTUGUESE CC art. 649 para 2 (see no. 8 above); SPANISH CC art. 1844 sentence 1).

14. The new DUTCH Civil Code does not provide a *beneficium divisionis* any more, as it appeared that in practice contracting parties mostly had excluded it. Parties are free, though, to expressly agree on the *beneficium* (*Blomkwist* no. 41 at p. 67–68).

II. Application to co-debtors for security purposes

15. The principles set out above for the case of plurality of providers of security are equally applicable to cases of co-debtorship for security purposes and situations where there is a co-debtor for security purposes besides a security provider. In ENGLISH law, this result follows from the fact that a co-debtor who agrees with the other (principal) debtor to act as surety only is treated as a normal security provider (cf. national notes to IV.G.–1:104 (Co-debtorship for security purposes) no. 11). Under GERMAN law co-debtors, like providers of personal security, may agree with the creditor upon the type and details of their liability (cf. *Reinicke and Tiedtke*, Kreditsicherung 15). In the absence of any agreement several co-debtors are solidarily liable (Erman/*Ehmann* § 421 no. 47). See generally as to the type of the security provider's liability under a co-debtorship for security purposes in the different member states notes to IV.G.–1:104 (Co-debtorship for security purposes) nos. 22 ss.

III. Personal and proprietary security

(a) Solidary liability

16. In ENGLAND often, even though not always, a person granting proprietary security for another person's debt in the same document also assumes a personal security (*Lingard* 154). Regardless of whether a security provider grants a proprietary security or assumes a personal security, it is regarded as a surety (Halsbury/*Salter* para 105; *Andrews and Millett* no. 1-001). Therefore providers of personal and proprietary security may be solidarily liable. The same is true for FINLAND (LDepGuar § 41 refers for third party proprietary providers of security, *inter alia*, to § 3 para 3, cf. no. 10 ss. above). Similarly, in FRANCE and BELGIUM a third party granting proprietary security is known as "*caution réelle/zakelijke borg*" (FRANCE: Cass.com. 7 March 2006, Bull.civ. 2006 IV no. 59 p. 59; Cass.ch.mixte 2 Dec. 2005, Bull.civ. 2005 ch.mixte no. 7 p. 17, JCP G 2005 II no. 10183; the *Grimaldi* Commission's proposed CC art. 2295 ("*Le cautionnement réel est une sûreté réelle constituée pour garantir la dette d´autrui*") has not, however, been adopted by the legislation of 2006; *Simler* no. 20; BELGIUM: *T´Kint* no. 718). Such security is regarded as proprietary security in relation to the creditor (FRANCE: Cass.com. 7 March 2006, above, confirming Cass.ch.mixte 2 Dec. 2005, also above; it is possible, however, that the provider of a proprietary security in addition also assumes a personal security: Cass.com. 21 March 2006, Bull.civ. 2006 IV no. 72 p. 71). The exercise of the *beneficium divisionis* is excluded (BELGIUM: *Van Quickenborne* no. 70; FRANCE: *Simler* nos. 22 and 510). Therefore providers of personal and of proprietary security are solidarily liable.

(b) Quasi solidarity

17. In GERMAN and SPANISH law the liability of providers of personal and proprietary security is technically not regarded as solidary because of the different content of the obligations or claims. However, the same results are achieved since the courts regard all providers of security as *quasi* solidarily liable (GERMANY: BGH 29 June 1989, BGHZ 108, 179, 183 and 187, confirming BGH 14 July 1988, BGHZ 105, 154, 158; BGH 24 Sept. 1992, NJW 1992, 3228; implicitly approving *e.g.* Palandt/*Heinrichs* § 426 no. 2; different view Erman/*Ehmann* § 421 nos. 40 s.; SPAIN: *Díez-Picazo* 445).

IV. Ranking of the creditor's claims against different providers of security

(a) Creditor's free choice

18. In most countries the creditor generally has the choice from which of the several providers of personal and proprietary security it will demand performance or payment (AUSTRIA: OGH 20 June 1984, SZ 57 no. 114 565-566; Schwimann/*Mader and Faber* § 1360 no. 1; BELGIUM: *Dirix and De Corte* no. 27; DENMARK: *Rørdam and Carstensen* 40 s.; *Højrup* 52; *Ussing*, Kaution 87; ENGLAND: *Re Bank of Credit and Commerce International S.A.* [1998] AC 214, 222 (HL); *Jackson v. Digby* (1854) 2 WR 540 (HL); FRANCE: the creditor is not obliged to first call upon the "*caution réelle*", Cass.com. 10 Nov. 1981, D. 1982, 417; *Simler* no. 510; GERMANY: BGH 29 April 1997, WM 1997, 1247, 1249; *Reinicke and Tiedtke*, Kreditsicherung 395; ITALY: the principle of free choice of the creditor is clearly expressed only in relation to several providers of personal security: *Ravazzoni* 263; *Giusti* 212; NETHERLANDS: while the principle of free choice is often made subject to the demands of good faith, this has not yet been utilised to negate a creditor's choice, H.R. 24 April 1992, NJ 1992 no. 463 with note *Snijders, H.*, NTBR 1993, 163, 166; CA Hertogenbosch 3 Oct. 1994, NJ 1995 no. 357; SCOTLAND: *Ewart v. Latta* (1865) 37 Sc Jur 418; 1865 SC 36 (HL (Sc))).

(b) Restrictions

19. Legal ranking may, however, result from the rules on the subsidiary liability of providers of dependent personal security. Yet these rules are subject to several exceptions so that in practice even the provider of a dependent security with subsidiary liability will very often not be entitled to demand from the creditor the prior enforcement of other securities (for details see national notes to IV.G.–2:106 (Subsidiary liability of security provider) nos. 13 ss.).

20. In SWEDEN, if the third party's liability under the security is *subsidiary*, the creditor must *in dubio* first enforce against the debtor's proprietary security (*Walin*, Borgen 150). The legal situation is more uncertain if a third person has granted a proprietary security and another security provider a *subsidiary* personal security. *Walin* seems to prefer that a proprietary security pledged by a third party is fully liable towards providers of personal security, although he also expresses the contrary opinion (317-320). There is no relevant Supreme Court decision (as to the principles, cf. HD 10 Nov. 1981, NJA 1981, 1104). There are, however, cases where a proprietary security provider is treated less favourably than a provider of personal security. *E.g.* in HD 18 Feb. 1987, NJA 1987, 80 primary liability was assumed although a personal security provider *in dubio* is liable only subsidiarily. Many other SCANDINAVIAN authors think that providers of personal and proprietary security in principle should be treated equally (cf. *Walin*, Borgen 317 fn. 15).

21. In FINLAND a free choice exists in case of a *solidary* personal security and proprietary security granted by the debtor if the parties have agreed on a so-called "supplementary security" (LDepGuar § 2 no. 4). There is such a security if the main purpose of the secured credit is the acquisition or repair of a house or vacation place and this serves as security for the credit (§ 3 para 2). Besides, the parties are free to agree against which of the several providers of security the creditor should turn first.

22. In GREECE, ITALY and SPAIN there is no straightforward rule regarding the relationship between personal and proprietary security (see for ITALY also no. 18 above). In GREECE, the creditor in general has the right to choose the security which seems more suitable for obtaining satisfaction; this right is not without limits and

subject to the so-called duty of vigilance, especially if the creditor is a bank (cf. *Doublis*, Metavivasi pistosis 122-123). By contrast, in PORTUGAL the relationship between personal and proprietary security is regulated by CC art. 639, though the parties may agree otherwise. The provider of dependent personal security with *beneficium discussionis* (*i.e.* with subsidiary liability; see national notes on IV.G.–2:106 (Subsidiary liability of security provider) no. 9) may demand from the creditor first to seek satisfaction from a provider of proprietary security securing the same debt and created prior to or contemporaneously with the dependent personal security. However, if the proprietary security also secures other claims of the same creditor, this rule only applies if the value of the proprietary security is sufficient to satisfy all claims. Literally, CC art. 639 only refers to proprietary securities on a contractual basis, but it may be applied to proprietary securities created by operation of law as well (*Almeida Costa* 776).

23. In ENGLAND, the free choice of the creditor from whom to demand performance can in appropriate situations be affected by the equitable doctrine of marshalling. This equitable right serves to ensure that one creditor does not deprive another creditor of that other's due portion of the debtor's estate. When *e.g.* the creditor demands performance from the provider of personal security, the latter may compel the creditor, if the latter has a claim upon two funds in respect of the secured debt, only one of which the provider of personal security can use, to resort to the other first (cf. Halsbury/*Salter* para 226; see generally *Ali*, *passim*).

IV.G.–1:106: Several security providers: internal recourse

(1) In the cases covered by the preceding Article recourse between several providers of personal security or between providers of personal security and of proprietary security is governed by III.–4:107 (Recourse between solidary debtors), subject to the following paragraphs.

(2) Subject to paragraph (8), the proportionate share of each security provider for the purposes of that Article is determined according to the rules in paragraphs (3) to (7).

(3) Unless the security providers have otherwise agreed, as between themselves each security provider is liable in the same proportion that the maximum risk assumed by that security provider bore to the total of the maximum risks assumed by all the security providers. The relevant time is that of the creation of the last security.

(4) For personal security, the maximum risk is determined by the agreed maximum amount of the security. In the absence of an agreed maximum amount, the value of the secured right or, if a current account has been secured, the credit limit is decisive. If a secured current account does not have a credit limit, its final balance is decisive.

(5) For proprietary security, the maximum risk is determined by the agreed maximum amount of the security. In the absence of an agreed maximum amount, the value of the assets serving as security is decisive.

(6) If the maximum amount in the case of paragraph (4) first sentence or the maximum amount or the value, respectively, in the case of paragraph (5) is higher than the value of the secured right at the time of creation of the last security, the latter determines the maximum risk.

(7) In the case of an unlimited personal security securing an unlimited credit the maximum risk of other limited personal or proprietary security rights which exceed the final balance of the secured credit is limited to the latter.

(8) The rules in paragraphs (3) to (7) do not apply to proprietary security provided by the debtor and to security providers who, at the time when the creditor was satisfied, were not liable towards the latter.

COMMENTS

A. Recourse between several security providers

General. The preceding Article establishes solidary liability of several personal security providers vis-à-vis the creditor. The general rules on recourse between several solidary debtors are well adapted to being applied between several security providers since all security providers are in the same boat. A creditor's decision to demand performance from one security provider rather than another or all is motivated by the creditor's interests.

Shares proportionate to maximum risk. Neither III.–4:107 (Recourse between solidary debtors) nor other provisions of Book III, Chapter 4 determine the size of the individual shares of solidary debtors. III.–4:106 (Apportionment between solidary debtors) paragraph (1) merely says that solidary debtors are liable in equal shares, unless otherwise provided. This is not suitable for recourse among security providers since they often run risks of very different extent. If for example A had assumed a personal security for 1.000 and B one for 300 for a credit being initially 1.300, but reduced by payments of the debtor to 500, it seems to be unfair to divide the remaining 500 between A and B equally, so that both would be internally

liable for 250. Under the present Article therefore each security provider is internally liable in proportion to the maximum risk that security provider had assumed.

Illustration 1
For a credit of 3.000 A had assumed a dependent personal security with a maximum amount of 1.000 and B one with a maximum amount of 2.000. The sum of all maximum risks being 3.000 (1.000 of A + 2.000 of B), A's portion is ⅓ and B's ⅔. If the debtor has paid 1.500, A would be internally liable for 500 (⅓ of 1.500) and B for 1.000 (⅔ of 1.500).

Agreements on another sharing. However, personal security providers may agree upon another sharing (paragraph (3). For instance, if shareholders of a company with very different holdings had assumed personal securities for a credit granted to their company, it must be possible for them to agree otherwise. But it may be a question of fact whether they wanted to share liability according to the size of their holdings in the company.

Time relevant for calculation of maximum risk. As several securities are not always created at the same time and as their value can differ, it is necessary to define the moment that is decisive for the evaluation of the maximum risk. According to paragraph (3) sentence 2 the moment of creation of the last security is relevant. This is justified since only at this moment can the maximum total and therefore the proportions be established. The time at which a security is assumed must be determined according to general rules, taking into account IV.G.–1:103 (Creditor's acceptance).

Illustration 2
In January, A had assumed a dependent personal security with a maximum amount of 3.000 for a credit to D of 3.000. In May the creditor and A agree to reduce the maximum amount to 2.000 and in June B assumed a dependent personal security with a maximum amount of 1.000. As the moment of creation of the last security is decisive and in June A is liable up to 2.000 and B up to 1.000, the portions are the same as in Illustration 1.

B. Definition of the maximum risk for personal security

Although most personal securities probably are limited by a maximum amount, it is according to these Rules possible to agree upon a dependent personal security without stipulating a maximum amount (cf. IV.G.–2:104 (Coverage of security)). In these cases the maximum risk is determined by the amount of the secured claim or, in case of a current account, by the credit limit at the time of the creation of the last security (paragraph (4) sentence 2 and paragraph (3) sentence 2) since the amount of the secured credit determines the maximum each personal security provider may be obliged to pay.

Illustration 3
For a current account with a credit limit of 3.000 A had assumed a personal security with a maximum amount of 2.000, whereas B had assumed the debt without limitation for security purpose. Later on the credit limit is extended to 5.000. A and B being solidary debtors only for 3.000, A is to that extent internally liable for $^{2}/_{5}$ and B for $^{3}/_{5}$, the latter being alone additionally liable for the remaining 2.000.

If a credit limit does not exist, the final balance of the secured credit is decisive according to paragraph (4) sentence 3. This rule is justified by the mere fact that there is no other possible moment to determine the maximum risk.

Illustration 4
A and B had assumed dependent personal securities for all existing and future obligations of D towards C, A agreeing a maximum amount of 1.000 whereas B's security had not been limited. If D in the end owes 9.000, A's portion is $^{1}/_{10}$ and B's $^{9}/_{10}$.

C. Definition of the maximum risk for proprietary security

For those types of proprietary security which can only be created if a maximum amount is agreed (*e.g.* real estate mortgages), the maximum risk can be determined as for personal securities paragraph (5) sentence 1). But in most cases of proprietary security in movables, no agreement of a maximum amount will be necessary. The maximum risk is determined in these cases by the value of the assets serving as security (paragraph (5) sentence 2), the moment of creation of the last security being again decisive. If the value of the assets diminishes later on, the proportion is not affected.

Illustration 5
For a credit of 3000 A had assumed a dependent personal security with a maximum amount of 2000 and B gave a car as security to the creditor, the value of the car being 2000 at the time of contracting. Two years later, the debtor has repaid only 1000 and the creditor has obtained the remaining 2000 from A. The latter is entitled to demand 1000 from B as the portion of each security provider is $^{1}/_{2}$. If the value of the car is only 500, A will only get this sum since B is not personally obliged.

D. Limitation of the maximum risk

Often the security provider assumes a personal security or creates another security whose maximum amount or value is at the time of contracting higher than the secured credit. In these situations it seems to be appropriate not to limit the maximum risk by the maximum amount or the value but by the amount of the credit since this is the amount the security is liable for. This is done by paragraph (6).

Illustration 6
For a credit of 3000 A had assumed a dependent personal security with a maximum amount of 4000 and B one with a maximum amount of 1000. If A had to pay 3000 to the creditor, he may demand payment from B up to 750 (the sum of all securities being 3000 + 1000 = 4000 and B's portion being therefore $^{1}/_{4}$).

However, if the amount of the secured claim is reduced after creation of the last security below the agreed maximum amount of a security, this is irrelevant, since otherwise any payment by the debtor would be mostly to the advantage of the security with the higher risk.

Illustration 7
For a credit of 3000 A had assumed a dependent personal security with a maximum amount of 1.000 and B one with a maximum amount of 2000. The debtor has paid 1500 to the creditor. A's portion remains ⅓ (= 500) and B's ⅔ (=1.000), rather than $^{10}/_{25}$ (= 600) and $^{15}/_{25}$ (= 900).

E. Special limitation

Paragraph (4) last sentence deals with an unlimited credit that is secured by an unlimited personal security; the maximum risk here is determined by the final balance of the credit. This rule can without any problems be applied if only unlimited personal securities are assumed since all security providers are equally liable in this situation.

> *Illustration 8*
> A and B had assumed dependent personal securities for all existing and future obligations of D towards C, both securities not being limited by maximum amounts. Independently from what D owes finally, both personal security providers are liable for half since the final balance determines both maximum risks which are therefore identical.

The solution according to paragraph (4) is still adequate if an unlimited credit is secured by unlimited personal securities and limited securities, provided that the final balance of the credit is higher than the limitations of the limited securities (cf. Illustration 4). But matters differ if the final balance is lower:

> *Illustration 9*
> A and B had assumed dependent personal securities for all existing and future obligations of D towards C; A agreeing a maximum amount of 1000 whereas B's security had not been limited. If the final balance of the credit is 500, A would according to the rule in paragraph (4) be internally liable for two thirds and B (only) for one third.

This solution seems to be unfair because A who only wanted to assume a limited risk is burdened with a higher portion than B who accepted every risk up to the loss of all B's assets. Moreover, as is shown by Illustration 8, the situation of A would be better if A had assumed an unlimited personal security. To prevent this obviously unfair result, paragraph (7) limits the maximum risk of the limited security to the final balance of the credit so that finally all security providers are *inter se* equally liable.

F. Exceptions

Paragraph (8) contains two exceptions to the preceding rules. The first exception refers to proprietary security rights granted by the debtor. Since it is the debtor who eventually has to reimburse all other security providers, it would make no sense if the debtor as a provider of proprietary security was allowed to participate in the internal recourse of the security providers as provided for in this Article. If the creditor enforces a security created by the debtor, the debtor may not take recourse against the security providers. On the other hand, if a third party security provider satisfies the creditor, the former is as a matter of course entitled to enforce a security right granted by the debtor, to which the third party security provider is subrogated according to IV.G.–2:113 (Security provider's rights after performance) paragraph (1) sentence 2 read with paragraph (3).

The second exception contained in paragraph. (8) relates to security providers who would not have been under any liability towards the creditor. In certain situations for example, a provider of dependent security can refuse payment to the creditor under IV.G.–2:103 (Debtor's defences available to the security provider), while a provider of independent

security is not entitled to do so. This position would be undermined if the provider of independent security could after payment to the creditor hold the provider of dependent security internally liable. The same principle applies to a security provider whose liability towards the creditor is only subsidiary: as long as the security provider may invoke the subsidiary character the liability according to IV.G.–2:106 (Subsidiary liability of security provider), this security provider is also protected against other security providers' claims for internal recourse.

NOTES

I. General

1. General legal provisions on recourse between several providers of security seem to exist only in DENMARK (Promissory Note Act § 61 read with § 2(2) read with Insurance Agreement Act § 42; cf. *Pedersen*, Kaution 97) and the NETHERLANDS (CC art. 7:869 read with art. 6:152). However, the FINNISH LDepGuar of 1999 regulates not only the relationship between providers of dependent personal security (§ 31) and their relationship vis-à-vis providers of proprietary security (§ 30(3)) but also the right of recourse of third party pledgees (§ 41 read with § 30). As far as general legal provisions on recourse between several debtors exist, these are in GERMANY not directly applicable to providers of security due to the peculiarly narrow concept of solidary liability under GERMAN law which requires an equal basis of the obligations, which does not exist for different types of security providers' obligations (see national notes to IV.G.–1:105 no. 17; BGH 29 June 1989, BGHZ 108, 179, 183 and 187). In some countries legal provisions on recourse between all providers of personal security exist (SWEDISH Promissory Note Act § 2(2) read with Ccom chap. 10 § 11). Nevertheless, in most continental legal systems there are at least legal provisions on recourse between several providers of dependent personal security (AUSTRIAN CC § 1359; BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2033 (since 2006: FRENCH CC art. 2310); DUTCH CC art. 7:869; GERMAN CC § 774(2); GREEK CC art. 860; ITALIAN CC art. 1954; PORTUGUESE CC art. 650; SPANISH CC art. 1844).
2. For all legal systems two observations can be made. First, freedom of contract prevails also in this part of the law so that the parties are free to deviate from legal provisions on recourse (see *e.g.* AUSTRIA: Schwimann/*Mader and Faber* CC § 1358 nos. 25-26; BELGIUM: *Du Laing* nos. 13, 23; *Van Quickenborne* no. 534; ENGLAND: *Andrews and Millett* nos. 12-001 s.; FINNISH LDepGuar § 30(3), 31(1) and (2); FRANCE: CA Lyon 13 October 1981, JCP N 1983, II no. 112; CA Riom 2 October 1996 (two decisions), JCP G 1997, I no. 4033 (9); *Simler* no. 636; GERMANY: BGH 29 June 1989, BGHZ 108, 179, 183, 186; GREECE: A.P. 793/1995, NoB 45, 775; ITALY: *Andreani* 704; NETHERLANDS: *du Perron and Haentjens* art. 869 no. 2).
3. Secondly, while the debtor does not have any right of recourse against third party providers of security, securities (especially proprietary securities) granted by the debtor are fully available to the providers of security after they have performed to the creditor (ENGLAND: *Andrews and Millett* no. 11-024; FINLAND: LDepGuar § 30(1); GERMANY: BGH 5 April 2001, NJW 2001, 2327, 2329; ITALY: *Ravazzoni* 269; SCOTLAND: Stair/*Clark* no. 930; SPAIN CC arts. 1210.3 and 1839). However, in FINLAND an exception applies if the debtor's proprietary security by virtue of legislation is liable only subsidiarily (LDepGuar § 30(2)).

II. Internal recourse

(a) Recourse between providers of dependent security

4. It is common opinion in most legal systems that several providers of dependent security are in the absence of any special agreement and in so far as they secure the same debt in general internally liable like solidary debtors. This means that a provider of security who paid the creditor, as a rule, has a right of recourse against the other provider(s) of security, irrespective of the circumstances, especially the time of assumption of the dependent personal security. This right arises in ENGLAND independently of any contract and is equitable in nature (Andrews and Millett no. 12-001). In most other legal systems this results from the general rules on co-debtorship (AUSTRIAN CC §§ 1359 sentence 2, 896; DENMARK: Promissory Note Act § 61 read with § 2 (2); Andersen, Møgelvang-Hansen and Ørgaard 35 ss., 251 s.; Pedersen, Kaution 97 s.; DUTCH CC art. 7:869 read with art. 6:152; GERMAN CC §§ 774(2), 426; GREEK CC art. 860, 487; ITALIAN CC art. 1954; SCOTLAND: Stair/Clark no. 940; SPAIN: CC art. 1844 is applied by the Supreme Court in cases of plurality of securities agreed to be liable solidarily (TS 4 May 1993, RAJ 1993/3403, TS 24 May 1994, RAJ 1994/3741); *Guilarte Zapatero*, Comentarios 258; *Díez-Picazo* 451; SWEDEN: Promissory Note Act § 2(2) read with Ccom chap. 10 § 11; Walin, Borgen 30; Walin, Lagen om skuldebrev 26 ss.). In PORTUGAL, several providers of personal security are internally liable like solidary debtors, but the provider of security with beneficium divisionis who pays voluntarily is only entitled to internal recourse after satisfaction has been sought from the debtor (CC art. 650(3)). Without a reference to the rules on internal recourse between co-debtors, the same result is achieved more directly in BELGIUM, FRANCE and LUXEMBOURG under CC art. 2033 (since 2006: FRENCH CC art. 2310) according to which the provider of personal security who paid the creditor in one of the cases enumerated in CC art. 2032 (since 2006: FRENCH CC art. 2309) has recourse against each of the other providers of security.

5. Only in FINLAND does the right to demand recourse depend upon the circumstances, especially the chronological order in which the several dependent personal securities have been established (LDepGuar § 31(2)): a subsequent provider of security may demand full payment from an earlier provider of security; but an earlier provider of security may not demand anything from a subsequent provider of security.

(b) Recourse upon part payment

6. Opinion is divided on the question under which circumstances a right of internal recourse arises upon part payment of the secured obligation.

7. In AUSTRIA, BELGIUM, ENGLAND, FINLAND, FRANCE, ITALY, the NETHERLANDS and PORTUGAL a provider of personal security seems to be entitled to recourse upon partial payment to the creditor, provided this payment surpasses the security provider's share (AUSTRIA: OGH 23 April 1998, ÖBA 1999, 154 critical note *Bacher*; OGH 23 February 1999, ÖBA 1999, 827 note *Riedler*; *Bydlinski* 105-106; BELGIUM: *Du Laing* no. 3; *Van Quickenborne* no. 530; ENGLAND: *Andrews and Millett* no. 12-004; FINNISH LDepGuar §§ 30(1) sentence 2, 31(1) – however, subject to the exception in § 31(2) (*above sub* a); FRANCE: Cass.civ. 3 October 1995, JCP N 1996, II no. 1631; *Simler* no. 640; ITALY: *Fragali*, Della fideiussione 446; NETHERLANDS: CFI Haarlem 24 February 1942, N.J. 1942 no. 849 at p. 1270; *Korthals Altes* 340-341; Asser/*Hartkamp* no. 116; PORTUGAL: CC art. 650(2); STJ 15 February 2001, 3764/00 www.dgsi.pt). Even more in FRANCE the provider of personal dependent security is entitled to exercise internally the right to

recourse before any payment if the creditor has brought an action against the security provider. The reason is that the claim of this provider of personal security against other providers of security is considered to exist since the date of the assumption of the dependent security so that the claim for contribution against a co-provider of security is not affected if the co-provider has become insolvent after assumption of the security (cf. Cass.com. 16 June 2004, Bull.civ. 2004 IV no. 123 p. 126). But a provider of dependent security can demand performance from other providers of security only after having paid (Cass.civ. 15 June 2004, D. 2004, 1972).

8. GERMAN courts are somewhat more favourable to the paying provider of security. As long as it is uncertain to what extent the creditor will demand performance from the providers of security, each provider of personal security is after every partial payment to the creditor generally entitled to demand proportionate recourse from the other security provider(s). It is irrelevant whether the security provider paid more than the correct internal share as that would have to be calculated on the hypothesis that the creditor demands performance of the full security or less than such share (cf. BGH 21 February 1957, BGHZ 23, 361, 364; BGH 19 December 1985, NJW 1986, 1097, 1097; BGH 15 May 1986, NJW 1986, 3131, 3132). But in the latter case recourse is suspended until the internal share of each security provider is certain if the paying security provider becomes insolvent after payment (BGH 17 March 1982, BGHZ 83, 206, 210). Finally, if the principal debtor is insolvent the paying security provider is entitled to recourse only if having paid more than the correct internal share (CA Köln 26 August 1994, GmbHR 1995, 51).

9. In GREECE, according to the predominant opinion in literature, in case of part payment the claim of the provider of personal security (security provider or co-debtor for security purpose) for partial recourse competes with the creditor's claim for payment still due: hence, according to CCP art. 977 paragraph 3, 1007 paragraph 1 the creditor and the provider of personal security are to be satisfied *pro rata* (*Georgiades* § 3 no. 164; *Kaukas* 858 § 3, 465-466; ErmAK/*Zepos* art. 858 no. 11; Georgiades-Stathopoulos AK/*Vrellis* art. 858 no. 13). However, according to a minority opinion, the claim of the creditor has priority: the predominant opinion would only be justified, if the claims of the creditor and of the provider of personal security vis-à-vis the debtor had the same rank; but this is not so, since the co-debtor remains liable until the whole performance has been furnished (cf. CC art. 482 sentence 2; *Tampakis* 425; on the grounds of good faith *Zepos* A 316), whereas the security provider may still be called upon by the creditor for the payment of the remaining part (*Tampakis* 426; on the grounds of good faith *Theodoropoulos* 217).

10. For a "second-degree" recourse if one (or more) security provider(s) are unable to contribute, cf. notes on III.–4:107 (Recourse between solidary debtors) paragraph (3). In SPAIN it is held that the co-guarantor who partially pays has recourse against the co-guarantors when the payment exceeds the amount to be borne by the payer in the internal relationship between them (*Carrasco*, Tratado, p. 293).

(c) Extension to all securities

11. In most countries the principle of full recourse is applied to all third party providers of security. All persons granting security of any kind have a right of recourse against each other. However, the legal basis for this solution differs: in DENMARK, Promissory Note Act § 61 read with § 2(2) concerning several providers of personal security as solidary debtors (cf. *Bryde Andersen* 35 ss. and 251 s.; *Pedersen*, Kaution 97 s.) is extended to the relationship between all providers of security according to the principle of the Insurance Agreement Act § 42 (cf. *Pedersen*, Kaution 97).

12. In ENGLAND a person granting proprietary security for another person's debt is regarded as a surety just as a provider of personal security and is thus entitled to the same remedies for the indemnity (*Rowlatt* 6). The principles of equity mentioned above (no. 4) are therefore applicable. The same is true in BELGIUM, FRANCE and LUXEMBOURG since CC art. 2033 (since 2006: FRENCH CC art. 2310) applies *mutatis mutandis* to providers of proprietary security (BELGIUM: *Du Laing* no. 7; *Van Quickenborne* no. 527; FRANCE: Cass.civ. 25 October 1977, Bull.civ. 1977 I no. 388 p. 306; CA Paris 13 January 1995, D. 1995, 573). And DUTCH CC art. 7:869 read with art. 6:152 and 6:151 paragraph 2 cover providers both of personal and also of proprietary security ("other sureties and persons who as non-debtors were liable for the obligation", cf. also *Blomkwist* no. 39).

13. In view of the lack of specific legal provisions in GERMANY and GREECE, legal practice had to find solutions on the basis of general principles of law. There was special need for adequate solutions in these countries since the strict application of existing legal provisions would result in an internal liability for "everything" by the first performing security provider and in no liability of any other security provider, which has been considered as arbitrary and unjust (GERMANY: BGH 29 June 1989, BGHZ 108, 179, 183, 186; GREECE: *Karasis* 179-180; ITALY: *Petti* 192). Therefore GERMAN courts apply with the approval of most legal writers the general rules on recourse among solidary debtors on the legal basis of *bona fides* (CC § 242) in all cases of plurality of providers of security, provided that the securities can be regarded as having equal rank (BGH 29 June 1989, BGHZ 108, 179, 183, 186; BGH 24 September 1992, NJW 1992, 3228; *Schlechtriem* 1026-1047; *Bülow*, Ausgleich 62-63; *Graf Lambsdorff and Skora* no. 313; *Schmitz* [a Justice of the Federal Supreme Court]; contrary view: *Reinicke and Tiedtke*, Kreditsicherung nos. 1111-1122; Staudinger/*Horn* § 774 no. 68 who are still of the opinion that providers of dependent personal security are to be privileged). The same solution is sustained by AUSTRIAN courts and writers (OGH 20 June 1984, SZ 57 no. 114 at p. 565-566; OGH 9 December 1987, SZ 60 no. 266 at p. 701; Rummel/*Gammerith* § 1359 no. 7) as well as by the prevailing opinion in GREEK legal literature (cf. with different dogmatic reasons *Georgiades* § 3 nos. 175 ss., 178; *Karakatsanis* 127-129; *Karasis* 187; *Spyridakis* § 80; *Theodoropoulos* 260 ss.; with a different – procedural – approach *Kaukas* arts. 847-848, § 9 *sub* c, § 10; but *contra Filios* II/1 § 128, 90-93; Georgiades-Stathopoulos AK/*Vrellis* art. 858 no. 12: providers of personal security must be treated more favourably than mortgagees).

14. Although in SPAIN the strict application of the legal provisions seems to result in the same difficulties and unfairness as in GERMANY and this has been demonstrated by scholars, SPANISH courts until now have not found a satisfactory solution. In literature, however, both solutions have been proposed: the proportional liability of providers of security as well as the privilege of providers of personal security (cf. *Guilarte Zapatero*, Comentarios 219). As a default solution when no special features exist it is proposed that the internal division should be in proportion to the respective amount of the risk borne by each security provider (*Carrasco*, Tratado, p. 267).

15. Under SCOTTISH law the question of recourse between providers of securities of a different kind is rarely discussed. *Thow´s Trustee v. Young* 1910 SC 588, 596 (CA) can probably be understood as indicating that it is in principle possible for a personal security provider to claim relief from proprietary providers of security (in this case, however, relief was denied because the proprietary security was held not to be granted as security for the same debt).

16. In SWEDEN, *Walin*, Borgen 317 ss., seems to prefer that a third party who has furnished proprietary security normally is fully liable with the encumbered assets towards providers of personal securities, although he finally also expresses the contrary opinion.

(d) Internal recourse restricted to some providers of security

17. In some countries the provisions on recourse between providers of dependent personal security are applied only to some minor extent to other securities.

18. Under PORTUGUESE law, the general rule being the non-solidarity of several obligations (CC art. 513), there is no internal recourse, unless the parties agreed otherwise. By contrast, in commercial obligations there is a general rule of solidarity according to Ccom art. 100.

19. Under FINNISH law the provider of dependent personal security has a right to recourse against a provider of proprietary security only in so far as this has been agreed between the security providers (LDepGuar § 30(3); RP 189/1998 rd 69). According to LDepGuar § 41 third persons' proprietary securities are governed by § 30. This means that after payment the provider of proprietary security has, as a rule, a claim for recourse against proprietary security granted by the principal debtor (§ 30(1), but see (2), cf. no. 3 above) but has not, unless otherwise agreed, a right of recourse against another third party provider of proprietary security (§ 30(3)). Since § 41 does not declare § 31 to be applicable, there is also no recourse against providers of dependent personal security.

III. The measure of internal recourse

20. Where internal recourse between providers of security is recognised, the question arises how the amount of this recourse should be calculated.

(a) Party agreement

21. As mentioned before (*above* no. 2), the principle of freedom of contract also applies in this part of the law. Due to this principle providers of security are free to agree upon the internal sharing of their liability (DENMARK*: Pedersen*, Kaution 96 s.; ENGLAND: *Andrews and Millett* no. 12-002; FINNISH LDepGuar § 31; RP 189/1998 rd 69 s.; FRANCE: CA Lyon 13 October 1981, JCP N 1983, II no. 112; CA Riom 2 October 1996 (two decisions), JCP G 1997, I no. 1033 (9); GERMAN CC § 426(1), *Schlechtriem* 1039 and *Bülow*, Ausgleich 59, 64; GREEK CC art. 487(1) and *Georgiades* § 3 no. 178; *Karakatsanis* 137; *Karasis* 187; *Spyridakis* § 80 no. 2; ITALY: *Fragali*, Della fideiussione 437; PORTUGAL CC art. 516; SCOTLAND: *Gloag and Irvine* 822; SPANISH CC art. 1138; SWEDEN: *Walin*, Borgen 119 s.). But an agreement between the creditor and one or all providers of security that excludes the internal recourse between the providers of security is not valid (GERMAN BGH 14 July 1983, BGHZ 88, 185, 189 for dependent personal securities assumed by standard form contracts).

(b) Internal liability "per capita"

22. According to ITALIAN and SPANISH law, several providers of security are, in the absence of an agreement to the contrary, internally liable *per capita* (ITALIAN CC art. 1954 read with art. 1299 and *Giusti* 243; SPAIN: CC art. 1844 read with art. 1145(2) and (3), 1138; TS 2 December 1988, RAJ 1988/9287). Similarly in SCOTLAND there is a presumption for *per capita* liability if the parties have not agreed on a different share to be borne by the providers of security (Stair/*Clark* no. 940).

(c) Proportional internal liability – cf. para (2)

23. AUSTRIAN CC § 896, FINNISH LDepGuar § 31(1), GERMAN CC § 426, GREEK CC art. 487, ITALIAN CC art. 1298, PORTUGUESE CC art. 516, SPANISH CC art. 1138 and SWEDISH Ccom chap. 10 § 11 provide that co-debtors are liable in equal shares unless there is a "special relationship" between them (AUSTRIAN CC § 896) or it is "otherwise provided" (GERMAN CC § 426) (the situation is similar in DENMARK: *Pedersen*, Kaution 101 s.). The latter is mostly the case since AUSTRIAN and GERMAN courts nowadays consider that the maximum risk assumed by the providers of security is in general the basis for internal recourse (AUSTRIA: OGH 9 December 1987, SZ 60 no. 266 p. 702-703 (at the time of the payor's payment); formerly different OGH 20 June 1984, SZ 57 no. 114 at p. 566; GERMANY: BGH 11 December 1997, BGHZ 137, 292 approving CA Hamm 29 October 1996, WM 1997, 710 for dependent personal securities). According to GERMAN case law the maximum risk of an unlimited dependent personal security is defined by the final balance of the secured credit (BGH 11 December 1997, BGHZ 137, 292, 296 s.). Most writers agree with this (AUSTRIA: Rummel/*Gamerith* § 896 no. 12, but differently in II § 1359 no. 7 a; indirectly also Schwimann/*Mader and Faber* § 1359 nos. 3-4); but some are opposed (GERMANY: *Schlechtriem* 1026-1047 – except if one of several security providers has a special interest in the secured credit 1026-1030, 1047; Staudinger/*Horn* § 774 nos. 55 ss., but rejected by BGH 11 December 1997, BGHZ 137, 292).

24. DUTCH CC art. 7:869 refers to art. 6:152 as the applicable rule on the measure of the internal recourse. The part which has remained unpaid by the debtor is apportioned among the subrogated party and other providers of security or liable "non-debtors" (*i.e.* providers of proprietary security) who are liable in proportion to the amounts for which each party was liable towards the creditor at the time of the payment (CC art. 6:152(1)), the maximum being the extent of their respective obligation towards the creditor (2); cf. also (3) (*Blomkwist* no. 39).

25. The solution is similar under BELGIAN, ENGLISH, FRENCH and LUXEMBOURGIAN law. If providers of personal security are not liable for equal amounts, they share the burden of the secured debt according to the proportion of their maximum liability (BELGIUM: *Du Laing* nos. 18-20; *Van Quickenborne* nos. 533-539; ENGLAND: *Ellesmere Brewery v. Cooper* [1896] 1 QB 75; FRANCE: Cass.civ. 2 February 1982, JCP 1982 II no. 19825; *Simler* nos. 646 ss.; LUXEMBOURG: CFI Luxembourg 8 October 1982, Pas luxemb XXVI (1984-1986) 59); the latter is according to FRENCH writers in cases of unlimited dependent personal securities determined by the final balance of the secured obligation (cf. *Simler* no. 649). In SPAIN, there is a similar solution when not every security provider is liable to the same amount (see *Carrasco*, Tratado, p. 296).

(d) Legal systems with uncertain solution

26. GREEK courts have not yet dealt with this issue and the literature is divided. Whereas some writers are of the opinion that providers of security should be internally liable in equal shares (*Karasis* 187; *Spyridakis* § 80 no. 2), others argue that only if the value of proprietary security exceeds the value of the secured obligation should the providers of security shall be internally liable in equal shares, but if the value of proprietary security is less than the value of the secured claim, the liability should be proportional (*Karakatsanis* 134-136; *Theodoropoulos* 263).

(e) Type of liability

27. It is commonly thought that a provider of security who has a right of recourse against several fellow providers of security cannot seek satisfaction from only one of them, with the consequence that the second would have to proceed afterwards against the third and so on. Rather, the first is obliged to divide recourse between the remaining providers of security *pro virili parte* (DENMARK: *Pedersen*, Kaution 101 s.; FRANCE: if fellow providers of security are liable for equal amounts CA Poitiers 11 June 1981, D. 1982, 79; for GERMANY in general Palandt/*Grünberg* § 426 no. 6: no solidary liability in the internal relationship of co-debtors).

IV.G.–1:107: Several security providers: recourse against debtor

(1) Any security provider who has satisfied a right of recourse of another security provider is subrogated to this extent to the other security provider's rights against the debtor as acquired under IV.G.–2:113 (Security provider's rights after performance) paragraphs (1) and (3), including proprietary security rights granted by the debtor. IV.G.–2:110 (Reduction of creditor's rights) applies with appropriate adaptations.

(2) Where a security provider has recourse against the debtor by virtue of the rights acquired under IV.G.–2:113 (Security provider's rights after performance) paragraphs (1) and (3) or under the preceding paragraph, including proprietary security rights granted by the debtor, every security provider is entitled to a proportionate share, as defined in IV.G.–1:106 (Several security providers: internal recourse) paragraph (2) and III.–4:107 (Recourse between solidary debtors), of the benefits recovered from the debtor. IV.G.–2:110 (Reduction of creditor's rights) applies with appropriate adaptations.

(3) Unless expressly stated to the contrary, the preceding rules do not apply to proprietary security provided by the debtor.

COMMENTS

A. Rights of security provider after exposure to internal recourse

General. If a security provider had been exposed to internal recourse according to IV.G.–1:106 (Several security providers: internal recourse) paragraphs (1) and (2) the next issue is what rights that security provider has against the debtor. This issue is addressed by paragraph (1) of the present Article. It has to be emphasised that this secondary recourse against the debtor does not feature prominently in the legal systems of the member states. The reasons are obvious. More often than not the security provider's chances of recovery from the debtor are low because of the latter's insolvency – precisely because it is especially in such situations that the creditor will demand payment from the security provider instead of the debtor. The situation is different in the area of, amongst others, personal securities on first demand. Also here, the effect of these Rules is that several providers of security are solidarily liable (cf. IV.G.–1:105 (Several security providers: solidary liability towards the debtor) paragraph (1)). However, the creditor typically demands payment from a security provider under such a security not only if the debtor defaults but because this is an easier way of achieving payment. Since in this situation the security provider is held liable by the creditor even though the debtor is solvent, the security provider's rights of recourse against the debtor become more important. Thus, not only the rights of internal recourse between several security providers but also the rights of secondary recourse against the debtor in the situation of a plurality of security providers need to be dealt with.

Rights against the debtor. Paragraph (1) deals with the question of which rights a security provider has against the debtor if the security provider has been exposed to recourse by another security provider according to paragraphs (1) and (2) of the preceding Article.

Secondary recourse against the debtor. Whenever a security provider performs to the creditor, the former acquires both rights against the debtor according to IV.G.–2:113 (Security provider's rights after performance) paragraph (1) sentence 1 and 2 read with paragraph (3) as well as rights against other security providers according to IV.G.–2:113 (Security provider's rights after performance) paragraph (1) sentence 2 read with paragraph (3) and IV.G.–1:106 (Several security providers: internal recourse) paragraph (1). While in principle the security

provider can claim reimbursement in full from the debtor, chances of success will typically be higher for proceeding against the other security providers. These are liable to the security provider, who has satisfied the creditor, however, only within the limits of their respective proportionate shares as defined in IV.G.–1:106 (Several security providers: internal recourse) paragraph (2). Therefore, any security provider who has been held internally liable by the security provider who has paid to the creditor may not in turn take recourse against the other security providers on the basis of IV.G.–1:106 (Several security providers: internal recourse) paragraphs (1) and (2), since a right to internal recourse is available only where a solidary debtor has paid more than the correct proportionate share. The security provider may in this situation only try to be reimbursed by the debtor, either directly (cf. the following paragraphs) or indirectly (on the basis of IV.G.–1:107 (Several security providers: recourse against debtor) paragraph (2).

Subrogation according to paragraph (1) sentence 1. A security provider (the "second" security provider) who has been held liable by the security provider (the "first" security provider) who had satisfied the creditor steps into the shoes of the first security provider according to the first sentence of paragraph (1); The second security provider is subrogated to the rights against the debtor to which the first security provider had been subrogated on paying the creditor (cf. IV.G.–2:113 (Security provider's rights after performance) paragraph (1) sentence 2). The second security provider is also subrogated to those rights against the debtor which the first security provider had acquired under IV.G.–2:113 (Security provider's rights after performance) paragraph (1) sentence 1.

This subrogation does not follow from any other provision, at least not to the extent provided for here: no rights are conferred to the security provider in question by II.–4:107 (Recourse between solidary debtors), since this provision applies only if a solidary debtor has performed more than the proper share.

Extent of the subrogation. The extent to which a security provider who is held liable by the security provider who has satisfied the creditor is subrogated to the latter's rights against the debtor depends upon the extent to which the latter security provider has taken recourse against the former security provider. Since this right to recourse is limited to the other security provider's proportionate share as defined in IV.G.–1:106 (Several security providers: internal recourse) paragraph (2), this security provider will normally acquire no more than the proportionate share of the rights against the debtor. The security provider who has satisfied the creditor is then entitled to the remaining part. A security provider held liable for less than the proportionate share as defined in IV.G.–1:106 (Several security providers: internal recourse) paragraph (2) is subrogated only proportionally to the rights acquired by the other security provider according to IV.G.–2:113 (Security provider's rights after performance) paragraphs (1) and (3).

It is important to stress that paragraph (1) sentence 1 of the present Article may not only give a security provider a personal claim for reimbursement against the debtor but may also confer an entitlement to proprietary security rights (not, however, to proprietary security rights provided by third persons) in so far as such rights have passed to the security provider who has satisfied the creditor (IV.G.–2:113 (Security provider's rights after performance) paragraphs (1) and (3)). It is self-evident, however, that paragraph (1) sentence 1 of the present Article cannot confer any entitlement to rights against the debtor or proprietary security rights which the security provider who sought recourse has not acquired by reason of performance under the security, but *e.g.* as a counter-security granted by the debtor. The

subrogation is limited to rights acquired by the security provider, who seeks recourse from the other security providers, under IV.G.–2:113 (Security provider's rights after performance) paragraphs (1) and (3).

Subrogation to proprietary security rights. It is expressly spelt out in IV.G.–1:107 Several security providers: recourse against the debtor) paragraph (1) that there is no subrogation to proprietary security rights provided by third persons. Third party proprietary security aside, however, the reference in IV.G.–1:107 (Several security providers: recourse against debtor) paragraph (1) to proprietary security rights granted by the debtor is to be understood in a wide sense. It is meant to cover not only proprietary security rights that a creditor obtains from the debtor (whether by transfer or by creation of a new proprietary security interest), but also proprietary security rights retained by the creditor on the basis of an agreement with the debtor, such as a retention of ownership. While it is envisaged that the future European Rules on Proprietary Security will cover both types of proprietary security rights (although they might to some extent be subjected to different rules), these provisions are not finally drafted yet. Therefore, it is thought to be preferable at this stage to have a rather broad reference to proprietary security rights irrespective of the method of creation instead of an explicit reference to both distinct types of proprietary security.

Reduction of rights. A security provider who – after having paid the creditor – seeks recourse from the other security providers, may find that the rights to recourse are reduced or extinguished because of the security provider's conduct. This may occur if such conduct makes it impossible for the other security providers to be subrogated to the first security provider's rights against the debtor, including any proprietary security rights granted by the debtor, or to be fully reimbursed by the debtor (cf. IV.G.–2:110 (Reduction of creditor's rights)). After the creditor is satisfied only the security provider who has paid the latter is entitled to the latter's rights against the debtor. The other security providers, however, will be subrogated to these rights once held internally liable by the security provider who satisfied the creditor, and then these rights against the debtor will be available as a means to secure reimbursement from the debtor for these other security providers. Thus the latter have to be protected against any loss or depreciation in value of these rights due to the fault of the security provider who has satisfied the creditor.

This aim is sought to be achieved by paragraph (1) sentence 2. This provision will apply, *e.g.*, where a security provider releases the debtor or fails to realise proprietary securities in due time, which are subsequently lost or depreciated. A security provider who does not timeously commence proceedings against the debtor who then becomes insolvent might also in appropriate circumstances lose rights of recourse against the other security providers. The basic principle can be seen as an aspect of the duty to act in accordance with good faith and fair dealing. A security provider which culpably fails to consider the interests of the other security provider's may find that rights of recourse against them are appropriately reduced or even extinguished.

B. Other security providers' entitlement to benefits recovered from the debtor

General idea. The basic principle underlying the provisions about a plurality of security providers is that all security providers securing the same obligation should share the risk which they assumed in proportion to their individual proportionate shares.

One consequence flowing from this principle is that a security provider who has satisfied the creditor under the security is entitled to take recourse against the other security providers up to the extent of their individual proportionate shares according to IV.G.–1:106 (Several security providers: internal recourse). On the other hand, where a security provider obtains relief by taking recourse against the debtor after having duly paid the creditor or any other security provider, this security provider has to share any benefits obtained with the other security providers. Without such participation, individual security providers could effectively reduce their total liability by taking recourse against the debtor to the disadvantage of other security providers who might not be able to get any reimbursement from the debtor, *e.g.* due to an intervening insolvency of the latter.

Security provider's entitlement to share of benefits recovered. Paragraph (2) achieves this objective by obliging any security provider who has taken recourse against the debtor to share any benefits so obtained with the other security providers in proportion to their individual proportionate shares as defined in IV.G.–1:106 (Several security providers: internal recourse). Again, no security provider is bound to let the other security providers participate in any benefits acquired *e.g.* under proprietary security rights granted by the debtor as a counter-security to this security provider only. The liability under paragraph (2) sentence 1 arises only where a security provider has recourse against the debtor under the rights conferred by IV.G.–2:113 (Security provider's rights after performance) paragraphs (1) and (3) or under IV.G.–1:107 (Several security providers: recourse against debtor) paragraph (1) or equivalent claims arising from the underlying relationship between security provider and debtor (*e.g.* a mandate). This liability arises in the case of a recourse by virtue of rights which in appropriate circumstances would have been available to the other security providers as well, if they had paid the creditor or had been held internally liable by another security provider, respectively. It should be emphasised that the reference to proprietary security rights granted by the debtor is to be understood in the same broad sense as in paragraph (1).

Reduction of rights under paragraph (2) sentence 2. Sentence 2 of paragraph (2) refers to IV.G.–2:110 (Reduction of creditor's rights). The intention is to prevent a security provider from sharing in benefits recovered if that security provider has culpably failed to exercise or pursue available rights against the debtor under IV.G.–2:113 (Security provider's rights after performance) paragraphs (1) and (3) or under IV.G.–1:107 (Several security providers: recourse against debtor) paragraph (1).

The rule in paragraph (2) sentence 2 will typically arise in two different sets of circumstances. In the first situation, a security provider might fail to take advantage of proprietary security rights, which subsequently are depreciated. Such conduct would be detrimental to the other security providers as well since in such situations their right to share in any benefits obtained from the debtor could be diminished or become worthless. It would be contrary to good faith and fair dealing to allow the negligent security provider to deprive the other security providers of their right to share in these benefits and yet still claim a right to share in their benefits. The reference to IV.G.–2:110 (Reduction of creditor's rights) is broad enough, however, to cover also situations, in which a security provider wilfully refrains from exercising any rights against the debtor. A security provider may have personal reasons not to demand reimbursement from the debtor although entitled to do so; however, that security provider should not then be able to share in benefits recovered by other security providers.

C. Exception

Proprietary security rights provided by debtor excepted. Paragraph (3) contains an exception referring to proprietary security rights provided by the debtor. In any case, it is the debtor who is liable in the end for the secured obligation, and obviously there is no point in subrogating the debtor to rights against the debtor.

Counter-exceptions. Some provisions in this Article, however, are expressly declared to apply also to proprietary security rights granted by the debtor (paragraph (1) sentence 1 and paragraph (2) sentence 1). These provisions are dealing with the exercise of or the subrogation to rights against the debtor, which for the purposes of this Article follows identical rules for personal as well as proprietary security rights.

NOTES

I. General

1. In most countries, it is a well-known principle that after performance towards the creditor, the security provider acquires rights against the debtor. Equally accepted and similarly prominently dealt with in the legal systems of most member states is the principle of an internal recourse between several security providers, which typically follows the idea of sharing the burden between all providers of security for the same obligation or the same security purpose. The problems dealt with in this article, *i.e.* the distribution of rights against the debtor and of benefits received from the debtor among several security providers, however typically feature much less prominently in the legal systems of the member states and relevant court decisions are scarce.

II. Entitlement of other security providers to rights against the debtor

2. The idea of an outright transfer of the rights against the debtor to any security provider who has satisfied another security provider's claim for reimbursement by way of an automatic subrogation as provided for in paragraph (2) of the present Article seems to be unknown in most member states.

3. In ENGLAND, however, falling short of a transfer of the legal title in any rights against the debtor, at least an equitable entitlement of co-security providers arises in those rights that the security provider who has satisfied the creditor is subrogated to, *i.e.* the security provider holds these rights in trust for the co-security providers (cf. *Re Arcedeckne; Atkins v. Arcedeckne* (1883) 24 ChD 709 (CFI); *O´Donovan and Phillips* no. 12-335). In SPAIN, the TS 23 March 2000, RAJ 2000/2025 refused the paying provider of proprietary security subrogation in the creditor's right against other co-obligees, but allowed it against the principal debtor. The solution has been criticised, because there is no reason to refuse the payer (first or secondary payer) any recourse grounded in subrogation in the creditor' rights, as far as the amount paid exceeds the risk to be borne by the payer in the internal relationship. As to the payee's right against the principal debtor, every paying co-surety (even a secondary payer) has a right to subrogation in the payee's right, regardless of whether payer and payee are co-guarantors to each other (*Carrasco*, Tratado, pp. 263, 296).

III. Entitlement of other security providers to benefits received from the debtor or third parties

4. More generally accepted is the principle that benefits received by any of the co-security providers have to be shared with the others.

5. Especially benefits recovered from the debtor are regarded as having to be accounted for in relation to the other security providers. In ENGLAND, this follows, first, from the principle that the rights acquired by the security provider who has satisfied the creditor are held in trust for the other security providers (cf. nos. 2-3 above). Second, the equitable doctrine of contribution, *i.e.* the principle of internal recourse between several security providers, is thought to demand that all benefits received by a security provider have to be shared *pro tanto* with the co-security providers (the so-called "hotchpot principle", cf. *O´Donovan and Phillips* no. 12-248). Under these principles, benefits received under counter-securities provided by the principal debtor are available to the other security providers even if it had been agreed between the security provider originally entitled to that counter-security and the principal debtor that this counter-security should not be for the benefit of the other security providers (cf. *Steel v. Dixon* (1881) 17 Ch. D 825; *Andrews and Millett* no. 12-017).

6. Benefits received from third parties other than the debtor, however, need not be shared with the other security providers (cf. *O´Donovan and Phillips* no. 12-249). Especially benefits secured on an individual security provider's own initiative and at that security provider's own expense (such as an insurance policy) do not fall under the "hotchpot principle" (cf. *Re Albert Life Assurance Co.* (1870) LR 11 Eq 164, 172 (CFI); *O´Donovan and Phillips* no. 12-249).

IV. Consequences of conduct disadvantageous to other security providers

7. Whereas – in accordance with the approach chosen throughout this Part – in the present Article conduct by a security provider that is disadvantageous to the other security providers is regarded as giving rise to a liability for damages, ENGLISH law seems to prefer the loss of the right to internal recourse as a consequence of any such conduct. An analogy is drawn to the situation of the creditor holding several security rights, and thus it has been suggested that a security provider loses the right to internal recourse on giving up any security rights against the debtor (cf. *Rowlatt* 160; *Andrews and Millett* no. 12-017). The idea of rights held in trust for the other security providers, however, makes it seem conceivable that in appropriate circumstances the liability for conduct that is disadvantageous to the other security providers could also be regarded as liability for breach of trust.

IV.G.–1:108: Subsidiary application of rules on solidary debtors

If and in so far as the provisions of this Part do not apply, the rules on plurality of debtors in III.–4:107 (Recourse between solidary debtors) to III.–4:112 (Opposability of other defences in solidary obligations) are subsidiarily applicable.

COMMENTS

A. General

Contracts of personal security and plurality of debtors. Contracts of personal security frequently involve situations where several persons owe similar or even identical obligations to the same creditor. Such situations, which might be described as a plurality of debtors in a non-technical sense, can exist in relation to several debtors owing the same secured obligation, or several security providers securing the same obligation or even under certain circumstances in relation to a debtor owing the secured obligation and a security provider owing an obligation under the contract of personal security that is at least partly identical with the secured obligation.

Solidary obligations according to Book III, Chapter 4 and effect of the present Article in general. The concept of solidary obligations according to Book III, Chapter 4 is rather wide. Therefore, a number of situations described in the preceding paragraph would fall under the rules on solidary debtors in Section 1 of that Chapter. On the one hand, this result has to be welcomed from the point of view of the law of personal security, since a number of the general provisions on solidary debtors fit the needs of this area of law perfectly well, so that a reference to these general provisions replaces the need to spell them out in detail here. On the other hand, the situations of solidary debtors (co-debtorship) in the context of personal security often are governed by considerations that are different from those relevant for situations of solidary debtors in general. Therefore the reference to these general rules can only be made with caution: the general rules are applicable only subsidiarily, *i.e.* as long as the rules in this Part do not contain specific provisions concerning the relevant issue.

Plurality of debtors of the secured obligation. The reference can be made unconditionally, however, in so far as a plurality of debtors owing the same secured obligation is concerned. The rules on personal security do not contain any specific provisions governing this issue, *i.e.* the effects of events concerning the obligation of one debtor on the obligation of the other debtor or debtors are governed by Book III, Chapter 4, Section 1 only.

Plurality of security providers and co-debtorship between debtor(s) and security provider(s). More important is the reference to the provisions on solidary obligations contained in Book III, Chapter 4, Section 1 in the following types of situations, which will be considered in greater detail in these Comments. Firstly, in the case of several security providers who are all securing the same obligation towards the creditor it has to be emphasised that the provisions on solidary debtors may apply under this heading to providers of dependent and independent security alike, provided that in respect of each security provider concerned the conditions for liability towards the creditor are fulfilled. Secondly, there might be a co-debtorship between debtor(s) on the one hand and security provider(s) on the other hand. A co-debtorship of this type, however, cannot exist if there is an independent personal security only; even in cases of a dependent personal security, such a co-debtorship between the debtor and the security provider can exist only if the liability of the security provider is

solidary or, should the latter's liability be subsidiary, if the special conditions according to IV.G.–2:106 (Subsidiary liability of security provider) paragraphs (2) and (3) are fulfilled.

Co-debtorship for security purposes. A special situation concerns the co-debtorship for security purposes according to IV.G.–1:104 (Co-debtorship for purposes). This provision contains its own reference to Book III, Chapter 4, Section 1.

B. Plurality of security providers

General. The rules in IV.G.–1:105 to IV.G.–1:107 deal specifically with a plurality of security providers. Concerning the topics covered by these specific Articles, Book III, Chapter 4, Section 1 is applicable only if it is specifically referred to. However, in a number of other situations outside IV.G.–1:105 to IV.G.–1:107 these general rules can be applied. It has to be emphasised in this context that the rules of III.–4:107 (Recourse between solidary debtors) to III.–4:112 (Opposability of other defences in solidary obligations) are applicable only if the requirements of III.–4:102 (Solidary, divided and joint obligations) paragraph (1) are fulfilled, *i.e.* if all debtors concerned are bound to perform the obligation in full and if the creditor may require performance from any one of them until full performance has been received. In relation to several security providers, such a co-debtorship arises only under the conditions set out in IV.G.–1:105 (Several security providers: solidary liability towards creditor): the conditions for liability towards the creditor must be fulfilled for every security provider concerned.

III.–4:107 (Recourse between solidary debtors). As between several security providers who are solidarily liable, III–4:107 (Recourse between solidary debtors) is applicable by virtue of the express reference contained in IV.G.–1:106 (Several security providers: internal recourse) paragraph (1) with the qualifications set out in paragraphs (2) and (3).

III.–4:108 (Performance, set-off and merger in solidary obligations) paragraph (1). It follows already from IV.G.–2:113 (Security provider's rights after performance) paragraph (3) (for providers of independent security, IV.G.–3:108 (Security provider's rights after performance) applies), that a security provider who has performed under the contract of personal security is subrogated to the creditor's rights against the other security providers. Consequently, these other security providers are no longer liable towards the creditor to the extent to which the former security provider has fulfilled the obligations under the security. Within its scope of application, III–4:108 (Performance, set-off and merger in solidary obligations) paragraph (1) serves as a clarification of that implied consequence.

III.–4:108 (Performance, set-off and merger in solidary obligations) paragraph (2). This provision is applicable, *i.e.* the merger of debts between one security provider and the creditor discharges the other security providers only for the share of the security provider concerned (this share to be determined according to IV.G.– 1:106 (Several security providers: internal recourse).

III.–4:109 (Release or settlement in solidary obligations). If the creditor releases, or reaches a settlement with, one of several providers of dependent security, the consequences are covered by IV.G.–2:110 (Reduction of creditor's rights) the liability of the other security providers is not affected, but the creditor is liable in damages towards them; this counter-claim can, obviously, be set off against the other security providers' liability under the

contract of dependent personal security. By contrast, there is no specific rule for the effect on the liability of providers of independent personal security; thus III–4:109 (Release or settlement in solidary obligations) paragraph (1) is applicable. This difference in treatment is due to the fact that independent security should be treated in a more formalistic way than dependent security where a more flexible approach is preferable.

III.–4:110 (Effect of judgment in solidary obligations) to III.–4:112 (Opposability of other defences in solidary obligations). These provisions are generally applicable in the situation of several security providers who are solidarily liable towards the creditor.

C. Co-debtorship between debtor(s) and security provider(s)

General. The following Comments concern the situation where a co-debtorship exists between the debtor(s) on the one hand and the security provider(s) on the other hand, *i.e.* where debtor(s) and security provider(s) are solidary debtors as defined in III–4:102 (Solidary, divided and joint obligations) paragraph (1). Apart from the situation dealt with by IV.G.–1:104 (Co-debtorship for security purposes), such a situation can arise especially where there is a dependent personal security with solidary liability of the security provider, so that the creditor is free to claim performance from the debtor or the security provider as solidary debtors (IV.G.–2:105 (Solidary liability of security provider). In a dependent personal security with subsidiary liability of the security provider, a co-debtorship exists between the security provider and the debtor only if the special conditions under IV.G.–2:106 (Subsidiary liability of security provider) paragraphs (2) and (3) are fulfilled, *i.e.* if the security provider can no longer invoke the subsidiarity as a defence against the creditor. There can be no co-debtorship between security provider and debtor, if any, in the case of an independent security: the obligation of a provider of an independent personal security is conceptually distinct from any underlying obligation. There are two obligations, not co-debtorship of one obligation.

III.–4:107 (Recourse between solidary debtors). The rights against the debtor of a security provider who performs the obligation under the contract of personal security are governed by IV.G.–2:113 (Security provider's rights after performance), so that there is no need to have recourse to III–4:107 (Recourse between solidary debtors). If, however, the debtor fulfils the secured obligation, it can be derived from III–4:107 (Recourse between solidary debtors) that the debtor has no claim against the security provider: internally the debtor is of course liable for the whole obligation owed to the creditor so that the internal share of the security provider is nil.

III.–4:108 (Performance, set-off and merger in solidary obligations) paragraph (1). This provision is not applicable. If, on the one hand, the security provider performs the security obligation towards the creditor, the debtor is not discharged, but IV.G.–2:113 (Security provider's rights after performance) operates so as to subrogate the security provider to the creditor's rights against the debtor. If, on the other hand, the debtor performs towards the creditor, the security provider may rely on this performance as against the creditor according to IV.G.–2:103 (Debtor's defences available to the security provider) paragraph (1). Thus, in this situation the principle of dependency on the secured obligation achieves the same result as III–4:108 (Performance, set-off and merger in solidary obligations) paragraph (1). The same principles apply if there is a set-off as between the creditor and either security provider or the debtor.

III.–4:108 (Performance, set-off and merger in solidary obligations) paragraph (2). This provision is applicable; it has to be kept in mind, however, that internally the debtor is liable for the whole of the secured obligation. One has to distinguish between two situations. If the merger of debts takes place between the debtor and the creditor, the security providers are discharged completely. If, however, the merger of debts concerns one security provider (as solidary debtor) and the creditor, the debtor remains liable towards the creditor for the whole debt.

III.–4:109 (Release or settlement in solidary obligations). This provision is only in part applicable. It is not applicable in so far as the consequences of a release by the creditor of the debtor on the liability of the security provider are concerned: in such a situation it follows already from the principle of dependency that such a release provides a defence for the security provider vis-à-vis the creditor. If, by contrast, the security provider is released by the creditor, III–4:109 (Release or settlement in solidary obligations) applies: since the debtor is internally liable for the whole of the secured obligation, the effect of the application of this provision is that the debtor is not discharged towards the creditor.

III.–4:110 (Effect of judgment in solidary obligations). This provision is applicable only if this would not run counter to the principle of dependency. Thus, contrary to the rule in III–4:110 (Effect of judgment in solidary obligations) a decision by a court as between the debtor and the creditor may affect the security provider's obligation in so far as according to IV.G.–2:103 (Debtor's defences available to the security provider) paragraph (1) the security provider, too, may raise the defence of *res judicata* if it is available to the debtor. If a court decides in proceedings between the debtor and the creditor in favour of the debtor – even if only partly – the creditor is barred on the basis of the defence of *res judicata* from bringing another action for the same claim not only against the debtor, but also against the security provider. In other constellations, however, III–4:110 (Effect of judgment in solidary obligations), is applicable, *e.g.* in so far as a court decides against the debtor or in proceedings between the creditor and the security provider.

III.–4:111 (Prescription in solidary obligations). This provision is not applicable in so far as the consequences of a prescription of the creditor's right to performance against the debtor are concerned: in such a situation it follows again from the principle of dependency that the security provider can rely on a prescription of the secured obligation vis-à-vis the creditor. III–4:111 (Prescription in solidary obligations) is applicable, however, as far as the effect of prescription of the creditor's claim against the security provider on the obligation of the debtor towards the creditor is concerned: according to III–4:111 (Prescription in solidary obligations) sub-paragraph (a) prescription of the creditor's claim against the security provider does not operate as a defence for the debtor vis-à-vis the creditor.

III.–4:112 (Opposability of other defences in solidary obligations) paragraph (1). This provision is not applicable. In so far as the possibility of the security provider to invoke a defence of the debtor is concerned, this situation is specifically dealt with in IV.G.–2:103 (Debtor's defences available to the security provider) paragraph (1). Since the security provider's obligation is merely an additional claim for the creditor, the debtor may not rely on any defence of the security provider.

III.–4:112 (Opposability of other defences in solidary obligations) paragraph (2). This provision is not applicable. As between the security provider and the debtor, contribution can

only be demanded by the security provider from the debtor after the former has performed the security obligation towards the creditor. Should the security provider have failed to raise vis-à-vis the creditor any personal defence of the debtor towards the creditor that was available to the security provider, the security provider may nevertheless claim full reimbursement according to IV.G.–2:113 (Security provider's rights after performance). The interests of the debtor are protected by the security provider's liability for damages according to IV.G.–2:112 (Security provider's obligations before performance) paragraph (2).

NOTES

1. It is a common legal technique in many member states to provide for the subsidiary applicability of the rules on plurality of debtors in specific matters of personal security. DUTCH law even provides that "Suretyship is governed by the rules on co-debtorship, except in so far as the present subchapter [on suretyship] does not deviate from them" (CC art. 7:850(3); in addition, there are express references to the rules on co-debtorship in arts. 7:866, 7:868 and 7:869).
2. Specific references to the law of co-debtorship can especially be found with respect to the internal relationship between several security providers (cf. AUSTRIA: CC § 1359 second sentence; DENMARK: *Andersen, Møgelvang-Hansen and Ørgaard* 35 ss.; FINLAND: RP 189/1998 rd 7; *Ekström* 73; GERMANY: CC § 774(2); BGH 24 September 1992, NJW 1992, 3228; Lunchroom/*Bydlinski* § 426 no. 46; ITALY: CC art. 1954; SWEDEN: *Walin*, Borgen 26 ss.).
3. In several member states, also the relationship between debtor and security provider vis-à-vis the creditor is regarded as a case of plurality of debtors (BELGIUM, FRANCE and LUXEMBOURG: for the security provider with solidary liability: CC art. 2021 (since 2006: FRENCH CC art. 2298); FRANCE: *Simler* nos. 534 ss.; ITALY: CC art. 1944(1); *Bozzi*, La fideiussione 252; *Casella* 250; *Giusti* 45; SPAIN: CC art. 1822(2); *Carrasco a.o.* 86). In other member states, however, it is thought that the rules on plurality of debtors are not applicable in such situations (cf. GERMANY: MünchKomm/*Bydlinski* § 421 nos. 33 ss.; Staudinger/*Noack* § 421 no. 38; for the contrary view Erman/*Ehmann* § 421 nos. 48 ss.).

CHAPTER 2: DEPENDENT PERSONAL SECURITY

IV.G.–2:101: Presumption for dependent personal security

(1) Any undertaking to pay, to render any other performance or to pay damages to the creditor by way of security is presumed to give rise to a dependent personal security, unless the creditor shows that it was agreed otherwise.

(2) A binding comfort letter is presumed to give rise to a dependent personal security.

COMMENTS

A. Definition and central role

Historically and still today, dependent personal security constitutes the core institution of personal security. This becomes even more obvious if one recurs to the different national names for the most important type of dependent personal security in all the member states (to mention only *suretyship*, *cautionnement*, *Bürgschaft* etc.). All other modern types of personal security, be they dependent (such as the binding comfort letter) or independent (such as indemnities, independent guarantees or stand-by letters of credit) have been developed by modifying the one or the other element of the dependent personal security.

B. General presumption

Paragraph (1) establishes a presumption that when a personal security is assumed it is a dependent personal security. This presumption is based upon the extremely risky nature and implications of any personal security: the security provider becomes liable with all present and future assets for the liabilities which another person, the debtor, has incurred or may incur in future. By virtue of the dependency upon the secured obligation, these risks can to some degree be limited. Therefore any personal security in favour of the creditor of another person is presumed to be dependent and therefore to be subject to Chapter 2.

The presumption in favour of a dependent security applies vis-à-vis all other types of personal security including both the independent personal security and the co-debtorship for security purposes. If the parties intend to agree upon an independent personal security or a co-debtorship for security purposes, this must expressly be said or unambiguously result from the agreement of the parties. Otherwise, it will be assumed that the parties intended to agree upon a dependent security, which is in general the most favourable for the security provider.

It goes without saying that the presumption in favour of a dependent security should also apply, and for particularly good reasons because of its protective function, to a personal security assumed by a consumer.

C. Binding comfort letter

Paragraph (2) establishes merely a presumption as to the classification of a personal security assumed by binding comfort letter. The presumption can, of course, be rebutted. The presumption is based upon the typical interests pursued by a "patron" in issuing a binding comfort letter of a commercial type. If the promise to the creditor to support financially the debtor (company) is not kept, the breach of that promise is sanctioned by an obligation to

compensate the creditor for the loss suffered. On the other hand, the "patron" generally will not be willing to be liable for those obligations of the debtor which are subject to objections or defences.

The preceding two reasons speak for classifying the obligation assumed by the binding comfort letter, in the context of the present Rules, as a dependent personal security – unless the contrary is proved.

In the case of a non-commercial binding comfort letter where the author promises to reimburse the creditor for any expenses incurred in assisting the debtor in so far as the debtor is liable to repay them and does not do so, this is the typical situation of a dependent personal security.

D. Consumers as security providers – general remarks

The rules on consumer protection for providers of personal security must be based, in order to fulfil their purpose of being protective for the security provider, on the regime of personal security which is most protective for security providers. Generally speaking, this is the regime of dependent personal security in Chapter 2. However, sometimes doubts may arise where exceptionally the application of rules on other security devices is, or may seem to be, more protective for the security provider. Such instances have to be analysed in detail.

The rules on dependent personal security are to be applied not only to a consumer's dependent personal security, but also to all other types of personal security assumed by a consumer: Specifically, they also apply to a consumer's independent personal security (cf. IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (c)) and to a consumer's co-debtorship for security purposes (cf. IV.G.–4:102(Applicable rules) paragraph (1)).

In applying the rules on dependent personal security to any type of personal security provided by a consumer, it is to be noted that in this context the rules on dependent personal security are mandatory and may not be deviated from to the disadvantage of the consumer security provider (IV.G.–4:102 (Applicable rules) paragraph (2)). This purpose is achieved in two ways which, however, converge in the end. If a consumer assumes a dependent personal security, the rules of Chapter 2 are not only directly applicable, but are made mandatory in favour of the consumer by (IV.G.–4:102 (Applicable rules) paragraph (2)). If a consumer assumes an independent personal security or acts as a co-debtor for security purposes the same result is achieved in two steps: firstly, by declaring applicable to these cases the rules of Chapter 2 (cf. IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (c)) and IV.G.–4:102 (Applicable rules) paragraph (1)) respectively). On this basis IV.G.–4:102 (Applicable rules) paragraph (2) becomes applicable and it provides for the mandatory character of the rules on dependent personal security. Thus, even where the presumption of paragraph (1) is rebutted, every personal security by a consumer security provider will be subject to Chapter 2.

NOTES

I. Ordinary dependent security

(a) No presumption

1. In most member states no presumption for a dependent personal security exists.

(b) Presumption for a dependent security

2. However, in FRANCE if it is doubtful whether a dependent personal security or another kind of personal security has been assumed, the qualification with the weaker effect, *i.e.* a dependent personal security will be chosen (cf. the general rules on interpretation CC art. 1156 ff; *Simler* no. 895). If the security provider is a consumer, this interpretation guideline is even more strictly respected (*Simler* no. 921; CA Paris 26 January 1993, D. 1993, I.R. 93). Also under GERMAN law, if after applying the principles of interpretation (CC §§ 133, 157) a doubt remains, a dependent personal security is assumed since this is the regular legal type of personal security and since the security provider is in this way best protected, especially by the formal requirement of a writing according to CC § 766 (cf. Staudinger/*Horn* § 765 no. 24). Similar arguments are used in AUSTRIA, although the dependent personal security does not enjoy better protection by a form requirement since that is applied also to independent personal securities. It is controversial whether banks as providers of security may invoke a presumption in favour of a dependent personal security; but prevailing opinion allows this (cf. Avancini/Iro/*Koziol* no. 3/32, but different at no. 3/25). Also in ITALY the general rules on interpretation of contracts (CC arts. 1362-1371) are applied and these also lead to a presumption in favour of a dependent security since this is the solution which is less onerous for the debtor (*Bonelli*, Le garanzie bancarie 56). In SPAIN there is properly not a presumption as such, but a chain of rules and general presumptions in the law of obligations; there is a presumption in favour of the lesser obligatory effect when the debtor gets no consideration for assuming the obligation (CC art. 1289) and it is also presumed (CC art. 1827) that mere *litterae commendatoriae* (i.e., statements as to the credit worthiness of the principal debtor) do not amount to a binding commitment (*Carrasco, a.o* 117 ff).

(c) Presumption for an independent security

3. In the area of bank guarantees, especially those employed in international trade, there is a special situation. The "security provider", *i.e.* the bank issuing an independent guarantee, is most interested in being involved as little as possible in the underlying transaction. Therefore, it prefers to perform upon first demand. The only requirement for its obligation to perform is that the conditions expressly set out in the mandate to issue the guarantee are fulfilled by the creditor. The debtor of the underlying transaction, very often the buyer/importer, must and can see to it that these conditions are laid down so as to suit the commercial requirements of the situation (cf. for GERMANY: *Graf von Westphalen* 5-7; ENGLAND: *Goode*, Commercial Law 1017 ss.; ITALY: *Bonelli*, Le garanzie bancarie 56; NETHERLANDS: *Pabbruwe*, Bankgarantie 1-10). In FRANCE if the principal debt covers non-pecuniary obligations (*e.g.* in the case of building contracts), there is a strong presumption for an independent security (*Simler* no. 924 a)).

II. Binding comfort letters

4. Most EUROPEAN member states do not share the rule of paragraph (2) of the present Article.

IV.G.–2:102: Dependence of security provider's obligation

(1) Whether and to what extent performance of the obligation of the provider of a dependent personal security is due, depends upon whether and to what extent performance of the debtor's obligation to the creditor is due.

(2) The security provider's obligation does not exceed the debtor's obligation. This rule does not apply if the debtor's obligations are reduced or discharged:

(a) in an insolvency proceeding;
(b) in any other way caused by the debtor's inability to perform because of insolvency; or
(c) by virtue of law due to events affecting the person of the debtor.

(3) Except in the case of a global security, if an amount has not been fixed for the security and cannot be determined from the agreement of the parties, the security provider's obligation is limited to the value of the secured right at the time the security became effective.

(4) Except in the case of a global security, any agreement between the creditor and the debtor to make performance of the secured obligation due earlier, or to make the obligation more onerous by changing the conditions on which performance is due, or to increase its amount, does not affect the security provider's obligation if the agreement was concluded after the security provider's obligation became effective.

COMMENTS

A. The principle of dependency

This Article is one of the two principal provisions expressing the guiding idea of a dependent personal security, namely the principle of dependency (or accessority, as it is sometimes called). Another important rule which is based upon the principle of dependency is IV.G.–2:103 (Debtor's defences available to the security provider).

B. Main rule

The main rule of the first paragraph expresses this basic feature. The security obligation must not exceed the secured obligation. Whether the secured obligation is due, and the extent of it, will, of course, depend on the terms regulating it. It may, for example, not be currently due because it is conditional and the condition has not yet been purified; or it may be due for performance only after a certain time which has not yet arrived; or it may have prescribed. If any feature of the security obligation exceeds the corresponding element of the secured obligation, the security obligation does not become void. Rather, the respective element of the security obligation is reduced correspondingly.

One application of the principle of dependency occurs upon the transfer of the right to performance of the secured obligation. Due to the practical importance of this phenomenon, this consequence of dependency is usually spelt out explicitly. For voluntary transfers of rights to performance (*i.e.* assignments) III.–5:115 (Rights transferred to assignee) paragraph (1) provides that "all accessory rights, including accessory rights securing the performance" of the assigned right are transferred to the assignee. This is supplemented for security rights which are not accessory by an obligation of the assignor to transfer such rights to the assignee (III.–5:112 (Undertakings by assignor) paragraph (6)). In addition, legal transfers are often provided for non-contractual transfers of claims, especially in the form of subrogation to a creditor's rights if a person other than the (principal) debtor performs an obligation of the

latter. Examples in the present rules can be found in IV.G.–2:113 (Security provider's rights after performance) paragraphs (1) and (3) and provisions which refer to this rule.

C. Exceptions

Debtor's insolvency and equivalent events. However, the principle of dependency does not apply in the case of necessity for which the security has been designed, namely where the debtor's obligations are reduced or it is even discharged in an insolvency proceeding. Generally speaking, an insolvency proceeding over the debtor's assets does not affect the debtor's liabilities. Even less does this occur when the opening of such proceedings has been refused, for whatever reason, especially due to insufficient assets of the debtor. Therefore, the relevant personal securities are not affected either.

However, modern insolvency laws tend to provide more and more for opportunities to discharge insolvent debtors, at least certain classes of debtors. Alternatively, the reorganisation of a commercial company and similar arrangements with creditors are provided for in which these may agree to reduce their claims. Nevertheless, the dependent personal securities securing obligations that are reduced or discharged should remain fully effective since they have been agreed upon precisely for the purpose of protecting the secured creditor against the risk of such insolvency.

The same is true if special laws enacted in times of war or general economic crisis liberate fully or partly national debtors or debtors who have fallen in distress. Such laws may for instance provide that debtors must make payments on secured obligations that have fallen due, to a prescribed national institution and that such payments discharge the debtor. Or the secured obligations may simply be declared discharged. Apart from specific legislation, such special rules may also be developed by court practice. Security providers living, or having assets outside these jurisdictions remain liable since they (or their foreign assets) are not subject to such measures which are directed at the persons of a circle of more or less closely defined debtors (cf. paragraph (2)(c)). However, even if such laws or practice discharge the debtor, personal security granted to the debtor is not affected since it would run counter to the very purpose of security which is meant to secure the creditor against risks of this kind.

D. Amount of security

Paragraph (3) gives rules on determining the amount of a security if this has not been expressly fixed by the parties, except if the security provider had assumed a global security. The amount may either be determined from the agreement of the parties, *e.g.* if a security is provided for the purchase price of a specific new car according to the dealer's price list. If the amount cannot be ascertained in this way, then the amount of the security is equal to the amount of the secured obligation at the time at which the security became effective. The security becomes effective upon its creation if at that time the obligation to be secured had already come into existence. By contrast, if the obligation to be secured comes into existence only after creation of the security, the latter becomes effective only at this latter point in time. This will generally correspond to the intention of both parties.

The question which ancillary obligations of the debtor are covered by the amount of the security, is answered separately by IV.G.–2:104 (Coverage of security).

The last term of paragraph (3) indirectly confirms the earlier rule that future claims can be secured, although within the limits indicated by this rule (cf. IV.G.–1:101 (Definitions) sub-paragraph (a)). A suggestion that a maximum amount might be fixed for the protection of security providers has not been followed for commercial security providers since it would unduly restrict business practices. However, if a consumer provides a global security or a specific personal security without a fixed maximum amount, such a security is reduced to a fixed amount which is determined by the amount of the secured obligations at the date on which the security became effective (IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (a)).

Subsequent increases of secured obligation. In the interest of protecting security providers, the extent of their security obligations is, as a rule, fixed at the time at which the security becomes effective; again, this is the presumed intention of both parties. Subsequent increases of the secured obligation, therefore, do not bind the security provider. This applies not only to an outright increase of the amount of the secured obligation; or an aggravation of the payment terms; or to a predating of maturity; but also to the aggravation of other terms of the personal security.

An extension of maturity, by contrast, usually will not increase the security provider's burden provided the security provider keeps within the time limit of the security, if any. If exceptionally there is an increase of burden (*e.g.*, if the debtor has become insolvent), the creditor is liable according to IV.G.–2:110 (Reduction of creditor's rights).

E. Further incidents of dependency

Less frequently arising issues of dependency are not expressly regulated in these rules on personal security. However, solutions can be derived via IV.G.–1:108 (Subsidiary application of rules on solidary debtors) from the general rules on solidary debtors laid down in Book III, Chapter 4, Section 1. Comment C to IV.G.–1:108 applies to the relationship between debtor and solidarily liable security provider.

F. Consumers as security providers

Dependent personal security. Only the application of paragraphs (3) and (4) calls for special explanatory remarks.

Paragraph (3) is supplemented in favour of consumer providers of a dependent security (as well as in relation to other consumer security providers) by IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (a). Specifically this means that the exception spelt out in the first half-sentence of paragraph (3) concerning global securities without a maximum amount is not applicable.

Generally, agreements between creditor and debtor increasing in any respect the burdens of the secured obligation do not affect the security provider. The exception in favour of a global security in paragraph (4) is qualified for consumers by IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (a): unless a maximum amount had been agreed for the security, the amount covered by the security has to be determined according to paragraph (3) of the present Article. Amendments can only bind the consumer security provider if they do not exceed the maximum limit of the security.

The rules on a consumer's dependent personal security are mandatory in favour of the security provider (cf. IV.G.–4:102 (Applicable rules) paragraph (2)).

Other types of personal security. For consumers who have provided security in any form other than dependent security, paragraph (1) and paragraph (2) first sentence of the present Article are also binding. For a consumer who has granted an independent personal security this follows from IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (c) and for a consumer's co-debtorship for security purposes this follows from IV.G.–4:102 (Applicable rules) paragraph (1). These two provisions declare applicable the rules of Chapter 2 on dependent personal security, and in the present context these rules are mandatory in favour of the consumer security provider.

For a consumer's co-debtorship for security purposes, additional protective rules are to be found in III.–4:107 (Recourse between solidary debtors), III.–4:108 (Performance, set-off and merger in solidary obligations); III.–4:109 (Release or settlement in solidary obligations) and III.–4:112 (Opposability of other defences in solidary obligations). These provisions remain applicable in favour of a consumer co-debtor for security purposes.

For independent personal security, the exception to the principle of dependency established by paragraph (2) second sentence merely spells out the general rule: the fate of a possibly underlying claim of the creditor against the debtor in an insolvency proceeding over the latter's assets is irrelevant for the security provider's liability towards the creditor.

The effect of a reduction or discharge of one of several co-debtors as a consequence of an insolvency proceeding over the assets of that co-debtor is nowhere explicitly spelt out. However, it would seem that such partial or full discharge is a personal defence in the sense of III.–4:112 (Opposability of other defences in solidary obligations) paragraph (1) sentence 1 and therefore does not benefit any co-debtor. This result would also be in conformity with the security purpose pursued by a co-debtorship for security purposes. The result conforms to paragraph (2) sentence 2 of the present Article and therefore is in harmony with the results reached for providers of dependent as well as independent security.

Paragraphs (3) and (4) are provisions for the protection of the security provider; as such they are applicable for the protection of consumer providers of an independent security or of a co-debtorship for security purposes as well (cf. IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (a) and IV.G.–4:102 (Applicable rules) paragraph (1) respectively). However, as in the case of a consumer provider of dependent security, paragraphs (3) and (4) apply to the consumer security providers of an independent security or a co-debtorship for security purposes only subject to the specific consumer protection effects of IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (a), which is applicable to all types of personal security by consumers.

In the present context, the rules of the Article are mandatory in favour of the consumer, cf. IV.G.–4:102 (Applicable rules) paragraph (2). And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" in the present Article means the debtor whose obligation is secured.

NOTES

1. In all member states the dependent personal security is due only when and to the extent that the secured obligation is due. This common feature, which has decisive consequences for the regime of dependent personal security, is the principle of dependency. In the national laws, especially of the CONTINENTAL countries, it is better known under the name of accessority. It is everywhere recognized as a general principle of EUROPEAN private law, basically aiming at the protection of the security provider (*van Erp* 309 ss.).

I. Nature of secured obligation

(a) Any kind of obligation

2. By a contract of dependent personal security, the provider of security assumes vis-à-vis the creditor responsibility for the payment of a third person's obligation (GERMAN CC § 765(1); GREEK CC art. 847; PORTUGUESE CC art. 627). In general it is possible to grant a dependent personal security for every kind of financial obligation, irrespective of its source or object (GERMANY: Palandt/*Sprau* § 765 no. 17; GREECE: *Georgiades* § 3 no. 35, PORTUGAL: *Pires de Lima and Antunes Varela* 644). Hence, the dependent personal security can also secure an obligation to hand over a specific object or an obligation to do or not to do something (BELGIUM: *Van Quickenborne* nos. 178-184; FRANCE: *Simler* no. 209 s.; GERMANY: Palandt/*Sprau* § 765 no. 17; GREECE: A.P. 691/1955, A.P. 692/1955, NoB 4, 455 ss.; ITALY: *Fragali*, Della fideiussione 98; *Giusti* 27; NETHERLANDS: *Blomkwist* no. 3; PORTUGAL: *Pires de Lima and Antunes Varela* 644; SCOTLAND: *Gloag and Irvine* 645; SPAIN: *Vicent Chuliá* 379) or secure against a "default or miscarriage of another person" (ENGLAND: *Mercers Co. v. New Hampshire Insurance Co.* [1992] 1 WLR 792; PORTUGAL: *Pires de Lima and Antunes Varela* 644; SPAIN: *Guilarte Zapatero*, Comentarios 89). Which obligation the personal security right secures, depends on the construction of the contract between the parties (DENMARK: *Højrup* 30 ss.; *Pedersen*, Kaution 15 s.; SWEDEN: *Walin*, Borgen 36 ss.).

3. If the dependent personal security secures a monetary obligation, the security provider's obligation will consist in a monetary obligation of the same content (GREECE: *Georgiades* § 3 no. 35) and, in some countries, the security provider also has to procure that the debtor performs the secured obligation (ENGLAND: *Moschi v. Lep Air Services Ltd.* [1973] AC 331, 348 (HL); SCOTLAND: *Erskine* III, 3, 61; Stair/*Eden* no. 918).

4. If the dependent personal security is provided in respect of a non-monetary obligation, *e.g.* a non-monetary performance or a forbearance of the debtor, then the security provider is obliged to pay damages to the creditor to the same extent as the debtor for the non-performance of the debtor's obligation, but does not have to perform the debtor's obligation (AUSTRIA: expressly CC § 1350; Schwimann/*Mader and Faber* § 1350 no. 1; DENMARK: *Pedersen*, Kaution 49; ENGLAND: *O´Donovan and Phillips* no. 10-203; FRANCE: *Simler* no. 209; GERMANY: Staudinger/*Horn* no. 14 preceding §§ 765 ff.; GREECE: *Georgiades* § 3 no. 35; ITALY: *Giusti* 31; SCOTLAND: Stair/*Clark* no. 918), in particular when the non-monetary obligation of the debtor is not fungible (NETHERLANDS: cf. CC art. 7:854; *du Perron and Haentjens* art. 854 no. 1; SPAIN: *Guilarte Zapatero*, Comentarios 89). In GERMANY the same result is achieved by means of interpretation of the contract of security (Palandt/*Sprau* § 765 no. 25).

(b) Another security provider's obligation as secured obligation

5. Almost in every member state the secured obligation may be the security engagement of a primary security provider (AUSTRIA: CC § 1348; BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2014(2) (since 2006: FRENCH CC art. 2291(2)); ITALIAN CC art. 1948; GERMANY: Staudinger/*Horn* nos. 57-59 preceding § 765; NETHERLANDS: CC art. 7:870; PORTUGUESE CC art. 630; SPANISH CC art. 1823(2)). But this security *(certification de caution)* is not very often used in FRANCE, because creditors prefer the more practicable securities with solidary liability (*Simler* no. 116).

(c) Future or conditional secured obligation

6. Future and conditional obligations may be secured in all member states (BELGIUM: *Van Quickenborne* no. 186; DUTCH CC art. 7:851(2) for future obligations and art. 6:26 for conditional obligations; ENGLAND: prospective securities, cf. *Andrews and Millett* no. 4-016; FRANCE: (for future obligations) see new CC art. 2301 as proposed by the *Grimaldi* Commission and *Simler* nos. 210 ss.; GERMAN CC § 765(2); GREEK CC art. 848; ITALIAN CC art. 1938; PORTUGAL: CC art. 628(2); *Almeida Costa* 785; SCOTLAND: Stair/*Eden* no. 835; SPAIN: CC art. 1825; *Guilarte Zapatero*, Comentarios 99 ss.). The parties are free in GERMANY to agree to secure all future obligations that will be created in a specific period of time (*Reinicke* and *Tiedtke* no. 150). In these cases the security provider is liable for all obligations which fall due in the agreed period of time and, contrary to the case of a security with time limit for the resort to the security (cf. IV.G.–2:108), the creditor is entitled to demand performance from the security provider even after expiration of the agreed time limit. Regarding global securities, see national notes to IV.G.–1:101 nos. 40-46.

(d) Restrictions

7. However, there are general limits regarding a security provided for future claims: In BELGIUM, FRANCE, GERMANY, GREECE, PORTUGAL, SPAIN and the NETHERLANDS there must be enough elements in the contract of security to determine the secured obligation at a later moment (BELGIUM: *Van Quickenborne* nos. 186, 188 and 191; FRANCE: CA Paris 17 February 1998, RD banc 1998, 177; *Simler* no. 210; GERMANY: BGH 30 March 1995, NJW 1995, 1886; Palandt*/Sprau* § 765 no. 7; Erman*/Herrmann* § 765 no. 3; GREECE: CFI Athens 975/1997, EED 48, 704; *Georgiades* § 3 nos. 36, 51-55; ITALY: Cass. 18 July 1997 no. 6635, Giur.it.Mass. 1997, 651; NETHERLANDS: CC art. 7:851(2); PORTUGAL: STJ 11 May 2000, 250/00 www.dgsi.pt; According to a liberal court doctrine, in SPAIN it suffices that the parties and the underlying transaction are sufficiently enough, and that a maximum amount is fixed (TS 23 february 2000, RAJ 2000/1242). The future or conditional claim must be somehow defined in order to prevent an excessive burden upon the security provider (DUTCH CC art. 7:851(2): "sufficiently determinable"; *Blomkwist* no. 11; FRANCE: *Simler* no. 210; without the intention to impose excessive burden, in application of this principle GERMAN modern case law and most writers nowadays, cf. only BGH 18 May 1995, BGHZ 130, 19; *Bülow*, Kreditsicherheiten nos. 840-841; *Reinicke and Tiedtke*, Bürgschaftsrecht no. 21 *in fine*; GREECE: *Georgiades* § 3 no. 36; PORTUGAL: STJ 30 September 1999, 436/99 www.dgsi.pt; SPAIN: *Reyes López* 217). This determination does not have to be precise, but one should be able to identify the legal relationship which may give rise to the future claim. In FRANCE, the interest rates do not have to be mentioned in the contract of security for future obligations, contrary to the case of security for present obligations (Cass.com. 9 March 2004, D. 2004, 2706, note *Aynès*).

8. It suffices that the obligation has come into existence, or that the condition has been fulfilled, at the time when a demand is made against the provider of the security (BELGIUM: *Van Quickenborne* nos. 185-187; GERMANY: *Reinicke and Tiedtke*, Bürgschaftsrecht no. 9; GREECE: *Georgiades* § 3 no. 36; ITALY: CC art. 1938; *Foschini* 465; *Giusti* 156; NETHERLANDS: *Blomkwist* no. 11; *du Perron and Haentjens* art. 851 no. 5; PORTUGAL: *Almeida Costa* 786; SPAIN: CC art. 1825; *Guilarte Zapatero*, Comentarios 80 s.).

9. In the NETHERLANDS the validity of securities for a conditional obligation is usually derived from CC art. 6:26, according to which the provisions on unconditional obligations apply to conditional obligations to the extent that the conditional character of the obligation in question permits (*Blomkwist* 24). In SPAIN the performance of the security can only be requested when the secured debt is fixed (CC art. 1825; TS 29 April 1992, RAJ 1992 no. 4470).

10. By contrast, in DENMARK, pursuant to the agreement between the DANISH Consumer Council and the Financial Council a security by a consumer for future and conditional obligations is not allowed.

(e) Maximum amount for future obligations

11. In ITALY dependent personal securities for future obligations must indicate a maximum secured amount (CC art. 1938 as amended 1992); otherwise they are *in toto* void (for an analogical application of that rule to a binding comfort letter see CFI Roma 18 December 2002, Giur.mer. 2003, 1661). Agreements exceeding an indicated maximum amount are *pro tanto* invalid (*De Nictolis* 207 ss.). In the NETHERLANDS, if at the time at which a non-professional party assumes a security the amount of the obligation of the debtor is not yet determined, the security is only valid to the extent of an agreed maximum amount, expressed in money (DUTCH CC art. 7:858(1)). This provision is mandatory for consumer providers of security (cf. CC art. 7:862 lit. a). In PORTUGAL, the indication of a maximum amount seems to be indispensable (STJ 19 October 1999, BolMinJus no. 490, 262). Furthermore, a dependent personal security that secures a future obligation may be terminated by the security provider before the obligation to be secured has actually come into existence, if the debtor's financial situation deteriorates or if, unless another time has been agreed, five years have passed since it was provided (PORTUGUESE CC art. 654). In SPAIN a maximum amount is required for the global security to be valid (TS 23 February 2000, RAJ 2000/1242).

II. Extent of the security obligation

(a) General rule

12. As a consequence of the principle of dependency, the security provider's liability is no greater than that of the debtor, in terms of amount, time for payment and the conditions under which the debtor is liable. Security obligations exceeding the secured obligations are automatically reduced to the limits of the latter (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2013 (since 2006: FRENCH CC art. 2290); DUTCH CC arts. 7:851 and 7:860; FINNISH LDepGuar § 5(2); GERMANY: cf. CC § 767(1) sentence 1; Palandt/*Sprau* § 767 no. 1; GREEK CC art. 851; ITALIAN CC art. 1941; PORTUGAL: CC art. 627(2) and 631; SPANISH CC art. 1826). The same is true for ENGLISH, IRISH and SCOTTISH law, where the security provider's liability is said to be co-extensive with the debtor's (ENGLAND: *Andrews and Millett* no. 6-002; IRELAND: *White* 541; SCOTLAND: Stair/*Eden* no. 918).

13. GERMAN CC § 767(1) sentence 1 provides that the extent of the secured obligation at any time determines the obligation of the security provider. Consequently, the security

provider is bound by modifications, including extensions, of the secured obligation that are not based on agreement between creditor and debtor (cf. GERMAN CC § 767(1) sentence 2 and Palandt/*Sprau* § 767 no. 2).

(b) Specific rules

14. In the NETHERLANDS it is stipulated by a provision which is mandatory for consumer sureties (cf. CC art. 7:862 lit. a) that a security provider is not bound by more onerous terms than those by which the debtor is bound, except however to the extent that they concern the manner in which proof of the existence and extent of the obligation of the principal debtor can be made against the security provider (CC art. 7:860; *Blomkwist* no. 26).

(c) Consequences of accessority upon assignment of secured claim

15. As a direct consequence of the accessory character of the dependent security, in most of the European legal systems a dependent security right passes to the assignee automatically with the assignment of the right to performance of the secured obligation. This rule is widespread in European codes and doctrines which state that every accessory right passes to the assignee automatically with the assignment of the principal right, without the need for a separate act of transfer (AUSTRIA: implicitly CC § 1393; OGH 17 March 1987, SZ 60 no. 46 at p. 244; DENMARK: *Ussing*, Kaution 98; BELGIUM, FRANCE and LUXEMBOURG for civil debts: CC art. 1692; FRANCE for professional debts: MonC art. L 313-27(3); GERMANY: CC §§ 398, 401; ITALY: CC art. 1263(1); NETHERLANDS: CC art. 6:142 and 3:82; PORTUGAL: CC art. 482; SPAIN: CC art. 1528; SWEDEN: *Walin*, Borgen 88 s.). Under ENGLISH law, however, the assignee of the secured claim is entitled to the rights under the dependent security only if the benefit of the security has been expressly or impliedly assigned along with the secured claim (*O´Donovan and Phillips* no. 10-176).

16. In FRANCE, contrary to the rules on assignment of rights to performance, court practice had held that the dependent personal security can not be transmitted automatically as an accessory contract to the new creditor upon an assignment. Rather, the dependent personal security was extinguished upon sale of a rented building by the secured lessor (Cass.com. 26 October 1999, D. 2000, 224, note *Aynès*) or even after a merger-absorption of the secured creditor (Cass.civ. 28 September 2004, JCP E 2005, no. 14 p. 619). It was considered that firstly the assignment of these contracts is generally not recognised in FRENCH law and that secondly the dependent personal security is concluded in consideration of the person ("*intuitus personae*") and can not be extended outside its limits (CC arts. 2013 and 2015 (since 2006: CC arts. 2290 and 2292)). This opinion has recently been reversed by a plenary decision of the Court of Cassation (for sale of rented buildings: Cass.ass.plén. 6 December 2004, D. 2005, 227, note *Aynès*; also for merger-acquisition: Cass.com. 8 November 2005, in JCP E 2006 II, no. 1000, note *Legeais*). According to the path-breaking decision of December 2004, the change of creditor is not essential for the contract of security in so far as the terms of the engagement of the security provider are the same. The dependent security is considered as a necessary accessory of the contract of rent which is itself by law (cf. CC art. 1743) accessory to a contract of sale of a building.

III. Exception upon discharge of debtor in insolvency proceedings and comparable events

(a) Insolvency proceedings

17. In no European country is the security provider released by virtue of the debtor's insolvency (AUSTRIA: Bankruptcy Act § 151 and Composition Act § 48; BELGIUM: Bankruptcy Act of 8 August 1997, last modified in 2005, arts. 21 § 1 and 35 § 4; however, there is a partial or full discharge of a consumer security provider if the engagement is disproportionate in relation to his or her income and assets: Judicial Composition Act of 1997 art. 80(3); Cass. 16 November 2001, JLMB 2001, 1731; *Lebon,* Borgtocht nos. 1-7; in the context of the Collective Debt Rescheduling Act of 5 July 1998: *Dirix and De Corte* no. 421; DENMARK: *Pedersen*, Kaution 106 ss.; ENGLISH Insolvency Act s. 281(7); FINLAND: LDepGuar § 21, RP 189/1998 rd 58 ss.; FRANCE: Ccom art. L 631-14 II for enterprise insolvency and CC art. 2308(2) as proposed by the *Grimaldi* Commission for insolvency of individuals; since Law no. 2005-845 of 26 July 2005 on Safeguard of Enterprises this is true even if the creditor omits to declare the claim at the opening of the insolvency procedure (Ccom art. L 622-26); GERMAN Insolvency Statute § 254(2) sentence 1; GREECE: *Filios* II/I § 127, fn. 29 at p. 89; ITALY: Cass. 17 July 2003 no. 11200, Giust.civ.Mass. 2003, 1709 s.; Cass. 27 June 1998 no. 6355, Fallim 1999, 525; LUXEMBOURG: *Ravarani*, Rapport Luxembourgeois 437-438; NETHERLANDS: Bankruptcy Act art. 241, 300 and 340(3); SCOTLAND: Bankruptcy (Scotland) Act s. 60; SWEDEN: *Walin,* Borgen 157 ss.). In SWEDISH law it is required that the creditor has to take all necessary steps to make the debtor pay, but he need not wait for the bankruptcy of the debtor before performance can be claimed from the security provider (*Gorton*, Suretyship 592 fn. 31). In SPAIN, although with some uncertainty, Supreme Court doctrine held in the past that in bankruptcy proceedings the security provider was not discharged, even in cases in which the insolvency plan approved a partial or total release of the debtor (*Carrasco*, Tratado, pp. 204 ff). This rule has been upheld in the present art. 135 of the Insolvency Law of 2003.

18. What effect has the avoidance of a performance made by the debtor in the suspect period upon personal security securing the avoided performance? In GERMANY the monetary claim underlying the returned performance is revived and both accessory and non-accessory security rights of any type for the claim are also revived (Frankfurter Kommentar/*Dauernheim* § 144 no. 3; CA Frankfurt/Main 25 November 2003, ZIP 2004, 271). In GREECE it has been held that a security is valid when provided in favour of a bankrupt debtor, even though any unilateral act reducing the latter's property, including an abstract acknowledgement of debt, is null in regard to the creditors when done during the suspect period, since it remains valid between the creditor and the debtor and subsequently the former can turn against the security provider and demand payment of the debt (cf. CA Athens 5511/1975, NoB 24, 85; Georgiades-Stathopoulos AK/*Vrellis* art. 850 no. 12).

19. In GERMANY it is held that even the disappearance of a debtor company, if due to insufficient assets, does not discharge the provider of a dependent security; rather, the security is maintained as an independent obligation and can then be assigned as such (BGH 25 November 1981, BGHZ 82, 323, 327 s.; *Reinicke and Tiedtke,* Bürgschaftsrecht no. 126).

(b) Transfer moratorium

20 The AUSTRIAN Supreme Court has held that an Austrian security provider of a claim against a Hungarian debtor cannot invoke vis-à-vis the Austrian creditor a transfer moratorium issued by the Hungarian government (OGH 5 September 1934, SZ 16 no. 162, p. 451 s.).

(c) Voluntary arrangements between the debtor and creditors

21. According to DUTCH, GERMAN and GREEK statute law as well as PORTUGUESE and SPANISH case law an arrangement between the debtor and creditors to avoid bankruptcy proceedings or a moratorium as well as a rescheduling agreement of a non-professional debtor do not release the security provider (DUTCH Bankruptcy Act art. 160 and 272 no. 5; GERMAN Statute on Insolvency § 254(2) sentence 1; GREECE: cf. Commercial Law art. 643; Georgiades-Stathopoulos AK/*Vrellis* art. 853 no. 29; PORTUGAL: Insolvency Code arts. 63, 81(2) and 245). However, if the creditor has accepted the arrangement, the security provider is released (STJ 19 April 2001, 329/01 www.dgsi.pt; STJ 18 November 1999, 859/99 www.dgsi.pt (no discharge by moratorium); According to some past SPANISH case law (*Carrasco,* Tratado, p. 206) a creditor would lose the right vis-à-vis the surety where the creditor has taken positive steps to get the release agreement approved; nowadays this rule has been probably upheld in the art. 135 Insolvency Law of 2003 . Also from ITALIAN statutory law it can be inferred that a voluntary agreement in bankruptcy between the debtor and creditors does not release the security provider (L.fall art. 140(3); art. 184; cf. Cass. 6 August 2002 no. 11771, Giust.civ.Mass. 2002, 1479). In GERMANY it is expressly provided that, while the security provider is not released vis-à-vis the creditor (cf. above), the debtor is released as against the security provider (Insolvency Statute § 254(2) sentence 2), so that recourse against the debtor is excluded. Corresponding rules probably also exist in other countries since otherwise the debtor's (partial) release would not be effective. In GREECE, however, the security provider who pays to the creditor part of the debt, participates in the insolvency procedure as creditor entitled to partial reimbursement (cf. Commercial Law art. 641 sentence 2; *Georgiades* § 3 no. 213).

22. In ENGLAND voluntary arrangements under Part VIII of the Insolvency Act 1986 regularly release the security provider because they are based on the parties' consent and thus the common law rules on variation of the principal contract (see below at IV) apply (*Johnson v. Davies* [1999] Ch 117); only if the creditor expressly reserves rights against the security provider will the latter not be released *(Andrews and Millett* no. 9-014). In FRANCE the same solution is in case of partial release of the debtor commonly admitted by court practice (Cass.com. 5 May 2004, Bull.civ. 2004 IV no. 84 p. 87; *contra* for release of debts: Cass.com. 13 November 1996, JCP E 1997, II no. 903, note *Legeais*; *Simler* no. 478), even if the security provider was excluded from the arrangement about debt releases and delays: the principle of good faith in contracting has to be respected. But the Law on Safeguard of Enterprises no. 2005-845 of 26 July 2005 now expressly recognizes the release of the security provider subsequently to the debtor's release in the *procédure de conciliation* (Ccom art. L 611-10(3)).

(d) No release of the security provider despite debtor's discharge

23. According to FRENCH consumer law the security provider is not discharged even after the partial release of the consumer debtor during the insolvency procedure (*Simler* no. 719). The security provider has only the right to be informed about the

opening of this procedure (ConsC art. L. 331-3; CC art. 2024 sentence 2 (since 2006: FRENCH CC art. 2301 sentence 2)).

24. The GERMAN Statute on Insolvency allows consumer debtors under certain conditions to obtain release from almost all existing obligations six years after termination of an insolvency procedure (cf. §§ 286-303, especially § 287(2) and § 300(1)). But according to § 301(2) sentence 1, security providers may not invoke this release vis-à-vis the creditor, although they have no recourse against the debtor (*ibidem* sentence 2).

25. The BELGIAN legislator is presently preparing an amendment to the Bankruptcy Act under which in specific situations the privilege of a discharged bankrupt trader would be extended to the trader's security provider.

IV. Agreement aggravating the secured obligation

(a) Generally

26. According to AUSTRIAN, BELGIAN, DANISH, FINNISH, FRENCH, GERMAN and LUXEMBOURGIAN law as well as GREEK, ITALIAN and SPANISH case law, agreements between the creditor and the debtor to increase the extent, to aggravate the conditions and terms or to predate the maturity of the secured obligations agreed upon after the security provider had assumed the security do not bind the latter (AUSTRIA: Rummel/*Gamerith* § 1353 no. 4; Schwimann/*Mader and Faber* § 1351 no. 14; DENMARK: *Pedersen*, Kaution 79 s.; FINLAND: LDepGuar § 8(1); RP 189/1998 rd 40 s.; FRENCH, BELGIAN and LUXEMBOURGIAN CC arts. 2013 and 2015 (since 2006: FRENCH CC arts. 2290 and 2292); BELGIUM: *Van Quickenborne* no. 241 ss.; FRANCE: *Simler* nos. 462 ss.; GERMAN CC § 767(1) sentence 3; GREECE: CA Thessaloniki 2539/1989, Arm 43, 986; *Georgiades* § 3 no. 111; ITALY: CC art. 1941(1) and 3; *Giusti* 141 ss., 150 s.; Cass. 20 February 1999 no. 1427, Giur.it. 1999 I 1576; SPAIN: art. 1835 CC and SAP Ciudad Real 26 January 1995, AC 1995/148).

27. By contrast, under ENGLISH law any material variation of the terms of the contract for the secured obligation will even discharge the security provider (*Holme v. Brunskill* (1877-78) 3 QBD 495; Chitty/*Whittaker* no 44-089). A security provider who assents to the variation will remain liable, however, unless after the variation the contract for the secured obligation is no longer within the general purview of the original dependent security; in this case there must be a new contract of security (cf. *Trade Indemnity Co. Ltd. v. Workington Harbour & Dock Board (No. 1)* [1937] AC 1; *Triodosbank NV v. Dobbs* [2005] EWCA Civ 630, [2005] 2 Lloyd's Rep 588). The same rule as to the discharge of the security provider by reason of a variation of the terms of the contract for the secured obligation applies in IRELAND (*MacEnroe v. Allied Irish Banks Ltd.* [1980] ILRM 171; *White* 545 s.), unless the variation is limited to a severable part of the contract.

(b) Details

28. GERMAN CC § 767(1) sentence 3 provides that the obligation of the security provider is not increased by any legal transaction entered into by the debtor after the assumption of the dependent personal security. Consequently, the security provider is not bound by any legal transaction that worsens the security provider's position, unless there is only a minor change that does not affect the substance of the secured obligation and that therefore, according to *bona fides*, appears to be reasonable for the security provider (BGH 1 March 1962, WM 1962, 701; Palandt/*Sprau* § 767 no. 3; Erman/*Herrmann* § 767 no. 9). In the NETHERLANDS, a special rule is laid down in

CC art. 7:861(4). A non-professional security provider is not bound by future obligations arising from a legal act, which the creditor has performed without being obliged to do so, after he had become aware of circumstances which have considerably diminished the possibility of recovering from the debtor. This rule does not apply if the security provider explicitly consented to the legal act or unless this act could not be postponed (*Blomkwist* no. 29).

(c) In particular: extension of time

Discharge

29. In ENGLAND, IRELAND and SCOTLAND the security provider is also discharged if the creditor gives additional time to the debtor (ENGLAND: *Swire v. Redman* (1875-76) 1 QBD 536; *Andrews and Millett* no. 9-029; IRELAND: *White* 545; SCOTLAND: Stair/*Clark* no. 965), because this would affect the security provider's right to pay off the creditor and then to sue the debtor in the name of the creditor. The security provider remains liable under ENGLISH law, however, if the creditor, on postponing the debt's payment date or releasing the principal debtor, notifies the principal debtor that rights against the security provider are reserved (cf. *Greene King v. Stanley* [2001] EWCA Civ 1966, [2002] BPIR 491; *O´Donovan and Phillips* nos. 6-66 ss.) Also according to SPANISH CC art. 1851 "an extension (of time) granted to the debtor by the creditor without the security provider's consent extinguishes the security". An express consent is not necessary if the security provider already knew about the possibility of tacit extension at the time of assumption of the security (TS 8 May 1984, RAJ 1984/2399). Consequently, the SPANISH Supreme Court has declared art. 1851 as not applicable in the case of security for future or conditional debts (TS 31 October 1984, RAJ 1984/5153).

(d) No discharge

30. By contrast, according to AUSTRIAN courts and writers an extension of time to the debtor does not release the security provider (OGH 4 May 2005, JBl. 2005, 722, 724 s.; OGH 6 May 1954, ÖJZ 1954, 455 no. 312; Rummel/*Gamerith* § 1353 no. 4). Also according to FRENCH and BELGIAN CC art. 2039 (since 2006: FRENCH CC art. 2316) and PORTUGUESE case law the extension of time granted to the debtor by the creditor does not discharge the security provider (PORTUGAL: STJ 24 January 1989, 77015 www.dgsi.pt). The security provider may also profit from the postponement of the due date, but can equally well waive the right to profit from this postponement (BELGIUM: *Van Quickenborne* nos. 326-329; FRANCE: *Simler* nos. 464 ss.). Pursuant to a minority FRENCH opinion CC art. 2039 (since 2006: FRENCH CC art. 2316) is applied also to the security provider with solidary liability (*Simler* no. 465), although the strict application of the rules on solidarity would exclude this solution (cf. FRENCH and BELGIAN CC art. 2021 (since 2006: FRENCH CC art. 2298)). As CC art. 2039 (since 2006: FRENCH CC art. 2316) is not compulsory, the parties can agree otherwise and discharge the security provider if the latter does not consent to the extension of time granted to the debtor by the creditor (*Simler* no. 469).

IV.G.–2:103: Debtor's defences available to the security provider

(1) As against the creditor, the security provider may invoke any defence of the debtor with respect to the secured obligation, even if the defence is no longer available to the debtor due to acts or omissions of the debtor occurring after the security became effective.

(2) The security provider is entitled to refuse to perform the security obligation if:

(a) the debtor is entitled to withdraw from the contract with the creditor under Book II, Chapter 5 (Right of Withdrawal).

(b) the debtor has a right to withhold performance under III.–3:401 (Right to withhold performance of reciprocal obligation); or

(c) the debtor is entitled to terminate the debtor's contractual relationship with the creditor under Book III, Chapter 3, Section 5 (Termination).

(3) The security provider may not invoke the lack of capacity of the debtor, whether a natural person or a legal entity, or the non-existence of the debtor, if a legal entity, if the relevant facts were known to the security provider at the time when the security became effective.

(4) As long as the debtor is entitled to avoid the contract from which the secured obligation arises on a ground other than those mentioned in the preceding paragraph and has not exercised that right, the security provider is entitled to refuse performance.

(5) The preceding paragraph applies with appropriate adaptations if the secured obligation is subject to set-off.

COMMENTS

A. General

This Article supplements the preceding Article by clarifying another aspect of the dependency of the security upon the secured obligation, *i.e.* the debtor's defences which are available to the security provider.

B. The principle

The main rule is laid down in the first sentence of paragraph (1): "any defence" available to the debtor may be invoked by the security provider. This general rule is in keeping with the principle of dependency laid down in paragraph (1) of the preceding Article.

However, an important qualification to the principle of dependency is established by the last half-sentence of paragraph (1): Any defence that originally had existed but which was lost later due to acts or omissions of the debtor can nevertheless be relied upon by the security provider if the loss occurred after the security became effective. Examples are a loss of a defence due to a waiver by the debtor; or an omission to raise the defence before it becomes time-barred. The rationale of this exception is to protect the security provider's expectancy to be able to continue to rely on any defence of the debtor which existed at the time the security became effective.

Existence of secured obligation. The secured obligation may not exist. In such a case there is technically no debtor. Nonetheless there may be an appearance of an obligation (for example, a forged document purporting to be signed by the debtor, or a contract which is invalid for some other reason) and the creditor may try to invoke the security. Of course, the

security provider can invoke the nullity of the document or the invalidity of the contract just as the apparent debtor could do.

Correspondingly, the secured obligation may have arisen but may thereafter have been duly paid by the debtor or a third person. In this case also, the security provider may counter any possible claim by the creditor by relying on the extinction of the secured obligation just as the debtor could do.

An invalidity of the contract or other juridical act giving rise to the secured obligation may have a variety of causes of a personal nature or related to the subject matter. The debtor may be subject to an incapacity which is unknown to the security provider (so that paragraph (3) does not apply). The underlying contract may have been avoided by the debtor for some such reason as fraud, mistake or threats (cf. Book III, Chapter 7, Section 2) or it may run counter to a legal prohibition and therefore be void or avoided by a court (cf. Book III, Chapter 7, Section 3).

Extent of the secured obligation. Since the obligation of the security provider does not extend beyond the secured obligation, on maturity of the security the security provider will first have to ascertain the exact extent or amount of the secured obligation at the point in time at which it has fallen due. If the dependent security has been given for a current account, it will be necessary to look at the balance of the account at the date of maturity of the security. A common situation where the extent of the secured obligation is likely to be relevant for the purposes of the present Article is where the debtor has paid part of the debt. If the creditor than tries to recover the whole amount from the security provider, the latter can invoke the part payment just as the debtor could do.

Performance of the secured obligation not due. The secured obligation may exist but performance may not be due. It may, for example, be subject to a suspensive condition which has not yet been fulfilled or a suspensive time limit which has not yet arrived. Or the debtor may have a right to refuse performance. An important example is where the period of prescription of the secured obligation has run. According to III.–7:501 (General effect) paragraph (1), after expiry of the period of prescription "the debtor is entitled to refuse performance". The security provider may invoke this defence of the debtor, whether or not the debtor had already invoked it. If, however, the security provider had already performed the prescribed obligation, anything conferred by the performance cannot be reclaimed merely because the period of prescription had expired (III.–7:501 (General effect) paragraph (2)).

C. Right to refuse performance

The second paragraph deals with three situations which are not technically defences of the debtor but in which the debtor could nevertheless lawfully refuse performance or bring about such a situation by giving notice. The first (sub-paragraph (2)(a)) is where the debtor has a right to withdraw from the contract with the creditor under the rules on this subject in Book II, Chapter 5. This right will often be of short duration and once the debtor loses it the security provider will also lose the right to refuse performance on that basis. The second situation (sub-paragraph (2)(b)) is where the debtor under the general rules of Book III has a right to withhold performance to the creditor, *e.g.* because the latter is refusing to perform a reciprocal obligation in time. The security provider may in effect invoke the debtor's right in order to withhold performance of the security obligation to the creditor. Again this right to refuse performance may be temporary. If later the creditor performs, then the security provider is no

longer allowed to refuse performance to the creditor. The third situation is where the debtor has a right to terminate the debtor's contractual relationship with the creditor under the rules in Book III, Chapter 3, Section 5. The typical case would be a right to termination for fundamental non-performance by the creditor of the creditor's obligations under the contract.

D. Debtor's lack of capacity

Many countries establish one exception to the principle, which relates to defects or lack of full capacity of the debtor and, in the case of a debtor legal entity, also the lack of legal personality. However, these incapacities or the non-existence of a legal entity must have been known to the security provider at the time when the security became effective. The underlying assumption is that in these cases the security serves the purpose of supplying an important element to overcome the economic consequences resulting from the debtor's "personal defect". But the provider of the security must have willingly incurred this risk. Paragraph (3) lays down this rule.

The consequences which any such lack of full capacity or of legal personality has for the security provider's recourse against the debtor are laid down in IV.G.–2:113 (Security provider's rights after performance) paragraph (4).

E. Debtor's unexercised rights of avoidance

The common feature of paragraphs (4) and (5) is that the debtor is entitled to exercise rights of avoidance or set-off but has not done so. Since in general the security provider is not entitled to exercise those rights because of their personal character, but, on the other hand, should not suffer from the debtor's passivity, some substitute must be designed. The position is not dissimilar to that under paragraph (2).

According to paragraph (4), the security provider is entitled to refuse performance where the debtor has not exercised an available right of avoidance. Examples are a right to avoid the contract which is the basis for a monetary claim by the creditor on the ground of a threat committed by the creditor or a mistake of the debtor. The granting of a right of refusing performance is a compromise: on the one hand, the security provider should not be entitled to exercise the debtor's right of avoidance since this is based upon a personal decision of the debtor but, on the other hand, should not be disadvantaged by the debtor's non-exercise of a right which by virtue of the principle of dependency is to the security provider's benefit.

F. Unexercised rights of set-off

The reasons just given apply equally if the debtor has a right of set-off against the creditor's claim but has not exercised it.

The same reasons apply also when the creditor also has a right of set-off against the debtor, as usually happens when the debtor has such a right. They also apply if exceptionally only the creditor is entitled to set off, but not the debtor.

G. Effectuation

In order to facilitate the effective realisation of the rights enumerated in the present Article, the security provider has not only a right towards the secured debtor but has even an obligation of inquiry according to IV.G.–2:112 (Security provider's obligations before

performance) paragraph (1). Further, the security provider is obliged to raise defences which were communicated by the debtor or which were otherwise known to the security provider (IV.G.–2:112 (Security provider's obligations before performance) paragraph (2)).

H. Consumer as security provider

Dependent personal security. If a consumer has assumed a dependent personal security, the rules of the present Article become mandatory in favour of the security provider by virtue of IV.G.–4:102 (Applicable rules) paragraph (2).

Other types of personal security. *Paragraphs (1) and (2).* From the point of view of a co-debtorship for security purposes, paragraph (1) (subject to the slight qualification in paragraph (2)) allows a security provider to invoke a defence inherent in the debt even in cases where a co-debtor as such had lost this defence due to acts done after the security became effective. This rule goes beyond III.–4:112 (Opposability of other defences in solidary obligations) paragraph (1) sentence 1. Consequently, if applied to a consumer co-debtor for security purposes by virtue of IV.G.–4:102 (Applicable rules) paragraph (1), this rule places the consumer in a better position than a non-consumer security provider.

If a consumer provides an independent personal security, the same result is achieved by virtue of IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (c): the consumer is enabled to invoke defences rooted in an underlying transaction which under the general rules of Chapter 3 the provider of an independent personal security is unable to invoke.

Paragraph (3). Generally, any form of incapacity or even legal inexistence of the debtor, whether a natural person or legal entity, does not affect the obligations of the provider of an independent personal security towards the creditor. The fact that a consumer provider of independent security is by virtue of IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (c) bound by paragraph (3) of the present Article does not therefore weaken the provider's position.

The position of a consumer co-debtor for security purposes is similar. III.–4:112 (Opposability of other defences in solidary obligations) paragraph (1) sentence 1 allows a co-debtor to invoke any defence which another solidary debtor can invoke, other than a defence personal to that other debtor. The incapacity of the debtor whose obligation is secured is a defence personal to that debtor. (See Comment to III.–4:112). So again the fact that the consumer security provider is subject to paragraph (3) of the present Article does not weaken the provider's position.

Paragraphs (4) and (5). For the consumer security provider of an independent personal security, paragraphs (4) and (5) offer remedies which are not available under Chapter 3. Consequently, there can be no objection to the application of these provisions in favour of a consumer provider of an independent personal security according to IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (c).

The same conclusion applies to a consumer's co-debtorship for security purposes. Paragraph (4) allows a consumer co-debtor for security purposes to invoke a personal defence of the principal debtor to avoid the contract giving rise to the secured obligation. According to III.–4:112 (Opposability of other defences in solidary obligations) paragraph (1) sentence 1, such

a remedy is not available to a co-debtor (cf. Comment on that Article). Paragraph (4) (as applied by virtue of IV.G.–4:102 (Applicable rules) paragraph (1)) therefore improves the position of the consumer co-debtor for security purposes. And paragraph (5) goes beyond III.–6:107 (Effect of set-off) since it allows the co-debtor to rely on the principal debtor's defence of set-off, although that defence had not yet been exercised and, as a personal defence could not be exercised by the co-debtor. By making these defences available to a consumer co-debtor for security purposes, the position of the consumer co-debtor is improved. This improvement is due to the reference to Chapter 2 which is contained in IV.G.–4:102 (Applicable rules) paragraph (1).

Mandatory character of consumer protection rules. In all instances in which the provisions of the present Article are applicable, these obtain a mandatory character in favour of the consumer by virtue of IV.G.–4:102 (Applicable rules) paragraph (2).

NOTES

I. General principle: extension of debtor's defences to the provider of dependent personal security

1. A primary consequence of the accessority principle is that the liability of the provider of dependent personal security must not be higher than the debtor's. Hence, the defences that are personally available to the provider of dependent security are supplemented by the debtor's defences (AUSTRIA: Rummel/*Gamerith* § 1351 no. 6; BELGIUM: *Van Quickenborne* no. 673 ss.; ENGLAND: *O´Donovan and Phillips* no. 11-46; FRANCE: *Simler* no. 656 ss.; cf. GERMAN CC § 767(1) sentence 1 and § 768; cf. Palandt/*Sprau* § 768 no. 6; Staudinger/*Horn* § 768 no. 16; GREECE: *Theodoropoulos* 273; ITALY: CC art. 1945; LUXEMBOURG: *Ravarani*, Jurisprudence récente 915; NETHERLANDS: CC art. 7:852; PORTUGAL: CC art. 637(1); *Almeida Costa* 774; SCOTLAND: Stair/*Eden* no. 841; SPAIN: CC art. 1853; *Guilarte Zapatero*, Comentarios 340). The provider of dependent security may raise as against the creditor pleas of the debtor, even if the latter has desisted from raising these defences (GERMAN CC § 768(2); PORTUGAL: CC art. 637(2); *Almeida Costa* 774; BELGIUM: *Van Quickenborne* no. 674; FRANCE: *contra Simler* no. 231) after creation of the security (cf. GREEK CC art. 853; SPAIN, *Carrasco*, Tratado, p. 176). However, frequently specific exceptions (*e.g.*, for the case of the debtor's incapacity, nos. 5-6 below) or modifications (for rights of avoidance, cf. nos. 16-19 below) are provided for.
2. In several countries, the debtor's defences that may be raised are specified by providing that the security provider is entitled to raise the defences that are "inherent" to the secured debt, excluding those that are personal to the debtor (cf. BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2036 (since 2006: FRENCH CC art. 2313); DUTCH CC art. 7:852(1), cf. also *Blomkwist* nos. 17, 32; *du Perron and Haentjens* art. 852 no. 5; GREEK CC art. 853; SPANISH CC art. 1853). "Personal" are those defences of the debtor which are closely connected to the debtor as a person and, thus, cannot be transferred actively or passively (see nos. 14-21 below). Furthermore, it has been held in GREECE that the provider of dependent security is entitled to raise the debtor's defences even if the security provider has no right of recourse vis-à-vis the debtor or has waived the *beneficium discussionis* (cf. CA Athens 6902/1995, EllDik 37, 1398 s.; *Theodoropoulos* 273).The PORTUGUESE CC

art. 637(1), on the other hand, uses as criterion the compatibility of the invocable defences with the guaranteeing obligation.

II. General defences

(a) Invalidity of the secured claim

3. According to AUSTRIAN CC § 1351, BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2012(1) (since 2006: FRENCH CC art. 2289(1)), GREEK CC art. 850, ITALIAN CC art. 1939, PORTUGUESE CC art. 632(1) and SPANISH CC art. 1824, a dependent security presupposes a valid principal debt. The same is true for ENGLISH and SCOTTISH law (cf. *Heald v. O´Connor* [1971] 1 WLR 497; *Andrews and Millett* no. 6-019; *Swan v. Bank of Scotland* (1836) 10 Bligh N.S. 627, 6 ER 231) and for DUTCH law (*Pitlo-Croes* no. 851) and can be derived indirectly from GERMAN CC § 767. In GREECE the secured debt need not be valid at the time of the assumption of the dependent security, but must be so at the time at which the security provider is called to perform the obligation (cf. *Kaukas* 437 fn. 1; ErmAK/*Zepos* art. 850 no.3).

4. As everyone may invoke the "absolute" nullity of a contract, the provider of dependent security can invoke the nullity of the secured debt and therefore of the security (FRANCE: *Simler* no. 227; GREECE: cf. Georgiades-Stathopoulos AK/*Vrellis* art. 853 no. 3; ITALY: *Fragali*, Della fideiussione 317; NETHERLANDS: nullity by law *(van rechtswege)*: *Du Perron and Haentjens* art. 852 no. 2; PORTUGAL: CC art. 632(1)). In some countries, the provider of dependent security may invoke the nullity of the debt, even if aware of this nullity at the time of the assumption of the dependent security (PORTUGAL: *Pires de Lima and Antunes Varela* 649, no exception), except regarding the debtor's lack of legal capacity (cf. nos. 5-6 below) and the nullity of the agreement due to excessive interest (GREECE: *Kaukas* 437; CFI Thessaloniki 399/59, Arm 13, 237). By contrast, in other countries, if the provider of dependent security already knew about the nullity of the secured obligation at the time of the security agreement, the security will be valid (SCOTLAND: Stair/*Eden* no. 838; SPAIN: *Carrasco*, Tratado, p. 151). In the latter case, the dependent security may have been assumed in GERMANY for the claim for unjustified enrichment which may arise due to the invalidity of the secured obligation, if one party or both had already made performances (*Reinicke* and *Tiedtke*, Bürgschaftsrecht nos. 4 ss.).

(b) Exception

Debtor's incapacity

5. Exceptionally, in many European countries a dependent security is valid even if the debt is defective by reason of any incapacity or limited capacity of the debtor to act legally (especially if a minor, cf. AUSTRIAN CC § 1352; FRENCH, BELGIAN and LUXEMBOURGIAN CC arts. 2012(2) and 2036(2) (since 2006: FRENCH CC arts. 2289(2) and 2313(2)) also BELGIUM: *T´ Kint* no. 753, *Van Quickenborne* no. 746; ENGLISH Minors Contracts Act 1987 s. 2; GREEK CC art. 850(2); ITALIAN CC art. 1939 *in fine*; PORTUGUESE CC art. 632(2) for incapacity and defective consent of the debtor causing a relative nullity, cf. *Galvão Telles* 279; SCOTLAND: cf. *Stevenson v. Adair* (1872) 10 M 919; SPANISH CC art. 1824(2)). In most countries, the provider of dependent security must have been aware at the assumption of the dependent security of the debtor's incapacity or limited capacity to contract (FRANCE: *Simler* no. 219; PORTUGUESE CC art. 632(2) *in fine*; SPAIN: *Reyes López* 170). In GREECE the creditor must prove the relevant knowledge of the security provider (cf. *Kaukas* 439; ErmAK/*Zepos* art. 850 no. 10; *Apostolides* art. 850

no. 5); negligent ignorance is not sufficient in this case (same references). Only in AUSTRIA is it provided expressly that a provider of dependent security is bound even if unaware of the lack of capacity (CC § 1352); however, this feature of the rule is generally criticised (Rummel/*Gamerith* § 1352 no. 4; Koziol and Welser II (-*Welser*) 139).

6. If a debtor company has acted *ultra vires*, the provider of dependent security (often a director) is personally liable in (ENGLAND: *Yorkshire Railway Waggon Co. v. Maclure* (1881-82) 19 Ch. D 478; it has been said, however, that the liability of the personal security provider should depend upon whether the security was intended to cover the risk of non-payment for the reason of legal incapacity of the debtor, cf. also *Garrard v. James* [1925] Ch 616; Chitty/*Whittaker* no. 44-036; after abolition of the doctrine of *ultra vires* by the Companies Act 1989 ss. 108, 109, 111 this problem is now of little relevance). In FRANCE some court decisions (Cass.civ. 27 April 1976, JCP G 1978, I, no. 2902 (79)) tried to assimilate incapacity to the lack of power (*e.g.* if dependent securities are granted by the manager of a legal person). But since 1980, this assimilation in regard to CC art. 2012(2) is no longer admitted (Cass.com. 25 November 1980, JCP G 1981, IV, no. 56). For SPANISH law, see CA Barcelona 1 February 2002, AC 2002/401 (promoting an application by ananlogy of CC art. 1824.2 to *ultra vires* transactions carried out by company representatives).

7. FRENCH and GERMAN courts have dealt with cases in which the debtor, a legal entity, was dissolved after assumption of the personal security. In a case where the assets of the dissolved company passed without liquidation to the sole shareholder, the FRENCH Supreme Court held that the dependent personal security remained valid for obligations that arose before the dissolution (Cass.com. 19 November 2002, Bull.civ. 2002 IV no.175 p.200). More daring is a decision of the GERMAN Federal Supreme Court on a similar set of facts; however, the company had been liquidated and erased from the commercial register. A creditor's claim under a dependent personal security failed; but it did not fail due to the "death" of the debtor company but because the security provider was allowed to invoke the expiration of the period of prescription for the secured claim (BGH 28 January 2003, BGHZ 153, 337, 339 ss., JZ 2003, 1068 with critical note *Tiedtke*; cf. also IV.G.–2:102 national notes no. 19).

(c) Unenforceability of the secured claim

8. The provider of dependent security may invoke the defence that the secured claim arose from gaming or betting and is therefore unenforceable (FRANCE: cf. CC art. 1965; *Simler* no. 215; GERMANY: Palandt/*Sprau* § 765 no. 28 with further references; GREECE: CC art. 844, cf. *Kaukas* 444; PORTUGAL: CC art. 1245). There is some authority in ENGLISH law that a provider of dependent security is in certain cases released from liability if the principal contract is unenforceable, *e.g.* for lack of compliance with statutory requirements (*Eldridge and Morris v. Taylor* [1931] 2 KB 416; *Temperance Loan Fund Ltd v. Rose* [1932] 2 KB 522: both cases concerning a failure to comply with the Moneylenders Act 1927). This, however, must not be understood as rendering unenforceable every dependent security which is provided for a principal obligation that is unenforceable (cf. *Andrews and Millett* no. 6-027). Rather, the decision has to be made on a case by case basis (*O´Donovan and Phillips* nos. 5-125 s.).

(d) Prescription of the secured claim

9. The provider of dependent personal security may invoke the defence of prescription of the principal debt (AUSTRIA: Schwimann/*Mader and Faber* § 1351 no. 10; FRANCE: *Simler* nos. 689 ss.; GERMANY: Erman/*Herrmann* § 768 no. 4 with

further references; see also no. 7 above and the exception in BGH 21 January 1993, BGHZ 121, 173; GREECE: A.P. 601/1985, EllDik 27, 77; ITALY: cf. CC art. 1945; *Fragali*, Della fideiussione 318; Cass. 15 March 2000 no. 2975, BBTC 2001 II 544; SCOTLAND: *Halyburtons v. Graham* (1735) Mor 2073 (CA); SPAIN: *Díez-Picazo* 455). This rule applies also if the prescription period has been completed after the creditor has initiated judicial proceedings against the provider of dependent security, because proceedings against the security provider do not interrupt prescription vis-à-vis the debtor (GERMANY: BGH 12 March 1980, BGHZ 96, 222, 225 ss.; CA Bamberg 14 January 1998, MDR 1998, 796; GREECE: *Georgiades* § 3 no. 133). The NETHERLANDS go one step further by declaring the dependent security to be extinguished if the prescription period for the secured claim has expired (CC art. 7:853). In GREECE, the provider of dependent security may exercise the general remedy of third party opposition (CCP art. 583 ff) against a decision rendered in a trial between the creditor and the debtor, where the debtor did not raise the plea of prescription, and raise this plea (*Kaukas* 445). If however the provider of dependent security assumed the dependent security after prescription of the debt, even if unaware of the prescription (cf. CC art. 272(2) sentence 2), then the security provider is not entitled to rely on that prescription (GREECE: *Georgiades* § 3 no. 134). If the claim against the provider of dependent security was declared valid by a final judgment and subsequently the prescription period of the secured debt expires, then the provider of dependent security may raise this defence with the remedy of opposition against the enforcement (cf. GREEK CCP art. 933; *Georgiades* § 3 no. 135).

10. In conformity with this principle, the creditor's demand for payment or the debtor's acknowledgement interrupts prescription also against the provider of dependent security (FRANCE, BELGIUM and LUXEMBOURG: CC art. 2250; BELGIUM: CA Brussels 8 May 1990, BankFin 1990, 463; GERMANY: *Reinicke* and *Tiedtke*, Bürgschaftsrecht no. 262; GREECE: *Kaukas* 445). In PORTUGAL, however, this interruption does not affect the dependent security unless the creditor informs the provider of the dependent security about the interruption of the prescription of the secured debt. The prescription of the dependent security is considered interrupted by law at the time of this communication (CC art. 636(1)). Suspension of prescription of the secured debt as well as its waiver do not affect the prescription of the dependent security (CC art. 636(2) and (3)). In SPAIN, the running of the prescription is interrupted only if the creditor's claim is a formal suit before a court (CC art. 1975).

11. By contrast, in ENGLAND it has been held that the prescription of the principal obligation does not release the provider of dependent security from liability (cf. *Carter v. White* [1884] 25 Ch. D 666).

(e) "Res judicata"

12. The provider of dependent security may invoke the defence of *res judicata* based upon a final judgment for the debtor in a proceeding brought by the creditor, if the decision dismissed the action of the creditor against the debtor as unfounded (GERMANY: cf. *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 535 with further references), unless it regards personal circumstances of the debtor, since these do not affect the liability of the security provider (BELGIUM: *T´ Kint* nos. 748, 373; FRANCE: cf. *Simler* nos. 499 for subsidiary liability and no. 541 for solidary liability; GREECE: cf. CCP art. 328, A.P. 1264/1995, EllDik 38, 798; NETHERLANDS: *du Perron and Haentjens* art. 852 no. 2; PORTUGAL: CC art. 635(1); SPAIN: *Guilarte Zapatero*, Comentarios 341). In GERMANY the provider of dependent security may rely upon a favourable final judgment between creditor and debtor, but not bound by a final judgment the other way (Erman/*Herrmann* § 767 no. 6 with further references). The same solution

is held by ITALIAN legal writers (*Fragali*, Della fideiussione 318 s.; however, *Ravazzoni* 261 thinks that the security provider is bound also by an unfavourable final judgment between the debtor and the creditor).

(f) Extinction of the secured claim

13. The provider of dependent security can raise the defence of extinction of the debt due to whatever reason, especially payment (cf. AUSTRIAN CC § 1363; FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 1281(2) and art. 2038 (since 2006: FRENCH CC art. 2315); cf. also for BELGIUM: *Van Quickenborne* nos. 680-698 and 707-726; FRANCE: *Simler* nos. 661 ss.; LUXEMBOURG: *Ravarani*, Jurisprudence récente 913-915; ENGLISH and SCOTTISH law: *Andrews and Millett* no. 9-001, Stair/*Clark* no. 958; GERMAN CC § 767(1) sentence 1; GREEK CC art. 851; Georgiades-Stathopoulos AK/*Vrellis* art. 853 no. 7; ITALIAN CC art. 1945; *Fragali*, Della fideiussione 317; NETHERLANDS: *du Perron and Haentjens* art. 852 no. 1; PORTUGAL: CC art. 651; *Almeida Costa* 784); SPAIN CC art. 1847 and *Carrasco*, Tratado, pp. 228 ff. Under FRENCH, BELGIAN, LUXEMBOURGIAN and PORTUGUESE law, payment may be made by a third party (FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 1236(2); PORTUGUESE CC art. 767), who will then be subrogated against the provider of the dependent security as well as against the debtor (FRENCH CC art. 1252; PORTUGUESE CC art. 593), except if the third party made this payment in that party's own interest (cf. FRENCH CC art. 1236(2); BELGIUM: *Van Quickenborne* no. 685; FRANCE: *Simler* no. 670). In PORTUGAL the subrogation depends either on the creditor's explicit declaration or on the debtor's explicit consent (CC art. 589, 590). However, a legal subrogation occurs if there is a direct interest of the third party (CC art. 592). In GREECE a third party who has mortgaged property provided as additional security, and who pays the secured debt, is subrogated to the rights of the mortgagee-creditor and the dependent security remains valid, although the principal debt has become extinct by virtue of payment (GREEK CC art. 1298, cf. Georgiades-Stathopoulos AK/*Vrellis* art. 853 no. 7). By contrast, under GERMAN law the payment of a third person extinguishes the obligation of the provider of a dependent security (Erman/*Kuckuk* § 267 no. 9).

14. In case of partial performance by the debtor, in some countries the dependent security remains valid for the remaining debt (AUSTRIA: CC § 1363 sentence 1 and Schwimann/*Mader and Faber* § 1363 no.1; GERMAN CC § 767(1) sentence 1 and Staudinger/*Horn* § 767 no. 10; BELGIUM: *Van Quickenborne* no. 688; FRANCE: *Simler* no. 673; GREECE: *Kaukas* 446). In BELGIUM, FRANCE and GREECE, a partial performance of the secured obligation is in the first place allocated to the non-secured part of the debt (BELGIUM: *Van Quickenborne* no. 689; FRANCE: *Simler* no. 674; GREECE: *Kaukas* 446).

III. Specific defences

(a) Right to withhold performance

15. In some European countries, the provider of dependent security can also invoke the debtor's right to withhold performance (defence of *non adimpleti contractus*) in order to force the creditor to perform to the debtor (BELGIUM: *T´ Kint* no. 749, *Van Quickenborne* no. 732; FRANCE: by analogy to CC art. 1653, *Simler* no. 730; GERMANY: Palandt/*Sprau* § 768 no. 6; GREECE: CC arts. 325 and 374, *Kaukas* 444 fn. 1a, 447; ErmAK/*Zepos* art. 853 no. 7; ITALY: cf. CC art. 1945; PORTUGAL: CC art. 637(1); SPAIN *Carrasco*, Tratado, p. 178). DUTCH law comes to the same result, but by another route: if the debtor rightfully withholds performance, the surety

provider has the same right (CC art. 7:852(3); *du Perron and Haentjens* art. 852 nos. 11-15).

16. The provider of dependent security may also invoke the defence that the debt cannot yet be claimed due to a condition or term set for performance (cf. DUTCH CC art. 7:852 (1); *du Perron and Haentjens* art. 852 no. 2(c), *Pitlo-Croes* no. 852, p. 353-354; BELGIUM: *Van Quickenborne* no. 322 *a fortiori*), unless this defence is considered as related to the person of the debtor (GREECE: *Kaukas* 444; ErmAK/*Zepos* art. 853 no. 11; ITALY: CC art. 1945, cf. also *Giusti* 209 s.).

(b) Debtor's rights of avoidance

17. The situation seems more complicated if the secured debt is affected by a "relative" nullity which can only be invoked by the contracting parties or one of them. The debtor is then entitled to avoid the contract by invoking this relative nullity. The matter is of great importance, since in some countries the solution will also apply for all other rights of the debtor concerning the effectiveness of the debt, *i.e.* not only for avoidance, but also for other rights such as termination, which do not relate to a relative nullity. One must distinguish as to whether the debtor avoids the contract or whether the provider of dependent security can exercise the respective right:

(c) Avoidance by court decision

18. If the contract is avoided by virtue of a court decision, then the dependent security as an accessory to the secured debt is also void *ab initio* and the security provider can raise the plea of *res judicata* against the creditor (BELGIUM: *Van Quickenborne* no. 729; FRANCE: *Simler* no. 229; GREECE: *Kaukas* 438; ErmAK/*Zepos* 850 no. 6; ITALY: *Fragali*, Della fideiussione 318; NETHERLANDS: (cf.) *du Perron and Haentjens* art. 852 no. 2e; PORTUGAL: *Almeida Costa* 774; SPAIN: cf. *Guilarte Zapatero*, Comentarios 427 s.). A corresponding rule applies if the contract is avoided by declaration (ENGLAND: *Andrews and Millet* no. 6-024; GERMANY: *Reinicke* and *Tiedtke*, Bürgschaftsrecht no. 280).

(d) Can the provider of dependent security avoid the contract?

19. In some countries the provider of dependent security may avoid a contract affected by a relative nullity in which the secured obligation is rooted (BELGIUM: *T´ Kint* nos. 748, 372; *Van Quickenborne* nos. 729-730; FRANCE: *Simler* no. 230; Cass.civ. 11 May 2005, Bull.civ. 2005 III no. 101 p. 94; ITALY: *Fragali*, Della fideiussione 317; PORTUGAL: CC art. 632(2); *Almeida Costa* 774; SPAIN: *Guilarte Zapatero*, Comentarios 340). By contrast, in many other countries the security provider is precluded from avoiding the contract (AUSTRIA: OGH 25 February 2004, ÖJZ 2004, 677; ENGLAND: *Andrews and Millett* no. 6-024; GERMANY: *Reinicke* and *Tiedtke*, Bürgschaftsrecht no. 280; GREECE: cf. CC art. 154; *contra* ErmAK/*Zepos* art. 850 no. 6, 853 no. 5; NETHERLANDS: *Pitlo-Croes* no. 852, p. 355). Especially in GREECE and the NETHERLANDS, this negative solution applies to all rights of the debtor concerning the effectiveness of the debt (GREECE: *Filios* II/1 § 127 at p. 89; NETHERLANDS: *du Perron and Haentjens* art. 852 no. 5). If the debtor ratifies the transaction as valid, the provider of dependent security is not deprived of the right to invoke the nullity of the secured obligation (BELGIUM: *Van Quickenborne* nos. 738-741 and cited references; FRANCE: *contra Simler* no. 231).

20. In still other countries, a provider of dependent security who is not entitled to avoid the contract is at least entitled to withhold performance as long as the debtor may avoid the contract (expressly GERMAN CC § 770(1); followed in AUSTRIA invoking the GERMAN provision, cf. Schwimann/*Mader and Faber* § 1351 no. 11

sub 1); Rummel/*Gamerith* § 1351 no. 6). When, however, in AUSTRIA and GERMANY the debtor has failed to invoke the defence and is precluded by a final decision from invoking it in future, then the provider of dependent security must perform (cf. AUSTRIA: OGH 27 April 1987, SZ 60 no. 69, p. 362 s.; GERMANY: cf. *Reinicke* and *Tiedtke*, Bürgschaftsrecht nos. 282 ss.). In the NETHERLANDS the provider of dependent security may grant the debtor a reasonable time to exercise the right of avoidance and is entitled to withhold performance of the security obligation during that period (CC art. 7:852(2); *du Perron and Haentjens* art. 852 nos. 2 and 7; *Pitlo-Croes* no. 852). Though SPANISH law has no legal provision on this matter, a similar approach has been advocated (*Carrasco,*Tratado, p. 178).

(e) Set-off

21. Three solutions can be distinguished if both the debtor and the creditor are entitled to a set-off, but neither of them has exercised such a right. In some European countries the provider of dependent security may set off the debtor's counter-claim against the creditor, even if the security provider's liability is solidary, since set-off is not considered to be a personal defence of the debtor which the security provider cannot raise vis-à-vis the creditor, and even ifthe security provider has no right of action and subrogation against the debtor (cf. BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1294(1); BELGIUM: *Van Quickenborne* nos. 699-703; FRANCE: Cass.civ. 1 June 1983, D. 1984, 152, note *Aubert*; also *Simler* no. 686 ss.; ENGLAND: *Bechervaise v. Lewis* (1871-72) LR 7 CP 372 ; *Murphy v. Glass* (1867-69) LR 2 PC 408; FINLAND: cf. LDepGuar § 27(2); RP 189/1998 rd 66 ss.; *Håstad* 3 s; GREECE: CC art. 447; cf. *Fragistas* 1371; *Georgiades* § 3 no. 129; SCOTLAND: Stair/*Eden* no. 843). Since in FRANCE the *Grimaldi* Commission proposes to suppress the distinction between personal defences and defences inherent in the debt (proposed new CC art. 2308(1)), the right of the security provider to set-off the debtor's claims is indirectly confirmed.

22. In other countries, the provider of dependent security has the right to withhold performance, either indefinitely or as long as the possibility of set-off exists (expressly GERMAN CC § 770(2); ITALY: *Giusti* 208; PORTUGAL: CC art. 642(1); SPAIN: *Guilarte Zapatero*, Comentarios 283). In AUSTRIA opinions are divided, the majority denying the provider of dependent security a right of set-off (OGH 20 December 1991, ÖBA 1992, 660; Schwimann/*Mader and Faber* § 1351 no. 11 *sub* 3) and most writers granting a right of retention (cf. Schwimann/*Mader and Faber* and Rummel/*Gamerith* § 1351 no. 6 *sub* c); *contra* OGH 20 December 1991, above); also in the NETHERLANDS (CC art. 8:150(3) read with 6:139(1), (2); *du Perron and Haentjens* art. 852 nos. 5, 9).

23. In SWEDEN and DENMARK, however, the provider of dependent security remains fully liable in spite of the set-off situation because the security provider should not be able to "reject the claim because the debtor has other assets, such as a counter-claim" (SWEDEN: HD 7 July 1994, NJA 1994, 474; DENMARK: *Ussing*, Kaution 222 ss.).

IV. Conditions for invoking these defences

(a) Solidary liability

24. The right of the provider of dependent security to invoke the defences of the debtor exists, even if the security provider has waived the *beneficium discussionis* (see national notes on IV.G.–2:106 nos. 8 ss.) and liability is solidary (BELGIUM: *Van Quickenborne* nos. 411, 214; GREECE: A.P. 148/1997, NoB 46, 1061). Although according to FRENCH CC art. 2021 (since 2006: FRENCH CC art. 2298) the rules on

solidary debtors apply for the solidarily liable provider of dependent security, such a person is considered first to be a security provider and not a solidary co-debtor. So the defences of set-off and of relative nullity, which according to the broad interpretation given to FRENCH CC art. 1208 are not available to co-debtors, can also be raised by the provider of dependent security who is solidarily liable (FRANCE: *Simler* no. 220).

(b) Waiver of defences and other rights by the debtor

25. If the debtor waives defences, in the narrow, technical sense of the word (cf. no. 26 below), the rule in BELGIUM, GERMANY, ITALY and PORTUGAL is that the provider of dependent security can still invoke all defences which are inherent to the secured debt (BELGIUM: T´ K*int* no. 751; *Van Quickenborne* no. 674; GERMANY: CC § 768(2); ITALY: *Fragali*, Della fideiussione 315, *Giusti* 206: the provider of dependent personal security acts *iure proprio* when invoking defences; PORTUGAL: CC art. 637(2); *Almeida Costa* 779; SPAIN, *Carrasco*, Tratado, p. 176), regardless of the time when the waiver took place. According to GREEK CC art. 853, however, if the debtor waives defences inherent to the debt *prior* to the assumption of the dependent security, then the security provider cannot invoke these defences, because they were not available to the debtor at the time of contracting, even if the security provider had no knowledge of this waiver on assuming the dependent security (cf. Georgiades-Stathopoulos AK/*Vrellis* art. 853 no. 18). If, however, the waiver took place after the assumption of the dependent security, the security provider may invoke the defences originally available to the debtor, despite the waiver (cf. CC art. 853, *Georgiades* § 3 no. 139).

26. By contrast if the debtor waives a right of avoiding the underlying contract or of set-off with respect to the secured obligation, opinions between the member states differ. If the debtor has waived the right to declare a set-off against the creditor demanding performance, then in some countries the provider of dependent security can nevertheless declare a set-off instead of the debtor (BELGIUM: *Van Quickenborne* no. 700; FRANCE: cf. *Simler* no. 686; GREECE: *Georgiades* § 3 no.130, *contra Fragistas* 1372). By contrast, in other countries, these rights are no longer available to the security provider (ENGLAND: *Bechervaise v. Lewis* (1871-72) LR 7 CP 372; *Andrews and Millett* no. 11-006; GERMANY: cf. CC § 770(1) (which is to be applied by analogy in the case of a right of set-off, cf. MünchKomm/*Habersack* § 770 no. 6; but the security provider may still rely on this defence as long as the *creditor* is entitled to set-off vis-à-vis the debtor, CC § 770(2)); SCOTLAND: Stair/*Eden* no. 843).

(c) Waiver by provider of dependent security

27. The provider of dependent security may waive the right to invoke defences available to the debtor, since the principle of accessority is generally dispositive (BELGIUM: *Van Quickenborne* no. 676, *contra*: *T´ Kint* no. 750; GREECE: cf. CC art. 853, CA Athens 635/1986, EllDik 27, 1476; SPAIN, *Carrasco*, Tratado, pp. 179 ff). In GREECE and in ITALY this waiver is a standard term in the General Business Conditions of banks (GREECE: cf. *Kozyris* EEN 1972, 416 ss.; ITALY: *Giusti* 132 ss.). This right to waive defences is restricted, however, by the core of the accessority principle: any waiver of defences available to the debtor in the contract of dependent security may not alter the core of the accessory character of the dependent security, so that defences available to the debtor regarding the existence and validity of the debt cannot be waived by the provider of dependent security, without at the same time transforming the dependent security into another contract (*e.g.* an independent security, promise or acknowledgement or assumption of debt: BELGIUM: *T´ Kint*

no. 750; *Van Quickenborne* nos. 675-677; FRANCE: S*imler* no. 924; GERMANY: The Federal Supreme Court has recently held that a term in general business conditions refusing the security provider a right to invoke set-off is at least invalid if the debtor's counter-claim is admitted or has been confirmed by final judgment; however it may even be admitted if the debtor is by court decision precluded from invoking a set-off (BGH 16 January 2003, BGHZ 153, 293, 299 s., 301 s.); cf. Erman*/Herrmann* § 768 no. 6; *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 293 ss. and 556 for standard contracts; GREECE: *Georgiades* § 3 no. 140; ITALY: Cass. 17 July 2002 no. 10400, Giust.civ.Mass. 2002, 1257; *Petti* 383 ss. and *Chinè*, I contratti di garanzia 309 ss. on the presumption of nullity of the term waiving defences when the security provider is a consumer on the basis of ConsC art. 33(2), former CC art. 1469*bis* (2); SPAIN: *Reyes López* 191).

28. Under DUTCH law, however, there may be no derogations to the detriment of the non-professional provider of dependent security from CC art. 7:852 on the possibility of the provider of dependent personal security to invoke the debtor's defences that relate to the existence, content and time of performance of the obligation of the debtor (CC art. 7:862 lit. a)).

V. Consequences of not raising these defences

29. Cf. national notes to IV.G.–2:112 (Security provider's obligations before performance) paragraphs (2) and (3).

VI. Defences unavailable to the provider of dependent security

(a) Debtor's personal defences (cf. nos. 2 and 5-6 above)

30. In ITALY and in GREECE the provider of dependent security may not invoke the defence arising from the personal agreement to release the debtor, concluded between the latter and the creditor (ITALY: *Fragali*, Della fideiussione 317; GREECE: CC art. 853; *Kaukas* 448; ErmAK/*Zepos* art. 853 no.16). Neither can in GREECE the security provider invoke the right of a donor (debtor) to refuse the performance of the donation if such performance would endanger either the donor's own maintenance or any maintenance owed by the donor to another by virtue of law (cf. CC art. 501; Georgiades-Stathopoulos AK/*Vrellis* art. 853 no. 26) or the rescission of a donation made *ultra vires* (cf. CC art. 1836; Georgiades-Stathopoulos AK/*Vrellis* art. 853 no. 26).

(b) Defences incompatible with the securing purpose of a dependent security

31. In addition to the cases mentioned in the national notes to IV.G.–2:102 (Dependence of security provider's obligation) nos. 17-23, the following defences are not admitted: a limitation of liability which results from the acceptance of a succession on behalf of the debtor with the benefit of inventory (GREECE: cf. CC art. 1902; *Georgiades* § 3 no. 141; NETHERLANDS: *du Perron and Haentjens* art. 852 no. 5). According to PORTUGUESE CC art. 637(2) sentence 2, the provider of dependent security may not invoke those defences of the principal, which are "incompatible with the guaranteeing obligation". In SPAIN, defences contrary to the security's intended purpose are not available; this is the case where the security provider tries to raise defences in order to get free of the special risk it agreed to bear for the creditor's benefit (*Carrasco*, Tratado, p. 177)

(c) Defences from the relationship between provider of dependent security and debtor

32. Since the creditor is a third party who stands outside the relationship between the provider of dependent security and the debtor, defences arising from this latter relationship cannot be invoked against the creditor (BELGIUM: *Van Quickenborne* no. 749; GREECE: CFI Pireus 1499/1968, EED 19, 629; ITALY: *Fragali*, Della fideiussione 317).

IV.G.–2:104: Coverage of security

(1) The security covers, within its maximum amount, if any, not only the principal secured obligation, but also the debtor's ancillary obligations towards the creditor, especially:

(a) contractual interest and interest due by law on delay in payment;

(b) damages, a penalty or an agreed payment for non-performance by the debtor; and

(c) the reasonable costs of extra-judicial recovery of those items.

(2) The costs of legal proceedings and enforcement proceedings against the debtor are covered, provided the security provider had been informed about the creditor's intention to undertake such proceedings in sufficient time to enable the security provider to avert those costs.

(3) A global security covers only obligations which originated in contracts between the debtor and the creditor.

COMMENTS

A. Survey

Paragraphs (1) and (2) set out those elements of a secured obligation which are, within the financial limits of the dependent security, covered by the latter. By contrast, paragraph (3) excludes for a global security coverage of certain "extraneous" items. Of course, the parties may deviate from any of these restrictions.

B. Principal, ancillaries and sums due upon default

According to paragraph (1) the dependent security primarily covers, apart from the principal, also contractual interest as an ancillary obligation. In addition, the normal items that will arise if a debtor defaults will also be covered since a dependent security is designed to cover such consequential damage, unless otherwise agreed. The typical items are:

- default interest;

- damages or an agreed sum of money or a penalty (where allowed) which fall due on the debtor's non-performance ; and

– reasonable extra-judicial costs of recovery of the preceding items.

The references to contractual and default interest are not qualified. Indeed, these items will be determined by fixed rates. These rates may be agreed upon by the parties or, if no agreement had been reached, by law. For default interest, III.–3:708 (Delay in payment of money) paragraph (1) provides a specific rule: the rate of default interest is determined by the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due. Additional damages may be recovered (paragraph (2) of same Article).

The same is true for any compensation which the debtor may owe to the creditor upon any non-performance of a contractual obligation. Such compensation may take the form of damages or payment of an agreed sum of money or, where allowed, a penalty.

By contrast, extra-judicial costs for recovery of the aforementioned items may only be demanded if they are “reasonable”. Where fixed scales for such costs exist, these must be observed. In the absence of such scales, average costs for average efforts must be considered to be reasonable. In both cases, the fixed scales and the reasonableness of average costs must be determined according to the rules and customs prevailing at the place where the services are to be rendered.

C. Costs and expenses of legal proceedings and executions

According to paragraph (2), the costs of legal proceedings and of judicial executions are covered. However, in this case it is necessary for the creditor to inform the security provider in due time, so that the latter is enabled to avert these costs by performing the security obligation.

D. Maximum limit

It goes without saying that all these specified ancillary items are secured only within the maximum limit of a security. If this limit is surpassed and the security provider makes full payment to the debtor, the following issue arises: to which parts of the secured obligation should this performance be attributed since the various elements of the secured debt may be subject to differing rules, especially with respect to prescription. III.–2:110 (Imputation of performance) paragraph (5) provides that a payment is to be appropriated, first to expenses, secondly, to interest, and thirdly, to the principal; however, the creditor may make a different imputation. Of course, the parties can agree otherwise, *e.g.* by extending the security to cover fully (or partly) all or some of the listed ancillary items.

E. Exclusions and extensions

Items not mentioned in paragraphs (1) and (2) and in the preceding comments are not covered by law. One example is a claim for repayment of a loan on the basis of unjustified enrichment by the creditor if, for whatever reason, the secured obligation is void or avoided. Of course, the parties may agree otherwise. An agreement providing not only for the repayment of a loan according to the terms of the valid loan contract, but also that claims for repayment of any advances made if the loan contract is void would be secured would not constitute a deviation detrimental to the security provider within the meaning of IV.G.–4:102 (Applicable rules) paragraph (2), since this would rather constitute a definition of the subject matter of the contract of security. Generally, any type of principal obligation can be made the object of dependent security; this would include also restitutionary and other non-contractual obligations. Of course, it has to be ascertained in these situations whether the contractual security might also be affected by the factors resulting in the ineffectiveness of the loan contract.

F. Exclusion of non-personal and non-contractual secured obligations from global security

In order to limit the risks of global securities, paragraph (3) provides that only contractual obligations directly incurred by the debtor towards the creditor are covered. This provision excludes, in particular, the coverage of claims against the debtor which have been assigned to the creditor after the global security had been assumed. In addition, non-contractual claims are excluded from global security. Again, the parties are free to agree otherwise.

G. Consumer as security provider

Dependent personal security. If a consumer has assumed a dependent personal security, the present Article becomes mandatory in favour of the security provider by virtue of IV.G.–4:102 (Applicable rules) paragraph (2).

Other types of personal security. The provisions of paragraphs (1) and (2) of the present Article are fully applicable to a consumer's independent personal security (cf. IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (c)) and to a consumer's co-debtorship for security purposes (cf. IV.G.–4:102 (Applicable rules) paragraph (1)). A slight qualification is necessary for the words "if any" in paragraph (1) relating to the indication of a maximum amount of the security. According to IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (a), the amount of a consumer security provider's security must always be limited, and the limitation, if the parties have not provided for it, is to be effected according to IV.G.–2:102 (Dependence of security provider's obligation) paragraph (3). Therefore, in the present context the words "if any" are irrelevant.

By virtue of the references in IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (c), paragraph (3) of the present Article is also applicable where a consumer assumes an independent personal security or a co-debtorship for security purposes. As in the case of a consumer provider of a dependent security, an agreement which according to its terms purports to cover all the debtor's obligations towards the creditor or the debit balance of a current account (a global security), is restricted to cover obligations which originated in contracts between the debtor and the creditor. An additional restriction in favour of consumer security providers follows from IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (a), according to which global securities of consumers must have a maximum limit, which either has been agreed by the parties or has to be determined according to IV.G.–2:102 (Dependence of security provider's obligation) paragraph (3).

The present Article is mandatory in favour of the consumer security provider, cf. cf. IV.G.–4:102 (Applicable rules) paragraph (2). And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" in the present Article means the debtor whose obligation is secured.

NOTES

1. In all legal systems a dependent security covers, of course, the secured obligation. But there are some differences regarding the coverage of other claims of the creditor against the debtor.

I. Ancillary obligations – General rules

2. BELGIAN, FRENCH, LUXEMBOURGIAN and SPANISH law differentiate between definite and indefinite dependent securities. A dependent security is "indefinite" if only the principal obligation is mentioned in the contract of security, no other limitation (maximum amount) of the security being agreed. By contrast, a dependent security is definite if security provider and creditor have specifically agreed upon the extent of the security (see *e.g.* FRANCE: *Cabrillac/Mouly* 129; BELGIUM: *Van Quickenborne* nos. 257 ss.). An indefinite dependent security secures the principal obligation and all its ancillary obligations (BELGIAN, FRENCH and

LUXEMBOURGIAN CC art. 2016 para. 1 (since 2006: FRENCH CC art. 2293 para. 1) and SPANISH CC art. 1827 para. 2).

3. FRENCH case law originally required for non-commercial dependent securities that the liability for ancillaries must be expressly mentioned in the dependent security provider's hand-written declaration in accordance with FRENCH CC art. 1326 (Cass.civ. 22 June 1983, Banque 1984, 860). The Commercial Chamber of the FRENCH Supreme Court (Cass.com. 16 March 1999, JCP G 1999, I no. 156 (1)), however, held that such a hand-written declaration is not necessary. Despite earlier decisions to the contrary (cf. Cass.civ. 13 October 1999, JCP G 2000, II no. 1037), the Civil Chamber of the Supreme Court has now accepted the view of the Commercial Chamber (Cass.civ. 29 October 2002, JCP G 2002, II no. 10187, note *Legeais*), CC art. 1326 is no longer applied to the liability for ancillaries. The proposals of the *Grimaldi* Commission would confirm this case law (cf. the proposed CC art. 2300 (1)).

4. In FRENCH consumer legislation, on the other hand, stricter formal requirements were developed (cf. ConsC arts. L. 313-7 and L. 341-2, see national notes to IV.G.–4:104 (Form)).

5. There are two general rules on ancillary obligations in GREECE: According to CC art. 852, in cases of doubt a provider of dependent security is not liable for contractually agreed ancillary obligations which were due and payable at the time the dependent security was provided; and is liable for those contractually agreed ancillary obligations that become due and payable after the assumption only if aware of the existence of these obligations (cf. Georgiades-Stathopoulos AK/*Vrellis* art. 852 no. 1).

6. AUSTRIAN writers similarly distinguish between a limited and a full dependent security, only the latter covering also ancillaries. Dependent securities by banks, in favour of banks and generally among merchants are usually full dependent securities (Rummel/*Gamerith* § 1353 no. 5; Schwimann/*Mader and Faber* § 1353 no. 5).

II. Specific items

(a) Contractual interest in general - Legal systems with a specific rule

7. The most extensive rule concerning the coverage of contractual interest seems to be FINNISH LDepGuar § 4 para. 1: a provider of dependent security is *ex lege* liable for contractual interest provided the provider of security and the creditor had not agreed otherwise (see also RP 189/1998 rd 35). The same is true for ITALY and PORTUGAL regarding all ancillaries (ITALIAN CC art. 1942; PORTUGUESE CC art. 634; *Almeida Costa* 770). In BELGIUM, FRANCE, LUXEMBOURG and SPAIN, an indefinite dependent security (*above* no. 2) covers contractual interest of the secured obligation since contractual interest is regarded as an ancillary obligation (cf. BELGIUM: *Van Quickenborne* no. 263; FRANCE: art. 2016 para. 1 (since 2006: CC art. 2293 para. 1); *Piedelièvre*, Sûretés 26; LUXEMBOURG: *Ravarani*, Jurisprudence récente 901-902; SPAIN: *Guilarte Zapatero*, Comentarios 132). However, nowadays FRENCH CC art. 2016 para. 1 (since 2006: CC art. 2293 para. 1) is applied to definite dependent securities as well (Cass.com. 16 March 1999, JCP G 1999, I no. 156 (1)). This solution seems to be confirmed by the *Grimaldi* Commission´s proposal of a new CC art. 2302, which determines the coverage of the security provider's liability, irrespective of the indefinite or definite character of the dependent securities.

(b) Legal systems without a specific rule

8. In other legal systems there are no relevant statutory provisions. Consequently, the provider of dependent security is only liable for contractual interest if this is at least

implicitly stipulated in the contract of security (DENMARK: *Pedersen*, Kaution 48 s.; ENGLAND: *Andrews and Millett* no. 6-010; GERMANY: *Reinicke* and *Tiedtke* no. 21; Palandt/*Sprau* § 765 no. 24; GREECE: Georgiades-Stathopoulos AK/*Vrellis* art. 852 no. 1; SWEDEN: *Walin*, Borgen 151 ss.). As far as there are formal requirements in these legal systems, they do not prevent such an extension of liability. Since for purposes of interpretation especially the surrounding circumstances of the transaction are to be taken into account, contractual interest will often be secured despite the silence of the written agreement (DENMARK: *Pedersen*, Kaution 48 s.; ENGLAND: *Andrews and Millett* no. 6-010; *Fahey v. MSD Speirs Ltd.* [1975] 1 NZLR 240 (PC)). In GERMANY and SCOTLAND, it is considered as sufficient that the provider of dependent security knows that the secured obligation bears interest (Erman/*Herrmann* § 765 no. 7 with further references; however critical Staudinger/*Horn* § 765 no. 40; cf. similarly for SCOTTISH law Stair/*Eden* no. 917). In AUSTRIA a full dependent security (*above* no. 6) covers contractual interest (Rummel/*Gamerith* § 1353 no. 5). AUSTRIAN law establishes a restrictive rule for contractual interest that is overdue: the provider of dependent security is not liable for those portions of such interest which had already been due for some time when the creditor demanded payment from the security provider (CC § 1353 sentence 2; cf. the prevailing interpretation of this provision by Schwimann/*Mader and Faber* § 1353 no. 2 and Rummel/*Gamerith* § 1353 no. 5).

(c) Implications of agreed maximum amount

9. In ENGLISH and SCOTTISH law an agreed maximum amount will usually be expressed to relate to the principal sum only and the provider of dependent security is then liable for interest on that sum, unless the maximum is expressed to include interest (ENGLAND: *Dow Banking Corp. v. Mahnakh Spinning & Weaving Corp.* [1983] 2 Lloyd´s Rep 561; SCOTLAND: Stair/*Eden* no. 917). On the other hand, the provider of dependent security is not liable for interest on parts of the secured debt exceeding the agreed maximum of the dependent security (ENGLAND: *Meek v. Wallis* (1872) 27 LT 650; SCOTLAND: *Commercial Bank of Scotland Ltd. v. Pattison´s Trustees* (1891) 18 R 476). Also in AUSTRIA and ITALY, an agreed maximum amount without further specification is understood as an absolute limit, excluding liability for any amount of interest surpassing the maximum (AUSTRIA: OGH 8 January 1956, SZ 29 no. 5 p. 11; Schwimann/*Mader and Faber* § 1353 no. 10; ITALY: CFI Roma 5 June 2003, BBTC 2005 II 71; SPAIN, *Carrasco*, Tratado, p. 162). In GREECE again the declaration of the provider of dependent security must be interpreted restrictively since the maximum amount aims to provide a general limit on the security provider's liability (*Georgiades* § 3 no. 116 and § 4 no. 30).

10. In GERMANY it is disputed whether an agreed maximum amount covers the principal obligation only or contractually agreed interest as well (BGH 17 March 1994, WM 1994, 1064, 1068: no exclusion of interests; *contra*: *Reinicke/Tiedtke* no. 24). However, general business terms and conditions according to which an agreed maximum amount does not limit the security provider's obligation for contractual interests have been held invalid (BGH 18 July 2002, BGHZ 151, 375, 380 ss.). In BELGIUM, it is thought that, if the parties limit the dependent security to a maximum amount that is lower than the secured debt, the security provider will normally be liable for the ancillaries in the same proportion as he is liable for the secured debt. But parties can agree otherwise (*Van Quickenborne* no. 284).

(d) Extra-judicial costs of recovery

11. According to GERMAN CC § 767 para. 2 and PORTUGUESE CC art. 634 the provider of dependent security is liable for the expenses of notice which must be paid by the principal debtor to the creditor; the same is true for BELGIUM, FRANCE, ITALY, LUXEMBOURG (CC art. 2016 para. 1 (since 2006: FRENCH CC art. 2293 para. 1); cf. BELGIUM: *Van Quickenborne* no. 264; FRANCE: *Simler* no. 299; ITALY: *Giusti* 155; LUXEMBOURG: *Ravarani*, Jurisprudence récente 901-902) and GREECE (ErmAK/*Zepos* art. 851 no. 6). By contrast, in SWEDEN the dependent security provider is *in dubio* not liable for the expenses of notice (*Walin*, Borgen 153 s.).

(e) Other ancillary obligations

12. What has been said above about contractual interest is in GERMANY also true for commissions and costs (GERMANY: Palandt/*Sprau* § 765 no. 24; Staudinger/*Horn* § 765 no. 40). FINNISH LDepGuar § 4 para. 1 extends the liability of the provider of dependent security to other extra costs if there is no other stipulation in the contract. The same is true in BELGIUM, FRANCE and LUXEMBOURG, since the dependent security covers according to CC art. 2016 (since 2006: FRENCH CC art. 2293) the principal debt and all its ancillaries (BELGIUM: *Van Quickenborne* no. 269; LUXEMBOURG, *Ravarani*, Jurisprudence récente 901; FRANCE: *Simler* no. 304).

(f) Obligations due to debtor's fault or default - Default interests; claims for damages due to the debtor's fault

13. In most European countries the provider of dependent security is, unless otherwise agreed in the contract of security, especially liable for default interest and for claims for damages due to non-performance of the secured obligation (BELGIUM: *Van Quickenborne* no. 266; ENGLAND: *Moschi v. Lep Air Services Ltd.* [1973] AC 331 (this decision is also relied upon in SCOTLAND, cf. Stair/*Eden* no. 918); *Astilleros Espanoles SA v. Bank of America National Trust & Savings Association* [1995] 2 Lloyd´s Rep 352; *Andrews and Millett* no. 6-030; FRANCE: ConsC arts. L. 313-7 and L. 341-2 for consumer securities; Cass.civ. 10 May 1988, Bull.civ. 1988 I no. 134 p. 93; *Simler* no. 300 ss.; GERMANY: BGH 17 May 1994, NJW 1994, 1790; Palandt/*Sprau* § 767 no. 2; Staudinger/*Horn* § 767 no. 25; GREECE: *Georgiades* § 3 no. 115; A.P. 1486/1997, listed in www.dsanet.gr; ITALY: cf. *Giusti* 154; LUXEMBOURG: *Ravarani*, Jurisprudence récente 902; NETHERLANDS: *Blomkwist* no. 19, p. 37; PORTUGUESE CC art. 634; SPAIN: *Guilarte Zapatero*, Comentarios 132). Especially in AUSTRIA, a provider of dependent security under a full dependent security (*above* no. 6) is liable for default interest (Rummel/*Gamerith* § 1353 no. 5; Schwimman/*Mader and Faber* § 1353 no. 5), but not under a limited dependent security (cf. OGH 24 September 1987, SZ 60 no. 185 at p. 276).

14. This principle applies also to all claims for damages in connection with the secured obligation that are based on an action of the debtor after conclusion of the contract of dependent security (GERMANY: BGH 14 July 1988, NJW 1989, 27; Staudinger/*Horn* § 767 no. 28; GREECE: A.P. 1486/1997, listed in www.dsanet.gr; Georgiades-Stathopoulos AK/*Vrellis* art. 851 no. 9; ITALY: *Giusti* 155; LUXEMBOURG: *Ravarani*, Jurisprudence récente 902; PORTUGAL: *Almeida Costa* 770), even after resolution or annulment of the contract (BELGIUM: *Van Quickenborne* no. 268; FRANCE: Cass.com. 2 November 1994, JCP G 1995 I no. 3851 (13), note *Delebecque and Mouly*; *Simler* no. 303; NETHERLANDS: *Blomkwist* no. 19, p. 37). In GREECE the provider of dependent security is additionally liable for alterations of the principal

obligation caused by fortuitous events or by force majeure, provided the debtor bears the respective risk (Georgiades-Stathopoulos AK/*Vrellis* art. 851 no. 9).

15. The legal situation is different in the SCANDINAVIAN countries and in the NETHERLANDS. In DENMARK the provider of dependent security is liable for claims for damages caused by the non-performance of the secured obligation (*Pedersen*, Kaution 49; CA Vestre Landsret 11 January 1971, UfR 1971 A 337) but according to DANISH court practice not for default interest, unless this has been stated in the security agreement (H 18 January 1982, UfR 1982 A 162; CA Vestre Landsret 4 October 1973, UfR 1974 A 198; *Pedersen*, Kaution 49). The same is true for SWEDEN (*Walin*, Borgen 151 ss.). If the contractual relationship comprising the secured debt is terminated owing to delay, a consumer provider of dependent security is pursuant to the FINNISH LDepGuar § 25 entitled to pay according to the conditions that had prevailed had the debtor not been in delay (RP 189/1998 rd 63).

16. In the NETHERLANDS, the provider of dependent security owes *legal* interest only over the period when in default, unless the obligation of the debtor arises from non-contractual liabilty for damage caused to another or from non-performance (CC art. 7:856). There may be no derogations from this rule to the detriment of the non-professional provider of dependent security (CC art. 7:862 lit. a)). Interest and costs owed according to art. 8:856 can be claimed irrespective of the expressed maximum (art. CC 7:858).

(g) Penalty for non-performance of contractual obligation

17. In BELGIUM, GERMANY, GREECE, ITALY, LUXEMBOURG and the NETHERLANDS a penalty for non-performance of a contractual obligation is only covered if this has been stipulated in the contract of dependent security (BELGIUM: CA Brussels 20 January 1982, RW 1982-83, 2397; CFI Brussels 27 September 1971, B.R.H. 1972, 2; *Van Quickenborne* no. 266; GERMANY: BGH 7 June 1982, NJW 1982, 2305; BGH 15 March 1990, WM 1990, 841; GREECE: *Georgiades* § 3 no. 115; ITALY: Cass. 30 May 1963, no. 1468, Giur.it.Mass. 1963, 502; *Giusti* 154; LUXEMBOURG: CA Luxembourg 9 November 1993, Pas luxemb XXIX (1993-95) Jur. 293; *Ravarani*, Jurisprudence récente 902; NETHERLANDS: *Blomkwist* no. 19); in deciding whether this is the case, the principles of interpretation are to be applied (GERMANY: cf. Staudinger/*Horn* § 765 no. 40 and Erman/*Herrmann* § 765 no. 7).

18. In AUSTRIA, under a full dependent security (*above* no. 6), there is liability also for penalties (Rummel/*Gamerith* § 1353 no. 5; differentiated Schwimann/*Mader and Faber* § 1353 no. 5). In FRANCE since the leading case of October 2002 (Cass.civ. 29 October 2002, JCP G 2002, II no. 10187, note *Legeais*) the Civil and Commercial (cf. Cass.com. 6 February 2001, Bull.civ. 2001 IV no. 29 p. 27) Chambers of the Supreme Court consider the penalty term as automatically covered by the ancillaries designated by CC art. 2016 para. 1 – since 2006: CC art. 2293 para. 1 – (Larroumet/*François* no. 161). It seems that in PORTUGUESE law a penalty for non-performance is to be borne by the provider of dependent security as an ancillary obligation (PORTUGAL: CC art. 634; *Almeida Costa* 770). In SPAIN, penalties for non-compliance have been deemed to be included in the scope of the suretyship, unless otherwise provided (TS 30 June 1969, RAJ 1969/3680; TS 3 October 1985, RAJ 1985/4570; TS 2 October 1990, RAJ 1990/7464, and also in legal writing; *Guilarte*, p. 133; *Carrasco*, p. 140).

(h) Costs of legal and enforcement proceedings

19. According to GERMAN CC § 767 para. 2, ITALIAN CC art. 1942, PORTUGUESE CC art. 634 and GREEK literature the provider of dependent security is, apart from the expenses of notice (see no. 11 above), liable for the expenses of legal action which are

owed by the debtor to the creditor. This liability exists regardless of whether the dependent security is solidary or subsidiary and especially does not depend upon any default of the debtor. The provider of dependent security is obliged to pay not only costs that have arisen in a formal proceeding but all costs for recovery owed by the debtor (GERMANY: Staudinger/*Horn* § 767 nos. 33 s.; GREECE: *Georgiades* § 3 no. 115), unless liability is excluded in the contract of dependent security. For a full dependent security (*above* no. 6), AUSTRIAN law comes to the same results (Rummel/*Gamerith* § 1353 no. 5; Schwimann/*Mader and Faber* § 1353 no. 5).

20. By contrast, in ENGLISH, FRENCH, BELGIAN and LUXEMBOURGIAN, DUTCH and SCOTTISH law a provider of dependent security is only liable for the costs of a fruitless action against the debtor if the creditor has given notice to the security provider of an intention to sue the debtor (ENGLAND: *Baker v. Garratt* (1825) 3 Bing 56, 130 ER 434; *Colvin v. Buckle* (1841) 8 M & W 680, 151 ER 1212; FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 2016 (since 2006: FRENCH CC art. 2293 para. 1); FRANCE: CA Pau 9 February 1905, S. 1905, 2, 76; BELGIUM: *Van Quickenborne* no. 264; NETHERLANDS: CC art. 7:856 para. 2; SCOTLAND: *Fraser v. Andrew* (1831) 9 S 345 (CA); *Collier v. Beath* (1836) 15 S 195). In ENGLAND and SCOTLAND it is further taken into consideration whether upon the true construction of the terms of the security agreement, expenses may fall within the object of the dependent security (ENGLAND: *O´Donovan and Phillips* no. 5-59; SCOTLAND: *Grant v. Fenton* (1853) 15 D 424 (CA)) and whether the expenses incurred were reasonable (SCOTLAND: *Struthers v. Dykes* (1847) 9 D 1437 (CA); Stair/*Eden* no. 916). Similarly, according to SPANISH CC art. 1827 para. 2 in cases of indefinite dependent securities those costs of suit are covered which arose after the creditor had demanded payment from the provider of dependent security.

21. According to DANISH law the provider of dependent security is not liable for the procedural costs, unless this has been stated in the dependent security (*Pedersen*, Kaution 49).

(i) Claims for repayment in case of nullity of underlying contract

22. Express extensions of a dependent personal security to claims for repayment of the capital, if the underlying contract providing for the payment is void, are, generally speaking, recognized (GERMANY: if not expressly agreed, an interpretation of the contract terms is necessary: Staudinger/*Horn* § 765 nos. 82-85 with references; ITALY: in banking practice, such terms are widely used and valid, if individually negotiated: CA Torino 27 October 1998, BBTC 2001 II 87; CFI Milano 25 May 2000, *ibid.* 88. Whether such extensions can validly be fixed by general conditions, is not free from doubt. In ITALY, a corresponding term in the model contract drafted by the Italian Bank Association was declared to be void – however, on the basis of a violation of antitrust law (decision of the Bank of Italy no. 55 of 5 May 2005, Bolletino no. 17 of 16 May 2005 p. 97 ss). The GERMAN Federal Supreme Court held a corresponding term to be compatible with the statutory regime on general terms (BGH 21 November 1991, NJW 1992, 1234, 1235; approving Staudinger/*Horn* § 765 nos. 87 s.; more differentiating *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 4-12). In SPAIN the case law is not conclusive as to the extension to secondary duties for repayment, but the extension has been proposed as a default rule (*Carrasco*, Tratado, p. 152).

23. FRENCH courts have repeatedly held that, even if the credit contract as such is void, the debtor's contractual duty of returning the payment received "survives" the contract; therefore, in that respect also the dependent personal security survives

(Cass.com. 2 November 1994, JCP G 1995 I 3851 no. 13 with note *Delebecque and Mouly*; Cass.com. 4 February 1986, JCP G 1986 IV 100).

III. Global security

(a) Liability of a provider of dependent security under a global security

24. See national notes to IV.G.–1:101 (Definitions) nos. 42-46.

(b) Proof of the secured claim

25. It has been held in GERMANY and in GREECE that the acknowledgement of the outstanding balance on behalf of the debtor also binds the provider of dependent security: the creditor may rely upon the non-causal acknowledgement of the balance and does not have to assert and prove each account entry, which, along with others, is contained in the outstanding balance (GERMANY: BGH 18 DECEMBER 2001, ZIP 2002, 297 ss., 298; GREECE: A.P. 1264/1994, EllDik 37, 316; *Chrysanthis* 299). Regardless of such an acknowledgement, the creditor may assert and prove the account claim by asserting and proving all account entries which led to the outstanding balance (GERMANY: BGH 18 DECEMBER 2001, ZIP 2002, 297 ss., 298; GREECE: A.P. 46/1984, NoB 33, 232; *Kondylis* 39 fn. 103).

IV.G.–2:105: Solidary liability of security provider

Unless otherwise agreed, the liability of the debtor and the security provider is solidary and, accordingly, the creditor has the choice of claiming solidary performance from the debtor or, within the limits of the security, from the security provider.

COMMENTS

A. The general rule: solidary liability

The present Article expresses the basic form of the security provider's liability under these Rules, which is solidary. The creditor may choose to claim full performance from the debtor or the security provider. The creditor may also divide the claim and claim one part from the one and the other part from the other person. Technically, in some cases this may not be solidary liability, since the legal bases of the two obligations may differ; but the effect is comparable in some respects.

Solidary liability is established for this situation by most modern legislation and has always prevailed in commercial relations. Where older laws provide for the security provider's subsidiary liability, in practice this is usually replaced contractually by solidary liability.

B. Security on first demand

If a personal security is due on first demand it is a security with solidary liability. Typically, it will be an independent personal security, cf. IV.G.–3:103 (Independent personal security on first demand), unless the parties have expressly designated it as a dependent personal security. However, any first demand security which has been assumed by a consumer, is considered as creating a dependent security, provided the requirements of the latter are met, cf. IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (c).

C. Consumer as security provider

While for ordinary dependent security solidary liability of the security provider is the rule and subsidiary liability the exception, by virtue of IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (b) this relationship is reversed for a consumer's dependent security: the latter's liability as a rule is subsidiary; however, the parties may expressly agree otherwise. This reversal is intended to grant better protection to the consumer who assumes a dependent personal security.

This rule applies to both a consumer's assumption of an independent personal security (cf. IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (c)) as well as to a consumer's co-debtorship for security purposes (cf. IV.G.–4:102 (Applicable rules) paragraph (1)). In the context of a consumer security provider's co-debtorship for security purposes the term "debtor" means the debtor whose obligation is secured.

NOTES

I. Solidary liability as the general rule

1. According to ITALIAN law, the security provider is solidarily liable with the debtor (CC art. 1944 para. 1; *Calderale*, Fideiussione 33 ss.), whereas there had been subsidiary liability under the old CC of 1865 art. 1907. The meaning of solidarity is vividly discussed (see *Giusti* 45 ss.). According to the majority of legal authors as well as the Supreme Court, solidarity of the security means that several persons are liable for the same obligation, so that every one of them can be compelled to render the full performance and the performance by one discharges all others (Cass. 15 December 1970 no. 2683, Giust.civ. 1971 I 569; *Giusti* 50). The securing obligation is due and payable together with the secured debt and the creditor can demand payment from the debtor and/or the security provider. The special features of the solidary security distinguish it from the obligation *in solido*; therefore, not all rules of the latter can be applied to solidary security (*Busnelli* 39 ss.; *di Majo*, Obbligazioni solidali 306 ss.; *Casella* 266 ss.; *Giusti* 50). Solidary liability of security provider and debtor is also the rule in both ENGLISH and SCOTTISH law. Although the liability under a security in ENGLISH law is contingent on the debtor's default, the creditor is regularly not obliged to take any steps against the debtor before turning to the security provider (*China and South Seas Bank v. Tan* [1990] 1 AC 536; *Moschi v. Lep Air Services Ltd.* [1973] AC 331): Contrary to the Roman-based systems, the *beneficium discussionis* was never adopted in ENGLISH law (*Andrews and Millett* no. 11-002). In general, the security provider's liability arises once the debtor defaults in the performance of the secured obligation (*Andrews and Millett* no. 7-002; *O´Donovan and Phillips* no. 10-07). A right to compel the creditor first to take steps against the debtor does not even exist in equity (see *Ewart v. Latta* (1863) 1 M 905); this decision in a SCOTTISH case is of highest authority in ENGLAND, too). The situation is similar in IRELAND (*White* 541).

2. SCOTTISH common law, which is based on Roman law, knew the *beneficium discussionis*. This was abolished by the Mercantile Law Amendment Act (Scotland) 1856 s. 8 in respect of securities for money debts. The *beneficium discussionis* is still recognized where the secured obligation is one *ad factum praestandum, i.e.* if the principal is obliged to perform a certain act. It suffices, however, that the creditor fruitlessly attempts to obtain satisfaction from the debtor; execution against the debtor's estate is not required (Stair/*Clark* nos. 923-926).

3. In the NETHERLANDS, one writer holds a very broad view of solidarity by thinking that solidarity and subsidiarity do not exclude each other; in his view a "subsidiary solidarity" is possible and he regards the dependent personal security as a statutory example for this (*Van Boom* 25-29). However, this is a minority view.

II. Solidary liability for commercial providers of security

4. AUSTRIAN, GERMAN as well as FRENCH, BELGIAN and LUXEMBOURGIAN and PORTUGUESE law distinguish between commercial and non-commercial providers of dependent personal security. A dependent personal security assumed by a merchant in the course of business is solidary (AUSTRIAN and GERMAN Ccom § 349 read with § 343). It is presumed that any legal act of a merchant is made in the course of business (GERMAN Ccom § 344). In AUSTRIA dependent personal securities of merchants incurred after the end of 2006 will create a merely subsidiary liability (Law amending commercial law of 27 October 2005 art. I no. 132 abrogates present Ccom § 349 as of 1 January 2007). In FRANCE and LUXEMBOURG the

dependent security has a commercial character if the secured debt is of a commercial nature; this follows from the principle of accessority. In addition, a personal interest of the security provider in the secured debt of a commercial nature is required (FRANCE: *Simler* no. 98; LUXEMBOURG: CA Luxembourg 26 June 1985, Pas luxemb XXVI (1984-86) Jur. 352), contrary to BELGIUM (cf. *T´Kint* no. 738). In FRANCE and BELGIUM the presumption of solidary liability which is in general available for commercial debts applies also to a commercial security (FRANCE: since Cass.com. 28 April 1966, Bull.civ. 1966 III no. 209 p. 187; *Simler* no. 364; BELGIUM: since Cass.com. 25 April 1985, Pas belge 1985 I 1044). In PORTUGAL the security provider does not have to be a merchant, the commercial character of the obligation being sufficient (Ccom art. 101). In SPAIN, although there is no relevant legal provision, the Supreme Court has in various decisions assumed solidary liability for commercial providers of security (TS 4 December 1950, RAJ 1951/227 ; TS 14 February 1997, RAJ 1997/1419 26 May 2004, RAJ 2004/4261). But since there are also Supreme Court decisions to the contrary (TS 5 March 1990, RAJ 1990/1665), the solidary nature of commercial securities cannot be regarded as settled.

III. Subsidiary liability by agreement

5. In the aforementioned countries the parties are free to agree that the provider of dependent security be charged only with subsidiary liability. This is expressly stated by ITALIAN CC art. 1944 para. 2 (cf. also *Ravazzoni* 262). The same is also true in ENGLAND and SCOTLAND (ENGLAND: *Holl v. Hadley* (1828) 5 Bing 54, 130 ER 980; SCOTLAND: Mercantile Law Amendment Act (Scotland) 1856 s. 8 at the end: “Provided always that nothing herein contained shall prevent any cautioner from stipulating in the instrument of caution that the creditor shall be bound before proceeding against him to discuss and do diligence against the principal debtor.”).

IV. Subsidiary liability as the rule

6. By contrast, in many other countries the security provider’s liability is, as a rule, subsidiary to the liability of the principal debtor and solidary liability must be agreed upon or, as an exception, prescribed by law (see national notes to following Article).

IV.G.–2:106: Subsidiary liability of security provider

(1) If so agreed, the security provider may invoke as against the creditor the subsidiary character of the security provider's liability. A binding comfort letter is presumed to establish only subsidiary liability.

(2) Subject to paragraph (3), before demanding performance from the security provider, the creditor must have undertaken appropriate attempts to obtain satisfaction from the debtor and other security providers, if any, securing the same obligation under a personal or proprietary security establishing solidary liability.

(3) The creditor is not required to attempt to obtain satisfaction from the debtor and any other security provider according to the preceding paragraph if and in so far as it is obviously impossible or exceedingly difficult to obtain satisfaction from the person concerned. This exception applies, in particular, if and in so far as an insolvency or equivalent proceeding has been opened against the person concerned or opening of such a proceeding has failed due to insufficient assets, unless a proprietary security provided by that person and for the same obligation is available.

COMMENTS

A. Subsidiary liability as exception

Since according to the preceding Article solidary liability of a provider of dependent security is the rule, subsidiary liability requires an agreement of the parties. In case of doubt the security provider has to prove that the liability is merely subsidiary. Exceptionally, according to IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (b) a personal security given by a consumer is always subsidiary.

Binding comfort letter. A binding comfort letter is "presumed" to create only subsidiary liability. This presumption is derived from the fact that the author of such a letter does not assume a direct liability to make payment to the creditor but, typically merely promises to see to it that the debtor has sufficient funds to satisfy the debtor's obligations towards the beneficiary of the letter. Failure to keep this promise results merely in liability in damages to the creditor. Of course, the presumption of a merely subsidiary liability of the patron can be disproved by the creditor.

B. Effects of subsidiary liability

The effect of subsidiary liability as intended by these Rules is defined by paragraph (2). In the case of subsidiary liability, the security provider is protected against too early an imposition of liability towards the creditor. Before being allowed to turn against the security provider, the creditor is required to have undertaken appropriate attempts to obtain satisfaction from several other possible sources. The subsidiary nature of a security provider's liability not only protects the security provider against a primary demand for performance under the security by the creditor but also gives provisional protection against attempts by other security providers, who have assumed solidary liability, to hold the security provider with subsidiary liability internally liable on recourse (cf. IV.G.–1:106 (Several security providers: internal recourse) paragraph (3) second alternative).

The appropriate attempts to obtain satisfaction which have to be undertaken by the creditor (or another security provider who might seek internal recourse) before claiming from a security provider with only subsidiary liability consist of the following requirements.

Firstly, the creditor must have tried to obtain satisfaction from the debtor. Only after having attempted an execution against the debtor may the creditor turn against the security provider for any obligation of the debtor which is still outstanding. Especially if the debtor has provided a proprietary security right, the creditor must attempt to satisfy the debt from this source.

Second, the creditor must have tried to enforce any personal or proprietary security rights granted by third parties for the same obligation which are not subsidiary. If another security provider has assumed solidary liability this shows a willingness to answer any demand for payment even though the creditor could well turn *e.g.* against the debtor. It is appropriate that a security provider who has assumed only a subsidiary liability should have to pay only if satisfaction cannot be obtained from a security provider of the "first rank".

C. Exceptions

In certain situations, a security provider who is only subsidiarily liable, is nevertheless not entitled to refuse performance to the creditor under the security even though the creditor has not undertaken all or some of the appropriate attempts to obtain satisfaction required under paragraph (2).

One self-evident case presents itself where all personal and proprietary securities are only subsidiarily liable. Provided that the creditor has undertaken appropriate attempts to obtain satisfaction from the debtor, the creditor can choose to claim performance from any of the security providers since their liability towards the creditor is solidary.

Other cases, in which it would be pointless to demand that the creditor first undertakes attempts to obtain satisfaction from the debtor or other security providers as required under paragraph (2) before claiming from the security provider with only subsidiary liability are dealt with in paragraph (3). This provision applies where it is obviously impossible or exceedingly difficult to obtain satisfaction from the debtor or other security providers who are solidarily or subsidiarily liable. In such a situation, a waste of time and money by the creditor must be avoided.

The most important example of a situation where it is obviously impossible or exceedingly difficult to obtain satisfaction from other persons is given in the second sentence of paragraph (3): insolvency or equivalent proceedings have been opened against the debtor or any other security provider or the opening of such a proceeding has failed due to insufficient assets. The mere chance to obtain some quota from the insolvent person's estate does not suffice since such quotas are, generally speaking, low or very low. The creditor may not be limited to such chances since full satisfaction in the near future is virtually excluded. And security is meant to prevent just such a result.

However, even if insolvency proceedings have been opened, the creditor still has chances of obtaining satisfaction from the insolvent person, if that person had provided proprietary

security rights for the creditor; therefore the second sentence of paragraph (3) provides for a counter-exception, where the creditor is not relieved from the requirements of paragraph (2).

Other situations falling under paragraph (3) first sentence not expressly mentioned could be cases where the asset which is subject to a proprietary security right is located outside the country of the debtor's (or any other security provider's) residence in a country outside the European Union and enforcement or execution would be difficult or time-consuming. Economic equivalents would be cases where the value of the encumbered asset has depreciated or where it is clearly inadequate to satisfy the creditor's claim or if the encumbered asset is obviously worthless.

D. Default security

Especially in commercial practice, performance by one security provider is frequently supported by a default security. This is furnished by a second security provider (often one residing in the creditor's country) which is assumed towards the creditor and can be utilised by the latter if the first security provider is unable or unwilling to perform. In this setting, the default security is subsidiary since it may only be invoked if the creditor's attempt to obtain satisfaction from the first security provider has failed.

E. Consumer as security provider

Contrary to the approach to ordinary dependent security a consumer who assumes a dependent personal security is as a rule liable only subsidiarily; cf. IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (b) and also Comment C to the preceding Article. This rule applies to a consumer who purports to provide an independent security (cf. IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (c)) as well as to a consumer who has assumed a co-debtorship for security purposes (cf. IV.G.–4:102 (Applicable rules) paragraph (1)).

Contrary to the general rule for consumer security providers, the basic principle of subsidiary liability may be deviated from by express agreement of the parties (cf. IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (b)). And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" means the debtor whose obligation is secured.

NOTES

I. Subsidiary liability of security provider as general rule

1. In most member states a dependent personal security establishes without agreement merely a subsidiary liability for the security provider (AUSTRIAN CC § 1355, 1351 para. 1 sentence 2; BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2011 (since 2006: FRENCH CC art. 2288); FRANCE: *Simler* no. 501 ss.; DENMARK: *Pedersen*, Kaution 32 ss.; *Ussing*, Kaution 78; DUTCH CC art. 7:855 para. 1; FINNISH LDepGuar § 3 para. 1; RP 189/1998 rd 33; GERMAN CC § 771; GREEK CC art. 855; PORTUGUESE CC art. 638; SPANISH CC art. 1822 para. 1; SWEDISH Ccom chap. 10 § 9). In most member states the liability of a security provider who assumes liability for another security provider (collateral or default-security) is also subsidiary (DENMARK: *Pedersen,* Kaution 40 s.; FINLAND: *Nehrman* 355; *Ekström*

27; FRANCE: *Simler* no. 504; GERMANY: Erman/*Herrmann* no. 15 preceding § 765; GREECE: *Georgiades* § 4 nos. 10 s.; ITALY: CC art. 1948; *Bozzi*, La fideiussione 258; SPAIN: CC art. 1836; *Díez-Picazo* 460). This is true equally for BELGIAN, LUXEMBOURGIAN and DUTCH law where the security to secure another security is dealt with as any other security. PORTUGUESE CC art. 643 establishes a two level subsidiary liability of the security provider "*subfiador*" securing another security provider. By contrast, in commercial matters, solidarity is the rule and subsidiarity the exception (cf. national notes to preceding Article no. 4).

II. Solidary liability by agreement

2. In most member countries, the principle of subsidiary liability is in reality very frequently derogated from by the parties.

3. Some countries expressly provide for the possibility of party agreement (AUSTRIAN CC § 1357; FINNISH LDepGuar § 3 para. 1; BELGIUM and FRANCE: CC art. 2021 (since 2006: FRENCH CC art. 2298); GERMAN CC § 773 para. 1 no. 1; GREEK CC art. 857 lit. a) read with art. 855; *Georgiades* § 3 no. 144; PORTUGUESE CC art. 640 lit. a); SPANISH CC art. 1822 para. 2, 1831 no. 1).

4. In these and other countries, very frequently the parties make use of the possibility to agree on solidary liability (AUSTRIA: Schwimann/*Mader and Faber* § 1357 no. 1; SPAIN: *Lacruz Berdejo* 534; *Guilarte Zapatero*, Comentarios 30 ss.; TS 5 December 1991, RAJ 1991 no. 8917 (the most frequent form of dependent personal security in both countries). This is also true for DANISH law, at least for commercial relationships (*Pedersen*, Kaution 34). On the meaning of solidary liability, cf. national notes to preceding Article.

5. In GERMANY general terms for dependent personal securities very often provide for solidary liability of the security provider. However, the security provider is protected in so far as the exclusion of subsidiary liability must be in writing and signed by the security provider (CC § 766; BGH 25 September 1968, NJW 1968, 2332), except if the latter is a merchant (cf. Ccom § 350).

6. Although the presumption in SWEDISH legislation (Ccom chap. 10 § 9) is for a subsidiary liability, even when the security provider is a commercial party, the creditor practically always provides for primary liability, also in relation to private persons assuming securities (*contra Walin*, Borgen 29). In BELGIUM, FRANCE and LUXEMBOURG, the subsidiary liability, although an important feature of dependent personal securities is of little practical importance nowadays as parties mostly agree to establish solidary liability for the security provider (BELGIUM: *Van Quickenborne* no. 404; FRANCE: *Simler* no. 512). This solidary liability cannot be presumed (CC art. 1202 para. 1). In FRANCE the presumption of solidary liability for commercial debts is applied also to commercial securities since 1966 (Cass.com. 28 April 1966, Bull.civ. 1966 III no. 209 p. 187).

III. Subsidiary liability – details

(a) Requirements

7. Subsidiary liability has different meanings in the various countries. One may distinguish between a slight and a strict form of subsidiarity.

(b) Slight subsidiarity

8. In AUSTRIA, the NETHERLANDS and in SCOTLAND for a specific form of security a slight form of subsidiarity applies. The creditor has first to demand performance from the debtor (AUSTRIAN CC § 1355; DUTCH CC art. 7:855 para. 1;

SCOTLAND, cf. national notes to preceding Article no. 1 ss.), but need not do more than that. In AUSTRIA it is expressly provided that the parties may deviate from this rule also in favour of the provider of dependent security: they may agree upon a "strict" form of subsidiarity (CC § 1356). The same is true in the NETHERLANDS, except if the security provider is a consumer (cf. CC art. 7:862 lit a)). According to DUTCH CC art. 7:855 para. 1, the security provider need not perform until the debtor has failed to perform. Therefore the creditor must first demand performance from the debtor; only if the latter does not perform can the creditor address the security provider (*Pitlo/Croes* 358; *Hartlief* 216). Since the creditor has not "the choice of claiming solidary performance from the debtor and/or… security provider", the security provider's liability is subsidiary only (cf. Nieuwenhuis/*Castermans* art. 855 no. 2; Dutch Business Law § 6.05 [2]; *du Perron and Haentjens,* Introduction no. 11 and art. 855 no. 1). The situation is similar in BELGIUM for consumer credits secured by consumer or other security providers. According to BELGIAN ConsCredA the preconditions for the consumer debtor's default are increased: the creditor may only sue the security provider for a consumer credit if the debtor has defaulted at least on two payments or twenty percent of the total sum due or on the last due payment and if the debtor has not performed within one month after the creditor's demand sent by registered letter (ConsCredA art. 36).

(c) Strict subsidiarity

9. In most legal systems of member states in case of a subsidiary dependent personal security the creditor must attempt to obtain satisfaction by execution from the debtor (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2021 (since 2006: FRENCH CC art. 2298); DENMARK: *Iversen* 24; *Pedersen,* Kaution 33; *Ussing,* Kaution 85; FINLAND: LDepGuar § 21 lit a); RP 189/1998 rd; GERMAN CC §§ 771 f; GREEK CC art. 855; PORTUGUESE CC art. 638; SPANISH CC arts. 1830, 1832, 1833 and 1834; SWEDEN: *Walin,* Borgen 157). In all these countries, the security provider's subsidiary liability is not observed *ex officio,* but is an exception that must be raised by the security provider against the creditor (*beneficium excussionis* or *discussionis*; for the use of both terms in ROMAN law sources cf. *Zimmermann* 130 fn. 104; BELGIAN, FRENCH and LUXEMBOURGIAN CC arts. 2022-2024 (since 2006: FRENCH CC arts. 2299-2301); GERMAN CC § 771 (exception of prior legal action against the principal debtor, *Einrede der Vorausklage*); GREEK CC art. 855; PORTUGUESE CC art. 638; SPANISH CC art. 1832). The raising of the exception forces the creditor first to bring action and execution against the debtor (FRANCE: *Simler* no. 501 ss.; GERMANY: Palandt/*Sprau* § 771 no. 1; GREECE: *Georgiades* § 3 no. 144; PORTUGAL: *Almeida Costa* 776).

10. If in ITALY the *beneficium excussionis* has been agreed, the security provider must point out the assets of the debtor to be executed (ITALIAN CC art. 1944 para. 2 *in fine*). In particular, under ITALIAN law the *beneficium excussionis* operates only if three conditions are given: a) it must be invoked by the security provider; b) the debtor's assets to be executed must have been pointed out by the security provider and c) unless agreed to the contrary, the security provider has to pay in advance the costs of this execution (*Distaso* 112 ss.; *Ravazzoni* 262 s.). In BELGIUM, FRANCE, LUXEMBOURG and SPAIN, the security provider who has raised the *exceptio discussionis* must indicate to the creditor those assets of the debtor into which an execution can be brought (BELGIAN, FRENCH and LUXEMBOURGIAN CC arts. 2023-2024 (since 2006: FRENCH CC arts. 2300 and 2301); SPANISH CC art. 1832). The *beneficium discussionis* may also in PORTUGAL be raised with regard to property rights of a third party, which secure the same debt, if they were constituted

before or simultaneously with the personal security (CC art. 639). In PORTUGAL the creditor is entitled in any case to demand performance only from the security provider or from the security provider together with the debtor. If performance is demanded from the security provider alone, in case both of solidary and subsidiary liability he has the right to call the debtor upon demand in order to defend or to be condemned together (CC art. 641 para. 1). If the security provider omits to do this, a waiver of the *beneficium discussionis* will be presumed, unless the security provider declares the contrary in the proceedings (CC art. 641 para. 2; *Pires de Lima and Antunes Varela* 658). Also according to SPANISH CC art. 1834, the creditor can sue the security provider together with the debtor, but the *beneficium discussionis* remains effective even if a judgement is rendered against both of them.

11. When the creditor omits or is negligent in bringing execution against the debtor's indicated assets, the creditor is liable to the extent of the value of these assets if they are lost in a subsequent insolvency of the debtor. To this extent the security provider is no longer liable (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2024 (since 2006: FRENCH CC art. 2301); *Simler* no. 521; and SPANISH CC art. 1833).

12. In contrast to these legal systems, in GERMANY and GREECE the security provider does not have to indicate assets of the debtor to the creditor. The creditor has to attempt execution against the secured debtor (GERMAN CC § 771; GREEK CC art. 855). However, according to GERMAN CC § 772 and GREEK CC art. 856 in most cases of securing money claims compulsory execution must only be attempted against the secured debtor's movables and only against those situated at the debtor's domicile or residence (in GERMANY including a place of business). Additionally, the creditor has in general to seek satisfaction from a pledge or lien on the debtor's movables (para. 2 of the previously cited provisions).

(d) Exception based on impossibility or extreme difficulty of execution

13. In DENMARK the creditor is not obliged to attempt to obtain satisfaction by execution from the debtor's assets if it is proved that this is impossible or if the security provider admits the impossibility (*Ussing*, Kaution 85; see *Kæstel* 1). In FRANCE, especially if the debtor is overindebted (and even if the security provider is a consumer), the creditor is not obliged to attempt satisfaction by execution from the debtor (*Simler* no. 511). Rather the security provider is liable if the debtor's assets are not sufficient (cf. Cass.com. 17 March 1969, Bull.civ. 1969 IV no. 96 p. 97). According to GREEK CC art. 857, the security provider's liability ceases to be subsidiary, if it is obvious that execution on the debtor's property would not yield results. The situation of obvious inability to pay of the debtor produces a factual impossibility of exercise of the *beneficium excussionis* also in ITALY (*Distaso* 116). Similarly, GERMAN CC § 773 para. 1 no. 4 prescribes that "the exception of prior execution against the principal debtor is barred if it must be assumed that compulsory execution on the property of the principal debtor will not lead to the satisfaction of the creditor." However, according to paragraph 2 there is again only subsidiary liability if the creditor can obtain satisfaction from a pledge or lien over a movable asset of the debtor.

14. In PORTUGAL the security provider cannot invoke the *beneficium discussionis* if the debtor or the owner of the goods securing the debt cannot be sued or be made the subject of execution within the continental territory or the adjacent islands, due to a fact that arose after the creation of the security (CC art. 640 lit. b)). The same is valid for SPAIN when the debtor cannot be sued within the Kingdom (CC art. 1831 no. 4). In BELGIAN, FRENCH and LUXEMBOURGIAN law, the assets of the debtor to be executed may not be located outside the district of the court of appeal of the place

where payment is to be made and may not be subject to a controversy or be pledged for the debt and therefore no longer in possession of the debtor (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2023 para. 2 (since 2006: FRENCH CC art. 2300 para. 2); BELGIUM: *Van Quickenborne* nos. 377-380; RPDB, Cautionnement nos. 237-243; FRANCE: *Simler* no. 518; in FRANCE the requirement of proximity is considered to be anachronistic). These requirements indicate the legislator's intention that only goods which can easily and within a short period of time be executed, can be indicated by the security provider (BELGIUM: *Van Quickenborne* no. 378 at p. 196; *Lebon*, Borgtocht no. 10; FRANCE: *Simler* no. 518). A general exception for executions that are obviously difficult or even without a chance does not exist.

15. By contrast, in SWEDEN and FINLAND there is no exception from the creditor's duty to attempt to obtain satisfaction by execution (SWEDEN: *Walin*, Borgen 157 ss.; FINNISH LDepGuar § 2 no. 2 and § 21; RP 189/1998 rd 30, 58 ss.).

(e) Exception in case of debtor's move

16. In GERMANY and GREECE the exception of prior proceeding is excluded if the difficulty of bringing an action against the debtor is materially increased due to a change of domicile, place of business, or place of residence occurring after assumption of the security (GERMAN CC § 773 para. 1 no. 2; GREEK CC art. 857 no. 2). The reason for this exception is that the creditor in cases of monetary claims is only required to bring executions against the debtor's assets at the debtor's domicile, residence or place of business as at the time of creating the security. In AUSTRIA, subsidiarity cannot be invoked by the security provider if the debtor's residence at this time is unknown, provided that the creditor did not behave negligently (CC § 1356).

(f) Exception in case of debtor's insolvency

Debtor's insolvency

17. According to SPANISH CC art. 1831 no. 3 an execution into all of the debtor's assets is not required in case of bankruptcy or insolvency of the debtor. The wording of this provision does not make clear whether an insolvency proceeding must have been opened or whether an obvious factual insolvency would be enough to exclude the *beneficium excussionis*. In case of an obvious factual insolvency, the security provider will not find the property of the debtor that can be sold within Spanish territory and which is sufficient to cover the amount of the debt, which according to art. 1832 sentence 2 must be pointed out. Moreover, according to general case law the creditor should not be compelled to bring suit for claims when it is obvious in advance that this will be useless (cf. TS 30 July 1999, RAJ 1999/5724; *Carrasco*, Tratado, p. 220). As mentioned (*above* no. 13) the ITALIAN solution is very similar.

(g) Insolvency proceedings over debtor's assets

18. GERMAN CC § 773 para. 1 no. 3 and GREEK CC art. 857 no. 3 exclude the exception of prior execution against the principal debtor if bankruptcy proceedings have been instituted against the debtor, unless the creditor can obtain satisfaction from a security right in a movable of the debtor (para. 2). In effect the same rule applies in BELGIUM, FRANCE and LUXEMBOURG. In the latter countries it is thought that the requirements spelt out in CC art. 2023 (since 2006: FRENCH CC art. 2300) express that the *beneficium discussionis* can no longer be invoked if an insolvency or equivalent proceeding has been opened over the debtor's assets, since this foils easy and fast execution against the debtor's assets (BELGIUM: *Dirix and De Corte* no. 410 at p. 270; *Van Quickenborne* no. 378 at p. 193; *Lebon*, Borgtocht no. 10; FRANCE:

Cass.civ. 21 December 1897, DP 1898, 262; *Simler* no. 511). In ITALY with the opening of bankruptcy proceedings against the debtor the possibility for the individual creditor to do execution against the debtor's assets is barred by law (L.fall art. 51) and in this case it is obviously impossible for the security provider to exercise the *beneficium excussionis* (*Giusti* 187).

19. In SWEDEN the opening of bankruptcy is not enough for a subsidiary security to become due; on the other hand, the creditor need not wait until the bankruptcy proceeding is closed, if and in so far as the creditor can provide some evidence that the bankruptcy will not give the creditor any dividend (*Walin*, Borgen 157 s.). Also in FRANCE the security provider cannot invoke the subsidiarity of liability if it is clear that the creditor will only obtain partial satisfaction from the debtor's assets (*Simler* no. 511 fn. 384). In AUSTRIA, the opening of insolvency proceedings over the debtor's assets cannot be invoked by a creditor who has acted negligently (CC § 1356), *e.g*. by failing to file a claim (Schwimann/*Mader and Faber* § 1356 no. 4).

20. According to FINNISH law and DANISH and FRENCH literature the provider of a dependent personal security is liable after *e.g.* an insolvency proceeding over the debtor's assets has been completed without satisfying the creditors (FINNISH LDepGuar § 21; RP 189/1998 rd 58 s.; DENMARK: *Pedersen*, Kaution 33; CFI Herning 6 April 1982, UfR 1983 A 739; FRANCE: in case of insolvency "*liquidation judiciaire*" *Simler* no. 511). In effect the same result has been achieved by a decision of the SWEDISH Supreme Court (HD 23 April 1990, NJA 1990, 245).

(h) Failure of insolvency proceeding due to insufficient assets of the debtor

21. In DENMARK and FRANCE the security provider under a dependent personal security is liable if the opening of a proceeding has failed due to insufficient assets of the debtor (DENMARK: *Pedersen*, Kaution 33; CA Søndre Landsret 10 October 1927, UfR 1928 A 194; FRANCE: Cass.com. 8 June 1993, JCP G 1993, II no. 22174; *Simler* nos. 517 and 725; cf. Ccom art. L 643-11 III). Pursuant to BELGIAN and LUXEMBOURGIAN law the debtor regains full disposition over assets in case the insolvency procedure has failed due to insufficient assets of the debtor; in this case the procedural impediments to an easy and smooth execution disappear. The security provider regains the possibility to invoke the *beneficium discussionis.* An exception to this rule exists where the insolvency proceeding has failed due to insufficient assets of the debtor, but where the debtor has nevertheless been discharged of debts (*Lebon*, Borgtocht no. 10 *a fortiori*). According to ITALIAN case law, when contracting the *beneficium excussionis* the parties may also choose to subordinate the security provider's liability to a definitive impossibility to pay as certified by the conclusion of the bankruptcy proceeding without the satisfaction of the creditor's rights (Cass. 17 July 1985 no. 4218, Giur.it.Mass. 1985, 803).

IV.G.–2:107: Requirement of notification by creditor

(1) The creditor is required to notify the security provider without undue delay in case of a non-performance by, or inability to pay of, the debtor as well as of an extension of maturity; this notification must include information about the secured amounts of the principal obligation, interest and other ancillary obligations owed by the debtor on the date of the notification. An additional notification of a new event of non-performance need not be given before three months have expired since the previous notification. No notification is required if an event of non-performance merely relates to ancillary obligations of the debtor, unless the total amount of all non-performed secured obligations has reached five percent of the outstanding amount of the secured obligation.

(2) In addition, in the case of a global security, the creditor is required to notify the security provider of any agreed increase:

(a) whenever such increase, starting from the creation of the security, reaches 20 percent of the amount that was so secured at that time; and

(b) whenever the secured amount is further increased by 20 percent compared with the secured amount at the date when the last information according to this paragraph was or should have been given.

(3) Paragraphs (1) and (2) do not apply, if and in so far as the security provider knows or could reasonably be expected to know the required information.

(4) If the creditor omits or delays any notification required by this Article the creditor's rights against the security provider are reduced by the extent necessary to prevent the latter from suffering any loss as a result of the omission or delay.

COMMENTS

A. Information on debtor's default

In accordance with modern trends in the law on personal security, these rules impose certain requirements on the creditor; especially of information towards consumer providers of security even in the pre-contractual phase, if the creditor is to preserve full rights against the security provider.

According to paragraph (1) the creditor is required to inform the provider of a dependent security as soon as any critical situation arises with respect to the secured obligation which may lead to demands upon the security provider. The creditor must, in order to allow the security provider to evaluate the possible risk and request relief from the debtor, inform the security provider about a non-performance or inability to pay of the debtor or an extension of maturity of the secured obligation. In this notification the creditor must indicate the outstanding amounts of principal, interest and other ancillaries as of the date at which the information is given. If the default continues, the information must be renewed every three months after the preceding information.

According to the third sentence of paragraph (1), a notification is as a rule not required if merely an ancillary obligation has not been performed. The requirement of information, however, is revived, if the total of all unperformed secured obligations which are due amounts to five percent or more of the outstanding total of the secured obligations. In other words, while a certain percentage of due but unpaid ancillary obligations does not call for a reaction by the creditor, the percentage of five percent triggers the requirement to report according to paragraph (1).

B. Information by creditor of global security

The provider of a global dependent security is not protected by the Rules of IV.G.– 2:102 (Dependence of security provider's obligation) paragraph (4) against any increase of the secured amounts or aggravation of the secured obligation because this would run counter to the essence of a global dependent security. However, the security provider's legitimate interest in knowing the approximate extent of the risk must be satisfied by information about any major increases of the total amount of potential obligations agreed by the creditor. Since information about the actual amount of indebtedness which may change daily is too burdensome, only major increases must be notified. The first "major" increase is fixed at 20 per cent over the amount of the secured obligations that were secured by the global security at the time of its creation. Correspondingly, subsequent "major" increases require notification to the security provider if they amount to an additional 20 percent over the secured amount at the time when the preceding information was given or should have been given.

C. Exception for informed provider of dependent security

The information requirements under paragraphs (1) and (2) are unnecessary if and in so far as the security provider is already informed, or can easily acquire the relevant information, *e.g.* as the director of the debtor company. The burden of proof for this exception must be borne by the creditor.

D. Sanction

The sanction for delaying or omitting altogether the information required under paragraphs (1) and (2) is spelt out in paragraph (4). The creditor's rights against the security provider are reduced to the extent necessary to prevent the latter from suffering any loss as a result of the omission or delay. Such loss may arise if due to the omitted information the security provider will be unable to obtain relief or satisfaction from the debtor because the latter has in the meantime become insolvent.

E. Consumer as security provider

The present Article is a provision for the protection of the security provider; as such, it is applicable not only to a dependent security assumed by a consumer security provider but also to a consumer's purported assumption of an independent personal security (cf. IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (c)) as well as to a consumer's co-debtorship for security purposes (cf. IV.G.–4:102 (Applicable rules) paragraph (1)).

Although there is a specific rule limiting global securities assumed by consumer security providers (IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (a)), the additional protection provided for by paragraph (2) fulfils an important role also in the consumer context. The creditor is required to inform the consumer security provider of any increase of the secured obligation, even if this does not exceed the maximum limit which in the consumer context a global security must have.

According to IV.G.–4:102 (Applicable rules) paragraph (2), the rules of the present Article are mandatory in favour of the consumer. And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" means the debtor whose obligation is secured.

NOTES

I. General attitude on information requirements orduties

1. Pursuant to the opinion of many FRENCH authors, post-contractual information duties of the creditor vis-à-vis the provider of dependent security seem to be contrary to the unilateral character of the dependent security (cf. *Delebecque* 256; *Simler* nos. 416 ss.). In GERMAN law and in other legal systems such duties are denied by courts and almost all authors (CA Bamberg 13 December 1999, WM 2000, 1582, 1584; MünchKomm/*Habersack* § 765 nos. 85, 91; *Schimansky/Bunte/Lwowski/Siol* § 44 nos. 57, 61; *Lwowski* no. 406). Additionally it is argued that the imposition of duties of information would weaken the dependent personal security as a security (CA Köln 7 February 1995, WM 1995, 1965; Staudinger/*Horn* § 765 no. 119). But because of their restricted scope they are tolerated in BELGIUM, DENMARK, FRANCE, ITALY, the NETHERLANDS and SWEDEN.

2. By contrast, FINLAND imposes upon the creditor firstly a general duty of information whenever any provider of dependent security so requests (LDepGuar § 14 para. 1). In addition, the creditor must inform consumer providers of dependent security upon request about the debtor's obligations and any circumstances which are relevant for appreciating the debtor's ability to pay, provided the creditor knows these facts, or can easily obtain information (§ 14 para. 2). Any violation of these duties which causes damage to the provider of dependent security is sanctioned by a reduction of the security provider's obligation (paragraph 3).

3. In GREECE there is a "soft law" provision in the Hellenic Banker's Code of Conduct of March 1997 of the Hellenic Bank Association. This Code is regarded by writers as a set of general business conditions, which can be invoked by third parties, especially consumers. They apply according to one opinion if they were incorporated into the contract or were made accessible to clients (*Karakostas* 23), according to another view in any case, since they were published and a disregard would constitute a misleading advertisement (*Georgakopoulos*, DEE 4, 774). According to the Bankers´ Code of Conduct art. 42 para. 1, the banks are obliged to inform the provider of dependent security of the contracting parties´ rights and obligations under the law and to provide the security provider with all relevant information which is given to the debtor (the banks are obliged by law to give the debtor copies of the credit contracts and a detailed report of the debt within 90 days after the latter's request, cf. Law 2873/2000 art. 47 para. 3 as replaced by Law 2912/2001 art. 42). Hence, the provider of dependent security is able to request from the bank this information (cf. Bankers´ Code of Conduct art. 39) and should receive any further information.

4. BELGIAN ConsCredA provides for the creditor's specific obligations of notification towards the provider of personal security securing a consumer credit – without distinguishing between consumer and other security providers: the creditor has to inform this security provider of the respites of payment granted to the debtor as well as of any modification of the credit contract (ConsCredA art. 35 sentence 2). In FRANCE the creditor of professional claims must remind a consumer provider of dependent security of the right to terminate at any time a dependent security without time limit (*Madelin* Act art. 47 II para. 2 read with MonC art. L 313-22). According to Law *Dutreuil* no. 2003-721 of 1 August 2003 this obligation also applies to creditors of consumer debts (ConsC art. L. 341-6 sentence 2). Moreover, according to FRENCH CC art. 2016 para. 2 (since 2006: FRENCH CC art. 2293 para. 2) information on the changes in the amount (any increase or decrease) of the secured debt including its collateral obligations should be made to a private provider of dependent security at

least once every year. Although the provision applies according to its wording only to indefinite dependent securities, the courts have extended it also to definite dependent securities (Cass.civ. 16 March 1999, D. 1999 I.R. 99). It is irrelevant whether the secured debt is owed by a consumer or a professional, as long as the provider of the dependent security is a consumer. However, in the case of a professional debt of an individual entrepreneur, the consumer provider of dependent security has to be given exact information about the amounts of principal and interest and not only about the changes in the amount of the debt (*Madelin* Act art. 47 II para. 2 read with MonC art. L 313-22). The Law *Dutreuil* no. 2003-721 of 1 August 2003 has extended this protection by a duty of detailed information to the consumer provider of dependent security, whether or not the secured debt has a professional character (ConsC art. L. 341-6 sentence 1). The *Grimaldi* Commission had proposed to merge these three provisions on a regular duty of information (CC art. 2016 para. 2 (since 2006: CC art. 2293 para. 2), *Madelin* Act art. 47 II para. 2 read with MonC art. L 313-22 and ConsC art. L. 341-6 sentence 1) into one provision of the Civil Code (new art. 2307), similar to the existing ConsC art. L. 341-6 sentence 1; however, this proposal was not adopted in the revision of 2006.

5. By contrast in GERMANY even a creditor bank is not obliged to inform the provider of dependent security at the end of a year about the remaining balance of the secured debt (Staudinger/*Horn* § 765 no. 121 referring to BGH 26 April 1976, WM 1976, 709, 711). The case Law in SPAIN is highly consistent with the idea that the creditor has no postcontractual duty to advice the guarantor as to the amount of the risk just borne by the non performance of the debtor; moreover, the creditor has only to notify the surety when he asks him for payment (TS 20 October 1993, RAJ 1993/7753, TS 14 July 2006, RAJ 2006/5342; *Carrasco*, Tratado, p. 108).

II. Information on debtor's default or inability to pay

(a) Legal systems with a special information duty

6. A general obligation to inform about default within one month is established by FINNISH LDepGuar § 4 para. 2 (RP 189/1998 rd 35 s.). In the NETHERLANDS, if the creditor gives notice to the debtor to pay, the creditor has to inform the provider of dependent security at the same time (CC art. 7:855 para. 2). No deviation from this provision to the disadvantage of a non-professional provider of dependent security is possible (art. 7:862 lit. a)).

7. In several countries, creditors are bound to inform consumer providers of dependent security about the debtor's default. In AUSTRIA, ENGLAND and FRANCE, a consumer provider of dependent security must be informed about the debtor's default (AUSTRIA: ConsC § 25 b para. 2; ENGLAND: ConsCredA s. 111; FRANCE: ConsC art. L. 313-9 sentence 1, Law no. 94-126 of 11 February 1994 *(Loi Madelin)* art. 47 II para. 3, and ConsC art. L. 341-1 sentence 1). There is a duty of information, irrespective of any breach of the bank's duty of confidentiality, if this information permits the consumer provider of dependent security to exercise the right to recourse before payment according to FRENCH CC art. 2032 (since 2006: FRENCH CC art. 2309) and also to take judicial protective measures (cf. national notes to IV.G.–2:111). If the secured obligation arises from a consumer credit, the information has to be given in case of a qualified inability of the debtor to pay (*incident de paiement caractérisé*, ConsC art. L. 313-9 sentence 1). This implies at least a delay of three months after the debt becomes due (JO débats Assemblée Nationale 8 December 1989, 6153 ss.). By contrast, if the secured obligation arises from any professional contract, the creditor has to inform the consumer provider of dependent security about the

default within one month after delay (ConsC art. L. 341-1 sentence 1 and Law no. 94-126 of 11 February 1994 (Loi *Madelin*) art. 47 II para. 3 sentence 1).

8. In BELGIUM the creditor has to inform the provider of a personal security for a consumer credit if the debtor has defaulted on two payments or at least one fifth of the total sum due (ConsCredA art. 35 sentence 2). Pursuant to the DANISH Consumer Council and the Financial Councils agreement (in force since 1 January 2002), the creditor's obligation to inform providers of dependent security within six months in case of a debtor's default of payment will eventually be replaced by an obligation to inform within three months.

9. Under SWEDISH law the creditor has an obligation to make sure that the right of the provider of dependent security to take recourse is not lost (or diminished in value) (cf. HD 16 June 1992, NJA 1992, 351). Therefore, the provider of dependent security must be informed of circumstances which are of importance in this respect (*e.g.* initial doubts about inability to pay, delays), when it cannot be assumed that the provider of a dependent security will already be informed. The requirements on banks and other similar creditors are higher than on private creditors (*Walin*, Borgen 53 ss.).

(b) Legal systems without a special information duty

10. No information is required to be given under GREEK, GERMAN, ENGLISH, LUXEMBOURGIAN, PORTUGUESE and SPANISH law.

11. According to GREEK literature, in addition to the obligation of the creditor to refrain from actions, which hinder the debtor from satisfying the creditor or endanger the right of the provider of dependent security to be reimbursed after paying (GREEK CC arts. 862, 863), the principle of *bona fides* (GREEK CC arts. 200, 288) sometimes creates an obligation of the creditor to take positive action, *e.g.* by informing the provider of dependent security of events which worsen the financial situation of the debtor, in order to achieve the same results (*Markou*, DEE 8, 366, 367). Furthermore, according to the Banker's Code of Conduct art. 42 § 2 (cf. no. 3 above), the banks as creditors must inform the provider of dependent security in case of a realisation of the assumed risks in the future. In GERMANY there may exceptionally be a duty of information derived from the principle of *bona fides* (CC § 242; cf. CA Bamberg 13 December 1999, WM 2000, 1582, 1584; CA Köln 7 February 1995, WM 1996, 1965; *Graf Lambsdorff and Skora* no. 246; *Bülow*, Kreditsicherheiten no. 864 with further references). The requirements are very high since there must be an extremely severe offence against the interests of the provider of dependent security (cf. CA Bamberg 13 December 1999 and CA Köln 7 February 1995). Similarly under ENGLISH law, such a duty to disclose unusual facts is limited to exceptional cases such as fidelity bonds (cf. *Andrews and Millett* nos. 5-018 ss.). In general, however, the creditor has to inform the security provider *e.g.* about the debtor's default only if such a notification is required by the terms of the security (*O´Donovan and Phillips* no. 10-101). Also in LUXEMBOURG some minor duties are imposed upon the creditor, which are based on good faith (*Ravarani*, Jurisprudence récente 916). The creditor may not unnecessarily increase the burden of the security provider. This general guideline can to some extent be specified by a couple of specific duties for the creditor, *e.g.* a duty of information. In PORTUGAL, the creditor must inform any providers of dependent security in case of the debtor's default to pay in order to prevent an increase of their liability according to the principle of *bona fides* (CC art. 762 para. 2; cf. STJ 20 April 1999, 162/99 www.dgsi.pt). However, a duty of information does not, in principle, exist in relation to a mere delay of the debtor in payment or any other increase of the risk of the provider of dependent security; at least a violation of such a duty could not

lead to a release of the security provider but only to damages, if at all (PORTUGAL: STJ 5 March 2002, 3971/01 www.dgsi.pt; STJ 6 May 1997, 88428 www.dgsi.pt).

(c) Sanctions

Partial release of provider of dependent security

12. In AUSTRIA, FINLAND and FRANCE, if the creditor does not give the required information, the consumer provider of dependent security is discharged from certain collateral obligations, *e.g.* penalties or default interest (AUSTRIA: ConsC § 25 b para. 2; FINLAND: LDepGuar § 4 para. 2; FRANCE: ConsC arts. L. 313-9 sentence 2, L. 341-1 sentence 2 and *Madelin* Act art. 47 II para. 3). But in FINLAND and FRANCE the creditor loses ancillary rights only for a limited time, namely until making notification (FINNISH LDepGuar. § 4 para. 2 sentence 2; FRENCH ConsC arts. L. 313-9 sentence 2, L. 341-1 sentence 2 and *Madelin* Act art. 47 II para. 3 sentence 2). According to the FINNISH LDepGuar § 4 para. 2 sentence 3 the provider of dependent security is also liable in relation to certain ancillary obligations, *e.g.* default interest, if the creditor can prove that the security provider is partly to blame for the delayed payment. The provider of dependent security must cover these ancillary obligations from the time when informed about the delay (RP 189/1998 rd 36). Pursuant to DANISH and SWEDISH law, if a creditor omits what reasonably could have been done, the provider of dependent security is relieved/discharged in so far as the omission has reduced the possibility for the provider of dependent security to take recourse against the debtor (DENMARK: H 14 January 1975, UfR 1975 A 168; *Pedersen*, Kaution 67 s.; SWEDEN: the creditor must prove that the omission has not caused such a loss; HD 16 June 1992, NJA 1992, 351; HD 22 April 1993, NJA 1993, 163; HD 13 June 1994, NJA 1994, 381; HD 22 December 1998, NJA 1998, 852).

(d) Damages

13. The BELGIAN Consumer Credit Act 1991 and the GREEK Bankers´ Code of Conduct do not provide any special sanction. The general rules on contractual liability apply (*Van Quickenborne* no. 432). A breach of the provisions of the GREEK Bankers´ Code of Conduct due to fault of the bank is regarded as a contractual fault and the bank is obliged to pay compensation for the damage caused (*Georgakopoulos* 775).

III. Duty of information in case of global guarantee

(a) Existence of a regular duty of information

14. In FINLAND the security provider under a global guarantee must be informed by the creditor every six months about the amount of the debtor's secured obligation (LDepGuar § 13 para. 1). In FRANCE a regular, annual information must be given by the creditor to the consumer provider of security of an indefinite dependent security, *i.e.* a global guarantee (CC art. 2016 para. 2 (since 2006: CC art. 2293 para. 2) or *Madelin* Act art. 47 II para. 2 read with MonC art. L 313-22). But the scope of these provisions is very reduced, since private persons are prohibited from assuming a security under a global guarantee in relation to consumer credits (ConsC art. L. 313-7) as well as professional debts (ConsC art. L. 341-2 as introduced by Law *Dutreuil* no. 2003-721 of 1 August 2003). According to the *Grimaldi* Commission´s proposal all these rules on information duties in the case of indefinite securities (CC art. 2016 para. 2 (since 2006: CC art. 2293 para. 2), *Madelin* Act art. 47 II para. 2 read with MonC art. L 313-22) should be replaced by only one provision in the Civil Code (proposed CC new art. 2307) that establishes a permanent information duty in favour

of a security provider requiring special protection, irrespective of the definite or indefinite character of the dependent security. Contrary to former solutions, the *Grimaldi* Commission also would have allowed a natural person requiring special protection to assume a dependent security without time limit (cf. CC new art. 2300). However, none of these proposals was adopted by the reform of 2006. In ITALY a duty of information must be implied since the provider of dependent security in relation to a future obligation is discharged if the creditor has given credit without the authorisation of the security provider although aware that the financial situation of the debtor had worsened to the point that performance by the debtor had become clearly more difficult (CC art. 1956 – a mandatory provision, cf. para. 2). Further, the ITALIAN Banking Law contains general provisions on banking contracts, applicable whether or not the contracting party is a person requiring protection according to which the bank has to inform the client clearly and completely once a year about the course of the relationship (DLgs 1 September 1993 no. 385 art. 119 para. 1). This Law is held applicable to dependent personal securities (*Chinè*, I contratti di garanzia 327). It is to be noted that in ITALIAN banking practice this rule is usually applied to a global guarantee and that this is the type of dependent personal security mainly requested by banks as creditors. In SPAIN in order for the creditor to be bound to provide this post-contractual advice in the case of a global guarantee it is required that the surety itself call for this information, or that the creditor advance new credit in a situation where the debtor's financial situation has deteriorated, or that the creditor knew that the relationship between the surety and debtor has changed so that it is highly dubious that the surety continues to know the financial situation of the debtor (*Carrasco* 163).

(b) Sanctions

Partial release of provider of dependent security

15. If the creditor omits or delays required information, the consumer provider of dependent security is definitely released from any liability in relation to ancillary obligations (FRENCH CC art. 2016 para. 2 (since 2006: CC art. 2293 para. 2)). This sanction is very harsh in situations where the creditor is not a professional (FRANCE: *Legeais* no. 14; *Piedelièvre,* Cautionnement et lutte contre l´exclusion no. 8). For this reason, the FRENCH Senate had (unsuccessfully) opposed this provision (JO débats Sénat 8 July 1998, 3718). However, for professional debtors (*Madelin* Act art. 47 II para. 2 read with MonC art. L 313-22) the sanction is not so hard since the creditor loses only provisionally the benefit of ancillary rights until performance of the information duty. The *Grimaldi* Commission´s proposal to merge these different provisions into one general rule (CC proposed new art. 2307) was not adopted in 2006 (cf. no. 14 above).

16. Pursuant to FINNISH LDepGuar § 13 para. 2 the liability of a provider of dependent security can be reduced if the creditor neglects the duty of information (RP 189/1998 rd 49).

(c) Full release

17. According to ITALIAN CC art. 1956 para. 1 the provider of dependent security for a future obligation will be discharged if the creditor grants credit without specific authorisation of the security provider, although aware that the financial situation of the debtor was such that performance by the debtor had become clearly more difficult. On the basis of the duty to act in good faith (CC art. 1175 and 1375), ITALIAN case law goes further and recognises that, even in case of waiver of the right arising for the

security provider from CC art. 1956, the security provider is not liable if the creditor grants credit to the debtor knowing that the latter will not be able to repay (CA Catania 24 March 1999, BBTC 2001 II 699; Cass. 28 January 1998 no. 831, Giur.it. 1998, 1645; Cass. 18 July 1989 no. 3362, BBTC 1989 II 357; Cass. 20 July 1989, no. 3386, Foro it. 1989 I 3100; this trend is supported by scholarly writings: *Sacco*, Il contratto 801; *di Majo* 45 ss.; *Cantillo* 59 ss.).

(d) Damages

18. Contrary to earlier decisions, the Commercial Chamber of the FRENCH Supreme Court no longer holds the creditor liable for damages, unless gross negligence has been established (Cass.com. 25 April 2001, JCP E 2001, no. 1276, note *Legeais*).

IV. Exception to the duty of information

19. In BELGIUM and LUXEMBOURG, there is no duty of information if the debtor has all the information (BELGIUM: *Dirix*, Zekerheidsrechten 318; CA Brussels 11 September 1987, T.B.H. 1989, 7 note *Devos*; LUXEMBOURG: *Ravarani*, Jurisprudence récente 917). On the contrary, in FRANCE a duty to give information is not affected by the fact that the provider of dependent security already knows about the development of the debt (cf. Cass.com. 25 May 1993, JCP G 1993, II no. 22147, note *Croze; Piedelièvre*, Cautionnement et lutte contre l´exclusion no. 8).

IV.G.–2:108: Time limit for resort to security

(1) If a time limit has been agreed, directly or indirectly, for resort to a security establishing solidary liability for the security provider, the latter is no longer liable after expiration of the agreed time limit. However, the security provider remains liable if the creditor had requested performance from the security provider after maturity of the secured obligation but before expiration of the time limit for the security.

(2) If a time limit has been agreed, directly or indirectly, for resort to a security establishing subsidiary liability for the security provider, the latter is no longer liable after the expiration of the agreed time limit. However, the security provider remains liable if the creditor:

(a) after maturity of the secured obligation, but before expiration of the time limit, has informed the security provider of an intention to demand performance of the security and of the commencement of appropriate attempts to obtain satisfaction as required according to IV.G.–2:106 (Subsidiary liability of security provider) paragraphs (2) and (3); and

(b) informs the security provider every six months about the status of these attempts, if so demanded by the security provider.

(3) If performance of the secured obligations falls due upon, or within 14 days before, expiration of the time limit of the security, the request for performance or the information according to paragraphs (1) and (2) may be given earlier than provided for in paragraphs (1) and (2), but no more than 14 days before expiration of the time limit of the security.

(4) If the creditor has taken due measures according to the preceding paragraphs, the security provider's maximum liability is restricted to the amount of the secured obligations as defined in IV.G.–2:104 (Coverage of security) paragraphs (1) and (2). The relevant time is that at which the agreed time limit expires.

COMMENTS

A. General

Provisions on time limits. This Article and the following one deal with dependent securities with or without time limits. While this Article is applicable where the parties have agreed on a time limit for resort to a security, the following Article provides for a possibility to limit the scope of a security in respect of the coverage of future obligations in cases without an agreed time limit. IV.G.–4:107 (Limiting security with time limit), which is applicable for consumer security providers only, extends this possibility to certain securities with an agreed time limit.

Other consequences of agreed time limits. Not all consequences of agreed time limits are spelt out in these two Articles. Depending on the type of time limit in question, a main effect is typically to restrict the scope of a security in respect of the coverage of future obligations. As this consequence directly flows from the agreement of the parties and depends on the terms of this agreement, it appears to be neither necessary nor possible to regulate this effect in the text of the Rules.

B. Types of time limits

Common features. While the parties can agree on different types of time limits for their security, such time limits share a common objective as a means to limit the security provider's liability, and hence risk, under the security. Moreover, the existence of any type of agreed

time limit for a security typically precludes the possibility to unilaterally limit the security according to IV.G.–2:109 (Limiting security without time limit). Cf. the Comments on that Article.

Time limits restricting the scope of the security. In one type of time limit, only the scope of the security is limited, *e.g.* the coverage of the security is limited to secured obligations arising, falling due or fulfilling other requirements before the expiration of the agreed time limit (such a time limit could for instance be agreed using the following formula: "This security is valid only for secured obligations arising until August 31"). Thus, even if a security provider assumes a security for obligations of the debtor that at the moment of the creation of the security are not yet in existence and whose scope is not known, especially in cases of global securities, the risk might be limited by excluding such obligations that do not arise or do not fall due or fulfil other requirements within a foreseeable period of time, *i.e.* before expiration of the agreed time limit. These effects are dealt with below. Such a type of time limit is not subject to the present Article, however, since the parties did not agree on a time limit for the creditor's right to rely on the security vis-à-vis the security provider.

Time limits for resort to security. The type of time limit covered by the present Article focuses not on the scope of a security, but on the creditor's right to resort to the security. By setting a time limit for resort to the security, whether directly (*e.g.* "The creditor may rely on this security until May 31") or indirectly (*e.g.* "This security expires 6 months after maturity of the secured obligation"), the risk assumed by the security provider in relation to the solvency of the debtor is limited to a period of time which is specified in the agreement or can be indirectly determined, *i.e.* until expiration of the agreed time limit in question. However, such a time limit typically also affects the scope of the security, *i.e.* restricts the scope of the security in respect of the coverage of future obligations.

Both types of time limits independent from each other. It has to be emphasised that these two types of time limits are quite independent from each other. A variety of combinations is possible, depending upon the construction of the agreement of the parties. The parties may have agreed on a time limit restricting the scope of the security, but may at the same time not have intended to restrict the possibility of resorting to the security. In special cases there might also be a time limit for resort to the security that does not give rise to a restriction of the scope of the security. It is also possible to have two separate agreed time limits for a single security: *e.g.* one restricting the scope of the security to obligations arising until expiration of this time limit, and a second one setting a (subsequent) time limit for resort to the security. In other cases, finally, one and the same reference to a limit may have to be regarded as restricting at the same time the possibility of resorting to the security and the scope of the security. See Comment H below.

C. Time limit for resort to security

Matter of construction. The existence of a time limit for resort to a security is, unless it is clearly set out, largely a matter of construction of the parties´ agreement. If the parties do not expressly refer to a time limit as being one for resort to a security, the following considerations might be of some assistance.

Indication for time limit for resort to security. As a rule of thumb, the fact that the personal security in question covers only existing obligations or specific future obligations will be an indication that an agreed time limit constitutes a time limit for resort to the security.

In such cases, there seems to be less of a need for a security provider to seek to be protected against a liability of an unforeseeable amount on the basis of future obligations of the debtor; rather, it is the additional protection of a time limit for resort to the security which limits the period of time during which the security provider assumes the risk of the debtor's solvency that might be of any interest for the security provider.

Date of maturity of secured obligations. A mere reference to the date of maturity of the secured obligations typically does not give rise to a time limit for resort to the security. Otherwise the creditor would lose the protection provided by the personal security by failing to immediately enforce the secured obligation or the security as soon as the secured obligation became due.

D. Consequences of expiration of time limit for resort to security

General rule: extinction of liability. The general rule is that if a time limit has been agreed for resort to a security, the security provider is no longer liable towards the creditor after expiration of the agreed time limit. For contracts of personal security establishing solidary liability, this is provided for in paragraph (1) sentence 1; in cases of subsidiary liability of the security provider paragraph (2) sentence 1 applies. This extinction of liability not only bars any liability of the security provider under the security for future obligations of the debtor, but also affects obligations already in existence: the security provider is no longer liable towards the creditor even in relation to obligations covered by the security that have become due by the time the agreed time limit expires.

Continuation of liability if additional requirements are fulfilled. The security provider remains liable towards the creditor after the expiration of the agreed time limit only if additional requirements are fulfilled. Generally speaking, only if the creditor has acted timeously upon the security in such a manner as to hold the security provider liable according to the terms of the security in question will the security provider's liability with respect to existing obligations not be extinguished. The details of the requirements to be fulfilled in this respect differ between situations of solidary liability of the security provider and those of subsidiary liability of the latter. See below.

Security provider's maximum liability determined by paragraph (4). Even if the creditor has in good time fulfilled the requirements for the continuation of the security provider's liability, this liability is restricted. According to paragraph (4), the security provider's maximum liability is limited to the amount of the secured obligations upon expiration of the agreed time limit. Principal and ancillary obligations are covered, however, only within the further limitation of an agreed maximum amount for the security, if any. For the determination of the maximum amount of the liability, any defences available vis-à-vis the creditor at the time at which the agreed time limit expires, have to be taken into account; thus, the amount of secured obligations that are not due yet does not increase the maximum amount of the security provider's liability.

Scope of security restricted according to terms of time limit. Also in case of a time limit for resort to the security, there will typically be an additional restriction of the scope of the security according to the terms of the parties´ agreement.

E. Continuation of liability in case of solidary liability

Request for performance. If the security provider had assumed solidary liability, the creditor only has to request performance from the security provider in good time in order for the latter to remain liable even after expiration of the agreed time limit (paragraph (1) sentence 2). A simple declaration by the creditor suffices; it is not necessary in this context that the creditor commences legal action against the security provider.

Time for request. The request is effective for this purpose only if it is made after maturity of the secured obligation but before expiration of the agreed time limit (paragraph (1) sentence 2). The first requirement, that the request must be made before expiration of the agreed time limit, is the essence of a personal security with a time limit for resort to the security: the security provider assumes the risk of the debtor's solvency only until the agreed time limit; should the creditor at a later point of time discover that due to the debtor's insolvency performance can only be expected from the security provider, this is no longer covered by the terms of this security, even if the secured obligation in question came into existence in time. The second requirement as to the time for the request for performance, *i.e.* that the request must be made after maturity of the secured obligation, has been introduced in order to prevent the request for performance becoming a mere formality for the creditor to be made already at the time of creation of the security: the request can be made in earnest only if the secured obligation is due. Specific provision is made for secured obligations becoming due upon, or within fourteen days before expiration of the time limit.

F. Continuation of liability in case of subsidiary liability

General. A security provider who is subsidiarily liable remains liable even after expiration of the agreed time limit only if the creditor has fulfilled stricter requirements than in the case of solidary liability of the security provider. The rationale is obvious: in the situation of subsidiary liability, the security provider is liable towards the creditor only if the latter has fruitlessly attempted to obtain satisfaction from the debtor or other security providers with solidary liability, if any. If additionally a time limit for resort to the security has been agreed, it follows that the creditor has to show that these requirements have been fulfilled before expiration of the agreed time limit.

Appropriate attempts to obtain satisfaction. According to paragraph (2)(a) the creditor must have started to undertake appropriate attempts to obtain satisfaction as required by IV.G.–2:106 (Subsidiary liability of security provider) paragraphs (2) and (3). The reference to paragraph (3) imports the exceptions provided for in that paragraph. Thus, in situations where the security provider may not invoke the subsidiary character of the liability vis-à-vis the creditor even though the latter has not attempted to obtain satisfaction from the debtor or any other security provider, as the case might be, the creditor does not have to start such attempts for the purposes of paragraph (2)(a) of the present Article either. It has to be emphasised that the attempts required by paragraph (2)(a) need not be completed – for the purposes of this provision it is sufficient that the creditor has started to undertake such attempts since demanding (fruitless) completion of these attempts to obtain satisfaction from other sources would be too onerous and time-consuming for the creditor.

Information required according to paragraph (2)(a). According to paragraph (2)(a) the creditor firstly has to inform the security provider of an intention to demand performance. In contrast to paragraph (1) sentence 2 no request for performance is necessary since in the situation dealt with by paragraph (2)(a) the security provider might still be able to rely on the

subsidiary character of the liability. Additionally, the creditor has to assert that the attempts described in the preceding paragraph have started.

Time for information. As in the situation of solidary liability of the security provider, the information required according to paragraph (2)(a) has to be given after maturity of the secured obligation, but before expiration of the agreed time limit. See Comment G below for the situation of the secured obligations becoming due upon, or within fourteen days before expiration of the agreed time limit.

Information required according to paragraph (2)(b). If the security provider so demands, the creditor also has to inform the security provider every six months about the status of the attempts to obtain satisfaction. This is a continuing obligation, *i.e.* if the creditor should even after expiration of the agreed time limit fail to comply with this requirement until completion of these attempts, then the security provider is no longer liable towards the creditor.

G. Maturity of secured obligations close to expiration of time limit

Modification of time for request or information. In certain situations, the point of time at which the request has to be made or the information to be given according to paragraphs (1) and (2) does not seem practicable: should the secured obligations become due only upon, or within a short period of time before expiration of the agreed time limit, the security provider might have only a very limited possibility to consider the options before having to turn against the security provider in order to avoid the loss of rights against the latter. Paragraph (3) applies in these situations and makes sure that the creditor has at least a period of fourteen days to make the request or to inform the security provider before the time limit of the security expires.

H. Time limit restricting scope of security

Legal basis. Agreed time limits typically also restrict the scope of the security with respect to the coverage of future obligations. This consequence is not limited to time limits for resort to a security within the meaning of the present Article: it flows directly from the agreement of the parties and is therefore not spelt out in the text of the Rules.

Existence of time limit restricting scope of security. Whether a reference to a time limit in the agreement of the parties is to be regarded as a time limit that restricts the scope of the security with respect to the coverage of future obligations is once more, unless clearly spelt out by the parties, a matter of construction of the agreement. In general every agreement by the parties including a time limit which has the effect of excluding future obligations – whether these are obligations arising or falling due or fulfilling other requirements after a certain date – from the scope of the security, is to be regarded as a time limit in this sense.

Time limits for resort to security. Time limits for resort to the security do typically also have the effect of restricting the scope of the security in the sense of the preceding paragraph. This follows from the fact that where a creditor is bound to resort to the security before expiration of a certain time limit, the creditor will after that point of time no longer be able to rely on the security in respect of any future obligations. There are, however, exceptions to this rule: agreements of the type “This security for all future indebtedness of the debtor towards the creditor expires in respect of each individual obligation secured 6 months after maturity of that obligation” do not provide for a time limit for the security as a whole. Thus such time

limits do not restrict the scope of the security with respect to the coverage of future obligations.

Duration of agreement giving rise to secured obligation as time limit. The mere fact that the agreement from which the secured obligation arises has a time limit should not in itself be regarded as indirectly giving rise to a time limit for the security. It should be noted, however, that even if such securities are regarded as unlimited, in cases where the security is restricted to cover obligations arising from specific contracts the applicability of IV.G.–2:109 (Limiting security without time limit) is excluded according to paragraph (1) sentence 2, cf. Comments on that Article.

Restriction of coverage of security. The effect of a time limit for the security is that the scope of security is limited accordingly, *i.e.* only those secured obligations are covered which are not excluded by virtue of the agreed time limit. The details depend upon the terms of the parties´ agreement: the coverage of the security could be restricted to obligations that arise or fall due or fulfil other requirements until that time, whatever the terms of the agreed time limit might be. Since IV.G.–2:109 (Limiting security without time limit) is inapplicable in any of these cases, there is no possibility for the parties on the basis of that provision to unilaterally set an earlier time limit by giving notice (cf., however, the exception provided for in IV.G.–4:107 (Limiting security with time limit) for consumer security providers).

Restriction of scope of security in case of a time limit for resort to security. In the case of a time limit such as "The creditor may resort to this security until August 31" or "This security expires August 31" it might not be easily determinable from the terms of the time limit whether the security is intended to cover secured obligations that have arisen, but are not due yet at that point of time. It is submitted that in general such time limits within the meaning of the present Article will restrict the liability of the security provider to secured obligations that have fallen due since only in respect of such obligations can the requirements of paragraph (1) sentence 2 and paragraph (2) sentence 2 be fulfilled. The additional restriction of the amount of the security provider's maximum liability according to paragraph (4) of the present Article, however, will often make a decision on this point unnecessary.

I. Consumer as security provider

Applicability to all types of consumer security providers. Chapter 4 does not contain any specific provisions on time limits for resort to security; therefore, the present Article is applicable directly and without modifications to consumer providers of dependent security. The same result is achieved for consumer providers of independent security (cf. IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (c)) and for consumer security providers in a co-debtorship for security purposes (cf. IV.G.–4:102 (Applicable rules) paragraph (1)). The application of the present Article to the last-mentioned type of consumer security providers is justified because the Article is favourable to them in so far as this rule provides legal certainty; otherwise it would be necessary to turn to uncertain general principles of contract law in order to determine the scope and the effect of an agreed time limit for resort to security.

Mandatory character. By virtue of IV.G.–4:102 (Applicable rules) paragraph (2), the present Article is mandatory in favour of all types of consumer security providers.

NOTES

I. In general

1. In all member states a distinction has to be made between dependent personal security given for an unlimited time (see national notes to following Article) and dependent personal security given for a fixed time. The proper classification of the dependent security is decisive for the determination of the extent of the security provider's obligation.

2. The following national notes deal with what may be designated as dependent security for a fixed time or as security with a time limit for resort to the security right. In FRANCE and GERMANY a dependent security for an existing obligation is usually regarded as meaning a dependent security for a fixed time (FRANCE: *Simler* nos. 771 ss.; GERMANY: BGH 6 May 1997, NJW 1997, 2233), whereas the assumption of a security for future obligations, especially those resulting from a current account, is a hint for the second type (FRANCE: *Simler* no. 771; GERMANY: BGH 17 December 1987, NJW 1988, 908).

3. According to GREEK and PORTUGUESE court practice, the sole fact that the secured obligation is limited in time does not restrict the dependent security to the same time limit, as long as the secured obligation has not yet been paid (GREECE: A.P. 463/1994, EEN 62, 332; PORTUGAL: STJ 20 April 1999, 162/99 www.dgsi.pt). In SPAIN it has been highly controversial whether the time limit agreed in the security has to be regarded as a limit within which the secured obligations have to arise or, to the contrary, as a limit for raising claims against the guarantor. As a matter of construction, case law favoured the first approach (see *Carrasco*, Tratado, p. 226). When parties have fixed a time limit for claiming payment from the surety, Spanish law does not know of any further grace period.

II. Dependent securities with a time limit for the resort to security

4. Only some continental legal systems provide expressly for dependent securities that have a time limit for resort to the security (AUSTRIAN CC § 1363 sentence 2; FINNISH LDepGuar § 19 para. 2; GERMAN CC § 777; GREEK CC art. 866).

(a) Agreement on time limit

5. Dependent securities may be limited in time by the parties not only by referring to a calendar date but also by referring to an (uncertain) event or a period of time (GERMANY: BGH 6 May 1997, NJW 1997, 2233 and MünchKomm/*Habersack* § 777 no. 7; GREECE: A.P. 463/1994, EEN 62, 335 and *Georgiades* § 3 no. 194).

(b) Consequences upon expiration of time limit

6. Most member states seem to agree that the provider of dependent security is discharged from the obligation when the agreed time limit expires and the creditor did not take action against or at least demand performance from the security provider (DENMARK: H 30 April 2001, UfR 2001 A 1543; *Ussing*, Kaution 301; Agreement between the Consumer Council and the Financial Council of 17 September 2001; ENGLAND: *O´Donovan and Phillips* no. 9-24; FINLAND: LDepGuar § 19 para. 2; RP 189/1998 rd 57; GERMAN CC § 777 para. 1; GREEK CC art. 866; ITALY: *Giusti* 149 and 253 s.; SPAIN: *Guilarte Zapatero*, Comentarios 310; *Carrasco a.o.* 226). GERMAN court practice demands, in addition, that the secured claim must fall due before expiration of the time limit (BGH 14 June 1984, BGHZ 91, 349 at 355 ss.)

7. If however, such suspensive conditions on the security provider's liability are fulfilled, under FRENCH and SPANISH law the time limit serves to freeze the continuing liability of the provider of dependent security to the amount at the expiration of the time limit (FRANCE: *Simler* no. 321 ss.; SPAIN: *Carrasco a.o.* 226). In SPANISH law it depends upon the wording of each particular dependent security whether liabilities incurred within the time limit of a continuing dependent security, but due and payable only after the dependent security came to an end, fall within the ambit of the security provider's liability (*Carrasco a.o.* 226).

8. In BELGIUM and in the NETHERLANDS the expiration of the time limit has the same effect as a unilateral termination of the contract of dependent security by the security provider for the future (BELGIUM: CA Brussels 25 May 1992, JLMB 1993, 870, note *de Patoul* and *Baudoux*; *T´Kint* no. 771; NETHERLANDS: *Blomkwist* no. 16 at p. 30-31). The provider of dependent security is only liable for those obligations that arose before the expiration date (BELGIUM: *T´Kint* no. 771; *Van Quickenborne* no. 253; NETHERLANDS: *Blomkwist* no. 16 at p. 30-31; SPAIN: *Carrasco a.o.* 226).

(c) Preservation of the liability of the provider of dependent security

9. The main issues in this context are until which point of time the creditor has to demand performance from the provider of dependent security and in which form.

(d) No differentiation between solidary and subsidiary dependent securities

10. In AUSTRIA, FINLAND, FRANCE and ITALY, solidary and subsidiary dependent securities are treated equally (AUSTRIAN CC § 1363 sentence 2; FINLAND: RP 189/1998 rd 56; FRANCE: *Simler* no. 488; ITALY: CC art. 1957; *Giusti* 281 s.). The same is true in SPAIN.

11. In ITALY, the provider of dependent security impliedly limited to the term of the secured obligation remains liable even after maturity of the principal obligation, if the creditor has diligently brought suit against the debtor within six months and has diligently pursued it (ITALIAN CC art. 1957 para. 1). This provision is also applied if the provider of dependent security has expressly limited the security to the same term as the secured claim; in this case, however, the debtor must be sued within two months (ITALIAN CC art. 1957 para. 2 and 3; *Giusti* 285 ss.). However, ITALIAN courts are agreed that CC art. 1957 does not apply to dependent securities without time limit (Cass. 27 November 2002 no. 16758, Giust.Civ.Mass. 2002, 2059). According to FINNISH LDepGuar § 19 para. 2 the creditor loses rights against the provider of dependent security on failing to demand payment from the latter before expiration of the fixed time. The demand does not have to comply with any form nor does it have to indicate the sum demanded by the creditor (RP 189/1998 rd 57). A corresponding rule has been developed in AUSTRIA, also without distinction as to the type of dependent security (OGH 11 April 1956, ÖJZ 1957, 129 no. 84, *obiter dictum*; Rummel/*Gamerith* § 1363 no. 4). The same is true for SPAIN. Since there are no legal provisions preserving the liability under a dependent security after expiration of the time limit, the creditor must ask for performance before that date (*Carrasco a.o.* 227).

(e) Differentiation between solidary and subsidiary dependent securities

12. Some countries differentiate between solidary and subsidiary dependent securities (GERMAN CC § 777 para. 1). Although GREEK CC art. 866 does not contain such a differentiation, the same results are achieved in GREECE due to the application of the general rules on dependent securities (cf. *Georgiades* § 3 no. 195).

(f) Solidary dependent security with time limit -Iimmediate notice

13. According to GERMAN CC § 777 paragraph 1 sentence 2 in connection with sentence 1, the provider of dependent security under a solidary dependent security in relation to an existing obligation is discharged upon expiration of the fixed time, unless the creditor gives immediately after expiration notice to the provider of the dependent security of an intention to demand performance from the latter. Although the provision refers to an "existing obligation", it is common opinion that it can be applied to dependent securities for future obligation(s) as well (Erman/*Herrmann* § 777 no. 1; MünchKomm/*Habersack* § 777 no. 5 referring to the genesis of the provision). The creditor's notice does not have to comply with any form nor contain the sum demanded by the creditor (MünchKomm/*Habersack* § 777 no. 11). The creditor has to give the notice immediately which means without culpable delay (GERMAN CC § 121 para. 1 sentence 1). Notice can also be given in the creditor's action against the debtor by serving a third party notice upon the security provider (CA Koblenz 14 July 2005, WM 2005, 2035 at 2036). However, the creditor's immediate notice achieves its purpose only if the secured obligation becomes payable before or at the latest at the expiration of the agreed time limit (BGH 29 June 2000, NJW 2000, 3137, 3138; MünchKomm/*Habersack* § 777 no. 5). The parties may waive the requirement of notice but it is highly controversial whether such stipulation is allowed in standard terms (Palandt/*Sprau* § 777 no. 2a).

(g) Legal action within time period

14. According to GREEK CC art. 866, the creditor has to take legal action for the satisfaction of the claim within one month after the expiration of the fixed period and has to pursue the legal proceedings without delay. Since in the case of a solidary dependent security the creditor can commence legal proceedings directly against the security provider, the creditor has to do so within a one month period after expiration in case of a dependent security for a fixed time, whereas it is not necessary for the provider of dependent security to turn against the debtor as well (A.P. 133/1956, NoB 4, 617 ss.; *Georgiades* § 3 no. 195). Legal action may be taken by commencing a civil action, by raising a defence or by submitting the claim in an insolvency or enforcement proceeding; on the other hand, a simple extra-judicial notice does not suffice (*Georgiades* § 3 no. 195 with further references, cf. fn. 139).

(h) Subsidiary dependent security with time limit

15. In case of a dependent security with subsidiary liability it is according to GERMAN CC § 777 para. 1 sentence 1 not sufficient for the creditor to notify the security provider after expiration of the fixed time that performance will be demanded from it. Rather, the creditor has to proceed immediately after expiration of the fixed time to the collection of the secured claim pursuant to § 772, continue the proceeding without serious delay, and, after termination of the proceeding, immediately give notice to the security provider that performance is demanded from the latter (GERMAN CC § 777 para. 1 sentence 1; for details concerning the proceeding according to § 772, see national notes to IV.G.–2:106 nos. 7-12). The notice must comply with the same requirements as in the case of a dependent security with solidary liability (see no. 13 above).

16. Again, the situation is similar in GREECE: As already said above (no. 14), the creditor has to take legal action within one month after expiration of the fixed time period and to pursue these proceedings without delay. But contrary to the preceding case, in the case of a subsidiary dependent security the creditor in accordance with the general

rules on dependent securities has to commence legal proceedings against the debtor; commencement of legal action directly against the dependent security provider is not sufficient (*Georgiades* § 3 no. 195). If, however, the creditor has an enforceable title against the debtor, the existence of the claim is confirmed and the creditor does not have to take legal action against the debtor or the provider of dependent security (A.P. 210/1993, NoB 42, 399, applying CC art. 866 to an independent security). As to the types of possible proceedings, cf. no. 14 above).

17. According to the prevailing FRENCH opinion, if in case of a subsidiary dependent security the *beneficium discussionis* (see national notes on IV.G.–2:106) is invoked by the security provider, a prior notice to the debtor to pay is necessary. If the debt is not paid by the debtor, the creditor has to proceed against the provider of the dependent security as well. Proceedings against the debtor alone are not sufficient to force the provider of dependent security to pay, regardless of the solidary or subsidiary character of the dependent security (*Simler* no. 491).

18. Since dependent securities with subsidiary liability are very rare in ENGLAND and SCOTLAND there does not appear to be any discussion as to whether notice by the creditor to the provider of dependent security of an intention to commence or actual commencement of proceedings against the debtor is necessary in order to preserve the liability of the provider of dependent security after expiration of the agreed time limit, does not seem to be discussed anywhere. Given that in these cases proceedings against the debtor are a condition precedent for the accrual of the security provider's liability it would then seem to depend upon the wording of each particular dependent security whether, in the absence of timely proceedings against the debtor, the security provider's liability survives the time limit of the dependent security.

(i) Legal consequences if expiration has been avoided

19. In GERMANY, if the creditor has given notice in due time in conformity with the rules, the liability of the provider of dependent security is restricted to the amount of the debtor's obligation at the time of expiration of the fixed period in cases of solidary dependent security or at the time of the termination of the proceedings in cases of subsidiary dependent security, respectively (GERMAN CC § 777 para. 2). In FRANCE the provider of dependent security is not released after expiration of the fixed time, unless the parties agree otherwise (*Simler* nos. 321 ss.); only the extent of the security provider's liability is limited by the expiration of time.

IV.G.–2:109: Limiting security without time limit

(1) Where the scope of a security is not limited to obligations arising, or obligations performance of which falls due, within an agreed time limit, the scope of the security may be limited by any party giving notice of at least three months to the other party. The preceding sentence does not apply if the security is restricted to cover specific obligations or obligations arising from specific contracts.

(2) By virtue of the notice, the scope of the security is limited to the secured principal obligations performance of which is due at the date at which the limitation becomes effective and any secured ancillary obligations as defined in IV.G.–2:104 (Coverage of security) paragraphs (1) and (2).

COMMENTS

A. General

Provisions on time limits. This Article deals with dependent personal securities which do not have a time limit, *i.e.* that cover future secured obligations over an indefinite period. In accordance with the general principle contained in III.–1:109 (Variation or termination by notice) paragraph (2), the present Article provides for a possibility to limit the duration of such a security, *i.e.* to limit the scope of the security to obligations performance of which is due at the time when the limitation becomes effective. An additional provision, IV.G.–4:107 (Limiting security with time limit), is applicable for consumer security providers only.

Limitation of duration of security outside scope of Article. The duration of a security might be unilaterally limited by any of the parties to the agreement even outside the scope of the present Article, e.g. where the parties have provided for such a right to limit the duration of a security in their agreement. In such situations, the Article may nevertheless be applicable in order to determine details or consequences of such a contractual term.

B. Security without agreed time limit

The Article provides for a possibility to limit the scope of a security in cases where such a restriction does not already follow from a time limit agreed by the parties. Whether a security is unlimited in this way must be determined by interpreting the parties´ agreement. This issue is dealt with in Comment C to the preceding Article. Generally, the existence of any type of time limit for the security leads to the inapplicability of the present Article, the only exception being such time limits as do not affect the security as a whole, *e.g.* time limits which apply to certain secured obligations only. For consumer security providers, cf. IV.G.–4:107 (Limiting security with time limit).

C. Limitation by giving notice

Declaration by any party sufficient. Any party may limit the security, *i.e.* limit its scope to secured obligations due at the time when the limitation becomes effective by simple declaration vis-à-vis the other party. An act of the court is not necessary, neither does the party have to show the existence of good reasons. Although the Article gives both the creditor and the security provider the right to limit the security, in fact it will typically only be the security provider who exercises this right.

Notice period. The limitation of the security by giving notice can become effective only after a period of at least three months that has to be set by the party giving notice has expired. This minimum length of the period of notice has been introduced in order to protect the interests of the creditor and the debtor: typically, if the security provider limits a security covering future obligations the creditor will immediately stop granting any further credit to the debtor which might cause short-term illiquidity of the latter. The three months period of notice should give the debtor the opportunity to arrange alternative security or credit from another source. The security provider is protected by the principle of good faith against any undue increases of the secured obligations agreed between debtor and creditor within this period (if covered at all, cf. IV.G.–2:102 (Dependence of security provider's obligation) paragraph (4)).

D. Effect of limitation of security

Secured principal obligations due at the time the limitation becomes effective. If notice is given, the scope of the security provider's liability is restricted to secured obligations that are due as of the date at which the limitation becomes effective. The limitation by giving notice in this respect has similar effects to those of an agreed time limit according to which the scope of the security would cover secured obligations that arise or fall due or fulfil other requirements before expiration of the time limit. For the purposes of this Article, it is thought to be preferable to restrict the liability of the security provider to secured principal obligations that are due as of the date at which the limitation becomes effective, since this is the solution that is most favourable to the security provider. Moreover, the fact that a dependent personal security is limited according to this Article will typically give the creditor the right to accelerate the maturity of obligations secured by this security that have arisen but are not yet due, such as a credit paid out to the debtor that under its original terms was repayable at a date after the three months.

Secured ancillary obligations covered even though arising or falling due at a later time. The requirement that secured obligations must be due as of the date at which the limitation becomes effective does, however, only apply to the secured principal obligations. Ancillary obligations as defined in IV.G.–2:104 (Coverage of security) paragraphs (1) and (2) are covered by the scope of the security even if they arise or fall due at a later point of time. These obligations typically arise and fall due later than the principal obligation; in the absence of an agreement to the contrary it would seem unreasonable that a security should cover a secured principal obligation, but not e.g. interest owed by the debtor in respect of that obligation even if accruing only after the limitation of the security became effective, since the source of the obligation to pay interest is the non-payment of the principal obligation.

Limitation does not create time limit for resort to security. The limitation of the security according to this Article does not, however, create a time limit for resort to the security, *i.e.* the security provider remains liable after the limitation of the security even if the creditor does not take any further action until that date. Should the parties also have agreed on a time limit for resort to the security, then this time limit is not affected by the fact that a party exercises the right conferred by the present Article.

E. Exceptions

Cases outside scope of the Article. Paragraph (1) second sentence sets out situations in which the parties may not unilaterally limit the scope of the security by giving notice. If the security is agreed to cover specific obligations or obligations arising from specific contracts the exercise of the right according to the Article by the security provider would run counter to

the interests of the creditor who may have agreed to contract with the debtor only on the basis of the existence of a dependent security and who may not be able to terminate the relationship resulting from the agreement. The creditor could, for example, have entered into a contract for the lease of an apartment only on the strength of a security provided in relation to the debtor's obligations to pay rent. According to the Article it is not possible to unilaterally limit the duration of a security in such a situation regardless of whether the lease contract itself has a time limit or is concluded for an indefinite period. The main example of a dependent security not covered by these exceptions (and therefore subject to the parties´ right to give notice) is a global security. It is clear that for a security covered by one of these exceptions, recourse to the general principle of III.–1:109 (Variation or termination by notice) paragraph (2) is not possible: *lex specialis derogat legi generali* (see I.–1:102 (Interpretation and development)).

Other bases of protection of security provider. In certain situations, the exclusion of the right to limit a security by giving notice might cause hardship to the security provider. It is assumed, however, that in appropriate circumstances protection for the security provider against an unreasonable duration of a security could be offered on other legal bases. Apart from the possible application of the rules on change of circumstances (cf. III.–1:110 (Variation or termination by court on a change of circumstances)), the creditor might in certain cases be prohibited from relying on a security running over an excessively lengthy period of time on the basis of the principle of good faith (cf. III.–1:103 (Good faith and fair dealing)); in other situations it is not inconceivable that the right to relief (IV.G.–2:111(Debtor's relief for the security provider)) might include a right to demand that the debtor terminates the contractual relationship comprising the secured obligation in order to prevent the creation of new secured obligations which would increase the security provider's liability.

F. Consumer as security provider

Applicability to all types of consumer security providers. This Article is directly applicable to consumer providers of dependent security and allows them to limit securities given for an unlimited time, subject to the exceptions provided for in paragraph (1) sentence 2. The protection of consumer security providers is supplemented by IV.G.–4:107 (Limiting security with time limit), which allows the security provider to limit securities with an agreed limit under the conditions set out in that provision. These principles also apply to consumer providers of independent security (cf. IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (c)) and to consumer security providers in a co-debtorship for security purposes (cf. IV.G.–4:102 (Applicable rules). The application of the present Article to these types of security providers includes the exceptions provided for in paragraph (1) sentence.2.

Mandatory character. By virtue of IV.G.–4:102 (Applicable rules) paragraph (2), the present Article may not be deviated from to the detriment of a consumer security provider in any type of security.

NOTES

I. Limiting security without time limit for secured obligations

(a) Limitation of principal obligation extended to security

1. As a general rule, in all countries even a security whose scope is not specifically restricted to obligations arising within a specified time limit will be interpreted as being limited to the duration of the secured obligation (BELGIUM: *T´ Kint* no. 771; ENGLAND: *Andrews and Millett* no. 4-019; FRANCE: *Simler* no. 270; GERMANY: Palandt/*Sprau* § 765 no. 13; ITALY: Cass. 8 February 1989 no. 786, Giur.it. 1989 I 1 1517; *Giusti* 251 ss.; SPAIN: *Díez-Picazo* 431). Securities in SWEDEN will not often set out a separate validity time, but the security will be tied to the underlying contract. In cases where a private person is a security provider in relation to a commercial entity there seems to be developing a rule that the security provider's undertaking is limited in time in the above-mentioned sense (although there is not yet any clear and general rule to such effect) (*Gorton*, Suretyship 591).

(b) Limitation by the security provider - Reason for termination of security

2. In AUSTRIA, any dependent personal security given for an unlimited time, *i.e.* with a scope that does not only cover obligations arising within an agreed time limit, may be terminated by the security provider giving notice to the creditor (OGH 22 June 1993, ÖBA 1994, 239 (240 requiring a reasonable duration of the security; without this requirement OGH 8 November 1970, JBl, 1971, 257 (258)). Even an "irrevocable" security may be terminated if there is an "important reason" (OGH 28 April 1971, ÖJZ 1971, 522 (523) no. 281).

3. In BELGIUM, DENMARK, FINLAND, FRANCE, ITALY and the NETHERLANDS if a security given for an unlimited time secures future debts or in case of a global dependent security without time limit, the security provider can also unilaterally terminate the security by giving notice to the creditor (BELGIUM: *T´ Kint* no. 771; DENMARK: for future debts, *Pedersen*, Kaution 53; DUTCH CC art. 7:681 para. 1 lit. a with effect for future obligations (art. 7:861 para. 2); FINLAND: HD 18 March 1997, KKO 1997:31; LDepGuar § 6 para. 1 for a global dependent security, including for a current account; FRANCE for all undetermined obligations: cf. *Grimaldi* Commission´s proposed art. 2302 para. 3 sentence 2; Cass.com. 3 December 1979, JCP G 1980, IV no. 67; *Simler* no. 282; ITALY: according to the general rule of CC art. 1373 para. 2 on unilateral withdrawal from the contract; Cass. 15 March 1999 no. 2284, Giust.Civ.Mass. 1999, 565; Cass. 2 July 1998 no. 6473, BBTC 1999 II 657; CFI Milano 15 July 1993, BBTC 1994 II 548; *Petti* 154; moreover, the limitations of CC art. 1957 are not applicable). In BELGIUM the sole requirement is a notice of reasonable length to the other party (CA Bergen 4 February 1986, Pas belge 1986 II 61; *T´ Kint* no. 771). However, in LUXEMBOURG, the provider of a dependent security cannot unilaterally terminate a security without such a time limit, if a time limit is fixed in the underlying contract (*e.g. caution réelle* CA Luxembourg 14 May 2003, BankFin 2004 169). In FRANCE the parties can agree on a notice of reasonable length (*Simler* no. 284). If the security provider is a consumer, the creditor of professional claims must remind the consumer security provider annually of the right of termination (*Madelin* Act of 11 February 1994, art. 47 II para. 2 read with MonC art. L 313-22). Since Law no. 2003-721 of 1 August 2003 this obligation has also to be fulfilled for consumer debts (ConsC art. L. 341-6 sent 2). But the scope of these provisions is reduced, since it is forbidden for private persons to contract global dependent securities both if they acted as consumers (ConsC art. L. 313-7) and if they

acted as professionals (ConsC art. L. 341-2 introduced by Law no. 2003-721 of 1 August 2003).

4. The security provider's right to terminate a security whose scope is not limited to obligations arising within an agreed time limit by giving notice depends in ENGLISH law on the consideration for the security provider's promise to secure: if the consideration is divisible, the security provider can at any time terminate the security (*Re Crace* [1902] 1 Ch 733) by giving notice; if the consideration is indivisible, the security provider cannot do so unless with the creditor's agreement (*Lloyds v. Harper* (1880) 16 ChD 290, CA, Halsbury,para. 1200, Vol 49, 5th ed, (2008). Thus, a security for the balance of a current account is terminable because the security provider's promise is "divisible as to each advance" and only after the advance is made to the debtor does the promise become irrevocable (cf. *Coulthart v. Clementson* (1879) 5 QBD 42; *Andrews and Millett* no. 8-003). This is achieved by treating the security given for a divisible consideration as a standing offer which is *pro tanto* accepted when a fresh advance is made, since as a general rule every offer may be revoked before it is accepted (Halsbury/*Salter* para. 1200, Vol 49, 5th ed, (2008); *Goode*, Commercial Law 821). The divisibility of the consideration is sometimes difficult to determine; as a rough guide it seems appropriate to examine the nature of the relationship the creditor has entered into in reliance on the security: if that relationship is terminable it is reasonable not to deprive the security provider of the right to revoke the security; if, on the other hand, the relationship is not terminable for a certain period, it would prejudice the creditor if the security provider could revoke the security and thereby deprive the creditor of the security (Chitty/*Whittaker* no. 44-017). Similarly in SCOTLAND: continuing securities are regarded as containing offers of securities for future advances which then can be revoked before acceptance of each particular offer (*Gloag and Irvine* 857). The security provider can therefore withdraw from the security with effect for a future advance by giving notice to the creditor (Stair/*Clark* no. 980; *Gloag and Irvine* 857). There is no such right, however, where the security is given in respect of the debtor's liability arising in a specific transaction (Stair/*Clark* no. 980).

5. In PORTUGAL the security provider with *beneficium discussionis* may demand that the creditor, once the principal obligation has fallen due, tries to obtain satisfaction from the debtor within two months after the moment the secured obligation fell due (however, this time limit does not run out before one month after the notice to the creditor). The security provider is released from liability if the creditor does not follow this demand. If the principal debt becomes due only after the creditor has given notice to the debtor, a security provider with *beneficium discussionis* may one year after having assumed the security demand that the creditor takes action against the debtor. Again, the security provider is released if the creditor does not comply with this demand (CC art. 652; *Almeida Costa* 784). It has been held that a dependent personal security is also terminated if the credit is transferred without the security provider's approval (STJ 2 July 1996, 165/96 www.dgsi.pt).

6. In GERMANY and SPAIN there are no statutory provisions on termination of dependent personal securities. Consequently, they are regarded, as a rule, as not terminable (GERMANY: Staudinger/*Horn* § 765 no. 229; Palandt/*Sprau* § 765 no. 16; SPAIN: *Carrasco a.o.* 227). However, some important exceptions are accepted for dependent personal securities securing future obligations without time limit. In GERMANY, the security provider has, based upon the principle of *bona fides* (CC § 242), a right of termination if a dependent personal security has been assumed for future obligations without time limit and if a reasonable time after the assumption of the security has passed (BGH 10 June 1985, NJW 1986, 252, 253; BGH 22 May 1986,

NJW 1986, 2308, 2309; approved in BGH 21 January 1993, NJW-RR 1993, 944, 944 s.; Erman/*Herrmann* § 765 no. 8; MünchKomm/*Habersack* § 765 no. 55; *contra*: *Derleder*, NJW 1986, 102), since long-term relations *(Dauerschuldverhältnisse)* must be terminable to re-establish freedom of contract (cf. CA Düsseldorf 24 November 1998, ZMR 2000, 89; *Reinicke and Tiedtke*, Bürgschaftsrecht no. 130). For the German Supreme Court a minimum period of at least three years seems to be sufficient (BGH 4 July 1985, NJW 1985, 3007, 3008; cf. *Bülow*, Kreditsicherheiten no. 807; Schimansky/Bunte/Lwowski/*Lwowski* appendix to § 91 no. 10). SPANISH scholarly opinion and case law, as well as contractual practice, agree in giving the surety the right to withraw the unlimited security (*Carrasco*, Tratado, p. 161)

7. In GERMANY, apart from expiration of a reasonable period of time, a second ground for termination is recognised: dependent personal securities for future obligations without time limit may also be terminated by the security provider on the basis of the principle of *bona fides* (CC § 242) for grave reason (see only BGH 10 June 1985, NJW 1986, 252, 253; BGH 4 July 1985, NJW 1985, 3007, 3008; Erman/*Herrmann* § 765 no. 8; MünchKomm/*Habersack* § 765 no. 56). In 2002, this case law has been codified in a generalised form for all long-term contracts by CC § 314. Termination is effective immediately (para. 1), but it must be exercised within a reasonable period after the security provider received information on the critical event (para. 3). A grave reason has been assumed *e.g.* if the debtor's financial situation had seriously worsened (BGH 21 January 1993, NJW-RR 1993, 944, 945), if there were no obligations to secure for a longer period (BGH 22 May 1986, NJW 1986, 2308, 2309) and if a manager or shareholder of a company who in consideration of this had secured the company's obligations leaves the company (BGH 10 June 1985, NJW 1986, 252, 253; CA Celle 5 October 1988, NJW-RR 1989, 548, 548; *Reinicke and Tiedtke*, Bürgschaftsrecht no. 131). The right of termination for grave reason is extended by some authors to dependent personal securities with time limit (MünchKomm/*Habersack* § 765 no. 56; Staudinger/*Horn* § 765 no. 235). Similarly, according to DUTCH CC art. 7:861 para. 1 lit. b) a dependent security that secures a future obligation may be terminated after five years even if it is given for a limited time.

8. Also in GREECE, there is no general right of the security provider to terminate a security for an unlimited period. According to GREEK literature, a right of termination is exceptionally admitted on the ground of good faith for securities without a maximum amount securing the outstanding balance of a current account and only if there is a grave reason (*Georgiades* § 4 no. 49; *Chelidonis*, EllDik 1998, 39, 1034, 1036). GREEK CC arts. 867, 868 allow, however, the security provider to set time limits to the unlimited liability. According to art. 867, a security provider who assumed the obligation for an unlimited period may upon maturity of the secured debt request the creditor to take legal action within one month for the satisfaction of the claim and to pursue the legal proceedings diligently. If the secured debt becomes due and payable only upon notice by the creditor, then according to CC art. 868 the security provider may, on the expiry of one year after assuming the security, demand that the creditor give notice to the debtor, take legal action within one month and pursue the legal proceedings diligently. In both cases, if the creditor does not comply with the security provider's demand, the latter is discharged (*Georgiades* § 3 no. 199).

(c) Period of notice to the creditor

9. In GERMANY a security provider who has a right of termination (see nos. 6 s. above) must in general set a reasonable period for the notice to take effect, since the security provider has to show consideration for the legitimate interests of both creditor and

debtor to enable them to adapt their relationship to the changed situation (BGH 10 June 1985, NJW 1986, 252, 253; BGH 4 July 1985, NJW 1985, 3007, 3008; CA Celle 5 October 1988, NJW-RR 1989, 548, 548). However, the reason for termination has also to be considered (Schimansky/Bunte/Lwowski/*Schmitz* § 91 no. 113; Staudinger/*Horn* § 765 no. 232): in cases of termination due to expiry of time for dependent personal securities securing a loan, reference is especially made to GERMAN CC § 489 para. 2 concerning the termination of a loan with variable interest; consequently, a period of notice of three months is regularly accepted (CA Celle 5 October 1988, NJW-RR 1989, 548, 548; MünchKomm/*Habersack* § 765 no. 55; cf. also *Derleder*, NJW 1986, 102). In cases of termination for a grave reason, however, a shorter period of notice (CA Celle 5 October 1988, NJW-RR 1989, 548, 548: 4 to 6 weeks) or even immediate termination (BGH 4 July 1985, NJW 1985, 3007, 3008: no opposing interests of debtor and creditor and various reasons for termination; MünchKomm/*Habersack* § 765 no. 56; *Derleder*, NJW 1986, 102) have been accepted due to special circumstances. The new general legislative provision of CC § 314 allows termination with immediate effect (*above* no. 7). In ENGLAND, if the consideration for the security provider's promise is divisible and the period of the security is unlimited then, in the absence of a notice provision, the security provider can terminate the security at any time.(Halsbury para.1200, Vol 49, 5th ed, (2008)).

10. According to GREEK literature, the period of notice must be reasonable, according to the circumstances of each particular case (*Georgiades* § 4 no. 51).

(d) Demand of security provider against debtor for early recourse

11. For details, cf. national notes to IV.G.– 2:111 (Debtor's relief for the security provider).

II. Amount of the security upon termination

12. In FRANCE, GERMANY, GREECE, ITALY, the NETHERLANDS and SCOTLAND a security for future or conditional (and global) obligations is limited to those obligations that exist at the time of termination of the security (FRANCE: *Simler* nos. 780 ss.; GERMANY: BGH 10 June 1985, NJW 1986, 252, 253; BGH 22 May 1986, NJW 1986, 2308, 2309; GREECE: C*helidonis*, EllDik 1998, 39, 1034; ITALY: Cass. 19 June 2001 no. 8324, Giust.civ.Mass. 2001, 1217; Cass. 6 August 1992 no. 9349, Giur.it 1993 I 1, 1255; NETHERLANDS: CC art. 7:861 para. 2 – mandatory rule for non-professionals (CC art. 7:862 lit. a), but also applicable to professional providers of security (*Blomkwist* no. 16 at p. 30); SCOTLAND: Stair/*Clark* no. 980; *Gloag and Irvine* 858). In FRANCE and GERMANY, obligations that are created after termination has become effective are not covered, unless these obligations are only ancillary obligations or costs (FRANCE: Cass.civ. 10 May 1988, Bull.civ. 1988 I no. 134 p. 93; GERMANY: CC § 767 para. 1 sentence 2 or para. 2; MünchKomm/*Habersack* § 765 no. 57). However, in GERMANY the security provider is liable for those obligations that are created after the notice reaches the creditor but before it becomes effective, provided these obligations are not extraordinary (cf. Schimansky/Bunte/Lwowski/*Schmitz* § 91 no. 114; *contra*: *Derleder*, NJW 1986, 97, 102). GERMAN CC § 777 is not applicable so that the creditor has not to demand performance from the security provider before or immediately after termination becomes effective (BGH 4 July 1985, NJW 1985, 3007, 3008).

13. In case of termination, the amount of the security will be determined in AUSTRIA, ITALY and the NETHERLANDS by the date on which the security provider communicates the intention to terminate (AUSTRIA: Schwimann/*Mader and Faber*

§ 1353 no. 8; ITALY: Cass. 15 March 1999 no. 2284, Giust.Civ.Mass. 1999 565; CA Milano 17 March 1998, BBTC 2000 II 402; CFI Milano 15 July 1993, BBTC 1994 II 548; DUTCH CC art. 7:861 para. 2; *du Perron and Haentjens* art. 861 no. 3). By contrast, according to GREEK literature, the termination becomes effective upon expiration of the reasonable period of notice (*Georgiades* § 4 no. 52). In SPAIN it has been held that the liability is restricted to the amount outstanding at the time the (necessary) notice reached the creditor, provided that the creditor has had a real possibility to avoid new sums being added (*Carrasco* 250).

14. Under ENGLISH law, termination of a security will not affect the liability of the security provider as it stands at the date of termination (cf. *Thomas v. Nottingham Inc. Football Club Ltd.* [1972] Ch 596; *Andrews and Millett* no. 8-006). It seems that the security provider's liability will also cover new secured obligations arising during the notice period, although there is little authority on this point (cf. *Andrews and Millett* no. 8-009; *O´Donovan and Phillips* no. 9-75). It is also not entirely clear whether the security provider is liable for secured obligations that have been incurred or undertaken before termination of the security but which only accrue at a later date (cf. *O´Donovan and Phillips* nos. 9-72, 9-22 ss.).

IV.G.–2:110: Reduction of creditor's rights

(1) If and in so far as due to the creditor's conduct the security provider cannot be subrogated to the creditor's rights against the debtor and to the creditor's personal and proprietary security rights granted by third persons, or cannot be fully reimbursed from the debtor or from third party security providers, if any, the creditor's rights against the security provider are reduced by the extent necessary to prevent the latter from suffering any loss as a result of the creditor's conduct. The security provider has a corresponding right to recover from the creditor if the security provider has already performed.

(2) Paragraph (1) applies only if the creditor's conduct falls short of the standard of care which could be expected of persons managing their affairs with reasonable prudence.

COMMENTS

A. Basic idea

Since a security provider usually assumes the security without remuneration, the security provider should, if obliged to perform to the creditor, be able to seek reimbursement from the debtor. IV.G.–2:113 (Security provider's rights after performance) makes various rights available to the security provider: a claim for reimbursement according to paragraph (1) first sentence as well as a subrogation to the creditor's rights against the debtor, both the personal rights (paragraph (1) second sentence) and the personal and proprietary rights securing this latter claim (paragraph (3)).

The present Article deals with the consequences if, due to the conduct of the creditor, these rights are lost or are diminished and therefore cannot pass fully or partly to the security provider, after the latter has performed to the creditor. Such conduct may result in the creditor being deprived of rights against the security provider.

B. Details

The rule in this Article may come into operation in various ways. One typical example is that the creditor delays collection of a sum which is due by the debtor, although well aware that the debtor's financial situation is worsening. If the creditor waits until the debtor has become insolvent before demanding payment from the provider of dependent security, the creditor will lose the right to proceed against the security provider to the extent that the latter has, because of the creditor's conduct, lost the right to be reimbursed from the debtor's insolvent estate. Another example is that the creditor, believing that the debtor will remain solvent, gives up a personal or proprietary security against the debtor who later, against expectations, becomes bankrupt. Another typical instance occurs where the creditor negligently allows a security right against the debtor to deteriorate or to disappear, especially if, as is usually the case, the encumbered assets are held by the debtor.

Which yardstick is appropriate in order to determine how carefully the creditor must act in order to avoid losing rights against the security provider? Paragraph (2) makes it clear that the standard is that which could be expected of persons managing their affairs with reasonable prudence. This is an objective standard which does not depend on, for example, the creditor's abilities or professional experience. However, it requires some negligence on the creditor's part. A creditor who fails to take action when no reasonable person would be expected to do

so will not lose rights. This is important for security providers too because the present Article is applied by reference in IV.G.–1:107 (Several security providers: recourse against debtor).

If the creditor prejudices the security provider's position by failing to preserve rights where this could reasonably be expected, the sanction may consist of a *(pro tanto)* discharge of the dependent security provider or by granting the security provider a claim for damages for breach of an obligation or duty imposed on the creditor. The former alternative has been chosen since it seems undesirable to place an *obligation* or *duty* on a creditor to protect the creditor's own interests and to place a creditor with a security in a potentially worse position (by virtue of an award of damages which might surpass the amount of the security) than a creditor without a security. In practice the two solutions would almost always lead to the same results.

C. Application to recourse claims

It should be noted that the rules of this Article are also applied with appropriate adaptations in the context of recourse claims as between several security providers. Where a security provider acts so as to deprive another security provider of the possibility of having secondary recourse against the debtor or of sharing any benefits recovered from the debtor, the former security provider may find that rights of recourse are correspondingly reduced, cf. Comments on IV.G.– 1:107 (Several security providers: recourse against debtor).

D. Consumer as security provider

The Article, as a rule protecting the security provider applies to a consumer who has provided a dependent personal security, one who has purported to assume an independent personal security (cf. IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (c)) and for consumer security providers in a co-debtorship for security purposes (cf. IV.G.–4:102 (Applicable rules) paragraph (1)). According to IV.G.–4:102 (Applicable rules) paragraph (1), the rules of this Article are mandatory in favour of the consumer. And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" in the Article means the debtor whose obligation is secured.

NOTES

I. Damages or discharge

1. The subrogation of the security provider to the creditor's rights against the debtor after the security provider has paid the secured debt, or otherwise performed under the security, is one of the ubiquitous features of the law of dependent personal securities within the different legal systems. It is also a common feature that acts of the creditor which deprive the security provider of the right to subrogation, or diminish this right, do not operate to the disadvantage of the security provider. In this respect two favourable solutions for the security provider are possible: the security provider can either be discharged (fully or *pro tanto*) from liability or be entitled to a claim for damages against the creditor. Most legal systems have opted for discharge of the liability of the provider of personal security (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2037 (since 2006: FRENCH CC art. 2314): full discharge; FRENCH *Grimaldi* Commission´s proposal of a new CC art. 2322: discharge *pro tanto*; however, this proposal was not adopted by the legislator of 2006;

DENMARK: *Pedersen*, Kaution 85 ss.; ENGLAND: *Andrews and Millett* nos. 9-040 ss.; GERMAN CC § 776; GREEK CC art. 863; cf. *Doublis*, Chrimatodotiseon 238 ss., 240; ITALIAN CC art. 1955; PORTUGUESE CC art. 653; SCOTLAND: Stair/*Clark* nos. 976 s.; SPANISH CC art. 1852; SWEDEN: W*alin*, Borgen 198 s.). Only a few legal systems uphold the liability of the security provider but grant a right to damages against the creditor (AUSTRIA: CC § 1364 sentence 2; NETHERLANDS: CC art. 7:850 para. 3 read with art. 6:12 read with art. 6:154; *Blomkwist* no. 21; there may be no derogations from CC art. 6:154 to the detriment of a non-professional security provider (CC art. 7:862 lit. b); *Blomkwist* no. 30)). The different approaches do not necessarily affect the end result since a security provider may set off a claim for damages against the creditor's claim for performance.

II. General scope of creditor's duties

2. The security provider's right of subrogation may be affected in several ways. The loss of co-providers of personal security or of proprietary security granted by a third party is strictly speaking not the loss of a right, which the creditor already had vis-à-vis the debtor. Due to these losses, however, the security provider's possibilities to be subrogated to the rights the creditor holds as security for the debtor's obligation are diminished or completely lost. Since under most legal systems, as well as under the present Rules, the security provider's right of subrogation comprises third party security – be it personal or proprietary – not only detrimental acts of the creditor concerning the secured obligation but moreover detrimental acts concerning third party security fall within the ambit of the relevant rules.

3. In GERMANY, on the other hand, only detrimental acts concerning security rights fall within the ambit of the relevant statutory provision (GERMAN CC § 776) while the legislator denied in general any duty of care (*Diligenzpflichten)* of the creditor vis-à-vis the security provider due to the unilaterally binding character of dependent personal securities (cf. Protokolle II 481); creditors should only be burdened with charges as against themselves *(Obliegenheiten)*, *i.e.* duties which are not enforceable by the security provider, but the creditor has to bear the disadvantages resulting from a breach of such duties (cf. Staudinger/*Horn* § 776 nos. 1, 17; Erman/*Herrmann* § 765 no. 10). As far as the creditor's acts affect the secured obligation and cause damage to the security provider, the latter is only protected by the principle of *bona fides* (GERMAN CC § 242; cf. only Palandt/*Sprau* § 776 no. 2 and § 768 no. 2). Although the requirements as to the creditor's behaviour in order to establish a liability according to this principle seem to be less severe now, the level of protection of the security provider seems to be still inferior to those legal systems in which a specific statutory provision exists. The situation appears to be similar in ENGLAND and SCOTLAND, cf. no. 6 below.

III. Delayed collection of secured claim

4. One situation in which the security provider's subrogated rights against the debtor are affected occurs when the creditor delays collection of a claim from the debtor and the latter suffers a deteriorating financial position or even becomes insolvent.

5. AUSTRIAN law expressly holds the creditor responsible for a delay in demanding performance from the debtor if that delay affects the security provider's claim against the debtor (CC § 1364 sentence 2). Such damage has been assumed if the debtor has become insolvent and the security provider will probably not be able to recover but a small dividend (OGH 7 December 1955, ÖJZ 1956, no. 125 at p. 237). Some aspects of the rule are uncertain, *e.g.* whether the creditor must have acted culpably (formerly the courts did not demand this, *e.g.* OGH 7 December 1955, above, but they seem now

to follow the writers´ contrary view, cf. OGH 26 May 1987, ÖBA 1987, 924; Rummel/*Gamerith* § 1364 no. 4; Schwimann/*Mader and Faber* § 1364 no. 3). Controversial is also whether solidary providers of security can rely on the provision (denied by OGH 22 October 1935, SZ 17 no. 146 at p. 416 s.; but apparently affirmed now by OGH 26 May 1987, above, and by most writers, *e.g.* Rummel/*Gamerith* § 1346 no. 6). However, the security provider's contributory negligence may diminish the claim; thus CC § 1364 sentence 1 entitles the security provider to demand security from the defaulting debtor (cf. OGH 7 December 1955, ÖJZ 1956, no. 125 at p. 237 (238)).

6. In ENGLAND and SCOTLAND, the delayed collection of the secured claim by the creditor will normally not discharge the security provider (ENGLAND: *Black v. Ottoman Bank* (1862) 15 Moore KB 472, 15 ER 573; *O´Donovan and Phillips* no. 8-109; Halsbury/*Salter* para. 1230, Vol 49, 5th ed, (2008); SCOTLAND: *Gloag and Irvine* 865). The reason is that it is the security provider's duty to see that the principal debtor performs (ENGLAND: *Wright v. Simpson* (1802) 6 Ves Jun 714, 31 ER 1272); moreover, the security provider is entitled at any time to pay off the creditor and then to sue the debtor in the creditor's name (ENGLAND: *Swire v. Redman* (1875-76) 1 QBD 536; *Andrews and Millett* no. 9-029). Should it be agreed as a condition of the security, however, that the creditor uses the utmost efforts to obtain payment from the debtor, a breach of this condition discharges the security provider (ENGLAND: *London Guarantie Co. v. Fearnley* (1879-80) 5 App. Cas. 911; *Andrews and Millett* no. 9-036; SCOTLAND: Stair/*Clark* no. 964). The security provider is also discharged from liability if the creditor agrees with the debtor to give time to the latter (cf. national notes to IV.G.–2:102 no. 29). Also according to ITALIAN legal writers on CC art. 1955, a simple delay of the creditor in collecting the secured obligation is not sufficient to discharge the security provider, even if the creditor knew of the debtor's precarious patrimonial situation or if such delay caused a deterioration of the securities (*Fragali*, Della fideiussione 475 s.).

7. In GREECE, there are two relevant provisions: according to CC art. 862, a security provider shall be discharged if by reason of a fault committed by the creditor, the latter cannot be satisfied by the debtor; but according to CC art. 863, a security provider shall be discharged if the creditor has desisted from enforcing securities covering exclusively the creditor's claim, in respect of which the personal security was issued, as a result of which the security provider is damaged. The GREEK Supreme Court held in decision 1230/1997 (DEE 4, 280 ss.) that the creditor's delay of 21 months before initiating legal proceedings against the debtor is a strong indication for gross negligence on the part of the creditor (the security provider had waived the *beneficium* of CC art. 862; this waiver, however, is only valid in so far as the creditor's fault is slight considering that CC art. 332 renders null any prior agreement excluding or limiting liability arising from gross negligence). It is also necessary, however, to show that this delay actually reduced the effectiveness of collecting measures against the debtor (cf. *Doublis*, Chrimatodotiseon, 244, 245).

8. In BELGIUM, FRANCE, LUXEMBOURG, PORTUGAL and SPAIN the security provider is generally discharged as soon as the creditor's responsibility for the loss of priority rights is established (FRANCE: *Simler* nos. 823 ss.; PORTUGAL: *Almeida Costa* 785). Especially if, due to an intervening insolvency of the debtor, the delayed collection of claims leads to a loss of assets, the creditor may be liable (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2024 (since 2006: FRENCH CC art. 2301); PORTUGUESE CC art. 653; SPANISH CC art. 1833). However, in some decisions the security provider has been relieved without proof of the actual loss of priority rights, since the delayed collection of a secured claim by the creditor would

constitute a case of inexcusable negligence (FRANCE: cf. Cass.civ. 23 January 1980, D. 1980, I.R. 408; *Simler* no. 826). By contrast, in PORTUGAL an effective loss of the security provider's right must be established and the discharge operates only in so far as the security provider actually suffered losses (*Pires de Lima and Antunes Varela* 671).

9. There is no specific provision in GERMANY concerning this issue. The creditor has according to court practice in general no collateral duties vis-à-vis the security provider and is consequently not obliged to preserve the security provider's rights against the debtor, especially not in execution against the debtor (Erman/*Herrmann* § 765 no. 11; Staudinger/*Horn* § 776 no. 2; critical *Reinicke and Tiedtke*, Bürgschaftsrecht no. 245; see also no. 3 above). However, the principle of *bona fides* (CC § 242) applies and the security provider is therefore at least protected against an abuse of rights by the creditor, *i.e.* if the creditor violates the security provider's interests in a grossly negligent way or in bad faith (BGH 5 December 1962, WM 1963, 24, 25; Palandt/*Sprau* § 768 no. 2). This has been assumed when the creditor is responsible for the debtor's economic breakdown and by this prevents the security provider from having recourse against the debtor (BGH 23 February 1984, WM 1984, 586; BGH 7 February 1966, WM 1966, 317). Moreover, the creditor is obliged to act vis-à-vis the debtor as if the secured obligation was not secured in order to preserve the creditor's own interests, especially to reduce possible damage (BGH 30 March 1995, NJW 1995, 1886, 1888; BGH 15 July 1999, NJW 1999, 3195, 3197). If one of these exceptional duties is violated the security provider has a claim for damages against the creditor who consequently loses rights against the security provider (Erman/*Herrmann* § 765 no. 11).

IV. Release of co-providers of security

10. In BELGIAN, FRENCH, DUTCH, ENGLISH and SCOTTISH law the release of co-providers of security may result in the security provider being either fully or *pro tanto* discharged (BELGIUM: *Van Quickenborne* no. 590 at p. 311; FRANCE: *Simler* no. 854; NETHERLANDS: Asser/*Hartkamp* no. 597). The security provider will be fully discharged if the released security provider's liability was joint or joint and several (*i.e.* "solidary" in the terminology of IV.G.–1:105) with the liability of the remaining security provider in which case the continued existence of the co-security provider is regarded as a condition of the other security provider's liability (ENGLAND: *Smith v. Wood* [1929] 1 Ch 14; *Andrews and Millett* no. 9-041; Halsbury/*Salter* para. 1246, Vol 49, 5th ed, (2008); SCOTLAND: Mercantile Amendment Act (Scotland) 1856 s. 9). If there is no such condition of the security, the discharge will operate *pro tanto* only in so far as the remaining security providers´ right of contribution is affected by the release (ENGLAND: *Re Wolmershausen* (1890) 62 LT (N.S.) 541; *Ward v. National Bank of New Zealand Ltd.* (1882-83) 8 App. Cas. 755; *O´Donovan and Phillips* no. 8-26; SCOTLAND: *Morgan v. Smart* (1872) 10 M 610, 615). There is no discharge if there is no actual release of the co-security provider but *e.g.* merely a covenant not to sue or a giving of time to the co-security provider (ENGLAND: Halsbury/*Salter* para. 1247 Vol 49, 5th ed, (2008)); SCOTLAND: Stair/*Clark* no. 976). According to GERMAN CC § 776, if the creditor waives the right against a co-provider of security the other security provider is released in so far as compensation could have been obtained by virtue of the waived right as provided for in § 774. This applies even if the waived right was not created until after the assumption of the security. This leads in general to a proportional release according to § 774 para. 2, § 426 para. 1; the situation is similar under the FINNISH LDepGuar § 18 para. 1 (RP 189/1998 rd 53 s.)

11. According to FRENCH CC arts. 1285 para. 2, 1287 para. 3 read with 1288, a security provider is either fully or partly discharged (*Simler* nos. 746 and 854) if a co-provider of security is released. SPANISH CC art. 1850 provides for *pro tanto*-discharge in case of release of a co-provider of security. In AUSTRIA it is expressly provided that the release of one security provider does not affect the relationship towards the other providers of security (CC § 1363 sentence 3). This means that a security provider who has performed to the creditor may take recourse also against the security provider released by the creditor (Rummel/*Gamerith* § 1363 no. 5 ss.). By contrast, the prevailing opinion in GREECE does not apply CC art. 863 which effectuates a discharge of the security provider's obligation to the case of a co-provider of security because of the solidary liability of the co-providers of security resulting from CC arts. 854 and 860 (cf. *Doublis*, Chrimatodotiseon, 249 fn. 109). According to PORTUGUESE case law, the release of one co-provider of security has the effect of discharging the other providers of security proportionally to the released security provider's share of the total liability (CA Coimbra 28 February 1989, CJ XIV, I-69).

V. Loss and deterioration of proprietary security rights held by creditor

12. Under BELGIAN, LUXEMBOURGIAN, DUTCH, GREEK and SWEDISH law the position is in general as follows: The creditor may not act or neglect to act so as to worsen the position of the security provider, and if by the creditor's act or omission the benefit of a security is lost or diminished, the security provider will be discharged, either wholly or in part (BELGIUM: *Van Quickenborne* no. 590; GREECE: CC art. 863; A.P. (Plenum) 6/2000, EED 51, 285 ss.; LUXEMBOURG: *Ravarani*, Jurisprudence récente, 918; NETHERLANDS: Asser/*Hartkamp* no. 597; SWEDEN: *Walin*, Borgen 122 ss.). In ENGLAND and SCOTLAND, the security provider is discharged in full if the release of a security by the creditor constitutes a breach of a condition of the security (ENGLAND: *Carter v. White* [1884] 25 Ch. D 666; Halsbury para. 1244, Vol 49, 5th ed, (2008); SCOTLAND: *Drummond v. Rannie* (1836) 14 D 437). The same consequence applies where the release is agreed between creditor and principal debtor as a variation of the terms of the principal agreement (cf. *O´Donovan and Phillips* no. 8-47; see also national notes to IV.G.–2:102 no. 27). If the security provider, however, cannot show that the giving up of a proprietary security amounts to a breach of condition of the security by the creditor, the security provider is only *pro tanto* discharged by this release to the extent that the security provider's rights have been impaired (ENGLAND: Halsbury para. 1244, Vol 49, 5th ed, (2008)); SCOTLAND: Stair/*Clark* no. 977). Apart from the question of a release of securities, the creditor is also under an equitable duty to maintain securities for the benefit of the security provider; if the creditor violates this duty, the security provider's liability will be reduced to the extent of losses suffered as a consequence of the creditor's dealings (ENGLAND: *Andrews and Millett* no. 9-041; *O´Donovan and Phillips* no. 8-49; the situation is similar in SCOTLAND: Stair/*Clark* no. 977). The extent of this duty of the creditor, however, has not been exactly defined in the case law yet (ENGLAND: *Andrews and Millett* no. 9-043; *O´Donovan and Phillips* nos. 8-55 ss.). It has been held, however, that the creditor is not under an obligation to enforce securities even though a delayed enforcement of the security might lead to less money being realised from it (*China and South Sea Bank Ltd. v. Tan* [1990] 1 AC 536).

13. In FRANCE, if the priority or proprietary rights existing at the time of contracting (*Simler* no. 836) are lost due to the creditor's fault (Cass.ch.mixte 10 June 2005, JCP E 2005, II no. 1088, note *Legeais*; *Simler* no. 842), the security provider is released from liability (CC art. 2037 (since 2006: CC art. 2314)). The *Grimaldi* Commission´s proposal to limit the security provider's release to the amount of damage suffered (CC

new art. 2322), in conformity with court practice, sets out in fact a partial discharge; however, the proposal was not adopted by the legislation of 2006. According to court decisions, the security provider is only partially discharged if *e.g.* the value of the lost priority rights is less than the value of the secured obligation (Cass.civ. 9 May 1994, JCP G 1994, IV no. 1730; *Simler* no. 854). Since 1984 (Law no. 84-148 of 1 March 1984 on prevention of enterprises's insolvency) the provision on the security provider's release is mandatory (CC art. 2037 sentence 2 (since 2006: CC art. 2314 sentence 2)). According to the SPANISH CC art. 1852 the providers of security, even if they are solidary, are discharged from their obligation whenever an act of the creditor prevents them from being subrogated to the creditor's rights, mortgages, and privileges. Most important legal writers agree on considering as "acts of the creditor" any conduct imputable to the creditor (*Díez-Picazo* 460), including omissions (*Díez-Picazo* 460; *Guilarte Zapatero*, Comentarios 410). The security provider will be discharged even if having failed to claim anticipated discharge (*Guilarte Zapatero*, Comentarios 412). In any case, the conduct must have taken place before the security provider has performed (*Guilarte Zapatero*, Comentarios 410). The wording of ITALIAN CC art. 1955 is parallel to its SPANISH equivalent, but it does not cover any conduct or any inactivity of the creditor. The act of the creditor must be a culpable violation of a legal or contractual duty (Cass. 6 February 2004 no. 2301, Giust.civ. 2004, 1479) and must have as consequence the complete loss of a right of the security provider. A mere difficulty in exercising this right due to acts of the creditor is not sufficient (*Bozzi*, La fideiussione 267; Cass. 21 January 2000 no. 675, BBTC 2001 II 431). PORTUGUESE CC art. 653 refers explicitly to "positive and negative acts of the creditor" and although it only mentions "rights", it does so with a general meaning, including therefore mortgages and privileges (see *Antunes Varela and Pires de Lima* 671).

14. According to GERMAN CC § 776 if the creditor waives a right of preference attached to the claim or a proprietary security right (cf. *Reinicke and Tiedtke*, Bürgschaftsrecht no. 241 s.; Erman/*Herrmann* § 776 no. 2; partly critical *e.g.* Staudinger/*Horn* § 776 no. 8), the provider of dependent personal security is discharged in so far as the provider could have obtained satisfaction by virtue of the waived right as provided for in CC § 774. This applies even if the waived right was created after the assumption of the dependent personal security. Contrary to the legal systems mentioned in preceding no. 13, under GERMAN law it is mostly held that only wilful acts of the creditor are sanctioned, excluding mere negligence (Erman/*Herrmann* § 776 no. 4; MünchKomm/*Habersack* § 776 no. 8 with references; however, the author takes a less strict view; *contra*: Staudinger/*Horn* § 776 no. 12). Omissions are not sanctioned either (Erman/*Herrmann* § 776 no. 4; see also BGH 15 July 1999, NJW 1999, 3195, 3197: it is not sufficient if the value of another security diminishes and the creditor does nothing; *contra* Staudinger/*Horn* § 776 no. 12). Concerning the reference to § 774 see again national notes to IV.G.–1:106 no. 4: there must be a right of recourse (cf. Staudinger/*Horn* § 776 no. 15). Finally, the waived security right must have an economic value (Erman/*Herrmann* § 776 no. 6).

15. There are contradictory decisions in GREECE on whether the creditor's negligence in respect of proprietary security releases the security provider from liability: the application of CC arts. 862, 863 stipulating the security provider's discharge if due to the creditor's negligence the security provider's claim for reimbursement against the debtor has been rendered impossible, has been denied in a case where, due to the creditor's negligence in safeguarding the pledged merchandise, it was received by the debtor and sold to third parties, thus depriving the security provider of any possibility to be satisfied out of the pledged things (A.P. 1260/94, DEE 1, 307 ss. = EllDik 1996,

101 ss.). In an older Supreme Court decision, on the other hand, the creditor was held responsible for not timeously selling perishable merchandise, which was eventually destroyed (A.P. 807/72, ND 1973, 235 ss. annotated by *Kalogeras* 260 ss.). In a recent case the creditor negligently returned pledged goods to the debtor. The security provider had waived the benefit of CC art. 863 on release of securities, and the Supreme Court had to answer the question whether or not the loss of securities could be qualified in the context of CC art. 862 as gross negligence of the creditor, resulting in an inability to be satisfied by the security provider. The Supreme Court denied this since the security provider's waiver of discharge due to release of securities by the creditor was exactly intended to enable the latter to waive securities, without losing at the same time the security (A.P. (Plenum) 6/2000, EED 2000, 285 ss., with strong minority opinion of four members; also critical on this position *Chelidonis*, EpiskED 2001, 351 ss.).

16. Again, AUSTRIAN law offers a different solution. CC § 1360 final sentence provides that the creditor is "not allowed" to give up a pledge created by the debtor or a third person before or at the time of assumption of the dependent personal security. In conformity with the corresponding rule discussed above no. 5, the waiver of the security is effective but the creditor is responsible without fault for the ensuing damage to the provider of dependent personal security (Rummel/*Gamerith* § 1360 no. 2; Schwimann/*Mader and Faber* § 1360 nos. 2, 4). The provision is extended to other security rights, *e.g.* a reservation of title under a contract of sale between creditor and debtor (Rummel/*Gamerith* § 1360 no. 5).

17. A comprehensive duty of care of the creditor vis-à-vis the provider of dependent personal security in AUSTRIAN law is derived from CC § 1364 sentence 2 (*above* no. 5; OGH 26 May 1987, ÖBA 1987, 924; 14 April 1996, Ecolex 1996, 744). In the latter case the Supreme Court held a creditor liable for the delayed enforcement of a reservation of title in a bus sold to the debtor although such enforcement had been promised.

IV.G.–2:111: Debtor's relief for the security provider

(1) A security provider who has provided a security at the debtor's request or with the debtor's express or presumed consent may request relief by the debtor:

(a) if the debtor has not performed the secured obligation when performance became due;

(b) if the debtor is unable to pay or has suffered a substantial diminution of assets; or

(c) if the creditor has brought an action on the security against the security provider.

(2) Relief may be granted by furnishing adequate security.

COMMENTS

A. The principle

Under certain conditions, the provider of a dependent security may demand relief from the debtor even before the security provider has in fact performed to the creditor. Such exceptional "preceding" relief presupposes, however, that the security provider had assumed the security upon the demand of the debtor or with the debtor's actual or presumed consent (*e.g.*, by virtue of benevolent intervention) – this, of course, will almost always be the case, except in the rare situation of assuming a personal security as a gift to the debtor. In this latter case, any claim of the security provider for relief from the debtor is excluded.

In many cases, the provider of a dependent security may not be prepared to assume a security, unless a potential claim for reimbursement against the debtor is secured from the very beginning, *e.g.* by a personal counter security furnished by a third person or by a proprietary security, furnished either by the debtor or a third person.

B. Conditions

The conditions for requesting relief from the debtor are exhaustively enumerated in paragraphs (1)(a), (b) and (c). The condition in (a) refers to the debtor's non-performance of the secured obligation upon maturity, since this may easily trigger the creditor's demand upon the security provider. The condition in (b) refers to the debtor's financial position. It covers the debtor's inability to pay (even if no insolvency proceeding has been opened) because this virtually precludes the creditor's recovery from the debtor; and it covers the situation where the debtor's assets have been substantially diminished – a fact that threatens the creditor's chances of successful recovery from the debtor and therefore increases the security provider's risk of being held liable by the creditor on the one hand and of having small chances of recuperating from the debtor, on the other hand. The substantial diminution which is required must be measured by the amount of the creditor's outstanding claims and the chances of realising a claim for reimbursement from the debtor's assets. The condition in (c) refers – independently of the conditions in (a) and (b) – to an action for performance brought by the creditor against the dependent security giver. This clearly justifies relief by the debtor.

The chances of obtaining relief from the debtor personally will usually be small. But the debtor may be able to raise money or at least personal or proprietary security from a third party, *e.g.* a relative or a related company.

C. Form of relief

Since in all the cases mentioned in paragraph (1), the provider of a dependent security has not yet performed to the creditor, the security provider cannot demand payment. Primarily the security provider is entitled to demand security for future performance to the creditor (cf. paragraph (2)). Such security may be granted by the debtor or by any third person on behalf of the debtor; the latter alternative will practically be the rule in the situations covered by paragraph (1)(a) because the debtor in these cases usually will not be able to furnish security.

If an insolvency proceeding has been opened over the debtor, a claim for relief will in fact be without chances.

D. Consumer as security provider

The Article is directly applicable to consumer providers of dependent security. Since the Article is favourable for consumer security providers, the rule also applies to consumers who have assumed an independent personal security (cf. IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (c)) and to consumer security providers in a co-debtorship for security purposes (cf. IV.G.–4:102 (Applicable rules) paragraph (1)).

According to According to IV.G.–4:102 (Applicable rules) paragraph (2), the rules of the present Article are mandatory in favour of the consumer. And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" means the debtor for whom security is being provided.

NOTES

I. Security provider's anticipated recourse

1. In most European countries the provider of dependent security may have before performance a right of anticipated recourse against the debtor (AUSTRIAN CC § 1364; BELGIAN, FRENCH and LUXEMBOURGIAN CC arts. 2032 and 2039 (since 2006: FRENCH CC arts. 2309 and 2316); ENGLAND: *Andrews and Millett* nos. 10-024 ss.; FINNISH LDepGuar § 36 para. 2; RP 189/1998 rd 75 s.; GERMAN CC § 775; GREEK CC art. 861; ITALIAN CC art. 1953; PORTUGUESE CC art. 648; SCOTLAND: Stair/*Clark* nos. 936-938; SPANISH CC art. 1843). However, such security provider's recourse is in FRANCE very rarely practised (*Simler* no. 611). In SPAIN the efficacy of such a right in practice is questioned by the authors (*Guilarte Zapatero*, Comentarios 297) and its scope has been narrowly construed by the courts (TS 21 October 2003, RAJ 2003/7517, TS 13 July 2007, RAJ 2007/4864).
2. In the NETHERLANDS, the security provider's anticipative recourse has been abrogated by the New Civil Code in 1992.

II. Reasons

3. In BELGIUM, FRANCE and SPAIN it is thought that the provider of dependent security has to be protected against additional risks of the debtor's insolvency, since the assumption of a dependent security is in principle considered as an act of friendship (BELGIUM: *Van Quickenborne* no. 504; FRANCE: *Simler* no. 610; SPAIN: *Guilarte Zapatero*, Comentarios 295 s.). In ENGLISH law the right of the provider of dependent security to anticipated recourse is founded in equity and based

on the equitable principle that an anticipated "injury" is to be prevented before it is suffered, "it being unreasonable that a man should always have such a cloud hang over him" (*Ranelaugh(Earl of) v. Hayes* (1863) 1 Vern 189 *per* Lord Keeper *North*, 190). In SCOTTISH law the right to anticipated relief is based on an implied mandate between debtor and security provider, and the latter is entitled to relief once "liability is threatened to be imposed" (*Cuningham v. Montgomerie* (1879) 6 R 1333 *per* Lord President *Inglis*). GERMAN CC § 775 is intended to protect the provider of dependent security against special risks that may occur after assumption of the security and that may affect the claim for recourse against the debtor (*Reinicke and Tiedtke*, Bürgschaftsrecht no. 426). There is special need for this rule in GERMAN law since the rules on mandate that are generally applicable to the relationship between provider of dependent security and debtor are not suitable for this special situation (cf. *Reinicke and Tiedtke*, Bürgschaftsrecht no. 425; Staudinger/*Horn* § 775 no. 1). Also in ITALIAN law the anticipated security provider's recourse is considered to be an instrument of protection, mainly based on the principle *rebus sic stantibus*, which allows the security provider to be secured from the debtor's failure to perform or to avoid payment (*Giusti* 247).

III. Conditions

(a) Subjective: dependent security assumed with debtor's consent

4. In AUSTRIA, FRANCE, BELGIUM and PORTUGAL the debtor must have agreed to the granting of a dependent security. If the dependent security is assumed without the debtor's consent or without information of the debtor, the security provider has no anticipated recourse against the former (AUSTRIAN CC § 1364 sentence 1; BELGIUM: *Van Quickenborne* no. 510; FRANCE: *Simler* no. 615; PORTUGAL: *Almeida Costa* 782); in SPAIN, the same approach is taken in *Carrasco*, Tratado, p. 277; FRANCE: *Simler* no. 615; PORTUGAL: *Almeida Costa* 782). A presumed intent of the debtor by virtue of benevolent intervention is not sufficient in FRANCE (*Simler* no. 615). Also in ENGLISH law anticipated relief may only be granted if the provider of dependent security had assumed the security on the express or implied request of the debtor (*Andrews and Millett* no. 10-025); the same seems to apply in SCOTTISH law because no mandate can be implied if the security provider has not acted on the debtor's – at least: implied – request. The situation is similar in GERMANY since according to the wording of § 775 the provider of dependent security has a claim for release only if having assumed the security by reason of a mandate of the debtor or if having the rights of a mandatory against the debtor under the provisions on benevolent intervention; this means that there must be an express or at least implicit mandate of the debtor (CC §§ 670, 683). A mandate is held to exist if a shareholder guarantees the company's obligations; consequently, after leaving the company the shareholder may demand release from the security obligation (Palandt/*Sprau* § 775 no. 1; Staudinger/*Horn* § 775 no. 3). However, if the provider of dependent security cannot claim recourse against the debtor for a legal reason, *e.g.* due to Insolvency Act § 254 para. 2 sentence 2, there is no claim for release (*Reinicke and Tiedtke*, Bürgschaftsrecht no. 426 s.).

(b) Objective conditions - Debtor's default or inability to pay, substantial decrease of debtor's property or proceedings against the provider of dependent security

5. In most European countries, at least two of the above-mentioned cases are dealt with: the debtor's inability to pay and proceedings of the creditor against the provider of dependent security:

(c) Debtor's default

6. According to GERMAN CC § 775 para. 1 no. 3 and GREEK CC art. 861 no. 3 the provider of dependent security can demand from the debtor release from the security if the debtor is in default in performing the obligation. It is irrelevant that the creditor extends maturity, unless the security provider has agreed (GERMANY: *Reinicke and Tiedtke*, Bürgschaftsrecht no. 438).

(d) Debtor's inability to pay

7. In FRANCE, BELGIUM and LUXEMBOURG reference is made to the professional or civil insolvency of the debtor (FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 2032 no. 2 (since 2006: FRENCH CC art. 2309 no. 2)), in ITALY and SPAIN to the debtor's bankruptcy or insolvency (ITALIAN CC art. 1953 para. 1 no. 2 speaks of insolvency, meaning any inability to pay: *Giusti* 245 fn. 217; SPANISH CC art. 1843 para. 1 no. 2), in PORTUGAL more generally to the increased risk of the provider of dependent security (CC art. 648 lit. b)). As a form of protection of anticipated recourse in FRANCE the *Grimaldi* Commission had proposed that the provider of dependent security should be entitled, before any performance, to declare a future or present claim at the opening of an insolvency proceeding of the debtor (CC new art. 2319 para. 3); but this proposal was not adopted by the legislator in 2006. In SCOTTISH law the security provider can take precautionary measures if the debtor is *vergens ad inopiam* (declining towards poverty; *Kinloch v. M´Intosh* (1822) 1 S 457).

(e) Substantial decrease of debtor's property

8. According to GERMAN CC § 775 para. 1 no. 1 and GREEK CC art. 861 no. 1, the provider of dependent security is protected if the financial position of the debtor has worsened. In addition, the claim for recourse must be endangered which is not the case if this claim is secured *e.g.* by a counter-security (*Reinicke and Tiedtke,* Bürgschaftsrecht no. 435). The same is true in AUSTRIA if the debtor's proprietary situation has so seriously worsened that there is "founded fear of the debtor being unable to pay" (CC § 1365).

(f) Proceedings against the provider of dependent security

9. According to BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2032 no. 1 (since 2006: FRENCH CC art. 2309 no. 1), ITALIAN CC art. 1953 para. 1 no. 1 and SPANISH CC art. 1843 para. 1 no. 1, the provider of dependent security has the right to exercise the right to anticipated security provider's recourse if proceedings are engaged by the creditor against the security provider. By contrast, GERMAN CC § 775 para. 1 no. 4, GREEK CC art. 861 no. 4 and PORTUGUESE CC art. 648 lit. a require that the creditor has already obtained an enforceable judgment for satisfaction against the security provider.

(g) Other cases - Express extension of maturity of the secured debt

10. Generally, cf. national notes to IV.G.–2:102. In FRANCE, BELGIUM and LUXEMBOURG, the provider of dependent security is entitled to exercise recourse in case of an express extension of the maturity of the secured debt (FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 2039 (since 2006: FRENCH CC art. 2316)). The parties can derogate from this provision (BELGIUM: *Van Quickenborne* no. 510; FRANCE: *Simler* no. 469).

(h) Implied extension

11. In FRANCE, BELGIUM, LUXEMBOURG, ITALY, PORTUGAL and SPAIN the rule on anticipated recourse applies if the debtor had promised to release the provider of dependent security within a certain period of time and this time limit has expired (FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 2032 no. 3 (since 2006: FRENCH CC art. 2309 no. 3); ITALIAN CC art. 1953 para. 1 no. 3; PORTUGUESE CC art. 648 lit. d); SPANISH CC art. 1843 para. 1 no. 3) or if the secured debt falls due because the maturity date has been reached (FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 2032 no. 4 (since 2006: FRENCH CC art. 2309 no. 4); ITALIAN CC art. 1953 para. 1 no. 4; SPANISH CC art. 1843 para. 1 no. 4). In AUSTRIAN, ENGLISH and SCOTTISH law the right of the provider of dependent security to anticipated relief arises once the secured debt is due and the security provider's liability has accrued in the sense that performance of the security obligation could be enforced by the creditor (AUSTRIAN CC § 1364 sentence 1). In ENGLAND the provider of dependent security can apply for *quia timet* relief (*Tate v. Crewdson* [1938] Ch 689; *Morrison v. Barking Chemicals Co. Ltd.* [1919] 2 Ch 325), and in SCOTLAND has an *actio mandati* (*Cuningham v. Montgomerie* (1879) 6 R 1333; *Scott v. Grahame* (1830) 8 S 749 (CA)). In case of demand securities it is now accepted that the security provider's right to anticipated relief is not dependent on a demand having been made by the creditor (ENGLAND: *Thomas v. Nottingham Inc. Football Club Ltd.* [1972] Ch 596; SCOTLAND: Stair/*Clark* no. 936).

(i) Debt without time limit

12. If the principal debt is agreed without time limit, the right to recourse may be exercised under FRENCH, BELGIAN, LUXEMBOURGIAN law after expiration of ten years (CC art. 2032 no. 5 (since 2006: FRENCH CC art. 2309 no. 5)). A similar provision exists in ITALIAN and PORTUGUESE law where, however, only a period of five years must have passed (ITALIAN CC art. 1953 para. 1 no. 5; PORTUGUESE CC art. 646 lit. e)). In PORTUGAL this rule applies even to a debt agreed with time limit, if there is a legally imposed extension of time (CC art. 646 lit. e *in fine*). The same is true under SPANISH CC art. 1843 para. 1 no. 4. However, the rule does not apply if according to the nature of the secured obligation it cannot be extinguished except after this period.

(j) Change of domicile or residence of debtor

13. In PORTUGAL, if after the conclusion of the dependent security the debtor cannot be sued or executed within the national territory and its adjacent islands (CC art. 648 lit. c)), the rule on anticipated recourse applies. A similar rule obtains in AUSTRIA (CC § 1365). In GERMANY and GREECE if the taking of legal action against the debtor has become difficult to a substantial degree by reason of a change of domicile or residence that occurred after the issue of the dependent security, the security provider may demand security from the debtor even before the debt has become due (GERMAN CC § 775 para. 1 no. 2, para. 2; GREEK CC art. 861 no. 2).

IV. Consequences

(a) Damages

14. In FRANCE, BELGIUM and LUXEMBOURG, the provider of dependent security may claim from the debtor compensation for damages (CC art. 2032; (since 2006: FRENCH CC art. 2309)) or may in case of the extension of time force the debtor to pay (CC art. 2039 (since 2006: FRENCH CC art. 2316)). In practice however, according to the FRENCH majority opinion (*Marty/Raynaud/Jestaz* no. 60; Aubry/Rau/*Ponsard* no. 236) the debtor's liability cannot be enforced since there is no present damage, whereas a minority of FRENCH writers and court decisions maintain that a present damage may well be caused by an undue extension of the security provider's obligation (CA Paris 2 March 1971, GazPal 1971, 2, 824). FRENCH majority opinion considers that the security provider cannot obtain any payment or any reimbursement as compensation for many other reasons: on one hand, there cannot be reimbursement without any payment by the security provider; on the other hand, the payment is mostly impossible due to the debtor's inability to pay. According to BELGIAN opinion, CC art. 2032 tends to avoid damage that would arise from the impossibility of the guarantor-solvens to obtain any recourse from the debtor (*Van Quickenborne* nos. 504-505).

(b) Release or security

15. In ITALY, PORTUGAL and SPAIN the provider of dependent security may claim release or require security for the security provider's own claims against the debtor (ITALIAN CC art. 1953 para. 1; PORTUGUESE CC art. 648 para. 1; SPANISH CC art. 1843 para. 2). In SPAIN it is asserted that the non-release entitles the provider of dependent security to claim damages but this is also considered inefficient in practice since the damage is difficult to specify and prove (*Guilarte Zapatero*, Comentarios 298, 299). By virtue of the *quia timet* action under ENGLISH law the security provider can either apply for a declaration of entitlement to be exonerated and an order that the debtor should pay whatever is due to the creditor (*Ascherson v. Tredegar Dry Dock & Wharf Co. Ltd.* [1909] 2 Ch 401), or for an order that the debtor is to set aside a particular fund to pay the creditor (*Andrews and Millett* no. 10-025; *O´Donovan and Phillips* nos. 11-147 ss.). In the case of a corporate debtor established under the Companies Act 1985, the provider of dependent security can further petition for winding-up of the debtor company by virtue of the Insolvency Act 1986 s. 124 para. 1. The same principles apply in SCOTLAND (Stair/*Clark* nos. 936 s.). Additionally, in SCOTLAND the security provider is entitled to apply for a court order of precautionary execution against the debtor's estate (*Kinloch v. M´Intosh* (1822) 1 S 457).

16. In GERMANY, if the secured obligation is due, the provider of dependent security may demand release from the debtor (cf. Staudinger/*Horn* § 775 no. 4). Contrary to earlier court practice, the GERMAN Supreme Court no longer allows the provider of dependent security to convert the claim for release against the debtor into a claim for reimbursement, not even if the debtor's inability to pay and the security provider's future performance to the creditor are certain (BGH 14 January 1999, BGHZ 140, 270, 272 ss. overruling RG 12 January 1934, RGZ 143, 192, 194). If the debtor, even after being condemned to release the security provider, does nothing, the security provider can pay the creditor and on the basis of the judgment demand these costs from the debtor by means of execution according to CCP § 887 (*Reinicke and Tiedtke*, Bürgschaftsrecht no. 442; Staudinger/*Horn* § 775 no. 5). If the secured obligation is

not yet due, the debtor is entitled to give security to the security provider instead of a release (CC § 775 para. 2).

(c) Security only

17. In AUSTRIA, the only remedy available to the provider of dependent security is a demand for security from the debtor (CC §§ 1364 sentence 1, 1365). Security may be furnished primarily by creating a proprietary security right for the security provider, otherwise by a third person's personal security (§§ 1373 f). Also pursuant to the majority of BELGIAN, FRENCH, PORTUGUESE and SPANISH writers, the furnishing of adequate security (proprietary or personal) is the only remedy that is available and reveals the true nature of the anticipated recourse as a measure of preservation of rights (BELGIUM: *Van Quickenborne* no. 504; FRANCE: cf. *Simler* no. 613 ss.; PORTUGAL: *Pires de Lima and Antunes Varela* 664; SPAIN: *Guilarte Zapatero*, Comentarios 299). As a result of this opinion, according to the FRENCH *Grimaldi* Commission´s proposal (CC new art. 2319 para. 2) the provider of dependent security may require the furnishing of adequate security; however, the legislator of 2006 did not adopt this proposal. According to GREEK literature, the request for security must be asserted by the provider of dependent security by a legal action or a request to the competent court (Georgiades-Stathopoulos AK/*Vrellis* art. 861 no. 8). According to a minority opinion in GREECE, if the security provider is in a position to know about the worsening of the debtor's financial situation and nevertheless does not exercise this right, then the security provider should share the damage with the creditor, if the latter has been negligent in collecting the debt from the debtor (cf. *Doublis*, Metavivasi pistosis 55 ss., 62).

IV.G.–2:112: Notification and request by security provider before performance

(1) Before performance to the creditor, the security provider is required to notify the debtor and request information about the outstanding amount of the secured obligation and any defences or counterclaims against it.

(2) If the security provider fails to comply with the requirements in paragraph (1) or neglects to raise defences communicated by the debtor or known to the security provider from other sources, the security provider's rights to recover from the debtor under IV.G.–2:113 (Security provider's rights after performance) are reduced by the extent necessary to prevent loss to the debtor as a result of such failure or neglect.

(3) The security provider's rights against the creditor remain unaffected.

COMMENTS

A. Basic idea

This Article introduces requirements of notification and inquiry before the provider of a dependent security performs to the creditor. The requirements are introduced in order to protect the rights of the debtor.

The requirements of notification and inquiry imposed by paragraph (1) must be interpreted in the light of the rights pertaining to the debtor that according to earlier Articles may be invoked by the provider of a dependent security on the strength of the principle of dependency.

B. Sanctions

If the provider of a dependent security performs to the creditor without having informed the debtor and made relevant inquiries this is not only contrary to the security provider's own interests, but may damage the debtor's rights. The same is true if the security provider neglects to raise debtor's defences which are available to the security provider. In all these cases, the security provider's rights to reimbursement or subrogation against the debtor will be reduced correspondingly.

If the debtor fails to reply to the security provider or gives incomplete or incorrect information, the sanction indicated by paragraph (2) is not justified. Alternatively, it may be justified only in part if the debtor had given some wrong information, but other information, although correct, had been overlooked or disregarded by the security provider.

The sanction imposed by paragraph (2) on the security provider is an appropriate reduction of the rights to recover from the debtor.

C. Preservation of rights as against creditor

Any mistakes which may be committed by the provider of the dependent security vis-à-vis the debtor do not affect the security provider's rights as against the creditor (paragraph (3)).

D. Consumer as security provider

This Article is directly applicable to consumer providers of a dependent personal security, which are not treated differently from non-consumers in this respect; the only difference is that the provision is mandatory in favour of the consumer security provider according to IV.G.–4:102 (Applicable rules) paragraph (2).

Although the present Article does not create rights for but introduces requirements to be observed by a security provider, nevertheless these rules also apply to all consumer security providers. They apply directly to consumers who provide a dependent personal security. By virtue of IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (c) they also apply to consumer providers of an independent security and by virtue of IV.G.–4:102 (Applicable rules) (1) to consumer providers of a co-debtorship for security purposes. The requirements laid down in the Article are necessary ingredients of a well-balanced system of personal security where the security provider must respect the legitimate interests of the principal debtor. The information by the security provider may be beneficial to the debtor since in appropriate cases it may prevent or reduce a performance by the security provider if it turns out that the debtor has already made partial or even full performance to the creditor or has defences of which the security provider also may take advantage.

NOTES

I. Legal basis

1. Although there is no general provision or rule in any member state that requires the provider of dependent security to give information to the debtor, all legal systems seem to agree that the security provider should not be reimbursed if a failure to inform the debtor caused harm. For this reason there are in some countries specific statutory provisions on the security provider's duty to inform the debtor about the creditor's request or the security provider's intention to perform, in order to prevent unjustified payment (AUSTRIAN CC § 1361; BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2031 para. 2 (since 2006: FRENCH CC art. 2308 para. 2); GREEK CC art. 859; ITALIAN CC art. 1952 para. 2; PORTUGUESE CC arts. 645 para. 1 and 647; SPANISH CC art. 1840). Furthermore in some countries specific rules exist sanctioning the security provider for not notifying the debtor of payment to the creditor if this results in the debtor also paying the creditor (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2031 para. 1 (since 2006: FRENCH CC art. 2308 para. 1); DUTCH CC art. 7:867; ITALIAN CC art. 1952 para. 1; PORTUGUESE CC art. 645 para. 1; SPANISH CC art. 1842).
2. In GERMANY, however, the legislator expressly rejected such specific provisions (Motive, in: *Mugdan* II 377) so that – in the absence of any contractual stipulation – the solution of these cases must be based upon the principle of *bona fides* (CC § 242) and the underlying relationship (cf. Soergel/*Mühl* § 774 no. 8; Staudinger/*Horn* § 765 no. 106, § 768 no. 41; cf. also already Motive, in: *Mugdan* II 377 s.; similarly BGH 19 September 1985, BGHZ 95, 375, 388).
3. Two countries expressly sanction the provider of dependent security who does not raise against the creditor defences of the debtor of which the security provider knew or ought to have known. In this case GREEK CC art. 859 denies a claim of recourse against the debtor, while DUTCH CC art. 7:868 allows the debtor to raise these defences against the security provider. In all other countries a sanction for this neglect

of the debtor's interests must be derived from the general rules concerning the relationship between security provider and debtor.

II. Duty of the dependent security provider to notify the debtor

(a) Requirements

Security provider's duty of information

4. In many countries, the provider of dependent security is held responsible if the provider had paid the creditor (GERMANY: cf. CC § 670 and MünchKomm/*Habersack* § 774 no. 19) without having notified the debtor and if there were defences the debtor could have raised at the time of the dependent security provider's payment (AUSTRIAN CC § 1361; OGH 19 October 1976, SZ 49 no. 121 at p. 570, 571; GREEK CC art. 859 and Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 2; ITALIAN CC art. 1952 para. 2, NETHERLANDS: CC arts. 7:867, 7:868; *Blomkwist* no. 37; PORTUGUESE CC art. 647 and SPANISH CC art. 1840). BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2031 para. 2 further limits its application to those cases where the provider of dependent security spontaneously paid without being called to pay by the creditor, *i.e.* if the provider of dependent security was not threatened by immediate execution against assets (BELGIUM: *Van Quickenborne* no. 498; FRANCE: *Simler* no. 606). The security provider is not held responsible for not notifying the debtor of an intention to perform or of the creditor's request for performance, but for not raising the debtor's defences (BELGIUM: *Van Quickenborne* no. 497; FRANCE: *Simler* no. 606). In BELGIUM and FRANCE, the provider of dependent security has to invoke all defences available to the debtor (BELGIUM: *Van Quickenborne* no. 499; FRANCE: cf. Cass.com. 14 January 1963, Banque 1963, 199). Hence, in these countries the provider of dependent security bears indirectly the burden of notifying the debtor. In fact, such notification is the only way for the provider of dependent security to obtain information about possible defences of the debtor against the creditor's claim for performance which the security provider is entitled to raise under the principle of accessority.

5. According to GREEK CC art. 859, the provider of dependent security who has paid the creditor is held responsible if the provider had omitted to invoke well-founded defences of the debtor of which the provider knew or ought to have known. The debtor can defend by proving that the provider of dependent security was or should have been aware of the debtor's defences (GREECE: ErmAK/*Zepos* art. 859 no. 5), whereas the security provider can prove that the lack of knowledge was justifiable (GREECE: Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 6). The security provider's duty to obtain information before performing towards the creditor derives from CC art. 859.

6. In GERMANY the provider of dependent security is obliged to respect the debtor's interests as the latter is the principal within the usually existing relationship of mandate between debtor and security provider (BGH 19 September 1985, BGHZ 95, 375, 388 with further references). Therefore, the provider of dependent security is obliged to inform the debtor immediately about the creditor's request for payment and to ask the debtor whether defences exist (Staudinger/*Horn* § 765 no. 106; Schimansky/Bunte/Lwowski/*Schmitz* § 91 no. 95; see also BGH 19 September 1985, BGHZ 95, 375, 389 and Palandt/*Sprau* no. 5 preceding § 765). Furthermore, the provider of dependent security has to examine on the basis of *bona fides* whether there is an obvious abuse of rights (Staudinger/*Horn* § 765 no. 107 with further references). However, the duty of the provider of dependent security to inform the debtor does not mean that the security provider has to ask for the debtor's approval (Staudinger/*Horn* § 765 no. 108; Palandt/*Sprau* no. 5 preceding § 765).

7. There is no such duty of information under ENGLISH law.

(b) Notification by the security provider

8. It has been held that there is an implied notification of the debtor if the provider of dependent security serves upon the debtor an extra-judicial document asking for information in due time of defences as against the creditor (GREECE: Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 6) or a document causing a third party notice in judicial proceedings brought by the creditor (AUSTRIA: OGH 19 October 1976, SZ 49 no. 121 at p. 571).

(c) Sanctions

9. In GREECE the failure of the provider of dependent security to fulfil the aforementioned duties before performance – the failure to invoke the debtor's defences, or indirectly also the failure to notify the debtor – deprives the security provider of the right of recourse (CC art. 859). The situation appears to be similar in SCOTLAND (*Maxwell v. Earl of Nithsdale* (1632) Mor 2115; Stair/*Eden* no. 935). Some ROMANIC countries provide the same sanction if the security provider after payment to the creditor does not inform the debtor and the latter also makes payment to the creditor (cf. BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2031 para. 1 (since 2006: FRENCH CC art. 2308 para. 1); DUTCH CC art. 7:867; ITALIAN CC art. 1952 para. 1; PORTUGUESE CC art. 645 para. 1; SPANISH CC art. 1842). Similarly in GERMANY the provider of dependent security who paid the creditor despite the existence of defences against the secured obligation may only claim recourse according to CC § 670 if the provider could reasonably assume according to the circumstances that there was an obligation to pay (BGH 19 September 1985, BGHZ 95, 375, 388). The latter is not the case if the provider of dependent security paid without informing the debtor. In BELGIUM, FRANCE and LUXEMBOURG the same harsh sanction applies if the security provider, without demand by the creditor and without notifying the debtor, makes payment to the creditor while the debtor had defences against such performance (CC art. 2031 para. 2 (since 2006: FRENCH art. 2308 para. 2)).

10. In other cases where the provider of dependent security had not raised defences against the creditor which pertained to the debtor, the security provider retains a right of recourse against the debtor, but the latter may raise those exceptions and defences which were available against the creditor at the time payment was made (cf. AUSTRIAN CC § 1361; DUTCH CC art. 7:868; ITALIAN CC art. 1952 para. 2 and SPANISH CC art. 1840). Whether a provider of dependent security in ENGLAND is entitled to a full recourse against the debtor after having paid the creditor without raising the debtor's defences vis-à-vis the creditor depends upon the circumstances of the case: if the security provider had assumed the security without any request of the debtor, the security provider can only have a restitutionary claim to a reimbursement, which requires that the debtor has received a benefit, *i.e.* the discharge of debts that could have been enforced by the creditor against the debtor (cf. *O´Donovan and Phillips* no. 12-44). If, however, the security was provided at the request of the debtor, it is said to depend upon the true construction of the agreement between security provider and debtor whether the former is entitled to reimbursement even though the secured obligation was not enforceable against the debtor: if, on the one hand, the security provider is bound to pay if the principal debtor does not, then the security provider has a right to reimbursement even though the secured debt was not enforceable; if, on the other hand, the security provider should pay only such amounts that the debtor was legally obliged to pay, then there is no right to reimbursement in

such situations (cf. *O´Donovan and Phillips* no. 12-39; there is a rebuttable presumption for the former meaning, cf. *Argo Caribbean Group Ltd. v. Lewis* [1976] 2 Lloyd´s Rep 289). It seems that even in this situation the security provider's right to reimbursement by the debtor should not be affected by the fact that the security provider failed to take advantage of a set-off open to the principal debtor since the latter could still assert a claim against the debtor at a later stage (cf. *Andrews and Millett* no. 11-007 at p. 400).

(d) Exclusion: Failure of debtor to inform the provider of dependent security

11. If the debtor, although notified, keeps silent so that the provider of the dependent security cannot or does not raise exceptions of the debtor, then the security provider has done everything which could be expected. In this case, the debtor is precluded from relying – vis-à-vis the security provider – on defences against the creditor's claim (AUSTRIA: OGH 19 October 1976, SZ 49 no. 121 at p. 570, 571; GREECE: Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 4; *Kaukas* 471; PORTUGAL: CC art. 647). Similarly in GERMANY the security provider who has not been informed by the debtor about the extinction of the secured obligation and who has therefore paid the creditor in good faith has a right of recourse against assignment of the claim for unjustified enrichment vis-à-vis the creditor (MünchKomm/*Habersack* § 774 no. 19; *Graf Lambsdorff and Skora* no. 296; cf. Erman/*Herrmann* § 774 no. 12). Not only is the provider of dependent security generally obliged to inform the debtor but also the latter is inversely obliged on the basis of *bona fides* to communicate all defences to the provider of dependent security as mandatory, even without being asked by the latter. The debtor may further be obliged to provide information about the debtor's financial situation upon the security provider's request (Staudinger/*Horn* § 765 no. 109 with further references). Also in GREECE a duty of the debtor to inform the provider of dependent security about defences may be derived from the principle of good faith, especially if the liability of the provider of dependent security liability is solidary (*Georgiades* § 3 no. 155).

III. Security provider's rights against creditor

12. The provider of dependent security remains entitled to reclaim the payment from the creditor (so expressly *e.g.* BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2031 para. 2 (since 2006: FRENCH CC art. 2308 para. 2) *in fine, action en répétition de l´indû*; DUTCH CC art. 7:867; ITALIAN CC art. 1952 para. 3; PORTUGUESE CC art. 645 para. 2; SPANISH CC art. 1842 *in fine*).

IV. General duty of information

13. Besides the specific rules holding the security provider responsible for not notifying the debtor in the above circumstances there seem to be no general statutory provisions creating a wider duty of information for the security provider. In GERMANY, however, a more general duty of information may be derived from the relationship between debtor and security provider (cf. Soergel/*Mühl* § 774 no. 8 and the general remarks in BGH 19 September 1985, BGHZ 95, 375, 388).

V. Duty of the provider of dependent security to invoke defences

14. The provider of dependent security may be obliged not only to inform the debtor but also to raise all defences of the debtor. According to GREEK CC art. 859 the provider of dependent security who has paid the creditor is deprived of the right to be reimbursed if the provider had omitted to invoke well-founded defences of the debtor of which the provider knew or ought to have known. In order for a defence to be

qualified as well-founded, on the one hand it must be of decisive importance in regard to the validity of the debt, and on the other hand it must be a defence which the provider of dependent security is entitled to invoke as against the creditor, *i.e.* the defence may not be invokable only by the debtor (GREECE: Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 3). Furthermore, the defence must relate to the secured debt, so that the provider of dependent security is not liable for failing to raise the provider's own personal defences as against the creditor (GREECE: ErmAK/*Zepos* art. 859 no. 6). Hence, in proceedings of the provider of dependent security against the debtor, the latter must assert and prove that the security provider was or should have been aware of the debtor's defences (GREECE: ErmAK/*Zepos* art. 859 no. 5), whereas the provider of dependent security can show that the lack of knowledge was justifiable (GREECE: Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 6). The same rules operate under ITALIAN law on the basis of a general duty of the security provider to act with diligence (*Fragali*, Della fideiussione 380 ss.).

15. Also in GERMANY the provider of dependent security who refrains from invoking a defence against the creditor's demand and pays the creditor loses the right to recourse against the debtor in so far as the defence could have been opposed to the creditor's demand, since the provider of dependent security can not assume, in the context of the underlying mandate relationship, the costs for the payment as necessary in the meaning of CC § 670 (Motive, in: *Mugdan* II 377s.; MünchKomm/*Habersack* § 774 no. 19; unclear Staudinger/*Horn* § 765 no. 110 and § 768 no. 41 who seems to want to grant a claim for damages as well). This is especially true in cases of obvious abuse of rights (Staudinger/*Horn* § 765 no. 107). The defences must be available and provable (Palandt/*Sprau* no. 5 preceding § 765; Staudinger/*Horn* § 765 no. 107; Schimansky/Bunte/Lwowski/*Schmitz* § 91 no. 95; cf. also BGH 19 September 1985, BGHZ 95, 375, 388 s.) and the provider of dependent security must or ought to know them (Staudinger/*Horn* § 774 no. 34). If the provider of dependent security performed although the secured obligation did not exist, the security provider is entitled to demand repayment from the creditor on the basis of unjustified enrichment (MünchKomm/*Habersack* § 774 no. 6; Staudinger/*Horn* § 768 no. 40 with further references).

VI. Waiver of rights

16. An agreement between the provider of dependent security and the debtor that the former will retain nevertheless and in any case the right of recourse, even on paying the creditor upon simple demand, without verifying the validity of the debt, is void in so far as the provider of dependent security did not invoke these defences on purpose or due to gross negligence (GREECE: cf. CC art. 332 para. 1; Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 1). On the other hand, if the debtor waives the right to damages, this waiver is valid if the provider of dependent security upon instruction by the debtor has also waived as against the creditor the right to invoke defences, especially in cases of securities on first demand (GREECE: *Georgiades* § 3 no. 156).

17. In GERMANY the former standard terms of the banks provided that the bank as provider of dependent security should be entitled to pay the creditor "on the unilateral demand of the creditor". The bank was thus liberated from the duty to ask for information and to invoke defences. This term has been considered as valid with the restriction that the principles that have been developed for first demand securities (see national notes to IV.G.–3:104) are to be applied so that the bank remains obliged to invoke defences in cases of obvious abuse of rights (BGH 17 January 1989, NJW

1989, 1480, 1481; for further details cf. *Graf Lambsdorff and Skora* no. 240 and Schimansky/Bunte/Lwowski/*Schmitz* § 91 no. 95). The term has now been deleted.

IV.G.–2:113: Security provider's rights after performance

(1) The security provider has a right to reimbursement from the debtor if and in so far as the security provider has performed the security obligation. In addition the security provider is subrogated to the extent indicated in the preceding sentence to the creditor's rights against the debtor. The right to reimbursement and rights acquired by subrogation are concurrent.

(2) In case of part performance, the creditor's remaining partial rights against the debtor have priority over the rights to which the security provider has been subrogated.

(3) By virtue of the subrogation under paragraph (1), dependent and independent personal and proprietary security rights are transferred by operation of law to the security provider notwithstanding any contractual restriction or exclusion of transferability agreed by the debtor. Rights against other security providers can be exercised only within the limits of IV.G.–1:106 (Several security providers: internal recourse).

(4) Where the debtor due to incapacity is not liable to the creditor but the security provider is nonetheless bound by, and performs, the security obligation, the security provider's right to reimbursement from the debtor is limited to the extent of the debtor's enrichment by the transaction with the creditor. This rule applies also if a debtor legal entity has not come into existence.

COMMENTS

A. Survey

This Article deals with the rights of the security provider after having fully or partly performed the security obligation to the creditor. Paragraphs (1) to (3) regulate the "normal" consequences of such performance, whereas paragraph (4) deals with the special case of a performance in favour of a debtor who is incapable. It can be taken for granted that a security provider who "volunteers" payment knowing that performance of the security obligation is not due (for example, because of the expiry of a time limit on it or the non-fulfilment of a suspensive condition) is not regarded for this purpose as performing the security obligation but is rather in the position of someone making a gift. Such a security provider should not have rights under the present Article.

The Article regulates the ordinary case of a payment by a security provider to the creditor. The situation becomes more complicated if several security providers are involved, and possibly providers both of personal and of proprietary security. Before attempting to recover from the debtor who at this stage usually is insolvent, the security provider who has satisfied the creditor may wish to proceed against one or more of the other security providers since these may be in a better financial position than the debtor. The issues of such recourse against other security providers and, eventually, against the debtor are primarily regulated by IV.G.–1:106 (Several security providers: internal recourse) and IV.G.–1:107 (Several security provider's: recourse against the debtor) since they may involve providers not only of personal, but also of proprietary security. The present Article is relevant; however, in that context in so far as it determines which rights against the debtor and against other security providers become available as the basis of this recourse.

B. Right to reimbursement and subrogation

Under paragraph (1) the security provider who has performed the security obligation has a right to reimbursement from the debtor in so far as the obligation has been performed. The security provider is also subrogated to all personal (and proprietary rights, cf. paragraph (3)), which the creditor had held against the debtor, especially contractual rights for payment of the secured obligation or other performance. On the special problems of security rights, cf. Comment F below.

Contrary to many legal systems, the last sentence of paragraph (1) allows a cumulation of the right to reimbursement and the rights acquired by subrogation. Cumulation is useful in order to enable the security provider to obtain full recovery.

C. Debtor's exceptions

The debtor may invoke as against the security provider two sets of defences. First, the debtor can invoke those which the debtor was entitled to invoke vis-à-vis the creditor. This follows from the fact that the security provider could have invoked such defences against the creditor and from the fact that the security provider's subrogation to the creditor's rights against the debtor means that the security provider takes over those rights such as they are. Secondly, the debtor may invoke defences deriving from the debtor's relationship with the security provider. For example, the security provider may have waived the right to reimbursement (cf. Comment D below).

However, the debtor will be precluded from raising a defence which the debtor has against the creditor if the debtor failed to communicate it to the security provider when requested for information about defences under IV.G.– 2:112 (Security provider's obligations before performance) paragraph (1) since this omission caused the damage.

D. Exclusion of rights

The security provider may, exceptionally, have assumed the security without the intention of claiming reimbursement from the debtor and may have accordingly waived the rights conferred by paragraph (1). This does not, however, necessarily also exclude recourse claims against other security providers under IV.G.–1:106 (Several security providers: internal recourse).

E. Part performance by security provider

A security provider who performs only in part is, of course, entitled only to a corresponding part of the rights mentioned in paragraph (1). In order to protect the creditor, the creditor's partial rights to which the security provider has not (yet) been subrogated, enjoy preference in case of the debtor's bankruptcy or upon execution by a third person, over those of the security provider (paragraph (2)). This is a general principle in order to protect the priority of an earlier holder of a right as against a holder who derives rights from the former.

F. Subrogation to security rights

If and in so far as the security provider has paid to the creditor, it is subrogated to the rights which the creditor holds against the debtor. Among these rights are the creditor's "dependent and independent personal and proprietary security rights", as paragraph (3) explicitly confirms. There is no reason why the creditor should retain these rights, which are either

accessory or of such a nature that to allow the creditor to retain and exercise them would be to allow the creditor to be unjustifiably enriched. Interests of other persons are not endangered. There will rarely be such interests of third parties; if there are, *e.g.* security rights in those security rights, they will, of course, be respected and enjoy priority over the rights of the subrogated security provider.

Subrogation to the creditor's personal or proprietary security rights presupposes that these are transferable. The debtor and third person security provider may have attempted to exclude transferability by a term in their contract. Since the security provider had acted in the debtor's or third person's interest, it would be inequitable if the latter were allowed to invoke such a term. Therefore, paragraph (3) expressly declares such terms to be ineffective to prevent the subrogation.

G. Reimbursement from incapable debtor

According to IV.G.–2:103 (Debtor's defences available to the security provider) paragraph (3), a security provider cannot invoke the lack of capacity of the debtor or the non-existence of the debtor legal entity if the relevant facts were known to the security provider when the security became effective. So the security provider may be bound to pay the creditor even although the debtor (or apparent debtor) has a defence against the creditor. Paragraph (4) makes it clear that the security provider's right to reimbursement from the debtor is in these circumstances limited to the extent of the debtor's enrichment. The enrichment here is not the performance of the secured obligation, because the debtor was not liable for that performance and gained nothing by the fact that it was made, but the enrichment which the debtor may have received by a performance made by the creditor, *e.g.* the amount of a loan received.

It will be remembered that "debtor" in the case of a legal entity which is not only incapable but is even non-existent means "apparent debtor" (IV.G.–1:101 (Definitions) paragraph (d). A legal entity may be inexistent if its creation was affected by a grave defect which according to the applicable law prevented it from coming into existence.

H. Consumer as security provider

This Article remains applicable to a dependent security assumed by a consumer; however, the provision becomes mandatory (cf. IV.G.–4:102 (Applicable rules) paragraph (2)).

The application of this Article to any independent personal security is already assured by IV.G.–3:108 (Security provider's rights after performance). This provision requires that application to be subject to "appropriate adaptations". However, in the present context it is not necessary to search for such adaptations since a consumer purporting to assume an independent personal security is according to IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (c) treated like a provider of a dependent personal security. Therefore, the Article fully applies in the same way as it applies to a consumer assuming a dependent personal security, cf. preceding Comment.

The application of this Article to a consumer's co-debtorship for security purposes may be defended on policy grounds if and in so far as that process does not involve an unequivocal disadvantage for the consumer as compared to the situation under the otherwise applicable rules on solidary debtors. This has to be examined for each part of the Article.

The first sentence of paragraph (1) corresponds, in effect, to III.–4:107 (Recourse between solidary debtors) paragraph (1) which gives a co-debtor who has performed more than the correct share a personal right of recourse. The correspondence is not absolute since in a true co-debtorship each of the co-debtors, in their internal relationship, bears some portion of liability. By contrast, in the context of a co-debtorship for security purposes, in the end the "secured" co-debtor is fully liable, while the security co-debtor is not liable at all. Therefore, if the creditor had received full payment from the "secured" co-debtor, the latter cannot claim any reimbursement from the security co-debtor. Conversely, if the security co-debtor had fully paid the creditor, that co-debtor may demand full reimbursement from the "secured" co-debtor.

An equivalent of the subrogation rules of the present Article is to be found in III.–4:107 (Recourse between solidary debtors) paragraph (2), which provides for subrogatory recourse. This equivalence is subject to the comments made in the preceding paragraph about the difference between normal co-debtorship and co-debtorship for security purposes.

Paragraph (4) of the present Article has no equivalent in III.–4:107 (Recourse between solidary debtors). In the application of those general rules to the situation here addressed the question would be whether there was a co-debtor at all. In so far as paragraph (4) gives relief against an only apparent debtor it can only be of advantage to the consumer security provider.

In short, there is no policy reason for not applying the present Article to the consumer co-debtor for security purposes.

Mandatory rules. All the preceding rules are mandatory in favour of the consumer (IV.G.–4:102 (Applicable rules) paragraph (2)). And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" as used in the Article refers to the debtor whose obligation is secured.

NOTES

I. Reimbursement and subrogation

1. In most countries, the security provider normally has two routes to recovery from the debtor: one based on a personal right to reimbursement derived from the relationship between security provider and debtor; the other based upon the security provider's subrogation to the rights of the creditor against the debtor (AUSTRIAN CC §§ 896 and 1358; BELGIAN, FRENCH and LUXEMBOURGIAN CC arts. 2028 and 2029 (since 2006: FRENCH CC arts. 2305 and 2306); DUTCH CC art. 7:850 para. 3 read with art. 6:12 and art. 7:866 (read with art. 6:10); *Blomkwist* no. 34 at p.57; GERMAN CC § 774 para. 1 sentence 1 and general rules on mandate or on similar relationships, CC §§ 670, 675, 683, 684; cf. Palandt/*Sprau* § 774 nos. 1-4; GREEK CC art. 858; ITALIAN CC arts. 1949 and 1950; PORTUGUESE CC art. 644 and general rules on mandate or similar relationships, arts. 468, 473, 1167; cf. *Almeida Costa* 780; SPANISH CC arts. 1838 and 1839; TS 13 February 1988, RAJ 1988/1985, 15 December 1997, RAJ 1997/8817, though coming to no special conclusion on this point; ENGLAND: *Andrews and Millett* nos. 10-003, 11-017; SCOTLAND: Stair/*Clark* nos. 929, 935 s.).

(a) Reimbursement

Legal bases

2. Many countries specifically grant the security provider who has paid off the secured debt a claim for reimbursement against the debtor (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2028 (since 2006: FRENCH CC art. 2305); DUTCH CC art. 7:866; ITALIAN CC art. 1950; SPANISH CC art. 1838). Although no-one will deny that the ground for this recourse has to be found in the relationship between the security provider and the debtor (BELGIUM: *Van Quickenborne* no. 450; FRANCE: *Simler* no. 558; ITALY: *Fragali*, Fideiussione 370), it is very controversial on which legal ground this recourse can be based. Both the arguments that the recourse can be based upon a mandate which the security provider has been granted or upon the fact that the security provider acted as a benevolent intervener have been criticized as unconvincing (BELGIUM: *Van Quickenborne* no. 450 and cited references; FRANCE: *Simler* nos. 13 and 558; ITALY: *Fragali*, Fideiussione 374), for in FRANCE the security provider assumes the obligation towards the creditor without having any intention of representing the debtor and the relationship between the security provider and the debtor is based upon a credit agreement (*Simler* nos. 13 and 558). Admittedly, this is a purely academic question as the instrument of dependent personal security itself gives rise to the recourse: the one who pays another's debt must be enabled to recover the money paid (BELGIUM: *Van Quickenborne* no. 451; FRANCE: cf. Cass.civ. 2 June 1992, JCP G 1992, I no. 3632 (6), note *Billiau*; ITALY: *Bozzi*, La fideiussione 260 s.; NETHERLANDS: *Korthals Altes* 94).

3. Neither the GERMAN, the GREEK nor the PORTUGUESE Civil Codes contain specific rules on reimbursement but only one on subrogation; however, GREEK CC art. 858 mentions the existence of the security provider's claim to be reimbursed as a necessary condition for the right of subrogation. Nevertheless, in these countries the security provider mostly has a claim for reimbursement against the debtor arising from the legal relationship between them that is the legal basis for the security provider's assumption of the security, such as a mandate or – especially in case of nullity of the contract of mandate – benevolent intervention (GERMANY: Erman/*Herrmann* § 774 no. 12; PORTUGAL: cf. *Almeida Costa* 780). In GERMANY, in all these cases CC § 670 is applicable. This rule grants a claim for reimbursement to the mandatary if for the purpose of the execution of the mandate the mandatary incurs any expense regarded as necessary under the circumstances. In PORTUGAL, a distinction is made between a mandatary or benevolent intervener with or without representation, the practical result being here the same for they are all entitled to reimbursement of the indispensable expenses and to indemnity for their loss (CC arts. 1167 litt. c), d), 1182 *in fine*, 468 and 471). Under special circumstances the security provider may even be entitled only to a claim for unjustified enrichment according to GERMAN CC § 684 and PORTUGUESE CC art. 473 ff (GERMANY: Staudinger/*Horn* § 765 no. 104; PORTUGAL: *Almeida Costa* 780). In GREECE as well, the security provider's claim for reimbursement depends on the internal relationship between the former and the debtor, *i.e.* whether the security provider acted as mandatary (GREEK CC art. 722) or as benevolent intervener (cf. GREEK CC art. 736 read with art. 722 or art. 737 read with art. 904; A.P. (Plenum) 10/1992, NoB 41, 70 ss.; *Georgiades* § 3 no. 153).

4. But there is no claim for reimbursement if the security provider assumed the security as a donation or as another form of liberality (GERMANY: cf. Palandt/*Sprau* § 774 no. 2; Staudinger/*Horn* § 765 nos. 103 s.).

5. Similarly in ENGLISH law the security provider has a right to be indemnified by the debtor once the security provider has paid the creditor or otherwise discharged the debt. This right may be based on either of three footings: (i) express agreement; (ii) implied agreement; or (iii) restitution in quasi-contract (*Andrews and Millett* nos. 10-002 s.). In case of an express agreement between security provider and debtor, the extent and nature of the indemnity are determined according to the agreement (*Re Richmond Gate Property Co.* [1965] 1 WLR 335; *O´Donovan and Phillips* no. 12-01), and there will be no implied or restitutionary right to be indemnified (*Toussaint v. Martinnant* (1787) 2 T. R. 100, 100 ER 55). An implied agreement as to indemnification is likely to be accepted if the security provider has assumed the security at the express or implied request of the principal debtor (*Re Debtor (No. 627)*[1937] Ch 156). The nature and extent of the debtor's implied promise to indemnify the security provider has to be construed in accordance with the intention of the parties and be ascertained by the court in each particular case (*Andrews and Millett* no. 10-007). It has been held to be effective even though neither the debtor nor the security provider are legally liable because the debtor's promise is presumed to be "pay if I do not", and not "pay if I do not and if I am legally compellable to pay" (*Argo Caribbean Group Ltd. v. Lewis* [1976] 2 Lloyd´s Rep 289; contrary in IRELAND: *Morris, Re* [1922] 1 IR 81); this presumption may be rebutted (*Sleigh v. Sleigh* (1850) 19 LJ Exch 345). Indemnification based on a restitutionary right in quasi-contract, on the other hand, is only awarded if the security provider was (i) legally bound to pay under the terms of the security (*Re Cleadon Trust Ltd.* [1939] 1 Ch 286); (ii) has not voluntarily exposed himself to make payment (*Owen v. Tate* [1976] QB 402); and (iii) has discharged a legal liability of the debtor (*Garrard v. James* [1925] Ch 616; *Re Law Courts Chambers Co. Ltd.* (1889) 61 LT 669; cf. further *Andrews and Millett* nos. 10-008 ss.). The first two conditions are regularly fulfilled if the security provider has acted on the request of the debtor (*Batard v. Hawkes* (1853) 2 E & B 287, 118 ER 775), although then there will be no need for a restitutionary claim since it is likely that an implied agreement will be established.

6. In SCOTTISH law the security provider's right to relief against the debtor, in the absence of an express agreement to that effect, is based on an implied mandate between debtor and security provider (Stair/*Clark* no. 935) and may be excluded or limited by agreement (*Williamson v. Foulds* 1927 SN 164 (CFI)). If the security provider has acted on the request of the creditor only and without the knowledge of the debtor, the security provider's right of recourse cannot be based upon a contract with the debtor, but may be based upon restitution or subrogation (Stair/*Eden* no. 834). The legal situation seems to be different in GERMANY. If the security provider assumed the security on the basis of a specific relationship to the creditor, especially if the creditor pays a commission to the security provider, the latter performs to the creditor in such circumstances that the rules on benevolent intervention are inapplicable (Staudinger/*Horn* § 765 nos. 104, 132). A claim for unjustified enrichment against the debtor might be excluded.

7. According to DANISH and SWEDISH literature and FINNISH law the security provider who has performed the security may claim reimbursement from the debtor (DENMARK: *Pedersen*, Kaution 85 ss.; FINLAND: LDepGuar § 28; RP 189/1998 rd 67 (see also HD 27 November 1986, KKO 1986-II-154; HD 7 June 1994, KKO 1994:47; HD 10 February 1995, KKO 1995:9; SWEDEN: *Walin*, Borgen 198 ss.). The FINNISH LDepGuar § 29 sentence 2 also affords the security provider a recourse unless there were good reasons not to pay, even if the debtor was not liable (RP 189/1998 rd 67 s.).

(b) Items covered

Principal, interests and costs

8. In most countries the Civil Codes establish the right of recourse of the security provider against the debtor for principal, interest and costs. This is true for BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2028 paragraph 2 (since 2006: FRENCH CC art. 2305 para. 2) and for GREECE, according to the principle arising from the nature of the security, that the security provider may not suffer any damage due to the fulfilment of the obligation assumed (*Theodoropoulos* 233). Interest arises automatically – without any notification to the principal debtor – from the moment of the security provider's performance (BELGIUM: *T´Kint* no. 782; France: *Simler* no. 578). Nevertheless, the security provider has only recourse for costs incurred after having informed the principal debtor of the proceedings (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2028 paragraph 2 (since 2006: FRENCH CC art. 2305 paragraph 2); GREECE: *Theodoropoulos* 234). In GREECE the question was raised whether the security provider's claim for interest, in case the sum paid to the creditor already included interest on the principal debt, violated CC art. 296 paragraph 1 regulating interest on interest (compound interest). The answer was negative, since for the security provider who has paid, this part of the debt is capital and not interest (CFI Athens 4621/1967, EED 18, 522).

9. In the NETHERLANDS as well, the security provider has a claim against the debtor for the entire amount the security provider paid to the creditor in principal, interests and costs (DUTCH CC art. 7:866 para. 1). The security provider, however, cannot derive a claim against the debtor for legal interest which accrues over a period in which the security provider has been in default by reason of personal circumstances or which it was not reasonable to incur (DUTCH CC art. 7:866 paragraph 2). According to ITALIAN CC art. 1950 paragraphs 2 and 3 the right of reimbursement comprises the principal, interest and expenses after the security provider has informed the debtor about the legal action taken against it. The security provider has also the right to the legal interest on the paid sum from the day of performance. If the principal debt bears interests above the legal interest, the security provider has also the right to these sums until reimbursement takes place (*Bozzi*, La fideiussione 261). According to SPANISH CC art. 1838 the indemnification consists of: (1) the total amount of the debt, (2) legal interest on the same from the time the debtor has been notified of the payment, even when it did not produce interest for the creditor, (3) expenses incurred by the security provider after notifying the debtor that payment has been demanded and (4) damages, when appropriate. All this, even when the security has been provided without the knowledge of the debtor.

10. In GERMANY the security provider's claim for reimbursement according to CC § 670 covers all outlays which the security provider may regard as necessary under the circumstances, especially the secured performances that the creditor is entitled to demand from the debtor and that the security provider has paid to the creditor (*Reinicke and Tiedtke*, Bürgschaftsrecht no. 381), *i.e.* regularly the principal debt and the contractual interest thereon. Furthermore, the security provider may demand reimbursement of the costs of proceedings with the creditor, the costs of legal defence, interest on outlays, consequential damage and legal interest on the paid sum (cf. Staudinger/*Horn* § 774 no. 4 and MünchKomm/*Habersack* § 774 nos. 18 s. with further references). In PORTUGAL, according to CC art. 468 or art. 1167 litt. c) and d), the reimbursement covers, with legal interest, the expenses the security provider has considered as indispensable; the security provider may also receive an indemnification for loss.

11. In ENGLAND, the indemnity usually covers the sum the security provider has paid on the debt (*Davies v. Humphreys* (1840) 6 M & W 153, 151 ER 361; *O´Donovan and Phillips* no. 12-57) and thus comprises interest (*Re Fox, Walker & Co, Ex p. Bishop* (1880) 15 Ch. D 400) as well as costs for reasonable legal defences – even if fruitless – against the creditor's call, especially if approved by the debtor or unavoidable (*Garrard v. Cottrell* (1847) 10 QB 679, 116 ER 258; *Pierce v. Williams* (1854) 23 LJ Exch 322. As to the extent of the recourse, SCOTTISH law is almost identical with ENGLISH law (Stair/*Clark* no. 935).

(c) Damages

12. In most countries also damages, if any, can be recovered by the security provider on the ground of the right of recourse. This is expressly stated by BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2028 para. 3 (since 2006: FRENCH CC art. 2305 para. 3) and by SPANISH CC art. 1838 no. 4. The same result is reached by PORTUGUESE law through the application of the rules on benevolent intervention or mandate (respectively, CC art. 468 para. 1 and art. 1167 lit. d)), by ENGLISH case law (*Badeley v. Consolidated Bank* (1886) 34 Ch. D 536) and by legal doctrine in ITALY, also along the line of old CC of 1865 art. 1915 para. 3 (*Giusti* 236 s.).

(d) Subrogation

Legal bases

13. According to AUSTRIAN CC § 1358, BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2029 (since 2006: FRENCH CC art. 2306), GERMAN CC § 774 para. 1 sentence 1, ITALIAN CC art. 1949, PORTUGUESE CC art. 644 and SPANISH CC art. 1839 a security provider who pays the debt is subrogated to all the rights which the creditor had against the debtor. These provisions are an application of the general rules on subrogation in BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1251 no. 3, GERMAN CC § 412, ITALIAN CC art. 1203 no. 3, PORTUGUESE CC art. 589 ff and SPANISH CC art. 1210 no. 3. In AUSTRIA, CC § 1358 embodies itself the general rule on subrogation (Rummel/*Gamerith* § 1358 no. 5); it is generally understood, beyond its wording, as providing a statutory, automatic subrogation of the security provider into the creditor's rights against the debtor (Rummel/*Gamerith* § 1358 no. 1). By contrast, according to GREEK CC art. 858 the subrogation claim depends upon the existence of the claim for reimbursement.

14. In the NETHERLANDS, the subrogative recourse of the security provider is not explicitly provided for, but can be derived from CC art. 7:850 para. 3 that refers to the general rules on solidary liability; there, CC art. 6:12 para. 1 provides for subrogation against the co-debtor(s) (*Blomkwist* no. 34 at p. 57; *du Perron and Haentjens*, art. 7:850 no. 9). In DENMARK and SWEDEN the security provider is subrogated to the rights, which the creditor had against the debtor (DENMARK: *Pedersen*, Kaution 86; SWEDEN: *Walin*, Borgen 198 s.). Pursuant to the FINNISH LDepGuar § 30 para. 1 the security provider has the same rights as the creditor against the debtor (RP 189/1998 rd 68). Equally under ENGLISH law the security provider is entitled to stand in the shoes of the creditor by being subrogated in all the creditor's rights against the debtor. The right is equitable – not contractual – in nature and arises out of the relationship of security provider and creditor itself (*Duncan Fox & Co. v. North & South Wales Bank* (1880-81) 6 App. Cas. 1; see also Mercantile Law Amendment Act 1856, s. 5; *Andrews and Millett* no. 11-017; *Lord Goff of Chieveley and Jones* no. 3-023; for the details of the dogmatic construction of the right to subrogation cf.

Dieckmann 200 ss.). The situation is similar in IRELAND: also here the doctrine of subrogation applies in order to prevent the debtor being unjustly enriched (*Highland Finance Ireland Ltd. v. Sacred Heart College of Agriculture Ltd.* [1992] 1 IR 472; *White* 543 s.). In SCOTTISH law the security provider has the so-called *beneficium cedendarum actionum* which gives a right, on full payment of the security obligation, to be put in the creditor's place vis-à-vis the debtor (*Ewart v. Latta* (1863) 1 M 905; *Gloag and Irvine* 803) and thus to demand from the creditor transfer of the secured claim and any security held for it (*Lowe & Burns v. Greig* (1825) 3 S 375; *Sligo v. Menzies* (1840) 2 D 1478; Bankruptcy (Scotland) Act 1985 s. 60 para. 3 read with para. 4). In certain situations it can be desirable to demand a formal transfer from the creditor, *e.g.* in order to safeguard the priority of a claim (*Graham v. Gordon* (1842) 4 D 903; Stair/*Clark* no. 929).

(e) Items covered

15. According to GERMAN CC § 774 para. 1 sentence 1 the security provider is subrogated to the creditor's claim against the debtor in so far as the security provider paid off the creditor. The subrogation covers the secured claim and accessory claims that have been secured (cf. national notes to IV.G.–2:102), as *e.g.* contractual interest that became due before the security provider's payment. Pursuant to court practice the security provider shall even be subrogated to the claim for contractual interest in so far as the interest becomes due after the security provider's payment (BGH 18 May 1961, BGHZ 35, 172, 174; Staudinger/*Horn* § 774 no. 15; critical: *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 351 s.).

16. Via a subrogative recourse, the security provider can claim the sums mentioned in BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2016 para. 1 – since 2006: FRENCH CC art. 2293 para. 1 – (BELGIUM: *Van Quickenborne* no. 480; FRANCE: *Simler* no. 593 ss.). According to PORTUGUESE and SPANISH law via subrogation the security provider can also claim the interest and accessories of the credit (PORTUGAL: *Pires de Lima and Antunes Varela* 660; *Almeida Costa* 780; SPAIN: *Díez-Picazo* 441). The security provider cannot claim more than what was effectively paid to the creditor (FRANCE: cf. *Simler* no. 593; NETHERLANDS: *Blomkwist* no. 34 at p. 57; PORTUGUESE CC art. 644; SPAIN: *Guilarte Zapatero*, Comentarios 276). DUTCH CC art. 7:866 para. 2 limits the security provider's recourse with respect to legal interest for a period in which the security provider had been for personal reasons in delay in performance and for expenses incurred in a personal interest. In ITALY the security provider is subrogated to the rights which the creditor had even after the creation of the security and the scope of the subrogation is the same as indicated by CC art. 1950 para. 2 and 3 for the security provider's recourse claim (cf. no. 9 above), except for the costs sustained by the security provider after he has informed the debtor of the legal actions taken against him (*Giusti* 230).

(f) Relation between the two claims

Independent claims

17. All countries recognise the independence of the security provider's claim for reimbursement against the debtor, on the one hand, and of the creditor's rights against the debtor, into which the security provider has been subrogated, on the other hand. Consequently, each of these claims and rights is subject to its proper regime, *e.g.* with respect to prescription (AUSTRIA: OGH 26 March 1987, SZ 60 no. 55 at p. 285 ss.; Rummel/*Gamerith* § 896 nos. 1a, 5, 11; BELGIUM: *T´Kint* no. 781 ss.; FRANCE: *Simler* nos. 555 ss.; GERMANY: MünchKomm/*Habersack* § 774 no. 15; *Graf*

Lambsdorff and Skora nos. 296 ss.; GREECE: G*eorgiades* § 3 no. 165). In ITALY the distinction between the two actions is still controversial (*Andreani* 710), and also in SPAIN, due to procedural barriers (*Carrasco* 258). Some authors are for an identification of the two actions, because the claim for reimbursement is seen as the technical way of exercising the subrogation (so *Fragali*, Fideiussione 375). The prevailing view, however, points out the autonomy of the two figures also because they have different legal base: respectively CC arts. 1949 and 1950 (*Bozzi*, La fideiussione 261).

(g) Cumulation of the claims

18. In most countries the security provider may, but need not cumulate the two claims: the security provider may rely upon one or the other or upon both claims (AUSTRIA: OGH 27 November 1928, SZ 10 no. 332 at p. 803; Schwimann/*Mader and Faber* § 1358 no. 23; ENGLAND: for the independence of the right to subrogation from the security provider's right to reimbursement *Dieckmann* 484 s.; GERMANY: Staudinger/*Horn* § 774 no. 5; GREECE: CFI Thessaloniki 1699/1967, ND 24, 369; *Theodoropoulos* 236; ITALY: G*iusti* 231 ss.; NETHERLANDS: Pitlo/*Croes* no. 866 at p. 374; PORTUGAL: *Almeida Costa* 780; SCOTLAND: *Smithy´s Place Ltd. v. Blackadder & McMonagle* 1991 SLT 790; SPAIN: *Díez-Picazo* 441 with extensive references).

19. On the other hand, in BELGIUM and in FRANCE it is the traditional view that the security provider has to choose between both types of recourse; but several authors plead in favour of allowing the cumulation of both claims (BELGIUM: *Van Quickenborne* nos. 484-489 with further references; FRANCE: *Simler* no. 556; Cass.com. 30 November 1948, GazPal 1949, 1).

II. Debtor's exceptions

20. According to DUTCH CC art. 7:868, a debtor from whom reimbursement is demanded pursuant to CC art. 6:10 may invoke against the security provider the defences which the debtor had against the creditor at the time the claim for recovery has arisen, unless a different result follows from the relationship between the debtor and the security provider (art. 868 read with art. 6:11 para. 4). The same is true under BELGIAN and FRENCH law where the security provider exercises the subrogative recourse, *i.e.* the creditor's recourse against the debtor (BELGIUM: *T´Kint* nos. 783 ss.; FRANCE: Cass.civ. 18 October 2005, D. 2005, 2870 for a plurality of security providers; *Simler* no. 591). The debtor cannot invoke defences that arose after the security provider's claim for reimbursement (*Blomkwist* no. 38). In case of a subrogative recourse, the debtor may invoke all defences which the debtor has against the creditor without any limitations against the security provider (*Blomkwist* no. 38 at p. 62-63; *du Perron and Haentjens* art. 868 no. 4). Further the debtor is no more liable according to FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 2031 para. 2 (since 2006: FRENCH CC art. 2308 para. 2), if the security provider pays without informing the debtor. Under ITALIAN law, if the debtor had the possibility of exemption from liability by raising an exception to the creditor relating to the secured claim, the security provider's reimbursement is given only if (a) the security provider informed the debtor of the intention to pay and (b) raised the exceptions to the creditor which the security provider knew of or had reason to know of if acting with due diligence (*Giusti* 237; CC art. 1952 para. 2). The same is true in SPAIN, according to CC art. 1840.

21. In GERMANY and in PORTUGAL the debtor may invoke against the security provider's claim for reimbursement only those defences that are based on the internal relationship between these two parties (GERMANY: Palandt/*Sprau* § 774 no. 4;

MünchKomm/*Habersack* § 774 no. 15). Against the subrogative claim, however, the debtor may invoke both defences (PORTUGAL: *Pires de Lima and Antunes Varela* 663) arising from the internal relationship with the security provider (GERMAN CC § 774 para. 1 sentence 3) as well as those arising from the relationship between debtor and creditor (GERMAN CC §§ 412, 404; cf. Palandt/*Sprau* § 774 no. 4; MünchKomm/*Habersack* § 774 no. 15).

22. In ENGLAND the security provider's right to be indemnified by the debtor is restricted as described above (no. 5): If no express or implied agreement on the right to indemnity can be established, the security provider can rely only on a restitutionary right based on quasi-contract, which is subject to an existing obligation to pay. Since the right to be indemnified is an independent claim of the security provider, it is subject to any right of set-off which the debtor can raise against the security provider (*Thornton v. Maynard* (1874-75) LR 10 C.P. 695). In relation to claims based upon subrogation, however, it seems that the debtor cannot rely on a set-off vis-à-vis the security provider (cf. *Andrews and Millett* no. 11-017 citing Commonwealth decisions).

23. According to GREEK CC art. 463 para. 1, as applied by analogy (cf. Georgiades-Stathopoulos/*Vrellis* art. 858 no. 8), the debtor may raise as against the security provider acting as assignee under the subrogation – in contrast to the case where defences are raised against the security provider's claim for reimbursement – all the defences, which the debtor had as against the creditor arising from the secured obligation which had arisen before the subrogation took place (*i.e.* satisfaction of the security provider).

III. Exclusion of claims

24. DUTCH, GERMAN, GREEK and ITALIAN law grant the security provider the subrogative claim, unless it is completely or partially excluded by the underlying relationship between security provider and debtor (NETHERLANDS: CC art. 7:868 read with art. 6:11 para. 4; GERMANY: Staudinger/*Horn* § 774 nos. 6, 15 and 40; cf. for contractual interest BGH 18 May 1961, BGHZ 35, 172, 174; GREECE: cf. wording of CC art. 858; ITALY: *Bozzi*, La fideiussione 260). Consequently, the security provider cannot rely upon the subrogative claim if excluded from recourse according to the internal relationship, *e.g.* in case the security provider did not intend to be reimbursed (BELGIUM: *Van Quickenborne* no. 491; FRANCE: *Simler* nos. 551 and 582; GREECE: Georgiades-Stathopoulos/*Vrellis* art. 859 no. 8).

25. Moreover, the security provider does not have any recourse if the debtor did not gain any profit from the security provider's payment. This happens for instance in case the security provider paid more than the debtor had to pay to the creditor, with reference to the differential amount (SPAIN: *Guilarte Zapatero*, Comentarios 272). Furthermore, reimbursement is excluded if the security provider violates the duty of information or of exercising the debtor's defences (cf. national notes to IV.G.–2:112).

26. Reimbursement on the basis of an agreement of indemnity under ENGLISH law is subject to the security provider being requested to assume the security by the debtor. If no agreement (implied or express) to that effect can be established, a right to reimbursement can exist only as a restitutionary claim and it is not clear on the authorities whether or not a restitutionary claim would lie, a possible argument against this being that the surety provider officiously stepped forward. See Chitty, para. 44-109.

IV. Part performance by security provider

27. One has to distinguish again between the claim for reimbursement and subrogation to the creditor's rights.

(a) Claim for reimbursement

A security provider who performs only in part is under BELGIAN, ENGLISH, FRENCH, LUXEMBOURGIAN, ITALIAN and SPANISH law entitled to partial recourse only against the debtor (ENGLAND: *Davies v. Humphreys* (1840) 6 M & W 153, 151 ER 361; *Soutten v. Soutten* (1822) 5 B & Ald 852, 106 ER 1403; FRANCE: *Simler* no. 568; GREECE: *Georgiades* § 3 no. 164; ITALY: *Giusti* 236 fn. 197; SPAIN: *Guilarte Zapatero*, Comentarios 268, 276 and 278).

29. If the security provider bases the recourse claim on BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2028 (since 2006: FRENCH CC art. 2305), a clash between the security provider's claim for reimbursement and the creditor's claim for payment of the residual debt is possible. The creditor does not have any priority over the security provider (BELGIUM: *Van Quickenborne* no. 460; CA Gent 10 February 1883, Pas belge 1883 II 224; CA Luik 13 February 1950, Pas belge 1950 II 100; FRANCE: cf. Insolvency Act of 25 January 1985 art. 60 para. 2 integrated into Ccom art. L 622-33 para. 2; Cass.civ. 25 November 1891, DP 1892, I, 261; except the parties agree otherwise *Simler* no. 568). The opposite is true in case of a subrogative recourse based on BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2029 (since 2006: FRENCH CC art. 2306); cf. no. 30 below.

(b) Subrogated claims

30. In BELGIUM, FRANCE, DENMARK, GERMANY, ITALY, SPAIN and PORTUGAL, even a partial satisfaction of the creditor leads to a corresponding partial subrogation. The creditor, benefiting from the maxim "*nemo censetur subrogasse contra se*", enjoys priority for the remaining claim over the (partial) claims of the security provider to which the latter is subrogated (BELGIUM: *Van Quickenborne* no. 479 p. 248; CA Antwerpen 26 October 1987, Pas belge 1988, II 46; FRANCE: but according to the predominant court practice only if the security provider wants to exercise a priority or a security, which belongs to the creditor: Cass.civ. 28 June 1977, JCP G 1979 II no. 19045, note *Guillot*; *Simler* no. 592; DENMARK: *Pedersen*, Kaution 88, 92; GERMAN CC § 774 para. 1 sentence 2; ITALY: *Giusti* 226; PORTUGUESE CC art. 593; SPAIN CC art. 1213 and Insolvency Law art. 87.7).

31. In ENGLAND the general rule being that subrogation is only available if the creditor is paid in full, a partial discharge of the secured obligation by the security provider does not normally entitle the security provider to be subrogated to the creditor's rights. Thus it is accepted that where there is a security for the whole debt with a limitation on the amount of the security provider's liability, a payment of the security provider which only partly satisfies the creditor does not entitle the security provider to a transfer of a proportionate interest in the creditor's securities (*Re Sass Ex p. National Provincial Bank of England Ltd.* [1896] 2 QB 12; *Andrews and Millett* no. 11-020; *O´Donovan and Phillips* no. 12-273). Where, however, the security provider is a surety for part of the secured debt only, the security provider is subrogated *pro rata* to any rights held by the creditor in respect of that debt after performance of the security (*Hobson v. Bass* (1870-71) LR 6 Ch. App. 792; *Andrews and Millett* no. 11-020; *O´Donovan and Phillips* no. 12-273). There is ENGLISH authority that subrogation only arises if the creditor has been fully satisfied by the security provider (*Re Howe Ex p. Brett* (1870-71) LR 6 Ch. App. 838; *Ewart v. Latta* (1865) 3 M (HL) 36); modern

AUSTRALIAN decisions, however, point to the contrary view and argue that the security provider should be *pro tanto* subrogated to the creditor's rights once the security provider has performed the security obligation, even though another part of the debt was paid by the principal debtor or another security provider (*A. E. Goodwin Ltd v. A. G. Healing Ltd* (1979) 7 ACLR 481; *McColl´s Wholesale Pty Ltd v. State Bank (NSW)* Ltd [1984] 3 NSWLR 365 (SCt); *Raffle v. AGC (Advances) Ltd* [1989] ASC 58, 528, all cited by *Andrews and Millett* no. 11-018; *O´Donovan and Phillips* no. 12-272). It is submitted that this view should be followed in ENGLAND too, and the contrary decisions not be followed (*Andrews and Millett* no. 11-018). Furthermore, there is ancient ENGLISH authority to the same effect (*Gedye v. Matson* (1858) 25 Beav 310, 53 ER 655), which has not been cited in the later ENGLISH decisions. In SCOTLAND the security provider's right to an assignation of the creditor's rights arises only if the security obligation has been fully performed (*Ewart v. Latta* (1863) 1 M 905; Stair/*Clark* no. 933).

32. According to GREEK literature, the claims of the creditor and of the security provider as against the debtor are concurrent and are to be proportionately satisfied (cf. GREEK CCP art. 977 para. 3; cf. also the critical approach of *Georgiades* § 3 no. 164).

V. Subrogation to security rights

33. GERMAN CC § 774 para. 1 sentence 1 read with §§ 412, 401 provides that the security provider is not only subrogated to the secured claim but also into the related dependent rights, especially security rights (Staudinger/*Horn* § 774 no. 19). The independent collateral rights are not transferred *ex lege* but the security provider is regularly entitled to demand their transfer (*Reinicke and Tiedtke*, Bürgschaftsrecht no. 358; Staudinger/*Horn* § 774 no. 21 with further references to court practice). Similarly in PORTUGAL, where the security provider acquires the securities and other dependent rights (CC arts. 593 para. 2, 594 read with art. 582). According to GREEK CC art. 458 applied by analogy, accessory proprietary rights are also transferred to the security provider which secure the claim, created either before or after the issue of the security, either by the debtor or a third party (Georgiades-Stathopoulos AK/*Vrellis* art. 858 no. 12). The security provider is also subrogated to any judicial acts commenced by the creditor (ErmAK/*Zepos* art. 858 no. 9) as well as to the rights of the creditor against a third party in whose hands the creditor attached a claim belonging to the principal debtor (*Kosadinos* 762-763). The same is true under BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1250 no. 1 since this subrogation covers all "rights, claims, priorities or mortgages [of the creditor] against the debtor". Subrogation in security rights is also the rule in SPANISH law (*Carrasco* 261).

34. Also under ITALIAN law the subrogation of the security provider affects all kinds of security rights for the secured claim (CC art. 1955 and, more generally, art. 1204; *Bozzi*, La fideiussione 259).

35. Under ENGLISH law the security provider is subrogated to all the security rights held by the creditor in respect of the secured claim (*Duncan Fox & Co. v. North & South Wales Bank* (1880-81) 6 App. Cas. 1; *Chatterton v. Maclean* [1951] 1 All ER 761), whether or not already existing at the time of assumption of the security (*Forbes v. Jackson* (1881-82) 19 Ch. D 615; *Pledge v. Buss* (1860) Johns 663, 70 ER 585), and whether granted by the debtor or third persons (*Goddard v. Whyte* (1860) 2 Giff 449, 66 ER 188; *Dering v. Winchelsea (Earl of)* (1787) 1 Cox 318, 29 ER 1184). There are only a few rights a security provider cannot be subrogated to: private insurance policies (*Dalby v. India and London Life Assurance Co.* (1854) 15 CB 365, 139 ER 465), purely personal rights of the creditor (such as the right to seize goods under a

hire-purchase agreement, cf. *Chatterton v. Maclean* [1951] 1 All ER 761), and rights wrongfully obtained by the creditor (*Andrews and Millett* no. 11-023). It is doubtful whether the security provider can be subrogated to floating charges (cf. the discussion in *Andrews and Millett* no. 11-022 and *O´Donovan and Phillips* nos. 12-319 s.). Under SCOTTISH law the security provider is entitled to demand transfer of all security rights held by the creditor over the principal debtor's estate and in relation to co-providers of security against whom there is a right of relief (*Thow´s Trustee v. Young* 1910 SC 588; *Scott v. Young* (1909) 1 SLT 47; Stair/*Clark* no. 930).

VI. Reimbursement from an incapable debtor

36. According to ITALIAN CC art. 1950 para. 4 a recourse against the incapable debtor is admitted only if and in so far the debtor has benefited from the security provider's payment. A similar view is held in FRANCE (*Simler* no. 224). According to GREEK literature, the security provider may have a claim for reimbursement but may not be subrogated to the claim of the creditor, because this claim is against a minor and is, hence, void. Furthermore, since the security remains valid, the security provider may not reclaim anything conferred by the performance according to the principles of unjustified enrichment (ErmAK/*Zepos* art. 850 nos. 11-12). It is unclear whether under ENGLISH law the security provider has a right to be indemnified from a minor debtor; this question is not dealt with in the Minors Contracts Act 1987; the Law Commission suggested that there should be a right to be indemnified if the minor could have been sued by the creditor under the common law rules (Law Commission Report on Minors´ Contracts, Law Commission 134). In other cases where the security provider could not rely on having assumed the liability at the request of the debtor, *e.g.* for lack of authority of the person acting for the company debtor, the security provider was held to have neither a contractual claim for reimbursement nor a restitutionary claim against the debtor (*Re Cleadon Trust Ltd.* [1939] Ch 286; *Andrews and Millett* no. 10-009).

CHAPTER 3: INDEPENDENT PERSONAL SECURITY

IV.G.–3:101: Scope

(1) The independence of a security is not prejudiced by a mere general reference to an underlying obligation (including a personal security).

(2) The provisions of this Chapter also apply to standby letters of credit.

COMMENTS

A. General

Due to the independence of the independent personal security from any underlying obligation, the rules applying to them are much simpler and can be less numerous than the corresponding rules on the dependent personal security. The latter have to spell out the extent and limits of dependence upon the secured obligation and the technical devices by which that dependency is realized. That, obviously, is not necessary for independent personal security since this stands largely on its own feet.

B. Definition

The independence from any other agreement, especially an underlying contract between the creditor and the debtor, is laid down and specified in IV.G.–1:101 (Definitions) sub-paragraph (b). In particular it is irrelevant for the security provider's obligation whether the underlying obligation (such as a seller's obligation to deliver or a buyer's obligation to pay the price under a contract of sale or for services) is based on a valid contract or not, which terms it contains and the extent of the debtor's obligations. The same independence exists with respect to any contract by which the debtor instructs the security provider to assume the independent personal security. The UN Convention on Independent Guarantees of 1995 defines the "Independence of undertaking" in a similarly broad manner (art. 3).

On the other hand, the validity of the contract or other juridical act from which the security provider's undertaking itself arises is crucial for the security provider's obligation. Thus the security provider must have full capacity and the undertaking must have been created without any defects of consent which might give rise to a right of avoidance.

The independent character of an independent security must be expressly or impliedly agreed. This rule dovetails with IV.G.–2:101 (Presumption for dependent personal security) paragraph (1) which establishes a presumption for any security being a dependent security, unless the creditor shows that it was agreed otherwise. For letters of credit and stand-by letters of credit, UCP 500 (1993) art. 3 and 4 explicitly and broadly emphasize the independence of the "credit" from underlying contracts or the objects of those contracts, such as goods, services and other performances. More succinctly in the same sense is UN Convention on Independent Guaranties article 3.

C. General reference to underlying obligation innocuous

Paragraph (1) serves to specify the independent character of a security. Usually, an independent security refers to an underlying contract (*e.g.*, of sale or services) or another

security (*e.g.*, a "confirming" security to the security given by the bank opening a letter of credit; or a "counter security" to the security issued by the security provider on the instruction of the issuer of the counter security) in order to specify the event upon the occurrence (or non-occurrence) of which performance of the security may be demanded by the creditor. Any such general reference to an underlying obligation does not affect the independent character of a security. The decisive point is that the security provider's obligation to perform is independent of the obligation of the principal as debtor of the underlying contract with the creditor.

D. Stand-by letters of credit

According to paragraph (2), Chapter 3 applies to stand-by letters of credit. This clarification appears to be useful since the name of this instrument does not reveal its legal character as security. However, the "stand-by" letter of credit at least hints to the security function which letters of credit may fulfil and which, originally for reasons of American internal banking law, this kind of letter of credit does fulfil. This is confirmed by the fact that stand-by letters of credit are also covered by the UN Convention on Independent Guaranties and "Stand-by Letters of Credit" of 1995. Functionally, the same is true for the "genuine" letter of credit, as used in international contract practice, since it secures claims for payment arising from various types of contract; the fact that in practice the security obligation represented by the letter of credit assumes the role of the primary obligation of a means of payment does not detract from its legal function as a mere security. The idea of independence of the security covers even cases where no preceding demand under the underlying contract has been made. Cf. also the preceding Comment.

E. Independent security of a consumer

According to IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (c), a consumer's "agreement purporting to create an independent security is considered as creating a dependent security, provided the requirements of the latter are met." For details, cf. the Comments on that provision.

NOTES

I. Legal sources

1. While the dependent security is broadly regulated in all Civil Codes of the CONTINENTAL countries, there is almost no legislation on independent security. An "early" exception is AUSTRIAN CC § 880a sentence 2 (enacted in 1916) according to which a security provider is fully liable if the promised performance of a third person is not rendered by the latter. Much more explicit is the new FRENCH regulation of 2006, enacting CC art. 2321 which in four paragraphs deals with essential elements of the independent security.
2. In view of the dearth of legislation, case law and writings are of prime importance everywhere. This is even true for AUSTRIA and FRANCE: for the former country because of the abstract character of the legislative provision; and for FRANCE because of the very recent date of its legislation.

II. Qualification of instrument as "independent security"

(a) Generally

3. It is common opinion that the denomination of an agreement as "dependent security" or "independent security" is not conclusive. In all countries, any case of doubt has to be resolved by interpretation of the contract. However, in ENGLAND the designation "indemnity" or "independent guarantee", especially if frequently repeated or used in the heading, indicates the independent character of that security (cf. *Goulston Discount Co. Ltd. v. Clark* [1967] 2 QB 493 at 498, *per Danckwerts* LJ; *Western Credit Ltd. v. Alberry* [1964] 1 WLR 945 at 949, *per Davies* LJ; *Heald v. O´Connor* [1971] 1 WLR 497 at 502; *O´Donovan and Phillips* no. 1-94). The true construction of the contract as a whole, however, may lead to a different conclusion (*Stadium Finance Co. Ltd. v. Helm* (1965) 109 SJ 471). In this respect, it has been said that especially the following factors should be regarded as arguments against interpreting a contract of security as a dependent security: (i) the contract relates to an underlying transaction between parties in different jurisdictions; (ii) the security is issued by a bank; (iii) the security contains an undertaking to pay "on demand" (whether or not "on first demand" or "on written demand"); and (iv) the security does not contain terms excluding or limiting the defences available to the security provider (*Gold Coast Ltd. v. Caja de Ahorros del Mediterraneo* [2002] EWCA Civ 1806, [2002] 1 All ER (Comm) 142; *Hapgood* 731). While the first three of these factors relate to the factual situations of international commerce in which the independent security is the preferred method of security, the rationale of no. (iv) appears to be as follows: in the case of an independent personal security, the security provider's possibility to take advantage of any defences against the creditor's claim are rather limited in comparison to the situation of a dependent personal security. It is therefore typically the latter situation where the creditor might see a practical need for the exclusion of defences of the security provider.

4. CONTINENTAL legal systems start from the general notion that the legal nature of a contract is to be determined by the parties´ intention and not by the terms the latter may, often mistakenly, have used (AUSTRIAN CC § 914; FRENCH and BELGIAN CC art. 1156; GERMAN CC §§ 133, 157; GREEK CC art. 173; ITALIAN CC art. 1362; PORTUGUESE CC arts. 236, 238; SPANISH CC art. 1281).

5. In BELGIUM (overview: *Simont/Bruyneel*; *Wymeersch/Dambre/Troch* no. 56, p. 1835-1837), some aspects of a contract for personal security may indicate the independence of that security: the internationality of the contract and the professional acting of the contractors (*Vliegen* nos. 175-193). The question whether a personal security is a unilateral obligation of the security provider or a bilateral agreement, is not yet solved. In the first case, only the intention of the security provider needs to be revealed, in the latter case, the intention of all parties involved. It cannot be denied, however, that the intentions of the creditor will always have to be taken into account, because the exact wording of the personal security will almost always be the result of negotiations between security provider and creditor (*Vliegen* no. 172; *Simont* 102-103).

6. Under GERMAN law the wording of the agreement is not decisive. Nevertheless, it is at least an important indication (CA Hamburg 18 December 1981, WM 1983, 188, 189; *Canaris,* Bankvertragsrecht no. 1124). The use of legal terms even by persons familiar with those terms merely creates a rebuttable presumption (BGH 5 March 1975, WM 1975, 348). Finally, the motivation and interest of the security provider to assume an independent security is relevant (*Hadding, Häuser, Welter* 702). A major indication for the security provider's intention to assume an independent personal

security is the security provider's own economic interest in the transaction (BGH 22 February 1962, WM 1962, 577). If there remains any doubt, the contract is considered to be a dependent personal security in order to protect the security provider (RG 28 September 1917, RGZ 90, 415, 417; BGH 5 March 1975, WM 1975, 348, 349). Similarly in FRANCE, where, in case of doubt, the courts qualify an agreement – even if expressly declared to be independent – as a dependent personal security. Since even a dependent personal security must not be presumed (FRENCH CC art. 2015: since 2006, CC art. 2292), there is even less a presumption for an independent personal security (CA Paris 17 December 1992, JCP E 1993 I no. 243 (39)).

7. AUSTRIAN and PORTUGUESE courts and writers rely on the independent character of a personal security as the decisive criterion for assuming an independent personal security. Personal securities indicating that the security provider waives all objections rooted in the underlying contract are regarded as independent personal securities (AUSTRIA: OGH: 24 October 2000, JBl. 2001, 380; 24 June 1999, ÖBA 2000, 322, 323; 9 November 1993, SZ 66 no. 140 p. 327 and 4 May 1977, SZ 50 no. 66 p. 324; Schwimann/*Apathy* § 880a no. 5; Avancini/Iro/*Koziol* II no. 3/26-3/27; PORTUGAL: CA Lisboa 18 October 1988, CJ XIII, IV-129; CA Porto 13 November 1990, CJ XV, V-187; STJ 1 June 2000, 316/00 www.dgsi.pt; *Galvão Telles* 285; *Ferrer Correia* 252). In other cases, the interests of the parties are considered; an independent personal security is assumed if the creditor was to obtain a strong and secure position (AUSTRIA: OGH 14 July 1992, SZ 65 no. 109 p. 68-69, and 10 April 1991, ÖJZ 1991, 595 no. 134) and especially if the security provider is a bank (OGH 24 June 1999, above).

(b) Particular case of first demand securities

8. In BELGIUM, the "on first demand term" can be considered as a rebuttable presumption of independence (*Romain* 33-40; *Simon/Bruyneel* 523); some authors think that the term cannot validly be added to dependent personal securities (*Van Ransbeek* nos. 15-23; *contra Wymeersch/Dambre/Troch* 1836). Also in FRANCE a personal security on first demand (for payment) is regarded as an independent personal security (*Simler* no. 894). Similarly in DENMARK: "If a personal security is expressed as a personal security on first demand, it is deemed to be an independent personal security" (*Pedersen*, Bankgarantier 140). Also in AUSTRIA, a first-demand term is a strong indication for an independent guarantee, especially if it is supplemented by a waiver of all defences and exceptions (OGH 26 August 1999, ÖBA 2000, 328).

9. In ITALY, the NETHERLANDS and SPAIN the demand term does not *per se* define the nature of the contract as independent personal security, therefore the term needs to be interpreted with the rest of the contract in order to determine the real will of the parties (ITALY: Cass. 20 April 2004 no. 7502, Giust.civ.Mass. 2004, 912; Cass. 25 February 2002 no. 2742, BBTC 2002 II 653; Cass. 23 June 2000 no. 8540, Foro pad. 2001 I 242; Cass. 21 April 1999 no. 3964, Arch. civ. 2000, 222; Cass. 14 July 1994 no. 6604, BBTC 1995 II 422 and 1 July 1995 no. 7345, Giur.it. 1996 I 1 620; *Portale*, Le garanzie bancarie 6; SPAIN: *Carrasco*, Las nuevas garantías 688; *Sánchez-Calero*, El contrato autónomo 145). Although ITALIAN case law often regarded the demand term as a very stark presumption of non-ancillarity of the contract, legal doctrine quite unanimously considers the term compatible both with dependent and independent security contracts (*Bonelli*, Le garanzie contrattuali 205-208). Sometimes ITALIAN case law requires express contractual terms barring the possibility for the security provider to invoke exceptions arising from the underlying relationship (Cass. 7 January 2004 no. 52, BBTC 2004 II 497 ss.). DUTCH writers attach great weight to a

"first demand" term, especially if it is accompanied by terms indicating that the security provider's obligation of performance is independent from any underlying transaction or from any approval by the obligor of that transaction (*Boll* 82-84, *Croiset van Uchelen* 10, both with references to and quotations from case law). However, in one recent case, the Supreme Court denied that a bank guarantee on first demand gave a personal security an independent character (HR 25 September 1998, NJB 1998 no. 892 at p. 5153).

10. In ENGLISH as well as GERMAN law demand terms are mainly used in independent personal securities; they have, however, been held legally effective in dependent personal securities as well (ENGLAND: *Bradford Old Bank v. Sutcliffe* [1918] 2 KB 833; *Andrews and Millett* no. 1-011; GERMANY: BGH 2 May 1979, BGHZ 74, 244 for dependent and BGH 12 March 1984, BGHZ 90, 287 for independent personal securities) and are usually stipulated for in bank personal security forms (ENGLAND: *Cresswell, Blair, Hill, Hooley, Phillips and Wood* I E 2068). At least in relation to securities given by security providers other than banks, demand terms should not necessarily lead to the conclusion that the parties intended to create an independent security if this would be inconsistent with other provisions of the security (ENGLAND: *Marubeni Hong Kong and South China v. Mongolia* [2005] EWCA Civ 395, [2005] 1 WLR 2497).

11. According to SWEDISH doctrine personal securities on first demand are considered to be dependent personal securities (*Dalman* 182). According to the FINNISH government's proposition (RP 189/1998 rd 17), the LDepGuar may be used in many legal matters, *e.g.* for bank personal securities. However, personal securities on first demand are not covered by the Law (RP 189/1998 rd 29).

12. In GREECE it is accepted that the term "on first demand" may be irrelevant if there are other countervailing terms (*Georgiades* § 6 no. 43). In SPAIN there is no firmly established rule. In TS 28 May 2004, RAJ 2004/3553, the Supreme Court regarded as a dependent security a guarantee in which the security provider promised to pay on first demand and surrendered the right to oppose any exception the debtor could raise against the creditor.

III. Autonomous undertaking

13. See national notes on IV.G.–1:101 (Definitions) *sub* III D.

IV. Reference to underlying obligation

14. A mere reference to an underlying obligation does not prejudice the independence of a personal security. Since the occurrence (or non-occurrence) of the event, which justifies the creditor's demand, is usually rooted in the relationship between creditor and debtor, a general reference to that relationship is almost unavoidable. In practice it is the rule; in GREECE (*Georgakopoulos* 256; *Psychomanis* 371; *Gouskou* 104) and FRANCE (CA Besançon 11 April 1991, JCP E 1991, I no. 90 p. 466) it is even obligatory. FRENCH law goes even further and holds valid personal securities with a sliding scale of liability (*garanties glissantes*: Cass.com. 5 December 1989, RD banc 1990, 139): The amount of the *garantie glissante* is progressively reduced with the performance of the main obligation; it is nevertheless independent, because it constitutes a mere modality of computation. Also in ITALY it is acknowledged that independent personal security contracts always contain a reference to the underlying obligation (*Bonelli*, Le garanzie bancarie 52 ss.) and that a contract term reducing the security to the amount of the secured obligation does not *per se* impair the independence of the security (CA Milano 15 October 1999, Contratti 2000, 468). According to an eminent GERMAN author (*Canaris*, Bankvertragsrecht no. 1137)

reducing terms (*Reduzierungsklauseln)* have to be admitted as part of the personal security contract and may be raised as defences *(inhaltliche Einwendung),* although independent personal securities with reducing terms apparently function like dependent personal securities on first demand (cf. *Hadding* 704, Staudinger/*Horn* no. 240 preceding §§ 765).

15. Also in other countries a general reference to the underlying relationship between creditor and debtor is held not to destroy the independent character of the personal security (AUSTRIA: OGH 9 November 1993, SZ 66 no. 140 p. 328, and 2 December 1975, SZ 48 no. 130 p. 661; Avancini/Iro/*Koziol* no. 3/6; BELGIUM: *Romain* 444-447; ITALY: Cass. 3 February 1999 no. 917, Giust.civ.Mass. 1999, 245; *Mastropaolo* 140 s.; PORTUGAL: CA Lisboa 18 October 1988, CJ XIII, IV-129). In ENGLAND, although the obligation has no reference *in law* to the debt of another (*Yeoman Credit Ltd. v. Latter* [1961] 1 WLR 828 at 830-831), most indemnities contain references to the underlying transaction. In SPAIN, the mere reference to the underlying transaction has been regarded as an indication that the parties do not want to agree upon a true independent guarantee (CA Rioja 17 October 2005, JUR 2006/11295).

V. Types of secured obligations

16. All types of obligation may be secured by an independent personal security. Hence, also claims for reimbursement that a (primary) security provider may acquire against the debtor under a primary security may be secured by a so-called counter security. In BELGIUM (*Delierneux* 21-27), GREECE (*Georgiades* § 6 nos. 168 ss.), ENGLAND (*Goode*, Commercial Law 1020), DENMARK (known as *re-garanti*: *Pedersen*, Bankgarantier 17), FRANCE (*Simler* no. 914) and PORTUGAL (*Almeida Costa and Pinto Monteiro* 25) counter-securities are well known and frequently used – mostly in an international context. The same is true in SPANISH and ITALIAN law (SPAIN: *Sánchez-Calero*, El contrato autónomo 63, 64; ITALY: *Mastropaolo* 145, 318 ss.; Cass. 17 May 2001 no. 6757, Giust.civ.Mass. 2001, 989). The GERMAN Supreme Court had recently to deal with a type of counter security and had no doubt concerning its general validity (BGH 10 October 2000, BGHZ 145, 286).

VI. Letters of credit and stand-by letters of credit

(a) Letters of credit

17. Views on the relationship between independent personal securities and letters of credit are to some degree influenced by the differing sources from which the rules governing personal securities have developed. Where, as in most member states, the relevant rules have been developed from the traditional rules on dependent personal securities, the differences from letters of credit tend to be emphasized. Admittedly, a common denominator is the independence of both types of instruments from any underlying transaction (AUSTRIA: Avancini/Iro/*Koziol* II no. 3/46 and *Avancini*/Iro/Koziol II no. 4/15; BELGIUM: *Byttebier* 56; *Van Lier*, JT 1980 no. 24; *Van Quickenborne* no. 904; GERMANY: *Zahn, Eberding and Ehrlich* no. 9/15; ITALY: *Pontiroli*, Il credito documentario 233; CA Milano 14 January 2004, BBTC 2005 II 419; FRANCE: cf. exceptionally *Ripert and Roblot* no. 2385; NETHERLANDS: Dutch Business Law § 6.05 [4] [a]; *Croiset van Uchelen* 13; PORTUGAL: STJ 17 April 1970, 63029, BolMinJus no. 196, 275; *Cortez* 566-567; SPAIN: *Marimón Durá*, Planteamiento 389 ss., 397 ss.).

18. The major difference, however, are the different purposes. The letter of credit is a technique of payment, while the personal security has a security function (AUSTRIA: *Koziol*, above; ENGLAND: *Goode*, Commercial Law 1017 s.; FRANCE: *Ripert and*

Roblot no. 2384; GERMANY: *Zahn, Eberding and Ehrlich* no. 9/14; ITALY: *Pontiroli*, Il credito documentario 12; NETHERLANDS: *Boll* 88; *Mijnssen* 20; PORTUGAL: *Galvão Telles* 284; even though a letter of credit may constitute a firm personal security cf. STJ 17 April 1997, CJ (ST) V, II-53; SPAIN: *Sánchez-Calero*, El contrato autónomo 109 ss.). AUSTRIAN writers emphasize that the different functions imply also some different rules: The letter of credit obligation is primary, while that of the personal security is subsidiary to non-performance of the secured obligation or non-occurrence of the secured event (*Koziol*, above, no. 3/47; *Avancini*, above, no. 4/15).

19. However, one AUSTRIAN banking expert, while acknowledging the legal differences, underlines that these are marginal from an economic point of view; in letter of credit transactions, whose purpose is not payment, even the legal difference disappears completely (*Avancini*, above, no. 17, no. 4/15), *e.g.* where the letter of credit is intended to secure that another bank accepts or negotiates a bill of exchange drawn by the buyer (*Avancini*, above, no. 17, no. 4/91, 4/93).

20. DUTCH and ITALIAN writers base the strong resemblance between independent personal securities and letters of credit also on the fact that historically the rules on those personal securities were developed by the courts by using the regime of letters of credit as a model (NETHERLANDS: Dutch Business Law § 6.05 [4] [a]; *Mijnssen* 21; ITALY: CC art. 1530 para. 2; *Portale*, Fideiussione 1062 ss.).

21. BELGIAN and ITALIAN legal scholars, besides pointing to the close relationship between letters of credit and independent personal securities, emphasize the differences, which are seen in the different purposes (payment v. security), the documentary character of letters of credit (BELGIUM: *Bertrams* 57; ITALY: *Pontiroli*, Il credito documentario 78) and the fact that letters of credit may only be issued by professional credit institutions (BELGIUM: *Van Lier* no. 2.4). However, the rules on documentary credits are generally used to solve problems resulting from the lack of rules for the independent personal security (ITALY: *De Nictolis* 43).

22. In ENGLAND letters of credit are rather distinct from personal securities, dependent or independent. They originated in international trade and mainly operate as a payment technique (*Todd* 6-18), while independent personal securities have evolved in a purely domestic environment and serve a security purpose. It is, however, admitted that letters of credit resemble performance bonds and demand personal securities, which are clearly based on personal securities (*Goode*, Commercial Law 1017).

(b) Stand-by letters of credit

23. See national notes on IV.G.–1:102 (Scope) *sub* II B.

IV.G.–3:102: Notification to debtor by security provider

(1) The security provider is required:

(a) to notify the debtor immediately if a demand for performance is received and to state whether or not, in the view of the security provider, performance falls to be made;

(b) to notify the debtor immediately if performance has been made in accordance with a demand; and

(c) to notify the debtor immediately if performance has been refused notwithstanding a demand and to state the reasons for the refusal.

(2) If the security provider fails to comply with the requirements in paragraph (1) the security provider's rights against the debtor under IV.G.–3:109 (Security provider's rights after performance) are reduced by the extent necessary to prevent loss to the debtor as a result of such failure.

COMMENTS

A. Introductory

This Article requires the security provider to notify the debtor if a demand for performance is received from the creditor or is met or is refused and sets out the sanction for failure to comply with the requirements.

B. Requirement of notification of receipt of demand

The first paragraph obliges the security provider to inform the debtor of any demand for performance received from the creditor. It may be expected that the security provider would also state whether or not the demand complies with the terms of the contract from which the security obligation arises. The information is to be given not only in order to keep the debtor informed about the creditor's demand from which other consequences may ensue in the relationship between the debtor and the creditor. A more direct purpose of the information is to prevent the risk of double payment (by the debtor as well as the security provider) and to provoke the debtor to bring to the attention of the security provider any possible objections or doubts concerning the creditor's full compliance with the terms of the contract or other juridical act creating the security. Also, the debtor may furnish objections which, exceptionally, may qualify the creditor's demand as manifestly abusive under IV.G.–3:104 (Manifestly abusive or fraudulent demand).

C. Requirement of notification of performance or refusal of performance

A security provider who performs the obligation on demand is required to inform the debtor immediately. Again this serves to prevent double payment.

Also, if the security provider's examination of the creditor's demand leads to the conclusion that performance of the demand must be refused, the security provider should forthwith inform the debtor stating the reasons for refusal. This requirement serves the purpose of clarifying the situation for the security provider and the debtor so that they are enabled to consider and prepare any steps which may be appropriate. For instance, the debtor may confirm that the reasons for refusal are justified, or point out that they are not justified.

D. Consequences of failure to notify immediately

The consequences of a failure by the security provider to comply with the requirements in the Article are that the security provider's rights to reimbursement from the debtor are reduced by the extent necessary to prevent any loss to the debtor as a result of the security provider's omission or delay. If, for example, a failure to notify leads the debtor to pay the creditor again in such circumstances that the payment cannot be recovered, it would clearly prejudice the debtor if the security provider could still obtain reimbursement from the debtor. The debtor would then pay twice because of the security provider's failure to notify. In such a case the most appropriate way of avoiding loss to the debtor is to extinguish altogether the security provider's right to reimbursement

NOTES

Security provider's notification to debtor

1. In most member states the security provider is required to inform the debtor of the receipt of a demand for payment by the creditor, together with the required documents when so agreed, and after having checked its compliance with the terms of the personal security (AUSTRIA: Avancini/Iro/*Koziol* no. 3/57; BELGIUM: *Bertrams* 124-127; *Poullet* 149; *Van Houtte* 306; DENMARK: *Pedersen,* Bankgarantier 68; GREECE: *Liakopoulos,* NoB 35, 290; *Loukopoulos* 737; *Georgiades* § 6 no. 117; ITALY: *Laudisa* 17 s.; *Mastropaolo* 308; NETHERLANDS: *Boll* 118-119; PORTUGAL: *Castelo Branco* 78; SPAIN: *Sánchez-Calero,* El contrato autónomo 365; SWEDEN: *Walin,* Borgen 177, *contra Bergström* 12). In GERMANY it is disputed whether the security provider is always obliged to inform the debtor of any demand (Staudinger/*Horn* no. 332 preceding §§ 765 ss.; cf. BGH 19 September 1985, BGHZ 95, 375, 389 for dependent personal securities); or whether this obligation only exists in case the security provider decides to perform (*Canaris,* Bankvertragsrecht no. 1110; in general *Graf von Westphalen* 235 s.). According to FRENCH banking customs, it is usual to inform the debtor of the demand for performance by the creditor. Some FRENCH authors claim that the security provider has for practical reasons a duty to inform the debtor (*Rives-Lange and Contamines-Raynaud* no. 799; *Gavalda and Stoufflet* no. 18). But there is no legal obligation to do so if the relationship between the security provider and the debtor is essentially regarded as a credit commitment and not as a mandate (*Simler* no. 965; cf. *Devèze, Couret and Hirigoyen* no. 3689).
2. In most other countries, the duty to inform is a consequence of the agency character of the relationship between the debtor and the security provider. SPANISH CC art. 1720 and Ccom art. 263 establish the obligation to render account to the mandator of the operations which have taken place in execution of the agency. Moreover, ITALIAN CC arts. 1710 and 1176 and SPANISH CC art. 1719 establish the obligation of the agent to perform the mandate diligently. Some authors have based the duty of information on these rules (ITALY: *Capo* 157). Other ITALIAN authors base it on the principle of good faith in performing the contract (CC art. 1375; *Tommaseo,* Autonomia negoziale 423; *Cassera* 2768). According to the first opinion, the security provider as agent must inform the debtor (as principal) so that the latter will be able to take position as to the demand and take any action necessary as against the security provider or the creditor. This duty has been considered compulsory by SPANISH authors (*Sánchez-Calero,* El contrato autónomo 365). Nevertheless, some ITALIAN

writers hold that there is no obligation but merely a right to inform the debtor (*Calderale*, Demand Guarantees 135 ss.). In banking practice this duty is usually derogated from in the contracts. The validity of such terms has been thoroughly discussed by ITALIAN authors (cf. *De Nictolis* 111). In the banking practice of DENMARK and GREECE usually the debtor waives the right of information (*Pedersen*, Bankgarantier 68; *Georgiades* § 6 no. 70).

3. A duty of information in ENGLISH law may result from the underlying mandate (cf. *Goode*, Commercial Law 981).

IV.G.–3:103: Performance by security provider

(1) The security provider is obliged to perform only if there is, in textual form, a demand for performance which complies exactly with the terms set out in the contract or other juridical act creating the security.

(2) Unless otherwise agreed, the security provider may invoke defences which the security provider has against the creditor.

(3) The security provider must without undue delay and at the latest within seven days of receipt, in textual form, of a demand for performance:

(a) perform in accordance with the demand; or

(b) inform the creditor of a refusal to perform, stating the reasons for the refusal.

COMMENTS

A. Introductory

This Article lays down the requirements for a demand for performance and most of the reasons which the security provider may invoke against such a demand and the procedures which must be observed in this respect. The security provider must examine the creditor's demand for performance or a demand to extend the security or pay. The security provider may raise personal objections and defences available against the creditor. The security provider must either perform promptly or notify the creditor promptly of a refusal to perform and will be liable in damages for non-performance.

B. Requirements for creditor's demand

The creditor's demand for performance must be in textual form. This requirement has been established for the sake of legal certainty and because of the high sums of money that are usually involved. The text must specify the contract of security to which it relates and the amount of money or the quantity and kind of other performance which is demanded. The expression "textual form" means "a text which is expressed in alphabetical or other intelligible characters by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form" (see I.–1:106 ("In writing" and similar expressions).

The creditor's demand must comply with all the terms and conditions laid down in the contract or other juridical act creating the security. One may distinguish between simple and documented demands. A simple demand is one which merely contains a demand for payment of a definite sum of money or an equivalent act, without requiring further written support. By contrast, a so-called documentary demand is one where the demand for payment must be supported by documents, the type and contents of which must strictly comply with the requirements fixed by the security contract. The UCP 500 (1993) devote almost 20 elaborate provisions to general prescriptions concerning the minimum requirements as to form and substance of various types of documents which the beneficiary typically may have to present for a demand under a letter of credit (articles 20–38) and the ISP98 contain over 20 such provisions (rules 4.01–4.21).

C. Examination of creditor's demand

It is implicit in this and the preceding Article that the security provider must examine the creditor's demand for performance. In the interest of the debtor, the security provider should

carefully investigate whether the creditor's demand strictly satisfies all the terms and conditions of the security. Even if exceptionally the security provider was not instructed by another person, it is in the security provider's own interest to undertake this examination in order to ensure that payment is not made without the conditions for payment having been fulfilled. The security provider must also check whether any objections may have to be raised with respect to the validity of the contract or other juridical act creating the security. Any failure to do this tends to endanger the security provider's claim for recourse against the debtor.

The security provider's examination of the demand must take place within a reasonable period of time. Both the UCP 500 (1993) (art. 13 lit. b) and the ISP98 (rule 5.01 (a) (i)) as well as the UN Convention on Independent Guarantees (art. 16 (2)) fix a maximum of seven business days for the reasonable period, unless the parties have agreed otherwise. This maximum appears to be sensible also for the present Article. (See paragraph (3).) Of course, the parties are free to fix a different time limit.

If the demand or any documents accompanying it do not fully comply with the terms of the contract or other juridical act creating the security, the security provider is, vis-à-vis the creditor, not obliged to perform. This rule implies that the security provider, in spite of doubts, may decide to perform. However, a security provider must also take care to perform any obligations owed to the debtor. If time permits, the security provider should also inform the creditor and ask the creditor to remedy any open point.

D. "Extend or pay"

Occasionally a creditor may set forth the alternative demand of "extend or pay". This is to be understood as an offer to the security provider to extend the time limit for the guarantee or, if that offer is rejected, to perform the security. If the security provider accepts the requested extension of time, the demand for performance must be regarded as withdrawn. If the security provider does not accept the requested extension, the security provider must examine the demand for performance according to the rules set out above at C. In the same sense ISP98 rule 3.09.

E. Security provider's personal objections and defences

Apart from objections and defences relating to the validity of the contract or other juridical act creating the security and as to full compliance with its terms, the security provider may also invoke objections and defences to which the security provider is personally entitled as against the creditor. This covers also the security provider's right to set-off a personal monetary claim against the creditor's claim under the security (cf. UN Convention on Independent Guarantees art. 18).

Usually, these objections and defences may be rooted in earlier and different legal relationships between the security provider and the creditor. Consequently, it would be irreconcilable with the independence of the security if the security provider could invoke an objection or defence arising from a claim which another person, especially the debtor, had assigned to the security provider. It is equally inadmissible for the security provider to set-off a right acquired by assignation from such a debtor. Invoking such defences or asserting such a set-off would run counter to the independent character of an independent security whose essence is the insulation from any underlying relationship between the creditor and a debtor.

The parties may expressly or impliedly exclude other personal objections as well. An exclusion may *e.g.* be implied if the security provider promises "unconditional" performance upon the creditor's demand.

F. Duty of information on refusal of performance

If the security provider's examination of the creditor's demand leads to the conclusion that performance of the demand must be refused, the security provider must inform the creditor, stating the reasons for refusal. This obligation to inform serves the purpose of clarifying the situation for the parties directly affected so that they are enabled to consider and prepare any steps which may be appropriate. For instance, the creditor, if time limits allow, may wish to remedy any defect in the demand pointed out by the security provider.

G. Remedies for security provider's non-performance

The creditor will have the usual remedies under Book III for non-performance of a security provider's obligations under this Article.

NOTES

I. Form of the demand

1. The demand for performance is in all countries usually made in writing (AUSTRIA: Avancini/Iro/*Koziol* no. 3/85; DENMARK: *Pedersen*, Bankgarantier 17; GREECE: *Georgiades* § 6 no. 115; ITALY: *De Nictolis* 101; NETHERLANDS: *Boll* 110; *Mijnssen* 44; PORTUGAL: *Castelo Branco* 78; SPAIN: *Sánchez-Calero*, El contrato autónomo 349). For commercial personal securities this form is in GERMANY agreed to be a binding commercial usage (cf. Ccom § 346: Staudinger/*Horn* no. 233 preceding §§ 765 ss. for personal security on first demand). BELGIAN and SPANISH authors allow to present a demand orally; however, its evident difficulties of proof do not make it adequate for this contract, being never used in banking practice (*De Marez* no. 97; *Sánchez-Calero*, El contrato autónomo 350).
2. Demands transmitted by any telegraphic or electronic technique have been considered valid by BELGIAN, DUTCH, FRENCH, GERMAN and SPANISH authors (BELGIUM: *De Marez* no. 59; FRANCE: *Simler* no. 962; GERMANY: Staudinger/*Horn* no. 233 preceding §§ 765 ss.; NETHERLANDS: *Mijnssen* 45; SPAIN: *Sánchez-Calero*, El contrato autónomo 349; cf. *Rivero* 443) as well as by the GERMAN Federal Supreme Court (BGH 10 October 2000, WM 2000, 2334, 2337).
3. By contrast, if the security provider had prescribed a specific formal requirement, this has to be observed strictly (AUSTRIA: an agreed "registered letter" cannot be replaced by a telex: OGH 24 March 1988, SZ 61 no. 79, p. 395; and a local authority's letter with an official stamp cannot be replaced by a fax: OGH 5 December 1995, SZ 68 no. 230, p. 749-753; but some writers plead for more flexibility: *e.g.* Avancini/Iro/*Koziol* no. 3/86). Also the DUTCH Supreme Court has insisted on strict observance of the agreed method of demand (a simple letter does not suffice if formal service had been agreed, HR 9 June 1995, NJB 1995 no. 639 at p. 3090).

II. Terms of the demand

4. The legal systems of most member states have adopted the doctrine of strict compliance *(garantieformalisme)*. It is the duty of the security provider to examine whether the demand and also the documents presented comply exactly with the terms and conditions agreed for the personal security (the AUSTRIAN OGH demands a "pedantical" examination, *e.g.* OGH 5 December 1995, SZ 68 no. 230 p. 750, 751; BELGIUM: *De Marez* 17-25; DENMARK: *Pedersen*, Bankgarantier 69; FRANCE: *Devèze, Couret and Hirigoyen* no. 3688; Cass.com. 21 June 1988, RD banc 1988, 204; GERMANY: MünchKomm/*Habersack* no. 30 preceding § 765; BGH 10 October 2000, WM 2000, 2334, 2336: "*Garantiestrenge*"; for documentary credits cf. *Schütze* no. 380; ITALY: *Bonelli*, Le garanzie bancarie 81 ss.; PORTUGAL: *Menezes Cordeiro*, Direito 609; *Galvão Telles* 289; for documentary credits cf. *Calvão da Silva* 18; SPAIN: *Sánchez-Calero*, El contrato autónomo 377). "There is no room for documents which are almost the same, or which will do just as well" *(Equitable Trust Co. of New York v. Dawson Partners Ltd.* (1927) 27 Lloyd's L. Rep 49, 52). Also purely terminological deviations may lead to refusal of the demand. In the ENGLISH case of *J. H. Rayner & Co. Ltd. v. Hambros Bank Ltd.* [1943] KB 37 documents evidencing shipment of "coromandel groundnuts" were required by the credit, but the documents delivered referred to "machine-shelled groundnut kernels". In fact, these are synonyms, but the court held that it was impossible for a banker to know all the different trades he is dealing with. By contrast, the GERMAN Supreme Court and PORTUGUESE authors only require that the content of the creditor's demand for payment has to correspond to the requirements that have been stipulated in the contract of personal security for the demand; but the wording must not be identical, unless otherwise agreed by the parties (GERMANY: BGH 10 October 2000, WM 2000, 2334, 2336; PORTUGAL: *Pinheiro* 449; *Almeida Costa and Pinto Monteiro* 29). Obvious typographical errors are generally disregarded by ENGLISH and FRENCH courts (ENGLAND: cf. *Hing Yip Hing Fat Co Ltd v. Daiwa Bank* [1991] 2 HKLR 35 (Supreme Court of Hong Kong); *Goode*, Commercial Law 977; FRANCE: CFI Paris 27 September 1993, GazPal 1994, 2, Somm.Comm. 464).

5. By contrast, UCP 500 (1993) art. 39 contains a few rules on tolerances regarding strict compliance of the documents presented for the purpose of making a demand with the terms of the personal security, *e.g.* that a deviation of 5% in terms of quantity is permissible unless the contract otherwise states.

6. In AUSTRIA and the NETHERLANDS, the security provider is obliged to inform the creditor if the latter's demand does not comply with the terms of the personal security and to invite the creditor to repair any deficiency, provided time permits to do so; violation of this duty of good faith exposes the security provider to a claim for damages (AUSTRIAN OGH 5 December 1995, SZ 68 no. 230 p. 753 ss.; cf. also Avancini/lro/*Koziol* no. 3/89; DUTCH HR 9 June 1995, NJB 1995 no. 639 p. 3091; cf. also Dutch Business Law § 6.05 [4] [b]).

III. Time for examination of the demand

7. Unless expressly fixed by the parties, the time necessary for the security provider to examine the demand and the documents depend on the circumstances of each case. The criterion of "reasonable delay" sounds satisfactory but has been criticized in SPAIN as being vague (*Sánchez-Calero*, El contrato autónomo 378). In most countries, the "reasonable delay" is in practice thought to be a period between three and seven days after receipt of the demand. The UN-Convention on Independent Guarantees of 1995 art. 16 (2) allows "reasonable time, but not more than seven

business days following the day of receipt of the demand …". In DENMARK, GREECE and SPAIN a period of one to three days as established by international banking practice is accepted (DENMARK: *Pedersen*, Bankgarantier 138 ss.; GREECE: *Georgiades* § 6 no. 117; *Gouskou* 136, 149; *contra:* CFI Athens 9790/1992, EED 43, 522; SPAIN: *Sánchez-Calero*, El contrato autónomo 379). In BELGIUM, ENGLAND and GERMANY three (working) days are generally admitted, being extended to one week depending on the circumstances (BELGIUM: *Schrans* 1176; *De Marez* no. 30; ENGLAND: *Bankers Trust Co v. State Bank of India* [1991] 2 Lloyd´s Rep 443; GERMANY: Staudinger/*Horn* no. 235 preceding §§ 765 ss. for personal security on first demand; *contra Zahn, Eberding and Ehrlich* no. 9/113: one to two days; also UCP 500 (1993) art. 43(a)). In FRANCE the customary reasonable delay has been fixed in one case by an appellate court at five days (CA Paris 10 July 1986, D. 1987, Somm.Comm. 217). In SWEDEN no concrete time limit has been defined (*Dalman* 202).

IV. Personal securities with time limit and creditor's demand "extend or pay"

8. Personal securities very often are agreed with a time limit aiming at reducing its costs and risks for the security provider. When the time limit is about to expire, creditors often require the security provider to extend it or perform the personal security. This demand is called "extend or pay". If the security provider does not extend, there is an obligation to perform, of course, only in so far as the demand is in full compliance with the formal requirements of the contract of personal security (BELGIUM: *De Marez* nos. 67-75; GERMANY: BGH 23 January 1996, NJW 1996, 1052; ITALY: *Viale* 206 s.; SPAIN: *Sánchez-Calero*, El contrato autónomo 333). In case of personal securities on first demand a demand "extend or pay" suffices to oblige the security provider to extend or to perform (BELGIUM: *De Marez* nos. 77, 93 and no. 103). In FRANCE the demand "extend or pay" is valid as a demand for payment without discretionary character (CA Paris 9 January 1991, RD banc 1991, 152; *Simler* no. 957; *contra Devèze, Couret and Hirigoyen* no. 3688). However, some other FRENCH courts consider the demand "extend or pay" as a non-serious demand (CA Paris 28 May 1985, D. 1986, I.R. 155) constitutive of abuse because the creditor seems to oblige the security provider to extend the personal security (Cass.com. 24 January 1989, JCP G 1990, II no. 21425). In ITALY if the debtor does not approve the extension of the personal security, the security provider must perform, no other demand of payment being necessary. The request of extension is made by the creditor to the security provider, the latter being obliged to inform the debtor who is the only person entitled to decide whether or not to extend (*Bozzi*, Le garanzie 78). The issue of the abusive character of the "extend or pay" term might arise depending on the circumstances of the case, *e.g.* if it is proved that the creditor seeks performance of the security only in order to exercise pressure and obtain an extension of the security (CFI Milano, 2 March 1994, Giur.it. 1995 I 308).

9. In ENGLAND in order to extend the personal security, the security provider must without delay inform the party who gave the instructions; the security provider has to suspend payment for a period of time as long as is reasonable for the creditor and the debtor to agree on the extension (*Goode*, Commercial Law 1029). The silence of the security provider or a decision to inform the debtor about the demand and to return to the subject later have in GERMANY been regarded as insufficient to extend (BGH 23 January 1996, NJW 1996, 1052; *Canaris*, Bankvertragsrecht no. 1128).

10. Especially for the demand "extend or pay" it is of special importance whether the security provider is obliged to inform the creditor about any inaccuracy of the demand.

While this issue is not finally settled by GERMAN courts, they seem to favour such a duty, at least if the creditor is obliged to present documents (BGH 23 January 1996, NJW 1996, 1052 referring to UCP 500 (1993) art. 14 d (i) concerning documentary credits; cf. also without this restriction CA Karlsruhe 21 July 1992, WM 1992, 2095 with further references).

V. Consequences of non-compliance with demand

11. Any demand which does not exactly comply with the terms and conditions of the personal security is void. According to most laws, if the demand does not comply with the terms and conditions of the personal security, the security provider is not obliged vis-à-vis the creditor to perform the personal security (BELGIUM: *De Marez* nos. 17-25; DENMARK: *Pedersen*, Bankgarantier 69; ENGLAND: *J. H. Rayner & Co. Ltd. v. Hambros Bank Ltd.* [1943] KB 37; *Goode*, Commercial Law 974; GERMAN BGH 12 March 1996, NJW 1996, 1673; Staudinger/*Horn* no. 234 preceding §§ 765; GREECE: *Georgiades* § 6 no. 122; A.P. 342/1970, NoB 18, 1092; PORTUGAL: *Castelo Branco* 79; SPAIN: *Sánchez-Calero*, El contrato autónomo 371 and 381; SWEDEN: *Dalman* 202). The FRENCH Supreme Court held that inconsistencies of the documents required to be presented which could only be clarified by reference to the underlying transaction entitle the bank to refuse performance of a stand-by letter credit (Cass.com. 28 March 2006, D. 2006, 1284). In FRANCE and ITALY the security provider is practically obliged to refuse performance (FRANCE: *Simler* no. 1003; ITALY: *De Nictolis* 102; CFI Bologna 27 September 1984, BBTC 1986 II 339). According to the rules on agency, the negligence of the security provider in performing the duty of examination incurs liability against the debtor (ITALY: *Bozzi*, L´autonomia negoziale 248; SPAIN: *Sánchez-Calero*, El contrato autónomo 381). In BELGIUM a security provider who violates the duty to examine may lose recourse against the debtor or become exposed to counterclaims by the latter (*De Marez* no. 33).

VI. Objections and defences of the security provider as against the creditor

12. In all countries the security provider may invoke personal objections and defences as against the creditor arising from the personal security (BELGIUM: *De Marez* no. 39; DENMARK: *Pedersen*, Bankgarantier 87; FRANCE: *Devèze, Couret and Hirigoyen* no. 3700; GERMANY: Staudinger/*Horn* no. 247 preceding §§ 765 ss.; ITALY: *Bonelli*, Le garanzie bancarie 78 ss.; NETHERLANDS: *Pabbruwe*, Bankgarantie 59 at no. 5; PORTUGAL: *Castelo Branco* 79; SPAIN: TS 27 October 1992, RAJ 8584 no. 1992 and 30 March 2000, RAJ 2314 no. 2000; SWEDEN: *Walin*, Borgen 179 ss.).

13. In several countries objections and defences (set-off, etc.) arising between the security provider and the creditor from any other relationship between these two parties may also be invoked (AUSTRIA: OGH 3 December 1998, ÖBA 1999, 558, 562, although the parties may exclude this, p. 563; Avancini/lro/*Koziol* no. 3/97; BELGIUM: *Van Quickenborne* no. 566 ss.; ENGLAND: *Hongkong & Shanghai Banking Corp. v. Kloeckner & Co. AG* [1990] 2 QB 514; *Goode*, Commercial Law 973; GERMANY: Staudinger/*Horn* no. 247 preceding §§ 765 ss.; GREECE: *Liakopoulos*, NoB 35, 297; *Gouskou* 152; ITALY: *Viale* 190; but see with regard to set-off the conflicting decisions: allowing the defence of set-off, Cass. 24 December 1992 no. 13661, Vita not. 1993, 769; *contra*: CA Roma 22 May 2001, GRom. 2002, 14; NETHERLANDS: *Pabbruwe*, Bankgarantie 59 at no. 5; SPAIN: *Sánchez-Calero*, El contrato autónomo 385).

14. However, for set-off restrictions are made in some countries. In GERMANY and some other countries it is common opinion that the security provider is not allowed to set off if this is contrary to the purpose of the personal security so that the security provider is

especially prevented from setting off claims, which are derived from the "secured contract" and had been assigned to the security provider (Staudinger/*Horn* no. 248 preceding §§ 765 ss.). This point of view is also shared by some writers in other countries (AUSTRIA: Avancini/lro/*Koziol* no. 3/97; BELGIUM: *De Marez* nos. 39-44; ITALY: *Mastropaolo* 371; *Villanacci* 101; *Portale*, Le garanzie bancarie 15; NETHERLANDS: *Pabbruwe*, Bankgarantie/borgtocht no. 5 at 59; SPAIN: *Sánchez-Calero*, El contrato autónomo 395). Apart from this restriction, the overwhelming opinion in GERMANY allows set-off provided the counter-claim can be proven easily (Staudinger/*Horn* no. 248 preceding §§ 765 ss. with further references, also to the opposite opinion; *Horn*, Bürgschaften und Garantien no. 535 now even demands that the counter-claim must be rooted in the financing of the transaction secured by the independent security).

VII. Security provider's duty of information upon refusal of payment

15. If the creditor's demand is rejected, the security provider has to inform the creditor as soon as possible in ENGLAND, FRANCE and SPAIN (ENGLAND: *Goode*, Commercial Law 986; FRANCE: *Simler* no. 965; SPAIN: *Sánchez-Calero*, El contrato autónomo 380, 381). Otherwise the security provider may be liable for the damage resulting from late performance. Electronic and telegraphic means may be used (SPAIN: *Sánchez-Calero*, El contrato autónomo 380).

IV.G.–3:104: Independent personal security on first demand

(1) An independent personal security which is expressed as being due upon first demand or which is in such terms that this can unequivocally be inferred, is governed by the rules in the preceding Article, except as provided in the two following paragraphs.

(2) The security provider is obliged to perform only if the creditor's demand is supported by a declaration in textual form by the creditor which expressly confirms that any condition upon which performance of the security becomes due is fulfilled.

(3) Paragraph (2) of the preceding Article does not apply.

COMMENTS

A. The special feature of a first demand security

An independent personal security that falls due upon "first demand" enjoys a higher degree of independence than a simple independent security. Being more efficient than a simple independent security, it is also more risky to the security provider who therefore deserves a somewhat better protection. This Article provides for both these features (see Comments C and D).

B. Applicable rules

Since the independent security on "first demand" is a special type of independent security, the general rules on demand of a security, as laid down in the preceding Article apply to it, subject to the special rules in the present Article, paragraphs (2) and (3).

C. Restriction of security provider's defences

As the name of the security "on first demand" indicates, it is the special feature of this particular kind of independent security that the creditor is entitled to a fast and effective satisfaction. Therefore, the security provider's possible defences against liability must be restricted. The general reference to the preceding Article covers also the defences contained in that provision, cf. Comment B. In addition, paragraph (3) of the present provision excludes defences to which the security provider in a personal capacity is entitled as against the creditor, including set-off with any counter-claim which the security provider may have against the creditor.

On the other hand, the defence of a manifestly abusive demand under the following Article remains available to the security provider since this defence is not rooted in the person of the security provider but, to the contrary, in that of the creditor.

D. Conditions for creditor's entitlement

As explained in Comment C, a security on first demand restricts the security provider's exceptions against the demand to the very exceptional cases of a fraudulent or abusive demand by the creditor. By contrast, performance on first demand does not mean that the creditor is only required to present a mere demand. There can also be a first demand guarantee if the creditor is contractually obliged to present additional documents. Such documentary securities and letters of credit are very frequent in practice.

In order to curb abusive demands which not infrequently have been made under "first demand" securities, recent practice sometimes requires the creditor to confirm expressly that the conditions upon which the security becomes due, are fulfilled. Such an express confirmation must be given in textual form by the creditor. While it imposes no real burden upon an honest creditor, such a declaration may be at least a moral warning to a dishonest person, and it may assist in bringing claims or even criminal prosecutions against a fraudulent creditor. If this declaration is not produced by the creditor, the security provider need not perform. A merely tacit implication of such a confirmation upon the model of the UN Convention on Independent Guarantees of 1995 art. 15 (3) does not appear to provide an effective assurance against fraudulent or abusive demands of performance.

NOTES

I. Introduction

1. In all European countries, except SWEDEN, personal securities on "first demand" are known and accepted as a special type of independent personal security, although almost no country has special statutory provisions for them (BELGIUM: *Romain* 437; DENMARK: *Pedersen*, Bankgarantier 140; ENGLAND: *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* [1978] QB 159; FRANCE: CC new art. 2321 para. 1 of 2006; *Devèze, Couret and Hirigoyen* no. 3652; *Simler* no. 905; GERMANY: BGH 12 March 1984, BGHZ 90, 287; GREECE: *Gouskou* 79; ITALY: *Bonelli*, Le garanzie bancarie 37 ss.; Cass. 17 May 2001 no. 6757, Giust.civ. 2002 I 729; Cass. 1 July 1995 no. 7345, Giur.it. 1996 I 1 p. 620; PORTUGAL: STJ 6 April 2000, 135/00 www.dgsi.pt; SPAIN: TS 27 October 1992, RAJ 1992 no. 8584, TS 17 February 2000, RAJ 2000 no. 1162, TS 30 March 2000, RAJ 2000 no. 2314; *Sánchez-Calero*, El reconocimiento 541 ss.; *Barres Benlloch* 314 s.; *Marimón Durá*, Garantía independiente 479 ss.). By contrast, according to SWEDISH doctrine personal securities on first demand are considered to be dependent personal securities (*Dalman* 182, similar *Bergström* 14). According to this opinion a personal security on first demand is an irregular form of the dependent personal security.

2. An independent personal security on first demand means that the creditor is entitled to performance of the personal security by mere demand upon the security provider who, as a rule, is precluded from invoking objections against the demand. This is how BELGIAN and FRENCH authors define a simple personal security on first demand *(garantie à première demande pure et simple/garantie op eerste eenvoudig verzoek)*; other terms may however create further conditions for the personal security, *e.g.* presentation of specified documents can be demanded *(De Marez* no. 78; Malaurie and Aynès*/Aynès and Crocq*, Les sûretés no. 331). The same is true for other countries: according to the principle of freedom of contract, it will be necessary to interpret the term precisely (DENMARK: *Beck Thomsen* 107 ss.; GERMANY: cf. Staudinger/*Horn* no. 231 preceding §§ 765 ss.; GREECE: *Georgiades* § 6 nos. 40-41; ITALY: *Bonelli,* Le garanzie contrattuali 208 ss.; PORTUGAL: CA Lisboa 11 December 1990, CJ XV, V-134; SPAIN: *Carrasco*, Las nuevas garantías 688 and 716; *Sánchez-Calero,* El contrato autónomo 145). The basic understanding of personal securities on first demand – *i.e.* undertakings predominantly securing payment or performance in international trade – in ENGLISH law is that the security provider is liable on the first written demand for payment (*Goode*, Commercial Law 1018 s.).

II. Creditor's confirmation of entitlement

3. There is no unanimity as between the member states as to whether the creditor is required to declare at the time of calling on the personal security that the conditions upon which the personal security becomes due, are fulfilled. Some BELGIAN authors find such an obligation to be incompatible with the nature of an independent personal security (for an overview: *De Marez* no. 87; *contra Bertrams* 79; *Prüm* no. 106). However, in all countries, parties are free to stipulate a demand term. In BELGIUM and FRANCE, this is regarded as a personal security on first demand on justified request (BELGIUM: *De Marez* no. 86; FRANCE: *Devèze, Couret and Hirigoyen* no. 3653).

4. In ENGLAND a "demand guarantee" (*Goode*, Commercial Law 1018 ss.) is payable on a written demand upon the occurrence of a specified event; in this case the beneficiary's demand must state that the event has occurred, see *Esal (Commodities) Ltd. v. Oriental Credit Ltd.* [1985] 2 Lloyd´s Rep 546. It has been argued in a domestic context that in spite of a demand having been expressly stipulated for in a personal security the creditor, by virtue of the primary character of the undertaking of a provider of an independent security, might be entitled to sue the latter without such an additional prior demand (cf. *M. S. Fashions Ltd. v. Bank of Credit and Commerce International SA* [1993] Ch 425; *Esso Petroleum Co. Ltd. v. Alstonbridge Properties Ltd.* [1975] 1 WLR 1474 at 1483; *Andrews and Millett* no. 7-006), but this does not seem to be entirely clear (cf. *O´Donovan and Phillips* nos. 10-118 ss.; Halsbury para. 1105, Vol 49, 5th ed, (2008).

5. A DUTCH court has held that, if such a declaration is missing, the security provider does not need to pay (CA Amsterdam 27 February 1992, NJB 1992 no. 735), and in DUTCH practice, this is regularly done (*Pabbruwe*, Bankgarantie/borgtocht no. 1 at 58; *Boll* 110).

6. In GREECE the creditor must simply invite the bank to pay without any further declarations. If along with the first demand term there is also a term "if damage was incurred", only then must the creditor declare (or prove or establish by *prima facie* evidence, depending on the contents of the letter) that the secured obligation has not been fulfilled (*Georgiades* § 6 no. 41). This personal security, however, is then conditional and not on first demand, despite the existence of the first demand term (*Georgiades* § 6 nos. 40-41).

III. Restriction of security provider's objections

7. In all countries, the very limited availability of defences is one of the most prominent advantages of personal securities on first demand. So the security provider cannot raise any exceptions based upon the underlying contract concluded between the beneficiary and the debtor or between the debtor and the security provider (GERMANY: BGH 22 April 1985, BGHZ 94, 167, 170 s. (including such claims if these have been assigned to the security provider); Staudinger/*Horn* nos. 202, 204 preceding §§ 765 ss. However, the court allows a set-off with a liquid counterclaim, p. 171 ss.; approving Staudinger/*Horn* nos. 248 s. preceding §§ 765 ss., but under the additional restriction that the counterclaim must closely relate to the financing of the underlying transaction, cf. *Horn*, Bürgschaften und Garantien no. 535; LUXEMBOURG: CFI Luxembourg 17 June 1982, Pas luxemb XXV (1981-1983) Jur. 450; ENGLAND: *Goode*, Commercial Law 1026 s.). However, the security provider can invoke the invalidity of the personal security, or that the demand on the personal security is not in strict compliance with the letter of the personal security (AUSTRIA: Avancini/Iro/*Koziol* nos. 3/91-3/92; BELGIUM: *De Marez* nos. 17-25 and no. 38;

DENMARK: *Pedersen*, Bankgarantier 148; FRANCE: *Devèze*, *Couret and Hirigoyen* no. 3691; GERMANY: Staudinger/*Horn* nos. 241-249 preceding §§ 765 ss.; MünchKomm/*Habersack* no. 33 preceding § 765; GREECE: *Gouskou* 148-149; PORTUGAL: *Galvão Telles* 289; ITALY: *Bonelli*, Le garanzie bancarie 79 ss.; NETHERLANDS: Bank's refusal to honour a performance bond justified where the necessary expert opinion had not been delivered by agreed expert but by another, since agreed expert had refused to give opinion; however, Supreme Court remanded case in order to examine whether due to changed circumstances contract needed to be adapted: HR 26 March 2004, NJB 2004 no. 309 with approving note by *PVS*; SPAIN: *Carrasco*, Las nuevas garantías 687). In ENGLAND, the doctrine of strict compliance has sometimes been said to be less strictly applied to personal securities on first demand than to documentary credits. In the *Esal* case *(above* no. 4), this question has been differently answered by the judges and remained unresolved in the end. In *I. E. Contractors Ltd. v. Lloyds Bank plc.* [1990] 2 Lloyd´s Rep 496 the question was said to be one of careful drafting and, hence, the degree of documentary compliance required may be strict or not so strict depending on the construction of the bond.

8. In AUSTRIA, BELGIUM, ITALY and PORTUGAL the security provider can also invoke the illegality of the underlying agreement. When the contract is *prima facie* illegal, as being contrary to public order or morality, the creditor is not allowed to sue on the contract and therefore, the call on the personal security may not be accepted by the security provider (AUSTRIA: Avancini/Iro/*Koziol* no. 3/91; BELGIUM: *De Marez* no. 36; *Wymeersch*, Bank guarantees no. 4; *Wymeersch, Dambre and Troch* no. 57; *Devos* 29-32; ITALY: Cass. 7 March 2002 no. 3326, BBTC 2002 II 653; CA Milano 12 February 2005, BBTC 2005 II 481 ss.; *Bonelli*, Escussione abusiva 522; PORTUGAL: *Ferrer Correia* 253; *Simões Patrício* 709).

9. In GERMANY it is disputed whether personal objections of the security provider vis-à-vis the creditor, especially the right to set-off, are excluded (cf. *Hadding, Häuser and Welter* 697; Staudinger/*Horn* nos. 248 s. preceding §§ 765 ss.).

IV.G.–3:105: Manifestly abusive or fraudulent demand

(1) A security provider is not obliged to comply with a demand for performance if it is proved by present evidence that the demand is manifestly abusive or fraudulent.

(2) If the requirements of the preceding paragraph are fulfilled, the debtor may prohibit:

(a) performance by the security provider; and

(b) issuance or utilisation of a demand for performance by the creditor.

COMMENTS

A. The issue

Any independent security is, due to its independence from any underlying contractual or other relationship between the creditor and the debtor, a risky undertaking both for the security provider and especially for the debtor. This risk is even higher in the case of a security on first demand. Experience in many countries has shown again and again that some creditors may call for performance by wrongfully asserting that the agreed conditions for a demand are fulfilled.

Such unjustified demands, if accepted and performed by the security provider, often place the debtor in a very difficult situation. The debtor may have to reimburse the security provider and then seek reimbursement from the creditor. The creditor's place of business, however, may be located in a distant country; enforcement of a judgment, whether obtained locally or abroad, may be subject to similar difficulties.

In order to protect debtors against extreme instances of such abuse, courts in many countries have evolved remedies against abusive or fraudulent demands for performance of independent securities. Evidence that either the creditor's assertion about the justification of the demand is wrong or that documents presented are falsified, can usually only be adduced by the debtor. Exceptionally, in these cases, the principle of the independence of the security is disregarded and the security provider is allowed to rely on the terms of the underlying contract between creditor and debtor.

In shaping any such remedies, a carefully defined balance must be struck between the interests of honest creditors and also security providers, who are interested in a smooth, speedy and reliable system of honouring independent securities, on the one hand; and the prevention of truly abusive or fraudulent demands by unscrupulous creditors, on the other hand. The Article is based upon the practice that has been developed by the courts of the major trading nations and which has been approved by the majority of writers. It in essence corresponds to UN Convention on Independent Guarantees of 1995 art. 19.

In the following, first the position of the security provider and then that of the debtor will be considered.

B. Security provider's position in relation to creditor

The basic rule is that the security provider has to comply with a demand for performance, provided this demand strictly complies with the formal and substantive conditions for an effective demand established by the parties and by the two preceding Articles. This Article

provides a strictly limited exception to that basic rule. The grounds why a demand for performance, although on its face complying with the conditions for a demand, may nevertheless be unfounded in substance, derive from the underlying relationship between the creditor and the debtor. Such a recourse to an underlying relationship to which the security provider is not a party, must, of course, be very exceptional; its conditions are therefore very narrowly circumscribed.

According to paragraph (1), two conditions must be fulfilled before the exception applies. First, in substance, there must be a manifest abuse or fraud; and secondly, procedurally, this must be proved by present evidence.

The strong terms "abuse" and "fraud" require that the non-compliance of the demand with the terms of the security must be unequivocal, obvious and commercially relevant for the debtor.

> *Illustration*
> A contract for the sale of 10 000 t coffee provides for "shipment: September". The bill of lading is dated 29 September, whereas in reality shipment took place on 3 October. This is a clear case of fraud: There is a manifest non-performance of the obligation under the contract of sale since prices vary from month to month.

In order to prevent unwarranted allegations of manifest abuse or fraud, the security provider must be able to rely on "present evidence". This will usually have to be furnished by the debtor who had instructed the security provider to issue the security. All types of evidence are admissible, especially documents and witnesses. A restriction to documents only, which is sometimes preferred, is difficult to justify; also, the borderline is sometimes doubtful, *e.g.* in the case of affidavits. The weighing of the evidence is a matter for the court which is bound by the relevant procedural rules of the law of the forum.

If after honouring the creditor's demand it is found out that this demand had not been justified or was even "manifestly abusive or fraudulent", the security provider is entitled to reclaim from the creditor (cf. IV.G.–3:106 (Security provider's right to reclaim).

C. Security provider's position in relation to debtor

The security provider's position vis-à-vis the debtor differs, of course, from that towards the creditor. Compliance with an obviously abusive demand might well be a non-performance of a contract with the debtor and might therefore expose the security provider to the debtor's contractual remedies, especially a claim for damages. The debtor could set off this claim against the security provider's claim for reimbursement of the money or other performance which the security provider had paid or furnished to the creditor. More directly, the security provider would lose any right to reimbursement from the debtor under IV.G.–3:109 (Security provider's rights after performance.

On the other hand, the security provider is, in principle, obliged to perform the undertaking to the creditor. Refusing to do so by invoking the present Article will almost inevitably expose the security provider to a confrontation with the creditor; the latter often will not easily accept the security provider's objection.

In order to escape from this dilemma, the security provider may be well advised to turn to the debtor and ask for clarification and instructions. Without the debtor's assistance, the security provider will hardly be able to adduce the necessary proof of the creditor's manifest abuse or fraud. In practice, however, often the debtor may be well aware of the true situation and press the security provider to refuse performance of the security. In such circumstances it may be the debtor who will not only be willing to support the security provider by supplying information and documents; but will also strongly urge the security provider not to honour the creditor's demand.

D. Debtor's preventive remedies

According to paragraph (2), if the requirements of paragraph (1) are fulfilled, the debtor is entitled to remedies both against the security provider and the creditor.

The remedy against the security provider is in line with the security provider's obligation towards the debtor to refrain from complying with the creditor's demand.

The debtor's remedy against the creditor is rooted in the direct relationship between these two parties and the manifestly abusive or fraudulent non-performance of that contract. This rule, in essence, corresponds to the UN Convention on Independent Guarantees of 1995 art. 20. The specific form of court remedies that are available or may be fashioned by the court, is left to the procedural law of the forum state and the discretion of the court. However, three specific remedies mentioned by UN Convention art. 20 paras. (1) and (2) should be mentioned here as means of achieving a balance between the contradictory interests of the creditor, on the one hand, and the security provider and/or the debtor, on the other hand:

> (1) the security provider may be ordered not to transfer the amount of the creditor's demand to the latter and to hold the amount of the security;
>
> (2) if payment has already been effected, the court may order that the creditor may not dispose of the proceeds;
>
> (3) the person applying for a court order may have to furnish security in a form to be determined by the court.

NOTES

I. Protection against abuse or fraud

1. In most EUROPEAN countries the right of the creditor against the security provider under an independent personal security or a letter of credit is subject to the prohibition of abusive exercise of rights. The prohibition of abusive exercise of a right constitutes a basic principle of private law for the exercise of all private rights and is mostly based on the duty of good faith and fair dealing (AUSTRIAN CC § 1295 para. 2; GERMAN CC § 242; GREEK CC art. 281; *Georgiades* § 11 nos. 73 ss.; CA Thessaloniki 449/1996, DEE 2, 826; *contra* CFI Patras 1683/1997, DEE 3, 1184; ITALIAN CC art. 1375; *Portale*, Fideiussione 1072 s.; *Nanni* 197 ss.; see also *Gambaro* 5; PORTUGUESE CC art. 334; SPANISH CC art. 7 para. 2). While in DENMARK and

BELGIUM there is no such statutory general term, the principle is broadly acknowledged (DENMARK: *Ussing*, Aftaler 27 ss.; BELGIUM: Cass. 10 September 1971, Arr.Cass. 1972, 31; *Van Gerven* nos. 70-72). This prohibition is compulsory and may not be deviated from.

2. The demand of the creditor is always exercised abusively when the secured risk has not occurred and subsequently there is no need for covering any damage caused thereby (GREECE: *Georgiades* § 6 no. 135; ITALY: in such a case there is a defect of *causa* of the personal security according to Cass. 6 October 1989 no. 4006, Giust. civ. 1990 I 731; CA Milano 12 February 2005, BBTC 2005 II 481 ss.; SPAIN: *Sánchez Calero*, El contrato autónomo 384; TS 1 October 2007, RJ 20078087). Furthermore, there is an abuse of rights when the creditor demands performance from the security provider although vis-à-vis the debtor not entitled to demand this security (BGH 10 February 2000, BGHZ 143, 381, 384; BGH 8 March 2001, BGHZ 147, 99 for the special case of a dependent personal security on first demand). It is sometimes said that invoking an abuse of right is invoking an objection from the underlying relationship, contrary to the independent nature of the independent personal security and therefore permissible only in exceptional circumstances as against the creditor (BELGIUM: *De Marez* no. 70; FRANCE: cf. *Simler* nos. 984 ss.; GERMANY: BGH 12 March 1984, BGHZ 90, 287, 292; Staudinger/*Horn* nos. 309 s. preceding §§ 765 ss.; for documentary credits see *Schütze* nos. 427 s.; GREECE: *Georgiades* § 6 no. 136; ITALY: Cass. 19 March 1993 no. 3291, Foro it. 1993 I 2171; SPAIN: *Carrasco*, Las nuevas garantías 741; *Sánchez Calero*, El contrato autónomo 385 and 387; SWEDEN: *Dalman* 199). More correctly, the security provider is only obliged within the limits of the security obligation, and may refuse performance if it can be proved that the creditor's assertion that the protected event has occurred is wrong (GREECE: *Georgiades* § 6 no. 136).

3. In ENGLAND, IRELAND, SCOTLAND and the NETHERLANDS, however, the term "fraud" is used instead of "abuse", *i.e.* the personal security may not be called upon if the demand is fraudulent (ENGLAND: *United City Merchants (Investments) Ltd. v. Royal Bank of Canada* [1983] 1 AC 168 (letter of credit); *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* [1978] QB 159 (performance bond); IRELAND: *White* 658; NETHERLANDS: Dutch Business Law § 6.05 [4] [e]; *Pabbruwe*, Bankgarantie/borgtocht 54, 58; SCOTLAND: *Centriforce Engineering Ltd. v. Bank of Scotland* 1993 SLT 190). The fraud exception does not apply, however, where the beneficiary only after the demand has been made discovers that the conditions of the personal security are not fulfilled (ENGLAND: *Montrod Ltd. v. Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954, [2002] 1 WLR 1975).

4. In other countries the two terms abuse and fraud are cumulatively or alternatively used without distinction. This is so in AUSTRIA, BELGIUM, in FRANCE and in PORTUGAL, where the duty of the security provider not to pay upon a manifestly abusive or fraudulent call on the personal security (AUSTRIA: "firm court practice", OGH 28 June 2005, ÖBA 2006, 62 at 64 and 24 June 2003, ÖBA 2003, 956 at 957; BELGIUM: *Wymeersch, Dambre, Troch* no. 57; FRANCE: *Devèze, Couret and Hirigoyen* nos. 3702 ss.; PORTUGAL: *Galvão Telles* 289; STJ 14 October 2004, CJ (ST) XII, II-55) is considered to be one of the exceptions to the general rule of strict compliance *(garantieformalisme)*. Some FRENCH authors expressly say that "fraud" is equivalent to the "abuse of rights" (*Simler* nos. 985 ss.). In case of counter-securities, the payment is prohibited in so far as the demands of both the creditor and the provider of independent security are "manifestly abusive". This requires either a fraudulent collusion between the creditor and the provider of independent security or a fraudulent intention of the latter (Cass.com. 9 October 2001, Bull.civ. 2001 IV no. 158

p. 149, RTD com 2002, 144). In FRANCE the exceptions to the principle of independence were first very restricted; the FRENCH courts seemed to require a fraudulent intention of the creditor (Cass.com. 11 December 1985, JCP G 1986, II no. 20593). Since 1987, a payment upon a manifestly abusive call may also be refused (Cass.com. 20 January 1987, JCP G 1987, II no. 20764). This court practice is confirmed by CC, new art. 2321 para. 2 of 2006, which requires for the discharge of the security provider a manifest abuse or a manifest fraud of the creditor or a fraudulent collusion between the creditor and the debtor.

5. In DENMARK the demand must be "unwarranted", in order for the security provider to deny payment (*Pedersen*, Bankgarantier 155).

6. Three cases decided in different countries dealt with the consequences of the revolutionary changes and expropriations that occurred in Iran in late 1979. European entrepreneurs working in Iran on constructions projects gave up these activities because they were expelled or otherwise forced to stop work. When their Iranian contracting parties or successors demanded payment under independent performance guaranties, a DUTCH court prohibited this upon the request of the Dutch contractor (CFI Amsterdam 18 December 1980, Schip en Schade 1981 no. 135) and the FINNISH Supreme Court rejected the demand as being unfair (HD 26 October 1992, KKO 1992:145, English translation in *Sisula-Tulokas* 41 ss.); for a related case, but with only a preliminary negative ruling cf. GERMAN BGH 12 March 1984, BGHZ 90, 287.

II. "Manifestly" abusive or fraudulent demand and evidence

(a) "Manifestly" abusive or fraudulent demand

7. According to most of the relevant statutory provisions or generally accepted rules (*above* no. 1), the abuse of rights must be "manifest". This term implies the gravity of the abuse, on the one hand, and the feasibility of proving it, on the other. Manifest is an abuse if the abusive demand is detectable by anybody, *e.g.* if the underlying claim has been held by court or arbitral decision to be invalid or when the demand is made for reasons of political vengeance (AUSTRIA: letter of personal security accidentally sent to a wrong person who promised return but demands performance, OGH 8 July 1993, SZ 66 part 2 no. 82 p. 21; generally speaking, there must be an evident abuse of right or fraud to be proved by liquid means of evidence: OGH 16 December 1981, SZ 54 no. 189 p. 929; OGH 14 November 1985, JBl. 1985, 424, 426; BELGIUM: "abuse that stares one in the face", *Wymeersch*, Bank guarantees no. 4; *De Marez* no. 35 at 23; FRANCE: *Devèze, Couret and Hirigoyen* no. 3707; GERMANY: BGH 12 March 1984, BGHZ 90, 287, 292; Staudinger/*Horn* no. 313 preceding §§ 765 ss.; GREECE: *Georgiades* § 6 no. 138; ITALY: *Mastropaolo* 307; *Cassera* 2768; CFI Milano 3 May 1984, BBTC 1985 II 85 and 12 October 1985, BBTC 1987 II 57; CA Milano 27 May 1994, BBTC 1995 II 423; CFI Verona 30 December 2003, Giur.mer. 2005, 176; PORTUGAL: STJ 14 October 2004, CJ (ST) XII, II-55; STJ 1 June 1999, 347/99 www.dgsi.pt; *Almeida Costa and Pinto Monteiro* 20-21; the same for documentary credits, GERMANY: *Schütze* no. 429; GREECE: *Georgiades* § 11 nos. 73-77). Concerning personal securities on first demand, only legal or factual objections that exist obviously to everybody are relevant, all other legal or factual problems or questions having to be settled between creditor and debtor (GERMANY: BGH 12 March 1984, BGHZ 90, 287, 239 s.; cf. also BGH 17 January 1989, NJW 1989, 1480, 1481; for dependent personal security cf. recently BGH 5 March 2002, NJW 2002, 1493). Also the ITALIAN Supreme Court tends to restrict the possibility of invoking

the *exceptio doli* (Cass. 19 March 1993 no. 3291, Foro it. 1993 I 2171; *De Nictolis* 114).

8. In ENGLISH law the fraud exception applies only if it is "seriously arguable that, on the material available, the only realistic inference is that [the creditor] could not honestly have believed in the validity of its demands" (*United Trading Corp. SA v. Allied Arab Bank Ltd.* [1985] 2 Lloyd´s Rep 554, at 561 *per* Ackner LJ.; see also *Goode*, Commercial Law 992 s.). These strict requirements stem from the fact that the courts are reluctant to interfere with the smooth operation of documentary credits which are regarded as the "life-blood of international commerce" (*R. D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.* [1978] QB 146, at 155 *per* Kerr J.).

9. In DENMARK it must be proven that the claim is unwarranted (*Pedersen*, Bankgarantier 156).

10. There is neither court practice nor literary opinion on this specification of the abuse and its proof in SPAIN. Authors have merely indicated in general that, in order to preserve the economic function of independent personal securities and their legal nature, objections to the creditor's demand must be limited (*Sánchez Calero*, El contrato autónomo 384; for an in-depth discussion of the topic on the basis of references to foreign countries *Carrasco*, Fianza 216 ss.).

(b) Present evidence

11. In some countries the proof can be made with any evidence which is "present" and allowed by law, *i.e.* not only with documents, but also with witnesses or affidavits (ENGLAND: *Etablissement Esefka International Anstalt v. Central Bank of Nigeria* [1979] 1 Lloyd´s Rep 445; GERMANY: Staudinger/*Horn* no. 315 preceding §§ 765 ss.; *contra* CA Köln 7 August 1986, WM 1988, 21, demanding documentary means of evidence; GREECE: *Georgiades* § 6 no. 140; for documentary credits cf. *Georgiades* § 11 no. 75). Furthermore, it suffices *e.g.* that the security provider is informed of the abuse by the debtor or by certain information in the newspapers, or just by certain well-known facts (BELGIUM: *De Marez* no. 29; PORTUGAL: STJ 14 October 2004, CJ (ST) XII, II-55; *Cortez* 513 ss.).

12. In other countries, however, courts admit a manifest fraud or abuse only if based on documentary evidence, *e.g.* a final judgement against the creditor, a certificate of payment from the creditor, because the proof must be beyond doubt (DENMARK: *Pedersen*, Bankgarantier 155); the same in FRANCE, where in only one decision the manifestly abusive call was not proved by documentary evidence, but by the admission of the creditor (CFI Paris 1 August 1984, JCP G 1984, II no. 20526). In ITALY opinions on this point are more fragmented (for the necessity of documentary evidence *Mastropaolo* 307; *Pontiroli*, Garanzie autonome 76 s.; but *contra Bonelli*, Le garanzie bancarie 107, fn. 70; for an overview of the diverging opinions expressed on this point by scholars and courts see *Calderale*, Fideiussione 305 ss.; more recently *Barillà*, L´abuso 93 ss., fn. 15; *Cuccovillo* 103 ss. and CFI Bologna 20 January 2003, BBTC 2005 II 79 on the relevance of testimonial evidence in proceedings for the granting of an interim injunction inhibiting payment by the security provider).

(c) Consequences for security provider

13. In some countries the security provider *is not obliged*, but *can* refuse, or *is only entitled not* to pay the creditor in cases of abusive/fraudulent demand (DENMARK: *Pedersen*, Bankgarantier 155; GERMANY: Staudinger/*Horn* no. 312 preceding §§ 765 ss.; PORTUGAL: CA Lisboa 11 December 1990, CJ XV, V-134; *Almeida*

Costa and Pinto Monteiro 21: the security provider however should not pay and may lose the right of recourse; in AUSTRIA one writer concludes that the security provider is only entitled to refuse performance if fully convinced, on the basis of present evidence, that the conditions summarized above (no. 6) have been met; if there is merely a doubt, performance must be made: *Harrer* 67).

14. In other countries the security provider *must* refuse payment because there is a duty to protect the debtor and the security provider is thus *obliged* as against the latter to omit payment (BELGIUM: *de Marez* no. 33; FRANCE: *Devèze, Couret and Hirigoyen* no. 3708; however, according to new CC art. 2321 para. 2 of 2006 the security provider is not obliged to refuse to pay, but only entitled to; GREECE: *Georgiades* § 6 no. 143; CFI Athens 9714/1996, EED 49, 45; for documentary credits *Georgiades* § 11 no. 73; ITALY: so according to the prevailing opinion among scholars and courts, often on the basis of the principal-agent relationship existent between debtor and security provider; see for all *De Nictolis* 113; *Calderale* 259 ss.; *Tommaseo*, Autonomia negoziale 425; CFI Torino 27 September 2003, Giur.mer. 2004, 280; CFI Bologna 20 January 2003, BBTC 2005 II 79; CFI Treviso 24 December 1997, Riv.Dir.Civ. 1998 II 443; CFI Roma 26 May 1995, Foro it. 1996 I 1091; SPAIN: *Sánchez Calero*, El contrato autónomo 389). In ENGLAND the security provider may be restrained from performance towards the creditor by an injunction sought by the debtor if clear knowledge of the fraud on the security provider's part can be shown (*Andrews and Millet* no. 16-021; *O´Donovan and Phillips* nos. 13-28 ss.).

15. As to the security provider's claim for return of what has been conferred by performance against the creditor, cf. national notes on IV.G.–3:106 (Security provider's right to reclaim) *sub* IV.

(d) Scope of debtor's protection

As against both the security provider and the creditor

16. The debtor may take legal action against the creditor: the debtor has a claim arising from the relationship with the creditor that the latter omit to demand performance of the personal security, if the secured risk has not occurred (BELGIUM: *de Marez* no. 39; ENGLAND: *Andrews and Millet* nos. 16-025 ss.; there is some discussion whether the standard of proof for a case of fraud might be lower in such a constellation as opposed to an action against the security provider, cf. *Themehelp Ltd. v. West* [1996] QB 84; see also *O´Donovan and Phillips* nos. 13-38 s.; minority opinion in GREECE: CFI Athens 7913/1998, EED 50, 279; *Georgiades* § 6 no. 148; for documentary credits, *Georgiades* § 11 no. 60; PORTUGAL: *Pinheiro* 461). In the NETHERLANDS and in ITALY often for procedural reasons the debtor enjoins both the security provider and the creditor, the former from performing the personal security, the latter from utilizing it (NETHERLANDS: *Pabbruwe,* Bankgarantie/borgtocht 54, 58; Dutch Business Law § 6.05 [4] [e]; ITALY: CFI Roma 26 January 1996, Foro it. 1996 I 2540; CFI Genova 9 December 1992, Giur.comm. 1993 II 757; however, interim protection of the debtor is rarely claimed against the creditor, especially in international commerce: *Bonelli*, Le garanzie bancarie 153 ss.; see however also, no. 17 below).

17. The debtor may demand that the security provider makes no payment to the creditor. This right can be enforced in court by requesting an interim order prohibiting payment (AUSTRIA: OGH 16 December 1981, SZ 54 no. 189 at p. 931; GERMANY: *Horn*, Bürgschaften und Garantien nos. 583-591 with case law; ITALY: CCP arts. 700 ss.; *Bonelli*, Le garanzie bancarie 133 ss.; *Tommaseo*, Autonomia negoziale 426 ss.; *e.g.*

CFI Milano 17 July 2003, Foro pad. 2003 I 398; CFI Bologna 20 January 2003, BBTC 2005 II 79; PORTUGAL: STJ 14 October 2004, CJ (ST) XII, II-55).

(e) As against the security provider only

18. In other countries, however, the debtor may only prohibit the security provider from making payment if the creditor abuses the creditor's rights. This right of the debtor can be enforced by an interim order (AUSTRIA: OGH 28 June 2005, ÖBA 2006, 62, 64 ("firm court practice"); 16 December 1981, SZ 54 no. 189 p. 931; FRANCE: *Devèze, Couret and Hirigoyen* no. 3692; *Simler* no. 971; GERMANY: MünchKomm/*Habersack* no. 35 preceding § 765). In some countries however, the debtor is not allowed to intervene in the relationship between security provider and creditor and therefore may not prohibit the security provider from making payment to the creditor (SPAIN: *Sánchez Calero*, El contrato autónomo 391; GREECE: CA Athens 3425/1985, Arm 41, 578; minority opinion in GERMANY: Staudinger/*Horn* nos. 320 ss. and 336 ss. preceding §§ 765 ss.).

(f) As against the creditor only

19. In DENMARK the debtor is entitled to try to prohibit the calling-up of a manifestly abusive payment only as against the creditor (*Pedersen*, Bankgarantier 65, 148, 155 and 158).

IV.G.–3:106: Security provider's right to reclaim

(1) The security provider has the right to reclaim the benefits received by the creditor if:

(a) the conditions for the creditor's demand were not or subsequently ceased to be fulfilled; or

(b) the creditor's demand was manifestly abusive or fraudulent.

(2) The security provider's right to reclaim benefits is subject to the rules in Book VII (Unjustified Enrichment).

COMMENTS

A. The issue

In the factually triangular situation of an independent security it is not quite clear who is entitled to request return of a performance that had been made by the security provider on the creditor's demand, although the conditions for the demand had not been fulfilled or later disappeared or the demand was abusive or fraudulent. Is the security provider entitled or rather the debtor or both?

National legal systems vary considerably on this issue, using sometimes very fine distinctions in allocating the right to the one or the other party. However, in this field any such distinction does not appear to be practicable since it leaves a margin of uncertainty. Therefore, only the *alternative* between security provider and debtor offers clarity and certainty.

Doubts may arise due to the fact that the security provider's performance of the creditor's demand at the same time often will extinguish (or reduce) an obligation of the debtor vis-à-vis the creditor in the framework of an underlying relationship between these two parties. This fact is sometimes invoked as justifying that return of such performances can only be requested by the debtor. However, this thesis overlooks the fact that the security provider's obligation is a separate and independent obligation and usually its content will also differ from the debtor's obligation to the creditor. The security provider only performs the security obligation; usually, of course, such performance may also extinguish (or reduce) the debtor's obligations towards the creditor, but this effect is incidental.

The better reasons speak for entitling the security provider. The person who performed has the greatest interest in rectifying an unjustified performance. Also, the security provider is more familiar with the circumstances under which performance was made and with defences and objections against the creditor's claim which the security provider had been precluded from raising against the creditor. This solution also avoids the duplication of remedies which would be involved in giving the debtor a right to reclaim from the creditor and then giving the security provider a right to claim from the debtor. Not only would this be inefficient but it would also expose the security provider to risk if the debtor has become bankrupt.

However, the security provider often will require the debtor's assistance with respect to the facts or legal rules envisaged by the terms regulating the independent security for justifying the creditor's demand. Such assistance is even more important if the conditions for the creditor's demand under the independent security had originally been fulfilled but later disappeared.

If the parties feel that it is more convenient to let the debtor bring the claim or an action against the creditor, they are free to agree on an assignment of the security provider's rights to the debtor.

However, there is an important outer limit to the security provider's entitlement. This follows from the wording of paragraph (1). The security provider may only invoke the terms of the independent security as against the creditor. By contrast, the security provider is not entitled to invoke the terms of an underlying contract or other juridical act between the debtor and the creditor. If the security provider's promise of performance had been invoked and honoured although the debtor had performed the secured obligation to the creditor in circumstances where performance was not due, any claim for the return of what was conferred by this performance must be brought by the debtor against the creditor. The only exception to this limitation is the case of an evidently abusive or fraudulent demand; but this exception is to be very strictly construed.

B. Terms of demand not fulfilled

Upon receiving a demand for performance, the security provider must examine the validity of the independent security and whether the demand exactly complies with the terms and conditions of the independent security; the debtor must be informed of the demand (cf. IV.G.–3:102 (Notification to debtor by security provider). Nevertheless, due to a misunderstanding or due to temporary absence of a competent person in either the security provider's or the debtor's office it may occur that the security provider erroneously believes that performance is due on the creditor's demand and in fact performs. The security provider is then entitled to demand return of the benefits conferred by the performance.

Illustration 1
B in France has concluded with S in England a contract of sale for 500 English sheep. On S's demand, B requests X-Bank in London to assume an independent security for payment of the purchase price which may be utilised by S on the day of shipping the sheep to France and on presentation of a veterinary certificate for the sheep. Although S has not presented such a certificate because he did not apply for it, he demands payment. An employee at X-Bank overlooks the absence of the required certificate and therefore honours S's demand for payment. X-Bank may request repayment of the amount paid under the independent security from S.

C. Security provider's defence or counterclaim

The security provider may have a defence or a counterclaim against the creditor which the security provider was not permitted to raise or to set off under the terms of the independent security or under an independent security on first demand. After having performed the security, the security provider is entitled to request return of the performance made on the basis of those defences or to raise the counter-claim.

D. Terms of demand subsequently disappeared

The justification for a demand that existed at the time of presentation of the security may later have disappeared.

Illustration 2
The basic facts are as in Illustration 1. However, S has applied for and obtained such a certificate, and X-Bank duly makes payment to him. Thereafter, the veterinary certificate is revoked due to the BSE crisis in England.

For the reasons set out in Comment A, the security provider should also in this case be entitled to request return of the money paid.

It deserves to be mentioned that the provider of an independent security is entitled to demand return of the benefits conferred by performance only if the conditions of the independent security had not been fulfilled or had later fallen away. If performance of the independent security for reasons rooted only in the underlying relationship never was justified or subsequently is no longer justified, then only the debtor as a party to that contract is entitled to request "return" of the performance.

Illustration 3
As in Illustration 2, but it turns out that the sheep are infected and therefore the French customs authorities refuse entry of the sheep to France. B terminates the contractual relationship. Only B and not X-Bank may request repayment of the purchase price from S.

E. Manifestly abusive or fraudulent demand

If the provider of independent security for whatever reason performs a demand which is, and is proved by present evidence to be, manifestly abusive or fraudulent, the security provider is entitled to request return of the performance made. The reasons correspond to those mentioned in Comment A.

However, if the security provider has already been (or may in future be) reimbursed by the debtor for the performance to the creditor, it may be more convenient for the parties to have the claim for repayment brought by the debtor; the security provider may then simply assign the right against the creditor to the debtor.

F. Consequences governed by rules on unjustified enrichment

The conditions set out in the first paragraph of the Article closely correspond to the basic conditions of a claim for unjustified enrichment. It is therefore consistent to refer with respect to the details of the provider's claim for return of the performance to those rules, as set out in Book VII.

In particular, the rules on unjustified enrichment may preclude a security provider's claim for return if the security provider knew (or ought to have known) at the time of the creditor's demand that this demand did not comply with the terms and conditions of the independent security or that the demand was manifestly abusive or fraudulent, if and in so far as the security provider had been entitled to raise those defences.

NOTES

I. Restitution if independent security is invalid

1. According to AUSTRIAN, DANISH, GERMAN, GREEK, ITALIAN, PORTUGUESE and SPANISH law, the provider of independent security may claim restitution from the creditor of what has been conferred by performance if the contract of independent security was invalid (AUSTRIA: OGH 11 May 2005, ÖBA 2005, 899, 901; Avancini/Iro/*Koziol* no. 3/156; DENMARK: *Pedersen*, Bankgarantier 72 s.; GERMANY: Staudinger/*Horn* no. 346 preceding §§ 765 ss.; *Hadding, Häuser and Welter* 727; GREECE: *Georgiades* § 6 no. 128; ITALY: Cass. 6 October 1989 no. 4006, Giust.civ. 1990 I 731; *Rossetti* 16; PORTUGAL: *Pinheiro* 455; SPAIN: *Sánchez-Calero*, El contrato autónomo 402).

II. Restitution upon non-compliance with terms of independent security – para (1) lit. (a)

2. According to GERMAN, GREEK, ITALIAN, PORTUGUESE and SPANISH law, the provider of independent security may claim restitution from the creditor if there was no right to claim under the independent security because the performance, as effected by the provider of the independent security, was according to the terms of the independent security not owed as to its amount, at this time or to this beneficiary (GERMANY: Staudinger/*Horn* nos. 346 and 244-246 preceding §§ 765 ss.; *Hadding, Häuser and Welter* 727; GREECE: *Georgiades* § 6 no. 128; ITALY: Cass. 6 October 1989 no. 4006, Giust.civ. 1990 I 731; *Viale* 203; *De Nictolis* 196; NETHERLANDS: *Pabbruwe*, Bankgarantie 63; PORTUGAL: *Castelo Branco* 79; *Pinheiro* 455; SPAIN: *Sánchez-Calero*, El contrato autónomo 403). Similarly, in ENGLISH law, the security provider might in appropriate circumstances be entitled to reclaim what has been conferred by the performance where the security provider has inadvertently paid against non-conforming documents; it is thought by one eminent writer, however, that such a recovery is limited to situations where the documents presented are totally valueless (cf. *Goode*, Commercial Law 998).

III. Restitution upon non-compliance with terms of underlying relationship

3. Apart from cases of a manifestly abusive demand, in GERMANY the provider of independent security may not rely upon the relationship between debtor and creditor, unless, and only in so far as, the security refers to that relationship. However, it is controversial (cf. *Hadding, Häuser and Welter* 729) in how far without such a reference, especially in the case of an independent security on first demand the provider of independent security may rely upon a lack in the underlying relationship. The Federal Supreme Court and the majority of writers today do not in such a case allow the security provider to claim restitution from the creditor and merely consider a claim for damages for breach of contract against the debtor (BGH 25 September 1996, ZIP 1997, 275, 277 s.; *contra* Staudinger/*Horn* nos. 347 s. preceding §§ 765 ss.; cf. also *Horn*, FS Brandner 632; *Zahn, Eberding and Ehrlich* no. 9/122). Even less may the provider of independent security reclaim anything conferred by performance when the debtor performs subsequently (cf. *Canaris*, ZIP 1998, 500 and Bankvertragsrecht no. 1143). Also in AUSTRIA, ENGLAND, FRANCE, ITALY, the NETHERLANDS and PORTUGAL it is the debtor who is entitled to reclaim a payment made under the independent security if that was not justified according to the terms of the underlying agreement with the creditor (AUSTRIA: Avancini/Iro/*Koziol* no. 3/157; OGH 12 August 1996, ÖBA 1997, 64, 66; OGH 16 March 1988, SZ 61 no. 63 p. 327;

ENGLAND: *Goode*, Commercial Law 998; FRANCE: *Simler* no. 1002; ITALY: Cass. 6 October 1989 no. 4006, Giust.civ. 1990 I 731; *De Nictolis* 197; NETHERLANDS: Dutch Business Law § 6.05 [4] [b]; *Pabbruwe*, Bankgarantie 63; cf. also CFI Breda 27 April 1993, NJB 1996 no. 99; PORTUGAL: *Galvão Telles* 283).

4. In GREECE, in the case of documentary credits which according to prevailing opinion are regarded as a payment order *lato sensu* according to CC arts. 876 ss., the debtor is entitled to a claim for unjustified enrichment if an underlying relationship is lacking or it has been defectively performed (cf. *Georgiades* § 11 no. 65).

5. According to DANISH law, the creditor has to pay back an amount, which has been paid under an independent security if it turns out that the security provider's payment according to the contract between creditor and debtor was in fact unwarranted; normally, both the security provider and/or the debtor are entitled to this claim (see *Pedersen*, Bankgarantier 72 s.).

IV. Restitution upon manifestly abusive demand – para (1) lit. (b)

6. According to the law of most member states, the provider of independent security who has performed may claim restitution in cases of manifestly abusive demand (AUSTRIA: Avancini/Iro/*Koziol* no. 3/57; DENMARK: *Andersen, Madsen, Nørgaard*, Aftaler 144; ENGLAND: *Goode*, Commercial Law 997; GERMANY: for an independent security on first demand BGH 10 November 1998, BGHZ 140, 49, 51 s.; Staudinger/*Horn* no. 358 preceding §§ 765 ss.; GREECE: *Demetriades* 77; ITALY: Cass. 6 October 1989 no. 4006, Giust.civ. 1990 I 731; *Bonelli*, Le garanzie bancarie 176; NETHERLANDS: *Pabbruwe*, Bankgarantie 63 s., on the ground that if the creditor's demand is obviously abusive, the security provider is to refuse performance and therefore may not debit the debtor; PORTUGAL: *Ferrer Correia* 257; SPAIN: *Sánchez-Calero*, El contrato autónomo 389; *Carrasco a.o.* 339, 360).

7. However, in AUSTRIA an exception from the preceding rule is made if the security provider performs an independent security, although the security provider knows or ought to know that the creditor's demand is unjustified or abusive. In this case, only the debtor is entitled to reclaim performance from the creditor (OGH 11 May 2005, ÖBA 2005, 899, 902 and 23 June 2005, ÖBA 2005, 902, 904). Also in FRANCE, the debtor is entitled to claim restitution of the performance in case of an unjustified demand (*Simler* no. 1002).

V. Bases of security provider's claim

(a) Unjustified enrichment including undue payment – cf. para (2)

The rule

8. In several countries, the security provider's claim for restitution is based upon unjustified enrichment (AUSTRIA: Avancini/Iro/*Koziol* no. 3/156; DENMARK: cf. also *Vinding Kruse* chap. 8 although there are no general rules on unjustified enrichment; GERMANY: MünchKomm/*Habersack* no. 20 preceding § 765; *Hadding, Häuser and Welter* 727 ss.; GREECE: *Georgiades* § 6 nos. 127 ss. and 144, § 11 no. 65; PORTUGAL: *Pinheiro* 455).

9. In BELGIUM, ITALY, the NETHERLANDS and SPAIN, the claim for recovery of the performance can only be based upon the more specific provisions on return of a payment erroneously made but not owed (BELGIUM: CC arts. 1235 para. 1 and 1376 ss.: *Vliegen* nos. 252-255; *Dirix,* Obligatoire 264 s.; ITALY: CC art. 2033; *Rossetti* 16; Cass. 6 October 1989 n. 4006, Giust.civ. 1990 I 731; NETHERLANDS: CC art. 6:203 ss.; *Pabbruwe,* Bankgarantie 63 s.; *Croiset van Uchelen* 25, 27; SPANISH CC

art. 1895-1901). Undue is a payment if the debt had already been fulfilled, or the debt had been discharged by set-off, or the person accepting the payment was in reality not the creditor, or the one paying (the *solvens*) was not the real debtor (cf. BELGIAN CC art. 1377; SPANISH CC art. 1901). It is not necessary that the *solvens* made a mistake; fault does not impede a claim for repayment on the ground of undue payment. A mistake will only have to be proved if it is doubtful whether the payment was really undue: *e.g.* if the *solvens* knew that the money was not due but paid, it will have to be found out why the *solvens* really paid and whether the payment was really undue (*Vliegen* no. 252). The consequences of a claim founded on undue payment are stipulated by BELGIAN CC arts. 1377 to 1381, especially in art. 1378: "If there was bad faith on the part of the one who received, he is required to make restitution of the capital as well as interests or fruits from the day of payment". Corresponding provisions are to be found in the NETHERLANDS (CC arts. 6:206, 3:121) and in SPAIN (CC art. 1896 para. 1).

10. In ENGLISH law, the security provider's claim against the creditor for recovery of money paid may be based upon a mistake of fact (cf. *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* [1978] QB 159, 170; *Bank Tejarat v. Hong Kong and Shanghai Banking Corporation (CI) Ltd*. [1995] 1 Lloyd´s Rep 239, 244). However, it is argued that a mistake of fact concerning the genuineness or conformity of the documents as a restitutionary basis for the recovery of money will only be available for a security provider against the creditor in cases involving fraud on the latter's part or the tender of documents that are totally valueless. It is thought that the claim for recovery of money would amount to a rejection of documents which had already been accepted and that this as a matter of policy should be discouraged (cf. *Goode*, Commercial Law 998; *Jack, Malek and Quest* no. 5.81).

11. By contrast, in FRANCE, some authors consider that neither the case law rules on unjustified enrichment nor the rules on undue payment (cf. no. 9 above) may be applied (see *Simler* no. 1004; Malaurie and Aynès/*Aynès and Crocq* no. 346). The payment is not unjustified because it is based on a (independent security) contract. But see no. 14 below.

(b) Restrictions

12. If the security provider has satisfied the creditor fully knowing the lacking justification of the creditor's demand, especially an abuse, a claim for unjustified enrichment may be excluded according to AUSTRIAN CC § 1432, GERMAN CC § 814 and GREEK CC art. 905 (AUSTRIA: OGH 23 June 2005, ÖBA 2005, 902, 904; Avancini/Iro/*Koziol* no. 3/156; GERMANY: Staudinger/*Horn* nos. 349, 358 preceding §§ 765 ss.; *Hadding, Häuser and Welter* 727; GREECE: *Georgiades* § 6 no. 144 and § 11 no. 65 for letter of credit). Similarly, in ITALIAN law the right of restitution of the security provider is excluded if he knew or had evident proof of the abusive character of the demand (CFI Milano 13 December 1990, BBTC 1991 II 588). In SPAIN it is said along the same lines that merely negligent ignorance of the creditor's fraud, due to negligent checking of the tendered documents, does not bar the security provider's right to restitution from the creditor (*Sánchez-Calero*, El contrato autónomo 403). By contrast, in PORTUGAL the decisive element is the security provider's intention to perform, knowledge of the lack of justification of the creditor's demand being irrelevant (*Pires de Lima and Antunes Varela* 464).

(c) Breach of contract

13. Damages may also be claimed for the creditor's breach of contract (GERMANY: *Horn*, FS Brandner 630). Also in ENGLISH law, there is some discussion whether a

creditor presenting non-conforming documents is liable for damages for breach of an implied warranty that the documents are genuine and that there is no latent non-conformity with the terms of the security (cf. *Goode*, Commercial Law 998; for the contrary view see *Jack, Malek and Quest* no. 5.81).

(d) Non-contractual liability for damages

14. Additionally, GERMAN CC § 826 and GREEK CC art. 919 allow the provider of independent security in some cases of abusive demand the right to claim damages for immoral, wilful and malicious injury (GERMANY: Staudinger/*Horn* no. 358 preceding §§ 765 ss.; GREECE: *Georgiades* § 6 no. 144). Also in FRANCE such a claim is considered, especially in cases of manifest abuse (cf. *Simler* no. 1004); of course the creditor's fault has to be proved (see CA Paris 14 March 1988, D. 1989, Somm.Comm. 152).

VI. Cross-reference

15. On restitution after assignment of the independent security, cf. national notes on IV.G.–3:107 no. 13.

IV.G.–3:107: Security with or without time limits

(1) If a time limit has been agreed, directly or indirectly, for the resort to a security, the security provider exceptionally remains liable even after expiration of the time limit, provided the creditor had demanded performance according to IV.G.–3:103 (Performance by security provider) paragraph (1) or IV.G.–3:104 (Independent personal security on first demand) at a time when the creditor was entitled to do so and before expiration of the time limit for the security. IV.G.–2:108 (Time limit for resort to security) paragraph (3) applies with appropriate adaptations. The security provider's maximum liability is restricted to the amount which the creditor could have demanded as of the date when the time limit expired.

(2) Where a security does not have an agreed time limit, the security provider may set such a time limit by giving notice of at least three months to the other party. The security provider's liability is restricted to the amount which the creditor could have demanded as of the date set by the security provider. The preceding sentences do not apply if the security is given for specific purposes.

COMMENTS

A. General

Basic idea. Within this Part, it is intended that dependent and independent personal securities should follow substantially identical rules as regards the question of agreed time limits and their legal consequences. This approach is in line with the position under international regulations, which at least in relation to matters of time limits for resort to a security subject independent securities to rules similar to the one contained in IV.G.–2:108 (Time limit for resort to security) for dependent securities (cf. UCP 500 (1993) art. 42, UN Convention on Independent Guarantees of 1995 art. 11 (1) (d) read with art. 12 (a)).

Content of the rule. Paragraph (1) covers independent securities with an agreed time limit for resort to security, while paragraph (2) deals with the possibility of the security provider limiting liability in cases where the security is given without a time limit. In both paragraphs the rules are drafted in a way closely resembling the provisions of IV.G.–2:108 (Time limit for resort to security) and IV.G.–2:109 (Limiting security without time limit) respectively. However, minor differences stem from the independent nature of the personal securities covered by this Chapter.

B. Security with time limit for resort to security

Scope. An independent security can be subject to different types of time limits. Some time limits relate to the point of time at which the conditions for liability under the security, if any, must be fulfilled. A time limit for resort to security as covered by paragraph (1), however, exists where the parties have agreed that the security provider ceases to be liable after a certain point of time. This will typically be the case where the parties have used formulas such as "This security expires August 31" or "The security provider is liable under this security only until August 31".

Consequences of expiration of time limit. As follows indirectly from paragraph (1) sentence 1 ("the security provider exceptionally remains liable"), the general rule is that the security provider is no longer liable at all towards the creditor after expiration of the agreed

time limit. The security provider remains liable after expiration of the agreed time limit only if the creditor had demanded performance at the proper time and in the required manner.

Time for demand for performance. Obviously, the demand for performance can have the effect of continuing the security provider's liability only if it is made before expiration of the agreed time limit. Moreover, for reasons equivalent to those described in the Comments to IV.G.–2:108 (Time limit for resort to security), the creditor generally must be entitled to performance at the time of the demand, i.e. the additional conditions for liability under the security, if any, must be fulfilled. In situations where these conditions are fulfilled only close to expiration of the agreed time limit, this rule could cause difficulties for the creditor; in order to solve this problem, paragraph (3) of IV.G.–2:108 (Time limit for resort to security) is declared applicable with appropriate adaptations. Thus, where the aforementioned conditions (replacing in the context of independent securities the maturity of the secured obligations as referred to in the text of IV.G.–2:108 (Time limit for resort to security) paragraph (3)) are fulfilled at the moment of, or within fourteen days before, expiration of the time limit of the security, the demand for performance under the security may be made earlier than otherwise possible, but no more than fourteen days before expiration of the time limit.

Security provider's maximum liability. Even if a demand for performance is made in accordance with the preceding requirements, the security provider's maximum liability is limited to the amount which the creditor could have demanded under the security as of the date when the time limit expired. Subsequent developments cannot increase the security provider's liability; from the agreed time limit itself also follows that the security provider is liable only if and in so far as the conditions for liability under the security are fulfilled by that time.

C. Security without time limit

Scope. Paragraph (2) covers securities that do not have any time limit, *i.e.* neither a time limit for resort to security as covered by paragraph (1) nor any other kind of restriction according to which the liability of the security provider effectively depends upon certain conditions being fulfilled before a certain time. Whether or not a security does have such a time limit, is a matter of construction of the parties´ agreement; some general guidelines for interpretation might be found in the Comments to Article IV.G.–2:108 (Time limit for resort to security).

Possibility to set time limit. According to paragraph (2) sentence 1, the provider of an independent security without a time limit may set such a limit by simple declaration with a notice period of at least three months. For the rationale behind this minimum period of notice, cf. Comments to IV.G.–2:109 (Limiting security without time limit).

Effect of limitation. If the security provider sets a time limit according to paragraph (2), the security provider's liability after expiration of this time limit is restricted to the amount which could have been demanded by the creditor at that point of time. In the exceptional case of a non-monetary obligation of the security provider under the security, the extent of that obligation at the moment of expiration of the time limit set by the security provider is decisive. In any case, the security provider is only liable if and in so far as any conditions for liability under the security are fulfilled when the time limit expires. The limitation by the security provider does not, however, give rise to a time limit for resort to the security.

Exceptions. Paragraph (2) does not apply if the security is given for specific purposes. As with IV.G.–2:109 (Limiting security without time limit) the possibility of limiting a security under this Article is therefore of importance predominantly in situations where the security is assumed in order to secure the creditor against risks that are not exactly specified, resembling a global security, e.g. where the security provider undertakes to secure the payment of all demands that the creditor may make against the debtor arising from their business relationship. As under IV.G.–2:109 (Limiting security without time limit), no recourse to the general principle in III.–1:109 (Variation or termination by notice) paragraph (2) is possible where the special exception in paragraph (2) sentence 3 of the present Article applies.

NOTES

I. Independent securities with a time limit for resort to security

1. In international commercial practice only rarely are independent personal securities issued without agreed time limits. Often also the meaning of these time limits will be spelt out in detail in the parties´ agreement. In the absence of such an agreement, it is a very debated question in the member states especially in relation to time limits for resort to the security whether the equivalent rules on time limits for dependent personal securities are applicable.

2. Most member states seem to embrace the general idea of these Rules by applying substantially identical rules with respect to time limits for resort to security in relation to both dependent and independent security. In a few states, this result is achieved by extending the rules on time limits for dependent securities to independent securities as well (nos. 3 and 4 below); others apply identical principles of general contract law concerning this issue in both types of securities (nos. 5 and 6 below). Some member states, however, expressly rule out the applicability of these rules and developed rules specific to independent securities (nos. 7 ss. below).

(a) Application of identical rules for dependent and independent security

Recourse to rules on time limits for dependent security

3. According to GREEK court practice, CC art. 866 on the time limit for resort to dependent securities applies to independent securities (A.P. (Plenum) 10/1992, NoB 41, 70 ss.); however, it constitutes *jus dispositivum* (A.P. 133/1956, NoB 4, 617-618). On the other hand, some writers deny its application to independent securities (*Gouskou* 90 ss.; *Psychomanis*, NoB 42, 1619 ss.).

4. Some ITALIAN authors think that the rules on the dependent security with a time limit for resort to the security (CC art. 1957) also apply to the independent security (*Bianca* 520; critical *Portale*, Fideiussione 1070 s.); according to CC art. 1957 para. 1, the provider of a security with time limit remains liable six months after the secured obligation has fallen due, provided that the creditor within six months commenced and diligently pursued available actions against the debtor. But this is not the majority's view in doctrine and it is not shared by the majority of recent case law (see no. 11 below).

(b) Application of general contract law rules to both types of personal security

5. In BELGIUM and PORTUGAL, obligations from dependent as well as independent securities expire according to rules of general contract law. Obviously the termination

of the main contract does not affect the existence of the independent security. But the issuer of a security does not have to respond to demands on the security after its expiration (BELGIUM: *T´ Kint* nos. 858-859; PORTUGAL: *Castelo Branco* 77; *Pinheiro* 449).

6. Also in SPANISH law, specific rules concerning the time limits for resort to dependent or independent securities do not exist. Therefore, rules of general civil law are applicable to both kinds of contracts. CC art. 1117 provides that if an obligation is conditional on the occurrence of a certain event within a given time the obligation is extinguished after the passing of the time, or when it becomes certain that the event will not occur. Therefore, the issuer of a security with a time limit should no longer be liable after expiration of the agreed time. Regarding specifically the contract of independent security, it has been doubted whether the extinction of the obligation should take place if no demand for performance is received or if the agreed event does not occur within the time limit. This problem is solved in international practice by an explicit term providing an express time limit for resort to the security, so that after expiration of such a time limit a call on the security is no longer valid (*Sánchez-Calero*, El contrato autónomo 351).

(c) Application of general contract law rules to independent security

7. According to DANISH literature it is not possible to apply the rules on dependent securities generally to independent securities (*Pedersen*, Kaution 14). The meaning of a time limit in an independent security must be ascertained by interpretation (*Ussing*, Kaution chap. 37; *Pedersen*, Kaution 14 and Bankgarantier 138).

8 Also in ENGLAND, it has been said to be rather doubtful in general whether independent personal securities with time limits follow identical rules as applicable to dependent securities (cf. *City of London v. Reeve & Co Ltd.* [2000] C.P.Rep 73). However, the inclusion of a date of expiration is regarded as a vital statement in an independent security, especially in commercial practice (cf. *Goode*, Commercial Law 981); it is thought to be generally accepted practice that a claim for payment under such a security has to be made before it expires (cf. *Gorton*, Independent Guarantees 250).

9. The analogous application of the rules on dependent securities is also excluded in FRANCE (*Simler* nos. 951 ss.). Because of its autonomous character, the duration of the independent security does not depend on the terms regulating the underlying obligation. Contrary to the dependent security, the expiry of the independent security discharges entirely the provider of independent security (*Simler* nos. 952 and 955). Beyond these two basic assertions, rules of general civil law are applicable to the contract of independent security (*Simler* no. 953).

10. In GERMANY independent securities are in general limited in time by the parties (Staudinger/*Horn* no. 205 preceding §§ 765 ss.; *Canaris*, Bankvertragsrecht no. 1126; *Graf von Westphalen* 50, 113). If an express agreement is missing, a limitation may be derived from other contractual stipulations by interpretation as well as from the circumstances (Staudinger/*Horn* no. 207 preceding §§ 765 ss.). Whether the demand has to be made or the secured event has to occur before expiration of the agreed time depends on the stipulation of the parties (*Canaris*, Bankvertragsrecht no. 1126). The corresponding rule for dependent securities in GERMAN CC § 777 is not applicable, so that after expiration of an agreed time the provider of independent security may refuse payment (GERMAN CC §§ 163, 158 para. 2; Staudinger/*Horn* no. 205 preceding §§ 765 ss.; cf. also *Hadding, Häuser and Welter* no. 712; in favour of the application of § 777 MünchKomm/*Habersack* no. 19 preceding § 765); consequently,

an additional period as according to § 777 para. 1 sentence 2 is not available, unless the contract has to be interpreted otherwise (cf. Staudinger/*Horn* no. 206 preceding §§ 765 ss.).

11. In ITALY the majority of recent court decisions (Cass. 21 April 1999 no. 3964, RN 1999 1271; Cass. 1 June 2004 no. 10486, Assicurazioni 2005 177; Cass. 31 July 2002 no. 11368, BBTC 2003 II 245; CFI Milano 2 July 2004, BBTC 2004 II 620) and writers regard the statutory provision of CC art. 1957 para. 1 on time limits for dependent personal security to be inapplicable to independent security (*contra* Bianca 520; cp. also *Portale*, Fideiussione 1070 s.). However, opinions widely diverge as to the alternative solution of the issue. The Supreme Court refers to the interpretation of the contract of security to find out whether the parties wanted or did not want the application of CC art. 1957 to independent security. The opinions of legal writers are quite diverse: According to one opinion based on CC art. 1340, an independent security is subject to a general implicit time limit to be derived from commercial customs; if there is no commercial custom, the time limit shall be derived from the nature of the contract according to CC art. 1374 (*Mastropaolo* 227). Another opinion considers that, unless a time limit has been agreed by the parties, according to CC art. 1183 no. 1 the judge must fix a reasonable one, which could be a six months period, according to art. 4 of the Uniform Rules for Contract Guarantees of 1978 (*Bonelli*, Le garanzie bancarie 61).

II. Independent securities without a time limit

12. In BELGIUM as well as in FRANCE, independent securities without time limits can be terminated by one of the parties after giving notice (BELGIUM: *Vliegen* 202; *contra T´Kint* no. 859; FRANCE: *Simler* no. 952). Without special contractual stipulation, unlimited contracts of independent security may in GERMANY not be terminated in general (Staudinger/*Horn* no. 209 preceding §§ 765 ss.; *Hadding, Häuser and Welter* 713; *Canaris*, Bankvertragsrecht no. 1155). But since securities are long-term relations (*Dauerschuldverhältnisse*, cf. *Hadding, Häuser and Welter* 713; *contra*: *Canaris*, Bankvertragsrecht no. 1133a at p. 772), they must be terminable to re-establish freedom from contract at least under special circumstances. If a security has been assumed for a long period of time or even without any time limit, it may be terminated if there is exceptionally a grave reason. Furthermore, the contract of security may be open to the interpretation that it impliedly contains a right of termination. In both these cases any termination may only be effective *ex nunc* (*Hadding, Häuser and Welter* 713; cf. Staudinger/*Horn* no. 209 preceding §§ 765 ss.). In PORTUGAL the rules for dependent securities are applicable to independent securities without a time limit in respect of an eventual release according to CC art. 648 lit. e) (*Pinheiro* 450).

IV.G.–3:108: Transfer of security right

(1) The creditor's right to performance by the security provider can be assigned or otherwise transferred.

(2) However, in the case of an independent personal security on first demand, the right to performance cannot be assigned or otherwise transferred and the demand for performance can be made only by the original creditor, unless the security provides otherwise. This does not prevent transfer of the proceeds of the security.

COMMENTS

A. The issues

One must distinguish between two closely related issues, *i.e.* the transfer of the proceeds of a security, on the one hand, and the transfer by contractual assignment or otherwise of the creditor's right to performance, on the other hand.

B. Transferability of proceeds

The transferability of the proceeds which result from the performance of the independent security upon the creditor's demand is everywhere affirmed (cf. UN Convention on Independent Guarantees of 1995 art. 10). This is in line with the principle of free disposition. On this, therefore, no rule is needed.

C. Transferability of the right to performance

The present Article deals only with the second issue which in part is quite controversial and therefore requires regulation.

Many international instruments prohibit transfer of the creditor's right to demand performance, unless otherwise agreed by the parties (UN Convention on Independent Guarantees of 1995 art. 9; UCP 500 (1993) art. 48; ICC Rules for Demand Guarantees art. 4; ISP98 rule 6.01 lit. a.). The reason for this deviation from the general principle that one can freely dispose of rights is the fear that a new creditor as transferee of an independent security may abuse the right. However, as a general assumption that fear appears to be unfounded. Paragraph (1) of the present Article therefore allows assignability as a general rule. It reaffirms for this context the general rule on assignability in III.–5:105 (Assignability: general rule). The paragraph also allows transferability – e.g. on death or bankruptcy.

The more risky type of independent security, the security on first demand, is declared to be non-transferable by paragraph (2) of the present Article. This exception is justified by the fact that an independent security on first demand is a rather risky instrument because the security provider may not even invoke its personal defences and exceptions (cf. Article 3:103 (3)). Paragraph (2) therefore seeks to strike an adequate balance between the general principle that, as a rule, a holder of a right can freely dispose of it, on the one hand, and means of defence against potential risks of abuse, on the other hand. However, the parties may deviate from this rule and allow assignment.

D. Straight and qualified demands for performance

Finally, in cases covered by paragraph (1), it is necessary to distinguish between straight and qualified demands for performance. A straight demand is one where the creditor merely needs to put forward its demand, without additional declarations or documents. The assignment of a right which can be exercised in this way is risky since the assignee merely has to submit the agreed demand for performance. In these cases the debtor and the security provider may wish to protect themselves against abuse of the security by an unknown third person by excluding assignability of the security right.

The risks of a straight demand for security are avoided or, at least, considerably mitigated, if the independent security is qualified beyond a simple demand for performance. This is achieved if the parties agree that the demand as such must be accompanied by additional documents or declarations which would show that the substantive conditions for invoking the demand are present. The creditor as the direct partner of the debtor in the underlying transaction would be best qualified to produce the required documents; by contrast, an assignee will usually be a stranger to the underlying transaction. The optimal way out of this dilemma is for the assignee and assignor to co-operate and arrange for the latter to furnish in case of need the documents which according to the terms of the security must be produced. In other words, this problem cannot be solved by a general rule, but must be left to a suitable agreement between the assignee and the assignor.

NOTES

1. In most member states the contractual transfer of a security is a very controversial issue. The following national notes deal with its several aspects: first, the assignment of the right to performance (leaving questions of who can demand performance on one side); then, the question of who can demand performance; thereafter, with the assignment of the secured obligation; and finally, with the combined assignment of the security right and of the secured obligation.

I. Assignability of right to performance

2. This is sometimes discussed under the heading of “assignability of the proceeds”. In all member states the assignability of the right to receive the proceeds of the security contract is admitted unanimously (AUSTRIA: Avancini, Iro and Koziol/*Koziol* II no. 3/107; *Jud/Spitzer* 397; DENMARK: *Andersen*, Kaution og bankgarantier 59 s.; ENGLAND: *Jack, Malek and Quest* no. 10.34; GERMANY: BGH 12 March 1984, BGHZ 90, 287, 291; *Graf Westphalen* 149; FRANCE: *Simler* no. 886; ITALY: *Bonelli*, Le garanzie bancarie 68 s.; *Calderale*, Demand guarantees 130; NETHERLANDS: *Pabbruwe*, Bankgarantie 65; SPAIN: *Carrasco a.o.* 366).

3. Even if the parties exclude the transferability of the actual demand for performance, this prohibition may be interpreted narrowly as allowing the transfer of the right to the proceeds to the assignee (FRANCE: CFI Paris 22 February 1989, D. 1990, Somm.Comm. 204, note *Vasseur*).

II. Assignability: Demand for performance by assignee

4. Whether an assignment of the security right with performance to be due on a demand by the assignee is possible and under which conditions is very controversial. The controversy centres around the issue whether or not a right to payment on demand is a highly personal one and therefore is transferable at all. It is also open to doubt whether

the consent of the security provider (no. 9 below) and also that of the debtor is required (no. 10 below).

(a) Assignability denied

5. BELGIAN, DANISH, FRENCH, GREEK and SWEDISH legal writers do not permit an assignment of the security right (BELGIUM: RPDB, Les garanties bancaires autonomes no. 48 at 568; *Van Malderen* 3203; *Dehouck* 2; *contra*: *Vliegen* 205-207 and 213-215; DENMARK: *Pedersen*, Bankgarantier 85; FRANCE: *Simler* no. 886; GREECE: CC art. 455; *Georgiades* 6 no. 157; *Gouskou* 91 ss.; SWEDEN: *Walin*, Borgen 52, 87). Two reasons are given. First, even an independent security functions like a security and therefore has to be accompanied by transfer of the right to performance of the underlying obligation. Second, the obligation of a provider of an independent security is regarded as highly personal, so that the right to activate it by demanding performance cannot be transferred to another creditor without the agreement of the security provider (no. 9 below).

(b) Assignability affirmed

6. In ENGLAND and GERMANY, in effect, such a personal character of the security provider's obligation is in general denied. In both countries the right to enforce an independent security is assignable (ENGLAND: cf. *Re Perkins* [1898] 2 Ch 182; *British Union and National Insurance Co. v. Rawson* [1916] 2 Ch 476; Halsbury/*Salter* para. 1263, Vol 49, 5th ed, (2008)); GERMANY: BGH 25 September 1996, ZIP 1997, 275, 278; 20 June 1987, NJW 1987, 2075; 12 March 1984, BGHZ 90, 287, 291; Staudinger/*Horn* no. 225 preceding §§ 765 ss. with further references).

(c) Assignability controversial

7. In other countries, the matter is controversial: In AUSTRIA, the Supreme Court has allowed it in two recent cases (OGH 23 May 2005, ÖBA 2005, 902, 905 *sub* no. 4; 18 January 2000, SZ 73 no. 10), but an influential writer has severely criticised this position (Avancini/Iro/*Koziol* no. 3/108-3/110). In ITALY, the opinions of writers are divided (against assignability *Dolmetta and Portale* 91 s.; *Laudisa* 16; *pro*, *Bonelli*, Le garanzie contrattuali 233 s.); but the famous Supreme Court decision legitimating independent personal security in ITALIAN law concerned a case where the assignee could demand performance (Cass. plenary decision 1 October 1987 no. 7341, Giur.it. 1988 I, 1, 1204). In the NETHERLANDS, courts and writers are also divided (against transferability CA Amsterdam 21 February 1991, NJB 1992 no. 141; *Boll* 103; *Pabbruwe*, Bankgarantie 66; for transferability CFI Haarlem 12 January 1993, NJB 1995 no. 53; *Mijnssen* 66-69). In PORTUGAL, although case law seems to accept transferability (STJ 17 April 1970, BolMinJus no. 196, 275), writers tend to deny it because of the nature of the obligation (*Pinheiro* 451).

(d) Additional requirements

8. Several countries allow assignability if the security provider agrees to it (no. 9 below); other voices even demand the debtor's consent (no. 10 below).

9. According to FRENCH case law, an assignment is valid if the provider of independent security expressly agrees to the transfer (Cass.com. 7 January 1992, Bull.civ. 1992 IV no. 3 p. 3). This has recently been confirmed by the legislator (CC new art. 2321 para. 4 of 2006). The security provider's consent can also be given by the term "pay to order" in the security contract. A merely implied agreement of the security provider, resulting from the circumstances in the relationship between the security provider and a new creditor, does not seem to be sufficient. According to FRENCH case law the

transfer of the security right, in contravention to a term prohibiting the transfer constitutes a fraud (CA Paris 23 September 1988, D. 1989, Somm.Comm. 156). The security provider is then discharged from the performance of the independent security. In PORTUGAL in the corresponding case of documentary credits an eminent writer considers that the consent of the security provider is always necessary because not only a credit, but the complete contractual position is transferred (*Vaz Serra*, Note on acordão de 16. 6. 1970, at 176).

10. Some DUTCH, ITALIAN and GREEK authors think that an assignment is only valid if the debtor agrees to the transfer (ITALY: when the possibility to transfer the security is convenient for the debtor, the debtor's consent suffices according to *Calderale* 236; references in *De Nictolis* 151; GREECE: *Georgiades* 6 no. 157; *Gouskou* 91 ss.; NETHERLANDS: *Ensink* 553 – both debtor and security provider must agree).

(e) Consequences of an effective assignment

11. In GERMANY where an assignment of the security right as such is allowed (*above* no. 6) it has been held that the assignment does not *per se* also comprise the conditions for invoking the security; however, the assignor is obliged to request the assignee to observe those conditions and would otherwise be liable for damages (BGH 25 September 1996, ZIP 1997, 275, 278 s.).

12. The GERMAN Supreme Court dealt in one case with the question which counter-claims can be set off after an assignment. It held that counter-claims arising from the relationship between the original creditor and the debtor cannot be set off against the security right, even if such claims had been assigned to the security provider (BGH 22 April 1985, BGHZ 94, 170 s.); by contrast, liquid counter-claims of the security provider can be set off against the assignee's claim under the assigned security right (*ibidem* p. 172 s.).

13. AUSTRIAN courts have dealt with the question from whom the debtor may demand restitution if after the security provider's performance it turns out that the independent security was invalid. Generally, the debtor may claim restitution from the original creditor, *i.e.* the assignor (OGH 23 May 2005, ÖBA 2005, 902, 905 *sub* no. 4; and 18 January 2004, SZ 73 no. 10 p. 48 ss. with careful reasoning and broad references). However, if there is a clear case of abuse of rights, especially an obvious disproportion between the assignee's personal interests and the interests of the other persons involved since it is clear that an underlying obligation does not (or no longer) exist and the assignee is aware of its defective title, then restitution must be claimed from the assignee as the new creditor (OGH 23 May 2005, ÖBA 2005, 902, 905 *sub* no. 5 b). These rules correspond to those that apply when no assignment has taken place (cf. national notes on IV.G.–3:105 no. 7).

III. Assignment of the right to performance of the secured obligation

14. For the more frequent case of an assignment of the right to performance of the secured obligation the majority of authorities in ENGLAND, FINLAND, FRANCE, GERMANY and ITALY state that such an assignment does not automatically extend to an independent security. The same seems true as to SPANISH law, although the *dictum* of the TS 28 May 2004, RAJ 2004/3553 is to be taken with caution, because the court eventually held that the guarantee in question was not a true independent guarantee on demand. The numerous national provisions and rules under which an assignment extends to *accessory* rights do not apply to an independent security. In the present rules, III.–5:115 (Rights transferred to assignee) adopts the same approach. See also III.–5:112 (Undertakings by assignor) paragraph (6). (FINLAND: LDepGuar

§ 9, RP 189/1998 rd 41; FRANCE: CC new art. 2321 para. 4 of 2006; earlier: *Simler* no. 887; *contra* Malaurie and Aynès/*Aynès and Crocq*, Les sûretés no. 347 : the transfer of the independent security occurs automatically with the transfer of the underlying obligation; GERMANY: Staudinger/*Horn* no. 227 preceding §§ 765 ss.; *Hadding, Häuser and Welter* 717; but the interpretation of an assignment may show that the transfer is intended to comprise also the rights arising from the independent security (BGH 22 April 1985, BGHZ 94, 167, 169); GREECE: *Gouskou* 91; *Demetriades* 54; ITALY: *Laudisa* 17; in ENGLAND this rule applies both to dependent and independent securities, cf. *O´Donovan and Phillips* no. 10-178).

IV. Combined assignment of security right and right to performance of secured obligation

15. Both AUSTRIAN courts and writers allow a combined transfer of both rights, since this does not aggravate the situation under the independent security with respect to the corresponding obligations, as agreed by the parties (OGH 29 January 1997, ÖBA 1997, 826; Avancini/Iro/*Koziol* no. 3/111). FRENCH law allows a combined assignment only if the parties so agree (CC new art. 2321 para. 4 of 2006 "*Sauf convention contraire, cette sûreté ne suit pas l´obligation garantie*"). In the NETHERLANDS, prevailing opinion also allows a combined assignment (CFI Utrecht 10 September 1997, JOR no. 34; *Mijnssen* 69-73; *contra Pabbruwe*, Bankgaranties 66, although with a reservation at 67).

IV.G.–3:109: Security provider's rights after performance

IV.G.–2:113 (Security provider's rights after performance) applies with appropriate adaptations to the rights which the security provider may exercise after performance.

COMMENTS

A. General

Chapter 3 does not establish explicit rules on the rights which the provider of an independent personal security may exercise after having performed on the creditor's demand. Instead, the present Article refers to IV.G.–2:113 (Security provider's rights after performance) which deals with the rights which the provider of a dependent personal security may exercise after performance to the creditor. However, in view of the differences between dependent and independent securities, the rules of IV.G.–2:113 are to apply only "with appropriate adaptations".

The general justification for this rather novel approach is that the true differences between dependent and independent personal securities reside in the prerequisites for demanding performance from the security provider. However, after the security provider has performed to the creditor, the security provider's position towards the debtor and towards other security providers is very akin to that of the provider of a dependent security. In order to simplify and to achieve internal consistency it is appropriate to apply essentially the same rules to the after-performance stage of both instruments of personal security.

B. Security provider's claim for reimbursement

The first sentence of IV.G.–2:113 paragraph (1) lays down the security provider's right to be reimbursed by the debtor. Obviously, the same right pertains to the provider of independent security who had assumed on the debtor's instruction the security and has performed it.

Exceptionally the security provider may have waived the right to reimbursement; then, of course, there is no recourse against the debtor, cf. Comment D on IV.G.–2:113.

Another equally peculiar and rare situation is present if the debtor is incapable or, as a purported legal entity, in truth non-existent, cf. Comment G on IV.G.–2:113.

The debtor may be able to set off counterclaims against the claim of the provider of an independent security for reimbursement.

In addition, cf. Comments B to D to IV.G.–2:113.

C. Subrogation to the creditor's rights against the debtor

In order to strengthen the position of the provider of a dependent security, the second sentence of IV.G.–2:113 paragraph (1) subrogates the provider of a dependent security to the creditor's rights against the debtor. In conformity with the laws of some member states, this subrogation is extended by the present Article to the provider of an independent security.

Of course, this subrogation is subject to the same exclusions that affected the creditor's original rights against the debtor. On exclusions, cf. Comment D on IV.G.–2:113.

See also the following Comment.

D. Subrogation to the creditor's personal and proprietary security rights

The security provider's subrogation to the creditor's rights against the debtor also extends to the personal and proprietary security rights which the creditor holds against the debtor or a third person. This subrogation comprises both the "dependent and independent personal and proprietary security rights", as IV.G.–2:113 paragraph (3) expressly confirms. On the justification for not limiting this rule to dependent security rights, but extending it to independent security rights and further details, cf. Comment F to IV.G.–2:113. The present Article has the specific effect of extending such subrogation to providers of an independent security.

E. Creditor's priority in case of part performance

The rule laid down in IV.G.–2:113 paragraph (2) applies with appropriate adaptations also to the case of partial performance of an independent security. Cf. Comment E on IV.G.–2:113.

NOTES

I. Introduction

1. The provider of an independent security may acquire two sets of rights by reason of performance under the security: there may be rights to reimbursement against the debtor (nos. 2 ss. below); and, in addition, the security provider may be subrogated to the creditor's secured right against the debtor (*below* nos. 8 ss.) and to the security rights securing this right (nos. 13 s. below).

II. Reimbursement

(a) Legal bases for reimbursement

2. The different jurisdictions use four different bases for the right to reimbursement.

(b) Mandate

3. In AUSTRIA, GERMANY, GREECE, ITALY, the NETHERLANDS and PORTUGAL the basis is mandate. In GREEK law the provisions on mandate (CC art. 722) are applied by analogy to the relationship between provider of independent security and debtor (*Georgiades* § 6 no. 125). The same is true according to the majority of ITALIAN scholars who base the reimbursement of the provider of independent security on an action *mandati contraria* (*Giusti* 346; for a summary of other views, which mainly apply by analogy the rules on dependent personal security, see *De Nictolis* 95; against this view *Calderale*, Fideiussione 265). In AUSTRIAN, DUTCH, GERMAN and PORTUGUESE law the relevant provisions on the principal's obligation to reimburse the agent's outlays (AUSTRIAN CC § 1042; DUTCH CC art. 7:406 para. 1; GERMAN CC § 670; PORTUGUESE CC art. 1167 lit. c) are directly applicable. Therefore the debtor as principal is obliged to reimburse the expenses incurred by the provider of independent security in performing the obligation

to the creditor. However, only such expenses are covered as the provider of independent security reasonably could regard as necessary, so that the security provider is not entitled to reimbursement if the security provider did not act as directed by the debtor as principal (Staudinger/*Horn* no. 329 preceding §§ 765 ss.). In AUSTRIA, it has been held that the claim for reimbursement comes into existence, under a suspensive condition, already when the independent security is granted and can therefore be secured as of that time (OGH 6 April 2005, ÖBA 2005, 649, 650).

(c) Analogy to dependent security

4. In FINLAND and SPAIN the right to reimbursement is based upon an analogy to the relevant specific provisions on dependent securities (FINNISH LDepGuar §§ 28 ss.; SPANISH CC art. 1838; *Sanchez-Calero*, El contrato autónomo 401). Cf. national notes on IV.G.– 2:113 nos. 1 ss.

(d) Relationship between debtor and provider of independent security

5. In BELGIUM, ENGLAND and FRANCE the right to reimbursement is not based on mandate. In BELGIAN and FRENCH law the right is said to arise from the agreement between the debtor and the provider of independent security; the latter performs the latter's own obligation (BELGIUM: RPDB, Les garanties bancaires autonomes no. 173 at 605; *Vliegen* nos. 206, 220-221; *Wymeersch*, Garanties 98; FRANCE: *Simler* no. 995). In ENGLISH law reimbursement is granted because the provider of independent security has acted at the request and for the benefit of the debtor (*Duncan Fox & Co. v. North & South Wales Bank* (1880-81) 6 App. Cas. 1; *Sheffield Corp. v. Barclay* [1905] AC 392; *O´Donovan and Phillips* no. 12-21; Chitty/*Whittaker* no. 44-114).

(e) Operation of law

6. In DENMARK and SWEDEN the right to reimbursement arises by operation of law without a specific legal justification being named (DENMARK: *Pedersen*, Bankgarantier 70; SWEDEN: *Walin*, Borgen 198).

(f) Differences between dependent and independent personal securities

7. Although the right to reimbursement in the case of an independent security is rather similar to the respective right in the case of a dependent security, there are situations where the solutions may differ in some member states: Firstly, if an independent personal security secures the debt of a minor, the latter will not be under any obligation to indemnify the provider of independent security (ENGLAND: Chitty/*Whittaker* no. 44-114; *O´Donovan and Phillips* no. 12-21; for the position in the case of a dependent personal security cf. national notes to IV.G.–2:113 no. 36). Secondly, if the obligation of the provider of an independent security surpasses that of the debtor, the security provider has nevertheless a right to full reimbursement (ENGLAND: Chitty/*Whittaker* no. 44-114; *O´Donovan and Phillips* nos. 12-21 s.; FRANCE: *Simler* no. 1001).

III. Subrogation to creditor's personal rights against the debtor

8. The provider of an independent personal security is not in all member states subrogated to the creditor's personal rights against the debtor, if any; moreover, even where such a subrogation takes place, it is based upon various grounds.

(a) No subrogation unless stipulated for by the parties

9. In BELGIUM, GERMANY, the NETHERLANDS, PORTUGAL and SPAIN, according to prevailing opinion there is no subrogation by operation of law. The relevant provisions for dependent personal securities (BELGIAN CC art. 2029; DUTCH CC art. 6:142; GERMAN CC § 774; PORTUGUESE CC art. 644; SPANISH CC art. 1839) are said to be inapplicable to independent personal securities (BELGIUM: RPDB, Les garanties bancaires autonomes no. 173 at 605; *Wymeersch*, Garanties 97; *contra* CFI Gand 12 February 1999, RDC 1999 727, note *Buyle and Delierneux* in a controversial case where an independent security was assumed by a consumer acting outside of any professional activity and intended to grant a dependent security; GERMANY: Staudinger/*Horn* no. 228 preceding §§ 765 ss.; MünchKomm/*Habersack* no. 19 preceding § 765; *contra*: *Canaris* no. 1112; NETHERLANDS: CA Amsterdam 18 August 2000, JOR 2000 no. 205; Dutch Business Law § 6.05 [4] [c]; PORTUGAL: STJ 13 November 1990, CJ XV, V-187; SPAIN: *Sanchez-Calero*, El contrato autónomo 401). In BELGIUM it is not possible either to base subrogation on the general rules on subrogation laid down in CC art. 1251 (RPDB, Les garanties bancaires autonomes no. 174). In GERMANY, however, in most cases the parties will have – impliedly – stipulated for the transfer of the right to performance of the secured obligation; in the absence of such a stipulation the beneficiary may in view of the security purpose be obliged to assign the right to performance of the secured obligation (Staudinger/*Horn* no. 228 preceding §§ 765 ss.).

(b) Subrogation by analogy to dependent personal security

10. In AUSTRIA, FRANCE, GREECE and ITALY prevailing opinion bases subrogation on the analogous application of the relevant provisions for dependent personal securities. These provisions may be of a general nature (AUSTRIAN CC § 1358; OGH 9 December 1997, SZ 60 no. 266, p. 694, 698-700; Avancini/Iro/*Koziol* no. 3/64; FRENCH CC art. 1251 no. 3; *pro Simler* no. 1001; *contra Gavalda and Stoufflet* no. 29) or may be specific for dependent personal securities (GREEK CC art. 858; ITALIAN CC art. 1949; but sometimes the subrogation is thought to be based upon the more general provision of CC art. 1203 no. 3: *Portale*, Fideiussione 1071; *Calderale*, Fideiussione 265, 267 s.). In GREEK law, however, there is a subrogation only if the provider of independent security has a right of reimbursement against the debtor or can prove justified benevolent intervention (CC art. 736; *Georgiades* § 6 no. 126 no. 19; CA Athens 3573/1970, EEN 38, 655-656).

11. Also in DANISH and SWEDISH law the provider of independent security is subrogated to the creditor's rights against the debtor (DENMARK: *Pedersen*, Kaution 86; SWEDEN: *Walin*, Borgen 183 ss., 198 ss.), since especially in SWEDEN (as well as in FINLAND) the independent personal security is more or less identified with the dependent personal security.

(c) Subrogation by nature of the independent personal security

12. In ENGLISH law subrogation results from the nature of the contract of independent personal security and is founded on equitable principles (*Morris v. Ford Motor Co. Ltd.* [1973] QB 792). Subrogation in this context does not amount to an assignment of the (legal) right of action to the security provider (*Morris v. Ford Motor Co. Ltd.*, above; *John Edwards & Co. v. Motor Union Insurance Co. Ltd.* [1922] 2 KB 249, 253). In the absence of an agreed assignment proper, rights against the debtor can only be pursued in the creditor's name (*Morris v. Ford Motor Co. Ltd.*, above; *Esso Petroleum Co. Ltd v. Hall Russell & Co. Ltd.* [1989] AC 643). The security provider

may upon tender of a proper indemnity as to costs compel the creditor to allow the use of the creditor's name (*John Edwards & Co. v. Motor Union Insurance Co.*, above; *Yorkshire Insurance Co. Ltd. v. Nisbet Shipping Co. Ltd.* [1962] 2 QB 330, 339; see generally *O´Donovan and Phillips* nos. 12-357 ss.), either in separate proceedings or by joining the creditor as defendant in the action against the debtor (cf. *Mitchell* 37).

IV. Subrogation to security rights held by the creditor

13. In addition to subrogation to the creditor's personal rights against the debtor, in AUSTRIA, DENMARK, FINLAND and FRANCE the provider of independent security is equally subrogated to the personal and proprietary security rights held by the creditor, as a surety is (AUSTRIA: CC § 1358 sentence 2; DENMARK: *Pedersen,* Bankgarantier 83 ss.; FINLAND: LDepGuar § 30; FRANCE: *Malaurie* and *Aynès,* Les obligations no. 1213). In ENGLAND, the provider of independent security is thought to be in a similar situation (cf. *O´Donovan and Phillips* nos. 12-357 ss.); however, here the provider of independent security cannot enforce the creditor's rights in the security provider's own name, but is merely entitled to sue in the name of the creditor, cf. preceding note.

14. According to GREEK CC art. 458 and GERMAN CC §§ 412, 401 – if the secured obligation is transferred according to the preceding rules (*above* nos. 9 ss.) – the provider of independent security is *ex lege* subrogated only to the accessory security rights held by the creditor (*Georgiades* § 6 no. 126). Independent security rights have to be transferred by agreement of the parties.

V. Part performance: Priority of creditor's remaining rights

15. In case of part performance FRANCE and DENMARK attribute priority to the creditor's remaining rights over the rights of the provider of independent security (FRENCH CC art. 1252; cf. *Simler* nos. 592 and 1001; DENMARK: *Pedersen,* Kaution 87).

16. In GERMANY, opinions on the corresponding application of the relevant provision for dependent security are divided (cf. Staudinger/*Horn* no. 228 preceding §§ 765 ss.), but a majority refuses it. Therefore, in case of partial payment, the relevant rule in CC § 774 paragraph 1 sentence 2 does not apply (Staudinger/*Horn* § 774 no. 61)

17. There is no equivalent to the above-mentioned FRENCH or DANISH rule in ENGLISH law, since it is the prevailing view that subrogation only occurs if the creditor is paid in full (cf. more fully national notes on IV.G.–2:113 no. 31).

VI. Application to documentary credits

18. The issuing bank's right to reimbursement in (stand-by) letter of credit transactions is evident (BELGIUM: *De Vuyst* nos. 96–97 at 53-54; ENGLAND: *Goode*, Commercial Law 954; FRANCE: *Ripert and Roblot* no. 2428; GERMAN CC § 670; *Schütze* no. 116; *Canaris* no. 968; GREEK CC art. 722; *Georgiades* § 11 no. 85; PORTUGAL: *Vaz Serra*, Note on acordão de 16. 6. 1970, at 173).

19. It is less clear whether an additional right of subrogation exists. In ENGLISH and GREEK law this question is not discussed since the paying bank acquires a legal pledge on the goods represented by the bill of lading (ENGLAND: *Sale Continuation Ltd. v. Austin Taylor & Co. Ltd.* [1968] 2 QB 849; *Jack, Malek and Quest* nos. 11.3 s.; GREECE: DL 17 July/18 August 1923 art. 25 § 2). Similarly, in GERMANY subrogation is denied because the bank is regarded as sufficiently secured by the principal's advance (CC § 669) and the security rights agreed upon in the bank's standard terms (*Schütze* no. 118; *Canaris* nos. 968, 970).

CHAPTER 4: SPECIAL RULES FOR PERSONAL SECURITY OF CONSUMERS

IV.G.–4:101: Scope of application

(1) Subject to paragraph (2), this Chapter applies when a security is provided by a consumer.

(2) This Chapter is not applicable if:

(a) the creditor is also a consumer; or

(b) the consumer security provider is able to exercise substantial influence upon the debtor where the debtor is not a natural person.

COMMENTS

A. General

This Article delimits the personal scope of application of the special rules established in Chapter 4 for the protection of consumer providers of personal security.

The key term "consumer" is defined in Annex 1 and need not therefore be explained here.

B. Assumption of personal security

The assumption of a personal security by the security provider usually – except in certain commercial relations – merely contains obligations of the security provider in favour of the creditor; the latter's acceptance of the terms offered by the security provider often is not explicit and therefore requires special regulation, cf. IV.G.– 1:103 (Creditor's acceptance). As far as the contents of the security contract is concerned, this is governed by the general principle of freedom of contract. Such freedom, however, is strongly limited by the rules in this Chapter for security obligations assumed by consumers.

C. Restrictions of the personal scope of application

Paragraph (2) of the Article restricts the application of Chapter 4 in two ways: the Chapter does not apply if either the creditor is also a consumer; or if the security provider can exercise substantial influence upon the debtor, provided the latter is not a natural person.

The creditor is also a consumer. If not only the security provider, but also the creditor is a consumer, typically there is no necessity of protecting the security provider. The creditor as consumer typically is on the same level of sophistication as the security provider; usually both are weak parties. Therefore, the ordinary contract rules should apply.

It would be inadequate to require a typical consumer in the position of the creditor to comply with the special rules of care, duties of information and formality established by IV.G.–4:103 and 4:105. Due to ignorance of these requirements, many otherwise impeccable contracts of personal security would be void or at least avoidable by the security provider. That risk is unacceptable.

Of course, sometimes the creditor, although a consumer, may be more shrewd than the security provider and may therefore "drive a hard bargain" by imposing inequitable terms on the security provider. In such cases, the security provider may invoke the general protective rules on unfair contract terms in Book II, Chapter 9, Section 4.

The consumer security provider with substantial influence upon the debtor who is not a natural person. The exclusion in paragraph (2)(b) is inspired by legislation and court practice in some member states. Natural persons who are closely affiliated – whether by legal bonds or by factual influence – with a company, whether or not a legal entity, do not deserve the normal protection afforded to a consumer. Of course, in many cases such persons, in providing a personal security for company obligations, are acting in a commercial capacity, *e.g.* as managers or directors of a company which has taken credit. However, in practice sometimes major non-commercial shareholders of such a company assume a personal security for financial obligations of the company.

Paragraph (2)(b) uses the terms "able to exercise". It is not required that the person has in fact exercised substantial influence since it would be difficult for an outsider to determine and prove the exercise of such influence in the case at hand. What is decisive is the ability of the security provider to exercise such influence. This ability may rest upon legal grounds, *e.g.* as a holder of the majority of the shares. But it may also be based upon factual circumstances, *e.g.* as the younger and energetic wife of a majority shareholder. Obviously, this is a factual issue which has to be decided in the light of all the relevant facts.

On the application of the provision to a case of co-debtorship for security purposes, see Comments on IV.G.–1:104 (Co-debtorship for security purposes).

D. Mandatory provision

This Article is a mandatory provision in favour of the consumer security provider. See paragraph (2) of the following Article.

NOTES

I. Scope of consumer protection provisions in the Member States

1. The scope of the consumer protection provisions in the area of personal security differs between the individual member states in at least two ways. Firstly, there are different concepts of "consumer" (cf. national notes on IV.G.–1:101 (Definitions) nos. 49 ss.). Not only do the member states apply different criteria as to when a person qualifies as a consumer but there is also no unanimity in general as to whether the security provider or the debtor has to be a consumer in order for specific consumer protection provisions to apply (cf. especially national notes on IV.G.–1:101 (Definitions) nos. 63-66). While within the context of these Rules it is the person of the security provider who is decisive, there is also national consumer protection legislation focussing on the person of the debtor. Such legislation is covered in so far as it indirectly provides protection also for the security provider specifically in relation to consumer matters. Secondly, not all member states embrace the general idea of these Rules, *i.e.* to apply the consumer protection provisions to all types of personal securities (on the different levels of protection of consumer security providers in the

member states, as well as on future perspectives of European regulation in that subject matter, see the research project by the Centre of European Law and Politics at the University of Bremen – ZERP – in co-operation with the University of Oxford, cf. *Colombi Ciacchi*, Unfair suretyships 281 ss.; *Colombi Ciacchi* (ed.), Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity, Baden-Baden, forthcoming 2007).

2. The AUSTRIAN consumer protection provisions apply to several types of personal security, especially dependent and independent personal securities (ConsProtA §§ 25b para. 2, 25c and 25d) as well as assumptions of debt or co-debtorship (§§ 25a para. 1, 25c, 25d). These provisions do not apply to contracts between an employee and an employer (§ 1 para. 4); any form of security assumed by an employee securing a monetary obligation of the employer towards creditors is forbidden and void (KautSchG §§ 1 and 4). However, the courts also apply the exception corresponding to paragraph (2) (b) of this Article (cf. no. 32 below) in the present context: OGH 20 February 2003, ÖBA 2003, 957. For GERMAN parallels, cf. no. 22 below.

3. Also in BELGIUM, the main rules applicable to consumer personal securities (ConsCredA arts. 34-37) apply to all personal securities granted in order to secure debts arising from a consumer-credit agreement (not only dependent but also independent personal securities, *Forges* 331 no. 195; *Lettany* 221 no. 253 at 221).

4. Besides the general rules designed to protect the consumer, the most relevant ENGLISH and SCOTTISH legislation, the ConsCredA and the Consumer Credit (Guarantees and Indemnities) Regulations 1983 (cf. reg. 2), apply to both dependent and independent (*i.e.* indemnities) personal securities. Further, it seems that the assumption of debt for security purposes is equally covered, since "security" is given a very wide meaning in ConsCredA sec. 189. The UnfContTA 1977 contains a specific consumer protection provision in s. 3, according to which a contractual term which would exclude or reduce one party's liability cannot be relied upon against a consumer (or any other person where the other party deals on written standard terms of business). However, since the ENGLISH law of personal security typically does not protect the security provider by imposing liabilities on the creditor, but by discharging the security provider, this provision is of limited assistance against typical standard terms used by professional creditors to the disadvantage of the consumer security provider: these terms purport to preserve the liability of the security provider despite the occurrence of certain events which would in the absence of any agreement to the contrary lead to a release of the security provider, but these terms normally do not aim at the restriction or reduction of the liability of the creditor (cf. *O´Donovan and Phillips* nos. 4-160 s.). Whether also the Unfair Terms in Consumer Contracts Regulations 1999 are applicable to security transactions is open to some doubt (cf. *O´Donovan and Phillips* nos. 4-163 ss.; *Andrews and Millett*, nos. 3-036 ss.). Even if these provisions were applicable it is argued that "all monies" terms, *i.e.* terms extending the security provider's obligation to all sums due by the debtor to the creditor – if written in a plain intelligible language – should not be subject to assessment under the Unfair Terms in Consumer Contracts Regulations 1999, since they are said to fall within the ambit of reg. 6 paragraph 2 (a) by defining part of the main subject matter of the contract (*Hapgood* 719; for the contrary view see *O´Donovan and Phillips* no. 4-173). The banks, however, have bound themselves in no. 13.4 of the Banking Code (version March 2008) not to take unlimited personal securities by personal customers.

5. In FINLAND the Law on Consumer Protection chap. 4 §§ 1-4 regulates the protection of consumers. According to chap. 1 § 2a the provisions in chap. 4 apply to the Finnish

Law on Dependent Personal Securities. The type of a personal security is irrelevant in this context as the Law on Dependent Personal Securities also applies to independent personal securities – but not to those on first demand – (RP 189/1998 rd 17).

6. In FRANCE the consumer legislation, first on Consumer Credit *(Loi Neiertz 1989)* and later on all types of credit *(Loi Dutreuil 2003)* applies to dependent personal securities only (cf. respectively ConsC arts. L. 313-7 ss. – in particular art. L. 313-10-1 – and L. 341-1 ss.).

7. The GERMAN ConsCredA that has been integrated with some modifications into CC §§ 491 ss. as of 1 January 2002 is not applicable to dependent personal securities (BGH 21 April 1998, BGHZ 138, 321; Erman/*Saenger* § 491 no. 21; approvingly: *Reinicke and Tiedtke*, Bürgschaftsrecht no. 476), but by analogy to assumptions of debt for security purposes (BGH 8 November 2005, WM 2006, 81; BGH 5 June 1996, BGHZ 133, 71, 77 ss.). The applicability to independent personal securities is uncertain. The GERMAN Law on the Revocation of Doorstep Transactions, that has now been integrated into CC §§ 312 ff, is according to common opinion of courts and writers generally applicable to dependent personal securities (cf. only Erman/*Saenger* § 312 nos. 28 s. with further references). The applicability to other instruments of personal security is still uncertain (cf. Erman/*Saenger* § 312 no. 30). The Law on Standard terms that was especially intended to protect from surprising or unfair terms and has been integrated with some modifications into CC §§ 305 ff applies to all types of contracts including contracts granting security.

8. It is assumed that the GREEK ConsProtA is to apply to every form of onerous contract (*Georgiades* § 3 no. 85). The personal security is regarded as an onerous contract since the security provider undertakes a burdensome obligation vis-à-vis the creditor (*Georgiades* § 3 no. 102). Hence, the security provider is always considered to be a consumer as defined in ConsProtA art. 1 para. 4 lit. a) (except if assuming the security as part of a profession) and for this reason is deemed to be an amateur and inexperienced, despite the fact that technically the debtor and not the security provider is the "final receiver" of goods or services (*Georgiades* § 3 no. 86). In addition, this wide meaning of the purpose of the ConsProtA speaks for the application of the consumer protective provisions to every form of security.

9. The IRISH ConsCredA covers only "contracts of guarantee" (cf. s. 2); it seems that this term is to be understood as being restricted to dependent personal securities. Concerning the applicability of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, it seems that this must be subject to the same doubts as in ENGLISH law (cf. no. 4 above), since the relevant provisions on the scope of application in the IRISH regulations (reg. 3 para. 1) resemble the ENGLISH provisions (reg. 4 para. 1).

10. ITALIAN ConsC arts. 33-38 on abusive terms are applicable to every contract concluded between a consumer and a professional (*Calvo* 69 ss. with reference to the previous CC arts. 1469*bis*-1469*sexies*, which have been replaced by DLgs no. 206 of 6 September 2005, ConsC); therefore they apply to both dependent as well as independent personal securities (*Falcone* 86 ss.). According to the interpretation developed by the Supreme Court, even if the security provider is not a consumer, consumer protection rules should nevertheless apply if the debtor of the secured obligation is a consumer (Cass. 11 January 2001 no. 314, Foro it. 2001 I 1589; Cass. 13 May 2005 no. 10107, Foro it. Mass. 2005, 1203).

11. In the NETHERLANDS, the CC contains in Book 7 both general rules on personal security (arts. 7:850-7:870) and, embedded into these, some specific rules on dependent personal security assumed by consumers (arts. 7:857-7:864).

12. The PORTUGUESE Law on General Contractual Terms (DL no. 446/85 of 25 October 1985) also applies to contracts granting security (STJ 28 May 2002, 1506/02 www.dgsi.pt for contracts of dependent personal security). As to the application of other consumer legislation to security providers there is neither case law nor specific literature. The Law on the Banks´ Duty of Information (DL 220/94 from 23 Aug. 1994), however, expressly excludes in art. 2 lit. a) contracts granting security from its scope.

13. In the SCANDINAVIAN member states other than FINLAND the protection of consumer security providers is hardly regulated (very critical on this *Andersen and Møgelvang-Hansen* 39 ss., 78 ss.). However, the DANISH ContrA §§ 36 and 38a ss. and the SWEDISH ContrA § 36 read with Law on Terms of Contracts in Consumer Relationships § 11 apply to both types of personal securities.

14. Although personal securities are very frequently provided by private persons in SPAIN there are no cases on the application of consumer legislation to personal securities, so that the legal situation is uncertain on this point. Literally, the new General Consumer Protection Act 2007 covers in its scope the consumer giving security, i.e. the security provider who, although not acting as an acquirer of a product or service, does not act as a professional or business actor. On the other hand, a contract of personal security does not fall under the scope of Law no. 7/1995 (ConsCredA) art. 1, the content of which corresponds to the one of Directive 87/102 on Consumer Credit (*Carrasco a.o.* 92).

15. For references on exceptional situations, in which at least some member states do not apply their relevant consumer protection provisions on contracts of personal security although the security provider is a consumer, see nos. 29 ss. Below.

II. Application of general rules and principles of law

16. In most member states, protection for typically weak parties is apart from specific consumer protection provisions also derived from the application of general rules and principles of law. For protection of typically weak parties through information requirements and similar institutions based upon rules of general application see the national notes to IV.G.–4:103 (Creditor's precontractual duty of information) nos. 27 ss.

17. The AUSTRIAN Supreme Court has developed three main criteria for determining whether the assumption of a dependent personal security is void as infringing good morals (CC § 879 para. 2 no. 4): (1) an obvious discrepancy between the amount of the security and the economic capacity of the security provider; (2) the circumstances of the assumption of the security, including the "thinning" of the free will of the security provider due to family solidarity; and (3) the knowledge or negligent ignorance of these factors on the part of the creditor (leading case: OGH 30 June 1998, SZ 71 no. 117 at p. 125 s.; further OGH 28 June 2000, JBl. 2000, 794, 795). In 1997 the legislator enacted a specific rule for personal securities of consumers which has similar, although less stringent prerequisites, but provides for a judicial right to mitigate the obligation of the security provider (ConsProtA § 25d). On the co-existence of this provision and the former case law, cf. OGH 28 June 2000, above.

18. In BELGIUM the creditor should see to it that the contract of personal security is drafted precisely, since any inaccuracy is interpreted in favour of the security provider, whereas the creditor may also be liable for it (*Van Quickenborne* no. 423). Specifically BELGIAN ConsCredA art. 38 § 3 protects the security provider for a consumer credit whose financial situation has aggravated at the time of the creditor's demand: the

security provider can apply to a judge for respites of payment in the same way as a consumer debtor could.

19. Under DANISH law, weak security providers enjoy statutory protection under the general provisions of ContrA §§ 36 and 38a ff.

20. In ENGLISH law, there have been attempts to introduce a broad concept of inequality of bargaining power which was intended to give protection amongst others to security providers in situations where the parties had not met on equal terms (cf. *Lloyds Bank v. Bundy* [1975] QB 326). The House of Lords, however, later rejected this general principle (*National Westminster Bank Plc. v. Morgan* [1985] AC 686). It has been argued, however, that in ENGLISH law situations in which such a principle could be relevant are to a great extent solved on the basis of the principle of undue influence (cf. national notes on IV.G.–4:103 no. 30). Sometimes also the application of the principle of unconscionability has been suggested, but no decision has been based in relation to securities on this concept yet (cf. *O´Donovan and Phillips* nos. 4-155 ss.).

21. In FRANCE the creditor must ascertain whether the engagement of the provider of dependent security is proportionate to the provider's financial capacity, otherwise damages for contractual liability may fall due (principle of proportionality: Cass.civ. 6 April 2004, Bull.civ. 2004 I no. 110 p. 90). According to FRENCH consumer legislation, the consumer security provider's obligations are not enforceable if the latter's engagement was at the time of contracting obviously disproportional in respect of his or her financial possibilities unless the assets are sufficient at the time of performance. This protective rule on proportionality applies not only to consumers (ConsC art. L. 313-10 for consumer credit), but since the "Loi *Dutreuil"* of August 2003 even if the debtor is a professional (ConsC art. L. 341-4 for all credit types). Prior to this Law which extends consumer protection to all debts irrespective of their nature, the creditor could be also liable in the case of excessive engagement, but the provider of dependent security was only partially discharged under CC art. 1382 ("*Macron* decision" Cass.com. 17 June 1997, JCP E 1997, II no. 1007, note *Legeais*; Cass.civ. 9 July 2003, JCP 2003, II no. 1590, note *Casey*). The damage suffered was the difference between the amount of the security and the financing capacity of the debtor. The *Grimaldi* Commission proposed to restrict this protective rule to consumers (CC proposed new art. 2305, excluding securities assumed by entrepreneurs cf. "*Nahoum* decision" Cass.com. 8 October 2002, RTD civ 2003, 125 ss.; Cass.com. 25 March 2003, RD banc 2003, 207, note *Legeais*). According to this proposal the liability of the security provider was to be reduced instead of the unenforceability of the security contract or the liability of the creditor. However, this proposal was not enacted by the legislator of 2006.

22. After two interventions of the GERMAN Federal Constitutional Court (BVerfG 19 October 1993, BVerfGE 89, 214 = NJW 1994, 36; BVerfG 5 August 1994, NJW 1994, 2749; for former court practice cf. only *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 174–180) the GERMAN Supreme Court has developed on the basis of the rule on immoral transactions (CC § 138) a specific practice to protect security providers who assume dependent personal securities that by far exceed their financial possibilities because of their personal relationship to the debtor. Unfortunately, the two divisions of the Supreme Court that were until December 2000 competent for personal security cases were in agreement on this target but not on the extent nor on the methods to achieve it.

23. According to the practice of the now exclusively competent division XI (for the extremely differential practice of division IX see the summaries of *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 182–209; Erman/*Palm* § 138 nos. 90 ss.) dependent

personal securities as well as assumptions of debt for security purpose that have been assumed vis-à-vis banks or other commercial or professional credit grantors (BGH 13 November 2001, NJW 2002, 746) are presumed to be immoral if (1) the security provider assumes a personal security to an extent that extremely overcharges the provider's actual and expected future financial situation and (2) if there is a relationship of proximity *(Näheverhältnis)* between debtor and security provider, as *e.g.* parents to children or between spouses (summary in BGH 29 June 1999, NJW 1999, 2584; BGH 4 December 2001, NJW 2002, 744 – with reaction to criticism). It is presumed that under these circumstances the security provider assumed the personal security only on the basis of emotional closeness to the debtor and that the creditor took advantage of these circumstances fraudulently (BGH 4 December 2001 above). In one case these rules were also applied to a dependent personal security assumed by an employee with a modest salary for a bank credit granted to the employer; the employee provided the security in the hope of protecting the workplace, a hope which quickly failed (BGH 14 October 2003, ZIP 2003, 2193). It is an indication of an extreme overcharge if the security provider will probably not even be able to cover at least the agreed interest for the secured credit (BGH 29 June 1999, NJW 1999, 2588). However, the transaction is not immoral if the security provider receives a direct monetary advantage from the secured credit (BGH 29 June 1999, NJW 1999, 2584, 2588; for details reference is made to *Fischer*, WM 2001, 1056–1059; Erman/*Palm* § 138 nos. 90 ss.) or if it serves as a counter-performance for an employer's legitimate claim for damages caused by an employee in a somewhat elevated position (LAG Köln 12 December 2002, EWiR 2003, 1129). Cf. also no. 2 above.

24. In GREECE, protection for weak providers of personal security is based upon the principle of *bona fides* laid down in GREEK CC arts. 281, 178–179, 371–372 and 288 which can also be applied for the protection of consumers (GREECE: *Georgiades* § 3 no. 80).

25. In ITALY, the principle of good faith (CC art. 1375) has been broadly applied to global securities *(fideiussioni omnibus)* by the courts in order to determine the secured obligation before Law of 17 February 1992 no. 154, art. 10 introduced in CC art. 1938 the requirement that a maximum amount for the security must be fixed (Cass. 15 March 1991 no. 2790, Foro it. 1991 I 2060; Cass. 25 August 1992 no. 9839, Foro it. 1993 I 2172; Cass. 7 October 1993 no. 9936, Giust.civ.Mass. 1993, 1449; Cass. 28 March 1994 no. 3003, Giust.civ.Mass. 1994, 405; Cass. 14 June 1999 no. 5872, Giust.civ.Mass. 1999, 1367; *De Nictolis* 222 ss.; 322 ss. with references).

26. In PORTUGAL the principle of good faith laid down in CC arts. 334, 227, 272, 475 etc. is applied also for the protection of consumers (cf. STJ 25 November 1992, 81181 www.dgsi.pt; STJ 22 February 2000, 995/99 www.dgsi.pt).

27. Also the SPANISH CC art. 7 which contains the principle of good faith is applied for the protection of consumers. However, there are no special legal or court rules applicable to consumers as security providers; as a security provider, the consumer who grants a guarantee is not protected beyond the general protection afforded to every guarantor. The protection granted to a consumer as a consumer flows only from the general law on consumer contracts (ConsProtA arts. 59-91), not from the security law.

28. In SWEDEN the general rules in ContrA § 36 read with Act on Terms of Contracts in Consumer Relationships § 11 are available for the protection of weak providers of security as well.

III. Non-applicability of consumer protection provisions in specific circumstances

29. In certain situations some member states expressly declare – even if the security provider is a consumer – that their relevant consumer protection regimes (cf. nos. 2 ss. above) are not to be applicable.

(a) Non-applicability if creditor is also a consumer

30. The most important AUSTRIAN consumer protection provisions apply only if the creditor is an entrepreneur (§ 3 para. 1 ConsProtA for doorstep transactions and §§ 25a-25d ConsProtA for consumer security providers). The special legislation generally prohibiting dependent security to be furnished by an employee in favour of the employer applies even if the employer is a consumer (§ 1 para. 1 KautSchG). The GERMAN special protective rules for doorstep transactions of consumers and for consumer credit debtors apply only if the creditor is an entrepreneur (CC § 312 para. 1 and § 491 para. 1, respectively). Under ENGLISH and ITALIAN law, however, the applicability of consumer protection provisions to personal security transactions does not depend upon whether the creditor is not also a consumer (for the relevant criteria see national notes to IV.G.–1:101 no. 67 for ENGLISH law; no. 66 for ITALIAN law). The same is true in FRANCE for some provisions related to secured consumer credit (ConsC arts. L. 313-7 to 313-8). But in other cases consumer provisions do not apply if the creditor is also a consumer (for all credit types: ConsC arts. L. 341-1 to 341-6 requiring a "*créancier professionnel*"; for consumer credit: ConsC arts. L. 313-9 and L. 313-10).

(b) Non-applicability if security provider has special relationship to debtor company

31. In a few countries it is expressly provided that officers of a company who assume a security covering an obligation owed by the company may not be regarded as consumers. This is so in the NETHERLANDS, provided the officer alone or together with colleagues holds the majority of the shares and provided further the officer was acting in the normal exercise of the business of the company (DUTCH CC art. 7:857). While there do not seem to be any cases on this provision, some decisions on CC art. 1:88 para. 5 are relevant since the latter has the same wording as the second part of art. 7:857. In one case the Supreme Court extended the scope of CC art. 1:88 para. 5 to a situation where the officer held all the shares of intermediate holding companies and was also the director of them (HR 11 July 2003, NJ 2004 no. 173 at p. 1459 s. with an express reference to the corresponding provision of CC art. 7:857). In another case the Court held that there is no "normal" exercise of business if a security is granted in the context of an inter-company financial transaction between several companies "owned" by three brothers; the only effect was to redistribute debts between these companies, but it did not secure fresh capital (HR 14 April 2000, NJ 2000 no. 689 at p. 4755). The FINNISH definition of this exception is even broader since it covers, without reference to activity, not only officers but also direct or indirect holders of at least one third of the shares of the debtor company or of a parent company (LDepGuar § 2 no. 6).

32. The AUSTRIAN Supreme Court has held in two cases that the sole shareholder of a company who acts as manager for "its" company in assuming a personal security for an obligation of the company does not have the status of a consumer (OGH 11 February 2002, SZ 2002 no. 18 at p. 133; OGH 25 June 2003, ÖBA 2004, 143, 145). In one case, even a manager who held 25% of the shares was denied that status as well

(OGH 20 February 2003, ÖBA 2003, 957). By contrast, "according to settled case law" the manager of a company who does not hold shares in it is in such cases regarded as a consumer (OGH 24 November 2005, JBl. 2006, 384, 387 with references; OGH 26 September 1991, ÖBA 1992, 578).

33. The GERMAN courts distinguish, in fact, between the assumption of co-debtorships and other ordinary personal security. It is now settled case law of the Federal Supreme Court that the co-debtorship even of a sole shareholder and director for the obligations of the company is subject to the rules on consumer protection (BGH 8 November 2005, WM 2006, 81, 82 ss.; 28 June 2000, BGHZ 144, 370, 380 ss.; 5 June 1996, BGHZ 133, 71, 77 s.). On the other hand, the Court excludes shareholders, directors and other persons who exercise considerable influence on the debtor company from its specific protective practice concerning global guarantees. Furthermore, the protective practice in favour of close relatives (cf. nos. 22 s. above) generally does not apply to shareholders either since the creditor has a justified interest in involving them in securing a credit granted to the company; only small shareholders – the limit appears to be 10% – are excepted (BGH 10 December 2002, ZIP 2003, 288 at 289 with numerous references).

34. It may be added that ITALIAN courts have developed another specific consequence of the existence of a special relationship between a (consumer) security provider and the non-consumer debtor: in certain cases where a spouse provides personal security for a business credit of the other spouse and this financial support is proved to be indispensable to the business activity, the courts assume that a *de facto* company between the two spouses exists, *i.e.* the security provider is regarded as a partner (with or even without limitation of personal liability, as the case might be) in the enterprise of the other spouse (Cass. 14 February 2003 no. 2200, Giust.civ. 2003 I 1220); however, additional indications for an implied intention of the parties to create such a *de facto* company must be present, such as the sharing of the profits (Cass. 23 December 1982 no. 7119, Giur.comm. 1983 II 847; CFI Napoli 25 March 1996, Riv.Notar. 1996, 1240; CFI Catania 15 July 1992, Dir.fall. 1993 II 167; *Galgano* 66; *Bronzini* 167). In such cases, insolvency proceedings can be opened also against this *de facto* company, which extend even to the consumer security provider as a partner in this company; in these proceedings, the consumer security provider can be held solidarily liable with all assets to all the creditors of the enterprise (not only the creditor of the obligation under the security), typically not even limited to the maximum amount of the security. This is particularly true if the security provider did not act for remuneration and the right of recourse against the principal debtor is excluded (CFI Napoli 12 December 1996, BBTC 1998 II 84 ss.).

IV.G.–4:102: Applicable rules

(1) A personal security subject to this Chapter is governed by the rules of Chapters 1 and 2, except as otherwise provided in this Chapter.

(2) The parties may not, to the detriment of a security provider, exclude the application of the rules of this Chapter or derogate from or vary their effects.

COMMENTS

A. Introduction

Paragraph (1) provides that the general rules of Chapters 1 and 2 apply to personal security provided by consumers, subject to the provisions of the present Chapter, while paragraph (2) fixes and specifies the mandatory character of the applicable rules.

B. Applicable rules

The applicability of Chapter 1 means that the general rules on personal security contained in that Chapter also apply – subject to any special rules established in Chapter 4 – to personal security assumed by a consumer.

In particular, the present Chapter also applies to a co-debtorship for security purposes. If one of the co-debtors is a consumer, the present Chapter 4 is applicable to that security provider; this is already spelt out in IV.G.–1:104 (Co-debtorship for security purposes). In addition to the present Chapter – and subject to its special provisions – also the regime for the protection of the security provider in Chapter 2 applies to a consumer's co-debtorship for security purposes by virtue of the reference to that Chapter which is contained in paragraph (1). The application of Chapter 2 is justified by the fact that the rules on dependent security make it the mildest form of security; and this is reinforced by the fact that, when applied to a consumer, those rules may not be derogated from to the disadvantage of the consumer, cf. paragraph (2) of the present Article. By contrast, a general co-debtorship without security purpose is only subject to Book III, Chapter 4, Section 1.

Also the set of rules on the rights and obligations of several security providers (IV.G.– 1:105–1:107) apply to consumer security providers.

The applicability of Chapter 2 means that the general rules on dependent personal security also apply to personal security assumed by consumers. Since Chapter 3 on independent personal security is *not* mentioned in paragraph (2), personal security by consumers can only be granted as a dependent personal security. This conclusion is explicitly confirmed by IV.G.–4:105 (Nature of security provider's liability) sub-paragraph (c).

While, generally speaking, Chapter 2 applies to a consumer's personal security, that general principle is subject to many exceptions. In fact, all the substantive rules of Chapter 4 derogate from, or supplement, the rules of Chapter 2 on dependent personal security. These supplements and derogations will be set out and explained in the Comments to the relevant rules.

C. Mandatory character of Chapter 4

As is usual for provisions serving the protection of consumers (or other weak parties), paragraph (2) provides that the parties to a personal security may not deviate to the disadvantage of a consumer security provider from the rules of this Part.

It is to be noted first, that this prohibition covers not only Chapter 4, but all the rules on personal security in this Part. Only by extending the protection of the consumer security provider beyond Chapter 4 to all the other Chapters is full protection assured. Also the negative implication of paragraph (1), namely the non-access of consumers to furnishing independent personal security is covered.

The consumer provider of personal security is protected against any deviation "to the disadvantage of a consumer security provider" from the rules of this Part. Deviations that are favourable for the consumer security provider are allowed. It is impossible to give an abstract definition of a disadvantageous deviation and neither is it possible to give a complete catalogue. Two general criteria must in each case be fulfilled. First, the specific instrument or contract or term must deviate from the specific rules in Chapters 1 to 4. And secondly, this deviation must be to the disadvantage of the consumer security provider. Out of dozens of possibly disadvantageous deviations, two specific cases may be offered for purposes of Illustration:

> *Illustration 1*
> According to a very frequently used term the creditor maintains all rights against the security provider until the debtor of the secured obligation has completely performed any outstanding obligation. This term deviates in case of partial repayment of the credit from IV.G.–2:102 (Dependence of security provider's obligation) paragraph (1) and is therefore void.
>
> *Illustration 2*
> Another term used in practice provides that the security provider remains liable, even if the creditor, for whatever reasons, fails to exercise all available rights against the debtor or another security provider. This term deviates from IV.G.–2:110 and is therefore void.

Each disadvantageous deviation as such is relevant. It is not possible to "compensate" one negative deviation by another positive deviation in favour of a consumer, since it would be difficult, if not impossible to attach relative weights to the one and the other factor.

The consequence of any disadvantageous deviation from the rules of this Part is not spelt out expressly. However, the clear implication of paragraph (2) is that a prohibited deviation is void. This nullity primarily affects the prohibited term of the contract. In general, the remaining part of the contract continues in effect; however, if the balance of the remaining rights and obligations of the parties would be fundamentally affected in favour of one of the parties and it would be unreasonable to uphold the remaining part of the contract, then the entire contract may become void. See II.–1:108 (Partial invalidity or ineffectiveness). An abstract formula for the decision whether or not to uphold the remaining part of the contract cannot be offered. Obviously, everything depends upon the circumstances, such as the importance of the prohibited term and the extent and weight of the remaining rights and obligations of the parties to the contract.

NOTES

I. Mandatory character of consumer protection legislation

(a) Deviation to the disadvantage of consumer security providers

1. Where specific rules on personal securities provided by consumers have been enacted, they are mandatory. All provisions of the relevant AUSTRIAN legislation on consumer protection, including the rules on the protection of consumer security providers (§§ 29a-29d) are mandatory in favour of the consumer; contractual deviations therefore have no effect (ConsProtA § 2 para. 2). According to FINNISH LDepGuar § 1 para. 3 the provisions of this Law on the rights and duties of private security providers may not be deviated from to the disadvantage of those security providers. BELGIAN ConsCredA arts. 34-37 on the protection of security providers for credits granted to consumers are mandatory (*Forges* no. 193 at p. 330; *Van der Wielen and Wallemacq* 23). One author makes a distinction between professional and non-professional security providers and considers the rules in ConsCredA arts. 34-37 as non-mandatory if the security provider is a professional (*Lettany* no. 252*bis* at p. 221). In FRENCH consumer law no deviations are admitted, even to the advantage of a consumer security provider (cf. for all credit types: ConsC arts. L 341-1 to 341-6, for consumer credit only: ConsC arts. L 313-7 to 313-10). In DUTCH law there may be no deviations to the detriment of the security provider from CC art. 7:852 to art. 7:856 (general provisions on dependent personal securities) and 7:858 to 7:861 (on dependent personal securities by consumers) and from the obligations which pursuant to art. 6:154 the creditor has toward the security provider in view of a possible subrogation (CC art. 7:862).

(b) Deviations to the disadvantage of consumers in general

2. In other countries such restrictions concerning the dispositive rules which aim to protect the security provider do not exist. However, according to the underlying EU-Directives, in most member states general legislation on consumer protection is mandatory in favour of the consumer so that contracts may not deviate from these rules to the disadvantage of the consumer. This is true *e.g.* for legislation on consumer credit (DUTCH CC art. 3:40 read with art. 7:862; *Hartlief* 224; *Blomkwist* 52-53; GERMAN CC § 506; ITALIAN Banking Law art. 127; SWEDISH Law on Terms of Contracts in Consumer Relationships § 11), on doorstep transactions (GERMAN CC § 312f; ITALY: ConsC art. 143, former DLgs 15 January 1992 no. 50 art. 10 para. 2) and also for the general laws on consumer protection (AUSTRIAN ConsProtA §§ 2(2), 25c; DANISH Law on Certain Consumer Contracts § 28; *Andersen, Madsen and Nørgaard* 96; PORTUGAL: ConsProtA art. 16(1); SPANISH ConsProtA art. 10).

3. Especially the rules on abusive terms or, more generally, on standard terms may become relevant for a personal security contract whenever they are considered applicable to those contracts (on this specific point see national notes on preceding Article *sub* I). According to the underlying EU-Directive, they provide that abusive terms are void (ENGLAND and SCOTLAND: Unfair Terms in Consumer Contracts Regulations 1999 reg. 8 para. 1; for the discussion on the applicability of these rules to personal securities cf. national notes to IV.G.–4:101 no. 4; FRENCH ConsC art. L. 132-1 para. 6; GERMAN CC § 307; PORTUGAL: Law on General Contract Terms art. 15; for consumers cf. also section III arts. 20, 21 and 22; for the applicability of this Law to dependent personal security see STJ 12 January 2006, 3756/05 www.dgsi.pt).

4. Also ITALIAN ConsC art. 36 (former CC art. 1469*quinquies*) establishes that abusive terms have no effect. However, it must be noted that the terms listed in ConsC art. 33 (former CC art. 1469*bis*) are not automatically void, but only subject to a rebuttable presumption of abusiveness. Moreover, ConsC art. 34 para. 4 (former CC art. 1469*ter* para. 4) states that terms that have been agreed by individual negotiation with the consumer are valid. Only a few terms listed in ConsC art. 36 para. 2 (former CC art. 1469*quinquies* para. 2) are void notwithstanding individual negotiation (for an application of the control of abusive terms to the model contract of dependent personal security drafted by the Association of Italian Banks see *Petti* 361 ss.; however, in the field of personal security that kind of control has been of very little relevance in court practice until now, for decisions on the issue are scarce: Cass. 11 January 2001 no. 314, Foro it. 2001 I 1589; Cass. 13 May 2005 no. 10107, Foro it. Mass. 2005, 1203). The model contract provided by the Italian Bank Association contained some terms derogating from the ordinary rules of the civil code for dependent personal securities. The most important one is the term on 'first demand' on the basis of which the security provider has to pay immediately on the creditor's request, but still maintains the right to raise against the creditor any exception the security provider had against the debtor after payment on the security *(solve et repete)*. According to the Bank of Italy – which supervises the application of antitrust law in the banking sector – this term of the model contract does not violate antitrust law (Law no. 287 of 10 October 1990 art. 2). Other terms, however, have to be deleted from the model contract: *e.g.* the term extending the liability of the security provider to any other obligation of reimbursement arising from the invalidity of any payment on the secured obligation made to the bank; the term extending the security provider's liability to the reimbursement obligation of the debtor arising in case of invalidity of the secured obligation; the term derogating from CC art. 1957 on time limits for the security (Bank of Italy, decision no. 55 of 2 May 2005, www.agcm.it, Bollettino no. 17 of 16 May 2005 p. 97 ss.). Yet, according to ITALIAN case law, this decision does not prohibit such terms from being individually contracted between banks and consumer security providers (CA Torino 27 October 1998, BBTC 2001 II 87; CFI Milano 25 May 2000, BBTC 2001 II 88; CFI Torino 16 October 1997, BBTC 2001 II 87; CFI Alba 12 January 1995, Dir.b.merc.fin. 1996 I 501).

5. The SPANISH law on consumer protection establishes the nullity of general terms contravening this law to the prejudice of the weaker party (adherent) (Consumer Protection Act art. 82). Of special relevance for consumer security contracts is art. 88.1. It states that terms imposing upon the consumer security provider a disproportionate liability are abusive. However, since the rule adds that financing or security contracts negotiated by financial institutions according to their governing laws are presumed not to be disproportionate, the provision is doomed to have no practical relevance (*Carrasco a.o.* 131).

(c) Consumer's waiver of rights

6. In ENGLAND, FRANCE and ITALY the special laws on consumers´ rights contain rules on the waiver of the rights. In ENGLAND, ConsCredA s. 173 expressly forbids "contracting-out", resulting in the nullity of that particular term. The FRENCH rule on doorstep transactions (ConsC art. L. 121-25 para. 2) provides for the nullity of any waiver of the consumer's right to withdraw. According to ITALIAN ConsC art. 143 para. 1 a waiver of the rights conferred on consumers by the ConsC is void.

7. GERMAN CC § 312f and § 506 prohibit the previous waiver by a consumer of the rights granted by the relevant rules on the revocation of doorstep transactions and on

consumer credits, respectively (cf. Palandt/*Grüneberg* § 312f no. 1 and Palandt/*Putzo* § 506 nos. 2 s.).

8. Although GREEK ConsProtA does not contain an explicit general provision on the mandatory character of the provisions of this Law, it sanctions with nullity the previous waiver of the right to withdraw from contracts negotiated outside business premises (art. 3 para. 4) and from distance contracts (art. 4 para. 10). Former GREEK ConsProtA (Law no. 1961/1991) art. 3 para. 3 nullified the consumer's waiver of the rights arising from the Law. The lack of such an explicit provision in the new ConsProtA gave rise to doubts regarding the protection of the consumer when he or she was unaware of the existence of general terms waiving all rights arising from the ConsProtA: in this case, the consumer will have already renounced also the right arising from ConsProtA art. 2 para. 1, according to which the terms of which the consumer was unaware do not bind him or her (*Alexandridou* 290). These doubts are dispelled by accepting, as is commonly done in the legal literature, that rules aiming to preserve the interests of the weaker contracting party like those contained in the ConsProtA are mandatory (*Georgiades*, General Principles § 5 no. 19).

9. Also in PORTUGAL similar rules prohibiting the waiver of rights conferred by protective consumer legislation exist (cf. ConsProtA art. 16(1) and ConsCredA art. 18(1)).

10. SPANISH CC art. 6(2) allows a voluntary exclusion of applicable law only when this does not contravene public interest or public order and does not prejudice third parties. More specifically, SPANISH ConsProtA art. 10 states that any previous waiver of the consumer's rights contained in the Law is void, whereas sentence 2 of the same provision establishes the nullity of acts in "fraud of the law" and refers to CC art. 6 para. 4, according to which acts realised under the protection of the text of a norm that seek a result prohibited by the legal order or that is contrary thereto are considered in fraud of the law and do not prevent the appropriate application of the law sought to be evaded. Art. 86.7 declares void any term not individually contracted with the consumer whereby the latter waives or limits his or her rights. It has been noticed that this means in effect that the legal regime of dependent personal security – normally non-mandatory – becomes mandatory if the security provider is a consumer. However, the rule is interpreted narrowly so as to limit the nullity of consumers' waivers only to those protective rights which are granted them by the law (*Carrasco a.o.* 131).

II. Sanctions in case of deviation to the disadvantage of the consumer security provider or consumer in general

11. In most member states deviations to the disadvantage of consumer security providers or consumers in general do not result in the nullity of the whole contract. However, consequences of the breach of the prohibition vary according to national practices.

(a) Partial nullity

12. In DANISH, DUTCH, FRENCH, GERMAN, ITALIAN and SPANISH law partial nullity does not, as a rule, entail nullity of the whole contract of personal security (DENMARK: *Andersen, Madsen and Nørgaard* 96; DUTCH CC art. 7:862 (read with art. 3:41); *Hartlief* 224; *Blomkwist* 52 s.; FRENCH rules on unfair contract terms integrated into FRENCH ConsC art. L. 132-1 para. 6, FRENCH rules on all credit types (ConsC art. L. 341-3 read with art. L. 341-5) and on Consumer Credit (impliedly ConsC art. L. 311-18), which stipulate a partial nullity for terms imposing solidary liability; ITALIAN ConsC art. 36 para. 1, former CC art. 1469*quinquies* para. 1; *Calvo* 230 ss.; CA Milano 31 December 1999, Giur.milanese 2000, 222 for the partial nullity

of the abusive terms only, in a dependent personal security; SPAIN: *Díez-Picazo and Gullón*, Instituciones 462). The GERMAN Federal Supreme Court also admits partial nullity of a consumer's co-debtorship for security purposes, provided the void part of the transaction can clearly be separated from the valid remaining part (BGH 14 November 2000, BGHZ 146, 37, 47 ss.). The position is similar in cases of violation of GERMAN CC §§ 305c(1), 307 and GREEK ConsProtA art. 2 para. 1, 6 and 7 (as amended in 1999), *i.e.* when terms in standard terms are surprising or abusive, these terms do not become part of the contract or are invalid, respectively (GREECE: *Georgiades* § 3 no. 97). According to GERMAN CC § 139 and GREEK CC art. 181 partial nullity of a legal transaction provokes in general its complete nullity, unless it may be assumed that the legal transaction would have been entered into even without the void part. But in GERMANY the invalidity of one or more terms in standard terms does not in general affect the validity of the whole contract (CC § 306). By contrast, according to GREEK ConsProtA art. 2 para. 8, only the consumer and not the provider of goods or services may, in this case, invoke the nullity of the whole contract (according to *Karakostas* 68, GREEK CC art. 181 on the consequences of partial nullity is not applied in this case). According to PORTUGUESE ConsProtA art. 16(3) and DL on General Contract Terms art. 13 the consumer may choose to keep the contract, when some of the terms are void, the general rules or the rules on the integration of contracts being then applicable. In ENGLAND and SCOTLAND, standard terms which are "unfair" under the Unfair Terms in Consumer Contracts Regulations 1999 are not "binding on the consumer" (reg. 8(1)); the remaining contract continues to bind the parties, if possible without the unfair term (reg. 8 para. 2).

(b) Reduction and interpretation by the court

13. In AUSTRIA the security provider's obligations may be reduced if the latter's assets were obviously insufficient for performing the personal security (ConsProtA § 25d). In FRANCE the same solution had been suggested by the *Grimaldi* Commission for the application of the so-called principle of proportionality (CC proposed new 2305): the engagement of the provider of dependent security acting for a private purpose may be reduced if the engagement was manifestly disproportionate to the provider's financial capacity and income, unless at the time of the requested performance the provider is able to perform the obligation; however, this proposal, like most others for a reform of the rules on personal security, was not adopted by the legislator in 2006. According to SPANISH Law 26/1984 (ConsProtA) art. 10*bis* para. 2, abusive terms are considered as not included in the contract. The remaining terms will be integrated and interpreted by the judge, who should modify the rights and obligations of the parties in case of subsistence of the contract and also the consequences of its eventual invalidity in case of considerable prejudice to the consumer. Law 7/1998 on General Contract Terms art. 9 para. 2 makes also reference to the partial nullity (only of the terms or conditions declared invalid according to the Law) and establishes the duty of the court to clarify the validity of the contract in these cases or to declare the nullity of the whole contract if one of its essential elements (according to SPANISH CC art. 1261 consent, object and cause) is affected by this nullity.

(c) Unenforceability

14. In FRANCE the professional creditor cannot enforce the security contract if the engagement of the provider of dependent security was manifestly disproportionate to financial capacity and income, unless at the time of the requested performance the

latter is able to perform the obligation (for consumer credit: ConsC art. L. 313-10, even if the debtor is a professional: ConsC art. L. 341-4).

III. Deviations to the benefit of the consumer security provider or consumer in general

15. Deviations to the benefit of the consumer security provider are allowed in DANISH and SPANISH law (DENMARK: Karnov/*Kristoffersen* 5486 fn. 160; SPANISH CC art. 6(2)). In GERMANY and GREECE, although there is no special provision to that effect, it follows from the general notion of freedom of contract, that deviations which are favourable for the consumer are always possible. In PORTUGAL the same is true (cf. ConsProtA art. 16(1); for a specific example see art. 4(2)). In ENGLAND and SCOTLAND, the provisions of the Unfair Terms in Consumer Contracts Regulations 1999 apply only to contractual terms that are detrimental to the consumer (reg. 5 para. 1) (but cf. national notes to IV.G–4:101 no. 4).

16. Exceptionally the FRENCH rules relating to all credit types (ConsC arts. L. 341-1 ff), to consumer credit (ConsC arts. L. 313-7 ff) and to doorstep transactions (ConsC arts. L. 121-23 ff) exclude any deviations even if they are favourable for the consumer.

IV.G.–4:103: Creditor's pre-contractual duties

(1) Before a security is granted, the creditor has a duty to explain to the intending security provider:

(a) the general effect of the intended security; and

(b) the special risks to which the security provider may according to the information accessible to the creditor be exposed in view of the financial situation of the debtor.

(2) If the creditor knows or has reason to know that due to a relationship of trust and confidence between the debtor and the security provider there is a significant risk that the security provider is not acting freely or with adequate information, the creditor has a duty to ascertain that the security provider has received independent advice.

(3) If the information or independent advice required by the preceding paragraphs is not given at least five days before the security provider signs the offer of security or the contract creating the security, the offer can be revoked or the contract avoided by the security provider within a reasonable time after receipt of the information or the independent advice. For this purpose five days is regarded as a reasonable time unless the circumstances suggest otherwise.

(4) If contrary to paragraph (1) or (2) no information or independent advice is given, the offer can be revoked or the contract avoided by the security provider at any time.

(5) If the security provider revokes the offer or avoids the contract according to the preceding paragraphs, the return of benefits received by the parties is governed by Book VII (Unjustified Enrichment).

COMMENTS

A. Need for protection

In view of the risk which any security provider incurs by assuming a personal security of whatever kind, the interest in self-protection should inspire the security provider to obtain as much information as possible from the debtor about the debtor's economic situation. Private persons and even more so business partners often know or at least often will or should be able to find out such information.

Experience in virtually all member states shows, however, that there are many private individuals who either close their eyes to the potential risks or who are unable to obtain relevant information. A few legislators and courts in some countries have obliged the creditor in certain circumstances to reveal to the intending security provider the debtor's financial situation. This should make the security provider aware of the risk which may be incurred by assuming the personal security. This, again, is a protective rule for consumer security providers, especially close relatives of the debtor who often are ignorant of, or blind to, the debtor's economic situation because they are moved by the desire to help and sentiments of kinship and benevolence. It is therefore necessary to establish specific rules aiming at protecting the security provider by making additional information available so that the security provider can better evaluate the risk incurred by assuming a personal security.

Such assistance is the more necessary since relatives or friends of a private debtor (who very often also is a consumer) usually assume a personal security without remuneration. In effect, they "donate" their credit and risk losing major portions of, or even all, their assets.

B. Information and advice for the security provider

Creditor's information. Paragraph (1) specifies the information that has to be disclosed by the creditor to the security provider.

Paragraph (1)(a) does not deal with the subjective risks inherent in the debtor, but with the general objective legal and economic risks that are connected with a dependent personal security. The creditor must start from the assumption that consumer security providers are not familiar with the far-reaching effects of assuming any personal security. In particular, intending security providers must be made aware that they will assume a potential debt for which they may be liable with all their assets. The practical effects of this abstract rule must clearly be impressed upon the mind of the intending security provider. This must be done in such a way that the latter becomes clearly and fully aware of the very real risk incurred by assuming the personal security.

Paragraph (1)(b) deals with the special personal risks which are inherent in the financial position of the debtor. Professional creditors usually will be able, either on the basis of earlier dealings with the debtor or else by virtue of investigations, to evaluate the economic capacity of their debtor. All presently available information on the economic potential of the debtor, especially present assets (whether encumbered or not) and earning capacity, must be utilised. These data are already relevant for the creditor's decision whether or not to grant a credit to the debtor. On this basis the creditor can and must provide a complete picture of the financial situation of the debtor to the intending security provider.

In the case of middle-term or even long-term credits, the investigations of the debtor and consequently the information given to the intending security provider must be even more extensive and careful. Of course, nobody is expected to make prophecies. However, those potential developments which can relatively clearly be foreshadowed must also be disclosed. This refers to data like the age and health situation of the debtor and consequences which these may have for the debtor's future economic situation.

The creditor's duty of disclosure is qualified by the words "information accessible to the creditor". The qualifying term "accessible" must be understood subjectively as meaning all the relevant information about the debtor of which the creditor disposes at the time of contracting the security. According to the drafting history accessibility does not prejudice the issue whether the relevant information must also be accessible to the security provider. If the creditor due to binding rules of professional secrecy, especially bank secrecy, is prevented from divulging all relevant information to which the creditor has access to the security provider, the creditor must attempt to obtain the debtor's consent for passing the information to the security provider or must bear the consequences of this subjective inability which are spelt out in paragraphs (3) –(5). Such a disability must be disclosed to the intending security provider so that he or she can look for other sources or for independent advice. An omission of such a disclosure may expose the creditor to the obligation to compensate any damage caused to the security provider.

Independent advice. Paragraph (2) deals with a special situation in which the creditor has a duty to ascertain that the intending security provider receives *independent* advice from a third person.

Such recourse to a source of independent advice is required if the creditor "knows or has reason to know" that the security provider "is not acting freely or with adequate information" in assuming the security. If the creditor's knowledge is alleged, this will require adequate proof. If it is alleged that the creditor had "reason to know", the interested party must prove the knowledge by the creditor of such facts as will allow the inference to be drawn that the creditor ought to have known of a relationship of trust and confidence between the debtor and the security provider.

A relationship of trust and confidence between security provider and debtor as such does not meet the requirement of paragraph (2). There are millions of such relationships, especially in well-functioning families. The members of such a family may have acquired or preserved personal independence and experience with respect to financial matters, especially by the independent administration of their financial affairs. However, there are probably more families where not all members have experience of this kind to a significant extent. Children, even if they have reached the age of majority, do not always appreciate financial risks of greater dimension. The same may also be true of sick or old people, depending upon the individual circumstances. If both the security provider and the debtor are members of a relationship of the latter type, then there is obviously a significant risk that the security provider is not acting freely or is acting without adequate information.

If the requirements mentioned in the preceding two paragraphs are fulfilled, then the creditor must ascertain that the security provider has received "independent advice" with respect to the assumption of the security required by the creditor. In practice this means that the creditor must request the intending security provider to obtain advice from an independent third party. The creditor's legal advisor obviously would not qualify for this purpose. Independent advice may be rendered by consumer organisations or bodies providing legal assistance. In important or complicated cases, advice by independent lawyers may be necessary. The costs will have to be borne by the security provider or the debtor.

C. Sanctions

Paragraphs (3) to (5) provide the sanctions if the information required by paragraph (1) or the independent advice required by paragraph (2) have been furnished late or have not been furnished at all. In these circumstances the consumer security provider is regarded as having assumed the security improvidently. These sanctions apply whether or not the consumer security provider in fact suffered a disadvantage.

Paragraphs (3) and (4) deal with two different, although related fact patterns: paragraph (3) applies if the information or independent advice is given, but is not given within the required time limit; by contrast, paragraph (4) applies if no information or independent advice at all is furnished.

According to paragraph (3) the information or independent advice required by paragraphs (1) and (2) must be furnished to the security provider "at least five days" before signing the offer of security or the contract creating the security. Five days should suffice to review the required information or independent advice; in the case of contracts for larger amounts, usually negotiations take more time so that in fact a longer period of time may be available to the security provider. References in this Article to a contract creating the security apply also to unilateral promises or undertakings creating a security (see IV.G.–1:102 (Scope) paragraph (4).

If the required time span of five days is not observed, the consumer security provider can revoke the offer of security or avoid the contract or other juridical act creating the security within a "reasonable" period after having received the information or independent advice. This span of reasonable time is under normal circumstances five working days; however, the circumstances may suggest a shorter or longer period (sentence 2). This period is more flexible than the corresponding time span fixed by the first sentence, since the intending security provider cannot foresee when he or she will receive the draft of the offer or contract of security.

If no information or independent advice is given, the intending security provider can at any time revoke the offer or can avoid the contract or other juridical act (paragraph (4)). This rule must be understood in a broad sense: it must also apply if information is given, but turns out to be obviously insufficient so that it is not helpful for the intending security provider or even misleads as to the circumstances that have been relevant to the decision to assume the security.

Paragraph (5) will in practice be of limited relevance. In the early stage it is unlikely that any performances will have been rendered by any of the parties. However, in the cases addressed by paragraph (4), where no information or advice at all has been given and therefore the contract can be avoided at any time, performances may well have been rendered. The return of benefits received as a result of such performances is governed by the rules on unjustified enrichment in Book VII.

D. Mandatory provision

According to paragraph (2) of the preceding Article, the present Article is a mandatory provision in favour of the consumer security provider.

NOTES

I. Different bases of creditor's precontractual duties of information

1. Precontractual duties of information of creditors towards consumer providers of security are based upon different legal concepts in the various member states. Some member states have enacted specific consumer protection provisions in order to regulate such information duties. Very often such information requirements are also derived from the application of general principles of law, while sometimes also the rules on error are applied in order to deal with situations in which no precontractual information had been provided by the creditor. In a number of member states, several of these concepts are applied simultaneously; for instance, precontractual information requirements may follow both from special consumer protection provisions and from more general principles.
2. In AUSTRIA, precontractual information duties follow from special consumer protection provisions (ConsProtA §§ 25a ff).
3. Precontractual information duties in BELGIAN law are laid down in special consumer protection provisions (ConsCredA art. 34) and can be derived from general principles of law.

4. In DENMARK, precontractual information duties are based upon the principle of good faith (ContrA § 36).

5. Under ENGLISH law, there are both precontractual information requirements laid down in special consumer protection provisions (esp. ConsCredA s. 105 para. 5) and precontractual duties of the creditor derived from the principles of undue influence and constructive notice.

6. In FINLAND, precontractual information requirements follow from special consumer protection provisions (LDepGuar § 12) and from the operation of general principles of law.

7. In FRANCE, there are special consumer protection provisions concerning precontractual information requirements (ConsC art. L. 313-7 ff), but also duties of the creditor based upon the principle of good faith.

8. GERMAN law bases precontractual information requirements of the creditor primarily upon the principle of good faith, but also upon the rules on mistake.

9. In GREECE, the principle of good faith is regarded as the single basis of precontractual information requirements.

10. In IRELAND, precontractual information requirements follow both from special consumer protection provisions (ConsCredA s. 30) and from the application of general rules of law.

11. In ITALY, some precontractual information requirements are contained in special consumer protection provisions (ConsC arts. 2), while others follow from legislation applicable for all kinds of security providers and other general rules of law.

12. In LUXEMBOURG, precontractual information requirements can become relevant in limited circumstances for the rules on mistake.

13. In the NETHERLANDS, precontractual information requirements typically are dealt with in connection with the rules on mistake; additionally, some precontractual information requirements based upon general rules of law are suggested.

14. In SCOTLAND, there are both precontractual information requirements which are laid down in special consumer protection provisions (esp. ConsCredA s. 105 para. 5) and precontractual information requirements of the creditor based upon the principle of good faith.

15. Under SPANISH law, pre-contractual information requirements follow from the principle of good faith and are subject to the requirements and extension mandatorily laid down in arts. 61 and 62 of the Consumer Protection Act. There are no special security related information duties.

16. In SWEDEN, some special consumer protection provisions contain precontractual information requirements (ConsCredA §§ 6, 7), while in other cases such duties of the creditor are based upon general principles (ContrA § 36).

II. Specific rules on creditor's precontractual duties of information towards consumer security providers

17. Most member states agree that special protection especially by way of information duties of the creditor must be given to the consumer security provider who more often than not lacks business experience; the degree of protection provided under specific consumer protection rules under the different legal systems, however, varies considerably. For the sanctions in case of a non-compliance with these duties, see generally notes 44 et seq. below

18. AUSTRIA enacted in 1997 a series of interconnected provisions on information duties: § 25a ConsProtA obliges professional credit providers to hand to spouses as co-debtors or one acting as surety a document informing them about the risks of solidary liability; according to § 25b para. 2 the provider of a personal security, whether dependent or independent, has to be informed by the creditor about the spouse's default; non-observance of this duty implies that the security provider is not liable for interest and costs that arise after the debtor's default; the most important provision in practice is § 25c: the creditor has to inform a consumer who becomes a co-debtor or a (dependent or independent) security provider about the economic position of the debtor if the creditor is, or should be, aware that the debtor probably will be unable (or only partly able) to perform the obligation (sentence 1). If the creditor omits this information the security provider will only be liable if the security obligation would have been assumed in spite of this information (sentence 2). The Supreme Court has held: if the creditor urges assumption of a personal security this indicates the creditor's doubts as to the solvency of the debtor (OGH 22 Dec 2003, JBl. 2004, 522 at p. 524; OGH 25 July 2000, SZ 73 no. 121 at p. 68); individual information is required, whereas a general form does not suffice (OGH 26 January 2006, ÖJZ 2006, 454, 455); the practice of the court is not quite uniform as to whether information by the creditor is required even if the security provider is already informed; prevailing practice supports repetition since this more strongly impresses the security provider (OGH 22 December 2003, JBl. 2004, 522 at 525; OGH 25 July 2000, above at p. 68; discussion and less strict view in OGH 21 July 2005, ÖBA 2006, 206 at 208); no information is necessary if the security provider had offered to assume the security, participated in the intensive negotiation of the credit and had earlier business experience (OGH 20 October 1999, ÖBA 2000, 527 at p. 531; OGH 22 October 2001, ÖBA 2002, 499 at p. 501); beyond the letter of § 25c, the Supreme Court allows a mere reduction of the security provider's obligation (OGH 25 July 2000, above at p. 69 s.)

19. In BELGIUM, ConsCredA art. 34 lays down a precontractual duty of information in favour of security providers for a credit granted to a consumer, without distinguishing between consumer and other security providers or between different types of personal security. The creditor must furnish gratuitously in advance to the security provider a copy of the security agreement (and then give notice of the conclusion of the credit agreement). The creditor must also inform the security provider in advance about any modification of the credit agreement (ConsCredA art. 34 para. 2).

20. In ENGLAND there are special consumer protective laws introducing a precontractual duty of information of the creditor in favour of consumer security providers (in ENGLAND: persons giving security in relation to a transaction falling under the consumer protection legislation, cf. national notes to IV.G.–1:101 no. 67) only (ConsCredA s. 105 para. 5; Consumer Credit (Guarantees and Indemnities) Regulations 1983 reg. 3). The information to be given must be in writing and it must also contain a warning "YOU MAY HAVE TO PAY INSTEAD" in capital letters (Part IV of the Schedule to the Consumer Credit (Guarantees and Indemnities) Regulations 1983), whereas the creditor has to supply the security provider with a copy of the security instrument and a copy of the underlying regulated agreement and any documents therein referred to within 12 working days (Consumer Credit (Prescribed Periods for Giving Information) Regulations 1983 reg. 2). Moreover, the creditor has to give additional information about creditor and debtor as well as a statement of the security provider's rights and duties under the security (ConsCredA s. 105 para. 5; Consumer Credit (Guarantees and Indemnities) Regulations 1983 reg. 3; cf. *O´Donovan and Phillips* nos. 3-176 s.).

21. In FINLAND LDepGuar § 12 provides a precontractual duty of information in favour of consumer security providers concerning four points: the obligations and specific costs of the dependent personal security assumed; the preconditions for demanding performance from the security provider; and of any other factors that may be of essential importance for the security provider; further, the creditor must inform the consumer security provider about the debtor's obligations and financial circumstances (§ 12 paras 1–2; RP 189/1998 rd 44 ss.). The written form is optional for this information; if the information is given in writing, this must take place at the latest on the day before the personal security is assumed (LDepGuar § 12 para. 1 sentence 2; RP 189/1998 rd 46).

22. In FRANCE an obligation of information in favour of the consumer security provider is implied: both the nature of the security provider's engagement and the maximum amount of the secured debt must be indicated in the contract of security (for all credit types: ConsC arts. L. 341-2 ff; for consumer credit only: ConsC arts. L. 313-7 ff).

23. In IRELAND, the security provider is entitled under ConsCredA s. 30 (1)(b) to a copy of the document on the agreement from which the secured obligations arise.

24. In ITALY the general rules of consumer protection enacted by Law 30 July 1998 no. 281, now integrated into ConsC, establish the rights of consumers to adequate information and publicity concerning services provided by professionals (art. 2 para. 2 lit. c)) and to fairness and equity in contractual relationships (art. 2 para. 2 lit. e)); these rules are considered as applicable to consumer security providers (*Petti* 484). Among other rules, ConsC art. 5 para. 3 states that information for the consumer should be adequate to the chosen technique of communication; it has to be expressed clearly and intelligibly, also taking into account the modalities of the conclusion of the contract or the characteristics of the area in which the service operates so as to ensure the consumer's awareness.

25. The situation in SCOTLAND is identical to ENGLISH law.

26. In SWEDEN there are special provisions introducing a precontractual duty of information of the creditor in favour of consumer security providers: The information to be disclosed must be given in writing before the assumption of the personal security (ConsCredA §§ 6, 7). According to the general guidelines of the Swedish Financial Supervisory Authority about securities in consumer relationships (FFFS 2005:3) the creditor has a precontractual duty to furnish information in writing to consumer security providers. The creditor may be obliged to inform the security provider about all circumstances that the latter may truly expect to know, *e.g.* extra costs connected with the personal security (ConsCredA §§ 6, 7). According to the general guidelines about securities in consumer relationships (FFFS 2005:3) the creditor is obliged to inform the security provider about the debtor's economic situation, if this is deteriorating over a lengthy period.

III. Creditor's precontractual duties of information based upon general principles

27. In addition to the specific protective rules for consumer security providers, there is typically also some protection through creditors´ precontractual duties of information which are based upon general principles of law, especially on the principle of good faith or similar concepts. As a general rule, these information duties, however, will be less strict and only available in limited circumstances. For the sanctions in case of a non-compliance with these duties, see generally nos. 44 ss. below

28. In BELGIUM, the creditor may be obliged to inform the security provider about all circumstances that the latter may truly expect to know, *e.g.* extra costs contained in the personal security (*Cornelis* 63; *Van Quickenborne* no. 423).

29. In DENMARK, a duty to disclose any sort of information about the financial situation of the debtor or the risk to be assumed has been acknowledged in literature and in court practice as arising from the principle of good faith (*Pedersen*, Kaution 23 ss.). Thus, a security in favour of a savings bank assumed by a disordered lady for old and future debts of her stepson was found not to be binding on the basis of ContrA § 36 for a lack of information by the bank (CA Vestre Landsret 30 August 1993, UfR 1993 A 949). The intensity of the duty of information depends upon whether the creditor or the debtor has approached the security provider, the creditor's duty being higher in the former situation than in the latter (*Pedersen*, Kaution 23 ss.). *Pedersen*, *ibid*. also points out that where undue influence is exercised against a security provider who is not properly informed a security might be invalid on the basis of ContrA §§ 30, 31 or 33 (fraud).

30. In ENGLISH law, wide-ranging supplementary pre-contractual duties are imposed upon the creditor, especially in cases of a relationship of trust and confidence or an emotional bond between the security provider and the debtor. In ENGLISH and SCOTTISH law the existence and exact scope of such duties has been the object of an intense discussion in the past years. While at first it was thought that the legal situation in both jurisdictions followed similar rules (cf. *Smith v. Bank of Scotland* 1997 SC 111), it has now become clear that substantial differences exist (cf. *Royal Bank of Scotland v. Wilson* 2004 SC 153; *Thomson v. Royal Bank of Scotland* 2003 SCLR 964). In ENGLISH law, the starting point is that while in certain cases such as the parent/child or solicitor/client relationship there is even an irrefutable presumption of undue influence between the parties (cf. *O´Donovan and Phillips* no. 4-130), in other non-commercial cases where a security provider can show that trust and confidence was reposed in the debtor and that the assumption of security is not readily explicable by the relationships between the parties and calls for an explanation, there is an evidentiary presumption of undue influence between debtor and security provider (*Royal Bank of Scotland Plc. v. Etridge (No. 2)* [2001] UKHL 44, [2002] 2 AC 773). This evidentiary presumption, which will however not apply merely because of the existence of a marital relationship (same decision at p. 822), will, if not rebutted, give the security provider a valid defence also against the creditor if the latter is found to have actual or constructive notice of this undue influence (*Barclays Bank plc. v. O´Brien* [1994] 1 AC 180; *Royal Bank of Scotland Plc. v. Etridge (No. 2)* [2001] UKHL 44, [2002] 2 AC 773, 798). At least in relation to securities provided by one spouse to the other, the courts have developed detailed rules which have to be complied with by creditors in order to rebut a presumption of constructive notice. In all cases where a security is provided by one spouse to the other, the other's business or a company in which they both had some shareholding the creditor "is put on inquiry" (cf. *Royal Bank of Scotland Plc. v. Etridge (No. 2)* [2001] UKHL 44, [2002] 2 AC 773, 803) and has to take steps to bring home to the security provider the risk run by standing as surety and advise the taking of independent advice (*Barclays Bank plc. v. O´Brien* [1994] 1 AC 180). Moreover there are detailed additional duties, for example requiring the creditor, even if the security provider has received legal advice, to inform the security provider that the creditor requires written confirmation from a solicitor acting for the security provider that the solicitor has fully explained to the security provider the nature of the documents of the security transaction and the practical implications; the creditor also has to advise the security provider of the possibility of appointing a solicitor different from the advisor acting also for both

spouses and the creditor has to give information about the other spouse's financial affairs either directly to the spouse granting security or to the solicitor acting for that spouse (*Royal Bank of Scotland v. Etridge (No 2)* [2002] 2 AC 773, 803; cf. also *First National Bank v. Achampong* [2003] EWCA Civ 487, [2004] 1 FCR 18; *Yorkshire Bank plc. v. Tinsley* [2004] EWCA Civ 816, [2004] 1 WLR 2380).

31. In FINLAND – as in DENMARK and SWEDEN – a security may be regarded as invalid by reason of undue influence if it has been assumed by a security provider without proper precontractual information on the basis of the general principles of ContrA §§ 30, 31 or 33 (fraud) (see also HD 18 December 1996, KKO 1996:149). At least in this regard, the different Nordic Contract Acts are in all SCANDINAVIAN countries more or less uniform since the early 20th century.

32. In FRANCE, it has been held that a duty to disclose any sort of information about the financial situation of the debtor or the risk to be assumed can arise from the principle of good faith (CA Versailles 9 November 1995, D. 1996, I.R. 17). A banker has to inform the security provider about essential facts which may influence consent, *e.g.* the very strained situation of the debtor, otherwise the contract of personal security can be avoided on the basis of deceit (Cass.civ. 26 November 1991, JCP G 1992, IV no. 369; Cass.civ. 8 July 2003 and Cass.civ. 13 May 2003, in D. 2003, 2308 ss., note *Avena-Robardet*) or damages for contractual liability may be claimed (Cass.com. 24 June 2003, D. 2003, 2309 ss., note *Avena-Robardet*). Moreover, the creditor may be obliged to inform the security provider about all circumstances that the latter may expect to know, *e.g.* extra costs connected with the personal security (impliedly ConsC art. L. 341-2 ff for all kinds of credit).

33. In GERMANY, the creditor is generally not thought to be obliged to disclose any sort of information about the financial situation of the debtor or the risk to be assumed since these risks are well known and generally to be known by all security providers (BGH 15 April 1997, NJW 1997, 3230, 3231; BGH 18 January 1996, NJW 1996, 1274, 1275; BGH 22 October 1987, NJW 1988, 3205, 3206; for further references cf. MünchKomm/*Habersack* § 765 no. 87). Both literature and court practice accept, however, that in appropriate circumstances a duty of information arises from the principle of good faith (only BGH 15 April 1997, NJW 1997, 3230, 3231). Such duty of information is exceptionally assumed by court practice on the basis of good faith if the creditor caused an error of the security provider, which the former could have discovered, concerning the increased risk of the personal security (cf. only BGH 15 April 1997, NJW 1997, 3230, 3231; BGH 17 October 1985, WM 1986, 11, 12; see also CA Oldenburg 22 July 1997, WM 1997, 2076: the creditor knows that the security provider will have to pay; BGH 27 May 2003, ZIP 2003, 1596, 1599: creditor, a bank, asserts to security provider that the security is required only "*pro forma*"). This has recently been extended to cases in which the creditor recognises or ought to recognise that the security provider has fundamentally erroneous ideas about the consequences of the declaration, for whatever reason (cf. BGH 1 July 1999, NJW 1999, 2814; see also BGH 11 February 1999, NJW 1999, 2032). But there is no duty of information if the creditor can assume that the security provider received all important information from the debtor (CA Koblenz 14 March 1996, WM 1997, 719). It has to be noticed that the courts – in accordance with most writers – have continued to extend the duty of information and that this development still continues (cf. CA Bamberg 13 December 1999, WM 2000, 1582, 1585; Staudinger/*Horn* § 765 nos. 184–188).

34. In GREECE, it is thought that the security provider is normally entitled towards the creditor to information about the risk to be assumed (*Georgiades* § 3 no. 72; *Markou*,

DEE 8, 363). In some situations it is assumed that such a duty of information might be based upon the principle of good faith (*Georgiades* § 3 no. 72). The creditor has this duty, if and in so far as the security provider declares that the assumption of the personal security depends on the facts made available to the security provider or if that assumption takes place by signing a document containing pre-written standard terms (*Georgiades* § 3 no. 72). According to the GREEK Banker's Code of Conduct art. 42 para. 2 (cf. national notes to IV.G.–2:107 no. 3), the bank must explicitly mention to the security provider the nature and extent of the obligations or risks which are assumed. Furthermore, the bank is obliged to give the security provider all the information made available to the debtor (art. 42 para. 1).

35. In IRELAND, information requirements for the creditor can be derived – as in ENGLISH law – from the operation of the principle of constructive notice in the area of undue influence, *i.e.* a personal security can become unenforceable if it is assumed that the creditor did have constructive notice of an actual undue influence by the principal debtor on the security provider and if the creditor in such a situation did not undertake special steps to ensure that the security provider obtained independent legal advice (cf. *Ulster Bank Ireland Ltd. v. Fitzgerald* [2001] IEHC 159; *Bank of Bank of Nova Scotia v. Hogan* [1996] 3 IR 239). However, the relationship of husband and wife does not in itself give rise to a presumption of undue influence and also constructive notice on the part of the creditor of any such undue influence depended upon the knowledge of at least some factors indicating such undue influence (cf. *Ulster Bank Ireland Ltd v. Fitzgerald* and *Bank of Nova Scotia v. Hogan*, above).

36. In ITALY, the principle of good faith is regarded as a basis for the creditor's duty of information in personal security contracts (*di Majo*, Clausola "omnibus" 45 ss., 52 ss.). The rules on transparency of contractual conditions in the banking sector also apply to consumer security providers when contracting with banks or financial institutions (Banking Law arts. 115-120; *Petti* 484). According to art. 116 at each office open to the public the following must be displayed to clients: interest rates, prices, expenses for notices, and every other financial condition regarding transactions and services offered, including overdue interests and values used for the imputation of interest. Reference to usage is not permitted. The contract must indicate the interest rate and every other price and condition in practice, including, for credit contracts, any increased fees in the case of late payment; also the possibility of a change of the interest rate and any other price and condition to the disadvantage of the client must be expressly indicated in the contract with a term that the client must individually sign (art. 117). Besides, annual notifications to clients are imposed by art. 119, in order to provide the client with complete and clear written information regarding the development of the relationship. In addition, some ITALIAN legal writers (*Benedetti* 208 ss.; *Petti* 98) point out that undue influence on the security provider without a proper information could be dealt with by recourse to the general remedies protecting the freedom of the individual will in the formation of the contract (CC arts. 1427 ff, mistake; 1434-1436, threat; 1439, fraud) or to the rules on non-contractual liability for damage (CC arts. 2043 ff).

37. In the NETHERLANDS, precontractual information requirements of the creditor outside specific consumer protection provisions are typically derived from the rules on mistake. In addition to this, however, according to one opinion, if a professional creditor knew or should have known that the security provider is being induced to enter into the contract of personal security as the result of special circumstances, such as a state of necessity, dependency, wantonness, abnormal mental condition or inexperience (*Tjittes*, WPNR 2001, 353), or that the security provider is about to incur a liability for debts that exceed present and expected financial capacity, then the

creditor should prevent the security provider from agreeing to the contract of personal security and encourage the taking of independent legal advice (*Tjittes*, WPNR 2001, 353, 356).

38. In SCOTLAND, there is as in ENGLISH law a discussion about the imposition of some supplementary pre-contractual duties upon the creditor, especially in cases of a relationship of trust and confidence or an emotional bond between the security provider and the debtor. In SCOTLAND, however, the principle of good faith imposes additional duties on a creditor taking security from a third party security provider only where the circumstances of the case are such as to lead a reasonable person to believe that the security provider did not act freely or in a fully informed way (*Smith v. Bank of Scotland* 1997 SC 111; *Royal Bank of Scotland v. Wilson* 2004 SC 153). Moreover, the security provider has to show that there actually was undue influence or a misrepresentation if the security provider wishes to challenge the validity of the security on these grounds (*Royal Royal Bank of Scotland v. Wilson* [2003] ScotCS 196, 2003 SCLR 716; *Braithwaite v. Bank of Scotland* 1999 SLT 25). The courts do not prescribe any specific steps for the creditor; it is sufficient that the creditor warns the potential security provider of the consequences of entering into the security and advises the taking of independent advice (*Smith v. Bank of Scotland* 1997 SC 111; *Royal Bank of Scotland v. Wilson* 2004 SC 153). Once the creditor has been informed that the prospective security provider has received legal advice, the creditor does not normally have to take any further measures, *e.g.* to question whether the advice given was of the requisite quality (*Royal Bank of Scotland v. Wilson* 2004 SC 153).

39. While it is generally thought in SPAIN that the creditor is not obliged to disclose any sort of information about the financial situation of the debtor or the risk to be assumed, such a duty is in appropriate circumstances said to arise from the principle of good faith (*Reyes López* 232 s.). This will especially be the case if the personal security is declared by the security provider to depend upon the facts made available or if the personal security is contained in a document with pre-written standard terms (*Reyes López* 232 s.).

40. In SWEDEN, it has been held that on the basis of the general principle of ContrA § 36 a security provider, especially when acting as a non-professional, can be partially freed from liability if and in so far as not informed by the creditor about special grave financial risks contained in the underlying obligation (HD 20 August 1997, NJA 1997, 524). Moreover, a lack of precontractual information by the creditor might free the security provider from obligations if this amounts to fraud (ContrA §§ 30, 31 or 33). In HD 5 February 1996, NJA 1996, 19, however, it has been held that a security provider might still be liable despite the creditor's failure to inform the security provider about the disproportionality between the debtor's income and the secured debt if the creditor had given information about the implications and consequences of the security in previous dealings with the creditor concerning the assumption of securities for the same debtor.

IV. Lack of precontractual information by creditor causing error of security provider

41. Some member states use a third method in order to regulate precontractual information requirements for the creditor by allowing the security provider to have recourse to the rules on error if the security provider concluded the contract of personal security without prior information by the creditor. For the consequences of a lack of information in these member states, see also no. 45 below.

42. In LUXEMBOURG the dependent security contract can only be avoided for mistake if the solvency of the debtor was a condition for assuming the security (CA Luxembourg 20 March 2002, BankFin 2003, 296).

43. In the NETHERLANDS, since the CC provisions do not deal with the precontractual protection of security providers, the courts continue to have recourse to the general rules on mistake. In 1990, the Supreme Court had held that a consumer security provider may avoid a security for mistake if he or she had erred in assuming that there was only a small risk of being called upon to honour the security (HR 1 June 1990, NJ 1991 no. 759 at p. 3302). Later, this view seems to have been affirmed in an *obiter dictum* (HR 3 June 1994, NJ 1997 no. 287 at p. 1544). However, an annotator ("CJHB") to the latter case has disagreed on this point and insists that avoidance for mistake is now only admissible if one of the new statutory requirements in CC art. 6:228 is met; in particular, under para. 1 lit. b) a contract may be avoided for mistake if the other party (*i.e.* the creditor) knew or ought to have known of the security provider's mistake as to the debtor's solvency but did not enlighten it.

V. Sanctions

44. In a few member states, protective statutes also provide for sanctions if statutory rules are violated. In AUSTRIA, a security provider is not bound by the personal security if the required information about the debtor's financial situation has not been given, unless the security provider would have assumed the personal security in spite of such information (ConsProtA § 25c sentence 2). In BELGIUM the obligations of the security provider are discharged if the creditor does not hand over to the (prospective) security provider a copy of the credit contract (ConsCredA art. 97, as amended in 2003). In FRANCE, if the nature of the engagement of the consumer security provider and the maximum amount of the secured claim are not indicated in the contract of personal security, the personal security is void (for all credit types: ConsC arts. L. 341-2 ff, for consumer credit only: ConsC arts. L. 313-7 ff).

45. In member states which lack special provisions on the duty of information, courts and writers rely on general rules sanctioning the lack of sufficient information or the furnishing of wrong information. The first case may provoke a mistake on the part of the security provider and thus entitle the latter to avoid the security (DENMARK: *Pedersen*, Kaution 23; FRANCE: cf. *Simler* no. 146; GREECE: A.P. 456/1971, NoB 19, 1245; LUXEMBOURG: CA Luxembourg 20 March 2002, BankFin 2003, 296; NETHERLANDS: HR 1 June 1990, NJ 1991 no. 759 at p. 3302; indirectly confirmed by HR 3 June 1994, NJ 1997 no. 287 at p. 1544; SPAIN: *Reyes López* 232). Also the furnishing of wrong or incomplete information by the creditor may induce a mistake on the part of the security provider (NETHERLANDS: HR 3 June 1994, NJ 1997 no. 287 (professional security provider); *Tjittes*, Bezwaarde Verwanten 59–62 and WPNR 2001, 353). Those general remedies are available also in ITALY, according to general rules; however, there seems to be no case law specifically concerning personal security (see no. 36 above). In case of a violation of the special rules in the DANISH agreement between the Consumer Council and the Financial Council concerning precontractual information to be provided by a financial institution, the sanctions are said to depend on the circumstances of the case (*Pedersen*, Kaution 24 s.).

46. In other countries the security provider has a claim for damages resulting from the creditor's *culpa in contrahendo* so that the security provider can not be called upon to make payment (BELGIUM: *Lebon*, Vorlagebeschluss 275; FINNISH LDepGuar § 12 para. 3; FRANCE: Cass.civ. 10 May 2005, Bull.civ. 2005 I no. 200 p. 169 on the ground that the creditor had not ascertained the security provider's financial ability to secure payment of a high debt; GERMANY: BGH 10 January 2006, BGHZ 165, 363,

371 invoking *culpa in contrahendo* resulting in a claim for damages and now based upon CC §§ 280 para. 1, 311 para. 2 no. 1, 249; BGH 15 April 1997, NJW 1997, 3230, 3231; BGH 1 July 1999, NJW 1999, 2814; ITALY: on the basis of CC art. 1337 and 2043; *e multis* cf. Cass. 29 September 2005 no. 19024, Foro it. 2006, 1105; Cass. 5 August 2004 no. 15040, Giust.civ. 2005 I 669; Cass. 16 July 2001 no. 9645, Giust.civ.Mass. 2001, 1404; for an application to dependent personal security Cass. 11 October 1994 no. 8295, Foro it. 1995 I 1903; *Roppo* 177 ss.; *Sacco and De Nova* II 260 s.).

47. In ENGLAND and SCOTLAND, if the creditor does not provide the security provider with a copy of the secured agreement according to ConsCredA s. 105 para. 5, the security is enforceable against the security provider on an order of the court only (ConsCredA s. 105 para. 7; cf. *O´Donovan and Phillips* no. 3-177; *Andrews and Millett* no. 17-005). For the specific sanctions in relation to non-compliance with additional precontractual requirements for the creditor in the situation of relationships of trust and confidence between debtor and security provider see nos. 30 and 38 above. Under IRISH law, a security given in relation to a consumer credit agreement is not enforceable if no copy of the credit agreement has been handed over to the security provider (ConsCredA s. 38).

IV.G.–4:104: Form

The contract of security must be in textual form on a durable medium and must be signed by the security provider. A contract of security which does not comply with the requirements of the preceding sentence is void.

COMMENTS

A. General rule and exception

The general rule, to which this Article creates a restricted exception, is stated in II.–1:106 (Form) – "A contract or other juridical act need not be concluded, made or evidenced in writing nor is it subject to any other requirement as to form."

The reasons for the exception are the same as those which justify corresponding requirements for assuming a personal security, especially a dependent personal security, enacted in the member states: *i.e.*, warning and protecting the providers of personal security generally and consumer providers of such security in particular.

B. Kinds of personal security

As to the instruments covered, all types of personal security are covered because otherwise no complete and effective protection of consumers can be achieved. In effect, since independent security as such is not accessible for consumers (see IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (c)), primarily the dependent personal security covered by Chapter 2 is affected. In addition, a co-debtorship for security purposes assumed by a consumer is subject to the rules of Chapter 4, as is expressly spelt out in IV.G.–1:104 (Co-debtorship for security purposes).

C. All terms to be in textual form on a durable medium

If it is to fulfil its function of clarification and warning, all terms of the contract of security must be in textual form on a durable medium. Terms which do not comply with this requirement are void (cf. sentence 2). Such partial nullity may not affect the validity of the written portions of the contract (cf. II.–1:108 (Partial invalidity or ineffectiveness)).

By virtue of I.–1:106 ("In writing" and similar expressions) "textual form" means a text which is expressed in alphabetical or other intelligible characters by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form. "Durable medium" means any material on which information is stored so that it is accessible for future reference for a period of time adequate to the purposes of the information, and which allows the unchanged reproduction of this information.

An electronic version of the security instrument on a disc or similar device suffices for these purposes. See also the EC Directive on Electronic Commerce 2000/31/EC of 8 June 2000, Article 9 (1).

Article 9 (2) of the Directive on E-Commerce allows member states to deviate from the Directive by requiring for a limited number of transactions a conventional writing, lit. (c) of Article 9 (2) allows such an exception for contracts of suretyship and collateral securities

furnished by consumers. A few major member states have made use of this particular exception. It has been considered whether the present rules should provide such an exception. After extensive discussion it was decided that this option should not be used. At present, only few consumers will possess the necessary technical equipment so that, in fact, recourse to the electronic form will be relatively rare. Of course, this may change in future as more and more people may dispose of the equipment and increasing use may be made of it. However, a problem of abuse will barely arise since the assumption of a personal security is an obvious "disadvantage" to the security provider.

D. Signature

The contract document or other instrument must be duly signed by the security provider since this makes the instrument binding upon it. By virtue of I.–1:107 ("Signature" and similar expressions) a reference to a person's signature includes a reference to that person's handwritten signature, electronic signature or advanced electronic signature, and references to anything being signed by a person are to be construed accordingly. See also the EC Directive on Electronic Signatures 1999/93/EC of 13 December 1999, Articles 1 (2) and 5 (1) (a).

As far as the consumer security provider's protection is concerned, the reasons given above apply equally. The electronic signature which is required is no less "complicated" than an ordinary hand-written signature so that the general warning effect is equally strong.

E. Mandatory provision

According to IV.G.–4:102 ((Applicable rules) paragraph (2), this Article is a mandatory provision in favour of the consumer security provider.

NOTES

I. Dependent securities

(a) Form in general required

General and specific rules

1. In AUSTRIA, GERMANY and GREECE contracts of dependent security by non-merchants must comply with a formal requirement established to warn the security provider (AUSTRIAN OGH 14 May 1985, SZ 58 no. 85 p. 400; GERMAN BGH 17 February 2000, NJW 2000, 1569, 1570 with further references; GREECE: *Georgiades* § 3 no. 60). As of 2007, AUSTRIA will require the written form even for the dependent security of an entrepreneur (Law amending commercial law of 27 October 2005 art. I no. 153 abrogates Ccom § 350; but for bank transactions an equivalent exception has been inserted into Law on banking § 1 para. 6). The security provider's declaration must be in writing (AUSTRIAN CC § 1346 para. 2; GERMAN CC § 766 and GREEK CC art. 849) which means that the written text of the contract must at the end be signed by the security provider (GERMANY: BGH 20 November 1990, BGHZ 113, 48, 51; less severe BGH 13 October 1994, NJW 1995, 43, 45; GREECE: *Simantiras* 13); the indication of a maximum amount is not necessary. Consequently, dependent securities may be assumed by use of general conditions and terms of contracts. However, the original of the signed document has to be handed to the creditor since a telefax is not considered as sufficient (GERMANY: BGH 28 January

1993, BGHZ 121, 224; GREECE: *Georgiades* § 3 no. 59, *contra Simantiras* 14 and 20). Furthermore in GERMANY an electronic signature is not accepted for dependent securities (cf. CC § 766 sentence 2, as of 13 July 2001). If these requirements are not met, the declaration is void (expressly GREEK CC art. 849; in the result also AUSTRIA and GERMANY since the provisions cited above declare the required form to be a condition of validity). However, in all three countries the formal defect can be validated by the security provider's performance of the security (AUSTRIA: Schwimann/*Mader and Faber* § 1346 no. 11; GERMAN CC § 766 sentence 3; GREEK CC art. 849 sentence 2).

2. Similarly, the ENGLISH Statute of Frauds 1677 s. 4 requires that dependent securities, but not independent securities, generally are in writing and signed by the security provider or by another person who is authorised to do so. The fact that the creditor relied upon an oral security in extending credit to the debtor does not prevent the security provider from invoking the lack of form (*Actionstrength Ltd. (t/a Vital Resourses) v. International Glass Engineering* [2003] 2 AC 541). It is sufficient, however, that the offer of a dependent security by the security provider containing the essential terms of the security is made in written form; the acceptance might then be made orally (*J. Pereira Fernandes SA v. Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543). Moreover, for the purposes of the Statute of Frauds, an e-mail can suffice as written form; the automatic insertion of the sender's e-mail address in the e-mail by the internet service provider can, however, not be regarded as a signature (cf. *J Pereira Fernandes SA v. Mehta,* above). In ENGLAND and SCOTLAND, additional formal requirements follow from the ConsCredA 1974: according to s. 105 para. 1 "any security provided in relation to a regulated agreement shall be expressed in writing" and s. 105 para. 5 prescribes that a copy of the document has to be handed over to the consumer security provider. The Consumer Credit (Guarantees and Indemnities) Regulations 1983 contain further detailed provisions regarding the prescribed form and content of security instruments. Thus, the consumer's signature has to be placed in a "signature box" at the end of the document, containing a prescribed warning and clearly distinguishable from the rest of the document (Consumer Credit (Guarantees and Indemnities) Regulations 1983 reg. 3 para. 1 lit. d read with Schedule Part IV). Further, the terms of the security have to be easily legible and of a colour which is readily distinguishable from the colour of the paper (Consumer Credit (Guarantees and Indemnities) Regulations 1983 reg. 4 para. 1). By virtue of ConsCredA s. 105 para. 7 lit. b a security granted in contravention of the formal requirements is not enforceable against the security provider except if a court order to enforce it is granted (ConsCredA s. 127). If such an order is dismissed, ConsCredA s. 105 para. 8 prescribes the application of s. 106, and thus the security is "treated as never having effect".

3. The situation is similar in IRELAND: also here the Statute of Frauds (Ireland) 1695 s. 2 contains the general requirement for dependent securities, but not independent securities, to be in writing and signed (cf. *Johnston* 9.06 and 9.17); modern consumer protection legislation contains further formal requirements for securities in relation to consumer transactions (ConsCredA 1995 s. 30).

4. According to the general rule on proof in FRENCH CC art. 1326 the secured amount must be indicated both in letters and in figures by the security provider as well as the type of liability – whether subsidiary or solidary. For unlimited securities, a maximum amount must be mentioned by the security provider (cf. Cass.civ. 22 February 1984, JCP 1985, II no. 20442). These requirements were first considered by the Civil Chambers of the French Supreme Court as a condition of validity of the security by combining the general rule on proof in CC art. 1326 with art. 2015 (since 2006: CC

art. 2292) which stipulates that a security cannot be presumed (Cass.civ. 30 June 1987, D. 1987, Somm.Comm. 442, note *Aynès*). But since 1989 (Cass.civ. 15 November 1989, D. 1990, 177; Cass.civ. 25 May 2005, Bull.civ. 2005 I no. 228 p.193), the courts regard these writing requirements as a mere condition of proof; if it is not met, the security contract is considered as a mere beginning of proof (Cass.civ. 15 October 1991, JCP G 1992 II 21923, note *Simler*) and other means of evidence such as witnesses are then admitted (*Ferid and Sonnenberger* 512). After adoption of rules on electronic communications and signatures of 13 March 2000, these indications are to be made in electronic form (cf. new version of CC art. 1326).

5. In addition to these general rules, there is specific legislation in FRANCE for securities assumed by consumers. According to the FRENCH ConsC (for all credit types: ConsC arts. L. 341-2 to L. 341-3, for consumer credit and home owner credit: ConsC arts. L. 313-7 to L. 313-8), the consumer security provider must write by hand an obligatory formula about the nature and the extent of the obligation, the name of the debtor as well as the type of liability – subsidiary or solidary. The validity of consumer securities depends upon the observance of this qualified written form. No confirmation of the irregular contract seems to be possible (CA Limoges 20 May 1997, CCC 1998 no. 12; *contra* Cass.civ. 28 November 1995, JCP G 1997, I no. 3991, JCP G 1997 I no. 3991, note *Simler and Delebecque*). The admission of electronic signatures by the amended version of CC art. 1326 in 2000 has not changed the situation. Of course, these formal requirements do not apply where a more qualified form, especially a notarial instrument is used (expressly in case of subsidiary liability: ConsC arts. L. 313-7 and L. 341-2, *a fortiori* in case of solidary liability: cf. Cass.civ. 24 February 2004, Bull.civ. 2004 I no. 60 p. 47). The *Grimaldi* Commission had proposed that protective rules on the form of the consumer security contract were not to be considered as conditions of validity but as mere conditions of proof (CC proposed new art. 2300). In fact, this is based upon the general rules on proof of the amended version of CC art. 1326 (cf. no. 4 above) and denies any special protection with respect to form; however, this proposal was not adopted by the legislator of 2006.

6. Under BELGIAN and LUXEMBOURGIAN law contracts of security may only be proved if the requirements of CC art. 1326 are met. Otherwise the security contract may serve as a beginning of proof, as now in FRANCE (cf. no. 4 above; BELGIUM: *Van Quickenborne* nos. 292-311; LUXEMBOURG: Cass. Luxembourg 23 March 1989, Pas luxemb XXVII (1987-1989) Jur. 323). In addition, in BELGIUM specific protective legislation exists for providers of personal security securing a consumer credit – without distinguishing between consumer and other security providers: BELGIAN ConsCredA art. 34 para. 1 requires to indicate in the security contract the secured amount, which may, however, be increased to cover default interest, but does not cover any penalty or damages caused by non-performance (ConsCredA art. 34 para. 1, as amended in 2003). In order to facilitate this, the creditor must hand gratuitously a copy of the credit contract to the potential security provider.

7. Similarly according to DUTCH CC art. 7:859 the dependent security of a consumer can in general only be proved against the security provider by a writing signed by the latter. But the dependent security can be proved by all means of evidence if it has been established that the security provider has performed it at least in part. In addition, DUTCH CC art. 7:859 (3) extends the preceding two rules to the form of a consumer's agreement to assume a dependent personal security.

8. According to PORTUGUESE CC art. 628 para. 1 the dependent security must be assumed in the form required for the secured obligation. If there is no formal requirement for the latter, the same is true for the security, the principle of the freedom

from form applying. Even if the parties decide to adopt a stricter form than is legally prescribed, the security provider is not obliged to do the same (STJ 14 June 1972, BolMinJus no. 218, 222; *Vaz Serra*, note STJ 14. 6. 1972). In SPAIN, as a rule, every consumer contract must be in writing. The consumer is entitled to a copy, in which the particular and general terms ought to be included (ConsProtA art. 63).

(b) Exceptions

9. In some exceptional cases the security provider may be precluded from invoking a lack of form if that would infringe the principle of good faith (AUSTRIA: Schwimann/*Mader and Faber* § 1346 no. 11; GERMANY: BGH 28 January 1993, BGHZ 121, 224; GREECE: *Georgiades* § 3 no. 66).

10. AUSTRIAN and GERMAN Ccom § 350 state that dependent securities assumed by merchants are valid without observing the form of AUSTRIAN CC § 1346 para. 2 or GERMAN CC § 766, respectively; however, as of 2007, the AUSTRIAN exception for merchants will be abrogated (Law amending commercial law of 27 October 2005 art. I no. 133; however, by a subsequent amendment of the Banking Law the exceptional freedom from form in CC § 1346 (2) has been reintroduced for "liabilities assumed by banks in their course of business" cf. Banking Law § 1 para. 6). The GREEK Draft of a Commercial Code contains a similar provision in art. 274. It has to be noticed that GERMAN courts do not apply Ccom § 350 to dependent securities assumed by managers, managing directors or shareholders for obligations of their company (BGH 29 February 1996, BGHZ 132, 119, 122; BGH 16 December 1999, NJW 1999, 1179, 1180; critical MünchKomm/*K. Schmidt* HGB § 1 no. 66 with further references).

11. Similarly in LUXEMBOURG the general rule on proof of CC art. 1326 (cf. no. 6 above) does not apply to dependent securities granted by merchants (LUXEMBOURG: CA Luxembourg 6 October 1993, Pas luxemb XXIX (1993-1995) Jur. 279). The dependent security has a commercial character if the security provider has a personal interest in the assumption of the security, even if the security provider is not a merchant (CA Luxembourg 26 June 1985, Pas luxemb XXVI (1984-86) Jur. 352). Such personal interest exists when the manager or the shareholder may by virtue of their shareholding exercise major influence upon the debtor company (CA Luxembourg 20 June 2002, BankFin 2003, 297). A direct or indirect participation in the management of the debtor's affairs is not necessary if any other patrimonial interest of the security provider can be found (CA Luxembourg 22 April 1992 no. 13246 unpublished).

12. In FRANCE, formerly special provisions (Ccom art. L 110-3) and the courts (Cass.com. 2 October 1985, Bull.civ. 1985 IV no. 227 p. 190 for managers and CA Paris 20 January 1999, JCP E 1999 Pan. no. 394 for major shareholders) had carved out exceptions from the general rule of CC art. 1326. However, a Law of 1 August 2003 has narrowed these exceptions by subjecting small and family enterprises which assume a dependent security to the rules for consumer security providers (cf. ConsC arts. L. 341-2 and L. 341-3; *Tricot-Chamard* JCP G 2004 I, no. 112, p. 334). The *Grimaldi* Commission had proposed to return to the solution prevailing before that Law (CC proposed new art. 2300), *i.e.* no form requirement and freedom of proof for security with a commercial character; however, this proposal was not adopted by the legislator of 2006.

(c) No form required

13. In DENMARK, FINLAND and SWEDEN no particular form is required under the general rule for contracts of dependent securities. According to DANISH and

SWEDISH literature a security can even arise by silence and inactivity (DENMARK: *Ekström* 32; Andersen, Termn, Edlund a.o./*Pedersen* 435 s.; *Pedersen*, Kaution 18; *Bryde Andersen* 425; *Højrup* 16 s.; *Jespersen* 21; SWEDEN: *Walin*, Borgen 36 ss.). According to the SWEDISH Supreme Court case HD 6 May 1961, NJA 1961, 315 silence can create an obligation of a security provider only where the inactivity shows a clear indication of the intention to be bound as security provider. However, in DENMARK and FINLAND contracts on dependent securities are normally made in writing (DENMARK: *Pedersen*, Kaution 18; Andersen, Termn, Edlund a.o./*Pedersen* 435; FINLAND: *Ekström* 32). The DANISH Law on Financial Business § 48 para. 5 requires the written form for a contract on dependent security when the security provider assumes a dependent security in favour of a financial institution as creditor (*Pedersen*, Kaution 19).

14. The general provision of ITALIAN CC art. 1937 requires only the express will of the security provider for the valid creation of a personal security. No form is required, but the will of the security provider must be clearly established. The meaning of "express" will is not always certain. Gestures and other kinds of traditional communication have been understood as ways of express manifestation. Since CC art. 1937 does not require a specific means of proof for the contract of security, any legal means of proof are admitted (Cass. 26 June 1979 no. 4961, Giur.it. 1980 I 1545; *Giusti* 93) and even the presumption (Cass. 14 July 1936 no. 2485, Foro it. 1937 I 38; Cass. 17 October 1992 no. 11413, Giur.it. 1994 I 1649 ss.; *Giusti* 93). However, the general provision of the Civil Code must be read in connection with the special rules on banking contracts, which do apply to personal security and require a written document as well as the handing out of a copy to the client (DLgs no. 385/1993, art. 117) for the valid formation of a contract (art. 117 para. 3). Moreover, specific contract terms favouring the party who supplied them require a specific approval in writing by the other party, according to CC arts. 1341-1342. Besides that, whenever consumer protection law applies (cf. national notes to IV.G.–4:101 no. 10) provisions on abusive terms apply (ConsC arts. 33-38) requiring that some terms listed in the law and producing a disadvantageous effect for the consumer are valid only if individually negotiated; of course, this rule may in the end result in a requirement of written form for that term or even in an individual approval of them in writing by the consumer.

15. SPANISH CC art. 1827 para. 1 only requires the express constitution of the contract of security; it does not require a special form. The contract does not have to be in writing or in any other prescribed form, only the will of the dependent security provider must be clearly established (*Guilarte Zapatero*, Comentarios 123 ss.). Nevertheless, business practice requires a writing for reasons of proof and security. Since SPANISH CC art. 1827 does not establish a specific way of proof for the contract of security, any legal means of proof are admitted. However, nowadays, the written form is mandatory for every consumer contract (Consumer Protection Act art. 63).

16. Exceptionally and amazingly, in SPAIN a written form is required for commercial securities (Ccom art. 440). A simple letter of the security provider is enough to fulfil this requirement. This provision has been considered as unjustified (*Carrasco a.o.* 77). However, the provision lacks practical importance, since securities are normally created in writing anyway. Only one decision of the SPANISH Supreme Court (TS 17 December 1996, RAJ 1996/9002) has declared void a commercial security because of lack of form. However, no writing is required for extensions of the time limit of a security (TS 8 October 1986, RAJ 1986/5333) and this might be extended to any declaration of the security provider except the creation of the security (*Carrasco a.o.* 77).

II. Independent securities

17. In AUSTRIA for independent securities of non-merchants the same form as for dependent guarantees (cf. no. 1 above) is required. In 1992, the Supreme Court extended that statutory rule to independent securities since these are even more risky for the security provider than a dependent security (OGH 14 July 1992, SZ 65 no. 109 p. 69-73); this is now standing practice of the courts (OGH 14 July 1994, SZ 67 no. 128 p. 56).

18. In FRANCE, no special form is required for independent securities but the rules on proof (CC art. 1326 ff, cf. no. 4 above) apply if the security provider is not a merchant but a consumer (*Simler* nos. 931 ss.). Therefore in FRENCH banking practice the contract of independent security is in writing. The same applies to BELGIUM and LUXEMBOURG (cf. no. 6 above). It has to be noticed though that what was said about the BELGIAN ConsCredA (cf. no. 6 above) also applies to independent securities (ConsCredA art. 34 para. 1). Also in the NETHERLANDS, the general rules on dependent securities of consumers apply to independent securities assumed by consumers (CC art. 7:863 read with art. 7:859).

19. The GERMAN and GREEK Civil Codes do not contain any formal requirement for independent securities and, although the matter is disputed, courts do not apply the above mentioned rules of GERMAN CC § 766, GREEK art. 849, respectively, by analogy (Staudinger/*Horn* no. 223 preceding §§ 765 ss.; *Georgiades* § 6 no. 48). Under ENGLISH law the general rule under the Statute of Frauds 1677 s. 4 that a security is only enforceable if it is in writing is not applicable to indemnities because they are primary undertakings by the security provider (*Andrews and Millett* no. 1-013). However, the formal requirements under modern consumer protection legislation as described above (no. 2) also apply to independent securities. Also in DENMARK independent securities are mostly drawn up as written documents. However, it is also possible to hand over an independent security by telex or electronic data transfer (*Pedersen*, Bankgarantier 77).

III. Co-debtorship for security purposes

20. The AUSTRIAN, GERMAN and GREEK Civil Codes do not contain any formal requirement for assuming a co-debtorship in general or a co-debtorship for security purposes in particular and the courts do not apply the above mentioned rules of AUSTRIAN, GERMAN and GREEK law (no. 1 above) by analogy (AUSTRIA: OGH 4 February 1992, JBl 1993, 657, 658; OGH 4 October 1989, SZ 62 II no. 160 p. 159; OGH 19 July 1988, SZ 61 II no. 174 p. 42; GERMANY: Palandt/*Heinrichs* no. 3 preceding § 414 with further references; GREECE: A.P. 934/1992, EEN 60, 656; *Georgiades* § 7 no. 13). However, among writers the latter issue is quite controversial (cf. especially in AUSTRIA *Bydlinski* 27, 29, 30 with references; for GERMANY: MünchKomm/*Möschel* no. 13 preceding § 414; *Harke*, ZBB 2004, 147 ss.).

21. In FRANCE, BELGIUM and LUXEMBOURG, if the debtor is a consumer the assumption of debt is an obligation to pay and the general rules on proof (CC art. 1326) apply (cf. nos. 4 and 6 above). Since it is a primary undertaking, an assumption of debt for security purposes under ENGLISH law does not require written form (cf. *O´Donovan and Phillips* no. 3-16). For the purposes of the ConsCredA, however, the above mentioned formalities (no. 2 above) have to be observed.

IV. Binding comfort letters

22. Binding comfort letters are not subject to any formal requirement. However, in so far as the binding comfort letter contains an obligation to pay and the issuer of the letter is

a consumer, in FRANCE, BELGIUM and LUXEMBOURG the general rules on proof (CC art. 1326) apply; FRANCE: *Simler* no. 1019).

IV.G.–4:105: Nature of security provider's liability

Where this Chapter applies:

(a) an agreement purporting to create a security without a maximum amount, whether a global security or not, is considered as creating a dependent security with a fixed amount to be determined according to IV.G.–2:102 (Dependence of security provider's obligation) paragraph (3);

(b) the liability of a provider of dependent security is subsidiary within the meaning of IV.G.–2:106 (Subsidiary liability of security provider), unless expressly agreed otherwise; and

(c) in an agreement purporting to create an independent security, the declaration that it does not depend upon another person's obligation owed to the creditor is disregarded, and accordingly a dependent security is considered as having been created, provided the other requirements of such a security are met.

COMMENTS

A. General

This Article specifically addresses three terms often utilised in personal securities and adapts these in the interest of protecting the consumer security provider. The remedy of adaptation is used in order to balance the opposite interests of the parties: that of the creditor in maintaining a security agreed upon and the security provider's interest in being protected against harsh contract terms.

The Article is mandatory in favour of the consumer with the exception indicated in sub-paragraph (b).

B. Security without a maximum amount

Sub-paragraph (a) affects a security which does not contain a maximum amount. It is obvious that such a security is particularly risky for the security provider since the upper limit of the future obligation is not known.

The Article does not nullify such agreements but maintains them, although with a limitation. The unlimited security is converted into a limited security with a fixed amount. This amount is to be determined according to IV.G.–2:102 (Dependence of security provider's obligation) paragraph (3). This rule provides, in essence, that, unless a maximum amount can be determined from the agreement of the parties, the amount of the security is limited to the amount of the secured obligation at the time the security became effective. For details, cf. IV.G.–2:102 (3) and the Comments on it.

C. Subsidiary liability

Sub-paragraph (b) reverses the normal rule that a provider of dependent security is solidarily liable with the debtor of the secured claim, unless subsidiary liability had been agreed upon (IV.G.–2:105 (Solidary liability of security provider)). A consumer security provider is better protected by the contrary rule: liability is subsidiary, unless solidary liability has been agreed. The consequences and limits of this subsidiary liability are laid down in IV.G.–2:106 (Subsidiary liability of security provider) and need not be repeated here.

A higher degree of protection for the consumer security provider could, of course, be achieved if any contractual derogation from the basic subsidiary liability were to be prohibited. That, however, would go clearly beyond the state of the law in most member states. Nor does there seem to be any practical need or demand for change. In practice, creditors usually turn first against the debtor in any event before considering steps against a security provider.

D. No independent security

According to sub-paragraph (c), an agreement for an independent personal security is converted to a dependent security. The reason for this automatic conversion is the increased risk which an independent security implies: independence means that the accessority of the dependent security is excluded so that the security provider's obligation may exceed the amount and other terms of the secured obligation, if any, and the security provider may not invoke defences of the debtor.

In order to avoid complete nullity of a consumer's independent security, sub-paragraph (c) provides for the conversion of the independent into a dependent security, provided the requirements of the latter (other than the absence of a declaration that the security is independent) are met. The "requirements" of a dependent security are , in particular, the substantive and formal requirements laid down in Chapters 1, 2 and 4. For instance, since according to the definition of a dependent security in IV.G.– 1:101 (Definitions), a dependent security must purport to serve as security for an obligation of the debtor owed to the creditor, a pure payment guarantee without any underlying obligation to be secured could not be converted to a dependent security. This is confirmed by the contents of Chapter 2 on dependent personal security: the application of this Chapter presupposes that there is an obligation to be secured since this is the basis upon which the security "depends".

It goes without saying, that, once the requirements are met, the effects of the converted independent security are subject to Chapters 2 and 4.

E. Application to co-debtorship for security purposes

Only sub-paragraphs (a) and (b) of the Article are applicable to co-debtorships for security purpose. By contrast, sub-paragraph (c) deals specifically with independent personal security and therefore does not apply to co-debtorship for security purposes.

Sub-paragraph (a) deals with a case which will rarely occur with a co-debtorship for security purposes, namely one without a maximum amount. In this rare case, the policy expressed in IV.G.–2:102 (Dependence of security provider's obligation) paragraph (3) must be adopted and slightly adapted: the security co-debtor's obligation must be limited to the amount for which the primary full co-debtor was liable at the time when the secondary co-debtorship has been assumed.

According to sub-paragraph (b), a consumer security provider's liability is subsidiary, unless the parties expressly had agreed otherwise. This provision will affect almost all cases of co-debtorship for security purposes, since normally these result in solidary liability. In order to prosecute the policy of sub-paragraph (b), it will be necessary to distinguish between two situations. On the one hand, if the co-debtors had simply agreed on creating a co-debtorship

(which merely *implies* solidary liability), there is no "express" agreement on solidarity, as required by the closing words of sub-paragraph (b); consequently, the co-debtor for security purposes will then have only subsidiary liability. On the other hand, if they had expressly agreed upon solidary liability, this complies with the requirement of the closing words of sub-paragraph (b).

NOTES

I. Limitation of security without maximum amount

1. See national notes on IV.G.–1:101 (Definitions) nos. 42-46.

2. In BELGIUM generally, in contracts of personal security that secure consumer credits, the extent of the liability of the security provider – whether being a consumer or not – has to be limited to a specific amount, which may, however, be increased to cover default interest, but does not cover any penalty or damages caused by non-performance (ConsCredA art. 34 para. 1, as amended in 2003). Also in the NETHERLANDS, a personal security provided by a consumer is only valid if a maximum amount has been fixed (CC art. 7:858 para. 1); however, interest for the debtor's delay in payment and the creditor's costs of action against the debtor may under certain circumstances be added to that maximum (CC art. 7:858 para. 2). These provisions are mandatory in favour of a consumer security provider (CC art. 7:862 lit. (a)). According to the FRENCH ConsC (for all credit types: ConsC arts. L. 341-2 to L. 341-3, for consumer credit and home owner credit: ConsC arts. L. 313-7 to L. 313-8), the consumer security provider must write by hand the maximum amount (including interest, penalties and – according to case law (Cass.civ. 30 March 1994, Bull.civ. 1994 I no. 230 p. 163; RTD civ 1994, 903) – the percentage rate of charge); otherwise the security contract is void. In SPAIN it is held that the normal protection given to every global security provider suffices where the grantor acts as consumer. Furthermore, as the global security is normally a continuous relationship, Consumer Protection Act art. 62.3 applies, thereby prohibiting any clause that could make the right of free termination upon notice difficult or expensive to exercise.

II. Subsidiary liability of the consumer security provider

(a) Subsidiary liability is mandatory

3. In the NETHERLANDS the general rule that the consumer security provider's liability is only subsidiary is mandatory (CC art. 7:855 para. 1 read with art. 7:862 lit. a). The situation is similar in BELGIUM, but there is no distinction between consumer and other security providers. In addition the preconditions for the debtor's default are increased: the creditor may sue the security provider for a consumer credit only if the debtor has defaulted at least on two payments or twenty percent of the total sum due or on the last due payment and if the debtor has not performed within one month after the creditor's demand sent by registered letter (ConsCredA art. 36).

(b) Subsidiary liability as the non-mandatory general rule

4. In all other member states there are no special rules on the character of a consumer security provider's liability. This means that the ordinary rules on a security provider's liability apply, but these rules are not mandatory. A non-mandatory subsidiary liability of all providers of dependent security is the rule in almost all member countries (See national notes to IV.G.–2:106.).

5. In ENGLAND, IRELAND and SCOTLAND the security provider's liability is solidary unless otherwise agreed (cf. national notes to IV.G.–2:105 no. 1). The situation is the same in ITALY (CC art. 1944 no. 1). Moreover, terms establishing the *beneficum excussionis* (see national notes on IV.G.–2:106 nos. 9-10) in favour of the security provider – whether or not a consumer – are hardly ever negotiated in banking practice (*Petti* 297 ss.).

III. Independent securities or co-debtorship assumed by consumers

6. Only in the NETHERLANDS is there a clear solution for the treatment of an independent security assumed by a consumer. All mandatory special provisions for a consumer's dependent security also apply to a consumer's independent personal security (CC art. 7:863). However, in practice such security instruments by consumers do not seem to be used (*Ensink* 552).

7. In BELGIUM the Consumer Credit Act applies to dependent security and other personal security (ConsCredA arts. 34 ff), including independent security. However, opinion among BELGIAN writers is split on whether an independent security may be assumed by consumers (*pro: Vliegen* no. 181; *contra: T´ Kint* 419 and *Geortay* 858, 862).

8. In FRANCE the recent Decree-Law no. 2006-346 of 23 March 2006 prohibits the assumption of an independent security for consumer debts (ConsC new art. L 313-10-1, irrespective of whether the security provider is a consumer or not). It remains open whether professional debts can be secured by an independent security of a consumer. According to writers (*Simler* no. 920; Malaurie and Aynès/*Aynès and Crocq* no. 339) independent securities granted by a consumer are generally valid, based upon the freedom of contract. But the courts are very restrictive in admitting the validity of such a security and on the ground of consumer protection often annul it (mostly for deceit: CA Paris 16 April 1996, JCP G 1997, I no. 3991 (10) or for error: CA Paris 27 June 1990, JCP E 1991, I no. 119, note *Hassler*). Sometimes the courts convert a consumer's independent security into a dependent security (CA Paris 26 January 1993, D. 1993, I.R. 93) regardless of the intention of the parties. Similarly in a case of co-debtorship where a housewife assumed a loan with which her husband as mere co-debtor financed a business, a first-instance court requalified the loan as a dependent personal security (CFI Lons-le-Saulnier 18 November 1997, CCC April 1998 no. 64, note *Raymond*), to prevent the circumvention of the mandatory rules of the Consumer Code (*Simler* no. 28).

9. In ENGLAND, the question whether a personal security is a dependent or an independent security is to be decided on the basis of the general rules on interpretation (cf. *Andrews and Millett* no. 1-013); there is no general principle that an independent security can be assumed by non-consumers only (but cf. national notes on IV.G.–3:101 no. 3). The consumer protection legislation in the ConsCredA covers independent securities as well (cf. *Andrews and Millett* no. 17-003), see however national notes on IV.G.–1:101 no. 67).

10. In GERMANY first demand securities may be assumed by consumers if two restrictions are respected. First, securities on first demand provided in standard conditions are binding only upon persons who are familiar with this kind of security so that consumers are excluded (cf. BGH 5 July 1990, NJW-RR 1990, 1265; BGH 2 April 1998, NJW 1998, 2280, 2281; BGH 8 March 2001, BGHZ 147, 99 for dependent and Staudinger/*Horn* nos. 232 and 25 preceding §§ 765 ss. for independent securities). Second, if a first demand security is individually negotiated, the creditor is obliged to inform the provider of security about the special risks linked to this type of

security if the security provider is obviously without experience in this matter. If these restrictions are not respected, the security provider is only liable as if a dependent security had been assumed (for dependent securities cf. BGH 2 April 1998, NJW 1998, 2280, 2281; MünchKomm/*Habersack* § 765 no. 100; Palandt/*Sprau* no. 14 preceding § 765).

11. In GREECE so-called "guarantee letters", which are independent securities, are usually issued by credit and financing institutions. However, it is generally possible for anyone to issue an independent security (*Georgiades* § 5 nos. 7 ss., § 6 no. 2 fn. 2, 3).

12. In ITALY, in the absence of a specific prohibition, it is thought to be possible to create independent securities between private persons (*De Nictolis* 34 and 37). Since the ITALIAN Civil Code covers both civil and commercial law, there is no clear differentiating element between both kinds of contracts. The most important authors, however, underline the commercial character of the independent securities, as opposed to the civil character of the dependent security (*Portale*, Le garanzie bancarie 15).

13. In SPAIN the granting of independent security by consumers could only be banned by considering that an independent guarantee entails a waiver of rights conferred by the suretyship law (cfr. Consumer Protection Act arts. 10 and 86.7). The situation would change if it were considered that the two types of guarantee are different in nature; in this case the lack of accesority would not mean any waiver as such. There is still no relevant decision on this point.

IV.G.–4:106: Creditor's obligations of annual information

(1) Subject to the debtor's consent, the creditor has to inform the security provider annually about the secured amounts of the principal obligation, interest and other ancillary obligations owed by the debtor on the date of the information. The debtor's consent, once given, is irrevocable.

(2) IV.G.–2:107 (Requirement of notification by creditor) paragraphs (3) and (4) apply with appropriate adaptations.

COMMENTS

A. Basic idea

For ordinary dependent security, IV.G.–2:107 (Requirement of notification by creditor) requires the creditor to notify the security provider of certain important changes that affect the secured obligation. Apart from instances of non-performance or inability to pay, the required information refers to major events affecting the extent of the secured obligation, such as an extension of maturity (IV.G.–2:107(1)) and major increases of the secured obligations under a global security (IV.G.–2:107(2)).

For personal security assumed by consumers it seems appropriate to extend the basic idea underlying IV.G.–2:107 and to require annual information to be furnished to the consumer. Such annual information is apt to remind the consumer periodically of the potential risk assumed which otherwise, especially in the case of long-term credits, might be forgotten. The requirement of annual information does not impose a major burden upon the creditor since business people usually strike such a balance for each account, often at the end of the calendar year or else at the end of the respective business year.

B. Debtor's consent

Contrary to IV.G.–2:107, the annual information under the present Article requires the debtor's consent (paragraph (1)). This difference between the two rules is justified by the fact that the two most important items to be communicated under IV.G.–2:107, *i.e.* the debtor's non-performance or inability to pay, concern vital events with respect to the secured obligation; they may trigger the security provider's duty to make payment to the creditor. Because of this importance for the security provider, these notifications must be communicated to the security provider even without the debtor's agreement. By contrast, the annual information required of the security provider under the present Article refers to the amounts of principal obligation, interest and other ancillary obligations and therefore affects very sensitive data. This justifies the requirement of the debtor's consent.

The second sentence of paragraph (1) supplements the preceding sentence by providing that the debtor's consent, once given, cannot be revoked by the debtor.

C. Scope of items to be disclosed

The text enumerates the principal obligation, interest and other ancillary obligations that have to be disclosed. It is the amount of each of these items that must be contained in the annual information. It is the sum total of these items that is relevant for the security provider in order to demonstrate the total potential indebtedness.

In order to be realistic, the figures to be given by the creditor must be as of the date of the information.

D. Exception

By referring to IV.G.–2:107(3), an exception made by that provision is adopted and incorporated into the present Article. The annual information required by paragraph (1) need not be given if and in so far as the security provider already knows that information. The exception also applies if the security provider can reasonably be expected to know that information. Both actual and constructive knowledge may, *e.g.*, be held by a security provider who is the spouse of a director of the indebted company.

E. Sanction

Likewise, the cross-reference to IV.G.–2:107(4) incorporates into the present Article the sanction which that provision establishes. For further details, cf. the Comments to IV.G.–2:107.

F. Mandatory rule

This Article may not be deviated from to the disadvantage of a security provider who is a consumer (IV.G.–4:102 (Applicable rules) paragraph (2)).

G. Application to co-debtorship for security purposes

The requirement to report annually on the amount of the debtor's outstanding obligations applies correspondingly to a co-debtorship for security purposes. The creditor must inform the "security debtor" about the obligations of the "real debtor" to the creditor.

NOTES

I. General

1. In the member states, the legal basis for the security provider to obtain information about the secured obligation in the absence of any default of the debtor is sometimes not framed as a duty of the creditor to inform but rather as a duty of the creditor to answer questions (see no. 2 below). Throughout the following national notes – as regards the duty of information dealt with in this Article as opposed to the creditor's duty of information in the case of a default by the debtor (cf. notes to IV.G.–2:107) – such a duty to answer questions is considered as being to a large degree functionally equivalent. The only difference is whether or not the security provider has to ask the creditor before the latter is bound to give information in regular intervals.

II. Duty to inform the security provider without default by debtor

(a) Legal systems with such a duty

2. In BELGIUM, the creditor has to inform the provider of security for a consumer credit – whether or not a consumer security provider – about respites of payment granted by the creditor as well as of any amendment of the credit agreement (ConsCredA art. 35 sentence 2). In ENGLAND, the creditor is bound to answer questions of the security

provider about the amount for which the security provider is liable under the security (*O´Donovan and Phillips* nos. 4-28, 11-06). The situation is similar in SCOTLAND (*Royal Bank of Scotland v. Greenshields* 1914 SC 259; Stair/*Eden* no. 898). Under ENGLISH law, the information to be given includes the amount of the secured debt (up to the maximum amount of the security) and any interest charged *(O´Donovan and Phillips ibid.)*. In both ENGLAND and SCOTLAND, even more far-reaching information rights exist under the ConsCredA 1974 (ss. 107–109): here the creditor has to provide *inter alia* copies of the credit agreement and statements showing the total sums already paid by the debtor, payable at the time of the information or becoming payable under the credit agreement (Halsbury/*Worsley, Rosenthal, Bourne and Riley-Smith* para. 1210, Vol 49, 5th ed, (2008)). In FINLAND the security provider under a global guarantee must be informed by the creditor every six months about the amount of the debtor's secured obligation (LDepGuar § 13 para. 1). According to § 13 para. 2 the liability of the security provider of a global guarantee can be reduced if the creditor neglects the duty of information (RP 189/1998 rd 49).

3. In FRANCE three distinct provisions exist, which provide for a duty of information towards the consumer security provider. Firstly, CC art. 2016 para. 2 (since 2006: CC art. 2293 para. 2) stipulates that information on the changes in the amount (any increase or decrease) of the secured debt including ancillary obligations should be given to a consumer provider of dependent security at least once every year. Although the provision applies according to its wording only to indefinite dependent securities, the courts have extended it also to definite dependent securities (Cass.civ. 16 March 1999, D. 1999 I.R. 99). Secondly, according to the Consumer Code the provider of dependent security has to be given exact information about the amounts of principal and interest and not only about the changes in the amount of the debt (ConsC art. L. 341-6 sentence 1 for all credit types). Finally the *Madelin* Act of 1994 requires the same information but only where a dependent security without a time limit is assumed by a natural person for the professional purposes of an individual entrepreneur (art. 47 II para. 2 of *Madelin* Act read with MonC art. L 313-22). All these three information duties should have been replaced according to the *Grimaldi* Commission´s proposal by one provision to be located in the Civil Code (CC proposed new art. 2307 para. 1), which would have been very similar to the present ConsC art. L. 341-6; however, this proposal was not adopted by the legislator of 2006. In ITALY, the bank's duty of annual notification to the client to provide complete and clear written information regarding the development of the relationship is applicable also to consumer security providers (DLgs no. 385 of 1 September 1993 on Banking Law art. 119; *Petti* 484).

(b) Whether duty depends upon security provider being a consumer

4. In ENGLAND, the general duty to answer questions as to the amount of the secured debt does not depend upon whether the security provider is a consumer; rather, this duty derives from a general duty of creditors to answer direct questions of security providers and, in answering these questions, to give information honestly and to the best of their ability (*Hamilton v. Watson* (1845) 12 Cl & Fin 109, 8 ER 1339; *O´Donovan and Phillips* no. 4-27). The more far-reaching information duties of the ConsCredA 1974 ss. 107–109 apply only if the security is given in relation to a regulated agreement under this Act (cf. national notes IV.G.–1:101 no. 67) and if the security itself is also a non-commercial agreement (ConsCredA 1974 ss. 107 para. 5, 108 para. 5, 109 para. 4). In FRANCE it is irrelevant whether the secured debt is owed by a consumer or a professional, as long as the provider of dependent security is a consumer (cf. CC art. 2016 para. 2 (since 2006: CC art. 2293 para. 2) and ConsC art. L. 341-6 sentence 1). Equally, the *Grimaldi* Commission had proposed to require

regular information to every natural person, whether acting for private or for professional purposes (CC proposed new art. 2307 para. 1); however, this proposal was not adopted by the legislator of 2006. In ITALY the bank's duty of annual information to the client (*above* no. 3) does not depend upon the qualification of the client as a consumer, for it is a general duty imposed upon banks in their relationship with all kinds of clients (*Petti* 484).

(c) Periodicity of duty to inform

5. For ENGLISH law it is said that there is a general right to inquire periodically as to the amount of the secured debt (*O´Donovan and Phillips* nos. 4-28); however, there does not seem to be any case law as to the precise duration of the interval between such inquiries of the security provider. Requests for information according to the ConsCredA 1974 ss. 107-109 can only be made after one month has passed since the last information was given in relation to the same credit agreement (ConsCredA 1974 ss. 107 para. 3, 108 para. 3, 109 para. 2). According to FINNISH LDepGuar § 13 para. 1 the security provider under a global guarantee must be informed every six months. In FRANCE this information has to be given every year (cf. CC art. 2016 para. 2 (since 2006: CC art. 2293 para. 2; ConsC art. L. 341-6 sentence 1, art. 47 II para. 2 of the *Madelin* Act read with MonC art. L 313-22) and in ITALY at least once a year (Banking Law art. 119).

(d) Consent of debtor

6. It seems that under ENGLISH law the creditor is bound to answer questions of the security provider as to the amount of the secured debt only if the debtor has given permission to do so (cf. *O´Donovan and Phillips* nos. 4-28; *Andrews and Millett* no. 5-026; *Hapgood* 712). The debtor's consent implies the permission for the creditor to answer specific questions of the security provider; thus, the scope of the consent being limited in this way, it seems that the question of revocability of the debtor's consent in relation to information to be given to the security provider does not arise.

(e) Sanctions

7. In ENGLAND, a specific sanction exists for the failure to comply with the information requirements under the ConsCredA 1974: according to ss. 107 para. 4, 108 para. 4 and 109 para. 3, the creditor is not entitled to enforce the security while the default continues (cf. *O´Donovan and Phillips* nos. 3-179; *Andrews and Millett* no. 17-008). Similarly in FRANCE, if the creditor does not give the required information, the consumer provider of dependent security is discharged from certain ancillary obligations, *e.g.* penalties or default interest, until the creditor makes the notification (ConsC art. L. 341-6 sentence 3 and MonC art. L 313-22 para. 2). By contrast, in case of a global security, if the creditor omits or delays the required information, the consumer provider of dependent security is definitely released from any liability in relation to ancillary obligations (FRENCH CC art. 2016 para. 2 (since 2006: CC art. 2293 para. 2)). ITALIAN Banking Law art. 127 entrusts the *Ufficio italiano cambi*, a special body of the Bank of Italy, and the Minister of the Economy with the task of controlling banks´ compliance with those rules. Repeated violations of these rules may lead to suspension of the bank's activities for no more than thirty days (art. 127 para. 5).

III. No duty to inform the security provider without default by debtor

8. In some member states, however, there is no such duty of annual information as provided for in this Article or a corresponding duty to answer questions, cf. the

national notes on IV.G.–2:107 concerning member states that do not impose any information duties on the creditor. In SPANISH consumer law, none of the items listed in ConsProtA art. 60 (duty to inform in consumer contracts) relates to the amount or increase of risk taken by a consumer as guarantor.

IV.G.–4:107: Limiting security with time limit

(1) A security provider who has provided a security whose scope is limited to obligations arising, or obligations performance of which falls due, within an agreed time limit may three years after the security became effective limit its effects by giving notice of at least three months to the creditor. The preceding sentence does not apply if the security is restricted to cover specific obligations or obligations arising from specific contracts. The creditor has to inform the debtor immediately on receipt of a notice of limitation of the security by the security provider.

(2) By virtue of the notice, the scope of the security is limited according to IV.G.–2:109 (Limiting security without time limit) paragraph (2).

COMMENTS

A. General

For providers of dependent or independent security – whether consumers or not – these Rules provide protection by requiring that such securities, subject to certain exceptions, must have either an agreed time limit or be subject to the possibility of a time limit being set by any party. For the consumer security provider, however, even securities with an agreed time limit can be regarded as creating an intolerable level of risk: consumer security providers will typically lack business experience; if they assume a security which is agreed to cover unspecified future obligations of the debtor over a period of several years they might not be able to foresee the extent of obligations of the debtor which over the course of time could fall under this security. This Article accordingly provides additional protection for consumer security providers by allowing them to limit the duration of securities with an agreed time limit if these securities run over a period of three years or more.

B. Scope of application

Securities with a time limit. The Article applies to securities with an agreed time limit only. This limitation may seem surprising since the need to limit a security obviously is more pressing if the parties had not agreed upon a time limit. However, this gap is easily explained by the fact that securities without an agreed time limit may be limited under IV.G.–2:109 (Limiting security without time limit) read with IV.G.– 4:102 (Applicable rules) paragraph (1) and IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (c)).

Applicability to all types of security. The Article is applicable regardless of the type of personal security assumed by the consumer security provider. The fact that the Article refers to IV.G.–2:109 (Limiting security without time limit) in the Chapter on dependent security, does not give rise to any difficulties since the provisions of that Chapter are applicable to consumer providers of an independent security and consumer security providers in a co-debtorship for security purposes by virtue of IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (c) and IV.G.–4:102 (Applicable rules) paragraph (1) respectively.

Excluded cases. According to paragraph (1) sentence 2, the right to limit a security on the basis of this Article does not apply where the security is restricted to cover specific obligations or obligations arising from specific contracts. This exception is intended to protect the creditor who may have concluded the contract from which the secured obligations arise only on the strength of the security provided in relation to these obligations. Moreover, the

risk of an unforeseeable extent of the consumer security provider's liability appears to be less pressing in these situations as the reference to a specific obligation or a specific contract should make the potential scope of the security more easily determinable even for the consumer security provider.

Scope of application limited. The scope of application of the Article is further in effect limited as a result of IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (a) to securities with an agreed maximum amount. The right to limit the scope of a security is of interest especially in cases where the security is agreed to cover not only existing but also future obligations. Should a security lack an agreed maximum amount, such a fixed amount will be determined on the basis of IV.G.–2:102 (Dependence of security provider's obligation) paragraph (3) read with IV.G.–4:106 (Nature of security provider's liability) sub-paragraph (a). Often in cases of securities covering future obligations the amount of the secured obligations at the time the security becomes effective, *i.e.* normally at the time the security is assumed, will be very low or nil, so that a future limitation on the basis of the present Article will not be of much interest for the security provider in these situations.

C. Limitation of security by consumer security provider

Limitation by security provider giving notice. The security may be limited by a simple notice; contrary to IV.G.–2:109 (Limiting security without time limit), only the security provider is entitled to limit the effects of the security.

Limitation after minimum period of three years. A security with an agreed time limit may only be limited by the security provider if at least three years have passed since the security became effective. It is assumed that even the consumer security provider should be able to foresee the risks to be incurred over such a period of limited time, so that the additional protection provided by this Article does not appear to be necessary in these cases.

Period of notice. As in IV.G.–2:109 (Limiting security without time limit), the limitation of the security can become effective only after a period of notice of at least three months has expired. See Comments on that Article.

D. Effects of limitation

Limitation of the scope of the security. For the limitation of the scope of the security, paragraph (2) refers to IV.G.–2:109 (Limiting security without time limit) paragraph (2). For the effects of the limitation under this provision see the Comments on that Article.

Creditor's duty to inform the debtor. According to paragraph (1) sentence 3, the creditor has to inform the debtor on receiving a notice of limitation of the security by the security provider. This provision is necessary because often not only the creditor, but also the debtor will have relied on the security running until its agreed time limit.

Limitation according to this Article and agreed time limit for resort to security. The limitation of the security by the security provider according to this Article does not in itself create a time limit for resort to the security within the meaning of IV.G.– 2:108 (Time limit for resort to security). However, should the parties have agreed on such a time limit for resort to the security, it will not be affected if the security provider limits the security according to

the present Article. While the scope of the security will be limited, the creditor will still be able to resort to this security until expiration of the original time limit agreed by the parties.

NOTES

I. Member States with specific rules on limitation of securities by consumer security providers

1. The DUTCH regulation of time limits for consumer providers of security is quite elaborate. It is limited, though, to personal security for future obligations of the debtor (CC art. 7:861(1)). Such a dependent security can be terminated at any time if no time limit had been agreed for it (lit. a); and after five years, if it had been agreed for a limited period (lit. b). In both cases, the security remains valid for obligations that had already arisen at the time of termination (CC art. 7:861(2)). These rules are mandatory in favour of consumers (CC art. 7:862 lit. a).
2. Under BELGIAN law personal securities for a credit without an agreed time limit assumed by security providers – without distinguishing between consumer and other security providers – are automatically limited to five years. This period of five years can be prolonged at the end of the period for another five years with the express consent of the consumer security provider (ConsCredA art. 34(3), as amended in 2003).
3. In FRANCE consumer security providers are not allowed to assume indefinite dependent personal securities; these must have a time limit but no maximum period has been fixed (for all credit types: ConsC art. L. 341-7 and for consumer credit only: ConsC art. L. 313-7).

II. Member States without specific rules on limitation of securities by consumer security providers

4. Under ENGLISH, FINNISH and GERMAN law, the possibilities for security providers to limit the scope of personal securities as described in the national notes to IV.G.–2:109 follow from general principles (England: general equitable rules, cf. *O´Donovan and Phillips* no. 9-43; Finland: LDepGuar § 19(2); RP 189/1998 rd 57; Germany: cf. national notes to IV.G.–2:109 nos. 6 s.). No special provisions do exist for the limitation of securities by consumer security providers. The same is true in SPAIN In Italy, in the absence of an agreement of the parties to the contrary, as a general rule a security provider may limit the security at any time only if the latter was without time limit (Cass. 6 August 1992 no. 9349, Giur.it 1993 I 1, 1255; *Petti* 154; see national notes to IV.G.–2:109 no. 3), but also this is a general rule which applies independently from the qualification of the security provider as a consumer.

PART H. DONATION

CHAPTER 1: SCOPE OF APPLICATION AND GENERAL PROVISIONS

Section 1: Scope of application and definitions

IV.H.–1:101: Contracts covered

(1) This Part of Book IV applies to contracts for the donation of goods.

(2) A contract for the donation of goods is a contract under which one party, the donor, gratuitously undertakes to transfer the ownership of goods to another party, the donee, and does so with an intention to benefit the donee.

IV.H.–1:102: Future goods and goods to be manufactured or produced

(1) In this Part of Book IV the word "goods" includes goods which at the time of the conclusion of the contract do not yet exist or are to be acquired by the donor.

(2) A contract under which one party undertakes gratuitously, and with an intention to benefit the other party, to manufacture or produce goods for the other party and to transfer their ownership to the other party is to be regarded as primarily a contract for the donation of the goods.

IV.H.–1:103: Application to other assets

(1) This Part applies with appropriate adaptations to:

- ***(a) contracts for the donation of money;***
- ***(b) contracts for the donation of electricity;***
- ***(c) contracts for the donation of stocks, shares, investment securities and negotiable instruments;***
- ***(d) contracts for the donation of other forms of incorporeal property, including rights to the performance of obligations, industrial and intellectual property rights and other transferable rights;***
- ***(e) contracts gratuitously conferring rights in information or data, including software and databases.***

(2) This Part does not apply to contracts for the donation of immovable property or rights in immovable property.

IV.H.–1:104: Application to unilateral undertakings and immediate donations

This Part applies with appropriate adaptations where the donor gratuitously, with an intention to benefit the donee:

- ***(a) unilaterally undertakes to transfer the ownership of goods to the donee; or***
- ***(b) immediately transfers the ownership of goods to the donee.***

IV.H.–1:105: Donations due or conditional on death

(1) This Part does not apply where:

(a) performance of the obligation to transfer is due only on the donor's death;

(b) the transfer or obligation to transfer is subject to the suspensive condition of the donor's death; or

(c) the transfer or obligation to transfer is made subject to the resolutive condition of the donee predeceasing the donor.

(2) Paragraph (1) does not apply if the donor renders performance or waives the condition before the donor's death.

Section 2: Gratuitousness and intention to benefit

IV.H.–1:201: Gratuitousness

An undertaking to transfer is gratuitous if it is done without reward

IV.H.–1:202: Transactions which are not entirely gratuitous

(1) If the party undertaking to transfer receives or is entitled to some reward and the transaction is thereby not entirely gratuitous the contract is regarded primarily as a contract for the donation of goods if:

(a) this party undertakes to transfer with an intention inter alia to benefit the other party; and

(b) the values to be conferred by the performances are regarded by both parties as not substantially equivalent.

(2) If the contract coming under paragraph (1) is void or avoided under these rules but would not be under general rules, III.–1:110 (Variation or termination by court on a change of circumstances) applies with appropriate adaptations.

(3) If in a case within paragraph (1) a party exercises a right to revoke under this Part, IV.H.–4:103 (Consequences of revocation) applies to the whole contractual relationship. The other party may prevent the effects of revocation by offering a reasonable reward within a reasonable time after revocation.

IV.H.–1:203: Intention to benefit

A donor may be regarded as intending to benefit the donee notwithstanding that the donor:

(a) is under a moral obligation to transfer; or

(b) has a promotional purpose.

CHAPTER 2: FORMATION AND VALIDITY

IV.H.–2:101: Form requirements

A contract for the donation of goods is not valid unless the undertaking of the donor is in textual form on a durable medium signed by the donor. An electronic signature which is not an advanced signature in the sense of I.–1:107 ("Signature" and similar expressions) paragraph 4, does not suffice in this regard.

IV.H.–2:102: Exceptions to the form requirements

The preceding Article does not apply:

(a) in the case of an immediate delivery of the goods to the donee or an equivalent to such delivery, regardless of whether ownership is transferred;

(b) if the donation is made by a business;

(c) if the undertaking of the donor is declared in a public statement broadcast in the radio or television or published in print and is not excessive in the circumstances.

IV.H.–2:103: Mistake

A donor may avoid the contract if it was concluded because of a mistake of fact or law although the requirements of II.–7:201 (Mistake) paragraph (1)(b) are not satisfied.

IV.H.–2:104: Unfair exploitation

A donor, who was dependent on, or was the more vulnerable party in a relationship of trust with the donee, may avoid the contract under II.–7:207 (Unfair exploitation) unless the donee proves that the donee did not exploit the donor's situation by taking an excessive benefit or grossly unfair advantage.

CHAPTER 3: OBLIGATIONS AND REMEDIES

Section 1: Obligations of the donor

IV.H.–3:101: Obligations in general

(1) The donor must:

(a) deliver goods which conform with the contract; and

(b) transfer the ownership in the goods as required by the contract.

(2) This Section applies with appropriate adaptations to fruits acquired from the time when the obligation to deliver is due.

IV.H.–3:102: Conformity of the goods

(1) The goods do not conform with the contract if they do not possess the qualities which the donee could reasonably expect unless the donee knew of the lack of quality or could reasonably be expected to have known of it when the contract was concluded.

(2) In determining what qualities the donee could reasonably expect, regard is to be had, among other things, to:

- ***(a) the gratuitous nature of the contract;***
- ***(b) the purpose of the contract of donation known by, or obvious to, the donee;***
- ***(c) whether the transfer or delivery of the goods was immediate;***
- ***(d) the value of the goods; and***
- ***(e) whether the donor was a business.***

(3) The goods do not conform to the contract if they are not of a quantity, quality or description provided for by the terms of the contract.

IV.H.–3:103: Third party rights or claims

The goods do not conform with the contract if they are not free from any right or reasonably well founded claim of a third party unless the donee knew or could reasonably expected to have known of the third party's right or claim.

Section 2: Remedies of the donee

IV.H.–3:201: Application of general rules

If the donor fails to perform any of the donor's obligations under the contract, the donee has the remedies provided for in Book III, Chapter 3 (Remedies for non-performance) unless otherwise provided in this Section.

IV.H.–3:202: Restricted right to enforce performance

(1) If the goods do not conform with the contract, the donee may not require replacement or repair under III.–3:302 (Enforcement of non-monetary obligations).

(2) The donee may not enforce performance under III.–3:302 (Enforcement of non-monetary obligations) in the case of goods which are to be acquired by the donor.

IV.H.–3:203: Restitution in case of termination

If the donee terminates the contract under Book III, Chapter 3, Section 5 (Termination), III.–3:511 (When restitution not required) paragraph (3) does not apply.

IV.H.–3:204: Exclusion of the right to damages in case of impediment

(1) A donee's right to damages is excluded if the donor's non-performance is due to an impediment and if the donor could not reasonably be expected to have avoided or overcome the impediment or its consequences.

(2) III.–3:104 (Excuse due to an impediment) paragraphs (3) and (5) apply correspondingly.

(3) In determining what impediment or consequences the donor could reasonably be expected to have avoided or overcome regard is to be had to the gratuitous nature of the contract.

(4) This Article does not affect liability under Book VI (Non-Contractual Liability Arising Out of Damage Caused to Another).

IV.H.–3:205: Measure of damages

(1) Damages cover loss suffered by the donee acting in the reasonable belief that the donor would fulfil the obligations.

(2) A supplementary sum of damages may be awarded by the court if it is seen as just and reasonable in the circumstances.

(3) In determining what is just and reasonable under paragraph (2), regard is to be had, among other things and apart from the gratuitous nature of the contract:

(a) the declarations and acts of the parties;
(b) the donor's purpose in making donation; and
(c) the reasonable expectations of the donee.

(4) The total amount of damages under this Article may not exceed such a sum as will put the aggrieved party as nearly as possible into the position in which it would have been if the donor's obligations under the contract had been duly performed.

(5) This Article does not affect liability under Book VI (Non-Contractual Liability Arising Out of Damage Caused to Another).

IV.H.–3:206: Delay in payment of money

If payment of a sum of money is delayed, the donee is entitled to interest under III.–3:708 (Interest on late payments) unless the non-performance is excused under III.–3:104 (Excuse due to an impediment) or the donee's right to damages is excluded under IV.H.–3:204 (Exclusion of the right to damages in case of impediment).

Section 3: Obligations of the donee

IV.H.–3:301: Obligations to take delivery and accept transfer

(1) The donee must take delivery and accept the transfer of ownership.

(2) The donee performs the obligation to take delivery and accept transfer by carrying out all the acts which could reasonably be expected of the donee in order to enable the donor to perform the obligations to deliver and transfer.

Section 4: Remedies of the Donor

IV.H.–3:401: Application of general rules

If the donee fails to perform any of the donee's obligations under the contract, the donor has the remedies provided for in III.–2:111 (Property not accepted), III.–2:112 (Money not accepted) and Book III, Chapter 3 (Remedies for non-performance).

CHAPTER 4: REVOCATION BY THE DONOR

Section 1: Revocation in General

IV.H.–4:101: Irrevocability and its exceptions

Contracts for donation of goods are revocable only if a right to revoke is

(a) conferred by the terms of the contract; or

(b) provided for under the rules in this Chapter.

IV.H.–4:102: Exercise and scope of the right to revoke

(1) The donor's right to revoke is to be exercised by giving notice to the donee.

(2) A declaration of partial revocation is to be understood as a revocation of the whole contract for the donation of goods, if, giving due consideration to all the circumstances of the case, it is unreasonable to uphold the remaining parts.

IV.H.–4:103: Consequences of revocation

(1) On revocation under this Chapter, the outstanding obligations of the parties under the contract come to an end. In the case of a partial revocation, the relevant part of the outstanding obligations comes to an end.

(2) On revocation under this Chapter, the donee is obliged to return the goods. Chapters 5 and 6 of Book VII (Unjustified Enrichment) apply with appropriate adaptations, unless otherwise provided in this Chapter.

IV.H.–4:104: Time limits

The right to revoke under this Chapter expires if notice of revocation is not given within a reasonable time, with due regard to the circumstances, after the donor knew or could reasonably be expected to have known of the relevant facts.

Section 2: Rights of the donor to revoke

IV.H.–4:201: Ingratitude of the donee

(1) A contract for the donation of goods may be revoked if the donee is guilty of gross ingratitude by intentionally committing a serious wrong against the donor.

(2) Revocation under this Article is excluded if the donor knowing the relevant facts forgives the donee.

(3) For the purpose of paragraph (1) a reasonable time under IV.H–4:104 (Time limits) is at least one year. If the donor dies before the reasonable time has expired, the running of the period is suspended until the person entitled to revoke knows or can reasonably be expected to know of the relevant facts.

(4) For the purpose of paragraph (1) the defence of disenrichment under VII.–6:101 (Disenrichment) does not apply.

IV.H.–4:202: Impoverishment of the donor

(1) A contract for the donation of goods may be revoked if the donor is not in a position to maintain himself or herself out of his or her own patrimony or income.

(2) The donor is not in a position to maintain himself or herself if:

(a) he or she would be entitled to maintenance from another if that other were in a position to provide the maintenance; or
(b) he or she is entitled to social assistance.

(3) The right to revoke is suspended if the donee maintains the donor to the extent that the latter is or would be entitled to under paragraph (2).

(4) A donor who is not in a position to maintain himself or herself in the sense of paragraph (1) or who will imminently be in that situation may withhold performance of any obligations under the contract which have not yet been performed. Paragraph (3) applies correspondingly to the right to withhold performance. If the donor withholds performance, the donee may terminate the contractual relationship.

(5) This Article applies also when the donor's ability to meet maintenance obligations established by rule of law or by court order, or the existence of those obligations, is dependent on effective revocation of a donation.

(6) The right to revoke under this Article may not be restricted or excluded by the parties.

IV.H.–4:203: Residual right to revoke

(1) A contract for the donation of goods may also be revoked to the extent that other essential circumstances upon which it was based have materially changed after the conclusion of the contract, provided that as a result of that change:

(a) the benefit to the donee is manifestly inappropriate or excessive; or
(b) it is manifestly unjust to hold the donor to the donation.

(2) Paragraph (1) applies only if:

(a) the change of circumstances was not so foreseeable at the time of the conclusion of the contract that the donor could reasonably have been expected to provide for it; and
(b) the risk of that change of circumstances was not assumed by the donor.

BOOK V

BENEVOLENT INTERVENTION IN ANOTHER'S AFFAIRS

CHAPTER 1: SCOPE OF APPLICATION

V.–1:101: Intervention to benefit another

(1) This Book applies where a person, the intervener, acts with the predominant intention of benefiting another, the principal, and:

(a) the intervener has a reasonable ground for acting; or
(b) the principal approves the act without such undue delay as would adversely affect the intervener.

(2) The intervener does not have a reasonable ground for acting if the intervener:

(a) has a reasonable opportunity to discover the principal's wishes but does not do so; or
(b) knows or can reasonably be expected to know that the intervention is against the principal's wishes.

COMMENTS

A. General

Terminology. The provisions of this Chapter contain rules regulating the legal relationship between two persons where one party, either for good reasons or with the subsequent approval of the other, has chosen to intervene in the other's affairs for the furtherance of the latter's interests. This law of benevolent intervention in another's affairs (or *negotiorum gestio*) thus governs the rights and duties of the party acting (in the various laws of the Member States presently termed, *inter alia*, *dioikitis allotrion, forretningsfører, gérant*, *Geschäftsführer*, *gestor, gestore, megbízás nélküli ügyvivoő, zaakwaarnemer*) and the party to be benefited (the *belanghebbende, dominus*, *dono do negócio, dueño, forretningsherre, géré, Geschäftsherr, huvudman*, *interesado, interessato, kyrios, maître de l´affaire, ügy ura*). In the English version of these Articles, the *dominus* is referred to as the "principal". The active party is referred to as the "intervener".

Requirements of benevolent intervention. According to paragraph (1) of the present Article and V.–1:103 (Exclusions), benevolent intervention has two positive requirements and three negative requirements. There must be (i) an act which is undertaken with the predominant intention of benefiting another (the principal) and (ii) a reasonable ground for this intervention. Additionally the party acting must not be either (iii) obliged or (iv) otherwise authorised under other rules of the legal system (that is to say, rules outside the law of benevolent intervention) to act in relation to the benefited party, or (v) under an obligation to act in relation to a third party. In addition sub-paragraph (b) of paragraph (1) of the present Article makes it clear that the provisions of this Chapter also apply if the intervener intervenes without reasonable ground in the affairs of the principal, but the activity is approved by the latter without such undue delay as would adversely affect the intervener. The approval by the

principal takes the place of the (missing) reasonable ground for acting in the principal's sphere of interest. There is no further requirement in that the intervener must manage an affair which from an objective perspective is the affair of another (that is to say, an extraneous affair in relation to the intervener); the single decisive element is that the intervener acts with the predominant intention to benefit the other. It is the intention to benefit another, acted upon on the basis of a reasonable ground, which attributes the act to the principal.

Illustration 1
G is the owner of a very ugly factory site. In order to save his neighbour the awful sight of the buildings, G, acting on his own initiative, plants a row of trees along the property boundaries. G may have acted with the predominant intention to benefit his neighbour, but he is not an intervener because he has not acted upon his intention to benefit another on the basis of a reasonable ground. He has imposed an enrichment on his neighbour.

Illustration 2
In order to apply an emergency bandage on a badly injured pedestrian, P, a passer-by G uses dressing material. G will qualify as an intervener in relation to P irrespective of whether she uses her own dressing material or if she smashes the window of a car belonging to a third party in order to get hold of dressing material lying on the back seat. In relation to the third party, this act qualifies as a justified act of emergency within the meaning of VI.–5:202 (Self-defence, benevolent intervention and necessity) paragraph (2) for which G is liable to provide reasonable compensation.

Protection of the principal against officious intermeddling. In order to protect the principal from officious intermeddling by others, paragraph (2) makes the clear demand that the intervener must be directed as far as possible in the circumstances by the wishes of the principal, so far as the intervener is in a position to identify them. Paragraph (2) is an ancillary norm serving as a particularisation of paragraph (1)(a).

Special forms of the law of benevolent intervention are not within this regime. The provisions of this Chapter have as their subject matter only the so-called justified management of another's affairs and the rights and duties of the intervener and the principal which arise out of that. If someone interferes in the affairs of another without reasonable ground and that other is not moved to approve the intervention, then the rights and obligations of the parties remain subject to other areas of the law – in particular the law on non-contractual liability for damage and the law on unjustified enrichment – and not the law on benevolent intervention. The same correspondingly holds true where a person intermeddles in the affairs of another in order to pursue that person's own interests, and that is so irrespective of whether this happens intentionally or by mistake (for example, because that person meant to advance his or her own interests, but has actually furthered another's interests). Contrastingly, the provisions of this Chapter are applicable where the intervention is justified, but the intervener infringes a duty which arises out of the justified management of another's affairs. See for more detail Chapter 2 (Duties of intervener).

Benevolent intervention as a defence within the framework of the law on non-contractual liability for damage. Justified benevolent intervention in advancement of another's interests constitutes a ground of defence in respect of a non-contractual liability in damages which would otherwise be imposed. That is expressly set out in VI.–5:202) (Self-defence, benevolent intervention and necessity) paragraph (2).

Illustration 3
As a result of a traffic accident P is rendered unconscious and locked in a car. G smashes a car window in order to be able to unlock the door from the inside and pull P out of the car. G is not liable to P under the law on non-contractual liability for the damage caused to the car.

Burden of proof. These rules regard the question of burden of proof as belonging to substantive law. Rules on burden of proof are applicable when it is not possible to clearly establish the circumstances of the case. Within the law of benevolent intervention the general principle applies whereby each party must make out the circumstances favourable to that party's case and in case of dispute prove them. When a given party is not able to do that, the decision in the case must be adverse to that party.

Illustration 4
The facts are the same as in Illustration 3, save that in smashing in the window G is injured. Both parties claim compensation – P under the law on non-contractual liability on account of property damage and G under the law on benevolent intervention (V.–3:103 (Right to reparation)) on account of the personal injury suffered in acting as intervener. If it is disputed and cannot be established whether G really acted for the purpose of rescuing P, then P's claim to compensation will succeed, while G's claim will fail.

Proof. By contrast, all questions which are related to the problem whether a given fact is to be regarded as proven are part of the law of procedure. They are therefore not the subject matter of these rules.

Illustration 5
The facts are again the same as in illustration 3. However, P later maintains that G smashed the window only (or at least primarily) for opportunistic reasons, meaning to steal the camera lying on the passenger seat of P's car. (National) procedural law determines under what conditions and to what extent G's case is supported by presumptions triggered by a *prima facie* case. (For example, G might prove that P was in fact subsequently liberated from the car by G, from which it may *prima facie* follow that when breaking the glass beforehand G was acting predominantly with the intention of rescuing P.) The same goes for the question as to what concrete circumstances place upon P an onus of introducing evidence to rebut a *prima facie* case. (For example, P might seek to show that G was later found with the camera and unable to offer a convincing explanation for having it and that G had made no serious attempt to free P.)

B. The activities covered

'Acting' for another. Paragraph (1) of the Article states that the provisions of this Book apply where a person 'acts' for another. The type of act required is not further qualified. It follows that every type of act may be considered a benevolent intervention – services as much as making things (or money) available for use or paying another's debt. This wide scope of application embraces acts having legal effects as well as acts merely changing the physical state of affairs. A benevolent intervention may consist in the conclusion of a contract or giving notice to terminate a legal relationship just as much as it may consist in effecting repairs, making a telephone call, keeping property safe, giving a warning, removing a vehicle,

cutting back trees overhanging the public thoroughfare, feeding (or, in a case of emergency, killing) animals, and so forth. All of these are 'acts' within the meaning of that term in the present Article. That of course does not exclude the possibility that certain of the following provisions of this Book may be entirely or at any rate predominantly directed towards one form of acting rather than another, be it acts having legal effects or acts of a merely physical import. A case in point where it is the former rather than the latter which is in focus is V.–3:106(Authority of intervener to act as representative of the principal) and which thus necessarily concerns only juridical acts. By contrast, V.–3:103 (Right to reparation) concerning reparation will as a rule only come into play in respect of acts of a merely physical significance.

Acts to protect another's person are included. Furthermore, it is clear that the concept of benevolent intervention in another's affairs as understood in these rules is in no way limited to acts for the protection of another's patrimonial interests. Instead it includes within its compass acts for the protection of another's person and hence such acts as bandaging the wounded, bringing the injured to hospital and saving someone from a dangerous situation (as in Illustration 3 above).

One-off activities and long-term undertakings. The 'act' can consist in an isolated, one-off act as much as an enduring matrix of activities such as the administration of a bank deposit or the management of another's farm or business. To cater in particular for such longer term activities the provision in V.–2:101 (Duties during intervention) paragraph (c) (concerning the on-going duty of the intervener to provide information) has been devised; for activities which start and finish in a momentary act that provision will not come into play.

Omissions. It is theoretically conceivable that a benevolent intervention might even consist in an omission. Practically speaking, however, that can rarely be the case, not least because the commonest situations in which the outward appearance of a person's conduct would lend itself to a benevolent intervention will often be absorbed by the law of contract and in such circumstances, in accordance with V.–1:103 (Exclusions) sub-paragraph (a), the rules of contract law will claim priority over the law of benevolent intervention in another's affairs.

> *Illustration 6*
> A notary, acting contrary to instructions, does not forward a client's money to the tax authority because the notary has learned in the meantime of a change to the taxing statutes whereby tax is no longer payable. A garage, acting in the interest of a customer, does not repair the car brought in to be repaired in order to save it from the grasp of an occupying power. Conduct of this kind would normally be construed as performing a contractual obligation and therefore as being outside the law of benevolent intervention in another's affairs from the very outset.

Actions contrary to law or public policy. Acts of an intervener which are unlawful or contrary to public policy are not *per se* excluded by the Articles from their scope of application. Such a rule does not appear necessary and, moreover, it would be dangerous to introduce one because in defined circumstances it could be the cause of misunderstanding. Certainly, under normal circumstances the act of the intervener must not be either prohibited by law or contrary to public policy. However, that follows from the fact that in both of those cases the reasonable ground for intervention would usually be missing.

Illustration 7
P, a member of a band of thieves, is ill. Disproving the adage that there is no honour among thieves, P's friend G undertakes P's "workload" on P's behalf. Under the law of benevolent intervention P can have no claim against G to the money stolen from third parties by G on P's behalf (and correspondingly G has no claims against P).

Emergency situations. However, it is conceivable that in situations of emergency even otherwise illegal conduct might, in special circumstances, be reasonable. The emergency might compel an intervener to act in a way which is prohibited by law or which, under normal circumstances, would be regarded as contrary to public policy.

Illustration 8
A person is only able to obtain the release of a travelling companion, who is being wrongfully held in custody in a corrupt foreign state, by paying bribes. Although bribery is prohibited and although the legal system to which the intervener and the principal are subject (be it by reason of common nationality or habitual residence) would also usually disapprove of the bribery of foreign officials, in such extreme conditions the act of bribery might still be reasonable in relation to the principal. The intervener can consequently demand reimbursement of the expenditure incurred in making the bribes: see V.–3:101 (Right to indemnification or reimbursement).

Disallowed interventions. It may nonetheless be the case that even after considering the situation of emergency, a given conduct is regarded by a legal system as prohibited for reasons of overriding significance. In that event it is unreasonable for the purposes of the law of benevolent intervention to disregard the prohibition.

Illustration 9
Under the law of a Member State it is prohibited on the basis of a particular statutory provision to pay a ransom to a kidnapper. A son who ransoms his father from the clutches of his captors has no claim against his father for reimbursement on the basis of benevolent intervention. The son has no reasonable ground to intervene in this manner.

Acts of an inherently personal nature excluded. Acts which are of such an inherently personal nature that they can only be done by an individual in person are by their very nature excluded. That is not expressly stated in the Article, but should be understood as inherent and can be inferred from V.–3:106 (Authority of intervener to act as representative of the principal) which under certain conditions confers on the intervener the authority to act in a way which binds and favours the principal directly in relation to third parties (i.e. to act as the principal's representative). Acts which cannot permissibly form the subject-matter of a representation relationship cannot permissibly be made the subject-matter of a benevolent intervention in another's affairs. In so far as the law of succession does not allow a person to execute a will for another, it will not be possible for an intervener to undertake such an act as benevolent intervener for the testator. A similar point can be made in relation to a juridical act which purports to change another's marital status or parental responsibility or to alter an individual's name. However, a person is also precluded from putting forward a particular philosophical or political viewpoint on behalf of another – for example election publicity as benevolent intervener for a political party.

Conducting litigation as a benevolent intervener. An act within the meaning of the law of benevolent intervention in another's affairs can also consist in conducting litigation. In that case, however, one must distinguish between two fundamentally different situations, namely conducting litigation in one's own name and conducting litigation in the name of the principal. The first situation, in which the intervener litigates against a third party in the principal's interest but in the intervener's own name (for example, in pursuing through the courts a claim to the purchase price where in a case of necessity the intervener has sold goods belonging to the principal), does not throw up any special issues. The intervener may even be obliged to take such action in defence of the principal's interests (in consequence of prior acts) as part of the duty to continue the intervention within the bounds set out in V.–2:101(Duties during intervention) paragraph (2). More difficult, by contrast, is the problem of whether and under what conditions an intervener may litigate in the name of the principal if the latter is hindered personally from attending to affairs. A case in point would be, for example, an attempt by an intervener to commence legal proceedings in order to prevent a statutory limitation of the principal's claim to an unpaid purchase price which threatens to become time-barred. Whether such a form of undertaking the affairs of another is possible or whether the matter remains reserved to the principal as something which can only be carried out personally is not determined by these rules. Rather they presuppose, in keeping with most jurisdictions of the EU, that one is concerned here with a question of procedural law which must be resolved by the applicable law of procedure. The position adopted in the majority of national procedural laws appears to be that an intervener will be permitted by a court to conduct litigation on a provisional basis up to a certain point in time, determined by the court, when a mandate or power of attorney must be filed, in default of which the action will be dismissed.

C. The intention predominantly to benefit another (paragraph (1))

Meaning of 'benefiting'. As regards the positive requirements of benevolent intervention in another's affairs, as stated already the text operates with one subjective element (intention to benefit) and one objective element (reasonable ground). As a first essential, the intervener must act with the intention of *benefiting* another. The word 'benefiting' is to be understood in this context as having a wide significance; in particular it does not relate merely to benefits of a type falling within patrimonial law in the sense of an enrichment. That follows already from the explanation in nos. 8-9 above of the concept of an 'act'. See also Illustration 3 above.

The success of the venture is not essential. Furthermore, it is important to recognise that it is the *intention* of benefiting another that matters, not an actual benefit as such. This intention turns only on the *prospective* utility which, at the time of acting, might be anticipated and not the *resultant* usefulness which may or may not have emerged after the act has been completed or stopped. The intervener must therefore have acted with the intention of managing another's affairs for that other's benefit, assessed at the time the intervener is active, but as a fundamental principle this good intention is sufficient. Whether or not the act was ultimately successful (the resultant benefit) is not a criterion and is immaterial. In this way the law of benevolent intervention in another's affairs is distinguishable from the law of unjustified enrichment.

Illustration 10
P suddenly loses consciousness behind the wheel of her car. Her car comes to rest over a sheer drop; she is rescued and taken to hospital. P's car threatens to run down the slope. G, who operates a breakdown service and has been informed of the situation by a third party, resolves to tow the car back on to the road using a winch and bring it to

P's house. Due to a latent defect in the material, the steel cable snaps; the car tumbles down into the void. G acted with the intention of benefiting P. That this intervention ultimately resulted in more harm than good does not alter the matter.

Benefiting another, not intending to pursue one's own interests. The intervener must have acted with the intention of benefiting *another.* A person who pursues their own interests is not a benevolent intervener. Moreover, merely having in fact undertaken another's affairs will also not suffice if that was done inadvertently or unwittingly. Someone who assumes they are discharging their own obligation and acts accordingly, in reality discharging another's obligation, is not acting as a benevolent intervener. A case in point would be a married man who maintains a child of his wife in the assumption that he is the father, though in reality another man is the biological father of the child. In the absence of a special statutory regime (in this case, in family law), such cases remain to be dealt with within the law of unjustified enrichment.

Illustration 11
From a vague report provided by children it appears that G's son has broken a neighbour's window pane with a ball. On that basis G pays for the damage. Later it emerges that a different boy was responsible. G does not act as intervener for either the boy responsible or (so far as they would be vicariously liable for the property damage caused by their son) the boy's parents. Any claim for reimbursement of the payment made can be made only in accordance with the law of unjustified enrichment. It will be for the law of unjustified enrichment to determine whether G has a claim against the other boy, or the parents of the other boy, or can instead demand a repayment from the neighbour.

Illustration 12
A music publishing company continues to make use of publishing rights, assigned to the company for its use for a limited time only, after the death of the composer in the erroneous supposition that the rights had fallen into the public domain. The publishing company cannot set off against the claim of the composer's successors for surrender of the proceeds a claim based in benevolent intervention for remuneration for its commercial activity in marketing the music. The company had not intended to benefit the composer's successors.

No possibility of approval for acts undertaken for own benefit. In contrast to the element of reasonable ground (paragraph (1) sub-paragraph (a) in conjunction with paragraph (2)), the subjective requirement of an intention to benefit another cannot be replaced by a timeous approval of the act by way of ratification. The justification for the possibility of an approval of an intermeddler's act is based on the assumption that the intermeddler was acting for the person subsequently giving their approval for what has been done, so that there is, as it were, in retrospect a meeting of minds between the parties. According to the rules of benevolent intervention in another's affairs an approval by the principal is not therefore an option if the intervener has been acting mainly in the intervener's own interest and just happened to have a secondary aim of benefiting the principal. That, however, does not preclude the possible application of the rules on representation. Under II.–6:111 (Ratification) paragraphs (1) and (2) a principal can ratify a transaction which a person purporting to be the principal's representative, but acting without authority, has concluded with a third party. In this context it does not matter whether the false representative acted with the intention of benefiting the principal or for his or her own benefit.

Predominant' intention of benefiting another. In order to evade the problem arising where an intervener acts with a mixture of interests in mind – that is, the problem that hardly anybody ever acts exclusively in another's interest – paragraph (1) requires that the intervener must intend *predominantly* to benefit the principal. Where the pursuit of another's interest and the pursuit of one's own interest have been combined together, it is sufficient that the former is, at the margin, uppermost. This excludes all argument that an intervener will have a right to reimbursement when in substance acting for his or her own advantage merely because some lesser part of the intention was to benefit the principal.

Illustration 13
A genealogist (G) makes his living by, among other things, responding to public announcements of apparently 'heirless' estates. Such publications arise where a person dies leaving an estate and the court responsible for matters relating to intestate succession to the estate is compelled according to the tenor of the documentation before the court to assume that the deceased died without relatives entitled to succeed to the estate. If such relatives do not identify themselves within a given time limit, the estate will pass to the public exchequer. G is successful in seeking out such relatives. He offers, in exchange for a reward amounting to 20% of the estate, to provide them with requisite details and to conduct the process of winding up the estate. To demonstrate his seriousness, he reveals to them preliminary information of a rudimentary kind. However, that information turns out to be sufficient for the relatives to locate the court with responsibility for the succession and to press their claims to the inheritance. G has only collaterally sought to advance the interests of the relatives. His main concern was the conclusion of a contract into which, however, the relatives did not in fact enter. G has no claim against the relatives and in particular none arising out of V.–3:102 (Right to remuneration). A second reason to deny such a claim for remuneration would be that under Art. 9 of the Directive 97/7 on protection of consumers in respect of distance contracts no consumer is compelled to pay for unsolicited services. This provision does not, however, mean that European Community law has completely abolished claims for expenditure in respect of unsolicited services (see II.–3:401(No obligation arising from failure to respond) paragraph (2)(a)), but it does mean that its value judgments must be reflected by the law of benevolent intervention.

Illustration 14
Farmer F notices that following a storm a tree in the highway has fallen down and is lying across the street. Being a weekend, nobody can be contacted at the local authority, which is responsible for the tree and the safety of the street, who will be able to react promptly. If F pulls the tree trunk off the road with a tractor, F acts as intervener for the local authority (V.–1:102 (Intervention to perform another's duty)). That remains the case irrespective of the fact that a collateral benefit of the activity is to enable F to reach part of F's farm which could otherwise only be reached by making a detour.

Illustration 15
Grown up children discharge their father's unpaid tax liability in order to prevent the Revenue from impounding some valuable pictures belonging to their father. It is no objection to recognising the existence of a benevolent intervention that the children in making the payment also had in mind their prospective inheritance of the pictures on their father's eventual death.

Illustration 16
The majority of the owners of land on an industrial estate make a request to the responsible local authority for the construction of a spur to connect with a nearby dual carriageway. The local authority consents on the basis that the owners make a substantial contribution to the costs of construction. Owners A and B are agreeable. C agrees too in principle, but makes it clear from the outset that he is not prepared under any circumstances to pay more than € 100,000. A and B (but not C) subsequently conclude a contract with the authority to make a contribution to the construction costs; the authority undertakes to construct the road. The resultant costs amount to €770,000. Quite independent of the fact that C expressly ruled out a greater contribution to the costs of construction, A and B have no claim against C in benevolent intervention because they did not act "predominantly" with the purpose of benefiting C.

Acting in pursuance of a void contract. A special case (which is not the subject of an explicit rule) in which an intention *predominantly* to benefit another is missing is when a person undertakes an act in the erroneous assumption that they are performing a contractual obligation which they believe they have incurred to the principal. Typical cases concern performances rendered on the basis of contracts which are void for illegality, want of required form, or because the parties are not truly *ad idem*. These rules proceed on the basis that claims in respect of such performances rendered fall within the domain of the law of unjustified enrichment and not within the law of benevolent intervention in another's affairs. Illustrative cases involve the repair of another's car pursuant to a void contract for services, or the acquisition of property in one's own name in supposed discharge of a void mandate. A few of the higher courts in Europe admittedly judge these latter cases differently at present, but within those countries their solution is anything but undisputed. Speaking in favour of the solution chosen here is the fact that those who act on the basis of a void contract are certainly, from a technical point of view, acting 'without authority' (see V.–1:103 (Exclusions) sub-paragraph (a)), but they also act without the "predominant" intention of benefiting another, seeking rather to advance their own interest by executing the concluded bargain.

Similar cases. The position is no different when a person discharges a debt as a result of a misapprehension as to the legal situation – for example, where a person mistakenly assumes that they are obliged on account of a supposed unjustified enrichment or non-contractual liability for damage to make a monetary payment. Here too an intention predominantly to benefit another is missing and consequently there is no benevolent intervention. Distinguishable, however, is the case of discharge of a duty to render assistance arising under criminal law (on which see further Comment B under V.–1:103 (Exclusions)). Moreover, one who erroneously supposes that a person in need has a right to assistance nonetheless acts predominantly with the intention of benefiting that person. The (unfounded) concern of the rescuer that they may otherwise be subject to a claim for damages blends into the background in a real life situation.

Collateral advancement of a subordinate personal interest can affect the quantum of the intervener's claim. It not uncommonly transpires that an intervener is predominantly acting to advance the interests of the principal, but at the same time has the advancement of his or her own objectives at the back of the mind. As stated above, that will not exclude the application of the rules on benevolent intervention in another's affairs. The (subordinate) collateral advancement of one's own purposes may call for consideration, however, in determining the legal consequences of the intervention – in particular in assessing the

quantum of damages or reimbursement of expenditure to which the intervener is entitled. That is the case primarily where the intervener and principal were exposed to a common danger (see V.–3:104 (Reduction or exclusion of intervener's rights)).

Illustration 17
Adjacent plots of land belonging to G and P respectively are situated on a slope in the hills, G's land lying immediately below that of P. After heavy rainfall and especially when settled snow melts, the stream which flows down the hill and along both plots of land overflows and floods the land. G knows from experience that when the water has reached P's house it will flood into P's kitchen if nothing is done. When the water levels upstream from P's land once more rise ominously high, G commissions a contractor to deal with the problem, P being away from the scene and not reachable by telephone. G has a claim against P for reimbursement in respect of the costs arising from commissioning the contractor. That claim will be reduced under V.–3:104 (Reduction or exclusion of intervener's rights) paragraph (2), however, if and so far as G's house would similarly have been flooded had G not commissioned the contractor to prevent the flooding of P's house.

Intervener and principal: general observations. Fundamentally anybody can be an intervener or a principal. That applies to legal persons as much as to natural ones. In many cases it will be not-for-profit organisations, formed as legal persons, which act as benevolent interveners (though this does not exclude the possibility that in the circumstances of the case they may often fall to be regarded for the purposes of V.–3:104 (Reduction or exclusion of intervener's rights) paragraph (1) as having manifested an intention at the time of their intervention not to assert their rights as interveners). Equally children may act as interveners or be principals (but see also the rules for their protection in V.–2:102 (Reparation for damage caused by breach of duty) paragraph (3), V.–2:103 (Obligations after intervention) paragraph (2), and V.–3:104) (Reduction or exclusion of intervener's rights)). Whether mentally disabled persons are capable of acting as benevolent interveners depends essentially on whether they are capable of mustering sufficient powers of comprehension as to be able to resolve to intervene predominantly with the intention of benefiting another. It is even conceivable that a benevolent intervener may act for a person not yet in existence (e. g. a foetus); though here the general rule must be observed that only a person can be subject to legal obligations.

Multiple interveners. Where multiple interveners act, it will depend on the circumstances of the individual case whether or not they are to be regarded as solidary debtors. According to general rules, they will usually be solidary debtors if (but only if) they carry out one and the same undertaking. They will be independent debtors however if they are pursuing different tasks.

Illustration 18
For lack of expertise, A is not in a position to put right certain damage to water pipes in the home of a neighbour N. A calls a plumber and (not acting as a representative of N) commissions the plumber to undertake the repairs. If the repairs are carried out unprofessionally, A will not be vicariously liable to N. However, under V.–2:103 (Obligations after intervention) paragraph (1) A is obliged to assign to N the right to damages under the contract made with the plumber which will entitle N to claim damages from the plumber.

Illustration 19
The facts are as in illustration 18 except that, instead of engaging the plumber, A merely alerts the plumber to the burst pipe and leaves to the plumber the decision whether or not to intervene. If the plumber does intervene, then both A (because of alerting the plumber) and the plumber constitute benevolent interveners. As regards the defective execution of the repairs, however, they do not constitute solidary debtors; in relation to that activity, A was not a benevolent intervener at all.

Book III. Chapter 4. Where interveners are liable as solidary debtors, their obligations towards the creditor principal to settle their liabilities will follow, by means of analogy, the rules of Book III. Chapter 4.

Identifying the principal. The intervener is the person who has acted for another; the principal is generally the person whose interests the intervener sought to look after. There can only be one principal or class of co-principals whom the benevolent intervener intends to benefit *predominantly* – i.e. to benefit above all others. The approach by which the principal is defined is thus a subjective one. It depends according to the basic rule on the intentions of the intervener. In the circumstances circumscribed by V.–1:102 (Intervention to perform another's duty) however, there is an exceptional case in which an "objective" approach supplements the core "subjective" one.

Illustration 20
In the immediate aftermath of a railway disaster which has resulted in a large number of victims, some private individuals in the vicinity of the accident rush to give assistance. Two of the helpers injure themselves when breaking the window of an overturned carriage, supposing there are survivors inside. There are in fact five survivors whom it is possible to rescue. Those five survivors, as well as the railway company (see: V.–1:102 (Intervention to perform another's duty)), are principals in relation to the rescuers. As between the railway company and the rescued victims, however, the railway company alone will be accountable if it is liable vis-à-vis its passengers: V.–3:105 (Obligation of third party to indemnify or reimburse the principal).

The determinability of the principal at the moment of intervention. The intention of the intervener to benefit another must relate to the principal. That does not mean that the intervener must have known the principal personally or by name; nor does it even mean that the intervener must have had a specific person in mind to benefit. It does mean, however, that at the moment of intervention the principal must at least have been ascertainable. Unless that requirement is satisfied there can be no benevolent intervention "for another".

Illustration 21
A company which runs a bus passenger service and as a precaution in case of accident keeps one or two vehicles in reserve in its depot does not act on behalf of someone who is responsible for a subsequent accident and causes damage to its fleet when it keeps those maintained vehicles on stand-by. Consequently, the company cannot under the rules of benevolent intervention in another's affairs demand from the person causing the accident a proportion of the costs of keeping the vehicles in reserve. That person was not identifiable at the time the decision was taken to establish a reserve fleet. (Quite aside from this the company may have acted predominantly to pursue its own interests. That is because such vehicles are not primarily held in reserve in

anticipation of an accident. Rather they are maintained first and foremost in order to provide undisrupted service to customers whenever a vehicle has to be taken out of service due to a breakdown).

Illustration 22
A water leakage occurs in a coal mine. The responsible authority prohibits the owner of the mine from pumping out the water, because it fears damage to the water table in summer. The costs of pumping out the mine later are considerably higher than if the measure had been undertaken immediately; in addition the mine owner suffers loss of earnings as a result of this delay. The mine owner is not a benevolent intervener, however, in delaying the draining of the mine because an indeterminate number of people benefits from the omission: a spa, hotels and bed and breakfast accommodation, retailers, other residents of the town and even traders in the towns through which the guests of the health resort, who would otherwise have stayed away, have to travel.

Where the principal is unknown to the intervener. As already indicated, it is not necessary that the benevolent intervener should know the principal personally. It is quite possible for an intervener to act to benefit an unknown person. Someone who is on the point of rescuing a stranger's property does not need to know who the owner is or which other persons, if any, have proprietary entitlements in respect of the property in order to be able to act as intervener in relation to them. The general intention to aid those who have some patrimonial interest in the property suffices. To that extent the 'subjective' method of identifying the principal also subsumes certain 'objective' elements within it. Moreover, in situations of emergency which require a rapid response it is quite unrealistic to expect the intervener to entertain precise thoughts about who exactly will benefit. In such cases the principal is that person whom the intervener would reasonably have contemplated as the object of the assistance had the intervener been able to give the matter full consideration at leisure. In this context it is also possible to bring into focus considerations of what is customarily the case. Someone who protects a small child from the dangers of road traffic, for example, might intend in a case of doubt to act also for the child's parents.

Mistake about the person benefited. It is correspondingly not fatal to the existence of a benevolent intervention in another's affairs that the intervener is mistaken as to the person who is in fact benefited by the intervention. In the case of a change in the supposed benefited persons, identification of the legally relevant parties turns on the material rather than the personal intentions of the intervener.

Illustration 23
Someone who pulls a car out of a ditch, thinking that the car belongs to X, but who later learns that the car is in fact owned by Y, acts with the intention of furthering the interests of Y: the intervener acts with the intention of benefiting the owner of the car, albeit that this is coupled with a mistaken assumption as to the identity of the owner. The same applies even if it later turns out that the car actually belongs to the person who has pulled it out. However, in this situation the congruence of the person acting and the person benefited takes the case outside the scope of benevolent intervention.

Indirect beneficiaries are not principals within the sense of the Article. On the other hand, the boundary is reached when the intervener obviously intended to benefit a particular person and it subsequently emerges that third parties have also profited from the intervention

(or would have profited, had the intervention been successful). Third parties of that type, in the ordinary course of life, are not within the intervener's contemplated class of beneficiaries. Such third party beneficiaries come into consideration as principals at most in the special circumstances of V.–1:102 (Intervention to perform another's duty) (on which see the comments to that Article).

Illustration 24
A person who protects a neighbour's house from a fire does not generally act for the purpose of benefiting the insurance company with which the neighbour has a fire insurance policy and which would otherwise incur a financial liability. Someone who is injured while endeavouring to free a person from a glass window frame which has fallen on that person's head during the person's course of employment would not have a claim to compensation under this Article, in conjunction with V.–3:103 (Right to reparation), against the employee's insurer against industrial accidents. Someone who intends to save another person's life does not act for the benefit of that person's life insurance company or employer, etc.

Illustration 25
At one o'clock in the morning G hears a woman's cry for help from a derelict site. He hurries over to it, but before he is able to reach the injured woman within he is struck on the back of the head with a hammer by a maniac. When he comes to, G manages to drag himself out into the street and alert passers-by to the plight of the injured woman (who has likewise been attacked by the maniac with the hammer); the injured woman is then immediately brought to a hospital. G will only have a claim against the woman's health insurer for compensation for the loss of income suffered as a result of his injury (V.–3:103 (Right to reparation)) if the insurer is to be regarded as the principal in accordance with V.–1:102 (Intervention to perform another's duty). It would not follow from the present Article that the insurer is a principal.

Multiple principals. It is, however, possible to act for multiple principals simultaneously. Someone who takes care of another's young child (for example by driving the child to hospital) may act on behalf of both parents; someone who takes care of a house belonging to various co-owners will act for all of them, etc. In their relation to the intervener multiple principals are liable according to the general rules governing solidary liabilities.

D. A reasonable ground (paragraph (1)(a))

General. In the absence of an approval by the principal (cf. paragraph (1) sub-paragraph (b)), the rules on benevolent intervention in another's affairs are applicable only if the intervener has a reasonable ground for taking care of the principal's affairs (paragraph (1)(a)). Whether a party intervening in the affairs of another acts with reasonable grounds must be assessed objectively – from the point of view of a reasonable intervener; a reasonable belief in the existence of a justification for intervention can itself constitute a reasonable ground. What is decisive is whether a reasonable person in the actual situation of the intervener would consider that there was cause for intervening by means of a measure of the type undertaken. Hence a person who takes measures to rescue the principal's property will act with reasonable ground if a reasonable person, placed in the circumstances confronting the intervener, would consider the property to be endangered and that intervention to protect it was necessary, even if (for reasons which the intervener could not know) the property was not in fact at risk.

Defective and deficient performance of the intervention. However, a justified intervention in another's affairs is excluded, if the person intervening makes an irrational assessment as to the existence of a sound reason for acting. On the other hand, someone who does have a reasonable ground for intervention, but merely makes a mistake in carrying out the measures taken, remains a (justified) benevolent intervener. In such a case the intervener has simply breached a duty of care and is answerable for that in accordance with the rules in V.–2:102 (Reparation for damage caused by breach of duty) but does not forego the status of a benevolent intervener.

Illustration 26
Someone notices that a water pipe in a neighbour's house has burst and (without acting in such a way as to bind the principal directly) engages a plumber to make temporary repairs. If a bad choice of plumber is made, this may constitute a breach of the duty of care, but that does not alter the fact that there was a reasonable ground for intervention. Only in the unlikely event that the commission for the job went to a plumber to whom the neighbour would never have entrusted the repairs, even at the price of considerable water damage in the house, and the intervener knew or ought to have known this, would the required reasonable ground for the intervention fall away because, to the intervener's knowledge, the act of commissioning the objectionable plumber contradicts the wishes of the principal (paragraph (2)(b)). The situation is also different if the water damage threatens to spread to other buildings. In that case the contrary wishes of the principal do not stand in the way of acting as a justified benevolent intervener (V.–1:102 (Intervention to perform another's duty)).

No requirement of pre-existing legal relationship. Since it is one purpose of the law of benevolent intervention in another's affairs to provide an incentive towards socially desirable intervention, there is no call for setting down strict standards to be satisfied when posing the question why this particular intervener undertook the measure (instead of leaving the matter to another). It is not necessary that the intervener and the principal should stand in any close pre-existing legal or personal relationship to one another. In fact, if the latter is the case, the intervener may have had an intention to donate the services and V.–3:104 (Reduction or exclusion of intervener's rights) paragraph (1) may come into play. Equally conceivable are cases in which a reasonable ground for intervention is excluded from the outset because in the circumstances there was no reasonable solution for the difficulty which the intervener sought to eradicate. In that case one is concerned not with a mere defective mode of conducting the intervention, but with the absence of reasonable ground for the intervention. The distinction between the two (which is occasionally difficult and in the last resort must be drawn by the courts in the particular circumstances of the case) will depend on whether a reasonable person would have considered that there was cause for intervention of the sort undertaken by the intervener.

Illustration 27
A stranger in an unfamiliar town sees a window in a building blown in by a strong wind. The building appears to be empty and it looks as if it would be easy to force entry by the front door and temporarily secure the window. The stranger has no reasonable ground for intervening: but should take into account in particular the fact that the owner of the dwelling will not want to have a complete stranger enter the house and damage the door just because such a comparatively minor problem has arisen.

Illustration 28
A fire breaks out in a chemical factory. If a private individual notifies the fire service, that would be to act with reasonable grounds. If, on the other hand, the individual attempts to extinguish the fire personally after the fire brigade has arrived on the scene, that would not be to act with reasonable grounds. If the individual makes an attempt to extinguish the fire before the fire service arrives, it will depend on the circumstances of the case whether there were reasonable grounds. If an enormous blaze has already developed it would be perfectly senseless for a private individual to make any attempt to extinguish the fire. Were the fire to be a small one, however, it could possibly be sensible to tackle it oneself.

A 'reasonable' ground. A definition of the concept of "reasonable" can be found in Annex 1. What is "reasonable" is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices.

Some guidance in the following rules. Beyond this general rule, and unaffected by the rule in paragraph (2), the following provisions offer some additional particularised guidance as to when a person acts as an intervener with reasonable ground. In particular, rendering assistance in a case of emergency is (as a rule) regarded as a justified intervention. That emerges automatically from V.–3:103 (Right to reparation), the provisions of which are of direct application only to the right to reparation, but can also be enlisted for another purpose as a concrete illustration of the concept of "reasonable ground". The Article envisages that the intervener may be "acting to protect the principal, or the principal's property or interests, against danger". Equally, it may be, for example, that a reasonable ground for stepping in arises only when the acting party has learned on inquiry that the principal, although obliged to act due to some overriding public interest, nonetheless intends to remain passive: see V.–1:102 (Intervention to perform another's duty).

E. Want of respect for the principal's wishes (paragraph (2))

Reasonable ground to act absent. Putting to one side the exceptional situations designated in paragraph (1)(b) of the Article (approval of act by principal) and V.–1:102 (Intervention to perform another's duty), a person does not act as a justified intervener by rashly meddling in the affairs of another. Such is the case when it has been made known to the intermeddler that the interference is against the wishes of the person assisted or the intermeddler could reasonably be expected to know this. This last possibility arises when the intervener could have asked the principal whether the principal was agreeable to the intervention, but failed to pose that question. In such a situation the intermeddler, according to the rules in paragraph (2)(a), acts without a reasonable ground. Should the intermeddler cause legally relevant damage to the other party as a result of the intervention, there may be a non-contractual liability for the damage under Book VI. The same applies if the intervener could not ask the principal but for other reasons knew or should have known that the principal was not inclined to allow such intervention in the matter at hand (paragraph (2) sub-paragraph (b)).

Where the wishes of the principal are not binding. There are, however, exceptional situations in which the intervener acts with reasonable ground, although the principal has made manifest a lack of agreement to an intervention. Leaving to one side those cases in which the principal behaves in bad faith in a way which contradicts what is said (so that the latter does not truly represent the principal's wishes), one is concerned here as a rule with

situations in which the intervener is acting for the benefit of a principal whose wishes an intervener acting responsibly and with due care would not heed. This is not to be regarded as a case of giving insufficient respect to another's right to free determination of their will. Rather the wishes of persons who by reason of mental disability, the influence of drugs or alcohol, or their minority are unable to express themselves in a way which would carry any weight with a reasonable intervener are not fundamentally opposed to a justified management of another's affairs. That goes for sub-paragraph (a) as much as for sub-paragraph (b) of paragraph (2). The wishes of someone intent on committing suicide are also as a general rule not binding on an intervener – at any rate not when the suicidal intent is the consequence of a psychiatric condition or mental imbalance or some other disturbance of the capacity for self-determination. Where devotees of a particular religious community are fundamentally opposed to blood transfusion on religious grounds, that wish should be respected as a matter of principle. The matter is different, however, as regards their wish as parents to allow their child to die in preference to undergoing a medically warranted blood transfusion. This wish is one which is not to be heeded if the circumstances are such that there is not enough time for taking blood from the child for later use when needed. That is because the wishes of parents to deny their children, for religious reasons, a medical treatment involving a comparatively slim risk to health do not generate an obligation to respect them.

Overriding public interest. A further special situation in which the wishes of the principal are not opposed to a justified benevolent intervention is the subject matter of V.–1:102 (Intervention to perform another's duty). In such a case (as a matter of law) the third party is to be regarded as principal, whether or not the recipient is also principal. See as to this special situation the comments to V.–1:102 and to V.–2:101 (Duties during intervention) paragraph (1)(b).

Priority of the principal's free determination of will. In all legal systems of the EU the intervener is subject to the duty (regarded as self-evident) to indicate to the principal the business being managed (which business the latter may then take over). This is likewise the fundamental position adopted in these Articles (V.–2:101 (Duties during intervention) paragraph (1)(c)). In contrast to that provision (which is focused on enduring measures undertaken by the intervener), and also in contrast to V.–2:103 (Obligations after intervention) paragraph (1) (which concerns the information provided by the intervener at the conclusion of the intervention

Paragraph (2) sub-paragraph (a). Paragraph (2)(a) expresses the rule that a person who in the circumstances of the case has a reasonable opportunity of asking the principal whether help is wanted and fails to use it only acts as a justified intervener if the principal later approves the act (paragraph (1) sub-paragraph (b)). For these purposes a reasonable opportunity of contacting the principal suffices. One can imagine a multitude of situations in which the principal would be pleased about the assistance rendered by an intermeddler, but (quite rightly) filled with indignation at not having been contacted despite the fact that it had been possible to do so. In such cases the rights of independence and self-determination deserve priority over the protection provided by a well-meaning, but rashly intermeddling fellow citizen. The requirement for and the possibility of a subsequent approval give due expression to those basic values. Only the approval of the act done creates in such cases the relationship of intervener and principal with its preferential legal position for the intervener and a legal position for the principal which differs clearly from that of an enriched party under the law of unjustified enrichment.

Illustration 29
One Saturday afternoon, G trims her garden hedge. Out of pure neighbourliness she goes on to cut the hedge belonging to her absent next door neighbour without bothering to ask him for permission. G is not a benevolent intervener.

The intervener is unable to contact the principal. However, it would be wrong to infer from sub-paragraph (a) the converse conclusion that a reasonable ground for intervention will always exist when the intervener is not able to contact the principal. In this instance too it remains of course the case that there must be reasonable cause for intervention by the intervener having regard to all the other circumstances of the case.

Illustration 30
A knows from his friend B that B has always longed to acquire a particular rare (and correspondingly expensive) stamp to augment his collection. While on holiday A suddenly notices that this stamp is on sale and, on the spur of the moment, buys it then and there. A has entered into this transaction at his own risk, even if he had no opportunity to reach B by telephone before deciding whether to buy. That is because an action of this type could have been postponed, or in other words it was unreasonable to act *without a mandate*. Should B have changed his mind in the meantime and accordingly chooses not to approve the purchase (V.–1:101(1)(b)), he is not obliged either to take the stamp off A's hands or to reimburse A for the sum he expended in purchase.

Illustration 31
A's neighbour, N, has failed to pay a telephone bill with due punctuality. That in itself is not a reasonable ground for A to pay the bill in N's stead. However, the matter might be different if the telephone company threatened to disconnect and A knew that N is dependent on maintaining a telephone connection intact. Only in this latter situation does the matter turn on the additional requirement in paragraph (2)(a).

Positive steps required. The benevolent intervener must go so far as to undertake positive steps to discover what the wishes of the principal are or would be if this is something which, according to the wording of the Article, there was "a reasonable opportunity to discover". In view of the modern possibilities of communication (not least, nowadays, the ever increasing availability of mobile telecommunication and electronic mail), the field of application for the law of benevolent intervention has come to occupy a considerably shrunken domain. The easier it is to get in contact with the principal, the lower the probability that a justified benevolent intervention will occur if no attempt to communicate is made.

Reasonable opportunity to discover the principal's wishes. The effort which must be expended in order to ascertain the actual wishes of the principal depends on the circumstances of the particular case. There must be a reasonable relationship between the significance and urgency of the measure on the one hand and the time and cost expended in seeking out the principal on the other hand. Everything turns on a sense of proportion. There are cases in which the measure called for by the situation is so pressing that no time remains even to pose the question; there are also cases in which it would be unreasonable to waste an hour telephoning the other side of the world in order to obtain permission for effecting provisional repairs; and there are contrasting cases in which one can simply wait.

Contacting the principal can in itself amount to a justified benevolent intervention. The attempt to reach the principal and to solicit a decision (an endeavour which in some circumstances might be very cost intensive in itself) will as a general rule amount to an act capable of constituting benevolent intervention in another's affairs. If it was reasonable in the circumstances to search for the principal and if the expenditure sustained in making the attempt is incurred reasonably within the meaning of V.–3:101 (Right to indemnification or reimbursement), then a claim to reimbursement arises, irrespective of whether in the end it proved possible to reach the principal (or, if reached, to get approval). That demonstrates, on the other hand, that as a rule, in the absence of special circumstances, one may not proceed to undertake the substantive act of assistance before making that attempt to obtain the principal's instructions where such an attempt is sensible in the circumstances. Of course an attempt to solicit information which, on a reasonable estimation, would appear at the outset to be pointless need not be commenced (or, as the case may turn out, repeated). That is because the costs of such an attempt would not be incurred reasonably within the meaning of V.–3:101 and no liability on the part of the principal to reimburse would arise.

Benevolent intervention or contract? Whether a contract comes into being between intervener and principal if the principal requests the intervener, in response to the latter's inquiry, to commence (or continue) the undertaking is to be determined in accordance with Book II; it does not need to be decided here. Should a contract be concluded, the rules of benevolent intervention in another's affairs will not of course apply from this point in time because the intervener will be contractually obliged to provide the service (V.–1:103 (Exclusions) sub-paragraph (a)). It is also possible that the terms of the contract might extend to the act carried out (as a benevolent intervention) before the contract was concluded – thus substituting, for example, a contractual right to reimbursement of expenditure for that contained in V.–3:101 (Right to indemnification or reimbursement) in respect of the intervention preceding the conclusion of the contract. Presumably, unless such an agreement can be inferred from the context, something more than a mere request to continue the act would be required in order that the contractual agreement should have such an extensive effect.

Paragraph (2) sub-paragraph (b). Even if the intervener had no reasonable opportunity in the circumstances to contact the principal, the intervener must do what is possible to satisfy the known wishes or probable wishes of the principal. This is the rule contained in paragraph (2) sub-paragraph (b).

Actual knowledge of the contrary wishes of the principal. It follows as a fundamental principle that a person does not act as a justified intervener if the person disregards the known contrary wishes of the principal. Whether or not those wishes are reasonable plays no role. Every person is entitled to live life as they choose within the bounds of what is allowed. One is not obliged to yield to judgements volunteered by others – even if one's own viewpoint is highly eccentric.

> *Illustration 32*
> The industrial injuries insurer and the liability insurer fall into a dispute over who will bear responsibility to indemnify in respect of the damage resulting from an accident. There is much in favour of the view that it is a case for a claim under the liability insurance. The industrial injuries insurer therefore demands that payment be made to the entitled injured party. The liability insurer issues a written refusal to do so, insisting (albeit, from the point of view of a neutral observer, somewhat obstinately)

that there must be a further scrutiny of the facts of the case. The industrial injuries insurer thereupon pays the injured person. That insurer cannot turn to the liabilities insurer for payment with a claim founded on the notion that they have managed the affairs of the liability insurer. The problem here is one of settlement of liabilities which falls under the law of unjustified enrichment and not the law of benevolent intervention in another's affairs.

Negligent failure to appreciate the principal's wishes. A justified intervention is excluded not only when the intervener positively knows that acting would contradict the wishes of the principal. The benevolent intervener must also contemplate ("can reasonably be expected to know") what might represent the presumed wishes of the principal. The significance of this rule, when set against the background of sub-paragraph (a) (i.e. the obligation to take positive steps to discover the principal's wishes), is perhaps not especially great, but as part of the overall picture is not to be overlooked. When the principal cannot be contacted, the intervener must (still) consider what a reasonable person in the situation would undertake in order to do justice to the principal's wishes.

Standard of care. The standard of care is an objective one (as in the law of non-contractual liability for damage under Book VI). There may admittedly be circumstances, of course, in which a quiet consideration of the matter in hand is made decidedly difficult. The same problem arises when it comes to determining whether an intervener has acted with care (V.–2:101 (Duties during intervention) paragraph (a)) which assumes that there *is* a benevolent intervention in another's affairs and resolves the subordinate question whether the intervener is in breach of duty in the manner of performing. The degree of care required depends on the circumstances; in particular, in emergency cases account must be taken of the fact that the intervener will most likely have had hardly any time for reflection before making a decision. On the other hand, an individual's personal ignorance of matters of general knowledge (which it is legitimate to expect a would-be intervener to know) will not provide an excuse.

Illustration 33
An armed robbery takes place in the foyer of a bank. A customer leaps into action and attempts to disarm the bank robber. In the struggle a shot is fired and the bullet lodges in the customer's knee. The customer has not acted as a justified intervener for the benefit of the bank, because the customer could reasonably be expected to know that the bank would have instructed its employees not to defend its stock of cash at the risk of life and limb.

Acting in ignorance of the principal's wishes, but without negligent failure to heed them. The benevolent intervener does not act without reasonable grounds merely because there is no real consent of the principal to the act. Paragraph (1) proceeds essentially on the basis that a reasonable ground to act is unaffected by the absence of actual consent as such and, indeed, is to be assessed given an absence of actual consent. The purpose of paragraph (2) is to preclude the existence of a reasonable ground where the wishes of the principal are disregarded, not properly considered or knowingly contradicted. What is decisive is whether the intervener knew, should have known or in the circumstances should have ascertained the principal's contrary wishes. Where the intervener had no reasonable opportunity to inquire as to the principal's wishes, however, and neither knew nor ought to have known that the principal did not want the intervention, the intervener nevertheless acts lawfully if according to the standard of paragraph (1) there was a reasonable ground for intervening. In those (infrequent) cases the principal's wishes, though they are in fact contrary to the act undertaken, do not

preclude a justified benevolent intervention. If the principal subsequently disapproves of the intervention, which according to the information obtainable for the intervener at the material time was adequate and reasonable, this retrospective disapproval does not alter the fact that the benevolent intervention is justified. If this were otherwise almost every principal could escape from an obligation to compensate which has already arisen.

F. Approval by the principal (paragraph (1)(b))

Significance and consequences of an approval by the principal. Sub-paragraph (b) of paragraph (1) has the effect that an approval by the principal transforms an originally unreasonable (and therefore unjustified) intervention into a justified benevolent intervention in another's affairs. An approval can be effected by any express or implied unilateral manifestation of an intention on the part of the principal that legal relations with the intervener in respect of the act be governed by the rules of benevolent intervention – in other words, that the legal rights and duties between the parties should be those which would have existed had there been at the outset a reasonable ground for acting. All that is required, therefore, is an indication by the principal of an intention to be bound by the act. The requirement remains, however, that the intervener acted with a view predominantly to benefit another. If this condition is missing the rights and duties of the participants fall to be determined by the law on non-contractual liability for damage under Book VI and the law of unjustified enrichment.

Legal nature of the approval. The approval by the principal is a statement of intention. The rules of Book II apply correspondingly to this manifestation of intention. That is the case in particular in relation to I.–1:109 (Notice).

An important case. An important case, perhaps even the most frequent one, in which the rule on approval applies is the situation in which, before acting, the intervener could have asked the principal and therefore ought to have done so. If the intervener in such a case has in fact acted in a way that accords with the principal's wishes, approval under paragraph (1)(b) at the principal's election is only possible if the intervener has acted with the predominant intention to benefit the principal. The circumstance that the intervener intended to act for the principal's benefit must assume some external manifestation susceptible to proof.

Approval without such undue delay as would adversely affect the intervener. As a matter of principle, approval is not restricted to a precise period of time. It is important only that the principal approves the act without such undue delay as would adversely affect the intervener. The person whom the intervener intended to benefit has the opportunity of deciding whether the intervener had a good ground for intervening. However, that right can only subsist for an indefinite period of time if (i) the principal was satisfied with the act, *and* (ii) approval at the time when it is given would still be to the benefit of the intervener. If the latter is not the case, the right to give approval has expired. It should have been exercised (if at all) promptly, that is to say, without what in the circumstances of the case would amount to an unreasonable delay. The underlying policy of the rule, in other words, is to protect the intervener from legal uncertainty. The is entitled to know what the position is.

Illustration 34
The facts are the same as in illustration 30. When A offers B the stamp and B refuses to reimburse the purchase price, A is free to sell the stamp to a third party. He is equally free to add it to his own stamp collection, if he has one. B no longer has the

(inchoate) right to demand the stamp from A. From this point on, if B changes his mind, B can procure the stamp only on the same basis as any third party – by negotiating for purchase of the stamp a contractual price agreeable to both parties.

Approval and contract. The provisions of this Book are not concerned with whether the approval has contractual effect as between intervener and principal. It might be possible to construe the act of the intervener as an offer (in performance) made to the principal which the principal accepts by approval. Whether that analysis is apt must be determined in the context of particular facts. The question is the same as that which arises in the context of paragraph (2)(a) when an intervener asks the principal what the principal wants. The general rule always applies that if a contract comes into existence between the parties, the rules of the law of benevolent intervention are ousted so far as the contract extends. See V.–1:103 (Exclusions) sub-paragraph (a).

Approval does not, as a rule, create a contract. It is clear at least that in many cases an approval could not create a valid contract. That might be because the intervener, while intending to benefit the principal, lacked the requisite intention to be legally bound when performing the act, and the principal when giving approval may mean to be legally bound but not *by way of contract* (cf. II.–4:102 (How intention is determined)). Equally the intervener may lack the requisite legal capacity to conclude a binding contract. For these reasons some provision within the rules of benevolent intervention itself is necessary as a rule of general application. It does not preclude the possibility that the parties might regulate their relationship by contract and thus displace the default rule that approval effects a retrospective creation of an intervener-principal relationship.

All other requirements of paragraph (1) remain unaffected. All other requirements of paragraph (1) must of course be satisfied in order for approval to create an intervener-principal relationship (see Comment F above). Actions carried out for one's own benefit are only susceptible to approval within the law of representation and not within the law of benevolent intervention in another's affairs. Someone who has acted for another, on the other hand, must accept the risk of being held to that altruistic intention. It follows, therefore, that such a person has to surrender to the benefited party everything acquired due to the benevolent intervention if the principal ratifies the undertaking. If the principal chooses to ratify it, the principal must of course bear the associated burdens.

NOTES

I. Prevalence and notion of the law of benevolent intervention (negotiorum gestio) in general

1. The Common Law in ENGLAND and IRELAND has never developed a discrete concept of a legal relationship arising from benevolent intervention in another's affairs (For details, and articulate criticism of this situation, see *Birks*, 24 (1971) CurrLegProbl 110-132). The social potential for conflict, which the Codes of continental Europe address by means of the concept of *negotiorum gestio*, is resolved by a variety of completely different legal instruments in the Common Law. This in turn is due to the fact that the general rule is shaped differently: whereas the systems of continental Europe in general accept that expenses incurred in another's interest are due compensation even though there was no duty to perform and try to keep this

general rule within reasonable limits, the Common Law has chosen the opposite starting point. As a general rule expenses incurred in the interest of a third party, but where there is no underlying duty to perform, do not give rise to a claim to compensation (*Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch. D 234*; In re Cleadon Trust Ltd., Re* [1939] Ch 286; approved by *Crantrave Ltd. v. Lloyds Bank plc.* [2000] QB 917. For details see *v. Bar*, FS Werner Lorenz (2001), 441-461). Accordingly the main focus is on the exceptions to this rule. The absence of a free-standing and cohesive law of *negotiorum gestio* or necessitous intervention in the Common Law has not passed without criticism (see, e. g., *Diamond*, Contract and Tort, 70) and there is not yet a clear consensus about the extent to which the law provides comparable legal redress for the intervener, although the trend seems to favour a more expansive restitutionary liability than the case law has hitherto acknowledged (see *Allen*, 40 (1931) Yale LJ 331, 374 (no equivalent); *Williston*, 22 (1944) Can. Bar Rev. 492, 508 (English law has not adopted *negotiorum gestio* in its entirety, but is not hostile to it in principle); *Marasinghe*, 8 (1976) Ottawa L Rev 573, 574 and 587 (English law has always recognised the doctrine under one heading or another; there is a right to restitution in cases where civilians would grant *actio negotiorum gestorum contraria*); *McCamus*, 11 (1979) Ottawa L Rev 297, 297 ("it seems to have been accepted as a general principle that one who, being an appropriate person to do so, responds to another's emergency by supplying (or by arranging at his own expense for the supply of) needed goods, services, or money, is entitled to restitution for the value of these benefits, provided that their conferral was not intended as a gift"); *Goff and Jones*, Restitution[6], para. 17-026, regretting that a general doctrine of necessitous intervention has not yet developed). Moreover, even where the Common Law does not recognise rights to reimbursement or remuneration, a reasonable ground for action (typically formulated enigmatically in terms of 'necessity') does at least render what is done lawful in relation to the affected party: cf. *Sorrell v. Paget* [1950] 1 KB 252 (farmer taking in a neighbouring farmer's heifer, which had strayed on to an adjacent railway line, did not commit a tort in taking possession as he acted in the interest of the owner and the railway company), and Children Act 1989, s. 3(5), which provides that a person without parental responsibility, but having care of a child may do what is reasonable to safeguard or promote the child's welfare.

2. Those jurisdictions which recognise a distinct legal relationship arising from the justified management of another's affairs formulate the requirements for its existence by and large in similar fashion. The most recent definition may be found in the ESTONIAN LOA § 1018 (Definition of *negotiorum gestio*). It reads: "(1) If a person (*negotiorum gestor*) acts for the benefit of another person (principal) without being granted the right or obligated by the principal to perform the act, the *negotiorum gestor* has the rights and obligations provided in §§ 1019-1023 of this Act if: (i) the principal approves of the act; (ii) the act corresponds to the interests and actual or presumed wishes of the principal; (iii) in the case of failure to act, the principal's obligation arising from law to maintain a third party would not be performed in a timely manner or the act is essential in the public interests for another reason. (2) A case where a person has no desire to act for the benefit of another person is not deemed to be *negotiorum gestio*." (This definition is unusual in requiring that the intervention has in fact resulted in benefit to the principal). DUTCH CC art. 6:198 defines *negotiorum gestio (zaakwaarneming)* as "the intentional undertaking of an interest of another, with knowledge and on reasonable grounds, without authority derived under a transaction or under a legal relationship provided for elsewhere in the law" (translation by *Haanappel* et al., Netherlands Business Legislation).

PORTUGUESE CC art. 464 reads: "There is a *gestão de negócios* when, without being authorised to do so, a person assumes the direction of another's business in the interest and for the account of the principal concerned". Here too *gestão de negócios* is recognised as a source of a legal relationship (*fontes das obrigações)*.

3. Closely related to Portuguese law is Italian law. According to ITALIAN CC art. 1173 ("Sources of Obligations") obligations may arise from contracts, unlawful acts or any other conduct or fact which according to law is apt to give rise to an obligation. This includes benevolent intervention (CC art. 2028 et seq.). The provisions are applicable subject to two requirements: (i) the absence of a pre-existing obligation (so-called *spontaneità*) and (ii) the link to another's sphere of interest (so-called *alienità dell´affare*). Further requirements are *absentia et inscientia domini, utiliter coeptum* and an *animus aliena negotia gerendi* (*Breccia*, La gestione d´affari[2], 857-860).

4. GREEK law defines benevolent intervention as the management of another's affairs without an authority or duty on the part of the intervener. As a general rule, such acts constitute undesired interference with the rights and interests of another (Georgiades and Stathopoulos [-*Papanikolaou*] Pref. to Artt. 730-740, no. 1). Exceptionally, however, they may be the emanation of an altruistic commitment for a fellow human being. In this case they fall within the scope of application of Greek CC arts. 730-740 on benevolent intervention. This is an *ex lege* legal relationship: it arises by operation of law and not from a contract. Attempts to construe the law of benevolent intervention as 'quasi-contractual' (see, for example, *Filios*, Enochiko Dikaio I/2, 192) have been rejected in the main as unnecessary, because interveners lacking legal capacity or restricted in their legal capacity are already sufficiently protected by Greek CC art. 735. The location of the law of benevolent intervention, as a matter of systematics, within contract law is justified by reference to substantive similarity with the law of mandate – in particular as regards the legal consequences (Georgiades and Stathopoulos [-*Papanikolaou*], Pref. to Artt. 730-740, no. 12).

5. The GERMAN CC sets out the law of benevolent intervention in its second book in §§ 677-687. As expressed in CC § 677 an act qualifies as benevolent intervention in another's affairs if a person (the intervener) takes care of some matter for another (the principal) without having been authorised by him or being otherwise entitled to do so in relation to him. An unauthorised management of another's affair is in general determined by the fact that a person attends to another's interest without request, whereby the expenses are incurred by the intervener and the benefit obtained by the principal. A balancing of interests seems to dictate protection for the principal against officious intermeddling or acts serving an intermeddler's own interests (CC §§ 677-681), but equally to grant an intervener whose act constitutes an emanation of community spirit legal security (CC §§ 683-686).

6. The relevant rules of the SPANISH CC which originates from almost the same time, may be found in arts. 1888 ff. In addition provisions on the law of benevolent intervention are comprised in the provincial law of the Foral Community of Navarra (*Fuero Nuevo de Navarra*, Ley 560 and 561 [Act 1/1973 of 1 March, which has adopted the *Compilación del Derecho Civil Foral de Navarra*]). There is no concise definition as there is in Estonian, Dutch and Portuguese law. The introductory phrase of SPANISH CC art. 1888 reads: "A person who consciously undertakes to manage or administer the affairs of another without being authorised by this other person, is obliged …" and ley 560 of the *Fuero Nuevo de Navarra* states: "If a person undertakes the management of another's affairs in the interest of that other without being authorised, it is obliged…". The *Tribunal Supremo* in its case law relies on a very narrow concept of benevolent intervention. Benevolent intervention is held to require

"that the acts, which aim at the management of another's neglected affairs must be undertaken spontaneously, without authorisation or knowledge of the principal and therefore without either explicit or tacit approval and without his objection, with an intention free of interest but without the aim of conferring a pure gift and without the intention to profit" (TS 2 February 1954, RAJ 1954 no. 322 p. 198). Spanish legal writing has voiced the criticism that the case law only very reluctantly resorts to the law of benevolent intervention (*Pasquau Liaño,* La gestión de negocios ajenos, 297). It is therefore of very limited practical importance. The *Tribunal Supremo* prefers the application of other concepts (*Pasquau Liaño*, loc.cit. 301). It is important to state in this context that the ratification of an unauthorised benevolent intervention results in the application of the law of mandate (CC art. 1892). Since the courts are comparatively eager to accept that an intervention has been approved, the law of mandate remains a focal point.

7. The BELGIAN, FRENCH and LUXEMBOURG CC regulate the concept of benevolent intervention in arts. 1372–1375. The *Code Napoléon* does not provide for a comprehensive definition of *gestion d´affaires.* An extensive range of similar definitions may be found in legal commentaries. For BELGIAN law, for example, it is maintained that '*zaakwaarnemin*' is a voluntary act – which is not intended to be a benefaction and is not self-interested – in taking care of the interests of another without being under a statutory duty, a duty arising by operation of law, or a contractual duty to do so; it may be with or without the knowledge of the other provided the *zaakwaarnemer* might reasonably assume that the other would have acted in a similar way (*Van Gerven*, Verbintenissenrecht II[7], 214). According to *de Page*, Droit Civil Belge II[3], no. 1069 p. 1129, it is an act of *gestion d´affaires* if a person who, without being under a contractual, statutory or other duty, intervenes in the affairs of another and acts, or effects a juridical act, on that other's behalf and in that other's interest so as to confer benefit. The intervention at its outset must be carried out without the prior knowledge of the principal. For FRENCH law a similar definition is put forward: a benevolent intervention takes place where a person spontaneously and in a reasonable way intervenes in the affairs of another in order to manage them in the interest of that other (JClCiv [-*Bout*], Art. 1372-1375, V° Quasi-Contrats. Gestion d´affaires – Conditions d´existence, Fasc. 10 no. 1). The MALTESE CC follows the French model (CC art. 1013).

8. Like all other early European codifications the AUSTRIAN CC does not contain any statutory definition. According to Klang (-*Stanzl*), ABGB IV/1[2], 890 the prerequisites of a benevolent intervention are as follows: (i) it must concern another's affairs, (ii) there must be an absence of authority to intervene and (iii) there must be an intention to act on another's behalf. In more recent literature the following definition is offered: benevolent intervention is an act at one's own instigation whereby the intervener undertakes to manage another's affair with the intention to advance that other's interests (Schwimann [-*Apathy*] ABGB V[2], § 1035 no. 1; *Koziol and Welser*, Grundriss II[12], 364). HUNGARIAN CC § 484 expresses the same concept in these words: "A person proceeding in a matter on behalf of another person without being authorised thereto by agency or otherwise shall be obliged to handle the matter as required by the interest and probable intent of the person in whose favour he has intervened". SLOVENIAN Code of Obligations art. 199 states that the unsolicited intervention in the affairs of another is only permissible if it could not be postponed without the other suffering serious damage or foregoing an obvious advantage. Thus necessity or usefulness belong to the prerequisites for a justified benevolent intervention.

9. This in turn comes close to the classical definitions of *negotiorum gestio* in SCOTTISH law: "The management of the affairs of one who is absent or incapacitated from attending his affairs, spontaneously undertaken without his knowledge, and on the presumption that he would, if aware of the circumstances, have given a mandate for such interference" (*Bell*, Rule 540). *Erskine* 323 in 1816 wrote: "*Negotiorum gestio* forms those obligations which arise from the management of a person's affairs in his absence, by another without a mandate." And *Stair* (Book I Title 8 § 3) wrote in 1693: "Likewise the obligation betwixt negotiators and these, to whose behalf they negotiate, ties to recompense what others (without our command, knowledge, or presence), have necessarily or profitably done for carrying on of our affairs, l. 2.ff neg. gest." [D. 3. 5. 2]).

10. The NORDIC COUNTRIES not only lack a general statutory regime for the law of benevolent intervention; the concept hardly plays any role in their contemporary court practice. The starting point for SWEDEN and FINLAND is Ccom chap. 18 § 10. In DANISH law not even such provisions exist. The (mainly) older Danish literature therefore as a rule bases itself on the Roman law concept of *negotiorum gestio* (*Lassen*, Handlinger paa fremmed formueretsomraade i romersk og dansk ret, 1880, 279-319; *idem*, Haandbog i obligationsretten, Speciel del, 1897, 851-872; *idem*, Lærebog i obligationsrettens specielle del, 1912, 422-439; cf. *Håstad*, Tjänster utan uppdrag, 36 et seq.). In older Swedish literature too the view is maintained on a number of occasions that a self-standing concept of benevolent intervention exists in addition to the specific rules, mentioned earlier, which are to be found in the Commercial Code (for references see *Håstad*, loc.cit. 40 et seq.). In contemporary scholarship *Håstad's* influential monograph is of major importance. It demonstrates that the law of benevolent intervention could be inferred from general principles of law by means of analogy. Essentially three groups of cases fall to be distinguished in which the principal is not in a position to attend to his or her own affairs, namely – as *Håstad* labels them – 'joint interest cases', 'trust cases' and 'possession cases'.

II. The activities covered

11. In the continental European legal systems it has been stressed time and again that the law of benevolent intervention covers a broad field of activities. Fundamentally it is only strictly personal acts which are excluded. The subject-matter of benevolent intervention under PORTUGUESE law can accordingly be either juridical acts or physical acts. It is not a necessary requirement that the act serves to protect the principal's assets; the interest in question may also be of a 'moral or spiritual nature' (as it is expressed) such as, for example, health, reputation or life and limb (*Antunes Varela*, Obrigações[10], 452). Juridical acts include juridical acts in a strict sense (*negócios jurídicos em sentido estrito*) and unilateral juridical acts which are not legal transactions (*actos jurídicos não negociais*), such as acceptance of payment or collection and discharge of debts (*Almeida Costa*, Obrigações[9], 433; *Antunes Varela*, loc.cit. 451).

12. The field of application of the law of benevolent intervention under GERMAN law is equally broad. The concept of *Geschäftsbesorgung* (CC § 677) covers all acts, whether of a juridical or physical nature and whether economic or non-economic in nature (Staudinger [-*Wittmann*], BGB[13], Pref. to §§ 677 ff, no. 20), which do not merely consist of an omission. The intervener need not undertake the act personally, but may instruct employees or third parties (BGH 25 November 1976, BGHZ 67, 368; Palandt [-*Sprau*], BGB[63], § 677, no. 2). Acts of a very short duration may also be considered (*Kropholler*, Studienkommentar BGB[6], § 677, no. 4). Examples are turning a steering wheel to effect a swerve (BGH 27 November 1962, BGHZ 38, 270, 275), giving

medical assistance to an unconscious accident victim or making efforts to procure necessary medical assistance for the injured person (BGH 7 November 1960, BGHZ 33, 251), halting a motor vehicle in order to draw the driver's attention to the dangerous condition of the vehicle (BGH 16 March 1965, BGHZ 43, 188), and hindering unlawful interference with another's property (BGH 22 March 1966, NJW 1966, 1360). According to the case law of the BGH it is even the case that 'where a legal transaction is void due to infringement of a statutory prohibition or because it is contrary to *bonos mores* resort may be had to the law of benevolent intervention' (BGH 20 October 1996, NJW 1997, 47 with numerous further references). The intervener in this case, however, is not entitled to reimbursement of expenses (BGH loc.cit.).

13. In GREEK law too it is generally considered that the concept of undertaking (another's) business is to be understood in a wide sense (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 730, no. 2; ErmAK [-*Sakketas*], Art. 730, no. 14). It covers all types of activities and therefore, besides juridical acts, includes rendering services and other acts (*Papanikolaou* and *Sakketas* loc.cit.), such as for instance transporting an injured person to hospital (*Kavkas and Kavkas*, Enochikon Dikaion II/2, 7). Undertaking (another's business) may take the form of an intervener (who is not himself at fault) placing himself in peril in road traffic to prevent an impending accident (*Papanikolaou* loc.cit. Art. 736 nos. 2 and 11). On the other hand, mere omissions are excluded (*Papanikolaou* loc.cit. no. 3; *Sakketas* loc.cit. no. 15), as are acts which are contrary to law or *bonos mores* (*Papanikolaou* loc.cit. no. 12; *Bosdas*, NoB 18/1970, 769, 772; *Sakketas* loc.cit. no. 24; *Kavkas and Kavkas* loc.cit. 8) and strictly personal acts, i. e. those which do not allow for representation (*Kavkas and Kavkas* loc.cit.). The latter includes acts relating to proceedings (instituting legal proceedings and replying to a statement of claim in another's name) (CA Thessaloniki 2823/1990 EllDik 33/1992, p. 1226; CA Athens 1210/1987 EllDik 29/1988, p. 1606; CA Athens 202/1975 NoB 23/1975, p. 504; CA Thessaloniki 258/1977 Arm 31/1977, p. 385; however, the contrary was held in Areopag 28/1977, NoB 25/1977, p. 959 and as to outcome likewise Areopag 981/1973 NoB 22/1974, p. 509).

14. As regards AUSTRIAN law it is undisputed that both juridical acts and physical acts can be the subject-matter of benevolent intervention (Schwimann [-*Apathy*], ABGB V^2, § 1035 no. 4; Rummel [-*Rummel*], ABGB I^3, § 1035 no. 2, *Meissel*, GoA, 58). Case law supplies a variety of examples (conclusion of a sale contract: OGH 17 May 1950, SZ 23/159; giving a guarantee: OGH 5 March 1963, EvBl 1963/309; OGH 19 October 1976, SZ 49/121; conduct of litigation by a solidary debtor: OGH 24 November 1997, SZ 70/241 [see for details on this problem *Pochmarski/Strauss*, JBl 2002, 353-374]; self-help remedy of sale of perishable goods: OGH 12 April 1950, SZ 23/95; snow clearance: OGH 9 December 1971, JBl 1972, 324; killing an injured dog: OGH 4 November 1981, EvBl 1982/83). According to Klang (-*Stanzl*), ABGB IV/1^2, 890, however, the act must be lawful. The discharge of debts of the principal may also be an act of benevolent intervention. If the intervener pays in his or her own name, the provisions of benevolent intervention supplement the rules on both assignment by operation of law (CC § 1358) and the discharge of another's debt (CC § 1422) (Rummel [-*Rummel*], ABGB I^3 § 1035 no. 3). Acts to protect the principal's person were regarded by the drafters of the ABGB as naturally falling within the scope of benevolent intervention (*v. Zeiller* III § 1036 no. 2 p. 318).

15. In FRANCE, BELGIUM and LUXEMBOURG similar basic principles are accepted. The intervention here may consist either of juridical acts (*actes juridiques*) or physical acts (*actes matériels)* (*Flour/Aubert/Savaux*, Le fait juridique^{10}, no. 8 p. 10-11; *de Page*, Droit Civil Belge II^3, no. 1076 p. 1143). However, mere omissions (*abstentions*)

are excluded from the scope of application (*le Tourneau*, RépDrCiv, VI, v° Gestion d´affaires [2002], no. 50) as are acts which require the principal personally to act or make an evaluation (*Marty and Raynaud*, Obligations I[2], no. 381 p. 394-395 and respectively *Paulus*, Zaakwaarneming, no. 34 p. 33-34 [with the common example of marriage]). The discharge of another's debts too is considered to be within the category of *actes juridiques* (cf. for FRANCE Cass.civ. 11 February 1986, Bull.civ. 1986, I, no. 23 and for BELGIUM Cass. 2 July 1948, Pas. 1948, I, p. 422), and *actes matériels* include acts for the protection of the principal's person (*Flour/Aubert/Savaux*, loc.cit. no. 8 p. 11; CA Liège 26 October 1992, JLMB 1993, 798).

16. The SPANISH CC does not explicitly set out which activities are covered by the law of benevolent intervention. Although the law of mandate, which is often applied by analogy, in SPANISH CC art. 1713 is confined to administrative acts, the *Tribunal Supremo* has not extended this restriction to the law of benevolent intervention. The latter has been held to have a wider scope of application (TS 16 October 1978, RAJ 1978 (2) no. 3076 p. 2606), since it covers not only juridical acts (such as the collection of debts), but also activities of a purely economic nature and even simple physical activities (TS 2 February 1954, RAJ 1954 no. 322 p. 198). The matter of discharge of another's debt is elaborately provided for in SPANISH CC arts. 1158 et seq. The provision in CC art. 1158 reads: "A person who discharges a debt for another may claim from the debtor what he has rendered, provided he has not done so against the express will of the debtor. In that case he may only claim from the debtor to the extent the performance has been useful for the debtor." The person who discharges the debt with an *animus solvendi* must have neither a contractual nor a personal close relationship to the debtor (TS 8 May 1992, RAJ 1992 (2) no. 3892 p. 5113). An overlap with the law of benevolent intervention is therefore conceivable, but this is by no means always clearly analysed in the case law (contrast TS 8 May 1992 loc.cit. [where only CC art. 1158 was applied] with TS 25 June 1992, RAJ 1992 (3) no. 5474 p. 7160 [where it is expressly stated that a third party, who pays a debt for another in his own name and for his own account, is a benevolent intervener, but not under a duty to continue his intervention]). Although the CC only refers to 'dealings' and 'assets' of the principal, there appears to be unanimity both in academic writing (*Sánchez Jordán*, Gestión de negocios, 106; Paz-Ares/Diez-Picazo/Bercovitz/Salvador [-*Lasarte*], Código Civil I[2], 1953; Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Díez-Picazo*], Código Civil II, 1944) and case law (TS 2 February 1954, RAJ 1954 no. 322 p. 198) that the activities covered by benevolent intervention may also include acts for the personal protection of the principal. Case law on such activities is extremely rare. However, strictly personal acts (in other words, those for which representation is not possible) are excluded under Spanish law from the scope of application of *negotiorum gestio* (*Lacruz Berdejo*, Rev.Crít.Der.Inm. 1975, 249; *Puig Brutau*, Compendio II, 599; *Lete del Río*, Obligaciones II[3], 160; *Pasquau Liaño*, La gestión de negocios ajenos, 117).

17. Under ITALIAN law it is undisputed that benevolent intervention may also take the form of a juridical act. Examples are the discharge of another's duty to provide maintenance (Cass. 9 August 1988, no. 4883, Rep.Giur.it. 1988, voce Alimenti, no. 2), the placing of a professional order (Cass. 13 March 1964, no. 550, Foro it. 1965, I, 866), the conclusion of a tenancy agreement (Cass. 23 May 1984, no. 3143, Rep.Giur.it. 1984, voce Gestione d´affari, no. 1), services rendered by a lawyer without instruction (Cass. 13 February 1996, no. 1085, Rep.Giur.it. 1996, voce Avv. e proc., no. 131) and the payment of a share of a several liability which another is due to discharge (Cass. 9 August 1988, no. 4883, in Rep.Giur.it. 1988, voce Alimenti no. 2).

The act must be permissible and of a patrimonial character (Cass. 29 May 1952, no. 1555, Foro it. 1953, I, 33). This includes dispositions and extraordinary administrative measures (*Breccia*, La gestione d´affari[2], 876-877; Cass. 23 July 1960, no. 2122, Giur. it. 1962, I, 1, 92; Cass. 3 March 1954, no. 607, Giur. it. 1954, I, 1, 596; CA Firenze 16 August 1955, Foro it. 1956, I, 93). Conducting litigation in another's name is excluded (Cass. 30 July 1973, no. 2229, Giur. it. 1974, I, 1, 1212) as are other strictly personal acts (such as for example conferring generous benefits from the property of the principal [*Breccia*, loc.cit. 874] or the acceptance of an inheritance [Cass. 10 June 1954, no. 1933, Rep. Giur. it. 1954, voce Successione no. 25]). According to case law, physical acts are also eligible for consideration, including, for example, the pursuit of a stolen motor vehicle in the intervener's own car in order to assist the owner to regain possession (Cass. 23 October 1956, no. 3843, Rep.Giur.it. 1956, voce Gestione d´affari no. 1). It has also been held that a woman who paid the medical expenses and funeral expenses for the man with whom she cohabited has acted as *gestor* for the heirs (Cass. 28 June 1975, no. 2557, Rep.Giur.it. 1975, voce Gestione d´affari no. 2). However, there do not appear to be any reported decisions in which rescue from imminent danger of personal injury has been characterised as a benevolent intervention.

18. As regards the determination of the scope of application of *zaakwaarneming* under DUTCH Law the distinction between juridical acts and physical acts is likewise of no consequence. Examples of physical acts drawn from Dutch case law include preventing a ship from sinking (CFI Rotterdam 7 March 1939, NedJur 1940 no. 1017 p. 1515), towing a car away (CA s´-Hertogenbosch 8 November 1966, NedJur 1967 no. 368 p. 974 and President Rechtbank Amsterdam 19 December 1991, KG 1992, 50), maintenance of another's animal (HR 20 November 1924, NedJur 1925 p. 153) and maintaining the child of an acquaintance (HR 27 March 1924, NedJur 1924 p. 656). The right to discharge another's debts is the subject matter of a separate provision: CC art. 6:30. As is the case elsewhere, Dutch law follows the principle that strictly personal acts do not come within the law of benevolent intervention. The rule is explained on the basis that in such cases a reasonable ground to act is missing. The *travaux préparatoires* of the CC give the example of conclusion of a contract of employment; that is normally a strictly personal act. Only in the exceptional case where the intervener has actual knowledge of the principal's wishes might a reasonable ground exist (T. M. Parlementaire Geschiedenis Book 6, p. 791). HR 20 September 2002, RvdW 2002 no. 142 concerned the question under which conditions the claim for damages for pain and suffering of the deceased will pass to the heirs. According to Dutch CC art. 6:106 (2) this requires that the deceased informed the other party in his lifetime that he intended to assert the claim for damages. In contrast to the courts of lower instance and the Advocate-General, the Hoge Raad did not discuss the question whether or not that communication might also be undertaken as a benevolent intervention (by the relatives). Instead it was inferred from the circumstances of the case that the patient had the 'presumed intention' to assert his claim for non-economic loss and for that reason the claim devolved on the heirs. The fact that as a consequence of serious injuries the deceased has not been conscious of his condition was held not to be relevant.

19. In SCOTLAND it is similarly understood that the law of *negotiorum gestio* relates to both juridical acts and physical acts (Stair [-*Whitty*], Vol. 15, para 96). However Scottish law has not yet extended the doctrine of *negotiorum gestio* to cases where the principal's life or personal safety is endangered. It is argued that the rescuer typically has no intent to charge for expenses and outlays. Such an extension would impose strict liability on rescued persons, undermining the general rule of the law of delict

that a rescuer can only obtain damages for personal injuries sustained in rescuing a person from danger if the defender had negligently created the danger. Finally, it is argued that the compensation of rescuers for their injuries would be more appropriately achieved by other means, such as social insurance or discretionary payments out of public funds (*Whitty* loc.cit., para 102; *Stoljar*, IECL X 17, 141, 149, 150).

20. In the light of the different starting point it is far more difficult to summarise the situation in the NORDIC COUNTRIES. According to SWEDISH and FINNISH Ccom chap. 18 § 10 the intervener may 'speak and answer' for the principal. The question what is to be understood by this phrase 'speak and answer' has in the past found three different answers: some have argued that the subject matter is an authorisation to conduct legal proceedings for another, others consider that it includes in addition juridical acts of all types, and the third view contends that besides the authority to conduct litigation the terms only cover (unilateral) juridical acts which are binding on the recipient of the declaration (such as termination of a contract or the interruption of a limitation period) (*Håstad*, Tjänster utan uppdrag, 34 with fn 2-4). The scope of application has likewise not yet been properly resolved. It may be assumed that the question of authority to conduct litigation in another's name is solved by specific provisions of other statutes (SWEDISH Code of Judicial Procedure [*rättegångsbalk* (1942:740)] chap. 12 §§ 9, 20 and 23 and FINNISH Code on Judicial Procedure [*rättegångsbalk*] of 31 December 1734 chap. 15 § 4) and therefore Ccom chap. 18 § 10 according to current understanding at most covers the unilateral juridical acts just mentioned, whereas the conclusion of contracts in the name of another and more especially purely physical acts in the interest of another are excluded. The latter are subject to the general rules (see below note 22). As far as DANISH law is concerned it has been held in HD 19 January 1912, UfR 1912 p. 239 that the conclusion of a compromise settlement between a life insurance company and the surviving dependants of the insured whose cause of death, it seems, was probably suicide can constitute a justified benevolent intervention with respect to the reinsurance company.

21. There are special statutory regimes dealing with a number of particular problems. One of these provides that a bank may accept gifts for the donee without the donee's authorisation (SWEDISH Gifts Act [*lag (1936:83) angående vissa utfästelser om gåva*] § 4; cf. further *Walin*, Lagen om skuldebrev m. m.[2], 241; *Håstad* loc.cit. 225). The provision was restricted to banks as these are subject to special supervision and therefore seem suited to attend as *gestor* to the interests of the donee (*Walin*, loc.cit. 242). Notwithstanding this reasoning, *Håstad* loc.cit. 225-226 considers the provision can be extended by analogy. Case law, however, is largely silent on the issue. SWEDISH HD 28 December 1961, NJA 1961 p. 673 and HD 2 July 1962, NJA 1962 p. 428 held that in principle a private individual's acceptance of a gift for another is possible, although in the first of these two cases the intention to act for another (a child) was absent. FINNISH law has a rule similar to that in the Swedish statute in the Act no. 625 on promises to make a gift (*lag om gåvoutfästelser*) of 31 July 1947 (§ 4). By contrast there is no comparable provision under Danish law.

22. Both the DANISH and the SWEDISH case law contain examples of physical acts of benevolent intervention for another (see in particular DANISH HD 28 November 1976, UfR 1977, 183 [reimbursement of the costs of a fire brigade under the rules of the law of *negotiorum gestio*; a defective pump in a factory pumped oil into the soil and a river; an immediate intervention was necessary, because the defendant had neither sufficient professional competence nor a sufficient number of employees at his disposal] and SWEDISH HD 9 March 1972, NJA 1972, 88 [a fire brigade eliminated

the danger created by roof sheeting which had been almost stripped away by a strong wind; however, the firemen did not contact the owner of the house, who was at home; for this reason, and also because the repair had been effected unskilfully, the owner was not held to be obliged to compensate]; see also SWEDISH Hovrätten 24 June 1991, RH 1991:56 [where custody of another's goods is dealt with under the keyword "*negotiorum gestio*"; HD 8 February 1993, NJA 1993, 13, however, seems to prefer a solution invoking the rules of unjustified enrichment law and HD 6 October 1999, NJA 1999, 617 even resorts to landlord and tenant law]). Compensation for expenses incurred in intervention of a physical nature is also the subject matter of some more specific statutes, such as the SWEDISH Act on Proceeding with Abandoned Property and Lost Property etc [*Lag (1974:1066) om förfarande med förverkad egendom och hittegods m. m.*]. The Act on Certain Stolen Goods etc [*Lag (1974:1065) om visst stöldgods m. m.*] obliges the owner who claims recovery of the asset from the person with custody of it to compensate for costs incurred for its improvement and repair (§ 7): see further *Lennander*, Återvinning i konkurs[2], 356; *Hellner*, Om obehörig vinst, 374; *Håstad*, loc.cit. 80. Besides this, *negotiorum gestio* is dealt with in particular in DANISH legal literature in the context of tort law (and treated as a defence) (*von Eyben and Isager*, Lærebog i erstatningsret[5], 51; *Jørgensen*, Kontraktsret, Bind 2, 152; *Vinding Kruse*, Erstatningsretten[5], 48). A similar analysis can be made in SWEDISH and FINNISH law. At the same time, it is maintained that as a matter of principle an intervener without authority cannot be granted more rights than a custodian appointed by a court would enjoy (*Håstad*, loc.cit. 53).

23. The discharge of debts of the principal in general only gives rise to a claim against the principal if he has consented to this beforehand (*Håstad* loc.cit. 109; *Hellner* loc.cit. 378; SWEDISH HD 23 November 1910, NJA 1910 p. 622 [where the payment was made against the debtor's wishes]; HD 28 April 1920, NJA 1920 p. 234; HD 29 December 1945, NJA 1945 p. 728; HD 21 May 1973, NJA 1973 p. 286; see, drawing the dividing line, HD 12 January 1979, NJA 1979 p. 51 [a haulage contractor, importing goods for another business and obliged by statute in such circumstances to discharge that business' debts in respect of custom duties and taxes, performed that duty]). In other words a claim for reimbursement of expenses incurred is not recognised if the payment is made in the knowledge there is neither an authority nor a duty to do so (*Håstad* loc.cit. 133), unless specific rules providing otherwise apply.

24. Within the COMMON LAW the rules on agency of necessity are particularly close to the idea of *negotiorum gestio*. (As to the requirement of *necessity* (not necessarily: *emergency*) and the similarities with the law of benevolent intervention see the striking statement of Lord *Goff* in *In re F. (Mental Patient: Sterilisation*) [1990] 2 AC 1, 74-75). Agency of necessity does not require a contractual basis (*Petrinovic & Co. Ltd. v. Mission Francaise des Transports des Maritimes* (1941) 71 Lloyd's L. Rep 208, 223 (*Atkinson* J)). As a rule an agent of necessity who acts reasonably has a claim for compensation of expenses and in addition as a security for this compensation is granted a possessory lien with respect to his principal's property in his possession (Loc.cit. 222 (*Atkinson* J)). The first essential requirement of an agency of necessity is that it is virtually impossible for the agent to contact the client and to communicate with him (*Australasian Steam Navigation Co. v. Morse* (1871-73) LR 4 PC 222; *Gwilliam v. Twist* [1895] 2 QB 84, 87 (Lord *Esher* MR); *Prager v. Blatspiel, Stamp & Heacock Ltd.* [1924] 1 KB 566, 571 (*McCardie* J). See further *Springer v. Great Western Railway Co.* [1921] 1 KB 257: the defendant was transporting the plaintiff's tomatoes from Jersey to London. Bad weather and a strike at the harbour delayed carriage. The tomatoes were threatening to spoil and the defendant therefore sold them directly at the port. The court considered this to be a

breach of duty, because the defendant could have obtained instructions from the plaintiff and he was accordingly obliged to do so). For precisely this reason the agency of necessity has been pushed to the back shelves in our modern information society. An agent who under present circumstances cannot expect to receive an answer in time does not even have to try to venture his inquiry (*Australasian Steam Navigation Co. v. Morse* loc.cit. 232 (Sir *Montague Smith*); *Tetley & Co. v. British Trade Corp.* (1922) 10 Lloyd's L. Rep. 678; *Petrinovic & Co. Ltd. v. Mission Francaise des Transports des Maritimes* (1941) 71 Lloyd's L. Rep 208); by contrast, an agent who is only temporarily unable to reach a contact person has to try again, or if he acts for a company must try to contact someone else (*John Koch Ltd. v. C. & H. Products Ltd.* [1956] 2 Lloyd's Rep 59). A further requirement is that the intervention is necessary, according to a standard of reasonableness, in the interests of the principal. An example may be to call at a harbour of refuge and subsequently steer the damaged ship to a port, where it can be repaired for a reasonable price (*Phelps, James & Co. v. Hill* [1891] 1 QB 605 (where it was impossible to communicate with the owner of the ship)). A sale of perishable goods (Cf. *Springer* v. *Great Western Railway Co.* loc.cit.) or goods which are likely to be stolen (*Sachs v. Miklos* [1948] 2 KB 23, 34-36 (*Goddard* LJ)) is necessary, whereas to sell commodities suitable for storage in general is not (*Prager* v. *Blatspiel, Stamp & Heacock Ltd.* loc.cit. (this concerned furs, which could have been stored in a cold-house)). An intervention may also not be necessary because in the circumstances it would have been more appropriate to inform the relevant public authority and to leave to their judgment the decision as to what has to be done (*Flannery v. Dean* [1995] 2 ILRM 393 (*Castello* P) (the defendant had brought a stallion into his possession, which the claimant had neglected, and looked after it; he should have informed the local authority, which would have taken care of the animal).). All depends on whether or not the agent "adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency." Then and only then "may [it] properly be said of the course so taken, that it was, in a mercantile sense, necessary to take it." (*Australasian Steam Navigation Co. v. Morse* (1871-73) LR 4 PC 222, 230 (Sir *Montague Smith*)) If these requirements are met then the principal will have to bear the risk of an economic failure of the intervention, not the agent (*Tetley & Co.* v. *British Trade Corporation* loc.cit.). It goes without saying that the agent has to act in the interests of the principal (*Sachs* v. *Miklos* [1948 2 KB 23, 29 (*Goddard* LJ)), a requirement that may be absent for instance where someone acts or pretends to act in fulfilment of a contractual duty, whether this duty actually exists or is merely supposed to exist (*Jebara v. Ottoman Bank* [1927] 2 KB 254, 264 (*Bankes* LJ)).). As in other jurisdictions a general restriction to juridical acts does not seem to exist: there may be agency of necessity, for example, in conduct – including omitting to do something: see, for instance, *The San Roman* (1869-72) LR 3 A & E 583, 593 (Sir *Robert Phillimore*: ship's captain has authority in the interests of the owners of the ship and the cargo to interrupt a journey, delay its continuation and remain in port until danger [here: seizure by foreign naval forces] passed). However, the scope of application of agency of necessity is arguably restricted to specific narrow categories of cases. According to a traditional view an agency of necessity can *only* arise out of a pre-existing agency: *Hanbury*, Agency[2], 42. More modern judicial decisions (albeit only at County Court level) have not adopted this restriction: see *Palmer v. Stear* (1963) 113 LJ 420; *White J. D. v. Troups Transport* [1976] CLY 33. Moreover, even in the older cases there are indications that a stranger may have authority implied by law to act for another in a case of emergency: see, for instance, the *dictum* in *Beard v. London General Omnibus Co.* [1900] 2 QB 530, 532 (*Smith* LJ). The remaining gaps

typically have to be bridged by falling back on bailment law. According to the general rule – though manifold questions are still a matter of dispute – a bailment-relationship (from French *bailler* to hand over) arises where a bailee voluntarily takes another's (the bailor's) goods into custody. Such a consensual taking of possession establishes a bundle of rights and duties between bailor and bailee and may or may not be based on a contract (*Morris v. C.W. Martin & Sons Ltd.* [1966] 1 QB 716, 731 E-G (*Diplock* LJ)). In exceptional cases the bailor need not even have agreed to the transfer of possession. This may be the case if the bailor believes that the relationship of bailment would improve his position and therefore subsequently authorises the taking of custody and thereby retroactively makes the custodian a bailee - with the result that even if the bailee has changed his mind in the meantime this does not affect either the existence or the continuation of the bailment relationship (*Bell*, Personal Property, 90; *Johnson Matthey & Co. Ltd.* v. *Constantine Terminals Ltd.* [1976] 2 Lloyd's Rep 215, 222 (*Donaldson* J)). On the other hand in a number of cases a person is authorised by law to take possession of another's properties. In such cases the possessor will also become a bailee by law - with all its consequences (The question whether the duty of care of the gratuitous bailee in comparison to a bailee for reward is a reduced one (to this effect: *Morris v. C.W. Martin & Sons Ltd.* [1966] 1 QB 716, 725 E-F [Lord *Denning* MR] and 737 B-C [*Diplock* LJ]), or whether it is to be judged according to the general standards of tort law (so held by the majority of judges in *Houghland v. R.R. Low (Luxury Coaches) Ltd.* [1962] 1 QB 694, and further *Salmon* LJ in *Morris*, loc. cit., p. 738 A-B) is a matter of dispute. Whether or not this question is of practical relevance is difficult to decide, in particular because the determination of the standard of care depends on the circumstances of each separate case and may take into account the fact that the act was conducted gratuitous and for another's benefit.). This group includes the finder of lost property (v. Bar (-*Middleton*), Sachenrecht in Europa, England, 111) and, most notably, all persons who (according to continental-European terminology) take custody of property of another after they have saved it from damage of loss by justified intervention (Examples given by *Bell*, Personal Property, 91: A person takes a thing away from a drunken person in order to keep it safe; for like reasons the jewellery of an unconscious or mentally disabled person is locked away by the hospital; a person saves things from his neighbour's house which has caught fire and stores them in his house). The legal position of a (gratuitous) bailee in all important features resembles the position of a *gestor* in relation to his principal (Whether the legal positions of *gestor* and bailee are similar also with respect to third parties is a matter of property law and needs not be dealt with in the present context. It depends not on the characterisation of the *gestor* under the law of obligations, but on the fact that the latter is considered to be a possessor within the meaning of property law). The bailee is under a primary obligation to treat the goods carefully and to hand them over to the bailor, as soon as the latter requests restitution (*Mitchell* v. *Ealing London Borough Council* [1979] QB 1, 6C (*O'Connor* J) (concerning gratuitous bailment)). The bailee is therefore under no duty to bring about a guaranteed outcome (*Houghland v. R.R. Low (Luxury Coaches) Ltd.* [1962] 1 QB 694, 699 (*Omerod* LJ) (no liability for the theft of goods by a third party which occurred without negligence on the part of the bailee)); moreover, a breach of the duty of care must be causative of the loss of or damage to the goods (Besides *Houghland* et al see also *Lilley* v. *Doubleday* (1880-81) 7 QBD 510 and *Mitchell* v. *Ealing LBC* loc.cit. (in this case the bailee had not handed over the goods to the bailor when due and *for this reason* was liable for the theft, for which in normal circumstances he would not have been held liable as he did not himself act negligently)). The counterpart of these duties is that the bailee is granted a claim against the bailor for reimbursement of expenses. The bailor

must cover the costs the bailee has incurred in the course of fulfilment of his duties (*China Pacific SA v. Food Corp. of India (The Winson)* [1982] AC 939, 960 F-G (Lord *Diplock*) (concerning warehouse charges of the salvor)). From the point of view of an agent of necessity, who at the same time is a bailee, it may be more favourable to rely on the latter position. As mentioned above he would have to show and, should the situation arise, prove that it would have been impossible or unacceptable to contact the principal in advance. By contrast there is no such requirement in bailment (*China Pacific SA v. Food Corp. of India (The Winson)* [1979] 2 All ER 35 (the intervener had undertaken to take care of the preservation of a quantity of wheat, which had been saved from a stranded ship. The House of Lords upheld a claim for expenses incurred, as it was obviously impossible to find out whom the batch belonged to and therefore to contact the owner)); it is sufficient that the act constitutes an emergency measure to prevent damage (*Tettenborn*, Restitution[2], 182 (§ 9-07)).

25. Of course an agent cannot undertake a strictly personal act. However, the demarcation of acts falling within the category of strictly personal acts may differ significantly between Civil Law and Common Law. The most important example may be the execution of a will. Under ENGLISH law (Wills Act 1837, s. 9) and IRISH law (Succession Act 1965, s. 78 rule 1) it is possible for someone other than the testator to sign a testamentary instrument on the testator's behalf, provided this is done at the testator's direction and in his presence. If the signature is not rendered by the testator's nominee under a contractual duty to the testator (e. g. as legal adviser to the testator), this act will remain within the scope of this Book. A mere authorisation to act (without a contractual or non-contractual duty to do so) is not excluded by V.-1:103(a).

III. Act on 'another's behalf' and the intention to benefit another

26. Many European jurisdictions have a double requirement in their law on benevolent intervention, namely that the *gestor* intervenes (i) in the affairs of 'another' and that he does so (ii) 'on another's behalf'. The second requirement (the intention to act on another's behalf) is universally undisputed, whereas the question whether or not the first requirement (that the intervention must concern the affairs of another – extraneous affairs) is necessary and expedient is the subject matter of a controversial debate in many jurisdictions. Nowhere does there appear to be any marked practical relevance in the sense that the requirement of furtherance *of another's affairs* actually excludes from the scope of benevolent intervention some precisely identifiable category of cases. As set out above in Comment A V.–1:101 therefore proceeds on the basis that, as a matter of principle, it is only the intention of the *gestor* which converts the matter being taken care of into an 'extraneous affair'.

27. This corresponds to the wording of GERMAN CC § 677. The terms of that provision likewise do not set out an additional requirement that the affair taken care of 'on behalf of another' must also qualify as an extraneous affair with respect to the *gestor* – that is to say, an affair which from an objective perspective would be considered to be the principal's. It is nonetheless often asserted in Germany that an act 'for another' must also be objectively extraneous and that the intervener must know it is extraneous. For example it is not an objectively extraneous affair for a hirer of goods to hire them out to another unlawfully (BGH 13 December 1995, BGHZ 131, 297). The intervener must have both the intention and knowledge of taking care of (or at least *also* taking care of) another's affairs. The intervener must thus recognise that the matter attended to is not the intervener's own (awareness of the extraneous nature of the business as a cognitive element) and must act with the intention of serving the interest of another (intention to further another's affairs in a narrow sense, as a purpose-orientated voluntary element) (see to this effect: Soergel [-*Mühl*], BGB[11], § 677, no. 3;

MünchKomm [-*Seiler*], BGB[3], § 677, no. 5; *Larenz/Canaris*, Schuldrecht BT II/1[13], p. 438; for further references see also Staudinger [-*Wittmann*], BGB[13], Introduction §§ 677 ff, no. 21). A strong movement within legal writing, however, regards this separate test of 'extraneous nature' as dispensable (as the present Article does); an 'extraneous' affair is always present when an intervener acts with the intention to benefit another (Soergel [-*Beuthien*], BGB[12], § 677 no. 3; *Gursky*, AcP 185 [1985] 13-45; *Wittmann*, Begriff und Funktionen der Geschäftsführung ohne Auftrag [1981], passim). Moreover, the requirement of an intention to act for another arises not just from CC § 677 ("*für einen anderen*"), but also from CC § 687 (1) and (2): if a person takes care of another's affair in the mistaken belief it is his own (subsection 1: putative management of one's own affairs [*vermeintliche Eigengeschäftsführung*]), the legal consequences of benevolent intervention do not apply; if a person takes care of another's affair as if it were his own, but knowing it is not (subsection 2: arrogated management of one's own affairs [*angemaßte Eigengeschäftsführung*]), they will not apply without further conditions being satisfied. The prevailing opinion which sticks to the requirement of an 'extraneous affair' defines these 'objectively' extraneous affairs as those affairs which a neutral observer would readily identify as belonging to the legal sphere of someone other than the intervener. According to case law, the mere fact that the objectively extraneous affair has been taken care of creates a (rebuttable) presumption that there was an intention to act on another's behalf; an outward manifestation of the intention is not necessary. In contrast 'neutral' affairs (where an objective observer cannot identify whether they were managed 'for another') qualify as extraneous affairs only if the intervener's intention to act for another becomes discernable for third parties (BGH 20 June 1963, BGHZ 40, 28, 31; MünchKomm [-*Seiler*], BGB[3], § 677, no. 5). The textbook example for a 'neutral' affair is the acquisition of an asset or the conclusion of a contract for services to be rendered in the intervener's own name but for the account of the principal. By contrast, where a health insurer provides benefits in kind to an injured person it is not to be supposed that the insurer is attending to the affairs of a tortfeasor who is liable to compensate the injured person (BGH 8 July 2003, NJW 2003, 3193). ESTONIAN LOA § 1018 (1) similarly dispenses with the requirement of an extraneous affair. The intention to benefit another is decisive. § 1018 (2) accordingly provides the clarification that "a case where a person has no intention to act for the benefit of another is not deemed to be *negotiorum gestio"*.

28. GREEK law requires both the awareness of the intervener that he or she is managing an extraneous affair and the intention to manage it as another's affair. That emerges from a juxtaposition of CC arts. 730, 736 (which do not expressly mention the requirement to act with the intention of benefiting another) with CC arts. 739, 740 (which exclude from the scope of application of justified benevolent intervention acts which are not managed with the intention of benefiting another) (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 730, no. 13). The intention to manage another's affairs does not presuppose legal capacity; in fact this intention need not be declared expressly provided it is manifest (*Papanikolaou* loc.cit. no. 14-15). Besides this, CC art. 730 explicitly requires that the matter taken care of be an 'extraneous affair'. The prevailing opinion is that an affair is extraneous if it concerns another's sphere of interest. A distinction is drawn between affairs objectively extraneous and affairs subjectively extraneous. An affair is objectively extraneous if its apparent substance is such that it belongs to another's legal sphere, because it is the exercise of another's right or the discharge of another's duty. By contrast a subjectively extraneous affair appears neutral from an objective perspective, but by means of the intervener's intention to manage another's affair takes on an extraneous nature. The prime example

in Greece too is the acquisition of an asset for another (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 730, no. 4).

29. Likewise PORTUGUESE law contains an *animus aliena negotia gerendi* as a requirement for the application of the rules on justified benevolent intervention: only a person acting with "*intenção de gerir para outrem*" – that is to say, a person who intends to act in the interest of and for the account of another (*Vaz Serra*, BolMinJus 66 [1957] 95) – will qualify as a *gestor* (CC art. 464). Portuguese law has also held on to the traditional requirement of *negotium alienum*. *Vaz Serra*, on whose draft (see art. 1, no. 4 of the draft) the wording of the law is based, did not further expound on the problem of this criterion; he considered it would not accord with the rationale of the law of benevolent intervention to restrict the application to the management of extraneous affairs (loc.cit. 69).

30. AUSTRIAN law similarly requires a *Fremdgeschäftsführungswillen* (i. e. the intention to act on another's behalf) on the part of the intervener (Schwimann [-*Apathy*], ABGB V^2, § 1035 no. 6; *Koziol and Welser*, Grundriss II^{12}, 364; *Meissel*, GoA, 79 et seq.; OGH 19 November 1974, SZ 47/130; OGH 11 July 2001, RIS-Justiz RS 0085741 [no benevolent intervention if a pretender to the inheritance operates a kiosk against the express wishes of the actual heir]; but see for a critical discussion *Fötschl*, ERPL 2002, 550, 570). Austrian CC § 1036 (intervention in order to prevent impending damage) does not expressly set out the requirement of an intention to act on another's behalf, but it will usually be a feature of such cases (*Meissel*, GoA, 79). Emergency actions undertaken in the face of a common danger are dealt with by the law of unjustified enrichment (CC § 1043). Intervention other than in a situation of emergency must be beneficial for the principal (CC § 1037). Besides the requirement of an intention to act on another's behalf, CC §§ 1036 and 1037 expressly require that the intervener manages an "extraneous affair". OGH 11 November 1987, SZ 60/235, for instance, dismissed a claim in a case where a person eradicated damage to the ground water on his own property which had been caused by an oil supplier because it was not another's affair. Austrian CC regards "intermeddling with the affairs of another" (CC § 1035) as a rule as constituting an infringement of rights. However, the boundary between an 'extraneous' affair and an intervener's 'own' affair is bedevilled with numerous problems of demarcation; it is also acknowledged that the 'extraneous' nature of an affair may be derived from the intention of the intervener alone (*Meissel*, GoA, 65). SLOVENIAN law produces the same outcome (*Cigoj*, Teorija obligacij, 245).

31. In both FRANCE and BELGIUM scholarly writing unanimously takes the view that a *gestion d´affaires* requires an intention to act on another's behalf (see, for France, *Mazeaud and Chabas*, Leçons de droit civil II,1^9, no. 675 p. 808-809; for Belgium, *Stijns/Van Gerven/Wéry*, JT 1996, no. 17 p. 696). Where a person manages the affairs of another in the firm belief that they are his own, the conduct does not constitute benevolent intervention (French Cass.civ. 25 June 1919, D. 1923, I, 223; S. 1921, I, 12). (See also for MALTA CC art. 1019: "Where the agent was under the impression that he was managing his own affairs, he shall not be entitled to any indemnity beyond the benefit which the party interested may have actually derived"). BELGIAN and FRENCH CC art. 1372 ("*lorsque volontairement on gère l´affaire d´autrui*") combines the requirements of an extraneous affair and the intervener's intention to act on another's behalf in a more or less inseparable fashion. Both elements likewise coalesce in scholarly treatment of the subject (see, for example, for Belgium *Paulus*, Zaakwaarneming, no. 33 p. 33 and B. H.Verb. [-*Roodhooft*] Hdst. V, De quasi-contracten, no. 2239; for France *Mazeaud and Chabas*, Obligations^9, no. 675 p. 808). Some French authors even set out the *intention de gérer les affaires d´autrui* and the

utilité of the intervention as the sole requirements of benevolent intervention (e. g. JClCiv [-*Bout*], Art. 1372-1375, V° Quasi-Contrats. Gestion d´affaires – Conditions d´existence (1996), Fasc. 10, no. 19 et seq.). The intention to act on another's behalf may be missing, for example, where two persons who have provided negotiable instruments as security obtain a release of the instruments from a creditor of the bankrupt borrower by repaying the outstanding loan; this act has been held to be undertaken in the sole interest of those who provided the security, even though it may lead to a third provider of security regaining his negotiable instruments (CFI Hasselt 25 June 1990, RW 1991-92, 925). A further example of lack of intention to act on another's behalf is where a son-in-law equips and furnishes a flat in a part of his father-in-law's house (CA Rouen 15 January 1992, Juris Data 1992-040373). Recent French legal writing introduces a further distinction, namely between benevolent intervention with an altruistic intention (so-called *gestion d´affaires désintéressée*) and benevolent intervention without an altruistic intention of the intervener (so-called *gestion d´affaires intéressée*); in the latter case the objective characterisation of an intervention as being undertaken 'on another's behalf' merges into the requirement of *utilité*, which is assessed from an objective perspective. As regards *gestion d´affaires désintéressée*, this appears to turn solely on the altruistic intention of the intervener; there is no scrutiny of whether the affair managed is objectively extraneous (see, in particular, Cass.civ. 16 November 1955, J. C. P. 1956 II no. 9087, note *Esmein;* RTD civ 1956, p. 356, obs. *Mazeaud*: the rescue of an unconscious driver by a passenger, who himself sustained bad injuries as a result of the rescue, was considered a benevolent intervention on behalf of the insurance company with whom the car was insured, although the driver as a member of the policy holder's family was not himself insured).

32. By contrast SPANISH CC art. 1888 only refers to an extraneous act (*alieneidad*), in other words interference with the legal sphere of the principal (*Pasquau Liaño*, La gestión de negocios ajenos, 110) as a requirement for the application of the law of benevolent intervention. Yet under Spanish law too it is undisputed that the *animus aliena negotia gerendi* represents an indispensable requirement of a benevolent intervention in another's affairs. Only a person acting with an altruistic intention will qualify as a *gestor* (*Pasquau Liaño*, loc.cit. 61), or, as the Supreme Court has put it, acts "with a disinterested intention, but without the purpose of making a donation, and without the intention to make a profit" (TS 2 February 1954, RAJ 1954 no. 322 p. 198). Essential elements are the intervener's actual knowledge that the interest concerned is extraneous and the intervener's disinterested wish to protect it (*Puig Brutau*, Compendio II, 599; *Sánchez Jordán*, Gestión de negocios, 151). Consequently, the management of another's affairs in the mistaken belief they are one's own is exclusively governed by unjustified enrichment law or, depending on the facts, the law on non-contractual liability for damage caused to another (*Lacruz Berdejo*, Rev.Crít.Der.Inm. 1975, 253).

33. ITALIAN law likewise has a requirement that the affair managed be extraneous ("*alienità" dell´affare*). This can be inferred from CC art. 2028 (*gestione di un affare* "altrui"). The prevailing view is that whether an act relates to another's affair is to be assessed in line with an objective standard (*Aru*, Gestione d´affari, 8; *Pane*, Solidarietà sociale e gestione di affari altrui, 78; Cass. 5 April 1971, no. 976, Rep.Giur.it. 1971, voce Gestione d´affari, c. 1537). It is said to be a prerequisite that the management concerns another's legal sphere (*Breccia*, La gestione di affari[2], 858-859) or property (*Cercone*, Codice civile a cura di Rescigno, sub. Art. 2028 CC). However, it is accepted that if there is no inherent objective connection to another's sphere, the issue will depend on the intention of the intervener; Italian law thus also recognises the

category of acts which are extraneous merely from a subjective point of view (*negozi soggettivamente altrui*). The details are a matter of dispute. Legal writing resolves the issue in disparate fashion. A growing body of opinion now equates an 'extraneous affair' with the pursuit of another's interest (*Pane*, loc.cit. 77-80), which effectively reconciles the objective and the subjective perspective (*Sirena*, Gestione di affari, 236-237). It is undisputed that from the onset of his action the intervener must act with the intention to act on behalf of the principal (*Aru* loc.cit. 13). This intention need not necessarily be explicitly stated; it may also be inferred form the circumstances (Cass. 13 March 1964, no. 550, Foro it. 1965, I, 866). The intention to benefit another was affirmed, for example, in a case where an heir incurred expenses in administering the deceased's estate, which administration benefited co-heirs (Cass. 30 January 2002, Foro it. Mass. 1222). By contrast the intention to benefit another was held to be absent where a seller of real estate sold the property to a second purchaser after it had already been sold under a written contract (Cass. 4 November 1995, no. 11519, Giur.it. 1996, I, 1, 902).

34. A *zaakwaarneming* under DUTCH CC art. 6:198 requires that a person voluntarily, knowingly and with a reasonable ground attends to the interest of another (*eens anders belang*). Activities covered by benevolent intervention may be acts which aim at the protection, preservation or the augmentation of legal interests (*rechtsgoederen*) of another (Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 291). Surprisingly few particulars can be found neither in case law nor legal writing as to when a person is to be regarded as attending to "*een anders belang*". Instead the focus is on the existence of an intention to act on another's behalf, which is understood to be the crucial prerequisite of *zaakwaarneming* (see for instance HR 10 April 1953, NedJur 1953, 630; CFI Almelo 24 November 1954, NedJur 1955, 753 and CFI Maastricht 7 April 2004, LJN-number AP4483, www.rechtspraak.nl).

35. SCOTTISH law likewise relies on the category of an extraneous affair: see above note no. 9.

36. Within the SCANDINAVIAN legal systems there appears to be no discussion in detail of the concept of an 'extraneous' affair or the intention to act on another's behalf. However, it may nonetheless be inferred from HD 28 December 1961, NJA 1961 p. 673 that according to SWEDISH law a benevolent intervention may only be recognised if the *gestor* acts with the intention of interfering in another's legal sphere. As regards DANISH case law, one might point to HD 18 May 1995, UfR 1995 p. 691, a case where it may be doubted whether the *gestor* acted with the intention to act on another's behalf. The case concerned a contract for the sale of land which ostensibly had been concluded. The putative purchaser had made an advance payment to the estate agent, but could not claim it back from the estate agent because of the latter's bankruptcy. According to trade practice, the broker's commission would be met by the seller. The court therefore granted the buyer a claim for compensation against the seller, as he (the seller) was 'closer' to bearing the risk of repayment. However, a further claim of the putative buyer to recover the wasted costs of enforcement which was likewise founded on the law of benevolent intervention was dismissed.

37. For agency of necessity the COMMON LAW requires that the agent acts in the interest of his principal. Of necessity this excludes acts which are a collusion with or otherwise manifestly intended to benefit third parties, rather than the principal. So, for example, there can be no question of a ship's captain having authority to create a security interest in his principal's property (the ship) if the purpose of the transaction is merely to benefit an existing creditor: *Empire of Peace, The* (1869) 39 LJ Adm (N.S.) 12 (Sir *R. J. Phillimore*) (bottomry bond, which was intended simply to enhance

the security of a pre-existing debt owed by the principal without advantage procured for the principal was ineffective as debt already secured). The same applies where a captain enters into a contract of salvage with the aim of benefiting the salvor rather than in good faith in the interests of the principal whose property is to be salvaged: *The Theodore* (1858) Swab 351, 166 ER 1163 (Dr *Lushington*). (See also *Prager v. Blatspiel, Stamp & Heacock Ltd.* [1924] 1 KB 566, 572-573 where *McCardie* J indicates as one ground of his decision (albeit without elaborating the point) that the agent must act in good faith.) A professed intention to act on behalf of another may render a person a self-appointed agent and liable to account for benefits obtained: see Chapter 2, Art. 2:103, Notes I, 22. Where the intervener has caused loss to the putative principal, however, an agency will be denied if the intervener has acted exclusively or predominantly in their own interest: cf. *Sachs v. Miklos* [1948] 2 KB 23, 29 (Lord *Goddard* CJ), where the defendant had sold the plaintiff's furniture solely in order to use the room which the furniture occupied, followed in *Anderson & Anderson v. Earlanger* [1980] CLY 133 (*Fay* J) (defence of sale through agency of necessity unavailable), and see also *Beaman v. A. R. T. S. Ltd.* [1948] 2 All ER 89, 94E (*Denning* J), holding that a person who stores things for an absent friend who cannot be contacted and then gives them away because they have decayed or have little value and the storage takes up space or costs money commits the tort of conversion – but see now also the statutory power of sale in the Torts (Interference with Goods) Act 1977, s. 12, which protects an involuntary bailee. Equally, one reason for the common law's unwillingness to recognise a right to a reward for the finder of another's property may be that preservation of property by a finder is deemed to be in one's own (finder's) interest – a preserving for oneself rather than the 'true' owner – because in the event that the owner does not or cannot claim it, title being relative, the finder is an owner subject only to the claims of one who is better entitled (i.e., the finder's title becomes impregnable when the true owner's claim in tort is time-barred): cf. *Sutton v. Buck* (1810) 2 Taunt 302, 129 ER 1094 at 1098 (Lord *Mansfield* CJ: salvaging, so far from being a duty to benefit the owner, is a mode of entitling oneself to the property in case the owner does not claim it), which case, however, only lays down the principle that there is no *duty* on a stranger to intervene to salvage wreck from navigable river.

IV. The preponderance of the intention to benefit another; simultaneous pursuit of one's own interests

38. None of the European concepts of the law of benevolent intervention requires that a person acts *exclusively* for altruistic reasons. This, as is generally accepted, would be unrealistic, because the intervener will often also be pursuing his or her own interests at the same time. Consequently, benevolent intervention is only held to be inapplicable if the relationship between the intention to benefit another and the intention to serve one's own interests is reversed, the intervener predominantly attending to his own interests and only secondarily attending to another's interests. However, no national legal system contains a clear provision which states with clarity that the intervener must act with the 'predominant' intention to benefit another (as paragraph (1) of the present Article does).

39. GERMAN case law has always emphasized that an intention to benefit another is not excluded by the fact the intervener has also acted in pursuit of own interests (BGH 24 October 1974, BGHZ 63, 167; BGH 8 March 1990, BGHZ 110, 313). Such cases are referred to as cases involving 'affairs which are also another's' (*auch fremde Geschäfte*). The (rebuttable) presumption of intention to benefit another also applies to these cases (BGH 18 September 1986, BGHZ 98, 235, 240; *Palandt* [-*Sprau*], BGB[632], § 677, no. 6; see, however, *Medicus,* Schuldrecht II BT[12], nos. 620, 630).

40. Under GREEK law it is similarly universally accepted that benevolent intervention is not excluded by the intervener serving his own interests as well as those of another. However, such coexistence of interests may make it more difficult to fulfil the requirement of the intention to act on another's behalf (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 730, no. 10; CA Athens 2896/1977, NoB 26/1978 p. 223 [where in a case of discharge of another's debt the court took the view that there was no *animus aliena negotia gerendi*] and ErmAK [-*Sakketas*], Art. 730, no. 22 [if an affair is partly another's interest and partly the intervener's own, benevolent intervention can apply, but if the intervener acts solely to further his own interests benevolent intervention will not apply even if the act is also beneficial for other persons]).

41. This accords with the position under PORTUGUESE law. The application of the provisions on benevolent interventions remains possible where the intervener acts on behalf of another and on his own behalf at the same time, as long as he acts with the intention to benefit another in regard to the extraneous affair (*Vaz Serra*, BolMinJus 66 [1957], 97). Typical cases of coexistence of interests concern interveners who act in the course of their profession or trade (as, for instance, in STJ 22 April 1986, BolMinJus 356 [1986], 352).

42. Likewise in AUSTRIA the law on benevolent intervention in general remains applicable even if the intervention for another also serves the *gestor's* own interests at the same time. Both case law (OGH 7 December 1972, SZ 45/137; OGH 8 November 1984, JBl 1985, 421, 423; OGH 3 October 1996 RdW 1997, 275) and academic writing (Rummel [-*Rummel*], ABGB I³, § 1035 no. 5, Schwimann [-*Apathy*], ABGB V^2, § 1035 no. 5, *Meissel*, GoA, 66 et seq.) recognise the concept which in Austria too is termed 'affairs which are also another's' (*auch fremde Geschäfte*). Older case law had required an intervention for another free of self-interest (for references see *Rummel* and *Meissel* loc.cit), and phrases which point in this direction reappear in some more recent judgments (e. g. OGH 28 January 1997,WBl 1997, 214 [full text in RIS-Justiz RS 0085741] and OGH 27 November 2001, RIS-Justiz RS 0023484). However, this does not seem to indicate a general change of the established practice of the courts as set out in the leading case OGH 7 December 1972, SZ 45/137. The terms of V.-1:101 seem to be in line with the current state of Austrian law.

43. Under BELGIAN law the question whether and, if so, to what extent an intervener may also pursue his own interests without loosing his status of benevolent intervener is still a matter of dispute (for details see *Stijns/Van Gerven/Wéry*, JT 1996, no. 17 p. 697). As far as FRENCH law is concerned, it is accepted that the law of benevolent intervention may apply although the intervener does not act solely with the intention to further another's interests, acting partly in his own interest (*Mazeaud and Chabas*, Leçons de droit civil II,1^9 no. 675 p. 808-809). Some authors even consider that a tendency can be discerned in recent case law to the effect that benevolent intervention will be recognised even if the intervener lacks any altruistic intention. This is explained by the development of a distinction between 'classic' benevolent intervention (acting with an altruistic motive – *gestion d´affaires désintéressée* –) and benevolent intervention without an altruistic motive (the so-called *gestion d´affaires intéressée*). As a result, a dualistic system of the law of benevolent intervention has emerged. A *gestion d´affaires désintéressée* only requires that from the subjective perspective of the intervener the act appeared at the outset to be beneficial, whereas the *gestion d´affaires intéressée* requires that from an objective perspective the act must ultimately prove to be beneficial (JClCiv [-*Bout*], Art. 1372-1375, V° Quasi-Contrats. Gestion d´affaires – Conditions d´existence, Fasc. 10, no. 19 et seq.). In at least one instance French case law has adopted this terminological distinction (CA Orléons 14 September 1993, Juris Data 1993-045124).

44. SPANISH legal writing unanimously maintains that a benevolent intervention will only be precluded if the intervener places the principal's interest second to his own interests (*Lacruz Berdejo,* Rev.Crít.Der.Inm. 1975, 257; *Sánchez Jordán*, La gestión de negocios ajenos, 151; *Díez-Picazo and Gullón*, Sistema II, 567). Although there is no elaborate doctrine on 'affairs which are also another's', the approach taken is in substance quite similar to that of German law (*Sánchez Jordán,* loc.cit. 156). One justification may be an argument *e contrario* from CC art. 1891, according to which the intervener is liable for accidental risks if he has put the interest of the principal second. In case law it has been held that a co-owner who, acting in his own name, had a second elevator built into an apartment house and in so doing (also) pursued his own interests might act with *animus aliena negotia gerendi* (CA Las Palmas 6 November 1985, La Ley 86 [1] no. 6091 p. 540); similarly this was also held to apply where one of several joint heirs fed animals forming part of the deceased's estate before the estate was distributed (TS 3 January 1962, RAJ 1962 [1] no. 265 p. 165; for details see *Pasquau Liaño,* La gestión de negocios ajenos, 237).

45. The rule contained in V.–1:101 also states the position of ITALIAN law. The *gestor* need not act exclusively in the interests of the principal, but he or she must act predominantly in the principal's interests (judged from an objective perspective) (Cass. 13 March 1964, no. 550, Foro it. 1965, I, 866). Where a part of the activity which concerns the intervener's own interests can clearly be distinguished from those parts of the activity which serve another's interests, the rules on benevolent intervention apply only to those activities which serve the interest of another (*Aru,* Gestione d´affari, 8). Benevolent intervention comes into play where one parent provides maintenances also on behalf of the other parent (Cass. 5 December 1996, no. 10849, Rep.Giur.it. 1997, voce Filiazione, no. 38) or where a *gestor* attends to the interests of multiple owners or heirs when he himself is one of them (Cass. 11 July 1978, no. 3479, Giur. it. 1979, I, 1,820; Cass. 4 May 1985, no. 2795, Rep.Giur.it. 1985, voce Responsabilità no. 154).

46. DUTCH law recognises the principle that a *gestor* may attend to own interests alongside the interests of the principal. The son who arranges for the provisional administration of his father's estate after the latter's death is *gestor* for his siblings even though he acts on his own behalf at the same time. An intervener may attend to the interests of another and at the same time pursue his personal interests. The concept of an affair which is 'also another's' is thus recognised (T. M. Parlementaire Geschiedenis VI, 790; Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 293, p. 308; Verbintenissenrecht [-*Heisterkamp*], Art. 6:198 BW, note 11; see also HR 24 January 1902, W 7714 and HR 26 June 1959, NedJur 1959 no. 586, p. 1284).

47. Under SCOTTISH law too the pursuit of one's own interests alongside an intention to advance another's interest does not fundamentally preclude the existence of a relationship of *negotiorum gestio* (*Kolbin & Sons v. Kinnear & Co.* 1931 SC (HL) 128; *SMT Sales & Services Co. Ltd. v. Motor and General Finance Co. Ltd.* 1954 SLT (Sh.Ct.) 107). However, it is not yet completely resolved what the balance must be between one's own interest and the interest of another. The boundary line seems to be drawn where a person acts selfishly, that is to say, with the predominant intention of advancing his own interests. In such instances the case is one for the law of unjustified enrichment or tort law (Stair [-*Whitty*], vol. 15, no. 138; see, however, *Gretton,* SLT 1978, 145). As a general rule compensation under the law of benevolent intervention is available only for expenses which have not been incurred to advance one's own interest (*Leslie*, SLT 1981, 259, 260; *idem*, Jur.Rev. 1983, 32, 33).

48. Within SCANDINAVIAN case law too there are cases in which the intervener has pursued his own interest as well as another's. In DANISH HD 3 December 1936, UfR 1937, 357, the Danish Ministry of Foreign Affairs arranged at the expense of the Danish charterer for the return of Danish seamen who had missed the departure of their vessel from a Columbian port and could not remain in Columbia for want of visa. The shipping company had been informed in advance, but although obliged to do so had refused to come to the seamen's assistance. The charterer was granted a claim against the shipping company for reimbursement of expenses incurred, although in effecting return carriage the chraterer had also acted in his own interest. Danish HD 19 January 1912, UfR 1912, 239 concerned compensation between several reinsurance companies as a result of a compromise settlement concluded by one of the reinsurance companies on behalf of them all. SWEDISH HD 28 December 1961, NJA 1961, 673 dismissed a claim alleged to have arisen out of *negotiorum gestio* for the reason that the defendant had not accepted the gift in dispute either for herself or for the claimant child.

49. The COMMON LAW on this point aspires to ensure the principal is fully protected. Agency by ratification is not precluded by the fact that the agent is (subjectively) also acting in furtherance of his own interests provided the agent is (objectively) demonstrably acting on behalf of the principal: *RE Tiedemann & Ledermann Frères Arbitration* [1899] 2 QB 66. Moreover, where the agent is only ostensibly acting on the principal's behalf the principal is nonetheless able to obtain from the agent the fruits of an unauthorised venture (so precluding the agent from profiting from his breach of duty). On the other hand, if the agent acts exclusively in their own interest, though in the principal's name, there will be no agency of necessity to the detriment of the principal (i. e. by recognising a burdensome transaction of the agent with a third party and holding the principal bound by it, or where the 'agency' would be at the principal's expense): cf. *The Alexander* (1842) 1 W Rob 346 at 355-356, 166 ER 602 at 606 (Dr *Lushington*). Notwithstanding this there is some doubtful indication in more modern case law that the performance of a 'duty' which is no more than a matter of self-interest (i. e., its non-performance does not entitle the other party to any redress, but merely excludes or restricts a possible claim of the 'obliged' party) does not preclude the party performing the 'duty' from also acting as an agent of necessity for the other party. It has been held (though only at County Court level) that a buyer of 'eating' strawberries to whom the seller delivers a proportion which are unfit for eating (but who apparently cannot or does not reject and return them, but instead claims a diminution in price) acts as agent of necessity in selling them to a jam-maker: see (1932) 76 SJ 663. (Until 1995, when the Sale and Supply of Goods Act 1994, s. 3(1), inserted a new s. 35A into the Sale of Goods Act 1979 – which replaced the Sale of Goods Act 1893 – the buyer had no right to reject part only of the goods supplied under an inseverable contract of sale since partial acceptance precluded repudiation for breach of condition: see ss. 11(4) and 53(1) of the 1979 Act; the former section and thus also indirectly the latter are now subject to s. 35A.) The proposition seems doubtful, however, because it is difficult to see how in such circumstances the agent is acting on behalf of anyone but himself. Where the breach of contract relates to the quality of the goods, the reduction in the price for the accepted goods which the buyer may set up against the purchaser for breach of warranty is *prima facie* determined by the difference between the value the goods would have had if they had fulfilled the warranty and the market value of the actual goods supplied: Sale of Goods Act 1979, s. 53(3). Moreover, where the buyer resells the goods at a time proximate to delivery and to a purchaser with knowledge of the (inferior) quality, that resale price provides strong evidence of their actual value: see Benjamin (-*Harris*), Sale of Goods[6], § 17-

052. Thus on a claim for the contract price by the unpaid seller, the buyer was liable to pay that price less the difference between the market value of 'eating' strawberries and the price that could have been obtained (and in this case was obtained) by a sub-sale to a jam-maker. Assuming (as the judge did) that the contract price reflected the market value of 'eating' strawberries, the defendant buyer was in all events liable under the Sale of Goods Act to pay the realisable value of the strawberries supplied. Sale to the jam maker did not affect the seller's position, but merely ensured that the buyer obtained the value of the inferior strawberries which he would in any case have to pay to the seller. The application of "agency of necessity" principles was entirely unnecessary to achieve the judgment outcome. Indeed, so far as it implied that the buyer was acting in the seller's interest and would be liable to account to the seller for the sub-sale, the application of the doctrine seems profoundly misleading. Academic literature supports the view that an individual who acts predominantly in their own interests is not conducting a "necessitous intervention": see *McCamus*, 11 (1979) Ottawa L Rev 297, 253 n 12, explaining *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch. D 234 on the basis that the benefit of another was merely incidental to the pursuit of one's own interests. See also *Re Leslie* (1883) 23 Ch D 552, where the husband, who paid premiums on an insurance policy taken out by his wife, had himself an interest in the policy, and the claim of his personal representatives for a lien on the policy failed. Any redress for expenditure made to safeguard one's own interest and benefiting another will be referable to other principles such as those governing contribution or subrogation. That the intervener has *some* interest in the matter, however, does not of itself preclude a restitutionary claim and the case law is not entirely clear on the exact boundary line: cf. *Williams v. Wentworth* (1842) 5 Beav 325, 49 ER 603 (Lord *Langdale* MR) (where a creditor could obtain reimbursement of the costs of litigation for the protection of his debtor).

V. In particular: performance on the basis of a void contract for services

50. A problem much discussed in many legal systems is whether services rendered under a void contract for services can constitute a benevolent intervention, or whether this question must be answered in the negative because the requirement to act with the intention to benefit another is absent. GERMAN law in such cases applies the law of benevolent intervention (see for instance BGH 31 January 1963, BGHZ 39, 87, 90; BGH 24 September 1987, BGHZ 101, 393, 399; BGH 30 September 1993, NJW 1993, 3196; BGH 10 October 1996, NJW 1997, 47, 48; BGH 20 October 1996, NJW 1997, 47 and (where the contract was void because administrative consent was withheld) BGH 4 December 2003, BGHZ 157, 168; see also BGH 4 November 2004, RIW 2005, 144 where the contract was void for want of the required formality). The justification given is that an erroneous belief in an obligation to perform does not preclude benevolent intervention. However, a growing body of opinion holds this approach to be wrong because by this means provisions which specifically address such situations are circumvented. This relates in particular to the statutory provisions on reversal of transactions in CC §§ 812 ff (unjustified enrichment law) and in particular CC §§ 814, 817 sentence 2 and 818 (3) (so, *inter alia*, *Medicus*, Schuldrecht II BT[12], no. 622; MünchKomm [-*Seiler*], BGB[3], § 677, no. 41).

51. GREEK case law has held the law of benevolent intervention applicable to cases of void contracts of mandate for the purchase of land. (At the time those cases were decided it was assumed that the contract of mandate – like the main contract itself – was subject to the requirement of a notarised deed. However, the line of authority to that effect was abandoned in 1975; since then it has been held that the mandate does not require any specific form: Areopag 104/1975 NoB 23/1975, p. 653; affirmed by

Areopag 1489/1982 NoB 31/1983, p. 1353). The acquisition of the land which was effected in accordance with the void contract of mandate was categorised as a subjectively extraneous affair if the agent implicitly indicated the intention to acquire the land for another. In such instances the courts have in consequence applied the law of benevolent intervention (Areopag 161/1974 NoB 22/1974 p. 1048). However, in the case of a void bilateral contract, the application of the rules on benevolent intervention seems doubtful. Greek legal writing assumes that if the contract is void there is no mandate in the sense of CC art. 730 (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 730, no. 21; ErmAK [-*Sakettas*], Art. 730, no. 31), but the additional requirement of an intention to benefit another is considered to be missing (*Papanikolaou*, loc.cit. no. 23).

52. PORTUGUESE legal writing (case law on this point seems to be non-existent) likewise argues in favour of the application of the law on benevolent intervention where services are rendered on the basis of a void contract – at any rate if the person acting did not know that the contract was void. The absence of an 'authority' is accordingly to be assessed objectively (*Vieira Gomes*, Gestão de negócios, 66 and *Vaz Serra*, BolMinJus 66 [1957], 104-105).

53. The starting point for AUSTRIAN law is different. Here (in agreement with the solution adopted by this draft) the view is taken that a service rendered under a contract which (unknown to the parties) is void is rendered without the intention to benefit another (OGH 19 November 1974, SZ 47/130; OGH 17 January 1979, SZ 52/9; for further case law see RIS-Justiz RS 0019735). Legal writing endorses that view (Schwimann [-*Apathy*], ABGB V^2, § 1035 no. 6; *Meissel*, GoA, 82 f; 215 ff; Rummel [-*Rummel*], ABGB, I^3 § 1035 no. 6 [though differing in respect of gratuitous mandates]). Exceptions from this principle are occasionally made in cases where the grant of a power of representation was more apparent than real (*Meissel* loc.cit. 216 and OGH 26 January 1995, SZ 68/21 [concerning a tax adviser]).

54. Despite pointers to the contrary in FRENCH legal writing (in particular JClCiv [-*Bout*], Art. 1372-1375, V° Quasi-Contrats. Gestion d´affaires – Conditions d´existence, Fasc. 10 no. 78), there appears to be no cases in which the courts have treated a party rendering services as agreed under a void contract to be an intervener in relation to the other contracting party. In BELGIUM this question has not even be addressed in the legal literature; equally there is no case law in which the law of benevolent intervention has been applied to the reversal of void contracts. The same holds true for ITALY.

55. SPANISH legal writing clearly identifies the *animus aliena negotia gerendi* as the crux of the issue (*Sánchez Jordán*, Gestión de negocios, 95, *Lacruz Berdejo*, Rev.Crít.Der.Inm. 1975, 253). Older case law assumed that if the intervener at the time of performance believed he was obliged to perform, an intention to manage another's affairs was absent (TS 26 November 1926, reported by *Pasquau Liaño*, La gestión de negocios ajenos, 253 and *Lacruz Berdejo*, loc.cit.). The current position of the *Tribunal Supremo* is contradictory. The Fourth Division of the court (then competent in matters of administrative law) has repeatedly applied the law of benevolent intervention to void contracts between private individuals and local authorities (TS 11 October 1979, RAJ 1979 [2] no. 3448 p. 2814; TS 29 October 1980, RAJ 1980 [2] no. 3964 p. 3213; TS 8 March 1984, RAJ 1984 [1] no. 1384 p. 1052 [Third Division, competent for contentious administrative proceedings]; TS 22 January 1975, RAJ 1975 [1] no. 8 p. 20). However, the First Division (competent in private law) has declined to apply the law of benevolent intervention to reverse void contracts (TS 9 April 1980, RAJ 1980 [1] no. 1373 p. 1045; TS 28 September 1960,

RAJ 1960 no. 3149 p. 2031). The more recent academic view seems rather to tend towards the approach of the administrative division, which for its part accords with the approach taken by the German BGH (*Lacruz Berdejo,* loc.cit.; *idem,* Elementos II [2] 418).

56. DUTCH case law has apparently not yet had opportunity since the coming into force of the new CC to consider the application of the law of benevolent intervention to cases of performance under a void contract assumed to be valid. The question is disputed in the literature (favouring the application of the law of benevolent intervention see in particular Verbintenissenrecht [-*Heisterkamp*], Art. 6:198 BW, no. 14 with reference to Rb Dordrecht 30 December 1953, NedJur 1954 no 618 p. 1148; for a contrary opinion, see *Schoordijk*, Zaakwaarneming een onderbelichte bron van verbintenis, 12-13). As a matter of principle, however, the reversal of contracts which are void or avoided (on the latter see also CC art. 3:53 (2)) is a natural subject for the rules on prestations conferred without obligation (CC art. 6:203).

57. Unambiguous authority on the application of the law of benevolent intervention to reverse void contracts is also missing from SCOTTISH law. However it may be assumed that this question is to be answered in the negative. Use is made of the law of benevolent intervention only very restrictively (*Schneiderhan*, Der Quasi-Contract im schottischen und englischen Recht, 135-136; Stair [-*Whitty*], vol. 15, paras 106, 108; *Leslie,* Jur.Rev. 1983, 13, 16, 18). Furthermore, the formative altruistic element is lacking in a case of performance in accordance with an obligation assumed to be valid. In addition the principal will have knowledge of the activity of the intervener. Scholarly treatment of the reversal of contracts which are void or avoided features only under the heading of the law of unjustified enrichment (e. g. *McBryde*, The Law of Contract in Scotland, 353; *Laura J Macgregor*, Edinburgh LRev 2000, 19; *MacQueen*, JuridRev 1994, 137; *Gloag and Henderson*, The Law of Scotland[12], ch. 25).

58. As far as SCANDINAVIAN legal systems are concerned it seems that the application of the law of *negotiorum gestio* to reverse transactions is considered out of the question. Such a construction would be perceived as unnatural. Neither case law nor academic writing show any inclination for such a solution.

59. Since agency in the COMMON LAW is not dependent on the existence of a contract, there is nothing which intrinsically excludes the operation of agency principles between the parties once an agreement is reached, even though, for some reason, that agreement is not (as the parties intended) valid as a contract. While an agent cannot be obliged to carry through the agreement (in the absence of a contractually binding obligation), an agent will be obliged to surrender any profits obtained if the agent nonetheless performs: cf. *Boston Deep Sea Fishing and Ice Co. v. Farnham* [1957] 1 WLR 1051 (*Harman* J) (where reasons of illegality prevented agency by ratification, but the self-appointed agent was nonetheless liable to surrender the profits made on the principal's behalf). However, there can be no agency where the principal lacks capacity and in such cases (as in other cases of intervention by strangers) it is the law of restitution which applies based on the principal's unjustified enrichment. The provision or financing the provision of food, clothing, accommodation and other necessaries to a person lacking capacity to conclude a contract so as to maintain and protect that person has long been recognised as entitling the provider to payment for the (necessary) goods or services rendered: see *Wentworth v. Tubb* (1841) 1 Y & C CC 171, 62 ER 840 (*Knight Bruce* VC)); *Re Gibson* (1871-72) LR 7 Ch. App. 52 (claim in respect of maintenance of mentally ill sister in a private institution for recoupment out of her estate); *Re Rhodes* (1890) 44 Ch. D 94, 102 (*Kay* J), 105 (*Cotton* LJ), 107

(*Lindley* LJ) and 108 (*Lopes* LJ), where the requirements of the claim were not satisfied; *Re Clabdon* [1904] 2 Ch 465 (*Farwell* J) (minor); *Re* [1909] 1 Ch 574, 576 (*Cozens-Hardy* MR); *Guardians of the Poor of St. Mary Islington v. Biggenden* [1910] 1 KB 105, 111 (*Bray* J: minors). The principle extends to the payment of or provision of legal services for the protection of the individual concerned, independently of the success of the litigation, provided it was necessary: see *Ex parte Price* (1751) 2 Ves Sen 407, 28 ER 260 (Lord *Hardwicke* LC); *Sherwood v. Sanderson* (1815) 19 Ves Jun 280, 34 ER 521 (Lord *Eldon* LC); *Williams v. Wentworth* (1842) 5 Beav 325, 49 ER 603 (Lord *Langdale* MR); *Wentworth v. Tubb* (1843) 2 Y & C CC 537, 63 ER 241 (*Knight Bruce* VC); *Nelson v. Duncombe* (1846) 9 Beav 211, 50 ER 323 (Lord *Langdale* MR); *Tayler v. Tayler* (1851) 3 Mac & G 426, 42 ER 325 (Lord *Truro* LC); *Chester v. Rolfe* (1853) 4 De G.M. & G 798, 43 ER 720 (CA in Chancery); *Re Meares* (1878-79) 10 Ch. D 552. The claim in respect of necessaries provided is a personal one – historically based on the notion of a contract implied by law and now more properly recognised simply as one of restitution: see *Wentworth v. Tubb* loc. cit. at 173-174 (842) (*Knight Bruce* VC); *Williams v. Wentworth* loc. cit. at 329 (605) (Lord *Langdale* MR); *Re Gibson* loc. cit., 53 (*Mellish* LJ); *Re Rhodes* loc. cit., 97 (*Kay* J); *Re J* loc. cit. 577 (*Fletcher Moulton* LJ) – though the point was left open by *Cozens-Hardy* MR (loc. cit., 576) and see also *Re Weaver* (1882) 21 Ch. D 615, 619 (*Jessel* MR: possibly a discretionary claim in Equity) and 620 (*Cotton* LJ: open question where claim arises at common law. *Brett* LJ: reserving the question whether an implied contract). The concept of an implied contract was particularly unsuitable in a context where the enriched person could never have concluded an express contract: *Re Rhodes* loc. cit., 105 (*Cotton* LJ: for that reason an erroneous and very unfortunate expression), 107 (*Lindley* LJ, pointing to "the unfortunate terminology of our law, owing to which the expression 'implied contract' has been used to denote not only a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it had a contractual origin [i. e.] *quasi ex contractu*"). The principle has been given statutory effect: see the Mental Capacity Act 2005, s. 7, which, when it comes into effect, will supersede (except as to supplies of goods sold and delivered to minors and drunks) the Sale of Goods Act 1979, s. 3. The restitutionary claim does not give rise to a proprietary security in the form of a charge over that person's assets: *Re* (1878) 8 Ch. D 256, 259 (*James* LJ).

VI. The principal

60. The question who is to be considered the principal is decided under GERMAN law, according to the prevailing opinion, in line with the (unwritten) requirement that the intervention must concern the affair of 'another'. An affair is considered to be that of another if it concerns the legal sphere or sphere of interest of another. However, this definition only relates to 'objectively extraneous affairs' (those affairs which according to their nature, content or outward appearance belong to another's sphere of interest) whereas in the case of a subjectively extraneous affair (where the outward appearance does not permit a clear-cut attribution) the existence of a principal and determination of the principal's identity is inferred by reference to the intention of the intervener. Examples are BGH 16 March 1965, BGHZ 43, 188 (where a car was stopped on a dark road in order to draw the driver's attention to a defective rear light and the danger of a collision from behind; this was held to constitute an intervention for the driver and the road users behind who were at risk of an accident); BGH 7 November 1960, BGHZ 33, 251 (a person who procures necessary medical assistance for an injured person acts on behalf of the health insurer with whom the injured person is insured); BGH 20 June 1968, BB 1969, 194 (a person who discharges another's debt

is held as a general rule to act on behalf of the debtor); BGH 20 June 1963, BGHZ 40, 28 (a fire brigade extinguishing a fire intervenes on behalf of both the arsonist and the owner of the property on fire). Any natural or legal person may be a principal; according to BGH 25 June 2003, NJW 2003, 3268 this extends to a community of heirs.

61. According to the prevailing opinion in GREECE the principal is whose affair is managed. Again this falls back on the distinction between an objectively extraneous affair and a subjectively extraneous affair (see above note 28). The 'extraneous' quality of an affair where the affair is subjectively extraneous is inferred from the intervener's intention to benefit another. That intention pinpoints the principal (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 730, no. 4). It is not a requirement that the intervener should know exactly who the principal is. Where the intervener is mistaken as to his identity, it will be the principal who is actually affected by the intervention who will obtain the rights and incur the duties arising from the benevolent intervention (*Papanikolaou,* loc.cit. no. 17; ErmAK [-*Sakketas*], Art. 730, no. 12). An act of benevolent intervention may concern multiple principals. Problems may arise where other persons besides the directly affected principal have an (indirect) interest in the intervention. For instance, where assistance is rendered to an unconscious accident victim, the injured person's health insurance will have an indirect interest. The question whether or not persons who only benefit indirectly from the intervention are also to be regarded as principals is usually answered in the negative in Greek legal literature. It is argued that the scope of application of benevolent intervention would otherwise become too broad (*Papanikolaou,* loc.cit. no. 9; see, however, *Filios*, Enochiko Dikaio I/2, 194, who in this case considers the health insurance to be a principal). Both natural and legal persons may be principals (ErmAK [-*Sakketas*], Art. 730, no. 10); the same applies to an unborn child and a legal person which has not yet been established (*Sakketas* loc.cit.).

62. PORTUGUESE academic treatment of the subject likewise emphasises that both natural and legal persons as well as persons not yet in existence (such as an unborn child or a legal person not yet established) can be a principal. It is not required that the intervener should personally know the principal. It is of no consequence if the intervener is mistaken about the true identity of the principal; only the 'true' principal will be relevant. It is of importance that the intervener acts *for* another, but it is irrelevant *who* this other person is (*Vaz Serra*, BolMinJus 66 [1957] 99).

63. As far as AUSTRIAN law is concerned it is undisputed that the principal need not have legal capacity (Schwimann [-*Apathy*], ABGB V^2, § 1035 no. 7), unless (as in the case of ratification) some statement of intention is essential (Rummel [-*Rummel*], ABGB I^3, § 1035 no. 7). It is possible to act on behalf of a (legal) person which is not yet in existence (Klang [-*Stanzl*], ABGB IV/1^2, 892; *Ehrenzweig,* System II/1^2, 715). The principal is the person with whose legal sphere the intervener interferes and for whom he intends to act (Schwimann [-*Apathy*], ABGB V^2, § 1035 no. 7; Rummel [-*Rummel*], ABGB I^3, § 1035 no. 3; *Meissel,* GoA, 59 ff). A determination of the principal's identity may depend on the intention of the intervener (*Meissel,* loc.cit. 65). However, an error of the intervener concerning the identity of the principal is without consequence (*Ehrenzweig,* System II/1^2, 715; Klang [-*Stanzl*], loc.cit. 892; Schwimann [-*Apathy*], loc.cit. no. 6). Instead an objective determination as to whose affair is concerned will be decisive (*Meissel*, GoA, 82). If the intervener believes that there is a principal when in fact there is none, there can be no benevolent intervention (*Meissel,* loc.cit. 109 giving the example of a search following an avalanche without the certain knowledge whether or not any person had been buried by the avalanche). The intervener need not know the principal personally (*Koziol and Welser*, Grundriss II^{12},

364). It must merely be possible to ascertain the principal at the material time, that is to say at the onset of the intervention (Schwimann [-*Apathy*], ABGB V[2], § 1035 no. 6; Klang [-*Stanzl*], ABGB IV/1[2], 892). Case law from time to time adopts a rather generous approach to this requirement of 'ascertainability' (e. g. OGH 23 February 1995, ZVR 1995/129; OGH 27 June 1996, ecolex 1997, 81 and OGH 6 December 2001, RIS-Justiz RS 0019810, all relating to compensation for costs incurred in maintaining vehicles held in reserve in case a third party causes an accident to those in operation). A person who merely draws indirect benefit from an intervention is not considered a principal (*Meissel*, GoA, 60). However, it is possible for more than one person to be a principal (OGH 8 November 1984, JBl 1985, 421: several co-owners of a house held to be principals).

64. Similarly, both natural and legal persons can be principals under FRENCH law (JClCiv [-*Bout*], Art. 1372-1375, V° Quasi-Contrats. Gestion d´affaires – Conditions d´existence, Fasc. 10, no. 27). The *Cour de Cassation* has even held a legal person under public law to be the principal in a case of benevolent intervention (Cass.civ. 8 July 1918, S. 1921, I, 5, note *Achille Mestre*), although it has never referred to this decision since. Whether or not a benevolent intervention is possible in favour of a legal person in the course of incorporation cannot be clearly stated. The *Cour de Cassation* has held (though without precise reference to the law of benevolent intervention) that a company cannot incur obligations by virtue of acts performed before its establishment (Cass.civ. 1 July 1971, D. 1972, 436, note *Larroumet*). However, academic treatment of such cases usually considers benevolent intervention to be applicable (for references see *Bout* loc.cit. no. 27). Moreover, persons who lack legal capacity may be principals (*le Tourneau*, RépDrCiv, VI, v° Gestion d´affaires [2002] no. 30). In general the legal position in BELGIUM is the same. It is, however, a matter of dispute both in case law and legal literature whether a private citizen can intervene benevolently for the benefit of a public authority (see for further details *Paulus*, Zaakwaarneming, nos. 27-28 p. 29-30; this has been affirmed by CA Liège 2 March 1967, JT 1967, 632 and CFI Zinnik 10 June 1992, TAgrR 1993, 202; but rejected in Cass. 13 October 1898, Pas. 1898, I, 301, *concl. Mesdach de ter Kiele*). It is clear at any rate that the law of benevolent intervention may apply where one legal person constituted under public law acts in favour of another legal person constituted under public law (CA Brussel 7 February 1964, Pas. 1965, II, 70: where the fire brigade of town A extinguished a fire within a district coming under the responsibility of the neighbouring local authority B).

65. By contrast, the problem how to determine the principal has only rarely been considered in FRENCH and BELGIAN law. The principal is the person in whose affairs the intervener spontaneously and beneficially interferes (JClCiv [-*Bout*], Art. 1372-1375, V° Quasi-Contrats. Gestion d´affaires – Conditions d´existence, Fasc. 10 no. 1) or whose affairs are attended to (*de Page*, Droit Civil Belge II[3], no. 1069 p. 1130). Apparently objective criteria (the sphere of interests concerned) are decisive. However, in respect of *gestion d´affaires désintéressée* some French case law has held a person to be the principal even though – from an objective perspective – his affairs were not concerned at all (Cass.civ. 16 November 1955, JCP 1956 II no. 9087, note *Esmein*; Rev.trim.dr.civ. 1956, 356, *obs. Mazeaud*: in this case of benevolent intervention by a rescuer who pulled an unconscious driver from a burning car, the insurer of the car owner was held to be the principal although the insurance cover did not extend to the driver). If the intervener is mistaken about the identity of the principal all depends on the actual person whose interests are concerned (*Bout* loc.cit. no. 24-25). The same approach is taken in Belgium (*Paulus*, Zaakwaarneming, no. 33 p. 33). Where several persons qualify as principal, there is no solidary liability – either

in France or in Belgium – notwithstanding that the contrary solution is adopted in the law of mandate (CC art. 2002): JClCiv [-*Bout*], Art. 1372-1375, V° Quasi-Contrats. Gestion d´affaires – effets, Fasc. 20 no. 86 and *Paulus* loc.cit. no. 92 p. 53.

66. SPANISH law refers to the principal as *dueño de los negocios*, *dueño* or *propietario*. However, the principal may not only be the owner of property; he or she may be any person who has an interest in having the matter addressed (*Pasquau Liaño*, La gestión de negocios ajenos, 86). The principal may be either a natural or a legal person (and in the latter case constituted under either private or public law). Spanish legal writing in general accepts that an unborn child or a legal person not yet established may be the principal in a benevolent intervention (*Pasquau Liaño*, loc.cit. 87). Likewise a benevolent intervention for the benefit of an unknown principal is accepted (TS 18 January 1908, cited according to *Pasquau Liaño*, loc.cit. 225). The principal need not have legal capacity (TS 2 February 1954, RAJ 1954 no. 322 p. 198); legal capacity is only required with respect to ratification (*Lacruz Berdejo*, Rev.Crít.Der.Inm. 1975, 262). The question who is a principal is usually decided by reference to the notion of the extraneous affair. The concept of a subjectively extraneous affair, however, is treated with great reservation (*Sánchez Jordán*, La gestión de negocios ajenos, 80). It is possible for an act of benevolent intervention to serve the interest of several principals, but if so they are not subject to the rules on joint liability under CC art. 1731, only the general rules (*Lacruz Berdejo*, loc.cit. 268). There are no statutory provisions on resolving the problem of an intervener's mistake as to the identity of the principal, nor is there any case law on the point.

67. Under ITALIAN law any person who can benefit from the acts of the intervener can be a principal. Thus under Italian law too it is not necessary that the principal has a proprietary right affected by the intervention (*Pane*, Solidarietà sociale e gestione d´affari altrui, 84). A mistake concerning the identity of the principal is without consequence (Cass. 23 July 1960, no. 2122, Giur. it. 1962, I, 1, 92; *Aru*, Gestione d´affari, 15). However, the person of the principal must be ascertainable (*Breccia*, La gestione d´affari[2], 871). Accordingly, acts in the interest of a person not yet in existence are in principle excluded; as soon as the affected person obtains legal capacity, however, he or she may ratify the act (Cass. 27 February 1971, no. 495, Foro it. 1971, I, 1945). Legal capacity on the part of the principal is not required (Corte dei Conti, Sez. giur. Sardegna, 3 November 1986, no. 384, Inf. prev. 1987, 469; *Bianca*, Diritto civile, 3, Il contratto[2], 143); in a case of complete lack of legal capacity, however, the legal representative may be regarded as the principal (*Aru*, loc.cit. 53). The co-existence of several principals is possible; they will be liable as joint debtors (CC art. 1294), but enjoy their rights as creditors on a several basis (*Sirena*, Gestione di affari, 296). The co-owners of common property may serve as an example (Cass. 15 October 1963, no. 2757, Foro it. 1964, I, 580 and Cass. 11 July 1978, no. 3479, Giur. it. 1979, I, 1, 820).

68. For DUTCH law too it is not necessary for the intervener to know the identity of the principal; it is precisely in those cases where it is most in the interest of another that someone takes action that the intervener will more often than not lack that knowledge (Asser [-*Hartkamp*], Verbintenissenrecht III[10] no. 298 p. 312; *Verburg*, De vrijwillige zaakwaarneming, no. 39 p. 67-68). Intervention on behalf of several principals is possible: for example, the admission of a child to hospital is an intervention both on behalf of the child and on behalf of the parents (CA Amsterdam 16 November 1984, NedJur 1985 no. 778 p. 2542; Verbintenissenrecht [-*Heisterkamp*], no. 11. 1; *Verburg*, loc.cit. no. 40, p. 68-69). Intervention in favour of a *dominus negotii* not yet existing (such as a foundation yet to be constituted [HR 20 November 1981, NedJur 1982

no. 568 p. 1974], an association yet to be incorporated [HR 8 January 1982, NedJur 1982 no. 333 p. 1227], or a foetus) has been held to be possible.

69. Under SCOTTISH law the principal is determined by reference to the intention of the intervener. An error concerning the identity of the principal is of no consequence; it will only preclude a benevolent intervention if the would-be *gestor* acts in the mistaken belief that the affair attended to is his own, or if he erroneously assumes he is acting for another, but is in reality taking care of his own affair (Stair [-*Whitty*], vol. 15, paras 103, 110 and 140; *Leslie*, JuridRev 1983, 14).

70. SCANDINAVIAN legal literature does not explain in detail how the principal is to be ascertained. The SWEDISH Parental Code [*Föräldrabalk* (1949:381; republished in SFS 1995:974)] chap. 11 § 3 contains a provision on caring for strangers; FINNISH Debt Enforcement Act [*utsökningslag*] of 3 December 1895 chap. 4 § 25 touches upon the risk that the debtor's land might be wasted or buildings destroyed. In such a case the court may authorise an 'agent' who will attend to the property at the expense of the creditors, which may not (yet) necessarily be known. Of course, technically speaking this agent is not a benevolent intervener since he is authorised by the court.

71. Under ENGLISH LAW, agency by ratification presupposes that the agent's intention to act on behalf of the principal was made manifest. Ratification is not possible if the agent has acted in his own name: the prospective agent must have acted in the name of the prospective principal; there can be no ratification of the acts of an unauthorised agent by an *undisclosed* principal: *Brook v. Hook* (1871) LR 6 Ex. 89, 91 (*Kelly* CB); *Keighley, Maxsted & Co. v. Durant & Co.* [1901] AC 240 (third party unable to obtain damages from principal for breach of contract concluded by agent, despite ratification, as the agent had acted beyond his authority with the undisclosed intention to act on behalf of the principal). However, while the agent must disclose that he is acting on behalf of another, it is not necessary for the principal to be personally identified, at any rate if the identity of the principal is ascertainable at the time of the agent's intervention. An agent is thus able to act on behalf of a deceased's successors 'whoever they might be', since they are legally ascertainable at the time of death: *Lyell v. Kennedy (No. 4)* (1889) 14 App. Cas. 437, 456 *per* Lord *Selborne*. The question of for whom an agent of necessity acts has been disputed in the case where, due to necessity, a ship's captain pledges, disposes or otherwise deals with the cargo. A strong line of authority holds that the captain, who is ordinarily the agent of the ship owner who engaged him, acts in such a case as the agent of necessity of the owners of the cargo: *The Gratitudine* (1801) 3 C. Rob 240 at 257-258 and 260, 165 ER 450 at 456 and 457 (Sir *W. Scott*) approved by Dr *Lushington* in *The James Seddon v. Jeffares* (1865-67) LR 1 A & E 62, 65, and Sir *Robert Phillimore* in *The Lizzie* (1867-69) LR 2 A & E 254, 258-259; *Freeman v. East India Co.* (1822) 5 B & Ald 617, 106 ER 1316 at 1318 (*Bayley* J) (where, however, necessity was not proven); *The Hamburg* (1863) 2 Moore PC (N. S.) 289, 321 (Lord *Kingsdown*: "The master is invested by presumption of law with authority to give directions on this ground – that the owners have no means of expressing their wishes.) See also *The Lizzie*, loc. cit., 259 (Sir *Robert Phillimore*: "If there be an opportunity for the owners to express their will . . . with respect to their cargo, the master, who is the agent of necessity and not of their choice, has no right to deprive them of this opportunity, and therefore must communicate with them if it be reasonably within his power to do so"); *The Karnak* (1867-69) LR 2 A & E 289, 299 and 309 (Sir *Robert Phillimore*); *The Onward* (1872-75) LR 4 A & E 38, 51 (Sir *Robert Phillimore*); *Metcalfe v. Britannia Ironworks Co.* (1876) 1 QBD 613, 626 (*Cockburn* CJ); and *Atlantic Mutual Insurance Co. v. Huth* (1880-81) 16 Ch. D 474, 481 (*Cotton* LJ). It may be, however, that this is in substance a short of hand for a chain of relationships. According to *Parke* B in *Vlierboom v.*

Chapman (1844) 13 M & W 230 at 239-240, 153 ER 96 at 99-100, a captain who sells the cargo in a case of necessity acts in the interests of the ship owner and exercises the ship owner's powers vis-à-vis the owners of the cargo and does not act as an agent of the owners of the cargo (though in that case *Parke* B also considered that, even if a direct agency were accepted, it would not have generated the right to remuneration contended for). See also *The Gaetano and Maria* (1882) 7 PD 1, 4 (*Brett* LJ), where English law was not applicable, but it was doubted by way of *obiter dicta* that a captain is ever an agent for the owner of cargo.

VII. The concept of reasonable ground and its equivalents

72. As far as the concept of a reasonable ground is concerned, V.-1:101 has largely drawn on the DUTCH CC art. 6:198 as its source of inspiration. The Dutch legislator intended the requirement of a reasonable ground to exclude improper and unlawful intermeddling with another's affairs (Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 299 p. 313). This criterion thus marks off justified intervention from an unlawful act in the sense of tort law. The existence of a reasonable ground does not depend on the result of the intervention, but rather from the circumstances which provide the incentive for the *gestor* to intervene in another's legal sphere. The court thus has to balance various factors. Within that framework the questions whether or to what extent the principal himself was capable of acting and whether the intervention accorded with the actual or presumed wishes of the principal are of particular importance (T. M. Parlementaire Geschiedenis VI, 791; Verbintenissenrecht [-*Heisterkamp*], Art. 6:198 BW no. 12-12. 3; Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 299-302 p. 312-315; T & C [-*Hijma*], Art. 6:198, no. 2). If the intervener takes action without prior consultation of the principal despite the fact that he could have easily contacted him, there is no reasonable ground for the intervention (so held by HR 31 October 1952, NedJur 1953 no 477 p. 756; CFI Zwolle 24 April 1957, NedJur 1957 no. 569 p. 1137). Exceptionally the intention to save time, effort and costs may serve as a sufficient justification (T. M. Parlementaire Geschiedenis loc.cit.; Asser [-*Hartkamp*] loc.cit. no. 300, p. 314; Verbintenissenrecht [-*Heisterkamp*], Art. 6:198 BW, no. 12. 1). A reasonable ground will also be absent if the intervener acts contrary to the intention of the person concerned unless the latter is unable to state his mind in a manner which binds him (Parlementaire Geschiedenis loc.cit.; HR 8 January 1982, NedJur 1982 no. 333 p. 1227). Otherwise contrary wishes may only be disregarded in extraordinary circumstances (HR 19 April 1996, NedJur 1997 no. 24 p. 101 [*Delta Lloyd/Interlloyd*]). The prime example for such cases is the prevention of suicide by someone professedly weary of life (Asser [-*Hartkamp*] loc.cit. no. 295 p. 310; *Schoordijk*, Zaakwaarneming een onderbelichte bron van verbintenis, 34; HR 23 February 1996, NedJur 1997 no. 276 p. 1465).

73. The formula 'the intervener must have a reasonable ground for intervening' is largely unfamiliar to other jurisdictions of the European Union, but this only relates to the phrase itself, not to its substance. Similar considerations are reflected in all the jurisdictions. According to GERMAN CC § 677 the act is to be undertaken in accordance with the interests of the principal and with regard to his actual or presumed intention. Whereas in CC § 677 both these criteria (interest and intention) relate to the manner of carrying out the intervention, CC § 683 takes up these requirements in relation to the fact of intervention as such. A corresponding distinction is drawn between justified and unjustified benevolent intervention. Taking the principle of private autonomy into account, the question of justification is to be answered first and foremost in accordance with the actual wishes of the principal – even if that intention might run contrary to his objective interests. In the absence of actual wishes, reference

must be had to the principal's presumed intention. Only at this stage does the objective interest of the principal come into play where it may be an important indicator of the principal's presumed intention; the details are a matter of dispute (for further details see *Medicus,* Schuldrecht II BT[12], no. 624, 627; MünchKomm [-*Seiler*], BGB[3], § 677, no. 45; § 683, no. 13; Palandt [-*Sprau*], BGB[63], § 677, no. 13; § 683, no. 6). Under CC § 679 contrary wishes of the principal are irrelevant if a duty of the principal whose discharge is required as a matter of public interest (for example, removal of dangerous obstruction from traffic road: BGH 4 December 1975, BGHZ 65, 354), or a duty to furnish maintenance, would not be performed in time without intervention. In setting out this requirement of a reasonable ground ESTONIAN LOA § 1018 (1) uses the classic phrase that the "intervention has to correspond to the interests and actual or presumed intention of the principal".

74. Under GREEK law it is one of the requirements of a justified legitimate benevolent intervention that intervention accords with the interest and the wishes of the principal (CC art. 736). Only if this requirement is satisfied does a legal relationship comparable to mandate arise. The actual wishes of the principal have to be heeded so far as this is discernable, that is to say, so far as expressed or implicit. Where an actual intention is established, this will be the sole criterion for assessing whether it was correct to intervene. There is no control of reasonableness; actual intention will prevail over objective interest, unless the further requirements of CC art. 730 (2) (principal's wishes contrary to statute or morality) apply, cf. *Bosdas*, NoB 18/1970, 769, 774 and CA Thessaloniki 693/1993, EllDik 34/1993 p. 1507). If the actual wishes of the principal cannot be ascertained, the presumed intention will be decisive instead. In determining what was the principal's presumed intention all the circumstances of the case are taken into account, including the principal's subjective considerations. The presumed intention does not necessarily correspond with the principal's objective interest (*Papanikolaou*, loc.cit. no. 34). An intervention will be in the objective interest of the principal if it is beneficial; a non-economic interest will suffice.

75. PORTUGUESE CC art. 464 likewise adheres to the principle that the intervener must act in the interest of the principal and in accordance with his or her wishes. CC art. 340 (3) confirms this general rule (*Menezes Leitão*, Responsabilidade do *gestor*, 189). The Portuguese CC does not distinguish between useful and urgent interventions. Neither is it required that the intervention is necessary. Apparent utility at the time of intervention will suffice.

76. The equivalent concept of 'reasonable ground' under AUSTRIAN law may be found in CC § 1036 (intervention in order to prevent an impending damage; benevolent intervention in a case of emergency). Where intervention serves to eliminate a common danger, regard must also be had to CC § 1043 (which contains elements of unjustified enrichment law) (Rummel [-*Rummel*], ABGB I³, § 1043 no. 1 and no. 7). As far as an emergency is concerned, the intervener will only have a claim if the activity proves to be useful from the subjective perspective of the principal, CC § 1037. Thus in such cases the presence of a reasonable ground for the intervention is determined by the success of the intervention.

77. A similar approach is taken by SPANISH CC art. 1893. The wording requires the intervention to be successful: the principle must have appropriated the fruits of the intervention, even though a profit in the sense of an economic advantage is not a prerequisite (*Díez-Picazo and Gullón*, Sistema II, 569). The criterion of usefulness assessed from an ex ante perspective is a point of discussion within legal literature; the intervention must have been undertaken in order to achieve an advantageous result for the principal (*Sánchez Jordán*, Gestión de negocios, 197; *Puig Brutau*, Compendio II,

559-560; *Lete del Río*, Obligaciones II, 126). The case law of the Tribunal Supremo has sent mixed messages (*Pasquau Liaño*, La gestión de negocios ajenos, 75). TS 27 April 1945, RAJ 1945 no. 685 p. 417, for instance, held that an assessment of utility at the material time of action is decisive, not the utility which results from it. TS 3 February 1965, RAJ 1965 (1) no. 525 p. 326, however, seems to proceed on the basis of some sort of ratification in the case where intervention has proved to be ultimately successful. Little clarity is provided by the proposition that while some advantage for the principal must arise from the intervention, that advantage may be present at any time and that it is therefore not necessary to examine the consequences of the intervention in more depth (TS 26 June 1946, RAJ 1946 no. 839 p. 549). CC art. 1893 (2) dispenses with the requirement of a resultant usefulness where the intervention is undertaken to prevent 'impending damage of an obvious nature'. In other words, in this case it exceptionally suffices according to the literal terms of the provisions that at the time of action it appears the intervention will be useful (*Sánchez Jordán*, loc.cit. 234). The provincial law of the Foral Community of Navarra, by contrast, relies generally only on the concept of an apparent usefulness at the time of intervention (*Sánchez Jordán*, loc.cit. p. 234, fn. 67; *Pasquau Liaño*, loc.cit. 75). Ley 560 of the *Compilación Navarra* only requires that the intervention was reasonably 'undertaken and continued' (*razonablemente asumida y realisada)*.

78. The ITALIAN law of benevolent intervention builds on the concept of solidarity. CC art. 2031 therefore requires that it was useful for the intervention to be commenced (*qualora la gestione sia stata utilmente iniziata*). The material time is that of the first act of intervention (Cass. 4 July 1964, no. 1750, Giur. it. 1964, I, 1, 1129). By contrast, it is irrelevant whether or not the outcome of the intervention is beneficial for the principal (*Aru*, Gestione d´affari, 44-45). The usefulness of the intervention will be assessed according to the presumed wishes of the principal, which are inferred from objective factors (*Breccia*, La gestione d´affari[2], 878; Cass. 13 October 1951, no. 2634, Foro it. 1952, I, 201). Regard is also had to how a *bonus pater familias* would have acted in the circumstances (Cass. 13 March 1964, no. 550, Foro it. 1965, I, 866). The usefulness of the intervention is presumed if the intervener undertakes something which the principal was under a duty to do (Cass. 15 October 1963, no. 2757, Foro it. 1964, I, 580) or if the principal's omission to act threatens to have a detrimental impact on inalienable rights of a third party. In that case, moreover, a *prohibitio domini* is to be disregarded (CC art. 2031 (2); Cass. 17 July 1969, no. 2636, Foro it. 1971, I, 713).

79. Although in older FRENCH legal literature some authors have argued that the intervention must be necessary (see, for instance, *Vasseur*, Urgence en droit civil, Rev. trim. dr. civ. 1954, no. 8-9 p. 415-420), recent legal literature prefers a test of usefulness of the intervention (*utilité de la gestion*) to one of necessity (*Mazeaud and Chabas*, Leçons de droit civil II (1)[9] no. 683 p. 811). According to French case law (as it is interpreted in French legal literature, at least), how that usefulness is to be assessed depends on whether or not the intervener acted with an altruistic intention (JClCiv [-*Bout*], Art. 1372-1375, V° Quasi-Contrats. Gestion d´affaires – Conditions d´existence, Fasc. 10 nos. 98 et seq.). In a case of *gestion d´affaires désintéressée* the matter turns on whether in the circumstances the intervener might permissibly assume that the intervention would be beneficial to the principal. Thus in a case of *gestion d´affaires désintéressée* it suffices if the intervention appears promising at the outset; whether or not the principal has been ultimately enriched is not critical. Where assistance is rendered in an emergency situation, but to no avail, the usefulness will be assessed according to the expected outcome, not the actual outcome. By contrast, in a case of *gestion d´affaires intéressée* the usefulness of a benevolent intervention *is*

determined by whether or not the principal has actually profited as a result. However, according to the prevailing legal opinion in BELGIUM, benevolent intervention only arises if the intervention by the *gestor* was necessary (d*e Page*, Droit Civil Belge II[3], no. 1074 p. 1138-1139). Moreover, the intervention must be beneficial for the principal, although usefulness at the outset of the intervention will suffice (Cass. 12 November 1998, De Verz 1999, 208). Belgian law does not follow the distinction between *gestion d´affaires désintéressée* and *gestion d´affaires intéressée*.

80. The SCOTTISH Institutional Writers echo the distinction set out above in the context of Austrian law and Spanish law, namely between an intervention in a case of emergency and a useful intervention. *Stair* states that "a negotiater cannot begin any new business, but only carry on that which is begun, and they must be necessarily or profitably done, otherwise he hath his labour for his pains" (The Institutions of the Law of Scotland, Book I/Title 8 § 3). *Erskine* elaborates on 'necessity' mainly in the context of the intervener's liability (Institutes of the Law of Scotland Book III § 53: "Where the *gestor*, from friendship, and the necessity of the case, takes upon him the direction of an affair which requires immediate execution, he is accountable only for gross omissions"). Modern legal literature likewise demands a certain urgency and necessity for the intervention (*Walker*, Principles of Scottish Private Law, II[4], 513-514). The predominant view is that an initial utility at the outset of the intervention – determined in the context of the presumed wishes of the principal – is decisive. An acute emergency is not required (*Leslie*, Jur.Rev. 1983, 28, 29; Stair [-*Whitty*], vol. 15, paras 117, 120; *Marshall*, General Principles of Scots Law[5], para 12-11). The same approach is taken in the case law: *Fernie v. Robertson* (1871) 9 M 437; *Dunbar v. Wilson and Dunlop's Trustee* (1887) 15 R 210.

81. Similarly, in the SCANDINAVIAN countries the basic idea that a claim may only arise in favour of the intervener if he has acted with 'reasonable grounds' is widely received, though the phrase itself is not contained in any of the statutory provisions. Since an overarching concept of benevolent intervention is largely unknown, resort must be had as far as possible to specific statutory provisions (e.g. chap. 18 § 10 Commercial Code 1736; Swedish *konsumenttjänstlagen* 1985:716 (Consumer Services Act) § 8; chap. 8 § 6 Finish Consumer Protection Law [*Konsumentskyddslag*] of 20 January 1978/38).

82. ENGLISH law draws on a notion of reasonable necessity for the measure undertaken as a fundamental requirement for agency of necessity: there must be a necessity that the agent act without instructions in order to safeguard the property or interests of the principal which are in danger. The notion of what is necessary is recognised to be question-begging (cf. *Gunn v. Roberts* (1873-74) LR 9 CP 331, 332 (*Brett* J)), but the requirement is of long-standing and seemingly entrenched: see *East India Co. v. Ekines* (1718) 2 Bro PC 382, 1 ER 1011, affirming *Ekines v. East India Co* (1717) 1 P Wms 395, 24 ER 441 (Lord *Cowper* LC); *The Alexander* (1842) 1 W Rob 346, 166 ER 602 (Dr *Lushington*); *Lindsay v. Leathley* (1863) 3 F & F 902 at 937, 176 ER 410 at 427 (*Cockburn* CJ); *The Pontida* (1884) 9 PD 102, 104 (Butt J). The necessity must relate both to the situation and the means adopted to remedy it. (As to the latter, see also Chapter 3, Art. 3:106, Notes, 11.) There can be no necessity to act if the principal is himself on the scene and capable of acting: see *Arthur v. Barton* (1840) 6 M & W 138 at 142 (*Alderson* B) and 143 (Lord *Abinger* CB), 151 ER 355 *Beldon v. Campbell* (1851) 6 Exch 886, 890-891 (*Parke* B); *Gunn v. Roberts* loc. cit., 331, 332 and 337 (*Brett* J) and 338 (*Denman* J) – all confirming the absence of necessity for conclusion of a loan contract by a ship's captain in his principal's name at a port where the principal or his representatives are themselves able to procure required finance – and see also *Nelson v. Duncombe* (1846) 9 Beav 211 at 233, 50 ER 323 at 332 (Lord

Langdale MR) (a restitutionary claim in respect of provision of necessaries to a person lacking capacity presupposes that that person is not able to cater for themselves) and, from the same context, *Pontypridd Union v. Drew* [1927] 1 KB 214, 218 (*Bankes* LJ: "there is no pretence for applying principles or doctrines of agency of necessity to relief given to a person of full age and capacity to contract"). Moreover, an intervener has no authority to act (e.g by selling property of the principal) merely because this would be of benefit to the principal: *Cammell v. Sewell* (1858) 3 H & N 617 at 635, 157 ER 615 at 623 (*Martin* B). Nor does it suffice that an agent considers the measure would be beneficial if the measure was not manifestly necessary: *Robertson v. Clarke* (1824) 1 Bing 445, 450 (Lord *Gifford* CJ), 130 ER 179; *Ewbank v. Nutting* (1849) 7 CB 797, 137 ER 316; *Tronson v. Dent* (1853) 8 Moore PC 419, 452 (Sir *John Patteson* for the PC); *The Segredo* (1853) 1 Sp Ecc & Ad 36 at 48, 164 ER 22 at 28 (Dr *Lushington*); *The Australia* (1859) 13 Moore PC 132, 144 (Dr *Lushington* for the PC), 15 ER 50; *Lindsay v. Leathley*, loc. cit. 938 (427) (*Cockburn* CJ), and see also *Atlantic Mutual Insurance Co. v. Huth* (1880-81) 16 Ch. D 474, 481 (*Cotton* LJ). The intervention must be a response which is called for in the circumstances and proportionate to the problem, cf. *Wilson v. Millar* (1816) 2 Stark 1 at 4, 171 ER 553 at 554 (Lord *Ellenborough* CJ: sale of entire cargo unauthorised as a mere pledge would have sufficed). A touchstone is whether a prudent person with clear knowledge of the circumstances of the case would have no doubt as to how he should proceed: *Somes v. Sugrue* (1830) 4 Car & P 276 at 282, 172 ER 703 at 706 (*Tindal* CJ). What is done or obtained must be necessary and it must be necessary that it be done or procured at the time it is done or supplied: cf. *Pocahontas Fuel Co. Inc. v. Ambatielos* (1922) 10 Lloyd's L. Rep 188, 190 (*McCardie* J), where, however, there was a "course of dealings" between the parties from which, besides considerations of necessity, authority for the transaction could be inferred, and in the same sense *The Sophie* (1842) 1 W Rob 368, 369, 166 ER 610 at 611 (Dr *Lushington*). In particular the problem must be so pressing that the agent is entitled to act without (fresh) instructions from the principal: see *Freeman v. East India Co* (1822) 5 B & Ald 617 at 624, 106 ER 1316 at 1319 (*Best* J: captain should have awaited owner's instructions because the cargo was not threatening to deteriorate); *Cammell v. Sewell*, loc. cit., 635 (623) and 644 (626) (*Martin* B), where the sale of cargo was unnecessary because it was not perishable, and consider also *Harris v. Fiat Motors Ltd* (1906) 22 TLR 556 (defendant's employee, whom the defendants had instructed to drive the plaintiff's car personally, had no power to delegate the driving to a non-employee passenger (whose driving damaged the car) in order to investigate noise at the back of the car – so as to make the defendants vicariously liable for the driver's negligence – because there was no necessity to keep the vehicle moving). The necessity is to be assessed objectively, based on what a reasonable and prudent person would contemplate in the circumstances; the fact that the intervener considered intervention justified is not sufficient. An interference with another's property may be justified, for example, where there is a risk of its loss or damage because it is exposed to bad weather or theives: *Sachs v. Miklos* [1948] 2 KB 23, 34-36 (Lord *Goddard* CJ). Although there is authority for the view that the reasonable necessity must amount to a real emergency (*Sachs v. Miklos*, loc. cit., 34-36 (Lord *Goddard* CJ), approved in *John Koch Ltd. v. C. & H. Products Ltd.* [1956] 2 Lloyd's Rep 59, 60 and similarly at 65 (*Singleton* LJ), other formulations of the requirement are broader and more flexible, requiring only that the circumstances determine the course which a person ought to take: *Australasian Steam Navigation Co. v. Morse* (1871-73) LR 4 PC 222, 230 *per* Sir *Montague Smith* ("[W]hen by the force of circumstances a man has the duty cast upon him of taking some action for another, and under that obligation, adopts the course

which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may properly be said of the course so taken, that it was, in a mercantile sense, necessary to take it"). Possibly the correct test turns on whether the intervener is a stranger or a person who is already an agent to the principal and merely acting outside the scope of his authority, the requirement of "emergency" being confined to the former case: in *Palmer v. Stear* (1963) 113 LJ 420, which was a case of intervention by a stranger, it was successfully argued for the vet that *in a case of emergency* one person might discharge another's legal duty; and in *Langan v. GWR Co.* (1873) 30 LT (N.S.) 173, 176 *Cleasby* B considered that an employee of the rail company would be authorised to procure medical and other necessary assistance for persons injured in a rail accident, but (short of ratification) a stranger would not – a distinction presumably based on the assumption that if there are employees of the rail company on the scene there is no need for a stranger to usurp their responsibility. The measure ventured need not be ultimately successful, but the intervention must have been necessary as a prospective solution to the difficulty: see *The Lizzie* (1867-69) LR 2 A & E 254, 256 (Sir *Robert Phillimore*) (secured lending by a ship's captain valid because concluded by the agent honestly and with due care, notwithstanding that it resulted in no benefit to the principal); *Re Meares* (1878-79) 10 Ch. D 552, upholding a right to reimbursement of legal costs incurred in maintaining an action to procure the appointment of administrators for the estate of a person without full mental capacity, in order to protect that person's property, despite the fact that the individual concerned died before administrators were appointed, and see similarly in respect of litigation which was reasonable, though unsuccessful, *Sherwood v. Sanderson* (1815) 19 Ves Jun 280, 34 ER 521 (Lord *Eldon* LC), *Nelson v. Duncombe*, loc. cit. (Lord *Langdale* MR) and; *Phelps, James & Co v. Hill* [1891] 1 QB 605 (CA), where a ship transporting goods from Swansea to New York was damaged due to bad weather and put into Queenstown as a safe harbour and the defendant's decision to deviate from his instructions and make for Bristol, where the ship could be repaired the most economically, was "reasonably necessary" (*ibid*, 610-611 (*Lindley* LJ), 614 (*Lopes* LJ), 617 (*Kay* LJ)), although the ship subsequently sank; *Tetley & Co. v. British Trade Corp.* (1922) 10 Lloyd's L. Rep. 678, where the principal's goods were transported in order to safeguard them from probable serious public disturbances and then sold, but the cost of transportation exceeded the proceeds of sale.

VIII. In particular: the duty to ascertain the principal's wishes

83. The draft deviates by a nuance from some of the national legal systems with its rule that an intervention is not justified if the intervener could have consulted the principal and failed to do so. Under GERMAN CC § 681 sentence 1, the intervener is obliged to notify the principal as soon as practicable of his intervention to manage the principal's affair and, unless delay would cause damage, to await the decision of the principal. In setting out these duties the legislator wanted to achieve clarity as regards the actual wishes of the principal (MünchKomm [-*Seiler*], BGB[3], § 681, no. 5; Prot II, 727). According to the case law of the BGH (BGH 4 December 1975, BGHZ 65, 354, 356) the duties arising from CC § 681 sentence 1 are only secondary obligations, which as a general rule presuppose the intervention (RGRK [-*Steffen*], BGB[12], § 681, no. 3). A violation of the duty of notification merely leads to a duty of the intervener to compensate for damage sustained by the principal as a result of the absence of or delay in notification (RGRK [-*Steffen*], BGB[12], § 681, no. 11; Staudinger [-*Wittmann*], BGB[13], § 681, no. 8; *Soergel* [-*Beuthien*], BGB[12], § 681, no. 4 and Erman [-*Ehmann*], BGB I[10], § 681, no. 4). The fact that the intervener has omitted to notify the principal

does not of itself automatically preclude an intervener from claiming compensation for expenses incurred (CC § 683). As the duty to notify serves first and foremost to enable the actual wishes of the principal to be ascertained, it is only of minor importance in the context of CC § 679 (discharge of a duty of the principal which is of public interest) (Staudinger [-*Wittmann*], BGB[13], § 681, no. 3), though an intervener is not liberated from the duty even then since notification may induce the principal to change his mind (RGRK [-*Steffen*], BGB[12], § 681, no. 8). Furthermore, breach of the duty to notify does not imply that the intervener intended to serve his own interests rather than act on behalf of another (BGH 4 December 1975, loc.cit.). Notification is 'feasible' if, looking at the circumstances objectively, it is required in the interest of all persons concerned and the intervener can be expected to do it. This is to be assessed according to the circumstances of the individual case, whereby both the possibility to contact the principal and the significance of the intervention are of particular importance (RGRK [-*Steffen*], BGB[12], § 681, no. 4; MünchKomm [-*Seiler*], BGB[3], § 681, no. 5; Staudinger [-*Wittmann*], BGB[13], § 681, no. 3; CFI Stuttgart 7 January 1972, VersR 1973, 517). If it is easy to contact the principal, the intervener has to notify him at once (MünchKomm [-*Seiler*], BGB[3], § 681, no. 5). The intervener will then have to await the principal's decision, unless any delay would lead to (further) damage.

84. GREEK law to a large extent resembles German law in this respect, as it also extends the main duty of the intervener to act in accordance with the interest and wishes of the principal by absorbing secondary obligations drawn from the law of mandate, *inter alia* the duty of the intervener to notify the principal of the fact of intervention (CC art. 733). The intervener should be compelled to ascertain the wishes of the principal (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 733 no. 1). A violation of this duty to notify the principal gives rise to a liability for damages on the part of the intervener (*Papanikolaou,* loc.cit. no. 4); the lawfulness of intervention, however, remains unaffected (CA Patras 92/1955, NoB 4/1956, 96).

85. POLISH CC art. 753 (1) provides for a duty of the intervener to notify the principal as soon as possible. CZECH and SLOVAK CC art. 743 (1) require that the intervener notifies the principal of his intention to act and awaits the principal's decision, unless the intervention serves to prevent impending damage. By contrast PORTUGUESE CC does not explicitly provide for a duty to ascertain the principal's wishes. CC art. 465 limb (b) confines itself to imposing a duty on the intervener to inform the principal as soon as possible.

86. The AUSTRIAN OGH (21 April 1982, JBl 1984, 256) has held that the intervener must act in accordance with the interests of the principal, having regard to the principal's actual or presumed wishes. Consideration must be given to the probable wishes of the principal – in particular where the intervention involves expense where it cannot be taken for granted that the principal will be willing to bear the costs. A *gestor* intervening in case of emergency (CC § 1036) will not only lose his right to compensation if he acts contrary to the presumed wishes of the principal; he will also be held to have acted unlawfully (Schwimann [-*Apathy*], ABGB V[2], §§ 1036-1040 no. 11; *Meissel,* GoA, 118 et seq.). If the intervener does not make use of an opportunity to contact the principal, his acts will not constitute benevolent intervention under CC § 1036; they will (at most) amount to intervention under CC § 1037 (OGH 22 November 1984, SZ 57/167; OGH 26 November 1981, SZ 54/176). That is because it is not a case of emergency if there is sufficient time to contact the principal and ask for his consent (Schwimann [-*Apathy*], ABGB V[2], §§ 1036-1040 no. 1, *Meissel,* GoA, 30). There may also be an element of fault in not contacting the principal where the case falls under CC § 1037 (*Ehrenzweig,* System II/1[2], 714 fn. 5), which in turn may render the intervention unlawful (Rummel [-*Rummel*], ABGB I[3], § 1037 no. 2). If the

intervener acts contrary to the express and legally binding wishes of the principal, a claim for compensation of expenses incurred is barred by CC § 1040 (Schwimann [-*Apathy*], ABGB V[2], §§ 1036-1040 no. 5). An exception is contained in CC § 1042 which allows for the discharge of debts contrary to the intention of the debtor (CC § 1042); in this case no overriding public interest is required (*Meissel*, GoA, 47 et seq.).

87. The intervener's duty to ascertain the wishes of the principal is hardly ever explicitly referred to in France or Belgium. As regards BELGIAN law, *Paulus*, Zaakwaarneming no. 48 p. 39, points out that only with great reservation could it be accepted that there was a 'necessity' for intervention if the intervener could have contacted the principal but failed to do so. In FRANCE it is said that the 'presence' of the party benefited is an indicator that the intervention was not necessary. The easier it was for the principal to act himself, the stronger the presumption that the intervener should not have acted (JClCiv [-*Bout*], Art. 1372-1375, V° Quasi-Contrats. Gestion d´affaires – Conditions d´existence, Fasc. 10 no. 105 ; see also *le Tourneau*, RépDrCiv, VI, v° Gestion d´affaires [2002], no. 60: if the measure was not urgent and the issue is open to doubt, it cannot have been appropriate to intervene without first contacting the principal). The opportunity to contact the principal prior to taking any measures does not, however, seem to preclude a justified intervention on another's behalf under all circumstances (cf. CA Paris 3 May 1989, Juris Data 1989-022252). It is generally assumed that as a rule a measure taken is regarded as unlawful if the principal disapproves it (*Flour/Aubert/Savaux*, Le fait juridique[10], no. 5 p. 7). The only exception is if the principal's opposition is manifestly unlawful (Cass.civ. 11 February 1986, Bull.civ. 1986 I, no. 23).

88. Under SPANISH CC art. 1888 the intervener is 'obliged to continue measures undertaken until completion of the measures or ancillary matters or to request the person concerned to take over from the intervener when he [the principal] is in a position to undertake them on his own'. The duty arising under CC art. 1888 to contact the principal is not aiming at eliciting his intention; it is concerned instead with calling upon the principal to continue a measure already underway. A duty of the intervener to make enquiries as to the principal's wishes is not set out. The existence of such a duty is nonetheless recognised and may either be inferred from the requirement of *absentia domini* (*Pasquau Liaño*, La gestión de negocios ajenos, 93) or from CC art. 1189 which codifies the general standard of care of an intervener (*Sánchez Jordán*, Gestión de negocios, 498-501). If, when the intervener makes inquiry, the principal consents to the measure, this may constitute a contract of mandate (*Sánchez Jordán*, loc.cit. 502).

89. Similarly under ITALIAN law the view is maintained that a person who interferes with another's legal sphere is obliged to ascertain the wishes of the principal and to await his directions, at least as far as this is possible in the circumstances (*Sirena*, Gestione di affari, 320). If the principal gives his consent, this will constitute a contract of mandate under Italian law too (*Breccia*, La gestione d´affari[2], 879-880; with some reservation *Aru*, Gestione d´affari, 23). If the principal disapproves, the provisions on benevolent intervention will not apply (CC art. 2031 (2); Cass. 23 May 1984, no. 3143, Rep.Giur.it. 1984, voce Gestione d´affari, no. 1, c. 1299). Disapproval may also be inferred from consistent conduct of the principal (*Aru* loc.cit. 47). Of deciding importance is whether the intervener knew of the contrary wishes of the principal or would have known of them if he had exercised reasonable care (*Breccia* loc.cit. 878).

90. According to DUTCH law only a person who acts in accordance with the actual wishes – and in particular the expressed wishes – of the principal acts with reasonable

grounds (see above note 72). Acts which do not correspond with the presumed (unexpressed) wishes of the principal may constitute a justified intervention in another's affair if the intervener has tried in vain to contact the principal (Verbintenissenrecht [-*Heisterkamp*], Art. 6:198 BW, comment 12. 2; Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 300 p. 314; HR 23 February 1996, NedJur 1997 no. 276 p. 1465). As a general rule a benevolent intervention contrary to the wishes of the *dominus negotii* is not permissible. However, exceptions are conceivable – for example, in preventing a suicide or overriding the wishes of a mentally disabled person (CA s´Gravenhage 28 November 1984, NedJur 1985 no. 863 p. 2831).

91. The legal position under SCOTTISH law is not quite clear. A justified benevolent intervener must abide by the presumed wishes of the principal. The main distinction between the law of *negotiorum gestio* on the one hand and mandate and implied mandate on the other is precisely that the principal has no knowledge of the action taken and has therefore not authorised it (*Gloag and Henderson*, The Law of Scotland[10], p. 373 no. 22. 31; *Walker*, Principles of Scottish Private Law, Volume II, Book 4: Obligations[4], 218). The Institutional Writers merely point out that an action contrary to the (express) wishes of the principal will in principle not found claims in *negotiorum gestio*; in this case it is at most claims on the basis of 'recompense' which can be considered (e. g. *Erskine* § 53). Stair (-*Whitty*), vol. 15 para 122 holds that the requirement to act in accordance with the 'assumed wishes' of the principal is a necessary and appropriate corrective to protect the principal against unwelcome interference.

92. SWEDISH law puts great emphasis on the intervener's duty to make inquiries about the principal's wishes. A breach of this duty in principle excludes claims on the basis of *negotiorum gestio* (*Bengtsson/Victorin*, Hyra och annan nyttjanderätt till fast egendom[6], 198; see also HD 9 March 1972, NJA 1972, 88, summarised above in note *22*). Exceptions to this general rule are in part set out in statute. The duty to preserve goods and keep them in safe custody arising in the context of sales law may serve as an example (Sale of Goods Act §§ 72-78; see for further details *Håstad*, Tjänster utan uppdrag, 79; *Hellner*, Speciell Avtalsrätt II (2)[3], ch. 29).

93. As the COMMON LAW largely integrates its cases of benevolent intervention into agency of necessity, it too emphasises the requirement that the intervener seek out and heed the principal's instructions, which is fundamental to agency in general. An agent may not act in contradiction of the principal's expressed or implicit wishes (if his instructions foresee the case at hand): see, for example, *Johns v. Simons* (1842) 2 QB 425, 114 ER 168, where the owner had instructed the captain to obtain necessary money only by selling cargo, but the captain obtained it by a loan from the claimant instead; *Acatos v. Burns* (1878) 3 Ex D 282, 290-291 (*Brett* LJ). Where the principal's wishes are unknown, there will be no agency of necessity as a rule unless it is impossible or practically impossible for the agent to contact the principal (and so obtain his authority to act): *Australasian Steam Navigation Co. v. Morse* (1871-73) LR 4 PC 222; *Gwilliam v. Twist* [1895] 2 QB 84, 87; *Pontypridd Union v. Drew* [1927] 1 KB 214, 220 (*Scrutton* LJ); *Prager v. Blatspiel, Stamp & Heacock Ltd* [1924] 1 KB 566, 571. (Consider also *Palmer v. Stear* (1963) 113 LJ 420, where there was no means for the vet to identify the owner of the dog). As the extensive authorities relating to the powers of a ship's captain solidly demonstrate, if the principal can be contacted, then as a rule there is no scope for agency of necessity; the agent must obtain instructions and abide by them: see *Hayman v. Molton*, loc. cit. at 68 (740) (Lord *Ellenborough* CJ; *La Ysabel* (1812) 1 Dods 273 at 274, 165 ER 1308 at 1309 (Sir *W. Scott*); *Wilson v. Millar* (1816) 2 Stark 1 at 4, 171 ER 553 at 554 (Lord *Ellenborough* CJ: captain should have sought instructions before selling the cargo);

Freeman v. East India Co (1822) 5 B & Ald 617 at 624, 106 ER 1316 at 1319 (Best J); *Stonehouse v. Gent* (1841) 2 QB 431n, 114 ER 170; *Jones v. Simons*, loc. cit. at 430 (170) (Lord *Denman* CJ); *The Lochiel* (1843) 2 W Rob 34 at 48, 166 ER 668 at 673 (Dr *Lushington*); *Beldon v. Campbell* (1851) 6 Ex. 886, 889 (*Parke* B: no necessity for the ship's captain to create security rights in the ship because it had already reached a port from which the owner could be contacted), 155 ER 805; *The Segredo* (1853) 1 Sp Ecc & Ad 36 at 62, 164 ER 22 at 36 (Dr *Lushington*); *The Royal Arch* (1857) Swab 269 at 282, 166 ER 1131 at 1139) (Dr *Lushington*); *Cammell v. Sewell* (1858) 3 H & N 617 at 635 and 644, 157 ER 615 at 623 and 626 (*Martin* B); *The Olivier* (1862) Lush 484 at 492, 167 ER 219 at 223-224 (Dr *Lushington*); *The Hamburg* (1863) 2 Moore PC (N. S.) 289 at 299 (Dr *Lushington*) and 321-322 (Lord *Kingsdown*, for the PC); *The Karnak* (1867-69) LR 2 PC 505, 300 and 309 (Sir *Robert Phillimore*); *The Onward* (1873) LR 4 A & E 38, 51 (Sir *Robert Phillimore*: "[W]hen the circumstances permit the master must communicate with the owner before he does any acts which seriously affect the value of the ship … or of the cargo."); *Kleinwort, Cohen & Co. v. The Cassa Marittima of Genoa* (1876-77) 2 App. Cas. 156, 157 (Sir *Montague Smith*, for the PC); *Acatos v. Burns* loc. cit. at 286 and 290 (*Brett* LJ, implicitly) and 288 (*Bramwell* LJ); *Atlantic Mutual Insurance Co. v. Huth* (1880-81) 16 Ch. D 474, 481 (*Cotton* LJ); *The Gaetano and Maria* (1881) 7 PD 1, 4 (Sir *Robert Phillimore*) and, on appeal (where it was held, reversing the court below on the point, that English law was not applicable), (1882) 7 PD 137 at 143-144 (*Brett* LJ) and 148 (*Cotton* LJ). The mere fact that the owner of the property affected is insolvent does not provide an excuse for failing to contact the principal if that was practicable: *The Panama* (1869-71) LR 3 PC 203. The fact that the conduct is otherwise reasonable will not protect the agent if he had a reasonable opportunity to contact the principal and failed to do so: see *Springer v. Great Western Railway Co.* [1921] 1 KB 257 (where tomatoes being transported from St. Helier to Covent Garden were held up by bad weather and a port strike and were sold before arrival because of their deterioration, but the court held the agent should have sought instructions). Whether there is a practical impossibility – a matter of time and opportunity – depends on the circumstances: *Australasian Steam Navigation Co. v. Morse*, loc. cit., 231 (Sir *Montague Smith*). Communication may be practically impossible where there is a multitude of principals who would have to be addressed: see, e. g., *Phelps, James & Co. v. Hill* [1891] 1 QB 605 (where there were numerous owners of cargo being carried by the distressed ship). A further case of impracticality of communication is where the matter is of such urgency that, weighed up against the chances of a successful and prompt correspondence, the principal's interests are at risk if the agent delays until he can ascertain the principal's wishes: *The Hamburg*., loc. cit., 299-300 (Dr *Lushington*), and for a clear application of this principle see *The Olivier*, loc. cit., 478-488 (221) and 492-493 (224) (Dr *Lushington*) and further confirmation of the principle in *The Lizzie* (1867-69) LR 2 A & E 254, 256 (Sir *Robert Phillimore*). Thus even if communication with the principal is possible, a person nonetheless acts as an agent of necessity if that communication would involve such delay that it would be detrimental to the principal's interests to await the principal's instruction: see *Johns v. Simons*, loc. cit., 430 (170) (*Patteson* J); *Edwards v. Havill* (1853) 14 CB 107, 139 ER 45 (ship confined to harbour due to bad weather; captain borrowed a small sum – without communicating with the owner, because if he had to await a reply (by post) first the ship would have been held up for two further days until a reply arrived, whereas the weather might have improved in the meantime); *Cargo Ex "Sultan"* (1859) Swab 504 at 511-512, 166 ER 1235 at 1239) (Dr *Lushington*); *The Victor* (1865) 13 L. T. (N. S.) 21 (Dr *Lushington*) (where a master's sale of the ship was within the scope of his agency of necessity because

communication to the principal would have involved a three month delay – during which time the ship might have been taken by creditors or, in view of its deterioration, lost to the elements); *Acatos v. Burns* (1878) 3 Ex D 282, 290 (Brett LJ) (to store goods while awaiting instructions would exceed their value and thus be uneconomical); and the IRISH case *The Staffordshire* (1871) 25 LT (N.S.) 137, 140 (*Townsend* J), affirmed *sub. nom. Smith v. Bank of New South Wales* (1871-73) LR 4 PC 194, 203 (*Mellish* LJ for the PC), where it would have been two or three months before a reply would have been received. Thus an attempt at communication can be dispensed with if the agent cannot receive or expect a reply 'in time': *Australasian Steam Navigation Co. v. Morse*, loc. cit., 232.

IX. Ratification by the principal

94. As regards interventions which are commenced without a sufficient ground, four distinct questions arise: (i) is ratification possible, (ii) what conditions must ratification satisfy, (iii) when does the time period during which the principal may ratify the intervention expire, and (iv) what effects does ratification have? These questions are not addressed in all jurisdictions with equal thoroughness.

95. Under GERMAN CC § 684 sentence 2, the principal may ratify an unjustified intervention and thereby bring about the legal consequences of a justified benevolent intervention. The ratification must be declared vis-à-vis the intervener, either expressly or by implication. An implicit ratification may be inferred if the principal demands a surrender of proceeds under CC § 681 sentence 2 (in conjunction with § 667) (Palandt [-*Sprau*], BGB[63], § 684 no. 2). A ratification substitutes for the requirements set out in CC § 683, according to which the intervention must be in the interest of the principal and in keeping with the actual or presumed wishes of the principal (BGH 16 December 1994, BGHZ 128, 210, 213). It does not, however, supersede the requirements of CC § 677, i. e. the condition that the intervention must have been undertaken on another's behalf (MünchKomm [-*Seiler*], BGB[3], § 684 no. 14). Consequently a ratification is not possible in the case of management of another's affairs by mistake (CC § 687 (1)) or arrogated management of another's affairs (CC § 687 (2)) (Palandt [-*Sprau*], BGB[63], § 684 no. 2). The effect of ratification is that the intervention is justified *inter partes*, i. e. between principal and intervener, with retrospective effect. However, ratification alone does not give rise to a contract of mandate (CC § 662) (Palandt [-*Sprau*], BGB[63], § 684 no. 2). A ratification under CC § 684 is subject to the rules of CC §§ 182 et seq. (BGH 14 February 1989, NJW 1989, 1672), but no specific time limit is stipulated (CA Stuttgart 25 June 1953, NJW 1954, 36). However, it is conceivable that the underlying ethos of CC §§ 108 and 177 may be applicable by analogy with the result that a ratification is deemed to be refused if, after a request for ratification, the principal does not ratify within a reasonable time.

96. GREEK law likewise enables a principal to ratify an unjustified intervention. The ratification may be declared expressly or tacitly. An implied ratification is inferred, for example, if the principal discharges an obligation which the intervener incurred in relation to a third party. As in Germany, the main effect of a ratification is that the unjustified intervention will be transformed into a justified intervention with retroactive effect. This is justified by means of an analogous application of CC art. 238 (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 738, no. 7). Ratification alone does not conclude a contract of mandate; Greek law does not follow the Roman law principle *ratihabitio mandato aequiparatur* (*Kavkas and Kavkas*, Enochikon Dikaion II/2, 28). A management of another's affairs in the mistaken belief they are one's own cannot be the subject of ratification (*Papanikolaou*, loc.cit. no. 5).

97. PORTUGUESE law draws a distinction between *aprovação* and *ratificação*. An *aprovação* (CC art. 469) is a general approval by the principal of the unauthorised intervention. An *aprovação* is only effective inter partes, that is to say between principal and intervener; if such an approval is given a justified *gestão de negócios* is created. By contrast a *ratificação* (CC art. 268) concerns juridical acts which the intervener has undertaken in relation to third parties; as a result of a ratification these transactions become valid retrospectively (for details see CA Evora 1 June 1999, CJ XXIV [1999-3] 270). An *aprovação* may be made manifest either expressly or implicitly (CC art. 217); it is not subject to any specific formal requirements or a time limit (CC art. 219). By contrast a *ratificação* must comply with the same formality requirements as are required for the grant of an authority (CC art. 268 (2)) to conclude the relevant transaction (CC art. 262 (2)); an implicit ratification will not suffice (STJ 17 February 1998, CJ(ST) VI [1998-1] 68). Moreover, for *ratificação* CC art. 268 (3) grants the third party who has contracted with the intervener the right to set a time limit in which to ratify; if ratification is not granted within the time limit it is deemed that the principal has refused to ratify. CC art. 469, read in conjunction with art. 468, sets out the legal consequences of an *aprovação* namely (i) the principal's waiver of any claim for damage negligently caused by the intervener and (ii) acceptance of the intervener's claims for compensation of expenses incurred and damage suffered. A *ratificação* pursuant to CC art. 268 (2) has retroactive effect and renders all contracts concluded by the intervener in the name of the principal effective (*eficácia retroactiva*). The limitation period, however, will only start to run *ex nunc* from the time of *ratificação* (CA Coimbra 2 March 1999, CJ XXIV [1999-2] 11). Special regulations on *ratificação* apply where a lawyer manages affairs relating to legal proceedings without authorisation: for details see CCP art. 41 and CA Coimbra 4 January 1989, BolMinJus 383 (1989) 620 and STJ 15 February 1966, BolMinJus 154 (1966) 286.

98. Under AUSTRIAN law a ratification may be declared expressly or by implication (*v. Zeiller* III § 1039 no. 2 p. 324); an implied ratification is typically inferred in the case of CC § 1016 (conferring benefit) (Klang [-*Stanzl*], ABGB IV/1^2, 895; Schwimann [-*Apathy*], ABGB V^2, §§ 1035 no. 3). The question of a time limit for ratification does not seem to have been a topic of discussion. The effect of a ratification is a matter of dispute. Formerly the view was held that ratification transforms the relationship between principal and intervener into one of *Bevollmächtigung* (agency) authorised from the outset (*v. Zeiller* III § 1039 no. 2 p. 324; *Ehrenzweig*, System II/1^2, 714; similarly *Gschnitzer* Schuldrecht BT^2, 283 and Klang [-*Stanzl*], ABGB IV/1^2, 895 [where the intervener has concluded legal transactions, this would point towards the law on contracts of mandate; where the intervention consists of physical acts, it points towards a contract for services]). The current view is that ratification transforms the unjustified intervention into a justified benevolent intervention (Rummel [-*Rummel*], ABGB I^3, § 1037 no. 2). What precisely a ratification covers is a matter of interpretation (Rummel [-*Rummel*], ABGB I^3, § 1037 no. 2; Schwimann [-*Apathy*] ABGB V^2 § 1035 no. 3). However, an intervention may only be ratified as a whole; the principal may not pick and choose particular component acts to ratify (OGH 4 December 1968, JBl 1969, 272). The intervener is bound by a ratification even if this is contrary to his wishes (Klang [-*Stanzl*], ABGB IV/1^2, 895). Under SLOVENIAN law too the principal may ratify an unjustified intervention. The ratification results in the retroactive conclusion of a contract between the intervener and the principal (*Cigoj*, Komentar II, 878). ESTONIAN LOA § 1018 (1) (i) provides three alternative criteria for a justification of a benevolent intervention and puts the ratification by the principal at the top of the list

(the other options are agreement with the presumed and actual wishes of the principal and intervention required as a matter of overriding public interest).

99. FRENCH and BELGIAN authors point out that only a principal capable of acting may validly ratify (*ratifier*) a benevolent intervention (JClCiv [-*Bout*], Art. 1372-1375, V° Quasi-Contrats. Gestion d´affaires – Effets, Fasc. 20 no. 76; *Paulus*, Zaakwaarneming no. 106 p. 60). The ratification does not require any specific formalities (*Bout* loc.cit. no. 72; d*e Page*, Droit Civil Belge II[3], no. 1088*bis* p. 1153). It may be either express or tacit (*tacite*), provided that the wishes of the principal are free from doubt (Cass.com. 13 May 1980, Bull.civ. 1980 IV, no. 199 p. 159; *Paulus*, loc.cit. no. 106 p. 60); in particular the principal must have knowledge of all relevant circumstances (*Bout* loc.cit. no. 73). No time limits seem to apply to ratification (*Flour/Aubert/Savaux*, Le fait juridique[10], no. 13 p. 15). The effect of *ratification* is usually expressed as *ratihabitio mandato aequiparatur*: the relationship between intervener and principal is transformed into a contractual mandate with retroactive effect (*Mazeaud and Chabas*, Leçons de droit civil II, 1[9] no. 691 p. 815; *Paulus*, loc.cit. no. 103 p. 59).

100. The corresponding POLISH provision may be found in CC art. 756 ('If the principal ratifies the intervention the legal consequences of a mandate arise'). SPANISH CC art. 1892, which is quite similar, reads: "the ratification of the intervention by the principal brings about the effects of an express mandate." Unless the parties agree otherwise, the ratification of an intervention (which has been started or completed) results in the application of the law of mandate with retroactive effect and the exclusion of the law of benevolent intervention. In this way the intervener is freed from liability for damages caused without fault (Paz-Ares/Diez-Picazo/Bercovitz/Salvador [-*Lasarte*], Código Civil II, 1949). Ratification may be express or implicit (*Albaladejo*, Derecho civil II (2) 497; *Lasarte* loc.cit. 1950; *Puig Brutau*, Compendio II, 602; *Lete del Río*, Obligaciones II, 127); the formality requirements mirror those required for the legal transaction to be ratified. A tacit ratification may be inferred, for example, where the principal does not take over the management of affairs from the intervener despite a request by the intervener to do so (*Sánchez Jordán*, Gestión de negocios, 427; *Lacruz Berdejo*, Rev.Crít.Der.Inm. 1975, 265). Substantial problems of interpretation however arise in the context of CC art. 1893 (1), which reads: "even if he has not expressly ratified the intervention, the owner of goods or principal who takes advantage of the benefits of the intervention will be liable for the obligations . . .". The meaning of the phrase 'not expressly ratified' is a matter of dispute, but of great importance for determining the scope of the law of benevolent intervention. A recent decision of the *Tribunal Supremo* construes this provision as meaning only that a tacit ratification may be inferred if the principal takes advantage of the benefits of the intervention. Thus CC art. 1892 relates to express ratification, while CC art. 1893 concerns tacit ratification, and a tacit ratification does not bring about the legal consequences of CC art. 1892 (TS 14 May 1991, RAJ 1991 [3] no. 3672 p. 4945). TS 21 October 1958, RAJ 1958 (2) no. 3109 p. 2055 (a case concerning remuneration for services provided by an architect) took a different approach and held the law of contracts of mandate and contracts for services applicable also to cases covered by CC art. 1893. This interpretation radically limits (or limited) the scope of application of the law of benevolent intervention (*Pasquau Liaño*, La gestión de negocios ajenos, 208), since it confines (or confined) benevolent intervention to the cases which do not call for ratification contained in CC art. 1893 (2) (prevention of an impending damage). Legal literature has thoroughly criticised both judgments of the *Tribunal Supremo* (e. g. *Lasarte* loc. cit. 1952; *Puig Brutau*, loc. cit. 602; *Albaladejo*, loc.cit. 497 and *Lete del Río* loc. cit. 127). The authors cited

consider CC art. 1892 to be applicable both to express ratification and tacit ratification; both cases result in the conclusion of a contract of mandate. In contrast to the *Tribunal Supremo*, they maintain that there is no tacit ratification in the mere fact of the principal taking advantage of the benefits provided by the intervention. Whether or not a ratification is subject to a specific time limit is not a topic of discussion. Finally, Ley 561 of the Fuero Nuevo de NAVARRA should be mentioned. It reads: "If a person in whose interest an intervention is undertaken ratifies such intervention, that person is bound like a mandator."

101. In ITALY CC art. 2032 provides that the principal may ratify an act undertaken by the intervener even if the latter has not acted with an *animus aliena negotia gerendi*. The ratification gives rise to the same effects which a mandate contract would have had. The Italian case law has taken the line that a ratification may replace every single prerequisite of a relationship of benevolent intervention (Cass. 23 July 1960, no. 2122, Giur. it. 1962, I, 1, 92; Cass. 3 March 1954, no. 607, Giur. it. 1954, I, 1, 596). However, legal writing has in part adopted a more narrow approach. The minimum requirement is that the affair is that of another and that it has been managed without any obligation to do so (*Breccia*, La gestione d´affari[2], 901-902; even more restrictive is *Aru*, Gestione d´affari, 56). Ratification in respect of a legal transaction must be declared vis-à-vis the affected third party (Cass. 24 January 1959, no. 193, Foro it. 1959, I, 979). A tacit ratification is possible. An example is enforcing rights arising from a contract concluded by the intervener (Cass. 23 July 1960, no. 2122, Giur. it. 1962, I, 1, 92). The formal requirements of the ratification depend on the requirements of the legal transaction which the intervener has concluded (*Breccia,* loc. cit. 903; contra *Aru*, loc. cit. 59). The law does not provide for a specific time limit for the ratification. The prevailing (but not undisputed) view is that ratification is subject to the general limitation period of ten years (*Aru*, loc.cit. 60). However, some authors have argued that the time limit under CC art. 1712 (2) (ratification without delay) should be applied (for details see *Breccia*, loc.cit. 904). Both the third party and the intervener may request the principal to ratify the intervention within a reasonable time. If there is no ratification in response, it will be presumed to have been withheld (Cass. 3 March 1954, no. 607, Giur. it. 1954, I, 1, 596). In that case the intervener is personally liable on all legal transactions which he has concluded in the name of the principal (Cass. 18 March 1957, no. 931, Rep.Giur.it. 1957, voce Gestione d´affari, no. 1; 6). A ratification has retroactive effect (Cass. 23 November 1954, no. 4297, Rep.Giur.it. 1954, voce Gestione d´affari no. 5; 12), but any rights acquired by third parties are not affected. If the intervener has acted in the name of the principal, the latter assumes the rights and duties arising. If the intervener has acted in his own name, the ratification only has effect for the internal relationship between principal and intervener (Cass. 11 July 1978, no. 3479, Giur. it. 1979, I, 1, 820; Cass. 25 January 1974, no. 199, Giur. it. 1975, I, 1, 1373, note *Stolfi*).

102. DUTCH CC art. 6:202 reads: "Where a person who has acted with a view to looking after the interest of another had done so without good reason or has not properly done so, the interested party may, by approving the acts, surrender the right to invoke the defect against the manager of his affairs (. . .)" (translation by *Haanappel* et al., Netherlands Business Legislation). The ratification is categorised as a juridical act. It replaces the reasonable ground to act and cures the intervener's breach of a duty of care within the meaning of CC art. 6:200. Where both a reasonable ground is absent and the intervener has breached his duty of care, the principal can choose which of these elements he wishes to eliminate by ratification. In case of doubt, his ratification will be regarded as remedying both defects (T. M. Parlementaire Geschiedenis VI, 801-802; Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 306 p. 317-318; T & C

Vermogensrecht [-*Hijma*], Art. 6:202 BW, no. 1). Furthermore, CC art. 6:202 provides that the principal may set a reasonable time limit (*redelijke termijn*) for a ratification. After expiry of this time limit ratification is no longer possible; claims may only arise under the provisions of unjustified enrichment law and tort law (T. M. Parlementaire Geschiedenis VI, 802; *Hartkamp* loc.cit. no. 306 p. 317-318; *Hijma* loc.cit. no. 3). If the intervener has acted without reasonable grounds for intervening, a ratification has the effect that the law of benevolent intervention remains applicable nonetheless (*Hartkamp*, loc.cit. no. 306 p. 318). A ratification restricted to the conduct of the intervention (breach of the duty of care) will only lead to a waiver by the principal of a claim for compensation. The principal himself remains liable to compensate the intervener under CC art. 6:200 (T. M. Parlementaire Geschiedenis VI, 801; *Hartkamp* loc.cit. no. 306 p. 318; *Hijma* loc.cit. no. 2).

103. Again the legal situation under SCOTTISH law is not quite clear. It seems that a ratification is considered the retroactive acceptance of an offer to conclude a contract, such as a contract of mandate or of agency; a tacit ratification is possible (for details see *Leslie*, JuridRev 1983, 34 and Stair [-*Whitty*], vol. 15, para 109).

104. According to SCANDINAVIAN law the rules on ratification under the statutes on contract law in general seem to be applied also in the context of benevolent intervention. A ratification may also be inferred from conduct, such as the use of the benefits obtained from the benevolent intervention. A principal may also be bound if in the circumstances he ought to have realised that the *gestor* was acting in his interest and expected a remuneration (*Håstad*, Tjänster utan uppdrag, 57; see also *Grönfors*, Avtalslagen[3], 158), or if (as in HD 15 July 1941, NJA 1941, 459) a principal pays a fine which has become due as a result of an act of the intervener conducted in the interest of the principal. A ratification leads to the application of the law of mandate (*Håstad* loc.cit. 57). In the context of the SWEDISH and FINNISH CCom chap. 18 § 3 *in fine* (principal bound as a consequence of his making use of the benefit of a contract concluded in excess of authority) it is a matter of discussion whether or not the third party has a direct contractual claim against the principal. This is arguably answered in the affirmative in Finland (*Chydenius and Hakulinen*, cited according to *Zackariasson*, Direktkrav, 100), but in the negative in Sweden. In Sweden only a claim of the third party against the principal arising from unjustified enrichment (*vinstanspråk*) is recognised (*Grönfors*, Ställningsfullmakt och bulvanskap, 115; *Hellner*, Om obehörig vinst, 324, 336; *Karlgren*. TfR 1951, 180; *Zackariasson*, Direktkrav, 103).

105. Agency by ratification in the COMMON LAW requires (a) an act on the part of the prospective agent demonstrably undertaken in the name of or on behalf of the prospective principal, (b) capacity of the principal at the time of the agent's act to ratify, and (c) a subsequent effective ratification of the act by the principal based either on complete knowledge of the act or an unqualified (i. e. unconditional) approval: see *Marsh v. Joseph* [1897] 1 Ch 213, 246-247 (Lord *Russell* CJ, for the CA); *Firth v. Staines* [1897] 2 QB 70, 75 (*Wright* J), approved in *Boston Deep Sea Fishing and Ice Co. v. Farnham* [1957] 1 WLR 1051, 1057 (*Harman* J). As to (a), see further Chapter 1, Art. 1:101, Notes, VI, 71. As regards (b), the principal must have had been in existence and have had capacity to undertake the agent's act personally both at the time of the act and at the time of ratification. Consequently a corporation is not able to ratify an act undertaken before the corporation was created or (subject to statutory exceptions) if it was outside the corporation's own powers for the corporation itself to undertake that act. If a person acting ostensibly as agent for a not yet existent corporation concludes a contract in the name of that corporation, the corporation cannot take over the rights and obligations arising out of that contract by ratifying its

conclusion by the agent: *Kelner v. Baxter* (1866-67) 2 CP 174, 183 (*Erle* CJ), 184 (*Willes* J), 185-186 (*Byles* J). (In such cases the agent may be regarded – contrary to the wording of the contract – as himself a party to the contract and liable on it accordingly.) Subject to developments in the law of unjustified enrichment, a corporation may in principle retain the benefit of such work done on its behalf by its putative agent before its creation without liability. A bare promise by the corporation to reward the agent will not give rise to contractual liability because the agent's act is only past consideration for the corporation's promise, while the absence of an anterior request by the corporation for the service rendered precludes a quasi-contractual claim: see *Re English & Colonial Produce Co.* [1906] 2 Ch 435; *Re Rotherham Alum & Chemical Co.* (1883) 25 Ch D 103. (Equally a corporation is not liable for unsolicited services rendered on its behalf after its dissolution: see *Re Banque des Marchands de Moscou* [1952] 1 All ER 1269 (*Vaisey* J).) Furthermore, the principal cannot ratify in respect of acts which the principal could not have authorised or undertaken at the time the agent acted: see *Boston Deep Sea Fishing and Ice Co. v. Farnham*, loc. cit. (French company could not ratify act of English company carrying on a fishing business in its name during world war two because, due to German occupation, the company had enemy status at the time of the agent's acts: it could not itself have lawfully conducted the fishing business at that time and the English company would have committed a criminal offence in accepting any mandate from the French company). However, where a self-appointed agency remains unauthorised, the agent will nonetheless remain liable to surrender any profit obtained: see Chapter 2, Art. 2.102, Notes II, 22. As regards (c), "ratification is the act of giving sanction and validity to something done by another.": *Brook v. Hook* (1871) LR 6 Ex. 89, 95 (*Martin* B, giving a dissenting minority view in that case, but not affecting this point). This requires that the principal recognises and accepts the agent's act or in some other manner treats the act as authorised. Ratification may be either express or implied. The latter may take the form of acquiescence on the principal's part if that is unambiguous and expliciable only by reference to the agent's act (i.e., where there is an 'obligation' on the principal to make a different view manifest): *Phillips v. Homfray (No. 1)* (1870-71) LR 6 Ch. App. 770, 778 (Lord *Hatherley* LC) and consider in this context *Hunter v. Parker* (1840) 7 M & W 322, 151 ER 789 (ratification of unauthorised sale by receipt of the purchase price). If the client knows the essential details of the agent's act, he may recognise it by making use of the rights resulting from that act in order to raise an action against a third party or to defend such an action: *Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd.* [1921] 2 KB 608, and see similarly *The Australia* (1859) 13 Moore PC 132, 158 (Dr *Lushington*), 15 ER 50,. A prerequisite of any ratification is knowledge of the circumstances of the agent's act at the time of the act or omission alleged to constitute the ratification: *Gunn v. Roberts* (1873-74) LR 9 CP 331, 335 (*Brett* J). For IRISH law (in connection with a gratuitous agency) see, for example, *O'Beirne v. Cornwall* (1852) 3 Ir Ch Rep 130, 138 (*Blackburne* LC). (iii) An unnecessary delay in contesting the agent's act may in suitable circumstances constitute a ratification: *The Australia*, loc. cit., 158 (Dr *Lushington*) (where, however, necessity sufficed to justify the captain's sale of the ship). A factor limiting the time period for ratification is the requirement that in order to be effective the principal must ratify at a time when he himself might have undertaken the agent's act (e. g. exercised the right vis-à-vis some third party or concluded the contract with the third party): see *Dibbins v. Dibbins* [1896] 2 Ch 348, where the principal had an option to buy the share of a partner exercisable by notifying the personal representatives of the partner within three months of the partner's death of an intention to buy, but the act of an unauthorised agent within that period signifying to the executors the principal's

intention was not effectively ratified by the principal (who at the time was mentally unfit and lacked capacity) where the purported ratification took place after the three months period had expired. Ratification has retrospective effect so that the act of the agent is to be regarded from the outset as authorised: *Boston Deep Sea Fishing and Ice Co. v. Farnham*, loc. cit., 1057 (*Harman* J); *Danish Mercantile Co. Ltd. v. Beaumont* [1951] Ch 680, 686 (*Jenkins* LJ). As a result, where a person acts without authority, but in the name of the potential principal, in order to conclude a contract between that principal and a third party, a withdrawal from the agreement by the third party before the principal has ratified the agent's act is ineffective, even though, assessed at the time the third party purported to withdraw, there was no contract binding the third party. The contract between the principal and the third party comes into being at the time of the principal's ratification, but with effect from the time the agreement was made by the agent. See *Bolton Partners v. Lambert* (1888) 41 Ch. D 295, 301 (*Kekewich* J), and on appeal (where the decision was affirmed), 306 (*Cotton* LJ), 309 (*Lindley* LJ) and 309-310 (*Lopes* LJ). (However, the PC in *Fleming v. Bank of New Zealand* [1900] AC 577, 587 (Lord *Lindley*) expressly reserved the right to reconsider the proposition decided in *Bolton Partners*.) On the other hand, a third party may withdraw from the contract before ratification by the principal if that ratification is an express condition of the contract: *Watson v. Davies* [1931] 1 Ch 455. As a further exception to the principle of retrospective effect, the ratification by the principal does not set aside any cancellation of the agreement which the agent and third party have undertaken before the principal ratified: *Walter v. James* (1870-71) LR 6 Ex. 124. Ratification retrospectively alters the legal position of agent and principal (their rights and obligations) as between them. As a result of the retrospective authorisation conferred by ratification, the agent is generally not liable to the principal in respect of his intervention: *Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd.*, loc. cit. (the legal action of the principal against a third party, wrongly supplied by the agent with goods, for payment of the purchase price operated to ratify the agent's supply so as to preclude the principal from suing the agent for damages in respect of the goods lost by the wrongful supply); *United Australia Ltd. v. Barclays Bank Ltd.* [1941] AC 1, 31 (Lord *Atkin*, for the PC). Moreover, the agent will have a claim for reimbursement of his expenditure: see *Bristow v. Whitmore* (1861) 9 HLC 391, 11 ER 781, especially Lord *Campbell* LC at pp. 400-402 (784) (where, however, the claim to a proprietary security in the form of a *lien* for the benefit of the agent was rejected). Ratification may likewise provide the agent with a claim to remuneration: if ratification was contractually agreed between the parties for the agent's performances under the contract, ratification of an act outside the terms of the contract may operate to bring the act within the terms of the remuneration clause. See *Keay v. Fenwick* (1876) 1 CPD 745; *Hartas v. Ribbons* (1889) 22 QBD 254.

X. Burden of proof

106. Under GERMAN law the general rules on the allocation of the burden of proof apply: each party has to allege those circumstances which are favourable to its case and prove them if they are disputed. Consequently the party (whether principal or intervener) who asserts a claim arising from benevolent intervention will have to prove the requirements of that claim. Proof of an intention to act on another's behalf will as a general rule require objective indications. Otherwise a person intermeddling could render themselves an intervener in the sense of CC § 677 retrospectively. However, according to settled German case law the intention to act on another's behalf is rebuttably presumed in the case of an 'objectively extraneous affair' or an affair which

is ‘objectively also another’s’. This presumption applies independently of whether it is the intervener or the principal who is asserting a claim: see above notes *27* and *39*.

107. Under GREEK law the intervener has to prove that he has conducted an affair of the principal and that this was in line with the interests of the principal. A principal seeking to set up a defence against claims arising from benevolent intervention must prove either that there was a mandate in the sense of CC art. 730, that the intervener did not act with the intention to act on the principal’s behalf, or that the conduct of the intervention was irreconcilable with his wishes (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 736, no. 15 and Art. 730, no. 16). As in Germany, it is said that the intention to act on another’s behalf will be presumed in the case of an objectively extraneous affair, whereas the intervener will have to assert and prove that he acted on another’s behalf in the case of a merely subjectively extraneous affair (*Papanikolaou* loc.cit. Art. 730, no. 5). However, the concept of a subjectively extraneous affair is nowadays severely criticised.

108. Under PORTUGUESE law too the general rule on the burden of proof applies to the law of benevolent intervention. Facts establishing a right fall to be proved by the person who invokes the right. As in Germany and Greece, the intention to act on another’s behalf is presumed (but open to rebuttal) if the intervener knew that the affair managed was objectively extraneous (*Vaz Serra*, BolMinJus 66 [1957] 95-97). It is a matter of dispute who bears the burden of proving fault in the context of CC art. 466 (2), which provides that the intervener is at fault if his intervention does not accord with the interest or the actual or presumed wishes of the principal. The Supreme Court has placed the burden of proof on the person sustaining damage in line with CC art. 487 (1) and so applied the rules of tort law by analogy (STJ 22 April 1986, RLJ 121 [1988] 59 with a critical note by *Baptista Machado*; BolMinJus 356 [1986] 352). However, a growing body of academic opinion advocates application of the contract law rule in CC art. 799 (1), which contains a reversal of the burden or proof (*Menezes Leitão*, Responsabilidade do gestor, 292-297).

109. The AUSTRIAN OGH (12 December 1962, SZ 35/130), in a case concerning exceeding an authority, indicated that it does not favour a reversal of the burden of (dis)proving the intervener’s fault (as an application of CC § 1298 by analogy). However, the impact of this decision is a matter of controversy within Austrian legal literature. It is doubted whether it has general relevance for the law of benevolent intervention and whether it would not be more appropriate to distinguish between the different types of benevolent intervention recognised by Austrian law. That would imply that the burden of proof as regards fault would remain with the principal within the context of CC § 1036, but in all other cases it would be shifted to the intervener (for details see *inter alia* Rummel [-*Rummel*], ABGB I³, § 1036 no. 3 and § 1040 no. 4; Schwimann [-*Apathy*], ABGB V^2, §§ 1036-1040, no. 18-19; *Meissel*, GoA, 147-148 and Klang [-*Stanzl*], ABGB IV/1^2, 896). The debate does not yet seem to be over as far as the details of the various modes of explanation are concerned. In contrast to Germany, the question whether or not the intention to act on another’s behalf may be presumed in respect of specific measures taken by the intervener has hardly been discussed in Austria. It would seem the burden of proof remains with the party who asserts that the intervener intended to manage another’s affair (*Meissel*, loc.cit. 149).

110. In accordance with the principle *actori incumbit probatio* under BELGIAN law the intervener has to prove all the requirements of the claims arising from justified benevolent intervention which he asserts. This includes the negative requirements (lack of a contractual or other legal obligation to act; absence of contrary wishes of the principal; action without *animus donandi*). As regards the latter requirement, the judge

may exercise discretion and reallocate the burden of proof (B. H.Verb. [-*Roodhooft*] Hdst. V, De quasi-contracten, no. 2260). Under FRENCH law too *faits juridiques* must be proven by the claimant, that is to say the party who relies on *un fait*, *un acte* or *un moyen quelconque* (*Malinvaud*, Droit des obligations[7], no. 197 p. 135). No more specific rules apply for the proof of 'mental elements' such as the intention to manage another's affair.

111. No indications can be found in SPANISH legal writing of specific rules on the allocation of the burden of proof in relation to the law of benevolent intervention. It is assumed that the general rules contained in CCP art. 217 apply. Of course the defendant will have to assert and corroborate any defence. Thus, for example, it will be for the principal to prove that the intervener acted with *animus donandi* (*Sánchez Jordán*, Gestión de negocios, 321; *Pasquau Liaño*, La gestión de negocios ajenos, 67). However, the *Tribunal Supremo* has ruled that *animus donandi* will be presumed (unless rebutted) if the intervener is related to the principal and provides the latter with maintenance (cf. CC art. 1894), (TS 25 September 1968, RAJ 1968 [2] no. 3959 p. 2657).

112. ITALIAN law too applies the principle (contained in CC art. 2697) that the party who asserts a right in judicial proceedings has to prove the facts on which the right is based, while one who controverts those facts or asserts they are not effective to establish the right, or claims the right has been altered or extinguished, must prove the facts on which the defence is based. It would seem that no exceptions from this general rule are discussed in the context of benevolent intervention.

113. Under DUTCH law it is assumed that the intention to manage another's affairs – the intention to attend to the affairs of another in the interests of that other – must be made manifest to third parties (Verbintenissenrecht [-*Heisterkamp*], Art. 6:198 BW, no. 11. 2; *Verburg*, De vrijwillige zaakwaarneming, no. 35 p. 63-64). The case law as a rule infers an intention to act on another's behalf from the nature of the act undertaken and from the circumstances of the case (inter alia CA Amsterdam 29 October 1936, NedJur 1937, no. 1035 p. 1455; CA Amsterdam 17 December 1947, NedJur 1948, no. 318 p. 545; CFI Almelo 24 November 1954, NedJur 1955, no. 753 p. 1347). If the intention to act on another's behalf is not convincingly evident, the burden of proof remains with the intervener (HR 24 April 1992, NedJur 1992, no. 688 p. 2955).

114. The legal position of SCOTTISH law seems to accord with that of SPAIN. Explicit discussion of the matter, however, is confined to the defence of acting with *animus donandi*: "The *gestor* may be able to rely on the presumption against donation to prove that he did not intend to donate his outlays. Where the *gestor* is a near relative of the dominus, this presumption may be displaced by a contrary presumption that the benefits are conferred out of a sense of family duty" (Stair [-*Whitty*], vol. 15, para 116).

115. A discussion bearing particular rules of allocation of the burden of proof with respect of the law of benevolent intervention are not apparent in the SCANDINAVIAN legal systems.

116. The ordinary rules of burden approach for private law claims apply in the COMMON LAW to claims arising out of benevolent intervention, whereby the legal burden of proof rests with the party seeking to establish the propositions on which their claim to legal redress or the defence rests. Hence if a third party asserts a personal or proprietary claim against the principal on the strength of a contract concluded by an agent of necessity on behalf of the principal, it will be for the third party to prove the necessity which provided the agent with authority to conclude the transaction: see *The*

Alexander (1842) 1 W Rob 346, 166 ER 602, where the plaintiffs failed to discharge the burden.

Illustration 1 is taken from the conclusions of Advocaat-Generaal *Hartkamp* to HR 21 December 2001, no. R00/032HR (http:www.rechtspraak.nl) (published in part also in RvdW 2002 no. 5); **illustration 3** from Cass.civ. 16 November 1955, JCP 1956 II no. 9087, note *Esmein*; RTD civ 1956, 356, obs. *Mazeaud*; **illustration 6** (two examples) from CA Rome 3 May 1983, Temi rom. 1983, 327 and from HR 10 December 1948, NedJur 1949 no. 122 p. 225; **illustration 9** from CFI Torino 1 December 1986, Riv.Dir.Comm. 1987, 541; **illustration 10** from STJ 22 April 1986, BolMinJus 356 (1986) 352; RLJ 121 (1988) 59; **illustration 12** from Cass.civ. 25 June 1919, D. 1923, I, 223; S. 1921, I, 12; **illustration 13** from OGH 3 October 1996, RdW 1997, 275; NZ 1997, 290; EFSlg. 81.427; RIS-Justiz RS 0019782; **illustration 14** from CFI Zinnik 10 June 1992, TAgrR 1993, 202; **illustration 16** from BGH 8 November 2001, MDR 2002, 270; **illustration 21** from OGH 7 December 1972, SZ 45/137; JBl 1973, 476 note *Koziol;* **illustration 22** from OGH 11 September 1885, GlU10.689 and OGH 6 February 1894, GlU15.008 (same facts; two different defendants); **illustration 24** (glass window frame) from CA Liège 3 April 1979, Pas. belge 1979, II, 88; RGAR 1980 no. 10195, obs. *Glansdorf*; **illustration 25** from BGH 7 November 1960, BGHZ 33, 251; **illustration 32** from HR 19 April 1996, NedJur 1997 no. 24 p. 101; **illustration 33** from Cass.civ. 26 January 1988, Bull.civ. 1988, I, no. 25, p. 16; JCP 1989 éd. G., no. 21217, obs. *Dagorne-Labbe*; RTD civ 1988, 539, obs. *Mestre*; D. 1989 Jur. 405, note *Martin*, and CA Karlsruhe 23 March 1977, VersR 1977, 936.

V.–1:102: Intervention to perform another's duty

Where an intervener acts to perform another person's duty, the performance of which is due and urgently required as a matter of overriding public interest, and the intervener acts with the predominant intention of benefiting the recipient of the performance, the person whose duty the intervener acts to perform is a principal to whom this Book applies.

COMMENTS

A. General

Scope and purpose. V.–1:102 governs a special situation within the law of benevolent intervention. It concerns the discharge of duties owed by another who has neglected them despite the fact that their performance is urgently required as a matter of overriding public interest. "Duty" means something which a person is bound to do: it may or may not be owed to a specific creditor (Annex 1). The term "duty" covers private law obligations but is much wider than that. The provision in V.–1:102 states that, without prejudice to other possible principals (primarily the recipient beneficiaries) the person whose duty is discharged is to be regarded as a principal to whom this Book applies. If the intervener, when acting, intended primarily to promote the interests of the party who owes the duty, the latter's status as principal may be deduced from the application of V.–1:101 (Intervention to benefit another); V.–1:102 is neither applicable nor necessary in this situation. The matter rests with the general requirements in V.–1:101. If, by contrast, the intervener acts primarily with the intention of benefiting the immediate recipient of the money paid or services rendered, the person primarily obliged to perform would not be considered a principal under V.–1:101. It is the aim of V.–1:102 to prevent this outcome. The provision to the effect that the third party "is a principal to whom this Book applies" at the same time clarifies that the subsequent rules, i.e. V.–1:103 (Exclusions) and Chapters 2 and 3 apply independently of whether the requirements of V.–1:101 are met. There is therefore no need to determine if the intervener has acted with reasonable ground (V.–1:101(1)(a) in conjunction with (2)). In other words, if the requirements of V.–1:102 are fulfilled, that in itself constitutes a reasonable ground to intervene. It follows that a justified benevolent intervention in relation to such a principal is not excluded merely because that principal (whose default has given rise to the situation) has forbidden intervention.

Duties during intervention. Furthermore, it follows from V.–2:101 (Duties during intervention) paragraph (1)(b) and (c) (Duties during intervention) that only to a very limited extent must the intervener have regard to the wishes of the principal in the course of the intervention. The benevolent intervener is not constrained by the contrary wishes of the principal – either within the context of whether the benevolent intervener may intervene or in the matter of how the undertaking should be carried out. The constraint of the principal's wishes is ousted to the extent that an overriding public interest displaces it.

Need for a rule within the framework of benevolent intervention. One question which can be posed is whether the special situations, which form the subject matter for V.–1:102, should not be taken out of the law of benevolent intervention and addressed in the law of unjustified enrichment instead. The answer is certainly not merely a matter of the aesthetics of codification. Quite apart from the consideration that the approach adopted here corresponds to the traditions of the civil law systems, this approach is supported by the notion that in this situation too the intervener ought to benefit from the privileges granted by the law of

benevolent intervention. Numbering among those in particular is the point that (in contrast with the law of unjustified enrichment) the intervener's claim turns only on the prospective usefulness assessed at the time the act was commenced; it is not decisive that as a result of the intervener's act the principal was actually saved expenditure and consequently enriched. Moreover, with the assistance of the approach chosen here, it is clear from the outset that the intervener acts lawfully within the meaning of the law on non-contractual liability for damage caused to another. The situations covered will not infrequently involve acts of intervention for which V.–3:103 (Right to reparation) is material.

B. Intervention Urgently Required in Overriding Public Interest

Overriding public interest. The contrary wishes of the principal need not be heeded if the principal is not discharging a duty, the performance of which is due and urgently required as a matter of overriding public interest. This rule requires not merely that the intervener acts to discharge a duty of the principal, but also that the discharge of the duty is of overriding public interest. It relates to the discharge of duties which are founded in a private law context, but are of such importance that their fulfilment is at the same time a matter of public interest. The question as to which circumstances generate an overriding public interest cannot be answered once and for all and perhaps the answer may not even be the same for all European jurisdictions. (The public attitude towards suicide, which differs from country to country, may serve as an example.) A minimum requirement for a public interest, however, is that the discharge of the duty is not merely in the interest of a single person. The typical cases concern duties, based in the law on non-contractual liability for damage, to secure safety at large, whereas the performance of contractual obligations will hardly ever be a matter of public interest.

Performing another's maintenance obligations. The performance of obligations to maintain persons who are not being maintained by the relevant maintenance debtor also falls under V.–1:102. For present purposes, such obligations of maintenance are not to be understood as confined to furtherance of a private interest only, at any rate so long and in so far as the social policy of the state follows the principle of subsidiarity. That is because an elementary public interest is contained within the advancement of a privately maintained community and the contingent relief of the public purse which that entails. A comparable case since time immemorial is the arrangement of a burial.

Performance must be due. Performance of the neglected duty must of course be due. It will not suffice that a duty whose performance will become due at some future point of time will most likely not be discharged. An imminently dangerous situation must already subsist at the moment of intervention. The requirement that performance of the duty is due is otherwise not of particular importance since the discharge of a duty where performance is not yet due will hardly ever be a matter of overriding public interest.

Performance must be urgently required. Not every duty that satisfies the requirement that its discharge is of overriding public interest may be enforced by a third party against the contrary wishes of the debtor. Performance must be urgently required. There must be a need for immediate action, which will as a rule consist of a provisional measure to ensure safety. Examples would be measures taken to safeguard dangerous spots for other road users, or to extinguish a fire or remove the risk of water damage which threatens to encroach on to neighbouring premises. Further examples would be taking measures (which cannot be postponed) to prevent an environmental damage which is immediately threatening to occur.

Illustration 1
P has parked a car in front of the emergency access for the fire service at a student halls of residence. I notices that the halls of residence have caught fire. I may remove the car despite the protest of P, if the removal is necessary in order not to delay the efforts of the fire brigade which is already on its way. If, by contrast, there are no signs that the building has caught fire and the obstruction of the emergency access by P's car presents a merely notional danger for the building and its residents, then the removal of the car, although in the public interest, does not require I to intervene personally. It would be sufficient to call the police

Illustration 2
A society for the prevention of cruelty to animals attends to a maltreated and injured pet lying in agony in the street. The owner may not counter a claim for compensation for the costs incurred by the society with the objection that she had informed the association that she did not consent to the emergency treatment. That would entail cruelty to the animal of a criminal nature.

Illustration 3
A warehouse, which P has rented from I in order to store large quantities of milk powder, catches fires. The warehouse is destroyed. Some of the milk powder has burned; the rest of it has mixed with the water from the fire fighting and threatens to pollute the ground water. The competent public authority instructs I to clean up the ground and remove the remains of the milk powder. I does not have to heed the contrary wishes of P, whose lease has terminated. I can claim compensation in respect of the costs incurred for the sum which P would in any case have had to bear in the case of a normal termination of the lease. The removal of the remaining milk powder was a matter of overriding public interest. The claim for compensation is not blocked by V.–1:103 (Exclusions), sub-paragraph (c), since the "obligation to a third party to act" referred to in that Article only extends to an obligation arising from a private law legal relationship (whereas I's duty to follow the instructions of the public authority is a duty under public law).

C. Third party to be regarded as principal

An exception to V.–1:101 (Intervention to benefit another) paragraph (1). The rule in V.–1:102 specifies that the third party who has not fulfilled the duty is to be regarded as a principal. This clarification is necessary because V.–1:101(1) looks to the direction in which the subjective aspiration of the intervener points and often (though, of course, not necessarily) the intervener will have the individual whose body or property is in fact being protected from danger exclusively or at any rate predominantly in mind. However, the person who is responsible in law for the situation of danger should not be relieved from that responsibility. It follows, therefore, that in such a case that person too is to be regarded as a principal and that must be so even though the person that the benevolent intervener predominantly intended to benefit was the beneficiary of the performance of the principal's duty. In other words, it must be decided from case to case on the basis of V.–1:101(1) whether the beneficiary is to be recognised as a principal too. V.–1:102, on the other hand, stipulates the general rule that in any case the person under the duty to act is "a" principal (albeit not necessarily "the", i.e. the sole, principal). This applies even if the benevolent intervener never even thought of seeking to protect that person from possible liability. On the other hand, it remains the case in situations of this type that the benevolent intervener must have intended to benefit *another* (as recipient of the performance). Just as with the basic situation covered by V.–1:101, there can

be no benevolent intervention in these circumstances if the intervener discharges a duty of the principal which was owed to the intervener, intending thereby to benefit himself or herself.

Illustration 4
The facts are the same as in Illustration 25 to V.–1:101 (Intervention to benefit another). The woman's health insurer established under public law is also regarded as a principal. The duty of such a health insurer to provide medical treatment is a matter of public interest.

Illustration 5
A woman, who is separated from her husband but dependent on maintenance payments received from him, has an adipoma removed from her back by a doctor. Prior to the operation her husband states that he will not cover the costs of the operation. If the woman cannot obtain her husband's financial support for the operation under the applicable provisions of family law, she will not be able to do so by virtue of the rules on benevolent intervention either, since the surgery performed is not of urgent necessity. The doctor therefore only has a claim against the woman, who is exclusively liable.

D. V.–1:101 (Intervention to benefit another) paragraph (2) inapplicable

Public interest overriding the contrary wishes of the principal. For cases which satisfy V.–1:102, V.–1:101(2) can have no application. We are concerned here with situations in which an overriding public interest has priority over the otherwise constraining wishes of the principal. Often the situation will amount to precisely the opposite of a conventional benevolent intervention; if the benevolent intervener has learned that the principal intends to default on the relevant duties, the benevolent intervener has a reasonable ground for intervention.

Illustration 6
A toddler is badly injured by a car accident and is taken to a hospital in a state of unconsciousness. The doctor in charge is able to contact the parents by telephone, but the parents object to the emergency operation for religious reasons. There is no time to apply to a court. The emergency operation may be conducted despite the contrary wishes of the parents.

NOTES

I. General requirements of a lawful management of another's affairs contrary to the principal's wishes

1. GERMAN CC § 679 provides that the contrary wishes of the principal may be disregarded, if without the management of the affair, a duty of the principal whose fulfilment is of public interest, or a statutory duty to provide maintenance, owed by the principal would not be fulfilled in due time. An example for the first alternative is a duty to ensure public safety by removing an obstacle which jeopardises traffic on a public road (BGH 4 December 1975, BGHZ 65, 354). It is a matter of dispute whether CC § 679 can be applied to cases in which a person prevents the suicide of another. Some authors answer this question in the negative on the basis that objections to suicide are merely a matter of ethics (Soergel [-*Mühl*], BGB[12], § 679 no. 5). However,

the prevailing opinion is that the contrary wishes of the person intending to commit suicide are to be disregarded; mere immorality suffices, as the duty to render aid under criminal law (on this point see further the notes under V.–1:103 [Exclusions]) according to case law (BGH 10 March 1954, BGHSt 6, 147) is effective also as against the person intent on suicide (Staudinger [-*Wittmann*], BGB[13], § 679 no. 10). Other authors have argued that the wishes of the suicide are insignificant because a person who intends to commit suicide lacks legal capacity (MünchKomm [-*Seiler*], BGB[3], § 679 no. 13; and with different emphasis also Erman [-*Ehmann*], BGB I[10], § 679 no. 4).

2. According to GREEK CC art. 730 (2) the contrary wishes of the principal are to be disregarded if these are either contrary to law or infringe principles of morality. A violation of law requires the infringement of a provision within the scope of CC art. 174 and hence a breach of the public order. This restrictive construction of the requirement of a provision within the meaning of CC art 174 is said to be necessary for the protection of the principal against interference with his affairs (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 730, no. 31). It is of no concern, for example, if the principal refuses to comply with a statutory duty to furnish maintenance (infringement of CC art. 1476) or an obligation to repair a building which threatens to collapse (infringement of CC art. 925) (*Papanikolaou*, loc.cit.). The term 'principles of morality' conforms with the term contained in CC art. 178. A violation of *bonos mores* is made out for example where a person is intent on committing suicide (*Papanikolaou*, loc.cit. no. 32). POLISH CC art. 754 corresponds with Greek CC art. 730 (2). Under this provision the opposed wishes of the principal may be disregarded, if they are "contrary to law or the fundamental principles of social coexistence". HUNGARIAN CC § 485 (2) formulates the matter in these terms: "Intervention is fitting and proper in order to avert life threatening situations even against the will of the person whose life is endangered, prevent or avert extensive potential hazards even against the will of the owner or another duly authorised person, or fulfil the obligation to provide support even against the will of a person who is obliged to provide support" (Official Translation, Hungarian Legal Norms in Force in three Languages, CompLex CD HMJ, 2004). ESTONIAN LOA § 1018 (1) (iii) goes beyond V.–1:102 in so far as any act performed for another is deemed justified if it is essential and in the public interest.

3. In the PORTUGESE law of benevolent intervention an intervention contrary to the principal's wishes is lawful if the wishes are contrary to law, public order or *bonos mores* (CC art. 465 (a)). Such wishes need not be and should not be heeded by the intervener. Examples are a suicide who is saved against his will (*Menezes Leitão*, Responsabilidade do gestor, 194; *Vieira Gomes*, Gestão de negócios, 199) and assistance to a child abandoned by its parents (*Almeida Costa*, Obrigações[9], 438; *Pires de Lima/Antunes Varela*, Código Civil Anotado I[4], Art. 465 no. 2).

4. AUSTRIAN CC § 1040 denies the intervener a claim under CC § 1037 for compensation of costs incurred, if he has knowingly acted contrary to the legally effective explicit or implicit wishes of the principal (Schwimann [-*Apathy*], ABGB V[2], §§ 1036-1040 no. 5). CC § 1040 similarly excludes claims on the basis of unjustified enrichment (OGH 23 October 1973, RIS-Justiz RS 0019806; Rummel [-*Rummel*] ABGB I³, § 1040 no. 1). However, by virtue of CC § 1040 the intervener is granted the right to take back an outlay *in specie* (*Meissel*, GoA, 46). Monies paid are considered always recoverable (OGH 30 August 2000, RIS-Justiz RS 0114088). A prohibition uttered by the principal is without significance, however, if it is contrary to law or good morals within the meaning of CC § 879 (OGH 26 November 1963, ÖJZ 1964, 429), if it adversely affects the rights of third parties in an impermissible manner or if

the principal lacked legal capacity at the time of his statement (*Meissel*, GoA, 46). Older legal writing also maintains that a prohibition is ineffective if it is contrary to general safety or public order (*Ehrenzweig*, System II/1[2], 719-720 [prohibition by home owner against extinguishing a fire; prohibition against bury a deceased person or providing maintenance to a child]) or if it is contrary to a duty owed to the community (Klang [-*Stanzl*], ABGB IV/1[2], 907; *v. Zeiller* II § 549 p. 408). According to CC § 1042 the discharge of a valid debt or other obligation which has fallen due is permissible despite the contrary wishes of the principal (the debtor); there is no further requirement of a particular public interest in the discharge (*Meissel*, GoA, 47). However, it has been argued that a debtor in his capacity as principal must have the opportunity of recourse against the intervener, who has discharged the debt, if the principal has suffered any disadvantages from the payment (such as the loss of a right of retention or set-off: *Meissel*, loc.cit, 51).

5. FRENCH case law proceeds from the principle that someone who intermeddles in the affairs of the principal against the principal's wishes commits a *faute*, which in a case of damage establishes tortious liability (*Flour/Aubert/Savaux*, Le fait juridique[10], no. 5 p. 7). The case law indicates, however, that the relationship of benevolent intervention can also arise where the opposition of the principal to the intervention was manifestly unjustified (*manifestement injustifiée*). This may be the case, for example, if the principal does not discharge a statutory duty and the intervener does nothing more than fulfil that duty (*Flour/Aubert/Savaux* loc.cit.). The cases of most practical relevance for this exception concern the discharge by a third party of one spouse's duty to provide maintenance and render assistance to the other spouse (JClCiv [-*Bout*], Art. 1372-1375, V° Quasi-Contrats. Gestion d´affaires – Conditions d´existence, Fasc. 10 no. 112). Similarly in BELGIAN legal literature the view has been voiced that the principal's opposition to intervention may be unlawful or socially unreasonable and in consequence may be disregarded (*Paulus*, Zaakwaarneming no. 53 p. 41).

6. The SPANISH CC does not contain any rule according to which, as an exception, a benevolent intervention may arise notwithstanding explicit contrary wishes of the principal; on the contrary, the case law has emphasised that the intervener has to respect the wishes of the principal (TS 2 February 1954, RAJ 1954 no. 322 p. 198). Note should be taken of CC art. 1158 according to which a person who "settles an account of a third party may claim from the debtor what he has contributed unless he has not acted against the express will of the debtor. In the latter case he may only claim compensation in so far as the performance was of benefit for the debtor." CC art. 1158 however is not considered as laying down a rule on benevolent intervention, but rather as a provision on unjustified enrichment (*Díez-Picazo*, Fundamentos II[4], 488). Despite this statutory starting point, Spanish legal literature considers that in some cases the rules on benevolent intervention may apply, even though the intervener has acted contrary to the wishes of the principal. These are situations in which the principal's wishes run contrary to statute or to a duty whose discharge is of public or social interest (*Sánchez Jordán*, Gestión de negocios, 290; *Pasquau Liaño*, La gestión de negocios ajenos, 456). According to *Lacruz Berdejo*, Rev.Crít.Der.Inm. 1975, 261 the principal's wishes may even be disregarded if they conflict with *bonos mores*. It is not evident how CC art. 1894 (1) is to be reconciled with this analysis. The provision contains the rule that if a stranger provides maintenance "without the knowledge" of the person obliged to provide it, the stranger has a right to demand the sum paid from the person obliged unless it is established that he provided maintenance "for charitable reasons and without the intention to claim compensation". CC art. 1894 is problematic on account of the opening phrase ('without the knowledge' of the person obliged) (*Puig Brutau*, Compendio II, 604). The phraseology has been criticised because it

places the person who pays the maintenance in a worse position than any third party who discharges a debt of another under CC art. 1158. A more logical legal policy would lead to the opposite result (*Lacruz Berdejo* loc.cit. 270; *Sánchez Jordán* loc.cit. 292). Finally, the Collection of Civil Laws of the Assembly of NAVARRA Ley 561 reads: "If he [the principal] has previously forbidden intervention, he is not under a duty to compensate."

7. Under ITALIAN law too acting contrary to a prohibition of the principal generally cannot not constitute a benevolent intervention. Such conduct is not held to be 'beneficial'. However, a prohibition of the principal is nugatory if it is contrary to statute or fundamental principles of the legal system or *bonos mores* (CC art. 2031 (2); CA Genova 10 April 1954, Foro Pad. 1955, I, 76). In cases of this type there is no requirement that the principal could not attend to his affairs himself. For example, the prohibition of the principal against intervention may be disregarded if, without intervention, inalienable rights of third parties would be infringed or adversely affected (Cass. 17 July 1969, no. 2636, Foro it. 1971, I, 713: a third party provides maintenance to an estranged wife in lieu of the defaulting husband). Acts by which a duty of the principal is discharged are in general held to be useful (Cass. 15 October 1963, no. 2757, Foro it. 1964, I, 580).

8. It is likewise the case under DUTCH law that benevolent intervention contrary to the wishes of the principal is generally not possible. In such a case a reasonable ground for intervening is missing. However, regard need only be given to the 'fully effective' wishes of the principal. Acts contrary to the wishes of a person who is mentally disabled are not necessarily wrongful and may even be necessary (T. M. Parlementaire Geschiedenis VI, 791; Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 301 p. 315; Verbintenissenrecht [-*Heisterkamp*], Art. 6:198 BW, no. 12. 2; *Schrage*, Verbintenissen uit andere bron, no. 16 p. 12-13). An intervention contrary to the wishes of the principal will otherwise only be recognised in extraordinary circumstances (T. M. Parlementaire Geschiedenis loc.cit.; HR 19 April 1996, *NedJur* 1997 no. 24, p. 101). The rescue of a person intending to commit suicide may serve as an example (Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 301 pp. 314-315; *Verburg*, De vrijwillige zaakwaarneming, no. 55 p. 84-85). There is no statutory counterpart to German CC § 679. However, it has been accepted that as a matter of public interest the public authority might clean up land as an intervener against the contrary wishes of the person responsible (*Frenk/Messer*, NJB 1993, 48-49; Verbintenissenrecht [-*Heisterkamp*], Art. 6:198 BW, no. 12. 5).

9. The legal situation in SCOTLAND appears not to be resolved. Among the institutional writers only *Stair*, Institutions, Book I, title 8, 3 and *Erskine* (1828), Book III, Volume II, 53 address the issue and discuss a claim of the intervener for reimbursement of expenditures limited to the surviving enrichment of the principal. Stair (-Whitty) vol. 15 para. 139 (1996), in reference to this, ventures the opinion that in extremely exceptional circumstances public interest may override the contrary wishes of the principal – at any rate where the latter is opposed to the discharge of his duty to provide maintenance. Whether the claim for reimbursement in this exceptional case is a matter of unjustified enrichment law or the law of benevolent intervention remains unclear.

10. In a case in which the fire brigade removed loose roof sheeting which a storm threatened to cast on to the street, the SWEDISH Supreme Court has held that the owner in general must suffer such an intervention (of the fire brigade or any third party) (HD 9 March 1972, NJA 1972, 88). HD 20 February 1952, NJA 1952, 63 has

held the same in a case of maintenance of animals where the principal would otherwise render himself criminally liable for cruelty to animals.

11. In a case of emergency – at any rate where human or animal welfare is concerned – a person may have authority in ENGLAND AND WALES as an agent of necessity to act contrary to the wishes of the principal: cf. *Palmer v. Stear* (1963) 113 LJ 420 (Kingsbridge County Court), where a vet employed by the defendants destroyed a seriously injured dog belonging to the plaintiff in view of its condition and an action for damages for trespass failed because it would have caused suffering to the semi-conscious and dying dog not to have done so, the owner being under a legal duty to destroy or procure the destruction of the dog to prevent cruelty, and the vet had authority as agent of necessity to put the dog down. There is no requirement that an act in connection with the care or treatment of a person lacking capacity under sec. 5 of the Mental Capacity Act 2005 (which, when it comes into force, also provides for rights under s. 8 for indemnification, to pledge that person's credit or to dispose of money in their possession) correspond with that person's wishes, but it must be done in the reasonable belief it is in that person's best interests and (under sec. 6) there are further restrictions if the act is intended to restrain that person's liberty. In extreme cases a *duty* to act may arise. Where a husband acquiesces in the request of his gravely-ill wife not to summon a doctor to attend to her and the wife dies as a result, the husband may commit the crime of manslaughter based on the fatal consequences of the omission to discharge a spouse's duty to care for the other spouse's health; the capacity of the wife to make rational decisions is a matter to be considered in determining whether there has been a "reckless disregard" of the duty to act: *R v. Smith* [1979] Crim LR 251. However, a person will not have authority to act contrary to the principal's wishes so as to interfere with the principal's right of self-determination if the principal is competent to act and makes his informed and free choice known: cf. Clerk and Lindsell (-*Jones*), Torts[18], para. 3-106. Nor will there be authority to act against the principal's wishes if the intervener can pass the matter to the public authorities who will have the necessary powers to intervene: cf. the IRISH case of *Flannery v. Dean* [1995] 2 ILRM 393, 397 (*Costello* J) (no right to retain possession of the owners horses against her consent, despite her neglect of them, because the defendant could have referred the matter to the local authority which had power to keep the animals in a local pound), and see to similar effect *Carter v. Thomas* [1893] 1 QB 673 (no right for volunteer to force his assistance where adequate fire brigade attending to fire). Where the claimant acts at the request of the public authorities in order to discharge a public duty for the defendant, performance of the duty being required urgently and the defendant being out of contact, the claimant will act as an agent of necessity: cf. *White J. D. v. Troups Transport* [1976] CLY 33 (Stockton-on-Tees County Court), where a business hiring out equipment acted as the defendant's agent of necessity when, at police request, it removed the defendant's vehicle which was stuck under a bridge on blocking a busy road before the rush hour.

II. Specific cases subject to particular rules (maintenance, funeral costs)

12. ESTONIA, GERMANY and SPAIN have explicit rules on rights in respect of maintenance provided and funeral costs incurred. Estonian LOA § 1018 (1) (iii) stipulates that an intervention contrary to the wishes of the principal is lawful if the principal does not discharge his statutory duty to pay maintenance when due. Similarly the German CC in § 679 declares the contrary wishes of the principal to be immaterial if these would lead to the principal's duty to pay maintenance not being discharged when due. Spanish CC art. 1894 (1) provides that a third party who discharges the duty of the party obliged 'without the knowledge' of the latter, may claim

compensation unless he did not have any intention to claim compensation at the time he provided the benefit. CC art. 1894 (2) grants a claim for compensation of reasonable funeral costs incurred against the deceased's estate and, as a subsidiary claim, against the persons who were under a duty to maintain the deceased while he was alive. The notion of funeral costs is given a wide meaning (Paz-Ares/Diez-Picazo/Bercovitz/Salvador [-*Lasarte*], Código Civil II, 1955). The duty to reimburse funeral costs contained in AUSTRIAN CC § 549 was originally also regarded as part of the law on benevolent intervention (*v. Zeiller* II, § 549 p. 409), but is now characterised as a claim in unjustified enrichment law. (Rummel [-*Welser*], ABGB I[3], § 549 no. 5). CC § 1042 (for whose application the provision of maintenance by a third party has always constituted a prime example) is likewise now seen as a provision of unjustified enrichment law. If a third party pays maintenance (provided for by statute) in the expectation of receiving compensation from the debtor under the maintenance obligation (and thus in absence of an *animus donandi*), that person has a claim for compensation under CC § 1042 (OGH [strengthened Division] 9 June 1988, SZ 61/143).

13. The GREEK Civil Code allows an intervention against the wishes of the principal if those wishes infringe statute or *bonos mores* (CC art. 730 (2)). Failure to pay maintenance (see above note 2) is an example of this. Apart from this rule CC art. 738 (2) only provides that in case of doubt a person is regarded as acting with *animus donandi* when they provide maintenance to a blood relation in the direct line or the second degree (by civil law reckoning) in the collateral line (i.e. brother and sister). PORTUGUESE law has no provision which explicitly provides for maintenance or funeral costs. Such cases will fall within the scope of CC art. 465 limb (a), a provision which has been drafted in wider terms than (for instance) German CC § 679 because (among other reasons) according to this provision an act may permissibly be undertaken in contravention of the principal's wishes if those wishes infringe *bonos mores* (*Menezes Leitão*, Responsabilidade do gestor, 194 (fn. 3)). As mentioned above (see note 5) FRENCH academic writing regards the discharge of an *obligation d´assistance et de sécours entre époux* as the textbook example of a legitimate intervention contrary to the wishes of the debtor of the maintenance obligation. On the claim for reimbursement of funeral costs under the rules on benevolent intervention see also CA Paris 3 May 1989, Juris Data 1989-022252. ITALIAN case law has repeatedly held that unless it is provided with an *animus donandi* payment of maintenance despite the contrary wishes of the defaulting principal can constitute benevolent intervention (Cass. 20 May 1961, no. 1196, Foro it. 1962, I, 1, 756; Cass. 17 July 1969, no. 2636, Foro it. 1971, I, 713; Cass. 9 August 1988, no. 4883, Rep.Giur.it. 1988, voce Alimenti, no. 2). The same holds true for meeting funeral expenses for the benefit of the heirs (Cass. 28 June 1975, no. 2557, Rep. Foro it. 1975, voce Gestione d´affari, no. 2; Trib. Milano, 13 July 1987, no. 6615 cited by *Rescigno*, Codice Civile, art. 2028 § 4). Under DUTCH law payment of maintenance for the benefit of neglected children likewise constitutes a recognised case of benevolent intervention which is justified despite the parents' contrary wishes (T. M. Parlementaire Geschiedenis VI, 791). It has also been held that necessary medical attendance provided by a hospital to a child who has fallen ill will be a legitimate benevolent intervention although the child's parents are opposed to treatment (CFI Rotterdam 20 August 1993, NedJur 1995 no. 18 p. 73).

14. In SCOTLAND it is argued that where a family member steps into the breach on behalf of another family member it may be assumed if there is nothing more to go on that that person has acted out of a sense of family loyalty and therefore with an *animus*

donandi. A benevolent intervention or claims for 'recompense' will thus only be considered in exceptional circumstances (Stair [-*Whitty*], Vol. 15, paras 98, 116).

15. There appear to be no decisions yet in SWEDISH case law on claims for compensation in respect of maintenance provided not merely in place of the person liable to provide it, but also contrary to that person's wishes. The decided cases all concern claims for contribution between siblings where one of the siblings has carried the sole or disproportionate burden of providing for their parents (HD 19 November 1909, NJA 1909, 551; HD 13 November 1937, NJA 1937, 524; HD 16 September 1944, NJA 1944, 429), or claims where the reputed father has raised a child in the belief he is the biological parent (HD 29 April 1968, NJA 1968, 183; HD 5 June 1975, NJA 1975, 330; HD 29 March 1978, NJA 1978, 144). However, changes to family law have rendered this line of case law irrelevant. The claims of the Swedish state for compensation against parents whose duty to maintain the children has been discharged by the state are specifically regulated by statute in §§ 21-31 of the Maintenance Support Act.

16. ENGLISH law recognises a right to intervene at another's expense in order to discharge a duty of that other which is due and a matter of overriding public interest where a person arranges for the funeral of a deceased person, although that person may not themselves be under an obligation to do so. An intervener (whether an undertaker or a third party who pays the undertaker: *Ambrose v. Kerrison* (1851) 10 CB 776 at 779 138 ER 307 at 308 (*Jervis* CJ)) has a claim to reimbursement of their expenses, provided these are reasonably incurred, i.e. that "no unnecessary expense is incurred" (*Rogers v. Price* (1829) 3 Y & J 28 at 37, 148 ER 1080 at 1083 (*Vaughan* B)). (As a rule, however, the reasonableness of the sum expended seems not to have been challenged: see, for instance, *Tugwell v. Heyman* (1812) 3 Camp 298, 170 ER 1389 and *Ambrose v. Kerrison*, loc. cit.) There is no requirement that the intervener act at the request of a person obliged to dispose of the body: *Jenkins v. Tucker* (1788) 1 H Bl 90 at 93, 126 ER 55 at 57 (Lord *Loughborough* CJ) (action supportable "though there was neither request nor assent on the part of the defendant"); *Rees v. Hughes* [1946] KB 517, 523 (*Scott* LJ), 527-528 (*Tucker* LJ, invoking the then commonplace legal fiction of a request implied by law) and for illustrations see *Tugwell v. Heyman*, loc. cit., (executor liable, though did not request burial). The basis for the exceptional rights of an intervener in this type of case (whose origins, if they lie in the case law of the ecclesiastical courts, may have been influenced by the Roman *actio funeria* through the channels of civil and canon law learning) is the public interest in discharge of the obligation to dispose of the body: see *Jenkins v. Tucker*, loc. cit., 93 (57) (Lord *Loughborough* CJ: "a duty which the defendant was under a strict legal necessity of [...] performing, and which common decency required"); *Shallcross v. Wright* (1850) 12 Beav 558 at 561, 50 ER 1174 at 1175 *per* Lord *Langdale* MR ("reasons of an important nature that the dead body should be buried without delay"), and similarly *Rogers v. Price*, loc. cit., 34 (1082) (*Garrow* B) and *Tugwell v. Heyman*, loc. cit., (where Lord *Ellenborough* CJ emphasises the necessity for intervention by a stranger). Traditionally the claim has been regarded as "quasi-contractual" (*Shallcross v. Wright*, loc. cit., 561 (1175) (Lord *Langdale* MR: "if this [burial] had been done by a stranger, there would have been a sufficient consideration, from which a contract to pay would have been implied") on the basis that in discharging the defendant's obligation the claimant has 'paid to the defendant's use' (*Jenkins v. Tucker*, loc. cit., 93 (57) (Lord Loughborough CJ)). In modern terminology it may be restated as a restitutionary claim based on unjustified enrichment arising from the discharge of another's liability, necessity providing the requisite unjust factor. The principle is obscured somewhat by unclarity in the law as to who or, rather, when a given person is obliged to bury the

deceased, though the following statement of the law may be extracted from the authorities. (1) Since the expense will be met by the deceased's estate (see the Administration of Estates Act 1925, ss. 33(2) and 34(3)), the duty to arrange the funeral is placed in the first instance on the person lawfully entitled to its administration. The persons primarily responsible for arranging a funeral are thus the personal representatives: see *Williams v. Williams* (1881-82) 20 Ch. D 659, 664 (*Kay* J: executors responsible for burial); *Holtham v. Arnold* (1986) 2 BMLR 123, 124-125 (*Hoffman* J) (the legal position of an administrator is no different from that of an executor and has the right and duty to arrange the funeral): *Grandison v. Nembhard* (1989) 4 BMLR 140 (*Vinelott* J) (executors); and see also *Dobson v. North Tyneside Health Authority* [1997] 1 WLR 596, 600 (*Peter Gibson* LJ). (2) Where there are no personal representatives in a position to do so (e.g. because there is no will, or no appointment of an executor under a will, and no administrator has been appointed, or the deceased's estate is insufficient for the purposes), the duty of interring the body devolves on the parent, if the deceased is an infant child and the parent has the means: see *R. v. Vann* (1851) 2 Den 325 at 326 and 300, 169 ER 523 at 524 and 525-526 (Lord *Campbell* CJ) (where, however, a criminal nuisance in failure to bury was not established because the impoverished parent was not obliged to take out a loan to finance burial), confirmed by Bramwell B in *Osborn v. Gillett* (1872-73) LR 8 Ex. 88, 99, and applied by *Stephen* J in *R. v. Price* (1883-84) 12 QBD 247, 254; *Bedwell v. Golding & Sons* (1902) 18 TLR 436 (*Phillimore* J); and *Clark v. London General Omnibus Co. Ltd.* [1906] 2 KB 648, 652, 655 and 659 (Lord *Alverstone* CJ) (but cf. 663, where *Farwell* LJ assumed the point without being satisfied of it), cited to this effect with approval in *Dobson v. N. Tyneside Health Authority* loc. cit., 478f (*Peter Gibson* LJ); *R. v. Gwynedd County Council ex parte B* [1992] 3 All ER 317, 319j (*Balcombe* LJ); *Hume*, 2 (1956) Sydney L Rev 109, 112. If the deceased was married, the surviving spouse is under a like contingent liability to bury the deceased: see *Clark v. London General Omnibus Co. Ltd.* loc. cit., 663-664 (where *Farwell* LJ assumed this) as well as the cases cited below; *Hume*, 2 (1956) Sydney L Rev 109, 110-112. For the view that a child of the deceased, if of full age, is correspondingly bound to bury their parent, see *Hume*, loc. cit., 113. However, there appears to be no authority for a wider proposition that the next of kin as such are under a duty to bury the deceased: see *Dobson v. N. Tyneside Health Authority* loc. cit., 478f (Peter Gibson LJ). (3) Failing someone responsible within the above categories, burial becomes the responsibility of the occupier in whose premises the deceased died (unless the householder does not have the requisite means): *R. v. Stewart* (1840) 12 Ad & E 773 at 778, 113 ER 1007 (Lord *Denman* CJ) (deceased dying in hospital; husband of the deceased, who was in receipt of social assistance, was too poor to effect burial). (4) If no suitable arrangements are apparently being made for burial or cremation, the local authority for the area where the person has died or been found dead has a statutory obligation to bury or cremate the body: Public Health (Control of Diseases) Act 1984, s. 46(1) (replacing the National Assistance Act 1948, s. 50). (At common law there was no such duty on the authority: *R. v. Stewart*, loc. cit. (disbursement for such purposes *ultra vires*; application for mandamus failed); *Woolwich Overseers v. Robertson* (1880-81) 6 QBD 654, 658 (*Lindley* LJ).) (On the rights and duties of local authorities in this matter, see further Chapter 1, Art. 1:103, Notes, IV, 30.) These rules sets out a hierarchy of liabilities; a person liable to arrange burial has no right of contribution or indemnification from a person whose contingent liability is of lower degree: see *Rees v. Hughes*, loc. cit., where the claim of an executor against the husband of the deceased failed because of the primacy of the executor's liability. (*R. v. Stewart*, loc. cit., where the application against the local authority was made on behalf

of the hospital in which the pauper died, could also now be regarded as a decision to the same effect.) The claim of an intervener is in the first instance for reimbursement out of the deceased's estate, since the personal presentatives are primarily obliged to dispose of the body (and have a right of recourse to the deceased's estate for that purpose): *Tugwell v. Heyman*, loc. cit.; *Arlot v. Churchland* (1828) unreported (Court of Common Pleas) cited 3 Y & J 32-33, 148 ER 1081; *Rogers v. Price*, loc. cit.; *Ambrose v. Kerrison*, loc. cit., 777 and 779 (308) (*Jervis* CJ: "There can be no question that an undertaker who performs a funeral may recover from the executor of the deceased (having assets) the reasonable and necessary expenses of such funeral, without any specific contract."); *Sharp v. Lush* (1878-79) 10 Ch D 468, 472 (*Jessel* MR: an executor is liable even though he has not arranged the funeral); *Rees v. Hughes*, loc. cit., 524-525 (*Scott* LJ), 528 (*Tucker* LJ). Alternatively the intervener may himself apply part of the deceased's estate to effect the funeral and does not become an executor *de son tort* in doing so: *Rees v. Hughes*, loc. cit., 524 (*Scott* LJ). (Prior to reform of the law of succession, the intervener's claim against the personal representatives or right to use the deceased's assets could only touch upon the deceased's personal property; an heir or devisee to whom the deceased's real property passed was unaffected: *Carter v. Beard* (1839) 10 Sim 7, 59 ER 514.) Only when the deceased's estate is insufficient to satisfy the expenses incurred does the intervener have a claim against the relatives of the deceased or third parties who are (in the circumstances, by virtue of their contingent obligation) liable to effect the funeral. The legal position in such a case was left open in *Rees v. Hughes*, loc. cit., 527 (*Morton* LJ), but the proposition is supported by and explains earlier case law. Where the deceased was a married woman who by virtue of that status (prior to reforms in the late nineteenth century) largely lacked an independent personal estate, an action for reimbursement of funeral costs could be brought against the husband: *Jenkins v. Tucker*, loc. cit. (deceased's father arranging the funeral, the husband being abroad); *Ambrose v. Kerrison*, loc. cit., and *Bradshaw v. Beard* (1862) 12 CB (N.S.) 344, 142 ER 1175 (where in both cases the deceased and her husband were separated). It has been asserted that there is no requirement that the intervener first contact the person who is obliged to effect the funeral and will be liable to make reimbursement: see to this effect *Bradshaw v. Beard*, loc. cit., 348 (1177) (*Erle* CJ). Arguably, however, that this is confined to cases where the intervener is himself (contingently) obliged to effect a funeral and is merely seeking reimbursement from one who is primarily liable: in *Bradshaw v. Beard* itself the brother was obliged at common law to arrange burial because the deceased had died in his house (loc. cit., 348 *per Willes* J). There is no clear authority that the same rule applies where a stranger who is not under any obligation intervenes; in a number of cases communication was either impossible or impractical in the circumstances – see *Ambrose v. Kerrison*, .loc. cit (claimant did not know where the husband resided); *Jenkins v. Tucker*, loc. cit. (husband abroad); *Rogers v. Price*, loc. cit. (executor residing too far away for advance notification). In any case there is no claim to reimbursement if the intervener (e.g. by concealment) impedes the person primarily liable to arrange the funeral from doing so: *Bradshaw v. Beard*, loc. cit., 349 (*Willes* J). Moreover, an intervener may not act in contravention of the known wishes of the person (primarily) obliged if the latter (lawfully) refuses to bury the body at that point in time: *Rogers v. Price*, loc. cit., 36 (1083) (*Hullock* B). Statutory provisions enable public authorities providing social assistance or maintenance to recover expenses incurred from persons who were liable to provide maintenance to the person assisted: see National Assistance Act 1948, s. 43; Children Act 1989, s. 29 and Schedule 2, Part 3; Child Support Act 1991 (as amended by Part 1

of the Child Support, Pensions and Social Security Act 2000 and supplemented by the Child Support Act 1995)

Illustration 2 is taken from CFI Groningen 2 September 1999, Prg. 2000, 5375; **illustration 3** from BGH 8 March 1990, BGHZ 110, 313; **illustration 4** from BGH 7 November 1960, BGHZ 33, 251; **illustration 5** from CFI Toulouse 26 October 1932, D. 1933, 2, 107; **illustration 6** from CFI Rotterdam 20 August 1993, NedJur 1995 no. 18 p. 73.

V.–1:103: Exclusions

This Book does not apply where the intervener:

(a) is authorised to act under a contractual or other obligation to the principal;

(b) is authorised, other than under this Book, to act independently of the principal's consent or

(c) is under an obligation to a third party to act.

COMMENTS

A. The negative requirements for the applicability of the law of benevolent intervention

Fundamentals. The provisions of V.–1:103 concern cases in which the law of benevolent intervention is not applicable, despite the fact that the conditions of V.–1:101 (Intervention to benefit another) or V.–1:102 (Intervention to perform another's duty) are satisfied. V.–1:103 therefore touches upon the 'negative' requirements of a benevolent intervention, namely (a) the absence of an authorisation (and obligation) to act arising out of some contract or other legal ground, (b) the absence of a power to intervene which is independent of the wishes of the principal, and (c) the absence of an obligation to act owed to a third party.

Priority of special statutory regimes. The Article does not expressly state that the law of benevolent intervention also yields priority to special statutory regimes which aim to provide a complete set of rules for the cases covered. That does not seem necessary because it is merely an instance of the general principle whereby in case of conflict more specialised statutory provisions oust the application of general provisions. Consequently, where the law provides for special and exhaustive rules governing the relationship between the intervener and the principal, those special rules have precedence over the rules in this text. Examples are to be found in statutes on the provision of emergency aid by doctors.

B. Authority and obligation (sub-paragraph (a))

The principle. A person who is obliged to the principal to undertake the act in question does not act as an *intervener without authority*. This is a defining feature of this area of law, whose purpose is precisely to bridge the gap which may arise from the absence of a pre-existent obligation under private law – in particular the absence of a contractual obligation to act. Moreover, someone who is obliged to the benefited party to undertake the act in question is necessarily at the same time also authorised to act. That is the point of departure for the formulation adopted for sub-paragraph (a) and is true both for contractual obligations and obligations imposed by law on the active party in favour of the benefited party. The authority to act derives its foundation from the particular obligation whose performance falls for consideration. Someone who is obliged to the principal to act is always also authorised to act (though conversely not everyone who is authorised to act is also obliged to act: see sub-paragraph (b)).

Precise identification of the obligation. It is important, however, to identify the relevant obligation precisely in the context of the particular case.

Illustration 1
A plumber who has been summoned by a home owner to repair the plumbing, but is not greeted by the owner on arrival at the house proceeds to repair the plumbing anyway. The plumber was obliged to make the repairs, but not authorised to enter the house without consent (unless the parties had agreed this). The apparent contradiction is resolved when it is accepted that the plumber was not obliged to convert the promise into action *in this way*. So considered it remains the case that one who is obliged to do an act is always also authorised to do it, while one who is authorised to do it is not thereby automatically obliged to do it.

Acting under a contractual obligation towards the principal. A benevolent intervention can only be made out if the parties do not stand in a legal relationship which confers on the intervener a right to conduct the affairs of the principal which are in fact managed. In particular, there is no benevolent intervention, therefore, if the party acting was contractually obliged to the entitled party to undertake the act in question. Whether a contract between the parties has come into existence and, if so, what rights and obligations it establishes between them are questions which are exclusively for determination in the law of contract. Contract law thus has complete priority to this extent in relation to the law of benevolent intervention. The latter comes into play only if the necessary contractual authority to act and a corresponding contractual obligation cannot be found. In that case there remains room for the law of benevolent intervention to operate between the parties.

Illustration 2
Where a party to a long-term contract suffers a heart attack during a business negotiation about termination of the contractual relationship and is brought to hospital by the other party, the latter acts as a benevolent intervener in doing so. Ferrying the contractual partner to the hospital has nothing to do with the contractual relationship between the parties.

Existence of a contract. The Article leaves to the law of contract all questions as to the existence of a contract and the rights and obligations which arise out of it. It is for contract law to decide whether and in what circumstances a contract has come into existence between an intervener and a principal by which the former obtains the consent of the principal to intervene or, as the case may be, continue the intervention. The Article equally leaves it to contract law to decide whether an approval of an intervention (V.–1:101 (Intervention to benefit another) paragraph (1)(b)) leads in any given case to the conclusion of a contract (see Comment F to V.–1:101). Moreover, under the rules on benevolent intervention in another's affairs it is for the law of contract to determine whether and in what cases a contract comes into existence where someone intervenes at the request of another or in response to another's cry for help. V.–1:103(a) is accordingly silent on the particular issue of what conditions are necessary for a contractual obligation to provide aid or the assumption of a contractual obligation to pay damages in favour of a rescuer (a *convention d´assistance*). Presumably, under Book II, as a rule, no contract to provide assistance or to pay damages comes into being between the injured party and the rescuer, since neither the rescuer nor the party calling for help will normally have the intention to bind themselves legally. Thus in such cases room is left for the application of the law of benevolent intervention. The same goes for courtesies and favours which do not involve a legal obligation. However in case of such arrangements (such as for example being given a lift in another's car) it will often be assumed that the active party acts with an intention of conferring a gratuitous benefit V.–3:104 (Reduction or exclusion of intervener's rights) paragraph (1). A contractual relationship does come into existence, however, if someone promises another a reward for doing something specific; it is concluded

at the moment that the promisee commences performance of that activity. Finally, so long as there is no European regime to determine under what circumstances a (valid and enforceable) contract is concluded with a person who lacks full legal capacity (e.g. a minor) this area too remains to be governed exclusively by the applicable law of contract or law of persons, as the case may be. In this context it may be that by virtue of a special statutory regime the relationship between doctor or hospital on the one hand and an unconscious patient on the other is configured on a contractual basis.

Acting in pursuance of a void contract. V.–1:103 does not touch upon the question whether a person who performs under a contract for services, supposing there is an obligation to do so, may qualify as an intervener if the contract turns out to be void. This question falls to be decided instead under V.–1:101 (Intervention to benefit another) and must be answered in the negative due to the absence of an intention to benefit another (see Comment C under V.–1:101).

Acting in breach of contract. There is equally no intervention without authority where a party to a contract acts in that capacity but not in conformity with the contract. The fact that a party to the contract performs the obligations under the contract poorly does not alter the fact that there was authority to intervene.

The priority of functionally similar contract law rules. The law of contract contains various rules which from a functional point of view show certain similarities to the law of benevolent intervention. These rules too, of course, have priority and thus correspondingly exclude the law of benevolent intervention. A case is provided by the obligation of a debtor whose creditor is in delay in accepting performance to safeguard or accept the subject matter of the performance (e. g. goods sold) in the interests of (but also at the expense of) the creditor (cf. III.–2:111 (Property not accepted). Another example can be found in the extended rule of the law of mandate whereby in a case of unforeseen events the agent may depart from the instructions which have been given and, after a vain attempt to contact the principal, may make a decision in the principal's interest. Where such a power arises out of contract law rules governing the relationship between the parties, the agent does not act as intervener. That is the case independently of whether the agent is also *bound* to deviate from the original instructions (i.e. to do what a reasonable agent would do to safeguard the principal's interest) (in which case V.–1:103(a) would apply); even if the applicable contract law regime merely authorises the agent to deviate from the principal's declared wishes, the intervener is entitled to act despite the absence of the principal's consent (V.–1:103(b)). Where, on the other hand, under the applicable contractual regime such a power founded on the law of contract is absent, then that very same act without more may constitute a benevolent intervention. A conceivable case in point would be an agent who feels compelled by a sudden and exceptional course of events in attending to the interests of the principal to exceed a price limit set by the principal for good reason. If the applicable contract law does not contain its own rule for this situation, then the law of benevolent intervention applies (and the converse is also true). As regards the substantive result in cases of this type, however, it will not make any difference whether they are resolved on the basis of the law of contract or the law of benevolent intervention in another's affairs.

Acting under another obligation towards the principal. The performance of a contractual obligation is only one case among many (albeit a particularly important one) in which there is no benevolent intervention because vis-à-vis the principal the party acting *must* do so as a matter of private law, is correspondingly authorised to act and consequently is not dependent

on the law of benevolent intervention for a justification for his acting. The Article does not employ the criterion of the "voluntariness" of the act, which can be found in Romance legal systems. That has been done, however, primarily for technical reasons and not on account of any legal policy consideration. The criterion of "voluntariness" appears both on the one hand too imprecise and on the other hand too narrow. What should be decisive instead is whether the party acting was under an obligation towards the principal. However, the matter does not turn on the source (statutory or contractual) of the obligation. Those who perform their statutory obligation to maintain their children, their spouse or their parents do not act as benevolent interveners any more than those who perform the obligation under the law of unjustified enrichment to return something in their possession or ownership. The performance of an obligation arising, for example, from the initiation of expectations of a concluded contract ("*culpa in contrahendo*"), cf. II.–3:302 (Breach of confidentiality) or in consequence of causing legally relevant damage to another is likewise not an incidence of benevolent intervention.

Illustration 3
A person does not act as a benevolent intervener when remedying damage for which that person is responsible, such as damage to ground water caused by trying to refill an underground oil tank which in fact no longer exists.

Moral obligations. Only legal obligations are relevant here; the discharge of a moral obligation will not suffice to exclude the application of the law of benevolent intervention in another's affairs.

The duty to render assistance under criminal law. Many European legal systems contain a rule which renders a person liable to criminal sanctions when he or she sees a fellow human being in substantial peril to life or limb and fails to render assistance despite the fact that it would have been possible to do so without having to subordinate any significant interests (a criminal omission to render assistance). In some cases particular professional groups (especially doctors, but in given circumstances also vets too, for example) are subject to wide-ranging duties to help and must reckon with the possibility of criminal punishment should they fail to fulfil them. Those who act under the threat of punishment if they do not help may well not act "voluntarily", but there should be no doubt that such persons are afforded the (privileged) legal position of benevolent interveners. The threat of punishment is meant to provide only a *further* 'incentive' for taking action; it should not have the counter-productive effect that interveners are stripped of legal protection available under private law. In these rules, therefore, it matters only whether the intervener is authorised to act under a private law obligation *owed to the person assisted*. It is precisely that requirement which is not in fact satisfied in the case of acts taken under the impulse provided by a threat of punishment by criminal law. That is because in the first place such duties exist for the general public interest; they do not provide even a theoretical platform for a claim based in private law and, according to the overwhelmingly predominant European legal viewpoint, their breach does not found a claim for compensation for the person who was not assisted. Even if one were to take a different view (i.e. regard a claim to reparation as well-founded), the circumstance that (at least theoretically) the assisted person could at any time refuse assistance as an unwanted interference shows that the person giving assistance is in fact a benevolent intervener. The duty to render assistance imposed by the criminal law does not provide the helper with authority to intervene which is independent of the principal's will. Correspondingly the duty to act does not exist, or ceases to exist, when the principal rejects assistance as unwanted.

C. Acting under another authority (sub-paragraph (b))

General. The second of the "negative" conditions for a justified benevolent intervention in another's affairs is the requirement that the acting party must not be authorised in relation to the benefited party to do the act in question independently of the latter's consent. This is the case where the authority to act stems from rules outside the law of benevolent intervention. Where there are such special grounds justifying intervention, there will also be as a rule an independent – and in a case of doubt exhaustive – legal regime for the regulation of the rights of the participants. That in itself, however, is not the decisive consideration; what matters is whether either the person acting is entitled to act against the wishes of the person affected or, as the case may be, the person acting is the one who generates the affected person's legally binding will. In either case one is concerned with an authorisation for a person to interfere in the legal position of another; that circumstance precludes a benevolent intervention relationship from arising between them.

Examples in private law. Examples include a guardian in relation to a ward, parents in relation to their children, or the governing organs within a legal person in relation to the legal person itself. In relation to particular acts undertaken these persons will often also fall under the rule in sub-paragraph (a); that is the case when they are fulfilling their existing (statutory) obligations in relation to the other person. However, even when that is not the case, by virtue of sub-paragraph (b) they still do not act in relation to that person as interveners. Furthermore, a neighbour who is granted power by property law rules to lop overhanging branches encroaching from neighbouring land or to clean shared drains against the wishes of a co-owner does not act as a benevolent intervener. The same holds where a tenant exercises a power under the tenancy agreement to carry out necessary repairs at the landlord's expense and without the landlord's consent in the particularly pressing circumstances envisaged by the contract.

Authority to act under public law. The situation is similar where someone is entitled to intervene under public law (a public fire service, the police etc.). The intervention of such services for the maintenance of public safety and order is referable to a special legal basis; it does not constitute a benevolent intervention in another's affairs. As a general point and for the avoidance of misunderstanding, it should be reiterated here that the draft only engages with questions of private law and does not address problems of reimbursement of costs or any other similar issue arising from the exercise of powers under public law. The power of an authority to intervene is of course an essential feature in the make up of a state or public prerogative.

Illustration 4
Other road users are obliged to stop when instructed to do so by a school crossing patrol; the patrol does not act as a benevolent intervener in relation to the children or the other road users.

Illustration 5
While a cattle truck is being unloaded a bull breaks free and escapes on to a dual carriageway, where it is shot by a police officer. The officer suffers trauma as a result of the blast. This does not confer a right to compensation from the cattle dealer under V.–3:103 (Right to reparation) in conjunction with V.–1:102 (Intervention to perform another's duty); the officer was authorised under public law – independently of the cattle-dealer's consent – to shoot the animal in order to protect road users from the danger.

Illustration 6
On the other hand, someone who at the invitation of the revenue service informs on tax dodgers in return for a 'bounty' acts without special authority in making investigations and passing on details to the tax authorities. The informer acts outside the field of public law and is not a benevolent intervener (and thus cannot recover costs from the tax authorities) only because acting predominantly in pursuit of his or her own interests – namely for the purpose of earning the reward on offer.

"Independently of the principal's consent". As already mentioned, there is no benevolent intervention if the party acting does not depend on the consent of the principal for intervention in the principal's affairs and instead acts by virtue of his or her own authority. An express consent of the principal, on the other hand, excludes the application of the rules on benevolent intervention only if as a result a contract is concluded between the intervener and the principal (see Comment B above). Taken by itself, the consent of the principal does not constitute an authorisation because it can be revoked at any time prior to carrying out the measure in question. Moreover, no other outcome would be possible here because the whole idea of benevolent intervention is to protect the active party who is entitled to set forth to comply with the assumed wishes of the other party. If those wishes are in fact complied with, that is obviously no reason to *deny* a benevolent intervention in that other's affairs.

Illustration 7
Following a road accident abroad, the holder of a third party insurance policy is arrested. At the insured person's pressing request the insurance company puts up the bail, although both parties know that according to the contract of insurance it is not obliged to do so. It is also clear to both sides that the insurance company has provided this additional service as a goodwill gesture. The insurance company acts as a benevolent intervener. It would not be correct to seek to deny the company that status on the basis that it had been "authorised to act". The insurance company's authority depends solely on the principal's consent.

D. Performing an obligation towards a third party (sub-paragraph (c))

Significance. Someone who by intervening performs an obligation imposed under private law does not act as intervener even if the other requirements of paragraph (1) are satisfied. In practice, however, it will seldom be the case that an intervention fails to qualify as a benevolent intervention for this reason alone. The intervention will often be excluded from the law of benevolent intervention due to the basic requirements of V.–1:101 (Intervention to benefit another), e. g. because performances which are rendered for the purpose of performing a (real or imagined) obligation are normally not undertaken with the intention *predominantly* of benefiting another. In particular, it follows from this that those who mistakenly assume that in acting they are performing a contractual obligation do not come under the regime of benevolent intervention in another's affairs; they must seek recompense instead within the law of unjustified enrichment.

Scope of application. Even if the requirements of V.–1:101 (Intervention to benefit another) are met as between the intervener and the benefited party, where the intervener is obliged to a third party to undertake the act done (the typical case involving a contractual obligation) the intervener is not to be regarded as a benevolent intervener in relation to the party benefited. In such cases there is neither need nor sufficient ground for the creation of an intervener-principal relationship: the party acting (the 'intervener') is entitled only to look to the

relationship with the contractual partner. A frequent case is where someone is commissioned to undertake repairs for the benefited party. (It is immaterial in that respect whether or not the person commissioning the repairs acts as a benevolent intervener in relation to the party benefited). In such situations it is occasionally the case that the person commissioned acts in relation to the party benefited with the intention of furthering the latter's interests – when (among other things) the contract is not the motive for intervening. It is the purpose of sub-paragraph (c) to clarify that in those instances too there is no benevolent intervention.

Illustration 8
R is commissioned by a landlord L to carry out repairs in the apartment let to the tenant T and carries these out. L is not a benevolent intervener in relation to T because L acts in relation to T in discharge of L's obligations as landlord and is thus authorised to act. R in turn is also not a benevolent intervener, either in relation to L because of the priority of the law of contract or in relation to T because of sub-paragraph (c). The latter provision is necessary for the case where R acts under contract to L, but would have been willing to intervene even if not commissioned by L (e. g. because R and T are neighbours on very good terms) and thus acted all along with a predominant intention to benefit T. (If, depending on the application of the rules on stipulations in favour of third parties (see II.–9:301 (Basic rules) paragraph 1), L and R concluded a contract for T's benefit, then R is no benevolent intervener in relation to T because of V.–1:103(b)). If R carries out the repairs badly, R is liable under the contract to L (and, as the case may be, to T); but there is no liability to either L or T under the law of benevolent intervention.

Illustration 9
A charitable organisation concludes a contract with a public authority whereby the charity is obliged to carry out certain rescue services for which the public authority, for its part, carries the cost. The charitable organisation in performing these services does not act as a benevolent intervener in relation to the persons rescued.

Demarcation. One should not confuse with this situation cases in which a benevolent intervener performs obligations incurred as a representative acting for the principal in benevolent intervention.

Illustration 10
The facts are the same as in Illustration 8, except that L is not the landlord of T but rather another friend of T who commissions R to deal with a broken pipe in T's apartment. L's act of commissioning R is in this case a benevolent intervention by L in T's affairs. The payment of R's bill by L remains a benevolent intervention in relation to T, unaffected by the circumstance that L is contractually under an obligation to R to pay: that obligation is merely the consequence of the intervention undertaken by L. It is not merely that L has a claim against T for reimbursement of expenditure. It is also the case that (so far as this is reasonable in the circumstances) L must inform T that the debt to R will become due and give T the chance to pay R directly.

Precise analysis of the contractual obligation. What matters is whether the person acting is contractually obliged to a third party in regard to the activity undertaken. Such cases may call for close scrutiny of the contract between the person acting and the third party in order to determine whether the actor is or is not actually under an obligation to perform the act which benefits another.

Illustration 11
A ship's doctor attends to a suffering passenger who has lost consciousness. If the doctor has undertaken to the shipping company to provide medical services to passengers (most probably in return for a fee), then it is not the doctor but rather the shipping company, with its employment of or arrangement with the doctor, which acts as benevolent intervener in relation to the patient. (This is assuming that the situation ought not rather to be analysed on the basis that the company for its part is merely discharging a contractual obligation to the passenger – in which case, there would be no benevolent intervener at all.) On the other hand, if the doctor has merely agreed to be "on call" (e. g. because the shipping company merely wished to preclude any potential non-contractual liability to a passenger which might result if the passenger fell ill and no medical assistance was available on board ship), the doctor performs his or her contractual obligation by being on the ship and accessible to those in medical need. Actual provision of medical treatment to any particular passenger who needs the doctor's assistance will exceed the doctor's contractual obligation to the shipping company.

No limitation to contractual obligations. The provision in sub-paragraph (c), however, is not limited to the discharge of *contractual* obligations incurred to third parties. It will also cover the performance of subsisting obligations to third parties arising under statute or by operation of law. V.–1:103(c), however, does not touch upon acts which are conducted in discharge of a duty under public law.

Illustration 12
A married person who complies with a subsisting statutory obligation *owed to the other spouse* to contribute to the maintenance of stepchildren (i.e. to the spouse's children living in the same household) is not a benevolent intervener in relation to the children in making that contribution.

Illustration 13
I and P are co-owners of a joint gable wall which is in danger of collapsing. A supervisory authority for buildings orders I to pull down the wall on grounds of public safety. I may claim from P a proportionate contribution in respect of the costs: P cannot veto the demolition of the wall due to V.–1:102 (Intervention to perform another's duty), and I does not act in compliance with an obligation to a third party arising under private law.

NOTES

I. The precedence of contract law

1. The precedence of contract law over the law of benevolent intervention is recognised in all legal systems of the Member States of the European Union. Under GERMAN law the intervener must not have been entrusted with authority by the principal nor otherwise be entitled to act (CC § 677); from this point of view the rules on benevolent intervention are subsidiary (*Medicus,* Schuldrecht II BT[12], no. 622). The only point of dispute in this respect is the situation of an intervener acting under a void contract for services (cf. on this point Note V under V.–1:101 (Intervention to benefit another)) or where an authority conferred by contract is exceeded (for details see inter alia

MünchKomm [-*Seiler*], BGB[3], § 677 no. 42; Soergel [-*Beuthien*], BGB[12], § 677 no. 17; Palandt [-*Sprau*], BGB[63], § 677, no. 11 and § 713 no. 11). Recent case law has dealt with such cases exclusively on the basis of a breach of contractual duty (see for example BGH 11 January 1988, DB 1988, 1377: the managing director of a company does not act without authority if he exceeds his competence; in this case no room remains for the application of the law of benevolent intervention; for the former approach to the contrary see RG 22 October 1938, RGZ 158, 302, 312 and BGH 7 January 1963, BGHZ 39, 1).

2. It is inferred from the requirement of 'without mandate' in GREEK CC art. 730 that managements of another's affair which find their basis in an already existing legal relationship do not come within the scope of application of the law of benevolent intervention. As in German law the term 'mandate' is not to be understood here in its technical meaning. Rather it indicates that there is no justification for or duty of the intervener to manage another's affair (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 730, no. 20). The same holds true for ESTONIAN LOA § 1018 (1) ("without being granted the right or obligated by the principal"), POLISH CC art. 752 ("without mandate") and HUNGARIAN CC § 484 ("without being authorised by mandate or otherwise"). According to Hungarian case law an intervention without authority may therefore only arise where the intervener provides more than he was contractually obliged to or continues to act on another's behalf after discharging his contractual duties (Legf.Bir. no. 564/1999, Bírósági Határozatok [Court Decisions] no. 12/1999). Under PORTUGUESE law the precedence of contract law is derived from CC art. 464: the intervention must have taken place without 'authorisation'. Should the intervention be founded on a contract, it will be left to contract law alone to decide on the rights and obligations of the participants (*Vaz Serra*, BolMinJus 66 [1957] 102-103). The concept of '*convention d´assistance*' is as foreign to Portuguese law as it is to German law.

3. Under AUSTRIAN CC § 1035 only an 'act without authority' can give rise to a benevolent intervention. 'Authority' may be conferred by a contract, a court order or by statute (for details see *Meissel*, GoA, 72 et seq. and *Fötschl*, ERPL 2002, 550, 562 (fn. 67)). A contractual agreement between principal and intervener consequently precludes the application of the law of benevolent intervention; contract law has priority. The scope of the contractual duties is to be determined by construction of the contractual agreement (OGH 25 April 1963, SZ 36/68; *Gschnitzer*, Schuldrecht BT[2], 279). For instance, the operator of an Austrian hospital had no claim for reimbursement in a case where, because of its own shortage of resources to deal with the case itself, it flew a newly born child to a clinic in Zürich for treatment there: under Austrian social insurance law the parents had concluded a contract with the hospital and according to the terms of that contract no counter-performance was due as *quid pro quo* for the hospital's services (OGH 29 March 2001, ZVR 2002/36 p. 154). In some rare cases, however, the provisions of the law of benevolent intervention may have an impact on contract law. For example, the OGH applies the provisions of benevolent intervention in the context of determining the amount of compensation of a person who has contractually agreed to keep property in safe custody (OGH 12 November 1997, JBl 1998, 303). If the intervener acts in response to another's request for help, a contract may be concluded, though the emergency situation of the person requesting help calls for particular attention (OGH 13 July 1994, SZ 67/123), both with respect of a possible lack of an intention to be legally bound in the case of non-professional assistance and in the case of professional assistance under the aspect of usury (Rummel [-*Krejci*], ABGB I³, § 879 no. 218). However, under Austrian law a benevolent intervention may be precluded not only by the existence of a contract but

also in the case of a courtesy arrangement which is not legally binding. This follows from CC § 1036 and its requirement of an emergency situation, which may be held to be missing if the intervener had the possibility to obtain the principal's prior consent (OGH 22 November 1984, SZ 57/167; *Meissel*, GoA, 31). But it is also linked to the converse requirement of CC § 1037 that the intervener has not obtained the consent of the principal. If he has that consent, there is a 'courtesy-relationship' interposing between contract and benevolent intervention. Its legal consequences are yet to be determined and are a matter of academic debate.

4. In SPAIN too the law of benevolent intervention is considered a subsidiary instrument. From CC art. 1888 ("voluntary, without being mandated") or Fuero Nuevo de NAVARRA ley 560, as the case may be, it is inferred that the intervener must neither be obliged to act nor be entitled to do so by reason of some special legal basis *(Pasquau Liaño,* La gestión de negocios ajenos, 101); otherwise the rights and duties of the parties will be determined exclusively by that special legal relationship (*Sánchez Jordán*, Gestión de negocios, 93). The term 'mandate' in CC art. 1888 is not to be understood as a technical term (Paz-Ares/Díez-Picazo/Bercovitz/Salvador [*-Díez-Picazo*], Código Civil II, 1944; *Lacruz Berdejo*, Rev.Crít.Der.Inm. 1975, 252). The demarcation between contractual and extra-contractual rights and obligations is regarded as difficult. An agent may exceed the limitations of the mandate pursuant to CC art. 1715 if he can thereby obtain advantages for the principal beyond those he would have by conduct in conformity with the contract. However, the principal will only be bound by such an act in excess of contractual duty if he ratifies it (CC art. 1727). In this case the rules of benevolent intervention are superseded. Moreover, according to the case law of the Supreme Court they remain inapplicable if ratification is withheld (TS 8 January 1980, RAJ 1980 (1) no. 79 p. 64; TS 19 October 1993, RAJ 1993 (4) no. 7744 p. 9863). The French concept of a *convention d´assistance* is also completely unknown in Spain.

5. ITALIAN CC art. 2028 only counts subject of the law of benevolent intervention those acts which the intervener is not obliged to conduct, which (as it is often put) the intervener renders 'voluntarily' (Cass. 30 November 1988, no. 6499, Rep. Foro it. 1988, voce "Gestione d´affari", no. 1; *Breccia*, La gestione di affari[2], 857). If the intervention finds a legal basis in either a contract or by operation of law itself this will render the law of benevolent intervention inapplicable. Even acts which are conducted in excess of a mandate (cf. CC art. 1711) do not constitute a benevolent intervention (Cass. 23 January 1953, no. 202, Rep.Giur.it. 1953, voce Appelo civile, no. 128; Cass. 14 July 1954, no. 2471, Rep.Giur.it. 1954, voce Mandato, no. 48-56, voce Obbligazioni e contratti, no. 262). Only where the intervention does not have any connection to the contract concluded by the parties will there be room for the application of benevolent intervention.

6. FRENCH and BELGIAN law as well as MALTESE law (CC art. 1013) require that the intervener has acted 'spontaneously' or as the case may be 'voluntarily'. Accordingly the law of benevolent intervention will not come into consideration if the intervener is obliged to act under a contract or statute (Cass. soc. 11 October 1984, Bull.civ. 1984, V, no. 369 p. 276; *Van Gerven*, Verbintenissenrecht II[7], 218-219). In case of performance beyond the contractual obligations, however, it is held possible to resort to the law of benevolent intervention (*le Tourneau*, RépDrCiv, VI, v° Gestion d´affaires (2002) no. 37; *Paulus*, Zaakwaarneming, no. 39 p. 35). French case law, moreover, has held that an act may be characterised as 'spontaneous' or, as the case may be, 'voluntary' with respect to the relationship between intervener and principal, even though the intervener vis-à-vis a third party is under a contractual duty to act (Cass.civ. 24 May 1989, Bull.civ. 1989, I, no. 211 p. 141). A further distinctive feature

of French law is the case law on so-called 'contracts for emergency assistance'. These concern the situation where a person has rendered emergency assistance to another without being obliged to do so and has been injured in the course of acting. French courts have granted these rescuers a contractual claim for damages independent of fault against the person who has received the emergency assistance. A contract between the party rendering assistance and the party receiving assistance is held to arise with the term that the party receiving assistance is obliged to compensate the party rendering assistance for any personal injury suffered (leading decision Cass.civ. 27 May 1959, JCP 1959 no. 11187). This concept of a *convention d´assistance* has had a hostile reception from commentators (*Viney*, JCP 1998 éd. G, I. 144, no. 7, p. 1096), but the case law adheres to the concept. In Belgium the French example has not been followed, while LUXEMBOURG has adopted the concept of *convention d´assistance* (CA Luxembourg 27 June 2001, Pas. lux. 2002, 154).

7. DUTCH CC art. 6:198 excludes the relationship of *zaakwaarneming* if a contractual or statutory relationship already exists between the parties from which the authority to undertake the management of affairs may be derived. Typical examples are the employment contract, contract for services, and contract for work. Medical treatment rendered to unconscious patients in a case of emergency is regulated by CC arts. 7:465 and 466 on contracts governing medical treatment. If someone acts upon the express or implied request of another, it will depend on the circumstances of each case whether or not a contract is held to be concluded. More often than not it will be a spontaneous attendance to another's interests which, as the reaction to a cry for help of a drowning person, will fall under the law of benevolent intervention (for details see Verbintenissenrecht [-*Heisterkamp*], Art. 6:198 BW, note 12. 3).

8. As everywhere else the precedence of contract law over *negotiorum gestio* is also acknowledged in SCOTLAND. As soon as it is established that the principal was not unaware of the management of the affairs or that the intervener has acted upon a prior expression of intent on the part of the principal then as a first step it will be ascertained whether or not this relationship is governed by a mandate (or an implied mandate, as the case may be) or whether (where the transaction is not gratuitous) a relationship of agency has been established (*Walker*, Principles of Scottish Private Law, II[4], Ch. 4. 14, p. 213-218; *Marshall*, Scots Mercantile Law[3], 31-41).

9. One reason why the law of benevolent intervention lacks a clear-cut concept under SCANDINAVIAN law is that numerous situations are governed by specific regulations, which in turn thrust a general concept aside. Furthermore, the law of contract is granted a broad scope of application with respect to cases on the boundary between contract law and the law of *negotiorum gestio* discussed here. This in part is achieved by the concept of a 'tacit promise' (see further on such *stiltiende løfte* under DANISH Law HD 23 October 2000, UfR 2001, 100) and also a consequence of the fact that even mere passivity may lead to the conclusion of a contract pursuant to Scandinavian Contracts Act §§ 4 (2) and 6 (2). A further example for this approach giving precedence to contract law may be found in the SWEDISH Act on Consumer Service Contracts *[Konsumenttjänstlagen (1985:716)]* § 8 and the FINNISH Consumer Protection Act [*Konsumentskyddslag*] of 20 January 1978 no. 38 chap. 8 § 6. Both provisions deal with remuneration for additional services rendered which had not been ordered and do so in a way which strongly resembles the general principles of the law of benevolent intervention. The underlying values of benevolent intervention may even be discerned in arbitral awards: these concern remuneration due for preparatory work which had not been ordered, but was necessary for the paintwork which was the subject matter of the service contract, as was pointed out to the

principal, although he made no comment on the issue (*Andersson/Söderlund*, JT 2002-03, 14).

10. In ENGLISH law agency of necessity, like any other form of agency, may or may not be contractual: *Petrinovic & Co. Ltd. v. Mission Francaise des Transports des Maritimes* (1941) 71 Lloyd's L. Rep 208, 223 (*Atkinson* J). It is thus no requirement of a valid agency of necessity that the agent act without contractual authority from the principal. Indeed the normal if not invariable case for the application of agency of necessity is where the necessity operates to enlarge or override pre-existing instructions from the principal (i.e. as a buttress to agency of agreement). For this reason an agent of necessity is often regarded as being both authorised *and bound* to act by reason of the emergency in order to protect the principal's interest: see further Chapter 2, Art. 2:101, Notes IV, 41. However, something of the same distinction arises through the requirement that in his dealings with third parties an agent of necessity must base his authority on the necessity and not on his (superseded) instructions or a purported mandate or another legal relationship altogether: see *Jebara v. Ottoman Bank* [1927] 2 KB 254, 264 (*Bankes* LJ), where the bank purported to act in accordance with the terms of the contract, rather than because of necessity not envisaged by the contract, and this was regarded as an additional ground (besides the absence of necessity) for dismissing the claim. Where the claim to recompense of an intervener is based on restitution, that will be excluded if the benefit is provided by the claimant to the defendant on the basis of a subsisting contract: cf. *Wentworth v. Tubb* (1841) 1 Y & C CC 171, 62 ER 840 at 841-842 (*Knight Bruce* VC) (in the context of provision of necessaries to a person without contractual capacity); *The Solway Prince* [1896] P 120, 128 (*Jeune* P, indicating that were the contract with a the owner instead of a third party there would likewise be no claim on the basis of salvage for the same reason that the matter rested in contract).

II. Contributions between joint debtors

11. A question not easily answered is the impact of the law of benevolent intervention on contributions between joint debtors (for instance joint debtors liable under a contract or liable under tort law) in favour of a joint debtor who has paid the creditor. By discharging the common debt he has also discharged the other joint debtors vis-à-vis the creditor. The prevailing opinion holds the rules on contribution between joint debtors (cf. III.–4:107 (Recourse between solidary debtors) to be an exhaustive special regime which has precedence over benevolent intervention law. The reasons given in favour of this opinion vary, however, and from time to time even the rationale of this approach has been questioned.

12. Under GERMAN Law CC § 426 on contribution between joint debtors not only precludes the application of the law of justified enrichment, but also renders the law of benevolent intervention inapplicable. The justification for this approach is to be found either in the principle that the provisions are *leges specialis* and thus claim precedence (BGH 4 July 1963, NJW 1963, 2067; Erman [-*Ehmann*], BGB I[10], § 426, no. 15; *Esser and Weyers*, Schuldrecht II(2)[8], § 46 V), or in the argument that a joint debtor who renders performance beyond the amount he is obliged to pay according to the relationship *inter partes* between the joint debtors does not attend to another's affair. From the point of view of the other debtors, the effect is no more than a subrogation of creditors (*Medicus*, Bürgerliches Recht[19], no. 415).

13. So far as is apparent GREEK legal literature does not discuss the interaction between a joint debtor's right to contribution (CC arts. 487 and 488) and the law of benevolent intervention. However a claim arising from *negotiorum gestio* seems to be precluded because in such cases the requirement of an *animus aliena negotia gerendi* is not

satisfied. The case law has even held that a person does not attend to another's affair if he discharged the debts of another on the basis of a settlement (CA Athens 2896/1977, NoB 26 [1978] 223).

14. The PORTUGUESE CC provides rules for joint debtors (*obrigações solidárias*) in arts. 512 et seq. The discharge of the entire debt by one of the joint debtors will satisfy the debts also for all other debtors (CC art. 523). A party who effects payment in excess of the amount he is obliged to bear according to the internal relationship of the joint debtors thereby acquires a *direito de regresso* vis-à-vis the co-debtors (CC art. 524). This right of recourse has no additional basis in the law of benevolent intervention: it may be doubted at the outset whether the joint debtor who effects payment attends to another's affair with the intention to benefit that other. In any case he acts, so it is said, with *autorização* (CC art. 464), which will render the law of benevolent intervention inapplicable (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 446). The sole point of discussion in legal literature therefore concerns the question whether or not CC arts. 490 and 497, which contain specific provisions on the contributions *inter partes* of joint tortfeasors, shall be applied to the particular case of liability of multiple interveners (*Menezes Leitão*, Responsabilidade do gestor, 299).

15. Earlier AUSTRIAN case law and doctrine have in part held that the legal basis of the claim for contribution by joint debtors (CC § 896) is to be found in CC § 1041 or in CC §§ 1042 et seq. (Rummel [-*Gamerith*], ABGB I[3], § 896 no. 1a). However recent case law and legal literature no longer follow this approach; the prevailing view is that the claim for contribution *inter partes* by the joint debtor who has effected payment to the creditor is an independent right which is exhaustively regulated in CC § 896 (OGH 23 March 1987, SZ 60/55; Rummel [-*Rummel*], ABGB I[3], § 1042 no. 8). The law of benevolent intervention cannot apply because the requirement in CC § 1042 of 'expenses incurred for another' is not met: the joint debtor effecting payment is liable for the complete amount. However, CC § 1037 may be considered as far as reimbursement of litigation costs is concerned which one party has incurred as defendant after it has in vain requested the other joint debtor to intervene as a co-defendant in the dispute (OGH 24 November 1997, SZ 70/241); a number of other points of law in the context of the compensable nature of litigation costs as between several joint debtors are yet to be resolved (cf. OGH 26 February 2002, JBl 2002, 658; OGH 18 July 2002, RIS-Justiz RS 0109200 and more generally *Pochmarski/Strauss*, JBl 2002, 353 and *Fötschl*, ÖJZ 2004, 781).

16. FRENCH law draws a distinction between a *solidarité passive* of several debtors and their liability *in solidum*. A *solidarité passive* of multiple contract debtors according to CC art. 1202 as a general rule must form part of the agreement with the creditor; it is presumed only in relation to commercial transactions (*Flour and Aubert*, Le rapport d´obligation[3], no. 313 p. 195). *Inter partes* the debtors are liable according to their respective share. The debtor who has effected performance can rely on either an *action subrogatoire* pursuant to CC art. 1251 (3) or an *action personnelle* for his right of recourse. The latter may find its legal basis either in a *mandat* (in the case of a contractual *solidarité passive*) or in the law of *gestions d´affaires* (in the case the *solidarité passive* arises by statute: *Mazeaud and Chabas*, Obligations[9], no. 1068 p. 1114-1115; *Flour and Aubert*, loc.cit. no. 325 p. 218-219). In any case the debtor can only claim payment of the relevant share in relation to each co-debtor (CC art. 1214). Because of CC art. 1202 and the fact that only in rare cases does statute provide for joint liability, legal literature and case law have developed the concept of an *obligation in solidum*. It plays an important role in the context of tort law. A debtor *in solidum* is similarly liable for the total amount in damages (*Flour and Aubert*, loc.cit. nos. 327-328 p. 219-220). A debtor who discharges the full amount may claim

reimbursement from the other debtor or debtors, a claim which is usually held to arise under CC art. 1251 (3) (*action subrogatoire*), though case law has often granted the debtor who has performed an *action personnelle* which appears to find its legal basis in CC art. 1214 (*Flour and Aubert*, loc.cit. no 329 p. 221; Cass. civ. 7 June 1977, Bull. civ. 1977, I, no. 266 p. 210). In legal literature, however, the view has also been advanced that an *action personnelle* of a debtor *in solidum* against the other co-debtors finds its legal basis, like a *solidarité passive*, in *gestion d´affaires* (*Terré/Simler/Lequette*, Les obligations[8], no. 1263 p. 1173, with fn. 2). The legal position in BELGIUM is the same. The legal basis for the claim for reimbursement is barely elaborated in more detail. *De Page* assumes that the joint debtor rendering performance to the creditor may invoke an *action de mandat*, an *action de gestion d´affaires* and a claim arising from a *subrogation légale* pursuant to CC art. 1251 (3) (*de Page*, Traité élémentaire de droit civil belge, Tome 3: Les obligations[3], no. 367 p. 350). Besides the *solidarité passive* (*passieve hoofdelijkheid*) the *obligation in solidum* (*verbintenis in solidum*) is also recognised in Belgium. A claim for contribution likewise exists between the joint debtors, which is assumed to find its legal basis either in CC arts. 1382-1383 (tort law) or a *subrogation légale* (*wettelijke subrogatie*) under CC art. 1251 (3) (*Cornelis*, Algemene theorie van de verbintenis, no. 135 p. 171-172).

17. It would appear that the relationship between *derecho de regreso* pursuant to CC art. 1145 (2) and the law of benevolent intervention under SPANISH law is only discussed by *Díez-Picazo*, Fundamentos II[4], 215. He considers that the law of benevolent intervention is inapplicable for the reason that the joint debtor who discharges the entire debt acts in his own interest, namely to free himself from a liability. Thus the condition of an *animus aliena negotia gerendi* is not met. The right of contribution finds its underlying justification in a specific emanation of principles relating to unjustified enrichment, an interpretation which unsurprisingly is a matter of dispute (for further details see *Puig Brutau*, Compendio II[2], 43; *Albaladejo*, Derecho Civil II (1)[10], 97; *Lacruz Berdejo*, Elementos II (1), 45). As regards joint creditors, as a *gestión del crédito* under CC art. 1141 a joint creditor may undertake acts which are advantageous for all creditors but none that result in detriment to the other creditors. The statute (it is construed) presumes a tacit mandate between the joint creditors (*Lacruz Berdejo*, loc.cit. 46).

18. A joint debtor who discharges the entire debt will also not be considered as a benevolent intervener acting in the interest of the other debtors under ITALIAN law. This is explained on the basis that the joint debtor does not act voluntarily (*Rescigno*, Codice civile, sub art. 2028). Similarly DUTCH case law does not rely on the law of benevolent intervention for the claim for contribution of one joint debtor against the other debtors. The matter rests with a claim for compensation under CC art. 6:8 ascribed to the principle of good faith. The application of the law of *negotiorum gestio* is likewise excluded in SCOTLAND; it would appear this issue is not even a matter for discussion.

19. In contrast to the legal situation under Belgian and French law, multiple debtors in SCANDINAVIA will as a general rule be jointly and severally liable. This principle is derived inter alia from the Promissory Notes Act (which on this point is held to be a suitable basis for generalisation) (cf. for SWEDEN the Promissory Notes Act § 2 and *Mellqvist and Persson*, Fordran och skuld[6], 51 and 60). The joint debtor effecting payment has a claim for contribution in the amount of the relevant share against each joint debtor (para (2); for details see *Håstad*, Tjänster utan updrag, 110). No room is left for an independent claim for compensation arising from the law of benevolent

intervention; it is not even discussed in extraordinary cases concerning contribution (compare for instance HD 29 December 2000, NJA 2000, 773).

20. Contribution as between co-debtors in the COMMON LAW, though forming part of the law of restitution, is not regarded as a matter of necessitous intervention. For details of the governing common law, equitable and statutory rules, see *Goff and Jones*, Restitution[6], Ch. 14.

III. Statutory duties to provide help

21. In many Member States of the European Union it is a punishable offence not to render assistance to someone whose life or physical integrity is endangered, if such assistance could be rendered without suffering any significant disadvantage. The question arises whether or not the person who discharges this duty to provide help will still come within the scope of benevolent intervention. This draft as a general rule answers this question (see above comment *B11*) in the affirmative. This accords with the legal position in GERMANY (Palandt [-*Sprau*], BGB[63], § 677, no. 11), GREECE (*Filios*, Enochiko Dikaio I/2, 197), PORTUGAL (*Menezes Leitão*, Responsabilidade do gestor, 201; *Vieira Gomes*, Gestão de negócios, 82), AUSTRIA (OGH 24 August 1995, SZ 68/142; cf. on the duty of a vet to provide aid arising out of the professional code of conduct OGH 18 June 1997, SZ 70/113) and THE NETHERLANDS (T. M. Parlementaire Geschiedenis VI, 792; Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 297, p. 311-312; Verbintenissenrecht [-*Heisterkamp*], Art. 6:198 BW, no. 13; T & C Vermogensrecht [-*Hijma*], Art. 6:198, no. 2).

22. By contrast in SPAIN it is assumed that acts which are undertaken to fulfil a duty to provide aid arising under criminal law (Spanish CP art. 195) are not performed 'voluntarily' and are therefore outside the scope of benevolent intervention. However, it is acknowledged that this outcome may contradict the rationale of the regime since the prerequisite of CP art. 195 is a 'manifest and serious danger' (*peligro manifiesto y grave*) while CC art. 1893 confers a claim for compensation of costs incurred and damages suffered on a person who renders assistance in a case of 'impending obvious danger' (*perjuicio inminente y manifiesto*). The latter is granted even if the action undertaken does not result in any benefit to the person threatened by danger. The problem is assumed to be resolved on the basis that if a saviour has suffered damage, that fact of damage indicates that he could not have acted without accepting a risk (which in turn is a requirement of the duty under CP art. 195); hence the rescuer remains within the scope of benevolent intervention (*Sánchez Jordán*, Gestión de negocios, 104). The prevailing view in ITALY likewise seems to hold that acts which fulfil a duty to provide help arising under criminal law (Italian CP art. 593) are not undertaken 'voluntarily' and therefore do not constitute an act of benevolent intervention without authority (*Sirena*, Gestione di affari, 162-163). Only if a person exerts himself beyond the extent demanded by criminal law will a benevolent intervention according to private law rules be constituted (*Bianca*, Diritto civile, V, La responsabilità, 669). To date there appears to be no case law on this question.

23. A line of argument similar to that in Spain may also be found in FRANCE. French legal literature points towards the fact that so far no claim arising from benevolent intervention has failed because the action was underpinned by a duty to provide help arising from criminal law. This may be explained by the fact that the duty to provide help under criminal law never obliges a person to put himself at risk of bodily injury, while it is exactly such cases which have been adjudicated upon by the courts (JClCiv [-*Bout*], Art. 1372-1375, V° Quasi-Contrats. Gestion d´affaires – Conditions d´existence, Fasc. 10 no. 57). By contrast BELGIAN legal literature does distinguish between a statutory *obligation générale* and a statutory *obligation spécifique*. The duty

to provide help arising under criminal law (Belgian CP art. 422) merely represents an *obligation générale* which concerns all citizens and whose main feature is precisely that it does not preclude the application of benevolent intervention (*Van Gerven*, Verbintenissenrecht II[7], 219-220). The opposite is true of an *obligation spécifique* – for instance where a fire brigade in discharge of its statutory duty extinguishes a fire (CFI (commercial matters) Antwerp 30 June 1998, JPA 1998, 342).

24. In ENGLAND AND WALES this issue is of limited magnitude. That is because a failure to render aid to someone in peril is only exceptionally subject to sanctions under the criminal law: *Stone*, Offences against the Person, p. 16 (reciting the example of a passer-by not assisting a drowning man). Where a by-stander is not himself the cause of the danger, an omission to act can form the *actus reus* of a criminal offence only if there is a specific duty to intervene; there are no general duties imposed on citizens to act: see *Ashworth*, Principles of Criminal Law[3], 48. Where there is neither a contractual duty to act nor a duty to act implied by law, non-feasance will not give rise to criminal liability: see *R. v. Smith* (1826) 2 Car & P 449 at 457, 172 ER 203 at 207 (*Burrough* J) (where the accused failed to provide their mentally handicapped brother with adequate warmth, food, and other necessaries, but an indictment was unsupportable because the siblings were not obliged to care for their brother); *R. v. Shepherd* (1862) Le & Ca 147, 169 ER 1340 (where the accused failed to call a midwife to attend her eighteen year old daughter, who died in labour, but conviction for manslaughter was quashed) – which cases, however, would be decided differently now precisely on the ground that an implied duty to act existed. Duties to intervene are often imposed by law for the furtherance of public law functions. An example is the criminal law duty of a citizen to comply with a constable's reasonable request to assist him in the execution of his duties in quelling a breach of the peace (*R. v. Brown* (1841) Car & M 314, 174 ER 522 (*Alderson* B); *R. v. Sherlock* (1865-72) LR 1 CCR 20), the discharge of which might operate to the benefit of a victim of physical attack or threats, but the ambit of this "uncertain" common law criminal liability does not as such extend to a duty to assist the police in rescuing those in peril (see *Nicholdson*, Crim LR 1992, 611, 612). A further case is the duty of a water undertaker under the Water Industry Act 1991, s. 57(1), to allow water to be taken for extinguishing fires. Criminal law duties to act also arise in relation to children: a parent has a duty to act for the welfare of his child and may be criminally liable at common law if the child suffers harm because of a failure to act: *R. v. Bubb* (1850) 4 Cox CC 455, 460 (where the father was acquitted); *R. v. Gibbins & Proctor* (1918) 13 Cr App Rep 134 (father's conviction for murder by neglect in starving his daughter to death upheld). At common law, any other person who fails to discharge a duty (contractual or otherwise) to provide necessaries such as food, clothing and lodging to a child of tender years (i.e., under sixteen years of age: *R. v. Sloane* (1851) 15 JP 22) who is under that person's control and unable to fend for himself or herself, so as to injure that child, commits an offence: see *R. v. Ridley* (1811) 2 Camp 650 at 652-653, 170 ER 1282 at 1283 (*Lawrence* J) (concerning a child servant, but where the indictment was defective); *R. v. Friend* (1802) Russ & Ry 20, 168 ER 662 (failure to provide apprentice with necessaries); *R. v. Bubb*, loc. cit., 459 (where the duty of the cohabitee of the child's father was self-imposed) and see also *R. v. Lee & Parkes* (1917) 13 Cr App Rep 39 (where the conviction for manslaughter of a midwife, engaged to nurse an infant for whom she neglected to summon medical aid, was upheld). The common law principles in relation to children are given statutory effect in provisions stipulating that any person who has the custody, charge or care of a person under sixteen may commit an offence if the child is neglected or abandoned: see the Children and Young Person's Act 1933, s. 1, and see also the Offences against the Person Act 1861, s. 27 (for

children under two). A general duty to act for the welfare of a person unable to fend for himself is imposed on a stranger under the criminal law only where that stranger has already assumed responsibility for the welfare of that other (whether expressly or impliedly, contractually or otherwise): see *R. v. Marriott* (1838) 8 Car & P 425 at 433, 173 ER 559 at 563 (*Patteson* J); *R. v. Bubb*, loc. cit., 459 (*Williams* J) (cohabitee convicted of manslaughter by neglect of partner's child); *R. v. Instan* [1893] 1 QB 450 (where the accused neglected to feed and procure medical assistance for an aunt who was immobilised by gangrene and with whom she resided); *R. v. Gibbins and Proctor*, loc. cit., 139 (*Darling* J, giving the opinion of the CCA) (where a cohabitee's conviction for murder in deliberately withholding food and medical care from her partner's daughter was upheld); *Stone*, Offences against the Person, p. 18. See also the National Assistance Act 1948, s. 51 (failure to maintain a person who is provided as a result with accommodation by a local authority). All such offences presuppose a pre-existing relationship or involvement with the vulnerable person. In SCOTLAND a failure to render aid is likewise not as a rule punishable under criminal law; an offence will only be committed if there is a particularly close relationship between the victim and the person who fails to act (such as a family tie) (cf. Stair [-*Christie*], Vol. 7, Criminal Law, para 40); therefore the problem treated above does not arise. This corresponds with the legal position under SWEDISH law (*Håstad*, Tjänster utan uppdrag, 60 and 138). In DENMARK (CP § 253 [*Straffelov*], promulgation of 6. September 2000 Nr. 849) and in FINLAND (CP chap. 21 § 15 [*Strafflag*] of 19. December 1889) the failure to provide aid is punishable, but discussions on the relationship between this offence and the law of *negotiorum gestio* are nowhere to be found.

IV. Other powers of intervention

25. For most legal systems of the European Union a matter is outwith the scope of benevolent intervention if the active party is entitled by some other legal authority (i.e., other than under a contract) to interfere with the affairs of another. Statutory powers to intervene recognised in GERMANY include, for instance, guardianship, curatorship, parental authority, administration in bankruptcy, position as executive of a legal person, and sovereign powers (MünchKomm [-*Seiler*]^{3}, § 677 BGB no. 36). It is similarly held in GREECE that a justification displacing the law of *negotiorum gestio* may arise from statute law. Guardianship, parenthood and administration in bankruptcy are mentioned as examples (Georgiades and Stathopoulos [-*Papanikolau*], Art. 730, no. 20; ErmAK [-*Sakketas*], Art. 730, no. 25). In PORTUGAL reference is made to the existence of a power of representation (CC arts. 262 et seq.), parental authority (*poder paternal* – CC arts. 1877 et seq.) and guardianship (*tutela* – CC arts. 1927 et seq.). In addition, according to STJ 8 July 1997, CJ(ST) V. (1997-2) 144 explicit consent of the person whose affairs are interfered constitutes an *autorização* and thus displaces the law of benevolent intervention; in such cases only unjustified enrichment law is held to be applicable. For DUTCH Law the standard examples or parental authority, guardianship and administration in bankruptcy are again taken as illustrations of statutory powers which render the law of benevolent intervention inapplicable (T. M. Parlementaire Geschiedenis VI, 791-792; Asser [-*Hartkamp*], Verbintenissenrecht III^{10}, no. 296-297, p. 310-312).

26. As mentioned above, a 'power' to interfere with the affairs of another precluding benevolent intervention under AUSTRIAN law may arise not only from contract but also from a statutory provision or a court decision (CC § 1034). The appointment of a curator by the court (CC § 273) or parental authority by operation of law (CC § 144) may serve as examples (Schwimann [-*Apathy*], ABGB V^{2}, §§ 1035 no. 4). Likewise

the law of benevolent intervention will not apply if a public authority acts within its competences (OGH 11 February 1953, SZ 26/35); this does of course not exclude public law from adopting some of the underlying thinking contained in the law of benevolent intervention (OGH 21 March 1999, SZ 72/47).

27. By contrast under FRENCH Law it is not the existence of a power to interfere but only the existence of a duty to interfere which will be decisive. However, this different nuance will only rarely lead to a different outcome. The execution of a power (*fonction*) in accordance with the statutory provisions is said not to preclude benevolent intervention. If the active party exceeds the duty imposed on him by law, that is if he renders performance in excess of the *obligation légale* then this leaves room for benevolent intervention (JClCiv [-*Bout*], Art. 1372-1375, V° Quasi-Contrats. Gestion d´affaires – Conditions d´existence, Fasc. 10 no. 58-60). The same holds true for BELGIUM, where again it is not the existence of a power but the existence or non-existence of a duty to act which will be decisive: see for instance CFI (in commercial matters) Antwerp 30 June 1998, JPA 1998, 342 and CA Brussels 7 February 1964, Pas. belge 1965, II, 70). For both countries it is therefore true that the existence of the active party's power to intervene will only preclude the application of benevolent intervention if this right coincides with a contractual or statutory duty to intervene. The mere fact that the principal was present during the intervention and has agreed to its execution does not necessarily preclude the existence of benevolent intervention (CA Paris 14 October 1997, Juris Data 1997-023144).

28. Under SPANISH law the rules of benevolent intervention are displaced if the active party is entitled to representation (TS 2 February 1954, RAJ 1954 no. 322 p. 198); the phrase 'without authority' also includes 'without authority to represent' (*Albaladejo*, Derecho civil II (2), 495). Any kind of entitlement, whether derived from the wishes of the principal or from operation of law is assumed to exclude the law of benevolent intervention (*Lacruz Berdejo*, Rev.Crít.Der.Inm. 1975, 252). Similarly a benevolent intervention cannot come into existence under ITALIAN Law if a (non-contractual) legal relationship between the parties already subsists (Cass. 30 November 1988, no. 6499, Rep.Giur.it. 1988, voce Gestione d´affari, no. 1). Hence, for example, a father who manages the assets of his son will not qualify as an intervener without authority (*Aru*, Gestione d´affari, 4).

29. As regards SWEDISH law *Håstad*, Tjänster utan updrag, 53, indicates that as a general rule a *gestor* may not be granted more power than a custodian appointed by court would obtain. Departing from the former legal position, recent amendments ensure a custodian can be granted authority with respect to personal (i.e. non-economic) interests of the person under curatorship, cf. HD 4 November 1999, NJA 1999, 691. The custodian himself, however, is not an intervener without authority. The same applies, for example, for the administrator which may be appointed by the court pursuant to FINNISH Debt Enforcement Act [*utsökningslag*] of 3 December 1895 chap. 4 § 25 in order to prevent dilapidation of the debtor's immovable property.

30. In ENGLISH LAW countless statutory regimes confer on a public authority a power or duty to intervene for necessary reasons and a right to recoup the expenses incurred from the beneficiary of that conduct or a person who was obliged to act. So, for example, a local authority in whose area a person has died or a dead body is found is under a statutory duty to make arrangements for disposal of the body if it appears to the authority that no such suitable arrangements are being made (see Chapter 1, Art. 1:102, Notes, II, 16) and a local authority has a statutory power to bury or cremate a deceased person whom that authority was providing with accommodation under social assistance legislation (Public Health (Control of Disease) Act 1984, s. 46(2)) or

if the deceased is a child whom the authority was looking after (Children Act 1989, Schedule 2, para. 20, replacing the Child Care Act 1980, s. 25). However, the latter power by contrast is exercisable only with the consent "so far as it is reasonably practicable to obtain it" of every person who has personal responsibility for the child (para. 20(1)(c)). The duty and power to intervene under the 1984 Act are additional to those arising at common law (set out in Chapter 1, Art. 1:102, Notes, II, 16): see s. 72 of that Act. Where an authority discharges the statutory duty or makes use of the statutory power under the 1984 Act, it may recover the expenses incurred as a civil debt from the deceased person's estate or from any person whom the relevant legislation regards as having been liable to maintain to the deceased (*ibid*, s. 46(5),(6)), namely a spouse or (if the deceased is under 16) parent of the deceased (National Assistance Act 1948, s. 42 (read in conjunction with s. 64(1)). An authority may similarly recover as a civil debt from a parent of a deceased child who died aged under sixteen and was buried or cremated by the authority the expenses it has incurred in exercising its power: para. 20(4) of Sch. 2 of the 1989 Act. Subject to exceptions, a local authority is under a statutory duty to provide accommodation for a person who refuses or neglects to maintain himself and as a result needs care and attention not otherwise available to them (National Assistance Act 1948, s. 21) and to recover some or all of the cost (s. 22). Where, in that person's own interests or in order to prevent injury to health or a serious nuisance to others, a court orders a person to be detained in accommodation (other than a NHS hospital) because of that person's disease, infirmity, or the like, coupled with their inability to devote to themselves the proper care and attention which they are not receiving from others, the local authority (who in such circumstances is primarily liable to maintain the person: s. 47(8)) may recover costs from that person, or someone liable under social assistance legislation to maintain that person: *ibid*, s. 47(9). Equally, where a person is admitted to hospital, or moved into local authority accommodation (or other accommodation under the power in s. 47), the council may recover from that person, or someone liable under social assistance legislation to maintain that person, the cost of any reasonable expenses incurred in discharging its duty to take reasonable steps to prevent or mitigate loss or damage to movable property of that person as a result of their inability to protect or deal with it: *ibid*, s. 48. A local authority has power to cleanse and disinfect premises in order to prevent the spread of infectious disease if the occupier fails to take required steps and to recover from the occupier as a "simple contract debt" expenses reasonably incurred: Public Health (Control of Disease) Act 1984, s. 31. Where there is an authority to act, a restitutionary claim is as a rule not envisaged – not least because it may be assumed that in conferring power to intervene the legislature or a court will also address issues of compensation and costs: cf. *Wentworth v. Tubb* (1841) 1 Y & C CC 171 at 173-174, 62 ER 840 at 841-842 (*Knight Bruce* VC) (provider of necessaries to a person without contractual capacity must not be acting under a court order); *Pontypridd Union v. Drew* [1927] 1 KB 214, 219 (*Scrutton* LJ) (no right to repayment could be implied by law where the guardians acted under a statutory duty to afford relief, which *prima facie* negatives any condition for repayment). Conversely, the fact that the intervener is a public body is not precluded from relying on a common law claim to restitution if there is no statutory authority: cf. *West Ham Union v. Pearson* (1890) 62 LT (N. S.) 638 (reimbursement of cost of accommodation and supervision of a violent and dangerous alcoholic suffering from delirium tremens and incapable of protecting himself – though not, under menthol health legislation in force at the time, regarded as suffering from a mental illness so as to come within statutory rules). Powers to manage the property and affairs of a person suffering from mental incapacity, or to make arrangements affecting that person's welfare, may be granted in

advance of mental decline under a 'lasting power of attorney' or are conferred by court order under a statutory regime: see the Mental Capacity Act 2005, which, when it comes into force, will supersede the Enduring Powers of Attorney Act 1985 and the statutory regime under the Mental Health Act 1983, Part VII. Under the Animals Act 1971, s. 7(2), the occupier of land on to which livestock strays has a circumscribed right to detain it. The Act further provides for (i) a right to reimbursement of expenses reasonably incurred in keeping the livestock while it cannot be restored to its owner (s. 4(1)(b)), (ii) if the livestock is unclaimed after 14 days, a right of sale at a market or public auction (s. 7(4)), and (iii) a liability for damage caused by failure to treat the detained livestock with reasonable care or to supply it with adequate food and water (s. 7(6)). In SCOTLAND there is likewise a statutory right to detain an animal which has strayed on to any land: see the Animals (Scotland) Act 1987, s. 3(1). In such a case (other than in relation to stray dogs) the rules on rewards and disposal of the property set out in Part VI of the Civic Government (Scotland) Act 1982 on lost and abandoned property apply. Under the Roads (Scotland) Act 1984, the roads authority or police may detain an animal straying on the road: s. 98(1). Payment of the authority's reasonable expenses in acting is a condition of the owner's right of recovery unless the owner took all reasonable care to ensure the animal did not stray onto the road: s. 98(2). The authority may sell or dispose of the animal to recoup its expenses if they are not paid within three days: s. 98(3).

V. Acts done to discharge an obligation to a third party

31. A further issue is whether a benevolent intervention without authority is possible where the active party has done what that party was obliged to do under a contractual or statutory duty toward a third party. According to the prevailing view in GERMANY the application of the rules on benevolent intervention remains possible where it can be discerned that the intervener also intends to act for the principal (MünchKomm [-*Seiler*], BGB[3], § 677, no. 9). However recent case law notably inclines towards the basic position of the present rules. On that view a claim arising from benevolent intervention will be excluded if the issue of remuneration is comprehensively provided for in the contract concluded with the third party (BGH 21 October 2003, NJW-RR 2004, 81). BGH 15 April 2004, NJW-RR 2004, 956 asserts that "a claim against the 'principal' … will be outside the scope of consideration if the duty the 'intervener' has discharged arises under a contract validly concluded which lays down the rights and obligations of the 'intervener' and in particular includes the issue of remuneration".

32. In GREEK law it is emphasised that in general only authority or duty vis-à-vis the principal will render the rules on benevolent intervention inapplicable. A duty of the intervener owed to a third party does not constitute a mandate within the meaning of CC art. 730 (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 730, no. 24), though in such cases as a rule the basic requirement that the act is undertaken with the intention to benefit another will not be satisfied (*Papanikolaou*, loc.cit.). As a result the legal situation in Greece is also along the lines of these Principles.

33. As regards PORTUGUESE law it may again be assumed that acts which are undertaken in order to discharge an existing duty owed to a third party will not qualify as benevolent intervention (*Vieira Gomes*, Gestão de negócios, 73-79). The legal relationship between the parties is governed by the provisions on contracts in favour of a third party (*contrato a favor de terceiro;* CC arts. 443-451). The existence of a contractual relationship between the intervener and a third party under AUSTRIAN Law likewise excludes the application of benevolent intervention in relation to the act performed. One and the same act cannot qualify both as the discharge of a contractual duty to a third party and as a benevolent intervention for the benefit of the principal

(*Meissel*, GoA, 75; OGH 15 December 1954, EvBl 1955/134, RIS-Justiz RS 0019765).

34. By contrast the FRENCH *Cour de cassation* has held that an act may be 'spontaneous' and 'voluntary' as regards the relationship between intervener and principal although the intervener was under a contractual duty to a third party to do the act undertaken (Cass.civ. 24 May 1989, Bull.civ. 1989, I, no. 211 p. 141). By contrast, in BELGIUM scholarly commentators seem to incline towards the view that benevolent intervention cannot apply if the active party has committed itself to that act vis-à-vis a third party. Thus, for example, a company operating a breakdown service which moves a vehicle on instruction by the police cannot rely on the rules of benevolent intervention as against the owner of the vehicle (B. H.Verb. [-*Roodhooft*] Hdst. V, De quasi-contracten, no. 2231). However, acts in compliance with a statutory duty (vis-à-vis the state) will exclude a benevolent intervention under French law (Cass.civ. 17 July 1996, Bull.Civ. 1996, I, no. 323 p. 225), whereas Belgium, as noted above in note *23*, distinguishes between an *obligation légale spécifique* and an *obligation légale générale*.

35. This question has hardly even been discussed within SPANISH law. One author expresses the opinion that the application of benevolent intervention is possible where the active party acts in discharge of a contractual obligation vis-à-vis a third party and at the same time acts in the interest of the principal (*Sánchez Jordán*, Gestión de negocios, 90). TS 23 July 1999, RAJ 1999 (4) no. 6355 p. 9958 has not elaborated further on this point, as the principal *in casu* had not obtained any benefit from the intervention. According to ITALIAN law a benevolent intervention is in general excluded if the active party is under a duty towards a third party to undertake the acts performed. CA Rome 22 May 2002 (cited by *Baralis*, Riv.dir.comm. 2004, 211, 223, fn. 17) may well be understood as an affirmation of this traditional approach in the legal literature (which has only rarely been disputed). Certainly benevolent intervention is excluded if the intervener acts on the basis of a contract in favour of the 'principal' (CC art. 1411 (2)) (*Sirena*, Gestione di affari, 169-170). For DUTCH Law, by contrast, it is again maintained that benevolent intervention will only be excluded where the intervener is obliged vis-à-vis the *principal*, whether that obligation arises from a contract or a statutory provision, but not merely because he discharges a duty to a third party. A person, for example, who is obliged to his employer under an employment contract to attend to the interests of a third party may 'under certain conditions' be considered a benevolent intervener vis-à-vis the principal (T. M. Parlementaire Geschiedenis VI, 792; Verbintenissenrecht [-*Heisterkamp*], Art. 6:198 BW, no. 13. 1).

36. Where two parties contractually agree that one is to attend to the affairs of a third party the view is maintained by some in SCOTLAND that the party obliged also has a direct claim against the benefited party on the basis of *negotiorum gestio*. This is supposedly the case in particular if someone instructs another to attend to the affairs of the principal. This is on the basis that the person acting is subrogated to the legal position of the original *gestor* (giving the instruction). In this way the principal retains the defences which he would have had in relation to the original or 'true' *gestor* (*SMT Sales & Services Co. Ltd. v. Motor and General Finance Co. Ltd.* 1954 SLT (Sh.Ct.) 107; Stair [-*Whitty*], vol. 15, para 142; *Whitty*, JuridRev 1994, 278, 279; see, however, *Leslie*, SLT 1981, 260, 261).

37. From all the SCANDINAVIAN jurisdictions only two DANISH judgments can be found which deal with a case where a *gestor* has acted in compliance with a duty arising under public law. That subsisting duty did not exclude a claim against the

benefited party for compensation in respect of the expenditure incurred (HD 24 May 1937, UfR 1937, 697 and HD 3 December 1936, UfR 1937, 357).

38. In those exceptional types of case where ENGLISH law is prepared to recognise restitutionary liability towards a stranger who has intervened, it too refuses to sanction a claim for reimbursement or recompense if the expenditure was incurred or service provided on the basis of a contract with a third party: cf. *Barnesley v. Powell* (1750) Amb 102, 27 ER 63 (Lord *Hardwicke* LC) (solicitor commissioned by third party to act in respect of person without full capacity must claim remuneration from third party); *Wentworth v. Tubb* (1841) 1 Y & C CC 171 at 173-174, 62 ER 840 at 841-842 (*Knight Bruce* VC) (in the context of provision of necessaries to a person without contractual capacity). Thus while a person may have a claim against the deceased's estate for reimbursement of expenditure in arranging the funeral where those obliged to do so have failed to act, a person paying funeral expenses is not automatically a creditor of the estate; if the payment is made at another's order, it is the person who gave the order who is responsible for reimbursement. A claim to reimbursement is not excluded by the mere fact the intervener acted at the request of a third party: *Arlot v. Churchland* (1828) unreported, cited 3 Y & J 32-33, 148 ER 1081 (action of undertaker acting at request of deceased's solicitor); *Rogers v. Price* (1829) 3 Y & J 28, 148 ER 1080 (action of undertaker acting at request of testator's brother); *Ambrose v. Kerrison* (1851) 10 CB 776, 138 ER 307 (request of a friend of the deceased), and consider also *Palmer v. Stear* (1963) 113 LJ 420 (vet alerted by a third party). If the acceptance of the request amounts to the conclusion of a contract, however, a restitutionary claim against the estate or relatives is apparently excluded: see *Rogers v. Price*, loc. cit., 35 and 37, where *Hullock* B emphasises that the claimant was not acting as agent of the deceased's brother, who was merely drawing his attention to the situation, and *Vaughan* B indicates that if the case were otherwise the claimant would have had no claim against the executor. Whether administration of the estate (entailing the right to payment out of the deceased's estate) will be granted to an undertaker on the basis he is a creditor of the estate will thus depend on whether another authorised the expense; if he has acted on another's order, the undertaker is simply an unsecured creditor of the person ordering the funeral: see *In the Goods of Fowler* (1852) 16 Jur 894 (Sir *J Dodson*), considered in *Newcombe v. Beloe* (1865-69) LR 1 P & D 314, 315 (Sir *J P Wilde*). The decision in *Re Leslie* (1883) 23 Ch D 552, where a husband paid the premiums on an insurance policy taken out by his wife, is also explicable on the narrow basis that the husband acted under an obligation to a third party (though the judgment itself only alludes to this point in its conclusion and is largely expressed in broader terms) because the husband had covenanted with trustees of a settlement to pay the premiums. Cf. also *Castellain v. Thompson* (1862) 13 CB (N.S.) 105, 143 ER 41 (as the claimant had concluded a contract with an insurer to retrieve cargo from the river bed, there could be no salvage type claim against the owner of the cargo), as explained in the similar case *The Solway Prince* [1896] P 120, 128 (*Jeune* P), where redress was sought from the owner because the insurer was insolvent. However, where the third party instigating another's intervention is regarded as themselves being an agent of the person benefited, the intervener may have a direct claim against the principal on the basis that the intermediary has exercised their power of representation so as to bind the principal to the intervener: see *Chester v. Rolfe* (1853) 4 De G.M. & G 798, 43 ER 720 (solicitor able to claim from the estate of the person whom he represented at the instigation of the latter's wife) – and the same reasoning might explain the decision in *Brockwell v. Bullock* (1889) 22 QBD 567 that the claim for remuneration of a doctor instructed by a solicitor to examine the mental state of his client was wrongly stopped at first instance.

Illustration 3 is taken from OGH 11 November 1987, SZ 60/235**; illustration 5** from BGH 13 November 2003, BGHReport 2004, 305; **illustration 6** from OGH 4 April 1906, GlUNF 3374; **illustration 7** from STJ 8 July 1997, CJ(ST) v (1997-2) 144**; illustration 8** (with slightly changed facts) from OGH 15 December 1954, EvBl 1955/134 and from BGH 21 October 2003, NJW-RR 2004, 81; **illustration 9** from OGH 10 May 1989, SZ 62/87; and **illustration 13** from BGH 15 December 1954, BGHZ 16, 12.

CHAPTER 2: DUTIES OF INTERVENER

V.–2:101: Duties during intervention

(1) During the intervention, the intervener must:

(a) act with reasonable care;

(b) except in relation to a principal within V.–1:102 (Intervention to perform another's duty), act in a manner which the intervener knows or can reasonably be expected to assume accords with the principal's wishes; and

(c) so far as possible and reasonable, inform the principal about the intervention and seek the principal's consent to further acts.

(2) The intervention may not be discontinued without good reason.

COMMENTS

A. The duties of the intervener in overview

Duties and obligations. The provisions of the second Chapter of these rules relate to the duties of the intervener to the principal. The subsequent Articles differentiate between the actual phase of intervention (V.–2:101 and V.–2:102 (Reparation for damage caused by breach of duty) and the period after the conclusion of the intervention (V.–2:103 (Obligations after intervention). The word "Duties" in the Chapter heading covers both sets of duties. However, there is a distinction between them. In the first phase the duties are only duties and not obligations. In the second phase the duties are not only duties but also obligations. The difference in the present context lies in the remedies for breach. Remedies for breach of the duties during interventions do not arise unless damage occurs; they are then regulated by V.–2:102. The reason for this is that it would be harsh to impose, for example, an *obligation* of care on a benevolent intervener and to thereby attract all the remedies for non-performance of an obligation, such as the remedy of enforcing specific performance. A person who has been good enough to intervene in the interests of another but who has not come up to the required standard of care, or who has not done the job as the principal would have wished it to be done, should not, for example, be liable to be forced to do the job again and to do it better the second time. In this situation a mere duty to take care and to act in accordance with the principal's known or assumed wishes, coupled with a carefully tailored liability to make reparation if breach of the duty causes damage, is quite sufficient. On the other hand, once a benevolent intervention has taken place, it is not unreasonable to impose an enforceable *obligation* on the intervener to account and to hand over any benefits obtained, particularly if the remedies for non-performance are slightly modified to take account of the benevolent nature of the intervention (as is done by V.–2:103 paragraph (3).

Duties during intervention. During the intervention a benevolent intervener (i) is subject to a general duty to act with reasonable care; (ii) must orientate the intervention according to the actual or presumed wishes of the principal; and (iii) is subject to a parallel duty to inform the principal of the intervention and seek the principal's consent to further acts (paragraph (1) (a), (b) and (c) respectively). The last of these duties implies that as soon as the intervener has succeeded in contacting the principal the intervention may be continued only if the principal consents. On the other hand the intervener may not (iv) discontinue the intervention without a reasonable ground. The intervener, in other words, may not discontinue at an inopportune time an intervention which has already begun (paragraph (2)). If breach of one of these duties

causes damage then, in certain circumstances, the intervener is liable for reparation but the benevolent nature of the intervention is taken into account in the rules on the assessment of this liability. The intervener may not be burdened with the entire risk of erroneous conduct during the intervention (V.–2:102 (Reparation for damage caused by breach of duty)).

Obligations after intervention. After conclusion of the act undertaken the benevolent intervener is subject to an obligation (v) to report, (vi) to account and (vii) to deliver up any proceeds (V.–2:103 (Obligations after intervention) paragraph (1)). The normal remedies for non-performance of an obligation apply but the fact that the intervener has acted for reasons of human solidarity will have to be taken into account (V.–2:103(2) and (3)).

The second Chapter's scope of application. The second Chapter concerns the duties of the acting party in the phase of carrying out the intervention. It regulates the matter of 'how' another's affairs may be managed without their authority and how this management must be brought to an end, as opposed to 'whether' they may be conducted, which is addressed in V.–1:101 (Intervention to benefit another) and V.–1:102 (Intervention to perform another's duty). The application of V.–2:101–V.–2:103 thus presupposes that the requirements of V.–1:101–V.–1:102 are satisfied and that none of the exclusions of V.–1:103 (Exclusions) applies. If one of these requirements is absent or an exclusion applies, then the rights and duties of the parties will be governed exclusively by other areas of the law – in particular, the laws of contract, non-contractual liability for damage and unjustified enrichment.

> *Illustration 1*
> The facts are the same as in Illustration 9 of V.–1:103 (Exclusions). A staff member of a charitable organisation giving emergency aid to an injured person makes a clinical error. Any liability of the organisation will be under the provisions of the law on non-contractual liability for damage in Book VI. There is no scope for the application of V.–2:102 (Reparation for damage caused by breach of duty) paragraph (2).

B. The general duty to act with reasonable care (paragraph (1)(a))

General. Interventions for the benefit of another are only useful as a rule if the intervener acts with reasonable care. A person who instructs a joiner to effect an emergency repair in a neighbour's house will have to choose a qualified joiner; a person who attends to a person injured in a traffic accident will have to secure the scene of the accident and in bringing the person to hospital will have to comply with the traffic regulations, etc. The requirements which reasonable care dictates are as manifold as life itself and thus cannot be elaborated in detail. As regards the management of affairs which interfere with interests protected by the law on non-contractual liability for damage recourse may be had to the definition of negligence in VI.–3:102 (Negligence). In accordance with that a definition an intervener may breach the duty of care by omitting to take a precautionary measure. This may occur for instance if the intervener takes valuable goods into custody but fails to take out insurance cover.

Standard of care of professionals. Conduct of a benevolent intervener who is acting in the course of a profession or trade is to be assessed against the standards of care expected of persons in that skilled group. That is in a way merely the flip side of the coin under V.–3:102 (Right to remuneration), which entitles a professional to remuneration. Compare in this context also the Comments to II.–9:108 (Quality), which deals with the quality to be expected under a contract in general in the absence of contractual regulation, and IV.C.–2:105

(Obligation of skill and care) paragraph (3), which deals with the standard of care of professionals in service contracts.

Emergency measures. These rules do not set out a specific standard of care applicable to emergency measures. For one thing, it did not seem necessary to do so. The general principles of the law of negligence lead to the result that, in determining whether the intervener is in breach of the duty to act with reasonable care in the course of acting, regard is to be had to the difficulty in judging a situation of danger and in endeavouring to eliminate it. The text of this Article refrains from spelling out this principle only because it is assumed to be self-evident. Moreover, the situations concerned also require a distinction with regard to the applicable standard of care – for instance, between a professional rescuer and a private individual. Emergency (para)medics, sea rescue services and other comparable professional groups and organisations should be capable, even in serious cases, of exercising a greater degree of composure in decision-making in the stress of an emergency, as is expected of their profession and acquired through training. On the other hand the drafting of a specific standard of care for emergency situations also appeared to be dispensable in view of the reduction clause in V.–2:103 (Obligations after intervention) paragraph (2). Under the latter the intervener's liability is reduced or excluded in so far as this is fair and reasonable, having regard to, among other things, the intervener's reasons for acting. This rule will be of great relevance in particular in cases of measures taken in an emergency.

C. Compliance with the principal's wishes (sub-paragraph (b))

Specification of the general duty of care. The law of benevolent intervention has on the one hand the task of protecting the activities of persons who are active for another's benefit, but on the other hand it must check rash acts of intervention. Someone who voluntarily undertakes to look after the interests of other people must do so with care; a person who is not prepared to do so ought to stay out of the matter altogether. However, paragraph (1) does not merely contain the general duty of care (sub-paragraph (a)); it also specifies that duty from the point of view of benevolent intervention. As part of the benevolent intervener's duties of care, the intervener must comply so far as possible with the wishes of the principal in the carrying out of the duties (just as much as in determining under V.–1:101 (Intervention to benefit another) paragraph (2) (Intervention to benefit another) whether there is at the outset a reasonable ground to act as a benevolent intervener at all). Only if those wishes are neither known nor ascertainable must the benevolent intervener take for orientation what, objectively understood, the principal could reasonably be assumed to wish.

Special information available to the intervener. The touchstone for the duty of care in such cases is therefore the wishes of a principal who takes reasonable care of his or her rights and interests. That is because the wishes of the principal can take priority only in so far as they were known by the intervener or, if such care as was reasonable in the circumstances had been exercised, would have been known by the intervener. Should the intervener have special information available which sheds light on the wishes of the principal, then the intervener must make use of that information.

The exception in V.–1:102 (Intervention to perform another's duty). Compliance with the contrary wishes of the principal is not obligatory if the principal is opposed to the performance of a duty owed to a third party when performance is due and urgently required as a matter of overriding public interest (V.–1:102). The same consideration which applies in relation to taking on the intervention applies also to its actual carrying out. This is expressed

in the introductory phrase of sub-paragraph (b). In this case too, though, all other duties continue to exist. This includes in particular the duty to inform in sub-paragraph (c).

Illustration 2
On a rainy autumnal day, B's fleet of construction vehicles have left residues of earth and building materials on the road. There is a great danger of an accident occurring. A, a neighbour, instructs a firm to clean the street without first telephoning B because due to the weather conditions A could not decipher the name of B's firm displayed on the vehicles. A's intervention was with reasonable ground. However, this does not free A of the duty to contact B if in the meantime A has learned about B's identity and telephone number – for instance, from an employee of the cleaning company instructed to clean the road. If A fails to contact B, B can set off against A's claim to reimbursement of expenditure the fact that B would have been able to dispose of the material on premises available to it much more cheaply than the road cleaning firm, which deposited the material (in the absence of contrary instructions) on a public authority site. The difference between the actual expense expended by A and this hypothetical cost which B would have incurred is a loss which A must carry.

D. The duty to inform (sub-paragraph (c))

A continual duty. Whereas V.–1:101 (Intervention to benefit another) paragraph (2) gives effect to the rule that someone who attends to others must first find out whether they in fact want that, V.–2:101(1)(c) clarifies that the duty to inform (and abide by the principal's decision to disallow any further interference) is a continual one: the intervener has a duty to keep the principal informed, so far as this is practicable and appropriate. This applies in particular when the intervener was unable to contact the principal before commencing the intervention, but it is not confined to that situation alone. As circumstances change, it may be necessary for the intervener to return to the principal to report on developments which might materially affect the principal's instruction.

"During the intervention". All duties specified in this Article relate to the executory phase of a benevolent intervention. Clearly the nature of the continual duty to inform – or more precisely, the duty, so far as possible and reasonable, continually to make fresh attempts to reach the principal – is such that it can apply only in the case of benevolent interventions which endure for any length of time; it cannot apply to measures which consist only of an instantaneous act.

An indicator of the intention to act for another. The performance of the duty to inform does not merely serve the interests of the principal. Informing the principal (or, depending on the circumstances, the attempt to contact the principal) also helps to reveal the intervener's intention to conduct another's affairs (required by V.–1:101 (Intervention to benefit another) paragraph (1)). Moreover, it points to the person for whom the intervener intends to act and helps identify the principal.

Providing the information itself amounts to a benevolent intervention. As stated before, the provision of information is in itself a benevolent intervention and consequently, if it necessitates expenditure, it can give rise to a claim for reimbursement where the conditions in V.–1:101 (Intervention to benefit another) and V.–3:101 (Right to indemnification or reimbursement) are satisfied.

Content of the information required. When the intervener must make a fresh attempt to inform the principal and what the intervener must tell the principal once contacted are matters which turn on the circumstances of individual cases and cannot be answered in a statutory provision of general application. As a rule the intervener must inform the principal of the situation of danger which has arisen, the measures which have been attempted in order to eliminate it and what has happened in between. Above all it is essential that the intervener gives the principal the chance to forbid any further intervention.

Consent and contract. However, the intervener is not bound by the wishes of the principal if the principal desires the continuation of an act of benevolent intervention after its commencement. That is because no contract exists between the parties and there is consequently nothing from which a claim to performance could be derived. The duty to continue the act arises only under this Book and it exists only under the conditions envisaged in paragraph (2). Should the intervener, however, accept a request from the principal to continue an intervention or undertake a new one, then as a rule the matter will be governed from this point in time onwards by the contract arising between them. Moreover, one will mostly be able to proceed on the basis that such positive conduct of the principal denotes a conclusive statement of approval of the measures already undertaken.

E. The duty not to discontinue an act after commencement without good reason (paragraph (2))

General. Whereas paragraph (1) is concerned with the actual phase of acting in management of another's affairs, paragraph (2) addresses the question when the intervener may discontinue an intervention once it has been started. The basic rule is that everyone is free to decide whether to intervene in the affairs of another, but having once resolved to do so, must in principle bring the matter to a conclusion. The purpose of the duty to continue consists in the protection of the principal from the impetuous intermeddling of others. Potential interveners ought to appreciate that they will be assuming responsibility with their intervention. On the other hand, the duty to continue the intervention ought not to extend so far that an activity embarked upon as a non-contractual management of another's affairs ceases to be distinguishable from a specifically enforceable duty to perform an agreed contractual obligation. The law of benevolent intervention should give well-meaning persons an incentive to look after their fellow citizens. For that reason it must remain possible for an intervener to venture the attempt to render assistance and to be able to give it up later if there is a good reason.

Good reasons to discontinue the intervention. Paragraph (2) deliberately does not list the "good reasons" for ending an activity in benevolent intervention; the matrix of possibilities in everyday life is too extensive. Without making claim to completeness, however, it is possible to compile the following list of four groups of cases: (i) achievement of the desired object, (ii) restoration of the principal's capacity to act independently, (iii) the wish of the principal that the intervener desist from further measures, and (iv) reasons attributable either to the intervener's circumstances (e. g. continuance would require unreasonable exertion) or the circumstances generally (e. g. uselessness of further exertion).

Achievement of the desired object. As soon as the intervention has achieved its purpose, that is to say, when the problem giving rise to the intervention has been solved, the intervener is not merely allowed to bring the intervention to an end. As a rule the intervener will also be obliged to refrain from other activity on behalf of the principal. (Whether further intervention

would be justified or not has to be decided afresh in accordance with V.–1:101 (Intervention to benefit another.)) What remains at this stage are merely the obligation to report, account and surrender anything acquired by reason of the intervention. These are regarded by V.–2:103 (Obligations after intervention) as independent obligations consequential on the intervention and not as a mere part of a duty to continue an intervention.

The principal can reasonably be expected to take over. The intervener also has a reasonable ground to end the intervention if the principal can legitimately be expected to take over or resume the management of the matter. This will more often than not be the case as soon as the intervener draws the principal's attention to the existence of the dangerous situation.

Actual or presumed contrary wishes of the principal. The intervener must discontinue the undertaking on becoming aware that the principal does not want it to be continued and the principal's wish is not (by way of exception to the general rule) non-binding. Moreover, the intervener is also obliged by paragraph (1)(b) to act according to what may reasonably be supposed to be the wishes of the principal. Consequently the intervener must also desist from continuing the intervention if the circumstances are such that it would be reasonable to suppose that the principal would not want further measures to be undertaken. This is often the reason why a benevolent intervention is complete when it merely achieves a provisional 'shoring up' of the principal's affairs. The decision as to the manner and timing of any permanent securing of the principal's interest must as a rule remain reserved to the principal.

Unreasonableness. The intervener also has a good ground for ending the management of the principal's affairs if it has become unreasonable to continue the intervention in the manner in which it was begun. What passes for reasonable or unreasonable depends on the particular circumstances and can hardly be expressed in an abstract formula. The personal circumstances of the intervener (dangers faced, pressure of time in regard to the discharge of other legal or social duties, the intensity of effort and time which has already been invested in the services rendered and would have to be invested in their continuation, etc) and the extent of the danger which cessation of the benevolent intervention would pose for the principal must be weighed up against one another. Within the boundaries of what is appropriate and reasonable the intervener is invested with a degree of discretion. As part of the balancing of interests, moreover, one must ascertain whether and (if so) in what way the intervener has adversely affected the interests of the principal by the intervention up to that point in time and whether the intervener had the opportunity to secure the assistance of third parties. The test question in such cases is: would a careful person, placed in the intervener's situation and conscious of having voluntarily assumed responsibility for some affair of the principal, have done more?

> *Illustration 3*
> A person who helps someone and by doing so causes others, who would equally have helped, to go home, may not give up the assistance all of a sudden, since the injured party would now be completely helpless, whereas in the situation at the outset it might have been possible to count on the (enduring) intervention of others. The person helping must at the very least see to it that the emergency medical services or the police are notified.

Uselessness. Finally, a benevolent intervention may be ended if it emerges after a first attempt that it will not meet with success. Here too, however, it is conceivable that the duty to

continue an intervention may take on the form of a duty to secure the help of third parties, should it transpire that the intervention has in fact made the situation worse.

Illustration 4
A has embarked on repair of the roof on the house of a neighbour, B, and, in order to be able to penetrate through to the damaged part, removes further tiles and roof battens. At this point it becomes clear to A that it will not be possible to carry out the repairs unaided and that it will be necessary to call in a professional roofer. Were it the case that A ought to have recognised this at the outset, then A would have been in breach of the duty of care under paragraph (1) and thus become liable for any additional damage to the building the intervention has caused.

Termination of the benevolent intervention without good reason. It does not suffice, however, as a reason for abandoning the matter in hand that the intervener has simply lost interest. Moreover, that is so irrespective of whether the interim intervention has increased the risk of damage to the principal in some shape or form.

Illustration 5
Of his own free will, A looks after the farm belonging to his brother, who is lying in a coma in hospital. After one year has passed, A decides to move into the city. He does nothing towards the administration of the farm and does not undertake or arrange for the tilling of the fields that should be carried out at this time of the year. A is of course not obliged to look after the farm permanently. However, he has not brought his benevolent intervention to a conclusion because he has failed to arrange what in the given circumstances was a reasonable solution for the future care of the farm (which could have consisted of a lease of the farm or, if there were no other relatives, its sale). A is liable to B for the damage suffered by the growth of weeds.

NOTES

I. The general duty to take reasonable care

1. The general duty to exercise reasonable care in the conduct of another's affair is essentially universal. That it has not been explicitly set out by the GERMAN CC may be explained by the fact that the intervener (both at the point of time he takes up the management of the affair as well as in the executory phase) is required to orientate his conduct by the principal's wishes or the principal's interests. No principal will have an interest that another attends to his affairs without the required caution and attention. AUSTRIAN CC § 1036 grants the intervener in an emergency a claim for reimbursement of expenditures even if his "efforts without his fault have remained unsuccessful". BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1372 subject an intervener without authority to all duties which would arise in a case of a *mandat exprès*. By this means CC art. 1992 (1), which provides for the liability of the agent for fault (i. e. wilful and negligent wrongdoing), also applies to the law of benevolent intervention. CC art. 1374 (1) confirms that the intervener will have to come up to the standard of care of a *bonus paterfamilias*. MALTESE CC art. 1015 subjects the "voluntary agent" to the high standard of care of a *bonus paterfamilias*. CC art. 1016 adds that this provision is to be applied "with the greatest strictness" if the intervener (a) acted in contravention of a prohibition by the principal, (b) the intervener by his

intervention prevented a more skilled person from attending to the affair or (c) the "agent himself did not possess the requisite skill".

2. Similarly GREEK CC art. 731 sentence 1 makes it clear that the intervener will be liable "for any fault". POLISH CC art. 752 and ESTONIAN LOA § 1022 demand from an intervener that he acts with requisite care. PORTUGUESE CC art. 466 sets out the rule that the intervener is liable to the principal for "damages, which he has caused by his fault during the intervention". Both formulas encompass a general duty of care. Portuguese CC art. 466 (2) adds that the intervener's management renders him liable if he does not act in accordance with the interest and the true or presumed wishes of the intervener. In contrast to tort law (CC art. 487 (2)) and contract law (CC art. 799 (2) in conjunction with art. 487 (2)) the law of benevolent intervention does not contain an explicit statement that fault will be determined according to the "standard of care a *bonus paterfamilias* would have taken with regard to the circumstances of the particular case". As a result the arguably prevailing opinion seems to be that within the law of benevolent intervention a *culpa in abstracto* will not suffice to give rise to liability and that a *culpa in concreto* or even a breach of the *diligentia quam in suis* is required instead (*Antunes Varela*, Obrigações em Geral I[10], 460-462; STJ 22 April 1986, BolMinJus 356 (1986) 352-357; *Ribeiro de Faria*, Obrigações I, 355-356; *Almeida Costa*, Obrigações[9], 442; but see for a distinct opinion *Galvão Telles*, Obrigações[7], 189-190; *Vaz Serra*, Gestão de negócios, 134 and 270, see also *Menezes Leitão*, Responsabilidade do gestor, 288 and *idem*, Direito das obrigações I, 439-440).

3. SPANISH CC art. 1889 demands that the intervener manage the affair with such care as a *bonus paterfamilias* would take. The standard is that of 'normal care of ordinary people' (Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Díez-Picazo*], Código Civil II, 1946), and therefore as a general rule not such care as an expert in the field would be able to exercise, unless the intervener is such an expert (*Sánchez Jordán*, Gestión de negocios, 448). The standard is determined by comparison with the standard of care a *bonus paterfamilias* would exercise with respect to his own affairs. This standard of care is intended to prevent an intervener from being liable in cases of mere *culpa levissima* or *culpa leve* (i. e. a slight or lesser degree of negligence) (*Díez-Picazo*, loc.cit.).

4. Under ITALIAN CC art. 2030 the intervener is subject to the same duties as would arise had a contract of mandate been concluded with the principal. CC art. 2030 thus points to CC art. 1710 (1). The same degree of care expected of the *bonus pater familias* provided for in the latter is demanded of an intervener in another's affairs (Cass. 4 May 1985, no. 2795, Rep.Giur.it. 1985, voce Divisione, no. 12; voce Responsabilità civile, no. 154). However, the second limb of CC art. 1710 (1), which provides that liability for negligence will be judged less strictly in the case of a gratuitous mandate, is not held to be invoked by CC art. 2030 (Cass. 4 October 1956, no. 3336, Rep.Giur.it. 1956, voce Gestione d´affari, nos. 8, 9, 12 and 13; Cass. 20 May 1953, no. 1472, Rep.Giur.it. 1953, voce Gestione d´affari, no. 5).

5. The SLOVENIAN LOA § 210 requires that the intervener acts as a person exercising average care would act and that he heeds the true or presumed needs of the intervener. The same holds true for DUTCH Law. Under CC art. 6:199 the intervener has to exercise reasonable care while he manages the affair of another. The intervener has to attend to the interests of the principal with the same care which would be expected in that context from a reasonable and diligent intervener. Whether the intervener has satisfied this standard will be determined by the judge according to the circumstances of the particular case (T. M. Parlementaire Geschiedenis VI, 793; Asser [-*Hartkamp*],

Verbintenissenrecht III[11], no. 307 p. 318-319; *Schrage*, Mon. Nieuw BW, no. 21 p. 15; T & C Vermogensrecht [-*Hijma*], Art. 6:199 BW, no. 2; Verbintenissenrecht [-*Scheltema*], Art. 6:199 BW, no. 2).

6. With regard to SCOTTISH law it was held in *Kolbin & Sons v. Kinnear & Co.* 1931 SC (HL) 128 that an intervener is obliged to act according to the standard of care which a reasonable person would exercise in his own affairs. Particularities of the individual case are to be taken into account (*Walker*, Principles of Scottish Private Law[4], 513-514; *Leslie*, Jur.Rev. 1983, 27; Stair [-*Whitty*], vol. 15, para 136).

7. As regards SCANDINAVIAN jurisdictions it is said or at least has been said that the standard of care the intervener has to exercise also requires that the intervener does not act beyond the scope of necessary measures and thus as a general rule restricts himself to temporary measures. The intervener should in general confine himself to measures which prevent the aggravation of the state of affairs and not try to improve it, as the latter are not necessary (*Håstad*, Tjänster utan uppdrag, 36 with reference to earlier Danish literature as well as to *Vinding Kruse*, En nordisk lovbog, 6-14-1, p. 272 and 599; *idem*, A Nordic Draft Code, ch. 57, sec. 1437, p. 379). Of note as regards SWEDISH case law is HD 9 March 1972, NJA 1972, 88 (where the fire brigade during a storm removed roof sheeting which threatened to be swiped on the street. The claim for recompense has been dismissed on the ground that it would have been more skilful and more advantageous to pin down the roof sheeting).

8. In the COMMON LAW an agent of necessity is invariably regarded as being obliged at the very least to take ordinary (i.e reasonable) care, even where the agent acts gratuitously: cf. *Grill v. General Iron Screw Colliery Co. Ltd.* (1865-66) LR 1 CP 600, 612 (*Willes* J); *Fridman*, Agency[5], p. 140. Where a pre-existing agency for reward is enlarged by necessity, the obligation (so far as not otherwise agreed by the parties) is one of best endeavours in order to protect the principal's interests: cf. *The Onward* (1873) LR 4 A & E 38, 57 (Sir *Robert Phillimore*). For example, this includes a positive obligation on a ship's captain to protect cargo against further deterioration arising out of an accident for which he is not responsible and to store cargo, rather than simply leaving it, if it is not collected at the time of unloading: see *Notara v. Henderson* (1869-70) LR 5 QB 346, 353 (*Cockburn* CJ, for the Court of Queen's Bench) where the cargo (beans) became damp as a result of a collision, but the captain refused to unload it to enable it to be dried while the ship was being repaired and it deteriorated. Conversely, an agent of necessity is not burdened with strict liability (unless this is contractually agreed) and if he has discharged his obligations honestly and reasonably he will not be liable for damage resulting from his lawful management of the principal's affairs: see *The Lizzie* (1867-69) LR 2 A & E 254, 256 (Sir *Robert Phillimore*) (concerning use of a ship as security for a loan which, it transpired, exceeded the value of the assets and thus created a net indebtedness for the principal). See further Chapter 3, Art. 3:106, Notes 11.

II. The duty to orientate the exercise of care according to the principal's wishes

9. Similar to POLISH CC art. 752 and HUNGARIAN CC § 484, GERMAN CC § 677 too obliges the intervener to conduct the management of the affair in accordance with the principal's interests with regard to his actual or supposed wishes. The decisive criterion to assess the 'interests' (as opposed to the 'wishes') will be what from an objective perspective and according to a generally accepted view would be considered to benefit the principal. However, the actual wishes of the principal will always claim priority, whether or not they are reasonable ones. Thus the supposed wishes of the

principal will only be decisive in a case where the actual wishes are not ascertainable or are not binding as being contrary to law or *bonos mores*. The question arises as to what according to an objective evaluation of all circumstances are to be regarded as the hypothetical wishes of the principal. If other pointers are lacking the supposed wishes will be ascertained according to the principal's objective interests (BGH 7 January 1971, NJW 1971, 609, 612). If in the exceptional case the principal's interests and wishes do not concur the question of an order of priority arises. Some commentary, adhering to the wording of CC § 677 ("*mit Rücksicht auf*" – 'having regard to'), give priority to the principal's interests and therefore to an objective standard (Jauernig [-*Vollkommer*], § 677, no. 9; MünchKomm [-*Seiler*], BGB[3], § 677, no. 45; Palandt [-*Sprau*], BGB[63], § 677, no. 12 et seq.). Others disagree, arguing that this does not accord with the rationale of the law of benevolent intervention and that it conflicts with the principal's right to self-determination to allow or even promote unauthorised interventions which are well-meant and useful but not undesired by the principal (Soergel [-*Beuthien*], BGB[12], § 677, no. 19; Staudinger [-*Wittmann*], BGB[13], § 677, no. 4; *Esser and Weyers*, Schuldrecht BT II/2[8], § 46 II 4 b).

10. GREEK CC art. 730 determines the most important duty of the intervener: the duty to conduct the affair in accordance with the interest and the actual or presumed wishes of the principal. This duty will only arise if the requirements of a justified intervention without authority are met. An intervener acts contrary to his principal's interest if he in arranging for necessary repairs, for instance, instructs a contractor whose services are less reasonably priced than those of a competitor (*Kavkas and Kavkas*, Enochikon Dikaion II/2, 25). The culpable breach of the duty to act in accord with the principal's interests or, as the case may be, the wishes of the principal does not transform a justified intervention into an unjustified intervention, but it may lead to the intervener's liability for damages. As regards the relation between the two criteria (interest and wishes of the principal), legal literature refers to the corresponding rule on taking over the management of another's affair (e. g. *Papanikolaou*, Art. 730, no. 40). Accordingly the principal's wishes will take priority over his objective interests. The latter will only be of relevance if the actual or supposed wishes are not ascertainable (ErmAK [-*Saketas*], Art. 730, no. 55 f; *Papanikolaou*, loc.cit. no. 35; but in part taking a different view, *Filios*, Enochiko Dikaio I/2, 200).

11. From PORTUGUESE CC art. 465 lit. a arises a duty of the intervener to have regard to the interests and the actual or supposed wishes of the principal, unless the latter are contrary to law or morality. According to the wording of CC art. 465 lit. a both the (objective) interest and the (subjective) wishes share the same priority. If (in exceptional circumstances) they differ the prevailing opinion holds the (legitimate) wishes of the principal to be decisive (*Antunes Varela*, Obrigações em Geral I[10], 462; *Menezes Leitão*, Responsabilidade do gestor, 218 ff). Others rate the objective interest to be of greater importance (*Vaz Serra*, Gestão de negócios, 122) and a third group considers that in such a case the *gestor* must abstain from acting altogether (*Menezes Cordeiro*, Obrigações II, 18).

12. AUSTRIAN CC § 1037 merely sets out a duty of the intervener to attempt to obtain the principal's consent. According to settled case law the intervener is nonetheless obliged to manage the affair in accordance with the principal's interest having regard to the latter's actual or supposed wishes. Regard is to be had to the probable intentions of the principal – in particular where the management involves expenses (OGH 21 April 1982, JBl 1984, 256). Observance of the supposed wishes of the principal is of great importance, as both the justification of the intervention (CC § 1036) and the claim for reparation depend on it (Schwimann [-*Apathy*], ABGB V[2], §§ 1036-1040

no. 11, *Meissel*, GoA, 118 et seq.). This also holds true for cases of intervention in an emergency (*Meissel*, loc.cit. 119).

13. The SLOVENIAN LOA § 201 demands that in the course of his management the intervener acts in accordance with the actual or supposed wishes of the intervener. Art. 204 adds that the intervener must refrain from any action if the principal forbids it.

14. BELGIAN, FRENCH and LUXEMBOURGIAN CC do not explicitly provide that the duty of care is coupled to observance of the principal's wishes. CC art. 1374 (1) merely states that the intervener must take such care as a *bonus paterfamilias* would exercise. Whether or not the intervener's action is culpable will accordingly be assessed *in abstracto* (*Flour/Aubert/Savaux*, Le fait juridique[10], no. 14 p. 16; *De Page*, Droit Civil Belge II[3], no. 1082 p. 1147). Although the conclusion is only infrequently stated explicitly, the conclusion may be drawn from this obligation of careful management that the intervener has to heed the principal's wishes (*Paulus*, Zaakwaarneming, no. 67 p. 45-46). The starting position of MALTESE CC is quite similar (CC art. 1015). However, CC art. 1016 tightens the standard of care if the intervener does not comply with a prohibition by the principal.

15. The starting point of SPANISH law is the basic rule that benevolent intervention cannot be undertaken contrary to the express wishes of the principal (TS 2 February 1954, RAJ 1954, no. 322 p. 198). An intervention undertaken contrary to the wishes of the principal does not meet the requirement of usefulness, i. e. *utiliter coeptum* (Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Díez-Picazo*], Código Civil II, 1944). Ley 561 of *Fuero Nuevo de* NAVARRA reads "If he (the principal) has previously forbidden the intervention, he is not obliged to pay compensation". In addition CC art. 1891 provides that the intervener will be liable for accidental loss in two cases, namely if he either undertakes a 'risky measure' which the principal does not usually engage in or if the intervener gives preference to his own interests over those of the principal. 'Risky measures' include, for instance, engaging in speculation on the stock exchange (*Díez-Picazo*, loc.cit. 1949).

16. In ITALY a determination whether the intervener has observed the required standard of care is likewise closely linked to the assessment of whether or not there is *utiliter coeptum*: the usefulness of a measure is to be assessed according to the standard whether or not it is in line with the presumed wishes of the principle or the principal's interest (Cass. 13 October 1951, no. 2634, Foro it. 1952, I, 201; *Breccia*, La gestione d´affari[2], 879). In addition the assessment follows objective criteria, i. e. regard is had to whether the intervener has acted as a *bonus paterfamilias* would have done in similar circumstances (Cass. 13 March 1964, no. 550, Foro it. 1965, I, 866).

17. Under DUTCH CC art. 6:200 claims of the intervener will depend on whether or not he has attended to the principal's interests properly. It is not only a pre-condition for the existence of a reasonable ground but also a requirement for satisfying the standard of care under CC art. 6:199 (1) that the management of the principal's affairs accords with the actual or presumed wishes of the principal. Thus fault in commencing an intervention in the first place and fault in its execution once begun hinge on the same criteria (T. M. Parlementaire Geschiedenis VI, 793; Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 307 p. 318-319; T & C Vermogensrecht [-*Hijma*], Art. 6:199 BW, no. 2; Verbintenissenrecht [-*Scheltema*], Art. 6:199 BW, no. 2).

18. Despite some problems which have their origin in the Roman legal sources and the paucity of useful observations among the institutional writers on this point, SCOTTISH law too seems to arrive at the same conclusion that the *gestor* is obliged to orientate his conduct according to the presumed wishes of the principal (Stair [-*Whitty*]

vol. 15, para 122). A duty to ascertain the wishes of the principal can at least be indirectly inferred from the notion that a measure will only constitute a benevolent intervention if it benefits the principal in his particular circumstances (for details see *Leslie*, Jur.Rev. 1983, 25). Agency of necessity under the COMMON LAW requires that the agent act reasonably and in the interests of the principal and that what he does be 'necessary'; these requirements are satisfied in effect if the principal, conducting himself as prudent person, would himself have undertaken the measure in question: *Gunn v. Roberts* (1873-74) LR 9 CP 331, 337 (*Brett* J), and see further *Notara v. Henderson* (1870) LR 5 QB 346, 353 (*Cockburn* CJ, for the Court of Queen's Bench) where it is indicated that where a ship's captain is under an obligation (arising from necessity) to store unloaded cargo, he must store it at the place which, considering the matter carefully, he regards as the most convenient for the cargo owner. In similar manner a claim to restitution which is based on necessitous intervention (e. g. in maintaining a person without full legal capacity) presupposes that the benefit conferred was a necessity and that quality is to be determined by reference to the recipient's reasonable needs and circumstances: cf. *Re Rhodes* (1890) 44 Ch D 94, 105 (*Cotton* LJ) and 109 (*Lopes* LJ).

19. In relation to the NORDIC Countries reference can be made to a small number of provisions of commercial law which all require that the active party act in accordance with 'the interest' of the other party. Under the DANISH and SWEDISH Factors Acts § 7 the commission agent has to take account of the interests of the principal and the same also applies under the SWEDISH Maritime Code *[sjölag* (1994:1009)] chap. 13 § 12 to the carrier of goods with regard to the interests of the owner of the goods. These rules may well be applied to the *gestor* by analogy.

III. The duty to inform

20. GERMAN CC § 681 sentence 2 refers to the law of mandate (which under German law is a gratuitous contract) and by this means subjects the intervener to the same duties as a contractual agent. The latter's duties according to CC § 666 also include the duty to inform and to give an account. Strictly speaking CC § 666 contains three separate duties of information, namely the duty to inform that an intervention is being conducted, the duty to provide information and the duty to provide an account. The duty to inform on the event of an intervention must be adhered to by the intervener on his own initiative, i. e. without a prior request from the principal; by contrast, the duty to provide information and to give an account will only arise as a consequence of a request by the principal. Though no clear line can or need be drawn between them, the duty to inform the principal that an intervention has occurred primarily relates to the circumstances which rendered the undertaking necessary, while the second duty to provide information concerns the state of the management of the affair as a whole.

21. GREEK law likewise extends the main duty of the intervener to act in accordance with the interest and wishes of the principal by accessory duties, which are drawn from the law of mandate. Setting out one accessory duty CC art. 733 states that the intervener must inform the principal of the commencement of the intervention and inquire as to the principal's wishes (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 733, no. 1). Of course it must be possible to contact the principal, which in turn will depend on the circumstances of the individual case. A stricter standard is supposed to apply where intervener and principal reside at the same place or if the intervener is acquainted with the principal (*Papanikolaou*, loc.cit. no. 2). After informing the principal the intervener has to await further instructions. It is a matter of controversy, however, whether the continuation of the intervention in accordance with instructions given may be characterised as a performance under a contract. A violation of the duty to inform

the principal results in a liability for damages, but it does not render the intervention unjustified as such (CA Patras 92/1955, NoB 4/1956 p. 96).

22. PORTUGUESE CC art. 465 lit. b obliges the intervener to inform the principal of the commencement of the intervention as soon as possible. An infringement of this duty supposedly may not only result in a liability for damages; it will have the effect that the management of the affair from this point in time is not justified (*Almeida Costa*, Obrigações[9], 438; *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], Art. 465 no. 3). If the duty to inform the principal is discharged, the intervener my continue the intervention until he receives instructions to the contrary. If the principal issues instructions approving the intervention, it has to be determined whether this concludes a contract of mandate. Furthermore, CC art. 465 lit. d expressly obliges the intervener to make full disclosure to the principal as regards the intervention.

23. Similarly the SLOVENIAN LOA § 200 obliges the *gestor* to inform the principal about the commencement of the intervention as soon as possible. CZECH and SLOVAKIAN CC art. 743 (1) contains a corresponding obligation. HUNGARIAN CC § 486 (1) even provides that "an impromptu agent shall *immediately* inform the person in whose favour he has intervened" (Official Translation, Hungarian Legal Norms in Force in three Languages, CompLex CD HMJ, 2004). ESTONIAN LOA provides for the duty of information in § 1020.

24. The AUSTRIAN CC does not expressly provide for a duty of information. However, the existence of such a duty is recognised in the legal literature (*Koziol and Welser*, Grundriss II[12], 366 et seq.). An infringement of this duty will lead to liability for damages under general rules (Rummel [-*Rummel*] ABGB I³ § 1039 no. 5).

25. Equally, the duty of the intervener to inform the principal about the commencement of the undertaking as soon as possible is not expressly provided for in the CODE NAPOLÉON. Even in legal literature that duty is only rarely mentioned. Only occasionally is it indicated that the duty to inform is one of the main duties of the intervener. Its main purpose is supposed to be that the intervener may receive instructions from the principal as a response and to enable the latter to resume attendance to his own affairs (*le Tourneau*, Rép. Dr. Civ., Bd. VI, V° Gestion d´affaires (2002), no. 68).

26. Similarly, the SPANISH CC does not explicitly set out a duty to inform, but it is acknowledged both in legal literature and in case law (TS 16 October 1978, RAJ 1978 (2) no. 3076 p. 2606). It is inferred from the general system of duties of an intervener and from the principle of good faith. So far as possible the principal must be informed both of the commencement of the intervention and of its continuation.

27. By contrast it is disputed whether under ITALIAN Law the intervener is obliged to inform the principal as soon as possible of the commencement of the intervention (*Aru*, Gestione d´affari, 30-31, for instance, has argued against such a duty.) Arguments in favour of the existence of such a duty are based on the general duty of fair conduct and the explicit duty in the law of mandate (CC art. 1712; see *Breccias*, La gestione d´affari[2], 897).

28. Under DUTCH Law the intervener must both try to contact the principal prior to the commencement of the intervention (a consequence of the requirement of a reasonable ground) and attempt to contact him as soon as possible during the executory phase of the intervention in order to enable the principal to attend himself to his affairs. This duty has not been explicitly provided for by statute for the mere reason that it is already considered as covered by the intervener's general duty of care (CC art. 6:199 (1)) (T. M. Parlementaire Geschiedenis VI, 793; Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 307 p. 319; *Schrage*, Mon. Nieuw BW, no. 22 p. 15-16).

29. Under SCOTTISH law a benevolent intervention without authority is only justified if the principal is unable to attend to the problem that has occurred because he is not aware of the situation. Against this background a duty to give notice of the commencement of the intervention or to inform about the intervention is considered to be irreconcilable with the concept of benevolent intervention; insofar as the principal is informed the rules on mandate will prevail over the law of benevolent intervention. However, even the effort to search out the principal may in itself be considered as a benevolent intervention. Generally it is emphasised that the law of *negotiorum gestio* has become less important due to the improvement in communication technology (*Marshall*, General Principles of Scots Law[7], para 11-11).

30. With regard to the legal systems of SCANDINAVIA one can only point towards the provisions on duties to inform to be found in neighbouring areas of the law. Strict adherence is to be inferred, so far as they apply by analogy, because the relationship in a case of a management of another's affairs without an underlying contractual agreement ordinarily lacks a voluntary entrustment of the affair to another. Compare in particular the SWEDISH Maritime Code [*sjölag* (1994:1009)] chap. 13 § 16 (3) in conjunction with § 12 (duty to inform of the carrier if the goods are damaged or if the carrier feels constrained to undertake extraordinary measures) and DANISH and SWEDISH Act regarding Factors § 7 (Duty of the commission agent to inform the principal).

31. The position in ENGLISH law is comparable to that of SCOTTISH law on this point: since agency of necessity presupposes that contact with the principal is impossible, or impracticable in the circumstances, acts undertaken when it is possible (without detriment to the principal's interests) to await the principal's instructions may be regarded as unnecessary and outside the scope of the authority which necessity created. It is now recognised that seeking such instructions may itself be an act entitling an agent to reimbursement: see *Pocahontas Fuel Co. Inc. v. Ambatielos* (1922) 10 Lloyd's L. Rep 188, 156 (*McCardie* J), but contrast the (implied) view of Sir *Robert Phillimore* in *The St. Lawrence* (1879-80) 5 PD 250, 253.

IV. Duty to continue the intervention

32. GERMAN Law deviates from V.–2:101(2) in so far as the intervener is not obliged as a rule to continue an intervention which has been commenced (RG 10 May 1906, RGZ 63, 280, 283; however, an intervener who puts his own interests first and neglects those of the principal will be liable according to this judgement even for loss of profits, i. e. the 'positive' (expectation) interest, loc.cit. 287). The legislature (Mot. II, 858) assumed that the intervener must conduct the intervention in a way which accords with the care of a *bonus pater familias*. The question whether or not the intervener may give up an intervention once begun is assessed against the same standard. If the discontinuance of the intervention would result in damage which would have not occurred if the intervener had not interfered in the principal's affairs, then the intervener is under a duty to continue the intervention. Apart from this a particular duty to continue an intervention is not recognised. An agent may similarly terminate a mandate at any time (CC § 671). In special circumstances, however, there may exceptionally be a partial duty to continue the intervention. This duty in particular cases is derived from the principle of good faith and also from the fact that the intervener by commencing the intervention takes upon himself the duty to consider the principal's interests (RG 10 May 1906, loc.cit.; cf. amongst others RGRK [-*Steffen*], BGB[12], § 677, no. 4; Erman [-*Ehmann*], BGB I[10], § 677, no. 5; Staudinger [-*Wittmann*], BGB[13], § 677, no. 5). The existence of such a duty to continue the intervention is established where continuation is possible and not difficult for the

intervener, but an abandonment by the intervention would severely aggravate the situation of the principal (RG 21 November 1921, WarnRspr. 1922 no. 12: a person who takes up an object left by another has to keep it in safe custody). Furthermore, a duty to continue may also exist where the intervention has prevented a third party from acting on behalf of the principal or if the principal is likely to suffer a damage from the intervention being discontinued which would not have occurred if the intervener had taken no action at all (Mot. II, 480; see also RG 5 December 1929, RGZ 126, 287, 292: duty to maintain a loan). The infringement of such a duty will result in liability for damages, but it cannot be enforced by means of a claim for performance (Soergel [-*Beuthien*], BGB[12], § 677, no. 20). Following the death of the intervener his rights and duties devolve to his heirs.

33. The duty to continue an intervention once commenced is also not expressly provided for in GREEK law. It is therefore presumed that the intervener is not generally obliged to continue an intervention he has begun. As in Germany, however, such a duty may arise in exceptional circumstances by virtue of the principle of good faith. This may occur in particular where the continuation would not be an unjust burden for the intervener, but discontinuation would result in damage for the principal (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 730, no. 42). *Filios*, Enochiko Dikaio I/2, 201 argues in favour of an application of CC art. 725 (2) by analogy.

34. PORTUGUESE CC art. 466 (1) to a large extent corresponds with V.–2:101(2). Under this provision "the intervener is liable" only "for damages which he has caused by an unjustified interruption (*interrupção injustificada*)." In that regard there is a marked difference in comparison to French and Italian law (*Menezes Cordeiro*, Obrigações II, 20; *Vaz Serra*, Gestão de negócios, 114-115). Where a duty to continue exists, it cannot be specifically enforced under Portuguese law; the only available remedy in case of failure of performance is a claim for damages (*Menezes Cordeiro*, loc.cit.). The intervention may be aborted if there is a specific justification. Such justification can arise in particular from conduct of the principal.

35. Under AUSTRIAN CC § 1039 too the intervener will be obliged to continue his intervention until the task undertaken is concluded. This duty to continue – this follows from CC § 1312 – does not apply in the case of intervention in an emergency under CC § 1036 (OGH 26 November 1981, SZ 54/176; *Meissel*, GoA, 154). It arises only in the case of 'useful' benevolent intervention under CC § 1037. It is understood as a mere standard of care as opposed to a duty to perform which would be enforceable by a separate claim (*Meissel*, loc.cit. 162 et seq.; Rummel [-*Rummel*], ABGB I³, § 1039 no. 2, Schwimann [-*Apathy*], ABGB V[2], §§ 1036-1040 no. 16; but possibly a different view in OGH 20 January 1977, MietSlg. 29.128=RIS-Justiz RS 0013779). The limits of the duty to continue are reached where further action would appear to be useless (CC § 1038; Rummel [-*Rummel*], ABGB I³, § 1039 no. 6).

36. BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1372 (1) obliges the intervener to continue and to complete the intervention until the principal is once more in a position to attend to his own affairs. If the principal is in that position, then the intervention may be terminated by notice that the intervener does not intend to continue the intervention (JClCiv [-*Bout*], arts. 1372-1375, Fasc. 20 no. 10). CC art. 1373 enhances the duty to continue by imposing the obligation that the intervener continue the intervention after the death of the principal until the heir is able to take over the management of the affair. The view is expressed, going beyond the literal wording of that article, that this rule should also be applied where the principal is either incapacitated or declared bankrupt: in such cases the intervention cannot be discontinued before the representative or administrator is capable of attending to the

matter (*Bout* loc.cit. no. 12; *Paulus*, Zaakwaarneming, no. 62 p. 45). If the principal has disappeared, the intervener may apply to the guardianship court under FRENCH CC art. 112 et seq. for the appointment of a representative to take over the management (*Bout*, loc.cit.). The same applies to an intervention which requires an extraordinary long attendance to the matter (*Bout* loc.cit. no. 14). Force majeure will constitute a reason for justified termination. In addition French legal literature has suggested the analogous application of CC art. 2007 (which forms part of the law of mandate), so that danger to the intervener or the threat of substantial disadvantage to the intervener may constitutes reasons for termination (*le Tourneau*, Rép.Dr.Civ., VI, v° Gestion d´affaires (2002), no. 70). The BELGIAN perception, by contrast, is that CC art. 1373 remains applicable also in the case where the principal has disappeared (*De Page*, Droit Civil Belge II[3], no. 1082 p. 1147). That the intervener may terminate the intervention if continuation is impossible for him is only stated in general terms (*RPDB*, v° Quasi-contrat, no. 58). One explanation for this strict duty to continue an intervention which has sometimes been offered is that a perfunctory or aborted intervention may prevent other more qualified persons from undertaking the necessary measures for the protection of the principal's interests (*Carbonnier*, Les obligations[21], no. 301 p. 501). An elaborate regulation of the duty to continue an intervention may also be found in MALTESE CC arts. 1013 and 1014.

37. According to the opinion of one SPANISH author the duty to continue the intervention pursuant to CC art. 1888 represents the main duty of the intervener because without the continuation of the intervention there would be no room for the duty of care (*Sánchez Jordán*, loc.cit. 410). Other authors hold the order of priority to be the other way round (e. g. Albaladejo [-*Santos Briz*], Código Civil y compilaciones forales, XXIV, 445). CC art. 1888 prevents the intervener from discontinuing the intervention *ad libitum* because otherwise more severe damage may occur than that which the intervention was intended to prevent (Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Díez-Picazo*], Código Civil II, 1945). The duty to continue is said to serve two purposes: to prevent damage and to prevent the thoughtless interference with another's affairs (*Lacruz Berdejo,* Rev.Crít.Der.Inm. 1975, 264). Pursuant to CC art. 1888 the duty to continue an intervention once begun concerns both 'the affair' and the 'auxiliary matters'. If the intervener is no longer willing or no longer in the position to continue the intervention, then CC art. 1888 permits the intervener "to call upon the principal to replace him in the conduct of the intervention provided that he is in the position to conduct that intervention on his own". In the law of mandate (CC art. 1736), by contrast, the agent may "resign by giving the principal notice thereof. If the latter suffers damage as a consequence of such resignation, the agent must make reparation for that loss, unless he can justify the termination because it has become impossible to complete the mandate without severe harm to his own interests". Thus according to the wording of the CC the contractual agent can give up his mandate under less strict conditions than an intervener without authority. This has repeatedly prompted scholars to argue in favour of an analogous application of the provision of the law of mandate to benevolent intervention (e. g. *Sánchez Jordán*, loc.cit. 428). If the intervener in accordance with CC art. 1888 calls upon the principal to replace him in the management of the affair, the mere request will not as such terminate the duty to continue the intervention. Termination will not occur before the principal attends to the affair himself; if he is not in a position to do so (for which the ability to instruct a third party would suffice) then the duty to continue persists. *Fuero Nuevo de* NAVARRA Ley 560 likewise obliges the intervener "to complete an intervention begun".

38. Under SLOVENIAN LOA § 200 the intervention must be continued provided this is reasonable and as long as the principal is not in a position to attend to his own affairs again. POLISH CC art. 753 (1) also obliges an intervener to continue an intervention until such time as the principal is in a position 'to attend to the business himself'. By contrast CZECH and SLOVAKIAN CC do not provide for a duty to continue an intervention. The same holds true for the ESTONIAN LOA and the HUNGARIAN CC.

39. Under ITALIAN CC art 2028 the intervener is obliged to continue an intervention and to bring it to an end until the principal is in a position to attend to his own affairs. This duty to continue also exists where the principal dies before the intervener has completed the task undertaken for the principal. It will persist until the heirs can take care of the affair. The duty to continue an intervention will cease if the management has become impossible due to a reason for which the intervener is not responsible (Cass. 11 November 1958, no. 3692, Rep.Giur.it. 1958, voce Gestione d´affari, no. 6-8) or useless or even dangerous.

40. Under DUTCH CC art. 6:199 (1) the intervener must "continue the management of another's affair he has begun … to the extent that this can reasonably be required of him". From this it follows that the intervener may not discontinue at an improper time. The particulars will depend on the circumstances of the individual case – in particular whether or not the principal is in the position to act himself and the balance between the interest of the principal in the continuation of the management of his affairs and the effort and expenditure which continuation would entail for the intervener (T. M. Parlementaire Geschiedenis VI, 793; Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 308 p. 319-320).

41. In SCOTLAND the duty to continue and to complete the intervention is one of the main duties of the intervener. This was recognised by the institutional writers (*Bell* § 541; *Stair*, Institutions, Book I, 8, 5) and remains the law today (*Walker*, Principles of Scottish Private Law, II[4], 513). The duty to continue terminates only when it would result in management of a new affair; it does not end automatically with the death of the principal or the intervener (Stair [-*Whitty*], The Laws of Scotland, vol. 15, para 130; *Stair*, Institutions, Book I, 8, 3; *Erskine*, Book III, Volume II, 53). Legal literature in the NORDIC COUNTRIES has not elaborated on the obligation to continue. In ENGLISH law a question of a duty to continue an intervention rarely poses itself in that form. Agency of necessity largely operates in the context of an existing relationship and an agent is regarded as not merely being authorised to intervene, but actually bound to take reasonable measures in order to protect the principal's interests: for authority asserting an obligation on the part of a ship's captain in a case of necessity, see *The Gratitudine* (1801) 3 C. Rob 240 at 259, 165 ER 450 at 457 (Sir *W. Scott*); *Tronson v. Dent* (1853) 8 Moore PC 419, 449 (Sir *John Patteson*); *The Hamburg* (1863) 2 Moore PC (N. S.) 289, 302 (Dr *Lushington*); *Australasian Steam Navigation Co. v. Morse* (1871-73) LR 4 PC 222, 228; *Gaudet v. Brown* (1873-74) LR 5 PC 134, 165 (Sir *Montague Smith*); *Hingston v. Wendt* (1875-76) 1 QBD 367, 372 (*Blackburn* J); *Metcalfe v. Britannia Ironworks Co* (1876) 1 QBD 613, 625 (*Cockburn* CJ). The question of when the agent may abandon the intervention is simply subsumed within the broader question of the scope of the duty to act in the principal's interests: intervention is required so long as the necessity requires a solution to the unforeseen problem and a response can reasonably be expected of the agent. In the case of a gratuitous agent, this will often mean there is no duty to act: cf *Fridman*, Agency[5], 138. However, a duty of an intervener who acts gratuitously or is not an agent of necessity to continue their intervention may arise under tort law on the basis that their interference (if now followed by an omission to improve matters) would cause damage

for which he would be liable as a tortfeasor on the basis of negligence: cf. *Gomer v. Pitt & Scott* (1922) 12 Lloyd's L. Rep 115, 116 (*Warrington* LJ).

Illustration 1 is taken from BGH 4 December 1975, BGHZ 65, 354; **illustration 5** from TS 2 February 1954, RAJ 1954 no. 322 p. 198.

V.–2:102: Reparation for damage caused by breach of duty

(1) The intervener is liable to make reparation to the principal for damage caused by breach of a duty set out in this Chapter if the damage resulted from a risk which the intervener created, increased or intentionally perpetuated.

(2) The intervener's liability is reduced or excluded in so far as this is fair and reasonable, having regard to, among other things, the intervener's reasons for acting.

(3) An intervener who at the time of intervening lacks full legal capacity is liable to make reparation only in so far as that intervener is also liable to make reparation under Book VI (Non-contractual liability arising out of damage caused to another).

COMMENTS

A. Liability to make reparation for breach of duty

The duty to make reparation under the law of benevolent intervention in another's affairs. Paragraph (1) establishes the intervener's liability for damages and thus at the same time the basis for a claim of the principal. Such provision appears necessary firstly because there should not be any discussion at the outset whether the principal's claim to damages arising out of the culpable execution of a benevolent intervention is in its nature derived form the law on non-contractual liability for damage under Book VI or must be derived from an analogous application of the contract law provisions. It is neither the one nor the other. Rather it takes the form of a claim to damages under the law of benevolent intervention itself. Secondly, paragraph (1) is required to give expression in a general rule to the specific limits of this claim to reparation.

Reparation. In agreement with the legal terminology being used in the law of non-contractual liability for damage under Book VI the concept of reparation embraces every form of making good on a damage. Usually this will take the form of compensation (monetary reparation; damages), but it may also assume another form of indemnification of the damage – in particular the restoration of the previously existing position by reparation in kind.

Damage. As in the law on non-contractual liability for damage under Book VI (in the concept of "legally relevant damage") and the law of contract, the expression "damage" also encompasses here economic as well as non-economic losses. The provisions in the law on non-contractual liability for damage regarding compensation for damage suffered by close relations are applicable here too by analogy where the facts of the case call for it. The crucial point is always that the damage must be the consequence of a breach of a duty which is imposed by V.–2:101 (Duties during intervention) and V.–2:102 upon an intervener whose intervention is justified in the sense prescribed by V.–1:101 (Intervention to benefit another) and V.–1:102 (Intervention to perform another's duty. Someone who intermeddles in the affairs of another without reasonable ground is liable for any damage which results not under the law of benevolent intervention, but under other provisions – in particular those of Book VI on the law on non-contractual liability for damage.

B. General limits to liability for defective execution of a benevolent intervention (paragraph (1))

Causation. The duty to make reparation for a breach of duty imposed on the intervener as such is limited by various requirements, first and foremost from the perspective of causation.

Damage which has occurred does not generate a claim to reparation if it is attributable to a risk which gave cause for the intervener's measure or, to formulate the same proposition in positive terms, damage is reparable only if it results from the intervention. The intervener must have either created or increased the relevant danger, or else must have deliberately allowed it to continue.

Three situations. It is not enough as regards the required limitation of liability simply to point to the general instrumentality of causation. Rather what is needed is a specific connection between the breach of duty of the intervener and the damage which has occurred. That is because there is a host of cases in which the damage would not have occurred if the intervener had acted in accordance with the prescribed duties, but the damage would have occurred anyway if the intervener had not interfered at all. In situations of this type there has to be an exact examination of attributability of the damage to the intervention. Liability ought to be incurred in only three basic situations: (i) where the intervener has created the risk of damage by the intervention; (ii) where the intervener has not created that risk but has increased it; and (iii) where the intervener has terminated the intervention prematurely without reasonable ground and in the conscious assumption of the risk that damage will follow.

Liability for the realisation of a risk created by the intervener. An intervener is liable for the realisation of a risk of damage which the intervener has brought about. The mere omission to intervene to break a chain of causation which is already in progress does not generate any liability to compensate – even if a reasonable intervener would have behaved differently.

> *Illustration 1*
> As a result of heavy and sustained rainfall, an entire region is flooded. As the house owner is on holiday and has left no contact address, a neighbour decides to enter the house and rescue a suite of Chippendale chairs. The neighbour is not liable for negligence in failing to see that in the adjoining room there are other Chippendale chairs; nor for negligently failing to appreciate that it would have been more important to remove from the house a considerably more valuable Persian rug.

Liability for the realisation of a risk increased by the intervener. The intervener need not have created the risk; it suffices that it has been enhanced by the intervention.

> *Illustration 2*
> Customers in a supermarket find a handbag and hand this in at one of the tills. The cashier announces over the loudspeaker that the bag has been found and asks the owner, whose name is read from the identity card contained in the bag, to retrieve it. Since nobody comes to claim it, the cashier hands it back to the customers who found it, as they lead her to believe that they know the owner and will bring it to her. In fact they keep the bag and the money which it contained. The supermarket is liable for the loss because it increased the risk of the ultimate loss of the bag and contents in handing the bag back out, it being secure in the custody of the supermarket's employee following the benevolent intervention in taking possession. The case would be correspondingly the same in Illustration 1 if after rescuing the chairs the neighbour stores them so carelessly that they sustain damage while stored. That damage is attributable to the intervener's breach of duty.

The intervener intentionally perpetuated the risk. The third basic situation is a premature termination of the intervention in breach of duty (V.–2:101 (Duties during intervention) paragraph (2)). This breach of duty too ought not to lead to liability for all damage which results. In addition to the requirement of causation it must be established that the intervener has caused the perpetuation of the risk intentionally.

Illustration 3
Intervener I negligently supposes that all necessary repairs have been completed and thus leaves the scene of action. In fact the problem has not been remedied: a short time later water starts once again to pour out of the damaged pipe. I is not liable to the principal.

Illustration 4
The facts are the same as in Illustration 1, except that in this case the neighbour has carried the chairs out of the adjoining room into the hall, and has left them there, having suddenly become indifferent as to what happens to the chairs. The intervener has intentionally perpetuated the risk.

Intention. The meaning of the term "intention" follows the definition in VI.–3:101 (Intention).

C. Liability for others; multiple interveners

No general liability for other interveners. The text contains neither special rules on liability for the defaults of others nor particular provisions on situations in which several benevolent interveners become active. Liability of the intervener for a failure to choose with care a person to render assistance is already provided for by paragraph (1) in conjunction with V.–2:101 (Duties during intervention) paragraph (1)(a). Since there is no contract between the intervener and the principal governing the measure being undertaken and the intervener is therefore not obliged to the principal to undertake it, a genuine liability for the default of others fundamentally cannot be regarded as justified. The act of engaging another may, of course, be an act of benevolent intervention in itself, from which it follows that the intervener is obliged to surrender to the principal all the rights acquired under the contract made with the engaged third party. The risk of the third party's insolvency is thus borne by the principal and not the intervener. The situation is otherwise where the intervener engages a third party in order to perform an obligation which is already imposed on the intervener, such as the obligation to deliver up and account. In that case the intervener is liable according to general principles for the non-performance of the obligation if the performance has been delegated to a third party who fails in that undertaking.

No joint liability of multiple interveners as a general rule. For the same reasons it did not appear to be justified to include a provision according to which multiple interveners would be jointly liable. Such joint liability may generally only be considered where several interveners are under the duty to undertake the same activity – a situation, however, which will be a rare exception.

D. Reduction of liability (paragraph (2))

General. The provision in paragraph (2) is a means of protecting persons who take care of others or their interests for especially commendable reasons. Paragraph (2) will typically (but not necessarily) operate in favour of emergency rescuers. The policy consideration behind

paragraph (2) is therefore tied to one very specific aspect of benevolent intervention: the existence and extent of the (required) element of intention to benefit another. The fundamental belief that helpers who render assistance to another for altruistic reasons should be privileged as regards liability is familiar to all European jurisdictions. Only the means by which this fundamental belief is implemented differ. Some legal systems reduce the applicable standard of care to gross negligence, only granting this privilege to helpers acting in an emergency, whereas other jurisdictions engage a more open reasonableness test without altering the standard of care. Paragraph (2) adheres to the latter model. The fact that in urgent situations of emergency non-professional helpers may easily misreact due to fear or precipitance is already taken into account in the context of the assessment under V.–2:101 (Duties during intervention) paragraph (1)(a): see the comments on that provision. Paragraph (2) therefore does not concern the basis of liability, but relates instead exclusively to the extent of the compensation. It is not confined to cases where the context to the benevolent intervention is the presence of a situation of imminent danger to another's body or health.

The fairness test. Liability may be either reduced or completely excluded under paragraph (2). Whether and to what extent such a reduction of liability (which in a suitable case may be a reduction to nil) applies will depend on a general fairness test ("fair and reasonable"). It must be determined according to the circumstances of the individual case and will depend in particular on the altruistic motive of the acting party.

Illustration 5
Mrs A looks after the estate of Mr X after he has died. She was due to inherit under a will, but has disclaimed the heritance. A dispute arises between Mrs A and Mr X's relatives concerning some animals which Mrs A has entrusted to the care of third parties. With regard to the majority of the animals Mrs A has acted in an exemplary fashion, whereas she has not timeously discharged her duty of information with respect to a goat and a sheep. The liability for damage may be reduced in the light of the altruistic motive of the intervener and the slightness of her oversight.

Illustration 6
A farmer, F, uses a tractor to tow away to the roadside a tree which had been uprooted by a storm; the removal was the responsibility of the local authority. Four months later the local authority has not taken any steps. At night an accident occurs. F has committed a fault by not completely removing the tree from the road and, together with the local authority, is liable to the road user as a joint debtor. However, inter partes F's share in the liability is to be reduced considerably below 50%.

E. Interveners without full legal capacity (paragraph (3))

General liability under the law on non-contractual liability for damage also required. The rule in paragraph (2) alone, however, does not offer the class of persons named in paragraph (3) adequate protection. Such persons ought to be liable to make reparation only if neither the law of benevolent intervention nor the general law on non-contractual liability for damage provides a protection against liability. The most important practical case is to be found in the law relating to the protection of minors and the rules on the minimum age for such liability (see VI.–3:103 (Persons under eighteen). Comparatively less important (but also to be considered) are the cases in which for other reasons there is liability in the law of benevolent intervention, but not in the general law on non-contractual liability for damage. That may come about because the intervener has infringed the duty imposed by V.–2:101 (Duties during intervention) paragraph (1)(b) to comply with the wishes of the principal, or

the duty to continue an intervention (V.–2:101(2)) (which as a rule will be alien to the law of non-contractual liability for damage), or because the intervener has caused a damage which is not legally relevant within the concept of the law on non-contractual liability for damage.

NOTES

I. The basis of the claim for damages

1. The GERMAN CC does not provide for an independent claim for damages within the law of benevolent intervention. If the intervener is in breach of his duties under CC §§ 677 and 681, the principal may claim damages subject to the general requirements of CC § 280, which applies to all breaches of duty. As regards fault, CC § 280 (1) sentence 2 provides for a reversal of the burden of proof in favour of the creditor (in this case the principal). A claim for damages is excluded if an approval by the principal covers the particular mode of managing the affair (Palandt [-*Sprau*], BGB[63], § 677, no. 15; § 681, no. 4; § 684, no. 2). The lack of success does not necessarily imply the conclusion that the intervention has been mismanaged (RGRK [-*Steffen*], BGB[12], § 677, no. 11). A breach of the duty arising under CC § 681 does not result in a loss of the intervener's claim for reimbursement of expenses incurred (BGH 4 December 1975, BGHZ 65, 354, 356) since the benevolent intervention remains a justified intervention. Although the claim for damages pursuant to CC § 280 includes the 'positive' interest and thus all direct and indirect disadvantages which are the result of the harmful conduct, the liability will only extend to such damage as results from carrying out the intervention. Disadvantages which result from a reasonable though unsuccessful management of the affair are not taken into consideration, because the unauthorised intervener is not under an obligation to achieve a successful intervention (Soergel [-*Beuthien*], BGB[12], § 677, no. 20). The principal is to be placed in the position he would have occupied if the intervener had given notice to the principal timeously, abstained from action or informed the principal (BGH loc.cit. 357).
2. A similar legal situation may be found in GREECE. The sole matter of dispute is whether the legal basis for the claim for damages is to be found in the general provisions on non-performance (CC arts. 335 et seq.; *Filios*, Enochiko Dikaio I/2, 201) or may be derived directly from the provisions of CC arts. 730, 731 (in favour of this solution *Kavkas and Kavkas*, Enochikon Dikaion II/2, 25). Despite a breach of duty the intervener will retain his claims against the principal (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 730, no. 40).
3. PORTUGUESE CC art. 466 (1) by contrast provides for a separate basis for liability of the intervener for damages: "The intervener is liable to the principal for damage which he causes by defective execution of the management or by an unjustified interruption of the management". CC art. 466 (2) spells out that an intervener acts negligently if he does not act in accordance with the interest and the wishes of the principal. This is in line with CC art. 465 limb (a). Furthermore, the general provisions on liability for damages also apply in the context of the law of benevolent intervention (*Menezes Leitão*, Responsabilidade do gestor, 273 ff). The liability of a lawyer who has conducted proceedings without authority is expressly stated in CCP art. 41 (2).
4. AUSTRIAN law also distinguishes between the different types of benevolent intervention with respect to the question of the intervener's liability for damages (*Koziol*, Haftpflichtrecht I³, no. 4/96, p. 185). CC § 1312 limits the intervener's liability in a case of intervention in an emergency (CC § 1036); he will not be held

responsible for the want of a successful outcome to his intervention. This will only be otherwise under CC § 1312 if the intervener has "by his fault prevented another from acting who would have achieved a better result". CC § 1312 sentence 2 grants the intervener the possibility to set off the profits gained against the damage sustained. This is considered as a particular case of equalisation of benefits (Rummel [-*Reischauer*], ABGB II^2, § 1312 no. 2). The intervener in a case of emergency is also subject to a duty of care; he is liable for damage negligently caused (Schwimann [-*Apathy*], ABGB V^2, §§ 1036-1040 no. 18), though the urgency of the intervention and the extent of the impending danger will be taken into consideration (*Meissel,* GoA, 140). As far as 'useful benevolent intervention' is concerned (CC § 1037) CC § 1311 (sentence 2, third alternative) applies. According to this provision the intervener "who without urgency intermeddles with another's affairs" will be liable for all disadvantages which would not have occurred but for his intervention (*v. Zeiller,* Commentar III § 1311 no. 9 p. 739, gives the example of an intervener who stores the fruit which he has harvested on behalf of the owner at a place where the owner would not have put them and where they are subsequently destroyed by a fire). A fault in venturing the intervention will suffice and the damage need not have been foreseeable (*Karollus,* Schutzgesetzverletzung, 63; Schwimann [-*Apathy*], ABGB V^2, §§ 1036-1040 no. 19). The intervener may set off against his own counterclaims. However CC § 1312 sentence 2 (see above) is not applicable. If the damage caused by the intervener exceeds the benefit brought about this will constitute a case under CC § 1038. Under that provision, in contrast to CC § 1324, the intervener will also be liable (even if only slightly negligent) for 'full satisfaction' and thus also for lost profits (Rummel [-*Rummel*], ABGB I^3, § 1038 no. 5; *Meissel,* GoA, 140 et seq.; the details are, however, a matter of dispute).

5. Under BELGIAN and FRENCH law the principle that the intervener who has breached his duties will be liable for the damage arising as a result is undisputed. However the wording of CC arts. 1372-1375 (apart from the reduction clause in CC art. 1374 (2)) do not further specify either the legal nature or the exact structure of liability. The majority of FRENCH authors hold the opinion that the liability of the intervener is in its nature a tortious one (*Viney,* Introduction à la responsabilité^2, no. 191 p. 348-349), others argue in favour of a concept of a contractual nature (*Acquarone,* D. 1986 chron. 21-26), while a yet third group consider it to be *sui generis* (*Starck/Roland/Boyer,* Les Obligations^6, no. 2045 p. 713). In BELGIAN legal literature, by contrast, the nearly unanimous view is that the intervener's liability is extra-contractual and thus tortious in nature (*Dalcq,* Traité de la responsabilité civile, I^2, no. 116 p. 131). The *travaux préparatoires* on the Belgian Limitation Act, however, reveal that the limitation of actions arising from quasi-contracts are subject to the general provisions on limitation of contractual claims (Parl. St., Kamer, 1997-98, no. 1087/1, p. 8 and 11).

6. Under SPANISH law the liability of the intervener for damages for the breach of duty of care is based on CC art. 1889. The duty to pay compensation will cover all damage which has been caused by the defective management without regard to its nature. CC art. 1106 (which in its wording actually only concerns liability for breach of contract and provides that lost profits are compensable) is applied correspondingly (Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-*Díez-Picazo*), Código Civil II, 1946; *Sánchez Jordán,* Gestión de negocios, 453; see also *Cavanillas Múgica and Tapia Fernández,* Concurrencia de responsabilidad, 9). CC art. 1889 requires that the intervener has not acted in accordance with the care of a *bonus paterfamilias*. Yet his liability is not regarded as tortious, but rather as (quasi-)contractual (*Díez-Picazo,* loc.cit., *Pasquau Liaño,* La gestión de negocios ajenos, 130; *Sánchez Jordán,* loc.cit.). It is disputed

whether liability will also arise in a case of slight or the slightest negligence (*culpa leve* and *culpa levissima*) (this is answered in the negative by Albaladejo [-*Santos Briz*], Código Civil y compilaciones forales, XXIV, 58; *Lacruz Berdejo*, Rev.Crít.Der.Inm. 1975, 266). As regards liability for breach of the duty to continue the intervention, it has been suggested (so far as this question is at all discussed) that the provisions of tort law apply (*Pasquau Liaño*, La gestión de negocios ajenos, 129).

7. According to the ITALIAN legal approach the liability of an intervener for the malperformance of his duties follows the principles of contract law (*Franzoni*, Dei fatti illeciti, in Commentario del c. c. Scialoja Branca, IV, Delle obbligazioni, arts. 2043-2059, p. 14). As the principal has no right to claim performance by the intervener it is assumed that only the negative interest will be compensated (i. e. the interest not to suffer any damage from another's interference in one's own sphere of legal interests).

8. Under DUTCH CC the intervener's liability for a breach of his duty of care (CC art. 6:199) is derived from CC arts. 6:74 et seq., i. e. the provisions on liability for non-performance of an obligation. The extent of liability is determined according to the general rules on damages contained in CC arts. 6:95 et seq. (Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 299, p. 312-313 and nos. 310-312, p. 320-321; *Schrage*, Verbintenissen uit andere bron, no. 23, p. 16; Verbintenissenrecht [-*Scheltema*], Art. 6:199 BW, no. 3).

9. In SCOTLAND the intervener's liability for damages (which is generally acknowledged) is apparently of delictual nature (*Harloff*, Tartan & Torts, 51; Stair [-*Whitty*], vol. 15, para 90). No details as to liability for breach of the duty to inform or the duty of care are to be found in the SCANDINAVIAN jurisdictions. Both the legal basis and the extent of such liability may apparently similarly arise out of tort law.

10. In the COMMON LAW liability of the intervener for breach of the duty of care will be a matter of tort law (negligence), though a (concurrent) liability in contract law is possible in those cases of agency of necessity which are based on contract where necessity has operated to impose a duty and confer an authority to act in the unforeseen circumstances. The intervener attempting a rescue (and whose interference is justified by necessity) is only liable in tort if he makes matters worse: *East Suffolk Rivers Catchment Board v. Kent* [1941] AC 74 (no liability in negligently repairing sea will since under no duty to do so and damage no worse than if not had repaired at all), and contrast *Capital & Counties plc. v. Hampshire County Council* [1997] QB 1004 (where the fire service was liable because in negligently turning off a sprinkler system it enabled the fire to spread more quickly). The burden of proving that negligence has not increased the damage rests on the intervener: *Capital & Counties plc. v. Hampshire County Council* loc. cit. at 1034 (*Stuart-Smith* LJ). However, an assumption of responsibility on the part of the intervener may be regarded as creating an affirmative duty to act, in which case the intervener will be liable for the negligent discharge of that duty to assist: cf. *Kent v. Griffiths (No. 3)* [2001] QB 36 – where, however, there was in any case a public law duty to act.

II. Liability for others; multiple interveners

11. Under GERMAN law several interveners will be liable as joint and several debtors (CC § 427 applied correspondingly) if together they have managed the same affair for the principal (Soergel [-*Beuthien*], BGB[12], Vor § 677, no. 11; Staudinger [-*Wittmann*], BGB[13], Introd. to §§ 677 et seq., no. 58). A person who has merely acted as an assistant of the intervener, on the other hand, will naturally not be considered as a joint debtor (RGRK [-*Steffen*], BGB[12], Vor § 677, no. 103). Interveners acting

independently are debtors liable for their own share of the debts (CC § 420; *Wittmann*, loc.cit.). An example for joint liability of interveners as regards an unjustified intervention (CC § 687 (2)) may be found in BGH 30 January 1959, MDR 1959, 635 (liability of publisher and author for surrender of profits in the case of an infringement of a copyright).

12. Under GREEK law several interveners are jointly liable if they have undertaken common action for the principal (CC art. 926 (1); *Kavkas and Kavkas*, Enochiko Dikaio II, 14). Interveners who act independently will be jointly liable if (and only if) it is impossible to ascertain whose action has caused the damage (CC art. 926 (2); *Kavkas and Kavkas* loc.cit.). An intervener is liable for the acts of his assistant according to the rules of CC arts. 330 and 334 (Georgiades/Stathopoulos [-*Papanikolaou*], Art. 731, no. 1).

13. In contrast to the German and Greek Civil Codes the PORTUGUESE CC art. 467 expressly provides for the case where "two or more interveners have acted solidarily". If so they are jointly liable to the principal (CC arts. 512 et seq., 518 et seq.; *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 449, note 1 under art. 467). Under CC art. 512 (1) "a legal relationship is a solidary relationship if every debtor is liable for the entire performance and such performance discharges the debt with respect to all debtors or if each creditor may request the entire performance and such performance discharges the debtor's duty to all creditors." CC art. 524 then provides for the usual rights of recourse in a case of joint debtors.

14. Under AUSTRIAN Law it must be ascertained as a first step whether in fact several interveners have acted or whether one of the active parties has only acted as an assistant to the true intervener. An intervener will be liable for his assistant under CC § 1313a (*Meissel*, GoA, 150 et seq.). By contrast in the case of several interveners CC § 1011 is thought to apply *mutatis mutandis:* Klang (-*Stanzl*), ABGB IV/1[2], 896 CC § 1011 (collective representation). In consequence only the particular intervener who is at fault will be liable.

15. For cases involving a plurality of interveners BELGIAN and FRENCH legal literature as a general rule reject the creation of a *responsabilité solidaire*. In France this result is reached by analogous application of CC art. 1995. However a judgment holding several interveners liable *in solidum* is conceivable if the activities of the various interveners cannot be distinguished and thus their exact participation cannot be ascertained (JClCiv [-*Bout*], Art. 1372-1375, Fasc. 20 no. 33; RPDB, v° Quasi-contrat, no. 114).

16. Under SPANISH law (in contrast to the position under the law of mandate, cf. CC art. 1723) several interveners without authority will in general be jointly liable (CC art. 1890 (2)). This does not apply, however, if there were different activities which lack an inherent interrelationship (Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Díez-Picazo*], Código Civil II, 1948; *Puig Brutau*, Compendio II, 602). If the intervener assigns tasks to third parties he will nonetheless remain liable for correct performance – even though the third parties will also be liable to the principal as if they themselves were interveners (CC art. 1890 (1); *Díez-Picazo*, loc.cit. 1946). Thus the principal may choose against whom he wishes to make his demands; both the actual intervener and the agents the latter has instructed will be liable as joint debtors.

17. The ITALIAN CC does not elaborate on the liability of multiple interveners. CC art. 1716 in para (3) in the context of the law of mandate provides for joint liability in respect of multiple agents, but it is considered not to be applicable to the law of benevolent intervention (*Rescigno*, Codice civile, sub Art. 2030 CC).

18. Under DUTCH law the intervener may appoint assistants both in his own name and in the name of the principal. This will be relevant in particular if the intervener does not personally possess the expertise necessary for the execution of the measure to be undertaken. Liability for culpable acts of the appointed assistants arises in the context of the duty to continue the intervention (CC art. 6:199 (1)) from CC art. 6:76, though a reduction of liability under CC art. 6:109 is conceivable (*Verburg*, De vrijwillige zaakwaarneming, no. 66 p. 97; no. 73 p. 109; *Schoordijk*, Het algemeen gedeelte van het verbintenissenrecht naar het nieuw BW, 417-418). However, it has also been held that an intervener who for good reason leaves the entire intervention to a third party will be freed from the duty to continue the intervention. In this case the intervener is only liable if he makes a poor choice of the third party; he is not liable as such for the latter's defective execution. The third party in such cases assumes the position of the actual intervener (Verbintenissenrecht [-*Scheltema*], Art. 6:199 BW, note 2. 1).

19. No clear-cut statement of the law could be divined for SCOTTISH law. The legal position within the SCANDINAVIAN jurisdictions is likewise not free from doubts. Several tortfeasors and several contract debtors according to the different statutes will in general be jointly liable. However there is no elaboration as to whether and, if so, in which cases this general principle may also be applied to multiple interveners. In the COMMON LAW too, where necessitous intervention is in any case fragmented into the law of agency, bailment and restitution, the matter depends on the applicable regime governing liability and is not susceptible of a precise general statement.

III. Reduction of liability

20. Most legal systems afford special measures of protection against liability to the intervener. Where such rules exist they consist of a provision which either excludes liability for slight negligence in emergency situations or corresponds to V.–2:103 (Obligations after intervention) paragraph (2). Moreover, general mechanisms for reduction of liability in a case of contributory fault on the part of the person entitled to redress of course also play a role within the law of benevolent intervention.

21. GERMAN CC § 680 provides that the intervener who has acted in order to avert an imminent danger threatening the principal will only be liable for loss caused intentionally or by gross negligence. This reduction of liability only applies inter partes between the intervener and the principal. It relates to both assumption of the intervention and its execution (BGH 30 November 1971, NJW 1972, 475; BGH 16 March 1965, BGHZ 43, 188, 193; CA Hamburg 5 January 1984, VersR 1984, 758), and it modifies the standard of fault under CC § 276 which is generally applicable to claims for damages under CC § 280 (BGH 30 November 1971, NJW 1972, 475). CC § 680 extends to the principal's claims for damages arising under tort law (BGH 20 December 1966, BGHZ 46, 313, 316; BGH 23 March 1966, BGHZ 46, 140, 145). Apart from this a reduction of the intervener's liability may only be considered under the aspect of contributory negligence (CC § 254).

22. Rules corresponding to German CC § 680 may be found in ESTONIAN LOA § 1022 (2), POLISH CC art. 757 and GREEK CC art. 732. Under these provisions the intervener who acts to avert imminent danger is likewise only liable for loss caused intentionally or by gross negligence. The precondition is an immediate danger to the person or property of the principal or one of his relatives (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 732, no. 2; ErmAK [-*Sakketas*], Art. 732, no. 2). Greek CC art. 732 is thought to apply if the intervener has assumed erroneously but without gross negligence that a situation of imminent danger has arisen (*Papanikolaou*, loc.cit. no. 3; *Sakketas*, loc.cit. no. 4). CC art. 732 also has an impact on the claim arising from a tort, but it will not be applied if the intervener has acted

contrary to the principal's wishes, which he knew or, had he not been grossly negligent, would have known (*Papanikolaou*, loc.cit. nos. 4-5).

23. The drafters of the PORTUGUESE Civil Code decided not to adopt a provision corresponding to German CC § 680 (*Vieira Gomes*, Gestão de negócios, 184 et seq.). They considered the French and Italian model to be preferable (*Vaz Serra*, Gestão de negócios, 135), but did not implement it specifically in the law of benevolent intervention, adopting instead a general tort law reduction clause in CC art. 294, which is of significance to all obligations to make reparation (*Menezes Leitão*, Responsabilidade do gestor, 280-281, 290). Accordingly the duty to compensate for damages in a case of *mera culpa* may be reduced on grounds of fairness and reasonableness. Those grounds include the economic position of the participants and the presence of a situation of imminent danger. Moreover, a reduction or exclusions of liability may arise in a case of contributory negligence on the part of the principal (CC art. 570). It is likewise possible under HUNGARIAN law to apply the tort law reduction clause (CC § 339 (2)) *mutatis mutandis* within the law of benevolent intervention.

24. AUSTRIAN CC law does not contain a reduction clause for the intervener's liability to the principal to make reparation. CC § 1312 merely clarifies that a person who has rendered assistance to another in a case of emergency will not be liable merely because he has not succeeded in averting the damage. The case is otherwise only if the active party has prevented a third party who was better qualified to manage the affair from acting. Finally, CC § 1299 provides that an intervener in an emergency will not be subject to an elevated standard of care even if such care was actually required for the management of the affair.

25. FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 1374 (2) grant the judge discretion to reduce the quantum of reparation according to the circumstances which induced the intervener to intervene – a rule which is described in France as *très exceptionnelle* because it deviates from the overall principle of full restitution (*Mazeaud and Chabas*, Obligations[9], no. 687 p. 814). However, there is no explicit discussion of whether CC art. 1374 (2) relates to all types of breach of duty or whether it is restricted to the breach of the general duty of care. Only in Belgium has it been argued (*Paulus*, Zaakwaarneming, no. 69 p. 46) that CC art. 1374 (2) should apply also to claims for damages arising from the infringement of specific duties (such as the duty to render an account). A reduction clause similar to that of French law may also be found in MALTESE CC art. 1017.

26. SPANISH CC art. 1889 (2) allows the courts to reduce the amount of liability according to the circumstances of the particular case or even to reduce it to nothing (*Sánchez Jordán*, Gestión de negocios, 455). A restriction to liability for intentional conduct and gross negligence (as in all Romance legal systems) is unknown. Typical reasons for a reduction of liability are the urgent character of the necessity to intervene, the intention to avert impending damage bound up with it, as well as the difficulty to correctly assess the situation (*Sánchez Jordán*, loc.cit. 456; Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Díez-Picazo*], Código Civil II, 1947). All these aspects, however, – in contrast to the systems under Germanic influence – have no impact on the determination of the severity of fault; they are taken into consideration in the context of the assessment of the amount of damages owed (*Pasquau Liaño*, La gestión de negocios ajenos, 133; of different opinion however *Díez-Picazo*, loc.cit.). The legal notion underlying CC art. 1889 (2) is reiterated in CC art. 1103 with regard to all cases of contractual liability (*Pasquau Liaño*, loc.cit.).

27. A court under ITALIAN CC art. 2030 (2) may likewise take into account all aspects which have prompted the intervener to undertake the management of the affair and accordingly reduce the amount of damages. On the other hand, CC art. 1710 (1), under which "liability for negligence is to be judged less severely" in case of a gratuitous mandate is not applicable within the law of benevolent intervention (Cass. 4 October 1956, no. 3336, Rep. Giur. It. 1956, voce Gestione d´affari, nos. 8, 9, 12 and 13; Cass. 20 May 1953, no. 1472, Rep.Giur.it. 1953, voce Gestione d´affari, no. 5). It is, however, emphasised that the claim for damages may be reduced in a case of contributory negligence (CC art. 1227 (1)) if the principal has neglected to attend to his own affairs in an unreasonable manner (*Bianca*, Diritto civile III, Il contratto[2], 149-150).

28. As regards DUTCH law the rule is that malperformance or non-performance by the intervener of a duty set out in CC 6:199 will give rise to liability for damages under the general rules of CC arts. 6:74 et seq. The fact that the intervener has acted on another's behalf and not in pursuit of his own interests is, though, a factor which the court may take into account in the assessment of the quantum of damages and may thus lead to a reduction on equitable grounds (CC art. 6:109). This may be the case, for example, if an intervener seeks to save the life of another, but by an incautious measure contributes to that person's injury or death. The case is otherwise where an intervener within the meaning of CC art. 6:200 (2) acts in exercise of his profession or trade (M. v.A II, Parlementaire Geschiedenis VI, 449 and 793; Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 496, p. 458-459; *Schrage*, Mon. Nieuw BW, no. 23 p. 16). The Code does not provide for a special standard of care privileging an intervener. It merely leaves a scope of appreciation to the judge with regard to the assessment of the content of the duty of care in the sense of CC art. 6:199 (1) (Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 307 p. 318-319; *Schrage*, loc.cit.).

29. Since the decision in *Kolbin & Sons v. Kinnear & Co.* 1931 SC (HL) 128 the general standard of care of a reasonable person applied to his own affairs will be decisive in SCOTLAND. The particulars of the individual case are to be taken into account, which may include the fact that the intervention concerned an emergency (*Walker*, Principles of Scottish Private Law, II[4],513-514; *Leslie*, Jur.Rev. 1983, 27). The Institutional Writers intended the intervener's liability in such cases to require gross negligence (*Bell*, § 541; *Erskine*, Book III, Volume II, 53), which, judged by the practical results, hardly deviates from the current situation.

30. The solution of German CC § 680 is discussed within SWEDISH legal literature and it has been stated that a comparable solution may be reached *inter alia* by introducing into the determination of negligence the fact that an emergency situation exists (*Håstad*, Tjänster utan uppdrag, 142). As regards DENMARK *Vinding Kruse* has included a provision similar to German CC § 680 into his draft of a common civil code for the Nordic countries (*Vinding Kruse*, En nordisk lovbog, 6-14-2 p. 272 et. seq. and 599; *idem.* A Nordic Draft Code, § 1438 p. 379).

31. ENGLISH law does not address damage caused by interveners on any special basis, the supposition being that the general tort law rules of negligence take sufficient account of the particular circumstances and the difficulties faced by a rescuer: cf. *Harrison v. British Railways Board* [1981] 3 All ER 679, 686 (finding of contributory negligence on the part of a rescuer rarely appropriate). The Trustee Act 1925, s. 61, enables a court to wholly or partly relieve from liability a trustee who has "acted honestly and reasonably, and ought fairly to be excused", but this anomalous provision (which, according to the case law, is seldom satisfied) is explicable as providing

protection for a trustee in respect of (inadvertent) breach of those trust law duties which result in strict liability.

IV. Intervener without full legal capacity

32. GERMAN Law in CC § 682 provides that an intervener lacking full legal capacity will be responsible only under the provisions relating to compensation for torts. This provision has the character of a reference to the legal basis of a tort law claim, which in particular results in the application of CC arts. 827-829 (Palandt [-*Sprau*], BGB[63], § 682, no. 2). The provision does not state, however, that CC §§ 677 et seq. are only applicable to interveners who have attained full age (Soergel [-*Beuthien*], BGB[12], § 682, no. 1). A similar provision is contained in ESTONIAN LOA § 1022 (5).

33. The legal situation arising under GREEK CC art. 735 is virtually identical. Again there is a statutory reference to the legal basis of a tort law claim (Georgiades/Stathopoulos [-*Papanikolaou*], Art. 735, no. 7), which ends in CC arts. 915 et seq. (*Kavkas and Kavkas*, Enochiko Dikaio II, 23). Again CC art. 735 only concerns the question whether an intervener may be held liable; it does not touch upon the possibility of an underage intervener asserting rights provided for under CC art. 736 (*Papanikolaou*, loc.cit. no. 6).

34. In PORTUGAL the liability of an intervener lacking full legal capacity will be determined by the specific rules on tort law contained in CC arts. 488, 489 and 491 (*Almeida Costa*, Obrigações[9], 440; *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 449, note 5 under Art. 466). Under CC art. 489 (1) a person lacking full legal capacity is liable on equitable grounds but only subsidiarily, i. e. in the event that the intervener is unable to obtain compensation from the person who was obliged to take charge of the person underage. CC art. 489 (2) only imposes a duty to pay such damages as that person can economically afford without putting his own reasonable livelihood at risk. CC art. 491 effects a liability for presumed defective supervision on the part of the supervisor. The person under supervision has a right of recourse against the supervisor, which may be of value if at a later point in time the latter again comes into money. CC art. 488 (1) provides that no one "who at the instant the act was undertaken for whatever reason was unable to understand or to wilfully act" will be accountable for the consequences of a damaging act "unless he has himself culpably brought about such condition of a merely temporary nature." Under CC art. 488 (2) the absence of accountability is presumed with respect to minors under the age of seven and persons which are completely incapacitated due to mental illness. A minor is a person under the age of 18 (CC art. 122); minors between the age of 7 and 18 have limited legal capacity (CC art. 123).

35. The liability for damages of an intervener lacking full legal capacity under AUSTRIAN law is likewise restricted to his liability for tortious acts (CC § 1310) (Klang [-*Stanzl*], ABGB IV/1[2], 893). Differing opinions are held on the issue of the intention to act on another's behalf and the duty to render an account where the intervener lacks full legal capacity and the possibility of ratification by the legal representative (see further Rummel [-*Rummel*], ABGB I[3], § 1035 no. 7).

36. Under BELGIAN and FRENCH law the rules of benevolent intervention are applicable to the relationship between the intervener and the principal without restrictions, unless the one of the parties' lack of full legal capacity excludes the application of the law of benevolent intervention altogether (*Marty and Raynaud*, Les obligations. I[2]. Les sources, no. 384 p. 398-399, fn. 1; *Paulus*, Zaakwaarneming, no. 76 p. 48-49). The prevailing opinion characterises liability for damage arising as a result of a breach of duty by an intervener lacking full legal capacity as tortious in

nature (*Viney*, Introduction à la responsabilité[2], no. 191 p. 348-349; *Dalcq*, Traité de la responsabilité civile I[2], no. 116 p. 131). In the French legal system this leads to the result that the intervener lacking full legal capacity cannot rely on the defence of *absence de discernement* in order to escape (tortious) liability for an established *faute* (for references see *Flour/Aubert/Savaux*, Le fait juridique[10], no. 101 p. 98-99). By contrast, the rule under BELGIAN law is that it is impossible to assert that a person lacking full legal capacity has acted with tortious *faute* if at the material time that person lacked the ability to distinguish between good and evil (*Van Gerven*, Verbintenissenrecht II[7], 302).

37. SPANISH legal literature (provisions on this point are lacking) is locked in a controversial discussion. Many authors arrive at the conclusion that the general rules on the capacity to conclude legal transactions should be applied (Albaladejo [-*Santos Briz*], Código Civil y compilaciones forales, XXIV, 57), whereas others consider an intervention by a person lacking full legal capacity to be impossible (*Lacruz Berdejo*, Rev.Crít.Der.Inm. 1975, 254).

38. Under ITALIAN CC art. 2029 the intervener must have capacity to conclude legal transactions, whereas the ability to be accountable is sufficient in the case of merely physical acts. Where there is accountability, any liability will be tortious (CC art. 2043) (*Aru*, Gestione d´affari, 27).

39. It appears the issue of liability of an intervener lacking full legal capacity is not discussed in DUTCH law. The solution must be derived from the general rules. Most likely only a tortious liability comes into question since the application *mutatis mutandis* to the law of benevolent intervention of CC art. 3:32 (which provides that legal transactions conducted by a person lacking full legal capacity are voidable) would lead to the result that liability for non-performance of an obligation (CC art. 6:74) is excluded. On the other hand, the act of a child who has not yet turned 14 pursuant to CC art. 6:174 cannot be characterised as a tort. A child's liability for his own actions is replaced by a parental strict liability (CC art. 6:169).

40. In SCOTTISH law the liability of minors and persons under a disability apparently falls to be decided by the law of delict. Illustrative case law, however, is naturally lacking, because the personal liability of minors will as a general rule be overridden by their parents' liability in respect of supervision (see further *Walker*, The Law of Delict in Scotland, 86).

41. In SWEDISH law both an intervener lacking full legal capacity, including infants, may be subject to tortious liability if their acts are covered by liability insurance (Damages Liability Act [*skadeståndslag* (1972:207)] chap. 2 § 4). Moreover (this issue is not dealt with by legal literature) the general rules seem to be applicable. Thus tortious liability is imposed on a person lacking full legal capacity with regard to physical acts (in particular for criminal offences, see HD 22 March 1901, NJA 1901, 129) whereas juridical acts will only come into consideration if the legal representative has ratified such acts. As a general rule a person under the age of 18 will lack full legal capacity and is therefore unable to dispose of his own assets or to bind himself (Parental Code [*föräldrabalk* (1949:381) chap. 9 § 1). As regards tortious liability under FINNISH and DANISH law see the Finnish Act on Liability for Damages (*skadeståndslag*) chap. 2 § 2 and the Danish Act on Liability for Damages (*EAL*) § 24a. Insurance solutions too are of considerable importance for these countries (*von Eyben/Isager*, Lærebog i erstatningsret[5], Ch. 5).

42. In ENGLISH law a minor may be an agent or a bailee, since these arrangements do not depend on the existence of a contract; his minority will not affect his liabilities in tort (arising out of the bailment or gratuitous agency): cf. Clerk and Lindsell (-*Jones*),

Torts[18], para. 4-58. The liability of a person of unsound mind will similarly sound in tort (as to which see Clerk and Lindsell (-*Jones*), Torts[18], paras. 4-67- 4-68).

Illustration 2 is taken from Cass. civ. 3 January 1985, Bull. civ. 1985 I, no. 5 p. 4; Gaz. Pal. 1985 pan. 90, obs. *Piedelièvre*; RTD civ. 1985, 575, obs. *Mestre*; **illustration 5** from CA Mons 27 February 1995, Rev. not. b. 1996, 33; and **illustration 6** from CFI Zinnik 10 June 1992, TAgrR 1993, 202.

V.–2:103: Obligations after intervention

(1) After intervening the intervener must without undue delay report and account to the principal and hand over anything obtained as a result of the intervention.

(2) If at the time of intervening the intervener lacks full legal capacity, the obligation to hand over is subject to the defence which would be available under VII.–6:101 (Disenrichment).

(3)The remedies for non-performance in Book III, Chapter 3 apply but with the modification that any liability to pay damages or interest is subject to the qualifications in paragraphs (2) and (3) of the preceding Article.

COMMENTS

A. General

Three obligations after intervention. V.–2:102 (Reparation for damage caused by breach of duty) paragraph (1) sets out the obligations which the party acting encounters after the activity: the obligation to report, to account and to hand over anything obtained as a result of the intervention. Among these, the obligation to hand over may be the most important in the practical application of the law. The intervener's obligation to deliver up extends to everything received by managing the principal's affairs. The intervener is additionally obliged to the principal to give information and an account. The main purpose of these obligations is to support the principal's claim for surrender. The obligation to report, however, is also effective in cases where a claim for surrender is not in consideration. Its purpose is to protect the principal against loss which might occur if the principal has no knowledge of the intervention and therefore refrains from taking necessary decisions or undertakes activity which in the changed circumstances will be wrong or useless. Paragraph (2) limits the claim for surrender vis-à-vis interveners who lack full legal capacity to the enrichment which they still have in possession (see D below).

"After intervening". It will depend on the circumstances of the individual case at what point in time the management of the affair is completed. Frequently the intervention will be terminated as soon as the intervener discharges the duty to inform under V.–2:101 (Duties during intervention) with the result that the principal can take charge of matters. The obligation to inform under the present Article may coincide in such cases with the duty under V.–2:101 and may be discharged by the same act. In other cases the intervention will be completed if the dangerous situation which prompted the intervener to take action has been eliminated at least temporarily. Cessation of the intervention also occurs where the intervener decides to cease the management of the affair, whether for good reason or in breach of the duty to continue under V.–2:101(2).

"Without undue delay". All three obligations arising under the present Article have to be performed by the intervener without undue delay. It will not infrequently be the case that the intervener has no knowledge of the principal's identity and reasonable inquiry has been made to no avail; those obligations cannot be discharged before the intervener learns of the principal's identity (name and address).

Obligations and rights. The principal's rights which arise under the presetn Article may be enforced independently because their counterpart on the side of the intervener does not merely represent a duty of care or similar duties (as is the case in V.–2:101 (Duties during

intervention)) but are actual obligations. The normal remedies for non-performance of an obligation, including specific performance, are available. This however is subject to the qualifications in paragraphs (2) and (3).

B. The obligations to report and to account

The obligation to report. The intervener is obliged to make every reasonable effort to contact the principal and to give an account of the management of the affair – both after the intervention as well as during it. Thus the intervener is obliged to take the initiative. If the principal learns of the intervention, the intervener will have to provide information on request. If the intervener has not obtained any proceeds from the intervention, the obligations subsequent to the completion of the intervention will be limited to the obligation to provide information. The scope of this obligation will mirror its purpose of making the principal sufficiently aware of the situation as to be able to resume the management of the affair in question. The obligation to provide information is not dependent on the existence of a claim for delivery up; it may be, for example, that the intervener has to disclose the account books or files and allow inspection of them, but is not obliged to hand them over to the principal.

The obligation to account. The obligation to account in essence serves the purpose that the principal may obtain the information necessary to specify his claim for surrender of proceeds of the intervention. From a procedural perspective he may have to bring an action against the intervener by stages. The latter's obligation to account to the principal includes the obligation to provide an orderly and comprehensive overview of the separate expenses incurred and profits obtained which if needs be can be checked. To what extent and by what means this is to be carried out will depend on the circumstances of the case. Moreover the principal's request to account is also subject to the general reservation of the principle of good faith (III.–1:103 (Good faith and fair dealing) paragraph (1). In a case of spontaneous assistance, such as between persons living in the same house or neighbours, much less may be demanded than in the case of management without authority of another's substantial assets or business. Here, depending on the circumstances, the obligation to account may perhaps only be discharged by supplying accounts satisfying professional standards.

> *Illustration 1*
> I, the daughter-in-law of a mentally disabled elderly man who has been admitted to a psychiatric institution for that reason, takes care of her father-in-law for a period of several years. His insurance company has remitted to her account the insurance payments which were owed to him. Out of this money I has made small expenditures for her father-in-law's benefit (clean bed linen, fruit, chocolate, cigarettes, taxi fares, replacement of glasses and alarm-clocks which he regularly breaks, etc.) until the death of the latter's wife, who consented to the expenditure. On the death of the father-in-law his heirs claim surrender of the insurance payments subject to a deduction of the expenses – specified precisely. The daughter-in-law cannot provide an account for these various minor expenses which in their entirety add up to a considerable sum, the more so, as she will not have received a receipt for the majority of these purchases. It would be contrary to the principle of good faith to request an account with a detailed list of all expenses. A rough estimation will suffice.

C. The obligation to deliver up

The most important economic obligation of the intervener. The obligation to deliver up to the principal all that has been acquired as a result of the intervention is in practice the most

important obligation of the intervener. It is recognised in all jurisdictions of the European Union and follows from the nature of benevolent intervention as management of another's affairs with the intention of benefiting another. It is part of its character that the intervener may neither be enriched nor suffer a disadvantage. The intervener acts on behalf of another; as a general rule the intervener's own financial situation should not be altered either positively or negatively. Thus the obligation to hand over all proceeds of the intervention finds its counterpart in the claim for compensation for expenses incurred under V.–3:101 (Right to indemnification or reimbursement).

Illustration 2
A person who collects the rent for the absent owner of a house must deliver up the money received.

Content and extent of the obligation to surrender. The principal's right to have what has been acquired surrendered (corresponding to the obligation of the intervener to deliver up) typically relates to the payment of monies received. More often than not it concerns the collection of receivables or the proceeds from the sales of another's goods (e. g. from the forced sale of perishable goods) or other assets (management of a bank deposit or sale of stocks). However, it may also occur that the intervener is obliged to hand over specific objects or documents. An example of the former is where the intervener has purchased a thing for the principal, but not as a representative of the principal, and the latter has subsequently ratified the intervention (cf. Illustration 30 at V.–1:101 (Intervention to benefit another)); the second situation may occur where the intervener has received a debtor's bond from the creditor, who in the meantime has been paid. The intervener may offset the claim for reparation against the principal's claim to deliver up proceeds or, as the case may be, withhold delivery until such time as the principal offers payment of the compensation due to the intervener.

Illustration 3
I in the course of a benevolent intervention purchases goods at a bargain price from X for P. For this transaction I has accepted a promise of a premium from X. If P pays the purchase price to I, then I must assign the right to the premium vis-à-vis X to P and transfer ownership of the goods to P.

Interest. The intervener has to deliver up "anything" obtained as a result of the intervention. Consequently this also includes interest on the monies received. If the intervener in the course of the benevolent intervention has received money and deposited it in an interest-bearing account, the claim for delivery up encompasses the interest as well as the money because the interest was received as a result of the conduct of the principal's affairs. If, however, the intervener has not deposited the money to earn interest, the question will arise whether the failure to do so was a breach of the duty of care under V.–2:101 (Duties during intervention) paragraph (1)(a) and (b). If there is no breach (because, for example, the intervener could not reasonably risk tying up the money for a long time in a savings account, though it later emerges that the intervener was only able to discover the principal's identity some six months later), then the principal has no claim for the interest foregone. On the other hand, if the intervener employs the money for the intervener's own purposes, this enrichment is being appropriated. The intention to benefit the intervener having at this point in time exhausted itself, the interest-earning deposit is not an act pursuant to the benevolent intervention. The basis for the principal's claim in that case is not one of damages for breach of the duty of care, but rather under the law of unjustified enrichment, or, as the case may be, under the law on non-contractual liability for damage.

D. Protection of interveners without full legal capacity

Paragraph (2). Although interventions by persons who lack full legal capacity are rare, they still occur. Children and mentally disabled adults may not be capable of binding themselves by way of contract, but they may nonetheless act as benevolent interveners if they can command sufficient capacity in fact to form the intention to look after the interests of another. They therefore enjoy the full legal protection of the law of benevolent intervention; they can look not merely to the rights conferred by V.–3:101 (Right to indemnification or reimbursement), but also to the protective mechanism of paragraph (2) which circumscribes their potential liability. This group of persons is only liable to the extent they are still enriched after the intervention: they are able to invoke the defence which is available in the law of unjustified enrichment based on change of position (VII.–6:101 (Disenrichment)). However, as paragraph (2) incorporates a defence from another Book by reference, the notion of good faith to be applied in this context, where the intervener can be expected to know at the moment of intervention of the prospective obligation to hand over any benefits obtained, may require a modified construction.

Lack of full legal capacity. The prerequisites for a person to enjoy full legal capacity and the different shades of less than full legal capacity do not form the subject-matter of these model rules. The only statement which can be made in this respect is that paragraph (2) applies in any event to interventions which consist of physical acts. No statement can be made as to which conditions enable a minor, either acting alone or with the consent of a legal representative, to effect or conclude juridical acts. For the time being the text assumes that every minor may rely on the defence of change of position. This includes a minor who has acted with the consent of a parent or legal representative. It may well be the case that this principle will require re-consideration if at some future date European model rules on the liability of minors and other persons lacking full legal capacity are formulated.

NOTES

I. Obligation to inform and obligation to render an account

1. The above mentioned duties are recognised in all jurisdictions of the European Union which provide for a distinct law of benevolent intervention. Where they are not already provided for in the text of the Civil Codes themselves, they have been developed by case law and supported in legal literature.

2. GERMAN CC § 681 sentence 2 refers to the law of mandate, where the same duties may be found in CC § 666. The intervener is obliged to inform the principal of the particulars of the intervention in accordance with generally acknowledged standards and to provide an overview of what he has undertaken, even where those activities do not lead to a duty to surrender under CC § 681 in conjunction with § 667 (BGH 30 November 1989, BGHZ 109, 260, 266). The duty to give an account arises as a rule after the completion of the intervention; in a case of incomplete execution it arises immediately after termination. The duty to account includes – beyond mere information – a duty to substantiate the information by providing an orderly account of receipts and expenses. The intervener has the burden of proving the accuracy of the account and in particular the whereabouts of funds received and that he has disposed of assets in accordance with the principal's instructions or in the latter's interest (Palandt [-*Sprau*], BGB[63], § 666, nos. 2-4). HUNGARIAN CC art. 486 (1) (for details

see *Ujlaki*, Gazdaság és Jog 10/2001, 24-25), POLISH CC art. 753 (2) as well as CZECH and SLOVAKIAN CC art. 746 are based on very similar concepts.

3. Similarly, GREEK CC art. 734 imposes on the justified intervener accessory duties derived from the law of mandate. The latter provides for a duty to render an account and thereby refers impliedly to CC art. 303 (Georgiades/Stathopoulos [-*Papanikolaou*], Art. 718, no. 2). Under that provision the management of another's affair (which has since finished) must result in income or expenditure (Georgiades/Stathopoulos [-*Papanikolaou*], Art. 719, no. 2). Otherwise a duty to provide an account will not arise.

4. PORTUGUESE CC regulates the duty to provide information about the intervention undertaken in art. 465 limb d and the duty to render an account in art. 465 limb c.

5. AUSTRIAN CC § 1039 obliges the intervener to give an account just as an agent is obliged to (CC § 1012). The claim enables the principal to check the management undertaken and the expenses incurred (Rummel [-*Rummel*], ABGB I³, § 1039 no. 3). The duty to render an account applies to all types of benevolent intervention (Schwimann [-*Apathy*], ABGB V^2, §§ 1036-1040 no. 17; *Meissel*, GoA, 164 et seq., Rummel [-*Rummel*], ABGB I³, § 1039 no. 7), including merely negligent unjustified intervention in another's affairs (OGH 11 May 1976, SZ 49/63; OGH 14 October 1986, RdW 1987, 51; see, however, OGH 22 November 1994, SZ 67/207).

6. Under BELGIAN, FRENCH and LUXEMBOURG law the *obligation de rendre compte* is conceived as one of the main duties of the intervener (*Carbonnier*, Les obligations^{21}, no. 299 p. 498). It is derived from CC art. 1372 (2) and the corresponding application of the rules on the contract of *mandat* (CC art. 1993) (JClCiv [-*Bout*], Art. 1372-1375, Fasc. 20 no. 40; *RPDB*, v° Quasi-contrat, no. 61 p. 16). The intervener has to inform the principal comprehensively about the management of the affair (*le Tourneau*, Rép. Dr. Civ., Bd. VI, v° Gestion d´affaires [2002], no. 81; CA Mons 27 February 1995, Rev. not. b. 1996, 33). Furthermore, under CC art. 1993 there is an obligation on the intervener to hand over all that he has received in the course of the management (*le Tourneau*, loc.cit.). The only exception from this *obligation de rendre compte* granted to an intervener is *force majeure*; otherwise he will be liable in a case of non-performance for damages (*Bout*, loc.cit. nos. 41-42). The form in which the account is provided will be determined by the particular circumstances of the individual case; in a long-term management concerning the private affairs of another, an oral report of the separate measures taken, giving the principal the opportunity to request further particulars, may suffice (CA Mons 2 March 2004, JT 2004, 555).

7. SPANISH CC (as opposed to Ley 560 of the *Nueva Compilación* of the law of NAVARRA) likewise does not contain an explicit provision on the duty to render an account. Here again this duty has been repeatedly confirmed by the case law (*inter alia* by TS 13 June 1956, RAJ 1956 (1) no. 1948 p. 1312). The duty to provide an account applies to all persons who manage the affairs of another (whether or not on a contractual basis). The intervener has to recount the measures undertaken and to provide information in an orderly account of all receipts and expenses. Under ITALIAN law too it is undisputed that after completion of the management of the affair the intervener is subject to the duty to render an account as provided for in the law of mandate (CC art. 1713 (1)) (*Breccia*, La gestione d´affari^2, 897; Cass. 7 June 1993, no. 6358, Giust. Civ. Mass. 1993, 998).

8. DUTCH CC art. 6:199 (2) contains both a general duty of information and the duty to render an account. The intervener must provide information as soon as reasonably possible and if he has either received monies or incurred expenses he must also give

an account of these transactions (T. M. Parlementaire Geschiedenis VI, 793-794; Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 309 p. 320).

9. The *gestor*'s 'duty to account for intromissions' in SCOTLAND is considered to be self-evident (*Bell* § 541; *Stair*, Institutions, Book I, 8, 4; *Erskine*, Book III, Volume II, 52; Stair [-*Whitty*], The Laws of Scotland, vol. 15, para 132). It corresponds to the intervener's claim for reimbursement of expenditure. Where there are multiple interveners, each intervener will only have to render an account on the share which he took in the intervention (*Whitty*, loc.cit.).

10. A duty to provide an account is unknown under SWEDISH law. Under the Swedish Interest Act [*räntelag* (1975:635)] § 3 (2) (cf. on this HD 16 September 1997, NJA 1997, 612) the duty to pay default interest begins the same day as an account would have had to be provided. Legal literature argues in favour of a corresponding application of the law of mandate to the management of another's affair without authority (*Håstad*, Tjänster utan uppdrag, 57). This points to Ccom chap. 18 § 9, a rule which concerns the law of limitation and is itself a highly contentious rule (*Lindskog*, Preskription[2], 161 et seq.). According to this provision the principal's claims are subject to a one year limitation period which starts to run from the day the mandate was completed and the account rendered (for details see HD 14 September 1998, NJA 1998, 520; *Lindskog*, loc.cit. 163; *Millqvist*, JT 1998-99 p. 387-390 and *Kleineman*, Festskrift Walin, 207-225).

11. In ENGLISH LAW an equitable jurisdiction to order an agent to give an account to his principal is of long-standing: see Snell (-*Baker/Langan*), Equity[29], pp. 637-638. Even a self-appointed agent is under a duty to give an account: see, for example, *Brown v. Litton* (1711) 1 P Wms 140, 24 ER 329; 10 Mod 20, 88 ER 606.

II. The duty to surrender

12. The intervener's duty to surrender is of considerable importance. GERMAN CC provides for this duty in §§ 681 (sentence 2) and 667. The intervener has to deliver up all that he has received in the course of the intervention, including the entire profits realised (MünchKomm [-*Seiler*], BGB[3], § 681, no. 7; Staudinger [-*Wittmann*], BGB[13], § 681, no. 3; Erman [-*Ehmann*], BGB I[10], § 681, no. 3). By CC § 687 (2) the scope of application of the duty to deliver up is extended to the cases of disbursements out of profits in cases of arrogated management of another's affair, which are of particular practical relevance (for details see MünchKomm [-*Seiler*], BGB[3], § 687, nos. 10, 21). POLISH CC art. 753 (2) sets out in one breath both the duty to deliver up proceeds and the duty to render an account. ESTONIAN LOA § 1021(1) corresponds to the rule provided for in V.–2:102 (Reparation for damage caused by breach of duty) paragraph (1).

13. In GREECE it is also assumed that the intervener's duty to surrender also includes profits which he has made (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 734, no. 3). In the case of impure *negotiorum gestio*, however, the balance of interests is thought to lead to a different result: it is suggested that the intervener may keep the profit which he has brought about by his own personal expertise (*Papanikolaou* loc.cit. Art. 739, no. 10; *Kallimopoulos*, I mi gnisia dioikisi allotrion, 189).

14. Under PORTUGUESE CC art. 465 limb (e) the intervener is obliged to deliver up all that he has received from third parties in the course of the management of the *gestão* or the balance of the account. The intervener also has to surrender proceeds obtained by legal transactions he has conducted in his own name or the name of the principal. The intervener must return not only the *lucrum ex re*, but also the *lucum propter negotiationem perteptum* (*Antunes Varela*, Obrigações em Geral I[10], 464).

15. The AUSTRIAN CC does not explicitly provide for the intervener's duty to surrender. However, that duty is recognised and is derived by an analogy with the law governing the contract of mandate (CC § 1009) (Rummel [-*Rummel*], ABGB I³, § 1039 no. 4). If the intervener disputes the fact that he intended to act in another's interest, the principal's claim for surrender will be derived from the intrusion into the legal sphere of the person who has suffered damage or whose rights have been infringed. The claim for surrender in that cases arises out of unjustified enrichment (*Meissel*, GoA, 168; Rummel [-*Rummel*], ABGB I³, § 1039 nos. 4 and 7).

16. In both the FRENCH and the BELGIAN legal systems the duty to surrender is conceived as a sub-category of the duty to render an account (CC art. 1372 (2) in conjunction with art. 1993). Under this provisions the intervener is obliged to deliver up to the principal all that he has received in the course of the intervention (*le Tourneau*, Rép.Dr.Civ. VI, v° Gestion d´affaires (2002), no. 81; *Paulus*, Zaakwaarneming, no. 74 p. 47-48).

17. The SPANISH CC only provides for a duty to surrender proceeds obtained in the context of the law of mandate and not in the rules on benevolent intervention. Under CC art. 1720 the intervener is obliged to deliver up to the principal all that he has received as a consequence of the mandate, whether or not the benefits received were due to the principal. Legal literature considers it to be self-evident that this duty to surrender also applies to the regime of benevolent intervention, but to date can only rely on case law concerning the law of mandate (amongst other cases TS 19 December 1983, RAJ 1983 (3) no. 6967 p. 5355; TS 6 October 1994, RAJ 1994 (4) no. 7459 p. 9703). The duty to surrender profits is placed in the context of the duty to render an account and in part even is deduced from it (for details see *Lacruz Berdejo*, Rev.Crít.Der.Inm. 1975, 267; *Sánchez Jordán*, Gestión de negocios, 489; *Pasquau Liaño*, La gestión de negocios ajenos, 135). A distinction is drawn between the duty to return what the intervener has obtained from the principal and the duty to deliver up what the intervener has received from third parties or has been created in the course of the intervention. Both duties, some authors maintain, are intended to prevent an unjustified enrichment of the intervener (*Sánchez Jordán*, loc.cit. 489). However, the particulars are barely explained and it is an open question whether the rules of the law on the owner-possessor-relationship are to be applied to the duty to make restitution by analogy (this is supported by *Sánchez Jordán*, loc.cit. 492). A further provision which is regarded as applicable by analogy is CC art. 1730. It provides that the agent may retain the assets, which are the object of the mandate, as a security until the principal discharges his duty to compensate (*Sánchez Jordán*, loc.cit. 1730).

18. The intervener is also obliged under ITALIAN law to deliver up to the principal all he has obtained on the occasion of the intervention. If the intervention concerned the purchase of movable goods, the intervener is obliged to hand over the profit obtained (which need not necessarily match the value of the asset): see Cass. 16 February 1949, no. 255, Rep.Giur.it. 1949, voce Gestione d´affari, no. 2- 11; voce Obbligazioni e contratti no. 110. This conforms to the rule on the law of mandate in CC art. 1713.

19. Under DUTCH law the duty to deliver up is derived from the general duty of care under CC art. 6:199 (1). If the intervener takes control of assets which belong to the principal then the intervener is obliged to take care of them and to return them to the principal at the completion of the action, including any profits realised. If the intervention was unjustified the duty to surrender is not subject to a corresponding right of retention with regard to expenses incurred (Verbintenissenrecht [-*Scheltema*], Art. 6:199, no. 2. 2). More generally it may be said that the legislature considered the duty to surrender to be self-evident and has therefore not provided for further rules on

the matter. The scope of the duty to surrender falls to be determined in the particular circumstances of each individual case (MvA. II Parlementaire Geschiedenis VI, 794).

20. Similarly under SCOTTISH law the "*gestor*'s duty to surrender all fruits and profits earned from the gestio" is beyond question (*Bell*, § 541; *Stair*, Institutions, Book I, 8, 4; *Erskine*, Book III, Volume II, 52). It includes the duty to surrender interest actually obtained or which according to commercial usage could have been obtained (*Erskine* loc.cit.; Stair [-*Whitty*], The Laws of Scotland, vol. 15, para 133).

21. Under SWEDISH law it is stated (as in Spain) that the duty to render an account will also encompass a duty to deliver up what the intervener has in possession for the principal. In this respect an analogous application of the law of mandate is supported (*Håstad*, Tjänster utan uppdrag, 57). As regards his counterclaim against the principal, the intervener has at most a right of retention which operates against the principal alone and not (as under the DANISH [cf. further CFI 4 March 1959, UfR 1959, 678 and CA 28 June 1973, UfR 1973, 696] and SWEDISH Commission Act § 32 in the case of the commission agent) a right of retention by operation of law effective also against third parties (HD 19 March 1985, NJA 1985, 205; cf. amongst others *Håstad*, Sakrätt avseende lös egendom[6], 350). The same must apply to the intervener without authority (*Håstad*, loc.cit.).

22. In ENGLISH law an agent, whether authorised or merely self-appointed, is liable to surrender any profit obtained if it belongs at law or in equity to the principal or is obtained by use of property of the principal or his position and opportunities as agent (unless its retention is authorised by the principal): see, for example, *De Bussche v. Alt* (1878) 8 Ch. D 286, 304 (*Hall* VC, affirmed by CA); for an older authority more closely concerned with necessitous intervention, see *Brown v. Litton* (1711) 1 P Wms 140, 24 ER 329; 10 Mod 20, 88 ER 606, where on the death of the ship's captain in the course of a voyage a mate took it upon himself to invest money which the captain had taken with him for that purpose (notifying the widow to that effect) and was compelled to surrender the profits, subject to an allowance for his labour and skill in managing the property, his liability not being limited as he argued to a repayment plus interest. The principle even applies where the agent has entered into transaction which the principal himself could not have entered into: *Boston Deep Sea Fishing and Ice Co. v. Farnham* [1957] 1 WLR 1051, 1058 (*Harman* J); *Boardman v. Phipps* [1967] 2 AC 46 (agents of a trust making investments outside the trustees' powers). This follows from (or in cases perhaps extends) the principle that a fiduciary is not entitled to make an unauthorised profit from assets belonging to or held for the person on whose behalf the fiduciary acts: the fiduciary is liable to surrender it (less appropriate deductions for his personal contribution to the profit in the form of expertise and work). See *Hugh Stephenson & Sons Ltd. v. Carton Nagen Industrie AG* [1918] AC 239, 250 (Lord *Atkinson*) (a case concerning a partnership, but see p. 256 for explicit confirmation that the principle applies to agents). However, where the agent has a right to reimbursement from the principal, the agent will have a right of retention in the form of a possessory lien to protect that claim: *Petrinovic & Co. Ltd. v. Mission Francaise des Transports des Maritimes* (1941) 71 Lloyd's L. Rep 208, 222 (Atkinson J) and see also *Tetley & Co. v. British Trade Corp.* (1922) 10 Lloyd's L. Rep. 678 (where the claim for reimbursement of the cost of transporting the principal's goods could be set off against the proceeds of sale which the agent was otherwise liable to deliver up to the principal).

III. In particular: the duty to pay interest on monies received

23. If the intervener in the course of his intervention has collected money for the principal then in the majority of the jurisdictions he will have to pay interest on the monies if

and only if he has actually obtained that interest. GERMAN CC § 681 (sentence 2) in conjunction with § 668, however, places on a par with that case the situation where the intervener has used monies received for his own purposes (in particular: spent it) despite his duty to deliver it up to the principal or use it for the principal's purposes. The fact that the intervener has merely delayed his handing over of the money, or its application for the principal's purposes, does not by itself trigger a duty to pay interest. Moreover, the duty to pay interest as a rule depends on neither fault, delay nor the occurrence of any damage for the principal. The duty to pay interest arises from the date the intervener has used the monies for his own purpose and in a case of mixing the funds with his own monies from the time the combined monies were spent. The interest rate will be determined by CC § 246 (4%) and Ccom § 352 (5 %).

24. The legal situation in GREECE is similar. An intervener who has not himself obtained interest is only obliged to pay it if he has self-interestedly used the principal's monies for his own purposes (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 734, no. 1; *Filios*, Enochiko Dikaio I/2, 201). Only sporadically is it maintained that the intervener is also obliged to pay interest if (on the basis of general practice and the actual or presumed wishes of the principal) the omission to profitably invest the money was culpable (so ErmAK [-*Saketas*], Art. 734 no. 4).

25. PORTUGUESE CC art. 465 limb e sets out the duty to pay interest in express terms: "The intervener must surrender all that he has obtained from third parties as a result of the intervention or the balance of the corresponding accounts and in the case of money together with statutory interest from the time when the claim for surrender has fallen due." Statutory interest (CC art. 559 (1)) thus accrues from the time the delivery up should have taken place and not merely from the time the court determines the balance (*Antunes Varela*, Obrigações em Geral I^{10}, 465). A corresponding rule is provided for in POLISH CC art. 753 (2), which likewise obliges the intervener to pay statutory interest.

26. Under AUSTRIAN law the duty to surrender (which has been developed by case law to go beyond the wording of the ABGB) undisputedly also encompasses the interest actually obtained and capital gains (Schwimann [-*Apathy*], ABGB V^2, § 1009 no. 17 with further references). Although the case law mostly concerns the law of mandate (OGH 12 January 1926, SZ 8/18; OGH 11 March 1924 SZ 6/103; OGH 29 October 1952, SZ 25/286), it may arguably be inferred from OGH 26 November 1981, SZ 54/176, that the claim for surrender of proceeds in the law of benevolent intervention is limited to the surplus actually generated.

27. In FRENCH and BELGIAN law CC art. 1996 may be applied to the law of benevolent intervention by way of analogy (JClCiv (-*Bout*], Art. 1372-1375, Fasc. 20 no. 30; *Paulus*, Zaakwaarneming, no. 75 p. 48). Under this provision the *mandataire* has to pay interest on the sums which he has applied for his own benefit from the day he has made use of them. For all other amounts he will only be obliged to pay interest from the day of default. Thus interest on money which he has applied for the benefit of the principal will only accrue from the time of delay in performance, whereas interest on the money he used for his own benefit will accrue immediately (*Bout*, loc.cit.).

28. The starting point of SPANISH law is the general principle that the principal is entitled to all benefits arising from an intervention (*Pasquau Liaño*, La gestión de negocios ajenos, 162). Thus the intervener will also have to deliver up all interest he has obtained on monies collected. Legal literature in explaining this principle refers to the rules on the owner-possessor-relationship (*Sánchez Jordán*, Gestión de negocios, 492). Under CC art. 455 a possessor in bad faith must deliver up all profits and all benefits obtained which the person entitled could have acquired. This too encompasses

interest. Other authors rely for the same result on a reference to CC art. 354 (3), which provides that the owner is also entitled to the civil fruits (*Pasquau Liaño,* loc.cit. 163).

29. The rules of ITALIAN law are that the intervener has to deliver up interest actually obtained and must do so even if these are higher than the statutory interest rate; if the intervener has only kept the monies safe without investing it profitably, he is not obliged to pay interest on it; if, by contrast, he has disposed of the amounts in his own interest, statutory interest becomes due from that point of time onwards (*Aru*, Gestione d´affari, 37).

30. In DUTCH law the question of whether or not the intervener is obliged to pay interest has attracted scant attention. In the Parlamentaire Geschiedenis only the opposite situation is expressly considered, namely whether the intervener who has spent his own assets or money may also claim interest foregone (T. M. Parlementaire Geschiedenis VI, 795). The question discussed is considered as one aspect of the intervener's general duty of care regarding the monies collected. It is held that depending on the circumstances he may be obliged to invest the money profitably (*Schoordijk,* Het algemeen gedeelte van het verbintenissenrecht naar het nieuw BW, 417; Verbintenissenrecht [-*Scheltema*], art. 6:199 BW, no. 2. 2).

31. In SCOTLAND the duty to surrender profits includes interest actually gained and interest which according to commercial usage in general are achieved (*Erskine*, Book III, Volume II, 52; Stair [-*Whitty*], The Laws of Scotland, vol. 15, para 133).

32. The legal situation in the NORDIC COUNTRIES is rather difficult to ascertain. Express rules on the law of benevolent intervention are lacking. The application of the 'general principles of mandate law' which relate to the duty to render an account would lead to the result that the intervener is obliged to pay interest on the monies collected (*Lindskog*, Lagen om handelsbolag och enkla bolag. 418). A duty of the agent to pay interest, for instance, may be found in the SWEDISH Act on Floating of Timber [*lag* (1919:426) *om flottning i allmän flottled*] § 20 (3) and similarly in the Swedish Act regarding Factors [*lag* (1991:981) *om värdepappersrörelse*] chap. 3 § 5). It is considered part of the duty to account that, firstly, the sums may not be mixed with the assets of the agent and, secondly, that they must be placed in a manner which serves the interests of the principal (*Hellner*, Speciell Avtalsrätt II: Kontraktsrätt. 1. volume: Särskilda avtal[3], 209). Where the monies have been kept separate and invested with due diligence, the duty to surrender profits will be limited to the interest actually obtained. Whether or not the general principles of mandate law may be applied without restriction to benevolent intervention in another's affair has not yet been decided by case law. Arguments supporting that solution may be found in the Swedish Interest Act § 3 (2), which provides that interest is due on "a claim which is founded on the fact that an agent or another has to render an account with respect to sums he has received from the principal or from a third party" from the day that the account has been rendered or, as the case may be, ought to have been rendered. An example for this is where a person sells a thing for another and subsequently to the sale collects the purchase price for the former owner (HD 16 September 1997, NJA 1997, 612, 621, where it is expressly stated that the duty to render an account does not depend on the existence of a contract).

33. In ENGLISH LAW an agent will have to account for interest which has actually accrued if the money in his hands is regarded as belonging at law or in equity to his principal (except in so far as a right to retain interest has been agreed): see Bowstead (-*Reynolds/Graziadei*), Agency[1], Article 54. Moreover, an agent may also be liable for interest which, by prudent investment, he would have obtained if he in retaining the money improperly or failing to invest it he has committed a breach of an equitable

duty: cf. *Re Waterman's Will Trusts* [1952] 2 All ER 1054 (*Harman J*) (breach of duty as trustee); *Wallersteiner v. Moir (No. 2)* [1975] QB 373 (company director misusing company funds).

IV. Intervener without full legal capacity

34. GERMAN CC § 682 contains a particular provision for the protection of an intervener who does not possess full legal capacity. It has also been the model for V.–2:102 (Reparation for damage caused by breach of duty) of these Principles. If the intervener lacks legal capacity or is restricted in his legal capacity, then under § 682 he is only held liable according to the provisions on compensation for torts and the rules on the surrender of unjustified enrichment. However, as far as unjustified enrichment law is concerned the reference made is a reference to the legal basis of a claim (Palandt [-*Sprau*], BGB[63], § 682, no. 2). Thus the provision does not state that CC §§ 677 et seq. are only applicable to persons over the age of majority (Soergel [-*Beuthien*], BGB[12], § 682, no. 1). However, in the legal literature (there is no case law on this point) it is disputed whether CC § 682 is also applicable to legal transactions effected by an underage person if the legal representative has granted consent (or if it should only be applied to physical acts of benevolent intervention or legal transactions which lack the consent of the statutory representative), cf. MünchKomm (-*Seiler*), BGB[3], § 682, no. 2 et seq.

35. Provisions corresponding to CC § 682 may be found in ESTONIAN LOA § 1021(2) and in GREEK CC art. 735. Under these provisions the person lacking legal capacity (in the former case) and a minor (in the latter) will similarly be liable only according to the provisions of unjustified enrichment law. Again the statutory reference is confined to a reference to the legal basis of the claim (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 735, no. 7). It only relates the liability of the intervener; it does not prevent a relationship of benevolent intervention involving a person lacking full legal capacity from arising in the first place (*Papanikolaou* loc.cit. no. 1). Where the activity undertaken takes the form of the conclusion of a legal transaction, the want of legal capacity implies no benevolent intervention can subsist (*Papanikolaou* loc.cit. no. 2). The scope of application of CC art. 735 is thus restricted to purely physical acts. An intervener who is a minor is not afforded the protection of this rule if his parents have ratified the legal transaction he has conducted (*Papanikolaou* loc.cit. no. 5).

36. A provision similar to German CC § 682 is not known in the PORTUGUESE CC. Under AUSTRIAN law an intervener lacking full legal capacity is only obliged to deliver up in accordance with the provisions of unjustified enrichment law (The only point in dispute is whether the same also applies with regard to a minor's claim for reimbursement of expenditure: cf. Klang [-*Stanzl*], ABGB IV/1[2], 893.) A person lacking full legal capacity is not obliged to continue an intervention once commenced (Schwimann [-*Apathy*], ABGB V[2], § 1035 no. 4). Many further details (determination of the intention to act on another's behalf, duty to render an account, possibility of ratification by a legal representative) are a matter of dispute (for details see Rummel [-*Rummel*], ABGB I[3], § 1035 no. 7).

37. According to BELGIAN legal literature if the intervener lacks full legal capacity the benevolent intervention will be a *nullité*. The *nullité*, however, is relative: only the person lacking full legal capacity may rely on this defect. If he does so the law of benevolent intervention is rendered inapplicable with retroactive effect; it will then be supplanted by CC arts. 1310 and 1312. Thus the person lacking full legal capacity will only be liable in accordance with tort law and unjustified enrichment law. If the person lacking full legal capacity does not invoke the *nullité relative* the relationship between

him and the principal will be governed by the rules of benevolent intervention (*Paulus*, Zaakwaarneming, no. 76 p. 48-49). In FRENCH legal literature a majority opinion is that the intervener's lack of full legal capacity will only be relevant if the intervener concludes the juridical act in his own name; in the case of a mere *acte matériel* or an *acte juridique* concluded in the name of the principal the intervener's *capacité juridique* will be irrelevant (only in the latter case is it of importance that the principal has full legal capacity). A juridical act conducted in his own name may by contrast be declared void; in this case no benevolent intervention arises (*Marty and Raynaud*, Les obligations I[2]. Les sources, no. 384 p. 398-399). To the extent that intervention without authority by a person lacking full legal capacity remains possible they do not enjoy any special protection (*Marty and Raynaud*, loc.cit., fn. 1).

38. Nor does the SPANISH CC contain an explicit protection for underage interveners. Legal literature opts for the analogous application of the provisions on formation of contracts (Albaladejo [-*Santos Briz*], Código Civil y compilaciones forales, XXIV, 57). Some authors even consider an intervention by a person lacking full legal capacity to be impossible; such persons, it is argued, cannot bind themselves either by a contrat or by a quasi-contractual act (*Lacruz Berdejo,* Rev.Crít.Der.Inm. 1975, 254). An approach similar to that of V.–2:102 (Reparation for damage caused by breach of duty) paragraph (2), however, is afforded by CC art. 1304, which provides that "if the nullity (of the contract) is a result of the intervener's lack of legal capacity the person lacking legal capacity is only obliged to surrender the asset or monies he has received in so far as he is enriched." This is considered to afford sufficient protection to a person lacking full legal capacity (*Lacruz Berdejo,* loc.cit.).

39. Under ITALIAN CC art. 2029 (which on this point has a corresponding rule in MALTESE CC art. 1013) the intervener as a general rule must have the capacity to conclude contracts; as regards mere physical acts, however, accountability for one's actions is sufficient. Juridical acts concluded by a person lacking legal capacity are ineffective vis-à-vis the principal. Moreover, juridical acts concluded in his name cannot bind him in relation to third parties (Bianca, Diritto civile, Il contratto[2], 142). In the case of an intervention which benefits the principal, the law of unjustified enrichment applies; in the case of a detrimental intervention, tort law will apply (Aru, Gestione d´affari, 27).

40. DUTCH Law does also not have a special provision on the protection of minors or other interveners lacking full legal capacity. However, it is recognised that a person lacking full legal capacity can undertake as a benevolent intervention both physical acts and such legal acts as he effects in the name of the principal. Juridical acts which the person lacking legal capacity effects in his own name are voidable under CC art. 3:32 (2) (Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 304 p. 316; Verbintenissenrecht [-*Heisterkamp*], Art. 6:198 BW, no. 15).

41. Under SCOTTISH law the liability of minors and mentally disabled persons arising from quasi-contract is restricted to the surrender of an unjustified enrichment, and thus also the liability incurred by benevolent intervention (Stair [-Whitty], The Laws of Scotland, vol. 15, para 141). The NORDIC countries do not provide for specific rules on an intervener lacking full legal capacity. In ENGLISH law a minor and other persons without full capacity to contract on their own behalf may nonetheless act as an agent unless lacking sufficient mental capacity (cf. Bowstead (-*Reynolds/Graziadei*), Agency[17], article 5) and in principle may act as an agent of necessity. Even where such agency is non-contractual, an agent remains in principle subject to the duty to hand over the principal's money and to surrender any unauthorised profit. Where no agency

can be established, the intervener's liability will in any case be governed by the law of restitution (unjustified enrichment).

Illustration 1 is taken from CA Mons 2 March 2004, JT 2004, 555, and **illustration 3** from RG 14 November 1919, Das Recht 1920 no. 628.

CHAPTER 3: RIGHTS AND AUTHORITY OF INTERVENER

V.–3:101: Right to indemnification or reimbursement

The intervener has a right against the principal for indemnification or, as the case may be, reimbursement in respect of an obligation or expenditure (whether of money or other assets) in so far as reasonably incurred for the purposes of the intervention.

COMMENTS

A. Two core elements of benevolent intervention

Chapter 3 in overview. The subject-matter of Chapter 3 consists of the rights of the intervener and the authority to act in the name of the principal (V.–3:106). V.–3:102 concerns the right to remuneration of interveners who act in the course of their profession or trade, V.–3:103 concerns the right to reparation of an intervener who has suffered personal injury in the course of a dangerous intervention, V.–3:104 the reduction or exclusion of the intervener's rights for compensation and V.–3:105 the principal's right to indemnification against a third party, who is accountable for the causation of damage which the intervener has intended to avert. In practice the most important of the intervener's rights, however, seems to be the right to claim indemnification and reimbursement. These therefore are to be found at the head of the Chapter on the rights of the intervener. These rights in turn are the mirror image of the obligations of the principal. If the principal does not perform these obligations the normal remedies for non-performance under the general rules in Book III, Chapter 3 (Remedies for non-performance) will be available in so far as applicable to non-contractual obligations of the type in question.

Reimbursement and indemnification. V.–3:101 contains two core elements of the law of benevolent intervention – as understood at any rate in the continental European legal systems: the right of the intervener to reimbursement of expenditure and to indemnification of liabilities incurred. V.–3:101 thus distinguishes between the claim to reimbursement of outlays or other disbursements (reimbursement claims), on the one hand, and the claim for indemnification on the other. In this way the claim to reimbursement is flanked by a claim for indemnification. The intervener can also secure these rights in accordance with general rules by exercising a right to withhold performance: until the principal offers any reimbursement or indemnification which is due, the intervener may refuse to deliver up to the principal that which has been obtained in the course of the intervention. See III.–1:102 (Definitions) paragraph (4)(c); III.–2:104 (Order of performance) and III.–3:401 (Right to withhold performance of reciprocal obligations).

B. The right to indemnification

Indemnification. The right to an indemnification has as its operand the relief of the intervener from any liability properly incurred. Where possible, the intervener is to be saved from having to discharge the liability to a third party out of the intervener's own funds.

Illustration 1
If A, as a benevolent intervener, engages a service provider in A's own name to provide a service for C, then A has a right to expect C to settle A's liability to the

service provider directly or at least to put A in funds in order to pay the service provider what is due.

Mode of indemnification. The claim to indemnification may be satisfied by the principal in one of two ways according to the principal's election: the principal can make a direct payment to the third party (the intervener's creditor), or can put the intervener in funds sufficient to enable the intervener in turn to pay the third party. So far as possible and reasonable, the intervener must alert the principal to the existence of the debt before the intervener discharges it. If in the circumstances the intervener had to pay before the principal could have an opportunity of doing so, then the intervener of course has a claim to reimbursement of the outlay. That claim may be asserted even in the case where the intervener discharged the debt without a compelling ground to do so before the principal's election. However, if in such a case the principal suffers damage because of that, the principal can set off against the intervener's claim a corresponding claim for damages.

C. The claim for reimbursement

Reimbursement. The second remedy is a right to reimbursement. In the context of a claim to reimbursement for burdens the latter may take the form of disbursements of money or the disposal of goods of value ("expenditure (whether of money or other assets)"). A liability incurred is also a "burden", but in that case, for the period before liability is satisfied by a monetary payment, the redress which the intervener is entitled to from the principal is indemnification.

D. General requirements applicable to both claims

The intervention must be reasonable but need not be successful. The main purpose of the law of benevolent intervention in another's affairs is the protection of the intervener's performance. The intervener's rights are therefore not dependent on an "enrichment" of the principal and thus also not on whether the intervention is in the end successful. It suffices that there was a reasonable ground to attempt the venture. It may be assumed that the principal would likewise have chanced an attempt, if in a position to make a decision personally.

No restriction to situations of emergency. V.–3:101 does not differentiate between help in a case of emergency and all other manifestations of benevolent intervention. It is enough that it was reasonable to seek to advance or safeguard the principal's interests; it is not possible to draw out different degrees of lesser or greater reasonableness within this test.

Reasonable expenditure. An intervener is entitled in relation to a principal to demand the amount of a debt to a third party which the intervener incurred, otherwise than as a representative of the principal, for the purposes of the intervention. This claim to indemnification of course only touches upon the internal relationship between the intervener and the principal. Moreover, this claim is subject to the same restrictions to which the reimbursement claim is subject: the obligation incurred must have been reasonable according to its nature and extent. The claims to indemnification and reimbursement are limited to such expenditure as the acting party was entitled to consider reasonable in the situation. In this regard the matter again turns on all the circumstances of the particular case – in particular the special difficulty of forming a view and decision-making in a situation of emergency.

Illustration 2

After damage caused by a storm to the roof on the property of a neighbour Y, the benevolent intervener X, instructs a roofing contractor to repair the damage. On being asked by the roofing contractor which roof tiles are to be used, X indicates roof tiles which are considerably more expensive than those which need replacement. Even if the new roof tiles are of a better quality, the expenses incurred will be unreasonable. X may only demand the (notional) costs of roof tiles which would have matched those which were replaced. Of course it would be different if the old roof tiles are no longer obtainable on the market and X thus had no other choice than to accept the offer made by the contractor. But the expenses would also be unreasonable if under the prevailing and forecast weather conditions a provisional repair would have been possible and it had been known that the principal would soon return. In such a case the decision on a lasting solution should have been left to the principal.

Illustration 3

After a traffic accident a vehicle has to be towed away. The company instructed tows the car to a storage place which belongs to the company but is far away and where further costs are incurred. It would have been possible to bring the vehicle to the owner's place of residence. The company could have easily ascertained the address by asking the police. The costs so far as they exceed the expenses which would have been incurred had the vehicle been towed to the owner's residence are not recoverable.

Interest on expenditure. The draft does not envisage an independent claim to interest on expenditure. The reason for that is that an intervener should be entitled to receive reimbursement only for the disadvantages actually sustained by managing another's affairs and those disadvantages are already covered by the rule. The text proceeds on the footing that an intervener may obtain reimbursement of debt interest actually paid as much as for interest foregone on funds in credit in the concrete circumstances of the case, provided that the intervener can prove that this interest has actually been foregone; but the intervener is not entitled to a claim for interest foregone in the "abstract" (that is to say, by irrebutable presumption of loss). Hence also it is not necessary to lay down a rule governing the quantum of such an "abstract" claim to interest. The right to interest on expenditure from the point in time at which it is incurred is parasitic on the right to reimbursement. Hence, most obviously, the intervener is entitled to interest only on that expenditure for which there is a right to be reimbursed because it was reasonable for it to be expended; it does not apply to expenditure which was in fact incurred, but which, for the purposes of the right of reimbursement, is disallowed. However, if the principal delays in paying over the amount of any reimbursement or indemnification after payment has become due, then interest on the amount outstanding would be payable in accordance with the normal rules (III.–3:708 (Interest on late payments).

Illustration 4

The roof of X's historic mansion is severely damaged in a storm while X is on a yacht somewhere in the Atlantic ocean and Y, a helpful neighbour, cannot make contact. Emergency repairs to X's roof must be sensitive to the heritage of its construction (something which to Y's knowledge X sets great store by). There are also paintings and furniture in the endangered upper storey which must be moved to protect them from the elements. All of this is beyond Y's meagre budget. So Y obtains a loan from a bank at the going rate. Y is not merely entitled to reimbursement of the loan received from the bank which has been used to pay for the necessary repairs and removals. The interest which Y pays to the bank, discharging an obligation which was properly incurred in order to perform the act benefiting the principal, is also expenditure which

must be reimbursed and which is subject to interest from the time of payment. The same principle would apply in the case of a hire-purchase. However, Y would not be entitled to any interest on expenditure if the sum owed to the contractors was rather small so that Y could pay it in cash with money which would not have been paid into an interest-bearing account anyway.

Expenditure, whether of money or other assets. If the intervener has paid out money, the claim to reimbursement is in respect of this form of "expenditure." "Expenditure of other assets" encompasses by contrast all patrimonial detriments which are voluntarily sustained, but do not take the form of an outlay of money. "Expenditure" is the umbrella term for obligations incurred, outlays and other contributions. Hence, "expenditure" for the purposes of the intervener's right of reimbursement under V.–3:101 covers not only out of pocket expenses. It extends to any form of voluntary disposition out of the intervener's own patrimony responsibly devoted to the cause of the principal's benefit. Thus it will include, for example, the intervener's loss of property when this is intentionally disposed of or when the intervener voluntarily acts to cause its destruction as part of the performance in the principal's interest. (*Involuntary* damage to property may fall to be compensated under V.–3:103 (Right to reparation)).

Illustration 5
A woman who, as a benevolent intervener, employs her own motor vehicle for the benefit of another may claim not only compensation for the fuel used but also compensation for the fact that she could not otherwise make use of her car during the material time.

Services. However, "expenditure" does not extend to investment of labour, for which only professional or commercial interveners may make a claim within the limits provided for in V.–3:102 (Right to remuneration). This does not mean that the non-professional intervener can never make a claim for remuneration for labour. Such an intervener will be able to do so if it can be shown that the labour has enriched the principal and the enrichment gives rise to a claim under the law of unjustified enrichment.

Loss of income. "Expenditure" likewise excludes any claim for loss of income which the intervener sustains because of being preoccupied with the interests of the principal. That is a matter of damage and not of expenditure in this sense of an outlay or contribution.

NOTES

I. The right to indemnification

1. GERMAN CC § 257 provides that a person who is entitled to claim compensation for expenses may also claim indemnification from liabilities incurred. This rule is also applicable in the law of benevolent intervention (MünchKomm [-*Krüger*], BGB[4], § 257, no. 2). As a rule the debtor obliged to indemnify – in this case the principal – has a right to choose by which means he wants to discharge his duty to indemnify (BGH 8 October 1964, NJW 1965, 249, 251; BGH 11 April 1984, BGHZ 91, 73, 77). He may perform as a third party (CC § 267), may conclude a contract with the creditor on cancellation of the debt in favour of the debtor, may persuade him to waive his claim or agree with him that he (the principal) will assume the obligation and that the

intervener be released from the obligation (CC §§ 414, 415). The decisive factor will be that the result which the principal is bound to bring about is realised, namely the intervener's release from the obligation. This result, however, does not occur simply because the party obliged to indemnify another places the amount necessary to discharge the debt to the party claiming indemnification – in the present case the intervener – at the latter's disposal. The principal will be held not to have satisfied the claim for indemnification as long as the money paid to the intervener has not yet been used to discharge the latter's debt. This result is justified on the basis that it is not the person entitled to indemnification but rather the person obliged to indemnify who should bear the risk that the liability is not (completely) discharged, whether because other creditors seize the money or other difficulties arise. The claim for indemnification thus in general focuses exclusively on the liability incurred; the principle of restitution in kind applies (Staudinger [-*Bittner*], BGB[13], § 257, no. 7; Soergel [-*M. Wolf*], BGB[12], § 257, no. 5; Erman [-*Kuckuk*], BGB I[10], § 257, no. 2). As an exception a claim for payment (to him) by the person entitled to indemnification can be made if the claim by the third party is definitely forthcoming (RG 2 December 1911, RGZ 78, 26, 34; RG 12 January 1934, JW 1934, 685). Similar exceptions exist where the party entitled to indemnification has set a deadline (BGH 11 June 1986, NJW-RR 1987, 43), where the third party has assigned its claim to the party entitled to indemnification (BGH 20 March 1978, BGHZ 71, 167, 170) and where the party to be indemnified has been declared bankrupt (BGH 22 September 1971, BGHZ 57, 78, 81; BGH 16 September 1993, NJW 1994, 49). In such situations the claim for indemnification according to prevailing opinion is transformed into a claim for payment (*Krüger*, loc.cit. no. 4 ff; *Bittner, loc.cit.* no. 7 et seq.). However, BGH 8 October 1964, NJW 1965, 249, 251 has held that the claim for indemnification of a commission agent against the principal may also be discharged by the principal making "the purchase money available [to the agent] for the purpose of discharging the seller". According to CA Karlsruhe 11 February 1993, NJW-RR 1994, 1157, 1159 the party obliged to indemnify discharges that obligation by payment only if the party entitled has given consent. POLISH CC art. 753 (2) and ESTONIAN LOA § 1023 (1) similarly provide explicitly for the intervener's claim for indemnification.

2. Under GREEK Law the intervener's claim for compensation against the principal may also take the form of a claim for indemnification, if the intervener has incurred a liability to a third party (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 736, no. 9). (By contrast in the law of mandate the claim for indemnification is considered a specification of the claim for reimbursement of expenses: Georgiades and Stathopoulos [-*Karassis*], Art. 722, no. 3.) The indemnification will be effected either by performance of the principal to the third party or by assumption of the obligation pursuant to CC art. 471 (*Karassis*, loc.cit.).

3. Under PORTUGUESE Law the claim for indemnification arises from a synthesis of CC arts. 471, 1182 and 595 (1). The intervener who conducts legal transactions for the principal in his own name acts as a "*gestão não representative*". In such a case CC art. 471 refers to the provisions of CC arts. 1180 to 1184. The intervener is obliged to assign the rights obtained to the principal (CC art. 1181 (1)) and the principal may assert the claims which the intervener has acquired (CC art. 1181 (2)). On the other hand the principal has to assume the obligations the intervener has incurred (CC art. 1182). This assumption of liability may be effected either by a contract between the old and the new debtor and the corresponding consent of the creditor (CC art. 595 (1)(a)) or by means of a contract between the new debtor and the creditor, which does not require the consent of the old debtor (CC art. 595 (1)(b)). If the principal is unable to assume the obligation then he will have to provide the intervener with the necessary

funds to discharge the debt in advance or refund such costs (CC art. 1182). If the creditor refuses consent to the assumption of the obligation by the principal, then intervener and principal will be jointly liable to the creditor (CC art. 595(2)).

4. A claim for indemnification likewise arises under AUSTRIAN Law (Rummel [-*Rummel*] ABGB I³ § 1035 no. 2). In the commentaries – the Code is silent on this question – it is argued that an obligation incurred may constitute compensable expenditure (Klang [-*Stanzl*], ABGB IV/1², 898). This in turn would mean that the intervener has a claim for the amount due under the obligation he has incurred but not yet discharged. A right of the intervener to request payment in advance of his outlay, however, is apparently not accepted in the case law (OGH 4 June 1987, SZ 60/100 [which, however, concerns a case within the scope of CC § 1037]; Schwimann [-*Apathy*], ABGB V², § 1036-1040 no. 10).

5. FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 1375 oblige the principal to 'compensate' the intervener for obligations incurred by the latter in his own name and which therefore only bind the intervener. Thus the principal has to refund the costs incurred by the intervener who has already discharged his obligations (JClCiv [-*Bout*], Art. 1372 à 1375, Fasc. 20 no. 68). If the intervener has not yet discharged his obligations then according to French legal literature the principal has to exonerate him from his liability. To this end the principal may directly discharge the obligation or propose to the third party an assumption of obligation with the effect of releasing the intervener from his debt (which of course will only take effect if the third party agrees to the proposal) (*Bout*, loc.cit.). As regards Belgian academic analysis it is merely stated that the principal has to exonerate the intervener from the liabilities, compensate him in respect of them and release him from his obligations. The intervener may request the principal either present a receipt made out by the third party or prove that the third party has agreed to an assumption of liability (*De Page*, Droit Civil Belge II³, no. 1091 p. 1153). MALTESE CC art. 1018 provides for both the intervener's right to indemnification and his right to reparation for expenses incurred.

6. Under SPANISH CC art. 1893 (1) the principal is liable to the intervener "for obligations which have been incurred in the interest of the principal". This is a consequence of the principal's duty to compensate for damages which includes a duty to exonerate the intervener from all liabilities to third parties independent of their particular legal basis (*Pasquau Liaño*, La gestión de negocios ajenos, 154). If the intervener acts in his own name then of course the principal is only obliged vis-à-vis the intervener (*Pasquau Liaño*, loc.cit. 155). A third party in this case may not assert a claim directly against the principal (*Sánchez Jordán*, Gestión de negocios, 615; TS 9 February 1957, RAJ 1957 no. 701 p. 448).

7. Subject to the condition that the intervention has been commenced profitably ITALIAN CC art. 2031 imposes the duty on the principal to discharge the obligations the intervener has incurred in the principal's name and to indemnify the intervener for all liabilities incurred to which the intervener has committed himself. In the latter case the principal will have to provide such funds to the intervener as are necessary in order that all liabilities can be discharged (*Bianca*, Diritto civile, 3, Il contratto², 150).

8. Under DUTCH Law the intervener may likewise act in his own name or in the name of the principal (CC arts. 6:198 and 6:201). The intervener will most likely choose the first alternative, so it is said, in a case of minor outlay or if his contract partner insists on concluding the contract with the intervener and not with a principal he does not know. (Asser [-*Hartkamp*], Verbintenissenrecht III¹⁰, no. 305, p. 317). The new CC no longer expressly provides for a right to indemnification. (By contrast CC art. 1393 in force until the end of 1991 did provide such rule, though details were disputed.) The

current CC art. 6:200 (1) obliges the principal to compensate the intervener for 'damage' sustained, whereby the term 'damage' covers both expenses sustained and the outlays which he has incurred. Whether or not incurring an obligation may in itself be regarded as 'damage' for these purposes seems to be unresolved.

9. SCOTTISH law obliges the principal to discharge the intervener from all obligations which the latter has incurred in the course of the intervention (*Bell*, § 541; *Erkine*, Volume II, 52; Stair [-*Whitty*], The Laws of Scotland, XV, para 127). In SCANDINAVIAN legal literature the question of a right to indemnification has not been discussed in the context of benevolent intervention. In the context of the law of mandate the rule is that the principal will only be obliged to make advance payment if this has been contractually agreed or is to be inferred in the circumstances (*Hellner*, Speciell Avtalsrätt. II (1): Kontraktsrätt. Särskilda avtal[3], 211). For some specific areas, such as insolvency law, there are particular provisions on the right to request advance payment. However, a general right to indemnification is apparently unknown in Nordic patrimonial law.

10. The COMMON LAW likewise recognises a right on the part of an agent of necessity to call upon the principal to discharge an obligation which, by virtue of the authority conferred by the necessitous situation, the agent has incurred to a third party: cf. *Stoljar*, Agency, 155. Where he has control of the principal's property, he may have a lien over or a right to recoup from that property: cf. *Selby v. Jackson* (1843) 6 Beav 192 at 202-203, 49 ER 799 at 803 (Lord *Langdale* MR). Of course, where the agent has concluded the contract in the principal's name, the principal is bound directly to the third party: see, for instance, *Gunn v. Roberts* (1873-74) LR 9 CP 331, 335 (*Brett* J: obligation to pay for supplies or repay money advanced). An equitable right to indemnification, even if the intervener is not formally a trustee, exists in favour of a person who with good cause takes upon himself the management of the property of a person who is incapable of making decisions for themselves: cf. *Selby v. Jackson*, loc. cit. at 202-203 (803) (Lord *Langdale* MR), affirmed (1844) unreported (Lord *Lyndhurst* LC). By statute (when it comes into force) an intervener acting in connection with the care or treatment of a person who is reasonably believed to lack capacity, reasonably believing it to be in that person's best interests to act, and incurring expenditure as a result will have a right under English law to reimburse himself from money in that person's possession or be otherwise indemnified: Mental Capacity Act 2005, s. 8(2).

II. Claim for reimbursement

11. The claim for reimbursement is less problematic in all jurisdictions. GERMAN CC provides for a claim in §§ 683, 677, 670, according to which the justified intervener may demand reimbursement of his expenditure like an agent. Expenditure within the meaning of CC § 670 encompasses the voluntary sacrifice of valuable assets (BGH 10 November 1988, NJW 1989, 1284, 1285; Soergel [-*Beuthien*], BGB[12], § 670, no. 2). Expenses need not necessarily take the form of disbursement of money. They may also be of a legal nature (e. g. incurring an obligation: BGH 23 February 1981, NJW 1981, 1502, 1503) or physical (e. g. excessive overuse of a thing) (*Beuthien* loc.cit. 2). Only expenditure which the intervener was entitled to regard as necessary is compensable, but the matter will not depend on whether or not it was (in the end) beneficial (BGH 12 July 1993, NJW-RR 1994, 87). The principal has to bear the risk of expenditure where the outcome is not a success (Staudinger [-*Wittmann*], BGB[13], § 670, no. 2). Under CC §§ 256 and 246 the principal is obliged to pay 4% interest on the intervener's expenditure from the point in time the intervener incurred it; default is not a requirement.

12. Under ESTONIAN LOA § 1023 (1) and GREEK CC art. 736 too the intervener enjoys a claim, like an agent under the law of mandate, to compensation for expenditure which he properly held to be necessary; this will not depend on whether or not the intervention has turned out to be successful (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 736, no. 2). Thus expenditure without success is compensable if the intervener was entitled to regard them as reasonable in view of the aim to which he aspired. The claim encompasses statutory interest form the point in time the expenditure is incurred (CC art. 301; for details see also CA Thessaloniki 1139/1992, Arm 46/1992, 712). The claim for reimbursement is independent of whether the intervener has invested his own money or has merely managed another's funds (A. P. 580/1953, NoB 2/1954, 168).

13. PORTUGUESE CC art. 468 (1) obliges the principal to reimburse necessary expenditure which an intervener has incurred in the course of a lawful act, including interest thereon from the day the expenditure was incurred. According to the wording of the provision all expenses are compensable "which the intervener held to be necessary". It is not required that the expenses were indispensable (*indispensáveis*); it will suffice that for good reason the intervener considered them to be necessary (*necessárias*). Thus it is possible that the principal may be obliged to reimburse expenses which from an objective perspective have not had a beneficial impact (*Menezes Leitão*, Obrigações I[3], 497). The claim for reimbursement also arises in a case of an intervention which was originally unlawful but has subsequently been ratified by the principal (CC art. 469 in conjunction with CC art. 468 (1)).

14. Under AUSTRIAN law the intervener's claim for reimbursement of expenditure will be allowed in a case of intervention in an emergency (CC § 1036) as in a case of beneficial intervention within the meaning of CC § 1037, together with interest (OGH 5 March 1963 EvBl 1963/309). In the case of CC § 1036 necessary and purposive expenditure must be reimbursed, even if the intervention has proved unsuccessful. Whether expenditure was necessary and purposive will be determined by means of an objective test according to the presumed view of a diligent third party who is hypothetically placed in the intervener's shoes at the material time of action (Schwimann [-*Apathy*], ABGB V[2], § 1036-1040 no. 11; Rummel [-*Rummel*], ABGB I[3], § 1036 no. 3; *Koziol and Welser*, Grundriss II[12], 365; *Meissel*, GoA, 170). As regards the rescue of things, besides the reimbursement of expenditure the intervener may also claim under CC § 403 a reward in the maximum amount of 10 % of the value of the asset secured, though this claim is almost irrelevant in practice (*Rummel*, loc.cit. no. 5, *Meissel*, loc.cit. 39). In cases within the scope of CC § 1037 a claim for reimbursement of expenditure is only granted if a clear and predominant benefit of the principal was achieved. CC § 1037 resembles an unjustified enrichment claim (*Meissel*, loc.cit. 14, 172). The intervener bears the risk that the intervention remains unsuccessful; in addition he has to prove the benefit achieved (*Apathy* loc.cit. no. 12). POLISH CC arts. 754, 755 and 757 similarly draw a distinction in relation to the requirements for reimbursement of expenditure between the different emanations of benevolent intervention and in particular between prevention of damage in a case of emergency and an act which was not based on "compelling necessity" (CC art. 755).

15. BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1375 oblige the principal to reimburse to the intervener all expenses which were useful or necessary; the intervener should not have to shoulder disadvantages arising from his altruistic intervention (JClCiv [-*Bout*], Art. 1372 à 1375, Fasc. 20 no. 51). Expenses are necessary if they serve the 'preservation of the affair'; they are useful if they serve its 'improvement' (JClCiv [-*Bout*], Art. 1372 à 1375, Fasc. 20 no. 52); the category of useful expenses encompasses necessary expenses (*Bout*, loc.cit.; *Paulus*, Zaakwaarneming no. 83

p. 51). In FRANCE too expenses are compensable although they have proved to be useless (Cass. req. 28 February 1910, D. 1911, I, 137, note *Dupuich*), whereas in BELGIUM such expenses are apparently not covered (*Paulus*, loc.cit.; *RPDB*, v° Quasi-contrat, no. 74). In French legal literature it is asserted that only expenses actually incurred are compensable. An intervener who discharges a debt by transfer of negotiable instruments which at the time of transfer have a market value below their nominal value may only claim reimbursement of the market value (*Bout*, loc.cit. no. 55). In both countries by means of analogous application of CC art. 2001 the courts grant the intervener a claim for interest on the funds disbursed (Cass. civ. 12 June 1979, Bull. civ. 1979, I, no. 173 p. 140; D. 1979 IR 539; Defrénois 1980, art. 32421, p. 1215, obs. *Aubert*; CA Brussel 7 February 1964, Pas. belge 1965, II, 70). The interest rate is that of statutory interest (*Malaurie/Aynès/Stoffel-Munck*, Droit civil. Les obligations, no. 1033 p. 537).

16. Under SPANISH CC art. 1893 the principal is obliged to reimburse the intervener for necessary and useful expenses. There does not seem to be case law elaborating on what expenses are considered to be necessary and useful. Academic commentaries refer to the corresponding terminology to be found in the law of possession in CC arts. 453 and 454 (Paz-Ares/Diez-Picazo/Bercovitz/Salvador [-*Lasarte*], Código Civil II, 1951). From this it follows that payment for the reasonable preservation and storage of goods are compensable as are costs which have served in a suitable manner to improve or increase the value of an asset (Paz-Ares/Diez-Picazo/Bercovitz/Salvador [-*Miquel González*], Código Civil I, 452-453).

17. ITALIAN CC art. 2031 provides *inter alia* that the principal has to reimburse the intervener for all necessary or useful expenditure (together with statutory interest form the day the expenditure was incurred). The intervener's claim for reimbursement of expenses is secured by means of a right of retention (*Aru*, Gestione d´affari, 54). This claim for reimbursement goes beyond the claim arising from the law of unjustified enrichment under CC art. 2041. Usefulness and necessity of the expenditure are assessed according to the standard of a *bonus paterfamilias*. The principal's obligation is a 'real value' obligation because it imposes a duty to compensate (*Breccia*, La gestione d´affari[2], 898).

18. Under DUTCH CC art. 6:200 (1) the principal is obliged to compensate the intervener for any damage which the latter has sustained in managing the principal's affair if the intervener has attended to the principal's interests properly. The concept of 'damage' (which must be interpreted in a wide sense) encompasses costs and expenses as well as the value of spent goods and interest foregone. In contrast to the law of unjustified enrichment it is not a requirement that the principal has obtained any real benefit. It will suffice that the intervention has been undertaken properly, i. e. that the intervener was entitled to assume that the expenses would contribute to the principal's benefit. The extent of the damage will be assessed according to the general rules of CC arts. 6:95 et seq. (T. M. Parlementaire Geschiedenis VI, 795; Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 311, p. 320-321).

19. The justified intervener is likewise granted a claim for reimbursement of expenditure against the principal under SCOTTISH law. This claim will cover all necessary useful expenditure, which the intervener has incurred in the course of the intervention. The intervener is also entitled to interest on his outlay on a commercial basis (*Bell*, § 541; *Erskine*, Book III, Vol. II, 52; Stair [-*Whitty*], The Laws of Scotland, XV, para 126).

20. The intervener's claim for reimbursement in general is also acknowledged in the NORDIC countries even though there is hardly any case law on this issue (for an extraordinary case see Danish HD 24 May 1937, UfR 1937, 697: reimbursement of

postal charges of 70 øre). Whether the claim for reimbursement includes a claim for interest cannot be stated beyond doubt because in the cases already decided only interest payable from commencement of proceedings has apparently been claimed (interest as from service of process) (Danish HD 3 December 1936, UfR 1937, 357; 26 October 1906, UfR 1907, 54). Swedish HD 29 March 1978, NJA 1978, 144 concerned a claim for recourse in respect of child maintenance (governed by superseded family law rules) between the husband of the mother and the biological father; interest was granted from the time of service of process in respect of the claim and not from the time the judgment declaring fatherhood (out of wedlock) became res iudicata. Whether or not a general principle may be inferred from this judgment, however, has yet to be resolved.

21. In ENGLISH law too a person who acts as agent of necessity and reasonably incurs expenses has a right to reimbursement: *Gaudet v. Brown* (1873-74) LR 5 PC 134, 165 (Sir *Montague Smith*, for the PC); *Petrinovic & Co. Ltd. v. Mission Francaise des Transports des Maritimes* (1941) 71 Lloyd's L. Rep 208, 222 (*Atkinson* J); *China Pacific SA v. Food Corp. of India (The Winson)* [1982] AC 939, 965D-F (Lord *Simon*). Thus a carrier of an animal who is forced to provide it with food and shelter because it is not collected at its destination will have a claim for reimbursement of the costs: *Great Northern Railway Co. v. Swaffield* (1874) LR 9 Ex. 132. The right to reimbursement extends to the costs of contacting the principal in order to ascertain his instructions: see *Pocahontas Fuel Co. Inc. v. Ambatielos* (1922) 10 Lloyd's L. Rep 188, 156 (*McCardie* J), and contrast the earlier position impliedly stated by Sir *Robert Phillimore* in *The St. Lawrence* (1879-80) 5 PD 250, 253. The right to reimbursement of expenses reasonably incurred is a manifestation of a broader principle applicable to all agents acting within the scope of their authority: *Leigh v. Dickeson* (1884-85) 15 QBD 60, 64 (*Brett* MR: "If a person is employed in a business which requires an expenditure in order that it may be carried on, […] the principal must indemnify his agent for the expenditure which he incurs"), and see also *Fridman*, Agency[5], 47, and specifically in relation to the claim in equity of fiduciary agents *Wallersteiner v. Moir (No. 2)* [1975] QB 373, 391G-H (Lord *Denning* MR), 403F (*Buckley* LJ) and 407B-C (*Scarman* LJ). This holds even if the agent has acted in error and the intervention has not resulted in benefit to the principal, provided the measure taken was reasonable and justified in the circumstances: *Tetley & Co. v. British Trade Corp.* (1922) 10 Lloyd's L. Rep. 678; *John Koch Ltd. v. C. & H. Products Ltd.* [1956] 2 Lloyd's Rep 59). Where the agent is also liable to surrender to the principal benefits obtained as a result of the agency, the agent will have a right of retention in the form of a possessory lien to protect his claim to reimbursement: see Chapter 2, Art. 2:102, Notes I, 22. The main difficulty, however, is that a right to reimbursement or recompense in cases of necessitous intervention outside the recognised categories of agency of necessity is not wholeheartedly assured by the existing case law. According to one *dictum* even a person who procures medical assistance for an unconscious person found lying in the street (e.g., by driving them to hospital) has apparently no common law right to reimbursement for the expenses incurred (*Schneider v. Eisovitch* [1960] 2 QB 430, 438 (*Paull* J)), though a clearer case of supply of a necessary to a person incapable of contracting for themselves could hardly be envisaged.

Illustration 2 is taken from *Paulus*, Zaakwaarneming no. 83 p. 51; **illustration 3** from OGH 21 April 1982, JBl 1984, 256; **illustration 5** from BGH 15 December 1975, BGHZ 65, 384.

V.–3:102: Right to remuneration

(1) The intervener has a right to remuneration in so far as the intervention is reasonable and undertaken in the course of the intervener's profession or trade.

(2) The remuneration due is the amount, so far as reasonable, which is ordinarily paid at the time and place of intervention in order to obtain a performance of the kind undertaken. If there is no such amount a reasonable remuneration is due.

COMMENTS

A. Remuneration of professionals (paragraph (1))

Should there be a right to remuneration? Paragraph (1) confers on persons who intervene in the course of their profession or trade a claim to remuneration. That they should have such a claim is by no means self-evident. The substantive appropriateness of such a rule, which can be found in many, but certainly not all, legal systems of the European Union, can indeed be disputed in terms of legal policy. Is it at all possible to maintain that someone who demands remuneration for the action predominantly advances another's interests? Is it not a contradiction of the "spirit" of the law of benevolent intervention in another's affairs to allow a claim to remuneration? And why should a lay person not have the same rights as someone who undertakes the intervention in the course of a trade or profession?

Underlying policy considerations of the rule. The first question can doubtless be answered affirmatively. All that the intervener has to demonstrate is that the conditions of V.–1:101 (Intervention to benefit another) are met. A doctor helping someone who lies unconscious or a breakdown recovery service salvaging a car which has been involved in an accident and whose owner has already been admitted to hospital are capable of acting predominantly with the intention of helping the person concerned. That they ultimately submit a bill for their service does not change their state of mind at the time of acting. The matter only becomes problematic when the active party mentally inverts the relationship between the reason for and the consequences of the action – by acting predominantly for the purposes of acquiring a right to remuneration. Such persons are not interveners and consequently are assigned to the law of unjustified enrichment (including its restrictive rules on unsolicited enrichments).

> *Illustration 1*
> X, a genealogist, earns a considerable part of his income by professionally searching for heirs. He reacts to public announcements of estates of persons who according to the knowledge of the authority in charge do not have any relatives and thus no successors. At the expiration of the time-limit indicated in the announcement the intestate estate will devolve to the state. X succeeds in tracing a relative (Y) of a deceased person and offers to disclose to Y the necessary information for a consideration of 20% of the inheritance. In order to indicate the reliability of the offer X discloses some vague information. Y declines the contract offered. However the information provided suffices to enable Y to locate the authority concerned and to accept the inheritance. Y is not indebted to X.

The claim to remuneration under paragraph (1) is thus conceived as a claim consequential on an undertaking which was *not* rendered with a view to an expected counter-performance. Such a claim, however, does not in any way contradict the spirit of the law of benevolent intervention in another's affairs.

Illustration 2
I, a professional shipping agent by means of a justified benevolent intervention in the course of an auction purchases three tank ships for P. P is obliged to pay to I the usual remuneration for such action.

Remuneration only for professionals. There are good reasons of legal policy for treating private individuals differently from persons who intervene in the course of their profession or trade. Firstly, a professional is likely to give a greater input than an amateur so that the former's performance from the perspective of the benefited party is as a rule simply more valuable than the latter's. In this respect the rule supports both core elements of benevolent intervention: the protection of the performance of the intervener and (albeit on a lower plane) the aspect of usefulness of the undertaking anticipated at the time of its commencement. Related to this is the further argument that remuneration is justified for provision of a professional level of performance as a correlative of the higher (professional) standard of care to which an intervener who acts as a professional will be implicitly subject under V.–2:101 (Duties during intervention) paragraph (1)(a) (see Comment B under that provision). Additionally the law of benevolent intervention in another's affairs aims to establish incentives for humane action. For professional providers of services the incentives to act must be more pronounced than for private individuals.

The main policy consideration. One can of course muster against the rule the fact that it may make no difference to the aspect of the intention to benefit another, which is at the same time constitutive of benevolent intervention, whether the action falls within the intervener's professional or commercial field of activity. The argument would then run that an intervener always acts "privately". However, this objection too is not convincing: an intervener who, from lack of time, expertise or ability, is not confident of being able to do what is required may naturally commission a professional to undertake it and can then pass the bill to the principal. Assuming this starting position it makes no sense to cut off an intervener who happens to be a professional from the possibility of billing for services rendered. That is probably the strongest policy consideration in favour of the rule. Furthermore, the criterion of reasonableness ensures that the intervener as a rule is only authorised to undertake provisional measures.

"Undertaken in the course of the intervener's profession or trade". Moreover, it must always be examined whether assistance is actually rendered "in the course of the intervener's profession or trade". Falling under that rubric, for example, would be a doctor who while on holiday gives aid at the hotel to a fellow guest who has fallen unconscious beside the swimming pool, but it would not cover someone who at the time of undertaking the relevant activity no longer practises the profession or has ceased to pursue the trade (for example, a doctor who has retired).

Non-profit organisations. The formula "profession or trade" includes not-for-profit organisations. If such organisations, constituted as legal persons, intervene, they will often equate to "trade" on account of the legal form which their organisation takes, irrespective of the fact that they are not orientated towards making a (distributable) profit. Where the applicable national law does not allow for that outcome, such organisations are encompassed by the expression "profession" if and to the extent that they have been formed for the purpose of rendering assistance, they have rendered that assistance to a professional standard and the intervention in question stems from their activity in that area.

Reasonableness. The claim to remuneration – just like the claims under V.–3:101 (Right to indemnification or reimbursement) – requires that the measure undertaken was reasonable according to its nature and extent. More often than not it will only be reasonable to undertake provisional measures and thus all services rendered beyond this will, if at all, only confer a claim for compensation according to the rules of unjustified enrichment. In any case no claim for remuneration will arise under the law of benevolent intervention.

B. Quantum of remuneration (paragraph (2))

The usual price. With regard to the quantum of remuneration, the basic principle is that the principal must pay for that breadth of performance which the principal, if in a position to do so, would reasonably have had to commission. To make this notion more concrete the Article takes as the fundamental benchmark the usual price at the time and place of the intervention. Where tables of fees exist (e. g. for the services of self-employed persons), these are to be adopted. In the rare case where there is no such usual price, a reasonable remuneration is payable.

"So far as reasonable". The economic activities of life are, however, so multifarious that the rule as to usual price must be subject to the general test of reasonableness. It may be that the intervener must act at a multitude of different places, but it is not sensible to ascertain an individual customary price for each of them. One can contemplate cases in which an intervener was overqualified for the performance rendered, but there was nobody else available who could have rendered it. Other cases which can be imagined include those for which no bearable expenditure would yield a local market price. In such cases the judge is left with no other choice than to make a general evaluation of all the circumstances of the particular case. Where assistance is rendered to someone who lacks full legal capacity, that may likewise be a relevant factor for the purposes of paragraph (2). Had the principal been able to conclude a contract for the assistance rendered – exceptionally so, precisely because it was aid in an emergency situation – no further considerations are required. On the other hand, had the principal not been in a position legally to conclude a contract, the case in this special situation resolves according to its nature into an unjustified enrichment claim and that must be taken into consideration in calculating the quantum of the claim.

NOTES

I. The foundation of the claim to remuneration

1. The basic rule of the law of benevolent intervention more or less everywhere is that the intervener will not be remunerated for his activity. However, there are a number of exceptions from this basic rule which exactly concern the group of persons which V.–3:102 has in view. Some of them have been developed by case law and are therefore not provided for in the wording of the Codes. As regards GERMAN law the principle (i. e. no remuneration) is inferred from the reference contained in CC § 683 to mandate law, which according to CC 662 is a gratuitous contract for services. Case law (BGH 15 December 1975, BGHZ 65, 384, 390; BGH 7 March 1989, NJW-RR 1989, 970; BGH 21 October 1999, BGHZ 143, 9, 16) and legal literature (e. g. *Medicus,* Schuldrecht II BT[12], no. 626) maintain by contrast that a right to remuneration is appropriate if the benevolent intervention is within the scope of the intervener's profession or trade, as in the case of a doctor who renders assistance to a person lying

unconscious or a breakdown recovery service which tows away a car in order to clear the road. This result is founded on an analogous application of CC § 1835 (3) under which compensable expenses of a guardian also include such services "which fall within his trade or profession", (cf. Staudinger (-*Wittmann*)[13], § 683 no. 3 and *Medicus* loc.cit.).

2. The same result is arrived at in GREECE. The intervener has a claim to remuneration if the activity undertaken as benevolent intervention belongs to his trade or profession (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 736, no. 11; *Filios*, Enochiko Dikaio I/2, 203; but taking a different view, *Kavkas and Kavkas*, Enochiko Dikaio II, 25). The *travaux preperatoire* to the Greek CC (Schedion Astikou Kodikos, II: Enochikon Dikaion, 232: doctor attending to an injured person) and the case law (CA Athens 6980/1987, EllDik 30/1989, 805) have confirmed this approach. ESTONIAN LOA § 1023 (2) has codified this concept; the rule corresponds in all its material parts with V.–3:102. HUNGARIAN CC § 486 (2) contains a reference to the law of mandate, which in CC § 478 (2) makes it clear that "the agent shall be entitled to demand remuneration even if his actions brought no results. The principal shall be entitled to reduce the remuneration or refuse to pay it if he is able to prove that success was not achieved in part or in whole for a reason for which the agent is responsible" (Official Translation, Hungarian Legal Regulations in Force in three Languages, CompLex CD HMJ, 2004).

3. PORTUGUESE CC art. 470 (1) in conjunction with CC art. 1158 (2) only provides for a right to remuneration where the intervention was undertaken in the course of a profession. The prime examples for such *gestão mista* concerns assistance rendered by lawyers (see also CCP art. 41 (1)) and doctors (*Almeida Costa*, Obrigações[9], 441). Non-professional interveners are not entitled to remuneration. This is criticised in part on policy grounds; the rule is considered to be out-dated because it should be presumed now that any service is provided in return for payment. Notwithstanding its spontaneous nature a *gestão de negócios* constitutes a provision of services (*Menezes Leitão*, Obrigações I[3], 497).

4. AUSTRIAN law on the face of the CC likewise does not grant the intervener any claim to remuneration (*v. Zeiller*, Commentar III § 1039 no. 3 p. 324). The only exception provided for may be found in CC § 403 (salvage award in a case of a successful intervention), a provision to which CC § 1036 makes reference. According to recent settled case law a claim for compensation for the loss of time will be granted if (and only if) the intervener has undertaken the intervention in the course of his profession or trade (OGH 26 November 1981, SZ 54/176; further references in RIS-Justiz RS 0019940). As a rationale for this position it is asserted that although also in the case of professional services the claim is confined as such to reimbursement of expenditure, the professional intervener has a right to compensation for loss of earnings. A loss of earnings will be presumed, which as a result leads to a claim to remuneration (Rummel [-*Rummel*], ABGB I³, § 1036 no. 4; Schwimann [-*Apathy*], ABGB V[2], § 1036-1040 no. 10) at any rate if, as in the case law, the loss of earnings is irrefutably presumed (OGH 3 October 1996, RdW 1997, 275; see further *Fötschl*, ERPL 2002, 550, 553).

5. As regards FRANCE the legal situation seems to be in a state of flux. Until recently case law has adhered to the principle of CC art. 1375, whereby the intervener only has a claim for compensation and no claim for either remuneration or fees (CA Paris 7 July 1989, Juris Data 1989-023369; Cass.civ. 15 December 1992, Bull.civ. 1992, IV, no. 415 p. 293). For costs incurred even the exact amount has to be verified; a judgment for payment of a lump sum which would result in the granting of a

remuneration is unlawful (Cass.civ. 19 February 2002, Juris Data 2002-013264). Cass. req. 10 January 1910, D. 1911, I, 370 (which affirmed a claim to remuneration) has thus long ceased to good law. On the hand, recent case law on the concept of *gestion d´affaires intéressée* must be taken into account. It is possible that Cass. civ. 18 April 2000, Bull. civ. 2000, I, no. 113 p. 76 has established that a *rémunération* for the intervener in the context of this sub-category of *gestion d´affaires* may be conceivable. The official headnote states that an undertaking which has rendered services as *gérant d´affaires* for the account of another undertaking may as a rule only claim compensation for expenditure "unless the undertaking has also acted in its own interest".

6. In BELGIUM the prevailing opinion is that the principal as a general rule is obliged to pay remuneration to the intervener. Such remuneration should not be regarded as real remuneration, but rather as a monetary compensation for the time, the knowledge and professional skills which the intervener has contributed. A remuneration is due in particular where the intervener has acted in the course of his profession (*B. H.Verb.* [-*Roodhooft*], December 2003, Hdst. V, De quasi-contracten, no. 2249).

7. SPANISH CC does not provide for a right to remuneration. The case law has even on one occasion stated that a person who requests remuneration may not even qualify as an intervener because they have no intention to benefit another (TS 15 June 1925, cited, inter alia, by *Pasquau Liaño,* La gestión de negocios ajenos, 158). Thus any claims must be based on the law of unjustified enrichment; the law of benevolent intervention does not even confer a right to remuneration on interveners who act in the course of their profession. However, this solution is almost unanimously criticised (*Lacruz Berdejo,* Rev.Crít.Der.Inm. 1975, 269; *Sánchez Jordán,* Gestión de negocios, 550; *Lete del Río,* Obligaciones II[3], 128; *Pasquau Liaño,* loc.cit. 411; *Lasarte,* Principios II[5], 309) and an effort is made to find a basis for its rectification, *inter alia* by means of reference to CC art. 1711 or an extension of the concept of damage under CC art. 1893 (Paz-Ares/Diez-Picazo/Bercovitz/Salvador [-*Lasarte*], Código Civil II, 1952). It may be that TS 23 July 1999, RAJ 1999 (4) no. 6355 p. 9958 has signalled a change in the case law. In its judgment the *Tribunal Supremo* dismissed a claim for remuneration made by an architect who had acted without authority, but it based this decision on the fact that the requirements of CC art. 1893 were not satisfied; there was no reference to the principle that a claim for remuneration is unknown in the law of benevolent intervention. (As this did not concern an emergency, it would have been a prerequisite that the intervener had made use of the plans, which was not the case.) CA Barcelona 12 February 2004, Aranzadi Civil 6/2004 no. 434 p. 832 likewise heads in this direction, as in that case the plaintiff had undertaken the bookkeeping for a condominium association without authority and a remuneration was granted for this activity.

8. Similarly the prevailing opinion in ITALY maintains that the intervener has no claim for remuneration against the principal because CC art. 1709 is not applicable in the law of benevolent intervention (*Breccia,* La gestione d´affari[2], 899). A principal who pays the intervener effects a so-called rewarding gift (CC art. 770; *Aru,* Gestione d´affari, 55). However, a right to remuneration has been granted in one case where the principal had ratified the intervention (CFI Firenze 31 May 1948, Mon.Trib. 1949, 90, cited by *Breccia,* loc.cit. 899, fn. 12).

9. Notwithstanding that a claim for damages under DUTCH CC arts. 6:95 et seq. may also include lost profits and loss of earnings (CC art. 6:96), the law of benevolent intervention only exceptionally provides for a claim to remuneration. One such exception is set out in CC art. 6:200 (2), which reads: "Where a manager of another's

affair has acted in the conduct of a business or profession, he has, to the extent that this is reasonable, the further right to be paid for his activities in accordance with the prices usually charged for such activities at the time of his management of another's affairs". A second exception may be found in the law concerning lost property (CC art. 5:10 (2)).

10. In SCOTTISH law the view has become accepted that an intervener who has acted for altruistic reasons may not claim remuneration (Stair [-*Whitty*], The Laws of Scotland, XV, para 126 with reference to the Institutional Writers, of which only *Stair* favours a claim for remuneration of services).

11. The legal position of the NORDIC countries is not easily ascertained. With regard to DANISH case law it may perhaps be inferred from HD 24 May 1937, UfR 1937, 697 that a claim to remuneration is rejected (see *Håstad*, Tjänster utan uppdrag, 70, cautiously arguing in this direction). However, it is possible that this decision was predicated by curious facts and too much may be read into it. There does not appear to be further case law in point. Within SWEDISH legal literature (again there is no case law) it is argued there is a claim to remuneration subject to the condition that the activity undertaken was not a (physical) act pure and simple or an act of friendship. Claims to remuneration may be considered in a case involving extensive measures or if the intervener acts in the course of his profession or trade (*Håstad*, loc.cit. 68 et seq.).

12. In the COMMON LAW systems a right to remuneration must ordinarily be based either on contractual agreement or a restitutionary claim such as *quantum meruit* based on unjustified enrichment. Unless provided for in a contract between them, the mere discharge of duties as an agent of necessity does not as a rule entitle the agent to remuneration from the principal. However, at any rate where the intervention has proved beneficial to the principal and the intervener is under a duty to surrender profits, Equity will make an allowance for the labour and skill which the intervener has invested if what has been done goes beyond fulfilment of basic duties: see, for instance, *Brown v. Litton* (1711) 1 P Wms 140, 24 ER 329; 10 Mod 20, 88 ER 606 (investment of deceased's money on behalf of executrix in trade). There is less than overwhelming authority in favour of a restitutionary claim to remuneration (e. g. for the value of pure services rendered) in a case of necessitous intervention, even though it is recognised that (in contrast to salvage) *quantum meruit* does not depend on the success of the venture: cf. *Aitchison v. Lohre* (1878-79) 4 App. Cas. 755 at 766-767 (Lord *Cairns* LC) and at 765 (Lord *Blackburn*, implicitly). There is a reluctance to recognise exceptions to the principle that a stranger cannot compel a person to pay for a benefit bestowed without his consent: *China Pacific SA v. Food Corp. of India (The Winson)* [1982] AC 939, 961E-F (Lord *Diplock*). In part this seems to be based on a deeply-rooted (though erroneous) assumption that any intervention by a stranger without request is a mere impertinence (cf. *Re Leslie* (1883) 23 Ch. D 552, 561 (*Fry* LJ)) – which disregards questions of necessity (though in *Pontypridd Union v. Drew* [1927] 1 KB 214 *Atkin* LJ went so far as to assert "[t]here is no principle of law which compels a man to repay expenses necessarily incurred for his benefit"). In addition there is a tendency to regard exceptions as justified only where this is needed as an encouragement to dangerous services involving a risk to the intervener's person (in contrast to the acts of someone who merely finds and safeguards another's property): cf. *Nicholson v. Chapman* (1793) 2 HBl 254 at 257, 126 ER 536 at 538 (*Eyre* LCJ). A further reason may be a false analogy with salvage: cf. *Sorrell v. Paget* [1950] 1 KB 252, 260 (*Bucknill* LJ: "salvage on land is not a recognised head of claim in the common law"), 265 (*Asquith* LJ: "slavage by land is a legal chimera"). The failure of claims raised by interveners in leading cases can, however, be explained on the basis

that the claimant was averring not a mere claim to recompense, but a right in the nature of salvage or a security right (lien or charge), though it must be conceded that generally (a) the tenor of the judgments is critical in wider terms and (b) the assumption or conclusion seems to have been also that that there was no underlying claim to support proprietary rights: see in particular *Binstead v. Buck* (1777) 2 Black W 1117, 96 ER 660 (no defence to trover in respect of dog taken into care by the defendant that he had maintained it and retained it until the costs incurred were paid because those expenses were not capable of supporting a particular common law lien); *Nicholson v. Chapman*, loc. cit. (no lien and no salvage where lost timber retrieved, though the court envisaged a possible (unsecured) personal claim); *Re Leslie*, loc. cit. (payment by husband of premiums to keep up wife's insurance policy not establishing lien in favour of former's personal representatives, where it was also assumed there would be no personal claim unless the payment was by request); The *Gas Float Whitton No. 2*. [1896] P 42; *sub nom. Wells v. Owners of the Gas Float Whitton No. 2* [1897] AC 337 (salvage does not extend to all constructions on the sea). Whatever the limitations of those authorities, they have repeatedly been regarded as laying down a wider general rule which precludes even a mere personal claim to recompense for the service rendered: *Aitchison v. Lohre*, loc. cit., 760 (Lord *Blackburn*: "No claim for remuneration from the owner is given by the Common Law to those who preserve goods on shore, unless they interfered at the request of the owner:"); *The Gas Float Whitton No. 2*, loc. cit. at 311 (*Jeune* P: "[F]or services rendered in preserving property astray [. . .] no payment is legally due."). Nonetheless, there is case law on claims to remuneration for funeral undertakers (see Chapter 1, Art. 1:102, Notes, II, 16) and solicitors and other professionals providing necessaries to persons without full legal capacity (see Chapter 1, Art. 1:101, Notes, V, 59 and Art. 1:103, Notes, V, 38). Moreover, in *White J. D. v. Troups Transport* [1976] CLY 33 (Stockton-on-Tees County Court) a business hiring out equipment had a claim for hire costs when, at the request of the police, it employed its equipment to remove the defendant's vehicle from the road under a bridge which it was blocking and so acted as the defendant's agency of necessity – though the claim was reduced because the claimant had could have employed smaller and thus cheaper equipment and the use of the excessively large and more expensive machine resulted from a failure to make precise inquiry beforehand. A claim to the value of care services may also arise where the person assisted was in need of care (which the intervener has provided) as a result of injuries for which a third party is liable in tort, conditional on the injured person making a claim against the third party in respect of those services: see Chapter 3, Art. 3:105, Notes, 1. Statutory provisions (which also apply in SCOTLAND) provide for a special regime where emergency medical treatment is given by a qualified medical practitioner or a hospital to a person injured as a result of a road traffic accident: see Road Traffic Act 1988, ss. 158-159. The claim under s. 158 falls short of being fully comparable to remuneration of an intervener along the lines of Art. 3:102 not least because (a) the remuneration is on a fixed scale without regard to the precise (extent of the) services rendered and (b) remuneration is due not from the person injured (or, where the injuries are fatal, his estate), but from the person using the vehicle causing the accident. In the case of a claim by a hospital there are further limitations confining its scope to private non-profit-making organisations: see s. 161(1). S. 157 of the Act imposes on an insurer who is liable to pay in respect of the accident a liability to pay towards expenses incurred by such a hospital (subject to maximum amounts). Though the context is undoubtedly that of compulsory insurance, this may also reflect, perhaps, an approach articulated on the bench that if there is to be a right to remuneration for services rendered in cases of this type this is best addressed by public

law or arrangement with public authorities responsible for such services in the public interest: cf. *Wells v. Owners of the Gas Float Whitton No. 2* [1897] AC 337, 349 (Lord *Macnaghten*).

II. Quantum of Remuneration

13. Provisions or case law on the quantum of remuneration are naturally only to be found in jurisdictions which provide for a claim to remuneration (under the conditions set out under I. above). As regards GERMANY remuneration is quantified as the usual remuneration (BGH 7 January 1971, NJW 1971, 609, 612; BGH 15 December 1975, BGHZ 65, 384, 390; BGH 7 March 1989, NJW-RR 1989, 970). GREEK case law refers to remuneration "which is usually owed" (CA Athens 6980/1987, EllDik 30/1989, 805). There does not appear to be reported BELGIAN (and FRENCH) case law dealing with the quantum of remuneration.

14. PORTUGUESE CC art. 470 (2) refers to the provision of mandate law in CC art. 1158 (2). According to that provision the quantum of remuneration will be determined, unless the parties have agreed otherwise, by the fees of the relevant occupational group or alternatively customs and practice, or if such benchmarks are not available then according to what is fair and reasonable.

15. The solution of V.-3:102 also corresponds with DUTCH CC art. 6:200 (2), which reads: "Where a manager of another's affair has acted in the conduct of a business or profession, he has, to the extent that this is reasonable, the further right to be paid for his activities in accordance with the prices usually charged for such activities at the time of his management of another's affairs" (translation by *Haanappel* et. al., Legislation).

Illustration 1 is taken from BGH 23 September 1999, NJW 2000, 72; OGH 3 October 1996, RdW 1997, 275 and from Cass.civ. 31 January 1995, Bull.civ. 1995, I, no. 59; **illustration 2** from CA Athens 6980/1987, EllDik 30/1989, 805.

V.–3:103: Right to reparation

An intervener who acts to protect the principal, or the principal's property or interests, against danger has a right against the principal for reparation for loss caused as a result of personal injury or property damage suffered in acting, if:

(a) the intervention created or significantly increased the risk of such injury or damage; and

(b) that risk, so far as foreseeable, was in reasonable proportion to the risk to the principal.

COMMENTS

A. The right to reparation for concomitant damage

Policy considerations. This Article is based on a simple consideration of justice. If a person undertakes an intervention to protect another person or another person's property against damage but in the course of this act himself or herself sustains damage then a decision must be made as to who is to bear such damage: the intervener or the principal. This Article, in line with the overwhelming majority of European legal systems, has decided to choose the second alternative. Only this solution corresponds to one of the main objectives of the law of benevolent intervention: the protection of the justified intervener.

Need for regulation. The Article is indispensable because V.–3:101 (Right to indemnification or reimbursement) only secures that the principal will discharge the obligations the intervener has incurred and will reimburse expenditure made. Thus V.–3:101 concerns patrimonial detriments which are voluntarily sustained by the intervener. Involuntary patrimonial detriment ("damage") does not come within the scope of the regime provided for by V.–3:101. This will be dealt with by the present Article.

Consideration of the principal's interests. The decision of general principle in favour of the intervener in some respects requires further specification. V.–3:103 subjects the claim for damages to the condition that the damage in question is a typical realisation of the risk incurred. The realisation of the general risks of life will not give rise to a claim. Additional provisions in V.–3:104 (Reduction or exclusion of intervener's rights) and V.–3:105 (Obligation of third person to indemnify or reimburse the principal) further alleviate the burden on the principal. If and to the extent that state insurance schemes or insurance schemes prescribed by law provide for compensation of the intervener this may, depending on the circumstances, operate to relieve the principal under V.–3:104(2). See the comments on that principle.

Relationship to the law on non-contractual liability for damage. V.–3:103 adds an independent concurrent right to those provided by the general rules on non-contractual liability for damage (Book VI). If the principal is also liable to the intervener under those general rules the intervener may rely on the compensation scheme which is more favourable.

B. The individual requirements of the right

A strict liability outside the general law on non-contractual liability for damage. V.–3:103 amounts to a strict liability (i. e. a liability without intention or negligence on the part of the principal) in damages to the intervener. If, by contrast, the principal's liability for damage

depended on the principal's wrongful conduct or fault, then the rule would more often than not prove to be superfluous. For in these cases the principal's liability would already arise under the provisions of the general law on non-contractual liability for damage (Book VI).

Illustration 1
A car driver is badly injured because he steers his car into a field in order to avoid a person who has suddenly rushed out in front of his car. According to the rule in V.–3:103, liability is imposed on that person, even though he might not, for some special reason, be liable under the general law on non-contractual liability for damage. The person may for instance be a cyclist who has suffered a hornet-sting and in consequence has lost control of his cycle for an instant and thus swerved into the oncoming lane.

Reparable damage. Damage which can give rise to a claim for reparation consists of injury to the person and damage to property and the damage which arises consequential on those (extending to economic as well as non-economic consequential losses). In contrast, so-called pure economic losses (meaning, here, losses which are not the consequence of bodily injury or damage to property) do not support a claim to reparation under the law of benevolent intervention in another's affairs. That is connected with the special nature of that economic damage and with the fact that fundamentally there should be no compensation for an expenditure of time (i.e. what the intervener might otherwise have earned during the time devoted to the benevolent intervention and therefore forewent in order to act). Personal injury is defined in VI.–2:201 (Personal injury and consequential loss), as is damage to property in VI.–2:206 (Loss upon infringement of property or lawful possession) paragraph (2)(b). According to the latter provision "property damage" will only cover damage to the physical integrity of a thing.

Illustration 2
If A rushes into B's burning house in order to save B, stranded in a smoke-filled bedroom, and sustains severe burns as well as ruining her clothing, B may be liable to compensate A for her personal injury, the lingering pain and discomfort associated with the damaged tissue, the loss of income while she is under treatment and recovering her health and the more trivial damage to her property. However, if A, in order to rescue B, must forego a business appointment, B will not be liable for A's economic loss consequential on the missed appointment. In order to avoid all argument about whether such items of damage are attributable to the risks generated by the benevolent intervention, pure economic losses have been removed at the outset from the protective sphere of the claim to reparation.

Damage suffered by third parties in consequence of the intervener's death. With regard to personal injury, however, liability under this provision may be as extensive as liability would have been in the law on non-contractual liability for damage in a case of liability independent of breach of duty. Hence, if the intervener has suffered a fatal injury in attempting to protect the principal, the principal will be liable to the intervener's successors and dependants in a manner analogous to the corresponding provisions in the law on non-contractual liability for damage (see VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death)).

General limits of the principal's liability. Since the liability provided for in V.–3:103 is strict (see *B* above), some further limitation to its scope seems to be appropriate in order to ensure that a just balance is struck between the conflicting interests of two innocent parties.

Protection against danger. Under the rule a claim to damages only comes into consideration if, firstly, it is a case of emergency which is in issue. There must be a damage which the intervener sustained by trying to protect the person, property or other interests of the principal "against danger". A danger is understood to exist where the situation will in all likelihood take a turn for the worse.

Illustration 3
After his graduation ceremony P, who is completely drunk, gets behind the wheel of his car. I takes away the key from P, who refuses to listen to reason, and himself gets behind the wheel. I acts to rescue P from danger. P's protest is irrelevant as he is in a state which renders him incapable of forming a legally relevant will.

Questions of causation. V.–3:103 also makes it clear that in order to make the principal liable for the realisation of a danger in the form of damage of the specified type, a particularly close causal connection is required between the intervention and the endangerment of the intervener. Not every damage which is causally connected to the act of the intervener will fall within the provision.

Damage suffered in acting. Firstly, damage must be suffered "in acting", and hence in the course of an undertaking to protect the person, property or other interests of the principal. The field of potential liability is opened up only from the point in time when the intervener commences the protective act – that is to say, the act which in fact provides protection or, were it not frustrated by nature or the intervention of third parties, would have rendered protection.

Illustration 4
In illustration 2, A is entitled to claim from B's estate for her damage even if A is unfortunately beaten back by the heat and B cannot be rescued. This point in time arises only when the intervener confronts and engages with the danger surrounding B or B's interests because an act of rendering protection is the process of eliminating the danger. Hence, if, in racing to reach B's burning house, A has rushed from her shop leaving it unlocked and it is looted in her absence or A has been knocked down by a passing vehicle while crossing the road then, quite apart from considerations of A's contributory want of care or the wrongful conduct of third parties in causing A's damage, A could not have a claim against B under this Article because such losses are not sustained "in acting" to render protection. They are losses sustained by A merely in placing herself in a position from which she is then able to render or attempt to render protection. The same is true where A trips on a loose flagstone in the path to B's house, breaks a bone and never reaches the burning front door. Any redress which A might have against B in such a case lies in the general rules on non-contractual liability for damage.

Illustration 5
For one evening and one morning I attends to the animals of his unmarried neighbour who is also a farmer and had to be taken to hospital suddenly due to a heart attack. An infectious animal disease has broken out. Without the fault of any party, since it could

not yet be known that P's animals have been infected, I transmits the virus to his own herd. The damage is a mere consequential loss and thus does not qualify as damage which I has suffered "in acting".

Created or significantly increased risk (sub-paragraph (a)). Secondly, the risk that such damage would be incurred must be "created or significantly increased" by rendering the specific protection. By contrast, all other risks will (even in the case of an emergency) fall within the ordinary hazards to which a helper is exposed.

Illustration 6
The owner of a grocer's shop sees an accident occur in the immediate vicinity of the shop and shuts the shop in order to help. (The loss of income is not a compensatable damage.) Should the grocer drive the victim to hospital and in the course of the journey a further accident occur in which the grocer's car is damaged, this damage too is only sufficiently closely bound up with the act of rendering assistance if in the circumstances it was necessary to adopt a particularly risky approach to making the journey by car.

Reasonable proportion between the danger to the principal and the risk incurred by the intervener (sub-paragraph (b)). Secondly, the intervener's right to reparation arises only if the intervener has not incurred an unreasonable risk. Ultimately this follows simply from the general principles as it cannot be in the principal's interest that the intervener assumes an unreasonable risk. In a normal case it might be unreasonable, for example, knowingly to endanger one's own life or health in order to save the property of others. This principle of proportionality may also be conceptualised in categories of causation. If a reasonable person in the circumstances would not have felt called upon to act in the manner in which the intervention was undertaken, then the risk realised should not be qualified as a consequence of the danger threatening the principal.

Illustration 7
The intervener's risk could be defined as the product of the probability of loss occurring and the extent of probable damage. If, as an example, there is a high probability (50%), that the intervener by the intervention would incur a comparably low property damage (ruining a suit which has a value of €1000) in order to preserve another's property of high value (a valuable painting or a laptop computer containing important data of which no backup copy exists), then the intervener incurs a reasonable risk even if the danger that the painting or the computer (value €10000) would be lost were comparatively low (10%).

"So far as foreseeable". The disproportionality between the danger to be prevented and the risk incurred however must have been observable for the intervener in the circumstances of the case. The risk of a reasonable but inaccurate estimation of the actual situation will again have to be borne by the principal.

Illustration 8
This may be illustrated by the example of a person entering a building in which the principal has stored dangerous substances of which the intervener could not have any knowledge and which endanger the lungs. Had the intervener known, or could reasonably be expected to have known, of the danger it would have been unreasonable to even attempt to rescue valuables in such circumstances.

Intervener's contributory fault. The contributory fault of the intervener (for example, A runs into the neighbour's burning house in highly inflammable plastic clothing) will result – in accordance with general principles – in a commensurate reduction of the quantum of the claim to reparation. It does not, as a matter of principle, lead to elimination of the claim to reparation. A complete exclusion of the claim to reparation by reason of contributory fault only comes into play if the damage is really entirely attributable to the intervener because the intervener behaved in a way which is beyond all bounds of reasonable conduct. In assessing whether the intervener is contributorily at fault, however, all the circumstances of the particular case have to be taken into account and, in particular, the fact that in a case of emergency not much time is left for consideration. In a panic situation, it cannot be expected that someone who is not specially trained to cope with such predicaments will proceed with the same care and consider the matter with the same level-headed deliberation as would be demanded in normal circumstances.

NOTES

1. The general principle of V.–3:103 is broadly established in Europe; the result it achieves is in substance, however, reached by different methodological approaches and on the basis of legal texts with markedly different wording. According to the literal terms of GERMAN CC § 670 only 'expenditure' is compensable thus excluding 'damage'. Yet case law has gone on to treat such damage as equivalent to 'expenditure' which the intervener incurs in the course of an effort to avert damage which has generated a substantial risk for himself (inter alia BGH 7 November 1960, BGHZ 33, 251, 257; BGH 27 November 1962, BGHZ 38, 270, 277; see further MünchKomm [-*Seiler*], BGB[3], § 683, no. 18 et seq.). In order to demarcate further damage which is compensable recourse is had to the notion of concomitant damage which is a typical realisation of the risk concerned. Only damage which appears to be a realisation of the typical risk of the assumed activity will be held to be compensable (*Medicus*, Bürgerliches Recht[19], no. 428; BGH 4 May 1993, NJW 1993, 2234). In cases of 'self-sacrifice' on the roads (by means of a manoeuvre a driver of a motor vehicle prevents a collision with another road user, the principal, but thereby himself sustains damage) case law recognises a claim not for full compensation but rather for a reasonable reparation (BGH 27 November 1962 loc.cit.). In a case of contributory fault by the intervener CC § 254 will be applied analogously to the claim for damages which is based on CC § 670 (Palandt [-*Heinrichs*], BGB[63], § 254, no. 6; BGH 27 November 1962, loc.cit.; *Larenz*, Schuldrecht BT II/1[13], 450). The claim for damages in a case of personal injury will also encompass non-economic losses (CC § 253). In a case of fatal injury CC §§ 844 and 845 will be applied by means of analogy (Staudinger [-*Wittmann*], BGB[13], § 683, no. 5; RG 7 May 1941, RGZ 167, 85, 89; Soergel [-*Beuthien*], BGB[12], § 683, no. 8).
2. As regards GREEK Law the starting point is more transparent as CC art. 736 explicitly provides for both a claim to compensation for expenses incurred independent of fault and a claim for damages. All damage which has been sustained during and as a result of the intervention will be compensated (ErmAK [-*Sakketas*], Art. 736 no. 12), though no compensation for pain and suffering is granted because the law of mandate does not provide for such a claim either (*Kavkas and Kavkas*, Enochikon Dikaion, 26). By contrast damage suffered by relatives will be compensated for by means of a corresponding application of CC arts. 928 and 929

(Georgiades and Stathopoulos [-*Karassis*], note under Art. 723). In a case of intervention in an emergency (CC art. 732) slight negligence on the part of the intervener will not result in a reduction of the claim (*Papanikolaou*, loc.cit. no. 7). In a case of self-sacrifice in a road traffic accident the reparation is quantified according to what is fair and reasonable (CC arts. 300 and 918) (*Papanikolaou*, loc.cit. no. 10 and Art. 730 no. 11). ESTONIAN LOA § 1025 (1) too corresponds in all material points to the rule in V.-3:103.

3. PORTUGUESE CC provides for two legal bases for a claim for compensation of a rescuer. The tort law provision of CC art. 495 (2) grants any person who (whether or not he was obliged by law) renders assistance to a person injured or fatally injured and thereby has himself sustained physical injury a claim for compensation against the person who is accountable for the injury of the primary victim (for details see *Vieira Gomes*, Gestão de negócios, 210). Derived from general principles of justice CC art. 468 (1) in addition grants a justified intervener a claim independent of fault against the principal (the primary victim) for 'losses sustained'. Where there is contributory fault on the side of the intervener, his claim will be reduced by corresponding application of CC art. 570 (*Antunes Varela*, Obrigações em Geral I[10], p. 468, fn. 2). By means of an *aprovação* of the intervention the principal acknowledges his liability for damages (CC art. 469).

4. It has been a long-standing dispute under AUSTRIAN law whether the intervener should be granted a claim for damages against the principal (*Meissel*, GoA, 185 et seq.). Recent case law grants a claim for appropriate compensation in a case of damage sustained in the course of rendering emergency assistance. This claim is characterised as a liability on grounds of equity which will be determined according to the circumstances of the individual case (OGH 24 August 1995, SZ 68/142; OGH 18 June 1997, SZ 70/113; Rummel [-*Rummel*], ABGB I³, § 1036 no. 4). CC § 1014 is not applicable either directly or by analogy because it only confers a claim on a contractual agent. The principle is instead a manifestation of the underlying ethos of appropriate compensation (CC §§ 1015, 1043 and 967). That in turn allows for a corresponding application of CC §§ 1306a, 1310 (Liability for equitable reasons without culpability).

5. FRENCH CC remains similarly silent on the question whether the intervener who has suffered damage as a consequence of his intervention may claim compensation from the principal, but case law has always recognised such a claim independent of fault, both for *dommages pécuniaires* and for personal injury (JClCiv [-*Bout*], Art. 1372 à 1375, Fasc. 20, nos. 63-64). Legal literature holds this to be founded on an analogous application of CC art. 2000 (*Flour/Aubert/Savaux*, Le fait juridique[10], no. 15 p. 17). Fault on the part of the intervener may reduce the claim or even exclude it altogether, but the matter is dealt with in generous terms for the intervener if he has taken a wrong decision in an emergency which left little time for deliberation (*Bout* loc.cit. no. 65; *le Tourneau*, Rép. Dr. Civ., VI, v° Gestion d´affaires (2002), no. 91). Likewise BELGIAN case law on principle awards the intervener a claim for compensation of damage which he has sustained in the course of his intervention (*Paulus*, Zaakwaarneming, no. 85 p. 51). No distinction is drawn between property damage and personal injury sustained by the intervener; reference is likewise made to french CC art. 2000 (*RPDB*, v° Quasi-contrat, no. 77). A distinctive feature of FRENCH law is the case law on the so-called contracts of assistance. French courts have recognised a contractual claim for damages in favour of persons who, without being obliged to, answered the request of others and rendered assistance to them. A contract between the rescuer and the person assisted arises which confers a duty on the person accepting assistance to compensate the rescuer for any personal injury suffered (leading case

Cass.civ. 27 May 1959, JCP 1959 no. 11187). This concept of a *convention* (or a *contrat*) *d´assistance* has met with opposition in legal literature (e. g. *Viney*, JCP 1998 éd. G, I. 144, no. 7, p. 1096), but case law adheres to this concept. LUXEMBOURGIAN case law has adopted the French solution (CA Luxembourg 27 June 2001, Pas. lux. 2002, 154). In BELGIUM the French approach has not been adopted (*Glansdorff* and *Legros*, RCJB 28 [1974], 82-85). Instead the rules on benevolent intervention (by which nearly the same result may be achieved) are held to be sufficient.

6. SPANISH CC art. 1893 (1) explicitly states: "[T]he principal compensates the intervener . . . for such damage, as he has sustained during the management of his task." Consequently the intervener has a claim to compensation for all damage which he has not caused himself and for which he is not legally responsible (CC art. 1729) (*Sánchez Jordán*, Gestión de negocios, 517; *Lacruz Berdejo,* Rev.Crít.Der.Inm. 1975, 267). The principal's liability is independent of fault; he will be liable in a case of accidental loss (*Sánchez Jordán*, loc.cit. 518.). Interest and earnings which are foregone qualify as compensable damage (Paz-Ares/Diez-Picazo/Bercovitz/Salvador (-*Lasarte*), Código Civil II, 1952.).

7. The legal basis of an intervener's claim for damage he has sustained is unresolved under ITALIAN law. Under the old *Codice civile* it was undisputed that such a claim existed. Currently recourse is predominantly had to the notion that damage suffered in the course of giving assistance in an emergency may be qualified as necessary or useful expenditure (*Pane*, Solidarietà sociale e gestione di affari altrui, 124-125; for the analogous application of CC art. 1720 (2) (law of mandate) in favour of an executive director of a corporate entity also Cass. 14 December 1994, no. 10680, Rep. Foro it. 1994, voce Mandato, no. 27). However, it is still a matter of dispute whether this claim can really be based on CC art. 1720 (2) (*Sirena*, Gestione di affari, 35-37).

8. DUTCH CC art.6:200 (1) imposes a duty on the principal not only to compensate the intervener for expenditure incurred, but also to compensate for damage. The quantum of this claim for damages will be determined according to CC arts. 6:95 et seq. From these provisions it follows in turn that the principal as a rule may also be liable for personal injury or as the case may be fatal injury of the intervener (Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 311 p. 320-321). The case of intervention in an emergency for the benefit of the principal may serve as an example in which compensation has been held to be appropriate (Parlamentaire Geschiedenis VI, 796). In legal literature (*Hartkamp*, loc.cit. no. 312, p. 321-322) it has however been indicated that a too generous application of the law of benevolent intervention may lead to a dysfunction with tort law – for instance, where an intervener is under age, cf. CC art. 6:164. Under CC art. 6:106, according to the circumstances of the particular case, the judge may grant an intervener who has sustained personal injury compensation for non-economic damage.

9. In SCOTLAND a claim of the *gestor* for compensation for damage sustained by him in the course of the intervention as distinct from the claim for reimbursement is not discussed.

10. As regards SWEDISH law it has been suggested that a distinction should be drawn between measures for the protection of a person and measures for the protection of property (*Håstad*, Tjänster utan uppdrag, 215). In the last mentioned case a claim for compensation should only be conferred on the intervener if the value of the asset sacrificed is significantly below the value of the property protected. If the intervener hazards the consequences of damage to his own interests, he should similarly be granted a claim for compensation subject to the condition that the loss is proportionate,

independently of whether or not the measure is successful (*Håstad* loc.cit. 164, 168 and 215). The legal consequences if the intervener has not accepted the possibility of injury to himself or damage to his property, however, are uncertain. If the intervener suffers damage in order to save the principal's person, the consequences are similarly uncertain. Theses cases ought at any rate to produce a different outcome, it is argued, because they do not in the main concern the preservation or improvement of the principal's solvency. A solution might be to compensate for minor damage involuntarily incurred and in a case of severe damage to operate on the basis of an equitable reduction of damages (*Håstad*, loc.cit. 216). Under DANISH law a separate claim for damages by the person rendering emergency assistance does not apparently exist, and a concept similar to the *contrat d´assistance* is unknown, cf. HD 2 May 1960, UfR 1960, 851: the plaintiff together with the defendant loaded tree trunks on to a lorry. The plaintiff had not properly secured the crane and in consequence suffered damage. In the course of the effort to come to the defendant's assistance the plaintiff was similarly injured. His claim based exclusively on tort law was dismissed for lack of causation.

11. In ENGLISH LAW, where there is no independent *negotiorum gestio* liability, a strict liability to compensate for loss could ordinarily only arise on the basis of contract (where the agency is contractual). Tortious liability follows ordinary principles which as a rule require negligence on the part of the principal in creating the danger tackled by the intervener in order to vest in the intervener a claim to compensation: see Clerk and Lindsell (-*Dugdale*), Torts[18], paras. 7-27–7-29. However, an extra-contractual strict liability to compensate for pecuniary loss may arise in the law of restitution – at any rate if old authority is to be relied on: see, for example, *Shallcross v. Wright* (1850) 12 Beav 558, 50 ER 1174 (Lord *Langdale* MR) where an ill person moved into a friend's home in order that he might obtain better medical treatment, but died shortly afterwards and, on account of the infectious nature of the fatal illness, the home had to be evacuated, fumigated and cleaned, and it was held that (on the basis of an 'implied contract') the home owner had a right to payment of the hotel costs for him and his family and compensation for loss of furniture which had to be burned (and consequently the executors of the deceased lawfully disposed of assets of the deceased when they made such payments).

Illustration 1 is taken from *Carmarthenshire County Council v. Lewis* [1955] AC 549 and BGH 27 November 1962, BGHZ 38, 270**; illustration 3** from BGH 30 November 1971, NJW 1972, 475.

V.–3:104: Reduction or exclusion of intervener's rights

(1) The intervener's rights are reduced or excluded in so far as the intervener at the time of acting did not want to demand indemnification, reimbursement, remuneration or reparation, as the case may be.

(2) These rights are also reduced or excluded in so far as this is fair and reasonable, having regard among other things to whether the intervener acted to protect the principal in a situation of joint danger, whether the liability of the principal would be excessive and whether the intervener could reasonably be expected to obtain appropriate redress from another.

COMMENTS

A. Acting with *animus donandi* and related cases (paragraph (1))

Legal certainty. V.–3:104(1) has been prompted by reasons of legal certainty. The provision is a clarification which is found in the same or a similar form in statutory rules on benevolent intervention and, beyond that, is a generally accepted principle. One who acts with an intention of conferring a benefit gratuitously without wishing any indemnification, reimbursement, remuneration or reparation (or with *animus donandi*, to use the older terminology) has no claim to compensation. In an individual instance it may of course be the case that the acting party has acted with *animus donandi* only with respect to particular rights and not all of them. A case in which it is particularly advisable to examine whether the intervener was looking to the principal for reimbursement of expenditure at the time of performance is where maintenance is paid to close relatives. In a case of doubt one would proceed on the footing that the intervener certainly intended to have recourse against the person obliged to provide the maintenance, but acted with a donative intent in relation to the recipients.

> *Illustration 1*
> A man and a woman cohabit for three years without being married. During this period the woman has improved the apartment by her good taste and style and in consequence increased its value. She is not entitled to claim monetary compensation for the services she has provided as an expression of her affection. This was done merely out of friendship.

No waiver of rights. It may also be noted, at a more general level, that we are not concerned here with a waiver of rights; instead the intervener has no right from the outset (and there is thus nothing which can be waived). Paragraph (1) does not allow for any doubt about that because it takes as the decisive point in time the moment when the intervener acts; a later change of mind is not material. Whether the intervener at the time of acting had the intention of intervening without a given recompense and, if so, which recompense that intention concerned are questions which in the absence of express statement by the intervener are to be answered by interpretation by employing the same criteria as are to be found in II.–8:101 (General rules) and II.–8:102 (Relevant matters) paragraph (1).

The other rules of the law of benevolent intervention remain applicable. V.–3:104 and in particular paragraph (1) does not alter the starting point that a person acting with *animus donandi* may still be a (justified) intervener within the meaning of this Book. The principle set out above merely grants the principal a defence and does not constitute a (negative) pre-

condition for the application of the law of benevolent intervention. This can already be deduced from V.–1:103 (Exclusions), which does not mention *animus donandi*. Thus the intervener will remain under the duty to act carefully and provide information and the obligation to surrender proceeds.

The scope of paragraph (1). Paragraph (1) is not limited to the right to reimbursement of expenditure or the pre-emptive right to indemnification. It equally embraces the right to remuneration and the right to reparation. That follows from the unqualified language of the article.

Illustration 2
During a privately organised football match among friends, a player is injured. Another player who happens to be a doctor provides makeshift aid to the injured party on the spot. It is to be presumed in the circumstances that there is no scope for a claim to remuneration: the incentive for rendering first aid is predominantly friendship and the joint activity. This is irreconcilable with a claim for reimbursement.

Illustration 3
In P's apartment a quarrel between the father P and his son X turns violent. I, the other son, comes to his father's assistance but in the course of the events is injured at his wrist by a blow X delivers with a plate. I (or rather his health insurance which wants to assert a claim against the father on the basis of subrogated rights) does not have a claim against P. The assistance provided to P by I arose from family commitment and was based on the bond of affection between father and son.

B. Reduction of liability on grounds of equity (paragraph (2))

General. Paragraph (2) provides for a reduction of the intervener's rights on grounds of equity. In litigation this grants a discretionary power to the court. At the same time paragraph (2), without claiming to be exhaustive, sets out the most important reasons, which may give rise to a reduction of the right.

Scope. Paragraph (2) primarily has the right to reparation under V.–3:103 (Right to reparation) in focus, but it is not restricted to this right. In fact it also concerns the intervener's rights to indemnification, reimbursement and remuneration.

Illustration 4
An example for the reduction of the right to reimbursement of expenditure in a situation of joint danger has already been given in Illustration 17 under V.–1:101 (Intervention to benefit another).

Reasons to reduce or exclude the principal's liability. The liability of the principal is subject to the general restriction that it must not be inequitable in the circumstances of the particular case. Paragraph (2) specifies a number of aspects which might make it justifiable to reduce or even exclude liability. However, the reasons which the provision offers for a possible reduction of liability are not exhaustive. The provision merely makes explicit the most important cases.

Joint danger. Expressly mentioned is the situation of common danger, an aspect which originates in the law of general average. In a situation of common danger for which neither

the intervener nor the principal are accountable the rule will generally be that liability must be divided.

Illustration 5
The case of a driver of a motor vehicle who avoids hitting a teenage pedestrian, who suddenly appears in front of the vehicle but is not responsible for this mishap, may serve as an example. A further example may be found in Illustration 4.

The principal's economic capacity. However, the economic capacity of the principal also calls for consideration. A measure undertaken in benevolent intervention in another's affairs can easily lead to costs and damage whose indemnification may lie beyond the financial capabilities of the principal (especially if the principal is a child). Of course it is impossible to frame a rule which will suit all cases; ultimately the decisive question will always be whether or not it is fair and reasonable to reduce liability in the particular circumstances. In general such reduction will be considered more in relation to the intervener's right to reparation than with regard to the right to reimbursement: expenditures in general result to the principal's benefit, whereas damage sustained by the intervener naturally does not afford any benefit to the principal. Thus the claim for reimbursement of expenditures which have contributed to the successful outcome should only be reduced in rare and exceptional cases, as for instance if the costs of financing a measure are concerned, which the principal, if asked, would have declined for economic reasons.

The intervener can reasonably obtain redress from another. The principal ought generally to be liable in only a subsidiary way if it is reasonable for the intervener to look to another to obtain redress. This applies in particular to compensation for damage caused wrongfully by a third party. If such a third party can be identified as a wrongdoer who clearly has assets sufficient to satisfy the intervener's claim, then the intervener must look to the third party. The risk of the third party's inability to pay, however, must be placed on the principal rather than the intervener (see V.–3:105 (Obligation of third person to indemnify or reimburse the principal)).

Illustration 6
A hotel keeper asks a guest to assist in the apprehension of a robber. The guest acts on the request, but in the course of events is wounded by a gunshot from the robber. As a rule the hotel keeper will be liable to the guest under V.–3:103 (Right to reparation). However, this liability will be reduced in so far as the guest can actually obtain compensation from the robber.

Rights against an insurer. It is fair to oblige the principal to ensure that the intervener is protected against damage when the latter must otherwise personally carry the risk of being placed in danger. However, if the intervener has a viable claim against an insurer, then the question may arise whether the insurer should be entitled to recourse against the principal. This will be relevant in particular with regard to personal injury of persons rendering assistance in an emergency. As the latter for practical reasons will turn first to their insurance the problem is ultimately whether or not the insurer should be granted a right of recourse (against the principal whose insurance cover will usually not extend to the obligation to compensate arising from the law of benevolent intervention) by means of an assignment by operation of law. This question too cannot be answered by a comprehensive rule appropriate to all cases. The decision should turn on considerations such as the basis of the insurance cover and the extent and the funding of the insurance. For example, many Member States of

the European Union have established a public insurance body, which compensates persons who have injured themselves in the course of rendering assistance to another. So far as such (state-run) health insurance for the benefit of emergency rescuers is funded by public tax revenues, the principal should not be burdened with liability for the intervener's personal injury: as everyone pays, everyone should profit. This is even more so where the reason for insurance cover may also be the fact that the legislator has imposed a sanction on failure to render aid. Where the insurance cover is not funded by taxes, but instead secured by contributions of (for example) either only employees or only employers, then there is no good reason why third parties who have not made any contribution (in this case: the principal) should profit from such payments, i. e. why they should not be subject to the insurer's recourse. Of course the principal's liability will be a precondition for such recourse; without the principal's liability to the intervener there is nothing which can be subrogated to the insurance company.

Illustration 7
A is a witness of an attack on a tourist at an underground station. He comes to the tourist's aid, but is himself injured. To the extent that A benefits from statutory non-contributory insurance, his claim against the tourist is correspondingly reduced by the amount received from the insurer. The operator of the insurance scheme acquires A's right to reparation from the attackers, but not A's claim against the tourist under the law of benevolent intervention. That is because A has no claim which is capable of transfer to the insurer.

Burden of proof. The burden of proof lies with the principal. The principal must assert and in a contested case prove that the requirements of paragraph (2) are satisfied.

NOTES

I. Acting with animus donandi

1. GERMAN CC § 685 (1) denies the intervener any claim if at the time of intervention he did not intend to demand compensation. This fact constitutes an exclusionary defence (CA Karlsruhe 18 May 2004, FamRZ 2004, 1870, 1871), precluding the intervener's claim for reimbursement of expenditure (CC § 683) and surrender of enrichment (CC § 684) to which regard must be had *ex officio*. As the law does not provide for a claim for compensation or for remuneration these are not explicitly addressed in CC § 685 (1). While the intention to waive need not be expressly declared, it must be evident to third parties; the onus of proof lies with the principal. The intention of the intervener not to demand compensation from a particular person who is assumed to be the principal does not automatically exclude the liability of the actual principal (Palandt [-*Sprau*], BGB[63], § 685, nos. 1-2, § 686, no. 2). CC § 685 (2) provides a presumption of law (BGH 5 November 1997, NJW 1998, 978, 979), that payments of maintenance made without a statutory obligation between persons who are related in the direct line have been made with *animus donandi* (unless the principal proves the contrary). However, this only concerns the relationship to the immediate payee (example: grandfather furnishes maintenance to the grandchild because the father does not pay; the possibility to take recourse against the father remains unaffected).

2. The intervener will likewise not be entitled to a claim under ESTONIAN LOA § 1023 (3) and GREEK CC art. 738 if at the time of acting the intervener did not have the intention to demand reimbursement of expenditure or compensation for damage. This rule is interpreted as an application of the prohibition of inconsistent conduct (*venire contra factum proprium*) (Georgiades and Stathopoulos [-*Papanikolaou*], Art. 738, no. 1). It will suffice that the intention of the principal not to demand compensation may be inferred from the circumstances – for example where the son protects the father against an attack from a third party and thereby suffers damage himself (*Papanikolaou*, loc.cit. no. 2). CC art. 738 (2) adds a rule of interpretation which goes beyond the German CC § 685 (2) as it applies to benefits provided to siblings. This apart, the provisions are congruent. Under Greek law too the principal will have to prove that the intervener has acted with *animus donandi*; only within the scope of CC art. 738 (2) does the intervener have to prove he furnished maintenance without such intention (*Papanikolaou*, loc.cit. no. 6-7).

3. PORTUGUESE CC does not contain a provision similar to German CC § 685 and Estonian LOA § 1023 (3) or Greek CC art. 738; nor does a particular rule exist on maintenance furnished to relatives without an underlying obligation. A proposal to that effect (*Vaz Serra*, Gestão de negócios, 228, 278 et seq.) has not been adopted on to the statute book. Nor does the case law seem to accept the defence that the intervener has acted with the intention of making a transfer by way of donation (STJ 29 February 2000, CJ(ST) VIII [2000-1] 116).

4. The AUSTRIAN CC similarly does not mention the defence of *animus donandi*. Academic writing (in contrast to V.–3:104(1)) considers that animus donandi can only concern expenditure and thus does not apply to the other claims (*Meissel*, GoA, 82). The discharge of another's duty to furnish maintenance falls within the scope of CC § 1042 – a provision forming part of unjustified enrichment law (Schwimann [-*Apathy*], ABGB V^2, § 1042 no. 5). It is presumed that the person rendering payment does not intend thereby to release the debtor from his obligation (Rummel [-*Rummel*], ABGB I^3, § 1042 no. 6).

5. In FRANCE it is questionable whether an *animus donandi* on the part of the intervener does not inherently rule out a relationship of benevolent intervention; case law has not yet entirely resolved this question. *Douchy*, La notion de quasi-contrat en droit positif français, no. 46 p. 112-113 considers that a person who acts with *animus donandi* does not act as an intervener. However, the prevailing view tends to the approach that the *intention libérale* merely constitutes a particularly altruistic form of an *intention de gérer* and thus is not inconsistent with benevolent intervention (JClCiv [-*Bout*], Art. 1372 à 1375, Fasc. 10, no. 39). However, an *animus donandi* implies the intervener's waiver of (all) his claims against the principal. It gives rise to an offer of a *remise de dett*e, which if the principal accepts operates to exclude benevolent intervention after all (*Bout*, loc.cit. Fasc. 20, no. 48). Both prior approval and subsequent acceptance (in the latter case by means of a *ratification*) lead to the conclusion of a contract (*Bout*, loc.cit., Fasc. 10 nos. 40-41). These cases apart an *intention libérale* will not be presumed; it must be proven (CA Paris 14 October 1997, JurisData 1997-023144). In BELGIUM it is said that an *intention libérale* on the part of the intervener will as a general rule exclude the formation of a legal relationship of benevolent intervention (*Stijns/Van Gerven/Wéry*, JT 1996, 689 no. 17). The case is considered instead as a donation. As in France, an *intention libérale* must be proven in Belgium (B. H.Verb. [-*Roodhooft*], II.5, p. 15 no. 2236-2237).

6. In SPAIN too the absence of an *animus donandi* is interpreted as a (negative) requirement of a benevolent intervention. An intervener is assumed to be defined by

the very fact that he acts neither with the intention to gain profit nor to make a donation (*Puig Brutau*, Compendio II, 599). The existence of an *animus donandi* will prevent the formation of a claim for reimbursement of expenditures because in such cases the conduct does not qualify from the onset as benevolent intervention (TS 15 June 1925, cited by *Pasquau Liaño*, La gestión de negocios ajenos, 158, and TS 2 February 1954, RAJ 1954 no. 322 p. 198). CC art. 1894 on benevolent intervention, however, states that an 'outsider' who without knowledge of the person liable to provide maintenance pays to those due maintenance has a claim for reimbursement unless it is certain that he acted 'out of sympathy' and without the intention to demand reimbursement. The burden of proof is reversed if a blood relationship exists between intervener and principal (TS 25 September 1968, RAJ 1968 (2) no. 3959 p. 2657). The Foral law of NAVARRA Ley 560 *in fine* contains an elaborate provision on the defence of *animus donandi*. Under that law the principal's liability requires in general (i. e. not only with respect to provision of maintenance) that "the intervener has acted without munificence". Such munificence will in turn be presumed if intervener and principal are related to each other (*Sánchez Jordán*, Gestión de negocios, 318).

7. In ITALIAN law a subtle distinction is drawn between cases of pure munificence (in which it is assumed that the requirement of *animus negotia aliena gerendi* is not met, cf. Cass. 29 March 2001, no. 4623, Riv. Notariato 2001, 1423) and cases in which the intervener acts with the intention not to demand reimbursement of his expenditure and thus acts with *animus donandi*. The desire to receive reimbursement is not considered to be a necessary requirement of benevolent intervention (*Aru*, Gestione d´affari, 14-15). Against this background difficult and in part unresolved questions of demarcation arise as far as maintenance payments within a family are concerned; for details see Cass. 17 July 1969, no. 2636, Foro it. 1970, I, 260 with note *Pisu*, Foro it. 1971, I, 713.

8. The problem referred to in V.–3:104 has not played any role in the development of the DUTCH CC; consequently the law does not address this problem. Yet in the case law of the appellate courts the aspect of munificence has repeatedly led to the dismissal of a claim based on benevolent intervention and sometimes on the ground that the intervener must have the intention to act for the account and expense of the principal (e. g. CFI Roermond 15 April 1915, NedJur 1915, p. 992; CFI Amsterdam 4 April 1939, NedJur 1939, no. 628 p. 978; CFI Haarlem 8 January 1954, NedJur 1954, no. 615 p. 1143). This reasoning has been criticised by commentators, because the existence of munificence need not lead to the result that the intervener is released from his regular duties, such as, inter alia, his duty to continue the intervention. Rather the case actually concerns the necessity to prevent the intervener from *venire contra factum proprium* (*Verburg*, De vrijwillige zaakwaarneming, nos. 60-62, p. 90-92). In recent case law it has been stated that friendly acts done for the benefit of a person with whom the active party lives in extra-marital cohabitation may not be qualified as benevolent intervention (CFI s´Gravenhage 28 February 2001, LJN-number AB1265, www.rechtspraak.nl).

9. Similarly it holds true for SCOTTISH Law that "there can be no claim for expenses where the *gestor* has acted *animo donandi*" (*Leslie*, Jur.Rev. 1983, 33). If the intervener is a close relative of the principal such *animus donandi* will be presumed (Stair [-*Whitty*], The Laws of Scotland, XV, paras 95 and 116).

10. In accordance with V.–3:104(1) SWEDISH academic writing has stated that a *gestor* who acts with the intention of making a donation is neither entitled to a claim for remuneration nor for reimbursement of expenditure (*Hellner*, Om obehörig vinst, 362). Such acts are mere acts of friendship (*Håstad*, Tjänster utan uppdrag, 68).

11. Where there is a recognised legal relationship of agency in the COMMON LAW (whether by agreement, necessity or ratification) or bailment, the terms of that relationship will determine the scope of the intervener's rights. In that context, where the intervener's generous state of mind is formed too late to help fix in advance the terms of the relationship, the principles of waiver and estoppel may come into operation to control the rights of the intervener against the principal. Any other benevolent intervener acting with *animus donandi* will have no claim to the extent to which the service or benefits are freely provided. For authorities confirming that a person supporting someone without full legal capacity has no claim if they did not intend to be reimbursed see *Wentworth v. Tubb* (1841) 1 Y & C CC 171 at 174, 62 ER 840 at 842 (*Knight Bruce* VC); *Re Rhodes* (1890) 44 Ch. D 94, 102 (*Kay* J: absence of intention to claim reimbursement could be inferred in the circumstances from fact neither payer had made a claim before the recipient's death or bothered with book-keeping), and on appeal (where the decision was affirmed) loc. cit at 106 (*Cotton* LJ), 107 (*Lindley* LJ: "[I]n order to raise an obligation to repay, the money must have been expended with the intention on the part of that person providing it that it should be repaid."), 103-104 and 108 (*Lopes* LJ); see also *Carter v. Beard* (1839) 10 Sim 7 at 8, 59 ER 514 at 515 (*Shadwell* VC), which decision if correct (notwithstanding the doubts of *Cotton* und *Lopes* LJJ on that point in *Re Rhodes* loc. cit., 103) is explicable on the basis that there was an "act of bounty" for which the claimant did not intend to be reimbursed. This exclusion of a restitutionary claim follows from the fact that the exceptional liability to a stranger for a benefit conferred is based on necessity for the intervention providing an unjust factor establishing a restitutionary claim and the intervener's free consent to the enrichment of the principal precludes redress on that basis. Indeed the position is more restrictive than this: the intervener has no restitutionary claim for remuneration if the intervener did not intend such a claim against the recipient of the benefit because the intervener intended to obtain reimbursement or a benefit in return through other channels. See, for example, *Wentworth v. Tubb*, loc. cit. (no claim for reimbursement for necessaries provided to a person without full capacity if intended to be reimbursed by a third party); *Shallcross v. Wright* (1850) 12 Beav 558, 50 ER 1174 (Lord *Langdale* MR), where the doctor provided medical assistance supposedly not on the basis of a contract with the patient, but in the expectation of receiving a legacy in the latter's will, and was thus denied a claim to remuneration. The latter decision, however, is open to some doubt not least because of its association with the broader but now moribund proposition that a doctor and a barrister have no legal claim to remuneration for their professional services (*Chorley v. Bolcott* (1791) 4 T. R. 317, 100 ER 1040) and the recognition of claims on the footing of constructive trusts and proprietary estoppel where services are freely rendered on a non-contractual basis, but in the expectation of a reward. Where a claim is being made in respect of medical treatment provided in respect of a road traffic accident under ss. 157-158 of the Road Traffic Act 1988, that claim must be made either at the time of treatment or in writing within seven days. This may serve in effect to exclude claims where there was no intention to seek recompense contemporaneous with provision of the service, but the purpose of the rule is presumably a different one and related to liability of and settlement by a driver's or owner's insurers.

II. Reduction of liability on grounds of equity

12. GERMAN CC does not provide for a rule corresponding to V.–3:104(2). However, in a case in which the driver of a motor vehicle avoided hitting a cyclist, who suddenly appeared in his lane but was not responsible for this mishap, and thereby sustained severe personal injury, the BGH reduced the motorist's claim for compensation to

50 % and in doing so relied on an argument by analogy with the provisions on general average contained in maritime law; it was considered to be a case of common danger (BGH 27 November 1962, BGHZ 38, 270, 277). Many further details are as yet unresolved. It is predominantly emphasised that the compensation of damage is strongly influenced by considerations of equity. In this context benefits provided under a social insurance scheme to a person who has rendered assistance are to be taken into consideration as far as appropriate (Palandt [-*Sprau*], BGB[63], § 683, no. 9; RGRK [-*Steffen*], BGB[12], § 683, no. 11; MünchKomm [-*Seiler*], BGB[3], § 683, no. 20). In the case of 'affairs of one's own which are also those of another' (i.e. coincidence of management of an affair on another's behalf and in pursuit of one's own interests) the intervener will as a rule only be entitled to reimbursement of expenditure corresponding to the share of the intervention which was on another's behalf (*Sprau*, loc.cit. no. 8). If the proportion cannot be determined in such a way, then the importance of responsibility, interests and benefits will be decisive (BGH 15 December 1954, BGHZ 16, 12, 16; BGH 18 September 1986, BGHZ 98, 235, 242; BGH 8 March 1990, BGHZ 110, 313).

13. ESTONIAN LOA § 1025 (1) (ii) states that compensation may not be demanded from the principal if the employer, mandator of the intervener, provider of social security or health insurer of the intervener has the obligation to compensate for the loss sustained.

14. In PORTUGUESE law the question of a reduction of the intervener's claim for damages against the principal has apparently not been an issue of discussion. It only seems to be recognised (for the opposite case) that CC art. 570 (the reduction clause provided for by tort law) may be applied if the intervener has contributed by his own fault to an aggravation of the principal's damage (*Antunes Varela*, Obrigações em Geral I[10], p. 468, fn. 2.).

15. In AUSTRIA both case law (OGH 24 August 1995, SZ 68/142) and academic writing (*Meissel*, GoA, 190) emphasise that in accordance with CC § 967 sentence 2 "appropriate compensation" must be afforded. If and to what extent an intervener who has rendered emergency assistance is entitled to such appropriate compensation will depend on the circumstances of the particular case. The factors calling for consideration will be the balance between the danger impending for the principal and the risk incurred by the intervener, the type and extent of the intervener's damage, the latter's contribution to the dangerous situation (if any) and financial capacity (cf. *Fitz*, Risikozurechnung, 100). The proportionality of danger and damage is assessed from an *ex post* perspective (Rummel [-*Reischauer*], ABGB II[2], § 1306a no. 12). Existing insurance cover is in general taken into account (*Reischauer*, loc.cit. § 1310 no. 9). However, the social security accident insurer of an emergency helper is not supposed to release the principal from his obligation; thus the insurer may have recourse to the principal (OGH 24 August 1995, SZ 68/142). This may perhaps rely on the fact that the insurance cover draws on funds which are exclusively contributed by employers.

16. The BELGIAN, FRENCH and LUXEMBOURGIAN *Code civil* do not provide for a reduction of the principal's liability on grounds of equity. Academic writing has not advanced an opinion on this topic. The same holds true for MALTA.

17. SPANISH CC art. 1890 (2) only contains a reduction clause with regard to the intervener's liability for damages – not with regard to the principal's liability for damages. Given that the general provisions of contract law may be applied to the principal's liability, it is to be expected against this background that the general rule of CC art. 1103 is similarly applicable. Accordingly liability in a case of negligence can be reduced by the courts according to the circumstances of the particular case; this will result in a proportionate reduction of the creditor's claims (e. g. TS 18 July 1994, RAJ

1994 (4) no. 6446 p. 8274 and TS 29 November 1993, RAJ 1993 (5) no. 9145 p. 11800). Case law bearing out this assumption that the principal's liability may similarly be reduced (and the circumstances on which such reduction would depend) does not apparently exist.

18. In ITALY the situation is as in Spain. CC art. 2030 (2) only concerns the intervener's liability; the law does not provide for the opposite situation which is of interest in this context.

19. DUTCH CC art. 6:200 (1) in conjunction with art. 6:109 permits not only a reduction of liability but also the reduction of the intervener's claim for compensation. A typical example would be the altruistic effort to rescue another in the course of which the intervener harms himself (T. M. Parlementaire Geschiedenis VI, 795; MvA II, Parlementaire Geschiedenis VI, 449-450; *Schoordijk*, Het algemeen gedeelte van het verbintenissenrecht naar het nieuw BW, 279).

20. A reduction of liability on grounds of equity is unknown under SCOTTISH law.

21. In DENMARK (*Lov om arbejdskadesikring* § 4 Nr. 3 and 4 [Act on Labour Insurance Employment Accidents of 20 May 1992 no. 390]; cf. on the preceding statute HD 8 February 1961, UfR 1961, 344) and in FINLAND (*Lag om skadestånd för olycksfall vid räddning av människoliv* § 1 [Act on Damages for Accidents by Saving Another Person's Life of 12 April 1935/158]) rescuers who render assistance after an accident are protected by state insurance cover (for details see Karnov and Hansen [-*Preben/RasmussenKolbjørn*], Arbejdsskadesikringsloven § 2 no. 11). The SWEDISH Act on Insurance for Accidents at Work [*lag* (1976:380) *om arbetsskadeförsäkring*] by contrast only applies to employees. The insurer (governed by public law) is not entitled to seek recourse from the tortfeasor (National Insurance Act [*lag* (1962:381) *om allmän försäkring*] chap. 20 § 7 (2); for details see *Wendel*, Sweden, in Magnus (ed.), The Impact of Social Security Law on Tort Law, 183), which apparently indicates that the insurer may not have take recourse against a principal either.

22. ENGLISH law does not provide for any general judicial discretionary reduction in liability in private law, though where a claimant is seeking an equitable remedy principles involving discretionary elements (including a consideration of hardship to the defendant) may apply so as in effect to diminish liability.

Illustration 1 is taken from CFI ,s-Gravenhage 28 February 2001, LJN-number AB1265, www.rechtspraak.nl**; illustration 3** from BGH 6 December 1962, BGHZ 38, 302; **illustration 5** from *Carmarthenshire County Council v. Lewis* [1955] AC 549; **illustration 6** from BGH 19 May 1969, BGHZ 52, 115.

V.–3:105: Obligation of third person to indemnify or reimburse the principal

If the intervener acts to protect the principal from damage, a person who would be accountable under Book VI for the causation of such damage to the principal is obliged to indemnify or, as the case may be, reimburse the principal's liability to the intervener.

COMMENTS

Purpose of the rule. V.–3:105 concerns the situation in which the intervener prevents damage for which, had it occurred, a third party would have been liable to the principal according to the general law on non-contractual liability for damage (Book VI). In other words the intervention has prevented impending damage to the principal or the principal's interests. But it has resulted in detriment to the intervener: for instance, the incurring of expenditure or the sustaining of damage. If and in so far as the principal is liable to the intervener in respect of such detriment, the principal is entitled to recourse against the third party. The third party is not to be relieved from liability by the fact that another (the intervener) has prevented the damaging event. Thus the principal is freed from the burden of establishing that the principal's *liability to the intervener* constitutes in relation to the third party "legally relevant damage" and that with respect to *this* damage (which in fact is a pure economic loss) the other requirements of liability under Book VI (causation and accountability) are met.

Illustration 1
Miscreants untie a yacht from its moorings and it threatens to drift away. The owner of another yacht motors up alongside it, but in heading back to the quay damages his own engine. In such a case the owner of the drifting yacht can be looked upon as the benefited party (the principal). Consequently, the owner of the second yacht will have a claim for damages to the value of the costs of repairing his engine. The owner of the rescued yacht will in turn have a claim for redress against the miscreants under V.–3:105, but he will bear the risk of their ascertainment and of their ability to pay when successfully sued. However, V.–3:105 at least relieves the principal from the difficulty that a court could deem the intervention of the intervener for the purposes of liability in non-contractual liability for damage to be a *novus actus interveniens* or that an action for recourse based in the law on non-contractual liability for damage may fail for other reasons.

Illustration 2
For inexplicable reasons a toddler disappears from protected premises and runs on to the road. In order to avoid hitting the child, who suddenly appears in front of his vehicle, A steers away, but as a result of the consequent accident suffers injury. The child remains unharmed. A on principle has a claim against the child under V.–3:103 (Right to reparation). However, this claim will be reduced under V.–3:104 (Reduction or exclusion of intervener's rights) paragraph (2), if and to the extent that A has a claim for reparation of damages vis-à-vis the nursery. Whether A in fact has such a claim is left to the general law on non-contractual liability for damage to decide. If there is no such claim, the child will have a claim for recourse against the nursery school arising from V.–3:105, if the nursery school would have been liable vis-à-vis *the child* if the latter had been hit by A's vehicle.

Rights in benevolent intervention and in the law on non-contractual liability for damage. The provision proceeds therefore on the basis that the intervener has direct redress against the principal, to whom passes in turn the burden of identifying the appropriate wrongdoer. This provides the necessary protection for the intervener, commensurate with having sustained damage for altruistic reasons, because the principal rather than the intervener will carry the risk that the person who is ultimately responsible for the intervener's damage is unable to satisfy the liability to compensate.

Wrongdoer and intervener. The person responsible for the danger – the potential wrongdoer – might be the party rendering aid rather than a third party. As noted earlier, a person who has injured another and then sets about reparation of the harm caused cannot act as intervener in relation to the victim because, by the rules of the law on non-contractual liability for damage, the person causing the damage is obliged to compensate the victim for the damage wrongfully caused. His act of "healing" the damage is a performance of the private law obligation owed to the victim and is thus excluded from benevolent intervention by V.–1:103 (Exclusions) sub-paragraph (a).

NOTES

1. The subject-matter of this Article has only rarely been a point of discussion in the various legal systems. If it is considered at all, then more often than not the issue treated is restricted to the question whether or not the rescuer has a direct claim against the tortfeasor, which in turn is often answered in the affirmative, cf. for SPANISH law CCP art. 113; for DUTCH law Asser (-*Hartkamp*), Verbintenissenrecht III[11], no. 312 p. 321-322; for DANISH and SWEDISH law *Andersson*, Skyddsändamål och adekvans, 437 et seq. (who though in this respect also points towards insurance solutions which may often render the question of recourse irrelevant); and for ENGLISH Law *Carmarthenshire County Council v. Lewis* [1955] AC 549, and see also the Road Traffic Act, s. 158(4), where liability of a car user to pay in respect of medical treatment given to a person injured in a road accident is damage recoverable from the person responsible in tort. Also of note as regards ENGLISH law is the possibility that one who provides gratuitous but necessary care services to a person injured as a result of the tort of a third party may recover from the injured person (on the basis of a trust of the damages) the value of those services or reimbursement of travelling expenses if the injured person sues the third party and recovers damages in respect of them: see *Hunt v. Severs* [1994] 2 AC 350 (where, however, the services were provided by the tortfeasor himself and the principle was inapplicable on the facts), approving *Cunningham v. Harrison* [1973] QB 942, 952A-C (Lord *Denning* MR). SCOTTISH law makes similar arrangements (expressly restricted to relatives) in the Administration of Justice Act 1982, s. 8 (injured person under an obligation to account).
2. AUSTRIAN Law apparently addresses the question whether or not the principal is entitled to recourse in the context of tort law. Compensable damage may also consist of monetary expenditure of the aggrieved party which served to prevent further damage (*Koziol*, Haftpflichtrecht I³, no. 2/66 p. 53). In addition incurring an obligation to a third party may likewise qualify as damage (*Koziol* loc.cit.; OGH 10 October 1979, SZ 52/146). For details on the claim of the rescuer against the person who caused the dangerous situation see *Koziol* loc.cit. no. 8/43, p. 261.

3. The lack of discussion on the problem addressed by V.–3:105 also holds true for FRENCH and BELGIAN academic writing. However, in terms of outcome it seems to be considered as self-evident that the principal is entitled to an independent claim under tort law against the third party who would have been accountable had the damage occurred. The principal may claim the amount which he (the principal) was obliged to pay to the intervener as compensation for the latter's damage. CAA Lyon 22 September 1993, RTD civ. 1994, 101, obs. *Mestre,* concerned a customer who – following the armed robbery of a store – pursued the robbers. One of them dropped the spoils, but another fired at the customer and injured him. The *Cour de Cassation* allowed a claim for damages based on benevolent intervention of the customer against the keeper of the shop (Cass. civ. 26 January 1988, Bull. Civ. 1988, I, no. 25 p. 16; JCP 1989 éd. G, no. 21217, obs. *Dagorne-Labbe*; *RTD civ*. 1988, 539, obs. *Mestre*; D. 1989 Jur., 405, note *Martin*). Subsequently the CAA Lyon upheld the claim for recourse made by the store operator's insurer against the state. The customer was held to have acted as a *collaborateur bénévole d´un service public*. For damage to the latter strict liability is imposed on the state. For BELGIAN law Cass. 30 November 1977, Pas. belge 1978, I, 351 has held that the expenses incurred by a third party rendering emergency assistance on which the victim is dependent will constitute a damage of the victim compensable under tort law, even if the assistance was provided gratuitously. Furthermore, an injured *gestor* (who acted gratuitously) may take legal action directly against the person responsible for the accident (Cass. 6 November 2001, Pas. belge 2001, 1790, conclusions *du Jardin*; for details see *Lindenbergh,* TPR 2002, no. 27 p. 1437-1438).
4. As regards SPANISH law attention should be drawn to CC art. 1729. According to this provision the principal will have to compensate a (contractual) agent for all damage and detriment which he has sustained as a result of the performance of the mandate. If a third party is responsible for the causation of such damage the principal is entitled to recourse against that third party (Paz-Ares/Diez-Picazo/Bercovitz/Salvador [-*Górdillo Cañas*], Código Civil II, 1575). It may be possible indeed to apply this provision accordingly to cases of benevolent intervention.
5. With regard to ITALIAN Law *Sirena*, Gestione di affari, 291-292 has argued that the rescuer may also be seen as an intervener on behalf of the tortfeasor, which in turn would lead to the result that two principals (the victim and the tortfeasor) have to be dealt with, at least in so far as the rescuer renders assistance going beyond the duties imposed by law. *Inter partes* the person who has received assistance is entitled to recourse against the tortfeasor. The claim will cover all payments that he (the victim) has made to the intervener.

Illustration 2 is taken from *Carmarthenshire County Council v. Lewis* [1955] AC 549.

V.–3:106: Authority of intervener to act as representative of the principal

(1) The intervener may conclude legal transactions or perform other juridical acts as a representative of the principal in so far as this may reasonably be expected to benefit the principal.

(2) However, a unilateral juridical act by the intervener as a representative of the principal has no effect if the person to whom it is addressed rejects the act without undue delay.

COMMENTS

A. Third party relations

Three different situations. Where third parties are engaged there are three situations which are legally distinguishable, though in terms of everyday life they are relatively proximate. Firstly, there is the situation where someone intends to be active as intervener, but – for example, because lacking the necessary expertise – leaves the actual carrying out of the work to another, such as an employee or an independent contractor. The second basic situation is where one person (A) merely alerts another (B) to the fact that the principal (C) is in danger or otherwise needs help, A leaving it up to B to decide whether or not to intervene for the benefit of C. Finally, in the third basic situation A again turns to B, but this time concludes a contract with B (or effects a unilateral juridical act vis-à-vis B), but as a representative of C (i.e. in the name of C or otherwise in such a way as to indicate an intention to affect C's legal position) but without being authorised by C to do so. V.–3:106 is concerned with only the last of these three situations.

Conclusion of a contract in the intervener's own name and not as principal's representative. In the first mentioned situation (where A concludes a contract with B in A's own name, though for the purpose of benefiting C) only A is an intervener. The party taking up the commission (in our example, the employee or independent contractor) does not satisfy the conditions of V.–1:101 (Intervention to benefit another) (see further V.–1:103 (Exclusions) sub-paragraph (c)) and is accordingly not a benevolent intervener – not even in relation to the benefited party. In that regard the outcome is no different if the contract between A and B is so constituted that as a genuine contract for the benefit of a third party it confers rights on C against B. If the contract is so constituted as a genuine contract for the benefit of a third party, this merely furnishes a further reason for excluding B from the law of benevolent intervention, namely V.–1:103 sub-paragraph (a). However, the intervener (the party giving the commission) of course remains obliged in relation to the principal, though having made use of another in order to fulfil the obligations.

Engagement of third parties without conclusion of a contract. There is no need for further rules either for the (second) case where someone, who has become aware of a danger threatening the principal, alerts a third person (once again, as a rule an independent operator) to the situation and abdicates to that third person the decision whether or not to intervene. If the third person steps in, then we are faced with two different measures taken (the invitation to act, on the one hand, and the actual carrying out of the preventative measures, on the other) and therefore with two interveners who are completely independent of one another and two independent acts of benevolent intervention.

Conclusion of a contract as representative of the principal. Finally, the third question looks to whether an intervener may conclude a contract with a third party on behalf of the

principal. This question is addressed in V.–3:106(1) and is answered here in the affirmative. The intervener may conclude contracts with third parties as a representative of the principal if in doing so the intervener is advancing the principal's interest appropriately. The intervener (A) in this situation, incidentally, is only the person who concludes the contract and not the third party (B), because B will provide the service to the principal (C) on the basis of a valid contract subsisting between B and C.

B. The intervener's power of representation

Considerations of legal policy. The European jurisdictions disagree on whether or not a power of legal representation should be conferred on the intervener. In Belgium, France and Luxembourg such a right is affirmed by CC art. 1375. The same is true for Italy, if the benevolent intervention has been "usefully" undertaken (CC art. 2031). In the Netherlands too a *gestor* is "authorised to carry out legal transactions in the name of the person concerned, in so far as the latter's interest is duly furthered thereby" (Dutch CC art. 6:201). In all other legal systems in continental Europe, by contrast, a justified intervener who acts in the name of the principal acts as an agent without a power of representation if there is no agreed mandate or power of attorney and the subsequent ratification (*ratificação*) of the principal is not forthcoming, albeit that this is only expressly set out in statute in Portugal (CC art. 471 sent. 1 in conjunction with art. 268). V.–3:106(1) proceeds from the basic idea that such a legally conferred authority does not impose an undue burden on the principal, but at the same time appropriately accommodates the interests of the intervener as well as those of third parties. The intervener who concludes a contract with a third party otherwise than as a representative of the principal is entitled to demand indemnification and reimbursement of expenditure from the principal (V.–3:101 (Right to indemnification or reimbursement)). Thus the principal will already have to bear the economic consequences: that is, will have to pay to the intervener the amount the latter is obliged to pay the third party. Thus from an economic perspective it does not make any difference whether an obligation is imposed on the principal to perform directly to the third party. The principal's position is by no means weakened. On the other hand the intervener benefits by being freed from liability under the contract with the third party provided the intervener acts within the scope of the legally conferred authority. The third party in turn must take action against the principal. This results in a reallocation of the risk of insolvency. Yet exactly this reallocation seems both appropriate and desirable since the third party knows that the intervener acts as a representative of the principal (see II.–6:105 (When representative's act affects the principal's legal position)) and is free to decide whether or not to accept the offer to conclude a contract with the principal.

Relation to the rules on representation in Book II. The rules on representation in Book II, Chapter 6 are not restricted to cases where the power of representation finds its basis in a voluntary grant of authority. "The authority of a representative may be granted by the principal or by the law" (II.–6:103 (Authorisation) paragraph (1)) (In the PECL Chapter 3 by contrast, the rules on agency did *not* govern an agent's authority bestowed by law (PECL art. 3:101(2)). Benevolent intervention is precisely an instance where a representative's authority is conferred by law. V.–3:106 grants authority itself and this makes up for the lack of any authority conferred by contract. The general requirement under the rules on representation that in order to affect the principal's legal position the intervener has to act in the name of the principal or otherwise in such a way as to indicate to the third party an intention to affect the legal position of the principal remains unaffected (II.–6:105 (When representative's act affects the principal's legal position)). A juridical act effected in the intervener's own name, and without indicating an intention to bind the principal, will bind only the intervener in relation to the third party (II.–6:106 (Representative acting in own name)). If the intervener

acts in the principal's name, but beyond the scope of the authority conferred by V.–3:106, the position is regulated by II.–6:107 (Person purporting to act as representative but not having authority).

Transactions covered. V.–3:106 (Authority of intervener to act as representative of the principal) paragraph (1) embraces legal transactions of all types. In particular it is not limited to the conclusion of a contract by way of offer and acceptance; it also covers unilateral declarations of the principal's will (e. g. a notice to quit). However, V.–3:106(2) provides for a special rule in the case of unilateral acts. Self-evident (and therefore not mentioned as such) is the proposition that there can be no representation for strictly personal acts (see Comment B under V.–1:101 (Intervention to benefit another)). Whether and to what extent an intervener may undertake the conduct of litigation is, as already stressed in Comment B under V.–1:101, a matter for the law of procedure and is not decided here.

"In so far as this may reasonably be expected to benefit the principal". A valid representation of the principal by the intervener may naturally only be considered if the general requirements set out in the first Chapter of this Book are met. Moreover V.–3:106(1) requires that the course of action chosen by the intervener, namely the making of an offer or other statement of intention *as a representative of the principal* must have been of such a nature as could reasonably be expected to benefit the latter. As may already be inferred from the general rules, conclusion of a contract by the intervener will as a rule only be considered justified for the purpose of temporarily stabilising a critical situation. V.–3:106 in addition demands that it must have been reasonable to expect that committing the principal to the third party would benefit the principal. This also applies to cases in which a representative appointed by contract is forced in the circumstances to act in excess of the contractual authority in order to advance the interests of the principal.

Illustration
B, the principal, is a celebrated public character, who visits another city incognito. As A knows, B suffers from a cerebral disease, which B has consistently concealed from the public due to reasonable concern for his career. Furthermore, B has good reason to conceal his presence in the city from the public. B is suddenly in urgent need of a hotel room for a few hours. A books this hotel room. It would not be reasonable to expect that concluding the contract in the name of B would be of benefit to B.

C. Unilateral acts (paragraph (2))

Third party protection. With respect to unilateral acts which the intervener does as a representative of the principal a further provision is necessary in order to protect the third party. It is contained in V.–3:106(2). In contrast to a conventional offer with a view to conclusion of a contract, a third party cannot simply ignore a notice of termination of a contractual relationship, or a notice of avoidance of a contract, or a measure interrupting the period of prescription or a notice by which an option is exercised or any comparable declaration which the intervener may effect in the name of the principal. Such declarations, if they are valid, modify the legal situation by themselves. Consequently the third party must be given some certainty. Thus paragraph (2) provides for the possibility to reject unilateral legal acts which the intervener effects in the principal's name, provided the rejection is done without undue delay. It would be inequitable to impose on the third party the risk entailed in the fact that within a short space of time it may not be clarified whether the requirements of V.–1:101 (Intervention to benefit another) for a valid benevolent intervention (and consequently a power of representation under V.–3:106(1)) were actually satisfied or not.

NOTES

1. As mentioned above the European jurisdictions are divided with regard to the question whether or not the intervener's authority should also include the possibility to act in the name of the principal and thus to represent him. CZECH, ESTONIAN, GERMAN, HUNGARIAN and POLISH law answer this question in the negative. Unless particular statutory rules provide otherwise – which rules may incidentally be found in the context of emergency assistance – an intervener cannot directly bind the principal nor dispose of the latter's property in his name. If such acts occur they fall within the scope of the rules on representation without authority (BGH 4 October 1977, BGHZ 69, 323, 327; BGH 4 May 1955, BGHZ 17, 181, 188; BGH 8 July 1953, LM § 683 no. 2). However, in the exceptional case that the intervener discharges a duty of the principal the performance of which is required as a matter of overriding public interest (German CC § 679) a duty to ratify is contemplated (BGH 9 February 1951, NJW 1951, 398, *obiter*). This apart, the intervener has to rely on his claim for indemnification against the principal (MünchKomm [-*Seiler*], BGB[3], Pref. to § 677, no. 6 and § 683, no. 27; Staudinger [-*Wittmann*], BGB[13], Pref. to §§ 677 et seq., no. 60; RGRK [-*Steffen*], BGB[12], Pref. to § 677, no. 83; a contrary view is only advanced by *Baur*, JZ 1952, 328).
2. GREEK law likewise only imposes duties on the intervener *inter partes*, i. e. in relation to the principal; no provision is made for a power of representation. Legal transactions which the intervener effects in the name of the principal come within the rules on representation without authority. In consequence they will only be valid if the principal ratifies them according to CC arts. 229 et seq. (Georgiades/Stathopoulos [-*Papanikolaou*], Pref. to arts. 730-740, no. 13; ErmAK [-*Sakketas*], art. 737, no. 13).
3. PORTUGUESE CC art. 471 also excludes a representative authority for the intervener (for details see *Menezes Leitão*, Responsabilidade do gestor, 210). If, despite this rule, the intervener concludes legal transactions with third parties in the name of the principal (and thus gives rise to a *gestão representativa*), CC art. 471 refers to CC art. 268, according to which such legal transactions will only have a binding effect on the principal if he ratifies them. The legal position of third parties is comparatively weak. The only possible means for a third party to protect himself against the invalidity of a legal transaction pursuant to CC art. 260 (1) is in general to request his contracting party to provide evidence of his representative authority (cf. CA Evora 1 June 1999, CJ XXIV [1993-3] 270). Moreover, under CC art. 268 (4) the third party is only granted a power of revocation if that party did not know that the intervener acted without authority.
4. AUSTRIAN law similarly proceeds on the basis that the intervener is not the principal's representative (Schwimann [-*Apathy*], ABGB V[2], § 1035 no. 4; Rummel [-*Rummel*], ABGB I[3], § 1035 no. 2, *Meissel*, GoA, 73). The law of benevolent intervention provides solely for the internal relationship between intervener and principal (OGH 17 May 1950, SZ 23/159).
5. By contrast the legal position in FRANCE, BELGIUM and LUXEMBOURG is completely different. Here the creation of representative authority is regarded as a statutory consequence of benevolent intervention (JClCiv [-*Bout*], Art. 1372 à 1375, Fasc. 20 no. 90; *De Page*, Droit Civil Belge II[3], no. 1090 p. 1153). In order to bind the principal it will be sufficient that the intervener points to the benevolent intervention and discloses that he acts in the name of the principal (Cass. civ. 14 January 1959, D. 1959 Jur. 106; RTD civ. 1959, 334, note *Henri* and *Léon Mazeaud*). The third party may of course make it a condition of the conclusion of the contract that the *gestor*

personally binds himself too (Cass.civ. 14 January 1959 loc.cit.). In this case the result will be that the third party will have rights against both the intervener and the principal (*Starck/Roland/Boyer*, Droit Civil. Les Obligations, II[6], no. 2172 p. 762). Moreover the intervener may be liable to the third party under tort law – for instance if he has made a false statement with respect to the principal's solvency (Planiol/Ripert [-*Esmein/Radouant/Gabolde*], Droit civil français VII[2], no. 732 p. 19). The representative authority of a *gestor* may exceed that of a *mandataire* because the former can also bring about a contractual obligation of a principal who lacks full legal capacity (*Bout*, loc.cit. no. 93; *Paulus*, Zaakwaarneming, no. 100 p. 57-58).

6. Although SPANISH CC art. 1893 merely states that "the owner of property or the principal of the affairs is liable for the obligations, which have been incurred in his interest", it is accepted in academic writing that the intervener may act both in his own name and in the name of the principal. In the latter case the principal will be bound directly vis-à-vis the third party (*Pasquau Liaño*, La gestión de negocios ajenos, 198; *Sánchez Jordán*, Gestión de negocios, 603; *Lacruz Berdejo*, Rev.Crít.Der.Inm. 1975, 267, Albaladejo [-*Santos Briz*], Código Civil y compilaciones forales, XXIV, 67). Of course the general requirements of a justified intervention on another's behalf (CC arts. 1892 and 1893) have to be met. If this is not the case (for instance, because the intervention does not qualify as useful or because the principal has not ratified the intervention), then according to the view advanced by some authors the contract is not void under CC art. 1259 but instead binds the intervener (*Lacruz Berdejo* loc.cit.; *Sánchez Jordán*, loc.cit. 606). However, it is difficult to find support for this opinion in the wording of the Code. The reference to CC art. 1259 *in fine* seems to be important, according to which a contract which has been concluded in the name of another who was neither granted a power of representation nor in possession of a statutory power of representation will be void unless the person in whose name the contract was concluded has "ratified, prior to the other contracting party's revocation". *Lacruz*, Elementos II (1), 524 considers that it is for exactly those cases in which the intervener has acted in another's name that provision has been made for the possibility to revoke. Until the contract is ratified its validity will be in suspense; if the third party revokes the contract prior to a ratification, it will be a dead letter. In this case the intervener will not be liable either.

7. Under ITALIAN Law the intervener may even conclude contracts which are subject to formality requirements (Cass. 20 March 1995, no. 3225, Foro it. 1996, I, 203, note *F. Loria*). That a statutory representative authority is conferred on the intervener which enables the latter to act in the name and for the account of the principal is nearly undisputed (a contrary opinion has apparently only been advanced by *Biondo*, Foro it. 1954, I, 98). The statutory authority arises from CC art. 2031 and encompasses both agreements creating obligations and transactions disposing of rights (*Breccia*, La gestione d´affari[2], 893).

8. Under DUTCH Law the intervener may conduct legal transactions both in his own name and in the name of the principal (T. M. Parlementaire Geschiedenis VI, 790; Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 295, p. 309; *Schrage*, Verbintenissen uit andere bron dan onrechtmatige daad of overeenkomst, no. 5, p. 5). The authority to act in another's name is explicitly provided for in CC art. 6:201. To the extent that the intervener by his acts conducted in the principal's name properly looks after the latter's interests the principal will be directly bound and entitled by such contract. CC art. 3:78 provides for the applicability of some mandate law provisions, which is set out in detail in CC arts. 3:60 et seq. (T. M. Parlementaire Geschiedenis VI, 797 et seq.; Hartkamp loc.cit. no. 305, p. 316-317; *Vriesendorp*, Verbintenissen uit de wet en

schadevergoeding, no. 283, p. 269-270). See also CFI Arnhem 19 May 2004, LJN-number AP6938, www.rechtspraak.nl.

9. Whether SCOTTISH law confers representative authority on the intervener is apparently still unresolved. Although *SMT Sales & Services Co. Ltd. v. Motor and General Finance Co. Ltd.* 1954 SLT (Sh.Ct.) 107 (where the police as *gestors* appointed a breakdown recovery service which subsequently succeeded in its direct action for costs against the principal) may be taken as an indicator that such representative authority is recognised, there is no express statement to that end. The basis of this direct claim is still a matter of debate (for details see Stair [-*Whitty*], The Laws of Scotland, XV, paras. 101 and 143).

10. In SWEDISH law it seems to be acknowledged that a *gestor* may interrupt a limitation period on behalf of the principal (*Håstad*, Tjänster utan uppdrag, 275; *Lindskog*, Preskription[2], 298; cf. also HD 11 October 1966, NJA 1966, 489, where the interruption of the limitation period was denied on the facts and not on the ground of legal principle). One who acts in his own name as a rule also binds himself (exceptions arise in 'man of straw' cases). *Håstad*, loc.cit. 230 et seq., following an elaborate discussion on the protection of the involved parties, has advanced the opinion that a representative authority of the *gestor* should be endorsed if the *gestor*, had he acted in his own name, would have been entitled to recourse against the principal. However there is no apparent case law which adopts this approach yet. Nevertheless (and in addition to the former Commercial Code chap. 18 § 10) some recent statutory provisions have been adopted which permit a person to act in another's name, e. g. Contracts Act § 24 (although a declaration of bankruptcy generally terminates all powers of authority, an emergency representative power for the protection of the principal's assets will remain effective until the appointment of an administrator in bankruptcy: *Grönfors*, Avtalslagen[3], 155); Maritime Code chap. 6 § 8 [*sjölag* (1994:1009)] (concerning the captain's authority to conclude contracts for the preservation of the vessel, passengers and the cargo, which bind the ship-owner); Commission Act § 8 [*lag* (1914:45) *om kommission*] of 15. September 1986 no. 636 (commission agent's authority to act in excess of his mandate if the principal's interests so require); Commission Act § 48 (entitlement and duty of the commission agent to take certain protective measures prior to the expiry of the contract); Marriage Act chap. 6 § 4 [*äktenskapsbalk* (1987:230)] (emergency power of representation between spouses). With regard to DANISH law see also HD 12 November 1917, UfR 1918, 42 and HD 12 November 1917, UfR 1918, 45 (emergency authority of a shipping company vis-à-vis the bearer of a bill of lading).

11. As the COMMON LAW operates in this field primarily with the instrument of agency of necessity and agency in the strict sense presupposes representation so as to change the principal's legal position vis-à-vis third parties, it is unsurprising that English law recognises that in appropriate cases (i.e. where the transaction is necessary and in the best interests of the principal) an agent of necessity has a power to conclude a transaction binding the principal. See, for example, *Wolff v. Horncastle* (1798) 1 Bos & Pul 316 at 323, 126 ER 924 at 928 (principal sending goods by sea and instructing agents to send bill of lading to defendant so that the defendant might insure the goods; defendant refusing to accept bill; agents procured insurance and notified principal; insurance valid and principal liable to pay premiums even if the acts of the agents had not been ratified). Indeed, English law sees the necessity for such intervention equally in terms of a *duty* of the agent to undertake the transaction: see, for example, *Metcalfe v. Britannia Ironworks Co* (1876) 1 QBD 613, 626 (*Cockburn* CJ: if the cargo is damaged, the damage cannot be eradicated by reasonable expenditure, and the cargo will deteriorate if transport continues, he is obliged to sell it). A holder or carrier of

perishable goods which are not collected may have authority from necessity to sell them: *Sims v. Midland Railway Co. Ltd.* [1913] 1 KB 103, and compare *Springer v. Great Western Railway Co.* [1921] 1 KB 257. Unsurprisingly there are voluminous authorities to the effect that in order to enable the ship's safe onward journey a ship's captain may enter into a loan in the principal's name and, if necessary, secure it in respect of the principal's ship in favour of creditors in a case of necessity (be it to finance essential repairs to a damaged ship, to pay fees and taxes at the port, or to pay the cost of repairs already incurred or pay the crew's wages or make payments to other creditors of the principal in respect of outstanding debts who are in a position to hold the ship in port or seize it): *Corset v. Husely* (1689) Comb 135, 90 ER 389; *Watkinson v. Bernadiston* (1726) 2 P Wms 367, 367-368, 24 ER 769 (*Jekyll* MR); *Hayman v. Molton* (1803) 5 Esp. 65 at 67, 170 ER 739 at 739-740 (Lord *Ellenborough* CJ); *Hussey v. Christie* (1808) 9 East 426 at 432, 103 ER 636 (Lord *Ellenborough* CJ); *Arthur v. Barton* (1840) 6 M & W 138, 143-144, 151 ER 355 (Lord *Abinger* CB); *The Lord Cochrane* (1844) 2 W Rob 320, at 166 ER 775 (Dr *Lushington*); *Beldon v. Campbell* (1851) 6 Exch 886, 889-890, 155 ER 805 (*Parke* B) (where, however, the court did not accept there was any necessity); *The Royal Arch* (1857) Swab 269 at 275, 166 ER 1131 at 1135 (Dr *Lushington*); *The Karnak* (1867-69) LR 2 A & E 289, 300 (Sir *Robert Phillimore*). See also the IRISH case *The Staffordshire* (1871) 25 LT (N. S.) 137, 140 (*Townsend* J), affirmed *sub nom. Smith v. Bank of New South Wales* (1871-73) LR 4 PC 194. The same applies in any other case where pledging the principal's credit is the best solution for the principal in the circumstances of the case: *Robinson v. Lyall* (1819) 7 Price 592, 146 ER 1071. Cf. *Miller & Co. v. Potter, Wilson & Co.* (1875) 3 R 105, 111 (Lord *Gifford*), where the comparable SCOTTISH law was expounded ("The captain of a ship at a foreign port who is without the means of communicating with his owners or employers, and where repairs or supplies to the vessel are indispensable, is entitled to get such necessary repairs executed or necessary supplies made, and to pledge therefore the credit of his owners or employers […] .") In that case it is suggested (loc. cit., 111 (Lord *Gifford*) and 115 (Lord Justice-Clerk *Moncrieff*)) that the power to create a proprietary security exists only if an unsecured loan is unavailable. See also in this regard *The Gaetano and Maria* (1882) 7 PD 137 (where, however, the CA held that English law was not applicable). It may be doubted whether that restriction is still good law. The assumption on which it was based (that an unsecured loan would be cheaper) may be counter-factual (a security reducing risk to the lender potentially enables a lower interest rate, though that might be off-set by higher transaction fees). The better view must be a more flexible test of whether a security is reasonably necessary in the circumstances. Similarly, in appropriately necessitous circumstances a captain has a power to conclude in the name of the principal a contract of salvage: *The Renpor* (1883) 8 PD 115; *The Unique Mariner* [1978] 1 Lloyd's Rep 438. In appropriately dire circumstances the captain even has a power of sale: see, for example, *The Victor* (1865) 13 L. T. (N. S.) 21 (Dr *Lushington*), a case of sale by public auction where the master had no credit and was unable to effect even temporary repairs, and the ship was under threat of arrest from creditors and in any case deteriorating daily, and see also *The Australia* (1859) 13 Moore PC 132, 15 ER 50 (the cost of repair of the ship – for which the captain had no funds, for which a secured loan could not easily be obtained, but without which a continuation of the journey was impossible – would have exceeded the value of the ship). See further *Read v. Bonham* (1821) 3 Brod & B 147, 129 ER 1238, where the captain likewise had no funds to finance the substantial repairs needed, even on the basis of a secured loan, although in the minority view of *Richardson* J there was no necessity for a sale because the captain could have offered the cargo as additional security and thus had

not exhausted all opportunity to obtain a loan for the repairs; *Idle v. Royal Exchange Assurance Co* (1819) 8 Taunt 755 at 772, 129 ER 577 at 584 (*Dallas* CJ); *Freeman v. East India Co.* (1822) 5 B & Ald 617 at 621, 106 ER 1316 at 1318 (*Bayley* J); *Robertson v. Clarke* (1824) 1 Bing 445, 450, 130 ER 179 (Lord *Gifford* CJ) (where the prospective cost of repairs exceeded the ship's value); *Hunter v. Parker* (1840) 7 M & W 322 at 342, 151 ER 789, (*Parke* B) (where, however, it was held there was ratification so that the question of authority by virtue of necessity did not have to be answered); *The Segredo* (1853) 1 Spinks Ecc & Ad 36 at 46-47, 164 ER 22 at 28 (Dr *Lushington*), where, however, necessity was not made out; *The Glasgow* (1856) Swab 145, 166 ER 1065 (Dr *Lushington*); *The Victor*, loc. cit. (Dr *Lushington*). As the above authorities indicate, however, the proposition has been more voiced than applied by the courts and it seems that to justify such a drastic step the circumstances must be extreme: *Hayman v. Molton* (1803) 5 Esp. 65 at 67-68, 170 ER 739 at 740 (Lord *Ellenborough* CJ: "extreme necessity" not proven); *The Lord Cochrane*, loc. cit., 334-335 (781) (Dr *Lushington*: "very extreme"). Authority denying a power of sale seems to be of no real weight. The assertion of *Holt* CJ in *Johnson v. Shippen* (1703) 2 Ld Raym 982 at 984, 92 ER 154 at 155 that a captain may pledge a ship but not sell it was dismissed in *Idle v. Royal Exchange Assurance Co.*, loc. cit., 771 (584) by *Dallas* CJ on the basis that in that case a mortgage would have sufficed and so in the circumstances of the case there was no necessity and accordingly no authority for a sale. Similarly criticism may be launched at Lord *Ellenborough* CJ's assertion in *Reid v. Darby* (1808) 10 East 143 at 157, 103 ER 730 at 735, as it was based on the *dictum* in *Johnson v. Shippen*, loc. cit., while in *Reid v. Darby* the sale was invalid independently of the captain's authority because the transfer of title failed to comply with statutory requirements of form. Moreover, *Dallas* CJ in *Idle v. Royal Exchange Assurance Co.* (1819) 8 Taunt 755 at 773, 129 ER 577 at 584, considered that no necessity was made out in *Reid v. Darby* – an explanation of the decision which, however, does not have any clear point of reference in the court's judgment. Equally, a ship's captain has a power in a case of necessity to pledge all or part of the cargo so as to bind the owners of the cargo: *The Gratitudine* (1801) 3 C. Rob 240 at 263, 165 ER 450 at 458 (Sir *W. Scott*); *Freeman v. East India* Co., loc. cit. at 621 (1318) (*Bayley* J). See also *Miller & Co. v. Potter, Wilson & Co.*, loc. cit., 111 (Lord *Gifford*), where the comparable SCOTTISH law is set out. Likewise, where circumstances render it appropriate, the captain has a power to sell cargo: *Australasian Steam Navigation Co. v. Morse* (1871-73) LR 4 PC 222, 228 (Sir *Montague Smith*) (wool which was in bad condition as a result of a shipping accident could not be dried out in port and stored and thus had to be sold). See also *The Gratitudine*, loc. cit., 259 (457) (Sir *W. Scott*, giving the example of cargo which threatens to deteriorate and cannot be transported further); *Freeman v. East India Co*, loc. cit. at 621 (1318) (*Bayley* J, giving the same example), at 622-623 (1318) (*Holroyd* J, giving the same example and the further example of sale of part in order to finance the onward transport of the remainder); *Atkinson v. Stephens* (1852) 7 Ex 567, 155 ER 1074 at 574 (1077) *per Martin* B and 576-577 (1078) *per Pollock* CB (sale of part of the cargo was a lawful method of borrowing money to finance necessary repairs). A captain likewise has a power in a case of necessity to commission another to salvage cargo (*Hingston v. Wendt* (1875-76) 1 QBD 367, 371 (*Blackburn* J); *China Pacific SA v. Food Corp. of India (The Winson)* [1982] AC 939), to bail it to another (creating a bailment between cargo owners and bailee) (*China Pacific SA v. Food Corp. of India*, loc. cit.), or to commission an agent (e. g. a legal adviser, where there is a dispute with a salvor) who will safeguard the cargo owners' interests (*The Soblomsten* (1865-67) LR 1 A & E 293, 299-300 (Dr *Lushington*)). In all of these cases the authority to transact and bind

the principal rests on the fundamental requirement of a necessity for the transaction. Thus money borrowed or goods procured must be needed (*Gunn v. Roberts* (1873-74) LR 9 CP 331, 335 (*Brett* J: reasonably necessary according to the usual course of careful conduct) and applied to necessary ends or expenditure (*The Karnak*, loc. cit., 300 (Sir *Robert Phillimore*)). Money cannot be obtained by means of a (secured) loan if funds are already there (e. g. because provided for the purpose by the principal) or available from other (more advantageous) sources: cf. *Soares v. Rahn* (1838) 3 Moore PC 1 at 9, 13 ER 1 at 4 (Dr *Lushington* for the PC); *The Hebe* (1843) 2 W Rob 146 at 150-151, 166 ER 710 at 712 (possibility of obtaining payment from principal's debtor); *Smith v. Bank of New South Wales* (1872) LR 4 PC 194, 202 (*Mellish* LJ for the PC, implicitly); *Gunn v. Roberts* loc. cit., 333 and 337 (Brett J), and see also *The Lochiel* (1843) 2 W Rob 34 at 48, 166 ER 668 at 673 (Dr *Lushington*). Equally the transaction concluded must be proportionate to the problem. A sale of cargo by a ship's captain will not be authorised unless reasonable efforts to arrange onward transportation have been made and failed or there are no resources available to that end or it would be uneconomic because the expenditure involved would exceed the value of the goods themselves or, as a result of deterioration during transportation, they would lose further value: cf. *Hunter v. Prinsep* (1808) 10 East 378, 394-395 (Lord *Ellenborough* CJ), 103 ER 818; *Atlantic Mutual Insurance Co. v. Huth* (1880-81) 16 Ch. D 474, 481 (*Cotton* LJ), where the captain did not try to commission a salvor or obtain funds to conduct a rescue attempt. Correspondingly, a sale by a captain of a damaged ship will not be authorised if it can be economically repaired and funds are available or can be obtained on economic terms: *Somes v. Sugrue* (1830) 4 Car & P 276 at 283-284, 172 ER 703 at 706 (*Tindal* CJ); *The Segredo*, loc. cit., 48 (28-29) and 55 (32) (Dr *Lushington*). If the agent has conducted himself reasonably and properly when assessing the situation as apparent to him and concluding that in the circumstances a transaction is necessary, the matter cannot be impeached, and the agent is not accountable to the principal for the loss, if it subsequently emerges that it was not strictly necessary – for example, because, despite all the indications, a ship could in fact be repaired economically and need not have been sold: *Robertson v. Caruthers* (1819) 2 Stark 571 at 572, 171 ER 739 (*Abbott* LCJ); *Lindsay v. Leathley* (1863) 3 F & F 902 at 937, 176 ER 410 at 427 (*Cockburn* CJ). By statute (when it comes into force) an intervener acting in connection with the care or treatment of a person who is reasonably believed to lack capacity, reasonably believing it to be in that person's best interests, may pledge that person's credit or apply money of that person in that person's possession in order to meet expenditure: Mental Capacity Act 2005, s. 8(1).

BOOK VI

NON-CONTRACTUAL LIABILITY ARISING OUT OF DAMAGE CAUSED TO ANOTHER

CHAPTER 1: FUNDAMENTAL PROVISIONS

VI.–1:101: Basic rule

(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage.

(2) Where a person has not caused legally relevant damage intentionally or negligently that person is accountable for the causation of legally relevant damage only if Chapter 3 so provides.

COMMENTS

A. The general approach

The basic rule in overview. Paragraph (1) contains a summary of the basic elements of non-contractual liability. It gives force to all the other Articles of this Book, none of which is complete in itself. This is expressed in VI.–1:103(a) (Scope of application). The present Article relates to the reparation of damage which has already occurred, while VI.–1:102 (Prevention) is concerned with prophylactic legal protection and compensation for expenditure incurred by someone for the purpose of preventing the occurrence of impending damage. Paragraph (2) of the present Article expresses one element of the basic rule in paragraph (1). It addresses the situation where the injuring person is liable in spite of having behaved perfectly correctly. Under such circumstances it will often be only certain defined types of loss which will be regarded as legally relevant damage – in particular personal injury and property damage. In so providing, paragraph (2) points ahead to the particular rules in Chapter 3, Section 2 (Accountability without intention or negligence).

Terminology: "tort" and "delict". The choice of the expression "non-contractual liability for damage caused to another" (often abbreviated in the following pages to "non-contractual liability") rather than "tort" or "delict" is easily explained. In the formulation of these model rules it was decided at an early stage to try to use descriptive language rather than technical terms from particular legal systems. Such technical terms often carry with them unwanted residues of a particular historical development and unwanted conceptual preconceptions and, partly for these reasons, can be notoriously difficult to translate. "Delict", for example, carries with it a suggestion of wrongdoing, sometimes deliberate wrongdoing or even criminality. In its origin "tort" also suggests wrongdoing. This Book, as has just been explained, is not confined to wrongdoing. Moreover, "tort" and "tortious" are inextricably bound up with English law, while "delict" or its equivalent in other languages has different meanings in different legal systems. "Tort" is short but that, sadly, is its only advantage. Brevity has had to be sacrificed, with some reluctance, for appropriateness and, in the broadest possible sense,

translatability. Some other terms which were considered (like "civil responsibility") would not by themselves, and when used in a new instrument without a background of shared understanding, have distinguished adequately between this branch of the law and other branches of private law.

Other terms. Some of the other terms frequently used in this Book are defined in Annex. The term "damage" has a wide meaning. It means any type of detrimental effect: it includes loss and injury. Not all damage is legally relevant damage for the purposes of this Book. The meaning of "legally relevant damage" – a key term – is explained below. The term "injured person" means a person suffering damage of any kind: it is not confined to a person who has suffered personal injury. Similarly, the term "injuring person" means a person causing or responsible for damage of any kind: again it is not confined to a person causing personal injury. A "claim" is a demand for something based on the assertion of a right. A "claimant" is a person who makes, or who has grounds for making, a claim. The words "claim" and "claimant" do not presuppose legal proceedings. This Book is concerned with the substantive law on non-contractual liability for damage. Most reparation claims are never the subject of legal proceedings. For this reason, and also because they are or were technical terms of particular legal systems, words like "plaintiff", "pursuer", "defendant" and "defender" are not used in this Book. Some other key terms ("economic and non-economic loss", "reparation", "compensation", "person") are, like "legally relevant damage", discussed below.

The injured person's perspective. Paragraph (1) is formulated in terms of a right and thus from the perspective of the injured person. That appeared a more straightforward approach than the one adopted in most of the current laws, which are constructed from the viewpoint of the injuring person. Furthermore, in the formulation chosen here the notion that liability for damage lies at the centre of this branch of the law is given more explicit expression. Finally, the formulation underlines the basic distribution of the burden of proof: the injured person must as a rule set out and prove all the facts founding the claim.

Economic and non-economic loss. The term "legally relevant damage" encompasses losses both of an economic and of a non-economic type, and in some cases injury as such. See further VI.–2:101 (Meaning of legally relevant damage) paragraph (1).

Damage and reparation. The basic rule draws a distinction between the concept of legally relevant damage and the reparation for that damage. The grounds of accountability (intention, negligence, and responsibility for a source of danger) are addressed in Chapter 3. They relate to the legally relevant damage (see in particular VI.–3:101 (Intention) and VI.–3:102 (Negligence)), which for its part may take the form of either an injury or a loss (stated in more detail in VI.–2:101 (Meaning of legally relevant damage)). The details on this point are to be found in Chapter 2. The form and amount of reparation and (in the case of an infringement of an interest which is allocated to multiple parties) the question of the person or persons to whom reparation should be made are governed by Chapter 6. VI.–4:101(2) (General rule [on causation]) makes it clear that in the case of personal injury and death the predisposition of the victim is to be disregarded even if this could not be foreseen by the injuring person.

Reparation and compensation. The term "reparation" encompasses generically all legal redress which serves the function of making amends for a damage which has already occurred. "Compensation" is used for reparation taking the specific form of a monetary payment. "Compensation" is therefore merely a special case of "reparation".

Grounds of accountability. The provision brings together in one norm liability for intention, liability for negligence and liability where neither intention nor negligence on the part of the responsible person are a precondition. The expression "grounds of accountability" is used here as well as later as an umbrella term embracing both the potential for liability on account of intentionally causing damage or negligence on the one hand and the potential for liability on account of responsibility for a source of danger on the other. Forms of liability derived from rebuttable presumptions of negligence systematically still belong to the regime of liability for negligence. Certainly negligence in that case need not be proved, so that *de facto* there may be liability when the responsible person is not at fault but cannot prove that. However, liability is so constructed by the norms of the legal system that negligence in such a case is to be regarded as made out unless the contrary is proved.

Grounds of accountability and causation. The formulation also makes it explicit that where there is not even negligence, but the responsible person is nonetheless liable, it cannot normally be said that the responsible person has caused the damage. Rather that person is accountable for the causation of the damage. An example would be where an employer is vicariously liable for damage caused by an employee, but in the absence of a breach of the duty to supervise the employee it cannot be said that the employer caused the damage; it was the employee who caused it. Strictly understood, the requirement of causation therefore emerges in two different contexts: it connects (i) intentional or negligent conduct, on the one hand, and legally relevant damage, on the other, and it connects (ii) a source of danger for which a person is accountable by law (i.e. without intention or negligence) on the one hand and the damage resulting from the realisation of that danger on the other. This is the reason for the formulation of the second alternative of paragraph (1) ("or is otherwise accountable for the causation of the damage"). In the latter context accountability for an occurrence by which damage is caused stems in particular from the conduct of a person (in the example already given, an employee) or from a thing or an animal under the responsible person's (ostensible) control. That a causal connection is required between the conduct of the person or the materialisation of the potential for danger inherent in the thing, on the one hand, and the damage sustained, on the other, is repeated in the provisions of Chapter 3, Section 2 and in Chapter 4.

Omissions. An express distinction between liability for positive acts and liability for omissions is not included because it is not required. These cases are not fundamentally distinguished either at the level of negligence or the level of causation (see further the comments to VI.–3:102 (Negligence) and VI.–4:101 (General rule [on causation]). Furthermore, omissions to act can also lead to the intentional causation of damage (on which point see the comments to VI.–3:101 (Intention)). Moreover, for liability imposed irrespective of conduct falling short of the required standard of care, any such distinction (i.e. between omissions and positive acts) as a starting point entirely misses what is at the heart of this form of liability. It operates independently of any conduct on the part of the responsible person.

Burden of proof. VI.–1:101 presupposes the basic rule that the injured person has to set out and, if need be, prove the requirements which have to be satisfied if there is to be a right to reparation. Exceptions from this basic and implicit rule on the burden of proof are specifically mentioned in the provisions which follow. By contrast, it falls to the injuring person to set out and prove the existence of a ground of defence. The basic rule consequently provides that each side must set out, and as the case requires prove, the circumstances founded on by that side. That this basic rule has not been adopted in the express wording of the Article is

explained by the fact that it is not limited to the law on non-contractual liability; the principle is of general application.

Natural and legal persons. Where the text speaks of "a person" or "another" or their cognates, or invokes similar formulations, then, so far as nothing else is expressly designated (as is done in VI.–2:201 (Personal injury and consequential loss), in VI.–2:202 (Loss suffered by third parties as a result of another's personal injury or death) and in VI.–2:203 (Infringement of dignity, liberty and privacy)), these terms are always to be understood as meaning both natural and legal persons. See Annex – "person" means a natural or legal person – and VI.–1:103 (Scope of application) sub-paragraph (b).

Liability under public law not covered. However, the liability of natural and legal persons subject to public law arising out of the exercise of a public function is not regulated; see VI.–7:202 (Public law functions and court proceedings). In VI.–5:201 (Authority conferred by law) in any case, however, there is a ground of defence if legally relevant damage is caused with authority conferred by law.

B. How the basic rule works

A single cause of action. According to the concept of this draft every claim to reparation under the law on non-contractual liability must satisfy the requirements of paragraph (1) of VI.–1:101(Basic rule). There are no exceptions. In every case it is necessary to assess whether (i) the claimant has suffered a legally relevant damage, (ii) there is a ground of accountability in relation to the person against whom the claim is made, and (iii) the damage has been caused by an act or omission for which that person must answer by reason of negligence or intention or responsibility for a source of danger.

VI.–1:103(a) (Scope of application). Furthermore, VI.–1:103(a) (Scope of application) makes it clear that VI.–1:101(1) must always be read in conjunction with the following Articles (The reason why this provision is not to be found in VI.–1:101 itself is purely a matter of drafting: the rule also applies to VI.–1:102 (Prevention)). Those following Articles furnish in particular an exhaustive statement of what is to be understood by the terms 'legally relevant damage' (Chapter 2), 'grounds of accountability' (Chapter 3) and 'causation' (Chapter 4). VI.–1:103(a) also helps to entrench VI.–1:101 within the exhaustive regime built up by the further Chapters of this Part. Liability under VI.–1:101(1) exists only as provided for by the following Articles - in particular, therefore, only in accordance with the provisions of Chapters 5 to 7. Thus it is settled that every one of the following provisions – and above all the provisions on grounds of defence and the consequences of liability – obtains its effectiveness only within the framework of the basic rule. The circumstance, for example, that a person has wilfully caused damage to another does not necessarily subject that person as a consequence to an obligation to make reparation. It is always open to that person to invoke one of the numerous grounds of defence, which incidentally are applicable generally to all three grounds of liability (and thus also to liability without intention or negligence).

No general clause. VI.–1:101(1) is thus on the one hand clearly a foundation for a claim. On the other hand it is not self-sufficient: rights are derived from it only with the aid of provisions beyond the confines of this rule, which is both fleshed out and limited by the following Articles. In other words, what we have here is not a general clause in the strict sense, but rather a provision whose component elements are later filled out with more precise content. That does not exclude the prospect that, alongside others with sharply drawn contours, the

following Articles may contain rules which have deliberately been left open and flexible. VI.–2:101 (Meaning of legally relevant damage) and VI.–4:101 (General Rule [on causation]) provide examples of this.

No liability beyond the boundaries of the following provisions. It is not possible to support liability on the basis of VI.–1:101 alone where this would extend beyond the boundaries pegged out by the following Articles.

Illustration 1
While parking her friend's (F's) vehicle in a car park, H damages O's parked car. In order to establish a claim against H under VI.–1:101, O must establish that (i) he has suffered a legally relevant damage, (ii) that H is accountable for it and (iii) either that H has caused the damage intentionally or negligently or that H is otherwise accountable for the causation of the damage. That follows from the wording of VI.–1:101(1). By virtue of VI.–1:103(a) (Scope of application), whether O has suffered a legally relevant damage primarily falls to be assessed under VI.–2:101(1)(a) (Meaning of legally relevant damage) in accordance with VI.–2:206 (Loss upon infringement of property) (The answer is, of course, affirmative). As regards the issue of accountability, VI.–1:103(a) points to VI.–3:101 (Intention) or VI.–3:102 (Negligence). If we suppose that H did not mean to cause the damage, accountability would nonetheless be established if H failed to exercise the care required in parking the car. The analysis then turns in accordance with VI.–1:103(a) to causation, i.e. to VI.–4:101 (General rule [on causation]). The question which claims to reparation O is able to assert (and for what amount of compensation) is answered, in accordance with VI.–1:103(a), by the provisions of Chapter 6 and more particularly Section 2 of that Chapter.

Illustration 2
The solution follows basically the same scheme if it is assumed (for whatever reason) that H has acted neither intentionally nor negligently. In this scenario, however, the question whether O has suffered a legally relevant damage must be assessed in accordance with VI.–1:101(2) by reference to VI.–3:206 (Accountability for damage caused by motor vehicles). The answer is in the affirmative because this case relates to property damage within the meaning of that provision (VI.–3:206, as compared with VI.–2:206, invokes a narrower concept of legally relevant damage). Finally, it must be established whether H is otherwise accountable for the damage (paragraph (1) of the basic rule). That question must be examined in accordance with the provisions of Chapter 3, Section 2 (Accountability without intention or negligence). The answer is in the negative because H is not a "keeper" of the car (VI.–3:208 (Control and use)). The claim would however be successful if directed against F as he is accountable for the causation of the damage by the motor vehicle. Whether O's claim ought to be reduced is a matter for VI.–5:102(4) (Contributory fault and accountability).

Illustration 3
The facts are as in illustration 1, except that H parked her own car and was not attending to her own affairs, but intended instead to make purchases on behalf of the F family, for whom she works as a childminder. In issue is the liability of Mr and Mrs F, neither of whom were negligent in the supervision of H. The test for legally relevant damage is the same as in illustration 1. That follows from VI.–1:101(2) in conjunction with VI.–3:201 (Accountability for damage caused by employees and representatives), because this latter Article contains no particularities with regard to the presence of

legally relevant damage. Mr and Mrs F have not caused the damage (that was done by H), but under VI.–1:101(1) (third limb: "*or who is otherwise accountable for the damage*") in conjunction with VI.–3:201 that fact does not preclude liability. Mr and Mrs F are jointly liable under VI.–1:103(a) in conjunction with VI.–6:105 (Solidary liability).

Illustration 4
While out on a day's shoot, J rests his loaded weapon, for a moment unattended, against a tree. A usurps possession of the weapon and fires off a shot. X is fatally injured and dies on the spot. Ascertaining non-contractual liability begins, as always and without exception, with VI.–1:101(1). X himself suffered no legally relevant damage (The case would have been different if he died only after some interval of time, e.g. after admission at a hospital: VI.–2:201 (Personal injury and consequential loss)). The legally relevant damage suffered by those X leaves behind is determined by VI.–2:202 (Loss suffered by third parties as a result of another's personal injury or death). As regards accountability, J has infringed either a statutory requirement to take care in handling weapons or a general duty to take care (VI.–3:102 (Negligence)). In determining that there was negligence it is immaterial whether J's conduct is characterised as one of positive act (the placing of the loaded weapon in an unguarded location) or omission (failure to supervise the loaded weapon). However, J is not liable to those X has left behind for the damage suffered if A shot X intentionally and J had no reason to suppose that that sort of eventuality could happen (VI.–1:103(a) in conjunction with VI.–4:101 (General rule [on causation]: the murder cannot be regarded as the consequence of J's negligence). The outcome would be no different if there were a strict liability for weapons (see VI.–3:207 (Other accountability for the causation of legally relevant damage)). In that case too the element of causation would still be missing.

Illustration 5
A is carrying out building work on her land which, on one particular occasion, results in a minor gathering of dust. A little dust settles on the car of B, a neighbour of A's. B has no claim to reparation for the costs incurred in finding a garage with a car-wash facility; the damage is trivial (VI.–1:103(a) in conjunction with VI.–6:102 (De minimis rule)). Were repetitions of this incident with more pronounced collection of dust to be envisaged over a long term, B could then demand preventative relief (VI.–1:102 (Prevention) in conjunction with VI.–6:301 (Prevention in general)), according to the circumstances conceivably even a reasonable outlay at A's own cost for the protection of the car against further soiling if another parking place is not usually available (VI.–1:102 in conjunction with VI.–1:103(a), VI.–2:206 (Loss upon infringement of property or lawful possession) and VI.–6:302 (Liability for loss in preventing damage)).

NOTES

I. General

1. There is at present no provision which in its wording precisely corresponds to VI.–1:101. The substance of VI.–1:101 is nonetheless common property in Europe. It is the purpose of the formulation presented in VI.–1:101 to bring together this common substance in one unifying concept and wording. The basic norms on legal liability in

the codifications and the Nordic statutes on damages are for the most part formulated from the perspective of the party responsible for the damage and not from the perspective of the party who suffers it. They take pains in their formulation to operate on the basis of a notion of fault. Only the newer codifications include a pointer to so-called strict liability within their basic norm. In many countries such liability developed outside the codes, partly on the basis of case law and partly on the basis of special legislation. Moreover, the Common Law developed on the basis of a multitude of particular torts and not on the foundation of a basic norm.

II. Structures and formulations of the existing basic rules

2. The Codes of the nineteenth century made do throughout with very broad principles. The Code Napoléon (the BELGIAN, FRENCH and LUXEMBOURGIAN CC) distinguishes between *délits* (intentional delicts) (CC art. 1382) and *quasi-délits* (delicts committed negligently) (CC art. 1383), but this distinction no longer fulfils any major role today. In substance there is a single legal rule consisting of the three elements *faute*, *dommage* and *causalité*. The same is also true for MALTA (CC arts. 1031-1033). The SPANISH CC (which, however, only applies to delicts which do not constitute crimes; see CC art. 1092) merged arts. 1382 and 1383 of the Code Napoléon in a single provision (CC art. 1902). Also resembling the Code Napoléon to a large extent is the text of AUSTRIAN CC § 1295(1) ("Every person is entitled to demand the reparation of damage from the person who with fault has inflicted it; the damage may be caused by a breach of contractual duty or without relation to a contract").

3. The tort laws of Central Eastern Europe follow without exception the approach of the Romance legal systems and thus confine themselves in principle to a general clause (CZECH and SLOVAKIAN CC § 420; HUNGARIAN CC § 339(1); POLISH CC art. 415; SLOVENIAN LOA § 131(1)).

4. Western Europe's Codes of the twentieth century formulated their foundation norms more restrictively. The GERMAN BGB structured itself around infringements of "absolute" rights (CC § 823(1)), infringements of protective statutory provisions (CC § 823(2)) and intentionally caused harm upon infringements of *gute Sitten* (CC § 826). The PORTUGUESE Civil Code (CC art. 483(1)) also sets out in a similar manner. The provision focuses on liability for intentional or negligent infringements of rights and a corresponding rule for infringement of protective statutory provisions. The ITALIAN legislator formulated CC art. 2043 in a broad way similar to the French or Spanish, but in CC art. 2043 one finds in the concept of *danno ingiusto* an Italian speciality with a powerful effect on the development of the case law. The text of DUTCH CC art. 6:162 has already been reproduced**:** DUTCH CC art. 6:162 reads (in the translation by *Haanappel/Mackaay/Warendorf/Thomas*, Netherlands Business Legislation): "(1) A person who commits an unlawful act against another which is attributable to him, must repair the damage suffered by the other as a consequence thereof. (2) Except where there are grounds for justification, the following acts are deemed unlawful: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct. (3) A wrongdoer is responsible for the commission of an unlawful act if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles."

5. The legislative approach of the BALTIC States varies considerably: The basic norm of the Estonian LOA § 1043 ("A person (tortfeasor) who unlawfully causes damage to another person (victim) shall compensate for the damage if the tortfeasor is culpable in causing the damage or is liable for causing the damage pursuant to law") is clearly influenced by German law. This influence is more clearly evident in the Estonian LOA § 1045(1) - the provision which lists the most important forms of causing damage

(causing death, personal injury or damage to health, deprivation of liberty, violation of a personality right, violation of the right of ownership or a similar right or right of possession, interference with the economic or professional activities of a person, behaviour which violates a duty arising from law, intentional behaviour contrary to good morals). The critical difference to the German system lies in the fact that this list is not exhaustive and allows room for further development. The Lithuanian Law of Obligations Act (CC) of 18 July 2000 addresses tort law in the 13th Chapter of its sixth Book. The starting point is CC art. 6.246(1), a provision which works with the notion of unlawfulness, but foregoes an express list of interests protected by tort law. CC art. 6.263(1) is formulated in the style of a general clause. The Latvian Civil Code of 1938, brought back into force on a phased basis from 1992, for its part adopts in CC art. 1635 the Romance concept of the general clause ("Every delict, i.e., every wrongful act per se, shall give the person who suffered the harm therefrom the right to claim satisfaction from the infringer, insofar as he or she may be held at fault for such act").

6. In the NORDIC systems the "culpa-rule" takes over the function of a basic tort law norm. In Denmark the rule is part of the common law (*Vinding Kruse*, Erstatningsretten[5], 29). In Finland and Sweden in contrast the rule has been formulated in the statutes on damages (SWEDISH Statute on Damages of 2 June 1972 chap. 2 § 1 reads: "A person who intentionally or negligently causes damage to persons or property must compensate for this damage in so far as this statute makes no other provision"). The corresponding FINNISH text (Damages Act 1974 chap. 2 § 1(1) (*skadeståndslag*)) reads: "A person who intentionally or negligently causes another damage must make reparation for that damage unless statute provides otherwise." Thus here too the elements of accountability (intention or negligence), damage and causation re-surface. The limitations relate partly to the special treatment of pure economic losses but partly also (and more importantly) to the special treatment of insured risks.

7. In the modern COMMON LAW, although it has a younger ancestry, the tort of negligence is placed in the centre point of its law on liability. This too is made up from the elements of breach of duty of care, damage and causation, and one may proceed on the footing that wherever there is liability on grounds of breach of duty of care there is necessarily also liability in cases of intentionally causing damage. The demarcation of the substantive area of application of the tort of negligence in relation to other torts has become increasingly difficult. Nevertheless the English and Irish tort laws continue to the present day to be based on a large set of particular grounds of liability, rather than on a single basic rule**.**

8. The 'tort' of negligence is also a feature of the SCOTS law of delict. *Donoghue v. Stevenson* [1932] AC 562, the decision which established it for the modern law, concerned a Scottish case and its aftermath contributed much to the harmonisation of the English and Scots laws on non-contractual liability for damage. Generally the differences in the modern law of torts in England and Ireland on the one side and the Scots law of delict on the other tend to be peripheral (summarised in *v. Bar*, Common European Law of Torts I, nos. 299-301). However, the basic systematic concept is different. The Scots law of delict stems from a basic norm of delictual liability, as it does in all Civil Law legal systems, and not from a multitude of co-existing torts which are basically independent of one another. The CYPRUS Civil Wrongs Law s. 51(1) defines negligence as consisting of causing damage by "doing some act which in the circumstances a reasonable, prudent person would not do or failing to do some act which in the circumstances such a person would do".

III. Wrongfulness as a prerequisite for liability

9. The wording of VI.–1:101 does not employ the concept of wrongfulness which is a requisite for the imposition of liability in tort law in several European jurisdictions. Above all, this notion is employed in § 823(1) and subsequent provisions of the GERMAN CC (e.g. § 831), where unlawfulness is ranked before fault or culpability, and fault is, in turn, regarded as an umbrella term for intention and negligence. Wrongfulness as a discrete requisite of liability, required to be considered prior to the examination of fault, is also expressly postulated by the PORTUGUESE CC art. 483(1) ("A person who, intentionally or negligently, unlawfully violates the rights of another person") and in DUTCH CC art. 6:162. It is not expressly mentioned in the basic norm of AUSTRIAN tort law (CC § 1295(1)). However, the ABGB does refer to "wrongful" in an array of other provisions (*inter alia* CC § 1294); the judiciary and prevailing legal opinion consequently concur that, in the Austrian legal system, wrongfulness is a required independent ingredient of liability.(*Koziol*, Haftpflichtrecht I[3], 138; see also Rummel [-*Reischauer*], ABGB II[2], § 1294 nos. 6 ff). GREEK CC art. 914 requires that the conduct must have constituted an "unlawful" act, if liability is to be imposed. "Unlawfulness" is, for the most part, equated with the more expansive concept of "wrongfulness" (*Stathopoulos*, Geniko Enochiko Dikaio A (1)[2], 257). HUNGARIAN CC § 339(1) states that a person is liable if that person unlawfully inflicts damage on another. This wording does not result in the scope of application of the provision being restricted to those cases in which an "absolute right" of another or a law has been violated. Under the ESTONIAN LOA § 1043 the imposition of liability essentially depends upon (i.e. in the field of liability for intention and negligence), whether the damage was "unlawfully caused". LOA § 1045 clarifies in detail, when this state of affairs is extant. LITHUANIAN CC art. 6.246 grounds liability, in general terms, on the "performance of actions that are prohibited by laws or a contract (unlawful acting)", and LATVIAN CC art. 1635 "every delict, i.e., every wrongful act per se" is deemed sufficient to establish liability, provided that "the infringer ... may be held at fault for such act".

10. According to the basic tort law norm under ITALIAN law (CC art. 2043) the imposition of liability requires the presence of "wrongful damage" (*danno ingiusto*). Only in the heading to the Chapter on tort law in the *Codice civile* and in the provisions governing the imposition of liability for the acts of another, (i.e. for children [CC art. 2048] and employees [CC art. 2049]), is mention made of a *fatti illeciti* .If a defence can be made out, this is referred to as an *esclusione* or *assenza di antigiuridicità* (for a comparison of Italian and German law, *Castronovo*, La nuova responsabilità civile[3], 18-19, 21).

11. The concept of wrongfulness is completely alien to the COMMON LAW.

12. The concept of wrongfulness is also foreign to BELGIAN, FRENCH, LUXEMBURGIAN and MALTESE law. In a similar fashion, SPANISH CC art. 1902, POLISH CC art. 415, SLOVENIAN LOA 131(1), CZECH and SLOVAKIAN CC § 420 as well as the applicable basic norms of the NORDIC countries have refrained from adopting this ingredient for the imposition of liability (see for a detailed comparative legal analysis *v. Bar*, Common European Law of Torts II, nos. 211-219). In POLAND, however, case law and academic analysis take the view that a person can only be at "fault" if that person has done something unlawful and consequently either the element of wrongfulness is to be read into the notion of fault in CC art. 415 or it constitutes an independent requirement for liability (*Radwański and Olejniczak*, Zobowiązania-część ogólna[5], 180-181).

13. Quite what "wrongfulness" means in detail, how it is to ascertained and what significance it should bear within the system of liability are all matters, however, on which there is no consensus even within the legal systems which recognise this requirement (*Koziol*, Unification of Tort Law: Wrongfulness, 129; *Weir*, [1999] CLJ 643-645). The only common denominator is the notion that a person acts wrongfully if that person infringes a mandatory duty or a prohibition of the legal system. The further particularisation of that proposition, however, varies and is a matter of debate within the jurisdictions concerned (see, for example, for POLAND *Radwański and Olejniczak*, Zobowiązania-część ogólna[5], 184-185, on the one hand and *Wierciński*, Niemajątkowa ochrona czci, 145-149, on the other) as much as in comparative discussions between them. To date, in particular, no agreement has been reached on whether the adjudication of wrongfulness should predominantly derive from the fact that a negative "result" has been caused (this view is still prevails, incidentally, by the courts in GERMANY [BGH 12 July 1996, NJW 1996, 3205, 3207] and in GREECE [A.P. 417/1974, NoB 22/1974, 1391; CA Athens 3114/1977, NoB 26/1978, 235]; in HUNGARY the issue of wrongfulness relates to the damage that has been caused, it does not appertain to the violation of an absolute right.') or whether it derives from the fact that the relevant act did not satisfy the requirements pertaining to the duty of care in the applicable legal order (the latter view is prevalent in e.g. AUSTRIAN law [*Koziol*, Haftpflichtrecht I[3], 140]). According to the "result orientated" notion of wrongfulness which has flourished in Germany, every infringement of a right or a protected legal interest enumerated in the German CC § 823(1) by a positive act automatically entails wrongfulness; conduct that realises the elements of the statutory provision "indicates" wrongfulness (the so-called law pertaining to the establishment and operation of a commercial enterprise and the general law pertaining to the legal protection of the personality are exceptions to this rule). According to the opposing "conduct orientated" theory ,on the other hand, an unintentional violation of a right or legally protected interest is only regarded as wrongful, if the actor infringes a specific norm of conduct set out in the relevant legal provision or if the actor has failed to heed the due care required to avoid the onset of damage (cf. for schools of thought, Palandt [-*Thomas*], BGB[65], § 823 nos. 32 ff; instructive *Larenz and Canaris*, Schuldrecht II(2)[13], § 75 II 3, which embodies an attempt to combine the two opposing theories, basing their approach on a distinction between a direct violation and indirect interference of the rights or interests of another; moreover, a quite similar approach is taken in Greece *Stathopoulos*, Geniko Enochiko Dikaio A (1)[2], 263; *Stathopoulos*, in: FS Larenz 1983, 631, 641; *Roussos*, EllDik 35/1994, 1492, 1494). In respect of indicated or ascertained wrongfulness, invoking a ground of justification may serve to negative wrongfulness. The burden of proof lies on the defendant to make out this defence (Erman [-*Schiemann*], BGB I[10], § 823 no. 146).

14. Similarly, in GREECE, a debate rages over the interpretation of the element of wrongfulness anchored in the basic norm CC art. 914 (for an in - depth analysis see *Eleftheriadou*, Die Haftung aus Verkehrspflichtverletzung im deutschen und griechischen Deliktsrecht, 60) Relying on the paradigm of art. 1382 of the French CC, it is even contentious as to whether wrongfulness is indeed a prerequisite for the imposition of liability (on this aspect, chiefly *Vavouskos*, I paraleipsis os simiogono gegonos eis ta adikimata tou Astikou Dikaiou, 61 ff, 83, 88 ff; *Vavouskos*, in: FS Michaelides-Nouaros I, 87 ff). In contrast, the prevailing view in academic writing views CC art. 914 as a "*Blankettnorm*" which is fleshed out by recourse to concepts and principles elsewhere in the legal system (*Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 131 ff; *Stathopoulos*, Geniko Enochiko Dikaio A (1)[2], 258 ff; *Deliyannis*, in: FS Michaelides-Nouaros I, 303, 310 ff). It is deemed sufficient that the

conduct is contrary to the general spirit of the legal order (*Deliyannis*, AID 13/1951-52, 153, 156 ff; A.P. 81/1991 EllDik 32/1991, 1215) or violates the obligation of good faith (CA Athens 3114/1977, NoB 26/1978, 235). It is not essential that a specific statutory provision be infringed; in short, if something is not expressly prohibited, it does not automatically entail that it is permitted (*Pouliadis*, Culpa in Contrahendo, 215; *Deliyannis*, AID 13/1951-52, 153, 165).

15. Additionally, in a number of legal orders, the significance of the criterion of wrongfulness for the forms of liability unattended by either intention or negligence has yet to be clarified. Those jurisdictions abiding by the requirement of wrongfulness, also characteristically recognise related "grounds of justification". These serve to negative the finding of wrongfulness, typically made out (indicated) when an absolute right or protective law has been infringed. For the most part, these grounds of justification are construed as grounds of defence for all types of tortious conduct (*Koziol*, Haftpflichtrecht I[3], 168). Typical grounds of defence are self-help (e.g. PORTUGUESE CC art. 336; GERMAN CC § 229; GREEK CC art. 282; ESTONIAN LOA § 1045(2)(iv)), self-defence (PORTUGUESE CC art. 337; GERMAN CC § 227; GREEK CC art. 284; POLISH CC art. 423; ESTONIAN LOA § 1045(2)(iii); HUNGARIAN CC § 343), emergency (PORTUGUESE CC art. 339; GERMAN CC §§ 228, 904; GREEK CC arts. 285 and 286; POLISH CC art. 424; ESTONIAN LOA § 1045(2)(iii), HUNGARIAN CC § 107) and the consent of the injured person (PORTUGUESE CC art. 340; ESTONIAN LOA § 1045(2)(ii); HUNGARIAN CC § 342(2)). Frequently, additional grounds of justification are put forward such as e.g. if the right to cause damage derives from the exercise of a right or the performance of a legal obligation (ESTONIAN LOA § 1045(2)(i); *Antunes Varela*, Obrigações em geral I[10], 552 ff and *Almeida Costa*, Obrigações[9], 519 ff).

16. A distinguishing feature of legal orders which have elevated the criterion of "wrongfulness" to an independent requisite for the imposition of liability, is ultimately their focus on the protection of "absolute rights" under tort law (see, with regard to GERMANY CC § 823(1); for AUSTRIA *Koziol*, Haftpflichtrecht I[3], 148, see for the examination of the wording of the statute and its being modelled on French CC art. 1382 also Schwimann [-*Harrer*], ABGB VII[2], § 1293 no. 2; for PORTUGAL CC art. 483(1); for ESTONIA LOA § 1045(1) and for the NETHERLANDS CC art. 6:162(2)). These rights are denoted as absolute because namely, such rights are valid against all persons. Consequently, infringing such rights is "wrongful", provided that a "ground of justification" for their violation is absent. As far as the legal orders mentioned above are concerned, the second repository from whence a judgment of wrongfulness can emanate, is in the infringement of a law intended to protect the injured party (GERMAN CC § 823(2); GREEK CC art. 914; PORTUGUESE CC art. 483(1); DUTCH CC art. 6:162(2); AUSTRIAN CC § 1311 second sentence; ESTONIAN LOA § 1045(1)(vii)). Third, a wrongful act is constituted by the (intentional) transgression of "*bonus mores*" (GERMAN CC § 826; GREEK CC art. 919; AUSTRIAN CC § 1295(2); ESTONIAN LOA § 1045(1)(viii); CZECH and SLOVAKIAN CC § 424) or in the violation of „a rule of unwritten law pertaining to proper social conduct" (DUTCH CC art. 6:162(2)).

IV. Fault, Intention and Negligence

17. The basic norms of tort law contained in the Codes of CIVIL LAW jurisdictions and in the NORDIC countries are dominated by the concept of liability for "fault". Equally, this notion has been frequently qualified as "fundamental" by the courts (see e.g. in respect of SPAIN TS 8 April 1992, RAJ 1992, no. 3187 p. 4202, 4. recital). Conversely, in the jurisdictions of the COMMON LAW, this concept has not attained

a corresponding significance. The use of the notion of "fault" is even characteristically shunned. ENGLISH and IRISH legislatures have only employed the concept of fault within the parameters of contributory negligence (see Law Reform (Contributory Negligence) Act 1945 s. 1(1)).

18. Under the codified tort law of the Civil law jurisdictions, whenever a requisite of liability is to prove that the defendant has conducted himself "culpably" or that s/he was "at fault" (e.g. DUTCH CC art. 6:162(3); GERMAN CC § 823(2); AUSTRIAN CC § 1295(1); SPANISH CC art. 1902; GREEK CC art. 914; POLISH CC art. 415; ESTONIAN LOA §§ 1043 and 1050; LATVIAN CC art. 1635; SLOVENIAN LOA art. 131(1)), the choice of word employed is representative throughout as an umbrella term for intention and negligence (see *inter alia* AUSTRIAN CC § 1294; LATVIAN CC art. 1640; LITHUANIAN CC art. 6.248(2) and SLOVENIAN LOA art. 135). This remains the case even if the particular basic norm does not expressly refer to intention (see. e.g. SPANISH CC arts. 1093 in association with 1902 [despite the failure of CC art. 1902 to refer to *dolo*, it is generally accepted *dolo is* embraced by the notion of culpa: *Lacruz Berdejo*, *Elementos* II (2)[4], 471]; for the corresponding legal position in POLAND see *Czachórski*, Zobowiązania[9], 212). For the most part, the Codes in Civil law jurisdictions (as in VI.–1:101(1)) employ the notions of intention and negligence concomitantly (e.g. in GERMAN CC § 823(1); ITALIAN CC art. 2043; PORTUGUESE CC art. 483(1); BELGIAN, FRENCH and LUXEMBOURGIAN CC arts. 1382 [*faute*] and 1383 [*négligence*, *imprudence*]; SWEDISH and FINNISH Statute on Damages chap. 2 § 1). In addition, it is a universal principle that the same legal consequences attend the varying manifestations of fault. In respect of the tortfeasor's liability, at the outset, it is of no consequence, whether the tortfeasor acted with slight or grave fault or whether he acted with intent. Uniquely, the argument has occasionally been advance in FRENCH legal writing that there exists a fundamental difference between liability on the grounds of intention and liability based on negligence, and it has been submitted that this distinction derives from the *différences de régime*, see. e.g. *Mazeaud and Chabas*, Obligations[9], no. 444 p. 451). In contrast, the HUNGARIAN CC eschews the word "fault". The basic norm does not literally speak of "blameworthiness", but it is uniformly construed as if that requirement were included in the article. A person already acts in a blameworthy manner merely by failing to conduct himself as expected; moreover, blameworthiness is rebuttably presumed (CC § 339(1) second sentence).

19. The practical importance of the distinction between causing harm intentionally or negligently (in respect of substantive requirements of these concepts, see the Notes to VI.–3:101 (Intention) and VI.–3:102 (Negligence)) is clearly of less significance in private law than in criminal law. Nonetheless, its relevance in the private law context should not be underestimated. This assertion is at the very least valid in the field of remedies (see for a contrary view to many commentators Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 72 p. 83-84). A prime example can be found in PORTUGUESE CC art. 494, whereby the obligation to make reparation for the damage that has already occurred can be reduced in its extent in cases of negligence (*negligência* respectively *mera culpa*). The discretion of the courts to reduce the quantum of damages is exercised on an equitable basis. However, this option is not available where the damage is intentionally inflicted (*dolo*) and the tortfeasor is then obliged to compensate the full extent of the damage (see further *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 475, note 9 to art. 483). In cases where the damage has been intentionally inflicted, HUNGARIAN CC § 360(4) extends the limitation period to 5 years.

20. Moreover, the distinction between intentional and negligent infliction of damage can be of particular significance in relation to discrete injurious acts. This is due to the fact that there is an array of ad hoc statutory provisions which expressly stipulate the intent as a requisite of liability. Prime examples include the behavioural elements of the causes of action mentioned above dealing with the intentional infliction of damage contrary tot he tenets of good faith (GERMAN CC § 826; AUSTRIAN CC § 1295(2); GREEK CC art. 919; ESTONIAN LOA § 1045(1)(viii); CZECH and SLOVAKIAN CC § 424) (DUTCH CC art. 6:162(2) does not have the requisite of intention: art. 6:162(3)). As far as SPANISH law is concerned, additional regard must be had to the fact that many intentional torts are also crimes and that criminal liability is regulated in the Criminal Code and not under the Civil Code (CC art. 1092).

21. Similarly, in the NORDIC countries the distinction between intention and negligence is rarely of significance (*Hellner and Johansson*, Skadeståndsrätt[6], 124; *Vinding Kruse*, Erstatningsretten[5], 52). It can be ascribed importance, much in the same manner as in the other States, where the liability of joint tortfeasors is concerned (see the note under VI.–4:102 (Collaboration)) (*Hellner and Johansson* loc. cit. 247 ff), likewise in the field of contributory negligence in cases of personal injury sustained by the claimant (SWEDISH Damages Act chap. 1 § 1(6)). The lines of demarcation are not delineated according to whether intent of negligence is at issue, rather are construed according to, on the one hand, intention and gross negligence and on the other, between what is often called ordinary or slight negligence. The same holds true for the regulation anchored in the DANISH Damages Act (*Erstatningsansvarslov*, EAL) § 19(2). According to this provision, private persons are liable for the damage that they have caused to insured things of another only in the event that the damage was caused intentionally or by gross negligence. In this manner, employees are frequently safeguarded from the imposition of personal liability. Moreover, under Scandinavian law, the distinction between intention and negligence can attain importance (and incidentally also elsewhere) in the law relating to liability for pure economic loss. The point of departure is that pure economic loss is principally only recoverable if the requirement that it be caused through a crime is satisfied. This requirement connotes that mostly intention is required. There are, however, numerous exceptions to this principle. They include *inter alia*, the general prohibition on chicanery, which for its part, figures e.g. in respect of blockades during industrial action (*Hellner and Johansson* loc. cit. 72 with further particulars.). An additional example can be discovered in the law relating to the abuse of a dominant position (on this point see SWEDISH Competition Act [*konkurrenslagen* 1993:20] § 33). See also the DANISH case on the prohibition of chicanery HD 8 May 1952, UfR 1953, 360 and in general *Vinding Kruse* loc. cit. 131 and the following for further particulars.

22. The COMMON LAW recognises a whole array of “intentional torts”. Within the confines of these torts “intention” frequently merely connotes that the tortfeasor was desirous of act in that manner. It is unnecessary that the tortfeasor should also have acted in the knowledge that his conduct was tortious. It does not even always have to shown that the defendant intended to cause actual harm. Intentional torts in this sense by no means always require “fault” on the actor’s part in the sense of the terminology employed by Civil Law jurisdictions. This is only a requirement of the so-called “malicious torts”.

23. The intentional torts are divided into torts to the person and torts to the property. Trespass to the person means direct and intentional acts of interference by the defendant with the person of the plaintiff. The main examples of this are battery, assault, false imprisonment and the infliction of emotional suffering. Assault is an act by the defendant which places the plaintiff in reasonable apprehension of an

immediate battery; it is neither dependant on the intentions of the defendant towards the plaintiff, nor on whether or not the defendant actually meant to carry out the threat. Assault can also include domestic violence (Street [-*Brazier and Murphy*], Torts[10], 34-36). Battery is the direct application of physical contact upon the person of another without his or her consent (*McMahon and Binchy*, Torts[3], 618-621; *Wilson v. Pringle* [1987] QB 237, 252 [*Croom-Johnson* J.: "an intentional touching or contact in one form or another of the plaintiff by the defendant"]). The intentional or reckless inflicting of emotional suffering also amounts to a tort. The IRISH courts still apply the rationale in *Wilkinson v. Downton* [1897] 2 QB 57, where liability was imposed on the basis that the defendant had wilfully done an act calculated to cause physical harm to the plaintiff. In ENGLAND and WALES this is now regulated by the Protection from Harassment Act 1997, ss. 3 and 7(3). Trespass to land, on the other hand, is understood as the intentional or negligent entering on to or remaining on land in the possession of another without lawful jurisdiction (*McMahon and Binchy*, Torts[3], 653-673). The intentional possession of the chattels of another party will also lead to a tort, see for ENGLAND and WALES the Tort (Interference with Goods) Act, 1977. Torts can arise in the conversion of chattels - any act to chattels of another party that continues an unjustified denial of title, the wrong delivery of chattels or in the wrongful failure of a person in possession of a chattel to deliver it to the person entitled to immediate possession (Street [-*Brazier and Murphy*], Torts[10], 46-67). Furthermore, the common law recognises a strand of so-called "malicious torts". The main elements of a malicious tort are that the defendant intentionally commits a wrongful act which necessarily produces harm. The defendant must know of that harm or must reasonably be aware that such conduct would lead to injury and act accordingly without just cause. Malicious torts generally arise in relation to defamation, slander, libel, invasions of privacy, disclosure and fraud. Other examples include the malicious abuse of process and malicious prosecution (see generally *McMahon and Binchy*, Torts[3], 981-990 for IRELAND and Street [-*Brazier and Murphy*], Torts[10], 491-500 for ENGLAND and WALES). Another category of malicious torts is that of injurious falsehood, which may be understood as the slander of title or of goods, or false statements which are aimed at injuring the trade of a person (see for ENGLAND and WALES Lord *Davey* in *Royal Baking Powder Co. v. Wright Crossley* (1901) 18 RPC 95, 99; and for IRELAND Defamation Act 1961, s. 20). Finally, malice can be of relevance where the defendant acts out of spite to cause injury or loss to the plaintiff by means of a nuisance (*Christie v. Davey* [1893] 1 Ch 316, 327 per *North* J.; *Hollywood Silver Fox Farm Ltd. v. Emmett* [1936] 2 KB 468, 475 per *Macnaghten* J.; Winfield and Jolowicz [-*Rogers*], Tort[14], 412-414; *McMahon and Binchy*, Torts[3], 695).

24. SCOTLAND, like other civilian law countries, recognises a definite difference between intentional and negligent delicts. The negligence requirements are considerably the same as the remainder of the British Isles, by virtue of the legacy of *Donoghue v. Stevenson* [1932] AC 562, which originated in Scotland. The intentional causation of harm – *injuria or damnum injuria datum* relates to the aggression of another's legally protected assets, which can sometimes also infer criminal liability: see generally *Walker*, Delict[2], 164. There is little discussion in Scotland on this topic, primarily due to the fact that it is usually obvious that reparation must be made: "in the absence of privilege, a person is subject to liability if he intentionally invades the interests of personality or reputation…" (*Seavey*, Harv.LR 56 [1942] 72, 84). The basic Scottish law of delict requires a mental element, an injurious, fraudulent or criminal purpose. Thus, the mental element must be *dolus*. The main idea is that someone intends a result – the intent is not necessarily a hostile intent to do harm,

rather the intent to bring about a result that interferes with the interests of another in a way the law does not allow (*Gordon v. Stubbs Ltd.* (1895) 3 SLT 10. No proof of intent to hurt is needed, merely a man's intent will be judged via his conduct (*Walker* loc. cit. 165). Not desiring to harm is not a defence. The doctrine *culpa lata dolo aequiparetur* will also apply – wantonness or recklessness will sometimes equate with intent, cf. *Clark v. Syme (William)* 1957 JC 1, 5 per LJG *Clyde* (concerning malicious mischief in the criminal law). Issues of remoteness of damage have been less discussed in the context of intentional wrongs – the defender will be liable for the consequences of his conduct, either intended or understood to have been intended by him (*Quinn v. Leathem* [1901] AC 495, 537 per Lord *Lindley*).

V. Strict Liability

25. As previously indicated, the majority of the basic norms of European Civil Codes have adopted the so-called "fault principle" as their point of departure. It is certainly true to state that all of the European legal orders in varying degrees have long developed forms of liability which do not depend on intention or negligence. However (see on this point Chapter III), provisions relating to strict liability either completely fall outside the parameters of the Civil Codes or are, at any rate, predominantly external to the Civil Code. The PORTUGUESE CIVIL CODE was the first in its field to deal with strict liability as part of the basic norms of tort law, albeit in a rudimentary fashion (CC art. 483(2): "Objective liability arises only where expressly provided for in law"). The DUTCH CC art. 6:162(3) appears to have advanced one step further ("A wrongful act (tort) can be imputed to a wrongdoer if s/he is at fault in causing it or from a cause for which he is answerable according to law or based on the fact that it was within his sphere of risk according to the precepts of common understanding"). The proper interpretation of this (as of the time of writing, a provision seemingly devoid of any practical significance) regulation is the subject of much controversy. According to prevailing legal opinion, this provision governs solely the liability of the actor who personally committed the wrongful act. Consequently, according to this interpretation, CC art. 6:162(3) is not understood as a reference to the provisions pertaining to strict liability for damage caused by others, by animals and for things in conjunction with CC art. 6:169, rather the stipulation must be perceived as referring, in particular to CC art. 6:165 (whereby "the fact that a positive act of a person aged of fourteen or older which occurred owing to a mental or physical disability does not preclude liability being imposed for the wrongful act") (Asser [-*Hartkamp*], Verbintenissenrecht III[10] no. 86, p. 95). Inexperience leading to the commission of a tort is representative of when a wrongful act is imputed to the tortfeasor based on a contravention of generally accepted societal standards (Parlementaire Geschiedenis VI, 618). The approach of VI.–1:101, namely incorporating strict liability directly into the basic norm is only reciprocated in more recent codifications, namely in the ESTONIAN LOA § 1043 and in SLOVENIAN LOA § 131(3).

26. For the most part, without prejudice to its mounting practical significance, strict liability (for which diffuse conceptual notions are employed; "objective" liability is utilised in part, occasionally, reference is made to "risk based liability or liability for a source of danger" is still regarded as a systematical anomaly, namely constituting an exception to the principle that liability is based on fault. Even the provisions in BELGIAN, FRENCH and LUXEMBOURGIAN CC arts. 1384(2) ff can be originally (and to some extent even today) traced back to the fault principle (*Flour/Aubert/Savaux*, Le fait juridique[10] no. 67 p. 62). This is because the provisions were construed as (or they continue to be construed) (either, as the case may be refutable or irrefutable) presumptions of fault (*Van Gerven*, Verbintenissenrecht II[7],

308; *Ravarani*, La responsabilité civile, no. 515 p. 394-395). The reinterpretation of CC art. 1384(1) (*gardien*-liability) which essentially originates from the case of arrêts Jand'heur decided by the Cour de Cassation (Cass.civ. 21 February 1927, D. 1927, 1, 97; Cass.ch.réun. 13 February 1930, D. 1930, 1, 57) and completed by *arrêt Blieck* (Cass.ass.plén. 29 March 1991, D. 1991 Jur. 324) have, however, fundamentally realigned matters under FRENCH law. CC art. 1384(1), which was originally never intended according to the scheme of the Code to enjoy any independent significance, today stands on an equal footing with the basic liability regime under CC arts. 1382 and 1383. Nowadays, the assertion can be made that the French courts, in practise, accord considerably more weight to *gardien*-liability than to liability for intention or negligence. The BELGIAN Cour de Cassation has, however, only partly followed the reinterpretation of CC art. 1384(1) adopted by its French counterpart. In particular, it has refused to derive *un principe général de responsabilité du fait d´autrui* from a CC art. 1384(1: Cass. 19 June 1997, JT 1997, 582, concl. Avocat général Piret. MALTESE CC only recognises a number of special cases of strict liability; there is no provision which corresponds to French or Italian law. The position is the same in POLISH law. The specific instances of strict liability (CC arts. 430, 433-436, 449^{1}) are, however, in effect supplemented by the doctrine of "anonymous fault" under the general norm of liability, enabling outcomes to be achieved which are equivalent to a strict liability (see *Radwański and Olejniczak*, Zobowiązania-część ogólna[5], 190-191).

27. Simplifying matters considerably, it can be asserted that a comparable development to that which unfolded under French law as outlined above has also succeeded in taking root under SPANISH law. However, it took a different path in as much as the Spanish courts directly resorted to CC art. 1902, the basic norm of Spanish tort law, largely approximating liability for negligence to strict liability. Case law and legal scholarship expressly term this an "objectivisation" of liability (TS 8 April 1992, RAJ 1992 (2) no. 3187 p. 4202; Albaladejo (-*Santos Briz*), Comentarios al Código Civil y compilaciones forales, XXIV, 433). This was effected not least by reversing the burden of proof in respect of fault (see below Note *VI34*) and by the *de facto* abandonment of the express requirement of *culpa in eligendo* or *educando* stipulated by CC art 1903 (TS 26 January 1990, RAJ 1990 (1) no. 69, 2. recital, p. 115). Modern Spanish liability law may be delineated into three subgroups: liability under *culpa clásica*, liability under *culpa cuasi-objetiva* and "genuine" objective liability. The first two groups are governed by CC art. 1902; only the third is the subject of specific regulations (within and outside the parameters of the CC): (see further *v. Bar*, Common European Law of Torts II, nos. 360-363).

28. Likewise, ITALIAN case law originally construed CC art. 2051 (liability for damage caused by things under one's control, *custodia*) as constituting a rebuttable presumption (presumption *juris tantum*) that the defendant was negligent. Cass. 20 May 1998, no. 5031, Foro it. 1998, I, 2875 then clarified that strict liability (liability without fault) arises under this provision. HUNGARIAN CC § 345(1) introduced a broad provision with connotations of a general clause concerning strict liability for "dangerous activities". According to this provision, a person who "carries out an activity with a high risk attached, is obliged to compensate the damage that thereby arises". The same holds true for activities which are hazardous to the environment. Proof of *force majeure* will operate to relieve the defendant from liability.

VI. Burden of proof

29. While it is true that questions pertaining to how evidence is submitted and evaluated are matters for procedural law, questions raised concerning the burden of proof remain governed by substantive law. Despite the fact that a number of jurisdictions regulate

the burden of proof within the parameters of their Civil Procedure Act (e.g. the DUTCH Code of Civil Procedure [Rv] in art. 177, BELGIAN *Gerechtelijk Wetboek* in art. 870 and the new SPANISCH Civil Procedure Code in art. 217: pursuant to all of these regulations, each party involved must generally plead facts in their favour and prove them if required), it is universally recognised on the European stage that the rules pertaining to the burden of proof are part of substantive law. This conclusion derives from the Rome Convention on the law applicable to contractual obligations ("Rome I") art. 14. Moreover, PECL assume that all issues pertaining to the allocation of the burden of proof belong to the substantive law, cf. e.g. PECL art. 8:108(1) (Excuse Due to an Impediment).

30. In turn, the cardinal principle of the rules relating to the allocation of the burden of proof sets forth that each party must allege and prove each component of a rule that s/he is seeking to rely on. This principle has garnered acceptance in all European jurisdictions and underpins these Principles, in particular VI.–1:101(1) and the provisions of Chapter V. This principle is expressly laid down in a number of national Civil Codes. The jurisdictions that have adopted this conceptual approach have generally abstained from placing the rule in Chapters of the Code regulating tort law, rather the principle is positioned in Chapters of the Code, from whence it can be deduced that the rule is imbued with general significance for the entire civil law (e.g. GREEK CC art. 338, PORTUGUESE CC art. 342(1); ITALIAN CC art. 2697; POLISH CC art. 6). Here and there, the national legislatures have deemed it necessary to enact a further general provision confirming this rule within the parameters of liability law (AUSTRIAN CC § 1296: the onus of proof in respect of proving the defendant's fault rests on the claimant; and PORTUGUESE CC art. 487(1): "The claimant is obliged to prove that the defendant was at fault, save in cases where a presumption of fault applies") (in respect of the countries which have statutorily provided for a reversal of the onus of proof for fault – the onus then lies on the defendant- cf. forthwith nos. 32 ff).

31. The axiom that emerges from the above delineated basic rule, as far as tort law is concerned, is that the plaintiff must plead/establish and prove all of the requirements pertaining to his claim, in particular damage, grounds of liability and causation save where express regulations permit departures from this rule, whereas it is incumbent upon the defendant to show and prove certain requirements which give rise to a ground of defence, thereby displacing the claimant's assertions (cf. in respect of the latter Chapter V).

32. There are, however, manifold exceptions to the basic rules pertaining to the allocation of the burden of proof. These exceptions typically impinge either on the factual basis for the adjudged negligence or causation. In turn, the exceptions to the statutory basic rule are partly predicated on case law alone. The upshot of these exceptions is that they always entail that the defendant's liability is aggravated. The particulars concerning the stages of development in this process under the relevant national law will, therefore, fall to be examined within the parameters of the relevant substantive law issue (i.e. in respect of the treatise on accountability and the examination of causation). The onus of proof will not be reversed where the question of whether (legally relevant) damage has been sustained calls for determination. The evidential requirements may, however, be relaxed in respect of the extent of recoverable damage.

33. Attenuating liability via the device of the reversal of the burden of proof is a typical feature of CIVIL LAW jurisdictions. Today, in a number of Central and Eastern European States, it is a general tenet derived from statute that the defendant is obliged to exculpate himself, in other words that the burden of proving the defendant's fault

does not lie with the plaintiff, and it is incumbent upon the defendant to prove that s/he conducted himself correctly (HUNGARIAN CC § 339(1), second sentence; ESTONIAN LOA § 1050(1); SLOVENIAN LOA § 131(1)). Since these rules are of binding effect for tort law in its entirety, they render superfluous special provisions in discrete areas of law, common to other jurisdictions (but here only in exceptional instances), the burden of proving an absence of negligence rests on the defendant.

34. To all intents and purposes, the position in the three legal orders examined above largely reflects the current legal position in SPAIN. Since the late 1950s, the jurisprudence of the *Tribunal Supremo* has elevated the reversal of the burden of proof in respect of fault to the status of general rule (TS 30 June 1959, RAJ 1959 no. 2944 p. 1809; cf. For submissions justifying this development *inter alia Lacruz Berdejo*, *Elementos* II (2)[4], 476). Essentially, only the liability of medical practitioners and freelancers are excluded from the ambit of this rule; here the plaintiff carries the burden of demonstrating that the defendant was at fault (*De Ángel Yágüez*, Tratado de responsabilidad civil[3], 203; TS 24 May 1990, RAJ 1990 [4] no. 3836 p. 5095); an exception to this state of affairs only arises in the case of *absolutely disproportionate damage indicative of a gross negligence* (TS 2 December 1996, RAJ 1996 [5] no. 8938 p. 12410).

35. For the most part, comparable jurisprudential developments have crystallised in GERMANY. However, in contrast to Spain, this refinement is confined to a limited number of cases. In the field of product liability, the BGH decided in the "Hühnerpest" judgment (BGH 26 November 1968, BGHZ 51, 91, corrected by BGH 17 March 1981, BGHZ 80, 186, 196) that the injured party should have the benefit of the rules pertaining to the burden of proof, given that the negligence of the manufacturer is presumed provided that it can be established that the damage was caused by a defect in the product. Similar developments can be observed in the sphere of environmental liability law (BGH 18 September 1984, BGHZ 92, 143). Where a so-called protective law is infringed (CC § 823(2)), fault is presumed until refuted provided that the claimant can surmount the twin requirements of namely, establishing an objective breach of the protective law and furthermore, provided that the protective law prescribes the required conduct in such concrete terms with the result that the realisation of the objective elements of the rule approaches an inference of subjective fault (BGH 19 November 1991, BGHZ 116, 104, 114; BGH 17 January 1984, VersR 1984, 270, 271; cf. regarding limitations BGH 19 November 1991, BGHZ 116, 104, 115).

36. According to ITALIAN Law the burden of proving fault lies principally with the injured party (CC art. 2697(1)). However, the breach of a concrete statutory duty of care must be, *per se*, tantamount to a so-called *colpa specifica*, a *colpa in re ipsa*, which requires no further proof (*Visintini*, I fatti illeciti II[2], 68). The only prerequisite is that the violated norm was designed to prevent the damage in question occurring (cf., derived from case law, in particular Cass.sez.un. 22 October 1984, no. 5361, Foro it. 1985, I, 2358; Cass. 9 June 1995, no. 6542, Giur.it. 1996, I, 1, 191; Cass. 13 May 1997, no. 4186, Giust.civ.Mass. 1997, 722 and Cass. 29 July 1995, no. 8300, Giur.it. 1996, I, 1, 328).

37. According to AUSTRIAN law, the basic rule of CC § 1296 previously touched on (pursuant to which, the plaintiff must prove the defendant's lack of care) is usurped by CC § 1298, which provides that the debtor is required to prove, in the event that s/he fails to fulfil a contractual or statutory obligation, that this failure to perform was not caused by any fault on his part. Furthermore, in the context of where a violation of a protective law is at issue (CC § 1311 second sentence), the burden of proving the lack

of (subjective) fault in Austria rests also on the defendant)(OGH 5 March 1970, ZVR 1970/232 (p. 296) and OGH 25 July 2000, SZ 73/118; in-depth *Reischauer*, JBl 1998, 473-487, 560-570).

38. In GREECE, in the field of liability for negligence, the fact that there are minimal differences between unlawfulness and fault can also occasionally lead to complexities in respect of the burden of proof (*Deliyannis*, in: FS Michaelides-Nouaros I, 303, 315 with reference to A.P. 854/1974 NoB 23/1975, 479 and CA Athens 2688/1969 Arm 24/1970, 313). However, the courts have only expressly facilitated relaxations in the requirements relating to the burden of proof within the parameters of product liability (CA Thessaloniki 1259/1977 Arm 32/1978, 121). This approach was enacted as an express regulation in the Consumer Protection Act (Act 2251/1994). Art. 8(4) of this Act introduced a general reversal of the burden of proof rules in services in respect of the fault of the service provider. How this provision was to be interpreted was the matter of some debate. Seemingly, the provision concerned a twofold rebuttable presumption: entailing that the service provider not only has to prove that he did not render, either intentionally or negligently, a defective service but must also prove that the performance of the service was not defective (*Georgiades Ast.*, in: FS Kiantou-Pampouki, 143, 149; *Karakostas*, Prostasia tou katanaloti, 138; for an in-depth analysis [in German] *Eleftheriadou*, Die Haftung aus Verkehrspflichtverletzung im deutschen und griechischen Deliktsrecht, 70). Act 2251/1994 art. 8(4) was amended by Act 3587/2002 art. 10 which concerns the liability of the service provider and now provides that the latter has to prove both absence of unlawfulness and fault.

39. In CIVIL LAW jurisdictions, shifts in the onus of proof as regards proof or negligence or proof of causation are generally the subject of special provisions within the parameters of the Civil Code. The provisions set forth rebuttable legal presumptions, The object of these provisions is that, as the case may be, the defendant has to shoulder the burden of proving that s/he was not at fault or it is incumbent upon him/her to demonstrate that the fault on their part did not cause the damage that resulted (e.g. PORTUGUESE CC arts. 350(1) and 487(1); cf. *Almeida Costa*, Obrigações[9], 536). Examples for this legislative approach are to be found in many areas of the law of non-contractual liability for damage, in particular parental liability for damage caused by their children (CZECH and SLOVAKIAN CC § 422(2); GERMAN CC § 832; GREEK CC art. 923; ITALIAN CC art. 2048 [which provision, however, generates in its practical effect a strict liability]; MALTESE CC art. 1034; POLISH CC art. 427; PORTUGUESE CC art. 491) and liability for buildings and structures (e.g. AUSTRIAN CC § 1319 [but liability for roads and paths under CC § 1319a is quite different and depends on proof of intention or gross negligence] and GERMAN CC §§ 836-838), but also liability for misleading advertising (DUTCH CC art. 6:195) and liability of employers in relation to their employees (DUTCH CC art. 7:658) or third parties (GERMAN CC § 831; POLISH CC art. 429). In addition, it is not uncommon for the courts to compensate the lack of a presumption fixed by statute by utilising the corrective device of prima facie proof (according to administrative law) to try and accommodate the interests of the claimant (cf. e.g. for PORTUGAL STJ 26 February 1992, BolMinJus 414 [1992] 533).

40. In a number of legal orders of the ROMAN legal tradition, one comes across so-called presumptions of liability. Here, reversal of the burden of proof in cases of negligence is no longer at issue, rather an irrebutable presumption of negligence is laid down and consequently, strict liability is engaged. The jurisprudence of the FRENCH courts, for example, reconceived the law relating the vicarious liability of parents which is based on CC art. 1384(4) along these lines. Originally, the provision was regarded as encompassing a mere *présomption de faute* (Cass.civ. 12 October 1955, D. 1956 Jur.

301, note *Rodière*). In present times, it is construed as being consonant with a *présomption de responsabilité* (Cass.civ. 19 February 1997, Bull.civ. 1997, II, no. 56 p. 32), which, for its part, does not leave the grounds of imputability untouched (*le Tourneau*, Droit de la responsabilité et des contrats, no. 2364). Similarly, the SPANISH courts did not fashion the reinterpretation of SPANISH CC art.1903 on the basis of a mere presumptions of negligence rather instead the courts harnessed genuine presumptions of liability (see e.g. TS 22 September 1984, RAJ 1984 (2) no. 4332 p. 3326).

41. In contrast to the foregoing, rules concerning reversals in the burden of proof are practically unheard of under COMMON LAW. The principal reason why the Common law is able to function without such rules is because, procedurally, the common law rules pertaining to the evaluation of evidence are at variance with most Civil Law jurisdictions. In ENGLAND and IRELAND it does not turn on whether the factual evidence presented, requires the presiding judge to be persuaded that the plaintiff has proved his case "beyond a reasonable doubt" (according to the standard test under German case, cf. BGH 17 February 1970, BGHZ 53, 245, 256), rather the standard of proof prescribed relates to the preponderance of evidence, namely, whether the presented evidence of one side is more convincing than that of the opposing side ("on the balance of probabilities"). In end effect, the balance of probability test can reach equivalent results as provisions shifting the burden of proof (a case in point cf. *Fairchild v. Glenhaven Funeral Services Ltd.* [2002] UKHL 22, [2003] 1 AC 32). However, it should be noted that relaxations in the burden of proof rules generally only impinge upon causation and do not have an influence on the basis for the adjudication of negligence.

42. The approach adopted by the Common Law is similar to that espoused by the Scandinavian legal orders, in particular SWEDISH law. Thus, where there are multiple causes for the damage, it suffices to prove that, once all the circumstances of the case are taken into account that it is clearly more probable that the damage originated in the manner as alleged by the claimant (rather than by the defendant) (Swedish HD 28 December 1993, NJA 1993, 764, 775; *Hellner and Johansson*, Skadeståndsrätt[6], 200 ff, 214 ff). This rule also applies in the field of product liability (HD 21 July 1982, NJA 1982, 421, 483). Pursuant to the Environmental Code, it suffices ,in the field of environmental liability law to prove that, on the balance of probabilities, the damage was caused in this manner [*Miljöbalken*] chap. 32 § 3(3), cf. also HD 29 April 1981, NJA 1981, 622, 633. In DENMARK, in this area, there is a perceived correlation between fault and causation: namely, the graver the adduced fault, the less stringent the requirements pertaining to the proof of causation (*Vinding Kruse*, Erstatningsretten[5], 501). The same holds true for the law pertaining to occupational accidents and medical negligence (HD 27 October 1989, UfR 1989, 1108 respectively HD 10 September 1993, UfR 1993, 908). As far as injury sustained by patients is concerned, throughout Scandinavia, anchored in statutory provisions, the standard of proof is proof on the balance of probabilities (SWEDISH Patient Injury Act [*Patientskadelag*] § 6; FINNISH Patient Injury Act [*Patientskadelag*] § 2 and DANISH Patient Insurance Act (*Lovbekendtgørelse om patientforsikring*) § 2.

Illustration 5 is based on *Hunter v. Canary Wharf Ltd.* [1996] 2 WLR 348 (at 366 per *Pill*, LJ). Cf. also BGH 18 September 1984, BGHZ 92, 143 (Damage to paint of car from emissions emanating from a nearby factory amounted to damage to property).

VI.–1:102: Prevention

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

COMMENTS

A. Prevention of impending damage

General. This Article makes it clear that preventative legal protection is also the concern of this Book. Prevention of damage is regarded as better than atonement for damage. At the same time the Article makes explicit one of the fundamental requirements of preventative protection of rights, namely the threat of damage. The second sentence pinpoints the person obliged to respect that right. All the other requirements of preventative protection of rights as well as limitations and particular forms of the right are the subject-matter of Chapter 6, Section 3 (Prevention).

Substantive law. The Article is formulated as a right based in substantive law and not as an instrument of the law of procedure. The entitlement to preventative protection of legal rights is consequently not a matter of judicial discretion. The Article furnishes a right no different in quality from the right under VI.–1:101 (Basic rule). Quite how as a matter of the law of procedure the right is to be enforced is not decided by these rules (see I.–1:101 (Intended field of application) paragraph (2)(h).

Prohibition of damage and compensation for loss averting damage. VI.–1:102 is formulated in a manner corresponding to VI.–1:101. Whereas VI.–1:101 provides for a right to reparation, the various forms of which are fleshed out in the first two Sections of Chapter 6, VI.–1:102 provides for a right to prevention whose particular forms are the subject matter of the provisions set out in the third Section of Chapter 6. It follows from those provisions that VI.–1:102 does not deal only with a right to prohibit; it deals also to rights arising from one's own voluntary endeavour to avoid damage which, were it not for the injured person's intervention, would have occurred (or would have been exacerbated) and would have entitled the injured person to reparation (see also VI.–6:302 (Liability for loss in preventing damage)). In this way it is made clear that under this Book cases of that type are absorbed within non-contractual liability law rather than the law of benevolent intervention in another's affairs.

Prevention and the law on non-contractual liability. Although VI.–1:102 is contained in the Book setting out the law on non-contractual liability, this does not amount to a definitive statement about whether preventative legal protection as a whole is to be considered part of this branch of the law, an independent area of the law or a part of other areas of the law (such as the law of property or the law of persons). The draft does, however, adopt the position that preventative legal protection forms a part of the law on non-contractual liability in so far as the person responsible for the threat of damage would be liable for the damage under VI.–1:101 (Basic rule) if it occurred. Further claims to restrain activities based on other legal grounds are unaffected: see VI.–1:103 (Scope of application) sub-paragraph (d).

B. Claimant and responsible person

Claimant. The beneficiary of the right conferred by VI.–1:102 is the person who would suffer the legally damage if its incidence is not prevented. Quite what counts as a legally relevant damage is to be assessed for the purposes of VI.–1:102 using the same framework of rules as applies in relation to VI.–1:101, namely in accordance with the provisions of Chapter 2. However, the draft does not purport to answer the question whether (and if so, in which circumstances) associations (howsoever legally constituted) are also beneficiaries of rights to restrain another's activities in the furtherance of collective interests and entitled to enforce those rights through the courts. This relates in particular to organisations such as environmental groups, consumer associations, or other bodies concerned with prohibiting unfair competition or improper practices. Rights under VI.–1:102 may of course be held by persons who, had they caused damage, would not themselves be liable: a child abused by a step-father has a claim that such conduct be stopped.

Responsible person. The person liable to respect the claimant's right to prohibition is someone who, were the damage to occur, would have been liable for its causation (called here the "responsible person"). Cases of this type presuppose in the nature of things an impending damage which can only be avoided by the removal of the danger which threatens to be a cause of damage. That danger normally emanates from a person who has acted or failed to act in the manner required in the circumstances.

> *Illustration 1*
> Owner of a vehicle O notices that a small child is working away at the paint on his car with a metal object. It may well be that the child is entirely unaware of doing any wrong and is therefore not liable under the law on non-contractual liability for causing the damage (see VI.–3:103 (Children)). However, O can insist that the child's mother, standing nearby, exercise her influence over the child to stop the scratching of the car (cf. VI.–6:301 (Prevention in general)). The mother would act negligently if she closed her eyes to her child's conduct. As to whether (and if so, how) O might have a claim directly against the child, see below at illustration 3.

Responsible person under strict liability. The responsible person may be someone who would be accountable without intention or negligence for the causation of the damage if it occurred. A prerequisite here of course is that the relevant judicial redress would be effective from a practical point of view. A genuine claim for prevention against someone who falls into the field of legal accountability merely because of responsibility for some risk will for that reason rarely come into question. The claim to reparation for a loss averting damage, however, remains unaffected.

C. Essential elements entitling the claimant

Impending damage. A prerequisite of every claim to prevention is an impending danger to an interest whose infringement would constitute a legally relevant damage. The danger has to be specific; there must be an immediate risk of legally relevant damage. Neither an abstract potential danger nor the endangerment of another suffices. No one, for example, has a claim against the manufacturer of an automobile that a particular component of the vehicle be constructed in a particular manner or that a defectively constructed vehicle be recalled from the market. A damage ceases to be impending, of course, when it has already occurred and there is no prospect of further damage. Similarly, there will as a rule be no threat of damage if the activity which is to cease does not allow of exact description. As regards the question

when a right to prevention also embraces the right to require another to undertake certain positive measures, see the comments to VI.–6:301 (Prevention in general).

Aggravation of damage. The right to protection from impending damage is concerned not only with preventing the first occurrence of damage. It includes the right to stop the aggravation of damage which the injured person has already started to suffer. The text does not state that point expressly only because (i) it appears self-evident and (ii) a longer formulation would have made it necessary to repeat the formula in all the Articles in the first two Sections of this Book.

> *Illustration 2*
> Without permission to do so, T heaves an extremely heavy object on to O's transport vehicle. Due to its sheer weight the object damages the vehicle when it is set down. The continued presence of the object in the vehicle threatens to cause further damage. O has a right of prevention in relation to the impending but avoidable further damage.

Protection of rights. Similarly the Articles make no express mention of the impending infringement (or threatened aggravation of an infringement) of an 'absolute' right or a legally protected interest. That was not necessary because the expression "legally relevant damage" embraces these positions worthy of legal protection: VI.–2:101 (Meaning of legally relevant damage).

Accountability. The claim is directed against the person who would be accountable for the causation of the damage if it occurred. From this it follows that the right contained in VI.–1:102 presupposes one of the three grounds of accountability of the responsible person set out in VI.–1:101 (Intention, negligence, or responsibility for a source of danger). That applies to VI.–6:301 (Prevention) as much as to VI.–6:302 (Liability for loss in preventing damage). From a merely factual point of view, there is as a rule no effective right of prevention in respect of aimless conduct or accidental happenings: the danger in such a case has almost always been fully realised when the damage is sustained. A conceivable exception is the impending worsening of a damage which was caused merely negligently. As regards the right of self-defence in relation to persons immune from liability see the comments below.

Restriction of the claim. The right to prevention is not unlimited; it has to be particularised and limited in many regards. Those limits are formulated in VI.–6:301 (Right to prevention) and VI.–6:302 (Liability for loss in preventing damage). VI.–1:103 (Scope of application) sub-paragraph (a) makes it clear that the Articles in Chapter 6 qualify VI.–1:102 in the same manner that they qualify VI.–1:101 (Basic rule) in the context of reparation.

D. Relationship to VI.–5:202 (Self-defence, benevolent intervention and necessity)

General. The avoidance of an impending damage is also the concern of VI.–5:202 (Self-defence, benevolent intervention and necessity). However, VI.–1:102 and VI.–5:202 differ from one another both in outlook and function. The effect of VI.–5:202 is that someone who causes another damage in the course of defending that person's own or another's property, person or other interests is not liable for that damage. VI.–1:102, by contrast, confers on a person who would suffer damage if it is not averted a right to prevention or, as the case may be, a right to reimbursement of the costs of protective measures. Both claims are directed

against the person who would be accountable for the causation of the damage according to the provisions of this Book.

Persons incapable of being accountable for their causation of damage. It follows from this approach that VI.–1:102 is concerned with persons incapable of being accountable for their causation of damage only to the extent that one is confronted with the question whether such persons have a right against someone acting against them in taking measures to avert the damage which threatens.

Illustration 3
The facts are the same as in Illustration 1, save that in issue are rights vis-à-vis the child rather than the parent. O has neither rights under VI.–1:101 (Basic rule) nor rights under VI.–1:102 (Prevention) vis-à-vis the child. An answer to the question whether O may permissibly exercise direct control over the child (by oral command and, if need be, physical restraint) depends simply on whether the child has a right to prevent O's conduct. This is not the case because O has a ground of defence contained in VI.–5:202(1) (Self-defence, benevolent intervention and necessity). That is a sufficient response: there is no necessity from the point of view of non-contractual liability law to re-formulate this ground of defence as a general right of O's. Additionally O may have a right to prevention under property law. The latter remains unaffected by virtue of VI.–1:103 (Scope of application), sub-paragraph (d).

NOTES

I. Basis of the right to prevent impending legally relevant damage

1. By considerably simplifying matters, it is possible to assert that all legal orders of the European Union recognise the right (or rights) to demand of a person who is threatening to cause legally relevant damage that s/he desist in their dangerous conduct. However, the concrete particulars of the requisites, the bars to recovery and substantive content of this right (s) may be cast differently.(compare. on this point the notes on VI.–6:301 (Prevention in general)); furthermore many legal remedies provided for by national law oscillate between procedural and substantive law.

2. One is confronted with divergent approaches as far as the positioning within the legal system of the rules on injunctive relief and the substantive reach of this remedy are concerned. Expressly placing the right to restrain the impending danger by means of injunctive relief on a statutory footing is a typical feature of tort law codifications in Central and Eastern European countries (CZECH and SLOVAKIAN CC §§ 415-419 (cf. in particular CC § 417(2); ESTONIAN LOA § 1055; HUNGARIAN CC § 341(1) (pursuant to which the "endangered person" has the right "to request the court to restrain the person imposing such (i.e. imminent) danger from continuing such conduct and/or to order such person to take sufficient preventive measures and, if necessary, to provide a guarantee"); LITHUANIAN CC art. 6.255; POLISH CC art. 439; SLOVENIAN LOA art. 133)). Amongst the Western European tort law regimes, the NETHERLANDS represents the vanguard in this regard as, on the basis of a successful claim under CC art. 6:162 ,a claim for injunctive relief (CC art. 3:296). can be raised alongside a claim for a declaratory judgment that a tort or delict is established (CC art. 3:302). The rationale behind the claim for injunctive relief is to compell the defendant to refrain from adopting a particular course of action. The

assertion of this remedy is not contingent upon establishing that a tort had been committed and that there is a danger that the tortious conduct will recur. The claimant can also avail of such relief if there is a danger that the tort is about to be committed for the very first time (Parlementaire Geschiedenis VI, 613; Asser [-*Hartkamp*] Verbintenissenrecht III[10], no. 118, p. 125-126).

3. The most widespread technique of codification in the West European states, however, consists of furnishing specific absolute rights with a claim to injunctive relief which is independent of fault on the part of the defendant. To that extent most codifications fall short of the approach adopted in this draft in protecting only specific absolute rights), but exceed it in so far as those provisions generally dispense with a requirement of fault for the protection of absolute rights. Examples of this legislative technique are typically found in the law protecting ownership and possession (e.g. GERMAN CC §§ 1004, 862 and GREEK CC arts. 1108, 989 first sentence) and in the general law of persons. In the latter case they either relate to particular rights of personality (name: GERMAN CC § 12, GREEK CC art. 58, ITALIAN CC arts. 7 and 8, PORTUGUESE CC art. 72; a pseudonym: ITALIAN CC art. 9, PORTUGUESE CC art. 74; right to one's own image: ITALIAN CC art. 10, PORTUGUESE CC art. 79) or feature in rules in connection with the general protection of personality rights, see e.g. FRENCH CC art. 9 and PORTUGUESE CC art. 80 (both concerning privacy), GREEK CC art. 57 (general law of rights of personality); PORTUGUESE CC arts. 70(2) (general law of rights of personality) and 71(1) (post mortem rights of personality), and POLISH CC art. 24(1)(first sentence) (protection of rights of personality in general). SPANISH law provides for a claim for injunctive relief in Law 1/1982 of 5 May 1982 on the civil law protection of the right to reputation, privacy and one's own image (art. 9(2)).

4. In addition to foregoing, there is an array of ad hoc provisions within and outside the framework of the Codes which provide for injunctive relief in certain fields of law, in particular, in the field of the law relating to anti competitive practices, e.g. ITALIAN CC art. 2599),, Intellectual Property Law and Copyright Law (e.g. GREEK CC art. 60) as well as in Collective Labour Law. Moreover, a number of the provisions geared towards protecting absolute interests and claims to injunctive relief mentioned in the previous excursus are likewise often not directly regulated in the Codes and are the subject-matter of special laws instead. Intermittently, claims for substantive injunctive relief can be found in Civil Procedure Codes. For example, in PORTUGAL ,CCP arts. 1474 ff on interim court protection for the right to one's own personality, the right to one's own name and protection of confidential correspondence supplement the substantive legal provision contained in Portuguese CC art. 70(2).

5. Despite the fact that there is frequently a dearth of a fixed statutory basis, a number of European courts have channelled the provisions of tort law (which wording is, strictly speaking, confined to a damages claim), in order to enhance the legal protection geared towards ensuring that impending damage does come into being. This refinement derives purely from case la w and it can be discerned in, e.g. FRANCE and in BELGIUM, where it is accepted that orthodox tort law countenances the possibility that an unlawful disturbance can be brought to an end; it is said that there is a right of *suppression de l´illicite* (see for FRANCE *le Tourneau*, Droit de la responsabilité et des contrats, no. 2441-2446 and for BELGIUM *Ronse and others*, Schade en schadeloosstelling I[2], nos. 302-303 p. 223-224). A thorny issue is, as previously alluded to, whether tort law provides a means of averting the impending damage. In other words, whether impending damage connotes damage pursuant to art. 1382 (for an analysis of Belgian Law on this issue which, however, lacks reference to case law, *Ronse and others* loc. cit. nos. 119-122 p. 93-96).

6. Other legal orders have effectively reached or propounded comparable solutions by ushering in injunctive relief via the analogous application of existing specific provisions. In GERMANY, the courts, by expanding the legal policy underpinning CC §§ 12, 862 and 1004, have extended the reach of general injunctive relief to encompass a large number of other rights and legal interests protected under tort law in addition to those governed by CC § 823(1). Fault is not a prerequisite for the availability of such a claim, however, a necessary precondition to raising the claim is establishing that there is a danger that the infringement will subsequently recur. In the case of an interlocutory injunction, a tangible threat of an (initial?) infringement is ranked the same as an infringement which has already been committed; consequently, there is no requirement to await the commission of an unlawful act (Erman [-*Schiemann*], BGB I[10], Pref. to § 823, no. 20). In GREECE, practically identical developments have unfolded. Similarly, today it is further recognised that every case of an infringement or where there is an immediate danger that a right or legally protected interest will be unlawfully infringed (this does not necessarily entail that it has to amount to a culpable infringement), the person affected can avail of a substantive legal remedy (*Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 317; Pipsou, Anagastiki ektelesi gia paraleipsei i anochi praxis, 55 ff) either putting an end to the source of damage or availing of the remedy geared towards preventing the impending danger (Georgiades and Stathopoulos [-*Georgiades*], art. 281 no. 25 as well as in the Pref. to arts. 914-938, no. 56; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 315 ff; *Filios*, Enochiko Dikaio II/2, 135 ff). In PORTUGAL, the prevailing situation is identical (*Vaz Serra*, RLJ 113 [1980-1981] 327).

7. Furthermore, it is recognised in Austria that the awarding of an interlocutory injunction is a matter for the substantive law (OGH 9 October 1991, JBl 1992, 176 = RS0010540). Whereas fault is not a prerequisite for the availability of this type of injunctive relief, legal capacity is a prerequisite (OGH 23 July 1997, ecolex 1998, 124 = RS0108220; *Hirsch*, JBl 1998, 541). Further requirements pertain to the locus standi of the plaintiff and the risk that the infringement will recur (see further OGH 22 April 1964, SZ 37/62; OGH 31 August 1983, SZ 56/124 and OGH 27 September 2001, SZ 74/168). Mere threat of an infringement of a subjective right or protective law (on this point OGH 25 September 2001, ÖJZ 2002, 147) will, exceptionally, suffice provided that the party seeking the order establishes that unless the prohibitory order is granted, the claimant would suffer irreparable damage.

8. In contrast, under ITALIAN law, the legal position is as before uncertain. The courts have continued to refuse to embrace a general expansion of the express statutorily permitted canons pertaining to the grant of a prohibitory injunction (Cass. 25 July 1986, no. 4755, Rep.Giur.it. 1986, voce Concorrenza e pubblicità no. 51, in this decision, it was however stated that an analogous application of the cases fixed by law pertaining to the grant of a prohibitory injunction to cases not provided for by law could not be completely ruled out) whereas legal scholarship is divided on this issue (for further analysis see, inter alia, *Bianca*, Diritto civile V, 785; *De Cupis*, Il danno II[3], 11 and *Rapisarda*, Profili della tutela civile inibitoria, 241 ff; in opposition *Santini*, Riv.Dir.Civ. 1959, I, 136-138).

9. Statutory legislation in the NORDIC Countries does not recognise a general substantive legal claim to injunctive relief. Instead, a whole array of special rules found in ad hoc regulations regulating particular discrete areas of law as well as authorisation found under procedural law allow the courts to grant interlocutory injunctions in the case of impending danger. Compare. for SWEDEN Code of Judicial Procedure [*Rättegångsbalk*] chap. 15 § 3 (this provision is of particular relevance in Competition and Environmental Law: *Fitger and Mellqvist*, Domstolsprocessen[2],

101); for FINLAND Code of Judicial Procedure [*rättegångsbalk*] chap. 7 § 3; and for DENMARK Civil Procedure Act [*retsplejelov*, public notice of 30 September 2003 no. 815] chap. 57 §§ 641-652, in particular §§ 641-643. Amongst the numerous statutory regulations permitting private persons (and also, to some extent, administrative agencies) to avail of substantive injunctive relief, the below listed are a representative sample of provisions under SWEDISH law namely, Environmental Code [*Miljöbalk* (1998:808)] chap. 32 § 12; Land (Real Property) Code [*jordabalk* (1970:994)] chap. 3 §§ 3 and 4; Competition Act [*konkurrenslag* (1993:20)] §§ 23-25; Marketing Act [*marknadsföringslag* (1995:450)] §§ 14, 20 and 21; Copyright Act [*lag* (1960:729) *om upphovsrätt till litterära och konstnärliga verk*] § 53a; Patents Act [*patentlag* (1967:837)] § 57a; Design Protection Act [*mönsterskyddslag* (1970:485)] § 35a and Trademark Act [*varumärkeslag* (1960:644)] § 37a; under DANISH law Marketing Act [*markedføringslov*, Legal Notice of 17 July 2000 no. 699] § 21; and under FINNISH law Consumer Protection Act [*konsumentskyddslag* of 21 January 1978 no. 38] chap. 2 §§ 7-9; Law on Compensation for Environmental damage [*lag om ersättning för miljöskador* of 19 August 1994 no. 737] § 6 (a claim can only be made for the recovery of costs associated with the averting the danger, in other words no general right to claim a prohibitory injunction) as well as the Neighbour Relations Law [*lag angående vissa grannelagsförhållanden* of 13 February 1920/26] §§ 10-23 (DENMARK has not placed law concerning neighbour relations on a statutory footing; Injunctive relief for disturbance derives from jurisprudential developments, e.g. HD 21 August 2001, UfR 2001, 2406, compare. also *Vinding Kruse*, Erstatningsretten[5], Kap. 18).

10. In the COMMON LAW the granting of preventative legal relief in the form of an injunction lies solely within the discretion of the courts. Where damages are the proper relief, an injunction should not be granted, see generally *Patterson v. Murphy* [1978] ILRM 85. In IRELAND the High Court may issue an injunction wherever it appears just or convenient to do so; see Courts (Supplemental Provisions) Act 1961 (no 39) s. 8 and Supreme Court of Judicature (Ireland) Act 1877 s. 28(8). Injunctions will be obtained in a wide array of torts, including nuisance, trespass, defamation and those which relate to industrial relations (*McMahon and Binchy*, Torts[3], 1187-1202). Injunctions are exercised in accordance with well established principles. These include the notions of the inadequacy of damages, the conduct of the parties and whether or not the principle of laches will apply. When granted, injunctions are generally mandatory or prohibitory. Mandatory injunctions are those which order the defendant to do some positive act to end a wrongful state of affairs that he has created. Prohibitory injunctions restrain the defendant from doing something or repeating a wrongful act. They include interlocutory injunctions which are aimed at protecting the rights of the plaintiff and are granted prior to the trial of action. Some may be merely interim, that is to say, they will be limited to a number of hours or days (*Delany*, Equity and the Law of Trusts in Ireland, 370). The balance of convenience test developed in *American Cyanamid Co. v. Ethicon Ltd. (No. 1)* [1975] AC 396 also applies in Ireland where it can be shown that on the balance of conveniences, the *status quo* between the parties should be preserved and the injunction granted (*Miss World Ltd. v. Miss Ireland Beauty Pageant Ltd.* [2004] IEHC 13, [2004] 2 IR 394, 405). *Quia timet* injunctions are granted, where there is a risk of impending damage. Here it is important to consider how likely it is that injury will in fact occur and how severe the apprehended damage will be. The burden of proof is on the applicant (*A-G (Boswell) v. Rathmines & Pembroke Joint Hospital Board* [1904] 1 IR 161; *Radford v. Wexford Corporation* [1954] 89 ILTR 184) and must include a strong probability on the part of the plaintiffs. The courts have also developed a “balance of convenience”

test in order for the injunction to be granted (*Garrahy v. Bord na gCon* [2002] 3 IR 566, 583 (*Geoghegan* J.)). The plaintiff must prove a substantial risk of danger as well as a strong case of probability that the apprehended mischief would arise.

11. This affirms the ENGLISH approach in *Cayne v. Global Natural Resources plc.* [1984] 1 All ER 225, 237 (*May* LJ). In *Drury v. Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 200, 1 WLR 1906, 1062, *Wilson* J. held that even an anticipated trespass sometimes gives rise to a right of action. The English courts will adopt a threshold requirement - there must be convincing evidence of real danger of actual violation (*Ministry of Agriculture, Food and Forestry v. Heyman* (1989) 59 P & CR 48, 50 (Lord *Saville*)). Legal scholars in England, as in Ireland, have long supported the notion of a *quia timet* injunction (Snell's [-*Baker and Langan*] Equity[29], 651; *Delany*, Equity and the Law of Trusts in Ireland, 403).

12. The SCOTTISH law of delict recognises the prevention by interdict of either the commission of a threatened wrong, or of the repetition of a completed wrong. Like England and Ireland, the discretionary element of the remedy remains the court's power to order or refuse interdict, and the equitable element relates to the fairness of ordering interdict (or the amount of damages to be awarded). Interdict is similar to the common law quia timet injunction, it is a preventative proceeding directed against a wrong being done or an apprehended violation of a party's rights (*Earl of Breadalbane v. Jamieson* 1877 4 R 667; *Hoyle v. Shaws Water Company* 1854 17 D 83; *Walker*, Delict, 452. Interdict is only directed against harm, rather than wrong doing – and where there is objectionable conduct without causing harm, interdict will not apply. The terms of the interdict must be specific and precise (*Shinwell v. The National Sailors' and Firemen's Union of GB and Ireland* (1913) 2 SLT 83). Interdicts have been awarded in such cases as threat of or imminence of legal wrong (*Martin v. Nisbett* (1893) 1 SLT 293; see *Walker* loc. cit. 453). Interdict, like *quia timet* injunctions, will be allowed where the wrong is threatened but not committed (*Wilson v. Shepherd* 1913 SC 300). There must be evidence of reasonable cause of wrong or fear – interdict is allowed therefore to avoid common law nuisance or statutory contraventions, for example. Wrongs based on mistake do not lead to interdict being awarded (*Walker* loc. cit. 456). Thus the court looks at the matter from the point of view of the pursuer, concentrating more on the continuance of wrong (and the effects) rather than issues of fault (*Watt v. Jamieson* 1954 SC 56; see *Stewart*, Delict, 22). Scottish law recognises a list of wrongs restrained by interdict, including those against personality, reputation, rights to heritable property, rights to movables, economic wrongs and other miscellaneous wrongs, such as breaches of confidence or breaches of procedure: (*Walker* loc. cit. 457-460). The provision providing interdict as an equitable and discretionary remedy has also been given a legislative standing. Court of Session Act 1988 s. 47(1) states that "in any cause containing a conclusion or crave for interdict or liberation, the Division of the Inner House […] may […] grant interim interdict." The use of the word 'may' indicates the discretionary nature of the remedy.

II. Basis of the claim for damages in respect of expenditure incurred in averting the damage

13. Reasonable expenses incurred by the claimant in his attempt to avert the impending damage are. as a general rule, recoverable head of damages in all legal orders of the European Union. Generally, a link is established between the debtor's obligation to tend to his affairs in order to avoid a charge of contributory negligence. The further particulars of this claim, which is for the most part regarded as part of tort law, although it occasionally appears clothed in the vestments of the law of Benevolent

Intervention in Another's Affairs (*negotiorum gestio*), see the comments and notes to VI.–6:302 (Liability for loss in preventing damage).

VI.–1:103: Scope of application

VI.–1:101 (Basic rule) and VI.–1:102 (Prevention)

(a) apply only in accordance with the following provisions of this Book;
(b) apply to both legal and natural persons, unless otherwise stated;
(c) do not apply in so far as their application would contradict the purpose of other private law rules; and
(d) do not affect remedies available on other legal grounds.

COMMENTS

A. Sub-paragraph (a)

VI.–1:101 (Basic rule) and VI.–1:102 (Prevention) not self-sufficient rules. The significance and operation of VI.–1:103(a) have already been explained in the comments to VI.–1:101 (Basic rule). This provision serves the purpose of guaranteeing that neither VI.–1:101 (Basic rule) nor VI.–1:102 (Prevention) can be read as constituting self-sufficient rules. The content and meaning of the particular elements they invoke (legally relevant damage, accountability, causation, reparation and prevention) are to be drawn exclusively from the provisions of the following Chapters 2, 3, 4 and 6. Moreover, VI.–1:103(a) makes it clear that the provisions concerning defences (Chapter 5) and the matters left unaffected by this Book (Chapter 7) retain their significance in the application of VI.–1:101 (Basic rule) and VI.–1:102 (Prevention).

B. Application to legal and natural persons (sub-paragraph (b))

Legal persons as claimants. Where the Articles in this Book speak of "a person" or "another" or their cognates, or invoke similar formulations, then, so far as nothing else is expressly designated, these terms, as was already explained, are always to be understood as meaning both natural and legal persons. As regards the few exceptions to this basic rule a distinction must be made according to whether the legal person is a prospective claimant or a responsible person. In the first case there are special rules, confined according to the nature of things to natural persons, to be found in VI.–2:201 (Personal injury and consequential loss), in VI.–2:202 (Loss suffered by third parties as a result of another's personal injury or death) and in VI.–2:203 (Infringement of dignity, liberty and privacy). The question as to the extent to which the legal person may enjoy incorporeal rights of personality must consequently be decided on the basis of VI.–2:101 (Meaning of legally relevant damage) (see the Comments to that Article and to VI.–2:203 (Infringement of dignity, liberty and privacy)). A further issue, moreover, is whether legal persons can suffer non-economic damage and on that account lay claim to damages. This draft leaves no doubt about the matter: the question is to be answered in the affirmative (see, for more detail, the comments to VI.–2:101 (Personal injury and consequential loss)).

Legal persons as responsible persons. It follows from VI.–1:103(b) that a legal person is accountable for the causation of legally relevant damage basically in the same manner as a natural person. A few clarifications only are required. Firstly, legal persons are liable to third parties not only for damage caused by their employees; they are also liable for damage caused by their representatives. See VI.–3:201 (Accountability for damage caused by employees and representatives) paragraph (2). Clarification is necessary in the second place because legal persons may be subject to special duties of care – in particular the duty to organise their activities in a way which does not expose others to hazards. These duties are "located" in VI.–

3:102 (Negligence). In other words, it follows from VI.–1:103(b) that a legal person too may act negligently or, as the case may be, intentionally within the meaning of VI.–3:101 (Intention): cf. Comment *B6* below. Thus its liability may be based on (i) its own intention, (ii) its own breach of duty, (iii) a breach of duty of its own representatives, (iv) a breach of duty by its (other) employees, and (v) its responsibility for one of the sources of danger set out in Chapter 3, Section 2 (Accountability without intention or negligence).

Bad organisation. The duties of correct organisation just mentioned are, purely from the nature of things, predominantly relevant to legal persons. However, in particular cases they may also come into play within the context of a sole trader's business or comparable organisation.

> *Illustration 1*
> A sudden emergency case in a hospital cannot be responded to early enough because the appropriate doctor is overburdened in another department of the hospital and cannot get away quickly enough. Had the hospital's activities been correctly organised, another doctor would have been present on the ward in question. The hospital is liable for the failure in its organisation. The case would not be decided differently if (as is admittedly rarely if ever the case) the hospital were operated by an individual rather than a legal person.

Legal persons under public law. These rules make no fundamental distinction between legal persons regulated by private law and legal persons regulated by public law. As a starting point the latter are subject to the same rules as legal persons regulated by private law. However, note must be taken of VI.–7:103 (Public law functions and court proceedings): this Book does not govern the liability of legal persons (or individuals) arising out of the exercise of public law functions.

Imputation of knowledge and state of mind of legal persons. A legal person has as such neither its own cognition nor its own will. On the other hand, actual and constructive knowledge, wilfulness and other aspects of state of mind provide elements for a multitude of prerequisites of liability (e.g. intention, negligence, and the definition of a keeper) and grounds of defence (e.g. contributory fault). For that reason clarification is needed that the state of mind and knowledge of persons by whom a legal person acts are imputable to the legal person. This rule is not explicitly taken up in this Book only because (i) it is also of significance well beyond the limits of non-contractual liability law and (ii) there is much to be said for characterising it as a principle of company law. The persons without whom the legal person could never engage in legal relations are its representatives (see the definition in VI.–3:201 (Accountability for damage caused by employees and representatives), paragraph (2)). It is immaterial whether the natural persons acting for the corporation are themselves liable or not. Furthermore, the legal person is to be regarded as if the individual knowledge of each of the representatives were bundled together and at its call. It is therefore conceivable that a legal person is liable on the basis of intentionally causing damage, although the member of the board actually taking the critical step was not even negligent.

> *Illustration 2*
> A, a member of the board of an incorporated company, arranges for building material from supplier L to be used in construction work for the company's customer K. Board member B, who is responsible for procurement, had arranged for these building materials to be acquired - contrary to the firm's policy - under reservation of title. A

was unaware of this and B, who had no knowledge of the shortage of materials at the building site, had not envisaged that the materials would be deployed at this point in time. As a result of the incorporation in the building work, L loses ownership of the materials. The legal person has committed an intentional infringement of ownership to the detriment of L.

C. The relationship of the law on non-contractual liability to other areas of private law (sub-paragraph (c) and sub-paragraph (d)); general

The principle of free concurrence of actions. VI.–1:103(c) and (d) regulate in two provisions the relationship of the law on non-contractual liability to other areas of private law. They proceed on the basis that generally an injured person can select from among the several bases of claim which come into consideration the one which seems the most advantageous (The same holds correspondingly where, according to the applicable law of procedure and jurisdiction, the court is required to recognise the basis of claim relied on by the claimant). Where the claimant, for example, has a claim arising out of unjustified enrichment and out of the law on non-contractual liability, the former providing more extensive relief in the particular case than the latter, the law on non-contractual liability does not prevent the application of the law of unjustified enrichment (sub-paragraph (d)). The claim in respect of the unjustified enrichment, however, is not additional to the claim for reparation, but rather an alternative claim (Similarly, where the enrichment is claimed *within* the law on non-contractual liability (see VI.–6:101(4) (Reparation)) this constitutes an alternative measure of redress to reparation, not an additional one.) However, in the converse situation (the non-contractual liability claim being more advantageous than the other claim) it may well be that the competing system – in particular the competing system for providing reparation - is an exclusive one, that is to say, the purpose of its rules is fulfilled only be ousting the law on non-contractual liability. Account is taken of that in sub-paragraph (c).

Preconditions of a situation of concurrent actions. The significance of the problem of concurrence of actions is occasionally overestimated. The problem only emerges if one and the same conduct falls under the provisions of two or more areas of the law, as an essential element of the claim, *and* that conduct is judged differently by those different provisions.

Illustration 3
No problem of concurrence of actions therefore emerges when a given non-performance of a contractual obligation does not in fact give rise to non-contractual liability according to the rules of this Book. Hence, for example, the mere failure to perform a contractual obligation to deliver goods at the correct time or of the correct quality is not covered by the terms of VI.–2:101 (Meaning of legally relevant damage).

Illustration 4
Similarly, no problem of concurrence of actions emerges where goods on hire are worn out, in accord with the terms of the contract by the hirer of the goods. That is because the act of the hirer is not merely not a failure to perform a contractual obligation; it does not even constitute an infringement of a property right relevant to the law on non-contractual liability since the destruction is justified by the consent of the lessor. The situation is different, however, if the law governing a contract of hire provides for a shorter limitation period for claims in respect of excessive destructive use of the goods than the law on non-contractual liability provides for a claim in respect of an intentional or negligent infringement of a property right. A problem of

concurrence of actions likewise emerges if it suffices for liability under the law on non-contractual liability that the destruction was caused by (mere) negligence, whereas the claim under the law of hire turns on a more qualified measure of fault on the part of the hirer. In such a case the purpose of the provisions of the law on hire is such that they claim priority of application over those of the law on non-contractual liability (sub-paragraph (c)), since they would otherwise not achieve their intended effect, namely to protect the hirer from liability in the cases excluded by the more tightly framed rules.

D. Sub-paragraph (c)

Scope of application. The provision concentrates predominantly, but by no means exclusively, on the relationship between the law of contract and the law on non-contractual liability. It plays a similar role in relation to the law on benevolent intervention in another's affairs, the law of property and even family law. Consequently it does not matter whether it is a provision of autonomous private law or a provision of these rules which in accordance with its objective claims priority of application.

Illustration 5
It may well be, for example, that family law seeks to regulate in an exclusive way the legal consequences of a breach of duties of fidelity owed by married or engaged persons. In such a case the law on non-contractual liability would not be applicable if, following the disclosure of adultery, the cuckolded spouse suffers a severe nervous collapse with physical symptoms of the sort prescribed by VI.–2:201 (Personal injury and consequential loss). The situation is no different where family law provides for a less demanding standard of care between spouses or between parents and children than that applicable generally in the law on non-contractual liability. In that case VI.–1:103(c) has the effect that VI.–3:102 (Negligence) is rendered inapplicable.

Illustration 6
In the law of property too there are many provisions whose purpose is to exclude the law on non-contractual liability. For example, there are the rules on acquisition of title to property in good faith. Someone who according to the provisions of property law acquires ownership in good faith as a result of a disposition by a non-entitled party but in circumstances where a diligent person might have ascertained the absence of title in the disponer cannot be sued by the former owner to make reparation on account of a negligent infringement (destruction) of a property right. That would undermine the purpose of the provisions on acquisition of property in good faith - especially when consideration is given to a claim for reparation in kind. A right to restitution of the property on account of mere negligent infringement of the right of ownership would undermine the rule of property law whereby only (intentional or) *grossly* negligent disregard of the true owner's title prevents an acquisition. The point can be underlined in relation to nuisance: the basic rule on nuisance is to be found in the provision on infringement of property rights, but the details regularly arise in the law governing and assigning rights between neighbours.

The law on non-contractual liability and the law of contract. As already indicated, however, the main area of application for the provision concerns the relationship to the law of contract. At the outset it must be appreciated that not every non-performance of a contractual obligation constitutes a non-contractual liability and nor is every non-contractual liability involving damage to a contracting party necessarily a non-performance of a contractual

obligation (A trivial example is where it just so happens to be the injured person's own employer who, on a Sunday afternoon, has caused damage by careless driving). A second point of note is that these rules have not merely achieved considerable approximation of the rules on prescription applying to contractual and non-contractual rights but have also increasingly approximated the legal consequences of non-performance of a contractual obligation and non-contractual liability. In particular III.–3:701 (Right to damages) provides for damages for non-economic as well as economic loss resulting from non-performance of a contractual obligation. These developments have effectively diluted the practical significance of the problem of concurrence of actions. Where the law of contract and the law on non-contractual liability do in fact overlap, they only diverge from one another at the margins.

Priority of contract law in case of conflict. Should it, however, in fact come to a conflict between the values of contract law and non-contractual liability law in any particular case, whereby contract law denies liability which would subsist according to the provisions on non-contractual liability, then it is for the rules of contract law to assert priority if that is to be claimed in accord with the objective of the contract law rules. That is again the case if an application of the law on non-contractual liability in parallel with the corresponding contract law provision would deprive the latter of its effect. The contract law rule has priority so far as contract law actually claims it, whether expressly or merely by implication from the nature of things. Where contract law makes no such demand for the subsidiarity of non-contractual liability law, sub-paragraph (c) has no application and the principle of free concurrence of actions governs.

Illustration 7
III.–3:703 (Foreseeability) reads: "The debtor in an obligation which arises from a contract or other juridical act is liable only for loss which the debtor foresaw or could reasonably be expected to have foreseen at the time when the obligation was incurred as a likely result of the non-performance, unless the non-performance was intentional, reckless or grossly negligent." In the commentary to this provision the following illustration (Illustration 2) is given: "Company S sells an animal food compound to B for feeding to pigs. B does not tell A for what breed of pigs the food is required. S negligently supplies a batch of the compound which contains a mild toxin known to cause discomfort to pigs but no serious harm. B's pigs are, however, of an unusual breed which is peculiarly sensitive to the toxin and after being fed with the compound many of the pigs die. S is not liable for the loss since it could not reasonably have foreseen it." It would effectively annul the liability limiting function of this contract law provision if the provisions of non-contractual liability for property damage were to be applicable on these facts and with a contradictory outcome. It makes no difference, moreover, whether that non-contractual liability presupposes a negligence or not.

Illustration 8
Seller S sells to buyer B a concrete mixer. As a result of a defect in the mounting, the drum falls out of its anchoring on first use. Both the drum and the surrounding structure are deformed. B fails to make use of the right to terminate the contractual relationship within a reasonable time (cf. III.–3:508 (Loss of right to terminate). B claims reparation for the damage to the machine on the ground that there has been an infringement of a property right as recognised by VI.–2:206 (Loss upon infringement of property or lawful possession). B would, let us suppose, be unable to recover damages for the non-conformity under contract law because of III.–3:107 (Failure to notify non-conformity). Moreover, consideration must be given to the fact that art. 9(b) of the EU product liability directive encompasses only damage which is caused to

a thing other than the defective product itself. That provision only concerns liability to consumers, but it invites the conclusion that the EU legislator generally wanted to leave cases of this type too to contract law. The priority of contract law can also be supported with the argument that in cases of self-destructive damage to goods after transfer of ownership there is no workable criterion for demarcating contractual and non-contractual responsibility and the legal system therefore always runs the risk of characterising a mere deviation of quality (and thereby also a core part of the law of sales) as a matter of non-contractual liability law. Under the system of these rules it may be that the question no longer merits any great attention. However, a consideration of the rules of general contract law, those of the law of sale and art. 9(b) of the product liability directive, taken together, justifies the conclusion that the law on non-contractual liability is not applicable to a buyer's claim to damages against a seller on account of self-inflicted damage to the goods acquired.

Illustration 9
Due to a doctor's error in treating a patient, the patient dies. There are no provisions in Book III specifically relating to legally relevant damage suffered by relatives in the case of a fatal personal injury. This silence on the part of Book III, however, is not an "eloquent silence" that speaks volumes in the sense that such claims are therefore to be excluded because the case is one of non-performance of a contractual obligation. The corresponding provision of the law on non-contractual liability for damage caused to another (VI.–2:202 (Loss suffered by third parties as a result of another's personal injury or death)) remains applicable. Within the non-contractual liability claim regard must also be had to VI.–6:203(2) (Capitalisation and quantification), VI.–7:105 (Reduction or exclusion of liability to indemnified persons), and even, depending on the organisational form of the hospital in the circumstances, VI.–7:103 (Public law functions and court proceedings).

E. Sub-paragraph (d)

The law on non-contractual liability does not oust other bases of claim. Sub-paragraph (d) concerns the converse situation: there is no valid claim which can be asserted according to the provisions of the law on non-contractual liability because, for example, there is no legally relevant damage or negligence or because the conditions for the liability for others are not fulfilled. In that case it is open to the claimant to pursue other bases for a claim which are more advantageous. This rule applies without exception and extends to the legal remedies available.

Illustration 10
Seller S has sold to buyer B land which is contaminated with oil residues. B has not suffered any infringement of a property right because the land was already contaminated at the time of transfer of ownership. A claim for damages for B against S under the law on non-contractual liability can therefore be contemplated only in the case of an intentional deception of B on the part of S (by an omission to make facts known) (VI.–2:210 (Loss upon fraudulent misrepresentation)). That of course does not preclude B from making use of contractual remedies available on account of S's non-performance of contractual obligations – in particular a contractual claim to damages.

Illustration 11
D is driving through a built-up area at an appropriate speed when a three year old girl suddenly steps into the road in front of him. He could not have foreseen that the girl

would let go of her aunt's hand because she had spotted her mother on the opposite side of the street. D tries to avoid hitting the girl and collides with a tree. If he has no claim under the law on non-contractual liability, he can still assert a claim against the girl and/or the girl's parents under the law of benevolent intervention in another's affairs (see V.–3:103 (Right to reparation)).

Illustration 12
A has registered a patent in respect of a certain industrial machine, but neither builds the machine nor undertakes any other efforts to commercialise the invention. Knowing of A's protected patent, B builds two machines of this type and sells them. A has suffered no substantial loss and therefore no legally relevant (economic) damage. However, that precludes only a claim in non-contractual liability and does not prevent a claim being made in the law of unjustified enrichment.

No limitation to the law of obligations. Sub-paragraph (d) is in no way confined to the relationship to other parts of the law of obligations. Rather the provision makes it clear that the law on non-contractual liability fundamentally does not oust any claims based on other legal grounds. This can obtain practical significance in particular in relation to the law of property and so in relation to the law governing claims for preventative legal protection. So far as the law of property recognises a claim to a prohibitory or mandatory remedy to prevent (impending or continuing) damage which is independent of fault, such a claim may be asserted independently of the requirements of VI.–1:102 (Prevention). The same is true for preventative legal protection under the rules protecting trades, as for example under the Community Trade Mark Regulation art. 98(1).

Special regimes relating to VI.–1:103(d). The following text features special regimes relevant to VI.–1:103(d) in three places, namely in VI.–2:203 (Defamation) paragraph (2), VI.–2:208 (Loss caused to a consumer as a result of unfair competition) paragraph (2) and VI.–3:207 (Other accountability for the causation of legally relevant damage). The former two relate to exceptional situations in which national law determines whether a legally relevant damage exists beyond that provided for by the express provisions of these rules. VI.–3:207, by contrast, refers to further instances of strict liability under national law. See the commentary to those Articles.

NOTES

I. Tort law and contract law: Theories of concurrence of action

1. Problems arising from concurrence of actions, which involves an examination how different areas of private law relate to each other, are difficulties which confront every Member State of the European Union. In this area, the focus primarily centres on the relationship between contract and tort law (see generally *v. Bar and Drobnig*, Interaction of Contract and Tort, nos. 280-315). AUSTRIA, GERMAN and GREEK legal scholarship distinguishes between the following categories where there is a concurrence between possible heads of legal action: If a norm precludes the application of another norm, reference is made to *Gesetzeskonkurrenz (concurrence of laws)*. The term *Anspruchshäufung* (cumulation of causes of action) describes the phenomenon whereby one and the same act can trigger the cumulation of parallel causes of action, e.g. a claim of damages to repair loss that has already occurred and a

claim for injunctive relief directed at averting impending fresh damage. The problem of the cumulation of actions is. *inter alia*, in these Principles dealt with under VI.–6:301(1) (Prevention in general). The term *alternative Anspruchshäufung (alternative causes of actions)* is used to describe when the Plaintiff must choose between different causes of actions. An example deriving from these Principles can be discovered in VI.–6:101 (Aim and forms of reparation) paragraph (4). If there are several claims triggered by the same damage which, however, do not preclude the continued existence of the other, this situation is classed as one of *Anspruchskonkurrenz (concurrence of claims)* or *Anspruchsnormenkonkurrenz (competing bases of a claim)*. The former contemplates that the plaintiff can avail of several parallel claims. These claims do not impinge upon the other. The Plaintiff is not even required to state which of these causes of action he is seeking to rely upon (subject to conflicting national rules on procedure); however, it goes without saying that it is not possible to obtain a doubling in compensation or even an increase in the extent of damages awarded, because the plaintiff (e.g.), as well as having sustained loss by virtue of breach of contract has also fallen victim to tortious action. In cases of the so-called *Anspruchnormenkonkurrenz* it is conclusively accepted that, from the outset, only one claim existed, although it was possible to anchor the claim to a number of bases for liability (*Koziol*, Haftpflichtrecht I[3], nos. 17/1 ff; MünchKomm [-*Kramer*][4], § 241, nos. 25 ff; *Medicus*, Schuldrecht I[13], § 32; *Vaz Serra*, BolMinJus 85 (1959) 230; *Almeida Costa*, Obrigações[9], 499-506; Georgiades and Stathopoulos [-*Georgiades*], art. 247, no. 29; Georgiades, Diki 6/1975, 43; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 110). In the sense of the terminology discussed above, this text postulates the concurrence of claims principle (however, it does not adopt the fine distinction between this principle and the *Anspruchsnormenkonkurrenz*), and makes clear in sub-paragraph (d), that tort law does not have the effect of subjugating contract law. Sub-paragraph (c) introduces a regulation, which adopts a converse approach (priority of contract law and other areas of private law over tort law) leading to, as previously alluded in the comments above, an application of the principle of *Gesetzeskonkurrenz*

2. The principle of *Gesetzeskonkurrenz* – is the point of departure for BELGIAN, FRENCH and LUXEMBOURGIAN law for the definition of the relationship between contract and tort law, derived from the fact that in these legal order a person's liability in damages cannot be contractual and tortious at the same time. In cases of overlap and conflict, contract law prevails (see for FRANCE *Mazeaud and Chabas*, Obligations[9], no. 404 p. 402-403; for BELGIUM *Vandenberge* a.o., TPR 2000, no. 176 and for LUXEMBOURG Cour 16 June 1982, Pas. luxemb. 25, 344). However, the courts have created exceptions to the principle of *non-cumul des responsabilités*. These exceptions centre primarily upon the case law of the criminal courts. The jurisprudence of the Chambre criminelle of the *Cour de Cassation* constantly re-iterates that the criminal courts do not have the authority to apply the laws governing contractual liability. If a criminal court, in the course of a claim for damages which is annexed to the criminal proceedings, is required to determine the merits of a claim for compensation anchored in civil law, the court therefore generally applies non contractual liability law even if the act committed also amounts to a breach of contract (*Viney*, Introduction à la responsabilité[2], no. 223 p. 412). BELGIAN case law allows the injured party to a contract, breach of which also constitues a criminal act, to elect between claiming in contract or in tort (*Vandenberge* a.o. loc. cit. no. 178). In addition, the general principles of tort law may be applicable between contractual partners, if the *faute* of one party is not merely the breach of a specific contract but represented the violation of a general duty of care and the damage resulting from the breach had nothing to do

with disappointed expectation under the contract (Cass. 4 June 1971, RW 1971-72, 371; Cass. 7 December 1973, RW 1973-74, 1597).

3. The trend under SPANISH law is somewhat unclear as a result of contradictory dicta in case law and in legal writing. The majority view in academic writing abstains from adopting a strict application of the principle of *non-cumul* (of a different view e.g. Paz-Ares/Diez-Picazo/Bercovitz/Salvador (-*Pantaleón Prieto*), Código Civil II[2], 1979, whose view is indeed backed up upon allusion to decisions of the *Tribunal Supremo*, e.g. TS 16 May 1985, RAJ 1985 (2) no. 2396 p. 2028). For the most part, case law tends to confine contractual liability to "rigurosa órbita de lo pactado", to the "strict sphere of the agreement" (TS 19 June 1984, RAJ 1984 (2) no. 3250 p. 2482). However, determining the exact particulars of the latter appears, as before, problematic not least because the *Tribunal Supremo* considers the general duty to conduct oneself according to good faith precepts to come within the remit of this "contractual sphere" (see further *Díez-Picazo*, Derecho de daños, 265). The *Tribunal Supremo* has aslo enabled the injured party to raise both claims either in the alternative or as a subsidiary claim. It has even accepted that the courts can employ the regime of liability which is more favourable to the plaintiff, even where the plaintiff has not asserted this claim (TS 15 February 1993, RAJ 1993 (1) p. 987 no. 771).

4. In ITALY, it is generally accepted that contractual liability will not generally have the effect of displacing parallel tort liability. If a breach of contract can simultaneously amount tot he violation of an interest protected by tort law, then the injured party can elect whether s/he wants to pursue a claim under contract or tort law; The principle of concurrence of claims is engaged (Alpa and Bessone [-*Rossello*], La responsabilità civile I[2], 316-317 and 321-326; *ders.*, Aggiornamento loc. cit. 1988-1996, I, 139-140; *Monateri*, Manuale della responsabilità civile, 19-30; *Bianca*, Diritto civile V, 551-555). It acquires practical significance above all in the field of carriage of persons (breach of contract leads to personal injury) (Alpa and Bessone [-*Lopez de Gonzalo*], La responsabilità civile IV[2], 32-37; Cass. 20 April 1989, no. 1855, Foro it. 1990, I, 1970; Cass. 28 January 1972, no. 226, Giur.it. 1972, I, 1, 1797; compare also [concerning liability for animals] Cass. 19 January 1977, no. 261, Giur.it. 1978, I, 1, 1791). Moreover, the majority consensus in case law recognizes that, parallel to the Sales Law liability for damage to other interests of the buyer, (his/her health, or property pursuant to CC art. 1474(2), liability may arise by virtue of CC art. 2043 (tort) (for citation of relevant case law, see *Monateri*, Cumulo di responsabilità contrattuale e extracontrattuale, 176). The principle of concurrence of claims is, in this respect, the point of departure (Cass. 5 February 1998, no. 1158, RGI 1998, voce Vendita no. 45; Cass. 28 July 1986, no. 4833, RGI 1986, voce Vendita no. 77-78; Cass. 13 March 1980, no. 1696, Giur.it. 1980, I, 1, 1460; otherwise Cass. 9 February 1965, no. 205, Rep.Foro it. 1965, voce Vendita, no. 68). Naturally, the possibility of obtaining a doubling in compensation in respect of the same damage is always ruled out. See further for complete overview: *Castronovo*, Europa e diritto privato 2004, 69.

5. At this point of time, HUNGARIAN CC § 318(1) envisages a uniform system for contractual and tort liability: "The rules on non contractual liability for damage are to be applied to liability for breach of contract and in the determination of the extent of compensation. A reduction in the amount of damages awarded is not permitted unless otherwise provided by law. POLISH CC art. 443, by contrast, expressly provides for a free concurrence of contractual and tortious liability. However, it is commonly recognised that a breach of contractual obligations may constitute a delict only if it infringes at the same time a generally binding rule of law or principles of community life (*zasady współżycia społecznego*). In that case the claimant may choose the claim which he regards as more advantageous to him. It suffices that the claimant sets out

and proves the facts founding his claim since the court is under a duty to choose the legal ground of liability, which in the circumstances of the case is more favourable to the claimant (SN 14 February 2003, LEX no 78273; *Safjan*, Kodeks cywilny I[4], 1268-1271; *Radwański and Olejniczak*, Zobowiązania-część ogólna[5], 353-354).

6. According to GERMAN law, breach of contractual obligations is not tantamount to either the breach of an (absolute) law in the sense of CC § 823(1) of the violation of a protective law in the sense of CC § 823(2). However, if, in conjunction with an existing breach of contract, one of the enumerated rights pursuant to CC § 823(1) (particularly violation of ownership or infliction of personal injury) has also been infringed, then the principle of concurrence of tort and contract law actions is postulated (reaffirmed on numerous occasions in jurisprudence, see. BGH 28 April 1953, BGHZ 9, 301, 302; BGH 24 May 1976, BGHZ 66, 315, 319; BGH 17 March 1987, BGHZ 100, 190, 201; Erman [-*Schiemann*], BGB I[10], Pref. to § 823, no. 25; Staudinger [-*Hager*], BGB[13], Pref. to §§ 823 ff, no. 38). An exception to this principle is made where applying tort law defeats the purpose of a contract law norm, e.g. because this norm provides for certain privileges from liability or shorter limitation periods. The rationale holds that then this norm would be emasculated and deprived of practical effect, if tort law were to be applied. The case law is extensive: see, for example, on CC § 521 BGH 20 November 1984, BGHZ 93, 23; on CC § 599 and CC § 690 BGH 23 March 1966, BGHZ 46, 140, 145; on CC § 708 BGH 20 December 1966, BGHZ 46, 313, 316 [all cases in which a qualified fault is required]; and on CC § 548 [=CC § 558 in its older version] BGH 31 January 1967, BGHZ 47, 53, 55; BGH 24 May 1976, BGHZ 66, 315, 320; BGH 8 January 1986, NJW 1986, 1608; BGH 23 May 2006, NJW 2006, 2399 and on CC § 606 BGH 31 January 1967, BGHZ 47, 53, 55 [shorter contract law limitation periods]). It is important to note that the reform of the German Law of Obligations in particular by CC § 280(1) second sentence (Reversal of the burden of proof for fault in contract liability) and CC § 253 (introduction of non- economic loss in the context of contractual liability) has rendered many of the issues obsolete, which had previously played a significant role in the discussions pertaining to problems of concurrence.

7. Similarly, in AUSTRIA, the principle of concurrence of tort law and contract law actions or *Anspruchnormenkonkurrenz* is generally applicable. In contrast to the prevailing legal position in Germany, a shorter limitation period under contract law has no bearing upon a damages claim under tort law (see further *Koziol*, Haftpflichtrecht I³, nos. 17/8; Rummel [-*Reischauer*] ABGB II² § 1295 no. 25). In particular, the specific limitation periods listed in the Third Chapter of the Commercial Code (Ccom §§ 414, 423 and 439) do not apply to tort law damages claims unless otherwise agreed. This is even the case if the consignor is the owner of the good that is lost or damaged. The rationale holds that the tortious actor should not be unduly favoured merely because s/he has a contractual relationship with the injured party (*Chr. Huber*, JBl 1986, 227; OGH 9 September 1986, JBl 1986, 793; OGH 16 November 1989, JBl 1990, 528 = RS0062408).

8. In GREECE, quite similar issues are the subject of deliberation. The courts have stated that a breach of contract is concurrently a tort pursuant to CC art. 914, if the damaging conduct would also be unlawful even if no contract was in existence (A.P. 967/1973 NoB 1974, 505; A.P. 1058/1977 NoB 1978, 929; CA Athens 10288/1986 EllDik 1987, 886). In such cases, the courts adopt the approach of concurrence of actions: contractual and tort claims can be separately raised according to the rules that govern the two rubrics of law (A.P. 171/1978 NoB 1979, 238; A.P. 967/1973 NoB 1974, 505; CA Athens 10288/1987 EllDik 1987, 886; CA Athens 5653/1987 EllDik 1989, 775). At this juncture, a rider must be added given that particular provisions of contract law

(e.g. those providing for a less strict yardtick for the imposition of liability as is the case with CC arts. 811 and 823) would be rendered effectively meaningless, an exception from the principle of concurrence of actions has been established (CA Athens 951/1967 NoB 1968, 279; *Balis*, Genikai Archai[8], 372). Furthermore, as far as prescriptive periods are concerned, contractual and tortious liability generally abide by their own respective rules (A.P. 47/1996 NoB 1998, 206; A.P. 1993 NoB 1993, 1069; A.P. 967/1973 NoB 1974, 505). Landlord and Tenant Law (CC art. 602) connotes an exceptional case where the landlord's tort law claims are subject tot he shorter contractual limitation periods (CA Athens 6595/1994 EllDik 1995, 1288; CA Dodoni 261/1997 EllDik 1998, 185). Academic writing favours the extension of the shorter period of limitation for consequential damage under the law of service contract to (CC art. 693) to the tort law claim (Georgiades and Stathopoulos [-*Kardaras*], arts. 688-690, no. 30), whereby the shorter limitation period for consequential damage under Sales Law ought not to be embrace tort law claims (Georgiades and Stathopoulos [-*Doris*], arts. 554-558, no. 18; of a divergent view *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio I, 260).

9. In preparing the groundwork for the enactment of the PORTUGUESE Civil Code in 1966, there was some deliberation on whether to adopt an express statutory stipulation on the relationship between contract and tort law (*Vaz Serra*, BolMinJus 85 (1959) 238), however this provision never saw the light of day. The majority legal opinion concedes that the principle of concurrence of actions holds sway whereby the Plaintiff can freely choose the regime of liability more favorable to him/her (see, *inter alia*. *Antunes Varela*, Obrigações em geral I[10], 637 and STJ 22 October 1987, BolMinJus 370 (1987) 529). However, the converse view is also propounded; namely, the "*princípio da consunção"* which is derived from "*sistema do não cúmulo*" which states that contractual regime of liability should be accorded priority (*Almeida Costa*, Obrigações[9], 501; STJ 9 February 1995, CJ (ST) III (1995-1) 75). There are distinctions between contractual liability and liability under tort in a multitude of areas (*inter alia* Prescription periods, burden of proving fault); however, the law on damages for both regimes is uniform and governed by CC arts. 562–572. In general, it is asserted that contract law covers loss arising from poor or non performance and the general principles can be found in CC arts. 798-800. Consequently, the liability of a contractor to a property developer or to a purchaser for losses resulting from a defective building is governed by contract law rules (CC art. 1225), the liability of the owner or the occupier of a building to a third party is resolved on the basis of tort law rules (CC art. 492) (*Pires de Lima and Antunes Varela*, Código Civil Anotado II[3], 827, note 5 to art. 1225).

10. According to DUTCH law, it would, in principle be conceivable that a breach of contract could connote a violation of a right in the sense of CC art. 6:162(1). However, it can be derived from the fact that given that there are separate provisions regulating the breach of contractual obligations contained in CC arts. 6:74 ff, they consequently enjoy priority over CC arts. 6:162 (Asser [-*Hartkamp*] Verbintenissenrecht III[10], nos. 8-9 p. 9-10). Only under exceptional circumstances will non performance under a contract simultaneously amount to a tort pursuant to CC art. 6:162. This state of affairs will arise if the wrongfulness stems from elsewhere other than the (mere) breach of contract. Examples include where the debtor damages a thing owned by the creditor which is held by the debtor by virtue of contractual relations, or where the employer breaches a health and safety obligation owed tot he employee. In such cases, there is a concurrence of tort and contractual claims (see further Asser [-*Hartkamp*] Verbintenissenrecht III[10], no. 8-11 p. 9-12; *Jansen*, Onrechtmatige daad: algemene bepalingen[2], no. 15 p. 23-24; T&C Vermogensrecht[4] [-*Lindenbergh*], art. 6:162 BW

no. 5; HR 9 December 1955, NedJur 1956 no. 157 p. 353; HR 6 April 1990, NedJur 1991 no. 689 p. 2961; HR 6 December 1996, NedJur 1997 no 398 p. 2176).

11. ESTONIAN LOA § 1044 is one of the very few provision which expressly deals with the relationship between contractual and tort law. This provision is on cognate lines to VI.–1:103(c) and (d) and provides: "(1) The provisions of this Chapter [= on "Unlawful Causing of Damage"] do not preclude or restrict the right of a victim to claim compensation for damage on a legal basis other than that provided in this Chapter or the right to make other claims, unless otherwise provided by law. (2) Compensation for damage arising from the violation of contractual obligations shall not be claimed on the bases provided in this Chapter, unless otherwise provided by law. Compensation for damage arising from the violation of contractual obligations may be claimed on the bases provided in this Chapter if the objective of the violated contractual obligation was other than to prevent the damage for which compensation is claimed. (3) If the death, personal injury or damage to the health of a person is caused as a result of the violation of a contractual obligation, the tortfeasor shall be liable for such damage on the basis provided in this Chapter." A comparable regulation which is couched in definitional terms can be discovered in LITHUANIAN CC art. 6.245(2)-(4) ("2. Civil liability is of two kinds: contractual liability and non-contractual (delictual) liability. 3. Contractual liability is a pecuniary obligation resulting from a failure to perform a contract or from its defective performance where one party of the obligation has the right to claim for compensation of damages or demand payment of penalty (fine, interest), and the other party is bound to make compensation for damages, or to pay penalty (fine, interest) caused by the failure to perform the contract, or by a defective performance thereof. 4. Non-contractual (delictual) liability is a pecuniary obligation which is not related with contractual relations, except in cases where it is established by laws that delictual liability shall also result from damage related with contractual relations").

12. In the NORDIC Countries the SWEDISH and FINNISH Damages Liability Act chap. 1 s. 1 state that contractual and tortious liability likewise are in principle subject to free concurrence of actions (cf. VI.–1:103(c) and (d)), but tortious liability can as a rule not be asserted if it allows further-reaching legal remedies than the competing contractual liability and if from their interpretation, it results that they wish to replace the tortious liability. This can be the case, for example, where a claim in contract has lapsed (*Lindskog*, Preskription[2], 555-556), or where the contractual claim does not include the entire damage (Swedish HD 25 May 1949, NJA 1949, 289; Swedish HD 28 September 1951, NJA 1951, 656; *Hellner and Johansson*, Skadeståndsrätt[6], 90). If the tortfeasor is in possession of the object, an existing contractual relationship with the injured party can shift the burden of proof, for example in the case of safe-deposit contracts (*Hellner and Johansson* loc. cit. 87). If, on the other hand, contract law is more favourable to the injured party than tort law, he can rely without further ado on contract law. Examples of this are found in consumer law, for example. In particular Swedish consumer sales law § 31 and (the not totally congruent) Finnish consumer protection law (*Konsumentskyddslag*) (Law of 20th January 1978/38) chap. 5 §§ 20 and 21 can be more favourable to the consumer than the transplanted EC Product Liability Directive. An instructive example for the approach of the Swedish courts is found in HD 28 February 1996, NJA 1996, 104. The plaintiff, the owner of a kennel for dogs and cats, was injured by one of the animals staying there, which pulled so strongly on the lead that the plaintiff fell and sustained a broken bone. The court held the strict non-contractual liability for dogs as inapplicable, and was of the opinion that only contractual liability could come into question, and this was to be denied on the basis of a lack of fault (*Hellner and Johansson* loc. cit. 181). Also in DENMARK

contractual and tortious liability in principle are subject to free concurrence of actions (cf. VI.–1:103(c) and (d)), but from the interpretation of the rules governing the actual contract one may in some situations say that they wish to replace the tortious liability (*Vinding Kruse*, Erstatningsretten[5], 26-27; *Gomard*, Forholdet mellem Erstatningsregler I og uden for Kontraktsforhold, 64).

13. The distinction between contract and tort is of great importance in the COMMON LAW tradition, see generally *McMahon and Binchy*, Torts[3], 32-36. In ENGLAND/WALES when there is a contract between the defendant and claimant it does not prevent the notion of there being a duty of care, and, conversely, "if a head of claim ... were recoverable in contract, the fact that it could not be recoverable in tort should not prevent it from being recoverable in contract" (*Hamilton Jones v. David & Snape (a firm)* [2003] EWHC 3147 (Ch), [2004] 1 WLR 924). A case may therefore be pled cumulatively or alternatively on the basis of breach of contract or of a duty of care in delict or tort, such as to obtain the benefit of any advantage with respect to limitations of time for bringing an action (*Henderson v. Merrett Syndicates Ltd. (No. 1)* [1995] 2 AC 145, *182 per Lord Goff of Chieveley*). The contract may be seen thus as an enabling actor, determining the range of matters which will be affected. It is not possible to disregard the contract – mutual obligations in tort are not capable of being any greater than those to be found expressly or by necessary implication in their contract (Lord *Scarman* in *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. (No.1)* [1986] AC 80, 107). The background of contracts, depending on the context, is a factor that can support the recognition of the situation being one in which a duty of care in delict/tort is capable of arising. However, there is no duty of care to subsequent purchasers of property that is defective (*Bellefield Computer Services Ltd. v. E Turner & Sons* [2002] EWCA Civ 1823, [2002] Build LR (N.S.) 97), and only once have the ENGLISH courts held that the existence of a contract with a third party would indicate the possibility of a duty of care being capable of arising in tort for negligence, namely *Junior Books Ltd. v. Veitchi* Co. Ltd. [1983] 1 AC 520, whereby a sub-contractor was held to be negligent in tort in respect of shoddy floors in the building, despite the absence of a direct contract with the injured party. This has not been followed. It is more the case in ENGLAND/WALES that the existence of contract(s) with third party(ies) will be looked on as a factor that strongly tends to negate the possibility of a duty of care arising in delict (*Norwich City Council v. Harvey* [1989] 1 WLR 828, 834 per *May* LJ). In SCOTLAND, the trend established in Junior Books has been more sporadically adopted (see *Norwich Norwich Union Life Insurance Society v. Covell Matthew Partnership* 1987 SLT 452, 459 per Lord *McCluskey*). But later in *Strathford East Kilbride Ltd. v. HLM Design Ltd.* 1999 SLT 121, 127 per Lord *Maclean* it was held that no duty of care was capable of arising to prospective tenants where the architect contracted with the owner of the building. For IRELAND, there has been a general trend in the courts to rule that the existence of a contract between the parties does not mean that there cannot be a liability arising out of tort (e.g. *Finlay v. Murtagh* [1979] IR 249, 256 per *Henchy* J.). Despite this, modern courts tend to disfavour plaintiffs attempting to sue in the more favourable manner open to them (*Madden v. Irish Turf Club* [1997] 2 IR 184; *Sweeney v. Duggan* [1997] 2 ILRM 211). Thus perhaps one could say that the Irish courts disfavour "picking and choosing" claims in contract or tort, in order to gain the most advantage. However, in cases of an employer's obligations to his workers and those obligations of a professional to a client, the courts will not restrict the injured party to either tortious or contractual remedies – both will be available (*McMahon and Binchy*, Torts[3], 35). See generally *von Bar and Drobnig*, Interaction of Contract and Tort, 203-206.

II. In particular liability in respect of self-contained damage in defective products and buildings?

14. A particularly problematic issue pertaining to the relationship between contractual and tortious liability and has provoked much discussion concerns the question which of the relevant regimes is applicable in the case involving the "self -destruction" of a product. This term is used to describe cases where a thing has been delivered or manufactured and at the time of acquisition the defect was confined to part of the thing and subsequently insidiously spreads to other components of the thing or takes hold throughout. For example, a complex structure (e.g. a large machine) with attendant defect (an operating switch which should automatically lead to the machine being turned off in the event of it overheating) is delivered but the machine is overall in working order. At a subsequent juncture, the machine is completely destroyed owing to the defect which was present in the machine from the beginning (there is a failure in disconnecting the supply of electricity, the machine catches fire and is completely destroyed). In similar cases to the above cited example, the GERMAN courts have affirmed that there may be a cause of action in tort law in respect of the remaining part of the object which is free from defects (the machine absent defective switch) and therefore, whilst applying the rules on concurring claims, granted a claim in tort law which entailed that the plaintiff could thus bypass contractual hurdles (such as limitation periods, exclusion clauses confined to contractual liability) (BGH 24 November 1976, BGHZ 67, 359). Conversely, a claim for damage to property (which is then as a consequence dealt exclusively within the realm of contractual liability) cannot be availed of where the damage claimed is equivalent to the "lack of value" which inhered in thing from the very beginning owing to its defectiveness (BGH 18 January 1983, BGHZ 86, 256; BGH 12 February 1992, BGHZ 117, 183). The exact particulars of where to draw the borderline, continue to vacilliate. It was held in the judgment of the BGH 12 December 2000, NJW 2001, 1346, that there is no physical damage to a building (consequently tort law is inapplicable) where the purchaser built upon land that has been filled with unsound slag and the construction works were later damaged owing to the slag expanding. At no stage did the plaintiff own a building free from defects.

15. GREECE has kept a close eye on the developments that have emerged from Germany (*Pouliadis*, in: FS Vavouskos II, 495, 498). *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 348 are oft he opinion that when a divisible part of a thing is defective and owing to the defect there is an extension of damage, encompassing the complete object, then there is an arguable that the provisions pertain to product liability ought to apply. *Pouliadis* (loc. cit. 501) is a proponent of utilising the provisions on product liability, if the damage to the product can be attributed to the effect of the defect.

16. PORTUGUESE Law provides for liability under sales law (CC arts. 913-922) and liability under service contract (CC arts. 1218-1226) for damage which is caused by latent defects in a product. Liability is of a tortious nature if the damage involved exceeds the actual defect in the product (*Romano Martinez*, Direito das obrigações, 130 and 441 ff). In a Supreme Court decision where a defective gas container exploded after it had been delivered to the purchaser, the court (STJ 22 April 1986, BolMinJus 356 (1986) 349) granted a contractual claim in respect of the damage to the gas container and by doing this it was able to avail of the general twenty year limitation period pursuant to CC art. 309. At the same time however, it abided by a previous decision of STJ 29 October 1974, BolMinJus 240 (1974) 209 and held that

the tort law claim pursuant to CC art. 509(1) which was governed by a limitation period of three years (498 CC) also came in for consideration.

17. Similarly in SWEDEN it would appear that since the decision in HD 2 April 1918, NJA 1918 156 the problem of an "insidious spreading damage" is predominantly overcome by having resort to tort law (*Hellner and Johansson*, Skadeståndsrätt[6], 311). However, it should be noted that the Swedish and FINNISH Consumer Protection Acts provide for contractual regulations which could be more favourable to the consumer than claiming under tort law.

18. The predominant view in European legal circles is however, that contract law should solely govern the liability for "damage which spreads insidiously". The EU Product Liability Directive excludes damage to a defective product itself from its scope of application, art. 9 lit. (b). This rule only pertains to strict liability under the Directive; the regime of liability for negligence is not encompassed within the Directive, the same holds true for the regime of contractual liability (art. 13). The Consumer Protection Directive does not consider this issue directly. The latter, however, does not impinge upon existing national tort law orders (art. 8 of the Directive).

19. In BELGIUM, FRANCE and LUXEMBURG, liability of the seller against the buyer for loss arising from a latent defect in the purchased product (*vices cachés*) is, on the basis of the principle of *non-cumul des responsabilités* governed by contract law *(*e.g. Cass.civ. 13 November 1984, Bull.civ. 1984 I, no. 303 p. 258). The relevant rules regulations are found in CC arts. 1641 et seq. The damages claim pursuant to CC art. 1645 extends to damage to the product itself as well as where harm accrues to other legally protected interests of the purchaser (on this point, see re FRANCE *Malaurie/Aynès/Gautier*, Contrats spéciaux[14], no. 411 p. 293 and for BELGIUM CA Bruxelles 22 November 1991, RGAR 1993, 12237). If a third party sustains loss which can be ascribed to the defect, the latter is confined to a remedy in tort law (see on this point re FRANCE *Malaurie/Aynès/Gautier* loc. cit. no. 421 p. 299 and re BELGIUM *Herbots/Pauwels/Degroote*, TPR 1997 no. 111 p. 735). A prerequisite of contractual liability under CC art. 1645 is that the seller has knowledge of the defect. FRENCH jurisprudence, however, has laid down an irrebutable presumption that the professional seller acted in bad faith. On the other hand, in BELGIUM, a rebuttable presumption operates (the seller must adduce proof that it was impossible for him to ascertain the defect) (see, in this respect for FRANCE Cass.civ. 19 January 1965, Bull.civ. 1965, I, no. 52 p. 59 and for BELGIUM *Herbots*, infra loc. cit. no. 103 p. 729. Since 1985, LUXEMBOURGIAN CC art. 1645 expressly classes the professional seller as having acted in bad faith. In all three legal orders, the claim must be filed within a short time frame (*bref délai*) CC art. 1648.

20. Similarly, in SPAIN a claimant in cases of this type is limited to asserting a contractual remedy. While the German approach (tort liability) has indeed been discussed in academic literature (*Cavanillas Múgica and Tapia Fernández*, La concurrencia de responsabilidad contractual y extracontractual, 13). There is no corresponding case law on the subject. According to structure of the Civil Code, CC arts. 1486(2) and 1591 constitute the point of departure (liability for latent defects in products under sales and services Law). The limitation period under Sales Law is 6 months starting from the time when the good was delivered (CC art. 1490). However, the courts in Spain consider that there is concurrence of claims between this cause of action and the general damages claim based on non performance (CC arts. 1101 ff). This conception of the law has the effect of extending the limitation period to 15 years (TS 3 February 1986, RAJ 1986 (1) no. 409 p. 360, 6. recital). CC art. 1591 as well as Law 38/1999 on Building Ordinance (of 5 November 1999 *de Ordenación de la*

Edificación) arts. 17 and 18 govern liability for damage resulting from defective construction of the building structure. Art. 17 loc cit expressly provides that the contractual liability of those involved in building the structure is not affected by its provisions. Similar to the position under sales law, it is inferred that CC arts. 1101 ff remains applicable to this part of services law (TS 9 February 1990, RAJ 1990 (1) no. 674 p. 782, 4. recital).

21. Art. 1494 of the ITALIAN CC distinguishes between loss which is directly caused by the defective product (Paragraph 1: diminution of value, costs of repair, loss of profits etc.) and the indirect damage to the purchaser's other legally protected interests caused by the product (Paragraph. 2: personal injury, property etc.). The case where the product is destroyed owing to an inherent defect may be construed as a cases falling under CC art. 1494(1) (for case law citations, see *Buonocore and Luminoso*, Codice della vendita[2], art. 1494 § 6). CC art. 1494(1) corresponds to CC art. 1668 which governs services contracts. However, it has not yet been authoratively decided whether the liability of contractor for the destruction of the subject matter of the contract for work and services or if that object turns out to be gravely defective pursuant to CC art. 1669 is of a contractual or tortious nature. At any rate, the courts consider that this scenario is governed by the precepts of non contractual liability. As this provision is concerned with promoting the common good (Cass. 26 May 2000, no. 6997, RGI 2000, voce Appalto privato no. 84; Cass. 7 January 2000, no. 81, Giur.it. 2000, I, 1, 977). If the requirements of CC art. 1669 are not fulfilled then, depending on the individual circumstances of the case at hand, tort law liability could arise (CC art. 2043) (Cass. 23 March 1977, no. 1136, Giur.it. 1978, I, 316; Cass. 7 April 1999 no. 3338, RGI 2000, voce Appalto privato no. 85).

22. In AUSTRIA, *Weiterfresserschäden* is governed by product liability law. According to Product Liability Act (PHG) § 1 the producer of a defective component only has to make good damage caused to the final product if the injured party purchased the component as an independent product. Whether or not this is the case is to be judged by the conceptions of the proper duty of care. The OGH expressly does not follow the German case law. The facts dealt with by tort law in German case law, in Austria constitute exclusively contract law (OGH 3 February 1992, SZ 67/22 and OGH 3 February 1994, SZ 67/22 [no liability imposed on the manufacturer of a water hose for damage caused to the engine of the purchaser's car])

23. HUNGARIAN Product Liability Act § 1(4) is only concerned with loss caused to other things. The general rules of contractual and tort liability remain in-situ (§ 12 loc. cit.). Aside from product liability, CC § 310 represents the point of departure for damages claims based on the defect. A contractual claim ensue to which tort law rules apply. Therefore, one is not faced with a problem of qualification (see in more detail *Fuglinszky*, Mangelfolgeschäden im deutschen und ungarischen Recht, *passim*). In POLAND on the other hand the view is taken in applying the principle of free concurrence of contractual and tortious liability that putting a defective product into circulation constitutes a wrong which can be the basis of liability in damages even for damage to the damaged thing itself (SN 6 February 1963, OSNC 1964, pos. 95; SN 19 November 1973, OSNCP 1974, pos. 169; *Radwański and Panowicz-Lipska*, Zobowiązania-część szczegółowa[5], 43).

24. In the event that a movable or immovable object does not conform to the sales contract, the purchaser can avail of a whole array of legal remedies pursuant to DUTCH CC art. 7:21. CC art. 7:22 provides that the purchaser is entitled to avail of these remedies irrespective of other claims that s/he may have. In addition, the purchase can have recourse to damages claim under contract for non performance (CC

art. 6:74 CC) as well as asserting a claim under tort law (CC art. 6:162) (Asser [-*Hijma*], Bijzondere overeenkomsten I[6], no. 380 p. 339). In respect of the latter, the question arises whether the damage to the product itself ("bargain write off" (Transaktionsschaden) is encompassed within the scope of the provisions (*Hijma* loc. cit. no. 475 p. 407 and no. 448 p. 389). For the law of concurrence of actions, it was decided to cede priority to contract law in these particular circumstances; therefore CC arts. 6:162 et seq. (tort) are not applicable and the plaintiff must rely exclusively on CC arts. 6:74 ff. CC arts. 6:162 et seq. are only relevant if the conduct of one party, unconnected with the breach of contract, amounts to a tort (*Hijma* loc. cit. no. 442 p. 384-385). Damage to the defective product itself within the framework of consumer sales is governed by CC art. 7:24. Paragraph (1) of the latter refers to the general rules on non- performance in respect of the damages claim. Consequential loss for product liability is not encompassed by this provision (see further *Hijma* loc. cit. no. 443 p. 385; T&C Vermogensrecht[4] [-*Castermans*], art. 7:24 BW nos. 1-3).

25. A proposition that where there was created a "complex structure" (*D. & F. Estates v. Church Commissioners for England* [1989] AC 177 per Lord *Bridge* at 206) that was affected by the negligence of the defender in the creation of one aspect of it there could be a duty of care capable of arising in respect of that negligence resulting in an adverse effect on that other part has also been rejected in ENGLAND (*Murphy v. Brentwood District Council* [1991] 1 AC 398 per Lord *Bridge* at 479).

26. In SCOTLAND there is a conflict of authority at first with respect to the proposition. The broad approach was applied in two cases (*Mcleod v. Scottish Special Housing Association* 1990 SLT 749 per Lord *Coulsfield* at 751-752; *Parkhead Housing Association Ltd. v. Phoenix Preservation Ltd.* 1990 SLT 812 per Lord *Prosser* at 817). However, a recent case (*Hughes v. Barratt Urban Construction (Scotland) Ltd* [2002] Scot CS 87 per Lord *Carloway*) has rejected it as inconsistent with later developments in House of Lords English cases formulating the general approach to be adopted in determining whether a duty of care is capable of arising in delict/tort for negligence. Recent English decisions can be taken as being the law. These have limited the idea a much narrower one covering only situations where the negligent party was responsible for the creation of something in a distinct part of a property already in existence, in circumstances where he was not responsible also for the creation of the whole, or a larger part of that property. It has been held, for example, that, though „close to the border", this could not apply where a manufacturer of carbon dioxide negligently caused it to be contaminated with benzene supplied it to another manufacturer who mixed with a combination of water and a concentrate acquired from another supplier to produce an alcoholic drink. A duty of care was held not to be capable of arising in tort as the claim related to „the finished product" and its diminution in value and consequential losses following later upon the need to recall it from market. The argument was rejected that the contaminated carbon dioxide could be seen as having damaged the concentrate with which it was mixed (*Bacardi-Martini Beverages Ltd. v. Thomas Hardy Packaging Ltd.* [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep 379 per *Mance* LJ at [18]).

III. Tort law and other areas of private law

27. The rules on concurrence of actions which define the parameters of the relationship between tort law and other areas of private law are complex and convoluted. The constituents of the relevant rules are not invariable and may be divergence depending on the field of law at issue. The following analysis focuses on the relationship that tort law has to other areas of the law of obligations and to important aspects of property law.

28. In BELGIUM, FRANCE and LUXEMBURG an unjustified enrichment claim (judicially created) is subsidiary to a tort law claim. Where tort law is applicable, it excludes the assertion of a claim based on *enrichissement sans cause* (s. for France *Mazeaud and Chabas*, Obligations[9], nos. 706-709 and for Belgium *de Page*, Les obligations, II[3], nos. 33-34 p. 41-45). Conversely, *action en répétition de l´indu* (condictio indebiti) which is governed by CC arts. 1376-1381 can also be asserted where tort law claim is admissible (at any rate, this true for France Cass.civ. 19 October 1983, Bull.civ. 1983, I, no. 242 p. 216). As far as the *gestion d´affaires* which is regulated in CC arts. 1372-1375 is concerned, the exact parameters of the relationship between the latter and a cause of action under tort law are not yet fully determined. There is well nigh universal acceptance that this claim is not possessed of a mere subsidiary character in relation to tort law (at any rate as far as the Belgian legal position is concerned *Fagnart*, JT 1969, 255; *Vael* is of a different view, TPR 1999, 104, no. 28, there fn. 67). In two general reports dealing with the law on quasi-contracts, *le Tourneau* (RépDrCiv IX, v° Quasi-contrats, no. 28) and *Jacquet* (JClCiv, arts. 1370-1371, v° Quasi-contrats, no. 77) proffered the opinion that, under French law, all quasi contracts, including the gestion d'affaires in this description, are legal concepts which are of subsidiary nature. Judicial confirmation of this analysis is still pending. The Cour de Cassation expressly refuted this approach with regard to the law of *répétition de l'indu* (loc. cit.).

29. Conversely, it is possible in SPAIN that a damages claim on the basis of tort and unjustified enrichment may be asserted cumulatively since the decision of the Supreme Court in the 1950s (TS 12 April 1955, RAJ 1955 (2) no.1125 p. 602). This is of particular significance, when the short limitation period of one year for bringing a claim under non contractual liability has expired. A claim based on unjustified enrichment has a limitation period of 15 years. Ad hoc statutory provision may stipulate that a damages claim is to be assessed according tot he extent to which the wrongdoer was enriched (for example, Royal Decree of 1/1996 of 12 April 1996 on intellectual Property and Law of 1/1982 of 5 May 1982 on the Civil Protection of Honour, of Family and Personal Privacy and Individual's Right to One's Own Image).

30. Under ITALIAN law, as far as the relationship to the *condictio indebiti* (non payment of a debt) is concerned, there is a primary distinction to be drawn between cases where the recipient acts in good faith and where the conduct of recipient acts reprehensibly. A recipient who acts in good faith is liable only for the enrichment that is extant at the time of the action; claims for the deterioration or perishing of the object under tort law are excluded (*Moscati*, Pagamento dell'indebito, 492-506). However, if the recipient acts in bad faith, then it is permitted to also assert a claim under tort law (*Moscati* loc. cit. 510 fn. 9 and 515-526). The unjustified enrichment claim is subsidiary to the tort law claim; it cannot be raised in conjunction with a tort law claim (*De Cupis*, Il danno II[3], 234-236). The availability of the possibility of accumulating claims in rem and tort law claims is contentious. It is possibly to avail of the latter if the property owner's enjoyment of property is disturbed or interfered with of s/he is divested of their property. In such cases, the damages claim can be raised in conjunction with the claim for restoration of the property (CC art. 948) or action for the abatement of the nuisance (CC art. 949) (Cass. 26 February 1986, no. 1214, RGI 1986, voce Servitù no. 4 [considering the rights of the holder of an easement]). Tort liability is precluded when the interference with property rights only entitles one to monetary compensation under the relevant property law rules. Then, the plaintiff must frame his breach of property rights claim in terms directed at obtaining monetary recompense (*Gambaro*, Il diritto di proprietà, 894-896); the exact contours and the particulars of the claim are still the subject of discussion (compare on the one hand Cass. 23 May 1985, no. 3110, RGI

1985, voce Servitù no. 4 [tort liability in conjunction with protection of possessory rights with respect to disturbances, which did not impair the exercise of rights under the easement]; Cass. 11 August 2000, no. 10733, Giur.it. 2001, 898 [usufruct] and Cass 16 March 1988, no. 2472, Giur.it. 1989, I, 1, 510 [liability in tort for impairment of rights under easement] and of a different viewpoint *Castronovo*, La nuova responsabilità civile[3], 614-623 [the distinction between tort liability and an action based on breach of property rights emphasised]). More recently, there has been a trend, also in jurisprudence, towards determining the relationship between tort and family law. Cass. 7 June 2000, no. 7713, Giur.it. 2000, 1352 awarded a son damages under tort law against his father for breach of maintenance obligations, Cass. 10 May 2005, no. 9801, Giust.civ.Mass. 2005, fasc. 5 awarded a woman damages under tort law against her husband who had failed to inform her before the marriage that he was impotent. Family law is not the only medium by which such claims can be asserted.

31. In POLAND the principle of free concurrences of actions applies also as between liability in tort and liability in unjustified enrichment (CC art. 414). However, concurrence between damages claims arising in tort and those arising out of the so-called owner-possessor relationship is much more complicated. The dominant opinion inclines towards yielding priority to the latter (CC arts. 224 and 225) within its scope of application to the exclusion of the law of tort (SN 25 March 1986, OSNCP 1987, pos. 44; *Gniewek*, System prawa prywatnego III, 505; *Wójcik*, System prawa cywilnego II, 509). HUNGARIAN CC § 118 lays down the prerequisites under which a *bona fide* purchaser for value can acquire property from a person not entitled or authorised to dispose of the property. The conclusion that can be derived from this provision is that the *bona fide* purchaser for value will not be liable to the true owner. The former is not "enriched" because he paid for the goods acquired.

32. The general tenet under GERMAN law is that, similar to the relationship of tort to contract law, the principle of concurrence of actions applies (RGRK [-*Steffen*], BGB[12], Pref. to § 823, no. 35; Palandt [-*Heinrichs*], BGB[65], § 194 no. 8). Only in exceptional circumstances will tort law have to yield to other fields of law, to cite one example the provisions governing owner- occupier relations (CC §§ 989 ff CC). These rules are special rules which are of exclusive operation (CC § 993(1) *in fine*. A claim, supplementing these rules, which asserts interference with property rights under tort law, will only arise in the enumerated cases stipulated in CC § 992 or where an exceptional case can be brought within a recognised category of cases (BGH 23 March 1966, BGHZ 46 140, 146) This serves to protect the possessor who is in possession of the thing in good faith albeit unlawfully, for example, the protection of a good faith purchaser who acquired a stolen good (and therefore property in the thing was not transferred); imposing tort liability even for ordinary negligence in such circumstances would contradict the spirit of CC §§ 989 ff (BGH 29 October 1959, BGHZ 31, 129, 134; BGH 31 March 1971, BGHZ 56, 73, 77; BGH 21 January 1980, NJW 1980, 2353, 2354). Identical considerations are prevalent in respect of CC § 932 which provides that the good faith acquisition of property from a person other than the owner of the property does not amount to an interference with property rights, a state of affairs which according to CC §823(1), if attended by at the very least ordinary negligence, would compel the return of the property or give rise to a damages claim (BGH 25 April 1967, NJW 1967, 1660, 1662; BGH 23 May 1956, JZ 1956, 490). A further example featuring the supplanting of tort law derives from rights conferred by marriage and under family law. According to case law, the sole infringement of a fiduciary duty imposed by virtue of marriage does not trigger liability under tort law; the consequences of the infringement are exclusively governed by provisions of family law (further particulars in RGRK (commentaries on decisions of the Supreme Court of

the German Reich) [-*Steffen*], BGB[12], Pref. to § 823, no. 51, § 823, no. 65 ff). Unjustified enrichment claims and claims under *negotiorum gestio can arise* independent of any liability under tort law (RGRK [-*Steffen*], BGB[12], Pref. to § 823, no. 49; BGH 2 July 1971, BGHZ 56, 317, 319; CA Hamm 25 September 2000, r+s 2001, 320 [Damages claim based on *negotiorum gestio* in a case where a rescuer injured himself]).In so far as a tort law claim under CC §§ 823 et seq. is concerned, § 852 sentence 1 (= CC § 852(3) (old)) would also appear to lend credence to the assertion that the unjustified enrichment claim arises independent of tort law. According to the latter, the person under a duty to make reparation who acquires something from another at that other's expense as a result of the commission of a tort, even if the damages claim is out of time, is required to surrender the property in accordance with the provisions pertaining to unjustified enrichment (see further BGH 2 July 1971, BGHZ 56, 317, 319).

33. In AUSTRIA, the principle of alternative concurrence of actions applies in respect of the relationship between damages claim and the claim for return of the property (*rei vindicatio*) (*Koziol*, Haftpflichtrecht I[3], 532) and *Anspruchsnormenkonkurrenz* applies to the relationship between the damages claim and claim for restitution (*Koziol* loc. cit. 534). OGH 17 May 2000, ZVR 2001, 44 opines that the erroneous failure to assert a damages claim in respect of recoverable damage is not tantamount to an enrichment under the law of unjustified enrichment; therefore the tort law limitation which had expired in the interim was of no relevance.

34. The GREEK courts have thus far adhered to the principle that the claim under unjustified enrichment is a subsidiary claim (A.P. 1567/1983, NoB 32/1984, 1354; A.P. 890/1982, NoB 31/1983, 1156; A.P. 8/1968, NoB 16/1968, 385), however, the well- nigh universal view contemporary academic writing is to refute this stance (Georgiades and Stathopoulos [-*Stathopoulos*], Pref. to arts. 904-913, no. 28; *Stathopoulos*, Axiosis adikaiologitou ploutismou, 236; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 16), in fact, they furthermore do not rely on the relationship to tort law. Tort law claims do not effect the exclusion of the applicability of claims based on unjustified enrichment (A.P. 72/1966, NoB 14/1966, 801; A.P. 7401/1976, NoB 25/1977, 752; CFI Patras 608/1968, NoB 16/1968, 1083; CA Athens 10119/1988, EllDik 30/1989, 1182; Georgiades and Stathopoulos [-*Stathopoulos*], Introduction. arts. 904-913, no. 36; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 18). In general, the following principles apply: in respect of the realisation of the elements of the claim pertaining to apparent *negotiorum gestio*, a claim under tort law always arises in conjunction with this claim. The damages claim can therefore be based on tort law as well as on CC art. 739 (Georgiades and Stathopoulos [-*Papanikolaou*], art. 739 no. 12). A claim can only be made under the provisions on *negotiorum gestio* in respect of the profit made from the unauthorised management of the business (*Papanikolaou* loc. cit.). The contours of the relationship between tort law provisions governing owner/occupier relations are unsettled (CC arts. 1096 ff). Two different approaches may be discerned on this issue. It is submitted that CC arts. 1096 et seq. exclude the applicability of tort law altogether (*Toussis*, Empragmaton Dikaion[4], 478, there fn. 10a). The converse proposition is also advanced, namely that both regimes involve a concurrence of actions. Which run parallel to one another (Georgiades and Stathopoulos [-*Georgiades*], Introd. arts. 914-938, no. 50; *Georgiades*, Empragmato Dikaio I, § 60, no. 32 f).

35. In PORTUGAL, determining the ambit of the relationship that tort law has to the law *of negotiorum gestio* is of particular importance when it comes to determining the burden of proof pertaining to the person performing the service absent the relevant authority. STJ 22 April 1986, RLJ 121 (1988) 59 with note from *Baptista Machado* in

accordance with CC art. 487(1) placed the burden of proof on the injured party, consequently tort law rules were applied. It should be noted that a contrasting approach has been adopted in academic writing, namely a strong trend can be observed which advocates the application of the contractual provisions anchored CC art. 799(1) (Reversal of the burden of proof) (*Menezes Leitão*, Responsabilidade do gestor, 291 ff). According to CC art 474, restitution claim, also a claim based on a condictio indebiti (*repetição do indevido*) is subsidiary to a tort law claim. The former can only be asserted once other remedies have been exhausted. This provision is however contentious from a policy point of view (particularly critical *Vieira Gomes*, Conceito de enriquecimento, 415 ff and *Menezes Leitão*, Enriquecimento sem causa, 700 ff). The courts have also conceded a claim for return of the enrichment in cases of interference with the rights of other which doe not cause pecuniary loss (damage) (STJ 22 April 1999, CJ (ST) VII (1999-2) 58; STJ 23 March 1999, BolMinJus 485 (1999) 396 ff). In general, CC art. 498(4) based on German model CC § 852 (old) clarifies that "expiry of the period of limitation for the bringing of a damages claim does not impinge upon the period of limitation in respect of bringing a claim *in rem* for return of the property nor does it affect the limitation period pertaining to the return of the enrichment provided that the necessary requirements are fulfilled"

36. In the NETHERLANDS, if tort law claims and claims anchored on another private law basis collide, the starting point is, in general the principle that causes of action may be invoked cumulatively. This is not only true of the relationship to contract law but also in respect of the relationship to the undue payment provisions of the Civil Code (CC art. 6:203 et seq) and to unjustified enrichment (CC art. 6:212). Exceptions to this basic principle are made where its application would lead to internal systematic imbalances, provoking an application that would contradict the spirit of the provision or would be unworkable or illogical leading to unacceptable results. In this case, the person entitled to make a claim normally has a right of election (the principle of alternative causes of action): occasionally leading to the result that the basis of the claim precludes raising other claim (so-called principle of exclusivity), for a more in-depth analysis see *Boukema*, Samenloop, nos. 5-7 p. 11-14; Asser [-*Hartkamp*], Verbintenissenrecht III[10], nos. 122-123 p. 135-136; *Jansen*, Onrechtmatige daad: algemene bepalingen[2], no. 12 p. 19-21). On occasion, the varying questions of concurrence of actions are the subject of statutory provision, e.g. in CC art. 3:121 (as far as bad faith cases of possession are concerned, it is possible to invoke the causes of action relating to the return of the property and the fruits and the damages claim cumulatively), in CC art. 3:125(3) (cumulation of the claim of dispossessed possessor for re delivery of the property and the claim for damages under tort law pursuant to CC art. 6:162) and in CC art. 6:193 (Product liability which is strict does not impinge upon the validity of other claims). In other cases, the answer is discovered by perusal of parliamentary debates, e.g. Parlementaire Geschiedenis III, 212 ff (concerning the relationship between claims arising out of CC arts. 3:44(2) or (4) rescission of legal transation on account of duress] and under CC art. 6:162); Parlementaire Geschiedenis III, 216 ff (concerning the relationship between CC arts. 3:45 et seq [Actio Pauliana; voidness of legal act] to CC art. 6:162); Parlementaire Geschiedenis VI, 830 (concerning the relationship between claims arising out of unjustified enrichments and damages claims under tort law; renunciation of the claim that unjustified enrichment claim is subsidiary to a claim under tort law) and Parlementaire Geschiedenis VI, 816 (claims based on undue payments [CC art. 6:203] and claims arising under tort law are alternative causes of actions). If research of the parliamentary debates fails to produce reliable indicator foe the will of the legislature, then it falls to an appraisal of the

purpose of the legal provision (Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 123 p. 136).

37. In the NORDIC countries the contours of the law of negotiorum gestio and unjustified enrichment are poorly mapped out; problems of demarcation seldom arise. In cases of a selling the same good twice, it is conceded that the first purchaser has a claim in rem for restitution of the good as opposed to a tort law claim against the second purchaser who purchases the good in bad faith (*Karlgren*, Skadeståndsrätt[5], 194, 206).

38. SCOTTISH scholars point out that unjustified enrichment has more in common with delict than with contract, with an obligation clearly imposed by law (*Stewart*, Delict[4], 2). The main difference between unjustified enrichment and delict is that in the former case there is no need for the defendant to have done something wrong in order to incur an obligation to pay (*Exchange Telegraph Co. Ltd. v. Giulianotti* 1959 SC 19). Nonetheless there is significant discussion concerning any possible overlap between the various laws of obligations in Scotland (*Hogg*, Obligations, 26-31). Concurrent liability will generally apply and has been accepted in case law (*Junior Books Ltd. v. Veitchi* Co. Ltd. [1983] 1 AC 520).

IV. Legal persons

39. Only in BELGIUM, FRANCE and Luxembourg does the basic norm of tort law CC art. 1382 („Tout fait quelconque *de l'homme*, qui cause ... un dommage") refer exclusively to natural persons, However, this wording is not ascribed any practical significance. Legal persons are also subject to the tort law rules of the Code Napoléon (see for FRANCE Cass.civ. 17 July 1967, Bull.civ. 1967, II, no. 261 p. 182 and for BELGIUM *Vandeputte*, Het aquiliaans foutbegrip, 86-88). In art. 1902 CC, the Spanish legislature opted for a preventative corrective device to obviate making the same editorial error as the French paradigm, and deliberately widened the scope of the article to embrace legal persons (*García Cantero*, in: Asociación de professores de Derecho Civil [ed.], Centenario del Código Civil I, 875, 879; see an array of decisions, inter alia. TS 29 September 1964, RAJ 1964 no. 4097 p. 2522). Furthermore, the remainder of the Civil codes in Europe utilise terminology in their basic norms ("whoever violates" the person who does something; "a person" who causes damage etc.) which serves to spell out that legal persons can constitute both tortfeasors and victims of tortious action (CZECH and SLOVAKIAN CC § 420; DUTCH CC art. 6:162; ESTONIAN LOA § 1043; GERMAN CC § 823(1); GREEK CC art. 914; HUNGARIAN CC § 339(1); ITALIAN CC art. 2043; LATVIAN CC art. 1635; LITHUANIAN CC art. 6.263; MALTESE CC art. 1031; POLISH CC art. 415; PORTUGUESE CC art. 483(1) in conjunction with art. 165; SLOVENIAN LOA art. 131(1)). In AUSTRIA, CC § 26 expressly prescribes that natural and legal persons are to be generally placed on an equal footing (see further *Koziol*, Haftpflichtrecht II², 375). The same principle apples in the culpa rule of the NORDIC counties ("*whoever* .... causes damage", cf. e.g. for SWEDEN HD 18 December 1972, NJA 1972, 589 and HD 3 November 1983, NJA 1983, 701; for FINLAND HD 26 August 1982, HD's årsbok 1982 II 123 and for DENMARK HD 12 October 1949, UfR 1950 p. 21).

40. In the BRITISH ISLES the situation as regards legal persons can vary slightly between incorporated and unincorporated bodies, partnerships and trade unions (see generally Street [-*Brazier and Murphy*] on Torts[10], 584-588; Winfield and Jolowicz [-*Rogers*] on Tort[16], 715-719; Salmond and Heuston [-*Heuston and Buckley*] on the Law of Torts[21], 421-423 for ENGLAND and WALES; *McMahon and Binchy*, Torts[3], 1035-1043 for IRELAND; and *Stewart*, Delict[3], 175-179 for SCOTLAND). Corporations may be sued in tort since medieval times (*Case of Sutton's Hospital* (1613) 10 Co Rep 1a, 77 ER 937, 960 (10 Co.Rep.)). Liability for tort is usually of a vicarious nature for the

acts of servants - legal entities, it is said, cannot have intention *per se*. However, the general rules of vicarious liability will apply with even the malice of the servant capable of being applied to the corporation (*Darling* J. in *Cornford v. Carlton Bank Ltd.* [1899] 1 QB 392, 395). Some acts of the corporation itself can be tortious where the act was authorised by the shareholders of the body (Lord *Haldane* in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] AC 705, 713, the so-called "directing mind" idea). The notion that an incorporated legal body cannot be liable for acts done *ultra vires* is a topic of debate. There is no firm case law on the matter. *McMahon and Binchy*, Torts[3], 1038 seem to favour IRELAND negating the distinction. This would bring it in line with ENGLAND where Companies Act 1989 s. 108(1) will not call into question the validity of an act on the grounds of capacity. Scholars believe this to be ending the distinction between *ultra* and *intra vires* actions (*Rogers* loc. cit. 716). In SCOTLAND incorporated legal persons may carry liability for acts *ultra vires* (*Houldworth v. City of Glasgow Bank* (1880) 7 R 53, as quoted in *Stewart*, Delict[3], 178). Partnerships can sue and be sued. Members of a club, however, cannot sue their club; this is based upon the idea of the common interest that would equate to suing oneself (*Murphy v. Roche (No. 2)* [1987] IR 656 (*Gannon* J.), as quoted in *McMahon and Binchy* loc. cit. 1039). In SCOTLAND, unincorporated bodies cannot sue in tort unless their patrimonial interests were damaged (*Highland Dancing Board v. Alloa Printing Co.* 1971 SLT (Sh.Ct.) 50, 52). A trade union can both sue and be sued in its own name (*Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* [1901] AC 426; *R. (IUDWC) v. Rathmines UDC* [1928] IR 260, 300 per *Murnaghan* J.). Trade unions, however, are generally not liable in tort (ENGLISH Trade Disputes Act 1906 s. 4; IRISH Industrial Relations Act 1990 s. 13(1)). The traditional immunity of the Crown from suit was removed in the Crown Proceedings Act 1947 where the crown is an employer or occupier (see the Occupier's Liability (Scotland) Act 1960 s. 2(1)). In ENGLAND and IRELAND, certain common law torts cannot give a legal person a right to sue in tort, such as assault or battery (although these torts can, of course, give a right of action against a legal person).

41. As far as further more particulars are concerned see the Notes on VI.–3:102 (Negligence) and VI.–3:202 (Accountability for damage caused by employees and representatives).

Illustration 1 is taken from Cass.civ. 15 December 1999, Bull.civ. 1999, I, no. 351 p. 225 = SemJur 2000, I, 241, note *Viney*; **illustration 2** is inspired by CFI Piraeus 1914/2003, DEE 10/2004, 678 and BGH 27 May 1971, BGHZ 56, 228**; illustration 11** is adapted from CA Hamm 25 September 2000, r+s 2001, 320; **illustration 12** is taken from STJ 22 April 1999, CJ (ST) VII (1999-2) 58.

CHAPTER 2: LEGALLY RELEVANT DAMAGE

Section 1: General

VI.–2:101: Meaning of legally relevant damage

(1) Loss, whether economic or non-economic, or injury is legally relevant damage if:

(a) one of the following rules of this Chapter so provides;

(b) the loss or injury results from a violation of a right otherwise conferred by the law; or

(c) the loss or injury results from a violation of an interest worthy of legal protection.

(2) In any case covered only by sub-paragraphs (b) or (c) of paragraph (1) loss or injury constitutes legally relevant damage only if it would be fair and reasonable for there to be a right to reparation or prevention, as the case may be, under VI.–1:101 (Basic rule) or 1:102 (Prevention).

(3) In considering whether it would be fair and reasonable for there to be a right to reparation or prevention regard is to be had to the ground of accountability, to the nature and proximity of the damage or impending damage, to the reasonable expectations of the person who suffers or would suffer the damage, and to considerations of public policy.

(4) In this Book:

(a) economic loss includes loss of income or profit, burdens incurred and a reduction in the value of property

(b) non-economic loss includes pain and suffering and impairment of the quality of life.

COMMENTS

A. The function of the rule

Three pillars of legally relevant damage. This provision is essential in relation to the Chapters on damage (Chapter 2) and reparation for damage (Chapter 6). Its function, as the wording of paragraph (1) makes evident, is to erect a concept of "legally relevant damage" on three pillars. The first, envisaged in sub-paragraph (a), consists of all those particular forms of damage specifically provided for in the following Articles (of Chapter 2, Section 2). The other two are therefore those which are *not* specially mentioned in the following Articles. They relate to (i) infringements of rights and (ii) infringements of interests which are worthy of legal protection in terms of non-contractual liability. Beyond paragraph (1)(a), this provision finds application (and only finds application) when and in so far as the relevant legal question is not specifically addressed in the subsequent Articles of the Chapter.

Indications of legally relevant damage. All three 'pillars' of VI.–2:101, which together amount to the comprehensive definition of legally relevant damage, presuppose some grievance which, conceptually, is capable of being recognised as damage which is legally relevant. The function of VI.–2:101 is to indicate what forms of damage are, in given circumstances, legally relevant and so capable of establishing the rights set out in VI.–1:101 (Basic rule) and VI.–1:102 (Prevention). There must at the outset be some type of detrimental effect (see the definition of "damage" in ***???***Annex 1 – "any type of detrimental effect: it

includes loss and injury") but there is no need to define the sub-set of all possible harms, annoyances, disturbances to existing modes of living, or other adverse effects on welfare or future aspirations which, conceptually, may constitute damage. That is because what matters is the coincidence of detriment amounting to 'damage' with the further qualification that the 'damage' be legally relevant. All the necessary work which will eliminate irritations or disruptions for which no remedy is due can be achieved by focusing on the requirement that the damage (if such it is) must also be legally relevant. At the same time, as is done in the definition of "damage" in ***???***Annex 1, it must be clear that as a matter of principle loss as well as injury may amount to damage. What matters is whether that damage is legally relevant and, unless specific provision is made otherwise, it will be if it satisfies the requirements of VI.–2:101.

Forms of legally relevant damage: loss and injury. Legally relevant damage may take the form of either a loss or an injury as such. The starting point must be that damage presupposes a loss, but, as emerges from the following provisions, that does not constitute an invariable rule. Whether the victim has suffered a damage *per se* because rights or interests have been violated is as a rule specified by the following provisions (see in particular VI.–2:201 (Personal injury and consequential loss) and the Comments to that Article). With regard to its own field of application VI.–2:101 does not by itself determine whether injury as such is sufficient or whether it is only consequential losses which amount to damage. Hence a judge who, in an exceptional case, is compelled to fall back on VI.–2:101 must decide that question simply on the basis of that provision. It will only be in very rare cases that a judge will be confronted with that necessity, but it is a possibility which cannot be excluded. A situation in point would be where an athlete is wrongly disqualified from participating in an Olympic games as a result of a drugs test which was carried out incorrectly and the athlete, soon to be past peak physical condition, will never again be in a position to compete in an international event of such calibre. Whether this detriment is to be characterised as an injury and whether a monetary reparation is due must ultimately be decided by a judge by applying paragraphs (2) and (3).

Loss includes non-economic loss. A loss may be either of an economic or of a non-economic nature, see paragraph (4). As a basic rule both forms of loss are in principle compensatable. Precisely which losses constitute non-economic losses, however, is not conclusively stated by the draft – in keeping with the tradition of most of the national legal systems. The multitude of possibilities life assumes and the variety of circumstances which must necessarily be weighed up in the balance are much too numerous and diverse to be encapsulated in an exhaustive definition. Paragraph (4)(b) confines itself to declaring that "non-economic loss includes pain and suffering and impairment of the quality of life". On the other hand, the text of the Article puts beyond doubt the proposition that legal persons (and not just natural persons) are capable of sustaining non-economic loss and demanding reparation on that account.

Interests without a market value. An economic loss is characterised by the fact that the harmed interest has a market value which can be assessed according to the economic rules of the market. Damage which is not economic in nature (such as bodily pain) can only be given a monetary equivalent by judicial decision. The same holds for injuries as such (as in the case of loss of a limb).

Quantum of loss. VI.–2:101 has the sole purpose of setting out the circumstances in which damage relevant to the law on non-contractual liability can be said to be recognisably present.

On the other hand, the quantum of the loss, leaving aside for a moment the de minimis rule in VI.–6:102 (De minimis rule), is without significance for the question whether a legally relevant damage is present. It becomes relevant only in the matter of determining appropriate reparation, not least in determining what if any sum the liable person should pay by way of compensation.

B. The flexibility of the rule

Multiformity of life. The residual, flexible provision governing 'legally relevant damage' not specifically enumerated in Section 2, which constitutes the bulk of the subject-matter for VI.–2:101, is required not merely because it is impossible to capture the multiformity of life within a set of rules without employing some such open-ended clause for matters which the legislator cannot foresee. It is also indispensable for two further reasons.

Constitutional issues. The first is that there are some legal issues whose resolution and further development are best left by a European legal text to the courts, especially when regard is had to constitutional peculiarities in the individual jurisdictions (see also in this context VI.–7:101 (National constitutional laws)). An example is provided by the question whether and in what circumstances a parent's obligation to maintain a child, which both parents, or at any rate one of them, did not want, constitutes damage recognised by the law on non-contractual liability. Another is whether a child, whose predisposition to some abnormality has been overlooked by the gynaecologist, can demand reparation on the ground that he or she would have been aborted. A third example is provided by the question of so-called *post-mortem* protection of a right of personality which is unknown in some legal systems (e.g. no defamation after death in the Common Law) and granted in others with the justification that it follows from the constitutional basic value of protection of human dignity. A fourth example is the question whether legal persons too enjoy a right of personality derived from basic norms (i.e. whether a legal person has a "reputation" or "dignity") and, if so, how far its protection extends. In so far as an interest is recognised by the European Convention on Human Rights as a basic right in relations between state and citizen, that value judgement at any rate must be fed directly into the application of VI.–2:101 for the purposes of ascertaining legally relevant damage within the meaning of the law on non-contractual liability.

Underlying issues not yet harmonised. The second reason is that a European law on non-contractual liability can only pave a course for itself in many marginal areas step by step. An example is provided by the infringement of so-called "subjective" rights which enjoy protection against everybody and which are therefore often called "absolute" rights. That loss consequential to the infringement of such a right constitutes damage in a case where this results from negligence is generally accepted; it is thus possible for a European law on non-contractual liability to articulate this rule. By contrast, it is not possible for a European law on non-contractual liability by itself to harmonise the underlying issue (on which non-contractual liability for infringement would be parasitic) of whether or not such a subjective right exists. One thinks here, for example, of the so-called right to a name: whether there is such a right must in the end be decided by the relevant law of persons and as long as that is not harmonised there can be no harmonised law on non-contractual liability in relation to the infringement of a right to a name. It also follows that a uniform text on the law on non-contractual liability may still lead to divergent solutions in particular areas. That is neither avoidable nor unusual in European law-making, nor exactly a particularity of the element of damage in the non-contractual liability system. A comparable phenomenon also exists, for example, in relation to negligence committed by breach of a statutory duty because statutory

duties may have different content not merely from country to country, but also nowadays from place to place. Another example from the sphere of infringement of rights is the so-called right to one's own image and the right to one's own voice. Reference in this context to the constitutionally based protection of rights of personality are obvious.

C. Violation of a right otherwise conferred by the law (paragraph (1)(b))

Scope of application. As is immediately apparent from paragraph (1)(a) and as we have already explained (see *supra* Comments B under VI.–1:101 (Basic rule)), it is only possible to have recourse to paragraph (1)(b) if there is no exhaustive regime for the case provided for in the following Articles of this Chapter.

Illustration 1
A is a member of an association of professionally active surveyors who are engaged to value land in connection with sale negotiations and applications for credit from banks. A's criticism, from a professional standpoint, of the association's board has placed him in dispute with that board. His membership is terminated as a result on a specious pretext and his name therefore ceases to appear on the publicised list of members. A suffers a substantial reduction in professional engagements. Since there is no legally relevant damage within the meaning of VI.–2:208 (Loss upon unlawful impairment of business), the judge must fall back on VI.–2:101(1)(b) to reach the result that A's membership right has been infringed and the loss of income caused in this way constitutes a legally relevant damage. Even if the judge should find that under the applicable law membership of the association does not constitute a "right" which operates *erga omnes* the judge will nonetheless have to decide on the basis of paragraph (1)(c) in A's favour. That is because an interest worthy of legal protection has been infringed in any event.

Illustration 2
W and H are obtaining a divorce. Custody of their child is granted to W; H has only contact rights. H is unable to accept this outcome and abducts the child. W has to engage a private detective to help find the child. The cost of doing so is a legally relevant consequential damage arising out of the infringement of a right (the right to custody or the right to provide parental care, however it may be described in the applicable family law) for which the following rules make no special provision.

Illustration 3
A damages a car which B has bought from C subject to reservation of title, the instalments of the purchase price remaining fully unpaid. VI.–2:206 (Loss upon infringement of property or lawful possession) is relevant not merely to the liability to C, but also to the liability in relation to B. There is no cause to resort to VI.–2:101(1)(b) because B too had a property right in respect of the car either in the form of a protected right of prospective ownership (cf. *Anwartschaftsrecht*) or based on his right of lawful possession, depending on the applicable law of property. The situation is no different if A crashes his car into B's house which is subject to a mortgage in favour of a bank. The bank's property right is damaged. However, the questions of who in such a case may demand reparation, in what measure and to whom it must be rendered belong, from a systematic point of view, in the Chapter on remedies (Chapter 6) and not in the Chapter on damage (Chapter 2). See further VI.–6:104 (Multiple injured persons).

Rights and interests worthy of legal protection. The Article distinguishes in paragraph (1) sub-paragraphs (b) and (c) between infringement of rights and injury to interests which are worthy of legal protection. For both of these alternatives the limitations and particularisations contained in paragraphs (2) and (3) apply. For that reason the practical significance of the distinction between "rights" and "interests which are worthy of legal protection" is not especially great. It has little significance because, as indicated already, the legal penumbra of the law on non-contractual liability is not yet harmonised and therefore the European legal systems may have completely diverse perceptions of what qualifies as a "right" and what is merely an "interest worthy of legal protection". The distinction is therefore perpetuated here primarily because the concept of infringement of a right is a familiar one in many (though by no means all) European jurisdictions. A secondary consideration is that in this way a certain gradation can be reached: a judge will be relatively more cautious in affirming a legally relevant damage if only sub-paragraph (c) presents itself for that purpose. It is, however, important that the concern here is with rights and interests which enjoy protection against all comers and which therefore are generally capable of being infringed by anyone. A mere contractual interest in some performance, for example, is excluded from the scope of application of VI.–2:101 for this reason alone.

Rights otherwise conferred by the law. As regards the rights referred to in sub-paragraph (b), we are concerned here with rights which have already been assigned to the claimant by other parts of the legal system with the purpose that the claimant may resist their infringement. To the extent that a national legal system recognises the concept of "absolute" rights, all of the rights so qualified by it will constitute "rights otherwise conferred by the law" within the meaning of paragraph (1)(b). Moreover, these rights need not be rights within private law. A right to vote in an election, for example, is a "right" within the meaning of paragraph (1): it is a potential basis of non-contractual liability for one person to intentionally obstruct another from casting a vote in a public election. The same holds for the right not to be discriminated against on the grounds of sex or ethnic or racial origin by hoteliers, banks and others trading openly with the public. In cases of the latter type, though, there will often be an infringement of the right to respect for personal dignity, given specific expression in VI.–2:203 (Infringement of dignity, liberty and privacy). (See also II.–2:101 (Right not to be discriminated against) and II.–2:104 (Remedies).)

Purely contractual rights are, as a rule, excluded. On the other hand, purely personal "bilateral" rights, such as, for example, claims arising from a contract against the other contractual partner, are, as a rule, excluded. One exception to this is set out in VI.–2:211 (Loss upon inducement of breach of obligation). As regards the relationship between the law on non-contractual liability and the law of contract see further VI.–1:103 (Scope of application) and the Comments on that Article.

D. Violation of an interest worthy of legal protection (paragraph (1)(c))

Significance of the provision. Paragraph (c) gives expression to the principle mentioned earlier that the law on non-contractual liability is not an ancillary area of the law in the sense that it can only grant legal protection where the claimant is adversely affected in a legal position whose worthiness for legal protection is already immediately ascertainable from the other provisions of the legal system. Rather, the law on non-contractual liability also determines autonomously what detriments in this context qualify as legally relevant damage.

Illustration 4

A, a married man, is severely ill with cancer and must contemplate his demise in the near future. The married couple would still like to have a child and A provides sperm which is deep-frozen pending a later *in vitro* fertilisation. A technician in the laboratory where the sperm is stored destroys it when she confuses test tubes. It would be difficult to argue that this is a case of personal injury within the meaning of VI.–2:201 (Personal injury and consequential loss), nor can the matter be subsumed without force under VI.–2:203 (Infringement of dignity, liberty and privacy). An interest worthy of legal protection has been violated.

Responsibility of the courts for the development of the law on non-contractual liability. Sub-paragraph (c) in paragraph (1) effects the basic rule that legally relevant damage is also present where an interest is violated which is worthy of protection by the law on non-contractual liability. In view of the multifarious forms life takes, such an "open" clause is indispensable and, moreover, present in most of the European legal systems. Furthermore, the provision also consciously makes space for the further development of the law on non-contractual liability by judges. It also avoids setting down in legislated form certain developments and concepts which are presently still in a state of flux. An example of the latter is liability for the loss of a chance. The problem is not merely best addressed at various points within the system of liability law; from a contemporary perspective it can also be said that the task of finding a solution is best delegated to the courts. Paragraphs (2) and (3) provide them only with certain guidelines.

E. Paragraphs (2) and (3)

Application to rights and interests worthy of legal protection. According to paragraph (2) a legally relevant damage only exists in cases of violation of a right or an interest if it is fair and reasonable to grant the claimant a right to reparation or prevention under VI.–1:101 (Basic rule) or VI.–1:102 (Prevention). Paragraphs (2) and (3) will have their main field of application within the framework of paragraph (1)(c), but they are not restricted to that. They also apply in cases of infringement of rights. In those cases too a weighing-up of interests cannot be entirely avoided. That is evident when one looks, among others, to the case already mentioned of an infringement of a right to a name: such conduct triggers liability (if at all) only when it is perpetrated in certain ways. More particularly, it may turn out that only preventative legal protection and not a right to reparation comes into question because while a legally relevant damage is present it does not also constitute a 'reparable' damage.

Illustration 5

On a poster are a number of far-right political slogans including the assertion that the genocide of millions of Jews in the Nazi concentration camps is a Zionist conspiracy. The sole surviving descendant of a man murdered in Auschwitz may demand on the basis of his ancestor's *post-mortem* right of personality (so far as such a right is recognised by the applicable legal system) that the objectionable poster be taken down. A claim for reparation of non-economic loss may be dismissed by the judge on the basis of paragraph (2).

The balancing process in ascertaining an interest worthy of legal protection. The text in paragraphs (2) and (3) equips the judge who must decide whether an interest worthy of protection by the law on non-contractual liability has been infringed with several hints. An essential factor in this decision is the remedies side of the liability equation: the legal protection which is sought must be fair and reasonable (paragraph (2)) and the decision on

that point depends *inter alia* on whether the case presented is one of intentionally inflicting damage, negligence or strict liability (paragraph (3)). Since the connection between a given form of strict liability and legally relevant damage is set out in most of the provisions of Chapter 3, Section 2 (Accountability without intention or negligence), paragraph (3) in fact only has practical significance for vicarious liability under VI.–3:201 (Accountability for damage caused by employees and representatives). Apart from VI.–3:207 (Other accountability for the causation of legally relevant damage), none of these Articles uses the term "legally relevant damage", and in the context of VI.–3:207 the term is left to be fleshed out by national law. VI.–2:101(2) and (3), however, can have a role to play in the context of VI.–3:103 (Persons under eighteen) or VI.–3:104 (Accountability for damage caused by children or supervised persons).

The ground of accountability. The question whether a defined detriment constitutes a legally relevant damage often depends on the nature of the conduct which has caused the damage – in particular whether the injuring person has acted intentionally or merely negligently. For example, there is a *legally relevant* damage only in cases of intentionally inducing non-performance of a contractual obligation (see VI.–2:211 (Loss upon inducement of non-performance of obligation)); a merely negligent enticement not to perform cannot create liability for want of a corresponding obligation not to interfere in that way and therefore consequently because there is no damage. Intentionally permitting the continuation of a detriment suffered by another may also signify in given circumstances an independent damage in the legal sense. An example would be when, without any want of care, someone has communicated incorrect information about another and they intentionally and with a view to causing damage leave the affected individual 'in the lurch' instead of making an appropriate correction without undue delay, although subsequently informed of the inaccuracy and despite such correction being possible. This type of damage may assume a more specific form where it amounts to infringement of a natural person's right to respect for personal dignity (VI.–2:203 (Infringement of dignity, liberty and privacy)).

> *Illustration 6*
> Through his careless failure to maintain a safe distance between his vehicle and the car in front, A causes a traffic accident, which in turn leads to a traffic jam. A commercial agent (H) is caught up in the queue of traffic and misses a business appointment, in consequence of which she suffers a loss of income. Neither an infringement of a right of the commercial agent nor the violation of a legally protected interest comes into play. Such types of obstacles are part and parcel of the everyday risks of life. The situation would be different, however, if A had caused the accident in order to hold up his competitor H. In that case H would suffer a legally relevant damage.

Nature of the damage. Moreover, the type of detriment suffered and the considerations involved in causation play a role. (In illustration 6, for example, it would make no difference if one argued that legally relevant damage is present but A did not cause H's loss.) There is a whole series of detriments which one has to accept without reparation even where it cannot be said that they are trivial within the meaning of VI.–6:102 (De minimis rule). An example expressly catered for in the following provisions is to be found in VI.–2:201 (Personal injury and consequential loss) paragraph (2)(b) ("personal injury includes injury to mental health *only* if it amounts to a medical condition"). Of course, the nature of the damage suffered also plays a substantial role besides this. There are interests, for example, which are in essence only assigned to the commonalty as a whole and therefore are not capable of constituting a legally relevant damage in relation to any particular individual. An example would be the loss

of quality of life which is inflicted on residents in a given region because as a result of an industrial accident they are no longer able to enjoy the spectacle of particular wildlife, be it animals or plants, affected by the pollution (see VI.–2:209 (Burdens incurred by the state upon environmental impairment)).

Damage suffered in business competition. In a free market, which thrives on competition, market participants are not merely not allowed to seek to squeeze the market shares of their competitors by improper means. It would amount to a prohibited cartel to come to an agreement with competitors not to enter into competition with one another (or, to formulate it another way, not to inflict damage on one another). Loss suffered in fair competition is thus not legally relevant damage. Consequently, whether damage in the legal sense is present may depend solely on the internal viewpoint of the injuring person. For example, a person who resells goods below their purchase price is usually just making bad bargains which harm only that person's own economic interests; but someone who undertakes the same activity with the purpose of driving competitors out of the market causes them legally relevant damage. It remains a pre-condition, of course, that the competitor is not engaged in an illegal market. The 'business activity' of a pimp or a heroin dealer does not inflict legally relevant damage on rival criminals in the same sordid trade.

Proximity of damage. Also inextricably interwoven with one another on occasions are the concept of legally relevant damage and considerations of causation. That inheres in the nature of the matter and affects the entire perspective. If, for example a partner in an association of tax advisers breaches a (contractual or statutory) prohibition on competition in relation to the fellow partners and subsequently the turnover in the partnership falls off, but as part of an economic cycle and not due to the breach of the prohibition, then there is not merely a lack of causation: there is also no legally relevant damage. The situation would be no different if a doctor makes a false diagnosis, but that has no adverse effects because the progress of the illness could not have been resisted to better effect if the correct diagnosis had been made (e.g. because the treatment would have been the same, or because the treatment rendered did not exacerbate the real illness and it was in any case, at the time of the false diagnosis, too late to render an effective treatment). In cases of this type it is of course traditional for liability of the doctor to be rejected on the basis of a want of causation rather than the absence of a breach of duty or of damage and these basic rules do not alter anything in that regard. The example does, however, demonstrate how closely related these elements are since there is generally no duty to assist someone who cannot be helped and equally someone who is succumbing to such an illness is not suffering any damage which (from a liability viewpoint) is legally relevant.

> *Illustration 7*
> Equally, there is no legally relevant damage suffered when a person organises a concert with a particular singer about whose private life a newspaper has published incorrect information, so that the audience for the event is smaller than under normal circumstances. That is a risk which every organiser of an event must suffer; the damage is too remote and consequently not legally relevant in terms of liability. However, the singer herself suffers a legally relevant damage if her fee has been fixed by a formula based on turnover (VI.–2:204 (Loss upon communication of incorrect information about another)).

Reasonable expectations on the part of the injured person. A further factor is the reasonable expectation of the injured person. The concept mentioned earlier of liability for a

lost chance – in particular the lost chance of being healed (though the point is not confined to this) – demonstrates this and is related to this consideration. At the same time it reiterates the point with clarity that ascertaining the existence of damage is often inseparably linked to the remedy which would be available for its reparation. It would be just as inequitable and unjust in those 'loss of a chance' cases to award compensation for 100% as it would be to award nothing at all. It is therefore not possible merely to state that a damage tows along a claim to reparation in its wake. Rather the position is that a legally relevant damage is only present so far and to the extent that the legal system is prepared to furnish the injured person with legal redress.

Considerations of public policy. Judgments of value concerning public welfare and the internal balance of the system of private law also play a role in ascertaining whether or not one is faced with a case of legally relevant damage. The mere non-performance of a contractual obligation (delayed performance, supply of defective goods, failure to transfer a promised debt, etc.) does not amount to a non-contractual liability because the legal system contains its own preferential regime for these cases; it would be superfluous if one proceeded from the converse principle that every non-performance of a contractual obligation constitutes at the same time a non-contractual liability. However, other considerations of public policy also play a not insubstantial role. If someone is so bodily disfigured as a result of an accident that his spouse cannot endure life with him and they divorce, then ultimately only the answer to the question what stresses and strains a marriage can be expected to 'endure', according to contemporary views, is capable of resolving the question whether the economic and non-economic adverse consequences of the divorce amount to a legally relevant damage suffered by the immediate victim of the accident and his partner. It is precisely the same if the marriage breaks down because as a result of the accident the injured person has lost the capacity for sexual intercourse (that damage as such making out, of course, a legally relevant damage in accord with VI.–2:201 (Personal injury and consequential loss)). If the marriage remains intact on the other hand, then the *uninjured* spouse suffers a legally relevant damage since he or she is adversely affected in respect of an interest worthy of legal protection. Someone who only stands in a loose relationship to the injured person, however, does not suffer a legally relevant damage. In that latter situation there is merely an insubstantial reflected damage. Considerations of public policy, however, can also play a crucial role in a multitude of other cases.

> *Illustration 8*
> If he had given the factual and legal position even a halfway careful examination, A would have had to accept that his legal action against B could have no realistic prospect of success. The proceedings are dismissed with costs. As a result of having to attend to the legal proceedings, B has had to sacrifice time which he would otherwise have devoted to his (thereby partially neglected) business affairs. A legally protected interest of B is not affected. Were the case otherwise, A's right to unimpeded access to the courts would not be assured.

F. Paragraph (4)

General. Paragraph (4) serves to make clear that the expression "economic loss" includes "loss of income or profit, burdens incurred and a reduction in the value of property" and that the expression "non-economic loss" "includes pain and suffering and impairment of the quality of life". (The paragraph also serves to avoid unnecessary repetitions of these propositions in the following Articles.) As the use of "includes" indicates, these are not exhaustive definitions or closed lists. Mention is made only of the most important of the

forms which these types of loss may assume. The provision makes no statement about the manner in which the obligation to make reparation is to be discharged or a compensatory monetary sum is to be assessed. Those questions are the province of Chapter 6 (Remedies) and, in part, Chapter 7 (Ancillary rules).

Significance of the distinction between economic and non-economic loss. Paragraphs (1) and (4) together minimise the significance of the (occasionally less than straightforward) distinction between economic and non-economic loss. Hence, for example, it is of merely academic interest whether (and if so, to what extent) the form of damage referred to in VI.–2:206 (Deprivation of the use of property) paragraph (2)(a) is a species of economic loss or of non-economic loss. In conformity with the general approach, here as in other instances both types of damage are reparable. A basic rule of the type to be found in some legal systems in Europe to the effect that non-economic damage does not generally support an entitlement to reparation and is only (exceptionally) reparable if statute expressly so provides is not a feature of these rules. Indeed some of these rules expressly apply solely to non-economic loss. By contrast, VI.–2:209 (Burdens incurred by the state upon environmental impairment) refers only to "burdens" incurred by the State. That expression leaves no room for the contention that in such cases the State might assert a claim to recover for non-economic loss.

Economic loss. The existence of an economic loss is usually not difficult to determine. In the main this is determined by a comparison of the current economic position of the claimant (*status quo*) with that prevailing immediately before the allegedly damaging incident occurred (*status quo ante*) and ascertainment of a negative net balance. The economic loss is the difference between these two sums. This method of determining economic loss is of course particularly transparent in the case of a reduction in value of the victim's property.

Increase in debts. An economic loss is also present, however, if the victim has damaged property repaired or if, following an injury to body or health, undergoes medical treatment. The economic loss in such cases consists of the increase in debts or outgoings which the victim has sustained in incurring an obligation to pay whoever was engaged to help eradicate or ameliorate the legally relevant damage. There are thus "burdens incurred" by the victim. For the case where an inanimate thing is so severely damaged that the costs of its repair would exceed the market value it possessed before it was damaged (an economic "write-off") VI.–6:101(3) (Aim and forms of reparation) provides a special regime.

Loss of income. A genuine 'balance sheet' comparison is an inadequate or impossible mechanism as regards the loss of rights which will only arise in the future, that is to say, rights which have not arisen in the interval between the damage causing event and its evaluation by the parties, insurers or the courts and which will only arise after this point in time. In accordance with all European legal systems, this Book expressly provides that a (future) loss of income or profit constitutes a reparable damage.

Other forms of economic damage. As already stated, however, the text does not exclude reparation for other forms of economic loss.

> *Illustration 9*
> A wife and mother (M) is so severely injured in a road accident that for a considerable period of time she is no longer able to provide domestic services in the family home. If M engages a home help, the latter's wages, due from M, constitute for M an economic

loss. Moreover, even if a home help is not engaged and the family decides to struggle through the difficult situation without outside assistance, there is still an economic loss. There is admittedly no "loss of income" because M was not remunerated for her domestic activity. Nonetheless M's housekeeping has an economic value and its cessation constitutes a loss to M for which compensation is due. This result is compatible with the rule in VI.–6:201 (Injured person's right of election) whereby the injured person can choose what to do with the compensation due.

Non-economic loss. Paragraph (4) lists in sub-paragraph (b) the most important forms of non-economic loss: pain and suffering and the impairment of the quality of life. These forms are, however, mere examples. Quite what other forms of impairment of emotional well-being constitute reparable loss must be decided by the courts. In doing so regard must be had in particular to VI.–6:102 (De minimis rule). Negative emotional responses such as annoyance, anger, disgust and repulsion which lie within the spectrum of normal, everyday feelings cannot suffice according to that provision. If the person concerned was driven to fear for his or her life, on the other hand, then a non-economic loss has been suffered for which reparation would be recoverable if all the other elements of the non-contractual claim are made out.

Pain and suffering. Bodily pain and bodily suffering constitute the most obvious forms of non-economic loss. They are capable of being ascertained and evaluated relatively easily.

Impairment of the quality of life. Injuries to body and health can of course generate more than an immediate pain; there may be significant long-term reductions in the victim's quality of life as a consequence – for example, if the injured person is confined for the rest of his or her life to a wheel chair and is thus prevented from pursuing a favourite hobby, such as football. Such reductions in the quality of life may, however, have other causes. Typical examples are provided by infringements of incorporeal rights of personality (among others, incursions into spheres of privacy; derogatory statements which have as a consequence a negative impact on the social profile of the person concerned). Moreover, infringements of the right of free movement – imprisonment as such – also constitute a non-economic loss. The same is true for a spouse who himself or herself has not sustained any direct injury, but is compelled to accept a vacuous sexual life because his or her partner is no longer capable of sexual intercourse as a result of an accident.

Bereavement. Impairment of the quality of life relates to the objective loss of real possibilities for making the most of one's life. There is, however, a host of situations in which, objectively considered, such possibilities still exist, but subjectively their availability is no longer capable of being recognised. This too can constitute a non-economic loss. Bereavement following the loss of a close relative – more precisely, suffering as a result of the sudden emptiness in the life of the person left behind – constitutes a non-economic damage, even if this is neither an impairment of the quality of life nor pain and suffering in the narrow sense expressed in the Article. Bereavement relates to the consequences of an awareness that an impairment of the quality of life has arisen. It is a matter of self-limitation in the exploitation of life's opportunities due to the condition of mourning. Although, for example, a widow may have taken part in various social events and activities independent of her husband during his life, her mourning may induce her to pass up on these opportunities for social interaction as she becomes depressed and cuts herself off from society.

Other cases. Similar in structure are cases in which a woman loses her emotional capacity to establish an intimate relationship with a man as a result of suffering a sexual assault, or where a man's self-esteem is dramatically reduced because an accident has rendered him impotent. Furthermore, people suffer a non-economic loss if, as a result of the damage-causing event, they are forced to make a fundamental change in their chosen mode of living. That remains the case irrespective of whether an impartial third party might regard the newly adopted mode of living as qualitatively better.

Overlaps. It was considered undesirable to particularise pain suffered and loss of amenity in the text of the Article more precisely. Since these are non-economic damages, their assessment (and later quantification in a compensatory monetary equivalent) is necessarily a process involving a wide range of possible value judgements. There are also many cases in which a given detriment suffered by the injured person might be categorised as either pain or loss of amenity, not least because the constant suffering of pain is in itself the loss of the amenity to enjoy a pain-free life. For such reasons it would be better to leave any necessary subordinate refinement to the courts.

NOTES

I. The notion of damage

1. To date, the notion of "legally relevant damage" does not feature in any European Civil Code. However, it would not be far off the mark to state that ITALIAN law comes relatively close. According to Italian legal conceptions, which in their exact particulars do not, of course, remain free of controversy, the concept of damage anchored in CC art. 2043 has two limbs. *Danno* constitutes *danno ingiusto*, i.e. the breach of a legally protected interest (Cass.sez.un. 22 July 1999, no. 500, Foro it. 1999, I, 2487, 3201); *danno* also pertains to the content of the obligation to make reparation (*Castronovo*, La nuova responsabilità civile[3], 12-13). In respect of the damage that is recoverable, a distinction is drawn between pecuniary and non-pecuniary loss.

2. FRENCH law adopts a similarly wide concept of damage. Every breach of a person's material or non-material interests constitutes damage, this also includes bodily integrity as such (*Mazeaud and Chabas*, Obligations[9], no. 409 p. 413). The concept of damage in BELGIUM has similar connotations, namely it is paraphrased as representating loss of an economic or non economic nature (*van Gerven*, Verbintenissenrecht II[7], 344). The FRENCH courts require that the damage must be direct and certain (*direct et certain*), whereupon "certain" incorporates the element of *actualité* which previously was the subject of separate examination (*Flour/Aubert/Savaux*, Le fait juridique[9], no. 136 pp. 124-125). Furthermore, future loss can also be *certain*, namely in the event where cogent grounds are extant which serve to indicate that the damage will occur (for an in-depth analysis see Cass.req. 1 June 1932, S. 1933, I, 49, note *H. Mazeaud*). In academic teaching, the requirement of "directness" is regarded as an element of the rule on causation (*Flour/Aubert/Savaux* loc. cit.; *Malaurie and Aynès*, Responsabilité délictuelle[11], no. 241 p. 138). A contrasting approach to that prevailing under contract law is adopted, given that unforseeable damage is also recoverable (*Malaurie and Aynès* loc. cit.). A number of legal commentators, relying on CCP art. 31, have additionally required that the damage should exhibit a *caractère légitime* (*Terré/Simler/Lequette*, Les obligations[8],

no. 704-706 pp. 684-686), however this requisite appears to have been divested of any practical importance (*Viney and Jourdain*, Les conditions de la responsabilité[2], nos. 271-273 pp. 59-62). The concepts of dommage and préjudice are usually regarded as synonyms (*Pradel*, Le préjudice dans le droit civil de la responsabilité, no. 15 pp. 10-12).

3. Similarly in BELGIUM, the damage must be "certain" whereby, once again, future loss can fulfil this prerequisite of certainty. Damage can only be recovered if the plaintiff has personally suffered damage and had a legitimate interest in the loss of chance of obtaining an advantage (*van Gerven*, Verbintenissenrecht II[7], 344-350; *Ronse and others*, Schade en schadeloosstelling I[2], no. 225 pp. 169-170). The predominant view in legal circles is that breach of the *obligation générale de prudence* merely amounts to a *faute* if the damage was forseeable in the given circumstances (*Dalcq and Schamps*, RCJB 1995, no. 6 pp. 536-537). In both countries, no distinction is drawn between the notion of damage which pertains to liability for *faute* and the concept of damage utilised in founding liability *du fait du chose* or *du fait d'autrui* (*Viney and Jourdain* loc. cit. no. 246 p. 1).

4. Similarly in SPAIN, there has been no attempt to place a definition of *daño* on a statutory footing. Academic literature has defined it in terms of a material or non-material damage which has been suffered by someone in the course of an event for which the other party is liable. There is an ongoing dispute as to whether harm which is not caused by a tortiously relevant act can amount to damage (cf. *Santos Briz*, La responsabilidad civil I[7], 146 and *Roca i Trias*, Derecho de daños[3], 67). The binomial *daños y perjuicios* frequently crops up in the *Código Civil* (e.g. in CC arts. 1101, 1106, 1107, 1108), however these concepts are "uncoupled" in the sphere of tort law (CC arts. 1902 ff). There is a tendancy in academic writing to equate *daños* with direct damage and *perjuicios* with indirect damage i.e. the damage that does not appear in the damaged thing itself but involves damage that subsequently manifests in the injured party's patrimony. Permanent damage is also included within this rubric (*Santos Briz* loc. cit. 150). However, the Civil Code for the most part uses the concepts of *daños* and *perjuicios as* synonyms. Mere interferences do not amount to damage (TS 19 February 1962, RAJ 1962 (1) no. 714 p. 458), unless their intensity requires them to be thus qualifed (*Santos Briz* loc. cit. 151). Incidentially, it is also a requisite of Spanish law that the damage be "certain"

5. Under HUNGARIAN Law, damage is understood to encompass all personal injury and damage to property which is sustained as a result of the act of another. The three types of economic loss (Damage to property, loss of profit and costs associated with rectifying the damage) are differentiated from the fourth manifestation of damage, namely non-economic loss (Petrik [-*Köles*], Polgári jog Kommentár a gyakorlat számára II, 630; Gellért [-*Kemenes*], A Polgári Törvénykönyv Magyarázata I, 1228-1229; Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata I, 1327-1328; *Ujváriné*, Felelősségtan[7], 59-60). According to SLOVENIAN LOA art. 132 "damage comprises the diminuation of property (ordinary damage), prevention of the appreciation of property (lost profits), the infliction of physical or mental distress or fear on another person, and encroachment upon the reputation of a legal person". In POLAND damage (*szkoda*) is usually defined as any detriment to the legally protected interests of another (*Dybowski*, System prawa cywilnego III(1), 214-215; *Czachórski*, Zobowiązania[9], 99; *Radwański and Olejniczak*, Zobowiązania-część ogólna[5], 88-89). Both the courts and the majority of academics adopt the view that the notion of damage embraces both economic and non-economic detriment (*Dybowski* loc. cit. 223-224; *Czachórski* loc. cit. 100; *Radwański and Olejniczak* loc. cit. 89-90). Non-economic damage is partly subject to special rules and within the scope of these rules

is designated as *krzywda* (CC arts. 445 § 1, 448). Some of the provisions of CC distinguish between personal injury and damage to property (arts. 417^2, 435, 444, 449^7 § 1). The former denotes non-economic as well as economic loss (e.g. lost earning capacity) resulting from an infrigement of a right of personality, the latter economic loss resulting from the infringement of a property right (*Czachórski* loc. cit. 100; *Radwański and Olejniczak* loc. cit. 90).

6. The GERMAN Civil Code differentiates between the infringement of a right or a protected legal interest and "the damage arising from therefrom [i.e. the breach]" under CC § 823(1). Pursuant to this provision, the damage results from the breach of a right or, in the event that CC § 823(2) is applicable, springs from the infringment of a legally protected interest. The notion of damage crops up frequently in the BGB, however, this concept is nowhere defined. It is generally understood to mean every involuntary interference with an interest capable of being valued in economic terms or also interference with a purely non-material interest (cf. CC § 253) (MünchKomm [-*Oetker*], BGB[4], § 249, no. 16). The particulars are, however, diffuse. The point of departure for determining the ambit of material damage is the socalled *Differenzhypothese* (an arithemical concept of damages, "by way of calculating the difference")(cf. CC § 249) which can be attributed to *Mommsen.* This theory sets forth that recoverable pecuniary damage amounts to the difference between the injured party's current financial position and the hypothetical position that which would have existed had the harmful event establishing the obligation to make reparation not occurred (Bamberger and Roth [-*Grüneberg*], BGB, Pref. to § 249, no. 9; Palandt [-*Heinrichs*], BGB[64], Pref. to § 249, nos. 8 f; BGH 31 May 1994, NJW 1994, 2357, 2359; BGH 10 December 1986, BGHZ 99, 182, 196). A particular manifestation of the *Differenzhypothese* can be seen in the principle of prohibition of enrichment (according to the judgment of the BGH 4 June 1992, BGHZ 118, 312, 338 this is understood as constituting a component of the German *ordre public*). Its objective is to forestall the possibility that the injured party would be placed in a better position than that which was extant prior to occurrence of the damage (MünchKomm [-*Oetker*], BGB[4], § 249, no. 20). However, in a number of categories of cases, the differential between the post tort and hypothetical "no-tort" positions is adjusted that is undergone adjusted at a normative level (*Kommerzialisierungsgedanke* (notion of commercialization), normative concept of damage), reflecting the idea that the pleasure or convenience of using of a thing has an independent economic value so that the loss of the pleasure or convenience of using the thing constitutes economic harm) (*Heinrichs loc. cit.* nos. 14, 10, 13). Occasionally, an additional lingustic distinction is drawn between "direct" and "consequential" damage. Direct damage embraces damage having a detrimental effect on an object or on a person, consequential damage concerns the other losses incurred as a result of the damaging event, especially loss of profits (CC § 252) and, as far as objects are concerned, pertains to liability for the loss of use (*Heinrichs loc. cit.* no. 15).

7. According to AUSTRIAN CC § 1293 first sentence damage, *Schade* pertains to any harm caused to a person's property, rights or person. This broad notion of damage embraces both socalled "real" damage as well as "calculable" damage. According to academic commentary, real damage connotes an actual alteration in the property, in the rights or the person of the injured party (*Koziol*, Haftpflichtrecht I³, no. 2/2). The concept of real damage is primarily of significance where the wrongdoer must make restitution in kind (*Koziol and Welser*, Bürgerliches Recht II[12], 285). Whether "harm to rights" (CC § 1293 Satz 1) is ascribed a stand-alone significance is unclear (*Koziol* loc. cit. no. 2/3; *Kramer*, ÖJZ 1972, 90, 92). Pursuant to CC § 1293 2nd sentence a distinction is drawn between "real damage" and loss of profits which should result in

the ordinary course of events. The latter is only recoverable where the degree of fault is substantial (CC § 1324). The notion of damage in the Austrian CC embraces every circumstance which can be conceived as a legal detriment. Every diminishment of assets and every increase of liabilities which cannot be offset (for which there is no counterbalance?) represents a loss (OGH 11 March 1993, SZ 66/31).

8. In GREECE, a distinction is drawn between the notion of damage understood in its "broad" sense and a "narrow" conception of damage. In academic literature, the broad notion of damage is conceived as involving every interference with a person's material or non- pecuniary goods, i.e. every unfavourable change in these goods (Georgiades and Stathopoulos [-*Stathopoulos*], arts. 297-298, no. 9; *Balis*, Enochikon Dikaion Geniko meros, 86; *Georgiades Ast.*, Enochiko Dikaio I, 120). The narrow definition of damage is regarded as encompassing only material damage, i.e. every loss/injury that financially impacts on the injured party (*Stathopoulos* loc. cit. art. 299, no. 1). Additionally, in academic teaching, a differentiation is made between the socalled direct and consequential damage. Direct damage denotes damage that is occurs to interests worthy of legal protection as a result of the injury. Frequently, this direct damage impinges upon the injured party's entire property (e.g. loss of earnings consequent upon personal injury). Consequential damage is postulated by this set of cases (*Stathopoulos* loc. cit. arts. 297-298, no. 44).

9. Similarly, the PORTUGUESE CC does not contain a definition of the notion of *dano*. Pursuant to CC art. 483(1) a distinction is drawn between the breach of a right or breach of a legal provison which is geared towards protecting third party interests and "the damage that arises out of the infringement". Only loss which the claimant would probably not have sustained but for the injury is recoverable (CC art. 563). It is stated in academic commentary that every material, spirtual or moral loss which accrues to a a legally protected interest amounts to damage (*Almeida Costa*, Obrigações[9], 542; *Antunes Varela*, Obrigações em geral I[10], 598); other commentators paraphrase damage in terms of *frustração de uma utilidade que era objecto de tutela jurídica* (the "frustration" of a legally protected "utility": *Menezes Leitão*, Obrigações I[3], 334). For the most part, a distinction is drawn between financial (*dano patrimonial*) and non economic loss (*dano não-patrimonial*), occassionally between, on the one hand, the *dano real* and on the other, the *dano patrimonial* or *dano de cálculo*. The socalled actual damage correlates with the principle of *restitutio in integrum* (CC art. 562: restoration of status quo ante), the calculable damage corresponds to the compensation received on the basis of a comparasion between the current financial position of the injured party with that which would have existed had the tort not been committed (CC art. 566). Pursuant to CC art. 564(1) both the *danos emergentes* and the loss of profits (*benefícios* or. *lucros cessantes*) are recoverable heads of damage. According to CC art. 564(2), damage includes both present loss and loss expected in the future. According to this statutory provision, a court is permitted to consider future damage in the assessement of the award of monetary compensation provided that the damage can determined according to the criterion of forseeability; if this is not the case, the estimation of the loss must be resolved at a later stage, cf. also CCP art. 661(2).

10. According to DUTCH Law 'damage' (*schade*) is understood as encompassing any actual detriment caused by a breach of contract or tortious act; further, according to the prevalent view in legal writing, it is submitted that, also within the framework of CC arts. 6:74 and 6:162, the notion of damage should not be ascribed a meaning which is at variance to that used in common parlance (Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 409 p. 327). A scratch on the paintwork of a car merely represents the (actual) damage (*beschadiging*); the car's dimuntion in value as a result of the scratch signifies the *schade* (*Hartkamp* loc. cit.). There have been numerous

attempts made at formulating a general definition of damage in Dutch legal literature. A number employ normative additions (e.g. *Polak,* Aanspraak en aansprakelijkheid uit onrechtmatige daad, 17 and *Hoekema,* NJB 1980, 977, 987), *inter alia* reasoning that the notion of damage only acquires significance when viewed in conjunction with liability law (*Spier,* Schade en loss occurrence-verzekeringen, 5; of a contrary view *Hartkamp* loc. cit. 328-329).

11. LITHUANIAN CC art. 6.249(1) declares, that "damage shall include the amount of the loss or damage of property sustained by a person and the expenses incurred (direct damages) as well as the incomes of which he has been deprived, i.e. the incomes he would have received if unlawful actions had not been committed. Damage expressed in monetary terms shall constitute damages. Where the amount of damages cannot be proved by the party with precision, it shall be assessed by a court". Further, CC art. 6.250(1) states: "Non-pecuniary damage shall be deemed to be a person's suffering, emotional experiences, inconveniences, mental shock, emotional depression, humiliation, deterioration of reputation, diminuition of possibilities to associate with others, etc., evaluated by a court in terms of money." LATVIAN CC art. 1770 stipultates "loss … to mean any depriviation which can be assessed financially." The following provisions then distinguish between the varying manifestations of "losses": loss that has already occured and loss expected in the future, (CC art. 1771), whereby loss of profits is regarded as embraced by present loss (CC art. 1772). Furthermore, a distinction is drawn between direct and consequential damage and blameworthy and "accidental losses" (CC arts. 1773 and 1774).

12. In SWEDEN, "damage" was once defined as "a certain prejudicial effect on the utilisation of property or to an interest" (*Karlgren,* Skadeståndsrätt[5], 194). However, little emphasis is placed on such general definitions because they are of little purport in the absence of a concrete statutory fallback provision (*Andersson,* Skyddsändamål och adekvans, 297). A distinction is drawn between 'real' or actual damage and the sum required to compensate it which is sometimes described as 'abstract' or calculated financial damage. For the most part it is simply described as loss (*Karlgren* loc. cit.).*Schaden* and *Verlust* thereby form a dichotomy (*Andersson* loc. cit. 298). Damage is governed by SWEDISH and FINNISH Damages and Tort Liability Act chap. 2, whereas loss is governed by chap. 5. Both statutes primarily deal with "real" damage, i.e. injury to person or damage to property provoking a financial loss. Alongside these provisions, regulations pertaining to a number of non-material types of damage have been incorporated: wounded feelings, pain, infirmity as well as permanent disability and significant impairment. Moreover, case law has introduced the category of ecological damage (Swedish HD 19 April 1995, NJA 1995, 249 and 21 December 1993, NJA 1993, 753 [concerning a public cultural monument]). DANISH approach holds that the infringement of a legally protected interest (*retsbeskyttet gode*) is a precondition for the existence of damage; "real damage" could be defined as a "factual interference with a legally protected interest" (*Vinding Kruse*, Erstatningsretten[5], 338). Both material goods (a thing, however, this expression also embraces the body if there is a subsequent reduction in earning capacity) as well as non-material goods (e.g. the reputation of the injured party) could be encompassed by this notion. With respect to economic loss, liability relates to the "loss" (*tabet*), as far as non-material damage is concerned, one speaks of making amends (*godtgørelse*) (Damages Act §§ 3, 4 and 6; *Vinding Kruse* loc. cit. 345; *Andersson* loc. cit. 298).

II. Injury as damage

13. In all of the legal orders under discussion, incurring loss is a generally a prerequisite for the existence of legal damage. If a different approach were to adopted, then the

compensatory function of tort law would be rendered nugatory; in other words, a solely punitive or deterrent function would be ascribed to tort law (*Viney,* Introduction à la responsabilité[2], no. 67 p. 111).

14. Exceptionally, proof of injury, be it a breach of a rule prescribing a particular standard of conduct or the infringement **of a** right is sufficient to constitute damage. For example, under FRENCH law on unfair advertising practices, the presence of damage is presumed if a *faute commerciale* is established. In order to circumvent the collaspse of the claimant's *action en concurrence déloyale* owing to a lack of evidence, the courts have proved to be satisfied with a mere assertion that loss has been incurred (see further *Viney and Jourdain*, Les conditions de la responsabilité[2], no. 247 p. 4). Furthermore, it is also accepted that a particular anti competitive practice necessarily imports a *dommage moral* (Cass.com. 9 February 1993, Bull.civ. 1993, IV, no. 53 p. 34; JCP 1994 éd. E, II, 545, note *Danglehant*). Furthermore, the breach of an intellectual property right can *par elle-même constitute* damage (Cass.civ. 11 October 1983, Bull.civ. 1983, I, no. 225 p. 201). In addition, a court decision in 1934 determined that the breach of the owner's *droit de possession* sufficed to justify an award of damages even when the owner did not suffer any pecuniary loss (Cass.req. 6 March 1934, D.P. 1937, I, 17, note *Blaevoet*). However, this set of developments has not taken root under BELGIAN law. Breach of a right is not tantamount to a necessary or sufficient precondition for the presence of damage (*Simoens,* Schade en schadeloosstelling, 18).

15. Pursuant to SPANISH law,as a general rule damages are only awarded if the claimant has suffered a pecuniary or non- pecuniary loss. Exceptions to this basic rule are made if a breach of a constitutionally protected personality right is concerned. Above all, violations of bodily integrity (*daño a la salud*, cf. *De Ángel Yágüez*, Tratado de responsabilidad civil[3], 698), violations of right to privacy, honour and right to one's own image are actionable *per se*. The aforementioned rights are expressly derived from art. 9(3) of Law 1/82 of 5 May 1982 pertaining to Civil Protection of the right to one's honour, to a personal and familial sphere of intimacy and control over the reproduction of one's image (*Ley Orgánica 1/1982, de 5 de mayo, de Protección Civil de los Derechos al Honor, a la Intimidad Personal y Familiar, y a la Propia Imagen*).

16. The prevailing view in ITALY regards the infringement of a legally protected interest as constituting a *danno ingiusto* under CC art. 2043, thereby justifying the imposition of liability. The particulars regarding the recovery of *danno* are governed in a variety provisions, depending on whether pecuniary damage or non-economic loss is involved. Breach of Cost. art. 32 which purport is to safeguard the individual's right to health is the subject of a special regime. With respect to violations of a person's psycho-physical integrity, namely the socalled *danno biologico*, the application of the concept of *danno evento* (event related damage) in this field was the product of judicial refinement. For a long time, the predominant view in case law was that the *danno biologico* should not only be conceived as the consequence of an event founding liability but should alone be conceived as the event (*evento*) that caused the infringment to health. The unjustness alone, which inheres in the act leading to the infringement of the psycho- physical integrity, founds the obligation to make reparation on the actionable per se *danno biologico.* This obligation is not dependent upon any further accrual of possible manifestations of damage which would in any event have to be proved separately. Therefore, the *danno biologico* was intermittantly regarded, in conjunction with pecuniary and non-pecuniary damage (*danni conseguenza)* as an additional discrete heading of damage (Corte Cost. 14 July 1986, no. 184, Giur.it. 1987, I, 1, 392). In more recent times, it is true to state that the courts have somewhat retreated from this conception of the *danno evento* (initially with Corte

Cost. 27 October 1994, no. 372, Foro it. 1994, I, 3297), however, have only opted to correct its practical results only in marginal areas. According to more recent case law, the *danno biologico* is regarded as indeed signifying non- pecuniary loss and consequently conceived as a manifestation of the *danni conseguenza*. These developments have not had any impact on the fact that in the event that there is an injury to health, the consequential damage is regarded as being actionable per se (Cass. 31 May 2003, nos. 8827 and 8828, Giur.it. 2004, I, 1, 29; Corte Cost. 11 July 2003, no. 233; Resp.civ. e prev. 2003, 1036; Cass.sez.pen. 25 November 2003 and 22 January 2004, Foro it. 2004, II, 138; Cass. 12 December 2003, no. 19057, Danno e resp. 2004, 762; Cass. 20 February 2004, no. 3399, Foro it. 2004, I, 1059). In other words, proof of any interference with a person's psycho-physical intergrity (health), now understood in the sense of a result of an injury to health suffices to render the *danno biologico* compensatable in conjunction with and (in addition to) the injured party's claim for pecuniary and non-pecuniary loss (see further *Castronovo*, Danno e resp. 2004, 237-247 and *Gozzi*, Der Anspruch iure proprio auf Ersatz des Nichtvermögensschadens, 61).

17. Whereas AUSTRIAN CC § 1293 states that the mere infringment of a right can represent damage, however this declaration has not acquired any practical significance (*Koziol*, Haftpflichtrecht I³, no. 2/3; *Kramer*, ÖJZ 1972, 90, 92; *Mayrhofer*, Schuldrecht AT³, 252). Proof of loss is required, otherwise the rules alleviating the burden of proof under CCP § 273 in respect of the extent of the damage incurred will not come into operation (*Koziol* [-*Rummel*], Haftpflichtrecht II², 302). There is no exception provided for under Competition law (*Koppensteiner*, Wettbewerbsrecht³, § 34 no. 53). However, it is generally accepted that non-material loss always arises from infringments of the right to liberty, it therefore does not have to proven or substantiated (OGH 24 June 1987, SZ 60/117). A uniform amount of damages is also awarded for copyright infringements if actual pecuniary loss cannot be adduced (OGH 26 May 1998, SZ 71/92). In POLAND the question whether the infringement of a right of personality, in particular an injury to body or health, constitutes damage in itself is the subject of debate (in favour: *Dybowski*, System prawa cywilnego III(1), 224-226; against – damage only if there is pain or a loss of earning capacity - *Radwański and Olejniczak*, Zobowiązania-część ogólna[5], 90). Compensation for infringement of rights of personality is in any case always a matter for the discretion of the court (*Szpunar*, Zadośćuczynienie, no. 81; *Safjan*, Kodeks cywilny I[4], 1284-1285). There is no doubt that an injured person has a right to compensation even though he or she is in fact incapable of suffering any pain (*Szpunar* loc. cit. nos. 91, 164). Statute provides in a number of special cases (innocent defamation; infringement of copyright) for compulsory compensation independent of loss.

18. In contrast the concept of damage *per se* is unknown in GERMANY, GREECE, PORTUGAL, The NETHERLANDS (Schadevergoeding II [-*Lindenbergh*], art. 6:106, no. 23; Schadevergoeding II [-*Bolt*], art. 6:107, nos. 9-25) and in the NORDIC Countries. However, both the GERMAN and PORTUGUESE courts, consistent with the prevailing jurisprudence of other States, have also permitted a claimant to recover non- pecuniary loss where, following an accident, the claimant sustained severe injuries leading to a permanent impairment of cognitive and sensory functions (BGH 13 October 1992, BGHZ 120, 1; STJ 5 March 1969, BolMinJus 185 (1969) 171, 178). In HUNGARY, there are indeed views in legal commentary which postulate that the injury of a personality right in itself is sufficient to render grounds for granting statisfaction (regarding these discussions, see for further analysis *Boytha*, Polgári jogi kodifikáció, 2003, 3-6 *Petrik*, Polgári jogi kodifikáció 2003, 6-8), however, the courts have thus far declined to follow this approach (Citations in *Gellért* [-*Benedek*], A

Polgári Törvénykönyv Magyarázata, 1322 ff). The draft of the new ZGB introduces the legal concept of *solatium* in place of non-pecuniary loss in the law pertaining to persons. The former is not a damages concept but is a legal institution belonging to the law pertaining to individuals. A person whose perosnaility rights are infringed can thereupon claim damages for pain and suffering without having to prove that further loss or detriment was suffered. The Draft contains an irrebutable presumption that every infringement of the right of personality rights amounts to a detriment for the party who suffered injury. The extent of the damages awarded for pain and suffering fall to be assessed by the courts (http://www.parlament.hu/irom38/05949/05949.pdf; *Vékás [-Székely]*, Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez [Expert submissions on the draft of a new Civil Code for Hungary], Budapest 2008, pp. 174-175).

III. Economic loss

19. There is no pan european universal criterion to assist in ascertaining when an economic loss is sustained and different approaches are adopted throughout Europe. According to FRENCH doctrine a *dommage matériel* signifies the damage that can be directly measured in money. It embraces both physical damage to goods (*atteinte aux biens*) as well as pecuniary loss as a result of personal injury (*atteinte à la personne physique*), loss of profits is embraced under this heading (*Flour/Aubert/Savaux*, Le fait juridique[9], no. 135 p. 124). A strong tendency exists to treat the *dommage corporel* in conjunction with the *dommage matériel* and the *dommage moral* as an automonous head of damages (*Terré/Simler/Lequette*, Les obligations[8], no. 708 p. 687; *Mazeaud and Chabas*, Obligations[9], no. 409 p. 413). Similarly, according to views in BELGIUM material damage signifies the damage that can be measured in money (*Dirix*, Het begrip schade, no. 85 p. 61). It embraces the physical damage to property or financial elements as well as loss of income resulting from the infringement of a persons physical intergrity (*van Gerven*, Verbintenissenrecht II[7], 352). The extent of the material damage is generally described as the difference between the financial position at the date of the judgment and the hypothetical economic position pertaining had the tort not been committed (*Dirix*, Het begrip schade, no. 85 p. 61). In both countries, loss of profits represents recoverable damge under tort law (*lucrum cessans*) (*Viney and Jourdain*, Les conditions de la responsabilité[2], no. 251 p. 19; *Dirix* loc. cit. no. 53 p. 46). One example is provided by a case where shortfalls in production occured where a gas pipe was damaged (Cass.civ. 8 May 1970, Bull.civ. 1970, II, no. 160 p. 122), another example pertains to the proof of loss of earning capacity in respect of permanent incapacity (*Viney and Jourdain*, Les effets de la responsabilité[2], no. 113 p. 214; *van Gerven* loc. cit.).

20. Under SPANISH law *daño* encompasses both pecuniary loss (*daño emergente*) that is sustained as well as loss of profits (*lucro cesante*). It is true that according to the legal postiioning of the provision which expressly mentions both of these heads of damages, CC art. 1106 only pertains to contractual liability, however, this provision has also been deemed to apply to tort law.(u.a. TS 23 March 1954, RAJ 1954 no. 1299 p. 839; TS 31 May 1983, RAJ 1983 (2) no. 2956 p. 2285; TS 3 October 1991, RAJ 1991 (5) no. 6902 p. 9381). The *daño emergente* covers a thing's dimunition of value. Loss of profits are only recoverable, if it can be shown that there is an adequate causal nexus between the defendant's act and the loss suffered and furthermore, when measured by objective standards, there is evidence to suggest that the claimed amount lost profit would probably have been realised (TS 20 March 1978, RAJ 1978 (1) no. 850 p. 747; TS 1 October 1986, RAJ 1986 (3) no. 5230 p. 5119; TS 19 July 1989, RAJ 1989 (5) no. 5725 p. 6651). An additional requisite is that the source of the lost profit must not

derive from illegal activities. Diminishment or permanent loss of earning capacity as a consequence of bodily injury or injury to health is encompassed within this head of damages. The calculation of damages is generally based on the *teoría de la diferencia*: namely, based on the difference between the extent of the victim's fortune following the occurence of the damaging event and the hypothetical assessement of the victim's assets had the damaging event not occured (TS 10 January 1979, RAJ 1979 (1) no. 18 p. 26; TS 14 February 1980, RAJ 1980 (1) no. 516 p. 396; TS 2 April 1997, RAJ 1997 (2) no. 2727 p. 4133).

21. Similarly, according to the Italien conception, pecuinary loss embraces the detrimental effect that a tort has in the patrimony of the injured party. The extent of the pecuniary loss is calculated according to the difference between the actual state of patrimony adjudged at the time following the accident and a hypothetical consideration of the state that that they would have been in had the loss not been sustained (see further Cendon [-*Gaudino*], Commentario al codice civile IV(2), arts. 1655-2059, art. 2043, § 10). Regarding the content of the particulars pertaining to the calculation of this head of damages, CC art. 2056 refers to CC arts. 1223, 1226, 1227 and hence to the rules governing the recovery of contractual damages which also recognises a claim for the recovery of lost profits. Additionally, CC art. 2056 expressly prescribes that a damages claim for the recovery of loss of profits is required to be assessed according to an equitable evaluation of the particular circumstances of the case. Recoverable damage entails daamage that arises as an immediate and direct consequence of the injury,irrespective of whether the damage was forseeable or not.

22. CZECH and SLOVAKIAN CC §§ 442 et seq. contain comprehensive provisions concerning the conceptualisation of pecuniary loss. It comprises of a "real" damage limb and another which pertains to lost profit (CC § 442(1)). The amount of damages awarded for physical damage to property is ascertained according to the value at the time the damage occurred (CC § 443). There are extensive rules governing the calculation of compensation for loss of earnings consequent upon personal injury (CC §§ 445-447a). HUNGARIAN CC § 355(1) makes an express distinction between pecuniary and non-pecuniary loss. CC § 355(4) augments this provision by providing that "compensation must be made for any depreciation in value of the property of the aggrieved person and any pecuniary advantage lost due to the damage as well as the indemnity or costs necessary for the attenuation or elimination of the material and non-material losses sustained by the aggrieved person". The following definition of damage is set forth in the SLOVENIAN LOA art. 132 : "Damage comprises the diminution of property (ordinary damage), prevention of the appreciation of property (lost profits), the infliction of physical or mental distress or fear on another person, and encroachment upon the reputation of a legal person".In POLAND economic loss is understood as damage to goods whose pecuniary value is ascertainable (*Dybowski*, System prawa cywilnego III(1), 221). CC art. 361 §§ 1 and 2 expressly state that the reparation of damage encompasses losses (*straty*) and lost profits (*utracone korzyści*). Both *straty* and *utracone korzyści* are ascertained according to the so called differential method, which consists in establishing the difference between the actual state of assets and the hypothetical state in which they would have been had the incident not occurred (*Dybowski* loc. cit. 214-215; *Czachórski,* Zobowiązania[9], 101; *Radwański and Olejniczak,* Zobowiązania-część ogólna[5], 91).

23. Please see Note *I6* which examines the concept of percuniary loss under GERMAN Law

24. In AUSTRIA, pecuniary loss is regarded as encompassing every detriment that is inflicted to goods possessing a monetary value. This concept embraces both the

socalled actual damage (destruction or diminution of existing patrimony; liability is imposed for ordinary negligence) as well as loss of profits (liability only incurred where the defendant acts with gross negligence). If problems of demarcation arise, the courts tend to assume the existence of actual loss (*Koziol and Welser*, Bürgerliches Recht II[12], 286). For example, depriving a businessman of the use of his vehicle amounts to actual loss (OGH 23 May 1956, SZ 29/43), likewise, future profits are also embraced by the head of actual loss provided that public opinion could regard the profit making opportunity as having an independent economic value (OGH 14 December 1979, SZ 52/187) or would have certainly materialised had the damage not taken place (OGH 17 October 1995, SZ 68/189). Furthermore, loss of earnings is generally comprehended by actual loss (OGH 18 March 1960, ZVR 1960/234, p. 161). Pecuniary loss also encompasses the incurrence of expenses or onerous obligation (OGH OGH 6 June 1987, ZVR 1987/128, p. 376; OGH 24 November 1964, SZ 37/168; *Koziol*, Haftpflichtrecht I³, no. 2/36). Austrian law also employs the socalled differential method: this involves comparing the actual position which results from the damging event from the hypothetical position that would exist if the damaging act had not occurred. The negative difference represents the damage that the plaintiff has suffered (OGH 27 August 1980, SZ 53/107; *Koziol* loc. cit., no. 2/19).

25. In GREECE, an identical approach is adopted: economic loss is assessed according to an assessment of the difference between the hypothetical state of the patrimony had the damaging event not occured and the actual state of patimomy (*Georgiades Ast.*, Enochiko Dikaio I, 120). It is not enough for the courts to confine themselves to assessing the effect of the damaging event on the affected asset, it is necessary for them to consider its effect on the entire patrimony of the aggrieved party (Georgiades and Stathopoulos [-*Stathopoulos*], arts. 297-298 no. 10).

26. In a similar fashion, the PORTUGUESE Civil Code does not contain a statutory definition of the d*ano patrimonial*, likewise no distinction is drawn between damage (*dano*) and loss (*prejuízo*) (*Almeida Costa*, Obrigações[9], 541, fn. 3). *Dano patrimonial* is conceived in academic teaching as "an injury to patrimonial assets or to legally protected interests comprising of material or economic interests involving a detimental effect on the partrimony of the aggrieved party" (*Almeida Costa* loc. cit. 542-543). Physical damage to tangible property or loss of use is filed under the heading of economic loss as is the impairment of earning capacity following personal injury. Economic damage, also defined as "the reflex of the actual damage (*dano real*) in the economic situation of the injured party, is measured, in principle, by the difference between the actual situation of the injured party and the situation in which he would be if the injury had not occurred (*Antunes Varela*, Obrigações em geral I[10], 598-599).

27. DUTCH CC art. 6:95 differentiates between 'economic damage' and 'other disadvantages'; a claim for recovery of the latter can only be asserted where provided for expressly by law. Under the rubric of economic loss, a further distinction is drawn between *zaakschade, persoonsschade* and *zuivere vermogensschade*. This subdivision is above all of relevance within the framework of CC arts. 6:107 and 108. *Zaakschade* signifies loss resulting from damage to, destruction or loss of tangible property. *Persoonsschade* comprises heads of recoverable economic loss which arise from personal injury (e.g. medical expenses, loss of earnings), and *zuivere vermogensschade* encompasses every pecuniary loss not embraced by personal or physical damage. It is conceded in Dutch legal literature that determing the dividing line between the three categories of damage, a task which carries particular import for insurance law, can engender some difficulty (Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 413 p. 335 with further references).

28. The NORDIC Countries, in particular SWEDEN and FINLAND, differentiate between pure and general economic loss. Pure economic loss is defined as economic loss which arises without connection to personal or property damage (Swedish Tort Liability Act chap. 1 § 2). Indirect loss (e.g. loss of financial support arising from the death of the primary victim) constitutes a discrete category; this head of damages (treated similarly to pure economic loss) is only exceptionally recoverable and is generally confined to instances laid down by law. The calculation of damages is extensively regulated down to the last detail. As a general rule, the function of tort law is to place the injured party in the position s/he would have been in, had the damaging event not occured.

29. The COMMON LAW too distinguishes between on the one hand economic loss as a consequence of personal injury or damage to property and on the other hand "pure" economic loss. The latter are compensable only in restricted circumstances. The law remains in a state of flux. A bank which has received from a claimant a notification of an injunction freezing the account of a customer, but nonetheless (due to carelessness) carries out an instruction of its customer to transfer money from the account is not liable to the claimant for want of a duty of care owed by the bank to the claimant (*Customs & Excise v. Barclays Bank* [2006] UKHL 28, 1 AC 181)

IV. Normative Economic Loss

30. The European legal orders frequently, however, permit economic loss to be recovered despite the absence of a genuine (present or future) net loss as measured by way of the difference method (see further *v. Bar*, Essays in Honour of Lord Goff of Chieveley, 23-43). The concept of "normative" damage is employed in such cases. It appears in multifarious forms, cf. e.g. for IRELAND *Hogan v. Steel & Co. Ltd.* [1999] IEHC 175, [2000] 1 ILRM 330 (economic loss resulting from loss of earnings following an accident was judged recoverable, even though the employer had voluntarily continued to pay the wages) and in respect of AUSTRIA Schwimann (-*Harrer*), ABGB VII², § 1293 nos. 8-9 (liability for the socalled abstract annuity, i.e. compensation for *possible* future disadvantages that a party who has sustained permanent injury may incur in the competition with healthy persons). In SWEDEN, the difference method is merely understood as a technique representing the normal case (*Andersson*, Skyddsändamål och adekvans, 301 fn. 43 with further references.). The courts are vested with a wide margin of discretion when it comes to the calculation of damages (Code of Judicial Procedure [*rättegångsbalk* (1942:740)] chap. 35 § 5), cf. HD 20 December 1973, NJA 1973, 717 (following excercise of judicial discretion, damages were awarded on the basis of an the unauthorised use of the claimant's name without proof of actual loss); HD 15 October 1981, NJA 1981, 933 and HD 27 June 2000, NJA 2000, 325 (estimation of the extent of pure economic loss in respect of illegal private copies) as well as *Radetzki*, Skadeståndsberäkning vid sakskada, 199). The same holds true for FINLAND (Code of Judicial Procedure [*rättegångsbalk*] chap. 17 § 6, cf. on this point HD 15 May 1998, HD 1998:53 and HD 31 August 1998, HD 1998:97) and DENMARK (*Vinding Kruse*, Erstatningsretten[5], 352; *von Eyben and Isager*, Lærebog i erstatningsret[5], 250; see also HD 31 October 1973, UfR 1973, 950 and HD 8 August 1994, UfR 1994, 785).

31. Furthermore, it is universally recognised that the "reduced commercial value" of tangible property, in particular a car, amounts to recoverable pecuniary damage. This head of damages compensates the depreciation of value in the case of a damaged car that was correct repaired (e.g. accident-damaged car). This dimunition in value is also compensated even the loss is not incurred in the event that the owner of tangible property decides not to sell (cf. e.g. for AUSTRIA *Harrer* loc. cit.; for DENMARK

ØLD 22 June 1981, UfR 1981, 919; VLD 19 January 1994, UfR 1994, 304 and VLD 23 April 1997, UfR 1997, 969; for FINLAND Tort liability Act chap. 5 § 5; for GERMANY BGH 3 October 1961, BGHZ 35, 396; for GREECE *Stathopoulos*, Geniko Enochiko Dikaio A1[2], 540; Georgiades and Stathopoulos (-*Stathopoulos*), arts. 297-298, no. 115 and CA Athens 737/1971, EEN 1972 75; for POLAND SN 12 October 2001, OSNC 2002, poz. 57 and for SWEDEN Tort Liability Act chap. 5 § 7 no. 1). The courts in ITALY have sometimes held that the socalled *deprezzamento commerciale* is recoverable even without the adduction of concrete proof of actual loss (Cass. 23 June 1972, no. 2109, Rep.Giur.it. 1972, voce Circolazione stradale, no. 363; CFI Palermo 9 October 1984, Riv.giur.circ.trasp. 1985, 394). Similarly, BELGIAN legal science views a reduction in market value of tangible property as constituting recoverable loss. It has, however, been pointed out that the courts are hestitant to allow a claim for recovery because, for the most part, they consider that the condition that the damage was "certain" has not been met (*Simoens*, Schade en schadeloosstelling, no. 169 pp. 322-323). The SPANISH courts only rarely particularise the head of damages upon which they are basing the compensatory award; therefore, it cannot be stated with certainty that a special head of damages for "reduction in market value" is extant; however, the possibility of its general incorporation within an award of damages based on an equitable assessment (unassailable on appeal) cannot be discounted (cf. e.g. CA Guipúzcoa 25 October 1999, BDA Civil no. 1999/7264 and CA Pontevedra 10 October 1995, BDA Civil no. 1995/1949).

32. Furthermore, European courts have consistently held that a family member who renders gratutious services in the home, typically a housewife, is entitled to claim damages for loss of housekeeping capacity consequent upon personal injury (see, for AUSTRIA *Harrer* loc. cit.; for POLAND *Safjan*, Kodeks cywilny I[4], 1279; for BELGIUM Cass. 15 June 1959, Pas. belge 1959, 1050; for FRANCE CA Colmar 15 May 1956, D. 1956 Jur. 653; for GERMANY BGH 9 July 1968, BGHZ 50, 304; for ITALY (Cass. 11 December 2000, no. 15580, Danno e resp. 2001, 587 [the ability to recover for pecuniary loss in correlation with the *danno biologico*] and Cass. 6 November 1997, no. 10923, Giust.civ.Mass. 1997, 2093, Danno e resp. 1998, 230 [Award of damages extended in circumstances where the housewife had indeed employed domestic help, however nonetheless was fully focussed on structuring family life]); for SPAIN TS (3. Senat) 20 October 1998, RAJ 1998 (5) no. 8844 p. 13069 as well as Law on Third Party Civil Liability and Insurance in the Circulation of Motor Vehicles (*Texto Refundido de la Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor*, enacted by *Real Decreto Legislativo* Nr. 8/2004 of 29 October 2004, Damages Table IV, Note 11) and for the COMMON Law *Daly v. General Steam Navigation Ltd.* [1981] 1 WLR 120. In SWEDEN (Tort Liability Act chap. 5 § 1(2) in conjunction with § 1(3) 2nd sentence) and in DENMARK (Tort Liability Act § 1(3)) the entitlement of a housewife to recover for loss of housekeeping capacity is the subject of express statutory regulation.

V. Non-economic loss

33. The underlying requisites for permitting the recovery of non-material damage in the European jurisdiction, despite recent steps taken towards convergence, still diverge greatly. As a general rule, two basic models are encountered. A number of European legal orders hold every damage recoverable. The remainder adopt a contrasting aproach and espouse the principle that non-material damage is generally only compensatble where provided for by law. In non core fields, up to now, no consensus has been reached on the question whether damage to injured feelings should be compensatable. On the other hand, there is seldom a distinction drawn between

liability for faulrt and strict liability; as far as the latter is concerned, in the interim, it is common practice throughtout Europe to permit recovery for non patrimonal loss.

34. BELGIAN, FRENCH and LUXEMBOURGIAN law proceed on the basis that both material and non-material loss which can be attributed to the tortfeasor's wrongdoing, is a recoverable head of damages (see for France, at an early stage Cass.civ. 13 February 1923, D. 1923, I, 52 and for Luxemburg Cass. 10 May 1990, Pas. luxemb. 1990-92, 37). The Belgian courts consider that the function of compensation for non-material damage is to ease pain, grief or other non-material suffering (Cass. 3 February 1987, Pas. belge 1987, I, 644). The recovery of non-pecuniary loss under the three legal systems does not depend on the drawing of any distinction between fault liability and the strict liability of the *gardien* (CC art. 1384(1)) (*Viney and Jourdain*, Les conditions de la responsabilité[2], no. 246 p. 1). In French academic circles, it is submitted that awarding damages for a *dommage moral* is not cognate to *réparer*, but must be viewed in the light of a *compenser* of the *irréparable* (*Terré/Simler/Lequette*, Les obligations[8], no. 712 p. 691). Accordingly ,the *dommage moral* is defined as a damage which does not signify detriment to the assets of the aggrieved party (*Flour/Aubert/Savaux,* Le fait juridique[9], no. 139 p. 128; *Dirix*, Het begrip schade, no. 86 p. 62). The mere intention of inflicting injury on another, in other words the abusive exercise of a right the injured party renders an entitlement to recover the *dommage moral* in isolated cases (e.g. CA Lyon 9 March 2006, JCP 2006, IV, 2661: refusal to issue a document of divorce required by religious ordinances).

35. SPANISH CC art. 1902 simply declares (a transplant of the Code Napoléon arts. 1382-1384) that " damage" which is caused to another is compensatable. No distinction is made between material and non-material damage. Initially, i.e until a later decision of the *Tribunal Supremo* of 12 December 1912 (cited by, *inter alia*, *Santos Briz,* La responsabilidad civil I[7], 165) only pecuniary loss (*daño material*) was recoverable. The above cited judgment fundamentally altered this prior conception of damage. Since the handing down of that judgment, Spanish jurisprudence has consistently declared that non- pecuniary loss is recoverable (e.g. TS 26 January 1972, RAJ 1972 (1) no. 120 p. 119; TS 19 December 1986, RAJ 1986 (5) no. 7682 p. 7462). Moreover, CP art. 110(3) expressly provides that non-material damage is recoverable in the event that the imposition of civil liability derives from the commisssion of a crime. Further, non-material damages are also explicitly envisaged by the Law 1/1982 (of 5 May 1982) on the Civil Protection of the Right to Honour, to a Sphere of Intimacy and the Right to Control the Reproduction of One's Own Image. art. 9(3). Spanish legal writing does not devote much attention to the distinction between economic and non economic loss. The ascertainment of the constitutents of the *daño moral* remains a perenniel problem. In general, it may be asserted that the *daño moral* comprises of all damage which does not have repercussions on the individual's wealth (*Lete del Río*, Derecho de obligaciones II[3], 193), further all injuries to the rights of the personality are compensatable. The latter is recoverable independent of the consideration of the effect on the injured party's patrimony (*Díez-Picazo and Gullón*, Instituciones de Derecho Civil I, 828). Spanish legal writing makes a distinction between non-material damage in a narrow sense (genuine non-pecuniary damage: *daños propiamente morales, daños morales propios*) and oblique or indirect patrimonial (*daños patrimoniales indirectos*, *daños morales impropios*). The first category embraces damage which results in injury to beliefs, feelings, dignity, reputation or physical or pschological health which do not directly impinge on the patrimony of the aggrieved party; the latter classification concerns economic loss which specifically derives from the infringment to a non-material interest.

36. Conversely, the prevailing principle in ITALY provides, (as consecrated in CC art. 2059) that non-economic loss may not be generally recovered unless expressly provided for by law Effectively, this entails that cases where a tort also amounts to a crime form the vanguard in this area (CP art. 185(2)). Further instances are provided for by supplementary statutes, e.g. Law 117/88 (Compensation for Damages caused by the exercise of judicial functions and the Civil Liability of Judges) art.2 which provides that claim for compensation for non pecuniary damage may be brought where it arises from a deprivation of liberty occasioned by judicial error art. 2; Personal Data Protection Code (*Decreto Legislativo* 30 June 2003, no. 196, Suppl.ord. alla Gazz. Uff. 29 July 2003, no. 174, *Codice in materia di protezione dei dati personali*) art. 15; and the Decree on the Prohibition of Discrimination art. 44(70). The precise scope of application of the articles CC arts. 2043 and 2059 (which have been deemed compatible with the Constitution: Corte Cost. 26 July 1979, no. 87, Foro it. 1979, I, 2543; Corte Cost. 14 July 1986, no. 184, Foro it. 1986, I, 2053; Corte Cost. 27 October 1994, no. 372, Foro it. 1994, I, 3297; Corte Cost. 22 July 1996, no. 293, Resp.civ. e prev. 1996, 909) has, as previously mentioned, absorbed both scholarly attention and that of the courts for a considerable amount of time. Fleetingly, an interpretation of CC art. 2059 took hold whereby the provision, nothwithstanding its express wording ("Non - pecuniary loss") was deemed to solely govern cases of pure moral damage arising from emotional distress (Corte Cost. 14 July 1986, no. 184, Foro it. 1986, I, 2976); the limits set forth in CC art. 2059 thereby only appertained to damage of this nature. Since the mid eighties (either directly or by way of analogy) recovery has been permitted for injury to the psycho- physical integrity of a person on the basis of CC art. 2043 in conjunction with Cost. art. 32. Thus, it was possible to remove liability for the protection of health from being fenced within the narrow parameters of CC art 2059. From a systematical viewpoint, this "trick" was facilitated by channelling the aforementioned development of the doctrine of *danno evento*, whose most important manifestaion was comprised of the *danno biologico*. Gradually, however the courts again revisited and retreated from this *danno evento* line of jurisprudence and proceeded to recognise the non-pecuniary nature of the *danno biologico* (Corte Cost. 27 October 1994, no. 372, Foro it. 1994, I, 3297). This does not lead, however, recovery being predicated on satisfying the narrowly drawn requisites of CC art. 2059. The courts have refashioned the provision with the result that its restrictive conditions apply only to claims for the recovery of damage arising from emotional trauma, i.e. moral damage in its narrow sense. Conversely, the restrictive limits of CC art. 2059 should not apply if the recovery of non-economic loss is concerned arising from the an infringement of a constitutionally protected right (for example, protection against interference to health and bodily integrity and the protection of the family). In this manner, the *danno biologico* is retained as a recoverable head of damage, irrepsective of whether recovery is expressly ordained by a special law (which is required by CC art. 2059) or otherwise (Cass. 31 May 2003, nos. 8827 and 8828, Giur.it. 2004, I, 1, 29; Corte Cost. 11 July 2003, no. 233 Resp.civ. e prev. 2003, 1036). It appears that a corresponding approach is adopting in respect of the recovery of the socalled *danno esistenziale*. This arises where there is a permanent and negative detrimental effect on a person's daily life and social interaction with others. Similarly this category is viewed as representing a discrete indemnifiable head of damages which are separately liquidated and is consequent upon the infringment of a constitutionally protected right which is exempt from to the underlying restrictions of CC art. 2059 (Cass. 31 May 2003, nos. 8827 and 8828, Giur.it. 2004, I, 1, 29; Corte Cost. 11 July 2003, no. 233, Resp.civ. e prev. 2003, 1036; Cass. Pen. 25 November 2003 - 22 January 2004, Foro it. 2004, II, 138; Cass.sez.un. 24 March 2006, no. 6572, Giur.it. 2006, I, 1359). After

all that, it should be noted that Italian law recognises three different catergories of non – economic loss (*danno morale*, *biologico* and *esistenziale*), the recovery of which is governed by various regulations (Corte Cost. 11 July 2003, no. 233 loc. cit.; the jurisprudence of the Supreme Court displays an increased tendency to distance itself from the discrete category of *danno esistenziale* and instead are inclined to advert, in general terms, to the non-pecuniary consequences oft eh infringement of constitutionally protected rights). According to recent jurisprudence, the calculation of the award of damages is once again vested in the discretion of the trial judge; this entails that the latter is no longer bound to follow the prior mathematical formulae utilised for the calculation of award of damages for *danno biologico* (Cass. 31 May 2003, nos. 8827 and 8828 loc. cit.). This discretional assessement takes into account the gravity of injury, the intensity of the anguish, the sensitivity of the injured party as well as the respective economic position of the parties. However, the enduring principle in Italian law is to refuse to allow recovery for non-economic loss in strict liability cases. The basic tenet, i.e predicated upon the lack of any countervailing statutory provision, is that *colpa* of the tortfeasor must be extant in order to recover for non-pecuniary loss. A failure to rebut a refutable legal presumption in the instant case will satsify this criterion, however a legal presumption of liability (as in e.g. CC arts. 2054(4), 2051 and 2052) will not suffice. However, the courts have created an exception in the field of strict liability for infringment of constitutionally protected personal values. Here, non- econonmic loss is deemed recoverable even if the liability incurred is strict (Cass. 27 October 2004, no. 20814, Resp.civ. e prev. 2005, 98; cf. CFI La Spezia 27 October 2005, Danno e resp. 2006, 173; Foro it. 2005, I, 3500: recovery for biological damage allowed, moral damage disallowed).

37. Until 1992, the year in which this provision was deemed unconstitutional by the Constitutional Courts on grounds of its perceived arbitrariness, (Decision of the Constitutional Court [*AB határozat*] 34/1992. [VI.1.]), HUNGARIAN CC § 354 k incorporated the rule that a wrongdoer was obliged to compensate non-material loss in the event that the loss resulted in the irretrievable or severe impairment to the aggrieved party's ability to participate in social intercourse or ability to organise his/her affairs or where prejudice is sustained by a legal person in its commercial dealings. Since then, the law currently continues to abide by the general rule concerning the indemnification of non-material damage (CC § 355(1) and (4)); the precise constitutents are filled in by the courts.

38. Pursuant to POLISH CC art. 445(1) and (2), a claim for indemnification of non-pecuniary damage may only be asserted in cases where there is injury to body or health, of deprivation of liberty and infringements of the right to sexual self determination. CC art. 448 broadens the scope of this rule to encompass injury to incorporeal rights of personality and further, confers a right upon the injured party to even direct that the award of compensation be paid to a charitable organisation of his/her choice. The prevailing view, however, is that CC art. 448 also applies to cases of personal injury. According to that view, it is only within the framework of CC art. 448 (and not within the framework of CC art. 445) that fault is a prerequisite for a claim (*Safjan,* Kodeks cywilny I[4], 1311-1314; *Radwański and Olejniczak,* Zobowiązania-część ogólna[5], 243; SN 12 December 2002, OSNC 2004, poz. 53). CZECH and SLOVAKIAN CC § 444 awards damages for non – pecuniary loss (in the form of a lump sum) only in cases of injury to body or to health. Damages are designed to compensate "pains and aggravation of (the victim's) social assertion". The former reluctance of Central and Eastern European jurisdiction, to permit recovery for non-pecuniary loss is abandoned by SLOVENIAN LOA art. 132, which, since 2002, sets forth: "Damage comprises the diminution of property (ordinary damage),

prevention of the appreciation of property (lost profits), the infliction of physical or mental distress or fear on another person, and encroachment upon the reputation of a legal person". Further particulars are regulated in LOA arts. 178 and 179 (for further analysis *Trstenjak*, MfOR 2002, 90, 106-107).

39. The "*Second Act on the Amendment of Provisions Pertaining to the Law of Damages*" of the 18 April 2002 (BGBl. 2002 I 2674) which was commenced on the 1 of August 2002 heralded a reform of the GERMAN law on the indemnification of non-peruniary loss. The point of departure remains CC § 253(1), according to which compensation for non- pecuniary loss may only be awarded in the cases specfied by law. This provision is supplemented by the addition of a new subpara. CC § 253(2), which provides that: " if compensation is to be awarded for injury to body, health, liberty of the right to sexual self determination, a fair monetary compensation may also be claimed in respect of any non-economic loss." This rule embraces both fault based and strict liability under the Code. In addition, with a number of modifications, CC § 253(2) is referred to in all supplementary statutes regulating instancs where strict liability is imposed. The upshot of this is that in the instancs enumerated above, compensation for non-material loss may also be claimed in cases of objective liability. The right to claim damages for non-pecuniary loss for infringements of rights of personality directly derives from the provisions oft he Constitution which protect basic human rights (GG art. 2 in conjunction with art. 1) (BGH 19 September 1961, BGHZ 35, 363, 368; BGH 15 November 1994, BGHZ 120, 1, 15; BGH 5 April 2000, NJW 2000, 2195,2197).

40. Similarly, in AUSTRIA, as a general rule, non-material loss may only be recovered in cases expressly ordained by law (*Koziol*, Haftpflichtrecht I³, no. 11/17; Rummel [-*Reischauer*] ABGB II² § 1324 no. 11; OGH 21 March 1951, JBl 1951, 377; OGH 26 April 1989, JBl 1989, 792 = RS0022551 [re compensation for loss of enjoyment on holiday]). The view has been advanced in legal literature that, CC § 1323 provides a general basis for the rule that non-material damage is recoverable if the damage sustained is caused by gross negligence (*Bydlinski*, JBl 1965, 173, 237, 247). At least in light of the results achieved, it can be said that there is a convergence between this conception and recent jurisprudence of the OGH (OGH 16 May 2001, ZVR 2001, 284, note *Karner*; *Fötschl*, VersRAI 2001, 60). In this decision, the court awarded non-pecuniary damages for parents' emotional suffering which was occassioned by the loss of their child. A claim for this head of damages may only be claimed in cases of intention or gross negligence. Despite strong critiscism from legal commentators, this distinction remains and thus entails that no claim can be made, in relation to this head of damages, in cases of strict liability (e.g. *Schobel*, RdW 2002/195, p. 206) .

41. While GREEK CC art. 299 also takes, as its point of departure, the basic rule that compensation for non-pecuniary loss can only be awarded in cases provided for by law, it does not, however, pan out in this way in the field of non contractual liability law. This is due to the fact that CC art. 932 also comprehended by the enumerated cases in CC art. 299. The former deems that an equitable compensation may be recovered for non-material damage occasioned by tortious action. This claim arises independant of thr existence of any pre-existing pecuniary loss (*Paterakis*, I chrimatiki ikanopoiisi logo ithikis vlavis, 244, 253; Georgiades and Stathopoulos [-*Georgiades*], art. 932, no. 4; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 291) and, further, the claim does not hinge upon whether liability is fault based (*Kornilakis*, I evthini apo diakindinevsi, 185; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 290; *Paterakis*, I chrimatiki ikanopoiisi logo ithikis vlavis, 263; Georgiades and Stathopoulos [-*Georgiades*], art. 932, no. 5; A.P. 444/1964, NoB 12 (1964) 1075; CA Patras 256/1984, NoB 32 (1984) 1567). CC arts. 57 and 59 stipulate that damages may

be recovered for non-material loss consequent upon an infringement of personality rights. CC art. 59 extends beyond CC art. 932, in so far as it provides for other forms of redress other than monetary compensation. Within the confines of CC art. 932 recovery is permitted for non-material loss arising out oft he commission of any tort. This is because CC art. 932 second sentence only contains indicative example of the application of the rule and has been expressly stated that an exhaustive rule is not comprehened by the provisionto an exhaustive, compare. A.P. 1589/1979, NoB 28 (1980) 1115, 1117 and CA Athens, 658/1975, NoB 23 (1975) 508 (non-material loss resulting from infringments of the right to ownership); CA Athens 3995/1970, Arm 1971, 410 (killing of a dog); CA Thessaloniki 1809/1990, Arm 1990 440 (Parental liability; daughter damaged a car); CA Thessaloniki 455/1982, Arm 1983, 212 (a brawl in pub for which the defendant was responsible; the plaintiff landlord was permitted to claim non-material damage); A.P. 175/2005, NoB 53 (2005) 2023 (Non-material damage given because another swimmer, in contravention of byelaws, took his dog to the beach and took the dog for a dip in the sea with him) The family of a person killed as a result of a tortious act may assert a claim for non-pecuniary loss for emotional distress (CC art. 933 third sentence).

42. PORTUGUESE CC art. 483(1) embraces both material and non-material damage. CC art. 483(1) is supplemented by CC art. 496, according to which non-pecunairy damages (*danos não patrimoniais*) may only be recoved if that loss " is deserving of legal protection on grounds of its severity" (on this point e.g. STJ 18 Novemer 1975, BolMinJus 251 (1975) 148, whereby mere inconvenience is excluded from the ambit of recovery for non- pecuniary loss). Portuguese law does not contain a rule which corresponds to the German CC § 253 or the Greek CC art. 299. It may be recalled that these provisions both provide that non-material damage may only be compensated in instances provided for by law.w

43. However, DUTCH CC art. 6:95 has adopted the latter principle and it provides : To the extent that the law confers a right to compensation thereof, the damage comprises of pecuniary loss and any other prejudice", a claim for the latter may only be asserted " insofar as a right of compensation is envisaged by the law". CC art. 6:95 expressly distinguishes patrimonial loss from other prejudice; the latter are only compensatable when the law expressly provides for their recovery. The terms "other prejudice" is understood as encompassing the socalled non-material (intangible or non patrimonial) loss (see further Asser [-*Hartkamp*], Verbintenissenrecht I[12], nos. 464 ff pp. 424 ff). A claim may only be asserted once the requisites of CC art. 6:101 satisfied, essentially therefore, (a) in respect of intentional infliction of immaterial prejudice (b) in respect of injury to corporeal and incorporeal personality rights and (c) violations to the reputation of the dead.

44. ESTONIAN LOA § 128(1) makes the distinction between pecuniary and non material loss. CC § 128(5) adds that: "non-patrimonial damage involves primarily the physical and emotional distress and suffering caused to the aggrieved person". The subsequent provisions each explicitly detail which forms of injury entitle a claim for damages: CC § 130(2) (Injury to Body and to health), CC § 131 in conjunction with CC § 134(2) (grave injury to liberty, honour and personality) and CC § 134(4) (Damage to or loss of intangible property; only in circumscribed circumstances is a tortfeasor deemed liable for non-material damage). For further analysis see *Tammiste*, Juridica 2004, 129–141. In a similar fashion, LITHUANIAN CC art. 6.250(2) emodies the principle that "non-pecuniary damage shall be compensated only in cases provided for by laws." Once more, CC art. 6.263(2) explicitly confirms the applicability of this principle to the field of tort law . CC art. 6.250(1) defines non-pecunairy loss in the following terms : „Non-pecuniary damage shall be deemed to be a person's suffering, emotional

experiences, inconveniences, mental shock, emotional depression, humiliation, deterioration of reputation, diminution of possibilities to associate with others, etc., evaluated by a court in terms of money".

45. Similarly, in the NORDIC COUNTRIES, a distinction is drawn between patrimonial and non patrimonial damages. The latter are only recoverable in cases specially ordained by law. However, there is an absence of an express statutory provision which would serve to buttress the aforementioned basis principle.(*Hellner and Johansson*, Skadeståndsrätt[6], 371; *Vinding Kruse,* Erstatningsretten[5], 346). SWEDISH law uses the Tort Liability Act chap. 5 § 1(3) as its point of departure. According to this provision, damages for personal injury encompasses compensation for pain and suffering (*sveda och värk*) or for other enduring impairments (*lyte eller annat stadigvarande men*); both heads of damages connote compensation for non material loss. The same holds true for compensation for "particular interferences" which are also enumerated in this provision, (*Sandstedt*, VersRAI 2002, 10, 11). The corresponding regulations under DANISH are encountered *Erstatningsansvarslov* § 1 in conjunction with. §§ 3-4 and, under FINNISH Law in Tort Liability Act chap. 5 § 2 and § 2c (however, there is no corresponding reference to "particular interferences"). The compensatable heads of damages for no-pecuniary loss damages comprise further damages for socalled injury caused by affront to feelings, i.e recovery is permitted for injury to liberty and honour as well as for particular manifestations of the intrusion to a person's privacy. According to SWEDISH law, the aforementioned damages to one's feelings (e.g. in respect of criminal "disturbances of the peace") may also be awarded in cases of mere damage to physical property (*Hellner and Johansson*, Skadeståndsrätt[6], 373). The legal basis for compensation for injured feelings is presently anchored in Tort Liability Act chap. 2 § 3 (fort h most recent amendment to this Act, see *Sandstedt* loc. cit.). Under DANISH law, damages for injured feelings is governed by *Erstatningsansvarslov* § 26, under FINNISH law, the claim for damages for socalled "suffering" is regulated in Tort Liability Act chap. 5 § 6. Moreover, in Scandanavia, a claim for non-material damage may be asserted for breaches of intellectual property rights and socalled right to a name (*Hellner and Johansson*, Skadeståndsrätt[6], 73, fn. 56 and 57). To conclude, SWEDISH Marketing Act (*marknadsföringslag* [1995:450]) § 29(2) provides: " When determing compensation to be awarded to business operators, regards may be had to circumstances which are not exclusively of an economic nature". In DENMARK, the courts have reached the same conclusion based on a statutory provision that deviates somewhat from the Swedish position (HD 30 August 1989, UfR 1989, 1146). Conversely, in FINLAND, it may be assumed that recovery of non-material damage is not permitted for infringements of competition law (*Kaulamo,* Probleme des finnischen Wettbewerbs- und Marketingrechts, 401).

46. In both ENGLISH and SCOTS law damages for non-pecuniary loss are available where the tort (or delict) results in physical personal injury, death, psychiatric injury, intentional invasion of a person's personal sphere, defamation, or where there is nuisance affecting the environment of immoveable property (*Hunter v. Canary Wharf Ltd.* [1996] 2 WLR 348). In cases of nuisance in English law this is confined to householders, on a view that the tort is aimed at protecting land (*ibid.*). However, recently in effect such a claim has been recognised in cases against public authorities as available to a wider range of people affected though basing the claim on a breach of Human Rights law (*Marcic v. Thames Water Utilities Ltd.* [2002] EWCA Civ 64, [2002] QB 929). The question whether a distinction between intention and other bases of liability has a bearing on whether non-pecuniary damages are available is in English law currently controversial. The view has been expressed judicially that in all torts

involving intention damages for non-pecuniary loss are always available for distress, inconvenience or discomfort (*Hunter v. Canary Wharf* [1997] AC 655 per Lord *Hoffmann*). Non-pecuniary damages are generally available in strict liability cases on the same basis as they are in negligence cases. Consumer Protection Act 1987 s. 6(1)(a) and (c) confirm this general rule. In the law of defamation liability is strict and awards under this head can be large. In both England and Scotland defamation cases can be heard and decided by jury trial. In response to the European Court of Human Rights (*Tolstoy Miloslavsky v. United Kingdom*, ECHR 13 July 1995, App. no. 18139/91) holding that jury awards without any control result in this field in a potential breach of Eur.Conv.Hum.Rights art. 10 (freedom of expression), control at appellate level has now been instituted, putting maximum levels on such awards.

47. The terminology for describing awards of non-pecuniary damages differs between English and Scots law. In SCOTLAND these awards are categorised as awards of *solatium* as opposed to damages for "patrimonial loss". In ENGLAND they are awards made under the head of "general damages", which is the heading that comprehends all aspects of a claim that are not capable of precise assessment. In cases of physical personal injury the award in England is characterised within this as an award for „pain and suffering and loss of amenities of life". In both jurisdictions the general nature of such awards results in them also being made in cases where the claimant is permanently unconscious and shown not to be suffering any pain (*H. West Ltd. v. Shephard* [1964] AC 326; *Dalgleish v. Glasgow Corp.* 1976 SC 32). In Scotland *solatium* awards for personal injury are analysed into three components (while awarding one figure), namely, pain and suffering, loss of faculties and amenities, and loss of expectation of life, which roughly map onto the factors that are considered in an English award.

VI. Non-economic loss juristischer Personen

48. It is well-nigh universally accepted that legal persons can also sustain non-economic loss and entitled to compensation thereof. This is a valid proposition for e.g for FRANCE (*le Tourneau and Cadiet*, Droit de la responsabilité et des contrats (2002/2003), no. 1466 pp. 387-388; compare also. Cass.ch.mixte 6 September 2002, Bull.ch.mixte 2002, no. 4 p. 9 symbolic sum of one franc awarded in facour of a consumer protection agency]) and for BELGIUM (*Simoens*, Schade en schadeloosstelling, 260). Typical cases pertain to injury to reputation (*Schuermans/Van Oevelen/Persyn/Ernst/Schuermans*, TPR 1994, no. 4.2 pp. 932-934). The criminal law division of the French Cour de cassation decided, however, in an *action civile* (in which a tort claim in respect of damage arising out of a criminal offence is raised and adjudicated upon within the criminal process), that the State and local authorities cannot assert a claim for compensation for non-pecuniary loss (Cass.crim. 26 February 1986, GazPal 1986 Som., 339). In addition, under the private law, legal persons are not entitled to assert a claim for damages for infringment of the right to one's own image or the breach of the right to respect for privacy (*Tallon*, Rép.Dr.Civ. VIII, v° Personnalité (Droits de la) (1996), no. 153; otherwise for Belgium - protection of the company's inner workings regarded as an aspect of the protection of the right to "private life" - *de Page and Masson*, Traité élémentaire de droit civil belge II(1)[4], no. 20 pp. 29-30).

49. Despite eliciting some criticism in legal literature, (e.g. *Gómez Pomar*, Comentario a la sentencia del Tribunal Supremo, 4) the approach of the SPANISH courts is to also award legal persons damages for non-pecuniary loss (TS 23 March 1987, RAJ 1987 (1) no. 1716 p. 1631; TS 4 October 1997, RAJ 1997 (4) no. 7641 p. 12103; TS 20 February 2002, RAJ 2002 (2) no. 3501 p. 6117). A corresponding situatuion prevails

in AUSTRIA (OGH 5 December 1989, SZ 62/192; *Koziol*, Haftpflichtrecht I³, no. 11/2, fn. 5) and for ITALY. Practical examples relate mostly to innterference with honour and reputation, (Cass. 10 July 1991, no. 7642, Giur.it. 1992, I, 1, 96), prejudicing credibility (Cass. 3 March 2000, no. 2367, Giust.civ.Mass. 2000, 518; Cass. 5 December 1992, no. 12951, Foro it. 1994, I, 561), injury to the right to one's name and image (for the latter see. Corte dei Conti, sez. riun. 23 April 2003, no. 10, Giur.it. 2003, 1710 re. The protection of a local authority's image; Compensation of the danno esistenziale). It is even possible to infringe a legal person's private sphere (*Franzoni*, Dei fatti illeciti, arts. 2043-2059, 1204-1205). The following have been deemed to connote creditors: private law companies (Cass. 3 March 2000 loc. cit.), local authorites (Cass. 15 April 1998, no. 3807, Resp.civ. e prev. 1998, 992), a foreign State (Cass. 5 December 1992 loc. cit.) and Italian State (Cass. 10 July 1991 loc. cit.).

50. Furthermore, non pecuniary loss suffered by legal persons is also deemed recoverable in HUNGARY (where this followed already from the former CC § 354), in SLOVENIA (LOA art. 132: "encroachment upon the reputation of a legal person"), in POLAND (*Radwański and Olejniczak*, Zobowiązania-część ogólna[5], 244; SN 15 December 1975, LEX no. 77/80), in THE NETHERLANDS (see. *inter alia* Parlementaire Geschiedenis VI, 380; Schadevergoeding [-*Deurvorst*], art. 106, no 11; Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 240 p. 227; *Overeem*, Smartegeld, 54-55; CFI Amsterdam 8 March 2006, LJN AV3959), in GREECE (A.P. 479/1968, NoB 17/1969, 597; CA Athens 4105/2004, DEE 12 [2006] 306 [The Consumer Protection Act 2251/1994 art. 10(9) and (13) (now arts. 10(15) and (16)(b) as inserted by Act no.3587/2007): award of non- material damages to Consumer Protection Agency; relayed to charitable organisation]), in PORTUGAL (Capelo de Sousa, Direito de personalidade, 599; *Vaz Serra*, Reparação do dano não patrimonial, BolMinJus 83 [1959], 70; *Gouveia de Andrade*, Da ofensa do crédito, 73; *Ferreira Dias*, O dano moral, 39; STJ 15 June 1994, BolMinJus [1998] 438; STJ 5 October 2003 and STJ 5 October 2003; compare, however, on the issue of the socalled *danos patrimoniais indirectos* of legal persons STJ 9 June 2005) and in the NORDIC COUNTRIES (. e.g. for SWEDEN Marketing Act § 29 and for DENMARK *Lynge Andersen*, UfR 1977, 241).

51. Conversely, in GERMANY, a legal person cannot generally claim damages for non – pecuniary loss. The fact that tort law protects the incorporeal personality rights of legal persons is indeed uncontentious, however, the courts are of the view that the function of an award of "satisfaction" cannot not be fulfilled in the case of a legal person thereby leading to the exclusion of a claim for non-material loss (BGH 8 July 1980, BGHZ 78, 24, 28; CA Munich 28 May 2003, MDR 2003, 1418). An exception is however permitted for legally incorporated religious organisations (BGH 25 September 1980, BGHZ 78, 274, 280). In contrast, the COMMON Law entitles a legal person to pursue a claim for redress of non-material harm in respect of damage to business reputation (*Jameel v. Wall Street Journal Europe SPRL (No. 3)* [2006] UKHL 44, [2007] 1 AC 359).

52. On 6 April 2000, the European Court of Human Rights decided in that case of *Comingersoll S.A. v. Portugal*, ECHR [GC] 6 April 2000, App. no. 35382/97, that a public limited company may also claim compensation for non-pecuniary loss pursuant to art. 41 ECHR, the loss originated from the undue length of civil proceeding relating to a claim arising out of bills of exchange (see further *Ress*, FS Ishikawa, 429).

VII. Breach of Absolute Rights

53. In Europe, one of the most controversial questions remains the question as to what what significance should be ascribed to the concept of absolute rights within the

framework of tort law. It is indeed true that, in all of the European jurisdictions prejudice resulting from a breach of absolute rights is, in principle, recoverable, however, there is a lack of consensus on what hierarcharical level these rights are to be ranked (for further analysis of this issue, see VIII.), and, secondly, above all, on the determination of the issue- whether a violation of absolute rights is of paramount or merely of accidential importance for tort law. In the latter case, tort liability may arise even in the absence of an infringement of such a right; its presence merely amounts to an evaluatory parameter, one of many, to be used by the courts when it comes to fleshing out the content of the "intrinsic" requisites for establishing liability (damage, fault and causation). It should be noted that the concept of absolute rights is not one that is employed in common law jurisdictions.

54. Tort liability under BELGIAN, FRENCH, MALTESE and LUXEMBOURGIAN law does not depend on the breach of a legally protected absolute right. These legal orders only require the occurence of damage, but then are of the view that the mere infringement of a right, alone cannot justify the imposition of liability because this infringement does not necessarily entail that damage arises from the breach (*Viney and Jourdain*, Les conditions de la responsabilité[2], no. 247 p. 3; *Dirix*, Het begrip schade, no. 1 p. 13; *Ravarani*, La responsabilité civile, no. 691 p. 487; Cass. 21 June 1990, RW 1990-91, 1199). An exception to this basic rule has developed out of a number of judgments of the FRENCH *Cour de cassation*, which espied not only a *dommage* arising out of breaches of rights to ownership and intellectual property *ipso iure* but at the same time also perceived a delictual *faute* (see in particular Cass.civ. 11 October 1983, Bull.civ. 1983, I, no. 225 p. 201 [infrigment of copyright] and Cass.req. 6 March 1934, D.P. 1937, I, 17, note *Blaevoet* [violation of an owner's *droit de possession*]).

55. Similarly from a SPANISH persepective, protection of absolute rights is not the function of tort law, rather this task is assigned to other civil actions, in particular, the action for the restitution of goods (*acción reivindicatoria*) and a negatory action (*acción negatoria*) (*Pantaleón Prieto*, Artículo 1902, p. 1972; *Díez-Picazo*, Derecho de daños, 291; *De Ángel Yágüez*, Tratado de responsabilidad civil[3], 260). These claims merely require an encroachment of the claimant's sphere of control amounting to a violation of the holder's subjective right, conversely neither damage nor fault are required. In contrast to this position, the provisions of Spanish tort law do not require the violation of the claimant's subjective right (either absolute or relative) or breach of a legally protected interest (*Pantaleón Prieto* loc. cit. 1993 ff; *Díez-Picazo* loc. cit. 50). According to CC art. 1902 in principle, all damage is recoverable, the rider added that recovery is not permitted if the loss was sustained to an interest that was immoral or illegal.

56. Similarly ITALIAN CC art. 2043 does not employ the notion of the violation of an absolute right or legal interets. The determinitive prerequisite for the impsoition of liability is rather the (culpable) infliction of a *danno ingiusto*. In turn, a *danno ingiusto* generally arises when a legally protected interest is infringed (see Note *I1 above*). Detriment suffered as a result of the breach of an absolute right connotes a legally protected interest, therefore there is no doubt tort laiability can be incurred for sucgh breachs (*Franzoni*, Dei fatti illeciti, arts. 2043-2059, p. 194). Of course, this does not preclude the recovery of damage under CC art. 2043 which does not arise from such a breach.

57. The codifications of Central and Eastern Europe universally follow the approach of the Romance legal orders. None of the Codes in the basic norm refer tot he infringment of a right as a prerequisite for tort liability to arise; the determining factor (and adequate

in itself) everywhere is the infliction of damage (CZECH and SLOVAKIAN CC § 420; HUNGARIAN CC § 339(1); POLISH CC art. 415; SLOVENIAN LOA § 131).

58. The approach of GERMAN CC § 823(1) stands in stark contradistinction to the aforementioned codifications. According to this provision, tort liability only arises if injury is caused in an unlawful and culpable manner to "life, body, health, liberty property or any other right". Only under exceptional circumstances, will tort liability arise independant of a breach of these right. This will ensue particularly in the cases appertaining to § 823(2) (violation of a protective law) and to § 826 (intentionally causing harm to another in a manner that is contra bono mores). PORTUGUESE CC art. 483(1) largely corresponds to German CC § 823(1) and (2).

59. According to the wording of AUSTRIAN CC §§ 1293 and 1295, there is no requirement that an absolute right be infringed in order for tort liability to arise (analogous position to French CC arts. 1382 and 1383). However, belying this wording, both the courts and academic teaching require the violation of an absolute right or the breach of a protective statute, in order for tort liability to be incurred. The argument advanced is that it is necessary to avoid the spectre of boundless liability for damage, which would thereby place an overwhemling burden on the economy (see for adivergent view to many Schwimann [-*Harrer*], ABGB VII^2, § 1293 no. 2 and OGH 7 March 1973, SZ 46/31). The "patrimony" as such of a person is not accorded absolute protection (OGH 12 April 1984, JBl 1985, 38).

60. DUTCH CC art. 6:162(2) expressly defines an unlawful act as comprising of a "violation of a right". A similar, however considerably more precise definition is contained in ESTONIAN LOA § 1045(1).

61. The notion of "absolute rights" is not a feature of the tort law of the NORDIC COUNTRIES; these types of dogmatic categories are incompatible with Scandanavian legal realism. Similarly, the ENGLISH and IRISH law of torts as well as that of SCOTTISH law function without the legal doctrine of absolute rights.

VIII. Particulars to certain rights

62. It is a self evident proposition that the killing of a person, injury to health or to body, deprivation of liberty and damage to physical property all give rise to a claim for damages. However, as far as the treatment of other rights under the tort law is concerned, is subjected to a variegated approach. While not claiming to be an exhaustive portrayal, the following treatise affords an overview of a number of the most practically relevant rights, which the Article in Section 2 of Chapter 2 does not paticularise.

(1) Incorporeal Rights of the Personality

63. The Civil law legal orders largely regard the protection from the arrogation by a third party of the absolute right to one's name as self evident. Preventative legal protection as well as represseive legal protection (in the case of loss) exists to combat such transgressions. see for FRANCE *le Tourneau and Cadiet*, Droit de la responsabilité et des contrats (2002/2003), no. 1608 p. 419 (a family member who does not bear the same name would even have *locus standi*: Cass.civ. 5 February 1968, JCP 1968, II, 15670); for BELGIUM (where it is a bone of contention in the case of incorporeal patrimonal rights whether a mere infringement of rights suffices for a claim of damages or whether loss must be proved.) *Guldix and Wylleman*, TPR 1999, 1589, 1624-1631 and CA Brussels 8 November 1989, RGAR 1992, 11906; for SPAIN Law on the Civil Status Register of 8 June 1957 (*Ley del Registro Civil*) art. 53; for ITALY CC arts. 7, 8 and 9 (on which see Cass. 5 October 1994, no. 8081, Giur.it. 1996, I, 1,

842 and Cass. 7 March 1991, no. 2426, Foro it. 1991, I, 2082; on the controversarial question as to whether a claim for recovery of *danno morale*, *Cian and Trabucchi*, Commentario breve al codice civile[6], sub art. 8, § 3); for HUNGARY CC §§ 77 and 84; for POLAND CC art. 23; for ROMANIA CC art. 54, for GERMANY CC § 12 (on which see BGH 26 June 2003, BGHZ 155, 273 and BGH 5 October 2006, WM 2007, 35); for AUSTRIA CC § 43 (on which see OGH 7 November 1962, SZ 35/110; OGH 22 October 1986, SZ 59/182 and *Koziol*, Haftpflichtrecht II², 9); for GREECE CC art. 58; for PORTUGAL CC arts. 72 and 74; for THE NETHERLANDS CFI Rotterdam, 4 February 1994, NedJur 1995, no. 39 p. 149; for ESTONIA LOA § 1046(1) and for SWEDEN the Act on Names and Pictures in Advertising [*Lag (1978:800) om namn och bild i reklam*].

64. The same holds true for the right to oppose unauthorised use and exploitaion of one's image and to assert a claim for damages in such cases. See for FRANCE CA Versailles 30 June 1994, D. 1995 jur. 645, note *Ravanas;* TGI Nanterre 6 April 1995, GazPal 1995 jur. 285; for BELGIUM see the references in the previous note; for SPAIN Cost. art. 18(1) and Law 1/82 of 5 May 1982 on Civil Protection for Civil Protection of the Right to Honour, to a Sphere of Intimacy and to Control over the Reproduction of one's own Image (*Ley Orgánica 1/1982, de 5 de mayo, de Protección Civil de los Derechos al Honor, a la Intimidad Personal y Familiar, y a la Propia Imagen*) art. 7(5) and (6) in conjunction with art. 8(2) and on this TS 26 January 1990, RAJ 1990 (1) no. 26 p. 60; for ITALY CC art. 10 (liability incurred if own picture or that of one's parents, spouse or child is reproduced without authorisation; see further Cass. 16 April 1991, no. 4031, Giur.it. 1991, I, 1, 1345 and – no compensation for *danno morale* – Cass. 10 november 1979, no. 5790, Resp.civ. e prev. 1980, 212); for HUNGARY CC §§ 80 and 84; for POLAND CC art. 23; for ROMANIA CC art. 54, for GERMANY KunstUrhG § 22; for AUSTRIA UrhG § 78 (see further OGH 6 December 1994, ZfRV 1995, 158, Rummel [-*Aicher*], ABGB I³, § 16 no. 19); for PORTUGAL CC art. 79; for THE NETHERLANDS HR 1 July 1988, NedJur 1988, 1000; for ESTONIA LOA § 1046(1), for SWEDEN the abovementioned Act on Names and Images in Advertising in the previous paragraph; for FINLAND among other decisions HD 21 November 1980, HD 1980 II 123 and for DENMARK among other decisions HD 25 January 1965, UfR 1965, 126.

65. The right to claim damages for a breach of the right to one's own voice is becoming increasedly accepted. See for FRANCE CFI Paris 3 December 1975, JCP 1978, II, 19002, note *Bécourt; Tallon*, Rép.Dr.Civ. VIII, v° Personnalité (Droits de la) (1996) no. 20 and no. 148 (here, allusions are made that a claim for damages only arises in the event of a pecuniary or non pecuniary loss eventuates); for SPAIN TC 25 April 1994, no. 117/1994, BOE no. 129 of 31 May 1994 and CA Barcelona 10 September 2003, TSJyAP 2004 (1) no. 289 p. 375); for ITALY *Bianca*, Diritto civile I[2], 187; for HUNGARY CC §§ 80 and 84; for POLAND CA Gdańsk 21 June 1991, OSA 1992, no. 8; and for AUSTRIA OGH 29 November 2001, MR 2002, 26 = RIS-Justiz RS0115837). Conversely, it remains uncertain whether the right to one's own voice as is deemed a protectable interest under DUTCH law (denying this claim CFI Utrecht 4 December 1996, NedJur 1998, no. 43 p. 237).

(2) Post-Mortal Protection of Personality Rights

66. There are varying approaches in evidence dealing with the issue as to whether and in which respect tort law protection of the personality of a person can extend beyond the grave and the purport of such rights is also contentious. We are not concerned here with cases where there there was a transgression of the deceased's personality rights while he was still alive and the assertion of such a claim befalls his successors in title

(These cases essentially fall to be resolved under the Law of Succession, compare. e.g. Cass.civ. 14 December 1999, Bull.civ. 1999, I, no. 345 p. 222: The right to resepct private and family law expires on the death of the bearer). The cases that come under consideration here concern circumstances where the deceased is "insulted".

67. It has been held in FRANCE that the deceased successors are only entitled to defend his/her memory against being portrayed in false or distorting reports, reports which are published in bad faith or where the report is excessively facetious (CA Paris 3 November 1982, D. 1983, 248, note *Lindon*; compare on the issue on postal-protection of image rights CA Paris 7 June 1983, GazPal 1984 jur. 528, note *Lamoureux and Pochon*, as well as, different view in parts, CFI Aix-en-Provence 24 November 1988, JCP 1989 éd. G., II, no. 21329, note *Joël Henderycksen*). In the case of an unauthorised publication of a photograph of a person's mortal remains and funeral, the widow and children are entitled to a damages claims on the grounds of interference with right to respect for family life derived from CC art. 1382 (CA Paris 26 April 1983, D. 1983 jur. 376, note *Lindon*). Considerable prominence is given to the fact that a criminal offence under *Loi sur la liberté de la presse* of 29 July 1881 art. 34(1) gives rise to a tort law action for damages (compare. Cass.civ. 22 June 1994, Bull.civ. 1994, II, no. 165 p. 95). The right to respect for private life expires eith an individual's death (Cass. 14 December 1999, Bull.civ. 1999, I, no. 345 p. 222).

68. Equally, the approach in BELGIAN equally leans towards the protection of certain rights oft he personality following the death of the bearer. This is especially true for the right to one's image, irrespective of whether it concerns the photograph of a corpse or depictions from the deceased's life which unlawfully discredit his memory (see further and also on the construction of *de Page and Masson,* Traité élémentaire de droit civil belge II(1)[4], no. 55 p. 69).

69. Likewise, post-mortal protection of personality rights commands general acceptance in SPANISH law. Arts. 4 and 5 of Law 1/82 of 5 May 1982 on Civil Protection for the Right to Honour, Intimate Sphere, and the Right to Control the Reproduction of one's Image defines the class of persons entitled to make a claim and also regulates an entitlement in the event that the injurious act took place during the lifetime of the deceased; art. 9(4) loc. cit. additionally clarifies the issue to whom non-pecuniary damages are due. TC 214/1991 of 11 November 1991, BOE no. 301 of 17 December 1991 conferred a right on a Jewish woman living in Spain in her capacity as a survivor of Holocaust the right to pursue civil and criminal law actions in order to defend the collective honour of the Jewish people against attacks.

70. ITALIAN law principally guarantees the protection of the deceased's dignity by vesting a right of action in the deceased relatives to vindicate this protection (*Bianca*, Diritto civile I[2], 154 and 187; CFI Rome 29 June 1998, Resp.civ. e prev. 1999, 477). Special copyright rules augment this protection (see in particular LA art. 23). In GERMANY, post-mortal personality rights even enjoy the status of constitutional protection (constitutively BVerfG 24 February 1971, BVerfGE 30, 173, 194; compare also BVerfG 5 April 2001, NJW 2001, 2957; for a comprehensive overview see *Pabst*, NJW 2002, 999-1004). An obligation to compensate for non-economic loss is not generally recognised (BGH 6 December 2005, BGHZ 165, 203 and BGH 5 October 2006, WM 2007, 35); however, at first instance, there have been deliberations as to whether an exception to this rule should be fashioned for severe violations (CA Jena 31 March 2005, NJW-RR 2005, 1566). Post-mortal protection of the right to one's image is subject of special regulation (KunstUrhG § 22). In AUSTRIA it has been emphasised that the right of free development of the personality can only be fully comprehended if it is recognised that the right endures after death, the protection of

the deceased's honour and right to respect for private life merit special consideration under the heading of post-mortal protection (OGH 23 May 1984, SZ 57/98, Rummel [-*Aicher*], ABGB I³, no. 28). HUNGARIAN CC §§ 84 and 85(3) (1)(e), ROMANIAN Decree 31/1954 art. 56 ~~und 85(3)~~, GREEK CC art. 57(1), DUTCH CC art. 6:106(1)(c) and PORTUGUESE CC art. 71(1) adopt a similar approach. The latter provision introduces a special rule to CC art. 68(1), stipulating that an individual's personality does not endure after death. CC art. 71(2) determines the class of persons that are entitled to bring an action to vindicate an individual's posthumous interests (see further *Leite de Campos*, BFD, L [1974] 297 and STJ 11 December 2003). POLISH law too allows a close relative of a deceased person to recover damages if the latter's memory or reputation is injured by false statements (SN 24 February 2004, OSNC 2005, poz. 48; *Radwański*, Prawo cywilne[8], 167).

71. Likewise, the NORDIC COUNTRIES also recognise a right to psot motal protection of personality rights, this right is, however, only crystallised under criminal law, cf. DANISH Penal Code §§ 264c, 264d, 274; SWEDISH Penal Code chap. 5 § 4 (on this point, see HD 14 December 1966, NJA 1966, 565) and FINNISH Penal Code chap. 27 § 4.

72. The COMMON LAW of England and Irland exclude any posthumous protection for injuries to an individual's reputation; it is said that one cannot defame the dead (Clerk and Lindsell [-*Brazier*], Torts[16], 21-01).

(3) Further rights with personality aspects attached

73. Moroever, courts of some jurisdictions are displaying an increasing tendency to create new absolute rights which reinforce the right to personality. They include the courts of e.g. PORTUGAL (*v. Bar*, The Common European Law of Torts II, 88; *Hörster*, Parte geral, 259; STJ 2 October 2003; STJ 4 July 1978, BolMinJus, 279 [1978], 124; so-called *direito ao repouso e à tranquilidade*") and in SPAIN (TS 29 April 2003, RAJ 2003 (2) no. 3041 p. 5721; cf. *Martín Vida*, VersRAI 2004, 20-23; *Martín Vida*, VersRAI 2005, 57-63 and 2006, 5-8) *recognised right to rest and recovery* which is derived from the constitutionally protected rights to intimate sphere and inviolability of a dwelling. Claimants in other jusrisditions must rely on the law concerning the respective interests of neighbours in cases of noise nuisance because tort liability is dependent on the presence of injury to body or health. This correpsonds tot he prevailing situation in GERMANY (CC § 823(1)) and in AUSTRIA (OGH 13 July 1988, JBl 1989, 41).

74. In turn, the latter two countries recognise that membership of an association is accorded the status of a right and thus the unjustified exclusion of a member oft he association can give rise to a claim for damages (BGH 6 February 1984, NJW 1984, 1884; BGH 12 March 1990, NJW 1990, 2877; OGH 10 July 1997, RIS-Justiz RS0108196). In ROMANIA adopts a similar stance (CC art. 998; CSJ 16 March 2001, *secţia civilă*, decision no. 1609). In DENMARK, damages may be recovered fort he unlawful exclusion from a trade union (HD 16 December 1936, UfR 1936, 672), and the same holds true for SPAIN in respect of an unjustified withdrawal of shareholder position (TS 20 March 1998, RAJ 1998 (1) no. 1712 p. 2649).

75. In addition, under Spanish law, reference must be made to right of protection of the family's intimate sphere (*intimidad familiar*) which is derived from Law 1/82 (*intimidad familiar*), which geared towards protecting "family secrets", i.e. facts which affect the family and of which only family members have cognisance of (TC 197/1991 of 17 October, BOE no. 274 of 15 November 1991; TC 134/1999 of 15 July, BOE no. 197 of 18 August 1999 ; cf. also *Igartua Arregui*, La Ley 1990, I, 1066, 1071).

76. In turn, the ITALIAN court consistently express the interests which they have classified as worthy of protection rights in terms of rights, their number include e.g. the right to family serenity (*diritto alla serenità familiare:* CFI Milano 18 February 1988, Resp.civ. e prev. 1988, 454) and the right to the integrity of one's patrimony (*diritto all'integrità del patrimonio:* Cass.sez.un. 26 January 1971, no. 174, Giur.it. 1971, I, 1, 680, note *Visintini*; Foro it. 1971, I, 342, 1284, notes *Jemolo* and *Busnelli*).

(4) Personality rights of legal persons

77. Please see the aforementioned notes under VI for an examination of how the personality rights of legal persons are legally protected in the respective jurisdictions.Wherever a legal person is permitted recovery for non-pecuniary loss, it thereby follows that legal persons are also entitled to personality rights. The SPANISH courts have even conferred a right on legal entities under private law to inviolability of certain areas of its business premises (TC 69/1999 of 26 April 1999, BOE no. 130 of 1 June 1999). Conversely, it has been held that legal persons under public law are not holders of personality rights (TC 107/1988 of 8 June 1988, BOE no. 152 of 25 June 1988; TS 24 October 1988, RAJ 1988 (5) no. 7635 p. 7492). It is a self- evident proposition that private corporations enjoy a right to protection of their professional reputation (TC 139/1995 of 26 September, BOE no. 246 of 14 October 1995; TC 193/1995 of 11 December 1995, BOE no. 11 of 12 January 1996; TS 15 April 1992, RAJ 1992 (3) no. 4419 p. 5849; TS 14 March 1996, RAJ 1996 (2) no. 2178 p. 2936; TS 20 February 2002, RAJ 2002 (2) no. 3501 p. 6117, TS 5 October 1989, RAJ 1989 (6) no. 6889 p. 8011); they can even assert a right to their own image (TC 19/1983, of 14 March 1983, BOE no. 87 of 12 April 1983). Similarly, in ITALY, in conjunction with a right to claim damages for violations of honour and good reputation, it is conceded that legal entities enjoy a right under tort law to personal identity (CC 10.7.1991, no. 7642, Giur.it. 1992, I, 1, 96), integrity (CC 03.03.2000, no. 2367,Giust.civ.Mass. 2000, 518; Cass. 5 December 1992, no. 12951, Foro it. 1994, I, 561) and to protection of its private sphere (*Franzoni*, Dei fatti illeciti, arts. 2043-2059, pp. 1204-1205). The position under HUNGARIAN Law is to apply the rules pertaining to protection of the personality to legal persons, unless the nature oft he rights entails that they can only be asserted by natural persons (CC § 75(2) i.V.m. § 84(1)(e)). The position is the same in POLAND (CC art. 43). Similarly, ROMANIA intends to adopt an approach along these lines (*Proiectul Noului Cod civil*: Draft new CC art. 196). Under AUSTRIAN Law, while it is true that the prevailing law holds that only natural persons can be insulted, this does not preclude granting an absolute right to legal persons in respect of the protection of their corporate professional reputation (OGH 11 January 1996, ecolex 1996, 361). SLOVENIAN LOA art. 183 stipulates that the court shall award a legal person just monetary compensation for the defamation of its reputation or good name, independent of the reimbursement of material damage, if it finds that the circumstances so justify, even if there is no material damage. On this provision see further Supreme Court 7 May 1993, II Ips 586/92.

78. Similarly, it is accepted under the COMMON Law, that it is possible to defame legal persons. It is not necessary to plead or adduce proof of actual economic damage in cases where the defamation affects the plaintiff's corporate reputation; general damages will also be awarded where such proof is absent (*Jameel v. Wall Street Journal Europe SPRL (No. 3)* [2006] UKHL 44, [2007] 1 AC 359).

IX. Violations of relative rights

79. Relative rights, in particular contractual claims, can generally only be transgressed by those who are under an obligation to perform under the contract. Liability for legal injuries of this type accordingly fall to be dealt with by that part of the legal order which regulates such claims, this especially pertains to contract law. In principle, parties who are not privy to the contract cannot acquire rights from it nor are they placed under any duty to observe the rights flowing from the contract as these rights are solely relative and effect the relations between the contractual partners. As a general rule, it is against public policy and thereby prohibited to intentionally prevail on another not to perform his contract with a third party; only in such circumstances will a tort action which can be enforced *erga omnes* flows from a right under a contract (see Notes under VI.–2:211 (Loss upon inducement of breach of obligation)). Naturally, many exceptions, which are not of an inconsiderable purport have been created regarding the application of this common point of departure. Developments engendered in France are particularly noteworthy in this regard.

80. FRENCH CC art. 1165 clearly articulates the basic rule that "agreements produce effect only between the contracting parties". Nonetheless (and despite drawing weighty academic criticism) it appears that the principle of *opposabilité du contrat par les parties aux tiers* has gained the upperhand. According to this exegesis, a third party is bound to respect the legal situation created by the contractual partners (for an in-depth analysis see v. Bar and Drobnig [-*Wintgen*], The Interaction of Contract Law and Tort and Property Law in Europe, nos. 625-664). The converse situation, in which a contractual infringement establishes delictual *faute* is called *faute opposabilité du contrat par les tiers aux parties* (*Terré/Simler/Lequette*, Les obligations[8], no. 490 pp. 482-483). The Supreme Court has, on many occasions,endorsed both aspects of the new doctrine (e.g. Cass.civ. 17 October 2000, JCP 2001 éd. G., I, 338, no. 6, note *Viney* [*faute* of the editor of a magazine for publishing advance excerpts of book which was about to be published] and Cass.civ. 18 July 2000 and 13 Febraury 2001, JCP 2001 éd. G., I, 338, nos. 8-10, note *Viney* [a breach of contract committed by one of the parties which caused harm to a third party represented *faute* pursant to CC art. 1382]). Cass. 5 April 2005, RTD civ 2005, 602, observant. *Jourdain*, argument is however contained: a third party can only rely on the breach of contract to ground tort liability if this breach amounts to a breach of a general duty to refrain from injuring others.

81. Similarly, the BELGIAN courts have affirmed that the fact that there is a contract in existence is a fact which a third party must take account of. Consequently, collaborating to breach of contract based on a negligent omission to acquaint oneself of these circumstances can constitute a delictual *faute* (essentially Cass. 22 April 1983, RW 1983-84, 427, note *Dirix*; RCJB 1984, 359, note *Merchiers*). Whether the same result holds true for SPAIN on the question whether a third party is only liable vis á vis a creditor for intentionally inducing the debtor to breach its contract remains shrouded in uncertainty (*Yzquierdo Tolsada*, Sistema de responsabilidad civil, 93; *Lacruz Berdejo*, Elementos II(1)[4], 480; *Díez-Picazo*, Fundamentos II[5], 604 [who opines that intention is a necessary prerequisite]).

82. For this rubric under ITALIAN Law, it is necessary to advert to cases where the creditor suffers loss as the result of an injury or the death of his contractual debtor. This type of loss has been qualified as a *danno ingiusto* in the sense of CC art. 2043 vis á vis the third party who caused the harm (landmark case the socalled *Meroni*-Fall Cass.sez.un. 26 January 1971, no. 174, Giur.it. 1971, I, 1, 680, note *Visintini*; Foro it. 1971, I, 342, 1284, notes *Jemolo* and *Busnelli* [killing of an employee]; see further e.g.

Cass.sez.un. 12 November 1988, no. 6132, Giur.it. 1990, I, 1, 280; Cass. 22 September 1986, no. 5699, Giust.civ.Mass. 1986, fasc. 8-9; Cass. 27 May 1982, no. 3284, Giust.civ.Mass. 1982, fasc. 5; Cass. 1 April 1980, no. 2105, Giust.civ.Mass. 1980, fasc. 4 [all of these cases affect the injury or death of employees] as well as Cass. 24 June 1972, no. 2135, Giur.it. 1973, I, 1, 1123 [interruption in the supply of electricity; possibly in connection with violation of property rights]); cf. on this point especially *Castronovo*, La nuova responsabilità civile[3], 590 and *Trimarchi*, Riv.Dir.Civ. 1983, I, 224, 229). In cases of inducing and acting as an accomplice to a breach of contract (e.g. Cass. 20 October 1983, no. 6160, Giur.it. 1984, I, 1, 439; Cass. 9 January 1997, no. 99, Nouva giur. civ. comm. 1998, I, 17 and Cass. 15 June 1988, no. 4090, Foro it. 1989, I, 1568 [Same piece of real estate sold twice; liability of the second buyer vis á vis the first buyer]) it appears that evidence of intention was always provided (*Bianca*, Diritto civile V, 605-607). In POLAND academic analysis adopts the position that an infringment of relative rights by a third person gives rise to tortious liability vis-à-vis the creditor where the third person unlawfully and through his or her fault renders the fulfilment of the obligation impossible (*Radwański and Olejniczak*, Zobowiązania-część ogólna[5], 17; *Czachórski*, Zobowiązania[9], 58).

83. Under GERMAN Law, the mere negligent contribution of a third party to a breach of contract will not suffice in principle to ground the liability of the latter as against the creditor (BGH 24 February 1954, BGHZ 12, 308). However, it has been mooted that the socalled “entitlement to make a claim” amounts to “another right” pursuant to CC § 823(1). This doctrine encompasses cases where a third party who is not a creditor accepts the performance of a good faith debtor whereupon the latter is released from his obligations vis á vis the true creditor. However, the courts have ,thus far, failed to pick up on this submission (overview of the current state of the discussions i*nter alia*. in *Medicus*, Schuldrecht BT[13], no. 812).

84. In contrast, in AUSTRIA, the OGH 30 August 2000, JBl 2002, 182, note *Dullinger and Riedler* and detailed analysis by *Fötschl*, VersRAI 2002, 57; 2003, 9, has held that “damages claims against third parties who encroach upon third party right to recover a debt, in certain circumscribed circumstances, may be asserted in cases of merely negligent interference” (liability of a bank affirmed where the bank arranged for a borrower to pay his debts into bank account even though these debts were previously assigned to the claimant). cf. *Pletzer*, Doppelveräußerung und Forderungseingriff, 103. OGH 12 December 2002, RdW 2003, no. 255 these principles were refined further.

85. In GREECE, it is exceptional that tort liability arises in cases where a third party merely negligently interferes in the contractual relations of another (e.g. von *Vavouskos*, I paraleipsis os simiogono gegonos eis ta adikimata tou Astikou Dikaiou, 83 and CA Athens 4393/1976, NoB 25/1977, 1367). The prevailing academic opinion regards intention as a prequisite for the impsoition of liability in this case (CC art. 919) (*Georgiades*, FS Larenz 1983, 175, 186; Georgiades and Stathopoulos [-*Georgiades*], art. 914, no. 46). However, liability under the basic norm of tort law (CC art. 914) ought to arise, where a third party collects or assigns effectively the debt of a third party. In addition, CA Athens 3148/1982, NoB 31/1983, 519 ruled that an interruption in electricity supply caused by a third party constituted interference with the tenant’s relative right to require their landlord to surrender the use of the property the subject of the rental agreement in conformity with the contract and this interference sufficed for the imposition of liability under CC art. 914.

86. In a similar manner, the touchstone concept in PORTUGAL remains the principle that contractual obligations can only be breached by the contractual partners (CC art. 40(2); cf. *Vaz Serra*, BolMinJus 74 [1958] 334; *dos Santos Silva*, ERPL 2006, 826,

828-829 and VersRAI 2007, 24). A third party who profit from the breach are only liable tot he creditor when the prerequisites of CC art. 483 are fulfilled, i.e. where there is a coinciding breach of an absolute right or protective law (*Vaz Serra*, BolMinJus 85 (1959) 346; *Almeida Costa*, Obrigações[9], 44). The principle of relativity of contract appears thus far only to have been perforated in cases involving the protection of third parties not privy to the contract, namely by utilising the conceptual technique of contracts with protective effects for third parties (*contratos com eficácia de protecção de terceiros,* see STJ 14 October 2004; *Sinde Monteiro*, RLJ 131 [1988/89] 49; *Carneiro da Frada*, Teoria da confiança, 109 and 135).

87. Rights deriving from a contract are not counted as "rights" in the terms of DUTCH CC art. 6:162(2). Therefore, interference with contractual relations by a third party is actionabel under tort law if it can be interpreted as amounting to a breach of an obligation pursuant to the same provision. Apart from cases involving the procurement of a breach of contract, this casuse of action is rarely successful, cf. e.g. HR 3 May 1946, NedJur 1946 no. 323 pp. 420-423 (breach of contract by supplier also led to an increase in costs to a client of the recipient; tort liability was incurred on the former) and HR 14 June 2002, RvdW 2002, 104 (vendor sold contaminated land with full knowledge of the circumstance that the purchaser intended to sell it on to a third party; liability incurred vis á vis the ultimate purchaser). The courts further recognise that exploiting another's breach of contract to the creditor's disadvantage can constitute an unlawful act (HR 23 December 1955, NedJur 1956, 54). See further *du Perron*, Overeenkomsten en derden, nos. 287-292 and 326-352.

88. In respect of SWEDISH law, it has recently been decided in HD 14 September 1998, NJA 1998, 520 that a bank which released stock to a depositor even though it was aware that a lien was issued on the deposit facility, was liable in damages to the holder of the lien. In addition, recent cases have awarded damages for inducement of breach of contract (HD 2 September 2005, NJA 2005, 608). It is generally recognised in the Nordic countries that intentionally procuring a breach of contract gives rise to a claim for damages cf. for DENMARK ,at an early stage, HD 16 September 1947, UfR 1947, 1005, on this case see *Gomard*, Obligationsret II, 146, and for FINLAND *Saxén*, Skadeståndsrätt, 74 ff. See further *Hagstrøm and Aarbakke,* Obligasjonsrett[2], 816 ff).

X. Wrongful conception, wrongful birth and wrongful life

89. The most hotly discussed and one of the most exceptionally contentious tort law issues in many of the European jurisdictions concern legal questions arising in connection with the birth of a child. These issues fall overwhemingly within the confines of VI.–2:101 of this Draft. Based on the prevailing terminolgy used in the European jurisdictions, it follows consequently that a distinction will be drawn between liability for *wrongful conception* (the birth of a healthy child which was not desired by its parents, liability to the parents for medical or other error in connection with recommended contraception methods), *wrongful birth* (birth of a disabled child which the mother would have aborted had the disability been correctly diagnosed in time, liability to the parents) and *wrongful life* (similarly involves the birth of a disabled child but is actionable at the suit of the child because of a failure to abort). In all three categories, liability can be tortious or contractual.

(1) Wrongful conception

90. If a child, while healthy, is born to parents who did not want it and the birth can be ascribed to a contraceptive failure, which arose due to the *faute* of a third party, in particular owing to erroneous information provided by the doctor, according to FRENCH law the patient is entitled to assert a claim against her contractual partner

(doctor or hospital for material or non-material loss which she has suffered (at any rate according to *Castelletta*, Responsabilité médicale[2], no. 71.54; there is a derth of case law on the subject). This must be distinguished from the case where a child is born as a result of rape. In these cases, according to previous case law, the child itself may maintain an action for compensation against the rapist (Cass.crim. 4 February 1998, JCP 1998, I, 185 no. 15, note *Viney*; CA Caen 7 November 2002, JCP 2002 éd. G., II, 10001, note *Sériaux*). In light of the newly in force *Loi* no. 2002-303 of 4 March 2002 *relative aux droits des malades et à la qualité du système de santé* (see the notes under 'wrongful birth' and 'wrongful life') it remains to be seen whether the courts will adhere to conventional practice).

91. According to BELGIAN law liability of a doctor for erroneous performance or the provision of erroneous information in connection with a sterilisation procedure for the father or mother is generally governed by contractual rules. It is necessary to prove the *faute* of the doctor (*de Kezel*, NjW 2004, p. 546 no. 9). The doctor is liable to compensate the financial and mental suffering that can be attributed to the pregnancy, birth and presence of an unwanted child. Factors taken into account are those that can be fairly attributed to the medical professional as a result of his (contractual) *faute* are the subject of examination. The courts will not take into that fact that the child's mother could have aborted the child or could have given it up for adoption (*de Kezel* loc. cit. no. 20; CFI Kortrijk 1 February 1994, RW 1995-96, 57; of a different view CFI Luik 10 May 2001, T. Gez. 2001-02, 247).

92. Under SPANISH Law, this type of liability, a number of exceptions apart, is generally recognised. Liability is based on a violation of the right to self determination (TS (3. Senat) 3 October 2000, RAJ 2000 (4) no. 7799 p. 12036); For the most part liability was imposed for breach of the duty to inform of risks in connection with the sterilisation (TS 25 April 1994, RAJ 1994 (2) no. 3073 p. 4169; TS 31 January 1996, RAJ 1996 (1) no. 546 p. 719; TS 11 February 1997, RAJ 1997 (1) no. 940 p. 1469; TS 11 May 2001, RAJ 2001 (3) no. 6197 p. 9524), technically incorrect performance of surgery (TS 10 October 1995, RAJ 1995 (4) no. 7403 p. 9826) or incorrectly inserted contraception (TS 24 September 1999, RAJ 1999 (4) no. 7272 p. 11439). The extent of recoverable damage remains a contentious issue. A number of courts situate the recovery of costs for the maintaining the child as economic loss (e.g. CA Barcelona 20 September 1999, AC 1999-III, no. 1973 p. 487), other courts have held only non-pecuniary loss to be recoverable stemming from a pregnancy, risk of which was thought to have been eliminated; conversely the doctor is not burdened with the actual costs of maintaining the child (TS 24 September 1999 loc. cit.; CA Alicante 9 July 1999, zitiert nach *Vicente Domingo*, El daño, 250, fn. 187; CA Badajoz, 22 April 1991, La Ley 1991, III, no. 11795 p. 484).

93. ITALIAN Cass. 8 July 1994, no. 6464, Giur.it. 1995, I, 1, 790 rejected a parents'claim for recovery of economic loss resulting from an unsuccessful abortion; solely the mother's *danno biologico* is recoverable. In cases where failure in birth control methods can be attributed to medical error, the courts of first instance have held that here the parents' economic loss was recoverable and the courts did not regard the failure to abort as contributorty negligence (CFI Venezia, 10 September 2002, Giur.mer. 2003, 468; CFI Milano 10 October 1997, Danno e resp. 1999, 82).

94. The HUNGARIAN courts have refused to acknowledge damages claims arising from the birth of a healthy child; neither maintenance costs or mental suffering associated with the upbringing of an unwanted child are recoverable (Stadt- und Komitatsgericht Veszprém [zit. nach *Köles*, Orvosi műhiba perek, 287-291]; BH 2000/207 and BH 2004/143 [=EBH 2003/941]). Academic writers share the same views as the courts

(*Dósa*, Állam- és Jogtudomány 2000, 143-153; *Dósa*, Az orvos kártérítési felelőssége, 134-154; *Jobbágyi*, Jogtudományi Közlöny 2004, 1-9; *Herpai*, Magyar Jog 2005, 691-701). POLISH courts have decided that where pregnancy results from a rape and a doctor unlawfully prevents a legal abortion contrary to the wish of the pregnant woman, that constitutes an infringment of her general personal freedom and gives rise to liability for both economic and non-economic loss (SN 21 November 2003, OSNC 2003, poz. 104; SN 22 February 2006, OSNC 2006, poz. 123).

95. If a healthy but unwanted child is born owing to a clinical error, then under GERMAN law, the parents have an actionable loss under both tort and contract law. An unwanted pregnancy, the product of a failed sterilisation is qualified as physical injury (BGH 18 March 1980, NJW 1980, 1452, 1453). This in turn gives rise to a claim for compensation of non-material loss. This claim will also ensue if no side effects materialise during the course of the pregnancy (BGH 10 March 1981, NJW 1981, 2002, 2003; BGH 19 June 1984, NJW 1984, 2625). Together with the doctor, the pharmacist may also be liable in negligence, for example, by providing negligent advice in respect of method of birth control (BGH 27 June 1995, NJW 1995, 2407, 2408). However, an action for the loss that the parents suffer in respect of costs of maintaining the unwanted child lies solely within contract law, namely the loss is not recoverable under tort law (Staudinger [-*Hager*], BGB[13], § 823, no. B 14; CA Frankfurt 25 June 1992, NJW 1993, 2388, 2389; BGH 18 March 1980 loc. cit.; BGH 10 March 1981 loc. cit.; BGH 2 December 1980, NJW 1981, 630; BGH 19 June 1984 loc. cit.; BGH 27 June 1995, NJW 1995, 2407, 2409). The claim is also actionable at the suit of the father on the grounds that his loss is regarded as coming within the protective scope of the contract (BGH 18 March 1980 loc. cit.; BGH 19 February 2002, NJW 2002, 1489, 1490; BGH 18 January 1983, BGHZ 86, 240, 249).

96. As regards AUSTRIAN law it was decided in OGH 14 September 2006, JBl 2007, 171 that "the birth of a healthy, but unwanted child [is] not damage in the legal sense". Consequently a doctor is not liable either for maintenance of the child or to compensate for pain and suffering of childbirth if, despite a vasectomy, a pregnancy occurs and no warning of this risk was given. See also OGH 25 May 1999, SZ 72/91.

97. PORTUGUESE academic writing had adopted the umbrella term of "wrongful birth" to encapsulate the cases we have designated as "wrongful conception" (*Pinto Monteiro*, RLJ 134 [2001-2002], 378). It is assumped that every time that a medical error results in an unplanned pregnancy, the parents may bring an action in order to obtain compensation (*Menezes Cordeiro*, Tratado I, 282). This claim is either based on the violation of the mother's right to self-determination (*autodeterminação*) in family planning or on the breach of the doctor's duty to give serious, credible and responsible information under CC art. 485(2). In practical terms, cases of failed sterilisations or failed abortions primarily end up before the courts (*Pinto Monteiro loc. cit.*). Negligently rendering performance of contractual duties is deemed to obligate compensation of losses which stem from this. There is no abridgement of the claim on the basis of the perceived joy attendent upon the birth of a healthy child. If the contract was concluded with a hospital run by the State, the hospital is also obliged to compensate loss (*Menezes Cordeiro* loc. cit.; Trib. Conf. 19 March 1971 [quoted by *Figueiredo Dias* and *Sinde Monteiro*, BolMinJus 332 (1984) 22, notes 2 and 3]; Trib. Conf. 5 November 1981, BolMinJus 311 (1981) 195). The parents could also choose to pursue an action under tort law instead of basing their claim in contract. This follows from the general doctrine pertaining to concurrence of actions (see the Notes under VI.–1:103 (Scope of application), see further e.g. STJ 19 June 2001, RLJ 134 [2001-2002] 371). Naturally, the child cannot hope to base an action on the fact of its existence, even if its birth transpired due to clinical error. At the time of writing, there

is a lack of case law on the issue, the same holds true for GREECE. Greek legal writing solely envisages a contractual liability to the parents derived from CC art. 690 (*Androulidaki-Dimitriadi*, I ipochreosi enimersosis tou asthenous, 415).

98. Under DUTCH Law, a claim for wrongful conception is generally recognised; it can be based in contract (HR 21 February 1997, NedJur 1999 no. 145 p. 837; HR 9 August 2002, RvdW 2002 no. 132 p. 1195), general tort law (CC art. 6:162: liability to the father) or, in the event of a faulty contraceptive product, an action may lie according to the rules on product liability (CC art. 6:185). It is averred that the child does not represent the damage, rather the hardship that results to its parents in respect of rearing and supporting the child. In addition, the deprivation of income of the mother owing to the fact that she must care for the child amounts to recoverable loss; however, according to previous case law, infringing upon the parents' life plans does not amount to non-material damage. Compensation for non-pecuniary loss is only awarded for pain and suffering of the mother arising from the pregnancy or birth, treatment of which was deemed medically necessary (HR loc. cit.).

99. At an early stage, the DANISH courts permitted a mother to recover material (maintenance costs) and non material loss (HD 19 November 1960, UfR 1961, 239). In the remainder of the Nordic Countries, the issue has not been resolved ;SWEDISH literature is not in favour of permitting the parents to recover the costs of maintaining the child (*Andersson*, Trepartsrelationer i skadeståndsrätten, 312); the mother alone should only be permitted to recover compemnsation for non-material loss in connection with the pain and suffering sustained during the course of the pregnancy (*Andersson*, Skyddsändamål och adekvans, 383).

100. Conversely, the COMMON LAW does not regard wrongful conception as actionable *McFarlane v. Tayside Health Board* [2000] 2 AC 59 (HL). However, in *Rees v. Darlington Memorial Hospital NHS Trust* [2003] 3 WLR 1091 (HL) added a gloss to the McFarlane decision and held that a parent of a healthy but unwanted child who was wrongly treated or advised in matters of reproductive medicine is entitled to claim conventional damages of 15.000 pounds for the loss of reproductive autonomy and an infringment of the right to plan their family.

(2) Wrongful birth

101. According to FRENCH *Loi* no. 2002-303 of 4 March 2002 *relative aux droits des malades et à la qualité du système de santé* art. 1(1) *al.* 3(?????? Code de L'Action Code de L'action Sociale et des Familles § L114-5.), the parents of a child who had they discovered its disability been in time would have induced its abortion, can assert a claim for material and non-material damage. Of course, the prerequiste for the success of this claim is the presence of a *faute caractérisée* (see further *Lambert-Faivre*, D. 2002 chron. 1217-1220 sowie *Arnold*, VersR 2004, 309-313). In addition, restrictions are placed on the extent of the claim. Parents may only assert a claim for the recovery of their own *préjudice économique*, they may not assert a claim for recovery of the costs arising in connection with the care of a disabled child; these costs should be borne by the *solidarité nationale*. However, precise lines of demarcation between the two heads of damages are conflated and therein difficulties arise. The transitional arrangements of the above mentioned Act which had the effect of dispossessing claimants of the possibility of recovering under an already established damages claim infringed upon the provisions pertaining to the protection of property under the European Convention of Human Rights (*Draon v. France*, ECHR [GC] 6 October 2005, App. no. 1513/03) and *Maurice v. France*, ECHR [GC] 6 October 2005, App. no. 11810/03).

102. In BELGIUM, cases of *wrongful birth*- are not subjected to the same analysis as the *wrongful conception* cases. In this regard, emphasis is solely placed on the fact that the damages recoverable under the first category, given the greater child rearing costs associated with disabled children, is higher than in the second (*de Kezel*, NjW 2004, p. 546 no. 7).

103. In SPANISH TS 6 June 1997, RAJ 1997 (3) no. 4610 p. 7083 found a gynaecologist (and the health service executive) was liable vis á vis the mother who was deprived of the choice of undergoing an abortion on the grounds of an error in examining the amniotic fluid. The birth of a child suffering from Downs-Syndrome constituted a *daño gravísimo.* In TS 4 February 1999, RAJ 1999 (1) no. 748 p. 1217 the principles ennuciated in this decision were affirmed, however the action was dismissed given that the doctor did not commit a medical error. According to case law, the recoverable material damage encompasses the entire basic costs associated with the child's upbringing. Conversely, it is submitted in academic literature (*De Ángel Yágüez*, Revista de Derecho y Genoma Humano 1996, V, 105, 151) that only the additional expenses arising in connection with the disability are recoverable. However, the extent of liability may be reduced on equitable grounds (at any rate according to the CA Cádiz 17 September 2002, AC 2002-III, no. 1929 p. 1117).

104. The ITALIAN courts awarded a mother who would have terminated the pregnancy if she had been informed of the child's impairment in time by her medical practitioner, compensation for *danno biologico* as well as damages for pecuniary loss. Furthermore, the father's claim for the recovery of *danno biologico* is also recognised (Cass. 1 December 1998, no. 12195, Giur.it. 1999, 2038; see. also Cass. 24 March 1999, no. 2793, Giur.it. 2000, 43 and on the father's entitlement to assert a claim– Cass. 10 May 2002, no. 6735, Foro it. 2002, I, 3115.

105. Today, the HUNGARIAN courts recognise that a claim for "wrongful birth" is actionable, insofar as there was a breach of the doctor's or hospital's duty to provide information or pre-natal exams were negligently carried out (BH 2004/10; BH 2004/112; see *Köles*, Orvosi műhiba perek, 203-208, 239-242). In the POLISH decision of the Supreme Court 13 October 2005, OSP 2006, no. 71 the view was taken that misleading medical advice on the risk of the child's disability and a refusal of a closer genetic examination which results in the parents being deprived of the possibility of legal abortion generate liability for non-economic and economic loss (costs of pregnancy and birth, loss of earning capacity of the mother and increased costs of maintenance of the child).

106. In GERMANY, a distinction is drawn between cases where there is negligence attendent upon birth control methods or prenatal screening for genetic defects and in respect of the termination of the pregnancy. In the latter case, it is averred that, at the most, special complications arising during the pregnancy or birth are caused by the doctor's negligence, not the pregnancy itself- (BGH 18 January 1983, BGHZ 86, 240, 248; BGH 27 November 1984, NJW 1985, 671, 673). The mother's emotional distress will only be compensated if it constitutes an illness of pathological significance (CC §§ 823, 253(2); BGH 18 January 1983 loc. cit.; BGH 30 May 1995, NJW 1995, 2412, 2413). The fact that the parents have "had" a disabled child is not sufficient in itself (BGH 18 January 1983 loc. cit.). Increased costs of maintenance and additional expenditure associated with the child's disability are actionable under contract law (BGH 4 March 1997, NJW 1997, 1638, 1640; BGH 16 November 1993, BGHZ 124, 128, 134; BGH 15 February 2000, BGHZ 143, 389, 393; BGH 4 December 2001, NJW 2002, 886; BGH 18 June 2002, NJW 2002, 2636, 2637). The parents' contractual claim for damages principally encompasses the entire basic expenses

associated with rearing a disabled child. The compensation is not restricted to the recovery of only the special additional financial outlay associated with rearing a disabled child as this is regarded as incompatible with the protective scope of the contract and above all with the human dignity of the disabled child (BGH 22 November 1983, BGHZ 89, 95, 104; BGH 16 November 1993 loc. cit.). However, the duty to compensate does not extend to the parents's loss of income, in the event that they had to give up their careers in order to care for their child (BGH 2 December 1980, NJW 1981, 630; BGH 4 March 1997 loc. cit.).

107. AUSTRIAN OGH 25 May 1999, SZ 72/91 (see *Rebhahn*, JBl 2000, 265, 266; *Kopetzki*, RdM 1999, 177) awarded the additional costs associated with rearing a disabled child to a woman who gave birth to a boy without arms, with club feet and truncated leg and to her husband. The relief sought was confined to the recovery of these special expenses. However, minor fault on the part of the doctor whose duty it was to provide the correct information will recede into the background vis à vis the parents' contributory negligence during the communication of medical advice (OGH 23 October 2003, JBl 2004, 311, note *Bernat*). The issue whether basic child rearing expenses are recoverable was deliberately left unresolved by the OGH. Views expressed in legal literature submit that a corresponding entitlement should be awarded provided that the birth of the child constitutes an extraordinary burden on the basis that financial resources will be strained (*Koziol*, Haftpflichtrecht I³, no. 2/29, *Bernat*, JBl 2004, 316). Since the judgment of OGH 11 December 2007, JBl 2008, 521, from henceforth, there can be no doubt that the entire maintenance costs associated with an unwanted disabled child represent recoverable damage. for For a treatise on the legal position in PORTUGAL see note 102 above.

108. For DUTCH Law, the HR 8 September 2000, RvdW 2000, 180C declined to endorse a claim for compensation of non-pecuniary damage of parents of a child who was injured in the womb owing to negligent medical treatment. The HR 22 February 2002, NedJur 2002 no. 240 p. 1704 adjudicated similarly in the case of a child who was not aborted owing to a diagnostic error. Both cases turned on the absence of psychiatric shock requiring medical treatment. HR 28 May 1999, NedJur 1999, no. 614 p. 3484 was of a divergent view and held every pecuniary loss arising from the additional costs invoved in rearing a disabled child resonated in damages.

109. At present, there is a dearth of case law on this issue in the NORDIC Countries. There are dissonant views in academic writing (see further *Andersson*, Trepartsrelationer i skadeståndsrätten, 312, 316). The predominant view ist hat recovery for the parents' emotional distress should be denied (*Andersson loc. cit.* 310).

110. For the COMMON LAW, the case of *Parkinson v. St. James and Seacroft University Hospital NHS Trust* [2002] QB 266 held that the parents of disabled child who was conceived following a negligently performed sterialisation operation could claim the extra special upbringing costs associated with rearing a disabled child. Following the case of *Rees v. Darlington Memorial Hospital NHS Trust* [2003] 3 WLR 1091 (HL) it is questionable whether this decision can continue unchallenged, cf. *Pedain*, [2004] CLJ 19-21.

(3) Wrongful life

111. The aforementioned *Loi* no. 2002-303 of 4 March 2002 *relative aux droits des malades et à la qualité du système de santé* was a reaction of the French legislature to the socalled *Perruche*-Entscheidung Cass.ass.plen. 17 November 2000, JCP 2000, 2309 (cf. also prior decision Cass.civ. 26 March 1996, D. 1997 Jur. 35, notes by *Roche-Dahan* and by *v. Bar*, ZEuP 2000, 119), where a doctor was held liable to both

the parents and to the child for failing to correctly diagnose the state of health of the embryo. The Act rejects that that there is any liability owed to the child on the basis of the argument that a correct diagnosis would have induced its abortion (art. 1(1) *al*. 1: „*Nul ne peut se prévaloir d´un préjudice du seul fait de sa naissance*"). The Law does not preclude a right of action if the prenatal injuries are caused by medical error (*al*. 2 loc. cit.). It the child's injuries cannot be attributed to the negligence of the physician, then these costs are instead covered by the *solidarité nationale* (*Malinvaud*, Droit des obligations[8], no. 545 p. 391).

112. In BELGIUM, this problematic issue has only been a matter of adjudication in the lower courts. CFI Bruxelles 7 June 2002, TBBR 2002, 483 awarded a child born with congenital disability damages on the grounds that medical error had deprived its parents of the choice of terminating the pregnancy. In SPAIN, the majoritarian view leans against imputing liability to the doctor, provided that it is not asserted that fault on his or her part contributed to the child's abnormality (CA Cádiz 17 September 2002, AC 2002, III, no. 1929 p. 1117; *Pantaleón Prieto*, Procreación artificial y responsabilidad civil, 263; *De Ángel Yágüez*, Revista de Derecho y Genoma Humano 1996, V, 151; otherwise *Ruiz Larrea*, La Ley 1998, I, 2039, where it is mooted that the child may assert a claim against the parents).

113. ITALIAN (Cass. 29 July 2004, no. 14488, Foro it. 2004, I, 3327; Resp.civ. e prev. 2004, 1348; Cass 14 July 2006, no. 16123, Dir.fam. 2007, 137; cf. an early decision of CA Perugia 24 May 2000, Rass.Giur.Umbra, 2000, 636), GERMAN (BGH 18 January 1983, BGHZ 86, 240, 251; CA Munich 27 February 1981, NJW 1981, 2012; CA Düsseldorf 14 July 1994, VersR 1995, 1498) and AUSTRIAN Law (OGH 25 May 1999, SZ 72/91) rejects the notion that the damages claim of the child can be solely based on the assertion that had the disability been correctly diagnosed, it would not have been born. There is no right not to be born. Recent DUTCH case law reached a similar conclusion.(CA The Hague 26 March 2003, NedJur 2003, no. 249 p. 1964; however, for a discordant view CA Amsterdam 4 January 1996, NedJur 1997, no. 213 p. 1169; cf. for further analysis *Lindenbergh*, AA 52 [2003] no. 5 p. 365). In GREECE, there is a dearth of case law on this issue; in Greek legal literature, comparative legal resources have been drawn upon, based on this the claims of the child would be excluded (*Androulidaki-Dimitriadi*, I ipochreosi enimersosis tou asthenous, 427). In end effect, this appears to represent the lion's share of views among PORTUGUESE authors. It is postulated that if the child were permitted to recover on the basis of the argument that it would have been better had he not been born, this would infringe notions of human dignity (*Menezes Cordeiro*, Tratado I, 288; *Álvaro Dias*, Dano Corporal 500; of a divergent opinion *Guilherme de Oliveira*, O direito do diagnóstico pré-natal, 214 and *Pinto Monteiro*, RLJ 134 [2001-2002] 384, who contemplates that the child may have a claim deriving from a contract having protective effects for third parties). This correponds to the stance adopted by the courts. Moreover, the courts have clarified that the hypothetical damages claim can only be asserted by the child and not by its parents (STJ 19 June 2001, RLJ 134 [2001-2002] 371, 377).

114. In the first instance adjudications by HUNGARIAN courts, it was held that the child could not assert a claim for damages because life could not constitute damage. Consequently, claimants could not seek compensation based on the argument that one was not aborted (Citations in *Dósa*, Az orvos kártérítési felelőssége, 137; *Köles*, Orvosi műhiba perek, 239-242; CA Pécs, Pf.I.20.187/2004/5.). However, the Supreme Court (BH 2004/112, BH 2005/394) did not follow this line of jurisprudence and in November 2005- in opposition to the european main stream (*Herpai*, Magyar Jog 2005, 699; *Lábady*, Családi Jog, no. 3/2006, 15-25.) – in a decision laying down

principles for this area (EBH 2005/1206 = BH 2005/394) – held that a child born with congenital disabilities could demand compensation if the responsible doctor, by his mistake, deprived the mother of the possbility of exercising her statutory guaranteed right of opting for a termination of her pregnancy. This decision was however revised by the uniform application of private law no. 1/2008 (Supreme Court 12 March 2008, Hungarian Gazette no. 2008/50, p. 2462). This judgment, which draws heavily from the law in other jurisdictions and which binds the other courts (Const. § 47(2)),, rejected the claim of a disabled child who would have been aborted, had its mother been informed of its condition in time.

115. For the NORDIC Countries *Andersson*, Trepartsrelationer i skadeståndsrätten, 307 die is a proponent of the view that the child is not entitled to assert a claim for damages.

XI. Interests worthy of legal protection

116. Similar to the concept of "legally relevant damage", the notion of "interests worthy of legal protection" constitutes a linguistic innovation given that the notion does not feature in any of the Civil Codes or Damage Liability Acts which are currently in force. However, this concept features in the jurisprudence of many countries. In the FRENCH legal order, this concept crops up together with the debate on the issue of whether the infringement of an illegimate interest can give rise to a damages claim.. Afterall the following provision can be encountered in CCP art. 31, which provides that persons with standing to sue are those having "a legitimate interest in the success … of a claim". A rule which is partly governed by administrative law is derived from this providing that only an action for *dommage licite* can be brought (*Starck/Roland/Boyer*, Obligations. 1. Responsabilité délictuelle[5], no. 111 p. 64 and *Viney and Jourdain*, Les conditions de la responsabilité[2], nos. 271-273 p. 59). In more recent times, a trend appears to be emerging which requires even for the substantive law proof that the damage concerned had a detrimental effect on a legally protected interest (*Terré/Simler/Lequette*, Les obligations[8], nos. 704-706 pp. 684-686; *Malinvaud*, Droit des obligations[8], no. 555 p. 398; *Flour/Aubert/Savaux*, Le fait juridique[10], no. 145 p. 138 and Cass.civ. 24 January 2002, Bull.civ. 2002, II, no. 5 p. 4 [the loss of revenue which was derived from clandestine employment does not constitute damage]). All in all, the argument that the damage that ensues is "illegimate" has lost much of its practical importance (*Viney and Jourdain* loc. cit.).

117. Furthermore, in BELGIUM, the question is as yet unresolved whether a clai,m based on the infringement of a legally protected interest is to be classifed as issue pertaining to its admissibility under adminstrative law or whether it concerns the substantive merits of a claim. The majoritarian view in legal writing is to plump for the former (*Ronse and others*, Schade en schadeloosstelling I[2], no. 33 p. 39; *Simoens*, Schade en schadeloosstelling, no. 21 p. 42); However,Cass. 14 May 2003, RGAR 2003, 13767, concl. *Spreutels*) concluded that it should be interpreted in the sense of a qualification under the substantive law (it was also determined here that the loss of revenue from moonlighting jobs did not amount to a recoverable loss).

118. The SPANISH courts held that a legally protected interest was infringed and accordingly awarded a wife damages when her husband was rendered impotent either on physical or pschological grounds following an accident (TS 9 February 1988, RAJ 1988 (1) no. 771 p. 752). The ITALIAN courts deemed that the infringemenr of an *interessi legittimi* (cf. Cost. art. 24(1)) sufficed for recovery of the *danno ingiusto* (CC art. 2043), in particular concerning relations with the public adminstration (see in particular Cass.sez.un. 22 July 1999, no. 500, Foro it. 1999, I, 2487, 3201). HUNGARIAN CC § 2(1) expressly prescribes that the Code is designed to protect the property and personality rights as well as the "legally protected interests" of citizens.

POLISH doctrine usually defines damage as any detriment to the legally protected interests of another. This assumes practical significance, for example, in justifiying the award of reparation for damage resulting from a disturbance of possession and the denial of reparation for loss of profits from illegal activities (*Dybowski*, System prawa cywilnego III(1), 217, 235-236). The GERMAN courts have recourse to the concept of "interests worthy of legal protection" in diverse argumentative strategies, the doctrine of general risks of life connotes one example, according to which damages cannot be claimed for the realisation of one of life's general risks (BGH 6 June 1989, JZ 1989, 1069, note *v. Bar;* BGH 17 September 1991, NJW 1991, 3275) or, for example,in the context of decisions which have held that where the sole cause of damage lies in subjecting the defendant to court proceedings, this does not connote a legally protected interest on the grounds that the right of unrestricted access to the courts has greater weight (BGH 25 March 2003, BGHZ 154, 269, 272; the position in AUSTRIA is identical, see OGH 1 October 1986, SZ 59/159). In ENGLAND, this concept appears in judgments on the law of privacy (e.g. *A v. B plc* [2002] 3 WLR 542, 550, *Woolf* CJ) and in SWEDEN this concept was latched onto in order to pave the way for recovery for particular ecological damage (HD 19 April 1995, NJA 1995, 249 and HD 21 December 1993, NJA 1993, 753). See also for DENMARK the Supreme Court case from the 4 November 2005, UfR 2006, 446 (in the absence of a legally protected interest of the individual, the State was not liable to the proprietor of a supermarket on the grounds that the authorites (wrongfully) gave a competitor permission to open its doors on a Sunday).

XII. Insbesondere: Loss of chance

119. A special case of the concept of liability for the infringement of an "interest worthy of legal protection" is represented in a whole array of European legal orders by liability for the loss of chance. The approach adopted in the respective jursidictions varies considerably. At its root, it concerns whether the loss of the chance of an improvement which it is not certain will be obtained (for example the loss of a chance of recovery where medical care was wrongly terminated or withheld, or a loss, caused by personal injury, of the chance to take an exam in the current year, where a successful outcome in the exam is uncertain) can be qualified *per se* as compensatable damage

120. In the FRENCH legal system the problem of the *perte d´une chance* is discussed in context of the "certain" character of the damage (*Malaurie and Aynès*, Responsabilité délictuelle VI(1)[11], no. 241-242 pp. 138-139) (For LUXEMBOURG see on this *Ravarani*, La responsabilité civile, no. 700 p. 490). The *perte d´une chance* qualifies as compensatable damage if the chance was real. The extent of the damage depends upon the probability that the chance would have led to the desired result; compensation remains necessarily under the value of the advantage not realized (Cass.civ. 16 July 1998, Bull.civ. 1998, I, no. 260 p. 181; CA Lyon 2 February 2006, JCP 2006, IV, 2662; *Malaurie and Aynès* loc. cit.). In BELGIUM also, the *perte d´une chance* represents compensatable damage, whereby the extent of damage depends upon the value of the expected advantage and the probability of its occurrence. If necessary it is estimated *ex aequo et bono* (B.H.Verb. [-*Hens*] II-4, no. 1853; *Simoens*, Schade en schadeloosstelling, no. 26 pp. 54-55). In both countries a requisite is "*la disparition certaine d´une éventualité favorable"* (*Flour/Aubert/Savaux*, Le fait juridique[9], no. 138 p. 126).

121. Similarly, under SPANISH law, for damage to be actionable, it is necessary that it is "certain" (*cierto*). This requirement of certainity is not met if a chance is merely lost (*Lacruz Berdejo*, Elementos II(2)[4], 480). Support can be found for this approach in older court decisions (TS 29 September 1986, RAJ 1986 (3) no. 4922 p. 4849 and TS

20 April 1995, RAJ 1995 (3) no. 3487 p. 4637). However, in the context of the contractual liability of a lawyer for missing a deadline, *inter alia* decision of TS 26 January 1999, RAJ 1999 (1) no. 323 p. 464 and of TS 14 May 1999, RAJ 1999 (2) no. 3106 p. 4817, damages were awarded for the lost chance of winning the case and for the tort law sphere, TS 10 October 1998, RAJ 1998 (5) no. 8371 p. 12306 affirmed liability for the lost chance of a successful cure.

122. ITALY also belongs to the legal systems in which a loss of chance qualifies as autonomous head of damage. The loss of a chance can represent a *danno ingiusto* in the sense of CC art. 2043 (Cass. 19 December 1985, no. 6506, Foro it. 1986, I, 383; see also Cass. 29 April 1993, no. 5026, Giur.it. 1994, I, 1, 234; *contra* aber *Busnelli*, Foro it. 1965, IV, 47, 50). The extent of compensation is assessed according to equitable principles and the courts inquire into the probability that the chance would have materialised (*Gazzoni*, Manuale di diritto privato[10], 697). The loss of chance of cure is regarded as connoting a lost chance. In the lost chance analysis, a clear disctinction is not always made between the existence of a *danno ingiusto* and the damaging consequences which result therefrom.

123. In GERMAN law (rejecting its place in tort law *Mäsch*, Chance und Schaden. Zur Dienstleisterhaftung bei unaufklärbaren Kausalverläufen, 2004) and in DUTCH Law (see further *Brunner*, AA 1995, 935) it is still a matter of controversy whether the loss of a chance *per se* can be characterised as damage. The position is similar in AUSTRIA (from the case law see in particular OGH 3 April 1962, SZ 35/42 and OGH 29 January 1992, SZ 65/13) and POLAND (rejecting the idea - *Dybowski*, System prawa cywilnego III(1), 280). The Dutch courts, above all in cases concerning the negligence of doctors (HR 24 October 1997, NedJur 1998, no. 257 p. 1359) and doctors (CA Amsterdam 4 January 1996, NedJur 1997, no. 213 p. 1169; CFI Middelburg 11 March 1998, NedJur 1999, no. 41 p. 136; CFI Amsterdam 28 October 1998, NedJur 1999, no. 406 p. 2205) have awarded a damages on a percentage basis according to the degree of likelihood that the lost chance would materialise.

124. SWEDISH HD 28 November 1964, NJA 1964, 431 held that a student who was injured six months before the exams that he would have in all liklihood sat, and whose entry into employment had to be deferred for a year as a result could recover damages for the loss of income for that year. DANISH ØLD 19 February 1974, UfR 1974, 625 reached the same conclusion in a comparable case. Likewise, henceforth, VLD 18 May 2005, UfR 2005, 2590 and Danish HD 24 May 1991, UfR 1991, 570.

125. The law in both ENGLAND and SCOTLAND does not recognise the possibility of a claim based on “loss of a chance” in the sense of a claim based on a delict or tort which gives rise only to worsened statistical prospects of the occurrence of harm. “Loss of a chance simpliciter” cannot form the basis of a claim (*Gregg v. Scott* [2002] EWCA Civ 1471 per *Latham* LJ at [39]; affirmed by *Gregg v. Scott* [2005] UKHL 2; [2005] 2 WLR 268). Academic writing (in particular *Stapleton*, (1988) 104 LQR 213 and 389), highlighting dangers that would stem from such a claim being recognised, has been expressly approved by the Court of Appeal.

126. In respect of the issues associated with the loss of a chance under contract law, see III.–3:701 (Right to damages) (exPECL art. 9:501) as well as *v. Bar and Drobnig*, The Interaction of Contract Law and Tort and Property Law in Europe, nos. 113-119.

Illustration 1 is taken from BGH 12 March 1990, NJW 1990, 2877; **illustration 2** from BGH 24 April 1990, BGHZ 111, 168; **illustration 3** from Trib. Superiore della Acque 16 January 1995, no. 3, Cons. Stato, 1995, II, 122 and Cass. 30 May 1981, no. 3541, Giust.civ.Mass.

1981, fasc. 5; **illustration 4** from BGH 9 November 1993, BGHZ 124, 52; **illustration 5** from BGH 18 September 1979, NJW 1980, 45, note *Deutsch*; **illustration 8** from OGH 1 October 1986, SZ 59/159, and **illustration 9** from TS 20 October 1998, RAJ 1998 (5) no. 8844 p. 13069.

Section 2: Particular instances of legally relevant damage

VI.–2:201: Personal injury and consequential loss

(1) Loss caused to a natural person as a result of injury to his or her body or health and the injury as such are legally relevant damage.

(2) In this Book:

(a) such loss includes the costs of health care including expenses reasonably incurred for the care of the injured person by those close to him or her; and

(b) personal injury includes injury to mental health only if it amounts to a medical condition.

COMMENTS

A. Matters not regulated

Wrongful conception, wrongful birth and wrongful life. This provision deals with the most important aspects of the law governing liability for injury to body and health. Deliberately left unregulated, as indicated earlier (see Comments B under VI.–2:101 (Meaning of legally relevant damage)), are the extraordinarily problematic questions arising in the context of the birth of children which their parents (or one of their parents) did not want to have, whether it be for reasons of family planning or because the infant would have been aborted if the affliction had been recognised in time (wrongful conception, wrongful birth, wrongful life, see Notes X89-115 under VI.–2:101 **(**Meaning of legally relevant damage**)**). The proposition that a child can be injured in the womb, however, is beyond all doubt. It is not material whether the child has even been conceived at the time of the act causing injury (e.g. in the case where a woman becomes pregnant *after* she has received an infusion of blood contaminated with a pathogen). As soon as the child obtains legal capacity, he or she has a claim against the person causing the damage, subject to the further requirements of the basic norm. Where, however, a child in the womb is so severely injured that a miscarriage or stillbirth results, the injury is to the mother's physical integrity and it is she who is correspondingly entitled to claim damages.

Detrimental impact on the quality of life without personal injury. VI.–2:201 concerns only injury to body or health. Adverse disturbance of the quality of life which does not result from such injuries can only be asserted as legally relevant damage on the basis of other rules in this Chapter – in particular on the basis of VI.–2:203 (Infringement of dignity, liberty and privacy) and, in part, VI.–2:204 (Loss upon communication of incorrect information).

Loss of chance. As already mentioned (see Comments D and E under VI.–2:101 (Meaning of legally relevant damage)), no specific mention has been made of loss of a chance, in particular the loss of a chance of being cured. At present no special rule can be stipulated here. This area is therefore left to the judiciary for future development (see Notes XII119-125 under VI.–2:101 **(**Meaning of legally relevant damage**)**). However, the general rule on legally relevant damage does leave room for characterising the loss of a chance as an independent form of damage for the purposes of the law on non-contractual liability (and not merely for the purposes of the law of contract: cf. III.–3:701 (Right to damages); that is to say, the rule permits a departure from the strict "all or nothing" principle.

Quantum of damages. Questions as to quantum of damages are the subject matter of Chapter 6. That is nothing peculiar to the law governing personal injury and needs no special mention here. It should be noted, however, that these rules do not determine the manner in which compensation for personal injury and non-economic loss is to be quantified (e.g. exact figures for a claim for damages in respect of defined injuries, or amounts for each day's stay in hospital, etc.). See VI.–6:203 (Capitalisation and quantification) paragraph (2).

Type and mode of reparation. Equally, particulars concerning the type and mode of reparation (e.g. lump sum or periodical payment) are provided for in Chapter 6. The fundamental principles governing the necessary assessment of an emergent loss – in particular the loss of a future or hypothetical income – are by contrast to be derived from the relevant national (procedural) laws.

B. Damage to a person's body or health

Body and health distinguished. VI.–2:201 regulates the questions of identifying damage given the occurrence in fact of an injury to a natural person's body or health. The distinction between injury to the body on the one side and injury to health on the other has no great significance. Where an injury to the body is present, an injury to health will also be involved except in exceptional cases (e.g. the cutting or shaving of hair). It may also be noted that injuries to health concern disturbance to the internal bodily processes, while injuries to the body as a rule look towards interference with the external bodily integrity. Harassment (e.g. sexual harassment or harassment by unsolicited photography) does not fall under VI.–2:201; it falls under VI.–2:203 (Infringement of dignity, liberty and privacy) instead. By contrast, rape of course also constitutes a personal injury.

Injury to the person. With the exception of paragraph (2)(b) (Mental health), the provisions do not specify any answer to the question when in a particular case an injury to body or health is present. As a rule, the existence of bodily injuries will be ascertained without difficulty. Every infringement of a person's bodily integrity is conceived by these Rules to amount to a personal injury. In this context too, however, regard must be had to VI.–6:102 (De minimis rule) (for example, where an intramuscular injection is being given and as a result of the nurse's clumsiness a small and harmless haematoma occurs, but nothing more serious happens). If an expectant mother is injured with the result that her child is stillborn this constitutes personal injury to the mother (and only to her; cf. above Comment A).

Medical treatment; sports injuries. The question whether a person's body has been injured or not does not depend on the purpose of the interference with the bodily integrity. Medical operations and treatment constitute an infringement of bodily integrity even though they are for a beneficial purpose. Whether or not such treatment is allowed is decided by the patient on the basis of consent (see VI.–5:101 (Consent and acting on own risk)). The same is correspondingly true for sports injuries – in particular the injuries sustained in the course of participation in competitive sports (e.g. football, rugby) and more especially boxing and the martial arts, so long as these relate to the realisation of risks which are accepted simply on the basis of participation in the activity concerned.

Injury to health. In contrast, not entirely straightforward questions of demarcation may arise in the context of the concept of injury to health. One can consider, for example, noise

nuisance resulting in a short-term headache and a multitude of other cases of diffuse departures from well-being. Here the decision in the particular case must be left to the judge. The impairment of health must not be of a banal nature. On the other hand, severe injuries to health may already be present at a point in time at which the injured person's subjective sense of well-being is not yet adversely affected.

Illustration 1
A person suffering from the common cold who in going about daily life passes the illness on to another does not cause an injury to health.

Illustration 2
An AIDS infection, on the other hand, constitutes an injury to health from the time of contracting the HIV virus; the injured person does not have to wait until the disease itself has broken out. The same holds for other illnesses or diseases whose manifestation develops only over the course of time. What is admittedly required, of course, is that there is at least some form of illness which can be diagnosed. Asbestosis, for example, has a long period of incubation and occasionally it is not detectable over many years. An injury to health will be acknowledged in such cases – not least for the practical reasons pertaining to the submission of proof – only at that point in time when the illness can be diagnosed by competent medically-trained persons.

Related interests worthy of legal protection. In other cases it must be recognised that the denial of an injury to (body and) health by no means necessarily implies that no protection under the law governing liability is granted to the affected party. In this context one must recall the example of the spouse who loses the capacity for sexual intercourse as a result of an accident. The *other* spouse suffers thereby no damage to health, but they are still adversely affected in respect of an interest worthy of legal protection: see above Comment E under VI.–2:101 (Meaning of legally relevant damage). Further examples for VI.–2:101 are provided by the unauthorised extraction of organs from deceased persons (infringement of their *post-mortem* right of personality) or the improper use of bodily substances taken from living persons (blood, sperm taken for the purposes of insemination) which are not property and therefore not the subject of property law within the meaning of VI.–2:206 (Loss upon infringement of property or lawful possession).

Mental health. Paragraph (2)(b) merely stipulates a general basic rule for dealing with injuries to health taking the form of injuries to mental health. It is one of the provisions which in regard to the basic rule contain by way of exception a conclusive ("only") definition. The problem of so-called nervous shock cases is deliberately addressed only partially. The further particulars remain left to the courts which must clarify them on the basis of the general rule of causation. Not every disturbance to the balance of mental and psychological well-being constitutes legally relevant damage. Rather injury must assume a condition which, according to the rules of medical science, can be diagnosed as an illness or complaint and which therefore calls for treatment (whether or not, according to the current state of medical science, treatment is in fact possible). In other words, psychiatric injury to health must amount to a medically ascertainable injury or recognisable condition. Precisely how such an illness is caused generally plays no role. What is decisive is only that it has been caused by conduct or an occurrence for which the injuring person is accountable. Provided the requirements of VI.–4:101 (General rule [on causation]) are satisfied, the legally relevant damage might take the form of damage to mental or psychiatric health, within the meaning of paragraph (2), which

has its cause in the (well-founded) suspicion that an injury to physical health has been sustained.

Injury as such constitutes legally relevant damage. Paragraph (1) treats the injury as such as an independent head of legally relevant damage. That takes account of the fact that the practical results of the concept of *danno biologico* have found increasing pervasive acceptance, albeit in various ways and with varied intensity. The physical injury is to be understood as damage in its own right, giving rise to its own entitlement to monetary compensation additional to and, as the case may be, independent of the existence of some economic or non-economic damage. According to the concept of the text, "injury as such" constitutes neither an economic damage nor a non-economic damage (the latter two being "losses" consequential to the injury), but rather falls into an independent category of its own. However, in quantifying monetary damages for some biological damage which has been suffered, it may well be necessary to put into the balance the other related heads of damage and weigh these up collectively. See also on this point VI.–6:204 (Compensation for injury as such), according to which "injury as such is to be compensated independently of compensation for economic or non-economic loss".

Illustration 3
The cerebral injuries of the victim after an accident are so severe that he permanently loses his sensory capacity and sense of awareness. He has a claim to reparation for the obliteration of his personality, i.e. because of the injury *per se*, independent of the fact that he suffers no pain.

C. Loss

Economic and non-economic loss. Paragraph (1) extends to the injury as such and to all consequential loss. The word "loss" is defined in VI.–2:101(4) (Meaning of legally relevant damage) and embraces economic loss as well as non-economic loss. The most important forms of economic loss are listed in VI.–2:101(4)(a); the most important forms of non-economic loss are listed in VI.–2:101(4)(b). These rules apply also to VI.–2:201. As their wording indicates ("… loss includes"), they are not, however, exhaustive definitions. Rather they purport to do no more than list mere examples of typical economic and non-economic loss. Obviously further injury to health which results from an initially rather limited injury to the body or health is also a consequential damage. Moreover, there might be other consequential economic losses besides loss of income because the injured person is unable to attend to his or her affairs. An example would be the inability of a man or woman to provide domestic services at home. The fact that this activity is not remunerated dictates that there is no reparable loss of earnings, but that does not mean that there is therefore also no reparable economic loss. Consequential loss embraces a multitude of other economic losses – for example, the loss sustained when the victim is compelled as a result of the injury to sell his or her business at an undervalue or is unable to work and has to fall back on more expensive outside labour.

Cost of health care. Especially important in the context of injury to body or health are the "costs of health care" referred to explicitly in paragraph (2)(a). They include an increase in basic needs (e.g. the need to make use of a wheelchair). The concomitant multiplication of necessities required to support daily life (such as the expenditure which someone confined to a wheelchair must make in order to re-structure accommodation) also belongs to this category.

Loss of income. Loss of income (VI.–2:101(4)(a) (Meaning of legally relevant damage)), moreover, includes both loss of actual income and loss of future income. Falling in the latter category is the loss of earning capacity – not least of persons who, at the time of injury, were not in fact in gainful employment but who in all probability would have been in due course (e.g. children or young persons). The judge is granted further room for discretion in the interpretation both of the concept of "consequential loss" and the notion of "loss of income". In dealing with these the judge must also take into account the fact that the text recognises a further distinct category of damage in the form of "injury as such".

D. Damage to the injured person and damage to third parties

Personal injury. As far as personal injury is concerned, the text does not draw any fundamental distinction between primary and secondary victims. This distinction is not helpful. That is because the decisive issue is always only whether the claimant has or has not suffered injury to his or her body or health. In the first case the claimant is a victim; in the second case not. Everything else is, within the framework of this article, immaterial.

> *Illustration 4*
> A is so severely injured in an accident that she temporarily loses consciousness. She is thus unable to arrange for someone to deputise for her in providing the care, incumbent on her, required by a bedridden lady, L, whose condition of health deteriorates as a result. Whether L has a claim is determined by the rules on accountability and causation; that she has suffered a legally relevant damage within the meaning of VI.–2:201, by contrast, is beyond question.

Economic or non-economic losses of third persons. However, it is inherent in the nature of the matter that as a result of the injury of one person other persons may come to suffer damage of a different nature. Their damage need not be to their health (as in the above illustration), but may take other forms (e.g. damage to property, in which case VI.–2:206 (Loss upon infringement of property or lawful possession) would become applicable), and in particular the form of loss of support or mental suffering not amounting to a medical condition within the meaning of paragraph (2)(b). Where that is the case, the problem that arises is one addressed by VI.–2:202 (Loss suffered by third parties as a result of another's personal injury or death) and not VI.–2:201. That is because VI.–2:201 only concerns damage suffered by the injured person, as indicated earlier.

Expenses of persons close to the injured person. There are, however, situations where it is difficult to say which losses qualify as damage suffered by the injured person and which are damage sustained by third parties. In respect of one problem which is important in practice paragraph (2)(a) ("including expenses reasonably incurred for the care of the injured person by those close to him or her") provides an answer. This provision regulates a case at the boundary of so-called transferred loss (*Drittschadensliquidation*) which is not so easy to construe as a matter of law. The solution consists of assigning the expenditures of the relatives to the damage sustained by the injured person. As between these parties, the injured person is liable in turn to the relatives from the standpoint of either benevolent intervention in another's affairs or unjustified enrichment.

Reasonable expenses of carers. The "expenses" of carers will not necessarily include the cost of sacrificing employment (e.g. foregone salary) in order to care for the injured person.

An exceptional case is where the carer provides care as a matter of his or her profession (e.g. as a nurse), in which case the loss incurred by giving up remunerated work would ordinarily equate to the cost of paying someone to provide the same care. In other cases, recovery will depend on whether the loss of earnings of the carer are less than or exceed the cost of contracting for care. The expenses are recovered as part of the loss suffered by the injured person and in the latter case recovery in excess of the costs of nursing care will be barred because the injured person might have obtained care more cheaply. It should be noted that it will only be possible to speak of "care" provided by the attendance of visiting relatives, supporting the emotional well-being of the injured person in recovering health or providing comfort in distress, when the injured person is conscious and thus able to reap the associated psychological benefit. The magnitude of the expenditure must be "reasonable". This qualification is necessary for the protection of the liable person (and, correspondingly, that person's insurer). An excessively frequent number of journeys to a remote special clinic where the injured person is being treated, for example, would not be reasonable.

Those close to the injured person. The injured person may only claim costs for those persons who are "close to him or her". Decisive here is not a formal or legal familial relationship, rather that an emotional and special relationship exists between the carer and the injured person. The litmus test should be whether the person concerned is one whose presence at the bedside of the injured person is necessary for the advancement of the injured person's convalescence or to stabilise his or her condition. This subgroup of people does not necessarily correspond to those people who under VI.–2:202 (Loss suffered by third parties as a result of another's personal injury or death) paragraph (1) have a claim to damages for their non-economic losses sustained as a repercussion. The latter subgroup is more confined; a "particularly close personal relationship to the injured person" is the prerequisite here. If, for example, someone lives alone and therefore has no one who falls within VI.–2:202(1), it might well be that the sole surviving brother or only sister is called to the injured person's bedside. Their travel expenses in getting to the hospital are recoverable, but, if the patient dies, the brother or sister in question has no claim to reparation for non-economic loss.

NOTES

I. General

1. It goes without saying that one's body and health are protected under every state's law of torts. The fact that they are seldom mentioned explicitly in basic legal norms of extra-contractual liability (see e.g., GERMAN CC § 823(1) and ESTONIAN LOA § 1045(1)(ii)) is of no practical consequence. One's body and health amount to "rights" under DUTCH CC art. 6:162 and PORTUGUESE CC art. 483(1) and are also considered manifestations of illegal conduct under GREEK CC art. 914 (?). Incidentally, without doubt injury to body and health constitutes "legally relevant damage" within the meaning of all relevant basic norms of CIVIL LAW. A new chapter 2 „*Du respect du corps humain*" (CC arts. 16 – 16-9) was even inserted (by Statute no. 94-653 of 29 July 1994) into Volume 1 of Title I of the FRENCH CC. The *principe d´inviolabilité du corps humain* is herein laid down. Third parties who do not respect this principle are subject to an action in damages under the rules of the law of obligations (Rép.Dr.Civ [-*Penneau*] IV, v° Corps humain [1995] no. 4). In SPAIN concrete protection of one's health beyond CC art. 1902 and certain specific statutes (e.g. ConsProtA art. 11 et seq. which replaced *Ley 26/1984, General para la Defensa de los Consumidores y Usuarios* from 19 July 1984]) is derived directly from the

Constitution (arts. 15 and 43). HUNGARIAN CC § 76 explicitly enumerates the inviolability of body and health as being among personal rights. ROMANIA is considering the implementation of equivalent rules into its Civil Code (Draft CC arts. 45 and 193).

2. Injury to body and health are ultimate or "personal damages" under NORDIC compensation statutes and the subject of protection of countless torts of the COMMON Law, especially the torts of trespass to the person, negligence, professional negligence, occupiers' liability and product liability.

II. Injury to body and health

3. In GERMANY (CC § 823(1)), ESTONIA (LOA §1045(1)(ii)), HUNGARY (CC § 76), POLAND (CC arts. 444-447) and SLOVENIA (LOA art. 174) it is common practice to distinguish between injury to the body and that to health. Injury to body is usually understood as an (outwardly apparent) violation of bodily integrity. On the other hand, the term injury to health includes "any inducement of a state, which varies – in an adverse way - with that of the body's normal functioning; it is inconsequential whether a condition of pain comes about or a drastic change of one's existential orientation occurs" (BGH 14 June 2005, VersR 2005, 1238). There are, however, no practical consequences attaching to the distinction between injury to body or that to health.

4. This distinction is also uncommon in most legal systems, e.g. in BEGIUM, FRANCE, ITALY, LUXEMBURG and MALTA. In FRENCH legal doctrine, the expression *dommage corporel* has established itself as an overarching term for all material and incorporeal damage caused by harm to body or to health. BELGIAN legal theory speaks mostly of *menselijke schade* or *persoonsschade*. Whether and how further sub-categories are possible and indeed desirable is debatable (*Simoens*, Schade en schadeloosstelling, no. 65 pp. 122-125). The *daño corporal* of SPANISH law is defined as "Non-property and Personal Damage", i.e. as the result of a violation of bodily or mental integrity (*Vicente Domingo*, El daño, 230). The terminology used in this area is, of course, inconsistent. Instead of *daño corporal*, often *daño personal* or *daño en la persona* is used; and recently *daño a la salud* is also increasingly being used (*De Ángel Yágüez*, Tratado de Responsabilidad Civil, 698; *Vicente Domingo* loc. cit. 138). DUTCH Law recognises as personal injury any injury which results from an adverse effect on the person (Schadevergoeding I [-*Lindenbergh*], art. 95, no. 7 pp. 25-26). The BW does not distinguish between injury to body and to health, but solely between non-property damage, personal damage and "fatal damage" (*overlijdensschade*) (*Lindenbergh* loc. cit. no. 27.2 pp. 196-205).

5. The compensation statutes of the NORDIC countries operate using the term personal injury (SWEDISH Damages Law chap. 2 § 1, chap. 3 §§ 1-2, chap. 5 §§ 1-2, chap. 6 § 1; FINNISH Damages Law, chap. 5 § 1 [chap. 5 § 2 speaks conversely of "physical injury or other personal injury"]; DANISH Damages Law §§ 1, 18). According to the Swedish and Finnish position, personal injury encompasses physical as well as mental adverse effects and indeed independent of whether they can be traced back to the ostensible effects of the use of force or not (*Bengtsson/Strömbäck*, Skadeståndslagen, 134). In Denmark the situation is similar, however psychological damage is in principle only recoverable if suffered in the context of (actual or imminent) material damage (*Hertz*, UfR 2004, 180; *Vinding Kruse*, Erstatningsretten[5], 293; *Øe and Røn*, Juristen 2004, 85, 89).

6. For cases of wrongful consultancy to pregnant women causing an unwanted birth ***???***see above, Notes *X95 et seq.* under VI.–2:101 (Meaning of legally relevant

damage). In relation to unwanted pregnancies, tortious liability of the natural father in relation to the mother only comes into play in cases of rape (for BELGIUM see CA Bruxelles 8 May 1985, JT 1986, 252, note *Van Gysel*).

7. It is generally accepted that prenatal injuries damage the health and/or the body of a child, as long as it is born alive (i.e. has not already died as a *nasciturus*; in such a case the mother, and in some jurisdictions [e.g. in SPAIN: TS 31 July 2002, RAJ 2002 (5) no. 7741 p. 14090], in addition the father has a valid cause of action), cf. e.g. for FRANCE *Viney and Jourdain*, Les conditions de la responsabilité[2], no. 249-3 p. 13; for BELGIUM *Dirix*, Het begrip schade, no. 209 p. 132; for ITALY Cass. 22 November 1993, no. 11503, Giur.it. 1995, I, 1, 318 (contractual liability) and Cass. 9 May 2000, no. 5881, Giust.civ.Mass. 2000, 967 (tortious liability); for POLAND CC art. 446; for SPAIN TS 23 November 2004, RAJ 2004 (5) no. 7384 p. 14992; TS 27 May 2002, RAJ 2002 (4) no. 7159 p. 12951; TS 14 May 2001, RAJ 2001 (3) no. 6204 p. 9535; TS 10 December 1997, RAJ 1997 (5) no. 8775 p. 14041 and TS 13 October 1992, RAJ 1992 (4) no. 7547 p. 9915; for PORTUGAL *Álvaro Dias*, Dano corporal, 485; *Capelo de Sousa*, Direito de personalidade, 158); for SWEDEN *Andersson*, Trepartsrelationer i skadeståndsrätten, 306 and for the legal position in ENGLAND and SCOTLAND *Thomson*, SLT 2005, 121. The occurrence of damage can also take place before the procreation of the child (e.g. BGH 20 December 1952, BGHZ 8, 243 [infection of the mother by the transfusion of lues infected blood]). In contrast, the legal position where a nascent mother harms her child by imprudent conduct (alcohol, drug or nicotine abuse) is still largely unclear.

III. Harm to mental health

8. It is seldom expressly stated in the statute codes of CIVIL LAW jurisdictions that severe adverse effects on one's mental well-being - even when not constituting *the sole consequence* of physical injury to oneself or another (see further Notes under VI.–2:202 (Loss suffered by third parties as a result of another's personal injury or death)) - *can* constitute recoverable damage (for an exception see SLOVENIAN LOA art. 132 in conjunction with art. 179, whereby "damage comprises ... the infliction of physical or mental distress or fear on another person"). Nevertheless, this may be deemed to be generally accepted. Thus, substantial suffering caused by an adverse effect on the victim's senses is qualified in FRENCH Law as *dommage moral* resulting in compensation (Rép.Dr.Civ. [-*Lapoyade Deschamps*] IV, v° Dommages et intérets [1997], nos. 217-218). So too in the BELGIAN legal system, the victim's lost well-being constitutes legally relevant damage in the context of the law of obligations (*Peeters*, De indicatieve tabel, no. 22 p. 34). SPANISH Law classifies serious harm to one's mental health as *daño corporal* or *daño a la salud* (i.e. TS 31 October 1973, RAJ 1973 (2) no. 4060 p. 3200 and TS 31 May 2003, RAJ 2003 (3) no. 4391 p. 8309 [though these decisions relate partially to consequential loss resulting from injuries suffered in an accident, partially to damage suffered by relatives).

9. In GERMAN Law it is stated that mental illness only constitutes an injury to health if it is medically ascertainable and exceeds what is endured in general everyday life (BGH 11 November 1997, BGHZ 137, 142, 145; BGH 30 April 1996, BGHZ 132, 341, 343; BGH 25 February 1997, NJW 1997, 1640, 1641). So-called "nervous shock" arising out of the witnessing of a fatal accident of a close relative is more restrictively formulated in that the harm to one's health must clearly exceed the nature and severity of the loss usually sustained by loved ones - in their capacity as parties indirectly concerned in such accidents - through the victim's injuries. This is gauged according to experience (BGH 11 May 1971, NJW 1971, 1883; BGH 4 April 1989, NJW 1989, 2317). As a general rule, particular mental instability on the part of the injured party

does not exonerate the wrongdoer, however (BGH 29 February 1956, NJW 1956, 1108; BGH 30 April 1996 loc. cit.). Along with those persons classified as close relatives under family law (BGH 31 January 1984, NJW 1984, 1405), fiance(e)s and cohabitees are entitled to a claim for compensation (CFI Frankfurt/M. 28 March 1969, NJW 1969, 2286). Under AUSTRIAN Law any mental impairment inflicted on a person that is a recognisable illness, thereby requiring medical treatment (e.g. anorexia or severe depression) constitutes recoverable damage within the meaning of CC § 1325 (*Karner*, Ersatz ideeller Schäden bei Körperverletzung, 94). Mental impairment amounts to a recognisable illness if it requires medical treatment or at least if it is medically diagnosable and therefore medically comprehensible (OGH 14 October 2003, ZVR 2004/49, 164; OGH 30 October 2003, ZVR 2004/6, 19). Where "facial surgery becomes necessary following psychological shock of the severest degree to a women who has substantially and prematurely aged", its cost is thus recoverable (OGH 20 January 2005, ZVR 2005/47, 166).

10. HUNGARIAN law confines itself to the statement that responsibility for mental crises, psychological pain and psychopathy can in principle lead to liability for non-economic damage (*Petrik*, Kártérítési jog, 74-75; Petrik [-*Petrik*], Polgári jog I[2], 202/3, 204). If, for other reasons, a personality problem is already present, then every substantial detrimental change to the victim's physical or mental quality of life establishes a correlative claim for compensation (see further BH 2001/12). An award of compensation for non-economic loss is, however, always a matter of judicial discretion (Gellért [-*Bendedek*], A Polgári Törvénykönyv Magyarázata, 1328-1334). In POLAND injury to health encompasses injury to mental health (*Safjan*, Kodeks cywilny I[4], 1273, 1284). In some older decisions there are indications that the injury must not be insignificant (SN 23 January 1947, OSN 1948, no. 7). If death results, the bereaved relatives in severe cases also have a claim to compensation for their pain (*Szpunar*, Odszkodowanie za szkodę majątkową, 140-141; *Safjan*, Kodeks cywilny I[4], 1273). In ROMANIA it is accepted that, at any rate, causing emotional trauma triggers a claim for reparation for non-material loss (*Adam*, Drept civil, 259-263 with further references to case law).

11. GREEK Law recognises as an injury to health any substantial (from a medical perspective) impairment to the physical, mental or psychological functioning of a person that necessitates treatment (cf. Georgiades and Stathopoulos [-*Georgiades*], art. 929, no. 5; similarly *Filios*, Enochiko Dikaio II(2)[3], 110). Harm to mental health is thus recognised as an injury to health where it requires medical treatment. Nervous breakdowns or other severe psychological shock that follows from the death or injury of a close relative also fall under this category (Georgiades loc. cit. no. 6, *Filios* loc. cit. 111; *Kornilakis*, Eidiko Enochiko Dikaio I, 625 and CFI Athens 7246/1986, EllDik 29/1988, p. 134).

12. In PORTUGAL it is a bone of contention, whether or not impairment of one's "psyche" (*danos biológicos de natureza psíquica*) may be classified as a stand-alone category of legally relevant damage (see, on the one hand, *Álvaro Dias*, Dano corporal, 142 and, on the other, *Costa Basto*, Personal injury compensation, 410). This debate does not, however, seem to have effects in practice. Recoverable damage to mental health consists of psychopathological disorders which affect mental well-being (*Álvaro Dias* loc. cit. 151 note 331). In the case law, which mainly involves traffic accident litigation, the following examples have been deemed to be recoverable and have been compensated by the granting of non-economic damages: anxiety and fear for one's own life because of the violence of the collision (STJ 22 September 2005), irritability and humour changes in virtue of multiple excoriations and treatments (STJ 17 November 2005), grief and personality changes in virtue of internments and

immobilisation with plastering (STJ 23 October 2003), post-traumatic neuroses (STJ 17 January 2002), epilepsy (STJ 20 November 2003), behaviour of auto and hetero-aggression, mental retardation and insanity (STJ 27 April 2004). Furthermore, the Supreme Court accepted the claim of an employee who was persecuted, mistreated and humiliated by his employer, for non-economic damages, on the basis of Portuguese Labour Code art. 24(1). Anxiety due to a potential risk to health resulting from an ecological accident may also constitute a recoverable non-economic loss (*Costa Basto*, Personal injury compensation, 410).

13. Harm to mental health can constitute recoverable damage under DUTCH CC 6:106(1)(b) (third alternative). In formulating this provision, what was contemplated was harm resulting from an "Offence against the Person" (Parlementaire Geschiedenis VI, 371, MvA II, Parlementaire Geschiedenis VI, 372), e.g. kidnapping, indiscriminate imprisonment or rape. However, serious disturbance of privacy is also categorised under this heading (Schadevergoeding II [-*Lindenbergh*], art. 106, no. 27.6). In the context of legally relevant damage to relatives, the Hoge Raad of course only recognised the existence of personal injury where the victim suffers from a psychiatrically definable illness (HR 22 February 2002, NedJur 2002, no. 240 p. 1704, referring to *Bouma*, VR 1995, 207, 209; *Holzhauer*, RM-Themis 1986, 4, 28; *Verheij*, NTBR 1998, 324, 329). Furthermore, reference must also be made to CC art. 7:658. According to this provision, an employer may be held liable for his employees' psychological damage suffered as a result of an excessively high degree of pressure at work or work that is too difficult for them (*Vegter*, NJB 2002, 1935-1942). Examples from case law relate to damage due to anxiety (CFI Middelburg, 30 May 2001, JAR 2001, 232), damage for post-traumatic stress (CFI The Hague 2 August 2001, TAR 2001, 118) and psychological damage resulting from sexual harassment (CFI Rotterdam 30 September 1999, JAR 1999, 230).

14. SWEDEN and FINLAND rank harm to mental health likewise as personal injury. Here it is also not a prerequisite that it is the *result* of an earlier physical injury (Swedish HD 30 March 1971, NJA 1971, 78; *Hellner and Johansson, Skadeståndsrätt*[6], 398; *Bengtsson/Strömbäck*, Skadeståndslagen, 134; Finnish HD 27 January 1982, HD 1982 II-6; HD 12 December 1980, HD 1980 II-133 and HD 25 June 1998, HD 1998:80). As a matter of principle, DANISH law, on the other hand, only compensates such losses where they are in connection with a physical injury or arise as a result of a situation of distress (*Hertz*, UfR 2004, 180; *Vinding Kruse*, Erstatningsretten[5], 293; *Øe and Røn*, Juristen 2004, 85, 89).

15. The legal position in England is similar to that in Ireland (no. 16 below). Employers are not liable for unforeseeable mental injuries that are suffered by an employee due to his fear of outbreak of disease, even where the risk that this disease could be actually contracted was foreseeable and is also attributable to the employer's negligence (*Rothwell v. Chemical & Insulating Co. Ltd.* [2006] EWCA Civ 27, [2006] 4 All ER 1161). The SCOTTISH Law Commission prepared an exhaustive 'Report on Damages for Psychiatric Injury (Scot.Law Com. no. 196) in August 2004 and a draft of a ‚Reparation for Mental Harm (Scotland) Bill' is therein published. S. 3(1) of this draft bill states: „A person is not liable for causing mental harm, whether intentional or otherwise, if the harm is of such a type that a person in the position of the victim could reasonably be expected to endure it without seeking reparation". And s. 4(1)(a) provides that the injured party shall only have a claim in damages for an unintentional act (along with other requirements), "if the harm amounts to a medically recognised mental disorder". Under current law damages for mental distress, anxiety or loss of enjoyment may be recovered under the rules of the common law along with damages for personal injuries or other losses (*Reid v. Ski Independence* 1999 SLT (Sh.Ct.) 62).

Thus a person pursuing a claim for physical injury will be entitled to compensation for mental distress etc. arising as a consequence of the injury (*Anderson v. Secretary of State for Scotland* 1999 SLT 515). A successful claim for pure psychiatric injury requires pursuers to establish that they suffered something beyond the normal emotional responses to an incident such as grief, distress or fear (*Simpson v. Imperial Chemical Industries Ltd.* 1983 SLT 601, 605; *McLoughlin v. O'Brian* [1983] 1 AC 410, 431; *Rorrison v. West Lothian Council* 2000 SCLR 245, 250). Reparation is possible only where the injuries have been induced by shock or if there is a sudden realisation of danger within a continuing process. A secondary victim may claim damages for a psychiatric injury if it arose out of an incident for which the defender was responsible and the secondary victim satisfies the three criteria set out by Lord *Oliver* in *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 411, namely that: (i) there must be a close tie of love and affection between the secondary victim and the injured person; (ii) the secondary victim must have been present at the accident or at its aftermath; and (iii) the secondary victim's psychiatric injury must have been caused by direct perception (i.e. through his or her own unaided senses) of the accident or its immediate aftermath.

16. In IRELAND mental injury is divided into "grief and sorrow" - for which damages are not recoverable - and "nervous shock (i.e. post traumatic stress disorder) and psychiatric illness" - for which damages are recoverable without the necessity of showing direct impact or fear of immediate personal injuries for oneself (*Kelly*, [1998] 16 ILT 10, 11). A claim will lie in damages for nervous shock sustained by reason of actual or apprehended physical injury, not only to the plaintiff, but equally to a person other than the plaintiff (*Kelly* loc. cit. 39, 42). Where a physically injured plaintiff suffers an unforeseeable psychiatric response or a psychiatric response that is more severe than might reasonably have been anticipated, the "egg-shell skull" rule (*McSweeney v. Cork Corporation* (DPIJ: Hilary & Easter Terms 1994, p. 37) ensures that the defendant will have to compensate for the full extent of that response (*McMahon and Binchy*, Torts[3], para. 44.176). In *Kelly v. Hennessy* [1995] 3 IR 253, *Hamilton* C.J. laid down five requirements for a successful nervous shock claim: (i) a recognisable psychiatric illness, which (ii) has been "shock induced", (iii) caused by the defendants' act or omission and (iv) occurred "by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff", and (v) the breach of a duty of care not to cause the plaintiff a reasonably foreseeable injury in the form of nervous shock. In *Cuddy v. Mays & Ors* [2003] IEHC 103, *Kearns* J. regarded *Kelly v. Hennessy* as determining the issue of damages for post-traumatic stress disorder suffered by the plaintiff, a hospital porter, when ambulances brought a number of traffic accident victims to the hospital where he worked, including his deceased brother and severely injured sister, as well as cousins and lifelong friends. *Kearns* J. applied a "close proximity test" (rather than the test of foreseeability, for which he expressly did not opt) to qualify the close family relationship between the plaintiff and his brother and sister. An employer who is or ought to be aware that an employee is working under such pressures that his or her mental health is likely to break down owes a duty to take reasonable steps to deal with the problem (*McMahon and Binchy* loc. cit. 18.60). Equally, the careless failure by an employer to recognise and treat the obvious symptoms of post-traumatic stress disorder in an employee may generate liability (*McHugh v. Minister for Defence* [1999] IEHC 91, [2001] 1 IR 424). The duty to protect an employee's mental health is contained in the Safety, Health and Welfare at Work Act 1989, s. 12. S. 2 defines injury as "any disease and any impairment of a person's physical or mental condition". *Fletcher v. Commissioners of Public Works* [2003] IESC 13, [2003] 1 IR 465 concerned a plaintiff employee who suffered no

physical injuries as a result of his prolonged exposure to asbestos dust, but did suffer from a recognised mental illness because of his fear of contracting mesothelioma, though medical advice proved this fear was irrational. The claim was dismissed. The case suggests that psychiatric damage that is not accompanied by physical injury will only be allowed in nervous shock cases or where relatives have suffered mental stress in fatal injuries cases; see also *Rafter v. A-G & Ors* [2004] IEHC 28). However, damages for negligently inflicted psychiatric harm were allowed in a number of other cases arising out of similar circumstances, but where the defendants did not establish the unreasonableness of the psychological suffering. See, for example, *Commissioners for Public Works v. Swaine* [2003] IESC 30, [2003] 1 IR 521 and *Commissioners of Public Works v. Brewer* [2003] IESC 51, [2003] 3 IR 539. On the extent of the employer's duty of care to employees in the context of stress and bullying in the workplace see further *McGrath v. Trintech Technologies Ltd.* [2004] IEHC 342; *Quigley v. Complex Tooling & Moulding* [2005] IEHC 71 and *Maher v. Jabil Global Services Ltd.* [2005] IEHC 130.

IV. Injury as such and „danno biologico"

17. For the foundations of "biological harm" in ITALIAN Law, see above notes *II18* and *V40* under VI.–2:101 (Duties during intervention). In SPAIN - due to the influence of the Constitution of 1978 (especially of arts. 10, 15 and 43) - it is now likewise accepted that harm to physical or general health (*daño corporal* respectively *daño a la salud*) amounts to damage as such, i.e. independent of its effects on property or non-property rights (*Vicente Domingo*, El daño, 231).

18. Synonymous with the term "physical injury" (*dano corporal*), lately the use of the phrase *dano biológico* has also become customary in PORTUGAL (e.g. STJ 29 November 2005 and *Álvaro Dias*, Dano corporal, 99). According to the Civil Code, bodily injuries as such seem to be considered as non-economic losses (*Sousa Dinis*, CJ (ST) IX [2001-1] 5, 11 A baremização do dano corporal). Nevertheless, case law, which used to see it as a creature of non-economic damage (CA Porto 7 April 1997, CJ XXII [1997-2] 205; STJ 8 March 1979, BolMinJus 285 [1979] 290 and STJ 9 January 1979, BolMinJus 283 [1979], 266), has been recently considering it an economic damage (STJ 17 November 2005; STJ 22 September 2005). Grave physical injuries to the individual or his way of life are seen as forms of loss requiring independent compensation regardless of any loss of property or physical pain (*Álvaro Dias* loc. cit. 137; *Sinde Monteiro*, Estudos sobre a responsabilidade civil, 248; STJ 27 April 2004; STJ 17 November 2005; see also STJ 6 May 1999 and STJ 19 December 2001). Examples include limping (STJ 10 October 2002), prothesis and incapacity to stand for long periods of time (STJ 14 October 2004), grief, immobilisation and displacement depending upon calliper-crutches (STJ 29 April 2004), wounds, fractures, loss of labour capacity and disfigurement (STJ 6 May 2003), permanent dependence upon others to satisfy basic needs (STJ 22 September 2005), loss of vision and sense of smell (STJ 16 January 2003) and sexual dysfunctions (STJ 27 April 2004: loss of a testicle). In this respect the Portuguese case law quite consciously inclined towards Italian case law, which had for a long time qualified *danno biologico* as *danno evento* (its basis has already been evinced in STJ 5 February 1987, BolMinJus 364 [1987] 819 and STJ 17 May 1994, CJ (ST) II (1994-II), 101; see further *Álvaro Dias*, Dano corporal, 123 as well as *Álvaro Dias*, Consequências não patrimoniais, 754). See also the Notes under VI.–6:204 (Compensation for injury as such).

19. In AUSTRIA the rudiments of a similar approach are also apparent, insofar as the fact that the injured party suffers pain is not a prerequisite for compensation for immaterial damages caused by physical injury. So-called "damages for pain and suffering" are

awarded e.g. for the cutting of hair against the will of the relevant party (Rummel [-*Reischauer*] ABGB II², § 1325 no. 1). More importantly even an injured party, for whom no pain results from the accident, has a claim to be compensated by "damages for pain and suffering" (OGH 26 July 2006, ecolex 2007, 4; *Karner*, Ersatz ideeller Schäden bei Körperverletzung, 125). This is referred to as damage *per se* (*Karner* loc. cit. 127). The OGH (Austrian Supreme Court) expresses that damages for pain and suffering are also afforded to any person, who „is disabled by a liability-inducing detrimental effect on his overall personality, experiences pain and suffering deemed to be detrimental to his well-being and contentment and is thereby robbed of the most fundamental of human feelings" (OGH 14 January 1993, ZVR 1993/150, p. 339).

20. The remaining countries' positions are evidenced above in Notes *II15-21* under VI.–2:101 (Meaning of legally relevant damage).

V. Recoverable consequential economic damage

21. In the context of material consequential loss flowing from *dommage corporel*, FRENCH commentators suggest differentiating between "functional" damage (*préjudice fonctionnel*) and economic damage (*préjudice économique*) (*le Tourneau*, Droit de la responsabilité et des contrats, 2004/2005, no. 1533). "Functional damage" refers to the adverse disturbance of one's psychiatric or physical health leading to a deterioration of one's functioning capacity. This "functional deficiency" is expressed in terms of percentages – the so-called *taux d´invalidité*. When assessing this loss in financial terms, it is not, however, within the court's jurisdiction to *expressly* found their judgment on this well-established table of damages (*Bourrié-Quenillet*, JCP éd. G 2004, I, 136, no. 24). "Economic damages" include the cost of medical care, including necessary transport costs. The cost of assistance of a third party after an accident and costs in connection with the renovation of one's house also fall under this category of damages. The same goes for lost income. In cases of permanent disability, loss of earnings is estimated (*le Tourneau* loc. cit. no. 1534).

22. Under Belgian Law, the aggrieved party is to be put in the position in which he or she would have been, had the injurious event not occurred. Consequently he or she has a claim to be compensated for loss of earnings caused by the accident. Moreover, additional strain, with which one must carry out one's normal duties, restriction of one's capacity in maintaining one's home, costs of aid from third parties and the availing of medical care, as well as necessary modifications to one's dwelling or one's car, are all subject to compensation (*Lindenbergh*, TPR 2002 no. 10 p. 1427). Under MALTESE CC art. 1045(1) actual and direct losses are subject to compensation, in addition to the expenses which the injured party may have been compelled to incur in consequence of the damage, his loss of actual wages or other earnings, and the loss of future earnings arising from any permanent incapacity, total or partial.

23. According to SPANISH law, along with the cost of medical treatment, loss of earnings is considered a recoverable financial loss. During the recuperation period, lost wages and the lost income of a freelance worker are equally recoverable (*Yzquierdo Tolsada*, Sistema de responsabilidad civil, 156, also in relation to the marginal importance of evidence by submission of tax returns). Though, as a matter of principle, evidence must be adduced for lost gains (TS 26 September 2000, RAJ 2000 (4) no. 7529 p. 11578), that still does not rule out the compensation of so-called "house-wife losses" (TS (3rd Senate) 20 October 1998, RAJ 1998 (5) no. 8844 p. 13069) or the compensation of a minor's losses, who, as a consequence of his or her injury, must attend school for a longer period of time or under difficult circumstances (TS 11 March 2000, RAJ 2000 (1) no. 1520 p. 2368; *Vicente Domingo*, El daño, 233; CFI Granada 14 June 1985, La Ley 1985, IV, no. 5784 p. 462; this is different from the

case of a third level student: Audiencia Nacional (Senate for Administrative Litigation Proceedings) 20 November 2002, RAJ (TSJ y AP) 2003 (1) no. 51 p. 1244). The Third Party Liability and Insurance (Motor Vehicle Traffic) Act (*Texto Refundido de la Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor*, brought into force by *Real Decreto Legislativo* no. 8/2004 of 29 Oktober 2004) expressly provides, in Table of Damages IV (Correction Factors for the Compensation of Permanent Physical Injury) of its appendix, that any injured party of employable age, even if he or she cannot prove any income, has a claim to the lowest bracket of compensation provided for in the table. Minors also benefit from this (Catalonian TSJ 20 February 2003, RAJ (TSJ y AP) 2003 (2) no. 304 p. 1296). As a general rule, ambulance, hospitalisation, domestic nursing, medication and physiotherapy costs are borne - in accordance with public law - by social insurance bodies, who only enjoy a right of recovery against the wrongdoer for these so-called health care expenses in the case of fault (intent or negligence) (Social Insurance Act [*Texto Refundido de las Leyes sobre Seguridad Social*, brought into force by *Real Decreto Legislativo* no. 1/1994 of the 20th June] art. 127(3); see further TS 21 October 1981, RAJ 1981 (2) no. 3948 p. 3175)). In contrast, the costs of making one's dwelling handicapped-accessible, of rehabilitation, and of psychotherapy fall to be met directly by the party held liable (*Yzquierdo Tolsada*, Sistema de responsabilidad civil, 156). He or she must also bear the expenses that are incurred by the injured party or by his or her family due to private hospitalisation that is not – under public law - covered by social insurance but is nevertheless reasonable in the circumstances (TS 19 November 1981, RAJ 1981 (2) no. 4536 p. 3627; TS 4 May 1984, RAJ 1984 (2) no. 2396 p. 1792; TS 13 September 1985, RAJ 1985 (2) no. 4259 p. 3591). Courts charged with establishing facts have a relatively wide discretion when assessing the amount of other damages e.g. with regard to violations of property rights caused by disfiguring physical injuries to models, actors or persons whose work requires face-to-face contact with customers (TS 20 November 2000, RAJ 2000 (5) no. 9310 p. 14424).

24. Under Italian Law, so-called "costs of health" (medical care, medication etc.) are considered recoverable pecuniary loss, i.e. expenditure that is necessary for the regeneration of psycho-physical integrity, incl. the costs of daily home care (Cass. 8 April 2003, no. 5504, Giust.civ.Mass. 2003, fasc. 4) and of other costs of health care (Cass. 1 December 1999, no. 13358, Giust.civ.Mass. 1999, 2413). Loss of one's ablilty to earn one's specific livelihood (*capacità lavorativa specifica*) also constitutes pecuniary loss. The claimant must show proof of this damage. His point of reference is his actual or probable future occupation (Cass. 12 September 2000, no. 12022, Danno e resp. 2001, 949; Cass. 29 October 2001, no. 13409, Giust.civ.Mass. 2001, 1814; Cass. 18 April 2003, no. 6291, Giust.civ.Mass. 2003, fasc. 4). Lost chance is also recoverable as future pecuniary loss (Cass. 27 October 2001, no. 10291, Giust.civ.Mass. 2001, 1489).

25. In HUNGARY costs of treatment and of lost profit (typically loss of salary) also fall under the category of recoverable *prima facie* pecuniary loss (*Eörsi*, Kártérítés jogellenes magatartásért, 54-55). In the case of treatment and hospitalisation costs damages are mandatory, along with, for example, expenses for medication, physical therapy, physiotherapy, ambulance, domestic health care, assistance from third parties and for a special diet, in addition to increased expenditure for washing, cleaning, electricity, heating, telephone and transport and the cost of renovating one's dwelling in order to make it handicapped-accessible (Petrik [-*Köles*], Polgári jog Kommentár a gyakorlat számára II, 632; Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata, 1358-1363; *Ujváriné*, Felelősségtan[7], 188; *Petrik*, Kártérítési jog, 230-236). CC §§ 356 and 357 regulate in a detailed manner, the compensation for loss of earnings.

26. CZECH and SLOVAKIAN CC arts. 445-447a also feature a range of detailed regulations for the compensation of loss of earnings arising out of an accident. CC art. 449 adds that "compensation shall also include compensation of purposeful expenses connected with medical treatment". POLISH CC art. 444 § 1 states that damages resulting from injury to one's body and health "shall cover all the resulting costs". They include treatment, special care and rehabilitation costs (medication, medical advice and operation, transport, rehabilitation equipment, wheelchair), and lost earnings during the treatment and recovery period (*Safjan*, Kodeks cywilny I[4], 1274-1275). If the injured party so requests, the wrongdoer is obliged to make an advance payment. This is also true for the necessary costs of re-education. Partial or entire loss of earning capacity and the cost of additional basic needs are to be covered by ongoing payments (§ 2 loc. cit.). SLOVENIAN LOA art. 174(1) enumerates "the costs in connection with treatment, other necessary expenses thereto connected and the earnings lost because of incapacity to work during treatment". Moreover, compensation falls due for partial or entire loss of earning capacity, the costs of increased basic needs and for loss of, or detriment to prospects of occupational success.

27. In the context of personal injury, under GERMAN CC § 249, primarily the costs of medical treatment are recoverable (Palandt [-*Heinrichs*], BGB[65], § 249, no. 8). Where these are borne by the social insurance carrier or a private insurance company, the relevant claim is vested, by law, in the insurer (Social Security Code [SGB] Book X § 116; Law on Insurance Contracts [VVG] § 67). Although expenses are sustained based on those of the reasonable person (BGH 23 September 1969, NJW 1969, 2281), the injured party may select such a standard of service as is customary for him or her (BGH 18 October 1988, NJW-RR 1989, 670). For panel patients, availing of private medical services that are not insured is justified where the services offered by statutory health insurance are inadequate for the eradication of the harm and either other reasonable alternatives are not available (BGH 6 July 2004, BGHZ 160, 126) or the suffered injuries are particularly severe (CA Munich 29 July 2004, DAR 2004, 651). The cost of an expensive cosmetic operation, for which there is no sufficient reason are not recoverable (BGH 3 December 1974, NJW 1975, 640). In contrast, costs of treatment and care are recoverable (RG 11 June 1936, RGZ 151, 298; BGH 8 November 1977, VersR 1978, 149), so too are expenses for occupational rehabilitation, especially re-education (BGH 4 May 1982, NJW 1982, 1638; BGH 26 February 1991, NJW-RR 1991, 854). Recovery of the cost of returning to education for a more highly qualified job is restricted to partial compensation (BGH 2 June 1987, NJW 1987, 2741). Where increased basic needs result from the injury, a distinction is drawn: where once-off measures are necessary (like, e.g. the acquisition of ancillary medical equipment, the overhauling of a vehicle to make it handicapped-accessible or the renovation of a dwelling to make it wheelchair-accessible) full particulars are provided for under CC § 249(2) (BGH 19 May 1981, NJW 1982, 757; BGH 20 January 2004, NJW-RR 2004, 671). However, if on-going special needs result, then the wrongdoer is liable for damages in the measure so provided for in the special regulations contained in CC § 843 (Palandt [-*Heinrichs*], BGB[65], § 249, no. 10). Lost profit also falls under the category of "natural restitution" [whereby the wrongdoer must compensate the injured party in order to restore his or her circumstances to the state he or she would have been in, had the wrongful event not occurred] (CC § 249 with clarification in § 252 first sentence; BGH 9 July 1986, BGHZ 98, 212, 219).

28. Under AUSTRIAN CC § 1325 the tortfeasor must compensate for costs of recovery and for present and future loss of earnings. Costs of recovery include all appropriate

expenses resulting from the physical injury, as long as they are with a view to eradicating or mitigating the medical after-effects of the accident (OGH 18 November 1982, ZVR 1983/281, p. 312; OGH 20 February 1963, ZVR 1963/144, p. 154). This does not depend on actual successful recovery (OGH 18 May 1971, ZVR 1972/56, p. 86). Counted among costs of recovery are, e.g. the costs of medical treatment, of hospitalisation or residence in a health resort, costs of transport, of operations, expense for medication and other aids to recovery, even the payment of gratuity to nursing staff (*Koziol and Welser*, Bürgerliches Recht II[12], 321; Rummel [-*Reischauer*] ABGB II², § 1325 no. 14). The costs of treatment by a private doctor or of being in the special class of a hospital are recoverable, if they appear to be necessary from a medical standpoint or at least where they facilitate the expectation of a more favourable result from treatment (OGH 24 May 1962, JBl 1963, 40) or where they are in keeping with the particular lifestyle of the injured party (OGH 5 February 1970, SZ 43/32; OGH 24 April 2003, ZVR 2004/38, p. 131). The injured party is not entitled to compensation if it is established that the treatment for recovery has ceased (no "fictitious treatment costs": OGH strengthened senate 23 October 1997, SZ 70/220). Along with actual costs of treatment, costs of an increase in basic needs are compensable (OGH 10 December 1964, ZVR 1965/225, p. 243). Belonging to this category are, e.g. a wheelchair, nursing services, the cost of a disabled-ready vehicle or the renovation of a dwelling in order to make it handicapped-accessible (Schwimann [-*Harrer*], ABGB VII², § 1325 no. 8). Lost earnings within the meaning of CC § 1325 are everything the injured party loses as a result of the deterioration of his or her ability to earn his or her livelihood, i.e. the ability to earn one's livelihood in a position that corresponds with one's education, qualifications and hitherto pursued occupation (*Koziol*, Haftpflichtrecht II², 134). Loss of occupational promotion opportunities are also recoverable (*Koziol and Welser*, Bürgerliches Recht II[12], 322). In contrast to loss of earnings, which is qualified as "positive damage", compensation for lost profit only falls due where there is intention or gross negligence (*Koziol* loc. cit. 132). Where someone is not in gainful employment, he or she has no claim for compensation of loss of earnings until his or her probable point of entry into the working world (Rummel [-*Reischauer*], ABGB II², § 1325 no. 23); losses that result from delayed entry into gainful employment are, however, recoverable (OGH 24 April 1969, EvBl 1969/374, p. 374). Where there is permanent damage, which goes part and parcel with a probable future reduction in earning capacity, a so-called "abstract pension" may be granted (OGH 30 September 1965, SZ 38/153; OGH 12 November 2003, ZVR 2004/18, p. 67). Additionally, CC § 1326 provides for compensation where a disfigurement arising out of the injury hinders the improved progression of the injured party; a low probability suffices here (OGH 11 November 1991, ZVR 1992/79, p. 176). Primarily belonging to this category is the diminution of employment prospects, but also the loss of the opportunity to marry or of social contact (OGH 11 January 1983, ZVR 1984/90, p. 84).

29. GREEK CC art. 929 clarifies that compensation for damages encompasses suffered damage and „costs of the medical condition", along with that which the injured party must do without in future or which he must expend as a result of increased basic needs; this provision complements CC arts. 297 and 914, but does not, however, replace them (Georgiades and Stathopoulos [-*Georgiades*], art. 929, no. 2; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio I, 625). Costs of the medical condition cover all expenses that are necessary for the rehabilitation of the injured party (treatment, medication, transport). Furthermore, loss of earnings during the period of treatment is recoverable (Georgiades loc. cit. no. 19) as well as the impairment of performing domestic activities (even if no home help is hired in order to take care of household

activities: CA Athens 5163/1996, EllDik/38/1997, p. 650; CA Athens 2043/1986, EllDik 27/1986, p. 678). Primarily, pecuniary loss resulting from one's diminished capacity to earn one's livelihood falls under the category of liability to compensate for that, which the injured party must do without, while expenditure for a specialised diet or for the hiring of a home carer, for example, falls under the category of liability to compensate for necessary additional expenditure (*Georgiades* loc. cit. nos. 22 and 28). According to CC art. 931, mutilation or disfigurement of the injured party shall carry weight when assessing the compensation for damages (for a more detailed account, see A.P. 739/1996, EllDik 38/1997, p. 72 and A.P. 477/2001 [unpublished, here cited under *Kornilakis*, Eidiko Enochiko dikaio I, 634).

30. PORTUGUESE Law follows much the same principles. The obligation to compensate for damage relates as much to current pecuniary disadvantages (*danos emergentes*: CC art. 564(1)), as it does to lost pecuniary advantages, as long as their realisation were sufficiently probable, had the accident not occurred (CC art. 564(2)), see *Costa Basto*, Personal injury compensation, 400). Liability covers, *inter alia*, costs of all types of treatment (STJ 21 December 2005), travel costs, actual loss of income and lost pay increases (in the case of permanent incapacity to earn one's livelihood, see STJ 7 April 2005) as well as the cost of necessary hired help (STJ 8 March 2005; *Álvaro Dias*, Dano corporal, 210 and 228). In contrast to labour law, traffic accident law does not recognise any fixed sums of damages (STJ 8 March 1979, BolMinJus 285 [1979] 290). It is therefore assumed in cases of permanent incapacity to earn one's livelihood, that the injured party is to be paid such lump sum that accords with his or her probable future earnings until death (STJ 6 July 2000, CJ VIII [2000-2] 144; STJ 9 January 1979, BolMinJus 283 [1979] 260; *Costa Basto*, Personal injury compensation, 405). More precise mathematical methods were developed for the concretion of these methods of calculation (STJ 5 May 1994, CJ II [1994-1] 86; STJ 7 February 2002), which can in turn be adjusted to accommodate the facts of each individual case (STJ 8 March 1979, BolMinJus 285 [1979] 290; STJ 6 July 2005). A claim in damages for pecuniary loss does not require that the injured party actually drew an income (see STJ 3 June 2004 and STJ 13 November 2001: the claim of a child due to the foreseeable delay of his entry into the working world, as well as STJ 13 May 2004: the claim of a housewife; see further STJ 13 November 2003 for the claim of a pensioner). A model, who can no longer pursue his occupation because of physical disfigurement, suffers not merely non-pecuniary damage, but genuine pecuniary losses (STJ 26 July 1968, BolMinJus 179 [1968] 165).

31. Under DUTCH CC art. 6:96, loss suffered, lost profit and all expenses that appear reasonable for the prevention and mitigation of the damage are considered recoverable pecuniary losses, see above HR 2 November 1962, NedJur 1963, no. 61 p. 193). For physical injury, CC art. 6:107 specifies that, in particular medical treatment and nursing, whether the latter is provided by a professional or a family member, e.g. the parents (HR 28 May 1999, NedJur 1999, no. 564 p. 3109) are covered. Liability for a specific fixed amount (currently 23 Euro per day) is imposed for additional costs that are not specified further. Furthermore, expenses for medication, transport costs, costs of everyday and industrial rehabilitation are recoverable (for more on this issue and what follows, see the commentary of *Lindenbergh*, Schadevergoeding II, art. 6:107, nos. 9-17). As long as recovery is still expected, in principle lost income may be recovered until one completes one's 65th year, and under certain circumstances also after this date (CFI Assen 15 January 1963, VR 1967, 61). For permanent damage, the difference between presumed attained income and actually earned income is compensated (HR 15 May 1998, NedJur 1998, no. 624 p. 3562; CFI Leeuwarden 26. April 1973, VR 1974, 21). For employees the starting point is always the net income,

to which expenses and emoluments may belong (CA ´s-Hertogenbosch 25 March 1970, VR 1973, 23). The percentage of one's incapacity to earn a livelihood offers indication when estimating this figure. Where illicit work is involved, it shall depend on the net income, with which the injured party would have been left after tax. In the case of the self-employed, the judge is vested with yet further reaching jurisdiction to assess this figure. Costs arising from a permanent disability (wheelchair and other aids, medical help and nursing, transport costs, costs for a home help and costs for higher health insurance premiums) are generally recoverable. Lump sums are awarded, e.g. for increased wear and tear of clothes and shoes (CFI Amsterdam 17 March and 15 December 1993, VR 1994, 206) or for the fact that the injured party must seek out a hotel for his or her holiday rather than camping like before, which was less expensive (CFI Amsterdam 20 November 1985, VR 1987, 48). The same is true for the inability to carry out smaller jobs and repairs oneself any longer (CA `s-Hertogensbosch 10 September 1968, VR 1970, 10). No compensation is granted for a decrease in one's chances of marriage (CFI Amsterdam 27 January 1961, VR 1964, 60).

32. ESTONIAN LOA § 130(1) formulates it thus: „In the case of an obligation to compensate for damage arising from harm to one's physical or general health caused to a person, the obligated person shall compensate the aggrieved person for expenses arising from such damage or injury, including expenses arising from the increased needs of the aggrieved person, and damage arising from total or partial incapacity to work, including damage arising from a decrease in income or deterioration of the future economic potential of the aggrieved person".

33. Under the SWEDISH Damages Law, chap. 5 § 1 no. 1 the „costs of recovery and other costs, including a reasonable allowance for the injured party's loved ones" are recoverable, so too is loss of earnings according to no. 2 loc. cit. and according to no. 3 loc. cit. "pain, affliction or other on-going disabilities, as well as particular (formerly: "other": *Sandstedt*, VersRAI 2002, 9, 11) adverse effects resulting from the harm" are also compensable. DANISH Damages Law § 1(1) enumerates the same heads of damages (loss of income, costs of recovery and other losses); reasonable remuneration of loved ones, however, goes unmentioned (for a more detailed account, see *von Eyben and Isager*, Lærebog i erstatningsret[5], 257; *Møller and Wiisbye*, Erstatningsansvarsloven[6], 22). FINNISH Damages Law chap. 5 § 2 nos. 1-4 accord with the equivalent Swedish rule. SWEDISH Damages Law chap. 5 § 1 nos. 2 and 3 regulate the establishing of recoverable loss of income including damages of tradesmen and persons who maintain a household. The subject matter of no. 1 loc. cit. is, *inter alia*, the costs of health care. They must be reasonable and necessary. Only costs that are not covered by general insurance come into play here (see also chap. 5 § 3 loc. cit. and in connection with that *Bengtsson and Strömbäck*, Skadeståndslagen, 141). The same is true in DENMARK (*von Eyben and Isager* loc. cit. 257).Treatment in a private hospital is compensable when public hospitals are overcrowded (Swedish HD 27 November 1967, NJA 1967, 497). The same goes for medically necessary care in a private home (HD 9 January 1968, NJA 1968, 23; HD 23 March 1976, NJA 1976, 103). The term "other costs" in the SWEDISH Damages Law chap. 5 § 1 no. 1 encompasses costs that are otherwise not covered, e.g. transport and travel costs in connection with after-treatment or costs of training to enable industrial rehabilitation, in addition to increased costs of getting to and from work and the additional expense - which resulted from the injury - of having to hire help with the upkeep of private property (*Bengtsson and Strömbäck*, Skadeståndslagen, 145; HD 16 November 1992, NJA 1992, 642). In DENMARK removal costs as a result of the injury are compensated (ØLD 15 August 2000, UfR 2000, 2357; HD 3 July 2002, UfR 2002,

2407). The costs of renovating a dwelling for a disabled person as well as for other increased basic needs are recoverable (*von Eyben and Isager* loc. cit. 258; *Møller and Wiisbye* loc. cit. 35). Calculation of compensation for loss of income in SWEDEN is done according to the Damages Law, chap. 5 § 1 nos. 2-3, the calculation of compensation for loss of future earnings, according to chap. 5 § 4. The equivalent provisions of the FINNISH Damages Law are to be found in chap. 5 § 2a and chap. 5 § 2b. The DANISH Damages Law contains corresponding provisions in § 2 (Loss of income) and §§ 5-9 (diminished ability to earn one's livelihood).

34. Under SCOTTISH Law consequential economic damage will include: wages lost by the injured party (*Doonan v. Scottish Motor Traction Co. Ltd.* 1950 SC 136); loss of capital (*Fox v. Caulfield & Co. Ltd.* 1975 SLT (Notes) 71); loss of earning capacity (*Whyte v. University of Dundee* 1990 SLT 545; loss of employability (*Robertson's Robertson's Curator Bonis v. Anderson* 1996 SC 217); pension rights lost by the injured party (*Mitchell v. Glenrothes Development Corp.* 1991 SLT 284); all medical expenses reasonably incurred (*Rubens v. Walker* 1946 SC 215) and other necessary expenditure such as the costs of prostheses, nursing, special clothing and altered premises (*White and Fletcher*, Delictual Damages, 15; *Tuttle v. Edinburgh University* 1984 SLT 172). Future loss of income and damages for the future cost of caring for an injured party are usually calculated by computing an annual loss (the multiplicand) to which is applied a multiplier appropriate to the age of the party and other relevant circumstances. This produces a lump sum which, when invested, should provide an annual income equivalent to the loss (*McNulty v. Marshall's Food Group Ltd.* 1999 SC 195). Under Administration of Justice Act 1982 s. 9 the claimant may seek a "reasonable sum" for services which, by virtue of his injuries, the claimant himself is no longer able to render to his relatives (*Brown v. Ferguson* 1990 SLT 274; *Ingham v. John G. Russell (Transport) Ltd.* 1991 SC 201; *Lynch v. W. Alexander & Sons (Midlands) Ltd.* 1987 SCLR 780). Under s. 10(c) and (iii), in assessing the amount of damages payable in respect of personal injuries, there must be deducted any benefit payable from public funds, in respect of any period before the date of the award of damages, designed to secure to the injured person a minimum level of subsistence.

35. Under IRISH law loss of earnings is also one of the principle heads of damage. In assessing loss of future earning capacity, "[n]ot merely is the former earning capacity of the plaintiff relevant but so also is the present physical condition, his prospective physical condition, the state of the labour market, the particular trade or skill which he has and the prospects for exercising it in the future having regard to the diminution of his capacity to do so resulting from the injuries he has sustained" (*Walsh* J. in *Long v. O'Brien & Cronin Ltd.*, SC 24 March 1972, unreported. In *Reddy v. Bates* [1983] IR 141 the Supreme Court stated that "where damages are to be assessed under several headings, where the jury has added the various sums awarded and arrived at a total for damages, they should then consider this total sum, as should this court on any appeal, for the purpose of ascertaining whether the total sum awarded is, in the circumstances of the case, fair compensation for the plaintiff for the injury suffered, or whether it is out of all proportion to such circumstances." The length of time by which the expectation of life has been reduced must also be taken into account (*Walsh* J. in *Doherty v. Bowaters Irish Wallboard Mills Ltd.* [1968] IR 277 at 285). Where there is probability of some disability or illness arising or developing in the future, the damages to be awarded "should be commensurate with, and proportionate to, the degree of that possibility or probability" (*Dunlop v. Kenny*, SC 29 July 1969, unreported, per *Ó Dálaigh* C.J. at p. 11). The plaintiff is also entitled to compensation "for the reduction in the spectrum of employment which would have been ope[n] to him if uninjured" (*Feeney v. John Sisk & Sons Ltd.*, DPIJ: Hilary and Easter Terms

1993, p. 254 at p. 258 [HC]). An injured plaintiff is entitled to recover all expenses reasonably incurred (or to be incurred) in respect of his or her medical care, inclusive of hospital expenses (*McMahon and Binchy*, Torts[3], para. 44.107). A plaintiff who is eligible to receive free treatment and care under the Health Act 1970 is not obliged to avail himself or herself of free services under pain of being held otherwise to have unreasonably failed to mitigate damages (Civil Liability Act 1961, s. 34(2)(b)). Where the spouse, parents, or other close relatives or friends take on the task of caring for the injured plaintiff on an ongoing basis, that is also recoverable loss to the plaintiff (*Doherty v. Bowaters Irish Wallboard Mills Ltd.* [1968] IR 277, 286). In *Curley v. Dublin Corporation* [2003] IEHC 28, *Gilligan* J. in awarding damages took into account "the risk of unemployment, redundancy, illness, accident or the like". In *O'Sullivan v. Kiernan* [2004] IEHC 78, *O'Neill* J. awarded general damages because the plaintiff's range of choice of career was significantly reduced (although the plaintiff had not suffered any actual loss of earning capacity).

VI. Expenses of close relations

36. Under French Law, close relatives who betake themselves to an immobile injured party can claim the reasonable costs of visiting (travel and overnight stay) as damages of their own - so-called *préjudice économique par ricochet* - (Cass.civ. 20 December 1960, s. 1961 jur. 178). In contrast, costs that are incurred by third parties (whether strangers or relatives: Cass.civ. 14 November 2002, Bull.civ. 2002, II, no. 260 p. 205) who provide assistance to the victim (so-called *assistance d´une tierce personne*) qualify as pecuniary losses of the victim (*Viney and Jourdain*, Les effets de la responsabilité[2], no. 110-2 p. 208; CA Paris 10 November 1983, D. 1984 jur. 214, note *Chartier*).

37. In BELGIUM close relatives also have their own claim to compensation of reasonable visiting costs, whereas the costs of third parties for actual assistance provided has been to date deemed as (recoverable) damage to the victim, and indeed even when the help is gratuitously provided (Cass. 30 November 1977, Pas. belge 1978, I, 351). Cass. 6 November 2001, Pas. belge 2001, 1790, concl. *du Jardin*) has, however, granted those who render assistance their own claim against the wrongdoer from now on; it seems that the resulting question of the relationship of the claim of the victim and that of those who provide assistance has yet to be clarified (see further *Lindenbergh*, TPR 2002, no. 27 pp. 1437-1438).

38. The SPANISH *Tribunal Supremo* has confirmed on numerous occasions that close relatives have a claim to compensation for their own material and incorporeal losses arising from the harm to the primary injured party. According to case law hitherto reported these damages can not only be claimed by the relatives themselves (see e.g. TS 23 April 1992, RAJ 1992 (2) no. 3323 p. 4388 and TS 9 February 1988, RAJ 1988 (1) no. 771 p. 752) but also by the primary injured party (in his or her own name) (see e.g. TS (5th Senate) 23 February 1988, RAJ 1988 (1) no. 1451 p. 1389). Parents often have successful claims in their own names, as well as in the name of their injured children (like e.g. in TS (3rd Senate) 25 April 1989, RAJ 1989 (3) no. 3471 p. 3921 and in TS 15 October 1996, RAJ 1996 (4) no. 7110 p. 9586). Where someone continually cares for a severely injured relative and must give up work as a result, he or she has a claim in damages for loss of earnings suffered (TS (5th Senate) 23 February 1988 loc. cit.).

39. ITALIAN case law also allows for care of the injured party by relatives in various aspects. Due to the impossibility of estimating a loss in financial terms, compensation for parents who care for a brain-damaged child - e.g. for the costs of renovating one's dwelling and its sanitary facilities, for the child's specialised diet and for his or her

daily care and supervision - is granted according to equity (Cass. 31 May 2003, no. 8827, Giust.civ.Mass., fasc. 5). A wife who gave up work in order to take care of her seriously injured husband is also recognised as having her own claim in damages for compensation. This is treated as pecuniary loss to the wife in the form of lost gains (Cass. 2 February 2001, no. 1516, Resp.civ. e prev. 2001, 881). Independent of this, relatives may assert their own claim for incorporeal damages based on CC art. 2059 for the harm to the familial relationship (Cass. 31 May 2003, no. 8827, Giust.civ.Mass. 2003, fasc. 5).

40. Under HUNGARIAN Law family members who nurse the victim may assert claims for their own loss of earnings as well as for costs incurred arising from the care provided. Care by a wife who was not gainfully employed before her husband's accident is also compensable (*Eörsi*, Kártérítés jogellenes magatartásért, 177 f). No person should have to undertake additional gratuitous work to relieve the injuring party from his obligation (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata, 1358 f; Petrik [-*Köles*], Polgári jog Kommentár a gyakorlat számára II, 631). Travel and visiting costs borne by family members are equally recoverable, not, however, by friends. The cost of gifts brought to the hospital are also incompensable (Gellért [-*Benedek*] loc. cit. 1362 f). BH 2001/15 granted the most severely injured victim of a car accident the costs for treatment (*inter alia* for physiotherapy, massage therapy, logopedic therapy), loss of salary and transport costs (including the costs of necessary treatment abroad), as well as the costs of a vehicle, the costs of increased basic needs (e.g. television set, books), increased costs in maintaining the household and nursing costs. His parents, who cared for their son, were granted damages for loss of salary, for the deterioration of the maintenance of the garden, travel and visiting costs, the cost of the supervision of their other child during their absence and the cost of renovating their dwelling in order to make it handicapped-accessible.

41. Under GERMAN law the visiting expenses of close relatives are counted among the costs that are recoverable by the injured party (BGH 22 November 1988, BGHZ 106, 28, 29; BGH 21 May 1985, NJW 1985, 2757; BGH 19 February 1991, NJW 1991, 2340). Compensability depends on whether the visits are medically beneficial and necessary to the recovery process and whether the costs were unavoidable. Therefore, compensation is only granted for the costs of e.g. the most economic mode of transport, loss of salary only for working hours that may not be made up, and lost profit of the self-employed only to the extent that it is directly assignable to the visitation time and can not be obtained by other means (BGH 19 February 1991, NJW 1991, 2340, 2341). Within the context of the case law here, "relative" is taken to mean cohabitees as well (CFI Münster 12 June 1997, NJW 1998, 1801). The relatives themselves have no claim against the injuring party, but can make a claim on the injured party to compensation (BGH 21 December 1978, NJW 1979, 598).

42. Within the meaning of AUSTRIAN CC § 1325, visting expenses of close relatives are regarded as recovery costs because their visit usually enhances recovery (Rummel [-*Reischauer*], ABGB II², § 1325 no. 16; OGH 11 November 2004, ÖJZ 2005, 390). Those who bear these visitation costs are entitled to claim (OGH 30 March 1967, ZVR 1968/83, p. 189). As a result, relatives can themselves be entitled to claim (OGH 20 June 1989, SZ 62/116: children of the injured party who were of full age; OGH 20 June 2002, ÖJZ 2002/190, p. 725: cohabitee). Though mere expenditure of time is indeed incompensable (OGH 1 March 1984, EFSlg 46.093), parents still enjoy a claim in damages when they take unpaid leave in order to look after their underage child in hospital (OGH 25 April 1985, EFSlg 48.648) or if they otherwise have to take on a particular extra burden (CA Innsbruck 20 September 2000, ZVR 2001/100, p. 363). Where a relative takes care of the injured party, this person can personally take a claim

against the tortfeasor, no different than if the injured party would have had to admit himself to a nursing home. The wrongdoer is liable for the cost that would have fallen due for professional carers (OGH 26 May 1999, ZVR 1999/109, p. 375 and OGH 20 June 2002, ZVR 2003/47, p. 166; different approach OGH 10 September 1998, SZ 71/146).

43. In GREEK Law it is argued that the term "costs of illness" in CC art. 929 also encompasses expenses that close relatives take on in order to visit the injured party. This relates to e.g. costs for phone calls, travel costs, loss of earnings or hiring a third party in the business of the relative in question for the time that he spends with the injured party (*Filios*, Enochiko Dikaio II(2)[3], 186). Others deem this to be an interpretation which is no longer true to the text of the law, they opine, however, that appropriate further legal education may be justified according to considerations of equity (Georgiades and Stathopoulos [-*Georgiades*], art. 929, no. 15).

44. PORTUGUESE CC art. 495 acknowledges some exceptions to the principle that tortious claims are only open to those whose right has been infringed (*Antunes Varela*, Obrigações em geral I[10], 620). According to this provision, along with hospitals and doctors, particularly those who have provided help to the injured party have their own claim in damages against the injuring party (for a more detailed account, see *Abrantes Geraldes*, Temas da responsabilidade civil I, 14). Though family members who suffer loss of salary because they are providing the victim with assistance are not expressly mentioned, they are, however, likewise considered entitled to compensation according to the case law (STJ 16 December 1993, CJ (ST) I (1993-3) 182; CA Porto 4 April 1991,), for instance the mother of a victim of a traffic accident who has given up her job to enable her to care for her daughter (STJ 8 March 2005). Naturally, a causal nexus between the injury of the primary victim arising from the accident and the pecuniary damage of the relative is required (STJ 26 February 2004).

45. DUTCH CC art. 6:107 entitles third parties (with the exception of insurance carriers), who have paid expenses for the benefit of the injured party, to a claim in damages against the wrongdoer, if the injured party were likewise entitled to claim damages for these expenses, had he paid them himself. Costs of treatment, nursing, rehabilitation and medication, in addition to reasonable costs of visitation come into play in this context (MvT, Parl. Gesch. Inv., 1283; Schadevergoeding II [-*Lindenbergh*], art. 107, no. 45). The loss of earnings of a close relative who temporarily gives up work in order to nurse the victim is recoverable, indeed to the amount that otherwise necessary professional assistance would have cost. Where an unscathed close family member hires home help, they shall have a claim to the costs of such expense (Asser [-*Hartkamp*], Verbintenissenrecht I[12,] no. 474); however, if the family themselves help, without being able to show an actual loss, a claim in damages does not arise (*Lindenbergh* loc. cit. no. 47).

46. The SWEDISH Damages Law, chap. 5 § 1 requires compensation for "costs of recovery and other costs, including reasonable compensation for the injured party's loved ones." This relates to expenses incurred for care and visiting. Where circumstances so allow, relatives who nurse the victim may even recover loss of revenue that exceeds the (hypothetical) costs of professional carers (*Sandstedt*, VersRAI 2002, 9, 10; HD 5 November 1996, NJA 1996, 639). It is unclear, who exactly can claim the damages. HD 23 March 1976, NJA 1976, 103 and HD 10 November 1982, NJA 1982, 668 granted the relatives their own claim. The explanatory notes on the newly formulated provision of chap. 5 § 1 loc. cit. indicate, however, that it is the claim of the injured party (Prop 2000/01:68 [*Ersättning för ideell skada*] 68). Loss of income and travel costs incurred by a relative who cares for

an injured minor fall within the meaning of "other loss" in § 1(1) of the DANISH Damages Law (ØLD 14 September 1995, FED 1995.1020 and HD 10 October 2000, UfR 2001, 28). However, it is required that measures taken by the relative are necessary for the injured party's recovery (HD 3 July 2002, UfR 2002, 2407). Whoever is entitled to the claim (the injured party or the relative) seems not to have been conclusively cleared up. In FINLAND close relatives can in certain circumstances claim loss of income and necessary costs incurred as a result of their care (Damages Law, chap. 5 § 2d, first sentence), in addition to compensation for other measures that aid recovery (loc. cit., second sentence), not however after the point in time at which the damage subsided (loc. cit., third sentence).

47. In ENGLAND Administration of Justice Act 1982 ss. 7 to 10 provide that services rendered to an injured person by a relative, unless it is expressly agreed that no sum shall be payable, will be a head of loss allowing recovery of "reasonable remuneration" and repayment of reasonable expenses. In SCOTLAND, a wide range of "necessary services" have yielded compensation under s. 8 (services rendered to the injured party): the wife who assisted her husband with washing and dressing (*Gripper v. British Railways Board* 1991 SLT 659); the wife who walked her husband's dog and drove his car (*Millar v. Fife Regional Council* 1990 SLT 651); the husband who took over the running of the household (*Smith v. Chief Constable, Central Scotland Police* 1991 SLT 634); the cohabitee who "effectively performed the services of a nursing auxiliary" (*Lynch v. W. Alexander & Sons (Midlands) Ltd.* 1987 SCLR 780). 'Relative' for the purposes of s. 8 is defined in s. 13(1) of the 1982 Act – it is restricted to spouses; 'ascendants'; descendants'; siblings; and uncles and aunts. Divorced spouses, 'common law spouses', those treated as children of the family, illegitimate children, and stepchildren are included, and since 'any relationship of the half blood shall be treated as a relationship of the whole blood' and 'any relationship by affinity shall be treated as a relationship by consanguinity' (loc. cit. s.13(a)), a broad array of relationships is provided for, such as half-siblings, uncles and aunts by marriage, and even 'grandparents-in-law', and combinations of these categories. The loss is recovered in a claim made by the injured person, who is placed under an obligation to account to the person suffering the loss.

48. Under IRISH law the spouse or parents of an injured victim of a tort can claim compensation for loss of consortium (*McKinley v. The Minister for Defence (No. 2)* [1997] IEHC 93, [1997] 2 IR 176) or loss of services as the case may be, in respect of, *inter alia*, the medical expenses that they incur in relation to the victim (*McMahon and Binchy*, Torts[3], para. 44.109). Where the spouse, parents or other close relations or friends have taken on the task of caring for the injured plaintiff on an ongoing basis, some judges in recent years (e.g. *Smith v. Ireland*, HC 16 August 1996, unreported [*Flood* J.]) have been willing to make an award *directly* in favour of the carer-spouse (or other caring relations or friends) rather than resorting to a trust (as has been done in England) of a restitutionary (*Hughes v. O'Flaherty*, HC 19 January 1996, unreported) characterisation.

VII. Recoverable consequential non-economic damage

49. The FRENCH legal system recognises a range of recoverable non-economic damage (see further *le Tourneau*, Droit de la responsabilité et des contrats (2004/2005), nos. 1582 *et seq.*; *Chartier*, La réparation du préjudice dans la responsabilité civile, 221 *et seq.*). It is normally divided into four categories: (i) mental and physical pain (*souffrances morales ou physiques*), (ii) aesthetic damage (*préjudice esthétique*), (iii) damage to sex life and fertility (*préjudice sexuel*) and (iv)loss of well-being (*préjudice d´agrément*). Even victims who find themselves in a vegetative and thereby

unconscious state are fully compensated; their damages are evaluated "*in abstracto*" (*Bourrié-Quenillet*, JCP éd. G 2004, I, 136 no. 20).

50. In BELGIUM the reference point is the same. Temporary or complete loss of the ability to earn one's livelihood is also compensated as immaterial damage - either as *pretium doloris* or as *préjudice d´agrément* (*Simoens*, Schade en schadeloosstelling, nos. 142-150 pp. 271-296).

51. SPANISH legal doctrine, much like its French counterpart, distinguishes between *pretium* (or *pecunia*) *doloris* (actual damages for pain and suffering), *perjuicio estético* (disfiguring physical damage), *pérdida de agrado* (loss of the pleasures or amenities of life) and *perjuicio sexual*; it also recognises, however, e.g. *perjuicio juvenil* (the "abstract" loss of the ability of a minor who has not yet entered the working world to earn a livelihood) (*de Ángel Yágüez*, Tratado de responsabilidad civil[3], 693; *Vicente Domingo*, Los daños corporales, 130). The question of the precise categorisation of a set of circumstances into any of these respective heads of damages is not, of course, answered consistently (see e.g. *Vicente Domingo*, El daño, 238 with *Yzquierdo Tolsada*, Sistema de responsabilidad civil, 161). Compensability of valid disfiguring physical harm, which is easily proven (TS 26 January 1988, RAJ 1988 (1) no. 477 p. 487) neither depends on the relevant part of the body, nor the age, gender or occupation of the injured party; this is not so for the assessment of the amount of compensation (TS 15 November 1990, RAJ 1990 (7) no. 8919 p. 11365), for which the judge may use his full discretion (TS 2 December 1989, RAJ 1989 (7) no. 9671 p. 11248). Table of damages no. VI contained in the appendix of the Road Traffic Liability and Insurance Act (*Texto Refundido de la Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor*, brought into force by *Real Decreto Legislativo* no. 8/2004 of 29 October 2004) expressly provides for compensation for disfiguring physical harm. Loss of the pleasures or amenities of life relates to everyday events, such as shopping, taking walks, dressing oneself and the loss of zest and energy for life (TS 7 May 1987, RAJ 1987 (2) no. 3022 p. 2814).

52. After a long and volatile history **(**see Notes II16 and V36 under VI.–2:101 (Meaning of legally relevant damage) above), under ITALIAN law *danno biologico* now also numbers among the consequential non-economic losses of physical injury (CC art. 2059) (Cass. 12 December 2003, no. 19057, Danno e resp. 2004, 762; Cass. 10 August 2004, no. 15434, Giust.civ.Mass. 2004, fasc. 7-8). This has not changed the fact that damages falling due for causing *danno biologico*, as before, aim to compensate for the damage to a person's psycho-physical integrity (Cass. 20 February 2004, no. 3399, Giust.civ.Mass. 2004, fasc. 2; Cass. 27 April 2004, no. 7980, Giust.civ.Mass. 2004, fasc. 4). New here, however, is that damages resulting from a violation of a constitutionally relevant interest closely relating to the person are compensated, without the restrictive requirements of CC art. 2059 (violation of a criminal law provision or the existence of another provision which expressly declares a *danno morale* as recoverable) coming into play. This is true for *danno morale* in the narrow sense (i.e. for mental suffering) (Cass. 6 August 2004, no. 15179, Giust.civ.Mass. 2004, fasc. 7-8) as well as for so-called – at least, until now - *danno esistenziale* (i.e. for harm to necessary elements of personal development worthy of protection) (Cass. 31 May 2003, nos. 8828 and 8827, Giur.it. 2004, 1129; Cass. 19 August 2003, no. 12124, Giur.it. 2004, 1129; Cass. 27 April 2004, no. 7980, Danno e resp. 2004, 962, note *Ponzanelli*; Cass. 15 January 2005, no. 729, Giust.civ.Mass. 2005, fasc. 1; Cass. 18 March 2005, no. 5677, D&G 2005, fasc. 19, 38). The claim to compensation of *danno morale* only remains subject to the limitations of CC art. 2059 if it does not relate to a violation of a constitutionally relevant right closely relating to the person.

53. Under HUNGARIAN Law the judge enjoys a wide case-by-case discretion in granting incorporeal damages (see in more detail *Lábady,* A nem vagyoni kártérítés újabb bírói gyakorlata, 51). Incorporeal damages are only granted in cases of reasonably significant interference with one's physical or mental well-being. Injury per se does not suffice to ground a claim for reparation; a non-material detriment must be proven (BH 2002/24; BH 2001/110; BH 2001/12; BH 1997/435), unless it is obvious (BH 2002/186), see Gellért (-*Benedek*), A Polgári Törvénykönyv Magyarázata, 1328-1330). For example, mere worry over the recovery of a child is insufficient (Petrik [-*Petrik*], Polgári jog I^2, 202). In contrast, compensation was awarded to a mentally indisposed mother who lost a child as a result of a doctor's error (BH 2005/105). The granting of incorporeal damages does not necessarily require fault on the part of the person liable (BH 2000/100 and BH 2005/250: objective liability of the state for a Hepatitis C infection). Even victims who are in a coma, do not feel the pain for other reasons or who have lost their comprehension capacity have a claim to compensation of their incorporeal losses (*Petrik* loc. cit. I^2, 165-166, 202/8-203; Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata, 1326-1327, 1346; *Petrik*, Kártérítési jog, 261-262). On top of physical damage (amputation, deterioration of general health, humiliation, mental suffering, psychopathy), also adverse effects on social surroundings and the loss of particular options when planning one's life goals (*Petrik*, Kártérítési jog, 74-75; *ibid.*, Polgári jog I^2 loc. cit.) are considered recoverable immaterial detriment.

54. CZECH and SLOVAKIAN CC provide that in the case of harm to physical or mental health, "the injured party's pain and aggravation of his or her social assertion shall be compensated by lump sum". POLISH CC art. 445 § 2 comes to the same result. SLOVENIAN LOA art. 179 prescribes reasonable monetary compensation for "physical distress suffered, for mental distress suffered owing to a reduction in life activities", and for "disfigurement". ROMANIA distinguishes between physical pain (*durerea fizică*), asthetic damage (*prejudiciu estetic*), physiological damage (*prejudiciu fiziologic*) and the *prejudiciu de agrement*, i.e. the damage that emanates from the fact that it is impossible for the injured party to pursue a sporting, artistic or other activity (*Adam*, Drept civil, 277).

55. In the context of harm to physical or general health, GERMAN CC § 253(2) expressly provides for the compensation of incorporeal damage. According to the case law, so-called "damages for pain and suffering" serves a dual function. They should serve to compensate for pain and suffering sustained as well as to provide the injured party with a sense of atonement about the sanctioning of the wrongdoer (BGH [Grand Senate For Civil Matters] 6 July 1955, BGHZ 18, 149, 154; BGH 29 November 1994, BGHZ 128, 117, 120) (this atonement function of damages for pain and suffering is, however, the subject of debate, see further, *inter alia*, MünchKomm [-*Oetker*], BGB^4, § 253 no. 11). The compensatory function is concerned with putting the injured party in such a position that he may avail of measures of alleviation and convenience (Palandt [-*Heinrichs*], BGB^{65}, § 253 no. 11). The assessment of compensation is carried out according to equity and under CCP § 287, this is at the full discretion of the court. All relevant circumstances of each particular case are to be considered, particularly the form, intensity and length of the injury suffered to that, which is protected by the law. Furthermore, it is noted by the courts that as far as possible, comparable injuries should result in approximately the same compensation. In practice, the "table of damages for pain and suffering", which is based on an analysis of numerous decided cases, along with the court's own jurisprudence, are accorded significant weight.

56. So-called “damages for pain and suffering”, which fall due under AUSTRIAN CC § 1325 should be an atonement for all detriment experienced by the injured party’s sensory spectrum. They should compensate the entire complex of pain, the feelings of listlessness that thereby arise and put the injured party in the position to be able to provide monetary reparation for suffering undergone and loss of the pleasures or amenities of life (OGH 22 November 1988, ZVR 1989/90, p. 147). Such claims for damages for pain and suffering are transferable and capable of being bequeathed (*Koziol and Welser*, Bürgerliches Recht II[12], 323). Damages for pain and suffering are also granted to those who are in an anaesthetic state due to the accident. So-called “compensation for disfigurement” (CC § 1326) is qualified by case law as a special case of compensation for economic loss (see above, Note *V19*).

57. GREECE grants incorporeal damages resulting from harm to physical or general health in the context of CC art. 932. Non-economic damages are damages, which a person suffers due to a violation of his moral, mental or physical integrity (Georgiades and Stathopoulos [-*Vossinakis*], art. 932, no. 1). The injured party shall receive reparation for grief, pain, discomfort or depression suffered (*Kornilakis*, Eidiko Enochiko Dikaio I, 647). Whether non-economic damages also fall due to victims who have lost their apperceptive and sensory capacity, is the subject of debate. In literature, the question is mostly answered in the affirmative (e.g. *Paterakis*, I chrimatiki ikanopoiisi gia ithiki vlavi, 277 and *Kritikos*, Aposimiosi apo troxaia avtokinitika atiximata, no. 891); in contrast, by granting a quite exceptionally low sum of compensation, CA Athens 2461/1991 (unpublished, cited here under *Kritikos* loc. cit. 308, fn. 13) basically answered it in the negative. It is recognised that loss of sex life amounts to recoverable non-economic loss (CA Athens 6055/1989 ArchN 41/1990, 776). Whether the so-called “compensation for disfigurement” (CC art. 931) provides reparation for economic or non-economic damages, is not consistently ruled upon. A.P. 739/1996, EllDik 38/1997, 72 opined, that both CC art. 931 and CC art. 932 sought to provide reparation for non-economic damages. Consequently, a unitary sum may be awarded for both.

58. Primarily enumerated in PORTUGAL as recoverable forms of non-economic damages are pain, so-called aesthetic damage, loss of amenities of life, harm to general health and longevity and “loss of youth” (STJ 17 June 2004). *Pretium doloris* comprises the physical and moral pain suffered during the disease and the temporary impairment (STJ 17 June 2004). Compensation for disfigurement is granted independently of whether the victim has to reckon with other concrete disadvantages (*Álvaro Dias*, FS Almeida Costa, 764). Its *quantum* is influenced by, among other elements, the victim’s job, the intensity and place of the injury, its static or dynamic character and the victim’s age and sex. The loss of amenities of life (*dano de afirmação pessoal* or *dano à vida de relação*), consists of the injury to social and relational capacity, to the possibility of living a life to enjoy moments of physical, social and familiar pleasure. The loss of the capacity to play football with friends (STJ 22 September 2005) or to lop off grape-vines and breed cattle (STJ 9 December 2004) and the isolation from family during hospitalisation (STJ 9 December 2004) are non-economic losses worthy of compensation. This category also includes the loss of sexual enjoyment (dano sexual), as it implies the limitation or suppression of the sexual function and other handicaps, such as the deterioration of one’s self-image and loss of attractiveness. Also, the abandonment by the spouse, of a man who became impotent after a road traffic accident, yields a cause of action for non-economic damages to the victim (STJ 27 January 2005). The loss of general health and longevity of life involves irreversible damage to health and well-being of the victim and the decrease in life expectancy (STJ

17 June 2004). Finally, *pretium juventutis* relates to the impairment of the ability to live out one's youth (STJ 29 May 2003).

59. DUTCH CC art. 6:106(1)(a-c) lists the circumstances under which a party has a claim in non-economic damages. Hereunder falls - in cases of physical injury and harm to general health - physical and mental pain, emotional distress, insomnia, aggravation, anxiety, feelings of inferiority, disfigurement of the body and decreased life expectancy (Schadevergoeding II [-*Lindenbergh*], art. 6:106, no. 5). It is still the subject of debate, whether victims who are unable to realise their situation (because they lie in a coma, for example, or are incapable of comprehension) also have a claim to damages for pain and suffering (see further *Lindenbergh* loc. cit. no. 10 and *Stolker*, RM-Themis 1998, 3-29). HR 20 September 2002, NedJur 2002, no. 112 p. 871 refused a cause of action for compensation of non-economic damages for a victim who never wakes from his state of unconsciousness; on the other hand, a short period of consciousness between injury and death is sufficient to found a cause of action and where a victim, who lies in a coma for a long time, later regains consciousness, his or her compensation is back-dated for that time (HR 20 September 2002 loc. cit.; *Vranken*, NedJur 2004, no. 112 p. 891).

60. ESTONIAN LOA § 130(2) avoids an exact classification of individual non-economic damages: "In the case of an obligation to compensate for damage arising from harm to one's physical or general health, the obligated person shall pay the aggrieved person a reasonable amount of money as compensation for incorporeal damage caused to the person by such damage or injury." LITHUANIAN CC art. 6.250(2) safeguards the compensability of non-pecuniary damages in the case of harm to one's physical or general health. CC art. 6.250(1) specifies that „non-pecuniary damage shall be deemed to be a person's suffering, emotional experiences, inconveniences, mental shock, emotional depression, humiliation, deterioration of reputation, diminution of possibilities to associate with others, etc., evaluated by a court in monetary terms".

61. According to the SWEDISH Damages Law, chap. 5 § 1 no. 3 a cause of action exists for reparation of (temporary) pain and affliction (*sveda och värk*), for permanent disabilities (*lyte eller annat stadigvarande men*) and also as an exception for other particular impediments of a non-pecuniary nature (*särskilda olägenheter*) (*Sandstedt*, VersRAI 2002, 9, 11). DANISH § 3 Damages Law regulates the compensation for pain and affliction in the case of illness (*svie og smerte*), and § 4 the non-economic compensation for permanent disabilities (*varigt mén*). FINNISH Damages Law, chap. 5 § 2 no. 3-4 in conjunction with chap. 5 § 2c deals again with the compensation for pain and affliction as well as for permanent disabilities (see further *Sisula-Tulokas*, JFT 2000, 634-651).

62. In SCOTLAND the injured person can recover for *solatium* (described by Lord President *Clyde* in *Duffy v. Kinneil Cannel & Coking Co. Ltd.* 1930 SC 596, 597 as "properly mean[ing] reparation for the pain and suffering inflicted on anyone in consequence of the commission of a delict against him"). *Solatium* may be divided up into three main segments: (i) pain and suffering; (ii) loss of faculties and amenities; and (iii) shortened expectation of life (*Dalgleish v. Glasgow Corp.* 1976 SC 32, 53; *Scottish Law Commission* Report on the Effect of Death on Damages (Scot.Law Com. no. 134) (Cm 1848 [1992] para. 2.3). A person in a coma or persistent vegetative state presumably suffers no pain, so no award under this head is appropriate (*Dalgleish v. Glasgow Corporation* loc. cit.). Damages (Scotland) Act 1976 s. 9A allows loss of expectation of life to be taken into account in awarding *solatium*. The claimant's right to damages by way of *solatium* for a shortened expectation of life depends on whether or not he is aware that his expectation of life has been reduced (*Gloag and Henderson*,

The Law of Scotland[11], para. 34.15). The courts will generally take a broad brush approach to questions of quantification (*Stewart*, Delict[3], para. 12.15). Courts are assisted by awards in clearly similar cases but obviously every case has its own peculiarities (*Barker v. Murdoch* 1979 SLT 145; *Bowers v. Strathclyde Regional Council* 1981 SLT 122). Jury cases are becoming more common, which inevitably results in increased awards.

63. In IRELAND there are two main heads of non-pecuniary loss: (i) pain and suffering; and (ii) loss of expectation of life. A plaintiff may recover damages (for future as well as for present and past) suffering not only as a direct result of the injury but also for the pain and suffering that may accompany or result from a reasonably necessary medical operation (*McMahon and Binchy*, Torts[3], para. 44.144). In *Lee v. Joyce*, SC 3 December 1964, unreported, *Lavery* J. concluded that it was impossible to explain "on any logical or mathematical basis", the translation of suffering into terms of money – the judge or a jury could only express a personal (and thereby subjective) view as to what was fair compensation. In *Sinnott v. Quinnsworth Ltd.* [1984] ILRM 523), the Supreme Court introduced a rough tariff in relation to damages for pain and suffering. *O'Higgins* C.J. noted that "unless there are particular circumstances which suggest otherwise, general damages … should not exceed a sum in the region of contemporary standards and money value". In other decisions, the court has regarded damages under this limb as another piece of the broader jigsaw that represents the total sum of damages to be awarded to the plaintiff in light of an intuitive "feel" for what is fair and proportionate compensation for the plaintiff (*Reddy v. Bates* [1983] IR 141, *Burke v. Blanch*, HC 28 July 1989, unreported; *Kealy v. Minister for Health*, HC 19 April 1999, unreported [*Morris* P]). The apparent cap of IR£ 150,000 [EUR 190,500] that was placed on damages in the *Sinnott* case has since been overhauled, in order to maintain comparability with the *status quo* (*Connolly v. Bus Éireann*, HC 29 January 1996, unreported (*Barr* J.); *Coppinger v. Waterford County Council*, DPIJ: Hilary & Easter Terms 1996, p. 1; *Kealy v. Minister for Health*, HC 19 April 1999, unreported [*Morris* P]; *McEneaney McEneaney v. Monaghan County Council* [2001] IEHC 114). Where a plaintiff accommodates himself particularly well to his plight, he will have his damages reduced (*Prendergast v. Joe Malone Self Drive Ltd.*, SC 21 June 1967, unreported; *O'Toole v. Kearns*, SC 31 July 1957, unreported). The Courts have tended to regard facial injuries as being of more importance for women than for men (*Prendergast v. Joe Malone Self Drive Ltd.*, SC 21 June 1967, unreported; *Foley v. Thermocement Products Ltd.* (1954) 90 ILTR 92 at 94 [SC]; *Ronayne v. Ronayne* [1970] IR 15 at 22 [SC]). The social standing of the plaintiff has also been considered relevant (*Ronayne v. Ronayne* [1970] IR 15 at 22 [SC]). In *Cooke v. Walsh* [1984] ILRM 208 [SC], the majority of the Supreme Court agreed that the amount to be awarded for general damages should be "moderate" on account of the plaintiff's lack of awareness or appreciation of his condition because he had been "spared the considerable mental suffering which would follow from knowledge or appreciation of the virtual destruction of his life." See also *Dunne v. National Maternity Hospital* [1989] IR 91. Where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of his estate are not to include damages "for loss or diminution of expectation of life or happiness" (Civil Liability Act 1961, s. 7(2)). Thus, recovery here is limited to cases where the victim is still alive but his or her expectation of life has been reduced. It seems that the position today is that damages may be recovered under this head, but that they should be moderate (*McMahon and Binchy* loc. cit. para. 44.197).

64. For an analysis of the wide discrepancies in the sums of compensation awarded by courts for non-economic damages see *v. Bar*, FS Deutsch (1999), 27-43.

Illustration 2 is taken from BGH 14 June 2005, BGHZ 163, 209; **illustration 3** from STJ 5 March 1969, BolMinJus 185 (1969) 171.

VI.–2:202: Loss suffered by third persons as a result of another's personal injury or death

(1) Non-economic loss caused to a natural person as a result of another's personal injury or death is legally relevant damage if at the time of injury that person is in a particularly close personal relationship to the injured person.

(2) Where a person has been fatally injured:

(a) legally relevant damage caused to the deceased on account of the injury to the time of death becomes legally relevant damage to the deceased's successors;

(b) reasonable funeral expenses are legally relevant damage to the person incurring them; and

(c) loss of maintenance is legally relevant damage to a natural person whom the deceased maintained or, had death not occurred, would have maintained under statutory provisions or to whom the deceased provided care and financial support.

COMMENTS

A. General

Overview. This Article concerns a segment of the question which losses suffered by third parties as a result of the injury or death of another constitute for them legally relevant damage. The Article is concerned with the claims of close relatives and other persons who were particularly close to the injured person or, as the case may be, the deceased.

Persons not covered. Others having a relationship to the deceased (e.g. employers or employees, partners in a firm, etc.) may also be adversely affected by the death of the injured person and likewise suffer consequential damage. Whether or not such persons, in given circumstances, can have any claim against the injuring person will depend on the application of the residual rule on damage under VI.–2:101 (Meaning of legally relevant damage) paragraph (1)(b) and (c). It follows, however, by inference from the text of this provision that persons who were connected with the injured person only in a business sense and not in a personal sense will only suffer a legally relevant damage in highly exceptionally circumstances. It is conceivable that they might be given a claim in cases of intentional killing with the aim of causing loss to the third party. The claim for labour or services which the employer had in relation to the party killed who was obliged to provide that service or those services does not amount to a "right" within the meaning of VI.–2:101(1)(b). It therefore depends on the circumstances listed in VI.–2:101(1)(c) whether or not the employer or business partner is injured in respect of an "interest worthy of legal protection".

Illustration 1

A, one half of a couple of professional figure skaters, is injured in a road accident caused by C's negligence. Because of the severity of his injuries, A is unable to skate for a while and consequently his skating partner B is unable to pursue her profession too. B has no claim under paragraph (1) to compensation for non-economic loss unless she was tied to B in a more than merely professional capacity on the basis of a particularly close personal relationship (as his spouse or cohabiting partner). Although it can be accepted that A and B are jointly exercising a profession or pursuing a trade within the meaning of VI.–2:208 (Loss upon unlawful impairment of business), a deliberate interference in the profession or trade is missing. A legally relevant damage can therefore only be made out within the scope of VI.–2:101 (Meaning of legally

relevant damage). However, after consideration of all the circumstances, such an application of that provision to that effect must be rejected.

Non-economic losses. It follows ultimately from VI.–2:202(1) that third parties who are not referred to here do not have a claim to compensation for possible non-economic losses. Their opportunities to recover compensation are confined to economic losses (if any).

Structure and organisation of the rules. Paragraph (1) relates to non-economic losses of dependents arising out of the injury or death of a closely connected person. Looked at from a systematic point of view, this is an exception to paragraph (2)(b) of VI.–2:201 (Personal injury and consequential loss): paragraph (1) in substance states that in the cases which it addresses nothing turns on the fact that the affected persons have not in fact suffered a damage to their psychological health which "amounts to a medical condition". Paragraph (2) in contrast relates only to those cases in which someone has been killed. The provision makes clear that (a) a legally relevant damage which the deceased suffered continues after the death to be one for which compensation is due, the entitlement to compensation passing to the heirs or representatives, (b) the reasonable costs of a funeral are a damage for which compensation is due, and (c) the survivors left behind by the deceased have a claim to reparation in respect of the maintenance foregone by them as a result of the death of their maintenance provider. Paragraph (1) concerns non-economic loss; paragraph (2)(a) relates to both economic and non-economic loss; and paragraphs (2)(b) and (c) are concerned only with economic loss.

B. Non-economic loss of close relations in cases of personal injury and death (paragraph (1))

Relation to VI.–2:201(2)(b) (Personal injury and consequential loss). As already stated, paragraph (1) provides persons who are particularly close to the injured or deceased person with a claim for compensation for their non-economic damage. This claim will exist even though the conditions of paragraph (2)(b) of VI.–2:201 (Personal injury and consequential loss) are not satisfied: Persons who are particularly close to the severely or fatally injured victim are also to be compensated for their mental suffering, even though their suffering may not amount to a medical condition.

Policy consideration. Paragraph (1) consciously exceeds the present legal position in certain European jurisdictions. It would be a value judgement which nowadays is no longer acceptable if a damage of the significance described in paragraph (1) were not to qualify as legally relevant damage. The emptiness which a person feels when a life partner, a child or a parent is killed or severely injured need not be suffered without reparation, though the parties concerned do not suffer injury to their health. Should they in fact suffer such damage, then two bases of claim are available to them. The judge must express the entire damage in terms of one sum – as a rule a lump sum (see further VI.–6:203 (Capitalisation and quantification) paragraph (1)). The rule in paragraph (1) reflects the legal position in what is by far the predominant majority of the Member States. However, this rule would be misunderstood if it were interpreted as (and criticised for) "commercialising death". That is certainly not the case. The reason is that this rule is concerned not with enriching the relatives, but with recognising that the severest of detrimental impacts on one's enjoyment of life is worthy of reparation.

The circle of persons affected. Included are persons who stand in a particularly close personal relationship either formally in law (spouse, children, parents) or *de facto* (cohabiting partner, step-parents). A mere friendship or a close professional or business relationship, on

the other hand, is not sufficient. Such persons might exceptionally have a claim for reparation of their economic loss if the conditions of VI.–2:101 (Meaning of legally relevant damage) are met, but they do not acquire a claim to reparation of their non-economic loss.

Claim by third parties for loss of maintenance in case of death only. In contrast to the rule applicable when the injured person *dies* (cf. VI.–2:202(2)(c)), a person who was being maintained by the injured person, before the latter sustained the injury, will have no claim against the injuring person for any consequential loss of maintenance during the life of the injured person. A third party might suffer a loss of maintenance because, for example, incapacity to work has deprived the injured person of the means to earn the income out of which the injured person would otherwise have paid maintenance to the third party. However, until the death of the injured person, this expectation loss does not constitute legally relevant damage to the third party. The *injured person* will have a claim for loss of income (or consequential loss in general) under VI.–2:101 (Meaning of legally relevant damage) paragraph (4)(a), so that, even though not put in funds for some time to come, the injured person nonetheless has a legal entitlement to income out of which maintenance might be paid. That right might be either enforced or else partially disposed of in favour of the third party in lieu of maintenance. Any loss of maintenance during the life of the injured person is thus to be attributed to the decision of the injured person. This result – which emerges directly from a comparison of the various provisions on injury to body or health on the one hand and those applicable in case of death on the other – may not and cannot be circumvented by invoking the assistance of VI.–2:101 (Meaning of legally relevant damage).

C. Loss suffered as a result of another's death (paragraph (2))

Death as such not legally relevant damage. Paragraph (2) introduces additional rules for the case where a personal injury has led to the death of the victim (whether immediately or only after the lapse of some period of time). The rules of VI.–2:201 (Personal injury and consequential loss) and potentially also VI.–2:101 (Meaning of legally relevant damage) paragraph (1)(b) and (c) remain applicable. The provision proceeds from the principle that death as such does not constitute legally relevant damage within the meaning of non-contractual liability law. The deceased has no claim which can be asserted on account of the death as such, and the loss of life as such has no value quantifiable in monetary terms which can be assigned by the system of private law to heirs or successors.

D. The claim of the deceased's successors (paragraph (2)(a))

Succession to subsisting claims of the deceased to reparation. Sub-paragraph (a) of paragraph (2) makes it clear that the deceased's successors (by which is to be understood the heirs or personal representatives, depending on what is determined by the law of succession) inherit all the rights (but only those rights) which the deceased would have been able to exercise while alive. Rights to compensation for economic damage belong in this category as much as rights to compensation for non-economic damage. Moreover, claims for compensation for non-economic damage or for anatomical damage are also generally capable of transmitting on death (a question which must be answered in the law on non-contractual liability) and that is so independently of whether the deceased while alive asserted these claims in or outside of the courts. However, had the deceased made it known that no claim would be made for compensation for non-economic damage, the deceased would in that case have waived this claim. Consequently the claim will not pass as part of the estate. The situation would be the same in a case of economic loss.

The limits of the claim. Sub-paragraph (a), however, contains a further limitation. Only those rights which the deceased had acquired during life pass to the successors. If death occurs instantaneously (without an intermediate period of suffering), then neither a claim for compensation for non-economic damage nor a claim for compensation for anatomical damage existed. The same holds for patrimonial losses.

Illustration 2
If the injured person while alive had received a complete settlement (as a lump sum) for future loss of income, this sum remains part of the inherited estate. (The situation is the same if, in the lifetime of the deceased, a lump sum settlement was reached but not paid or judgment was given.) In contrast, if the claim has been settled on the basis of monthly compensatory payments during the lifetime of the deceased, the claim will expire at the end of the month in which the deceased dies.

Illustration 3
If the deceased took to the grave some secret (such as a code word for a computer program which was only known to the deceased), the successors will receive no compensation at all. Only exceptionally will the result be different under the rule in VI.–2:101(1)(b)-(c) – in particular in the case of an intentional killing.

E. Funeral expenses (paragraph (2)(b))

Funeral costs constitute legally relevant damage. In some countries there exists a dispute of legal theory about whether funeral costs can be compensated (because they would have to be incurred anyway at some time), but the legal position today is unequivocal: funeral costs must be compensated everywhere. Sub-paragraph (b) sticks to this principle. The only problem is to determine the amount of compensation and the person entitled to claim it.

Reasonable funeral expenses. As regards the amount, the text states only that the costs must be "reasonable"; an express reference to the living standards of the deceased seemed not to be appropriate. The expression "funeral costs" is broader than the expression 'burial costs'. The former includes, for example, the costs of transporting the body from the place of death to the place of burial. The costs of caring for a grave, however, do not come within funeral costs.

Persons entitled to claim funeral expenses. Sub-paragraph (b) only states that a person is entitled to compensation if that person has paid for the costs of the funeral. A more detailed regulation is excluded for a number of reasons. One of these is the fact that the national laws of succession are not harmonised and therefore it cannot be said for the purposes of the law on non-contractual liability who is obliged under those laws to arrange the funeral. On the other hand, of course, the person who is obliged under the law of succession or by other legal provisions to organise the burial had "reasonable funeral costs". It is even possible, depending on the particular circumstances of a country, that a moral obligation to organise the burial may suffice. However, an insurer who takes care of the funeral "*in natura*" will not be able to claim on the basis of this Article. Ultimately it is the criterion of "reasonableness" which determines who can assert a claim to compensation for funeral costs.

F. Loss of maintenance (paragraph (2)(c))

Loss of breadwinner. Unlike the case where the injured person does not die (or has not yet died) as a result of the injury, VI.–2:202(2)(c) gives a direct claim against the injuring person to certain classes of persons who suffer a consequential loss of maintenance. As already

explained in Comment B, such a claim is inappropriate if the injured person has not died. Moreover, even if the injured person subsequently dies, a third party whom the injured person had previously maintained will not acquire a claim for loss of maintenance in the period between the victim's incapacity through injury and his or her later death. The injured person's right to reparation for loss of earnings (out of which maintenance might have been paid, if damages had been recovered) is not extinguished by death and will pass to the successors. However, the death of the injured person does create a material difference in the legal position of the injured person and alimentary creditors in respect of maintenance foregone *after death*. The deceased's successors have no claim to the loss of income which the deceased might have earned after the time of death, had there been no injury. Consequently, there is no person entitled as against the injuring person to the income out of which maintenance might have been paid after the injured person's death. The loss of maintenance suffered by certain classes of affected persons therefore becomes a legally relevant damage.

Persons entitled to compensation. Entitled to compensation are primarily those to whom the deceased according to legal rules (in family law) was obliged to pay maintenance. Additionally the proposed text provides for an extension of the entitlement to compensation to those who were dependent on the deceased as their *Versorger* (provider). The expression *Versorger* is easily understood in, for example, German and Swedish legal discourse. An example of a *Versorger* is the breadwinner who provides for a life partner within a stable relationship, but the term also includes, for example, a step-father in relation to a step-child within the family. The English circumlocution "provided care and financial support" is intended to express the requirement of just such a personal *Versorger* relationship.

"Statutory provisions". These rules do not determine what is to be understood as coming within the notion of "statutory provisions". This question must instead be decided on the basis of the applicable national law concerned. See VI.–7:102 (Statutory provisions).

Time limits. The right to reparation for lost maintenance is not of course without any kind of restriction in time. It is limited to the extent that the loss of maintenance was in fact caused by the injuring person. The relevant period of time is thus that in which the deceased would probably have maintained the surviving claimants. That period of time must be estimated, based on the probable life expectancy of the deceased had the fatal accident not occurred and, in respect of children, by considering the period during which they would have had a right to maintenance from the deceased.

NOTES

I. No civil liability for death as such

1. A person cannot mount a personal cause of action for loss of his or her own life. While GERMAN CC § 823(1) and ESTONIAN LOA § 1045(1)(i) seem to be formulated otherwise, they cannot alter the fact that the "right to life" extinguishes when it is violated (see further *v. Bar*, FS Sturm, 1151-1163). The consequences affect third parties, not the bearer of the right him/herself.
2. On the most part, the death of a person as such does not trigger a corresponding obligation to pay damages. In this way, as far as the deceased is concerned, death as such does not constitute legally relevant damage (see for BELGIUM *Simoens,* Schade en schadeloosstelling, no. 107 p. 205 and for HUNGARY Petrik (-*Petrik*), Polgári jog

I[2], 178, 204, 213). In the context of ITALIAN Law, death as such does not amount to *danno biologico* either (Cass. 23 May 2003, no. 8204, Giust.civ.Mass. 2003, f. 5). Separate from one's health, one's life is a stand-alone interest worthy of legal protection, protected only by the criminal law (Cass.sez.pen. 30 January 2003, no. 7632, Riv.it.med.leg. 2003, 694; Cass. 16 May 2003, no. 7632, Foro it. 2003, I, 2681). In this regard it is also stated in AUSTRIA that claims arising out of CC § 1327 (lost maintenance) constitute original and personal claims of the surviving parties, and not of the deceased him/herself (OGH 17 October 1963, SZ 36/133). Other than for funeral expenses, no liability accrues *de lege lata* for the death of a person who was not obliged to support another (Schwimann [-*Harrer*], ABGB VII², § 1327 no. 1), not even for non-pecuniary loss due to the untimely death of the deceased (OGH 1 March 2005, RdW 2005, 289). The same view is taken in the Netherlands (Schadevergoeding II [-*Lindenberg*], art. 108, no. 17) and in SPAIN. Despite scholarly criticism, which is not to be completely disregarded (*Yzquierdo Tolsada*, Sistema de responsabilidad civil, 377; *Lacruz Berdejo*, Elementos II(2)[4], 485; *Vicente Domingo*, Los daños corporales, 241) the case law in this jurisdiction likewise denies that loss of life constitutes damage for the victim, which might generate a claim transferable *mortis causa* and actionable *iuris hereditatis* by the survivors (TS 20 December 1930, RAJ 1930-31 (1) no. 1365 p. 538; TS 25 February 1963, RAJ 1963 (1) no. 1187 p. 734; TS 9 June 1969, RAJ 1969 (2) no. 3353 p. 2275; TS 24 November 1970, RAJ 1970 (2) no. 4889 p. 3345; TS 1 July 1981, RAJ 1981 (2) no. 3037 p. 2495; TS 18 May 1999, RAJ 1999 (2) no. 4112 p. 6346 and often recurs). The criminal division of the *Tribunal Supremo*, which had originally taken a different view (TS 30 November 1932, RAJ 1932-33 (2) no. 2178 p. 857; TS 12 November 1957, RAJ 1957 no. 2969 p. 1987) has for some time now followed suit from the case law of the civil division (e.g. TS 20 October 1986, RAJ 1986 (4) no. 5702 p. 5579).

3. However, in PORTUGAL the case law maintains that indeed loss of life itself amounts to damage capable of monetary valuation payable to the survivors. The claim is treated as the deceased's claim for pain and suffering, which then passes under the law of succession and is included in the personal economic and non-economic claims of the surviving parties (CA Oporto 13 April 1989, CJ XIV (1989-2) 221). The loss of life has been recently evaluated at approx. €40,000 (STJ 16 June 2005; the older methods of calculating damages are seen in CA Lisbon 25 January 1994, CJ XIX (1994-1) 151). The Portuguese Ombudsman, however, has recommended that compensation should always be 10,000,000 escudos (approximately €50,000) (Critérios apresentados pelo Provedor de Justiça para indemnização dos danos causados pela derrocada da ponte de Entre-os-Rios, http://www.provedor-jus.pt/restrito/rec_ficheiros/Ponte_Entre-Rios.pdf, p. 14), with the non-economic damage suffered by the victim also included in this amount. If a foetus is killed *in utero*, the mother is entitled to a claim due to her own losses; the loss of life of the foetus is not, however, compensated because it is not yet afforded the enititlements of a human person (STJ 23 May 1985, BolMinJus 347 (1985) 398).

II. Recoverability of non-economic damage to relatives in the case of death or injury to the primary victim

4. Where a person is severely injured or killed, the question of whether and under what circumstances his or her relatives are entitled to the reparation of *their* non-economic loss still yields quite different answers in the various European legal systems (for up-to-date comparisons see also *Janssen*, ZRP 2003, 156-159 and *Wagner*, JZ 2004, 319-331). In Resolution (75)7 of 14 March 1975, the Council of Europe expressed the opinion that in cases of injury to the body, damages for pain and suffering endured by

relatives should only be considered for parents or spouses, and even then only "if the suffering is of an exceptional nature" (no. 2.10). It seems that more generous practices of compensation - even for the benefit of fiancé(e)s - have been supported in the case of death; however, damages will only be granted where the surviving parties in question "have maintained close bonds of affection with the victim at the time of his death" (no. 3.6).

5. FRENCH law recognises that as a result of the victim's injury, persons who are closely connected to the victim may suffer their own *préjudice moral* within the scope of recoverable non-economic damages. The sole prerequisite is that personal, proximate and fixed damages are incurred (the seminal decision of Cass.civ. 23 May 1977, Bull.civ. 1977, II, no. 139 p. 96). It is not necessary that the primary victim has suffered particularly severe injuries (Cass.civ. 23 May 1977 loc. cit.); neither does it depend on proof of any particular family relationship - purely "the genuineness of the suffering counts" (*Bourrié-Quenillet*, JCP éd. G 1998, I, 186, no. 14). The decision as to who is entitled to claim under this criterion is made by the courts charged with establishing the facts. Individual cases may not only concern surviving spouses, non-marital life partners, parents, children, grandparents and siblings, but also parents-in-law, nephews, nieces, uncles and aunts, e.g. where the latter have brought up the child who has been killed or an otherwise significant emotional relationship with the primary victim exists. According to statistics, on average, 2.6 close relatives are compensated in cases of injury to body and even 5.0 in cases of death (*Bourrié-Quenillet*, JCP éd. G. 2004, I, 136, no. 35). Also, where the parents raise a child who is born disabled owing to an accident during the pregnancy, non-economic damage suffered by the parents is recognised (*Viney and Jourdain*, Les conditions de la responsabilité[2], no. 249-3 p. 13).

6. So too under BELGIAN law, loss sustained due to the sight of a loved one's suffering or owing to a fear of their condition deteriorating, is recoverable. The case law is more conservative than in France, however, and a claim will only usually be granted where the primary victim suffers serious and permanent injuries (*Schuermans* et al., TPR 1994, 851-1430 [no. 35]). Proof of strong mutual affection between the primary victim and the injured third party is decisive here. Where a death occurs, such persons, who did not live with the deceased, may be entitled to a claim for the recovery of their non-economic harm; however, the level of their claim is normally lower than that of someone who lived with the primary victim in the one household (e.g. Indicatieve Tabel 1 May 2004, NjW 2004, annex to issue no. 72, no. 53: €7,500 where the parents lived with the deceased child, otherwise €3,750). In cases where death has occurred, MALTESE CC art. 1046 leaves it to the discretion of the court to grant compensation for the non-economic losses of the deceased's heirs.

7. SPANISH case law recognises the recoverability of non-economic damage to relatives in the case of death or serious injury to the primary victim, as long as the relatives' losses are certain and have been evidenced. A fiancé(e) (TS 12 February 2003, RAJ 2003 (2) no. 2491 p. 4590 [posttraumatic stress disorder of a fiancée who had to witness the accidental death of her fiancé]) or the deceased's homosexual partner (CA Sevilla (Criminal Division) 6 September 2004, RAJ (TSJ y AP) 2004 (3) no. 480 p. 776) may also qualify as a "relative" in this sense. The basis for the claim is either CC art. 1902 or, in the case of a criminal offence, CP art. 113 ("Compensation for economic and non-economic detriment not only encompasses that incurred by the injured party, but also that inflicted upon his or her family members or upon third parties"). What is at stake here, is the survivors' own personal claim, not a right reserved to them by virtue of its transmission from the deceased (TS 20 December 1930, RAJ 1930-31 no. 1365 p. 538; TS 1 July 1981, RAJ 1981 (2) no. 3037 p. 2495;

TS 4 May 1983, RAJ 1983 (2) no. 2622 p. 1975; TS 19 December 1986, RAJ 1986 (5) no. 7682 p. 7462; TS 31 December 1986, RAJ 1986 (5) no. 7881 p. 7682; TS 14 December 1996, RAJ 1996 (5) no. 8970 p. 12478; TS 24 November 1998, RAJ 1998 (5) no. 9694 p. 14172). For its part, the survivors' claim may be inherited (TS 19 June 2003, RAJ 2003 (3) no. 4244 p. 7941). Table of Damages I and II of the Law on Liability and Insurance for Motor Vehicle Traffic (*Texto Refundido de la Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor,* brought into force by *Real Decreto Legislativo* no. 8/2004 of 29 October 2004) expressly provide for the reparation of consequential damages sustained by close relatives of the deceased or injured victim of a traffic accident. Likewise, the *Tribunal Supremo* has confirmed on numerous occasions that such a claim also arises in the case of severe injuries to the primary victim's body and health, e.g. in favour of his or her parents (TS 23 February 1988, RAJ 1988 (1) no. 1451 p. 1389; TS 25 April 1989, RAJ 1989 (3) no. 3471 p. 3921; TS 23 April 1992, RAJ 1992 (2) no. 3323 p. 4388; TS 15 October 1996, RAJ 1996 (4) no. 7110 p. 9586) or his or her spouse (TS 9 February 1988, RAJ 1988 (1) no. 771 p. 752). CA Ciudad Real 14 September 2000 (cited under *Vicente Domingo,* El daño, 258) opines, however, that the consequential damages of third parties resulting solely from the injury of the primary victim must be extraordinarily severe and must exceed what one must normally endure when a loved one is injured.

8. Cass. 31 May 2003, no. 8828, Foro it. 2003, I, 2272 has clarified the position in ITALIAN law, stating that close relatives of a deceased party have a claim to reparation of their non-economic losses under CC art. 2059, even where the requirements of CP art. 185 (criminal offence) are not fulfilled. Interpreting CC art. 2059 in conformance with the Constitution, relatives have a claim to the recovery of their *danno biologico* (see above Corte Cost. 27 October 1994, no. 372, Foro it. 1994, I, 3297; Cass. 25 February 2000, no. 2134, Riv.it.med.leg. 2001, 1135; Cass. 25 January 2002, no. 881, Danno e resp. 2002, 747 and Cass. 13 February 2002, no. 2082, Giust.civ.Mass. 2002, 235), their *danno morale* and their *danno da lesione del rapporto parentale*, i.e. damages arising from the harm to their family relationship. Cass. 31 May 2003, no. 8827, Foro it. 2003, I, 2273 extended this principle in favour of a mother who had born a severely impaired child due to a medical error. Corte Cost. 11 July 2003, no. 233, Giur.it. 2004, 1129 approved this decision in *obiter dictum.* Already there seems to be a wealth of case law for the compensation of non-economic losses suffered by relatives, certainly in the case of death (Cass. 19 August 2003, no. 12124, Giur.it. 2004, 1129) and also in the case of the birth of a severely impaired child (Cass. 22 July 2004, no. 13634, Giust.civ.Mass. 2004, 7-8). Where the primary injured party dies as a result of his or her injuries, but lives for a short period after the injury (a few hours suffice: Cass. 2 April 2001, no. 4783, Danno e resp. 2001, 820; Cass. 16 June 2003, no. 9620, Giust.civ.Mass. 2003, f. 6), his or her biological damages may be claimed *iure hereditatis* by his or her survivors.

9. Under HUNGARIAN Law also, the claim to recovery of non-economic damages is not restricted to the primary victim (BH 2006/15; see in more detail *Lábady,* A nem vagyoni kártérítés újabb bírói gyakorlata, 68-70, 213, 247). So, for example, in the case of a severely injured son, BH 2001/15 granted the parents damages for their non-economic loss, justified on the grounds that they had to give up their normal lives and jobs in order to care for their son. Where the primary victim dies, a distinction is to be drawn. The mere fact that someone becomes a widow(er) or orphan or otherwise loses a relative, is not yet accepted as sufficient grounds for non-economic damages; pain and suffering alone does not suffice (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata, 1330; Petrik [-*Petrik*], Polgári jog I^2, 207-208; *Petrik,* Kártérítési jog,

260-265). In fact, proof of actual adverse effects and aggravation to the secondary victim's life is necessary. This is so, e.g. where a widow suffers a mental illness requiring medical treatment as a consequence of the accidental death of her husband (Gellért [-*Benedek*] loc. cit. 1336-1338) or where the parents of a child who has been killed (BH 2001/14) or a child whose parents have been killed (BH 1992/529) sustain particular detriment by other means. The courts draw on the intensity of the pain or dolour for the detriment actually suffered. Sometimes the right to family life is also qualified as the infringed interest worthy of legal protection in question, which can be of heightened importance if, for example, the case concerns an infant who is incapable of feeling sorrow for the loss of his or her parents (see further *Petrik* loc.cit. 208/1-208/5).

10. For cases involving death POLISH CC art. 446 § 3 merely provides that the court may award an appropriate indemnity to the closest members of the family of the deceased person if his death resulted in a considerable deterioriation of their standard of living. Traditionally, the provision is interpreted quite narrowly; it is regarded as an exception to the general rule that parties who are harmed indirectly are not entitled to claim compensation (Supreme Court 17 April 2001, Orzecznictwo Sądu Najwyższego, Izba Cywilna 2001, no 11 p. 161). CZECH and SLOVAKIAN CC do not provide for the recovery of non-economic damage to relatives. In contrast, the detailed rules of SLOVENIAN LOA arts. 179 and 180 follow the modern European trend. Married couples, children and parents have a claim to the compensation of their mental suffering as a result of the death or serious injury of their family members (LOA art. 180(1) and (2)). In addition, partners of a long-term non-marital cohabiting relationship are entitled to claim (LOA art. 180(3)). ROMANIAN law recognises a claim on behalf of close relatives to recover for compensation for grief (*Lupan*, Răspunderea civilă, 262-263; *Adam*, Drept civil, 260; *Dogaru and Drăghici*, Drept civil, 213). It is intended to codify this approach in the proposed Draft CC art. 1131 kodifizieren (*Proiectul Noului Cod civil*, 222).

11. GERMAN law is markedly more restrictive. Damages for relatives' pain and suffering only comes into play here under the requirement that the relevant party suffered personal damage to his or her health as a result of being informed of the death or serious physical injury of someone close to him or her (CC §§ 253(2), 823(1); see Palandt [-*Heinrichs*], BGB[65], § 253, no. 12; Staudinger [-*Schiemann*], BGB [Revised edition, 2005], § 249, no. 44). For example, compensation was granted to children whose mother had been killed in front of them (CA Nürnberg 27 February 1998, NJW 1998, 2293), children whose mother died due to an error in medical treatment (CA Frankfurt/M. 15 December 1998, FamRZ 1999, 1064), parents and siblings of an infant who drowned in a public swimming pool (CA Koblenz 22 November 2000, NJW-RR 2001, 318) and to a father who suffered nervous shock as a consequence of the death of his daughter (CA Oldenburg 1 December 1998, NJW-RR 1999, 820). The constant prerequisite is that the surviving family member's impairment of health is medically ascertainable, as well as clearly exceeding the type and severity of adverse effects ordinarily sustained by loved ones in their capacity as indirectly affected parties in these types of cases (judged on empirical evidence) (BGH 11 May 1971, NJW 1971, 1883; BGH 4 April 1989, NJW 1989, 2317). CA Naumburg 7 March 2005, NJW-RR 2005, 900 accordingly held as insufficient the claim in damages for pain and suffering of a mother who, after experiencing the serious injuries of her brutally abused son – the son having died in the hospital 36 hours later - was rendered helpless as against them and had not yet mentally come to terms with his senseless killing. In addition, the shock must be understandable, taking into account its cause. This applies to death and serious injury, if the relative has not personally witnessed the

incident but 'only' been informed of it (BGH 5 February 1985, NJW 1985, 1390). Along with the close relatives defined under family law (BGH 31 January 1984, NJW 1984, 1405) fiance(e)s and cohabitees are also protected (CFI Frankfurt/M. 28 March 1969, NJW 1969, 2286; MünchKomm [-*Oetker*], BGB[4], § 249, no. 147).

12. According to recent AUSTRIAN case law, so-called "damages for pain and suffering caused to relatives" are granted, where as a consequence of the death or serious injury of the primary victim, close relatives suffer adverse psychological effects of a medically diagnosable character (CC § 1325, s. dazu OGH 16 June 1994, ZVR 1995/46; OGH 29 August 2002, JBl 2003, 118 = ZVR 2002, 388, note *Karner*; OGH 12 June 2003, JBl 2004, 111). If "only" mental suffering in involved, which does not amount to a medically diagnosable illness, since OGH 16 May 2001, SZ 74/90, the granting of non-pecuniary damages has three requirements: (i) the primary victim's injury must have been caused by the gross fault of the defendant (intention or gross negligence, see *Schobel*, RdW 2002, 206-209), (ii) the person affected must be a close relative of the primary victim and (iii) there must have been a close personal relationship between the parties in question. These are rebuttably presumed in the case of parents and children, and spouses and partners, but in all other cases they must be proven (OGH 1 July 2004, ZVR 2004, 294; OGH 21 April 2005, ZVR 2005/73). Damages for the pain of bereavement were denied in the case of a seven month old infant following the death of its grandfather (OGH 12 May 2005, ZVR 2005/88). In contrast, such damages were granted to siblings, who had had a particular close emotional bond with the victim (OGH 21 April 2005 loc. cit.; OGH 23 May 2005, ZVR 2005/89). In addition, damages for pain and suffering occasioned to relatives may be awarded even where the case is not one of death, but of a particularly severe injury to the body or health of the primary victim (OGH 12 June 2006, ZVR 2006/178 p. 458 [where, however, the claim in that particular case was dismissed]; Rummel [-*Reischauer*], ABGB II/2b[3] § 1324 no. 1/5b). A similar approach is adopted by the draft new law on damages (Draft CC § 1316(3); *Griss*, JBl 2005, 273, 282).

13. According to GREEK CC art. 932 third sentence, in cases of death (not of mere injury to body, however) the party's "family members" have a claim in compensation for adverse psychological effects suffered. The term "family" is broadly interpreted in Greek case law. Non-pecuniary damages have been granted to parents (A.P. 404/1964, NoB 12 [1964] 1000), parents-in-law (CA Athens 4287/1988, EllDik 30 [1988] 1464) and spouses living apart (CA Athens 5805/1991, EllDik 33 [1992] 1495). According to more recent case law, the family extends principally to the parents, children, siblings and half-siblings, spouse, relations in the direct line, and parents-in-law and children-in-law (A.P. 795/2004, NoB 53 [2005] 1414; A.P. 924/2004, EEN 2005, 34), not, however, unmarried co-habiting partners (A.P. 434/2005, EEN 2005, 676). For a more detailed account of this issue, see *Karakostas*, ZEuP 2005, 107.

14. PORTUGAL distinguishes between non-economic damage caused to relatives consequent upon death and consequent upon injury to body. CC art. 496(2) grants compensation for non-economic damage to surviving spouses, children and other descendants, parents and other ascendants, siblings as well as nephews and nieces of the deceased, whereby preferential beneficiaries exclude those lower ranked (*Abrantes Geraldes*, Temas da responsabilidade civil II, 22). Children not yet born at the time of their father's death are also entitled to claim; they are likewise entitled to a share of the damages granted for the death *per se* (*dano-morte*; see above Note *I3*). Whether non-marital cohabitees may be included in the list of claimaints entitled to reparation is still contentious (affirmatively answered by CA Coimbra 21 February 2003 and – but only where death was intended – Const. Court TC 19 June 2002, Diário Rep. II Serie de 24 July 2002; answered in the negative by STJ 4 November 2003, CJ (ST) XI (1993)

133). The amount of damages is assessed by the courts according to principles of fairness (*Abrantes Geraldes* loc. cit. 23). In cases where the primary victim has been "only" injured, and not killed, the CC offers no clear solution. In the case law (STJ 30 April 2003) and scholarly legal writing (for a more detailed discussion see, *inter alia*, *Abrantes Geraldes* loc. cit. 36 and 50; *Antunes Varela*, Obrigações em geral I[10], 621) the existence of a claim in principle has mostly been denied. However, the victim of a traffic accident's widow (STJ 27 April 2004) and son (STJ 27 February 2003) have been granted non-pecuniary damages for the injury to their mental health. The courts have even gone so far as to recognise a right of compensation for non-economic loss incurred by virtue of a son's pain and suffering which resulted from having to witness his mother's depression (STJ 13 May 2004). Furthermore, damages were granted to a spouse because the primary victim could no longer engage in sexual intercourse due to the accident (STJ 8 March 2005; CA Porto 23 March 2006; but decided otherwise in STJ 26 February 2004). More recent case law also seems to be moving in the direction of basing the claims of a secondary victim on an infringement of the right to protection of the family (STJ 3 June 2004). The result is the extensive erosion of CC art. 496(2), insofar as this provision provides for the award of damages to relatives for pain and suffering only in the case of the primary victim's death (CA Porto 23 March 2006).

15. Under DUTCH law it was decided by HR 22 February 2002, NedJur 2002 no. 240 p. 1704 (=ERPL 2003, 412 with comparative notes by *Zinnen, Pretto, Janssen, Meilhac-Redon, Pasa, Ebers, Arroyo i Amayuelas* and *Michalowska*) that while medically diagnosable harm to mental health inflicted on a mother, which was suffered following the death of her child, was recoverable, damages purely for injured emotions were not. The case law is very restrictive. It requires that the secondary victim: (i) was a witness to the accident or its consequences; (ii) that he had a close affectionate relationship with the primary victim; (iii) that the accident was attributable to the defendant's wrongdoing; and (iv) that the accident caused the secondary victim to suffer from a disease pattern recognised by psychiatric science (Jansen [-*van Dam*], Smartengeld[15], Verkeersrecht/ANWB, 2003, 8-12). Additionally, damages for pain and suffering caused to relatives have only thus far been granted in cases where the primary victim has died. If an injury to emotions is intentionally caused, it is recoverable regardless of the presence of an injury to mental health (CC art. 6:106(1)(a); HR 26 October 2001, NedJur 2002 no. 216 p. 1500: Death of a child because of revenge against the mother). Whether this (on the whole conservative) attitude to the recoverability of harm to emotions will remain is open, given the current discussion for reform (see the following, taken from parliamentary debates, Kamerstukken II, 2002-2003, 28 781, no. 3 [Memorie van Toelichting] and Tweede Kamer, vergaderjaar 2003–2004, 28 781, no. 6).

16. ESTONIAN LOA § 134(3) rules that "in the case of an obligation to compensate for damage arising from the death of a person or a serious bodily injury or health damage caused to the person, the persons close to the deceased or the aggrieved person may also claim compensation for non-economic damage if payment of such compensation is justified by exceptional circumstances". LITHUANIAN CC art. 6.284(1), second sentence, contains a comparable rule for the benefit of "minor children, spouses, parents incapable of work, or other factual dependants incapable of work". In contrast, the LATVIAN CC has no analogous provision.

17. Since 1 January 2002, SWEDISH Damages Law chap. 5 § 2 no. 3 provides that damages also fall due for personal injuries that result from the death of someone to whom the applicant was particularly close (for a discussion of the term "close relatives" within the meaning of this provision, see HD 21 April 2005, NJA 2005, 237; see also HD 29 December 2006, NJA 2006, 738 and *Sandstedt*, VersRAI 2002, 11). In

the case law, such "damages for pain and suffering caused to relatives" are granted according to the circumstances of each individual case, even where the primary injured party has not been killed (HD 5 April 2006, NJA 2006, 181; for older case law of the lower courts, see *Sandstedt*, VersRAI 2003, 43 and 2004, 23). The primary significance of this statutory amendment would lie in the fact that the granting of damages for pain and suffering caused to relatives no longer hinges on the tortfeasor acting intentionally (as in HD 24 February 1993, NJA 1993, 41 I and II) or with gross negligence (as in HD 13 June 1996, NJA 1996, 377) (mere negligence did not suffice: HD 18 October 1999, NJA 1999, 632, note *Sandstedt*, VersRAI 2002, 11, 14). Under the new law, even strict liability suffices (*Sandstedt* loc. cit.). However, higher sums are awarded in cases of intentionally caused death or injury than in the context of liability in negligence or absolute liability (HD 4 February 2004, NJA 2004, 26; *Sandstedt*, VersRAI 2004, 28, 29). HD 17 October 2000, NJA 2000, 521 enunciated a presumption of the presence of non-pecuniary damage caused to relatives (for a critique, see *Andersson*, JT 2000-01, 897, 902), which expressly endorses the legislature's motives for the statutory amendment (Prop 2000/01:68 [Ersättning för ideell skada], 35).

18. Following the situation whereby the FINNISH courts were not willing to grant damages for pain and suffering caused to relatives, without first having an express statutory basis (HD 21 October 1991, 1991:146; for a more detailed account, see *Sisula-Tulokas*, JFT 2000, 634, 641), this basis is now provided by Damages Law chap. 5 § 4a. The provision requires intention or gross negligence, however, (in contrast to its Swedish counterpart) and is not satisfied with a presumption of non-pecuniary damage, in fact requiring proof of actual suffering from the relatives. DANISH Damages Law has been supplemented by Law no. 35 of 21 January 2003 on § 26a. Here also, intention and gross negligence have been elevated to the status of being prerequisites of a claim (para. (1) loc. cit.); recoverable suffering is, however, presumed (para. (2); see further *Øe and Røn*, Juristen 2004, 85). The object of the rule is to compensate for the relatives' grievance caused by the death, not the compensation of their personal injuries (*Øe and Røn* loc. cit. 88).

19. The ENGLISH Common Law is quite restrictive. In cases of psychiatric injury where the claim is based on negligence but takes the form that it is alleged to have arisen as a result of becoming aware of injuries caused or about to be caused to a third party there will be no liability at all unless there is in the light of the relationship to the victim of the person suffering the psychiatric injury and the spatial and temporal closeness to the event, and the general nature of it, seen to be a relationship of proximity, such that it is fair and reasonable for a duty of care to be capable of arising (*Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 AC 310). The same is probably true of cases of psychiatric injury based on such facts where liability is strict, as in a products liability case (The question has never been considered, but arguably follows from the meaning of the word „caused" in Consumer Protections Act 1987 s. 2(1)). In death cases in SCOTLAND awards for non-pecuniary loss by the Damages (Scotland) Act 1976 were reclassified by abandoning the traditional general term *solatium* in favour of a head of „loss of society and guidance" (Damages (Scotland) Act 1976 s. 1(4)), but in the event, other than the amounts becoming somewhat larger, no substantive change in the factors taken into account occurred. The award is available to a range of close relatives and is assessed by the court looking at the matter generally. A reform of the law is under discussion (see above at Note III15 under VI.–2:201 (Personal injury and consequential loss)). In England the equivalent awards, introduced originally to the law by statute in the nineteenth century, are described as „bereavement" awards and are of amounts fixed artificially by the current legislation, which have been changed

from time to time (Fatal Accidents Act 1976 s. 1A(3) as amended by The Damages for Bereavement (Variation of Sum) (England and Wales) Order 2002 S.I. 2002 no. 644). They are slightly lower sums than those awarded in Scotland under the broad approach there.

III. Survival of the deceased person's claims

20. Claims for the reparation of pecuniary damage suffered by the deceased during his lifetime are inheritable in all member states (see, e.g. for FRANCE *Lapoyade Deschamps*, Rép.Dr.Civ. IV, v° Dommages et intérets, no. 224; for BELGIUM *Dirix*, Het begrip schade, no. 138 p. 94; for HUNGARY Gellért [-*Sőthné*], A Polgári Törvénykönyv Magyarázata, 2134-2135; for PORTUGAL *Antunes Varela*, Obrigações em geral I[10], 622 note 3 and for the NORDIC Countries *Bengtsson and Strömbäck*, Skadeståndslagen, 329 as well as *von Eyben and Isager*, Lærebog i erstatningsret[5], 382). In SPAIN it is substatiated that in cases where the death of the victim did not occur instantly on being injured, making the deceased himself (in the time between his injury and death) personally in arrears for the cost of attempting to save his life, his successors acquire the relevant claim in damages against the tortfeasor. Conversely, where the primary injured party has already personally brought a claim for the reparation of his damages, his successors are entitled to the sum awarded after his death, as long as they carried on the proceedings (*De Ángel Yágüez*, Tratado de responsabilidad civil[3], 896; TS 20 November 1990, RAJ 1990 (7) no. 9174 p. 11680; TS 24 June 1997, RAJ 1997 (3) no. 5208 p. 7978; TS 3 December 1999, RAJ 1999 (5) no. 8532 p. 13363).

21. A predominant body of legal opinion in Europe also favours the survival of claims to compensation for non-pecuniary damage suffered. Their survival is recognised today in FRANCE (in the seminal judgments of Cass.ch.mixte 30 April 1976, Bull.ch.mixte 1976 p. 1 no. 2 and Cass.ch.mixte 30 April 1976, Bull.ch.mixte 1976 p. 2 no. 3); in BELGIUM (in the seminal judgment of Cass. 30 June 1930, Pas. belge 1930, I, 281; however, non-pecuniary damages on the part of the victim, which may transfer to the heirs, shall not exist where the victim was instantly rendered unconscious and died without regaining consciousness: Indicatieve Tabel 1 May 2004, NjW 2004, bijlage bij no. 72, no. 51 p. 9); in GERMANY (where CC § 847 (old version) was repealed in 2002); in AUSTRIA (where the words "by request" ("auf Verlangen") in CC § 1325 are no longer attributed any independent sifnificance: *Koziol and Welser*, Bürgerliches Recht II[12], 323; OGH 30 September 1996, SZ 69/217; OGH 11 July 2002, ZVR 2004/26, p. 95); in the BALTIC States and in DENMARK (statutory amendment by Law no. 35 of 21 January 2003; see further *von Eyben and Isager*, Lærebog i erstatningsret[5], 382; *Øe and Røn*, Juristen 2004, 85, 91).

22. In ITALY also, the deceased's claims in damages do not extinguish on his death. They are transferred to the survivors, regardless of whether economic or non-economic losses are involved (as indicative of the situation in many cases, see Cass. 7 March 2003, no. 3414, Giust.civ.Mass. 2003, 485). The same is true for a claim for compensation of *danno biologico* suffered. In this respect, the only prerequisite is that the deceased survived the injury for an (albeit short) period of "cognizance" (Cass.sez.pen. 30 January 2003, no. 7632, Riv.it.med.leg. 2003, 694; Cass. 16 May 2003, no. 7632, Foro it. 2003, I, 2681); any schematical examination of the length of this period and the amount of compensation is to be avoided (Cass. 14 July 2003, no. 11003, Resp.civ. e prev. 2003, 1049).

23. Today, there are still notable exceptions to the general rule of the survival of non-pecuniary claims. Under GREEK CC art. 933, such a claim is only transferable and only passes to the survivors where it had been recognised in a contract or already

asserted before a court. This is also the situation in POLAND (CC art. 449). HUNGARY also follows the older school of thought, under which the compensation of non-economic damages are of a highly personal nature and therefore do not pass to the deceased's survivors. This only changes if the deceased asserted his claim before a court while still alive; in this case, the survivors are allowed to join the lawsuit. The same is true if the party causing the damage acknowledged his duty without litigation (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata, 1332, 1340-1341). SLOVENIAN LOA art. 176 additionally even rules out the *inter vivos* transfer of non-pecuniary claims in damages.

24. To date, in SPAIN it has been always inferred that it follows from the nature of non-pecuniary damages that they may only be claimed by the person who has suffered them (*Gómez Calle*, Los sujetos de la responsabilidad civil, 395, 404; *Roca i Trias*, Derecho de daños[3], 175). Only when the injured party personally brings an action before his death, could the survivors carry on the action (TS 20 November 1990, RAJ 1990 (7) no. 9174 p. 11680; TS 24 June 1997, RAJ 1997 (3) no. 5208 p. 7978; TS 3 December 1999, RAJ 1999 (5) no. 8532 p. 13363). TS 19 June 2003, RAJ 2003 (3) no. 4244 p. 7941 has, however, acknowledged the survival of all claims in damages suffered by third parties where a person has been killed. In its judgement, the court did not distinguish between pecuniary and non-pecuniary damages. Whether this signifies a fundamental change in the case law may not yet be said with any certainty.

25. PORTUGUESE CC art. 496(2) contains a special regulation to the extent that "in the case of death to the victim … a spouse who is not judicially separated (i.e. separation of the person and of assets) and children or other progeny [are] together [entitled to] the claim in non-economic damages" (see Note II14 above). In successive order, the parents, grandparents, siblings and where these do not exist, the nephews and nieces of the deceased are entitled to claim in all other cases. These relatives also have the right to be compensated for the non-economic losses that the injured person suffered from the moment he or she was injured until the time he or she died (*Menezes Cordeiro*, Tratado III, 139). The claims in damages for pain and suffering are thus accumulated. From a systematic perpective, CC art. 496(2) is a special succession law rule for non-pecuniary claims (*Leite de Campos*, BFD V [1974] 247, 270). Their survival as such is not disputed (STJ 16 June 2005; *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 500). Under CC art. 496(2) a child not yet born at the time of the killing is entitled to claim; he is not, however, entitled to the reparation of his own personal non-pecuniary losses (*Abrantes Geraldes*, Temas da responsabilidade civil II, 24).

26. Under DUTCH Law, while claims for compensation of non-pecuniary damages are transferable in principle, CC art. 6:106(2) also restricts their survival. A claim to non-economic damages is a personal right. It is also assumed that it would run contrary to the legal system as a whole to block survivors from recovering for their own personal non-economic damages with one hand (CC arts. 6:107 and 108, see Note II15 above) and then to compensate them in a roundabout way through the law of succession, with the other. Therefore, in the Netherlands a claim to recovery of non-economic damages only forms part of the decendents' legal estate where it has been acknowledged to the primary victim or had already been asserted before a court. Contractual recognition leads to a claim under the law of property, which is inheritable, like any other claim under property law. According to the ESTONIAN Succession Act § 2, an estate does not include the rights and obligations of the deceased which pursuant to law or by their nature are inseparably bound to the person of the deceased. The transfer of a deceased person's claim of compensation for non-economic loss to the heir is therefore problematic. There seems to be no case law on this point.

27. SWEDISH Damages Law chap. 6 § 3 and FINNISH Damages Law chap. 7 § 3 also provide that claims in damages for pain and suffering, for particular adverse effects and for grievances extinguish on the death of the injured party, as long as he did not assert them as against the injuring party or his insurance carrier in his lifetime. A judicial determination of these claims is no longer required in order to ensure their survival, see *Sandstedt*, VersRAI 2002, 9, 11. It is also not necessary for the deceased to have expressly stated that he wished to assert his claim in non-economic damages (Prop 2000/01:68 [Ersättning för ideell skada] 77).

28. In IRELAND, the previous common law rule encapsulated by the Latin maxim *actio personalis moritur cum persona* was replaced wholesale with Civil Liability Act 1961 ss. 6-10. The general rule now is that all causes of action (other than "excepted causes of action" within the meaning of loc. cit. s. 6, i.e. one for defamation or seduction or any claim for compensation under the Workman's Compensation Act 1934) vested in a deceased person or subsisting against him or her, survive for the benefit of, or against, the deceased person's estate as the case may be (*McMahon and Binchy*, Torts[3], para. 41.04). However, damages for purely "personal" loss are excluded from the damages recoverable in an action previously vested in the deceased person. Thus, exemplary damages, damages for any pain and suffering, for personal injury or for loss or diminution of expectation of life or happiness are not recoverable (loc. cit. s. 7(2)). This is because the law does not allow recovery in respect of those items of damage intimately connected with the deceased person. Where the circumstances that caused the death of the deceased also vested in him or her a cause of action against the defendant, such cause of action survives and may be asserted for the benefit of his or her estate. The damages recoverable in any such action must be assessed regardless of any loss (e.g. the termination of a life interest in property) or gain (e.g. insurance policies) consequent on the death of the plaintiff. It is also reasonable to assume that the position enunciated in the UK decision of *Gammell v. Wilson* [1982] AC 27 will be followed in Ireland, thereby allowing damages to the estate for the "lost years" to be recovered (see, although on a narrower issue, *McMahon v. Burke and Midwestern health Board* [1991] ILRM 59 [HC] and *White*, Irish Law of Damages for Personal Injuries and Death, paras. 14.3.03 – 14.03.04). In SCOTLAND, the right to sue passes, on the death of the injured party, to his executor (*Gloag and Henderson*, The Law of Scotland[11], para. 34.12; *Smith v. Duncan Stewart & Co. Ltd. (No. 2)* 1961 SC 91; *Russell's Executix v. British Railways Board* 1965 SC 422) who sues in a representative capacity, thereby not precluding claims by relatives (e.g. by immediate family for loss of support) arising out of the same events (*White and Fletcher*, Delictual Damages, 52 and 55; citing *Dick v. Burgh of Falkirk* 1976 SC (HL) 1 and the Damages (Scotland) Act 1976, s. 4). The 1976 Act (which replaced the previous common law rule) currently regulates the entitlement of an executor to claim. Thus, according to loc. cit. s. 2, the "like rights to damages in relation to personal injury… as were vested in the deceased immediately before his death" are transmitted to the executor. This includes the right of solatium (awards of damages for suffering lasting only minutes will be modest: *Beggs v. Motherwell Bridge Fabricators Ltd.* 1998 SLT 1215); however damages by way of solatium or by way of compensation for patrimonial loss attributable to any period *after* the deceased's death are excluded (1976 Act, s. 2(1)-(3), as substituted by the Damages (Scotland) Act 1993). The fact of whether or not the deceased had brought an action in his lifetime has no practical effect on the executor's title to claim (loc cit. s. 2A, as inserted by the Damages (Scotland) Act 1993). However, in relation to "defamation, or any other verbal injury, or other injury to reputation", s. 2(4) provides that this principle does not apply to non-patrimonial claims (all solatium claims which are not "real" personal injury ones);

these may be *continued* by executors, but *not initiated* by them (*White and Fletcher*, loc. cit., 55). Any right the deceased had to damages in respect of the death of another (e.g. loss of society claims) will transmit to his executor, but in assessing damages the court will have regard only to the period ending immediately before the relative's death (loc. cit. s. 1A, as inserted by the Damages (Scotland) Act 1993, which also repealed the 1976 Act, s. 3).

IV. Funeral costs

29. Today, funeral costs are also recognised everywhere as recoverable economic loss. The various European legal systems differ only on peripheral issues, which mostly relate to the claimants and the level of claim.

30. FRENCH Law grants a claim in compensation to the surviving family members who have actually paid for the funeral (Cass.soc. 8 January 1981, Bull.civ. 1981, V, no. 22 p. 16; *Viney and Jourdain,* Les conditions de la responsabilité[2], no. 110-2 p. 209). BELGIAN doctrine also infers that funeral costs constitute recoverable damage for the person who actually bears them, and indeed regardless of whether he is an heir or not. However, in the case of the death of (e.g.) a parent, a significant reduction is supported by the argument that the younger generation would have one day had to pay for the older's funeral costs anyway; the killing only caused such damage as results from the untimeliness of the funeral. Within the boundaries of reasonableness, therefore, as a general rule only the funeral costs that are incurred by someone from the older generation (parents) for the burial of someone from the younger generation (children) are fully recoverable (*Simoens,* Schade en schadeloosstelling, no. 132 pp. 250-252).

31. In SPAIN funeral costs form part of the deceased's legal estate (CC arts. 902(1) and 903). Where they have actually been denied as forming part of the estate, the successors have a relevant claim in damages against the tortfeasor (TS 17 February 1956, RAJ 1956 (1) no. 1103 p. 691). If the funeral is financed not from the estate but by a relative personally (e.g. the widow), this relative can take action *iure propio* against the tortfeasor (*Vicente Domingo*, Los daños corporales, 232, fn. 735). In its appendix in s. 1 no. 6, the Law on Liability and Insurance for Motor Vehicle Traffic (*Texto Refundido de la Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor,* brought into force by *Real Decreto Legislativo* no. 8/2004 of 29 October 2004) confirms the recoverability of funeral costs for a traffic accident which has fatal effects. Where there is contributory fault, the claim is proportionately reduced (no. 7 loc. cit.). As regards the level of claim, it is stated that "average funeral costs" are recoverable; anything seen as luxurious or extraordinary would have to be paid for by the survivors themselves (*Gázquez Serrano,* La indemnización por causa de muerte, 100). According to TS 10 March 1973, RAJ 1973 (1) no. 1235 p. 984, the cost of flying the body over from a foreign country is also counted as reasonable costs.

32. Under ITALIAN law, the successors are entitled to claim for compensation of funeral costs (Cass. 12 May 1993, no. 5416, Giust.civ.Mass. 1993, 850). In HUNGARY funeral costs are awarded to the ascending and descending relatives, the spouse and siblings of the deceased. Only expenses actually executed and even then only to an economically acceptable extent, are recoverable. The cost of the gravestone, the wreath, the church service, the transport of the body and even proportionate costs of mourning have been enumerated (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata, 1360-1361; *Eörsi*, Kártérítés jogellenes magatartásért, 169-170; Petrik [-*Köles*], Polgári jog II, 634). That corresponds to the legal situation in ROMANIA (*Lupan*, Răspunderea civilă, 256; *Adam*, Drept civil, 279).

33. CZECH and SLOVAKIAN CC art. 449(2) express that "in case of death, the compensation shall also include compensation of adequate expenses connected with the burial". Of course that does not apply, if and so far as these costs are covered by health insurance. Incidentally, paragraph (3) loc. cit. adds that the claim in damages falls due to the person who has actually borne the cost. This corresponds to the position in POLAND (CC art. 446 § 1).

34. On the other hand, under GERMAN CC § 844(1) "in the case of death … the party liable in damages [has] to compensate for the funeral costs of the person(s) on whom the obligation to bear the costs lies". Normally this is the heirs (CC § 1968). Thus, someone who *de facto* takes on the funeral costs without any *de jure* obligation to do so, has no claim in tort (BGH 5 February 1962, NJW 1962, 791, 792; CA Oldenburg 27 July 1979, VersR 1979, 1135); however, in such cases a claim against the tortfeasor under agency of necessity comes into play (CA Berlin 12 February 1979, VersR 1979, 379). Funeral costs that are reasonable in view of the social and economic status of the deceased are recoverable. The cost of transporting the body also fall within the scope of application of CC § 844(1) (CA Berlin 10 November 1997, VersR 1999, 504, 508).

35. The position in AUSTRIA corresponds to this in all essential respects. Funeral costs constitute recoverable economic loss (e.g. OGH 18 December 1957, ZVR 1958/144, p. 153; OGH 26 November 1998, ZVR 1999/126, p. 417). It covers all costs that are in keeping with local traditions, the status and the economic circumsatnces of the deceased (OGH 4 November 1971, SZ 44/168; see further Rummel [-*Reischauer*], ABGB II², § 1327 no. 7). Who exactly is liable to compensate for the costs, is not expressly mentioned in the ABGB (*Koziol*, Haftpflichtrecht II², 147). It is inferred that such person(s) may claim who have to bear the costs under law. This is normally the heirs who have acquired seisin (Schwimann [-*Harrer*], ABGB VII², § 1327 no. 4).

36. GREEK CC art. 928 expressly provides for the recoverability of funeral costs. Funeral costs befitting the economic status of the deceased are recoverable to a reasonable extent; the cost of taking care of the grave are not covered here, however (Georgiades and Stathopoulos [-*Georgiades*], art. 928 no. 17). Any person required, by operation of the law, to arrange the funeral has title to claim for reparation. A contenious point, however, is whether this is the person who had to pay for the maintenace of the deceased (the opinion of *Kornilakis*, Eidiko Enochiko Dikaio I, 614-615), or the heir(s) (the view of *Filios*, Enochiko Dikaio II(2)^3, 105). Where a third party, without being obliged to do so, takes on the funeral costs, he shall also have a direct claim against the injuring party (see in any case *Georgiades* loc. cit. no. 15).

37. PORTUGUESE CC art. 495(1) also expressly requires the party tortiously responsible to compensate for funeral costs. Whoever aided the deceased is entitled to claim, namely (and accordingly, whoever organised the funeral) the hospital, the doctors or other persons and institutions who had contributed to the treatment (CC art. 495(2)). Further, thoe who had drawn maintenance from the deceased are entitled to claim (CC art. 495(3)). The funeral costs must be reasonable and are determined by, *inter alia*, the deceased's standard of living. They include the cost of transporting the body home from abroad (STJ 5 May 2005), costs of calling in a funeral home, as well as a priest to celebrate the funeral mass (STJ 11 December 2003), further, the cost of a gravestone and for the grave-diggers (STJ 11 December 2003; *Abrantes Geraldes*, Temas da responsabilidade civil I, 15). In the case of fatal accidents in the workplace, there is a special regime.

38. Under DUTCH CC art. 6:108(2) reparation for funeral costs is payable to the person who actually bore them; that can be e.g. an employer. In relation to the level of recoverable costs, along with the expectations of the deceased it depends on his social

status and on his financial circumsances (Schadevergoeding II [-*Lindenbergh*], art. 108, no. 18).

39. ESTONIAN LOA § 129(1) and (2) restrict compensation to "reasonable" funeral expenses. In principle, anyone who has to *de jure* bear the funeral costs may claim. However, „if funeral expenses are borne by another person, compensation for the expenses shall be paid to that person". LITHUANIAN CC art. 6.291 requires the person responsible for the death "to compensate the person who incurred the funeral expenses for those expenses. Only such funeral expenses that conform to the criterion of reasonableness shall be subject to compensation." LATVIAN CC art. 2350 requires anyone who is at fault for the death of another to compensate the heirs for the funeral costs. This bears correlation to the position in the NORDIC Countries, who restrict the level of any damages to "reasonable" costs (SWEDISH Damages Law chap. 5 § 2 no. 1 and *Bengtsson and Strömbäck*, Skadeståndslagen, 215; FINNISH Damages Law chap. 5 § 3; DANISH Damages Law § 12).

40. IRISH Civil Liability Act 1961 s. 49(2) provides for damages in respect of funeral and other expenses actually incurred by the deceased's dependants. Funeral costs include the costs of a normal tombstone and of embalming, but not the cost of an elaborate monument (*O'Brien v. Higgins*, SC 13 March 1967, unreported). Funeral expenses would also include expenses connected with the burial operation (or with cremation), and also with religious services for the deceased (*McMahon and Binchy*, Torts[3], para. 42.20). Coupled with having to be reasonably necessary, the "other expenses" that can be claimed here must also be immediately related to the obsequies, or perhaps medical expenses caused by the wrongful act (*Byrne v. Houlihan & De Courcy* [1966] IR 274). Other than the aforementioned expenses, primarily travelling costs incurred by the dependants visiting the deceased before he died and attending the funeral, also acknowledgement cards to sympathisers, a wake and the cost of mourning clothes may be inferred here (*McMahon and Binchy* loc. cit.). The phrase does not include expenses incurred by a widower for extra domestic help or for the tuition of his children (*Byrne v. Houlihan & De Courcy* [1966] IR 274). In SCOTLAND, in fatal accident cases the Damages (Scotland) Act 1976, s. 1(3) permits the claim for expenses in connection with the deceased's funeral, incurred by a "relative" as defined. The claim is on their own behalf, *viz.* not on behalf of the deceased. The definition of relatives, in loc. cit. Schedule 1, is the same as for "loss of support" claims, see below, Note V53. S. 1(3) of the Act limits funeral costs to "any reasonable expense". There is a paucity of case law in this area, where in this small body of decisions, the primary concern was whether a headstone is a funeral expense at all; in the Inner House in *Prentice v. Chalmers* 1985 SLT 168 at 171), Lord *Hunter* observed that it was not argued that the cost of the headstone "was unreasonable in amount having regard to the station in life of the deceased and his family". Thus, "reasonableness" may vary according to the circumstances.

V. Loss of Maintenance

41. The tortious obligation to assume the role of maintaining those who had been economically dependant on the deceased in a special way is of common ground in Europe. Differences in legal systems are encountered, however, in determining precisely who is entitled to damages and occasionally in the level and legal construction of the claim in damages.

42. Under FRENCH law, anyone to whom the deceased had provided maintenance is, in principle, entitled to claim; it does not depend on an existing legal relationship *inter partes* (Cass.ch.mixte 27 February 1970, Bull.ch.mixte 1970 no. 1; RTD civ. 1970, 353, note *Durry*; D. 1970 jur. 201, note *Combaldieu*; JCP 1970 II 16305, concl.

Lindon, note *Parlange*; see also *Beysen*, VersRAI 2004, 41, 44). As a result, not only family members and non-marital cohabitees may be entitled to claim, but also any other person whom the victim had supported, provided only that the discontinuation of the advantage is a definite consequence of the primary victim's death (*le Tourneau*, Droit de la responsabilité et des contrats, no. 1456). This mirrors the position in BELGIUM (e.g. Cass. 24 March 1969, Pas. belge 1969, I, 655: the claim of a cloistral community for reparation of monies paid by a deceased nun to the community fund).

43. Under SPANISH law, anyone who was financially dependent on the deceased is entitled to claim for damages, as long as the lost maintenance can be proven. The law provides no precise criteria for the calculation of the level of this claim. However, in traffic accident cases the courts apply the table of damages in the appendix to the Law on Liability and Insurance for Motor Vehicle Traffic (*Texto Refundido de la Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor,* brought into force by *Real Decreto Legislativo* no. 8/2004 of 29 October 2004). The assessment of damages is incumbent upon the courts charged with jurisdiction to establish facts; the *Tribunal Supremo* does not review it in cassation proceedings (see e.g. TS 26 March 1997, RAJ 1997 (1) no. 1864 p. 2856). Normally, an all-inclusive sum is awarded for all damages, without differentiating between the details of the various positions.

44. So too, the ITALIAN CC does not expressly regulate the liability for lost maintenance after death. The older case law had considered whether secondary injured parties had a statutory claim to maintenance (CC art. 433) against the deceased. However, for some time now, economic disadvantages of others are compensated, to the extent that they can prove that they have been continuously supported by the deceased (Cass. 10 April 1979, no. 2076, Giust.civ.Mass. 1979, fasc. 4; Cass. 1 August 1987, no. 6672, Riv.giur.circ.trasp. 1988, 102). Even persons who have not yet been supported by the deceased, but would have been supported by him in the future, shall be entitled to claim, even where no statutory claim to maintenance would have accrued to them (Cass. 12 October 1998, no. 10085, Resp.civ. e prev. 1999, 752; Cass. 10 October 1992, no. 11097, Giust.civ.Mass. 1992, 10). The only prerequisite is that they would have been supported in the normal course of events (Cass 14 February 2000, no. 1637, Resp.civ. e prev. 2000, 609). As regards the quantum of the claim for lost maintenance and other economic loss caused to children following the death of their wage-earning mother, see the detailed judgment of Cass. 12 September 2005, no. 18092, Danno e resp. 2006, 753.

45. HUNGARIAN CC § 358(1) states that "dependents of a person who has died in an accident shall be entitled to claim an annuity that will supplement any support and ensure the satisfaction of their needs in accordance with the standard of living to which they were accustomed before the accident (by considering their actual or expected earnings)". When calculating the pension, consideration is to be given to whether the surviving dependents also had a claim against another party who had an obligation to provide maintenance, which made this party liable to an equal degree to that of the deceased (CC § 358(3)). According to case law, only those who had a statutory claim for maintenance against the deceased are entitled to claim. Maintenance provided out of genorosity may be given as little consideration as that which goes over and above the level required by statute. Thus, non-marital cohabitees do not form part of the circle of possible claimants (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata, 1374-1375.; Petrik [-*Köles*], Polgári jog II, 641-643; *Petrik*, Kártérítési jog, 251-255; *Ujváriné,* Felelősségtan[7], 200-204).

46. POLISH CC art. 446 § 2 provides a claim to those surviving dependents who had a statutory claim to maintenance against the deceased. However, "the same pension may

be claimed by other persons related to the deceased whom the latter voluntarily and permanently supplied with means of maintenance if it follows from the circumstances that this is required by the principles of community life". Likewise, CZECH and SLOVAKIAN CC § 448(1) considers as entitled to claim, not only those who had a statutory claim to maintenance, but also those to whom the deceased actually provided maintenance. However, a claim does not exist to the extent that sums accrued to the relevant parties out of (social) insurance. In the same way, SLOVENIAN LOA art. 173(1) considers those "who were maintained or regularly supported by the deceased", just as much entitled to claim as those who had a statutory claim against the deceased. That is also the position in ROMANIA (*Lupan*, Răspunderea civilă, 258-262; *Adam*, Drept civil, 279-281). Draft CC art. 1133 provides fro an express statutory provision.

47. GERMAN CC § 844(2) only affords a claim to persons to whom the deceased was (or could become) required under statute to provide maintenance, and indeed in the amount and for a time period that the deceased would have had to provide maintenance in the likely duration of his life. Contributory fault of the deceased leads to a reduction of the claim (CC § 846). The position is the same in AUSTRIA (CC § 1327); damages are only afforded to those entitled to maintenance under statute (OGH 14 November 1934, SZ 16/223); a contractual claim to maintenance does not suffice (OGH 26 April 1991, JBl 1992, 44). Monetary compensation also falls due for maintenance the deceased had provided by nature (OGH 30 August 1988, ZVR 1989/106, p. 178). Where the *de facto* maintenance provided exceeds the *de jure* obligation - without being disproportionate - it is to be fully compensated. On the other hand, the statutory level of maintenance is to be paid, even where the maintenance previously provided by the deceased had fallen short of this level (OGH 2 September 1999, SZ 72/135). In Austria, contributory fault on the part of the deceased has to be considered also (OGH 19 November 1957, JBl 1957, 645).

48. GREEK CC art. 928 (second sentence) affords a claim in damages to those (and only those) to whom the deceased provided maintenance or services under a statutory obligation; solely contractual obligations to provide maintenance and services do not suffice. The precise determination of the list of entitled claimants takes its cue from the relevant family law provisions (Georgiades and Stathopoulos [-*Georgiades*], art. 928, no. 26). The point in time at which the tortious act was committed is key here, not the time of death. Therefore, a widow who married the already injured party is not entitled to claim (*Georgiades* loc. cit. no. 9). If, and so far as the maintenance obligation passes to the deceased's survivors and they in turn are able to economically meet the claim to maintenance, no damages shall exist (*Kornilakis*, Eidiko Enochiko Dikaio I, 615). On the other hand, it is sufficient that the deceased would have had an obligation to provide maintenance to the claimant in the near future (A.P. 359/1957, NoB 5/1957, 1012: the death of a 15-year-old male who would have completed his apprenticeship as a watchmaker in one year and then would have earned enough to provide his mother with maintenance). Spouses are also obliged to support each other and their children generally; the previous obligation of a wife for the provision of services has fallen away (CC arts. 1389 and 1390). The widower or the widow is thus likewise afforded a claim under CC art. 928 (*Kornilakis*, Eidiko Enochiko Dikaio I, 621; *Kounougeri-Manoledaki*, FS Vavouskos II, 221). The material factor is the economic value of the contribution, which the deceased was obliged to make towards family maintenance according to provisions of family law (A.P. 84/2005, NoB 53 [2005] 1418). It is doubtful whether this also applies in relation to the lost services on the part of the deceased in the spouses' joint enterprise (answered in the negative by CA Athens 7212/1984, NoB 32/1984, 1561; answered in the affirmative by *Doris* in the note on this decision (loc. cit. 1562)).

49. PORTUGUESE CC art. 495(3) also provides a right to be compensated to those who could claim alimony (under CC art. 2009) from the victim or to those to whom the latter rendered support under a 'natural obligation' (see further *Antunes Varela*, Obrigações em geral I[10], 622; *Abrantes Geraldes*, Temas da responsabilidade civil I, 16-17). CC art. 495(3) throws up an exception to the general principle, whereby only those directly injured have a claim to compensation (*Almeida Costa*, Obrigações[8], 546-547). According to case law, non-marital life partners are also entitled to claim (CA Lisbon 20 February 1974, BolMinJus 234 [1974] 336) as are children, who have been already been conceived at the time of death, but not yet born (*Vaz Serra*, BolMinJus 86 [1959] 103, 123). The claim requires actual loss of maintenance. In contrast, it is not invariably necessary that the deceased provided maintenance in pursuance of a statutory obligation on him to do so; it suffices that maintenance had been rendered under a moral duty. Evidence that the injured third party was "needy" within the meaning of maintenance law is also not necessary (STJ 16 April 1974, RLJ 108 [1975-76] no. 3549 p. 182).

50. The equivalent rule in DUTCH law is to be found in CC art. 6:108(1). Lost maintenance does not only cover pecuniary support, but also extends to the provision of physical care, sustenance, accommodation, clothing and other support in kind. Primarily, spouses, registered partners and children are entitled to claim. They are entitled to a claim to the level of statutory maintenance at the very least; however, where the deceased has provided maintenance over and above what is necessary this is also recoverable (lit. (a) loc. cit.; on this issue and what follows, see in particular Schadevergoeding II [-*Lindenbergh*], art. 108, nos. 19 *et seq.*). Other relatives or in-laws only have a claim in damages if the deceased contributed to their maintenance at the time of his death or would have been compelled by a court order to do so (lit. (b)). Further, belonging to the circle of claimants entitled to damages is - according to lit. (c) loc. cit. - anyone, who lived together with the deceased as part of a family unit, if and so far as the deceased had actually covered their maintenance and it may be inferred that this would have continued, had his death not occurred and that the relevant parties cannot fairly provide for their own maintenance. Finally, those persons are entitled to claim who lived with the deceased as part of a family unit, in which the deceased kept house; they essentially have a claim to reparation of the costs for a home help (lit. (d)). In all cases, contributory fault on the deceased's part results in a corresponding reduction of the claim (CC art. 6:108(3)).

51. ESTONIAN LOA § 129(3)-(6) contains just as detailed a regulation: persons, who had a statutory claim to maintenance against the deceased, may claim the amount of lost maintenance actually incurred (para. (3)). The same goes for persons, for whom the deceased would have had a maintenance obligation under statute (para. (4)). This applies particularly in relation to children who were in fact already conceived at the time of death but had not yet been born (para. (5)). Finally, anyone who had permanently lived with the deceased as part of a family unit or had been otherwise provided maintenance by him due to a moral duty, is also entitled to damages, as long as they are dependant on this maintenace, they cannot obtain maintenance through other means and the deceased would have also provided them maintenance in the future (para. (6)). LITHUANIAN CC art. 6.284(1) lists "minor children, spouses, parents incapable of work, or other factual dependants incapable of work" as entitled to claim. LATVIAN CC art. 2351 is to the same effect. However, the provision only benefits those persons, for whose maintenance the deceased was obliged to provide. The death must have been caused through fault. The obligation to provide maintenance ends as soon as the beneficiary can provide for himself.

52. The Damages Laws of the NORDIC Countries coincide with these Principles in that reparation for lost maintenance only comes into play in cases of death (DANISH Damages Law §§ 12-14a; FINNISH Damages Law chap. 5 § 4 [in force since 1 January 2006]; SWEDISH Damages Law chap. 5 § 2 no. 2). Anyone who had - or would have shortly acquired - a statutory claim to maintenance against the deceased is entitled to reparation under the Swedish regulation; additionally, anyone who was dependant on the deceased. This involves primarily family members and non-marital cohabitees *(Hellner and Johansson,* Skadeståndsrätt[6], 413-414). When assessing the level of damages, the economic circumstances of the surviving family members comes into consideration, taking into account possible insurance benefits (Swedish Damages Law chap. 5 § 3). Danish Damages Law § 12 states that damages fall due to anyone, who has lost his or her breadwinner. §§ 13-14a loc. cit. regulate the details of the level of reparation. Under FINNISH Damages Law chap. § 4(1) anyone is entitled to claim, who had a claim against the deceased for maintenance or received maintenance from him *de facto*. Work in the home only equates to maintenance under special circumstances (chap. 5 § 4(3)).

53. In SCOTLAND, liability under this heading is imposed under the Damages (Scotland) Act 1976, s. 1(3), read in conjunction with s. 1(1). It is necessary that the deceased died "in consequence of personal injuries sustained by him as a result of an act or omission of another person … giving rise to liability to pay damages". The injuring party is required to pay to any defined relatives damages "such as will compensate the relative for any loss of support suffered by him since the date of the deceased's death or likely to be suffered by him". Support is a factual matter, which must be established (*White and Fletcher,* Delictual Damages, 34). Under loc. cit. s. 1(6) it is not essential in such a claim that the deceased had a legal obligation to support, but if that is so, it is to be taken into account in establishing a claim to support. The loss of support claim is based on the actual amount of support that was usually received (*Hatherley v. Smith* 1989 SLT 316). It is appropriate to take account of likely increases in support which would have followed (*Smith v. Comrie's Executrix* 1944 SC 499) but not speculative matters (*Daniell v. Aviemore Station Hotel Co. Ltd.* 1951 SLT (Notes) 75). In assessing loss of support, the court will not take account of remarriage prospects (Law Reform (Miscellaneous Provisions) Act 1971, s. 4), nor will the court deduct any social security benefits paid or money that will accrue from the deceased's estate, such as insurance policies (*Stewart*, Delict and Related Obligations[3], para. 11.29). As far as liability goes, the claim is not independent because liability to the relatives depends upon liability to the deceased; however, as was noted above in note *III28*, it does not rely on an action by the deceased's executor. Relatives in this context are defined in the 1976 Act, Schedule 1 and include: spouses; a parent or child; "ascendant or descendant (other than a parent or child)"; siblings; uncles and aunts; nephews and nieces; and first cousins. "Common law" spouses, but not divorced spouses (1976 Act, Schedule 1, para. 1(aa)), those treated as children of the family (loc. cit. para. 1(c)) and illegitimate children (loc. cit. para. 2(b)) are included as well. Also, stepchildren and since "any relationship of the half blood shall be treated as a relationship of the whole blood" and "any relationship of affinity shall be treated as a relationship of consanguinity" (loc. cit., para. 2(a)), presumably again, a variety of relationships such as half-siblings, uncles and aunts by marriage, "grandparents-in-law" and even "half-nephews" and cousins by marriage would fall under this category (*White and Fletcher,* loc. cit. 35). The inclusion of daughters-in-law and mothers-in-law has also been affirmed (*McAllister v. Imperial Chemical Industries plc.* 1997 SLT 351; *Monteith v. Cape Insulation Ltd.* 1998 SC 903). It must, however, be remembered that the abovementioned possible claimants may only claim if they were in fact dependent on

the deceased. In the usual case, where there will be more than one dependent relative, the sum awarded requires to be apportioned between them.

54. In IRELAND, loss of pecuniary benefits that could have reasonably been expected, but for the wrongful act of the defendant, represents the principal heading under which dependants (defined according to Civil Liability Act 1961, Part IV) may claim damages under the fatal injuries provisions of the Act. To ascertain the value of dependency, the dependants' annual average loss is first calculated, which is then multiplied by the number of years during which the loss is likely to continue and is discounted to give the present value of the dependency. Finally, benefits as a consequence of the death are deducted in order to reach the amount recoverable (*McMahon and Binchy*, Torts[3], para. 42.26). The courts take into account the deceased's actual income, his prospects for advancement in his job or profession, the fringe benefits to which he was entitled (e.g. company car, free heat and light, bonuses, pension rights, etc.) and the proportion of his income that was directed at his dependants (*McMahon and Binchy* loc. cit. para. 42.27). Along with direct financial contributions made by the deceased and likely to have continued but for his death, the loss of services, or acts in kind that can be reduced to financial terms is also recoverable; this includes the compensation of expenses incurred where a tutor must be employed to replace the deceased's contributions in the instruction of his children, a gardener must be taken on in the management of the family garden or a carpenter or a painter has to be engaged to do routine maintenance work in the home that the deceased did before his death (*O'Sullivan v. Córas Iompair Éireann* [1978] IR 407; *Waters v. Cruikshank* [1967] IR 378; *Berry v. Humm & Co.* [1915] 1 KB 627). The primary victim's dependants can only recover damages for pecuniary benefits that could be reasonably expected to be made by the deceased *in the future*; therefore, damages may be awarded to the dependants in the case of the death of a minor son or daughter if a future pecuniary benefit could be reasonably expected (*Hamilton v. O'Reilly* [1951] IR 200; *Malynn v. Farrell* (1956) 90 ILTR 137). The inferences made in the dependants' claim must be substantiated by facts in order to enable the Court to reasonably conclude that a benefit would have accrued; otherwise their claim will fail as being predicated on mere speculation (*Horgan v. Buckley* [1938] IR 115; *Good v. Callaghan*, Supreme Court, 25 April 1967). The Court considers the working life expectancy of the deceased and the life expectancy of the relevant dependants in assessing the period of loss. In the case of minor dependants, the extent of the child's education and whether the child was likely to move away after taking up employment are relevant factors. Taxation (of the deceased's income), inflation and the likely increase of the deceased's income, had he continued to earn, also come into play when assessing the value of the claim (*McMahon and Binchy* loc. cit. 42.32). As a general rule, pecuniary benefits to the deceased's dependants are also taken into account (*Byrne v. Houlihan & De Courcy* [1966] IR 274; *Murphy v. Cronin* [1966] IR 699, 708). This includes the accelerated nature of the inheritance (*Tubridy v. White*, High Court, 31 January 1974; *O'Sullivan v. Córas Iompair Éireann* [1978] IR 407). Any possible increase of savings that would have accumulated during the deceased's lifetime, had he lived, is also relevant (*Murphy v. Cronin* [1966] IR 699 at 710; *v. Córas Iompair Éireann* loc. cit.). There are two exceptions to the general rule that benefits will be taken into account: (i) property of which the widowed claimant had the shared use during the deceased's lifetime (*v. Córas Iompair Éireann* loc. cit.; *Murphy v. Cronin* loc. cit.) shall not be a relevant factor in the assessment; and (ii) Civil Liability Act 1961 s. 50 states that in a fatal injuries action, no account is to be taken of (a) any sum payable on the death of the deceased under any contract of insurance, or (b) any pension, gratuity or other like benefit payable under statute or

otherwise in consequence of the death of the deceased. Civl Liablity Act s. 49(5) provides that where a cohabitant of three years standing had no enforceable right to financial maintenance by the deceased, the court shall take that fact into the account, together with any other relevant matter, in determining the damages to be awarded. It must be noted, however, that merely the absence of a legal claim is to be taken into account by the Court, with no further direction as to apportionment of damages.

VI. Pecuniary and non-pecuniary claims of other third parties harmed

55. Death or injury to a person can also cause sustained harm to other third parties, for instance employers or business partners, and inflict disadvantages on them that do not fit within the framework of lost maintenance. There is no uniform yardstick in the various European legal systems for measuring whether such damages are entitled to be recovered (and if so, by whom). However, it may be stated in general that great reluctance as to the recoverability of such consequential damages prevails. In most legal systems a claim in damages would only be affirmed in such cases as the harm was intentionally inflicted on the third party.

56. The FRENCH courts usually deny claims in damages of third parties, whose interests are infringed or compromised by the death or injury of the primary injured party, but who are only linked to him by a relationship under the law of obligations (*Viney and Jourdain*, Les conditions de la responsabilité[2], no. 312 pp. 135-136). While there are, indeed, exceptions (e.g. CA Colmar 20 April 1955, D. 1966 jur. 723, note *Savatier*: Reparation of the harm suffered by a football club as a result of the accident-caused death of one of its players), they do not correspond with the main line of reasoning of the court of cassation (see, in particular, Cass.civ. 14 November 1958, GazPal 1959, I, 31: no claim for an Opera against the originator of an accident, which had the effect of rendering a singer unable to perform).

57. This is also how the issue is dealt with in BELGIUM. At most a claim arises where the contractual relationship between the primary injured party and the claimant is of a nature that the promised performance of the injured party may only be carried out exclusively by him personally and no-one else (*Dirix*, Het begrip schade, no. 225 pp. 140-141).

58. So too, the SPANISH *Tribunal Supremo* only apparently considers the compensation of third parties if they had a particularly close personal relationship with the deceased. TS 17 May 1973, RAJ 1973 (1) no. 2087 p. 1664 provides an example of this (a “wet nurse” who had taken care of the deceased for a significant part of her life, was now left without a job and had no prospect of getting another one or of gaining income by other means). In a decision that was met to some extent with sharp criticism by academic commentators (*Yzquierdo Tolsada*, Sistema de responsabilidad civil, 381) the Supreme Court granted a claim to an order of nuns who ran the nursing home in which the deceased had lived (TS 31 May 1972, RAJ 1972 (1) no. 2787 p. 2121), and in TS 30 June 1965, RAJ 1965 (2) no. 3425 p. 2080 it even suggested the possibility that the Church could be entitled to damages for the death of a bishop or capitular. On the other hand, it denied the claim in compensation of a congregation for the death of one of its members (TS 12 June 1970, RAJ 1970 (2) no. 3500 p. 2388). Conversely, the state has been compensated for the pecuniary damages (continuation of wage payments) occasioned to them due to the intentional injury of a member of the *Guardia Civil* (TS 24 April 1979, RAJ 1979 (1) no. 1430, p. 1178; for similar cases see also TS 13 December 1983, RAJ 1983 (3) no. 6522 p. 5022; TS 20 September 1982, RAJ 1982 (2) no. 4948 p. 3215; TS 12 June 1989, RAJ 1989 (4) no. 5094 p. 5892 and TS 11 December 1989, RAJ 1989 (7) no. 9527 p. 11090). The case law is of course inconsistent, as in a number of cases whose facts were identical to these,

pecuniary damages were denied (TS 14 February 1980, RAJ 1980 (1) no. 516 p. 396; TS 14 April 1981, RAJ 1981 (1) no. 1539 p. 1282 and TS 29 December 1986, RAJ 1986 (3) no. 4922 p. 4849; see *Santos Briz*, La responsabilidad civil I[7], 238).

59. In certain instances, ITALIAN case law has also extended the protection of relative rights of claim beyond maintenance obligees. In the co-called *Meroni*-decision (Cass.sez.un. 26 January 1971, no. 174, Giur.it. 1971, I, 1, 680, note *Visintini* = Foro it. 1971, I, 342, notes *Jemolo* and *Busnelli* 1284) the Court granted damages to an obligee who, due to the obligor's death, had lost his claim against the obligor for the provision of nondelegable services. Likewise, an employer, who has to continue to pay the wages of an employee injured by a third party receives relief (settled case law, see Cass. 12 November 1988, no. 6132, Giur.it. 1990, I, 1, 280). As a matter of principle, HUNGARIAN Law grants no damages to third parties, and so does not compensate non-economic loss, like e.g. in the case of friends, neighbours or carers (Petrik [-*Petrik*], Polgári jog I, 208/2; *Petrik*, Kártérítési jog, 260-261).

60. In principle, GERMAN Law in no way grants persons indirectly harmed (apart from cases of intentional harm: CC § 826) a claim in damages, not even for the reparation of their economic losses suffered. According to BGH 21 Novemer 2000, NJW 2001, 971, this even applies where the beneficiary's claim (in this case the original owner of agricultural property) against the deceased (the adult son and heir to the farm) to pension benefits in old age was backed up by its entry in the land register. Additionally, in a case where a man who represented one half of a well-known and successful figure skating duo was injured in a traffic accident, BGH 10 December 2002, NJW 2003, 1040 decided that his female partner could not claim any damages from the injuring party for loss occasioned to her due to the temporary accident-caused absence of her partner. However, if an employee is injured and his employer has to continue to pay his wages, the employee's claim against the injuring third party is transferred to the employer by operation of statute (Law on the Payment of Remuneration on Public Holidays and in the Case of Illness [*EntgFG*] § 6).

61. In AUSTRIA, despite the broad formulation of CC § 1295(1), in principle the pure economic losses of third parties still go without reparation (Schwimann [-*Harrer*], ABGB VII², § 1295 no. 3). CC § 1327 (loss of maintenance) is interpreted as an exhaustive exception; apart from the circumstances enumerated here, in no case will a claim be entertained if no intention is present (OGH 19 November 1956, ZVR 1957/37, p. 51; OGH 5 April 1979, ZVR 1980/240, p. 226; OGH 8 July 1993, ZVR 1994/129, p. 311). However, an employer who continues to pay the wages of an injured worker during his illness acquires the employee's claim in damages against the injuring third party by operation of statute (General Social Insurance Law [*ASVG*] § 332(1)).

62. GREECE also grants no reparation to persons who suffer economic damages as a result of the death or injury of another but are not mentioned in CC arts. 928 and 929 (loss of maintenance). Only "indirectly injured parties" are concerned here (*Kornilakis*, Eidiko Enochiko Dikaio I, 596; *Georgiades*, Enochiko Dikaio, Geniko meros, 608; Georgiades and Stathopoulos [-*Georgiades*], art. 914, no. 70, and art. 928, no. 1). Examples offered by these commentators include a football club, which loses a famous player, an opera house, in which a famous singer cannot perform and obligees of a building contractor, to whom he cannot fulfill his contractual obligations in due time because of his injury.

63. The position in PORTUGAL is the same. Third parties, who are merely 'indirectly' harmed and not mentioned in CC art. 495 (***???****supra,* **Note *V49***), have no personal claim of their own (*Sinde Monteiro*, Responsabilidade por conselhos, 190). Exceptions

to this basic rule require a specific statutory basis. Among them, is Decree-Law no. 218/99 of 15 June 1999, which grants the national health services the right to reimbursement in regard to hospitalisation costs caused by criminal acts, road traffic accidents and accidents at work (*Abrantes Geraldes*, Temas da responsabilidade civil I, 14; see STJ 13 February 2003). Likewise, Decree Law no. 59/89 of 22 February 1989 grants Social Security institutions the right to claim reimbursement for expenditure caused by an injured party's personal injury or death in civil or criminal proceedings (*Abrantes Geraldes* loc. cit. 19). Similar regimes operate in favour of the employer and the insurer in regard to accidents at work attributable to a third party (Act no. 100/97 of 13 September 1997, art. 31; see now Labour Code art. 294), and to the State (by means of subrogation into the injured civil servant's claim, see the *acórdão uniformizador de jurisprudência* no. 5/97 Diário Rep. no.73, Series I-A, 27 March 1997).

64. So too in DUTCH Law pure economic losses of third parties in principle still go without compensation. However, according to CC art. 6:107(1) an employer is entitled – through a right of his own (and not only an assigned right) – to damages for medical costs and costs of other treatment, which he incurred for the benefit of his employee. The claim to compensation of wages continuously paid during the period of illness results from CC art. 6:107a. This does not encompass the cost of hiring a substitute or damages attributable to a disruption of operations. Damages suffered by a company because of injury to one of its members are also unrecoverable; only the personal losses of the member are recoverable (CA Amsterdam 9 July 1998, VR 1999, 64).

65. The claims of third parties in SWEDEN are likewise rejected (*Hellner,* SvJT 1969, 332; *Hellner and Johansson*, Skadeståndsrätt[6], 364, 411; *Kleineman,* Ren förmögenhetsskada, 180; *Andersson,* Skyddsändamål och adekvans, 560; *Andersson,* Trepartsrelationer i skadeståndsrätten, 38; *Radetzki,* Skadeståndsberäkning vid sakskada, 56). Also, HD 5 May 1995, NJA 1995, 269 would not represent an exception to this rule (damages to the mother of a child abducted by the father and brought to Tunisia).

66. At COMMON LAW the general principle is that "the loss of A arising out of an injury whereby B is unable to perform his contract [with A] is not actionable": *Admiralty Commissioners v. Owners of Steamsship Amerika* [1917] AC 38, 45 per Lord *Parker*. Consequently a company or a partnership has no claim for loss of services where a director or employee of the company or a partner of the firm is injured and equally an employee has no claim if injury to his employer ends his employment: *Inland Revenue Commissioners v. Hambrook* [1956] 2 QB 641, 660 (*Denning* LJ). In ENGLAND, before the Administration of Justice Act, 1982 s. 2(c) abolished the anomalous common law action *per quod servitium amisit* for the loss of domestic services rendered by a servant within the employer's household (*Inland Revenue Commissioners v. Hambrook* [1956] 2 QB 641, 666 [*Denning* LJ]), this action had been subject to judicial scepticism. Due to the lack of statutory reform in this area in IRELAND, this anomalous action survives to this day. It is founded on the now out-dated concept of the servant falling within the proprietorship of his master. Similar to the position before the aforementioned abolition in England, in Ireland too, the courts have little sympathy with this concept today and have tended to regard the action as anomalous and restrict its scope as much as possible (*McMahon and Binchy,* Torts[3], para. 32.03). The action does not depend on any contract of service (*A-G for New South Wales v. Perpetual Trustee Co. (Ltd)* [1955] AC 457 at 483 [PC]) but rather on the fact (or even right) of service. Mirroring the position of the Court of Appeal in *Inland Revenue Commissioners v. Hambrook* (loc. cit.), in *A-G v. Ryan's Car Hire Ltd.* [1965] IR 642), the Irish Supreme Court (in emphasising the restricted scope of

this anomaly) concluded that public servants (e.g. in the armed forces, police or civil service) did not fall under this exception. It is also unclear in Ireland, whether the action should be limited to deny the right to sue to all masters apart from those of "menial" servants (i.e. living as part of their master's household). In *Ryan v. Ireland* [1989] IR 177), *Finlay* CJ (although only *obiter*) expressed the view that the action should in fact be limited in this way. Some damage must be shown to ground the action (*Hall v. Hollander* (1825) 4 B & C 660, 107 ER 1206). Recovery may be allowed for the actual pecuniary loss because of the loss of services and other expenses necessarily sustained in consequence of the servant's injury (*Chapman v. McDonald* [1969] IR 188). Thus, the master may recover for the extra cost of obtaining and training a substitute for the servant or in paying overtime rates to existing staff (*McMahon and Binchy*, loc. cit., para. 32.11). Whether the foreseeability limitation applicable to negligence actions applies to actions *per quod servitium amisit* has not been decided upon (see, however, *Jones v. Fabbi* (1973) 37 DLR (3d) 27).

67. In SCOTLAND, it is not an actionable wrong to cause a person indirect economic loss by injuring, or causing death of, another person with whom the loser has contractual ties (*Walker*, Law of Delict[2], 916). In this way, an employer has no claim where his employee is injured or killed by the fault of a third party (*Allan v. Barclay* (1864) 2 M 873; *Reavis v. Clan Line Steamers*, 1925 SC 725), nor has one business partner where another partner has been injured or killed (*Gibson v. Glasgow Corp.* 1963 SLT (Notes) 16), nor has a company for loss of services of a director (*cf. Young v. Ormiston*, 1936 SLT 79, though its authority was doubted in *Vaughan v. Greater Glasgow Passenger Transport Executive* 1984 SC 32), nor the owner of a business for the death of the manager (*Quin v. Greenock & Port-Glasgow Tramways Co.* 1926 SC 544), nor a professional dancer for the death of his dancing partner (though because they were also married, he could claim for damages in his capacity as a widower who had lost his wife under other heads of damages) (*Burgess v. Florence Nightingale Hospital* [1955] 1 QB 349). The principle has been stated to be that the foresight of harmful consequences attributed to a wrongdoer does not extend to include the victim's contractual relationships (*Walker*, loc. cit. 917).

Illustration 1 is taken from BGH 10 December 2002, NJW 2003, 1040.

VI.–2:203: Infringement of dignity, liberty and privacy

(1) Loss caused to a natural person as a result of infringement of his or her right to respect for his or her dignity, such as the rights to liberty and privacy, and the injury as such are legally relevant damage.

(2) Loss caused to a person as a result of injury to that person's reputation and the injury as such are also legally relevant damage if national law so provides.

COMMENTS

A. General

1. Purpose of the provision. The purpose of this provision is to clarify that loss and injury caused by the infringement of human dignity constitutes legally relevant damage which leads to an obligation to make reparation according to the basic rule on non-contractual liability. One important aspect of human dignity is the protection of a person's right to liberty; another is the protection of a person's private sphere. Of course consequential losses also constitute damage relevant to the law on non-contractual liability, whether they be economic or non-economic losses.

Horizontal effects of human rights. I.–1:102 (Interpretation and development) paragraph (2) states that these model rules "are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms". The very position of this provision indicates its status as a general provision, whose significance goes far beyond the law on non-contractual liability. It is also necessary for the law of contract – for example in the law of credit securities. It seems to be certain, however, that such a general norm on the so-called 'horizontal effects' of human rights and fundamental freedoms cannot render a specific non-contractual liability law protection of rights of personality superfluous. Furthermore, it goes without saying that holders of rights in private law in relation to others are not subject to the same duties as the state in its dealings with citizens. Persons subject to private law who offer their goods or services to the public must, however, comply with more stringent rules than individuals conducting their private lives.

Illustration 1
For example, an infringement of dignity is made out when a business which is open to the public (e.g. a bank, restaurant or hotel) turns someone away on account of their skin colour or creed. A private person by contrast may generally adopt entirely arbitrary criteria in deciding when to let someone into his or her house.

B. Infringement of human dignity (paragraph (1))

Infringement. Technically speaking, there can be an "infringement" of the incorporeal rights of personality in VI.–2:203 within the meaning of these rules even where the injuring person can invoke a ground of defence set out in Chapter 5, e.g. VI.–5:203 (Protection of public interest). The distinction is important because the allocation of the burden of proof turns on it.

Injury and loss. The infringement of human dignity, like injury to body or health, constitutes a damage *per se*. However, a legally relevant damage is also constituted by the losses which result from that infringement. Infringements of human dignity can entail economic as well as non-economic damage.

Trivial injury. In every case the injury must not be merely trivial (VI.–6:102 (De minimis rule)). In establishing whether the case is one of trivial damage it will be material whether the injuring person has acted intentionally or merely negligently and, moreover, whether a violation of a private sphere or an infringement of freedom is at stake. For infringements of rights of personality or interferences in the private sphere which result from mere negligence there is sometimes no scope for a claim to damages. With infringements of the right to liberty, however, the position is usually different. Here negligence is often sufficient, provided that the circumstances are such that the infringement of the right to liberty equates to an infringement of human dignity. Everything depends on assessing the circumstances of the individual case. The regulation of the corresponding details must therefore be left to the courts. Furthermore, the generally applicable principle of Chapter 6 that reparation is to be awarded in a way which best corresponds to the injury suffered (VI.–6:101(2) (Aim and forms of reparation)), which necessarily involves a consideration of commensurability between the award and the damage, may have particular significance here. Compensation, for example, will not be due where the infringement of a right to respect for personal dignity is trivial.

> *Illustration 2*
> A sensationalist news gatherer forces a way into a hotel room in order to catch a famous person "in flagranti". Protection against such conduct obviously calls for liability to make monetary reparation. Where, however, a hotel guest enters the wrong room by mistake, that is not normally such a serious infringement of the private life of the other guest concerned as to give rise to a claim to compensation. However, the hotel guest is of course obliged to leave the room immediately (i.e., there is a right against further intrusion) and in the event of a stubborn refusal to do that, the invasion of the private sphere ceases to be trivial.

Groups of cases. Furthermore, there exists today a whole spectrum of relatively firmly settled groups of cases in which the laws on non-contractual liability affirm an infringement of human dignity or, as is often said, an infringement of personality. Particular mention may be made of degrading and marginalising the social profile of a person, cases of unlawful exposure to publicity and infringements of family-related rights of personality. However, these groups of cases are not particularly stressed in the text of the provision in order not to hinder further developments and its application to specific cases. An example of unlawful exposure to publicity is to be found in the following illustration:

> *Illustration 3*
> While in hospital recovering from severe head surgery, a famous actor is illicitly tracked down to his hospital room, and interviewed and photographed there by sensationalist journalists. This occurs while he is neither capable of answering questions rationally, nor even consenting to the "interview". This amounts to a case of an infringement of his right to the protection of his personal dignity.

Sexual harassment; Community law; II.–2:101 (Right not to be discriminated against). An infringement of human dignity is of course also made out in a case of sexual harassment. European Community law defines "harassment" in Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods (OJ L 373/37 of 21 December 2004) art. 2(c) as "an unwanted conduct related to the sex of a person … with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or

offensive environment". Art. 8(2) loc. cit. provides: "Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation … for the loss and damage sustained by a person injured as a result of discrimination within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered. The fixing of a prior upper limit shall not restrict such compensation or reparation." VI.–2:203 does not provide merely for protection against sexual harassment. The rule also guarantees that in cases regulated by II.–2:101 an appropriate remedy under the law on non-contractual liability is available: see II.–2:104 (Remedies).

Protection of minors. Minors require special protection from sexual assault.

Illustration 4
Father F coerces his underage daughter to have sexual intercourse with the threat of killing himself otherwise. This constitutes a violation of the child's personality; and in addition, depending on the other circumstances of the case, also an infringement of the mother and wife's right of personality.

Illustration 5
An infringement of a person's sexual sphere through omission is also conceivable, e.g. where the administration of a home for mentally disabled minors fails to prevent young girls from engaging in sexual intercourse for which they are not emotionally and socially prepared. To deal with the specific problem area of electronic media, a Council Recommendation on the protection of minors and human dignity in audiovisual and information services has been in place since 24 September 1998, and has been expeditiously incorporated in a number of national legal systems (Evaluation Report COM (2001) 106 final).

The right to liberty. VI.–2:203 does not attempt to enumerate all manifestations of the infringement of another's dignity that are relevant to the law on non-contractual liability. In light of the multifaceted nature of life, this would be impossible. However, particular mention is given to the invasion of a person's private or indeed intimate sphere, and the infringement of another person's liberty. By 'liberty' the text comprehends freedom of physical movement, i.e. the right to leave the place in which one currently finds oneself and the right not to be compelled to go to a specified place. On the other hand there is no infringement of liberty in being prevented from entering a given space or in being merely adversely affected in the freedom to resolve upon some action.

Illustration 6
Without good reason an association prohibits one of its members access to the club rooms. There is no infringement of liberty to the detriment of the member of the association.

Illustration 7
The position is the same if somebody parks a car so as to block another parked vehicle and prevent its owner, returning from a shopping trip, from driving away. This case may well be relevant from the viewpoint of the violation of a property right. It does not involve an infringement of liberty, however, for the simple reason that the driver of the car can leave the parking space at any time by other means.

Illustration 8
On the other hand, liberty is infringed if someone is locked in a room – even if the occupant is lying inside with a broken leg and could not possibly have ventured from the spot. Critical is the fact that the right is infringed and not whether the right could actually have been utilised.

Arrest and imprisonment of innocent persons. The problem of the state's liability in cases where innocent persons are arrested and imprisoned remains outside the scope of application of VI.–2:203. This follows from VI.–7:103 (Public law functions and court proceedings).

The right to privacy. The Article also gives express mention to the right to protection of the private sphere which is conceived as a manifestation of the right to protection of personal dignity. The right to protection of the private sphere assures every person an untouchable personal living space which everyone must respect. The ways in which the private sphere may be violated are for their part so numerous that they elude capture within an exhaustive group of cases. They include, for example, harassment and, more remotely, deliberately spying on others in their personal life. On the other hand, there is no violation of the private sphere when a photograph is taken of a private estate, albeit without permission. Such conduct may, however, amount to a violation of a property right or a violation of a legally protected interest.

Persons of contemporary celebrity. It must be stressed that the right to a private sphere is enjoyed by everyone and therefore also by celebrities. "Private sphere" must be understood not merely spatially, in the sense of a private dwelling (flat, house, etc). Rather it also subsists where, for example, someone wishes to eat in a restaurant alone or with friends and the existence there of a private sphere is quite independent of whether the person is or is not of current notoriety.

Illustration 9
The right to a private sphere is thus infringed by someone who covertly photographs a world famous princess during her stay in a fitness studio with a hidden camera and without her knowledge while she is exercising in a separate room, or by someone who photographs her in a café in which she is chatting with friends in private company.

Protecting a public interest. The defence of protection of the public interest (see VI.–5:203 (Protection of public interest)) is not fundamentally set against infringements of human dignity because the protection of human dignity is itself (also) in the public interest. However, that does not remove the need to consider all the circumstances of the individual case when determining whether there is in fact an infringement of dignity. The defence of acting in the public interest can also assume significance in the context of VI.–2:204 (Loss upon communication of incorrect information about another) where defamation takes the form of disseminating false information about another person to that person's prejudice.

C. Legal persons

Application of the general rule on legally relevant damage. The text specifically addresses only the infringements of incorporeal 'personality rights' (*Persönlichkeitsrechte*) of *natural* persons. The particular problem whether legal persons too are endowed with a "right of dignity" is not expressly addressed in the provision. The matter therefore falls to be resolved by judicial consideration under VI.–2:101 (Meaning of legally relevant damage) paragraph (1)(b). See Comments on VI.–1:103 (Scope of application). Depending on the current rules on

fundamental rights in a given country, it is conceivable that this issue will result in diverse solutions. On the other hand, there is no doubt that legal persons can commit a violation of a right of personality. In other words, within the framework of VI.–2:203, they do not come into consideration as claimants and injured persons, but they certainly do as opponents of claims and injuring persons. That holds true also for businesses in the media. Such undertakings enjoy no constitutional protection of their existence in the sense that they cannot be called on to make reparation, even though the quantum of the claim may be such as to endanger the financial basis of the undertaking.

D. Posthumous protection of personality rights

Post-mortem protection of personality and protection of one's own rights. As already mentioned (see above, VI.–2:101 (Meaning of legally relevant damage), Comment B), the problem of posthumous protection of personality rights is likewise not expressly regulated. Here too substantial reference is made to the relevant national conception of fundamental rights (see Notes VIII66-721-77 under VI.–2:101 (Meaning of legally relevant damage)**)**. The courts consequently must resolve the questions relating to posthumous protection of personality rights on the basis of VI.–2:101(1)(b). Often the matter will only revolve around claims to a prohibitory order made by near relatives who are contesting a particular account of the deceased's life. A claim to damages in such cases would only rarely come under consideration, but it is not excluded if it concerns an economic loss – for example, where unfair use is made of the deceased's name or image for advertising purposes. However, it will not infrequently be the case that the relatives themselves can proceed on the basis of an infringement of their own rights because they are affected in their own dignity. Where a posthumous right of personality is accepted, it is also beyond question that such a right cannot be protected in perpetuity. A solution which commends itself, by analogy to the EU Directive 93/98/EEC harmonising the term of protection of copyright art. 1(1), is to adopt at the uppermost a maximum period of 70 years from death.

E. Defamation (paragraph (2))

Defamation not specifically addressed in the Chapter 2, Section 2. Section 2 of Chapter 2 does not contain any specific provisions on defamation. That is because it appears to be extraordinarily difficult to formulate in a way which is politically acceptable some regulation in non-contractual liability law of the complex issue of protection of 'honour'. The extent to which honour, reputation, good standing or status in society, or similar attributes of a person should be protected by the legal system is a matter of controversy among the various European jurisdictions, not least because of the correlative limitation of freedom of expression which such protection necessarily entails. Consequently, no attempt has been made directly to protect such attributes of the person in any general way. The text confines itself to providing that an injury to reputation is a legally relevant damage if this is envisaged by the applicable national law. However, where national law does not impose liability, a claim may nonetheless succeed if it involves communication of false information for which the responsible person is accountable: see VI.–2:204 (Loss upon communication of incorrect information about another).

Criminal defamation. It has also emerged as impossible to base the rule on the minimum proposition that a legally relevant damage is at least present if the claimant is made the victim of a criminal defamation. That approach would have led to diverse legal results (since the criminal laws are not coordinated). For example, a defamatory statement which is communicated only to the individual defamed constitutes a criminal defamation in some

criminal jurisdictions only (e.g. in Germany, England and Wales, but not in Austria and in Spain). Admittedly, such variations in the applicable criminal law would not have been a peculiarity of this area. The same inherent diversity is also true, for example, of liability for breach of statutory obligation (because such obligations differ from place to place) and even for liability for negligence because the way in which this concept is made concrete is and will remain dependent on local particularities. Nonetheless the problem of diversity is particularly acute here. There are some national legal systems (e.g. the Common Law ones) for which certain criminal defamations do not give rise to liability in private law. This problem of a criminal law which runs into overkill for private law purposes would necessitate an express limitation. For the purposes of liability in private law only those crimes could be regarded which serve to protect the honour and good reputation of the individual; one would have to disregard those crimes which seek to protect the public interest (e.g. preventing a disturbance of the peace or an affray) and where the making of a defamatory statement which is *true* is therefore criminalised. The necessity for such a limitation, however, would serve only to show that the fundamental question of when an individual should be entitled to redress for defamation would not be solved by appeal to the criminal law. For while the existence of a crime shows, by definition, that *in relation to society* a person has overstepped the bounds of freedom of expression, this does not automatically resolve the further question whether *in relation to the claimant* that act warrants a right to redress in private law. Conversely there are also cases in which a private law liability is affirmed but the criminal law takes no cognisance of a crime. That is again particularly problematic for English law, where libel but not slander may constitute a crime and where the arguably required element of seriousness for punishment by the state excludes many non-trivial cases where non-contractual liability is recognised. The position is even starker in Scotland, which no longer recognises a criminal act of defamation. In that regard, as regards Scottish law, a provision on non-contractual liability for criminal defamation would have achieved nothing. It is in the light of such difficulties and complexities that the attempt to couple non-contractual liability for defamation at a European level with infraction of national criminal law was abandoned.

Freedom of expression. Obviously all European societies respect and nurture a domain for freedom of expression, quite irrespective of considerations of public interest protecting the making of statements which would otherwise be regarded as having overstepped the bounds of that freedom. However, in given circumstances, an attack on a person's status in society may be so wanton or so severe in its means or depth, for example, that it can properly be said to have infringed a person's right to respect for personal dignity. There may be no right to any particular level of standing in society (since society will make its own mind up about the merits of one's character and achievements); but an individual's right to respect for personal dignity includes the right not to have to tolerate a vicious and unjustified rubbishing of reputation.

F. Relation to other provisions in chapter 2, section 2

Overlaps. It is conceivable that the scope of application of VI.–2:203 overlaps in several cases with the scope of application of other provisions, but that does not represent a problem. The injured person in such a case would have two or even more grounds of action but naturally only one claim to compensation or other remedy. However, it may well be that in a single event a cumulative set of wrongs emerges which, in ascertaining and making good the damage done, are to be treated separately. An example would be where personal injury to a foreigner is caused by right-wing thugs simply on account of the victim's different appearance.

NOTES

I. Infringement of liberty

1. Infringements of liberty are criminally punishable in FRANCE (NCP art. 224-1) and in BELGIUM (CP art. 434). In both countries the violation of a criminal law provision constitutes *ipso facto* a tortious *faute civile* (*Carbonnier*, Droit civil IV[21], no. 231 p. 398); freedom of physical movement is thus an independent interest protected by the law of extra-contractual liability. The position is exactly the same in SPAIN (CP arts. 163 *et seq.* in conjunction with art. 109) and in ITALY. Economic loss and non-economic loss are equally recoverable; in this respect the limits in CC art. 2059 are no longer a source of dependence and the same goes for unjust imprisonment suffered (Cass.pén. 25 November 2003-22 January 2004, no. 2050, Nouva giur. civ. comm. 2004, I, 56).

2. In all other member states of the EU infringements of the right to freedom of physical movement are of course also counted among the independent legal interests protected by the law of tort, see e.g. for GERMANY CC §§ 823(1) in conjunction with 253(2); for PORTUGAL CC art. 483; for GREECE CC arts. 914 in conjunction with 932; for HUNGARY Const. § 55(1) and CC § 76 in conjunction with § 84(1)(e); for POLAND CC art. 445(2); for SLOVENIA LOA arts. 134 and 179; for AUSTRIA CC § 1329; for DUTCH Law CC art. 6:106(1)(b) ("infringement of another right of personality"; Asser [-*Hartkamp*], Verbintenissenrecht I[12], nos. 465-467 pp. 425-430); for SWEDEN, Law on Damages chap. 2 § 3 (infringement of liberty by a criminal offence); for FINLAND, Law on Damages chap. 5 § 6(1) (same); for DENMARK, Law on Damages § 26(1) and for ESTONIA LOA § 1045(3). Of the aforementioned provisions, some confine themselves to clarifying that in the case of an infringement of liberty, a cause of action will also lie for the reparation of non-pecuniary losses. In SWEDEN these damages are termed "reparation for indignation"; in FINLAND one speaks of reparation for pain endured through indignation. Special rules are in place almost everywhere to govern the state's liability in damages in the case of the unjust imprisonment of those wrongly presumed to be offenders.

3. Among the torts of the COMMON LAW that compensate for the detrimental consequences of an infringement of liberty, the tort of false imprisonment is to be mentioned first and foremost. "False imprisonment" was defined in the IRISH case of *Dullaghan v. Hillen* [1957] Ir Jur 10, 15 as "unlawful and total restraint of the personal liberty of another whether by constraining him or compelling him to go to a particular place". Surveillance is not considered false imprisonment (*Finlay* CJ in *Kane v. Governor of Mountjoy Prison* [1988] ILRM 724, 735), however false imprisonment may be psychological (*Phillips v. GN Ry Co Ltd* (1903) 4 NIJR 154).

4. In some legal systems the tort law concept of the protection of liberty goes over and above the protection of freedom of physical movement. Under GREEK Law it has been decided, for example, that an infringement of liberty is suffered where someone is refused access by unauthorised means to a particular room (CA Athens 807/1956, NoB 4 [1956] 624) or to a place of general use (e.g. to the beach, *cf.* A.P. 244/1959, NoB 8 [1960] 162). In ITALY it is recognised that some rights of liberty specifically protected under constitutional law (e.g. Const. art. 16 [freedom of movement and freedom to choose one's place of dwelling]) assume third-party effect even between private legal persons (*Bianca*, Diritto civile I[2], 146). In SPAIN the right to the free development of personality (*libre desarollo de la personalidad*) is based on the concept of the protection of liberty, which has become practical, for example, in the context of excessive noise pollution (TS 29 April 2003, RAJ 2003 (3) no. 3041 p.

5721). Additionally, liability for insufficient disclosure of information to a patient before surgical operation has been grounded on the basis of, *inter alia,* the concept of the infringement of personal liberty (TS 12 January 2001, RAJ 2001 (1) no. 3 p. 18), and the same applies to doctors' liability in cases of so-called *wrongful conception* (infringement of an individual's freedom to decide upon parenthood him/herself: TS 3 October 2000, RAJ 2000 (4) no. 7799 p. 12036).

II. The protection of incorporeal rights of personality

5. *General.* It is generally accepted today, that not only are an individual's bodily integrity and his freedom of physical movement protected by the law of tort, but also his incorporeal rights of personality. There exists, however, no prevailing uniformity on the extent of this tort law protection or on its underlying legal basis. Legal systems like the COMMON LAW work with individual, quite specific claims; further, there are other legal systems that have developed a comparatively large number of "specific" rights of personality; and then there are other legal systems that, because they only recognise a lesser amount of such "specific" rights of personality, developed in addition to these the concept of an all-encompassing "general right of personality". The "specific" incorporeal rights of personality are of course ultimately only distinct from the "general" ones to the extent that they have been independently elaborated upon in the relevant laws, while the so-called "general" right of personality takes the form of a general clause, regardless of whether it has been expounded in statute, or amounts solely to the result of the judicial development of the law.

6. FRENCH Law belongs to the category of legal systems that guarantee the necessary tort law protection via a multitude of specific incorporeal rights of personality. The most extensive rule relates to the right to the protection of one's private sphere (CC art. 9). Further, tort law protection is afforded to e.g. the right to control over the use of one's name (Cass.civ. 5 Febraury 1968, JCP 1968, II, 15670), the right to control over the reproduction of one's image (CA Versailles 30 June 1994, D. 1995 jur. 645, note *Ravanas*) and the right to control over the reproduction of one's voice (CFI Paris 3 December 1975, JCP 1978, II, 19002, note *Bécourt*), the infringement of which can, however, also constitute an infringement of CC art. 9. Whether evidence of actual loss is necessary in the latter cases or whether the infringement as such already justifies a claim, does not seem to be well and truly clear; in any event non-economic damage suffices (Rép.Dr.Civ. [-*Tallon*] VIII, v° Personnalité, no. 148; see further CFI Nanterre 6 April 1995, GazPal 1995 jur. 285). The starting point in BELGIUM and LUXEMBURG is the same, with the only deviation being the lack of a specific statutory regulation for the protection of one's private sphere (for a more detailed account see *Guldix and Wylleman*, TPR 1999, pp. 1624-1631 nos. 21-23). Here also indeed the predominant opinion is that an infringement of a right of personality is not yet sufficient *per se* for proving a *faute* and damage (see e.g. CA Brussels 8 November 1989, RGAR 1992, 11906), of course others believe that the case law to date has to be interpreted in the opposite sense (*Guldix and Wylleman* loc. cit. pp. 1632-1639 nos. 25-26).

7. SPANISH Law also does not recognise a "general personality right". Nevertheless it does protect a large number of "specific" incorporeal rights of personality and indeed mostly with recourse to the correlative fundamental constitutional rights. Those cited are e.g. the prohibition of discrimination (Const. art. 14), the right to life and to bodily as well as moral integrity (Const. art. 15), the right to honour, to a personal and familial sphere of intimacy and to control over the reproduction of one's image (Const. art. 18(1); specifically laid out and regulated for the purposes of civil law in Law 1/82 of 5 May 1982 on the Civil Protection of the Right to Honour, to a Sphere of Intimacy

and to Control over the Reproduction of one's own Image [*Ley Orgánica 1/1982, de 5 de mayo, de Protección Civil de los Derechos al Honor, a la Intimidad Personal y Familiar, y a la Propia Imagen*]), the right to inviolability of the dwelling (Const. art. 18(2)) and the right to the safeguarding of communicative secrecy (Const. art. 18(3)). A further incorporeal personality right is the right to control over the use of one's name (Law on Civil Status [*Ley del Registro Civil*] of 8 July 1957 art. 53: protection of the right to control over the use of one's fore- and surname "against everyone").

8. There is debate in ITALIAN doctrine as to whether there are solely "specific" personality rights or whether these are the collective manifestation of a comprehensive "general" personality right, which lies at the root of them all (references in *Cendon*, Commentario al codice civile IV(2), art. 2043, no. 11.2. p. 1993). The Italian CC only expressly recognises "specific" personality rights (e.g. CC arts. 6-10: name and image). However, the case law has for some time departed from this catalogue and accepted the existence of further subjective personality rights (like, for example, the right to the observance of one's private sphere [Cass. 25 March 2003, no. 4366, Giust.civ. 2004, I, 2417; Cass. 10 May 2001, no. 6507, Nouva giur. civ. comm. 2002, I, 529] and the right to one's own identity [Cass. 7 February 1996, no. 978, Foro it. 1996, I, 1253 (relating to a body corporate); CFI Modena 23 October 1996, Riv.dir.ind. 1997, II, 177; CFI Rome 10 February 1993, Foro it. 1994, I, 1237; CFI Rome 27 March 1984, Foro it. 1984, I, 1687]). Since the aforementioned incorporeal personality rights are clothed with constitutional protection, the earlier difficulties in the context of the recoverability of non-patrimonial losses have been surmounted by the recent developments in the interpretation of CC art. 2059; these losses are now also recoverable (Cass. 18 March 2005, no. 5677, Dir. e Giust. 2005, fasc. 19, 38: non-patromonial loss caused by affronts to dignity or reputation even falls to be compensated where no criminal offence has been thereby committed; the limits of CC art. 2059 are not determinative, where personality rights of a constitutional degree are involved).

9. HUNGARY is one of the countries in which, along with the classic specific rights of personality (name, image, voice, honour and good name and reputation, secrecy of postal correspondence, protection of personal intellectual creations etc.), the concept of a general right of personality is also recognised (CC §§ 75 and 84; Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1343; Gellért [-*Zoltán*], A Polgári Törvénykönyv Magyarázata[6,] 267-272; Petrik [-*Petrik*], Polgári jog I[2], 160/26-171; AB határozat 8/1990. (IV. 23.)). Violations of human dignity and freedom of belief are, *inter alia*, qualified as infringements of the general right of personality (CC § 76). A personality right to education would also exist, for the violation of which (e.g. by a college that does not refer to the nullity of a concluded training contract in a timely fashion: BH 2004/235) non-economic damages have also been provided in case law. SLOVENIAN LOA art. 181 under the heading "violation of dignity" provides a claim to reparation of non-patrimonial losses to those persons who are made the victim of an infringement of their right to sexual self-determination or the victim of a criminal offence against their dignity. POLISH CC arts. 23 and 24 protect the individual's rights of personality by means of numerous legal remedies (prohibitive injunction, retraction, damages). It is expressly stated that these rights of personality include "freedom, dignity, [and] freedom of conscience".

10. Among the legal systems that invoke the construct of a "general right of personality" even in their civil codes, are GREECE (CC art. 57) and PORTUGAL (CC art. 70(1)). Both codes additionally outline a range of "specific" rights of personality; PORTUGUESE CC e.g. the post-mortem personality right (art. 71), the right to control over the use of one's name (arts. 72 and 73), the right to control over the use of

one's pseudonym (art. 74), rights to confidential postal correspondence (arts. 75 and 76), family memoirs and other confidential manuscripts (art. 77), to non-confidential postal correspondence (art. 78), to control over the reproduction of one's image (art. 79) and the right to the protection of the intimacy of one's private life (art. 80).

11. GERMANY and AUSTRIA also operate with the concept of a general right of personality. In GERMANY it was exclusively developed by case law, which based itself directly on the provisions of the Constitution on the protection of human dignity (Const. art. 1) and the right to the free development of one's personality (Const. art. 2(1)) (the seminal case of BGH 25 May 1954, BGHZ 13, 334, 338; see further, *inter alia*, BGH 2 April 1957, BGHZ 24, 72, 76; BGH 20 March 1968, BGHZ 50, 133, 143; BGH 5 December 1995, NJW 1996, 984; BGH 1 December 1999, NJW 2000, 2195, 2197). Damages for non-patrimonial losses awarded for significant infringements of this general right of personality assume an exemplary or deterrent character, primarily as against the mass media, which in turn is the reason for the comparatively high sums of compensation (BGH 15 November 1994, BGHZ 128, 1, 15; BGH 5 December 1995, NJW 1996, 984). The claim in non-patrimonial damages is based directly on Const. arts. 2(1) in conjunction with 1 (BVerfG 8 March 2000, NJW 2000, 2187, 2188; MünchKomm [-*Oetker*], BGB[4], § 253, no. 14).

12. In AUSTRIA, CC § 16 was previously (i.e. before CC § 1328a [right to protection of one's private sphere] came into force on 1 January 2004) relied upon. Today, *inter alia*, the right to bodily integrity, honour, protection of commercial reputation, to control over the reproduction of one's image, to the observance of one's private sphere, to the restraint of telephone calls, tape and picture recording and to the post mortem protection of one's personality rights, fall under this provision (see particularly OGH 27 February 1990, SZ 63/32, according to which CC § 16 essentially protects human dignity, and OGH 18 December 1992, SZ 65/166, which states that the general moral concepts of the fundamental rights guaranteed in the constitution permeate the system of private law through CC § 16). Whether there is also a "general" right of personality in addition to these specific situations, has in effect, however, not yet been conclusively clarified (for an overview of the differing approaches see Rummel [-*Aicher*], ABGB I[3], § 16 nos. 12 *et seq.*).

13. DUTCH CC art. 6:162(2) protects "rights" of every kind. CC art. 6:106(1)(b) grants a claim to reparation of non-patrimonial losses, "where the victim has suffered bodily injuries, his honour or good name and reputation have been tarnished or his state of personality has been harmed by other means". Among these latterly named harmful acts are invasions of one's private sphere (HR 9 January 1987, NedJur 1987 no. 928 p. 3139); infringements of dignity (damage to one's feeling of self worth and to one's estimation in the eyes of third parties as a consequence of media torts) are litigated in the context of infringements of honour and reputation (Schadevergoeding [-*Lindenbergh*] II, art. 6:106, no. 27.1 pp. 195-204). Incorporeal rights of personality, so it is stated, have their source typically in the constitution and international treaties on the protection of human rights referred to thereunder (in art. 93). It is even debated, whether such rights of personality are to be understood as the fallout from a general and unenumerated basic norm located on the periphery of the four corners of the CC, so that reliance on the rights listed in CC art. 6:162(2) is "in fact" not at all necessary and that one should in fact rely on the infringement of the "unwritten norms of social interaction" mentioned in CC art. 6:162(3). The case law has taken both paths, without it actually having a practical effect on the outcome (for a more detailed account, with references, see *Jansen*, Onrechtmatige Daad: algemene bepalingen[2], art. 6:162(2) nos. 7-8, pp. 75-95 and no. 32 p. 262).

14. ESTONIAN LOA § 1046 states that "the defamation of a person, *inter alia*, by passing undue judgement, by the unjustified use of the name or image of the person, or by breaching the inviolability of the private life or another personality right of the person is unlawful unless otherwise provided by law."

15. In the NORDIC countries the term "right of personality" is to a great extent unknown and in any event unusual. It has been deemed too difficult to define the scope of a general right of privacy or personality, both under the constitutional and private law (*Strömholm,* SvJT 1971, 695; *Strömholm*, Right to Privacy and Rights of Personality, 59; *Stenvik,* TfR 2003, 601). The protection of privacy and personality is thus based on a series of specific statutes; 'horizontal' effects of Eur.Conv.Hum.Rights art. 8 are denied (Swedish HD 29 October 2007, NJA 2007,747). The national laws on damages operate predominantly with the concept of the reparation for "affronts", and compensation sometimes requires the existence of a crime (SWEDISH Damages Liability Act chap. 2 § 3). Some specially drafted statutory regulations supplement these general laws, see e.g. for Sweden: Law on the Prohibition of Discrimination (*lagen* [2003:307] *om förbud mot diskriminering*) § 16 and § 21 (reversal of the burden of proof – on which see HD 28 March 2006, NJA 2006, 170 [damages for injured feelings awarded to a lesbian couple who were ejected from a restaurant after kissing there), Law on Credit Information (*kreditupplysningslag*) § 21, Law on Personal Data (*personuppgiftslag* [1998:204]) § 48, further the system of liability under the Law on Names and Pictures in Advertising (*lag* [1978:800] *om namn och bild i reklam*) and the definitively and fully independently regulated system of liability of the press in the Freedom of the Press Act (*tryckfrihetsförordningen* [1949:105]) as well as in the Fundamental Law on Freedom of Expression (*yttrandefrihetsgrundlag* [1991:1469]) (DENMARK, which likewise has a Law on Media at its disposal, conversely subjects the liability of the press to the general law of tort, and indeed even in the case of the unauthorised publication of images taken from the private life of the person concerned, *cf.* e.g. Eastern CA 16 April 1985, UfR 1986, 405 and Eastern CA 23 October 1990, UfR 1991, 194). Of particular note in FINNISH case law are Supreme Court 1 April 1982, HD 1982, II, 36 (publication of a photo of an officer in a tourism brochure; liability affirmed because no person may be represented in such a brochure without his or her permission, but no infringement of privacy arose solely from the mere fact that the officer had worn his uniform without the complete consent of the Garnisonsordre) and Supreme Court 15 October 1986, HD 1986, II, 131 (advertisement for a newspaper on television; no infringement of the rights of the celebrity legitimately represented in the newspaper arose solely out of the mere fact that he had not consented to the newspaper's advertisement).

16. In the meantime, however, FINNISH Law on Damages chap. 5 § 6(1) nos. 2-4 have advanced towards the concept of the general protection of one's personality. According to these provisions, "2) any person who through a criminally punishable offence is discriminated against, 3) any person whose personal integrity is seriously affronted, either intentionally or through gross negligence", as well as "4) any person, whose human merit is affronted intentionally or through gross negligence and in such a way that is comparable to No. 1-3" has a claim in damages. Similar provisions are indeed to be found in SWEDEN and in DENMARK, but they are more narrowly formulated.

17. ENGLISH law does not recognise a "general right of personality"; it does not even recognise an "overarching, all-embracing cause of action for 'invasion of privacy'" (Lord *Nicholls of Birkenhead* in *Campbell v. Mirror Group Newspapers* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232, 1236 at 11). Essential aspects of the protection of incorporeal rights of personality do, however, fall within the scope of the

new interpretation of the tort of breach of confidence (for more detail, see below Note *III28*).

18. In IRELAND there prevails the concept of acknowledging a civil wrong where an individual's constitutional right has been interfered with – so-called "constitutional torts", see *Meskell v. Córas Iompair Éireann* [1973] IR 121, 133 (*Walsh* J). The protection of expressly enumerated fundamental rights is drawn from Const. arts. 40–44 (e.g. personal liberty, inviolability of the dwelling, freedom of expression and freedom of conscience and the free profession and practice of religion. Moreover, certain unenumerated rights are derived from Const. art. 40.3.1°, the existence of which was first recognised by *Kenny* J in *Ryan v. A-G* [1965] IR 294, who extended the recognition of unspecified "personal rights" founded upon the "Christian and democratic nature of the State". Among the list of rights that do not enjoy express reference in the Constitution but have yet been deemed by the judiciary as warranting protection are, *inter alia*, the right of bodily integrity and the right to (marital) privacy. However, in the context of private law, the abovementioned (see note *II5*) age-old common law practice of having to crowbar one's cause of action within specific cases in which a tort has been affirmed results in the prevailing idea that there is no need for a clearly defined notion of a "general" incorporeal right of personality and hence the lack of any reference to the notion of specific *personality* rights where private law comes into play. The unfolding of this judicial predilection for clinging to previously acknowledged torts instead of delving into the realms of constitutional law in order to found a cause of action in a private law context (thus hampering the advancement of "constitutional torts") begins with the statement of *Henchy* J in *Hanrahan v. Merck, Sharpe & Dohme (Ireland) Ltd.* [1988] ILRM 629 that "[a] person may of course in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right … but when he founds his action on an existing tort he is normally confined to the limitations of that tort". In *W. v. Ireland (No. 2)* [1997] IEHC 212, [1997] 2 IR 141 *Costello* P considered *obiter* that constitutionally guaranteed rights might be split into two categories: first those which, independently of the Constitution, were regulated and protected by law (common law and statutory law) and secondly, those that were not so regulated and protected. *Costello* P concluded (in compliance with *Meskell* and *Hanrahan*) that it was well established that for the latter class of rights the Constitution was to be construed as providing a separate cause of action for damages for breach of a constitutional right. *Barrington* J then stated in *McDonnell v. Ireland* [1998] 1 IR 134, 148 that "[i]f the general law provides an adequate cause of action to vindicate a constitutional right it appears to me that the injured party cannot ask the Court to devise a new and different cause of action". Indeed it has been succinctly noted in commentary that "the courts, having established the principle that the infringement of constitutional rights, by the State or by private individuals, warrants a remedy in the form of damages or an injunction, have baulked at the prospect of replacing the pre-existing statutory and common law remedies by a new constitutional remedial regime but they have not repudiated the principle. Instead they have sought to mitigate its practical effects by looking to the pre-existing law as the medium through which the constitutional remedy should be channelled in most cases" (*McMahon and Binchy*, Torts[3], para. 1.60). In a private law context, one's right to a good name (art. 40.3.1°) is traditionally protected under the tort of defamation, without direct recourse to the Constitution. However, this preference for pre-existing torts is most vividly seen where in spite of a right to privacy being recognised as an unenumerated constitutional right, its existence under private law is nevertheless catered for by a range of different torts (shaped for different circumstances in which it has been infringed), leading to such an unsatisfactory state that reform in this area has

been mooted and indeed a Privacy Bill published (see below Note *III29*). It may be argued, however, that in the case of *Norris v. A-G* [1984] IR 36, 71, in stating that "[a]mongst those basic personal rights is a complex of rights which vary in nature, purpose and range (each necessarily being a facet of the citizen's core of individuality within the constitutional order) and which may be compendiously referred to as the right of privacy", *Henchy J* (dissenting) was acknowledging the existence of such a general right of personality (albeit clothing it in the language of a right of privacy) and using privacy as the linchpin for all rights of personality. However, it is to be mentioned that although this *dicta* has been since cited (in *A Ward of Court, Re* [1996] 2 IR 73), nothing has come of the opportunity herein presented to use this statement as a conceptual hook upon which to place a group of such rights and to hence develop *Henchy* J's exposition in order to forge either a "general", catch-all right of personality or to derive other specific rights of personality therefrom. The right over the use of one's actual name (dealt with under the tort of passing off) is seen in a commercial and above all proprietary sense, which is difficult to reconcile with the ideology that such a right falls under the heading of an incorporeal right of personality requiring of protection by the fact of being an inherent feature of one's personality, inextricably linked to human dignity. The conceptual understanding of the equitable realm of breach of confidence has also been connected to this proprietary idea (the *dicta* of Lord *Denning* MR and *Winn* LJ in *Seager v. Copydex Ltd. (No. 2)* [1969] 1 WLR 809 give some support for the argument that an analogy can be drawn with the tort of conversion of a property interest). As has been noted, however, whereas confidential information of a commercial kind might be regarded as property, this is hardly the case with most personal intimate confidences (*McMahon and Binchy,* loc. cit. para. 37.22). On the issue of whether constitutional infringements constitute a case of *injuria sine damno, viz.* whether they are actionable *per se*, although in the case of *Kearney Kearney v. Minister for Justice, Ireland and the A-G* [1986] IR 116, *Costello* J regarded the infringement of a prisoner's constitutional right to communicate as actionable without proof of damage, one cannot conclude that this is so in all cases (*McMahon and Binchy*, loc. cit. para. 1.63).

19. In SCOTLAND, the 1998 Human Rights Act entered into force on 2 October 2000 (in order to "give further effect" to the European Convention on Human Rights). The horizontality of this act has not yet been definitively clarified in case law (*MacQueen*, [2003] 78 TulLRev 363), with the practice also being to use established protected legal interests under the law of delict, rather than developing or indeed recognising any incorporeal rights of personality as such. The position in Scotland is, however, a little closer to that in civil law jurisdictions here, as can be seen from a look at the general context of liability for an *actio injuriarum*. Here it has been stated that *injuria* is actionable at least for solatium if the *injuria*, referred to as "the insult or affront to personality", and *animus injuriandi* are proved, without proof of any actual or patrimonial loss (*Walker*, Delict[2], 40). Self-esteem and honour are protected from unjustifiable attack, as are public reputation and good name in the eyes of others (*Walker* loc. cit. 729; see below Note *IV42*). Publicity with respect to private matters of purely personal concern is an injury to personality which is protected in "pockets of liability" rather than by a general right (*MacQueen*, (2002) 8 Edinburgh LRev 248, 251). The kind of cases in which the issue of the recognition of the right to privacy has traditionally arisen include the publication of a photograph taken surreptitiously and without consent (*Pollard v. Photographic Co.* (1889) 40 Ch. D 345, *arguendo*), the use of a person's name or title or photograph or other reference to or representation of him in an advertisement without his consent (*cf. Tolley v. J. S. Fry & Sons Ltd.* [1931] AC 333), the unauthorised use of a person's name in bogus testimonials published in

advertisements (*cf. Mazatti v. Acme Products Ltd.* [1930] 4 DLR 601), and the publication of a biography of a distinguished person without that person's permission, knowledge or co-operation, and against his wishes (*Walker*, loc. cit.). It is evident from this list that here privacy is seen as a wider source of various rights of personality, including the right to control over the use of one's name and image, although in recent decisions, it has in fact been the tort of breach of confidence that has been extended and applied to cover the wider area of personality rights (see *Campbell v. Mirror Group Newspapers* [2004] UKHL 22; [2004] 2 AC 457; *Douglas v. Hello! Ltd. (No. 3)* [2003] EWHC 786 (Ch), 3 All ER 996 (*Lindsay* J); and *A v. B plc.* [2002] EWCA Civ 337, [2003] QB 195).

III. The right to privacy

20. The right to privacy (under these Principles) has gained particular distinction in certain jurisdictions. Thus, under FRENCH CC art. 9 "everyone has the right to respect for his private life" and when this right is infringed, the courts have opened up the law to a broad range of possible remedies. The exact meaning of the term *vie privée* has not been defined by statute. Further developments shall continue to be left to the courts. Primarily what is meant is family and private life, everyday domestic events, a person's state of health, his or her love-life and emotional life, his or her friendships and holidays, private aspects of his or her working life and also the place and type of his or her funeral (*Cornu*, Droit civil. Introduction. Les personnes. Les biens[10], no. 516 pp. 234-235). Overlap with other personal rights is also conceivable (e.g. Cass.civ. 10 June 1987, Bull.civ. 1987, I, no. 191 p. 141: the infringement of *vie privée* as well as of *droit à l´image* if an actress is photographed against her will leaving the hospital in a wheelchair). CC art. 9 is even brought into play as the basis for the recognition of a change of sex after an operation (Cass.ass.plén. 11 December 1992, Bull.civ. [ass.plén.] 1992 no. 13 p. 27). The legitimate interests of others remain, however, unaffected by CC art. 9 (e.g. Cass.civ. 6 May 1999, Bull.civ. 1999, II, no. 85 p. 63: the use of diary entries as evidence of infidelity in divorce proceedings permitted). Infringements of CC art. 9 lead to a claim in damages even when proof of actual damage or a *faute* is absent (Cass.civ. 5 November 1996, Bull.civ. 1996, I, no. 378 p. 265).

21. In BELGIAN Law the starting point for the law of obligations in this area is also Const. art. 22, which guarantees to every person the right to a private and family life. To date, a generally accepted definition of these terms does not exist. Generally what is meant is the freedom of an individual to shape his own life and the protection of the confidentiality of his personal living space (*de Theux*, Ann. Louv. 2002, 287, 293-297). Claims in damages are subject to the general prerequisites of CC arts. 1382 and 1383 (e.g. CA Gent 12 June 2001, TBBR 2003, 305, note *Sottiaux*: the liability of a newspaper that – truthfully – had reported on the homosexual disposition of a member of a music band).

22. In SPANISH Law the right to privacy has its foundations in Const. art. 18 as well as in the aforementioned Statute 1/1982 of 5 May 1982 on the civil protection of the right to honour, to privacy and to control over the reproduction of one's own image. The Spanish jurisprudence extends the right to privacy quite broadly. It covers e.g. the right to peace and relaxation (TS 29 April 2003, RAJ 2003 (3) no. 3041 p. 5721; see also *Martín Vida*, VersRAI 2004, 20-23; *Vida*, VersRAI 2005, 57-63 and 2006, 5-8) (not however a claim in damages or an injunction where the marital obligation of fidelity is infringed: TS 22 July 1999, RAJ 1999 (3) no. 5721 p. 8928 and TS 30 July 1999, RAJ 1999 (3) no. 5726 p. 8933). The right to privacy encompasses the right to personal information; no one is permitted to interfere with the confidential documents

concerning another's private life (*Balaguer Callejón*, Los derechos fundamentales, 102). Law 1/1982 art. 7 lists as impermissible injurious behaviour, *inter alia*, the installation of bugging devices and photographic equipment, and further, methods of spying on private communication and the publishing of confidential information relating to the person. Moreover, the law expressly protects one's private family life (*intimidad familiar*).

23. The ITALIAN jurisprudence has also recognised the right to privacy. It aims to protect the confidentiality of personal and familial affairs and information from the curiosity of others; infringing this right constitutes a *danno ingiusto* in the sense of CC art. 2043 (Cass. 25 March 2003, no. 4366, Giust.civ.Mass. 2003, 594). During the development of the right to privacy, originally a claim was based on a correlative application of the rules on certain "specific" personal rights (right to control over the reproduction of one's own image [CC art. 10], right to correspondence [Copyright Act arts. 93-97], right to restrain publication of a manuscript [Copyright Act arts. 21-24] etc.), on Europ.Conv. Human Rights art. 8 and, as far as the existence of an all-encompassing "general" personal right was granted, on Const. art. 2. Later, Statute 675/96 on the protection of private data brought express statutory recognition to the right to privacy, if only for a specified area. The limits of the right to privacy are established through a balancing of interests on a case-by-case basis (*Cian and Trabucchi*, Commentario breve al codice civile, arts. 1-10, § IV, nos. 1-3).

24. The HUNGARIAN Constitutional Court (AB határozat 8/1990 [IV. 23.]) stresses that the general right of personality is a subsidiary basic right, to which the civil courts may refer, if a more concrete basis for a claim is absent. Violations of privacy often fall under this category (Gellért [-*Zoltán*], A Polgári Törvénykönyv Magyarázata, 274-279) unless in specially regulated cases like the invasion into private secrets or the right to a private dwelling. The protection afforded to an individual's private sphere is based on the protection of human dignity (AB határozat 46/1991 [IX. 10.]). Examples relate, for instance, to truthful press reports about the sexual behaviour of private persons (BH 2004/103), the right to know one's own descent and the right that no outsider negates an existing relationship between relatives (AB határozat 57/1991 [XI. 8.]; Petrik [-*Petrik*], Polgári jog, Kommentár a gyakorlat számára I 168-171). SLOVENIAN LOA art. 134 provides the courts with a broad spectrum of remedies in the case of contravention of the "inviolability of the person, personal and family life or any other personal right".

25. In GERMANY the right to privacy is a component of the judicially developed general personality right (e.g. BVerfG 19 December 1995, BVerfGE 101, 361, 382 and BGH 15 December 1999, BGHZ 131, 332, 338). One's sphere of privacy, so it is stated, "does not end at the front door … if in the first instance it encompasses the inner area between the four walls of one's house in a spatial sense. Privacy worthy of protection exists equally outside the house ... when one places one's self in a secluded area in which it is objectively evident that there exists the wish to be by one's self" (BGH 9 December 2003, JZ 2004, 622, note *v. Gerlach*). Therefore, an intrusion into one's privacy also occurs if someone "by surmounting existing obstacles or with suitable aids (e.g. telephoto lens, ladder or aeroplane), spies on the living space of another" (BGH 9 December 2003 loc. cit.).

26. In contrast, the right to privacy is again the subject of an express statutory regulation in AUSTRIA (CC § 1328a; in force since 1 January 2004) and in Portugal (CC art. 80). Under Austrian CC § 1328a illegal and culpable intrusion into one's privacy and actions, through which a person's private affairs are revealed or exploited, leads to liability for the compensation of pecuniary and, in cases of considerable

infringements, also for non-pecuniary damage (see *Helmich*, ecolex 2003, 888). According to PORTUGUESE CC art. 80 everyone must "respect the intimate private life of another. The scope of this protection is defined based on the facts of each case and the living conditions of the person in question". Similar protective measures are to be found in GREEK CC art. 57. In DUTCH Law violations of privacy fall under CC art. 6:106(1)(b) and justify a claim to compensation of non-pecuniary damage (Memorie van Antwoord II, Parlementaire Geschiedenis VI, 380; HR 30 October 1987, NedJur 1988 no. 277 pp. 1097-1107; HR 1 November 1991, NedJur 1992 no. 58 pp. 177-180; Asser [-*Hartkamp*] Verbintenissenrecht I[12], nos. 465 and 467, pp. 425-430). The ESTONIAN LOA § 1046(1) expressly classifies contraventions of "the inviolability of the private life or another personal right" as illegal acts. On this aspect, see Supreme Court 3-2-1-161-06, RT III 2006, 23, 209.

27. In the NORDIC countries numerous statutory instruments for the protection of individual aspects of privacy are in place, among them is also the right against unauthorised publications of one's portrait; see Notes *II15-16* above. Incidentally, the right to compensation for indignation does the necessary here (loc. cit.). Here the natural starting point is the Law on Damages chap. 2 § 3 ("Any person who offends another through wrongdoing, which includes an attack on the person, on his/her freedom, on his/her ability to live peaceably, or on his/her honour, has to compensate the injured party for damage suffered." The protection of someone's *ability to live peaceably* includes the right to be left in peace and consequently not to be obliged to extend one's private life to others (*Sandstedt,* VersRAI 2002, 9, 10). This is also the law under the relevant formulation of the DANISH Law on Damages § 26 (see also, *inter alia*, Eastern CA 24 September 2004, UfR 2005, 123). The FINNISH Law on Damages chap. 5 § 6(1) no. 1 expressly states that privacy enjoys protection under the law of torts (for a more detailed account see Supreme Court 19 December 2005, HD 2005 no. 136; Supreme Court 25 August 2000, HD 2000 no. 83 and *Sisula-Tulokas,* JFT 2000, 634).

28. In ENGLAND it has been again recently stressed that "[i]n this country… there is no overarching, all-embracing cause of action for 'invasion of privacy'" (*Campbell v. Mirror Group Newspapers* [2004] UKHL 22; [2004] 2 AC 457, 464 per Lord *Nicholls of Birkenhead*). Notwithstanding this, it is also valid law "that the values enshrined in articles 8 and 10 (of the European Convention of Human Rights) are now part of the cause of action for breach of confidence" (loc.cit. 1238 (at 17); see also *Phillipson,* 2003 ModLRev 726-758).

29. Although the law in IRELAND had been slow to recognise a general "right to privacy", interference with which causes a tort, such a right has been recognised as a constitutional right since 1987 (*Kennedy & Arnold v. Ireland* [1987] 1 IR 587, a case involving telephone-tapping). Rather than delving into the realm of the law of torts the courts have developed this right under Const. art. 40.3.1 (see also, in relation to a marital couple's access to contraceptive facilities, *McGee v. A-G* [1974] IR 284). Privacy interests are however still subject to tort law actions (see in more detail *McMahon and Binchy*, Torts[3], 994), particularly to: (i) Trespass to land (e.g. *Whelan v. Madigan* [1978] ILRM 136 (HC); see, however, the *Law Reform Commission*'s Consultation Paper on Privacy: Surveillance and the Interception of Communications (1996), para. 4.4: this tort does not extend to surveillance activities which are conducted *outside* the boundaries of the property); (ii) torts affecting interests in goods, e.g. trespass to goods (*The People (D. P. P.) v. Morgan* (1980) 114 ILTR 60, 62 [a person takes another's diary and reads it]); (iii) trespass to the person (which however requires physical contact or threat of such contact); (iv) intentional infliction of mental suffering (improper techniques of investigations, intimidatory debt

collection, harassment of tenants by landlords); (v) private nuisance (intrusions on the ability of a person to live peaceably in his or her home); (vi) injurious falsehood (see *Law Reform Commission* loc. cit. paras. 4.22 – 4.24); (vii) negligence (*McMahon and Binchy* loc. cit. 997); and (viii) breach of statutory duty (disclosure of confidential information by semi-state agencies, see *House of Spring Gardens Ltd. v. Point Blank Ltd.* [1984] IR 611 (Sup.Ct.); *Private Research Ltd. v. Brosnan* [1996] 1 ILRM 27, 31 (HC) and *Cogley v. Radio Telifis Éireann* [2005] IEHC 180, [2005] 4 IR 79). The publication of a new privacy bill (Privacy Bill 2006) based on recommendations put forward by the Working Group on Privacy has recently been approved by the Government in order to adapt to recent court decisions in Ireland and Europe in the area of privacy. The main purpose of this Bill is to introduce a modern statutory framework to protect all citizens from the invasion of their privacy. The Bill creates a specific tort to violate the privacy of an individual, which is actionable without proof of special damages. In deciding whether or not a breach of privacy has taken place and in assessing the extent to which a defendant may be liable for damages for any such breach, a court may have regard to factors such as the extent to which an individual has engaged in surveillance of another, the means used and the extent to which the individual has engaged in the harassment of another or has trespassed upon the property of another.

30. In SCOTLAND, notwithstanding the entry into force of the 1998 Human Rights Act on 2 October 2000, the statement still holds true that the law has "not yet fully recognised the interest which an individual has that his private and personal affairs shall not be unjustifiably pried into and disclosed to outsiders" (*Walker*, Delict[2], 703). In seeking a definition of privacy, it has been pointed out that "access, attention, and information are all necessary components of privacy" (*Hogg*, (1992) SLT 349). It has been submitted that the principle of *actio injuriarum* would justify a Scottish court in giving a remedy for unjustifiable infringement of privacy (*Walker* loc. cit. 704; *Hogg*, loc. cit. 351). That a privacy right might develop in Scotland was noted by the Calcutt Report, in recognising that "a common law right to privacy could possibly develop in Scotland, where there is a more general concept of culpa … compared with the more narrowly-drawn English torts" (*Committee on Privacy and Related Matters*, Cm 1102, July 1992, para. 12.2). However, in *Martin v. Mcguiness* 2003 SLT 1424 arguments based on *actio injuriarum* were submitted by counsel for the pursuer, essentially asserting that the court had a duty to develop the existing law to be compatible with the ECHR, and that the *actio injuriarum* provided a basis for the protection of privacy in Scots law. Lord *Bonomy* merely noted the submissions made on this point, deciding the case on other grounds, "giving little support to any development of the law in this particular way" (*MacQueen*, (2004) 8 Edinburgh LRev 249, 253). The difficulty with any possible attempt to develop the common law to create a general obligation to respect individual privacy is the fact that "privacy is so multi-faceted that generalisation by judges arising from particular cases is dangerous, and that the responsibility for the creation of a general right, if that is needed or desirable, should fall on the legislature". Instead of having an express privacy right, "[p]rivacy, as with other interests, is protected, but in pockets of liability, rather than in general" (*MacQueen* loc. cit., 251). Such cases in which the claim over a right to privacy has been incidentally grafted onto other causes of action include causes of action primarily in libel (*Monson v. Tussaud* [1894] 1 QB 671; *Tolley v. J. S. Fry & Sons Ltd.* [1931] AC 333), infringement of copyright (*Williams v. Settle* [1960] 1 WLR 1072) and breach of confidence (*Pollard v. Photographic Co.* (1889) 40 Ch. D 345). The essence of the wrong consists in bringing the name, characteristics, appearance or facts relating to the pursuer into the public notice without the consent of the pursuer or legal

justification (*Walker* loc. cit.). Telephone tapping and intercepting information being communicated also falls under an infringement of privacy (*Walker* loc. cit. 706). Where a person has been charged with crime and liberalised on bail, photographs and finger-prints may not be taken without consent, and to do so is illegal and actionable (*Adamson v. Martin* 1916 SC 319). Nor in such a case may a person be searched, or have his finger-prints taken or scrapings taken from under his fingernails (*McGovern v. H. M. Advocate* 1950 JC 33). A person who is merely charged cannot be subjected to medical examination without his consent, though he may be observed medically (*Reid v. Nixon* 1948 JC 68; *Forrester v. H. M. Advocate* 1952 JC 28; *Farrell v. Concannon* 1957 JC 12; *McKie v. H. M. Advocate* 1958 JC 24). The clearest case of infringement of privacy is where a wrongful or unwarranted search is made of the pursuer's premises, and such facts are recognised as wrongful (*Walker* loc. cit. 707). In a civil action, Lord *Jauncey* described the act of asking a woman in police custody to remove her brassiere as "not justified in law" and an "invasion of privacy" as well as of liberty (*Henderson v. Chief Constable of Fife Police* 1988 SLT 361). Based on this decision, it has been submitted in scholarly writing that this case supports the award of damages for the invasion of the right to privacy (*Hogg* loc. cit. 351). In considering a claim for infringement of privacy, countervailing social interests (freedom of speech and of the press, the reasonable interest of individuals in the lives and deeds of persons prominent in the community and the public interest in government and the administration of justice) have to be weighed (*Walker* loc. cit. 708). Although the notion of public interest (as a counterbalancing factor against one's privacy) is normally seen from the vantage point of freedom of speech and of press (as indispensable elements of a democratic society), it has also been noted in case law that "the interest of an individual in his own privacy is itself a public interest" (*Parks v. Tayside Regional Council* 1989 SC 38, 42). In spite of the abovementioned lack of a general right of privacy, it has been argued that over the last two decades the law of confidence has been continually evolving to fill the gaps left by the lack of a statute based privacy law (*Mackenzie*, "Privacy – A New Right in UK law?" (2002) SLT 98, 99). In light of the constantly adapting interpretation of breach of confidence in order to cater for this area, the practical effects of the denial of a general right to privacy in *Campbell v. Mirror Group Newspapers* [2004] UKHL 22; [2004] 2 AC 457 are not as major as it would seem at first blush.

IV. Defamation

31. Under the law governing liability for affronts to honour, some not-so-insignificant distinctions once again crop up, especially between the common law and the civil law; in this branch of the law, even among the civil law countries, some very different regulatory techniques have developed. It is the settled case law of the FRENCH Courts to rule that an affront to another person's honour (*atteinte à l´honneur et à la considération*) constitutes a tortious *faute* (see solely CA Paris 8 October 1985, D. 1986 I.R. 190, note *Lindon*); furthermore, affronts to honour are normally liable to criminal prosecution. CC art. 9-1 provides protection from the publication of the name of an accused party, who has not yet been convicted and can therefore rely on the presumption of innocence "the respect for which is the right of all". In BELGIUM varying standpoints subsist on the question of whether the protection of honour is to be understood as an independent category of tort law or simply as a case encompassed by the application of the protection of one's private sphere (see in detail *de Theux*, Ann. Louv. 2002, 287, 300); it is indisputable, however, that affronts to honour fall under the normal requirements of CC arts. 1382 and 1383, amounting to a claim in damages (e.g. CA Gent 28 March 2002, RW 2003-2004, 507).

32. SPANISH Act 1/1982 art. 7(7) defines *difamación* as a statement of fact or value judgement, through which an individual's dignity is violated by means of injury to their good name and reputation or detriment to their self-estimation; this extensively overlaps with the definition of *injuria* (affront) in CP art. 208 (*Yzquierdo Tolsada*, Sistema de responsabilidad civil, 51) ("defamation/affront is an act or expression, which violates a person's dignity through the injury to their reputation or detriment to their self-estimation. Only those affronts that - due to their form, consequences and circumstances - are deemed to be severe by public opinion, amount to a criminal offence. Affronts implicit in the imputation of having committed a criminal offence are not to be deemed severe, unless they are carried out with knowledge or their falsity or with reckless disregard for their truth".

33. In ITALIAN Law a distinction is drawn between honour (*onore*), decorum (*decoro*) and reputation (*reputazione*). *Onore* relates to the sum of a person's moral qualities, *decoro* to their remaining qualities and *reputazione* to their estimation in society, whereby in turn personal reputation is distinguished from professional reputation. Legal entities, political parties and religious communities can bring a claim based on an injury to reputation. The civil law protection of honour and reputation goes over and above that under criminal law (CP arts. 594 *et seq.*). This is due to the fact that negligence suffices for civil liability (Cass. 13 May 1958, no. 1563, RGI 1959, Resp. uso mezzi diffusione, no. 9; Cass. 18 October 1984, no. 5259, Giur.it. 1985, I, 1, 1100; *Visintini*, I fatti illeciti I^2, 334); moreover, civil law protection steps in even where the defamatory statement is made to one single third party (Cass. 13 October 1972, no. 3045, Giur.it. 1973, I, 1, 36). Furthermore, liability for justifiably catering to the public's interest in important information can yet be excluded even where the complete criminal law defence of *exceptio veritatis* was not available to the defendant (Cass. 12 December 1955, Giur.it. 1956, I, 326; Cass. 24 April 1962, no. 816, Foro it. 1962, I, 1722; Cass. 28 March 1974, no. 868, Foro it. 1974, I, 1358; Cass. 24 May 2002, no. 7628, Foro it. 2002, I, 2322).

34. HUNGARIAN CC § 76 expressly counts "honour", along with human dignity, as an interest worthy of tort law protection; CC § 78(1) additionally enumerates one's good reputation/name. Honour, as is stated, concerns a value judgement that has formed in society about a human being (whether bodies corporate can suffer an injury to their "honour" is controversial). Unreasonable and unjustifiably injurious, abasing or degrading statements or behaviour can even lead to liability for an affront to honour, where their core fact assertion is true; in each individual case it always depends on the result of balancing the injury with the fundamental right to the free expression of one's opinions (Petrik [-*Petrik*], Polgári jog I^2, 178/2).

35. In cases of a "disparagement of honour", AUSTRIAN CC § 1330(1) in conjunction with § 1295 provides a claim in patrimonial damages and lost gains, not however in non-economic damages. The latter are only recoverable where statute expressly provides for such (CC § 1340), and that is precisely not the case with CC § 1330(1) (*Koziol and Welser*, Bürgerliches Recht II^{12}, 327; *Bydlinski*, JBl 1965, 237, 252; OGH 26 September 1951, EvBl 1951/487 p 618). Conversely, GERMAN CC § 823(1) does not list honour as among the absolute rights protected by this provision. According to the original spirit of this law, civil liability for affronts to honour should be dependant on the existence of a criminal offence in the case in question (CC § 823(2)). Today liability for affronts to honour fall however within the scope of the "general right of personality" afforded under § 823(1) (e.g. BGH 5 March 1963, BGHZ 39, 124, 129).

36. In GREECE "honour" is undoubtedly counted among the interests protected under CC arts. 57 *et seq.*; a culpable affront to honour results in liability under CC art. 914,

without the requirement of having to prove the existence of a criminal offence (for more detail, see Georgiades and Stathopoulos [-*Karakatsanes*], art. 57, no. 6; Georgiades and Stathopoulos [-*Georgiades*], art. 914, no. 35 and *Karakostas*, Prosopikotita kai tipos, 55). All people, even children and those of unsound mind, bear this interest worthy of legal protection (*Karakatsanes*, loc. cit. no. 6). In the context of publications in the press, a distinction is made between statements of fact and value judgements; the impact of the publication on the party in question, the extent of its circulation, the reason for it, and the motives of its author (information of general interest; deliberateness of harm) are drawn upon in the overall consideration, in order to take account of the freedom of press (*Karakostas*, loc. cit. 56 *et seq.*; CA Athens, 9975/1986, EllDik 27/1987, 299). Just like the Law on the Mass Media no. 2328/1995 art. 4(10), Law no. 1178/1981 on the Civil Liability of the Press, art. 1 provides for a minimum threshold sum for the reparation of non-pecuniary losses (*cf.* CFI Thessaloniki 26488/2001, Arm 2003, 931: minimum liability set at 10,000,000 Drachma). This provision does not violate the Greek Constitution (A.P. 1043/2001, NoB 50/2002, 1108).

37. Though admittedly PORTUGUESE CC art. 483 does not expressly list "honour" as an interest worthy of legal protection, on the one hand it still falls under the "rights" protected by this provision and on the other it is the subject-matter of a protective law in the sense meant in this provision, namely of CP art. 180, which regulates the criminality of affronts to honour. It is conceivable that false information about one person will affront the honour of a third party close to this person, *cf.* e.g. STJ 26 February 2004 (National newspaper reports in a major exposé on the alleged frivolities and adultery of a married woman; also an affront to the husband's honour). However, in recent case law, there has been a clear retreat from the legal protection afforded for affronts to honour; there is talk of an "erosion" of the protection of honour (*Faria Costa*, Direito Penal Especial, 104), *cf.* especially CA Guimarães 27 April 2006 (where someone is held up to ridicule, this constitutes merely bad conduct, not however a tort); CA Porto 7 December 2005 (no affront, if someone is called *maluco* – crazy); CA Porto 19 April 2006 (no affront, where it is said of a priest "he was not a priest, he was not anything") and CA Porto 11 January 2006 (*assassino* "murderer" of an animal; no affront).

38. DUTCH CC art. 6:106(1)(b) enumerates injuries to honour among the torts in which the tortfeasor will be held liable for non-pecuniary losses. CC art. 6:106(1)(c) provides a special rule for the reparation of non-economic damages in the case of the denigration of a deceased's remembrance. ESTONIAN LOA § 1046(1) expressly counts the "defamation of a person" among its list of torts. In contrast, LITHUANIA and LATVIA lack a corresponding regulation.

39. The SWEDISH Law on Damages chap. 2 § 3 imposes liability in damages on a person who "grossly affronts someone else through the commission of a crime, which includes an attack against his person, his freedom, his ability to live peacibly or his honour". This corresponds to the FINNISH Law on Damages chap. 5 § 6(1) (as of 1 January 2006); a criminal offence and an affront are also required here. In contrast, DANISH Law on Damages § 26(1) omits the requirement of a *criminal* affront to honour in the establishment of civil liability.

40. The situation in ENGLAND is quite complex. The Common Law traditionally distinguishes between *libel* and *slander*. Libel is an affront to honour in fixed (typically, but not necessarily, written) form, while slander is an affront to honour in transient, typically spoken form. The prerequisite element for a claim in defamation is fulfilled in both cases by anything that is seen as holding the relevant party up to

public hate, contempt or ridicule (*Parmiter v. Coupland* (1840) 6 M & W 105; 151 ER 340), see e.g. *R. v. Adams* (1888) 22 QBD 66 (letter sent to a young woman of modest virtue inviting her to name her price for surrender of her virginity). The threshold question remains to this day: "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally … or would cause him to be shunned or avoided?" (*Sim v. Stretch* (1936) 52 TLR 669, per Lord *Atkin*). Libel is at the same time a crime, slander just a tort. The criminal and private law concept of libel are, however, not identical. For example, under English criminal law a libel which is true may nonetheless amount to an offence at common law, if the defendant cannot show that publication was for the public benefit (Libel Act 1843, s. 6), whereas under English tort law the justification of the libel will provide a complete defence. Nor is it possible under English tort law to libel an indeterminate class of persons, although the same libel may constitute an offence under criminal law if calculated to provoke the members of that class to commit a breach of the peace. The ability to defame a public corporation in tort is also more limited than in the criminal law of libel: see *Derbyshire CC v. Times Newspapers Ltd.* [1993] AC 534. A further extension of the protection of the criminal law of libel is that a deceased person can be defamed, if the libel would tend to provoke living persons such as members of the deceased's family, although the same libel will not give rise to tort law liability.

41. In IRELAND, although one's right to a good name is expressly protected by Const. art. 40.3.2° and defamation is governed under the Defamation Act 1961, defamation takes much the same format as the approach in England (in regard to the libel and slander distinction and the definition of the concept of "defamation" itself). Defamation is committed by the wrongful publication (i.e. to a third party, *cf M'Laughlin v. Doey* (1893) 32 IrLR 518 (Ex. D)) of a false statement about a person, which tends to lower that person in the eyes of right-thinking members of society or tends to hold that person up to hatred, ridicule or contempt, or causes that person to be shunned or avoided by right thinking members of society (*Quigley v. Creation Ltd.* [1971] IR 269; *Berry v. Irish Times Ltd.* [1973] IR 368). Once the defamatory nature of the statement is proven, its falsity is presumed. Vulgar abuse does not amount to defamation – the gist of the action is injury to reputation and if the remarks are made in an abusive way or in anger so that they injure only the pride of the plaintiff rather than his reputation no action lies at common law (*McMahon and Binchy,* Torts[3], para. 34.85). Libel is actionable *per se*, whereas slander requires proof of special (actual) damage, unless it falls under one of four categories of slander. They are: (i) slanders which impute unchastity or adultery to any woman or girl (Defamation Act 1961 s. 16); (ii) slanders affecting a person's official, professional or business reputation (Defamation Act 1961 s. 19); (iii) slanders imputing a criminal offence punishable imprisonment (*cf Ruckley v. Kiernan* (1857) 7 ICLR 75; *McCabe v. Foot* (1866) 11 Ir.Jurist (ns) 287; *Dempsey v. Wall & Co. Ltd.* (1943) 78 ILTR 73; *Coleman v. Keanes Ltd.* [1946] Ir Jur 5; *Corcoran v. W. & R. Jacob & Co. Ltd.* [1945] IR 446); and (iv) slanders imputing a contagious disease which tends to exclude the sufferer from society (*Bloodworth v. Gray* (1844) 7 Man & G 334, 135 ER 140; *Milner v. Reeves* (1617) 1 Roll Abr 43 pl. 3; *Taylor v. Perkins* (1607) Cro Jac 144, 79 ER 126; *Villers v. Monsley* (1769) 2 Wils KB 403, 95 ER 886). Reform of defamation is imminent in Ireland, with the publishing of the Defamation Bill 2006 (in tandem with the Privacy Bill 2006 – see above, Note *III29*). The main proposals of the Bill are: (i) the present torts of libel and slander will cease to be so described and are henceforth to be collectively described as the tort of defamation (s. 5); (ii) an offer of apology shall not be construed as an admission of liability (s. 23); (iii) provision is made for new remedies which a court may grant in addition to damages; (iv) a correction order is

envisaged (s. 28); (v) the defence of *fair and reasonable publication on a matter of public importance* is created (s. 24); (vi) the common law position with regard to the liability of distributors for defamatory material is being given a statutory basis (s. 25); (vii) bodies corporate are to be allowed to sue for defamation irrespective of whether financial loss has occurred (s. 11); (viii) a limitation period of one year will apply in relation to the bringing of defamation proceedings unless a court directs otherwise where the interests of justice so require (s. 37); and (ix) although there is no provision for a defamation action to be taken in the name of a deceased plaintiff, the Defamation Bill provides that where a defamation action is pending in court, the cause of action will survive for the benefit of the estate of a person who dies before the actual hearing/determination of the matter.

42. In SCOTLAND a person has a legally recognised interest in the preservation of his own self-esteem and honour from unjustifiable attacks, and this has come to be extended to include an interest in his own public reputation and good name in the eyes of others (*Walker*, Delict[2], chap. 23). A claim for *solatium*, of the nature of an *actio injuriarum*, accordingly lies against another who unjustifiably impugns a person's honour and self-esteem, and a claim for patrimonial loss lies in addition, where his public reputation has been impugned as well (*Walker* loc. cit. 749). Although the wrong has been variously called verbal injury, *convicium*, defamation, slander and libel in books and cases, the position has emerged that verbal injury and *convicium* (if indeed there is a distinction between these two, discussed below at Note *I14* under VI.–2:204 (Loss upon communication of incorrect information about another) are in fact detached from defamation. Marking a distinction from the position in England (and currently in Ireland), in Scots law libel and slander are frequently used interchangeably for each other and for defamation, with no distinction between written and oral communication. Defamation is "the wrong or delict which is committed when a person makes an injurious and false imputation, conveyed by words or signs, against the character or reputation of another" (*Cooper*, Defamation and Verbal Injury[2], 1). There are three requisites which must be proven: (i) there must be a false statement made, of and concerning the pursuer; (ii) the statement must be defamatory (or libellous or slanderous); and (iii) there must exist malice on the part of the defender in making the statement or communicating the idea (*Walker* loc. cit. 742). It is possible to defame by innuendo or other than by express communication (*Cooper* loc. cit. 29). While the fact of communication must be proved, it is not necessary that the statement be communicated to a third party, i.e. anyone other than the pursuer himself (*Gloag and Henderson*, The Law of Scotland[11], para. 35.04), just that it was as such capable of deeply hurting the pursuer's feelings. This element underlines the character of the claim as one of *solatium* for hurt feelings and not of reparation. Defamatory statements include statements against the moral character, the trade, business, or occupation, profession, or office, and the public character of another; and statements attributing insanity or obnoxious physical defects to persons, and verbal injuries" (*Cooper* loc. cit. 33). Allegations of certain sexual conduct may be, for example that a man has associated with a known prostitute (*Dwek v. MacMillan Publishers Ltd.* [2000] EMLR 284), but an allegation of homosexuality is probably not now defamatory (*Quilty v. Windsor* 1999 SLT 346). There is a material distinction between private individuals and public figures, critics of the latter being allowed a wide latitude in the public interest (*Gloag and Henderson* loc. cit. para. 35.05); a person's status as a public figure is not, however, a defence to an allegation of defamation (*Bennett v. Guardian Newspapers Ltd. (No. 1)* [1997] EMLR 625). Although in the abovementioned prevailing formula for defamation, the defamatory nature of the statements is the second requisite (after the falsity of the statements), this is in fact the primary and

central requirement because once the statements are proved to be defamatory, there is a presumption of malice (*Norrie*, (1984) JurRev 163, 168)) and a presumption of the falsity of the statement, though the defence under the maxim *veritas convicii excusat* is open to the defendant. The following other nine defences are also open to the defender (see *Gloag and Henderson* loc. cit. 35.07): (i) that the words founded on were not used by the defender; (ii) that the statement did not refer to the pursuer and could not reasonably construed as referring to him; (iii) that the words used were not reasonably capable of bearing the alleged defamatory meaning ascribed to them; (iv) that the slander was unintentional, coupled with an offer of amends (under the Defamation Act 1996); (v) that the pursuer expressly or impliedly assented to the statement being made (*Friend v. Civil Aviation Authority (No. 1)* [1998] IRLR 253); (vi) absolute privilege; (vii) qualified privilege; (viii) fair retort; (ix) fair comment (for more detail, see below at Note *II25* under VI.–2:204 (Loss upon communication of incorrect information about another)).

Illustration 1 is taken from Bavarian Supreme Court 7 March 1983, NJW 1983, 2040; **illustration 3** from *Kaye v. Robertson* [1991] FSR 62; **illustration 4** from CA Amsterdam 22 October 1975, NedJur 1977 no. 282 p. 973; **illustration 5** from Cass.civ. 24 January 1996, Bull.civ. 1996, II, no. 16 p.11; D. 1996 I.R. 63; **illustration 6** from CA Athens 807/1956, NoB 4 (1956) 624; **illustration 8** from *Grainger v. Hill* (1838) 4 Bing NC 212, 132 ER 769; **illustration 9** from BGH 15 November 1994, BGHZ 128, 1.

VI.–2:204: Loss upon communication of incorrect information about another

Loss caused to a person as a result of the communication of information about that person which the person communicating the information knows or could reasonably be expected to know is incorrect is legally relevant damage.

COMMENTS

A. General

Liability for misinformation instead of protection of honour. This Article is based on the notion that one can hardly dispute liability for misinformation, whereas liability for "injury to honour" can easily open up a source of endless disputes and the exertion of influence by lobbyists (e.g. through the press). The concepts of honour or reputation therefore only play a role within the scheme of these rules to the extent that they are also applicable as part of national law: see VI.–2:203(2) (Infringement of dignity, liberty and privacy) and the Comments on that Article. Moreover, in an open society a rule which simply characterised injury to reputation as a legally relevant damage would be too imprecise. The assertion that someone belongs to a political party or has subscribed to a particular school of thought is anything other than an imputation of dishonour. At the same time such assertions, if they are false, may inflict substantial damage on that person's progress in life. The same applies to the assertion that a given Catholic priest supports abortion. It would also be less productive to have to resolve the question whether an athlete's honour is injured when it is falsely asserted that he or she takes drugs. All of these cases turn only on the point that the information was false.

Protection of the media. From the perspective of the media too it can hardly be maintained that there is a fundamental problem with press freedom when the published information is false. False assertions are as a matter of general principle not within the protection of press freedom. Incorrect assertions which cast the person concerned in a more favourable light than they are really entitled to, however, will as a rule not result in damage.

Personal honour need not be affected. It follows from the approach chosen here that the incorrect information need not affect the injured person's personal honour at all. It suffices, for instance, that the incorrect information causes doubt about the injured person's credit-worthiness. If, however, the false information also adversely affects the injured person in the pursuit of a profession or trade, as is likely to be the case e.g. if information is addressed to customers or suppliers, the requirements of VI.–2:208 (Loss upon unlawful impairment of business) may also be satisfied.

Persons. The text makes no distinction between natural and legal persons. A "person" within the meaning of this provision includes (according to the general rule, see VI.–1:103(b) (Scope of application)) legal as well as natural persons. Deliberately omitted from this provision, however, is the protection of personality after death: see Comments under VI.–2:101 (Meaning of legally relevant damage) and VI.–2:203 (Infringement of dignity, liberty and privacy).

Defences. The general grounds of defence in Chapter 5 have application in relation to VI.–2:204 as they do in relation to other instances of legally relevant damage. However, VI.–5:203 (Protection of public interest) takes on a special significance here. Furthermore, regard

must also be had to VI.–6:102 (De minimis rule) – in particular in relation to the legal relevance of non-economic losses. (See the Comments on those Articles.) Moreover, liability in consequence of VI.–2:204 (or indeed any other Article under this Chapter) will be excluded where it would conflict with constitutional rights, such as rights of freedom of expression, which are enshrined in the national laws: see VI.–7:101 (National constitutional laws). National constitutional law may, for example, come into play to protect the fundamental right to marriage and family life with the consequence that confidential information communicated between spouses can never give rise to liability and in particular therefore when information about a third party which is known to be false is communicated by one spouse to the other.

B. Communication

Communication and dissemination distinguished. The element of communication of the information does not require a "dissemination" in the sense of either communication to a determinate or indeterminate group of persons or a chain or repetition of communications to a number of persons (multiple simultaneous or serial communications). A "one to one" communication can fall within the Article and likewise a communication on a single occasion suffices. It is not essential that communication should take the form of a wide publication of information directed to the public at large. Depending on the circumstances, it may suffice that the information has been passed down the telephone line to a single individual. VI.–2:204 is therefore in no way confined to the dissemination of false news in the media. It may also apply to false information communicated among business persons or even private contacts (who turn, for example, to the press, or the employer or school of the individual concerned) where, however, according to the general rules on accountability, different standards of care are imposed.

Internet communication. The position is the same where false information about another is incorporated into a web page on the internet. As regards publications in the internet, it will always be necessary to ascertain precisely who is the person who "ought to know" that the information is incorrect. As far as intermediary service providers are concerned, this issue is specifically addressed and conclusively resolved by Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178 of 17 July 2000, pp. 1-16), s. 4 ("Liability of intermediary service providers"), arts. 12-15.

Repetition of incorrect information. The person communicating the misinformation need not be the person who has created or formulated it. The repetition of incorrect information which has been obtained from another will amount to a communication; there is no requirement of 'first dissemination' in VI.–2:204. In the context of transmission of false information in this manner, however, note must be taken of the element of accountability. If publishers have repeated in good faith information obtained from a source in whom it would be reasonable to place reliance (such as communications from public authorities within their sphere of activities) and where it would be unreasonable to expect the publishers to examine the matter in any depth for themselves without repeating it (because, on its face, it has an innocent character), there may be no legally relevant damage.

Telling lies. On the other hand, VI.–2:204 does not mean that a person is liable *per se* for having told a lie. Making a misstatement, even intentionally, does not by itself give rise to liability. Only when additional elements besides the mere falsehood of the information are

present does a right to relief arise under this Article. The misstatement must be "about another" and it must result in either a disturbance to that person's life or economic loss. Trivial damage is not legally relevant (VI.–6:102 (De minimis rule)). It is the consequences – the prejudice caused to another *in consequence of the misstatement* – which generates the claim under this Article and not the mere fact of the misstatement.

C. Incorrect information

Facts and value judgements distinguished. Information within the meaning of VI.–2:204 is an assertion of fact and does not extend to mere expressions of opinion or value judgements. The borderline between these two basic categories is not always easy to draw, but it is conceptually clear because only assertions of fact are susceptible to proof of veracity. Information is incorrect when it does not correspond with the truth. Information which is hearsay must be disclosed as such in order to correspond with the truth: someone who in that manner communicates information, making it clear that it is not known whether the reported assertion is correct, does not generally communicate false information unless this caveat serves only as a blind to escape liability (e.g. because it is sham and the information is relayed not merely to report that another has made such an assertion, but rather to imply also that the assertion is correct). The same applies when the information communicated contains the pointer that the assertion is made on the basis of only limited investigation.

> *Illustration 1*
> In the course of divorce proceedings, in order to further his position, a husband asserts that his wife "cheated" on him with another man. This is an assertion of fact.

> *Illustration 2*
> A theatre critic writes of a singer and actress that her voice and acting are so bad that she belongs not on the stage, but at the cash register in a self service restaurant. This is a value judgement.

Information about a person. VI.–2:204 concerns false information about a "person"; it does not extend to false information about a product or service.

> *Illustration 3*
> The assertion that electronic organs are completely unsuitable for use in churches falls outside VI.–2:204 and consequently does not provide the manufacturer of such organs with a claim to reparation of legally relevant damage under this rule, even where the statement was reinforced by concrete (but false) assertions of fact: it does not pertain to information about the manufacturer's person.

Burden of proof. The provision refers to information which is "incorrect". Starting from the proposition that the claimant must make out all the elements necessary to support the cause of action, this Article has the effect of placing on the claimant the burden of proving that the information communicated was "incorrect". However, in contrast to burden of proof (which is a material aspect of the rule), the standard of proof required will remain a procedural matter not governed by these rules. The same holds true for the question whether any alteration in the rules governing the standard of proof are considered appropriate so as indirectly to ease the onus placed on the injured person.

D. The mental state of the responsible person

Carelessness in relation to the incorrectness. As regards the mental state of the injuring person, negligence is always sufficient. That is so as much in relation to the act of communication or publication (which is governed by VI.–3:102 (Negligence)) as in regard to the fact that the injuring person ought to have known that the information was incorrect (which is governed by this Article). The Article therefore provides for liability when, for want of reasonable thoroughness or accuracy in research, the injuring person has communicated the false information. This will entitle the claimant to any appropriate remedy, including compensation. Conversely, where false information is published without negligence, because the information was communicated with every good reason (in the light of scrupulous research) to suppose that it was correct, there will be no liability, notwithstanding that the publication of false information may make a detrimental impact.

E. Relationship to other provisions

VI.–2:203 (Infringement of dignity, liberty and privacy). However, the fact that there is no liability under VI.–2:204 (and therefore no right to a correction of the falsehood as reparation for damage under this Article either) does not mean that the party innocently injured is entirely without redress. Precisely because the publisher has injured another by actions (albeit without liability), the publisher may in given circumstances be under an obligation to publish a correction in order to eradicate or ameliorate the prejudice or detriment generated. Such a positive obligation to rectify may arise out of the duty not to infringe an individual's right to respect for dignity implied by VI.–2:203 (Infringement of dignity, liberty and privacy). A failure to respond to the plea of an affected individual, whom one has significantly maligned or prejudiced by one's own (innocent) act, to salvage that individual's reputation may amount in some cases to such a failure to treat the other person with the minimum respect which a fellow member of society merits as to infringe the right to personal dignity. This specific damage falling under VI.–2:203 makes it unnecessary to fall back on the wider argument to the same effect under the general residual rule on damage in VI.–2:101 (Meaning of legally relevant damage), at any rate where the person adversely affected is a natural person.

Reporting suspicions. VI.–2:203 (Infringement of dignity, liberty and privacy) may be of particular relevance in relation to the reporting of suspicions. Where a report is made that someone is suspected of wrongdoing or circumstances are detailed which pinpoint a given individual as a plausible suspect for the wrongdoing, there will as a rule be no scope for liability under VI.–2:204. That is for the simple reason that the reported information is correct so far as it goes (i.e. there *is* a suspicion, there is no good reason to assume that the suspicion is wrong or ill-founded, and the circumstances *are* as narrated).

> *Illustration 4*
> A newspaper reports about a letter in which A informs B that he (A) suspects a third party (C) of being guilty of electoral malpractice and having committed a criminal offence which should be reported to the police. Since the newspaper correctly reproduced the contents of the letter, without passing the contents off as its own, and since there was a public interest in the publication of the news, the report does not cause legally relevant damage in the sense of VI.–2:203 (Infringement of dignity, liberty and privacy) or VI.–2:204 (Loss upon communication of incorrect information about another), even if C is later acquitted of the charge.

Freedom of expression and the right to respect of dignity. However, depending on the precise circumstances of the case, it is conceivable that reporting of the suspicion itself in this way, while communicating correct information, could nonetheless be subject to the competing right of the individual to respect for personal dignity. This must necessarily be the case because reporting (truthfully) a suspicion so as to expose a given individual to the negative attention of others may in some contexts amount to placing an individual on trial in a forum in which there is no means of defence against the more or less explicit accusation. This may easily overstep the bounds of fair treatment of the individual and thus amount to a denial of the right to respect for personal dignity. No definite guidance can be given here, since the matter will be one for the courts to elaborate in the context of the inescapable conflict of interests between freedom of expression and a right to be treated with dignity. However, even where reporting a suspicion does infringe a person's right to respect for personal dignity, this will be subject to the defence of public interest, that is to say a justifiable ground for publishing the suspicion (see further VI.–5:203 (Protection of public interest)). This will clearly be the case, for example, where a newspaper acts responsibly in publishing descriptions or images of persons wanted for questioning in respect of serious crimes. Quite aside from that defence, it may well be that an infringement is not so profound as to justify compensation, as opposed to some other remedy which serves directly to remove the stigma or prejudice which reporting the suspicion generated (such as a right to have published further details which will make manifest the individual's innocence). In every case the remedy must be appropriate to the injury caused: see VI.–6:101(2) (Aim and forms of reparation).

VI.–2:205 (Loss upon breach of confidence) and VI.–2:207 (Loss upon reliance on incorrect advice or information). Liability arising under VI.–2:204 in respect of communication of information to another's prejudice is further flanked by the rules in VI.–2:205 (Loss upon breach of confidence) (where there is a breach of confidence) and VI.–2:207 (Loss upon reliance on incorrect advice or information) (where false information is communicated in the course of business to one who relies on it).

VI.–2:208 (Loss upon unlawful impairment of business). In a few cases there may be an overlap with the scope of application of VI.–2:208 (Loss upon unlawful impairment of business) – for instance where false information about a competitor is "spread" to customers in order to ruin the competitor.

NOTES

I. Liability for Misinformation

1. All European legal systems recognise the basic rule that the dissemination of false assertions of fact results in liability for a person's ensuing losses. However, in each respective system it is to be found in entirely different quarters. In BELGIUM, FRANCE and LUXEMBOURG it is a part of the general tort law clause of CC arts. 1382 and 1383. It is settled case law that the spreading of lies about another amounts to a *faute* leading to a claim in damages when it causes pecuniary or non-pecuniary losses (*le Tourneau,* Droit de la responsabilité et des contrats, no. 1645; CFI Brussels 5 December 2000, AM 2001, 409). Of particular note in this context is the fact that in France the right against unfair competition likewise has its roots in CC arts. 1382 and 1383. Therefore, these provisions also govern cases of discrediting competitors and their products (JClCiv [-*Courtieu*], arts. 1382 à 1386, fasc. 132-1 (1998) no. 43).

2. In SPAIN the basis for liability for misinformation, at least in so far as it concerns press publications, is mostly extracted directly from the constitution (arts. 18(1) and 20(4)) and transposed into civil law through Law 1/1982 on the Civil Protection of Honour, Sphere of Intimacy and Control over the Reproduction of One's Image. Journalists are under an obligation of accurate research. False assertions, however, may not be avoidable in every circumstance; thus the press does not assume a guarantee of truth. Of course, freedom of press neither protects the spreading of mere rumours, nor complete fabrications or malicious insinuations. However, it protects the dissemination of carefully surveyed information, even where it should later turn out to be false (TC 21 January 1988, BOE no. 31 of 5 February 1988. See also TS 5 July 1999, RAJ 1999 (3) no. 5898 p. 9197; TS 20 November 1999, RAJ 1999 (5) no. 8293 p. 13010 and TC 31 January 2000, BOE no. 54 of 3 March 2000). This is only different where the information has been presented in an undignified way (TS 17 April 2000, RAJ 2000 (2) no. 2567 p. 3985) or otherwise infringes the right to the protection of one's sphere of privacy (TC 10 May 2000, BOE no. 136 of 7 June 2000). Misinformation supplied to customers about a competitor is subject to the law on unfair competition (TS 11 July 2006, BDA RAJ 2006 no. 4977).

3. ITALY makes liability for the publication of false assertions of fact dependant upon the incidentally occasioned infringement of an interest protected under tort law (*Bianca*, Diritto civile V, 614). It is not of course necessary that the infringement of an absolute right is at issue. The false reproduction of a lawyer's forename in a telephone book, with the result that he loses clients after moving office even suffices (Cass. 6 December 1994, no. 10457, Foro it. 1995, I, 3258), likewise for false information by a television journalist about alleged harmful substances in a type of food (Cass. 4 February 1992, no. 1147, Foro it. 1992, I, 2127).

4. HUNGARIAN Law deals with false assertions of fact using a whole range of legal instruments. Among them is the protection of personality, which according to CC § 78(1) also extends to good name and reputation. CC § 78(2) adds that damage to reputation is to be especially inferred "if someone intimates or spreads a false injurious statement in relation to another or allows a true fact to be released, which represents them in a false light." An untrue statement is only "injurious" if it may engender in the minds of others negative prejudice against the party in question (for a more detailed account of this and what follows, see in particular Gellért (-*Zoltán*), A Polgári Törvénykönyv Magyarázata[6], 286-291). Different from false assertions of fact, which in principle do not fall under the scope of protection of freedom of opinion (Petrik [-*Petrik*], Polgári jog I[2], 182/5-182/8), negative value judgments only lead to an affront to personality if they injuriously abase the party without any grounds. False assertions of fact in the media may be combated under CC § 79(1) with the claim for the release of the text within eight days (or in the next issue), from which it is to emerge, which assertion was unfounded. CC § 83(3) additionally grants particular rights, e.g. to correction of an entry in a register.

5. SLOVENIAN LOA art. 177 consolidates very similar principles in the following way: "(1) Any person that defames another or asserts or disseminates untrue statements on the past, knowledge or capability of another, even thought the former knows or should have known that they were untrue, and thereby inflicts material damage on the latter must reimburse such damage. (2) However, any person that reports anything untrue about another without knowledge that such was untrue shall not be liable for the damage inflicted if there was a genuine interest in so doing for the former or the person to whom the report was made."

6. In the GERMAN CC an express rule of liability in relation to the publication of false assertions of fact only surfaces in § 824. This concerns the basic fact situation of "jeopardising credit-worthiness". Under CC § 824(1) liability accrues to "a person who asserts or disseminates a fact contrary to the truth that is apt to put the credit-worthiness of another in jeopardy or occasion other detriment to his spending power or advancement". If the communicator was not aware of the untrue nature, he is absolved of liability "where he or the addressee of the communication had a legitimate interest in it" CC § 824(2). There is a special regulation in CC § 839a for expert witnesses called by the court. Incidentally, extra-contractual liability for false assertions of fact requires in principle the infringement of one of the rights enumerated in CC § 823(1), the infringement of a protective law (CC § 823(2)) or an affront to public morals (CC § 826). See also BGH 24 January 2006, BGHZ 166, 84, 108.

7. Express reference in the AUSTRIAN CC (in § 1330(2)) is also confined only to the basic fact situation of jeopardising credit-worthiness. Hereunder, liability for patrimonial losses is incurred by a person who spreads incorrect facts that jeopardise the credit-worthiness, spending power or advancement of another, as long as the communicator of the asserted facts was aware of their untruth or must have been aware of such. Proof of actual damage is not required; damage to economically significant relationships through assertions contrary to fact suffices (OGH 14 November 1963, SZ 37/146). From a systematic point of view, CC § 1330(2) was inserted into the part above the class of damages awarded for affronts to honour, however it equally does not require an affront to honour (*Koziol*, Haftpflichtrecht II², 174).

8. The basic fact situation of so-called adverse effects on credit-worthiness (*ofensa do crédito ou do bom nome)* is also to be found in PORTUGAL (CC art. 484). However, some commentators here find it superfluous because the interests protected under this regulation – good name and reputation – already fall under the scope of application of both Const. art. 26(1) and CC art. 70(1) (*Capelo de Sousa*, O direito geral de personalidade, 305; *Gouveia de Andrade*, Da ofensa do crédito, 28). A claim under CC art. 484 is open not only to natural, but also to legal persons (STJ 15 June 1994, BolMinJus 438 [1994] 383; STJ 24 February 1960, BolMinJus 94 [1960] 107; *Almeida Costa*, Obrigações[9], 517). Conversely, the point on the admissibility of *exceptio veritatis* (the defence of truth) is extraordinarily contentious (for the proponents' arguments, see e.g. *Almeida Costa*, Obrigações[9], 517 and *Menezes Leitão*, Obrigações I[4], 285; and for those of the opponents, see *Antunes Varela*, Obrigações em geral I[10], 548 and STJ 3 October 1995, BolMinJus 450 [1995] 424). In relation to the omnipresent conflict between the right to the free expression of one's opinion and the protection of good name, a *practical concordance* is suggested (*Cardoso da Costa*, BolMinJus 396 [1990] 5, 16; STJ 14 May 2002; STJ 2 March 1995). In cases of doubt, however, freedom of opinion shall be given precedence (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 226; STJ 26 February 2004; STJ 5 December 2002).

9. ESTONIA also deploys the concept of jeopardising credit-worthiness in LOA § 1047(1). LOA § 1047(2) and (3) regulate the cases where the communication of information is not unlawful; subs. (4) provides for the legal remedies. See Supreme Court 3-2-1-161-06, RT III 2006, 23, 209. Under GREEK CC art. 920 "a person who knowingly or with a culpable lack of knowledge alleges or disseminates untruthful messages that put the credit-worthiness, occupation or advancement of another at risk" is likewise liable for damages.

10. In DUTCH Law the situations addressed in VI.–2:204 correspond to CC art. 6:162(2), because the spirit of this provision deals with the breach of a right or obligation

(through an action that infringes unwritten norms of social interaction). Under the latter aspect, accusations are in any event more seriously unlawful when they are not demonstrably true (Onrechtmatige Daad IV [-*Schuijt*], chap. VII, note 37, pp. 442 *et seq*.). So, for instance, if a stockbroker is accused of introducing an untrustworthy person to his acquaintances but it cannot be proven that the stockbroker knew of the untrustworthiness, if damage is suffered, this grounds liability (CFI Amsterdam 17 December 1974, reproduced in HR 30 January 1976, NedJur 1977 no. 106 p. 397). The incorrectness of an assertion alone does not always establish its unlawfulness, for instance where mistakes or discrepancies of minor significance are at issue or if the statement in question was not made recklessly (*Schuijt* loc. cit. 477-478).

11. Comprehensive provisions for the regulation of the problem of liability for harm through false information do not exist in the NORDIC countries either. Consequently, the general norms are drawn upon, in SWEDEN thus on Law on Damages chap. 2 § 2. However, individual special laws occasionally offer clarification and precision, in Sweden especially the Law on Credit Information [*kreditupplysningslag* (1973:1173)] § 21, which provides for the liability of persons who administer credit information on a commercial basis (loc. cit. § 1(1)), as well as for pecuniary and non-pecuniary losses (for more detail, see *Kleineman*, Ren förmögenhetsskada, 501 and – for the previous position – HD 26 January 1962, NJA 1962, 31). Negligence is rebuttably presumed. FINNISH Law on Personal Data (*personuppgiftslag*) § 9(2) first sentence obliges the respective registrar (and hence also commercial credit agencies) to use only data that is up-to-date and correct; § 29(1) first sentence prohibits the relaying of incorrect data and obliges the person from whom the original incorrect data came to re-register. Violations of the law found claims to pecuniary and non-pecuniary damages (loc. cit. § 47). This corresponds to the DANISH Law on the handling of Personal Data (*lov om behandling av personoplysninger* of 31 May 2000 no. 429) §§ 5(4), 24 and 69. Here also liability for rebuttably presumed fault is concerned. Another area for which there is specific regulation is the Law on Liability for False Information through the Press and other Media, *cf.* for SWEDEN Freedom of the Press Act (*tryckfrihetsförordningen* [1949:105]) chap. 7 § 4 nos. 14 and 15 in conjunction with chap. 11 (liability on the basis of a criminal offence) as well as the provisions of the Fundamental Law on Freedom of Expression (*yttrandefrihetsgrundlag* [1991:1469], *cf.* RH 1994:14); for DENMARK the Statutory Proclamation on the Law on the Liability of the Media (*lovbekendtgørelse af medieansvarsloven* of 9 February 1998 no. 85) §§ 29-33 (connection to the existing elements of the criminal offence through the respective mass medium); and for FINLAND the Law on Freedom of Expression in Mass Communication (*lag om yttrandefrihet i masskommunikation* of 13 June 2003 no. 460) § 14 (liability according to the rules under the Law on Damages).

12. In IRELAND, this issue falls under the torts of defamation (***???***see above, Note *IV41* under VI.–2:203 (Infringement of dignity, liberty and privacy)), injurious falsehood and negligent misstatement. The term injurious falsehood, coined by *Salmond* (Torts, 1st ed., 1907, § 149), is used in preference over "slander of title", "slander of goods" or "malicious falsehood" and covers false statements calculated to injure a person in his trade or, more broadly, even damaging falsehoods of a non-commercial nature (e.g. *Sheperd v. Wakeman* (1662) 1 Sid 79, 82 ER 982 – loss of marriage; *cf. Irish Transport & General Workers Union v. The Transport & General Workers Union* [1936] IR 471). The essence of this tort is that the falsehood deceives others about the plaintiff (*Schulke & Mayr U.K. Ltd. v. Alkapharm U.K. Ltd.* [1999] FSR 161) so as to cause loss to the plaintiff (*McMahon and Binchy*, Torts[3], para. 35.26). It consists of the publication or communication to a third person, of false statements concerning the plaintiff, his property, or his business, which cause him

pecuniary loss. The tort differs from defamation in that the falsehood may reflect well on the plaintiff whilst nonetheless causing loss to him (*Jones v. McGovern* IR 1 CL 100 at 103-104, and *cf Irish Toys & Utilities Ltd. v. "The Irish Times" Ltd.* [1937] IR 298); however, as is noted in commentary (*McMahon and Binchy* loc. cit. para. 35.26), sometimes the difference between the two torts is a narrow one. Thus, injurious falsehood does not require the lowering of reputation or holding the person up to ridicule, hatred or contempt, with the focus rather being on injurious statements reflecting on tangibles or services (for more detail on the distinction, see *McDonald*, Irish Law of Defamation[2], 23-26). The requisites for a claim under injurious falsehood were set out by Lord *Davey* in *Royal Baking Powder Co. v. Wright Crossley* (1901) 18 RPC 95 at 99 (1901), stating that "to support such an action it is necessary for the plaintiff to prove (i) that the statements complained of were untrue; (ii) that they were made maliciously – i.e. without just cause or excuse; (iii) that the plaintiffs have suffered special damage thereby." Hence, the burden of proof in relation to the falsity of the statements is on the claimant here (unlike where the statements are proven to be defamatory) and at common law special damage must also be proven (in contrast to libel and instances where slander is actionable *per se*, see above ***???***in Note *IV41* under VI.–2:203 (Infringement of dignity, liberty and privacy)). There is no uniform view on the definition of "malice", with some courts following Lord *Davey's* "without just cause or excuse" approach and others requiring that some indirect, dishonest or improper motive be established (*London Ferro-Concrete Co. v. Justicz* (1951) 68 RPC 261; *Serville v. Constance* [1954] 1 WLR 487). It is clear that an honest belief in an unfounded assertion will not make a defendant liable (*Loudon v. Ryder* (No 2) [1953] Ch 423; *Spring v. Guardian Assurance plc.* [1995] 2 AC 296; *Greers Ltd. v. Pearman & Corder Ltd.* (1922) 39 RPC 406; *Cooke v. McGuigan* (1927) 61 ILTR 45; *Malone v. McQuaid* [1998] IEHC 86). Carelessness will also be insufficient to mount a claim here, although in this case the plaintiff may raise the claim in the form of negligent misstatement; recklessness in the sense of gross negligence, however, may provide a basis for liability for injurious falsehood (*Malone v. McQuaid* loc. cit.; *cf. Sherriff v. McMullen* [1952] IR 236). Under common law, actual damage must be proven and it is also of note that only damage of a monetary nature is actionable; non-financial damage as injured feelings may not be compensated (*McMahon and Binchy* loc. cit. para. 35.29). However, the common law position has been changed somewhat by Defamation Act 1961, s. 20(1), which provides that it is not necessary to allege or prove special damage (i) if the words on which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form (including radio and television broadcasts, loc. cit. s. 20(2)), or (ii) if the words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business carried on by him at the time of the publication.

13. In SCOTLAND, a claim may be mounted under the guise of defamation (see above Note IV42 under VI.–2:203 (Infringement of dignity, liberty and privacy)), verbal injury or indeed negligent misstatement of the *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 variety. Verbal injury (sometimes referred to as malicious falsehood, see *Trapp v. Mackie* 1977 SLT 194, *Trapp v. Mackie* 1979 SLT 126) is seen as an alternative to defamation (contrary to the views of *Walker*, Delict[2], 730-732, who sees the notion of verbal injury as the umbrella term for the whole class of injury), with certain commentators seeing verbal injury as being restricted to the aspect of the wrong which is concerned with *solatium* for insult only (see, e.g., *Smith*, Short Commentary, 726-727). Verbal injury as an independent claim was first recognised in *Paterson v. Welch* (1893) 20 R 744, in which Lord President *Robertson*

concluded that the attribution to the pursuer of certain unpopular statements, though not slanderous could amount to an action in damages if it could be shown that: (i) the statement made by the defender was false; (ii) it was made with a design to injure; and (iii) it did in fact injure. Thus, the distinction with defamation is in the lack of the defamatory or slanderous nature of the statements. If the words are slanderous, then malice and falsity are presumed, whereas if the words are not *per se* slanderous, then malice and falsity are not presumed but will have to be proved (*North of Scotland Banking Co. v. Duncan* (1857) 19 D 881; see Lord *Deas'* dissenting judgment). At common law, in cases of malicious falsehood or other verbal injuries some damage had always to be averred and proved (*Norrie*, Defamation and Related Actions in Scots Law, 35). However, this situation has been changed by Defamation Act 1952, s. 3 (as applied to Scotland by s. 14), which provides that in actions for verbal injury it is not necessary to aver and prove special damage if the words founded on are calculated to cause pecuniary damage to the pursuer. As with defamation, it suffices that the statement be communicated to its subject alone (where *solatium* may be granted for affront or insult suffered), not only where it is published to third parties (where economic losses occasioned to the pursuer may also be recovered). Broader than the rule contained in VI.–2:204, which is restricted to communications concerning the person himself, and not his products or services (Comment C), slander of title, property or business is committed when a person maliciously communicates to a third party some falsehood about the pursuer's property (see *Hamilton v. Arbuthnot* (1750) Mor 13923, *Bruce v. J. M. Smith* (1898) 1 F 327 and *Argyllshire Weavers v. A Macaulay (Tweeds) Ltd. (No. 3)* 1965 SLT 21) or title to property (*Philip v. Morton* (1816) Hume 865) or his business (*Parlane v. Templeton* (1896) 4 SLT 153; *Lamond v. Daily Record (Glasgow) Ltd.* 1923 SLT 512) in a manner intended to cause and with the result of causing loss (invariably economic) to the pursuer (*Norrie* loc. cit. 44). Under an action known as "third party slander", the law even extends relief to instances where another person is the subject of the communication (see Lord *Deas'* judgment in *North of Scotland Banking Company v. Duncan* loc. cit. 887, where, *inter alia*, the example is given of an injury to credit being suffered by the pursuer on the basis of a statement being "spread abroad" that his factor or agent has defrauded him and absconded with his funds). If an attack on another can reasonably be read as an attack on the pursuer, he may sue in defamation (*Bradbury v. Outram & Co.* (1903) 11 SLT 71), and in verbal injury if it can be shown that by attacking another person the defender is intending to cause loss to the pursuer and actually did so (*Cooper*, Defamation and Verbal Injury[2], 1). However, there is no case in the Scottish law reports in which such an action has been successfully pursued, and some dicta seem to strike out actionability on this basis (*Norrie* loc. cit. 58). Any person, natural or legal, who is capable of suffering the loss complained of has title to sue for defamation or verbal injury, and will have an interest to do so if the loss is actually suffered; although, for instance, it is clear that *solatium* for hurt feelings may not be claimed by a body corporate, for such an entity has no feelings that the law recognises as capable of being hurt (*Norrie* loc. cit. 63). If neither the hurdles of defamation nor verbal injury can be surmounted, for instance where the defence of qualified privilege may be validly invoked, which in turn requires malice to be proven (and it is lacking), then the claim of negligent misstatement is open to the pursuer (see *Spring v. Guardian Assurance plc.* [1995] 2 AC 296, where liability for economic loss was imposed for a negligently inaccurate reference given by the defendant [the claimant's ex-employer] to a third party; the majority of the House of Lords adopted the two-stage test [of proximity and policy] laid down by Lord *Wilberforce* in *Anns v. Merton London Borough Council* [1978] AC 728).

II. Distinction between assertion of fact and value judgment

14. The distinction between an assertion of fact and a value judgment is relied upon in most legal systems and is also enforced for the most part according to the same criteria. In FRANCE it plays a role primarily because it is acknowledged that any person who circulates "critical" information is under an *obligation de prudence* concerning the content, to ensure that the disseminated facts correspond to reality. The dissemination of in principle correct information only founds a *faute* in exceptional cases. The main examples of where this occurs stem from the law against unfair competition. It may even be that the impartation to a competitor's customers of information that is true constitutes a *concurrence déloyale*, due to the concomitant circumstances under which it is carried out (Cass.civ. 12 October 1966, Bull.civ. 1966, III, no. 393 p. 345).

15. Under the case law of the SPANISH Constitutional Court (TC 104/1986 of 17 July 1986, BOE no. 193 of 13 August 1986; TC 160/2003 of 15 September 2003, BOE no. 242 of 9 Oktober 2003) and the Supreme Court (e.g. TS 11 December 2003, RAJ 2003 (5) no. 8653 p. 16209) the subject matter of freedom of expression includes thoughts, ideas and opinions, i.e. value judgments of every kind. The subject matter of freedom of the press is the dissemination of relevant facts. Great importance is attached to the distinction between thoughts, ideas and opinions on the one hand and the dissemination of facts on the other. Different from facts, the accuracy of an opinion or value judgment may not be proven; however, the two streams frequently intermingle (TC 160/2003 of 15 September 2003 loc. cit.; critical *Balaguer Callejón*, Los derechos fundamentales al honor, 111). In such cases, it is helpful to consider each concept's focal point of emphasis. Freedom of expression is only limited by the concept of an affront, whereas constraints are placed on freedom of press through the criterion of truthfulness (TC 240/1992 of 21 December 1992, BOE no. 17 of 20 January 1993; TS 14 November 2001, RAJ 2001 (5) no. 9303 p. 14707). The civil courts also employ these criteria where the interests of the person affected and the communicator have to be balanced (e.g. TS 8 March 2002, RAJ 2002 (1) no. 1882 p. 3129; TS 10 July 2003, RAJ 2003 (3) no. 4624 p. 8851).

16. In ITALY the point of departure is similar. This is because here the distinction between an assertion of fact and a value judgment predominantly plays a role in the assessment of infringements of personality rights and then within this framework, it in turn has a role in the balancing of the interests involved. Thus, the liability of the press hinges on overstepping the right to free reporting, the frontiers of which are staked out not only by the *pertinenza* (the social relevance of the piece of news) and the *continenza* (the moderateness in the sense of formally correct, inoffensive portrayal), but also by the *verità del fatto* (the truth of the asserted fact). Here the content of the information, as well as the existence of the information as such (where it is merely forwarded) are open to be proven true (Cass. 26 July 2002, no. 11060, Giust.civ.Mass. 2002, 1365). What is important is that the facts were carefully researched and fully portrayed (Cass. 13 February 2002, no. 2066, Giust.civ. 2002, I, 1880). Assertions of fact found in official documentation may be presumed to be true (Cass. 24 May 2002, no. 7628, Foro it. 2002, I, 2322). Tort law protection against defamation requires the circulation of an assertion of fact, i.e. communication to third parties (*Cappellari*, RCP 2000, 1061).

17. HUNGARIAN Law also draws a line of distinction between assertions of fact and value judgments, see above Note *I4*. The expression of an opinion, a value judgment or a critique only result in the establishing of an affront to honour or dignity in the sense of CC § 76, where by its nature, the expression is unreasonably injurious,

offensive or abasing. A negative value judgment in itself does not occasion the infringement of a personality right, even where an erroneous, unsuitable or inappropriate opinion lies behind it (BH 2001/468). Only false assertions of fact and not erroneous expressions of opinion found a right to a counterstatement (BH 1999/357; Gellért [-*Zoltán*], A Polgári Törvénykönyv Magyarázata[6], 294, 298; Petrik [-*Petrik*], Polgári jog I[2], 182/8-183, 186).

18. For GERMAN Law the differentiation between assertion of fact and value judgment is primarily important, because the conclusive rule contained in CC § 824 is only applicable to the dissemination of untrue facts, whereas recourse to CC § 823(1) may be had where the facts and value judgments that are circulated are true (BGH 24 January 2006, ZIP 2006, 317). Furthermore, the right to a counter statement, regulated by the federal states' press laws, only relates to assertions of fact. "Assertions of fact are characterised by the objective relationship between comment and reality, whereas the communicator's subjective connection with the content of his statement is the hallmark of value judgements and expressions of opinion. ... To be classified as an assertion of fact, it is accordingly essential whether the statement is open to examination for accuracy with the aid of verification. This excludes value judgments and expressions of opinion because they are denoted by the element of opinion and point of view and therefore are not susceptible to being proven true or untrue" (BGH 24 January 2006 loc. cit. 323).

19. Under AUSTRIAN Law value judgments are comments that are based on one's own thinking and convey the purely subjective opinion of the communicator; they consequently escape objective examination. Facts are, in contrast, circumstances, events or attributes with an identifiable content that is cognisable to third parties and capable of being examined for accuracy with the aid of definite or definable criteria by them. Comments are assertions of fact, where their accuracy may be verified, *viz*. where they can be adjudged to be true or false; otherwise value judgments are at issue (OGH 18 December 1991, SZ 64/182). The term assertion of fact is interpreted broadly; as long as their objective accuracy is examinable, evaluative appraisals equate to assertions of fact (Rummel [-*Reischauer*], ABGB II², § 1330 no. 8). Indeed examples of what has been qualified as a value judgment include the description of comic strips as inferior reading material that vulgarises youths and incites them to criminal activity (OGH 14 November 1962, SZ 35/113), the comment that a particular political party could never become a liberal party (OGH 30 November 1987, SZ 60/225) or the assertion "only a camel walks miles for a cigarette" (OGH 13 September 1988, SZ 61/193). Conversely, an assertion that an undertaking was afflicted with organisational deficiencies, the wrong product mix policy and high personal drawings, was deemed an assertion of fact (OGH 31 August 1977, SZ 50/111), the same is true for the allegation that someone functions as a "guerrilla in a tree" (OGH 29 October 1979, JBl 1980, 481: the assertion contained the allegation of unlawful felling of trees), the allegation that a political party was solely made up of bar-room politicians (OGH 30 November 1987, JBl 1988, 174), the assertion that a particular report in a newspaper was a "disgrace" (OGH 9 Jan 1990, SZ 63/2), the description of an academic painter as an "amateur painter" (OGH 19 March 1975, SZ 48/28) and the description of an innkeeper as a "whore" (OGH 13 November 1957, JBl 1958, 233).

20. In GREECE there is also the distinction between assertions of fact and value judgments, especially where the liability of the press for affronts to personality is concerned. It is often immediately added, however, that the distinction is problematic because in many cases factual statements and value judgments are intertwined (*Karakostas*, Prosopikotita kai tipos, 57). A specific action for a correction order may

be brought against untrue offensive assertions of a factual character. Negative value judgments only amount to an affront to personality if they go over and above the limits of reasonable criticism and offend the dignity of the person in question (*Karakostas* loc. cit. 58). The distinction between value judgments and assertions of fact plays a further role in the context of CC art. 920 (placing credit-worthiness in jeopardy), because value judgments are not "news" in the sense of this provision. However, CC art. 920 is also applied where untrue items of news are circulated, which are accompanied by value judgments (Georgiades and Stathopoulos [-*Vosinakis*], art. 920 no. 3).

21. In PORTUGAL the distinction between assertions of fact and value judgments is even accorded constitutional significance in the context of Const. art. 37 (for more detail, see *Carvalho Rebelo*, A responsabilidade civil pela televisão, 36; in case law they are not as sharply distinguished as in commentary, *cf.* e.g. CA Lisbon 20 June 1994, CJ XIX [1994-4] 117 and CA Coimbra 3 July 1993, CJ XVIII [1993-4] 71). It is also stated here that assertions of fact – as distinct from expressions of opinion – are open to verification (*Carvalho Rebelo* loc. cit. 38). The basic fact situation of placing credit-worthiness in jeopardy in CC art. 484 is likewise geared towards assertions of fact. The provision protects the "credit-worthiness or the good name and reputation of a natural or legal person". Expressions of opinion that rest upon false assertions of fact are covered (for more detail, see *Gouveia de Andrade*, Da ofensa do crédito, 70-72). The form in which the fact is disseminated is immaterial. This can also concern the publication of a picture in the context of a report about criminals (*cf.* STJ 27 June 1995, BolMinJus 448 [1995] 378; *Vasconcelos Abreu*, FS Magalhães Collaço II, 472), especially where the newspaper was aware, due to official sources, that the person affected was no longer suspected of the offence (STJ 24 February 1999, CJ (ST) VII [1999-1] 118).

22. DUTCH law distinguishes both in criminal and civil law between harm to reputation and honour through assertions of a factual character and affronts by disparaging value judgments. The line of demarcation is once again drawn with the aid of the criterion of proof; here one relies on the case law of the European Court of Human Rights (ECHR 8 July 1986, NedJur 1987 no. 901 p. 2992; ECHR 24 February 1997, NedJur 1998 no. 360 p. 2026). It depends in the respective case on whether a comment was founded upon a kernel of fact or not (*cf.* e.g. Gemeenschappelijk Hof Nederlandse Antillen en Aruba 4 May 1999, NedJur 1999 no. 545 p. 2971 on the one hand and CA Amsterdam 19 October 2000, www.rechtspraak.nl, LJN-no. AA 7654 on the other: the description of a doctor as a "kwakzalver" [quack(salver) or charlatan] contains an assertion of fact).

23. In SWEDEN the distinction between assertions of fact and value judgments can assume importance in the context of the Law on Damages chap. 2 § 2, where and to the extent that it is interpreted under the corresponding criminal norm referred to by the cited norm of liability. Among these criminal norms is especially CP chap. 5 § 1 (defamation). Under this provision a true statement can, however, in exceptional cases amount to defamation if it lacks a basis for making it. This can in turn lead to problems of co-ordination with Eur.Conv.Hum.Rights art. 10, *cf.* ECHR 19 January 2006, *Albert-Engelmann-Gesellschaft mbH v. Österreich*, ECHR 19 January 2006, App. no. 46389/99.

24. Again in SCOTLAND, the comment (statement of opinion) and assertion of fact distinction assumes relevance primarily in the field of defamation where after the defamatory nature of the statement has been affirmed, the defender wishes to raise the defence of fair comment; this defence would equally apply to verbal injury (though its

invocation would be unlikely) and perhaps appear dressed in different robes under negligent misstatement. The defence is not open to statements of fact, liability for which can only be escaped through the means of *veritatis* (truth), privilege or other miscellaneous defences. It has been noted that in flowing from the right of free speech, "the right to make comment is a right that attaches equally to everyone, and the publisher or broadcaster has no greater or higher right to do so than a private individual" (*Norrie*, Defamation and Related Actions in Scots Law, 135). The authoritative appraisal of the defence emanates from the case of *Archer v. Ritchie & Co.* (1891) 18 R 719, where Lord *McLaren* enunciated that "[t]he expression of an opinion as to a state of facts truly set forth is not actionable, even when that opinion is couched in vituperative or contentious language" (*Archer v. Ritchie & Co.* loc. cit. 727). In order to succeed with the defence of fair comment, the defender must establish (i) that the statement complained of is a comment on fact or facts; (ii) that the facts upon which the comment is made are truly stated; and (iii) that the facts concern some matter of public interest (*Norrie* loc. cit. 139). The judge has the task of deciding whether the statement can be understood as containing both fact and comment. If the conclusion is drawn by him that there is no doubt that only fact or only comment exists then the defence cannot be put to the jury (*London Artists v. Littler* [1969] 2 QB 375, 394 per *Edmund-Davies* LJ; *Waddell v. BBC* 1973 SLT 246, 249 per Sherriff Principal *Walker*; *Fairbairn v. Scottish National Party* 1979 SC 393, 397 per Lord *Ross*). If the statement is reasonably capable of being considered as comment, then it is for the jury to establish whether it is indeed comment or fact (*London Artists v. Littler* loc. cit. 199 per Lord *Denning* MR; *Telnikoff v. Matusevitch* [1992] 2 AC 343, 351 per Lord *Keith of Kinkel*). If the jury decides that the statement contains both fact and comment, then it must go on to consider whether the comment is fair and on a matter of public interest (*Norrie* loc. cit. 141). It is for the pursuer to prove lack of fairness (in the sense of being irrelevant to the facts being commented upon or not warranted by the facts) once the defender has established that the statement complained of is a comment on facts. The truth of the comment itself is inconsequential (*Wheatley v. Anderson & Miller* 1927 SC 133, 147 per Lord *Anderson*; *Broadway Approvals v. Odhams Press Ltd.* [1965] 1 WLR 805, 817 per *Sellers* LJ).

25. In IRELAND the distinction between assertions of fact and value judgments takes on importance under the heading of defamation in that here the defence of *fair comment on matters of public interest* is open to the defendant (the term "comment" is used, though as with the term "value judgment", an expression of opinion is meant). To establish this defence, the defendant must show: (i) that the comment was made on a matter of public interest; (ii) that what he said was comment as opposed to fact; and (iii) that the comment was fair in the sense of being honest (*McMahon and Binchy*, Torts[3], para. 34.201). The distinction is important here because facts must be proved to be true (or privileged) whereas comments need only be shown to be fair and honest. However, the comment must also be based on facts (proven to have been) truly stated (*McMahon and Binchy* loc. cit. para. 34.205). The facts if given or accessible must be shown to be true if they are to support the comment. If the facts on which the comment is based are not given and not available to the public, then the defence of fair comment is not available and the defendant must justify the comment or show that the occasion was privileged (*McMahon and Binchy* loc. cit. para. 34.207). There are no fixed rules in distinguishing between fact and comment (*McDonald*, Irish Law of Defamation[2], 212). The courts currently rely on a variety of circumstances, such as the language used and its arrangement, the person who makes the statement, and the way he conducts his case (see *Campbell v. Irish Press Ltd.* (1955) 90 ILTR 105 and *London*

Artists v. Littler [1969] 2 QB 375). The sole principle that has emerged is that "if what is intended to be comment appears in the guise of a fact, and there is nothing to show on what it is based, then it must be treated as a statement of fact … but [not as a comment]" (*Crawford v. Albu* [1917] 1 AD 102 at 105). In the realm of defamation, from the victim's point of view, the overall significance of the distinction between the two is muted by the fact that defamatory statements can either take the form of a factually untrue assertion or indeed of indirect derogatory language. The object of such derogatory language may well find himself or herself shunned but those who do the shunning may be unclear as to precisely what fact is being alleged by the stigmatised person (*McMahon and Binchy* loc. cit. para. 34.209). In commentary, one may see the traditional distinction being drawn between factual assertions and value judgments founded on the accepted idea that factual assertions may be validated and refuted and thus may be characterised as true or false, while expressions of value judgments are incapable of validation or refutation (*McMahon and Binchy* loc. cit. 34.210); however, there is no Irish case law on this point. Resorting to first principles, this recognised distinction begs the question of why the defence of comment *per se* (i.e. without the qualification of "on a matter of public importance") is not argued when, from a theoretical standpoint, aside from issues of freedom of expression (which would tend to reinforce it), this simple argument should relieve the defendant of liability since a sheer comment (as an expression of opinion) itself is not capable of being proven true or false, thus logically undermining the abovementioned presumption of falsity where defamation is concerned and thwarting a plaintiff's assertion of falsity in attempting to fulfil Lord *Davey's* first requirement of a claim in injurious falsehood (see above in Note I13). However, from the foregoing requirements of fair comment it would seem that the answer lies in the reality that for the most part a comment (or expression of opinion) only assumes legal relevance where it is based on facts proven true (a naked, unsupported statement is not considered a comment). This also muddies the waters when one tries to distil the *de facto* distinction between the two. Due to this mist which shrouds the distinction between facts and comments, defendant's lawyers have adopted at common law a form of pleading known as the "rolled-up plea", which in effect asserts both the truth of any factual assertions and the fairness of any comments. The new Defamation Bill 2006 proposes to introduce the defences of *honest opinion* (s. 18, replacing *fair comment*) and *fair and reasonable publication on a matter of public importance* (s. 24). Under s. 19, in distinguishing between a statement consisting of allegations of fact and a statement consisting of opinion, a court is to have due regard to: "(a) the extent to which the statement is capable of being proved; (b) the extent to which the statement was made in circumstances in which it was likely to have been reasonably understood as a statement of opinion rather than a statement consisting of an allegation of fact; and (c) the words used in the statement and the extent to which the statement was subject to a qualification or disclaimer or was accompanied by cautionary words".

III. Reporting Suspicions

26. Under French Law the question of whether it is permitted to report on a mere suspicion depends on the person who is the subject of the report and in what manner it is carried out. For instance, a *concurrence déloyale* can lie in pointedly informing a competitor's customers of an existing suspicion against this competitor. Incidentally, CC art. 9-1 is to be heeded, according to which "everyone has the right to respect of the presumption of innocence. Where, before any sentence, a person is publicly shown as being guilty of facts under inquiries or preliminary investigation, the court, even by interim order and without prejudice to compensation for injury suffered, may prescribe

any measures, such as the insertion of a rectification or the circulation of a communiqué, in order to put an end to the infringement of the presumption of innocence, at the expenses of the natural or juridical person liable for that infringement". The requisites of this provision shall only be fulfilled, however, where the publication contains the journalist's prejudice that the person in question is guilty (Cass.civ. 12 July 2001, Bull.civ. 2001, I, no. 222 p. 139). The publication of the name of an accused of full age is permitted in principle (Cass.civ. 20 June 2002, Bull.civ. 2002, II, no. 142 p. 113). Infringements of the presumption of innocence no longer depend on CC art. 1382; CC art. 9-1 is exclusively applicable (Cass.civ. 8 March 2001, Bull.civ. 2001, II, no. 46 p. 31). In BELGIAN case law it has been pointed out that a journalist is indeed free to disseminate information. This must however be accurate, thorough and objective. The journalist must act with the utmost caution in collecting and circulating his information; he may only rely on information that he has fairly examined, with regard to its ramifications. The presumption of innocence places particularly high demands on objectivity and impartiality (CFI Brussels 16 February 1999, AM 1999, 282).

27. The SPANISH Constitutional Court opines that the spreading of mere rumours is not shielded by the protection of freedom of press (TC 158/2003 of 15 September 2003, BOE no. 242 of 9 October 2003). The publication of a suspicion does not automatically result in an affront to honour. TS 7 June 2001, RAJ 2001 (3) no. 5535 p. 8476 rejected, for instance, the liability of a newspaper that had truthfully reported on a letter in which the claimant was accused by a third party of having committed a criminal offence. TS 31 May 2001, RAJ 2001 (3) no. 5529 p. 8465 clarified that neither the lodging of a complaint to the police nor the report thereof, amount to an affront to honour *per se*. It rather depends on the circumstances of each individual case. For example, people in the public eye have to put up with more with reference to their position than private persons under comparable circumstances (TC 297/2000 of 11 December, BOE no. 14 of 16 January 2001).

28. Under HUNGARIAN Law criminal proceedings may be truthfully reported upon, also that someone was justifiably suspected, charged or convicted at first instance. It is against the law, however, to later conceal the fact that the accused was acquitted or that the judgment does not yet have force of law (see further Petrik [-*Petrik*], Polgári jog I^2, 178/2, 182/6, 182/8, 186; Gellért [-*Zoltán*], A Polgári Törvénykönyv Magyarázata, 300-301). CC § 80(3) states additionally, that the picture and a voice recording of a person who was prosecuted for a severe crime may be used freely on the basis of cogent public interest reasons or a particularly appreciable private interest upon the authorisation of the authorities.

29. GERMAN CC § 824 protects the commercial esteem of persons and enterprises, so-called "commercial honour", from adverse effects that are brought about by the assertion or circulation of untrue facts about them (Palandt [-*Sprau*], BGB[65], § 824 no. 1). Expressing a suspicion can fall hereunder (BGH 20 June 1978, NJW 1978, 2151), where the unbiased recipient of the communication gets the impression that it is an - even hidden - assertion of fact (BGH 26 January 1951, NJW 1951, 352). The factual prerequisites of CC § 824 BGB are met where the train of thought of a report does not arrive at any other destination than that of wrongdoing (BGH 12 May 1987, NJW 1987, 2225; see also BGH 8 July 1980, BGHZ 78, 9, 14 and BGH 20 May 1986, NJW 1987, 1398, 1399). However, when inferring such hidden assertions particular restraint is advised, in order to take account of freedom of opinion. It is to be accordingly decided, whether the author himself draws his own conclusions or leaves that solely to the reader (BGH 8 July 1980, loc. cit. 15). Liability for infringements of the general right of personality (CC § 823(1)) remains unaffected; conversely, liability for

encroaching on the right to private enterprise takes a back seat as subsidiary to CC § 824 (Erman [-*Schiemann*], BGB II[11], § 824 no. 1). Cases of reporting on the suspicion of a criminal offence remain under the protection of personality rights. This requires a minimum amount of verificatory facts that maintain the truthful substance of the information and thereby afford it "public value" (CA Dresden 27 November 2003, NJW 2004, 1181, 1182; BGH 7 December 1999, BGHZ 143, 199, 203; BGH 26 November 1996, NJW 1997, 1148, 1149). The demands on the cautiousness of the media are higher, the more severely and permanently the estimation of the person in question is curtailed. The portrayal may not contain any prejudgment and must take into account the facts and arguments presented in defence of the accused. The decisive factor is that a pressing need for information in the general public justifies the publication (BGH 7 December 1999 loc. cit.; Palandt [-*Sprau*], BGB[65], § 823 no. 103). Naming the accused is only admissible in cases of severe criminality or criminal offences that particularly stir the public (BGH 7 December 1999 loc. cit. 207; *Sprau* loc. cit.).

30. AUSTRIAN Law on the Media (BGBl 1981/314, of 12 June 1981) § 7b(1) provides a claim to reparation of non-pecuniary damage, where a person who has been suspected of a criminal offence but not yet convicted with full force of law, is portrayed by the media as having been convicted or found guilty or as the perpetrator of this criminal offence and not merely described as a suspect. The amount of liability is limited to € 14,535. Permitted will be, *inter alia*, a truthful report on a judgment of a criminal court of first instance, as long as it is expressed that the judgment does not yet have force of law (Law on the Media § 7b(2)).

31. GREEK commentary points out that in reporting on persons who are suspected of having committed a criminal offence, a balance must be drawn between the public interest in the information and the interest of the suspect in not appearing in the media. The rule of never publishing the name or picture of a suspect before he has been arrested has even been mooted. The protection of personality and the presumption of innocence would even counter the inference that someone who has been arrested automatically becomes a person of celebrity, meaning that every report about him must come off reservedly and may only be carried out for informational purposes. As soon as the case goes to trial, the name and image of the accused may be published, at least for severe crimes, because here the public interest in the information prevails (for more detail on this whole issue, see *Paparigopoulou-Skorrini*, NoB 25 [1977] 278).

32. Under PORTUGUESE CP art. 180 it is criminally punishable to insult another by disseminating false assertions of fact or false suspicions. A violation of this rule also leads to civil liability. The same holds true for the spreading of suspicions with the aim of discrediting a competitor (Industrial Property Code art. 317(b)). Journalists are subject to the general duty to examine the truthful substance of the information they disseminate in a reasonable fashion. They are not allowed to invent news, spread mere rumours or to blaspheme others in their writings (*Carvalho Rebelo*, A responsabilidade civil pela televisão, 39). In this context the Portuguese courts also ascribe great importance to the protection of rights of personality (*Vasconcelos Abreu*, FS Magalhães Collaço II, 472; see e.g. CA Lisbon 18 May 1988, CJ XIII [1988-3] 180; CA Lisbon 14 May 1998, CJ XXIII [1998-3] 101; STJ 14 February 2002). For instance, a television station is not permitted to claim without sufficient evidence that an international company had installed wire-tapping devices in a law enforcement agency in order to be able to spy out on-going investigations there (STJ 17 October 2000, CJ (ST) VIII [2000-3] 78). Where in a press conference, a football manager repeats his previously expressed, but unsubstantiated suspicion that a colleague was the anonymous author of a threat to sabotage the clubs' upcoming league game, he

also commits a severe affront to personality justifying damages (STJ 27 June 1995, BolMinJus 448 [1995] 378). It is a defence to prove either the truth of the assertion or at least having been convinced of the truth and therefore disseminating it *bona fide* (CP art. 180(2); STJ 8 April 1999).

33. In DUTCH case law it is underscored that a suspicion may only be published if it is founded on facts (HR 27 January 1984, NedJur 1984 no. 802 p. 2859). Any person who spreads information but does not want to divulge its source because, e.g. he is subject to an occupational duty of maintaining confidentiality, bears the risk of not being able to show probable cause for the accuracy of his accusations by other means (President CFI Groningen 26 June 1996, KG 1996 no. 238; Onrechtmatige Daad IV [-*Schuijt*] Chapter VII, note 39, pp. 501-502).

34. In SCOTLAND, any repetition of a defamatory communication is actionable against a person, other than the original defamer, responsible for repeating the defamation, publishing it, or otherwise putting it in circulation (*Hayford v. Forrester-Paton* 1927 SC 740). However, the publisher or broadcaster will usually be less culpable than the original framer of the defamatory idea and might indeed be entirely innocent (*Morrison v. Ritchie & Co.* (1902) 4 F 645). The defence of innocent dissemination (see below, under Note *IV44*) is normally regarded as limited to situations in which the distributor cannot be aware of the defamatory content of the material being distributed. It is no defence for a newspaper or broadcaster to say that a story it publishes is merely a rumour or that someone else alleged it, for "the existence of a slanderous report, or its prevalent currency, is no justification for repeating it. Each repetition is a new injury to the party slandered" (*Marshall v. Renwick* (1835) 13 S 1127, 1129 per Lord President *Hope*). "The injury to the pursuer is exactly the same, whether the writer himself affirms the truth of the story, or whether he says that some lawyer or other person has affirmed it" (*Pope v. Outram* 1909 SC 230, 235 per Lord *McLaren*; *Fairbairn v. Scottish National Party* 1979 SC 393, 397 per Lord *Ross*). For a newspaper or magazine to report that a certain rumour is current while stating that it is untrue is usually considered not to protect the defender if the rumour is defamatory (*Norrie*, Defamation and Related Actions in Scots Law, 30). Though such a disclaimer does not negative the defamatory nature of the communication, it may serve to mitigate any damages awarded (*Macculloch v. Litt* (1851) 13 D 960; *Morrison v. Ritchie & Co.* loc. cit. 652 per Lord *Moncrieff*). While the general rule is that a person who repeats or republishes a defamatory statement is as liable as the original utterer, there are some circumstances in which newspaper reports of parliamentary or judicial proceedings will be protected by qualified privilege (which may be defeated by the pursuer with proof of malicious intent to injure). In *Richardson v. Wilson* (1879) 7 R 237, 241 Lord President *Inglis* stated that "[t]he publication by newspapers of what takes place in Court at the hearing of any case is undoubtedly lawful; and if it be reported in a fair and faithful manner the publisher is not responsible though the report contains statements or details of evidence affecting the character of either of the parties or other persons". In the Outer House decision of *Cunningham v. The Scotsman Publications Ltd.* 1987 SC 107, 116, Lord *Clyde* affirmed the recognised proposition that "[t]he Scottish cases disclose the general principle that a fair and accurate report of what takes place in court may be protected by qualified privilege". Comment on the report is not privileged (*Drew v. Mackenzie & Co.* (1862) 24 D 649), though the independent defence of fair comment might be available (see above, Note *II25*). The report is to be read as a whole, and if a headline gives a misleading impression then the report as a whole might not be held to be fair and accurate (*Clive, Watt and McKain*, Scots Law for Journalists[5], 186, *Carter-Ruck*, Libel and Slander[4], 141).

35. In IRISH scholarly legal writing, reference has been made to the general policy of defamation law of rejecting the views of the suspicious and unreasonable (*McDonald*, Irish Law of Defamation[2], 248 f). Again in the context of defamation, under the heading of the defence of justification, if the defendant makes the statement that "X is helping the police with their enquiries" in a criminal investigation and the context would also support the innuendo that X is under suspicion, then the defendant must, to succeed in the defence of justification be prepared not only to show that the police interviewed X, but they suspected him also (*McMahon and Binchy*, Torts[3], para. 34.131). To prelude a defamatory statement with the clause "It is rumoured that…" or "It is suspected that…" (or some similar phrase) will not protect the defendant who can only prove that such a rumour or suspicion existed; the law will also oblige him to prove the content of the rumour before it allows him a defence (*McMahon and Binchy* loc. cit. para. 34.133). In the area of defamation dealing with instances in which slander will be actionable *per se* (see Note IV41 under VI.–2:203 (Infringement of dignity, liberty and privacy)) and specifically with the case of slanders imputing a criminal offence punishable by death or imprisonment, the Law Reform Commission in its Consultation Paper points out that "the imputation must be that the plaintiff actually committed the offence, and not merely that he is under suspicion of having done so" (Consultation Paper on the Civil Law of Defamation, 1991, http://www.lawreform.ie/publications/data/volume8/lrc_61.html, para. 42), though from the foregoing it is logical to conclude that the latter will found a claim in the lesser degree of slander where special damages can be proven (or indeed in libel). Statements that a person had in the past been convicted of an offence and served a term of imprisonment were held actionable in themselves (*Gainsford v. Tuke* (1620) Cro Jac 536, 79 ER 460) or where the person had been pardoned, or whose prosecution was time barred (*McDonald* loc. cit. 84 f). This subject is also relevant in relation to the defence of qualified privilege where a person may in certain circumstances be absolved of liability for making a defamatory statement in self defence. It has also been noted in commentary that such a statement should not be based only on rumours, or fear of a suspicion of wrongdoing that might arise because a person is a member of a group, one or all of whom is suspected of wrongdoing (*McDonald* loc. cit. 146). Under common law, the defence of qualified privilege (which may be countered by proof of malice) is available for fair and accurate reports of judicial proceedings, howsoever published or whether or not published contemporaneously with the proceedings. However, according to the Law Reform Commission: "the courts have consistently refused to recognise an interest or duty on the part of the press to report matters of public interest to the public sufficient to constitute an occasion of privilege. There is therefore no media qualified privilege as such" (loc. cit., para. 111). Certain reports are privileged under Defamation Act 1961 s. 24. The Second Schedule sets out a lengthy list of matters the reports of which enjoy qualified privilege. This list represents the range of subjects of which the media are entitled to make fair and accurate reports, which does not include anything relating to suspicions or accusations made in the period before judicial proceedings are initiated, pointing to the conclusion that anything reported during this time will not enjoy privilege and may only escape liability by means of the abovementioned defence of justification where the suspicions can be substantiated.

IV. Liability of Internet Providers

36. Liability of so-called *access providers* (who enable the user to access the internet) and above all, of so-called *host providers* (who offer internet users storage space, e.g. for setting up a so-called homepage) is, as is stated above (Comment B) the subject matter

of Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178 of 17 July 2000, pp. 1-16). FRANCE implemented the Directive with *Loi n° 575 du 21/6/2004 pour la confiance dans l'économie numérique*, BELGIUM with *Loi du 11 mars 2003 sur certains aspects juridiques des services de la société de l'information*, thereby likewise replacing the previously applicable system of liability in CC arts. 1382 and 1383 (on this, *De Groote*, in: Privaatrecht in de rëele en virtuele wereld, 657, 677). The SPANISH implementing law is Law 34/2002 of 11 July 2002 on Services of the Information Society and E-commerce (*Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico*). In general, no liability accrues where the host providers were not aware of the unlawfulness of the information, in the absence of culpable hesitation to do what was necessary to remove the information or to make access to it impossible (arts. 16 and 17 loc. cit.).

37. In ITALY the directive was implemented by *Legge Delega no. 39/2002*, for which further executing stipulations have been enacted. The system of liability broadly follows the general tort law ethos of CC art. 2043 (for more detail, see *Cassano and Cimino*, Giur.it. 2004, 671-675). HUNGARIAN Law no. CVIII from 2001 on particular Issues of E-commerce Services and Services in the Information Society predominantly adopts the Directive word for word, but supplements it with regulations on material which lies outside the scope of the latter (e.g. on the possibilities of the how facilitators of search engines may be discharged of liability). For GERMAN Law it was decided in BGH 23 September 2003, MDR 2004, 92, that liability of the host provider for the infringement of the general right of personality (CC § 823(1)) only comes into focus where the requirements under the Law on the Use of Teleservices (*TDG*) in its version from 22 July 1997 (BGBl I 1870) § 5(2) are also fulfilled.

38. AUSTRIA regulates the accountability of access providers and host-service providers in its E-Commerce Law (*ECG*, BGBl I 2001/152, in force since 1 January 2002) §§ 13-19. However, this law brought no new and independent system of liability, relying rather on the general rules of the CC and supplementing them through individual caps on liability in relation to the storage of external texts and contents (§ 16 loc. cit., *cf.* OGH 6 July 2004, RIS-Justiz RS0118525). Prohibitory injunction (no-fault liability) actions arising out of CC § 1330(2) remain unaffected (OGH 19 February 2004, RdW 2004, 536).

39. PORTUGAL likewise distinguishes between various internet providers. The so-called content providers are clearly liable for the unlawfulness of the content of material they place on the internet (*Vasconcelos Casimiro*, A responsabilidade civil pelo conteúdo da informação, 53); CP art. 183(1), with effect from 24 November 2005 even regulates the details of the criminal prosecutability of such behaviour). Causing particular debate is the question of whether someone who has a link to pages with unlawful content is thereby liable for the text to which he has referred (as argued by *Vasconcelos Casimiro* loc. cit. 55), or whether such liability is only affirmed where the referrer identifies himself with the referred text (according to *Menezes Leitão*, in: Direito da sociedade da informação III, 147, 163; similarly in *Vasconcelos Casimiro* loc. cit. 58). A content provider can become contractually liable to the access provider where he feeds illicit content onto the web (*Vasconcelos Casimiro* loc. cit. 62). The access provider is however not liable to third parties, unless he knew of the illegal content and did not block it according to art. 12(3) of the Directive (*Vasconcelos Casimiro* loc. cit. 24; *Menezes Leitão* loc. cit. 159). The TV services providers are jointly liable with those responsible for the broadcast of previously recorded television shows (Television Act art. 70(2).

40. GREECE implemented Directive 2000/31/EC by Presidential Ordinance 131/2003. The rule of liability in this Presidential Ordinance (arts. 11 *et seq*.) corresponds nearly verbatim to the provisions of the Directive (arts. 12 *et seq*.). A person who merely provides access to external information, without having had an influence on its content, is placed in more ameliorating circumstances than content providers; they are subject to the general tort law (*Alexandridou*, To dikaio tou ilektronikou emporiou, 101).

41. Likewise DUTCH Law refrained from introducing strict liability and left the liability of internet providers up to the open-ended system of its law on civil offences (Onrechtmatige Daad I [-*Jansen*], art. 162, note 7 p. 73). The question of whether host providers are liable owing to an infringement of copyright law when the host's customers violate the rights of third parties in using the storage space it has provided, was answered in the negative by CA The Hague 4 September 2003, NedJur 2003 no. 664 p. 5102. CA Amsterdam 7 November 2002, NedJur 2003 no. 54 p. 374 required a provider to block access to a site, on which information was to be found on how best to sabotage the rail system of Deutsche Bahn (Germany's rail operator). The provision of compensation in kind would also have been in the picture. Comparable case law also exists on the deletion of domain names (CFI Arnhem 3 December 2002, KG 2003, 20).

42. SWEDISH Law on Liability for electronic Message Boards (*lag* [1998:112] *om ansvar för elektroniska anslagstavlor*) relates to all services in the electronic transfer of communications with the exception of the communications of authorities, emails and publications through the mass media falling under the protection of freedom of the press (loc. cit. §§ 1 and 2). Liability is concentrated on those who provide the service (loc. cit. §§ 4 and 5); it complies with criminal accountability (loc. cit. §§ 6 and 7 in conjunction with Law on Damages chap. 2 § 2). The system of liability of Directive 2000/31/EC was implemented in Sweden by the Law on E-commerce and other Services of the Information Society (*lag* [2002:562] *om elektronisk handel och andra informationssamhällets tjänster* §§ 16-18), in FINLAND by the Law on the Provision of Services in the Information Society (*lag om tillhandahållande av informationssamhällets tjänster* of 5 June 2002, no. 458, §§ 13-15) and in DENMARK by the Law on Services in the Information Society with particular Provision for E-commerce Transactions (*lov om tjenester i informationssamfundet, herunder visse aspekter af elektronisk handel* of 22 April 2002, no. 227, §§ 14-16) in conjunction with the general culpa rule (Karnov [-*Latrup-Pedersen*], E-handelsloven, nos. 70 and 83).

43. In SCOTLAND (as with the rest of the UK) the Electronic Commerce (EC Directive) Regulations 2002 were brought into force on 21 August 2002 through S.I. 2002 No. 2013. Ss. 17-19 follow the wording of arts. 12-14 of Directive 2000/31/EC virtually word for word, relieving internet service providers of liability for "damages or for any other pecuniary remedy" in relation to either being a "mere conduit" for information, "caching" it and "hosting" it respectively, where the internet service provider has a purely passive role in the relaying or storing of information and would be otherwise liable. Under the common law in Scotland before the aforementioned regulations, Lord *Anderson* held that innocence was a defence pleadable by "mere messengers", or the mechanical instrument by which the slander was published (*Gibson v. National Citizens' Council* (1921) 1 SLT 241). Defenders who are not responsible for the form or content of the material in which the defamation is contained will be *prima facie* liable for defamation but may use this defence as an escape hatch from liability if they can show that they did not know that the material contained a libel and that this ignorance was not due to any negligence on their part. A library is not expected to

check every single book that it possesses and cannot therefore be held to be aware of the contents of them all (*Weldon v. "The Times" Book Co. Ltd.* (1911) 28 TLR 143). However, it is no excuse for a distributor to say that the mass and volume of its business precludes it from checking the material it distributes (*Sun Life Assurance Co. of Canada v. W. H. Smith & Son Ltd.* (1933) 150 LT 211). The net result of *Morrison v. Ritchie & Co.* (1902) 4 F 645 does not read well for initial publishers or broadcasters of information provided by third parties. In this case, the defence of innocent publication did not apply since the newspaper (as the initial publisher) was held responsible for whatever appeared in its own columns and was therefore expected to take care to ensure that it printed nothing defamatory.

44. In IRELAND the European Communities (Directive 2000/31/EC) Regulations 2003 were brought into force on 24 February 2003 by S.I. No. 68 of 2003. "The Regulations create an exemption from liability for intermediary service providers (persons whose business consists in the connection of persons to the Internet) where certain activities are performed and in certain circumstances" (Explanatory Note to S.I. No. 68 of 2003, available at http://www.irishstatutebook.ie/ZZSI68Y2003.html). Ss. 16-18 of S.I. no. 68 of 2003 follow a near-identical format and wording to arts. 12-14 of the Directive, under which purely passive and anonymous intermediary service providers that transmit, cache and host information are relieved of liability for misinformation. At common law, persons who are in the final stage of the distribution process of a libel such as newspaper vendors, booksellers and others may avail themselves of an exception to the rule that each time another person becomes aware of a defamatory statement there is actionable publication (innocent dissemination). Provided that, as persons carrying on their business properly, they neither knew nor ought to have known that the paper or book contained a libel, they are not deemed to be publishers at all (*Fitzgibbon v. Eason & Son Ltd.* (1910) 45 ILTR 91; *Ross v. Eason & Son Ltd.* [1911] 2 IR 459; *O'Brien v. Eason & Son* (1913) 47 ILTR 266; *McDermott v. Eason & Son* (1913) 48 ILTR 1; *Vizetelly v. Mudie's Select Library Ltd.* [1900] 2 QB 170; *Bottomley v. F. W. Woolworth & Co. Ltd* (1932) 48 TLR 521). The onus is on the defendant to establish he or she is innocent and comes within the exception (*Ross v. Eason & Son Ltd.* loc. cit.; *McDermott v. Eason & Son* loc. cit.).

46. See also the Notes under VI.–2:208 (Loss upon unlawful impairment of business)

Illustration 1 is taken from from CA Oporto 20 October 1988, CJ XIII (1988-4) 201; **illustration 2** from OGH 18 May 1995, SZ 68/97; **illustration 3** from BGH 2 July 1963, NJW 1963, 1871**; illustration 4** from TS 7 June 2001, RAJ 2001 (3) no. 5535 p. 8476.

VI.–2:205: Loss upon breach of confidence

Loss caused to a person as a result of the communication of information which, either from its nature or the circumstances in which it was obtained, the person communicating the information knows or could reasonably be expected to know is confidential to the person suffering the loss is legally relevant damage.

COMMENTS

A. General

Source of inspiration. The provision takes its inspiration from the rules on liability for breach of confidence originating in the Common Law. Loss suffered as a result of a breach of confidence amounts to damage recognised in the law on non-contractual liability. Liability, however, only arises if all the other requirements of VI.–1:101 (Basic rule) (i.e. causation and accountability) are satisfied as well.

Relationship to other rules. In a few situations, the damage described in this Article may coincide with injuries or losses that already amount to legally relevant damage under other provisions. According to the general rules, the claimant then has multiple causes of action, but of course can only have the total damage satisfied once. Since VI.–2:204 (Loss upon communication of incorrect information about another) relates to false information while the present Article, in contrast, deals with correct (but confidential) information, each rule's scope of application is clearly separate from the other. It is readily conceivable, however, that a breach of confidence may cause e.g. damage to mental health in the sense of VI.–2:201 (Personal injury and consequential loss) – for instance, where a doctor breaches doctor/patient confidentiality and consequently an already psychologically fragile patient becomes severely depressed. Moreover, cases of absolute confidentiality may fall to be addressed under the right to privacy whose infringement constitutes a breach of the right to respect for personal dignity (VI.–2:203 (Infringement of personal dignity, liberty and privacy)). Nonetheless, despite such overlaps, it cannot be assumed that VI.–2:205 is superfluous. In the first place, VI.–2:203 is confined to protecting a natural person's right to personal dignity, whereas VI.–2:205 also provides protection for the confidences of legal persons. And secondly, the confidential information may not be of a 'private', that is to say, personal nature: an individual's sensitive commercial information would fall for protection primarily under this Article, rather than as an aspect of privacy.

II.–3:302 (Breach of confidentiality). II.–3:302 (Breach of confidentiality) governs a special case of so-called culpa in contrahendo. The Article imposes on a party who has obtained confidential information from a contractual partner in the course of the contractual negotiations a duty neither to disclose that information nor to use it for the party's own ends. Provision is made for compensation for damage suffered and restitution of the benefit received where this duty is breached. Thus VI.–2:205 and II.–3:302 (Breach of confidentiality) in part cover like situations. Their relationship to one another is determined by the general rules for cases of conflicting regulations set out in VI.–1:103 (Scope of application) sub-paragraphs (c) and (d). Due to VI.–6:101 (Aim and forms of reparation) paragraph (4) it is conceivable that liability under II.–3:302 extends further than liability under general non-contractual liability law. In this case, according to VI.–1:103(d), contractual liability for the committed culpa in contrahendo prevails. Conversely, VI.–2:205

is the basis for a claim where the parties neither concluded a contract nor even engaged in any contractual negotiations.

Illustration 1
A informs B about A's idea for a new carpet grip with express reference to the confidentiality of this information. Without the conscious intention of plagiarism, B further develops this idea and exploits it for commercial ends. B is liable to A in damages even where B and A were not in contractual negotiations.

Relation to Chapter 3, Section 1. The subject matter of VI.–2:205 are all those circumstances establishing an obligation to respect the confidentiality of information. This extends beyond cases of actual knowledge of confidentiality to cases in which there is an absence of knowledge only because the injuring person has been careless in appreciating the circumstances. All questions relating to the mode of breach of duty, however, are the subject matter of Chapter 3, Section 1. The breach of duty consists in the communication of the confidential information. To be capable of establishing liability the communication must either be intentional or negligent within the meanings of VI.–3:101 (Intention) or VI.–3:102 (Negligence).

B. Communication of confidential information

Communication. The provision, like VI.–2:204 (Loss upon communication of incorrect information about another) which invokes the same concept of "communication" of information, presupposes a communication of the information to a third party. What types of act constitute such a "communication" must be established on a case by case basis in harmony with the development of that concept within the parameters of the preceding Article. It is not a ground of defence that the information is true, but furtherance of a public interest (see VI.–5:203 (Protection of public interest)) may play a role here too as a ground of defence.

Information. The expression "information" in the context of VI.–2:205 has the same meaning as in the context of VI.–2:204. It embraces assertions of fact, not mere value judgements. The subject-matter of VI.–2:205, however, consists of true assertions of fact (since only true assertions of fact can be confidential), and, in contrast to VI.–2:204, it need not necessarily relate to information about the injured person. It may concern information about third parties or other circumstances e.g. a commercial transaction or a business concept (as in illustration 1).

Third parties. Liability arising on the basis of VI.–2:205 only affects those who communicate the confidential information. Third parties who exploit for their own purposes a breach of confidence by those to whom the information was entrusted do not come within this provision. Conceivably, however, such persons may be liable under the rules of unjustified enrichment in respect of the benefits derived from making use of this protected 'asset' of the victim.

Absolute and relative confidentiality. The provision embraces not merely cases in which the recipient of the information has obtained the information when sworn to silence, but also cases in which the information is relayed when the recipient knew or ought to have known that the information was confidential and not for further communication. The injuring person need not positively have known that confidential information was involved; it is enough that the confidentiality of the information ought to have been recognised and that the information

is communicated merely negligently. Thus the confidentiality protected may be either 'relative' or 'absolute' in character. The former is concerned with information which is made confidential only by the manner in which it is transmitted (typically, where it is made explicit that the information is to be treated as a matter of confidence). This certainly addresses cases in which information is directly imparted by the person affected in explicit terms of secrecy, but it also extends to cases where the information is received directly, provided the recipient ought to know from the manner of communication that the information is confidential to someone other than the intermediary (e.g. because the intermediary has repeated the explicit requirement of secrecy) or has 'eavesdropped' on the original communication and in that way learned that the recipient must treat the information as confidential. The latter is concerned with cases where the information has in some other manner become available to the injuring person and it is the very obvious sensitive nature of the information itself, rather than the manner in which it is come by, which signals or ought to signal the confidential character of the information. Classic examples would be the discovery of another's medical records or private journal.

Illustration 2
An employee of a health authority passes on information to a reporter, which, if published, would be sufficient to identify two doctors as suffering from AIDS. The doctors can claim an order (under VI.–1:102 (Prevention)) to restrain publication.

C. Legal consequences

Reparation and prevention. As long as the other prerequisites of VI.–1:101 (Basic rule) are present, in particular causation and intention (or negligence), the usual legal consequences arise. Thus reparation may be demanded for both non-economic and economic losses (VI.–2:101 (Meaning of legally relevant damage) paragraph (1)). In cases involving VI.–2:205, preventative legal protection (VI.–1:102 (Prevention) and Chapter 6 Section 3 below) as well as the rule in VI.–6:101 (Aim and forms of reparation) paragraph (4) assume particular significance. The latter provision allows damages to be assessed according to the amount of profit realised by the injuring person .

NOTES

1. Damage resulting from the unauthorised disclosure of confidential information is dealt with by the various European tort law systems in varying systematic contexts. However, the outcomes respectively attained only marginally diverge from each other. In FRANCE and BELGIUM certain emphasis is placed upon the law of breach of professional secrecy, which is accorded criminal liability under French NCP art. 226-13 and Belgian CP art. 458 and therefore also civil liability under CC arts. 1382 and 1383. Criminality of conduct is not, however, a prerequisite for civil liability. Non-pecuniary damage caused by the breach of a professional duty of secrecy or discretion is as recoverable as pecuniary damage caused by same (CFI Brussels 25 February 2000, TBH 2001, 860, note *Buyle and Delierneux*: negligent breach of banking confidentiality; since the recipient of the information had not made use of it, there was solely non-pecuniary damage). A breach of confidence may in some situations further constitute a violation of the right to respect for one's private or family life (French CC art. 9; Belgian Const. art. 22) (JClCiv [-*Ravanas*], art. 9, fasc. 10 no. 30; *de Theux*, Ann. Louv. 2002, 287, 296). In French doctrine it is additionally alluded to, that where in the course of contractual negotiations confidential information is disclosed to a

contracting party by the other side, he has a duty of discretion, and indeed even where confidentiality is not expressly agreed upon (*le Tourneau*, Droit de la responsabilité et des contrats (2004/2005) no. 3710-1).

2. In SPAIN there is extensive overlap between the criminal norms on the spying out and divulgement of secrets (CP arts. 197 et seq.; CP art. 200 extends its protective purpose to legal persons also) and the matters that ground liability under Law 1/1982 of 5 May on the Civil Protection of the Right to one's Honour, Sphere of Intimacy and Control over the Reproduction of one's Image, art. 7 (*Yzquierdo Tolsada*, Sistema de responsabilidad civil, 49). Within the scope of application of Law 1/1982, the civil law consequences of a criminal offence are subject to the rules of this law alone and not those of CP (loc. cit. art. 1(2)). Express enumeration is provided for, inter alia, the unauthorised publication of letters, memoirs or other private personal writings (loc. cit. art. 7(3)). The relevant criminal and civil law norms are interpreted as flowing from the fundamental rights protection of secrecy of communication (TS 23 October 2000, RAJ 2000 (5) no. 8791 p. 13632), this being a strand of the fundamental right to the protection of one's sphere of privacy (TS 14 May 2001, RAJ 2001 (2) no. 2719 p. 4370). Against this backdrop, TS 7 December 1995, RAJ 1995 (5) no. 9268 p. 12329 granted e.g. the adoptive children of a prominent couple non-pecuniary compensation because a newspaper had published information on the children's biological descent; in applying Law 1/1982 art. 9 the estimated profit of the newspaper was included in the amount of damages. In the context of this and similar decisions, the protection offered by the law on liability for exposing "family secrets" is ultimately at issue, i.e. the confidentiality of facts that relate to the family and are known only by its members (TC 231/1988 of 2 December 1988, BOE no. 307 of 23 December 1988; TC 197/1991 of 17 October 1991, BOE no. 274 of 15 November 1991; TC 134/1999 of 15 July 1999, BOE no. 197 of 18 August 1999). Breach of professional secrecy is likewise relevant for both the civil (loc. cit. art. 7(4)) and criminal (CP art. 199) law. The term professional secrecy is interpreted broadly (*Yzquierdo Tolsada*, in: Reglero Campos (ed.), Tratado de responsabilidad civil, 1113). Even a nanny who worked at a prominent couple's house is bound to secrecy by the aforementioned provisions (TC 115/2000 of 10 May 2000, BOE no. 136 of 7 June 2000). Furthermore, liability is founded where after finding out in the course of her work at a public hospital that one of her patients had had two abortions, a doctor tells her (the doctor's) mother about it, who in turn spills the beans to a relation of the patient, who shares the same home town (TS 4 April 2001, RAJ 2001 (2) no. 2016 p. 3292). Further special rules of liability relate to the protection of confidential personal data (Gesetz 15/1999, of 13 December, über Datenschutz [*Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal*] arts. 10 and 19) and the protection against premature publication of secret information in patent registrations (CP art. 277).

3. In ITALY the first question in the firing line is whether a specific duty of secrecy has been breached. Typical cases relate to the unauthorised disclosure of professional secrets (CP art. 622) and the breach of duties of loyalty arising out of an employment relationship (CC art. 2105; see Cass.sez.lav. 9 May 1996, no. 4328, Giust.civ.Mass. 1996, 696). A breach of confidence leaves in its wake fallout for primarily criminal, employment and administrative law, and founds civil liability where it occasions *danno ingiusto*, i.e. harm to a subjective legal position (Cass.sez.pen. 13 January 1999, no. 2183, Riv.giur.pol. 1999, 480). In any event, the only decisive point for private law is of course whether the prerequisites of CC art. 2043 are fulfilled and it is readily conceivable that after taking all the circumstances of the individual case into consideration and affirming the existence of *danno ingiusto*, liability will be also

declared where the breach of a specific duty of secrecy is absent. To date, case law on this point seems to be non-existent.

4. In the central and southern European countries, as in all civil law countries, an independent head of liability for "breach of confidence" is lacking. However, functional equivalents are to be found in every system. Under HUNGARIAN CC § 81(1) a violation of another's right of personality is committed by anyone who e.g. interferes with secrecy of postal correspondence, comes into the possession of private or business secrets and publishes them without authorisation or misuses them in another way. In 2003, a more precise definition of the term "trade secret" was adopted into law through CC § 81(2)-(4). In contrast, there is no corresponding legal definition of the term "private secret". It is said that private secrets are facts that are known only by few people and to the non-disclosure of which the person affected has a justified claim because his personality would be injured if the fact were to reach the public (Petrik [-*Petrik*], Polgári jog I[2], 190/3). A certain amount of effort is therefore required of the affected party in shielding the secret. Private secrets may be simultaneously "professional secrets"; particularly prominent examples are offered by doctor/patient and lawyer/client confidentiality (Gellert [-*Zoltán*], A Polgári Törvénykönyv Magyarázata[6], 313; cf. in case law also BH 1999/156 [along with doctors, other hospital workers are under a duty of discretion in relation to patients' medical information and indeed even after their treatment is concluded] and BH 1995/87 [a hospital violates a patient's personality rights where it refuses to issue him the documents relating to his treatment and operation]). CC § 80 brings additional claims against the misuse of a person's image or utterances into play, CC §§ 86 and 87 guarantee the protection of intellectual creations, among which e.g. particular business knowledge ("know how") is also counted. A greater number of criminal law norms supplement the private law bases; where any person acts contrary to these criminal provisions and damage is occasioned, this person is as a rule also civilly liable. Among those enumerated are for example CP § 177(1) (breach of private secrets); CP § 177/A(1) (protection of personal data); CP § 178(1) (breach of postal secrecy) and CP § 178/A(1) (spying out of private secrets through trespass to property or the use of technological devices).

5. In GERMANY the general right of personality (CC § 823(1)) also safeguards against the disclosure of personal secrets worthy of protection (MünchKomm [-*Rixecker*], BGB[4], appendix to § 12, no. 107). A distinction is drawn between one's sphere of individuality, privacy and intimacy (for more detail, see Palandt [-*Sprau*], BGB[65], § 823, no. 87; BVerfG 15 December 1999, NJW 2000, 1021; BVerfG 7 May 1997, NJW 1997, 2669). A violation of the general right of personality was seen e.g. in secretly taken photographs (BGH 10 May 1957, BGHZ 24, 200), in a detailed press report on a person's sex life (BGH 24 November 1987, NJW 1988, 1984), as well as in the television broadcast of a naked photograph of a person who had only consented to its publication in a biology book (BGH 22 January 1985, NJW 1985, 1617). Other forms of betraying confidentiality are covered by criminal laws (in particular CP §§ 201 et seq.: breach of oral confidentiality and highly personal living space through the taking of photographs; breach of postal secrecy; spying out of data, as well as of corporate or trade secrets; breach of doctors', lawyers', administrations' etc. duty of confidentiality) that, for their part, are protective laws in the sense of CC § 823(2). Additionally, the provisions of the Federal Data Protection Law is counted as a protective law (Staudinger [-*Hager*], BGB[13], § 823, no. C 172). Corporate secrets, under further specific requisites, are singled out, even advocated, as belonging among the "other" absolute rights of CC § 823(1) (BGH 25 January 1955, BGHZ 16, 172, 175; Soergel [-*Zeuner*], BGB[12], § 823, no. 145); however, that may not be the

prevailing opinion (see further Erman [-*Schiemann*], BGB II[11], § 823, no. 40; MünchKomm [-*Wagner*], BGB[4], § 823, no. 158; BGH 18 March 1955, BGHZ 17, 41, 51; BGH 9 March 1989, BGHZ 107, 117, 122).

6. AUSTRIAN Law also does not work with an independent head of liability for breach of confidence. It systematically covers the corresponding potential for social conflict by other means. Of particular note are the rules on affronts to honour (CC § 1330(1)) and on the violation of the right of personality. An infringement of the right of personality takes place e.g. where the right to respect for one's sphere of secrecy is disregarded. It protects privacy of the person and his or her utterances that are not intended for the public (Rummel [-*Aicher*], ABGB I³, § 16 no. 24, with further references to the concretion of this principle in specific laws). The right to observance of one's sphere of privacy embraces the protection against the penetration of one's sphere of secrecy, as well as the protection against the publication of legally obtained secrets (OGH 24 October 1978, SZ 51/146). A breach of professional secrecy will also typically fulfil the requisites for the violation of a protective law.

7. In GREECE the right to respect for private life is interpreted as a facet of the general right of personality (*Karakostas*, Prosopikotita kai tipos, 62). The latter is violated where details from a person's private life are published, even where true statements are concerned (*Karakostas* loc. cit. 64 and 76). The "right to privacy" is infringed, for instance, where hitherto secret bodily imperfections are dragged into the public domain. The secret zone of one's private life is very generally protected by CC art. 57 (*Kapsalis*, Persönlichkeitsrecht und Persönlichkeitsschutz nach griechischem Privatrecht unter Berücksichtigung des deutschen Rechts [The Right of Personality and its Protection under Greek Private Law, with due Regard for German Law], 106). Infringements of postal (CP art. 370) and professional secrecy (CP art. 371; e.g. doctors) are criminally punishable; in such cases civil liability flows from CC art. 914 (*Alexiades*, Eisagogi sto Iatriko Dikaio, 28).

8. In PORTUGAL the basis for tort law protection of secrecy is CC art. 70(2) (Injury to personality). It is stated that all the thoughts, opinions, feelings, events, actions, omissions or characters that an individual recognizably hides, thus manifesting their will not to reveal them, are interests of personality worthy of legal protection where the person affected has a legal and socially acceptable interest in maintaining the respective secret (*Capelo de Sousa*, O direito geral de personalidade, 335). A civil wrong is committed under CC arts. 75(1) and 77 particularly where someone publishes the private letters or confidential diary entries and memories of another for their own gain; the situation is of course different where the affected party personally makes this and other personal data accessible to the public (*Carvalho Rebelo*, A responsabilidade civil pela televisão, 80). CC art. 79(2) provides for specific limitations in the case of persons of contemporary celebrity. However, that does not give the press a carte blanche. For instance, it is not permitted to publish details on the private home of a famous football player (STJ 14 June 2005). Special rules have been developed for data protection, especially for information on the religious affiliation, membership in political parties, state of health and sex life of the affected party (1999 and 2001/2003 reports of the activities of the *Comissão Nacional de Protecção de Dados*, http://www.cnpd.pt/bin/relatorios/anos/relat99.htm).

9. DUTCH Law addresses the problematics of "breach of confidence" first and foremost in the context of privacy protection (cf. Const. art. 10), among which the right to personally determine whether personal data may be collected, saved and viewed is counted. This in turn encompasses the right to personally decide on the relay of such information (*Verheij*, Vergoeding van immateriële schade, 192; Onrechtmatige Daad

IV [-*Schuijt*] chap. VII, note 101 pp. 1387-1410). Whether a breach of confidentiality will constitute a civil wrong is decided either according to whether a protective law (particularly a provision of the criminal code on professional duties of secrecy) is infringed, or if such a criminal offence is lacking, whether the breach of confidentiality contravenes "codes of practice for commercial dealings based on unwritten law" (CC art. 6:162(2)(third alternative)). The aspects to be taken into consideration within the framework of this assessment are manifold (severity of infringement, type and degree of intimacy of the information, duration of the adverse effects, meaning and recency of the information's content, the affected party's personal living circumstances, the reason for and circumstances of publication, the character of publication medium and the expense that was necessary in order to obtain possession of another's personal data: Onrechtmatige Daad IV [-*Schuijt*] loc. cit. note 104, pp. 1412-1414). Liability for breach of professional secrecy is subject to the respective contract regime. The internal rules set down by the profession itself and even disciplinary decisions of the respective professional bodies can be considered in the assessment of liability, but are not of decisive significance for its result (Onrechtmatige Daad IV [-*Huijgen*] chap. VI.2, note 18 pp. 24-25; note 31 p. 47 and notes 118- 119 pp. 240-241). The ESTONIAN LOA contains no provision similar to VI.–2:205. However, the disclosure of confidential information may give rise to an obligation to compensate for damage if the unlawfulness can be established on some basis, e.g. the confidentiality duty of providers of health care services (LOA § 768) and the confidentiality duty of parties to precontractual negotiations (LOA § 14(4)).

10. In SWEDEN, on top of Law on Damages chap. 2 § 2, criminal law (e.g. CP chap. 4 §§ 8-9c [secrecy of communication and data] and chap. 20 § 3 [professional secrecy]) often also provides the framework for civil liability, provided the result of the infringement committed falls within the scope of protection of the respective norm (*Bengtsson and Strömbäck*, Skadeståndslagen[2], 86). A breach of confidentiality with a subsequent injury to personality entails additional liability for compensation for insult (Law on Damages chap. 2 § 3; *Bengtsson and Strömbäck* loc. cit. 62); it may also concern damage to health (*Conradi*, Brottsskadelagen, 27: the "nervous disorder" of a woman after an employee of a hospital spoke freely about her abortion). Several specialised laws come to the table with their own criminal norms and occasionally even their own systems of liability, e.g. Law on the Protection of Corporate Secrets (*lag* [1990:409] *om skydd för företagshemligheter*) §§ 5-10; Law on Banking and Financial Efficacy (*lag* [2004:297] *om bank- och finansieringsrörelse*) chap. 1 § 10(1) and (3) (on its significance for civil liability, see further Prop 2002/03:139 pp. 472, 477) as well as Law on Electronic Communication (*lag* [2003:389] *om elektronisk kommunikation*) chap. 7 § 15(1). In chap. 38, FINNISH CP (*strafflag* of 19 December 1889 no. 39) lists an array of criminal offences from the area of breach of secrecy, the commission of which can simultaneously trigger civil liability (Law on Damages chap. 5 § 1). Further basic requisites for criminal offences in this context are to be found in CP chap. 24 § 8 (dissemination of information that infringes on privacy), chap. 24 § 5 (unauthorised eavesdropping) and chap. 24 § 6 (unauthorised observation). Additionally, the Law on Improprietous Commercial Conduct also applies to the protection of corporate secrets (*lag om otillbörligt förfarande i näringsverksamhet* of 22 December 1978 no. 1061) §§ 4 and 10, cf. Supreme Court 15 March 1984, HD 1984, II, 43. The duty of discretion of credit institutions is to be found in Law on Credit Institutions (*kreditinstitutslag* of 30 December 1993 no. 1607) § 94. DANISH CP (*Bekendtgørelse af straffeloven* of 27 September 2005) § 152 (Duty of Discretion in the Civil Service), § 263, § 264 (Postal, Telephone and further Secrets) and § 264c(2) (Trade Secrets) become civilly operative in the context of the general culpa

rule. On the protection of corporate secrets, see also Law on Merchandising (*lov om markedsføring* of 21 December 2005 no. 1389) §§ 19 and 117 (Banking Secrecy). Other injuries to personality are subject to general tort law, cf. e.g. Eastern CA 23 October 1990, UfR 1991, 194 (a doctor publishes photos from an operation in which the applicant was having liposuction done; the applicant's face remained recognisable in the picture; liability under Law on Damages § 26).

11. In IRELAND, the exact basis for the protection afforded against misuse of confidential information is not easy to identify, with elements of contract, equity, property law, tort and constitutional law evident in the leading cases on the subject (*McMahon and Binchy*, Torts[3], para 37.21). It is sometimes stated that the courts are "asked to enforce what is essentially a moral obligation" (*House of Spring Gardens Ltd. v. Point Blank Ltd.* [1984] IR 611, 663 (SC) [*Costello* J. in the High Court, *O'Higgins* C.J. in the Supreme Court]; *Oblique Financial Services Ltd. v. The Promise Production Co. Ltd.* [1994] 1 ILRM 74, 77 [*Keane* J.]). In the case of *Seager v. Copydex Ltd. (No. 2)* [1969] 1 WLR 809, Lord *Denning* MR and *Winn* LJ supported the argument that what is hereunder concerned is akin to the tort of conversion of a proprietary interest. However, this approach has been criticised in commentary wherein the proprietary nature of most intimate confidences is questioned (*McMahon and Binchy* loc. cit. para. 37.22; *Lavery*, Commercial Secrets, chap. 2). In *Coco v. AN Clark (Engineers) Ltd.* [1969] FSR 415; [1969] RPC 41, *Megarry* J. stated the three elements of breach of confidence: "First, the information itself…. must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it" (loc. cit. 419-420). In order to fulfil the first requirement, the information "must not be something which is public property and public knowledge" (Lord *Greene* MR in *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* [1978] 65 RPC 203, 215). The obligation under the second requirement can arise as a term of contract, express or implied, or "by imposition of the law" (*Gurry*, Breach of Confidence, para. 2-24); this includes relationships such as those between employer and employee (*Lavery* loc. cit. chap. 7), doctor and patient (*Tomkin and Hanafin*, Irish Medical Law, chap. 4; *Mason and McCall Smith*, Law and Medical Ethics[7], chap. 8), accountants (*Parry-Jones v. Law Society* [1969] 1 Ch 1), lawyers (*Gurry* loc. cit. chap. 18), bankers (*Donnelly*, The Law of Banks and Credit Institutions, 147-166; *Tournier v. National Provincial & Union Bank of England* [1924] 1 KB 461) and their clients, intimate personal relationships (*Argyll v. Argyll* [1967] Ch 302; *Stephens v. Avery* [1988] Ch 449) and other situations where confidences have been relied upon for a particular limited purpose. A general test for such obligation was suggested by *Megarry* J. in *Coco v. AN Clark (Engineers) Ltd.* [1969] FSR 415; [1969] RPC 41, 48, namely that "if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised upon reasonable grounds the information was being given to them in confidence, then this should suffice to impose upon him the equitable obligation of confidence". Remedies for breach of confidence range from injunctions, Anton Piller - or "search and seize" - orders (*House of Spring Gardens Ltd. v. Point Blank Ltd.* [1984] IR 611; *Toulson and Phipps*, Confidentiality, para. 10-15), orders for delivery up or destruction (*Franklin v. Giddins* [1978] Qd R 72; *Robb v. Green* [1895] 2 QB 315; *Peter Pan Manufacturing Corp. v. Corsets Silhouette Ltd.* [1964] 1 WLR 96), an account for profits (*House of Spring Gardens Ltd. v. Point Blank Ltd.* loc. cit.; *Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd.* loc. cit.; *A-G v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 AC 109), restitutionary (*Lavery* loc. cit. 253-254; *Toulson and Phipps*

loc. cit. paras 10.06-10.08) or declaratory (*Malone v. Metropolitan Police Commissioner (No. 2)* [1979] Ch 344) relief and - most controversially - damages (*Lavery* loc. cit. 244-252; *Toulson and Phipps* loc. cit. paras. 2.06-2.11, 10.09-10.13). It must also be noted that Ireland has not seen the tendency apparent in the UK to expand the equitable breach of confidence action and use it as a panacea for claims involving privacy, nor have any concrete indications been evident from case law (Report of the Working Group on Privacy, 31 March 2006, para. 2.44, *http://www.justice.ie/en/JELR/WkgGrpPrivacy.pdf/Files/WkgGrpPrivacy.pdf*). It is stated in scholarly writing (*Cassidy*, (2004) 98 (5) LSG 14) that this lack of expansion is due to the recognition of a general right of privacy in 1987 (*Kennedy & Arnold v. Ireland* [1987] 1 IR 587) and the statement in the High Court in 1992, that the constitutional right to privacy was co-extensive with the common law right to confidentiality (*Desmond & Dedeir v. Glackin (Minister for Industry and Commerce, Ireland) & A-G (No. 2)* [1993] 3 IR 67: confidential information obtained from the Central Bank).

12. SCOTLAND also recognises the wrong of disclosing information in breach of confidence, of an implied undertaking or obligation not to do so (*Walker*, Delict[2], 709), with *Megarry* J.'s three requirements from *Coco v. AN Clark (Engineers) Ltd.* [1969] FSR 415; [1969] RPC 41 (see above, Note 12) also applicable in the aftermath of the case (though the requirement of the obligation of confidence was whittled away by cases such as *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 WLR 892; *Stephens v. Avery* [1988] Ch 449; *Barrymore v. News Group Newspapers Ltd.* [1997] FSR 600; *A-G v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 AC 109; *Shelley Films Ltd. v. Rex Features Ltd.* [1994] EMLR 134 and *Hellewell v. Chief Constable of Derbyshire* [1995] 1 WLR 804). The traditional action centres around the issue of whether the circumstances were such as to impose a duty on the defender to keep confidence and maintain secrecy about the information which had been disclosed to him. Here the absence of an express contractual prohibition on disclosing secrets is not fatal to a pursuer's claim (*Printers & Finishers Ltd. v. Holloway (No. 2)* [1965] 1 WLR 1), being an implied term for persons of "professional standing" (*Walker* loc. cit.). An obligation also exists where there was no contract of employment, e.g. where information would be divulged to a clergyman by a parishioner making confession or seeking advice (*Broad v. Pitt* (1828) 3 C & P 518, 172 ER 528). The duty of confidence in this sense also probably exists in any case where one person communicates information to another with the request that the latter do not publish it further, agreement to this becoming contractual if the second person does not demur to receiving the information (*Walker* loc. cit. 710). It seems that case law (*Douglas v. Hello! Ltd. (No. 1)* [2001] QB 967; *Venables and Thompson v. News Group Newspapers Ltd*. [2001] Fam 430; *Theakston v. Mirror Group Newspapers Ltd.* [2002] EWHC 137 (QB), [2002] EMLR 22; *A v. B plc.* [2002] EWCA Civ 337, [2003] QB 195; *Campbell v. Mirror Group Newspapers* [2002] EWHC 499 (QB), [2002] EMLR 30; rev'd [2003] QB 633 (CA); *Douglas v. Hello! Ltd. (No. 3)* [2003] EWHC 786 (Ch), 3 All ER 996 (*Lindsay* J.); *X, A Woman formerly known as Mary Bell v. O'Brien* [2003] EWHC (QB) 1101; [2003] EMLR 37) has recently cross-bred breach of confidence in the UK with the rights contained in ECHR arts. 8 and 10. This has resulted in an overarching cause of action, thus casting the net beyond merely cases of breach of confidence, reeling in breach of privacy wholesale, and thereby - through its protection of privacy - rendering any apparent (necessity for) recognition of a free-standing right to privacy virtually immaterial. The two main extensions of the law of breach of confidence have been summarised thus: "(1) the scope of the information recognised as confidential has broadened and the assessment of this includes the

impact of the form of the proposed publication, the test being whether the disclosure would be highly offensive to a reasonable person of ordinary sensibilities and would shock the conscience…; and (2) there may be an obligation of confidentiality even although the information was not really imparted in a relation of confidence" (*MacQueen*, (2004) 8 Edinburgh LRev 249). The second extension is particularly relevant to the amalgamation with breach of privacy and is a significant departure from the statement that "[t]he law of confidentiality proceeds on the basis of the existence between confider and confidant of an obligation of confidence" (*Bonnigton*, (1992) SLT 289, 290) existing before the information has been imparted. In its current form, the "basis" of breach of confidence is no longer to be found; this is since, in the cross-over cases mentioned above involving the serruptitious taking of photographs, the information is not willingly or voluntarily imparted in confidence, rather the information is seized by or comes into the possession of the defender, resulting in the situation that in fact no confidence or trust ever existed at all. This means that the obligation of confidence is imposed because of the very seruptitious "gathering" of private information and not (as was traditionally so) due to an obligation based on information confided by the pursuer and so carrying the essential ingredient of trust and confidence, with the defender's conscience binding him not to relay the information to a party external to this relationship of trust.

13. See further Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, art. 7.

Illustration 1 is taken from *Seager v. Copydex Ltd. (No. 1)* [1967] 1 WLR 923, and **illustration 2** from *X Health Authority v. Y* [1988] 2 All ER 648 (QBD).

VI.–2:206: Loss upon infringement of property or lawful possession

(1) Loss caused to a person as a result of an infringement of that person's property right or lawful possession of a movable or immovable thing is legally relevant damage.

(2) In this Article:

(a) loss includes being deprived of the use of property;

(b) infringement of a property right includes destruction of or physical damage to the subject-matter of the right (property damage), disposition of the right, interference with its use and other disturbance of the exercise of the right.

COMMENTS

A. General

The Article in overview. This Article takes as its subject-matter loss caused by an infringement of another's property right or lawful possession (paragraph (1)). Paragraph (2) explains what is meant by "loss" and "infringement" of property. The definition of "loss" in VI.–2:101 (Meaning of legally relevant damage) remains unaffected by this; VI.–2:206(2)(a) is concerned with extending, not restricting, that general definition.

Accountability. Under these rules, the infringement of a property right and infliction of legally relevant damage thereby occasioned do not automatically result in liability. As with all the Articles in Chapter 2, VI.–2:206 pertains only to the question of what constitutes legally relevant damage. Whether someone is then liable for it, is only decided in the Chapters that follow: the injuring person must have caused the damage deliberately or negligently or be otherwise responsible for its causation and have no defences available.

Loss as legally relevant damage. VI.–2:206(1) makes it clear that an infringement of a property right is not damage *per se* (injury as such). Rather the existence of a legally relevant damage depends on the existence of an economic or a non-economic loss.

Illustration 1

N has cultivated land belonging to L without L's permission or other authority. The pleasant decorative effect as well as the investment of plants has added considerably to the value of the land. Since N has made use of L's land and modified its appearance, N has infringed L's property rights in respect of the land and L may have a right to prevent further acts of gardening, infringing his property rights, under VI.–1:102 (Prevention), but N's interference has not necessarily caused L any legally relevant damage. Indeed, so far from causing L an economic loss, N's activity has conferred on L a valuable benefit if L is not correspondingly liable to N (under the law of unjustified enrichments) for the full value of the improvement to the land. Unless L can show that the use of the land has interfered with his (L's) plans (e.g. because L will now incur a cost in having to clear the land of trees and shrubs to make way for a building) or that he has suffered some other loss as a result of the infringement of his property rights, L will have suffered no legally relevant damage.

Illustration 2

A ship damages a disused and worthless quay. Damage to property, in the sense of a violation of ownership rights, it may be, but legally relevant damage it is not. The latter would require a financial loss on the part of the quay owner.

Relationship to other regimes. Consideration must also be given to the fact that in relation to title to things some special statutory regime may apply and will then take precedence over VI.–2:206 (see VI.–1:103(c) (Scope of application)) as far as its purposes so require. That will be of significance in particular in relation to infringements of property rights within a so-called owner-possessor relationship (see below Comment B).

Remedies. VI.–2:206 must be read in conjunction with the provisions on remedies contained in Chapter 6. Particularly of Note in this context are VI.–6:101 (Aim and forms of reparation) paragraph (3), VI.–6:104 (Multiple injured parties) and VI.–6:201 (Injured person's right of election). VI.–6:101(3) concerns cases in which the costs for the repair of a thing exceed their value. VI.–6:104 in its main thrust addresses the question who among several holders of property rights in relation to a given thing can demand reimbursement of expenditure on repairs. Finally, it falls within the framework of VI.–6:201 (Injured person's right of election) to consider whether it is one or the other holder of a property right or only both of them together who is or are authorised to decide whether the compensation provided is to be invested in reinstating the property to its former condition or whether it should be applied for other purposes.

B. Property rights and questions arising from property law

Terminological difficulties. Hitherto, the private law systems of the European Union neither boast a unified concept of "ownership" nor a uniform notion of "lawful possession". Thus, it may be that in the course of further deliberations on a European private law it will prove necessary to adjust the formulation of VI.–2:206 in line with more recent developments. On the other hand, it appeared to be untenable not to expressly rank losses resulting from an infringement of ownership or lawful possession under the "Particular Instances of Legally Relevant Damage" solely because of apparent terminological and conceptual difficulties that are still tied to both those notions. The law of property's inconsistent terminology does not call into question the general core content of the values underlying non-contractual liability law.

Property rights. VI.–2:206 expressly relates only to property rights in movable or immovable things. However, this provision is not limited to any specific type of property right. Generally any proprietary right will suffice. It is not necessary that the claimant affected be the owner of all interest in the property. "Infringement of property" within the meaning of the provision may also be suffered by one who is admittedly not the holder of all the rights of an owner in the property, but who holds some of the property rights which make up ownership (e.g. a mere pledge). What rights are in point of fact "property rights" can only be answered, at the current stage of European legal development, by dipping into the respective applicable national law. An example is provided by the question of whether one who has acquired subject to the seller's reservation of title is to be regarded as a holder of a property right (i.e. of a so-called *Anwartschaftsrecht*). The answers to this question may turn out differently, without thereby putting in doubt the principle that VI.–2:206 seeks to express.

Nuisance. In order to ascertain whether there is damage under VI.–2:206, which turns on the infringement of a property right, it will be necessary to look to property law to ascertain the boundaries of any right: the act of the injuring person must be an incursion on another's rights of property. As has already been noted, this interrelation between the law in this Book and the law of property (on which European rules remain to be developed) will be of particular

significance in relation to nuisance. While the cause of action arises in this Book by virtue of damage suffered within the meaning of VI.–2:206, to establish that the injuring person's conduct infringed the injured person's rights as landowner will depend on showing that the injuring person exceeded the bounds of enjoyment determined in property law for the use of the land. What levels of noise from neighbours, for example, must be tolerated by a landowner, and what can be objected to, will be part and parcel of the demarcation of the limits of property rights as between neighbours. Such intangible boundaries are as much a part of property law as the physical divide between different land holdings. A similar point may be made in relation to rights of property in movables. Those rights may be limited by social *mores* and accepted conventions, so that in given circumstances, quite aside from questions of whether the injury is so trivial as to preclude the grant of redress, it may be that as a matter of property law there is no infringement of a property right and therefore no damage under this Article. Questions of this sort must also be resolved on the basis of national property law.

The owner-possessor relationship. However, this does not exhaust the property law dimension. In particular, it is important to recognise that VI.–2:206 may be ousted by special rules in the various jurisdictions (until now often collated in a self-contained part of a civil code) governing the so-called owner-possessor relationship. There are two difficulties here arising from the fact that many (but by no means all) jurisdictions allow the claim of acquisition in good faith from transferors to succeed where the acquirer obtains title being 'merely' (as opposed to grossly) negligent as to the seller's title. Thus, for example, a purchaser of a car from a person who presents a log book with a falsified entry may acquire good title from the unauthorised transferor, even though the falsification could have been ascertained if the log book had been scrutinised with more care. The first implication of this proposition of property law is that the transferee can acquire property in circumstances of bare negligence. That means that if, without more, the non-contractual liability law provisions on infringement of property rights were applicable, it could be supposed that the transferee causes damage to the owner negligently when acquiring ownership in such circumstances since the owner's title is destroyed by the (negligent) good faith acquisition. Such a non-contractual liability law rule, however, would serve no purpose, of course, because while property law would assure ownership of the good faith acquirer, non-contractual liability law would impose an obligation to make reparation and therefore to transfer it back to the previous owner. Burdening the new owner with such an obligation would in large measure frustrate the aim of the property law rule. It must therefore be taken as implicit that such cases will not give rise to non-contractual liability. This is encapsulated by the rule in VI.–1:103 (Scope of application) sub-paragraph (c) which disapplies the provisions of this Book where they would contradict the purpose of other rules of private law.

Stolen goods. The second problem arising from the possibility of acquisition of property in good faith in the absence of *gross* negligence is the exception sometimes made which completely excludes the possibility of acquisition in good faith where the property is stolen or has otherwise gone astray. Without an adjustment to the non-contractual liability law provisions one would arrive on the basis of such property law at the contradictory notion that a person who by mere negligence failed to appreciate the transferor's lack of title, but neither knew nor should have known that the property had been taken from the owner, will be liable for destroying or damaging it, whereas such a person would become owner if the property has not been stolen, and would consequently not be liable for its subsequent destruction, this being the destruction of the person's own property. The different outcome for the two cases is determined solely by whether the property is stolen (about the existence of which state of affairs the acquirer was not grossly negligent). Given that the acquirer's state of mind is the

same in both cases, there is a necessity to treat the two cases alike from a non-contractual liability law perspective. This involves extending to damage of stolen property for non-contractual liability law purposes only the protection granted by property law to the 'merely' negligent good faith acquirer of non-stolen property. VI.–1:103(c) (Scope of application) in turn ensures that there is no resulting contradiction between non-contractual liability and property law.

Property rights in corporeal things. VI.–2:206 applies to immovable as well as movable property. Plots of land, houses and corporeal movable objects are "things" within the meaning of the Article. It does not, however, apply to incorporeal property. Intellectual property rights (copyright, patents, etc.) are subject to special legal regimes in all the Member States of the EU which are unaffected by these rules. The same is true for rights embodied in an instrument. The right "to" a bond is ownership in property within the meaning of VI.–2:206; the right "from" a bond is not.

Mere contractual or other relative rights excluded. Mere contractual or other relative rights are also excluded from the provision. That does not mean, though, that such rights are not capable of enjoying legal protection under the law on non-contractual liability. Rather it means only that the question whether one is faced with a legally relevant damage must be decided in the absence of a special regime (e.g. in VI.–2:211 (Loss upon inducement of breach of obligation)) according to VI.–2:101 (Meaning of legally relevant damage) paragraph (1)(c). Here again it can depend in particular on whether the injuring person acted intentionally or merely negligently. The practical result differs little from a concept whereby the presence of an infringement of a property right is assessed differentially based on whether the injuring person acted intentionally or negligently.

Illustration 3
A operates a hairdresser's salon in house which is damaged by T with a lorry. Of necessity the business must be closed for a period. Two of A's employee hairdressers sue on account of their loss of wages. They have neither suffered an infringement of any "property right" of theirs nor suffered an infringement of lawful possession in regard to the hairdresser's salon nor become the victim of an inducement of their employer to fail to perform obligations towards employees. Had T however acted to cause loss intentionally – for example, by an act of vandalism – then the employees too would have suffered a legally relevant damage, though not under this Article or VI.–2:211 (Loss upon inducement of breach of obligation), but instead on the basis of VI.–2:101 (Meaning of legally relevant damage).

Illustration 4
A construction company carrying out road works negligently cuts through a subsurface electricity cable. Legally relevant damage is suffered as a result by the electricity company, which is the owner of the cable, but not by a business at whose head office work is consequently temporarily interrupted. The negligent impact on its contractual relationship with the electricity company does not establish legally relevant damage. The situation is different where as a result of the power cut, property is damaged or destroyed, e.g. heated metal cools down or (in a private household) the contents of a freezer are spoiled.

C. Lawful possession

Possession. For the purposes of VI.–2:206 "property rights" do not include lawful possession of corporeal things. For that reason lawful possession is given separate mention in paragraph (1). Possession as such is a mere state of affairs, not a right and thus not a property right. If, however, possession is reinforced by a right to possession, then in accordance with paragraph (1) it likewise amounts to an interest protected by this rule.

Detention included. Mirroring the hitherto lack of a common European notion of ownership, there is to date no uniform European concept of lawful possession. In a range of legal systems the notion of possession only encompasses so-called "proprietary possession" (or, in relation to immovables, "owner occupation") and thus only cases in which someone possesses the thing "as his own". In these systems, therefore, even a lessee is not a possessor; but only a so-called detentor. In contrast, the category of detention is completely unknown in other legal systems. They use the term "possessor" also of a person who possesses "for another". Consequently in these legal systems the complete opposite prevails: – a lessee is seen as the prototype of a possessor. VI.–2:206 does not seek to take a stand on this difference of views in property law; as stated above, the provision must therefore be adjusted at a later point in time to take on board more recent developments, as the need arises. Here it is only necessary to clarify that the notion of possession deployed by VI.–2:206 is to be understood as including detention. This readily follows from the protective aim of the rule: a proprietary possessor (i.e. a "possessor" in the sense of systems that distinguish between possession and detention) is either entitled to claim as an owner or falls completely outside this rule because the possessor would be a thief and would not have lawful possession.

Lawful possession. VI.–2:206 is not concerned with possession as such, but rather the right to possession. A thief does not fall within the provision's scope of protection. The same goes for a possessor to whom the thing is unlawfully sub-let by its lessee; in any such case the sub-lessee has no right to possession as against the owner.

Several possessors. The legal protection which several possessors (or detentors) of the same thing are to enjoy in their relations to one another must be determined on the basis of the applicable national property law.

Property law protection of possession remains unaffected. It follows from VI.–1:103 (Scope of application) sub-paragraph (d) that VI.–2:206 does not affect remedies available on other legal grounds. Thus, to the extent that legal protection of possession is also provided for by property law and the injured person is equipped with a more favourable course of action under that regime, this will not be impinged upon by the parallel provisions of non-contractual liability law. The same is of course equally true for protection of ownership under property law, as the case may be.

Loss caused by infringement of lawful possession. Legally relevant damage within the meaning of VI.–2:206 is only loss resulting from the infringement of a right to possession of the thing. While that normally includes loss of use, it does not encompass loss resulting from harm to the thing's substance.

Illustration 5
If a business traveller's hired car is stolen, he has a claim against the thief to reparation of damage arising from having to hire another car. By contrast, however, the business traveller does not suffer legally relevant damage where someone damages the vehicle without adversely affecting its roadworthiness. It is the owner who is entitled to reparation on account of the property damage.

Illustration 6
A renovates B's apartment in an unauthorised fashion, despite the fact that B is not at all in agreement with this. B therefore restores the apartment to its previous state. The costs of restoration constitute recoverable damage.

D. Infringement

The concept. Paragraph (1) invokes a broad concept of infringement of another's property right. Another's property right is infringed where a person uses the property in a manner solely befitting the holder of the property right. The most important cases of infringement of a property right are enumerated in paragraph 2(b). The cases listed there are not, however, exhaustive ("includes").

Illustration 7
A accepts B's request to bring a picture bought by B in London back to Munich – the place of residence of both A and B – on A's return journey. A carelessly leaves the picture unattended at the airport and it is stolen. A has infringed B's property right (by omission), although A has neither damaged the picture, nor disposed of it, nor occasioned an interference with use or other disturbance of the exercise of B's right.

Defences. The concept of infringement operates independently of the existence of a defence. It is based on a "factual" concept to that extent. Someone who is attacked by another's dog and injures the dog in self-defence "infringes" the property rights of the dog owner, but is not liable to the dog owner (VI.–5:202(1) (Self-defence, benevolent intervention and necessity)). The same is true for an insurance fraudster who, with the assent of the owner, drives the latter's car in order to stage an accident: VI.–5:101 (Consent and acting at own risk) does not change the fact that this concerns property damage.

E. The most important modes of infringement of another's property right (paragraph (2)(b))

Damage to property. Typical infringements of property rights consist of the destruction or damaging of the subject-matter to which the property right relates. The wording of the text therefore employs for this purpose (and solely for this purpose) the expression "property damage", to which reference is made in later Articles. This relates in particular to VI.–3:202 (Accountability for damage caused by the unsafe state of an immovable) and VI.–3:206 (Accountability for damage caused by dangerous substances or emissions), from which it follows that the "strict liability" regulated there is not tailored to infringements of property rights of every kind, but only to infringements of property rights in the form of damage to property.

Ineffectual products. Property damage can also be the result of an ineffectual protective measure and in particular an inoperative product.

Illustration 8
A obtains for use on fruit plantations a fungicide which should prevent the natural fungal infestation of apples. It does not do what it says on the tin. The apples get worse and prove to be unmerchantable. This is loss resulting from property damage.

Self-contained damage in defective products and buildings. One case of property damage which is excluded from this Article, though not alluded to in the text, is where damage results to the entirety of a product or spreads to other parts of a product as the result of a defect within it. As regards strict liability, the matter is governed exhaustively by the EU directive on product liability to the effect that strict liability is excluded (see VI.–3:204(1) (Accountability for damage caused by defective products)). With regard to negligence-based liability the matter will reside exclusively within contract law. That follows from VI.–1:103 (Scope of application) sub-paragraph (c). The provisions of non-contractual liability law do not apply if they would contradict other rules of private law. That would be the case in respect of damage to the product itself because the application of VI.–2:206 would have the effect of displacing or making inroads on contract law rules on liability. Consequently, VI.–2:206 will only apply where the impairment to property caused by a defective product is damage to property other than the defective product itself.

Sale of land. Comparable problems can also arise in regard to the sale of land. They concern the same general problem of concurrence of actions in relation to the law of contract and the law on non-contractual liability and they must therefore be resolved likewise on the basis of VI.–1:103 (Scope of application) sub-paragraph (c).

Disposition of the right. An infringement of property rights can of course also occur where the thing itself remains undamaged. An important example of this type of case relates to the disposition of another's property. This is because a disposition of the property may amount to its destruction in economic terms if, as a result of a third party's acquisition of title in good faith, this brings about a loss of ownership. The position is quite similar where, as a result of the injuring person's disposition, a third person acquires a limited right in rem in respect of the owner's property.

Illustration 9
A acquires goods from B under reservation of title. B does not consent to their resale or consents only under certain conditions, such as A transferring to B his claims to payment from his sub-purchasers. A does not comply; his sub-purchasers acquire title in good faith. Besides a non-performance of a contractual obligation, there is also the causation of damage relevant to the law on non-contractual liability. B therefore (under certain circumstances) also has a non-contractual (but not a contractual) claim to damages directly against C, the managing director of A, a legal person.

Illustration 10
A hired an item from B and pawned it to X, to whom it is handed over. In view of her good faith assumption as to A's title, X has acquired a security right burdening the property which is also effective against B. A has caused an infringement of B's ownership.

Law of unjustified enrichment. Concurrent liability under the law of unjustified enrichment remains unaffected by non-contractual liability for damage under this Book: see VI.–1:103

(Scope of application) sub-paragraph (d). This is of particular significance where the disponer neither acts intentionally nor negligently disregards the owner's title.

Interference with use. An infringement of a property right is also made out when the owner's use of property is disturbed. This is obvious for immovable property (see Comment B above), but it also occurs frequently in cases of movables.

Illustration 11
Destroying the ordered system of an archive, warehouse, stamp collection or files in an office does not amount to property damage because the individual items remain undamaged and because, in any event under most legal systems, there is no property in the archive (etc.) as such. However, there is an infringement of a property right in the form of a detrimental interference with use.

However, transient interferences with use of the sort that permanently occur in daily life will not suffice. That follows from VI.–6:102 (De minimis rule).

Illustration 12
Where a person parks a vehicle in a city for a short time in such a way that another vehicle is hemmed in, no infringement of property is committed. The situation is different where a car is blocked for days on end or where a ship (which docked for unloading) cannot leave a canal harbour for over half a year due to the collapse of a negligently and inadequately secured retaining wall.

Deprivation of use: infringement and loss distinguished. Paragraph 2(b) states that interferences with use amount to an infringement of property rights; conversely, paragraph 2(a) takes up the loss of use *resulting from* an infringement of a property right. Both aspects are to be differentiated. Paragraph 2(a) requires an infringement of a property right, regardless of the kind of infringement. Property damage provides the typical example. Paragraph 2(b), in contrast, makes it clear that interference with use as such can constitute an infringement of the property right of another. See also Comment E below.

Other disturbance of the exercise of the right. Other disturbances of the exercise of property rights, which do not take the form of property damage, the loss of a right or an interference with use but nonetheless amount to infringements of property rights, are equally numerous. Frequent examples include thefts, misappropriation and trespass.

Illustration 13
A, the owner of historical castle grounds, forbids visitors from taking photographs in the interior, as she wants to make a small additional income from the sale of postcards and the like. It is to be used for the upkeep of the site. A commercial photographer does not comply with the ban and subsequently offers his own postcards for sale to tourists. The photography of the rooms constitutes an infringement of property rights.

F. Loss

General. VI.–2:206(1) makes it clear that losses which result from an infringement of a property right constitute legally relevant damage. Typically these take the form of costs of repair, the subject-matter of the property right having been physically damaged, and a loss of profit because the claimant has been deprived of the opportunity to exploit the property

commercially. These losses are already covered by the general rule in VI.–2:101 (Meaning of legally relevant damage) paragraph (1) in conjunction with (4)(a), and the same holds true for a reduction in the value of property. If a thing is damaged, then the property right which subsists in relation to that thing loses value. (The case differs only if, for example, the thing affected is a building which is standing empty and destined for demolition and damage arises through children throwing stones to break the window panes, see Comment A above.)

Depreciation in merchantable value. A not uncommon case is where a complete repair or restoration will not in fact eradicate entirely the loss of value which has arisen. In such cases there must be compensation for the residual loss of value in addition to the repair costs.

> *Illustration 14*
> A's vehicle is damaged in a traffic accident. While it can be fully repaired, it nevertheless loses value because a so-called "accident damaged car" will sell for less on the used car market than an otherwise identical, but accident-free car. This so-called "depreciation in merchantable value" is recoverable loss, which must be compensated in addition to the repair costs.

Non-economic loss. As regards non-economic losses, it equally follows from the general rule contained in VI.–2:101 (Meaning of legally relevant damage) paragraph (1) that they are also recoverable in principle, as long as the other requisites of liability under VI.–1:101 (Basic rule) are fulfilled. The affirmation of legally relevant damage in the form of non-economic loss caused by an infringement of property rights is particularly self-evident where there is an intentional infringement of property rights, which was orchestrated purely to inflict mental pain on the owner. An example would be where a person intentionally shoots another's pet, whose death causes distress to the pet owner. VI.–2:206 is not of course restricted to such cases. It is not necessary that the injuring person should want to inflict mental suffering on the owner. Instead liability for non-economic losses as a rule falls to be considered whenever an intentional infringement of property has taken place. Whether or not the injuring person intended to cause mental suffering will not affect liability, provided the injuring person intended to cause the infringement of the claimant's property right (the act of destruction) whose consequential loss constitutes the damage, meaning to inflict that property damage on the owner. A case in point would be where a burglar disrupts possessions in the dwelling which he has broken into and it is this violation of the home owner's rights which causes distress: the burglar, intent on finding and stealing any valuables he finds, means to infringe the owner's property rights when he disturbs the owner's belongings; he need not intend to cause distress, but it suffices that this is the result of his intentional infringement. Conversely, in cases of purely negligent infringements of property rights, a precise assessment is to be carried out as to whether the alleged non-economic losses have actually occurred. Such liability is not ruled out in these cases, but a more precise analysis of the consequences of the infringement of property rights is demanded. A run-of-the-mill traffic accident involving physical damage to a standard vehicle cannot be seen as the cause of non-economic loss (see VI.–4:101 (General rule [on causation]).

Deprivation of use (paragraph 2(a)). However, other forms of loss beyond the ones already mentioned may also arise. Of these one form is explicitly mentioned in paragraph (2)(a), namely, a deprivation of the benefits of using or being able to use property. This constitutes a loss and thus a legally relevant damage. Withholding property from another or preventing others from using their property, in other words, can constitute both an "infringement" (sub-paragraph (b)) as well as a "loss" (sub-paragraph (a)).

Illustration 15
Consider the case where property (in particular a motor vehicle) is damaged and not available for use during the period of repair. In that case damage is not merely present when the person affected must procure a substitute and must incur the expense of using public transport. Rather the loss of *potential* use – the loss of the benefit which the property right would otherwise have assured - is in itself a legally relevant damage. It does not matter that the use which would have been made of the vehicle would have been for pleasure, rather than for business. That avoids a differential treatment of property which is not deployed by the owner in a profit-earning capacity. If a taxi is damaged, the owner can naturally claim the profit foregone during the period of repair or the cost of procuring a new vehicle; a private individual ought to have a corresponding claim on account of the loss of the opportunity to make use of the car whenever so desired, which necessarily looks towards the latter of these two measures of loss. Given the absence of actual economic loss of profit, the measure of the loss referred to in paragraph (2)(a) will generally be a substantial part of the cost of hiring a substitute vehicle (even if that is not done), because that approximates the value of the use of which the injured person was deprived. However, it is of course a requirement that the claimant wanted to make use of the property right or was at least able to do so.

Illustration 16
Youths occupy an empty house in a university town. They infringe the property rights of the house owner (paragraph 2(b)) and occasion loss to the owner in the amount of the estimated rental value of the house; they are still liable even if the owner cannot prove that during their period of occupancy a tenant willing to pay rent was dissuaded from renting.

Cable cases. In other words sub-paragraph (a) concerns situations in which it cannot be said that there is legally relevant damage simply on the basis of VI.–2:101 (Meaning of legally relevant damage) paragraph (4)(a). VI.–2:206(2)(b) on the other hand does not provide any clarification as to the concept of a loss. Rather VI.–2:206(2)(b) describes the forms of infringement of property rights and makes the (essentially obvious) point that a deprivation of use is numbered among them.

Illustration 17
The so-called cable cases (see illustration 4 above) were not concerned with either an infringement of property within the meaning of paragraph (2)(b) (the owner of the machine is admittedly cut off from electricity, but is not hindered in the use of it or otherwise disturbed in the exercise of the right) nor with loss in the sense of paragraph 2(a) (which would need to be assessed if, for example, property damage were caused as a result of the interruption in power supply). The loss lies in the expense of repair, a fall in value and lost profit, not in the loss of use as such.

NOTES

I. Tort law protection of property rights

1. "Ownership" within the meaning of FRENCH, BELGIAN AND LUXEMBURGIAN private law is an absolute, exclusive and perpetual right (CC art. 544; *Cornu*, Droit civil[11], 440) in material objects; according to conventional (Cass.req. 25 July 1887, S.

1888, I, 17, note *Lyon-Caen*), albeit now no longer indisputable opinion (see further e.g. *Carbonnier*, Les biens III[19], nos. 250-251 pp. 388–391 and no. 254 pp. 392–394, as well as *Van Neste*, in: Het Zakenrecht, 511–537) "intellectual" property is not counted among property in the sense of civil law. The owner's monopoly position entitles him to prohibit any action of any third person which amounts to laying a claim to one of his property rights (namely *jus utendi*, *jus fructuendi* and *jus abutendi*) and indeed independently of whether the interference would cause actual loss or not (*Bergel/Bruschi/Cimamonti*, Les biens, no. 95 p. 99; *Hansenne*, Les biens I[1], no. 632 pp. 585–586). Along with the *actions en révindication* and *en bornage* the general tort law action is also open to the owner of property. In relation to the latter, there is the peculiarity in France that a claim in damages is already made out where an infringement of a *droit de possession* flowing from property rights is established; in such a case there is no requirement of actual loss (Cass.req. 6 March 1934, D.P. 1937, I, 17, note *Blaevoet*). However, Belgian law does not follow suit. The infringement of a right is neither a necessary nor a sufficient requisite for proof of damage, according to Belgian opinion (*Simoens*, Schade en schadeloosstelling, 18). For both countries it is to be noted that an infringement of property rights implies a violation of CC art. 544 and that such a violation of a law is assessed *ipso iure* as a *faute*; *atteintes à la propriété* constitute *fautes contre la légalité* (from which it is additionally concluded in France, as is stated, that they themselves would amount to *dommages et interest*, independently of proof of damage: *le Tourneau*, Droit de la responsabilité et des contrats (2006/2007), no. 6746). The use of a foreign historical building (Cass.civ. 10 March 1993, Bull.civ. 1993, I, no. 87 p. 58; D. 1999 jur. 319, concl. *Sainte-Rose*, note *Agostini*) or ship (Cass.civ. 25 January 2000, Bull.civ. 2000, I, no. 24 p. 16; D. 2000 I.R. 61; JCP éd. G. 2001, II, 10554, note *Tenenbaum*) for the marketing of photographs of these objects has even been occasionally qualified as an infringement of property rights grounding liability (on its limits, see Cass.civ. 2 May 2001, Bull.civ. 2001, I, no. 114 p. 74; D. 2001, 1973, note *Gridel*: no infringement of property rights by the depiction of a private island in a state's tourist advertising campagne). The *assemblée plénière* of the court of cassation corrected this case law, however, to the extent that in such cases a claim for a prohibitory court order or in damages required a severe interference, a *trouble anormal* (Cass.ass.plén. 7 May 2004, Bull.Ass.plén. 2004 no. 10 p. 21). Damage that arises due to the fact that someone temporarily cannot sell or otherwise dispose of his item of property, is recoverable (Cass.civ. 23 June 1993, Bull.civ. 1993, III, no. 102 p. 66); likewise for the depreciation in value of a plot of land due to the fact that an overhanging boulder from a neighbour's land threatens to come crashing down (Cass.civ. 17 May 1995, Bull.civ. 1995, II, no. 142 p. 81). It is fully self-evident that theft and receiving stolen goods also amount to torts relevant for private law (e.g. Cass. 13 October 2004, Pas. belge 2004, no. 476 p. 1558).

2. The starting point in SPANISH law is CC art. 348, according to which "ownership … [is] the right to dispose of a thing and enjoy it without prejudice to further statutory restrictions". As in France, protection of ownership is served first and foremost by the action to vindicate title, which is complemented by an action to establish title (TS 12 June 1976, RAJ 1976 (1) no. 2699 p. 2003). The tort law action in damages is not actually a claim for the protection of absolute rights; however the owner, like every other injured party, is entitled to draw on it when damage eventuates. In general, one can therefore say of Spain that an infringement of a right of property results in liability to the owner for the damage thereby occasioned to him, and indeed on the basis of CC arts. 1902 *et seq.* or on the basis of CP arts. 109-112 (*Díez-Picazo*, Sistema II[9], 546). The special rules of Law 40/2002 of 14 November (*Ley 40/2002, reguladora del contrato de aparcamiento de vehículos*) apply with regard to damage to vehicles in

public car parks. They relate to the non-negotiable duty on the car park operator, to return the vehicles stored there in the same state as when they were parked there (loc. cit. arts. 3(1)(c) and 5(1)). This would involve strict liability; the only disputed point is whether a *vis major* or happenstance relieves liability (see further *Carrasco Perera*, Actualidad Jurídica Aranzadi no. 557, December 2002, p. 2 and *Álvarez Lata*, InDret 2/2003, 12). Liability ensues in any event for theft (CA Madrid 28 November 2000, BDA JUR 2001/73233; CA Asturias 26 July 2002, BDA JUR 2002/253857) and the "unexplained disappearance" of a parked vehicle (CA Barcelona 22 April 2002, AC 2002, no. 1137). Where any person destroys or damages the property of another, evidently an infringement of property rights is committed and liability to that other in damages results therefrom. The same also applies to someone who broadens the bandwidth of the electric masts and circuits aboveground without the consent of the land owner and in this way lays claim to more ground than he had been entitled to (CA Girona 6 February 2006, AC 2006 (5) no. 341 p. 750 [however, no damages for use of the claimant's private roadways by an electricity company's vehicles, as the value of using the road could not be expressed in numbers]). An infringement of property rights resulting in liability in damages was further seen e.g. in the delayed return of an item of property (CA Huesca 8 March 2006, AC 2006 (5) no. 374 p. 836). TS 5 November 1998, RAJ 1998 (5) no. 8404 p. 12363 indeed granted the affected telecommunications company compensation for costs of repair in a "cable case", but no compensation for lost profit because the company had been able to (at least provisionally) repair the cable.

3. Under ITALIAN law ownership is an absolute right and is as such protected by tort law. This has been attested to by the jurisprudence in numerous decisions, particularly in the context of actions against the public administration (e.g. Cass. 5 May 2005, no. 9361, Giust.civ.Mass. 2005, fasc. 5; Cass. 3 May 2005, no. 9173, Giust.civ.Mass. 2005, fasc. 5; Cass.sez.un. 20 April 2005, no. 8209, Giust.civ.Mass. 2005, fasc. 4; Cass. 4 March 2005, no. 4797, Giust.civ.Mass. 2005, fasc. 4; Cass.sez.un. 7 December 2004, no. 22891, Giust.civ.Mass. 2004, fasc. 12; Cass.sez.un. 29 November 2004, no. 22490, Giust.civ.Mass. 2004, fasc. 11. S. ferner ECHR 12 January 2006, *Sciarrotta and others v. Italy*, ECHR 12 January 2006, App. no. 14793/02, Resp.civ. e prev. 2006, 834 and the Presidential Decree thereupon enacted [DPR] 327/2001 of 8 June 2001, no. 327 [Suppl. ordinario no. 211 alla Gazz. Uff., 16 August, no. 189] *Testo unico delle disposizioni legislative e regolamentari in materia di espropriazione per pubblica utilità*, art. 43). Difficulties are however posed by the determination of the relationship between the general tort law action in damages and the claim in damages under CC arts. 948-949, which is built upon the action for vindication of title and the property law action for a prohibitory court order (see further *Gambaro*, Il diritto di proprietà, 894). Damages in tort (CC art. 2043) done to the whole building by a co-owner fall due to the other co-owner (Cass. 18 May 2001, no. 6849, Giust.civ.Mass. 2001, 1007), likewise for damage to a neighbour's land resulting from carelessly carried out building projects (Giust.civ.Mass. 2001, 568).

4. HUNGARY also interprets the right in ownership as an absolute material-oriented right, which affords its holder extensive powers (Petrik [-*Sárközy*], Polgári jog I^2, 231); in contrast, so-called "intellectual property" does not amount to property in the sense of civil law (see further and with references to diverging opinions Gellért [-*Petrik*], A Polgári Törvénykönyv Magyarázata[6], 348). The right of ownership is comprised of the right to possession (CC § 98), the right to use and reap the benefits of an asset (CC § 99) and from the right of disposition (CC § 112(1)). Unauthorised dispositions of foreign property constitutes a tortl. The owner can claim damages from

the unauthorised disposer, where the transferee acquires title to the property under the provisions of the law of property (*Lenkovics*, Dologi jog, 132-134).

5. CZECH and SLOVAK CC § 415 expressly enumerates the infringement of the property rights of another as a ground of liability for loss resulting therefrom. While SLOVENIAN LOA arts. 131 and 132, as well as POLISH CC art. 415 refrain from an express mention for infringement of property rights, the loss flowing therefrom is still of course legally relevant damage.

6. GERMAN CC § 823(1) protects the right to ownership in objects (CC § 903). Naturally, material harm (destruction, damage, defacement) is covered. The deprivation of and interference with the possibility of another's use of his or her property also constitutes an infringement of property rights (Palandt [-*Sprau*], BGB[65], § 823, no. 7; Erman [-*Schiemann*], BGB II[11], § 823, no. 25). Therefore, the alienation of another's property to a *bona fide* transferee triggers a tort law obligation to pay damages (BGH 12 March 1996, NJW 1996, 1535, 1537) (the - even negligent - *bona fide* transferee is clearly not liable: BGH 14 February 1967, WM 1967, 562, 564). Furthermore, an infringement of property rights will not only be affirmed in cases of short term (BGH 18 November 2003, NJW 2004, 356, 358) interferences with the designated use of property (BGH 21 December 1970, BGHZ 55, 153, 159; BGH 2 July 1959, BGHZ 30, 241). An infringement of property rights will also be inferred where the systematic order or an arrangement of items (stamp collection, library, archive) is destroyed (BGH 26 February 1980, BGHZ 76, 216). No infringement of property rights shall occur in relation to a standstill in production resulting from an interruption of energy supply (BGH 9 December 1958, BGHZ 29, 65), unless property damage simultaneously eventuates (BGH 4 February 1964, BGHZ 41, 123).

7. AUSTRIAN CC §§ 1331-1332a relate to the compensation of damage to personalty, to which all rights in assets also belong. Although the aforementioned provisions only apply to legal consequences of damage to personalty, it is undisputed that ownership and all restricted rights *in rem* enjoy tort law protection (*Schilcher and Kleewein*, in: v. Bar (ed.), Deliktsrecht in Europa, Österreich, 35). "All that appertains to a person, all of his corporeal and incorporeal objects, equates to his property" (CC § 353). According to CC § 285, on top of corporeal "objects", energy, rights and especially intellectual property rights, as well as prospective objects, as long as they are dealt with by a law or juridical act as such (e.g. rights of expectancy, CC § 1276). According to CC § 354, ownership in property in a subjective sense is the discretionary control over the subject matter and use of an object and the power to exclude any other person from such. Animals indeed belong to one's property, but are not objects (CC § 285a). Along with the actions in property law for establishment of title, recovery of property, prohibitory and mandatory restorative court orders (CC §§ 372, 366, 523, 364), claims for damages in tort also arise (CC §§ 1295 *et seq*.; for more on the relationship of these claims to one another, see OGH 20 June 1962, JBl 1963, 320). Every culpable interference with rights of ownership and possession, which at the same time occasions damage within the meaning of CC § 1294, grounds liability (OGH 10 January 1968, SZ 41/2; OGH 13 December 1988, SZ 61/270; *Koziol and Welser*, Bürgerliches Recht II[12], 293). CC §§ 1331-1132a provide more detailed regulations on the scope of the duty to compensate. The very exposure to harm of another's property is prohibited (OGH 18 September 1975, ZVR 1976/229). Infringements of property rights are not only encountered in the guise of the destruction and deprivation of an object. The distribution of trail maps with incorrect markings, which cause hikers to trespass on another's property (OGH 29 August 1995, SZ 68/145) and the "occupancy" of a building site by anti-power plant protestors (OGH 25 May 1994, SZ 67/92; see also OGH 25 March 1999, ZVR 1999/56) also

constitute modes of behaviour that found liability. In contrast, "indirect" production outages resulting from the damage to an electricity cable that is not owned by the injured party are not compensable (OGH 8 July 1976, SZ 49/96; OGH 4 March 1982, RZ 1982/68), indeed even where strains of bacteria are thereby destroyed (OGH 18 June 1975, JBl 1976, 210) or electronic appliances are damaged (OGH 1 December 1977, RZ 1978/31; OGH 20 August 2005, 1 Ob 117/05w). CC § 367 second sentence clarifies that a *bona fide* acquisition of title does not ground liability in damages.

8. In GREECE it is likewise a given that the right to ownership and restricted rights *in rem* enjoy tort law protection as absolute rights (Georgiades and Stathopoulos [-*Georgiades*], art. 914, no. 36; *Georgiades Ap.*, Enochiko Dikaio, geniko meros, 597; *Kornilakis*, Eidiko Enochiko Dikaio I, 484; A.P. 1110/1996, EllDik 38 [1997] 1045). Interference with rights of ownership is not only represented by property damage (A.P. 1110/1996 loc. cit.) or destruction (A.P. 38/1996, EllDik 38 [1997] 41), but also by e.g. the unlawful disposition of another's property (e.g. CFI Trikala 201/1962, NoB 11 [1963] 1154: an authorised execution of foreclosure; auctioning of items not owned by the debtor). Case law is at times criticised in scholarly writing for not always drawing a sufficiently trenchant line between pure economic loss and economic loss resulting from interference with property rights (*Georgiades* loc. cit. no. 37; see also *Georgiades*, Enochiko Dikaio, geniko meros, 597).

9. In PORTUGAL it is derived right back from Const. art. 62 that private tort law must also cater for the reasonable protection of property rights (*Miranda*, Manual de Direito Constitucional IV, 467). CC art. 483 accordingly lays out liability in damages for all culpable infringements of rights; infringements of property rights belong among them (*Almeida Costa*, Obrigações[8], 505). The claims in tort law accompany the property law claims for establishment of title, recovery of property and a prohibitory court order (CC arts. 1311 and 1314; STJ 4 April 2006). The destruction or damaging of things is not the only manifestation of an infringement of property rights. Such an infringement also occurs, e.g. where entry to land is hampered due to a neighbour's construction work (STJ 3 February 2005) (the situation is different where a tenant builds a fence in order to prevent intrusion by strangers: STJ 24 February 2005) or where rubbish is left on land (STJ 23 September 2004 and 18 March 2004). In case of conflict between the owner's interest in use and the health interests of his neighbours, the latter is given preference (STJ 6 May 1998, CJ [ST] 1998-II, 76; STJ 9 January 2006).

10. DUTCH CC art. 6:162(2) (first alternative) is counted among the civil wrongs expressed in terms of interferences with another's rights. Title in property is evidently one such "right". Along with the general requisites for a civil wrong, the claimant must prove his title in the property and the "interference"; however, CC art. 3:119 accommodates him with the presumption of title in favour of the party who holds the property as his own (for more detail, see Onrechtmatige Daad I [-*Jansen*], art. 6:162(2), nos. 44, 45, 108, pp. 452-453, 1159-1203). According to CC art. 5:1(2) "the owner [is entitled] to freely use the item of property to the exclusion of all others, provided that this use does not infringe the rights of others and restrictions in relation to statutory provisions and rules of unwritten law are adhered to". This limitation of the right to private property can have significant consequences for tort law, *cf.* e.g. CFI Middelburg 1 October 1980, NedJur 1981 no. 374 p. 1243 (empty houses in a trouble hotspot are temporarily "occupied"; an interference with property rights is affirmed, however a civil wrong is denied) and HR 12 January 1923, NedJur 1923 p. 307 (raising an embankment without the consent of the owner of the land; no infringement of ownership) as well as CC arts. 5:37 *et seq.* (limitations under the law concerning the respective interests of neighbours) and 3:13 (abuse of right). An interference with the

right to ownership principally occurs where another engages in conduct peculiar to the owner or hinders the exercise of his powers (*Jansen* loc. cit. nos. 52-53 pp. 479-501). An "interference" with the right of another is only typically spoken of in cases of direct, immediate infringements. Acts and omissions further down the chain of causation are mostly not deemed "interferences", but are analysed under different aspects, particularly the issue of whether the party claimed against has breached a statutory duty or conducted himself otherwise than "unwritten rules of social interaction", i.e. the general precept of care, demand of him (*Jansen* loc. cit. nos. 56-57 pp. 528-559). Ownership is not infringed when a purchaser acquires land from a seller which is already contaminated at the time of transfer of title (HR 4 March 2005, JOL 2005, 142; RvdW 2005 no. 36 p. 331).

11. ESTONIAN LOA § 1045(1)(v) sets out that the occasioning of damage is *inter alia* unlawful where "the damage is caused by violation of the right of ownership or a similar right or right of possession of the victim". The details of the damages are, however, regulated in LOA § 128(3) and (4). LITHUANIAN CC art. 6.263(2) likewise enumerates the infringement of the right to ownership as a civil offence grounding liability.

12. SWEDISH Law on Damages chap. 2 § 1 distinguishes between personal and material damage; the calculation of compensation for material damage is the subject-matter of chap. 5 § 7. The owner is the first in line for the entitlement of compensation, without it being expressly stated; others indirectly harmed only exceptionally come into the picture as claimants (for more detail, see HD 27 October 2004, NJA 2004, 609; *Sandstedt*, VersRAI 2005, 38; *Andersson*, Pointlex 2004-12-20). Physical damage to corporeal objects, i.e. to moveable and immoveable objects, is in any event understood as property damage. However, aesthetic changes as well as the removal or reduction of the functional capabilities of a thing and its loss (e.g. by theft) are interpreted as property damage (*Hellner and Johansson*, Skadeståndsrätt[6], 98; *Bengtsson and Strömbäck*, Skadeståndslagen[2], 43 and 319; *Radetzki*, Skadeståndsberäkning vid sakskada, 11 fn. 1). A further case is that of impairment of use (*Hellner and Johansson* loc. cit 98 and 429; *Hellner*, Om obehörig vinst, 229; *Bengtsson and Strömbäck* loc. cit. 319; *Agell*, in: Familjerätt, skadeståndsrätt och annan förmögenhetsrätt, 197, 205 and 211). HD 28 February 1990, NJA 1990, 80 has deemed the impregnation of a thoroughbred dog by a mongrel as property damage, HD 20 February 1996, NJA 1996, 68 affirmed property damage in a case in which the purchaser of a defective item had welded it to another new one; it comes down to the adverse effects on the functionality of the latter, not to its physical alteration. The FINNISH rule on property damage (Law on Damages chap. 2 § 1) is to be similarly interpreted to its Swedich counterpart, despite not entirely identical wording. In DENMARK, under the term property damage (*tingsskade*), not only the physical harm to corporeal objects, but also consequential losses (e.g. production outage: *von Eyben and Isager*, Lærebog i erstatningsret[5], 9). In the course of the claimant's investigation, drawing a distinction between property law entitlements and those under the law of obligations is not first and foremost on the agenda, this position is assumed by the "power of disposition" (*rådighedsretssynspunktet*). In a case in which an electricity cable was severed, Danish Supreme Court 22 June 2004, UfR 2004, 2389 denied damages in favour of a business; the disadvantage suffered did not lie in the property damage, but purely in the interruption of work and therefore did not constitute legally relevant damage.

13. In ENGLAND the law on the tort of conversion has been criticized for its enduring uncertainty and the lack of definition in the ways it may be committed: *Douglas*, LMCLQ, 129. The traditional principle (derived from the fiction underpinning the historical form of the action in trover that the chattel was lost by the plaintiff and

found by the claimant) has been that the tort is confined to chattels (*Douglas*, LMCLQ, 129).

14. In IRELAND, as with other common law jurisdictions, torts have developed centring on the concept of possession rather than of exclusive or absolute ownership. Due to the stronger gravitational pull of the torts of conversion, detinue and passing off towards affording protection against infringements of property rights (of ownership) they are dealt with under this heading (for infringements of other property rights with more affinity to those in possession, see below Note II26). Conversion consists of any act relating to the goods of another that constitutes an unjustifiable denial of his or her title to them, or the wrongful assertion of dominion over them (*McMahon and Binchy*, Torts[3], para. 30.01). Conversion may be committed by the wrongful taking possession of the goods where the defendant deals with the goods in a manner inconsistent with the right of the true owner, abusing possession already acquired (by pawning another's goods: *Parker v. Godin* (1728) 2 Strange 813, 93 ER 866; sale or delivery of them: *Hollins v. Fowler* (1874-75) LR 7 HL 757; *Haggan v. Pasley* (1878) 2 IrLR 573; *Magee v. D'Arcy* (1879) 4 IrLR 312; or where the chattel is wilfully destroyed: see *Heald v. Carey* (1852) 11 CB 977, 138 ER 762); or otherwise denying the title of the other person to them, whether or not possession has been acquired (*McMahon and Binchy* loc. cit.). One may be guilty of conversion of any corporeal personal property (*Allen v. Sharp* (1848) 2 Ex. 352, 154 ER 529), including papers and title deeds (*McMahon and Binchy* loc. cit. para 30.19). Money can be converted (*Dillon v. O'Brien* (1887) 16 Cox CC 245); *Fitzpatrick v. Dunphy* (1851) 1 ICLR 366; *Shield Life Insurance Co. Ltd. v. Ulster Bank Ltd.* [1995] 3 IR 225; *cf. Hennerty v. Bank of Ireland*, HC 5 July 1988, unreported) as may negotiable instruments (*Alsager v. Close* (1842) 10 M & W 576, 152 ER 600; *Liston v. Munster Leinster Bank Ltd.* [1940] IR 77), title deeds (*Plant v. Cotterill* (1860) 5 H & N 430, 157 ER 1249; *Curry v. Rea* [1937] NI 1 (CA)) and realty when severed (*Mills v. Brooker* [1919] 1 KB 555; *Quinn v. Pratt* [1908] 2 IR 69). Animals and birds may also be converted (*cf. Wymes v. Tehan* [1988] IR 717; *Toome Eeel Fishery (Northern Ireland) Ltd. v. Cardwell* [1966] NI 1). A plaintiff may maintain an action if, at the time of the defendant's act, he had either (i) ownership and possession of the goods; or (ii) possession of them; or (iii) merely an immediate right to possess them, unless the defendant can prove that the title to the goods is in some other party (*McMahon and Binchy* loc. cit. para. 30.20). The measure of damages for conversion is generally the value of the article converted at the date of the conversion (*Allibert SA v. O'Connor* [1982] ILRM 40). Where the converted article would have been put to profitable use – such as being hired out – losses for this use may also be recovered (*Fleming*, Law of Torts[9], 77-78). Copyright and Related Rights Act 2000 chap. 9 contains provisions prescribing remedies for infringement of copyright in this context. These include actions for damages (s. 128) and for orders for delivery up (s. 131). The copyright owner also has the right to seize infringing copies, articles or devices (s. 133). The essence of the tort of detinue (abolished in England by means of the Torts (Interference with Goods) Act 1977, s. 2(1)) is the wrongful refusal by the defendant to deliver up to the plaintiff a chattel after demand has been made by the plaintiff to do so, whereby a detention is not wrongful unless the defendant's possession is adverse to or in defiance of the plaintiff's right (*Spackman Spackman v. Foster* (1882-83) 11 QBD 99; *King v. Walsh* [1932] IR 178; *Treasure Island Ltd. v. Zebedee Enterprises Ltd*., HC 29 May 1987, unreported; see also e.g. *Webb v. Ireland* [1987] IESC 2, [1988] IR 353 and *McKenna v. Commissioner of An Garda Síochána* [1993] 3 IR 543). The action may lie even where the chattel is no longer in the defendant's possession (*Morgan v. Maurer & Son* [1964] Ir Jur 31). One of the advantages of the action for detinue over that of

conversion lies in the range of remedies available to the plaintiff (on the role of restitutionary remedies in this context, see the dicta of *Kinlen* J. in *Hanley v. ICC Finance Ltd.* [1995] IEHC 5, [1996] 1 ILRM 463, with reference to *Denning* L.J. in *Strand Electric & Engineering Co. Ltd. v. Brisford Entertainments Ltd.* [1952] 2 QB 246, 255, and for a comprehensive analysis of the subject see *O'Dell,* Submission to the Law Reform Commission on Damages in the Restitution Measure for Tort and Breach of Contract (1999)). Three possible forms of judgment exist: (i) for the value of the chattel as assessed and damages for its detention; (ii) for the return of the chattel or its value as assessed in damages; (iii) for the return of the chattel and damages for its detention (*McMahon and Binchy* loc. cit. para. 29.10). Despite statutory regulation of trade marks (Trade Marks Act 1996), copyright (Copyright and Related Rights Act 2000) and industrial design (Industrial and Commercial Property (Protection) Act 1927), the tort of passing off remains a means of common law protection of the plaintiff's proprietary interest in his goodwill (*McMahon and Binchy* loc. cit. para. 31.03). Although it has its roots in the concept of deceit (*Clark and Smith*, Intellectual Property Law in Ireland, chap. 24), the requirement of fraudulent intent fell away (*McMahon and Binchy* loc. cit. para. 31.02). The essence of the tort is that one trader represents its goods or services as those of another (thus "passing them off" as those of that other), so as to be likely to mislead the public and involve an appreciable risk of detriment to the plaintiff (*Polycell Products Ltd. v. O'Carroll & others* [1959] Ir Jur 34; *Player & Wills (Ireland) Ltd. v. Gallagher (Dublin) Ltd*., HC 26 September 1983, unreported).

15. In SCOTLAND, an action for interdict or damages lies for any unjustifiable interference with or infringement of any interest which a person has in any heritable property (*Walker*, Delict[2], 936). Corporeal moveable property – including a wide range of things, all having a corporeal tangible corpus capable of physical possession and the interests which may subsist in such things, *viz*. ownership and possession – may be infringed in many different ways, by taking away from the legitimate owner or possessor, by withholding or failing to return, by selling by mistake, by damaging deliberately or carelessly etc. (*Walker* loc. cit. 1002). Incorporeal moveable property includes all those kinds of proprietary rights which consist in legal rights or claims only, conferring no right to actual possession or control of any corporeal moveable subject (*Walker* loc. cit. 1023) and is protected in this context. Of the above interests, ownership in property is protected, *inter alia*, under the following headings: (i) title of ownership in heritable property; (ii) trespass - a temporary intrusion into property owned by another without the permission of the owner, e.g. playing football in the owner's field or taking a short cut through his garden (*Thomson*, Delictual Liability[3], 19-20); (iii) withdrawal of or interference with support - it is wrongful to conduct operations on one's land so as to interfere with the support afforded to adjacent or superincumbent land or buildings without a contract agreement thereto (*Bell*, Principles of the Law of Scotland[10], § 965); (iv) abstraction of water (*Walker* loc. cit. 951); (v) interference with servitudes (*Walker* loc. cit. 954); (vi) malicious damage to lands or buildings; (vii) misuse of land leased; (viii) incorporeal heritable rights (*London Midland & Scottish Railway v. McDonald* 1924 SC 835: interdict granted to restrain an infringement of the right to ferry); (ix) damage to animals; (x) damage to ships by other ships; (xi) the infringement of interests in incorporeal moveable property (including claims of debt or damages, company shares, stock in public funds, life insurance policies, negotiable instruments, goodwill, patents, trade marks, literary copyright, copyright in industrial designs and plant breeders' rights – see *Walker* loc. cit. 1023).

II. Infringement of other rights in rem and of lawful possession or detention

16. In FRANCE, BELGIUM and LUXEMBURG the general point of departure is that anyone who has personally suffered "sure" damage can claim in tort. Any person whose lawful use of the thing in question is impaired belongs to this category. The precise basis for the right of use, however, is inconsequential: it might be title to ownership, a restricted right *in rem* or a mere entitlement under the law of obligations, like for instance a rental relationship. Even mere *bona fide* natural possession suffices (*Simoens*, Schade en schadeloosstelling, no. 152 p. 301). The borrower of an object, from whom a thief takes the borrowed object, is also entitled to a claim in damages (JClCiv [-*Maistre du Chambon*] arts. 1382 à 1386, fasc. 220, no. 9). Property law (but not tort law) draws a distinction between possession and detention. Both possession and detention are additionally protected by other possible specific actions (*actions possessoires*) (CC arts. 2255, 2279; French CCP arts. 1265 and 1266). Their relationship with the material tort law is of course, especially in France, extraordinarily difficult to define. BELGIUM allows actions for the protection of possession only for the protection of immoveable objects (*Gerechtelijk wetboek/Code judiciaire* arts. 1370-1371).

17. In SPAIN it is likewise beyond question that where the object is e.g. destroyed or damaged, such damages that are not suffered by the owner, but by the holder of another right *in rem*, are relevant for tort law (*Díez-Picazo*, Derecho de daños, 307). Apart from that, several decisions of the Supreme Court confirm that the tenant of a building which is destroyed or damaged has his/her own claim against the third person (TS 13 March 1976, RAJ 1976 (1) no. 1324 p. 966; TS 28 February 1983, RAJ 1983 (1) no. 1079 p. 815; TS 16 December 1988, RAJ 1988 (6) no. 9471 p. 9311).

18. Infringements of restricted rights *in rem* also trigger liability in damages in ITALY under the general requisites (for a case of easement, see further 23 May 1985, no. 3110, Giust.civ.Mass. 1985, fasc. 5, and for one of beneficial use, see Cass. 11 August 2000, no. 10733, Giur.it. 2001, 898, note *Tommasi*). Further, a *bona fide* possessor who is deprived of possession can claim damages under the provisions of tort law (Cass. 6 February 1984, no. 889, Giust.civ.Mass. 1984, fasc. 2; Cass. 21 July 1980, no. 4776, Giust.civ.Mass. 1980, fasc. 7; Cass. 28 February 1989, no. 1093, Giust.civ.Mass. 1989, fasc. 2). Damage arising out of the temporary deprivation of use is recoverable, as well as any other loss which is causally connected to the infringement of possession. The free standing tort law action falls into line alongside the action for restoration (CC art. 1168) and preservation of possession (CC art. 1170) (Cass. 16 March 1988, no. 2472, Giur.it. 1989, I, 1, 510). Therefore, the grant of damages should also be possible where the object has been destroyed or alienated (see further *Gambaro*, Il diritto di proprietà, 895). Tort law protection extends to the lawful detentor (Cass. 30 October 1986, no. 6394, Giust.civ.Mass. 1986, fasc. 10; *Monateri*, Manuale della responsabilità civile, 167). In principle, the possessor is not entitled to compensation for the value of the item, but only to damages due to the loss of possible use (for an exception to this, see Cass. 12 May 1987, no. 4367, Giust.civ.Mass. 1987, fasc. 5).

19. Under HUNGARIAN law the holders of restricted rights *in rem* and of lawful possession can claim damages according to the general rules of tort law where they are seen as injured parties and the disadvantages they suffered are deemed tortiously relevant damage. Where a rented object is destroyed, the rental agreement is brought to an end (CC § 430(2)). In such a case the renter can also claim compensation for his damages (see further *Besenyei*, A bérleti szerződés, 49-50). The situation is the same where an object is destroyed, in which there lies a beneficial interest, *cf.* CC § 163. As

to the relationship between the owner and the holder of a restricted right *in rem*, issues of damages are subject to the respective property law regime.

20. GERMAN CC § 823(1) sees only so-called "absolute rights" – namely rights that (in contrast to choses in action) are to be observed by all – as falling under "other rights". Belonging to this category are also restricted rights *in rem*, rights of expectancy in property (RG 1 July 1942, RGZ 170, 1, 6; BGH 11 November 1970, BGHZ 55, 20; BGH 5 April 1991, BGHZ 114, 161), public easements (hunting and fishery rights: BGH 30 October 2003, NJW-RR 2004, 100; CFI Trier 21 June 2005, NJW-RR 2006, 894; BGH 3 January 1968, BGHZ 49, 231; BGH 5 April 1968, BGHZ 50, 73; BGH 21 July 1969, VersR 1969, 928) and lawful possession (RG 25 October 1917, RGZ 91, 60, 65; BGH 26 March 1974, BGHZ 62, 243, 248). However, the extent of the protection of possession is a much debated issue (see further Soergel [-*Zeuner*], BGB[12], § 823, no. 58; MünchKomm [-*Wagner*], BGB[4], § 823, no. 151).

21. In AUSTRIA it is likewise undisputed that along with the right of ownership, all restricted rights *in rem* enjoy tort law protection (*Schilcher and Kleewein*, in: v. Bar (ed.), Deliktsrecht in Europa, Österreich, 35). Herein included are prospective entitlements to property (like e.g. the prospective entitlement of a purchaser under retention of title: *Koziol*, Haftpflichtrecht II², 31, 34). Possessors and detentors (e.g. a renter or leaseholder) enjoy absolute protection in the context of CC § 372 (Rummel [-*Spielbüchler*], ABGB I³, § 372 no. 5); consequently they may enforce their own claim against the tortfeasor where there is property damage (*Koziol and Welser*, Bürgerliches Recht I[11], 246; OGH 20 June 1990, JBl 1991, 247, note *Rummel*). The same goes for a lessee if in relation to the owner, he bears the costs of repair (OGH 24 May 1995, JBl 1996, 114 note *Lukas*, OGH 29 April 1997, SZ 70/85, 627). Conversely, any person who, without such an internal rule on bearing the costs of damage, solely has a relationship with the owner under the law of obligations, does not have his own personal claim in compensation (*Koziol and Welser*, Bürgerliches Recht II[12], 298, discussing a cable case). Therefore, a person who borrows a car and has to rent a replacement car because of an accident which was the fault of another does not suffer any recoverable damage (CA Innsbruck 2 December 1992, ZVR 1994, 28).

22. The situation in Austria mirrors that of GREECE in all essential aspects. Alongside the right in ownership and restricted rights *in rem*, possession and protected detention also count among the interests worthy of tort law protection here (Georgiades and Stathopoulos [-*Georgiades*], art. 914, no. 38; *Filios*, Enochiko dikaio II[2][3], 29). In the case of property damage the possessor is consequently entitled to a claim in damages. It exists independently of the owner's claim and covers the loss of use and the costs to be borne by the renter. Damages for depreciation in value and (in case of the object's destruction) for material damage are, in contrast, only open to the owner (A.P. 983/1986, NoB 36 [1988] 339). The right of expectancy of a purchaser under retention of title also enjoys tort law protection. The purchaser under retention of title indeed already has his own claim in damages in view of the infringement of his detention. Moreover, in his capacity as the holder of a right, he also has a claim to material damages, bestowed upon him by CA Athens 1554/1996, EllDik 39 (1998) 602, where the object is destroyed. Conversely, in academic writing, the opinion prevails, that in such a case the purchaser under retention of title as well as the vendor under retention of title could claim damages, however only in a manner in which both claim payment communally. This is supported by an analogy to CC arts. 495, 11 second sentence, 1180 first sentence and 1253 (*Kritikos*, note under CA Athens loc. cit.).

23. PORTUGUESE law equips the lawful possessor of a thing with legal protection against impending or current interferences with use (CC arts. 336, 337, 1276-1286 and

1277; *cf*. CA Oporto 3 April 1984, CJ [1984-2] 225; CA Lisbon 2 April 1973, BolMinJus 226 [1973] 262; STJ 15 May 2006; STJ 3 November 2005; STJ 8 May 2001, CJ [ST] 2001-2, 57). In some cases statute also extends this protection on equitable grounds to a mere detentor (CC arts. 1037 no. 2, 1125 no. 2, 1133 no. 2 and 1188 no. 2; CA Evora 29 July 1987, CJ [1987-4] 289). Under tort law (CC art. 483), the leaseholder of an agricultural site can therefore claim damages for lost profit from a township that builds a street on a piece of his land without his authorisation and without a compulsory purchase order (STJ 20 January 2005). On the other hand, a renter is not liable for the normal wear and tear of the rented item (STJ 27 April 2005; CA Oporto 30 June 2005).

24. Despite some reservations, in DUTCH law, it has been derived from arts. 3:107(1) and 3:125 that not only restricted rights *in rem* (like e.g. a land easement [CC art. 5:70], fee farm [CC art. 5:85], usufruct [CC art. 3:201], residential property [CC art. 5:106] and right of abode [CC art. 3:226]), belong among the "rights" within the meaning of CC art. 162(2), but also lawful possession (distinct from detention) (Onrechtmatige Daad I [-*Jansen*], art. 6:162(2), no. 15 pp. 142-143). Holders of restricted rights *in rem* can consequently enforce their own claims in damages, especially in the case of property damage by a third party (CA Amsterdam 27 October 1938, NedJur 1939 no. 242 p. 380; *Jansen* loc. cit. no. 21 pp. 168-188). The legal position is the same under ESTONIAN LOA § 1045(1)(v).

25. Though the action for compensation of property damage in SWEDEN lies first and foremost with the owner, it is recognised that others may have interests worthy of protection in the damaged property. Therefore, in analogy to insurance law provisions, compensation for value (not: compensation for consequential loss) can be granted particularly to the holders of real securities as well as of a heritable building right, and further those who bear the risk of the property's destruction (*Sandstedt*, VersRAI 2005, 38, 43; *Andersson,* Trepartsrelationer i skadeståndsrätten, 137; similarly for DENMARK *Vinding Kruse*, Erstatningsretten[5], 295 as well as [with a detailed compilation of case groups] *von Eyben and Isager*, Lærebog i erstatningsret[5], 251 and for FINLAND Insurance Contract Act [*Lag om försäkringsavtal*] §§ 62, 65(2) and 66). However, the basic rule is that only the directly injured party is entitled to recover in tort. Those indirectly harmed must show "concrete and proximate interests" in the object (*Andersson,* loc. cit. 20, 179 and 184; SWEDISH HD 4 April 1966, NJA 1966, 210; *cf*. HD 27 October 2004, NJA 2004, 609). HD 18 December 1972, NJA 1972, 598 granted the renter of a cottage in which he kept chickens, damages for their freezing to death when the electricity cable which belonged to the owner had been negligently damaged by a third party. HD 7 March 1988, NJA 1988, 62 denied damages for a breakdown in production resulting from a power outage but granted compensation for destroyed materials and materials to be disposed of, although this also concerned damage to a third party (the cable did not belong to the injured party). FINNISH Supreme Court 12 December 2003, HD 2003:124 denied damages for breakdown in production in a case where someone had intentionally shot at power supply lines. *Cf*. further Finnish Supreme Court 6 October 1994, HD 1994:94. DANISH Supreme Court 5 July 1988, UfR 1988, 878 deemed a sport fishing club eligible for recovery of damages for the destruction of a fish stock resulting from water pollution, although it had no real fishery right. An action for compensation of higher maintenance costs for ships as a result of damage to a bridge was turned down (HD 16 November 1939, UfR 1940, 117); in contrast, a rail operator that had a real right in the overpass was granted compensation in a similar case (HD 7 April 1960, UfR 1960, 932).

26. In IRELAND the torts of trespass to land and trespass to goods protect rights of possession, with nuisance protecting against "any interference with a person's use and enjoyment of his land" (*Redfont Ltd. v. Custom House Dock Management Ltd*. [1998] IEHC 206, per *Shanley* J.). In *Farrell v. Minister for Agriculture and Food*, HC 11 October 1995, unreported, *Carroll* J. observed that the tort of trespass to goods "consists of wrongfully and directly interfering with the possession of chattels". A number of aspects of the tort are uncertain in the absence of clear Irish authorities in point (*McMahon and Binchy*, Torts[3], para. 28.03). The interference may consist of taking the chattel out of the possession of another (*Brewer v. Dew* (1843) 11 M & W 625, 152 ER 955; *Gahan v. Maingay* (1793) Ridg L & S 20; *Conway v. Archdall* (1826) 1 Batt 182; *Wilson v. Lombank Ltd.* [1963] 1 WLR 1294), moving it from one place to another (*Kirk v. Gregory* (1875-76) 1 Ex. D 55), or doing damage to it (*Fouldes v. Willoughby* (1841) 8 M & W 540, 151 ER 1153, 1157; *Deering v. Mahon* (1851) 2 ICLR 25; *M'Cormick v. Ballantine* (1861) 10 ICLR 305). The interference must be direct (*McDonagh v. West of Ireland Fisheries Ltd.*, HC 19 December 1986, unreported, *Blayney* J). In commentary the general consensus is that trespass to goods is actionable *per se* (*McMahon and Binchy* loc. cit. para 28.07), but the judicial authorities are less than compelling on this issue (*Leitch & Co. Ltd. v. Leydon* [1931] AC 90, 106 [Lord *Blanesburgh*]). As in the case with trespass to land the tort of trespass to goods is "founded on possession" (*Ward v. Macauley* (1791) 4 T. R. 489, 100 ER 1135) and not ownership. To be actionable a trespass must be either wilful or negligent (*M'Cormick v. Ballantine* loc. cit.). The defendant will however be liable even where he did not appreciate that the interference was wrongful (*Farrell v. Minister for Agriculture and Food* loc. cit.; *M'Mullan v. Bradshaw* (1916) 50 ILTR 205). Thus, the deliberate use of a chattel in the mistaken belief that it is one's own will constitute a trespass (*Wilson v. Lombank Ltd.* [1963] 1 WLR 1294). In some circumstances an action that would otherwise constitute a trespass to goods may not be tortious because the actor has lawful authority to do the action (*McMahon and Binchy* loc. cit. para. 28.14). Trespass to land is defined by *Shanley* J. in *Royal Dublin Society v. Yates* [1997] IEHC 144, as consisting "in any unjustifiable intrusion by one person upon land in the possession of another", noting that the "intrusion may be intentional or it may be negligent: in either case, it is actionable in the absence of lawful justification". Where persons have lawfully entered land in the possession of another, they will commit a trespass if they remain there after their right to stay has ended (*Wood v. Leadbitter* (1845) 13 M & W 838, 153 ER 351; *Duffield v. Police* [1971] NZLR 381; *Carson v. Jeffers* [1961] IR 44; *Irish Shell & B. P. Ltd. v. John Costello Ltd.* [1984] IR 511). It is trespass for a person to place any chattel (including animals) on the land of another or to cause any object or substance directly to cross the boundary of another's land, or even to reach the boundary (*McMahon and Binchy* loc. cit. para. 23.29). Where the plaintiff establishes an act which physically constitutes a trespass, the onus is upon the defendant to show that he was neither negligent nor acted intentionally (*Electricity Supply Board v. Hastings & Co. Ltd.* [1965] Ir Jur 51; *Royal Dublin Society v. Yates* loc. cit.). The tort is not generally available to persons out of possession at the time of the intrusion (*McMahon and Binchy* loc. cit. para 23.41). Nuisance may be broken down into public nuisance and private nuisance (*O'Higgins* C.J. in *Connolly v. South of Ireland Asphalt Co. Ltd.* [1977] IR 99). Public nuisance is a crime, the essence of which is injury to the reasonable comfort and convenience of the public or a section of the public (*Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 [SC] and *Truloc Ltd. v. District Judge McMenamin & Donegal County Council* [1994] 1 ILRM 151). Only where a person has suffered 'particular' or 'special' damage over and above that suffered by other members of the

public may he or she take civil proceedings (*Coppinger v. Sheehan* [1906] 1 IR 519, 522-523). It has been stated in commentary that private nuisance is "really a field of tortuous liability rather than a single type of tortuous conduct: the feature which gives it unity is the interest invaded – that of the use and enjoyment of land" (*Salmond and Heuston* on the Law or Torts[21], 53). In *Hanrahan v. Merck, Sharpe & Dohme (Ireland) Ltd.* [1988] ILRM 629, *Henchy* J. stated that it was "clear from authorities on the law of nuisance that what an occupier of land is entitled to as against his neighbour, is the comfortable and healthy enjoyment of the land to the degree that would be expected by an ordinary person whose requirements are objectively reasonable in all the particular circumstances" (loc. cit. 634). With three notable exceptions, private nuisance is not generally actionable *per se*, and actual damage must be proven; the damage may consist in (i) physical injury to land, (ii) a substantial interference with the enjoyment of land, or (iii) an interference with servitudes, where the disturbance constitutes a substantial interference with the plaintiff's rights (*McMahon and Binchy* loc. cit. chap. 24).

27. In SCOTLAND, possession is protected under the heading of various different delicts, including: (i) ejection and intrusion; (ii) molestation; (iii) encroachment; (iv) nuisance; (v) use of land in *aemulationem vicini*; and (vi) *spuilzie*. Ejection is where someone enters on to lands and removes another or stays on when his right to stay there has expired (*Stewart*, Delict[3], para. 2.10). Intrusion is sneaking on to the subjects when the possessor holds *animo* (by will) rather than *corpore* (in person): "[ejection and intrusion] differ in this; that intrusion is the entering in possession, being for the time void, without consent of the parties interested, or order of law … but ejection … is not only the unwarrantable entering in lands, but the casting out violently of the then possessor" (*Stair* I, ix, 25). The remedies for these nominate delicts are: (a) summary ejection; (b) violent profits, being the greatest profit the pursuer could have made if in possession; and (c) actual compensatory damages (*Stewart* loc. cit.). Molestation is a possessory action, now disused, for determining "to which of two coterminous tenements some disputed part or pertinent pertains, so as to prevent the pursuer being further molested or troubled in his possession of the lands claimed; the modern remedy is by way of declarator or interdict" (*Walker*, Delict[2], 938). Encroachment consists in the permanent usurpation by another in some portion of a man's lands, which deprives him of the free use of it for the future (*Walker* loc. cit. 944). Examples of encroachment include a building projecting over the property of another (*Bell*, Principles of the Law of Scotland, §§ 941, 967; *Graham v. Greig* (1838) 1 D 171; *M'Intosh v. Scott & Co.* (1859) 21 D 363; *Leonard v. Lindsay & Benzie* (1886) 13 R 958 or a pipe running through a neighbour's property (*Galbreath v. Armour* (1845) 4 Bell 374) or by trees overhanging the neighbour's garden (*Wedderburne v. Halkerston* (1781) Mor. 10495), or by the roots of trees penetrating the ground beyond the boundary (*McCombe v. Read* [1955] 2 QB 429; *Davey v. Harrow Corp.* [1958] 1 QB 60). The term nuisance is used loosely to cover any use of property which causes trouble or annoyance to neighbours (*Walker* loc. cit. 955). Scotland does not follow suit with the distinction drawn in England and Ireland between public and private nuisance, with Scots law taking its own tripartite approach, distinguishing between common law nuisances, statutory nuisances and conventional nuisances (*Walker* loc. cit.). In Scots law use of land which is otherwise lawful may be actionable as wrongful if the predominant motive for the use in question is the harm of a neighbour, the gratification of spite, or the oblique motive: this is termed "use of the land *in aemulationem vicini*" (*Walker* loc. cit. 993-995). Spuilzie both describes: (a) the act of interfering with property, namely spoliation; and (b) a remedy known to the law of Scotland in respect of such actions (*Stewart* loc. cit. para. 2.21). It is committed by a

person who takes away moveables without the consent of the possessor or without order of law – it is not even necessary for the pursuer to establish ownership of the property so long as there is a right of possession or custody (*Stair*, I, ix, 16). There is liability for property destroyed, property of another taken, property of another used without permission and property detained (*Stewart* loc. cit. para. 2.22).

III. Loss, in particular, recoverability of non economic losses and loss of use

28. Under BELGIAN, FRENCH and LUXEMBURGIAN law every loss following from the destruction, loss, damaging or depreciation in value of an object constitutes damage recoverable under tort law, without there really being any differentiation in principle between these different heads of damages (*Viney and Jourdain*, Les conditions de la responsabilité[2], no. 251-1 p. 19). Where a new car is damaged, according to French doctrine (the situation in Belgium has yet to be definitively clarified) not only costs of repair, but also the depreciation in market value of an accident damaged car are to be made good (Cass.civ. 6 October 1966, D. 1967, jur. 5). Loss of use (the temporary impossibility of being able to use an object) amounts to recoverable damage in both legal systems (*Viney and Jourdain* loc. cit. 20; *Schryvers and Ulrichts*, Schaderegeling in België[5], 34-37); it is even granted where animals are injured (e.g. a riding horse: CFI Nijvel 3 February 2003, RGAR 2004, no. 13927). Up to the delivery of the new car, the owner of a car that is written off has a claim to compensation of the costs of a reasonable rental car, and furthermore a claim to compensation for the fact that he has lost the advantage of free servicing on the old car (CFI Charleroi 7 May 2001, RGAR 2002, no. 13575). If it is established that the *atteinte au bien* has caused *dommage moral*, this is also to be compensated (JClCiv [-*Bertolaso*], art. 1382 à 1386, fasc. 110, no. 18; *Simoens*, Schade en schadeloosstelling, no. 175 pp. 327-328). The principle of objective and complete reparation applies generally: the state in which the injured party would have found himself, had the injurious event not occurred, is to be restored (*Simoens* loc. cit. no. 152 p. 300).

29. In SPANISH academic writing there is debate on whether non-economic losses, which the owner of a thing suffers as a result of its destruction or damage to it, are also recoverable (for those in favour, see e.g. Albaladejo [-*Santos Briz*], Comentarios al Código Civil y compilaciones forales XXIV, art. 1902, 217; verneinend dagegen *Díez-Picazo*, Derecho de daños, 328). CA Álava 18 June 1999, AC 2000 (1) no. 118 p. 204 granted non-economic compensation to a house owner when her front door was damaged by the defendant company and as a result she could not close it for a time, meaning that she had lived in constant fear of intruders. Every crease in relation to tort law recoverability for damage resulting purely from loss of use has not yet been ironed out, *viz*. the question of whether the abstract possibility of using an object amounts to economic value *per se*. It is affirmed here and there, see e.g. Albaladejo (-*Santos Briz*) loc. cit. art. 1902, 231; CA Ciudad Real 12 February 1998, BDA AC 1998/3435 (amount of damages assessed at 20% of the costs of public transport); CA Pontevedra 10 October 1995, BDA AC 1995/1949 (damages for loss of use affirmed but only for the time in which it was actually being repaired in the workshop); CA Soria 15 February 2000, BDA JUR 2000/113208 (same); CA Zamora 1 February 2001, BDA JUR 2001/123000 (damages for loss of use affirmed for an apartment, although the owners did not live in it consistently); CA Barcelona 24 November 2000, BDA JUR 2001/63518 (in the case of a car being used for professional purposes, no compensation for time during public holidays). Also Catalan CC art. 546-14 points in a similar direction with its rule on damages (for the position before codification see further *Martín Vida*, VersRAI 2005, 57-63; VersRAI 2006, 5-8). In the same way, the overwhelming number of appellate court decisions (clarifying words of the Supreme

Court are absent) constantly insist on the existence of actual loss, thereby granting no compensation of abstract damages for loss of use. See for instance CA Guadalajara 22 March 2006, BDA JUR 2006/140758 (no compensation for the mere loss of potential use); CA Baleares 13 February 2006, BDA JUR 2006/84138 (water leak caused by neighbour, no damages for the deprivation of the use of the house during the period of repair because the house was a second home, not designated for renting purposes); CA Caceres 6 May 1998, BDA AC 1998/5721 (no damages for the deprivation of the use of a car during the period of repair because the plaintiff did not manage to prove any loss); CA Zamora 1 February 2001, BDA AC 2001/229 (no compensation for the deprivation of the use of two hotel rooms during repair works because there was no full booking and thus no relevant damage); and CA Barcelona 15 January 1999, BDA AC 1999/2960 (no compensation for the deprivation of the use of an apartment because there was no tenant).

30. In ITALY non-economic damage as a result of damage to property or destruction thereof is not recoverable (CC art. 2059; for a revision of this traditional viewpoint *Conti*, Danno e resp. 2006, 237). Conversely, the situation in Italy in relation to damages flowing from loss of use is not completely clear. If another's land is illegally occupied, the assessment of damages takes its cue from the rental value (Cass. 4 November 1995, no. 11524, Giust.civ.Mass. 1995, fasc. 11). The damage is *in re ipsa*, since the dispositional authority of the *dominus* can be injured and the *utilitas* (= the civil fruits, namely the rent) can no longer be drawn (Cass. 11 March 1995, no. 2859, Giust.civ.Mass. 1995, 583). An estimated amount is granted, a *danno figurativo*. Recoverability of accident damage to cars had been denied some few years ago; the owner must at least have proven that he would have actually used the car, if it did not have to be repaired and that he could no longer work or was forced to use public transport (so-called *danno da fermo tecnico*, see particularly from case law: Cass. 19 November 1999, no. 12820, Giust.civ.Mass. 1999, 2295). In more recent decisions, however, is has been stated that *danno da fermo tecnico* is to be compensated independently of particular proof of damage according to the free discretion of the trial judge, in order to compensate frustrated expenses (general running costs of the car) and depreciation in value (Cass. 13 July 2004, no. 12908, Giust.civ.Mass. 2004, fasc. 7-8; Cass. 14 December 2002, no. 17963, Giust.civ.Mass. 2002, 2202).

31. Under HUNGARIAN CC § 355(4) loss in value occasioned to the assets of the injured party (BH 1996/196) and proprietary advantages that fail to come to fruition (BH 1984/401; the claim in this case was denied due to factual reasons, however) are to be compensated, as are, furthermore, all costs that are necessary to reduce or eradicate the injured party's economic and non-economic detriment. Where an apartment is flooded, the costs of repair are consequently to be compensated; moreover, compensation for the restriction of the use of the apartment – as lost profit – is to be provided. In contrast, the fact that a family get-together could not take place to a respectable degree in the apartment in question was not deemed severe enough to make out a further claim in non-economic damages (BH 2002/482). If someone misses a business appointment due to a traffic accident for which another is at fault, the loss is recoverable flowing from the fact that a contract failed to be concluded as a result (BH 2001/273); the same goes for lost profit as a result of the destruction of an ice cream parlour (BH 1997/332). The consequential costs of an interference with possession are also recoverable (BH 1999/202: restorative building work as a result of the unauthorised renovation of an apartment). Where someone expertly repairs her/himself, s/he can account for the market price of such repairs (BH 1996/313). Further, e.g. the rental costs of a replacement vehicle during the period of repair may be compensable (BH 1984/499, relates to a locomotive). In contrast, the recoverability

of damages for non-material loss for damage to property is denied, see *Vékás*, FS Boytha György 2004, 332. BH 2002/482 follows the view that non-economic damages only fall due for infringements of personality rights. See also BH 1996/358 (the right to property does not belong among personal rights, which is why a claim in non-economic compensation does not come into the picture where a thing is merely confiscated by a judge for an amount of time that exceeds the lawful period). The proposed scheme for a new CC tends in the same direction (*Herpai*, VersRAI, 2005, 46).

32. Under GERMAN law non-economic damage as a result of an infringement of property rights is not recoverable (CC § 253(2)). More often than not, this throws up the question of which disadvantages are to be qualified as economic and which as non-economic. BGH 9 July 1986 (Grand Senate for Civil Matters), BGHZ 98, 212) inferred that where objects are used on the operations side of business, the lost possibility of use is to be qualified as lost gains. If private use is at issue, compensation only comes into focus in cases of commercial goods of basic necessity; however, even a "normative supplementation" of the calculation of the differential under the law of damages is imperative here. The loss of use in elementary necessities (automobile, abode, necessary fixtures) is qualified as economic, the loss of use in luxurious goods (private swimming pool, fur coat, private jet) as non-economic damages (see further Palandt [-*Heinrichs*], BGB[65], preliminary observations to § 249, nos. 20, 25 and MünchKomm [-*Oetker*], BGB[4], § 249, no. 58).

33. It is also true for AUSTRIA that for property damage, compensation in kind (repair) falls due first and foremost. Compensation of value in the amount of the value of reconstruction is payable in cases of the destruction of a thing due to slight negligence (CC § 1332), in cases of gross fault, lost gains are additionally recoverable (CC § 1331 first sentence) and for malice also non-economic damages (CC § 1331 second sentence: "particular sentimental value"; the so-called "sentimental interest"). Furthermore, the so-called drop in market value is recoverable (Schwimann [-*Harrer*], ABGB VII², § 1323 no. 20), not however pure loss of use (thus no reparation of so-called "notional car rental costs": OGH 3 March 1969, SZ 42/33, *Koziol*, Haftpflichtrecht I³, no. 2/108). There is, however, a claim to the compensation of frustrated expenses (tax, insurance, garage rental) during the period of repair (*Koziol and Welser*, Bürgerliches Recht I[11], 287). On the other hand, the cancellation fee for a boat, which the claimant had rented for his holidays but could not take due to an accident, is not compensable; in reality this type of frustrated expenses is concerned with non-economic loss (CFI Salzburg 10 April 2004, 22R34/04k). Pure loss of the possibility to use a thing is also not recoverable (OGH 9 October 1986, SZ 59/165; OGH 17 June 1993, JBl 1994, 121; OGH 4 June 1987, SZ 60/102), which is why e.g. so-called 'notional rental costs' (illustration 15 above) are qualified as irrecoverable non-economic loss (*Koziol and Welser*, Bürgerliches Recht II[12], 287). Things are different where deprivation of use brings with it a real loss of assets (OGH 14 August 1996, EFSlg 81.472; OGH 16 December 1992, ecolex 1993, 379).

34. In GREECE, just like in Austria, but not in Germany, the opinion prevails that a so-called "abstract loss of use" is not recoverable damage; it lacks a loss of assets in the sense of the method of calculating damages whereby the disparity of assets between the situation before and after the injurious event is sought to be remedied (*Stathopoulos*, Geniko Enochiko Dikaio A(1)[2], 540; *Sourlas*, NoB 33 [1985] 728, 743). The additional expenditure of time, the discomfort and effort on the part of the injured party are, however, recoverable as non-economic damages in the context of CC art. 932 (*Stathopoulos* loc. cit. 541). During the period of repair of a damaged car, frustrated expenses are additionally compensated (*Stathopoulos* loc. cit.; CFI Athens

3053/1978, NoB 27 [1979] 106; critical, *Sourlas* loc. cit. 736); to this extent, the situation corresponds with that in Austria.

35. In PORTUGAL the question of the recoverability of damage resulting from loss of use has to date remained unanswered (details in *Abrantes Geraldes*, Indemnização do dano, 6). It seems that previously in relation to vehicles, it was predominantly affirmatively answered (*Mesquita*, RLJ 125 [1992/93] 159; *Menezes Leitão*, Obrigações I, 297; STJ 6 June 2006; STJ 9 May 1995, BolMinJus 457 [1995] 325), of late it tends mostly to be answered in the negative (STJ 8 June 2006; STJ 12 January 2006; STJ 4 December 2003; CA Oporto 8 July 1997, BolMinJus 469 [1997] 663; see also CA Coimbra 4 October 1994, BolMinJus 440 [1994] 554). The illegal occupancy of land, however, shall even ground liability where the owner cannot prove that he would have rented it for this period (CA Lisbon 11 March 2003, CJ 2003-II, 70). Evidence of actual loss is therefore unnecessary here (STJ 29 June 2004). It is self-evident that the expense of having to rent a car during the period of repair of one's own car is recoverable (*Abrantes Geraldes* loc. cit., 33; STJ 5 March 2002). In the context of lost use even compensation for non-economic losses has been granted (STJ 23 January 2001; CA Evora 26 March 1980, CJ 1980-II, 96), however, that is not done as a rule (denied by e.g. STJ 4 December 2003 and CA Coimbra 4 October 1994 loc. cit.).

36. In DUTCH Law the rule that the party liable in tort is automatically in default (CC art. 6:83(b)) and therefore must pay statutory interest on his liability in damages from the moment the tort is committed, is transferred to the situation of the detention of a thing. *Bedrijfsschade* (loss of operation) and *gebruiksderving* (loss of use) are spoken of here. Compensation for such a loss of use is concretely calculated; the value of the real lost use is authoritative, not a mere abstract possibility of use (for more detail and references to diverging views, see *Salomon*, Schadevergoeding, no. 21 pp. 45-50). A claim in compensation of non-economic losses will only lie where the person responsible had the intention of inflicting such damage (CC art. 6:106(1)(a)). The provision foresees cases in which an object is destroyed or damaged with the purpose of inflicting mental pain on the owner, thus injuring his "sentimental interest" (Parlementaire Geschiedenis VI, 378-380). The intention must also cover this advanced purpose; it is not sufficient that it "only" relates to the property damage as such (Schadevergoeding II [-*Lindenbergh*], art. 6:106, nos. 20-21, pp. 134-145).

37. ESTONIAN LOA § 134(4) follows a very similar, if not perfectly identical approach ("In the case of destruction or loss of a thing, the aggrieved person has, taking into account exceptional circumstances, the right to claim a reasonable amount of money as compensation for non-patrimonial damage in addition to compensation for patrimonial damage regardless of the usefulness of the thing if the person had a special interest in the destroyed or lost thing primarily for personal reasons"). The compensatory obligation in relation to patrimonial damages is elaborately regulated in LOA § 132. In the case of destroyed things, the point of departure is the principal of compensation of value (paras. (1) and (2)); in the case of property damage, the costs of repair are to be met (para. (3)). Loss of use is the subject-matter of the rule in § 132(4): "If a thing damaged was necessary or useful for the aggrieved person, in particular, for the person's economic or professional activities or work, compensation for the damage shall also cover the costs of using a thing of equal value during the time in which the damaged thing is being repaired or a new thing is being acquired. If the person does not use a thing of equal value, the person may claim compensation for loss of the advantages of use which the person could have benefited from during the time in which the thing is repaired or a new thing is being acquired". On this provision see Supreme Court 3-2-1-137-05, RT III 2006, 3, 26.

38. SWEDISH Law on Damages chap. 5 § 7 states: "Compensation for property damage encompasses compensation for (i) the value of the thing or the costs of repair and depreciation in value, (ii) other costs resulting from the damage, (iii) lost income or interference with commercial activity." This extensively corresponds with FINNISH Law on Damages chap. 5 § 5. The DANISH Law on Damages is silent on the issue of property damage. For all three legal systems, see also the Notes under VI.–6:101 (Aim and forms of reparation). In a case in which someone felled six large old trees on neighbouring land, DANISH Supreme Court 12 September 1994, FED 1994.995V expressly also compensated the non-pecuniary damage. The "other costs" enumerated in SWEDISH Law on Damages loc. cit. may refer to wholly different headings. In particular what is meant are costs for the transportation of the damaged thing, costs of inspection (restricted, however, by HD 5 June 1989, NJA 1989, 251), of an expert valuation and for expenses for the mitigation of damage. Furthermore, so-called "standstill compensation" (pure loss of use in the case of vehicles) and the recoverability of the cost of keeping a reserve are also recognised (a transportation company's precaution of keeping by a replacement vehicle in case of an accident); compensation of costs on a pro rata basis) (HD 6 February 1932 and 14 October 1939, NJA 1939, 481; HD 4 June 1945, NJA 1945, 295; HD 27 September 1950, NJA 1950, 409; *cf*. HD 8 February 1993, NJA 1993, 13). Compensation has even been granted for the impossibility of using a damaged yacht during the holiday season (HD 5 October 1945, NJA 1945, 440), the same goes for three lost days of vacation resulting from damage to a car and caravan (HD 10 April 1992, NJA 1992, 213) and for the reward paid by the insurance company after a theft (HD 6 May 1994, NJA 1994, 283). DANISH case law grants compensation for increased maintenance costs as a result of property damage (Supreme Court 12 April 1960, UfR 1960, 932) and for the loss of use during repair and the waiting period until repurchase (*von Eyben and Isager*, Lærebog i erstatningsret[5], 251).

39. It is apparent that in IRELAND, apart from rulings in connection with car accident damage, there is near sole reliance on English rules due to the former's dearth of case law on this subject (for the case of car accident damage, see *Hayes v. Callanan* [2000] 1 IR 321: a case involving a road traffic accident where a previous action between the parties had come before the District Court and damages for loss of use and depreciation of the plaintiff's car, along with travelling expenses, were granted; subsequent proceedings were brought for personal injuries, the admissibility of which constituted, *inter alia*, the subject-matter of the case coming before the High Court in this reported case). As far as its significance for Ireland is concerned, reported case law and commentary in England on the recovery of damages for loss of use seems to be restricted to where the plaintiff would have derived direct commercial benefit (more easily transferable into a monetary sum) from its use, as is noted above in the context of conversion (under Note *I14*): where the converted article would have been put to profitable use – such as being hired out – losses for this use may also be recovered (*Fleming*, Law of Torts[9], 77-78). In an action for detinue the scope is broader (see above, Note *I14*), with damages for the chattel's detention also recoverable, under which damages for rental costs (*General & Finance Facilities Ltd. v. Cooks Cars (Romford)* [1963] 1 WLR 644, quoted with approval by *Blayney* J. in *Webb v. Ireland* [1987] IESC 2, [1988] IR 353) and the depreciation in value of the chattel between the date of the defendant's refusal to deliver the chattel (up to the plaintiff) and its actual return also fall (*Rosenthal v. Alderton & Sons Ltd*. [1946] KB 374, 378, per *Evershed* J.; see also *Hymas v. Ogden* [1905] 1 KB 246, where damages were awarded for the wrongful detention of the plaintiff's running dog). In *General & Finance Facilities Ltd. v. Cooks Cars (Romford)* loc. cit. *Diplock* L.J. referred to the

damages awarded under conversion as being "for a single sum of which the measure is generally the value of the chattel at the date of the conversion together with any consequential damage flowing from the conversion and not too remote to be recoverable in law" (loc. cit. 649). In *Egan & Sons Ltd. v. Sisk & Sons Ltd.* [1986] ILRM 283 (where the plaintiff's warehouse was flooded due to the negligence of the first named defendant and brochures stored there to be used in connection with their mail order business were destroyed), the plaintiffs recovered loss of profits on anticipated sales, *Carroll* J. stating that "if a defendant through its negligence injures property in a warehouse, it must take the responsibility for damaging whatever goods are there… It is also foreseeable that because a warehouse is part of the world of commerce, there will be economic loss and possible loss of profits. If the goods can be replaced at cost, so much the better for the defendant; if the goods cannot be replaced, then the economic loss, including loss of profits, is foreseeable."

40. In SCOTLAND where a car is damaged in a road accident, the owner is entitled to loss of use of the damaged car while it is being repaired or replaced (*Thomson*, Delictual Liability[3], 253). The reasonable cost of hiring a car while the damaged vehicle is off the road is the yardstick drawn upon here. Accident car hire companies or credit hire companies that do *not* require a debit or credit card 'up front' (going against the grain of the normal practice of charging the pursuer's card first, with damages then eventually recovered by the pursuer from the defender) partake in the practice of assessing the merits of the motorist's case when he seeks a replacement car; if satisfied that the claim is unanswerable, the company provides a car and then pursues the motorist's claim against the defender's insurer, charging an additional fee beyond the so-called 'spot rate' for simple car hire (*Thomson* loc. cit.). In *Dimond v. Lovell* [2002] 1 AC 384 the House of Lords held that compensation for loss of use of a damaged car was restricted to the spot rate for hiring a car from a company other than an accident or credit hire company, i.e. the additional fee element charged by an accident or credit hire company was not recoverable. In *Lagden v. O'Connor* [2003] UKHL 64, [2004] 1 AC 1067, however, the House held that where the motorist was not in a pecuniary position to fund the cost of hiring a replacement car from a car or credit hire company himself, his loss could be assessed taking account of the accident or credit hire company's charges *including* the additional fee. The majority held that the impecuniosity of the plaintiff should be taken into account, with the effect that Lord *Wright's* opinion in *Owners of Dredger Liesbosch v. Owners of Steamship* Edison [1933] AC 449 (that a claimant's lack of means should not be taken into account when assessing the loss) was no longer to be followed. In the context of ejection and intrusion, an owner kept out of possession by a tenant may claim damages for loss resulting from that person's failure to remove and wrongful retention of possession, and possible also violent profits, which are penal damages instituted as a special deterrent against taking the law into one's own hands (*Walker*, Delict[2], 937). In the case of encroachment, the invasion of the pursuer's exclusive rights in the property is sufficient to justify an action, and no damage or loss need be proved (*Colquhoun's Trustees v. Orr Ewing & Co.* (1877) 4 R 344). In an action of spuilzie, the "action lies against the delinquent, not only for restoring to the former possessor the goods or their value, but for all the profits he might have made of these goods had it not been for the *spuilzie*. These profits are estimated by the pursuer's own oath … and get the name of violent, because they are due in no other case than of violence or wrong" (*Erskine*, II, 7, 16).

Illustration 2 is taken from HR 20 September 1985, NedJur 1986 no. 211 p. 775; **illustration 4** from Danish Supreme Court 22 June 2004, UfR 2004, 2389; similarly Swedish HD 7 March 1988, NJA 1988, 62; **illustration 6** from BH 1999/202; **illustration 8** from BGH 17 March 1981, BGHZ 80, 186 and 199; **illustration 9** from CFI Piraeus, DEE 10 (2004) 678; **illustration 11** from Finnish HD 27 May 1994, NDS 1995, 264; **illustration 12** from BGH 21 December 1970, BGHZ 55, 153 and from BGH 18 November 2003, NJW 2004, 356, 358; **illustration 13** from Cass.ass.plén. 7 May 2004, Bull.ass.plén. 2004 no. 10 p. 21; similarly BH 2005/143**; illustration 14** from *Payton v. Brooks* [1974] 1 Lloyd's Rep 241; and OGH 23 February 1995, ZVR 1995, 304; **illustration 15** from CA Pontevedra 10 October 1995, BDA Civil 1995/1949; and **illustration 16** from Cass. 4 November 1995, no. 11524, Giust.civ.Mass. 1995, fasc. 11 and Cass. 11 March 1995, no. 2859, Giust.civ.Mass. 1995, 583.

VI.–2:207: Loss upon reliance on incorrect advice or information

Loss caused to a person as a result of making a decision in reasonable reliance on incorrect advice or information is legally relevant damage if:

(a) the advice or information is provided by a person in pursuit of a profession or in the course of trade; and

(b) the provider knew or could reasonably be expected to have known that the recipient would rely on the advice or information in making a decision of the kind made.

COMMENTS

A. General

Policy considerations. As a general principle there is no liability for advice, recommendation and information. Any such liability would go too far to be workable for daily life and would burden every interpersonal communication with an unbearable risk of liability. The case is otherwise only when the recipient of the information has special cause to rely on the correctness of the information and the provider of the information knows or should know about this special situation in which the recipient of the information is placed. Typical cases concern information about credit-worthiness provided by banks and faulty valuations or certifications. Further instances would be instructions on use which a producer encloses with a product for the guidance of the end consumer or where a certificating authority issues digital signatures. However, the provision can also have effect in the realm of legal liability of doctors and other professionals.

European community law. As regards the special rules for internet service providers see Comment A and Notes IV37-45 under VI.–2:204 (Loss upon communication of incorrect information about another). In contrast to the Directive on Electronic Commerce (2000/31/EC), the Directive on the prospectus to be published when securities are offered to the public or admitted to trading 2003/71/EC (OJ L 345 of 31 December 2003) has left the civil liability of the publisher of the prospectus unaffected (loc. cit. art. 6).

Relationship to contractual liability. Like all rules in this Book, VI.–2:207 is related to non-contractual liability. In some of the cases covered by VI.–2:207 a liability in contract may also arise. See further Book IV Part C. (Services). It is possible that contract law may undergo further developments whose effect will be to buttress or overlap with VI.–2:207 to a not insignificant extent. Whether in a particular case a parallel liability in non-contractual liability ought to be excluded must then be determined by contract law (VI.–1:103 (Scope of application) sub-paragraph (c)). However, the text proceeds on the basis that in cases comparable to the English decision in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 (concerning a credit reference provided by a bank in response to the third party's inquiry whether the bank's customer would be in a position financially to discharge obligations under a prospective transaction) a contract solely containing an obligation of the bank to be liable in the event of the information being incorrect would not arise. That is because there is no unilateral promise.

Relationship to VI.–2:204 (Loss upon communication of incorrect information about another). Whereas VI.–2:204 (Loss upon communication of incorrect information about another) governs legally relevant damage in case of incorrect information communicated to a third party, VI.–2:207 governs damage in case of incorrect information communicated to the

recipient. VI.–2:207 thus concerns the question when does a recipient of false advice or information suffer a legally relevant damage if suffering loss by relying on that advice or information. It does not concern the situation in which false information is given *about* the claimant to a third party.

Illustration 1
If in deciding to make a (detrimental) tax-privileged capital investment a dentist relies on the incorrect information which an accountant and tax consultant has given the dentist orally, in a letter or in a brochure, the resultant loss will be legally relevant damage within the meaning of VI.–2:207. If it is reported that the dentist is evading tax, the matter falls within the ambit of VI.–2:204 (Loss upon communication of incorrect information about another).

B. The circle of protected recipients of the information

Professional advice or information. Not every provision of information and advice which is defective and relied on by the recipient to the recipient's detriment can lead to liability under this Article. The damage must be caused by provision of information "in pursuit of a profession or in the course of trade". So-called 'kerbstone' advice falls outside those terms because provision by a professional is not enough; what is required is provision of the defective information or advice in the course of carrying out the profession. In the usual case this will mean in the context of a business activity, albeit irrespective of whether that is remunerated and whether there is a pre-existing contractual relationship with the recipient.

"The" recipient, not "a" recipient. The recipient of the information may be either a private individual or a person engaged in a business, trade or profession and may be either a natural or a legal person. The provision does not apply, however, to just any incidental recipient of the information who happens to rely on the correctness of the message that has come to that recipient's attention. The matter does not turn on whether the person communicating the information knew or ought to have known that somebody at least would rely on the information. What is essential is rather that that person must have had a definite circle of persons in view (sub-paragraph (b)). The person who gives the information or advice certainly need not know the actual recipient. An anonymous recipient suffices. Nor is it necessary that the recipient received the defective information or advice from the provider directly. An indirect recipient who obtains the information through intermediate third parties may equally have a claim. However, in both such cases the claimant must belong to the class of potential recipients of the information whose members the provider of the information knew or ought to have known would be dependent on the corrections of that information in coming to a decision of substantial significance and would rely on it. A person who does not reach a business appointment due to an incorrect traffic congestion report does not suffer legally relevant damage.

C. Reliance

Reasonable reliance. The existence of relevant damage for the purposes of the law on non-contractual liability arises crucially out of the disappointment of a legitimate reliance. It does not suffice that the recipient of the information actually relied on its correctness. This must be accompanied by the element that in the circumstances and in relation to the decision to be made, the recipient might reasonably rely on the information. A reasonable reliance on the accuracy of the information or advice is missing if one has trusted the utterances of a fortune teller, astrologist or similar charlatan. The recipient of information may also not rely on it if

the recipient knows or should know that the provider of the information does not wish to vouch for the correctness of the communication.

Illustration 2
The element of justifiable reliance is therefore missing if the providers of the information makes it explicit that they do not or cannot accept responsibility for the correctness of the information (e.g. by making use of a "without obligation" clause or similar formulation).

Foreseeability of reasonable reliance. The requirement that the provider should have foreseen reasonable reliance on the advice or information provided (sub-paragraph (b)) will also operate to qualify implicitly the types of decision which can result in a loss relevant to VI.–2:207. The claimant must show that the provider ought to have foreseen that (i) the injured person would have made a decision of the type in fact made and (ii) would make such a decision in reliance on the information or advice provided. It is inherent in the foreseeability of such (reasonable) reliance on the information or advice that a decision of the sort made will be a significant one. The more serious the decision, the more the recipient's need for expert insight and correspondingly the greater opportunity for dependence on another's provision of expertise because of the informational imbalance between the parties. Conversely, the more trivial the decision, the less the grounds for supposing that the recipient would depend on the information given and the greater the reason for assuming that the recipient would not be strongly influenced by it. An information provider can safely expect others to make trivial decisions under their own steam and not to act parasitically on the guidance of others.

Illustration 3
Representatives of a regional agency of an *association pour l´emploi dans l´industrie et le commerce* hold an information session on the terms of early retirement annuities in the rooms of the claimant's employer. The claimant relies on this information; the damage that is caused to her as a result of her leaving the working world on the basis of too generous statements of her prospective pension is legally relevant damage. The *association* is liable if negligence is attributed to its representative. Contributory fault on the part of the claimant leads to a reduction in the claim to reparation.

D. Incorrect advice or information

An inseparable composite term. The subject-matter of VI.–2:207 is loss as a result of decisions that are attributable to "incorrect advice or information". This term does not denote two separate events (*either* advice *or* information), but rather a single activity in which an assertion of fact blends with a recommendation to make a decision based thereon. Mere advice ("travel by train, not by car") taken on its own lends itself just as little to being qualified as "right" or "wrong" as a mere value judgement. The advice must be based on a core of fact. On the other hand, a pure assertion of fact is likewise no sufficient basis for ascribing decision-making to that assertion. Instead a combination of both elements, for instance the (false) statement that the required planning permission for a piece of land had been given, coupled with at least the implicit recommendation to opt for the acquisition of that land. Mere conjecture is no assertion of fact.

Causation. VI.–2:207 operates with a two-pronged requirement for causation. The incorrect advice or information must have been a cause of the affected party making the relevant decision and this must in turn be seen as a cause of the loss. In each case, so-called

"psychological causation" is in issue, which can be ascribed to an omission by the party responsible.

Illustration 4
A firm of accountants negligently overlooks considerable book losses while auditing a company's balances. Relying on the report, private persons invest in the audited company, which shortly afterwards goes into liquidation. The firm of accountants is liable to the investors for the price paid for the shares.

Accountability. VI.–2:207 relates only to the question of the prerequisites for the affirmation of legally relevant damage. As with all the provisions of this Section, it does not constitute a complete norm of liability. In particular it remains to be examined, whether the provider of the information acted negligently and whether contributory fault may be attributed to the recipient of the information in not having verified the information.

NOTES

1. In cases of erroneous information to the detriment of a contracting party, FRENCH and BELGIAN contract law first and foremost differentiate according to whether the person who has to furnish the information is to assume an *obligation de moyens* or an *obligation de résultat* (*le Tourneau*, Droit de la responsabilité et des contrats 2004/2005, nos. 5379-5381; CA Antwerp 2 May 1995, RW 1996-1997, 302 [upon request of a customer, a bank provides trade information; liability for its incorrectness only where breach of duty is present]). Against the backdrop of an extra- or precontractual relationship, in both systems it depends on the existence of a *faute* causing damage (Cass.soc. 5 November 1999, Bull.civ. 1999, V, no. 430 p. 318; CFI Bergen 26 September 1994, TBH 1995, 1035). Any person who declares himself as being willing to provide information has the duty to sufficiently inform himself beforehand (Cass.civ. 19 October 1994, Bull.civ. 1994, II, no. 200 p. 115; Raad van State/Conseil d´État 28 March 1996, RW 1996-1997, 435, note *Lambrechts* [false information by a borough on the competent court of review; liability for the claimant's procedural costs]).
2. The SPANISH CC likewise contains no general provision on liability for damages resulting from erroneous information or advice; jurisprudence on the extracontractual side of this problem field seems to be absent to date. In academic writing, reference is made to suggestions from English law (particularly *Frades de la Fuente*, La responsabilidad profesional frente a terceros por consejos negligentes, 1999; also *Del Olmo García*, ADC, 2001, pp. 257-368). *De Ángel Yágüez*, Responsabilidad por informar, 171, 188 opines that extracontractual liability for erroneous information would in principle not be made out by mere negligence. This is of course not on all fours with CA Barcelona 31 July 2000, BDA JUR 2000/306843 (following an erroneous audit report in which considerable book losses had been overlooked, liability of the relevant accountancy firm was affirmed not only to the client and contractual partner, but also to later investors, who lost their investment as a consequence of the insolvency of the audited company).
3. The situation in ITALY corresponds to the rule in VI.–2:207. Case law only allows a tort law claim for erroneous information where it reaches the stage of qualified contact between the participants in the context of an economically relevant decision-making-process. Anyone who has requested the information must have relied on the specialist

skills and knowledge of the person who has provided the information (Cass. 9 June 1998, no. 5659, Foro it. 1999, I, 660 and Cass. 10 October 1998, no. 10067, Resp.civ. e prev. 1999, 404; cf. for information from a public authority, also Cass. 9 January 2004, no. 2424, Resp.civ. e prev. 2004, 731 [liability *in casu* denied because of a lack of negligence]). Most cases concern the liability of banks for erroneous information on the financial status of one of their customers (Cass. 9 June 1998 loc. cit. [emphasising the legally protected interest in informed decision-making]; Cass. 10 October 1998 loc. cit.; Cass. 1 August 2001, no. 10492, Giust.civ.Mass. 2001, 1517) and the liability of governmental posts to private persons (see, along with Cass. 9 January 2004 loc. cit., e.g. also Cass.sez.lav. 9 April 2001, no. 5247, Giust.civ.Mass. 2001, 751 [inflated details of paid social insurance contributions]; Cass.sez.lav. 18 November 2000, no. 14953, Giust.civ.Mass. 2000, 2373 [similar facts; claim however qualified by contract]; Cass.sez.lav. 31 January 2003, no. 1104, Giust.civ.Mass. 2003, 173 [erroneous information on a pension claim apparently already obtained; liability for the remaining outstanding payments]). In academic commentary it is disputed, whether cases of this type concern liability in tort or contract law, cf. on one side *Busnelli*, Contr. Impr. 1991, 561 (tort law; the *ingiustizia* of the damage lies in the innocent reliance of the recipient of the information which is cognisable by the other party) and on the other *Castronovo*, La nuova responsabilità civile[3], 492 and Scognamiglio, Giur.it. 1995, IV, 356 (contract law; liability for the breach of a duty of care, which is to be derived from the fact that the recipient relied on the professional qualifications of the other party).

4. In HUNGARIAN law the point of departure is the general presumption of fault in CC § 339(1) second sentence. It can be expected of those gainfully employed in the relevant area, that the information provided by them is correct (BH 1996/471). In principle, it is also true in Hungary that pure words of advice or suggestions do not trigger liability; the recipient may decide whether or not to follow them himself (BH 1993/425). However, CC § 6 places the grant of damages at the discretion of the courts where someone bona fides and with cogent reason allows himself to be guided towards certain behaviour by another, through which he innocently harms himself. What is in issue here is a rule of liability, which is neither of a tortious nor contractual nature, since the conduct of the party proffering the recommendation or encouragement is not unlawful (Gellért [-*Vékás*], A Polgári Törvénykönyv Magyarázata[6], 56-63; *Bíró and Lenkovics*, Magyar Polgári Jog, 194-199). Practically speaking, CC § 6 only plays a minor role because personal fault on the part of the party affected is mostly inferred. It would also be expected of entrepreneurs that they should not rely on the statements of their negotiating partner uncritically and without their own personal assessment under normal market practices (BH 1990/64). Furthermore, CC § 6 is to be distinguished from liability due to *culpa in contrahendo*, which is in any event subject to the general tort law, where the conclusion of a contract between the negotiating partners has not been arrived at (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 766-767). Where stocks and bonds are issued on the basis of false information, the contract is invalid; the duty to compensate is subject to Law No. CXX/2001 on the Capital Market § 29(1) (EBH 2001/544). Apart from that, it is conceivable that erroneous information is deemed as an affront to personality (BH 2004/235: invalid indenture with the consequence of a disruption of the affected party's career). Reference is also ultimately made to CC § 210(2), whereunder a contract can be avoided due to a mistake of law, where the mistake was essential and was attributable to misinformation that had been furnished to both parties by a legal expert.

5. GERMANY deals with liability for pure economic loss through erroneous information predominantly with the aid of contract law constructs. In the context of tort law, essentially only CC § 826 is at hand. "Immoral" within the meaning of this provision is e.g. providing information, the incorrectness of which is known to its communicator (RG 18 October 1917, RGZ 91, 80, 81; RG 9 March 1938, RGZ 157, 228, 229; BGH 22 June 1992, NJW 1992, 3167, 3174) or which the communicator recklessly confers as a "shot in the dark", despite its content being of recognisable importance to the recipient and the communicator reckoning with possible harm to the recipient (BGH 22 June 1992 loc. cit.). This can assume practical significane, e.g. where banks administer information on the solvency and credit-worthiness of their customers to the latter's contractual partners and default on their claim upon the insolvency of the customer (BGH 20 February 1979, NJW 1979, 1599; BGH 6 December 1983, NJW 1984, 921, 922). However, more frequently case law falls back on the inference that despite the rule in CC § 675(2), a contract for information is implicitly concluded between the requester and provider of information, for the breach of which damages fall due in the case of negligence. The prerequisites are simply that (i) the information is of considerable commercial importance to the recipient, (ii) he wants to make use of it as the basis for essential decisions and (iii) the provider of information either has particular expertise at their disposal or has a personal commercial interest in the provision of the information (BGH 29 October 1952, BGHZ 7, 371, 374; BGH 22 March 1979, BGHZ 74, 103, 106; BGH 17 October 1989, NJW 1990, 513; BGH 16 October 1990, NJW 1991, 352; BGH 7 July 1998, WM 1998, 1771). Even the Supreme Court of the Reich argued thus (RG 27 October 1902, RGZ 52, 365, 366; RG 3 June 1913, RGZ 82, 337, 339). Where a credit institution provides an incorrect attestation to his pecuniary circumstances and where this is submitted in accordance with stipulations to a third party, who in reliance on its correctness makes economic arrangements, the bank is liable for the resulting damages. This is likewise under the guise of an implicitly concluded contract for information (BGH 7 July 1998, WM 1998, 1771). Only where one of the aforementioned requisites are absent is there therefore still a current need for recourse to CC § 826. Similar developments are emerging for the liability of accountants as well as for the liability of evaluators and experts (for more detail, see MünchKomm [-*Wagner*], BGB[4], § 826, no. 54; Erman [-*Schiemann*], BGB II[11], § 826, no. 38).

6. Under AUSTRIAN CC § 1300 (first sentence) an "expert" is liable when he provides advice or information "for remuneration" and thereby acts with at least slight negligence (CC § 1299). Everything that is not done out of "pure courtesy" and "selflessness" is done "for remuneration" (OGH 11 July 1990, JBl 1991, 249; OGH 27 March 1995, SZ 68/60; Schwimann [-*Harrer*], ABGB VI[3], § 1300 no. 2). "Selflessness" is lacking where the advice is given in preparation of a transaction for remuneration (*Harrer* loc. cit.). Even trade unions and interest groups do not act selflessly (OGH 27 March 1995, SZ 68/60: liability of the medical association for omitting to advise of an imminently expiring claim under the law on prescription of claims), this is not so for banks that gratuitously provide credit information (OGH 28 March 2002, ÖBA 2002, 937, note *Koziol*). Even in such cases a contract for information implictly comes into existence (OGH 17 November 1970, SZ 43/208). Liability for advice and information can also be based on public law relationships of duty (OGH 27 May 1980, SZ 53/83; OGH 14 November 1984, SZ 57/172). Hence, false information provided by authorities or courts can ground liability (of the state) (*Harrer* loc. cit. no. 36). If information is indeed provided "for remuneration" in this wide sense and yet gratuitously, individual factors mitigating liability may come into question (see further *Welser*, Die Haftung für Rat, Auskunft und Gutachten, 36). In

principle, only the person to whom the advice is administered is entitled to claim, unless a contract for the protective benefit of the injured third party is in issue. The latter is inferred where the information was recognisably directed at a third party so that the third party could rely on it and make it the basis of his decision (Koziol/Bydlinski/Bollenberger [-*Karner*], ABGB, § 1300 no. 3; OGH 20 November 1996, SZ 69/258 [evaluation of land submittable to a bank]). In contrast, it does not suffice if the provider of information must solely notionally reckon with the relaying of the information to third parties (OGH 27 June 1994, SZ 57/122). Where a specific relationship of proximity between the parties is absent, liability only comes into focus if the provider of the information acted with the intention to harm and with knowledge of the erroneousness of the advice or information (CC § 1300 second sentence); *dolus eventualis* is sufficient (OGH 15 June 1978, MietSlg 30.246; OGH 14 November 2000, ÖBA 2001, 819). CC § 1300 second sentence relates to everyone, not only "official experts". The provision essentially has the function of founding liability also for pure economic losses, since cases of the infringement of absolute rights and interests worthy of legal protection remain within the scope of the general rules (OGH 13 July 1964, SZ 37/105: persuasion to make a mountain trip with the untruthful claim that this was completely safe). Liability for omissions also comes to this table (OGH 4 November 1959, SZ 32/144), but not however for denying being able to bear a child with the conscious knowledge that it was untruthful (OGH 27 January 1994, SZ 67/17).

7. In GREECE the cases covered by VI.–2:207, particularly the liability of banks to third parties, are categorised under tort and not contract law (*Kotsiris*, Arm 38 [1984] 601, 615; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 144). While the tort law protection does not in principle extend to property in general, there are still exceptions thereto in the context of specific duties of care (*Eleftheriadou*, Die Haftung aus Verkehrspflichtverletzung im deutschen und griechischen Deliktsrecht, 124). CC art. 729 does not alter any of this; the application of tort law remains imperative where the information or recommendation no longer turns upon everyday affairs due to its recognisable significance for the recipient and due to the occupation of the provider (*Truli*, Dienstleistungshaftung, 200; see also again ErmAK [-*Kapodistrias*], art. 729 nos. 21, 28). CA Athens 4486/1989, ArchN 1991, 206 affirmed liability of a newspaper for errors in the publication of boat connections to a holiday island. Today, along with CC art. 914, also 2251/1994 art. 8 (as amended by Act no. 3587/2007) is deemed a basis for liability (*Truli* loc. cit. 201 and 203: banks and official experts).

8. PORTUGUESE CC art. 485(1) – like German CC § 675(2) and Greek CC art. 729 – takes the irrelevance of advice, recommendations and information to the law of liability as its point of departure. According to CC art. 485(2), however, a duty to compensate damages emerges in the case of fault, where liability for the damage was assumed and where there was a contractual or statutory duty to provide the advice, recommendation or information (for more detail, see *Carneiro da Frada*, Uma terceira via, 66 and STJ 4 April 2006). In the cases where contractual or statutory duties to provide information are infringed, liability only accrues in principle as against the entitled recipient of the information (*Pires de Lima and Antunes Varela*, Código Civil Anotado I^4, 487; CA Lisbon 22 May, CJ 1993-III, 188). However, a mediator can also become liable to persons who were not party to the mediation contract (CA Oporto 29 May 2003). Further, participants of a course for learner drivers who receive false information on the legal prerequisites for self-employment are entitled to compensation for economic and non-economic damage where they had reason to rely on its correctness (STJ 28 February 2002). Conversely, an assistant of a clerk of court who rendered erroneous information to a party to suit against express instructions

given by the lawyer of the latter is not liable (STA 3 November 1988, BolMinJus 381 [1988] 358).

9. In DUTCH law the starting point is the third alternative in CC art. 6:162(2), according to which conduct constitutes a wrong when it "contravenes unwritten norms of social interaction" (see further Asser [-*Hartkamp*], Verbintenissenrecht III[12], nos. 32-33 p. 42). Counted among these "unwritten norms" are also general norms of care for the protection against pure economic losses; usually this would concern the requirements of care in such groups of occupations that take care of others' property (*Hartkamp* loc. cit. nos. 45 and 51, pp. 59 and 69; Onrechtmatige Daad I [-*Jansen*], art. 6:162 paragraph 2, no 86.2 pp. 884-885). The particular details are left up to jurisprudence, which generally recognises the liability of expert officials for information, on the correctness of which the recipient could rely (see from the cases of the court of first instance e.g. CFI Assen 24 March 1992, Prg 1997, 4771 and CFI Leeuwarden 20 August 1987, NedJur 1992 no. 803 p. 3456). HR 11 April 1997, NedJur 1998 no. 236 pp. 1231-1245 inferred that a bank that executes against the owner of land may rely on the information through his consultant without having to directly contact the owner once again. Conversely, a bank is liable for erroneous or insufficient information on the credit history of one of its customers, which was provided to the latter's contractual partner (HR 10 December 1993, NedJur 1994 no. 667 p. 3192; HR 22 December 1993, NedJur 1994 no 668 p. 3206). HR 19 May 1967, NedJur 1967 no. 261 p. 705 accepted a clause excluding liability in a case in which on its own initiative and in good faith a bank had advised the purchase of particular shares in a company, which immediately lost their value.

10. ESTONIAN LOA § 1048 corresponds in large part to VI.–2:207. It provides: "The behaviour of an expert is deemed to be unlawful if the expert provides incorrect information or an incorrect opinion to another person in a financial matter or, regardless of receiving new knowledge concerning the matter, fails to correct the information or opinion already provided, and if the expert enjoys particular trust due to his or her professional activities and the person who was given the information or opinion could expect to rely on such trust." LOA § 1048 thus expressly clarifies that the omission to correct incorrect information can give rise to liability if the person providing the opinion or information becomes aware of new circumstances. See further *Tammiste*, Juridica 2005, 385–395.

11. SWEDISH law provides compensation for pure economic losses only under quite strict requirements; this also applies in view of extracontractual liability for false information (on contractual liability in this context, see e.g. HD 14 April 1992, NJA 1992, 243). It only comes into focus in "quasi-contractual" relationships (*Hellner and Johansson*, Skadeståndsrätt[6], 76; *Kleineman*, Ren förmögenhetsskada, 439-469). Occasionally it has even operated with a type of artificial contractual liability, like in Germany (e.g. HD 14 July 1980, NJA 1980, 383: false information on financial figures of one of the parties to proceedings by a representative of an authority). Later, liability (first in the context of a false expert appraisal) was then grounded on the justified reliance of the injured third party (HD 14 October 1987, NJA 1987, 692; affirmed on this point by HD 19 December 2001, NJA 2001, 878, cf. *Kleineman*, JT 2001-02, 625, 632). Liability under the Law on financial Advice to Consumers (*lag* [2003:862] *om finansiell rådgivning till konsumenter*) § 1 also oscillates between tort and contract law, which likewise rests upon the principle of justified reliance (*Swahn and Wendleby*, Lagen om finansiell rådgivning till konsumenter, 31). In DENMARK it is said that no clear line can be drawn between contract and tort law for liability for professional information (*Ulfbeck*, Erstatningsretlige grænseområder, 7). In any event, culpable behaviour (*culpøst*) as against a third party, so not only as against the

contractual partner, is a prerequisite of liability (*Samuelsson and Søgaard*, Rådgiveransvaret, 88). Specific laws can impose on individual occupational groups such duties directed towards third parties; occasionally they have also been developed by jurisprudence (*Ulfbeck* loc. cit. 36, 46, 60), e.g. for accountants (Supreme Court 9 April 2002, UfR 2002. 1444 and 25 June 2002, UfR 2002, 2032 [liability of an accountant for false information to a bank providing credit]).

Illustration 2 is taken from *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465; **illustration 3** from Cass.civ. 19 October 1994, Bull.civ. 1994, II, no. 200 p. 115; and **illustration 4** from CA Barcelona 31 July 2000, BDA JUR 2000/306843.

VI.–2:208: Loss upon unlawful impairment of business

(1) Loss caused to a person as a result of an unlawful impairment of that person's exercise of a profession or conduct of a trade is legally relevant damage.

(2) Loss caused to a consumer as a result of unfair competition is also legally relevant damage if Community or national law so provides.

COMMENTS

A. Purpose and scope

Purpose. The purpose of this provision is to make it clear that loss resulting from an unlawful interference with another's business or profession constitutes a recognised damage for the purpose of the law on non-contractual liability. It concerns losses as a result of prohibited interferences with competitors' access to the market. Falling outside its remit, therefore, is the question whether and under what circumstances a consumer too can claim reparation from an undertaking that has caused him or her a loss by an unfair competitive practice (paragraph (2)). This problem area is the subject-matter of a self-contained branch of law in many (if not in all) European legal systems; today, only exceptionally is it still located in the general law on non-contractual liability.

Prevention. In the situations covered by this Article, it is not only compensation for losses suffered which plays a role. Preventative legal protection is also of great practical significance here. For that reason particular regard is to be given to VI.–1:102 (Prevention) and VI.–6:301 (Prevention in general).

Scope. The Article borrows in part from the concept developed in German non-contractual liability law of a "right to form and operate a business enterprise" (or "right to enterprise"), but does not correspond with its scope of application in every regard. In particular, VI.–2:208 is narrower because it is silent on the legal liability arising from unauthorised forms of labour disputes: see VI.–7:104 (Liability of employees, employers, trade unions and employers associations). Due to VI.–7:104, all cases of "harassment" of fellow-employees also remain unaffected by VI.–2:208. The so-called "jeopardising of credit-worthiness" recognised in many legal orders is covered by VI.–2:204 (Loss upon communication of incorrect information about another). VI.–2:211 (Loss upon inducement of breach of obligation) provides for another special rule for legally relevant damage arising from inducing non-performance of a contractual obligation. On the other hand, VI.–2:208 markedly goes beyond the concept of the "right to form and operate a business enterprise" referred to above in so far as the provision also gives effect to the general proposition that a market participant's losses as a result of any unauthorised competitive behaviour of a competitor constitute legally relevant damage.

Groups of cases covered. Cases which may fall under VI.–2:208(1) may, therefore, involve industrial espionage, boycotts and (other) activity in contravention of competition law including the law against cartels or the abuse of dominant positions, and the law against unfair commercial practices such as wrongful advertising. True assertions about a competitor can also fall under VI.–2:208 if they have no intrinsic connection to the substance of the competitor's commercial activity and therefore are only made in order to scare away potential or current customers. Of further note are e.g. product piracy and cases of unlawful warning to

a rival or a rival's customers with the false claim that the rival's products infringe an industrial property right of the person giving the warning.

Illustration 1
Company X asserts that the sanitary fittings manufactured by company Y are infringing its three-dimensional trademark and seeks a court order prohibiting Y from marketing the fittings. In the ensuing trademark law dispute, X's trademark is deleted from the trademark registry with retroactive effect for lack of any distinctiveness. The losses that Y suffers as a result of the temporary discontinuation of the marketing of their sanitary fittings represents legally relevant damage, which must be compensated if X acted intentionally or negligently.

Infringement of EU competition law. Under VI.–2:208 legally relevant damage is also constituted by losses that are inflicted upon an undertaking through a competitor's breach of EU competition law. According to the case law of the ECJ, Member States must provide for such a claim for reparation. Even a person who was party to the anti-competitive agreement may invoke the protection of Community Law, unless this would amount to rewarding it for its own unlawful conduct (*Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage Ltd. and Others*, ECJ 20 September 2001, C-453/99, ECR 2001, I-6297). The legal discussion as to whether such a claim for reparation should depend on fault or be independent of fault has just begun (Commission of the European Communities, Green Paper – Damages actions for breach of the EC antitrust rules, COM(2005) 672 final). Under these rules, negligence is required as a minimum according to the general rules (VI.–3:102 (Negligence) in conjunction with VI.–1:101 (Basic rule)).

B. Unlawful impairment of profession or trade

Profession or trade. The cause of the damage is an unlawful impairment of another person's exercise of a profession or conduct of a trade. The formulation "profession or trade" ensures that not only trading companies (regardless of their legal form), but also other working persons, whether they engage in trade or not, fall within the provision's scope of protection.

Illustration 2
A company offers medical services without the necessary governmental licence. It calls its business "Polyklinik" and advertises in a catalogue of an international travel operator with a logo similar to the Red Cross with the slogan "medical aid wherever it is needed, first line of human assistance day and night." The advertisement violates the legislation of all the countries in which the company operates its business. The doctors who work in the vicinity of the "Polyklinik" may seek a court order prohibiting the business and the advertisement. The advertising material must be withdrawn.

Exercise of a profession. The term "exercise" of a profession was chosen in order to make it clear that the provision protects not merely existing professional activities but also a person who has not yet commenced a professional activity but is unlawfully hindered in doing so.

Illustration 3
In applying for a position, a doctor claims credit for a scientific study carried out by someone else, as a result of which a competing applicant loses out. The competitor suffers legally relevant damage. The competitor's non-economic loss is also recoverable.

Impairment. An "impairment" of another's exercise of a profession or conduct of a trade is sufficient because it is the unlawful harming of business which is at stake; its complete destruction or obstruction is not essential.

Illustration 4
The personnel of several tugboats are incited not to tug out of the harbour the claimant's tankership which sails under a flag of convenience. There is an unlawful impairment of the claimant's business..

Unlawful impairment. The interference must be unlawful, i.e. contrary to either statutory provisions or established practice, the latter including rules of correct conduct developed by the courts. "Unlawful" incorporates into the draft the benchmarks of both European Community law and the relevant individual jurisdictions in the Member States. An interference directed at the business or occupational activity of the claimant is required. It must involve an impairment of either the right to access the market or the right to compete on the market under fair conditions for customers. Purely accidental (even if possibly severe) consequences of an act which, according to its nature, is not directed at another's freedom of business is insufficient.

Illustration 5
In the so-called "cable cases" (see illustration 4 under VI.–2:206 (Loss upon infringement of property or lawful possession)), an unlawful impairment of another's business is absent even where production is at a complete standstill for some time.

Unfair competition to the detriment of competitors included. An unlawful impairment of another's business within the meaning of paragraph (1) is also present in cases of unfair competition to the detriment of a competitor. Account has been taken of the fact that there is at present no common concept in Europe of what is "unfair competition". In addition, some legal systems operate in this area, for want of a special regime, with the general law on non-contractual liability, while others have addressed this field either completely or partially with special statutes. It did not therefore seem appropriate to exclude the law of unfair competition with regard to business to business relations from the Article's scope of application. However, wherever specific rules intend to provide an exclusive regime for the law against unfair competition they have priority of application over VI.–2:208(1). That follows from VI.–1:103 (Scope of application) sub-paragraph (c).

Unfair competition to the detriment of consumers excluded. Paragraph (2) follows the approach adopted for VI.–2:203 (Infringement of personal dignity, liberty and privacy) paragraph (2). A loss which a consumer suffers due to the unfair competition of a business is only a legally relevant damage according to these rules if Community or national law so provides – in other words, if the consumer (and not merely competing businesses) come within the scope of protection of the law on unfair competition. Consequently, the Article does not address the question whether consumers or consumer associations can assert claims on the basis of a business's unlawful anti-competitive acts. This question remains to be answered by national (substantive or procedural) law.

NOTES

1. The *action en concurrence déloyale* in FRENCH law is nothing further than a specific case of the application of the general tort law clause in CC arts. 1382 and 1383 (Cass.com. 29 May 1967, Bull.civ. 1967, III, no. 209 p. 200). It provides claims against other commercial competitors who wish to procure unfair advantages on the market. It is irrelevant whether the competitors involved are *commerçants*; it is only important that both pursue an *activité professionnelle* (*le Tourneau*, Droit de la responsabilité et des contrats 2004/2005, no. 7014) and are in direct competition with one another. Where such a *situation de concurrence* is lacking, the unfair conduct – as an *agissement parasitaire* – may still be relevant for tort law. Many seek to furthermore distinguish between *concurrence déloyale* and *concurrence interdite* (where the very competitive activity as such is prohibited, not solely the means applied), whereas others, and particularly the majority of jurisprudence, opine that every statutory breach is automatically *déloyale* (see further *le Tourneau* loc. cit. no. 7020 or 7012 and *Serra*, Rép.Dr.Com., v° Concurrence déloyale [1996] no. 41). For the *action en concurrence déloyale*, proof of a *faute*, damage, and causation between *faute* and damage is necessary (*Reinhard and Chazal*, Droit commercial[6], no. 226 p. 174). A *faute commerciale* lies in the infringement of statutory requirements and in the breach of trade practices (Ripert/Roblot/Vogel, Traité de droit commercial I(1)[18], no. 729 p. 595); negligence is sufficient. Conceivably little demand is placed on proof of damage (e.g. Cass.com. 9 February 1993, Bull.civ. 1993, IV, no. 53 p. 34); on the other hand, the *action en concurrence déloyale* is subsidiary to contract law and property law, including intellectual property law (Cass.com. 3 October 1978, Bull.civ. 1978, IV, no. 208 p. 176; *le Tourneau*, Le parasitisme, no. 250-254 pp. 195-199).
2. BELGIUM had already consolidated the rules on the combatting of "dishonourable trade practices" by the beginning of the 1970's in a specific law - *Loi sur les pratiques du commerce* (LPC) – which in 1991 was superseded by the *Loi sur les pratiques du commerce et sur l´information et la protection du consommateur* (LPCC of 14 July 1991). This regulates consumer information, indications of sources, advertisements, methods of sale, and the prohibition of illicit clauses in contracts for the sale of goods and supply of services. Thereupon, LPCC arts. 93-94*bis* bring two general clauses with the prohibition of dishonourable trade practices, through which competitors or consumers are or can be harmed (see further *Verougstraete*, in: Stuyck and Wytinck (ed.), Nieuwe wet handelspraktijken, 129-147).
3. With Law 3/1991 of 10 January 1991 on Unfair Competition (*Ley 3/1991, de 10 de enero, de Competencia Desleal*, LCD), Spain also has a specific piece of legislation over this terrain in its arsenal. "Any conduct, which objectively proves to offend against requirements of good faith, is unfair", loc. cit. art. 5. Thereafter, this general clause is concretised by a range of specific regulations. Provisions on denigration (art. 9; on this complex, see the previously cited TS 31 March 1930, RAJ 1930-31 [1] no. 816 p. 303) and inducing breach of contract (art. 14) also fall hereunder. It only respectively depends on the involvement of a market-related act; a relationship of competition between the parties is not necessary (arts. 2 and 3(2)). The claim in damages requires fault (intention or negligence), which is, however, rebuttably presumed where a civil wrong is objectively present (TS 10 July 1985, RAJ 1985 [2] no. 3965 p. 3338; *Wirth*, Das neue Recht des unlauteren Wettbewerbs in Spanien, 180). The provisions of the Law on Competition (LCD) are in free competition with the provisions of the Law Against Restrictions of Competition (*Ley 15/2007 de Defensa de la Competencia*, LDC). Both pursue the same aim. Therefore, it is unproblematically accepted that the Law on Competition e.g. in art. 16 (prohibition of

discrimination) and art. 17 (selling below cost price) regulates material that is dealt with in other countries by the anticartel aspect of the law rather than the law prohibiting unfair behaviour (*Berg*, Das neue spanische Gesetz gegen den unlauteren Wettbewerb von 1991, 156).

4. ITALIAN law regulates questions of unfair competition in CC arts. 2598-2601. This is accompanied by the so-called *Legge Antitrust* of 10 October 1990, no. 287 (Gazz. Uff. 13 October 1990, no. 240) on the protection of competition and the market. CC art. 2598 regulates the requisites of unfair competition, CC arts. 2599-2600 its legal consequences. Compensation for damages requires fault; however negligence is rebuttably presumed (CC art. 2600(3)). The relationship between the claim in damages arising out of CC art. 2600(1) and out of CC art. 2043 (the basic tort law norm) is disputed. Jurisprudence still seems to regard CC art. 2043 as ancillarily applicable (Cass. 11 April 2001, no. 5375, Danno e resp. 2002, 288; Giur.it. 2002, I, 1, 1010: where a relationship of competition was absent, recourse could be had to CC art. 2043), provided of course, that it is an interest protected by the general tort law that is injured (Cass.sez.un. 15 March 1985, no. 2018, Foro it. 1985, I, 1663). In contrast, the voices in commentary that wish to see a special rule displacing tort law in CC art. 2600(1) are multiplying (*Cian and Trabucchi*, Commentario breve, art. 2043, no. 42). Injury to commerical reputation, often in the form of the unlawful raising of an act of protest (e.g. Cass. 3 April 2001, no. 4881, Giur.it. 2001, 1657), and further the so-called "bullying" of fellow employees (*Frati/Montanari Vergalli/Di Luca*, Riv.it.med.leg. 2003, 533) are subject to general tort law.

5. In HUNGARY, as long as special laws do not step in, the problem field dealt with by VI.–2:208 likewise belongs within the context of the general tort law clause there. The right to pursue an occupation or trade undisturbed is a personal right; therefore, its unlawful disturbance "undoubtedly" amounts to a wrong. In the case of considerable infringements, a claim to the compensation of non-ecnomic damage also comes into focus (CA Baranya 1. Pf. 20 574/2001/3: economic and non-economic compensation for the scheduled disruption of water supply to a chemist over a period of two months). Incidentally, Competition Act § 2 provides a general clause on the prohibition of unfair competition; it also facilitates the grant of non-economic damages (BH 2004/479). Loc. cit. § 3 not only prohibits the assertion or dissemination of untrue facts, but also true facts presented "in a false light". Numerous further concretions of the general clause ensue, *inter alia*, rules on the incitement to boycott (§ 5), passing off (§ 6), public tenders (§ 7; *cf.* BH 2005/364), cartel contracts (§§ 11-17) and breaches of the prohibition of the abuse of a dominant position on the market (§ 21). The consequences of breach of the Law on Competition flowing from the law on damages are normally subject to general tort law; however, in all cases which are not covered by §§ 2-7 of the Law, a breach of competition must have been first established by the Office of Commercial Competition (BH 2004/151). Liability requires a damage caused by the breach of competition law and a failure to prove an exemption (BH 2001/73).

6. According to settled case law in GERMANY, the so-called "right to form and run a business enterprise" (or more simply put: "right to enterprise") counts among the "other rights" within the meaning of CC § 823(1). This construct fills gaps in legal protection, particularly in the area of commercial protection of rights (BGH 21 June 1966, BGHZ 45, 296, 307; BGH 10 December 2002, NJW 2003, 1040, 1041). At the beginning of the development there was the vexatious notice of infringement of trademark law, against which neither the avenues under competition law, nor CC §§ 824 and 826 could offer a sufficient remedy (RG 27 February 1904, RGZ 58, 24, 29: RG 19 December 1918, RGZ 94, 248; see furter RGRK [-*Steffen*], BGB[12], § 823, no.

36). The vexatious notice of infringement of trademark law has remained a significant field of application to this day (BGH 17 April 1997, NJW-RR 1998, 331, 332; BGH 19 January 1979, NJW 1979, 916; BGH 15 July 2005 [Grand Civil Senate], BGHZ 164, 1). Further case groups have long since taken up their seat at this table: blockading business (BGH 30 May 1972, BGHZ 59, 30, 34; BGH 4 November 1997, BGHZ 137, 89, 97), illegal strike action (BAG 4 May 1955, BAGE 2, 75; BAG 20 December 1963, BAGE 15, 174), incitement to boycott without a competitive aim (BVerfG 26 February 1969, BVerfGE 25, 256, 266), the circulation of true facts damaging to business (e.g. by sending "blacklists" with the names of defaulters [BGH 28 November 1952, BGHZ 8, 142, 145; *cf*. also CA Rostock 21 March 2001, ZIP 2001, 793], value judgments damaging to business but not necessarily offensive, without a competitive aim (BGH 21 June 1966, BGHZ 45, 296, 310; BGH 9 December 1975, BGHZ 65, 325, 333) and the publication of insufficiently verified product testing (BGH 2 July 1963, NJW 1963, 1871, 1872; BGH 20 March 1986, NJW 1987, 1082, 1083). It is generally the case that such a gap-filling exercise only comes into question when existing statutory law on the fact situation is not already at the ready (RG 21 April 1931, RGZ 132, 311, 316; BGH 16 June 1977, BGHZ 69, 128, 138; BGH 21 June 1977, NJW 1977, 2264, 2265; BGH 23 October 1979, NJW 1980, 881; BGH 10 December 2002, NJW 2003, 1040, 1041). Furthermore, a "business-related" interference is required, hence direct impairment of the business enterprise itself (BGH 15 November 1982, BGHZ 86, 152, 156) or the commercial decision-making freedom of its proprietor (BGH 10 December 2002, NJW 2003, 1040; BGH 18 November 2003, NJW 2004, 356; BGH 11 January 2005, NJW-RR 2005, 673). Mere inconveniences or socially usual hindrances are not sufficient (BGH 21 April 1998, BGHZ 138, 311, 317; BGH 29 January 1985, NJW 1985, 1620). The illegality of the interference is established on the basis of balancing the respective legally protected rights and intersts in each individual case (BGH 21 April 1998, BGHZ 138, 311, 318). Where German and European antitrust law is breached, in addition to CC § 823(1) and (2), Restraints on Competition Act (GWB) § 33(3) itself grants a claim in damages.

7. Under AUSTRIAN Federal Law against Unfair Competition 1984 (UWG) § 7(1) "degrading a business" in competition by means of factual assertions that are not demonstrably true about the undertaking, its propritor's or manager's person and about his goods or services is forbidden. "Degrading" is that which is apt to harm the business' operations or the credit-worthiness of its proprietor. The injured party is entitled to a strict liability claim in damages (OGH 31 August 1983, SZ 56/124), or further, a claim to a prohibitory court order, to a retraction of the statement(s) and to the publication of the retraction; other circumstances only apply to (like under CC § 1330(2) third sentence) confidential communications, in which the communicator had a vested interest. Damages covers lost earnings (§ 16(1)) as well as a reasonable sum of money for the reparation of suffered illnesses or other personal detriment (loc. cit. para. (3)). Alongside this, CC § 1330(2) remains applicable, according to which any person is liable in damages where they disseminate facts, which place the credit-worthiness, the purchase-power or the advancement of another in jeopardy, when he was aware or ought to have been aware of their falsity. In practice the general civil law (disfavourable to the claimant) also plays a role if the statement is not made "for competitive purposes" and therefore gives no room for the application of the law on fair practices (OGH 19 May 1987, RS0031715, 4 Ob 391/86) or if the deadline under which a claim arising from the law on fair practices may lawfully be brought has already expired (loc. cit. § 20(1): six months from knwoledge, three years at the longest). Comparative advertisement is permitted when it is substantively justified

(loc. cit. § 2(2)). The dissemination of true facts can constitute a civil wrong when it is made without sufficient grounds and can only be explained with the intention to offend or harm the persona affected (OGH 26 April 2001, RIS-Justiz, 6 Ob 69/01t; OGH 23 October 1990, RS0031783, 4 Ob 143/90). The spying-out of commercial and trade secrets is prohibited (UWG § 11) and results in liability (§ 13); the same applies for the betrayal of such secrets by employees (§ 12(1)) and the exploitation by the recipient (§ 12(2)). The damages side of violations of the Federal Law against Cartels and other Restrictions of Competition (BGBl 2005 I no. 61/2005) is subject to CC § 1311 (violation of a protective law, see further *Stillfried and Stockenhuber*, WBl 1995, 301 and OGH 16 December 2002, RS0117115, 16 Ok 10/02). Vexatious notice with reference to alleged patency protection (see illustration 1 above) results in liability, as long as the person whose patency protection was invalidated had culpably misjudged the inventive value lacking in his idea (OGH 21 September 1982, SZ 55/131).

8. The ever-noted "right to enterprise" in Germany is only received by few commentators in GREECE (e.g. *Filios*, Enochiko Dikaio II[2][3], 28). Predominantly however, this construct is deemed superfluous because interferences with commercial activity in any event fall under CC art. 914 (see further *Eleftheriadou*, Die Haftung aus Verkehrspflichtverletzung im deutschen und griechischen Deliktsrecht, 125). Thereunder a claim in damages is enjoyed by e.g. a kiosk owner, if a neighbour blocks off the pavement by the erection of a site fence (CA Athens 217/1967, NoB 16 [1968] 859; similarly also CFI Athens 6541/1961, NoB 10 [1962] 920). Incidentally, Law 146/1914 on Unfair Competition has created a specific tort law regime under which, along with competitors, consumer interest groups, though not individual consumers, are also protected (see futher Georgiades and Stathopoulos [-*Georgiades*], preface 52 to arts. 914-938).

9. PORTUGAL likewise has an extensive specific piece of legislation on the law on the restriction of competition and fair practices (Act no. 18/2003 of 11 June 2003 and DL no. 370/93 of 29 October 1993 as amended). Practical cases relate to e.g. unauthorised legal advice (CA Oporto 16 March 2006; CA Lisbon 14 April 2005); the importation of piratic merchandise (CA Oporto 29 March 2006 and 7 January 2004), software piracy (CA Oporto 16 June 2004) and the unlawful increase of charges by the public telephone service (STJ 7 October 2003). In the general tort law (CC art. 483) it is inferred that an unlawful impairment of business at least in severe cases grounds a claim in damages (*Vaz Serra*, BolMinJus 93 (1960) 11; *Almeida Costa*, Obrigações[9], 83; STJ 19 March 2002, CJ (ST) X (2002-I) 139), particularly where an *abuso de direito* is concerned (*Carneiro da Frada*, Uma terceira via, 50). The right "to set up and run a business enterprsie", long-since a part of the furniture in German law (see *Sinde Monteiro*, Responsabilidade por conselhos, 206, fn. 102) has not, however, found general recognition in Portugal (*dos Santos Silva*, ERPL 2006, 836). Nevertheless, the Constitutional Court has stated on one occasion that the Constitution also guarantees the right to form an enterprise and that therefore the *direito à empresa* is protected as a fundamental right (TC 12 July 1990).

10. The DUTCH law against unfair competition (*ongeoorloofde mededinging*, previously *oneerlijke mededinging*) is fundamentally buttressed by the general tort law norm in CC art. 6:162 (specific rules are to be found in CP art. 328*bis* and – for false advertising – in CC arts. 6:194-196). In relation to conduct between competitors, the applicable point of departure is freedom of trade and business (HR 1 November 1991, NedJur 1992, no. 423 p. 1697 and HR 1 November 1991, NedJur 1992, no. 424 p. 1707; Onrechtmatige Daad I [-*Jansen*], art. 162[2], no. 38 pp. 337-379). Liability therefore requires either the breach of a duty or right. Such duties can also be the result

of standardisation by public law organisations (so-called *PBO*'s) for specific occupational sectors (Onrechtmatige Daad IV [-*van Nispen*], s. 2, no. 22-26, pp. 1-13). In the instance of a breach of statutory duties, the assessment is made whether the claimant falls under the category of persons that the statute seeks to protect; if that is not the case, the test is then whether he can rely on a breach of an "unwritten rule of social interaction" (Onrechtmatige Daad II [-*van Maanen*], art. 6:163, no. 10 pp. 71-93). In the assessment of the further necessary fault for a claim in damages, a very strict standard has been set in place (CFI `s-Hertogenbosch 15 February 1982, NedJur 1984, no. 603 p. 2096; CA `s-Hertogenbosch 11 November 1986, NedJur 1987, no. 841 p. 2778).

11. ESTONIAN law corresponds to VI.–2:208 on all essential points. According to LOA § 1045(1)(vi) "the causing of damage is unlawful if … the damage is caused by … interference with the economic or professional activities of a person". LOA § 1049 specifies "[i]t is deemed unlawful to cause a complete or partial halt in the economic or professional activities of another person for a significant period if the halt is caused by interfering in the activities by means of an unlawful threat or a prohibited boycott, demonstration or strike, or in another manner aimed specifically at halting the economic or professional activities of the person". It is conceivable that LOA § 1049 is narrower than VI.–2:208 in so far as the former requires a "halt" in the business activities of the person concerned. Unfair competition is prohibited under the Competition Act § 50(2). Where a consumer suffers loss resulting from unfair competition, the consumer may claim compensation under the provisions of the CC. Unlawfulness can be established relying on the violation of the relevant provisions of the Competition Act as violation of duties arising from law within the meaning of LOA § 1045(1)(vii). On competition law in LITHUANIA see *Eisfeld*, WiRO 2006, 225-230.

12. While SWEDISH Law on Damages chap. 5 § 7 no. 3 indeed expressly states that compensation for "property damage" also embraces compensation for "loss of income or interference with an economic activity", there is still only little illustrative material on the explanation of this provision. Intended first and foremost are obviously the consequential losses of an integral injury (e.g. lost gains after the total write-off of a ship: HD 4 March 1955, NJA 1955, 119), not interferences with commercial activity as such. Furthermore, the provision does not nullify the rules on the restriction of compensation for third-party damages (see the Notes under VI.–2:206 (Loss upon infringement of property or lawful possession)): where a machine is damaged, employees who consequently lose the performance-related part of their wages have no claim to compensation. However, a not-so-insignificant role is played by Law on Competition (*konkurrenslag* [1993:20]) § 33 (which establishes a duty in damages due to particular restrictions of competition), Law on Marketing (*marknadsföringslag* [1995:450]) § 29 (which foresees a duty to compensate for unfair competitive practices primarily as against the consumer; see further *Sandstedt*, VersRAI 2007, ??) and Law on the Protection of Commercial Secrets (*lag* [1990:409] *om skydd för företagshemligheter*) §§ 5-10 (on this issue, ***???***see above, Note *10* under VI.–2:205). The FINNISH Law on Improper Conduct in the Economy (*Lag om otillbörligt förfarande i näringsverksamhet*) of 22 December 1978 no. 1061 operates with a general clause (§ 1 [1]), which in conjunction with Law on Damages chap. 5 § 1 establishes a claim in damages. Loc. cit. § 4 safeguards commercial secrets; loc. cit. §§ 2-3 are directed at individual unfair marketing strategies. Supreme Court 29 September 2005, HD 2005:105 saw a tort to the detriment of a competitor in the vexatious notice to the competitor's buyers of a supposed existing copyright. The Law on Restrictions of Competition (*lag om konkurrensbegränsningar*) of 27 May 1992 no.

480 and the Law on Consumer Protection (*konsumentskyddslag*) of 20 January 1978 no. 38 contain likewise no stand-alone rules on damages, but at the same time do not rule out the application of the Law on Damages. DANISH Law on Marketing (*Lov om markedsføring* of 21 December 2005 no. 1389 §§ 1 and 20(2), through their reference to the "general rules" of Danish law, include a duty of reparation (D-Karnov 2005 IV [-*Skovbo*], Markedsføringslov, no. 156). Supreme Court 8 August 1994, UfR 1994, 785 denied an interference with another's freedom of commercial activity when that other's trawler could no longer sail after his partner's ship, the only person with whom he could fish, had been damaged.

Illustration 1 is taken from BGH (Great Senat in Civil Matters) 15 July 2005, BGHZ 164, 1; similarly OGH 21 September 1982, SZ 55/131 and Finnish Supreme Court 29 September 2005, HD 2005:105; **illustration 2** from CFI Rethymnon 149/2004, NoB 53 (2005) 1657; **illustration 3** from Cass. 11 December 1995, no. 1540, Riv.Dir.Civ. 1997, 91; **illustration 4** from *Merkur Island Shipping Corp. v. Laughton* [1983] 2 AC 570.

VI.–2:209: Burdens incurred by the state upon environmental impairment

Burdens incurred by the State or designated competent authorities in restoring substantially impaired natural elements constituting the environment, such as air, water, soil, flora and fauna, are legally relevant damage to the State or the authorities concerned.

COMMENTS

A. Pure ecological damage

Directive 2004/35/EC on environmental liability. VI.–2:209 latches on to the autonomous legislation of some of the Member States, while at the same time inserting two core messages of Directive 2004/35/EC of the Council and the European Parliament of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ L 143, 30 April 2004, pp. 56-75) into the structure and language of these basic rules: (i) ecological damage is legally relevant damage. It is, however, (ii) not legally relevant damage to the individual in the sense that each citizen can claim reparation for it. Environmental impairments may – depending on the point of view – also infringe individual rights to the environment, but as a matter of the law on reparation they are only recoverable in their capacity as damage to a legally protected interest, to which all citizens are entitled indivisibly. Hence only public authorities can claim compensation for such damage (under the general prerequisites of VI.–1:101 (Basic rule)). This accords with recital no. 14 to that Directive which reads: "This Directive does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damages." Incorporating this, Directive 2004/35/EC art. 3(3) specifies: "Without prejudice to national legislation, this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage." Consequently, Directive 2004/35/EC art. 8 only grants a claim for recovery of costs to the "competent authority" and not to private parties. This formulation is also to be found in VI.–2:209. Under Directive 2004/35/EC art. 19, the Member States are obliged to implement the Directive by 30 April 2007.

Public and private law. This Article lies on the border between private and public law. Its characterisation as a creature of public law stems from the element that pure environmental damage becomes legally relevant solely from the perspective of the public – the state or a competent authority (and so therefore only the state can enforce a claim to reparation). On the other hand, the rule also has the exact opposite function in saying that private law subjects do not normally suffer any legally relevant damage from detriment resulting from pure environmental damage (e.g. the loss of quality of life springs to mind, but also, for instance, for hotels or petrol stations, the absence of tourists). This second statement in the Article is certainly one of private law. Ultimately, however, the question of characterisation must remain open here. This is so not only because to date there are no criteria accepted across Europe for the theoretically "correct" demarcation between public and private law, but also because in this instance the question is wholly irrelevant. Rather the critical point is that compensation for the expense of redressing environmental damage follows categories of civil *liability* and not those of public order. In other words, the Article is formulated as if it related to a normal private law claim under non-contractual liability law. This is shown not just by the prerequisites for a claim, but also by the defences to it (such as e.g. force majeure, see VI.–5:302 (Event beyond control) or Directive 2004/35/EC art. 4) and the applicability of the rules on causation and compensation.

B. Legally relevant damage and accountability

Damage to individuals and damage to the society at large. The object of this Article is, as already mentioned, to assert that so-called "pure ecological damage" constitutes legally relevant damage. This is a damage suffered by the public at large, rather than by particular individuals. However, the Article is not concerned with damage which natural persons or legal persons constituted under private law may suffer as a result of an impairment of the environment. Such forms of damage constitute legally relevant damage if (but only if) the conditions of the preceding Articles of this Chapter are fulfilled. From the individual's point of view it is a matter of indifference whether a personal injury or property damage, for example, has been caused by some run-of-the-mill incident such as a road accident or by an environmental catastrophe. Infringements of property rights and bodily injury invariably remain legally relevant damage to the individual, regardless of how they are caused. Conversely, genuine environmental damage is collective damage; this Article is concerned exclusively with the latter.

Environmental organisations. The Article also makes it clear that the collective damage it covers is not legally relevant damage to the detriment of environmental protection organisations constituted under private law or any other associations. Notwithstanding the fact that they have devoted themselves to environmental protection, no legally protected interest of their own is affected. This does not exclude national arrangements under which authorities at least partially cede the pursuit of environmental interests to such organisations (cf. Directive 2004/35/EC arts. 11(3) and 12(1)). On the other hand this very possibility shows how difficult the demarcation between public law and private law is within this overall matrix.

Relationship to VI.–3:206 (Accountability for damage caused by dangerous substances or emissions). As regards accountability for damage a special rule has been formulated in VI.–3:206 (Accountability for damage caused by dangerous substances or emissions). In contrast to VI.–2:209, which only specifies that expenses for the elimination of pure environmental damage are legally relevant damage, VI.–3:206 relates to the attribution as well as the causation of both individual and collective forms of damage within the meaning of VI.–2:209. Naturally, the State can also assert a claim under VI.–1:101 (Basic rule) in conjunction with VI.–3:206 in its capacity as the holder of an individual right (e.g. as the owner of a forest); that it has sustained a legally relevant damage results in such cases from VI.–3:206 in conjunction with VI.–2:206 (Loss upon infringement of property or lawful possession) and not from VI.–3:206 in conjunction with VI.–2:209.

VI.–3:207 (Other accountability for the causation of legally relevant damage). With regard to the issue of attribution (independent of legally relevant damage), reference should also be made to VI.–3:207 (Other accountability for the causation of legally relevant damage) sub-paragraph (b): as soon as all Member States have implemented Directive 2004/35/EC, attribution will first and foremost follow the national laws implementing the Directive.

C. Other matters

Expenditure incurred by private persons. The Article is silent on the issue of whether a private person (or a legal person constituted under private law, i.e. a NGO) who (or which) has for good reason incurred expenditure in order to eliminate environmental damage, can claim compensation from the person who is responsible for the environmental damage. From the point of view of non-contractual liability law, this question will usually be answered in the negative, whether that be due to the lack of legally relevant damage, or a denial of causation

because the affected party deliberately incurred exposure to the risk of loss or injury. The answer is thus to be sought in the law on benevolent intervention. This relates, for example, to the costs of cleaning prompted by environmental damage before the responsible public body or professional services are able to intervene. The advantage of this solution is that the claim to reimbursement of expenditure is linked in this way to the general requirements of the law on benevolent intervention in another's affairs. That in turn means that a right to reimbursement is excluded in respect of rash or unreasonably extensive intervention.

Environmental impairment. Directive 2004/35/EC art. 2(1) defines what is to be understood by the term environmental damage. VI.–2:209 refers to this definition by means of a mere summary of the essential elements of that definition in a language tailored to these rules.

The State or designated competent authorities. The text also draws on the Directive with the formulation that the damage described in VI.–2:209 is legally relevant damage "to the State or designated competent authority". However, it appeared inexact to rely only on the "competent authority", as the Directive does, because mostly it is not the authority, but rather the representative regional administrative body, that will suffer the damage.

Burdens incurred and loss in preventing damage. "Burdens" are expenditure for the redress of environmental damage. Thus, the cost of restorative measures is at issue. On the other hand, expenditure made before the injurious event occurred and frustrated by the injurious event is in principle non-recoverable damage. Examples here would be the high costs of the renaturalisation of a particular species of animal whose population is wiped out once more. Frustrated expenditure may, however, serve as an indicator for the assessment of the amount of restorative costs (in this case: the resettlement of the animals). The costs of preventing further threatening environmental damage are subject to the general rule in VI.–6:302 (Liability for loss in preventing damage).

NOTES

I. Implementation of the Directive

1. To date (as of August 2008), Directive 2004/35/EC has been implemented in the following Member States: FRANCE (Law no. 2008-757 of the 1st August 2008, *relative à la responsabilité environnementale et à diverses dispositions d'adaptation au droit communautaire dans le domain de l'environnnement),* this law will be incorporated in *Code de l'environnement (Environmental Code);* SPAIN (Environmental Liability Act 2007 [*Ley* 26/2007, of 23 October 2007, *de responsabilidad medioambiental,* BOE no. 255 of 24 October 2007]); ITALY (*Decreto Legislativo* 3 April 2006, no. 152 [Suppl. ord. no. 96 to Gazz. Uff. of 14 April, no. 88] - *Norme in materia ambientale,* in particular arts. 300, 306 and 318); POLAND (*Ustawa z dnia 13 kwietnia 2007 r. o zapobieganiu szkodom w środowisku i ich naprawie* [Dz. U. 2007, no. 75, poz. 493, in particular art. 23, which contains the basis of the state authority's cause of action]); GERMANY (*Gesetz über die Vermeidung und Sanierung von Umweltschäden* [*Umweltschutzgesetz*] of 10 May 2007 [BGBl 2007 I 666]); SWEDEN (*lag* (2007:660) *om ändring av miljöbalken,* 20 June 2007); BELGIUM (*arrêté royal* of 3 August 2007 *concernant la prévention et la réparation des dommages environnementaux lors de la mise sur le marché*

d'organismes génétiquement modifiés ou de produits en contenant); CZECH REPUBLIC (*Zákon* no. *500/2004, Sb.* of 24 September 2004); ESTONIA (*Keskkonnavastutuse seadus* of 14 November 2007 [RTI of 6 December 2006, 62, 396]); HUNGARY (2007. *évi XXIX. törvény egyes környezetvédelmi tárgyú törvények környezeti felelősséggel összefüggő módosításáról* [Hungarian Gazette no. 2007/52, 3316]); ROMANIA (*Ordonanţă de urgenţă privind răspunderea de mediu cu referire la prevenirea şi repararea prejudiciului asupra mediului* [Monitorul Oficial al României no. 446 of 29 June 2007, pp. 2-13]) and SLOVAKIA (*Z. z. o prevencii a náprave environmentálnych škôd a o zmene a doplnení niektorých zákonov* [*Zákon* no. 359/2007, Zbierka zákonov SR no. 158 of 3 August 2007]).

2. Preliminary governmental drafts are also existent in DENMARK (2006-07 - L 175 [*forslag til lov om ændring af miljøbeskyttelsesloven og forskellige andre love og*] and 2006-07 - L 176 [*forslag til lov om undersøgelse, forebyggelse og afhjælpning af miljø-skader (miljøskadeloven*)]) and FINLAND (*Regeringens proposition om verkställighet av Europaparlamentets och rådets direktiv 2004/35/EG om miljöansvar för att förebygga och avhjälpa miljöskador*). Furthermore, a draft law is extant for LUXEMBOURG. For commentary on the Directive, see incidentally, *inter alia*, *Garcia-Bragado Manen*, [2006] 13 ILT, 220-224; *Hager and Leonhard*, FS Stoll, 167-184; *Hager*, ZEuP 2006, 21-44; *Wagner*, VersR 2005, 177-189.

II. Collective damage relevant to the environment in other national law

3. Since in the case of environmental impairment - which affects the general public – an individual often lacks an *intérêt personnel pour agir*, FRENCH *Code de l´Environnement* arts. L 142-1 and L 142-2 provide accredited environmental organisations with the right to lead certain proceedings in administrative courts or tribunals. Where the requisities of an offence under environmental criminal law are fulfilled, these organisations are also hereunder equipped with the right to appear as a civil law joint claimant in the criminal law proceedings and claim damages in their own name (which must be then invested to further the registered aims of the organisation, i.e. the protection of the environment). The *Code de l´Environnement* provides further specific rules for individual forms of environmental impairment, e.g. in arts. L 571-1 to L 571-26, which give the "competent authorities", inter alia, the right to take measures against unlawful noise pollution. In relation to BELGIUM, it is bemoaned that a clear definition of the term "*ecologische schade*" is still lacking (*Deloddere*, NjW 2004, 38). An attempt is made to distinguish between damage to things serving the public interest, and yet ownerless, and then on the other hand things that lie within the realm of private property. Damage solely to the first group of things constitutes ecological damage (*Deloddere* loc. cit. no. 4). Damage resulting from environmental impairment to things under private ownership are subject to the general rules of private law, and is thus recoverable particularly in the case of a *faute* of the respondent (e.g. CA Antwerpen 2 December 2002, NjW 2004, 56: the liability in damages of the constructor of a sewer for damage flowing from the subsidence of the ground water level on his neighbour's land). There are specific statutory regulations – often susceptible to swift change - for many forms of environmental pollution. *Décret relatif au Livre II du Code de l'Environnement constituant le Code de l'Eau* (of 27 May 2004, JO 23 September 2004) art. 410 provides that the office of the Director of Public Prosecutions makes an application against the polluter for a judgment for the repair of the harmed natural resource.

4. SPANISH Const. art. 45 expressly authorises public authorities to make a claim against polluters of the environment for damages or reparation of the costs of preventative measures taken (see further *Yzquierdo Tolsada*, Sistema de

responsabilidad civil, 314). The duty to pay damages for ecological collective damage has been formulated in a more detailed format by a multitude of individual statutory regulations; an all-encompassing regulation at the level of a general standard law is not in existence to date. Counted among these specific regulations are praticularly Law on Water (*Real Decreto Legislativo 1/2001* of 20 July, *por el que se aprueba el texto refundido de la Ley de Aguas*) art. 118; Law on Coastal Areas (*Ley 22/1988*, of 28 July, *de Costas*) arts. 95(1) and 100; Law on integrated prevention and inspection of contaminations (*Ley 16/2002*, of 1 July, *de prevención y control integrados de la contaminación*) art. 36; Nature Reserve and Flora and Fauna Act (*Ley 42/2007, del Patrimonio Natural y Biodiversidad,* of 13 December 2007) art. 37; Law on Waste (*Ley 10/1998*, of 21 April, *de Residuos*) art. 36; and Law on genetically modified organisms (*Ley 9/2003*, of 25 April, *por la que se establece el régimen jurídico de la utilización confinada, liberación voluntaria y comercialización de organismos modificados genéticamente*) art. 38. Conversely, damage to the individual is further subject to the general rules of civil liability (CC arts. 1902 and 1908).

5. ITALIAN Law of 8 July 1986, no. 349, on the establishment of a Ministry for the Environment and regulations on envoronmental damage (*Istutuzione del Ministero dell'ambiente e norme in materia di danno ambientale*) art. 18 attaches an obligation to "any intentional or negligent act in contravention of a law or of regulations enacted on the basis of a law, which endangers the environment in its infliction of damage thereto, its alteration, impairment or its partial or complete destruction thereof… obliging the originator of the act to pay damages to the State". Fault-based liability is in issue here; an amelioration of the State's burden of proof is not provided for (*Comai*, in: Ponsanelli [ed.], La responsabilità civile, 101-102). It is also necessary to prove the breach of a statutory provision or of a regulation enacted on the basis of a statutory provision (Cass. 3 February 1998, no. 1087, Foro it. 1998, I, 1142). This follows the model of the basic tort law norm in CC art. 2043. Law 349/86 art. 18(6) provides the judge with the authority to evaluate in relation to the amount of damages where precise indications are not possible. Some even see a form of compensation of non-economic losses here (*Castronovo,* La nuova responsabilità civile[2], 741). In any event an impairment of the environment as such is what is involved (*Comai* loc. cit. 95), not the sum of the damage to its component parts (Cass. 1 September 1995, no. 9211, Giur.it. 1996, I, 1, 950). The action is to be brought before a (civil) court of law (Cass.sez.un. 25 January 1989, no. 440, Foro it. 1990, I, 232); the Italian State and the relevant regional statutory corporations constitute the actively legitimate claimants. The judge can decree that the State itself, but at the cost of the injurer, may arrange for the reconstruction of the former state of affairs (loc. cit. art. 18(8)). An element for consideration is the fact that under loc. cit. art. 18, a proprietor who himself harms his own immoveable property can also become liable as against the State (*Castronovo* loc. cit. 750, 756). In relation to the general bases of liability for collective environmental detriment, the courts also often refer to the Constitution (Const. arts. 2, 3, 9, 41, 42) and use it to substantiate the existence of a *danno ingiusto* to a non-economic interest vested in the public (e.g. Cass. 19 June 1996, no. 5650, Foro it. 1996, I, 3062). Cass. 1 September 1995, no. 9211, Giur.it. 1996, I, 1, 950 accordingly emphasised that Law 349/86 art. 18 only applies to environmental damage as such; damage to individual legally protected interests remains in the realm of the ordinary civil liability in CC art. 2043.

6. HUNGARY also fuses the general rules of tort law (particularly CC § 345(1): strict liability of undertakings endangering the environment for damage to the individual) with its rules on liability for purely ecological damage. Law no. LIII of 1995 on the general rules of environmental protection (as amended) § 103(1) verweist auf CC

§§ 345 and 346 (strikte Haftung für umweltgefährdende Tätigkeit). Loc. cit. § 4 defines the following as elements of the environment: earth, air, water, the biosphere as well the man-made environment and its respective components; these "elements of the environment" and their systems, processes and structures constitute 'the environment'. Loc. cit. § 103(2) further provides that in all cases in which the injured party would not wish to enforce his claim against the originator of the damage, the Minister for the Environment - on the basis of the injured party's corresponding declaration - can pursue the claim for the benefit of the State treasury under the chapter "Restricted Allocation of Environmental Protection Funds". According to § 109(2), in relation to the (not necessarily criminally punishable) endangerment of the environment, the state attorney is also justified in bringing an action in damages. Law no. LIII of 1996 on the preservation of nature § 3(2) refers to the provisions listed in Law no. LIII of 1995 on the general rules on environmental protection, but also additionally contains its own regulation in § 60(2) on the role of the state attorney in the enforcement of compensation claims and a definition of damage in § 81(2). Also falling due for recovery are, inter alia, the non-economic damages following from the harm to the natural environment and its natural features and the non-economic damages due to the deterioration of the living conditions of society, its groupings or its individual members. The claim in non-economic collective damages due to the deterioration of the living conditions of society, its groupings or its individual members is enforced by the state attorney's office (§§ 81(4) and 60(2)) in favour of the state environmental protection fund mentioned.

7. Under the autonomous GERMAN civil law, the duty of the injuring party to compensate depends on the infringement of the individual right or legally protected interest of another party. The Law on environmental protection § 1 makes no exception to this; it requires personal or property damage. The protection of collective interests in the environment is simply a side-effect of this rule of liability. It materialises through the duty to remove such ecological damage that is directly linked with the damaged property (CC § 251[1]; Staudinger [-*Hager*], BGB[13], § 823, no. B 186). The occasionally raised claim, to recognise a (supplemental) "right in the environment" in the context of CC § 823(1) has not gained currency. However, in connection with the duty to compensate for damage to the individual, Law on liability for harming the environment § 16 states that where nature or the countryside is impaired through the harming of a thing, expenses for the restoration of the previous state of affairs is not to be seen as disproportionate within the meaning of CC § 251(2) solely on the basis of the fact that the cost of such restoration exceeds the value of the thing. Additionally, a similar rule is to be found in Law on genetic engineering § 32(7).

8. AUSTRIA has already attempted in 1994 to enact an exhaustive Law on liability for impairment of the environment, though this plan was foiled at that time. The applicable law leaves the matter predominantly to the federal criminal (CP §§ 169 et seq.) and state-level Law on the protection of nature. Thus, for instance, Viennese Law on the protection of nature § 17, along with its express prohibitions on impairing the environment, provides for a duty to make good the environmental damage caused. The other federal states also have similar rules at their disposal. Federal law is acquainted with similar provisions only in the form of specific regulations on the protection of individual environmental resources (Law on the water and waterways; Law on raw mineral materials). Private law provides a general action for defending against emissions (CC §§ 364[2], 364a), in which some commentators are inclined to see a basis (albeit flawed) for "private claims resulting from environmental impairment" (Koziol/Bydlinski/Bollenberger [-*Eccher*], ABGB, § 364, no. 1). The currently

discussed draft of a new Law on damages in Austria only provides for civil claims for compensation in the case of damage inflicted on the individual (§§ 1334 et seq.). Claims of the State or of the competent regional corporation for the compensation of purely ecological damage remain factored out; anticipating the implementation of the Directive was not desirable (*Hinteregger*, in: Griss/Kathrein/Koziol [ed.], Entwurf eines neuen österreichischen Schadenersatzrechts, 122). Moreover, such claims are referred to public law (Schwimann [-*Harrer*], ABGB[3], Pref. to §§ 1293 et seq., no. 42).

9. In GREECE a distinction is drawn between so-called "liability for environmental impairment" and civil liability for causing damage to the environment (*Tzimapiti*, Prolipsi kai apokatastasi tis perivallontikis simias, http://www.nomosphysis.org). The general "liability for environmental impairment" relates to matters in the (not yet implemented) Directive, viz. pure ecological damage. In the case of civil liability for causing damage to the environment, damage to an individual's health, property and other interests resulting from harming the environment are in issue. Where such damage to the individual is compensated in accordance with either CC art. 914 or Law 1629/1986 on the protection of the environment art. 29 ("Any natural or legal person who occasions pollution or other impairment to the environment is liable for damages, unless this person can prove that the damage is attributable to a vis major or is the result of the culpable conduct of a third party acting intentionally") (on this point, see further *Karakostas*, Perivallon kai Astiko Dikaio, 104), the restoration of "the environment" is thus solely an indirect consequence of civil liability. In contrast, liability as against the State for pure ecological damage is hitherto not yet in existence. However, doctrine and jurisprudence proceed on the basis that contaminating things dedicated to general use (like, for example, the beach) also injure the individual citizen in his or her personality, if he or she is affected in the right to use this thing. Along with claims to reparation of patrimonial damage, in such cases a claim for the compensation of non-economic loss also comes into focus (*Karakostas*, Perivallon kai Astiko Dikaio, 71). In relation to liability for environmental impairment, it is to be noted that the Directive has not yet been implemented.

10. PORTUGUESE Basic Environment Act *(Lei de Bases do Ambiente*, Act no. 11/87 of 7 April 1987*)* art. 40(4) provides all "citizens who are indirectly threatened or injured in their right to a healthy and ecologically balanced social living environment" with the right "under general laws" to seek a prohibitory order or to claim damages. For "particularly dangerous activities" occasioning considerable damage to the environment, art. 41 provides for strict liability in damages. Art. 48 clarifies that the impairment of the environment is to be put to an end and the previous state of affairs is to be restored, as far as possible. On the other hand, Water Quality Act *(Lei da qualidade da água*, DL no. 236/98 of 1 August 1998) art. 73 provides that any person who intentionally or negligently harms the environment by impairing the quality of the water is laible to "the State" in damages. This latter claim in damages in favour of the State (see STJ 14 January 1999, cited in *Cunhal Sendim*, Responsabilidade civil por danos ecológicos, 12) is deemed an exception today. This is because in principle every citizen is seen as being justified in claiming compensation as much for the environmental damage inflicted individually on him as well as collectively, the latter in the form of an actio popularis *(acção popular*, see Const. art. 52(3), Popular Action Decree Law art. 12 and Basic Environment Act art. 41(6)). The right to bring such an *actio popularis* claim is also enjoyed by environmental protection agencies. The Portuguese system, it is stated, is thus based on a vision of "environmental democracy". It is not believed that "the environment is a public good and the damage to the environment is a damage to the State-community". The infringement of rights of

the State are not involved here, but the infringement of private rights in the environment (*Cunhal Sendim* loc. cit. 55; *Sousa Antunes*, FS Almeida Costa, 643, 659). In practical terms, this means that in an action for damages, private law entities (including environmental protection organisations) may not only plead their own personal (economic and non-economic) losses, but also additionally and in the same proceedings, damages in favour of the local authority and the State (CA Guimarães 17 November 2004 [re: a claim of land owners]). To date there is of course a general dearth in jurisprudence on these issues.

11. Under DUTCH law, along with the legal remedy in CC art. 3:299 (prohibitory order), the State is also equipped with the claim to damages resulting from a civil wrong (CC art. 6:162). While admittedly CC art. 3:303 indeed requires a "sufficient interest" in order to be enforceable before the court, this does not mean, however, that the State would have to pursue its own private law interest; a relevant interest in the environment is sufficient (T&C Vermogensrecht[3] [-*Stolker*], art. 3:303 no. 1 p. 1368). Redress for costs within the parameters of the law on liability for environmental impairment on the basis of CC art. 6:162 only comes into the picture where the polluter of the environment had to have reckoned on the State taking care of the restoration (HR 9 Februar 1990, NedJur 1991 no. 462 pp. 1973-1990). Furthermore, the courts assess whether the State is overstepping an existing rule of public law in an unacceptable manner when it avails itself of private law remedies. This is the doctrine of *onaanvaardbare doorkuising*. Private law may only be drawn on by the State when public law leaves the State no reasonable opportunity to pursue its interests (HR 26 January 1990, NedJur 1991 no. 393 p. 1657). Environmental protection organisations shall also be entitled to damages within the framework of their registered aims (CFI Rotterdam 15 March 1991, NedJur 1992 no. 91 p. 304: damages in favour of an asscoaition for the protection of birds following oil pollution). The extent of the damages is assessed on the basis of CC arts. 6:95-110 and 6:184 (in relation to preventative measures). In the event that it is no longer possible to restore the situation that existed before the environmental damage, varying methods of calculating the level of damages are weighed up (see further *Kottenhagen-Edzes*, Onrechtmatige daad en milieu, 79). Jurisprudence on this matter seems to still be absent, however.

12. Under ESTONIAN LOA § 133(1), where damage is caused by environmentally hazardous activities, reparation related to the deterioration in environmental quality also falls due. Expenses relating to preventing an increase in the damage and to applying reasonable measures for mitigating the consequences of the damage, and the damage arising from the application of such measures are also subject to compensation. FINNISH Law on compensation for impairing the environment (*lag om ersättning för miljöskador* of 19 August 1994, no. 737) § 6(1)(ii) entitles public authorities to compensation for the cost of reasonable and proportionate measures that they have put in place in order to avert imminent environmental damage or to restore the impaired environment to its previous state. Comparable provisions are to be found for the protection of inland water and waterways in the Law on environmental protection (*miljöskyddslag* of 4 Februar 2000, no. 86) §§ 66 and 67. Where the party liable to compensate is not in a financial position to do so or the originator of the environmental damage can not be established, insurance against environmental damage steps in (Law on insurance against environmental damage [*lag om miljöskadeförsäkring* of 30 January 1998, no. 81] § 1(1)(i-ii)); pollution of the environment by oil is subject to a specific regime to this extent (Law on funds for oil damage [*lagen om oljeskyddsfonden* of 30 January 2004, no. 1406]). While SWEDEN does not boast a clear cause of action in favour of the State for the compensation of pure ecological damage, it arrives at essentially the same destination after taking a

detour through the (public law) rule on recovery of costs in the Environemental Code (*miljöbalk* [1998:808]) chap. 26 §§ 17(1) and 18(1) in conjunction with § 9(1) and chap. 10. Loc. cit. chap. 10 contains rules on (in addition to chap. 2 § 8) key issues of responsibility under environmental law and of private law liability in damages. So-called "costs of after-treatment" are also within its scope. Regarding the claims of the State, in the recorded reasons (Prop 1997/98:45 p. 757) for placing the rule on damages in chap. 10 § 3, the observation is to be found that it was about "regulating" the responsibility of the land owner as against the "general public". Chap. 26 ("Surveillance") §§ 17-18 refer accordingly, inter alia, to chap. 26 §§ 9-13. Chap. 26 § 9(1) in turn empowers the competent public authority to pass ordinances and prohibitions in order to achieve the aim of the Law. Remedial measures at the expense of the responsible party under civil law rules are also counted hereunder (*cf*. Prop 1997/98:45 p. 909). Where the said party is not in an economic position to fulfill this obligation or where he can not be identified, insurance steps in (chap. 33 §§ 1 and 3).

13. On the duty to compensate for damage to the individual, see the Notes under VI.–3:206 (Accountability for damage caused by dangerous substances or emissions).

VI.–2:210: Loss upon fraudulent misrepresentation

(1) Without prejudice to the other provisions of this Section loss caused to a person as a result of another's fraudulent misrepresentation, whether by words or conduct, is legally relevant damage.

(2) A misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false and it is intended to induce the recipient to make a mistake.

COMMENTS

A. The legally relevant damage

General. This Article contains the proposition – essentially self-evident for all non-contractual liability law systems – that losses as a result of fraudulent misrepresentation are legally relevant damage. In practice, however, claims for damages for fraudulent misrepresentation (*'actio de dolo'*) do not arise very often in most jurisdictions. This is because fraudsters are in many cases economically incapable of fulfilling their obligation to compensate and personal liability insurance does not provide cover in cases of intentionally committed wrongs.

Relationship to VI.–2:204 (Loss upon communication of incorrect information about another). The present Article operates "without prejudice to the other provisions of this Section", thus leaving especially VI.–2:204 (Loss upon communication of incorrect information about another) and VI.–2:207 (Loss upon reliance on incorrect advice or information) unaffected. VI.–2:204 addresses losses resulting from the communication of false information about the injured person to third parties. Overlap with the present Article is less likely here. However, both Articles may apply in one and the same case for the benefit of different injured parties.

> *Illustration 1*
> In order to prevent a competitor B from "remaining in business" with a mutual customer C, A tells B that C is embroiled in a bribery scandal. B consequently refrains from concluding a contract with C, as originally planned. The losses B suffers are legally relevant damage within the meaning of the present Article, while C suffers legally relevant damage within the meaning of VI.–2:204 (Loss upon communication of incorrect information about another).

VI.–2:207 (Loss upon reliance on incorrect advice or information). The present Article differs from VI.–2:207 (Loss upon reliance on incorrect advice or information) essentially on the point that the present Article relates to losses caused by misinformation outside professional or trade activity. In private life, false advice and misinformation remain in principle without consequence in the law of liability. It is only actual deception which gives rise to liability. The latter also naturally applies to working life. As a result, it can arise that one and the same loss constitutes legally relevant damage within the meaning of these two Articles. Of course, as always in such cases, this does not alter the fact that the injured person can only have the damage satisfied once.

Loss. The legally relevant damage within the meaning of this Article will often take the form of so-called "pure economic loss", i.e. loss which is independent of injury to the person or damage to property and which is equally independent of an infringement of some other right.

Pure economic loss in this sense is suffered by any person who is induced by a fraudulent misrepresentation to enter into a disadvantageous contract. The fact that rules on the compensatory consequences of such deceit are to be found in ***???* DCFR** II.–7:214 (Damages for loss) does not conflict with a concurrent application of non-contractual liability law: the fraudster has no claim to protection by insistence on a rule of contract law which is potentially more favourable: see VI.–1:103 (Scope of application) sub-paragraph (c).

Non-economic losses. The Article is not, however, restricted to specific forms of loss; consequently, non-economic loss in particular constitutes legally relevant damage within the meaning of this provision. That relates not only to cases of deception, causing suffering on the part of the victim, but to all intentional infliction of detriment through fraudulent misinformation for the purpose of inducing a mistake on the part of the affected party.

> *Illustration 2*
> X, having a peculiar sense of "humour", knocks on his neighbour N's door and informs her that her husband has had a severe accident and is in the intensive care unit of the hospital. N makes her way to the hospital with great anxiety, where she is told that her husband is not there. Nothing at all had happened to her husband; X has taken the liberty, as he says, of making a "joke". N has suffered not only economic loss due to the travel expenses, but also primarily recoverable non-economic loss arising out of her anxiety, and this is so even where the requisites of VI.–2:201 (Personal injury and consequential loss) paragraph (2)(b) are not fulfilled (i.e. she has not suffered a mental condition requiring medical treatment).

Damage and accountability. The Article produces an appreciable proximity between legally relevant damage and the basis for accountability. This lies in the nature of the beast and is therefore unavoidable. However, one must still distinguish between these two aspects. This is evident in all cases in which a claim is brought against an employer on the ground that an employee has fraudulently deceived the injured person (see VI.–3:201 (Accountability for damage caused by employees and representatives)). The distinction between legally relevant damage and the basis of accountability of course also remains important where the person causing the damage and the person sued are the same person. This is because the person causing the deception need not have acted with intention as regards causing the loss of the deceived party. While under the conditions of this Article this may indeed very rarely not be the case, deviating case structures are certainly conceivable.

> *Illustration 3*
> A bank (B) makes a credit guarantee to one of its customers (X) dependant on proof that goods sold have also actually been delivered to X's buyers. Upon X's request, one of his buyers, Y, accordingly signs a receipt, although Y knows that the goods have not yet been delivered. Y merely wishes to speed up the process of B's obtaining credit, having no cause to suppose that X could be in financial difficulty, nor thus that it was not an everyday transaction with B which was at stake. B's claim against X for the repayment of the loan proves worthless. Y has caused B's loss negligently, even though Y fraudulently deceived B and thereby caused B's loss. Causing the loss negligently suffices for liability (VI.–1:101 (Basic rule) in conjunction with VI.–3:102 (Negligence)).

B. Fraudulent misrepresentation

Misrepresentation. The Article relates to causing loss through misrepresentation. The formulation takes its cue from ***???* DCFR** II.–7:205 (Fraud) which, however, speaks of fraudulent 'representation'. Both texts consciously avoid technical concepts of particular national legal systems, especially those of criminal law (e.g. *Betrug* or 'obtaining something by deception'). The misrepresentation, moreover, can take place in any conceivable manner, thus "by words or conduct". As regards the latter aspect, a fraudulent misrepresentation through omission is conceivable where a duty to provide information exists.

> *Illustration 4*
> A does not inform B before they enter into marriage that he is impotent. B is entitled to claim against B for reparation of non-economic loss suffered. The family law repercussions (divorce, post-marital maintenance) do not conflict with the award of reparation.

'Fraudulent' misrepresentation. According to VI.–2:210(2) a misrepresentation is "fraudulent" under two (cumulative) conditions: (i) it must be made with knowledge or belief that the representation is false, and (ii) it must be intended to induce the recipient to make a mistake. With the formulation "made with belief that the representation is false" those cases are addressed in which the person making the representation was not sure that the information was false but made it in the hope and assumption that it was false. If the information was in actual fact true, what we have is merely an attempt, irrelevant for private law; there is then no 'misrepresentation' within the meaning of section (1).

Intention to induce the recipient to make a mistake. The second element of a fraudulent misrepresentation lies in the intention to induce the recipient to make a mistake; furthermore, the latter must actually make a mistake, since otherwise the misrepresentation cannot have been causative of the loss. The term "intention", so far as it relates to the causation of the loss, is defined in VI.–3:101 (Intention). In VI.–2:210(2) it is the intention to induce a mistake which is in issue. It is not every ill-considered statement capable of inducing error which justifies liability. What is required in this context is rather that the deceiver's mind is directed towards the causation of the victim's error. The aim of the misrepresentation must be to induce an error; it is not sufficient that the person making the misrepresentation merely willingly reckons with an error on the part of the deceived person.

> *Illustration 5*
> B, a board member of a company intentionally falsely informs a broker that after exploratory drilling the company has not found any oil reserves. In doing so B wanted to protect the interests of the company. He was not, however, concerned with inducing the shareholders to infer that their shares were likely to become worthless and therefore should be sold as soon as possible. B did not fraudulently deceive the shareholders.

NOTES

1. Under FRENCH and BELGIAN law any person who knowingly deceives another is liable under tort law (Cass.civ. 28 June 1995, D. 1996 jur. 180, note *Mouralis*). However, a tortiously relevant *faute* may also be committed by someone who negligently and unintentionally misleads another (Cass.civ. 19 October 1994, Bull.civ.

1994, II, no. 200 p. 115; Arbitragehof Gent 27 December 1999, RW 2000-01, 168). Falling under this category is also the French jurisprudence, according to which a bank that opens an account for a new customer without carrying out sufficient checks can be made liable for damage as against a third party for the damage the latter incurs due to the new customer's fraudulent use of the account, e.g. by writing out cheques which cannot be honoured (see further JClCiv [-*Grua*], art. 1382 à 1386, fasc. 335-10 [2001], nos. 80-85).

2. While SPANISH CP art. 248 defines criminal fraud (special forms thereof are to be found in CP art. 251; including the disposal of a thing while concealing rights of third parties therein), CC art. 1269 defines the civil law equivalent: deceit. This is present "where the deceitful words or underhanded dealings of one of the contractual partners leads his or her counterpart to conclude a contract which he or she would otherwise have not concluded". Fraudulent intent (the mala fides, intentional malice, the *dolo civil*) is nowhere presumed; even in a purely tort law context (CC art. 1902), it must be always fully proven (TS 21 May 1982, RAJ 1982 [1] no. 2586 p. 1775). The *dolo civil* consists of malice and outward conduct. The latter objective element is a question of fact, with its subjective counterpart being a question of law. *Dolo*, as is stated, is frequently accompanied "by artfulness and dishonest scheming" (TS 28 February 1969, RAJ 1969 [1] no. 1034 p. 759); furtiveness, mala fide concealment and exploiting another's naivety are other indicators of the existence of *dolo* (TS 15 June 1995, RAJ 1995 [3] no. 5296 p. 7097). There is an ambiguous line of demarcation between civil law deceit and criminal fraud (*Yzquierdo Tolsada*, Sistema de responsabilidad civil, 40). When utilised by the wrongdoer in misleading the victim, the following are deemed in jurisprudence as the cornerstones of criminal fraud: deceptiveness, falsehood, trickery, craftiness, swindle and mendacity (TS 5 October 1988, RAJ 1988 [5] no. 7669 p. 7526). On the question of when a breach of contract fulfils the requisites for fraud, see TS 16 June 1992, RAJ 1992 (3) no. 5397 p. 7070.

3. Under ITALIAN Law fraud *per se* constitutes a wrong (*Alpa*, Trattato di diritto civile IV, 235; *Bianca*, Diritto civile V, 574-575). In some other cases the *dolo* is a necessary prerequisite for the presence of a wrong in the sense of (civil) tort law. Vexatious actions (CCP art. 96(1)) and "enticement through the promise of marriage", which falls under CC art. 2043 provide examples of such (Cass. 8 July 1993, no. 7493, Giust.civ.Mass. 1993, 1135) (further cases in which intention is a requisite of liability are cited in *Visintini*, Fatti illeciti II^2, 382). *Dolo* in the sense of fraud is often deemed a necessary prerequisite for the affirmation of a delictual wrong within the arena of contractual negotiations (*Alpa* loc. cit. 236-239). Cass. 9 February 1980, no. 921, Giust.civ.Mass. 1980, fasc. 2 passed judgment against an Italian vendor for full damages in tort (reparation of depreciation and lost profit), who tricked the buyer into thinking that the sale price of the real property was below the market value and that there were high returns in the form of rent. Cass. 18 December 1987, no. 9407, Giur.it. 1989, I, 1, 537 awarded damages against a third party who had strung along the bailee in mala fides in relation to his (the third party's) debts as against the bailor and in relation to the bailor's things, which were in the possession of the third party.

4. In HUNGARIAN Law fraudulent misrepresentations likewise fall under the general tort law norm (CC § 339(1)). Where the injuring party acts with malicious intent, within the meaning of this provision, he or she also always acts "objectionably". It also includes claims to compensation of pure economic losses (as long as they, as with all other economic losses, are sufficient for the definition of damage in CC § 355(4)). The general provision of CC § 6, which relates to so-called "damages resulting from incitement or fomentation" also comes to the table of tort liability here. Hereunder, the court can impose the payment of full or partial compensation on persons whose

intentional conduct induces with cogent reason a *bona fide* person to engage in behaviour causing damage to him- or herself through no fault of his or her own. However, CC § 6 is not a tort law norm due to the fact that the provision (i) does not consider the conduct an unlawful act and (ii) the grant of damages lies with the discretion of the court (Gellért [-*Vékás*], A Polgári Törvénykönyv Magyarázata[6], 56-63; *Bíró and Lenkovics*, Magyar Polgári Jog, 194-199); where the "incitement" occurred with intention to harm, this is not a case for CC § 6, rather a tort under CC § 339 (*Vékás* loc. cit. 56, 58, 60-61; *Légrádi*, Polgári Jogi Kodifikáció 2003-4, 20-27). Incidentally, fraudulent misrepresentation of course constitutes a ground of contractual avoidance (CC § 210(1) and (4)) and – as fraud – a criminal act (CP § 318(1)). Criminal conviction for fraud at the same time provides evidence of the existence of a deceit in civil proceedings (BH 1996/200; BH 1996/253).

5. CZECH and SLOVAK Law handle cases of harm through fraudulent misrepresentation in CC § 424, whereunder "a person who caused damage by intentional conduct offending good morals shall be liable for such". ESTONIAN LOA § 1045(1)(viii) and LATVIAN CC art. 1641 (which states that "every intentional harm shall be understood as wrongful intent") deal with these matters in the same way.

6. Under GERMAN law liability for causing so-called pure economic losses through criminal fraud (CP § 263) results from CC § 823(2) (e.g. BGH 14 October 1971, BGHZ 57, 137: deceit in the purchase of a used car; BGH 5 March 2002, NJW 2002, 1643: incorrect details in a contract of sale for a freehold apartment; BGH 17 September 2001, NJW 2001, 3622: subsidy fraud). Moreover, liability under CC § 826 for intentionally and immorally inflicted damage is incurred by any person who knowingly deceives another e.g. in order to conclude a contract with the latter (in such cases the corresponding right to avoidance flows from § 123). This applies particularly to untrue information on subject matter essential to the contract. Even concealing such details (e.g. about personal insolvency) can constitute fraudulent misrepresentation (for more detail, see e.g. Palandt [-*Sprau*], BGB[65], § 826, no. 20). It is widely believed that where one contracting partner fraudulently wards off his counterpart from the necessary form of a juridical act, in order to be able to rely later on formal defects, the deceived person shall at the same time have a claim to fulfillment of the contract, and not arising out of the contract, but out of tort law (CC § 826; Palandt [-*Heinrichs*], BGB[65], § 125, no. 22).

7. AUSTRIA has rules on fraudulent misrepresentation at its disposal in contract law, as well as in tort law. The deceived party can avoid his or her statement of intent to contract (CC § 870) and also claim damages for pure economic losses (CC § 874). Criminal fraud is not required. Any unlawful, intentional misrepresentation suffices for the existence of "deceitfulness" ("List") within the meaning of CC § 870; the intention must not also extend to the occurrence of damage (Koziol/Bydlinski/Bollenberger [-*Bollenberger*], ABGB, § 870, no. 1). Incidentally, even *dolus eventualis* is sufficient. Fraudulent misrepresentation can also be committed through the concealment of facts that are obliged to be disclosed (*Bollenberger* loc. cit. no. 1). Information, advice or a recommendation known to be false likewise results in liability in tort because such acts are immoral within the meaning of CC § 1295(2). Hereunder, however, the intention must also cover the infliction of damage.

8. In all cases in which criminal fraud is present, under GREEK CC art. 914 civil liability also ensues (Georgiades and Stathopoulos [-*Georgiades*], art. 914, no. 53). Fraudulent misrepresentation furthermore grounds liability under CC art. 919 because it has the immoral and intentional infliction of harm at its core (*Eleftheriadou*, Die Haftung aus

Verkehrspflichtverletzung im deutschen und griechischen Deliktsrecht, 65). Examples are provided by intentionally giving false advice out of self interest (CA Athens 4172/1982, NoB 31 [1983] 822; *Georgiades* loc. cit. art. 919, no. 5) and the conclusion of a contract as a result of a fraudulent misrepresentation (*Georgiades* loc. cit. art. 919, no. 25). Further, CC art. 919 imposes liability in damages on any person who fraudulently induces the formal invalidity of a juridical act and then relies on this invalidity (CA Athens 414/1972, Arm 26 [1972] 519; CA Crete 138/1965, EEN 33 [1966] 366).

9. Contrary to the opinions of *Vaz Serra*, BolMinJus 85 (1959) 243 and 335-342, the PORTUGUESE Civil Code did not formulate the *actio de dolo* in a separate provision (*v. Bar*, The Common European Law of Torts I, 52). Recourse may only be had to CC art. 334 (*"abuso de direito"*) in few exceptional situations; according to the prevailing opinion, the provision does not even constitute a protectionary law within the meaning of CC art. 483 *(dos Santos Silva*, ERPL 2006, 834; CA Coimbra 14 December 1993, CJ XVIII [1993-5] 48). Therefore, in the context of tort liability for fraudulent misrepresentation outside the realm of contractual dealings (the concept of liability for *culpa in contrahendo* [CC art. 227] is available in this case: *v. Bar* loc. cit. 36; *Carneiro da Frada*, Uma terceira via, 96; *Almeida Costa*, Responsabilidade civil pela ruptura, 98) usually criminal fraud (CP art. 217) is required (CC art. 483(1)). The fraud in turn requires *astúcia*, namely an act of deception, without which merely an irrelevant *reserva mental* is concerned (CC art. 244) (CA Oporto 3 May 2000, CJ XXV [2000-3] 223). Any person who has shares transferred to him, after he has previously instructed a bank not to honour a cheque issued as counterperformance, commits fraud (STJ 20 March 2003); on the other hand, any person who does not pay the purchase price for delivered goods is, in the absence of certain circumstances, not criminally liable (STJ 3 February 2005).

10. For the purposes of the law on contractual avoidance, DUTCH CC art. 3:44(1) art. 3:44(3) defines fraud (*bedrog*) in the following manner: "Fraud takes place where someone induces another to engage in a particular juridical act, either by means of giving information known to be false and with the intention of bringing about this result, intentional concealment of a fact for his own ends, which the concealing party was under a duty to communicate, or by way of another act of deception. Instructions in general language, even where they are untrue, treated on their own do not constitute fraud." Fraud within the meaning of this provision is at the same time a civil wrong under CC art. 6:162 (*Boukema*, Samenloop, no. 30, p. 65). The victim can enforce the corresponding claim in damages additional to his right of avoidance in CC art. 3:44 (HR 2 April 1993, NedJur 1995, no. 94 p. 385; *Boukema* loc. cit. no. 9, pp. 17-18). This is primarily important because of the longer proscription period in tort law and because of the damage that is not yet eliminated upon avoidance (Onrechtmatige Daad III [-*van der Wiel*], s. II.3, no. 72 pp. 64-71; Asser [-*Hartkamp*], Verbintenissenrecht II[12], no. 204 p. 200).

11. Damage caused by fraud can be compensated under both ESTONIAN LOA § 1048 and § 1045(1)(viii). In addition, compensation for damage caused by misrepresentation can also be claimed under LOA § 14(1)(second sentence). If the aim of the fraud is to induce a person to enter into a transaction, compensation can be claimed also under GPCCA § 101(1). SWEDISH Law on Damages chap. 2 § 2 in conjunction with CP chap. 9 § 1 sets down civil liability for criminal fraud (which requires the making of profit by the wrongdoer); it also encompasses pure economic losses. Under Parental Code chap. 9 § 7(2)(first sentence), liability is incurred by the parents of minors who commit an act of deception when concluding a contract (which is ineffectual as against them). Similar provisions are to be found in DANISH Law on

Supervision (*værgemålslov* of 14 June 1995, no. 388) § 45(2) and (3) and FINNISH Law on the Function of Guardians (*lag om förmyndarverksamhet* of 1 April 1994, no. 442) § 28(3). Further regulations that relate to liability for fraudulent misrepresentation are to be found in the Scandinavian Law on Contract § 30 (se further *Grönfors and Dotevall,* Avtalslagen[3], 187-190 and *Gomard*, Obligationsret I[4], 143) and, for the special case of the liability of the *falsus procurator*, in § 25.

12. Deceit is counted among the "malicious torts" of the COMMON LAW (*Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465). To establish deceit, the plaintiff must establish, inter alia, misrepresentation, scienter, intent, reliance and damage. Thus the defendant must make a respresentation that is not true. This must be done knowingly, without belief in its truth or carelessly as to the truth (scienter). There must be intention in order to induce reliance, the representation must have materially influenced the detrimental reliance of the plaintiff, who must have suffered a damage or a loss in order to maintain an action. However since the Statute of Frauds Amendment Act 1828 in ENGLAND AND WALES, such represenation must be made in writing in order for the tort to succeed. See generally *McMahon and Binchy*, Torts[3], 967-979.

Illustration 2 is taken from *Wilkinson v. Downton* [1897] 2 QB 57; **illlustration 3** from *Shinhan Bank Ltd. v. Sea Containers Ltd.* [2000] 2 Lloyd's Rep 406; **illustration 4** from Cass. 10 May 2005, no. 9801, Giur.it. 2006, IV, 691, Danno e resp. 2006, 37 and **illustration 5** from *Tackey v. McBain* [1912] AC 186.

VI.–2:211: Loss upon inducement of non-performance of obligation

Without prejudice to the other provisions of this Section, loss caused to a person as a result of another's inducement of the non-performance of an obligation by a third person is legally relevant damage only if:

(a) the obligation was owed to the person sustaining the loss; and

(b) the person inducing the non-performance:

(i) intended the third person to fail to perform the obligation; and

(ii) did not act in legitimate protection of the inducing person's own interest.

COMMENTS

A. The Article in overview

Inducing non-performance of an obligation. Inducing non-performance of a contractual obligation gives rise to non-contractual liability in all parts of the European Union. In classical Roman law this was one of the recognised groups of cases of the *actio de dolo*, which even today – often as "intentional causation of damage contrary to good morals" – still features in many civil codes. Where this specific basis of claim is missing, inducing non-performance of a contractual obligation is either subsumed within the basic non-contractual liability law norms or (as in the Common Law) constitutes an independent basis of non-contractual liability in itself.

Intention required. Inducing non-performance of a contractual or other obligation necessarily requires intention. Legally relevant damage is not caused by a third party to the contract when that third party merely exploits the conduct of another party in non-performance of a contractual obligation or causes it through negligence. This Article therefore has a direct intrinsic connection with VI.–2:101 (Meaning of legally relevant damage) paragraph (1)(b) and (c). These provisions give expression to the general (and essentially self-evident) rule that "relative" rights can in principle only be infringed by persons who owe a corresponding obligation to the holder of the right to render the relevant performance. Were this not so, the right would cease to be "relative" in character. However, if a person is intentionally induced not to perform contractual or other obligations to a third party, the third party who thereby suffers loss may claim reparation from the person inducing the non-performance.

Illustration 1

A and B conclude a contract for the production of a film. A assists with approximately 25% of the production costs and in return is to get a share of the expected net profit. A considerable part of the remaining costs are financed by B on credit, including a loan from company X. In order to secure its loan and despite knowledge of the agreements (under partnership law) between A and B, X has all of B's rights over the subsequent film distribution assigned to it. X induced B to breach the contract with A.

Illustration 2

The organiser of an opera production (A) persuades a famous female opera singer (S) not to honour her contract with a competing opera production B and instead to sing with A. A is liable to B to compensate for the damage this causes. A would not be liable to B, however, if A had merely brought S on a ski trip, during which she broke her leg and was unable to perform for B; that remains so even if A had known that the

contract with B forbade S from such recreational activities during the period of her contractual engagement to B.

Damage and accountability. The relationship between legally relevant damage and accountability in this Article is no different from how it is under VI.–2:210 (Loss upon fraudulent misrepresentation). Thus, an intentional inducement of the non-performance of a contractual obligation or other obligation is all that is involved (VI.–2:211(b)(i)). In contrast, it is not necessary that the loss resulting from it was also intended or was at least willingly reckoned with (VI.–1:101 (Basic rule) paragraph (2)). However, in the context of the present Article the two aspects can for the most part scarcely be separated from one another. This is because any person who induces another to fail to perform an obligation also invariably does so conscious of the fact that this harms the creditor. It remains to be considered in the context of this Article that an employer can be liable for an employee's inducement of a non-performance of an obligation .

Loss. As in VI.–2:210 (Loss upon fraudulent misrepresentation), "pure economic losses" are what are mostly in issue in this Article, but it is not limited to such losses. Non-economic losses are also recoverable. For harm of other kinds, overlap with previous provisions of this Chapter will also occur, e.g. where the supplier of a service is bribed to damage the item to be repaired. VI.–2:208 (Loss upon unlawful impairment of business) stretches beyond the scope of the present Article. This is because undertakings which are in a competitive relationship with one another may be subject to more stringent obligations under competition law to respect others' contractual relationships than is the case under the general rule in this Article .

The entitled claimant. According to sub-paragraph (a) only the person whose entitlement (within the law of obligations) is interfered with suffers a legally relevant damage. The person who is induced not to perform the obligation, by contrast, is expected to withstand temptation and, on failing to do so, to must suffer the consequences of the non-performance (vis-à-vis the creditor). That person will not be able to invoke this Article to pass the burden of any resultant liability to pay damages for non-performance of the obligation to the person inducing the non-performance. Nor is there any solidary liability, in relation to the third party, between the person inducing the non-performance of the obligation and the non-performing party (which would in effect provide the inducing person with a right of recourse vis-à-vis the non-performer). In cases in which the person who is to be induced is subjected to physical or mental pressure, that person has a preventative recourse on the basis of VI.–1:102 (Prevention) in conjunction with VI.–2:101 (Meaning of legally relevant damage).

Illustration 3
X, formerly a member of a religiously active sect (S), has since become an employee in an ecclesiastical undertaking. The contract of employment prohibits X from membership in associations of a type like S. Nevertheless, S threatens X with considerable disadvantages if he does not pay his membership fees to the sect and serve its interests. Membership in the community is for life, the sect insists. X has a claim against S for prevention of the pressure.

B. Non-performance of obligation

Contractual and other obligations. The Article is not restricted to inducing non-performance of a contractual obligation. In practice that may be the most important type of case, but there is no reason in principle why contractual rights should be treated differently

from rights to the performance of other obligations. Hence this provision embraces claims in respect of non-contractual obligations, including alimentary obligations. Moreover, where the obligation arises out of a contract, the fact that the contract may be avoided does not prevent a right to reparation under non-contractual liability law.s.

Illustration 4:
M, operator of a hamburger restaurant, wishes to enlarge the business and to cease using the premises hitherto used in favour of larger restaurant premises in direct proximity. He enters into negotiations with company P, surrendering to P his former premises because P assures him that it will operate an art gallery there, thus not intending to compete with M. In reality, at the time of the negotiations, X had attained a decisive influence over P (through an acquisition of shares effected in secrecy). X instructs P, as planned from the beginning, to open a hamburger restaurant in M's former premises. Shortly afterwards, P gets into financial difficulties. Although M can avoid the contract with P due to fraudulent misrepresentation, M also has a claim to reparation directly against X, who induced P to breach its agreement with M.

Obligation 'owed to the person sustaining the loss'. As already noted, the obligation in question must always be owed to the injured person by the party induced to fail to perform (sub-paragraph (a)). It does not suffice that the obligation is owed to another person. Conversely, the Article does not require that the identity of the injured creditor was known to the deceiver.

Breach of conjugal obligations. According to its wording, interferences in another's marriage, and in particular the inducement to commit adultery also fall under this provision. In this context, however, regard must be had to VI.–1:103 (Scope of application) sub-paragraph (c), and thus the question is raised whether the applicable law on marriage strives to regulate such cases conclusively. That would usually be the case in the matter of adultery: cf. above: illustration 5 under VI.–1:103. If the adulterous spouse does not become liable under non-contractual liability law, the third party who commits adultery with him or her cannot be held liable either. Otherwise the third party could have recourse against the spouse as a joint injuring person in their internal relationship as joint debtors and thereby circumvent the conclusiveness of the rule provided for by family law.

Non-performance. Legally relevant damage is only ever present where the respective loss is the consequence of a non-performance of an obligation on the part of the claimant's debtor. Thus, if e.g. an employee is poached from an employer due to the poacher's offering the employee a higher salary, then as long as the latter terminates the existing employment relationship and changes employment, inducement to non-performance of a contractual obligation is not in issue. The situation is the same if a competitor approaches the customer of another undertaking with the purpose of doing business with the customer in the future. Where unfair means are used in these and other types of cases, it may be a case concerning VI.–2:208 (Loss upon unlawful impairment of business). Typical situations for VI.–2:211 by contrast consist of the inducement to breach a prohibition against competition contained in the contract between the party induced to breach and the injured third party and inducements to terminate contractual relationships unlawfully.

Illustration 5
During the owners' general meeting, certain apartment owners of a multi-storey building instigate the dismissal of the building's supposedly inefficient caretaker,

using false facts as a pretext, after having accepted payment from the prospective replacement caretaker as remuneration for "being instrumental" in procuring the new job. The caretaker who is dismissed suffers legally relevant damage under VI.–2:204 (Loss upon communication of incorrect information about another), as well as under VI.–2:208 (Loss upon unlawful impairment of business) and the present Article.

C. Intentional inducement

Intentional inducement. According to paragraph (i) the person inducing the non-performance must have "intended" the third person to fail to perform the obligation. As in VI.–2:210 (Loss upon fraudulent misrepresentation), the requirement of "intention" is thus related not to loss, but to the failure to perform. The concept of "intention" is therefore once again not identical with that of VI.–3:101 (Intention), which is linked to the causation of the damage. What is required in the context of the present Article is rather that the inducing person's mind is directed towards the non-performance. The non-performance itself must be intended; it does not suffice that the inducing person acting merely willingly reckoned with it as a side-effect or exploited a non-performance which had already occurred. Only in the case of acts of infringement to the detriment of competitors may this be different, as noted above, due to the application of standards of competition law. That case is within the scope of application of VI.–2:208 (Loss upon unlawful impairment of business).

Absence of legitimate interest. Legally relevant damage within the meaning of the Article is also absent under sub-paragraph (b)(ii), if the inducing person acted "in legitimate protection" of the inducing person's own interest. A person is not bound to allow a fortuitous legal opportunity to go to waste, solely because by grasping it detriment would be caused to a third party.

Illustration 6
Before her death, an old lady (L) gives away the same piece of land to two different donees consecutively. The second donee (X) effects a registration in the land registry and in this way acquires ownership under the applicable land law because the prior donee (Y) did not carry out registration. At the time the conclusion of the contract of donation was offered to her by L, X did not know anything of the contract with Y, but X found out about it before the registration in the land registry was effected. X merely pursued her legitimate interests. She did not induce L to breach her contract with Y; consequently, X has no non-contractual liability to Y.

NOTES

1. FRENCH Law goes over and above the principle opted for in VI.–2:211. This is owing to the reality that it corresponds with settled case law whereby any person who knowingly aids another in breaching the latter's contractual obligations, commits a tortious *faute* in relation to the party who is affected by this breach of contract. The *principe d´opposabilité des conventions aux tiers* holds true (Cass.civ. 17 October 2000, Bull.civ. 2000, I, no. 246 p. 161). Not only incitement, but even the abetting of a breach of contract grounds a *faute*. It suffices that the third (non-contractul) party had knowledge of the existence of the contract. Business people are often even required to provide information on whether and what form of contractual relationship their business associate has with third parties (*le Tourneau*, Droit de la responsabilité et des contrats [2004/2005], no. 977). This is in conformity with the reality that French

jurisprudence solves issues of unfair competition drawing on general tort law (***???***see above Note *1* under VI.–2:208). Special regulations for labour law are to be found in *Code du travail* art. L 1237-3. Hereunder the new employer and the employee are solidarily liable for reparation of the damage which the old employer suffers through the unlawful termination of the contract of employment, effectuated by the employee, as long as some participation therein on the part of the new employer is proven. In tandem with this, the general tort law action remains applicable, for instance where a non-compete obligation is intentionally breached (a *clause de non-concurrence*), which the employee had signed in favour of the previous employer (Cass.com. 5 February 1991, Bull.civ. 1991, IV, no. 51 p. 34).

2. In BELGIAN case law it is also recognised that a tortious *faute* is committed by any person who knows or must know that he is assisting another's breach of contract (see the seminal case of Cass. 22 April 1983, Pas. belge 1983, 944). However, it is necessary that the the third party knew of the existence of the contract in question and knew or must have known that he was playing his part in a breach of contract, i.e. taking part in it (see further *Stijns*, in: Wéry (ed.), Le droit des obligations contractuelles et le bicentenaire du Code civil, pp. 189, 214-221, nos. 41-50).

3. According to SPANISH Law 3/1991 of 10 January 1991 on unfair competition (*Ley 3/1991, de 10 de enero, de Competencia Desleal*, LCD) art. 14(1) it is unfair "to induce employees, suppliers, customers and other creditors to breach essential contractual duties owed to competitors". Conversely, "inducing the customary cessation of a contract or exploiting a breach of an extrinsic contract for the benefit of oneself or a third party" is only unfair under art. 14(2) where either a betrayal or exploitation of an industry or trade secret is in issue or where deceit, an intention to oust the other party or other scheming is in play (see further *Berg*, Spanisches Gesetz gegen den unlauteren Wettbewerb, 279). The mere exploitation of a breach of an extrinsic contract, poaching customers or enticing away employees through the submission of a better offer are inconsequential to competition law as long as no special circumstances arise (CA Málaga 23 October 1995, RGD 1996, 4753). This is down to the fact that according to Spanish doctrine, contracts only generate effects on the contracting parties (CA Sevilla 21 June 1993, AC 1993-II no. 1270). When in doubt, an "essential contractual duty" (LCD art. 14(1)) is breached, where the conduct is severe enough to warrant the aggrieved party being given the right to terminate the contract (CA Madrid 1 July 1996, AC 1996-III no. 1942 p. 394). Any person who, e.g. pays extraordinarily high premiums or who expresses their readiness to take on a potential duty in damages on the part of the party in breach of contract, "induces" a breach. Overall, Spanish jurisprudence holds back from affirming an incitement to breach of a contract carrying liability, see e.g Tribunal de Defensa de la Competencia 6 February 1995, AC 1995-I, no. 889 p. 1498 and 7 July 1995, AC 1995-II no. 1500 p. 962. Immaterial damage suffered by a spouse as a result of the adultery of the counterpart is not recoverable (TS 22 July 1999, RAJ 1999 [3] no. 5721 p. 8929 and TS 30 July 1999, RAJ 1999 [3] no. 5726 p. 8933). However, a tortious wrong shall occur where it has been kept from a man for years that the three youngest of his four children are actually from another man (CA Valencia 2 November 2004, AC 2004-XXI no. 1994 p. 1069).

4. Under ITALIAN law the party injured by an "incitement to non-fulfillment" (*induzione all'inadempimento*) is equipped with a tortious claim for damages against the third party (*Bianca*, Diritto civile V, 605-607). Therefore, e.g. the second buyer of immovable property is liable to the first buyer under CC art. 2043 where the second buyer planned the harm to the first buyer (loss of title in ownership due to the registration of title of the second buyer) and participated in the vendor's breach of

contract (from a long line of case law, see inter alia, Cass. 9 January 1997, no. 99, NGCC 1998, I, 17; Cass. 18 August 1990, no. 8403, Foro it. 1991, I, 2473; Cass. 17 December 1991, no. 13573, Giust.civ.Mass. 1991, fasc. 12; Cass. 15 June 1988, no. 4090, Foro it. 1989, I, 1568; Cass. 20 October 1983, no. 6160, Giur.it. 1984, I, 1, 439; Cass 8 January 1982, no. 76, Riv.Dir.Civ. 1983, II, 678; CFI Ivrea 16 May 2003, Giur.it. 2004, 778; CFI Verona 4 March 1991, Giur.mer. 1992, 569). However, it is a bone of contention whether the mere knowledge of a contract with the first buyer suffices (rejected by *Castronovo*, La nuova responsabilità civile[2], 113). Cass. 25 October 2004, no. 20721, Giur.it. 2006, I, 1, 486 rejected it in a case of where the same gift was given to two people and disallowed the action due to the lacking intention to harm. The principles on liability for incitement to sell the same thing to two parties also hold true where merely two preliminary contracts are involved (Cass. 20 October 1983, no. 6160, Giur.it. 1984, I, 1, 439). Furthermore, the purchaser of a plot of land, who in collusion with the vendor infringes the previous owner's right to repurchase (Cass. 9 January 1997, no. 99, Giur.it. 1998, 928) and an acquirer who through de facto acts prevents a third party from exercising the *azione revocatoria* with which he is furnished under CC art. 2901 (Cass. 13 January 1996, no. 251, NGCC 1998, 104). The first buyer injured as a result of the "double sale" would suffer pure economic losses and not consequential losses flowing from an infringement of the title in ownership (*Castronovo* loc. cit. 109). Acts for purposes relevant to competition law may additionally be appraised under CC art. 2598(3) and accordingly be subject to more stringent requirements.

5. HUNGARY covers the inflicting of damage through inducement to breach of contract under civil law by means of its general tort law clause (CC § 339(1)): inducements to breach of contract may be "objectionable" within the meaning of this regulation. The inducer and inducee are liable solidarily as against the injured obligee (CC § 344). This is due to the fact that solidary liability even rears its head under Hungarian law where the contributory causes are independent of one other and occur after each other from a temporal perspective (see further *Eörsi*, Kártérítés jogellenes magatartásért, 64-65; Gellért [-*Kemenes*], A Polgári Törvénykönyv Magyarázata[6], 1238-1240; Petrik [-*Harmathy*], Polgári jog II[2], 581-582; *Ujváriné*, Felelősségtan[7], 75-80). In competition law inducements to breach of contract are subject to Law No. LVII from 1996 on the prohibition of unfair market behaviour and restriction of competition (Law on competition, *Tpvt*) § 5. Hereunder it is forbidden to call upon others in an unfair manner to discontinue their contacts with third parties or to refrain from taking up new commercial contacts. *Tpvt* § 5 does not require that the call for a boycott comes from a competitor. Of course it is not yet unfair to advertise to new potential customers by offering more favourable conditions.

6. The POLISH Civil Code leaves the *actio de dolo* undecided in its general tort law clause (CC art. 415). CC art. 422 adds as a general clause that "not only the person who directly caused the damage shall be liable, but also any person who has induced or helped another person to cause the damage, including those who consciously took benefit from a damage caused to another person". On the other hand, CZECH and SLOVAK CC § 424 deal with the inducement to breach of contract in a general provision on intentional and immoral infliction of damage. Things are the same in ESTONIA (LOA § 1045(1)(viii)).

7. In principle, GERMAN CC § 823(1) excludes tortious liability for third party interference with a contractual relationship existing between two others: contracts do not generate absolute, but merely relative rights, which thus cannot be enforced against third parties (e.g. *Medicus,* Bürgerliches Recht[20], no. 610; *same author*, Schuldrecht II[12], no. 842). However, under CC § 826, inter alia, as long as they are

caused intentionally and immorally, liability ensues for pure economic losses, which are - from a German understanding - losses that are not the result of the infringement of an absolute right. The inference of an immoral act requires special circumstances. In the case of a double sale, for instance, the second purchaser's mere knowledge of the vendor's breach of contract in itself will usually not suffice (*Medicus,* Schuldrecht II[12], no. 842). Immorality only comes into focus in the case of an active inducement to breach of contract. The inducement to breach of contract is immoral where the inducer exhibits a particular measure of recklessness or in other words: when he behaves in such a manner that is incompatible with the basic necessities of good faith in the legal sense (BGH 24 February 1954, BGHZ 12, 308, 317; BGH 23 April 1999, NJW-RR 1999, 1186 and BGH 19 October 1993, NJW 1994, 128). This shall also be the case where e.g. the second purchaser promises the vendor that he will release him from all the claims of the first buyer (BGH 2 June 1981, NJW 1981, 2184, 2185; ähnlich BGH 19 October 1993, NJW 1994, 128, 129). The finding of immorality can also result from the fact that the third party caused the breach of contract (or the non-performance of another obligation: BGH 1 April 1992, NJW 1992, 2152, 2153) through deceit or unlawful threat or from the fact that he co-operated with the vendor based on a plan (cullusion) (Palandt [-*Sprau*], BGB[65], § 826, no. 23). For instance, where in collusive co-operation with the recipient of the credit, a bank clerk carries out a forged transfer order, without prjudice to his claims against the bank, the debited account holder also has a claim in damages against the recipient of the credit under CC § 826 (BGH 31 May 1994, NJW 1994, 2357). The inducement to breach of contract for purposes relevant to competition is always immoral (*Sprau* loc. cit. no. 24). Moreover, conscious exploitation of the abuse of the representative authority of another or the fraudulent co-operation of a contractual partner with the representative of his contractual counterpart is also immoral in this sense (BGH 26 March 1962, NJW 1962, 1099). Head-hunting workers and "pinching" customers are per se not immoral. Immorality can however be established with the aid of accompanying circumstances, particularly by a plan of action under the accpeptance of a contractual penalty or by exploiting or impairing an employer or supplier (Erman [-*Schiemann*], BGB II[11], § 826, no. 29).

8. AUSTRIA likewise treats inducement to breach of contract as a subset of the immoral inflicting of damage (CC § 1295(2); OGH 9 November 1982, 4 Ob 562/82). Where a third party induces the injured party's contractual partner to breach the contract, jurisprudence even dispenses with the requirement of special evidence of intention to harm (necessary per se under CC § 1295(2)) (OGH 28 April 1998, 1 Ob 186/97b). Of the not so numerously reported judgments, most relate to inducements to the double sale of things that have already been sold. Instead of monetary damages, the injured party can claim damages in kind, namely the return of the thing (OGH 29 May 2001, 5 Ob 259/00z). In another case the inducement to pay membership fees to a frozen account was in question (OGH 12 December 2002, 6 Ob 62/02i, RdW 2003, 314). The case groups that are particularly economically relevant – the head-hunting of employees and the inducement to breach of contract to the detriment of competitors – are decided according to the rules of competition law and not general private law (OGH 18 February 2003, 4 Ob290/02d, SZ 2003/12). Any person who exploits an external breach of contract – i.e. a contract to which he was not party - for his own ends, will not be liable (compilation of the relevant cases in RIS-Justiz RS0107766).

9. Inflicting damage by inducing a third party to breach a contract fulfills the requisites of GREEK CC art. 919 (A.P. 2169/1958, NoB 7 [1959] 195 [= illustration 5 above]; Georgiades and Stathopoulos [-*Georgiades*], art. 919, no. 5 [with the example of an

inducement to double sale by offering a higher price for a thing which is already sold, but not yet transferred]).

10. The point of departure in PORTUGUESE law is CC art. 406(2), under which "in relation to third parties, the contract only produces effects on the cases and terms specially provided by law". According to CC art. 490, while as well as the wrongdoer, the inducer and abettor are also liable, this is only so in cases where the principal wrongdoer commits a tortious (and not just contractual) wrong. Consequently, it is said, in cases of inducement to breach of contract in principle only the inducee, and not also the inducer is liable (*Antunes Varela*, Obrigações em Geral I[10], 179); the injured party has only the possibility of attaching himself to the rights of the inducee as against the inducer (CC art. 794). Jurisprudence occasionally draws upon other techniques for justifying liability (e.g. STJ 18 December 2003: where a bank debits an account held with it, though knowing that the signature of a second manager was also necessary for this (and was not provided), it is liable to him due to the infringement of his good name). The principle of relativity of contractual obligations should be open to exceptions, according to some commentators (pointers in *Almeida Costa*, Obrigações[9], 82 and 83; *Antunes Varela*, loc. cit. 175). The proponents of this thesis particularly want to attain the position of where inducement to breach of contract is recognised as a tort (*Galvão Telles*, Obrigações[7], 20 and *Menezes Cordeiro*, Obrigações, 251). Prevailing opinion (e.g. *Vaz Serra*, BolMinJus 85 [1959] 345; *Antunes Varela* loc. cit. 176; *Almeida Costa* loc. cit. 81) and more importantly case law (CA Coimbra 20 January 2004; STJ 19 March 2002, CJ [ST] [2002-1] 139; CA Lisbon 21 February 1991, CJ XVI [1991-1] 165; see also STJ 25 October 1993, BolMinJus 430 [1993] 455) have hitherto not followed this viewpoint, however. Due to CC arts. 406(2) and 1306(1) liability for inducement to breach of contract only comes into play on other bases, in particular under the heading of competition law (*Antunes Varela* loc. cit. 177; *Alarcão*, Obrigações, 84) (for an example of such, see STJ 29 September 1995, BolMinJus 449 [1995] 374).

11. Under DUTCH law it is a civil wrong to intentionally induce another to breach his obligation existing as against a third party, as long as it is apparent that the third party will suffer detriment thereby and as long as a justificatory reason for the inducement is lacking (Onrechtmatige Daad III [-*van der Wiel*], s. II.3, no. 122; Onrechtmatige Daad IV [-*van Nispen*], nos. 209 and 230). HR 18 June 1971, NedJur 1971 no. 408 p. 1226 related to e.g. the sale and transfer of a plot of land in breach of a preemptive right to purchase of the leaseholder; the purchaser of the plot of land is also liable to the latter. Incidentally, even unlawful assistance with another's breach of contract can constitute a civil wrong. Moreover, the unlawfulness of the interference with another's right of claim can also result from other circumstances, e.g. from the abuse of a relationship of trust and confidence (HR 3 January 1964, NedJur 1965 no. 16 p. 65: purchase of immovable property already sold to a third party). Reparation in cases of inducement to breach of contract can also take the form of the return of the thing, e.g. where the second purchaser transfers title in ownership to the first buyer. In this case what arises is a so-called *aangepaste veroordeling*, a "customised award" (HR 28 June 1974, NedJur 1974 no. 400 p. 1105; *Verkade*, in: FS van der Grinten, 561-576). The ESTONIAN LOA does not contain provisions similar to VI.–2:211.

12. In the NORDIC Countries, so-called pure economic losses are in principle only compensated under tight requirements. The most important case is the violation of a criminal law. However, there are a range of exceptions thereto. Among them is the recoverability of damages – at this stage recognised in principle everywhere – which result from an inducement to breach of contract (see for SWEDEN HD 12 September 2005, NJA 2005, 608 [above, illustration 4; see *Bernitz*, JT 2005-2006, 620 and

Sandstedt, VersRAI 2007, 44]; for DENMARK HD 16 September 1947, UfR 1947, 1005 [on this issue *Gomard*, Obligationsret II, 146]; for FINLAND *Saxén*, Skadeståndsrätt, 74 and for NORWAY *Hagstrøm and Aarbakke*, Obligasjonsrett[2], 816). Where a second purchaser induces the vendor to re-sell him the thing already sold to another, the doctrine of bona fide acquisition of title of the second purchaser fails under Nordic law due to his mala fides (SWEDEN: Law on the bona fide acquisition of title in moveables [*lag* (1986:796) *om godtrosförvärv av lösöre*] § 2(1); Code on Immoveable Property [*jordabalk* (1970:994)] chap. 17 §§ 1-2; DENMARK: *Elmer and Skovby*, Ejendomsretten (1)[4], 193; FINLAND: Ccom chap. 1 § 5; Code on Immoveable Property [*jordabalk* of 12 April 1995, no. 540] chap. 13 § 3). Where a damage is lacking, issues of liability in such cases have to date not arisen.

Illustration 1 is taken from BGH 24 February 1954, BGHZ 12, 308; **illustration 2** from *Lumley v. Gye* (1853) 2 E & B 216, 118 ER 749; **illustration 3 ist angelehnt an** *Boulting v. Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606; **illustration 4** is taken from Swedish HD 12 September 2005, NJA 2005, 608; **illustration 5** from A.P. 2169/1958, NoB 7 [1959] 195; and **illustration 6** from Cass. 25 October 2004, no. 20721, Giur.it. 2006, I, 1, 486.

CHAPTER 3: ACCOUNTABILITY

Section 1: Intention and negligence

VI.–3:101: Intention

A person causes legally relevant damage intentionally when that person causes such damage either:

(a) meaning to cause damage of the type caused; or

(b) by conduct which that person means to do, knowing that such damage, or damage of that type, will or will almost certainly be caused.

COMMENTS

A. General

Intention as ground of accountability. Intention, like negligence, is a ground of accountability (VI.–1:101 (Basic rule)). What is to be understood by the notions of intention and negligence is defined in this Section. Liability arising from intentional acts and liability arising from negligence follow in part different rules: see e.g. VI.–2:101(3) (Meaning of legally relevant damage), VI.–5:103 (Damage caused by a criminal to a collaborator) and VI.–5:401 (Contractual exclusions and limitation of liability). Moreover, the differentiation plays a role in the rule on reduction of claims due to contributory fault: see VI.–5:102 (Contributory fault and accountability). The question whether the causation of damage occurred intentionally or negligently can also be crucial, however, in other contexts – for example, within the field of causation.

Illustration 1

A ten year old child drops a stone from a bridge over a motorway and as a result cause the death of a passenger in a bus. The passenger's surviving dependents make a claim against, among others, the undertaking responsible for the motorway on the basis (well-founded in the circumstances) that it has failed to adopt the required safety measures and has thus acted negligently. The causal connection between that negligence and the damage is only broken if the child brought about the death of the passenger intentionally. Assuming the child was not focused on killing another (VI.–3:101(a)), the matter turns on whether, according to the child's individual's stage of development, the child knew that with the greatest probability a death would result from the action of dropping the stone. In the case of a ten year old, that will be answered in the negative if there any is doubt on the issue.

Natural and legal persons. The provisions of this Section are not restricted to natural persons; the general rule of interpretation applies whereby "person" is to be understood as including legal as well as natural persons (see Annex 1). Legal persons are as capable of causing damage intentionally (or negligently, as the case may be) as natural persons. The intention of the legal person is found by establishing the state of mind of natural persons acting as its governing organ (see VI.–1:103 (Scope of application) sub-paragraph (b) and Comments on that Article).

B. Intention

The need for a definition. The Article effects a definition of the concept of intention in relation to the causing of damage. Such a definition is indispensable for various reasons. In the first place, European private law currently lacks a uniform definition of intention. Secondly, under these rules, the presence (or absence) of intention can play a role in a not insignificant number of cases. Thirdly, liability for intentionally causing damage is, as a rule, not insurable. For that reason such liability affects the liable person in a direct and potentially ruinous way. The inclination of private law therefore ought to be towards invoking a somewhat narrow concept of intention.

Intention to do the act required but not sufficient. The Article does not adopt the notion of 'intention' invoked in the English law of trespass where a mere intention to do the act suffices, it being established that the act interferes with another's rights. A person only acts intentionally in the sense of this Article if that person (i) acts as he or she meant to act, and (ii) either means to cause legally relevant damage (sub-paragraph (a)) or recognises that it is as good as certain that such damage will be the consequence of the conduct and nonetheless does not desist from that conduct (sub-paragraph (b)). The reference point for intention for present purposes is thus always the causation of a *legally relevant* damage.

> *Illustration 2*
> A damages or destroys the property of another, believing that it belongs to him. A acts negligently if he ought reasonably to have known that it was not his property, but there is no intentional causation of legally relevant damage. That is because the destruction of one's own property does not constitute a legally relevant damage.

On the other hand, a person does not act intentionally if the person does not know what he or she is doing (e.g. a patient at a hospital who unconsciously hits out in sleep or under the influence of medication), or, while so aware, is unable to act differently (e.g. because of duress or because a sudden impairment of certain cerebral functions temporarily deprives that person of the ability to control the conduct).

C. Sub-paragraph (a)

Deliberate causation of legally relevant damage. A person acts intentionally when the causation of the legally relevant damage is deliberate. The concept of legally relevant damage is established by Chapter 2. The liable person therefore must know the elements of the applicable concept of damage and have intended to bring these about. It is not essential, of course, that the person acting recognises that the damage about to be caused would be characterised in law as "legally relevant". On the other hand, the person must be conscious of doing wrong; in other words, the lay person must anticipate that civil legal consequences are to be reckoned with. Where the person acting has made a mistake about the circumstances or the wrongful nature of the conduct, the ground of accountability (if any) will be negligence rather than intention.

Breach of a statutory rule of behaviour. Equally, a person who deliberately and knowingly infringes a given statutory rule of behaviour (e.g. by driving faster than traffic regulations permit), but who in no way means to cause an accident by doing so, will not act intentionally.

Omissions. The same applies to cases of omission. Someone who is obliged to intervene and who is also aware of that, but does nothing to avert the impending damage, only acts intentionally if he or she remains inactive precisely in order that the damage may occur. Intention always relates to the incidence of damage, and the infringement of a norm of behaviour does not constitute per se a damage (only per se negligence). Where a woman who knows she is obliged in the morning to clear the snow and black ice from the pavement in front of her house, resolves nonetheless to stay in bed, and a neighbour slips and suffers a leg fracture, the neighbour's injury is caused negligently and not intentionally.

Illustration 3
By contrast, a drunken car driver, who suddenly steers his vehicle towards two pedestrians in order to terrify them and in doing so runs them over, causes death intentionally by an omission if, although he knows that one of them is particularly badly injured and is unlikely to be helped by a third party at that time of night, simply drives on, leaving the pedestrian to bleed to death.

Causation. On the other hand, those who witness a situation in which they are not obliged to intervene and do not intervene, although capable of doing so, because they take delight in the impending damage, act intentionally, but they do not cause legally relevant damage intentionally.

Illustration 4
A sees that in the house belonging to her neighbour, whom she has always hated, a fire has started to burn. She does not inform the fire service because she hopes that the whole building will be destroyed. A *acts* intentionally, but she has not *caused* the loss of the house. A would only have caused the damage by her omission to act if she had been under a duty towards her neighbour (and not only to the public at large) to intervene.

"Damage of the type caused". To establish intention it is sufficient that the person meant to cause damage of the type in fact brought about. If the person is mistaken about circumstances which are immaterial for the qualification of a damage as legally relevant, the conduct remains governed by the regime for liability for intentional causation of damage.

Illustration 5
A intends to damage B's car and vandalises a car which formerly belonged to B. A did not know that B had recently transferred the car to C. The property damage suffered by C was caused intentionally. A knew that he was causing damage to the property of another and meant to do so. The situation is the same in the textbook case where A means to shoot B, but in the darkness shoots C by mistake.

D. Sub-paragraph (b)

General. Sub-paragraph (b) concerns cases on the border between intention and negligence. A person causes legally relevant damage intentionally (and not merely negligently) when that person acts as he or she means to act and at the same time knows that in doing so he or she will cause legally relevant damage. The present Article (in conformity with these rules generally) does not adopt the formulation of PECL art. 1:301 under which "[a]n 'intentional' act includes an act done recklessly". Nor does the Article use the concept of "recklessness" (defined in Annex 1 as follows – "[a] person is "reckless" if the person knows of an obvious and serious risk of proceeding in a certain way but nonetheless voluntarily proceeds without

caring whether or not the risk materialises"). That concept is helpful for the purposes of contract law (see, e.g., III.–3:501 (Scope and definition) and III.–3:703 (Foreseeability)), but not for those of the law on non-contractual liability for damage. It was important for the latter that a simple structure of grounds of accountability be maintained and thus merely to distinguish between intention and negligence and not between intention, negligence and recklessness. However, first and foremost the decisive question for the purposes of non-contractual liability should not be whether a person 'could not care less' whether or not the damage concerned will result from conduct, but rather whether the person knows that the damage will be a well-nigh certain consequence of the conduct. A person who hopes desperately that damage will not result, but who knows that the hope is completely unrealistic in the circumstances, brings about that damage intentionally.

Illustration 6
A drives at high speed in the outside lane round a blind bend in the road. Houses by the side of the road hide the headlights of an oncoming car. A head-on collision results. The damage is not caused intentionally. Had A, however, seen the oncoming car before he began to overtake and it was evident to him that an accident was highly probable and unavoidable if he did not pull back into the inside lane, the damage caused by carrying on in the outside lane is intentional. Intention in such a case is not excluded simply because the person acting hoped at the time that 'everything would turn out all right'.

Dolus eventualis. Sub-paragraph therefore equates extensively, but not perfectly, to the traditional notion of *dolus eventualis* which in some legal systems is defined exactly as Annex 1 defines "recklessness". However, sub-paragraph (b) excludes conscious carelessness from the notion of intention. Furthermore, a person does not act intentionally when causing damage simply through gross negligence, whether or not that person is aware of the carelessness.

Illustration 7
A construction company which undertakes excavation work on another's land and is aware of a cable laid there causes damage intentionally, when it slices the cable, if it made no inquiries as to the position of the cable and knew that, in view of the size of the machine being deployed and the small size of the plot of land, it was well-nigh impossible that the machine would miss the cable. On the other hand, a person who negligently fails even to contemplate that there might be cables laid beneath the soil acts merely negligently.

Gross negligence. Gross negligence is an unreasonable or extraordinary want of care (see Annex 1 – "There is 'gross negligence' if a person is guilty of a profound failure to take such care as is self-evidently required in the circumstances") and therefore does not amount to intention. See also VI.–5:102(2)(c) (Contributory fault and accountability).

"by conduct which that person means to do…". A person causes legally relevant damage intentionally only when he or she meant to act in the way in which he or she has in fact acted. This excludes from the notion of intention, therefore, not just acts under duress, but also unintended incorrect responses. A guest whose lit cigar falls from his hand and damages the carpet in his host's flat does not cause that damage intentionally. While he means to smoke, he does not mean to drop the cigar.

"… knowing that … damage … will almost certainly be caused". Crucial for the demarcation between intention and negligence is, however, the question of whether the person acting knew that legally relevant damage would be caused by the conduct. The assured knowledge that such damage will arise is placed by sub-paragraph (b) on the same footing as cases in which the person acting knew that legally relevant damage would "almost certainly" be caused. This gives the judge a certain amount of discretion in order to do justice in the circumstances of each individual case. Where the abnormally high likelihood of damage occurring would be obvious to everyone and there are no special circumstances present which would justify the inference that the person in question was not aware of this well-nigh certain likelihood, then this suffices for the inference of intentional harm, even in the case of an omission. Once again, it is not necessary that the perpetrator should have foreseen the exact causal chain of events and the concrete damage arising. The foresight need only have related to damage of this type.

Illustration 8
A as owner carries the responsibility for a dilapidated old building. It is empty and ought to be torn down to make way for a new one. Children are in shorts playing soccer in the building. A watches this and is aware that in light of the countless glass shards lying around, it is impossible that this will "end well" if he does not intervene immediately. Nonetheless he does nothing about it. Assuming that A is obliged to undertake preventative measures in respect of the dangers facing the children and supposing also that A is conscious of this obligation, A will have acted intentionally in relation to the later injuries to the children even though his main reason for doing nothing might have been to save money.

Illustration 9
A person who fires at a jeep from a distance of a few short metres and knows that the passengers of the car may be killed by the shots, kills intentionally even where the primary motive was to injure the victim in order to satiate a need for revenge.

NOTES

1. FRENCH CC arts. 1382 and 1383 distinguish between *faute intentionnelle* and *faute non intentionnelle*. Nowadays it is seldom argued that there is substantial difference between liability for intention and liability for negligence, for the most part there is universal agreement that it does not involve a (*Mazeaud and Chabas*, Obligations[9], no. 444 p. 451); *summa divisio* (see further e.g. *Brun*, Responsabilité civile extracontractuelle, no. 363 pp. 187-188 also *Lévy and Castaldo*, Histoire du droit civil, no. 640 p. 917). The *faute intentionnelle* is based on the wrongdoer's intention to cause the legally relevant damage.(*Brun*, loc. cit. no. 364 p. 188). It provides that the wrongdoer must deliberately act or omit to act, and intend to cause damage unlawfully. In comparision the *faute lourde* and the *faute inexcusable* do not require an intention to cause damage (*Flour/Aubert/Savaux*, Le fait juridique[11], no. 110 pp. 109-110). Making the distinction remains, in spite of the clear criteria, occasionally difficult, especially where the wrongdoer, must have known that his actions would cause damage to another person, (näher *Terré/Simler/Lequette*, Les obligations[9], no. 727 p. 711). Persons who are not capable of distinguishing between right and wrong cannot act intentionally, in the sense of *faute intentionnelle* (*Brun* loc. cit.; *Flour/Aubert/Savaux* loc. cit. no. 101 p. 103). The distinction between *faute intentionnelle and faute non intentionnelle* acquires practical importance above all in

insurance law, owing to the fact that personal liability insurance does not provide coverage in cases of intentional infliction of damage (Code des assurances art. L. 113-1(2). Intention presupposes here «*la volonté de causer le dommage*» that is, a mere intent to create a situation of damger will not suffice.(Cass.civ. 10 April 1996, Bull.civ. 1996, I, no. 172 p. 120). Moreover not only do the courts appear to award higher amounts of compensation in these cases, (*Carbonnier*, Droit civil IV[21], no. 226 p. 389; *Flour/Aubert/Savaux* loc. cit. no. 111 p. 111), they also settle for applying a lesser standard of proof of causation.(*Carbonnier* loc. cit.).

2. In contemporary BELGIAN doctrine, faute *intentionnelle* is on occasion defined as the deliberate infringement of a legal rule or general standard of care; decisive is the intent to infringe a particular standard of conduct. Initially the *faute dolosive* additionally required the intention to cause damage to another (*Cornelis*, Responsabilité extra-contractuelle, nos. 96-97 pp. 178-180). However, the distinction between *faute intentionelle* (CC art. 1382) and *faute non intentionnelle* (CC art. 1383) in Belgium is only exceptionally decisive, since the gravity of the fault has no impact on the legal consequences.(*Vandeputte*, Het aquiliaans foutbegrip, nos. 16-17 p. 22). A special case of this kind is to be found, for example, in the rule, according to which contractual clauses seeking to limit liability cannot exclude liability for a *faute intentionnelle* (*Kruithof*, TPR 1984, 233, 269-272 [no. 31]). Other commentators continue to regard this (unwritten) rule as applying only to cases of *faute dolosive* (*Cornelis* loc. cit.).

3. The SPANISH CC is silent on the issue of intentional inflictional of damage and consequently does not contain any definition of intent (*Yzquierdo Tolsada*, Sistema de responsabilidad civil, 236). This exclusion of an express reference to intent has been traditionally explained on the basis that the distinction between *dolo* und *culpa* is a meaningless one for the law on extra contractual liability; the concepts *culpa o negligencia* (CC art. 1902) are to be read in such a manner, that they also embrace the *dolo* (*Lacruz and Rivero*, Elementos II(2)[4], 471-472; *Díez-Picazo*, Derecho de daños, 351; *Roca i Trias*, Derecho de daños[3], 60). However, the distinction between liability arising from intentional acts and liability arising from negligence plays an important role within the area of insurance law. Liability arising from intentional acts is excluded from liability insurance (Insurance Contract Act art. 19) (it is only unclear as to whether the insurer can rely on this against the plaintiff, if the plaintiff claims against the insurer in a direct action; see loc. cit. art. 76 as well as Liability and Insurance for Motor Vehicle Traffic Act art. 7). The distinction between intentional and negligent infliction of damage can also play a role in family law; at any rate it appears that the courts will not allow themselves to be satisfied with proof of mere negligence in order to guarantee compensation, for loss or damage between close family members (*Salvador/Ramos/Luna*, InDret 3/2000, p. 9; *Ferrer i Riba*, InDret 4/2001, p. 12; see also TS 22 July 1999, RAJ 1999 (3) no. 5721 p. 8928 [no right to damages in cases of adultery, when it was not committed with the intent of inflicting damage] and CA Valencia 2 November 2004, AC 2004 (21) no. 1994 p. 1069).

4. ITALIAN CC art. 2043 expressly provides that every *fatto doloso o colposo* grounds an obligation to pay damages; therefore it brackets together both pillars of fault based liability without actually defining them (in respect of a number of exceptional provisions, where only proof of intention suffices to establish liability, see Alpa and Mariconda [-*Alpa*] Codice civile commentato, sub art. 2043, IV, § 14). Nowadays the concept of intent is not defined in an identical manner throughout the legal order. In the area of private law intentional behaviour presupposes willed action, the intention to cause damage, knowledge of the wrongfulness of the damage, (der *ingiustizia*) absence of grounds of defence as well as the capacity to commit fault on the part of the wrongdoer. However the the aim of acting does not have to be synonymous with

the infliction of damage; *dolo eventuale* suffices in this regard (*Franzoni*, Dei fatti illeciti, arts. 2043-2059, 110). Negligence is affirmed CP art. 43(1)), if the damage, although forseen, was not intended by the actor, rather it was the product of inattentiveness,carelessness, or solecism (so-called *colpa generica*) or was the result of breach of a statutory rule of behaviour (commonly called. *colpa specifica*). Whether the defendant acts in an intentional or merely negligent manner, may also be relevant in establishing whether the claimant suffers a compensatable damage, for example in cases of procuring a breach of contract, in cases of boycott or defamation cases (Cass. Pen. 5 November 2004, no. 46311, Giur.it. 2005, I, 1, 2385).

5. The basic norm of HUNGARIAN tort law, (CC § 339(1)) deliberately does not refer to the concepts of "intention and negligence"; these concepts receive as a result little attention from academics. These concepts are instead superceded by the concept of "blameworthiness" in Hungarian civil law, (Gellért [-*Kemenes*], A Polgári Törvénykönyv Magyarázata[6], 1231-1232; *Lábady*, A magyar magánjog (polgári jog) általános része, 308-309; *Bíró*, A kötelmi jog és a szerződéstan közös szabályai[6], 466), which is objectively assessed and is differentiated from fault by its individual graduations (*Petrik*, Kártérítési jog, 48-51). It is also employed in attributing liability to legal persons (*Kemenes* loc. cit. 1226-1227). Intention and negligence are however encountered in some special provisions. The concept of intent is used in CC § 6 (see above Note *4* under VI.–2:207), in CC § 342(1) (Inoperativeness of contractual clauses which limits or excludes liability for intention or gross negligence)), in CC § 360(4) (limitation period for willful infliction of damage), in CC § 581 (liability of the donor) and above all in insurance law. As regards property insurance CC § 556(1) provides that the insurer is exempt from its payment obligation, upon proof that the damage was intentionally or in a grossly negligent manner, caused by the insured person or by certain persons with whom he is associated with. Proof of intentional or grossly negligent conduct on the part of the insured person does not exempt the insurer from its payment obligation under liability insurance to the injured party, however the insurer has in these circumstances a right to seek reimbursement from the insured person (CC § 559(3)). A similar position is adopted by POLISH tort law. The notion of intention does not appear expressly in the basic rule of CC art. 415, but it is universally recognised that the term "fault" invoked there encompasses both intentional fault and unintentional fault (negligence) (*Czachórski*, Zobowiązania[9], 212). The distinction between liability arising from intentional fault and liability arising from negligence is vital, as many CC provisions are confined to cases of damage caused intentionally, e.g. CC art. 473 § 2 (invalidity of contract terms excluding liability for damage caused to a creditor intentionally), CC art. 757 (liability of a *negotiorum gestor* for damage caused trying to save another's property limited to cases of intention or gross negligence), CC art. 827 § 1 (insurer's liability exluded where the insured caused the damage intentionally). The Civil Code avoids defining intentional fault (*wina umyślna*). In doctrine and case law it is understood as embracing cases where unlawful conduct was aimed at causing the damage (*dolus directus*) as well as where the tortfeasor did not aim at causing it, but knew that damage would result (*dolus eventualis*) (*Radwański and Olejniczak*, Zobowiązania - część ogólna[7], 197). In BULGARIAN tort law, in contrast to negligence, intention is not presumed, (LOA art. 45(2)); proof must be adduced (*Konov*, Osnovanie na grajdanskata otgovornost, 131; *Kalaydjiev*, Obligazionno pravo, Obshta chast, 373). In cases of intentional fault, a higher compensatory sum will usually be awarded for causing non-economic damage than in cases of simple negligence (*Takov*, Obzor na deliktnoto pravo na Bulgaria, no. 61 p. 8). The employee is only personally liable to an unlimited monetary extent for damage caused to their employers if they acted in an

intentional manner (Labour Code art. 203(2); in all other cases the extent of financial liability is restricted to not more than three times the monthly renumeration (loc. cit. art. 206 no. 1). Other special statutes require (e.g. Ccom art. 631a: Liability for error in filing for insolvency) intention or negligence for the attribution of liability.

6. "Fault" under GERMAN law is comprised of *Intention* and negligence (CC § 276). However the components of intention are not statutorily defined. It is generally stated that intention connotes knowledge and desire to bring about an unlawful result.The distinctions that are made between intention, *dolus directus* und *dolus eventualis* in the criminal law are meaningless in tort law (*Medicus*, Schuldrecht I[16], no. 306); in tort law *dolus eventualis suffices*. It is said that a person acts with conditional intent, when he/she accepts the unlawful result as a possible consequence of his act or omission. Advertent or conscious negligence exists when the actor trusts that the damage will not ensue (Palandt [-*Heinrichs*], BGB[65], § 276, no. 10; Erman [-*Westermann*], BGB I[11], § 276, no. 7). Intention need only relate to the infringement of another's rights, it is not necessary that it correlate to the economic or non economic loss that results from the infringement of those rights (the "damage" under German law.); CC § 826 provides an exception to this rule (*Heinrichs* loc. cit.). Intent in civil law presupposes an awareness of the wrongfulness of the act. Therefore, a mistake in law as well as factual error precludes the existence of intent (*Heinrichs* loc. cit. no. 11). However, special criteria apply, where liability is based on the violation of a protective criminal law (CC § 823[2]) (in this case the law relating to criminal intention is also applicable for private law purposes) (BGH 26 February 1962, NJW 1962, 910; BGH 10 July 1984, NJW 1985, 134, 135). Moreover in order to establish liability under CC § 826, it is not a prerequisite that the defendant acted with the knowledge that his act was morally culpable; knowledge of the factual circumstances which make his actions morally culpable in the eyes of the law is sufficient (BGH 26 March 1962, NJW 1962, 1099, 1100; BGH 13 September 2004, NJW 2004, 3706, 3710). Within the framework of CC § 823(2) a problematic question is whether a person acts intentionally, if he /she wants to violate a protective law but does not intend the subsequent injury. The predominant view is that only the intentional transgression of the protective law is relevant (Palandt [-*Sprau*], BGB[66], § 823, no. 60; BGH 20 March 1961, BGHZ 34, 375, 381).

7. The AUSTRIAN CC § 1294 distinguishes between damage which is caused by "malicious intent" and damage caused by "oversight". In interpreting these concepts the courts have strictly adhered to the definitions of "intention" and "negligence" which are found in CP §§ 5(1) and 6(1). Accordingly a person acts intentionally, when he/she wants to bring about a certain state of affairs which corresponds to the ingredients of a tortious cause of action, in this case it suffices that the wrongdoer seriously considers that the realisation of this state of affairs is possible and approves of this result. According to CC § 1294 malicious purpose (intent) is given when the damage is caused knowingly and wilfully. "The knowledge must relate to the unlawfulness as well as to the possibility of occurrence of the harmful result, whereas the wilfulness must only relate to the latter." (*Koziol*, Haftpflichtrecht I[3], no. 5/25). As regards CC § 1295(2) (Liability for intentional infliction of damage considered a violation of public morals) it is regarded as sufficient, that the wrongdoer forsees the occurrence of the result and approves of it.(*dolus eventualis*) (Schwimann [-*Harrer*], ABGB VI[3], § 1295, no. 146; OGH 20 May 1992, SZ 65/76). A person who hopes that the damaging result will not occur, acts negligently (*Koziol* loc. cit. no. 5/27). Since the decision of OGH 1 January 1951, SZ 24/5 regarding the violation of a protective law, fault only has to relate to the transgression of the norm and not to the harmful result. As regards the violation of public morals it is deemed sufficient that the

wrongdoer has knowledge of the circumstances that would entail an infringement of public morals (*Bydlinski*, JBl 1986, 631). In contrast, according to a decision of OGH 31 August 2005, 9 ObA 16/05a the intentional violation of occupational health and safety provisons in social security law will not suffice to deprive the employer of its privileged position as to liability by categorising it as intentional damage; rather it is necessary that the harmful result be intended. Incidentially other situations where intent has been deemed to be present include, a car dealer who was found to have acted with intent in respect of the purchaser and the bank which financed the buyer's purchase, where he prevaricated about the year of manufacture of the vehicle, the longer prescription period under CC § 1489(2) applies in respect of the damages resulting from the loan default (OGH 30 June 1987, WBl 1987, 273).

8. The GREEK CC regards intention as a pillar of fault, intention is, however, not defined. For a long period, two competing doctrines were championed in academic teaching. According to one exposition, the question of whether intention exists ought to depend on whether the wrongdoer foresaw the unlawful result and nonetheless continued to act, the alternative view propounded is to regard as decisive the question of whether the wrongdoer wished or intended the prohibited result. The current prevailing view is that intention is given, if the wrongdoer has forseen the unlawful result and has assimilated its occurence into his will; it is not necessary that he intends the unlawful result (Georgiades and Stathopoulos [-*Stathopoulos*], art. 330, nos. 13-14). In particular Greek law distinguishes between the following different forms of intention. *Dolus directus* is given when the wrongdoer recognises the unlawful result as the necessary consequence of his actions; on the other hand *dolus eventulais* arises when the wrongdoer envisages the occurrence of the unlawful result merely as possible and approvingly accepts it. It is important for the affirmation of intent in each case that the wrongdoer acts knowing that his acts or omissions are prohibited (*Stathopoulos* loc. cit. no. 21; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 158): the existence of a factual error as well as an error as to the prohibited nature of the act preclude the existence of intention (ErmAK [-*Michaelides-Nouaros*], art. 330, no. 18

9. The PORTUGUESE CC art. 483(1) also differentiates between intentional and merely culpable tortious acts (*meramente culposos*). The former are characterised by virtue of the intent to cause damage (*Almeida Costa*, Obrigações[9], 506-507). Intention is a manifestation of the *culpa grave*. It features in many contects- also in the context of civil law, but especially in connection with the quantum of damages owed- (CC arts. 494, 497(2), 506(2), 507(2) and 570(1); see *Almeida Costa* loc. cit. 496-497, 507-508, 534-535; *Antunes Varela*, Obrigações em geral I[10], 568-569; *Pessoa Jorge*, Ensaio sobre os pressupostos da responsabilidade civil, 361, 364). Exceptions from the basic principle, that intentional as well as negligent tortious acts establish a right to damages are found in CC arts. 814(1), 815(1) and 1681(1). However these provisions concern issues of contract law and family law and do not concern tort law. The knowledge of acting in an unlawful manner is a prerequisite for the affirmation of intention (*Almeida Costa* loc. cit. 533), as a consequence the mistaken belief that there was an emergency or some other justifiable ground for acting precludes the existence of intention. A distinction is made in Portugal also between *dolo directo*, *dolo indirecto* und *dolo eventual*, cf. CP art. 14(1)-(3); *Almeida Costa* loc. cit. 533; *Antunes Varela* loc. cit.; *Pessoa Jorge* loc. cit. 322). *Dolus directus* was affirmed in the following cases e.g. a person, who removed the boundary stone from a plot of land and thereby claimed that the boundary was incorrectly constituted (STJ 18 April 2006). The Portuguese understanding of *dolus indirectus* (dazu *Almeida Costa* und *Pessoa Jorge* loc. cit.; CA Coimbra 18 January 2006) largerly corresponds to the rule anchored in VI.–3:101(b);

The comprehension of *dolus eventualis* is more akin to the definition of under the DCFR (see above for Comment *D10* and also CA Evora 18 June 2002).

10. DUTCH law regards intention (*opzet*) und negligence (*onachtzaamheid*) as mutually exclusive polar opposites. In particular civil law differentiates between numerous graduations of fault (for an in-depth consideration *cf* the contributions in *Haak and Koot*, Bewuste roekeloosheid in het privaatrecht): *opzet* (Absicht), *grove Schuld* (gross negligence) or. *roekeloosheid* („recklessness“ in the sense of carelessness.), *voorwaardelijk opzet* (dolus eventualis) und *lichte schuld* (slight fault). *Opzet* in a criminal law context does not necessarily have the same meaning as that prevailing under private law (*Haak and Koot* loc. cit. 1-11). It is unclear and is matter of contention in which area of private law opzet is actually required. It has even been suggested that the various categories of wrongful acts found in CC art. 6:162, also adhere to varying requirements at the level of the imputation of liability, such that the "infringement of a right" can only invariably be given in the case of an intentional act. This view is held because in the case of negligent actions liability is imputed under the alternative heading in CC art. 6:162(3) "according to generally accepted standards" (*van Maanen*, Onrechtmatige Daad, 210-213; otherwise by Asser [-*Hartkamp*], Verbintenissenrecht III[12], nos. 69-73 pp. 92-95). Of course, the distinction between opzet and mere negligence does not attain practical importance under this rubric (this area is concerned solely with therotical questions), rather at the stage where causation is investigated (CC art. 6:98; see the Notes under VI.–4:101 (General rule) in conjunction with this topic),within the framework of curtailing claims on the grounds of contributory negligence (CC art. 6:101), liability for immaterial damage (CC art. 6:106) and within the area of the claim to recourse on the part of the social insurance authority (CC arts. 6:108 and 6:109).

11. ESTONIAN LOA § 104(5) provides: "Intent is the will to bring about an unlawful consequence upon the creation, performance or termination of an obligation". Of course it is propounded that this definition is solely concerned with the dolus directus; the dolus indirectus was deliberately left undefined, because the strategy was adopted of leaving conceptual elucidation to academic erudition and case law (*Lahe*, Fault in the Law of Delict, passim; *Lahe*. Juridica 2002, 30–36. LATVIAN CC art. 1641 sagt: "As wrongful intent shall be understood every intentional harm".

12. In the NORDIC Countries intention and negligence are, from the perspective of the provisions concerning liability, are placed in principle on the same level. Following the expansion of the traditional borders of tort law, it is now easierto determine the components of the intent to cause intentional damage than for negligent causation of damage. For example in Swedish case law, decisions have been handed down regarding compensation for the pain and suffering of relatives and on liability as to the procurement of a breach of contract (see above, Note 12 under VI.–2:211 (Loss upon inducement of non-performance of obligation)). Of further importance is the fact that according to DANISH Damages Act § 19(2) a private individual is only be liable for damage to an insured thing, if intention or gross negligence are present. The criminal and civil legal concept of intention should be regarded as identical contentwise (in any event according to Swedish Literature: *Hellner and Johansson*, Skadeståndsrätt[6], 124; *Bengtsson and Strömbäck*, Skadeståndslagen[2], 46 and 58; see also HD 12 September 2005, NJA 2005, 608). The understanding of direct and indirect intent coincide with the definitions contained in VI.–3:101(a) and (b); in respect of the second alternative in lit. (b) („knowing that such damage … will almost certainly be caused“) one speaks of an intent based on indifference, a concept which is espoused in the stead of the former socalled *dolus eventualis* (S-Karnov 2005/06 [-*Rekke*], Brottsbalk, no. 2 p. 2502). Apart from direct and indirect intent, Danish law recognized the socalled intent

based on probability (which depends on what the wrongdoer recognised as a preponderant possibility) along with the intention based on risk, which can be likened to *dolus eventualis* (D-Karnov 2004 IV [-*Elmer*], Straffelov, no. 86 p. 4952; *Vinding Kruse*, Erstatningsretten[5], 52)

Illustration 1 is taken from TS 27 January 2006, RAJ 2006 (1) no. 615 p. 1486; **illustration 2** from *Wilson v. Lombank Ltd.* [1963] 1 WLR 1294; **illustration 3** from STJ 27 September 1995; **illustration 6** is based on STJ 30 October 2002; **illustration 7** is based on CA Valencia 18 May 2004, BDA JUR 2005/13603; **illustration 8** is based on *Smith (or Maloco) v. Littlewoods Organisation Ltd.* [1987] AC 241; and **illustration 9** is taken from CA Evora 18 June 2002.

VI.–3:102: Negligence

A person causes legally relevant damage negligently when that person causes the damage by conduct which either:

(a) does not meet the particular standard of care provided by a statutory provision whose purpose is the protection of the person suffering the damage from that damage; or
(b) does not otherwise amount to such care as could be expected from a reasonably careful person in the circumstances of the case.

COMMENTS

A. General

Scope. This Article defines negligence as a ground of accountability for the purposes of the present Book. It is not a question of creating a self-standing "tort of negligence" but rather (as has been done for intention in the preceding Article) of fleshing out the notion of negligence referred to in VI.–1:101 (Basic rule). The present Article is only concerned with negligent or careless conduct. Consequently, it does not address cases in which liability is derived from infringement of a statutory duty which does not revolve around a requirement to exercise care. Where liability is exclusively based on the fact that the level of safety demanded by statute has not been achieved (as may be the case, for example, in respect of certain statutes concerned with accidents at work), one has left the realm of negligence and is concerned instead with a specific form of liability without (intention or) negligence, see VI.–3:207 (Other accountability for the causation of legally relevant damage).

"by conduct". Negligence requires conduct controlled by will. An unconscious act, for instance movement while asleep, under narcosis or under the influence of a sudden apoplectic seizure, is not "conduct" within the meaning of VI.–3:101 (Intention) or the present Article. The same goes for an omission in a situation in which the affected party could not have recognised or removed the danger even when exercising all due care.

Illustration 1
On a foggy winter evening a boat capsizes on a lake. The occupant calls for help but the fog is too dense for his cries to be heard. It cannot be said of a woman walking along the shore - who does not hear the calls and therefore does not act - that she "omitted" to undertake a rescue effort; in fact there was no "conduct" at all on her part in relation to the person drowning.

Illustration 2
However, the situation is different where an old man who is hard of hearing is shovelling snow from the pavement and without hearing the warning cry of a passer-by approaching him from behind, hits her across the face with the shovel. His bad hearing does not alter the fact that the motion with the shovel was conduct relevant to the danger and controlled by will. Due to the fact that the man was aware of his bad hearing, he even acted negligently: he should have been aware of the danger and should have looked behind him before swinging the shovel..

Sources of duties of careful conduct. This rule mirrors the two sources which in every Member State generate the duties of careful conduct in relation to the interests of another protected by the law on non-contractual liability for damage: statutory provisions (sub-

paragraph (a)) and the general precept of not harming another (*neminem laedere*, sub-paragraph (b)). A general duty of care is implied here. Previous generations formulated it by referring to the conduct expected of a *bonus paterfamilias* or *reasonable man*.

Positive acts and omissions. The Article relates – in both alternatives – as much to omissions as it does to positive acts. This follows from the use of the word "conduct" (see Annex 1 – conduct includes "not doing something"). A person who omits doing something acts negligently if he or she either does not take the preventive measures that must be taken in the interests of the injured person under statutory provisions or where he or she does not do something that a reasonably careful person in the circumstances of the case would have done to protect the injured person. It is not possible to draw a clearly-defined line between positive acts and omissions. The draft therefore deals with both forms of conduct in principally the same fashion.

Persons under eighteen. In relation to the requirements of due care to be placed on youths and children under sub-paragraph (b) of the Article, special rules are to be found in VI.–3:103 (Persons under eighteen) paragraph (1). While children who have not yet attained their seventh year may indeed likewise be capable of acting negligently, the consequences of such action will not be imputed to them under VI.–3:103(2).

Mentally handicapped persons. In cases concerning mentally disabled persons, who cannot distinguish between right and wrong as a result of their disability, there is a different starting point. Such persons may also readily deviate from the standard of care, which according to VI.–3:201 (Accountability for damage caused by children or supervised persons) is to be observed in principle by everyone. The only requirement is that it is "conduct" controlled by will. Under the circumstances in VI.–5:301 (Mental incompetence), for which the party claimed against bears the burden of proof, a mental disability is a defence that, depending on the circumstances of the case, can lead to a reduction or exclusion of liability. The rule relates mainly to mentally disabled adults, but can also be of benefit to mentally disabled adolescents, who fall short of the behavioural standard for their age group. Of course, the relief from liability only embraces cases where intention or negligence is the source of accountability, and not a possible basis of responsibility within one of the particular situations governed by the second Section of the third Chapter of these basic rules.

> *Illustration 3*
> While sitting at the steering wheel, X suddenly and unforeseeably suffers a brain haemorrhage. While he remains conscious and realises that he is steering the car into the middle of a lane of traffic, he is no longer capable of doing anything to stop this due to the brain haemorrhage. X acts negligently within the meaning of VI.–3:102. He is also not entitled to any defence under VI.–5:301 (Mental incompetence), since he fully recognises that he is acting improperly. Conversely, had X been rendered unconscious, under VI.–3:205 (Accountability for damage caused by motor vehicles) he would only be liable for the subsequent accident if he was not merely the driver, but also the owner of the vehicle.

Physically disabled persons. Physically disabled persons are subject to the same requirements of due care as physically able persons, to the extent that they are aware of their physical disability, and their conduct must be adjusted accordingly, see Illustration 2 above. A person who must anticipate sudden but short-lived losses of vision due to a chronic circulatory disorder is not permitted to sit at the wheel of a car.

B. Duties of care required by statute (sub-paragraph (a))

Statutory provisions. A person acts negligently where they do not behave as prescribed by statute in a given situation, if a danger is realised thereby, the prevention of which is the aim of the law for the protection of the injured person. The meaning of a "statute" under VI.–3:102 is not elucidated by these rules. Read with VI.–7:102 (Statutory provisions), the term "statute" in this article has the meaning given to it in the relevant applicable law. However, it should be emphasised that "statute" covers not only primary legislation, but also secondary legislation made by central and regional governments (regulations, etc.) and by local authorities (e.g. bye-laws). On the other hand, guidelines issued by social insurance bodies for the prevention of accidents are, as a rule, not "statutory" provisions.

Criminal law provisions. If the statute is part of the criminal law, it is sufficient that the person liable objectively failed to behave in the manner required by the statutory norm. It is not necessary that the person can also in fact be punished for an offence. It may well be, for example, that in that particular jurisdiction criminal responsibility commences only at the age of 16 or that criminal prosecution depends on circumstances that have nothing to do with the reparation of damage in civil law.

Mere references to the duty to act with reasonable care. From the perspective of the law on negligence one must differentiate four types of statutory provision. There are, first, statutory provisions which merely involve a general requirement to take care not to violate the physical integrity, rights or interests of another. Provisions of this type are irrelevant for the purposes of sub-paragraph (a) because they do not say more than is already to be found in sub-paragraph (b). In other words, statutory provisions of this type set down no "particular" standard of care. For instance, provisions that state no more than that "negligent bodily injury" is criminally punishable belong to this group.

Provisions reducing the standard of care. Secondly, there are provisions whose effect is that in defined situations or for defined persons (e.g. parents and children or spouses in their relation to each other) compliance with a *lower* standard of care than the general one suffices. Typically, such provisions prescribe liability for damage caused only in cases of gross negligence (and of course in cases of intention). They take priority over the general requirement of care by constituting special regimes. That is taken care of in VI.–1:103 (Scope of application) sub-paragraph (c). To the extent that employees are also personally liable *vis à vis* third parties under the applicable law only in the case of grave fault, in particular only where they are charged with gross negligence, VI.–7:104 (Liability of employees, employers, trade unions and employers' associations) is to be taken into account.

Provisions requiring a higher standard of care. A third class of statutory provision is one which requires persons undertaking defined activities to comply with a *higher* standard of care than the general standard. The failure to reach the stipulated higher standard then amounts to negligence. Of course, such provisions must have the establishment of duties of care as their subject-matter; they must not impose on their addressees an obligation to ensure that a particular state of affairs (a particular outcome) occurs. This is because provisions of the latter type do not refer to the notion of care at all. They are therefore, as mentioned earlier, excluded from this Article and dealt with in VI.–3:207 (Other accountability for the causation of legally relevant damage). One thinks, for example, of provisions relating to safety equipment for machines which are operated by workers. It is indeed correct that the borderline

between the protective laws embraced by sub-paragraph (a) of the present Article and by VI.–3:207 (Other accountability for the causation of legally relevant damage) is not always easily drawn, either in theory or in practice. This is because there may be statutory rules capable of being subsumed under both provisions. For instance, a statutory rule might prescribe that for certain operations a second heart-lung machine must be available in the operating theatre. Such duties of conduct have a double function because they indeed specify a special standard of care in relation to the protected interest, and simultaneously call for a certain state of affairs. As a result, in such a case the injured person can invoke two grounds of accountability. However, this does not greatly affect the practical result. This is down to the fact that VI.–5:302 (Event beyond control) also applies to VI.–3:207 (Other accountability for the causation of legally relevant damage).

Provisions particularising the general duty of care. Fourthly, a number of statutory provisions have as their function a particularisation or concretisation of the general duty of care for a defined situation. They are the focus of the rule in VI.–3:102. Typical examples are provided by provisions of building and planning law and of commercial law, by rules on earning a livelihood, by provisions on health protection and by the rules in road traffic regulations.

Adherence to the provision does not automatically exclude liability in negligence. Provisions of this type, however, are not a *carte blanche* for acting negligently in a given case. Where the average person under the circumstances must recognise that adherence to a specific statutory safety requirement is insufficient in a given situation and where statute leaves a corresponding discretion to act, then a person in that situation must use the discretion as a reasonably careful person in the circumstances of the case would have done.

Illustration 4
A regulation on the protection of woods requires farmers burning stubble in their fields in autumn to observe a minimum distance of 300 metres from the nearest wood when igniting the stubble. B complies with that requirement. However, on the day in question an exceptionally strong wind prevails and B ought to have appreciated that the minimum distance laid down in the statute would not suffice under these weather conditions. The wood catches fire. B has acted negligently according to sub-paragraph (b). Compliance with the statutory provision does not relieve B from the need to comply with the general standard of care.

Illustration 5
Things are of course different where statute practically prohibits taking reliable safety measures. For instance, one thinks of provisions for the protection of buildings of historic importance and natural monuments, like for example a medieval tree of justice, which may not be felled although this would be the only available safety measure for the protection of passers-by.

Prohibitory norms and norms of care. Where statute merely provides for a prohibition, but does not articulate any specific duties of care, then the issue of negligence is judged according to the rule in sub-paragraph (b), which of course does not rule out considering the values of the prohibitory norm in the context of the general norm of care.

Illustration 6

A road traffic sign which indicates a one-way street and accordingly prohibits entry into the street from the exit is masked by a parked lorry. As A does not know this area and there are no other indications by which she might recognise that the road is a one-way street (as would be the case if there were indicative road markings or the cars on her side of the road were all parked against her direction of passage), she does not act negligently if she turns into the road and an accident results. That does not exclude the argument, however, that the level of care required in recognising traffic signs will be rather high.

The purpose of the statute. The purpose of the statutory norm of care infringed must be to safeguard the injured person from the legally relevant damage, which he has actually suffered. Hence the purpose of the statute must not simply be either the assurance of protection in general or predominantly of the public interest, or the protection of the injured person from a damage other than the one which has in fact occurred.

Illustration 7

A, B and C are witnesses to an accident in which X is badly injured. It would have been an easy matter for them to render first aid to X and to alert the emergency services. They neglect to do that. A, B and C are not liable under these rules if, even though breach of that duty to render first aid at the place where the accident has taken place constitutes a crime, the duty to render assistance existed solely for reasons of public interest. This is the practice in most Member States.

Illustration 8

There exists a statutory obligation to keep animals transported on the deck of a ship caged up. The purpose of this statute is to prevent the transmission of disease amongst animals. Its purpose is not to prevent the animals from falling overboard, though it has that collateral effect. In regard to the statutory provision at least, therefore, there is consequently no negligence when a failure to cage animals leads to their loss when they fall overboard. That of course does not exclude the possibility of recognising, aside from the statute, a breach of the general duty of care under sub-paragraph (b).

C. The general duty of care (sub-paragraph (b))

An objective standard. Sub-paragraph (b) deals with the second form of negligence. Conduct is negligent when it does not satisfy the care which must be exercised under the circumstances of the case by a reasonably prudent person**.** The standard is an objective one. It does not turn on the individual abilities of the person acting, rather it is based on what can be reasonably expected of that person: a dentist cannot escape liability by claiming to be a slow learner and very forgetful. Persons commencing their professional lives must likewise live up to the standard of the competent professional (and likewise the newly qualified driver must reach the standard of the more experienced), although it would be wrong to measure them by the standard of the most capable.

Conclusive list of deciding factors impossible. The question of what reasonably careful conduct means under the circumstances of each individual case is affected by several factors which are beyond conclusive enumeration. On the one hand, maintaining concentration is necessary because this facilitates the awareness of danger. Whoever turns a blind eye to the foreseeable negative consequences of actions can only be saved by sheer luck from harming others.

Illustration 9
Where a construction company lays underground pipelines for drinking water, it must not only obtain the plans from the other utility companies on the exact location of their cables and pipes, in fact it must also check whether the site plan specifications are accurate.

What actually has to done does not ultimately hinge on a weighing up of the costs and benefits of prevention. The type and extent of the imminent damage serve to dictate the type and extent of the measures necessary for its prevention. In some cases information to the public or a simple indication of a particular source of danger will be sufficient, in others the source of danger itself must be confronted. Also relevant is whether there was a particular close relationship or a relationship of trust between the person acting and the injured party, since fiduciary duties and similar factors can raise the degree of necessary care. Other relevant factors may be whether risks of private or commercial life are involved, whether children or only adults are to be anticipated as being in proximity to the source of danger, whether the relevant risk was known or arose for the first time etc. The conceivable situations are unlimited. The assessment of negligence in particular cases must therefore remain with the courts, whose assessment of what constitutes careful conduct or conduct without due care in a given set of facts may quite properly change over time. Generally it is of course to be borne in mind that the requirements of necessary care may not be arbitrarily raised. This would not only diminish the distinction with "strict" liability, but also emphatically hinder human activity; people would scarcely be able to move freely, constantly in fear of possibly encountering liability.

Illustration 10
During the warm-up before a volleyball game a ball is inadvertently hit high into the tiers of spectators, where it hits a visitor so hard in the eye that she is blinded. The distance and arrangement of the spectator area by the club was in conformity with the structural safety measures; neither the player nor the organising club ought to have perceived any need for further measures. No negligent physical injury exists.

Organisational defects. A particular form of negligence is seen in the notion of what is sometimes termed defective organisation. It is not only the specific safety risks associated with events with mass attendance which are involved here. Here, emphaisis is particularly placed on the duty of all large organisations to arrange their work processes in such a way that third parties are not endangered by problems of internal communication, the hierarchy of authority or decision-making. In practice legal persons in particular bear the burden of such organisational duties. They are subject to them independent of the organisational duties to which the natural persons acting on their behalf are subject.

NOTES

I. The concept of negligence in general

1. According to the concept of negligence under FRENCH law, a *faute d´imprudence ou de négligence* (CC art. 1383) is established if the defendant makes a mistake which a very prudent person (a *homme très diligent*) would not have made under the same circumstances,: a *faute* is given even in the case of the slightest fault (*culpa levissima*)

(*Terré/Simler/Lequette*, Les obligations[9], no. 728 p. 711). Whilst the standard of care is indeed abstract, in that, the defendant's conduct will be judged against the standard of a *bon père de famille*, consideration will also be given, where appropriate, as to how the *bon père de famille* would have acted, in the event that he, for example, had the same occupation or was of the same age as the defendant and found himself in the same situation (*le Tourneau*, Droit de la responsabilité et des contrats (2004/2005), no. 6707). However, there is no exoneration from liability on the grounds of lack of capacity (CC art. 489-2). In this respect, no differentiation is made between adults and minors, nor is one made in respect of a person suffering *sous l'empire d'un trouble mental* (*Terré/Simler/Lequette* loc. cit. no. 733 pp. 715-716) be it merely temporary or permanent. Needless to say, the prerequisite of liability for this class of individuals remains the identification of *faute* (Cass.civ. 24 June 1987, Bull.civ. 1987, II, no. 137 p. 78). The *faute d'imprudence ou de négligence* in civil law is more wide ranging than the *faute non-intentionnelle* in criminal law: In spite of the fact that the criminal law judges have expressly rejected the latter, the judges of the civil law still remain free to rely on the former (Cass.civ. 30 January 2001, Bull.civ. 2001, I, no. 19; JCP 2001, I, 338, obs. *Viney*). Moreover CP art. 121-3(4) has appreciably modified the former prevailing doctrine that the concept of *faute* is uniform in both the civil law and criminal law.

2. The test taken to establish negligence in BELGIUM revolves around the assessment of whether a person acted in a manner contrary to that expected of the ordinary prudent person acting with foresight (the *bonus pater familias*), (*van Gerven*, Verbintenissenrecht II[7], 298), who finds himself in the same situation as the defendant (Cass. 30 April 1976, RW 1976-77, 1709). More specifically, a distinction is made between external and internal factors. However, only the external circumstances are taken into account. They include, for example, the time and place of the occurence, the prevailing weather conditions and the social status and education of the defendant. The internal factors include age, sex, intelligence, character and temperament (*van Gerven* loc. cit. 300). A *faute* is committed only by a person with capacity to commit the tort and to whose act or ommissions tortious liability can be imputed. This is known as the subjective element of *faute* (*Vandenberghe/Van Quickenborne/Wynant/Debaene*, TPR 2000, 1551, 1688). The capacity of children is determined in each individual case, for adults suffering from a mental impairment CC art. 1386*bis* provides for an obligation to compensate where it is just and reasonable.

3. Under MALTESE CC art. 1032(1) "a person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a *bonus paterfamilias*".

4. In SPAIN, *culpa o negligencia* (CC art. 1902) is defined, by reference to the notion contained in CC art. 1104, as the infringement of a duty of care.(z.B. TS 9 April 1963, RAJ 1963 (1) no. 1964 p. 1217; Reglero Campos, Responsabilidad civil[3], 235; *Peña López*, La culpabilidad en la responsabilidad civil extracontractual, 443). The applicable standard of care is defined in a corresponding manner by case law and legal scholarship by recourse to CC art. 1104(2), which requires that a person acts in the same manner as a *buen padre de familia* would have acted in the circumstances of the case. The standard of care is determined abstractly according to objective criteria (Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Badosa Coll*], Código Civil II[2], 41; *Díez-Picazo*, Derecho de daños, 360). The judiciary has however heightened the required standard of care on many occasions (see TS 8 April 1992, RAJ 1992 [2] no. 3187 p. 4202 and Albaladejo [-*Santos Briz*], Comentarios al Código Civil y compilaciones forales XXIV, 433). This was realised essentially by three steps: by case law which cut away the possibility of escaping liability within the regime of CC art. 1903 (liability

for others) by proof of an absence of *culpa in eligendo* or *culpa in educando* (e.g. TS 26 January 1990, RAJ 1990 (1) no. 69 p. 115), by case law which permitted exculpation from liability in cases of an increased situation of danger only by proof of an "exhaustion of carefulness" so that even in the context of CC art. 1902 ultimately only force majeure remained as a ground of defence (e.g. TS 20 May 2005, RAJ 2005 (5) no. 6693 p. 14224; see *von Bar*, The Common European Law of Torts II, nos. 360-363), and by case law which clearly enlarged CC art. 1908 beyond its literal terms and at the same time reconstruing it as concerned with a "strict liability"(TS 14 March 2005, RAJ 2005 (2) no. 2226 p. 4747). In this manner the field of application for *culpa clásica* was dramatically narrowed (an important scope of application remain, however, injuries arising in sport and leisure time, see e.g. TS 9 March 2006, RAJ 2006 (2) no. 1882 p. 4474 and CA Pontevedra 11 May 2006, BDA JUR 2006/158510). In one case (TS 22 September 2004, RAJ 2004 (4) no. 5681 p. 11634) in which a fire had resulted in a loss of jobs the Supreme Court upheld liability for non-economic loss which the employees suffered in consequence on the basis of "a sort of strict liability" and even stressed that "the notion of fault [has] been widened to embrace [voluntary] acts which ... are done carefully and lawfully, but entail a damaging outcome that results in deprecation of the whole act". As regards risky occupational or commercial activities, the yardstick of the *bonus paterfamiliasis is* not decisive, rather a higher standard of care is imposed, measured according to the conduct of a member of a relevant group of experts in each case (e.g. TS 9 April 1963, RAJ 1963 (1) no. 1964 p. 1217; TS 28 April 1992, RAJ 1992 (3) no. 4466 p. 5917; TS 23 March 1993, RAJ 1993 (2) no. 2545 p. 3291; TS 3 May 1997, RAJ 1997 (2) no. 3668 p. 5546).

5. Under the rubric of negligence ITALIAN law differentiates between (CP art. 43(1)) *colpa generica* (causing damage through inattentiveness, carelessness or solecism) and the *colpa specifica* (causing damage which results from breach of a statutory rule of beahaviour). *Colpa generica* postulates the forseeability of resulting damage and the possibility of its avoidance and both are decisive. The test for forseeability is based on the knowledge of the average citizen and on the special knowledge of the defendant which extends beyond the former. It is sometimes propounded that, in individual cases, allowances can be made for below average knowledge or ability (*Alpa*, Trattato di diritto civile IV, 246; *Bussani*, La colpa soggettiva, 1-25). From a theoretical viewpoint, this proposition is not easily reconciled with the prevailing objective definition of negligence which legal scholarship is equally inclined to endorse (*Bianca*, Diritto civile V, 576; *Alpa*, loc. cit. 240).

6. One of the basic principles in the HUNGARIAN CC § 4(4) is formulated to require that, in the context of private law, unless this statute imposes stricter requirements, a person must conduct him- or herself in a manner that can be generally expected in the given situation. No person should benefit from his own blameworthy conduct; but such conduct does not *per se* preclude a claim in damages against another who for his or her part acted in a blameworthy manner. An autonomous theory of negligence has not developed. Even in academic commentary the concept of negligence is only rarely defined (e.g. by *Lábady*, A magyar magánjog (polgári jog) általános része, 309). The reason for this is that Hungarian tort law utilises the concept of the objectively assessed "blameworthiness" instead of intention and negligence. The defendant must prove the absence of blameworthiness (CC § 339(1)). Nonetheless, it is also propounded that the wording in CC § 4(4) epitomises the Hungarian equivalent to the *bonus et diligens paterfamilias or reasonable man* which are features of other European legal orders (*Lábady* loc. cit. 144-145; *Bíró and Lenkovics*, Általános tanok, 98-101) and accordingly, this provision has to be drawn on in order to interpret CC § 339(1) (*Lábady* loc. cit.). Under POLISH tort law negligence (*wina nieumyślna,*

niedbalstwo) is tied to the notion of due care. Some commentators consider conduct is negligent, if it does not meet the required standard of care and is reproachable in the circumstances of the case. Whereas the compliance with the required standard of care is judged by reference to the objective or abstract touchstone of the careful person (careful driver, careful doctor, etc.), disregarding strictly personal characteristics of the person, reproachability depends on those personal characteristics, e.g. the state of mind (*Radwański and Olejniczak,* Zobowiązania - część ogólna[7], 197-198). Other writers simply equate negligence with lack of due care in the particular circumstances of the case, subject to a reservation for the general requisites for fault such as age or soundness of mind (*Czachórski*, Zobowiązania[10], 238-240). The required standard of care is set out in CC art. 355 § 1, according to which the debtor is obliged to take the care generally required in such circumstances; CC art. 355 § 2 raises the standard of care as it provides that the due care of a debtor pursuing a business activity is to be determined having regard to the professional character of the activity. Despite the use of the term "debtor" the majority of commentators as well as the case law treat the rule as applicable also to tort liability (*Radwański and Olejniczak* loc. cit. 197; Pietrzykowski [-*Safjan*], Kodeks cywilny I[4], art. 355 p. 847). Art. 6 of the SLOVENIAN LOA displays cognate tendencies The remaining codifications in Central and Eastern Europe also avoid a statutory definition of negligence and also forgo a definition of the required standard of care. However, here it is also commonplace to define negligence according to objective criteria (for a detailed exposition e.g. for BULGARIA *Konov*, Osnovanie na grajdanskata otgovornost, 133).

7. Under the GERMAN CC § 276(2) a person acts negligently if he or she disregards the standard of due care expected in the circumstances. The decisive yardstick is not typical care; rather it must be emphasised that due care must be taken. In contrast to the criminal law, an abstract objective yardstick is utilised (BGH 21 May 1963, BGHZ 39, 281, 283; BGH 17 March 1981, BGHZ 80, 186, 193; BGH 26 January 1989, BGHZ 106, 323, 330; BGH 20 October 1987, NJW 1988, 909; BGH 11 April 2000, NJW 2000, 2812; BGH 13 February 2001, NJW 2001, 1786). Consequently, in principle, it does not depend on the care that the individual defendant can muster up (*Medicus*, Schuldrecht I[16], no. 309). Special knowledge or skills of the defendant raise the required standard of care to a higher plane. Moreover, pursuing a particular occupation, belonging to a particular age group and level of education are significant factors in determining the standard of due care, as are legal provisions (for example, road traffic legislation), regulations pertaining to prevention of accidents, technical norms and even rules of sport, if the latter can assist in concretising the concept of negligence (Palandt [-*Heinrichs*], BGB[66], § 276, no. 15). Important elements of the test of negligence are: forseeability and avoidability of the unlawful result (Erman [-*Westermann*], BGB I[11], § 276, no. 13). Forseeability relates to the injury, not to the damaging consequences.(*Heinrichs* loc. cit. no. 20). An error as to the prohibited nature of an act can equally ground liability in negligence. A gradual differentiation is made between gross, mere or slight negligence. Gross negligence denotes conduct which has deviated, to an unusually high degree, from the required standard of care i.e, there is a disregard of circumstances which would have been clear to anyone in the same situation (BGH 11 May 1953, BGHZ 10, 14, 16). In addition CC § 277 recognises "the care, that the defendant would have customarily exercised in his own affairs" (the *diligentia quam in suis rebus adhiberi solet*).

8. AUSTRIAN law also recognises that intention and negligence are constituents of fault (CC § 1294); negligence is established when an objective standard of due care is subjectively flouted on the wrongdoer's part (OGH 1 March 1988, ZVR 1989/64, RS0022399). The requirements of care as developed in case law are, comparatively

speaking, lenient (z.B. OGH 10 April 1997, ZVR 1998/92, RS0107618 und OGH 26 March 1987, ZVR 1989/28, RS0023787). In respect of a number of discrete professions, for which particular expertise is required, stricter standards of care are imposed, (CC § 1299); for example for lawyers (OGH 11 November 1971, EvBl 1972/124, RS0038663 and for medical consultants (OGH 4 February 1959, JBl 1960, 188, RS0026598: the skill and knowledge of a general practitioner is not measured against that of a consultants.).

9. GREEK CC art. 330 tallies with the German CC § 276(2). A person, who disregards the standard of due care, is negligent. An objective standard of care applies (Georgiades and Stathopoulos [-*Stathopoulos*], art. 330, no. 30). The care required to be complied with, is that which an average member of the profession or average citizen would exercise as the case may be.(*Stathopoulos* loc. cit. no. 33; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 160).

10. PORTUGUESE law also defines negligence as the disregard of the standard of due care (*Almeida Costa*, Obrigações[9], 533; *Antunes Varela*, Obrigações em geral I[10], 573; STJ 2 February 2006). There is a distinction made between *culpa consciente* und *culpa inconsciente*. "Conscious" negligence is established when an individual, who knows that he or she behaves in an improper manner but owing to carelessness or over confidence does not amend his or her behaviour accordingly. In contrast, "unconscious" negligence is given when a person, owing to carelessness or inattentiveness, does not realise that he or she will probably cause damage to another by the conduct (*Antunes Varela* loc. cit. 573; *Pessoa Jorge*, Ensaio sobre os pressupostos da responsabilidade civil, 331). The extent of the required standard of care is derived from CC arts. 487(2) and 799(2); the decisive factor is the question of what a good father would have done or would have omitted to do, if he found himself in the same situation as the tortfeasor (STJ 19 September 2006). A slight degree of negligence suffices (STJ 27 May 1997, BolMinJus 467 [1997] 565). Ordinary care is not a determining factor, rather the pertinent question is what measures were necessary in the circumstances to avoid causing the damage (*Antunes Varela* loc. cit. 574; *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], art. 487(2) no. 2; STJ 23 September 1998, CJ (ST) VI [1998-3] 32; STJ 12 February 2004 and STJ 30 October 2002). Nevertheless, and notwithstanding the special care requirements in particular occupations, if a doctor acts according to what is customary in the practise of surgery but the results of his performance were harmful to a patient, this will not be a case of medical negligence (CA Lisbon 27 October 1998, CJ XXIII [1998-4] 130). In respect of the standard of care of lawyers see STJ 10 May 2001.

11. In DUTCH law while the distinction between intention and negligence is not a facet of the basic norm of tort law (CC art. 6:162), the disparity between the two grounds for the attribution of liability plays a decisive role in an array of other regulations, e.g. in the context of CC art. 6:98 (Definition of the nature of damage for which liability to pay compensation arises), CC art. 6:101 (reduction of damages owing to contributory negligence), CC art. 6:106 (Liability for non-pecuniary loss), CC art. 6:108 (Right of the social insurer to initiate an action for contribution) and CC art. 6:109 (reduction in liaibility in the case of slight fault). The Code only uses the term negligence (*nalatigheid*) in company law (CC arts. 2:9, 2:138 and 2:48), and not in tort law. The concept remains undefined under company law.

12. ESTONIAN LOA art. 104(3) adopts a contrasting position ("Carelessness is failure to exercise necessary care") and CC art. 104(4) ("Gross negligence is failure to exercise necessary care to a material extent"). A person is negligent, if he or she does not conduct himself or herself as a reasonably careful person would have acted in the

given situation. LOA art. 1050(2) adds that liability cannot be attibuted to individuals, who lack capacity to recognise the wrongfulness of their actions, unless they had put themselves in this position as a result of their fault. Legal scholarship derives from this the premise that the concept of negligence is subjective and therefore it is argued that account should be taken of the personal characteristics of the actor (*Lahe*, Fault in the Law of Delict, *passim*; *Lahe*, Juridica International 2004, 108; *Lahe*, Juridica 2002, 30; *Lahe*, Juridica International 2001, 125. LATVIAN CC art. 1644(1) provides: "If a person inflicts harm upon another without wrongful intent, if such person is at fault for the wrong, then he or she acted negligently". A differentiation is made between gross and ordinary negligence (CC arts. 1644(2), 1645 and 1646). Ordinary negligence suffices for the imposition of liability in tort (CC art. 1649(1)). "Ordinary negligence shall be considered to be that lack of care and due diligence as must be observed by any reasonably prudent and careful person" (CC art. 1646). LITHUANIAN CC art. 6.246(1) differentiates as per VI.–3:102 between statutory specifications of negligence and the "general duty of care".

13. In the NORDIC countries, there is no statutory definition of negligence. Nonetheless, there is consensus that negligence should be defined objectively, therefore, in principle, no account is taken of the personal characteristics and abilities of the wrongdoer (*Bengtsson and Strömbäck*, Skadeståndslagen[2], 45; *von Eyben and Isager*, Lærebog i erstatningsret[5], 61; *Vinding Kruse*, Erstatningsretten[5], 55). In respect of straightforward activities SWEDISH case law appears to make an exception (e.g. Swedish HD 14 August 1948, NJA 1948, 489 [illustration 2 above: negligence denied; in more detail e.g. *Hellner and Johansson*, Skadeståndsrätt[6], 138 and *Vinding Kruse* loc. cit. 128] as well as DANISH Western CA 16 October 1967, UfR 1968, 133). Apart from this state of affairs, it will depend, in the abstract, on how a reasonable person would have acted in the same situation. In clarifying the concept of negligence, recourse is also had to statutory provisions, public policy, customs and prior case law (*Bengtsson and Strömbäck* loc. cit. 46). If the wrongdoer knew that an accident had already occured on an earlier occasion, it is expected that he or she take particular care in acting (FINNISH Supreme Court 17 June 1981, HD 1981 II 84). In an overall weighting, account is taken of the probability of damage, the type and extent of the probable damage, the avoidability of the damage and the recognition of the respective dangers for wrongdoer and victim (*Hellner and Johansson* loc. cit. 130; SWEDISH HD 4 June 1981, NJA 1981, 683; HD 9 March 1967, NJA 1967, 164 and HD 14 April 1987, NJA 1987, 222). Socially desirable conduct is treated less strictly than anti-social behaviour (Swedish HD 25 June 1958, NJA 1958, 461; (*von Eyben and Isager* loc. cit. 44; *Vinding Kruse* loc. cit. 52).

14. IRELAND IRISH law also differentiates between negligence (or carelessness) as a pillar of fault and the (independent) tort of negligence. According to recent case law especially following the Supreme Court cases of *Glencar Explorations plc. v. Mayo County Council (No. 2)* [2002] 1 IR 84 and *Fletcher v. Commissioners of Public Works* [2003] IESC 13, [2003] 1 IR 465, Irish law has adopted, in principle (again) as that prevailing in English law

15. Liability for negligence under SCOTTISH law is also derived from *Donoghue v. Stevenson* (no. 14 above), cited as *M'Allister v. Stevenson.*

II. Negligent omissions

16. In all legal orders of the Member State it is nowadays self evident that negligent conduct can also also encompass omissions and not merely connote a positive act. This truism is only expressly anchored in a number of Civil Codes (e.g. in AUSTRIAN CC § 1294, MALTESE CC art. 1033, SPANISH CC art. 1902,

PORTUGUESE CC art. 486 and LITHUANIAN CC art. 6.246(1)). Others have left it to special provisions, which stipulate an obligaton to supervise defined individuals or things in a number of given situations. Initially, therefore, liability for negligent omissions had to gradually carve out a position for itself under the basic norms of tort law. This is a valid assertion for e.g. FRANCE, BELGIUM and LUXEMBOURG. CC arts. 1382 and 1383 speak of *faute*, *imprudence* und *négligence*. Based on the wording of the provision, it cannot be conclusively asserted, that these concepts are exclusively confined to positive acts. Nonetheless the present guiding principle, namely that tort liability can arise from an act as well as from an omission, was contentious for a long time. It became firmly entrenched only after World War 2 (see. for France Cass.civ. 27 February 1951, D. 1951, 329; for Belgium *Dalcq*, Responsabilité civile. I[2], nos. 356-366 and for Luxemburg Cour 23 December 1971, Pas. luxemb. 22 [1972] 93).

17. In contrast, as already mentioned, the text of the SPANISH CC art. 1902 does not leave any room for doubt, given that any person "who by action or omission causes damage to another by fault or negligence is obliged to compensate the damage caused". Of course this does not preclude a differentiation between the discrete variant types of omissions and subjecting them to different rules. In any event, some commentators see a fundamental difference between omissions arising as a consequence of an antecedent positive act and the socalled "pure" or "simple" omission (*de Ángel Yágüez*, Tratado de responsabilidad civil[3], 257; *Lacruz and Rivero*, Elementos II(2)[4], 466). TS 9 March 2000, RAJ 2000 (1) no. 1183 p. 1861 is an example of the first category (Liability of a doctor who omitted to inquire of his patient whether he was allergic to the drug which was eventually administered). In this case no special requirements would apply. However, in respect of "pure omissions" intention is a prerequiste (*de Ángel* loc. cit.). This theory is however by no means undisputed and is possibly also not prevailing legal scholarly opinion (*Lacruz and Rivero* loc. cit.; *Yzquierdo Tolsada*, Sistema de responsabilidad civil, 110). Other voices surmise that it depends on whether the defendant was subject to a particular obligation to act prior to the ensuing result (Albaladejo [-*Santos Briz*], Comentarios al Código Civil y compilaciones forales XXIV, 103). If such an obligation is missing, the omisson must either flow from the intention to inflict damage or otherwise not correspond to what could have normally been required from the defendant in the circumstances of the case (*Lete del Río*, Derecho de obligaciones II[3], 187; *Lacruz and Rivero* loc. cit. 466; *de Ángel Yágüez* loc. cit. 257).

18. The principle that an unlawful act can be established, either as a result of a positive act or omission is also the approach adopted in ITALIAN law. A distinction is made between an *omissione propria* (the violation of an express statutory obligation in respect of a positive act) and an *omissione impropria* (the infringement of a general duty of care, which is linked with CP art. 40(2), whereby causation is established when a person fails to hinder a result although he was legally obliged to do so *Castronovo*, La nuova responsabilità civile[3], 319). The judiciary examine in the first instance whether a statutory duty to avoid the damaging result existed, the violation of the duty then makes the application of CC art. 2043 possible. However, the judiciary also regard as sufficient the violation of a duty to act postively which is based on a legal transaction or if the defendant did not adhere to a duty of protection which was compelling in the given circumstances of the case (Cass. 29 July 2004, no. 14484, Giust.civ.Mass. 2004, 7-8; Cass. 1 December 2004, no. 22588, Giust.civ.Mass. 2005, fasc. 1; Cass. 23 May 2006, no. 12111, Danno e resp. 2007, 163; *Alpa*, Trattato di diritto civile IV, 265-267).

19. It is contended in HUNGARY, that an omission is, in principle, only unlawful if the debtor was under a statutory or contractual duty to act (Gellért [-*Kemenes*], A Polgári

Törvénykönyv Magyarázata[6], 1227 and 1230). Liability for omissions arises only if there was a positive legal duty to act which was violated (*Marton*, A polgári jogi felelősség, 128-129). Certainly, in this context, an omission is causal for the resulting damage (*Eörsi*, Kártérítés jogellenes magatartásért, 65; *Marton* loc. cit.; *Ujváriné*, Felelősségtan[7], 51-52, 63; *Bárdos*, Kárfelelősség a Polgári Törvénykönyv rendszerében, 52-53; *Szalma*, Okozatosság és polgári jogi felelősség, 76). The duty to act positively does not have to be subject of a specific statutory provision, rather such an obligation can be derived from the general axiom to respect the interests of others, cf the extensive case law on the subject; e.g. BH 2003/152; BH 2002/435; BH 2002/266; BH 2002/227; BH 2002/185; BH 2000/445; BH 2000/198; BH 1998/131; BH 1996/530 (*in casu* action denied) and BH 1994/596. In POLAND too there is no doubt that an unlawful omission may give rise to tortious liability. An omission is unlawful if it constitutes a breach of a statutory duty (SN 19 February 2003, LEX no. 121742). Whether unlawfulness may result also from a breach of a duty of action stemming from the principles of community life (*zasady współżycia społecznego*) is controversial (see in support *Czachórski and Ignatowicz*, System prawa cywilnego III, 1, 534; *contra* Pietrzykowski [-*Banaszczyk*], Kodeks cywilny I[4], art. 415 p. 1092, arguing that the principles are not precise enough).

20. In GERMANY, similar principles apply. The factual elements of a tort can also in this jurisdiction be fulfilled by either a positive act or an omission (Erman [-*Schiemann*], BGB I[10], § 823, no. 13). However, an omission is then only unlawful if the wrongdoer has breached a legal duty to act (Palandt [-*Thomas*], BGB[66], § 823, no. 35). The duty to act can derive from: statute, contract, an antecedent act which increased the risk of danger, a close relationship in the sense of family law, initiation of contractual negotiations, or above all, from the general principle that every person who within the scope of his responsibility, creates a source of danger or allows it to continue, must do everything necessary in the circumstances of the case to prevent the realisation of the danger. Via this concept of liability for the violation of a so-called *Vehrkehrspflicht*, the duty to be observed in various situations of social interaction, which is a creature of case law, the statutory obligations to act CC §§ 823(2), 831-838) which are of themselves narrowly defined have expanded greatly. In essence the only remaining question is whether the general duty of care (CC § 276) requires a postive act (von Bar, Verkehrspflichten, passim; see the very extensive case law on the subject) e.g. BGH 8 November 2005, NJW 2006, 610 (regarding the *Verkehrspflich*t of the proprietor of a theater in respect of a shot fired in the air by an actor during a performance). The *Verkehrssicherungspflichten* are special instances of the duty to be observed in various situations of social interaction and comprise of the duty to take appropriate measures to ensure safety on property to which the public have access.

21. AUSTRIAN CC § 1294 expressly provides that damage can be caused by acts as well as omissions. However, liability in respect of the consequences of an omission only arises when the defendant was under a legal duty to prevent the damage (*v. Zeiller*, Commentar III, 702 [no. 2 under CC § 1294]; see OGH 13 December 1966, SZ 39/170 and OGH 15 January 1986, SZ 59/7, RS0022458). An affirmative duty may derive from statute (CC § 1311; on this point see OGH 16 September 1999, JBl 2000, 113, RS0112533, note *Fötschl*, VersRAI 2001, 24), from contract or from an antecedent act aggravating risk (*Ingerenz*) (Rummel [-*Reischauer*] ABGB II², § 1294 no. 4).

22. In GREECE, legal scholarship and the judiciary are equally at one on the following issue, namely, that omissions can also connote relevant conduct under tort law in the sense of CC art. 914; the fact that the provision is silent on this issue is of no account. Affirmative legal duties are again derived from statute, contract or from the tenets of *Ingerenz* (Georgiades and Stathopoulos [-*Georgiades*], art. 914, nos. 27-30). Moreover

in Greece, the principle applies that every person who creates a dangerous situation or allows it to persist is obliged to take all necessary measures to ensure that others are not harmed (e.g. A.P. 250/1956, ArchN 7 [1957] 451; A.P. 343/1968, NoB 16 [1968] 943; A.P. 854/1974, NoB 23 [1975] 479; CA Athens 1773/1982, Arm 37 [1983] 215; CA Athens 46/1985, EllDik 26 [1985] 511). In addition it is accepted that a positive duty to act can also be derived from the tenets of good faith and the prevailing precepts of a generally accepted social standard (see essentially A.P. 510/1959, NoB 8 [1960] 251; A.P. 343/1968, NoB 116 [1968] 943 and A.P. 854/1974, NoB 23 [1975] 479; more recent case law e.g. CA Athens 12263/1990, NoB 39 [1991] 583; CFI Athens 9286/1985, Arm 40 [1986] 501 and A.P. 81/1991, EllDik 32 [1991] 1215). In both cases, similar to the German position, there is talk of duties to be observed in various situations of social interaction and duties to ensure safety of third parties (*Filios*, Enochiko Dikaio II(2)[4], 35; *Eleftheriadou*, Die Haftung aus Verkehrspflichtverletzung im deutschen und griechischen Deliktsrecht, *passim*).

23. PORTUGUESE CC art. 486 provides that, "the simple omission" can only be compensated, independent of other statutory prerequisites, if it can be derived from a statute or derived from a legal transaction which contained an affimative duty to act. A positive duty to act under tort law can thereby arise particularly under ancillary contractual obligations, e.g. a duty to ensure safety of fans attending a football match (CA Lisbon 17 October 2002, CJ XXVII [2002-4] 97) or the duty of a hospital to ensure that a mentally impaired patient who absconded was brought back to the in-patient treatment centre. STJ 25 July 1985, BolMinJus 349 [1985] 516; see also STJ 22 September 2005). Also DUTCH CC art. 6:162(2) expressly differentiates between acts and omissions, however, in substance, it treats both forms of conduct as equivalent in principle. "Saving grounds for justification, the following acts are deemed to be wrongful, the infringement of a right, an act or omission violating a statutory duty or conduct contrary to the standard of conduct seemly in society". The aforementioned corresponds in all essential points to the LITHUANIAN CC art. 6.246(1).

24. The NORDIC legal orders proceed from the premise that omissions do not ground liability and thereafter define numerous exceptions to this rule. A positive duty to act can be derived, in the first instance, from statutes (*Hellner and Johansson*, Skadeståndsrätt[6], 106). Such statutory obligations to act are found in, for example, the Swedish criminal code (negligent manslaughter, the consequence of an omission HD 26 May 2005, NJA 2005, 372), in statutes relating to the countryside and rights of way [*väglagen* (1971:948)] § 26; statutes pertaining to the control of pollution [*renhållningslagen* (1979:596)] §§ 18 and 19 and in the Parental Code [*föräldrabalk* (1949:381)] chap. 6 § 2(2)(iii). Moreover it is said that duties to act can also be contractual (e.g. HD 9 September 1932, NJA 1932, 457 [landlord fails to remove ice from the tenant's tap, the tenant slips on the icy patch] and HD 19 December 1995, NJA 1995, 720 [failure to adhere to promise to lay waterpipes, damage resulting to neighbour; see *Bengtsson and Strömbäck*, Skadeståndslagen[2], 47]). Finally it is recognised that a duty to act can be created by virtue of a prior act which aggravates risk, the wrongdoer is obliged to take appropriate measure against the danger which has arisen (HD 14 December 1935, NJA 1935, 636). The same is true of DENMARK (*Vinding Kruse*, Erstatningsretten[5], 111, 117; *von Eyben and Isager*, Lærebog i erstatningsret[5], 69 and HD 9 April 1975, UfR 1975, 504 [liability of organisers of events]) and of FINLAND (Supreme Court 10 October 1991, HD 1991:138 [road maintenance; failure to signify the existence of a pit]; Supreme Court 6 October 1997, HD 1997:151 [build up of ice on the street following a burst water pipe, no warning sign was displayed nor was salt placed on the roads] und Supreme Court 4 October

1996, HD 1996:117 [a 13 year old girl was found not to be liable in negligence when she failed to prevent her playmate from negligently setting fire to a building and failed to warn the property owner]).

25. IRISH law on liability for negligent omissions is the same on all essential points to that of England A positive duty to act in tort law can be derived from an employer-employee relationship, for example see on this point the duty to protect an employee from bullying by colleagues (*Quigley v. Complex Tooling & Moulding* [2005] IEHC 71).

III. Breach of statutory duty

26. Under BELGIAN, FRENCH und LUXEMBURGIAN law the breach of a statutory standard of conduct only grounds *per se* the existence of a faute provided that the defendant commits the breach *librement et consciemment* (Cass. 3 October 1994, Pas. belge 1994, I, no. 412 p. 788; *Viney and Jourdain*, Les conditions de la responsabilité[2], no. 448 pp. 327-330). Prevailing legal opinion has rejected the socalled theory of relativité *aquilienne*, according to which the breach of a statutory standard of behaviour only establishes a causal *faute* when the aggrieved party is a member of the class which the provision is geared towards protecting (see further *Ghestin*, Les conditions de la responsabilité, 157 and 318 and *Cornelis*, Responsabilité extra-contractuelle, 65; cf. also Cass.civ. 27 October 1975, GazPal 1976, I, 169, note *Plancqueel*).It is even understood as a special feature of CC art. 1382 ,since this provision establishes a general protective norm for every person who suffers damage because another did not adhere to the law, irrespective of whether the applicable statute was designed to protect the injured party or otherwise (*Ravarani*, La responsabilité civile[2], 711).

27. In contrast, legal position in SPAIN corresponds to VI.–3:102 (a): namely the breach of a particular standard of care as provided by the statutory provision only grounds the charge of negligence when the purpose of the breached provision was the protection of the injured party from the damage suffered (*Díez-Picazo*, Derecho de daños, 360; TS 27 April 1992, RAJ 1992 [2] no. 3414 p. 4519). On the other hand the compliance with defined statutory specifications does not automatically entail that the observance of the general duty of care is always regarded as given. Rather, the *Tribunal Supremo* has pronounced in numereous decisions that CC art. 1902 requires not only the care and attention as prescribed by the specific statute, moreover it also always requires that measures are taken which the *bonus paterfamilias* would have taken in the circumstances of the case (TS 3 May 1997, RAJ 1997 [2] no. 3668 p. 5546; TS 24 December 1992, RAJ 1992 [5] no. 10656 p. 13899; TS 19 December 1992, RAJ 1992 [5] no. 10703 p. 13990).

28. The ITALIAN civil law abstains from defining negligence and therefore, as starting point, resort must be had to CP art. 43(3). According to this provision a criminal offence is committed in a negligent manner when the result was not desired by the wrongdoer, but was the product of inattentiveness,carelessness, or solecism or resulted from a disregard of Acts**,** Regulations,Statutory Orders or Rules**.** This proposition holds true even if the result may have been foreseen by the wrongdoer. In the first instance a *colpa generica is* established, in the second (breach of Acts etc.) *colpa specifica.* As regards the *colpa specifica* it is emphasised that it can only arise under provisions which have as their purpose, the avoidance of certain damage. Only under these conditions can one speak of a *colpa per inosservanza di leggi* which is relevant for liability (*Visintini*, I fatti illeciti II[2], 62; *Franzoni*, Dei fatti illeciti, 127). If these prerequisites are given, then it is said that negligence *in re ipsa is* established (Cass. 9 June 1995, no. 6542, Giur.it. 1996, I, 1, 191; Cass. 13 May 1997, no. 4186,

Giust.civ.Mass. 1997, 722 [each time unlawful administrative acts]; Cass.sez.un. 29 July 1995, no. 8300, Giur.it. 1996, I, 1, 328, note *Musy* [Violation of CC art. 844]). The breach of a statute as such already constitutes negligence because the legislator has already statutorily clarified questions of forseeability and the required standard of care. Nonetheless the existence of a causal nexus betwenn the breach of the norm and the damage sustained needs to be examined (*Franzoni* loc. cit. 127; Cass. 4 September 1981, no. 5051, Giust.civ.Mass. 1981, fasc. 9; Cass. 20 March 1998, no. 2980, Giust.civ.Mass. 1998, 626; Cass. 26 Januar 1990, no. 480, Giust.civ.Mass. 1990, fasc. 1). In order to establish causation the question has to be asked whether the purpose of the breached statutory provision was to protect the injured person from the damage suffered (*Visintini* loc. cit. 63).

29. The starting point under HUNGARIAN tort law is that the infliction of damage is prohibited by law and that therefore every infliction of damage is unlawful unless otherwise provided by law. It is envisaged that this principle will be expressly adapted in the new Civil Code (http://www.parlament.hu/irom38/05949/05949.pdf). A provision along the lines of VI.–3:102(a) is thereby unnecessary. Moreover the theory of the protective purpose rule (under which only damage, which the violated statute was designed to hinder, is recoverable) has not taken root. A causal nexus in respect of the damage inflicted suffices in principle to ground liability. Of course related questions can implicitly arise in the analysis of causation and above all concerning the question as to whether the defendant can relieve himself of liability by arguing a lack of blameworthiness (Petrik [-*Harmathy*], Polgári jog II[2], 570; *Petrik*, Kártérítési jog, 49). Nothing in the general formula of POLISH CC art. 415 corresponds to VI.–3:102(a). Some scholars take the view that in principle every infringement of a statutory rule is unlawful (subject to exceptions such as self-defence) irrespective of whether the injured party or the damage sustained falls within the protective range of the rule (*Czachórski*, System prawa cywilnego, III, 1, 533-534; *Safjan*, FS Maksymilian Pazdan, 1329; SN 22 February 2006, OSNC 2006, poz. 123). Liability arises if the other party is at fault (i.e. breach of the statutory rule resulted from negligence) and the infringement and the damage are causally linked. On the other hand, a large number of commentaries adhere to the concept of so-called “relative” unlawfulness, according to which an act or omission is unlawful vis-à-vis an injured person only if the person belongs to the group for whose protection the rule had been made (and the same applies to the type of inflicted damage – see *Szpunar*, Glosa, 381-382; *Kasprzyk*, Stud.Prawn. 1988, 149, 150-151, 165, 171; SN 27 April 2001, OSNC 2001, poz. 161).

30. GERMAN CC § 823(2)(i) provides that the violation of a law which has as its aim the protection of another is one type of unlawful act. Therefore, a person who violates a statute, is liable under this provision only when the statute was geared towards protecting the person injured from the damage suffered. To illustrate ,for example legal provisions concerning clearways near construction sites are not geared towards protecting building contractors from loss of earnings (BGH 18 November 2003, MDR 2004, 274). On the other hand numerous provisions of the Civil Code have been recognised as socalled Schutzgesetze (z.B. CC §§ 226, 618, 858, 906-909 and 1004). Further archetypes of protective laws can be found in the Criminal Code (e.g. CP §§ 123 [trespass to property], 185 [Defamation], 263 [Fraud], 266 [breach of trust] und 306 [Arson]) and in the Road Traffic Ordinance (e.g. provisions relating to maximum speed limits, keeping a minimum distance behind vehicles, prohibition on overtaking et al.) (see further MünchKomm [-*Wagner*], BGB[4], § 823, no. 357). CC § 823(2) does not regard the violation of a protective law as a manifestation of negligence, rather as a

manifestation of unlawfulnesss. Liability under CC § 823(2)(ii) therefore depends on whether the violation of the statute was a consequence of negligence or intention..

31. Under AUSTRIAN CC § 1311 second sentence a person is liable, who culpably infringes a law which seeks to prevent „incidental injuries“ (OGH 26 April 1977, ZVR 1978/42; OGH 6 July 1978, SZ 51/109),. However, the wrongdoer's fault is presumed in cases of the violation of a protective law. This presumption can be rebutted (OGH 6 July 1978 loc. cit.; OGH 31.8.1984, SZ 57/134; OGH 14.1.2004, 7 Ob 276, 03v), however in practice, although possible in theory, adduced exculpatory evidence hardly ever succeeds (Schwimann [-*Harrer*], ABGB VI[3], § 1311 no. 36). The concept of a protective law is given a very broad interpretation. It is not exclusively confined to parliamentary legisltion but encompasses all types of legal norms. Even an administrative act can fall within ist remit (*Bescheid*, siehe OGH 25 February 1982, ZVR 1983/35)The decisive question is whether the applicable legal provision pursues, contentwise, a protective aim for the benefit of private individuals.(OGH 17 April 1969, ZVR 1969/330; OGH 15 October 1978, ZVR 1979/283). Contentwise, protective laws comprise of a prohibition on conduct which is abstractly dangerous, the aim of these prohibitions being to safeguard certain individuals or class of individuals against an infringement of their legal interests (*Harrer* loc. cit. no. 9; OGH 22 August 1996, SZ 69/188). Liability is restricted to the damage which the protective purpose norm was intended to avoid. Discrete provisions of the Civil Code can also constitute in themselves protective laws (e.g. CC § 154(3)). For further examples see for instance OGH 15 February 1983, JBl 1983, 373; OGH 21 October 1987, 8 Ob 29/87; OGH 20 September 1978, ZVR 1979/203 and OGH 21 December 1982, ZVR 1984/46.

32. In GREECE the violation of a statutory provision can likewise constitute a species of unlawful act. However it is accepted that in order to ground liability it is simply not enough to violate simply any statutory provision, rather the provision must either establish an absolute subjective right or it must safeguard a legally relevant interest (*Georgiades*, FS Larenz 1983, 175, 184; Georgiades and Stathopoulos [-*Georgiades*], art. 914, no. 32; *Kornilakis*, Eidiko Enochiko Dikaio I, 484, 487). As regards the second classification it is necessary to examine whether the affected interest is within the scope of the violated provision. Not every provision containing a duty to act or a duty to refrain from acting are inevitably protective laws (*Georgiades* loc. cit. no. 50). The question as to whether the infringed provision has to-at a minimum-safeguard a private interest is to be ascertained by means of interpreting the provision at hand, (*Kornilakis* loc. cit. 487). This question was answered affirmatively in respect of e.g. offences under the Criminal Code pertaining to fraud, embezzlement, handling of stolen goods, perjury and false criminal accusations.(*Georgiades* loc. cit. no. 53). CC art. 281 also constitues a protective law along these lines (Prohibition on abusive exercise of a right: *Georgiades* loc. cit. no. 56 gegen *Filios*, Enochiko Dikaio II(2)[4], 33). In contrast, offences relating to for example espionage and treason are exclusively concerned with the wider public interest (*Georgiades* loc. cit. no. 54).

33. PORTUGUESE Law CC art. 483 proceeds from a starting point which evinces cognate considerations to that outlined above. If the injured party can prove that the defendant violated a legal provision geared towards safeguarding the interests of the injured party, then a (rebuttable) presumption of negligence on the part of the defendant arises (STJ 10 March 1998, BolMinJus 475 [1998] 635; STJ 13 December 1990, BolMinJus 402 [1990] 558). In contrast, proof of negligence must be postively adduced in the case of, for example, a road traffic accident, if it cannot be successfully proven that a provision of the Road Traffic Ordinance was violated (STJ 13 December 1990, BolMinJus 402 [1990] 537). On many occasions the courts have considered that

the infringement of a legal provision suffices *per se* as proof of negligence (e.g. STJ 16 February 1993, BolMinJus 424 [1993] 635 [concerning conduct at railway level crossings]). For particularly dangerous places, a higher degree of care may be required under statutory provisions (e.g. CA Coimbra 26 October 2000, CJ XXV [2000-4]) 132: Safety on the corridors of a hospital]).

34. Breach of statutory duty (be it in the commission of an act or omission) under the DUTCH CC art. 6:162(2) is subsumed into the category of wrongful acts. A breach of a statutory duty does ground an obligation to pay compensation, however only if the additional prequisites of tort law are fulfilled. Therefore, the damage must be encompassed by the protective purpose of the violated rule and must result from a breach of the statute, breach of which can be imputed to the wrongdoer. „Statutory Duties "in the sense of CC art. 6:162(2) are found in the Civil Code itself as well as in special civil or public law statutes. As regards the latter it is however necessary to examine precisely whether the statute was solely designed to safeguard the public interest (TM, Parlementaire Geschiedenis VI, 675; Onrechtmatige Daad I [-*Jansen*] art. 6:162(2) nos. 67-71 pp. 600-635; see also HR 20 November 1924, NedJur 1925, 89). If the breach of a statute is identified, it is rebuttably presumed that the defendant was at fault. However, as against the infringement of the statute, the fault element remains a separate issue of determination (*Jansen* loc.cit. para. (3) no. 7.3 pp. 48-68 and no. 57 pp. 910-911).

35. The legal position in the NORDIC Countries corresponds largely to that covered by *VI.*–3:102(a)). For instance in DENMARK numerous statutory provisions are of direct significance when it comes to determining culpa. The general doctrine of culpa is not permitted to negate the specific of legal regulations, for example Road Traffic Ordinance or Regulations pertaining to the Health and Safety of Workers (*von Eyben and Isager*, Lærebog i erstatningsret[5], 62; HD 26 June 1950, UfR 1950, 746). The damage actually suffered must be encompassed by the protective purpose of the rule (*von Eyben and Isager* loc. cit. 65; HD 12 December 1966, UfR 1967, 72). In addition, the contravention of an administrative order is qualified as a relevant factor for establishing *culpa* (Eastern CA 8 December 1988, UfR 1989, 353). Similarly in SWEDEN many statutory provisions are judged to be relevant for tort law, provided that the damage suffered is embraced by the protective purpose of the rule. The more precisely the direction to act is formulated, the less discretion is left for an independent determination of culpa according to the general tenets of culpa (*Hellner and Johansson*, Skadeståndsrätt[6], 125; HD 11 June 1976, NJA 1976, 379 [pedestrian on signposted cycle path]). Conversly, however, it is not enough to blindly adhere to certain statutory or administrative standards, namely a general duty of care may require in addition an appreciation of risk (HD 20 December 1977, NJA 1977, 788 und HD 5 November 1991, NJA 1991, 580).

Illustration 1 is similar to MvA II Inv., Parl. Gesch. VI, 1350-1351; **illustration 2** is taken from Swedish HD 14 August 1948, NJA 1948 no. 99 p. 489; **illustration 3** from *Roberts v. Ramsbottom* [1980] 1 WLR 823; **illustration 4** from BGH 3 December 1952, LM no. 1 zu WaldschutzVO**; illustration 8** from *Gorris v. Scott* (1873-74) LR 9 Ex. 125; **illustration 9** from CA Valencia 18 May 2004, BDA JUR 2005/13603 and **illustration 10** from Finnish Supreme Court 17 June 1981, HD 1981 II 84.

VI.–3:103: Persons under eighteen

(1) A person under eighteen years of age is accountable for causing legally relevant damage according to VI.–3:102 (Negligence) sub-paragraph (b) only in so far as that person does not exercise such care as could be expected from a reasonably careful person of the same age in the circumstances of the case.

(2) A person under seven years of age is not accountable for causing damage intentionally or negligently.

(3) However, paragraphs (1) and (2) do not apply to the extent that:

(a) the person suffering the damage cannot obtain reparation under this Book from another; and

(b) liability to make reparation would be equitable having regard to the financial means of the parties and all other circumstances of the case.

COMMENTS

A. The Article in overview

Matters covered. This Article deals with issues of intention and negligence on the part of persons under eighteen. The provision thus leaves all grounds of accountability in Chapter 3, Section 2 (Accountability without intention or negligence) unaffected. Those grounds do not hinge on intention or negligence. It is the objective criteria for accountability which are far more crucial under that Section; for the most part it turns on the liable person's capacity as a keeper of a thing or an animal.

Purpose. The purpose of paragraph (1) is to particularise the general standard of care in VI.–3:102 (Negligence) sub-paragraph (b) for children between seven and seventeen years of age. The provision relates to the personal liability of children in relation to third parties. The liability of parents for the misconduct of their children is the subject of VI.–3:104 (Accountability for damage caused by children or supervised persons). Paragraph (2) clarifies that children who have not yet attained their seventh year are in principle liable for neither intention nor negligence. Paragraph (3) provides a counter-exception for the case in which the relief for persons under eighteen provided for in paragraphs (1) and (2) would lead to unjust results, in particular in view of the financial circumstances of the parties involved.

Persons under eighteen. The Article does not use the expression "minor", rather speaking of persons under eighteen. The reason for this is that while persons who have attained the age of eighteen are indeed of full age everywhere in the EU, this proposition is not capable of being inverted. It may be, for example, that married persons attain the legal status of an adult before that age. They also benefit from paragraph (1).

B. Intention; violation of a statutory norm of conduct

Intention. Paragraph (1) provides clarification that this provision only involves the concretisation of the general duty of care in relation to minors. Thus, liability in negligence in the form of a violation of a statutory norm of conduct, as well as liability for intention, remain unaffected. Apart from paragraph (2) there is no special rule for the latter. Its definition in VI.–3:101 (Intention) is determined consistently by reference to "subjective" elements. For that reason the definition appears equally fitting in relation specifically to persons under eighteen. It is decisive that "intention" depends on the person who acted wanting to do exactly

what was done, rather than it being clear to him or her that their conduct would almost certainly inflict legally relevant damage on another. This will be often lacking in children in their early school years. Conduct which for adults would have to be readily qualified as intentional, can be merely negligent for young persons, whether because they could not clearly anticipate the danger due to lack of experience or because their desire to play relegated all other concerns to the background.

Illustration 1
In order to scare their detested neighbour, several ten-year-olds inform her in conscious knowledge of its falsity that her husband is severely injured in a traffic accident and is lying in hospital. Children of this age are not normally aware of the danger of severe mental harm. Therefore, they do not cause the damage to the neighbour's mental health intentionally

Illustration 2
Two children aged seven and ten throw stones at moving vehicles from a motorway bridge. The boys are not in a position to comprehend what they are doing; the tragic death of a driver, whose windscreen is smashed by one of the stones, was not intentionally caused by them. In contrast, in the case of an adult who throws stones at the windscreen of a moving car, there is usually *dolus eventualis* in respect of the driver's death.

VI.–3:102 (Negligence) sub-paragraph (a). Neither does the present Article lay down a special rule in respect of VI.–3:102 (Negligence) sub-paragraph (a) (failure to meet a statutory standard of care). This is because there is no need for such a rule. If a statute lays down a specific duty of care for a defined area of life (e.g. for road traffic), that standard must be met by everyone – including minors. Most of the standards of care stipulated by statute are in any case not directed at activities undertaken by young persons. In fact they typically pertain to working, business and professional life, and hence to matters which are not generally accessible to minors anyway.

C. The general standard of care for persons under eighteen (paragraph (1))

A group-specific standard of care. Paragraph (1) has the aim of assessing the conduct of children and juveniles aged seven to seventeen by only using a standard of care which takes into consideration their youth and thus their lesser experience compared with adults. A twelve-year-old girl need only behave as can be expected of a girl of this age in the circumstances and a fifteen-year-old boy, as may be expected from a boy of this age. The older children become, the more the care which can be expected of them approaches the care expected of adults.

Illustration 3
A 16-year-old boy, who grew up in the mountains, chooses a dangerous route for an excursion with a group of other minors, during which one of the party is severely injured due to the difficult terrain. The age and experience of the 16-year-old allow him to comprehend and foresee the danger to which he would expose others. Consequently the route planning was negligent.

Illustration 4
During their stay at a holiday camp, five youths aged between twelve and sixteen buy two bottles of caustic acid and a roll of cooking foil in the campsite shop in order to carry out an experiment with a bottle of Coke with the aim of causing an explosion. After the experiment, they hide one of the bottles containing the chemicals in a small house at the edge of the campsite, where it is found by smaller children aged below ten. One of them throws the bottle against the wall of the house, smashing it. Some of the fluid splashes in the eye of one of the small children involved, causing blindness. The two 12-year-olds, who had participated in the experiment, could neither anticipate the dangerousness of their actions nor withstand the influence of the older members of the group. The latter ought however to have reckoned with endangering younger children at the campsite. They are solidarily liable with the parents who breached their supervisory duty. In the internal relationship with the other solidarily liable parties, the liability of the 16-year-olds is however reduced to zero due to their very slight fault.

D. Children below the age of seven (paragraph (2))

No liability in principle for intentional or negligent infliction of damage. Paragraph (2) provides for an age limit whereby children under seven years of age are not accountable for causing damage intentionally or negligently. The provision opts for a normative proposition that, for the purposes of VI.–1:101 (Basic rule), children under seven years of age are not capable of causing damage either intentionally or negligently (although, from a purely factual point of view, the contrary notion may certainly be entertained). Hence, this involves neither a presumption of the incapacity to commit fault, which the claimant may rebut, nor a rule allowing children to prove that they do not yet have the ability to distinguish right from wrong. The provision cuts out all issues of this type. This appeared to be the most effective means of protecting children from premature liability. Such protection is indispensable in order to prevent minors from later entering adulthood with a burden of debt, which makes future considered life choices impossible. The age limit of seven years seemed realistic because the development of a true-to-life standard of care for children under this age is scarcely possible., This age restriction does not create a chasm in liability because, in the case of harm by small children, usually (if not always) the parents incur liability; see VI.–3:104 (Accountability for damage caused by children or supervised persons).

Strict liability remains unaffected. The liability of children due to one of the fact situations set out in Chapter 3, Section 2 (Accountability without intention or negligence) remains unaffected by VI.–3:103(2). Of course, children of this young age will rarely be the keepers of a dangerous animal or thing. They can however be the owners of a thing occasioning damage, e.g. a building.

E. Liability according to equity and fairness (paragraph (3))

Purpose of the rule. A significant aim of the rule in paragraph (2) is to safeguard children from premature financial burdens through liability for damage caused by them. However, in special, rather rare individual cases this purpose can be dropped for purely factual reasons. It can exceptionally turn out that a child (e.g. as a result of an early inheritance) is readily in a financial position to provide reparation for damage done, whereas the injured person may be in a position of financial difficulty and may be unable to bear the burden of the damage alone. In such a case equity and fairness demand reasonable reparation of the damage. Paragraph (3) adopts a legal idea which is to be found in many (but by no means all) European legal systems.

Situations covered. Liability according to equity and fairness represents a counter-weight to the rules of both the preceding paragraphs. It corrects where necessary not only the effect of paragraph (2) (children under seven years of age), but also the effect of paragraph (1) (age-specific standard of care). Therefore, there is also room for liability according to equity and fairness where an adolescent satisfies the standard of care for his or her age group, but did not behave as would have been expected of an adult under the circumstances. In practice, the second group of cases can even be more important than the first.

Subsidiarity of liability according to equity and fairness (sub-paragraph (a)). There is no room for personal liability of small children according to equity and fairness where the injured person can obtain damages by other means. This is again typically the case where parents or other persons who are obliged to supervise the child cannot prove that they reasonably performed their supervisory duty, see VI.–3:104 (Accountability for damage caused by children or supervised persons) paragraph (4). There are also other conceivable situations, e.g. where a six-year-old in collaboration with a 10-year-old, throws stones at windows, for which the 10-year-old is readily responsible under the law on liability. A third party's ability to pay reparation must of course always be taken into account along with the legal responsibility; where the ability to pay is lacking, then the injured person simply cannot "obtain reparation" from another. The third party must ultimately have been liable "under this Book". The issue of what influence existing insurance cover has on the liability according to equity and fairness is not a question of its subsidiarity, rather a question of its other requisites.

Liability to make reparation must be equitable (sub-paragraph (b)). What matters is an overall assessment of all the circumstances of the individual case, among which the financial circumstances of the parties (the child and the injured person, not infrequently also a child) are particularly significant, while not necessarily solely decisive. It will also be relevant whether e.g. there was "inherently" harmless infantile behaviour or deliberate harm. Another relevant factor is whether there was contributory fault on the part of the injured person, as this normally rules out a claim according to equity and fairness. The insurance cover of the parties involved is a factor in the assessment of their financial circumstances. Where the injured person is sufficiently insured through personal insurance cover, equity and fairness do not justify pursuit of the child; the child is also not liable to an uninsured injured person if the family indemnity insurance of the parents also encompasses their children – in this case, indemnification for the parents' liability according to equity and fairness. Ultimately, equity and fairness must also justify the reparation of the damage actually claimed. This justification may be absent, e.g. where, in cases in which major physical harm or injury to health is concerned, reparation of non-economic losses is also claimed.

VI.–5:301 (Mental incompetence). Children are not placed on the same level as mentally disabled adults. VI.–5:301 (Mental incompetence) is therefore, as a rule, of no relevance to infants. However, it is conceivable that an adolescent who suffers from a mental disability could rely on this provision. Such an adolescent has the same defences available as fellow sufferers who are adults.

NOTES

I. Personal Accountability of Persons under eighteen

1. In the interests of victim protection FRANCE subjects minors to a more rigorous regime of liability than that evinced by *VI.*–3:103. Since the Cass.ass.plén. 9 May 1984, JCP 1984, II, no. 20256 (two judgments with a note by *Jourdain)* the tort liability of minors does not depend on their ability to understand the wrongfulness of their acts. This capacity is not generally a prereqisite for tort liability. The relevant standard of care determinative in ascertaining a *faute*, is nonetheless as before lowered to take account of the age of the tortfeasor.(*le Tourneau*, Droit de la responsabilité et des contrats [2004/2005], no. 6707). The latter rule contradicts at least the policy direction exhibited in the above mentioned judgments of the Court of Cassation. However this rule was confirmed by the same court in Cass.civ. 7 March 1989, JCP 1990 éd. G, II, no. 21403, note *Dejean de la Bâtie* (see, illustration 3). Moreover, account should be taken of recent French case law which has developed a theory of strict liability for parents for damage caused by their children; with the result that only on rare occasions will the personal liability of children be determinative (cf. the Notes under VI.–3:104).

2. In contrast, in BELGIUM it is still the case that capacity is a prequisite for liability for *faute* under CC arts. 1382 and 1383. Children are regarded as having the capacity to commit fault only if they have reached an age when they can appreciate the distinction between good and evil, namely when they have attained the *jaren des onderscheids.* A child must appreciate what he or she is doing and must forsee the consequences of his or her actions. Whether a child has attained the "age of discernment" does not hinge on whether the child has reached a legally defined minimim age. This is a fact to be determined in each individual case, based on an assessment of the individual child and on the concrete circumstances of the case (*Vandenberghe/Van Quickenborne/Wynant/Debaene*, TPR 2000, 1551, 1688, no. 36).

3. No specific age is mentioned in the SPANISH Civil Code, after which a minor would be personally liable for tortious acts. Hence, the view is also taken that the applicable yardstick in each individual case is the determination of whether the minor can be held accountable for his or her acts (Reglero Campos [-*Gómez Calle*], Responsabilidad civil[3], 479). In more concrete terms this entails that the minor must be able to distinguish between good and evil and must appreciate what it means to cause damage to another (*Pantaleón Prieto*, CCJC 1983, 452; TS 27 January 2006, BDA RAJ 2006 no. 615). In general the liability of minors is subject to the general rules anchored in CC art. 1902. In particular, it is important to note that, therefore, the liability of minors is not displaced by parental liability (but another view is submitted by a number of academic commentators, e.g. *Yzquierdo Tolsada*, Sistema de responsabilidad civil, 230 and *Díez-Picazo and Gullón*, Sistema I[10], 229). The *Tribunal Supremo* approved this proposition on many occasions (e.g. TS 22 September 1992, RAJ 1992 [4] no. 7014 p. 9220; TS 30 December 1992, RAJ 1992 [5] no. 10565 p. 13807; TS 9 July 1998, RAJ 1998 [3] no. 5547 p. 8208 and TS 8 March 2002, RAJ 2002 [1] no. 1912 p. 3178). According to arts. 1(1) and 61(3) of Organic Law 5/2000 which pertains to the criminial responsibility of minors (*Ley Orgánica 5/2000, Reguladora de la Responsabilidad Penal de los Menores* of 12 January 2000) minors are criminally responsible and therefore also have capacity under civil law from the age of 14. As regards children under the age of 14, liability remains to be judged according to the precepts of the *Código Civil* (Act 5/2000, art. 3).

4. The ITALIAN CC also does not contain a provision which regulates the personal liability of children. The starting point for any examination for attributing liability for the act causing damage is first and foremost the question of capacity (CC art. 2046). If the defendant lacks capacity, then the court will proceed to examine whether a person charged with supervision is liable (CC art. 2047). On the other hand if a minor is found to have capacity, a concrete assessment for each individual child is required to be undertaken; liability is then subject to the general provisions of CC art. 2043. The court takes account of, *inter alia,* age, the physical and mental maturity of the child and all other circumstances relevant to his actions.(e.g. Cass. 19 November 1990, no. 11163, Giust.civ.Mass. 1990, fasc. 11). There is a concurrence of liability, namely that of personal liability of the minor and the liability of parents, guardians, teachers and tutors (CC art. 2048; Cass. 3 March 1995, no. 2463, Giust.civ.Mass. 1995, 513; Cass. 13 September 1996, no. 8263, Giust.civ.Mass. 1996, 1278); the former is an independent liability, not merely a subsidiary one (Cass. 1 August 1995, no. 8384, Giust.civ.Mass. 1995, 1455).

5. The HUNGARIAN Civil Code does not contain special provisions concerning the personal accountabilty of minors (defined in CC §12) nor does it contain special provisons pertaining to the liability of their parents. Therefore, they fall under the scope of CC § 347, which states that individuals lacking capacity are not liable for reparation. A person lacks capacity under CC § 347(1) first sentence, if he or she cannot appreciate the wrongfulness of his or her act or can do so only to a limited extent (see further Petrik [-*Wellmann*], Polgári jog II, 598, 603; *Ujváriné*, Felelősségtan[7], 124). This concept applies equally to persons evincing a mental impairment and to small children. A stipulated legal minimum age of responsibilty exists only under criminal law, not under civil law. However, a person who has attained the age of criminal responsiblity can also be held accountable for his acts under the civil law. *De facto* the courts appear to work mostly with an age limit of 12 in respect of children who have developed normally. However, it is important to note that here a fixed rule has not been laid down; divergences from the rule can be found in both directions (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1284). If a minor can understand the wrongfulness of his or her act, then, theoretically, it is not necessary to continue to differentiate according to age and type of fault. However, it appears that these factors are already taken into consideration in the examination of fault or capacity. For example, a nine year old boy ought to be liable for his actions if he intentionally breaks his neighbour's window pane, but he ought not to be liable when he does the same thing unintentionally when playing football (*Benedek* loc. cit. 1282). According to POLISH CC art. 426 a minor under thirteen years of age is not accountable for causing damage. He can be liable only on equitable grounds (CC art. 428). The accountability of minors over thirteen is controversial. Where the damage has been caused by a minor between thirteen and eighteen years of age, courts and some commentators consider that the plaintiff must prove the minor had obtained sufficient intellectual maturity to be reproachable for the negligence (SN 11 January 2001, OSPiKA 2002, poz. 2; *Czachórski*, Zobowiązania[10], 240). Others opt for a factual presumption of sufficient maturity in such cases, which can be rebutted by the minor (*Radwański and Olejniczak,* Zobowiązania - część ogólna[7], 196).

6. SLOVENIAN LOA art. 137(1) resembles VI.–3:103(2). According to LOA art. 137(2) "minors aged seven and over but under fourteen shall not be liable for damage, unless it is shown that they are capable of accounting for their actions when the damage was inflicted". Upon attaining the age of 14, minors are subject to the general provisions of tort law (LOA art. 137(3)). The proposed draft with a view to reforming the ROMANIAN Civil Code openly displays quite similar policy considerations;

however, it does not provide for a fixed minimum age limit of seven (CC-Draft art. 1105). In contrast, the CZECH and SLOVAK CC § 422(1) again forgo a fixed minimum age limit for the accountability of a minor under tort law. The decisive factor is merely whether he or she "was able to govern his or her conduct and consider its consequences".

7. Under the GERMAN CC § 828(1) children under seven years are not liable for damage caused by them. Furthermore, up to this age their conduct cannot be capable of amounting to contributory negligence justifying a reduction in the apportionment of damages (Palandt [-*Sprau*], BGB[66], § 828, no. 2). In respect of minors who have attained the age of seven but have yet to reach the age of 18, it is necessary to examine whether they had the capacity necessary to recognise that they are responsible for their acts (CC § 828(3)). In this case, the examination of intention and negligence must be kept strictly separate (CC § 276) (BGH 14 November 1978, NJW 1979, 864, 865). As regards the ascertainment of tortious responsibilty, it will depend on the particular minor's capacity to appreciate the dangerousness of his actions and his awareness that he is responsible for his action. However, according to case law, the individual's capacity for self-control, i.e. the ability to conduct oneself according to one's appreciation of the dangerousness of one's actions and in the awareness that one is responsible for one's actions, is not relevant (BGH 30 November 2004, NJW 2005, 354, 355). The minor has the burden of adducing evidence and proving the lack of appreciation of the wrongfulness of his acts (Erman [-*Schiemann*], BGB II[11], § 828, no. 6). The examination of negligence,- in contrast to the question of tortious capacity- will not depend on the ability of the particular minor to forsee the dangerousness of his actions and conduct himself so as to avoid the danger; the decisive factor is rather the capacity of a child of the same age and normal development (*Sprau* loc. cit no. 7). Children up to the age of ten years are exempt from liability for negligently caused motor vehicle or railway accidents on the basis of CC § 828(2). As a general rule children who have yet to attain this age are not able to recognise the specific dangers of vehicles on roads or specific dangers of rail traffic and therefore cannot behave accordingly (*Sprau* loc. cit. no. 3). The major significance of this provision in practice is that it also has the effect that minors up to this age are not guilty of contributory negligence. According to CC § 828(2)(ii) in the case of intentional conduct, liability remains governed by the provisions in CC § 828(3).

8. According to the AUSTRIAN CC § 1308 "minors", that is, persons who have not attained the age of 14 (CC § 21(2)) are generally not accountable for the damage that they cause. They may be accountable only under the rules relating to liability on the basis of equity and fairness (CC § 1310). Under GREEK CC art. 915 children, once they reach the age of ten, can be liable in tort. Only once the age of ten is reached are they viewed as possessing the necessary intellectual maturity in order to comprehend the significance of their actions (Georgiades and Stathopoulos [-*Georgiades*], art. 916, no. 1). Juveniles who have reached the age of ten, but who have yet to reach the age of fourteen, are liable under the general tort law provisions unless in exceptional cases they lack the capacity to appreciate the wrongfulness of their act (CC art. 917). It is debatable whether the ability to appeciate the wrongfulness of one's actions also requires knowledge in order to be liable in damages (answered in the negative by *Georgiades* loc. cit. art. 917, no. 4; answered in the affirmative *Filios*, Enochiko Dikaio II(2)[4], 48; CA Athens 2494/1978, NoB 26 [1978] 387). The lack of a pre-existing capacity to appreciate the wrongfulness of one's actions and the ability to conduct oneself accordingly ought to not to preclude tortious responsibilty but should exclude the existence of negligence (*Georgiades* loc. cit. no. 5).

9. PORTUGUESE CC art. 488(1) exempts from liability, individuals who lack the capacity to appreciate the wrongfulness of their act and persons who lack the ability to control themselves at the time of the unlawful act (see further *Antunes Varela*, Obrigações em geral I[10], 563; *Vaz Serra*, BolMinJus 68 (1957), 13, 89). In respect of children who have yet to attain the age of seven (CC art. 350(2)), there is a rebuttable presumption that they are not responsible for their tortious acts (CC art. 488(2)). Once they have reached this age, the presumption is inverted and the onus of proof rests on the child (*Antunes Varela* loc. cit.; *Pessoa Jorge*, Ensaio sobre os pressupostos da responsabilidade civil, 332; *Neto*, Código Civil Anotado[14], 540).

10. According to DUTCH CC art. 6:164 once the age of fourteen is reached, a minor can be held accountable for unlawful acts. This rule is tenable on policy grounds given that it is supplemented by a provision which provides that parents can be held strictly liable for the tortious acts of children who have yet to reach the age of fourteen (CC art. 6:169(1)). Another factor which led to the fixing of the age of fourteen was the insurability of the risk of damage to a third party caused by children (Parlementaire Geschiedenis VI, 645, 652, 678; Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 84 p. 93). Children who have attained the age of 14 are subject to the general provisions contained in CC art. 6:162(3). In principle, mental impairment or physical disability are not grounds of defence (CC art. 6:165). However the required standard of care is defined by reference to age, Where liability depends on knowledge of particular circumstances, unlawfulness may not be established owing to the defendant's young age, if this knowledge could not have been expected from a juvenile. CC art. 6:164 does not exempt a child from strict liability; the child is responsible for causing a certain source of danger under CC arts. 6:169-184, i.e. liability is not excluded when the child is in possession of a moveable thing, (CC art. 6:173), a building or other construction (CC art. 6:174) or an animal (CC art. 6:179) which causes damage. This conclusion is derived from CC art. 6:183(1). However, CC art. 6:183(2) immediately adds that the parent or guardian of a child who has not reached the age of fourteen, is liable in the place of the child for damage caused by the thing or animal, (CC arts. 6:173 and 6:179 unless they were used in the course of carrying on a business (see further *Hartkamp* loc. cit. no. 85 p. 94).

11. The prevailing legal position in ESTONIA corresponds to that of the Netherlands. According to the law pertaining to liability, responsibility for unlawful acts can be attributed once the age of fourteen is attained. LOA § 1052(1)). A similar situation prevails also in LITHUANIA (CC arts. 6.275 and 6.276). For minors who have reached the age of fourteen, the age of the wrongdoer is taken into account when ascertaining the required standard of care (LOA art. 1050(2)).

12. SWEDISH Damages Act chap. 2 § 4 provides that, a person who, prior to reaching the age of eighteen, causes damage to a person or thing, causes pure economic loss or pain and suffering, only has to pay damages to the extent that this is reasonable. The criterion of reasonableness is determined by an examination of a range of factors. These factors include the age and maturity of the minor, the nature of his actions alongside a consideration of the individual's economic circumstances especially a consideration of whether the individual is covered by liability insurance. There is no fixed minimum age limit either generally or under current insurance policies (*Hellner and Johansson*, Skadeståndsrätt[6], 265). However, HD 3 February 1977, NJA 1977, 186 rejected a claim against a child who was three years and two months old on the grounds that it was not yet possible to speak of fault in a child of this age. There is a dearth of more recent case law on the personal liability of minors. It appears that the problem is largely disposed of via the rules pertaining to parental liability and insurance coverage. The FINNISH Damages Act chap. 2 § 2 largely corresponds to

the Swedish provisions but it does not contain any reference to existing liability insurance. In the Supreme Court 12 February 1991, HD 1991:73 damages were awarded against a fifteen year old girl who encouraged her boyfriend of the same age to set fire to a rubbish bin, which led to a building catching fire. The DANISH Damages Act § 24a permits the court to reduce damages on equitable grounds in favour of minors who have yet to attain the age of fifteen. The existence of insurance coverage is a factor relevant to the assessment of whether an equity to reduce damages exists. The Damages Liability Act § 24a only concerns liability for fault and has no relevance for strict liability (*Møller and Wiisbye*, Erstatningsansvarsloven[6], 486), § 24 of the Damages Liability Act provides that damages can be reduced in a case of strict liability (*Møller and Wiisbye* loc. cit. 502, 517). For the remainder the principle applies that, being below the age of eighteen does not make an individual, as a rule, immune from liability; age will ,however, be taken into account when it comes to assessing the standard of required care in the circumstances of the case (*von Eyben and Isager*, Lærebog i erstatningsret[5], 89). The courts have, on many occasions, awarded damages against four and five year olds (see for sources *von Eyben and Isager* loc. cit. 93). The Insurance Contract Act (*Forsikringsaftaleloven*) is of practical importance in this regard. According to § 19(1), liability insurance also guarantees coverage for damage which was intentionally caused by children under the age of eighteen (see further *Møller and Wiisbye* loc. cit. 515). SWEDEN and FINLAND have the same provision regarding children who have yet to attain the age of twelve, (Insurance Contracts Act chap. 4 § 9(1)(ii) and in FINLAND Insurance Contract Act § 36).

13. According to CYPRUS Civil Wrongs Law s. 9 “no action shall be brought against any person in respect of any civil wrong committed by such person when such person was under the age of twelve years.” Civil Wrongs Law s. 8 enacts the following rule derived from the case of *Jennings v. Rundall* (1799) 8 TR 335, 101 ER 1419 (see *I13* above) that a person under the age of eighteen years may, subject to the provisions of s. 9 of this Law, be sued in respect of a civil wrong, provided that no action shall be brought when such wrong arises directly or indirectly out of any contract entered into by such person. Under MALTESE CC art. 1035 minors under the age of nine are exempt from liability und children who have yet to attain the age of 14 are only liable for their acts in tort law if they “have acted with a mischievous discretion”.

II. Billigkeitshaftung

14. FRANCE, SPAIN and LUXEMBURG do not recognise liability based on equity and fairness. BELGIAN CC art. 1386*bis* envisages such liability only for persons with a mental impairment (irrespective of age), and not for children or young adults of normal development. In contrast, in all essential points the MALTESE CC art. 1036 resembles the situation contemplated by VI.–3:103(3).

15. ITALIAN CC art. 2047(2) provides that the court can award compensation as deemed appropriate in the circumstances, against a child to whom liability can not yet be attributed on account of age, upon consideration of the financial means of the injured person. However, in order to award compensation, it must not be possible to obtain compensation from the person whose duty it was to supervise the child. In end effect it involves in the same manner as VI.–3:103(3) a liability which is subsidiary. Within this framework the court not only has to decide whether compensation should be awarded but must also determine the measure of compensation according to equitable discretion (CFI Macerata 20 May 1986, Foro it. 1986, I, 2594).

16. This corresponds to the legal position under the HUNGARIAN CC § 347(2). A wrongdoer who cannot generally be held responsible for tortious acts, is exceptionally

liable in whole or in part according to judicial discretion, if this is clearly necessary in the circumstances of the case and upon consideration of the financial means of the parties involved. Here, it must also be proven that the wrongdoer either does not have a supervisor at all or that the responsibilty of the person whose duty it was to supervise the child for the ensuing damage cannot be established. Under POLISH CC art. 428, where a person is not accountable for the inflicted damage due to their minority or mental or physical state, and either there are no persons obliged to supervise the person or they are not able to make good the damage, the injured person may claim reparation in whole or in part from the person who caused the damage if this is equitable in the circumstances of the case, in particular having regard to the parties' financial means.

17. The GERMAN CC § 829, AUSTRIAN CC § 1310, PORTUGUESE CC art. 489, ESTONIAN LOA § 1052(3) and GREEK CC art. 918 resemble on all essential points VI.–3:103(3). The liability of a child on the basis of fairness and equity in Greece is predicated on the absence of another means of compensating the party who has suffered loss. Insurance policies are taken account of in the assessment of whether there is another method of compensating the claimant (Georgiades and Stathopoulos [-*Georgiades*], art. 918, no. 11). In assessing whether there are equitable grounds to award compensation, the economic means of the parties is not the only focus: the gravity and permanence of the injury, the contributory negligence of the injured party and the intellectual development of the wrongdoer are all taken into account (*Georgiades* loc. cit. no. 16). The court can award full or partial compensation against a wrongdoer; moreover, it can judge the claimant not liable to make reparation (*Georgiades* loc. cit. 918, no.19).

18. In the NORDIC Countries provisions which reduce damages as outlined above in I12 fulfill a comparable function. The Common Law in ENGLAND und IRELAND sas well as SCOTTISH Law does not recognise liability on the basis of fairness and equity.

19. See generally *von Bar*, FS Egon Lorenz, 73-93.

Illustration 1 is based on *Wilkinson v. Downton* [1897] 2 QB 57; **illustration 2** is taken from TS 27 January 2006, BDA RAJ 2006 no. 615 (cf. also, in regard to adults, *R. v. Hancock & Shankland* [1986] AC 455)**; illustration 3** inspired by Cass.civ. 7 March 1989, JCP 1990 éd. G, II, no. 21403, note *Dejean de la Bâtie* and **illustration 4** from TS 8 March 2006, RAJ 2006 (1) no. 1076 p. 2795.

VI.–3:104: Accountability for damage caused by children or supervised persons

(1) Parents or other persons obliged by law to provide parental care for a person under fourteen years of age are accountable for the causation of legally relevant damage where that person under age caused the damage by conduct that would constitute intentional or negligent conduct if it were the conduct of an adult.

(2) An institution or other body obliged to supervise a person is accountable for the causation of legally relevant damage suffered by a third party when:

(a) the damage is personal injury, loss within VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death) or property damage;

(b) the person whom the institution or other body is obliged to supervise caused that damage intentionally or negligently or, in the case of a person under eighteen, by conduct that would constitute intention or negligence if it were the conduct of an adult; and

(c) the person whom the institution or other body is obliged to supervise is a person likely to cause damage of that type.

(3) However, a person is not accountable under this Article for the causation of damage if that person shows that there was no defective supervision of the person causing the damage.

COMMENTS

A. General

Subject matter of the rule in VI.–3:104. While VI.–3:103 (Persons under eighteen) relates to the personal liability of minors, the subject matter of the present Article is liability of persons (natural and legal) who are obliged by law to provide parental care. It concerns not only liability for damage caused by persons under eighteen, but also, in paragraph (2), liability for damage caused by certain adults. Paragraph (1) regulates the liability of parents (and others subject to a duty to provide parental care) for harm caused by children who have not yet attained the age of fourteen (The present Article does not contain a specific provision for damage caused by older children; to this extent such damage remains within the general rule in VI.–3:102 (Negligence)). Paragraph (2) of the present Article provides a rule of liability for institutions inhabited by persons (under or over eighteen) who might inflict personal injury or property damage on third parties if unsupervised. Issues of personal liability of mentally disabled persons are specifically addressed in VI.–5:301 (Mental incompetence).

The regime of liability. Under paragraph (1) of the present Article persons who are obliged by law to provide parental care for a child under fourteen years of age have the liability for damage caused by the child which would have been imposed on the child, had the child already attained the age of eighteen when the harm was occasioned. Paragraph (2) contains a similar rule for cases where persons requiring supervision cause legally relevant damage to a third party, for which damage they are responsible under the general rules or, in so far as youths are involved, would have been responsible had they been subject to assessment under the standard of care for adults. Paragraph (3) clarifies that in both cases the ground of liability is insufficient supervision. Therefore, the person under the supervisory obligation has the opportunity to provide evidence proving that reasonable supervision was carried out in relation to the person causing the damage.

No strict liability. From this and from the very positioning of VI.–3:104 in the Section 1 (Intention and negligence) of the this Chapter, it follows that these rules do not propose the imposition of strict liability on parents: having children is not a sufficient basis of liability. The protection of the family under fundamental rights prohibits socialising the advantages brought by children with one hand and individualising the disadvantages with the other. The basis of parental liability lies in that most primary right and resulting duty to take care of and supervise the child. Where the child occasions harm to a third party, then the presumption of failure to supervise takes hold. As a result the parents are obliged in such a case to present and prove that in spite of the damage, they satisfied their supervisory duty.

B. Liability for children under fourteen (paragraph (1))

The risk covered by liability. The point of liability for parents is that they carry the risk (but *only* that risk) which arises out of the circumstance that children are unable to muster the maturity and care of an adult. Such liability therefore presupposes conduct on the part of the child which, assessed according to the standards of a careful adult, amounts to negligence. Whether the child was in fact personally capable of recognising the harmfulness or at any rate the perilousness of his or her behaviour plays no role. Conversely, the mere fact that the child occasions legally relevant damage to a third party does not suffice. Where liability would not be imposed on an adult who, in the position of the child, would have done exactly as the child did, then the child's conduct does not trigger any parental liability.

> *Illustration 1*
> Children are playing in a sandpit. A boy throws sand into a playmate's face. This results in an eye injury. The boy may well not have been at all conscious of the dangerousness of his act, but it nonetheless leads to parental liability. This is because an adult acting in the same manner as the child would naturally have been liable.

> *Illustration 2*
> A holiday resort organises a water polo match for children in a designated children's swimming pool. A mother comes to the edge of the pool to take a photograph. A ball volleyed by a player hits the camera which is knocked into the water. Playing water polo in the pool was permitted; an adult exercising reasonable care would have behaved no differently from the children in the pool. Consequently, no parental liability arises. The further question of contributory negligence on the part of the mother does not come into issue.

Various age brackets. Paragraph (1) of this Article relates to harm by children under fourteen years of age. The age bracket in VI.–3:103 (Persons under eighteen) paragraph (2) (attainment of the age of seven) plays no role here. It is also irrelevant for the purposes of paragraph (1) whether the damage was caused by a child capable of comprehending the consequences of actions or one who is still incapable of such comprehension. In fact what is consistently crucial is only that the child, gauged using the standards of an adult, caused the damage negligently or in any way intentionally. The possible strict liability of a minor does not trigger parental liability. For children who have attained the age of fourteen, the injured person will again have to provide evidence of a breach of supervisory duty. Whether parents in this phase of life are in turn subject to a supervisory duty will for the most part depend on the applicable family law. Under the general rules parents can also be subject to a supervisory duty in relation to adult offspring who are still living with them.

Persons liable. Liability under paragraph (1) affects "parents or other persons obliged by law to provide parental care". Thus, in so far as only the two parents are entitled to parental care it makes no difference whether the child lives in the shared family household or grows up with one of the parents, or whether the parent claimed against is responsible for taking care of the household duties or pursues gainful employment. On whom the parental care and with it the supervisory duty rests in the case of broken families or unmarried parents, is decided by relevant applicable family law. "Other persons obliged by law to provide parental care" are, for instance, guardians and adoptive parents. On the other hand, stepparents remain under VI.–3:102 (Negligence), in so far as nothing different results from the applicable family law. Babysitters, nannies or childminders who take care of the child on a contractual basis do not fall under VI.–3:104(1). Of course, occasional temporary helps (neighbourly help, grandparents, etc.) are not obliged "by law", "to provide parental care".

Relationship to VI.–3:103 (Persons under eighteen). In principle, the liability under the present Article operates independently of the liability of a child under VI.–3:103 (Persons under eighteen). Where the requisites of liability of both Articles are fulfilled, the child and parents are in principle solidarily liable (VI.–6:105 (Solidary liability)). In their relationship to each other, liability usually of course solely rests with the parents.

Children as victims. If children are harmed by third parties, they must indeed live with their claim being reduced for personal contributory fault under the criteria in VI.–5:102 (Contributory fault and accountability), not however for a contributory supervisory failure on the part of their parents. This follows from an *argumentum e contrario* to VI.–5:102 (Contributory fault and accountability) paragraph (3), which refers exclusively to VI.–3:201 (Accountability caused by employees and representatives), not, however to VI.–3:104. Where children are harmed though a failure to supervise on the part of their parents or others subject to the supervisory duty, the claim to reparation follows the general rules or, to the extent that they are more beneficial, the rules of applicable family or contract law. If children are the victim of the actions of a third party as well as a breach of duty of their own parents, then the third party and parents are solidarily liable to the child.

C. Liability of institutions (paragraph (2))

Policy considerations. Paragraph (2) provides for liability of institutions and other bodies, which are under a duty to supervise persons who are a danger to third parties. The provision mirrors a legal situation which is to be found in a similar or at least comparable way in many of the Member States' legal orders. Whether the persons to be supervised are under or over age makes no fundamental difference. What is far more crucial is that the institution concentrates in one area persons who require particular control. This heightened potential for danger justifies the rebuttable presumption of defective supervision in case of harm (see paragraph (3)). However, it seems appropriate to limit liability to corporeal damage, that is to say, personal injury and property damage (paragraph (2)(a)).

The duty to supervise. The duty to supervise covered here has its legal basis in the general rules on liability for omissions. It can also therefore follow from specific statutory regulations, have its basis in a contract or quite simply result from the fact that the institution, through its assembly of persons with certain problems, has created a particular source of danger which must be kept under control according to VI.–3:102 (Negligence).

Institution or body. These rules do "not govern the liability of a person or body arising from the exercise or omission to exercise public law functions" (VI.–7:103 (Public law functions and court proceedings)). Therefore, e.g. prisons from which criminals escape do not fall under paragraph (2); the same goes for State hospitals or similar institutions catering for those who would have been convicted of a crime but for mental incapacity. Also damage caused by juvenile delinquents who have escaped from a public institution (so-called "borstal boys") does not fall under paragraph (2) because of the effect of VI.–7:103 (Public law functions and court proceedings). Examples of the operation of paragraph (2) are provided by private playschools and private schools and boarding schools, old peoples' homes in relation to demented inmates and psychiatric clinics with severely ill private patients.

Persons likely to cause personal injury or property damage. Persons of whom it ought to be assumed that they are likely to injure others or cause property damage if they are not supervised need not have criminal proclivities of any kind. The examples given in the previous paragraph themselves show that the issue may arise in relation to persons who are ill or children and youths who lose their inhibition to harm others when they are in a group.

Illustration 3
A depressive hospital patient jumps out of an upper storey window in order to commit suicide. He brings a pedestrian with him to the grave. The hospital is liable to the pedestrian's survivors to the extent that it cannot prove that it properly supervised the patient.

Illustration 4
A man accommodated in a public institution for the mentally disabled sets the forest of a married couple (C) alight while unsupervised on day release. The institution is responsible for the fire damage under VI.–3:104(2).

Requisites personal to the direct injurer. As with paragraph (1), in the framework of paragraph (2) the conduct in question must be such that it would be qualified as intentional or negligent were it the conduct of an adult of sound mind. A possible incapacity to comprehend the nature of one's actions on the part of the person directly causative of the damage is irrelevant to this extent (cf. VI.–5:301 (Mental incompetence)). In fact, such persons require particularly special supervision.

D. Defective supervision (paragraph (3))

General. In relation to both paragraph (1) and paragraph (2), it is open to the potentially liable person to prove that the damage sustained by the third party was not the consequence of defective supervision of the person causing it. The concept of "defective supervision" set out here draws on the notion of what is "defective" invoked by the Product Liability Directive (cf. VI.–3:204 (Accountability for damage caused by defective products) paragraphs (1) and (7)) and thus takes as its basis an objectified and - in comparison with VI.–3:102 (Negligence) - higher standard. It hinges on the fact that the person who was the immediate cause of the damage was inadequately supervised. It does not depend on whether this inadequate supervision was a breach of an obligation or could have been prevented by a reasonable and prudent person in the circumstances. A child who manages to wander off from its parents' premises or play school when the parents' or teacher's attention is absorbed by more pressing problems with other children is nonetheless defectively supervised.

Illustration 5
An infant succeeds in leaving the premises of a play school for reasons later inexplicable. She walks out on to the road, where a driver manages to prevent a collision but suffers severe injury himself because he steers his car into a roadside ditch in order to save the child. The play school is liable to the driver. In contrast, the parents of the child are not liable under VI.–3:104(1) since they did not breach their supervisory duty, even using the yardstick of an objective standard. *Vis à vis* the parents, only a claim under V.–3:103 (Right to reparation) comes into the picture.

Supervision of children. With regard to the supervision of children, for the same reason, it makes no difference which parent was responsible for the defective supervision in the concrete case. To this extent, it only depends on the result – inadequate supervision of the child. If the father goes to the zoo with the child, the mother who stays at home is just as liable, and it is the same in the reverse situation of the father sitting in his office when the mother inadequately supervises the child. However, where supervision on the part of both persons entitled to custody is factually impossible (e.g. because the child lives in a boarding school far away), paragraph (3) opens up to both the possibility of being discharged of liability. It does not come down to a parental failure.

Supervision of high-risk groups. Matters are dealt with correspondingly for the case of the supervision of high-risk groups in permanent or temporary accommodation. The injured person is not obliged to single out individual employees or clarify the circumstances which led to the accident. It is sufficient that a person requiring supervision remained unsupervised and caused the damage while supposed to be under supervision.

NOTES

I. Liability of the individual who is required to exercise parental care

1. According to the FRENCH CC art. 1384(4) (as slightly modified by the Law of 4 March 2002) and (7) the predominant view for a long period of time was that, as regards liability of parents for harm caused by a minor, a twofold *présomption de faute* existed which could be rebutted; it was presumed that the child was either badly brought up or badly supervised (*Flour/Aubert/Savaux*, Le fait juridique[11], no. 193 p. 195). Since the decision of the Cass.civ. 19 February 1997, Bull.civ. 1997, II, no. 56 p. 32 (*arrêt Bertrand*) it is now accepted that parents are only relieved from liability upon proof of *force majeure* or a *faute de la victime*. In essence, for liability of the parent to be affirmed, four prequisites have to be fulfilled, namely (i) the existence of parental authority (*autorité parentale*), (ii) the fact that the child is a minor (iii) that the child is living with the parent(s) (*cohabitation*) and (iv) the *fait causal*, namely, that the child caused the damage. The concept of *cohabitation* is given a very broad interpretation, see for instance, Cass.crim. 8 February 2005, JCP 2005, II, no. 10049 (13 year old child had lived with his grandparents from the age of one; this was nonetheless regarded as *cohabitation* with his parents). Since Cass.ass.plén. 13 December 2002, Bull.ass.plén. 2002, no. 4 p. 7 (two decisions), it is moreover accepted that the liability of parents is not based on the *faute* of the child. The conclusion drawn is that the fact that the damage was directly caused by the child suffices, even if no mistake on his part occured (similarly Cass.civ. 10 May 2001, Bull.civ. 2001, II, no. 96 p. 64). This parental liability is ancillary to the personal

liability of the child; it does not replace it (*Flour/Aubert/Savaux* loc. cit. no. 198 p. 203). Given the very strict regime operating in respect of the liability of parents the Court of Cassation suggested in its end of year report for 2002 that to avoid the prospect that the parents do not have liability insurance the legislator should either make insurance mandatory for parents or set up a guarantee fund. At the time of writing, the legislator has not yet reacted to these calls.

2. A less harsh liability regime operates under BELGIAN law. Liability arising under CC art. 1384(2) is based on a rebuttable presumption (CC art. 1384(5)), that there has been a dereliction of parental or supervisory duty (Cass. 28 September 1989, Pas. belge 1990, I, no. 63 p. 117). The parents must adduce evidence to exonerate themselves on both fronts (Cass. 23 February 1989, Pas. belge 1989, I, no. 356 p. 649), even where, at the time, the child was under the supervision of another individual(s) or institution, for example, if the child was in school (Cass. 23 February 1989 loc. cit.;for a different view Cass. 22 September 1978, Pas. belge 1979, I, 108). Cass. 20 October 1999, Pas. belge 1999, no. 549 p. 1360 regarded CC art. 1384(2) not merely as a *présomption de faute*, but qualified it as a *présomption de responsabilité*. This entails that there is a rebuttable presumption that the damage was caused due to the fault of the parents (Tilleman and Claeys [-*Fagnart*], Buitencontractuele aansprakelijkheid, 172, 200). Even when the minor is incapable of fault, he or she must commit *un acte objectivement illicite*. This means that the minor must have done something which would constitute fault in an adult of sound mind (*Fagnart* loc. cit. 199). The liability of the parents is additional to the personal liability of the minor (compare the case of minors with a mental impairment and the relationship to CC art. 1386*bis* Cass. 18 October 1990, Pas. belge 1991, I, no. 90 p. 171).

3. In SPAIN a distinction is drawn between the regime of the *Código Civil* and the rules on damages anchored in the Criminal Code and in more specific statutes pertaining to criminal law (especially the Organic Law on the criminal responsibility of minors [*Ley Orgánica 5/2000, Reguladora de la Responsabilidad Penal de los Menores*] of 12 January 2000, in force since 13 January 2001). Liability for damage which is caused by non-criminal acts of minors is dealt with under the laws pertaining to liability of parents and guardians under CC art. 1903. The basis for liability, according to this provision, is a presumed dereliction of parental or supervisory duty (a *culpa in vigilando* or *educando*), see e.g. TS 24 March 1979, RAJ 1979 (1) no. 919 p. 741; TS 11 March 2000, RAJ 2000 (1) no. 1520 p. 2368; TS 8 March 2002, RAJ 2002 (1) no. 1912 p. 3178 and TS 13 September 2002, RAJ 2002 (5) no. 8828 p. 16172. According to prevailing legal opinion CC art. 1903 is not a strict liability provision, owing to the fact that the parents can exonerate themselves from liability upon proof that they acted with all due care to avoid the harm caused by the child (*Díaz Alabart*, ADC 1987, 795, 803, 819; *Gómez Calle*, Responsabilidad de padres y centros docentes [3]. 1234, 1237). In practice, this transpires to be a purely theroetical possibility, given that the courts have glossed the Code, no longer accept such proof of exculpation and state that CC art. 1903 concerns a quasi strict liability (TS 17 June 1980, RAJ 1980 (1) no. 2409 p. 1874; TS 10 March 1983, RAJ 1983 (1) no. 1469 p. 1128; TS 22 September 1984, RAJ 1984 (2) no. 4332 p. 3326). In more recent times CC art. 1903 has been openly classed by the *Tribunal Supremo* as a case of where liability is based on risk (TS 22 January 1991, RAJ 1991 (1) no. 304 p. 333; TS 7 January 1992, RAJ 1992 (1) no. 149 p. 174; TS 30 June 1996, RAJ 1996 (3) no. 5272 p. 7064; TS 28 July 1997, RAJ 1997 (3) no. 5810 p. 8942; TS 11 March 2000, RAJ 2000 (1) no. 1520 p. 2368; for criticism see *Gómez Calle* loc. cit. 1236). The liability of parents has been –sporadically- qualified as subsidiary to the personal liability of the minor (confirmed by TS 24 May 1947, RAJ 1947 nos. 631 and 631*bis* p. 407; see also TS 22 January 1991, RAJ 1991

(1) no. 304 p. 333). However this view does not correspond to current understanding (*Gómez Calle* loc. cit. 1049, 1238; *Díaz Alabart* loc. cit. 876; *Roca i Trias*, Derecho de daños[3], 94); parents and children are solidarily liable (TS 14 April 1977, RAJ 1977 (1) no. 1654 p. 1230; TS 30 December 1992, RAJ 1992 (5) no. 10565 p. 13807; TS 28 July 1997, RAJ 1997 (3) no. 5810 p. 8942; TS 8 March 2002, RAJ 2002 (1) no. 1912 p. 3178). In general, similar to VI.–3:104, the liability of parents depends on the child acting in such a manner, that if an adult had been found to be acting in that way, the conduct would at least constitute negligence (*Gómez Calle* loc. cit. 1239; see also TS 10 June 1983, RAJ 1983 (2) no. 3517 p. 2738 and TS 4 May 1984, RAJ 1984 (2) no. 2396 p. 1792). The defendant must furthermore have parental authority, but they do not have to live with the child (*Gómez Calle* loc. cit. 1242).

4. Where the act commited by the minor amounts to a criminal act, resort is had to the Spanish Criminal Code and the abovementioned Organic 5/2000 pertaining to the criminal responsibility of the minor. Minors who have yet to attain the age of fourteen cannot be held criminally liable. They are instead subject to the rules relating to liability of parents under CC art. 1903. In respect to minors who have attained the age of fourteen, Organic Law 5/2000 art. 61(2) provides that, they are (in the following order) "solidarily liable with their parents, guardians, foster parents or persons charged with legal supervision or who as a matter of fact have them in their supervisory care" for the damage which results from the criminal act. If the named individuals do not promote the conduct of the minor either intentionally or in a grossly negligent manner, the court can decide "to reduce responsibility". Liability is strict (loc. cit. art. 61(3)), Therefore, it arises independent of any existence of *culpa in vigilando* or *educando* (*Gómez Calle* loc. cit. 1266; *Durany Pich*, FS Díez-Picazo II, 1749, 1762; CA Asturias 19 June 2003, BDA JUR 2003/184176; CA Asturias 6 May 2004, BDA JUR 2004/259497, CA Asturias 24 February 2005, BDA JUR 2005/90985; CA Asturias 4 March 2005, BDA JUR 2005/90490; CA Lleida 11 March 2002, BDA JUR 2002/118814; CA Jaén 28 November 2002, BDA JUR 2003/14953; CA Sevilla 3 June 2004, BDA JUR 2004/216620; CA Badajoz 25 January 2005, BDA AC 2005/333). The injured person can also bring a civil action against the parents before a judge of the children's court with jurisdiction to hear the criminal matter.

5. ITALIAN CC art. 2048 establishes direct liability of the parents and other persons charged with supervision of the child, if they fail to prove that they could not have hindered the conduct of the child which led to the damaging event (CC art. 2048(3)). The ground of liability is usually declared to be a presumed fault in relation to the parental and/or supervisory duty (Cass. 29 May 2001, no. 7270, Nouva giur. civ. comm. 2002, II, 326; Cass. 10 July 1998, no. 6741, Giust.civ. 1998, I, 1809; *de Cupis*, Il danno II[3], 134-137; *Alpa*, Trattato di diritto civile IV, 672-673), for which the yardstick is an upbringing which would, as a general rule, enable an individual to conduct himself correctly when socially interacting with others (Cass. 11 August 1997, no. 7459, Danno e resp. 1998, 251; *Alpa* loc. cit. 672). In order to establish liability it must be shown the child's conduct if committed by an adult, would fulfill all conditions to establish liability (Cass. 26 June 2001, no. 8740, Foro it. 2001, I, 3098).

6. HUNGARIAN CC § 347 employs the wide ranging concept of the "curator", a term which encompasses the parents as well as other individuals entrusted with the supervision of the child. The liability of the curator is imposed in place of liability of persons who are incapable of appreciating the wrongfulness of their acts (CC § 347(1)(ii)) while the curator is solidarily liable with the minor who is liable on the grounds that he has sufficient capacity to appreciate the wrongfulness of his acts (CC § 347(4)). In the former case, liability is based on a rebuttable presumption of fault,

while in the second case the fault as to the defective supervision requires positive proof (BH 1995/214). The defective suprevision is manifested by a failure to supervise adequately and can also be attributed to an inadequate upbringing (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1286-1287, 1290; Petrik [-*Wellmann*], Polgári jog II[2], 600; BH 1980/129). A curator is defined as a person who as a matter of fact supervises the individual and is in a position to control and guide their behaviour or who is obliged to control and direct their behaviour as the case may be. Normally, parents with whom the child shares a household, are curators. If the parents do not live together, the curator is the parent with whom the child actually resides or who supervises it. Curators are, moreover, the child's guardian and all persons (relations, friends) or institutions (Kindergarten, schools and hospitals) who merely temporarily and factually take on the supervision of the child. Depending on circumtances this may not impact on the qualification of the parents as curators. Schools and parents are solidarily liable, when, for example, the child causes damage at school and the cause for this lay in the lack of supervision or a failure of the parents to ensure proper upbringing. Natural persons, who have the task of supervising a child as part of their conditions of employment, e.g teachers, nurses, tutors, social welfare workers and trained educational staff are not curators. Here, only the curator is the employer (*Benedek* loc. cit. 1285-1287; *Wellmann* loc. cit. 599).

7. Under CZECH and SLOVAK CC § 422 persons with a duty to supervise are liable; this liability is based on a rebuttable persumption of fault. The liability is solidary if the child is adjudged to be personally liable. According to POLISH CC art. 427, someone who is bound under a statutory duty (such as a parent, teacher, or doctor in a psychiatric institution) or a contractual obligation (e.g. a babysitter) to supervise another, who is not reproachable for fault due to their age or mental or physical state, is accountable for the damage caused by that person, unless he or she had discharged the duty of supervision or the damage would have been occasioned notwithstanding due supervision. The rule applies also to persons who without any statutory or contractual obligation in fact permanently exercise supervision over such persons (e.g. relatives or neighbours). It in effect introduces a rebuttable presumption of *culpa in custodiendo* as well as a rebuttable presumption of the causal link between improper supervision and the damage (*Radwański and Olejniczak,* Zobowiązania - część ogólna[7], 203; *Czachórski,* Zobowiązania[10], 253). It is now widely recognised that *culpa in custodiendo* must consist of specific acts or omissions and may not be inferred solely from the general social maladjustment of a child (*Radwański and Olejniczak* loc. cit.) in the form of a general educational neglect (*Czachórski* loc. cit.; Pietrzykowski [-*Safjan*], Kodeks cywilny I[4], art. 427 p. 1208). The application of CC art. 427 is precluded if the conduct of the minor (or mentally disabled person) was not objectively unlawful (*Radwański and Olejniczak* loc. cit. 204; *Safjan* loc. cit. 1206). Furthermore, the rule does not apply where the damage is caused by a person under supervision who may be accountable on the basis of fault. In that case the basic rule of CC art. 415 applies, so that a person supervising improperly may be jointly liable if at fault (*Radwański and Olejniczak* loc. cit. 202). However, it falls to the injured person to prove all the requisites of the claim (*Safjan* loc. cit. 1205). SLOVENIAN LOA art. 142(1) envisages strict liability for parents, whose child has yet to attain the age of seven. This liability is not imposed if "if the damage occurred while the child was entrusted to another and such person was liable therefore" (loc. cit. para. (3)). In addition LOA art. 145(1) introduces a "special parental liability", whereby parents are liable for a failure to educate their child properly if this failure materialises at a time when the child was under the supervision of another. The parents are solely liable, the person exercising the supervision excapes liability (loc. cit. para. (2)).

8. GERMAN CC § 832 is the applicable provision governing liability of persons who, are either legally or contractually obliged to supervise other persons, namely due to their being under the age of majority or on the grounds of a mental or physical disability. This relates to a liability which is based on a presumption of fault. The loss recoverable is that which was inflicted on a third party by the person who was under supervision. A duty to supervise is imposed by law on those who are responsible for the care, custody and upbringing of a minor, as a general rule the parents (CC §§ 1626, 1671, 1757 and 1765), but also guardians and carers (§§ 1793, 1797, 1800, 1909f, 1915). A further prerequisite for liability is the unlawful infliction of damage by the person who was to be supervised. An unlawful act must have been committed (CC §§ 823-826); according to the wording of the applicable legal provisons, fault is irrelevant in this respect. It is possible for the person with the legal duty to supervise to prove that this duty was not breached. It is also possible to prove that, if there was such a violation of duty, this neglect of duty did not cause the damage which was sustained. It is becoming more difficult to rebut this presumption (*Bernau*, FamRZ 2007, 92).

9. AUSTRIAN CC § 1309 governs the liability for the acts of minors and individuals with a mental disability. The liability impacts on those with a duty to supervise; it also embraces cases of self inflicted harm by the individual who was under supervision (CA Innsbruck 11 March 1985, ZVR 1986/114 p. 274). Although CC § 1309 refers to "minors" (according to CC § 21(2) persons under 14), liability extends to older minors who are aged fourteen and above.(OGH 27 January 1971, SZ 44/8; OGH 29 November 2006, FamZ 2007/35). The basis for liability is the intentional or negligent breach of a supervisory duty; the burden of proof rest on the claimant (OGH 6 October 1961, SZ 34/137). The duty to supervise can arise under a statute or a contract (OGH 24 April 1968, EvBl 1968/379). In the first instance, the duty to supervise rests with the parents, (CC §§ 144, 146), then grandparents (CC § 145(1)) and foster parents (OGH 14 October 1970, EvBl 1971/74). The requirements of the supervisory duty are comparatively modest (see further Schwimann [-*Harrer*], ABGB VI^3, § 1309 no. 1). The decisive question is what a reasonably prudent parent would have done in the concrete circumstances of the case in order to prevent damage resulting to a third party as a consequence of their child's conduct (OGH 26 August 2004, 3 Ob 128/04a). The situation of the parents is also taken into consideration (*Harrer* loc. cit. no. 11). A typical case where liability would be affirmed is where smaller children are permitted to play with dangerous toys and then left to their own devices (OGH 24 January 1968, EvBl 1968/379; OGH 22 November 1938, SZ 20/241; OGH 11 January 1967, JBl 1967, 431).

10. GREEK CC art. 923 differentiates between persons who are under a statutory duty to supervise (para. (1)) and those under a contractual obligation (para. (2)) .In both cases, a rebuttable presumption arises that the person whose duty it was to supervise breached their duty either intentionally or negligently and this breach caused the resulting damage (*Kornilakis*, Eidiko Enochiko Dikaio I, 549; Georgiades and Stathopoulos [-*Georgiades*], art. 923, no. 1; CA Athens 6492/1998, EllDik 39 [1998] 1645; A.P. 1173/1994, EllDik 37 [1996] 79). CC art. 923 is geared only towards protecting third parties, not the person who required supervison, who will have to base any claim that they might have as regards damage that they have suffered on applicable family law provisions or contractual law provisions (e.g. CC arts. 335 et seq, 380 et seq) (*Kornilakis* loc. cit.). The criteria used to determine the content of the supervisory duty include, in particular, age, maturity and degree of development of the minor. Furthermore, the forseeability and the dangerousness of the conduct which caused the damage are important factors (*Kornilakis* loc. cit. 550; *Georgiades* loc. cit. no. 6; A.P. 1173/1994, EllDik 37 [1996] 79). The task of a person charged with the

duty to supervise is to steer the person who requires supervision towards socially accepted conduct and to point out to him or her the dangerousness of particular objects and conduct (*Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 195). Minors are persons who require supervision (CC art. 127). Parents when exercising parental care have a duty to supervise. A prerequisite of liability under CC art. 923 is that the minor's conduct objectively fulfils the requirements of a tort, Whether the presence of fault on the minor's part is required is debatable (see further *Georgiades* loc. cit. no. 13). According to CC art. 932(2) persons who have a contractual duty to supervise are also liable. An implied contractual assumption of a duty to supervise will arise where the minor resides for a long period of time with relatives. However, if the duration of stay is short or where an individual cares for a child as a favour to the parents, the duty is denied (*Georgiades* loc. cit. no. 10).

11. In a similar manner, according to PORTUGUESE CC art. 491 liability is imputed to a person who has a statutory or contractual duty over a person incapable of fault. The latter concept does not exclusively pertain to minors (*Vaz Serra*, BolMinJus 101 [1960] 15, 124). The statutory supervisory duty of parents arises under CC art. 1878(1), that of a guardian (*tutor*) under CC art. 1935 (*Sottomayor*, BFD LXXI [1995], 403, 405). Once the age of sixteen is reached, minors become criminally responsible. From this point onwards CC art. 491 is no longer applicable, given that it is not possible to regard minors who are criminally responsible for their acts as "naturally incapable" under the terms of this provision (CA Lisbon 15 October 2002; another view taken in a decision which has not been followed since in STJ 20 March 1991, BolMinJus 445 [1991] 220). CC art. 491 does not apply when the claim of the injured child is at issue (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 493; *Sottomayor* loc. cit. 411; STJ 17 January 1980, BolMinJus 293 [1980] 308;otherwise CA Oporto 10 October 1996). The basis for liability is a *culpa in vigilando* (*Antunes Varela*, Obrigações em geral I[10], 590; *Pires de Lima and Antunes Varela* loc. cit. 492; *Sottomayor* loc. cit. 411, 456 and 466; STJ 3 June 2004; CA Oporto 6 June 2001). There is a rebuttable presumption that the supervision was defective (CC art. 491(2); see *Antunes Varela* loc. cit. 491). In the context of adducing proof, exonerating the parent from liability, it is necessary to prove that the standard of the *bonus paterfamilias* was adhered to (STJ 13 February 1979, BolMinJus 284 [1979] 190; STJ 15 October 2002). The requirements appear to have become more rigid in recent times (e.g. STJ 17 January 1980, BolMinJus 293 [1980] 308). The courts also require proof of an absence of *culpa in educando*, and in this requirement go beyond the wording of the statutory provision (*Sottomayor* loc. cit. 424; STJ 18 May 1999; STJ 20 March 1991, BolMinJus 405 [1991] 220; CA Lisbon 17 March 1987, BolMinJus 366 [1987] 550). If the parents live apart then, in principle, the parent, who is responsible for the exercise of parental care has the supervisory duty. The duty to supervise is only imposed on the other parent when the child pays a visit (*Sottomayor* loc. cit. 443). However a duty to supervise should be borne by a stepfather given his capacity as head of the family (*Sottomayor* loc. cit. 406, note 7).

12. DUTCH CC art. 6:169(1) provides that: "the parents or guardians of a child are liable, in respect of the damage that is suffered by a third party, caused by the acts of a child, who has not yet attained the age of fourteen, if these acts would have been imputable as an actionable tort to the child if its age would not have prevented this imputation". According to this provision the parents are vicariously responsible. In respect of children who have attained the age of fourteen but who have yet to reach sixteen, according to CC art. 6:169(2) there is a rebuttable presumption that the parents are liable, on the basis that the child was inadequately supervised. The age limits were fixed based on the insurabilty of the respective risks.(Asser [-*Hartkamp*],

Verbintenissenrecht III[11], no. 84 p. 93; Parlementaire Geschiedenis VI, 645, 652, 678) In both cases, the defendant must either exercise parental authority or be the guardian of the child; it is not necessary that the child act in an intentional or negligent manner If the child can invoke a defence or adduce a ground which excludes fault, and this ground of defence or justification is not age related, then the parents can also rely on this defence or justification (Onrechtmatige Daad II [-*Oldenhuis*], art. 6:169, no. 4 p. 66, no. 14 p. 197, no. 18 p. 241). Both parents are responsible for the exercise of parental authority (CC art. 1:125(1)); consequently both parents are solidarily liable even when the child only lives with one parent. Judicial separation (Hof ´s-Hertogenbosch 25 February 1997, NedJur 1997 no. 659 p. 3595) and divorce do not, in principle, impact on the continuity of the exercise of parental care; they are relieved from their duty only when a court pronounces on the matter (CC arts. 1:266 and 1:269). Even when a child welfare agency is appointed guardian of the child, (*voogdij-instelling*), the parents remain liable (*Oldenhuis* loc. cit. nos 5-6, p. 66). The use of the formula that the conduct of the child must amount to an act, serves to indicate that the parents are not liable if their child fails to warn another of an impending danger or otherwise omitted to do something to safeguard a third party.(*Oldenhuis* loc. cit. no. 12, pp. 156-197).

13. ESTONIAN LOA § 1053(1) is similar to VI.–3:104(1). The liability of parents for defective supervision is based on fault once the child has attained the age of fourteen. Liability can no longer be imposed, when the child reaches the age of nineteen (LOA § 1053(2)

14. In SWEDEN the liability of parents, while anchored in the general *culpa*-rules, has however been extended by chap. 6 § 2(2)(third sentence) of the Parental Code which was enacted in 1993 (*Föräldrabalk* [1949:381]). According to this provision "a person who exercises care and custody over a child is required to ensure that the child is supervised or other appropriate measures are adopted, in order to prevent the child inflicting damage on another". This provision has noticeably tightened the liability of the parents (*Hellner and Johansson*, Skadeståndsrätt[6], 270; *Bengtsson and Strömbäck*, Skadeståndslagen[2], 54; contrast the older decisions of HD 8 November 1949, NJA 1949, 617 and HD 29 October 1954, NJA 1954, 450). Under FINNISH law the liability of parents is still determined by reference to the general *culpa*-liability under the Damages Act chap. 2 § 1, cf. Supreme Court 16 January 1976, HD 1976 II 1 (no liability was imposed for damage, which was intentionally caused by an intoxicated fourteen year old), Supreme Court 7 October 1981, HD 1981 II 124 (a reduction in liability for a sixteen year old who, while unsupervised, fired shots at objects owned by a third party), and Supreme Court 12 April 1983, HD 1983 II 41 (seven year old child threw a dart at a five year old child, liability was imposed on the parents). Similarly, DANISH law does not have special regulations pertaining to the liability of parents and other persons (guardians, childminders, Kindergarten, schools, holiday camps). As regards defective supervision, recourse is had to the general fault based liability (*Vinding Kruse*, Erstatningsretten[5], 123; *von Eyben and Isager*, Lærebog i erstatningsret[5], 100).

II. Liability of other persons and institutions for damage caused by others

15. According to the FRENCH CC art. 1384(6), teachers and craftsmen are liable for damage caused to a third party by their pupils or apprentices while under their supervision. CC art. 1384(8) provides that the claimant has the burden of proving that the instructor (*instituteur*) acted in a negligent manner, thereby displacing the presumption of fault which had held sway until 1937 (*le Tourneau*, Droit de la responsabilité et des contrats [2004/2005], no. 7472). The liability of teachers in

public schools is displaced by State liability (*Code de l´Éducation* art. L 911-4). Such teachers are liable only via their internal relationship with the State. There is a rebuttable presumption of fault as regards the liability of craftsmen (*artisans*) towards a third party (CC art. 1384(6) and (7)), but nowadays this liability is of little practical significance. This is due to the fact that it is no longer customary that apprentices live with their masters (*Brun*, Responsabilité civile extracontractuelle, no. 561 p. 289). The Napoléonic Code does not explicitly recognise a general rule pertaining to liability for other individuals (*fait d´autrui*) (compare. Cass.civ. 15 February 1956, JCP 1956, II, 9564, note *Rodière*). Nonetheless, the Cass.ass.plén. 29 March 1991, Bull.ass.plén. 1991, no. 1 p. 1 (*arrêt Blieck*) introduced a fundamental change in direction. This is grounded in the Court of Cassation's confirmation that an institution responsible for the care of the mentally disabled was liable for damage suffered by a third party, the result of arson, which was inflicted by a mentally disabled person under the care of the institution. The basis of liability was CC art. 1384(1), namely, liability was based on the general strict *gardien*-liability. It remains a subject of debate, whether the court thereby created a new *principe général de responsabilité du fait d´autrui* or created merely a new special head of vicarious liability (see on the one hand *Malinvaud*, Droit des obligations[9], no. 584 p. 370 und *Flour/Aubert/Savaux*, Le fait juridique[11], no. 223 p. 239 and on the other *Brun* loc. cit. no. 566 p. 292). According to current case law CC art. 1384(1) is applicable, if (i) a natural or legal person has the *garde* over another or (ii) an institution had assumed control over the acts of another person. A *garde d´autrui* in the sense of *arrêt Blieck* is established, if a natural or legal person holds *le pouvoir d´organisation, de direction et de contrôle du mode de vie* over the person requiring supervision. The second category can be traced back to Cass.civ. 22 May 1995, Bull.civ. 1995, II, no. 155 p. 88 (2 decisions) whereby sports clubs, established for the purpose of organising, managing and controlling the activities of their members in sporting events, are liable under CC art. 1384(1) for damage caused during this time by their members. Both decisions affirmed liability of a rugby club for injuries inflicted on the opposing team, as the player who inflicted the injuries could not be identified. The basis for liability is the *contrôle de l´activité d´autrui* (*Flour/Aubert/Savaux* loc. cit. no. 227 p. 245). In later decisions this was used as a basis to extend liability to other clubs (e.g. Cass.civ. 12 December 2002, Bull.civ. 2002, II, no. 289 p. 230). It remains uncertain whether liability can be broadened in scope to encompass other legal persons and institutions (*Flour/Aubert/Savaux* loc. cit. no. 227 p. 247). Moreover, it is also unclear whether, in order to ground liability, it is necessary to have at the very minimum the existence of an (objective) *faute* of the person who directly caused the damage

16. According to BELGIAN CC art. 1384(4) there is a rebuttable presumption that teachers and craftsmen are liable, either intentionally or negligently (CC art. 1384(5)) for damage caused to a third party by a pupil or apprentice who was under their supervision at the time. The word "teacher" is broadly interpreted (Cass. 1 December 1986, JT 1987, 196). Craftsmen are subject to the provisions of CC art. 1384(4), once the apprentices whom they are training are under a contract of training. At the same time, the craftsmen concerned are also employers in the sense of CC art. 1384(3), but CC art. 1384(4) has precedence as a special norm (*Vandenberghe/Van Quickenborne/Wynant/Debaene*, TPR 2000, 1551, 1827, no. 118). It is a prerequisite for liability that the pupil or apprentice commits a *faute* or in the case of a youth who is not able to appreciate the wrongfulness of his act that an *acte objectivement illicite* is committed (Tilleman and Claeys [-*Fagnart*], Buitencontractuele aansprakelijkheid, 172, 204, nos. 80-82). Teachers who are also employees under the Act of 3 July 1978 can rely on art. 18 of that Act which provides that employees have a privileged

position as far as liability is concerned. A general liability for *fait d´*autrui is not a feature of Belgian law Cass. 19 June 1997, Pas. belge 1997, I, no. 284 p. 700, concl. *Piret*).

17. SPANISH CC art. 1903(5) establishes that the governing body of a school is liable for damage caused by a minor, during the time that he or she was under the supervision of the teaching staff of the institution The governing body is relieved from liability when it adduces proof that it used the standard of care of a *bonus paterfamilias* in order to prevent the damage occuring. The governing body can only seek redress from the teacher, if the teacher acted intentionally or in a grossly negligent manner (CC art. 1904), In practice this right of redress is rarely exercised (*Roca i Trias*, ADC 1998, 7). The *Tribunal Supremo* exonerates the school from liability more willingly than it exempts parents from liability (which today is practically impossible to achieve; see above at *I3*), see e.g. TS 8 March 1999, RAJ 1999 (2) no. 2249 p. 3575 and TS 27 September 2001, RAJ 2001 (4) no. 8155 p. 12833). CC art. 1903(5) is only applicable to private schools; it does not extend to state owned schools, because the latter are subject to a special regime within administrative law (*Gómez Calle*, Responsabilidad de padres y centros docentes[1], 1098), providing for strict liability for damage caused by civil servants and other public service employees. On the other hand, private schools are also liable under CC art. 1903(5), when the tort committed by the pupil also amounts to a criminal act (see further *Gómez Calle* loc. cit. 1315; *Vaquer Aloy*, La Ley 2001, I, 1635; cf. CA Álava 27 May 2005, BDA AC 2005/1062). CC art. 1903(3) also establishes the liability of guardians (*tutores*). Whether the liability under CC art. 1903 can be extended to other persons or institutions not specifically alluded to in the provisions is debatable. The prevailing opinion of legal scholarship is that the provision contains a *numerus clausus* list that cannot be extended or applied analogously (*Lacruz and Rivero*, Elementos II(2)[4], 524; *de Ángel Yágüez*, Tratado de responsabilidad civil[3], 329; *Roca i Trias*, Derecho de daños, 95; TS 16 October 2003, RAJ 2003 (5) no. 7392 p. 13834). Other commentators would extend CC art. 1903(3) to embrace the "factual carer" e.g. apply the provision correspondingly to psychiatric clincs or holiday camps (*Gómez Calle* loc. cit. 519). It is undisputed that such institutions could be liable according to the general clause of CC art. 1902 (*Miquel González*, ADC 1983, 1501, 1505).

18. ITALIAN CC art. 2048(2) provides that persons responsible for educating children and persons who are responsible for training of apprentice craftsmen or training in a particular trade, are liable for the damage caused by an unlawful act of their pupils or apprentices while under their supervision. Persons responsible for the education and training supervisors can exonerate themselves from liability by proof that they could not prevent the unlawful act (CC art. 2048(3)). Persons reponsible for the education of minors are teachers who are employed to teach on a regular basis by virtue of their civil service position or a private contractual duty. This establishes the duty to supervise (Cass. 18 July 2003, no. 11241, Giust.civ.Mass. 2003, fasc. 7-8; *Visintini*, Trattato breve della responsabilità civile, 745; *Bianca*, Diritto civile V, 699; *Monateri*, Manuale della responsabilità civile, 315). The liability of public school teachers is subject to a special public law regime, which essentially entails that those teachers are not liable vis á vis third parties and are only liable as against the State if they acted in an intentional or grossly negligent manner (as to the constitutionality of the provision, see Corte Cost. 24 February 1992, no. 64, Giur. it. 1992, I, 1, 1618). Individuals and institutions which conduct sports training on a private basis are also liable under CC art. 2048(2) (Cass. 22 October 1965, no. 2202, Giur.it. 1966, I, 1, 1281; CFI Monza 13 September 1988, Resp.civ. e prev. 1989, 1200), as are educational institutions charged with supervising minors (Cass. 7 December 1968, no. 3933, Giur.it. 1969, I, 1, 2187),

organisers of a hoilday camp (CA Genova 11 July 1962, Arch.resp.civ. 1962, 192) and even school caretakers.(Cass.sez.un. 3 February 1972, no. 260, Giur. it. 1972, I, 1, 1310). In contrast, the liability of those charged with the responsibility for training trade apprentices or trainee craftsmen is no longer of practical significance, owing to changing social perceptions. The vicarious liability of employers for employees has emerged in its stead (*Visintini* loc. cit. 748). The content of the duty to supervise is proportional to the age of the minor, namely, the more mature the minor, the less need for constant supervision on the teacher's part (Cass. 23 June 1993, no. 6937, Giust.civ.Mass. 1993, 1065). In respect of adducing proof to relieve liability (CC art. 2048(3)) the decisive factor is whether the damage was forseeable; since only that which is forseen can also be avoided (Cass. 2 December 1996, no. 10723, Stud.Iuris 1997, 314). Moreover, persons responsible for the education of children can also exonerate themselves upon proof that the necessary precautionary organisational measures were taken, in order to rule out the possibility of the injury occuring (Cass. 3 February 1999, no. 916, Giust.civ.Mass. 1999, 244).

19. The HUNGARIAN Special law pertaining to public schools (Statute Nr. LXXIX of 1993) § 77, in principle, renders pupils subject to the rules of liability anchored in the Civil Code. However, the extent of liability (graduated according to intention and negligence) is restricted to the amount of damages that can be awarded. Loc. cit. § 77(3) constitutes strict liability for Kindergarten, schools, boarding schools and the "organisers of practical schooling". It is possible to be relieved of liability (departing from the general provisions of the Civil Code) only if the defendant institution can prove that the damage was caused by an unavoidable occurence outside the scope of their activities (BH 2003/62; BH 1996/310; BH 1996/148). Furthermore, the provisions pertaining to the liabilty of parents (above at Note *I6*) are also applicable to the liability of other institutions and bodies, provided that they are only "curators" according to the meaning of the statute. A sanitorium or any other institution which assumes a factual duty of supervision can be regarded as a curator. A person who has a duty to supervise because of their status as employee is not a curator (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1286; Petrik [-*Wellmann*], Polgári jog II[2], 599). The same rule (liability of the institution, not the employee) is also found in the CZECH und SLOVAK CC § 422(3). For POLAND see note *I7* above. SLOVENIAN LOA art. 144 provides: "(1) The guardian, school or other institution shall be liable for damage inflicted by a minor while under the supervision of the guardian, school or other institution unless it is shown that the supervision was conducted with due care or that the damage would have occurred even under careful supervision. (2) If the minor is also liable for damage, they shall be jointly and severally liable":

20. According to the GERMAN CC § 832 a duty to supervise those entrusted in their care (particularly arising under a contract) can be imposed on persons and institutions, notwithstanding the fact they are not exercising parental care and custody, e.g. in schools, Kindergarten, educational institutions and nursing homes as well as hospitals (Palandt [-*Sprau*], BGB[66], § 832, no. 5). However, the foregoing provision only concerns private institutions. In respect of civil service employees of state institutions, CC § 832 is displaced by the public law rules on state liability for the wrongs of public servants (Const. art. 34 in conjunction with CC § 839). A duty to supervise under CC § 832 is no longer imposed on masters and other job training instructors (Bundesbildungsgesetz [*BBiG*] § 6); older case law (e.g. BGH 24 June 1958, VersR 1958, 549, 550) is thereby rendered obsolete by the more recently enacted statute. Those persons with responsibility for training could nonetheless be liable as employers under CC § 831 (Soergel [-*Krause*], BGB[13], § 832, no. 11). Guardians, (CC § 1896)

are only obliged to supervise their (adult) wards, if their sphere of supervision includes a statutory obligation for care and maintenance of the person cared for or if they were specifically appointed to supervise him or her.

21. Under AUSTRIAN CC § 1309 liability of other persons and institutions for damage caused by minors and mentally disabled adults follows the rules on the liability of parents. The supervisory duty can be established by contract (Kindergarten: OGH 11 February 1997, 10 Ob 2441/96k, RS 0107494; au pair: OGH 26 June 1901, GlUNF 1483) as well as in statutory provisions (e.g. for teachers and the management of youth custody centres: OGH 29 November 2006, FamZ 2007/35). Liability was affirmed in the following case of a dangerous mentally ill patient who absconded from a psychiatric clinic (OGH 24 November 1998, JBl 1999, 325).

22. In GREEK legal literature, it is postulated that CC art. 923 should be used analogously for cases where a natural or legal person assumes a contractual duty to supervise an individual in need of supervision owing to a psychosomatic condition or mental disability. It is contemplated that the duty would be imposed on e.g. the director of a psychiatric clinic or a self employed nurse (*Kornilakis*, Eidiko Enochiko Dikaio I, 551). The liability of state schools and teachers employed in the schools, is subject to a special regime of state liability (*Kornilakis* loc. cit.; Georgiades and Stathopoulos [-*Georgiades*], art. 923, no. 9).

23. PORTUGUESE CC art. 491 essentially follows the model of the German Civil Code § 832. However, it should be noted that the two provisions are not identical. CC art. 491 subjects every person who "by virtue of law or by virtue of a legal transaction is under a duty to supervise those who are naturally incapacitated" to liability based on a rebuttable presumption that the supervision was defective. The contractual duty to supervise can impinge on a large number of individuals, particularly teachers and proprietors of all types of educational institutions (*Antunes Varela*, Obrigações em geral I[10], 590). The supervision of children on holiday in non-residential and open camps is specifically regulated by statute (DL no. 304/2003, DR 283/2003 I-A (revised by DL no. 109/2005 of 8 July 2005, DR 130/2005 I-A), art. 10). If a duty to supervise is imposed on more than one person (parents, teachers) then they are jointly and severally liable (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 492). "Natural incapacity" is not identical in meaning to being incapable of understanding and controlling one's acts. Consequently it can also arise that the person requiring supervision and the person whose duty it was to supervise can be solidarily liable (CC art. 497; *Sottomayor*, BFD LXXI (1995), 403, 409). If a seven month old baby is left unsupervised for a moment in a Kindergarten and suffers injury in this time, the management of the Kindergarten is liable to the child according to the general rules of liability (STJ 25 November 1998, BolMinJus 441 [1998] 470; also compare CA Lisbon 16 February 1995). In another case, a different approach was taken. Here a child pilfered explosives from his father and gave them to his playmate. Despite the fact that at the time of the accident the child was under the supervision of a holiday camp, the father was found liable (CA Oporto 23 March 2006). A contractual assumption of a supervisory duty, e.g by grandparents, can also be implied, provided that they assume the duty to bring up the child (STJ 15 October 2002; CA Oporto 14 February 2002, CJ XXVII [2002-1] 14; CA Oporto 28 February 2002). It will not suffice if the child was supervised merely as a favour to the parents (*Vaz Serra*, BolMinJus 85 [1959] 381, 409; *Sottomayor* loc. cit. 409; STJ 14 December 1994). Furthermore, the Supreme Court confirmed a decision from the Court of Appeal of Lisbon (of 28 January 2003, CJ XXVIII [2003-1] 79), which held that a clinic violated its contractual duty of supervision of a mentally ill in-patient who, during the night, severely injured another patient (STJ 22 September 2005).

24. According to DUTCH law, liability is imposed under the general rule of CC art. 6:162 on a person who exercises a supervisory duty but does not exercise parental control *(toezichthouder*). The requirements imposed are stricter when the supervison is exercised in a professional capacity (HR 12 May 1995, NedJur 1996, no. 118 p. 561). CC art. 6:162 applies also in respect of the liability of teachers (CA Amsterdam 17 July 1997, VR 1998, no. 187 p. 378). Here also, the prerequisite for liability is that, judged objectively, the child committed an unlawful act, namely that the child violated a norm of social behaviour. The liability of schools for the breach of the teacher's supervisory duty arises under the general rules pertaining to the liability of employers (CC art. 6:170). Moreover, a school can also be liable for defective organisation under CC art. 6:162 (Onrechtmatige Daad II [-*Oldenhuis*] art. 6:169, nos. 58A-58C, pp. 447-469).

25. ESTONIAN law does not recognise an express statutory regulation along the lines of VI.–3:104(2) but the prevailing legal position is largely identical (see *Tampuu*. Juridica 2003, 464–474.)

26. In SWEDEN, individuals, who supervise children but do no exercise parental control, are not subject to the special rules pertaining to liability of parents anchored in the Parental Code chap. 6 § 2(2)(third sentence) (above at *I14*). They are subject solely to the general c*ulpa*-liability (*Hellner and Johansson*, Skadeståndsrätt[6], 272; HD 9 November 1984, NJA 1984, 764 [liability of a recreational facility operated by a local authority]). The same also holds true for DENMARK (*Møller and Wiisbye*, Erstatningsansvarsloven[6], 516 ; *Vinding Kruse*, Erstatningsretten[5], 122) and FINLAND (Supreme Court 10 January 1994, HD 1994:1 A local authority was found liable for injury to a pupil inflicted during school sport. Liability was imposed on the basis that the teacher failed to clamp down on a game that was too boisterous; but damages were reduced because the injured party participated in the game]). Liability in damages on the grounds of defective supervision can also be imposed on those entrusted with the care of a mentally disturbed individual; although this liability will affect mostly state institutions (*Bengtsson and Strömbäck*, Skadeståndslagen[2], 54; HD 20 October 1939, NJA 1939, 501 and cf. *Andersson*, Skyddsändamål och adekvans, 422). A special public law regime, namely an Act on correctional treatment in penal institutions exists in Sweden to deal with injuries inflicted by prisoners (*Lag* [1974:203] *om kriminalvård i anstalt*).

Illustration 3 is taken from TS 12 March 1975, RAJ 1975 (1) no. 1798 p. 1355; **illustration 4** from Cass.ass.plén. 29 March 1991, D. 1991 jur. 324, note *Larroumet*; and **illustration 5** from *Carmarthenshire County Council v. Lewis* [1955] AC 549.

Section 2: Accountability without intention or negligence

VI.–3:201: Accountability for damage caused by employees and representatives

(1) A person who employs or similarly engages another is accountable for the causation of legally relevant damage suffered by a third person when the person employed or engaged:

(a) caused the damage in the course of the employment or engagement; and

(b) caused the damage intentionally or negligently, or is otherwise accountable for the causation of the damage.

(2) Paragraph (1) applies correspondingly to a legal person in relation to a representative causing damage in the course of acting as such a representative. For the purposes of this paragraph, a representative is a person who is authorised to effect juridical acts on behalf of the legal person by its constitution.

COMMENTS

A. The Article in overview

Instances of strict liability for others. This Article addresses instances of liability for others. Liability under this provision is "strict"; it does not depend on the intention or negligence of the liable person. Paragraph (1) is concerned with liability for employees and auxiliary persons placed on an equal footing to them; paragraph (2) gives effect to a structurally quite similar liability of legal persons for their representatives. The premise that employers' liability for their personnel ought to be independent of personal fault on the part of the employer is currently representative of the legal conception in the vast majority of Member States. Even where the text of the respective codification clings to the requirement of a failure to supervise on the part of the employer, the courts have consistently attached such high requirements to the proof necessary to escape liability that, although theoretically possible under these provisions, such escape is practically a dead letter.

Liability of legal persons for their representatives. Legal persons can only act through their board members and, since the legal persons themselves simply cannot supervise liability tied to the negligent supervision by the legal person of its representatives is discarded on "technical" grounds. In other words the rule in paragraph (2) follows from the nature of the beast. It expresses a well-nigh unanimous European value judgement. A further rule on the liability of legal persons was not required. This is because VI.–1:103 (Scope of application) sub-paragraph (b) already clarifies that in principle all provisions of this Book apply in equal measure to natural and to legal persons. Under the general rules, legal persons are consequently already liable for civil wrongs which they themselves commit; see Comments on VI.–1:103 (Scope of application), on VI.–3:101 (Intention) and on VI.–3:102 (Negligence). Legal persons, just as much as natural persons, are liable under paragraph (1) of the present Article for those they ordinarily employ.

Public sector bodies. The Article applies to all employers and legal persons, including the state and public sector bodies. However, where the exercise of a public law function is at stake, this Book has no application, see VI.–7:103 (Public law functions and court proceedings).

"Legally relevant damage…". The Article covers liability for legally relevant damage of all types. Thus, although the provision declares strict liability, it is not limited bodily injury and property damage but applies to all kinds of legally relevant damage listed in the catalogue in the second Chapter. This corresponds to the legal situation in all Member States of the Union. A restriction of liability to personal injury and property damage only comes into the picture for certain forms of liability without intention or negligence (see the following Articles of this Section), not, however, in the context of employer's liability. On the other hand, the present Article still requires that the injured person has suffered some form of *legally relevant* damage within the meaning of the second Chapter of this Book. As a result, in particular liability for "ordinary" non-performance of a contractual obligation lies outside its scope of application. Cases which have to deal with a non-performance of a contractual obligation as well as non-contractual liability for damage are conversely again subject to the general conflicts rules in VI.–1:103 (Scope of application) sub-paragraphs (c) and (d).

"… suffered by a third person". Both paragraphs of the Article exclusively pertain to harm of "third parties". Harm of the employee or the representative by the employer or legal person remains out of the equation, as does the reverse, *viz*. harm of the employer or legal person by an employee or representative. The same result follows to a great extent also from VI.–7:104 (Liability of employees, employers, trade unions and employers' associations), however, only VI.–7:104, not VI.–3:201, expressly clarifies that harm of an employee by another employee in the same company is not embraced by this Book (and that it does not make any proposals on the fashioning of personal liability of employees as against third parties).

Defences. Every defence in Chapter 5 is applicable to the liability under this Article. If such a defence is not open to the employer (or legal person) personally, but to the employee (or representative), then this likewise exonerates the employer (or legal person). This results from the fact that it is not a basis of liability simply to employ someone. The basis of liability under the present Article lies in the fact that someone has duties carried out by others. Consequently, the liable person must indeed submit to everything that would have had to be submitted to had the duties been carried out personally, but *only* to that precisely. Where there would have been no liability had the employer done (or omitted to do) exactly what the employee did (or did not do) then the delegation of duties has not become effective for the law on liability; as a consequence, there is no room for employer's liability.

B. Employer's liability (paragraph (1))

Employees. The Article provides first and foremost for liability for employees, i.e. persons who have a normal relationship of employment with their employer. However, in conformity with almost every Member State's legal system, the provision does not lay down any liability for independent (sub-) contractors and their operatives. The requisite for liability for another is always the minimum abstract possibility of directing and supervising their conduct through binding instructions. That is not the case with independent subcontractors. Liability under VI.–3:102 (Negligence) remains of course unaffected by this.

> *Illustration 1*
> In an aeroplane accident, the flying instructor and two student pilots are killed. One of the two students had been flying the plane; the flight instructor had not properly fulfilled his instructional and inspectional duties. The company which runs the flying instruction centre is liable for the flight instructor's error, although he was not its employee and in fact issued personal receipts for the flying lessons. This is because

the flight instructor continuously worked in the framework of the instruction centre and had been subject to the directions of the school's operator. It was furthermore subject to the very high requirements of the duty to carefully select and monitor the instructors working at the school.

Illustration 2
A Bulgarian company obtained an arbitral award against an Italian debtor from an arbitral tribunal instituted by the Bulgarian Chamber of Industry and Trade. However, the arbitral tribunal was guilty of such gross procedural defects that the Bulgarian claimant could not obtain executory title in Italy. The Chamber of Industry and Trade is not the employer of the arbitral tribunal; it does not matter that the Chamber had published lists with the names of persons whom the parties could select as arbitrator.

Illustration 3
A sailing club rents a crane in order to bring its members' boats to land. The crane firm also provides the operating personnel. As a result of the negligence of the operating staff, a harness is broken and a boat is damaged. The specialist crane company is liable for the damage, not the sailing club.

"Similarly engages". The Article is, however, not confined to the liability of employers. Even where the liable person and the person whose actions are in question are not connected through an employment relationship in the technical sense, the requisites of the provision may be fulfilled. The only decisive factor is that there is a relationship of instructional dependence (or superiority and inferiority), out of which flows an authority on the part of the liable person to control the conduct of the relevant acting party. Therefore, the Article also applies e.g. where without being detected, the employment relationship was invalid or where it has been avoided with retroactive effect at the time of the injury. A contract for service (e.g. with a lawyer) can also suffice under certain criteria, namely where a lawyer is retained for a concrete task with a precisely specified line of approach and without room for personal discretion. It is not even a requirement for the application of this Article that the person acting is gainfully working for the liable person.

Illustration 4
While standing on a ski slope, a woman is hit by a toboggan driven by a first aid relief worker. The company which operates the ski slope is liable for the accident, although it does not employ the driver of the toboggan on the basis of an employment contract. A local law stipulates in detail that operators of ski slopes must arrange a transport service for injured persons. This suffices for the inference that the questionable first aid service was employed within the scope of the organised commercial activity of the ski slope operator. The fact that the aid-worker was working voluntarily and without payment does not affect this result.

A hospital is liable for the errors of its chief physicians, as long as it has the authority to determine their area of activity and to have an influence over their working hours. Where the chief physician is a member of the board, the hospital's liability then follows from paragraph (2).

Illustration 5
The negligence of a gynaecologist causes blindness to a newborn child. The private hospital is liable for this where there is a relationship of instructional connection and

dependence between it and the doctor; it does not depend on the existence of an employment contract.

In the case of temporary agency workers, in principle liability falls on the company who contracts out, or supplies, the workers. If however the agency worker is integrated into the client company over a longer period of time and this is externally documented (e.g. through wearing its work uniform), then such agency workers are as "similarly engaged" (in the sense of this Article) by the client company as its own workers.

Illustration 6
An oil company is in need of an extra truck and driver for transporting oil during a few months, due to capacity constraints. The oil company contracted a transportation firm for this purpose. The driver from the firm was given an educational course by the oil company. The driver negligently caused damage to a third person when delivering oil. This is not within the work sphere of the transportation company but rather of the oil company on account of the driver having the same tasks as the company's own drivers; he was integrated into the general organisation of the company, the latter also being his supervisor and instructor. Even though the driver was hired and paid by the transportation firm, he was to be seen as a natural integrated operator of the oil company which was familiar with, and de facto supervising and instructing, the driver's work and hence was familiar with the risk.

Illustration 7
A bystander loses an eye from a chipping thrown up in the course of excavation work. The driver of the mechanical digger responsible was subject to the instruction of the construction company, although from a technical legal perspective he was an employee of a third party. The construction company is liable for the error of the driver of the mechanical digger, even though the relationship between the two parties was not permanently laid out. It suffices that the construction company insured the work of the driver and had instructional authority over him.

Temporary relief workers. The duration of engagement plays no role in the operation of this Article. A temporary worker responsible for looking after children for a couple of hours also falls under this provision. However, a contractual or quasi-contractual relationship between the party liable and the relevant person acting must always be at issue. A spontaneous favour in everyday life does not suffice.

Illustration 8
A housewife asks a guest to carry a pan of hot soup from the kitchen to the dining table, in the course of which the soup is inadvertently emptied over the trousers of another guest. The housewife is not liable under VI.–3:201 for the damage caused.

In the course of employment or engagement (sub-paragraph (a)). Liability only takes hold where the person engaged caused the damage "in the course of the employment or engagement". The demarcation depends on whether the person acting was working within the employer's sphere of influence or was exclusively pursuing personal aims.

Illustration 9
Where a doctor is on holiday far away from home and helps a fellow holiday-maker, harming her through negligence in the process, this does not ground any liability on the part of the doctor's employer.

The risk of harm to a third person must have had its basis in the employment relationship. Therefore, intentional damage through employees is in principle included in the liability – this expressly results from sub-paragraph (b). Damage only lies outside the context of accountability (i.e. it only does not occur in the course of the employment or engagement), where the employee pursues entirely personal interests on occasion.

Illustration 10
A legal apprentice who is assigned to a lawyer under a civil law contract provides advice to a terminally ill woman who wishes to draw up her will. The information given by the apprentice on the requirements for formal validity is wrong; the will is void. The lawyer is liable under VI.–3:201 in conjunction with VI.–2:101 (Meaning of legally relevant damage) in damages to the "heirs" now left empty-handed. The fact that advice in testamentary matters was not part of the duties that the lawyer had allocated to the apprentice, so that the latter consciously acted contrary to instructions, does not alter the result under the law governing liability.

Illustration 11
The doorman of a nightclub is beaten up by guests. He manages to flee. He runs back to his nearby apartment and gets a knife, hurries back and pursues one of the guests, now fleeing themselves, and severely injures him. The act occurs "in the course of the employment". This is because the doorman had been employed for the purposes of removing riotous guests, using force where necessary.

Employees excluded from service. An employer is not liable under VI.–3:201 for employees who have already been excluded from service at the time of the injury; under special circumstances only liability under VI.–3:102 (Negligence) is otherwise conceivable, for instance because the third person should have been warned and this warning was not given.

Illustration 12
The manager of a pizzeria, the franchisee of a large chain, is shot and severely injured by a former employee of the franchisor; the latter had been dismissed by the manager. The franchisor is not liable for the shooting injury under the present Article or under VI.–3:102 (Negligence). Possible faults in the dismissal process would not have been causative of the damage; the intentional act interrupted the chain of causation.

Personal requisites of the person acting (sub-paragraph (b)). The liability of the employer arises if the employee causes legally relevant damage intentionally, negligently, or is otherwise accountable for its causation. The liability of the employer is not intertwined with the personal *liability* of the employee, rather that the latter acted intentionally or negligently within the meaning of VI.–3:101 (Intention) and VI.–3:102 (Negligence) or is responsible for damage due to one of the grounds enumerated in Chapter 3, Section 2 (Accountability without intention or negligence). That is not the same. This is because it may be that under the applicable law employees are quite generally only personally liable under special requirements, e.g. only where they are guilty of qualified fault (intention; gross negligence),

see VI.–7:104 (Liability of employees, employers, trade unions and employers' associations) sub-paragraph (a). In such a case the liability of the employer is already triggered by simple negligence on the part of the employee. The same goes for a mentally disabled employee. The mental disability exonerates the employee personally under the criteria in VI.–5:301 (Mental incompetence), but not the employer.

"…is otherwise accountable for the causation of the damage". Liability under this Article arises not only where the employee harms the third person through intention or negligence, but also where the employee is responsible for the damage arising due to an objective ground of accountability. This can be of practical importance particularly where the responsibility of the employee personally as a keeper is at issue, for instance as the keeper of an animal (VI.–3:203 (Accountability for damage caused by animals)) or as the keeper of a motor vehicle (VI.–3:205 (Accountability for damage caused by motor vehicles)). In the case of animals or motor vehicles used by an employee professionally in the interests of the employer, it is often questionable who the keeper is. Paragraph (1)(b) relieves the injured person from the necessity of explaining in detail the internal operational circumstances relevant to the determination of who is the keeper. The employer is also liable even if in the individual case not the keeper of the thing causing the damage.

Solidary liability. According to its basic system, liability under this Article does not displace the personal liability of the employee; rather it is added to it. Thus, where the employee as well as the employer are liable under the rules of this Book or under the applicable law (VI.–7:104 (Liability of employees, employers, trade unions and employers' associations) sub-paragraph (a); see above), then there is solidary liability (VI.–6:105(1) (Solidary liability)). Conversely, the internal relationship between employer and employee is usually determined by a special regime of labour law, which according to VI.–7:104sub-paragraph (a) displaces the general rule in VI.–6:105 (Solidary liability) paragraph (2).

C. Liability of legal persons for their representatives (paragraph (2))

Purpose of the rule. Paragraph (2) provides for liability of a legal person for damage caused by its representatives. This rule appears necessary because a representative is not always also an employee. Incidentally, the requisites of both paragraphs in VI.–3:201 are of course identical. As a result the operation of the Article is not strained by the occasionally problematic differentiation between a "simple" employee and a representative. As long as it is certain that the person acting is to be allocated to *either* one *or* the other category, the liability of the legal person for the harmful conduct of the person acting is fixed.

Representative. The second sentence of paragraph (2) defines a representative as a person who is authorised to effect juridical acts on behalf of the legal person by its constitution. It is for the terms of the latter (charter, memorandum and articles of association, etc.) to determine the persons who are its representatives. That constitution is of course subject to the statutory rules of the legal system to which the legal person owes its existence. Paragraph (2) also applies where the representative in turn is a legal person.

NOTES

I. Employers' liability and liability for independent contractors

1. Under FRENCH CC art. 1384(5) masters (*maîtres*) and employers (*commettants*) are liable for the damage caused by their servants (*domestiques*) and employees (*préposés*) during the course of the performance of their functions of employment. The term *commettant* encompasses the epithet of the *maître*, likewise the term *préposé* embraces the concept of the *domestique*; consequently it suffices to speak of liability of an employer for their employees (*Flour/Aubert/Savaux*, Le fait juridique[11], no. 203 p. 209). Originally the personal liability of the employee was 'cumulated' with that of the employer, however, since the decision of Cass.ass.plén. 25 February 2000, Bull.ass.plén. 2000, no. 2 p. 3 the former is only relevant if the employee exceeds the scope of his duties assigned to him by his employer. CC art. 1384(5) requires a *rapport de préposition* between employer and employee and this is based on a *relation d´autorité*, i.e. authority to give directions. In respect of this authority, a legal basis ought not to be required. It is sufficient that this authority derives from the actual prevailing state of affairs in the individual case (*Flour/Aubert/Savaux* loc. cit. no. 211 p. 217). In the majority of cases, an employment contract provides the basis for the *relation d´autorité* (*Brun*, Responsabilité civile extracontractuelle, nos. 535-536 pp. 270-271). Furthermore, as derived from the wording of CC art. 1384(5) the only additional requirement is that the *préposé* caused the damage. At least, according to the prevailing rule, damage caused by the employee in his capacity as *gardien* of a thing (CC art. 1384(1)) should therefore not be taken into account in this context because it is not possible to be simultaneously *préposé* and *gardien* (*Flour/Aubert/Savaux* loc. cit. no. 214 pp. 221-222). The employer is regarded as the *gardien* of the thing which is utilised by the *préposé* in the course of his employment. This state of affairs entails the result that the employer is directly liable under CC art. 1384(1). This issue is, however, the subject of contentious debate. A number of influential voices argue that liability under CC art. 1384(5) should be not only based on a *faute* des *préposé, and argue that* strict liability ought to suffice, in order to trigger the liability of the employer which is understood as a liability which does not depend on fault (*Viney and Jourdain*, Les conditions de la responsabilité[3], no. 807 p. 1010). The final requirement is that the damage must have been caused within the functions for which the employee was employed. Drawing the line of demarcation is not always straightforward. It is however incontrovertible that the employer is not liable, when an employee commits a *faute*, which does not bear any relation to the performance of his duties and responsibilities (Cass.civ. 23 November 1961, D. 1962 Som. 85). The borderline cases are usually discussed under the heading *abus de fonction*. On this point Cass.ass.plén. 19 May 1988, Bull.ass.plén. 1988, no. 5 p. 7) has clarified that, *le commettant s´exonère de sa responsabilité à la triple condition que son préposé ait agi hors des fonctions auxquelles il était employé, sans autorisation et à des fins étrangères à ses attributions*. Independent contractors are personally liable for injuries suffered by a third party and are moreover liable when the unlawful act ensued during the course of performing duties on the instructions of the principal (CC art. 1992; Cass.civ. 20 April 1977, Bull. civ. 1977, I, no. 181).

2. BELGIAN CC art. 1384(3) corresponds to French CC art. 1384(5): Masters and employers are liable for the damage caused by servants and employees in the functions for which they have been employed. Therefore, it is also necessary in Belgium to have a relationship of appointment/subordination which is largely derived from a contract of employment. However it can also be grounded on a *de facto* state of affairs (*van*

Gerven, Verbintenissenrecht II[7], 320-321). The premise adopted is that a person should solely have the ability to exercise a power of control or direction in one's own affairs (Tilleman and Claeys [-*Fagnart*], Buitencontractuele aansprakelijkheid, 172, 186, no. 38). Furthermore, there must be grounds for imposing liability on the *préposé*, namely that either a *faute* or requires another factor triggering liability (*Fagnart* loc. cit. no. 42 pp. 187-188). The employee's lack of necessary tortious capacity has no bearing on the liability of the employer (*van Gerven* loc. cit. 323). Finally the *préposé* must have caused the damage in the course of performing the functions for which he was employeed. The courts have interpreted these criteria in a pro-plaintiff manner. It suffices that the conduct *ait été accompli pendant le temps de la fonction et soit, même indirectement et occasionnellement, en relation avec ladite fonction*. Consequently the employer can only excuplate himself from liability upon proof that the employee acted outside the scope of his functions, *sans autorisation, et à des fins étrangères à ses attributions* (Cass. 26 October 1989, Pas. belge 1990, I, no. 123 p. 241). In Belgium, the liability under CC art. 1384(3) is also strict; it is not open to the employer to exonerate himself by proving that he was not at fault in either the selection or supervision of the employee or that he could not have either foreseen or hindered the conduct of the employee (*Vandenberghe/Van Quickenborne/Wynant/Debaene*, TPR 2000, 1551, 1867, no. 138). Employees may be liable under art. 18 of the Law of 3 July 1978 concerning employment contracts, for damage inflicted on a third party during the course of their employment, if they acted in an intentional or grossly negligent manner (*faute lourde*). Employees are only liable in ordinary negligence (a *faute légère* if such conduct was a regular occurence. In respect of independant contractors the legal rules in Belgium and France are identical (CC art. 1992). The principal is however, liable for culpa in contrahendo on the part of his contracting agent against a third party which is not simultaneously a tort (Cass. 20 June 2005, no. JC056K5_2, no. de rôle C030105F; Cass. 16 February 2000, no. JC012G2_2, no. de rôle C990477Nt).

3. SPANISH CC art. 1903 provides, that (1) Liability for damages does not solely arise "on the basis of personal acts and omissions", but also for the acts of those persons for whom they are responsible for ... (4) Owners or directors of companies or establishments are liable for the damage caused by their employees in the services of the branches in which they are employed or on account of their duties ... Liability referred to under this article ceases when the persons referred to therein prove that they employed all the assiduity of a good father of a family to prevent the damage from occuring. ". CC art. 1904 permits an unqualified right of recourse on the part of the person incurring liabilty under CC art. 1903 against the employee (in the case of a a teacher, the right of seek indemnity from the employee is restricted to cases where the teacher acted with intention or gross negligence). The prerequiste of liability under CC art. 1903 are as follows (i) a relationship of subordination or dependence between the person who directly caused the damage and the person incurring liability (ii) fault on the part of the principal (which connotes a presumption of fault which can be rebutted, however this argument rarely succeeds in relieving liability before the *Tribunal Supremo*, see e.g. TS 9 June 1998, RAJ 1998 (2) no. 3717 p. 5368; TS 10 March 1997, RAJ 1997 (2) no. 2483 p. 3786; TS 29. März 1996, RAJ 1996 (2) no. 2203 p. 2993), and (iii) a fault on the part of the employee. Also.under this rubric ,the courts lean towards *a iuris tantum* presumption of fault unless the employee belongs to a particular occupation, in respect of which, especially in the case of doctors, a reveral of the burden of proof would not othewise occur.(*Rodríguez y Rowinski*, Die Haftung für Hilfspersonen im spanischen Recht, 79). In practical terms the employer can only escape liability along these lines, if he can prove that the employee acted beyond the

scope of his duties of employment (TS 18 March 1986, RAJ 1986 (1) no. 1268 p. 1238; TS 2 July 1990, RAJ 1990 (5) no. 5766 p. 7471) or when the employee had caused intentional damage or in breach of the orders or instructions received (TS 13 April 1981, RAJ 1981 (1) no. 1637 p. 1337; TS 29 November 1982, RAJ 1982 (3) no. 7217 p. 4769). According to the wording of art. 1903 owners and directors of establishments and companies can also incur liability (*dueños o directores de un establecimiento o empresa*). "Directors"are all *altos cargos* (Managing Directors CEO or Executive Directors on the Board of Directors, chief operating officers,Head of administration) under the Employment Contracts Act (*Estatuto de los Trabajadores, Real Decreto Legislativo 1/1995 por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores* of 24 March) art. 2 (*Real Decreto 1382/1985 por el que se regula la relación laboral de carácter especial del personal de alta dirección* of 1 August), however middle management are not embraced by this term. They are classed as *dependientes*. A relationship of dependence to company is given when an individual is subject to its control, direction or supervision (*Barceló Domenech*, Responsabilidad del empresario, 216). In respect of independent contractors, liability does not arise under CC art. 1903 (*Pantaleón Prieto*, Responsabilidad por hecho ajeno, 5957; *Salvador Coderch and Gómez Ligüerre*, InDret 3/2002, 15; TS 14 May 2001, RAJ 2001 (3) no. 6204 p. 9535; TS 18 June 1979, RAJ 1979 (2) no. 2895 p. 2353; TS 4 January 1982, RAJ 1982 (1) no. 178 p. 117; TS 9 July 1984, RAJ 1984 (2) no. 3801 p. 2902). On the other hand, liability may arise, if the main contractor retains the authority to supervise, control or instruct the personnel of the sub contractor. It has not as yet been comprehensively clarified, whether and on what grounds a person commissioning construction work is liable for the unlawful acts of the building firm and its employees under CC art. 1903(4); cf. on this issue TS 26 May 1989, RAJ 1989 (3) no. 3890 p. 4420; TS 12 November 1986, RAJ 1986 (4) no. 6386 p. 6231; TS 31 October 1984, RAJ 1984 (3) no. 5159 p. 4054; TS 5 July 1979, RAJ 1979 (2) no. 2931 p. 2390; TS 18 June 1979, RAJ 1979 (2) no. 2895 p. 2353). The general principle holds that an employer will only escape liability for the damages inflicted on a third party by the acts of his employees, if he can adduce proof that there is no connection between the damage caused and the duties assigned to the employee (TS 19 November 1991, RAJ 1991 (6) no. 8412 p. 11517; TS 26 November 1984, RAJ 1984 (3) no. 5992 p. 4715). In contrasst to CP art. 120 nos. 4 and 5 the liability of the principal under CC art. 1903 is not subsidiary to the personal liability of the employee (TS 16 March 1987, RAJ 1988 (6) no. 10213 p. 10001; TS 8 February 1989, RAJ 1989 (1) no. 756 p. 785); rather a joint and several liability arises (TS 14 February 1964, RAJ 1964 (1) no. 749 p. 453; TS 7 February 1986, RAJ 1986 (1) no. 446 p. 409; TS 2 February 1987, RAJ 1987 (1) no. 673 p. 580). For a consideration of the prequisites for liability in damages for employers governed by the *Código Penal* please see *Rodríguez y Rowinski* loc. cit. 105).

4. According to the ITALIAN CC art. 2049 masters and employers incur direct and strict liability (*Alpa*, Trattato di diritto civile IV, 673); the courts view the grounds for liability in the „operating risk" of the defendant (Cass. 18 July 2003, no. 11241, Giust.civ.Mass. 2003, fasc. 7-8). CC art. 2049 requires a *rapporto di preposizione* and a *rapporto di occasionalità necessaria* between the unlawful act and the duties assigned to the employee. The actual duration of the relationship of subordination is not relevant. The decisive issue is whether the actor was factually under the control of another and acted on that other's account (Cass. 24 May 1988, no. 3616, Giur.it. 1989, I, 1, 99). The criterion of factual control can effect the result that the employer in the labour law sense, is not liable under CC art. 2049, rather liability is borne by the individual with day to day responsibility for supervision and assignment of tasks

(Cass. 19 December 2003, no. 19553, Giust.civ.Mass. 2003, fasc. 12). The necessary connection to the duties carried out is present when the assigned task facilitates the commission of the illicit act or renders the performance of it easier; it is not relevant that the employee did not adhere to the instructions given to him by the employer (Cass. 10 December 1998, no. 12471, Giur.it. 1999, 2031; Cass. 20 March 1999, no. 2574, Danno e resp. 1999, 1021; Cass. 9 June 1995, no. 6506, Giust.civ.Mass. 1995, fasc. 6). The master is liable when the servant fulfills the requirements for the commission of a tort. However, masters are also liable for the servants who lack tortious capacity (Cass. 12 November 1979, no. 5851, Giust.civ.Mass. 1979, fasc. 11) and for torts committed in an emergency (Cass. 24 July 1951, no. 2095; *Monateri*, Manuale della responsabilità civile, 353). CC art. 2049 has also been held to apply to employers of employees who are minors (Cass. 10 May 2000, no. 5957, Giust.civ.Mass. 2000, 980) and to state adminstration for the acts of civil servants (Cass. 9 February 2004, no. 2423, Giust.civ.Mass. 2004, fasc. 2). Employer and employees are joint and severally liable.(CC art. 2055; see Cass. 9 November 2005, no. 21685, Foro it. 2006, I, 1454).

5. HUNGARIAN CC § 348(1) establishes strict liability for employees (and also for members of a cooperative). When an employee causes damage to a thrid party in connection with his employment, in the absence of a conflicting statutory provision, the employer is liable to the injured party for the damage caused. However, if the injured person is not a third party but another employee of the same employer, CC § 348(1) does not apply (BH 2008/59). The employer can only exonerate himself from liability if the employee could also adduce grounds to exculpate himself from liability. However, proof that the employer acted with care in the selection and supervision of the employee will not suffice (Petrik [-*Wellmann*], Polgári jog II[2], 606/1; *Ujváriné*, Felelősségtan[7], 137). The conduct of the employee who directly caused the damage must satisfy the requisites laid down under CC § 339 and it must occur in connection with the employment (BH 1988/239).Accidents with vehicles of the employer are governed by the provsions relating to the liability of keepers under CC § 345, thereby not encompassed by CC § 348. An employer is also keeper of a vehicle, which, although it belongs to the employee, was financed as working equipment by the employer (BH 1991/148). CC § 348 is employed in respect of interns and apprentices (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1293-1294). The link with a relationship of employment is not necessarily interrupted by the employee not adhering to instructions (BH 2001/526; BH 1986/230; BH 1983/443). The employer's right to claim of compensation/indemnity from the employee is covered by the Labour Code (CC § 350(5)), which restricts the claim according to its merits and amount (Labour Code, Law no. XXII/1992, §§ 166-168). As regards „borrowered" workers, responsibility must be borne by both „employers" (Labour Code § 193/C). Likewise, the liability of civil servants is governed by special rules (CC § 349(1)). CC § 350(1) establishes liability based on a refutable presumption of fault on the part of the principal for contractually authorised representatives and „agents". However, this article does not apply in respect of individuals who perform harzardous activities. In respect of permanent agency or if the principal and agent are companies, the court can also apply CC § 348 (CC § 350(2)). As regards the internal relationship, principal and agent are individually liable. CC § 350(1) only governs principal-agency relationships, it does not impinge on a contract for services or contracts of carriage (*Benedek* loc. cit. 1308). If the agent can exonerate himself, then the principal is also exculpated (*Benedek* loc. cit.; *Petrik*, Kártérítési jog, 164). The regulation of POLISH CC on damage occasioned by a person in the course of activities entrusted to them by another is not uniform. The Civil Code distinguishes between an activity entrusted (on a

contractual or even factual basis) to an independent person (CC art. 429) and one entrusted to a dependant person, who remains under the direction of and subject to the instructions of the person entrusting them with it (CC art. 430). In the first case the employer is accountable for *culpa in eligendo* – the fault is presumed – and may escape liability by showing that he was not at fault while choosing the employee or that he entrusted the activity to one who carries out this activity professionally. Whether the employee acted negligently is irrelevant; however, liability arises only when the conduct is unlawful (Pietrzykowski [-*Safjan*], Kodeks cywilny I[4], art. 429 p. 1213). The second scenario is a case of liability without fault; the employer is accountable for the damage only if the employee was at fault while causing the damage. CC art. 430 applies mostly to damage occasioned by employees, whose personal liability *vis-à-vis* third persons is excluded by Labour Code art. 120. However it is equally applicable in other cases where the person causing the damage is under statutory duty (e.g. in the army), a contractual duty, or even a factual duty (e.g. in family relations) to comply with the instructions of the person entrusting the activity (*Radwański and Olejniczak*, Zobowiązania - część ogólna[7], 207; *Czachórski*, Zobowiązania[10], 257). In the current law the relation of dependence between the person entrusting the activity and the one to whom it is entrusted is interpreted in a rather extensive way. An organisational dependence suffices as is the case between a person operating a hospital and physicians working there who are actually independent within the field of medical treatment (*Radwański and Olejniczak* loc. cit.; *Czachórski* loc. cit.; *Safjan* loc. cit. art. 430 p. 1217).

6. Pursabt to GERMAN CC § 831(1)(first sent.) a person, who employs another to do any work is bound to compensate for any damage which that other unlawfully causes to a third party in the performance of his work. The employer or master has the possibilty, derived from the wording of CC § 831(1)(second sent.), of exculpating himself. According to this provision, the duty to compensate does not arise if the employer has exercised the necesasry care in the selection of the employee/servant and also exercised the necessary care in the event that he had to supply appliances or equipment or supervise the work, or if the damage would have arisen, notwithstanding the exercise of care. A person is employed to do work when assigned duties by another, and is integrated into that person's sphere of influence and is,to a certain extent, dependent on that person (BGH 12 June 1997, NJW-RR 1998, 250, 251). It suffices that the employer/master can restrict the duties of the actor at any stage or can relieve them from their duties, or can delineate the duration and extent of those duties (BGH 30 June 1966, BGHZ 45, 311, 313). As a consequence, independent contractors are not employees/servants (Palandt [-*Sprau*], BGB[66], § 831 no. 5). The damage suffered by a third party in the execution of tasks during the course of employment, when a direct intrinsic connection exists between the damaging act and the function of the assigned duty (BGH 6 October 1970, NJW 1971, 31; BGH 14 February 1989, NJW-RR 1989, 723, 725); his conduct should not exceed the scope of the duties entrusted to him (BGH 13 July 1977, WM 1977, 1169). The servant/employee acts "wrongfully" when his conduct objectively fulfills one of the requirements of CC §§ 823 ff and a ground of justification is not extant. The fault of the employee/servant ought not to be relevant (Sprau loc. cit. no. 8). An extremly high bar has been set regarding the proof sufficent to relieve the master/employer of liability and is accordingly rarely successful. Moreover, in order to evade this requirement, the courts have had covert resort to quasi contractual constructions. The courts have also developed a very strict general supervisory duty derived from CC § 823(1). The practical significance of the latter lies in the fact that independent contractors can thus be incorporated within its scope (*Medicus*, Schuldrecht II[13], no. 859).

7. The point of departure in AUSTRIAN law is “of itself” CC § 1315. The prequisite of liability under this provision is that the employer appoints dangerous (knowing that that person is dangerous) or an unfit person to carry out appointed functions. The restrictiveness of this provision is viewed as an unsatisfactory, therefore the courts and academics increasingly resorted to devices which attempt to circumvent the application of the provision. One such avoidance strategy is the extending the application of CC § 1313a, which, in its original manifestation, was conceived to cover contractual liability (strict liability for principals for all misconduct of person employed to perform an obligation), to embrace all types of legal obligations. Utilising the concept of *culpa in contrahendo* and the rules in respect to contracts with a protective purpose in favour of third parties reinforces this strategy. From a systematic viewpoint, CC § 1313a connotes an exception to the general rules of CC § 1313, according to which a person is generally not responsible for the unlawful acts of another. As regards relationships arising under the law of obligations, extant prior to the occurance of the damaging event, the appointment of the person employed to perform an obligation should not lead to the creditor being disadvantaged (CC § 1313a; OGH 30 May 1994, SZ 67/101). The same also holds true, if the person appointed (helper) avails himself of additional helpers (OGH 2 March 1955, SZ 28/61; OGH 24 May 1972, JBl 1973, 151). The prerequisite for liability is the fault of the person appointed (negligence or intention: OGH 26 April 2000, ZVR 2000/102 p. 423; OGH 25 November 1959, SZ 32/153; OGH 7 Ob 400/97t, RdW 1998, 459) and that when performing, he acted within the scope of the duties assigned to him by his employer (OGH 26 April 2000 loc. cit.). In determining whether the conduct was either intentional or negligent, the decisive factor is if the performance of the conduct had been ordained by the employer (OGH 7 September 1988, JBl 1989, 175; OGH 24 April 1991, JBl 1992, 31; OGH 6 October 2000, SZ 73/151). If, at the very minimum, there is a lack of a special legal relationship akin to contract between employer and the party who causes the damage, the sole remaining possibility for the creditor is a cause of action under CC § 1315. In this context, the determining factor is the presence of fault in selecting the employee/servant. According to case law defective supervision will also suffice. The concept of “helper” has been given a broad interpretation, namely the term can also encompass a contractor, provided that the necessary integration in the management and organisational fields has taken place (OGH 28 February 1968, JBl 1968, 473; OGH 25 April 1995, SZ 68/79); the decisive factor is whether the contractor is bound to abide by any instructions given (OGH 28 October 1975, SZ 48/110). However, there are also a number of ad hoc provisions which extend far beyond CC § 1315 and ordain strict liability,(e.g. EKHG § 19(2); AtomHG § 17; ForstG § 56(2)). Against this backdrop the courts have developed the tenet that keepers of dangerous things are vicariously liable for the gross fault of persons whom they have appointed to perform an obligation (OGH 2 April 1958, JBl 1958, 550; OGH 20 October 1981, JBl 1982, 150).In addition, legal persons are liable not only for the damages caused by their organs, liability is extended to embrace all types of representatives (OGH 17 July 1997, SZ 70/150; OGH 28 February 2000, ZVR 2000/90 p. 376; OGH 20 December 2000, JBl 2001, 525). In the interim, this “liability for representatives” has also been employed and is has been used to the detriment of natural persons.(OGH 20 May 1998, JBl 1998, 713 [Liability of a building firm for engineers in executive positions]; OGH 12 September 2002, ZVR 2003/108 p. 394).

8. GREEK CC art. 922 refers in an old fashioned manner to “masters” and “servants”, however the current meaning given to this provision has transcended the problems associated with this formulation. The provision implements a genuine objective liability for damage which is inflicted on a third party by a subordinate employee

(Georgiades and Stathopoulos [-*Stathopoulos*], art. 922, nos. 3, 11, 38; *Kornilakis*, Eidiko Enochiko Dikaio I, 533). According to the wording of the provision, an unlawful act of a subordinate is sufficient to invoke liability; fault on his part is not required. However, prevailing legal opinion considers this state of affairs amount to a legislative blunder which was influenced by German law. Therefore, legal scholarship only dispenses with the minimum requirement of negligence on the part of the employee, if the legal provision infringed by the employee also dispenses with the requirement of fault (*Stathopoulos* loc. cit. no. 23; A.P. 156/1953, NoB 1 [1953] 192; A.P. 1125/1977, NoB 26 [1978] 934; CA Thessaloniki 522/1990, EllDik 31 [1990] 1331; otherwise *Michaelides-Nouaros*, EllDik 29 (1988), 1641). The prequisite of liability under CC art. 922 is the existence of a relationship of subordination between the master and person appointed to perform a duty (ErmAK [-*Michaelides-Nouaros*], art. 334, no. 17; A.P. 651/2001, Arm 45 [2001] 1475; A.P. 248/1992, EllDik 34 [1993] 1312; Areopag 385/1988, NoB 37 [1989] 258). The search for a concrete line of demarcation has proven to be difficult (*Georgiades*, FS Larenz 1983, pp. 175, 185, 192). The courts have taken an increasingly relaxed approach to the relationship of subordination. It has been affirmed in e.g a case between a company and independent contractor, where the company had reserved the right to instruct and supervise the contractor (A.P. 942/1976, NoB 25 [1977] 359; Areopag 300/1980, NoB 28 [1980] 1723, 1724). Damage is caused "in the course of performing his duties" if the conduct of the employee is intrinsically connected to the task that he has been assigned (*Stathopoulos* loc. cit. no. 33). The fact that the damage occurs merely on the occasion of the duty should not break the connection.(A.P. 380/1979, NoB 27 [1979] 1437). It is suggested, that for cases in which the employee has not adhered to the instructions given, a distinction should be drawn between typical and abnormal dangers. Theft, or acts of revenge on the part of the employee cannot ground liability of the employer, unless, the risk that such torts would occur was increased owing to the employee's engagement.

9. PORTUGUESE CC art. 500 has, in a similar fashion, established vicarious liability for employers. The prequisites of liability under this article are that (i) the person appointed to perform the duty (*comissário*) is tortiously liable and (ii) the act was commited in the course of performing the duties assigned to him by his employer, even in the event that the act causing damage was intentionally committed or occurred because the employee failed to adhere to the instructions of the employer (*comitente*). Employer and employee are jointly and severally liable to the third party (CC arts. 497(2) and 500(3)); in respect of their internal dealings, the employer has a right to seek indemnity from the employee, provided that he himself was not at fault (CC art. 500(3); see *Antunes Varela*, Obrigações em geral I[10], 639). The employee must have acted either intentionally or negligently in order for the liability of the employer to arise (CC art. 500(1) *in fine*; STJ 26 October 1978); presumed fault which is not refuted suffices (CC arts. 503(3) and 506(1)), however, a mere objective liability on the part of the employee will not be sufficient (CC art. 503(1) and (3); see *Antunes Varela* loc. cit. 644; *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 513; see also *Almeida Costa*, Obrigações[9], 569). The employer is only liable for damage caused by the comissário when exercising the function to which he was entrusted (CC art. 500(2); *Almeida Costa* loc. cit. 567). The relation of "representation" (CC art. 500(1)) consists of the execution of material or legal acts which are part of a task or function entrusted to someone other than the *comitente* (*Pessoa Jorge*, Ensaio sobre os pressupostos da responsabilidade civil, 148), a mere temporal or spatial connection with the assigned duty will not suffice (*Antunes Varela* loc. cit. 642; STJ 14 October 1987, BolMinJus 370 [1987] 519). In this respect, a cleaning contractor will not be

held liable under CC art.500 for the theft of a credit card by staff (STJ 2 March 2006), similarly a football club ought not to be liable for a player who poleaxes a referee (CA Coimbra 13 December 2000). On the othe hand, the operator of a mine will be liable for errors of his employees in dealing with explosive substances (STJ 26 October 1978).

10. DUTCH CC art. 6:170(1) is a legislative measure which places the risk liability of the employer on a statutory footing. According to this provision, an employer is liable for damage caused to a third party by his subordinates. The prerequisites for liability are as follows (i) misconduct on the part of the actor, (ii) a relationship of superiority/subordination, and (iii) a functional relationship between the tasks assigned to the subordinate and his wrongful conduct. CC art. 6:170(1) consequently requires liability on the part of the employee, which entails that the employer is entitled to rely on all applicable defences and grounds of justification, which the employee would be entitled to assert (Nieuwenhuis/Stolker/Valk (-*Lankhorst*), T & C Burgerlijk Wetboek, art. 6:170 no. 2 p. 2350). Injuries which were caused by the employee under the influence of a physical or mental defect, will not be attributed to the employer, if the conduct of the employee constituted a positive act (otherwise: in respect of an omission, CC art. 6:165) (Onrechtmatige Daad II [-*Oldenhuis*], art. 6:170, no 35 p. 126). The concept of "subordinate" (*ondergeschikte*) is given a broad interpretation. The core idea is found in the existence of a juridical relationship of authority. The existence of an employment contract is not the decisive factor here, rather that a person either gives instructions and has the power of control or receives instructions and must adhere to them (*Oldenhuis* loc. cit. no. 8 p. 41; HR 28 May 1999, NedJur 1999 no. 564 p. 3109 [Commune in their relations with a primary school,teacher]]; HR 2 March 2001, NedJur 2001 no. 649 p. 4809 [hospital doctor]). With respect to the functional relationship between the act of the employee and the employment, the basic principle holds that the employer is always liable if the employment relationship has increased the liklihood that such an error would materialise. This requirement is relatively easy to prove (e.g. CFI Utrecht 25 September 2002, NedJur 2002 no. 592 p. 4373 und HR 12 April 2002, NedJur 2003 no. 138 p. 920). In addition, the courts also examine whether the employer has the authority to prohibit the conduct in question. Demonstrating that the employer had in fact prohibited the questionable conduct, and that, in spite of this prohibition the employee continued to act in defiance of the instructions does not relieve the employer from liability (HR 1 February 1957, NedJur 1957 no. 175 p. 311; CA The Hague 19 April 1963, NedJur 1964 no. 407 p. 975; CA Amsterdam 2 February 1961, NedJur 1961 no. 190 p. 398; *Oldenhuis* loc. cit. nos. 38-39 pp. 137-153). If the employee commits a crime, independent of any duty which was assigned to him by the employer, the employer is not liable. Questions of demarcation are resolved by balancing all of the relevant consideration, namely, a consideration of the type of damage, the time and place of the act causing damage and the resources used to commit the act (*Lankhorst* loc. cit. no. 2c p. 2350). As regards damage caused by persons working outside of the business or profession of the employer (e.g. housekeeper or Babysitter) CC art. 6:170(2) mitigates the liability of the employer; above all, the employer is only liable if there is a close relationship between the event causing damage and the duty that the employee has been assigned to carry out (Parlementaire Geschiedenis VI, 715). In contrast in the commercial world CC art. 6:171 introduces liability for principals for torts committed by independent contractors employed by him.: "if a person who is not a subordinate/servant performs duties on the order of another person, in the exercise of that other person's business, and a tort is committed by the non servant during the course of the performance of these duties, the commissioning person is also liable for the damage suffered by the third party." This

regulation is based on the rationale that the injured party should be able to regard all activities generated by the operations of the defendant as indivisible (Parl. Gesch. VI, 712, 728-729; *Oldenhuis* loc. cit. art. 6:171 no. 3 p. 13). CC art. 6:171 is not applicable when the independent contractor is only liable under a tort ofstrict liabilty and this tort does not involve questions of vicarious liability.

11. ESTONIAN LOA § 1054(1) establishes strict liability of an individual who engages another person to carry out financial or professional activities on their behalf "on a regular basis". LOA § 1054(2) is also a strict liability provision, governing the liability of a person who avails himself of the services of another in performing his duties, similarly according to LOA § 1054(3), a strict liability provision, governing the liability of an individual who calls on another to perform a service for him. Liability only arises if the person performing the service acts in an intentional or negligent manner and commits an unlawful act (Supreme Court 3-2-1-53-06, RT III 2006, 33, 283; *Tampuu*, Juridica 2003, 464–474.

12. In SWEDEN Damages Liability Act chap. 3 § 1 provides for the liability of persons engaging employees in their undertaking, with regard to damages caused by employees in the course of their engagement for that employer. The employer is accountable for (i) personal injuries and damage to property, where the employee was 'wrongful or negligent'; (ii) pure economic loss, where the employee committed a crime; and (iii) damage to incorporeal personality rights (as defined in chap. 2 § 3), where the employee was 'wrongful or negligent'. The concept of employer's vicarious liability is generally known as *principalansvar*. The particular requirement for accountability, including both intentional and negligent acts or omissions, - 'wrongful or negligent' – under the above mentioned heads of liability are intended to make the assessment more objective, whereby the employer is not excused from liability due to particular circumstances related to the individual employee (inexperience etc.). However, the case-law does not make any particular distinction (HD 20 December 1979, NJA 1979, 773 [operator of an excavator caused damage, but was not found negligent due to his youth and inexperience, instead the employer was held liable for his negligence of selecting such an operator, i.e. for *culpa in eligendo*]; see also HD 26 September 1974, NJA 1974, 476). A particular employee must not be identified as negligent. It is sufficient for negligence to be attributed to the employer's workforce in general (so-called anonymous and cumulated negligence, see *Bengtsson and Strömbäck*, Skadeståndslagen[2], 80-82). Damage must be caused in the course of the employee's engagement which requires a sufficient link between the act or omission and the engaged person's duties at the employer's enterprise. Damage caused during the engaged person's free time, outside the office or due to acts of a private nature are thus generally excluded. However, it is not necessary that the act causing damage is specifically part of the employee's duty to his employer or in the latter's interest. In HD 15 November 1977, NJA 1977, 639, a group of workers assigned to clear the area under power lines from trees, also cut down trees in the near vicinity on the request of neighboring property owners, which still was considered in the course of the workers' engagement. Liability for pure economic loss requires a closer connection to the employer's enterprise and is related to the latter's possibility of preventing the criminal act (HD 13 July 2000, NJA 2000, 380; HD 4 December 2000, NJA 2000, 639; *Kleineman*, JT 2000-01, 924). In all cases a subordinate relation to the employer, who supervises the worker, is regarded as an indication for a person being an employee. However, persons with supervisory or controlling functions may also be regarded as employees (Damages Liability Act chap. 6 § 5). Even persons without formal employment, such as a house caretaker who sporadically manages house property or a functionary of a non-profit sports association are regarded as employees

(*Hellner and Radetzki*, Skadeståndsrätt[7], 157). However, a person is generally not liable for other independent subcontractors or their operatives (*Bengtsson and Strömbeck* loc. cit. 79). Certain statutory duties may not be passed on by engaging an independent contractor though ('non-delegable duties', such as the duty of clearing ones roof from snow for public safety: *Hellner and Radetzki* loc. cit.166), and if a certain type of enterprise is regulated under a strict liability regime, this also usually encompasses liability for subcontractors or leased services. *Leges specialis* may also extend the scope of vicarious liability, such as the Maritime Code providing liability of the ship-owner for the pilot, and Environmental Code chap. 32 providing vicarious liability for persons engaging independent subcontractors for excavation and activities dangerous to the environment. Some cases involve difficulties as to who the liable employer is, especially when a person engages workers from independent subcontractor. This must be decided on a case-by-case basis, where the question of who controls, instructs and supervises the professional will be decisive (HD 20 December 1979, NJA 1979, 773; HD 8 January 1992, NJA 1992, 21). FINNISH Damages Liability Act chap. 3 § 1, based on the Swedish regulation, provides that the employer is liable for damage caused by his employee, or a person comparable to an employee, through 'wrongful or negligent' conduct. Furthermore, it is provided that such liability also covers independent contractors if they "can be regarded as employees", having regard to the duration of the engagement, the nature of the work and other circumstances of the particular case. The notion of accountability – 'wrongful or negligent' – makes it, as in Sweden, possible to establish liability even if negligence cannot be traced to an individual employee (Finnish Supreme Court 24 August 1982, HD 1982 II 120). The principle of 'non-delegable duties' is codified under this provision, whereby liability is vicarious regarding activities which are prescribed by law, even if they are carried out by independent contractors (see e.g. Finnish Supreme Court 20 October 1992, HD 1992:142). In DENMARK, the basis for employers' vicarious liability is derived from a provision of the ancient Danish Code (1683), § 3-19-2, providing that the house master answers for his servant (*von Eyben and Isager*, Lærebog i erstatningsret[5], 105-120, *Trolle*, Risiko & Skyld[2], 222-257). The liability is vicarious as to persons involved in entrepreneurial activity, but also to persons with a comparable relationship such as parents and baby-sitters, house owners and self-employed gardeners – the rationale being that persons who carry out work which is being instructed, supervised and controlled are encompassed (*von Eyben and Isager* loc. cit. 107; Eastern CA 15 February 1958, UfR 1958, 628). The presence of a formal employment relationship (involving a contract, certain duration, or even salary) is not decisive (HD 29 June 1937, UfR 1937, 785). Negligence or intent of the employee must be established. However, as in Sweden and Finland, the fault or negligence may be 'anonymous' or 'cumulated' (*von Eyben and Isager* loc. cit. 110). Further, some connection to the engagement is required for vicarious liability; the employer does not answer for abnormal acts, such as sexual harassment (Western CA 6 December 1993, UfR 1994, 215) or a fight during the break (HD 30 November 1951, UfR 1952, 73). By contrast, liability was established for a harbor worker who put out his cigarette on the goods which he was unloading (SH 5 August 1965, UfR 1967, 664). Like in Sweden, in principle, independent contactors are accountable for themselves (*von Eyben and Isager* loc. cit. 107). Problems arise when several employers are involved, especially situations involving the temporary engagement of workers in one firm from another, and typically a person leasing equipment together with an operator. The general contention is that less importance is placed in who's interest work is being done, and more regard is had to who instructs and supervises the worker (*von Eyben and Isager* loc. cit. 112, *Trolle* loc. cit. 256, *Selvig*, Såkalte

husbondsansvar, 168; SH 2 August 1983, UfR 1983,1065; HD 13 December 1990, UfR 1991, 106). However, there are situations where the engaging person is held liable for an independent subcontractor (see e.g. Western CA 10 March 1981, UfR 1981, 564: land owner engaged an independent contractor for spraying his fields with chemicals, neighboring crops were damaged; the land owner was held liable because the spraying was part of the general caretaking of the land; see further (*von Eyben and Isager* loc. cit. 134-148). In DENMARK, liability is not passed on to the employer if the employee only answers for strict accountability (Eastern CA 29 September 1970, UfR 1970, 940). Correspondingly, in SWEDEN strict accountability is also not passed on (*Bengtsson and Strömbeck* loc. cit. 80), and the same holds for FINLAND (Supreme Court 21 September 1993, HD 1993:114).

13. In SCOTLAND whether a principal is vicariously liable for the delicts of an agent on the same basis as employers are for the delicts of their employees remains to be definitively determined: cf. *M. v. Hendron* [2007] CSIH 27 at [131], 2007 SLT 467 at 497 (Lord Osborne, reserving his opinion on that issue).

II. Liability of legal persons for their representatives

14. According to FRENCH case law, fault on the part of a decision-making body acting on the behalf of a legal person is regarded as the fault on the part of the legal person itself (already detailed in this regard Cass.civ. 15 January 1872, D.P. 1872, 1, 165). The decision-making body is the legal representive of the legal person (Cass.com. 8 December 1981, Rev.soc. 1981, 351, note *Bouloc*). In this context, a single individual can constitute the competent body as can a class of individuals can also be a competent organ (*le Tourneau and Cadiet*, Droit de la responsabilité et des contrats [2006/2007], no. 1373). The decision-making body and the legal person are liable *in solidum* (*Ghestin*, Les conditions de la responsabilité[3], no. 855). The legal position in BELGIUM is identical. In the event that there is fault on the part of the decision-making body but this fault cannot be qualified as a tort, the courts have recourse to CC art. 1992 (Cass. 20 June 2005, no. JC056K5_1, no. de rôle C030105F).

15. In SPAIN, liability of a legal person for the wrongful acts of a decision-making body acting on its behalf is subject to the rules anchored in the basic norm, CC art. 1902. Liability is not attributed on the basis of the provisions concerning the liability of employers under CC art. 1903. The decision-making body and the legal person are regarded as one single entity Correspondingly, for the large part in academic scholarship there is a tendency to differentiate between damage caused by a decision-making body and damage caused by a mere representative, only in the latter case is liability governed by CC art. 1903(4) (Albaladejo and Díaz-Alabart [-*Capilla Roncero*], Comentarios al Código Civil y Compilaciones Forales I(3), 865; *Díez-Picazo and Gullón*, Sistema de Derecho Civil II, 556-557). The courts have also rountinely adopted this bifurication (TS 29 September 1964. RAJ 1964 (2) no. 4097 p. 2522; TS 3 July 1968, RAJ 1968 (2) no. 3610 p. 2426; TS 23 January 1986, RAJ 1986 (1) no. 113 p. 124; TS 19 February 1985, RAJ 1985 (1) no. 561 p. 464; TS 25 October 2000, RAJ 2000 (5) no. 9588 p. 14895; TS 27 May 2003, RAJ 2003 (3) no. 3930 p. 7257 [on each occasion, the direct liability of a legal person under CC art. 1902 was affirmed]). However, it is not a seldom occurance that there is a lack of more specific detail concerning the representative and their fault, and even in the exceptional case where CC art. 1903 is, for once, cited, the legal person is treated as if they had directly caused the ensuing damage (e.g. TS 29 June 1984, RAJ 1984 (2) no. 3443 p. 2619). Tortious liability of unincorporated associations and companies not endowned with legal personality is also recognised, e.g an informal joint venture (TS 29 April 1988, RAJ 1988 (3) no. 3326 p. 3299).

16. Similarly in ITALY, CC art. 2043. is relied upon to attribute liability to a legal person for the acts of a natural person. The tort of a natural person is imputed to the legal person directly on the basis of the relationship between the decision-making body and the legal person (*Alpa*, Trattato di diritto civile IV, 199). The legal person and the relevant member of the board of directors are solidarily liable (*Bianca*, Diritto civile V, 631). In respect of unincorporated associations, individuals who act in its name and on the account of the association are (personally) solidarily liable (CC art. 38). Likewise, members of charitable committees are (personally) solidarily liable (CC art. 41). The inquiry as to who in fact acted on the committee's behalf is extraneous (Cass. 12 January 1982, no. 134, Foro it. 1982, I, 385). The "simple partnership" (*società semplice*) is itself liable and is solidarily liable together with the partner who acted on its behalf (particulars in CC art. 2267). Companies with a share-holding are directly liable on the basis of CC art. 2043; the directors' liability to the company is governed by CC arts. 2392 et seq.

17. In HUNGARY the liability of legal persons for the injuries suffered by third parties caused by members of the board of directors of the company is governed by CC § 350 in conjunction with the rules on agency contained in CC §§ 29(2), 219 and 220; if the representative is also an employee of the company, then CC §§ 348 und 349 must also be taken into account. § 30(1) of Law no. IV/2006 on Business Associations also ordains that a company is liable for damage inflicted on a third party by a representative in an executive position in the course of exercising his authority. § 16(3) and (4) loc. cit. provide further clarification in respect of companies before incorporation, the liquidation phase is dealt with in loc. cit. § 50(1)-(2). In POLAND cases where the damage is occasioned by a person acting as a statutory representative of a legal person do not fall under either CC art. 429 or CC art. 430 (Pietrzykowski [-*Safjan*], Kodeks cywilny I[4], art. 430 pp. 1215, 1218). The fault of the decision-making body is deemed a fault of the legal person itself. In such cases CC art. 416 applies, according to which a legal person is obliged to make good the damage caused by fault of the decision –making body. The legal person and the natural persons acting as its competent body are solidarily liable (Pietrzykowski [-*Banaszczyk*], Kodeks cywilny I[4], art. 416 p. 1097). In the case of decision-making body consisting of several persons, the fault of one of the members taking part in harmful activity (usually the taking of a decision), is sufficient (*Banaszczyk*, loc. cit.). In the context of liability of legal persons, case law and legal writing often refer to the concept of so-called anonymous fault, according to which in a case of objective conflict with the required standard of care within the structure of a legal person it is not necessary to establish who precisely among the members of the decision-making body was at fault (SN 11 May 2005, LEX no. 151668; *Radwański and Olejniczak*, Zobowiązania - część ogólna[7], 201). The application of CC art. 416 is expressly confined to the liability of legal persons. Whether the rule governs the liability of organisations without legal personality is disputed (see, opposing its application, *Banaszczyk* loc. cit.).

18. GERMAN CC § 31 governs the liability of legal persons for damage which a third party has sustained, where the damage was caused by its decision-making body in the course of acting in the discharge of the functions with which it was entrusted and the damage gives rise to a liability in damages. The provision imputes liability to the legal person, given that the decision-making body is itself liable on the basis of another provision (BGH 13 January 1987, BGHZ 99, 298, 302). Therefore, it is a matter of some debate, whether it suffices that the duty violated was exclusively a duty owed by the legal person or whether the duty violated must always be one owed by the decision-making body as well. The courts appear to want to sidestep the issue, by invariably qualifying the obligations of the legal person as embracing also the

obligations of the authorised representative who is internally appointed to discharge the obligations (BGH 5 December 1989, BGHZ 109, 297). CC § 31 has been held to apply to all types of legal persons, not just associations and legal persons under public law (CC § 89). as the wording and context of the provision might imply (MünchKomm [-*Reuter*], BGB[4], § 31, no. 11) In order to overcome the manifold difficulties associated with CC § 831, the courts have extended CC § 31 to govern liability for representatives. Going beyond the wording of the provisions, the courts have imposed liability on individuals who are not strictly speaking constitutional bodies of the companies, but who "through the general operational and management rules, have been appointed to autonomously carry out significant and core functions associated with a legal person and have been allocated sole responsibility regarding the discharge of those functions, with the result that those individuals represent the legal person in legal transactions." (BGH 5 March 1998, NJW 1998, 1854, 1856; BGH 30 October 1967, BGHZ 49, 19, 21). In addition, liability can also be imposed on legal persons under the heading of 'shortcomings' in the organisational structure of the legal entity. Under this rubric, liability arises when no constitutionally appointed representative in the sense of CC § 31 has been appointed to deal with important tasks which the board of directors cannot perform. Legal persons are regarded as having a duty to organise their fields of activity in such a way, with the result that a decision-making body or representative in the sense of CC § 31 is responsible for each area of importance. If this obligation is not adhered to, then the legal person is treated as if it were a constitutionally authorised person or a servant of the decision-making body. In this manner the possibility of exculpation under CC § 831 is cut off and this is referred to as the legal fiction of liability for defective organisation (see further BGH 10 May 1957, BGHZ 24, 200, 213; BGH 5 March 1963, BGHZ 39, 124, 129; BGH 8 July 1980, NJW 1980, 2810, 2811; BGH 5 March 1998, NJW 1998, 1854, 1857).

19. AUSTRIAN CC § 26 places natural and legal persons, in principle, on an equal footing vis à vis third parties (*Koziol*, Haftpflichtrecht II², 375). However, legal persons are not, of themselves, regarded as being capable of fault. In fact, they are liable for the tortious acts of their executive bodies and the representatives of the decision-making bodies, to which an autonomous sphere of influence has been assigned (e.g. OGH 25 January 1995, SZ 68/14=RS0009102) (Liability of a cooperative for a member of the supervisory board with auditing responsibilities who made a false allegation of theft against an employee.). It is conceiveable that in a given case, only a duty of the legal person has been breached, in this case liability is solely attributed to the legal person. It is only when the representative of the decision-making body himself is guilty of the commission of a tort that the natural person, besides the legal person, is also capable of being sued (OGH 15 October 1985, JBl 1986, 184; OGH 28 March 2000, RS0009105).

20. GREEK CC art. 71 establishes liability of legal persons for damage inflicted on a third party by their decision-making bodies (CC arts. 65, 67-69, 74), this damage being committed during the discharge of functions which they were appointed to carry out, where this act gives rise to a liability in damages. It is apparent that, here, we are dealing with the same construction as in German CC § 31 (*Arxaniotakis*, I astiki evthini tou nomikou prosopou idiotikou dikaiou, 106.) Going beyond CC art. 71, legal persons are held accountable for the acts of natural persons, when the duties of the natural person are laid down in the company's constitution. This is the case even where that natural person has not been empowered to represent the competent body (*Papantoniou*, Genikes Arches tou Astikou dikaiou, 151). Contemporary legal scholarship suggests that, with reference to developments in German law, that the concept of decision-making body should encompass all persons who, through the

general operational rules and management structure, have been appointed to autonomously carry out significant and core functions associated with a legal person and have been allocated sole responsibility regarding the discharge of those functions, (*Arxaniotakis* loc. cit. 204; *Filios*, Enochiko Dikaio II(2)[3], 73). The liability of the legal person does not hinge on the existence of fault in the selection of a representative (*Papantoniou* loc. cit. 152). CC art. 71 is not solely confined to claims for damages but is also employed in unjustified enrichment claims (CC art. 904) and applies in claims for mandatory relief (CC arts. 57, 59) (*Papantoniou* loc. cit.; *Arxaniotakis* loc. cit. 189).

21. According to PORTUGUESE CC art. 165 liability is attributed in civil law to legal persons for the acts or omissions of their representatives (*representantes*), agents (*agentes*) and mandataries (*mandatários*) under the same prerequisites, by which an employer or master/principal (*comitente*) is liable under CC art. 500 (see above Note I9) for the acts or omissions of his employees/servants (*comissários*). Corresponding regulations are found for partnerships under the Civil Code (CC art. 998) and for the State or other corporations under public law insofar as they pursue a private law activity (CC art. 501) (see further *Hörster*, Parte geral, 391), such as where a state owned company operates a railway (CA Lisbon 21 May 2005; see. previously Procuradoria-Geral da República 19 June 1975, BolMinJus 252 [1976] 69). *Representantes* can include individuals who act temporarily for the legal person (*Antunes Varela*, Obrigações em geral I[10], 640; STJ 12 July 2001, CJ [ST] IX [2001-2] 27; CA Lisbon 18 May 2004).

22. DUTCH CC art. 6:162 does not differeniate between natural and legal persons; it is also possible for the latter to commit an unlawful act (Asser [-*Hartkamp*], Verbintenissenrecht III[10], no. 155 p. 153) and in this regard the imposition of liability does not hinge on whether a natural person who is in the service of the legal person has committed an unlawful act (President CFI Zwolle 2 September 1992, KG 1992 no. 327; Onrechtmatige Daad II [-*Oldenhuis*], art. 6:170 no. 4A p. 23). A legal person is liable for the acts of its decision-making bodies according to CC art. 6:170 (see above Note *I10*), provided that they acted on the basis of an employment contract. However (above Note *I10*), independent of any employment contract, the conduct of the competent body is generally regarded as the conduct of the legal person itself. Consequently CC art. 6:162 applies. In respect of larger organisations, it may be necessary to aggregate the conduct of different representatives of the decision-making body in order to constitute the unlawful act of the legal person. Staff changes, which have the effect of rendering it impossible to discover the identity of the natural person who was responsible for acting, have no impact on the imposition of liability on the legal person (HR 8 January 1982, NedJur 1982 no. 614 p. 2138; *Oldenhuis* loc. cit. art. 6:170 no. 30 p. 119).

23. In ESTONIA GPCCA § 31(5) expresses the basic principle that the actions of a decision-making body of a legal entity are attributed to the legal person as though they were committed by the legal person itself, and hence, the liability for the representative of does not equate to employer's vicarious liability. However, if the representative of the decision-making body commits a tort, the representative and the legal perso are solidarily liable, cf. *Saare*, Juridica 2003, 673–683 and *Saare*, Juridica 2000, 203–211.

24. In SWEDEN it is generally recognised that a legal person may per se be held accountable, under the same basic statutory provisions of the Damages Liability Act which apply to natural persons. Hence, damage caused by representatives of a legal body, where the representative acts or omits something in the place of the legal body,

the legal person encompassing that body is held directly accountable. This embraces representatives for a limited company, associations, deceased's estate, or other legal person, acting as a body of the legal person (*Hellner and Radetzki*, Skadeståndsrätt[7], 142, 151). In FINLAND legal persons are similarily accountable for board members and other representatives (Supreme Court 21 May 1992, 1992:66; Supreme Court 9 August 2001, 2001:70; *Kurkela*, JFT 2003, 40-56). In DENMARK, the Swedish notion of liability for bodies of legal persons does not exist. Nevertheless, the Danish rule for liability of employees and representatives is widely defined and non-formalistic, and thus also including the liability for e.g. the board of a limited company (*Vinding Kruse*, Erstatningsreten[5], 188). However, formal legal representatives such as liquidators do not fall within its scope (*von Eyben and Isager*, Lærebog i erstatningsret[5], 107, fn. 7).

25. See generally Hartkamp/Hesselink/Hondius/Joustra/du Perron (*-von Bar*), Towards a European Civil Code[2], 431-447 sowie *Renner*, Die deliktische Haftung für Hilfspersonen in Europa.

Illustration 1 is taken from TS 19 June 2000, RAJ 2000 (3) no. 5291 p. 8152; **illustration 2** from Bulgarian Supreme Court 19 January 2000, judgment no. 8470, case no. 1095/1999; **illustration 3** from Danish SH 2 August 1983, UfR 1983, 1065; **illustration 4** from Cass. 9 November 2005, no. 21685, Foro it. 2006, I, 1454; **illustration 5** from TS 24 March 2001, RAJ 2001 (2) no. 3986 p. 6032: **illustration 6** from Danish HD 13 December 1990, UfR 1991, 106; **illustration 7** from Cass. 9 October 1998, no. 10034, Giust.civ.Mass. 1998, 2055; **illustration 9** from BH 1996/89; **illustration 10** from BH 2001/56; **illustration 11** from *Mattis v. Pollock (trading as Flamingos Nightclub)* [2003] EWCA Civ 887; [2003] 1 WLR 2158; and **illustration 12** from TS 26 June 2006, BDA RAJ 2006 no. 4612.

VI.–3:202: Accountability for damage caused by the unsafe state of an immovable

(1) A person who independently exercises control over an immovable is accountable for the causation of personal injury and consequential loss, loss within VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death), and loss resulting from property damage (other than to the immovable itself) by a state of the immovable which does not ensure such safety as a person in or near the immovable is entitled to expect having regard to the circumstances including:

(a) the nature of the immovable;

(b) the access to the immovable; and

(c) the cost of avoiding the immovable being in that state.

(2) A person exercises independent control over an immovable if that person exercises such control that it is reasonable to impose a duty on that person to prevent legally relevant damage within the scope of this Article.

(3) The owner of the immovable is to be regarded as independently exercising control, unless the owner shows that another independently exercises control.

COMMENTS

A. The legal policy

Liability for the unsafe state of an immovable. This Article imposes strict liability for personal injury and property damage caused by the unsafe state of an immovable. It is not confined to damage which has its cause in the poor state of construction or maintenance of buildings and other man-made structures, and it is not confined to damage which results from parts of these structures falling off, coming apart or entirely collapsing. In fact, the Article pertains to all types of dangers on immovables. Furthermore, it relates both to damage sustained on the land or in the building itself and damage suffered by persons or property in the vicinity of the immovable concerned, but not actually on it or in it. Liability attaches to anyone who exercises control over the property independently and without being subject to instructions; in cases of doubt, this is the owner (paragraph (3)).

Liability is strict. Liability is "strict" in the same sense as it is strict under the Product Liability Directive: the injured person only has to show that the immovable was unsafe (in the language of product liability: "defective"), according to the criteria set out in paragraph (1),. This is most clearly demonstrated by considering cases of defective construction of a building which the occupier has taken over from another (e.g. inherited). The decisive issue is not whether the occupier as such could have arranged for greater safety. Rather the decisive issue is simply whether it had been ensured that the required safety precautions were actually in place. The operator of a supermarket is accountable for the causation of damage if, in its vegetables department, foliage which has fallen to the floor and created for customers a danger of slipping is not removed and results in injury: the floor must be kept safe at all times and not merely (as would be the case if resort were had to the general standard of care) at regular intervals. Everything of course depends on the exact circumstances of the individual case: the owner of a wild wood is not obliged to ensure the safety of paths through the wood vis-à-vis recreational users; someone who operates a nature reserve for commercial purposes and attracts visitors to that end is bound to ensure their safety.

Policy considerations. The Article corresponds to the current legal situation in several Member States of the EU, but in many respects goes beyond the present state of legal

development there. To the extent that this is the case, the justification is the protection of the victim, taking into account that the owner of an immovable should in any case have reasonable insurance cover and that in many situations there are no sufficient grounds for distinguishing between damage through defective products and damage through unsafe immovables: if a customer in a supermarket has a right to damages if a bottle of mineral water explodes on being picked up, then the customer also ought to have a right to damages if injured by stepping on a glass shard in the drinks section. A further argument in favour of the solution opted for in the Article, is the fact that even in those legal systems which have at least theoretically held on to liability for immovables connected with negligence, the borders between liability for, and without, negligence no longer lend themselves to being authoritatively defined; quite apart from the other fact that numerous reversals of the burden of proof have further contributed to the situation that adherence to the so-called "fault principle" has increasingly taken on the features of mere lip service. The solution in the present Article is further supported by the consideration that the injured person is often left with no other choice than to go on to another's property, without being able to deal sensibly with hidden dangers present there. In contrast, it must normally be expected that the person responsible for the property should be aware of these dangers and should deal with them in a reasonable manner. The way in which paragraph (1) is phrased takes account of the fact that this argument does not apply to undeveloped land in the open countryside. Finally, it would not be consistent with present-day legal understanding to distinguish in principle between, on the one hand "constructs" (man-made structures), and on the other hand "natural" dangers of an immovable (falling trees; black ice on the way to the front door); this is just as weak as distinguishing for the purposes of the law on liability between, on the one hand, matter that falls downwards and, on the other, unevenness in the ground or an excavated pit.

Legally relevant damage. In conformity with all the provisions of Chapter 3, Section 2 (Accountability without intention or negligence), the liability under this Article is limited to cases of death, personal injury and property damage (as defined in VI.–2:206(2)(b) (Loss upon infringement of property and lawful possession)). Only damage of this kind is within the protective purpose of liability due to the realisation of dangers on immovables. In relation to liability for all other types of damage, the necessity for intention or negligence remains.

Public roads excluded. Excluded from the scope of application of the present Article is the liability of the State and its organs, in so far as they attend to or omit to attend to public law duties in relation to public roads. This follows from VI.–7:103 (Public law functions and court proceedings).

Relationship to VI.–3:206 (Accountability for damage caused by dangerous substances or emissions). The present Article concerns the liability of the person who is responsible for the dangerous state of the land or building. VI.–3:206 (Accountability for damage caused by dangerous substances or emissions) relates to the liability of those who are responsible for dangerous substances or installations which release or discharge substances or emissions dangerous to the environment. VI.–3:206 (Accountability for damage caused by dangerous substances or emissions) is concerned essentially with dangers arising from an enterprise or undertaking, whereas the present Article is concerned with "static" dangers which are inherent in an immovable. It is conceivable that in exceptional cases the requirements of both provisions may be satisfied simultaneously (in which case the claimant may rely on whichever regime is the more advantageous), but they remain clearly distinct in their tenet. The present Article is solely geared to the unsafe state of an immovable ("state" including both the condition of the immovable and its features). Furthermore, it is directed at risks for

persons “in or near the immovable”; that is not the case for VI.–3:206 (Accountability for damage caused by dangerous substances or emissions) (which also covers mobile installations).

Illustration 1
Only this Article (and not VI.–3:206 (Accountability for damage caused by dangerous substances or emissions)) is relevant if someone is injured by a roofing shingle which falls from a roof or if a customer of a bank with access to a safe suffers a shock after a door slams to behind him, locking him in, because no emergency call system has been installed. On the other hand, it is only VI.–3:206 (and not the present Article) which is relevant if the danger in question arises not from the state of the land or a building, but from the use of a building in a particular way. A building is not unsafe merely by reason of the fact that fireworks are stored there; a public house is not unsafe simply because it runs a disco.

Relationship to contract law. The relationship between liability under this Article and liability under contract law is subject to the general rules of VI.–1:103 (Scope of application). A lessee, for example, can invoke the present Article unless the relevant law governing leases contains provisions which would lose their effect were the rules of non-contractual liability applied. By the same token, the rules in the present Article leave unaffected not only the general non-contractual liability for negligence, but also a basis of claim in contract that is more favourable to the lessee.

Illustration 2
X rented rooms in Y’s building for the pursuit of a tailoring business. A fire breaks out in the storage room; items belonging to X are burnt, along with items of clothing that belong to his customer C. The fire can be traced back to the accumulation of soot in the chimney, which had ignited, causing an explosion, which itself left a hole in the wall. X and C have a claim against Y under VI.–3:202 for the damage suffered to their respective property; the building was clearly in an unsafe state. Y cannot exonerate himself by proving that he contracted a chimney-sweeper for the regular cleaning of the chimney. X can also base a claim for damages in contract law (VI.–1:103(d) (Scope of application)), which can be more favourable to him because (i) it compensates for the lost profit that results from the temporary standstill in business operations and (ii) the fire is not attributable to force majeure (see III.–3:104 (Excuse due to an impediment)). Also, in relation to the issue of whether X can have recourse against Y for the damage that X suffers because he must replace C’s burnt suits under the applicable contract law (which may be assumed here), it would be more beneficial for X to claim damages under contract law. This is because under the law on non-contractual liability for damage this element only constitutes legally relevant damage (VI.–2:101 (Meaning of legally relevant damage)) where Y had acted negligently. However, this is lacking here.

Defences. The defences in Chapter 5 of this Book also apply to claims under the present Article. Of particular practical significance is VI.–5:302 (Event beyond control), which can rule out liability for the realisation of dangers on immovables as a consequence of extreme weather conditions.

B. The risk embraced by liability

Basis. The liability under VI.–3:202 relates to personal injury and property damage which arises because an immovable does not come up to standard of safety which persons who find themselves on it or in it or in its vicinity may reasonably expect. The type of hazard plays no role. The Article can cover cases where parts of a building or structure become detached, where a gravestone falls over in a cemetery, where the floor of a house is slippery from being over-polished and a corresponding warning to the public is lacking, where a tree falls over, where an icy footpath is not treated with grit and there is no corresponding sign, where a pit has not been secured or where the water extraction system in a swimming pool is set so high that children who are caught by its suction when diving cannot free themselves from its pull.

Illustration 3
Sloped premises are unsafe where frequent torrential rainfall occurs in the area and the water drainage system does not function properly, so that walls on a neighbour's property situated below break under the pressure from a mudslide.

Immovable. "Immovable property" is defined in Annex 1 as "land and anything so attached to land as not to be subject to change of place by usual human action." This clearly covers buildings, permanent bridges and similar structures. The term immovable is not further defined for the purposes of this Article. This appeared neither possible nor necessary because the Article does not depend on technical issues. In fact it usually suffices for the term immovable as used in this Article to equate it in a natural sense with "premises". Where the goals on a football field designed for competitive sport fall over from even light contact, this sports ground is unsafe for its users regardless of whether the goals formed an essential part of the football field or not.

"Other than to the immovable itself". In cases of property damage, accountability under this Article is limited to damage to other items of property than the premises themselves. This restriction has been formulated following the corresponding rule in the Product Liability Directive (see VI.–3:204(1) (Accountability for damage caused by defective products)). It seemed necessary in order not to disturb the numerous special regimes of landlord and tenant law and residential property law.

Illustration 4
A chimney jutting high above the roof of a block of apartments collapses; stones break through the roof into an apartment situated below. Its owner cannot hold the owners of the other apartments accountable under VI.–3:202.

"In or near the immovable". It makes no difference to the liability under VI.–3:202 whether the harm comes about on or in the premises or outside the premises but near to them: the owner is liable for the damage caused by parts of a building falling away or a tree falling over, regardless of whether the victim is hit while on the premises or on a footpath belonging to someone else or in a public car park.

"Such safety as a person … is entitled to expect". The test decisive for liability is whether the premises lacked the safety which the injured person could reasonably have expected under the circumstances. The test is an objective one, to be applied from the standpoint of the injured person in or near the immovable. Quite what is "safe" depends on the particular

circumstances. The concept is based on the notion of what is 'defective' adopted in the product liability defective.

Illustration 5
An adventure playground for children may well involve some risks because it otherwise would not be an adventure playground.

Illustration 6
In contrast, a ski slope is unsafe if it has an integrated liftmast whose sharp edges are not padded by bails of straw or by other means.

The nature of the immovable (paragraph (1)(a)). It is in the nature of the matter that the safety which can be expected from an immovable depends on all the circumstances of the particular case. Among these circumstances is the kind of land or the kind of premises involved and the kind of danger which is present. A person who strolls around private gardens open to the public can expect a different type of safety to someone collecting mushrooms in the forest, who can at most reckon with warning signs in particularly dangerous spots and this only in a recreational area close to urban life.

The access to the immovable. It is also important to identify whether the case involves land or premises on to which people have been invited by a person entitled to do so or land or premises on to which people may come against that person's will. In the latter case the standard of safety which the public can expect is much lower than in the former. Someone who is in an area of danger without authority can naturally expect less safety (the matter may be otherwise in relation to children) and a thief or another person who violates the sanctity of the home cannot basically expect any safety at all.

Costs. Only such a standard of safety can be ultimately expected as can be produced with reasonable cost under the circumstances. Therefore, often warnings of certain dangers must suffice; to this extent, of course, everything depends on the circumstances of the individual case. Where a pit is excavated in the course of construction work, it must be fenced in and the fence must be lit up at night; a mere warning sign is certainly insufficient here. Furthermore, the amount of expenditure must be in reasonable proportion to the type of risk. More must be done to protect against dangers to life and limb than to protect against dangers to property.

Illustration 7
Subsequent to an accident in the outside lane of a motorway, the passenger of the vehicle attempts to seek safety from the fast-moving traffic by leaping over the crash barrier. Between this and the crash barrier on the opposite carriageway there is a dangerous twenty metre drop, into which the passenger plunges to her death. The drop between the carriageways was not discernible in the darkness. The structure of the elevated motorway was unsafe at this point. The operator of the motorway is liable under VI.–3:202., However the person causing the car accident is not liable because the fatal plunge is no longer to be qualified as a consequence of the accident, see VI.–4:101 (General rule [on causation]).

C. Persons liable

Policy considerations. There is no uniformity between the various European legal orders as to the question on *whom* the liability should be imposed. Essentially the owner, the person

possessing for himself or herself (in contrast to a mere *detentor*) and the occupier come into focus. Against this backdrop, the Group proposes a compromise. Under VI.–3:202 the basic rule is that the liability is that of the person "who independently exercises control". In relation to the victim, however, it is (rebuttably) presumed that the owner of the immovable is the person who independently exercises control (paragraph (3)). In order to prevent an amicable solution to the problem of liability for an immovable collapsing (so to speak) simply because of the different concepts of "ownership" in relation to immovables in the various jurisdictions, it is left to national laws to determine what is meant by an owner of an immovable. In the countries that have land registries at their disposal, for the most part this does not present a problem; here the owner of the premises is also the person whom the injured person may identify most easily and thereby minimise the procedural risk. This fact also justifies the policy decision behind paragraph (3).

Paragraph (2). Paragraph (2) furnishes an additional clarification as to the persons who may be liable because they are exercising independent control. The primary source of inspiration for paragraph (2) is the definition of "occupier" in the Irish Occupiers' Liability Act 1995, s. 1(1). Despite its partial circularity it expresses all the essential elements. In any given case the outcome of this criterion will depend on all the circumstances. In the case of larger residential property it may be that different persons are occupiers in relation to different parts of the property. A tenant of a flat is capable of being an occupier of the rented area. During the building phase, the construction company is liable for the safety of the building site and the stability of the scaffolding erected by it.

Occupier and keeper. The definition of the person who independently exercises control ("occupier") was restricted to immovables because the policy question of who is to be burdened with liability for damage caused by an unsafe immovable cannot in all cases be satisfactorily addressed by a purely factual assessment as in the case of keepers of motor vehicles, animals and substances in determining whether there should be accountability without intention or negligence. The situation for immovables is distinguishable from that of motor vehicles or animals because with immovables (e.g. large buildings) different parts may be under the control of different persons. The concept of a keeper is not designed to cover such situations.

Paragraph (3). Under paragraph (3) the owner can show "that another independently exercises control". In such a case liability does not attach to the owner, but to the third person. A person who has leased out a large complex of commercial premises is not responsible for the state of the commercial units within the complex; a person who lets out an apartment is not responsible for the quality of the carpet laid by the lessee. The owner of an empty house is not faced with liability for damage which has its basis in its neglect if youths occupy the house and the police are afraid to cause a stir by initiating a move to evacuate the house. However, in such a case the owner must do everything possible to put the occupation of the house to an end; otherwise there may be liability for negligence.

Abandonment. Under VI.–3:208 (Abandonment) a person who abandons an immovable remains accountable for it up until the time when another person exercises independent control over it. For further details see the Comments on that Article.

NOTES

1. According to FRENCH CC art. 1386 the owner of a building is responsible for damage which is caused by the building's collapse provided that the cause of the collapse was due to a lack of maintenance or a structural defect. The concepts of "building" and "collapse" have been broadly interpreted by the courts (see further *le Tourneau and Cadiet*, Droit de la responsabilité et des contrats [2004/2005], nos. 8028 and 8030); the fact that a a brick or a slate in the roof has become dislodged is sufficient. A faute on the part of the *de facto* owner is not necessary. For many years, CC art. 1386 was construed as a *lex specialis* provision which superceded the general *gardien*-liability anchored in CC art. 1384(1) (Cass.civ. 17 December 1997, Bull.civ. 1997, II, no. 323 p. 190). However, Cass.civ. 23 March 2000, Bull.civ. 2000, II, no. 54 p. 37 permitted a suit against a *gardien* who was not the landowner on the basis of CC art. 1384(1),. In its report for the year 2000 the same Court suggested to the legislature that CC art. 1386 should be repealed (Rapport Annuel de la Cour de Cassation 2000, http://www.courdecassation.fr/_rapport/rapport.htm). In its 2005 annual report (http://www.courdecassation.fr/_rapport/rapport05) the Cour de cassation renewed its recommendation and, moreover, submitted that CC art. 1384(2) ("However, a person who possesses, regardless of the basis thereof, all or part of a building or of movable property in which a fire has originated is not liable towards third parties for damages caused by that fire unless it is proved that the fire must be attributed to his fault or to the fault of persons for whom he is responsible") should also be repealed. CC arts. 1384(2) and 1386 contradicted the judicially created system of gardien liability for all manner of things (see further *Depadt-Sebag*, D. 2006, 2113).

2. According to BELGIAN CC art. 1386, similar to the French position, the owner of a building is liable for the damage, which was caused by the collapse (ruine) of the building. Again, similar to the position adopted in French law, the collapse must have been due to defective maintenance or must result from a structural defect. The owner of the building is liable, even where he is not the *gardien* of the building concerned (*Vandenberghe/Van Quickenborne/Wynant/Debaene*, TPR 2000, 1551, 1781, no. 89). The term "building" encompasses all building constructions which are attached to land (house, bridge) or structures covered by water (swimming pool, piers etc) (*van Gerven*, Verbintenissenrecht II[7], 341-342). The use of the word "collapse" does not simply dennote that the entire building must cave in, the dislodgement of other building materials can connote a "collapse" (Cass. 18 April 1975, RW 1975-76, 159). The fact that the owner is not at fault is not a grounds of defence; CC art. 1386 establishs an irrebutable presumption of liability to the prejudice of the owner (*Vandenberghe/Van Quickenborne/Wynant/Debaene* loc. cit. 1789-1791, no. 96).

3. Similarly, under the SPANISH CC art. 1907, liability is imposed on the owner. The predominant view in legal scholarship is that the liability for faulty maintenance (not, however, defective construction) of a building structure should be extended to the occupiers that have accepted a duty to ensure the repairs (Albaladejo [-*Santos Briz*], Comentarios al Código Civil y compilaciones forales XXIV, arts. 1907-1909, p. 623; *Roca i Trias*, Derecho de daños[3], 270). It is, however, far from clear whether the liability of an occupier excludes the liability of the owner (e.g. Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*de Ángel Yagüez*], Código Civil II[2], arts. 1905, 2040 and CA Alicante 9 February 2005, BDA JUR 2005/80628) or whether both owner and occupier are jointly liable vis-à-vis third parties (in this respect *Herbosa Martínez*, La responsabilidad extracontractual por ruina de los edificios, 113 and, implicitly, *Santos Briz* loc. cit.). When the damage caused by the collapse of a construction is not due to the lack of repairs, but to a mistake in the construction of a building, CC art. 1909 –

which entitles the victim to address his or her claim to the architect or the builder – applies (TS 29 March 1983, RAJ 1983 (1) no. 1652 p. 1295; TS 29 November 1990, RAJ 1990 (7) no. 9059 p. 11543). Where a building is threatening to collapse CC art. 389 applies, whereas, when the collapse has already occurred, CC arts. 1907 and 1909 apply. CC art. 1907 is often qualified as a form of liability which derives from a rebuttable presumption of fault, in respect of the necessitated repairs which were not carried out (*Albadalejo*, Derecho Civil II[12], 966). However, some authors consider that it is a strict liability provision (*Lacruz and Rivero*, Elementos II(2)[4], 535; Puig Ferriol/Gete-Alonso/Gil Rodríguez/Hualde Sánchez [-*Asúa González*], Manual de Derecho Civil II[3], 514) or, at least, a 'liability based on risk' (*Santos Briz*, La responsabilidad civil II[7], 774; *Herbosa Martínez* loc. cit.). Court decisions follow the trend set by prevailing legal doctrine and consider that liability under CC art. 1907 arises from negligence (TS 25 April 1986, RAJ 1986 (2) no. 1999 p. 1941; TS 9 March 1998, RAJ 1998 (1) no. 1269 p. 2039; TS 29 October 1999, RAJ 1999 (4) no. 7628 p. 12042; TS 22 November 1999, RAJ 1999 (5) no. 8296 p. 13016; TS 8 June 2006, BDA RAJ 2006 no. 3207 [dismissing a claim as there was 'no negligent action of the defendant']). A "building" within the meaning of CC art. 1907 is any kind of man-made 'construction' (see CC art. 389: "building, wall, column or whatever other construction"; *de Ángel Yagüez* loc. cit. 2045; *Roca i Trias* loc. cit. 269; TS 25 February 1987, RAJ 1987 (1) no. 736 p. 668: damage caused by the fall of a 'column'; TS 9 March 1998, RAJ 1998 (1) no. 1269 p. 2039: damage caused by the fall of a 'post'). CC art. 1907 does not apply to other dangers or risks associated with immovables, for example flooding of a neighbour's land (TS 3 April 1996, RAJ 1996 (2) no. 2880 p. 3822, *obiter*; see also TS 6 April 2001, RAJ 2001 (2) no. 3636 p. 5582; TS 22 July 2003, RAJ 2003 (4) no. 5852 p. 10961).

4. According to art. 2053 ITALIAN CC art. 2053, the owner of a building or other man made structure is liable for damage which ensues from the collapse of the construction, unless he can adduce proof that the collapse cannot be ascribed to construction or maintenance defects. Prevailing legal opinion considers the provision to be one of strict liability (*Franzoni*, Dei fatti illeciti, 622; *Monateri*, Manuale della responsabilità civile, 414; *de Cupis*, Il danno, 206); in case law occasional reference is made to a legal presumption that the owner of the property is liable, which in end effect achieves the same result.(Cass. 12 March 2004, no. 5127, Giust.civ.Mass. 2004, fasc. 3). CC art. 2053 is a *lex specialis* in relation to CC art. 2051 (*Franzoni* loc. cit. 623; Cass. 8 September 1998, no. 8876, Giur.it. 1999, I, 1, 1822). CC art. 1669 governs the right of the owner to claim compensation from the construction company. "Buildings or structures" CC art. 2053 dennote man made constructions which are, at a minimum, temporarily attached to land (*Monateri* loc. cit. 416). The terms structure connotes a river dam, (Cass.sez.un. 14 December 2001, no. 15875, Giust.civ.Mass. 2001, 2165), the basin of a river (CFI Città di Castello 13 November 1964, Foro pad 1966, I, 120, *obiter*), a footbridge for pedestrians (CFI Parma 25 January 1960, Arch.resp.civ. 1961, 218), an advertising billboard which was brought onto a balcony (CFI Taranto 15 March 1977, Giur.it. 1978, I, 2, 296), an audience tribune (CA Firenze 3 April 1963, RCP 1963, 205), a funicular railing at the entrance to a building site (CA Rome 19 May 1958, *Monateri* loc. cit. 416, fn. 32) and a window (CFI Roma 30 November 1967, Giur.it. 1968, I, 2, 436), even debris is embraced by the term (*Cian and Trabucchi*, Commentario breve[6], sub art. 2053, II), however, snow, trees and paving are not within its scope (Cass. 31 October 1961, no. 2530, RGI 1961, note R.C. no. 27). The term "collapse" also encompasses parts of the buildings which have become dislodged. Apart from the owner, responsibility is attributed to those individuals who have rights over an immoveable, conferring a power of control. The

holder of a right to use and enjoy the property will be occassionally held to be solely liable (*Monateri* loc. cit. 423-424; *Bianca*, Diritto civile V, 762; *Gazzoni*, Manuale di diritto privato[11], 707), however the usual case is that this party is held liable in addition to the owner (Cass. 7 May 1957, no. 1533, Foro it. 1958, I, 1310; *Franzoni* loc. cit. 628). Whoever accepts an inheritence is liable for the *medio tempore* resulting damage, because the acceptance has an *ex tunc* effect (Cass. 24 August 1954, no. 2987, Resp.civ. e prev. 1955, 190). CC art. 2053 also applies when building is owned by the public adminstation (Cass. 11 November 1977, no. 4898, RGI 1977, voce R.C. no. 20, 21). The defendant can exculpate himself from liability upon proof of a *caso fortuito* or a *forza maggiore* (*Cian and Trabucchi* loc. cit. V). The lines of demarcation are difficult to draw in respect to the general *custodia*-liability anchored in CC art. 2051 (cf. Cass. 6 October 2005, no. 19474, Danno e resp. 2006, 642: damage caused by a mudslide, by- product of construction of motorway; Liability of contractor and person who commissioned the contract affirmed under CC art. 2051).

5. HUNGARIAN CC § 352(1) establishes the liability of an owner for damage suffered by another, which is caused by falling objects or other defects of the building. The owner can however escape liability upon proof that the current regulations pertaining to maintenance and construction of buildings were not infringed and furthermore, that the measures necessary to prevent damage occurring were adopted. Liability for falling objects which had been affixed to the building (for example, flags, billboards, illuminated advertsing hoardings, street lighting affixed to buildings), is imposed on the individual, whose interest was served in attaching the object to the building (CC § 352(2)). In respect of damage ensuing from objects which were thrown out of, dropped or emptied from a dwelling or other premises, the tenant or the user of the premises is liable and liability is strict (CC § 353(1)); if the tenant can identify the person who was responsible for causing the damage, he remains liable as surety unless he can prove that the person who caused the damage was not authorised to stay in the dwelling (CC § 353(2)). Under CC § 352(1) a person in a contractual relationship with the individual responsible for the damage is not entitled to claim under CC § 352(1) (Petrik [-*Wellmann*], Polgári jog II[2], 624/3; Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1316-1317; *Petrik*, Kártérítési jog, 215-216). The term "building" emcompasses all types of building structures (CC § 686), for example, garages, basements, churches, factory chimney, and audience tribunes. Construction defects typically embrace defective roofs, lack of barriers, unsecure terrain and steps or crumbling waterpipes. The courts have interpreted dropped objects to include heavy snowfall from the roof (BH 1979/236). Liability is strict, insofar as the owner cannot escape liability upon proof that the mistake was already committed by the previous owner and could not be discerned by the new owner. In respect of damage which materialised during construction work, the construction firm, not the owner, is liable (*Wellmann* loc. cit.; *Benedek* loc. cit. 1317-1319). The person which is responsible according to these rules can claim reimbursement from the person which actually caused the damage (CC §§ 352(3), 353(4)).

6. Under POLISH CC art. 434 the person in direct possession of a structure (*samoistny posiadacz*) is accountable for damage caused by parts of that structure falling off or by its collapse, unless the collapse or falling off did not result from an improper maintenance of the structure or defects in construction. This is a case of liability without fault, although the risk for the possessor is limited to improper maintenance and construction defects (Pietrzykowski [-*Safjan*], Kodeks cywilny I[4], art. 434 p. 1226). The possessor may be accountable despite exercising required care and in ignorance of construction defects (e.g. where the property has been recently inherited or acquired). Liability of the possessor arises even if he or she entrusted the

maintenance of the structure to a professional, who failed to exercise his duties properly (SN 13 September 1988, OSN 1990, poz. 55; *Radwański and Olejniczak,* Zobowiązania - część ogólna[7], 231). The possessor may escape liability only by proving that the damage resulted from something other than improper maintenance or construction defects (and some scholars consider this constitutes a rebuttal of the presumption introduced by the rule: *Radwański and Olejniczak* loc. cit.; *Safjan* loc. cit. 1229). The notion of the structure is interpreted broadly and covers any man-made construction connected, even if temporarily, with the soil (such as buildings, towers, bridges, monuments, and street lamps; *Radwański and Olejniczak* loc. cit. 230; *Safjan* loc. cit. 1228). The parts of the structure are usually its essential parts (chimney, balcony, and balustrade). CC art. 433 regulates separately the *actio de effusis vel ejectis*: "The person who occupies premises shall be liable for the damage caused by the ejection, effusion or falling off of any object from those premises, unless the damage arose out of *force majeur*, solely through the injured party's fault or through the fault of a third person for whom the occupier is not responsible and whose action he or she could not prevent". It is also a case of strict liability. The occupier is a person who exercises factual control over the premises in their own interest (*Safjan* loc. cit. art. 433 p. 1224). If an object falls from premises dedicated to the common use of all inhabitants, the possessor of the building incurs liability (*Safjan* loc. cit.). There has been an enduring discussion in the commentaries whether the flood of a lower flat due to a plumbing defect in the upper flat falls under CC art. 433 (pro *Radwański and Olejniczak* loc. cit. 229 and *Safjan* loc. cit.; contra SN 5 March 2002, OSPiKA 2003, poz. 5). Two provisions of the SLOVENIAN Civil Code also deal with dangers associated with immoveables. LOA art. 159 establishes strict liability for the "keeper" of an immoveable in respect of falling objects, whereas LOA art.106 corresponds in many respects to the Polish CC art. 434. The keeper of the immoveable can however adduce proof that he "did everything to avert the danger."

7. GERMAN CC § 836 governs the liability of the owner of an immoveable. This provision is supplemented by the rules anchored in CC §§ 837 and 838 pertaining to the liability of occupier of a building and person who is under a duty to maintain the building. In each case, liability is attributed on the basis of a refutable presumption of fault. CC § 836(1) pertains to the collapse of a building or other structure which is attached to the land or any part of the building which becomes detached from the building. The tortfeasor is liable for bodily injury and damage to property. The term "building" connotes an immoveable and generally enclosed structure which is firmly attached to the ground, into which people can enter (Erman [-*Schiemann*], BGB II[11], § 836 no. 2; MünchKomm [-*Wagner*], BGB[4], § 836 no. 8). Liability can also arise in respect of parts of the building, for example for balconies (BGH 11 December 1984, NJW 1985, 1076), roof slates (CA Düsseldorf 20 December 2002, NJW-RR 2003, 885) or roofing felt (BGH 23 March 1993, NJW 1993, 1782). Destruction or damage does not entail that the structure forfeits its categorisation as a building. Consequently building ruins and derlict or demolished buildings are also embraced by CC § 836 (*Wagner* loc. cit.). "Other structures attached to the land" include, for example, fences, scaffolding, monuments and gravestones (Palandt [-*Sprau*], BGB[66], § 836 no. 3). A building is constructed in a defective manner, if the requirements necessary to ensure that the life and health and safety of others are not placed in jeopardy have not been satisfied. An element of the duty of maintenance is the examination of the structural and physical condition of the building (*Sprau* loc. cit. no. 8). In principle, the person who suffered damage must prove the presence of a structural defect or that the structure was inadequately maintained and must proved a causal nexus between the damage suffered and the structural defect or the inadequate upkeep. However the rules

pertaining to *prima facie*-proof are often of great assistance to him (however, these rules will not apply in cases of extraordinary natural occurrences: BGH 23 March 1993 loc. cit. 1783; BGH 27 April 1999, NJW 1999, 2593, 2594). Exculpation, while still theoretically possible, is subject to stringent requirements which have been established by the courts (BGH 23 March 1993 loc. cit. 1783; BGH 27 April 1999 loc. cit.). Liability is imposed on the owner-occupier (CC § 836(3)); this concept is defined in CC § 872. Liability does not depend on the ownership structure. Under certain prerequisites, liability may be imposed solely on former owner-occupiers (CC § 836(2)). The successor becomes owner-occupier immediately, upon succession (CC § 857), this is the case even when he has no knowledge of the inheritence. A lack of knowledge may be a relevant factor in the question of exculpation (*Wagner* loc. cit. no. 27). The liability of the owner-occupier under CC § 837 supplants liability in CC§ 836 (BGH 29 March 1977, NJW 1977, 1392), liability of the person under a duty to maintain the building under CC § 838 is joined to the liability under CC §§ 836, 837 (*Sprau* loc. cit. § 838, no. 1).

8. AUSTRIAN CC § 1319 governs liability for damage which is caused by the collapse or dislodgment of parts of a structure. The liability of the occupier of a dwelling is the subject of a separate regulation, CC § 1318. Structures in the sense of CC § 1319 are all man made buildings, excavations or other artifical structures on the ground or terrain (OGH 29 November 2001, JBl 2002, 463; *Koziol and Welser*, Bürgerliches Recht II[12], 342). CC § 1319 has been deemed to apply analogously to trees, (OGH 31 March 1970, EvBl 1970/294) and even to heavy snow sliding from a roof (*Koziol and Welser* loc. cit. 343; Schwimann [-*Harrer*], ABGB VI[3], § 1319 no. 16; Koziol/Bydlinski/Bollenberger [-*Danzl*], ABGB, § 1319 no. 2). The damage must be attributable to the defective condition of the building, damage which is caused by typical dangers associated with a man made structure suffices (OGH 12 February 1998, JBl 1998, 715 note *Koziol*). The person responsible can exonerate himself from liability upon proof that he exercised reasonable care to prevent the danger materialising. e.g. in that he adopted sensible precautionary measures (OGH 20 March 1951, SZ 24/78; OGH 8 July 1986, SZ 59/121). Therefore it is unclear whether, as regards liability, CC § 1319 provides for a rebuttable presumption of fault (still of this view OGH 30 July 1963, SZ 36/103) or whether it is a strict liability provision (According to recent perception: OGH 25 June 2002, ZVR 2003/37, p. 130; *Koziol*, Haftpflichtrecht II², 400). According to the wording of CC § 1319, liability is imposed on the "holder" of a building or structure. According to case law, this concept is not identical to the concept of possessor under property law. Holding in the sense of CC § 1319 requires a link to a building or structures "which enables appropriate preventative measures to be taken to avoid the danger" (OGH 17 February 1954, SZ 27/37). This interpretation is similar in many respects to the interpretation given to the concept of keeper in modern law (OGH 8 April 1997, ZVR 1997/124 p. 356). Therefore, this approach entails that a tenant can also be a holder under CC § 1319 (OGH 7 February 1968, EvBl 1968/192).

9. GREEK CC art. 925 provides that an "owner or occupier" of a building is liable for damage which is suffered by a third party owing to the collapse of the building. Owners or occupiers can escape liability upon proof that the collapse could not be ascribed to either defective construction or inadequate upkeep of the building. Nonetheless, according to prevailing legal opinion, this provision triggers objective liability; the presence of fault on the part of the owner or occupier is not required (Georgiades and Stathopoulos [-*Vosinakis*], art. 925 no. 1; *Balis*, Genikai Archai[8], 453; *Kornilakis*, Eidiko Enochiko Dikaio I, 565; its qualification as liability based on a rebuttable presumption of fault is advanced only by *Zepos*, Enochikon Dikaion II(2),

802). The term "building" connotes any man made construction which is attached to the land, even where the structure is incomplete or is derelict. "Other structures" include walls, fences, scaffolding as well as installations used for the production, relaying and use of electricity and gas (*Vosinakis* loc. cit. no. 5). Plants and rocks are not included within its scope (*Kornilakis* loc. cit. 566). There is a rebuttable presumption that the collapse was the result of defective construction or maintenance. Only damage which ensues from the realisation of risks typically associated with a collapse is recoverable, therefore e.g. the damage suffered by a passer-by, who stumbled over rubble from the building was not recoverable (*Kornilakis* loc. cit. 567). According to the wording of the statutory provision, either the owner or occupier may be held liable. This is understood to mean that liability will only be imposed on the owner if he is simultaneously an occupier. Otherwise, the occupier is held solely liable (*Kornilakis* loc. cit. 568; *Vosinakis* loc. cit. no. 9). As regards liability, the tenant is privileged in that he can choose between claiming under contract (CC arts. 575 ff) or tort law. The tort claims are more favourable because CC arts. 579 ff are not applicable under tort law (*Kornilakis* loc. cit. 568; CFI Athens 30/1980, Arm 35 [1981] 471).

10. PORTUGUESE CC art. 492(1) similarly provides, that the owner or possessor of a building or other construction (*obras*) is liable for damage which ensues from the partial or complete collapse of a structure, provided that the collapse was caused by inadequate upkeep of the structure or resulted from a structural defect. The individuals responsible can, however, escape liability. upon proof that they exercised reasonable care or prove that the damage would have resulted in any event even if they had exercised reasonable care (STJ 17 March 1977, BolMinJus 265 [1977] 223). In cases involving the inadequate upkeep of a building, the individual, who is under a legal or contractual duty to maintain the building is liable in the place of the owner or the occupier (CC art. 492(2)). Liability in each case is based on a rebuttable presumption of fault, liability is not strict. The prerequisite needed to trigger the presumption of fault is proof of a collapse which was the consequence of defective construction or inadequate upkeep (*Antunes Varela*, Obrigações em geral I^{10}, 592; STJ 6 February 1996, BolMinJus 454 [1996] 697; CA Lisbon 6 June 1995, CJ XX [1995-3] 127; STJ 28 April 1977, BolMinJus 266 [1977] 161). CC art. 492 is also applicable to constructions connected to the soil or attached to the building (e.g. bridges, columns, wells and water pipes [STJ 6 February 1996, CJ (ST) (1996-1) 77]) but neither to movables without such a connection (e.g. a vase on the window-sill) nor to natural products connected to the soil (trees etc.) (*Pires de Lima and Antunes Varela*, Código Civil Anotado I^{4}, 493, note 3 to art. 492; *Antunes Varela* loc. cit. 592). The "collapse" can be total or partial (tiles falling down) (*Pires de Lima and Antunes Varela* loc. cit.). Liability is attached to ownership or possession. The owner of a flat in which a water pipe breaks is liable vis-à-vis the owner of the flat below (CA Oporto 18 March 1999; CA Lisbon 9 March 2002). During execution works, the master-of-works (*empreiteiro*) and not the owner of the building or construction will be liable, as it is the former who has the effective direction of the work (STJ 14 April 2005; STJ 26 April 1988, BolMinJus 376 [1988] 587).

11. According to the DUTCH CC art. 6:174(1) liability is predicated on the basis that a structure "does not correspond to established standards" and consequently "presents a danger for persons or things" Liability is imposed on the basis of the unsafe state of the building, however, liability is not premised on a structural defect as is the case under VI.–3:202. The former is established when, for example, software which is used to control a lift does not function properly. In respect of buildings owned by the state, the unsafe state of the building is more readily affirmed than in the case of a privately

owned building (Nieuwenhuis/Stolker/Valk (-*Lankhorst*), T & C Burgerlijk Wetboek[4], art. 6:174, no. 4a p. 2361; Onrechtmatige Daad II [-*Oldenhuis*], art. 6:174, no. 6 p. 69 and nos. 73-74 p. 216). Liability arises independent of the question whether the owner/occupier recognised the defect (*Oldenhuis* loc. cit. no. 93 p. 357, Parlementaire Geschiedenis Inv. VI, 1378). "Structures" are buildings and other structures which are permanently, either directly attached to the land or indirectly via the linkage with other buildings or structures (CC art. 6:174(4)). Therefore, gravel on roof cladding, (CFI The Hague 16 November 1977, BR 1978 no. 89), a linoleum flooing which is too smooth (CA ´s-Hertogenbosch 5 February 2002, VR 2003, no. 139 p. 310), doors, lifts and houses which are in the process of being built, fall within the scope of CC art. 6:174, in similar manner also the cables which are found in the building (CC art. 6:174(2)). However, temporary works put in place by a building firms do not fall within CC art. 6:174 (HR 6 December 1963, NedJur 1965 no. 9 p. 33). The concept "structure" includes, *inter alia*, fences, (CFI Rotterdam 8 January 1917, NedJur 1917, 754), walls (CA Amsterdam 21 June 1956, NedJur 1957 no. 261 p. 462), bridges (CFI Amsterdam 27 March 1956, NedJur 1956 no. 281 p. 641), equipment on a playground, boat bridges, oil tankers, monuments and aerials on a building (*Oldenhuis* loc. cit. nos. 42-43 pp. 143-167). Special rules govern underground structures (CC art. 6:174(3)).Liability under CC art. 6:174(1) is imposed, in principle, on the owner/occupier (Definition in CC art. 3:109); CC art. 6:174(5) supplements this provision by providing for a presumption that, whoever is registered in the Land Registry as owner, is also owner- occupier for the purposes of CC art 6:6174. Joint occupiers are jointly and severally liable. In the event that a construction is used in the course of a business, the operators are solely liable (CC art. 6:181).In each case, liability is imposed only for bodily injury or physical damages to things (as regards the former law, see for comparative purposes HR 13 June 1975, NedJur 1975 no. 509 p. 1619).

12. According to ESTONIAN LOA § 1059 a landowner is liable for structures which are attached to the land. If a structure was built by a person exercising a real right over the land, liability is imposed on the holder of that right (cf. Supreme Court 3-2-1-64-06, RT III 2006, 26, 241). Liability attaches solely to the property or to the ownership of the right, liability does not hinge upon the question of the exercise of factual control. In both cases, liability is strict, only proof of force majeure or "of an act of the victim" will exclude the imposition of liability. Additionally liability of the owner for a "dangerous structure or thing" arises under LOA §1058. This provision is concerned with the production, storage or transmission in the structure of energy or hazardous materials. Moreover, LOA § 1056(1) establishes liability of an operator of a "major source of danger".

13. Apart from a small number of exceptions, liability for the unsafe state of buildings in the NORDIC Countries is premised on the general principles of liability for negligent omissons; in general, the exceptions pertain to the law regulating relations between neighbours and interests of owners of adjoining properties (SWEDEN: Land Code § 3 and *Hellner and Radetzki*, Skadeståndsrätt[7], 329; DENMARK: *Vinding Kruse*, Erstatningsretten[5], 135, 248-258; FINLAND: *Hakulinen*, Obligationsrätt, 312) and to environmental liability law which has been constructed on the basis of "neighbour law" and -in the meantime- has even supplanted it to some extent (Swedish Environmental Code chap. 32 [see further under VI.–3:206 below]). The point of departure is the basic rule, according to which liability for omissions is exceptional (*Hellner and Radetzki* loc. cit. 111; *Karlgren*, Skadeståndsrätt[5], 31; *Vinding Kruse* loc. cit. 111-124; *Saxén*, Skadeståndsrätt, 41). The imposition of liability for the unsafe state of property must therefore be based upon the principle that a person has a duty to

avert an antecedent act which increases risk of danger or must derive from the fact that an individual infringed a specific statutory or contractual duty to act (*Vinding Kruse* loc. cit. 117, Danish HD 7 December 1976, UfR 1977, 75; *Hakulinen* loc. cit. 256). In exceptional cases, pure omissions have also been deemed by the courts to ground liability, however, strict liability has been rejected by the courts. In order to establish negligence, the general rules are followed; namely, forseeability, probability and avoidance of the damage are guiding criteria (Swedish HD 16 October 1996, NJA 1996, 564; Swedish HD 24 June 1975, NJA 1975, 319; Swedish HD 9 September 1969, NJA 1969, 375; *Hellner and Radetzki* loc. cit. 134; *Andersson*, Skyddsändamål och adekvans, 268; Danish HD 15 April 1953, UfR 1953, 519; Finnish Supreme Court 26 August 1982, HD 1982 II 123; *Saxén* loc. cit. 10). Occassionally however, extremely strict requirements are placed on the standard of care (see e.g. für Sweden HD 17 April 1934, NJA 1934, 227; HD 26 June 1973, NJA 1973, 365 I and II; and for Denmark *von Eyben and Isager*, Lærebog i erstatningsret[5], 72). The specific purpose and risks associated with a particular device may lead to a stricter assessment. If an incident of the type previously occurred, without causing damage, negligence is affirmed in respect of the failure to adopt appropriate remedial measures in respect of the cause of the incident (Swedish HD 3 April 1985, NJA 1985, 269; Danish Eastern CA 2 December 1974, UfR 1975, 463; Danish HD 24 Novermber 1982, UfR 1983, 55). In respect of property which is designated to be accessed by the public, a similarly high standard of care (albeit unrealistic: Swedish HD 8 April 1976, NJA 1976, 196) is imposed (Swedish HD 22 February 1979, NJA 1979, 129; Swedish HD 6 April 1973, NJA 1973, 141; Danish HD 30 January 1980, UfR 1980, 205; Finnish Supreme Court 10 October 1991, HD 1991:138). The current occupier of an immovable will also be held liable even if the unsafe state results from an activity of a previous occupier (*Hellner and Radetzki* loc. cit. 168). The duty to act is imposed, depending on the circumstances of the individual case, on the owner or the occupier of the property (*Hellner and Radetzki* loc. cit. 113). In constrast, at least under Danish law, liability is practically strict as regards the landlord- tenant relationship, (HD 25 October 1984, UfR 1984, 1098; *Trolle*, Risiko & Skyld[2], 78). Finnish Supreme Court 6 October 1997, HD 1997:151 placed the burden of proof for taking sufficient precautionary measures on the defendant owner of a building, from which water had pored down on the street; the plaintiff slipped during the night when passing the building as the water had frozen. In all three countries, liability in respect of trespassers who enter the zone of danger, depends on the circumstances of the individual case (*Karlgren* loc. cit. 36).

Illustration 2 is taken from Polish Supreme Court 13 September 1988, OSNC 1990/12/155; **illustration 3** from Catalan Supreme Court 27 February 2006, BDA RAJ 2006 no. 5155; **illustration 4 ist angelehnt an** CA Burgos 24 January 2001, BDA JUR 2001/82707; **illustration 5** is taken from BGH 25 April 1978, NJW 1978, 1626; **illustration 6** is taken from BGH 23 October 1984, NJW 1985, 620; and **illustration 7** from Cass. 7 December 2005, no. 26997, Resp.civ. e prev. 2006, 862.

VI.–3:203: Accountability for damage caused by animals

A keeper of an animal is accountable for the causation by the animal of personal injury and consequential loss, loss within VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death), and loss resulting from property damage.

COMMENTS

A. General

Strict liability for animals of all types. The Article provides for strict liability for animals of all types, without distinguishing between animals kept as household pets or for business purposes, between domestic and wild animals, or between native and foreign species. The provision thus follows the prevailing approach of the Member States' legal systems. Even where individual groups of animals have been excluded from strict liability in principle, such special rules are today frequently met with considerable political criticism. Liability for the realisation of the dangers inherent in animals should lie with their keepers independently of personal negligence (or the negligence of their workers). This is widely acknowledged in Europe today and represents the applicable law.

Animals living in the wild excluded. Liability only arises, however, in respect of animals which are "kept". Wild animals, living in the wild, are therefore not within the scope of this rule. Damage caused by game is generally subject to its own regime. Its idiosyncrasies are not covered by the present Article, see VI.–3:207(a) (Other accountability for the causation of legally relevant damage).

Legally relevant damage; relationship to contract law. As with all cases within Chapter 3, Section 2 (Accountability without intention or negligence), liability under VI.–3:203 only relates to death, personal injury, health injuries (e.g. infection with a disease) and property damage. On the other hand, the scope of protection also encompasses a person who temporarily exercises control of the animal, without being its keeper, e.g. someone who takes another's dog for a walk or who rides another's horse. Where a contract for the care of the animal was concluded between the victim and the keeper, liability depends on whether the regime of contract law demands primacy of applicability (VI.–1:103 (Scope of application) sub-paragraph (c)).

> *Illustration 1*
> K, who runs a home for cats and dogs, takes a sheepdog which had been left with her for a few days out for a walk. The dog recognises a place where it has the opportunity to run free and pulls so fiercely on the leash that K falls and breaks her wrist, which leads to prolonged pain and inconvenience. The applicable law of contract provides for liability of a person who, providing payment, temporarily gives over an animal for care only where negligence is present. This interpretation results in the situation that the stipulation under contract law seeks to provide a conclusive rule. Since there is no negligence evident, K is not entitled to a claim in damages.

Defences. The defences in Chapter 5 also apply in relation to the liability of the keepers of animals. In the area of equestrian sport, the rider's claim in damages against the keeper of the horse will therefore often fall at the hurdle of VI.–5:101 (Acting at own risk) paragraph (2).

Where one animal injures another, VI.–5:102 (Contributory fault and accountability) paragraph (4) is of particular note.

Illustration 2
A dog belonging to Carlos but whose possessor and keeper is his sister Esther enters the injured person's rabbit farm and causes the death of 73 'mother rabbits', the miscarriage of 12 other 'mother rabbits' and the death of several baby rabbits. Esther, not Carlos, is liable for this damage. Due to the fact that the owner of the farm had left open the gate to the area in which the rabbits were kept and that the damage would not at all have arisen had the gate been properly closed, the damages are reduced to approximately 80%. A further reduction as a consequence of the fact that there was also strict liability for the rabbits, does not, however, come into play. This is because there was no danger inherent in the rabbits.

Illustration 3
K's dog, who is off the lead, fights with another dog (kept by B), likewise not on a leash. K attempts to separate them but is permanently injured by B's dog in the process. K did not accept the risk of injury solely because she let her dog walk around without a leash. However, she must face a reduction in her claim because her own dog was actively involved in the occurrence of the accident.

B. Damage caused by animals

Animal. The notion of an animal is not necessarily being used here in a biologically exact sense. Rather it is the conventional notion of ordinary language which forms the basis of all rules on the liability of a keeper of an animal. Consequently, bacteria (and in any case viruses) are not animals within the meaning of VI.–3:203. That proposition also follows from the fact that VI.–3:206 (Accountability for damage caused by dangerous substances or emissions) paragraph (2) envisages a special regime for micro-organisms. The practical outcome is that the smallest animals in the sense invoked by VI.–3:203 are insects.

Causation by the animal. In keeping with the preponderant majority of the existing statutory rules, VI.–3:203 does not (i) single out particular modes of causing damage or (ii) confine liability to the realisation of dangers specific to animals. The criterion of causation in VI.–4:101 (General rule) is flexible enough to avoid absurd outcomes (e.g. a cat does not "cause" damage if it is thrown by someone at the victim, who is thereby injured). The rule proceeds on the basis, however, that animals (as is also the case for things) are capable of "causing" damage. The concept of causation in the draft is not confined to human conduct. See further VI.–1:101 (Basic rule).

Notion of keeper. The concept of a "keeper" is of general significance for the entire law on non-contractual liability. It is invoked in these rules not only within the framework of liability for animals, but also in the regimes under VI.–3:205 (Accountability for damage caused by motor vehicles) and VI.–3:206 (Accountability for damage caused by dangerous substances or emissions). The meaning is always the same: a keeper, in relation to an animal (motor vehicle or substance), is the person who has the beneficial use or physical control of it for that person's own benefit, and who exercises the right to control it or its use. The rules deliberately avoid invoking the concept of "possession": "possession" is a concept of property law and has or may have a meaning which differs from jurisdiction to jurisdiction.

Examples. A person who rents a horse to ride at stables is not its keeper**.** A short-term loan by a keeper to another for that other's use does not mean that the existing keeper will lose the status of keeper. Conversely, a stable which competes at tournaments and to which a horse is rented for use in tournament events for two years is a keeper during this time. Employees who take care of their employer's animals (non-self-employed shepherds; circus workers etc.) are not the keepers of the animals. Animals which are not desired are not even "kept" at all (fleas are not "kept" – unless in a flea circus – because the individual afflicted is an involuntary carrier). Also not bearing the characteristic of keeper of an animal is an association for the protection of animals, which temporarily takes dogs and cats knocked down on the road into care in order that they are given back to their owner as soon as possible after care.

Illustration 4
V is bitten by a pit-bull terrier. X's adult daughter is the owner of the dog. For two years the daughter has lived on the third floor of an apartment building. In order that she does not have to go up and down so many flights of stairs with the dog every day, the dog lives on the first floor with X, who feeds it, cares for it and pays for the dog tax and insurance. X is the keeper and in this capacity is liable for the damage caused by the bite.

Ownership. Ownership of an animal is an important indicator of the presence of a right to control and enjoy beneficial use, but it is not ultimately decisive. There are many cases in which someone other than the owner is the keeper: examples are where an animal is acquired under retention of title or leased or where a valuable horse is loaned out under a long-term arrangement. Moreover, there are cases in which, despite someone being owner of an animal, there is no keeper: for example, wild animals may belong to the state or another public body, but, unless fenced or caged in, the state does not "keep" them.

Children. Children are as a rule not the keeper of things which belong to them. Rather it will be the children's parents as a rule who are the keeper because they enjoy the right to exercise control.

Several keepers. It is possible for an animal to have more than one keeper. In that case, they will be liable as solidary debtors. The same applies where several animals of different keepers occasion the same damage or if it cannot be established which of these animals has caused the damage, see VI.–4:103 (Alternative causes).

Illustration 5
At a beekeeping demonstration, bees from hives belonging to several beekeepers have been disturbed and are flying about aggressively. X is severely stung by many bees. Among the bees flying about near X were bees belonging to Y, but it is not possible to establish whether X was actually stung by Y's bees. Y is liable under VI.–3:203 in conjunction with VI.–4:103 (Alternative causes).

Illustration 6
X suffers damage to her vehicle when she reverses into a flock of sheep, which are being herded on the road. There are sheep of various different owners in the flock. Since they have all caused the source of danger (VI.–4:101) (General rule), it is not only the owner of the sheep who happens to be walking at the back of the flock who is liable (VI.–6:105(1)) (Solidary liability).

Illustration 7
A victim bitten by a dog suffers severe injuries. The dog belongs to a partnership; its keepers are three brothers, each of whom is a partner. The three brothers are solidarily liable for the damage (VI.–6:105(1) (Solidary liability)).

Thieves. As a rule a thief may be a keeper. It is not possible, however, to state in general whether the former keeper's status as keeper terminates as a result of the theft. In any event the former keeper may remain accountable for damage caused by the animal on the basis of negligence if the former keeper has not taken reasonable precautions to prevent the theft: see VI.–3:102 (Negligence) sub-paragraph (a).

NOTES

1. According to FRENCH, Belgian and Luxemburgian CC art. 1385 the owner of an animal or the person using it, and who was using it when damage occured, is liable for the damage which the animal has caused. Liability is triggered, independent of the fact whether the animal was, at the relevant time, in the custody of the person responsible, whether it had strayed or had escaped. Liability is imposed only for animals that have an owner, CC art. 1385 is not applied in respect of damage caused by game (Cass.civ. 4 June 1997, Bull.civ. 1997, II, no. 166 p. 99). Liability is imposed on the *gardien* of the animal, i.e. the person who exercises *pouvoirs de direction, de contrôle et d´usage* (*le Tourneau and Cadiet*, Droit de la responsabilité et des contrats [2004/2005], no. 7958). If the animal has a *gardien*, and this person does not own the animal, the latter is only liable when the requirements listed in CC arts. 1382-1383 are satisfied; however, in contrast to the owner, the *gardien* cannot escape liability by proving a lack of *faute (le Tourneau and Cadiet* loc. cit. nos. 7959 and 7985).
2. The legal position in BELGIUM is, in all essential matters, identical to that prevailing in France. CC art. 1385 establishes an objective liability, which presupposes an "act" of the animal as well as damage resulting from that act. Liability in Belgium does not hinge upon a *faute des gardien* (*Weyts*, RW 1998/99, 930, 932, no. 7). Incidentially, liability can be imposed upon the *gardien* of the animal in question (Vandenberghe/Van Quickenborne/Wynant/Debaene, TPR 2000, 1551, 1758, no. 73). A non owner is *gardien*, if, at the time of the damaging occurence, he had *la maîtrise de l´animal, comportant un pouvoir de direction et de surveillance, sans intervention du propriétaire, et un pouvoir d´usage égal à celui de ce dernier*. It is not necessary that the gardien exercises this power for his own account (Cass. 18 November 1993, Pas. belge 1993, I, no. 472 p. 970). Similarly, in Belgium, wild game does not fall within the scope of the provisions pertaining to the liability of the keeper of an animal (*van Gerven*, Verbintenissenrecht II[7], 338).
3. SPANISH CC art. 1905 provides that "the possessor of an animal, or the person who makes use of it, is liable for the damage that it causes, although it had escaped or got lost. This liability shall only cease if damage results from *force majeure* or fault on the part of the victim". This provision is one of strict liabiliy; absence of negligence does not connote a ground of defence (*Roca i Trias*, Derecho de daños[3], 225; *Yzquierdo Tolsada*, Sistema de responsabilidad civil, 308; TS 3 April 1957, RAJ 1957 (1) no. 1944 p. 1284; TS 26 January 1972, RAJ 1972 (1) no. 120 p. 119; TS 15 March 1982, RAJ 1982 (1) no. 1379 p. 1380; TS 31 December 1992, RAJ 1992 (5) no. 10662 p. 13907; TS 10 July 1995, RAJ 1995 (3) no. 5556 p. 7492; TS 21 November 1998, RAJ 1998 (5) no. 8751 p. 12913; TS 12 April 2000, RAJ 2000 (2) no. 2972 p. 4630; TS 10

October 2002, RAJ 2002 (6) no. 9978 p. 18515; TS 29 May 2003, RAJ 2003 (3) no. 5216 p. 9730; TS 24 November 2004, RAJ 2004 (5) no. 7248 p. 14697). No distinction is drawn between domestic and wild animals; the decisive factor is that the animal is the object of possession (for example, a swarm of bees: CA Guadalajara 10 December 2004, BDA JUR 2005/29458), because liability attaches to possession and not to ownership (*Díez-Picazo and Gullón*, Sistema I[10], 570; *Roca i Trias* loc. cit. 225). According to case law, liability is imposed nonetheless on the owner, if he fails to aver that he is not the possessor of the animal or that he did not have the beneficial use of the animal (TS 12 April 2000, RAJ 2000 (2) no. 2972 p. 4630). Legal doctrine and the courts concur that the notion of possessor does not include the *servidor de la posesión*, i.e. a person who possesses in someone else´s name (CC art. 431) (such as employees: TS 2 November 2004, RAJ 2004 (5) no. 6864 p. 13956). Where several persons have the beneficial use of an animal they are solidarily liable (TS 29 May 2003, RAJ 2003 (3) no. 5216 p. 9730). Minors appear to be capable of possessing animals (CC art. 443) and are thus also liable under CC art. 1905 (*Gómez Calle*, La responsabilidad civil de los padres, 193).

4. ITALIAN CC art. 2052 provides that the owner of an animal or the person who makes use of it, the liability of the latter being confined to the period of use, is liable for the damage which is caused by the animal, irrespective of the fact that, at the relavant time, the animal was not in his/her custody, had strayed or had escaped. The owner is permitted to adduce proof of a *caso fortuito*. Consequently, the liability underpinning the provison is an objective one (Cass. 4 December 1998, no. 12307, Foro it. 1999, I, 1938; Cass. 9 January 2002, no. 200, Resp.civ. e prev. 2002, 1390; *Monateri*, Manuale della responsabilità civile, 405). The owner's liability is excluded, if he has accorded a third party a right to use the animal and this right encompasses the authority to have the beneficial use of the animal (Cass. 4 December 1998 loc. cit.; Cass. 17 October 2002, no. 14743, Foro it. 2003, I, 1175). "Animals" in the sense of. CC art. 2052 are all types of animals, including bees (CFI Torino 4 December 1956, Giur.it. 1957, I, 2, 1001), but not microbes (*Monateri* loc. cit. 407). Animals which have their natural habitat in the wild are embraced by CC art. 2052, regardless of the fact that they belong to the State. Consequently, liability is predicated on the presence of a fault (CC art. 2043; Cass. 14 February 2000, no. 1638, Danno e resp. 2000, 398; Cass. 24 June 2003, no. 10008, Giust.civ.Mass. 2003, fasc. 6). In general, it is incumbent upon the plaintiff to prove the causal nexus between the damage suffered by him and the "*fatto*" of the animal (Cass. 29 October 2003, no. 16226, Danno e resp. 2004, 612; Cass. 9 January 2002, no. 200, Resp.civ. e prev. 2002, 1390). The animal must have played an active part in the event which caused damage (liability was denied under CC art. 2052, when a shop customer tripped over a sleeping dog:1965, 264; of a different view *Alpa*, Trattato di diritto civile IV, 702). As regards infections with disease contracted from an animal, it is unresolved whether they are goverened by CC art. 2052 or by CC art. 2043 (so Cass. 10 April 1970, no. 1004, RGI 1970, voce R.C. 143). A *caso fortuito* (proof of which can relieve the defendant of liability) connotes an extraordinary, unforeseeable and unavoidable event (Cass. 30 March 2001, no. 4742, Nouva giur. civ. comm. 2002, I, 412) Grave fault on the part of the person who suffered damage leads to the exclusion of liability (*Alpa* loc. cit. 703; CFI Pordenone 10 April 1989, Foro it. 1989, I, 2950; Cass. 23 February 1983, no. 1400, Resp.civ. e prev. 1983, 632; Cass. 26 June 1981, no. 4160, Giust.civ.Mass. 1981, fasc. 6; CFI Rome 27 March 1997, Resp.civ. e prev. 1997, 1215). There is an obligation to take out liability insurance in respect of dogs belonging to a particularly agressive breed. This obligation derives from the *ordinanza* issued by the Department of Healthdes of 12 December 2006 (Gazz. Uff. 31 January 2007).

5. HUNGARIAN CC § 351(1) sets out that liability is imposed on a person who keeps animals, "in accordance with the general provisions, for damage caused by the animal to another person." In contrast, the liability of a keeper of a wild animal is governed in the same manner as the liability of a person who pursues an activity involving a considerable hazard (CC § 351(2)). Game is subject to the special provisions of Hunting Act (Law of. LV/1996 for the protection of game, game management and hunting § 75(1)-(3)). A keeper of an animal connotes a person who has the animal in his possession and under his control. Aside from the owner a keeper of an animal is, in particular, a person who has control over the animal grounded in a legal relationship (agency, hiring of animal), in this case the principal and agent are solidarily liable (CC §§ 350(1), 344). Thieves can also be keepers of an animal, as can a person who takes in a stray animal. The employer is liable for animal minders (CC § 348(1)). The liability for damage caused by animals under CC § 351(1) is not conceived as one of strict liability; the basic norm of CC § 339(1) remains applicable. Only CC § 351(2), which makes reference to CC §§ 345-346, channels strict liability. The concept of "wild animals" does not have an identical meaning to game: many zoo and circus animals and, for example, snakes and scorpions which are kept in dwellings are considered to be "wild animals". However, hares and deer are not embraced by the term. CC § 351(2) signifies animals which are volatile in nature and therefore represent a danger for persons and things. Special provisions qualify particular (attack) dogs as dangerous and therefore they are classified as "wild" under the civil law.

6. Under POLISH CC art. 431 § 1 "whoever keeps or uses an animal shall be obliged to redress the damage it caused regardless of whether it was under his care or went astray or ran away, unless he or the person for whom he is responsible is at fault". This is liability based on *culpa in custodiendo* (*Radwański and Olejniczak*, Zobowiązania - część ogólna[7], 228). The rule reinforces the legal position of the injured party by introducing a rebuttable presumption that the damage resulted from the keeper's fault (Pietrzykowski [-*Safjan*], Kodeks cywilny I[4], art. 431 p. 1221). A keeper is a person who for his own purposes (which may be non-pecuniary), with or without legal title, takes care of the animal over a longer time, providing it with shelter and food (*Radwański and Olejniczak* loc. cit. 226). On the other hand temporary use of the animal may be sufficient to give rise to liability. The rule applies only if an animal caused the damage on its own initiative; if it is directed by a person (e.g. a dog is set on another), the general rule of CC art. 415 applies. CC art. 431 does not apply to damage caused by wild animals; such cases are partially subject to special regulations (e.g. under Hunting Law art. 50 the State is liable for damage occasioned by the animals used in the chase which are under yearlong protection). CC art. 431 § 2 stipulates that compensation may be awarded on equitable grounds for cases in which the keeper can exculpate himself, but the financial means of the parties justify partial or full compensatation for the damage inflicted. SLOVENIAN LOA art. 158 differentiates between "dangerous animals" and "domestic animals". Liability for the former is consonant with strict liability (para. (1)), liability for the latter is based on a rebuttable presumption of fault (para. (2)).

7. GERMAN CC § 833 provides for a bifurcation of liability for the keeper of an animals, depending on whether an individual is the keeper of, on the one hand, so-called "luxury animals" (first sentence), under which risk-based liability arises and on the other hand, liability is based a rebuttable presumption of fault in respect of the keeper of domestic animals (second sentence). In principle, the term "animal" encompasses all creatures; no distinction is drawn between tame, wild, animals with a vicious prospensity or goodnatured animals (Palandt [-*Sprau*], BGB[66], § 833 no. 4). Insects also belong to this classification (RG 19 November 1938, RGZ 158, 388; BGH

24 January 1992, BGHZ 117, 110), according to prevailing, yet not uncontentious, opinion, micro-organisms are not embraced by the term (MünchKomm [-*Wagner*], BGB[4], § 833, no. 5). CC § 833 second sentence refers only to domestic animals which are used for a certain purposes. In contrast to "wild" animals (CC § 960), domestic animals are animals which are tame by nature, horses, cattle, pigs, horses and cats are regarded as domestic animals.. They must, in fact, be put to use as domestic animals (that is, they must not be used in scientific animal testing experiments). In addition, the domestic animal must have been intended to serve the occupation, business or livlihood of the keeper. According to prevailing legal opinion, the damage caused by an animal must have resulted from a typical danger inherent in the animal. The damage must have ensued from inherent, unpredictable and autonomous behaviour associated with the animal (BGH 20 December 2005, NJW-RR 2006, 813, 814). In contrast, CC § 833 does not apply, if the animal obeyed the commands of his instructor and thereby the individual concerned is the sole cause of the damage suffered (see for line of demarcation, BGH 20 December 2005 loc. cit.). In addition, the impact that the animal caused must have been unlawful, the requirement of unlawfulness may not be satisifed in, for example, pollination of flowers by bees kept by a neighbour (BGH 24 January 1992 loc. cit.). In each case, liability is imposed on the keeper. Possession and ownership serve as indicators for the categorisation of the individual as a keeper; however, they are not pre-requisites. The decisive factors are the ascertainment of who had the power of control, who was burdened with the expenses associated with keeping the animal, who had the benefit and use of the animal and who bore the risk of the loss of the animal. A temporary loss in possession or loss of the ability to exert control over the animal (e.g in the event that the animal runs away) does not impinge on the classification as keeper. In addition to the liability of the keeper of an animal under § 833, liability is also imposed on the minder of the animal pursuant to CC § 834. Liability is conceived in terms of a rebuttable presumption of fault and no differentiation is made between wild animals and domestic animals.

8. AUSTRIAN CC § 1320 (first sentence) provides for conventional fault based liability for diverse forms of misconduct in respect of all types of animals (OGH 4 July 1983, ZVR 1985/45 p. 86). The keeper of the animal is liable, provided he does not adduce proof that he took care to arrange for the custody and supervision of the animal (loc. cit. second sentence). According to current prevailing legal opinion, this provision is not one of strict liability nor one which is based on fault but connotes a liability which is imposed for an unlawful omission (OGH 10 July 1996, SZ 69/162). The provision is considered to be in need of reform (Schwimann [-*Harrer*] ABGB VI[3] § 1320 no. 32). A keeper is a person who exercises the factual control over the animal and can decide, on his own account, how the animal should be kept and supervised.(OGH 12 March 1964, ZVR 1964/201 p. 241; OGH 15 March 1953, SZ 26/121); ownership is not the decisive criterion (OGH 15 January 1986, EvBl 1986/111; OGH 22 June 1972, ZVR 1973/157 p. 216). If there is more than one keeper, they are jointly and severally liable (OGH 11 April 1962, SZ 35/45; OGH 29 April 1982, SZ 55/62). The question whether the animal was kept in an appropriate manner will depend on the circumstances of the individual case (OGH 10 July 1996, JBl 1997, 99; OGH 27 March 2003, 2 Ob 40/03a). Entrusting the animal to the safekeeping of reliable individual, can entail that the keeper of the animal has fulfilled his obligations, in this case the keeper is liable for this person only under the prerequisites of CC § 1315 (OGH 2 April 1962, ZVR 1964/200 p. 240).

9. GREEK CC art. 924 also differentiates between liability of the keeper of a domestic animal (para. (2)) and liability of a keeper of other animals.(para. (1)). In respect of the

latter, liability is strict, namely as liability does not hinge upon the establishment of fault in the supervision of the animal (*Kornilakis*, Eidiko Enochiko Dikaio I, 556). The situation is different where domestic animals are concerned pursuant to the provisions of CC art. 924(2); the keeper, however, has the possibility of excuplating himself. This has been criticised on policy grounds. The provision is regarded as antiquated when viewed in the light of current prevailing economic and social standards (*Kornilakis* loc. cit.; Georgiades and Stathopoulos [-*Vosinakis*], art. 924 no. 3). "Animal" in the sense of this provision connotes that it must be possible for humans to control the animal, because otherwise the animals would not be capable of having keepers (*Kornilakis* loc. cit. 557 [who also counts micro-organisms cultivated in a lab in this category.]; *Vosinakis* loc. cit. no. 4). Similarly, under Greek law, in order for a keeper to be held accountable for the damage caused by the animal, it is necessary for a specific danger inherent in the animal to be realised, i.e. autonomous action on the part of the animal (*Kornilakis* loc. cit. 558). The concept of "keeper" in the sense of CC art. 924 denotes a natural or legal person, who uses the animal for his own account and not on a short term basis. A person who uses the animal typically holds the factual control over the animal, namely in the sense that he determines who cares for and determines the life span of the animal. If the control over the animal and the benefical use are segregated, then whoever has the benefit (benefical use) of the animal is the keeper. Ownership and possession merely serve as *prima facie* indicators that a person is a keeper (*Kornilakis* loc. cit. 561).

10. In PORTUGAL a distinction is drawn between the strict liabilty of the keeper of an animal and (CC art. 502) and liability of the animal minder; liability of the latter is based on a rebuttable presumption of fault (CC art. 493(1)), see *Almeida Costa*, Obrigações[9], 573; *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 511, art. 502 no. 1).In respect of the damage caused, once again, it must pertain to the realisation of a specific danger inherent in the animal. This was even affirmed, for example, in a case where a 600 strong herd of sheep broke through their enclosure and ran onto a train track, the keeper was found liable and it was adjudged that the keeper was obliged to compensate the damage which accrued to the train (STJ 17 June 2003). On the other hand, a danger inherent in an animal will not materialise, if the damage can be attributed to human behaviour asssociated with the animal e.g. where a team of oxen were driven on the streets at night without any appropriate lighting (*Almeida Costa* loc. cit. 574; *Antunes Varela*, Obrigações em geral I[10], 593; *Pires de Lima and Antunes Varela* loc. cit. art. 493 no. 5; *Vaz Serra*, BolMinJus 86 [1959] 21, 41; CA Coimbra 13 January 2004). CC art. 493(1) pertains to individuals who have assumed the control over an animal, (bailee, herdsman, cattleman, a person who appraises/tests/tries out an animal before buying, etc.: *Antunes Varela* loc. cit. 653, fn. 3; CA Oporto 7 July 1997); in contrast CC art. 502 only concerns those persons who use an animal for their own benefit (STJ 17 June 2003; STJ 9 March 1978, BolMinJus 275 [1978] 191). Both heads of liability – that arising under CC art. 493 and that under CC art. 502 – can coincide in one and the same case- (*Almeida Costa* loc. cit. 574-575), e.g. in cases concerning the hire of an animal (CA Oporto 3 February 1997).

11. DUTCH CC art. 6:173(3) expressly stipulates that (strict) liability of keepers of animals does not arise under CC art. 6:173 (liability for moveables), but is deriven from CC art. 6:179. In principle, any kind of damage caused by an animal suffices (e.g. an accident which was caused by crossing the street???: Onrechtmatige Daad II [-*Oldenhuis*], art. 6:179, no. 6 p. 70). However, damage caused by an infection which does not stem from the conduct of the animal are excluded from the ambit of the provision (HR 24 January 1984, NedJur 1984, no. 415 p. 1518: a farmer drove a sick pig which had run away onto his meadow, in the wrongly held belief that it was one of

his own; no liablity was imposed on the keeper of the sick pig for the consequences resulting from the infection of the other animals). A contrasting approach is adopted, for example, in a case where the infection results from a bite, the infection can be atttributed to the conduct of the animal and the unpredicitability of the animal (HR 24 January 1984 loc. cit.). Wild animals as well as domestic are embraced by art. 6:179, but game are not governed by this provision (but are subject to the provisions of hunting law). Micro-organisms are also excluded from the ambit of CC art. 6:179 (Parlementaire Geschiedenis VI, 763); they are dealt with under CC art. 6:175 (dangerous substances), in certain circumstances they could fall to be dealt with under CC art. 6:186 (defective products: *Oldenhuis* loc. cit. art. 6:179, no. 32 pp. 142-143). Liability under art. 6:179 is imposed on the owner-possessor (*bezitter*). If the animal is used for professional purposes, then the proprietor of the business is liable (CC art. 6:181(1)), if the benefit of the animal is obtained from hiring the animal out, for commercial purposes, to other businesses, then the liability is imposed on the latter (loc. cit. para. (2)). In defining the term "owner-posessor", recourse must be had to the general rules contained in CC arts. 3:107-109. Therefore, for example, a managing director not acting upon instruction, carriers, custodians und operators of boarding facilities for animals and animal homes are not liable under CC art. 6:179. The parents of children who have yet to attain the age of fourteen are liable in their stead, unless the circumstances pertain to an animal which is used in the course of a commercial enterprise (CC art. 6:183(2)). Liability is strict in all cases. The person responsible can only relieve himself/herself of liability upon proof that s/he could not avoided the damage if he had the animal under his control, for example, in self defence, the defendant set his/her dog on an assailant.

12. ESTONIAN LOA § 1060 succinctly provides that: "The keeper of an animal shall be liable for damage caused by the animal". Consequently, under this provision, liability is similarly strict. Only the damage stipulated in LOA § 1056(1) is recoverable.This corresponds to the regulation contained in VI.–3:203. According to the consonant provision of LITHUANIAN CC art. 6.267(1) liability for the keeping of all animals is strict; however, game conotes an exception and is the subject of a special regime (para. (2)).

13. In SWEDEN, several statutes regulate the liability for the keeping of animals. Law (1943:459, replaced by 2007:1150) on supervision of dogs and cats § 6 (now § 19) introduces strict liability for the owner of a dog and introduces solidary liability, in the event that another individual uses or keeps the animal (see e.g. HD 10 December 1947, NJA 1947, 594 and HD 28 February 1990, NJA 1990, 80). The owner is only liable to the keeper in the case where he is at fault (HD 28 February 1996, NJA 1996, 104). Cats (and also dogs) have to be supervised by their owner, in order to prevent them causing damage (loc. cit. § 1). Law (1933:269) on peaceful enjoyment of property § 47 subjects the owner as well as the keeper of the animal to strict liability for cattle causing damages to other persons' crops. *Byggningabalken* (the ancient Land Code) chap. 22 § 7 establishes strict liability for damage caused by cattle to another's cattle, and loc. cit. § 8 regulates the liability for damage caused by game. DENMARK also does not recognize any general liability for the keeping of animals (*von Eyben and Isager*, Lærebog i erstatningsret[5], 179). Dog Act (*Hundloven*) § 8 provides for strict liability of the dog's possessor; it covers all types of damage (see Western CA 21 January 1931, UfR 1931, 356 and *Vinding Kruse*, Erstatningsretten[5], 201-203). Law on peaceful enjoyment of land and roads (*mark- og vejfredsloven*) § 3 provides for strict liability of the possessor of a domestic animal, for damage caused to other domestic animals, crops or other agrarian property; other damage remains however within the realm of the general *culpa* rule (*von Eyben and Isager* loc. cit. 180). *Danske*

Lov (the ancient Danish Code) 6-10-2 establishes strict liability for the possessor of cattle which is outside of his immediate control (Western CA 19 April 1994, UfR 1994, 573; see also Western CA 15 December 1997, UfR 1998, 502 and HD 19 June 1974, UfR 1974, 692). Personal injuries may also be compensated under this head (Western CA 19 April 1994 loc. cit.). Loc. cit. 6-10-4 and 5 also provide for strict liability for damage caused to another's cattle and for damage caused by wild animals. On the notion of „possessor" within Dogs Act § 8 see Eastern CA 31 January 2007, UfR 2007, 1169. Under FINNISH Hunting Act (*jaktlagen*) § 87 compensation for damage caused by wild animals, domestic animals and cattle may be sought from the state. *Byggningabalken* chap. 22 § 8 provides for strict liability of the owner of dangerous, but not domestic, animals (see in more detail *Hakulinen*, Obligationsrätt, 311). For other types of animals, the general *culpa* rule applies (Supreme Court, HD 1951 II 154). Damage caused by animals to another's crop are also subjected to the rules on negligence (*Hakulinen* loc. cit. 312).

14. In ENGLAND AND WALES statute provides for a keeper's strict liability for damage caused by an animal in certain demarcated categories of case, although judicial interpretation has tended to give a broad scope to the provisions based on a keeper's choice whether to run the unavoidable risks of keeping the animal and whether to insure against them: cf. * *Mirvahedy v. Henley* [2003] UKHL 16, [2003] 2 AC 491 (Lord Walker), approved in *Welsh v. Stokes* [2007] EWCA Civ 796 at [47], [2008] 1 WLR 1224 at 1239 (Dyson LJ). The Animals Act 1971, s. 2(1), provides for a strict liability of a keeper of an animal for damage caused by that animal if the animal belongs to a "dangerous species", defined by s. 6(2) as a species which is not commonly domesticated in the British Islands and whose fully grown animals, if not restrained, are likely to cause severe damage or may cause damage which, if it occurs, is likely to be severe. If the animal belongs to a dangerous species, it does not matter whether the particular animal was dangerous or tame or whether the keeper knew the species was dangerous: Clerk and Lindsell (-*Dugdale/Jones*), Torts[19], 22-03. For damage caused by animals belonging to a non-dangerous species, a keeper is liable if three conditions are satisfied: (a) the damage is of a kind which the animal, unless restrained, was likely to cause or which was likely to be severe if the animal caused it; (b) that likelihood was due to characteristics not normally found in animals of that species (e.g. the animal is abnormally aggressive) or only at particular times or in particular circumstances (e.g. a horse with a particular fear of farm machinery: ** *Flack v. Hudson* [2001] QB 698); and (c) those characteristics were known to the keeper, a servant of the keeper in change of the animal at the time, or, for the head of a household, another keeper under the age of 16 within that household: s. 2(2). A propensity to cause injury is sufficient without the need for proof of any vicious tendency of the animal: Clerk and Lindsell (-*Dugdale/Jones*), Torts[19], 22-05, citing ** *Wallace v. Newton* [1982] 1 WLR 375. Nor must the characteristic of the animal which renders (severe) damage likely *in particular circumstances* be one which is abnormal for that species, even though this interpretation renders the second condition of liability otiose in most cases and creates strict liability for normal behavior of animals of non-dangerous species: *Curtis v. Betts* [1990] 1 WLR 459; *Cummings v. Granger* [1977] QB 397 (where an Alsatian guard dog, acting normally for such dogs, attacked a trespasser), approved in *Mirvahedy v. Henley* [2003] UKHL 16 at [43], [2003] 2 AC 491 (collision with a bolting horse – normal for a horse to panic when frightened). The characteristic giving rise to danger may thus be a natural, yet unusual one: *Welsh v. Stokes* [2007] EWCA Civ 796 at [47], [2008] 1 WLR 1224 at 1239 (where a frightened horse, instead of turning and fleeing, reared and fell on its rider). However, such a characteristic must be one which is only found in the animal in

particular circumstances: *irvahedy v. Henley* [2003] UKHL 16, [2003] 2 AC 491 (Lord Nicholls giving the example of a large and heavy cow stumbling and falling on a person – such danger is attributable to a characteristic normally found in cows at all time, namely their size and weight). The precise degree of "likelihood" of damage required is not settled: contrast *Smith v. Ainger* (1990) Times, 5th June ("material risk" sufficient) and *Mirvahedy v. Henley* [2003] UKHL 16, [2003] 2 AC 491 (damage need not be "probable", but must be "reasonably to be epected" and more than a mere possibility). It seems that actual knowledge of the animal's propensities is required; it is not enough that the keeper (or servant or minor) merely ought to have known of this fact: Clerk and Lindsell (-*Dugdale/Jones*), Torts[19], 22-08. However, proof of a keeper's knowledge of the normal behaviour of animals of the particular species in question suffices to establish the keeper's knowledge of the characteristic of the animal in question where its normal behavior has caused the damage: *Welsh v. Stokes* [2007] EWCA Civ 796 at [71], [2008] 1 WLR 1224 at 1244 (Dylon LJ). Recoverable damage expressly embraces personal injury (including fatal personal injury) (s. 11), but the unrestricted wording of s. 2(1) ("any damage") implies that recovery is not apparently confined to particular types of damage and would thus extend to property damage: Clerk and Lindsell (-*Dugdale/Jones*), Torts[19], 1279 n 15 and 17. The damage need not be severe: Clerk and Lindsell (-*Dugdale/Jones*), Torts[19], 1279 n 17. It would also seem that to be recoverable damage need only be causally related and need not be reasonably foreseeable: ** *Behrens v. Bertram Mills Circus Ltd.* [1957] 2 QB 1, 17 (Devlin J). Nor must the damage result directly from a characteristic of an animal which renders it dangerous; there is sufficient causation when a person is injured in fleeing from the danger, e.g. by falling over or suffering a heart attack: *Behrens v. Bertram Mills Circus* [1957] 2 QB 1, 17 (*Devlin* J); *Chauhan v. Paul* [1998] CLY 3990. The Animals Act 1971 also provides for the strict liability of a keeper of a dog which causes damage by killing or injuring livestock (s. 3), but not if the livestock strayed onto land whose occupier permitted the dog's presence (s. 5(4)). A person is a keeper if he owns the animal or has it in his possession: s. 6(3)(a). However, a person does not become a keeper merely by taking into and keeping possession of an animal for the purpose of preventing it from causing damage or restoring it to its owner: s. 6(4). If the animal is owned or possessed by a member of a household under the age of sixteen, both that person and the head of the household are keepers: s. 6(3)(b). Furthermore, under s. 4 a person who has possession of livestock is strictly liable for damage done by the livestock to land, or property on land, in another's ownership or occupation onto which the livestock strayed, unless it strayed from a highway where its presence was lawful. Residual liability for damage caused by animals rests on establishing a breach of a duty of care in common law negligence: *Draper v. Hodder* [1972] 2 QB 556 (defendant liable for failure to take reasonable precautions to prevent foreseeable risk of a pack of terriers attacking a child); *Smith v. Prendergast* (1984) Times, 18 October (liability for damage resulting from attack by stray Alsatian dog, which had taken up residence in the defendant's scrapyard three weeks earlier, as the defendant was negligent in not controlling the dog or checking whether the dog was aggressive); *Hole v. Ross-Skinner* [2003] EWCA Civ 774 (no liability for injury to a user of the highway caused by collision with the defendant's escaped horse straying onto the highway as the fence had been cut and a gate opened by an unkown third party). Alternatively there may be a breach of duty under the Occupiers' Liability Act 1957. Liability may also be founded on trespass (e.g. driving animals onto another's land) or nuisance, whether public (e.g. where animals obstruct the highway) or private (e.g. stench from farm animals): Clerk and Lindsell (-*Dugdale/Jones*), Torts[19], 22-19.

15. The IRISH law on liability for injury or damage caused by animals relies on special rules of strict liability (which, unlike ENGLISH law, remain largely matters of common law), supplemented by the general rules of the law of tort: *McMahon and Binchy*, Torts[3], 27.01. Under the *scienter* principle, the owner of an animal is strictly liable in respect of damage which it causes if the animal had a vicious propensity to cause the damage of the type caused and the owner knew this: 27.15. The vicious propensity and the owner's knowledge is irrebuttably presumed for animals of a dangerous class, so that the owner of a wild animal which is kept is strictly liable for damage which it causes; proof of the propensity and knowledge is only required for tame animals: *ibid*, 27.15. For other animals, proof of past display of aggressive behavior is sufficient to establish an animal's viscious propensity; there is no necessity to show that actual harm had previously resulted: *Duggan v. Armstrong* [1992] 2 IR 161, 164-165 (McCarthy J) (where a dog had growled and run at children, but had not hitherto bitten one). The requirement of the owner's knowledge may be established by showing the knowledge of another family member: *Duggan v. Armstrong* [1992] 2 IR 161, 165 (McCarthy J) (where a child's knowledge was imputed to a parent). As regards general rules, liability may be founded on trespass (*ibid*, 27.07), nuisance (*ibid*, 27.05-27.06), negligence (*ibid*, 27.03-27.04) or *Rylands v. Fletcher* (*ibid*, 27.08). Liability on the latter basis will be in practice be rare since liability presupposes an escape of a "dangerous thing" and a "non-natural" user of the land (e.g. keeping an unreasonable number of animals): *ibid*. Liability under the Occupier's Liability Act 1995 is also probably arguable if, in the circumstances, the presence of the animal can be regarded as "a danger due to the state of the premises" (within the meaning of s. 1(1)): *ibid*, 27.09-27.14 and cf. *Duggan v. Armstrong* [1992] 2 IR 161 (breach of common law duty of care [superseded by Act] in permitting a large mongrel Alsatian dog with a known vicious propensity towards children to run free within the premises in an area where a large number of guests, including children, congregated). Equally, a hotel proprietor may be in breach of the duty of care under the Hotel Proprietors Act 1963, s. 4: *Duggan v. Armstrong* [1992] 2 IR 161.

16. The law in SCOTLAND on liability for injury and damage caused by animals closely resembles that in ENGLAND AND WALES with specific statutory rules providing for strict liability in defined cases (though not in terms identical to those enacted earlier for the sister jurisdiction), supplemented by the residual application of general (fault-based) principles of delictual liability: see generally Stair (-*Clifford*), The laws of Scotland II, para. 161. Under the Animals (Scotland) Act 1987, s. 1, a keeper of an animal is liable for injury or damage caused by an animal if the animal belongs to a species whose members generally are, by virtue of their physical attributes or habits, likely (unless controlled or restrained) to injure severely persons or animals or to damage property to a material extent. The injury or damage must be directly referable to the physical attributes or habits of the animal which rendered it likely to injure or damage: s. 1(1)(c). It is irrebuttably presumed that dogs and certain dangerous wild animals are likely to injure severely by biting or otherwise savaging, attacking or harrying (s. 3(a)) and that (among others) cattle, horses, sheep, pigs, goats and deer are likely, in the course of foraging, to damage land or its produce to a material extent (s. 3(b)). However, liability for disease is excluded if it is transmitted by means unlikely to cause severe injury other than disease: s. 1(4). Besides strict liability, an owner or keeper of an animal may be liable under the rules relating to negligence if his breach of a duty of care caused actual harm: **Clelland v. Robb 1911 SC 253; Stair (-*Clifford*), The laws of Scotland II, para. 163 (setting out the various judicially recognized duties of care). *Culpa*-based liability may also arise under the Occupiers' Liability (Scotland) Act 1960: *Hill v. Lovett* 1992 SLT 994 (occupiers liable to

window cleaner attacked by their pugnacious dog). Equally there may be liability for intentionally causing harm, such as setting a dog on another (Stair (-*Clifford*), The laws of Scotland II, paras. 160 and 164) or deliberately riding a horse at a pedestrian (*Ewing v. Earl of Mar* (1851) 14 D 314), or under the rules relating to nuisance (Stair (-*Clifford*), The laws of Scotland II, para. 162).

Illustration 1 is taken from Swedish HD 28 February 1996, NJA 1996, 104; **illustration 2** from CA Navarra 30 November 2004, BDA JUR 2005/87935; **illustration 3** from HR 24 January 1992, NedJur 1992, no. 302 p. 1187; **illustration 4** from CFI Amsterdam 11 April 1995, VR 1995, no. 192 p. 351; **illustration 5** from CA Guadalajara 10 December 2004, BDA JUR 2005/29458; **illustration 6** from CFI Assen 16 January 1962, NedJur 1963, no. 301 p. 742; and **illustration 7** from TS 29 May 2003, RAJ 2003 (3) no. 5216 p. 9730.

VI.–3:204: Accountability for damage caused by defective products

(1) The producer of a product is accountable for the causation of personal injury and consequential loss, loss within VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death), and, in relation to consumers, loss resulting from property damage (other than to the product itself) by a defect in the product.

(2) A person who imported the product into the European Economic Area for sale, hire, leasing or distribution in the course of that person's business is accountable correspondingly.

(3) A supplier of the product is accountable correspondingly if:

(a) the producer cannot be identified; or

(b) in the case of an imported product, the product does not indicate the identity of the importer (whether or not the producer's name is indicated), unless the supplier informs the person suffering the damage, within a reasonable time, of the identity of the producer or the person who supplied that supplier with the product.

(4) A person is not accountable under this Article for the causation of damage if that person shows that:

(a) that person did not put the product into circulation;

(b) it is probable that the defect which caused the damage did not exist at the time when that person put the product into circulation;

(c) that person neither manufactured the product for sale or distribution for economic purpose nor manufactured or distributed it in the course of business;

(d) the defect is due to the product's compliance with mandatory regulations issued by public authorities;

(e) the state of scientific and technical knowledge at the time that person put the product into circulation did not enable the existence of the defect to be discovered; or

(f) in the case of a manufacturer of a component, the defect is attributable to:

(i) the design of the product into which the component has been fitted; or

(ii) instructions given by the manufacturer of the product.

(5) "Producer" means:

(a) in the case of a finished product or a component, the manufacturer;

(b) in the case of raw material, the person who abstracts or wins it; and

(c) any person who, by putting a name, trademark or other distinguishing feature on the product, gives the impression of being its producer.

(6) "Product" means a movable, even if incorporated into another movable or an immovable, or electricity.

(7) A product is defective if it does not provide the safety which a person is entitled to expect, having regard to the circumstances including:

(a) the presentation of the product;

(b) the use to which it could reasonably be expected that the product would be put; and

(c) the time when the product was put into circulation,

but a product is not defective merely because a better product is subsequently put into circulation.

COMMENTS

A. General

Council Directive 85/374/EEC. This Article reproduces Council Directive 85/374/EEC of 25th July 1985 on liability for defective products (as amended by Directive 1999/34/EC art. 1). Since the liability regime under the product liability Directive undoubtedly constitutes a cornerstone of the European law on liability for damage, it did not appear sufficient simply to make reference to the Directive in the text of the Article. Rather it seemed necessary to spell out its effects in these rules.

Detailed commentary unnecessary. To the extent that the Article coincides with the Directive this text can dispense with a more detailed commentary. Reference can be had for that purpose to the voluminous literature devoted to this topic to be found in each Member State.

Restriction to consumer protection. In keeping with the fundamental legal policy adopted by the Directive, VI.–3:204 is restricted to matters of consumer protection. For that reason it deliberately refrains from extending strict liability to "business to business" relationships. Such a step would depart from the Directive's purpose of consumer protection and entail a wide-ranging interference with freedom of contract – quite apart from the fact that to date there have been no audible demands in the business sector that a corresponding liability regime be established. Rather the complete opposite is the case. The European Commission, which posed the question whether product liability should be extended to business property in its Green Paper of 28 July 1999 (COM(1999) 396 final, p. 31), stated in its report of 31 January 2001 on the application of the product liability Directive (COM(2000) 893 final, p. 25) that the tenor of responses was "in general negative" and "[o]n the basis of data available it does not seem appropriate to amend the Directive on this point".

Burden of proof in relation to damage to business property. Given this background, VI.–3:204 likewise does not provide for a reversal of the burden of proof to the detriment of the producer of the sort adopted in a few of the legal systems not just for "B2C" cases, but also for "B2B" cases. Such rules have the effect of presuming negligence to the producer's detriment if one of the products causes damage to another's business property. Where those rules are to be found in the law currently in force, their practical effect is barely distinguishable from a strict liability.

No contractual exclusion or restriction of liability. VI.–3:204 must be read in conjunction with VI.–5:401 (Contractual exclusion and limitation of liability) paragraph (3). By virtue of the latter Article, liability under VI.–3:204 can neither be restricted nor excluded before the occurrence of the damage. This, too, follows from the product liability Directive (art. 12). The nullity of an exclusion of liability relates both to personal injury and damage to consumer property.

No punitive or aggravated damages. The draft does not provide for punitive damages in general and the law on product liability does not constitute an exception. Since VI.–3:204 is concerned with strict liability and no element of fault is required, the introduction of punitive damages in this context must be completely out of the question.

Primary agricultural products and game. Since Directive 1999/34/EC art. 1(2) came into force, Directive 85/374/EEC no longer permits Member States a decision-making power in regard to whether or not primary agricultural products and game should be subjected to strict liability. VI.–3:204 reflects this legal development. Products of this type are included in its scope of application.

Liability for development risks. The draft follows the Directive also in its approach to liability for so-called "development risks". Under VI.–3:204(4)(e) there is no strict liability if the producer shows that the state of scientific and technical knowledge at the time that person put the product into circulation did not enable the existence of the defect to be discovered. That rule must, however, be read in conjunction with VI.–3:207 (Other accountability for the causation of legally relevant damage) sub-paragraph (c) which, like Council Directive 85/374/EEC art. 15(1)(b), leaves to the national legal systems the option not to introduce this ground of defence into their law. The various jurisdictions do not asses in a completely uniform way, however, the conditions under which it may be said that the risk which has realised is merely a 'development risk'. The ECJ in its judgment of 29 May 1997 in *Commission of the European Communities v. United Kingdom*, ECJ 29 May 1997, C-300/95, ECR 1997, I-2649 at para. 29 defined in the following terms how the concept deployed by the Directive is to be understood: "the producer must prove that the objective state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product in question was put into circulation was not such as to enable the existence of the defect to be discovered. Further, in order for the relevant scientific and technical knowledge to be successfully pleaded as against the producer, that knowledge must have been accessible at the time when the product in question was put into circulation." In so doing the court essentially adopted the Opinion of Advocate-General *Tesauro*.

Policy considerations. The question whether product liability should also embrace liability for development risks has been and remains a matter of controversial discussion at the level of legal policy in many Member States. According to a study in 2003 by the *Fondazione Rosselli* compiled for the European Commission the argument that the risk concerned was a development risk has only rarely been successful. To date it has been pleaded as a defence primarily in proceedings relating to blood products and their derivatives, medicines and vaccines, foodstuffs and chemicals (For further information see http://europa.eu.int/comm/enterprise/regulation/goods/liability_de.htm). The study concludes by advocating the retention of the development risk defence. One of the reasons put forward is the difficulty of finding a reasonable cover for the risk on the insurance market, an aspect which the European Commission also emphasises in its report referred to in the third paragraph of this Comment. Moreover, mention is also made of the concern that the propensity to innovate and the range of industrial products might otherwise diminish.

Further considerations. These rules consider – in agreement with the studies referred to – that the current regime in the Directive is a balanced one. It does not appear to have caused difficulties in practice or gaps in liability which cannot be easily accommodated. It is sufficient to leave the decision as to maintenance or abolition of the development risk defences to the national legal systems. They (i) enjoy as a result the freedom to define the concept in a manner which appears to them to be reasonable and (ii) retain the freedom to abolish the defence only for defined products with special potential for hazard (blood products, medicines, genetically modified produce) and to create the necessary insurance framework.

Application of the general provisions. In accordance with Council Directive 85/374/EEC art. 13, VI.–3:204 leaves other causes of action unaffected. Product liability based on the law on non-contractual liability for negligence and on contract (see VI.–1:103 (Scope of application) sub-paragraph (d)) remains applicable. That is of practical significance in particular in reference to damage to property of businesses or professionals. Compensation for damage to property (as a result of a defective product) which a business causes to *another business* is consequently (as already indicated) only obtainable under the rules on non-contractual liability if the injured person can prove that the person causing the damage did so intentionally or negligently.

Duty to warn of development risks. The exclusion of strict liability for development risks does not then simultaneously mean an exclusion of liability for negligence. Such liability can arise in this context if the producer breaches duties to warn in relation to the realisation of development risks that have only become apparent after the product has been put on the open market and of which the consumer would have been made aware by a producer monitoring its products with reasonable care.

Deviations from the Directive; options left to discretion of Member States. VI.–3:204 departs from the Directive on one point (there is no excess provision for consumers suffering property damage) and VI.–3:204 also proposes that the options left by the Directive to the Member States in respect of non-economic losses and the introduction of a quantitative ceiling on liability be superseded by solutions which are in harmony with the general approach of these rules).

B. Damage to consumer property

Deviation from the Directive. Departing from the Community law currently in force (Product Liability Directive art. 9(b)), VI.–3:204 proposes to extend the strict liability of a producer in favour of consumers to damage to property which amounts to less than €500 (The Directive originally provided for an excess of 500,- ECU. Council Regulation EC/1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro [OJ L 162, 19 June 1997, p. 1] art. 2 converted that sum into € 500). It may well be that for such small levels of damage solutions outside of the court system ought to be found. The Commission report referred to in paragraph 3 of these Comments mentions this topic, but does not go into any detail.

Policy considerations. A primary explanation for the excess for consumers in relation to property damage which has been given is that producers, insurers and the courts ought not to be burdened with proceedings in respect of trivial sums and, furthermore, that a limit of this nature reduces transaction costs. However, tending against the rule are the facts not only that it constitutes a rather singular 'foreign body' within Community law, but that in a predominant number of the legal systems of the Member States it is practically an empty shell because both contract law and the law on non-contractual liability have developed mechanisms in the law of evidence which in terms of practical outcome cut out the producer's defence of an absence of fault. Furthermore, in all cases of property damage which exceed the minimum limit for liability the rule leads to an unjustifiable difficulty for the consumer in the conduct of proceedings; the claim must be based in such cases on different causes of action. The rule also contributes towards new legal differences in European product liability partly because the character of the rule as a general excess is liable to fall into disrespect, but also because the Directive originally expressed the excess in terms of ECU and the Euro has not

yet been introduced in all Member States. Fluctuations in currency values consequently have the effect that the amount of the excess varies not inconsiderably from country to country. Finally, a want of justice is inherent in the excess: it seems anomalous that damage to property of less than €500 is to be withdrawn from just one regime of strict liability, but to allow such damage to be compensated in all other cases (a property damage of, say, €450 is certainly not within the notion of "trivial damage" within the meaning of VI.–6:102 (De minimis rule)). The same goes for damage to property which exceeds €500 in value. From the point of view of legal policy it is hardly a convincing standpoint that if there is a damage of, for example, €20,000, compensation will only amount to €19,500, and one may speculate that in judgments for which (as is often the case) the quantum of damage depends on an estimation, the excess will be 'reckoned in' before the level of compensation is set.

C. Liability for non-economic losses; no maximum limit to liability

Liability for non-economic loss and injury as such. The definition of damage in the Directive is "without prejudice to national provisions relating to non-material damage" (art. 9, second sentence). Since the rules in this Book do not generally distinguish between economic and non-economic loss, the term "loss" consequently embracing loss of a non-economic nature (see VI.–2:101(1) (Meaning of legally relevant damage), VI.–3:204 too will provide a platform for a claim for reparation for such losses. The same applies to the claim for compensation for the injury as such. The reparable nature of non-economic loss within a strict liability regime corresponds with the current position in the legal systems of most EU Member States.

No maximum limit to liability. VI.–3:204 likewise corresponds with the majority of the legal systems in the EU Member States in not proposing an upper limit to liability (cf. Council Directive 85/374/EEC art. 16). Such limits are not an appropriate instrument to structure issues of strict liability, including product liability.

NOTES

I. Implementation of the Directive

1. The product liability directive 85/374/EEC, as amended by Directive 1999/34/EC, has been implemented in all Member States. See for FRANCE the Loi no. 98-389 of 19 May 1998 (= CC arts. 1386-1 - 1386-13); for BELGIUM the statute of 25 February 1991 (BS of 22 March 1991); for LUXEMBURG Products Liability Act of 21 April 1989 (Mémorial of 28 April 1989); for MALTA the Consumer Affairs Act (Act XXVII of 1994, supplemented by Act V of 1995, Act XIX of 1996, Act XXVI of 2000 and Act VI of 2001) part VII; for SPAIN the Consumer Protection Act and related statutes (*Real Decreto Legislativo* 1/2007, of 16 November, *que aprueba el texto refundido de la Ley General para la Defensa de los consumidores y usuarios y otras leyes complementarias*) book III chaps. 1 and 2; for ITALY Legislative Decree of 6 September 2005 no. 206 (Suppl.ord. no. 162 alla Gazz. Uff. no. 235 of 8 October) (arts. 114-127); for HUNGARY Products Liability Act (Act no. X of 1993 as amended); for POLAND Act of 2 March 2000 (Dz. U. no. 22, poz. 271) (= CC Book III, title VI[1]); for the CZECH Republic Act 59/1998 of 5 March 1998 on Responsibility for Damage Due to Defect of a Product as amended by Act 209/2000; for the SLOVAK Republic Act of 2 November 1999 on Product Liability; for SLOVENIA the Consumer Protection Act 1998 (Official Journal 20/1998, amended

by the statutes *23/1999*, *110/2002*, *51/2004*); for BULGARIA Consumer Protection Act of 9 December 2006 (DV no. 99), which repealed the Consumer Protection and Trade Rules Act of 2 April 1999 (DV no. 30) commenced on the 10 June 2006; for ROMANIA Act no. 240 of 7 June 2004 on Product Liability (OJ Part I no. 552 of 22 June 2004); for GERMANY the Product Liability Act of 15 December 1989 (BGBl I 1989, 2198) as amended (BGBl I 2002, 2674); for AUSTRIA Products Liability Act of 21 January 1988, amended in 1993 and subsequently (BGBl I 1988/99, 1993/95, 1999/185, 2001/98); for GREECE the Consumer Protection Act no. 2251/1994 (as amended by Act no.3587/2007); for PORTUGAL Decree-Law no. 383/89 of 6 November 1989 on Liability for Defective Products as amended by Decree-Law no. 131/2001 of 24 April 2001; for THE NETHERLANDS CC arts. 6:185-193; for ESTONIA LOA § 1061; for LITHUANIA CC arts. 6.292-6.300; for LATVIA Law on Liability for Defective Goods and Deficient Services of 5 July 2000; for DENMARK the Products Liability Act of 7 June 1989/371 (lov om produktansvar); for FINLAND the Products Liability Act of 17 August 1990/694 (produktansvarslag); for SWEDEN Products Liability Act of 23 January 1992 (Produktansvarslag 1992:18); for the UNITED KINGDOM the Consumer Protection Act 1987, Part I (ENGLAND AND WALES, SCOTLAND) and the Consumer Protection (Northern Ireland) Order 1987, Part II (NORTHERN IRELAND); for IRELAND the Liability for Defective Products Act of 1991; and for CYPRUS the Defective Product (Civil Liability) Laws of 1995 to 2002.

2. FRANCE has reacted to the condemnation of the ECJ 14 March 2006, JCP 2006 éd. G., and has enacted Law no. 2006-406 of 5 April 2006 and reformulated CC art. 1386-7(1) accordingly, prompted by the requirement to ensure conformity with the Directive. The ECJ in its judgment of the 10th of January 2006, C-402/03, *Skov Æg v. Bilka Lavprisvarehus A/S*, ECJ 10 January 2006, C-402/03, ECR 2006, I-199 clarified that the Directive must be interpreted as (i) "precluding a national rule, according to which the supplier is subject to a non fault based liability, beyond the cases which are exhaustively listed in art. 3(3), which the Directive ….burdens the producer with, and (ii) as not precluding a national rule, according to which the supplier is accountable without restriction for the producer's fault based liability."

II. Liability for Damage to Property

(1) Damage to things intended for private use

3. The commonly called lower threshold for property damage claims of consumers is mandatorily prescribed in community law (ECJ 25 April 2002, *Commission of the European Communities v. French Republic*, ECJ 25 April 2002, C-418/00 and C-419/00, ECR 2002, I-3969, *Commission of the European Communities v. Hellenic Republic*, ECJ 25 April 2002, C-154/00, ECR 2002, I-3879). In spite of this, provisions effecting its transposition have only been found since the beginning of 2005 in all the legal orders of the Member States. Even today (writing as of January 2007) the threshold amounts under national laws vary considerably; moreover many issues have been left undecided, namely, how the damage, the extent of which exceeds the stipulated amount, is to be regulated. On this and on many other policy grounds, the threshold has come in for heavy criticism.

4. FRANCE did not transpose the threshold amount envisaged by the Directive and was consequently condemned for omitting to do so by the ECJ.(see previous Note). The French legislature thereupon amended CC art. 1386-2 by the Law no. 2004-1343 of 9 December 2004 CC art. 1386-2, under which the heading pertaining to product liability is only applicable to injury to persons (para. (1)) and to damage to property

which exceeds a particular amount to be fixed by decree (para. (2)). This sum was set at € 500 (*Décret* no. 2005-113 of 11 February 2005, JO 11 February 2005, 2408). BELGIUM transposed the threshold amount at an early stage in the form of a deductible excess (Products Liablity Act art. 11: € 500); there is also case law pertaining to this provision (e.g. CFI Brugge 30 October 2000, RW 2001-2002, 1182: damage inflicted to an electrical applicance by a too high electrical voltage), however it is emphaised throughout that, in respect of such "minor" damage, the general (and to some extent rules which also operate on a strict liability basis) contract and extra contractual rules on liability remain applicable (CFI Brugge loc. cit.; CFI Hasselt 8 November 1999, RW 2001-2002, 100, note *De Boeck*; Debaene and Soens (-*Verlinden*), Aansprakelijkheidsrecht. Actuele tendensen, 31-32. LUXEMBURG has also fixed the threshold at € 500 (Products Liability Act art. 2(2)).

5. MALTA has fixed the lower threshold amount at Liri 200,- (ca. € 510), however, at the same time, the Minister responsible was given the power to alter the sum (Consumer Affairs Act art. 61(b)), should the need arise. As of the time of writing, no use has been made of this authorisation.

6. SPANISH ConsProtA art. 141(a) (formerly Products Liability Act (*LRCP*) art. 10(1)(a)) provides for a lower threshold (deductible) amount of € 390,66. Damage caused to property used for private purposes is thereunder not completely recoverable but can always only be recovered following deduction of this fixed amount (*Lasarte Álvarez*, Manual de protección, 295-296). Also in Spain, this regulation is highly controversial on policy grounds (*de la Vega García*, Responsabilidad civil derivada del producto defectuoso, 63; see otherwise also *Salvador Coderch*, Green Paper – Civil Liability for Defective Products, 21, who points out the danger of class actions, if the lower threshold amount was abholished). In addition, it is also recognised in law that damage to property falling below the stipulated lower threshold amount can be recovered under general contract and tort rules, in practice this leads, in most cases, to the result that the provision is drained of any effect (*Instituto Nacional de Consumo*, Green Paper, 59). Up to now, it appears that the amount was actally deducted in two reported judgments, both cases dealt with more significant damage (namely CA Burgos 13 February 2003, BDA Civil, JUR 2003 no. 122404 and CA Jaén 22 October 2002, BDA JUR 2003 no. 118952.

7. The ITALIAN Consumer Protection Code (Note 1 above) provides in art. 123(2) ,that damage to property is only recoverable if it exceeds the sum of € 387. The Act makes clear that the provision provides for an excess, the "first" 387 Euro, therefore are irrecoverable. Italian consumer organisations have trenchantly criticised this regulation (e.g. the *Associazione Italiana Difesa Consumatori e Ambiente,* http://europa.eu.int/comm/enterprise/regulation/goods/docs/liability/1999-greenpaper-replies/002.pdf) **and das Comitato Consumatori Altroconsumo CCA Milano,** http://europa.eu.int/comm/enterprise/regulation/goods/docs/liability/1999-greenpaper-replies/002.pdf).

8. HUNGARY, before its accession to the European Union, only provided for a lower threshold amount of 10.000 Forint (ca. € 40), then, reluctantly however, enacted the Products Liability Act (§ 1(4)(b)) providing for an amount in Forints as converted by the official conversion rate on the date that the damage occurred, corresponding to € 500. In SLOVENIA comparable developments transpired. In spite of a comparably low standard of living, the lower threshold amount was increased in 2004 to 100.000 Tolar (ca. € 418) (Consumer Protection Act § 2(4) as amended by Act of 3 May 2004).

BULGARIA has adopted a lower threshold amount of 500 Lewa (€ 255) (Consumer Protection Act art. 131(1) no. 2). POLISH CC art. 449^7 § 2 provides that reparation of the damage caused by a defective product is not available, if the property damage (other than damage to the product itself) does not exceed the value of 500 euro. Academic writing takes the view that if the damage exceeds 500 euro, it is to be compensated fully (i.e. the sum of 500 euro is not to be deducted: Pietrzykowski [-*Banaszczyk*], Kodeks cywilny I^4, art. 449^7 p. 1343). Damage below this limit may be compensable under general rules (*Radwański and Olejniczak*, Zobowiązania - część ogólna[7], 275).

9. According to the GERMAN Product Liability Act § 11 a consumer must "in the event of damage to property ... bear the loss of up to 500 Euro". Therefore, until this threshold is exceeded, the manufacture is not liable under the strict product liability regime, and in respect of damage to property exceeding that amount, the manufacturer is only burdened with the remaining amount (BT-Drucks. 11/5520, 16). In practice, the provision is regarded as largely devoid of effect, due to the fact that, according to prevailing legal opinion, the regime has no bearing on the general liability under tort law grounded in CC § 823(1). In order to combat this, the courts have reversed the burden of proof in respect of the negligence of a producer. In practical terms, this approach is not inferior to "real" strict liability or, may be, at the most, only in peripheral areas (Erman [-*Schiemann*], BGB II^{11}, § 11 ProdHG, no. 1; MünchKomm [-*Wagner*], BGB^4, § 11 ProdHG, no. 2).

10. Originally the AUSTRIAN Products Liability Act 1988 § 3 no. 2 provided for a threshold amount of 5.000 Schilling (ca. € 363), however this amount was increased to 7.900 Schilling (ca. € 749) upon accession to the European Economic Community and was reduced again to € 500 on the 1 January 2002. Damage to property under this threshold is subject to the general tort law regime or the rules of contract law dealing with the rights of third parties (*Koziol and Welser*, Bürgerliches Recht II^{12}, 355; *Welser and Rabl*, Produkthaftungsgesetz[2], § 2 no. 11); Products Liability Act § 14 makes clear that the general civil law remains unaffected by the regulation pertaining to the threshold amount.

11. Originally, the GREEK Consumer Protection Act no. 2251/1994 did not provide for a threshold amount. In 2002, only following the condemnation of Greece by the ECJ in a judgment pertaining to the incorrect transposition of a Directive (detailed above, see Note A3) a threshold amount of € 500 was intorduced by legislation (Act no. 2251/1994 art. 6(6) as amended; on this please see *Karakostas*, Dikaio prostasias tou katanaloti, 231; *Rokas*, Evthini gia ta proionta, 260; *Alexandridou*, Dikaio prostasias tou katanaloti, no. 168).

12. Originally the PORTUGUESE Products Liability Act art. 8(2) provided that "damage to property is only compensated if it exceeds 70,000 escudos". This provision was repealed by a decree- Law131/2001 of 24 April 2001 and was replaced by a new article 9, which increased the amount to € 500. This provision also specified that damage to goods intended for private use could only be compensated, "in so far as they exceed the sum of 500 €". This wording, similarly, led to problems of interpretation. *Calvão da Silva*, Responsabilidade civil do produtor, 701 opines that, that art. 9 must be read in the sense of a general deduction to the extent of the stipulated amount. This approach, however, does not yet entail that only the "first" € 500 are only recoverable, if the person suffering damage can prove fault on the part of the manufacturer under the general regime of liability under CC art. 483 as, namely, the consumer can base his action on the strict liability regime under the Consumer Protection Act 24/96 of 31 July 1996 art. 12(5).

13. DUTCH CC art. 6:190(1) (b) states that liability for any damage to property intended for private use arises, "upon application of a *franchise* of € 500". The legislature was of the opinion that the text of the Directive permitted a socalled "threshold franchise" (*drempel*) which would be fully recoverable because the property damage incurred was beyond that amount as well as a "deductible excess" (*aftrek*). Against this backdrop, the Dutch expressly opted for the "threshold franchise" (Onrechtmatige daad III [-*Stolker*], art. 6:190, no. 11 p. 14; for criticism of this solution, see *Snijders*, Produktenrecht, 83-84). In the Netherlands, therefore, this entails that damages of (e.g.) € 750 are fully recoverable and not replaced by a sum of € 250 (cf. MvA, Kamerstukken II 1987/88, 19636, no. 6 pp. 27-28). In respect of minor damage under the € 500 threshold, the consumer can, in any event, make a claim against the vendor based on the strict liability provision contained in CC art. 7:24(2)(c) (Nieuwenhuis/Stolker/Valk (-*Lankhorst*), T & C Burgerlijk Wetboek[4], art. 6:190 no. 3 p. 1943; *Jongeneel*, Koop en consumentenkoop[3], 65). The limits placed on liability set out in the Product Liability Directive as thereby practically thwarted. Accordingly, legal commentators have clamoured for the repeal of the *franchise* (see for an opposing view *Dommering-van Rongen*, Produktenaansprakelijkheid, 141). Even the restriction of the ambit of liability to damage to goods intended for private use has been heavily criticised (e.g. *Knottenbelt*, Hoofdstukken produktenaansprakelijkheid, 74-75).

14. ESTONIAN LOA § 1061(2)(iii) guarantees damages for damage to property intended solely for private use, "if the extent of the damage exceeds an amount equal to € 500". This wording alludes to the fact that damage which is in excess of this amount is fully recoverable. No liability is generally imposed on damage caused to the product itself by a defect (LOA § 1061(3), see further *Tampuu*, Juridica 2003, no. 3, 161–168.

15. Similarly, the rules on the threshold amount are not uniform in the NORDIC Countries DENMARK has opted for a sum of 4000 dkr (Products Liability Act § 8; ca. € 527); FINLAND 2.350 finnische Mark (Products Liability Act § 8; ca. € 395) and SWEDEN 3.500 Kronen (Products Liability Act § 9; ca. € 375).The DANISH Products Liability Act § 8 and the SWEDISH Products Liability Act § 9 expressly provide that, when ascertaining the compensation of damage to property, the relevant sum will be deducted. In contrast, the FINNISH Products Liability Act § 8(2) is expressed in terms that the obligation to compensate "ceases to apply" when the damage to property is valued at under 2.350 (finnische) Mark. Damage which exceeds this sum is 100 % recoverable.

16. In the UNITED KINGDOM the Consumer Protection Act 1987, s. 5(4) and the identically worded Consumer Protection (Northern Ireland) Order 1987, art. 8(4) provide that no damages are to be awarded in respect of any loss or damage to property if the amount to be awarded apart from any liability for interest does not exceed £ 275 (ca. € 403). A claim for amounts which fall under that threshold may still be made on the basis of negligence (*Nelson-Jones and Stewart*, Product Liability, 56; Clerk and Lindsell [-*Tettenborn*], Torts[18], para. 9-63). The provision is regarded as only setting out a threshold, so that a claim which exceeds it may be recovered in full – i.e. without deduction (*Clark*, Product Liability, 129 [implicitly]; *Geddes*, Product and Service Liability, 28). This is thought by some at least to be an incorrect implemention of the directive on the basis that art. 9(b) of the latter requires that the first € 500 will always be irrecoverable (*Clark* loc. cit.). Since the exclusion under the statute is tied to the amount of compensation actually to be awarded, a claimant will fall foul of the provision and recover nothing if his claim is above the threshold, but reduced below it by the effect of a defence based on the claimant's own contributory negligence (*Nelson-Jones and Stewart* loc. cit. 56; *Tettenborn* loc. cit. para. 9-63 no.

54). Literature recognises that the purpose of the rule is to discourage small claims (*Nelson-Jones and Stewart* loc. cit.), but criticises its tendency to produce fortuitous results (*Clark* loc. cit.).

17. Similarly in IRELAND, it is also discussed whether the Directive provides for a threshold or excess franchise (*McMahon and Binchy*, Torts[3], 280). The Irish legislature has plumped for the second alternative. Liability for Defective Products Act s. 3(1) provides "where, but for this section, damages not exceeding € 500 in respect of any loss of or damage to, or destruction of, any item of property other than the defective product itself would fall to be awarded by virtue of this Act, no damages shall be awarded, and where, but for this section, damages exceeding that amount would fall to be awarded, only that excess shall be awarded." Thus IRELAND has a two pronged approach – the loss must be greater than € 500 and then € 500 will be deducted from the compensation awarded.

(2) Damage to business property

18. Liability for damage to property used in the course of business lies outside the scope of the Directive. The corollary is that there are not inconsiderable differences in this respect between the various legal orders of the Member States.

19. FRENCH CC art. 1386-1 initially clarifies that the *producteur* is also liable under the subsequent provisions pertaining to extra contractual liability, if he has a contractual relationship with the victim; the principle of *non cumul des responsabilités* is therefore not applicable here (*le Tourneau and Cadiet*, Droit de la responsabilité et des contrats [2006/2007], 8404-8405). The law pertaining to product liability is understood as a typical case of the *théorie de la risque* (*Flour/Aubert/Savaux*, Le fait juridique[11], no. 300 p. 303). Therefore, even subsequent to the transposition of the Directive, a distinction is still made under French law between damage to property used for private purposes and damage to property used in the course of business (*le Tourneau and Cadiet* loc. cit. 8406; Rép.Dr.Civ. [-*Caillé*] IX[2], no. 30). The revised CC art. 1386-2(2) has not made any modifications. However, CC art. 1386-15 enables businessmen to contractually exclude liability for damage to property in their dealings with one another.

20. In contrast to the France, in BELGIUM, damage to business property is only be recoverable upon application of the general rules (contractual or extra contracual) on liability law (Act of 25 February 1991 [Note 1 above] art. 11). These provisions determine whether and under which circumstances this liability is strict or whether the imposition of liability depends on the presence of a faute. An identical situation prevails in LUXEMBURG (Products Liability Act art. 2(1) no. 4).

21. Similarly, according to the SPANISH ConsProtA art. 129(1) (former Products Liability Act art. 10(1)), the sole beneficiaries of a strict liability regime in relation to damage to property are consumers (CA Toledo 16 March 2000, AC 2000/959 [liability was not imposed on the proprietor of a restaurant due to an interruption in the supply of electricity]; similarly CA Alicante 8 January 2002, BDA JUR 2002/48487; compare. in addition CA Burgos 13 February 2003, BDA JUR 2003/122404 [no liability imposed under the Products Liability Act for fire damage to a hairdressing salon caused by a techinal defect in an applicance; strict liability was only imposed in respect of the damage accruing to the private property of the staff and customers]). Product Liability for damage to business property is therefore subject to the general contract or tort law regimes of the CC (e.g. CA Navarra 22 September 2003, BDA JUR 2004/112848: no analogous application of the Products Liablity Act where defective property was acquired; strict liability was not imposed on a manufacturer in

respect of a purchaser's loss of profits; furthermore no liability for risk under general tort law precepts).

22. ITALIAN Consumer Protection Code art. 123(1)(b) clarifies, that the Code is not applicable to damage to property intended for use in the course of business or for professional purposes. Therefore, for example, damage resulting from a disruption in production or damage flowing from the sale of the defective product to customer, who thereupon took their business elsewhere, is only recoverable under the general rules of contract or tort law (loc. cit. art. 127(1); see also *Franzoni*, Dei fatti illeciti, sub art. 2056, p. 846). In conjunction with the general liability for negligence in tort law contained in CC art. 2043, regard must, above all, be had to the strict liability provisions of CC arts. 2049 and 2050. Additionally, damage which results from defective production of a vehicle is also subject to the strict liability regime anchored in CC art. 2054(4) (Alpa and Mariconda [-Alpa], Codice civile commentato IV, art. 2054, VI, no. 11).

23. In a similar manner, the HUNGARIAN Products Liability Act § 1(4)(b) recognises a strict product liability for damage to property only in the consumer's favour. Under POLISH CC art. 449^2 the producer of the dangerous product is accountable only for the damage to the property designated for personal use if that property had in fact been mostly used for personal purposes. Damage to "business" property may only be compensated under general rules.

24. While the GERMAN Products Liability Act § 1(1) second sentence also only provides for strict liability in favour of consumers for damage to property, under the general provisions of tort law (CC § 823(1)) a special case must be taken note of, namely, that also in respect of business undertakings that have suffered damage, there is a rebuttable presumption that the manufacturer of a defective product acted illegally and was at fault (fundamentally BGH 26 November 1968, BGHZ 51, 91). However, it is debatable whether this situation as it stands can be reconciled with the stated objective of the Directive as a regulation providing for the complete harmonisation of the liability for defective products (Langenbucher [-*Riehm*], Europarechtliche Bezüge des Privatrechts, 202-203).

25. Originally the AUSTRIAN Products Liability Act § 2 (old version) also included businessmen in the protective strict liability regime for damage to property, however this legal position was changed in 1993 in the course of the preparations for accession to the EU (§ 2(2) (new version)). Der OGH has since then repeatedly confirmed that in respect to damage to property, only consumers fall within the protective scope of the provisions, not "everyone" can avail of the protection proffered by the Act (OGH 26 November 2002, ecolex 2003, 161; OGH 22 February 2005, RS 0117224). As far as damage to business property is concerned, liability falls to be determined under the general provisions pertaining to fault based liability under the CC.

26. In GREECE, only goods intended for private use or consumption were subject to the regime of the Consumer Protection Act (art. 6(6); the term employed there, namely "items of property" ought to mean the same as "thing": *Karakostas*, I evthini tou paragogou gia elattomatika proionta, 82). After the amendment of the Consumer Protection Act by Act no. 3587/2007, the notion "items of property" includes the right to use environmental "goods". The strict liability regime has no application to things which have been acquired for use in the course of business even where, in the concrete case at hand, they were actually used for non commerical purposes (*Karakostas*, Dikaio prostasias tou katanaloti, 228; for a different view see *Baltoudis*, I evthini apo ta elattomatika prioionta, 310). However, business operators can rely on the judically created rules pertaining to the reversal of the burden of proof in respect of the property

damage suffered by them (*Karakostas*, I evthini tou paragogou gia elattomatika proionta, 82).

27. Equally the PORTUGUESE Products Liability Act art. 8(1) confines strict liability for damage to property to things inteneded for private use. The sole recourse of business operators is under the general rules of fault based liability under the CC (STJ 27 April 2004, Proc. 04B44057, Relator *Ferreira de Almeida*; CA Lisbon 9 July 2003, Proc. 3635/2003-6, Relator *Lúcia de Sousa*). This situation also corresponds to that prevailing under the DUTCH CC art. 6:190(1)(b), under DANISH Products Liability Act § 2, under FINNISH Products Liability Act § 1(1) and under SWEDISH Products Liability Act § 1(2) or where appropriate under the culpa-rules of the common Scandinavian tort law.

28. Finally, the situation is the same in the UNITED KINGDOM (Consumer Protection Act 1987, s. 5(3); Consumer Protection (Northern Ireland) Order 1987, art. 8(3)) and in IRELAND (Liability for Defective Products Act 1991 s. 1(1)). Loss of or damage to property will only fall within the ambit of liability if the property is of a type ordinarily intended for private use or consumption – thus commercial usage will be excluded. Any liability in the latter case will be on the basis of the general rules of the tort of negligence.

III. Liability for non-economic loss

29. The Directive on Product Liability leaves it to the Member States to decide whether they wish to provide that non peecuniary loss should also be recoverable under the strict liability regime. The majority of Member States have answered this question in the affirmative.

30. According to FRENCH, BELGIAN, LUXEMBURGIAN and SPANISH Law [compare. the latter's ConsProtA art. 129(1) (former Products Liability Act art. 10(2))] it is indisputable that non material damage is recoverable under the strict product liability regime. This proposition is self- evident. In ITALY damage of this type was irrecoverable for a long period of time (e.g. CFI Milan 31 January 2003, Resp.civ. e prev. 2003, 115), however, in the interim, recovery is assured, following a change in approach in the decisions of the higher courts as to the recoverability of non pecuniary loss (e.g. CFI Rome 4 December 2003, Danno e resp. 2004, 52; CFI Rome 3 November 2003, Danno e resp. 2004, 529 and CFI Brescia 31 March 2003, Danno e resp. 2004, 666).

31. Moreover, recovery of non economic loss is guaranteed by the PORTUGUESE (Products Liability Act art. 8(1); see *Calvão da Silva*, Responsabilidade civil do produtor, 678 with the additional reference that liability is also directed at "bystanders" according to the CC art. 496), the HUNGARIAN (Products Liablity Act § 1(4)(a)), the POLISH (CC art. 449^1 in conjunction with art. 445 § 1); the ROMANIAN (Products Liability Act art. 2(3)); the GERMAN (Products Liability Act § 8 second sentence), the BULGARIAN (Consumer Protection Act art. 131(2)), the IRISH (Liability for Defective Products Act 1991 s. 1(1), defining "personal injury" as including "any disease and any impairment of a person's physical or mental condition") and the UNITED KINGDOM Law (*Geddes*, Product and Service Liability, 25-26; Clerk and Lindsell [-*Tettenborn*], Torts[18], para. 9-63; *Clark*, Product Liability, 130-131; *Nelson-Jones and Stewart*, Product Liability, 53). In the Nordic countries, it is similarly recognised that non economic loss can be recovered. In SWEDEN recovery of such damage is permitted, based on the rationale anchored in the general rules of the Damages Liability Act chap. 5 § 1(3), namely that the product liability regime was not designed to restrict the entitlement of the victim, rather is

geared at broadening the entitlement of the victim (*Hellner and Radetzki*, Skadeståndsrätt[7], 317). DANISH Products Liability Act chap. 6 § 13, provides that the Act does not limit the plaintiff's possibilities of attaining compensation under the general rules of contract or tort. A corresponding provision can be found in FINNISH Products Liabilty Act § 11.

32. In contrast, non pecuniary damage was previously considered to be irrecoverable under the GREEK strict product liability regime. The Consumer Protection Act (2251/1994) referred, in respect of such damage, to the general tort law rules. Prevailing legal opinion interpreted this cross reference to mean that a claim for compensation in respect of non- pecuniary loss could only be asserted in circumstances where there was fault on the part of the manufacturer (*Karakostas*, I evthini tou paragogou gia elattomatika proionta, 196; CA Thessaloniki 3141/2002, XrID 2003, 135; CA Athens 5298/2001, DEE 2002, 1137; unclear CA Piräus 301/2001, DEE 2001, 1147, note *Karakostas*; see for an opposing view especially *Eleftheriadou*, PHI 1999, 102, 107 and *Baltoudis*, I evthini apo ta elattomatika prioionta, 312). However, Act no.2251/1994 art. 7 was amended by Act no.3587/2007 which now provides for the recoverability of non-economic losses.

IV. Liability for development risks

33. The question, whether a producer can relieve himself of liability by asserting a development risk defence, resulting in the materialisation of a development risk outside the scope of his control, is, in spite of its minor importance, one the most debated policy questions of the European Product Liability regime. In this regard, not only is it necessary to assess two opposing camps, but furthermore within both camps there are varying degrees of differences in detail.

34. According to the FRENCH CC art. 1386-11(1) no. 4 a producer is liable, unless he can prove that the defect was not discoverable according to the state of scientific and technological knowledge existing at the time that the affected product was put into circulation. Accordingly, the risk of a development defect materialising is borne, in principle, by the consumer. CC art. 1386-12(2) attenuates this point of departure by providing that: "A producer may not invoke the exonerating circumstance provided for in art. 1386-11(4) and (5), where, faced with a defect which has revealed itself within a period of ten years after the product has been put into circulation, he did not take the appropriate steps to avoid its damaging consequences". If, within ten years of putting the product into circulation of the product, new findings emerge in respect of the development risks, the producer is under an obligation to warn about or recall the product as the case may be (see further *le Tourneau and Cadiet*, Droit de la responsabilité et des contrats [2006/2007], 8425). Even though this provision has been deemed by the ECJ to infringe community law (ECJ 25 April 2002, Note 3 above), the French legislature has not as yet seen fit to introduce an amendment to the provision.

35. BELGIAN Products Liability Act art. 8 lit. e has remained true to the wording of the Directive. A parliamentary initiative proposing to strike out the development risks defence was unsuccessful (Parl. St. Kamer, Zittingsperiode 1999-2000, 0480/001 and Parl. St. Kamer, Zittingsperiode 2000-2001, 0966/003, p. 6). However, the adoption of a restrictive approach to this ground of defence has been advanced in academic literature (*Van de Gehuchte*, De aansprakelijkheid voor producten, 84; Debaene and Soens [-*Verlinden*], Aansprakelijkheidsrecht. Actuele tendensen, no. 24 p. 44). Similarly, MALTA permits exculpation in the case of the realisation of a development risk (Consumers Affairs Act art. 62(e)). In contrast, according to LUXEMBURGIAN Law the producer bears the development risk (*Ravarani*, Pas. luxemb. 2000, 393, no. 511).

36. SPANISH ConsProtA art. 140(1)(e) (formerly Products Liability Act art. 6(1)(e)) enables the producer, in principle, to adduce proof that, "the state of existing scientific and technical knowledge at the time when the product was put into circulation did not allow to find out the existence of the defect", however, art. 140(3) (formerly Products Liability Act art. 6(3)) provides that this exception is disapplied in the case of medicines, food and food products for human consumption. Further special legislation introduced additional exceptions from the basic rule for cases where the State is the defendant (Law 30/1992, art. 141(1)). Following the introduction of special rules particular to this area, there does not appear to be any further cases, in which the development risks exception has been successfully invoked.

37. According to the ITALIAN Consumer Protection Code art. 118 lit. e the producer is exempted from liability if the state of scientific and technological knowledge at the time when he put the producer into circulation was not such as to enable the presence of the defect to be ascertained. Up to now, it appears that, also in Italy, no action has failed because the defence was asserted.

38. The SLOVENIAN Consumer Protection Act § 10(5) indeed accepts that the materialisation of a development risk can amount to an defence which leads to exculpation, however the wording of the Act differs from that of the Directive by expressly providing that proof must be adduced that the state of scientific and technological knowledge "worldwide" was not such as to enable the defect to be discovered. However, it has been submitted that this formulation, contentwise, does not deviate from the Directive (*Siegel*, Produkthaftung im polnischen, tschechischen und slowenischen Recht, 127). HUNGARIAN Products Liability Act § 7(1)(d) and BULGARIAN Consumer Protection Act art. 137(1) no. 5 have adhered to the text of the Directive. Furthermore, the development risks defence is also espoused by the ROMANIAN Products Liability Act art. 7(1) lit. e and POLISH CC art. 449^3 § 2 second sentence.

39. The development risks defence is also recognised by the GERMAN Products Liability Act § 1(2) no. 5; however, this defence does not apply in respect of medicinal products liability (Arzneimittelgesetz § 84) and also to products which contain genetically modified organisms or is composed of such organisms (Gentechnikgesetz § 37(2) second sentence). According to case law, the Products Liability Act § 1(2) no. 5 is only applicable to design defects and not to manufacturing defects (BGH 9 May 1995, BGHZ 129, 353, 358).

40. In a similar manner, the AUSTRIAN Products Liability Act § 8 no. 2 excludes liability for development risks. A development risk is defined as a danger resulting from the nature of the product which could not have been detected according to the current stare of scientific and technological knowledge at the time the product was put into circulation (OGH 8 April 1997, SZ 70/61; OGH 24 October 2001, RS0107608). Extremely exacting criteria have been placed on the requirement regarding the discoverability of the defect. Liability is only excluded upon proof that it was impossible to view a certain attribute of the product as a defect, the defence will not apply when it was impossible to ascertain the defectiveness of a rogue product (in German literally "runaways", e.g. a defect in material) (OGH 22 October 2002, ecolex 2003, 46). There does not appear to be cases, where the producer was relieved from liability because of the existence of a development risk (compare e.g. OGH 6 September 2000, ZVR 2001/36 p. 127 [a flanged wheel of a cable care broke off, the site of rupture could have been detected by X-ray.]; OGH 8 April 1997, SZ 70/61 [the cap of a bottle of mineral water exploded due to excess pressure] and OGH 28 June

1995, JBl 1996, 188 [contamination of hydraulic oil resulting in the collapse of a hydraulic hoist]).

41. The legal position under the GREEK Consumer Protection Act art. 6(9) lit. e and under the PORTUGUESE Products Liability Act art. 5 corresponds in all essential matters to the prevailing legal position in Austria. In legal commentary, the provisions have been to some extent, subjected of sharp criticism (*Alexandridou*, Dikaio prostasias tou katanaloti, nos. 219-221; *Rokas*, Evthini gia ta proionta, 224-225; *Alves*, A responsabilidade do produtor: soluções actuais e perspectivas futuras, 44). The same holds true for the NETHERLANDS (CC art. 6:185(1)); similarly in this jurisdiction (as far as can be ascertained) there is a lack of decided case law where the development risks defence has been successfully argued.

42. FINNISH Products Liability Act § 7 does not recognise a development risks defence. Accordingly, the Finnish legal position can be distinguished from the legal position prevailing in DENMARK (Products Liability Act § 7 no. 4) as well as that prevailing in SWEDEN (Products Liability Act § 8 no. 4). Above all in Denmark, it appeares that the focal point of attention was in choosing a regulation that had been adopted by the majority of the remainder of the Member States (*Bloth*, Produkthaftung, 48). In Sweden the regulation was the subject of heated political debate. The issue that tipped the scales at the end was the desire to ensure that Swedish industry was not placed at a competitive disadvantage (*Bloth* loc. cit. 49).

43. Unsurprisingly (since inclusion of the defence was insisted upon by the UK before it would accept the directive) the development risks defence has been adopted in the UNITED KINGDOM (Consumer Protection Act 1987, s. 4(1)(e); Consumer Protection (Northern Ireland) Order 1987, art. 7(1)(e)), though in terms formulated more generous to the producer than the directive (*Nelson-Jones and Stewart*, Product Liability, 69). The defence, which is seen as principally applicable to advanced technologies (aerospace, pharmaceuticals, chemicals), is regarded as by some commentators as leaving a significant gap in the network of strict liability for defective products (*Nelson-Jones and Stewart* loc. cit. 68). That claimants in cases of a 'thalidomide nature' (one of the mainsprings leading to the directive and the implementing statute) may continue to go uncompensated is seen as the price for safeguarding industrial innovation and technological progress which might otherwise be inhibited (*Nelson-Jones and Stewart* loc. cit.). Another primary reason is to keep down insurance costs. However, the need for and correctness of the defence (even as formulated in the directive) is doubted by some commentators (*Clark*, Product Liability, 183-184).

44. Similarly in IRELAND, the difficulties attending the development risks defence has given rise to heated policy discussions (*Pelly*, [2002] 20 ILT, 9, 12; *McMahon and Binchy*, Torts[3], 290). In the end, it was decided to strictly adhere to the wording of the Directive (Liability for Defective Products Act 1991, s. 6(e)). At the time of writing, there des not appear to be any decisions concerning the applicable section relating to the development risks defence.

V. Financial ceiling on liability

45. The Member Statees have reacted differently to the question as to whether they wished to provide for a financial cap on liability. The following Member States have decided to abstain from adopting such a regulation: FRENCH CC; BELGIAN Products Liability Act; LUXEMBURG Products Liability Act; MALTESE Consumer Affairs Act; ITALIAN Products Liability Act; SLOVENIAN Consumer Protection Act; HUNGARIAN Products Liability Act (see § 13(2)); POLISH CC, BULGARIAN

Consumer Protection Act; ROMANIAN Product Liability Act (see art. 3); AUSTRIAN Products Liability Act; GREEK Consumer Protection Act 2251/1994 (which repealed an earlier financial ceiling); PORTUGUESE Products Liability Act (since the 2001 reform); ESTONIAN LOA, LITHUANIAN CC, LATVIAN Defective Products and Deficient Services Act; DUTCH CC; The Product Liability Acts of all the NORDIC Countries, the UNITED KINGDOM Consumer Protection Act 1987 and Consumer Protection (Northern Ireland) Order 1987; the IRISH Liability for Defective Products Act 1991 and the CYPRUS Defective Products (Civil Liability) Law.

46. In contrast, the Acts in Spain and Germany have introduced a financial ceiling on liability. SPANISH ConsProtA art. 141(e) (formerly Products Liability Act art. 11) restricts the monetary extent of liability for personal injury to € 63.106.270,96. In contrast, no financial limits have been placed on the liability for damage to property. On many occasions, the abolishment of the financial ceiling (which has yet to attain a practical relevance) has been recommended (*Instituto Nacional de Consumo*, Green Paper, 62). Products Liability Act art. 11 concerns only cases where the personal injury suffered, has been caused by "identical products with the same defect". This regulation raises numerous questions of interpretation (*de la Vega García*, Responsabilidad civil derivada del producto defectuoso, 129). In addition, the liability regime under the Civil Code remains applicable, with the result that it is, in end effect, possible to circumvent the financial ceiling on liability by resorting to the provisions of the Civil Code (*de la Vega García* loc. cit.).

47. The GERMAN Product Liability Act § 10(1) essentially corresponds to the Spanish regulation. However, the damages cap in Germany is 85 Million €. The ceiling only covers damage flowing from personal injury, it does not apply to damage to property. It was primarily Germany which insisted that the Directive should allow the Member States the possibility of introducing a cap on damages (MünchKomm [-*Wagner*], BGB[4], § 10 ProdHG, no. 1; *Taschner*, NJW 1986, 611, 612). However, the Product Liability Act § 10(1) deviates from the authorisation conatined in the Directive, in that the financial ceiling is also applicable to major damage caused by a single product (e.g. by a plane or train). Similarly, the Product Liability Act § 10(2),which provides for a proportional reduction in damages payable to several injured parties in the case that the maximum rate is exceeded, is not a feature of the Directive.

VI.–3:205: Accountability for damage caused by motor vehicles

(1) A keeper of a motor vehicle is accountable for the causation of personal injury and consequential loss, loss within VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death), and loss resulting from property damage (other than to the vehicle and its freight) in a traffic accident which results from the use of the vehicle.

(2) "Motor vehicle" means any vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled.

COMMENTS

A. The concept of the rule

Formulation of the principle; no detailed rules. Liability for damage by motor vehicles is in many Member States the subject matter of an elaborate and detailed special regime of legislation, which for its part is flanked by a plethora of rules of the law on insurance, mainly indemnity insurance. The comprehensive legal matters which are the subject matter of this legislation did not lend themselves to being portrayed in detail in the context of these rules. On the other hand, the rules would have suffered from a considerable lacuna if they had remained silent on the law governing traffic accidents: traffic is still generally one of the most significant causes of damage. Therefore, this Article formulates the two principles crucial to the law on liability, but goes no further. These principles are: liability for personal injury and property damage caused by motor vehicles (i) is strict, and (ii) lies with the keeper of the vehicle. A strict liability for keepers of a motor vehicle is nowadays almost a common feature within Europe. In the few countries which do not provide for it, there are insurance solutions or a raising of the standard of care which in practice more or less produce the same outcome.

VI.–3:207(a) (Other accountability for the causation of legally relevant damage). The present Article must be read in conjunction with VI.–3:207 (Other accountability for the causation of legally relevant damage) sub-paragraph (a). This is because under the present Article there is liability only for motor-driven vehicles and not for other dangerous machines (e.g. a crane, or a concrete mixer or a shredder making tree branches into wood chips). These rules do not themselves propose strict liability for such machines and the same goes for vehicles like bicycles which are not motor-powered. The Member States' viewpoints are simply too far apart from each other to be able to devise an acceptable common proposal for all of these areas. These rules do not therefore contain the proposal to again forego the regime of liability already existing in the areas enumerated; through VI.–3:207 (Other accountability for the causation of legally relevant damage) the Group in fact clarifies that it could not arrive at a unified stance on these issues.

Insurance. Where insurance solutions *limit* the liability of the keeper (or any other person responsible for the damage caused), those rules will have priority by virtue of VI.–7:105 (Reduction or exclusion of liability to indemnified persons). Issues of direct liability of insurers or insurance funds are not the subject-matter of this Book. Issues of this kind belong in insurance law, not in the general law on non-contractual liability for damage. This follows indeed from VI.–1:101 (Basic rule). Solutions provided by insurance which operates independently of personal liability on the part of the keeper or the originator of the damage (including insurance remedies which leave it up to the injured person to pursue rights against the insurer or against the injuring person) remain likewise unaffected. The same applies to claims against funds, in particular in cases in which the identity of the person causing the

damage cannot be established due to the driver fleeing the scene of the accident. Both follow from VI.–1:103 (Scope of application) sub-paragraph (d).

Legally relevant damage. As with all the strict liability cases in Chapter 3, Section 2, the present Article relates only to personal injury and property damage. The specific risk which is of concern to the liability of keepers of motor vehicles only manifests itself in personal injury and property damage. For all other damage, only in the case of intention or negligence on the part of the person acting is the damage legally relevant and thus recoverable; the keeper *qua* keeper is not involved here.

> *Illustration 1*
> On the spur of the moment, a frustrated lover locks his girlfriend, who wants to break up with him, in the boot of an acquaintance's vehicle. The acquaintance is not responsible for the false imprisonment merely because he is the keeper of the vehicle.

Property damage. The damage caused due to the use of the motor vehicle must have been done to something other than the vehicle or its freight. In regard to damage to the vehicle itself there is no strict liability of the keeper vis-à-vis the owner of the vehicle. The liability of the keeper aims at protecting third persons and not the property interests of persons who have rights in the vehicle (e.g. a seller who has retained ownership of the vehicle until full payment of the price). Also excluded from the keeper's liability is any commercial freight transported using the vehicle. Damage to it is subject to a special regime of transport law. However, liability for property damage suffered by persons transported is included, e.g. damage to clothes or a mobile phone carried with them.

Personal injury. As regards personal injury, by contrast, there are no restrictions on the range of persons entitled to claim reparation. In particular, individuals are not deprived of the protection of this Article because they were passengers in the vehicle or driving it at the time. Persons who are active in the operation of the vehicle also have a claim in damages against the keeper in the case of personal injury.

Defences. The general defences in Chapter 5 also apply to the liability of keepers under VI.–3:205. However, VI.–5:102 (Contributory fault and accountability) paragraph (2)(c) deserves particular mention because under it, in road traffic cases, only considerable contributory fault (gross negligence) on the part of the victim is to be taken into account. The provision expressly relates only to personal and health injury.

B. Details

Motor vehicles and trailers. The Article, as mentioned, provides for strict liability to the detriment of keepers of motor vehicles. What "motor vehicles" are is defined by paragraph (2). That definition is in turn taken from Directive 72/166/EEC ([First] Directive on Insurance against Civil Liability in Respect of the Use of Motor Vehicles). The strict liability under VI.–3:205(1) thus relates to motor-driven vehicles of all types, including slow-moving vehicles (such as tractors, bicycles with an auxiliary motor, and sit-on lawnmowers, which, depending on their construction, may not be capable of more than 20 km/h). Trailers are also "motor vehicles" according to the Directive, even where they are not connected to the towing vehicle at the time of the accident. Railway vehicles (including trams and underground railway), aeroplanes and ships are excluded; they are consistently subject to special regimes of liability,

which remain unaffected by these rules (VI.–3:207 (Other accountability for the causation of legally relevant damage) sub-paragraph (a)).

Keeper. The term keeper in the context of this Article also follows from the general rules (see above Comments under VI.–3:203 (Accountability for damage caused by animals)). Thieves and others who use the vehicle against the keeper's will are themselves made keepers. However, the "real" keeper's liability in negligence remains potentially applicable in such cases; it takes hold where the keeper in breach of duty omitted to reasonably secure the vehicle against unauthorised use.

No special liability for drivers. The Article channels the liability to the keeper (or the keeper's insurer). In contrast, the liability of a driver who is not at the same time the keeper is subject to the general rules. In the case of professional drivers there may even be specific relief from liability provided for in the national legal systems, see VI.–7:104 (Liability of employees, employers, trade unions and employers' associations) sub-paragraph (a). To subject private drivers to a particularly intensified liability (in the form of either strict liability or liability for presumed misconduct) seemed unreasonable against this background. The strict liability of the keeper, coupled with compulsory insurance and a direct claim against the insurer, suffices for the requirements of victim protection.

Traffic accident resulting from the use of the vehicle. Liability is confined to those cases where the damage has been caused "in a traffic accident which results from the use of the vehicle". Damage in connection with a parked car is therefore only within the scope of the Article if the vehicle has been parked on a road or area open to traffic or the public. In other words, *the Article* relates only to situations in which the vehicle is used on a public road or on a road accessible to the public, and in which an "accident" in the sense of a sudden occurrence, typically a collision, occurs.

Illustration 2
X, renter and keeper of a tractor, drives home from a field with a trailer full of bales of hay. Not noticing that the hay has caught fire, he causes fire damage to the adjoining fields, which are likewise currently being harvested. X is liable due to a negligent breach of property rights, not however in his capacity as keeper of the tractor and trailer. A traffic accident is not at issue here.

Illustration 3
Someone illegally parked causes a traffic jam. This does not involve a traffic accident.

Causation. In relation to causation, the general rules in Chapter 4 apply. Thus, it must be possible to say of the relevant personal injury or property damage that it is to be regarded as a consequence of the use of the relevant vehicle, see VI.–4:101 (General rule). A vehicle properly parked at the side of the road is not to be regarded as the cause of the injury suffered when someone drives against this vehicle due to carelessness or drunkenness. The same applies to a car, which is at the front of a queue, into which the third person in the queue pushes the second vehicle. The use of the vehicle at the front did not cause the damage to the second and third vehicles. It is not sufficient that the vehicle (the parked car or vehicle number one) was "involved" in the accident; in fact it is decisive whether its use has caused the relevant accident within the meaning of VI.–4:101 (General rule).

Illustration 4
A collision between two vehicles occurs, leaving them stationary on the road with the consequence that a subsequent vehicle can no longer brake and drives into them. Here the person causing the first accident also caused the second accident.

NOTES

1. In FRANCE the law governing the legal liability for traffic accidents is anchored in the Law no. 85-677 of 5 July 1985 *tendant à l´amélioration de la situation des victimes d´accidents de la circulation et à l´accélération des procédures d´indemnisation*; it has even been asserted of the regulations contained therein that they amount to an *d'ordre public* (*Flour/Aubert/Savaux*, Le fait juridique[11], no. 320 p. 337). Loc. cit. art. 1 the law is designed at compensating the victim of a traffic accident in which a landborne motorised vehicle is "involved" (*impliqué*). All types of trailers are embraced by the law, however track bound vehicles (trains, trams etc.) are excluded from its scope. Whether the victim found himself/herself inside or outside of the vehicle or whether the victim was conveyed on the basis of a contract or otherwise is irrelevant. The term "accident" denotes every event which has resulted in the damage occurring (*Flour/Aubert/Savaux* loc. cit. no. 324 p. 341).The concept of a "landborne" motor vehicle has also be given a broad interpretation (e.g. Cass.civ. 24 June 2004, Bull.civ. 2004, II, no. 308: lawnmower with traction drive). A car becomes "involved" in an accident when it, as a matter of fact, becomes implicated in an accident (e.g. Cass.civ. 29 April 1998, JCP 1998 éd. G., IV, 2342 [A motor vehicle, which is involved in a collision, is involved in the accident, at all times and independent of whether it was being driven or was stationary.] and Cass.civ. 24 June 1998, Bull.civ. 1998, II, no. 205 p. 121 [In a collision involving a number of vehicles, each one is involved in the accident, independent of the question of the role it played leading to the collosion occurring.]). The requirement of involvement (*implication*) does not denote a causation criterium, the mere *coïncidence* of the events is sufficient (*Favre Rochex*, GazPal 1998, doctr., 355). Only when the affected vehicle did not play any role whatsoever in the accident can it be said that the vehicle was not involved in the accident (detailed in *Lambert-Faivre*, Droit du dommage corporel[5], no. 473 p. 632 und *Fabre-Magnan*, Les obligations, no. 299 p. 804). The concept of "traffic accident" entails that the pertinent vehicle engaged in traffic at the point of time of the accident. It is not necessary that the vehicle was in motion, as accidents involving parked or stationary vehicles also connote, as a rule, traffic accidents (e.g. Cass.civ. 22 November 1995, JCP 1996, II, 22656, note *Mouly*: traffic accident affirmed, when a fire which originated in a parked car, spread to a building and other vehicles.) However, an accident is not given where damage was intentionally inflicted (Cass.civ. 12 Dezember 2002, D. 2003, I.R., 468). The statute establishes claims can be made against the driver and the *gardiens* of the vehicle involved in the accident. If an accident results between a motorised vehicle and a pedestrian or a cyclist, the *liability* of the latter (e.g. in respect of damage to the vehicle) continues to be subject to the *droit commun* (Cass.civ. 19 January 1994, Bull.civ. 1994, II, no. 28 p. 15). Act no. 85-677 art. 2 defines the persons liable as the driver (*conducteur*) and the keeper of the vehicle involved in the accident; the outcome of this is that the "appropriate" insurance can be determined (*Terré/Simler/Lequette*, Les obligations[9], no. 960 p. 931). Drivers and *gardien* can invoke neither force majeure nor the acts of a third party against the victim; if the driver is the victim, the same holds true for the *gardien*. Victims who are not drivers, can recover damages for personal injury (loc. cit. art.

3(1)); these damages cannot be recovered if the sole cause of the accident is a *faute inexcusable* of the person injured. Victims who are younger than 16 or who are older than 70 Jahre or who have suffered at least an 80% reduction in earning capacity, this ground of defence remains inapplicable (loc. cit. art. 3(2)). Effectively, their claims for compensation are only excluded in the event of a suicide or in an attempt to commit suicide (loc. cit. art. 3(3)). If the driver of the vehicle is the victim, his/her claim to damages will be reduced to take account of his contributory negligence, loc. cit. art. 4. In respect of damage to property, the contributory negligence of the person who has suffered injury may lead to a restriction or even exclusion of liability (loc. cit. art. 5(1)). An exception under this head exists for medically prescribed items and apparatus; they are subject to the rules applicable to bodily injury. In respect of damage to the vehicle itself, the owner of the vehicle must be able to assert fault on the driver's part against the *gardien* of the vehicle and his insurance; however, in such an event, the owner has a direct right of recourse against the owner (loc. cit. art. 5(2)).

2. According to the BELGIAN *Loi relative à l'assurance obligatoire de la responsabilité en matière de véhicules automoteurs* of 21 November 1989 art. 29*bis* § 1(1) insurers, who provide coverage in respect of the liability of owners, the driver, or the détenteurs of a vehicle which has been involved in a traffic accident, are jointly and severally obliged to compensate personal injury (death, bodily injury), resulting from the accident. The foregoing also remains applicable, when the driver of the vehicle intentionally caused the damage. All types of damage to property are expressly excluded from the ambit of the provision, (exceptions: prostheses and other similar aids [wheelchairs, guidedogs, baby seats: *Simoens*, RW 2000-01, 1577, 1584, no. 27]) and damage to the clothes of the injured parties as well as bodily injury suffered by the driver of the vehicle which was implicated in the accident, furthermore personal injury suffered by victimes who are older than 14 and who intentonally caused the accident is also exempted (loc. cit. art. 29bis §1(6)). The term "motor vehicle" denotes all *véhicules destinés à circuler sur le sol et qui peuvent être actionnés par une force mécanique sans être liés à une voie ferrée* (loc. cit. art. 1). Motorised vehicles are placed in the same bracket as trailers, in so far as they meet the standards of the appropriate royal decree and were designed to transport persons or things. Motorised wheelchairs are not embraced by the term motorised vehicles (loc. cit. art. 29*bis* § 3). Under art. 29*bis* § 1(2) owners of a track bound vehicles are also liable. In every case where a collision occurs, the relevant vehicle is "involved" in an accident. If the victim does not come into contact with the other party's vehicle, it must be proved that this vehicle played a role of some type in causing the accident (*Simoens* loc. cit. 1580, no. 15). Only traffic accidents occuring on public streets or in areas which are either freely accessible to the public or to a certain number of indivduals fall within the scope of the application of the statute (loc. cit. art. 2 § 1 in conjunction with art. 29*bis* §1(1)). The driver excepted, claims can be asserted by all victims and their descendents (loc. cit. art. 29*bis* § 2; please see also for an analysis of the concept of " driver" *Simoens* loc. cit. no. 21 p. 1582); Drivers can only acquire compensation, if two requirements are met, namely that they are the descendent of the victim and did not intentionally cause the damage. If the damage resulting is not dealt with by the provisions of the statute, it can be recovered under the general civil law precepts (loc. cit. art. 29*bis* § 5); this particularly concerns damage to property and the personal injury claims of the driver.

3. SPANISH Liability and Insurance for Motor Vehicle Traffic Act art. 1(1) provides that "the driver of motor vehicles is liable, by virtue of the risk created by their driving, for the damage caused to persons or to property in the course of traffic". In so far as bodily injury and death are concerned, liability is strict for the realisation of the risk that is linked with the use of a motor vehicle (*Díez-Picazo and Gullón*, Sistema II,

574); in contrast, damage to property remains subject to the general regime of the art. 1902 of the CC (Liability and Insurance for Motor Vehicle Traffic Act art. 1(1) and (2)). The scope of application of the Liability and Insurance for Motor Vehicle Traffic Act is governed by the concepts 'fact of traffic' (*hecho de la circulación*) and 'motor vehicle' (*vehículo a motor*). *Reglamento* on Road Traffic Liability (Real Decreto no. 1507 of 12 September 2008) art. 2 provides that a *hecho de la circulación* is every fact occurring as a consequence of the risk created by the driving of motor vehicles, including those occurring in garages and car parks, and no matter whether they happen on a public or private road. No such hechos are: (i) accidents occurring in sport competitions and on circuits specially designed or adapted for such use; (ii) accidents occurring in the course of industrial or agricultural activities, unless they happen on a road; and (iii) the use of a motor vehicle as an instrument to commit an intentional crime. The definition of a "motor vehicle" in *Reglamento* art. 1 is based on Directive 72/166/EEC. Damage which ensues from exposure to farm machinery does not connote a traffic accident (TS 10 February 1998, RAJ 1998 (1) no. 752 p. 1178; TS 7 May 1998, RAJ 1998 (2) no. 3238 p. 4723) nor does carbon monoxide posisoning of children in a garage (TS 4 July 2002, RAJ 2002 (4) no. 5900 p. 10483). According to the Liability and Insurance for Motor Vehicle Traffic Act art. 1(1) liability is imposed on the driver. Loc. cit. art. 5(1)(i), however, provides that, along with the driver, the owner of the vehicle shall also be strictly liable, if the driver, in the sense of CP art. 120(5), is an employee of the owner and commits a criminal act (see further *Gómez Calle*, Los sujetos de la responsabilidad civil[3], 524). If the conduct of the employee which causes damage does not amount to a criminal act, the liability of the owner is based on CC art. 1903 (*Díez-Picazo*, Derecho de daños, 130; *Roca i Trias*, Derecho de daños[3], 247). Liability and Insurance for Motor Vehicle Traffic Act art. 5(1)(i *in fine*) provides that the liability of the owner shall cease if the owner proves that he or she acted as *buen padre de familia* to prevent the damage. This provision accords with CC art. 1903, not with, however, the CP, which provides for strict liability which is subsidiary. At this juncture it cannot be conclusively asserted, how this tension is to be resolved (see further *Yzquierdo Tolsada*, Sistema de responsabilidad civil, 294 and *Gómez Calle* loc. cit. 525-527). There are no statutory regulations pertaining to the liability of the custodian; this state of affairs has been frequently criticised (*Reglero Campos*, Responsabilidad civil, 913). TS 30 December 1992, RAJ 1992 (5) no. 10565 p. 13807 refused to find a company liable liability, where the company had placed a company car at the disposal of an employee. The employee, for his part, permitted his son to use the car (without the permission of the company); the son caused a traffic accident; the company was not liable, owing to the fact that it did not have any control over the use of the car. Liability under the Liability and Insurance for Motor Vehicle Traffic Act is curtailed by *force majeure* and fault on the part of the victim (art. 1(1)(ii)); *caso fortuito* is not admitted as defence (TS 22 December 1992, RAJ 1992 (5) no. 10639 p. 13873; TS 17 November 1989, RAJ 1989 (6) no. 7889 p. 9187; TS 8 February 1992, RAJ 1992 (1) no. 1198 p. 1516). Contributory negligence on the part of the victim leads to the exclusion of liability if it was sole cause of the accident; in other cases it leads to an appropriate reduction in the award of damages (loc. cit. art. 1(1)(iv)).

4. Under the ITALIAN CC art. 2054(1) "the driver of a vehicle which is not track bound……is obliged to compensate loss accruing to persons or property caused by placing the vehicle into traffic circulation, unless s/he can prove that s/he did everything in his/her power to avoid the damage". Passengers in the vehicle may also assert a claim for compensation, independent of inquiry into the reason as to their carriage. In respect of transport for a fee, contractuals claims (CC art. 1681) compete

with extra contractual liability. A “vehicle” denotes every machine in circulation on public streets or their equivalent, which is capable of transporting persons or property. It can be mechanically propelled or propelled by animals and human power. All types of bicycles and trolleybuses are therefore “vehicles” Art (Cass. 7 January 1991, no. 57, Giust.civ.Mass. 1991, fasc. 1), however motorised wheelchairs and aber motorgetriebene Rollstühle und skis are not encompassed by this term (Cass. 30 July 1987, no. 6603, Arch.Giur.circolaz. 1988, 863). The term “circulation” is understood to mean driving, being stationary in traffic and parking (Cass. 5 July 2004, no. 12284, Giust.civ.Mass. 2004, fasc. 7; Cass. 28 November 1990, no. 11467, Giust.civ.Mass. 1990, fasc. 11; Cass. 24 July 1987, no. 6445, Riv.giur.circ.trasp. 1988, 100; *Franzoni*, Dei fatti illeciti, 647-648), vehicles on the areas designed for use by public transport, also if these are owned privately (Cass. 3 February 1987, no. 965, Giust.civ.Mass. 1987, fasc. 2). Whether liability under CC art. 2054(1) is based on a presumption of fault (according to *Monateri*, Manuale della responsabilità civile, 433-438; cf. also *de Cupis*, Il danno I, 208) or must be constued as being strict (*Franzoni* loc. cit. 668-669; *Visintini*, Trattato breve della responsabilità civile, 681), remains theroretically contentious. The courts rely on the avoidability of the event causing as providing a basis for exoneration from liability (Cass. 7 August 2000, no. 10352, Giust.civ.Mass. 2000, 1732). According to CC art. 2054(2), in the case where two vehicles collide, unless proved otherwise, it is presumed that each driver contributed to the same extent to the damage caused to the individual vehicles. According to the Corte Cost. 29 December 1972, no. 205, Giur.it. 1973, I, 1, 708; Foro it. 1973, I, 1 the provision remains operative, if one of the vehicles implicated in the accident is in itself not damaged. In practice, CC art. 2054(2) for the most part boils down tot he result that each of the drivers concerned must bear half of the damage caused by another (*Monateri* loc. cit. 441). CC art. 2054(3) provides that the owner of the car or the holder of a usufructuary right, the hire purchaser jointly and severally liable with the driver, unless they can prove that the vehicle was used ahgainst his or her will. The exact legal nature of this provision is contentious (see further *Visintini* loc. cit. 684). The ability to adduce exculpatory evidence is subject to stringent criteria (Cass. 21 June 2004, no. 11471, Giust.civ.Mass. 2004, fasc. 6: proof of theft alone will not suffice). A person who leaves his car in a company’s custody is relieved of liability (Cass. 27 January 1995, no. 981, Giust.civ.Mass. 1995, 198; Cass. 29 August 1987, no. 7118, Giust.civ.Mass. 1987, fasc. 8-9). Finally, CC art. 2054(4) imposes strict liability on drivers, owners and on other persons enumerated in CC art. 2054(3) in the event that the accident was caused by a manufacturing or maintenance defect in the vehicle. Only proof that there was no causal nexus between the defect and the accident will exclude lthe attribution of liability (Cass. 9 March 2004, no. 4755, Giust.civ.Mass. 2004, fasc. 3; *Visintini* loc. cit. 686).

5. In HUNGARY, liability for damage caused by motor vehicles is dealt with under the extremely comprehensive regime of strict liability for dangerous activities (CC § 345(1)); only proof that the damage occured for an unavoidable reason, unconnected with the dangerous activity can provide relief from liability (e.g. natural phenomenon; also uinevitable damage caused by animals). Contributory negligence on the part of the victim will be taken account of and will lead to the abridgment of the claim for compensation (para. (2)), a contractual disclaimer of liability will in principle be disregarded (para. (3)). For example, a defective tyre which could not have been forseen or a sudden indisposition of the driver are deemed to be connected with the dangerous activity (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1263-1268; Petrik [-*Wellmann*], Polgári jog II, 590-592), no longer in contrast the explosion of a bomb which was placed on the defendant’s bus by a third party and detonated

(BH 2000/200). A parked car does not partake in traffic and therefore does not signify a hazardous activity; the same holds true for a bus which stopped and was waiting at a bus stop in accordance with its timetable, however the opposite conclusion was drawn in the case of a car stopped at a traffic light, even when the engine was turned off (*Benedek* loc. cit. 1245-1246; *Wellmann* loc. cit. 586-587). The keeper is deemed to exercise the dangerous activity; the driver is only liable under the general civil law precepts. Ownership and registration merely serve as an indicators as to the existence of custodianship. It is possible to have more than one keeper (e.g. married couple who both use the vehicle); permission use of the vehicle temporarily does not alter the custodianship (*Benedek* loc. cit. 1250-1253, 1255; *Wellmann* loc. cit. 587-590). As regards the convergence of "danagerous activities", typically therefore the collosion of vehicles, liability based on a presumption of fault according to the general rules governing liability are applicable in the stead of strict liability (CC § 346(1)). In the absence of fault of both sides if an "irregularity" is ascertained in one of the vehicles, liability is imposed solely on the keeper of this vehicle (CC § 346(2)). Examples under this rubric include the sudden indisposition of the driver, the unforseeable flat tyre, the dispersal of a stone which hits another car, (EBH 1999/99; BH 2000/348) and the sudden swerve to avoid hitting an animal of one of the vehicles involved in the accident (BH 2003/500). If such an irregularity is attributable to both parties or is lacking on both sides and each party can exculpate itself, each party is responsible for its own loss (CC § 346(3)). In relation to accidents involving passengers, the strict liability regime under extra contractual liability is employed in practice, even when the accident is the result of a violation of contractual obligations, unless a special regulation is applicable (*Benedek* loc. cit. 1280-1281). The proposed new Hungarian Civil Code envisages that the regime of liability pertaining to dangerous substances will remain for the foreseeable future essentially insitu (http://www.parlament.hu/irom38/05949/05949.pdf).

6. POLISH CC art. 436 governs liability for damage caused by the **movement** of a "mechanical means of conveyance". Liability is strict and is primarily imposed on the independent possessor; if the means of conveyance is transferred to a dependent possessor, the dependent possessor is liable (CC art. 436 § 1 second sentence). The existence of a causal nexus between the use of the means of transport and the resulting damage is all that is required (CC art. 361; see Supreme Court 28 December 1981, IV CR 465/81, OSNCP 1982, nos. 5-6, poz. 88; Pietrzykowski [-*Safjan*], Kodeks cywilny I[4], art. 436, no. 12). According to prevailing legal opinion, the concept of "conveyance" comprehends the entering and alighting from the vehicle as well as stopping on the way (Supreme Court 14 April 1975, II CR 114/75, OSNCP 1976, no. 2, poz. 37). A car crashed in a car accident is in the movement in the legal sense as long as it remains on the public road (SN 7 April 2005, LEX no. 151656; *Radwański and Olejniczak*, Zobowiązania - część ogólna[7], 236). The term "means of conveyance" embaraces all vehicles which are propelled by an engine, therefore the term denotes not only cars but also aeroplanes, motorboats, street trams and motorbikes etc (*Radwański and Olejniczak* loc. cit. 234). Proof of force majeure as well as exclusive fault on the party of the person who suffered damage or of a third party, the exception being where the possessor of the vehicle is responsible for the third party, operates to exclude the imposition of liability (CC art. 435 § 1 *in fine* in conjunction with. CC art. 436 § 1). The liability regime reverts back to liability based on fault in two instances, namely: in the case of collision between mechanical means of conveyance and in the circumstances where a person is conveyed as a courtesy (CC art. 436 § 2). However, driving into a stationary vehicle does not connote a "collision" under the statutory provison (Supreme Court 4 March 1958, 1 CR 154/56, OSPiKA 1959, no. 10, poz.

257; *Safjan* loc. cit. art. 436, no. 24). The possessor is accountable also for damage caused to the car driver (*Czachórski*, Zobowiązania[10], 288). Particularities pertaining to liability insurance can be found in the law of the 22nd May 2003 on Compulsory Insurance, Guarantee funds and the Polish Motor Insurers Bureau (Dz. U. no. 124 poz. 1152 as amended).

7. SLOVENIAN LOA art. 150 establishes strict liability for keepers of all types of dangerous objects; a rebuttable presumption exists in respect of their potential to cause damage (LOA art. 149). An individual who steals a dangeous object (e.g. a car), is liable in the stead of the keeper, provided that the latter was not at fault as far as the theft is concerned (LOA art. 151). Cases involving the collision of vehicles are the subject of a standalone regulation (LOA art. 154). It amounts to a liability based on fault, proportionate to the number of keepers involved; if there is an absence of fault, then each party is liable, in principle, for the half of the total loss. According to BULGARIAN law, the driver of a motor vehicle is liable if he is at fault in causing the accident (LOA art. 45(1)). If the driver was e.g employed at a transport company or as a chauffeur, the employer is also liable (LOA art. 49; *Burov*, Grajdanska otgovornost za vredi, prichineni pri avtomobilna zlopoluka, 35).The owner and the keeper of the motor vehicle are jointly and severally liable for damage resulting from a hidden defect in the motor vehicle (a unforseen failure of the brakes) which can not be attributed to the fault of the driver (LOA art. 50). The differences between the two liability regimes are, of course, minor, owing to the fact that liability under LOA art. 45(1) is constructed as liability based on a presumption of fault (LOA art. 45(2)); where the distinctions exist, they only become relevant if the vehicle is owned by the driver. If the driver is simultaneously the owner and the accident can be attributed to fault on his part, then if there is more than one owner of the same vehicle, they will not be liable for the ensuing loss. The liability will not be imposed on the owner, if the accident can be attrbuted to force majeure, to the exclusive fault of the person who has suffered damage or to the third party intervention (e.g. theft) (Decree no. 7 of the Supreme Court of 30 December 1959, Plenum, no. 10).

8. GERMANY has constructed the liability for damage caused by the operation of motor vehicles in the Road Traffic Act (*Straßenverkehrsgesetz*, StVG) § 7 in the form of a strict liability imposed on the registered user of the vehicle. Liability is based on the special danger present for other users in motorised traffic which inheres in every vehicle, regardless of the circumstances of the individual case (*Greger*, Haftungsrecht des Straßenverkehrs[3], § 7 StVG, no. 2). This liability is also imposed on the keeper of a trailer which is designed to be carried along by a motor vehicle. According to StVG § 1(2) “motor vehicles” are all land motorised vehicle propelled by engine power, with the exception of vehicles running on tracks. The vehilce must be capable of reaching a minimum speed of 20 km/h (StVG § 8). The “user“ of the vehicle is assessed not predominantly by legal means but also by assessing factual and financial circumstances. A user connotes a person who uses the motor vehicle or trailer on his own account and who, in addition, exerts the factual control with is connected with the use of the vehicle (BGH 3 December 1991, NJW 1992, 900, 902). Ownership serves as an indicator for the custodianship, but not a required element (Geigel [-*Rixecker*], Der Haftpflichtprozess[24], chap. 25, no. 36 p. 863; Hentschel [-*Hentschel*], Straßenverkehrsrecht[37], § 7 StVG, no. 14). If a father donates a Go kart with the capacity to achieve 40 km/h, despite the change in ownership, the father remains the keeper of the go-cart if he solely continues to exert power of disposal, bears all running costs associated with the operation of a go-cart and determines when the go-cart can be used (CA Koblenz 26 April 2004, NJW-RR 2004, 822). Liability is triggered, if, in the course of operating the vehicle, a person is killed, or personal

injury, damage to health, or damage to property ensues (StVG § 7(1)). A motor vehicle is "in operation" when it is used in the area of public traffic. The "operation" begins when the engine is started up and finishes once the motor is turned off outside the area of public traffic (*Hentschel* loc. cit. no. 5). Operating the vehicle must have caused the loss which resulted. Liability is precluded when the damage results from force majeure (StVG § 7(2)). "Force majeure" denotes an extraordinary external event, which is caused by a supervening natural event or by the actions of third parties (external) which, according to human perceptions and experience amounts to an unavoidable event. This event cannot neither be avoided by exercise of the utmost care to be expected under the circumstances and employing commercially viable means nor could be predicated on the basis of its frequency of occurrence (*Hentschel* loc. cit. no. 32). Liability of the keeper is excluded, if a third party uses the vehicle without the knowledge and permission of the keeper. The unauthorised person using the vehicle is is liable instead of the keeper. The keeper is liable in conjunction with the unauthorised user, if it was the fault of the keeper that the unauthorised person could use the vehicle (StVG § 7(3)). However, the keeper remains liable if the user if the vehicle is an employee or if he gave the vehicle to the user. The liability of the keeper is restricted in amount (StVG §§ 12, 12a and 12b), however, it also encompasses non pecuniary loss (StVG § 11 sent. 2).

9. Damage, resulting from the operation of a motor vehicle, are subject to the provisions of the AUSTRIAN Traffic Liability Act (EKHG) § 5 which provides for a strict liability in respect of keepers. It also encompasses damage which occurs upon entering and alighting, dangerous parking of the case or damage which is caused by a leakage of oil. A keeper is not liable to those persons, who use the motor vehicle without the permission of the keeper (loc. cit. § 6), and no liability exists in respect of individuals who are employed to operate the motor vehicle (loc. cit. § 3(1)). Keeper denotes anyone, who, at the time of the accident, used the vehicle for his advantage and had the ability to avert the danger. Ownership merely serves as an indicator of custodianship, it is not however a prerequisite (the hire purchaser, in particular, is a keeper). In conjunction with the keeper, his/her insurer is jointly and severally liable (KHVG 1987 § 22), the person who has suffered loss may make a direct claim against the insurer. The concept "motor vehicles" denotes all vehicle powered by an engine which can attain a speed greater than 10 km/h erreichen (therefore e.g. snow grommers are not emcompassed by the concept: *Barta*, Zivilrecht II^2, 639) and can be regarded as road vehicles (fon these grounds e.g. lawnmowers are not subject to the strict liability regime: OGH 19 December 1996, ZVR 1998/18 p. 47). Liability is excluded, when the cause of the accident has its roots in an unavoidable event (EKHG § 9(1)), therefore e.g. in the conduct of the person who has suffered damage (person committing suicide), caused by a third party or an animal (loc. cit. § 9(2)). The driver must exercise all due diligence according to the circumstances of the case. The prequisites of the EKHG § 9 were not established where e.g the mistake on the driver's part resulted from an insect sting to the eye (OGH 30 September 1965, ZVR 1966/87 p. 104). Furthermore, a sudden unconsciousness of the driver does not lead to exculpation from liability because the classification as an unavoidable event must be triggered by an external influence (OGH 30 March 1978, SZ 49/20). The sphere of legally relevant damage corresponds to the rule contained in VI.–3:205. Disclaimers of liability are inoperative. However, there are limits placed on the compensation that can be awarded (loc. cit. §§ 15 and 16); in respect of the loss which exceeds these limits, it may be recoverable under the general liability regime under the ABGB (EKHG § 19).

10. GREEK Road Traffic Liability Act (Law of 4/5 December 1911 on the criminal and civil liability in respect of moto vehicles) introduced at an early stage a strict liability

regime for damage caused by motor vehicles (*Georgiades*, Enochiko Dikaio I, 688; *Kornilakis*, Eidiko Enochiko Dikaio I, 674). Liability is imposed on the driver, the owner (provided he is not the keeper but in this case only up to the extent of value of the motor vehicle: loc. cit. art. 4) and the keeper. The term "keeper" denotes a person who, at the time of the accident, was the owner of the vehicle or who held the vehicle under a contract and used it in his own name. Furthermore the term encompasses every person who without permission acquires possession of the motor vehicle and uses it in some manner (loc. cit. art. 2(2)). A person who rents out a motor vehicle for commercial purposes, is or remains the keeper of that vehicle (*Georgiades*, Enochiko Dikaio I, 690; A.P. 3/1987, NoB 36 [1988] 71); the property law notion of possession is not decisive (A.P. 558/1990, EllDik 1990, 1000). An employee who uses the vehicle in the course of his employment is not the keeper of the vehicle (A.P. 682/1983, NoB 32 [1984] 276). "Motor vehicles" also connote according to the definition contained in the Road Traffic Liability Act art. 2(1) motorbikes, mopeds and tracked vehicles (*Georgiades* loc. cit. 689).The Act does not apply to military or emergency response vehicles. Only "third parties" are entitled to assert a claim, i.e individuals who were not in the vehicle (*Georgiades* loc. cit. 689); an exception is carved out for bus passengers (Act 48441/1930 art. 45). Damage can be caused "while the vehicle is in operation" when the engine is switched off. Liability can be avoided once proof of "force majeure" (for an analysis of this concept see *Georgiades* loc. cit. 693 and CA Thessaloniki 274/1980, Arm 34 [1981] 462) and fault of a third party is adduced (Road Traffic Liability Act art. 5). In respect of the victim's contributory negligence, today only CC art. 300 remains a point of reference and can effect a reduction in the extent of liability. However, the fact of the victim's contributory negligence does not lead to an automatic exclusion of liability (as was orginally envisaged by the Road Traffic Liability Act) (*Kornilakis*, I evthini apo diakindinevsi, 174; *Livanis*, I efarmogi tou arthrou 300 is to pedion tis antikimenikis evthinis, 140; *Georgiades* loc. cit. 693). However, it will be presumed that the person who suffered injury was partly at fault, if the driver, unlike the injured party adhered to the rules of the Road Traffic Liability Act (Road Traffic Liability Act art. 50); if the injured party bases his claim on CC art. 914, this presumption does not apply (A.P. 1618/1987, EllDik 1988, 1375). The driver can exonerate himself by proving that the accident was caused by a defect in the motor vehicle which he could not have discovered (Road Traffic Liability Act art. 5(2)). The extent of damages to be awarded is limited to a "reasonable amount of compensation". In measuring the amount of compensation to be awarded, assessment of fault is of paramount consideration (loc. cit. art. 9; see further *Georgiades* loc. cit. 691). According to these principles, non pecuniary loss is also recoverable (CA Patras 257/1984, NoB 32 [1984] 1567; A.P. 516/1967, NoB 16 [1968] 94; A.P. 997/1983, NoB 32 [1984] 649). Damage which results from the collision of vehicles cannot be recovered; in such a case, the mutual claims of the drivers fall to be dealt with under the general provisions pertaining to liability based on fault (loc. cit. art. 10). Meanwhile, the objective liability of the owner and keeper remains untouched by this (CA Athens 1019/1988, EllDik 1990, 360; CA Athens 11768/1986, EllDik 1987, 1338; A.P. 683/1983, NoB 32 [1984] 276).

11. According to the PORTUGUESE CC art. 503(1) strict liability for the damage caused to "land bound vehicles" is imposed on the person who holds the effective control (*direcção efectiva*) over the vehicle and uses the vehicle for his own benefit. even if this person is merely an employee (*commissário*). Liability may also lie with the keeper of the vehicle (*Antunes Varela*, Obrigações em geral I[10], 656; *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 513; *Almeida Costa*, Obrigações[9], 578; STJ 12 May 2005), however not necessarily with the owner (STJ 9 July 1998). CC art.

503(1) is applicable to all types of land bound vehicles and also applies to track bound vehicles.(STJ 18 May 2006; STJ 27 June 2002; STJ 5 February 1971, BolMinJus 204 [1971] 138) and also to vehicles without a motor, for examples bicycles.(*Vaz Serra*, BolMinJus 90 [1959] 5, 102). Only damage, (material and non pecuniary: CA Oporto 14 September 2006; STJ 17 March 2005; CA Lisbon 17 November 2005), which "emanantes from a danger inherent in the vehicle even if this vehicle was not involved in traffic". It is irrelevant that the accident occured on public or private terrain (*Antunes Varela* loc. cit. 667; *Pires de Lima and Antunes Varela* loc. cit. 514; CA Oporto 11 April 2005; STJ 26 April 1974, BolMinJus 236 [1974] 147).

12. According to the DUTCH Road Traffic Act (*Wegenverkeerswet* of 1935 as amended) art. 185 strict liability is similarly imposed, in the first instance on the keeper; The owner becomes liable only in the event that there is no keeper of the motor vehicle. Liability is attched to "motor vehicles driven on a public road".The damage that is recoverable is that which results from a traffic accident to the prejudice of a person or property which was not transported in the vehicle itself. According to the Road Traffic Act art. 1 a motor vehicle is defined as "any vehicle intended to be moved, other than on rails, propelled totally or partially by mechanical power on or in the vehicle itself or by electrical traction with power supplied from elsewhere". Consequently, damaged vehicle being towed for repairs are encompassed by this term (HR 14 December 1965, NedJur 1966 no. 360 p. 966) as well as mopeds; however, bicycles are excluded from the scope of application, as are (Asser [-*Hartkamp*], Verbintenissenrecht III[12], no. 215 p. 235) switched off vehicles, which are not running. The concept of "traffic accident" no longer requires a collision to occur (the position was otherwise under an earlier law, see for comparasion in so far as relevant HR 4 February 1937, NedJur 1937 no. 489 p. 659); e.g. it suffices that a vehicle catches fire or that the vehicle takes a wrong turn thereby so discomfiting a cyclist that he falls (see further *van Dam*, VR 2005, 301). Injury to passengers of the vehicle is only recoverable under the general rules, i.e. under CC arts. 6:162, 6:170 and under contractual law provision; in respect of person who were conveyed out of courtesy, further limitations on liability have been debated and their adoption has even been deemed imperative (see further Onrechtmatige Daad III [-*Bouman*], no. 221 p. 46; HR 3 December 1971, NedJur 1972 no. 144 p. 433; HR 11 April 1975, NedJur 1975 no. 373 p. 1131), it has been suggested that CC art. 6:109 (reduction of liability on the basis of fairness and equity: Asser [-*Hartkamp*], Verbintenissenrecht I[12] no. 429 p. 358) should be applied. No liability exists in resepect of "stowaways" (HR 27 January 1984, NedJur 1984 no. 536 p. 1855). Liability is excluded in a case of force majeure. CA Arnhem 4 April 2006, VR 2006 no. 107 p. 253 affirmed the existence of force majeure in a case where the driver of a recumbent bike, who drove directly in front of the vehicle of the defendant, thereby in disregard of the rules on who had the the right of way.

13. Similarly ESTONIA has constructed liability for damage caused by motor vehicles along the line of strict liability. According to LOA § 1057 liability is imposed on the "direct possessor" of the vehicle. However, strict liability can also be imposed for damage caused by a motor vehicle under LOA § 1056, which applies in respect of all things constituting "a major source of danger" (Supreme Court 3-2-1-48-06, RT III 2006, 25, 228). The extent of damage recoverable is ascertainable according to the regulation anchored in VI.–3:205 (LOA § 1056(1)). The concept of "motor vehicle" is defined by the Estonian Traffic Act § 12, according to which a motor vehicle is a vehicle powered by an engine. Motor assisted cycles, mopeds and power-driven rail-borne vehicles are not deemed to be power-driven vehicles.

14. In the NORDIC COUNTRIES compulsory insurance schemes provide compensation regardless of whether or not a natural or legal person is liable for the accident. If such

a liability exists, while the injured party can proceed directly against the the person responsible for the causing the loss, this way of proceeding is not compulsory. Consequently, in practice, the latter claim is rarely asserted. In a similar manner to all cognate Nordic Acts, the SWEDISH Traffic Damages Act (*Trafikskadelag* [1975:1410]) permits the person who has suffered damage to claim traffic insurance compensation for personal injury and property damage directly from the other party's insurer, independent of any question into liability (see further *Hellner and Radetzki,* Skadeståndsrätt[7], 279-282). An insurer, who has compensated the victim of a traffic accident has a right of recourse agsinst the person who caused the damage, provided that this person was at least negligent in causing the accident. The amount of compensation obtainable under the scheme of traffic insurance is constructed along the lines of general laws pertaining to liability, i.e. according to the provisions of the Damages Liability Act. The prerequisite for claiming traffic insurance compensation is, namely, that the damage was "caused in the course of traffic involving a motor vehicle". "In the course of traffic" has been given a broad interpretation; even an accident occuring in a repair shop (CA for Skåne och Blekinge 4 May 1961, NJA 1962, 172), an injury to a front-seat passenger by the hurried slammed closure of the front door of the car by the driver (HD 29 April 1988, NJA 1988, 221) and loss of balance while alighting from the vehicle (HD 15 November 1974, NJA 1974, 616) are embraced by this term (see for further examples *Nordenson,* Trafikskadeersättning, 579). Drivers, passengers, pedestrians and cyclists are entitled to assert a claim for damages in personal injury cases, even in cases where there were negligent; this claim can only be reduced in cases of contributory gross negligence (intention, gross negligence) (Traffic Damages Act §§ 10-12). Compensation for damaging the motor vehicle of another and the load transported on it will only be granted under traffic insurance, if the driver of the vehicle which caused the damage conducted himself in a negligent manner (loc. cit. §§ 10-11). The traffic insurance will not compensate damage to the insured person's vehicle. In contrast, damage to the property of other individuals involved (e.g. cyclists) is recoverable, irresepctive of whether the driver was at fault; the claim will be reduced correspondingly if the person who suffered damage has contributed negligently to his damage (loc. cit. § 12). DANISH Traffic Act (*Færdselslov, lovbekentgørelse* 14 November 2005, no. 1079) § 101 provides for a strict liability for personal injury, loss of maintenance and loss resulting from property damage caused by motor vehicles from a traffic accident, explosion or fire. Liability is on the owner (*ejer*) or, if he shows that another person used it, on the user of the motor vehicle (loc. cit. § 104; see in more detail *von Eyben and Isager*, Lærebog i erstatningsret[5], 163). However, Traffic Act § 105 provides for compulsory insurance, under which the injured party may seek compensation directly from the insurer (loc. cit. § 108), regardless of whether or not the person causing the damage paid the insurance premium (*von Eyben and Isager* loc. cit. 155). Injury and other damage to the policyholder himself or herself are excluded from the insurance cover (HD 1 September 1998, UfR 1998, 1626; HD 15 November 2003, UfR 2003, 339), unless they are caused by a collision with another motor vehicle. In the latter case any damage to the owner, user or driver is to be compensated under the basic rule in Traffic Act § 101 which requires that the damage resulted from the "use" (see on this notion HD 9 August 2002, UfR 2002, 2432) of a motor vehicle. Furthermore, according to loc. cit. § 101 the damage has to be caused on a road for public use, and must be the consequence of a traffic accident, an explosion or fire. The notion of "traffic accident" is a very broad concept. It covers, for example, damage caused by objects which fall from the vehicle and hit other road users following behind (*von Eyben and Isager* loc. cit. 161). If the prerequistes of loc. cit. § 101 are not satisfied,

then the liability of the person reseponsible for the vehicle is governed by the general *culpa* rule (loc. cit. § 102). The "person responsible for the vehicle" is the owner or user;the liability os the driver remains unaffected by this and is, likewise, governed by the general *culpa* rule (loc. cit. § 104). FINNISH Traffic Insurance Act (*Trafikförsäkringslag* 26 June 1959/279) § 1 provides that a personal injury or a loss resulting from property damage, suffered in the course of using a motor vehicle in traffic, shall be compensated from the traffic insurance of the vehicle. The vehicle's owner or permanent user is obliged to insure the vehicle (loc. cit. § 15). Compensation is awarded in accordance with the rules of the Damages Liability Act (loc. cit. § 6). The party suffering the loss or injury thus has a direct claim on the insurance company, regardless of another person's liability (loc. cit. §§ 4 and 11). Compensation is also awarded even if there is no valid insurance contract, except for losses or injuries caused by the owner or driver to him- or herself (loc. cit. § 10). A right to claim damages from the owner, driver or passenger who caused the damage is available on the basis of the general *culpa* rule, if the insurance company may deny compensation (loc. cit. § 12). Personal injuries of the policyholder caused to him- or herself are covered by the compulsory insurance, but not property damage (loc. cit. § 5; see Supreme Court, HD 1976 II 10). Personal injury compensation can be adjusted in cases of contributory gross negligence, and be excluded in cases of illegal use of the vehicle or driving under severe influence of alcohol or drugs. The vehicle need not be in motion (Supreme Court 1990:159) but must be on a public road at the time of the accident (Supreme Court 1991:169; *Hakulinen*, Obligationsrätt, 309). Damage caused during car repairs are excluded (loc. cit. § 2).

Illustration 1 is taken from CA The Hague 11 April 1984, VR 1990 no. 44 p. 74; **illustration 2** from BH 2000/349; **illustration 3** from CFI Mechelen 10 May 2006, RW 2006-2007, 732, note *Vandeplas*; and **illustration 4** from STJ 11 October 2005.

VI.–3:206: Accountability for damage caused by dangerous substances or emissions

(1) A keeper of a substance or an operator of an installation is accountable for the causation by that substance or by emissions from that installation of personal injury and consequential loss, loss within VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death), loss resulting from property damage, and burdens within VI.–2:209 (Burdens incurred by the State upon environmental impairment), if:

(a) having regard to their quantity and attributes, at the time of the emission, or, failing an emission, at the time of contact with the substance it is very likely that the substance or emission will cause such damage unless adequately controlled; and

(b) the damage results from the realisation of that danger.

(2) "Substance" includes chemicals (whether solid, liquid or gaseous). Microorganisms are to be treated like substances.

(3) "Emission" includes:

(a) the release or escape of substances;

(b) the conduction of electricity;

(c) heat, light and other radiation;

(d) noise and other vibrations; and

(e) other incorporeal impact on the environment.

(4) "Installation" includes a mobile installation and an installation under construction or not in use.

(5) However, a person is not accountable for the causation of damage under this Article if that person:

(a) does not keep the substance or operate the installation for purposes related to that person's trade, business or profession; or

(b)shows that there was no failure to comply with statutory standards of control of the substance or management of the installation.

COMMENTS

A. A strict regime for environmental liability

Structure of the regime. This Article relates to liability for damage arising from dangerous substances or emissions. The provision establishes a strict environmental liability for businesses (paragraph (5)(a)). Paragraphs (1) and (5) clarify the ground of accountability, while paragraphs (2)–(4) add clarity as regards certain concepts which are invoked by paragraph (1): substance, emission, and installation.

Relationship to VI.–2:209 (Burdens incurred by the state upon environmental impairment). VI.–2:209 (Burdens incurred by the state upon environmental impairment) only regulates the question of what constitutes a legally relevant damage (of the state) in the circumstances set out there. It says nothing about the ground of liability or accountability. The latter aspect, even in relation to the "pure ecological damage" detailed in VI.–2:209 (Burdens incurred by the state upon environmental impairment), is only taken up in the present Article.

Illustration 1

Cyanide which has been used in the process of extracting gold escapes from a gold mine. The River Tisza is polluted; an entire region suffers ecological damage. The State concerned may demand reparation from the business operating the mine by

virtue of VI.–3:206 and, if the infringement of safety and maintenance rules can be established, VI.–2:209 (Burdens incurred by the state upon environmental impairment) in conjunction with VI.–3:102 (Negligence).

Legally relevant damage. Apart from this "pure ecological damage", only injury to the body or health of an individual, detriments sustained by that individual's relatives, and losses consequential to property damage are legally relevant in the context of the strict liability under the present Article. All other forms of damage are legally relevant only on the basis of liability for intention or negligence or in the context of national law (VI.–3:207 (Other accountability for the causation of legally relevant damage) sub-paragraph (b)). The contamination of land by emissions amounts to property damage sustained by the owner.

Illustration 2
Fluorine used in the processing of bauxite leaks from an aluminium plant. The toxic substance pollutes the surrounding agricultural estates, which as a result of the emission lose 90% of their earning potential. The company operating the plant is liable to the farmers for this damage independent of whether they can show that it was negligent in controlling the chemicals.

Illustration 3
Clouds of dark foul-smelling particles escape from a factory and settle on the roofs of houses in the locality. This is property damage for which there is strict liability under VI.–3:206.

Policy considerations. The Article is based on the observation that the predominant number by far of the EU Member States have shaped the core of environmental liability within private law – liability for injury to health and damage to property as a result of impairment of the ecosystem – in terms of strict liability. However, there still exist such substantial differences in detail between the national legal systems that it did not seem either sensible or indeed possible to formulate the rule in the manner of a proposal for maximum harmonisation. This Article therefore confines itself to expressing what, according to the appraisal of the comparative legal survey of the laws of the Member States, proved to be the "common denominator" of the preponderant number of the EU's legal systems. Those marginal areas which do not lie within this intersection thus remain to be dealt with by reference to the applicable national law (VI.–3:207 (Other accountability for the causation of legally relevant damage) sub-paragraph (b)).

Illustration 4
A large accident occurs at a chemical plant, as a result of which steam containing dioxins is released into the atmosphere. The local population has to keep windows and doors closed and cannot leave their homes for 36 hours. Under these rules the restriction on freedom of movement for the individuals affected which has been caused by the air pollution is only a legally relevant damage (VI.–2:203 (Infringement of dignity, liberty and privacy) paragraph (1)) if the operator of the chemical plant can be shown to have been negligent or if the applicable law provides for a strict liability for infringements of liberty.

Illustration 5
Following a fire at a business's warehouse, substances containing oil mix with the water used to extinguish the fire and flow into the nearby river. A few kilometres

downstream company X operates open air swimming baths, which it is forced to close for several days. X sustains a loss of income, but no property damage. The question whether such a "pure economic loss" falls within the protection of a strict regime of environmental liability is determined exclusively by national law (VI.–3:207 (Other accountability for the causation of legally relevant damage)); under these rules X does not suffer legally relevant damage which is caught by the strict liability envisaged in VI.–3:206.

B. The persons liable

Keeper of a substance and operator of an installation. Liability under VI.–3:206 attaches to persons who independently exercise control over a substance or an installation, i.e. to the "keeper" of a substance and the "operator" of an installation. The "keeper" of a substance is liable for damage which is caused by the substance; the "operator" of an installation is liable for emissions. The concept of "keeper" follows the general rules. The term "operator" (*Betreiber*) designates the person (as a rule, a legal person) to whose business assets the installation belongs.

Private use excluded (paragraph (5)(a)). Liability does not arise under paragraph (1) if the relevant person does not keep the substance or operate the installation for purposes related to that person's trade, business or profession (paragraph (5)(a)). An owner-operator's private oil tank constitutes an "installation", but strict liability by reason of VI.–3:206 is not imposed on the owner-operator. Depending on their properties, pills and other medicines may be dangerous substances within the meaning of paragraph (1) and the same may be true of chemicals which are used for household cleaning or weed control. A general strict liability in such cases does not seem appropriate; it ought to arise only in respect of industrial production or commercial storage of these or similar chemicals, not least because in such cases entirely different quantities are involved. However, private individuals are subject to a particular duty of care if they possess or operate substances or installations of the type referred to in this Article. Moreover, the more dangerous a substance is, the more probable it is that there are prohibitions on private possession or at least public law rules to ensure the safe storage of such substances. The infringement of such rules is by itself negligence within the meaning of VI.–3:102 (Negligence) sub-paragraph (a). The same applies for the operation of installations with a potential environmental impact.

Other legal bases for a claim remain unaffected. Paragraph (5)(a) does not allow any room for doubt as to the fact that it is only liability "under *this* Article" which does not apply to private individuals. All other bases for a claim therefore remain unaffected. That applies not only to the claims just mentioned on the grounds of intention or negligence but also to claims for some other legal reason, e.g. property law claims between owners of neighbouring land (VI.–1:103 (Scope of application) sub-paragraph (d)) and claims based on public law duties to eliminate dangers to public safety.

C. The risk within the scope of the strict liability

Causation of damage by dangerous substances and emissions (paragraph (1)(a)). The potential danger which is intended to be covered by this Article is paraphrased in sub-paragraphs (a) and (b) of paragraph (1). Strict liability is not envisaged for every kind of substance or emission, but only for those which, viewed in the abstract, inherently pose a high risk for the environment (VI.–2:209 (Burdens incurred by the state upon environmental impairment)), for people and for property. The test question is whether it is "very likely" that

the stored substance or emitted material will cause damage to health, property or the environment if it is not taken care of in an appropriate manner. Whether in an individual case appropriate care was in fact taken is not decisive; what is decisive is merely the fact that the dangerous characteristics of the substance or material make special precautions necessary. That is an objective test; the issue does not turn on the actual or constructive knowledge of the keeper or operator.

Dangerous quantity. The risk which is inherent in the relevant substance must be identified by having regard the quantity and its specific characteristics. For example, water is, as such, completely harmless. However, when held in large volumes, it constitutes an obvious danger for people and property unless it is secured against leakage either above ground or subterraneously: a dam can burst and the base of a reservoir can be permeable. Even large quantities of grain or milk powder can be dangerous due to the risk of spontaneous combustion. Pure and therefore easily ignited alcohol can also be a dangerous substance if stored in larger quantities. If, on the other hand, it is merely used to disinfect a wound, liability under this Article can be excluded for several reasons.

> *Illustration 6*
> Doctors disinfect a patient prior to an operation, using chemicals containing alcohol. At the same time they use an electronic scalpel which produces a spark that ignites the alcohol in the chemicals. As a result the patient suffers severe burns. The liability of the hospital (VI.–3:201 (Accountability for damage caused by employees and representatives)) turns on the negligence of the doctors, not on the present Article. At the point in time that the injuries occurred, the hospital was not keeper of the chemicals; nor could it be said that it was "very probable" that "if not adequately controlled" those chemicals, in that small amount, would cause damage of that type. Nor is the electronic scalpel an "installation" within the meaning of this Article.

Relationship to VI.–3:202 (Accountability for damage caused by the unsafe state of an immovable). The relationship between this Article and VI.–3:202 (Accountability for damage caused by the unsafe state of an immovable) has already been explained in the Comments on VI.–3:202. The rule in that Article embraces, for example, damage as a result of a burst water pipe. If, on the other hand, corrosive material is transported through a defective pipe, reparation for the damage will be recoverable on the basis of both provisions because the case involves a dangerous substance.

Dangerous attributes. Substances which pose a particular danger to persons and property due to their specific attributes are, for example, substances which ignite, explode or oxidise easily, poisonous and radiating materials of every sort and corrosive chemicals. Danger for the environment (though not necessarily for the health of individuals) is associated with, for example, genetically experimental breeding, but equally with mere liquid manure which is stored in the tanks of a large-scale agricultural concern. The number of dangerous substances is in fact so large that they cannot be exhaustively listed here. A good indicator of the dangerousness of a substance is the obligation to use hazard signs when transporting such materials by road. Many European legal systems, moreover, have special regimes in which particular substances are characterised as dangerous for persons, property or the environment. This Article refers to such regulations implicitly.

Realisation of the risk establishing liability (paragraph (1)(b)). The strict liability for dangerous substances and emissions only arises if the damage results from the realisation of

the risk which is specifically associated with the substance or emission. The danger which justifies a strict liability for the storage of a large volume of water in a reservoir is not that someone swimming in the reservoir might drown, but that the dam might burst and people or animals may be killed or injured as a result or that damage may be caused to premises in the neighbourhood.

Illustration 7
The owner of an estate constructs a water reservoir on his land. The contractor entrusted to undertake the work overlooks the fact that tunnels run under the reservoir, linking the land to a mine whose seams consequently fill up with water. The owner of the mine has a claim to reparation against the owner of the estate under this Article.

Causation. The damage must have been caused by the dangerous substance or emission. The test of causation is subject to the general rules of Chapter 4. Issues of the law of evidence and thus also questions of alleviation of the burden of proof (such as, for example, rules on *prima facie* evidence) remain matters for the law of evidence and procedure.

Illustration 8
A fish farming company loses a substantial part of its stock. The fish have been poisoned by substances which got into the ground with the effluent from X's plant and from there passed into the river whose waters transported the toxins into the company's breeding tanks. The death of the fish has been caused by the substances from X's plant. That the natural flow of the river has played a role in the causation of the damage does not detract from that.

Substance (paragraph (2)). The concept of 'substance' does not presuppose any particular physical condition. It may be solid, liquid or gaseous in form. The damage may be brought about by particles which are transported by the wind, by disposal of effluent, or by vapours. Micro-organisms as well as chemicals are substances. The former, however, are not animals within the meaning of VI.–3:203 (Accountability for damage caused by animals).

Emission (paragraph (3)). It follows from paragraphs (2) and (3) that the concept of an emission extends further than the concept of a substance. While substances (in whatever form) are also capable of being emitted, the notion of an emission equally embraces the conduct of electricity, heat, light and other radiation, noise and other vibrations and other incorporeal impact on the environment which is not referable to some substance. The concept of an emission always connotes a negative impact on the environment. In order to ascertain what is meant by "impact on the environment" in paragraph (3)(e) reference can be had to VI.–2:209 (Burdens incurred by the State upon environmental impairment).

Installation (paragraph (4)). Paragraph (4) extends the liability of the operator of an installation to its construction phase. The provision also makes it clear that the mere closure of an installation will not preclude liability. In contrast to a "plant" an "installation" also embraces a mobile installation.

No failure to comply with statutory standards. Paragraph (5)(b) makes it possible for the potentially liable person to escape liability by proving that control of the substance was not defective or, as the case may be, that there was no mismanagement of the installation. That does not detract from the strict liability character of the rule because, as in the case of liability

for products, only objectively defective control or management is in issue. However, such a provision is necessary – for example, in order to enable the operator of an installation to establish that the statutorily prescribed emission levels were not exceeded. Such statutory rules which lay down the extent of permitted emissions may be found in either Community law or national legal provisions.

Other defences. The defences in Chapter 5 are also applicable in the context of this Article. In particular VI.–5:302 (Event beyond control) is unaffected. In applying this provision, however, it is always necessary to assess whether it was really an external risk which materialised or whether, despite the influence of, for example, adverse weather conditions, it was in truth a risk on account of which the present Article envisages strict liability.

Illustration 9
In an agricultural concern rapeseed is sprayed with pesticides. As a result of torrential rainfall, the pesticide residues are transported on to neighbouring land where they cause the death of fish in a pond. The rain has not interrupted the chain of causation. It is not an event beyond control within the meaning of VI.–5:302 (Event beyond control), so as to excuse the farmer from liability. It does not excuse liability because it was the materialisation of a risk for which the farmer must bear responsibility under the present Article.

NOTES

1. The constructs of FRENCH law relating to environmental liability is based on many pillars, namely, on the *théorie des troubles anormaux de voisinage*, on the liability for *faute* (CC arts. 1382-1383), on a number of special regimes dealing with certain hazardous substances and on the liability *du fait des choses* under CC art. 1384. A requisite of the latter is that the thing, which is in the keeping (*garde*) of the defendant has caused the relevant damage. It is not an essential requirement that the thing be inherently dangerous (*le Tourneau and Cadiet*, Droit de la responsabilité et des contrats [2004/2005] nos. 7729-7731). The notion of a thing is given a broad interpretation (e.g. Cass.civ. 10 February 1967, Bull.civ. 1967, II, no. 66 p. 47: condensated water vapour which froze leading to black ice on a street). In order to constitute a *fait de la chose*, there is no requirement fort he existence of direct contact between the thing and the person who has suffered damage nor is it a requirement that the thing be in motion. It is only necessary that the thing plays a *rôle actif*, with the result that it becomes an *instrument du dommage*. A person is regarded as having *garde*, if the person exercises a *pouvoir d´usage, de direction et de contrôle* over the thing (Cass.ch.réun. 2 December 1941, D.C. 1942 jur., p. 25, note *Ripert*); the term *garde* denotes (also when it is merely temporary) actual control over the thing (*pouvoir de fait*). A person will be relieved of liability solely upon proof of *cause étrangère* which cannot be attributed to the *gardien* (*Flour/Aubert/Savaux*, Le fait juridique[11], no. 269 p. 290). There are no special statutory regulations in respect of an array of dangerous substances. The strict liability imposed on hospitals is included in this classification (private doctors‘ practices are however excluded: *Mistretta*, JCP 2003 éd. G, I no. 57, 165) as regards *infections nosocomiales* under *Code de la Santé Publique* (CSP) art. L 1142-1, I(2). In this regard, what the law is concerned with is, the responsibility for illnesses which are caused by micro organisms typically associated with hospitals (*Lambert-Faivre*, D. 2003, 361, 362). Liability is

supplemented by a compulsory liability insurance provided for by statute (CSP art. 1142-1). In the case of permanent dimunition of earning capacity of more than 25% a state scheme then intervenes (CSP art. 1142-1-1), which the hospital can have recourse to, in the event of gross negligence (CSP art. 1142-17). A further example of a special staututory regime can be found in the *Code minier* arts. 75-1 ff in respect of the liability of mining operators for damage resulting from mining operations. Strict liability for *troubles anormaux du voisinage* becomes relevant in cases for example, of water pollution (Cass.civ. 2 March 1966, Bull.civ. 1966, II, no. 279; Cass.civ. 12 February 1974, JCP éd. G 1975, II, 18016, note *Despax*; Cass.civ. 15 February 1989, JCP éd. G 1989, IV, 142). It is a matter for the discretion of court of first instance to determine whether an emission can be characterised as normal or abnormal (*le Tourneau and Cadiet*, Droit de la responsabilité et des contrats [2006/2007], no. 7180 and 7184).

2. Similarly, in BELGIUM, the point of departure is generally CC art. 1384(1). In Belgium this regulation only becomes applicable, if the damage originated owing to a defect in the thing (in the stead of many Tilleman and Claeys [-*Baudoncq and Debaene*], Buitencontractuele aansprakelijkheid, 83, 88; *van Gerven*, Verbintenissenrecht II[7], 329). The definition of the *gardien* is largerly identical to the French definition (e.g. Cass. 24 January 1991, Pas. belge 1991, I, no. 276 p. 500); however, in contrast to the prevailing law in France, it must be possible to impute the legally relevant act to the defendant. A thing is defective if it exhibits an abnormal characteristic which renders it susceptible, in the circumstances of the case, to causing injury to a third party; the defect can be transitory, it is, furthermore, not essential that the defect be an inherent attribute of the thing (Cass. 3 September 1992, Pas. belge 1992, I, no. 585 p. 985).

3. The SPANISH law on liability for environmental damage is governed by a number of disparate regimes. The rule contained in CC art. 1908(1) is among their number. According to this article, the owner shall be liable for damage caused “by explosion of machinery that had not been maintained with due care”, and for damage caused “by the ignition of explosive materials that had not been put in a safe and appropriate place”. Prevailing legal opinion asserts that this regulation is a special case of liability based on fault. The same opinion is professed in respect of CC art. 1908(4), according to which the owner is liable for damage caused “by emissions from sewers or deposits of infecting substances that had been built without the preventive measures that were appropriate according to the place where they were located” (*Díez-Picazo and Gullón*, Sistema II[9], 572). Loss which falls within the scope of both of these statutory provisions, is, therefore, treated by the courts as generally falling within CC art. 1902 which enables the application of the risk theory devised under this norm which pertains to liability as well as the application of the doctrine of *culpa cuasi-objetiva* (see above, Note I4 under VI.–3:102 (Negligence)) (e.g. TS 18 November 1998, RAJ 1998 (5) no. 8814 p. 13018; TS 20 May 2005, RAJ 2005 (5) no. 6693 p. 14224; TS 28 January 2004, RAJ 2004 (1) no. 153 p. 305). In contrast, it is not necessary for the courts to resort to such a “circuitous route” in the event that the damage is encompassed within the scope of application of CC art. 1908(2). This is due to the fact that this provision already provides for strict liability (*Díez-Picazo and Gullón* loc. cit.; *Álvarez Lata*, La responsabilidad civil por daños al medio ambiente[3], 1917; TS 15 March 1993, RAJ 1993 (2) no. 2284 p. 2958; TS 24 May 1993, RAJ 1993 (2) no. 3727 p. 4743; TS 14 March 2005, RAJ 2005 (2) no. 2236 p. 4747). Liability is imposed on the owner for damage caused “by noxious fumes that are harmful to persons or property”. The disputable issue is, however, whether this liability can be extended to any kind of emission or whether it must remain restricted to ‘noxious fumes’. In

general, the courts do not hesitate to apply this provision analogously to other emissions (e.g. TS 29 April 2003, RAJ 2003 (2) no. 3041 p. 5720; CA Valencia 26 March 2004, A.C. 2004 (2) no. 890 p. 248 [both on noise]; CA Alicante 15 March 2002, BDA JUR 2002/140080 [electromagnetic radiation]; CA Baleares 21 February 2005, BDA JUR 2005/118262 [humidity]). In contrast, views are split in legal commentary (in favour of an analogous application e.g. *Cabanillas Sánchez*, ADC 1993, 1957, 1969-1974; Moreno Martínez [-*Algarra Prats*], Perfiles de la responsabilidad civil en el nuevo milenio, 639; *Martín Vida*, InDret, 2/2005, p. 3; against e.g. *Santos Morón*, in FS Díez-Picazo II, 3015, 3022). Among the regulations pertaining to liability external to the Civil Code to which a certain importance has been conferred, include, *inter alia*, the Law on Civil Protection of the Rights to Honour, to Private Life and to one´s own Image. This is due to the fact that a number of courts have had recourse to its provisions regarding the protection of personality rights, in order to establish liability for excessive noise (TS 29 April 2003, RAJ 2003 (2) no. 3041 p. 5720). In addition, a specific regime of liability can be found in the Nuclear Energy Act (*Ley 25/1964, de 29 de abril, reguladora de la energía nuclear*, BOE no. 107, 4 May 1964). Moreover, regard must be had to the CATALAN CC arts. 546-13 and 546-14, which provide for liability for damage caused by wrongful emissions. Generally speaking, Spanish statutory law does not formally use the concept of 'keeper of the dangerous thing'; rather it tries to connect this sort of liability to ownership or possession. TS 20 May 2005, RAJ 2005 (5) no. 6693 p. 14224, however, applied CC art. 1902 to circumvent the wording of CC art. 1908 and to impose strict liability on a tenant for damage caused by the ignition of dangerous substances. According to case law of the Supreme Court, the observance of duties imposed by statute is no defence in the area of liability arising out of damage caused by dangerous substances or emissions (TS 24 May 1993, RAJ 1993 (2) no. 3727 p. 4743; TS 14 March 2005, RAJ 2005 (2) no. 2236 p. 4747).

4. The point of departure of ITALIAN law in respect of liability for environmental damage is the legislative scheme contained in Law of 8 July 1986, no. 349, establishing a Ministery for the Environment and laying down provisions pertaining to environmental damage (*Istituzione del Ministero dell'ambiente e norme in materia di danno ambientale*) art. 18 (see above Note *II5* under VI.–2:209 (Burdens Incurred by the State upon Environmental Impairment)). This provision governs liability in respect of damage caused to the environment by a violation of a statutory provision, the tortfeasor must provide redress to the State. Tortious liability owed to private individuals remains unaffected by this Law; in other words loc. cit. art. 18 governs only "pure ecological damage" (see further *Castronovo*, La nuova responsabilità civile[3], 747). Both liability regimes can be applied cumulatively, in the event that damage is caused to the specific legally protected interests of the individual as well as to the environment (Cass.sez.un. 21 February 2002, no. 2515, Resp.civ. e prev. 2002, 385; 726; Cass. 3 February 1998, no. 1087, Danno e resp. 1998, 495). Apart from CC art. 2043, CC art. 2050 could provide another basis for the imposition of liability in respect of environmental damage. According to this provision "whoever causes injury to another in carrying out an activity which is inherently dangerous or by reason of the instruments employed to carry it out, shall be obliged to pay compensation unless he can prove that he took all the necessary measures to avoid the damage occurring". The notion of "dangerous activity" under CC art. 2050 connotes that the means employed to carry out the activity must be continous and organised, however it does not connote business organsation in the sense of commercial law? (Cass. 24 February 1983, no. 1425, Giust.civ.Mass. 1983, fasc. 1). Liability arising from injuries resulting from peaceful nuclear activities is governed by the Laws of the 31st December 1962, no.

1860; of 30 December 1965, no. 1704; vom 19 December 1969, no. 1008 and a number of supplementary Presidential Orders.

5. HUNGARIAN CC § 345(1)(third sentence) expressly states that the strict liability provided for in this provision (liability for dangerous activities) is also applicable to individuals, "who cause damage to other persons through activities that endanger the human environment". Handling hazardous substances or operating an installation from which dangerous emissions could escape, are examples denoting a dangerous activity under this provision (see further Petrik [-*Wellmann*], Polgári jog II[2], 596/2). Liability for damage in the field of nuclear energy is governed by the Law no. CXVI of 1996, liability for losses arising out of the mining operations is governed by Law no. XLVIII of 1993. "Dangerous operations" or "activities" under CC § 345(1) include *inter alia*, power stations, structures, mines, water works, gasworks, electricity power stations, electricity supply installations, handling explosions, radioactive substances and poisonous substances (unless small amounts, used only for household purposes, are involved; spraying fields with pesticides is considered to be a dangerous activity, of course, in particular, if this is carried out from an aeroplane: BH 1983/203 and BH 1987/437; Petrik [-*Wellmann*], Polgári jog II[2], 585-586; Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata I, 1246-1250, 1256-1257; *Petrik*, Kártérítési jog, 109-111). However, medical radiation therapy is subject to the general rules pertaining to liability (*Wellmann* loc. cit. 585). Use of an open flame does not of itself denote a dangerous activity, (BH 1988/183), the use of a pyrotechnical device is by all means a dangerous activity (BH 2000/349; BH 1991/314). Furthermore, spread of corrosive substances through a supermarket is dangerous (BH 1993/678); the keeper of a helicopter is liable for noise (BH 1984/114). Further cases emerging from the extensive case law on the subject include cases where liability was imposed on an installation for vibrations (BH 1981/15), in respect of dangerous pesticides (BH 1981/413) and for excessive dust particles (BH 1973/71).

6. Under POLISH CC art. 435 § 1 a person operating on its own account an installation driven by natural forces (steam, natural gas, electricity, liquid fuels, etc.) is accountable for personal injury or damage to property, occasioned to anyone by the movement of the installation, unless the damage resulted from *force majeur*, the sole fault of the injured person or of a third person, for whom the person who runs the enterprise is not responsible. The same applies to installations producing or using explosives. This is a case of strict liability (Pietrzykowski [-*Safjan*], Kodeks cywilny I[4], art. 435 p. 1231) incurred usually by legal persons (not necessarily the owner, e.g. a lessee, *Safjan* loc. cit. 1233) operating a large installation such as operators of electric plants and transportation or building companies. The movement of the installation is interpreted broadly; it covers among other things cases of air pollution, piping off sewage (even below the norm – see SN 7 April 1970, OSPiKA 1971, poz. 169; *Radwański and Olejniczak,* Zobowiązania - część ogólna[7], 235), and noise pollution. The application of CC art. 435 is extended to mining installations (with some modifications – see Geological and Mining Law arts. 93 ff) and installations which, due to the quantity or quality of accumulated dangerous substances, create a danger of a serious industrial breakdown (even if the installation is not driven by natural forces and even if its activity is exercised on the basis and within the confines of an administrative decision: Protection of the Environment Law arts. 324 and 325). Where the damage was caused by the latter type of installation, the aggrieved party (in the case of damage to the environment as a common good: the State, local government or an ecological organisation) may claim from the person liable *inter alia* in respect of taking preventive measures; if those measures are impossible or excessively difficult he may claim cessation of the dangerous activity (loc. cit. art. 323). Liability for

nuclear damage is regulated separately by Atomic Law arts. 100 ff. A special regime for prevention and reparation of damage to the environment caused by an activity creating the risk of such damages is established by Prevention and Repair of Damages to the Environment Law arts. 1 ff. BULGARIAN Environmental Protection Act art. 170 contains a general principle that damage to the environment, which is culpably inflicted by the State, local authorites or private (natural or legal) persons, must be compensated. According to § 1 nos. 5 and 6 of the supplementary provisions of the Environmental Protection Act damage that is recoverable encompasses damage that appears as a result of physical, chemical or biological processes. Damage which occurs despite compliance with statutory reglations is also encompassed within this provision. The notion of "damage to the environment" connotes a change to the ecological balance in the area, leading to the impairment of the standard of living, leading to a poorer biological diversity or leads to a lasting adverse impact on the natural ecological system. The damages claim is supplemented by injunctive relief (mandatory and prohibitory) (Environmental Liability Act art. 171).

7. GERMAN law pertaining to liability for damage to the environment is essentially regulated in an array of specific strict liability statutes ([Environment Liability Act [UmweltHG] §§ 1 ff, Water Resources Act [WHG] § 22, Liability Act [HaftPflG] § 2, Act on Genetic Engineering [GenTG] §§ 32 ff, Federal Mining Act [BBergG] §§ 114 ff, Nuclear Energy Act [AtomG] §§ 25 ff), on the provisions of the law pertaining to the respective interests of neighbours (CC § 906(2) second sentence); Federal Act on Intomission [BImSchG] § 14 second sentence) as well as by the general tort law liability for intention and negligence (CC § 823). The Environmental Liability Act § 1 provides for the imposition of strict liability in respect of impact to the environment, which emanates from techinical works, plants or installations enumerated in the Act. Furthermore, strict liability is imposed in respect of death, bodily injury, detriment to health as well as material loss to another caused by an environmental impact. The loss must be due to an enviromental impact on the soil, air or water, caused by substances, vibrations, noise, pressure, radiation, gases, steam, vapour, heat or other similar manifestations (UmweltHG § 3(1)). This causal nexus is presumed once certain prerequisites are satisified (loc. cit. §§ 6 and 7). There is a cap placed, limiting the amount of damages that can be awarded (loc. cit. § 15) und liability is excluded in the event of force majeure (loc. cit. § 4). In respect of installations which have yet to be completed or installations which are no longer operated, liability is governed by the requirements of loc. cit. § 2(1) and (2). WHG § 22 provides for strict liability in respect of the introduction or discharge of substances into water resources (para. (1)) and in respect of the operation of a plant which poses a danger for the preservation of water resources (para. (2)). This liability, therefore, extends beyond the scope of liability regulated in the Environmental Liability Act, primarily because there is no cap placed on the amount of damages that may be awarded. Furthermore, liability under the Water Resources Act is restricted to the violation of a specific legal interest, in particular the act permits recovery of damages for non pecuniary loss (BGH 23 December 1966, BGHZ 47, 1, 13; BGH 21 January 1988, BGHZ 103, 129, 140; BGH 6 May 1999, NJW 1999, 3203). § 2 of the Liability Act governs the liability of the keeper of electrical cables and pipelines for water, gas, oil etc; the Act on Genetic Engineering §§ 32 ff regulates liability for damage arising from genetically modified organisms; Federal Mining Act §§ 114 ff regulates liability for damage resulting from mining activities or mining operations. There is no cap placed on the amount of damages that can be awarded in the event that possessor of a nuclear facility (Nuclear Energy Act § 31(1)) and the possessor of nuclear ship (Nuclear Energy Act § 25(1)) are found to be strictly liable. According to CC § 906(2) second sentence a landowner,

who must generally tolerate emissions emanating from a neighbouring property, may be entitled to claim compensation from the user of that property, provided that the emissions unreasonably interfere with the common use of the land at that location or the income that he derives from the property. The Federal Emission Control Act § 14 second sentence permits the owner of property to claim damages, provided that a number of additional requisites are satisified in the case that the detrimental impact emantes from an installation on a neighbouring property, where the licence to operate has become final. In the context of a cause of action under CC § 823(1), the courts try to accomodate the interests of the claimant, in they have relaxed the requirements in respect of the allocation of the burden of proof. This relaxation of the rules of evidence also has import for the question of causation, for example, significant in a decision where the defendant polluter exceeded the emission and immission limits (essentially BGH 18 September 1984, BGHZ 92, 143, 147).

8. In the mid 1990s, proposals were advanced advocating the adoption of an Austria Environmental Liability Act, yet these recommendations did not herald concrete legislative action. Consequently, the Austrian legal position remains governed by the provisions of the Civil Code and a number of additional specific statutes. According to CC § 364(2) an owner of property can prohibit emissions (liquid effluents, smoke, heat, smells, noise, vibrations and other emissions of comparable impact) emanating from a neighbouring property, if and to the extent that they exceed the amount that is customary for that area and significantly impair the use of the land that is customary in that location. CC § 364a adds, that, in the event that a licence to emit has been granted, the claimant is only entitled to damages. Based on this, the inference is drawn that under CC § 364 the claimant is entitled to assert a claim to prohibitory injunctive relief as well as a claim for damages and this claim is actionable regardless of the presence of fault (*Jabornegg*, ÖJZ 1983, 365 and *Gimpel-Hinteregger*, ÖJZ 1991, 145). An array of special Acts pertaining to liability for particularly dangerous activites and Acts geared towards protecting particularly important environmental interests complete the regime (e.g. Act on the Liability for Nuclear Facilities Act § 11, Forestry Act § 54, Mining Act § 185, Act relating to Water Use § 26 and Aviation Act § 148). These specific Acts in turn are regarded as being suspectible to analogous application; corresepondingly they have been deemed to apply in cases where the damage is caused by comparable dangerous activites (essentially OGH 28 March 1973, SZ 46/36; see further OGH 25 July 2000, SZ 73/118). An operation is “dangerous”, if the operator is permitted, in the collective interest, to conduct operations, which would of themselves be prohibited, if sole regard was had to the legal interests of another at risk from the operation (OGH 24 October 1985, JBl 1986, 525), e.g. igniting a firework (OGH 28 March 1973 loc. cit.), operating a munitions factory or high voltage equipment (OGH 2 April 1954, SZ 25/84), and operation of plants and installations where harmful gasses and matter are generated (OGH 20 February 1958, SZ 31/26 [magnesite plant]; OGH 16 July 1998, SZ 71/126 [chlorine-hydrocarbon plant]). However, it should be noted that not every industrial or manufacturing operation is *per se* “dangerous” (OGH 25 July 2000, SZ 73/118 [Hotel]).

9. According to GREEK Law 1650/1986 art. 29 “every natural or legal person who pollutes or otherwise damages the environment is liable to pay damages unless he can prove that the damage could be attributed to force majeure or occured due to the intentional culpable act of a third party”. This provision is one of strict liability (*Deliyannis and Kornilakis*, Eidiko Enochiko Diakio III, 365; *Dimopoulou*, Evthini apo diakindinevsi, 240; *Karakostas*, Perivallon kai Astiko Dikaio, 334). The concepts of “pollution” and “damage to the environment” are defined in loc. cit. art. 2. According to prevailing Greek academic opinion, the damage must be capable of

being attributed to a source of danger which poses a particularly high risk to the environment. Extending beyond the wording of the statutory provision, an additional requirement is that damage resulted from a danger typically associated with the possession or operation of a potential source of pollution or damage (*Dimopoulou* loc. cit. 242; *Georgiades*, Enochiko Dikaio I, 702). Every person who suffers injury to their person or damage to property is entitled to assert a claim. The State also has a claim for the costs involved in remedying environmental damage (*Dimopoulou* loc. cit. 241; *Georgiades* loc. cit.). In addition, CC art. 57 (Protection of Personality) and the fundamental basic norm of tort law (CC art. 914), together with the law pertaining to the respective interests of neighbours (CC art. 1003) are of considerable relevance. In respect of oil pollution at sea, the owner of the ship is strictly liable under Law 314/1976. Similarly, harm caused by the peaceful use of nuclear energy is governed by a special regime of liability operating to the detriment of the operator of the relevant nuclear facility (Legislative Decree 336/1969, amended by Law 1758/1988; on this point *Dimopoulou* loc. cit. 252).

10. PORTUGUESE CC art. 493(2) establishes liability for damage which is caused by a dangerous activity; liability is grounded on a rebuttable presumption of fault. Dangerous activity? is denoted by e.g. the manufacture of explosives, the treatment or examination of patients with short waves or X-rays, transporting oil or petrol (*Antunes Varela*, Obrigações em geral I[10], 595; CA Oporto 9 February 2006; STJ 12 February 2004), conveying high tension energy supply via overland pipelines (STJ 25 March 2004; CA Oporto 3 February 2004; STJ 10 July 2003) and lighting a firework (STJ 17 June 2004). The keeper (*detentor*) can excuplate himself of liability if he proves that in the circumstances of the case all due diligence was exercised to prevent the onset of the damage (*Antunes Varela* loc. cit.). In contrast, CC art. 509(1) does not permit any investigation of fault and provides that "a person who has the effective direction of an installation aimed at conducting or delivering electric energy or gas, and utilises it in their own interest, is accountable for damage which may arise from the conduction or delivery of electricity or gas, as much as for damage resulting from the installation itself, except if at the time of the accident the latter is in accordance with the binding technical rules and in a perfect maintenance state". This provision is not simply concerned with damage resulting from the supply of energy or gas (on this point *Vaz Serra*, BolMinJus 92 [1960] 139; STJ 25 March 2004; CA Lisbon 22 October 1973, BolMinJus 230 [1973] 155), it also governs damage which results from the generation of electricity or gas or from its storage (*Almeida Costa*, Obrigações[9], 599; CA Lisbon 8 January 1975, BolMinJus 243 [1975] 318; see, however, CA Coimbra 15 January 1991, CJ XVI [1991-1] 47). The operator of the installation incurs liabilty (*Almeida Costa* loc. cit.); he can exonerate himself from liability under the same prerequistes as those detailed under VI.–3:206(5)(b) (see further *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 525, note 1 under art. 509; *Vaz Serra* loc. cit.; STJ 18 April 1996, CJ [ST] IV [1996-2] 26; see also STJ 25 March 2004 [where, however, liability was confirmed due to the infringement of a statutory safety regulation]). An additional ground providing a defence to the imposition of liability is force majeure (CC art. 509(2)): an example would be the uprooting of a pylon on account of entirely exceptional stormy conditions (*Almeida Costa* loc. cit. 600; *Pires de Lima and Antunes Varela* loc. cit. note 2; see STJ 5 June 1985, BolMinJus 348 [1985] 397). Liability under CC art. 509 will not be imposed on consumers who have errected electrical installations for their private use; this corresponds to the regulation in VI.–3:206(5)(a) (see further *Pires de Lima and Antunes Varela* loc. cit. note 3 under art. 509; *Antunes Varela* loc. cit. 713). Strict liability (however, solely strict liability) is capped (CC arts. 510 and 508(1)). There is a specific regulation in CC art. 1346 in

respect of relations between neighbours. This provision governs emissons which endure for some time and are of a particular intensity (*Mesquita*, Direitos Reais, 143-145; STJ 3 December 1992; STJ 7 April 2005).

11. DUTCH CC art. 6:175 imposes strict liability on the keeper of a substance (see further Asser [-*Hartkamp*] Verbintenissenrecht III[12], no. 192a, p. 206). The concept of "substance" in liability law extends beyond the legal definiton of "thing" under property law (Memorie van Toelichting, Tweede Kamer 1988-1989, Kamerstukken no. 21202, p. 13; Onrechtmatige Daad II [-*Oldenhuis*], art. 6:173, no. 28 p. 95). Together with solid substances, the provision also regulates gasses and fluids. The substance could be a basic element, adjuvant substance, crude oil, finished product or waste material. Radiation and electricity are not regarded as substances (the latter is incorporated within the concept of product): *Oldenhuis* loc. cit. art. 6:174 no. 25 p. 117). Similarly, blood plasma, ampules and intravenous liquids are governed by product liability and are not subject to the rules governing liability in respect of dangerous substances (CC art. 173(2)); Bacteria and virus cultures are regulated by the latter. "Dangerous substances" are substances of which is is known that they possess properties which pose a particular danger of a serious type for persons or things. The Law on Substances Dangerous to the Environment provides guidance, (Stb 1985, 639) art. 34(3); CC art. 6:175(1) incidentially, mentions explosive, oxidative, flammable and poisonous substances. In any event a substance is "known" to exhibit dangerous properties, if the substance is statutorily classified as dangerous (CC art. 6:175(6)). Substances, which are carried by pipes are subject to an independent regime (CC art. 6:174; on this point see CFI Utrecht 30 January 1998, NedJur (kort) 1999, no. 29). The defences to liability (force majeure and comparable situations, including mandatory statutory regulations) are governed in CC art. 6:178.

12. Under ESTONIAN law, strict liability for environmental damage is based primarily on CC § 1058 in conjunction with CC § 1056. The former provision, however, does not adhere to the approach of imposing liability on the possessor or operator. Rather, CC § 1058 imposes strict liability on the owner of a dangerous structure or thing. Furthermore, this liability makes no distinction between private and commercial use. In contrast the specifications in, on the one hand CC § 1058(1), and on the other VI.–3:206(2) and (3), are largely similar. CC § 1058(4) corresponds largely to VI.–3:206(5)(b).

13. It is impossible overlook the legal provisions relating to liability for environmental damage in the NORDIC Countries. SWEDEN Environmental Code chap. 32 provides for liability for personal injury, loss resulting from property damage and pure economic loss (§ 1) caused by (§ 3) pollution of water areas, pollution of groundwater, changes in the groundwater level, air pollution, land pollution, noise, vibration, or other similar disturbances, such as heat, strong light, bacteria, insects. It has been held that a pure economic loss suffered from the restriction of access to a business during construction work is repairable damage (HD 1 November 1996, NJA 1996, 634). In another case damages were awarded, where excavation work was carried out to avert the torrent of water from one property during heavy rainfall, causing flooding on another property (Environmental Appellate Court 22 December 2006, MÖB M 1785/06). Environmental Code chap. 32 §§ 4-5 provide for claims for damages for loss or injury caused by blasting or excavating work. Loc. cit. chap. 10 entails rules on strict liability of the operator, and, subsidiarily, of the property owner, for environmental clean-up, including costs incurred by the state. Damages for loss or injury suffered from electric currents are regulated under Electricity Act (1997:857) chap. 10, providing strict liability for the operator of the electrical installation from which the electricity last came. Nuclear Liability Act (1968:45) § 5 provides for strict

liability of the operator of a nuclear installation. Liability under Environmental Code chap. 32 requires that an activity (see on this notion e.g. Environmental Appellate Court 11 January 2007, MÖB M 9741/05) on immovable property caused loss or injury to its surroundings (loc. cit. § 1), thus excluding e.g. damage to the owner himself caused by his tenant (HD 3 October 2003, NJA 2003, 384). The source of the emission must have a connection with an immovable (noise from airplanes flying low over a suburban area falls outside the scope of loc. cit. chap. 32; it covers however noise from a nearby airport: Environmental Appellate Court 8 November 2002, MÖD 2002 DM 92; *Hellner and Radetzki*, Skadeståndsrätt[7], 330). Where the Environmental Code does not apply, other regimes may fill the gap, such as the Act concerning liability for damages in the course of aviation (1922:382) (see HD 11 May 1945, NJA 1945, 210: strict liability for noise from an airplane causing damage to animals); the Traffic Act (1975:1410) (e.g. oil spills from a truck causing damage) and the Maritime Code (oil pollution: chap. 10). If no such special regime applies, damages may be sought under the general *culpa* rule or under the more general rules on strict liability for 'dangerous activities' (*Hellner*, JT 1991/92, 646-650; *Hellner and Radetzki* loc. cit. 181; *Bengtsson and Strömbäck*, Skadeståndslagen[2], 36). Unless intent or negligence can be attributed to the causation of the loss or injury, all claims for damages are subjected to a test of whether the emission should be tolerated by the claimant with regard to local conditions or the general presence of the emission under similar circumstances (Environmental Code chap. 32 § 1(3); see HD 20 March 1975, NJA 1975, 155; HD 30 June 1977, NJA 1977, 424; HD 26 July 1988, NJA 1988, 376 and HD 14 June 1999, NJA 1999, 385). Instances involving intent or negligence, whereby this test does not apply, may *inter alia* include unauthorized activities, non-compliance with an authorization for an activity, emissions which could have been prevented through relatively inexpensive measures, emissions which were brought to the defendant's attention, although the mere fact that the defendant was aware of the emission does not *per se* imply negligence (*Hellner and Radetzki* loc. cit. 333). Specific rules facilitate the proof of causation (loc. cit. § 3), whereby a damage shall be deemed to have been caused by a disturbance if, in view of the nature of the disturbance and its adverse effects, other possible causes and any other circumstances, the balance of probability indicates that the disturbance was the cause (see HD 29 December 1992, NJA 1992, 896). An insurance scheme exists under Environmental Code chap. 33 for cases where liability under chap. 32 exists but cannot be executed, e.g. due to insolvent or unidentifiable defendants.

14. DANISH Environmental Damage Liability Act (*lov om erstatning for miljøskader*) § 1 provides for strict liability for personal injury, loss resulting from property damage, pure economic loss, and costs for preventing damage or restoring the environment, caused by pollution of water, air, soil, underground, or interferences from disturbance, vibrations or similar emissions (*Pagh*, Miljøansvar, 34, 145). Damage must be caused in the course of a commercial or public activity of a certain specified type (the Act enlists eleven categories). This is intended to create a transparent strict liability regime for activities carrying a high risk for the environment (*von Eyben and Isager*, Lærebog i erstatningsret[5], 193). An emission must not be insignificant, having regard to what normally or reasonably can be expected to be tolerated under similar circumstances (*von Eyben and Isager* loc. cit. 196). The defendant has a defence, if the damage is caused by an activity which was exercised in accordance with compulsory prescriptions ordered by a public authority (loc. cit. § 3(2)), the mere permission of a certain type of activity does not itself amount to such defence. Proof of causation follows general principles. Liability rests with the operator. An insurance scheme has not been enacted. Recent case law has primarily dealt with polluters' and property

owners' non-statutory liability for environmental clean-up costs incurred by public authorities, where strict liability was consistently rejected (HD UfR 1991, 674; UfR 1995, 505; UfR 1998, 549; UfR 2001, 1709). The current Environment Protection Act (*lov om miljøbeskyttelse*) however has introduced strict liability also towards the public authorities in regard of their clean-up costs (§§ 69-70). Soil Pollution Act (*lov om forurenet jord*) § 41 also provides for strict liability for costs incurred by the public authorities. It targets all commercial or public activities regardless of their nature, and also other persons if negligence or stricter accountability under another statute can be attributed to them. These regulations concern public enforcement, based on injunctions and reimbursements of the authorities' costs. The Environmental Damage Liability Act thus only concerns damage or injury to private persons. Other statutes may also provide for a (specific) strict liability regime, e.g. Maritime Act (*søloven*) § 191, Traffic Act (*faerdselloven*) § 101, Aviation Traffic Act (*luftfartsloven*), Nuclear Liability Act (*atomskadeloven*) and Electrical Power Act (*lov om elektriske stærkstrømsanlæg og elektrisk materiel*). A sort of strict liability may also come into play under the law concerning neighbours (e.g. HD 8 February 1996, UfR 1996, 661; HD 1 December 1998, UfR 1999, 360; HD 14 February 2005, UfR 2005, 1551). Non-statutory strict liability has also been established for certain specific activities, in particular for excavation work and similar activities (HD 10 January 1968, UfR 1968, 84, HD 24 June 1983, UfR 1983, 714; *Gjerulff*, UfR 1968 B, 333; *Pontoppidan*, UfR 1984 B, 50) and for damage caused by the breaking of main water, gas and sewage pipes (HD 18 August 1983, UfR 1983, 866; HD 2 September 1983, UfR 1983, 895; HD 23 May 2000, UfR 2000, 1779; *Gomard*, Moderne Erstatningsret, 74, *Hellner*, JT 1991/92, 646-650); in contrast strict liability was rejected in HD 13 November 1987, UfR 1988, 19 for a gas explosion caused by a small gas installation in a private summer house. The scope for non-statutory strict liability is however limited; there is no general principle on strict liability for 'dangerous activities' (*Gomard* loc. cit. 83)

15. FINNISH Environmental Damage Compensation Act (737/1994) § 5 provides for strict liability for personal injury, loss resulting from property damage, pure economic loss (if it is not insignificant), and also other environmental damage caused by water, air or soil pollution; noise, by vibration, radiation, light, heat or smell, or by any similar disturbance. Prevention and clean-up cost of public authorities or other organisations may also be compensated (loc. cit. § 6). The notion of emission includes e.g. dust from a sand-blasting operation causing damage to a parked car and personal injury to its driver (Supreme Court 13 December 1999, HD 1999:124). Emissions must relate to an activity on a specific area, causing damage to its surroundings (loc. cit. § 1), implying a link to immovable property although the activity must not necessarily be of a long-lasting nature (*Wetterstein*, SvJT 1993, 737). Other activities may trigger strict liability under e.g. Maritime Act (1994/674) chap. 10 (*Wetterstein*, JFT 2007, 119), the Traffic Insurance Act (1959/279), the Air Traffic Act (1995/281) and under Water Act chap. 11 § 2 (strict liability for activities causing damage due to a defective installation). The Act Concerning Certain Respective Interests of Neighbours (1920/26), although subsidiary to the Environmental Damage Compensation Act, covers certain less significant disturbances. Electricity Safety Act (1996/410) chap. 7 and the Nuclear Liability Act (1972/484) constitute *leges specialis.* Accidents caused by breaks in sewage and water pipes have also in Finland given rise to non-statutory strict liability, with *force majeure* as defence (Supreme Court 21 February 1980, HD 1980:20; *Saxén*, Skadeståndsrätt, 238). Damages under the Environmental Damage Compensation Act are only awarded if it is considered unreasonable to tolerate the disturbance, unless it was caused by intent or criminal behaviour; the counter-exceptions being personal injury and property damage of a not insignificant extent (§

4; see Supreme Court 20 September 2004, HD 2004:87). Environmental Damage Compensation Act § 3 facilitates proof of causation. The Environmental Damage Insurance Act (81/1998) guarantees full compensation for environmental damage in cases where the liable person is either insolvent or cannot be identified.

Illustration 1 is taken from Metropolitan Court Budapest 4.P.23.771/2001/137, 8 May 2006; **illustration 2** from TS 14 March 2005, RAJ 2005 (2) no. 2236 p. 4747; see also STJ 3 December 1992; **illustration 3** from CA Oporto 3 January 2003; **illustration 4 is based on** CFI Milan 11 July 1991, Arch.civ. 1991, 1277; **illustration 5** is taken from BGH 31 December 1972, cited according to *Wüsthoff and Kumpf*, Handbuch des deutschen Wasserrechts, R 1219; i**llustration 6** from BH 2005/251; **illustration 7** from *Rylands v. Fletcher* (1868) LR 3 HL 330; **illustration 8** from Cass.civ. 23 September 2004, Bull.civ. 2004, II, no. 432 p. 366; and **illustration 9** from BH 1981/413.

VI.–3:207: Other accountability for the causation of legally relevant damage

A person is also accountable for the causation of legally relevant damage if national law so provides where it:

(a) relates to a source of danger which is not within VI.–3:104 (Accountability for damage caused by children or supervised persons) to VI.–3:205 (Accountability for damage caused by motor vehicles);

(b) relates to substances or emissions; or

(c) disapplies VI.–3:204 (Accountability for damage caused by defective products) paragraph (4)(e).

COMMENTS

A. Policy considerations

Wide-ranging national law on strict liability; international treaties. The laws of the Member States on non-contractual liability for damage adopt differing standpoints on the issue of which matters should be the subject of accountability without intention or negligence. Hence the Articles under Chapter 3, Section 2 (Accountability without intention or negligence) which have so far been discussed only contain rules for those matters which according to the predominant European legal view ought to be subject to a regime of strict liability. Beyond this, matters must be left to the national legal systems. That is equally true for the issues of liability which have already become the subject of international treaties unifying the law. Their myriad details and minutiae cannot be reproduced in model rules such as these. The rules could not address and do not aspire to address those matters of liability law which are unified by international treaty. A further consideration supporting this reticence is that for some matters, namely those of environmental liability law (e.g. in the area of oil pollution at sea) insurance and liability have been so closely tied up that a separate liability rule on these matters would not seem sound. In yet other areas of the law of reparation unified by international treaty the question may well be asked whether they actually form part of the law of non-contractual liability for damage. The law on the liability of innkeepers for things brought on to the premises is an example of that. In these rules this question is dealt with in Book IV, Part C in connection with contracts for storage (see IV.C.–5:110 (Liability of the hotel-keeper)).

Overview. This Article gives expression to the basic principle that a person is also accountable under these rules without intention or negligence if that person is subject to strict liability according to the applicable national law of a Member State. The word “also” makes it clear that one is concerned here with the causation of damage in circumstances in which there is no strict liability under VI.–3:201 to VI.–3:206. The relevant national non-contractual liability law must of course be applicable according to the private international law rules of the forum. That appeared so self-evident that it has not been mentioned expressly. On the other hand, it was necessary to spell out that the rules which this draft itself establishes for accountability without intention or negligence ought basically to be conclusive for the matters they address. Without this restriction it would be senseless to extend these rules to matters of strict liability. So the present Article circumscribes the referral to national law. It is only to be effective in three groups of cases, namely (i) where it is the realisation of a source of danger which is not already covered by VI.–3:104 (Accountability for damage caused by children or supervised persons) to VI.–3:205 (Accountability for damage caused by motor vehicles) which is at stake, (ii) where questions of environmental liability law are concerned, and (iii) where national product liability law recognises strict liability for development risks.

Legally relevant damage; national law. The provisions of Chapter 2 determine what is to be understood as a legally relevant damage in the context of this Article. The referral to "national" law includes a referral to national implementations of internationally unified liability law since international treaties as such bind the ratifying states. National implementation of Directives of the European Community are also "national law".

B. Details

Sub-paragraph (a). The rules in VI.–3:104 (Accountability for damage caused by children or supervised persons) are also conceived as being exhaustive for their field of application. In other words these rules adopt the position that there is to be no strict liability of parents (VI.–3:104(3)). They do not regard the fact that people have children as being a sufficient ground of liability. The reference to VI.–3:201 (Accountability for damage caused by employees and representatives) has the effect, for example, that there can be no going behind the proposition implied there which rules out a strict liability for the conduct of employees who cause damage other than "in the course of their employment". It follows from the references to VI.–3:202 to VI.–3:205 that the strict liability set out there may not be extended to damage which is only legally relevant in cases of intention or negligence.

Examples. Dangers which are *not* addressed by the Articles referred to in paragraph (a) include, for example, the danger envisaged by the rule in Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods (OJ L 373/37 of 21 December 2004). The Directive makes provision regarding unwanted conduct related to the sex of a person with the purpose *or effect* of violating the dignity of a person (art. 2(c)). VI.–3:207 sub-paragraph (a) also embraces those cases in which the liable person (from a purely objective point of view) has infringed a statute which requires compliance with a certain standard of safety (e.g. in respect of safety of machinery in a factory) independent of any considerations as to want of care, and liability for the accident turns only on the fact that the required measure of safety was not in place. "Breach of statutory duty" in this specific sense is not negligence, but rather a form of strict liability. The source of danger which is at issue in VI.–3:201 (Accountability for damage caused by employees and representatives) is labour under the control of the person accountable. Consequently there remains scope under sub-paragraph (a) of the present Article for a strict liability for independent contractors or sub-contractors and for mere casual helpers. Similarly VI.–3:205 (Accountability for damage caused by motor vehicles) relates to the dangers arising from motor vehicles but is silent as regards other dangerous vehicles and machines (e.g. a crane, or a concrete mixer or a shredder making wood chips out of tree branches). Railways, aircraft and watercraft are expressly excluded from the scope of that Article by its second paragraph. Consequently the present Article creates scope for strict liability in those fields under the applicable national law. That applies even for movables which cannot even be described as a "machine" (e.g. weapons of all sorts) and it applies also for movables which are not inherently dangerous (such as, for example, bicycles, tables or items of sports equipment).

Sub-paragraph (b). There is also broad scope for supplementary strict liability under national law by virtue of sub-paragraph (b). The provision gives expression to the proposition that VI.–3:206 (Accountability for damage caused by dangerous substances or emissions) only covers the core component of rules on environmental liability. Beyond that core it neither intrudes into special regimes (nuclear civil liability, oil pollution at sea, etc) nor

purports to develop a conclusive set of rules for legally relevant damage in the context of liability without intention or negligence.

Sub-paragraph (c). Finally, sub-paragraph (c) translates into the language of these rules the principle in Council Directive 85/374/EEC art. 15(1)(b): see Comments under VI.–3:204 (Accountability for damage caused by defective products).

NOTES

1. For an earlier consideration of the differing positions adopted by the national legal orders with respect to the forms of accountability without intention and negligence, see the comparative legal note prefacing this Chapter,as regards the *gardien*-liability of FRENCH law please see also Note II15 unter VI.–3:104 (Accountability for damage caused by children or supervised) and Note 1 under the previous Article. Given the previous analysis, the ensuing notes only deal with a number of ancillary matters.
2. As regards SPAIN, note must be taken of an array of additional strict liability provisions. CC art. 1910 imposes liability on the head of the household for damage caused by things that fall down or are thrown from there. Negligence on the part of the defendant is not a requirement (TS 14 April 1984, RAJ 1984 (1) no. 1958 p. 1490; TS 20 April 1993, RAJ 1993 (2) no. 3103 p. 3975; TS 26 June 1993, RAJ 1993 (3) no. 5383 p. 6869). The expression "head of the household" has been broadly interpreted; for example ,the possessor/occupier of a night club is also liable under CC art. 1910, if a client loses his eye owing to an object being thrown at him by an unknown assailant (TS 21 May 2001, RAJ 2001 (4) no. 6464 p. 10039). CC art. 1908(3) imposes strict liability on the owner of a tree located in areas of passage, see e.g. TS 17 March 1998, RAJ 1998 (1) no. 1122 p. 1783. Hunting Act (*Ley* 1/1970 of 4 April 1970, BOE no. 82 of 6 April 1970) art. 33(5) imposes strict liability on hunters, see CA Palencia 9 October 1996, AC 1996 (3) no. 1838 p. 246 ("quasi-strict liability"). ConsProtA art. 148 introduces an additional strict liability regime (former *Ley* 26/1984 of 19 July *para la defensa de consumidores y usuarios)* art. 28. This provision retains significance, even following the transposition of the Product Liability Directive, especially for specific medical services (see Reglero Campos [-*Asua González*], Tratado de responsabilidad civil[3], 1219-1226) and transport law (Reglero Campos [-*Álvarez Lata*] loc. cit. 1961, 1979-1980). To conclude, mention must also be made of the specific regime of nuclear liability under the Nuclear Energy Act (*Ley* 25/1964 of 29 April *reguladora de la energía nuclear*, BOE no. 107 of 4 May 1964).
3. ITALIAN tort law adopts a divergent approach to these Principles, namely in that it has codified a discrete basis for liability in respect of the carrying out of a dangerous activity under CC art. 2050. According to this provision, liability is imposed on a person who causes loss to another in the exercise of an activity which of itself or by reason of the means employed to carry it out is considered dangerous unless that person proves that all necessitated measures were adopted to avoid the damage occuring. For example, organising a premier division football game connotes a dangerous activity, when rampaging fans and throwing of smoke bombs are, (CFI Torino 11 November 2004, Danno e resp. 2006, 767), likewise CA Rome 7 March 2005, Danno e resp. 2005, 641 marketing of cigarettes. CC art. 2051 prescribes further that a person is liable for damage arising from things in his custody, unless he proves that the damage derived from a chance event. A person having the actual factual

control over the thing is regarded as custodian of the thing (Cass. 18 February 2000, no. 1859, Danno e resp. 2000, 390; Cass.sez.un. 11 November 1991, no. 12019, Giur.it. 1992, I, 1, 2218). The range of potential defendants under CC art. 2051 include e.g. the rail operator who is liable for dangers on the platform or footbridge caused by inclement weather conditions (Cass. 10 July 2005, no. 14091, Giur.it. 2006, I, 1, 1378).

4. In a similar manner HUNGARIAN strict liability law also harnesses the categories of liability for dangerous operations and liability for dangerous activities (CC § 345). Consequently, in Hungary, a further festoon of activies are subject to a regime of liability which does not depend on the presence of intention or negligence (blameworthiness); these activities cannot be exhaustively enumerated owing to the broad formulation of CC § 345 which is cognate to a general clause (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1242; Petrik [-*Wellmann*], Polgári jog II[2], 584-586; *Eörsi*, Kártérítés jogellenes magatartásért[7], 102-104; *Marton*, A polgári jogi felelősség, 196-197; *Ujváriné*, Felelősségtan, 106-110; see in case law BH 2002/306 and BH 2005/251). For example, all types of motorised appliances and a whole arrray of tools (apart from household applicances and medical devices: *Benedek* loc. cit. 1242 and 1246; BH 1996/199), are subject to the regime of strict liability, furthermore the handling of weapons and explosives are subject to a strict liability regime, furthermore covering roofs, felling trees as well as errecting buildings and civil engineering works (*Benedek* loc. cit. 1249-1250; *Petrik*, Kártérítési jog, 112). A whole array of specific statutes complement the provisions in the Civil Code, e.g. the Nuclear Energy Act, the Law pertaining to the Protection of Game, Game Managment and Hunting Act and Public Education Act.

5. According to POLISH CC art. 433 the occupier of a premises is liable for damage caused by the ejection, effusion or falling of any object from the premises. See also VI.–3:206, Note *6*. SLOVENIAN LOA art. 156 imposes strict liability on the State or on those who should have prevented the damage, in the event that a person sustains personal injury arising from an act of terrorism or during the course of a public demonstration; in respect of the latter, the organisers are also liable (see further Juhart and Plavšak [-*Pensa*], no. 1 under art. 156, p. 903). Organisers of all types of mass events are subject to a strict liability regime in respect of personal injury arising from an "extraordinary occurrence" (panic outbreak; rush of spectators climb and traverse unchecked the crowd control fence at football grounds: Pravno mnenje občne seje VS RS, 21, 22 December 1987, Poročilo VS RS 2/87, 13) (LOA art. 157). In ROMANIA, large swaths of environmental liability law have been placed subject to a regime of objective liability under the Emergency Ordinance 68/2007 on environmental liability. The Nuclear Energy Liability Act (Act no. 703/2001) art. 4(1) is also an example of a provision laying down objective liability. Moreover, where judicial error forms the basis for tort liability (or does it signify an actual miscarriage of justice not sure here) (CCrimProc arts. 504-507) and as regards liability for unlawful administrative action (or misfeasance in public office?) the liability imposed is also objective, see Notes under VI.–7:103).

6. In GERMANY, a rail operator or operator of an elevated railway will be strictly liable for fatal or personal injuries or damage to property arising in connection with the operation of a railway (Liability Act § 1), in a similar fashion the keeper of aircraft incurs strict liability (Air Traffic Act § 33 (LuftVG)). According to the Medical Preparations Act § 84 a pharmeuctical untertaking incurs liablity, if the use of product placed in circulation causes death or causes substantial personal injury to another. A further specific regime in respect of game is contained in § 29 of the Federal Hunting Act.

7. With respect to the prevailing law in AUSTRIA please see the previous discussion in Note *8* under VI.–3:206. Alongside the *actio de effusis vel ejectis* . CC § 1318 provides for the imposition of strict liability for dangerously placed objects if these items fall from a dwelling (examples include an advertising board, flower pot etc.). CC § 1318 is correspondingly employed for water damage (defective dishwashers or washing machines, cracked aquariums). A number of important provisions in specific Acts place strict liability for certain fields of activity on a statutory footing and are found in the Nuclear Energy Act § 11, Forestry Act § 54, Mining Act § 185, Water Rights Act § 26, Aviation Act § 148 and Pipeline Act § 10. Austrian federal law is also familar with such ad hoc statutes, regulation of hunting being one such example.

8. GREEK law provides for further forms of strict liability in the field of air transport law. The Air Transportation Code [Law 1815/1988] art. 106 provides for liability of the air carrier for personal injury incurred by passengers aboard domestic flights (see *Dimopoulou*, I evthini apo diakindinevsi, 121); loc. cit. art. 117 sets forth a corresponding claim for persons who are on the ground (see *Georgiades*, Enochiko Dikaio I, 696). Employer's liability for work related accidents of employees is also a case of strict liability and is regulated in Law 551/1915 (*Dimopoulou* loc. cit. 136); however, a social security scheme was implemented to cover this field of liability (*Georgiades* loc. cit. 698). Law 314/1976 pertaining to oil pollution at sea, nuclear energy law (*Dimopoulou* loc. cit. 251) and the Law 563/1977 concerning liability for damage caused by space objects (*Dimopoulou* loc. cit. 257) are further instances of ad hoc strict liabilty provisions.

9. Similarly, a copious number of strict liability provisions remain to be considered under PORTUGUESE law (i.e. ancillary to those provisions already examined in the Notes pertaining to VI.–3:201-3:206), to some extent integrated within the Civil Code, otherwise can be found in various ad hoc statutes. Under CC art. 1347(3), the owner of constructions, installations or deposits of corrosive substances is liable independent of fault for damage caused by them. It is important to note that CC art. 493(2) (on liability for dangerous activities, see Note *10* under VI.–3:206) has been given a wide scope of application. For example, this provision has been held to apply to the organisers of large sporting events (STJ 17 November 2005). Further strict liability regimes can be encountered in numerous specific statutes which have not been integrated within the Civil Code, *inter alia* the Labour Code arts. 120g, 239, 281, Hunting Act art. 33(1) (see STJ 10 October 2002) and Ultra-light (non-motorised) Aircraft Decree Law art. 14(1). DUTCH CC arts. 6:176 and 6:177 are discrete provisions where strict liability is attached to the operation of dumping grounds and drilling holes. Additionally, by virtue of CC art. 7:658(1) a strict liability regime exists to render the employer liable for damage arising from an unsafe work environment (see further HR 10 December 1999, NedJur 2000 no. 211 p. 1376; HR 17 November 2000, NedJur 2001, no. 596 p. 4376; HR 26 January 2001, NedJur 2001, no. 597 p. 4393; HR 15 December 2000, NedJur 2001, no. 198 p. 1306; HR 4 May 2001, NedJur 2001, no. 377 p. 2814 and HR 29 June 2001, NedJur 2001, no. 476 p. 3556).

10. Likewise, further additional expositions of strict liability can be found in the NORDIC countries. They include regulations pertaining damage arising in the course of transport by plane, rail and ship (in respect of SWEDEN please see the Act concerning liability for damage caused in the course of aviation [1922:382], Railway Traffic Act [1985:192] chap. 5 § 1 and Maritime Code chaps. 7 and 10; for DENMARK Aviation Traffic Act (*luftfartsloven*), Railway Act (*jernbaneloven*) chap. 7 and Maritime Act (*søloven*) § 191; and for FINLAND Air Traffic Act [1995/281], Railway Traffic Liability Act [1999/113] and Maritime Act [1994/674] chaps. 7 and 10). The general tenor of liability for individual loss arising from damage to the environment in

SWEDEN and FINLAND can have a considerably more wide ranging reach than these Principles, in particular in that pure economic loss is captured (e.g. Swedish Supreme Court 1 November 1996, NJA 1996, 634). It may also be noted that, in a number of cases, the FINNISH Environmental Damage Compensation Act § 7 allows for liability to be imposed on the natural person which is controlled by the legal person, this entails that the natural person incurs liability when the relevant installation is formally operated by the legal person (Finnish Supreme Court 22 March 2001, HD 2001:61). Moreover, the trinity of Nordic Countries have developed rules of strict liability for damage arising from excavations and similar construction work. There is also a special regime in respect of damage arising from fractured water and sewage pipes.

VI.–3:208: Abandonment

For the purposes of this Section, a person remains accountable for an immovable, vehicle, substance or installation which that person abandons until another exercises independent control over it or becomes its keeper or operator. This applies correspondingly, so far as reasonable, in respect of a keeper of an animal.

COMMENTS

A. First sentence

Purpose of the rule. This Article adds a clarification for the purposes of VI.–3:202 (Accountability for damage caused by the unsafe state of an immovable), VI.–3:203 (Accountability for damage caused by animals), VI.–3:205 (Accountability for damage caused by motor vehicles) and VI.–3:206 (Accountability for damage caused by dangerous substances or emissions). The point in time for which status as owner, keeper or occupier is material is essentially the moment when the event causing the damage occurs. This Article makes an exception to that basic rule. No-one should be able to avoid responsibility as owner, keeper or occupier simply by abandonment.

Abandonment. "Abandonment" presupposes an intentional and voluntary act which is directed towards giving up control of the thing. The unintended loss of a thing is not an abandonment. Nor is there an abandonment when another's property is returned properly, e.g. when a motor vehicle is parked by its temporary keeper at a given car park, as agreed with the owner, in order that the latter can drive it away from there later. Equally the correct disposal of a thing or substance is not an abandonment because in such a case the thing or substance passes without hiatus into another's control. By contrast, a person who simply leaves an old, but still fully functional, vehicle at the side of the road or lets an installation or plant become derelict without taking measures to safeguard it or who tips dangerous substances on to a rubbish dump, buries them somewhere in the countryside or lets them sink into a pond, remains responsible for that thing, even if no longer its keeper at this point in time.

B. Second sentence

Animals. The same starting point applies also to animals, but requires qualification by a reasonableness test. This is necessary to take account, for example, of wild animals which have been raised in captivity, but with a view to their reintroduction into the wild, and animals which have run away and can no longer be recaptured.

NOTES

1. Pursuant to FRENCH law "abandoned" objects (*res derelictae*) are things which are ownerless or without a keeper; consequently, no person can be made accountable for the ensuing damage (*le Tourneau and Cadiet*, Droit de la responsabilité et des contrats [2006/2007], no. 7695). The feasibility of renouncing ownership is derived from an analogous application of CC arts. 656, 699, 917 and 2172, culminating in a release from obligations tied to ownership (*Zenati and Revet*, Les biens[2], no. 202 p. 242). This premise essentially applies also in respect of liability for animals pursuant to CC art. 1385. In general property in ownerless things accrues to the State (CC arts. 539 and 713; Code général de la propriété des personnes publiques art. L. 1122-1 and 1123-1).

There is a scarcity of case law in respect of the liability for *res derelictae*. Cass.civ. 18 June 1997, Bull.civ. 1997, II, no. 197 p. 116 concerned an abandoned warhead in a mine which had not been operated in eight years. The claimant picked it up and succeded in manipulating it in such a manner that it denotated, resulting in severe injury. It was held that while the quarry belonged to the commune, it could not be said that the commune was the *gardien*; on the contrary the injured party himself was its *gardien*. Similary, according to the prevailing view in BELGIUM *res derelictae* are, as a general rule regarded as res nullius, i.e things which do not have a keeper (*Dalcq*, Responsabilité civile I^2, no. 2090). As a consequence liability is excluded pursuant to CC art. 1384(1) (*Dalcq* loc. cit. no. 2042).

2. In SPAIN the basic rule provides that a person who has legally abandoned a thing and therefore renounced their property right no longer has the duty of care that ownership requires or involves (*Albadalejo*, Derecho Civil, III[1]^8, 231-232). That implies, for instance, that the owner or possessor of an animal, once the animal was abandoned, will not be liable for damage caused by the latter under CC art. 1905 (Albaladejo [-*Pantaleón Prieto*], Comentarios al Código Civil y compilaciones forales VIII[1], art. 610 p. 187). Nevertheless, damage caused by a thing which was abandoned may be attributed to the conduct of the former owner or former possessor under the general rule on non-contractual liability (CC art. 1902, see *Albadalejo* loc. cit. 232, fn. 5; Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Miquel González*], Código Civil II^2, 1232). In respect of waste, some provisions within the autonomous legislation of the regions establish a specific liability regime (see, for instance, *Ley Comunidad de Madrid* 5/2003 of 20 May *de residuos de la Comunidad de Madrid*, BOE of 29 May 2003, art. 25(6) [producers of waste substances remain liable for damage caused as long as they possess these substances] and *Ley Parlamento de Galicia* 10/1997 of 22 August *de residuos sólidos urbanos* art. 10 [all urban waste substances shall always have a keeper]). It must be stressed, however, that abandonment of a substance does not seem to play any significant role when determining liability (see e.g. TS 8 March 2006, RAJ 2006 (1) no. 1076 p. 2795: parental liability under CC art. 1903(2) for dangerous substances in a bottle which was probably abandoned by their children). Of course a distinction must be drawn beween moveable and immoveables**.** If ownership of an immoveable is renounced, then ownership then accrues (escheats?) to the State by virtue of law (Act on assets of the Public Administration [*Ley* 33/2003 of 3 November *de patrimonio de las Administraciones públicas*, BOE of 4 November 2003]) art. 17. Thus, the competent public administration becomes strictly liable for damage caused by an immovable that has been abandoned (loc. cit. art. 139).

3. Similarly in ITALY a differentiation is made betweem moveables and immoveable property. It can be educed CC art. 923(2), that ownership of a moveable can be renounced by means of a *derelictio* and hence acquires teh status of a *res nullius*. This circumstance alone does not alter the fact that a *derelictio* can also in the individual case simulataneously amount to a tort in particular cases which entails that the renounciation of ownership is not effected. This is the case e.g., if rubbish is not correctly disposed of or where it is sold illegally (*Gambaro*, Diritto di proprietà, 862-863). The liability of a person in ist capacity as custode of the thing ends as soon as the person relenquishes control over the thing. In respect of immoveables, italian law recognised what is commonly called *abbandono liberatorio* (CC arts. 888, 1070, 2858). This doctrine permits the owner to absolve himself of particular encumbrances or obligations in a number of defined circumstances. Naturally the property does not become ownerless but ownership is immediately vested in the new owner (e.g. in the case that the owner of a servient estate renounces ownership in favour of the owner of

the dominant estate). In a case of *abbandono semplice*, as can be inferred from CC art. 827, ownerhip is immediately vested in the State (*Gambaro* loc. cit. 867-868).

4. Similarly, HUNGARIAN law takes cognisance of the *derelictio,* however its application is precluded in the case of registered land (CC § 112(2)). Incidentially there is no corresponding provision to VI.–3:208 in the Civil Code. Law no. LIII/1995 on the General Rules of Environmental Protection §§ 102(4) and 104 set forth specific provisions on liability for environmental damage for a company's legal successor. POLISH CC art. 340 provides that a temporary loss of possession will not interrupt the continuance of possession, hence this has an impact on all strict liability provisions which relate to the possession of a thing (CC arts. 434, 436 § 1). There is a presumption that possession endures continously. The possessor cannot excuplate himself from tortious liability by claiming that he assigned the running of the business to another (CC art. 429). The application of CC art. 431 § 1 extends the liability of the keeper to animals which have strayed. *Derelictio* is possible only in respect of movables (CC art. 180) in the form of an abandonment (an intention to abandon is required) which entails the loss of possession having an effect on all provisions of strict liability which are based on possession of a thing (CC arts. 434, 436 § 1). It is accepted within the framework of the provisions pertaining to the keeper's liability under ROMANIAN CC art. 1000(1) that the owner does not via *derelictio* forfeit his status as keeper, until another party acquires actual control and a congruent right of control over the thing (*Lupan*, Răspunderea civilă, 187). There is correspondence between these provisions and the provisions dealing with liability for animals under CC art. 1001 (*Lupan* loc. cit. 221).

5. Pursuant to GERMAN Law ownership of land (CC § 928) as well as ownership of moveable property (CC § 959) can be renounced, hence the property becomes ownerless. As a general rule, the voluntary abandonment of goods is bound up with the relinquishment of the attribute of keeper. However, the argument has been advanced that pursuant to § 7(1) of the Road Traffic Act the former keeper retains responsibilty because the motor vehicle is not permitted to be keeperless in operation (*Greger*, Haftungsrecht des Straßenverkehrs[4], § 3, no. 274). The Environmental Liability Act § 2(2) provides, in respect to dangers posed to the environment by installations that liability will be incurred by the previous operator provided that the impact to the environment derives from a hazard, and the basis for the danger posed by the installation was already in place prior to the cessation of operations.

6. In AUSTRIA ownership of moveable property can be relinquished by a voluntary renouncement of possession (CC § 349); renouncing the ownership of rela property requires the deletion of the land registry entry (CC § 350). Renouncing ownership does not entail that any previous incurred obligation to pay damages or obligation to remove the harmful consequences is nullified (OGH 31 October 1968, JBl 1968, 568; *Ertl*, JBl 1974, 281, 342) nor does it follow that the defendant is relieved of his obligations in respect of the fulfillment of specific protective duties owed to the general public (Rummel [-*Spielbüchler*], ABGB I[3], § 387 no. 2). This holds true, e.g. in respect of the duty of the landowner to maintain and keep the property in proper condition. Ad hoc statutes, in particularly environmental statutes, clarify that the last keeper or proprietor remain liable, and hence cannot abdicate responsibility simply by means of voluntary renouncement of posession (e.g. Waste Management Act § 18).

7. Within the framework of the *derelictio*, a similar distinction is made in PORTUGAL between movable and immovable property. The ownership of animals and other movables abandoned by their owners can be acquired by occupation (CC arts. 1316, 1317(d), 1318 and 1323(2)); if the freehold is renounced then ownership accrues *ex*

lege to the State (Const. art. 89; *Menezes Cordeiro*, Direitos Reais, 484- 485). If someone abandons a vehicle he loses "effective direction" (CC art. 503(1)) over it and is therefore no longer strictly liable. As far as dangerous substances are concerned, the same holds true for the point of departure under CC art. 509(1). However, the failure to properly dispose of such substances could amount to a dangerous activity in the sense of CC art. 493(2). When building works are completed, a duty is extant in respect of the removal of waste and other rest matter from the area (Urbanisation and Construction Decree Law art. 86; Public Contracts Code art. 177(2)). A commune which fails to remove the charred part of a building which resulted from a fire in a palace owned by it, hence causing damage to neighbouring property, is liable under the general tenets of tort law (CA Oporto 6 January 2003; STJ 8 July 2003). If wild or stray animals stray onto a motorway owing to a failure to secure a fence which ringed them in and their keeper cannot be ascertained, recent case law has held that the person licensed to operate the motor way is liable for accidents caused in this manner (STJ 22 June 2004; CA Lisbon 15 May 2007; CA Evora 25 January 2007). According to DUTCH Law the scope of application of the regulation contained in VI.–3:208 corresponds to CC art. 6:176(1), whereupon the operator of a dumping ground is also liable for damage which is caused by air, water of ground pollution, even if it originates following the closure of the dumping ground. Ownership of ownerless property accrues to the State (CC art. 5:24).

8. In the NORDIC countries the issue addressed by VI.–3:208 is rarely broached. In the first instance, liability for omissions could be regarded as providing a basis for liability for an abandoned object. This stems from the fact that the relinquishing the object could entail a prior positive act increasing the risk of danger, which according to general tort law rules would ground a duty to proactively obviate the ensuing danger (see further *Hellner and Radetzki*, Skadeståndsrätt[7], 114; *Vinding Kruse*, Erstatningsretten[5], 111; *Saxén*, Skadeståndsrätt, 41). Swedish HD 14 December 1935, NJA 1935, 636 held e.g. that a man was liable to pay damages, who left a piece of quick lime in a bucket, after pouring water on it, which later exploded, injuring some bypassing children. DANISH Eastern CA 12 February 1931, UfR 1931, 598 confirmed the liability of a tenant who had moved away from his apartment and left an accumulator in it, which later started leaking acid causing damage to the tenant occupying an apartment below. Furthermore Finnish HD 1954 II 66 affirmed the liability of a man who wished to dispose of some chemical waste by burning it on another person's property, subsequently causing damage to the latter's animals. For Sweden, the prepatory works to the Environmental Code confirm that a person who secretly disposes of substances on another person's property is liable for damage caused by those substances (NJA 1986 II, 141). At the same time, it is necessary to take note of the fact that conceptually, the Environmental Code chap. 32 employs a very extensive meaning of an installation posing a danger to the environment or an activity dangerous to the environment (e.g. a person who acquires real property is liable for substances which pose a danager to the environment, which had been left on the land by the previous operator of an installation without the knowledge oft he new owner : HD 3 September 1983, NJA 1984, 602; Supreme Administrative Court 16 January 1997, RÅ 1997, 12 I; S-Karnov 2006/07 [-*Karlsson*], Miljöbalk, no. 347 p. 2385). It is uncertain that this position prevails in Denmark and Finland; however actual and constructive knowledge of dangerous substances leads the new owner being made accountable (Danish Western CA 24 May 1994, FED 1994, 537; *von Eyben and Isager*, Lærebog i erstatningsret[5], 190; Finnish Environmental Damage Compensation Act § 7(1-3)).

CHAPTER 4: CAUSATION

VI.–4:101: General rule

(1) A person causes legally relevant damage to another if the damage is to be regarded as a consequence of:

(a) that person's conduct; or

(b) a source of danger for which that person is responsible.

(2) In cases of personal injury or death the injured person's predisposition with respect to the type or extent of the injury sustained is to be disregarded.

COMMENTS

A. General

Scope. Paragraph (1) contains a general rule on causation. It relates to both the causation of damage by human conduct and the causation of damage in cases in which the ground of accountability is not human conduct, but rather a person's responsibility for a source of danger. In the latter case the legally relevant damage must have been caused by the source of danger. The Article is linked to VI.–1:101 (Basic rule) paragraph (1), under which causation constitutes one of the three indispensable pillars for liability under this Book (alongside legally relevant damage and accountability). Paragraph (2) of the present Article contains a special rule for the case of the injury or death of a person who already, prior to the accident, suffered from an infirmity or illness which contributed to the severity of the physical injury.

Policy considerations. Notwithstanding the many questions connected with the concept of causation, it is an undisputed cornerstone of all European legal systems of liability - including Community law - that the legally relevant damage must have been "caused" either by the liable person or by another person or a material source of danger for which that person bears responsibility. Although causation alone is never sufficient for liability - apart from some regional exceptions in the law on traffic accidents - civil liability in damages never comes into the picture without it. This branch of the law does not impose liability for damages simply for moral or general political reasons. It is not the "duty defaulter", the "rich person" or the "insured party" who is made liable, but rather a person to whose sphere of control the subsequent mishap may be traced back. Where sufficient evidence of this causal link is lacking, while a person may be exposed to responsibility under criminal or insurance law or may incur other sanctions, there is no liability under this branch of the law. In the Europe of today, a mere attempt to harm no longer grounds civil liability in damages in any jurisdiction. Wrongful conduct that is apt to occasion damage, but has not yet done so, may, however, be prevented by means of a prior restraint order (VI.–1:102 (Prevention)).

Illustration 1

A claim in damages does not materialise where the dishonest competitive conduct of A did not cause the subsequent loss of profit of competitor B, because the lost profit had been attributable to a dip in sales due to a slow-down in the economy. B can, however, obtain protection from further dishonest anti-competitive behaviour on A's part where there is a threat of a further setback in profits because of it.

The term causation. The term "causation" is used in all European systems of legal liability, but is nowhere defined. Provisions giving some indication of how causation is to be *determined* are encountered, but only infrequently. As can be seen from this Article and from VI.–1:101 (Basic rule), this Book regards causation as the necessary link between (a) the intentional or negligent conduct of the person who is to be held liable or a source of danger for which that person bears responsibility and (b) legally relevant damage. It must be possible to say of the damage that it is to be regarded as a consequence of the liable person's conduct or of a source of danger for which that person is responsible. The Article builds on Chapters 2 and 3 and makes it clear that causation can follow differently nuanced rules depending on the attributive cause and the legally relevant damage.

Causation by conduct. Paragraph (1)(a) governs the case in which a person has caused the relevant damage by that person's own conduct. "Conduct" has the same meaning here as in the context of VI.–3:102 (Negligence). See the comments on that provision.

Causation by omission. The Article makes no distinction between positive action on the one hand and passivity or omission on the other. The cause of legally relevant damage as a matter of law under these rules may well be an omission. This follows the pattern set in the context of negligence, where the draft also avoids differentiating between positive acts and omissions (see comments to VI.–3:102 (Negligence)). It would contradict that approach to adopt a different line in relation to causation. The only possibility for a precise separation of positive acts from omissions would presumably be a test of whether a person had physically acted or not. Such a criterion is, however, not legally usable. For example, a driver who fails to stop at a red light and consequently injures a passenger would have to be regarded as having omitted to act (by omitting to remove the foot from the accelerator and apply it to the brake pedal) rather than as having positively done something which ought not to have been done. That would scarcely be in line with normal conceptions of the basis of liability. An omission by a person is a cause of damage when (a) the person had the opportunity to intervene and was under a duty to use that opportunity and (b) the damage is to be regarded as a consequence of the failure to intervene.

Illustration 2
A doctor fails to tell the hospital of a patient's high risk of suicide. However, the hospital was already aware of this danger. The omission to inform was thus not causative of the death of the patient.

Illustration 3
Two acquaintances go fishing together. For that they use electric power – as they have done on previous occasions – which one of them (A) feeds into the river with the aid of an insulated cable from a public power supply line, while from the riverbank the other (B) drags a long wooden rod with a wire net on it through the water. B suddenly falls into the river. A sets about getting him out of the water but abandons his attempt when he feels the electricity in the water. First of all, he disconnects the cable from the supply line, which costs him a lot of time. B's deceased body is later taken from the water. It turns out that he was already dead when he fell into the water. The cause of B's death was not A's omission to rescue him, but a circulatory failure (resulting from a so-called stance tension caused by the splay of his legs while fishing). Conversely, while A's joint action with B in relation to the fishing was indeed causative of B's death, the latter acted at his own risk when he got involved in such a dangerous activity (VI.–5:101(2) (Consent and acting at own risk)).

Causation by a source of danger. Chapter 3, Section 2 (Accountability without intention or negligence) sets out the situations in which a person is liable although that person may have behaved entirely correctly and not caused the damage by conduct. While in these cases liability also requires causation, the damage will not have been caused by the person liable. Precisely because this is so, in most cases of this nature it is only the causing of particular types of damage which will lead to liability. In other words, in the context of this type of attributive cause, only certain types of damage are legally relevant. Two basic situations must be distinguished.

Vicarious liability. In the first group of cases – often and imprecisely termed "vicarious liability" – the damage has been caused by a person for whom the person liable must take responsibility. The main example is to be found in VI.–3:201 (Accountability for damage caused by employees and representatives). The damage is actually caused by, for example, the employee and not the employer. The mere hiring of an employee is insufficient to qualify as a cause of damage because such conduct is allowed and even desired (It would be different where the employee is hired for a job which is manifestly beyond the employee's capabilities; here the employer is acting in breach of duty). In contrast, the case of a parent's liability (VI.–3:104 (Accountability for damage caused by children or supervised persons)) has to do with a double test of causation because the wrongdoing of the child as well as the parent's failure to supervise will be causative of the damage.

Damage caused by animals and things. In the second group of cases the damage has been caused by the realisation of a danger from a source for which the liable person is responsible. The text does not therefore proceed from the proposition that only humans are capable of being the "cause" of damage. Rather the cause of a legally relevant damage might equally be an animal, the condition of land or premises, motor vehicles, products, substances or the like. In such cases the rules set out in VI.–4:103 (Alternative causes) might also apply..

Connection between legally relevant damage, attributive cause and causation. Paragraph (1) of the Article sets out the connecting link – necessary for the law on liability - between legally relevant damage and attributive cause (intention, negligence, source of risk). The formulation has been deliberately kept flexible ("is *to be regarded* as a consequence…") so as to ensure that, in the context of causation, differences between individual attributive causes and legally relevant damage can be taken into account. In a legal setting there is no "one-size-fits-all" general test for causation. Rather, considerations relevant to causation may be different depending on which ground of liability and which kind of legally relevant damage is in focus. If the person causing the damage has acted intentionally, it will be easier to characterise a legally relevant damage as the consequence of the conduct than if the matter is one of misjudgement or minor carelessness. Similarly, if the damage takes the form of personal injury, causation may be more readily affirmed than would be the case with damage to property or a pure economic loss. For the cases of liability without intention or negligence the provisions of Chapter 3, Section 2 contain specific rules which are also important for the test for causation. This is because their underlying feature is that liability depends on whether the risk which justifies the imposition of the strict liability is realised in the damage which has occurred.

Special rules. A few special rules supplement the general rule in paragraph (1) of the Article**.** Paragraph (2) expresses the idea that a wrongdoer "must take his victim as he finds him", thus

precluding the argument that the injury is in reality attributable to a condition or affliction from which the victim already suffered and not to the conduct of the wrongdoer. VI.–4:102 (Collaboration) may be regarded as a rule which clarifies in a specific case the application of the doctrine of "psychological" causation. VI.–4:103 (Alternative causes) governs the special case of so-called "alternative" causation. In contrast, VI.–6:103 (Equalisation of benefits) proceeds on the basis that issues of so-called benefit equalisation are not to be qualified as a matter of causation, but as a question of the extent of the reparation which is to be provided. However, there is no provision in this Book which would render the members of a group (e.g. participants in a protest march willing to resort to violence) liable solely because of their participation in the activities of the group. Incidentally, that would also be a rule which would have to be conceived as a norm of accountability (liability for the causation of legally relevant damage by others), not of causation. The question of liability for loss of a chance would be a question concerning legally relevant damage, not causation; of course the differences of opinion on this issue confirm that these two elements of liability (legally relevant damage and causation) partially intersect.

B. Particulars

Cause in fact and cause in law not distinguished. Many jurists are inclined to make questions of causation the subject of fundamental and philosophically elevated treatment. It is not the function of paragraph (1) of this Article to attach itself firmly to a defined theoretical position within the broad spectrum of opinion. The width and complexity of the subject do not speak in favour of a precise rule on causation. Paragraph (1) therefore only establishes the basic principle on which all juristic considerations of causation rest: a conduct or a source of danger causes a legally relevant damage if the damage is to be regarded as a consequence of that conduct or source of danger. Consequently, the provision does not distinguish between a cause in fact and a cause in law. The Article rather leaves it for further discussion whether and to what extent such a distinction will stand up in theory and in turn lend itself to be being put into practice.

No reduction to a "conditio sine qua non" formula. This is in turn the reason why paragraph (1) does not reduce the test for causation to a "but for" or "*conditio sine qua non*" test. This would have merely put a "factual" or "scientific" concept of causation into words. Numerous exceptions and expansions would have been necessary, even at this level, without there being any real prospect of exhaustively covering the subject-matter. Just as important is the point that the "but for" test alone cannot separate consequences falling within the perimeter of relevant liability from consequences falling outside this perimeter and not giving rise to liability. This process of separation takes place well-nigh unavoidably on the basis of a value judgement, of what might be called a "legal" or "normative" test for causation. Incidentally, in the context of these rules, the decisive factor is not whether a random event is the cause of another random event, but rather whether there is a link of cause and effect between an intentional or negligent conduct or a source of danger on the one hand and a legally relevant damage on the other. The jurist does not ask the question e.g. whether someone who gets up in the morning five minutes earlier and was therefore earlier at the scene of the accident has caused the accident solely by virtue of this fact, because the very breach of duty is already lacking. The question would be just as pointless as the question whether a person injured by an assault caused the injury through mere presence at the site of the incident.

Illustration 4
An accident occurs on a straight road. Through lack of attention, A drives into B's car, which is at the side of the road fully in accordance with traffic regulations. Neither the damage to B's vehicle nor the damage to A's car is the consequence of negligent conduct on the part of B; nor are they a consequence of the use of B's car.

Elements of assessment. The factors to be taken into account in deciding whether a particular legally relevant damage is to be seen as a consequence (even if it is not the only one) of particular wrongdoing or of a particular source of danger do not lend themselves well to being conclusively listed nor to being given a relative weighting in relation to each other. Each individual case can make a new calibration necessary. Aspects of probability and foreseeability come into play but so too do the type of the attributive cause and the type of damage. Also relevant are the protective aim of the norm of social behaviour which has been infringed and (occasionally) general policy considerations. In European legal doctrine there are numerous formulations on this topic – for instance that the damage arising must be an "adequate" consequence of the act breaching a duty, that it may not be "too remote" or that through it, an individually specified risk must have been realised. These doctrinal approaches are neither confirmed nor challenged by the Article.

Break in the chain of causation. Only through carefully evaluated considerations of the type mentioned may a solution be found to questions like whether the damage incurred is to be deemed a consequence of a particular person's conduct or whether it is to be attributed in whole or in part to the conduct of an intervening third party or even to the conduct of the victim. While the intentional intervention of a third party typically breaks the chain of causation or liability, it depends on the circumstances of each individual case whether or not the damage is to be seen as a consequence of a particular person's conduct.

Illustration 5
While having a rest, a hunter (A) leaves a loaded rifle leaning against a tree contrary to regulations. B lifts the rifle; it lets off a shot and C is killed. A's conduct in breach of duty was causative for the death of C if the shot went off by accident when B was holding the rifle or if B indeed intended to fire the rifle and then mistakenly hit C. In contrast, C's death can no longer be seen as a consequence of A's not unloading the weapon if B took the rifle for the purpose of killing C, unless A had set up the scenario in order to facilitate this deed.

Illustration 6
A is responsible for a road accident. The scene of the accident must be closed off for a spell. Impatient drivers drive around the accident scene and so damage the bordering cycle lanes and pedestrian pathways. This is no longer a consequence of A's wrongdoing, through which the road accident occurred.

Illustration 7
A and her life partner B are accosted by D and E when leaving C's discotheque. After an exchange of words between C and D, B is beaten up. A attempts to get help but is then struck herself by E and severely injured. C (who is sued by A because he alone has a deep pocket) is also liable to A for her damage. The intervention of E does not break the chain of causation because life experience shows that when someone out of a group begins a brawl, it easily leads to uncontrollable complications.

Self-harm of the victim; contributory fault. Where the intervening person is later the victim, two questions must be kept apart. The first question is always whether the person alleged to be liable also caused (along with the victim) the victim's conduct and subsequent damage. This is typically answered in the affirmative if the victim's act or omission was provoked by the person's wrongdoing, i.e. where it was probable that the victim would react in this way. Only when this question has been answered in the affirmative does the further question arise whether the injured person's right to compensation under VI.–5:102 (Contributory fault and accountability) is to be reduced because of contributory fault.

Illustration 8
A suffers a head injury in a traffic accident and then develops a tendency to attack women. He is rendered liable in damages to the women and demands compensation from B, who was responsible for the traffic accident. However, the liabilities to pay damages are not to be regarded as a consequence of the accident; they are to be regarded as the consequences of A's own criminal acts.

Illustration 9
In the course of an operation, A's daughter's only kidney is culpably removed; A's mother then decides to donate one of her kidneys. An easily understandable and obvious decision is what is at issue here; consequently, the doctor is liable as against the mother.

Illustration 10
Following the theft of several vehicles and their retrieval, an insurance company pays a finder's reward. The vehicle thief must compensate the insurance company for this because even the insured party, whose claims to insurance were passed over, would have had to pay a finder's reward. The latter is a consequence of the theft.

Illustration 11
A tram driver is stopped by an inspector and summoned to pay a fine. The driver jumps up and runs through the opening door of a train just arriving at the stop. The inspector follows, falls and breaks a leg. This is still deemed a consequence of the conduct of the tram driver, unless the tram driver did not know of the pursuit and would have had no reason to infer this.

Causation of a legally relevant damage. The Article is concerned with the causation of legally relevant damage. What exactly constitutes a legally relevant damage is determined by Chapter 2. It may take the form of a mere injury, but equally it may consist in a particular loss. In the latter case, strictly considered, there are two issues of causation in the majority of cases. In a case involving VI.–2:206 (Loss upon infringement of property or lawful possession), for example, the conduct must have caused physical damage to the thing and that in turn must have resulted in a loss. However, the considerations as a legal matter of causation are in the two cases fundamentally the same. The same arguments apply in relation to those provisions in Chapter 2 which refer to a loss arising "as a result" of a given injury, infringement of a right or physical damage.

Burden of proof. In this context, the decisive element is the determination that the legally relevant damage suffered is to be deemed a consequence of a person's conduct or the realisation of a source of risk, for which a person bears responsibility. Therefore, under paragraph (1) there is no room for specific provisions on the burden of proof, and particularly

no room for the reversal of the burden of proof in special situations. After all the relevant circumstances have been weighed up in an individual case, the conclusion that the damage is to be deemed a consequence of the relevant conduct or source of danger is based on a legal assessment. If the matter goes to court, the judge is afforded a certain amount of discretion which may and must be exercised. The facts upon which a judgment will be based are to be proven by the claimant according to general provisions (possibly including the *res ipsa loquitur* rule, depending on the applicable law of evidence). Whether the existence of a cause-and-effect relationship between the wrongdoing and damage can be drawn from them, is not something which seems to be amenable to the allocation of the burden of proof. Particularly in the frequently very complex situations of cause and effect with which the law on liability for environmental pollution has to struggle, the assessment of causation must be undisturbed in relation to probability assessment. Where for instance rays of a certain kind very frequently lead to a cancerous disease of the relevant kind and the victim lives in the vicinity of the emitting entity and belongs to a special risk group, there is no reasonable ground for the inference that the disease is not a consequence of the rays.

"Egg shell skull" (paragraph (2)). Under paragraph (2), in cases of personal injury or death, the injured person's predisposition with respect to the type or extent of the injury sustained is to be disregarded. In principle, any person who injures another should not be exonerated because the victim's health was previously unsound or because the victim suffered from a physical or mental affliction. Injury to body or health, and death, in cases caught by paragraph (2) in conjunction with paragraph (1) must be seen as a consequence of the relevant conduct. A person who injures a victim in weak health cannot demand to be put in the position which would have existed if the victim had been healthy; also, in cases of psychological injury, the injury is in principle attributable to the person who inflicted the injury despite the injured person's particular vulnerability. However, depending on the situation in each case, it is conceivable that some pre-existing harm might be regarded as relevant to a reduction of the amount of compensation owed.

Illustration 12
Following an accident for which X is responsible, malignant tumour tissue in the victim's head is torn open and she dies three weeks later. Her hitherto unknown cancerous disease would have ended fatally in any event. However, the accident sped up the process; as a result, the death was a consequence of the accident. The compensation due to dependants for lost maintenance (VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death) paragraph (2)(c)) is limited to the period of time the victim would have probably lived had it not been for the accident. When calculating the non-economic losses suffered by third persons as a result of the death, the pre-existing cancerous disease is also to be taken into account.

Illustration 13
As a result of the severe injury of both parents, a child suffers nervous shock, requiring medical treatment. The fact that the child had a pre-existing illness and even a hereditary affliction changes nothing *vis à vis* causation.

NOTES

I. General Theory of Causation

1. The requirement of causation is a feature common to all European tort law regimes. However, it is very often the case that its precise constitutents cannot be easily discerned from statutory sources. This is true of the FRENCH CC. The only uncontentious issue is that, in order for tortious liability to arise, there must be a causal connection between the fait générateur and the resulting loss (Cass.civ. 27 October 1975, GazPal 1976, I, 169, note Plancqueel). Legal scholarship differentiates between two main (alternative?) theories of causation: the doctrine dite de l´équivalence des conditions and the théorie de la causalité adéquate. The doctrine of equivalent conditions provides that every circumstance which was instrumental in the damage occurring is to be regarded as the cause of the whole extent of the damage; every conditio sine qua non is causal (*le Tourneau*, Droit de la responsabilité et des contrats [2006/2007], no. 1715). Conversely, the doctrine of adequate causation sets forth that an act is only causal when, objectively and a posteriori considered, it seems generally capable of bringing about the resulting damage (*le Tourneau* loc. cit. no. 1716). Both doctrines have been utilised in jurisprudence; it cannot be conclusively asserted that one theory prevails over the other, compare. e.g. in respect of the adequacy doctrine Cass.civ. 24 February 2005, Bull.civ. 2005, II, no. 53 (the children of a man who was injured in an accident long before their birth, sued the defendant on the grounds of préjudice moral, on the basis that they never could establish a normal affectionate relationship with their father; the court held that there was no lien de causalité between the accident and the loss suffered by the children) and as regards the theory of equivalence Cass.ass.plén. 24 June 2005, Bull.ass.plén. 2005, no. 7 p. 16 (occupational accident; it was sufficient that the employer's faute inexcusable was a cause nécessaire for the accident, even where, other fautes, could have contributed to the damage occuring).

2. Conversely, the majority of courts in BELGIUM tend to favour application of the conventional test commonly known as the theory of equivalence of conditions (but for test) (*Vandenberghe/Van Quickenborne/Wynant/Debaene*, TPR 2000, 1551, 1876, no. 144; *Dalcq and Schamps*, RCJB 1995, 663, 696 no. 126); it is frequently very strictly applied. It suffices that, but for the act of the defendant, the harm would not occured in the manner that actually transpired (Cass. 13 October 2004, Pas. belge 2004, I, no. 476 p. 1558). Every condition or event, without which the concrete damage would not have occured in the manner that it did occur, is regarded as one of the causes of the damage (Cass. 23 February 1994, Pas. belge 1994, I, no. 90 p. 196; Cass.ch.réun. 1 April 2004, JT 2005, 357, note *Estienne*). The trial judge hypothetically reconstructs the chain of events leading to the damage: causation will only be denied in the event that, the damage would have occured anyhow, had the defendant behaved in a rightful (non-tortious?) manner (*Bocken*, TBBR 1988, 268, 273, no. 8). However, it remains to be said that the *Cour de cassation* has not always strictly abided by these criteria. In several decisions, the courts have had recourse to the socalled doctrine of "rightful alternative behaviour" (the issue that presents itself here is that the damage can be attributed to the wrongful behaviour of the defendant, even if he had acted lawfully, the damage would have resulted nonetheless) (Cass. 25 September 1979, Pas. belge 1980, I, 111; Cass. 8 September 1983, RW 1983-84, 2033; Cass. 19 November 1987, RW 1987-88, 1125). This approach has not been well received in academic circles, (*Vandenberghe/Van Quickenborne/Geelen/De Coster*, TPR 1987, 1255, 1522, no. 164) and the decision of the Cass. (audience plénière) 25 March 1997, Pas. belge

1997, I, no. 161 p. 405 does not fully clarify whether the courts will continue to observe this jurisprudential direction. In any event, there are further indications that the Cour de Cassation has departed from the strict application of equivalence theory, thereby, ceding some scope to the adequacy theory (Cass. 14 June 1996 and Cass. 5 November 1996, Pas. belge 1996, I, nos. 413-414 p. 1070, see illustration 4 above; Cass. 10 May 1994, Pas. belge 1994, I, no. 228 p. 455; *Beysen*, VersRAI 2004, 10).

3. Generally, SPANISH courts rarely delve into questions of causation. However, it can be asserted that given that the Supreme Court refers so frequently to the criterion of "adequate causation" (TS 15 March 1993, RAJ 1993 (2) no. 2284 p. 2958; TS 9 October 1999, RAJ 1999 (4) no. 7245 p. 11381; TS 16 January 2002, RAJ 2002 (1) no. 8 p. 24; TS 5 December 2002, RAJ 2002 (6) no. 10427 p. 19300; TS 27 June 2005, RAJ 2005 (3) no. 4438 p. 9337; TS 9 March 2006, RAJ 2006 (2) no. 1882 p. 4474), that it has matured into a point of departure under prevailing law. TS 24 May 1993, RAJ 1993 (2) no. 3727 p. 4743, however, applied the 'preponderance evidence criterion'; the causal nexus was affirmed owing to the fact that it was highly improbable that harm was not caused by the defendant's emissions. TS 10 February 2006, RAJ 2006 (1) no. 675 p. 1617 u (at FJ3) expressly distinguished between causation in fact and causation in law; factually the damage was caused by the defendant but legally the damage was caused by the injured party itself. Older decisions were based simply on the *buen sentido*, "common sense" (e.g. TS 18 April 1985, RAJ 1985 (1) no. 1770 p. 1511 and TS 4 March 1988, RAJ 1988 (1) no. 1553 p. 1497), furthermore, until recently, the doctrine of 'effective cause' was frequently utilised (*causa eficiente*)(TS 11 February 1993, RAJ 1993 (1) no. 1459 p. 1836; TS 3 December 2002, RAJ 2002 (6) no. 10414 p. 19277). The First Chamber of the *Tribunal Supremo* recently applied the 'general risk of life' criterion in order to exclude the liability of a gardening company for the damage caused to a passer-by who fell down because of a hose that lay in the pavement (TS 2 March 2006, BDA RAJ 2006 no. 5508) or to exclude the liability of the owner of a building for damage caused to the tenant after its collapse (TS 5 January 2006, RAJ 2006 (1) no. 131 p. 320). It also excluded liability of a hotel owner for damage caused by a fire that had started in the hotel kitchen but spread rapidly due to explosive substances deposited by a third person in the hotel (TS 11 March 1988, RAJ 1988 (2) no. 1961 p. 1925). A break in the chain of causation was conversely denied if the intervening third party did not act in an intentional or grossly negligent manner (TS 27 January 2006, RAJ 2006 (1) no. 615 p. 1486). In order to establish causation, the courts sometimes have recourse to the reliance principle, namely, where the injured party could have relied on the absence of a particular risk (TS 9 March 2006, RAJ 2006 (2) no. 1882 p. 4474); in contrast, causation was denied whre the wrongdoer was not able to appreciate the source of danger (TS 23 February 2001, RAJ 2001 (2) no. 2549 p. 4071). Furthermore, if an infringement of a statutory provision is at issue, the courts will inquire into the protective purpose of the norm (TS 8 October 1998, RAJ 1998 (4) no. 7559 p. 11113).

4. The ITALIAN civil courts apply the same principles governing causation under the criminal law (CP arts. 40 and 41) to what is commonly known as "causation which founds liability", i.e. a link must be found to exist between the act or the omission involving a breach of duty (to act? Is this necessary) and the primary damage incurred. These provisions are regarded as an expression of general legal principles. The Italian courts tend to predominantly abide by the *conditio sine qua non* formula, however, conduct will no longer be considered as causing the harmful event, if the ensuing damage constitutes a departure from the normally expected course of events (*regolarità causale*) (*Franzoni*, Dei fatti illeciti, sub art. 2043, p. 95; cf. E.g. Cass. 7 December 2005, no. 26997, Resp.civ. e prev. 2006, 862: night-time car accident on the

left lane of motorway; the passenger in the car attempted to save himself by jumping over the middle crash barrier but precipitated into an abyss through a hole which was not visible in the darkness and died; the operator of the motorway was found liable; the person who caused the accident did not incur liability based on causation grounds).

5. HUNGARIAN CC makes reference to the requirement of causation in several provisions (e.g. in §§ 339(1), 345(1) and 347(4)). The test usually applied is that the damage must either be caused by a wrongful and culpable/blameworthy act of the defendant (Petrik [-*Harmathy*], Polgári jog II[2], 568; *Petrik*, Kártérítési jog, 64; *Bárdos*, Kárfelelősség a Polgári Törvénykönyv rendszerében, 50; *Szalma*, Okozatosság és polgári jogi felelősség, 52) or derive from that fact that the defendant pursued an activity bound up with an increased potential for danger (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1241, 1259; *Szalma* loc. cit. 50, 70); if causation is not given, then no liability is incurred (BH 2005/364; BH 2004/409; BH 2002/186; BH 1996/255; BH 1993/ 355; BH 1992/637). Causation is also of significance in determining the extent of the damage and in the determination of the compensation that can be obtained as, namely, under Hungarian law, losses are only compensated, if a causal nexus exists between the loss suffered and the damage caused (*Marton*, A polgári jogi felelősség, 122; *Ujváriné*, Felelősségtan[7], 60). Finally, the question of the unlawfulness of the defendant's behaviour falls to be considered under the causation heading, because once damage is caused, it is qualified as unlawful (*Eörsi*, Kártérítés jogellenes magatartásért, 56). A causal connection between the conduct and the damage ought to be given, if the damage would not have occurred but for the conduct of the defendant, the conduct can be imputed to the defendant and his behaviour can be influenced by the threat of sanctions (*Ujváriné*, Felelősségtan[7], 62-63; Gellért [-*Kemenes*], A Polgári Törvénykönyv Magyarázata[6], 1230). The question of liability for indirect causation is of significance especially in the sphere of liability for others and for objects (see further *Marton* loc. cit. 129-130; *Bárdos* loc. cit. 53-54); here the courts factor in the forseeability of the damage as well as the extent of fault on the part of the defendant (*Marton* loc. cit. 178-179; *Petrik* loc. cit. 66-69).

6. According to POLISH CC art. 361 § 1 the person obliged to make reparation is responsible only for the "normal consequences" of an act or omission, out of which the damage arose. The yardstick of "normal consequences" determines also the extent of losses (including loss of profits) which are to be compensated (CC art. 361 § 2). On these grounds legal writing and case law consider that the causal link fulfills two functions: it is a prerequisite of liability and it determines the amount of reparation (Radwański [-*Dybowski*], System prawa cywilnego III(1), 247; *Radwański and Olejniczak*, Zobowiązania - część ogólna[7], 86). The assessment of the consequence as "normal" is a two step process: first, the test of *conditio sine qua non* is applied, determining whether there was any causal link between the act or omission and the damage. If that is answered in the affirmative, the second test is whether the consequence is normal, i.e. whether such an act or omission is generally (in particular, statistically) conducive to the occurrence of such a consequence (*Dybowski* loc. cit. 251, 257; *Radwański and Olejniczak* loc. cit. 87-88). According to the dominant legal opinion objective connections are decisive; whether the tortfeasor knew or should have known of this connection is irrelevant (*Radwański and Olejniczak* loc. cit.; *Dybowski* loc. cit. 247). An omission may be regarded as causing damage if there was a duty to act, possibility of action and typically that action would have prevented the damage (*Dybowski* loc. cit. 269). BULGARIAN LOA art. 51(1) first sentence provides that "there is an obligation to make reparation for all losses which are the direct of indirect result of a damaging act." A loss is direct or indirect (these expressions are read as synonyms, they not meant to represent discrete categories of

damage: *Staneva*, Otgovornost za vredi, prichineni ot deza i nesposobni, 115) according to the Bulgarian interpretation of the adequacy theory, if it is the typical or usual result of an event establishing liability (*Kalaydjiev*, Obligazionno pravo, Obshta chast, 360). "Consequential" or indirect damage encompasses the idea of damage which, if anything, unexpectedly occurs and is not necessarily causally linked to a tortious act; this damage consequently arises as the typical and usual result of a separate event (*Kojucharov*, Obligazionno pravo I, 278). According to ROMANIAN CC art. 1086 (however, this provision is only directly pertinent to contract law), the damage is required to be a direct and necessary consequence of the injury that transpired. There are two co-existing doctrines of causation, namely, the doctrine of "necessary cause" (*sistemul cauzalităţii necesare*) and the theory of the indivisible unity of all causes and conditions (*sistemul unităţii indivizibile dintre cauză şi condiţii*); the courts conventionally favour the latter (*Adam*, Drept civil, 296; *Dogaru and Drăghici*, Drept civil, 242-245; *Lupan*, Răspunderea civilă, 94-95). However, an intervening act of a third party or an intervening voluntary autonomous act on the plaintiff's part will break the chain of causation. Therefore, the theft of property from a vehicle involved in a traffic accident cannot be attributed to the party who caused the accident. Likewise, the fact that the victim of accident contracted hepatitis while recuperating from the accident cannot be ascribed to the defendant who caused the accident (for accompanying case law see *Lupan* loc. cit. 363-364).

7. A tenet of GERMAN tort law holds that, in order to succeed in a claim for damages, a claimant is required to establish that the damage can be imputed to the defendant. A distinction is drawn between causation which founds liability (*haftungsbegründene Kausalität*) and causation which determines the ambit of liability (*haftungsausfüllende Kausalität*). Under the rubric of "causation founding liability" the usual requirement is to demonstrate the existence of an adequate causal nexus between the conduct (an act or an omission) and the breach of law, and secondly, it calls for further examination into whether the ensuing damage is encompassed within the protective scope of the rule that has been infringed (Palandt [-*Sprau*], BGB[66], § 823, no. 2a). Causation determining the ambit of liability concerns the causal link between the basis for liability (breach of law) and the ensuing damage (Palandt [-*Heinrichs*], BGB[66], Pref. to § 249, no. 56). The theory of equivalence lays down minimum requirements pertaining to *Haftungsbegründung* und *–ausfüllung* harnassing the *conditio-sine-qua-non* formula. Accordingly, an event causes damage, on the basis that were it "assumed away", the concrete damage would not have occured. The *conditio-sine-qua-non* approach is complemented by the adequacy theory, which operates to reduce the scope of liability. According to this exposition, an event is an adequate cause of the damage, if it is generally suitable to cause the damage that ensued. An event is not an adequate cause of the damage, if it could engender the damage in question only under particularly unique, improbable circumstances which would have been disregarded had events followed their usual course. The adequancy theory is premised on an assessement of probabilities and is supplemented by the "scope of rule" theory. This postulates that an obligation to make reparation will only arise, if the damage claimed, according to its type and its origin, stems from a sphere of danger which the infringed norm was enacted to protect against (*Heinrichs* loc. cit. no. 57 with extensive examination of case law).

8. Similarly, AUSTRIAN CC fails to particularise the exact constitutents of the notion of causation. The answer to the question of when damage is "caused" or "inflicted" by the damaging party must therefore be derived from legal teaching and from case law. Consensus exists on the conventional approach to be adopted, namely, a distinction is made between metaphysical and legal causation, the latter being decisive. Therefore,

arguments have been tendered that one should refer to "imputability of damage" as opposed to employing the term "causation" (e.g. *Barta*, Zivilrecht II[2], 590). The so-called causation doctrine or doctrine of imputability of damage differentiates between the equivalence theory or but for test and the theory of adequate cause. The first step under the adequacy theory based on CC § 1311, is the examination of the question of whether if the defendant's conduct was assumed away, the same result would not have eventuated. Thereafter, the identified causes of the damage are narrowed down by further control mechanisms regarding the imputation of liability, the most important of these being adequate cause. An event is regarded as the adequate cause of the damage if the conduct of the tortfeasor (either a positive act or an omission) appears to be generally apt to bring about the result that has occured. This approach has the effect of excluding abnormal causal effects. A person will not be held accountable for damage over which no judicious control can be exercised (*Koziol*, Haftpflichtrecht I[3], nos. 8/2 and 8/3). A more expansive approach has been adopted in the case of intentional torts as opposed to negligence torts (*Koziol* loc. cit. no. 8/16). For example, an adequate causal nexus was affirmed between leaving a loaded weapon unattended and damage which eventuated from unauthorised use of same (OGH 16 January 1952, SZ 25/14); similarly, between a child in peril and an injury sustained by the rescuer who rushed to the child's assistance (OGH 23 June 1967, ZVR 1968/87 p. 193); between a grave permanent injury and an attempt at suicide while in a depressed state (OGH 12 June 1991, JBl 1992, 255; for further comparisons see OGH 30 January 2003, ZVR 2004/37 p. 128) and for an ensuing drug addiction (OGH 28 October 1993, ZVR 1995/73 p. 181). OGH 27 March 2001, JBl 2001, 656 determined that "a voluntary act of a third party does not necessarily preclude a finding that damage is an adequate consequence". At this juncture. the decisive point is to determine whether the conduct of the third party lay outside the realm of every possibility. Only "sheer unforseeable" intervention of a third party will have the effect of breaking the chain of adequate causation. The adequacy criterion as a means of restricting accountability is of no effect, if a law is violated and the purpose of the enactment was directed against preventing the occurence of the kind of damage that eventuated. Remote or improbable damage is included within its scope (as e.g. in any case falling under CC §§ 460, 996, 979 and § 1311); this is because, in these circumstances, sole recourse is had to the doctrine of the protective purpose of the violated rule (*Koziol* loc. cit. no. 8/18).

9. Similarly, under GREEK law, it is a self evident proposition that causation is a prerequisite of liability (*Stathopoulos*, Geniko Enochiko Dikaio, 468; *Georgiades*, Enochiko Dikaio, Geniko meros, 139). Within the framework of CC art. 914, an examination is conducted to determine whether a causal relation exists between the unlawful culpable conduct and the ensuing damage (*Stathopoulos* loc. cit. 469; Georgiades and Stathopoulos [-*Stathopoulos*], arts. 297-298, no. 41), The theory of equivalence and the theory of adequate cause are employed for this purpose. Within the scope of the doctrine of "rightful alternative behaviour" there is a tendency to deny the presence of a causal link ; the unlawful conduct is not the cause of the damage (*Stathopoulos* loc. cit. no. 49; *Georgiades* loc. cit. 141). The theory of adequate cause has been recognised for decades (*Stathopoulos* loc. cit. no. 50). The theory of "the purpose of the rule" is increasingly espoused in both academic commentary and case law,(*Stathopoulos* loc. cit. no. 60; for an in- depth analysis of the relationship between the theory of adequate cause and the purpose of the rule doctrine, see *Stathopoulos*, Geniko Enochiko Dikaio A(1)[2], 491 and *Georgiades* loc. cit. 144).

10. The PORTUGUESE CC also defines the basis (CC art. 483(1)) and the ambit of liability (CC art. 563) by reference to the causation criterion. The approach adopted in

case law is to split the requirement of causation into factual and legal strands (STJ 27 January 2005; STJ 12 October 1999). The determination of whether a cause is legally imputable is assessed according to the principles of the theory of adequate cause (*Menezes Cordeiro*, Obrigações II, 335; *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 578; *Galvão Telles*, Obrigações[7], 404, 409; CA Lisbon 17 June 2006; STJ 7 April 2005). However, this theory is only capable of filtering out a relatively small number of cases on the basis that the causal nexus was "inadequate" (see e.g. CA Oporto 10 February 2000, CJ XXV [2000-1] 215; CA Oporto 4 October 2006 and STJ 11 October 2005 [in respect of a multiple car pile up on the motorway, the first accident was regarded as causing the subsequent accidents that ensued]). A textbook example of where adequate cause is not given, is where a landlord attempting to collect his rent from a recalcitrant tenant is hit by a whirlwind (*Galvão Telles* loc. cit. 404). It is certain that omissions, e.g. failure to warn can be causal (CA Oporto 31 October 2006; STJ 12 December 2002; RL 9 May 2002, CJ XXVII [2002-3] 69 and 70). A break in the chain of causation is affirmed, if one adequate cause is superimosed on another (CA Oporto 4 October 2006; *Pereira Coelho*, O problema da causa virtual, 38, 109; *Galvão Telles* loc. cit. 413); a break in the chain of causation can arise via the voluntary act of a third party (also on the part of the State: STJ 25 March 2003) and can be due to the conduct of the injured party itself (e.g. CA Lisbon 17 June 2006 and CA Coimbra 4 April 1995, CJ XX [1995-2] 31).

11. DUTCH CC art. 6:98 states that damage is only recoverable when "it is related to the event giving rise to the liability of the debtor and that, having regard to the nature of liability involved and that of the damage, the damage can be imputed to the debtor as a result of this event". Dutch law has recanted from the earlier prevailing *Adequatie* doctrine and has fixed upon a test of imputability, whereby other questions, apart from general forseeability, play a decisive role (Schadevergoeding I [-*Boonekamp*], art. 98, no. 26 p. 79). The type of damage and the gravity of imputation of fault are of decisive importance; the graver the fault is, the more likely it will be that damage is imputed (Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 434 p. 367; see also *Boonekamp* loc. cit. no. 29.4 p. 94). A wrongdoer who acts with intent will be answerable for all damage which is capable of being embraced by the scope of his intent, provided that there is a *conditio-sine-qua-non* relation between his conduct and the damage that ensues. The argument has been advanced that the *conditio-sine-qua-non*-test is to be found in CC art. 6:162 as opposed to CC art. 6:98 (*Boonekamp* loc. cit. no. 26 p. 79).

12. ESTONIAN LOA § 127(4) defines causation in a quite similar fashion to VI.–4:101(1): "A person shall compensate for damage only if the circumstances on which the liability of the person is based and the damage caused are related in such a manner that the damage is a consequence of the circumstances (damage)".

13. In the NORDIC countries, the common core of causation is generally considered to consist of the *conditio sine qua non* test and the test of adequacy (*Dufwa*, Flera skadeståndsskyldiga, 2401; *Schultz*, Kausalitet, 375; *Karlgren*, Skadeståndsrätt[5], 37). There are no general statutory rules on causation, except for certain relaxations of the burden of proving the causal link. In SWEDEN, case-law and legal doctrine consider the *conditio sine qua non*-test as starting point for any inquiry into causation (*Hellner and Radetzki*, Skadeståndsrätt[7], 197; *Andersson*, Skyddsändamål och adekvans, 290; *Agell*, in Festskrift Ekelöf, 1; *Hellner*, 40 Scandinavian Studies in Law 2000, 119). An additional requirement is that the defendant's conduct was a sufficient? cause of the damage suffered. On this doctrinal basis, the HD 21 October 1987, NJA 1987, 710 affirmed that an individual who hired a room to a band was liable for theft of the musical instruments by an unknown third party because he had wrongly assured the band that there was an alarm system in place. Conversely, the HD 23 September 1983,

NJA 1983, 606 found that the keeper of a hunting dog was not liable for an accident occuring between an elk and a car, because it could not proved that the dog had a decisive influence on the elk's behaviour. HD 29 December 1998, NJA 1998, 893 articulated the adequate cause test as follows, "that the damage should have appeared to a person with the knowledge of all the circumstances as a foreseeable and to a certain extent typical consequence of the harmful conduct". The two-stage assessment – one of natural causation (cause-in-fact) and one of adequate causation is also applied in the other Nordic countries. The DANISH HD 22 November 1995, UfR 1996, 245 denied the liability of a lawyer who had failed to file a claim in time, on the grounds that he would have, in any event, lost the case. FINNISH Supreme Court 23 January 1991, KKO 1991:13 refused to find an auditor liable to a creditor of the company for which he had prepared accounts. The Court reasoned that the creditor would not have read the report in any case; similar arguments have been advanced by the Finnish Supreme Court 18 November 1992, KKO 1992:167 and the SWEDISH Supreme Court HD 13 January 1983, NJA 1983, 3. A multitude of alternative causation theories have been propounded in recent academic exegesis. The four step test as advanced by *Peczenik,* Causes and Damages, *passim* and Schultz's empirical theory *Schultz* loc cit. can be counted among their number. A great deal of attention is devoted to cases involving multiple causation or 'competing causes' (e.g. see *Hellner and Radetzki* loc cit. 213; *Peczenik* loc. cit. 100; *von Eyben and Isager,* Lærebog i erstatningsret[5], 237 and *Saxén,* Skadeståndsrätt, 330). If the damage can be attributed to multiple contemporaneous causal factors, then the parties responsible are jointly and severally liable (*Dufwa* loc. cit. 2498; *Saxén* loc cit. 342); however, if the damage can be attributed to a non - tortious cause, then the outcome is uncertain; it is widely accepted that the individuals responsible for the event grounding liability are jointly and severally liable and based on his/her contribution to the ensuing damage, each defendant would pay a percentage of the total damage (*Hellner and Radetzki,* loc cit. 215; *von Eyben and Isager* loc. cit. 239; *Vinding Kruse*, Erstatningsretten[5], 145; *Iversen*, Erstatningsberegning i kontraktsforhold, 813; *Saxén* loc. cit. 340). If two consecutive causal factors have contributed to the damage, the person who caused the initial harm will be held liable for the entire damage, provided his conduct increased the risk of the subsequent injury (see e.g. Swedish HD 15 February 1957, NJA 1957, 139: the first accident was causal for the victim being run over twice). Swedish HD 19 December 1950, NJA 1950, 650 concerned a personal injury sustained from a traffic accident, but the plaintiff also later on sustained a gastric ulcer, whereby two independent sufficient conditions competed. Three different opinions were delivered, but the leading rationale was based on the principle that no damages were to be awarded for the time that the gastric ulcer was a sufficient condition for work disability. Some Danish case-law supports this view (Eastern CA 18 June 1925, UfR 1925, 769).The Danish HD 18 May 1961, UfR 1961, 574 reduced the quantum of damages awarded following the bursting of a dam and ensuing damage. The court surmised that the land would have flooded as quickly even if the dam not burst. Other cases involve two separate conditions which start working in different timeframes but render an undividable damage. Cases involving a pre-existing illness that also may have contributed to the harm are of particular interest. In Swedish HD 31 July 1961, NJA 1961, 425 the plaintiff had been assaulted, sustaining a head injury, and a few years later he also sustained a head injury in a car accident with the second defendant. It was held that, since it could not be distinguished to what extent each condition had contributed to the final injury, both defendants should be jointly liable for the total damage (similarly HD 25 November 1992, NJA 1992, 740 I and II). In comparable cases under Danish and Finnish law, the courts ruminate on whether the precepts of

fairness and equity should intervene in order to attentuate the extent of incurred liability (e.g. Danish HD 6 December 2001, UfR 2002, 519 and 15 August 2002, UfR 2002, 2458; Finnish Supreme Court 13 July 1995, KKO 1995:129).

II. Founding liability and determining the ambit (limits) of liability

14. The distinction between the basis of liability and determining the ambit of liability and thereafter the treatment of causation under both of these headings is a particularly pronounced feature of legal orders which place the infringment of a right or legally protected interest at the focal point of their system of tort law. The distinction between causation as a fount of liability (causal link between the conduct and the main damage) and causation which determines the extent of liability (causal link between the primary damage and consequential loss) is, for this reason, unknown to both French and Belgian tort law systems.

15. Occasionally, SPANISH legal commentators espouse adopting such a differentiation (e.g. Albaladejo [-*Santos Briz*], Comentarios al Código Civil y compilaciones forales, XXIV, art. 1902, 263); in general, in so far as such an issue is broached, there is consensus that no distinction exists between causation extablishing the grounds of liability and causation which acts as a determinant on the scope of liability under Spanish law (recently, once again *Luna Yerga*, La prueba de la responsabilidad civil medico-sanitaria, 406). The courts merely emphasise that conduct and damage are questions of fact, not of law. Therefore, pursuant to CCP art. 477 a cassation cannot be based on these concepts (TS 26 November 1990, RAJ 1990 (7) no. 9047 p. 11522).

16. Conversely, it is said, that the twin objectives of the causation requirement under ITALIAN law are: attributing the commission of tort to the wrongdoer and determining the extent of compensation to be awarded (Cass.sez.un. 26 January 1971, no. 174, Giur.it. 1971, I, 1, 680). Therefore, the causal nexus between the conduct of the actor and the unlawful event as well as the causal link between the unlawful result and the consequences that derive from that result are the subjects of examination (*Franzoni*, Dei fatti illeciti, arts. 2043-2059, p. 89*).* The first phase entails an inquiry underpinned by the principles contained in CP arts. 40 and 41: *conditio sine qua non* and *regolarità causale* (i.e. that there was no divergence from the normal course of events leading to the damage: Alpa and Bessone [-*Carbone*], La responsabilità civile I, 64-65). Pursuant to CC arts. 2056 and 2057 the second step involves an assessment of the direct or primary damage that has resulted. CC art 1225 is only applicable within the remit of contract law. It is of no irrelevance to tort law. This provision restricts the obligation to make reparation to losses which were foreseeable at the time that the contract was concluded.

17. The HUNGARIAN legal theory emphasises that the causation requirement fulfills twin functions. On the one hand, there needs to be a causal nexus between the tortious conduct or wrongfulness and the damage (Petrik [-*Harmathy*], Polgári jog II[2], 568; *Petrik*, Kártérítési jog, 64; *Bárdos*, Kárfelelősség a Polgári Törvénykönyv rendszerében, 50; *Szalma*, Okozatosság és polgári jogi felelősség, 52; Gellért [-*Kemenes*], A Polgári Törvénykönyv Magyarázata[6], 1220, 1230); on the other hand, causation is significant in determining the extent of the damage and thereby also the recovery of damages, owing to the fact that the liable person will only bear those losses which can be attributed to his tortious conduct (*Marton*, A polgári jogi felelősség, 122; *Ujváriné*, Felelősségtan[7], 60; *Fuglinszky*, Mangelfolgeschäden im deutschen und ungarischen Recht, 17 and 260). In POLAND the distinction is not drawn. Unlawfulness of an act or omission occurs in the case of infringement of statutory or moral rule; the infringement of rights or interests is not necessary. The consistent position is that the existence of an adequate causal link is to be considered

only as regards the relationship between the occurrence for which a person is accountable and the damage suffered by the injured party (*Radwański and Olejniczak,* Zobowiązania - część ogólna[7], 86; Radwański [-*Dybowski*], System prawa cywilnego III(1), 247). A coherent bifuricated classification of the causation requirement does not underpin BULGARIAN tort law, principally; it is simply examined whether the defendant caused the resulting loss. The proposition, namely, that the determination of causation envisages a two step assessment, is sporadically advanced. According to this approach, it is submitted that the first step involves the assessment of the nexus between the conduct and the result, the second step entails examining the connection between the result and the damage.(*Konov,* Osnovanie na grajdanskata otgovornost[2], 60). Auch dem RUMÄNISCHEN Deliktsrecht ist die Unterscheidung zwischen Haftungsbegründung und Haftungsausfüllung fremd. Kausalität wird zwischen der rechtswidrigen Handlung und dem Schaden geprüft.

18. This distinction is habitually drawn under GERMAN law and is particularly acute under CC § 823(1). An obligation to make good the damage which the tortfeasor has caused underlies this provision. The "basis for liability" requirement is a systematic feature of the German tort law system (CC §§ 823 ff), whereas the "determining the scope of liability" requisite is subsumed under the general law of obligations (CC §§ 249 ff). An identical situation prevails in Portugal (arts. 483 ff and arts. 562 ff). The converse is true of Austria where the general consensus is that this distinction is of no relevance for prevailing law (*Koziol*, Haftpflichtrecht I³, no. 3/12).

19. Greek legal teaching views the distinction drawn in German law between casuation as a basis for liability and causation as a determinant of the ambit of liability as a corollary of the manner in which German CC § 823(1) is structured and regards such a distinction as superfluous to Greek law (*Stathopoulos*, Geniko Enochiko Dikaio A(1)[2], 473-474; *Georgiades*, Enochiko Dikaio, Geniko meros, 139; anders aber *Filios*, Enochiko Dikaio II(2)[4], 52).

20. Similarly, DUTCH law also adopts a distinction between liability itself (CC arts. 6:162 ff) and the limits of liability, the latter is employed to discern the scope of the damage (CC arts. 6:95 ff). Causation is examined under both of these headings. The courts first proceed by examining whether a causal link is extant in respect of the primary damage (personal injury, damage to property). An evaluation then takes place as to whether the actual loss and the ensuing financial losses can be causally linked (occasionally the terms primary and secondary causation are employed: Schadevergoeding I [-*Boonekamp*], art. 6:98, no. 4). It is well nigh universally accepted that a *conditio sine qua non*- link suffices to meet the test of primary causation (T&C Vermogensrecht[6] [-*Lindenbergh*], art. 6:162(1), no. 1; see also below). The assesment of the extent of the obligation to pay damages hinges on the test of imputability (CC art. 6:98). Within its confines, particular significance is accorded to the type of liability and to the purport of the infringed statutory rule of behaviour (see further *Lindenberg* loc. cit.; T&C Vermogensrecht[6] [-*Oosterveen*], art. 6:98, nos. 1-10; *Boonekamp* loc. cit.). Intermittently, it is espoused that CC art. 6:98 should also be relevant in assessement of whether primary causation is given (advanced by Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 432 p. 363 and no. 437 pp. 380-381 as well as *van Schellen*, Toerekening naar redelijkheid, 15, 32-33); this does not, however, correspond to prevailing academic opinion (see *Schut*, Onrechtmatige Daad[4], 83-91; *Hijma and Olthof*, Compendium van het Nederlands Vermogensrecht[3], no. 396 p. 268 und *Lindenbergh* loc. cit.).

21. In the NORDIC legal orders, this distinction is relevant, at the very least due to the mulitiude of statutory provisions facilitating a reduction of the extent of recovery on

the grounds of equity and fairness, on this point see the notes under VI.–6:202 (Reduction of liability). Generally, great weight is not accorded to this differentiation.

III. Burden of proof

22. A basic tenet of tort law holds that the burden of proving that a causal nexus exists between the tortious conduct and the ensuing damage rests on the claimant. This is also the case in FRANCE (*Flour/Aubert/Savaux*, Le fait juridique[11], no. 164 p. 162). There are no restrictions on the evidence admissible to adduce proof and resort may also be had to evidential presumptions (Cass.civ. 24 May 1978, Bull.civ. 1978, II, no. 139 p. 111), thereunder to a "negative" presumption, according to which causation is established by ruling out all other probable causal factors other than the defendant's fault (Cass.civ. 10 June 2004, Bull.civ. 2004, II, no. 293 p. 247: a wave, which swept the claimant's husband out to sea, could have only come from the defendant's ship, given that proof that other ships were in the area at the time could not be adduced).

23. Similarly, in BELGIUM, the general rule holds that the onus of proving causation rests on the claimant (Cass.ch.réun. 1 April 2004, JT 2005, 357, note *Estienne*; see also *Fagnart*, RGAR 2006, 14080 no. 29). It is not sufficient that the trial judge has ascertainined that a causal link exists between the *faute* and the ensuing damage is highly probable. This link must be legally certain (Cass. 17 September 1981, Pas. belge 1982, I, 90; compare also Cass. 19 June 1998, Pas. belge 1998, I, no. 324 p. 763). Reservations surrounding the establishment of certain causation cannot be overcome by recourse to the theory of *perte d´une chance* (Cass.ch.réun. 1 April 2004 loc. cit. 356); as, namely, this analysis is only of relevance in respect of the quantification of damages (CA Mons 10 October 2005, JT 2005, 717).

24. SPANISH law does not recognise a reversal of burden of proof in the law of causation, in contrast to the law of negligence; according to the general rules, the onus is on the claimant to prove that there is a causal link between the defendant's conduct and the resukting damage (CCP [*Ley de Enjuiciamiento Civil 1/2000*] art. 217). The Supreme Court stauchly adheres to this analysis (e.g. TS 25 September 1999, RAJ 1999 [4] no. 7275 p. 11445; TS 30 June 2000, RAJ 2000 [3] no. 5918 p. 9083; TS 8 February 2000, RAJ 2000 [1] no. 1235 p. 1946). According to CCP art. 217(6), the claimant may be relieved of the burden of proof, in some circumstances, by virtue of the principles of kommt dem Kläger *disponibilidad* (availability/disposability) and *facilidad* (easiness/ facilitation?). This is of particular relevance in cases where the parties respective knowledge of the circumstances relevant to establishing the causal link is imbalanced and where, in complying with the evidentiary requirements would render the claimant subject to extraordinary financial expense, for example in medical negligence cases (TS 10 June 2004, RAJ 2004 [3] no. 3605 p. 7445; TS 29 November 2002, RAJ 2002 [6] no. 10404 p. 19265). Within the confines of medical neglience claims and a number of other areas, the courts have recourse to evidentiary presumptions. Particular significance is accorded to the socalled theory of disproportionate or extraordinary result" (*resultado desproporcionado*). This presumption entails that e.g. an inference is drawn that exceptional negative results from a course of treatment, in the absence of proof to the contrary, are regarded as having been caused by the initial surgical procedure (TS 18 March 2004, RAJ 2004 [2] no. 1823 p. 3435; TS 2 April 2004, RAJ 2004 [2] no. 2607 p. 5215; TS 7 October 2004, RAJ 2004 [5] no. 6692 p. 13644; TS 17 November 2004, RAJ 2004 [5] no. 7238 p. 14674).

25. In ITALY, HUNGARY, and POLAND, the onus is on the injured party to prove that a causal nexus exists between the alleged cause of the damage and the damage itself (Cass. 11 January 1982, no. 103, Giur.it.Mass. 1982, fasc. 1; Petrik [-*Harmathy*], Polgári jog II[2], 568; Gellért [-*Kemenes*], A Polgári Törvénykönyv Magyarázata[6],

1230-1231; *Ujváriné*, Felelősségtan[7], 68; *Czachórski*, Zobowiązania[10], 251, for an exception see above Chapter 3, VI.–3:104, Notes, I 7). The same holds true for ROMANIA (CC art. 1169).

26. When compared with other European legal orders, SLOVENIAN LOA art. 149 derogates significantly from the norm in allocating the burden of proof. Within the framework of rules governing the liability for danagerous things and activities, this provision ushers in a general reversal of the burden of proof of causation: "Damage in connection with a dangerous object or dangerous activities shall be deemed to originate from the dangerous object or dangerous activities unless it is shown that such was not the cause."

27. According to GERMAN CC § 823, the onus generally lies on the injured party to prove the two prong test of causality. The possibility is however open to the claimant to rely on the rules governing *prima facie* evidence and in exceptional circumstances s/he can also benefit from reversal in the burden of proof in respect of causation which founds liability, which is of particular significance, if it is established that the defendant violated a protective law or statutory duty of care. This was the case where the defendant, a licensed operator of a facilty, constituting an environmental hazard, exceeded emission values laid down by adminstrative rules and by state authorities (BGH 17 June 1997, NJW 1997, 2748). Other illustrations are furnished by infringements of statutes aimed at accident prevention. The burden of proof is also shifted in cases of serious malpractice, namely, in cases where healthcare professionals breach their obligations (doctors, midwives) (BGH 27 March 2007, NJW 2007, 2767, 2769; BGH 27 April 2004, BGHZ 159, 48, 53; BGH 16 May 2000, NJW 2000, 2737). If an infraction of a protective law (CC § 823(2)) is established, then making out a *prima facie* case that this violation caused damage will suffice, provided that the enactment in question was aimed at avoiding the onset of a typical source of risk and if, subsequent to the violation, the type of damage which the protective law was devised to protect against, has ensued, subsequent to the violation (BGH 4 October 1983, NJW 1984, 432, 433; BGH 19 April 1991, NJW 1991, 2021, 2022; Palandt [-*Sprau*], BGB[67], § 823, no. 80). Rules governing a reversal in the burden of proof in respect of causation are occassionally envisaged by statute (see. In particular the Environmental Liability Act [*Umwelthaftungsgesetz*] §§ 6 and 7).

28. In AUSTRIA the burden of proof lies on the claimant to prove that the defendant's conduct caused the ensuing damage (CC § 1296; vgl. *Koziol*, Haftpflichtrecht I[3], no. 16/11). This general principle is harnessed in contract la was well as in field of tort law. However, this is only the prevailing tenet of general tort law. Exceptions to this basic premise can be found in a number of ad hoc statutes. These special regimes either employ rebuttable presumptions regarding causation (e.g. Genetic Engineering Act § 79a; Nuclear Energy Act § 12(1)) or a right to request information against the likely wrongdoer is conceded to the plaintiff. The judge can overcome difficulties in assessing the extent of recoverable damage by reverting to the rules governing loss appraisal (CCP § 273).

29. According to GREEK CCP art. 338, the onus of proof in respect of causality rests on the claimant. In legal commentary, the issue of the difficulty of discharging the burden of proof, particularly in medical negligence cases is adverted to, however, the solution to this problem remains with the remit of the legislature (*Foundedaki*, EllDik 35 (1994) 1226, 1230). *Liapis*, DEE 9 (2003) 138, 147 submits that, in respect of negligent representations in a prospectus, a socalled "typified causation" ought to suffice. The claimant is not required to prove that he had knowledge of the initial

prospectus that was issued. It is sufficient that the issuing of the prospectus created a favourable selling climate for the financial product in question.

30. DUTCH courts have tried to accommodate the interests of the claimant by adulterating the burden of proof requirements in the field of causation. The obligation to keep records plays a significant role in cases of professional negligence. If the defendant cannot substantiate his arguments by reverting to his records, it is conceivable that his submissions on this point will be thereby rendered immaterial and disregarded by the court (HR 20 November 1987, NedJur 1988 no. 500 p. 1852; HR 13 January 1995, NedJur 1997 no. 175 p. 881; HR 10 January 1997, NedJur 1999 no. 286 p. 1521). The courts have even reversed the burden of proof requirement in a number of discrete fields. This shift is particularly prominent in cases where specific rules precribing conduct or (health and) safety regulations are infringed, and the ensuing damage falls within the protective remit of the violated norm (HR 16 November 1990, NedJur 1991 no. 55 p. 228; HR 23 June 1995, NedJur 1995 no. 730 p. 3718; HR 21 October 1994, NedJur 1995 no. 95 p. 396). In the interim, the courts have also reversed the burden of proof in cases dealing with the departures from standard practice (HR 26 January 1996, NedJur 1996 no. 607 p. 3388; HR 19 January 2001, NedJur 2001 no. 524 p. 3805; HR 16 June 2000, NedJur 2000 no. 584 p. 4079). The defendant is required to introduce evidence and prove that the damage would have ensued in any event, had the breach of duty not occured (Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 434a p. 367; *Sieburgh*, WPNR 2001 no. 6450 p. 588). A particularly manifest application of the regulation of this general principle can be seen in CC art. 7:658(2), which governs injuries to employees resulting from the employer's contravention of Health and Safety Regulations. If the risk of damage was precipitated by the violation, and if damage of this kind materialises, then it is presumed that there is a causal link between the violation of the Health and Safety Regulations and the resulting damage (HR 17 November 2000, NedJur 2001 no. 596 p. 4376).

31. The general rule in SWEDEN is that the plaintiff has to prove causation. However, where there are two or more possible causes of damage the plaintiff will in most cases succeed if he can make his causal explanation "clearly more probable" than any other explanation, provided the plaintiff's explanation is probable in itself (HD 13 April 1977, NJA 1977, 176; HD 29 April 1981, NJA 1981, 622; HD 21 July 1982, NJA 1982, 421; HD 28 December 1993, NJA 1993, 764; HD 31 October 2001, NJA 2001, 657). Although there are still some doubts as to the groups of cases to which this rule applies (see in more detail *Bengtsson and Strömbäck*, Skadeståndslagen[2], 37), it is beyond dispute that it requires a probability which exceeds 51 per cent (*Dufwa*, Flera skadeståndsskyldiga, 2658; *Nygaard*, 41 Scandinavian Studies in Law 2001, 421). A reversal of the burden of proof is only rarely accepted. One exception is HD 4 May 1988, NJA 1988, 226, where the burden of proof was reversed to a person in possession of stolen property (not the thief), which was damaged, but it was disputed when the damage occurred. It was presumed that the damage had occurred in the hands of the defendant (see further *Peczenik*, Causes and Damages, 316). Also in DENMARK, the general rule is that the plaintiff has the full burden of proof; the probability test (under which proof of a probability exceeding 51 per cent suffices) has not been accepted (*von Eyben and Isager*, Lærebog i erstatningsret[5], 221; *Vinding Kruse*, Erstatningsretten[5], 143). Nevertheless, several cases of intentionnally or grossly negligently inflicted bodily harm display a tendency to facilitate proving causation (see e.g. HD 16 April 2002, UfR 2002, 1496; *von Eyben and Isager* loc. cit. 222; *Gomard*, Juristen 85 [2003] 132). In a tort based case concerning severe professional negligence of a lawyer, causation was even rebuttably presumed (HD 14 June 2002, UfR 2002, 2000). In HD 14 August 2002, UfR 2002, 2443, however, strict liability for

the unsafe state of a passage in a warehouse was rejected for lack of proof of causation. In FINLAND, as in Sweden, it often seems sufficient for the plaintiff to show that his explanation of the causal link is more probable than any other possible explanation; the burden of proof then passes on to the defendant (*Saxén*, Skadestånd vid avtalsbrott, 133; Supreme Court 8 June 1993, HD 1993:80; Supreme Court 2 April 1990, KKO 1990:42). *Saxén*, Skadeståndsrätt, 58 draws attention to the difficulties which are affiliated with proving causation in cases involving omissions, contending that where an omission corresponds to the non-compliance with a statutory regulation, causation should be presumed. Proof of causation by proving a probability of at least 51% is sometimes explicitly recognised by statute (e.g. Swedish *miljöbalken* [Environmental Code, SFS 1998:808] chap. 32 § 3(3); Finnish *lag om ersättning för miljöskador* [Environmental Damage Compensation Act 19 August 1994/737] § 3 [here even mere "probability" suffices]; Swedish *patientskadelag* [Patient Injury Act (1996:799)] § 6; Finnish *patientskadelag* [Patient Injury Act of 25 July 1986/585] § 2; Danish *lovbekendtgørelse* of 24 March 1997 no. 228 *om patientforsikring* [Patient Insurance Act] § 2).

IV. The so-called egg shell skull-rule

32. A particular *prédisposition de la victime* does not have the effect of interrupting the chain of causation under FRENCH law. The general premise is that if a vulnerable plaintiff, would not have ended up the condition that he now finds himself in but for the conduct leading to liability, then this conduct also caused this loss (*Flour/Aubert/Savaux*, Le fait juridique[11], no. 179 p. 179). However, it is conceivable that the predispositions of the injured party will have an effect in the assessment of recoverable damages (Cass.civ. 28 November 1974, Bull.civ. 1974, II, no. 317 p. 261: accident ruptured maligant tumour tissue); the same also holds true, in the case that mutiple cause of the injury are present, the claimant's predispoition being one of those causes (CA Rouen 13 March 1986, GazPal 1987 Som. 136: Husband suffering from depression commited sucicide following the death of his wife in an accident). Victims, who suffered from a disability prior to the accident, have generally only a damages claim based on the aggravation of their pre-existing condition (Cass.ass.plén. 27 November 1970, Bull.ass.plén. 1970, no. 6 p. 9). However, it has been held that a defendant is liable for the full extent of a claimant's incapacity to work which only occurred following the loss of the claimant's remaining good eye in a hunting accident (Cass.civ. 19 July 1966, D. 1966, 598).

33. Similarly, the prevailing law in BELGIUM deems that the victim's predisposition does not break the chain of causation: the duty to make reparation extends to both foreseeable damage and to loss that is actually suffered (Ronse [-*De Wilde, Claeys and Mallems*], Schade en Schadeloosstelling I[2], p. 191 no. 255; Cass. 14 June 1995, Pas. belge 1995, I, no. 298 p. 630). An exception exists where the predisposition would have, in any event, caused the same injury as was caused by the defendant's wrongful conduct. In this case, the victim's damages are reduced. Legal scholarship postulated, in respect of the classical example employed in teaching, namely, the case of the one - armed man who loses his other arm as the consequence of an accident, that 100% recovery in respect of the incapacity to work would not be allowed (van Gerven [-*Stijns*], Verbintenissenrecht II[8]. 334). A converse position is adopted in France. In the light of CFI Turnhout 8 November 1994, Turn. Rechtsl. 1994-95, 40 it is not apparent that this approach correspond to that adopted by the courts.

34. The rule contained in VI.–4:101(2) appears to be the accepted rule in SPAIN (see CA Madrid 4 April 2005, BDA JUR 2005/106828 and, implicitly, also CA Baleares 19 September 2001, BDA JUR 2001/322667). An identical position prevails in ITALY.

As a general rule, pre-existing ill health on the victim's part prior to the accident is regarded as being immaterial. This state of affairs by itself is considered to amount to an inadequate concurrent cause of the ensuing damage (Cass.sez.pen. 1 March 1989, Cass. Pen. 1990, I, 838; Cass.sez.pen. 24 March 1986, Cass. Pen. 1986, 1924=Riv.it.med.leg. 1988, 612). The judge is furthermore precluded from reducing the amount of damages. The premise is as follows; either it is espoused that a wholly inadequate consequence is concerned (*Busnelli*, Il danno biologico, 202; *Bona*, Danno e resp. 2005, 353), that, simulataneously, a *forza maggiore* is implicated which has the effect of precluding the imposition of liability, or that the defendant is liable to compensate the full extent oft the damage (Cass. 2 February 1991, no. 981, Nouva giur. civ. comm. 1991, I, 797; Cass. 9 April 2003, no. 5539, Resp.civ. e prev. 2003, 1074; Cass. 4 November 2003, no. 16525, Giur.it.Mass. 2003, fasc. 11).

35. At the time of writing, the rule anchored in VI.–4:101(2) has been the subject of occassional discourse in HUNGARY. It seems that the matter is viewed with some sceptism. Loss is only recoverable if it was foreseeable under normal circumstances. Therefore, for example, liability will not be imposed, if a person who previously underwent brain surgery, succumbs to his/her death because of a small slap in the face (*Bárdos*, Polgári Jogi Kodifikáció, 2004, issue 5-6, p. 5). In the other words, the wrongodoer may not be liable to pay damages, if s/he would not be capable of recognising the serious medical condition of the aggrieved party. However, the courts will more readily assume foreseeability in the case of an intentional act than where a loss is attributable to a negligent act (*Petrik*, Kártérítési jog, 69-70).

36. POLISH legal writing and case law do not devote particular attention to the issue. Some scholars consider that where an act causes a personal injury due to the abnormal predispositions of the victim, the damage, although inevitable, is not to be regarded as an adequate consequence (Radwański [-*Dybowski*], System prawa cywilnego III(1), 259). This position seems to be adopted by the case law too. In SN 22 June 1972, OSNCP 1973, poz. 46 the court denied the liability of the employer for the mental disease of a dismissed employee on the ground that the disease resulted from his particular psychological predispositions. A similar position was taken in SN 21 June 1976, OSPiKA 1977, poz. 106. The court recognised that the suicide of a schoolgirl might constitute a normal consequence of her consultation with the doctor, in the course of which the doctor expressed the suspicion she had contracted a venereal disease, unless the suicide resulted from the mental abnormality of the victim. To date, the ROMANIAN Supreme Court has determined that where a plaintiff's pre-existing illness was exacerbated by nervous shock of great magnitude sustained in an accident, the defendant could be made accountable for this course of events (*Tribunalul Suprem*, decision no. 1589/1974, cited by *Adam*, Drept civil, 290).

37. According to GERMAN law, similarly, the attribution of responsibility will not be forestalled owing to some inherent factor in the victim's constitution which makes him/her more susceptible to injury and which facilitates the actual damage caused or amplifies it (Palandt [-*Heinrichs*], BGB[66], Pref. to § 249, no. 67; MünchKomm [-*Oetker*], BGB[4], § 249, no. 133; Erman [-*G. Kuckuk*], BGB I[11], before § 249, no. 51; Staudinger [-*G. Schiemann*], BGB [New Edition 2005], § 249, no. 35). A person who injures a person in ill health or person with a frail constitution, cannot expected to be treated in the same manner, as far as the asssessment of liability is concerned, as if s/he had injured a person in optimal health (BGH 29 February 1956, BGHZ 20, 137, 139; BGH 30 April 1996, BGHZ 132, 341, 345; BGH 19 April 2005, NJW-RR 2005, 897, 898). Attribution of responsibility is not excluded on the basis given that, apart from the event giving rise to the duty to compensate, there may be other factors contributing to the damage that has occured (*Heinrichs* loc. cit. no. 66; BGH 10 May

1990, NJW 1990, 2882, 2883). The case is otherwise, if a course of events takes a wholly unexpected turn (BGH 3 February 1976, NJW 1976, 1143 [minor defamation leading to cerebral haemorrhage]; BGH 6 June 1989, NJW 1989, 2616 [stroke resulting from an altercation concerning who was responsible for a traffic accident]). In the case of a victim, who, owing to an earlier accident, is predisposed to injury, and who sustains injury in a subsequent accident, the party responsible for the earlier accident is liable for further loss sustained by the victim, provided that the preceding accident either established the victim's vulnerability or at the very least increased the plaintiff's sensitivity (BGH 20 November 2001, NJW 2002, 504; cf. also BGH 16 March 2004, NJW 2004, 1945). In general, the same reasoning is employed to deal with pre-existing psychological conditions (CA Hamm 2 April 2001, NJW-RR 2001, 1676). However, exceptions exist for cases of socalled "compensation neurosis", where the expectation that damages will be awarded impedes recovery (BGH 29 February 1956, BGHZ 20, 137, 142; BGH 8 May 1979, NJW 1979, 1935, 1936).

38. A basic tenet of AUSTRIAN law holds that the tortfeasor has to take his victim as he finds him. The risk that the injury could bring about consequence of varying degrees in persons with different states of health, is allocated to the wrongdoer (OGH 19 June 1973, 8 Ob 110/72; OGH 12 June 2003, JBl 2004, 111, 112). Furthermore, even if the magnitude of the ensuing injury can be attributed to the predisposition of the plaintiff, in legal terms the injury remains wholly attributavle to the conduct of the wrongdoer (OGH 7 February 1974, 2 Ob 6/74). The victim's vulnerability is only of relevance to cases which concern the socalled superseding causation. This entails that the wrongdoer is capable of adducing proof that the damage which occured would have resulted in any event without any action taken on his part (OGH 15 December 1992, JBl 1993, 663). In these cases, the wrongdoer will not be required to answer for the full extent of the damage, merely for the acceleration of its occurence (OGH 25 March 1999, SZ 72/55; OGH 22 May 2002, 7Ob 86/02a).

39. As a general rule, GREEK courts have rejected the notion that the victim's vulnerability can break the chain of causation (CA Athens 9835/1984, Arm 39 (1985) 118; ErmAK [-*Litzeropoulos*], Pref. to arts. 297-298, no. 60; *Foundedaki*, EllDik 35 (1994) 1226, 1230; *Stathopoulos*, Geniko Enochiko Dikaio A(1)[2],, 507 [this issue is examined futher in the context of the protective purpose of the rule doctrine]).

40. The principle contained in VI.–4:101(2) is, apart from the law pertaining to occupational injury, rarely considered in Portugal. It has been propounded by some legal scholars that it is *prima facie* unjust that to alone tortfeasor alone is burdened with the risk that he might injury a person with physical or psyhological abnormalities. Special case must be excerised in respect of the latter as regards the participation in general dealing with others by virtue of CC art. 570(1) (Contributory negligence) (*Brandão Proença*, A conduta do lesado, 192 and 199). Moreover, it follows from the general doctrine of adequate causation that the tortfeasor should not be held accountable for unusually grave consequences deriving from a minor injury (*Galvão Telles*, Obrigações[7], 404; *Almeida Costa*, Obrigações[10], 764; *Antunes Varela*, Obrigações em geral I[8], 629). In medical negligence cases, the predispositions of the victim operate to reduce damages claims. The classical example employed in teaching is that of where the victim loses the use of his only functioning eye (*Esperança Pina*, A responsabilidade dos médicos[3], 125). The Labour Code art. 287(1) and (2) represents a deviation from the general principles (STJ 4 June 2003, Proc. 02S3304) and provides that the "pathological predisposition of the accident victim does not exclude the right to full compensation except when such predisposition was concealed. When the injury or illness following the accident is worsened by prior injury or illness, or when the latter is worsened by the accident, the incapacity will be determined as if

it had all resulted from the accident, unless the victim had already been compensated for the prior injury or illness". CA Coimbra 1 June 2006, Proc. 478/06 applied the exception anchored in art. 287(1) to the employee's disadvantage, who, while sustaining a diabetic shock, was injured by a machine.

41. DUTCH cases, in which, in contrast to the normal run of events, the resulting damage, owing to certain physical or psychological predispostion of the victim, is amplified, primarly encompass post traumatic disorders, from which the victim has never fully recovered from. According to decisions of the *Hoge Raad*, the wrongdoer must answer for all oft he consequences flowing from the physical injury. The fact that the damage partly arose owing to a preexisting condition on the part of the victim, save for an exceptional turn of events, is immaterial. However, the predisposition will have an impact on the measure of damages, and will operate to restrict the amount of damages awarded (HR 8 February 1985, NedJur 1986 nos. 136 and 137 pp. 497-514). In a similar manner to other European jurisdictions, the prevailing principle in the Netherlands holds that the wrongdoer must take his victim as he finds him and that the victim's predispostions do not have the effect of breaking the chain of causation (*van Wassenaer*, Eigen Schuld, 213).

42. There is no ESTONIAN statute in force that recognises a corresponding rule to that contained in VI.–4:101(2). Howver, legal scholarship is in favour of such a rule. At the time of writing, there was no decided case law on the issue (*Lahe and Tampuu*, Training Guide for Judges 2006).

43. In the NORDIC Countries the 'egg shell skull' rule is generally acknowledged, and sometimes coined as "one finds the plaintiff in the state as he or she is" (*Hellner and Radetzki*, Skadeståndsrätt[7], 208; *von Eyben and Isager*, Lærebog i erstatningsret[5], 243; *Saxén*, Skadeståndsrätt, 143; Danish HD 20 August 1996, UfR 1996, 1334; Swedish HD 25 November 1992, NJA 1992, 740 I and II; Finnish Supreme Court, HD 1950 II 240).

Illustration 1 is taken from BH 2005/364; **illustration 2** from Cass.civ. 11 December 1984, D. 1985 I.R. 367; **illustration 3** from Polish Supreme Court 3 March 1956, OSPiKA 1959, no. 7-8, poz. 197; **illustration 4** from Cass. 14 June 1996 and Cass. 5 November 1996, Pas. belge 1996, I, nos. 413-414 p. 1070; **illustration 5 is based on**OGH 16 January 1952, SZ 25/14; **illustration 6** is taken from BGH 16 February 1972, BGHZ 58, 162; **illustration 7** from OGH 28 January 1997, SZ 70/11; **illustration 8** from *Meah v. McCreamer (No. 2)* [1986] 1 All ER 943; **illustration 9** from BGH 30 June 1987, BGHZ 101, 215; **illustration 10** from Swedish HD 6 May 1994, NJA 1994, 283; **illustration 11** from BGH 13 July 1971, BGHZ 57, 25; **illustration 12** from Cass.civ. 28 November 1974, Bull.civ. 1974, II, no. 317 p. 261; and **illustration 13** from OGH 12 June 2003, JBl 2004, 111.

VI.–4:102: Collaboration

A person who participates with, instigates or materially assists another in causing legally relevant damage is to be regarded as causing that damage.

COMMENTS

Purpose. This Article establishes the rule that persons who collaborate in causing legally relevant damage are to be regarded as causing the damage. Normally the question at issue here is liability for intention – on the part of the main actor and the persons with a contributory role. In cases of liability without intention or negligence collaboration is not conceivable. That is because in those cases no conduct of the liable person is required. In cases of instigation or assistance, all parties act intentionally. Where accomplices are involved, it is conceivable that as a consequence of an intentional antecedent wrong, merely negligent consequential harm then comes about, for which all accomplices are solidarily liable, even where their participation was not active. Several thieves can also become collective holders of a stolen vehicle; they are already liable under VI.–3:205 (Accountability for damage caused by motor verhicles).

> *Illustration 1*
> A, B and C have stolen a car and wish to bring it to a safe place. A sits at the wheel, B in the passenger seat and C in the back seat. Through a driving error during the nervous getaway, A causes damage to the car or to property belonging to a third party. B and C are also liable for this because the theft and getaway rested upon a common resolution of intent and a common plan. This liability results from the present Article. Liability as holder of the vehicle under VI.–3:205 (Accountability for damage caused by motor verhicles) remains unaffected.

Scope. This Article relates to the causation of damage by participants, instigators and accessories or aiders. It concerns situations which may be described as ones of "psychological causation". This is because the issue here is responsibility for having either brought about the resolution of intent of the person acting directly or having spurred that person on in the relevant conduct. Since all three classes of persons are treated alike, no precise differentiation among them is required. Hence the wording of the rule deliberately avoids the use of terminology from criminal law.

Relation to VI.–4:103 (Alternative causes). The present Article requires a conscious and wilful co-operation of the participant in the causation of damage. If this is present every person acting causes the damage. In contrast, VI.–4:103 (Alternative causes) deals with cases in which multiple occurrences are possible alternative causes of the damage – where, in other words, it is an open question whether one person or another has caused the damage but where it is clear that either the one or the other caused it. Where a case falls under VI.–4:102, there is consequently no room for the application of VI.–4:103; this is because under the former Article it is already given that *each* collaborator is regarded as causing the damage. Moreover, VI.–4:103 may also come into play in cases of strict liability, whereas VI.–4:102 presupposes a liability for some misconduct.

Relation to VI.–6:105 (Solidary liability). VI.–4:102 must be read in conjunction with VI.–6:105 (Solidary liability). Participants, instigators and accessories are solidarily liable with the (principal) wrongdoer.

Illustration 2
At a public meeting, a son reads the text of a speech drafted by his father, which contains serious defamatory attacks on the personal and professional reputation of another. The media report on this event and on the defamatory allegations made in the speech. Both father and son are looked upon as the cause of the third party's damage; they are solidarily liable.

Illustration 3
A, B, C and D had drawn up a plan to poach X's customers through the provision of false information on X's supposed infringements of copyright law. A drafts and (alone) signs the relevant letter. B, C and D have also caused X's damage (see VI.–2:208 (Loss upon unlawful impairment of business)).

Collaboration. VI.–4:102 only relates to cases in which several persons collaborate to cause one and the same damage. This applies e.g. to the thief and the receiver of stolen goods in relation to the owner. Conversely, where collaboration is absent, the case is then one of so-called *concurrent wrongdoers*. Such persons, who act independently of each other or are independently responsible for different sources of danger, are solidarily liable under VI.–6:105 (Solidary liability) where the same damage is attributable to each of them, for instance, where liability results from the positive act of one party and the omission of another or where an employee is liable for intentionally inflicted damage and he employer is subject to strict liability for the same damage.

Members of a group. During the preparation of this Book, intense discussion took place on the issue of whether a further rule should be adopted in addition to this Article. Under this mooted rule, where a member of a group intentionally causes a third party a legally relevant damage, other members of that group would be liable for the damage in so far as the risk of intentional occurrence of damage of that type was foreseeable and those members should have abstained from participating in the group. It was also discussed whether this liability should rest only upon those who were present at the scene of the wrong and whether their liability should only come into play in a subsidiary fashion. This suggestion was, however, rejected as being too far-reaching. The main objection was that such a rule, which would forego the requirement of collaboration and would be based solely upon "membership" in a group, would not be capable of being brought into harmony with the freedom to demonstrate.

Participants. "Participants" in the sense of the Article are those persons who either play a part in carrying out an overall plan (one person breaks into a house in order to make away with items from it, the other stands at the door and keeps a look out or waits in the getaway car), or persons who indeed do not participate in the actual act of wrongdoing themselves, and yet stay "in the background" maintaining command or co-command over the course of events. Injurious conduct of the primary acting party going beyond the original common plan will be attributed to them as a consequence of their own participation in the act, unless there are extraordinary circumstances.

Instigators. Instigators cannot make the excuse that the acting party wished to carry out the act and did so intentionally. Rather, the Article makes it clear that this does *not* break the

chain of cause and effect between the incitement and the legally relevant damage. The decisive point is that the instigator has provided the party acting with an additional reason to take action. It is not necessary that the instigator was the person who first put the idea into the acting party's mind.

Illustration 4
Students have occupied an empty house in order to draw attention to what in their view are indefensible machinations of local property dealers, who are apparently raising the price of property by reducing the availability of accommodation. The police attempt to clear the property and an affray with the students breaks out on the ground floor. On the floor above other students call out heated encouragement to their colleagues below. The students in the upper storey have caused damage to the police officers even if the students below would have initiated the affray without their calls to arms. On the other hand the students in the upper storey are not causally connected if, in the tumult below, their encouragement could not be heard.

Accessories. Accessories or aiders support the person acting directly in carrying out the act, but have no influence over whether it actually comes about or not. The requirement is that the aider knows of the general outline of the primary act and wishes to assist in it. There is no negligent assistance; the same goes for assistance with a negligent act.

NOTES

1. The point of departure in FRANCE is CC art. 1202. By virtue of this provision, there is no presumption of solidary liability (*solidarité*). However, heretofore Cass.civ. 11 July 1892, D. 1894, I, 561, note *Levillain* determined that, in the event that loss to the injured party is caused by the *faute* of several (concurrent?) wrongdoers, the duty to compensate for the entire loss sustained by the plaintiff falls individually on each debtor, provided that there is a direct and immediate (notwendig, is this what is meant here?) causal nexus between each *faute* and the resulting damage. In such cases, liability is said to be incurred *in solidum.* This type of liability sets forth that one single (or the same) damage is caused by several *faits générateurs*. Nowadays, no distinction is made between *gardien liability and* liability which derives from a *faute* (*Terré/Simler/Lequette*, Les obligations[9], no. 864 p. 839). Liability *in solidum* does not arise, if several *coauteurs* have caused different damage and the respective causes of the damage can be independently apportioned (Cass.civ. 19 April 1956, JCP 1956 éd. G., 9381). On the hand, there is no requirement that the *faits générateurs* be contemporaneous (*le Tourneau*, Droit de la responsabilité et des contrats (2006/2007), no. 1741). A *coauteur,* who has paid the entire compensation, is entitled to recover contributions in proportion to the part in the loss sustained played by the other *coauteurs* (CC art. 1251(3)). The same principle applies, if the insurance company is to pay for the loss (in respect of the latter (Code des Assurances art. L121-12.) If the claimant renounced his/her claim against one of the *coauteurs*, the remaining tortfeasors, despite the rule anchored in CC art. 1251 can initiate a recourse action against the co-debtor who would have otherwise, if sued, have been liable (Cass.civ. 7 June 1977, Bull.civ. 1977, I, no. 266 p. 210).
2. The starting point in BELGIUM pursuant to CC art. 1202 is identical to that prevailing in France. Similarly, the consistent position adopted by the Cour de Cassation has been that whenever damage is caused by *fautes concurrentes* of several debtors, each

is liable, *in solidum*, for the whole of the damage (Cass. 26 April 1996, Pas. belge 1996, I, no. 138 p. 392). However, the courts have displayed a tendency, whenever intentional fautes and negligent fautes concur to disregard the latter in this context (*Vandenberghe/Van Quickenborne/Wynant/Debaene*, TPR 2000, p. 1917 no. 166). As regards concurrent criminal offences, in this case, by virtue of CP art. 50, solidary liability is incurred. In contrast to France, it can be of significance in Belgian law to ascertain the exact constitutents of the *fait générateur* in the instant case. It is true to state that, the *faute* of a third party will not, in principle, operate to exclude the imposition of liability on the *gardien* for a defective thing (CA Gent 8 June 1994, R.W. 1996-97, 1063), however, in the context of where liability is imposed on the keeper of an animal (CC art. 1385), the *faute* of a third party can operate to break the chain of causation, if the third party was responsible for the *fait de l´animal* (Cass. 19 January 1996, Pas. belge 1996, I, no. 41 p. 85). Incidentally, the rules governing the bringing of recourse (contribution?) actions against (fellow concurrent wrongdoers? (co-debtors) has developed along the same lines as in France (CC art. 1251(3); Cass. 9 March 1992, Pas. belge 1992, I, 607).

3. Within SPANISH tort law it is beyond doubt that if several persons participate under a common agreement with the purpose to cause a damage, they all are jointly liable, even if it clear that only one of them materially caused the damage (Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Pantaleón*], Código Civil II[2], 1983; *Roca i Trias*, Derecho de daños[3], 143; TS 20 February 1981, RAJ 1981 [1] no. 756 p. 610). The same rule applies if damage is caused by crime (CP art. 116(2)). The rationale for the rule is namely, that the existence of a plan formulated by the tortfeasors would have to entail that each of them is liable for the whole of the damage caused (TS 11 July 2006, BDA RAJ 2006 no. 4977; *Pantaleón* loc. cit.; *Gómez Calle,* in Reglero Campos (coord.), Tratado de responsabilidad civil[3]. 499).

4. The ITALIAN Civil Code does not contain a corresponding provision to VI.–4.102 (CC art. 2055 corresponds to VI.–6:105 (Solidary liability); see the notes following this rule), however, collective participation in the commission of a tort entails that each individual wrongdoer is jointly and severally liable, provided that s/he contributed to creating the risk that damage would ensue (*Bianca*, Diritto civile V, 648; *De Cupis*, Il danno, 273-275). It is widely accepted in case law and legal commentary that the rule contained in CP art 113 (criminal liability for collaboration in a crime of negligence) is also applicable in the private law context (*De Cupis* loc. cit. 275; *Monateri*, Manuale della responsabilità civile, 141; Cass. 18 October 1982, no. 5425, Giur.it.Mass. 1982, fasc. 9). Seemingly, there is no requirement that the parties be aware that their individual actions converged to amount a single joint action (Visintini [-*Capecchi*], I fatti illeciti III, 52; Cass. 15 January 1996, no. 268, Danno e resp. 1996, 521). CFI Rome 3 February 2003, Giur. romana, 2003, 291, held that the organisers of an event were liable as "instigators" and were obliged to compensate damage caused by an angry mob. The crowd's wrath was vented because the entry tickets sold exceeded the seats available.

5. HUNGARIAN CC § 344 provides for solidary liability in the case that two or more defendants "jointly" cause damage. The notion of "jointly causing damage" has been broadly interpreted. It is not a prerequisite that the defendants acted with a common purpose in mind. The fact that, viewed objectively, they acted in concert will suffice to make them solidarily liable (Petrik [-*Harmathy*], Polgári jog Kommentár a gyakorlat számára II, 581-582; Gellért [- *Kemenes*], A Polgári Törvénykönyv Magyarázata I, 1238-1240; *Ujváriné*, Felelősségtan, 75-80; *Petrik*, Kártérítési jog, 93-95; *Bárdos*, Kárfelelősség a Polgári Törvénykönyv rendszerében, 54-55). Whether the exertion of psychological influence will be regarded as (not causal) mere advice or as (causal)

instigating the decision to commit the [tortious] act will be determined by the courts upon examination of the circumstances of the individual case (*Eörsi*, Kártérítés jogellenes magatartásért, 64-65). In the context of private law, no sharp distinction is drawn betweeen joint enterprise, incitement, and aiding and abetting a crime/tort. All three categories entail that the parties are "jointly" responsible for causing the damage compare e.g. BH 1980/471. The thief and receiver of the stolen goods are jointly and severally liable to the victim (BH 2004/145), furthermore, the person who negligently facilitated the commission of an intentional offence is solidarily liable with the immediate tortfeasor (BH 2008/118, BH 2000/198; compare. also EBH 2000/199). This dovetails with the legal position prevailing in BULGARIA. According to LOA art. 53 e.g all co- principals involved in the theft of a car are solidarily liable for damage to property directly caused by person who was driving the car, (Supreme Court 10 May 1978, decision 1207 in civil matters no. 116/1978, first chamber). In ROMANIA, the courts reach the same result by adverting to the general doctrine of causation (*Tribunalul Suprem*, decison no. 1769/1982 in criminal matters, cited by *Adam*, Drept civil, 296); it is proposed under the Draft Civil Code that this rule will be codified in art. 1107 (Proiectul Noului Cod civil, 217). SLOVENIAN LOA art. 186(2) conforms in all essential points to VI.–4:102. VI.–4:102 corresponds to POLISH CC art. 422, according to which liability for damage is incurred not only by the person who directly caused the damage, but also by one who induced or helped another to cause it and by one who knowingly took advantage of it. The general view is that the rule is based on the so-called normative relation between the act and the damage; in such a case the question whether there was an adequate causal link is irrelevant (*Radwański and Olejniczak*, Zobowiązania - część ogólna[7], 89; Radwański [-*Dybowski*], System prawa cywilnego III(1), 271).

6. GERMAN CC prescribes solidary liability for the event that several persons are responsible for damage deriving from a tortious act. CC § 830 governs three discrete cases of participation, namely the joint commission of a tortious act, (Abs. 1 Satz 1) its instigation and when the tortfeaor aids and abets in ist commission (Abs. 2). The legal consequences are identical in each case. Each tortfeasor is jointly liable for the whole of the damage. It is not a prerequisite to prove that the defendant directly caused the damage (BGH 7 November 1978, BGHZ 72, 355, 358). Joint enterprise where several persons collaborate to cause the same damage, instigation and aiding and abetting are notions which derive from criminal law and the meaning given to these terms pursuant to CP §§ 25-27 has been transposed into the civil law. Accordingly, joint enterpise denotes a deliberate and willed collaboration on the part of the participants to achieve a certain result (BGH 11 May 1971, NJW 1972, 40, 41). Under this framework, the contributions of the parties concerned are imputed to each tortfeasor (BGH 24 January 1984, NJW 1984, 1226, 1228; BGH 4 November 1997, NJW 1998, 377, 381 f.). A prerequisite as far as secondary particiption (incitment and aiding and abetting) is concerned is that the tortfeasor deliberately assisted in the commission of an intentional act by a third party. "Instigation" denotes that the tortfeasor procured the commission of the act giving rise to damage by the principal tortfeasor. "Aiding and abetting" denotes every assistance that is intentionally rendered, i.e. conduct that encourages the tortious conduct of the principal wrongdoer, which strengthens his resolve to commit the act, which facilitates the commission of the act. For these purposes, mere psychological encouragement will suffice (see further Palandt [-*Sprau*], BGB[66], § 830, no. 3; MünchKomm [-*Wagner*], BGB[4], § 830, nos. 9 and 19).

7. AUSTRIAN CC § 1301 speaks of joint participants in the commission of a tortious act, instigators and accessories (*Koziol*, Haftpflichtrecht I[3], no. 14/5). "Joint" commission of the tortuous act pursuant to CC § 1301 is not only established if there is

a common understanding amongst the tortfeasors to inflict t damage. It is sufficient that the tortfeasors were in agreement that they would collaborate to achieve a certain purpose and in so doing, damage was inflicted negligently on a third party (OGH 12 February 1998, SZ 71/22; OGH 21 October 1999, SZ 72/156), for example, within the scope of a common demonstation (OGH 25 March 1999, SZ 72/55). In respect of harm that is inflicted intentionally, the parties are solidarily liable. Conversely, in respect of damage that is inflicted negligently, solidary liability is only imposed if the respective individual contributions to causing the damage cannot be iascertained (CC § 1302). In the following decision by the OGH, it was held that all three wrongdoers were jointly and severally liable for damage inflicted on the claimant, who, when he attempted to obtain assistance for his companion mishandled by two oft he wrongdoers, was set upon and injured by the third (OGH ZVR 1998/6). It is possible for a joint tortfeasor who is found liable to seek contributions from the co-debtor. The size oft he share to be contributed by the other parties in the internal relationship will depends on the extent of their input in causing the damage and the degree of respective fault (OGH 23 February 1999, SZ 72/35). In cases of doubt, the parties in the internal relationship are liable to pay equal shares (*Koziol and Welser*, II[13], 327).

8. Pursuant to GREEK CC art. 926, solidary liability is imposed in the case that the ensuing damage was caused by the colloborative action of several parties. Any contribution to the unlawful act of another which can be regarded as causal for damage that resulted, will suffice (Georgiades and Stathopoulos [-*Georgiades*], art. 926 no. 5; *Kornilakis*, Eidiko Enochiko Dikaio I, 572; a narrower interpretation is adopted in *Filios*, Enochiko Dikaio II(2)[4], 92). Intention is not a prerequisite. It is sufficient, for example that, independently of each other, two individuals omitted to adopt necessary preventative safety measures. Joint enterprise, instigation, aiding and abetting are self evident components of CC art. 926. Further, cases of the socalled direct contemporaneous causation (which occurs when damage is caused solely by the convergece of two acts;namely, one act on its own would not have been sufficient) and "double causation" (each single act was sufficient, taken on its own to cause the entire damage) (*Georgiades* loc. cit. no. 10; *Kornilakis* loc. cit. 573). It has been espoused that CC art. 926 should be applied, even in constellations where a certain act contributes to the perpetuation of the damage (For example: the stolen goods are hid by a third party: *Georgiades* loc. cit. no. 12; *Kornilakis* loc. cit. 574).

9. PORTUGUESE CC art. 490 corresponds in all essential elements to VI.–4:102. Each participant in the commission of a tortious act is solidarily liable (CC art. 497). This is also true for those who steal and those who receive stolen goods, (STJ 29 March 1989, BolMinJus 385 [1989] 379) or for the author of a defamatory text and the person who reads it out loud in public (CA Oporto 10 March 2005). CC art. 490 does even have a intentional colloboration as a prerequisite. Negligent co-participation will suffice (STJ 11 March 1999; *Vaz Serra*, BolMinJus 101 [1960] 121).

10. For each participant (*deelnemer*), the DUTCH CC art. 6:166 precludes the possibilty to assert that his contribution to the commision of the tortious act was not causal. Members of a dangerous "group" are already liable for the fact that they joined the group (TM Parl. Gesch. VI, 662; Asser [-*Hartkamp*] Verbintenissenrecht III[12], nos. 93-94 p. 114-116; T&C [-*Lindenbergh*], art. 6:166, no. 1 p. 2340): Reliance is no longer placed on the parties' individual contributions to causing the damage because participation in the activities of a group that one should not, in the first place, have joined, suffices for liability to be imposed. A prerequsite is conscious and willed collective conduct, whereas there is no requirement that a common purpose to inflict damage be extant (*Hartkamp* loc. cit.). It must be possible for the participation to be imputable according to the general rules of tort law and the person who is responsible

for directly causing the damage mus have committed a tort in the sense of CC art. 6:162 (*Lindenbergh* loc. cit.; *Hartkamp* loc. cit. no. 93 p. 115). It can be derived from CC art. 6:102 that the members of the group are solidarily liable.

11. ESTONIAN LOA § 1045(4) tallies with this Article.

12. Similarly in the NORDIC countries if several persons collaborate in causing damage or injury it is generally accepted that they are jointly liable for the damage caused (*Hellner and Radetzki*, Skadeståndsrätt[7], 216; *Vinding Kruse*, Erstatningsretten[5], 149, 307; *Saxén*, Skadeståndsrätt, 342). The concept of 'psychological causation' allows the question as to who of the collaborators actually initiated the chain of causation to be disregarded (*Vinding Kruse* loc cit. 150). In Swedish HD 15 December 1980, NJA 1980, 670 a school pupil brought (A) staples with him to school and distributed them. It was common practice that the pupils would fire pieces of papers tied with rubber bands, however, now they stepped it up a notch and began using the staples. A classmate (B) injured a another pupil (C). A and B were solidarily liable for the damage inflicted to C.

Illustration 1 is taken from Bulgarian Supreme Court, decision no. 1207, case no. 116/1978 in civil matters of 10 May 1978 and from BH 1980/471; **illustration 2** from CA Oporto 10 March 2005; and **illustration 3** from TS 11 July 2006, BDA RAJ 2006 no. 4977.

VI.–4:103: Alternative causes

Where legally relevant damage may have been caused by any one or more of a number of occurrences for which different persons are accountable and it is established that the damage was caused by one of these occurrences but not which one, each person who is accountable for any of the occurrences is rebuttably presumed to have caused that damage.

COMMENTS

Loosening requirements for establishing the chain of cause and effect. The aim of this Article is to facilitate the establishment of a causal link between legally relevant damage and conduct in breach of duty or flowing from a source of danger even in certain cases where such a link would have to be denied under VI.–4:101 (General rule) paragraph (1) or under VI.–4:102 (Collaboration). Where under the rule in VI.–4:101(1), a legally relevant damage is to be seen as the consequence of *either* the wrongdoing (etc.) of A *or* the wrongdoing of B (or of C, etc.) but it is not possible to conclusively say that it was the consequence of A's behaviour or of B's behaviour, the effect of the present Article is that the damage is presumed to be the consequence of the conduct of A *as well as* of B (and of C etc.). Each is free, however, to prove facts from which it may be gathered under VI.–4:101(1) that his or her conduct in breach of duty was not part of the causal chain.

Policy considerations. Such a special rule requires justification. This is to be found in a general consideration of justice. A person who breaches a duty owed to the injured person or exposes that person to a greater risk should not be exonerated from liability solely because another person also breached a duty owed to the injured person and it is no longer possible to say which of the breaches of duty caused the damage. The corresponding risk of inexplicability must be borne by those in breach of duty and not by the injured person.

> *Illustration 1*
> Solidary liability falls on the operators of two mountain coal-mines, in which the injured person worked under conditions of exposure to an unreasonably high health risk; even if it can no longer be determined in which of the two work places the person contracted the illness. The position would be different if a social insurance scheme for accidents at work provided a different solution for such cases (VI.–1:103 (Scope of application) and VI.–7:104 (Liability of employees, employers, trade unions and employers' associations)).

General requirements. The Article aims to relieve the victim of an undue necessity to prove facts from which a court, under VI.–4:101 (General rule) paragraph (1), would have drawn the conclusion that the legally relevant damage suffered by the victim is to be regarded as a consequence of a particular person's intentional or negligent conduct (or a source of danger for which that person is responsible). It is not intended to do more. The victim must therefore, as before, prove the existence of a legally relevant damage and that the other person would be liable for the damage suffered if the causality of that person's contribution is supposed. The victim must also establish that the other person belongs to that circle of persons of whom it can be said with certainty that one caused the damage. On the other hand the Article is not intended to provide the victim with an additional person against whom a claim can be made. If it is clear that a particular person is fully responsible for the damage, but that person is not financially capable of making full reparation, there is no reason why the victim should have

the windfall benefit of other persons to sue. The same holds true where it is clear that two persons have respectively caused different damage.

Illustration 2
In a traffic accident, for which T is responsible, O is thrown from a bicycle on to the tarmac. T stops, but is not able to prevent a following vehicle (driven by F) from hitting O. It is not clear which injuries O had sustained before the second collision. T is liable for the full damage because T's conduct was causal in relation to the subsequent accident and the injuries it entailed. F is not liable for the full damage; but is at most liable for a share of the damage to be assessed on the basis of the rules of civil procedure (If no such assessment is possible, F is not liable at all.) The situation would not be different if T failed to stop and left the scene unidentified. As regards the share for which F is liable, T and F are solidary debtors. The case is not one for the application of VI.–4:103.

Illustration 3
An employee A suffers a lung disease. It is not clear whether this disease is triggered by a single proximate exposure to a particular chemical or an accumulation of such exposures. Successive employers of A in breach of their duty failed to protect A from the hazard posed by this chemical. It is therefore uncertain whether only one (and, if so, which one) of these breaches of duty has caused A's damage or whether both have. The causation by each of these breaches of duty is presumed; VI.–4:103 dispenses with A's difficulties of proof.

Illustration 4:
Two hunters discharge their weapons at the same time and in the same direction. A third party is hit and injured, once in the left leg and once in the right. Weapons specialists can say, however, from which weapon each relevant shot was fired. Each hunter is liable solely for the consequences of his shot; the case does not fall under VI.–4:103. It would be different where the victim had only been injured by one shot, and it could no longer be established from which of the weapons the shot in question had come.

Different persons must be accountable. In relation to the claimant's legally relevant damage, the Article requires that the various parties fulfill the requisites of liability of VI.–1:101 (Basic rule) (except for causation) and that at the least it is established that the damage is the consequence of the intentional or negligent conduct of one of the persons or the consequence of the realisation of a source of danger for which one of these persons bears responsibilty. It is thus not necessary that these persons, assuming causation in each case, have acted culpably or that their liablility arises out of the same attributive cause.

Illustration 5:
Cows from two different herds which graze on the same pasture attack a man and fatally injure him. It is later no longer possible to say whether just one cow caused the fatal injury or whether it was more than one and it is also no longer possible to determine, to which of the two herds the cow(s) belonged. Both of the respective keepers of livestock are solidarily liable. Persons who, without being livestock keepers themselves, were to supervise the animals and neglected to carry out the supervision necessary under the circumstances are likewise solidarily liable (VI.–3:102 (Negligence)).

The damage must be caused by one of two or more occurrences. It is, however, necessary that "it [be] established that the damage was caused by one of these occurrences". This is not the case where it is unclear whether one of the occurrences brought about the damage at all. VI.–4:103 particularly does not bring in any market-share-liability, thus no *pro rata* liability for damage from products of an ambiguous origin attributed according to the market share of their manufacturers.

Illustration 6
The claimants' mothers had during their pregnancy taken medication, which was marketed in the same chemical formula under different brand names by competing companies. This medication caused the claimants to suffer from cancer of the uterus years later. They cannot say, however, which brand of medication the mothers bought at the time, nor even whether the medication taken came from any one of the companies which they now seek to hold liable; the medication may well have come from a company which does not exist any more. VI.–4:103 does not help the claimants' with either of these difficulties. An "occurrence" within the meaning of VI.–4:103 is lacking. This is because even if all of the companies were active and present in the market, the claimants could not prove that each had unleashed a danger on their mothers. In other words, it is not even ascertained that any one of the mothers took medication from *different* companies. The people involved simply cannot remember who brought about the cause of damage. This does not suffice for VI.–4:103.

Defences. Each person accountable for one of the occurrences may not only prove a lack of responsibility for the damage due to factual reasons, but may also show that another defence from Chapter 5, including the possible contributory fault of the injured person, is available.

Illustration 7
Several children throw stones in the injured person's direction. It is no longer possible to establish which child hit the injured person's eye with a stone. The parents of one of the stone throwers can prove, however, with the aid of a witness who happened to be at the scene, that in any event the only stone thrown by their child went in a different direction. Only the other parents are liable.

Illustration 8
The injured person, X, was consecutively employed by several employers and was exposed to asbestos dust at the workplaces. The severe lung disease that X contracted can be caused by even a single inhalation of particular asbestos particles. It is consequently unclear whether the disease was contracted when X worked for employer A or employer B; it is clear only that both acted negligently. A and B are solidarily liable. If contributory fault is attributed to X because of a failure to wear the necessary protective clothing, X's claim is to be correspondingly reduced, and this holds true whether the contributory fault occurred during the period of employment with A or with B. In contrast, if X had occasionally pursued the same occupation in a self-employed capacity, so that the cause of the illness could have been due to that independent exposure during the same time period, VI.–4:103 does not apply. In such a case it cannot even be established that either A or B caused the damage.

NOTES

1. A number of older French decisions declined to impose liability in theset of circumstances enumerated by VI.–4:103. This disinclination was rooted in a strict application of the *conditio sine qua non* test.(e.g. Cass.civ. 4 January 1957, D. 1957 jur. 264: two men fired contemporaneously in the direction of a fellow hunter, resulting in him suffering hand and facial injuries; his claim was rejected by the courts because it could not be clarified which weapon fired the shot). However, subsequently, the Cour de Cassation veered in a more claimant friendly direction and decided that the solidary liability of the defendants who had possibly caused the damage was grounded either on the assumption that participation in the dangerous activity was capable of being qualified as a common *faute* (so Cass.civ. 6 March 1968, Bull.civ. 1968, II, no. 76 p. 52: a group of seven youths threw stones at other adolesecents, one person was hit but the actual perpetrator could not be identified; all seven members were held to be solidarily liable because they had collectively participated in the dangerous activity), or on the assumption that all of the participants were *gardiens* of the object which caused damage.(of this view Cass.civ. 13 May 1975, Bull.civ. 1975, II, no. 88 p. 73: two hunters fired simultaneously in the same direction and generated a cloud of pellets thereby injuring a third hunter; solidary liability was imposed, based on the implicit rationale that both hunters were collectively *gardiens* of the "cloud of pellets").
2. If it is determined that the cause of the damage must be attributed to at least one member of a group but the actual offender's identity cannot be established, then similarly in BELGIUM all of the members of the group are regarded as having collectively committed a causal *faute*, provided that they had hitherto reached an understanding that they would collectively bring about the dangerous situation. In such a case, proof that the direct cause of the damage emantated from another member of the group will not serve to excuplate the other members from liability. In contrast, if the *fautes* of several parties coincide purely by happenstance and it remains unclear who was concretely responsible for causing the damage, then according to prevailing legal doctrine, the claim must be dismissed (*Bocken and Boone*, TPR 2002, 1625, 1665, nos. 41-43).
3. With the exception of an ad hoc regulation in the SPANISH Hunting Act (*Ley* 1/1970 of 4 April) art. 33(5)(ii) (which imposes strict liability on all the participants to a hunting party for the damage caused while hunting, when the author of the damage remains unknown), there is not, within the scope of Spanish tort law, any general provision dealing with the issue of alternative causes. Most legal writers consider that all members of the group should be solidarily liable unless they are able to show that they did not cause the damage (*de Ángel Yágüez*, Tratado de responsabilidad civil[3], 877-888; *Roca i Trias*, Derecho de daños[3], 143; *Díez-Picazo*, Derecho de daños, 167-168; *contra*, however, Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Pantaleón*], Código Civil II[2], 1984). The Supreme Court follows the opinion of the prevailing doctrine, see e.g. TS 8 February 1983, RAJ 1983 (1) no. 867 p. 602 (several children were playing by throwing different objects; one of these objects caused injury to another child; solidary liability of all parents of the children that were throwing objects); TS 13 September 1985, RAJ 1985 (1) no. 4259 p. 3591; TS 11 April 2000, RAJ 2000 (2) no. 2148 p. 3316; TS 2 November 2004, RAJ 2004 (5) no. 6864 p. 13956 (illustration 5 above). There are of course a number of decisions, in which there was a refusal to impose liability along the lines of VI.–4:103 on the basis that proof of causation had not been established. see TS 2 April 1996, RAJ 1996 (2) no. 2984 p. 4005 and in TS 26 November 2003, RAJ 2003 (5) no. 8354 p. 15639.

4. Similarly the ITALIAN Zivilgesetzbuch does not contain a provision which corresponds to 4:103; the absence of such a provision was criticised, without success, before the Constitutional Court.(Corte Cost. 4 March 1992, no. 79, Foro it. 1992, I, 1347, note *Ponzanelli*). It is suggested in legal writing that a finding that the members of a group are solidarily liable will not be precluded in any event, if the individual culprit cannot be identified, provided that the ensuing damage emananted from a group acting in a collective manner, for example, from a riotous group of people who broke into a licensed premises and smashed up corporeal moveables. Otherwise, it is, of course, necessary to identify the instigator of the damage; it will not suffice to prove that the defendant had involved himself in a group where, within the parameters of the group, there was a number of possible contenders for causing the damage (*Bianca*, Diritto civile V, 648). The premise is as follows, namely that solidarily liability should only be imposed on several parties, if those parties all played a role in causing the ensuing damage (Cass. 13 May 1989, no. 2204, Giur.it.Mass. 1989, fasc. 5; Cass. 4 June 1977, no. 2294, Arch.Giur.circolaz. 1977, 261).

5. The question of alternative causation is rarely a matter of deliberation under Hungarian legal doctrine; statute law is silent on this issue. However, case law has arrived at a pratically identical result as that contained in VI.–4:103, see e.g. BH 1995/214 (woodscrews were thrown from a group of primary school pupils; a fellow student suffered an eye injury as a result; the courts imposed solidary liability on all those who were involved in throwing the screws, even though it was unclear who actually succeeding in hitting the injured pupil) and BH 1991/314 (damage caused by firecrackers used by members of a music ensemble; liability of all the members was affirmed; the initial step of inquiry did not relate to who threw the firecracker).

6. SLOVENIAN LOA art. 186(3) embodies the same rule as that contained in VI.–4:103. There is no rule under POLISH law corresponding to VI.–4:103. The majority of scholars contend that where there are two or more dangerous occurrences which could have caused the damage and it has been established that the damage was caused by one of them, but not which one, all the persons accountable for these occurrences are solidarily liable, as they all caused the dangerous state (Radwański [-*Dybowski*], System prawa cywilnego III(1), 264). Solidary liability has been accepted by the Supreme Court where two persons were “strictly” liable for one damage (one as the possessor of the construction – CC art. 434 – and the other as the operator of an installation – CC art. 435) and neither could prove facts allowing them to escape liability (SN 4 July 1985, LEX no. 8724).

7. According to the GERMAN CC § 830(1) second sentence, where several “participants” are involved in causing damage, each participant is liable for the damage caused, if it cannot be conclusively ascertained which party’s conduct was actually responsible for the damage caused. The purpose of this provision is to overcome the evidential difficulties which a claimant is confronted with, if it is unclear, when more than one person is involved, which party was the culprit responsible for the damage caused, or, if it transpires that the individual role that each party played in causing the ensuing damage can indeed be established, however the actual share of damage attributable to each individual involved cannot be calculated with any degree of success. The premise is that a damages claim, in the event that the damage has been caused by several parties, ought not to fail due to the fact that the “real” culprit cannot be conclusively ascertained (BGH 15 December 1970, BGHZ 55, 86, 88). The prerquisites for such a claim are as follows (i) that, causation excepted, each party involved acted in a manner which would serve to ground tortious liability (ii) that, at any rate, one of the parties involved has caused damage and (iii) it cannot be conclusively ascertainined which of the participants was directly responsible for the

damage that ensues (BGH 12 July 1996, NJW 1996, 3205, 3207; BGH 23 May 2006, NJW 2006, 2399; BGH 7 November 1978, BGHZ 72, 355, 358). The claim does not hinge upon whether the liability is based on fault, presumed fault or on the creation of a risk (strict liability?) (Palandt [-*Sprau*], BGB[66], § 830, no. 7; Staudinger [-*Belling and Eberl-Borges*], BGB [New Edition 2002], § 830, no. 72; BGH 15 December 1970, BGHZ 55, 96, 98; BGH 22 July 1999, NJW 1999, 3633, 3635). Parties are only "involved", if their conduct is factually, spatially and temporally connected to the damage, i.e .constitutes a homogeneous event (BGH 15 November 1960, BGHZ 33, 286, 291). Each party involved can refute the presumption of causation in his/her favour (*Sprau* loc. cit. no. 11; BGH 23 March 1999, NJW 1999, 2895). If it is ascertained that one party is the culprit and thereby responsible for the entire damage caused, then the other parties, who only potentially caused the damage, are not not liable (BGH 22 June 1976, BGHZ 67, 14, 20; BGH 18 December 1984, VersR 1985, 268, 269). Even if only one involved parties can rely on a ground of defence, this entails that the other involved parties are also exonerated from liability (BGH 17 December 1952, LM no. 2 under § 830 BGB). The other parties are also relieved of liability if the injured party was also an " involved party" (BGH 8 May 1973, NJW 1973, 1283; BGH 30 January 1973, BGHZ 60, 177).

8. GREEK CC art. 926 (second sentence) corresponds in all essential points to VI.–4:103. Examples, apart from hunting accidents, include where a passer- by falls victim to a street affray, or car collisions where a cyclist suffers injury but cannot conclusively prove which car struck him (Georgiades and Stathopoulos [-*Georgiades*], art. 926 no. 17). It is a matter of some dispute whether CC art. 926 (second sentence) can be applied to cases corresponding to illustration 2 above (in favour *Kornilakis*, Eidiko Enochiko Dikaio I, 580; in opposition *Filios*, Enochiko Dikaio II(2)[4], 97).

9. An earlier decision of the PORTUGUESE courts dealing with inconclusive alternative causation declined to make a finding that the parties involved wer solidarily liable. This conclusion was reached on the basis that there was a failure to establish proof of causation (STJ 9 December 1959, BolMinJus 92 [1959] 301). This approach of the courts continues to be supported in contemporary legal commentary (*Pereira Coelho*, O problema da causa virtual, 24 fn. 5). Within the framework of preparatory materials which led to the introduction of the Portueguse Civil Code, *Vaz Serra*, BolMinJus 84 (1959) 138 strongly advocated the adoption of a cognate provision to that of VI.–4:103. However, CC art. 493(2) only introduced a rebuttable presumption to the detriment of the person who inflicted damage on another owing to the nature of the dangerous activity exercised or owing to instrument employed to carry out the activity (see further on this point *Antunes Varela*, Obrigações em geral I[10], 617). The issue of causation is not dealt with under CC art. 493(2); therefore the matter remains to be tackled under the general rules of tort law.

10. If the damage that ensues may have be caused by any one of a number of occurences for which differents persons are accountable for and if it is determined that that the damage was caused by at least one of these occurences, then, pursuant to DUTCH CC art. 6:99, each of these persons is liable. The onus of proof in respect of causation is reversed in such cases (Parlementaire Geschiedenis VI, 346). The legal basis of liability is irrelevant; liability can be imposed on the basis of fault or strict liability (Schadevergoeding I [-*Boonekamp*], art. 6:99, no. 3 p. 11). There has been much discussion of late whether the case law of Supreme Court dealing with DES-pharmaceutical product case (HR 9 October 1992, NedJur 1994 no. 535 p. 2474) is compatible with the Product Liability Directive (of this view Asser [-*Hartkamp*] Verbintenissenrecht I[12], nos. 441a-b p. 388-392). According to the judgment of the *Hoge Raad*, CC art. 6:99 is, in any event, also applicable if the contribution of one

involved party to causing the damage is uncertain whereas in respect of the other involved party it is beyond doubt that they played a role in causing the damage .(HR 31 January 2003, NedJur 2003 no. 346 p. 2777 [dealing with two successive arson attacks]; see *Boonekamp* loc. cit. no. 4 p. 12; *Hartkamp* loc. cit. no. 441b p. 391; *Akkermans*, WPNR 6043 [1992] 249).

11. ESTONIAN LOA § 138(1) corresponds in all essential points to VI.–4:103. LOA § 138(2) permits each party involved to exculpate themselves by adducing proof that they did not cause the damage. Pursuant to LOA § 138(3) liability is assessed in proportion to the probability that the involved party caused the resulting damage.

12. In SWEDEN, as noted above under VI.–4:101, the plaintiff must make his causal explanation "clearly more probable" than any other possible explanation, provided, the plaintiff's explanation is probable in itself (HD 28 December 1993, NJA 1993, 764; HD 31 October 2001, NJA 2001, 657). HD 21 July 1982, NJA 1982, 421 concerned personal injury from pharmaceutical drugs used during x-ray examinations. The defendant pharmaceutical company claimed that the injury was sustained by another company's drugs which were also used during the examinations. Each of the drugs were considered as probable causes, but the defendant's not as the 'clearly more probable' one, so that the claim was dismissed (this case met with much criticism, however, see *Hellner and Radetzki*, Skadeståndsrätt[7], 201; *Dufwa*, Flera skadeståndsskyldiga, 2659, 3007; *Schultz*, Kausalitet, 494). The result is that a special provision concerning solidary liability in the event that alternative tortfeasors are at work has not been enacted (*Dufwa* loc. cit. 3008). However, HD 31 July 1961, NJA 1961, 425 previously affirmed solidary liability in a case where it could not be conclusively ascertained in the case of two competing torts, what share of the damage can attributed to each tort. In contrast to Sweden, in the interim, it appears that in FINLAND (see Supreme Court 14 June 1990, KKO 1990:78 and Supreme Court 11 April 1990, KKO 1990:47) and in DENMARK in (of a different view Eastern CA 15 June 1914, UfR 1914, 897) it is universally accepted that where alternative causes are involved, unless proved otherwise, all the parties involved are solidarily liable (*Vinding Kruse*, Erstatningsretten[5], 151-152; Westen CA 30 December 1948, UfR 1949, 439 [a girl was injured by two boys who fired sling shots in her direction; both boys were held jointly liable]; Western CA 2 July 1894, UfR 1894, 1042 [three hunters fired in the same direction; all three were held to be solidarily liable, although it was not clear which of them was direcly responsible for injuring the victim]; *contra*, however, *von Eyben and Isager*, Lærebog i erstatningsret[5], 239) (HD 22 October 1982, UfR 1982, 1111 concerned a gas explosion which had killed several persons, the leak could either be attributed to A or B. A, who was sued, was held to be the considerably more likely source).

Illustration 1 is taken from Bulgarian Supreme Court decision no. 2286, case no. 89/1978 in civil matters of 16 August 1978; **illustration 2** from BGH 15 November 1960, BGHZ 33, 286 and BGH 7 November 1978, BGHZ 72, 355; **illustration 3** from *Fairchild v. Glenhaven Funeral Services Ltd.* [2002] UKHL 22, [2003] 1 AC 32; **illustration 4** from Cass.civ. 19 April 1956, JCP 1956 éd. G., 9381; **illustration 5** from TS 2 November 2004, RAJ 2004 (5) no. 6864 p. 13956; **illustration 6** from HR 9 October 1992, NedJur 1994, no. 535 p. 2474; **illustration 7** from Cass.civ. 6 March 1968, Bull.civ. 1968, II, no. 76 p. 52; and **illustration 8** from *Barker v. Corus UK Ltd.* [2006] UKHL 20, [2006] 2 AC 572.

CHAPTER 5: DEFENCES

Section 1: Consent or conduct of the person suffering the damage

VI.–5:101: Consent and acting at own risk

(1) A person has a defence if the person suffering the damage validly consented to the legally relevant damage and was aware or could reasonably be expected to have been aware of the consequences of that consent.

(2) The same applies if the person suffering the damage, knowing the risk of damage of the type caused, voluntarily takes that risk and is to be regarded as accepting it.

COMMENTS

A. Chapter 5 in overview

The notion of defence. The subject-matter of this Chapter is the defences open to a person against whom a claim is made under this Book. Even where the requisites of VI.–1:101 (Basic rule) are fulfilled, such a person is relieved of liability where and to the extent that one of the defences in this Chapter is available (see VI.–1:103 (Scope of application) sub-paragraph (a)). It is to be assumed that, under the general rules of evidence, the factual prerequisites for a defence are to be presented by the person founding on them and where contradicted must then be evidenced. A defence can extinguish liability but may also, depending on its type and on the circumstances, be used to reduce the level of damages.

Five Sections. The five Sections in the Chapter are structured not according to dogmatic categories, but according to predominantly factual aspects. In particular, they are not based on the distinction known to some legal systems between "justificatory" and "exculpatory" grounds. This is because technically speaking the category of "justificatory grounds" requires "unlawfulness", which is not actually one of the requisites of liability for these model rules (VI.–1:101 (Basic rule)). Section 1 contains those defences that are derived from consent or other contributory conduct on the part of the injured person, like consciously incurring danger or participating in a criminal act. Cases of justifiably serving one's own or another's interests are the subject-matter of Section 2, with Section 3 handling situations where the damage-causing risk was uncontrollable. Section 4 deals with contractual terms excluding or limiting liability and Section 5 deals with a particular problem in the area of damage suffered by family members.

Further defences. Further defences may result from Book III (in particular Chapter 7 (Prescription)) and indirectly also from such rules of national law as are mentioned in Chapter 7 of this Book (Ancillary rules). This is because these model rules are silent on issues that permeate the law on extra-contractual liability from other legal quarters. Thus, further defences may be derived from e.g. the fundamentally protected rights to freedom of opinion and of the press or from the special protection of marriage and the family which is constitutionally guaranteed (see VI.–7:101 (National constitutional law)). Judges and lawyers may enjoy certain privileges in relation to the law on liability (see VI.–7:103 (Public law functions and court proceedings)), and employees are often not personally liable for damage

that they inflict on other persons in the course of their employment unless very strict conditions are satisfied (see VI.–7:104 (Liability of employees, employers, trade unions and employers' associations)). This Book leaves these issues (and their corresponding defences) completely untouched. Apart from such matters the list of defences in the present Chapter is formulated conclusively. The Group saw no adequate grounds for having more rules on exceptions than are here mentioned.

B. Consent (paragraph (1))

The basic principle. Paragraph (1) expresses a rule which is to be found in all European systems of law on non-contractual liability for damage, although it is only rarely codified expressly: any person who inflicts damage (that is legally relevant, within the meaning of Chapter 2) on another with the latter's previous consent, commits no civil wrong. It would have been possible to formulate the rule so as to provide that damage which is occasioned with the consent of the victim is not legally relevant *vis à vis* the latter party, but that would have lost the element that the person committing the injury must make out the requisites for (effective) consent. Of course, this does not rule out the reality that there are cases in which the previous consent of the injured person to certain conduct also leads to the situation under these rules that the very existence of legally relevant damage is to be denied. Such situations no longer involve paragraph (1) of the present Article.

> *Illustration 1*
> A theft (and consequently an infringement of property rights) is not committed by a person who takes another's property with the owner's permission; a breach of confidence is not committed by a person who is authorised by the relevant person to publish the entrusted information. Upon approval, it ceased to be "confidential" within the meaning of VI.–2:205 (Breach of confidence).

The injured person. Paragraph (1) covers legally relevant damage of every type. An "injured" person is therefore not only someone who suffers a bodily injury (for fatal injuries, see VI.–5:501 (Extension of defences against the injured person to third persons)), but also any person who has consented to damage of another type, e.g. property damage. (See also the definition of "injured person" in Annex 1.) On the other hand, paragraph (1) assumes that in principle one can consent to an infringement of one's own bodily integrity, e.g. to an operation, a tattoo, to the cutting of hair or to certain sexual practices that are connected with the infliction of pain.

Non-contractual liability and contract. The consent can be part of a contract (e.g. a contract with a construction company on the demolition of a building or a contract for medical treatment). It can also constitute counter-performance for some payment or other performance by the other party (permission, in exchange for payment, to exploit a copyright or to build over the border between two pieces of land). Issues such as whether the consent in such cases is to be qualified as the acceptance of an offer for the conclusion of a contract or as the fulfilment of a contractual obligation and whether the contract law regime displaces the law on non-contractual liability, are questions to be answered solely by contract law. In principle, contractual and non-contractual liability freely compete under these rules, see VI.–1:103 (Scope of application) sub-paragraph (c).

> *Illustration 2*
> X commissioned Y to chop down trees in X's nursery and shred them. A dispute emerges as to whether X had also instructed Y's workers to chop down lime trees and

oak trees to the left and right of a path. Y has the burden of proving this instruction. This affects X's claim in damages against Y as well as Y's (possible) claim for payment from X under their contract.

Consent, acting at own risk and contributory fault. Consent and acting at one's own risk will rule out a claim in damages. Where contributory fault alone is in issue the claim may also be completely precluded under special circumstances; but this is not the case as a rule. In a case where contributory fault is present, the claim is typically only partially reduced (VI.–5:102(1) (Contributory fault and accountability)).

Illustration 3
An employee of a farm-owner transports an inebriated man on a tractor trailer, together with a large amount of wood. Soon after the driver starts to travel with excessive speed and the passenger is thrown from the trailer and crushed by its wheels, suffering severe bodily injury. The employer of the tractor driver is liable for the damage because the passenger did not consent to the harm or voluntarily expose himself to the risk of injury in such a manner that it must be inferred that he accepted it. The injured man is, however, subject to 50% contributory fault.

Consent. The previous agreement of the injured person is what is to be understood under the term "consent". Subsequent agreement ("approval") can have the effect of waiving a claim in damages but does not take away the unlawful character of the behaviour. The situation is different only in cases in which the approval transforms an originally unlawful act into a lawful benevolent intervention in another's affairs, see V.–1:101 (Intervention to benefit another) paragraph (1)(b) and VI.–5:202 (Self-defence, benevolent intervention and necessity) paragraph (2). Consent need not be expressly given; it may result from the circumstances thus it is implicitly conferred. The person giving consent decides on the scope of the consent; a mistake by the other person on the extent of the consent given may exclude negligence, depending on the circumstances of each individual case.

Illustration 4
By way of a clearly visible sign, the owner of a car park warns persons who store their vehicles on her premises without authorisation that she will demand a release fee. In order to enforce it, she puts a wheel clamp on the claimant's car. The claimant in this case gave implied consent to this infringement of property rights.

Illustration 5
A, an actress, is involved in a photo reportage. This implies agreement to publication, but not to the publication of any random photo, where it is clear under the circumstances that A wants to examine the selection in order to avoid the situation where pictures are released that in her view have not turned out well.

Consent as a defence against purposeful conduct. The defence of consent under paragraph (1) requires purposeful conduct on the part of the other person. "Consent" to inattention is excluded; such cases come under the rules on the acceptance of a risk in paragraph (2). In the case of the latter, the person accepting the risk knows that there is a specific danger and accepts it but then hopes that it will not transpire. Conversely, in consent cases, typically both sides envisage that the primary injury will occur. Of course, in such cases consent also rules out liability under Chapter 3, Section 2 (Liability without intention or negligence).

Illustration 6
A and B plan an insurance fraud. A drives A's worthless vehicle into B's already damaged vehicle, with B hoping to be able to shift the previous damage on to A's third-party insurance. B has neither a claim under VI.–3:101 (Intention) nor a claim under VI.–3:205 (Accountability for damage caused by motor vehicles) for the second damage and indeed not even where it is not A, but C who is the owner of the other vehicle.

Valid consent. Only valid consent will preclude liability. Paragraph (1) does not, however, specify the requirements for "valid" consent. Life is too multi-faceted and legal structure-requirements too complex for a detailed rule on this issue. The typical grounds of invalidity of consent are: lack of capacity of the injured person; the absence of sufficient information before the consent was given; and illegality or immorality.

Lack of capacity. Valid consent requires that the person giving consent be of sound mind. A person who, while completely inebriated, agrees to allow a similarly drunk contemporary to drive her home, does not confer valid consent and does not validly accept the risk of an accident. For persons under age, however, no general rule could be stated, because European rules for minors are not yet in existence (see I.–1:101 (Intended field of application) paragraph (2)(a). The issue of minors' capacity to consent must therefore be developed from the Member States' general law on minors. Where the consent has the disposition of property as its contents or consequence, then it rests on the corresponding rules of the relevant applicable contract or property law. Often special rules apply to consent to medical operations. However, it can be said that even with the approval of the parents, curative medical operations against a minor's will are no longer admissible where the minor has attained a sufficient degree of maturity to make the decision not to be operated upon.

Informed consent. Consent is valid only where the person giving consent knows or at least has a general idea of what the other party plans to do and what consequences this conduct will have or could have, in the event that things turn out unfavourably. Therefore, paragraph (1) links this defence to the requisite that the person giving consent "is aware or could reasonably be expected to be aware of the consequences of that consent". The rule thereby seeks to express the recognised rules on the requirement of "informed consent". Its main field of application lies in the law on curative medical operations, for which – as long as they result from a contract – further elaboration is to be found in the commentary under IV.C.–8:108 (Obligation not to treat without consent).

Illegality. Consent can also be invalid because it contravenes the law or is incompatible with basic ethical values of the legal system. Of course, on a more specific level, the more pertinent question to be posed in each case is why a law prohibits certain behaviour (even making it criminally punishable) even in the case where the party injured expresses agreement with it. Where the prohibition does not serve the protection of the individual, but the protection of the public interest, then consent further rules out civil liability.

Benevolent interventions in another's affairs. Where effective consent is lacking or where the consent granted does not extend to the actual concrete events, then the defence of benevolent intervention in another's affairs in particular also comes into focus for the originator of the damage. Of course, the prerequisites for this must all be satisfied.

C. Acting at own risk (paragraph (2))

The basic idea. Paragraph (2) expresses a general consideration of justice. A person cannot complain about damage if that person has voluntarily incurred exposure to the danger of it arising and thereby indicated acceptance of the risk of damage occurring. The rule's main practical field of operation lies in the realm of participation in martial arts or dangerous sports, but it is not confined to that. In principle its application is conceivable for all fields of the law on liability, e.g. as a defence against product liability, vehicle liability or liability for animals and as against liability for the unsafe condition of land, which would arise in its absence.

Systematic considerations. The rule also has the purpose of providing the defence of acting at one's own risk with a self-contained and independent place in the overall system of liability. The circumstance that the claimant freely accepts the risk that is then realised can play a role in several contexts. Usually, the first test is whether the other person acted negligently under the circumstances. In football, for instance, physical contact is a part of the game and the higher the division, the higher the contact. Therefore, certain behaviour is allowed on the pitch that is prohibited in normal life, and even an infringement of the rules of the game does not necessarily lead to the inference of negligence. This is because not only do the rules of the game not equate with legal rules, they also frequently serve a different purpose than the protection of players. Even in combat sports, the defence of voluntary assumption of risk is only brought to bear where negligence on the part of the opponent or team-mate is established. Conversely, where the acceptance of a risk is in issue, there is no more room for a test of contributory fault; the acceptance of a risk rules out liability. This also applies where from the outset there is no room for a test for negligence because the basis of liability is the liability of a keeper within the meaning of Chapter 3, Section 2. Further, there is a certain proximity between the assumption of a risk and the contractual exclusion of liability. The defence of the voluntary assumption of a risk is not, however, bound to the restrictive prerequisites of VI.–5:401 (Contractual exclusion and limitation of liability).

Knowing the risk of damage of the type caused. Paragraph (2) requires that the injured person was aware of the type of damage risked. The amount or magnitude of the damage is not at issue here, but rather its type, thus e.g. personal injury, property damage, or economic loss.

> *Illustration 7*
> During a sailing regatta, a collision occurs, resulting in the death of one of the sailors. There is no room for the defence of voluntary assumption of risk because it did not relate to risking one's life.

Voluntary exposure to and acceptance of the risk. The decisive point is that the injured person voluntarily incurred exposure to the risk and that a neutral bystander would come to the conclusion that the injured person did indeed accept the risk (if not also the damage). To this extent, everything hangs on the circumstances of each case. One of the factors to be considered is the distinction between a mere leisure activity and a sporting exercise governed by rules; only in the latter case do the participants typically accept the dangers inherent in the sport because only then can it be said that it ultimately depends on the mere chance of "whom it will hit today". The form of the cause of damage is also to be considered, as well as why the injured person incurred the exposure to the risk.

Illustration 8
A football player kicks an opponent out of anger, leaving the opponent severely injured. At this point the ball is no longer near the incident because the flow of the game had shifted long before. There is no acceptance of this risk.

Illustration 9
A sixteen-year-old girl embarks on a trip with a female friend and two young men. The friend and one of the men split off from the group. In order to get home that evening (the last bus has already left), the girl sits in the other young man's passenger seat, although she knows that he only has a provisional driving licence. In an effort to show off, he drives too fast, causing an accident. The girl did not voluntarily accept the risk.

NOTES

I. Consent

1. In FRANCE, while it is indeed true that the maxim *volenti non fit iniuria* is generally recognised, however, that a person can legally consent to the infliction of bodily injury is the matter of some controversy. A number of exceptions to this principle are extant. This is particularly the case in respect to operations which are deemed to be medically necessary (CC art. 16-3; see further *Flour/Aubert/Savaux*, Le fait juridique[10], no. 131 p. 60-61; on liability for cosmetic procedure further Cass. 22 November 2007, JCP G 2007 no. 51). If the expressed consent to a particular course of action of the other party results in a contract (as is often the case of consent to an operation, cf. for BELGIUM *Vansweevelt*, De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis, 48), then the contractual liability law supercedes tort law; the principle of *non cumul des responsabilités applies*. Liability will be imputed for a failure to fully disclose the medical risks associated with the operation (CA Mons 27 September 2005, Rev.gén.Ass.Resp. 2007 no. 14323), if the failure to fully inform was causal for the resulting damage (which was rejected e.g. in CA Liège 25 September 2006, Rev.gén.Ass.Resp. 2007 no. 14324 wurde).
2. Likewise, in SPAIN a distinction is required to be drawn depending on whether pecuniary interests or non pecuniary interests are involved. The consent of the owner of pecuniary goods is legally effective (see further *Yzquierdo Tolsada*, Sistema de responsabilidad civil, 353). The legal status in respect of non pecuniary goods is more complex i.e. in respect of personality rights because they are regarded as comprising of inalienable rights. Consent can be given to infringements to the rights of protection one's honour, the right to protection of a sphere of intimacy and right to control the reproduction of one's own image given that there is an express statutory mechanism providing for the effectiveness of consent (Law 1/1982 on Civil Protection of the Right to Honour, to a sphere of intimacy and a right to control the reproduction of one'e image art. 2(2)); the consent can be revoked at any time (loc. cit. art. 2(3)). Furthermore, the *Tribunal Supremo* regards consent to infringements oft he right to honour as legally binding (TS 7 March 1990, RAJ 1990 [2] no. 1677 p. 2228; TS 1 July 1992, RAJ 1992 [4] no. 6499 p. 8488; TS 30 November 1992, RAJ 1992 [5] no. 9458 p. 12411; TS 19 July 2000, RAJ 2000 [4] no. 6753 p. 10329). In contrast, consent to death and consent to infringements of bodily intergrity is generally ineffective (*Yzquierdo Tolsada* loc. cit. 351). Consent to medical procedures connotes an exception to this rule (see further G 41/2002 of 14 November, on Patient Autonomy

and on Rights and Duties in respect of Information and Medical Records [*Ley 41/2002 básica reguladora de la autonomía del paciente y de derechos y obligaciones en materia de información y documentación* clínica] arts. 2-5 and 8-11).

3. In ITALY, the defence of consent under private law is prinicipally governed by the criminal law, more specifically by CP art. 50 (Cass. 24 February 1997, no. 1682, GCM 1997, 303). The defence also pertains to infringements of bodily integrity as governed by CC art. 5, therefore, in particular medical procedures (Cass. 15 November 1999, no. 12621, Foro it. 2000, I, 3588; Cass. 8 November 1994, no. 9261, GCM 1994, fasc. 11). The rules on legal capacity govern consent to breaches of corporeal rights (CC art. 2).The same holds true for consent to the collection and storage of personal data (*Decreto legislativo* 30 June 2003, no. 196, *Codice in materia di protezione dei dati personali*, Suppl.ord. no. 123 alla Gazz. Uff. of 29 July, no. 174). For the remainder, it depends on whether the injured party can lawfully dispose of the right. It is not possible to lawfully dispose of the right to life (CP art. 579). CC art. 5 probits the lawful disposition of rights of bodily integrity if the disposition has the effect of creating a permanent physical impairment or if on other grounds it would contravene the basic values of the legal order or would be contra bonos mores (Cass.pen. 11 July 2002, no. 26446, Foro amm. CDS 2003, 2902). As far as medical procedures are concerned, a distinction is drawn between procedures which are deemed medically necessary and cosmetic surgery. There is not an unfettered application of CC art. 5 as far as medically necessary procedures are concerned; occasionally the courts have rejected the applicability of the defence in this area (Cass. 15 January 1997, no. 364, Riv. it. med. leg. 1998, 345). It is requirement that the patient be informed about the significance and risks entailed with the operation. If the patient is not in a position to consent, then a relative can consent in the patient's stead (Cass. 8 November 1994, no. 9261, Giust.civ.Mass. 1994, fasc. 11). If a close relative cannot be reached, then the operation can be justified on other grounds (in an emergency; exercise of an activity permitted by law). Difficulties arise in repect of justifying a merely cosmetic procedure (see further e.g. *Cian and Trabucchi*, Commentario breve[6], sub CC art. 5). Organ transplants or partial organ transplants are the subject of special regulations in an array of statutes (Kidneys: *Legge* 26 June 1967, no. 458 [Gazz. Uff. 27 June, no. 160, edizione straordinaria] *Trapianto del rene tra persone viventi*; cornea: *Legge* 12 August 1993, no. 301 [Gazz. Uff. 17 August, no. 192] *Norme in materia di prelievi ed innesti di cornea*; Liver: *Legge* 16 December 1999, no. 483 [Gazz. Uff. 20 December, no. 297] *Norme per consentire il trapianto parziale di fegato*; Bone marrow: *Legge* 6 March 2001, no. 52 [Gazz. Uff. 15 March, no. 62] *Riconoscimento del Registro nazionale italiano dei donatori di midollo osseo*; Taking of blood and removal of specific cells: *Legge* 4 May 1990, no. 107 [Gazz. Uff. 11 May, no. 108] *Disciplina per le attività trasfusionali relative al sangue umano ed ai suoi componenti e per la produzione di plasmaderivati*).

4. HUNGARIAN CC § 342(2) makes clear that compensation can be recovered if the damage was caused with the assent of the injured party and the damage caused does not endanger or cause harm to any social (public) interest. Harm is caused to a social interest e.g assent is given to the destruction of an object to which is endowned with public importance e.g. a valuable painting, a building, it can also even comprise of a field given over to the production of grain (*Eörsi*, Kártérítés jogellenes magatartásért, 53). Consent is not effective if the result is to endanger third party interests, e.g. consent to laying of a fire (*Petrik*, Kártérítési jog, 35). Further, CC § 75(3) provides that the rights to bodily integrity, health and life are not regarded as having been infringed if the holder of the right consents to the infringement provided that the assent does not entail that the a social interest is transgressed or endangered. Therefore,

consent to medical surgical procedures is valid provided that an appropriate steps are taken to properly inform the patient about the nature of the proposed operation – of its risks and the consequences should treatment be refused (*Szalma*, Okozatosság és polgári jogi felelősség, 91, 151; Gellért [-*Kemenes*], A Polgári Törvénykönyv Magyarázata[6], 1238; BH 2000/536). Even in the case of terminally ill patients, euthanasia is not permitted; it is not possible for a person to consent to conscious termination of one's own life (*Kemenes* loc. cit. 1237; *Petrik* loc. cit. 35-36). Further, ROMANIA recognises consent as a ground of defence. This defence contemplates an agreement between the parties and legal capacity and a right to dispose oft he relevant right are prerequisites of this accord. In particular, this encapsulates consent to infringements of corporeal rights; the defence of consent can be invoked in respect of physical injuries resulting from partaking in sports and in respect of medical procedures (cf. CC art. 998; further *Adam*, Drept civil. Teoria generală a obligaţiilor, 288; *Dogaru and Drăghici*, Drept civil. Teoria generală a obligaţiilor, 238; *Romoşan*, Vinovăţia în dreptul civil român, 85). The Draft of the new Civil Code contemplates in arts. 1136 und 1137 comprehensive regulations on the validity of consent and on the waiver of liability before the putative tortious event (Proiectul Noului Cod civil, 223).

5. SLOVENIAN 140(1) provides that "any person that allows another person to do something to the former's detriment may not demand from the latter the reimbursement of the damage that the latter thereby inflicted". However, one cannot validly consent to an unlawful action (LOA art. 140(2) in conjunction with arts. 14 und 86). Consent is a unilateral legal transation and the rules pertaining to declaration of intention apply (Obligacijski zakonik s kommentarjem [-*Pensa*], I, 817-818). In POLAND, an individual's consent renders the putative tortfeasor's conduct lawful (Supreme Court 11 April 2006, I CSK 191/05, OSNC 2007, no. 1, pos. 18, p. 111). The defence of consent is however not expressly regulated under the Civil Code (*Radwański and Olejniczak*, Zobowiązania - część ogólna[5], 183; *Pietrzykowski* [-Banaszczyk], Kodeks cywilny I[4], art. 415 no. 27), however, numereous provisions regulating special cases are found elsewhere (e.g. CP art. 27 § 2 [Consent to participation in an experiment]; CP art. 192 [medical treatment without consent]; Law on Mental Health [Official Journal 1994.111.535] arts. 21, 22, 26 and 28 [Consent to psychiatric treatment]). A It is always necessary to prove that the victim had a right of disposal over the legal interest (*Przybylska*, MoP 2003/16/740, LEX no. 38745; Bieniek [-*Bieniek*][5], art. 415 no. 5). Jehovahs witnesses have the right to refuse a blood transfusion prior to an operation, even where that decision could endanger their life (Supreme Court 27 October 2005, III CK 155/05, OSNC 2006, nos. 7-8, pos. 137). Consent is partly classified as a unilateral juridical act and is governed by the general rules on declaration of intent (so Supreme Court 27 October 2005 loc. cit.), and partly categorised as an act which has connotations of a legal transaction but to some degree has a different status (see further *Radwański and Olejniczak* loc. cit.; *Pietrzykowski and Banaszczyk* loc. cit. no. 30). In BULGARIAN legal doctrine, similarly it is universally recognised that consent operates to vitiate the unlawful conduct of the tortfeasor (*Kalaydjiev*, Obligazionno pravo, Obshta chast, 347). It is yet to be clarified whether under the private law, consent to an act can be operative, if that act contravenes the law or is *contra bonos mores* (*Takov*, Bulgaria).

6. Likewise, a general proposition under GERMAN law is that consent, validily given, renders lawful the violation of the legal interest lawful (Palandt [-*Sprau*], BGB[66], § 823, no. 38). Consent does not amount to a jurdical act (*Medicus*, Schuldrecht II[13], no. 765; Erman [-*Schiemann*], BGB II[11], § 823, no. 147; MünchKomm [-*Wagner*], BGB[4], § 823, no. 666; Soergel [-*Spickhoff*], BGB[13], § 823, no. 119), however, in order to flesh out its contours, the general principles on the interpretaion of juridical

declarations of intent may be drawn upon (BGH 18 March 1980, NJW 1980, 1903; BGH 3 December 1991, NJW 1992, 1558, 1559). Consent that is elicted because of force, duress, pressure or fraud is vitiated (BGH 2 December 1963, NJW 1964, 1177, 1178), further, consent to an unlawful act or to an act which is contra bonos mores is also not a valid consent (*Sprau* loc. cit. no. 39). Legal capacity is not a prerequisite; the individucal who consents must, however, understand the import of the encroachment (BGH 5 December 1958, BGHZ 29, 33, 36). Therapeutic medical procedures also require the patient's consent (BGH 14 March 2006, NJW 2006, 2108; BGH 9 December 1958, BGHZ 29, 46). The patient must at least be aware of the nature and major risks of the medical procedure, which in turn entails that the doctor is obliged to impart the information to the patient in a timeous fashion, the current state of scientific knowledge being the diagnostic benchmark (BGH 23 September 1980, NJW 1981, 633; BGH 25 March 2003, NJW 2003, 2012, 2013). It is necesary to disclose the facts which are of decisive import for the informed decision oft he patient; if grave consequences are a potential result of the treatment, then a particularly comprehensive disclosure is required (BGH 17 December 1991, BGHZ 116, 379: Hepatitis- or AIDS-infection acquired via a blood transfusion), the same holds true for cosmetic procedures (BGH 6 November 1990, NJW 1991, 2349) and blood donations (BGH 14 March 2006, NJW 2006, 2108). Implied consent may establish a ground of justification, in circumstances where deferaal of the operation is not possible and close relatives or a person who acts as proxy to the unconscious patient cannot be asked for their consent (BGH 10 March 1987, NJW 1987, 2291, 2293; BGH 25 March 1988, NJW 1988, 2310; BGH 16 January 1959, BGHZ 29, 176, 182, 185). The burden of proof regarding proof of procurement of consent rests on the injuring party; this also applies in the case of a contract of repair where the nature and extent of the oblugation to perform is dispute and the claimant has recourse to a tort law claim of infringment of property rights (BGH 19 October 2004, VersR 2005, 282).

7. The point of departure in AUSTRIA is identical: conduct which would otherwise be unlawful is justified by procuring the consent oft he injured party, if he has a right of disposal over the impaired legal interest (*Koziol*, Haftpflichtrecht I[3], no. 4/90). This is true for both property rights (CC § 354) as well as consent to violations of the right to bodily integrity. The latter dispositions cannot be contra bonos mores (CP § 90(1)), and this is adjudicated by balancing the respective interests involved (OGH 26 January 1978, JBl 1978, 385). For consent to be operative in the case toof grave physical injury, it must be deemed necessary to promote the recognised interests of the injured party or of a third party.(*Koziol* loc. cit. no. 4/92). Conversely, consent cannot render permission to kill permissible (CP § 77), however, it is possible to consent to risk-carrying medical procedures, e.g transplants. Legal capacity is a prerequisite for an operative consent. Moreover, the declaration of consent must be imparted with knowledge of possible risks (OGH 26 January 1978 loc. cit.). The medical practitioner is required to inform the patient of the nature and consequences of the procedure, the consequences of electing not to undergo the procedure and alternatives prior to beginning treatment. Otherwise, liability will be triggered even in the case of, in all other respects, correctly adminstered treatment (OGH 23 January 1986, SZ 59/18 p. 71; OGH 7 February 1989, SZ 62/18). The *Act on Patients' Rights* 2006 governs the validity of declarations which a person makes in the case s/he is no longer able to make a judgment or express consent in emergencies and in case of illness. The circumstance that the injured party factually consented but the consent is not legally operative, can be of significance because on this ground, it may be possible to reduce the amount of compensation payable (CC § 1304).

8. Im GREEK law, it is accepted that consent embodies a ground of justification; *volenti non fit injuria* (*Stathopoulos*, Geniko Enochiko Dikaio A(1)[2], 819; *Kornilakis*, Eidiko Enochiko Dikaio I, 505). The provisions pertaining to juridical acts correspondingly govern such declarations (*Stathopoulos* loc. cit.; *Kornilakis* loc. cit.). As a consequence, a consent is inoperative if it contravenes the law or is *contra bonos mores* (CC arts. 174 and 178; *Stathopoulos* loc. cit.; *Georgiades*, Enochiko Dikaio, Geniko meros, 603). Consent to ciolations of property rights are generally unproblematic; in contrast, consent to infringements of personality rights are generally regarded as *contra bonos mores*, at any rate, if it amounts to a serious violation (*Stathopoulos* loc. cit.). A divergent approach is only adopted where the infringement was necesary to protect an elevated legal interest (on this basis, operations which are deemed medically necessary are permissible, whereas mere cosmetic procedures are not *Kornilakis* loc. cit. which are deemed tob e uunlawful even where consent is given; however, see also *Fountedaki*, Astiki iatriki evthini, 256: only in respect of dangerous cosmetic surgery does consent not amount to a ground of justification). In the case of damage or dstruction to property, consent is inoperative if e.g a rare painting was involved. Consent to therapeutic medical treatment is only operatibe if the patient was fully informed of the risks and advantages associated with the procedure (*Fountedaki* loc. cit. 174; *Agalopoulou-Zervogiani*, in FS Litzeropoulos I, 27). Consent, which does not have the effect of rendering the infringement lawful, remains relevant under the heading of contributory negligence (*Stathopoulos* loc. cit. 819-820).

9. PORTUGUESE CC art. 340(1) provides that violations of the rights of other are not unlawful of the holder of the right consent to their violation; similarly, at this juncture, the maxim *volenti non fit iniuria* applies (*Almeida Costa*, Obrigações[9], 528; *Antunes Varela*, Obrigações em geral I[10], 560). The courts appear to favour a strict application (STJ 23 September 2004: Consent to the storage of construction materials in a backyard precludes a claim for damages, even in respect of chemicals and fecal matter which was left behind). The validity of consent is ascertained according to the general rules on declarations of intent. Special provisions govern medical law (*Dias Pereira*, O consentimento informado, 214). Consent is required to be given voluntarily and is required to be an informed consent (Const. arts. 1, 25 and 26; CP arts. 156 and 157; CC art. 70; *Vaz Rodrigues*, O consentimento informado para o acto médico, *passim*). If the procedure was carried out in the interests of the affected party and corresponded to his or her presumed will (CC art. 340(3)). Cases involving unconscious patients provide important examples for the above mentioned principle; in essence, we are talking of cases concerning a benevolent intervention in another's affairs (see further *Almeida Costa* loc. cit.). Procedures which are not deemed necesary from a medical point of view (as, for example, cosmetic surgery, experiments, consent to organ removal) require an express declaration of consent; an implied consent here will not afford a defence (*Dias Pereira* loc. cit. 478 and 626; Clinical Trials on Medicinal Products for Human Use Act art. 6(1)(d) and before the Clinical Trials on Human Beings Decree Law art. 10(1)). Consent to illegal conduct or conduct which contravenes "*good practice*" is inoperative (CC art. 340(2)). An example is provided by a case where a professional football transfer of the right to control the reprodution of his image in its entirity to his club (CA Evora 24 February 2005; see also STJ 8 November 2001, CJ [ST] IX [2001-3], 113), consent of a sixteen year old to live in *de facto* cohabitation with a man denotes another example (STJ 21 November 1985, BolMinJus 351 [1985] 429).

10. The following principle is derived from DUTCH CC art. 6:162(2), namely that an unlawful act is rendered lawful, if the tortfeasor can aduce a ground of justification. Consent affords a ground of justification e.g. consent to an operation carried out *lege*

artis (Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 455 p. 414). ESTONIAN LOA § 1045(2) adheres to teh same conceptual understanding. The consent of the injured party renders the damaging conduct lawful provided that the consent was legally operative. The injured party must be aware of the consequences of that consent, i.e. that s/he knew the consequences or could have reasonably ben expected to know of them. In addition, the consent cannot be unlawful or contra bonos mores.

11. Similarly, in the NORDIC countries, the defence of consent is occasionally discussed in connection with the theory of "wrongfulness" (*rättsstridighetsläran*) and it is said that a valid consent renders the damaging act lawful gesagt, aus (*Ussing*, Retstridighed, *passim*; *Karlgren*, Skadeståndsrätt[5], 67). At any rate, in SWEDEN (*Hellner and Radetzki*, Skadeståndsrätt[7], 62; *Agell*, Samtycke och risktagande, 67; *Conradi*, SvJT 1989, 225-234) and in FINLAND (*Taxell*, JFT 1944, 367-387; *Hakulinen*, Obligationsrätt, 237), in the interim also in wohl aber DENMARK (*Vinding Kruse*, Erstatningsretten[5], 30; *von Eyben and Isager*, Lærebog i erstatningsret[5], 44) there are hardly any remaining proponents oft he theory of wrongfulness. This does not have any impact on the fact that an express or implied consent affords a defence to liability; only a presumed consent will not generally be enough (*Hellner and Radetzki* loc. cit. 124; *von Eyben and Isager* loc. cit. 51; *Taipale*, Accept af risiko, 385). Consent to a particular type of damage will also not suffice if the actual damage that has occured is atypically more serious than was previously contemplated (*Hellner and Radetzki* loc. cit.; *von Eyben and Isager* loc. cit. 52; *Saxén*, Skadeståndsrätt, 112; *Hakulinen* loc. cit. 265).

II. Acting at own risk

12. Questions in connection with the contentious principle of acting at one's own risk raise a mutitude of not inconsiderable systematic difficulties in national legal orders and under EU law. In conjunction with art. 2(1) of the Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of laws of the Member States relating to insurance against civil liability and art. 1 of the Third Council Directive 90/232/EWG of 14 May 1990 on the approximation of laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, the ECJ held in a judgment handed down on 30 June 2005 – C-537/03, *Candolin v. Vahinkovakuutusosakeyhtiö Pohjola*, EuZW 2005, 593, it amounted to a contravention of community law to deny a passenger of a motor vehicle, who was also the owner of the vehicle, the right to be compensated by the the driver's third party liability insurance on the grounds that the injured party must have recognised the driver's drunken condition.

13. In respect of the legal consequences of an *acceptation des risques*, in FRANCE, a distinction is made between liability for *faute* and the objective liability. In the first category of cases, namely the *responsabilité du fait personnel*, it is acknowleged that the fact the victim voluntarily accepts the risk does not have the effect of either reducing or exempting the liability of the tortfeasor (*Flour/Aubert/Savaux*, Le fait juridique[10], no. 180 p. 172), unless, the assumption of risk amounts to contributory negligence (Cass.ch.mixte 28 January 1972, Bull.ch.mixte 1972, no. 1 [passenger injured; here the claim was reduced by 25%, because the victim knew that the driver was drunk]). An acceptance of risk where there is no underlying fault can impinge on the question of whether the injuring party actually acted with *fautivement*: a person who injures another in a combat sport where the rules were observed, does not commit a *faute* vis *á* vis the injured party (Cass.civ. 5 December 1990, Bull.civ. 1990, II, no. 258 p. 133 [Boxing] and Cass.civ. 23 September 2004, Bull.civ. 2004, II, no. 435 p. 369). In respect of the second category (objective liability) consensus exists at any rate

on the point that an *acceptation des risques* generally entails that individuals injured while participating in a sporting activity cannot rely on the *gardien*-liability under CC art. 1384(1). How this conclusion is be rationalised on a dogmatic basis is a bone of contention. A number of legal writers contend that it can be regarded as a legal consequences of a *faute de la victime* (*le Tourneau*, Droit de la responsabilité et des contrats (2004/2005), no. 1894), other commentators consider the assumption of risk amounts to a mutual agreement to absolve each other from liability (*Flour/Aubert/Savaux* loc. cit. no. 262 p. 267, insbes. fn. 5). The theory of the *acceptation des risques* only comes to the fore in competitive sporting events, it is inapplicable in the case of a non-competitive or impromptu sporting meetings (Cass.civ. 28 March 2002, Bull.civ. 2002, II, no. 67 p. 54) or during youth sports training (Cass.civ. 4 July 2002, D. 2003, 519, note *Cordelier*).

14. In BELGIUM, the doctrine of *risicoaanvaarding* or. *acceptation des risques* is typically exemplied by the case of travelling in a vehicle with a driver in a recognisably drunken state (*Vandenberghe/Van Quickenborne/Wynant/Debaene*, TPR 2000, 1551, 1673, no. 30). Indeed, assumption of risk " of itself" is not tantamount to a ground of justication leading to the exculpation of tort liability, (*Cornelis and Claeys*, TBBR 2003, 586, 595 no. 46), however, it may be classifed as contributory negligence leading to an apportionment of liability (CA Gent 21 March 1995, RGAR 1996, no. 12557). In other words, the injured party is required to have breached a duty of care (CA Gent 22 January 1999, RGAR 2000, no. 13.200). Therefore, the theory of assumption of risk is only relevent if the victim did not breach any other legal norms (e.g. provisions relating to the compulsory wearing of a seat-belt) (*Vandenberghe/Van Quickenborne/Wynant/Debaene* loc. cit. no. 31).

15. The SPANISH Supreme Court has, on many occassions, approved the theory of assumption of risk (see further *Orti Vallejo*, Responsabilidad en la explotación, 1357; for a critical exposition, see *Solé Feliu*, FS Díez-Picazo II, 3097-3123), see e.g. TS 10 February 2006, RAJ 2006 (1) no. 675 p. 1617 (no liability vis-à-vis a man who took part in a bullfighting festivity; the plaintiff assumed the risk) and TS 31 May 2006, RAJ 2006 (3) no. 3494 p. 8007 accident between racing cyclists; however, the race organisers were liable for inadequate safety on the cycle route). The assumption of risk doctine was deemed inapplicable to operators of a golf course in a case where the ball of one player hit another player while he was searching for his golf ball; operating a golf course does not constitute a dangerous activity which was a prerequisite for the imposition of strict liability (CA Pontevedra 11 May 2006, BDA JUR 2006/158510; see also TS 9 March 2006, RAJ 2006 (2) no. 1882 p. 4474). Similarly, the basic tenet in respect of all kinds of combat sports is that injuries that habitually crop up in these sports must be tolerated and therefore, such injuries must be reckoned with see TS 22 October 1992, RAJ 1992 (5) no. 8399, p. 11045; TS 20 March 1996, RAJ 1996 (2) no. 2244 p. 3058; TS 16 October 1998, RAJ 1998 (4) no. 8070 p. 11793. The organisers are liable to the participants only where proof of fault can be adduced (CA Valladolid 21 September 1994, AC 1994 (2) no. 1397 p. 1030; CA Vizcaya 15 March 1999, AC 1999 (2) no. 881 p. 83; TS 14 April 1999, RAJ 1999 (2), no. 3140, p. 481; TS 29 December 1997, RAJ 1997 (5) no. 9602 p. 15314 [Non fulfillment of safety obligations]; TS 30 October 1992, RAJ 1992 (4) no. 8186 p. 10736 [negligent organisation]); a judgment following different lines TS 17 September 1998, RAJ 1998 (4) no. 7282 p. 10711 is is apparently still in force (liability was imposed on the organisers of a bullfight solely on the grounds of the creation of an increased risk). The theory of assumption of risk is even applied in the case of accidents occuring during public entertainment spectacles (Big wheel etc.) (CA Guadalajara 27 Juli 1994, AC 1994 (2) no. 1190 p. 715; CA Segovia 14 February 1997, AC 1997 (1) no. 254 p.

447; CA Córdoba 16 December 1997, AC 1997 (3) no. 2417 p. 1200; however, of a differnt view, CA Granada 3 February 1998, AC 1998 (3) no. 1696 p. 63; CA Granada 11 May 1999, AC 1999 (1) no. 470 p. 665; CA León 9 April 1999, AC 1999 (2) no. 1387 p. 820), it does not apply in the case of accidents in public swimming pools (TS 23 November 1982, RAJ 1982 (3) no. 6558 p. 4358; TS 14 June 1984, RAJ 1984 (2) no. 3242 p. 2471; TS 10 April 1988, RAJ 1988 (2) no. 3116 p. 2956; TS 2 April 1993, RAJ 1993 (2) no. 2986 p. 3820). A distinction, not always a sharp one, has been drawn in case law between a lack of negligence, contributory fault and assumption of risk.

16. In a similar fashion, the ITALIAN courts apply the following rule to competitive sporting activities, namely, the participants waive their damages claim against each other owing to their voluntarily assumption of risk (the *accettazione del rischio*), provided that the injury remains within the boundaries of a typical risk associated with a sport of this nature and the injury is not linked to failure to abide by the rules, was not deliberate or was the result of the exercise of disproportionate force (Cass. 27 October 2005, no. 20908, Giust.civ.Mass. 2005, fasc. 10; Cass. 20 February 1997, no. 1564, Resp.civ. e prev. 1997, 669; Cass. 8 August 2002, no. 12012, Danno e resp. 2003, 529 = Foro it. 2003, I, 1,168).

17. In HUNGARY, it is assumed that sporting injuries are governed by CC § 342(2) and therefore consent is presumed (Petrik [-*Harmathy*], Polgári jog II[2], 580), unless the rules of the sport were flagrantly disobeyed or the organiser did not adhere to health and safety obligations (Petrik [-*Petrik*], Polgári jog I[2], 178/1; Gellért [-*Kemenes*], A Polgári Törvénykönyv Magyarázata[6], 1327). An implied consent can only be invoked in respect of tthose injuries which are necessarily comprehended by the relevant sporting activity, therefore, implied consent will not afford a consent in cases e.g of deliberate infliction of injury. Commonplace infringements of the rules governing a particular sport are classified as coming within the risk associated with the particular sport provided that the infringement was not intentional (*Petrik*, Kártérítési jog, 35 et seq; *Eörsi*, Kártérítés jogellenes magatartásért, 52). The legal postion in SLOVENIA appears to correspond in nearly all respects to the Hungarian situation (*Cigoj*, Teorija obligacij, splošni del obligacijskega prava, 179). However, that the injury must have come to pass while abiding by the rules of the game (Supreme Court of Yugoslavia 21 November 1984, Poročilo VSS 2/84, 20). A person does not act at their own risk if they sustain injury while attempting to rescue another (*Cigoj* loc. cit.). Under ROMANIAN Civil law, it appears ther is no distinction between consent and acting at one's own risk.

18. Under POLISH law, the theory of acting at one's own risk is considered to render lawful what would otherwise be unlawful. It is not unusual for the same substantive considerations to be employed in the context of contributory negligence, as regards causation and within the framework of rules on implied consent (see further Pietrzykowski [-*Banaszczyk*], Kodeks cywilny I[4], art. 415 no. 32; Bieniek [-*Bieniek*][5], art. 415 no. 5). As regards the field of sports, there is some leewas here as competitive athletes are under a duty to insure themselves against an accident (Qualified Sports Act [Dz. U. 2005.155.1298], art. 29(1)). Similarly, the concept of assumption of risk is a familar one to BULGARIAN law (*Goleva*, Pravna misul 1985 [4] 46-56) It primarily comes to the fore in the context of dangerous sports (football, boxing) and is deployed in cases where an individual allows himself or herself to be transported in a vehicle driven by a recognisably drunk driver or recognisably dangerous vehicle and the ensuing accident is caused by these dangers (*Goleva* loc. cit. 48). The doctrine of voluntary assumption of risk is deemed to be inapplicable in cases where a person sufferes injury while attempting to rescue another (Supreme Court 19 August 1972, decision no. 2031, case no. 967/72 in civil matters, first chamber).

19. In GERMANY, for the most part, consent justifying an exemption from liability is only recognised in the case of markedly dangerous sports (boxing; motorsports) (BGH 14 March 1961, BGHZ 34, 355, 363; BGH 5 November 1974, BGHZ 63, 140, 144; BGH 5 March 1963, BGHZ 39, 156, 161; however, see also BGH 1 April 2003, NJW 2003, 2018, 2019). In the context of other competitive sports (e.g football), where even full compliance with the rules or minor infringements carries a potential risk of injury to both sides, it is assumed that each participant has accepted the consequences, even if grave, of injuries that cannot be avoided in sports of this nature. If a claim were to be asserted against the injuring party, this would constitute inconsistent behaviour (*venire contra factum proprium*) and therefore, such a claim is precluded. Consent is not contemplated hereby, because e.g. every football player plays in the hope that he won't sustain injury (BGH 5 November 1974, BGHZ 63, 140, 144; BGH 1 April 2003, BGHZ 154, 316). The rules governing the assumption of risk are not deployed in the context of sporting events which are not subject toa hard and fast set of rules are (BGH 7 February 2006, NJW-RR 2006, 672, 674). Occassionally, the assumption of risk is reinterpreted to connote implied consent.(CA Karlsruhe 19 March 2004, NJW-RR 2004, 1257: Segelregatta).

20. In AUSTRIA, implied consent is held to be extant where an individual sustains injury while partaking in a sporting activity despite the rule having been fully observed or where the injury was the result of a commonplace violation (OGH 24 September 1981, SZ 54/133 p. 660; OGH 22 September 1987, SZ 60/176 p. 219); divergent principles to the rules usually governing the infliction of physical injury, apply in the context of injuries sustained in competitive sports (OGH 24 September 1981 loc. cit.). If the transgression goes beyond a typical breach of the rules, liability, governed by the general tort law principles, is triggered (OGH 22 September 1994, EvBl 1995/74). This is the case e.g., if a football player extends out his leg and strikes his opponent's leg, deliberately bringing him to the ground (OGH 22 September 1994 loc. cit.). A duty to compensate was held to exist where in contravention of the rules, a racing driver was guilty of overtaking during the race and by doing so killed a track attendent. The rules which have developed for competitive sports are also valid for games which involve physical contact and where it is required to at least comply with a minimum number of rules or conventions (OGH 22 March 1983, ZVR 1984/92 p. 89; OGH 25 November 2004, JBl 2005, 380). The above mentioned rules are deemed not to apply to the detriment of a rescuer who sustains injury during the rescue attempt (OGH 17 March 2005, ÖJZ 2005, 713).

21. In GREECE, it is said that wrongfulness is nullified if the injured party is deemed to have assumed the risk of injury bound up with a particular activity. The most important case of application for this doctrine is participation in competive sports. One requisite of this defence is that there is adherence to the rules of the sport. A further requirement is that the harm caused is regarded as a typical risk associated with sports of this type (*Kornilakis*, Eidiko Enochiko Dikaio I, 506; Georgiades and Stathopoulos[-*Georgiades*] assert that such cases should be solved by utilising the consent mechanism, art. 914, no. 59).

22. Similarly, in PORTUGAL, the doctrine of *assunção do risco* also represents a ground of defense (in depth *Brandão Proença*, A conduta do lesado, 615; *Ribeiro de Faria*, Direito das Obrigações, 525; *Calvão da Silva*, Responsabilidade civil do produtor, 735). This defence is seldom invoked in the law pertaining to traffic liability (*Brandão Proença* loc. cit. 626: passengers who were given a free lift), it is largely significant in determining liability under sports law. Here, it serves to impute consent to players of competitive sports in respect of the realisation of risks which are synonymous with their sport (*Brandão Proença* loc. cit. 613, 631 and 632; *Antunes Varela*, Obrigações

em geral I[10], 562; *Hörster*, Parte geral, 269). Implied consent to contact is excluded if the injury was caused intentionally or resulted from a serious breach of the rules (Almeida Costa, Obrigações[9], 529).

23. Under DUTCH law, there is no overall consensus on how to order a *risico-aanvaarding* within the Civil law system. On these grounds, nor is there agreement on the legal consequences flowing from an assumption of risk. The law on consent, the implied waiver of liability, contributory negligence and negligence all feature in the discussion (Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 454 p. 413); at any rate, assumption of risk is not tantamount to an autonomous ground of justification (HR 28 Juni 1992, NedJur 1992 no. 662 p. 2546; T&C Property Law [-*Lindenbergh*][4], art. 6:162 p. 1861; *Hartkamp* loc. cit.). A person, who was transported gratutiously, does not impliedly waive a potential damages claim; a person who permits himself to be driven by a driver in a recognisably drunken state must reckon with a reduction in damages owing to contributory negligence (HR 28 September 1990, NedJur 1992 no. 619 p. 2530; HR 20 October 1990, NedJur 1992 no. 620 p. 2535). A reduction in liability on the basis that risk was assumed can also be attained in other instances by reverting to CC art. 6:109 (*Hartkamp* loc. cit. nos. 456-456a p. 416).

24. Similarly, there is no corresponding express regulation in ESTONIA which is comparable to VI.–5:101(2). If acting at one's own risk canno be regarded as consent, then recourse is had to the rules on contributory negligence (LOA § 139) (*Lahe*, Juridica 2003, 83–91).

25. The universal consenus in the NORDIC legal writing is that acting ot one's own risk does not lead to complete exculpation from liability but is classified as contributory negligence (see e.g. for SWEDEN HD 6 April 1973, NJA 1973, 141; HD 22 February 1979, NJA 1979, 129 and HD 6 April 2000, NJA 2000, 150) which will only result in a reduction of the extent of liability (*Hellner and Radetzki*, Skadeståndsrätt[7], 124; *von Eyben and Isager*, Lærebog i erstatningsret[5], 53; *Saxén*, Skadeståndsrätt, 112; *Bengtsson*, Skadestånd vid sport, lek och sällskapsliv, 62; *Agell*, Samtycke och risktagande, 12 and 176; *Vinding Kruse*, Erstatningsretten[5], 45; *Hahto*, JFT 2005, 250, 265). Closer analysis reveals a distinction is drawn between personal injury and physical damage to property. In the case of bodily injury, considerable hurdles under the Swedish Damages Liability Act chap. 6 § 1 and Swedish Traffic Damages Act § 12 must be surmounted before a reduction of liablity will be entertained; even where the injured party was guilty of gross negligence, the hurdles are not always overcome (*Hellner and Radetzki* loc. cit. 224). Therefore, acting at one's own risk remains a line of argument that only comes to the fore in cases leaving no room for doubt and where the defence self-evidently applies. It is of particular relevance in the sports law context (*Hellner and Radetzki* loc. cit.; *Bengtsson*, SvJT 1976, 593, 613; *Bengtsson and Strömbäck*, Skadeståndslagen[2], 50). Today, assumption of risk is classified as contributory negligence in DENMARK, (it is, therefore, no longer characterised as acting at one's risk operating to exclude the imposition of liability), for example, where a individual permits himself or herself to be transported by a driver in a recognisably drunken state (Traffic Act § 101(2)). As a general rule, the damages claim is reduced by a third (*Jensen*, UfR 1988 B, 383-389; HD 15 November 2003, UfR 2003, 339; Western CA 15 May 2007, UfR 2007, 2275). In FINNISH Supreme Court 28 November 1980, KKO 1980:126 a guest on a sail boat was injured in the course of helping to get the boat off a shoal: he was not deemed to have acted on his own risk and received full compensation. In Supreme Court 5 September 1980, KKO 1980 II 89 pedestrians walked through a dark residential court yard and fell into a hole; they were regarded as acting with contributory negligence. In Supreme Court KKO 1979:99 a person diving from an unfamiliar deck was injured by hitting his head

on a raft lying in water, invisible from the deck; he was considered to have acted at his own risk. In a similar vein, passengers, who travel with a recognisably drunken driver, must, on the grounds of their contributory negligencem, reckon with a reduced damages claim (Supreme Court 6 March 1996, KKO 1996:24); if they also encourage the driver to particularly risky driving behaviour, then the damages claim is reduced to nothing (Supreme Court 6 September 1999, KKO 1999:93). Acting at one's own risk in respect of physical damage to property has more potential as a successful defence (*Hellner and Radetzki* loc. cit. 125; *Taipale* Accept af risiko, 385). Decisions on this point amount to a rara avis (see e.g. SWEDISH HD 8 April 1993, NJA 1993, 149: a golfer's ball hit a car in the parking lot of a golf course; no acceptance of such risk by the owner of the car). In DANISH HD 22 January 1959, UfR 1959, 160 an airplane, being transported on a public road was negligently damaged by another truck; compensation was reduced due to the extraordinary transport, its value and its fragile nature.

Illustration 2 is taken from BGH 19 October 2004, VersR 2005, 282; **illustration 3** from STJ 23 November 2005; **illustration 4** from *Arthur v. Anker* [1997] QB 564; **illustration 5** from Cass. 10 June 1997, no. 5175, Foro it. 1997, I, 2920, note *Chiarolla*; **illustration 6** is comparable to BGH 13 December 1977, BGHZ 71, 339; **illustration 7** is taken from Cass.civ. 8 March 1995, Bull.civ. 1995, II, no. 83; **illustration 8** from HR 28 June 1991, NedJur 1991 no. 622 p. 2546; and **illustration 9** from *Weir v. Wyper* 1992 SLT 579.

VI.–5:102: Contributory fault and accountability

(1) Where the fault of the person suffering the damage contributed to the occurrence or extent of legally relevant damage, reparation is to be reduced according to the degree of such fault.

(2) However, no regard is to be had to:

(a) an insubstantial fault of the person suffering the damage;

(b) fault or accountability whose contribution to the causation of the damage was insubstantial; or

(c) the injured person's want of care contributing to that person's personal injury caused by a motor vehicle in a traffic accident, unless that want of care constituted profound failure to take such care as was manifestly required in the circumstances.

(3) Paragraphs (1) and (2) apply correspondingly where the fault of a person for whom the person suffering the damage is responsible within the scope of VI.–3:201 (Accountability for damage caused by employees and representatives) contributed to the occurrence or extent of the damage.

(4) Compensation is to be reduced likewise if and in so far as any other source of danger for which the person suffering the damage is responsible under Chapter 3 (Accountability) contributed to the occurrence or extent of the damage.

COMMENTS

A. General

Contributory fault, contributory fault of auxiliary persons and contributory sources of danger. Strictly speaking, this Article features three defences. Paragraphs (1) and (2) involve the personal contributory fault of the person suffering the damage. Paragraph (3) clarifies that the injured person is also to be imputed with the contributory fault of an employee or representative for whom the injured person is responsible and paragraph (4) relates to the circumstances in which compensation is to be reduced because of the injured person's own responsibility for a contributory source of danger. The legal basis of liability on the part of the injuring person does not matter; this Article relates both to those situations in which liability is based on intention or negligence and those in which liability is strict.

Reparation. This provision is applicable to all forms of reparation, not only to compensation (i.e. reparation by means of monetary payment: VI.–6:101 (Aim and forms of reparation) paragraph (2)). Admittedly this will only rarely be practically relevant, but it is conceivable, e.g. where damages are to be rendered *in natura* in the form of the carrying out of work and this can be confined to a part of the necessary repairs.

Contribution to the occurrence or extent of the damage. The Article refers throughout to contributory responsibility on the part of the injured person for the materialisation of the damage as well as to contributory responsibility for the extent of the damage. This corresponds to III.–3:704 (Loss attributable to creditor), which the present Article concretises and (partially) modifies for the purposes of the law on non-contractual liability. Where both points of view coincide (contributory responsibility regarding the materialisation of damage as well as with respect to the extent of the damage) then account must be taken of both together.

Type of damage. The type of legally relevant damage makes no fundamental difference. However, paragraph (2)(c) provides a special rule for bodily injury resulting from traffic accidents.

The mirror principle. In essence (and apart from some exceptions mentioned below) this Article is built upon what might be called the "mirror principle": everything which can go towards establishing accountability and thus liability on the part of one party for a legally relevant damage can (wholly or partially) reduce liability when the roles are reversed and it is the injured person's conduct or source of danger which is under scrutiny. This approach did not cause controversy. The legal order is not allowed to be "blind in one eye": whatever is advantageous for the injured person, as regards the law of liability, should also act to the injured person's disadvantage in the reverse situation. The injured person's claim indeed remains in principle preserved (if not ruled out by another defence), but its amount is reduced. The claim is entirely cut down ("reduced to zero") only in cases in which it may be said that the injured person's contributory fault outweighs the injuring person's responsibility to such an extent that there is no more room for liability on the part of the latter. Of course, in cases of this type, negligence of the injuring person or the realisation of a risk justifying liability will often already be absent.

Exceptions. The mirror principle is only capable, however, of being the starting point for the formation of the rule. It is not without its limitations, from a theoretical standpoint, as well as from a policy point of view. Neither "intention" nor "negligence" within the meaning of VI.–3:101 (Intention) and VI.–3:102 (Negligence) can be given their normal meaning in relation to the victim and, in a nutshell, the policy question is invariably to what extent the protection of the victim will be deemed reasonable and necessary; to this end, paragraph (2) of the Article presents a number of compromises.

Fault. It is common ground that so-called "contributory fault" does not hinge upon negligence. This is because any person who harms himself or herself (or who co-operates in doing so) does nothing forbidden and consequently occasions no legally relevant damage. The issue is not that the injured person injures the liable person through the former's conduct, but rather that the injured person must accept the consequences of having been careless with that person's own rights and assets. The claim is reduced because the injured person has shown through the relevant behaviour that the protected personal interests were not in fact so important. The expression "contributory negligence" is therefore an unfortunate one. It is better to speak of "contributory fault", not only because the injured person does not cause any harm to another person, but also because it better reflects why the claim is to be reduced, namely the adoption of a personally neglectful position towards one's own interests. Consequently, in contrast to accountability, paragraph (1) (and, as far as the employee is concerned, also paragraph (3)) comes into operation only if there is genuine "fault" on the part of the injured person, that is to say, conduct which is improper or reprehensible or at least may be criticised in a moral or ethical sense.

Children and mentally handicapped people. For persons who are incapable of "fault" (such as small children and the mentally incapacitated) no such reduction of their claim can therefore arise. In the case of older children, account is taken of their immaturity and their incompletely developed capacity for reasoned deliberation. For the purposes of this Article children are not imputed with the contributory fault of their parents or supervisors. This is because children are not liable for their parents; rather, in the case of a failure to supervise, typically they are entitled not only to a claim against the third person causing injury but also a concurrent claim in damages against their parents. (The finer details of the latter claim may be specifically

regulated by family law, however; this Book leaves such rules unaffected I.–1:101 (Intended field of application) paragraph (2)(c); VI.–1:103(c) (Scope of application)). In the case of preponderant fault on the parents' part, the third person causing the injury must therefore bring in the parents under the mechanism of solidary liability in damages. It is conceivable, however, that the wrongdoing of a person who is taking care of the child (regardless of whether it is the parents or someone else) heavily tips the balance so much on one side that it causes the third person's contribution to the cause or to a source of danger for which the third party is responsible to completely fade into the background.

Illustration 1
A fifteen-month old baby has died. Instead of giving him medication for relieving inhalation difficulties, his grandmother had given him a chemical product which removes toilet lime scale. The medication and the chemical product were next to each other in the closet. Indeed the chemical product had not been correctly packaged and labelled but, under the circumstances, that alone does not suffice to render the manufacturer liable for the child's death. The parents and grandmother have behaved in such a grossly negligent way that the death of the child can no longer be deemed as having been caused by the packaging and labelling defects.

Paragraph (2). In the interest of protecting the injured person, paragraph (2)(a) and (b) provide that immaterial contributory fault and an insignificant contribution to the cause are to be disregarded. Less care is necessary when dealing with one's own personal interests than in dealing with those of another; a bicycle thief cannot use the argument against the victim of the theft that the bicycle was not locked. In the "normal" cases of the negligent infliction of damage, it is also to be considered that liability - though this is considerably less so for the economic consequences of contributory fault - is insured against or insurable. Paragraph (2)(c) allows for the special dangers of road traffic and takes up a widespread tendency in European general liability law in affording more robust protection for traffic accident victims than for those who are injured in other areas of life, e.g. when playing sport or in their free time.

B. Contributory fault (paragraph (1))

Fault contributory to the materialisation of the damage. Paragraph (1) contains the basic rule on contributory fault: a person who, through fault, is a contributory cause of the damage must accept a reduction in compensation, depending on the degree of this fault. "Fault" means intentional or neglectful harm to one's own interests. Where the injured person intentionally caused the accident, the liability will usually be reduced to zero. The dependants of a person who commits suicide by jumping in front of a car do not even have a claim against the driver, cf. VI.–5:101 (Consent and acting at own risk) and VI.–5:501 (Extension of defences against the injured person to third persons). A reduction of the claim due to the intentional contributory fault of the injured person mostly crops up in cases in which that person intentionally and unreasonably refuses to minimise damage that has already occurred. Even in cases where grossly negligent fault contributes to the materialisation of the damage, a reduction of the claim to zero is by no means rare; cases of this type often border on the defence of an inescapable event (VI.–5:302 (Event beyond control)).

Illustration 2
The claimant was bitten by X's dog, but had ignored a clearly visible sign saying "Beware of the dog". The claimant must accept a reduction in the claim for damages.

Illustration 3
A law, which seeks to protect gamblers from the dangers of an addiction to gambling and the detrimental effects it can have on one's life, requires casinos not to admit certain gamblers. A casino which has breached this duty cannot defend itself with the argument that the claimant is guilty of contributory fault by not respecting the ban.

Illustration 4
A patient admitted to a psychiatric clinic jumps out of the window and kills himself. The personnel of the clinic were aware of the danger of suicide but did not deal with it. The family members' claim (cf. VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death)) is not to be reduced (see VI.–5:501 (Extension of defences against the injured person to third persons)).

Reduction of liability. The claim is to be reduced according to the degree of contributory fault on the part of the injured person. The result is mostly a division of liability; the proportions will depend on the circumstances – for instance one third to two thirds or one fifth to four fifths. In appropriate cases – where contributory fault is overwhelming – reduction of the claim can even mean a complete denial of compensation.

Co-responsibility for the extent of the damage. The contributory fault of the victim is still relevant to mitigation of the claim where it relates not to the materialisation of the damage, but to its extent or amount. In principle, this requirement to minimise damage is independent of the type of damage occasioned. Under paragraph (1) it also relates to the minimisation of patrimonial consequences of a bodily injury. However, the injured person is only required to take or permit reasonable measures; there is no requirement to take new risks.

Illustration 5
A local newspaper had falsely reported that the claimant had been caught having sexual intercourse with another man during the wedding breakfast. Subsequent to this, the national press also reported on the story. The claimant's lawyers first made the issue "properly public" through their request to her to hold a large press conference on the day after the wedding. This made the damage worse; the claimant's claim in damages against the media is to be reduced by approximately one third.

Illustration 6
A woman and her daughter are seriously injured in an accident. The woman must close her butcher's shop for several years. When she is fit for work again, the machines are outdated and she has lost her customers; the business has become worthless. In fact the woman had the opportunity of continuing the business in between with staff, but did not want to do this. Her claim in damages due to the loss of business is to be reduced by a high fraction.

C. Exceptions (paragraph (2))

Insubstantial fault and causation. Paragraph (2)(a) contains a clarification in relation to paragraph (1): very minimal contributory fault is not to be taken into account. This means that it is left out of account altogether. A reduction of the claim by merely nominal percentages is not to be undertaken; the minimum threshold is usually set at 10%. This corresponds to widespread court practice, saves work for the judiciary, is in line with the considerations that support the defence of contributory fault and reflects in this area the rule of liability in VI.–6:102 (De minimis rule). Paragraph (2)(b) contains a comparable rule for cases in which the injured person's causal contribution is negligibly low, regardless of whether it concerns the

causal contribution of the fault or the causal contribution of a source of danger for which the injured person is responsible. However, there is an intrinsic relationship between the reason for the claim and the issue of whether the victim's contributory fault is inconsequential or substantial.

> *Illustration 7*
> A postal worker, P, steals credit cards out of letters sent by banks. Using the cards, P is able to withdraw money from the injured parties' accounts at an ATM. P obtains the necessary PIN numbers from the bank's customers by posing as the bank official who is investigating the whereabouts of the credit cards. In light of P's elaborate criminal scheme, what is involved here is merely negligible inattention on the part of the customers; their claim against P and P's employers is not reduced.

Traffic accidents. Paragraph (2)(c) contains a special rule for traffic accidents. In cases of bodily injury as a result of a traffic accident, contributory fault only gives cause for reducing the claim if it constitutes a gross disregard of one's own safety. This rule reflects a widespread tendency of European systems of liability – namely affording special protection to victims of traffic accidents. Encountering road traffic constitutes an unabatedly high risk. Slight breaches of the rules happen every day and are a reality of life. The originator of the damage is normally insured against liability; conversely, a pedestrian or cyclist affected outside the course of employment can only rarely shift the pecuniary consequences of contributory fault to an insurer. This lack of balance is at least partially remedied by paragraph (2)(c). This provision pertains to contributory fault in the materialisation of the damage, not a failure to minimise the damage. It only affects damage that falls under the scope of application of VI.–3:205 (Accountability for damage caused by motor vehicles). Where on an icy winter's day a person wearing slippery leather shoes walks on an ungritted pavement, a reduction under paragraph (1) ensues; it is only traffic accidents caused by a motor vehicle which are covered by paragraph (2)(c).

Policy considerations. Due to varying conceptions on the form of contributory fault on the part of traffic accident victims which should be afforded consideration (in relation to its capacity to reduce the claim), on who is to be deemed the "weaker candidate" enjoying a claim to special legal protection and on the type of damage that should be covered by this protection, paragraph (2)(c) suggests a middle ground: where bodily injury is at issue, everyone is affected in a special way and is at the mercy of the dangers of road traffic. Therefore, it did not seem advisable to include further distinctions between the various categories of persons. On the other hand, with property damage, the usual care in dealing with one's own goods can also be required where traffic is concerned; in the case of contributory fault, it would not be reasonable to allow virtually the entire weight to be shifted on to the risk borne by the other party's indemnity insurance.

Gross negligence. As far as bodily injuries are concerned, where the injured person has behaved in a grossly negligent manner, the limit of the special rule in paragraph (2)(c) has been reached. Depending on the grounds for the liability, in such cases the claim is to be reduced or even ruled out altogether. Gross negligence is a profound failure to take such care as is manifestly required in the circumstances. Standard examples include not buckling one's seatbelt, drunkenness at the wheel or driving through a red light.

D. Extension of the mirror principle to the law of strict liability (paragraphs (3) and (4))

Contributory fault of employees. Paragraph (3) concerns cases in which employers must accept a reduction in their claim to reparation on account of the contributory fault of their employees.

> *Illustration 8*
> Small children are gathered around X's company car; using a screwdriver, they want to see whether they can succeed in putting a scratch in the paintwork. The company's employees follow the goings-on, but do not intervene. Liability to the company on the part of the parents does not arise because the company's employees willingly allowed the damage to occur.

Contribution of a source of danger. When considering the injured person's contribution, it is not only *contributory fault* in the sense of intentional or careless harming of one's own interests which follows from the mirror principle; in fact, another element is to be weighed up: where in an individual case, a source of danger - for which the injured person would be liable under Chapter 3, Section 2 (Accountability without intention or negligence) - contributes to the accident or to its consequences, it would be that person's role as an *injuring* party which is at issue. That is the content of paragraph (4). This rule is of particular importance where the strict liability of the two parties collide, but it also has significance where the injuring party must be deemed contributorily responsible for the accident due to negligence and the injured person is also seen in such a light, but owing to an objective ground; both cases have the restriction that the intervention of the injuring party does not constitute an unavoidable occurrence from the perspective of the injured person (mirrored application of VI.–5:302 (Event beyond control)). It is worth noting that in the context of paragraph (4), paragraph (2)(b) remains applicable: an insubstantial contribution to the causal element is not deemed capable of reducing the claim. Where necessary, in the case of the collision of two strict liabilities, an amendment to the result is to be made with the aid of VI.–6:202 (Reduction of liability).

> *Illustration 9*
> An accident between two vehicles occurs in the middle of a road consisting of two lanes going in opposite directions. It is no longer possible to establish which of the vehicles had crossed over the line in the middle of the road. A's vehicle, a larger and more expensive car, has suffered damage to the extent of €20,000; B's vehicle, a budget-priced "student car", has suffered damage to the extent of €2,000. Each of the owners bears half of the damage to each car; A has a claim against B for €10,000, from which €1,000 will be deducted in the course of the setting-off calculations.

> *Illustration 10*
> A drives into B's vehicle, which was correctly positioned in the traffic. The contribution of B's vehicle to the cause is so slight that B's claim against A is not reduced.

> *Illustration 11*
> Messenger pigeons get caught up in the jets of an aeroplane set to land, leaving it considerably damaged as a result of the collision with the birds. The owner of the messenger pigeons is still ascertainable. Here the basic rule is again that each of the owners involved (supposing that the liability of the owner of the aeroplane is also strict, see VI.–3:207 (Other accountability for the causation of legally relevant

damage)) bears half of the other party's and half of its own damage. However, account is to be taken of the fact that aeroplanes are far more dangerous and it must be expected that their owners can draw on insurance premiums, in the context of VI.–6:202 (Reduction of liability). In the case of a private pigeon keeper, the liability is even to be reduced to zero due to considerations of equity and fairness.

NOTES

I. Contributory fault in causing the damage

1. Under FRENCH law both liability based on *faute* and strict liability yield to *force majeure* (see the notes under VI.–5:302 (Event beyond Control)). There is equally no liability as a rule if the injured party has committed *faute intentionelle* and the person causing the damage has merely acted negligently (Cass.civ. 16 October 1984, Bull.civ. 1984, I, no. 266 p. 225). A typical *faute* of the injured party which has in part contributed to causing the damage normally results in a reduction of liability, even when the claim to reparation is based on CC art. 1384 (Cass.ass.plén. 6 April 1987, JCP 1987, II, 20828, with a note by *Chabas*). Parents who are liable for the conduct of their children may invoke the negligent *faute* of the injured party in order to obtain a reduction in liability (Cass.civ. 29 April 2004, D. 2005, 188, note *Denis Mazeaud*). The reduction is proportionate to the comparative gravity of the *fautes* concerned (*Flour/Aubert/Savaux*, Le fait juridique[10], no. 176 p. 168). In BELGIUM the law likewise proceeds from the precept that the injured party's own *faute* results in a reduction of liability if there is a causal connection between that *faute* and the damage; here too this principle applies to both *faute*-based liability and strict liability under CC art. 1384 (*Vandenberghe/Van Quickenborne/Wynant/Debaene*, TPR 2000, 1551, 1907, no. 158). The proportionate reduction in liability is determined by the gravity of the *fautes* in issue (Cass. 29 November 1995, Pas. belge 1995, I, no. 517 p. 1087). The more serious the *faute* of the victim is, the greater is the scope for the supposition that the causal connection between the conduct of the injuring party and the damage has been broken (*Vandenberghe/Van Quickenborne/Wynant/Debaene* loc. cit. 1913-1915 no. 163).

2. In SPAIN it is concerned self-evident that a detriment which is sustained as a result of one's own fault is not damage in a legal sense: *quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire* (*Medina Alcoz*, La culpa de la víctima, 158). The statutory basis from which this ground of defence is derived is, however, a matter of dispute. Aside from exceptional instances where it is possible to resort to a more specific statutory regime, it is CC arts. 1105 (according to which no one is to be liable for an unforeseeable or unavoidable incident) and 1103 (the rule on liability for negligence) in particular which are the suitable candidates. Specific statutory provisions on contributory fault are to be found in amongst other statutes: the Liability and Insurance for Motor Vehicle Traffic Act, art. 1(1)(ii) and (iv); Atomic Energy Act, art. 45(2); Consumer Protection Act art. 145 and CP art. 114. The *Tribunal Supremo* has on many occasions confirmed in relation to CC art. 1105 that the *responsabilidad objetiva* (or *responsabilidad por riesgo*) is disapplied in the case where damage is exclusively the fault of the victim; such fault breaks the causal nexus (e.g. TS 14 October 1957, RAJ 1957 no. 2865 p. 1921; TS 26 May 1969, RAJ 1969 (1) no. 2864 p. 1978; TS 1 October 1985, RAJ 1985 (3) no. 4566 p. 3818; TS 1 February 1989, RAJ 1989 (1) no. 650 p. 703; TS 29 May 1999, RAJ 1999 (3) no. 4382 p. 6739; TS 21 November 1985, RAJ 1985 (3) no. 5624 p. 4783 and TS 11 July 1990, RAJ 1990 (5)

no. 5852 p. 7579). Among other requirements for damage to be attributed exclusively to the fault of the victim, the party causing the injury must have behaved correctly and the injured party must have been mentally competent (TS 31 December 1997, RAJ 1997 (5) no. 9195 p. 14688); it is not necessary, however, for the victim to have injured himself deliberately since negligence suffices (see further Reglero Campos [-*Reglero Campos*], Tratado de responsabilidad civil[3], 431; *Medina Alcoz*, La culpa de la víctima, 144). The terminology is admittedly not uniform in those cases in which the party causing the damage is also at fault (TS 16 January 1991, RAJ 1991 (1) no. 297 p. 320 disapproves of the widespread use of the expression *compensación de culpas* on the basis there is no "compensation of fault", only an end reduction in liability; see further *Yzquierdo Tolsada*, Sistema de responsabilidad civil, 207 [*concurrencia de concausas* is a suitable expression]; Reglero Campos [-*Reglero Campos*], Tratado de responsabilidad civil[3], 443 and *Roca i Trias*, Derecho de daños[3], 144 [*concurrencia de culpas*] as well as *Martín Casals*, FS Díez-Picazo II, 2472 [*concurrencia de culpa de la víctima*]). Nonetheless the legal position is unequivocal in so far as case law based on CC art. 1103, reduces the quantum of liability in accordance with the extent of the contributory fault (e.g. TS 22 February 1985, RAJ 1985 (1) no. 739 p. 585; TS 5 February 1991, RAJ 1991 (1) no. 992 p. 1190; TS 20 April 1993, RAJ 1993 (2) no. 3103 p. 3975; TS 3 February 1995, RAJ 1995 (1) no. 737 p. 971; TS 12 September 1996, RAJ 1996 (4) no. 6561 p. 8801; TS 15 December 1999, RAJ 1999 (5) no. 9200 p. 14491). It has been mooted, however, that the same outcome can be achieved on the basis of CC art. 1902 because the reduction in liability is not a mere matter of equity, but rather one of of accountability (e.g. *Pantaleón*, ADC 1991, 1042; *Díaz Alabart*, ADC 1988, 1168-1169; *Montés Penadés*, FS Díez-Picazo II, 2591, 2627; TS 14 June 2007 (BDA RJ 2007/5120,TS 29 December 1998, RAJ 1998 (5) no. 9980 p. 14596; *Medina Alcoz* loc. cit. 224). Where the fault of the person causind the damage is substantial and that of the victim is minor there is no reduction in liability (TS 18 January 1936, RAJ 1936 no. 86 p. 41; TS 10 July 1943, RAJ 1943 no. 856 p. 481; TS 8 July 1999, RAJ 1999 (3) no. 4766 p. 7360); generally it seems that the injured party's claim is also not reduced if either the person causing the damage acted intentionally (TS 8 June 1995, RAJ 1995 (3) no. 4563 p. 6101) or the fraction of contributory fault on the part of the victim is less than 10% (*Solé Feliu*, ADC 1997, 874, 896). A court will take account of contributory fault on its own motion; it is not necessary for the defendant to plead the defence (TS 22 April 1987, RAJ 1987 (2) no. 2723 p. 2546; TS 7 June 1991, RAJ 1991 (4) no. 4431 p. 6072). As regards injuries to children, a contributory fault of their parents is only taken into account where the parents' own damage is at stake (TS 1 February 1989, RAJ 1989 (1) no. 650 p. 703) and not it seems – the issue has not yet been settled by case law – to the extent that it is the child's own damage which is in issue (Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Pantaleón*], Código Civil II[2], art. 1902 p. 1998; *Solé Feliu* loc.cit. 879).

3. ITALIAN CC art. 1227(1) expressly extends to non-contractual liability law (CC art. 2056). If the event causing damage is also causally attributable to the injured person, the claim to reparation is to be reduced in accordance with the "severity of the fault" and "the extent of the resultant consequences". If the injured party is not capable of being at fault or there is only an objective (i.e. strict) ground of accountability on his or her part, then regard is hard to the causal contribution to the damage instead of fault (Cass. 10 February 2005, no. 2704, Giur.it.Mass. 2005, fasc. 2; *Franzoni*, Dei fatti illeciti, sub art. 2056, 776-777; Cass. 20 July 2002, no. 10641, Danno e resp. 2002, 1201). A claim will also be reduced under CC art. 1227(1) for reasons of strict accountability (z.B. aus CC art. 2051, siehe Cass. 20 July 2002, no. 10641, Danno e

resp. 2002, 1201 und CFI Bologna 25 September 1988, Danno e resp. 1999, 560: customer ran too quickly to an exit and thus ran into an unsafe pane of glass in the shop front).

4. The HUNGARIAN CC addresses the so-called "apportionment of damage" in § 340(1) and, so far as strict liability for dangerous enterprises is concerned, in § 345(2). CC § 340(1) places the injured party under an obligation when averting or mitigating the damage to proceed as could generally be expected in the circumstances. The other party is not obliged to compensate damage which arises from the non-performance of this duty. The injured party is also burdened by the defaults of persons for whose conduct he or she is responsible (CC § 340(2)) – for example, an employee or a person who is not capable of being held responsible for their conduct (Gellért [-*Kemenes*], A Polgári Törvénykönyv Magyarázata[6], 1235). The party causing the damage is therefore not liable for that part of the damage which has resulted from the negligent conduct of the victim or an employee or other auxiliary of the victim. In a particular case the claim to reparation can also be reduced beyond that provided for by § 340 under CC § 339(2), which enables a court to relieve the person responsible for the damage partially from liability on the basis of extraordinary circumstances. Under CC § 345(2) damage caused by a dangerous enterprise (typically a vehicle) need not be compensated in so far as it arises from reproachable conduct of the party sustaining the damage. CC § 345(2) therefore does not apply if the injured party is incapable of being held responsible for their conduct; a fault of a parent does not operate as a contributory fault so as to reduce a child's claim (Opinion of the Civil College of the Supreme Court PK 39; BH 1980/90; Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1270f; Petrik [-*Wellmann*], Polgári jog II[2], 592; *Petrik*, Kártérítési jog, 124ff,; cf. BH 1998/381[on the liability of a keeper of animals]). The apportionment of liability is a matter for the discretion of the court, which is based on the relative degree of reproachability or the extent of the contribution to causation of the damage (e.g. a 60%/40% split in BH 1995/27 or a 20%/80% split in BH 1992/242 because the injured passenger had thoroughly disturbed the driver or a 20% (passenger-victim), 80% (driver) split in BH 2008/61 in case of not fastening the seat-belt).

5. According to POLISH CC art. 362, where the plaintiff's conduct contributed to either cause or heighten the injury that was sustained by him/her, the damages recoverable by the injured party are reduced having regard to the circumstances and in particular having regard to the degrees of fault of both parties. This provision is employed in both contractual and extra-contractual damages claims (Supreme Court 23 June 1999, I CKN 57/98, OSNC 2000, no. 1, pos. 13; Bieniek [-*Wiśniewski*][5], art. 362, no. 3; Pietrzykowski [-*Banaszczyk*], Kodeks cywilny I[4], art. 362 no. 2). Difficulties arise when it comes to the conceptual understanding of "contribution of the injured party" to the ensuing harm. Some commentators intrepret it to signify a case of adequate contributory causation, other writers additionally require objective misconduct, some opine that subjective fault is requires whereas a fourth view distinguishes between the various grounds of liability: only where, the injured party is held liable for fault, can it be said that s/he similarly culpably contributed to causing the damage; on the other hand, if the injuring party is liable on the basis of strict liability, then solely objective misconduct on the part of the injured party will lead to a reduction in the amount of damages recoverable (see further *Radwański and Olejniczak*, Zobowiązania - część ogólna[5], 96 no. 250; SystPrCyw [-*Dybowski*] III, 298; *Wiśniewski* loc. cit. nos. 5 and 7). The question as to which approach is favoured by the Supreme Court does not allow a definite answer. The victim's response to fear will not amount to contributory negligence, even if this response is objectively wrong (Supreme Court 16 August 1956, NP no. 11-12/1956, p. 181; *Wiśniewski* loc. cit. 11, *Radwański and Olejniczak*

loc. cit. 97 no. 254). Contributory fault, while it does reduce the extent of the injuring party's liability, will not serve to nullify it *Banaszczyk* loc. cit. no. 13). Objective misconduct of persons who lack torious capacity will also operate to reduce liability (Supreme Court 20 September 1975, III CZP 8/75, OSN 1976, no. 7-8, pos. 151; *Banaszczyk* loc. cit. no. 18). Further, contributory negligence of his or her auxiliary (CC arts. 417, 427, 430, 474) is imputed to the injured party (*Banaszczyk* loc. cit. no. 24; *Wiśniewski* loc. cit. no. 10).

6. Similarly, under BULGARIAN LOA art. 51(1) the amount of compensation can be reduced if the damage is not only attibutable to the tortious conduct oft he injuring party but also to the victim's contributory negligence; only the exclusive fault of the injured party affords a complete defence. The employer's duty to compensate only completely falls away, if the victim intentionally brought about the accident at work or the illness (Labour Code art. 201(1)). If the injured partyis deemed to be incapable of fault, then the tortfeasor can rely on negligence of the victim's supervisor, especially on the parent's failure to adequately supervise their child (Interpretative judgment no. 88 des Obersten Gerichtshofs of 12 September 1962, full civil chamber). According to SLOVENIAN LOA art. 171(1), contributory fault results in reducible damages, provided that the injured party contributed to the event giving rise to damage or contributed to an aggravation of that damage. The conduct of the injured party must be the care that a sober-minded individual would take. Whether a minor is contributory negligent is determined on a consideration of age, experience and intellectual development (Juhart and Plavšak [-*Plavšak*], Obligacijski zakonik I, art. 171 p. 964; VSS II 28 June 2001, Ips 190/2000). Contributory fault also results in a reduction in claims based on strict liability (LOA art. 153(2)). An express regulation on contributory fault is absent from the ROMANIAN Civil Code. The courts and academic teaching present nonetheless a united front on this issue and the victim's contributory fault is relevant in the assessment of the award of damages (*Adam*, Drept civil. Teoria generală a obligaţiilor, 301, 310-311; *Dogaru and Drăghici*, Drept civil. Teoria generală a obligaţiilor, 250; CSJ 26 March 1992, *secţia penală*, decision no. 818; CSJ 2 June 1993, *secţia penală*, decision no. 937; both in Culegere de practică judiciară pe anul 2003 [2004]). The draft of a new Romanian Civil Code envisages an array of reformative measures under arts. 1109 und 1125(3), which for the most part correspond to VI.–5:102 (cf. Proiectul Noului Cod civil, 221).

7. GERMAN CC § 254(1) reduces the extent of the tortfeasor's duty to compensate, if fault on the part of the victim contributed to the cause of the injury. A blameworthy transgression of the duty to appropriately safeguard one's own interests, "fault committed against oneself" is intended hereby (BGH 18 April 1997, NJW 1997, 2234, 2235; MünchKomm [-*Oetker*], BGB[5], § 254, no. 3). CC § 254 is also operative in respect of claims arising under strict liability regimes (*Oetker* loc. cit. no. 7; Palandt [-*Heinrichs*], BGB[66], § 254, no. 2). CC §§ 827–829 is deemed to apply analogously to individually who are deemed incapable of committing a fault. The victim's contributory fault must amount to an adequate cause of the ensuing damage; further, the doctrine on the protective scope of the rule is also directly relevant in this regard. A doctor who gives a patient the wrong treatment cannot raise the argument that the patient was at fault in requiring the treatment (BGH 21 September 1971, NJW 1972, 334, 335). The extent to which damages are reduced depends on the particular circumstances of the case, an especially weighty factor is the degrees of fault the respective parties. This evaluation generally results in an apportionment of damages in proportion to the percentage of fault attributable to each party. This assessment can exceptionally result in the duty to compensate being obviated or indeed there may be no curtailment of liability at all (*Heinrichs* loc. cit. nos. 59 and 66).

8. Similarly, in AUSTRIA, the doctrine of the protective scope of the transgressed norm is also relevant in connection with the examination of the presence of contributory fault. OGH 21 December 2004, ecolex 2005, 204 held e.g, that a provision which provided that pathological gambers must be refused entry to casinos constituted a protective law, the purpose of which was to safeguard gamblers (pathological) from the lure of games of chance which threatened their very existence. Therefore, the fact that the gambler continued to partake in the game and did not voluntarily request to be barred from participation is not of decisive weight in assessing contributory fault. see also on the extent of liability in such a case OGH 17 February 2005, 8 Ob 134/04w, RS 0117007 T1 and T2.

9. If the injured party's "own fault" contributed to cause the damage, then the claim for compensation can also be reduced or even negated altogether according to the GREEK Civil Code. "One's own fault" connotes that the conduct of the injured party did not adequately protect his own interests (Georgiades and Stathopoulos [-*Stathopoulos*], art. 300, no. 5). While it is true to assert that the injured party's fault must have contributed to the damage, chronologically, this conduct can occur prior or subsequent to the act of the injuring party (*Stathopoulos* loc. cit. no. 9; ErmAK [-*Litzeropoulos*], art. 300, no. 5). The extent to which the claim is reduced will depends on the circumstances of the individual case, in particular, emphasis is placed on the detrmination of whether one party can be regarded as the primary cause of the damage (*Stathopoulos* loc. cit. no. 12).

10. According to PORTUGUESE CC art. 570(1), the courts determine the legal consequences of fault of the injured party which has contributed to the damage or has operated to aggravate it; in the light of the fact that there is a degree of negligence on both sides, contributory fault may operate to reduce or obviate liability or on the other hand full damages may be recoverable. CC art. 570(2) adds that contributory fault on the part of the victim will operate to negate liability in all cases where the injuring party's fault rests on a mere presumption of fault. It can thereby be concluded that the victims's contributory fault must operate to exclude claims arising under strict liability provisions (*Menezes Leitão*, Obrigações I[3], 332; *Antunes Varela*, Obrigações em geral, I[10], 677). Contributory fault on the part of an employee or legal representative are attributed to the injured party, CC art. 571; the same holds true for the parents of minors (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], art. 571 no. 1). The burden of proving contributory fault on the part oft eh victim rests on the injuring party; however, there is no need for him to expressly invoke this defence in order for it to afford a defence (CC art. 572).

11. Under DUTCH law, the injured party's "own fault" connotes that, in the circumstances of the case, the victim failed to deal carefully with his own interests (Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 448 p. 399, 409; Parlementaire Geschiedenis VI, 351). In cases where contributory fault oft eh victim is of overwhelming preponderence, then, according to CC art. 6:98, the necessary causal nexus between the conduct of the defendant and the ensuing damage may be absent. CC art. 6:101, according to which there may be a curtailment of liability, provided that the damage is caused by an event (s) which can be attributable to the injured party, only comes to the fore once the requisites of CC art. 6:98 are established (HR 1 Juli 1977, NedJur 1978 no. 118 p. 371). Since the judgment of the HR 4 February 1916, NedJur 1916, 450, the fact that fault on the part of the injured party operates to reduce his damages claim constituted well-entrenched judicial principle. CC art. 6:101 had the effect of codifying this judicial principle. The decisive feature of this provision is that the damage suffered is caused by the injured party himself or herself (*Hartkamp* loc. cit. no. 450 p. 402). That part of the damage for which compensation cannot be

recovered, is imputed to the claimant according the general precepts of CC art. 6:162(1) and (3) aswell as art. 6:163; therefore the claimant must have been at fault or the cause is regarded as being encompassed within his sphere of risk according to law or social convention (Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 69 p. 81).

12. ESTONIAN LOA § 139(1) und (2) correspond to VI.–5:102(1) in all essential points. The enumerated provisions do not refer to contributory fault, rather they refer in general terms to contributing to a risk which the injured party is deemed to be reponsible for. See Supreme Court 3-2-1-38-06, RT III 2005 (18) 187. A provision similar to VI.–5:102(3) does not feature in the LOA.

13. Similarly, in the NORDIC countries, contributory fault of the claimant is regarded as a mirror image of the other party's liability, although it is stressed that contributory fault does not constitue a breach of duty (*Vinding Kruse*, Erstatningsretten[5], 320, 323; *von Eyben and Isager*, Lærebog i erstatningsret[5], 319; *Saxén*, Skadeståndsrätt, 108; *Hellner and Radetzki*, Skadeståndsrätt[7], 222, 228). The various countries adopt clearly divergent approachs as far as further particulars are concerned. from each other. SWEDISH Damages Liability Act chap. 6 § 1 differentiates between bodily injury and other harm; only gross negligence and intention on the part of the injured party leads to a reducible damagesowing to contributory negligence. FINNISH Damages Liability Act chap. 6 § 1 merely contains a general rule, according to which damages may be reduced as to what is reasonable. On the other hand, the DANISH Damages Liability Act (EAL) does not contain any general regulation on the issue of contributory negligence. Nonetheless, the precept that contributory fault results in a reduced damages claim is generally recognised; the axiom can be indirectly derived from EAL § 24. Contributory negligence can only operate to reduce a compensation claim in respect of physical injury sustained in a traffic accident if the injured party is at a minimum guilty of gross negligence. In general, Incidentially, other general propositions in this area include the precepts that contributory fault leads to a proportional reduction in liability and that a minor fault of the injured party will be disregarded; as a general rule, damages claims are seldom reduced by less than one-third (*Karlgren*, Skadeståndsrätt[5], 219; *Vinding Kruse* loc. cit. 318; *Saxén* loc. cit. 125). In SWEDEN and DENMARK the considerations for reduction include, primarily, the degree of contributory fault, but also in certain instances the dangerousness of the activity of each party, the risk-allocations of the parties through insurance schemes, and in exceptional cases the economic situation of the parties (*Bengtsson and Strömbäck*, Skadeståndslagen[2], 340; *von Eyben and Isager* loc. cit. 319; see also EAL § 24). Conversely, the position adopted in FINLAND appears to concentrate solely on the contributory fault of the injured party; at any rate, it is a matter of some dispute whether other factors are permitted to flow into the equitable assessment (*Hahto*, JFT 2005, 267; *Saxén* loc. cit. 124). The regulation in SWEDISH Damages Liability Act chap. 6 § 1, according to which damages claims for physcial injury can be reduced in the event that the injured party was grossly negligent is, comparably speaking, rarely employed. Examples are provided, *inter alia*, HD 22 February 1979, NJA 1979, 129 (headfirst dive into shallow water in public swimming pool; the claim was reduced by 50%), in HD 1 December 1995, NJA 1995, 661 (Robber shot by victim of robbery; claim reduced by two-thirds) and in HD 6 April 1973, NJA 1973, 141 (a man who trepassed onto construction site at night fell into a unsecured manhole; claim reduced by a third). Conversely, reduction in claims in cases involving bodily injury are a common occurence in FINLAND (*Saxén*, Skadeståndsrätt, Tillägg till Skadeståndsrätt, 407; *Hahto*, JFT 2005, 267-8; see e.g Supreme Court 25 June 1980, KKO 1980 II 72; Supreme Court 20 August 2003, KKO 2003:70; Supreme Court 13 August 2003, KKO 2003:67 and Supreme Court 31

August 1994, KKO 1994:74). In DENMARK the courts appear to requires (and not only in the case of traffic accidents) an increased acuteness of contributory fault, in order to reduce liability in cases of physical injury; see e.g HD 4 October 1979, UfR 1979, 964; HD 24 November 1981; UfR 1982, 50; HD 25 October 1984, UfR 1984, 1098; Western CA 30 August 2002, UfR 2002, 2546 and HD 6 December 2002, UfR 2002, 519). Sucide attempts do not automatically result in an exclusion of liability (SWEDISH HD 11 July 1983, NJA 1983, 522 II; FINNISH Supreme Court 5 March, KKO 1985 II 30; *Bengtsson and Strömbäck* loc. cit. 333; DANISH Western CA 7 June 1993, UfR 1993, 785). In each of the three Nordic countries, contributory fault of children and mentally disabled adults is subject to a special judically created regulatory regime (*Bengtsson and Strömbäck* loc. cit. 346; *Saxén*, Skadeståndsrätt, 120; *von Eyben and Isager* loc. cit. 322. In SWEDEN, the "normal" rules apply with regard to physical damage to property and pure economic loss, whereby ordinary (not gross) negligence will suffice to support a claim for the reduction of liability (Damages Liability Act chap. 6 § 1(2); see in more detail *Bengtsson and Strömbäck* loc. cit. 340). The failure of an employer or the State to insure their property can amount to contributory fault (Damages Liability Act chap. 3 § 6); the courts have displayed a reluctance to extend this provision analogously to other cases (e.g. HD 29 October 1991, NJA 1991, 567; see *Bengtsson*, Om jämkning av skadestånd, 103). The DANISH courts, in particular, tend to regard the failure of a property owner to adopt appropriate measures to safeguard particularly valuable property or property which is prone to damage, thereby exposing that property to risk of damage, as amounting to contributory fault (*Trolle*, Risiko och Skyld[2], 445; *von Eyben and Isager* loc. cit. 332; HD 28 January 1941, UfR 1941, 291; HD 10 November 1952, UfR 1953, 12; Eastern CA 18 March 1955, UfR 1955, 607; HD 6 June 1956, UfR 1956,742; Eastern CA 10 December 1969, UfR 1970, 407; HD 15 April 1981, UfR 1981, 415 and Western CA 19 January 1994, UfR 1994, 304).

14. In ENGLAND **t**he defence of contributory negligence extends to claims based on strict liability arising under the Animals Act 1971: see s. 10 of that Act. Where the claimant has sustained damage in attempting to avert or minimise loss or injury, the claim for reparation is likewise subject to the defence of contributory negligence: *Sayers v. Harlow Urban District Council* [1958] 1 WLR 623 (where the claimant, who had been locked in a lavatory cubicle due to the defendants' negligence and attempted to climb out, was 25% to blame for her injuries in precariously resting her weight on the toilet roll when, realising that it was impossible to climb out, she abandoned the attempt). To the required standard of care see *The Genua* (1936) 55 Lloyd's L. Rep 139, 147 (*Langton* J: "ordinary [nautical] skill"). A mere error of judgment is not regarded as contributory negligence: *S.S. "Baron Vernon" v. S.S. "Metagama"* 1928 SC (HL) 21, 27 (Viscount Dunedin) and 32 (Lord Phillimore), (who both, however, considered the claimant's "supine inaction" amounted to negligence). The burden of proving the claimant's contributory negligence rests on the defendant: *S.S. "Baron Vernon" v. S.S. "Metagama"* 1928 SC (HL) 21, 25-26 (Viscount Haldane) and 29 (Lord Shaw), explained in *The Genua* (1936) 55 Lloyd's L. Rep 139, 144 (Langton J). However, if the contributory negligence is established the burden of proof as regards the extent to which this has or has not exacerbated the claimant's damage has been said to rest on the claimant: *S.S. "Baron Vernon" v. S.S. "Metagama"* 1928 SC (HL) 21, 27 (Viscount Dunedin), but contrast 33 (Lord Blanesburgh: act of negligence must be regarded as otiose unless it is shown that damage would in ordinary course flow from it).

II. The Duty to Mitigate Damage

15. In two decisions, the FRENCH Cass.civ. 19 June 2003, Bull.civ. 2003, II, no. 203, cases no. 930 and 931 principally rejected the argument that the victim has a duty to mitigate his or her damage under tort law; *la victime n´est pas tenue de limiter son préjudice dans l´intérêt du responsable*. Prior to this, the Cass.civ. 19 March 1997, Bull.civ. 1997, II, no. 86 p. 48 already formulated the specific principle that the victim has a right to refuse medical treatment and this refusal can therefore not be characterised as a *faute* Many legal writers point out that these decisions cannot be interpreted to connote that the tortfeasor is under a duty to compensate such consequential damage which the victim could have simply avoided and fails to do this in a grossly careless manner. Furthermore, there is no bar in characterising conduct which aggravates the damage caused as a *faute* on the part of the victim, If this is the case, then liablity is principally split (*Jourdain*, RTD civ 2003, 716). In contrast, under BELGIUM the traditional view that every victim of tort has a duty to mitigate the damage, is still adhered to. However, the victim is not required to resort to anything more than a *mesures raisonnables* (Cass. 14 May 1992, Pas. belge 1992, I, no. 478 p. 798). The criterion employed is whether a *homme raisonnable et prudent* would have had recourse to appropriate measure in the case at issue. Acadameic teaching regards the duty to mitigae or reduce damage as emanating from the general tort law duty of care (Ronse [-*De Wilde/Claeys/Mallems*], Schade en schadeloosstelling I^2, p. 325 no. 464).

16. In SPAIN, there is universal consensus on the principle that an injured party is required to take all suitable measures to reduce the damage. This *deber de mitigar los daños* finds its rationale in the general principle of good faith (CC art. 7(1); TS 29 November 1995, RAJ 1995 (5) no. 8361 p. 11143). It does not imply disproportionate sacrifices or the confrontation of the victim with new risks (*Díez-Picazo*, Derecho de daños, 322). In the other hand, reduction in liability claims as a consequence of a failure to mitigate damage are not confined to physical injury or damage to property; e.g. an injury of incorporeaö personality rights can also be counted among their number (see TS 23 April 1999, RAJ 1999 (3) no. 4248 p. 6542: a report in the local press where it was alleged that the claimant had sexual intercourse with a man other than her husband at her wedding reception, was elevated to a national news story as the claimant called a press conference the next day to speak about the issue; the damages claim was reduced by approximately one -third).

17. According to ITALIAN CC art. 2056, CC art. 1227 is also applicable to tort law claims. CC art. 1227(2) introduces a rule for the reduction of a liability claim in cases where the injured party did not act in a sufficiently careful manner subsequent to the damaging event in order to contain its impact (Cass. 13 March 1987, no. 2655, MFI 1987, 2655). The compensation claim is reduced, if the ensuing damage cannot be regarded as a normal consequence in the chain of causation set in motion by the tortfeasor (*Franzoni*, Dei fatti illeciti, sub art. 2056, 785-786). CC art. 1227(2) is employed e.g where the victim of an accident claimed disproportionally high repair costs (see CFI Genova 8 April 1983, Arch.Giur.circolaz. 1983, 775; CFI Forlì 9 March 1994, Arch.Giur.circolaz. 1994, 1073; CA Genova 6 May 1985, Giust.civ. 1986, I, 2257) or where a victim unnecessarily sought medical treatment in a private clinic instead of at a state run hospital (CFI Trieste 14 January 1988, Dir. economia assicur. 1988, 539). A further example for CC art. 1227 is provided by a decision in which a shopkeeper failed to move goods threatened by floodwaters into storage which was not threatened therefrom (Cass. 9 February 2004, no. 2422, Giur.it.Mass. 2002, fasc. 2). CC art. 1227 also crops up in a case of an employee, who was at first unfairly

dismissed, then reinstated to his position where that employee failed to exercise himself to find another position during the period of unemployment (Cass.sez.lav. 21 September 2000, no. 10859, Stud. Iuris 2001, 217).

18. In order to supplement the analysis for HUNGARY above in note *I4* above, it is necessary to advert *inter alia* to BH 1996/38 (whereby the failure to mitigate damage resulted in the victim incurring further costs, the tortfeasor's insurer was not required to compenates these additional costs), BH 1987/450 (according to which the duty to mitigate damage cannot impose an undue burden on the injured party; its purpose is not to exculpate the tortfeasor from liability) and BH 1984/197 (according to which the tortfeasor is only required to compesnate those costs which would have arisen, if the injured party had fulfilled his duty to mitigate damage in an appropriate manner). Similarly, under BULGARIAN LOA art. 83(2) the debtor is not liable for damage which an honest creditor could have avoided. However, he cannot be expected to resort to measures which would generate more costs than the prevention of the damage, in addition, s/he cannot be required to resort to unlawful measures or to measures *contra bonos mores* nor be expected to employ means that have the effect of injuring his good reputation (*Kalaydjiev*, Obligazionno pravo, Obshta chast, 389). According to SLOVENIAN LOA art. 171(1) a breach of the duty to mitigate damage results in a reduction of claims for compensation for pecuniary and non-pecuniary loss (art. 185) (VSS II 25 January 1996, Ips 423/94: refusal to consent to an operation performed under general anaesthetic). The injured party is not obliged to resort to extaordinary measures nor act as a sacrifical lamb (VSS II 14 March 1996, Ips 652/94). ROMANIAN statute law currently does not recognise any duty to mitigate damage; however, this duty ought to achieve statutory recognition in the proposed Civil Code (Entwurf art. 1109(1); Proiectul Noului Cod civil, 217).

19. GERMAN CC § 254(2) makes explicit what in actual fact already follows from CC § 254(1), namely, that contributory fault on the part of the injured party can also stem from a failure to point out an extraordinary risk that extensive damage will result or may derive from a failure to prevent the damage occuring or failing to take measures that minimise the impact of the damage. Three duties are imposed on the injured party, namely, a duty to warn, a duty to avoid damage and a duty to take appropriate measures to reduce the extent of the damage. The injured party is guilty of contributory fault if s/he violates the duty to act in good faith by failing to take those measures that a ordinarily careful and reasonable person would take in the circumstances to safeguard his or her interests (BGH 13 December 1951, NJW 1952, 299, 300). It is incumbant upon a person who is seriously injured to take it upon themselves to seek medical treatment and to follow doctors's orders (*Medicus*, Schuldrecht I AT[16], no. 675); he is even obliged to consent to an operation, if it can be regarded as a safe routine procedure, recovery is not particularly painful, there is a excellent chance of recovery or the operation offers a prospect of considerable improvement (BGH 15 March 1994, NJW 1994, 1592, 1593). The injured party is also under a duty, within reasonable bounds, to utilise his remaining working capacity to avoid or reduce a loss of earnings and if necessary to undergo training in this regard (BGH 13 May 1953, NJW 1953, 1098; BGH 9 October 1990, NJW 1991, 1412, 1413). The tortfeasor must compensatte the injured party for expenditure incurred while fullfilling the duties outllined above (BGH 1 April 1993, NJW 1993, 2685, 2687). The duty to warn is only extant when it was possible for the injured party to have recognised the high potential for harm or s/he should have recognised this risk (Palandt [-*Heinrichs*], BGB[66], § 254, no. 38; Erman [-*Kuckuk*], BGB I[11], § 254, no. 56; BGH 1 February 1965, VersR 1965, 484, 487). A warning is not required, in circumstances where the tortfeasor and injured party are in a similar position as far as

recognising the risk is concerned (Staudinger [-*Schiemann*], BGB [Neubearbeitung 2005], § 254, no. 75). If the tortfeasor in any case, would have failed to heed the warning had it been given, then the causation requirement is not established for the presence of contributory fault (BGH 26 May 1988, NJW 1989, 290, 292; vgl. auchBGH 19 September 1995, VersR 1996, 380, 381). However, it will suffice for the tortfeasor to assert that had he been warned, he would have resorted to approrpriate measures, even in a case where it was not certain that this course of action would have prevented the ensuing harm (BGH 1 December 2005, NJW 2006, 1426, 1428; BGH 1 December 2005, NJW-RR 2006, 1108, 1110). The risk of unusually extensive damage was e.g. approved in a decision where a daily loss of € 11.500 was accrued where a printer valued at € 14.400 broke down (CA Hamm 17 June 1996, NJW-RR 1998, 380); loss resulting from a translating error, which amounted to 40 times the fee charged (CA Hamm 28 February 1989, NJW 1989, 2066) and in respect of a risk of losing a particularly favourable financial investment (RG 29 October 1910, JW 1911, 35; however, the BGH 18 February 2002, NJW 2002, 2553, 2554 was critical of this decision).

20. Pursuant to AUSTRIAN law, an injured party violates his duty to mitigate damage when s/he culpably (OGH 30 May 1974, SZ 47/69 p. 301) fails to act as the ordinary person would have done to avert or minimise the ensuing damage (OGH 28 March 2000, 1 Ob 9/00f). The measures that the injured party is expected to adopt fall to be decided on a case by case basis., (OGH 30 May 1974 loc. cit.; OGH 26 February 2002, 1 Ob 24/02i), and will also hinge on whether the such protective measures were necessary was common knowledge (OGH 10 October 1983, ZVR 1984/122 p. 116; OGH 7 July 2005, 2 Ob 135/04y: cyclist failed to wear a helmet; did not amount to contributory fault). Refusal to undergo therapeutic medical treatment or an operation may constitute contributory fault (OGH 12 March 1963, SZ 36/37 p. 104; OGH 30 May 1974 loc. cit.; OGH 12 February 1981, ZVR 1982/113 p. 86), as may the failure to pursue a occupation that can be reasonably expected of one (OGH 25 June 1998, ZVR 1999/25 p. 91; OGH 7 December 2000, ZVR 2002/5 p. 13) or allow repairs to be carried out (*Koziol*, Haftpflichtrecht I[3], no. 12/104). A Von Jehovah‘s witness is not required to accept a blood transfusion (OGH 25 June 1998, ZVR 1999/25 p. 91). As a general rule, a person cannot be reasonable expected to consent to serious or even potentially life- threatening surgery (OGH 30 May 1974 loc. cit.). The tortfeasor bears the burden of proving that the injured party breached the duty to mitigate his loss (OGH 8 November 1984, ZVR 1985/114 p. 212; OGH 26 November 1992, JBl 1994, 331).

21. GREEK CC art. 300(1)(second sentence) makes explicit that an injured party can be guilty of contributory fault in failing to point out the risk of the occurence of unusually extensive damage or failed to avert the damage or take steps to minimise it. It will depend on whether the injured party has infringed the duty to act in good faith or remained inactive, thereby in contravention of social conventions (Georgiades and Stathopoulos [-*Stathopoulos*], art. 300, no. 10). A textbook example is provided by the failure to quench a fire in the expectation that the arsonist would have to pay anyhow and refusing to consent to a routine unproblematic medical treatment or operation (*Stathopoulos* loc. cit. no. 11).

22. PORTUGUESE CC art. 570(1) confers a discretion on the courts to reduce damages if the injured party culpably failed to hinder an aggravation of the damage, see note *I10* above; *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], 588, note 2 under art. 570 and *Brandão Proença*, A conduta do lesado, 101. This state of affairs can occur if the victim of accident sspurns medical treatment befitting the circumstances where it might be generally expected that such consent would be forthcoming.

23. In a similar fashion, the DUTCH CC art. 6:101(1) requires victims to take measures to contain the damage within reasonable bounds (Parlementaire Geschiedenis VI, 351; Schadevergoeding I [-*Lindenbergh*] art. 6:96, note 172 p. 768; HR 24 January 1997, NedJur 1999 no. 56 p. 224). This provision is supplemented by CC art. 6:96(2), according to which the injured party is entitled to claim for reasonable expenditure incurred in his or her attempt to avert or minimise the loss. The courts determine reasonableness by reference, *inter alia*, to the relation between the impending damage and the costs of containing it as well as examining the risk incurred by the injured party in adopting these containment measures (Parlementaire Geschiedenis VI, 335).

24. The duty to mitigate damage is universally recognised in the NORDIC countries (*Bengtsson and Strömbäck*, Skadeståndslagen[2], 338; *von Eyben and Isager*, Lærebog i erstatningsret[5], 245; *Saxén*, Skadeståndsrätt, 122). At the same time, while it is indeed conceded that this duty is related to the doctrine of contributory fault, the duty to mitigate is usually only mentioned under the heading of adequate causation (*Andersson*, Skyddsändamål och adekvans, 479; *Radetzki*, Skadeståndsberäkning vid sakskada, 158; *Peczenik*, Causes and Damages, 246). We are concerned here with the extent of the damage once part of it has already occured whereas contributory negligence concerns the occurrence of the damaging event itself. Compensation is restricted to the loss which the injured party could not have adverted by resorting to appropriate measures (*Vinding Kruse*, Erstatningsretten[5], 334; *Andersson* loc. cit. 480; *Hellner and Radetzki*, Skadeståndsrätt[7], 417; *Saxén* loc. cit. 117, 122). "Appropriateness" is measured according to an evaluation of the particulars of the individual case, *inter alia*, the courts have regard to the basis for liability and the nature of the loss sustained (*Andersson* loc. cit. 482; *Radetzki* loc. cit. 159). The injured party is required to seek medical treatment, if he cannot have failed to have realised the seriousness of his injury or illness (Swedish HD 19 July 1909, NJA 1909, 369 and HD 15 December 1939, NJA 1939, 601); he is also required to undergo an operation to which he could reasonably be expected to consent as it was not particularly risky nor were any other reasons extant to justify a refusal to consent (*Jørgensen*, Erstatning for personskade og tab af forsørger[3], 467; Danish HD 23 June 1969, UfR 1969, 682). A further requirement is that proactive measures are adopted in respect of reintregration into the workforce (Swedish Damages Liability Act chap. 5 § 1, Finnish Damages Liabaility Act chap. 5 § 2a, Danish EAL chap. 1 § 5(2); see also Swedish HD 4 December 1991, NJA 1991 662. In general, physical damage to property damage and pure economic loss are treated the same as physical injury. For example, if a fire breaks out, the plaintiff must attempt to rescue the livestock (Danish Western CA 25 February 1942, UfR 1942, 560), and moor vehicles must be brought promptly for repair so that loss of earnings and damages resulting from loss of use can be contained Fa (Swedish HD 20 April 1938, NJA 1938, 147; HD 31 May 1965, NJA 1965, 165; HD 12 April 1978, NJA 1978, 207). Of course, it is not *per se* inappropriate to charge a vet to take measures that cost more than the animal itself (Swedish HD 22 February 2001, NJA 2001, 65 I-II; Danish Eastern CA 14 September 1981, UfR 1981, 1074; *Vinding Kruse* loc. cit. 334; *Andersson* loc. cit. 484; *Hellner and Radetzki* loc. cit. 416; *Saxén* loc. cit. 122, 280). As far as pure economic loss is concerned, e,g a break down in operations, it may be necessary in exceptional circumstances to make employees redundant (HD 11 November 1959, NJA 1959, 552) or to take out a bank loan to get the production up and running again (*von Eyben and Isager* loc. cit. 245); it may also be required to restructure costly working practices (Danish SH 7 April 1960, UfR 1960, 932; Danish HD 24 June 1983, UfR 1983, 714).

III. Contributory Fault in Road Traffic Accidents

25. In FRANCE, compensation for traffic accidents is governed by the socalled. *Loi Badinter* (des Gesetzes of 5 July 1985). These rules, in so far as they are apply, have precedence over the general rules on liability (*Bénabent*, Obligations[9], no. 647 p. 428); the latter are only employed when the *Loi Badinter* no longer applies (Cass.civ. 4 March 1999, Bull.civ. 1999, II, no. 36 p. 27: liability of a pedestrian vis á vis a motor cyclist). The victim of a traffic accident has a compensation claim against the driver of the *gardien* of the involved vehicle and this claim does not require proof of fault. Drivers and *gardien* cannot rely on either *force majeure* or argue that it was a case *fait d´un tiers* (loc. cit. art. 2). A distinction is drawn between bodily injury and physical damage to property in cases where the victim was guilty of contributory fault. The defence of a *faute inexcusable* can only be asserted gainst a victim, who is not the driver of the vehicle, and only when the cause of the accident could solely be attributed to the victim (loc. cit. art. 3(1)) and the victim was not younger than 16, older than 70, or has a degree of permanent disability or incapacity to work of at least 80 % (loc. cit. art. 3(2)). Liability will not be imposed on a defendant in cases of suicide or attempted suicide (loc. cit. art. 3(3)). If the driver sustains injury, than his or her contributory negligence generally reduces the liability of the *gardien* by 50%; in serious cases liability can be reduced by up to 100% (loc. cit. art. 4); that the driver contributed to the cause of the accident (under the influence of alcohol; driving too fast) is always a prerequisite fort he reduction of liability (Cass.ass.plén. 6 April 2007, Bull.civ. 2007, no. 5 p. 11; Cass.ass.plén. 6 April 2007, Bull.civ. 2007, no. 6 p. 12). Article 4 regulates physical damage to property and is also relevant vis á vis injured party who were not the drivers of the vehicle (loc. cit. art. 5(1)).

26. In BELGIUM, compensation for victims of traffic accidents is governed by the Law of 21 November 1989. Loc. cit. art. 29*bis* §1(1), governs the liability of the insurer of the owner, driver and keeper of a motor vehicle involved in an accident for death or bodily injury to someone other than the driver. Persons, over the age of 14 or those who intend the occurence of the accident and intend its consequences cannot rely on this provision (loc. cit. (6)). SPANISH Liability and Insurance for Motor Vehicle Traffic Act art. 1(1) 4 provides that in the case that the driver is at fault, the victim's claim is reduced in proportion tot he extent that s/he contributed to the cause of the damage. This rule applies to both physical injury and economic loss (loc. cit. art. 4(3)). The wording of the statutory provision has attracted criticism, however, legal commentators have given a broad welcome to the clarification that the rules on contributory fault also apply in the context of a traffic accident (Reglero Campos [-*Reglero Campos*], Tratado de responsabilidad civil[3], 933-934). Loc. cit. art. 1(2) contributory fault on the part of a person to whom fault cannot generally be imputed is treated no differently the fault of every other victim of a traffic accident (see CA Ciudad Real 25 February 2002, BDA JUR 2002/117158; critical on policy grounds *Medina Alcoz*, La culpa de la víctima, 297.

27. ITALIAN CC art. 1227 applies also to traffic accidents. Not wearing a seat belt is an orthodox example; if a front-seat passenger fails to wear a seatbelt, then, up to a certain percentage amount which is assessed on the circumstances of the case, the driver can also be held responsible (compare Cass. 11 March 2004, no. 4993, Foro it. 2004, I, 2108 und 3129: here, failure to wear a seat-belt contributed to the cause of the accident by 50%; 30% of liability was apportioned to the injured party, 20% to the driver). Further, pedestrians must reckon with a reduction in their claim for damages pursuant to CC art. 2054(1) if they can be deemed to have conducted themselves in a dangerous manner and displayed a want of care (Cass. 10 August 2000, no. 10352,

Giur.it.Mass. 2000, 1732; Cass. 16 September 1996, no. 8281, Danno e resp. 1997, 252). In the event that two vehicles collide, according to CC art. 2054(2), " until there is evidence to the contrary, it is presumed that each driver contributed in equal measure to the cause of the damage sustained by the respective vehicles..

28. In BULGARIA, the general rules on contributory fault govern traffic accidents. A passenger is not deemed to have contributed to the cause of the accident where, for example, subsequent to the accident, where a car travelling at too high a speed spun around, sprang out of the window and was thereby fatally injured (Supreme Court 22 September 1983, decision no. 590 in criminal matters, case no. 599/83). On the other hand, a pedestrian was found guilty of contibutory fault which has the effect of reducing liability, where he traversed a zebra crossing without watching out for oncoming traffic (Supreme Court 19 August 1980, decision no. 846 in criminal matters, case no. 756/1980*). According to case law*, individuals who are deemed to be incapable of committing a tort (e.g. minors) are required to either know the rules oft he road or at all times are required to be accompanied (Supreme Court 16 October 1979, decision no. 1082 in criminal matters, case no. 956/79). Proof of contributory fault must be established; it is not possible to derive a presumption of contributory fault from an analogous application of LOA art. 45(2) (*Burov*, Grajdanska otgovornost za vredi, prichineni pri avtomobilna zlopoluka, 158).

29. Strict liability of the keeper of a mechically propelled vehicle under POLISH CC art. 436 § 1 cannot be imposed if, the accident was exclusivley caused by the injured party or by a third party, for whom the injured party bore no responsibility (Bieniek [-*Bieniek*][5], art. 436 nos. 17 and 21; Pietrzykowski [-*Safjan*], Kodeks cywilny I[4], art. 436 no. 14). This "exclusive fault" must be the sole cause of the accident (Radwański [-*Olejniczak*], Zobowiązania - część ogólna[5], p. 226 no. 576; *Bieniek* loc. cit. art. 435 no. 33; *Safjan* loc. cit. art. 435 no. 21; Supreme Court 18 December 1961, 4 CR 328/61, NP no. 11/1962, p. 1523: in spite of defendant's warning, the claimant stepped onto a moweing machine which was running at the time). If the injured party does not commit an "exclusive" fault, rather is guilty of a "common" fault, then his or her claim will be reduced according to the criteria contained in the general rule under CC art. 362 (*Bieniek* loc. cit. art. 436, no. 19; ; Bieniek [-*Wiśniewski*][5], art. 362 no. 6; *Safjan* loc. cit. art. 435 no. 25 and art. 436 no. 14; Supreme Court 2 December 1985, IV CR 412/85, OSPiKA 1986, no. 4, pos. 87; Supreme Court 6 June 1997, II CKN 213/97, OSNC 1998, no. 1, pos. 5: travelling with an intoxicated driver following joint alcohol consumption).

30. A rule governing the reduction in recovery of damages to the detriment of the victim of an accident can be derived from GERMAN CC § 254(1). This rule comes into operation if the victim does not observe traffic regulations or was responsible for operating a vehicle with an inherent danger (BGH 9 January 1959, BGHZ 29, 163, 171; BGH 30 January 1979, NJW 1979, 980). It is certainly true that CC § 254 only impinges on a relatively minor number of cases of loss sustained in traffic accidents. If the damage is caused by more than one vehicle or if the keeper of one vehicle sustains loss which is caused by the other, then Road Traffic Act § 17(1) is applicable; however, this provision fully corresponds with CC § 254(1) (Erman [-*Kuckuk*], BGB I[11], § 254, no. 35). The duty to mitigate damage pursuant to CC § 254(2) is left unaffected by the Road Traffic Act § 17 (MünchKomm [-*Oetker*], BGB[5], § 254, no. 13). Children who have yet to attain the age of ten are not liable for damage that they unintentionally inflict on another party in a trsffic accident (CC § 828(2)); consequently, they do not have to reckon with a reduction in recovery.

31. AUSTRIAN CC § 1304 also operates to govern road traffic accidents. It is also applicable to cases where the injured party bases his claim to recovery on the defendanrt being strict liable (EKHG § 7). Special rules solely arise in the context of a breach of a duty to wear a seat-belt or in the contxt of motorcycles, a failure to wear a helmet (see note *I8* above). An individual will be deemed to have committed a contributory fault, for example, where s/he agrees tob e carried by a recognisably a drunken driver (OGH 10 December 1970, SZ 43/231 p. 813) by employing CC § 1310 in a corresponding manner, the courts affirmed the contributory fault of a child who was capable of distinguishing between right and wrong who suddenly jumped out from behind a parked car and ran onto the road (see further Koziol/Bydlinski/Bollenberger [-*Karner*], ABGB^{2} § 1310 no. 7).

32. GREEK CC art. 300 (note *I9* above) also applicable to road traffic accidents (*Kritikos*, Aposimiosi apo trochaia avtokinitika atichimata, 34 und 460). As far as minors who have yet to attain the age of ten are concerned, it is questionable on the grounds of CC art. 915 whether their claims can be reduced on teh grounds of contributory fault. The majority view in legal commentary submits that the question should be resolved by employing CC art. 918 in a corresponding manner: it then hinges on whether the minor should be deemed liable upon application of the rules on equitable liability, if he himself did not sustain injury but caused loss to a third party (ErmAK [-*Litzeropoulos*], art. 300, no. 22; *Kritikos* loc. cit. 36; Georgiades and Stathopoulos [-*Stathopoulos*], art. 300, no. 8; *Dimopoulou*, Evthini apo diakindinevsi, 39). Road Traffic Liability Act art. 6 does indeed contain a provision, liability of the injured party is completely excluded under this Act is precluded, however, this provision is regarded as having been rendered obsolete by the subsequent enactment of CC art. 300, (*Kornilakis*, I evthini apo diakindinevsi, 174; *Livanis*, I efarmogi tou arthrou 300 is to pedion tis antikimenikis evthinis, 140; s. auch *Georgiades*, Enochiko Dikaio, Geniko meros, 694).

33. PORTUGUESE CC art. 505 makes explicit that the rules on reduction of liability on the grounds of contributory fault (CC art. 570) are also valid in cases where the keeper is deemed strictly liable pursuant to art. 503(1). Incidentially, liability is only excluded where the victim alone or an act of a third party causes the accident or if the gardien invokes force majeure, which does not arise in connection with the operation of a motor vehicle (see further *Antunes Varela*, Obrigações em geral I^{10}, 676). For the cases governed by CC art. 505, the realisation of a risk, for which CC art. 503 affixes strict liability, should be absent. Cases, where both the driver and the injured party contributed to the cause of the accident remain governed by art. 570 (see e.g. CA Evora 17 April 1997, BolMinJus 466 [1997] 610 and STJ 6 July 1971, BolMinJus 209 [1971] 102). The driver is exempt from liability, if and insofar as the accident can be attributed to the misconduct of an individual not capable of committing a fault. In the event that two or more vehicles collide, the following distinction is required to be drawn: CC art. 570 is applicable, if both sides are at fault. If neither one of the drivers is at fault, it will then depend on the degree to which the inherent operating risk present in the respective vehicles contributed to the cause of the accident (CC art. 506(1)). In the absence of evidence to the contrary, the inherent operational risks of both vehicles, and if it is ascertained that fault was present on both sides, then liability is equally apportioned (CC art. 506(2)).

34. As a general rule, DUTCH CC art. 6:101 (see *I11* above) is also applicable to road traffic accidents. However, the prerequiste that a reduction in liability must meet the requirements of fairness, is attibuted a particular significance in this area. It has been noted that the courts display a tendency to protect the interests of weaker road user even in the event of a breach of traffic and safety regulations and the courts curb the

use of CC art. 6:101 in this context (see further Onrechtmatige daad III [-*Bouman*] Part III.7, nos. 253-254 pp. 97-118; Schadevergoeding I [-*Boonekamp*], art. 6:101, no. 12.1, p. 38). As far as injury ti children who have yet to attain the age of 14 is concerned, it is accepted that full damages can be recovered from the individual who caused the dangerous situations. This rule is only diverged from if it can be proved that the child acted with a lack of due care and require express justification (HR 8 Dezember 1989, NedJur 1990 no. 778 p. 3248). Furthermore, cyclist and pedestrians enjoy a measure of special protection, namely, provided that they neither acted in an intentional or careless manner, such plaintiffs are entitled to recover a damages award of at least 50% from the keeper of the motor vehicle (HR 28 Februar 1992, NedJur 1993 no. 566 p. 2117).

35. ESTONIAN LOA § 139(1) confers a discretion on the judge, enabling him/her to disregard an insignificant fault of the injured party. VI.–5:102(2)(b) resembles LOA § 139(3), however, the latter provision is not confined to regulating road traffic accidents, it impinges on all types of personal injury.

36. Please see also the note following under *IV* for a detalied examination of the situation prevailing in the NORDIC Countries. SWEDISH Traffic Damages Act § 12 corresponds to the general rule govening general tort liability (see note *I13* above), according to which liability for personal injury may only be reduced where the victim acts intentionally or in a grossly negligent manner. An identical situation prevails under the DANISH Traffic Act § 101(2) and FINNISH Traffic Insurance Act chap. 2 § 7. The SWEDISH Act additionally provides fort he possibility that liability can be reduced tot he detriment of a drunken driver, who negligently contributed to causing his own damage (see HD 6 April 2000, NJA 2000, 150). The situation in DENMARK (HD 15 November 2002, UfR 2003, 339) and FINLAND (loc. cit.) is similar. An individual who permits himself to driven by a driver who is recognisably under the influence is grossly negligent. Ordinary (not gross) contributory fault on the part of the injured party suffices to reduce a liability claim in cases of damage to property (SWEDISH Traffic Damages Act § 12(2); DANISH Traffic Act § 101(3); FINNISH Traffic Insurance Act chap. 2 § 7(2)). In the event of a vehicle collison, the respective degree of fault and other determining factors (such as the existence of other risks that contributed to the cause of the accident) are taken account of by the courts when weighing up all the circumstances of the case (*Hellner and Radetzki*, Skadeståndsrätt[7], 228, 235; *von Eyben and Isager*, Lærebog i erstatningsret[5], 167; *Lyngsø*, Færdselsansvar[3], 73; *Saxén*, Skadeståndsrätt, 256).

IV. Reduction in Liability where the strict liability of the injured party contributes to the cause of the accident

37. The notion that liability can be reduced on the basis of the injured party‘s objective fault is not recognised under FRENCH and BELGIAN law. Each party is obliged to fully compensate the other, unless the injured party contributed to the cause of the damage (Cass.civ. 11 Februray 1976, D 1976 Jur. 609, note *Larroumet*).

38. In SPAIN, the defence of contributory fault operates in cases of fault based liability as well as in cases of strict liability (e.g. Reglero Campos [-*Reglero Campos*], Tratado de responsabilidad civil[3], 446; see also Liability and Insurance for Motor Vehicle Traffic Act art. 1.1(4)). Initially, in cases involving motor vehicle collisons, the *Tribunal Supremo* deemed the strict liability regime to be inapplicable and that liabilty was tob e apportioned along the respective lines of fault (TS 6 March 1992, RAJ 1992 [2] no 2397 p. 3245; TS 15 April 1992, RAJ 1992 [2] no. 3306 p. 4368; TS 29 April 1994, RAJ 1994 [2] no. 2983 p. 4029). However, the courts of first instance have decided

that each party must compensate 50% of the loss of the other party in cases, where the facts resemble those contained in *illustration 9* under VI.–5:102, provided that the respective degrees of fault and contributions to the cause of the accident cannot be definitively ascertained (CA Islas Baleares 12 September 2006, BDA JUR 2006/279403; CA Islas Baleares 2 February 2006, BDA JUR 2006/155482). CA Barcelona 19 January 2006, JUR 2006/112784 reduced the claim of each party by a half, without having determined the presence of a concrete fault on the part of either of the drivers. In a collision between a car and motorbike CA Barcelona 2 March 2006, JUR 2006/232076 reduced the car drivers's claim by 75 % (because he had overlooked a traffic sign), and the motorbiker's claim by 25 %. In line with VI.–5:102(2)(a) and (b), courts seem to disregard an insubstantial contributory fault or accountability (CA Barcelona 23 October 2006, BDA JUR 2007/149; CA Madrid 28 September 2006, JUR 2006/268555; CFI Barcelona 16 May 2007, La Ley 18 July 2007 no. 6758). The prevailing legal doctrine also favours a reduction of compensation when two sources of danger mutually contribute to the occurrence or the extent of the damage (*Reglero Campos* loc. cit. 447). It goes without saying that the contributory fault of an employee is imputed to his/her employer and operates to reduce liability (TS 9 March 1995, RAJ 1995 [1] no 1847 p. 2431).

39. The rational of ITALIAN CC art. 1227(1) is interpreted as connoting that the injured party must bear his or her share of the entire damage that s/he contributed to cause. Consequently, this provision also applies where one or both the parties concerned are strictly liable or where fault is presumed (*Franzoni*, Dei fatti illeciti, supplement to arts. 2043, 2056-2059, sub art. 2043, p. 41, 46). For example, in a case involving a motor vehicle and an animal, the extent of the relevant liability (CC arts. 2052 und 2054(1)) is determined with reference to the circumstances of the individual case (Cass. 9 December 1992, no. 13016, Giust.civ.Mass. 1992, fasc. 12; Cass. 27 June 1997, no. 5783, Giust.civ.Mass. 1997, 1077). If the animal caused the driver of the motor vehicle to suffer a loss and affirmative proof cannot be aduced that the latter did everything in his power to avoid the loss occuring, (CC art. 2054(1)), this hast he effect of reducing his damages claim upon application of CC art. 1227(1) (Cass. 9 June 2002, no. 200, Resp. civ. e prev. 2002, 1390). In the event that a "collision of motor vehicles" occurs, then pursuant to CC art. 2054(2) "unless contrary evidence is adduced, there is a presumption that the drivers of the vehicles are jointly and severally liable for causing the damage". Therefore, it is incumbant upon each party to bear 50% of the damage that s/he has sustained and each party is bound to compensate 50% of the other party's loss. This corresponds to the rule anchored in VI.–5:102.

40. If two considerably hazardous activities (e.g two motor vehicles) meet head on, then, according to HUNGARIAN CC § 346(1), first and foremost, the "classical" rules pertaining to fault based liability govern the relationship to one another. If fault is absent, and the cause of the damage can be attributed to an "irregularity" inherent in one of the vehicles involved, then liability is imposed on that party (CC § 346(2)). However, if such an irregularity was present in each vehicle or it cannot be positively affirmed in respect of any of them and fault is absent, then each party has the burden of bearing his or her own loss (CC § 346(3)); in this case, a solution entailing that each party is to compensate the loss of the other is regarded as "absurd": *Eörsi*, Kártérítés jogellenes magatartásért, 118ff. If a dangerous activity collides with a non hazardous activity and damage is also incurred by the dangerous activity, then the claim of that party is reduced according to the extent that the inherent operating risk contributed to the cause of the damage (Opinion of the Civil College of the Supreme Court PK 38 Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata I, 1271f; Petrik [-*Wellmann*], Polgári jog II, 593f). Likewise, CC § 346 applies to cases where a road

traffic accident is caused by wild game. That game turn up on highways is not regarded as an " irregularity", however, individuals holding a hunting permit are liable for game which venture onto motorway and for game that do not behave as expect on highways (*Benedek* loc. cit. 1278; BH 2003/237; BH 2000/401; cf. also *Wellmann* loc. cit. 596; BH 2000/402). Similarly, in ROMANIA, the courts and prevailing legal opinion operate on the assumption that liabilites which collide operate to cancel each other out so that systematically, it falls to be governed by the generally rules pertaining to fault based liability (*Romoşan*, Vinovăţia în dreptul civil român, 177-178). BULGARIAN law does not recognise a reduction in liability on the grounds of strict liability of the injured party which contributes to the cause of the acccident. The courts simply declare that objective liability for animals and property is dispenseed with in cases where the cause of the accident can be exclusively ascribed to the fault of the injured party (Supreme Court 26 November 1960, decision no. 799 in civil matters, case no. 6940/60, fourth chamber). Pursuant to SLOVENIAN LOA art. 154(3), as a general rule both parties are liable for road traffic accidents which were not caused by the fault of either of the involved parties, unless achieving an equitable result necessitates a different apportionment of liability. Above all, consideration of the dangerous state of the respective vehicles flows into this equitable assessement (see further Juhart and Plavšak [-*Pensa*], Obligacijski zakonik I, art. 154 p. 882).

41. The issue of confining the scope of a damages claim in cases where there is no actual contributory fault on the part of the injured party, however, strict liability of that party operates to contribute to the cause of the damage is the subject of intense discussion in POLAND (for further analysis e.g. *Szpunar*, Rejent no. 2001 (6) 13; *Granecki*, PiP 2003 (1) 68; Radwański [-*Olejniczak*], Zobowiązania - część ogólna[5], 96, no. 249; SystPrCyw III [-*Dybowski*], 298; Pietrzykowski [-*Banaszczyk*][4], art. 362 no. 5). The majoritarian view in teaching and jurisprudence appears to favour an approach where it hinges on the grounds for which liability was imposed on the defendan: if fault liability is at issue, then only the contributory fault of the injured party will operate to reduce his damages claim; conversely if strict liability is involved, then the strict liability of the injured party will operate to reduce his claim (*Olejniczak* loc. cit. no. 250; *Dybowski* loc. cit. 298; Bieniek [-*Wiśniewski*][5], art. 362 nos. 5 and 7; Supreme Court 7 October 1977, I CR 366/77, OSNC 1978, no. 7, pos. 118; Supreme Court 13 October 1998, II UKN 259/98, OSNP 1999, no. 21, pos. 698; Supreme Court 6 October 2000, II UKN 27/00, OSNP 2002, no. 10, pos. 249). In the case of a venicle collison, according to CC art. 436 § 2, the general rules pertaining to fault based liability prevail over the strict liability rules, with the result that if fault is absent, then, in end effect, each party bears his or her own loss (for an interpretation of the concept of collision, see Supreme Court 4 March 1958, 1 CR 154/56, OSP 1959, no. 10, pos. 257; Supreme Court 2 January 1976, III CZP 79/75, OSNCP 1976, nos. 7-8, pos. 155). Of course, strict liability (and joint and several liability) endures vis à vis third parties (Supreme Court 19 May 1970, II CR 137/70, OSPiKA 1971, no. 5, pos. 90).

42. According to GERMAN law, an operational risk or an inherent danger in tangible propertyon the part of the injured party which contributed to cause the damage has the effect of reducing his or her claim and whether the damaging party is liable under contract or tort law is irrelevant for these purposes (BGH 9 June 1952, NJW 1952, 1015; BGH 30 May 1972, NJW 1972, 1415). According to case law, the operating risk inherent in the injured keeper's motor vehicle is taken account of in the assessment of damages for non-pecuniary loss (BGH 13 April 1956, NJW 1956, 1067; BGH 18 November 1957, NJW 1958, 341; cf. CC § 253(2)). The factor is, however, disregarded in cases involving a claim of the keeper vis á vis the driver (BGH 30 May 1972, NJW 1972, 1415). The principle that a risk inherent in a thing or an inherent

operating risk which contributes to cause the damage sustained, operates to reduce a claim for reparation is not applicable in cases involving the liability of an animal keeper (BGH 6 July 1976, NJW 1976, 2130), to cases pertaining to the liability for damage caused by aircraft (BGH 18 November 1999, NJW-RR 2000, 549) nor even to certain areas of environmental liability law (BGH 13 December 1994, NJW 1995, 1150, 1151).

43. The mirror image principle (in Austria it is known as principle of equal treatment) is also valid in AUSTRIA. Consequently, it follows that liability will be reduced, in the event that the inherent operational risk in the injured party's vehicle (*Koziol*, Haftpflichtrecht I[3], no. 12/1) or another reason for imposing strict liability (as e.g. strict liability under the Product Liability Act § 11) operated to contribute to the cause of the damage sustained.

44. The position under GREEK law conforms to the aforementioned. CC art. 300 is also applicable to cases if an inherent risk in a thing or operational risk or other ground for imposing strict liability contributes to cause the loss sustained (*Dimopoulou*, Evthini apo diakindinevsi, 33). Therefore, for example, a claim will be reduced to the prejudice of e.g the owner, if a dog is killed as a result of a road traffic accident (for which strict liability under CC art. 924 is imposed; for further analysis see *Dimopoulou* loc. cit. 36)

45. PORTUGUSE CC art. 506(1) makes a distinction for the case where there is a motor vehicle collison which is not to due to fault of either one of the drivers, on the basis whether only one of the vehicles may be regarded as the cause of the accident (e.g. because the brakes of that vehicle malfunctioned), or whether both are involved (e.g. because both skidded on an imperceptible patch of oil), see *Antunes Varela*, Obrigações em geral I[10], 683, *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], art. 506 no. 1 p. 519). In the first case, the keeper of the vehicle that caused the accident is liable, in the second case, it depends on the degree of gravity of the risk of fault with which both vehicles contributed to the cause of the accident; in the case of doubt, it is generally assumed that both parties are equally at fault (CC art. 506(2). For example, in a case involving a collision between a van and a moped, liability of the keeper of the small van was apportioned at 75% and the driver of the moped was deemed to be responsible for 25% of the entire damage (CA Oporto 28 February 2005, Proc. 0550692). However, in addition, whether the general contributory fault rules regulation contained in CC art. 570(1) could be applied analogously to the case where the strict liability of the injured party contributes to the cause of the accident is a matter of some contention. Academic teaching is predominantly in favour of this solution (*Brandão Proença*, A conduta do lesado, 170, 174-175; *Vaz Serra*, RLJ 111 [1978/1979] 281 and *Almeida Costa*, Obrigações[10], 641). STJ 9 March 1978, RLJ 111 [1978/1978] 276 rejected the analogous application of CC art. 506(2) in respect of the liabilityof the keeper of an animal.

46. Prevailing legal opinion deems that DUTCH CC art. 6:101 (claim will be reduced, if the damage is also the result of circumstances which may be imputed to the injured party) is not only applicable in cases where the injured party was guilty of contributory fault, but may be also employed in cases where circumstances which belong in his sphere of risk contributed to the cause of the accident. Risk based liability imposed by statute or imposed on the basis of social convention which contributes to cause the accident will also be taken account of by the courts (Asser [-*Hartkamp*] Verbintenissenrecht I[12], no. 450 p. 402; Schadevergoeding I [-*Boonekamp*], art. 6:101, no. 5 pp. 14-20; HR 27 April 2001, NedJur 2002, no. 54 p. 383; HR 2 December 2005, NedJur 2006, no. 444 p. 4241).

47. VI.–5:101(4) largely corresponds to ESTONIAN LOA § 139(1); similarly, according to this provision, the extent of damages may be reduced if the damage was caused partly as a result of a risk for which the injured party is liable (*Lahe*. Juridica 2003, 83).

48. In a claim for damages is only diminished in cases of direct physical injury and injuries to health if the injured party acted intentionally or was grossly negligent; the injured party's strict liability which contributed to the cause of the accident does not therefore impinge upon his damages claim (Damages Liability Act chap. 6 § 1(1); Traffic Damages Act § 12(1)). The legal solution is conversely unsettled where physical damage to property is at issue. Damages Liability Act chap. 6 § 1(1) only stipulates contributory fault as a reason for reducing a liability claim ; the authors of the provision, however, had their sights set on enacting a general principle of tort law, pursuant to which the injured party would be required to rekon with a reduced damages claim in the event that s/he was strictly liable (Prop. 1975/76:15, 84). In the period following, the aforementioned principle has been embraced by a majority of legal commentators (*Dufwa*, SvJT 1979, 401; *id.*, JT 1990-91, 456; *Andersson*, Skyddsändamål och adekvans, 579; *Bengtsson*, Om jämkning av skadestånd, 111; *Agell*, FS Grönfors, 9-28; see also *Dufwa*, Flera skadeståndsskyldiga II, 4440; for a critical viewpoint, above all *Hellner*, JT 1991-92, 252) and by the courts (HD 11 April 1985, NJA 1985, 309 and HD 1 October 1990, NJA 1990, 569 [collison between a car and a bicycle; the cyclist was solely negligent; the claim of the driver of the car was nonetheless reduced by a half]; HD 10 November 1987, NJA 1987, 749 [collison between a car and a construction vehicle; only the latter was negligent; claim of the driver of the car was reduced by a quarter]; HD 14 October 1988, NJA 1988, 495 [a hound attacked a goat and was shot by their owner ; the owner of the dog claim was reduced by one third, owing to the fact that strict liability on his part contributed to the cause of the accident]). In the interim, the Traffic Damages Act § 18(2) has been amended and it now provided that damages *may* be reduced, if the inherent operational risk of the damaged vehicle contributed to the cause of the road traffic accident; therefore, an " automatic" reduction no longer takes place. Furthermore, the explanatory note to this amendment deliberately leaves undecided the issue as to whether the mirror principle can be regarded as a general tort law principle (NJA II 1999, 393, 395-396). At the time of writing, it is unclear whether it will continue in force (*Hellner and Radetzki*, Skadeståndsrätt[7], 114; *Bengtsson and Strömbäck*, Skadeståndslagen[2], 52). In a number of special statutory provisions, the following approach has been adopted, namely, in the case involving a motor vehicle, where both parties are jointly responsible for the collison which " of itself" is usually subject to the rules of strict liability, is once again admitted to the ranks of the general tort liability regime (Traffic Damages Act §§ 10(2) and 12(2); Railway Traffic Act chap. 5 § 3(3); Maritime Code chap. 8 § 1 [with the addendum that if negligence of neither party can be ascertained, then each side must bear 50% of the entire damage] and Act concerning liability for damage in the course of aviation [1922:382] § 2(2)). If, the contributory fault of a third party for whom the injured party was liable contributed to cause the accident, then the question is raised whether in conjuncton with an *aktiv*, a *passiv identifikation* should also take place. In turn, under the general principles of tort law, this submission is generally refuted in the event that personal injury is at stake, whereas it is approved of, if physical damage to property eventuates (see in more detail *Hellner and Radetzki* loc. cit. 229; *Bengtsson* loc. cit. 157; *Dufwa*, Flera skadeståndsskyldiga, no. 4066; HD 26 February 1955, NJA 1955, 102 (Judge *Walin*); HD 24 May 1984, NJA 1984, 420).

49. In DENMARK a general mirror principle with regard to the injured party's strict liability was supported in the literature (*Ussing*, Erstatningsret, 191; *von Eyben and Isager*, Lærebog i erstatningsret[5], 329; cf. *Trolle*, Risiko og Skyld[2], 424). This principle has not, as yet, been approved by the courts (*Vinding Kruse*, Erstatningsretten[5], 327). Where personal injury is sustained by passengers and drivers, it is submitted that a claim may only be reduced, where the accident could be also ascribed to the driver's negligence and the defendant was a non-motorist (prepatory works *Betænkning* no. 1036/1985, 47). Conversely, in the event that physical damage to property has occurred, the mirror principle remains applicable (*Vinding Kruse* loc. cit. 213), unless the damaging party acted in a grossly negligent manner (Eastern CA 2 February 1987, UfR 1987, 587: an intoxicated pedestrian ran onto the street) (if the damaging party was only gulity of ordinary negligence and the injured party is insured, then private individuals are not at all liable: Damages Liability Act § 19). If a dog's death is due to a collision between that dog and a car, then strict liability of the owner of the dog will operate to reduce his or her claim (HD 13 January 1961, UfR 1961, 170); in the case where two dogs attack each other causing mutual injury and causing damage, then, save where special circumstances exist to justify a departure from the rule, each keeper is required to bear half of the other party's loss (*von Eyben and Isager* loc. cit. 184; Eastern CA 18 December 1941, UfR 1942, 412). In the case of a collision between two motor vehicles, claims for personal injury are only reduced if intention and gross negligence were extant (Traffic Act § 103, § 101 (2)). If neither party is guilty of negligent conduct, then both parties share the costs of the damage (*Vinding Kruse*, loc. cit. 327). Cases where the values of the property and the risks involved are clearly dissonant (e.g. Eastern CA 17 June 1938, UfR 1938, 972: dog ran into the propeller of a plane which was just starting its engines), then the outcome can be corrected by having recourse to the Damages Liability Act § 24. Similarly, in FINLAND, a reduction in damages with reference to the injured party's strict liability is advocated (*Saxén*, Skadeståndsrätt, 110). It is possible to avail of this possibility in cases of personal injury and physical damage to property (Damages Liability Act chap. 6 § 1; *Saxén*, Tillägg till Skadeståndsrätt, 407). Personal injury which derives from a road traffic accident, a reduction is not exclusively imposed in cases where the injured party acted with intent or was grossly negligent (Traffic Insurance Act § 7). Exceptional circumstances may generate a reduction of liability on equitable grounds (Damages Liability Act chap. 2 § 1 (2)).

Illustration 1 is taken from STJ 6 May 2003; **illustration 2** from BH 1982/119; **illustration 3** from OGH 21 December 2004, ecolex 2005, 204; **illustration 4** from TS 3 April 2001, La Ley 2001 (3) no 3371 p. 608; **illustration 5** from TS 23 April 1999, RAJ 1999 (3) no 4248 p. 6542; **illustration 6** from Cass.civ. 19.06.2003, Bull. Civ. 2003, II, Nr. 203, case no. 930 (reaching, however, the opposite conclusion); **illustration 7** from TS 8 June 1995, RAJ 1995 (3) no 4563 p. 6101; and **illustration 11** from CA Hamm 11 February 2004, NJW 2004, 2246, note *Pfab*, VersR 2006, 894.

VI.–5:103: Damage caused by a criminal to a collaborator

Legally relevant damage caused unintentionally in the course of committing a criminal offence to another person participating or otherwise collaborating in the offence does not give rise to a right to reparation if this would be contrary to public policy.

COMMENTS

Ex turpi causa non oritur actio. The maxim *ex turpi causa non oritur actio* is known to many, but not all, of Europe's legal systems. It is sometimes restricted to the law of unjustified enrichment but in some other systems is a well-established part of the law on non-contractual liability. This Article follows the latter model. The defence not only partially overlaps with the defences of contributory fault and acting at one's own risk, but also adds new dimensions to the question of whether a person has acted negligently at all. However, in none of these three systematic categories can the true character of this idea be unqualifiedly expressed, namely that an injured person may lose a claim to compensation through particularly dishonourable conduct.

> *Illustration 1*
> Two young men steal a car; A drives, B sits in the passenger seat. A negligently causes an accident, through which B is injured. B has no claim in damages against A. The reason for this under these model rules is not that A did not owe to B a duty of care, nor that B was guilty of contributory fault, nor that he acted at his own risk. The reason for the exclusion of liability is the participation of the injured person in the theft and the inevitable getaway.

> *Illustration 2*
> The position is the same where other things, apart from a car, are stolen, and as a consequence of drunkenness in the undertaking of the crime or the subsequent getaway, an accident occurs. The injured person sitting in the back seat has neither a claim against the driver nor a claim against the owner who was sitting in the front passenger's seat.

Illegality. A further argument in favour of the rule in this Article is that it would not be plausible if, as the case may be, an unjustified enrichment could not be retained due to illegality (see VII.–6:103) (Illegality)) but the claim in damages were to stand (see VI.–6:101 (Aims and forms of reparation) paragraph (4)).

Burden of proof. Technically speaking, what is involved is a defence because the person seeking to escape liability must prove that the rule's requirements are in fact met. Indeed, this is not entirely unproblematic, because public ends are also served by the maxim *ex turpi causa non oritur actio*; however, this is unavoidable in the law of civil procedure.

Damage must be caused unintentionally. It does not flow from the recognition of the maxim *ex turpi causa non oritur actio* that the injured person is stripped of all rights. It is not about denying an injured person all legal protection, but about avoiding the absurdity of a legal system developing standards of care for the conduct of criminals *vis à vis* each other. The provision therefore only excludes those rights to reparation which one participant in a crime unintentionally confers on another participant in the very same crime.

Collaborator. The Article covers only damage to a participant in a criminal act by a fellow participant. The term collaborator or collaboration has the same meaning as in VI.–4:102 (Collaboration).

Illustration 3
While fleeing the scene of the crime, a young delinquent is shot dead by an over-zealous security guard, whose job was merely to call the police in the event of the threat of theft. The victim's parents do not lose their claim by virtue of this Article.

Illustration 4
A thief steals from a narcotics dealer money which the dealer has earned from his illegal trade. The thief does not have a defence under this Article to the dealer's claim arising out of the infringement of his property rights in the money: the thief is not a collaborator in the dealer's unlawful activity.

Reparation must be contrary to public policy. Collaboration in a criminal act should not automatically defeat a right to damages against another participant. In view of the multi-faceted nature of everyday life, it seems to be preferable to once again subject the outcome to a test of justice and fairness. The Article incorporates such a control mechanism through the criterion that a right to damages is only to be excluded where awarding it would be contrary to public policy. Ultimately this decision depends on the circumstances of each individual case, particularly on whether the injured person is injured in a manner that is directly connected to the participation in the criminal act.

Illustration 5
A and B are involved in a brawl and are thus criminally punishable. In full knowledge of his physical superiority, the younger of the two, A, who was provoked by B, hits B so hard that he fractures his skull. Even where it can be inferred that A did not intentionally inflict this injury to B, VI.–5:103 does not stand in the way of B's claim.

NOTES

1. The legal orders of Europe are divided on the question on whether to recognise *ex turpi causa*- as a general defence under tort law. The majority of jurisdictions answer this question in the negative; however, this does not preclude the possibility of the legal policy behind it appearing in another dogmatical guise. This ground of defence is not recognised in FRANCE (Cass.civ. 22 June 2004, D. 2005, 189, note *Denis Mazeaud*; *Roland and Boyer*, Adages du droit français[4], 487), ITALY, ROMANIA, GERMANY, GREECE, the NETHERLANDS nor SPAIN (CA Las Palmas 1 March 2002, BDA JUR 2002/126749 and CA Jaén 1 September 2003, BDA JUR 2003/242232 does indeed mention the principle of *ex delicto* or *iniuria ius non oritur*, however, derived no concrete legal consequence therefrom). HUNGARIAN BH 1980/471 imputed contributory fault to an intoxicated victim who suffered injury as a passenger in a car accident on the grounds that she stole the car together with similarly intoxicated driver. In AUSTRIA, it can even transpire that an injured party who contributes to cause the commission of a criminal offence will be denied a remedy on the basis of contributory fault (OGH 19 May 1994, ZVR 1995/41 p. 108 [*illustration 1* above]). Other legal orders make available the general prohibition on abuse of legal procees (PORTUGUESE CC art. 334; POLISH CC art. 5) or a general rule permitting the reduction of liability on equitable grounds (e.g. CZECH and SLOVAK CC § 450).

These provisions are also valid for tort law. MALTESE CC art. 1051A(5) contains a special rule which governs cases of corruption. For SWEDEN see *illustration 4* above.

2. In contrast, the *ex turpi causa* defence is recognised in LATVIA (CC art. 1642) and in the COMMON Law jurisdictions.

Illustration 1 is taken from OGH 19 May 1994, ZVR 1995/41 (p. 108); **illustration 2** from *Ashton v. Turner* [1981] 1 QB 137; **illustration 3** from TS 22 November 1993, RAJ 1993 no. 8654 p. 11139; **illustration 4** from Swedish HD 2 September 2008, NJA 2008, 861; and **illustration 5** from *Lane v. Holloway* [1968] 1 QB 379.

Section 2: Interests of accountable persons or third parties

VI.–5:201: Authority conferred by law

A person has a defence if legally relevant damage is caused with authority conferred by law.

COMMENTS

General. A person who is exercising an authority conferred by law and who remains within the bounds of this authority does not incur non-contractual liability, even where the conduct harms another. The present Article formulates this universally accepted principle as a defence. This is because the person seeking to found on the rule has the burden of proving the factual prerequisites for its application.

Applicable to private persons only. The Article relates only to private persons and not to public bodies or other persons, such as police officers, exercising public law authority. That follows from I.–1:101 (Intended field of application) paragraph (2) as well as from VI.–7:103 (Public law functions and court proceedings). Liabilities arising out of the performance of public law functions are altogether excluded from these model rules.

Relation to other defences. The defence provided by the Article is a residual defence, which helps to slot this Chapter neatly into the overall legal order. It refers to the authority which the law grants to the injuring person in a different, separate arena (i.e. outside this Book). While it could indeed be argued that further defences in this Book confer legal authority to harm another, there is still the systematic consideration that these defences are not at issue here or – and this boils down to the same result – take priority over this Article as *leges speciales*. The defences in VI.–5:202 (Self-defence, benevolent intervention and necessity) are prominent members of this group. Furthermore, the present Article is focussed on, and more heavily justified by, the injuring person's standpoint rather than the victim's predicament.

Scope. The Article covers a wide range of situations. It covers such disparate cases as the lawful arrest of a criminal by private individuals pending the arrival of the police, damage to the environment based on special statutory or regulatory permission, the authority to report the suspicion of criminal activity to the police, the authority to enter another's land while hunting, the authority to take water from a river, and even the relatively "harmless" case of rules governing rights of neighbours, whereby proprietors may cut back vegetation protruding on to their land from the adjacent property.

> *Illustration*
> A woman harassed by a sex offender follows him in her car. She cuts across his getaway car with her own car in order to stop him and to allow him to be arrested by the police, whom she herself has notified. The woman is not liable for the damage to the getaway car on the basis of intention nor on in her capacity as keeper of the car causing the accident.

Authority. "Authority" within the meaning of this Article is held only by those authorised by law to interfere with the rights of others or to inflict damage on them in another manner. Therefore, it is particularly pertinent in the law governing liability for environmental

impairment that there is exact examination into whether merely permission to carry out certain operations is concerned, which leaves the rights of third parties unaffected or takes from them only certain specific legal remedies (e.g. the right to demand that the operations be restrained, leaving the right to damages unaffected), or indeed whether the content of the permission is really the right to harm others or the environment without any consequences in terms of liability. It is comparatively rare for this type of permission to be given.

Conferred by law. The Article relates only to authority conferred "by law". Thus, it does not apply to authority which has its basis in a contract or in the agreement of the affected party (in cases of a benevolent intervention attributable to an alleged agreement on the part of the affected person, the categorisation is naturally more difficult, but precisely because of this, these situations are also specifically regulated). Rather the Article is concerned with authority which results directly from the law as such. Conferred "by law" does, of course, not necessarily mean "conferred by statute". It suffices that a legal norm allows the intervention in the form which occurred. The same applies to authority conferred on a person by an individual decision of a governmental body, which is based on a legal norm.

Limits. While the Article provides a defence against all forms of liability (thus, also against liability under Chapter 3, Section 2 (Accountability without intention or negligence)), it does not allow an abuse of rights. It was not necessary to individually express this in the text of the model rule because it is an inherent component of the term "authority conferred by law": no legal system confers authority to act in abuse of the law.

NOTES

1. *Ordre de la loi* and *commandement de l´autorité légale* rank among the grounds of defence (*faits justificatifs*) explicitly regulated under FRENCH criminal law (CP art. 122-4). The aforementioned are also valid within the rubric of tort law (*le Tourneau*, Droit de la responsabilité et des contrats [2004/2005], no. 1969); whatever the law decrees or authorises, establishes a *cause d´irresponsabilité* (*Malaurie/Aynès/Stoffel-Munck*, Les obligations, no. 120 p. 51). To take an actual decision as an example, where a man sexually harrassed a woman and thereafter, in her endeavours to apprehend him, she succeeded in injurying him, such damage is embraced by this defence (C.proc.pén. art. 73; Cass.civ. 10 June 1970, D. 1970 jur. 691). However, it should be noted that legal authority does release one from the obligation to exercise the legal authority conferred with due care when dealing with the legal interests of other persons (*le Tourneau* loc. cit. no. 1970). The aforegoing analysis also represents the current legal position in BELGIUM (Tilleman and Claeys [-*Claeys*], Buitencontractuele aansprakelijkheid, p. 1, 38-39 nos. 61-63).
2. Similarly, pursuant to SPANISH Law, a ground of justification may exist in respect of the infliction of damage on another if it is exercised in furtherance of a subjective right and the relevant legal boundaries are respected (*qui suo iure utitur næminem lædit*: *Yzquierdo Tolsada*, Sistema de responsabilidad civil, 115; *Díez-Picazo*, Derecho de daños, 303). The prohibition of abuse of legal right (CC art. 7; TS 14 February 1944, RAJ 1944 no. 293 p. 160; TS 25 November 1960, RAJ 1960 no. 3766 p. 2431; TS 10 June 1963, RAJ 1963 (2) no. 3596 p. 2298; TS 12 February 1964, RAJ 1964 (1) no. 688 p. 418; TS 5 January 1977, RAJ 1977 (1) no. 6 p. 13; TS 14 February 1986, RAJ 1986 (1) no. 674 p. 651) is an example of the limits to the extent of the exercise of this right. To illustrate, an abuse of right can arise, where a person brings a suit against another, although s/he is positively aware that his or her claim was unfounded (*De*

Ángel Yágüez, Tratado de responsabilidad civil[3], 264; *Yzquierdo Tolsada* loc. cit. 118). In such a case, there is absence of any *iusta causa litigandi* with the einer Schadenersatzpflicht des Klägers (TS 4 April 1932, RAJ 1932-33 (1) no. 991 p. 430; TS 20 April 1933, RAJ 1932-33 (1) no. 1633 p. 668; TS 5 January 1977 loc. cit.; TS 15 December 1992, RAJ 1992 (5) no. 10496 p. 13708; TS 4 December 1996, RAJ 1996 (5) no. 8810 p. 12171; TS 20 May 1998, RAJ 1998 (2) no. 3379 p. 4915). An authority conferred by law to cause damage is found in an array of statutory provisions. Statutory provisions which are particularly noteworthy in this regard include: the Civil Protection of Honour, Personal and Family Privacy and One´s Own Image (*Ley Orgánica* 1/1982, of 5 May, *de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen*) art. 2(2) in conjunction with CC art. 184 (pertaining to the authority to publish a missing person's photo; see *Medrano*, El derecho fundamental a la propia imagen, 164); Catalan CC art. 546-14 (which governs *immissions legítimes*, "permitted emissions"); Copyright Act (*Texto Refundido de la Ley de Propiedad Intelectual* of 1996) arts. 31(2), 31*bis*(2) and 32 permission to make photocopies of copyrighted material for private use or for the benefit of disabled persons ; permission to cite for scientific purposes).

3. The legal ground of justification namely conferring authority to commit an offence if it is in pursuance of the exercise of a right, codified in ITALIAN CP art. 51 is also applicable in the following manner within the context of the civil law, namely, that having evaluated all the relevant circumstances, the damage is regarded as having been inflicted *secundum ius* (*Franzoni*, Dei fatti illeciti, sub. art. 2043, p. 192; Cass. 16 October 2001, no. 12617, Danno e resp. 2002, 321). A number of statutes already provide for *atto lecito dannoso* e.g in cases of CC arts. 843, 924 and 925. It goes without saying that the legal justification of exercise of a right is of special significance for public authorities (e.g. Cass. 16 May 1996, no. 4561, Danno e resp. 1997, 119), but may also benefit private citizens who act in the public interest (reporting a crime: CFI Naples 11 December 1997, Dir.fam.pers. 2000, 1096; Cass. 13 January 2005, no. 560, Giur.it.Mass. 2005, fasc. 1). Furthermore, it plays a particularly significant role within environmental liability law (Cass.sez.un. 18 November 1992, no. 12316, Giur.it.Mass. 1992, fasc. 11) and in the context of hunting (Cass. 28 July 2004, no. 14241, Giur.it.Mass. 2004, fasc. 7-8).

4. HUNGARY also recognises the legal ground of justification contained in VI.–5:201; it is irrelevant that this defence is not expressly mentioned in the Civil Code. According to Hungarian law damage is unlawful unless permitted by law (cf. *Ujváriné*, Felelősségtan[7], 49). Damage, which results from an exercise of a right in accordance with the terms of the law is also permissible. This category includes e.g. the exercise of rights of use and exercise of rights vis á vis neighbours (*Eörsi*, Kártérítés jogellenes magatartásért, 53; *Ujváriné* loc. cit. 58). According to CC § 100 a landowner is obliged to refrain from doing anything which would disturb his neighbours unnecessarily or jeopardise the exercise of their rights (see further BH 2006/184, EBH 2001/408, and BH 1993/161). If a right is not exercised according to law, then it amounts to an abusive exercise of that right (CC §§ 2(2) und 5). Similarly, under SLOVENIAN and under ROMANIAN law, a person will not incur liability, if that person is entitled to encroach on the legal interests of another pursuant to a licence from the relevant authority (*Cigoj*, Teorija obligacij, splošni del, 179; CSJ 17 July 2001, *secţia comercială*, decision no. 4718).

5. Similarly, under BULGARIAN law, no liability is generally imposed on a person pursuing a "legally regulated activity". The justification that the damage was authorised by law may be invoked, for example, by individuals who detain a suspected criminal until the arrival of the authorities and use force to combat resistance (CP art.

12a). The duty to compensate is also countermanded if the cause of the damage is due to honest and legal advertising practices of a competitor (*Takoff*, Obzor na deliktnoto pravo na Bulgaria, 23). An important departure from the abovementioned principle (no liability) arises under the Agricultual Enterprises' Protection Act art. 30(1): There is a duty to compensate the landowner for damage to agricultural enterprises caused by air, soil or water pollution, even if the polluter adhered to the relevant legal standards; however, there may be a reduction in the quantum of damages awarded, given that the injuring party acted according to the governing regulations.

6. Similarly, under GERMAN law, there is a whole array of provisions in existence which authorise an individual to encroach in the rights or legal interests of another. Provided that the person thus entitled confines himself or herself to acting with the parameters of the authorisation thus conferred, then according to German law, his conduct is justified and s/he does not have to fear that tort law consequences will ensue. CC § 229 (Self -help), CC §§ 859 and 860 (Self-help by the possessor) as well as CC § 910 (Right of self-help by the owner) serve as illustrations of the foregoing. CP § 193 (Safeguarding legitimate legal interests in the context of torts involving expression or criticism is also of considerable importance for the realm of tort law, see further Erman [-*Schiemann*], BGB II[11], § 823, no. 148). CCrimProc § 127(1) confers a right on every citizen to provisionally arrest a person who is caught in the act or being pursued, even without a judicial order, if there are grounds for suspecting that this person might take flight or if his or her identity cannot be immediately established. A parental right to physically chastise their children is no longer in force (CC § 1631(2)). In contrast, it is not impermissible for a person who acts in good faith during court or other official proceedings to introduce or pursue untrue claims, if s/he does not knowlingly or carelessly do so even if those claims turn out to be unjustified, and this results in prejudice to the other party extending beyond the immediate proceedings (Palandt [-*Sprau*], BGB[66], § 823, no. 37).

7. In AUSTRIA, the defence of self- help is understood to mean an exceptional legal (not: contractual) right which is permitted to be exercised in order to secure or bring about a situation that is in line with the law (CC §§ 19, 344 und 422). A prerequisite for the successful invocation of the defence is that assistance from authorities could not obtained in time and that the parameters of the defence were not exceeded, those same parameter also apply to self- defence. However, self-help can be invoked in respect of interests which are excluded from the scope of self-defence, provided that the concrete act manifests itself as lawful following an assessment of all of the interests involved (OGH 11 July 1989, SZ 62/132 p. 22). Private citizens are permitted to pursue criminals offenders where assistance from the authorites would come too late provided that the frontiers of the defence must not be traversed (OGH 19 September 1996, SZ 69/214 p. 426; OGH 9 October 1991, SZ 64/137 p. 230).

8. Similarly, under Greek law, where the plaintiff is entitled to redress the harm himself amounts to a ground of justification which excludes the imposition of liability (*Stathopoulos*, Geniko Enochiko Dikaio A(1)[2], 818; *Kornilakis*, Eidiko Enochiko Dikaio I, 507). A requisite of CC art. 282 is that an actionable entitlement under private law is put at risk and assistence from the authorities in enforcing this entitlement could not be obtained in time (*Karakostas*, AstK, art. 282, no. 1811; Georgiades and Stathopoulos [-*Tabakis*], art. 282, no. 7). The measures taken for the purposes of exercising self-help must not exceed that permitted to defend oneself against the impending harm (CC art. 283). Special cases where self –help is lawful are regulated in CC arts. 985, 986 (Protection of posssession) and in CC arts. 1008, 1079 (Rights vis á vis neighbours; bees in flight); the defence of self-help under criminal

law, anchored in CP art. 367 can also be of relevance in a civil law context (*Kornilakis* loc. cit.).

9. The regular exercise of a right also constitutes a ground of justification in PORTUGAL and operates to exculpate the putative tortfeasor from liability, see Const. art. 271(2) and (3) and CP art. 31(2)(b). Examples found in academic teaching include entry onto land without a licence in pursuance of an entitlement to hunt or where the owner of land located on higher ground extracts water, thereby causing prejudice to the owner of the property located below (*Antunes Varela*, Obrigações em geral I[10], 552). Regard must also be had to CC art. 335 and the doctrine of abuse of a right (*Almeida Costa*, Obrigações[9], 568; STJ 15 May 2003).

10. DUTCH CP art. 42 provides that an act is not punishable under the criminal law, where that act is carried out in furtherance of a statutory obligation or pursuant to legal authority. The aforegoing is also a valid ground of justification under the private law (For examples, see Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 63 p. 77, Onrechtmatige daad I [-*Jansen*], art. 6:162 lid 2 no. 152.1 p. 1661). It may be indeed be difficult to distinguish between the two alternatives contained in an actual case, however the result does not depend on a clear cut distinction being made. For example, statutory provisions pertaining to getting into the correct traffic lane are regarding as constituting a duty as well as conferring statutory authority (HR 8 November 1957, NedJur 1958, no. 1 p. 5). A person who abides by an administrative order (*ambtelijk bevel*) acts in futherance of a statutory obligation (*Jansen* loc. cit. no. 152.2 p. 1662). A prerequisite for the successful assertion of the claim that on acted pursuant to statutory duty or administrative order depends naturally on the validity of the relevant statute invoked to underpin that claim (HR 22 March 1946, NedJur 1946, no. 206 p. 289-292; HR 20 April 1990, NedJur 1991, no. 53 p. 214); in addition, the act carried out, in its exact manifestation, must fall within the scope of the statute.

11. ESTONIAN LOA § 1045(2) corresponds with VI.–5:201. The causation of damage is not unlawful if the authority to cause such damage arises from law.

12. In the NORDIC countries it has been been held that a "legal" exercise of a right can *a fortiori* not be deemed wrongful (*Vinding Kruse*, Erstatningsretten[5], 50). The classical defences are consent (and acting at own risk), self-defence, state of emergency (*Notstand*), and official duty. There may be, however, further defences (see e.g. Swedish HD 20 October 1915, NJA 1915, 511 [no liability of a man violently removing a person disturbing a church service]; HD 21 December 1960, NJA 1960, 670 [no liability of a concert pianist practicing in his apartment, disturbing other tenants]; HD 1 March 1990, NJA 1990, 71 [no liability because the defendant had a right to trim the hedge]). A particular explicit authority conferred by Swedish Consitution chap. 2 § 18(3) and Finnish CP chap. 28 § 14 is the right to enjoy nature, to a certain extent even on another private person's property (see Swedish HD 27 September 1996, NJA 1996, 495). No authority conferred by law allows for chicanery; chicanery is a tort in itself (see e.g. Finnish Act concerning the respective interest of neighbors [*lag angående vissa grannelagsförhållande* of 13 February 1920] § 13; *Hakulinen*, Obligationsrätt, 259; *Karlgren*, Skadeståndsrätt[5], 86; *Hellner and Radetzki*, Skadeståndsrätt[7], 71, 128; *Kleineman*, Ren förmögenhetsskada, 245; *Ussing*, Erstatningsret, 62).

The **illustration** is taken from Cass.civ. 10 June 1970, D. 1970 jur. 691.

VI.–5:202: Self-defence, benevolent intervention and necessity

(1) A person has a defence if that person causes legally relevant damage in reasonable protection of a right or of an interest worthy of legal protection of that person or a third person if the person suffering the legally relevant damage is accountable for endangering the right or interest protected. For the purposes of this paragraph VI.–3:103 (Persons under eighteen) is to be disregarded.

(2) The same applies to legally relevant damage caused by a benevolent intervener to a principal without breach of the intervener's duties.

(3) Where a person causes legally relevant damage to the patrimony of another in a situation of imminent danger to life, body, health or liberty in order to save the person causing the damage or a third person from that danger and the danger could not be eliminated without causing the damage, the person causing the damage is not liable to make reparation beyond providing reasonable recompense.

COMMENTS

A. Three grounds of defence

Overview. This Article gives effect to two "classic" grounds of defence, namely self-defence (paragraph (1)) and necessity (paragraph (3)), and, in paragraph (2), to the ground of defence based on justified benevolent intervention in another's affairs. The second sentence of paragraph (1) contains a clarification in regard to self-defence against children. Paragraphs (1) and (2) lead to a complete defence. Paragraph (3) has as its main consequence a reduction of liability to what is under the circumstances a reasonable recompense.

B. Self-defence (paragraph (1))

Protecting personal rights and interests and those of another. The law must not yield to injustice. Therefore, every Member State's legal system recognises the right to self-defence. Precisely speaking, it is broken up into two characteristics: self-defence in the strict sense and the defence of others, namely protecting the rights and interests of another against danger from a third party. In contrast, self-defence against self-defence is not possible: such a protective measure would not be reasonable (as is required by paragraph (1) of the Article).

> *Illustration 1*
> A is attacked by B with a blunt object. A defends herself by attempting to destroy the weapon. B in turn defends his property. The latter is without good reason and may therefore be overcome by A by force, as long as B's attack continues.

Endangerment. The defence of self-defence requires, first, the actual endangerment of a right or legally protected interest (see VI.–2:101 (Meaning of legally relevant damage)). An endangerment can lie in a person, a thing or an animal. Paragraph (1) is not limited to attacks by people.

> *Illustration 2*
> A is attacked by a dog whose keeper and owner is B. A is only able to defend himself by striking the dog with a slat which he tears from a wooden fence belonging to C. In relation to B, A acts in self-defence; the situation would only be different if B was the owner, but not the keeper of the dog (in which case paragraph (3) would apply in relation to B). In relation to C, it is paragraph (3) which applies. A is not liable to C

under the general rules on non-contractual liability in this Book, but he is liable nonetheless to make reasonable compensation. On the other hand, C cannot defend himself against the intervention by A in accordance with paragraph (1). That is because A is not responsible under this Book for the property damage, nor would he be responsible for it if C had tried but failed to hinder it by force. B in turn is unequivocally liable for the damage to the fence under VI.–3:203 (Accountability for damage caused by animals) in conjunction with VI.–4:101 (General rule [on causation]); a break in the chain of causation by A's conduct is to be denied.

Reasonable protection. A person who relies on this defence must also demonstrate, and if necessary prove, that the acts were done with defensive intent. Moreover the person must have opted for a means of defence that was reasonable under the circumstances. That will be so only where the means chosen were apt and necessary to fulfil the intended aim. Furthermore, the act of self-defence must not have been out of all proportion to the interest under threat – even if there was no other possibility of defence.

Illustration 3:
The owner of a cherry tree may not shoot at children who are stealing cherries and refuse to budge despite the owner's protests – even if the owner is confined to a wheelchair and has no other means to defend the property.

Self-defence against children. The second sentence of paragraph (1) clarifies that self-defence may as a matter of principle be exercised against children (provided that the act of self-defence is reasonable). A corresponding rule in relation to the mentally disabled is not necessary because, in principle, mental incapacity in the context of a ground for liability is not afforded any consideration. It only comes into focus as an independent defence (see VI.–5:301 (Mental incompetence)); self-defence is therefore also possible against attacks from mentally disabled or intoxicated perpetrators.

Putative self-defence and excessive self-defence. Paragraph (1) does not come into operation where a person misreads the situation and wrongly believes there is an attack (so-called putative self-defence), nor where there is indeed an attack but the person resorts to an unreasonable method of defence (so-called excessive self-defence). In both situations, the issue of liability is decided solely under VI.–3:102 (Negligence). Where the mistake was avoidable, negligence is present; where it was unavoidable, liability is absent.

Illustration 4
A strikes B, who has acted threateningly towards him and claims to have a weapon in his bag with A in mind. Since B is in truth not carrying any weapon in his bag, A is not acting in self-defence; however, he is not liable because he did not negligently infer an instance requiring self-defence.

Illustration 5
An employee of a security firm is attacked by an intruder, who threatens to kill him. A fight ensues, during the course of which the security guard shoots at the intruder and in an ironic turn of events ends up actually killing him. Under the circumstances, a non-fatal shot to the leg would have sufficed to defend himself. The widow has no claim where the security guard cannot be blamed for being negligent for over-reacting in a life-threatening situation.

C. Benevolent intervention in another's affairs (paragraph (2))

Benevolent intervention as a defence within the framework of the law on non-contractual liability. Interfering in the affairs of another under the prerequisites of V.–1:101 (Intervention to benefit another) and V.–1:102 (Intervention to perform another's duty) is quite allowed and indeed desired. Where the principal is harmed thereby, the intervener is equipped with a defence in the context of the rules in this Book, see the Comments under V.–1:101 (Intervention to benefit another) and illustration 3 there. Expressing that is the aim of paragraph (2) of the present Article.

Without breach of the intervener's duties. However, benevolent intervention is only a ground of defence if the intervention is carried out with all care due in the circumstances. Where the intervener breaches a duty of care *vis à vis* the principal's rights and interests, the intervener remains liable under the conditions set out in V.–2:103 (Reparation for damage caused by breach of duty).

D. Necessity (paragraph (3))

Situations covered. Paragraph (3) closes a gap in the law governing self-defence. It deals with situations in which a defence against a direct threat to life, body or freedom is possible only by making use of another person's property. Given the serious discrepancy between the legally protected interests in play here, the owner of the property must endure this interference and cannot block the original self-defensive action by in turn defending the property against it. A person who uses the property of another in legitimate self-defence does not commit a legal wrong. However, in so far as the owner is not responsible for the danger arising and can regard it as "none of his business", the owner has a right to reasonable recompense. Thus, paragraph (3) follows the maxim "endure, then claim". This "imperative endurance" is a part of the law on non-contractual liability for damage, the granting of a right to reasonable recompense is *strictu sensu* not. In actual fact, of course both parts of the rule are inextricably entangled; they are dependent on each other.

Precedence of the interest defended over the legally protected interest. Paragraph (3) covers only situations where there is a clear legal discrepancy between the values of the conflicting interests. This is a question not of economic comparison but of weighing-up moral values. The rule assumes that, in the situations mentioned, property rights, possessions and money cede to life, body and freedom. For conflict situations *within* both groups, a general defence cannot be formulated. Such situations have to be solved by reference to the general rules on liability for intention or negligence. In some cases recourse to VI.–6:202 (Reduction of liability) may be possible.

> *Illustration 6*
> The victim of a kidnapping is locked inside a stolen car or is detained in the rooms of a bank by the kidnappers, with a view to extracting a ransom. The kidnapped person may damage the car or the windows in the bank in order to flee. The same applies where a third party rescues the victim.
>
> *Illustration 7*
> Lady A is out and about in an expensive designer dress; Lady B is wearing jeans and a T-shirt. The difference in value of the clothes does not give Lady A the right to wrench Lady B's umbrella from her, after it has suddenly begun to rain.

Imminent danger. The special authority to interfere with the property of another arises only in cases of imminent danger to the life, body or freedom of the person in danger. Only dangers for which one cannot reasonably prepare and with which one cannot reckon are meant here. If it were otherwise, it would be possible to tackle the dangers without inflicting the damage.

Illustration 8
Where homeless people have not arranged a place to stay for the cold winter months in a timely fashion, paragraph (3) does not give them the right to break into houses, even where they are empty.

Liability. Under the law on non-contractual liability for damage, liability falls naturally on the negligent or intentional causer of the dangerous situation or the person who must account for the source of danger according to objective criteria. However, there will not always be such a person principally responsible (e.g. if the dangerous situation is attributable to natural events) and even where there is, the question remains as to who should bear the risk that that person will be unable to pay the damages or will be unidentifiable. Paragraph (3) decides this issue in favour of the owner and to the detriment of the person who resorted to self-defence: the latter must bear the risk of not being able to recover damages from the principally responsible person, because the person resorting to self-defence, and not the owner, was the pro-active party.

Reasonable compensation. Equally, there often remains the delicate task of coming up with a solution to compensate for the damage which adequately serves the interests of the two parties. On the one hand, paragraph (3) provides for strict liability of a person acting in an emergency situation requiring self-defence, but then limits this liability, depending on its extent, to a reasonable compensation. The rule gives a certain amount of discretion to the court as regards the evaluation. It is not necessary to compensate the full damage; in fact a balance of values is more appropriate. The amount payable turns upon the time and market value of the damaged thing; in contrast, general damages are not recoverable, i.e. compensation for lost profit and losses of a non-pecuniary nature.

NOTES

I. Self-defence

1. The specifics of *légitime défense* are regulated in FRENCH CP arts. 122-5 and 122-6; these provisions, with appropriate adaptations being undertaken, also apply in the sphere of private law (*Viney and Jourdain*, Les conditions de la responsabilité[2], no. 563 p. 503). Self defence can only be legitimately exercised if there was aggression directed towards the involved party which rendered it necessary to act with immediate effect. A prerequiste for the success of the defence is the existence of a real danger to the person himself, or another person or to their legally protected goods. Self- defence is only permitted to obvert an unlawful attack and a further precondition is that the act of self-defence must be proportionate in the circumstances (*Viney and Jourdain* loc. cit. nos 563-1 – 564-1 pp. 503-506). The successful invocation defence of *légitime défense also* precludes liability even where an objective liability, which arises independent of fault is present on the side of the actor (Cass.civ. 22 April 1992, Bull.civ. 1992, II, no. 127 p. 62). The foregoing analysis corresponds to the legal position in BELGIUM. However, in this jurisdiction, it is stressed that lawful self-defence can only constitute a *fait justificatif*, if the reaction which caused injury was

not disproportional in the circumstances, namely the question which is asked is whether *un homme normalement prudent et raisonnable* would have reacted in the same manner in the circumstances of the case (*Cornelis*, Responsabilité extra-contractuelle, no. 20 p. 34).

2. Although the SPANISH *Código Civil* expressly mentions neither self-defence (*legítima defensa*) nor the defence of necessity (*estado de necesidad*), there is universal agreement that self-defence constitutes a ground of justification operating to preclude the imposition of liability (*de Ángel Yágüez*, Tratado de responsabilidad civil[3], 284; *Yzquierdo Tolsada*, Sistema de responsabilidad civil, 113; *Díez-Picazo and Gullón*, Sistema II[9], 554; *Santos Briz*, La responsabilidad civil I[7], 36). It is expressly envisaged for civil liability which has its roots in the commission of a criminal offence únder CP art. 118 in conjunction with art. 20(4). The following prerequisites are listed therein, namely, (i) an unlawful attack (ii) necessary act of self-defence using proportionate force and (iii) an lack of serious provocation on the part of the person exercing self-defence. An acquittal under the criminal law does not bind the civil law courts; if, the civil courts determine that the person who exercised self-defence was negligent, then the courts are permitted to require him or her to pay damages even after the wrongdoer has been acquitted pursuant to the criminal law (TS 28 June 1996, RAJ 1996 [3] no. 4905 p. 6421; however, *in casu* liability was refuted).

3. ITALIAN CC art. 2044 provides that a person is not liable, "for causing damage in self- defense or in defense of others". CC art. 2044 is augmented by CP art. 52. According to this provision, a person will not be punished for conduct, which was necessited in order to defend his own rights or the rights of another against an imminent danger of an unlawful attack, provided that means of self –defence employed was proportionate to the attack, see further *Alpa/Cuffaro/Mariconda*, Codice civile commentato IV, art. 2044, II, no. 6; Cass. 24 February 2000, no. 2091, Danno e resp. 2000, 877). This provision was modified by *Legge* 13 February 2006, no. 59 *modifica all'articolo 52 del codice penale in materia di diritto all'autotutela in un privato domicilio* (Gazz.Uff. 2 March 2006 no. 51) which added two further articles to CP art. 52, providing that in certain defined constellations, the proportionality of the act of self-defence is presumed. *Legittima difesa* excludes the *ingiustizia* of the damage (*Franzoni*, Dei fatti illeciti, sub. art. 2044, p. 289). It is also possible to exercise self-defence against a person not endowed with legal capacity as well as in respect of things and animals, for which the other party is strict liable. It is said that the reaction of the person attacked must be necessitated, unavoidable and proportional (*Franzoni* loc. cit. 291; *Alpa/Cuffaro/Mariconda* loc. cit. sub art. 2044, III, nos 16-17). If the person attacked intentionally created the risk, then, that person cannot invoke a *legittima difesa*. In cases of putative self-defence, the person attacked may not be regarded as having committed a fault. In such cases, according to prevailing legal opinion, the damage is apportioned along equitable lines between the parties concerned, either, by applying CC art. 1227(1) with appropriate adaptations (provision on contributory negligence, see *Franzoni* loc. cit. 294) or CC art. 2045 (provision on necessity, see Cass. 6 April 1995, no. 4029, NGCC 1995, I, 1137 and Cass. 12 August 1991, no. 8772, Giur.it. 1992, I, 1, 734).

4. According to HUNGARIAN CC § 343 damage, which is caused to an aggressor in order to avert an unlawful attack or threat suggesting that an imminent unlawful attack would be carried out, need not be compensated, provided that the person acting in self-defence did not adopt excessive measures to stave off the attack. Self-defence operates to negate the unlawfulness of the damage inflicted (Petrik [-*Harmathy*], Polgári jog II[2], 580f; *Eörsi*, Kártérítés jogellenes magatartásért, 50f). Excessive self–defence or putative self-defence remains unlawful (*Marton*, A polgári jogi felelősség, 138); its

presence or absence is judged according to CC § 339(1) (BH 2001/574). Whereas exceeding the parameters of self- defence need not result in liability under criminal law, the imposition of liability under civil law in such circumstances lies in the discretion of the court (*Petrik*, Kártérítési jog, 38; Gellért [-*Kemenes*], A Polgári Törvénykönyv Magyarázata[6], 1238; BH 1980/128). However, the contributory negligence of the injured party usually leads to a reduction in liability in cases of this type (*Marton* loc. cit.). It is also permitted to exercise self-defence vis á vis individuals who are deemed not to be responsible for their actions under the civil law. If a person exerting self-defence injures somebody other than the aggressor, it is not quite clear whether the former only has a claim against the aggressor or whether, by applying CC § 107 (Necessity) with appropriate adaptations, s/he can also claim against the person who exercised self-defence (see further *Petrik* loc. cit. 39).

5. The conceptual understanding of self-defence under BULGARIAN LOA art. 46(1) is that it connotes a ground of justification, thereby precluding the imposition of liability. A precondition for the valid invocation of this defence is that the actor does not exceed the measures deemed sufficient to repel the attack (Plenum of the Supreme Court, ordinance no. 12 of 29 November 1973, case no. 11/1973 in criminal matters). In the event that the self-defence exerted is excessive, then even where the actor was influenced by fear or fright and is, therefore, immune for criminal liability, civil liability will be incurred (Supreme Court loc. cit.). POLISH CC art. 423 provides: "Whoever acts in necessary defence by repelling a direct and unlawful attempt against any interest of his own or another person shall not be liable for the damage caused to the assailant". The foregoing also corresponds to ROMANIAN CP art. 44(2), which is also relevant in the civil law context. Excessive self-defence does not serve as a ground of justification, however, it can operate to release the actor from liability on the grounds that the actor was not guilty of negligence (*Adam*, Drept civil. Teoria generală a obligațiilor, 285). According to SLOVENIAN LOA art. 138(1), a person who acts in self-defence, is not liable for damage caused to the agressor, unless the limits of the defence were negligently exceeded. The elements of this defence are derived from CP art. 11(2) which is also pertinent in the civil law context. There must be an unlawful and imminent attack; in addition, the means taken to avert the attack must be proportionate to the attack itself (Juhart and Plavšak [-*Pensa*], Obligacijski zakonik I, art. 138 p. 809). A person who uses bodily force in response to a verbal attack does not act in self-defence (VSS II Ips 718/94).

6. Similarly, under GERMAN CC § 227(1), an act prompted by the need to defend oneself is not unlawful. Self-defence denotes a defence which is required to ward off an unlawful imminent attack oneself or another (CC § 227(2); see further CP § 32). It is said that the law is not required to yield to an unlawful action (Palandt [-*Heinrichs*], BGB[66], § 227, no. 1). The notion of "attack" connotes solely an attack coming from a person (not: that emanating from an animal or thing) where there is an imminent threat of attack to a legally protected interest; it does not depend to any extent on the fault of the aggressor. The attack must be unlawful and imminient: this requirement is not fulfilled if the act is completed The act of self-defence must be accompanied by a subjective element, namely the requisite intent to defend oneself. The actor is required to employ the least dangerous means or the means calculated to cause the less damage when warding off the attack; however, the law does not require that the person exercising self defence risks that the act of self defence would prove ineffectual to repel the attack (BGH 23 September 1975, NJW 1976, 41, 42; BGH 5 October 1990, NJW 1991, 503, 504). The prohibition on abusing one's rights which derives from CC § 242 may entail that an act of self defence cannot be exercised against children or those suffering from a mental disability or that the act of self defence must be

employed in a suitably restrictive manner. If there is a glaring disparity between the defence of the legal interest and the damaged legal interest, then in a similar fashion, an abuse of right may be given (BGH 23 September 1975 loc. cit.). There is no right to self-defence, if the person attacked provoked the situation where s/he found himself or herself having to act in self-defence (BGH 7 June 1983, NJW 1983, 2267; see also BGH 14 June 1972, NJW 1972, 1821, 1822; BGH 15 May 1975, NJW 1975, 1423, 1424). Cases of excessive self-defence and putative self-defence hinge upon whether the actor was negligent (BGH 23 September 1975 loc. cit.).

7. According to AUSTRIAN CC § 19, an act is not unlawful, if the offendor acted in self defence. According to CP § 3 self-defence is given, if a person avails of an act of self-defence which is necessary to repel a real attack or an imminently threatened unlawful attack on one's life, health, bodily intergrity, liberty or property or that or another. This definition is also applicable in the private law context (OGH 29 June 1989, JBl 1990, 104). An act of putative self-defence only eliminates the obligation to compensate if the injured party conduted himself in such a manner which engendered on the part of the person exercising self-defence a belief that s/he was about to be attacked and therefore reacted accordingly. Negligently misjudging the situation has no impact on the existence of liability (OGH 19 January 1972, EvBl 1972/219, 433). The same rules apply when excessive self-defence is exercise (OGH 17 September 1964, SZ 37/121 p. 348).

8. Similarly, pursuant to GREEK CC art. 284, an act of self-defence negates unlawfulness; the concept of self-defence is identical under the criminal and civil law (*Karakostas*, AstK, art. 284, no. 1823; ErmAK [-*Gafos*], art. 284, no. 3; Georgiades and Stathopoulos [-*Tabakis*], art. 284, no. 1). The same notion as that existing under German law is employed. In Greece, the successful invocation of self defence also hinges on the existence of an attack which originates from a person; a threat of attack by an animal will not connote an attack for the purposes of this provision (*Karakostas* loc. cit. no. 1827; *Tabakis* loc. cit. no. 7). The prohibition on abuse of rights (CC art. 281) is also relevant for self-defence. For example, a person can be guilty of an abuse of rights where a trenchant act of self-defence is employed to stave off an attack to property of minor value, and this attack emanates from a minor or from a person who is deemed not to be responsible for his or her actions under tort law (*Karakostas* loc. cit. no. 1834).

9. According to PORTUGUESE CC art. 337(1), an act of self-defence which is employed to avert a present (see further STJ 6 January 1993, BolMinJus 423 (1993) 342) and unlawful attack serves as a ground of justification, if it was not possible to parry the attack by utilising "normal means" and further, if "the loss occasioned by the act of self-defence is not manifestly higher than that that would have been caused by the attack". According to CC art. 337(2), excessive self-defence which resuls from "confusion or fear on the part of the actor which was not negligent in the circumstances" is also justified. The ground of justification of excessive self-defence is not given, where a person, in response to verbal provocation, used an axe to hit the offender on the head (STJ 4 January 2006; see, also, 2 July 2003). Conversely, self-defence has been successfuly invoked in a case, where a man, in order to defend his right of way, threatened to physicaly harm the person who was about to set out to destroy the right of way (CA Porto 14 June 2006). There is no requirement that the aggressor be at fault (*Pessoa Jorge*, Ensaio sobre os pressupostos da responsabilidade civil, 234). If putative self-defence is employed, then the person employing such force, comes under a duty to compensate, "if the mistake cannot be excused", CC art. 338. For example, a person is excused, if that person knocks down a putative attacker because the latter ostensibly threatened him with a weapon concealed under his coat

(STJ 1 February 1996). The President of a Public Limited Company does not act in self –defence, if, in response to third party statements endangering the company's credit, he made defamatory statements in public concerning that other party. It follows from the principle of proportionality that the right of reply and the defence of honour do not justify a new act of defamation (STJ 14 October 2003).

10. DUTCH CP art. 41(1) precludes the imposition of criminal liability where an act is exercised in *noodweer*. According to this provision, self-defence has five prerequisites in order for it to be legimately invoked: there must be (i) a present and (ii) unlawful attack. The attack must be directed (iii) at the body, the or property of the person attacked or those of a third party The act of self defence must have been (iv) necessary and (v) apt and proportionate to avert the attack (Onrechtmatige Daad I [-*Jansen*], art. 6:162(2), no. 167 p. 1737; HR 10 December 1999, NedJur 2000, no. 9 p. 82; Asser [-*Hartkamp*] Verbintenissenrecht III[11], no. 62 p. 76). A person remains liable if the self defence exercised is excessive, namely, the parameters of a legimate act of self-defence were culpably exceeded, cf. CP art. 41(2). Thus, liability may not be incurred, because the contrbutory negligence of the attacker clearly outweighes the culpability of the person acting in self-defence (CC art. 6:101; *Jansen* loc. cit. no. 170 p. 1780).

11. ESTONIAN LOA § 1045(2) states tersely, an act exercised in self-defence is not unlawful. LITHUANIAN CC art. 6.269(1) is to the same effect. CC art. 6.269(2) adds that "the aggrieved person can claim from the person against whose unlawful actions defence was used, i.e. from the assailant, to compensate for the damage occurred".

12. In the NORDIC countries self-defence in private law is governed by the same rules as in criminal law (SWEDISH CP chap. 24 § 1; DANISH CP § 13 and FINNISH CP chap. 4 § 4). Where criminal liability is excluded civil liability is also excluded. However, in cases of excessive self-defence and putative self-defence, the actor remains liable (*Hellner and Radetzki*, Skadeståndsrätt[7], 120). An attack, emanating from an animal or property are not embraced by this defence but are governed by the laws on necessity, which can require that stricter preconditions are met than in the context of self-defence (see HD 14 October 1988, NJA 1988, 495: goat keeper held liable for shooting a valuable hunting dog which attacked some goats; see also *Vinding Kruse*, Erstatningsretten[5], 38). If a third party is injured or suffers a loss from the action of self-defence, liability is attributed to the original attacker (*Hellner and Radetzki* loc. cit. 120; *von Eyben and Isager*, Lærebog i erstatningsret[5], 49; *Saxén*, Skadeståndsrätt, 172; HD 13 December 1947, NJA 1947, 626 [a group of persons assaulting a person, who in self-defence fired a shot hitting a by-passer, was found solidarily liable for the by-passer's personal injuries).

13. **British Isles [missing]** Under the Animals (Scotland) Act 1987, s. 4(1)(a)(i), a person who kills or injures an animal has a defence if he proves he acted in self-defence. A person also has a defence if he proves that he killed or injured the animal in acting to protect another person: s. 4(1)(a)(ii). Additionally, a person who proves he killed or injured the animal in acting for the protection of livestock has a defence if he is (a) a keeper of the livestock, (b) the owner or occupier of the land where the livestock is present, or (c) authorised by a keeper or by the owner or occupier of the land to act for its protection: s. 4(1)(iii), (3). Each of these defences requires that the animal attack or be about to attack the person causing the damage or the person or livestock being protected (or have attacked a person or livestock and remained in the vicinity) and that there were reasonable grounds for believing there was no other practicable means of ending or preventing the attack (or a further attack): s. 4(4). Each is subject to the proviso that the killing or injury is reported to the police within 48 hours (s. 4(1)(b))

and is excluded if the damage is caused in furtherance of criminal activity or at or near a place where that person was present for that purpose (s. 4(2)).

II. Benevolent Intervention

14. On the issue of liability of a lawful but carelessly performed act of benevolent intervention, see the notes under **PEL Ben.Int. Art. 2:103***???*. A benevolent intervention in another's affairs which was lawfully undertaken and carefully carried out, does not lead to liability in any legal order which recognise this legal institute, not even if the intervention results in bodily injury, property damage, or loss of rights to the principal's detriment. This result is either rationalised on the basis that there is a lack *faute* or fault or on the basis that the fact that the benevolent intervention was justified constitutes a defence.

15. Cf. e.g. for SPAIN CA Jaén 2 July 1999, AC 1999 (3) no. 1950 p. 452 and CA Alicante 7 March 2005, BDA JUR 2005/132762; for ITALY *Cian and Trabucchi*, Commentario breve[6], sub art. 2028, no. 4; for HUNGARY CC § 485(1) (from whence, it can be inferred that a person who appropriately intervenes in another's affairs without authority does not act in a culpable manner according to § 339); for GERMANY *Medicus*, Schuldrecht II[13], no. 760; Palandt [-*Sprau*], BGB[66], Pref. to § 677, nos. 5, 11; *Larenz and Canaris*, Schuldrecht II(1)[13], § 57Ib and Staudinger [-*Bergmann*], BGB, Pref. to §§ 677 ff., no. 243; of a different view MünchKomm [-*Seiler*], BGB[4], Pref. to § 677, no. 16); for PORTUGAL CC art. 340(3) (legal fiction that consent has been obtained to a lawful benevolent intervention in another's affairs, see *Vaz Serra*, BolMinJus 85 [1959] 13, 108-109 and *Menezes Leitão*, Responsabilidade do gestor, 248); for GREECE *Kornilakis*, Eidiko Enochiko Dikaio I, 506; *Georgiades*, Enochiko Dikaio, Geniko meros, 604 (ground of justification); for the NETHERLANDS Parlementaire Geschiedenis VI, 617 und Onrechtmatige Daad I (-*Jansen*), art. 6:162(2), no. 233 p. 6100 and for ROMANIA *Adam*, Drept civil. Teoria generală a obligaţiilor, 182 as well as *Dogaru and Drăghici*, Drept civil. Teoria generală a obligaţiilor, 358.

16. At any rate, in AUSTRIA, intervening in another's affairs in order to avert an emergency (CC § 1036) constitutes a ground of justification (CC §§ 1311 and 1312; Koziol/Bydlinski/Bollenberger [-*Koziol*], ABGB², § 1036 no. 7). That the same ought to hold true for the mere "benevolent" intervention in another's affairs (CC § 1037), has been refuted by recent legal commentary (*Koziol* loc. cit. § 1037 no. 1; *Meissel*, GoA, 119, 135). In any event, this issue is not ascribed with any considerable practical importance as, in the latter case, for liability to be incurred, depends on the existence of fault. Liability of the intervener under ESTONIAN LOA § 1022(1) and (2) is also dependent on the existence of fault. In BULGARIA, it appears that the submission that a lawfully exercised benvolent intervention in another affair's can operate to exculpate from liability has not been discussed.

17. Within the NORDIC countries in DENMARK *negotiorum gestio* is explicitly referred to as a separate defence, whereby the intervener has a defence if the principal is harmed (*Vinding Kruse*, Erstatningsretten[5], 41; *von Eyben and Isager*, Lærebog i erstatningsret[5], 51). However, the issue of the intervener causing damage to the principal or another has also been dealt with in SWEDEN (*Håstad*, Tjänster utan uppdrag, 139) and FINLAND (*Saxén*, Skadeståndsrätt, 173). See in more detail PEL/*von Bar*, Ben.Int., Introduction *I53-57*.

III. Necessity

18. Under FRENCH CP art. 122-7 "a person is not criminally liable if, confronted with a present or imminent danger to himself, another person or property, he performs an act

necessary to ensure the safety of the person or property, except where the means used are disproportionate to the seriousness of the threat." A person finds themselves *état de nécessité*, a condition which serves to justify the commission of a damaging act, if they are threatened by a danger of the kind mentioned above and employ proportionate measures to counteract it. The interest violated must always lie below the preserved interest in the hierarchy of competing values; for example, it is permitted to sacrifice the property of another, however not his life, in order to rescue one's own property. A person whose property is damaged in an act done under necessity has a claim under *enrichissement sans cause* for recompense against the person who either saved himself or was rescued by another (*le Tourneau*, Droit de la responsabilité et des contrats [2004/2005], nos. 1973-1976). The prevailing legal position in BELGIUM is similar. It is said, that a justficatory *état de nécessité* would particularly lie, if the actor or a third party found himself in a situation of danger, which is so concrete that it compels the actor to react in a specific manner. The endangered interest and the violated interest must, at a minimum, be of equal value. In addition, the defence is not available to an actor who himself brought about circumstances, whereupon it was then incumbent upon him to exercise the defence of necessity (Tilleman and Claeys [-*Claeys*], Buitencontractuele aansprakelijkheid, 1, 34-37, nos. 55-59).

19. In SPAIN, necessity negates criminal liability; however, it does not operate to cancel out the civil liability which is triggered by the commission of the criminal offence (CP arts. 118(3) and 20(5)). This affects the person who benefitted from its exercise (even where the conduct done under necessity was unsuccessful) and also affects a person who did not personally exercise the defence. The relative values of the protected interest and the damaged interest serves as a basis for the assessment of damage; if, this approach is not feasible, then the judge is conferred with an equitable discretion. Necessity, pursuant to provisions of the aformentioned article of CP, is established, if (i) the damage inflicted is not greater than that which was threatened; (ii) the circumstances giving rise to necessity were not deliberately instigated by the actor; and (iii) it was not incumbent upon the person benefitting to sacrifice himself owing to their occupation or an office held by him. The same critieria apply in the context of civil liability (*Díez-Picazo and Gullón*, Sistema II[9], 554). In contemporary legal theory, the submission has been made that CP art. 118(3) concerns a recompense for lawfully inflicted damage, in other words, that it is not connected with genuine tort liability. The proposition tendered is that the law should solely seek to preclude that the person who benefits from the defence should be unjustly enriched (*Yzquierdo Tolsada*, Sistema de responsabilidad civil, 115; *de Ángel Yágüez*, Tratado de responsabilidad civil[3], 285; *Díez-Picazo and Gullón* loc. cit.). The law pertaining to benevolent intervention in another's affairs is also of relevance in determining the basis of the duty of the person benefitting to make reparation (CC art. 1893(2)) (Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Pantaleón*], Código Civil II[2], art. 1902 p. 1986; for a discordant view e.g. *Busto Lago*, La antijuridicidad del daño, 412). CATALAN CC art. 546-12 ushers in the following clarification for the scope of application of the defence of necessity, namely, that the owner of assets which are utilised in a situation of danger, must tolerate such interference. However, the former can demand appropriate compensation to offset the damage caused.

20. ITALIAN CC art. 2045 provides: "If a person causes damage and that act was compelled by a situation of necessity, in order to save himself or another from an immediate danger of sustaining grave personal injury and this danger was not deliberately created by the person exercising the defence of necessity nor was it possible to employ other means to avert the danger, then the injured party is entitled to compensation, the extent of which is determined equitably be the court". CC art. 2045

corresponds, for the most part, at least in so far as the prerequisites of the defence of necessity are concerned, with CP art. 54(1). That a threat of "grave personal injury" must be extant is always a precondition. Relying on Const. art. 2, this concept has been interpreted to connote not only a person's bodily intergrity but also extends to incorporeal personality rights (*Franzoni*, Dei fatti illeciti, sub art. 2045, p. 296). The interim period which lies between the perception of the danger and reacting to it as well as between the reaction and damage caused, must, each time, bear a proportionate relation (*Franzoni* loc. cit. 303-305; Cass. 21 December 2004, no. 23696, Giur.it.Mass. 2005, fasc. 1). The obligation to compensate is anchored in the fact that the actor was conscious of, and deliberately resolute in his actions (Cass. 3 April 1980, no. 2206, Arch.Giur.circolaz 1980, 743). A discretion is conferred on the courts regarding the determination of the quantum of compensation. It can fix a duty to compensate on either the actor or the person profiting from the exercise of the defence (*Franzoni* loc. cit. 314).

21. HUNGARIAN CC § 107 imposes a duty on the owner of property to tolerate interference with their property, if the life or bodily integrity or property of another is in immediate danger and that danger cannot be averted in any other manner. However, if, merely, the property of another is endangered, then the owner is only obliged to tolerate interference with his or her property, if the forseeable damage accruing to the other party would considerably outweigh the damage likely to be caused to the former by the exercise of the defence of necessity. However, the owner can demand compensation from the endangered person; the owner can assert a claim for reparation against the person who causes an unjustifiably large amount of damage in order to dispel the emergency in respect the additional damage. If more than one person is affected by the state of emergency, then they incur liability in proportion to the extent of their involvement. To date, the defence is contained within the confines of property law, but the draft for a new CC also refers to the situation of emergency as a matter which negates unlawfulness (http://www.parlament.hu/irom38/05949/05949.pdf). In ROMANIA, recourse is had to the provision on necessity in CP art. 45(2) which also applies in the civil law context. The duty to compensate the party whose property has been used by the person in protection of his legal interests in order to elimate a state of emergency is partly derived from the provisions pertaining to Benvolent intervention in another's affairs and partly anchored in the law on unjustified enrichment (*Adam*, Drept civil. Teoria generală a obligaţiilor, 286; *Dogaru and Drăghici*, Drept civil. Teoria generală a obligaţiilor, 236).

22. Similarly, BULGARIAN LOA art. 46(2) provides for the obligation to compensate for damage caused to another's property, if it was used to ward off a state of emergency, however, it does not indicate exactly who owes the duty of compensation. The Supreme Court has opted for a socalled "cascade liability": namely, the person who caused the situation of emergency primarily incurs liability. If, this state of emergency was brought about by an animal or a thing, then its owner or keeper is liable. Finally, the person benefitting from the exercise of the defence of necessity is subsidiarily liable (Supreme Court, ordinance no. 4 of 30 October 1975, Plenum). Under SLOVENIAN LOA art. 138(2), the injured party may bring a claim either against the person responsible for bringing about the dangerous situation or against the person whose legal interest were endangered, "but may not request compensation from the latter greater than the benefit they had therefrom". Under LOA art. 138(3) any person that incurs damage when the risk of damage is averted from another shall have the right to demand therefrom the reimbursement of the damage to which the latter was reasonably exposed.

23. The GERMAN Civil Code distingusihes between defensive (CC § 228) and aggressive necessity (CC § 904); both afford a ground of justification. CC § 228 permits property of another to be damaged if it was necessary to avert danager and the danger emanated from this object; CC § 904 confers the right to interfere with the property of another, if it was necessary to utilise that property in order to defend oneself. Both provisions are predicated on the concept that, in a state of emergency, a lesser legally protected good may be sacrificed in order to preserve a higher ranked interest. Moreover, CP § 34 is also relevant to the private law context, as it (to some extent, under more rigourous prequisites than those contained in CC § 228) allows interferences with legal interests which are personal to the individual such as interference with health and liberty. Pursuant to CC § 228, a thing owned by another must present an immediate actual danger to the rights or legal interests of the actor (necessity) or to another (assistance in an emergency). This thing may be damaged or destroyed, in so far as the damge caused was not a disproportionate response to the danger threatened. If the actor himself brought about the dangerous situation, then s/he must recompense the damge caused. If, in order to ward off the danger, it is necessary to interfere with the property of an uninvolved third party and the danger threatened is disproportionally great when compared to the damage caused to the owner by the interference, then the owner must tolerate the interference under the provisions of CC § 904. However, the owner may demand compensation from the owner and this claim does not hinge upon whether the latter was subjectively at fault or otherwise.

24. AUSTRIAN CC § 1306a regards a state of emergency as given, if a person can only save himself from a dangerous situation, which is not directly occassioned by an unlawful attack, by interfering in another's legally protected interests. Necesssity is treated the same as aid given to another in an emergency (another person's interests are endangered) (OGH 10 May 1979, ZVR 1980/277, 280). Necesity and aid given to another in an emergency constitute grounds of justifications if the relevant conduct was directed at safeguarding a legally protected interest, and following an examination of all the circumstances, the conduct is classified as proportionate and was confined to causing the least amount of harm (OGH 13 December 1988, SZ 61/270 p. 509). The actor comes nonetheless under a duty to compensate the injured party according to equitable precepts (see further Koziol/Bydlinski/Bollenberger [-*Karner*], ABGB², § 1306a no. 4).

25. According to GREEK CC art. 285, an act which is occassioned by necessity is justified (*Kornilakis*, Eidiko Enochiko Dikaio I, 507; *Georgiades*, Enochiko Dikaio, Geniko meros, 603). In the event that there is a conflict of interests, a legally protected interest which is accorded less value in the eyes of the law must cede to the protection of a higher interest (Georgiades and Stathopoulos [-*Tabakis*], art. 285, no. 1). CC art. 285 solely governs interference with someone else's property, it does not concern (like CP art. 25) the violation of personality rights. However, the approach adopted by the majority of legal commentators is that CP art. 25 also applies in the context of the civil law (see further *Tabakis* loc. cit. no. 5).There is no requirement that the danger, against which CC art. 285 is geared towards preventing, emanates from the same object which is utilised to fend off the attack (*Karakostas*, AstK, art. 285, no. 1841; *Tabakis* loc. cit. no. 6). Assistance in an emergency in support of another is possible (*Karakostas* loc. cit. no. 1842; *Tabakis* loc. cit. no. 9). The damage averted is required to be disproportionately greater than that which is occasioned by exercising the defence of necessity. The actor comes under a duty to compensate, if s/he was at fault in creating the state of emergency i.e the danger (CC art. 286(first sentence); see further *Tabakis* loc. cit. art. 286, no. 2). In all other cases, a discretion is conferred on the courts to require the person exercising the defence of necessity to pay a reasonable

amount of damages (CC art. 286(second sentence); see further *Karakostas* loc. cit. no. 1850).

26. PORTUGUESE CC art. 339(1) contains a regulation which governs the defence of "aggressive" necessity (*Almeida Costa*, Obrigações[9], 527). According to this provision, it is permitted to damage or destroy the property of another, in order to ward off an immediate threat of considerably more severe damage accruing to oneself or to another. The danger may originate from any source and operate to threaten the person or legal interests of the actor or a third party (CA Lisbon 12 May 2005). A person who causes damage to property or even its destruction is liable in damages to the owner, if he culpably provoked the threatening danger (see further CA Porto 25 September 1997); in all other cases, the court is conferred with an equitable discretion to determine recompense, whereupon (in turn according to the court's discretion) the actor or the person profitting from his actions or indeed both may come under a duty to compensate the owner's loss (see further *Pessoa Jorge*, Ensaio sobre os pressupostos da responsabilidade civil, 260). The following case will serve to illustrate, whereby the driver of a vehicle swerved to prevent an accident occurring (STJ 17 June 1999); if the driver had provoked the dangerous situation by failing to observe the Rules of the Road, then conversly s/he alone would be liable to pay compensation (STJ 19 April 1988, BolMinJus 376 [1988] 602; STJ 3 March 1990, BolMinJus 395 [1990] 534; different view CA Coimbra 20 March 2001).

27. Under DUTCH law, *noodtoestand* is conceptualised as a particular manifestation of *overmacht* ("force majeure"). It concerns a case of competing obligations: the legal obligation not to commit an unlawful act must cede to a superior interest. The example employed in legal textbooks to illustrate this maxim pertains to breaking into a house to rescue another. Also, local authority would act in accordance with law if it refused to hand over meat endangering human health to its owner (HR 3 May 1934, NedJur 1934, 1549; see also CFI Arnhem 22 June 1950, NedJur 1951, no. 290 p. 558 and Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 60 p. 76). The defence always concerns cases where immediate action is necessitated (Onrechtmatige Daad I [-*Jansen*], art. 6:162(2), no. 176.2, p. 1875). The state of emergency must not derive from circumstances which may be imputed to the actor (HR 19. March 1943, NedJur 1943, no. 312 p. 417 and HR 20 June 1986, NedJur 1987, no. 35 p. 152 [harbour workers' strike]). An act which is necessitated to ward of actual damager is lawful and, therefore, does not trigger the imposition of liability pursuant to CC art. 6:162. However, upon application of the rules governing unjustified enrichment, a reasonable compensation may be mandated (Parlementaire Geschiedenis VI, 617; *Hartkamp* loc. cit. no. 359 p. 362).

28. Under ESTONIAN LOA § 1045(2) and (3) it is not unlawful to cause damage in necessity. Necessity is defined in GPCCA § 141(1). However, the fact that the act was justified does not obviate the duty to pay a reasonable recompense. This obligation is incurred by the actor (GPCCA § 141(2)) as well as the person profiting from his or her actions (loc. cit. § 141(3)). LITHUANIAN CC art. 6.274 confers a discretion on the courts regarding the determination of the obligation to compensate. It can require the person in whose favour the defence was exercised to compensate the damage in whole or in part.

29. In the NORDIC countries the notion of necessity implies that another's patrimony is sacrificed in order to rescue a person, property or a legitimate interest protected by law under imminent danger. This defence is codified in criminal law (SWEDISH CP chap. 24 § 4, DANISH CP § 14 and FINNISH CP chap. 4 § 5) and reflected in the law of civil liability. Within the latter, however, the person who has rescued his property by

damaging another's property will, as a rule, be held liable (HD 19 October 1929, NJA 1929, 542 concerning the owner of a dam who due to heavy rainfall had to open the flood gates, causing damage to other premises). If there is a tortfeasor who created the danger, he shall primarily bear the liability. Otherwise, the person who was endangered is liable for the consequences of the rescue measures. If a third person has taken action in another's interest, liability shall fall upon the latter (*Saxén*, Skadeståndsrätt, 171; *Hellner and Radetzki*, Skadeståndsrätt[7], 122; *von Eyben and Isager*, Lærebog i erstatningsret[5], 50). Necessity requires an imminent danger. The protective measure must be legitimate, whereby the value of property serves as a natural reference, but regard is also to be had to the severity of the danger (HD 14 October 1988, NJA 1988, 495). However, if a less valuable thing is used to rescue a more valuable one that cannot foreclose the right of the owner of the former to be compensated (*Vinding Kruse*, Erstatningsretten[5], 40).

31. In SCOTLAND neither the defence of self-defence, nor either of the defences of protection of another or of livestock under the Animals (Scotland) Act 1987, s. 4(1), (see Note 13) is expressly confined to the case where the claimant would be liable for the damage which the defender, killing or injurying the animal, has sought to avert (although, given the strict liability regime provides for in s. 1 of the Act, this may often be the case). To that extent the defences may be regarded as defences of necessity in the sense of paragraph (3).

Illustration 4 is taken from STJ 1 February 1996; **illustration 5** from TS 28 June 1996, RAJ 1996 (3) no 4905 p. 6421; and **illustration 8** takes up an example given by Lord *Denning* MR in *Southwark London Borough Council v. Williams* [1971] Ch. 734, 744..

VI.–5:203: Protection of public interest

A person has a defence if legally relevant damage is caused in necessary protection of values fundamental to a democratic society, in particular where damage is caused by dissemination of information in the media.

COMMENTS

Purpose of the rule. This Article grants the originator of the damage a defence where the damage was caused in necessary protection of values fundamental to a democratic society. It gives effect to a principle which is rarely clearly visible in the black-letter law of the Member States, but is encountered in the jurisprudence on the law on non-contractual liability virtually everywhere. The Article should reduce the necessity to rely on VI.–7:101 (National constitutional laws). The latter provision cannot be expected to serve as a panacea for all problematic cases.

Protection of public interest. The primary significance of the rule lies in giving the press and other forms of media a defence in cases in which the person who is the subject of a report suffers legally relevant damage under the criteria set out in VI.–2:203 (Infringement of dignity, liberty and privacy), VI.–2:204 (Loss upon communication of incorrect information about another) and VI.–2:205 (Loss upon breach of confidence). The person must put up with such damage if the prerequisites of VI.–5:203 are satisfied. Very frequently there is a particular public interest in reporting on celebrities or leading personalities in political life. This also applies to the latter in relation to such news about their private lives as concerns their integrity and therefore is relevant to voters in deciding whether or not to vote for them. Moreover, the public interest in certain information can make particularly speedy reporting necessary, in the context of which the full accuracy of the disseminated news cannot always be guaranteed. Nor can it always be expected in such circumstances that the publisher or the organ of the press authoritatively assesses all the associated legal issues. Of course, the Article protects neither invented stories nor the reckless publication of untrue facts or mere rumours. However, in the case of journalistic investigations deemed to be of a reasonable intensity under the circumstances, it may be permissible to publish information which later proves to be partially false. Where the report is corrected upon learning the truth, no liability arises. For accuracy's sake, of course everything depends on the conditions of each individual case; weighing-up the interests involved must be left to the courts.

Fundamental to a democratic society. If the Article is to apply, the mere existence of any arbitrary public interest does not suffice. Rather, basic values of a democratic society must be at issue, and the protective measure taken must be necessary. Included among the basic values of a democratic society are particularly freedom of expression and freedom of assembly. The Article can therefore be important in relation to the freedom to demonstrate. The participants in a large demonstration, for instance, are not liable for the fact that private persons cannot use their vehicles for a certain period of time or that delivery vans cannot reach a factory which the demonstration passes. Also the mere participation in the demonstration itself is not a ground for liability where under the circumstances it may be expected that rather violent people will join the demonstration. Certainly, the Article does not provide carte blanche for irresponsible carelessness in the planning and organisation of such processions, but seeks to ensure that the exercise of fundamental rights is not made factually impossible by the consequences of civil liability.

NOTES

1. The FRENCH courts strive to attain a balance between freedom of the press and the right to respect for private and family life (CC art. 9). Publications, containing hyperbole which the reader does not require to know in order to inform himself, cannot be justified by invoking the function of the press as affording a vehicle of information (Cass.civ. 23 April 2003, Bull.civ. 2003, I, no. 98 and D. 2003, 1854, note *Bigot*; JCP 2003, II, 10085, note *Ravanas* and GazPal 2003, IV, 2403, note *Amson* [two judgments delivered on the same day]). A person, against whom criminal proceedings have been instituted, cannot be portrayed as guilty in the media prior to the handing down of the court's decision (Conseil d'Etat 14 March 2005, AJDA 2005, 576; Cass.civ. 6 March 1996, Bull.civ. 1996, I, no. 123; D. 1997, Somm. 72, obs. *Dupeux*; Cass.civ. 29 April 1998, Bull.civ. 1998, II, no. 141). The presumption of innocence is ranked higher than the freedom of the press to report news (CFI Nanterre, 22 June 1996, GazPal 1996, II, 559). Conversely, a published report which merely mentions that the dead victim was married and was the father of two children and which correctly depicted the circumstances which surrounded the discovery of the body must be tolerated (Cass.civ. 20 November 2003, Bull.civ. 2003, II, no. 354; GazPal 2005, II, 1224, note *Guerder*). Furthermore, infringements of the right to one's own image can be justified if higher ranked legal interest is involved e.g. artistic freedom (CFI Paris 9 May 2007, D. 2008, 57; CFI Paris 25 June 2007, D. 2008, 58). Claims regarding an abuse of press freedoms may only be based on CC art. 9, CC art. 1382 is no longer applicable in this regard (Cass.civ. 27 September 2005, Bull.civ. 2005, I, no. 348; *Dreyer*, D. 2006, Chron. 1337), this remains the case even in the light of Criminal Law of 29 July 1881 on Press Freedom which expressly refers to both of the aforementioned provisions.
2. The BELGIAN Cour de Cassation (Cass. 14 January 2005, no. JC051E4_1, no. de rôle C030622N) permits restrictions on press freedom, with the proviso being added that these restrictions must be necessary in a democratic society in that they meet a compelling social purpose. Moreover, in order for the restrictions to be justified. a proportionate relationship must be extant between the means employed and the strived for purpose and a cogent and satisfactory reason must exist for the restriction. When freedom of the press and the right to respect for private life collide, the courts try to strike a balance between the competing values. The courts examine, making full use of all the circumstances of the individual case, whether the intereference with journalistic freedom exceeds what is necessary to vindicate the individual rights of the person affected (CA Brussels 5 February 1999, no. JB40966_1, no. de rôle 98/AR/425). It is possible that preventative legal measures may be granted to check impending press publications (Cass. 25 September 1969, Pas. belge 1969, I, 89).
3. SPANISH Const. arts. 18(1) in conjunction with 20(4) is also directly employed in the private law context; these provisions ground and abridge the right of freedom of expression and freedom of the press. According to jurisprudence of the Constitutional Court, it is indeed incumbent on journalists to carefully verify the correctness of the asserted claims; however, there is no requirement that every aspect of the claim has to be substantiated. The legal system affords protection if the information is carefully collated and disseminated, however, the law does not afford protection in the event that there is a careless distain for the truth, spreading of rumours, fabrications or spiteful intimations (TC 21 January 1988, no. 6/1988, BOE 1988 no. 31 of 5 February; see also TS 5 July 1999, RAJ 1999 (3) no. 5898 p. 9197; TS 20 November 1999, RAJ 1999 (5) no. 8293 p. 13010 and TC 31 January 2000, no. 21/2000, BOE 2000 no. 54

of 3 March). In addition, making false statements of fact will not result in liability being incurred for infringing a person's honour, if, prior to making these claims, appropriate measures were adopted by the journalist concerned to verify the truth of these statements and the report was characterised by an absence of insults and disrespectful terms were not employed (TS 17 April 2000, RAJ 2000 (2) no. 2567 p. 3985). Of course, it is conceivable that liability may be incurred for a breach of the right to protection of family life and right to a sphere of intimacy, in the event that no public interest was served by the article (TC 10 May 2000, no. 115/2000, BOE 2000 no. 136 of 7 June). According to the jurisprudence of the Spanish Constitutional Court (TC 17 July 1986, no. 104/1986, BOE 1986 no. 193 of 13 August; TC 15 September 2003, no. 160/2003, BOE 2003 no. 242 of 9 October; TS 11 December 2003, RAJ 2003 (5) no. 8653 p. 16209), thoughts, ideas and opinions are embraced by the right to freedom of expression, whereas the dissemination of relevant facts is the subject matter of the freedom of the press. Thus, above all, this distinction acquires significance under the civil law in respect of the burden of proof in respect of the correctness of the factual assertion as it generally behoves the person who makes those claims to prove their accuracy (see further on this delineation and on the many cases which mix freedom of expression and assertions of claims of fact TC 21 December 1992, no. 240/1992, BOE 1993 no. 17 of 20 January; TS 14 November 2001, RAJ 2001 (5) no. 9303 p. 14707). The Organic Act on the Civil Protection of Honour, Personal and Family Privacy and One´s Own Image (*Ley Orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen*) art. 2(2) also pertains to the primacy accorded to the protection of the public interest. According to this provision, the breach of a legally protected right is not regarded as unlawful if a historical, scientific or cultural interests prevails over it.

4. The Italian courts have developed a number of criteria in order to tackle the collision between constitutionally protected rights (as, for example, the clash between the right to freedom of information or freedom of expression and personality rights of the person involved). The *ingiustizia* of the damage is a factor which flows into this determination. The media are permitted to publish reports which represent a legitimate exercise of their *diritto di cronaca* (right to broadcast news). Here, the report must have been true, there must be a legitimate public interest in acquiring the pertinent information (socalled. *pertinenza*), and the report must appear in a suitable format (known as *continenza*). A "close relationship" must exist between the newsworthy event and the subsequent report. This is necessary in order to meet the requirement that the public interest was served by the report (Const. art. 21) (Cass. 4 February 2005, no. 2271, Giur.it.Mass. 2005, fasc. 2; Cass. 13 January 2005, no. 559, Giur.it.Mass. 2005, fasc. 1; Cass. 15 December 2004, no. 23366, Giur.it.Mass. 2004, fasc. 1). The subject matter of the *diritto di critica* is the publication of a subjective opinion (in contrast to the *diritto di cronaca*) and not the report on the newsworthy event. The *diritto di critica* is ranked below the *continenza.* It can only be exercised to the extent that it is justified as being in the public interest. Furthermore, negative value judgments which affect the reputation or honour of the affected party must be properly accounted for (Cass. 11 January 2005, no. 379, Giur.it.Mass. 2005, fasc. 1). The publication of negative value judgments and criticism must be based on circumstances which the public have an interest in knowing about (Cass. 11 January 2005 loc. cit.).

5. Similarly, in HUNGARY, clashes between, on the one hand, freedom of expression, freedom of the press and right of freedom of information (Const. § 61) and, on the other hand, protection of the affected party's personality rights,(Const. §§ 54 und 59) are resolved by balancing the respective interests in individual cases (cf. Petrik [-

Petrik], Polgári jog I[2], 178/2). Print Media Act § 3 makes clear that the freedom of the press is abridged in that the media may not commit a criminal offence, incite the commission of a criminal offence or breach the precepts of public morality or violate personality rights. § 4 imposes a duty on public authorities to give the press information which is of importance for the general public. CC §§ 76, 77, 78, 80, 81, 82, 83 and 85(3) und (4) provide for extensive protection of incorporeal personality rights which are once again safeguarded by the general clause contained in CC § 75(1); please see the notes above under VI.–2:203 (Infringement of personal dignity, liberty and privacy) and VI.–2:204 (Loss upon communication of incorrect information about another). Under the civil law, in the event that there is a clash between the aforementioned competing rights, the court, in attempting to strike a balance between those rights may have recourse to CC § 2(2) (according to which the law ensures that all persons "can freely exercise the rights to which they are entitled in accordance with the social intent of these rights") as well as to CC § 5(1) and (2). CC § 5(1) prohibits an abuse of rights; CC § 5(2) provides that the exercises of a right which is directed at a goal which is incompatible with the social intent of the right may be regarded as an abuse of a right, particularly if it harms the national economy, results in a person being harassed, or leads to an impairment of their rights or legal interests, or results in the acquisition of undue advantages. According to continual jurisprudence of the Supreme Court of ROMANIA, the law absolutely protects incorporeal personality rights against untrue claims and injurious statements (CSJ 24 September 2003, *secţia civilă*, decision no. 3623; CSJ 30 September 2003, *secţia civilă*, decision no. 3733). Persons, holding public office must accept that there will be a commensurate public interest in undisclosed information (CSJ 28 November 2001, secţia civilă, decision no. 5435).

6. SLOVENIAN LOA art. 177(2) affords a ground of defence to any person who acts in ignorance of the falsity of information in respect of another which s/he has disseminated, provided that the precondition is met that the injuring party or the recipient of the information has a justifiable interest in the disclosure of that information. It is incumbent upon the injuring party to prove that this criterion is met (Juhart and Plavšak [-*Pensa*], Obligacijski zakonik I, art. 177 p. 1018). POLISH Supreme Court 14 May 2003, OSPiKA 2004, no. 2 p. 87 ruling bears out VI.–5:203. This judgment concerned allegations about the President which appeared in a press article, namely that in 1997 he conspiratorially met with former KGB agents. The Plaintiff claimed an apology and non-pecuniary damages corresponding to € 600.000, which were to be paid to the Polish Red Cross. The Supreme Court pointed out that the mere fact that a statement is not true does not, without more, give rise to liability of the press. Liability for the infringement of a right to respect for personality rights depends on the unlawfulness of the infringement. Although the unlawfulness of such infringement is presumed under CC art. 24, this presumption may be rebutted *inter alia* by proving that the infringement aimed at the protection of a legitimate social (or public) interest. Supreme Court 18 February 2005, OSNC 2005 nos. 7-8 p. 1 is to the same effect: "a journalist's proof that in collecting and using press material he acted in defense of a legitimate public interest with all reasonable care and diligence excludes the unlawfulness of his activity. However, if the allegation turns out to be untrue the journalist is obliged to withdraw it". Under BULGARIAN Const. art. 41, a person may disseminate information provided that it does not infringe the rights or reputation of another citizen and further, that it does not endanger national security, constitute a breach of public order, harm public health or infringe against public morals. The Court of Cassation no. 891 of 7 June 2002, civil matters 183/2002 held that an article must contain true facts and must convey information, which is the public's interest to know.

Further, information which owing to is incompleteness engenders a false impression in the mind of the recipient, is regarded as false and, thus, does not enjoy constitutional protection.

7. See note 6 under VI.–5:201 (Authority conferred by law) for a treatise on the ground of justification of safeguarding a legitimate interest under GERMAN law. Interests personal to the individual and, moreover, the wider public interest are recognised as pertinent in this regard (BGH 22 December 1959, BGHZ 31, 308, 312). It is universally recognised (also on the basis of Const. art. 5(1) second sentence) that the press are authorised to safeguard the interests of society. Naturally, this authority is not boundless. The press have a duty to carefully examine the information that they intend on publishing; false allegations about an individual may not be published without due care being taken. In addition, the press must attempt to achieve a respectful balance between the relevant interests, namely, it has to examine whether the detriment that accrues to the affected party is outweighed by a substantial and justifiable public interest in the disclosure of the information (see further Soergel [-*Spickhoff*], BGB[13], § 823, no. 131). The criteria developed to govern the publication of articles also apply to the publication of images (BGH 6 March 2007, BGHZ 171, 275). Additionally, conduct which is unlawful can be rendered lawful by invoking the fundamanetal right of freedom of assembly (Const. art. 8). The unintentional, yet inevitable side-effects of a demonstration (as e.g. obstructions to traffic or impeding access) must be tolerated (*Spickhoff* loc. cit. no. 133).

8. A comparable regulation to VI.–5:203 can be found in the AUSTRIAN Media Act (BGBl 1981/314) § 6(2)(iv) which affords a ground of justification. According to this provision, a claim for damages for injury to feelings may not be made if the report concerns an accurate quotation of a statement made by a third party and there was a prevailing public interest in knowing about statement concerned (see further Schwimann [-*Harrer*], ABGB VI³, § 1330 no. 49). The making of political statements may be justified on the basis of ECHR art. 10 (OGH 14 December 2000, SZ 73/198 p. 546; *Harrer* loc. cit. no. 48). Conversely, the right of freedom of assembly does not constitute a ground of justification in respect of the interference with third party rights. The frontiers of this right are reached when the exercise of the right results in an interference with the rights of a third party; each exertion of force against persons or things is, also in the context of assemblies, unlawful (OGH 25 May 1994, SZ 67/92 p. 531; OGH 25 March 1999, SZ 72/55 p. 337; *Harrer* loc. cit. § 1301 no 60).

9. GREEK Gesetz no. 1178/1981 on the Civil Liability of the Press provides that strict liability will be imposed on the owner of a newspaper in respect of publications which operate to breach an individual's personailty rights; as far as damages are concerned, minium amounts are fixed which depend on the newspaper circulation and these amounts were raised again by Law no. 2243/1994. Law 1178/1981 also applies to other forms of mass media (Gesetz no. 2328/1995 on the legal status of private television and radio art. 4(10)); the aforementioned Act provides for minimum amount of damages for violations also in the field of television and radio. Howver, the damages awarded by the courts frequently tend to considerably exceed these amounts (e.g. CFI Thessaloniki 26488/2001, Arm 2003, 931; A.P. 788/2000, EllDik 42/2001, 162; CFI Athens 6472/2003, XrID 4/2004, 120). In Greece, owing to these minimum fixed amounts of damages, in the context of breaches of right to honour by the press, a particular manifestation of the problem arises concerning the clash, on the one hand, between freedom of expression and freedom of the press and, on the other, safeguarding personality rights of the person affected. CA Athens 9975/1986, EllDik 28/1987, 299 stressed, in this context, that the press have a legitimate interest in sharply criticising public personae; the article at issue in this case was, when

objectively examined, untrue, however was the only means available of obtaining the truth. A.P. 167/2000 EllDik 41/2000, 772 tends in the same direction. However, prior case law shows that the courts do not always attempt to strike a careful balance between all of the interests involved; therefore, in recent times, Greece has been brought before the European Court of Human Rights on this very point.

10. PORTUGUESE courts generally resolve conflicts between freedom of expression and freedom of the press, on the one hand (Const. arts. 37 and 38 and the rights to good name, reputation and protection of intimacy of private life (Const. arts. 25 and 26) on the other, according to the same rules employed by the rest of the European courts. Freedom of expression and freedom of expression only have precedence over the individual's interest in safeguarding enumerated incorporeal personality rights, if a public interest is involved and the disclosure does not exceeed what was necessary to vindicate the public interest (CA Evora 8 February 2001, CJ 2001-1 [XXVI] 267; STJ 29 October 1996, BolMinJus 460 [1996] 686; STJ 5 March 1996, CJ (ST) IV [1996-1] 122). A person acts to vindicate a public interest, for example, if he informs the relevant authorities about the workshy ethic of the manager of a public health centre, whose job it was to introduce particular procedures to pave the way for the establishment of further healthcare agencies, where the situation endured for over a year (STJ 3 March 2005). The same holds true for an article which reported about financial irregularities in the books of a state hospital and the ensuing issuance of reprimands against the Minister for Health; of course, such information is required to be reported in an objective manner and should be not contain barbs leading to the infringement of a person's honour (STJ 18 April 2002; CA Lisbon 27 April 1978, BolMinJus 276 [1978] 170). No public interest is given, where an article reports on a woman's premarital sex life, in the event that she is not a public figure (CA Evora 8 February 2001 loc. cit.). Likewise, there is no public interest in seeing photos of a world famous footballer together with his wife on the buidling site where their future family home was being constructed (STJ 14 June 2005).

11. Under DUTCH law, within the parameters of *noodtoestand* it can happen that the actor invokes the protection of *algemene belang* (a public interest). The justification for this is reasoned on the basis that the community's welfare is more deserving of protection than the competing private interest. For legal persons under the civil law to successfully invoke the public interest defence in order to justify their actions, their actions must meet a societal function which is directed at preserving the public interest. The function of the press is relevant here as is e.g consumer agencies which inform their members about the quality of a particular product (see further Onrechtmatige Daad I [-*Jansen*], art. 6:162(2), no. 178 pp. 1900-1926; HR 24 June 1983, NedJur 1984, no. 801 p. 2849; HR 27 January 1984, NedJur 1984, no. 802 p. 2859; HR 27 January 1984, NedJur 1984, no. 803 p. 2870; HR 19 April 1968, NedJur 1968, no. 263 p. 865 [a consumer agency is permitted to warn the public about selling methods in respect of the marketing of particular pressure cookers]). The ground of justification of safeguarding the public interest is of particular relevance in the arena of torts committed by the press. In addition, CC art. 6:168 permits the opening of the following avenue, namely that the courts may award the plaintiff damages, however, may refute his claim for an injunction prohibiting the defendant's conduct, on the basis that there was a profound public interest opposing the grant of an injunction (see further Onrechtmatige Daad II [-*van Nispen*], art. 6:168, no. 1 p. 2). An example for the application of this provision is provided by claims asserted at short notice by environmental organisations (see further *van Nispen* loc. cit. no. 7 p. 21-22).

12. ESTONIAN Law of Obligations Act does not contain an article along similar lines to VI.–5:203. However, the public interest is taken into account in cases which concern

the breach of an incorporeal personality right (LOA § 1046(2)). The public interest is also pertinent in the context of LOA § 1045(2)(i).

13. In SWEDEN, the liability of the relevant medium which is channelled through the editor, is governed by two Acts which are regarded as having constitutional status, namely, the Freedom of the Press Act (*Tryckfrihetsförordningen* [1949:105], chap. 11) and the Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlag* [1991:1469], chap. 8) and depends on whether particular criminal provisions have been infringed. A jury is sworn in to try the accused in the criminal proceedings. Liability for defamation (Freedom of the Press Act chap. 7 § 4(14)) is excluded if the communication of the information was justifiable *and* if the information was either correct or if there was a reasonable basis for the assumption that it was correct, the burden of proof being on the editor. The issue of "justifiability" is determined by the courts striking a balance between the public's need to know and safeguarding the individual's private sphere (HD 15 April 1987, NJA 1987, 285; HD 5 December 2003, NJA 2003, 567; HD 16 November 1994, NJA 1994, 637; Svea CA 21 February 2002, RH 2002:39 [see further ECHR 19 September 2006, *White v. Sweden*, ECHR 19 September 2006, App. no. 42435/02]). Under special circumstances it may even be justifiable to disseminate untruthful and unfounded information (HD 14 December 1966, NJA 1966, 656, concerning a report on already disseminated incorrect information). Persons who in confidence give information to the media for the purpose of making that information public, have a right to remain anonymous; revealing that kind of source amounts to a crime (Freedom of the Press Act chap. 1 § 1(3), chap. 3; Fundamental Law on Freedom of Expression chap. 1 § 2). DANISH Media Liability Act (*Medieansvarslov*) identifies the persons who can be held liable, under civil and criminal law; civil liability, however, is grounded on general principles. Under Damages Liability Act § 26 the latter does not depend on the existence of a crime. Liability for defamation is excluded if the information is correct or if it was disseminated in good faith for a significant public interest. In that context special regard is had to ECHR art. 10 (HD 28 October 1998, UfR 1999, 122; HD 6 January 1999, UfR 1999, 560; HD 2 July 2002, UfR 2002, 2398; HD 18 December 2002, UfR 2003, 624; Eastern CA 24 September 2004, UfR 2005, 123; *Werlauff*, Juristen 2002, 1). FINNISH Damages Liability Act chap. 5 § 6 (amended in 2006) remsembles the Swedish regulation. Likewise, the editor or the person who is the head of programming is deemed liable (Freedom of Expression in Mass Communication Act [*lag om yttrandefrihet i masskommunikation* 460/2003] § 14) and, the imposition of civil liability is predicated on the commission of a criminal offence. CP chap. 24 § 9 excludes liability for defamation in respect of criticism directed at someone's conduct in, *inter alia*, politics, business, or similar 'public' services, and which does not clearly transgress what may be considered justifiable (Supreme Court 22 August 1980, KKO 1980 II 86; Supreme Court 28 March 2000, KKO 2000:45; Supreme Court 7 January 2005, KKO 2005:1). Under CP chap. 24 § 8 it amounts to a crime, and thus a tort, to disseminate information that violates private life, with a defence regarding public persons if the information relates to that person's official duty and is of public interest (see Supreme Court 26 September 2001, KKO 2001:96; Supreme Court 25 August 2000, KKO 2000:83; Supreme Court 11 June 1997, KKO 1997:80; Supreme Court 25 June 2002, KKO 2002:55; see *Sisula-Tulokas*, JFT 2000, 634).

Section 3: Inability to control

VI.–5:301: Mental incompetence

(1) A person who is mentally incompetent at the time of conduct causing legally relevant damage is liable only if this is equitable, having regard to the mentally incompetent person's financial means and all the other circumstances of the case. Liability is limited to reasonable recompense.

(2) A person is to be regarded as mentally incompetent if that person lacks sufficient insight into the nature of his or her conduct, unless the lack of sufficient insight is the temporary result of his or her own misconduct.

COMMENTS

A. Policy considerations and overview

Options. In Europe, there is no prevailing uniformity on the issue of how harm caused by mentally disabled persons (typically, but not necessarily mentally incompetent adults) is to be dealt with reasonably by the law on liability. As a result, there were several options available. The rule could have been (i) formulated in such a way that a mental disability was either not considered in any respect or in any event did not come into consideration in the field of liability for negligence. It could also have been formulated in the exactly opposite manner, namely (ii) upon the principle that a mentally disabled person was, without exception, never liable for damage caused, or (iii) a middle ground between the two could have been taken up. That is the solution opted for in the Article.

The preferred solution. The Article takes as its starting point the consideration that a balancing of the interests of the injuring person and the injured person is necessary. The legal system should lose sight neither of the protection of the victim nor of the adverse circumstances of the injuring person who cannot be held responsible for his or her condition. A person who, due to mental illness, cannot distinguish between right and wrong (see paragraph (2)), does not act "intentionally" within the meaning of VI.–3:101 (Intention); this is because such a person is not in a position to differentiate between arbitrary and legally relevant damage. On the other hand, the liability of a mentally disabled person in cases covered by the Chapter 3, Section 2 of this Book solely depends on whether - under the circumstances - he or she can be qualified as a "producer", "keeper" or "occupier". In the standard case that will usually be answered in the negative. However in the case of a sudden onset of mental illness exceptions are conceivable (see illustration 3 under VI.–3:102 (Negligence)). Therefore, the actual problem area is liability for negligence. Under VI.–3:102 (Negligence), deviation from the standard of care which can be expected from a reasonably careful person under the circumstances of the individual case is sufficient. Conduct caused by illness may constitute such a deviation; something like the average "care" taken by a mentally disabled person does not exist. As a consequence, in the terminology of these model rules a person with mental incapacity is "accountable" for negligently occasioned legally relevant damage under the same prerequisites as for someone of sound mind. However the present Article restricts the normal effects of this accountability in three different respects. Liability can (i) only lie in the duty to pay a sum of money from available assets; due to the nature of the situation, rendering compensation through reparation in kind is excluded from the outset. Liability lies (ii) not in the payment of the full monetary damages ("compensation"), but in a

reasonable recompense ("recompense"). Hence, VI.–5:301 draws on the concept which has already been presented in VI.–5:202(3) (Self-defence, benevolent intervention and necessity) for the reparation of loss in an emergency situation necessitating self-defence. Both cases exhibit certain similarities. Even liability for reasonable monetary compensation under VI.–5:301, however, (iii) only remains justifiable where it conforms to equity and fairness under the circumstances, as might be the case if the liability could easily be borne by the liable person because of his or her favourable financial situation. On this point, the model of liability in VI.–5:301 is in accord with several (but in no way all) of the European legal systems. The considerations are similar to those relating to VI.–3:103 (Persons under eighteen) paragraph (3) on the personal liability of children. Of course the liability of children is subsidiary (VI.–3:103(3)(a)); the liability of mentally disabled adults is not.

B. Mental incompetence

Lack of insight. According to the definition in paragraph (2), a natural person is "mentally incompetent" if he or she is not in a position to grasp the nature of his or her conduct (act or omission), i.e. to foresee its possible consequences and to understand how society judges it in general. Typically the issue is that the person in question in not in a position to differentiate between right and wrong. A person who has this ability, but is not able to fashion his or her behaviour accordingly, is not mentally incompetent within the meaning of VI.–5:301, see illustration 3 under VI.–3:201 (Accountability for damage caused by employees and representatives). Also other physical disabilities, which do not have an effect on a person's mental capacity, do not fall under VI.–5:301. They can only be taken into account in the context of VI.–3:102 (Negligence), depending on the circumstances of each individual case (see comments under that Article).

Temporary lack of insight. The lack of sufficient insight can be either temporary or permanent. However, where the lack of sufficient insight is only temporary, the conduct of the person concerned must be considered in order to determine whether the temporary lack of insight can provide a defence. Consideration must be given to what that person has done to bring about the condition and whether this amounts to misconduct. Thus an alcoholic who has suffered brain damage and has a permanent deficiency of insight into his or her conduct will fall under VI.–5:301, whereas a mentally fit and healthy individual who embarks on a one-off "bender" and so puts himself or herself beyond proper self-control will not have a defence under this Article for damage caused during the drunken escapade.

Instinctive reflex actions. VI.–5:301 does not extend to bodily movements while in a state of unconsciousness and to the mere instinctive reflex actions of mentally competent persons. Such reflex actions do not constitute "conduct" within the meaning of this Book, see comments under VI.–3:102 (Negligence). In such a case there is no liability at all. The situation is different only where the injuring person should have anticipated having such episodes or reflex actions as a consequence of a physical problem and therefore should have refrained from the activity in question in advance.

Illustration 1
A dancer falls and to steady herself she reaches out to another dancer, who is pulled down and injured. That is not "conduct".

Illustration 2
In the course of an operation, a doctor loses consciousness. If the loss of consciousness is attributable to a sudden and unforeseeable drop in blood pressure, the doctor is not liable for the harm caused to the patient; conversely, where the doctor should have

been aware of the risk of such a loss of consciousness, then the doctor should not have been allowed to operate at all in the first place.

C. Recompense according to equity and fairness

Parallel comments. According to VI.–5:301(1) second sentence the originator of damage is liable for reasonable monetary recompense, subject to the proviso of equity and fairness. The concept of liability subject to equity and fairness has already been explained in comments under VI.–3:103 (Persons under eighteen) paragraph (3) and the concept of liability for a reasonable monetary recompense in comments under VI.–5:202 (Self-defence, benevolent intervention and necessity). Thus, reference can be made to both here.

Illustration 3
A suffers from schizophrenia. He notices that someone has turned off the light in his apartment. He takes a hunting rifle and shoots at two men, who are standing near the electricity meter: his father and an electrician. Both are killed. A comes from a wealthy family and commands a great personal fortune. The electrician's dependants have a claim to reasonable monetary compensation. However, A must meet the necessary means for the maintenance of himself and his mother, who is financially dependent on him.

NOTES

1. According to recurrent jursiprudence of the FRENCH courts, the presence of culpability on the part of the injuring party is not a prerequisite for the determination of *faute* to under tort law (*Flour/Aubert/Savaux*, Le fait juridique[10], nos. 99-101 p. 96-99). This premise derives from an amendment to the Civil Code in 1968 which led to the insertion of CC art. 489-2 which provides that "a person who has caused damage to another when he or she was under the influence of a mental disorder is nonetheless liable to compensation". The *absence de discernement* (the inability to distinguish between right and wrong) will not afford a defence.
2. The approach adopted in BELGIUM stipulates that *faute* comprises of a subjective element which takes account of the tortfeasor's personal characteristics (*fault or culpabilité* oder *imputabilité*) and an objective element which is comprised of an objective element which refers to the behaviour (*onrechtmatigheid* or *illicéité*). Consequently, the principle that tortious capacity is a requisite is firmly adhered to (Tilleman and Claeys [-*Claeys*], Buitencontractuele aansprakelijkheid, p. 1, 7, no. 7; Cass. 3 October 1994, Pas. belge 1994, I, no. 412 p. 788). This also holds true for *gardien* liability which derives from CC art. 1384(1); only a person in full control of his/her faculties can be a *gardien* (Tilleman and Claeys [-*Baudoncq and Debeane*] loc. cit. p. 83, 89 no. 8). Mentally disabled persons may be subject to the imposition of a liability in equity under CC art. 1386*bis*. This article confers a discretionary power to the courts to award compensation, either in full or in part, against the class of persons enumerated in this provision, having regard to the financial position of the respective parties (CA Bruxelles 21 April 2006, Rev.gén.Ass.Resp. 2007, no. 14313). An analogous application of ths provision to other groups of persons . in particular, to small children (who have developed normally) is however precluded (Cass. 24 April 1980, Pas. belge 1980, I, p. 1055, concl. *Dumon*). A person lacks tortious capacity if that individual is not aware of the damaging nature of his/her act or acts and it is not possible to reproach that person for voluntarily bringing about a condition in which

they could lose control over their actions. A person lacks tortious capacity where at the time of the commision ofthe tort, s/he could not distinguish between right and wrong (van Gerven (-*Covemaeker*), Verbintenissenrecht II[7], 302).

3. SPANISH CC art. 1902 requires *culpa* or *negligencia*, these terms, according to the professed views of many commentators connote that civil legal reponsibilty is a pre-condition for the imposition of liability (Reglero Campos [-*Gómez Calle*] Tratado de responsabilidad civil[3], 461, 479). Legal responsibility connotes that an individual is in a position to understand the implications of his or her behaviour and forsee the possible results thereof and act on the basis of this knowledge (*Gómez Calle* loc. cit. 406). However, apart from the proposition that lack of legal repsonsibility entails that the putative tortfeasor is absolved from liability (so e.g. *Albaladejo*, Derecho Civil II(2)[10], 490), it is also espoused that the tortfeasor who lacks tortious capacity should at least be secondarily liable in order to protect the interests of the victim, if the person whose duty it was to supervise was unavailable or was bankrupt or could adduce grounds for exculpation under CC art. 1903. This submission is backed up by arguments based on comparative legal research, which are *inter alia* deduced from CC art. 3(2) (*Yzquierdo Tolsada*, Sistema de responsabilidad civil, 230; see also *de Ángel Yágüez*, Tratado de responsabilidad civil[3], 308). The regulation, which was previously contained in CP(old) art. 20 m ties in therewith. However, CP art. 118(1) likewise contains a special rule for the case that a criminal offence is committed by a person who has reached the age of majority but who cannot be deemd to be responsible fir his actions according to the criminal law. Accordingly, parents, legal guardians or persons who were under a duty to supervise, may “also” be civilly liable on an equitable basis, provided that they can be held accountable for their negligence. This liability which is joint and several, arises in conjunction with the liability of the person who directly causes the damage who remains civily, if not criminally, responsible (*Yzquierdo Tolsada* loc. cit. 259); further particulars remain the matter of some dispute (please see the discussion in Reglero Campos [-*Gómez Calle*] Tratado de responsabilidad civil[3], 1234, 1251-1252). If the tort is committed by a person who has attained the age of legal majority, who however, remains under the care of his or her parents of legal guardian and who nonetheless is criminally responsible, then the parents or legal guaridan, with whom the tortfeasor lives with, are secondarily liable, based on a corresponding application of CP art. 120(1), if negligence can be imputed and the tortfeasor who is of full age is insolvent (TS 22 April 2004, RAJ 2004 (3) no. 3992 p. 8236). All in all a much criticised twofold regime governs the liability of the primary tortfeasor: if his act does not amount to a criminal offence, then civil liability under CC art. 1902 is ruled out; conversely, if a criminal offence is involved, then the perpetrator is liable under CP art. 118(1). The court has been imparted with an equitable discretion to curtail liability (*Gómez Calle* loc. cit. 1286).

4. According to ITALIAN CC art. 2046 a person is not liable for the consequences of a damaging act if, at the time of its commission, that person lacks torious capacity unless the lack of tortious capacity can be attributed to his or her culapbilty. CC art. 2047 provides that in such an event, the person under a duty to supervise is liable to pay compensation unless it was not possible to forestall the conduct of tortfeasor lacking capacity. If the injured party cannot obtain compensatation from the person who was under a supervisory duty, then the court can award an equitable compensation against the instigator of the damage, having regard to financial circumstances oft he respective parties. According to case law, the same holds true if a person exercising a supervisory duty was absent (Cass. 28 January 1953, no. 216, Giur.it. 1953, I, 1, 496). Tortious capacity is ascertained on an individial basis; the Civil Code does not furnish any criteria wth which to measure tortious capacity

(*Franzoni*, Dei fatti illeciti, sub art. 2045, p. 317; *Visintini*, I fatti illeciti II[2], 1 ff; Cass. 18 July 1975, no. 2425, Giur.it. 1976, I, 1, 1587). The socalled *capacità di intendere e di volere* is based on the ability to realise the consequences of one's conduct and to act according to this insight (Cass. 27 March 1984, no. 2027, Giur.it.Mass. 1984, fasc. 3-4). Whether tortuous capacity is encompassed within the concept of fault or whether it is divorced from this concept is a matter of some controversy (see further *Salvi*, La responsabilità civile[2], 106; *Bianca*, Diritto civile V, 656). As far as minors are concerned, the ability to exercise self determination, the recognition of the impact that one's conduct has on third parties, mental and physical development and strength of character are factors which influence the adjudication on the presence or absence of tortious capacity (Cass. 26 June 2001, no. 8740, Giur.it.Mass. 2001, 1270).

5. According to HUNGARIAN CC § 347(1)(i) the inability to distinguish between right or wrong operates to exclude the imposition of liability. An exception to the foregoing, which is deemed to be warranted on equitable grounds, is contained in CC § 347(2). Insofar as compensation cannot be extracted from the person upon whom it was incumbant to exercise a duty of supervision, and the circumstances of the individual case and the financial positions of the parties justify it, the court may award damages (in full or in part) against the tortfeasor lacking tortious capacity. According to prevailing legal opinion, every natural person is endowed with tortious capacity, if that person can forsee the possible consequences of their actions and is able to grasp that society in general would condemn such conduct (*Ujváriné*, Felelősségtan[7], 66). Accordingly, the court then examines whether the damaging party was capable of comprehending the wrongfulness of his actions and the forseeable detrimental consequences oft hat conduct (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1282; Petrik [-*Wellmann*], Polgári jog II[2], 598; *Petrik*, Kártérítési jog, 139). Of course, a wrongdoer cannot invoke lack of tortious capacity if self-induced (CC § 347(3)) and cannot aduce a ground for exculpation (for further analysis, please see *Ujváriné* loc. cit. 124-126). POLISH CC arts. 425 and 428 and SLOVENIAN LOA arts. 136 and 146 correspond with the aforementioned in all essnetial points. Conversly, CZECH CC §§ 422 and 423 do not recognise a liability which is imposed on equitable grounds.

6. BULGARIAN LOA art. 47(1) generally precludes those persons who are incapable of committing a tort from incurring liability, unless this condition was self induced. A person, deemed by the criminal courts to lack the ability to appreciate the wrongfulness of his conduct, is also regarded as incapable of committing a tort (Supreme Court 9 October 1964, decision no. 1046, criminal case no. 924/1964). Conversely, a person possesses the capacity to commit a tort, if, although s/he was under the control of a court appointed guardian or supervisor, at the time of acting, that person was in actual fact legally capable of committing a tort (Supreme Court 8 October 1973, decision no. 2469, civil case no. 1410/73). Moreover, a person who suffers from a socalled "impaired capacity to appreciate the wrongfulness of his or her actions" which induced the damaging act, possesses tortious capacity (Supreme Court 28 June 1995, decision no. 190, criminal case no. 48/1995). According to ROMANIAN law, as a general rule, person is only liable, if s/he has the ability to appreciate the wrongfulness of their conduct; however, this precept is the subject of a formal statutory provision solely in the context of criminal law (CP art. 48). There is a presumption in force in respect of persons who have attained the age of fourteen, whereby it is presumed that such persons possessed the ability to appreciate the wrongfulness of their actions, it must be positively ascertained in respect of persons below this age limit. However, according to case law, persons not possessing tortious capacity (adults and minors) can be deemed liable on equitable grounds (for citations

of relevant case law, please see *Adam*, Drept civil. Teoria generală a obligaţiilor, 306; *Lupan*, Răspunderea civilă, 376). There is a proposal contained in the Draft Civil Code which envisages that liability based on equitable considerations will be the subject of specific statutory provision (art. 1106).

7. Under GERMAN CC § 827 first sentence, a person is not liable for damage which s/he caused to another, while in a state of unconsciousness or in a state of pathological mental dsiturbance which operated to preclude the exercise of free will. If this condition precluding the exercise of free will was temporal and self-induced, then CC § 827 second sentence provides that liability will be imposed as if that person was guilty of negligence at the time of committing theact; consequently, the wrongdoer comes under a duty to compensate, if the remaining prequisites for imposing liability are satisified. CC § 829 provides that a person who, for the above cited reasons contained in CC § 827 is deemed not responsible for the damage which s/he has caused, must, nonetheless, compensate the damage sustained, if equity demands that damages should be awarded in the circumstances of the instant case. Particular regard is had to the financial means of the parties involved and further, the wrongdoer is not deprived of financial resources required to meet legal maintenance obligations or s/he would be bereft of funds needed for reasonable maintenance. The duty to compensate is subisidiary to the liability of persons with a duty of supervision (CC § 832). Thus, liability under CC § 829 only comes to the fore, where there was no duty to supervise the wrongdoer or compensation cannot be obtained from that person for either factual or legal reasons.

8. Similarly, pursuant to AUSTRIAN CC § 1306, damage which is caused by an involuntary action is not generally compensatable. On the other hand, the duty to compensate endures, wherethe damging party voluntarily creates a state of self induced disorientation (CC § 1307). However, if the injured party, by his or her own (contributory negligence) gave rise to the commission of the act by the mentally impaied person, then again, the latter escapes liability (CC § 1308). Aside from this special instance, the injured party can pursue the person who culpably breached his or her obligation to supervise for damages (CC § 1309). A subsidiary equitable liability may be imposed on the persion incapable of committing fault under CC § 1310. The court may also decide to award partial damages. In detemining if equitable grounds exist for awarding damages, the courts have regard to all the circumstances of the individual case, including the available insurance coverage (Koziol/Bydlinski/Bollenberger [-*Karner*], ABGB², § 1310 no. 8).

9. GREEK CC art. 914 includes fault among the prequisities for the imposition of tortious liability. A person can only commit a fault if that personis endowed with tortious capacity (CC art. 915). Thus, the actor must possess intellectual maturity and must not suffer from impaired mental health. These qualities are indispensible in order for the person concerned to recognise the significance and reach of his or her own actions (Georgiades and Stathopoulos [-*Georgiades*], art. 915, no. 1). This ability is generally extant; exceptional cases are caught by CC art. 915 (CC art. 915(1) which was amended by Law no. 2447/1996). According to this provision, a person will not incur liability, if he was unconscious at the time of acting or was in a mentally disturbed state, which had the effect of considerably restricting the exercise of his power of judgement and the exercise of his or her free will. An exception to the foregoing arises when the wrongdoer himself (e.g via alcohol) culpably and voluntarily brings about the required impairment of mental faculties (CC art. 915(2)). CC art. 915(1) is augmented in CC art. 918 by a subisidiary liability imposed on gronds of equity and fairness.

10. Pursuant to PORTUGUESE CC art. 488(1), a person is not responsible for the damaging effect of their conduct, if they are, for whatever reason, not capable of "understanding or desiring" those effects, unless this condition was self induced (STJ 25 July 1978, BolMinJus 279 [1978] 160) and only temporal in nature. It is rebuttably presumed that minors under the age of seven and persons who are subject to court protection owing to their mental illness are incapable of committing a tort (CC art. 488(2); *Hörster*, Parte geral, 351). Tortious capacity comprises of two limbs, namely an intellectual and a willed component (*Antunes Varela*, Obrigações em geral I[10], 384; STJ 13 January 1998, BolMinJus 473 [1998] 78). Furthermore, a person who is not capable of conducting himself or herself according to his or her knowledge or experience, is considered to be incapable of committing a tort. However, a person who is deemed not to possess the capacity to commit a tort may, under CC art. 489, come under an obligation to pay damages (in whole or in part) if the requirements of equity so demand. This, in turn, which is incurred on equitable grounds, constitutes a subsidiary liability; this entails that it can only be invoked if no liability exists in respect of a breach of a duty to supervise or it cannot be realised. Apart from the existence of capacity to commit a tort, all (other) prequisites for the imposition of tort liability as enumerated under CC art. 489 are required to be extant. In Portugal, the assessment which is based on the individual circumstance of the case at hand, takes account of the financial positions of the respective parties (*Antunes Varela* loc. cit. 565). Pursuant to CC art. 489 e.g. it was held that a man suffering from paranoia was liable to pay damages for conduct following his release from a relevant institution, where he attempted to murder 3 people, including his wife (STJ 13 January 1998 loc. cit.). The same holds true for a case where a man suffering from schizophrenia shot his father and an electrician who were present in his apartment. The wrongdoer came from an extremly wealthy family, following his death, the family of the electrician found themeselves living in very straightened financial circumstances (STJ 31 January 1996, BolMinJus 453 [1996] 205).

11. DUTCH CC art. 6:162(3) clarifies that an unlawful act may be imputed to the wrongdoer, in the absence of fault if it results from a cause which is allocated to his sphere of risk by law. CC art. 6:165 is a case in point for the application of this provision. The former lays down that a wrongful act (not however, omission) can also be imputed to person aged 14 or older, even if the act came about under the influence of a mental deficiency. Mental impairment does not alter the fact that the act was unlawful nor does it operate to affect the existence of civil responsibility (Parlementaire Geschiedenis VI, 661; Onrechtmatige Daad II [-*Jansen*], art. 6:165, nos. 3-5 pp. 2-24; CA 's-Hertogenbosch 3 February 1998, VR 1999, no. 63 p. 114). However, the quantum of the damages owed may be reduced on equitable grounds (CC art. 6:109; Parlementaire Geschiedenis VI, 449; Asser [-*Hartkamp*] Verbintenissenrecht III[12], nos. 86-89 pp. 105-108). The concept of "mental deficiency" is given a broad interpretation. It encompasses not only illness, intoxication but also embraces somnambulism and self inflicted injury caused in a state of unconsciousness (CFI Zwolle 13 November 1991, VR 1992, no. 111 p. 253 [doctor falls in a state of unconsciousness during the course of an operation; liability affirmed]; *Jansen* loc. cit. no. 6 pp. 24-44).

12. ESTONIAN LOA § 1052 corresponds in all essential matters to VI.–5:301(1). The law, however, does not refer to the notion of 'mental incompetence', rather in terms where a person could not understand the meaning of activity or could not direct it. The liability based on equity and fairness under LOA § 1052(3) is not limited to a reasonable compensation; it is necessary to adjudicate on the circumstances of the instant case whether an award of full compensation would be fair. A perso who

culpably induces a state which renders him or her incapable of committing a tort, remains liable (LOA § 1052(2); see *Lahe*, Juridica 2002, 391–400).

13. In the NORDIC countries, legal capacity is not counted among the prerequisites necessary for the establishment of negligence or *culpa*. Psychological or other "internal" characteristics of the actor are, in principle, not taken into account (*Hellner and Radetzki*, Skadeståndsrätt[7], 108, 140; *von Eyben and Isager*, Lærebog i erstatningsret[6], 66; *Saxén*, Skadeståndsrätt, 104; *Rodhe*, Obligationsrätt, 310). Conversly, physical infirmity is by all means taken into consideration, see SWEDISH HD 14 August 1948, NJA 1948, 489 (hard of hearing); DANISH Western CA 16 October 1967, UfR 1968, 133 (blind person stepped on a guitar which was lying on the ground; contributory negligence of the owner prevailed entirely) and Western CA 11 January 1995, FED 1995, 108 (a person who suffered an unforeseeable epilectic seizure stumbled against another person; no "act", no liability). However, under SWEDISH Damages Liability Act chap. 2 § 5 the liability of the mentally disabled may be mitigated on equitable grounds. A person who, while suffering from a mental illnes or impaired intellectual development, causes injury to a person or physical damage to property, is obliged to make reparation for the damage, however, "only to the extent that this would be an equitable result having regard to the actor's mental state, the nature of the act, whether liability insurance was extant and the economic positions of the parties as well as other relevant circumstances of the case at hand". The same holds true, if a person causes such damage while suffering from impaired mental activity which was not voluntarily brought about and was not only of a temporary nature" Similar rules exist under DANISH EAL § 24b and FINNISH Damages Liability Act chap. 2 § 3. The general rule therefore connotes that mentally disabled persons are liable for the damage that they cause; howver, this liability may be reduced if equitable grounds exists for its mitigation (Swedish HD 15 April 1992, NJA 1992, 541; Swedish HD 24 September 1979, NJA 1979, 581; Swedish HD 17 June 1999, NJA 1999, 441; Danish HD 26 March 1926, UfR 1926, 380; Danish Western CA 4 February 2004, FED 2004, 177; Danish HD 20 January 2005, UfR 2005, 1259; FINNISH Supreme Court 19 June 1980, KKO 1980 II 67). It is important to note that the insurer cannot invoke the defence that the person insuredsuffered from a mental disorder (Swedish Insurance Contracts Act; Danish Insurance Contracts Act § 19; Finnish Insurance Contract Act chap. 4 § 36). Drunkenness or consumption of other intoxicating substances does not amount to a "mental disorder" under the aforementioned regulations governing tort liability.

Illustration 1 is taken from CA Celle 27 March 2002, NdsRpflege 2002, 263; **illustration 2** from CFI Zwolle 13 November 1991, VR 1992 no. 111 p. 253; and **illustration 3** from STJ 31 January 1996, BolMinJus 453 (1996) 205.

VI.–5:302: Event beyond control

A person has a defence if legally relevant damage is caused by an abnormal event which cannot be averted by any reasonable measure and which is not to be regarded as that person's risk.

COMMENTS

A. General

Event beyond control as a defence in the framework of strict liability. This Article deals with the defence of an event beyond control. Under these model rules, this is only significant for the law on liability without intention or negligence. This is because where an uncontrollable event has caused the damage, then it is already a certainty that, to this extent, the person could not have acted negligently. Where an uncontrollable natural occurrence was, however, foreseeable and where the consequences of it could and should have been avoided by taking anticipatory measures, then under the criteria set out in VI.–3:102 (Negligence), negligence is to be affirmed. There is no room for VI.–5:302 here; the two provisions preclude each other.

Accountability without intention or negligence. This Article can also be important in the realm of employers' liability (VI.–3:201 (Accountability for damage caused by employees and representatives)) – however, only where the employee's liability does not depend on negligence.

> *Illustration 1*
> While dismantling his market stall, a trader leaves his unsold goods (items of clothing), packed in plastic refuse sacks, unattended behind his stall. Third parties unknown to him carry the bags to the side of the street. On their daily route, the local refuse collectors take the plastic bags with them; the pieces of clothing are mixed with domestic waste in the bin truck and are irreparably damaged. The refuse collectors did not act negligently (VI.–3:201(1)(b) (Accountability for damage caused by employees and representatives)). Their employer would not be liable even where it transpired that one of them was the owner of the truck: the defence in VI.–5:302 would not only be of benefit to the refuse collector, but also to the employer.

B. Event beyond control

Notion. An event beyond control is an abnormal occurrence which cannot be averted by any reasonable measure and which is not to be regarded as the realisation of a risk for which a person is responsible under Chapter 3, Section 2 (Accountability without intention or negligence). As far as possible and reasonable for the purposes of the law on non-contractual liability, this definition follows the corresponding rules provided by CISG art. 79(1) and III.–3:104 (Excuse due to an impediment) for contract law.

Two elements. An event beyond control is thus characterised by two elements – a factual one and a normative one. On the factual plane it is marked by the fact that the cause of damage would not have been discovered or precluded even if as much care had been taken as could possibly be expected in the circumstances. On the normative plane, damage must not have resulted from the realisation of the very risk on account of which liability is rendered strict. The Article does not address the distinction between "force majeure" and an "inescapable

event". This distinction is not prevalent in many Member States' private law systems and, even where it is recognised, the boundary between force majeure and inescapable event is often drawn by reference to different criteria. The defence under the Article does not depend on whether the actual cause of the damage is a natural occurrence or human behaviour (that of a third party or the victim), but on the fact that even where extraordinary care and prudence is exercised, it could not have been foreseen or, though foreseeable, could not have been avoided.

Abnormal event. The defence of an event beyond control only comes into play where an abnormal event was causative of the damage. Damage from the continuous operation of equipment would rarely constitute such an abnormal event. Nor would injury to health caused by the regular noise of low-flying aircraft. Everyday events do not lend themselves well to being termed events beyond control.

Illustration 2
An abnormal event would be where a bolt of lightning causes a sudden power cut, which in turn leads to an electrical cable being broken and a house being set on fire. Conversely, such an abnormal event is lacking where the power cut and subsequent cable breakage occur because birds have sat on a power line and momentarily connect it with another power line, so that a short-circuit occurs.

'Not to be regarded as that person's risk'. The predominant field of application for the defence is naturally that of strict liability. The purpose of the Article is not, however, to reduce the strict liability of keepers, occupiers, owners, producers or operators "through the back-door" to mere liability for negligence. Its sole purpose is to keep strict liability within the borders of the risk for which it exists.

Illustration 3
Where a terrorist ignites a bomb that has been deposited on a bus, the danger normally lying in vehicles is no longer an issue. From the point of view of the bus driver, this is an event beyond control exonerating him or her from liability.

Illustration 4
During the night, martens nibble at the brake cable of a car parked in a town. The conduct of the martens is "beyond any control", but the risk that the car brakes do not function as the result of such an event must be borne by the keeper of the car.

Illustration 5
A fire breaks out in a train station because an extraordinarily strong gale throws a tree on to the electricity line and breaks it. The railway operator is not liable under VI.–3:202 (Accountability for damage caused by the unsafe state of an immovable) or under VI.–3:207 (Other accountability for the causation of legally relevant damage).

Relationship to contributory fault. In contrast to the defence of contributory fault, the defence of an event beyond control always leads to a complete exclusion of liability and never merely to an apportionment of damage. Where the victim's contributory fault is totally dominant the result can, however, be the same because a reduction of liability "to zero" will then also come about by the application of VI.–5:102 (Contributory fault and accountability).

Illustration 6
The facts are the same as in illustration 1, with the only difference that it is not third parties who place the refuse sacks filled with goods at the side of the street, but the market dealer himself. His contributory fault is so extensive that it is indistinguishable from an event beyond control.

NOTES

1. In FRANCE, whether *force majeure* is given depends on the presence of three cumulative criteria, namely the *extériorité*, the *imprévisibilité* und der *irrésistibilité* of the harmful event (*Malaurie/Aynès/Stoffel-Munck*, Les obligations, no. 195 p. 96; *le Tourneau*, Droit de la responsabilité et des contrats [2004/2005], nos. 1807-1824). The most important characteristic is the *irrésistibilité*, i.e. that it was impossible to avoid the event occurring and or to take measures to resist its occurence (*Malaurie/Aynès/Stoffel-Munck* loc. cit.). The *irrésistibilité* of an occurence is assessed *in abstracto*; an event will only be qualified as *force majeure* if the average person in the same position of the defendant could not have avoided its occurrence (*le Tourneau* loc. cit. no. 1808). The precise connotations of *imprévisibilité* requirement were equivocal for a period of time. Whereas the Second Chamber of the *Cour de cassation* adhered to the view that the presence of this criterion was indispensible, the remaining Civil Chambers were inclined to regard *irrésistibilité* as sufficient to qualify an event as *force majeure* (see further *le Tourneau* loc. cit. no. 1813). However, Cass.ass.plén. 14 April 2006, JCP éd. G, 2006 no. 194 p. 835 made clear that the approach of the second Civil Chamber must be followed, i.e. that the *irrésistibilité* as well as the *imprévisibilité* are required to be extant in order for an event to qualify as a *force majeure* event. The *extériorité* characteristic (cf. for contract law CC art. 1147) denotes that the relevant event was not within the sphere of control of the person invoking the defence of *force majeure* (*le Tourneau* loc. cit. no. 1816). A case will serve to illustrate this requirement, a company providing water supply services could not invoke the defence of *force majeure/overmacht*, which was under a contractual *obligation de résultat* in regard of the supply of drinking water; the water had to be free of nitrate and pesticide residues (Cass.civ. 30 May 2006, D. 2006, 1705). If it is ascertained that the damage is based on *force majeure*, then the liability of the putative tort feasor is completely denied (*le Tourneau* loc. cit. no. 1803). This rule is valid in the arena of liability for *fait personnel* as well as in the field of liability for *fait d´autrui* and for *fait des choses* (*Flour/Aubert/Savaux*, Le fait juridique[10], no. 168 p. 160 und no. 228 p. 233). A *faute* on the part of the tortfeasor or strict liability under CC arts. 1384-1386 is also denied, if the *faute* of the victim which was causal for the damage, exhibits attributes of *force majeure* (Cass.civ. 25 June 1998, Bull.civ. 1998, II, no. 238 p. 141; Cass.civ. 11 July 2002, Bull.civ. 2002, II, no. 174 p. 138; CA Poitiers 18 May 2005, JCP 2006, IV 2302; Cass.ass.plén. 14 April 2006, D. 2006, 1577, note *Jourdain* [Suicide; *force majeure* for the rail company]). However, as regards liability for road traffic accidents, the "Banditer Act" (*Loi Badinter*) art. 2 provides that it is not open to the driver or *gardien* of a motor vehicle to invoke the defence of *force majeure* or rely on a *fait d´un tiers* vis á vis the victim (see above the notes under VI.–3:205 (Accountability for damage caused by motor vehicles)).
2. In BELGIUM, for the most part *force majeure/overmacht* is defined as an event which occurs independent of the will of a person, is unforseeable and unavoidable. In contrast to France, the *extériorité* of the event does not count as a prerequisite for the establishment of *force majeure/overmacht*. Similarly, in Belgien, the main focus is on

the issue of the unavoidability of the event. A forseeable event which is unavoidable can qualify as a *force majeure/overmacht* event. *Naturally,* the successful invocation of this defence, is contingent, of course, on whether the alleged tortfeasor herself caused the *force majeure/overmacht*-event (Tilleman and Claeys [-*Claeys*], Buitencontractuele aansprakelijkheid, 1, 16-17, nos. 21-22). *Force majeure/overmacht* results in a complete denial of liability in the field of liability *faute* as well as in areas governed by strict liability (*Claeys* loc. cit. p. 24 no. 38).

3. According to SPANISH CC art. 1105, a person is not liable for an event which was unforseeable or for a foresseable event which could not have been avoided. A different approach is adopted only if a law or contract provides otherwise. CC art. 1105 is also employed in the realm of extra contractual liability (TS 16 February 1988, RAJ 1988 (2) no. 1994 p. 1966; TS 5 February 1991, RAJ 1991 (1) no. 991 p. 1188; TS 4 April 2000, RAJ 2000 (2) no. 2506 p. 3887). Consequently, the resulting damage cannot have been intended, forseeable or avoidable (TS 31 May 1995, RAJ 1995 (2) no. 4106 p. 5467; TS 20 July 1995, RAJ 1995 (3) no. 5717 p. 7654). The burden of proof rests on the person who caused damage (TS 2 February 1989, RAJ 1989 (1) no. 657 p. 713). However, the terminology employed in the Civil Code is vacillatory. Occasionally the concept of *caso fortuito* (CC arts. 1096(3), 1891) is utilised, in other areas *fuerza mayor* (CC arts. 1784, 1905 and 1908(3)), other governing provisions employ either both concepts (CC arts. 1602, 1625), however, here and there completely different expressions are used (e.g. CC art. 484: *siniestro o caso extraordinario* [Misfortune or extraordinary event]; CC art. 499: *acontecimiento no común* [extraordinary event] and CC art. 1561: *causa inevitable* [unavoidable cause]). In general, the following holds true, a debtor is deemed not to be responsible for an "absolutely unavoidable" event, i.e. events that, in the best case scenario could be resisted with "excessive" and therefore unreasonable efforts (*prestación exorbitante*) (TS 9 November 1949, RAJ 1949 no. 1245 p. 750; TS 7 April 1965, RAJ 1965 (1) no. 2118 p. 1295). Case law inclines to the view that a *fuerza mayor* must constitute an unforseeable event which is completely outside the debtor's activities, whereas a *caso fortuito* connotes an unavoidable event, which is connected with the debtor's activities (TS 15 February 1968, RAJ 1968 (1) no. 1082 p. 733; TS 30 September 1983, RAJ 1983 (2) no. 4688 p. 3594 und TS 3 March 1999, RAJ 1999 (1) no. 1400 p. 2235). The distinction between *caso fortuito* and *fuerza mayor* is primarily of relevance within the context of (strict) state liability, because the State is only permitted to raise the case of *fuerza mayor* as a defence. The presence of a *caso fortuito* will not lead to a denial of liability (see further TS 31 May 1999, RAJ 1999 (4) no. 6154 p. 9656; TS 15 February 1968 loc. cit. and TS 28 July 1986, RAJ 1986 no. 4451 p. 4279). However, TS 30 September 1983 loc. cit. stressed that within the context of CC arts. 1784 (liability of custodian) and 1905 (liability of animal keeper), a distinction must be drawn between *fuerza mayor* and *caso fortuito,* because in both cases only a *fuerza mayor* will operate to absolve the putative tortfeasor from liability. In addition, most of the laws which impose strict liability, either refer solely to *fuerza mayor* (e.g. Hunting Act [*Ley 1/1970*, of 4 April, *de Caza*] art. 33(5); Liability and Insurance for Motor Vehicle Traffic Act art. 1(1)(i); Social Insurance Act [*Real Decreto Legislativo* 1/1994, of 20 June, *por el que se aprueba el texto refundido de la Ley General de la Seguridad Social*] art. 115(4)(a)), or the Acts expressly list the events that qualify as a *fuerza mayor* (e.g. Nuclear Energy Act [*Ley 25/1964*, of 29 April, *sobre Energía Nuclear*] art. 45(3)). Aviation Act (*Ley 48/1960*, of 21 July, *sobre Navegación Aérea*) art. 120 expressly provides that a *caso fortuito* does not constitute a ground of exculpation; a *fuerza mayor* must be established. *Fuerza mayor* "or" *caso fortuito* was affirmed in a case where, as a result of a storm (92 km/h), a tree fell against an electricity power line

which in turn caused a fire at a railway station; the electricity supply company was not liable for the damage (TS 12 September 2002, RAJ 2002 (5) no. 8555 p. 15592). The same result was reached in a case involving a minor who was killed by a falling electricity cable, owing to the fact that the accident was due to extraorinary weather conditions (TS 15 December 1996, RAJ 1996 (5) no. 8979 p. 12495).

4. ITALIAN jurisprudence has also applied the contractual regulation contained in CC art. 1218 analogously in the field of tort law. This provision concerns damaging events which stem from insurmountable and unforseeble natural phenomenona or in unavoidable and unforseeable acts of a third party (Cass. 5 December 1967, no. 2897, Rep.Giur.it., voce Resp. civ. 165; Cass. 7 September 1966, no. 2333, Rep.Giur.it. 1966, voce Resp. civ. 232; Cass. 22 Mai 1998, no. 5133, Danno e resp. 1998, 945). No distinction is drawn in tort law between (in contrast to the criminal law) *caso fortuito* and *forza maggiore*; indeed, the courts often use this terms interchangeably (*Franzoni*, Dei fatti illeciti, sub art. 2051, p. 575). Ultimately, such cases are regarded as connoting that there is a lack of a causal nexus between the damage and the tortfeasor's act or the source of danger for which s/he was responsible for (Cass. 13 April 1989, no. 1774, Giur.it.Mass. 1989, fasc. 4; Cass. 8 January 1981, no. 170, Giur.it.Mass. 1981, fasc. 1). *Caso fortuito* is the defence typically invoked in the context of strict liability e.g within the framework of CC art. 2051.

5. HUNGARIAN CC § 339(1) bases the its tort law on a system whereby the onus is generally on the damaging party to prove that s/he acted in a manner that can be generally expected in the given situation". In a number of special provisions (e.g. CC § 352(1) [liability for buildings]) the abovementioned formula crops up again. A stricter benchmark applies in the strict liability context (CC §§ 345-346). According to CC § 345(1) a person who carries on an activity imbued with considerable hazards will only be released from liability if s/he can adduce proof that the damage arose due to an unavoidable event which did not arise in connection with the carrying out of the hazardous activity. This corresponds to VI.–5:302 in all essential matters. *Vis maior* can constitute such an unavoidable reason pursuant to CC § 345(1); however, it could also be envisaged that the injured party himself or indeed a third party could furnish the unavoidable cause. For example, an avoidable reason was deemed to be present which operated to relieve a bus operator from liability, where a third party deposited a bomb in a bus and subsequently detonated it (BH 2000/200). The unavoidable criterion is only given, when, viewed objectively, it was impossible for the damaging party to prevent the damage occurring (*Wellmann* loc. cit.; *Eörsi*, Kártérítés jogellenes magatartásért, 106-107). The following occurrences are not outside the tortfeasor's sphere of responsibility: unforeseeable tyre blow-out, defective brakes or the sudden indisposition of the driver (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1263-1268; Petrik [-*Wellmann*], Polgári jog II[2], 590-592). In ROMANIAN Civil law, a distinction is drawn between *forţa majoră* and *cazul fortuit*. Force majeure is a complete defence to liability. Force majeure connotes an extraordinary external event which was neither forseeable nor could have been avoided (CC arts. 1082 und 1083; CSJ 27 January 2000, *secţia comercială*, decision no. 414). Ground frost during the winter naturally does not amount to force majeure (CSJ 4 February 1999, *secţia comercială*, decision no. 403). Conversely, extraordinary natural events do amount to force majeure, as do wars and insurgences. A "happenstance" could on the one hand, be regarded as stemming from internal factors, for example, the hidden defect or an animal's fear; happenstance begins where fault ends. In a similar fashion, happenstance generally excludes the imposition of liability; however, in some fields, it is expressly deemed to be inapplicable (Nuclear accidents, damage caused by airplanes etc.). Furthermore, the only defence to the imposition of

strict liability under CC arts. 1000(1), 1001 and 1002 is force majeure (*Romoşan*, Vinovăţia în dreptul civil român, 99; *Lupan*, Răspunderea civilă, 368 with citations from case law).

6. BULGARIAN case law adheres to the distinction between *casus fortuitis* and *force majeure* (Overview in *Kalaydjiev*, Obligazionno pravo, Obshta chast, 274). *Casus fortuitis* is composed of an unforseeable and thereby blameless event, *force majeure* denotes the consequences of an event which even if they were forseeable could not be eluded; the typical case is a natural catastrophe (*Kalaydjiev* loc. cit. 276). *Casus fortuitis* premits an excuplation from liability (only) within the framework of fault based liability; *force majeure* alone is a defence in a case of strict liability (*Tassev*, Nepozvoleno uvrejdane, 172). Consequently, the operator of a mine remains liable if, owing to an imperceptible crack, rock blasting causes an unforeseeable avalanche resulting in personal injury (Supreme Court 10 December 1960, decision no. 868, case no. 7466/60 in civil matters). According to the Labour Code art. 200(2), an employer is liable to his employee for work accidents even in the case of force *majeure* (on this matter critical *Tassev* loc. cit. 173, who suggests that this result should be corrected by judicial intrepretation). POLISH CC art. 435 § 1 restricts the strict liability of a person, who runs on his own account an enterprise or business set in motion by natural forces (steam, gas, electricity, liquid fuels etc.) via the defence of *force majeure*. Similarly, the SLOVENIAN Law of Obligations Act does not contain a general defence of an event beyond control. However, LOA art. 153(1) releases the keeper of a dangerous thing from liability "if it is shown that the damage originated from any cause outside the object whose effect could not be foreseen, avoided or averted".

7. For the most part, under GERMAN law only *höhere Gewalt* (*force majeure*), see e.g. Road Traffic Act § 7(2); Liability Act (*Haftpflichtgesetz*) §§ 1(2) and § 2(3)(iii); Environmental Liability Act (*Umwelthaftungsgesetz*) § 4; Water Budget Act (*Wasserhaushaltsgesetz*) § 22(2)(ii) affords a defence to the imposition of strict liability. Sporadically, the *caso fortuito*, the *unabwendbare Ereignis* (*unavoidable event*) (Road Traffic Liability Act § 17(3); Liability Act § 13(3)) can operate as a defence, however, these criteria typically only come to the fore within the framework of the internal relationship between keepers who are jointly and severally liable and their obligation to make contribution. *Höhere Gewalt* in the context of liability of keepers of motor vehicles connotes an extraordinary, external cause, which arises from elemental forces of nature or is caused by the acts of third parties and viewed from human experience and knowledge connotes an avoidable event which cannot be prevented by resorting to reasonable financial measures nor by exercising extreme care that would be expected in the circumstances (Hentschel [-*König*], Straßenverkehrsrecht[39], § 7 StVG, no. 32). A typical case concerns unforseeable natural events (sudden flooding, lightening, earthquake, landslide, avalanche, squalls). Conversely, gross violations of regulations do not come within the scope of force majeure (infringing rules pertaining to the right of way, misconduct of children), see further *König* loc. cit. no. 34). An unavoidable event connotes an event which cannot be avoided even if extreme care is adopted. The primary way in which it can be practically distinguished from force majeure is in the fact that one is permitted to trust that other road traffic user will refrain from grossly violating the rules of the road (*König* loc. cit. nos. 22 and 31).

8. According to AUSTRIAN EKHG § 9, the keeper of a motor vehicle duty to compensate is denied, if the accident was caused by an *unabwendbares Ereignis* i.e. if the accident could not be avoided, despite the taking of all imaginable precautions and care (*Koziol*, Haftpflichtrecht II², 546). The following case will serve to illustrate. A keeper is therefore not liable for damage which a stone lying on navigated street

causes, after the motor vehicle accidently (OGH 21 January 1959, SZ 32/10). In particular, an event is deemed to be unavoidable according to EKHG § 9(2), if it can be attributed to the conduct of the injured party, to a third party who was not operating the vehicle or an animal and if the keeper or driver had observed the due care that was necessary in the circumstances of the case. Conversely, if, in connection with the operation of a vehicle, a risk (if also extraordinary) is realised, then liability ensures (e.g. OGH 30 September 1965, SZ 38/152: insect sting to the eye of the driver). Forestry Act § 53 no. 4 corresponds to EKHG § 9. In sporadic cases, *höhere Gewalt* operates as a defence to liability (Nuclear Liability Act § 9; Act on Pipelines § 12; further references and details in Koziol loc. cit. 430 and 578).

9. Traditionally, force majeure also provides a defence to liability in GREECE. However, the exact particulars of force majeure is the matter of some debate and subject matter of an array of theories (in-depth *Kornilakis*, I evthini apo diakindinevsi, 175 ff). It is submitted that the concept ought to be capable of possessing. The defence of force majeure is expressly mentioned in, *inter alia*, an Act of 1911 concerning the liability for traffic accidents art. 5 (further examples can be found in *Dimopoulou*, Evthini apo diakindinevsi, 62). Only unforeseeable and unavoidable events, which occur even after taking the greatest amount of care and do not connote a typical risk associated with the operation of a motor vehicle fall within the scope of the defence of force majeure (*Georgiades*, Enochiko Dikaio, Geniko meros, 693; CA Thessaloniki 274/1980, Arm 34/1980, 462). A particularly dangerous slippy patch on the motorway does not amount to force majeure (CA Thessaloniki loc.cit.), even where it was caused by an oil spill (CFI Drama, EsingD 1992, 96).

10. Similarly, PORTUGUESE law employs the concepts *caso de força maior* and *caso fortuito*. Both concepts describe an unforseeable and unavoidable event (*Prata*, Dicionário jurídico, 184; *Melo Franco and Antunes Martins*, Dicionário de conceitos, 151). A different view regards *force majeure* as defined by the unforseeability element, whereas *caso fortuito* is characterised by the unavoidable factor (*Almeida Costa*, Obrigações[10], 586; *Prata* loc. cit.). Of course, *force majeure* is the only available defence to the imposition of liability which is not based on fault. For example, CC art. 505 precludes the imposition of liability under CC art. 503 (on strict liability for accidents caused by vehicles), if the cause of the accident can be attributed to the injured party or a third party or if it can be ascribed to force majeure, which does not arise in connection with the vehicle's operation. Whether an unavoidable loss of control over the vehicle (as a consequence of an oil spill or black ice on the motorway) amounts to *force majeure*, has been the subject of differing judicial pronouncements (in the affirmative e.g. STJ 11 December 1970, BolMinJus 202 [1970] 190; in the negative CA Oporto 2 June 2005 and STJ 9 January 2003; in a similar fashion *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], art. 505 note 4, p. 519 and *Almeida Costa* loc. cit.). A controversial topic is also whether the sudden unconsciousness of the driver can be regarded as falling within the scope of force majeure (of this view *Antunes Varela*, Obrigações em geral I[10], 668 and *Almeida Costa* loc. cit. 645; of an opposing viewSTJ 10 Febuary 2005 and STJ 27 July 1971, BolMinJus 209 [1971] 120). Liability for damage casued by electricity cables and gas pipes is excluded pursuant to CC art. 509(2) if the damage is due *force majeure*, whereby "force majeure connotes every external cause which is not connected to the operation or use of a thing". In this context, *force majeure* is given, when a ray provokes an electrical discharge which leads to the break of a high-tension wire which causes a fire (STJ 3 October 2000, CJ (ST) X (2002-3) 77). Conversely, force majeure is not established where an electric cable came into contact with another cable after a bird rested on it, leading to it short circuiting, falling and causing death (CA Coimbra

15 January 1991, CJ (1991-1) XVI 47). Finally, Labour Code art. 291(1) relieves the emloyer from liability if an occupational accident is caused by *force majeure*. Force majeuere under this provision solely connotes an event "which due to unavoidable forces of nature, independent from human intervention, does not constitute a risk created by the conditions of work nor occurs during performance of the services expressly ordered by the employer in conditions of obvious danger".

11. In ESTONIA, an event beyond control (LOA § 103(2)) is primarily understood to mean that it has the effect of breaking the chain of causation. If, in exceptional circumstances, this is not the case, then, as a general rule, imposing liability for fault is nonetheless precluded (see further *Lahe*, Juridica 2003, 236–242). The imposition of strict liability for dangerous activities (such as, the operation of motor vehicles, machines, utilising electrical or nuclear energy and the use of explosives or poisonous substances) under LITHUANIAN CC art. 6.270(1) is subject to the proviso that the damage was not caused *force majeure*. The defendant bears the burden on proof.

12. While DUTCH CC art. 6:162(2) does indeed provide that the prerequisite for an unlawful act is the absence of a ground of justification; the provision fails to fill out the particulars of the ground of justification, owing to the fact that its exact constitutents can be determined by referring to the criminal law, which is also applicable in the civil law context. CP art. 40 ("A person is not liable for an act under criminal law if that act was compelled by force majeure [*overmacht*]") is of analogous application. This includes all situations of compulsion which are impossible to check (Onrechtmatige Daad I [-*Jansen*], art. 6:162(2), nos. 171-172 p. 1782-1783; *Schrage*, Van delict tot onrechtmatige daad, 71; see on necessity the previous note *III28* under VI.–5:202). *Overmacht* connotes a sudden extraordinary situation which has eventuated, which could not have been foreseen and which left the act in question unavoidable (*Jansen* loc. cit. no. 173 p. 1786-1826). If a vehicle remains at a standstill, this is regarded as a case of force majeure. Of course, this state of affairs will not therefore preclude the imposition of liability for a subsequent accident because the driver failed to secure the place where the accident sufficiently. Only where, and this argument is rarely successful, the defendant could not be expected to reckon with the actual behaviour of the other road users will the imposition of liability be precluded (Verbintenissen uit de wet en Schadevergoeding [-*Hartlief*] no. 157 p. 142; *Jansen* loc. cit. no. 175 p. 1830-1850).

13. In the NORDIC Countries, *force majeure* is not a generally recognised defence within strict liability, and it plays only a minor role in defining the scope of that liability (*Hellner and Radetzki*, Skadeståndsrätt[7], 177; *Hellner*, in: In memoriam Jean Limpens, 53, 59; cf. *Rodhe*, Obligationsrätt, 540; *von Eyben and Isager*, Lærebog i erstatningsret[6], 149; *Saxén*, Skadeståndsrätt, 215 ; *Sandvik*, JFT 1998, 544, 550). *Force majeure* is explicitly provided for as a defence only in legislation which has its origin in international conventions (such as strict liability for nuclear installations, maritime and railway traffic). Conversely, it is not expected that the courts will accept the defence of force *majeure* in the context of environmental liability (*von Eyben and Isager* loc. cit.; *Hellner and Radetzki* loc. cit. 339, 342; *Sandvik* loc. cit.). The general question is raised whether and in what manner the concept of adequate causation could apply in the strict liability context; a thorny issue here would be that the issue does not depend on (or not essentially on) probability and foreseeability of the relevant harm (*Andersson*, Skyddsändamål och adekvans, 105). At any rate, it is required that the risk, at which the strict liability provision is directed, materalises (*Hellner and Radetzki* loc. cit. 176; *Andersson* loc. cit. 396; *Saxén* loc. cit. 216). As regards strict liability regimes which have their basis solely in judge-made law (and not in statute), the courts tend to consider the entry of extraordinary circumstances as nullifying

liability (e.g. Swedish HD 16 October 1997, NJA 1997, 684 [Flooding, after very heavy rainfall, forced a dam to burst]; Swedish HD 10 March 1983, NJA 1983, 209 [*force majeure* explicitly accepted in a quasi-contractual context]; Danish HD 18 August 1983, UfR 1983, 866 and 2 September 1983, UfR 1983, 895 [broken water pipes; no strict liability for "unforeseeable" damage]; Danish HD 12 February 1987, UfR 1987, 258 [flooding of a sewage installation caused by extraordinary amounts of rainfall; no defective construction of the pipe systems]); see further *Hornslet,* UfR 1987 B, 288-291; *von Eyben and Isager* loc. cit. 160 and *Sandvik,* loc. cit. 556.

14. Under ENGLISH law there is no defence of act of God against strict liability under the Animals Act 1971: Clerk and Lindsell (-*Dugdale/Jones*), Torts[19], paras. 22-10 and 22-15.

Illustration 2 is taken from STJ 3 October 2000, CJ (ST) X (2002-3) 77 and CA Coimbra 15 January 1991, CJ 1991-1 (XVI) 47; **illustration 3** from BH 2000/200; **illustration 5** from TS 12 September 2002, RAJ 2002 (5) no. 8555 p. 15592; and **illustration 6** from CA Poitiers 18 May 2005, JCP 2006, IV, 2302.

Section 4: Contractual exclusion and restriction of liability

VI.–5:401: Contractual exclusion and restriction of liability

(1) Liability for causing legally relevant damage intentionally cannot be excluded or restricted.

(2) Liability for causing legally relevant damage as a result of a profound failure to take such care as is manifestly required in the circumstances cannot be excluded or restricted:

(a) in respect of personal injury (including fatal injury); or

(b) if the exclusion or restriction is otherwise illegal or contrary to good faith and fair dealing.

(3) Liability for damage for the causation of which a person is accountable under VI.–3:204 (Accountability for damage caused by defective products) cannot be restricted or excluded.

(4) Other liability under this Book can be excluded or restricted unless statute provides otherwise.

COMMENTS

A. Exclusion and restriction of liability

Pre-emptive exclusion of liability. This Article relates exclusively to the validity of a pre-emptive exclusion or restriction of liability. It is not concerned with agreements on liability after the event giving rise to the damage. Once liability arises, any agreed absolution from that liability is a transaction relating to an existing debt. That is not an 'exclusion' of liability. *Ex post facto* agreements as to liability are therefore subject to no special restrictions; nobody is obliged to exercise a right (apart from cases where a person is bound in some such capacity as a guardian to make a claim on behalf of a ward.)

Exclusion and restriction of liability. The Article covers both contractual arrangements for the complete exclusion of possible subsequent liability and arrangements under which the materialisation of such liability is made dependent on certain circumstances (e.g. no liability in cases of slight negligence) or its level restricted. Included are all agreements which put the subsequently injured person in a worse position than if there were no rules on non-contractual liability.

Implied exclusion of liability. An exclusion or reduction of liability does not have to be expressly agreed upon. A contract with this effect can come into existence implicitly.

> *Illustration 1*
> Where help is provided out of courtesy in rescuing a lorry which is stuck, an implied exclusion of liability for slight negligence is to be inferred in all events where the rescue is risky due to the surrounding local conditions and available aids.

Contractual exclusions. Agreements as to liability require a valid contract between the injuring person and the injured person. This in turn is subject to the general rules, particularly the provisions on concluding a contract, and the invoking of standard terms and their validity. In a range of cases, the restriction of liability by contractual terms is already struck at under

II.–9:411 (Terms which are presumed to be unfair in contracts between a business and a consumer) paragraph (1)(a). These provisions remain unaffected by VI.–5:401, see VI.–1:103 (Scope of application) sub-paragraph (c).

Unilaterally imparted information. Unilaterally imparted items of information do not constitute agreements restricting or excluding liability within the meaning of this Article. Their significance for the law on liability lies in other fields. So, for example, a remark by the provider of information that "no liability is accepted" for the accuracy of the information imparted can lead to the recipient of the information having no reasonable ground to rely on the accuracy of the communication within the meaning of VI.–2:207 (Loss upon reliance on incorrect advice or information) paragraph (1); see Illustration 2 under that Article. Often the very wording of unilaterally provided items of information does not contain a statement as to liability, but rather draws attention to a particular source of danger ("During snowfall and icy weather, this path will not be cleared", or "Beware of biting dog"). Then, depending on the circumstances, it may have to be decided whether the information justifies the inference that there was no negligence, that the piece of land was not in an unsafe state or that overwhelming contributory fault is to be ascribed to the injured person because that person proceeded, without good reason, into a situation known to be dangerous.

Freedom of contract. The Article stems from the principle of freedom of contract. This allows the parties to set precautionary stipulations in relation to non-contractual liability possibly arising between them in the future. Paragraph (4) reflects this principle.

Basis. The rationale behind the extension of the principle of freedom of contract to non-contractual liability is not self-evident. Under these model rules it follows primarily from the principle of free concurrence of contractual and non-contractual claims (*'cumul des responsabilités'*), which is set out in VI.–1:103 (Scope of application). Even at the level of the law governing the exclusion and restriction of liability, this demands a greater synchronisation of the two regimes than would be necessary had these model rules proceeded on the basis of the opposing principle of mutual exclusivity of contractual and non-contractual liability (*'non-cumul des responsabilités'*).

> *Illustration 2*
> Where a person leaves a suit at the cleaners and it is returned damaged, (where there is negligence as to its cleaning) there isn't only a claim for damages for non-performance of a contractual obligation, but also a claim for damages under the law on non-contractual liability. Where and in so far as it is possible in such cases to limit the contractual liability to a pre-agreed multiple of the amount to be paid for cleaning a suit, it must also be possible to come to a corresponding agreement for parallel liability under this Book; the agreement to restrict liability would be pointless otherwise.

Exceptions. However, no Member State's legal order (nor Community Law) handles the law on the exclusion and restriction of non-contractual liability without having a large number of exceptions to the principle of freedom of contract. After long and controversial discussion, VI.–5:401 strives for a middle ground, which (as with the law on liability without negligence or intention, above; see VI.–3:207 (Other accountability for the causation of legally relevant damage)) partially operates with references to the respectively applicable national law. The principles are as follows. (i) An exclusion or restriction of non-contractual liability for damage should generally not be permitted if it relates to the intentional causation of legally relevant damage of any type. (ii) An exclusion or restriction of liability should likewise not be

permitted if it relates to grossly negligent causation of legally relevant damage and if either the latter consists of personal injury or, where other types of legally relevant damage occur, the exclusion would be illegal or immoral. (iii) Producers' liability for damage caused by a defective product under VI.–3:204 (Accountability for damage caused by defective products) cannot be excluded or restricted. (iv) Although, in all other cases, the general principle of freedom of contract prevails, it remains subject to statutory limitations in the applicable national law. In this way paragraph (4) provides room for certain "isolated solutions" to regional and precisely defined sectors of the law on liability. Conversely, paragraph (2)(b) contains a special rule applicable only to damage caused by gross negligence and to this extent grants the law of contract precedence over the law on non-contractual liability.

B. No exclusion of liability for damage caused intentionally (paragraph (1))

Policy considerations. Paragraph (1) contains a rule which is widely regarded as axiomatic: agreements waiving liability in the case of future intentional damage are essentially the prototype for an immoral contract, since this boils down to rendering oneself defenceless against another. Agreements with such content are invalid, regardless of the type of damage.

Employers' liability. Paragraph (1) does not rule out the situation in which an employer excludes or restricts liability for eventual intentional wrongs on the part of personnel, e.g. for thefts. If contained in standard terms, however, usually such an exclusion or restriction of liability will fail under the fairness test and, in relation to physical injury already falls under II.–9:411(1)(a) (Terms which are presumed to be unfair in contracts between a business and a consumer).

Line of demarcation with consent and acting at own risk. The impossibility of contracting out of subsequent liability for the intentional infliction of damage does not affect the defences of consent and acting at own risk (see VI.–5:101 (Consent and acting at own risk)). The difference lies in the fact that consent relates to a concrete event and acting at own risk pertains to an occurrence which by its nature is foreseen, while the exclusion of liability for intentionally caused damage would include acts that do not remain within the context of something agreed in advance between the injuring person and the injured person.

C. Exclusion of liability in cases of gross negligence (paragraph (2))

Personal injury (sub-paragraph (a)). In accordance with the position adopted in an overwhelming number of European legal systems, and in line with the policy of placing a high value on protecting body and health, paragraph (2)(a) rules out the exclusion of liability for personal injuries caused by gross negligence. In any event, the rule only has significance for individual agreements; in standard terms between businesses and consumers, every term in a contract is presumed to be unfair if it "excludes or limits the liability of a business for death or personal injury caused to a consumer through an act or omission of that business", see II.–9:411 (Terms which are presumed to be unfair in contracts between a business and a consumer). Both rules ensure that the rights of dependants and (in the case of fatal injuries) the surviving dependants are immune from a contractual exclusion of liability.

"Gross negligence". Paragraph (2) does not explicitly invoke the concept of "gross negligence" as such. Instead it provides an immediate definition: gross negligence consists of a profound failure to take such care as is manifestly required in the circumstances.

Other types of legally relevant damage (sub-paragraph (b)). Where damage of another type is at issue (e.g. damage to property), an exclusion of liability for causing such damage through gross negligence is invalid where it is illegal or offends against the precepts of good faith. Hence, paragraph (2)(b) is linked to the rules in II.–7:301 and in II.–7:302 (Infringement of fundamental principles or mandatory rules) and refers to the rules of the applicable contract law. An exclusion of liability for property damage caused by gross negligence is thus impossible where the national applicable national law stands in opposition to it, e.g. because the law governing the exclusion of liability deals with intention and gross negligence in principle in the same way. Alongside this, VI.–5:401(2)(b) is based on whether, under the circumstances of each individual case, it is to be deemed an offence against the principle of good faith for a personally grossly negligent injuring person to invoke an equivalent contractual exclusion of liability. An implied waiver of liability is to be denied without exception in cases of gross negligence. A contractual exclusion of liability is in any case contrary to good faith even where the injuring person is reasonably insured against the risk of liability for causing damage through gross negligence.

D. Product liability (paragraph (3))

No contractual exclusion of liability. Paragraph (3) adopts the corresponding rule of the product liability directive (Directive 85/374/EEC, art. 12). A contractual exclusion of liability for negligently caused damage to commercial property remains possible. This is not addressed by VI.–3:204(1) (Accountability for damage caused by defective products).

E. Paragraph (4)

Exclusion of liability in cases of ordinary liability in negligence. Paragraph (4) expresses the principle that a pre-emptive exclusion or restriction of liability is possible in all remaining cases. What is essentially involved here is the exclusion of liability in cases of ordinary negligence and the exclusion or restriction of liability without intention or negligence. In turn, II.–9:411 (Terms which are presumed to be unfair in contracts between a business and a consumer) is to be observed here. Liability for damage to body and health caused by slight negligence is also immune from being contractually excluded in standard terms. Of course, the same does not apply to liability without intention or negligence. This is because II.–9:411 requires an "act or omission" on the part of the business and this is lacking in the cases covered by Chapter 3, Section 2 (Accountability without intention or negligence). Where a person is liable without having "done something wrong", that person is liable for neither a positive act nor an omission; but is liable regardless of conduct.

Unless contrary to statute. Also under paragraph (4), an exclusion or restriction of liability is invalid where such a contractual stipulation contradicts the applicable national law. Thus, these model rules leave room for regional statutory rules for individual fields of activity, e.g. for the prohibition of the contractual exclusion or restriction of vehicle owners' liability or for a prohibition of the contractual exclusion or restriction of liability for certain professional groups that are subject to the duty to take out indemnity insurance and have arranged such insurance. In the Member States there is such a large spectrum of such "isolated solutions" specific to certain activities, for which various insurance practices and duties provide the basis, that it did not seem possible to reduce them all to a general concrete principle. An example of paragraph (4) from Community Law is to be found in Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods (OJ L 373/37 of 21 December 2004) art. 8(2), which provides: "Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation … for the

loss and damage sustained by a person injured as a result of discrimination within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered. The fixing of a prior upper limit shall not restrict such compensation or reparation."

NOTES

1. FRENCH jurispridence regards contractual agreements which attempt to exclude liability for torts committed in the future as null and void. The same holds true for agreements which do not impinge on the grounds of liability but solely affect the ambit of liability (immutable line of jurisprudence since Cass.civ. 17 February 1955, JCP 1955, II, 8951, note *Rodière*). Extra contractual liability constitutes an *d'ordre public*. Conversely, an agreement which impinges on the contractual partner's respective rights and obligations following the onset of damage is valid (*le Tourneau*, Droit de la responsabilité et des contrats [2004/2005], nos. 1054-1058).

2. In contrast to France, in BELGIUM, the view is adopted that an injured party is capable of agreeing to a waiver of the (potential) damaging party's liability both prior to and following the onset of damage. This result is possible owing to the fact that the rules on tort liability are neither mandatory nor constitute an *d'ordre public* (Cass. 4 January 1993, Pas. belge 1993, I, no. 1 p. 1; Cass. 15 February 1993, Pas. belge 1993, I, no. 92 p. 171). In general, an "aquilianische Befreiungsklausel" is therefore effective. It is only ruled out in the case of causing intentional damage and where the law expressly provides that a waiver of liability is deemed to be ineffective (*Vandenberghe/Van Quickenborne/Wynant/Debaene*, TPR 2000, 1551, 1702, no. 45). The (at a later stage) injured party is required to, at the very least, have impliedly consented to the waiver of liability (CA Antwerp 16 January 1996, RW 1995-1996, 1417).

3. In SPAIN, it is a contentious issue whether prospective tort liability can be excluded or resticted by contractual agreement. Prevailing academic opinion refutes this suggestion (*Lacruz and Rivero*, Elementos II(2)[4], 515; *Cavanillas Múgica and Tapia Fernández*, La concurrencia de responsabilidad contractual y extracontractual, 56-57; *Santos Briz*, La responsabilidad civil I[7], 37-38; *Álvarez Lata*, Cláusulas restrictivas de responsabilidad civil, 108). *Yzquierdo Tolsada*, Sistema de responsabilidad civil, 370, currently adopts a converse approach, and justifying it, *inter alia*, by adverting to CC art. 1255 which guarantees freedom of contract within the boundaries of the law and public morals. Similarly, however, this author is of the opinion that the constitutional protection afforded to basic fundamental rights also features among the legal boundaries in CC art. 1255 and the aforementioned author derives the following from this state of affairs, namely, that, for example, a hospital cannot hope to restrict or exclude liability for medical negligence by contract means (*Yzquierdo Tolsada* loc. cit. 346). According to law, liability for intentional acts cannot be premptively restricted (CC art. 1102). Occasionally, intention is equated with gross negligence (TS 2 July 1992, RAJ 1992 (4) no. 6502 p. 8492), on ocassion, it is not (TS 25 April 1984, RAJ 1984 (1) no. 1969 p. 1501). ConsProtA art. 86(2) classifies clauses which purport to exclude or restrict liability of professionals for personal injury as an abuse of law. Such contractual provisions are null and void (ConsProtA art. 83(1)). As far as we can tell, the Supreme Court has only dealt with the issue of contractual waivers of extra contractual liability on two occasions. TS 4 July 1953, RAJ 1953 (1) no. 2017 p. 1305 held that a contractual stipulation of a railway company was against public policy and therefore void, which sought to exclude the liability of the railway for passenger's death. Conversly, TS 5 March 1992, RAJ 1992 (2) no. 2390 p. 3232 deemed valid an

arrangement between a bank and an employee, who had embezzled money from the bank, which had the means of making amends as its focus.

4. According to ITALIAN CC art. 1229(1), contracts are null and void which purport to restrict or exclude in advance the liability of the debtor for intention or gross negligence. According to CFI Rome 11 July 1979, Giur.it. 1980, I, 2, 611, this also pertains to waivers of tort liability. It is debatable whether liability for "normal" or ordinary negligence can be contractually modified. This proposition is mostly refuted on the grounds that extra-contractual liability belongs to the realm of the *ordre public* (*Alpa*, Trattato di diritto civile IV, 346-348; *Visintini and Cabella-Pisu*, L'inadempimento delle obbligazioni IX(1)[2], 289-290); naturally, there are strong views in literature and (older) jurisprudence which favour the validity of such arrangements (*Bianca*, Diritto civile V, 66; Cass. 3 July 1968, no. 2240, Giust.civ. 1968, I, 1121). *Ponzanelli*, Le clausole di esonero della responsabilità civile, 204 regards a clause disclaiming liability as possible for property damage but conversly deems it unacceptable in the context of personal injury. Of course, disclaimers of liability are ineffective which infringe an express statutory provision. An example would be product liability.

5. HUNGARIAN CC § 342(1) states that contracts are void which attempt to restrict or exclude tort liability for intentional or grossly negligent infliction of damage. The same applies for causing death, bodily injury, injury to health and for consequences of a criminal act. CC § 314(1) is worded in practically the same manner and regulates contract law. During the debate on reform, a proposal was made to repeal CC § 342(1), on the grounds that the provision is systemically out of place and is expendible (*Ujváriné*, Felelősségtan[7], 82-85), but the proposal is not adopted in the current draft.

6. Similarly, pursuant to BULGARIAN LOA art. 94(1), it is possible to contractually exclude liability for damage which has not been intentionally caused or caused in a grossly negligent manner; however, it is also contentious whether this regulations governs tort liability as well as contractual liability (refuting this e.g. *Kalaydjiev*, Obligazionno pravo, Obshta chast, 343 and *Kojucharov*, Obligazionno pravo I, 261; of a differnt view and supporting this approach *Mousseva*, Dopustima li e avtonomiyata na volyata pri nepozvoleno uvrejdane spored bulgarskoto mejdunarodno chastno pravo, Suvremenno pravo, H. 6/2003 and Supreme Court 16 January 1970, decision no. 47, case no. 780/69 in criminal matters). The view that the frontiers of in LOA art. 94(1) generally include the possibility of disclaiming tortious liability is supported by reference to Consumer Protection Act art. 139, where it is provided that product liability cannot be the subject of a contractual disclaimer. The provision would otherwise be superfluous. The same conclusion can be deriven from POLISH CC art. 437 which provides that liability under arts. 435 und 436 (pertaining to dangerous activities) cannot be excluded or limited in advance.

7. In GERMANY, contractual stipulations exempting or restricting tort liability are generally permissible (BGH 28 April 1953, BGHZ 9, 301, 306; Staudinger [-*Hager*], BGB[13], Pref. to §§ 823 ff, no. 41; Soergel [-*Spickhoff*], BGB[13], Pref. to § 823, no. 99). However, liability for intentional acts cannot be restricted in advance (CC § 276(3)). Many strict liability provisions cannot be the subject of a disclaimer (e.g. Product Liability Act § 14; Liability Insurance Act § 7, Road Traffic Act § 8a; Aviation Act § 49c); additionally, a clause disclaiming liability cannot infringe public policy or be contrary to good faith (e.g. RG 24 April 1908, RGZ 68, 358, 367; CA Stuttgart 7 December 1977, NJW 1979, 2355, 2356; BGH 25 September 1952, BGHZ 7, 198, 207). According to CC § 309 no. 7 a stipulation in standard terms and conditions

which purports to exclude or restrict liability for death, personal injury injury to health which was culpably inflicted and clauses which purport to exclude liability for all types of damage which was caused in a grossly negligent manner are ineffective. If general disclaimers are deemed effective, then clauses which attempt to restrict the amount of compensation due are also valid (Palandt [-*Heinrichs*], BGB[67], § 276, no. 35) as well as stipulations which shorten the prescriptive period within which to bring a claim (CC § 202(1)). It is also possible for an implied restriction of liability for intention and gross negligence to be valid. However, adequate pointers must exist for an implied restriction to be effective (Staudinger [-*Löwisch*], BGB, § 276, no. 118; *Heinrichs* loc. cit. no. 37; CA Koblenz 11 October 2004, NJW-RR 2005, 1048). CA Dresden 27 June 1996, VersR 1998, 1027 held that an implied disclaimer of liability for ordinary negligence was valid in a case which involved assistence rendered gratitously in a risky attempt to salvage a LKW which had gotten stuck.

8. AUSTRIAN case law shows a tendency to qualify an exemption from liability for bodily harm in general contract terms as grossly disadvantaging the other party and therefore void even if merely liability for slight negligence is excluded (OGH 24 March 1998, SZ 71/58 p. 336). Liability for property damage, on the other hand, can be excluded in standard terms and conditions, at any rate for cases of slight negligence, and, within the framework of individual agreements in the domain of courtesy relationships, even to the extent of gross negligence, see *Koziol*, Haftpflichtrecht I[3], no. 18/35 p. 558). For the remainder, it is accepted that nobody can withdraw from legal liability by means of a one-sided declaration. One-sided declarations can destroy the basis of trust and reliance, however, which in an individual case may be the basis of liability, for example with reliance on information or where the public is granted entry into certain premises, the dangerousness of which is pointed out (see also CC § 1319a which restricts liability for the unsafe state of paths and roads to gross fault).

9. In GREECE, restrictions and exclusions on liability are, in principle, permitted (*Stathopoulos*, Geniko Enochiko Dikaio A(1)[2], 343). However, liability for intention and gross negligence cannot be excluded in advance (CC art. 332). Since the amendment CC art. 332 in 2002, every contractual disclaimer of liability is void (even in cases of slight negligence), if the injured party was a servant of the debtor or liability arises from the operation of a business which has been granted a prior concession by a relevant authority wenn der Geschädigte im Dienst des Schuldners steht oder die Haftung aus dem Betrieb eines behördlich konzessionierten Unternehmens entsteht. A contractual disclaimer of liability cannot be effected by incorporated within standard terms and conditions; moreover, in individually negotitated agreement, a disclaimer of liability be invalidated if there is an attempt to use this as a vehicle for the restriction or exclusion of liabilty for corporeal and incorporeal personality rights. Special statutes ordain that clauses excluding liability are void under product liability law or under the law pertaining to the liability of service providers (see further *Stathopoulos* loc.cit. 335). It is a matter of interpretation as to whether a clause disclaiming liability pertains to contractual or tortious liability; if there is any doubt, the view taken is that the exclusion of extra–contractual liability was intended (*Stathopoulos* loc.cit. 343; *Georgiades*, Enochiko Dikaio, Geniko meros, 255).

10. In PORTUGAL parties to a contract can in advance agree on the amount of compensation or its maximum limit (*Pinto Monteiro*, Cláusulas limitativas e de exclusão de responsabilidade civil, 91; STJ 25 March 2004; STJ 13 February 2001; see also the notes under VI.–6:202). CC art. 809 is intrepreted by a number of legal writers to solely govern the validity of exemption of liability for intention or gross

negligence (*Pessoa Jorge*, BolMinJus 1978 [281] 5, 9 and 18; *Pinto Monteiro* loc. cit. 237; unclear STJ 9 July 1991, BolMinJus 409 [1991] 759). It is the matter of some dispute whether CC art. 809 may even be applied in the context of extra-contractual liability. *Pessoa Jorge* loc. cit. 22 is of the view that it may be applied, however, subject to the caveat that liability cannot be excluded in the case of personal injury and in cases which concern damage which flows from the commission of a criminal offence; such contracts are contrary to public policy. Liability for auxiliaries can generally be excluded unless these persons infringe obligations imposed by norms of public order (CC art. 808(2)). Consequently, it is even possible to exclude liabilities for intentional acts of auxilaries (*Vaz Serra*, BolMinJus 72 (1958) 287-289; *Pessoa Jorge* loc. cit. 31; *Pires de Lima and Antunes Varela*, Código Civil Anotado II[3], note to art. 800; critical, on this point *Pinto Monteiro* loc. cit. 245, 264). Similarly, in Portugal, it is not possible to exempt liability for product liability (Decree-law 383/1989 art. 10). Such clauses are regarded as "not having been drafted".

11. In a similar fashion, DUTCH Law generally adopts the possibilty of a exempting liability by contractual means as a starting point., however, restricts it via an array of mandatory statutory provisions (e.g. CC arts. 6:192 [product liability], 7:24 und 7:6 [Purchase by consumer], 7:463 [medical assistance], 7:658(3) [liability of employers] and 7:762 [liability of construction company]). However, CC art. 7:463 does not preclude an exemption of liability pursuant to CC art. 6:109 (Onrechtmatige Daad IV [-*Slabbers*] chapter VI.3, note 18 p. 261; *Stolker*, AA 1995, 13; *de Vries*, AA 1995, 186-192). According to CC art. 7:508, tour operators are not permitted to exclude or restrict liability for death or personal injury of their clients. The aforementioned only applies to damage to property if this damage was caused in an intentionally or grossly careless manner (CC art. 7:509). However, it is possible to exempt liability for the intentional or grossly negligent actions of subordinates (CC art. 6:170) (HR 26 March 1920, NedJur 1920, 476 und HR 3 June 1938, NedJur 1938 no. 920 p. 1290; the reform of the law has not impinged on this state of affairs). This is only precluded in the context of standard terms and conditions (CC arts. 6:233, 6:237(f)). The acts of the directors of a company are deemed to be the acts of the legal person itself (HR 20 February 1976, NedJur 1976 no. 486 p. 1418; HR 31 December 1993, NedJur 1995 no. 389 p. 1719 und HR 12 December 1997, NedJur 1998 no. 208 p. 1086), with the result that the rules pertaining to subordinates do not apply. Mandatory tort law can also be found in ad hoc statutes e.g. in the Act concerning Liability for Oil Tankers (*Wet van 11 juni 1975, tot uitvoering van het op 29 november 1969 te Brussel tot stand gekomen Internationaal Verdrag inzake de wettelijke aansprakelijkheid voor schade door verontreiniging door olie*) art. 10. Disclaimers must meet the requisites of general contractual provisions, therefore, one contratual partner is not permitted to grossly disadvantage the other and disclaimers must not contravene public policy. The latter is established if there is an attempt to exclude liability for intention or gross negligence (see further Compendium Vermogensrecht volgens het nieuwe BW [-*Hartkamp*] note 274a pp. 266-267).

12. ESTONIAN LOA § 1051(2) corresponds to VI.–5:401(1). While there is no provision that equates to VI.–5:401(2), the same result is frequently achieved by resorting to contractual legal norms which govern the nullity of contracts which contravene law or public policy. VI.–5:401(3) corresponds to LOA § 1067. The regulation in VI.–5:401(4) is derived from the general principles on freedom of contract.

13. SWEDISH Damages Liability Act chap. 1 § 1 and FINNISH Damages Liability Act chap. 1 § 1 expressly provide that the following provisions of that Act only apply in the event that nothing else has been contractually agreed. On the other hand, DANISH EAL § 27 provides that the parties are not generally permitted to deviate from the

statute; thus contractual arrangements providing for such a scenario are generally ineffective. However, by means of this regulation, contractual stipulations providing for an exemption of liability are generally not prohibited because the statute only governs the consequences of liability and not the foundation of liability (*Møller and Wiisbye*, Erstatningsansvarsloven[6], 585). The Nordic countries generally adhere to the principle of free concurrence of claims. However, contractual restrictions on liability also operate in the realm of extra-contractual liability unless they are solely designed to govern contractual liability (then extra-contractual liability remains untouched and this plays a significant role especially in the context of occupational liability *Hellner and Radetzki*, Skadeståndsrätt[7], 95; *Gomard*, Forholdet mellem erstatningsregler i og uden for kontraktsforhold, 40; *id.* Obligationsret II, 143; *Ulfbeck*, Kontrakters relativitet, 94; *Langsted*, Rådgivning I, 153; *Hakulinen*, Obligationsrätt, 230). Consumer protection law aside, contractual and tortuous exemptions from liability run parallel to each other: liability that can be effectively excluded under contract law, can also be exempted under tort law (*Kleineman*, JT 2001-02, 625, 634). It is not possible to exempt liability for intention or gross negligence, at any rate, in the contextof personal injuries (*Hellner and Radetzki* loc. cit. 91; Danish Eastern CA 22 November 2002, UfR 2003, 500; *Hakulinen* loc. cit. 231). Further, it is not possible to exclude the liability of an employer, if this hast he effect of extending the personal liability of an employee (Danish EAL § 27; Finnish Damages Liability Act chap. 7 § 1; Swedish Contracts Act § 36); therefore, employer's liability can be regarded as a category where it is not possible to exempt future liability. On the other hand, liability for damage by to intellectual property rights by products can be validly exempted or restricted (*Ulfbeck*, Professionsansvar og produktansvar, 171, 198). An important area for disclaimers of liability is pure economic loss which results from incorrect advice or incorrect information (HD 14 October 1987, NJA 1987, 692; HD 19 December 2001, NJA 2001, 878; *Kleineman* loc. cit. 625-635).

Illustration 1 is taken from CA Dresden 27 June 1996, VersR 1998, 1027.

Section 5: Loss within VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death)

VI.–5:501: Extension of defences against the injured person to third persons

A defence which may be asserted against a person's right of reparation in respect of that person's personal injury or, if death had not occurred, could have been asserted, may also be asserted against a person suffering loss within VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death).

COMMENTS

Aim. This Article contains the rule that every defence which is available to the injuring person against the directly injured person, may also be asserted against the latter's dependants or surviving dependants (VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death)). This corresponds to a consideration of justice that is widely acknowledged in Europe: where the injured person could not have brought a personal claim, or at any rate must bear a reduction of its extent, the same applies to the detriment of persons who derive rights from the injury or death of that person.

Examples. The Article pertains to every defence in this Chapter. Third party claims are e.g. excluded where the injured person validly consents to treatment or had participated in a team sport having accepted the risks. They are likewise ruled out where the person directly affected has been killed or injured in an emergency situation requiring self-defence or had validly agreed to a contractual exclusion of liability. Even contributory fault is not an exception. Where the injured person is ascribed half of the fault for the mishap, the claims of family members and surviving dependants are reduced to 50% of the amount of damages to which they are otherwise entitled.

NOTES

1. According to FRENCH law, a person will be partly relieved of liability, if it can be established that fault on the part of the victim contributed to the cause of the damage. This is a valid proposition when the primary victim seeks compensation and also if a secondary victim asserts a claim for damages for the death or injury of another and in this manner seeks to enforce his or her own claim for damages. The subject matter of the secondary victim's claim is different to that of the primary victim (this remains the case even if the secondary victim is the primary victim's successor in title); however, both claims arise from the same set of facts (Cass.ass.plén. 19 June 1981, D. 1981. I, 641, note *Larroumet*; D. 1982, Jur. 85, concl. *Cabannes*, note *Chabas*; JCP 1982, II, 19712, rapport *Ponsard*; GazPal 1981, II, 529, note *Boré*; RTD civ 1981, 857, obs. *Durry*). The same rule applies in BELGIUM (and also in the context of *Gardien* liability: Cass. 30 September 2004, Pas. belge 2004, I, no. 444 p. 1437) and in SPAIN (Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Pantaleón Prieto*], Código Civil II[2], art. 1902 p. 1998; TS 18 July 2006, BDA RJ 2006/4952; TS 8 July 2005, RAJ 2005 (7) no. 9577 p. 20268 [reduction of the damages awarded to the widow of the deceased because of his contributory fault in the accident which occurred in a bullfighting festivity]). In the event that the contributory fault of the injured or deceased primary

victim completely overshadows that of the defendant, then his dependants' claim for compensation is consequently excluded (TS 26 May 2006, RAJ 2006 (3) no. 3786 p. 8795).

2. If a person is killed or injured and the actor relies on a ground of justification, then the *antigiuridicit*à is excluded also in respect of the claim asserted by the secondary victim; therefore, in a similar fashion, the latter is not entitled to assert a claim for compensation under ITALIAN law (*Navarretta*, Diritti inviolabili e risarcimento del danno, 210; *Gozzi*, Der Anspruch iure proprio auf Ersatz des Nichtvermögensschadens wegen der Tötung eines nahen Angehörigen in Deutschland und Italien, 134-135). The same holds true with respect to contributory negligence of the *de cuius*. It results in a reduction in the ambit of the claims of close relatives (CC arts. 2056 and 1227; Cass. 25 July 1957, no. 3143, Rep.Foro it. 1957, voce Resp. civ. no. 308; Cass. 20 March 1959, no. 849, Giur.it. 1959, I, 966). The jurispriudence of the Corte di Cassazione leaves no room for doubt that contributory negligence on the part of the primary victim can work to the disadvantage of dependants if they wish to assert a claim *iure proprio*. The reduction in the claim is a consequence of the primary victim's conduct (Cass. 18 February 1971, no. 430, Rep.Giur.it. 1971, voce Resp. civ. no. 117 and no. 311; Cass. 29 September 1995, no. 10271, Giust.civ.Mass. 1995, 1689; Cass. 6 October 1999, no. 11137, Giust.civ.Mass. 1999, 2079; *Gozzi* loc. cit. 153-154).

3. HUNGARY does not have an express statutory provision which corresponds to VI.–5:401. As far as we can tell, the subject matter of the latter has not been considered further. However, the general norms concerning the legal effect of grounds of defence permit the conclusion to be drawn that the general legal position does not deviate from that contained in VI.–5:401. In BULGARIA, it is recognised that the secondary victim can also avail of grounds of defence that are at the disposal of a primary victim. According to the rules governing assignment, this also applies if the claim of the injured party passes to its insurer (Decree no. 7 of the Supreme Court of 4 October 1978). This corresponds to the current legal position in ROMANIA (*Adam*, Drept civil. Teoria generală a obligaţiilor, 260; *Lupan*, Răspunderea civilă, 88).

4. Where a plaintiff seeks to assert their own claim for damages for loss caused owing to the death of another under CC §§ 844 und 845, under GERMAN CC § 846, the contributory fault of the deceased person will operate to reduce the plaintiff's claim for compensation. The same holds true in the case of an operational risk which contributed to the cause of the damage (CC § 254 applied with appropriate adapations). Similarly, in so-called nervous shock cases, the contributory fault of the injured primary victim will be imputed to the secondary victim who has suffered psychiatric injury. This can be adduced from CC § 242 (Palandt [-*Heinrichs*], BGB[67], § 254, no. 57; Erman [-*Kuckuk*], BGB I[11], § 254, no. 82; BGH 11 May 1971, NJW 1971, 1883, 1885). The foregoing equates to the legal position in AUSTRIA (loss of maintenance: EKHG § 7(2); *Koziol*, JBl 1997, 207; damages for grief and nervous shock: OGH 23 September 2004, ecolex 2005, 112).

5. In PORTUGAL, while there is no express statutory provision on this issue, case law does set forth that the defences which may be asserted against a person's right of reparation may also be asserted by a third person who suffers a loss subsequent to another's personal injury or death. If the primary victim's contributory fault prevails, then, consequently, the secondary victim has no claim for compensation (STJ 19 October 2004), and this is even the case if the primary victim is a child (STJ 28 January 1992, BolMinJus 413 [1992] 554; STJ 21 June 1994; CA Oporto 5 April 2001). Of course, the primary victim's wrongdoing must have, at the very least,

contributed to cause the accident; if this prerequisite is not met, then a reduction of the extent of the claim will not take place (STJ 17 October 2006; STJ 11 January 2007).

6. DUTCH CC art. 6:107(2) makes clear that a tortfeasor can avail of the very same defences in action against a secondary victim as would have been available in a personal injury action initiated by a primary victim. CC art. 6:108(3) contains the same regulation for accidents which result in death. CC art. 6:184(2) echoes these principles in connection with the reparation for measures adopted to avert or reduce the damage. ESTONIAN Law also does not feature an express regulation governing this matter, however, an implicit rule can be derived from the internal logic of the law on liability which is in force there. A person who does not act in an illegal manner towards the primary victim must therefore also be capable of asserting the same grounds of justification in the action initiated by the secondary victim.

7. According to SWEDISH Damages Liability Act chap. 6 § 1, a claim for compenstion for personal injury as a result of contributory fault may only be reduced in extent if the injured party contributed either intentionally or in a grossly negligent manner to the cause of his injury; this ground of defence may not be exerted against third parties (*Hellner and Radetzki*, Skadeståndsrätt[7], 227). A different approach is only adopted in the case of a suicide, however, it should be noted that even this exception is subject to restrictions imposed on equitable grounds (HD 14 October 1981, NJA 1981, 920; see *Dufwa*, Flera skadeståndsskyldiga, nos. 4354-4355; and *Hellner and Radetzki* loc. cit. 226). While Sweden genereally rejects “principle of identification” on the basis of victim protection, the law in DENMARK corresponds to that which is governed by VI.–5:501 (*von Eyben and Isager*, Lærebog i erstatningsret[6], 376; HD 6 October 1958, UfR 1958, 1119), and this is also true for the law governing road traffic accidents (Traffic Act § 101(2), see HD 15 November 2002, UfR 2003, 339 [gross contributory fault of a mother who was killed in an accident, led to a reduction of the claims of her children to the same extent as her claim would have been reduced had she been had lived]; Western CA 9 June 1993, UfR 1993, 785 and HD 29 October 1999, UfR 2000, 197). In FINNISH legal writing, there are calls for restraint when dealing with the principle of identification (*Saxén*, Tillägg till Skadeståndsrätt, 407). There is, however, no basis in law for this assertion and the courts have not hesitated to reduce the claims of surviving dependants on the basis that the deceased played a major contributory role in the cause of the accident (Supreme Court 25 June 1980, KKO 1980 II 72; Supreme Court 23 April 1998, KKO 1998:46).

CHAPTER 6: REMEDIES

Section 1: Reparation in general

VI.–6:101: Aim and forms of reparation

(1) Reparation is to reinstate the person suffering the legally relevant damage in the position that person would have been in had the legally relevant damage not occurred.

(2) Reparation may be in money (compensation) or otherwise, as is most appropriate, having regard to the kind and extent of damage suffered and all the other circumstances of the case.

(3) Where a tangible object is damaged, compensation equal to its depreciation of value is to be awarded instead of the cost of its repair if the cost of repair unreasonably exceeds the depreciation of value. This rule applies to animals only if appropriate, having regard to the purpose for which the animal was kept.

(4) As an alternative to reinstatement under paragraph (1), but only where this is reasonable, reparation may take the form of recovery from the person accountable for the causation of the legally relevant damage of any advantage obtained by the latter in connection with causing the damage.

COMMENTS

A. Chapter six in overview

Reparation, compensation, prevention. This Chapter deals with the legal consequences of non-contractual liability. Section 1 provides rules for all forms of reparation. Section 2 provides special rules for the monetary reparation of damage ("compensation"). Section 3 addresses issues of damage prevention. Claims for the costs incurred in the prevention of imminent damage also fall under this Section. Section 1 applies in principle (i.e. as far as possible with due regard to the nature of the thing) to all remedies, Section 2 only to monetary damages, and Section 3 solely to the preventive protection of rights.

Overlap between reparation and prevention. In certain special cases there can be an overlap between reparation and prevention. Here the injured person can choose which of these remedies to claim.

> *Illustration 1*
> A man has sexually abused a minor for two years. Then he has the portrait of the boy tattooed on his chest. The boy claims the removal of the tattoo, which is a constant affront to his personal dignity. This claim is as much a claim in damages (VI.–6:101(1) and (2)) as a claim under VI.–1:102 (Prevention) in conjunction with VI.–6:301 (Right to prevention).

Relationship to Chapter 2. This Chapter applies only where the claimant has suffered legally relevant damage or where such damage is imminent. Chapter 2 states what legally relevant damage is. This Chapter is concerned with the liable person's obligation to provide compensation for causing such damage. The answers to such questions as what is meant by

"loss" are therefore to be found not in this Chapter, but in Chapter 2 (see e.g. VI.–2:101 (Meaning of legally relevant damage) paragraph (4), VI.–2:201 (Personal injury and consequential loss) paragraphs (1) and (2), and VI.–2:202 (Loss suffered by third persons)).

Substantive law, not procedural law. This Chapter deals exclusively with questions of substantive law. Matters relating primarily to procedure or enforcement are beyond the scope of application of these model rules (I.–1:101 (Intended field of application) paragraph (2)(h)). Rules on the assessment of damages are regarded for this purpose as being of a procedural nature, as are such questions as whether and to what extent appellate courts may review decisions taken by courts of first instance charged with establishing the facts.

B. The Article in overview

Aim and forms of reparation. The Article relates to the aim and forms of reparation. Paragraph (1) expresses the general principle that a person who is obliged to make reparation must reinstate the situation which would have existed if the event giving rise to liability had not occurred. This general principle applies to the type as well as the extent of compensation. The question of *how* the damage is to be made good is answered by paragraph (2), which states that reparation must be made in a manner that best befits the type and measure of damage in the circumstances of the case. Paragraph (3) provides special rules on the amount of compensation payable where things are harmed and animals injured. Finally, paragraph (4) opens up the possibility of claiming the profit gained from the wrongful activity, instead of restoration of the previous situation.

C. Restoration of the previous situation (paragraph (1))

The principle of restitution in kind. The injuring event should be "undone" as far as possible by the obligation to provide damages. Therefore, in principle the injuring person has to restore the situation which would have existed had the harm not been occasioned. This is the principle of restitution or restoration in kind. *How* the original situation is restored is another question. It can be done in various ways. The injuring person can perform the necessary work, or commission a third party to do so or pay the injured person money, so that the latter can eliminate the damage, either personally or in turn through a third party commissioned to do so. Where the injured person undertakes the removal of the damage personally or has it done by another, the claim in damages is for the costs incurred.

Restitution in kind and full restitution. Restitution in kind indeed means restoration of the situation that would have existed were it not for the injuring event, but not necessarily restoration through the injuring person's personal work or through the work of someone who is commissioned to do so. Damages in the form of the payment of money (compensation) can also be restitution in kind or be in furtherance of it. In this case the principle of restitution in kind has the task of contributing towards concretising the amount of money falling due. It is subject to the principle of full restitution: in the case of compensation the amount of money which is necessary for the complete elimination of the damage falls due, no less, but also no more.

> *Illustration 2*
> A is the owner of items of clothing specified for sale. B soils the goods. They can be cleaned; however, after they are cleaned, they are no longer suitable to be sold as new. The payment of cleaning costs does not provide total restitution for the damage; the overall loss in value is what is in fact to be compensated.

Illustration 3

The wooden floorboards in a house are damaged. It proves to be impossible to even partially repair them; the entire flooring must be re-laid. The owner must incur a "new for old" deduction; without such a deduction, the laying of completely new flooring would lead to an unjustified enrichment on the part of the injured person, in that it would exceed the target for full restitution.

No punitive damages. The punishment of wrongdoers is a question for criminal law, not private law. Under these model rules, punitive damages are not available. They are not consistent with the principle of restitution in kind or with that of full restitution.

D. Damages in money or by other means (paragraph (2))

General. Paragraph (2) concerns the question how reparation is to be made. The answer is: in money ("compensation") unless another form of reparation ("reparation in kind") is better suited to the nature and extent of the damage. While paragraph (2) does not expressly give normative precedence over other forms of reparation to monetary compensation, the provision of damages is still, purely "statistically", the most reasonable form of reparation. In cases of injuries to body and health - apart from minor wounds occurring in everyday life - every other type of reparation, practically without exception, is inapplicable and in cases of property damage or loss of property of another kind (e.g. as a consequence of false information) things are no different.

Reparation not in money. There are of course cases in which only a claim for reparation in kind (i.e. not in money) can carry into effect the basic principle formulated in paragraph (1). The claim in damages against a thief, for instance, is first and foremost directed at the return of the thing; if this were different, the practical result under the law on damages would be to aid and abet an obligatory sale of property. The main field of application of reparation in kind is without doubt the law on infringements of incorporeal personality rights. The retraction of a statement about another is a common example, but not the only one. Moreover such a retraction is often not sufficient to make good the damage. Paragraph (2) can therefore also justify the right to demand the publication by the injuring person of a corrective judicial decision in the same manner as the incriminating comments were published.

Forms of reparation not mutually exclusive. Damages are not necessarily always to be performed either exclusively in the form of a payment of money or in the form of reparation in kind; it may be that the damage suffered can only be completely removed by the payment of money *and* a certain *de facto* act.

Illustration 4

A construction company causes damage to the claimant's house and removes the damage using its own people. That does not change anything with regard to its obligation to pay the cost of renting a replacement apartment, into which the claimant must move until the repair work is finished.

E. Economic total loss (paragraph (3))

An exception to paragraph (1). It follows from paragraph (1) that the entire damage is to be compensated; as stated, the principle of full restitution applies. Where a thing is harmed and the necessary expense of repairing it exceeds its value, the question arises of what "full restitution" means in such a case. Under paragraph (1) it is arguable that it does not depend on the value but on the amount of the repair costs. This is because the protection of property

rights also means that the integrity of concrete assets is protected and their restoration is only possible by the (albeit costly) repair of the damaged thing. In many situations, however, that would lead to the result that an unreasonable burden is placed on the liable person. Consequently, paragraph (3) limits the extent of reparation in accordance with the majority of the Member States' legal systems. Where the repair costs are disproportionately high in relation to the loss in value of the thing, compensation is restricted to the loss in value. It is not possible to give a single answer to the question of when the repair costs will exceed the loss in value in an unreasonable fashion. In the normal case, especially cases of vehicle damage, a scale of 30% may serve as a guideline, but that is nothing more than a general figure. Where things not only have a material value, but also a non-material value to the owner for understandable reasons, increased repair expenses may also be reasonable.

Animals. The second sentence of paragraph (3) provides an exception for animals, according to the purpose for which they are kept. Where normal production animals are at issue (e.g. a farmer's cows) the reparation falling due remains limited to their market value (plus a marginal amount in excess of that for veterinary treatment, as the case may be); in the case of domestic animals kept by families, such a limit does not correspond to the legally protected interest of the owner.

F. Recovery of profit instead of compensation of loss (paragraph (4))

Siphoning-off of profits. Not being concerned with reinstatement, paragraph (4) provides another exception to paragraph (1). It involves infusing into the law on damages the principle that the profits made from a civil wrong should not be retained by the wrongdoer.

Systematical issues. Paragraph (4) clarifies two systematical issues. The recovery of profits has not been assigned to the law on benevolent intervention in another's affairs nor solely to the law on unjustified enrichment. The law of benevolent intervention in these model rules is confined to genuine and justified intervention in and conducting of another's affairs (see V.–1:101 (Scope of application)).

Relationship to the law of unjustified enrichment. Paragraph (4) bears a very close resemblance to the situations that are the subject-matter of VII.–4:101 (Instances of attribution) sub-paragraph (c) in the Book on unjustified enrichment. That rule pertains to enrichments as a result of the interference with another's rights and interests, i.e. enrichments through actions, which usually constitute a civil wrong as well. VII.–4:101(c) indeed goes beyond the law on non-contractual liability to the extent that it denies a *bona fide* person the advantages of exploiting another's goods and interests and deems such a person liable to surrender the fruits even where and so far as the entitled party did not want to exploit the goods or interests personally and thus suffered no loss (or damage). Notwithstanding that, paragraph (4) seemed indispensable because although this provision has an unjustified enrichment "varnish", it is solely concerned with following the intrinsic logic of the law on non-contractual liability for damage caused to another. Potential wrongdoers are warned that there is no profit to be made from a civil wrong. Furthermore, paragraph (4) is intended to ease the burdens on the courts, sparing them from carrying out another, separate unjustified enrichment test in addition to the one under this branch of the law. In many cases the law of unjustified enrichment and the law on non-contractual liability through their separate means of reasoning will reach the same or at least similar results. This is because the cases dealt with here will usually concern people acting in bad faith and they will not only be liable under the law of unjustified enrichment for the fruits of the exploited benefit but will also not typically have the defence of disenrichment (VII.–6:101 (Disenrichment) paragraph (2)(b)). To the extent that the wrongdoer satisfies the claim under paragraph (4) of the present Article,

concurrent liability under the law of unjustified enrichment is then extinguished (VII.–7:102 (Concurrent obligations) paragraph (1)(b)).

Commercial trademark rights and copyright. Paragraph (4) is of particular significance in the law governing the infringement of incorporeal personal interests worthy of legal protection. Under the law on liability for commercial trademark rights and copyright, the claim to recovery of profits has been particularly moulded by a range of special laws (see e.g. Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights art. 13(1)(a)); the same is true for the law against unfair competition. These provisions are not affected by VI.–6:101(4); as long as they conclusively govern the subject-matter they enjoy precedence of application over the general law on non-contractual liability (VI.–1:103 (Scope of application) paragraphs (d) and (c)).

Right of choice. Paragraph (4) provides the injured person with a right to choose between a claim to reparation of the actual loss occasioned and a claim to the recovery of the injuring person's profit, i.e. another method of quantifying the claim to reparation due to the detriment suffered. The claim to recovery of the injuring person's profit proceeds from the fiction that the injured person would have been able to exploit the relevant rights in the same way and with more or less the same economic success as the injuring person. Only where such a fiction is entirely inappropriate in the circumstances of the case can the court reject the exercise of the right of choice as abusive.

NOTES

I. Nature and Extent of the Compensation

1. According to FRENCH law, a claim for reparation of damage caused by a *faute civile* enjoys constitutional protection (Conseil constitutionnel 22 October 1982, D. 1983 jur. 189, note *Luchaire*; *le Tourneau*, Droit de la responsabilité et des contrats [2006/2007], no. 2438). The *responsabilité civile* is directed at restoring the victim in as far as possible to the same position as s/he would have been in, had the damaging event had not occured (Cass.civ. 7 December 1978, Bull.civ. 1978, II, no. 269 p. 207). The victim should not be enriched nor be burdened with a loss (Cass.civ. 23 January 2003, Bull.civ. 2003, II, no. 20 p. 16: *ni perte ni profit*). The reparation can take the form of a *réparation en nature* (unwavering jurisprudence since Cass.req. 6 December 1869, D. 1871, I, 56) or *réparation par équivalent*. By means of *réparation en nature,* the *status quo ante* is restored; the *réparation par équivalent* is achieved by the payment of a sum of money. *Réparation en nature* is of particular importance in the context of physical damage to property; conversely, the latter principle is not applicable in the context of personal injury and is only exceptionally granted in the case of a *dommage morale* (*Flour/Aubert/Savaux*, Le fait juridique[11], no. 385 p. 411). The duty imposed on the damaging party in respect of the payment of the victim's costs incurred while attempting to rectify the damage is regarded as a particular manifestation of the *réparation en nature* (Cass.civ. 19 November 1975, RTD civ 1976, 550, note *Durry*; see further *le Tourneau* loc. cit. no. 2447). As a general rule, *réparation en nature* is not only granted when the wrongdoer himself performs the necessary work but is also available if s/he pays or must pay for its performance by another (Cass.civ. 9 July 1981, GazPal 1982, jur., 109, note *Chabas*). The decision on whether compensation is to be made on the basis of *réparation en nature* or *réparation par equivalent* is generally taken by the court of first instance at their discretion

(Cass.com. 5 December 1989, Bull.civ. 1989, IV, no. 307 p. 207). However, the Court of Cassation supervises the exercise of this discretion on the following point, striving to ensure that the cost of repairing a thing does not exceed the cost of its replacement (Cass.civ. 7 December 1978, Bull.civ. 1978, II, no. 269 p. 207). Only when its replacement is impossible, then, exceptionally, the cost of repairs greatly exceeding the value of the thing may be awarded (CFI Créteil 26 May 1981, JCP éd. G 1982, 19745, note *Chabas*).

2. Similarly, in BELGIUM, the prevailing maxim holds that purpose of reparation is to restore the injured party to the position that s/he would have been in, had the damage not occurred (Cass. 13 April 1995, Pas. belge 1995, I, no. 201, p. 423). The victim has a claim for reparation of the entire damage, not more and not less (*van Gerven* [-*Covemaeker*], Verbintenissenrecht II^{2}, 456). Similar to the position adopted in France, a distinction is drawn between *herstel/réparation en nature* and *vergoeding/réparation en équivalent*, namely, between the actual restoration of the *status quo ante* and its monetary equivalent (*Simoens,* Schade en schadeloosstelling, no. 33 p. 64). The injured party can request restitution in kind, if this is feasible and the redress sought does not amount to an abuse of law (Cass. 26 June 1980, Pas. belge 1980, I, 1341). A commonly used example is the return of a stolen article (Cass. 8 May 1952, Pas. belge 1952, I, 570). The reparation awarded for repairing a damaged good may not exceed the market value of that good (Cass. 23 October 1986, RW 1986-87, 54). *Réparation en équivalent* is always owed if restitution in kind is impossible; it falls to the court to decide on the amount of reparation and it decides this matter by reference to the concrete circumstances of the case at hand and, if necessary, *ex aequo et bono* (*Covemaeker* loc. cit. 457-458). If the injured party took it upon himself to rectify the damage because he was legally or contractually obliged to do so, then no claim for reparation can be made on the grounds that either the aforementioned obligation broke the chain of causation (so Cass. 28 April 1978, RW 1978-79, 1695, note *Dumon* [the city of Antwerp was not able to claim the costs of salvaging a sunken ship from the person who caused the ships to collide because the city was statutorily bound to undertake a salvage operation] and Cass. 26 September 1979, Pas. belge 1981, I, 119) or the assumption is justified that there was no legally relevant damage (according to more recent jurisprudence which rejected the claims of the State to continued payment of wages and social security contributions where a civil servant was injured: Cass. 19 February 2001, Pas. belge 2001, I, no. 97 p. 322, no. 98 p. 327, no. 99 p. 329 and no. 100 p. 332 as well as Cass. 20 February 2001, Pas. belge 2001, I, no. 101 p. 334). To conclude, restitution in kind is also a feature of LUXEMBOURGIAN law (CFI Luxemburg 27 March 1954, Pas. luxemb. 16 [1954-1956] 181).

3. Similarly, under SPANISH law, a distinction is drawn between compensation in money (*indemnización*) and restitution in kind; the latter is described in the following terms, namely *restitución, resarcimiento* or *indemnización en forma específica*, occasionally, it is also designated as *reparación en especie* or *reparación in natura* (*Yzquierdo Tolsada*, Sistema de responsabilidad civil, 477; *Díez-Picazo and Gullón*, Sistema II^{9}, 559; *Roca i Trias*, Derecho de daños^{3}, 181; *Carrasco Perera*, Aranzadi Civil 1996, II, 51-68). Restitution in kind is the basic rule; *indemnización* is the exception to the rule and is utilised in cases where restitution in kind is not possible (Albaladejo [-*Santos Briz*], Comentarios al Código Civil y compilaciones forales XXIV, art. 1902, p. 188; *Lete del Río*, Derecho de obligaciones II^{3}, 211; *Lacruz and Rivero*, Elementos II(2), 512; *Díez-Picazo and Gullón*, Instituciones de Derecho Civil I, 837). This can be deduced from CC art. 1096 and from CP art. 110. CP art. 110 provides, however, for three ways of reparation: (i) restitution; (ii) reparation in kind, and (iii) compensation of economic and non-economic losses. Reparation in kind also

plays an important role within the scope of protection of incorporeal personality rights, see Law on Civil Protection of the Rights to Honour, to Private Life and to one´s own Image art. 9(2) (which e.g. lists the publication of a judgment as a possible form of compensation) and *Ley Orgánica* 2/1984, of 26 March 1984, *reguladora del derecho de rectificación* (which allows any natural or legal person to obtain the correction of any information which is inaccurate and potentially harmful). A claim for monetary compensation is, however, not precluded by these other means of making reparation (Salvador Coderch [-*Martín Casals*], El mercado de las ideas, 383-384). In comparative terms, the Spanish courts frequently order the remedy of the publication of the judgment (e.g. TS 25 January 2002, RAJ 2002 (1) no. 31 p. 51). The choice between the various types of redress is controlled by the courts (TS 22 October 1932, RAJ 1932-33 (1) no. 1245 p. 526; TS 24 March 1952, RAJ 1952 no. 1209 p. 862; TS 3 March 1978, RAJ 1978 (1) no. 954 p. 829; *Lacruz and Rivero* loc. cit. 513; *Díez-Picazo and Gullón*, Sistema II[8], 181). In the context of physical damage to property, restitution in kind (performed by the injured party or paid by him/her) or *resarcimiento por equivalente (*compensation for lost value*)*. The latter is then the sole form of reparation if restoration of the *status quo ante* is impossible or unreasonably expensive (*Lacruz and Rivero* loc. cit. 553; *Lasarte*, Principios de Derecho Civil II(2), 432; *Yzquierdo Tolsada* loc. cit. 478; *Roca i Trias* loc. cit. 181). The property owner is not obliged to choose the alternative that would have the least impact on the damaging party's pocket (Albaladejo (-*Carrasco Perera*), Comentarios al Código Civil y compilaciones forales XV(1), art. 1106, p. 669). In the absence of an application to the contrary, the courts favour restitution in kind (*Luna Yerga*, InDret 2/2002; CA Badajoz 2 March 1998, AC 1998 (1) no. 406 p. 584; CA Álava 12 September 1996, AC 1996 (3) no. 2482 p. 1326; CA Badajoz 3 September 1996, AC 1996 (2) no. 1512 p. 1083). This corresponds to the regulation contained in CP art. 111(1)(i). Whether the current market price of a vehicle constitutes the the upper limit of repair costs that can be recovered is contentious (of this view TS 30 October 1997, RAJ 1997 (5) no. 8563 p. 13711 and CA Pontevedra 21 July 2006, BDA JUR 2006/216508; rejecting this approach, TS 3 March 1978, RAJ 1978 (1) no. 759 p. 671; TS 9 July 1987, RAJ 1987 (3) no. 5213 p. 4973; CA Cantabria 5 November 1993, BDA AC 1993/2307; CA Baleares 10 October 2006, BDA JUR 2006/278350 and many others). A number of courts do not take the current market value as a benchmark, instead they look to the value in the use of the car (*valor de uso* oder *valor de reposición*), which connotes approximately 20 to 30% of the current market value of the car before the accident occurred (CA Huesca 11 January 1994, BDA Civil 1994/39; CA Asturias 1 December 1994, BDA Civil 1994/2129) (even 50% CA Cuenca 18 September 1997, BDA Civil 1997/1794; CA Cáceres 31 March 1997, BDA Civil 1997/502; CA Badajoz 25 February 1998, AC 1998 (1) no. 142, p. 216). Frequently, a deduction "new for old" (*deducción nuevo por viejo*) is made (CA Asturias 9 January 1998, BDA Civil 1998/2967; CA Cantabria 1 March 1999, AC 1999 (1) no. 656 p. 917).

4. In ITALY, compensation (*risarcimento del danno*) is achieved through the payment of a sum of money (*risarcimento per equivalente*) or restitution in kind (*riparazione* oder *risarcimento in forma specifica; reintegrazione in forma specifica; risarcimento in natura*). The injured party can request that s/he be restored to the position that s/he would have been in had the event giving rise to liability not occurred, provided and insofar as this is possible (CC art. 2058). The court can however order compensation by payment of a monetary sum if reinstating the status quo ante would prove to be an unreasonable burden for the debtor. *Risarcimento in forma specifica* does not only comprise oft he reinstatment of the creditor's earlier position but is also extant when the debtor pays the sum of money necessary to reinstate the status quo ante (*di Majo*,

La tutela civile dei diritti III[4], 269; *de Cupis*, Il danno II[2], 307). Nonetheless, teh creditor is not obliged to apply this sum to restore his earlier position (*de Cupis* loc. cit. 337). According to judicial pronouncements, the distinction between *risarcimento in forma specifica* und *risarcimento per equivalente* lies in the fact that, in the first category, the extent of the reparation is assessed on the basis of the costs of restoring the status quo ante, in the second case, it is assessed on the basis of the loss of value suffered (Cass. 3 July 1997, no. 5993, Giust.civ.Mass. 1997, fasc. 1128; Cass. 4 March 1998, no. 2402, Giur.it. 1999, 255; critical, on this point, *Castronovo*, La nuova responsabilità civile[3], 824). A very controversial issue is whether the costs of repair may exceed the market value of the damaged property. In the opinion of many commentators, the market value always represents the upper limit of the recoverable damage (e.g. *Castronovo* loc. cit. 828; *Salvi*, Il danno extracontrattuale, 40; *Franzoni*, Dei fatti illeciti, 1126). The deduction "new for old" will take place, if the repair has the effect of increasing the value of the property (Cass. 4 March 1983, no. 1636, Giust.civ.Mass. 1983, fasc. 3). Generally, the injured party may choose to opt for either risarcimento *in forma specifica* or *risarcimento per equivalente* (Cass. 25 July 1997, no. 6985, Giust.civ.Mass. 1997, 1280). If no particular application is filed, then compensation *per equivalente* will be awarded. Of course, an order of *risarcimento in forma specifica* does not preclude a claim of compensation *per equivalente* for the period of time that the damaged good (Cass. 20 August 1981, no. 4958, Giust.civ.Mass. 1981, fasc. 8). In the context of personal injury of a permanent character, the courts may award compensation in the form of an annuity (CC art. 2057).

5. HUNGARIAN CC § 355(1) provides that a person who is liable for causing loss must restore the *status quo ante*. Only when this is impossible or for cogent reasons, is not desired by the injured party, will there be an award of compensation for economic and non-economic loss. Compensation is awarded for the depreciation in value accruing to the injured party's patrimony, economic benefits foregone as well as costs necessary to reduce or eliminate the economic and non-economic losses sustained (CC § 355(4)) The civil law in ROMANIA adopts the principle of integral reparation as its point of departure (CC arts. 998, 1073, 1084). The entire damage that flows from the injury is recoverable. Reparation can take the form of payment of a sum of money or may lie in the performance of an act, such as by publishing or making a public apology or even doing both of these. The primary form of compensation is restitution in kind. The return of a dispossessed item and the repair of a damaged thing serve as illustrations; if it is unclear whether they are still in existence, then, the courts may alternatively award damages to the extent of its value (*Adam*, Drept civil. Teoria generală a obligaţiilor, 273-275; *Lupan*, Răspunderea civilă, 247-248). Conversly, in the context of personal injury, restitution in kind is not possible. Here, monetary compensation is awarded.

6. The distinction between restoring the *status quo ante* and monetary compensation is also a familiar one to BULGARIAN law (*Kojucharov*, Obligazionno pravo I, 286). While it is true to state that the basic principle that the injured party should be restored to the position that he would have found himself in, had the damaging event not occured is only codified in the contractual law provisions of LOA art. 79(2), according to the view of some legal writers, this principle can be applied analogously in the tort law context (*Antonov*, Nepozvoleno uvrejdane, 193; *Kojucharov* loc. cit. 287). In a similar fashion, under tort law restitution in kind has precedence over monetary compensation; in respect of the latter, the injuring party does not come under any obligation, provided and to the extent that restitution in kind is possible. The analogous application of LOA art. 79(2) in the realm of tort law is rejected by

Kalaydjiev, Obligazionno pravo, Obshta chast, 392 and Supreme Court 27 September 1955, decision no. 1787, civil case no. 5611/55. *Kalaydjiev* was of the opinion that restitution in kind was not possible within the frameworkl of extra-contractual liability. The Supreme Court held that the injuring party was not obliged to procure a thing of the same type and quality as the damaged item, nor did h/she obliged to repair it. The following should not be regarded as a form of compensation, namely, if the injuring party, following the accident, e.g attends to the needs of the injured party by, e.g., delivering the latter's belongings from the scene of the accident to the hospital of to the injured party's place of residence (Supreme Court 25 March 1972, decision no. 786, civil case no. 5/72). Pursuant to SLOVENIAN LOA art. 164(1), while the principle of resitution in kind does indeed prevail, the creditor can, however, always seek monetary compensation unless important grounds would necessitate a different result (LOA art. 164(4)). Additionally, only monetary compensation may be claimed if restitution in *natura* is impossible or, in the discretion of the court, is deemed inequitable (LOA art. 164(3)). Restitution in kind is, for the most part, impossible in the context of non-pecuniary loss (see LOA art. 178). The correction of a false portrayal in the media constitutes an exception to this general rule (Media Act art. 26). Restitution in kind can be deemed inequitable, e.g if the costs of repair exceed the current market value of a damaged vehicle (Juhart and Plavšak [-*Plavšak*], Obligacijski zakonik I, art. 164 p. 926).

7. Similarly, GERMAN law draws a distinction between restitution in kind and compensation. The modalities of restitution in kind are described in CC § 249. The first sentence concerns restoring the situation that would have existed, had the event giving rise to liability not occurred. In the context of personal injuries or damage to property, the second sentence confers a right on the creditor to claim "monetary compensation in lieu of restitution in kind". CC § 251 governs compensation; the focus is placed on safeguarding the value of the claimant's assets (*Medicus*, Schuldrecht I[17], no. 589). Priority is generally accorded to restitution in kind (CC § 251(1)): the person with a duty to make reparation is only obliged to pay compensation, provided that and insofar as restitution in kind is impossible or deemed to be inadequate to compensate the creditor. Moreover, CC § 251(2)(i) permits the debtor to pay monetary compensation if restitition in kind is only possible with disproportionate expenditure (with respect to animals, CC § 251(2)(ii) postulates an exception to the general rule which corresponds to 6:101(3)(ii)). The "disproportionality" of the expenditure is usually assessed by comparing the costs of restoring the orginal position – occasionally employing a deduction "new for old" (BGH 8 December 1987, NJW 1988, 1835) – and the monetary compensation due under CC § 251. In the context of damage to motor vehicles, the courts have developed the following rule, namely that the costs of repair cannot exceed the replacement value of the vehicle by more than 30% (BGH 15 October 1991, NJW 1992, 305; BGH 17 March 1992, NJW 1992, 1618; BGH 15 February 2005, NJW 2005, 1108, 1109). Other ceilings may apply in the context of other things (Palandt [-*Heinrichs*], BGB[67], § 251, no. 7). Together with costs of repair, replacing the thing damaged with a thing of the same value is also a form of restitution in kind (BT-Drucks. 14/7752, 13, 23; BGH 23 March 1976, BGHZ 66, 239, 247; BGH 15 October 1991, BGHZ 115, 364, 368; BGH 15 October 1991, BGHZ 115, 375, 378; BGH 20 June 1972, NJW 1972, 1800, 1801; BGH 4 March 1976, NJW 1976, 1202, 1203; BGH 6 April 1993, NJW 1993, 1849, 1850; BGH 7 June 2005, NJW 2005, 2541, 2542). The damaging party is permitted to elect the most favourable form of redress (BGH 7 June 2005, NJW 2005, 2541, 2542). The injured party who decides to carry out the repairs himself upon may claim the higher costs of repair as estimated by an expert to the

extent that those costs do not exceed the value of its replacement (BGH 29 April 2004, JR 2004, 23).

8. According to AUSTRIAN CC § 1323 (first sentence), the injuring party is obliged to do "everything in his power to restore the *status quo ante* or, if this is not possible, it is incumbant upon him to reimburse the estimated value of damaged good". Therefore, priority is given to reparation in kind: monetary compensation is a subsidiary claim (*Koziol*, Haftpflichtrecht I[3], no. 9/1). Generally speaking, the same holds true for other obligations to pay compensation which are contained in other statutes, extraneous to the Civil Code. However, a number of these (including the Insurance Contracts Act which is of significant practical relevance) expressly exclude restitution in kind. Restitution in kind denotes reinstating a situation which is similar to and on a par with that in existence before the damaging event occured (OGH 26 February 2002, 1 Ob 15/02s; OGH 14 October 2003, SZ 2003/119 p. 293). Restitution *in natura* is understood to connote not only reparation by the damaging party itself but is also understood to mean that a commensurate sum of money may be paid to a third party who is capable of reinstating the s*tatus quo ante*. In the context of property damage, the procurement of a thing which is commensurate to and is of equal value to the damaged thing constitutes restitution in kind (Koziol/Bydlinski/Bollenberger [-*Danzl*] ABGB[2], § 1323 no. 4). With respect to payments of money, the basis for calculating the expenditure necessary to cover the cost of repairs is not, as distinct to monetary compensation, the deterioration in value resulting from the damage to property. A claim for restitution in kind can be made if, "an economically minded person who had to bear the costs of the damage himself, would have also incurred such expenditure" (OGH 18 April 2003, JBl 2004, 657). If the costs of repair only negligibly exceed the market value of the thing, then, repairing the item can be considered justifiable from an economic point of view (OGH 9 July 1974, ZVR 1975/79 p. 116; *Danzl* loc. cit. 7). Fixed percentage rates are not endorsed; rather, it will depend on the individual circumstances of the case at hand (*Koziol* loc. cit. no. 9/19). Nonetheless, a tendency to draw the line at around 10% of the eclipsed market value can be observed (*Danzl* loc. cit. no. 7, Schwimann [-*Harrer*], ABGB VI[3], § 1323 no. 43). If it is only possible to partially recompense the damage caused by means of restitution in kind, then the remainder of the damage is compensated in money; restitution in kind and monetary compensation can coexist (*Koziol* loc. cit. no. 9/1). A person is liable to pay monetary compensation if reinstating the status quo ante proves to be factually impossible or economically unviable (OGH 25 November 2004, 6 Ob 139/04s; OGH 25 January 1978, SZ 51/7 p. 24). The leading example in this area is socalled total loss, whereby the costs of repair considerably exceed the market value (*Danzl* loc. cit. no. 7). In this case, the difference between the market value of the damaged property and the projected value in its undamaged state is recoverable (*Danzl* loc. cit. no. 8). As a general rule, the injured party may claim compensation if the injuring party defaults in the performance of his obligations under the restitution *in natura* head (OGH 18 November 1964, SZ 37/165 p. 471). CC § 1323a is applicable in respect of animals. According to this provision, the actual costs incurred in treating the animal are also recoverable if those costs would exceed the cost of the animal, subject to the condition that a reasonable animal keeper would have also incurred these costs. Punitive damages are not recognised under Austrian law (*Harrer* loc. cit. Pref. to §§ 1293 ff, no. 4).

9. GREECE distinguishes between restitution in kind and monetary compensation (*Georgiades*, Enochiko Dikaio, Geniko meros, 158). Monetary compensation is the basic rule (CC art. 297 first sentence; see ErmAK [-*Litzeropoulos*], art. 297, no. 2; *Georgiades* loc.cit.); the courts only award restitution in kind if the particular

circumstances of the case render its award justifiable (CC art. 297 second sentence). In this respect, the Code refers to the "restoration of the *status quo ante*". For this requirement to be met, it is sufficient that an approximately equivalent situation is restored, e.g. this could be achieved by repair or procuring a similar type of thing or paying the costs of medical care directly to the hospital (*Balis*, Enochikon Dikaion, Geniko meros[3], 124; *Stathopoulos*, Geniko Enochiko Dikaio A(1)[2], 77). Restitution in kind connotes that the injuring party is required to bring about an actual result (*Stathopoulos* loc.cit.). CA Athens 97/1965, NoB 13 (1965) 502 opined that a claim for repair costs was a form of restitution in kind (therefore, not tantamount to compensation), on the grounds that the sum of money served to effect an actual result. If repairing the damaged property would lead to unreasonably high costs, then the injured party is only obliged to make reparation to the extent of the costs of replacement (*Filios*, Enochiko Dikaio I[2], 267).

10. Pursuant to PORTUGUESE CC art. 562(1) it is incumbant upon the injuring party to restore the (hypothtical) position that would have existed had the damging event not occured (*Antunes Varela*, Obrigações em geral I[10], 905; STJ 23 October 2003; STJ 18 September 2003), it contains therefore, the *princípio da reposição* or *princípio da reconstituição natural* (*Antunes Varela* loc. cit. 904; STJ 9 December 2004, CJ (ST) XII (2004-3) 137). In conjunction with the *reconstituição natural*, forms of reparation also envisaged comprise of (in CC art. 566) monetary compensation or (in CC art. 567) compensation in the form of an annuity. Restitution in kind is accorded priority (CC art. 562); compensation is always constituted in money, if restitution in kind is impossible, further, if this remedy will not serve to completely rectify the damage caused or if it would result in the debtor being unreasonably burdened (CC art. 566(1)). There is no right of election between forms of redress; the forms of reparation are determined by the court. In the case that property is destroyed, lost or damaged, the injuring party is required to procure property of the same quality (or similar in all essential points: CA Oporto 16 December 1997, BolMinJus 472 [1998] 564) or to carry out repairs at his or her own cost; in the context of personal injuries, he is liable for the necessary medical treatment costs and nursing expenses (*Antunes Varela* loc. cit.) and in the context of infringements of the right of honour, there may be publication of the judgment (*Vasconcelos Abreu*, A violação de direitos pela comunicação social, 472). Frequently, restitution in kind will not suffice to completely remedy the damage caused, e.g it may cover only the costs of repairing a vehicle, however, it does not encompass the loss of use, or only covers medical costs but does not embrace compensation for pain suffered (*Antunes Varela* loc. cit. 905; *Abrantes Geraldes*, Temas da responsabilidade civil I[2], 95-113 [with a summary of cases on deprivation of use]). The assessment of compensation principally addresses the *interesse*, namely, the difference between the existing state of affairs and the situation prevailing before the event generating liability occurred (CC art. 562(2); *Antunes Varela* loc. cit. 907); this includes compensation for losses due to inflation (CA Évora 19 February 1987, CJ XII (1987-1) 308; CA Lisbon 21 February 1985, CJ X (1985-1) 69). This difference is assessed according to the principle of replacement value, in the event that restitution in kind would be "excessively burdensome" for the debtor (CC art. 566(1); STJ 7 July 1999, CJ (ST) VII (1999-3) 16). The leading example concerns the extent of expenditure necessary to repair an older car model. CA Évora 12 February 1987, CJ XII (1987-1) 300 refused to award the costs of repairing a used car which, following an accident, was rendered practically worthless, on the grounds that such an award would represent economic folly as the repair costs would have been twice as high as the value of the car prior to the accident. However, this does not entail that the courts will never award the costs of repairing an older car; because a small

award of compensation for lost value can entail that the injured party will not be able to afford a suitable mode of transport any more (STJ 7 July 1999, CJ (ST) VII (1999-3) 16; STJ 29 April 2003, CJ (ST) XXVIII (2003-2) 28). Whether restitution in kind would be "excessively burdensome" for the injured party depends on an assessment of the individual circumstances of the case. This can also connote that, in the event that a pet is injured, that the injuring party must pay the veterinary costs of treating the animal, even if those costs considerably exceed the value of the animal (*Pessoa Jorge*, Ensaio sobre os pressupostos da responsabilidade civil, 422)

11. The point of departure of DUTCH CC art. 6:103 is indeed the general principle that the notion of compensation connotes the payment of a sum of money, however, a caveat is added to this provision which provides that upon application by the injured party the courts may award another form of reparation; if this decision is not complied with timeously, then the injured party again acquires the right to claim monetary compensation. A grant of compensation which takes a different form to that of the payment of money includes an order to render actual performance as well as an order to render a legal act (see further Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 411 p. 331; *Spier*, Schadevergoeding: algemeen, deel III, no. 22 p. 44-45). ESTONIAN LOA § 127(1) tallies with VI.–6:101(1). The basic rule provides that compensation takes the form of a monetary payment and namely, in a lump sum (LOA § 136(1)). Other forms of reparation are not expressly excluded (LOA § 136(5)). There is no special provision concerning animals.

12. SWEDISH statute law almost exclusively concentrates on monetary compensation (e.g. Damages Liability Act ch. 5 § 7 no. 1: Reparation in the context of property damage). A distinction is drawn between the cost of replacement and the costs of repair; the injuring party is generally liable for the lowest amount in each case. However, in the context of injury to domestic animals and damage to things possessing special qualities (e.g. a rare car), the courts will consider conferring a right of election on the injured party (*Andersson*, Skyddsändamål och adekvans, 488); at any rate, in the context of cases dealing with pets, an analysis of case law shows that the courts have accepted that treatment costs which exceed the market value of the animal can be claimed (HD 22 February 2001, NJA 2001, 65 I-II; similarly, for DENMARK Eastern CA 14 September 1981, UfR 1981, 1074). Awarding compensation which takes another form to that of a monetary payment plays a relatively ancillary role. It can be encountered e.g. clothed in the garb of restitution claims in property law (*Karlgren*, Skadeståndsrätt[5], 194, 206) and in the area of protection of the right to honour. In this context, the most important example pertains to the award of costs in respect of the publication of judgments in one or more newspapers (Damages Liability Act ch. 5 § 6). Moreover, FINNISH Damages Liability Act ch. 5 clearly postulates that monetary compensation denotes the normal rule. A statutory exception to this rule can be found in CP ch. 27 § 7, which provides that person who violates the right to honour, and this infringement amounts to a criminal offence, an order granting publication of the judgment may be granted. This corresponds to the position in DENMARK (*Vinding Kruse*, Erstatningsretten[5], 348 bzw. CP § 273(2)). In the context of total loss, the amount of monetary compensation is generally directed at the cost of replacing the thing to its state immediately before the damaging event occurred (*Bengtsson and Strömbäck*, Skadeståndslagen[2], 321; *Hellner and Johansson*, Skadeståndsrätt[6], 420; Swedish HD 7 May 1991, NJA 1991, 269; *von Eyben and Isager*, Lærebog i erstatningsret[5], 247; see also Swedish Insurance Contracts Act ch. 6 §§ 1-2 and Danish Insurance Contracts Act § 37). If replacement is precluded, then the assessment hinges on the market value of the thing. In the case of partial damage, two methods are used. If considerable damage is caused, this is

governed by the net realisable value method, whereby the compensation awarded is the difference between the market value and the residual value of the damaged object (*Hellner and Johansson* loc. cit. 423; Swedish HD 7 April 1971, NJA 1971, 126; *Bengtsson and Strömbäck* loc. cit. 324; *von Eyben and Isager* loc. cit. 249). In contrast, if the damage is minor, the actual costs of repair provide the basis for calculation, provided that this method is more favourable for the injuring party when compared to the net realisable value method (Danish Eastern CA 14 September 1981 loc. cit.); the reduced market value of a vehicle damaged in an accident is still recoverable (*Hellner and Johansson* loc. cit.; Danish Western CA 9 May 1972, UfR 1972, 809 and 23 April 1997, UfR 1997, 969). The same holds true for loss of value to land which ocurred after a neighbour mistakenly allowed six mature trees to be felled onto the land (Danish Western CA 12 September 1994, FED 1994, 995). Conversely, in the context of repairs which have the effect of increasing the value of the thing, a deduction "old for new" is carried out (Swedish HD 16 March 1955, NJA 1955, 89 II; *von Eyben and Isager* loc. cit. 249; *Vinding Kruse* loc. cit. 350).

II. The injuring party's gains as a basis for recovery

13. In principle, "profit-erasing" is not recognised by FRENCH or BELGIAN liability law. The profits which a wrongdoer has generated by way of his wrong may be taken into account when the courts come to assessing the extent of an award of compensation to which a victim who has sufferred *dommage moral* is entitled, cf. e.g. CA Paris of 4 January 1988, D. 1989 somm. 92, note *Amson* (unlawful publication of private nude images of a woman who subsequently became famous). Some see in this developement a gateway ushering in the notion of punitive damages (*Carval*, La responsabilité civile dans sa fonction de peine privée, no. 29 p. 31).

14. SPAIN has a number of special statutes which expressly provide that, upon application by the claimant, the measure of compensation may be assessed on the basis of the enrichment obtained by injuring party's from his wrong (*inter alia* Copyright Act art. 140, Trade Marks Act art. 43; Patents Act art. 66; Law 1/1982 of 5 May 1982 on Civil Protection of the Right to Protection of Honour, Intimate sphere and Right to One's Own Image art. 9(3) and (4)). Moreover, it is important to note that Spain regulates the relationship between law on delict and law on unjustified enrichment in a different manner to France. This is of major significance if the prescription period for making a claim pursuant to CC art. 1902 has expired; given that the limitation period for a claim under unjustified enrichment is fifteen years (TS 5 October 1985, RAJ 1985 (3) no. 4840 p. 4085). It is also relevant where the benefit acquired by the wrongdoer through the commission of a tort is greater than the loss that the victim sustains. In such cases, it can turn out to be more favourable for the victim to assert a claim under unjustified enrichment, directed at erasing the profits of the wrongdoer (*Álvarez-Caperochipi*, El enriquecimiento sin causa[3], 119). For years, the *Tribunal Supremo* has repeatedly confirmed that both claims subsist independently from each other, i.e. the claim under delict and the unjustified enrichment claim. The tort law claim requires a culpable wrongful act in contradistinction to the prerequisite of a successful unjustified enrichment claim which requires an increase to the estate of the defendant, without a legal basis and at the claimant's expense, but no more (TS 12 April 1955, RAJ 1955 (2) no. 1125 p. 602; TS 5 May 1964, RAJ 1964 no. 2208 p. 1380). In conjunction with the foregoing, Spanish legal writers, influenced by German legal doctrine refer to a *Eingriffskondiktion* or *condictio por intromisión* (*Díez-Picazo*, Dos estudios sobre el enriquecimiento sin causa, 116). A tortfeasor is not only obliged to make reparation for the damage caused but is also obliged to compensate for the value of the increase which has accrued to his assets, in particular in the cases dealing with the use of

another's property and the exploitation of another's intellectual property. With respect to cases dealing with the exploitation of another's reputation and for all other cases concerning infringements of another's personality rights, a presumption relating to the presence of damage is contained in Law 1/1982 of 5 May 1982 pertaining to the Civil legal protection of the right to honour, a sphere of intimacy art. 9(4). Consequently, it is only necessary to prove an unlawful infringement of these rights. Additionally, in the context of the calculation of the measure of compensation, the courts take account of an enrichment which the infringer has obtained from the commission of a tort (loc. cit. art. 9(3)). In this way, the claim for non-pecuniary damages and the restitution claim indivisibly merge together to emerge in the delta of one single claim. Moreover, the extremely wide margin of discretion conferred by Spanish law on the courts of first instance in the field of the assessment of compensation is of practical importance (*Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 173; *Carrasco Perera*, ADC 1987, II, 149). Incidentially, an attempt has been made to base a general tort law doctrine which would be directed at erasing the enrichment obtained on the theory of the bilateralisation of loss profits (*bilateralización de lucro cesante*), whereby a loss of profits tends to connote the same to the injured party as profits which are actually obtained by the wrongdoer (Bercovitz [-*Carrasco Perera*], Comentarios a Ley de propiedad intelectual, 1796). Similarly, TS 11 July 2006, BDA RJ 2006/4977 could be explained on this basis.

15. According to ITALIAN CC art. 2042, while an unjustified enrichment claim is subsidiary to a claim initiated under tort law, frequently, this provision does not clearly provide an adequate answer to solve the problem of concurrence of tort law and unjustified enrichment actions. At any rate, jurisprudence and academic teaching lean towards permitting the injured party to assert a claim, directed at erasing the unlawful profits which the wrongdoer has obtained (*Sacco*, L'arricchimento ottenuto mediante fatto ingiusto, passim). This primarily impinges on dispositions of another's property, which are then effective against the holder of the right (*Trimarchi*, L'arricchimento senza causa, 55; *Sacco* loc. cit. 99; *Gallo*, Arricchimento senza causa e quasi contratti 44; *Cian andTrabucchi*, Commentario breve[8], note X under art. 1153), and breaches of incorporeal personality rights of another (CFI Monza 26 March 1990, Foro it. 1991, I, 2862) and intellectual property right infringements (Intellectual Property Code art. 125). Within this framework, when calculating the reparation due, account is taken of all the circumstances of the individual case, including the benefits that the injuring party has obtained. In addition, reparation for loss of profits which is a feature of the total sum awarded, may not fall below the sum which the infringer would have had to pay for a licence permitting him to use the right (loc. cit. art. 125(2)). Of course, the general civil law basis for claiming the profits which the injuring party has obtained from his wrongdoing remains contentious, some commentators contend that this claim is not anchored in tort law, rather, that it is tantamount to an unjustified enrichment claim, which, because tort law does not recognise such claims, therefore, does not fall foul of the principle of subsidiary (see further *de Cupis*, Il danno II[3], 16; *Franzoni*, Dei fatti illeciti, 665-666; *Castronovo*, La nuova responsabilità civile[3], 648-654).

16. HUNGARIAN tort law does not contain a rule comparable to that contained in VI.–6:101(4). However, a number of statutes governing the protection of intellectual property and copyright confer a right on the holder of a right to claim back the advantage which the injuring party acquired through the commission of the infringement (Act no. XXXIII/1995 on Protection of Inventions by Patents §35(2)(e); Law no. XI/1997 on Protection of Trademark and Geographical Indications § 27(2)(e); Act no. LXXVI/1999 on Copyright § 94(1)(e)). Unjustified enrichment claims which

are aimed at restituting profits are also taken into account in the context of using another's property for economic gain (BH 2005/143: publishing unauthorised photos of a house with an architecturally interesting roof; redress conceivable under CC § 361(1), as an exploitation of the owner's right of use and right to fruits, but awarded on the facts under the Copyright Act which protected the roof's design). In the context of a breach of incorporeal personality rights, the courts determine the extent of compensation for non-pecuniary loss according to a discretion which is exercised according to the equitable precepts; it cannot be affirmatively stated that the profits garnered by the infringer are taken account of when it comes to assessing compensation. In addition, decisions on the unlawful appropriation of the reputation of another in an advertisement do not express an opinion on this point (BH 2002/261; BH 1995/509). Legal commentary on the reform of the Hungarian Civil Code tend to leave resolution of the problematic issue of disgorgement of profits to the law on unjustified enrichment out of concern that it would otherwise not be possible to keep out the notion of punitive damages from tort law (*Vékás*, FS Boytha György, 331, 351-355; *Vékás* [-*Vékás*], Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez, S. 1144).

17. BULGARIAN tort law also does not recognise a claim to restitution of the enrichment obtained by the infringer. The compensation claim only embraces the compensation of the injured party's lost profits. This also applies in patent law (Patents and Registration of Useful Designs Act art. 28(1)(no.2)); in this context, however, the loss of profits is calculated on the basis of lost licence fees (Supreme Court 18 November 2004, decision no. 669, civil case no. 1907/2003). According to copyright law, the profits realised by the injuring party also constitutes a relevant basis for the assessment of compensation (Act on Copyright and similar rights art. 94(3)). A method of calculating damages which takes account of the enrichment accruing to the injuring party can also be found in ROMANIAN Copyright Act art. 139(4).

18. While GERMAN CC § 252(sent. 2) does indeed the injured party to assert a claim for recovery of lost profits, the provision fails to stipulate anything about clawing back the profits obtained by the injuring party by his wrong; the statutorily regulated damages law is also silent on this issue (MünchKomm [-*Oetker*], BGB[5], § 252, no. 52). In the context of intellectual property infringements or infringements of other positions protected by the law on unfair competition, the courts confer a "right of election" on the injured party. The latter can either claim the recovery of lost profits which can be postively adduced or payment of a reasonable licence fee (without having to adduce an actual loss of profits) or the recovery of the gain actually realised by the wrongdoer (BGH 2 November 2000, BGHZ 145, 366, 375; BGH 6 October 2005, NJW-RR 2006, 834, 835; BGH 27 February 2007, MittDtPatAnw 2007, 317; BGH 21 September 2007, WRP 2007, 533). In the field of copyright law, the later claim is expressly regulated in Copyright Act § 97(1)(ii). This right of election is also conferred in cases of socalled slavish imitation of products and the unlawful exploitation of trade secrets (see further *Oetker* loc. cit. no. 53). In the context of calculating non-pecuniary reparation for infringements of incorporeal personal rights, the injuring party's share of the profits can be taken into consideration. The general rule is that a claim for restitution of profits can only be based on a special construction of the law of benevolent intervention in another's affairs which for its part, has intention as a prerequisite to any successful claim (CC § 687(2)).

19. In AUSTRIA, while the principle that a wrongdoer may not gain any profit from his wrongful action is indeed recognised, the corresponding claim of the the injured party is classified as one anchored in the law of unjustified enrichment and is not regarded as a tort law claim; the causes of action under tort law and unjustified enrichment are concurrent (Koziol/Bydlinski/Bollenberger [-*Koziol*] ABGB, § 1041 no. 4). If the

victim's loss and the injuring party's gain coincide in amount, then a claim for compensation will indeed arise; if, however, there is no loss of profits, then only a claim under unjustified enrichment will arise. Thereby, every opportunity of making use of or exploiting [the asset] which the injured party has been deprived of and which has passed to the injuring party is regarded as an "enrichment" (OGH 13 July 1953, ÖBl 1953, 52; OGH 15 September 2005, SZ 2005/130 p. 181). Special statutory regulations governing the claim to restituting the profits that the injuring party has derived from his wrong are found in the Unfair Competition Act (UWG § 9) and under intellectual property law (Patents Act § 150; Trademark Protection Act § 55; Copyright Act § 87), for the rest, "profit-erasing" is governed by CC § 1041. It should be noted that the "restitution of profits" claims under competition law and intellectual property law, despite their classification as an unjustified enrichment claim, require fault on the part of the defendent (*Torggler and Kucsko*, GRUR Int 1980, 282, 284) and that the gravity of the injury calibrates with the legal sanctions. The current legal position is not in dispute; *de lege ferenda* it is proposed the profits garnered by the injured party should be recognised as a general principle of liability (*Koziol*, FS Bydlinski, 175, 194).

20. A claim for disgorgement of profits obtained by wrongdoing is also not a feature of PORTUGUESE tort law.

21. Pursuant to DUTCH CC art. 6:104, upon application by the injured party, the judge can calculate the damages so as to include, completely or in part, the profits wrongfully obtained by the injuring party. HR 24 December 1993, NedJur 1995 no. 421 p. 1942 held that this claim did not constitute claim to resitution of the profits, rather it connoted the exercise of a "discretionary power of the court." CC art. 6:104 is construed as a form of abstract method of calculating loss. The injuring party's gain is regarded as a good benchmark to measure the loss actually suffered. The provision's scope of application is confined to contract and tort law; it is not applicable in the context of the law on unjustified enrichment. With respect to infringements of personality rights by the media, the profit obtained are incorporated in the determination of the measure of non-pecuniary damages (Memorie van Antwoord II Inv. Parlementaire Geschiedenis, 1267; HR 4 March 1988, NedJur 1989 no. 361 p. 1236; Schadevergoeding II [-*Deurvorst*], art. 6:104, no. 5 p. 11 and no. 7 p. 14). Special statutory provisions which expressly provide for claims of restitution of profits, are primarily found in intellectual property law (see further *Deurvorst* loc. cit. no. 6 p. 12 and HR 14 April 2000, NedJur 2000 no. 489 p. 3267).

22. Similarly, ESTONIAN tort law does not contain a provision similar to VI.–6:101(4). The injured party can assert a claim against the injuring party under unjustified enrichment (see in particular LOA § 1037(1)) (see further on the relationship that exists between these two causes of action RKTKo 3-2-1-70-06 – RT III 2006, 32, 274). As a general rule, one claim excludes the other.

23. The principle expressed in VI.–6:101(4) is not generally recognised in NORDIC tort law. However, instances involving unauthorised use of another's property may be subsumed under the principle of unjustified enrichment, and compensation can be awarded regardless of the plaintiff proving a loss or negligence (*Hellner*, Obehörig vinst, 232; *Hellner and Radetzki*, Skadeståndsrätt[7], 421; *Agell*, in: Familjerätt, skadeståndsrätt och annan förmögenhetsrätt: valda skrifter, 197-239; HD 2 July 2007, NJA 2007, 519; *Vinding Kruse*, Restitutioner, 363; *Vinding Kruse*, Erstatningsretten[5], 264; *Hakulinen*, Obligationsrätt, 368). Furthermore, in cases concerning someone selling another's property without authorisation, compensation corresponding to the actual sale price may be awarded regardless of the actual value (*Hellner* loc. cit. 241;

Hellner and Radetzki loc. cit. 414). Compensation for infringement of incorporeal property rights (such as trade name [*firma*], trademark, patent and copyright) share similar enrichment characteristics; reasonable compensation is due even for infringements made in good faith (*Hellner and Radetzki* loc. cit. 421; *Monsen*, Berikelsekrav, 330). However, the notion of assessing damages according to the enrichment of the infringer is rather unknown to the nordic countries (*Koktedgaard and Levin*, Immaterialrätt[7], 454; *Skovbo*, Erstatning for uphavsretliga krænkelser, 238). With the implementation of Directive 2004/48/EC, the profit of the infringer is explicitly listed in SWEDEN and DENMARK in the relevant statutes as a condition to be taken into account when assessing damages (SWEDISH proposal Ds 2007:18 *Civilrättsliga sanktioner på immaterialrättens område - genomförande av direktiv 2004/48/EG*; DANISH Copyright Act § 83 (The FINNISH Government Bill RP 26/2006 did not consider it necessary to explicitly mention enrichment in the relevant statutory amendments). SWEDISH HD 16 November 1994, NJA 1994, 637 concerned a photo montage. A porno magazine stuck the heads of celebrities onto the heads of persons featured in the magazine who were depicted in compromising positions. When it came to the assessment of damages, the fact that the plaintiffs were in the public eye plus the fact that but the fact that "financial considerations" were the reason for the publication served to ground the unusually high award of compensation (see further *Axberger*, JT 1994-95, 716, 726). In DENMARK (Eastern CA 20 December 2004, UfR 2005, 1131) and FINLAND (Supreme Court 12 April 2000, HD 2000:54; Supreme Court 24 November 1997, HD 1997:185; see *Sisula-Tulokas*, JFT 2000, 634, 637; *id.*, Contract and tort law: twenty cases from the Finnish Supreme Court, 121) it is possible to find quite similar decisions.

24. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights art. 13(1) provides that the Member States are obliged to ensure that when the courts calculate damages in respect of the culpable infringement of rights under the Directive, that account is taken of the profits that the injuring party derives from the wrong. The Member States are also permitted to provide for legal sanctions which do not depend on the commission of a fault by the injuring party (loc. cit. art. 13(2)). The ECJ has held that: "Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them". Case-law: *Ireks-Arkady GmbH v. European Economic Community*, ECJ 1 July 1981, C-238/78, ECR 1891, 1723, paragraph 14, *Hans Just I/S v. Danish Ministry for Fiscal Affairs*, ECJ 27 February 1980, C-68/79, ECR 1980, 501, paragraph 26; Joined Cases *Kapniki Michaïlidis AE v. Idryma Koinonikon Asfaliseon (IKA)*, ECJ 21 September 2000, C-441/98 and C-442/98, ECR 2000, I-7145, paragraph 31; *Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage Ltd. and Others*, ECJ 20 September 2001, C-453/99, ECR 2001, I-6297, paragraph 30

Illustration 1 is taken from CFI Groningen 31 May 2002, LJN AE3727, note *van der Hoek*, NJB 2006 no. 29 p. 1618; **illustration 2** from CA Jaén 29 January 1998, BDA Civil 1998/3150; **illustration 3** from Cass. 4 March 1983, no. 1636, Giust.civ.Mass. 1983, fasc. 3; and **illustration 4** from CA Murcia 25 January 1999, BDA AC 1999/3056.

VI.–6:102: De minimis rule

Trivial damage is to be disregarded.

COMMENTS

Policy considerations. This Article provides that trivial damage does not lead to a claim for reparation or to a claim to preventive legal protection. The idea is that trivial damage must be accepted in highly civilised society as a socially acceptable interference not warranting reparation; and actions for damages should be prevented if they do not primarily involve making good a loss, but rather involve harming the other party through the burden of having to bear the costs of legal proceedings. The rule of leaving trivial damage without a corresponding claim to compensation can also prevent class actions or other collective actions in which ultimately it is only the lawyers who profit or the organisations to which the relevant rights to reparation have been assigned. Trivial damage remains trivial even where it is suffered by many simultaneously.

Trivial damage. On the issue of whether damage is trivial, economic considerations are not decisive, but rather the legally protected interests of those involved, the type of grounds for attribution and the other conditions of damage causation. It is not trivial where a child's old and almost economically worthless doll is destroyed or taken away, and it is also not trivial when the dog of an old lady living alone is killed; even if the amount of compensation in such a case were to be at the lowest level, it would not fall under the present Article as trivial damage. Intentionally inflicted damage can hardly ever be categorised as trivial. However, it would be trivial to complain about a medically notified and correctly carried out injection, solely because one is subsequently made aware of the fact that one had not been sufficiently briefed by the hasty nurse. The situation is of course different where a complication arises as a consequence of the injection: serious consequences of minor individual damage are not trivial. Minor inconveniences of everyday life are also socially acceptable and thus trivial: a banal infection (a head cold) that one contracts in a packed airport shuttle bus does not provide a basis for a claim in damages against the fellow passenger, entering a room which one inadvertently thinks is one's own guest room does not ground liability in damages for the infringement of another's privacy.

Products liability. Departing from the Community law currently in force (Product Liability Directive art. 9(b)), VI.–3:204 (Accountability for damage caused by defective products) proposes to extend the strict liability of a producer in favour of consumers to damage to property which amounts to less than €500. This proposition does not contradict the tendency of VI.–6:102. Quite apart from the fact that losses of several hundred Euros are not, on any view, trivial, VI.–6:102 in no way depends on such quantifications.

NOTES

1. Under FRENCH liability law, an inclination on the part of the courts can be observed to disregard trivial damage (*Roland and Boyer*, Adages du droit français[4], 151). Cass.civ. 4 April 1991, Bull.civ. 1991, I, no. 127 p. 85 e.g. confirms that an appeal court may derive from the determination of *caractère insignifiant du fait invoqué* that there is no recoverable damage. However, this does not preclude an award of nominal damages in the particular case of non-material loss which is not trivial as such (cf. for

BELGIUM e.g. CFI Brugge 7 February 2005, NJW 2005, 316, note *Boone*: damages of € 1 to compensate the non-material loss of an elderly lady whose dog was killed).

2. In SPAIN, the *de minimis* rule mainly comes to the fore in the context of the violations of incorporeal personality rights. In exceptional cases, a number of courts have only awarded nominal damages (e.g. TS 23 February 1989, RAJ 1989 [1] no. 1250 p. 1334 [Catholic priest defamed a medical doctor who was a proponent of abortion; 1 peseta as compensation]; TS 31 December 1993, RAJ 1993 no. 9918 p. 12834; CA Barcelona 12 December 2000, BDA JUR 2001/130964; CA Granada 20 December 2004, AC 2005 [1] no. 63 p. 150 [Meeting of joint property owners; one co-owner was accused of failing to discharge his obligations; damages of € 1 as the injury was "minimal"]). This line of jurisprudence has been sharply criticised; on the grounds that an award of nominal damages is not a salient feature of Spanish law (*Martín Casals*, Notas sobre la indemnificazión del daño moral en las acciones por difamación de la LO 1/1982, 1231, 1263; Salvador Coderch [-*Salvador Coderch*], El mercado de las ideas, 183 [espousing an application of the '*de minimis non curat iudex*' principle within the law of defamation]). TS 14 December 1993, RAJ 1993 no. 9886 p. 12784 picked up on this criticism and denied the existence of legally relevant damage where a plaintiff would normally have had merely an action for nominal damages; TS 18 November 2002, RAJ 2002 (6) no. 10261 p. 19070 und TS 28 April 2003, RAJ 2003 (2) no. 3548 p. 6541 endorsed this approach. Naturally, this course of action has been censured (in particular by Carrasco *Perera*, CCJC 1993, 1105-1117). The *de minimis* rule is not merely relevant in the law governing breaches of incorporeal personality rights but is also pertinent in the field of environmental liability law. In the latter context, only significant damage is recoverable (Reglero Campos [-*Álvarez Lata*], Tratado de responsabilidad civil[3], 1912-1913; see also CFI Bilbao 11 October 2005, AC 2006 [1], no. 60 p. 124 [playing of a piano in a neighbouring apartment]).

3. In ITALY, in each particular case, it will depend on whether the party concerned has suffered a *danno ingiusto*. Whether this is extant is decided by striking a balance between the interested parties' conflicting interests (Cass.sez.un. 22 July 1999, no. 500, Foro it. 2000, III, 481; Cass. 17 May 2004, no. 9345, Giust.civ.Mass. 2004, fasc. 5). Occasionally, it can be derived from law that a particular detriment does not constitute a *danno ingiusto* (see e.g Cass. 28 July 2004, no. 14241, Giust.civ.Mass. 2004, fasc. 7-8 [re damage to farm occasioned by wild animals]; CC art. 924 [bee flight]; further examples can be found in the statutory rules regulating the liability of the postal service). Apart from the aforementioned cases regulated by statute, the *de minimis non curat praetor* rule has not permeated other fields, however, it should be noted that CC art. 2059 can be read in this light. Even today, non-pecuniary loss, the recovery of which is not expressly provided for by law, will only be redressed, if it stems from a breach of a constitutionally protected position and is not restricted to trivial damage (*Zivic*, Resp.civ. e prev. 2007, 517, 526).

4. HUNGARIAN law does not contain a rule governing trivial damage. Claims for the recovery of non-material damage are nonetheless dismissed by the courts, if there is merely a trivial violation of the affected interest (e.g. BH 2002/482: Water damage in an apartment; no compensation for non-pecuniary loss for the forced cancellation of a family celebration).

5. Similarly, BULGARIAN civil law does not recognise a general principle of non-recoverability of trivial damage. However, it can be increasingly gauged from case law dealing with non-material harm, whereby, in a case of trivial damage, permitting recovery is deemed inequitable (see further Supreme Court 9 April 1981, decision no. 1102, civil case no. 623/ 81).

6. Likewise, the GERMAN courts dismiss claims for the recovery of non-material damage, if the damage is trivial, if the injured party's well-being is merely temporarily, and to an insignificant extent, affected (BGH 14 January 1992, NJW 1992, 1043; BGH 27 May 1993, NJW 1993, 2173, 2175); an exception is allowed for cases of intentionally inflicted harm (Palandt [-*Heinrichs*], BGB[67], § 253, no. 15). The legislature has approved of this judically created *de minimus* ceiling, however, it did not deem it necessary to *expressly* restrict claims for compensation for pain and suffering by means of a *de minimus* threshold (BT-Drucks. 14/8780, 21). A special case regulated by statute precluding recovery of trivial damage is the threshold operating to a consumer's disadvantage in the context of property damage under product liability law (Product Liability Act § 11). Moreover, it is generally recognised that socially acceptable interferences must be tolerated. This principle is derived from an analogous application of CC § 906, e.g. discomfort occasioned by overcrowded public transport. Even the circumcision of young boys in a family has been deemed to be socially acceptable, however, of course this criterion will not be met in a case where an eleven year old boy who was residing with his mother but was forced, during a visit to his father to undergo a circumcision without his mother's consent (CA Frankfurt/Main 21 August 2007, FamRZ 2008, 785).

7. The point of departure in AUSTRIA is the same: neither statute nor the courts recognise a general rule precluding the recovery of trivial damage. However, a number of discrete statutory provisions provide that the prejudice caused must have been "material". CC § 364a(2)(first sent.) provides a salient illustration, providing that marginal interference caused by emissions must be tolerated. This rule is derived from the principle of *minima non curat praetor* (OGH 3 February 2005, 2 Ob 11/05i). The qualification marginal is e.g. given where an interference with the use of the claimant‘s property led to damage which amounted to a maximum of € 2; nor will it justify an award of an injunction (OGH 23 March 1983, 1 Ob 6/83). However, it should be noted that this line of jurisprudence dealing with legal relations between neighbours has not led to the creation of a general prevailing principle governing the entire law on liability. Therefore, trivial damage generally grounds a claim for recovery. However, a plea of legal chicanery by the defendant can stand in the way of a valid assertion of this claim. If the purpose of the claimant's action was solely to cause prejudice to the other party (e.g. with the aim of burdening it with the legal costs), then, a tort claim may be given pursuant to CC § 1295(2)(second alt.). An award of damages for pain and suffering can be ruled out where the interference with bodily integrity is regarded as insignificant, e.g. minor skin abrasions, bruises or temporary discomfort (Schwimann [-*Harrer*], ABGB VI[3], § 1325 no. 83). Trivial damage in the context of the socalled ‘mercantile decrease in value of vehicles involved in an accident is also disregarded (OGH 26 January 1977, ZVR 1977/298 p. 370; OGH 2 September 1982, ZVR 1983/280 p. 311).

8. In PORTUGAL, it is said that the duty to pay compensation requires not only a certain loss and that it results from an injury, but also that the loss is sufficiently grave (*Prata*, Dicionário jurídico, 311). In light of the fact that an insignificant deviation by the debtor from the terms of the contract does not amount to a breach of contract, it must therefore be possible to derive from this, the principle that a trivial loss is not worthy of compensation (*Pessoa Jorge*, Ensaio sobre os pressupostos da responsabilidade civil, 387 who uses the example of damage to a stalk of corn or causing a minor scratch to an old vehicle). This principle is derived from the canon of good faith and from CC art. 398(2), according to the latter, compensation "shall correspond to an interest of the creditor worthy of legal protection" (*Pessoa Jorge* loc. cit.). Payments which only serve to satisfy the the creditor's capricious demands, do not connote a

legally protected interest (*Pereira Coelho*, Obrigações, 8; cf in relation to CC art. 398(2) also *Antunes Varela*, Obrigações em geral I[10], 73). Additionally, CC art. 496(1) makes clear that damages for non-material loss can only be recovered, if the loss is regarded as sufficiently grave to merit legal protection. The gravity of the damage should be serious enough to justify the grant of a pecuniary satisfaction (*Antunes Varela* loc. cit. 605-606; *Neto*, Código Civil Anotado[14], 498). Mere inconvenience or annoyance and the suffering or grief resulting from an abnormal sensitivity do not, as a rule, justify a compensation for non economic loss. The same holds true for sadness and concern caused by redundancy (STJ 14 March 2007; STJ 22 March 2006). A contentious issue relates to the actual constitutents of the *de minimus* ceiling, for example, this occured in a case where a woman was falsely accused in a restaurant of attempting to pay with counterfeit money (STJ 19 September 2006). In addition, the *de minimus* threshold can be exceeded in a case of repeated- even in cases concerning damage of an insubstantial nature–infringements (*Pessoa Jorge* loc. cit. 388). Moreover, de minimus ceilings can be found in both substantive and procedural law (CCP art. 822(c)).

9. Under DUTCH law, CFI Arnhem 21 September 2005, LJN no. AU5454 dismissed a damages claim based on an infringement of copyright on the grounds that the prejudice suffered was trivial; an award of compensation would have been disproportionate to the insignificant loss suffered. However, a *de minimis* rule comes close to the rule contained in CC art. 3:303, which provides that a person does not have a right of action where "he lacks sufficient interest". Not every trifling damge will ground such an interest. However, the legislator and courts proceed from the assumption that the claimant is pursuing a sufficient interest; the defendant is obliged to rebut this by proof to the contrary (Parlementaire Geschiedenis III, 915-916; HR 17 September 1993, NJ 1994, no. 118 p. 462; HR 9 October 1998, NedJur 1998, no. 853 p. 4904; T&C Vermogensrecht[4] [-*Stolker*], art. 3:303, pp. 1468-1469). There is no corresponding provision to VI.–6:102 under ESTONIAN law.

10. In the NORDIC countries a rule that generally bars a claim based on the damage's nominally or substantively trivial nature does not exist. However similar concerns may be identified. Under SWEDISH Environmental Code chap. 32 (similarly the FINNISH Environmental Damage Compensation Act), which entails a rather wide understanding of emissions under a strict liability regime, damages for pure economic loss do not necessarily require a criminal offence (as is the general rule under the Damages Liability Act); however, damages are only awarded if the damage is of some significance (see in more detail *Bengtsson*, 21 uppsatser, 53, 65). With regard to other types of damage or loss no such requirement exists. However, compensation is subject to the general rule which requires a reasonable balance between the competing interests, e.g. as to what must be tolerated with regard to local conditions or the general presence of emissions of the relevant type. The same applies to disputes between neighbours (Swedish Land Code chap. 3 § 1). HD 1 March 1990, NJA 1990, 71 concerned a damages claim for 100 kr. [10 EUR] against a neighbour who had cut down the plaintiff's hedge, which was dismissed as the latter had disregarded his obligations to his neighbour of taking reasonable consideration; see also FINNISH Supreme Court 10 February 1981, KKO 1981 II 10. Furthermore, a prerquisite for the recovery of damages under SWEDISH Damages Liability Act chap. 2 § 3 in the context of a breach of incorporeal personality rights is a "great anguish. One is consequently not entitled to recover damages for trivial infringements (*Bengtsson and Strömbäck*, Skadeståndslagen[2]; 62; HD 21 September 2007, NJA 2007, 584). Furthermore, under FINNISH Damages Liability Act chap. 5 § 6, a prerequisite for an award of damages for non-pecuniary loss is a "serious" breach of personal integrity or

dignity. The restiction of actions for trivial breachs of incorporeal personality rights also helps to explain why Swedish law habitually requires the commission of a criminal offence in this context (Government Reports [Ds] 2007:10, Skadeståndsfrågor vid kränkning, 36).

11. ENGLAND: Not every impact on or physiological change to a person's body is regarded as a personal injury (see e.g. for pleural plaques *Rothwell v. Chemical & Insulating Co Ltd* [2006] EWCA Civ 27, [2006] 4 AllER 1161).

VI.–6:103: Equalisation of benefits

(1) Benefits arising to the person suffering legally relevant damage as a result of the damaging event are to be disregarded unless it would be fair and reasonable to take them into account.

(2) In deciding whether it would be fair and reasonable to take the benefits into account, regard shall be had to the kind of damage sustained, the nature of the accountability of the person causing the damage and, where the benefits are conferred by a third person, the purpose of conferring those benefits.

COMMENTS

General. This Article deals with the problematic question of so-called "equalisation of benefits" (*compensatio lucri cum danno*). It concerns cases in which the behaviour of the wrongdoer caused not only detriment to the injured person but also some (mostly) economic advantage, especially because third parties provided payment or are liable for such payment to the injured person due to the damage suffered. The question is thus always whether such advantages may be set off against the liable person's obligation to pay damages or whether such a mitigation of liability is to be denied, with the result that the injured person (provided the wrongdoer is in a position to satisfy the claim) may be entitled to multiple payments by reason of the damage suffered. The answer is that in principle the latter holds true and a mitigation of liability only comes into the picture if it is fair and reasonable under the circumstances (paragraph (1)). Paragraph (2) lists the criteria that are important in the context of this fairness test.

Policy considerations. The basic rule (no set-off) seems to be substantively imperative due to the variety of insurance systems and provisions on sick pay resting upon the model that the insurer or a party performing a comparable service acquires the injured person's rights against the injuring person in the amount of the performance rendered. Such an acquisition of rights would be impossible if the right to damages were to be reduced. Naturally, only an existing right can be assigned. In other words, the basic rule is required and confirmed by insurance law. However, it also follows from considerations of justice inherent in the present branch of the law. In principle, the acts of third parties benefiting the injured person are no concern of the liable person; the fact that others are looking after the victim does not free the liable person of personal responsibility.

Causation. It is a general prerequisite of the equalisation of benefits that there be a causal link between the injuring event and the subsequent advantage. The tighter this link is, the easier it is for an equalisation of benefits to come into focus; the looser it is, the more susceptible to exclusion such an equalisation becomes.

> *Illustration 1*
> Trader T's claim is frustrated as a result of erroneous information as to the solvency of T's customer (C) provided by the bank. C is insolvent. T's claim against the bank is to be correspondingly reduced only where the bank can prove that it was solely the proceeds of reselling the delivery, the payment for which remained outstanding, that enabled C to satisfy another debt of long standing to T.

VI.–7:105. VI.–7:105 (Reduction or exclusion of liability to indemnified persons) remains unaffected by the present Article. The rule in VI.–7:105 does not involve issues of benefit

equalisation, but provisions of national law, which channel the *de jure* liability to an insurer, a fund or another institution with the consequence that the originator of the damage does not even come "face to face" with the liability in the first place. It is correct, however, that, at least in the economic result, this is close to an equalisation of benefits.

Several liable parties. Situations in which several persons are liable to the injured person under this Book for the same damage are to be strictly distinguished from the cases covered by the present Article. In cases of the former type a double payment of damages is ruled out without exception; this would constitute an unjustified enrichment. Therefore, the rule only applies to the case where, along with the damages to be satisfied by the injuring person, another advantage based on a different legal basis accrues to the injured person.

Case groups. Precisely speaking, two different basic fact situations are to be distinguished. In the first (and less frequent) case, the advantage is a direct consequence of the event giving rise to liability; in the second, compensation payments or other economic benefits accrue to the injured person from third parties.

Kind of damage. In both types of case, it is first of all the type of damage suffered which plays a role. This is because in the case of solely economic detriment and also in the case of property damage, an equalisation of benefits in relation to the material losses comes into play more frequently than in the case of bodily injury and death. This results from the fact that in the case of the latter, it would be cynical and anything but "fair and reasonable" to say that the loss of someone close had also brought with it monetary benefits. Furthermore, such benefits are normally to be deemed a consequence of certain provisions of the law of succession and family law, not as a consequence of the wrongdoer's behaviour.

Examples. A textbook example of one situation in which an equalisation of benefits would exceptionally be seen as fair and reasonable, is the destruction of a house with the consequent discovery of treasure trove on the owner's land. The following are more true to life:

> *Illustration 2*
> A lorry driver drives into the claimant's house, which is so badly damaged that it has to be completely demolished. By this very occurrence, the piece of land goes up in value enormously; a new urban development plan allows economically far more attractive forms of development. The owner exploits this increase in value by auctioning off the piece of land on very beneficial terms. The claimant's claim in damages is, as far as it concerns economic detriment, to be reduced according to the extent of the increase in value, perhaps even to zero. However, the non-economic damage of the claimant remains unaffected by this; the claimant did not vacate the house voluntarily, but merely made the best of the situation.
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> *Illustration 3*
> An equalisation of benefits also comes into play if a vehicle has to be repaired over a lengthy period and there are savings as a result of the fact that there would otherwise be wear and tear on the vehicle during that time.
>
> *Illustration 4*
> A child is killed. The parents' claim in damages for the non-economic damage they have suffered is not to be reduced by the argument that their nerves and finances, which would have been expended in raising the child, have been "spared".

Illustration 5
A father, who financially supported his children's education, dies in an accident. The children's claim to compensation for their loss of maintenance is not be reduced for the reason that, as a consequence of their father's death, they were able to inherit his estate earlier. As long as the accident was neither caused through intention nor appreciable negligence, it could however be fair if the considerable income from interest gained due to the prematurely inherited assets were to be counted as reducing the claim when calculating the level of damage due to loss of maintenance.

Nature of the accountability. In assessing whether an advantage accrued is to be set against liability, the basis of liability is also of great significance. In particular, there will be no reduction in liability where the liable person caused the damage intentionally.

Performance by a third party. Most issues in relation to a possible equalisation of benefits are raised in the context of benefits performed for the injured person by third parties by reason of the harm. Under paragraph (2) the result depends on the aim of these benefits, i.e. on whether alleviating the position of the injuring person was or was not an objective. In the normal case there will be no such purpose, which once more confirms the rule (no setting off). In special circumstances it can even occur that third party expenditure not only does not mitigate the liable person's obligation to pay damages but also increases it: see VI.–2:201(2)(a) (Personal injury and consequential loss).

Examples. As already stated, the most important examples relate to insurance payments to injured persons and continuation of pay by employers (to injured and therefore absent workers). Other examples are donations from third parties (not being participants in the causation of damage) and increased income as a result of a change in career necessitated by injuries sustained. Such benefits are generally not to be taken into account to reduce compensation. If there is no assignment by operation of law of the injured person's right to compensation, the injured person may effectively recover twice over. The position is different only where the aim of the contribution from the third party was also to benefit the injuring person. The other criteria of the fairness test also hold true in cases involving benefits from third parties, especially the rule that a wrongdoer who acted intentionally will in principle not be entitled to any relief.

Illustration 6
At a major football event a police officer from the host nation is beaten up and very severely injured by hooligans from a participating nation. There is extensive media coverage of the event. People from the country from which the hooligans come are ashamed of their fellow countrymen and donate large sums for the benefit of the police officer. This does not reduce the hooligans' liability.

NOTES

1. The point of departure of FRENCH law is the principle that the injured party is to be restored to the position that he would have been in had the damaging event not occurred; the injured party is not permitted to suffer a loss or obtain a benefit (Cass.civ. 23 January 2003, Bull.civ. 2003, II, no. 20 p. 16). Therefore, claiming cumulative recovery for overlapping items of damage is, as a general rule, excluded (*le Tourneau*, Droit de la responsabilité et des contrats [2006/2007], no. 2546). A divergent approach is only adopted if the collateral source of benefit does not evoke

connotations of indemnification (Cass.crim. 17 December 1970, D. 1971 Somm., 41 [compensation awarded to the widow of a farmer; the widow's legal right share was not taken into account in the computation of damages under CC art. 1382]; Cass.crim. 1 June 1999, JCP 2000 éd. G, I, 197, no. 7, note *Viney* [no reduction in compensation for children's claim for loss of support following the accidental death of their father on account of their fixed right to a share of the latter's estate]).

2. According to BELGIAN legal doctrine, in this context, a differentiation must be made between distinct groups of cases (on the following, see *Simoens*, Schade en schadeloosstelling, no. 48 p. 92). (i) Collateral benefits directly arising from an event grounding liability are taken into account in the assessment of damages (textbook example: the destruction of a house leads to a treasure trove being unearthed). (ii) However, involuntary (undesired) savings in expenditure are disregarded (textbook example: parents who have a lost a child are spared the financial costs of rearing that child). (iii) Moreover, there is no set-off in respect of benefits arising consequent upon the rectification of the damage and which are unavoidable (textbook example: a damaged vehicle is repaired by using new parts). (iv)Benefits, which can be attributed to the injured party's initative, are only set off in the event that his actions could be reasonably expected of him. If, in the course of a limiting his possible loss, the victim goes over and above his obligations and through this secures a benefit, here, no corresponding set off in damages as against benefits will be entertained (Cass. 7 September 1982, Pas. belge 1983, I, p. 19). (v) The most pervasive difficulty in this field arises in cases where compensation is paid by a third party. The general rule propounds that, in this case, cumulative recovery is permitted, if the legal basis and the purpose of the collateral subvention paid by the third party is not identical with the tortfeasor's duty to make reparation (Cass. 28 April 1992, Pas. belge 1992, I, no. 452 p. 761 [no set off of unemployment insurance contributions against the delictual damages claim]). The focus of professional legal discourse is on the issue as to whether the third party can seek to recoup his payment from the tortfeasor. If this were indeed the case, then the upshot of this is that the third party's payment stemmed from the same legal basis and fort the same purpose as the tortfeasor's duty to make reparation (van Gerven [*Covemaeker*], Verbintenissenrecht², 480).

3. SPANISH TS 15 December 1981, RAJ 1981 (2) no. 5157 p. 4131 held, in connection with the doctrine of *compensación de beneficios* (or *compensatio lucri cum damno*), that benefits arising from the damage caused, which the tort victim obtains as a result of the incident, must also be taken account of when it comes to computing damages (a heavy goods vehicle drove into a building, which, as a result had to be torn down. However, as the land had been rezoned, the demolition led to an enormous increase in the value of the property; critical, on this point Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Pantaleón*], Código Civil II[2], art. 1902, p. 1989-1990). However, an exception is made for cases for payments arising under a contract of insurance CHECK (TS 27 November 1965, RAJ 1965 (2) no. 5534 p. 3387); in such cases, at any rate, the losses are first of all frequently taken care of by the insurer and should the injured party advance a claim against the tortfeasor, the former is liable to his insurer under the principles of unjustified enrichment (Insurance Contract Act 1980 art. 26). Legal commentary postulates that a model which espouses that collateral benefits should be set-off against damages would only be relevant in cases where the benefits received are a direct consequence of the damaging event and stem from the same cause (*Díez-Picazo*, Derecho de daños, 320; *Roca i Trias*, FS Albaladejo, 4255; see also *Yzquierdo Tolsada*, Sistema de responsabilidad civil, 498). Where damage is caused by terrorist attacks, the State is thereupon obliged to compensate the victim of such attacks; the State is thereby subrogated to victim's claims against the offender

(Act on Solidarity with the Victims of Terrorism [*Ley 32/1999, de solidaridad con las víctimas del terrorismo*]); the same rule is found in the law governing the compensation of victims of crime (Act on Allowances and Assistance to the Victims of Violent Crimes and Crimes against Sexual Liberty [*Ley 35/1995*] of 11 December 1995) and in the Regional regulations governing compensation of HIV infected patients. In the socalled 'colza oil case', collateral benefits conferred by the State were set off against the delictual compensation owed by the State. Both subventions arose from the same catastrophe (TS 24 May 2001, RAJ 2001 [3] no. 5442 p. 8342). Previously, cumulative recovery was allowed in respect of payments made under an occupational injury insurance scheme and tort damages (TS 27 November 1993, RAJ 1993 no. 9143 p. 11794; TS 19 February 1998, RAJ 1998 [1] no. 986 p. 1564). However, recent case law of the social chamber of the *Tribunal Supremo* demonstrates that this trend has waned and such benefits must be brought into account in the calculation of damages (see, instead of many, TS 10 December 1998, RAJ 1998 [5] no. 10501 p. 15488). In the interim, this approach has been approved by the Civil Chamber (TS 21 July 2000, RAJ 2000 [3] no. 5500 p. 8397; TS 8 October 2001, RAJ 2001 [4] no. 7551 p. 11863).

4. While there is no express statutory basis for *compensatio lucri cum damno* in ITALY, in principle, it is, however, recognised (*Salvi*, La responsabilità civile[2], 251). This postulates that an injured party is not permitted to profit from the unlawful act. A prerequisite for setting off benefits against damages is that both the benefit and the damage are an immediate and direct consequence of the same occurrence (as e.g. in Cass. 22 June 2005, no. 13401, Giust.civ.Mass. 2005, fasc. 6: damage caused to a salt production plant; the plant was fitted out with new and therefore, more valuable machines; 40% of the costs had to be borne by the injured party; cf. also Corte dei Conti reg. Basilicata, sez. giur., 2 February 2005, no. 14, Riv. Corte dei Conti 2005, fasc. 1, 234: employee fraudulently secured his position by submitting bogus qualifications; benefits derived from the part of job which did not require a professional qualification taken into account).

5. Furthermore, in HUNGARY, the operative assumption is that an award of compensation should not lead to the enrichment of the injured party. Consequently, benefits received by the plaintiff which are immediately derived from the damaging event will factored in the computation of damage leading to a reduction in the award. A deduction "new for old" takes place in the cases where vehicles are repaired by using new parts (see further Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1363). In the context of insurance benefits, a distinction is drawn between socalled "indemnity" policy of insurance (such as liability insurance) and socalled fixed sum insurance (such as life insurance or accident insurance). Benefits deriving from a compensatory insurance are deducted from the compensation; the corresponding claim of the victim against the tortfeasor is subrogated to the insurer. By contrast, a cumulation of benefits is permitted in respect of the collateral benefits obtained under a fixed sum insurance policy and grant of compensation (*Benedek* loc. cit. 1364-1367; Petrik [-*Köles*], Polgári jog II, 632 et seq; *Petrik*, Kártérítési jog, 235 et seq; *Eörsi*, Kártérítés jogellenes magatartásért, 157 et seq). In cases concerning the death of a person, the expenses incurred by the deceased dependents in connection with the administration of the estate do not amount to recoverable damage, however, the benefits obtained from the inheritance do not operate to reduce the award of damages; tort law and the law on succession are kept strictly separate from one another (*Köles* loc. cit.).

6. Similarly, the principle of *compensatio lucri cum damno* does not find statutory expression in BULGARIA. Nonetheless, it is deemed operative in a number of

constellations (see further *Tzachev*, Zakon za zaduljeniyata i dogovorite I[2], 201; *Kojucharov*, Obligazionno pravo I, 271). The tortfeasor's liability will only be reduced by a collateral benefit if a causal nexus exists between the benefit and the unlawful act (*Kojucharov* loc. cit.). This criterion is not met e.g where a donation is made by a third party or in cases of assistance rendered following an accident. Life insurance or accident insurance payouts to the injured party will not operate to reduce a tortfeasor's liability (see Insurance Code art. 238(2)). According to the (older) jurisprudence of the Supreme Court, the same does not hold true for disability pensions (Supreme Court 23 December 1968, Decree no. 4); however, a complicated model has been adopted which distinguishes between varying degrees of disability. Typically, where payments are property insurance payouts, the insurer becomes subrogated to the injured party's right to assert a claim against the damaging party (Insurance Code art. 213(1)). The economically realisable vestiges of a damaged thing are set-off against damages, i.e, e.g. the fur of an animal which was killed (*Kojucharov* loc. cit.). In ROMANIA, social security benefits supplant the injured party's recovery under tort law; however, the claim is subrogated to the insurer who has paid the loss. Benefits obtained from third parties, the purpose of which was not to redress the damage caused but were merely furnished as a means of providing support, do not operate to reduce the extent of the damages claim (*Adam*, Drept civil. Teoria generală a obligaţiilor, 268-272; *Lupan*, Răspunderea civilă, 78-82, 342).

7. The drafters of the GERMAN BGB (old) expressly left the problem of set-off to the courts and legal teaching (Mot. II 19). However, the drafters did consider its dimensions in a number of instances and either expressly ordained that a set off would take place in a number of isolated provisions (e.g. in CC § 642(2) [contract for work and services; breach of contract by the person ordering the work, expenditure that is saved by the contractor]) or that there was a bar to the right of set-off (as in CC § 843(4) [no set-off of maintenance payments provided by a third party as against the injured party's damages claim]). Great practical importance is ascribed to the provisions governing *cessio legis*, namely the automatic passing of the injured party's rights to the insurer who has made a payment to the insured (especially Social Security Code [*SGB*] X § 116 and Insurance Contract Act [*VVG*] § 86). A requirement of these provisions is the denial of a right to set-off as otherwise, the insurer cannot be subrogated to the rights of the insured person against the tortfeasor. Moreover, there is no prevailing general rule; the outcome will depend upon an assessment of the individual circumstances of the case at hand (see further Palandt [-*Heinrichs*], BGB[67], Pref. to § 249, nos. 122 and 125; Staudinger [-*Schiemann*], BGB, § 249, nos. 140 and 145). A generally recognised principle is the deduction "old for new" in the context of repairing things (*Schiemann* loc. cit. no. 175; *Medicus*, Schuldrecht I[17], no. 607). Further, one has to make do with a general rule of thumb, which provides that (i) there must be an adequate causal nexus between the damaging event and the benefit accrued (BGH 15 November 1967, NJW 1968, 491, 492; BGH 13 July 1981, NJW 1982, 32, 33; BGH 16 January 1990, NJW 1990, 1360), and (ii) an unreasonable burden must not be imposed on injured party by the set off and, the tortfeasor taking unreasonable advantage of the collateral benefit is not condoned (BGH 15 January 1953, NJW 1953, 618, 619; BGH 17 May 1984, NJW 1984, 2457, 2458; BGH 6 June 1997, NJW 1997, 2378; BGH 17 November 2005, NJW 2006, 499).

8. In turn, it has been espoused in AUSTRIA that the injured party is to be restored as far as is possible to the position he would have been in. had the event generating liability not occured, however, the award of damages must not represent a profit for the claimant (OGH 16 February 1955, SZ 28/46 p. 109). The principle that all benefits are to be set-off against damages is derived from this (*Koziol*, Haftpflichtrecht I[3], no.

10/33; Rummel [-*Reischauer*], ABGB II[3], § 1312 no. 2). Deductible benefits can consist of cost savings, availability of manpower, earnings, and any third party dispositions (*Reischauer* loc. cit. no. 5). However, the prerequisite for a deduction of benefits is a causal nexus between the damaging event and the subsequent benefit. In addition, a temporal and objective congruity between the damage and the ensuing benefit is required (OGH 2 April 2003, 7 Ob 298/02b, RIS-Justiz 0114259; OGH 28 September 2000, ÖJZ 2001, 268). This criterion is not met if the injured party nets a higher wage following vocational retraining which was prompted by injuries which he sustained in the accident (OGH 28 September 2000 loc. cit.) or where a person is "spared" household expenses given that they are lying in a hospital bed (OGH 23 November 1971, ZVR 1972/154 p. 299; cf. also OGH 27 September 1978, ZVR 1979/277 p. 334). If it was incumbent on the person who was killed to provide maintenance to the dependants who were the successors in title to the deceased's estate, the causation requirements for a valid set-off will not be met if the person concerned would also have inherited in the event that the deceased succumbed to a natural death (*Koziol* loc. cit. no. 10/48); therefore, claims for loss of support may only be reduced by the advantages derived from the accelerated availability of the inheritance (OGH 5 November 1965, SZ 38/186 p. 567; OGH 5 December 1968, SZ 41/169 p. 532). The current earned income from the inheritance reduces the damage of the survivors. There is no causation in respect of the death and subsequent funeral expenses as the successors in title would have had to bear those costs in any event (CC § 569). In general, the acceleration of this claim for reimbursement is offset by the early receipt of the inheritance (*Koziol* loc. cit. no. 10/51). Third party payments are not included in the set-off if it is deemed that the damaging party should not have the benefit of them (*Reischauer* loc. cit. no. 3a; Koziol and Welser, Bürgerliches Recht II[13], 331). This will depend on the content of the statutory obligations of the third party which can be ascertained by examining the statutory purpose underpinning the norm, voluntary payments are contingent upon the intention of the provider (*Koziol* loc. cit. no. 10/38). In case of doubt, it is presumed that the purpose of the disposition was not to alleviate the plight of the damaging party (*Reischauer* loc. cit. no. 4a). This is true e.g. for compulsory insurance pay-out and for maintenance payments (OGH 18 December 1969, ZVR 1970/150 p. 205), for emergency payments by the Social Welfare (OGH 29 April 2004, 6 Ob 260/03h), for charitable donations (OGH 15 April 1980, SZ 53/58 p. 265) and for all other dispositions made with the solidarity of the injured party in mind (OGH 4 February 1965, ZVR 1965/283 p. 335; CA Wien 1 December 1993, ZVR 1994/130 p. 314). However, in many instances, the problem of set-off is solved by subrogation of the claim (e.g. Social Security Act [*ASVG*] § 332; Insurance Contract Act [*VVG*] § 67). Whether pain "spared" can be set off against pain actually suffered is questionable and at any rate is only conceivable once very restrictive pre-conditions have been satisfied (see further OGH 13 January 2004, ZVR 2005/28, p. 95).

9. In GREECE, the tenet holds that the injured party should receive full reparation, however should not be enriched by his loss and therefore, for the most part by relying on CC art. 930(3), professional legal opinion favours deduction benefits obtained from the award of damages (Georgiades and Stathopoulos [-*Stathopoulos*], arts. 297-298, no. 89; *Stathopoulos*, Geniko Enochiko Dikaio A(1)[2], 546). The criterion of adequate causation is promoted in this context in an attempt to circumvent of charges of unfairness. An adequate causal nexus must be extant between the damaging event and the subsequent benefit; only if this is given, will the benefit be deducted. Additionally however, the courts occasionally simply refer to the principle of good faith to justify the non-deductibility of benefits (CC art. 288; see *Georgiades*, Enochiko Dikaio,

Geniko meros, 154 and A.P. 523/1995, NoB 45 [1997] 966, note *Stathopoulos*). Voluntary payments made by a third party, which are intended to benefit the victim and not release the damaging party from its obligations (*Stathopoulos,* Geniko Enochiko Dikaio A(1)[2], 556). By contrast, a deduction "new for old" takes place in the context of repairs (Georgiades and Stathopoulos [-*Stathopoulos*], arts. 297-298, nos. 97, 114).

10. In PORTUGAL, the appositeness of *compensação de lucros com danos* (or *compensação de vantagens*) is inferred from CC art. 568 which provides that, under certain circumstances, a person who is under a duty to pay damages, can require the injured party to relinquish his rights vis á vis a third party; moreover, reference is made to CC art. 803(2) (*commodum de representação*) and CC art. 566(2) in this regard, whereby the assessment of damages hinges on the difference between the injured party's current financial situation and the financial situation which would have probably existed had the accident not occurred (*Pessoa Jorge*, Ensaio sobre os pressupostos da responsabilidade civil, 379, 413, 416). There must be a causal link between the damage and the ensuing benefit; a mere coincidence will not suffice in this regard (*Pires de Lima and Antunes Varela,* Código Civil Anotado I[4], note 2 under art. 568, p. 586). For example, if, a person is not permitted to sit his driving instructor exams, despite having secured guarantee from his training school assuring the claimant that his application would not fail on the basis of his failure to meet a number of statutory requirements, it then followed that the advantage that he secured from these lessons, which were indeed of help to him in passing his exams which he had taken once the necessary changes in the law had been made, could not be deducted from his award of damages (STJ 28 February 2002). By contrast, in a case concerning the cause of action of a manager pertaining to his loss of employment at a charitable foundation which functions had been transferred to the State, his salary earned as an employee of another State institution was set off against the damages (CA Lisbon 12 May 2005). It appears that the philosophy of the *compensatio lucri cum damno* is primarily drawn upon in connection with the breach of a pre-contractual obligation, namely, where the complainant subsequently saves costs as a result of the failure to realise the contract (*Prata*, Notas sobre a responsabilidade civil pré-contratual, 180; STJ 11 January 2007).

11. If same damaging event causes the injured party to suffer damage and at the same time causes him to obtain a benefit, then, according to Dutch Civil Code CC art. 6:100 this benefit will be set off against the compensation, however, only insofar "as it is reasonable to do so". The "benefit" could be anything that reduces the extent of the damage suffered (savings in expenditure; increase in assets; continued payment of salary even though no work is performed; payment of a pension; tax savings). Non-material benefits are only relevant in the context of calculating compensation for non-pecuniary loss (HR 21 February 1997, NedJur 1999, no. 145 p. 837: wrongful birth). Set-off of benefits as against damages does not take place in the context of payments derived from indemnity insurance; the victim's claim against the tortfeasor is subrogated to the insurer. In the context of a pay-out under a fixed sum insurance policy (e.g. life insurance), it still appears to be the case that amount paid out on the death of the assured is set off against the dependent's claim for loss of support (CC art. 6:108) if these payments are a means of subsistence for the dependants (HR 19 June 1970, NedJur 1970, no. 380 p. 1066; HR 4 February 2000, NedJur 2000, no. 600 p. 4155). Continuation of salary during protracted illness (CC art. 6:107a) and in a number of other situations is the subject of special statutory regulations. At any rate, a set –off will not be "reasonable" pursuant to CC art. 6:100 if there is not a sufficient causal nexus between the damaging event and the benefit obtained therefrom

(Parlementaire Geschiedenis VI, 348; Schadevergoeding I [-*Lindenbergh*], art. 6:100, no. 4 p. 10, nos. 7-8 pp. 13-24; *Salomons*, Schadevergoeding, no. 19 p. 34).

12. ESTONIAN LOA § 127(5) proceeds from the principle that every benefit obtained from a injuring event will operate to reduce the quantum of damages. However, it should be noted that the set-off may not run contrary to the purpose of an award of damages

13. The principle of *compensatio lucri cum danno* is generally recognised in the NORDIC countries. It is, however, referred to only in a limited number of cases. Equalization of benefits should be reserved for obvious advantages which have a clear causal link with the injuring event (*Hellner and Radetzki*, Skadeståndsrätt[7], 368; *Rodhe*, Obligationsrätt, 476; cf. *Hellner*, Obehörig vinst, 163). Others rely on a general reasonableness test (*Bengtsson*, Ersättning vid offentliga ingrepp II, 234; *Saxén*, Skadeståndsrätt, 269), a number of commentators point to the a formula whereby the protective scope of the reparation is examined (*Andersson*, Skyddsändamål och adekvans, 459), other rely on the concept of adequacy (*Radetzki*, Skadeståndsberäkning vid sakskada, 184; critical on this point, however, *Rodhe* loc cit. 476 and *Iversen*, Erstatningsberegning i kontraktsforhold, 734). In DENMARK, stress is placed on the tenet that an award of damages should not operate to enrich the injured party (*von Eyben and Isager*, Lærebog i erstatningsret[6], 285; *Vinding Kruse*, Erstatningsretten[5], 342). Therefore, e.g. living expenses saved during hospitalisation are set off against the compensation claim (HD 13 March 1959, NJA 1959, 181), whereas donations, prompted by the accident, made by a third party are disregarded (HD 4 December 1947, NJA 1947, 586; *Andersson* loc cit. 459; similar for FINLAND *Saxén* loc cit. 320; cf. *Møller and Wiisbye*, Erstatningsansvarsloven[6], 371). In SWEDISH HD 3 December 1990, NJA 1990, 705 a municipality had recommended a house owner to install a special heating system, as the municipality wrongfully claimed that a nuisance was at hand due to high radon levels. The municipality was held liable for the cost of the instalment of the heating system, and no reduction was made, as the municipality had argued, with reference to that the plaintiff would not have installed the system unless mislead by the recommendation and furthermore no economic benefit to the plaintiff had been proven by the defendant such as cost savings or a sustaining increase of property value. In HD 21 December 1993, NJA 1993, 753 a person carrying out excavation work negligently damaged ancient remains enjoying statutory protection, necessitating archeological examination for which costs the defendant was liable, who claimed equalisation due to the benefit of knowledge which the national heritage agency gained through the examination. The Court dismissed that defence, as the advantage had no commercial value, and the agency should be free to freely decide which sites to examine. Generally speaking, cumulative (double) compensation is not allowed in the Nordic countries. Most deductions, however, are not based on the principle of *compensatio lucri cum danno*, but rather follow from principles and rules on the assessment of damages (*Hellner and Radetzki* loc cit. 418; *von Eyben and Isager* loc cit. 291). Swedish Damages Liability Act chap. 5 § 3 ordains e.g that, in the context of assessing damages arising out of a claim for loss of income and support, benefits arising from the compulsory social security insurance, industrial injury insurance and other benefits paid for by the employer are to be deducted. Subrogation of the victim's claim to the relevant insurer does not take place. By contrast, benefits obtained from insurance privately taken out does not led to a reduction in damages (*Hellner and Radetzki* loc cit. 388; *Bengtsson and Strömbäck*, Skadeståndslagen[2], 248). Similarly, according to Danish EAL §§ 2 and 7 compensation flowing from social security and industrial injury insurance is deducted from the damages claim. This also includes pay-outs under private health insurance. A

right of subrogation (to the employer) is only envisaged for continuance of salary in cases of illness and for other employee benefits (*von Eyben and Isager* loc cit. 331; *Møller and Wiisbye* loc. cit. 370 and 597). There is not right to subrogation (by the insurer) in respect of damage caused to insured property; a private individual who was merely negligent in causing such damage does not incur liability (EAL §§ 19 and 22). In Finland, payouts made under social security compensation (sick pay) as well as industrial injury insurance compensation are generally deducted from the victim's damages claim (*lag om sjukföräkring*, 21 December 2004, chap. 12 § 2; *lag om olycksfallsförsäkring*, 20 August 1948/608, § 61), however, the insurer has a right to recoup the payment from the tortfeasor. Special regulations exist to govern damage caused by a criminal act (e.g. *lag om sjukföräkring* § 7). Incidentially, for all of the Nordic countries, the principle holds that payouts under a fixed sum insurance (*summaförsäkring*) are not deductible; therefore the damages claim and insurance payout may be cumulatively recovered, the victim's rights are also not subrogated to the insurer

14. IRISH Civil Liability (Amendment) Act 1964 sec. 2 provides that "[i]n assessing damages in an action to recover damages in respect of a wrongful act (including a crime) resulting in personal injury not causing death, account shall not be taken of (a) any sum payable in respect of the injury under any contract or insurance, (b) any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury." By operation of this section a plaintiff may receive double compensation for the same loss. Social Welfare (Consolidation) Act 1993 secs. 75(1) states that, not withstanding sec. 2 of the 1964 Act, in an action for personal injuries there shall in assessing damages be taken into account, against any loss of earnings or profits that has accrued or probably will accrue to the injured person from the injuries, the value of any rights that have accrued or will probably accrue to the injured person therefrom in respect of injury benefit (a weekly benefit payable where a person is unfit for work on account of an accident at work or an occupational disease) or disablement benefit (payable to a person who suffers a loss of physical or mental faculty as a result of an occupational injury or disease while in insurable employment) for the five years beginning with the time when the cause of action accrued. Section 237(1) of the 1993 Act provides that, notwithstanding sec. 2 of the 1964 Act, in assessing damages in any action in respect of liability for personal injuries not causing death relating to the use of a mechanically propelled vehicle, there shall be taken into account: "the value of any rights arising from such injuries which have accrued, or are likely to accrue, to the injured person in respect of disability benefit … or invalidity pension under Part II [of the Act] for the period of five years beginning with the time when the cause of action accrued." Judicial disapproval has been expressed for this legislative policy (*O'Loughlin v. Teeling* [1988] ILRM 617 [HC] per *McKenzie* J). In its *Report on Section 2 of the Civil Liability (Amendment) Act 1964: The Deductibility of Collateral Benefits from Awards of Damages* (LRC 68-2002), the Law Reform Commission made radical recommendations for changes in the law of collateral benefits. The Commission proposes that double recovery should be barred in respect of permanent health insurance [para 1.49]. Where a plaintiff has paid the entirety of the insurance premiums payable under a personal accident insurance policy, directly and independently and in his or her own name, the Commission recommends that the plaintiff should be allowed to make double recovery (para 1.56). It is recommended that, in general, charitable benefits should not be deducted from an award of damages (para 2.05) and that occupational pensions should not be subject to deductibility. It is also proposed that sick pay should be deductible from the award of damages against the wrongdoer, "save that no account shall be taken where the sick pay gives rise to a

legally enforceable debt or where the sick pay is a charitable debt or where the sick pay is a charitable donation" (para 4.36). The Commission also recommends that the principle of deductibility apply across the board to social welfare payments (para 5.016). It is recommended by the Commission that the two statutory exceptions to the general rule against deductibility contained in Social Welfare (Consolidation) Act 1993 ss.75 and 237 apply equally to all types of accident. It proposes (para 5.054) that social welfare payments, which arise in consequence of injury and compensation for loss of earnings or profits, should be deducted but only from damages for loss of earnings or profits. Finally, the Commission recommends (para 5.110) that the Department of Social and Family Affairs give consideration to the setting up of a reimbursement system under which the amount by which a compensation award has been reduced, by virtue of the payment of social welfare payments including health allowance, should be reimbursed by the defendant to the Department or a Health Board, as is appropriate. In *O'Neill v. Electricity Supply Board* (unreported, High Court, July 31, 2002), *Finnegan* P. made no reduction under the rule in *Reddy v. Bates*, where the plaintiff, aged 52 at the time of the accident in 1999, had been an employee of the defendant since 1965. In view of the plaintiff's security of employment, *Finnegan* P. stated that he thought that a reduction would be inappropriate. In contrast, in *Boyne v. Bus Átha Cliath* (unreported, High Court, 11 April 2002), *Finnegan* P. made a 10% reduction on the basis of *Reddy v. Bates* where the plaintiff, prior to the accident, had had two fairly long bouts of unemployment. The general concerns about the employment market over time which were expressed in *Reddy v. Bates* do not need to find foundation in a plaintiff's pre-accident history but such history will no doubt strengthen the argument for the application of the rule in a particular case (*Byrne and Binchy*, Annual Review of Irish Law 2002, 523). In *Hogan v. Steele & Co. Ltd.* [2000] 1 ILRM 330 (HC), the High Court held that that it was not possible to set off the voluntary salary continuance against the employee's damages claim against the person who caused the accident; however, the damages must be remitted to the employer.

Illustration 1 is taken from BGH 23 June 1992, NJW-RR 1992, 1397; **illustration 2** from TS 15 December 1981, RAJ 1981 (2) no. 5157, p. 4131**)**; and **illustration 5** from Cass. crim. 1 June 1999, JCP éd. G 2000, I, 197, no. 7, note *Viney*.

VI.–6:104: Multiple persons suffering damage

Where multiple persons suffer legally relevant damage and reparation to one person will also make reparation to another, Book III, Chapter 4, Section 2 (Plurality of creditors) applies with appropriate adaptation to their rights to reparation.

COMMENTS

Reparation to one person will also make reparation to another. This Article relates to a problem which arises relatively frequently in the law on non-contractual liability. It concerns the question of who can claim damages (or as the case may be, who can claim which part of the damages) where the injuring person has inflicted a legally relevant damage on several persons and the making good of one of these damages results in the simultaneous reparation of all others; this meaning in turn that the injuring person must only satisfy the damages once in total. The most frequent case in practice is that of damaging a thing in which various different people hold a property right. The repair of the thing or the compensation of the necessary repair costs remedies the consequences of several separate legally relevant damages.

> *Illustration 1*
> B has purchased goods from S who enjoys a reservation of ownership. T damages this property negligently. Although there is legally relevant damage both to S's ownership and to B's property right in the goods (if such a property right, e.g. an *Anwartschaftsrecht*, exists under the applicable law), T is in any case never liable as regards the repair costs (the position will be different, for example, as regards an additional loss of income for B during the time of repair) for more than 100% of the expense.

Damage and damages. In these cases it is important as a first step to distinguish between determining the existence of a legally relevant damage for a given interested party and, on the other hand, the appropriate remedy which responds to that claim. VI.–2:206 (Loss upon infringement of property or lawful possession) is concerned solely with the ascertainment of a legally relevant damage. By contrast, the questions of (i) the mode, (ii) the quantum and (iii) the appropriate recipient of reparatory legal redress which may be claimed belong in the law of remedies. The present Article addresses the third of these questions. This provision does not, however, apply where the same conduct has caused several separate legally relevant damages *and* they can only be made good separately and independently from their counterparts.

> *Illustration 2*
> A operates a hairdresser's salon in a house which is damaged by T's lorry. Of necessity the business must be closed for a period. O, the owner of the building, and A have each suffered loss, O as a result of the infringement of his property right and A as a result of the infringement of her right to lawful possession of the salon. O has a claim to compensation for the repair costs; A has an independent claim to compensation for the loss of business income during the time in which it was not possible to operate the salon. The fact constellation required in VI.–6:104 is not present here.

Reference to Book III. The Article deals with the question by making reference to the rules in Book III, Chapter 4, Section 2 (Plurality of creditors). Within these rules, III.–4:202 (Solidary, divided and joint rights) distinguishes between these different types of right; III.–4:203 (When different types of right arise) paragraph (1) stipulates that whether a right to performance is solidary, divided or joint depends on the terms regulating the right, and paragraph (2) of the same Article provides that the default rule is that the rights of co-creditors are divided.

Significance for the rules in this Book. These basic rules also apply to situations which may arise in the law on non-contractual liability. In view of the variety of possible case constellations, a more precise rule could not be formulated. The point of departure may nonetheless be set down, namely that in principle the damages must accrue to the person who in actual fact suffers a loss due to the property damage. This is because such a loss is a prerequisite for the fact that a person has suffered a legally relevant damage according to the rules of Chapter 2. The mere breach of a right is not sufficient for this except in those specific situations in which the very breach itself is expressly qualified as legally relevant damage.

Illustration 3
T, driving too fast, loses control of a lorry on a bend and damages a house owned by O. The land on which the building stands is burdened with a security in favour of the B bank. Both O and B suffer an infringement of their property rights. The quantum of loss in each case, however, depends on the circumstances of the particular case. Depending on the creditworthiness of O, the width of the security (i.e. whether it extends to O's right to reparation and any proceeds of it) and the extent of their (other) securities, the bank may suffer only a limited loss or perhaps none at all. In the latter case, despite the infringement of its property right, B suffers no legally relevant damage.

Illustration 4
The facts are the same as in illustration 1. If B performs the obligations under the contract with S, as agreed, and continues to pay the instalments of the price, a case of default does not arise. S has no loss; B alone is entitled to the damages. Things are different where at the time of the accident B has already stopped performing the obligations under the contract of sale. In case of doubt, B is entitled to the part of the claim in damages that correlates to the percentage of the cost price which has already been paid off and S to the other part. That is so, in any event, where the car is a total loss. Conversely, where lesser damage is involved, which can still be reasonably removed by repair, both of the injured parties are entitled as joint creditors to the claim to reparation for repair costs and the claims due to loss of use and loss in value of the now damaged car; this is in the case where the security interest matures. The issue of equalising the interests between them is an issue that should not burden the action for damages following from the accident. As a consequence, each creditor may only demand performance to both collectively (see III.–4:202 (Solidary, divided and joint rights) paragraph (3)).

NOTES

1. In FRENCH tort law, this problem is seldom discussed; apparently, whoever has paid the costs of repair is entitled to compensation. At any rate, the relevant damage must be immediate, ascertained and personal (Cass.civ. 23 May 1997, GazPal 1977, II,

677). A damages claim can only be asserted by a person who has actually suffered damage (*Mazeaud/Mazeaud/Tunc*, Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle[6], no. 272 p. 359). If more than one person is affected by the same act, it is not possible that they suffer the same damage. This is the case e.g. where a person is killed, where the extent of liability essentially turns on how many family members survive the deceased (*Savatier*, Traité de la responsabilité civil II, no. 559 p. 125). Each person concerned is entitled to assert their own individual claim, each person has a right to claim compensation for the damage that they suffer, this compensation is assessed on a discretionary basis by the court of first instance (*Viney and Jourdain*, Les conditions de la responsabilité[3], no. 291 p. 120). Consequently, a partner in a commercial firm who suffers economic loss following the death of one of the other partners can bring an action for his individual loss which results out of the diminution in the value of the business (Cass.crim. 16 May 1979, JCP 1979, IV, 237).

2. As far as BELGIUM is concerned, it has been pointed out that it is invariably the case that whenever several persons hold a property right in a damaged thing (or a right to it), the claim to compensation of one holder of a property right restricts the claim of the other. At any rate, owners of property and tenants of a house that has sustained damage cannot claim a higher sum in total than what would have been due to the landlord, had he not rented the house (*Simoens*, Schade en schadeloosstelling, no. 152 p. 301).

3. In SPAIN, each holder of a joint right, independently and in his own name, is permitted to pursue the matter on behalf of the rest of community of right holders; as a general rule, the judgment which is handed down also operates in favour of the other rightsholders (TS 31 January 1973, RAJ 1973 [1] no. 100 p. 74; Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Miquel*], Código Civil II[2], 1077). Most notably, special rules can be discovered in the Intellectual Property, Patents and Utility Models Act (*Ley 11/1986, de patentes de invención y modelos de utilidad*, of 20 March 1986) art. 72 states that: "(1) Where a patent application or patent already granted belongs to a number of persons in undivided parts, the resultant co-ownership shall be governed by agreement among the parties or, in its absence, by the provisions of the present Article, or, ultimately, by the common law provisions on joint ownership. (2) However, any one of the parties alone may […] (d) bring civil or criminal action against third parties who in any way injure the rights conferred by the joint application or patent. The party exercising such action shall be obliged to notify the other parties of the action taken so that they may also take part". A similar provision can be found in Trade Marks Act (*Ley 17/2001, de marcas*, of 7 December 2001) art. 46(1). According to the legal doctrine, the co-owners of a trade mark or patent right are to be regarded as solidary creditors of the obligation that arises from the infringement of the right and therefore the debtor of the obligation to compensate damages (i.e. the infringer of the right) is entitled to pay to any of the solidary creditors; but where only one of them has brought the tort law suit, the debtor is obliged to pay to that creditor (CC art. 1142; Reglero Campos [-*Reglero Campos*], Tratado de responsabilidad civil[3], 2207 and, concerning patents right, TS 13 May 1996, RAJ 1996 [2] no. 3903 p. 5054). The assessment of the amount of damages will depend on the share of ownership. However, the assessment of damages seems to be more difficult within the scope of the relationship between rightholder and licensee of intellectual property rights. It is usually admitted that where the licensee is an exclusive one, the damage is basically sustained by the licensee and although both the rightholder and the licensee are entitled to claim (Patents Act arts. 62 and 124(1)) the right to compensation belongs to the licensee. Therefore, if the plaintiff is not the same person who has the right to

compensation, he/she has to reverse in the internal relationship the compensation to that other person (*Portellano Díez*, La defensa del derecho de patente, 112). In case the rightholder also sustained a damage by the infringement (for instance, the loss of reputation of the patented invention: Patents Act art. 68), it should be assessed in the internal relationship who is entitled to the compensation (*Portellano Díez* loc. cit.).

4. Under ITALIAN law, only a buyer, and not a seller retaining property in the goods under a retention of title clause has a right to claim reparation against the person who caused damage to the thing. The rationale for this is the damage is only suffered by the buyer as s/he alone used the thing (Cass. 30 May 1981, no. 3541, Giur.it.Mass. 1981, fasc. 5; Tribunale Superiore delle Acque 16 January 1995, no. 3, Cons. Stato, 1995, II, 122). The seller is confined to asserting a claim against the buyer (*Carpino*, Obbligazioni e contratti III, 319). A similar state of affairs can be observed without the framework of a contract for the lease of goods. The right to reparation devolves upon the lessee because the damage occurs in his legal sphere (*Bianca*, Diritto civile V, 597). The legal position is not as clear -cut if the thing that is damaged or destroyed is burdened with a proprietary security right. The claim of person holding the security right in the property is denied, partly on the basis of the argument that the security interest also comprises part of the former's compensation claim (CC art. 2742(1)), with the result that the secured creditor does not suffer a legally relevant damage (*Bianca* loc. cit.). In addition, CC art. 2743 also confers upon the creditor a right to demand that the debtor provide something else as security if the originally encumbered asset was destroyed or becomes worthless. The counter argument that is made is, namely, that the proprietary interest as such must be protected by tort law on the grounds that the claim arising under CC art. 2743 could be rendered worthless in some cases (see further *de Cupis*, Il danno II, 61-62). The predominant view in legal writing is that the right to assert a claim *iure proprio* is conferred upon the holder of a lien owing to the fact that s/he exercises factual control over the thing (Cendon [-*Realmonte*], Commentario al codice civile VI, sub art. 2789 p. 333). If ownership and possession diverge, then each person concerned has the right to assert a claim for the damage that he has sustained (*Sacco*, Il possesso, 309; Cendon [-*Gaudino*] loc. cit. IV(2), sub art. 2043, § 20.1 p. 2016). The same holds true for the relationship between owner/detentor (Cas. 10 June 1977, no. 2420, Rep.Giur.it. 1977, voce Resp. civ. 185; Cass. 22 July 1971, no. 2410, Foro it. 1971, I, 2482; Cass. 23 October 1976, no. 3815, Foro it. 1977, I, 2763). Therefore, the lessee may claim compensation for the loss of use of a leased good, the claim for compensation on the grounds of the diminished value of the good falls to be asserted by the owner (Cass. 27 July 1998, no. 7337, Giur.it. 1999, I, 1, 1601; Cass.sez.un. 30 March 1972, no. 1008, Foro it. 1972, I, 880; Cass. 24 February 1981, no. 1131, Giur.it. 1981, I, 1, 1586).

5. In HUNGARY, the following distinction is made**. If there are several co-owners of the same thing, then they are co-creditors of th**e claim to reparation (cf CC § 139(1)). Within the internal relationship between the co-owners, the compensation is allocated in proportion to their share in the ownership (CC § 141). If several persons hold different rights *in rem* over the same thing then, as a general rule, the owner is regarded as the injured party vis á vis the injuring party (arg. e CC § 99) if it relates to property damage and reparation to one person will also make reparation to another (cf *Marton*, A polgári jogi felelősség, 136). According to property law provisions, s/he must then grapple with the holder of the security right in the property (e.g. CC §§ 159(3) and 163 [usufruct] and § 260 [lien]). A similar situation prevails in the context of a lease: the owner is regarded as the injured party who, for his part, must contend with the lessee under the provisions of the law relating to the lease of goods (CC §§ 424(1), 430(2)). Where title is retained in goods that are destroyed or damaged, the

tenet, derived from an analogous interpretation of the passing of risk provisions under CC § 368(3) which deals with immoveable property (for further analysis of this analogy, please see *Kisfaludi*, Az adásvételi szerződés, 183-185; Bíró [-*Bíró*], Szerződési Alaptípusok, 51-53) is that the reparation claim may be asserted by the buyer.

6. BULGARIAN legal writing does not provide any pointers on this issue. If the seller retains title, then, in the case of loss or damage to the good, the risk passes to the buyer (LOA art. 205(1)). Whether the claim to reparation (in exceptional cases) can be directly asserted by the buyer or whether he is forced to tackle the seller has not been determinatively resolved.

7. In GERMAN law, the question as to who is entitled to assert a claim is a polemical one. A judgment handed down by RG 1 July 1942, RGZ 170, 1, 7, which, even today, is followed by a number of legal writers (z.B. *Müller-Laube,* JuS 1993, 529, 534), ordains that a buyer on reservation of title terms is solely entitled to assert a damages claim; namely, s/he is the holder of a proprietary right (the socalled *Anwartschaftsrecht*). However, BGH 11 November 1970, BGHZ 55, 20, 31 took a different approach and divided the indemnity between the owner and purchaser in proportion to the values held. The buyer's damages will not run to the extent of the full value of the good (plus damages for loss of use); this is because the remaining outstanding payments in respect of the good are to be deducted from this amount. The remainder must be asserted by the owner. Another approach proclaims that solely the seller under a reservation of title clause is entitled to assert a damages claim, however, s/he can only demand that the buyer receive performance (*Flume,* Allgemeiner Teil des Bürgerlichen Rechts II[3], 741). In reliance on CC §§ 851 and 1281, a fourth view advocates employing, with appropriate adaptations, the rules which govern several creditors of an indivisible performance (CC § 432) (*Baur and Stürner,* Sachenrecht[17], 761; *Larenz and Canaris,* Schuldrecht II(2)[13], 393; MünchKomm [-*Wagner*], BGB[4], § 823, no. 146; Staudinger [-*Hager*], BGB[13], § 823, no. B 155). Comparable problems of concurrence exist in the context of the relationship between the owner and creditor with a right of lien or the person in possession of the property. With the aim being to avoid the damaging party being hit with a twofold claim for compensation, the majority view among legal practitioners is to commend an analogous application of CC § 1281 BGB. This entails that the injuring party is only obliged to effect performance to the owner and to the other entitled persons jointly and indeed may only do so. Other commentators favour a solution which is derived from CC § 428 (joint creditors of an indivisible performance) or rely on the concept of restitution in kind (see further *Wagner* loc. cit. no. 144 and *Medicus,* Bürgerliches Recht[20], no. 609).

8. According to AUSTRIAN CC § 1295, a person has a right to claim compensation for damage which another has inflicted on him. This means that the person who is directly injured, namely, every person whose rights are infringed. Other persons holding a proprierty right as well as the owner (or co-owner) are included within the provision's scope. Within the internal relationship, The coowners' right to pursue a claim for reparation and the distribution of damages are governed by the rules relating to co-ownership or partnership law. In contrast, if damage is not only caused to the person of the owner but, at the same time, the financial status of a person standing in a contractual relationship with the owner who primarily suffers harms, is also compromised by the injuring event, then the rules governing recovery of compensation on account of damage sustained by third parties. This deals with the problematic case, where the primary victim does not suffer a detriment or, at any rate, only a minor one on the grounds that the risk of financial loss was already contractually shifted to a third party (Rummel [-*Reischauer*], ABGB I[3], § 1295 no. 27). However, the latter has

only suffered (as a general rule, irrecoverable) pure economic loss. This is regarded as being incorrect (OGH 22 November 1978, SZ 51/164 p. 725; OGH 26 June 1991, JBl 2003, 379). Consequently, the defence, namely that the third party was merely a secondary victim, may not be availed of by the injuring party. Therefore, the former can require that s/he receive the same extent of compensation as the owner would have been entitled to, had there not been a passing of risk (*Koziol*, Haftpflichtrecht I[3], no. 13/24). The most important case of application for this doctrine is where the goods being sold are destroyed after the passing of risk; however, it is, *inter alia*, also employed within the framework of transactions on a commission basis and cases concerning the continuance of salary payments (*Bollenberger*, JBl 1997, 284). The rules governing recovery of compensation in respect of damage sustained by a third party can also impinge on other fields of law (OGH 18 February 1986, JBl 1986, 468), for example, if a leased business premises are culpably destroyed and, as a result, the lessee who merely has contractual rights, suffers damage (*Koziol* loc. cit. no. 13/5; *Harrer*, Schadenersatzrecht, 67).

9. For an analysis of the legal position in GREECE see above note *II22* under VI.–2:206. Under PORTUGUESE CC art. 1405, as a general rule, co-owners can pursue claims against third parties on their own behalf (the exception being rei vindicatio) (*Neto*, Código Civil Anotado[14], 1156, note 4 under art. 1405) and, therefore, the compensation claim is proportionate to their share in the co-ownership (CA Oporto 4 June 1981, CJ [1981-3], 143). Under procedural law, we are dealing with a *litisconsórcio voluntário*. The holders of the right may elect to pursue the claim alone or jointly with the other co-owners. If they choose the second path, then the court will only award them a sum of damages in proportion to the share of ownership, insofar as this is permitted by the nature of the claim (CCP art. 27; see STJ 27 June 1995, BolMinJus 448 [1995] 309-313; *Neto* loc. cit. 1157, note 15 under art. 1405).

10. DUTCH CC art. 6:15(1) provides that, if a performance is owed to two or more creditors, each creditor may pursue claim to an equal share provided that no other result can be derived from law, custom or other juridical act. By contrast, the creditors have a joint single claim where an indivisible performance is concerned or the right to assert the claim is held jointly. In the context of co-ownership, CC art. 3:170(2) provides that the co-owners may only proceed with a joint claim for compensation against a third party (see further T&C Vermogensrecht[4] [-*Valk*] art. 6:15, pp. 2133-2134; Verbintenissenrecht I [-*Busch*] art. 6:15, nos. 3-8 pp. 2-12). ESTONIAN LOA §§ 73-75 contains a number of general rules governing the plurality of creditors.

11. In the NORDIC countries damages for the mere loss of value of damaged property may be awarded to either the owner or other property right holder, or to both, but the total liability of the tortfeasor has to remain unaffected (*Hellner and Radetzki*, Skadeståndsrätt[7], 362). This may also be derived from the Insurance Contract Acts of SWEDEN (chap. 9 § 1), FINLAND (chap. 9 § 62) and DENMARK (§ 54) which provide for compensation by a property value insurance to third persons, such as the holder of an usufruct, a security right holder, or a person who carries the risk for the property in connection with the transfer of ownership in it. In a similar fashion, these provisions do not specifically lay down what share can be recovered by each of the respective claimants; only the fact that more than one claimant does not entail an increase in the damages will awarded, is not surrounded by doubt (*Radetzki*, Skadeståndsberäkning vid sakskada, 60; *von Eyben and Isager*, Lærebog i erstatningsret[6], 293). The following rule is of general applicability, namely, the person who, following the conclusion of a contract (already concluded or still to be concluded) bears the risk of loss, may also assert a damages claim against the injuring party (*Radetzki* loc cit. 62; *Andersson*, Trepartsrelationer i skadeståndsrätten, 148-

151). Holders of limited property rights who exercise control over the property may in some (so far not very clearly specified) cases have an own right to claim damages (*Vinding Kruse*, Erstatningsretten[5], 298; *Andersson* loc cit. 137).

VI.–6:105: Solidary liability

Where several persons are liable for the same legally relevant damage, they are liable solidarily.

COMMENTS

A. Solidary liability of multiple liable persons

Common European law. This Article expresses a rule which is part of every Member State's legal system and is also to be found in Community Law (primarily in Council Directive 85/374/EEC of 25th July 1985 on liability for defective products art. 5): if several persons are liable to the injured person for causing the same damage, they are solidarily liable. This rule has also prevailed (with some minor differences in the details) in a notable fashion where, under the wording of the legal authorities, another solution (separate liability) would have been more obvious.

Policy considerations. The principle formulated in the Article is justified by a range of policy considerations. Each of the liable persons has caused the entire damage and so is therefore liable to the victim for the reparation of the entire damage. It should not become a "defence" against the victim – so far as the economic result is concerned - that another person has also caused the same damage. The victim should not be expected to establish the respective shares of liability; this issue must be ironed out by the liable persons between themselves. It would be unfair to require the injured person always to sue each and every liable person and dispute with them all and it would be especially unfair to require the injured person to bear the risk of personal insolvency of one of the liable persons. The injured person should in fact have the option of pursuing the person from whom reparation can probably be obtained most quickly and most easily. Along with economic reasons (inability to pay), legal and tactical considerations may also play a role here. One claim might be more difficult to establish than another or it may seem desirable not to bring an action against a particular person, in order to remain free to call that person as a witness (e.g. the employee of the liable employer).

Terminology. The Article invokes the terminology of III.–4:102 (Solidary, divided and joint obligations), which states: "An obligation is solidary when each debtor is bound to perform the obligation in full and the creditor may require performance of any of them until full performance has been received". The present Article provides an answer for one situation for the purposes of III.–4:103 (When different types of obligation arise) paragraph (1) and simultaneously establishes the principle of solidary liability of several liable persons in the law on non-contractual liability. Furthermore, the present Article is confirmation of the general rule in III.–4:103 (When different types of obligation arise) paragraph (2), second sentence, according to which the liability of several persons for the same damage is solidary in cases of doubt.

Scope of application. The Article covers all cases in which at least two persons are responsible for the same damage under the rules of this Book. "The same damage" may relate to only a part of the overall loss of the victim. The Article then applies to this part. The basis of the liability of the individual liable persons plays no role in relation to the injured person. Accessories are just as liable under solidary liability as accomplices, and as persons whose contribution to the chain of causation is presumed under VI.–4:103 (Alternative causes) and who cannot rebut this presumption. It is possible for liability due to a positive act and liability

due to an omission to converge; the same goes for fault-based and strict liability (e.g. in the case of liability of employees and employers), and in the same way it can happen that two bases of strict liability may concur and ground solidary liability.

Illustration
At 5.30 am, horses of different owners are standing out on a dark roadway. The horses have broken out of their paddock. A man rides into the group of horses on his motorbike and is fatally injured as a result. Through hair follicles from a mare and a gelding found on the motor bike, forensic scientists can identify the owners of the two horses. The two owners are solidarily liable to the widow.

B. Internal allocation of liability

III.–4:106 (Apportionment between solidary debtors). VI.–6:105 does not deal with the internal allocation of liability between the solidarily liable parties. This is already adequately dealt with in III.–4:106 (Apportionment between solidary debtors). Paragraph (2) of that Article sets out the basic rule that in their internal relationship each of the co-debtors is burdened with the same share of the debt. However, superimposed on that basic rule is a reasonableness test. Deviations from liability in *per capita* shares may be justified for a multitude of reasons which are not susceptible of being comprehensively listed. From the point of view of the law on non-contractual liability the most important factors are the extent of the fault of the participants and the extent of the realisation of a danger for which Chapter 3, Section 2 of this Book imposes strict liability. However, contribution between the debtors may also be affected by matters which are not related to the law on non-contractual liability – in particular those which derive from a contractual relationship between the co-debtors. It may be, for example, that a person has contractually agreed with an owner to keep the latter's building safe. In such a case the contractor alone will be liable in a question with the owner. As regards contribution between an employer and an employee in cases in which both are liable as solidary debtors to a third party, VI.–7:204 (Liability of employees, employers, trade unions and employer's associations) applies. Questions relating to employment law are not addressed by this Book.

NOTES

1. FRENCH CC art. 1202 consecrates the following principle, namely that solidary liability will not be presumed. However, at an early stage, the Cass.civ. 11 July 1892, D. 1894, I, 561, note *Levillain* held that where damage is caused by the *fautes* of two or more persons, each comes under an obligation to make reparation for the full extent of the damage. This is termed the socalled liability *in solidum*. Today, the only prerequisite remaining is the several *faits générateurs* cause the same damage; no distinction is drawn between liability which is based on *faute* and the *gardien* liability (*Terré/Simler/Lequette*, Les obligations[9], no. 864 p. 839). By contrast, if the several *coauteurs* cause different damage and the particular damage caused can only be attributed to one specific *coauteur*, then s/he is solely liable (Cass.civ. 19 April 1956, JCP 1956 éd. G., II, 9381). If the *faits générateurs* do not occur at the same time, *this state of affairs will not hinder in solidum*-liability will not be hindered (*le Tourneau,* Droit de la responsabilité et des contrats [2006/2007], no. 1741; see also Cass.civ. 25 January 2007, JCP 2007 éd. G, no. 10 p. 29, note *Radé* [*in solidum*-liability of blood transfusion services and injuring person for AIDS infection]). If the wrongdoers are liable *in solidum,* then a *coauteur* who has satisfied the entire claim, can recover a

contribution, based on the respective share of liability from the other solidary tortfeasors in the internal relationship (CC art. 1251(3)). The shares of liability are apportioned on a discretionary basis by the court (Cass.civ. 11 January 1979, Bull.civ. 1979, II, no. 19 p. 14). Above all, the court examines the gravity of the *faute* committed by each of the relevant parties (Cass.civ. 3 April 1973, GazPal 1973 jur. 559; *Flour/Aubert/Savaux*, Le fait juridique[11], no. 173 p. 172). If the insurer of one of the *coauteurs* pays the compensation owed, then the insurer is subrogated to the insured's right to claim contribution against the remaining tortfeasors (Code des Assurances art. L121-12). If the injured party decides not to proceed in his claim against one of the *coauteurs*, the latter remains nonetheless liable to the other *coauteurs* within the internal relationship (Cass.civ. 7 June 1977, Bull.civ. 1977, I, no. 266 p. 210).

2. Similarly, despite the rule in CC art. 1202, the Belgian courts presume a *in solidum*-liability if several persons cause the same damage (Cass. 2 April 1936, Pas. belge 1936, I, 209; Cass. 10 July 1952, Pas. belge 1952, I, 738). Here, no distinction is drawn between liability which is based on fault and strict liability. *In solidum*-liability will even arise if the court can determine the part played by each of the parties in events giving rise to the damaging occurence and their share of liability in respect to that damage (*van Gerven and Covemaeker*, Verbintenissenrecht[2], 556). If the tortfeasors have acted intentionally, then a true *in-solidum* liability under CC arts. 1200 et seq arises (Cass. 3 May 1996, Pas. belge 1996, I, 410). The right of the debtor *in solidum*, who has already paid off the plaintiff's entire claim, to seek contribution from the remaining tortfeasors is primarily derived from CC art. 1251(3) (Cass. 17 June 1982, Pas. belge 1982, I, 1221), occasionally, however, the rules on *enrichissement sans cause* govern this situation (Cass. 21 October 1965, Pas. belge 1966, I, 240) or CC art. 1382 may apply (Cass. 17 June 1982, Pas. belge 1982, I, 1221). The amount that can be recovered under a contribution claim essentially depends on the magnitude of respective fault and on the degree to which each of the separate torts contributed to cause the damage (*van Gerven and Covemaeker* loc. cit. 434-435).

3. In a similar fashion, the SPANISH CC art. 1137 also adopts the principle of divided liability as a point of departure, not that of solidary liabilty. Case law has, however, made the exception the general rule in many legal areas and has, *inter alia*, pronounced "solidary liability is the general rule" for all contractual law cases (TS 11 July 2006, BDA RAJ 2006/4977 at FJ 7; see also TS 31 October 2005, RAJ 2005 (5) no. 7351 p. 15730). A specific rule on plurality of debtors is absent in the tort law regulations of the CC. However, several special statutes ordain a system of solidary liability (e.g. Air Navigation Act [*Ley 48/1960, de navegación aérea*, of 21 July 1960] art. 123; Nuclear Energy Act [*Ley 25/1964, reguladora de la energía nuclear*, of 29 April 1964] art. 52; ConsProtA art. 132; Construction Act [*Ley 38/1999, de ordenación de la edificación*, of 5 November 1999] art. 17(3); Press and Printing Act [*Ley 14/1966, de prensa e imprenta*, of 18 March 1966] art. 65 [on this, see further TS 17 March 2004, RAJ 2004 (2) no. 1927 p. 3697]), and the rules on the imposition of civil liability for the commission of criminal offence also proceed from the assumption that solidary liability applies (CP art. 116). According to prevailing view practitioners, that the principle of solidary liability is operative can be derived the abovementioned provisions. If it is possible to ascertain precisely the contribution made by each of the tortfeasors to the damage caused, only then will the issue of solidary liability not arise (*Díez-Picazo and Gullón*, Sistema II[9], 557-558; *Roca i Trias*, Derecho de daños[3], 174; Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Pantaleón*], Código Civil II[2], art. 1902, p. 2001; for the applicability of CC art. 1137 in a tort law context, see, however Paz-

Ares/Díez-Picazo/Bercovitz/Salvador [-*Caffarena*], Código Civil II[2], art. 1137, p. 120). The courts had long determined that several tortfeasors causing the same damage, are solidary liable (TS 3 December 1998, RAJ 1998 (5) no. 9703 p. 14187; TS 15 July 2000, RAJ 2000 (4) no. 6885 p. 10573; TS 13 February 2001, RAJ 2001 (4) no. 853 p. 10573; TS 10 March 1994, RAJ 1994 (1) no. 1736 p. 2323; TS 15 December 1999, RAJ 1999? (5) no. 8908 p. 13978). Here, the only prerequiste is that the degree to which the defendant contributed to cause the damage cannot be precisely determined (TS 27 June 2001, RAJ 2001 (3) no. 5087 p. 7758; TS 31 October 2003, RAJ 2003 (5) no. 7978 p. 14953). The *Tribunal Supremo* would not affirm solidarity when it is possible to precisely individualise the liability of each of the torfeasors (TS 3 April 1987, RAJ 1987 (2) no. 2485 p. 2327; 23 January 2004, RAJ 2004 (1) no. 1 p. 17). The rationale for the validity of the principle of solidary liability is based on the notion of victim protection. In this connection, the Supreme Court often refers to the emergence of *solidaridad impropia* ('improper or *sui generis* solidarity'), namely because, in this context, soliday liability does not result from either under a contract or pursuant to a statutory regulation (TS 7 November 2000, RAJ 2000 (5) no. 9911 p. 15406; TS 29 May 2003, RAJ 2003 (3) no. 5216 p. 9730). The most important legal consequence of this is that it enables the injured party to take action against anyone of the concurrent tortfeasors (TS 1 July 1986, RAJ 1986 (3) no. 4559 p. 4416; TS 22 January 2004, RAJ 2004 (1) no. 207 p. 384). The issue of whether an interruption in the running of the presecription period operates in favour of the remaining tortfeasors does not appear to have been definitively determined (in favour *inter alia*, TS 17 December 1979, RAJ 1979 (2) no. 4363 p. 3532 und TS 14 April 2001, RAJ 2001 (2) no. 3640 p. 5587; against TS 21 October 2002, RAJ 2002 (5) no. 8770 p. 16021 and TS 14 March 2003, RAJ 2003 (3) no. 3645 p. 6729). That a concurrent wrongdoer who has paid the entire compensation may assert a claim for contribution against the remaining tortfeasors is derived from CC art. 1145(2). In case of doubt, concurrent tortfeasors are liable for the same share of the damage caused (CC art. 1138).

4. ITALIAN CC art. 2055 which is operative in the tort law context, provides that where several tortfeasors are responsible for the same damage, they are liable *in solidum*. Each concurrent wrongdoer must have contributed to cause the damage (Cass. 4 February 1992, no. 1147, Foro it. 1992, I, 2127) and each of them must have violated the same interest (Cass. 18 July 2002, no. 10403, Giust.civ. 2003, I, 2876). CC art. 2055 is also applicable in the strict liability context, furthermore, if, in the concrete case at hand, one tortfeasor is at fault, whereas the other is not fault but is strictly liable (*Alpa*, Trattato di diritto civile IV, 330; *Salvi*, La responsabilità civile[2], 235). Each injured party may claim the entire compensation from any one of the concurrent wrongdoers; among the concurrent tortfeasors, the right to claim contribution remains intact (Cass. 17 November 2003, no. 17372, Giust.civ. 2004, I, 637). Generally, the claim is asecertained by examining the magnitude and the degree to which the tortfeasors contributed to the accident; in case of doubt, it is presumed that the respective degrees of faults are equal (CC art. 2055). If a concurrent tortfeasor is liable under strict liability, the widespread view is held that fault is replaced by an examination of the extent of contribution to the damage caused (*Salvi* loc. cit.).

5. HUNGARIAN CC § 344 corresponds to VI.–6:105. If several persons cause the same damage, then they are solidarily liable; the extent of their liability towards each other is fixed in proportionate to their degree of blameworthiness. Here, the courts can take into account the fact that one of wrongdoers has obtained a particular benefit from the commission of the tort (*Petrik*, Kártérítési jog, 95-99; Petrik [-*Harmathy*], Polgári jog II[2], 582). If there is any doubt about the degree of blameworthiness, liability is divided in equal proportions among the concurrent tortfeasors. However, according to CC §

344(3), the courts are entitled to refrain from imposing a liability which is joint and several and may instead impose liability on the tortfeasors in proportion to their contributions if (a) this will endanger or significantly delay the award of compensation, or if (b) the injured party also contributed to cause the damage or was remiss in asserting his claim and could adduce no cogent ground to excuse the delay. A reform of this provision is to be expected. Incidentially, solidary liability also arises even if each of the tortfeasors is liable on different legal grounds (*Ujváriné*, Felelősségtan[7], 79; Gellért [-*Kemenes*], A Polgári Törvénykönyv Magyarázata[6], 1238-1240).

6. Similarly, according to BULGARIAN LOA art. 53, solidary liability arises when the same damage is caused by multiple persons. This principle is, however, subject to some exceptions which can be discovered in specific statutes. The exceptions concern liability for damage to ship and cargo following a ship collison (Commercial Shipping Code art. 314(1)(first sentence): In the context of divided liability, responsibility is apportioned according to the degree of fault). However, in the context of this exception, solidary liability continues to apply if personal injury is caused (loc. cit. art. 314(2)). If the concurrent wrongdoers are held to be co –principals in the commission of a crime by the criminal courts, that judgment of the criminal court binds the civil court when apportioning the responsibility of those solidarily liable (CCP art. 300). ROMANIAN CC art. 1003 makes clear that solidary liability arises where "a tort or quasi-tort can be imputed to several persons". The most frequent example that crops up in practice concerns the solidary liability of employees and employers to a third party (CC art. 1000(3); *Lupan*, Răspunderea civilă, 358-359). Persons who jointly cause damage also liable *in solidium* under SLOVENIAN LOA art. 186(1). The same holds true for instigators, accessories and persons who attempt to conceal the identity of the injuring party (LOA art. 186(2)). Likewise, tortfeasors, who, although acting independently cause the same damage, are liable *in solidum*, unless their precise causal contribution can be ascertained (LOA art. 186(3)). The parties to a building contract will be liable *in solidum* to a third party for damage caused during the course of construction of the building (CC art. 187).

7. According to GERMAN CC § 840(1), if several persons is responsible for damage arising from the commission of a tort, then those persons are solidary liable. CC § 840(1) does not denote an independent cause of action (BGH 7 November 1978, BGHZ 72, 355, 358), rather it is regarded as a basis for structuring the tortfeasors' liability to the injured party and the internal legal relationship between the tortfeasors.. The concept of "unlawful act" is given a wide interpretation and embraces all types of extra contractual liability. In particular, it also extends to strict liability (which is the subject of specific regulation in various ad hoc statutes, see further Palandt [-*Sprau*], BGB[67], § 840, no. 1; Erman [-*Schiemann*], BGB II[11], § 840, no. 2). Each solidary tortfeasor is liable to compensate the claimant for the entire damage, the claimant, however, is only entitled to recover compensation once. The tortfeasors among themselves are liable in equal shares unless otherwise determinable (CC § 426(1)(first sentence)). Statute can "determine otherwise" (e.f. CC § 840(2) and (3)), as can a pre-existing legal relationship between those responsible or it simply follows from the circumstances (*Sprau* loc. cit. no. 7).

8. In AUSTRIA, solidary liability can either arise where multiple wrongdoers contribute to cause the same damage and this damage can be imputed to them, or if a tortious claim to compensation coincides with a claim based on another legal ground (e.g. in unjustified enrichment). In both cases, of course, the injured party will not be compensated twice over. With respect to the first case, (plurality of tortfeasors), CC §§ 1301 and 1302, most notably, provide that solidary liability is to arise; these

provisions also apply outside the confines of fault based liability, unless, the relevant special statutes contain specific regulations to the contrary (*Koziol*, Haftpflichtrecht I[3], no. 14/7). Notwithstanding the wording of both provisions, the prevailing interpretation of CC §§ 1301 and 1302 is that the existence of a common plan is not a prerequisite for solidary liability to arise. Instead, solidary liability is said to arise if several persons independently cause the same damage (*Koziol* loc. cit.). However, CC § 1302 provides that divided liability will arise if (i) the respective degrees of contribution to the entire damage can be determined and that it concerns (ii) damage that was caused through negligence (CC § 1302 second sentence). By contrast, tortfeasors acting together will not be able to avail of the advantages conferred by divided liability, on the grounds that each wrongdoer is in any event liable for the entire damage and therefore, what holds for one concurrent wrongdoer must hold. dass jeder von ihnen ohnehin auf den gesamten Schaden hafte und nicht deshalb begünstigt werden solle, weil dasselbe auch noch für einen anderen Nebentäter zurifft (*Koziol* loc. cit. no. 14/11). Since the injured party, ordinarily has no knowledge of the course of events which led to the commission of the tort nor does he have any idea about the respective causal contributions to the damage, it is considered that s/he deserves the protection of a claim based solely on the fact that a possible contributor to the injury may have caused it (Koziol/Bydlinski/Bollenberger [-*Karner*] ABGB[2], § 1302 no. 3). Solidary liability also arises where it is not possible to identify the tortfeasors' respective separate shares in causing the damage or where the injury has been caused intentionally (CC § 1302 second sentence). Acting in concert to carry out the forbidden intent will, in itself, be sufficient (see further *Karner* loc. cit. § 1301 no. 3). Joint tortfeasors are even liable solidarily under CC § 1302, if the respective shares in causing the injury can be established affirmatively (OGH 14 April 1957, SZ 27/103; OGH 2 September 1970, SZ 43/141; against *Koziol* loc. cit. no. 14/10). Internally, the right to seek contribution in order to apportion the loss is regulated by CC § 896.

9. GREEK CC art. 926 first sentence ordains solidary liability in the event that the damage is the result of joint action by several persons. The notion of "joint acton" is broadly interpreted; it is sufficient that several persons make a causal contribution to commit the tort (Georgiades and Stathopoulos [-*Georgiades*], art. 926, no. 5; *Kornilakis*, Eidiko Enochiko Dikaio I, 572). Employer and employee or supervisor and supervisee are liable *in solidum*, in a similar fashion, the owner of a newspaper, the editor and all other persons listed in the Media Acts are solidarily liable for defamatory publications (A.P. 635/2001, EllDik 42 [2001] 1639). Each concurrent wrongdoer is liable for the entire amount of the plaintiff's claim, the plaintiff is not, however, permitted to obtain double recovery (A.P. 119/1999, NoB 48 [2000] 478). Liability of the concurrent tortfeasors to each other essentially depends on the respective degree of fault (CC art. 927); in the case of doubt, they share responsibility equally. As regards the respective magnitude of fault, the respective degree of causal contribution is also taken into account in apportioning liability (*Georgiades* loc.cit. art. 927, no. 10), which permits CC art. 927 to be applied correspondingly if the tortfeasors commit two independent strict liability torts which coincide to cause the same damage (*Georgiades* loc.cit. no. 15).

10. PORTUGUESE CC art. 497(1) makes clear that multiple tortfeasors are solidary liable. Solidary liability is also of great importance in the law regulating traffic accidents (CC art. 507(1)). The concurrent tortfeasor right to recover contribution from his fellow concurrent tortfeasors is determined by the magnitude of respective fault; in case of any doubt, the concurrent tortfeasors share liabilty in equal proportions (CC art. 497(2)). The general rules on solidary liability (CC arts. 512 et seq) are applied. CC art. 497 governs all types of delictual liability, it therefore

embraces e.g. instigators and auxiliaries (CC art. 490; STJ 13 September 2006; STJ 29 March 1989, BolMinJus 385 [1989] 379; *Vaz Serra*, BolMinJus 85 [1959] 115, 139), principals/employers (CC art. 500; STJ 14 September 2006; CA Oporto 22 April 1972, BolMinJus 216 [1972] 199; STJ 12 January 1984, BolMinJus 333 [1984] 413), supervisors (CC art. 491; STJ 21 September 2006), owners and possessors of a building (STJ 12 June 2003), and the State (CC art. 501; Const. art. 22; STJ 14 September 2006; STJ 20 January 2005). CC art. 497(1) does not concern the causal contribution made by the injured party; this issue is mentioned in connection with contributory negligence (CC art. 570; STJ 2 November 1971, BolMinJus 211 [1971] 276; *Neto*, Código Civil Anotado[14], 515). An array of special statutes governing the liability of specific persons and cases also provide for the imposition of solidary liability; in in contrast, *consorts* (the members of an unincorporated joint venture) are only subject to a regime of proportionate liability (Decree-law no. 231/81, of July 28, art. 19(3); see *Almeida Costa*, Obrigações[9], 607, note 2). In the internal relationship amongst the concurrent tortfeasors, if one tortfeasor was at fault, and, in contrasdistinction to this, the other was strictly liable and did not commit a fault, then, the former bears the entire loss (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], note 1 under art. 497, p. 502; *Almeida Costa* loc. cit.; *Antunes Varela,* Obrigações em geral I[10], 697; see also CC arts. 507(2) and 497(2)). If both wrongdoers were strictly liable, then the apportionment of liability will depend on the respective causal contributions to the injury. In the context of liability for motor vehicles, it will depend on the extent of the benefit that each party obtained from using the vehicle (CC art. 507(2); *Pires de Lima and Antunes Varela* loc. cit. note 2 under art. 507). If one co-owner only used the vehicle for two months in the year, and the other co-owner used it for ten months, then the liability will be apportioned based on their respective aforementioned usage (see further *Antunes Varela* loc. cit. 698; see also STJ 18 May 2006). The same applies if several vehicles caused the same damage (*Antunes Varela* loc. cit. 697). Solidary liability will not arise if several separate acts have accumulated to result in the aggregate damage (RL 17 November 1983, CJ VIII (1983-5) 118: shipping company was fined for smuggling carried out by various crews of the same ship; liability of the crews involved to the company was divided, the liability of natural persons within the respective crews was solidary in respect of that crew's contribution to the damage).

11. DUTCH CC art. 6:102(1) reads: "Two or more persons who are each obliged to repair damage for the same damage are solidarily liable. In order to determine their contribution as amongst themselves pursuant to article 10, the damage shall be apportioned amongst them by corresponding application of article 101 [of Book 6] unless the law or a juridical act requires a different apportionment". Solidary liability also arises if the liabilities of the debtors are mixed (e.g. one debtor is liable under tort, another for non-performance of a contract, another under benenvolent intervention in another's affairs and another debtor is strictly liable: Parlementaire Geschiedenis VI, 354). The sole decisive criterion is that they are responsible for causing the same damage (Asser *[-Hartkamp]*, Verbintenissenrecht I[12], nos. 458-460, pp. 419-421). The legal consequences of solidary liability are governed by CC arts. 6:6 et seq; of particular note, is, namely, that the injured party can claim reparation for the entire damage from any of one of the concurrent tortfeasors. As regards the right of contribution amongst the concurrent tortfeasors, dictates of equity are of considerable importance under CC art. 6:102. This provision is supplemented by CC art. 6:165(2) which provides that persons with a duty to supervise, where they failed to look after the child properly, have to bear the entire damage in the internal relationship with the other injuring parties. By relying on CC art. 6:109 (reducing compensation on

equitable grounds), the foregoing result can also be taken into account when the courts come to assess the extent of compensation owed to the child (*Hartkamp* loc. cit. no. 21 pp. 25-27 and no. 90, pp. 98-99).

12. ESTONIAN LOA § 137(1) corresponds to VI.–6:105. Whether the concurrent wrongdoers are liable pursuant to the same cause of action or commit independent torts is of no particular relevance (RKTKo 3-2-1-48-06 – RT III 2006, 25, 228). The right to seek contribution is regulated in LOA § 137(2).

13. The principle of solidary liability is also in force in the NORDIC countries. Only SWEDEN (Damages Liability Act chap. 6 § 4) and FINLAND (Damages Liability Act chap. 6 § 2) have enacted an express statutory regulation to this effect; With DANISH EAL § 25, the Danish legislature have contended themselves with a rule regulating the apportionment of loss amongst the concurrent tortfeasors. The imposition of solidary liability does not hinge on any requirement that same grounds for imposing liability are extant (e.g. negligence and strict liability, see *Hellner and Radetzki*, Skadeståndsrätt[7], 238; *von Eyben and Isager*, Lærebog i erstatningsret[6], 387; *Saxén*, Skadeståndsrätt, 323), instead, liability depends on whether the concurrent tortfeasors cause the "same damage" (In Denmark, the doctrine of 'primary cause' occasionally results in a departure from this principle: *von Eyben and Isager* loc cit.). Similarly, employer and employee can, in principle, be held to be liable *in solidum*; however, the employee enjoys special privileges as regards his liability vis á vis the victim (*Bengtsson and Strömbäck*, Skadeståndslagen[2], 361; *Hellner and Radetzki* loc cit. 271; D-Karnov 2006 [-*von Eyben*], Erstatningsansvarsloven, no. 113 p. 5645) (Finnish Damages Liability Act chap. 6 § 2(2) even provides that an employee can only be held liable for reparation which cannot successfully be sought from the employer). According to Swedish Damages Liability Act chap. 6 § 4, solidary liability is restricted, if one person's liability is reduced pursuant to the numerous adjustment clauses which reduce damages on equitable grounds. In the event of such a reduction taking place, solidary liability is then restricted to that reduced amount of compensation; the excess is a matter of sole liability of the tortfeasor who does not have the benefit of the adjustment clause (HD 16 December 1993, NJA 1993, 727; Finnish Damages Liability Act chap. 6 § 2(2); *von Eyben and Isager* loc cit. 388). Moreover, difficult issues arise when it comes to coordinating the contributory negligence rules with those governing solidary liability. In this context, the following contentious issue arises, namely whether the extent to which the victim was guilty of contributory negligence is compared against all the concurrent tortfeasors as a unit or whether it has to assessed against each individual separately (*Dufwa*, Flera skadeståndsskyldiga, 4031; *Hellner and Radetzki* loc cit. 240; *Vinding Kruse*, Erstatningsretten[5], 310; *Bengtsson and Strömbäck* loc cit 362). Amongst the concurrent tortfeasors themselves, only the Finnish Damages Liability Act chap. 6 § 3 and Danish EAL § 25 regulates this issue statutorily. How loss is apportioned in the internal relationship will depend on an assessment of all the circumstances of the individual case, including an assessment of the magnitude of fault and the degree of respective causal contribution to the damage. Additionally, Danish EAL § 25(2) provides that the existence of liability insurance is to be taken into account: a concurrent tortfeasor who is not covered by liability insurance and who did not act intentionally or in a grossly negligent manner, is not liable to the other concurrent tortfeasors. Exceptions to this rule exist in respect of public bodies, business operators and the statutorily regulated regime of strict liability. In Sweden, it is generally accepted that an person who is strictly liable, always has a right of contribution against the multiple wrongdoers who were negligent in causing the same damage (critical on this point *Hellner and Radetzki* loc cit. 247).

The **illustration** is taken from CA Saarbrücken 17 January 2006, NJW-RR 2006, 893.

VI.–6:106: Assignment of right to reparation

The person suffering the damage may assign a right to reparation, including a right to reparation for non-economic loss.

COMMENTS

General. This Article provides that non-contractual rights to reparation are freely assignable (and hence, depending on the applicable law of succession, also transmissible on death to heirs or successors). There is no exception for rights to the reparation of non-economic loss. From the perspective of the law on non-contractual liability for damage, it is not necessary that the right has been made the subject of a court action or recognised by the liable person before the death of the injured person; it is not even necessary that the injured person clearly declared a wish to pursue the claim if in a position to do so. In contrast, a valid waiver of the right to damages brings about its extinction; in the absence of an existing right, there is no room for assignment or succession.

Policy considerations. The ability to assign (and with it to bequeath) rights to reparation for economic damage is for the most part unproblematic. More heated policy debate continues to centre on the ability to assign or bequeath rights to reparation for non-economic loss. This Article adopts the position that such rights should not be treated any differently from rights to reparation for economic loss. This corresponds to the equation – in principle – of economic and non-economic damage, which finds expression in VI.–2:101 (Meaning of legally relevant damage) and it is in conformity with the majority of legal systems and the trend of more recent statutory law-making.

Moral reservations obsolete. Earlier moral reservations against such a rule should nowadays be regarded as obsolete. It would unreasonably diminish the legal position of the surviving injured person if that person could not personally decide upon the means of realising the rights held. Conversely, the issue of the ability to bequeath a right to compensation for non-economic losses is indeed in principle an issue of the law of succession and as such not the subject-matter of these model rules (I.–1:101 (Intended field of application) paragraph (2)(b)). However, where the applicable law of succession is built on the principle that only those rights can be bequeathed which can be transferred in one's lifetime (thus are not of a highly personal nature and therefore do not disappear upon the death of their holder), VI.–6:106 also has an indirect effect in succession law. This is desired. There is little force in the argument that the law should not allow third parties (especially the heirs) to be "enriched" by the suffering of the deceased. The sole concern here is the post-mortem realisation of interests which the person concerned was not able to realise while alive: a dying person should at least be aware that the law will not close its eyes to the pain endured in the fight for life.

Assignability in specific cases. The Article leaves it to the injured person to decide how to realise a right to damages; it need not necessarily be exercised personally, but can be sold or donated. This applies to rights to damages of all types, even those directed at compensating for the loss of a right which would not have been assignable itself. Such a case is conceivable e.g. in the situation set out in VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death) paragraph (2)(c): the fact that the right to maintenance in question may not have been assignable under the applicable law does not mean that the right to damages for its loss should be unassignable. That may also be justified by the fact that

reparation will itself often take the form of lump sum compensation and that the corresponding right should not be less freely available than a lump sum already paid.

NOTES

1. According to FRENCH law, (CC arts. 1689 ff), the general rule is that all types of claims may be assigned; exceptions only exist in respect of maintenance claims (*créances alimentaires*) and claims to particular social benefits (see further *Terré/Simler/Lequette*, Les obligations[9], no. 1278 p. 1217). The view has been advanced in legal scholarship that an *action en réparation d´un préjudice moral* must also constitute a claim which is not capable of assignment. It is said that this claim is personal to the injured person: an assigment of a right to reparation is only permissible in cases of *préjudice matériel* (*Mazeaud and Chabas*, Obligations[9], no. 608 pp. 705-706). However, this analysis is no longer supported by the jurisprudence of the courts. Instead, it is accepted,that, in the event that the victim dies, claims for reparation of *préjudice moral* may be asserted by the victim's survivors (Cass.ch.mixte 30 April 1976, D. 1977 jur. 185, note *Contamine-Raynaud*), and indeed, this encompasses claims based on the loss of a close relative (Cass.ch.mixte 30 April 1976 loc. cit. note *Contamine-Raynaud* [2ème espèce]; RTD civ 1976, 556, obs. *Durry*; GazPal 1976 jur. 459 [for example, a claim based on pain and suffering consequent upon the death of his son in an accident,that the deceased could have brought, prior to his death, will also be vested in his survivors]; see. also Cass.civ. 11 March 1981, GazPal 1981 Pan. 240, noted. *Chabas* und Cass.crim. 9 October 1985, D. 1987 jur. 93, note *Breton*). A claim for compensation for non-pecuniary loss is also vested in the survivors even in the event that the victim of accident did not feel any pain in the short space of time prior to his death (Cass.crim. 28 October 1992, D. 1993 Som. 203, note *Pradel*). In BELGIUM, the general principle is that all claims are freely assignable, unless, that assignment is prohibited by law or is of a personal character dem stünde ein gesetzliches Verbot oder die persönliche Natur der Forderung entgegen (*de Page*, Traité élémentaire de droit civil belge III[3], no. 382 p. 368; *van Gerven and Covemaeker*, Verbintenissenrecht[2], 565). As far as we can tell, the issue relating to restrictions placed on the assignment of tort claims has not been broached.

2. In SPAIN, only a small minority of legal writers, mainly citing moral reservations, speak out against the assignment of tort claims *(Martín Villa and Blanco*, Revista de Derecho Privado 1992, 663). The legal opinion that entirely prevails regards such claims as assignable *(Roca i Trias*, Derecho de daño[s3], 173; *Yzquierdo Tolsada*, Sistema de responsabilidad civil, 389; Reglero Campos *[-Gómez Calle*], Tratado de responsabilidad civi[l3], 461, 478), a view which finds statutory confirmation the Regulation for the Implementation concerning cover of the risk of nuclear damages *(Decreto 2177/1967, reglamento sobre cobertura del riesgo de daños nucleares*, of 22 July 1967) art. 29 which deals with this special case. The general principles in the Civil Code relating to *cesión de créditos* do not expressly regulate this issue; CC art. 1112 merely states that "every right which is acquired by virtue of an obligation is assignable according to the legal norms, unless something else is stipulated". Three grounds of non-assignability of claims are derived from this provision: (i) legal prohibition; (ii) *pactum of non cedendo*, and (iii) where the nature of the claim implies its non-assignability *(Pantaleón Prieto*, ADC 1988, 1031, 1096). Tort claims do not fall under either of these classifications; they belong to the *patrimonio* of the victim *(Roca i Trias* loc.cit.). This is only contentious in respect to claims for reparation for non-economic loss. These claims are occasionally characterised as *personalísima*

(highly personal) *(Gómez Calle* loc.cit.; also apparently *Roca Trias* loc.cit. 174). It is difficult to find a rationale for this assumption (compare. *Yzquierdo Tolsada* loc.cit. 390), in particular, because the Act on Solidarity with the Victims of Terrorism *(Ley 32/1999, de solidaridad con las víctimas del terrorismo*, of 8 October 1999) art. 8 (see also art. 6 and Annex I to the Act) expressly provides that the victim's claim for non-economic loss against the wrongdoer may be assigned to the State. ausdrücklich einen Übergang auch der immateriellen Ansprüche des Verletzten gegen den Täter auf den Staat vorsieht.

3. According to ITALIAN CC art. 1260(1), all claims are assignable. The exceptions to the rule are claims of a highly personal character or where the assignment would contravene a statutory prohibition. Claims for compensation are not encompassed within either of these categories (Cass. 21 April 1986, no. 2812, Giust.civ.Mass. 1986, fasc. 4 [while the case deals only with contract law, the propositions enunciated in the cases are of general validity]).

4. HUNGARIAN CC § 360(3) refers to the general rules on assignment of claims CC §§ 328-331; they are applied correspondingly to the assignment of claims for reparation. According to CC § 328(2),*inter alia*, claims which are of a personal nature cannot be assigned. According to BH 1998/379 and BH 2000/197 (dealing with the same case), an injured party‘s compensation claim for breach of his personality rights and other damage which he had suffered due to an unlawful criminal proceeding initiated against him, falls under the aforementioned exception.

5. According to POLISH CC art. 445 § 3 and art. 448(second sentence), claims for compensation of non-pecuniary loss for infringment of corporeal and incorporeal personality rights are only on transmissable on death to the injured party's survivors during the lifetime of the former, s/he had either filed a claim or the injuring party acknowledged that claim in writing. This corresponds to the legal position prevailing under the SLOVENIAN LOA art. 184(2). The ROMANIAN Civil Code does not (yet) contain a similar regulation; however, it should be noted that *de lege lata*, the question as to whether a claim for compensation for "moral" damage can be the subject of an inter vivos assignment, remains unresolved. The new Draft Civil Code proposes that such claims may only be assigned if they are accepted in writing or have become final; the heritability of such claims is organised in a similar fashion to arts. 445 and 448 in the Polish Civil Code (Proiectul Noului Cod civil, 223: arts. 1131(3) and (4)). According to BULGARIAN law, claims cannot be assigned if the assingment is precluded by claw, by contract or by the nature of the claim (LOA art. 99 (1)). It appears that claims for the compensation of non- pecuniary loss fall into the third category (*Kalaydjiev*, Obligazionno pravo, Obshta chast, 433); it is said that they are of a highly personal nature and, therefore, are only form part of the estate if the testator, during his or her lifetime, enforced them in court proceedings (Supreme Court 5 August 1969, decision no. 829, criminal case no. 730/1969).

6. The special rules that dealt with assignment of claims and succession to thos claims contained in GERMAN CC § 847(1)(ii) (old version) were repealed in 2002 by the reform of law on damages, with the result that there are no restriction placed on the transmissibility of compensation claim (Palandt [-*Heinrichs*], BGB[67], § 253, no. 23).

7. Similarly, under AUSTRIAN CC § 1393, the general rule is that compensation claims are assignable. The injured party can even be legally obliged to assign such claims (OGH 27 May 1992, SZ 65/83 [Leasing]). Many special statutes contain a subrogation claim in favour of a third party who has already performed (such as insurer, employer). The only problematic issue that arises under the rubric of claims that are inherently personal (CC § 1393) regards the assignability of claims for loss of

maintenance (CC § 1327) and compensation for pain and suffering. In end effect, prevailing legal scholarship and the courts are united on the issue and consider that these claims can also be assigned (claim for maintenance: OGH 15 March 1989, SZ 62/44; OGH 25 November 1992, EvBl 1993/106; Schwimann [*Heidinger*], ABGB VI[3], § 1393, no. 6; Schmerzensgeld: *Heidinger* loc. cit. no. 13 with further citations). Notwithstanding the wording of CC § 1325, more recent jurisprudence has held that claims for compensation for pain and suffering may also be transferred on death and the ability to transfer these claims does not hinge on whether the victim enforced this claim during his lifetime (OGH 30 September 1996, SZ 69/217; Schwimann [-*Harrer*], ABGB VI[3], § 1325 no. 91; *Koziol and Welser*, Bürgerliches Recht II[12], 323).

8. According to GREEK CC art. 933, the claim for compensation for pain and suffering (CC art. 932) is not assignable and upon death, is not transmissible to the deceased survivors, unless the claim forms part of a contract or the testator enforced the claim in court proceedings.

9. PORTUGUESE law regulates numerous cases where a third party is subrogated to another's statutory compensation claim where that third party (e.g. insurer or the State) has compensated the victim. Contractual assignment of a claim is permissible insofar as it is not precluded by law or by contract or conflicts with the highly personal nature of the claim. For example, maintenance claims (CC art. 2008(1) cannot be assigned; see *Ribeiro de Faria*, Direito das Obrigações II, 512) and neither can the so-called "litigious rights" (CC art. 579(3)). There is no rule precluding the assignability of claims for reparation; it is also conceivable that compensation claims for pain and suffering may be assigned.

10. Pursuant to DUTCH CC art. 3:83, all claims are assignable unless an assignment is prohibited by law. Claims for compensation for non-pecuniary loss cannor be assigned or pledged, unless, the claim is acknowledged in a contract or enforced in court proceedings. In order to esure the transmissibility of the claim to the deceased's survivors, it suffices that the deceased, during his lifetime, informed the defendant that s/he wished to enforce the claim (CC art. 6:106(2); näher Goederenrecht [-*Snijders*], no. 309 p. 278, no. 311 p. 280; T&C Vermogensrecht[4] [-*Oosterveen*], art. 6:106, no. 9 p. 2240). This largerly corresponds to the legal position under the ESTONIAN LOA §§ 164(1) and 166(1).

11. SWEDISH Damages Liability Act chap. 6 § 3 as well as FINNISH Damages Liability Act chap. 7 § 3 proceed from the assumption that claims for compensation for non-material loss are extinguished upon the victim's death, if he himself made no attempt to enforce the claim. The deceased may have instigated the claim himself or someone on his behalf, such as an insurance company; at this stage, there is no requirement that the extent of the claim have been estimated Anspruch muss der Höhe nach noch nicht beziffert worden sein. By contrast, it is possible to freely assign claims for the reparation of economic loss (*Bengtsson and Strömbäck*, Skadeståndslagen[2], 359; *Karlgren*, Skadeståndsrätt[5], 231). DANISH EAL § 18(1) provides that compensation claims for personal injury and loss of maintenance cannot be assigned, unless the claim and its quantum have been established by a court, except for loss of income. By contrast, compensation claims for personal injury, including non-economic loss, may be inherited; it is not necessary that the deceased, during his lifetime, sought to enforce the claim, dass der Verstorbene sie noch zu Lebzeiten geltend gemacht hat. Compensation claims arising from an interference with the enjoyment of property are freely assignable (*von Eyben and Isager*, Lærebog i erstatningsret[6], 434).

Section 2: Compensation

VI.–6:201: Right of election

The person suffering the damage may choose whether or not to spend compensation on the reinstatement of the damaged interest.

COMMENTS

General. The rules of Section 2 of this Chapter relate only to monetary damages ('compensation', see VI.–6:101 (Aim and forms of reparation) paragraph (2)). This Article begins with a clarification: the fact that damages are intended to restore the circumstances that would have prevailed had the event causing damage not occurred (see VI.–6:101 (Aim and forms of reparation) paragraph (1)), should not lead to the inference that a sum of money received for the reparation of the damage must be actually invested by the injured person in the restoration of the previous state.

Property damage. The Article relates primarily to property damage. The injured person can claim the cost of repair even if having no intention of repairing the damaged thing or having it repaired. The injured person is freely entitled to invest the money received for the reparation of the damage in another way. However, if the repair is not carried out then no value added tax falls due; the reparation of VAT which might have been payable had there been an actual restoration is consequently unnecessary.

Other cases. So too, in other cases neither the court nor the liable person may dictate to the injured person how the compensation is to be used. Furthermore, the award of damages may not be made subject to a condition that it be used in a certain specified way. Depending on the applicable procedural law it may indeed be possible that, *upon application* by the claimant, the court orders payment directly to a third party (e.g. in the case of the infringement of the personal dignity of a well-known politician who requests that the compensation due for non-economic losses be transferred by the liable person directly to a named charity); however, such a decision may not be made against the will of the claimant.

NOTES

1. Under FRENCH law, the "compensation creditor" is free to dispose of the money that he receives. A court cannot direct that a creditor pay part of the award of compensation to a third party (e.g to a nursing home where the victim is forced to reside) (Cass.crim. 22 February 1995, JCP 1995 éd. G, I, 3893, no. 22, note *Viney*), nor can additional conditions be attached to the disposal of an award of compensation (Cass.civ. 8 July 2004, Bull.civ. 2004, II, no. 391 p. 329 [for example, an award of compensation for damage to property will not be contingent upon the presentation of a receipt detailing the costs of repair; the victim has a right to full compensation which includes VAT]; see also Cass.civ. 21 October 1987, Bull.civ. 1987, II, no. 207 p. 116). This corresponds to the legal position in BELGIUM (Cass. 28 May 1996, JT 1996, 757). VAT must be paid, not only in the case where the victim has not carried out

repairs himself, but also where the victim repairs the damage himself (Cass. 23 December 1992, Pas. belge 1992, I, no. 812 p. 1406).

2. The guiding principle contained VI.–6:201 was confirmed in SPAIN by TS (criminal chamber) 28 April 1989, RAJ 1989 (3) no. 3567 p. 4025 (traffic accident with terrible consequences for a 12 year old girl; damages of 60 million pesetas were awarded and it was expressly stated that the award was not predicated on "any restriction in the enjoyment and disposition [of it] *inter vivos* or mortis causa"). The calculation of compensation for property damage is generally based on the costs of repairs; however, there is no requirement that repairs be actually carried out (see further, critical in some parts, *Carrasco Perera*, Aranzadi Civil 1996, II, 51, 55). By contrast, a point for discussion is whether compensation awarded for a violation of the reputation of the deceased must be invested in measures directed at restoring the good (post-mortem) reputation of the latter, if the person entitled to compensation has not personally suffered any loss (a proponent of this view; Salvador Coderch [-*Salvador Coderch*], El mercado de las ideas, 202).

3. The rule in VI.–6:201 is the same as in ITALIAN (*de Cupis*, Il danno II, 337), BULGARIAN (Supreme Court 1 September 1989, decision no. 447, civil case no. 420/89 [top up of compensation ordered for the employment of a nurse, whose employment was deemed, in the circumstance of the case, to be objectively necessary, even although the accrued costs of that employment were not documented]), in ROMANIAN (here, it is conceivable that the court may impose restrictions on how the award of compensation is spent, given that restitution in kind is accorded priority) and HUNGARIAN law (*Eörsi*, Kártérítés jogellenes magatartásért, 152); it should, however, be noted that the issue of contributory negligence could arise in connection with a claim for loss of profits, where a payment in respect of property damage is not used to acquire a replacement machine (BH 1997/332).

4. The GERMAN courts have used CC § 249(2) as a basis to sanction an abstract (or "fictive") calculation of damages. The "requisite sum of money" in the sense of this provision is that which is calculated by an expert witness, i.e the sum that would have been paid to a garage in order to carry out repairs. The injured party can even claim this amount if he or she fails to repair the thing (as a general rule, a motor vehicle), if the work is carried out "off the books" or he or she repairs it himself or herself (BGH 19 June 1973, NJW 1973, 1647; BGH 29 October 1974, NJW 1975, 160, 161; BGH 23 March 1976, NJW 1976, 1396; BGH 30 January 1985, NJW 1985, 1222; BGH 29 April 2003, NJW 2003, 2085). This "notional" assessment of damages is even permitted, if the repairs were actually carried out by a garage and the amount invoiced is considerably lower than that estimated by the expert witness (BGH 20 June 1989, NJW 1989, 3009). If a converse result is reached, namely, the actual costs accrued are lower than the notional valuation, then the injured party may request the court to adopt a "concrete" calculation of damages, provided that the claimant did not irretrievably bind himself to the "fictive" calculation of damages (BGH 17 October 2006, NJW 2007, 67). However, sales tax may only be recovered if it has actually been accrued (CC § 249(2) (second sentence)).

5. Under AUSTRIAN law, the injured party may generally choose between restitution in kind and monetary compensation (OGH 29 May 2001, 4 Ob 118/01h), unless, the choice made is detrimental to one of the legitimate interest of the injuring party (OGH 12 October 2004, 1 Ob 264/03k). Whether the injured party can make use of this right of election in the case that he or she does not use the award of compensation to reinstate the damaged interest, is contentious. Indeed, the courts have proceeded from the assumption that they are free to calculate the damages on the basis of the sum of

money which is deemed necessary to reinstate the damaged interest, even if the injured party does not intend to use the award of compensation for this purpose. A number of legal commentators have asserted that, in the context of compensation for economic loss, the injured party is only entitled to claim reimbursement of expenditure incurred, if restitution in kind is possible and is actually carried out (*Koziol*, Haftpflichtrecht I[3], no. 10/13). If the financial resources of the injured party do not permit restitution in kind, then he can claim an advance payment or require that the costs are borne by the defendant (*Koziol* loc. cit. no. 9/11); "Fictive" manufacturing costs cannot be compensated (*Koziol* loc. cit. no. 10/19; *Apathy*, ZVR 1981, 261). A number of commentators hold an opposing view and argue that a victim is entitled to spend an award of compensation as he or she chooses (e.g. Koziol/Bydlinski/Bollenberger [-*Danzl*], ABGB[2], § 1323 no. 10). In recent times, the Supreme Court, has in turn, on numerous occasions, awarded "notional" repair costs, but limited the award of damages to the amount awarded to compensate the diminution of the value of the damaged thing (OGH 28 October 1987, JBl 1988, 249; OGH 29 March 1989, JBl 1990, 718; OGH 23 March 1990, SZ 63/46; OGH 29 May 1995, SZ 68/101; concurring *Danzl* loc. cit. no. 11). If no repair work is carried out, then, a claim may only be made for compensation for the depreciation in the value of injured party's patrimony. At the same time, it follows from this that sales tax is only be recoverable if it was actually paid by the injured party (OGH 7 June 1978, SZ 51/7; OGH 23 March 1990 loc. cit.; a different approach is seen in OGH 10 July 1975, JBl 1976, 44). A contentious issue is, as before, whether costs of medical care, which, from an objective point of view, the incurrence of which would be considered appropriate, are recoverable if those costs have not actually been incurred. Initially, the recovery of these costs was endorsed, e.g. where the injured party did not purchase the required medication (OGH 12 January 1955, JBl 1955, 305) or did not consent to cosmetic surgery which was reasonable for him to undergo in the circumstances of the case (OGH 19 October 1977, ZVR 1978/179 p. 215; critical on this point *Apathy*, Aufwendungen zur Schadensbeseitigung, 82 und Rummel [-*Reischauer*] ABGB II[2], § 1325 no. 18). However, following more recent jurisprudence emerging from the Austria courts on the issue of recovery of "fictive" repair costs in the context of damage to property, the decision of OGH 23 October 1987, SZ 70/220 (see further OGH 21 January 1993, ZVR 1994/22 p. 52) completed a jurisprudential shift in the context of the recovery of notional medical costs. If it is determined that the injured party has not undergone medical treatment, then it now follows that it doesn't have to be paid for (Schwimann [-*Harrer*], ABGB VI[3], § 1325 nos. 12-13). By contrast, it appears that, today, it is still possible to claim for "notional" nursing costs. If a dependent cares for the injured party, then that carer can recover his or her actual expenditure as well as the costs that would have been incurred, had a professional carer been employed (OGH 25 November 1992, 2 Ob 60/92; OGH 26 May 1999, ZVR 1999/109 p. 375; OGH 10 December 1999, ecolex 2000, 120; OGH 27 April 2006, 2 Ob 176/05d; critical *Harrer* loc. cit. no. 15; different approach. OGH 10 September 1998, SZ 71/146).

6. In PORTUGAL, it appears that this issue has not been discussed. It has been observed that the injured party may freely invest his award of compensation in anything that facilitates enjoyment of life or makes his life easier (e.g. *Antunes Varela*, Obrigações em geral[10], 602; *Almeida Costa*, Obrigações[10], 599; *Ribeiro de Faria*, Direito das Obrigações I, 488).

7. According to DUTCH CC art. 6:103, if requested by the claimant, the judge can award compensation in form other than a payment of a sum of money. If this result is not carried into effect within a reasonable time, then the injured party once again acquires

the right to demand monetary compensation. Conversely, it is conceivable, that the (compensation) creditor may be guilty of contributory fault if he or she rejects the offer of reparation in kind or an offer to cover the costs of repair proffered by the injuring party (Schadevergoeding II [-*Deurvorst*], art. 6:103, nos. 7-11 pp. 25-35; Asser [-*Hartkamp*], Verbintenissenrecht I[12],nos. 410-411 pp. 330-332). Under ESTONIAN law the injured person is not required to spend compensation on the reinstatement of the damaged interest.

8. In the NORDIC countries, the alternative method for evaluating property damage is guided by the cost of reparation (as opposed to the replacement cost), which is applied to less significant damages to property and based on the condition that the injured party keeps the property although an explicit requirement with regard to the spending of the damages does not exist. It should be noted, that the injured party may not elect the most advantageous method of calculating damages; this choice is made by the court having regard to the reasonableness of each method (*Hellner and Radetzki*, Skadeståndsrätt[7], 415; *von Eyben and Isager*, Lærebog i erstatningsret[6], 287; *Saxén*, Skadeståndsrätt, 276). An issue both related to the principles of quantifying damages and the injured person's right of election, is the value compensation method applied for property damage (see notes under VI.–6:101). In that context the injured party's intention to sell the property is to be disregarded (e.g. HD 7 May 1991, NJA 1991, 269). The notion of the injured person's right of election is also to some extent interrelated with the question of whether a lump sum or periodical payment are awarded, as the latter delimits the injured person's factual freedom to spend the compensation.

VI.–6:202: Reduction of liability

Where it is fair and reasonable to do so, a person may be relieved of liability to compensate, either wholly or in part, if, where the damage is not caused intentionally, liability in full would be disproportionate to the accountability of the person causing the damage or the extent of the damage or the means to prevent it.

COMMENTS

A rule subject to policy debate. The reduction clause contained in this Article is a particular bone of contention in the Member States. Opinion is divided. The idea behind the reduction clause has as many resolute supporters as it has adversaries. It is rejected in systems which hold that the extent of damages should depend only on the extent of the damage suffered; it is supported in systems which hold that the basis of liability can also play a role in the assessment of the reparation to be made, where this appears to be fair and reasonable in the circumstances of the individual case. The Article follows the latter approach.

No reduction of liability where damage is intentionally inflicted. Where damage is intentionally inflicted, a reduction of liability under this Article is excluded. This is in line with the general convictions of all Member States' legal orders.

Grounds for and prerequisites of a reduction of liability. In all remaining cases a policy decision is ultimately required between the two alternatives. The deciding ground for the solution chosen here is mentioned in the Article itself. Such abnormal discrepancies between the basis of liability and the extent of the damage may arise as to make it seem intolerable to let the liable person bear liability for the entire damage. There should therefore be an instrument available to allow a final check of the decision against general considerations of justice and fairness. This is mainly significant where a slight oversight or a technically negligent but morally unobjectionable act leads to damage, the reparation of which would disproportionately burden the injuring person, there being other possibilities for reparation open to the injured person. The rule can play a role in certain emergency situations requiring self-defence and it may also be the only way of achieving a reasonable result in cases coming under Chapter 3, Section 2 (Accountability without intention or negligence).

Illustration 1
Children aged eight and nine are playing in the barn of a farm. They light a "campfire"; the entire premises are burnt down, after hay stored nearby caught fire and the children had fled in panic. The insurer, to whom the farmer's claim in damages is assigned, sues the children personally, in order to be able to execute the judgment as soon as they (many years later) begin gainful activity. As long as the parents' indemnity insurance does not have to step in, until their middle age the children would have no prospect of earning more money through personal initiative than the limit set for them that is free from whatever form of execution is used by the insurer. Their lives would be ruined before they have even begun. A reduction of the extent of their duty to render compensation is fair and reasonable.

Illustration 2
A water pipe bursts in A's apartment. As a result, a very valuable archive in B's apartment (directly below A's) is damaged. B had specifically insured the archive with his household insurance. The liability of A is to be reduced so that the discrepancy

between the grounds of liability (A could not have discovered the fault and is thus liable only under VI.–3:202 (Accountability for damage caused by the unsafe state of an immovable)) and the extraordinary risk of damage can be balanced out.

The reduction clause in the overall system of these model rules The Article also helps usefully to reduce the distinctions between contractual and non-contractual liability. III.–3:703 (Foreseeability) restricts the extent of damages for non-performance of a contractual obligation to the foreseeable loss of the other party. The law on non-contractual liability does not have a corresponding rule. The resulting differences are, however, diminished by VI.–6:202, so that it becomes less significant whether certain conduct between contractual parties is at the same time to be qualified as a civil wrong giving rise to non-contractual liability. There is also a reduction clause in the rules on benevolent intervention (see V.–2:103(2) (Obligations after intervention) and V.–3:104 (Reduction or exclusion of intervener's rights)) and it diminishes the importance of VI.–7:105 (Reduction or exclusion of liability to indemnified persons), a provision, which, *inter alia*, refers to legal orders which provide that private persons are not liable for property damage caused through negligence in so far as the injured person is indemnified by an insurer.

Scope. The Article covers all non-intentionally caused damage. It is therefore applicable not only in the context of liability for negligence, but also in the context of strict liability. In this latter area the availability of such a reduction mechanism can be particularly important if reasonable solutions are to be possible.

Illustration 3
While an aeroplane is landing, X's messenger pigeons get caught in the air duct of the propellers. The owner of the aeroplane claims compensation from X, as the keeper of the pigeons, for the damage, which amounts to several hundred thousand Euros. It would be inequitable to allow X - who is not insured against such cases - to incur unlimited liability even for the portion of the damage remaining after the application of VI.–5:102 (Contributory fault and accountability) paragraph (4). As long as X was not negligent, X's liability is to be reduced to zero.

Extent of the reduction. Illustration 3 shows not only that in exceptional cases a reduction of liability to zero is possible under this Article, but also that the formulation "liability in full" means "reparation, so far as due". In other words, even liability which has already been reduced for other reasons (such as contributory fault) can be reduced again under this Article.

NOTES

1. In FRANCE, the sole basis for determining the extent of the duty to compensate remains the damage sustained; the courts are not permitted to take the financial resources of the injuring party into account when it comes to assessing compensation (Cass.civ. 21 July 1982, Bull.civ. 1982, II, no. 109 p. 80). Moreover, the magnitude of *faute* and the personal circumstances of the injured party may also not be taken into consideration (*le Tourneau*, Droit de la responsabilité et des contrats (2006/2007), no. 2522). The same principle applies in BELGIUM. Tort liability law is so conceptualised in the Code Civil to entail that even a *culpa levissima* will serve to ground an obligation to compensate in full (Ronse [-*de Wilde/Claeys/Mallems*], Schade en schadeloosstelling I[2], nos. 267-269 pp. 200-269). However, CC art. 1386*bis* contains an exception, according to which the court, may reduce the extent of a

mentally disabled person obligation to pay compensation, should equity and the circumstances of the case so require.

2. Similarly, SPANISH law does not, it is said, permit the courts to reduce compensation on equitable grounds (Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Pantaleón*], Código Civil II[2], art. 1902, p. 1971, 1998-1999). However, Organic Act on Criminal Liability of Minors (*Ley Orgánica 5/2000, de responsabilidad penal de los menores*, of 12 January 2000) art. 61(3) *in fine* provides that, in the event that the individuals listed under a supervisory duty and are therefore, solidarily liable with the minor "have not promoted the conduct of the minor with intention or gross negligence, courts shall be able to moderate their liability according to the circumstances of the case". This possibility to reduce liability is of major practical significance; liability is usually reduced by 50% (e.g. CA Asturias 4 March 2005, BDA JUR 2005/90490; CA Badajoz 25 January 2005, Aranzadi Civil 2005 (1) no. 333 p. 741; CA Córdoba 20 February 2004, BDA JUR 2004/105382 [concerning a mother who had quit her job because of the drug addiction of her child and had tried to help him constantly]). Above all, the Supreme Court has conceded that CC art. 1103 (which allows damages to be adjusted in the event that a negligent breach of contract arises) permits liability to be reduced in the realm of extra-contractual liability (e.g. TS 13 October 1981, RAJ 1981 (2) no. 3734 p. 3018 and TS 20 June 1989, RAJ 1989 (4) no. p. 5438). *Equidad* is regarded as providing the rationale for an analogous application of CC art. 1103. This result remains, however, a bone of contention in legal commentary (*Díaz Alabart*, ADC 1988, 1133, 1222; *Yzquierdo Tolsada*, Sistema de responsabilidad civil, 234; TS 29 September 2005, RAJ 2005 (5) no. 7155 p. 15272). TS 20 April 1993, RAJ 1993 (2) no. 3103 p. 3975 concerned a water pipe which burst, in the process damaging an usually valuable archive contained in the dwelling below. The owner of the archive received a pay-out under his house insurance; the insurer's recourse claim against the tenant of the dwelling above who was responsible for the damage was reduced by a half.

3. In ITALY, a functional equivalent to VI.–6:202 can be seen, at most, where the court is conferred with a discretion to determine the extent of compensation (such as e.g within the framework of CC arts. 2056 in conjunction with 1226 und 1227). However, note should be taken of *Codice delle Assicurazioni private* (Decreto Legislativo of 7 September 2005, no. 209 [Suppl.ord. no. 163 alla Gazz. Uff. of 13 October 2005, no. 239]) art. 140(1), according to which the claims of several injured parties against the motor insurer are to be reduced on a pro-rata basis if the claims exceed the amount insured.

4. HUNGARIAN tort law, as a rule, adopts the principle of full compensation as its point of departure, however, CC § 339(2) allows the court to reduce liability in exceptional circumstances. This provision is confined to tort law, it is not a valid proposition for contract law (CC § 318(1)). According to CC § 339(2), the court can partly relieve the person responsible for the causing the damage "from liability" on equitable grounds in extraordinary circumstances. According to prevailing legal opinion, the extent of compensation is reduced (*Ujváriné*, Felelősségtan[7], 73 et seq). The Code fails to particularise the exact grounds permitting a reduction of liability, instead leaves this to the discretion of the judge. The courts take account of the wrongdoer's financial position, the degree of fault and other relevant personal factors (*Petrik*, Kártérítési jog, 83 et seq). It is not possible to reduce liability to nil (Gellért [-*Kemenes*], A Polgári Törvénykönyv Magyarázata[6], 1223; *Petrik* loc. cit. 84); liability cannot be reduced where a wrong is intentionally committed (*Eörsi*, Kártérítés jogellenes magatartásért, 168 et seq; cf. auch *Petrik* loc. cit. 85). However, in practice, CC § 339(2) is rarely cited (Petrik [-*Harmathy*], Polgári jog II[2], 575). Instead, the courts avail of the

provisions governing contributory fault and by this, achieve the same result (*Ujváriné* loc. cit. 74 et seq). Generally, it is possible that CC §§ 340(1) and 339(2) may be cumulatively applied (*Ujváriné* loc. cit.). Under the proposed reform of the Hungarian Civil Code, it is submitted that this damages adjustment clause should be retained with some modifications (http://www.parlament.hu/irom38/05949/05949.pdf) Similarly, SLOVENIAN LOA art. 170 allows an exception to be made to the principle of full compensation on equitable grounds. In particular, this comes to the fore if the injuring party is guilty of simple negligence and only has meagre funds at his or her disposal (LOA art. 170(1)) or if the injuring party wanted to actually do something benefical for the injured party and in this way observed a standard of care which he would have observed had he been dealing with his own affairs (*diligentia quam in suis*), and did not act in a grossly negligent manner (LOA art. 170(2)).

5. BULGARIAN law does not contain an independent provision permitting an adjustment of liability. A possible reduction of liability on the grounds of equity and fairness therefore only comes to the fore where, at the outset, the measure of compensation was determined by the courts on equitable grounds, as in the case of reparation for non-economic loss under LOA art. 52. For example, pursuant to this provision, a wife will not be able to obtain compensation for non-pecuniary loss in the event that at the time of his death, she no longer had either marital relations or an emotional connection with her husband who died in a car accident (Supreme Court 15 November 1979, decision no. 1235, criminal case no. 1125/79). ROMANIAN law also does not feature a provision equivalent to Art des VI.–6:202. The financial resources of the parties concerned has no influence on the measure of compensation (*Lupan*, Răspunderea civilă, 242, 341, 347).

6. Similarly, under GERMAN law, the principle of full compensation applies; even in cases of the slightest degree of negligence, the injuring party is obliged to make reparation in full. The principle also applies in the event that the obligation to pay compensation would clearly overextend the financial resources of the injuring party (Palandt [-*Heinrichs*] BGB[67], Pref. to § 249, no. 5). Pursuant to CC § 828, only children under 10 in cases involving motor vehicle or train accidents, are, as a rule, exempt from liability (exception: intention). In essence, only the rules on contributory fault operate to extenuate the impact of premise “everything or nothing” which is inherent in the principle of full compensation (CC § 254); there was a conscious decision not to adopt a provision permitting damages to be adjusted (*Medicus*, Schuldrecht I[17], no. 585). Generally the compensation that can be obtained under strict liability provisions is fixed by statute (e.g. ProdHG § 10, StVG § 12, UmweltHG § 15).

7. In AUSTRIA, the extent of liability depends on the degree of fault. Whereas simple negligence may only be recovered in cases of “positive damage” (the economic loss that has actually eventuated), in cases of intent and gross negligence, the injuring party must also compensate loss of profits. Additionally, note must be taken of provisions in supplementary statutes, providing for a reduction of liability in cases where the degree of fault is slight or very slight (e.g. DHG § 2, ForstG § 176, KMG § 11). From this, it follows in the reverse that there is, as yet, no general damages adjustment clause in Austria law (critical on this point *Koziol*, Haftpflichtrecht I[3], no. 6/24). The examples mentioned in the comments to VI.–2:202 are nonetheless the subject matter of special rules, see for example, under CC § 1306a (emergency; liability may be reduced to nill) and under CC § 1307 (pertaining to the liability of minors). The liability of children who have yet to reach the age of 14 remains governed by the subsidiary liability based on equity and fairness under CC § 1310 (see further OGH 1 December 1927, SZ 9/257; CA Vienna 3 December 1996, ZVR 1998, 68 p. 166; OGH 9 July 1996, SZ

69/156 and OGH 30 March 1999, SZ 72/59 [affirmed that it was permissible to take account of the existence of liability insurance policy when determining liability based on equity and fairness]). Equitable considerations may also feature at the assessment of damages stage (CC § 1325; *Koziol* loc. cit. no. 11/24). The notion that the financial resources of the injuring party may justify a reduction in liability is the rationale behind strict liability provisions which limit liability to a predetermined amount (e.g. RHG § 7; EKHG §§ 15 and 16; AtomHG §§ 15 und 29). This system which is perceived as inflexible is due for reform; the proposal for reform envisage an expansion of CC § 1317 to include a reduction clause.

8. GREECE adheres to the principle of full reparation; the injuring party is obliged to compensate damage in full, irrespective of the degree of fault (*Georgiades*, Enochiko Dikaio, Geniko meros, 151; A.P. 698/1992, EllDik 35 [1994] 1503). The socalled "everything or nothing" principle applies (*Stathopoulos*, Geniko Enochiko Dikaio A(1)[2], 515). A rule according to which the judge can measure the extent of compensation according to the circumstances of the case, where, particular, account is had to the degree of fault or a rule permitting the judge to reduce the extent of recoverable damages has not been adopted under the Greek Civil Code which the judge Regelung des Inhalts, dass der Richter den Schadenersatz nach den Umständen des Einzelfalles, insbesondere nach der Schwere des Verschuldens bemessen kann oder dass der Umfang des ersatzpflichtigen Schadens reduziert werden kann, ist in das griechische Zivilgesetzbuch nicht aufgenommen worden (*Stathopoulos* loc.cit.). Exceptions to the rule of full compensation can be encountered only in the strict liability provisions in special statutes which fix the extent of liability to a predetermined amount, and in those provisions which ordain that an " equitable" compensation must be paid die sich in einigen Spezialgesetzen zum Recht der strikten Haftung finden, und in solchen Vorschriften, die die Pflicht zur Leistung eines "billigen" Ersatzes anordnen (e.g. CC art. 286 [causing damage in a situation of emergency] and CC art. 918 [liability of person not deemed to possess tortious capacity in equity]).

9. According to PORTUGUESE CC art. 494, the duty to compensate may, on equitable grounds, be reduced to an amount lower than that which would have been necessary to make full reparation for the damage caused. The foregoing amounts to an exception to *teoria da diferença* in the law of damages which is based on CC art. 566 (*Almeida Costa*, Obrigações[10], 779; STJ 19 February 2004; STJ 17 January 2007). Liability may only be reduced in cases of negligence (*negligência* or. *mera culpa*), not in cases of intent (critical, on these grounds CA Evora 13 March 1986, BolMinJus 357 [1986] 512); the slighter the degree of negligence, the more probable the reduction in liability (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], note 2 to art. 494, p. 497; STJ 19 November 2002). The factors relevant in the equitable assessment were deliberately not enumerated in statute (*Galvão Telles*, Obrigações[7], 211, fn. 1). Legal writing and the courts consider that, in conjunction with the degree of fault, above all the financial positions of the injured and injuring party to be relevant (*Pires de Lima and Antunes Varela* loc. cit.; *Antunes Varela*, Obrigações em geral I[10], 913; STJ 5 July 2007; STJ 8 March 2007). CA Lisbon 6 May 1999, CJ XXIV [1999-3] 88 reduced to half the compensation owed by the driver and owner of a personal watercraft ("JetSki") due to the fact that they were both minors and students without personal income. According to contemporary prevailing legal opinion, CC art. 494 can also be applied within the framework of the *responsabilidade pelo risco* (*Almeida Costa* loc. cit. 780; *Pires de Lima and Antunes Varela* loc. cit.; *Antunes Varela* loc. cit. 914; STJ 4 April 2002; STJ 21 March 2000, CJ [ST] VIII [2000-1] 138; the courts held a different view up until CA Lisbon 16 February 1979, CJ IV [1979-1] 163).

10. DUTCH CC art. 6:109(1) provides that the judge can reduce the legal duty to pay compensation if imposing full liability in the circumstances, would lead to unacceptable results. Factors taken account of include, *inter alia* the nature of liability, the legal relationship existing between the parties and their ability to pay compensation. This reduction in amount may not be less than that amount that is covered by the debtor's insurance or should have been covered (CC art. 6:109(2)). Generally, the presence of intention or gross negligence preclude the applicability of the clause permitting the extent of liability to be reduced (Parlementaire Geschiedenis VI, 404 and 452; Asser [-*Hartkamp*] Verbintenissenrecht I[12], no. 498 p. 459). The type of damage caused is also of relevance: CC art. 6:109(1) is employed far less in cases of bodily injury than in cases of property damage (Parlementaire Geschiedenis VI, 450; *Hartkamp* loc. cit. no. 499 p. 460). ESTONIAN LOA § 140(1) contains a similar provision.

11. In the NORDIC countries particular regimes on the reduction of liability exist. They are based on considerations of equity, channelling of liability, and the injured party's interest in full compensation. However, special circumstances are required for applying these regimes; their relevance in practice should not be overestimated. In all the Nordic countries, the extent of children's and mentally incompetent persons' liability is assessed under separate heads of the respective Damages Liability Acts. The general rule on reduction of liability in SWEDISH Damages Liability Act chap. 6 § 2 requires that the liability is unreasonably burdensome with regard to the tortfeasor's economic situation; however, the injured party's need to receive compensation and other circumstances are also taken into consideration (*Hellner and Radetzki*, Skadeståndsrätt[7], 425; *Bengtsson*, Om jämkning av skadestånd, 231). If liability is covered by a liability insurance reduction generally does not come into play. The same applies to a tortfeasor who has omitted to obtain appropriately available liability insurance, although this shall only apply with regard to legal persons. The 'deep pockets' of the injured party may not per se render reduction. A poor economic situation of the injured party may on the other hand encumber a reduction even if liability would be burdensome for the tortfeasor. Another factor which may be taken into account is the degree of the tortfeasor's fault. Damage caused intentionally shall only be reduced in exceptional circumstances (e.g. HD 3 April 1986, NJA 1986, 193 and HD 16 December 1993, NJA 1993, 727 [young offenders]; HD 21 April 1987, NJA 1987, 376; HD 25 November 1992, NJA 1992, 660; see generally *Kleineman*, JT 1993-94, 789). It has been submitted that protective purpose of strict liability as a rule militates against permitting a reduction in liability, but that a reduction may take place in exceptional cases (*Hellner and Radetzki* loc cit. 426; *Bengtsson* loc cit. 285). Similarly, DANISH EAL § 24 focusses on the financial resources of the parties responsible which also entails examining whether liability insurance was extant. Factors taken into consideration include, the seriousness of fault, the extent of the damage and the injured party's interest in obtaining indemnification. The courts will only reduce liability where equity so requires (*von Eyben and Isager*, Lærebog i erstatningsret[6], 415). Where damage has been inflicted intentionally, even through criminal conduct, reduction may in exceptional cases take place with regard to humanitarian and social concerns (HD 2 April 1996, UfR 1996, 862). Legal persons hardly ever benefit from a reduction in liabilty (Western CA 9 September 2004, FED 2004, 1804; HD 16 August 2005, UfR 2005, 3151). FINNISH Damages Liability Act chap. 2 § 1 adheres to the same principle (*Saxén*, Skadestånd vid avtalsbrott, 245; *id.*, Skadeståndsrätt, 162). In the context of intentional acts, it is expressly provided that a reduction in liability may only take place where such a result is necessitated by the dictates of equity; as a result, such a claim is generally rebuffed by the courts (e.g.

Supreme Court 19 June 1985, KKO 1985 II 101 and Supreme Court 18 March 1999, KKO 1999:41).

Illustration 1 is similar to BGH 28 February 1984, NJW 1984, 1958; **illustration 2** from TS 20 April 1993, RAJ 1993 (2) no. 3103 p. 3975, and **illustration 3** from CA Hamm 11 February 2004, NJW 2004, 2246, note *Pfab*, VersR 2006, 894.

VI.–6:203: Capitalisation and quantification

(1) Compensation is to be awarded as a lump sum unless a good reason requires periodical payment.

(2) National law determines how compensation for personal injury and non-economic loss is to be quantified.

COMMENTS

The Article in overview. This Article relates to two different issues. Paragraph (1) provides that damages are in principle to be paid as a lump sum. Payment in the form of an annuity is to be exceptional and is to require special grounds. Paragraph (2) clarifies that this Book does not deal with the actual quantification of monetary damages in the case of personal injury and non-economic loss: that is left to national laws.

Paragraph (1). Monetary damages have as their purpose the restoration of the circumstances which would have prevailed if the event causing the damage had not occurred. In the normal case, viewed statistically, this purpose is best served by the payment of damages in the form of a lump sum. This has the beneficial side-effect that no protracted legal relationship persists between the injuring person and the injured person, during which new difficulties arising could be used as a reason for new conflicts and further court proceedings. In the case of property damage and damage to other assets there is therefore practically no alternative to the payment of damages by way of a lump sum. This is also true for damages for the reparation of lost profit, or losses flowing from a misguided investment and a decrease in turnover.

Good reason. The situation is different in the case of death or personal injury. In cases of this kind every European legal system provides for the possibility of ordering the liable person to make recurring periodic payments; most systems even prefer annuity payments as the general rule in this type of case and therefore require a good reason for ordering payment of a one-off lump sum. Apart from tax aspects, which can sometimes play a role, the main consideration in favour of granting annuity payments is that in cases of death or personal injury they are better suited to ensuring (as far as possible) the maintenance of the quality of life enjoyed before the accident. This is because a lump sum can often not protect against the danger of future underprovision; money is fleeting and is subject to the risk of inflation. Furthermore, the damage to be made good is often the loss of a regular periodic income and precisely this loss is then to be compensated for under the general rules of VI.–6:101 (Aim and forms of reparation) paragraph (1). This is particularly apparent where the damage in question is the death or disabling injury of a person who provided the claimant with maintenance, see VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death) paragraph (2)(c). The question whether there is a good reason for ordering the wrongdoer to make periodic payments is decided by the court; to this extent it does not depend on an agreement of the parties. Of course they are always free to contractually agree on the amount of damages and methods of payment.

Heads of compensation. The payment of an annuity may be useful not only for the compensation of economic damage. In the case of severe personal injury this mode of reparation may also be appropriate in relation to continuous non-economic losses. A combination of both types of damages is possible, e.g. a basic lump sum and subsequent annuity payments. The duration of periodic payments is geared according to the extent of the damage suffered; the frequency (usually every month) is set by the court. Conversely, in the

case of an infringement of incorporeal patrimonial rights there will only rarely be a good reason for not using a lump sum.

Procedural issues. This Article does not deal with questions of a procedural nature. In particular, it does not deal with the issue of whether a non-contractual claim in damages must be litigated once and for all or whether, in the interests of minimising the risk associated with bringing proceedings, a claimant is permitted to claim only a partial amount of the entire damage and then claim the rest before the court when the preceding action has been won.

Paragraph (2). This Book also makes no statement on the issue of whether in the case of personal injury fixed sums of money are to be set as reparation for individual injuries (e.g. for the loss of one's right arm) or disadvantages (e.g. for each day which the injured person had to spend in bed) or whether in these cases an individual quantification of the monetary compensation is to be carried out. This Book likewise refrains from addressing the problem of whether for the case of the infringement of non-economic personal rights, a minimum monetary sum for the reparation of the non-economic damage is to be set (see, however, comments under VI.–6:204 (Compensation for injury as such)). It also abstains from proposing an approach to the very variable high sums of money awarded for the compensation of non-economic loss. It seemed just as impossible to submit precise proposals for the quantification (in table form) of compensation of biological damage (see VI.–6:204 (Compensation for injury as such)). The question of whether such tables of damages are desired at all was not discussed. They are established practice in many countries, in some even statutorily set out; by contrast, in others they are strictly rejected. Even if an understanding had been achieved on such tables for certain issues, the specification of figures would have been impossible. Paragraph (2) of the present Article also counts compensation for bereavement among non-economic losses. The basic decision of this Book not to make provision for punitive damages remains untouched by this rule.

NOTES

1. Under FRENCH law, compensation can take the form of a lump sum (*capital*) or be awarded in the form of a recurring periodical payment (*rente*). The courts of first instance are conferred with a discretion with respect to this and, in this regard, are not bound to defer to the claimant's request (Cass.crim. 19 June 1996, GazPal 1996, Chron. de droit criminel, 190 [lifetime annuity, although the claimant had requested that compensation be partly paid in the form of a lump sum]). The measure of compensation is not affected by the modalities of compensation payment. An award of a *rente* may not exceed the lump sum payment that the claimant would have received (Cass.civ. 3 February 1960, Bull.civ. 1960, II, no. 89 p. 58), furthermore the measure of compensation may not be reduced because a lump sum compensation payment is awarded (Cass.civ. 20 December 1966, D. 1967, 669, note *Le Roy*). The quantification of damages for non-economic loss resulting from bodily injury is accorded great significance. This is because the social security institutions and other *tiers payeurs* cannot exercise a right of recourse in respect of this element of reparation; irrespective of any possible payments made by the social insurer, the victim alone is entitled to receive compensation for *dommages moraux* (*Viney and Jourdain*, Les effets de la responsabilité[2], no. 142 p. 259). Essentially, it concerns compensation for *souffrances physiques et morales*, for *préjudice esthétique* and for *préjudice d´agrément*. In order to determine the level of the award, the courts, without mentioning this expressly (on the grounds of CC art. 5) often have recourse to tables which appear in special

publiciations on an on-going basis. Of course, the courts are not bound by these tables (see further *le Tourneau*, Droit de la responsabilité et des contrats [2006/2007], no. 2516). In order to quantify the *préjudice d´agrément* (definition found in Cass.ass.plén. 19 December 2003, Bull.ass.plén. 2003, no. 8 p. 21) the courts routinely ascribe a certain monetary sum to each degree of permanent incapacity which is expressed in percentage terms, which, in turn, derives from the jurisprudence of the court having jurisdiction over the case or case law from a group of courts (*Le Roy*, L´évaluation du préjudice corporel[17], nos. 136-1 - 142 pp. 52-54). The monetary value alloted to such a percentage can vary according to the age of the injured party and the severity of his or her incapacity; the younger the victim and the greater the incapacity, the greater the amount allocated to that percentage value (*Le Roy* loc. cit. p. 67 with actual examples of quantification of damages). As regards the classification of *souffrances physiques et morales* a table featuring a scale of seven classes of damage (ranging from very slight to very serious) developed by *Thierry* is mostly followed (cf. *Viney and Jourdain* loc. cit. no. 148 pp. 273-275). The extent of compensation awarded per damage class can vary extensively from court to court (*Le Roy* loc. cit. no. 148 p. 60). In the context of an assessment of damages for *préjudice esthétique*, in conjunction with the severity of the deformation, the courts take account of the victim's sex, age, marital status and occupation. An award of damages can lie anywhere between € 500 and tens of thousands of euro (*Le Roy* loc. cit. nos. 149-151 p. 61). This disparity termed *loterie judiciaire* has been strongly criticised in legal scholarship (*Viney and Jourdain* loc. cit. no. 152 p. 279).

2. Similarly, in BELGIUM, the courts are at liberty to decide between an award in the form of a capital sum or an award of periodical payments; the courts are not bound by the claim filed by the plaintiff: they can also decide that the sum should be divided into two parts, namely party lump sum, part periodic payment (*Ronse* [*-de Wilde/Claeys/Mallems*], Schade en schadeloosstelling I^2, no. 313 p. 225). As a rule, a capital sum is awarded (*Simoens*, Schade en schadeloosstelling, no. 97 p. 184). For the first time, in 1995, the *indicatieve tabel of* the Working Group of the *Union nationale des magistrats de première instance* and the *Union royale des juges de paix et de police* were published. Since then, they have been reissued and updated on a regular basis. These tables contain guidelines and fixed sums for the assessment of damages. As well as the variant manisfestations of property damage, these tables primarily concern material and non –material damage as a consequence of bodily injury (including the loss suffered by dependents). Despite garnering (not inconsiderable) criticism in academic literature, these tables have acquired great significance in judicial and extra judicial practice dealing with the meting out of compensation (see *Van den Bossche*, NjW 2004, 614, 615 no. 2). Insurance companies are said to decide 90% of all of the cases involving compensation that don't make it to court on the basis of these tables (*Van den Bossche* loc. cit. 621 no. 25).

3. The guiding principle that the judge is conferred with a discretion to decide the nature and extent of compensation is also recognised in SPAIN (cases which fall under the law on Liability Insurance and Motor Liability Insurance form an exception to this rule [*Texto Refundido de la Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor*], *Real Decreto Legislativo* no. 8/2004 of 29 October 2004) (e.g. TS 22 April 1983, RAJ 1983 (1) no. 2118 p. 1613; TS 10 July 1987, RAJ 1987 (3) no. 5318 p. 5079). Although Spanish courts award usually a lump sum (*indemnización a tanto alzado* or *capital*) the award of periodical payments (*rentas periódicas*) is, particularly in cases of permanent personal injuries, also common court practice. A life annuity (*renta vitalicia*) is regarded as an efficient remedy to assess certain damages (*Pintos Ager*, Baremos, seguros y derecho de daños,

193) and may therefore be awarded instead of a lump sump (TS 5 June 1997, RAJ 1997 (4) no. 5945 p. 9184; *Medina Crespo*, La valoración civil del daño corporal III(1), 283). Even though courts were initially reluctant to award periodical payments (see e.g. TS 2 February 1980, RAJ (1) 1980 no. 743 p. 579; TS 13 June 1984, RAJ 1984 (2) no. 4374 p. 3365; TS 28 April 1989, RAJ 1989 (3) no. 3567 p. 4025), this technique has been increasingly applied by courts and has been explicitly acknowledged both (i) within the scope of liability of legal persons subject to public law (*Ley de Régimen Jurídico de las Administraciones Públicas y Procedimiento Administrativo Común* art. 141(4)(ii) within the scope of damage arising out of traffic liability (Road Traffic Liability Act [*Ley de responsabilidad civil y seguro en la circulación de vehículos a motor*] Annex point 8). Courts may even award a life annuity when the plaintiff claims a lump sum (TS 5 June 1997 loc. cit.; TS 17 March 1998, RAJ 1998 (1) no. 1122 p. 1773; contra, however, CA Castelló 1 March 2005, BDA JUR 2005/131696 and CA Castelló 8 February 2005, BDA JUR 2005/118706).

4. According to ITALIAN CC arts. 2056 and 1226, damage, the extent of which cannot be definitively ascertained, is determined by the court on an equitable basis. Pursuant to CC art. 2057, in the context of compensation for permanent bodily injury, the courts, having regard to the conditions of the parties and the nature of the injury, may ordain the payment of a life annuity. The matter of the quantum of compensation for personal injury, in particular, *danno biologico*, is left solely to the judge's discretion, however, a practice has developed whereby the courts tend to resort to indicative tables to assist them to quantify the level of damages. The values contained in these tables are predicated on the average level of compensatory amounts calculated on the averaawarded in court decisions of precedential value. These amounts are based on the archetypal consequences of injury sich auf die durchschnittlichen Beträge bezieht, die in Präzedenzfällen auf der Grundlage von Typisierungen der Verletzungsfolgen ausgeurteilt wurden. It should be noted that the courts are not bound by these tables. Personal injury compensation claims deriving from traffic accident are governed by arts. 137-139 of the Decreto Legislativo 7 September 2005, no. 209, *Codice delle assicurazioni private*, which provide that special tables are to be devised for this area.

5. Similarly in HUNGARY, compensation may either take the form of a lump sum or a recurring periodical payment. In particular, an annuity may be awarded in cases concerning claims for loss of support or claims for supplementary assistance (CC § 355(3)), therefore in the context of death, bodily injury and injury to health (*Ujváriné*, Felelősségtan[7], 190 et seq; *Petrik*, Kártérítési jog, 238 et seq). The courts also award an annuity in order to compensate the permanent special needs of the victim (*Petrik* loc. cit. 236f.; Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1355). The courts are not bound by the request filed by the victim; the decision regarding the form of the award, is left to the discretion of the court. The payment of an annuity to compensate a victim of an accident for his or her restricted ability to work is regulated in CC §§ 356-357 is directed at compensating loss of earnings. CC § 358 governs a dependent's claim for an annuity payment following the death of the bread-winner in an accident. Moreover, compensation for non-pecuniary loss can take the form of an annuity payment (for an overview of case law, please see *Lábady*, A nem vagyoni kártérítés újabb bírói gyakorlata, 201-212, 229-234). The cases affected are primarily those involving a very young victim or where the future medical prospects are inconclusive. Nowadays, it is possible to award a settlement that combines a lump sum award and periodical payments (*Lábady* loc. cit. 67 et seq; *Ujváriné* loc. cit. 218 et seq; *Benedek* loc. cit. 1334 et seq, 1356). Alimony, life annuities and accident compensation must be paid in advance (CC § 280(3)). The Code is silent as regards the quantification of compensation for non-pecuniary loss;

CC § 355(1) und (4) merely make clear that such loss is, in principle, recoverable. The determination of the measure of compensation is left to the discretion of the court (see *Herpai*, VersRAI 2005, 43, 45-46) (*Bárdos*, Kárfelelősség a Polgári Törvénykönyv rendszerében, 43 et seq; Petrik [-*Köles*], Polgári jog II^{2}, 634/2; *Benedek* loc. cit. 1333). Generally, the courts may not resort to actuarial tables. Legal practitioners seek direction from previous court cases, in particular relying on those cases handed down by the Supreme Court. Nonetheless, the awards vary greatly; overall, the awards seem to be increasing in keeping in line with society that is becoming increasingly prosperous (*Lábady* loc. cit. 63 et seq, only with citations up to 1992).

6. BULGARIAN LOA art. 51(1)(second sentence) expressly provides that compensation may take the form of as a once off capital sum or that of a periodical sum. Annuities are generally come to the fore in cases where the main bread-winner dies or in cases of loss of capacity to work (*Kojucharov*, Obligazionno pravo I, 292). The court can adjust the amount at a later stageto take account of medical developments and any other effects that the disability has on the ability to work; the legal validity of previous decisions does not hinder the handing down of this adjustment judgment (LOA art. 51(3)). In all essential terms the legal position in ROMANIA is similar (*Lupan*, Răspunderea civilă, 263-264, 346 with citations from case law). If there is a possibility that the injured party may leave the jurisdiction or otherwise sich sonst seiner Zahlungspflicht entzieht, wird er zu Kapitalzahlung verurteilt; Rentenzahlungen können aber auch wegen des Inflationsrisikos als ungeeignet erscheinen (*Lupan* loc. cit. 265).

7. The point of departure of GERMAN CC §§ 249 et seq is that compensation usually takes the form of an award of a lump sum; an annuity payment is only awarded in exceptional cases (RG 27 May 1908, RGZ 68, 429, 431; Erman [-*Schiemann*], BGB II^{12}, § 843 no. 1; Soergel [-*Beater*], BGB^{13}, § 843 no. 1; Staudinger [-*Vieweg*], BGB^{13} [2007], § 843 no. 2). CC § 843(1) accommodates such an exception: in the event that, as a consequence of bodily injury or injury to health. capacity to work is impaired or there are increased needs, then in these cases an annuity must be generally paid unless cogent grounds justify the award of a capital sum (CC § 843(3)). CC § 843 is germane to cases involving permanent injury; once-off outlays, especially medical expenses, are governed by the general regime anchored in CC §§ 249 and following provisions (*Beater* loc. cit.; *Vieweg* loc. cit. nos. 4 and 9). However, within the framework dedicated to governance of permanent injury, an even more precise distinction must be drawn between permanent and constant increased needs (CC § 843) and once -off expenditure (CC §§ 249, 251) (BGH 12 July 2005, NJW 2006, 1271, 1273). the rationale behind the award of an annuity is to relieve the injured party of the burden of adducing and proving that the expenditure incurred was necessary; moreover, the reasoning is that the claimant should not have to pay the necessary expenditure in advance out of his of her own pocket (RG 11 June 1936, RGZ 151, 298, 302; *Beater* loc. cit.). An array of supplementary statutes contain corresponding rules or refer to CC § 843 (HaftPflG § 8; ProdHG § 9; StVG § 13; UmweltHG § 14).

8. The AUSTRIAN CC is silent on the modes of reparation. While the payment of compensation in the form of annuity is recognised, it is confined to exceptional cases and can have disadvantageous tax repercussions for the injured party (Schwimann [-*Harrer*], ABGB VI^{3}, § 1325 no. 94). Damages for pain and suffering are chiefly awarded in the form of a lump sum which is designed to compensate the entire non-material loss sustained (OGH 20 January 1977, ZVR 1977/169 p. 210; OGH 27 February 1979, ZVR 1980/159 p. 159; *Harrer* loc. cit. no. 87). Periodic payments geared towards compensatig non-material loss are only awarded where cogent grounds

are established justifying such an award, for example, in cases of grave personal injury with severe (or not compeletely negligible) permanent consequences (OGH 21 November 1968, SZ 41/159; OGH 20 January 1977 and 27 February 1979 loc. cit.; OGH 10 September 1985, ZVR 1986/50 p. 141; OGH 11 June 1987, ZVR 1988/66 p. 142; OGH 8 August 2002, ZVR 2002/95 p. 385) or in cases where it is foreseeable that the injured party will be afflicted by considerable bodily pain or psychiatric illness for the duration of his life (OGH 13 March 1976, JBl 1976, 539; OGH 8 August 2002 loc. cit.). furthermore, annuity payments are awarded in cases of disfigurement (CC § 1326) and in order to compensate loss of earnings (CC § 1325; see OGH 21 November 1974, ZVR 1975/198 p. 277); in cases of this kind, a lump sum will only be awarded if a good reason exists justifying such an award (OGH 26 January 1988, ZVR 1989/107 p. 179: award of a lump sum in order to zur Umstellung eines landwirtschaftlichen Betriebs) and, taking account of his or her financial resources, it is reasonable to require the wrongdoer to pay a lump sum (OGH 26 April 1973, SZ 46/45). It is said that an "abstract annuity" arises where the de facto reduction in income has not yet occured but will probably materialise in the future and is awarded in order to make it possible for the injured party to put funds aside to buffer a future loss of employment (OGH 21 November 1968 loc. cit.; OGH 5 June 2002, JBl 2003, 242). Similarly, compensation for loss of maintenance of dependents deriving from the death of the main breadwinner, principally takes the form of an annuity payment (CC § 1327; for an exceptional case, see CA Linz 11 January 2002, ZVR 2002/68 p. 274).

9. In GREECE, compensation for non-pecuniary loss is statutorily fixed to at least the amount stipulated in a number of supplementary statutes (for a case involving unlawful junk mail , see, e.g. CFI Piräus 2061/2005, NoB 53 [2005] 1469 on Act 2472/1997 art. 23: Minimum liability to the extent of 2 Mio Drachma).

10. Similarly, in PORTUGAL compensation is, as a rule, to be awarded as a lump sum. However, according to CC art. 567(1), if requested by the claimant, the court may choose to grant a periodic payment, either entirely or in combination with a capital sum, in order to compensate permanent physical injury and the consequent heightened needs of the injured party; in this case, the court must make the necessary arrangements in order to guarantee the payment. The extent of the annuity is determined by the court freely exercising their discretion; this does not alter the fact that life annuity payments are often calculated by adverting to acturial tables which take account of inflation tabellarischen Inflationsindices (CA Lisbon 5 July 2001, CJ XXVI [2001-4] 76 and 77; STJ 12 September 2006; STJ 3 June 2003; STJ 8 March 2005; STJ 20 June 2006). CC art. 567(1) governs immediate and future damage including loss of profits (CA Lisbon 5 July 2001 loc. cit.); in an individual case, it is possible for an award to combine an annuity payment and payment in the form of a capital sum (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], note to art. 567, p. 585). Similarly, loss incurred by dependents can be compensated by the award of an annuity payment, this will occur in particular where minors are concerned (STJ 20 June 2006). An annuity payment will only be awarded if a request to that effect is made by the claimant;the court is not conferred with a discretion in this regard (STJ 6 July 1971, BolMinJus 209 [1971] 102; critical *Vaz Serra*, RLJ 105 [1972] 154). Subsequently, each party can return to court to seek adjustment of the award if their situations change substantially (CC art. 567(2)); this possibility is precluded in the case of claims for reparation of non-material loss (CA Lisbon 5 July 2001 loc. cit.).

11. According to DUTCH CC art. 6:97, the judge calculates damage in a manner most compatible with the nature thereof; if the extent of damage cannot be precisely ascertained then it will be estimated. The court is also conferred with a discretion in

this regard unless there is an upper ceiling placed on the award of damages (e.g. CC art. 6:110) or where a statute sets the relevant parameters Unter DUTCH CC art. 6:97 bemisst der Richter den Schaden auf die Weise, welche seiner Art am besten entspricht; kann der Schadensumfang nicht präzise festgestellt werden, so wird er geschätzt. Dem Gericht kommt ein weiter Ermessensspielraum zu, es sei denn, es ist an eine Obergrenze (z.B. CC art. 6:110) oder an andere gesetzliche Vorgaben gebunden. There are no rules governing the capitalisation of an award of damages; the decision lies with the court (Schadevergoeding I [-*Lindenbergh*], art. 6:97, nos. 19-20 pp. 99-144, no. 2728 pp. 147-158; Verbintenissen uit de wet en Schadevergoeding [-*Hartlief*], nos. 206-211 pp. 195-201). By contrast, a corresponding regulation to VI.–6:203(1) is found in the ESTONIAN LOA § 136(1). Compensation by periodical payment is further regulated by LOA § 136(2)–(4). Compensation for bodily injury is regulated by LOA §§ 130 and 134(3). The special conditions for compensation for non-economic loss are set out in LOA § 134.

12. Each year, DENMARK fixes the level of reparation that can be awarded for non-pecuniary loss (EAL §§ 3 and 15). The is also the case with regard to compensation for permanent disability, loss of ability to work and compensation of the loss suffered by surviving dependants (EAL §§ 4, 7, 13-15; see further *Møller and Wiisbye*, Erstatningsansvarsloven[6], 333). In SWEDEN, the quantum of damages for pain and suffering is set at a fixed amount; the Supreme Court approved the adoption of the Traffic Accident Compensation Board (*trafikskadenämnden*) tables as a guide (HD 3 March 1972, NJA 1972, 81). However, it is possible to depart from these tables in special circumstances and in these types of cases, the court is conferred with a discretion to determine the level of compensation (HD 14 June 2000, NJA 2000, 278; HD 4 April 1990, NJA 1990, 186; *Bengtsson and Strömbäck*, Skadeståndslagen[2], 185). Tables issued by the Traffic Accident Compensation Board are also relevant for assessing compensation for permanent disability (*lyte eller annat stadigvarande men*). The indexes listed in these tables are structured along a sliding scale; a percentage of invalidity is allocated a corresponding monetary amount; the greater the disability and the younger the victim is, the higher the level of compensation (see further *Bengtsson and Strömbäck* loc. cit. 197). In FINLAND, the recovery of compensation for non-material loss is assessed on an individual basis; particular account is had to the severity of the injury and the wrongdoer's degree of fault (Supreme Court 5 July 1994, HD 1994:62; Supreme Court 10 October 1980, HD 1980 II 98). As far as the form the compensation payment is to take (capital sum or annuity) it has been asserted that the award of a capital sum is the preferred solution, because the injured party is then completely free to use the award as he sees fit and it ensures that the wrongdoer's future insolvency will not affect the injured party; moreover, another advantage is that an award of a capital sum creates less administrative costs. The advantage of an annuity payment lies in the fact that it ensures that the injured party has a regular income. Swedish Damages Liability Act chap. 5 § 4 confers a wide discretion on the courts: "Reparation for future loss of future earnings or loss of maintenance is awarded in the form of a life time annuity or in the form of a capital sum or a combination of both. If the reparation is of major importance for the conntinous maintenance of the injured party, a lifetime annuity will be awarded unless particular circumstances dictate that another result should be reached. The award of an annuity for life can be converted into a capital sum, either entirely or in part, if cogent reasons exist for such a conversion". However, the parties are free to reach an agreement on this issue (*Hellner and Radetzki*, Skadeståndsrätt[7], 386; *Bengtsson and Strömbäck*, Skadeståndslagen[2], 262). Essentially, Finnish Damages Liability Act chap. 5 § 7 follows the rules. In Denmark, however, compensation is always awarded in lump

sums. Annuity payments are regarded as too complex and uncertain, the injured party may retain the economic value of the capital sum by careful investment; in this regard, he or she does not depend on the injuring party (*von Eyben and Isager*, Lærebog i erstatningsret[6], 423).

VI.–6:204: Compensation for injury as such

Injury as such is to be compensated independently of compensation for economic or non-economic loss.

COMMENTS

Injury as such. This Article is a corollary to VI.–2:201 (Personal injury and consequential loss) paragraph (1) and VI.–2:203 (Infringement of dignity, liberty and privacy) paragraph (1). In both of these Articles (and, under certain conditions, in VI.–2:101 (Meaning of legally relevant damage)), certain injuries are qualified as legally relevant damage even where they have caused neither economic nor non-economic loss. Violations of bodily integrity or injuries to a person's health or incorporeal personality rights are already as such legally relevant damage; it is not just (as is otherwise the case) the loss flowing from them which counts as legally relevant damage. These rules only take effect in conjunction with the present Article. "Injury as such" is to be compensated not only where there is an absence of any economic or non-economic loss, but also where the injured person also suffered such losses. In the latter case compensation for the injury as such will be independent of and additional to compensation for those losses.

A new concept. A rule in this form is not found in any national civil code or other national legislation. Its substance, which has been essentially adopted from Italy, is however recognised in the laws of several Member States and in others enjoys increasing acceptance. Frequently the courts act upon this idea even without an express statutory basis. In some legal systems minimum thresholds of liability laid down by the law fulfil the same function, at least in the field of the infringement of incorporeal personality rights.

NOTES

1. SPANISH Road Traffic Liability Act *(Ley de responsabilidad civil y seguro en la circulación de vehículos a motor*), Annex art. 1(7) expressly provides that, in the context of personal injury (as in Italy), the *daños psicofísicos* suffered denotes a separate item of redress. Moreover, the Supreme Court has, on numerous occasions, distinguished between *daño biológico*, *daño moral* and economic loss (TS 21 January 1998, RAJ 1998 (1) no. 350 p. 568; TS 21 April 1998, RAJ 1998 (2) no. 4045 p. 5903; TS 27 July 2006, BDA RAJ 2006/6548); as can be seen from the case law of the courts of first instance, it has long been common practice for the *daño biologica* to operate as a separate compensatable head of damages (e.g. CA Madrid 10 July 2006, BDA JUR 2007/16767; CA Sevilla 18 May 2006, BDA JUR 2007/28095; CA Madrid 4 May 2006, BDA JUR 2006/192847; CA Madrid 7 July 2005, BDA JUR 2006/12356; CA Madrid 6 September 2005, BDA JUR 2006/70043; CA Madrid 20 June 2006, BDA JUR 2007/41433). In the context of a breach of incorporeal personality rights "the existence of injury shall be presumed, whenever the illegitimate intrusion is proven" (Organic Act 1/1982, of 5 May 1982 [*Ley Orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen*] art. 9(3)). This presumption only arises in the context of non-economic loss (*Casas Vallés*, RJC, 1989, 49; Salvador Coderch [-*Martín Casals*], El mercado de las ideas, 382, 385). According to case law, this presumption is a presumption *iuris et de iure*, i.e. an irrebuttable presumption (TS 9 March 2006, RAJ

2006 (4) no. 5413 p. 11866; TS 7 March 2003, RAJ 2003 (2) no. 2900 p. 5410)), (an opposing view, shared by a not insignificant number, can be discovered in legal writing: *Díez-Picazo and Gullón*, Sistema I[11], 355; Reglero Campos [-*Yzquierdo Tolsada*], Tratado de responsabilidad civil[3], 1333, 1393) um

2. See with respect to the quantification of the damages for *danno biologico* which is based on indexes in tables under ITALIAN law, *inter alia*, Cass. 11 August 2000, no. 10725, Giust.civ.Mass. 2000, 1782; Cass. 22 May 2000, no. 6616, Giust.civ.Mass. 2000, 1078; Cass. 20 October 1998, no. 10405, Giust.civ.Mass. 1998, 2130; Cass. 16 September 1996, no. 8286, Giust.civ.Mass. 1996, 1283; Cass. 8 October 1996, no. 8784, Giust.Civ.Mass. 1996, 1386 sowie *Gozzi*, Der Anspruch iure proprio auf Ersatz des Nichtvermögensschadens, 208 et seq). More minor injuries of a permanent nature arising from a traffic accident are governed by Act of 5 March 2001, no. 57 (Gazz. Uff. 20 March, no. 66 - *Disposizioni in materia di apertura e regolazione dei mercati*) art. 5(2)-(6). *Danno biologico* is defined in this Act as "an interference with the psychological and physical integrity", "which can be ascertained by reference to medical criteria" and for which "compensation should not be linked to any influence the injury may have on the injured party's ability to work". Originally, the assessment of damages for all cases was based on variable percentages of invalidity (*punto variabile*) corresponding to a monetary amount and to the age of the injured person which were fixed by statute (and regularly adjusted to take account of inflation). Since the 1st of January 2006, a new rule was introduced by the coming into force of *Codice delle assicurazioni private* (Suppl.ord. no. 163 alla Gazz. Uff. of 13 October 2005, no. 239) arts. 138 und 139. The foregoing solely govern damage which arises from a traffic or maritime accident and in this context, a distinction is drawn between severe (*macropermanenti*) and minor injuries (*micropermanenti*). In a similar fashion, tables are employed to liquidate the damages, the aim being to establish a uniform system, used countrywide, for the assessment of compensation for *macropermanenti*. It is argued that this new regulation may not compatible with the Constitution (see futher *Chindemi*, RCP 2006, 549-569; *Zivic*, Resp.civ. e prev. 2006, 641-646).

3. To date, in HUNGARY, a mere infringement of rights will not suffice to ground a damages claim; there must be an additional material or non material loss (Petrik [-*Petrik*], Polgári jog I[2], 201-203; Petrik [-*Köles*], Polgári jog II[2], 634/2; Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1325, 1328, 1344; *Petrik*, Kártérítési jog, 74, 258 et seq; *Ujváriné*, Felelősségtan[7], 216 et seq; *Vékás*, FS Boytha György, 331, 332; BH 2002/24; BH 2001/110; BH 2001/12 and BH 1997/435). Whether the injured party has suffered a non-material loss is determined by the courts exercising their discretion (*Lábady*, A nem vagyoni kártérítés újabb bírói gyakorlata, 51 et seq), but nonetheless a specific justification is given for a finding of non-material loss. Even the loss of a kidney appears not to be enough of and in itself to ground a claim for compenstion of non-pecuniary loss. What is decisive in this context is that the claimant is forced to alter his or her way of life and to live in a way whch does not endanger the remaing kidney. The position is similar in the context of facial burns and, in this context, the non-pecuniary loss is found in the fact that the claimant's life is made more difficult (see further with citations from case law Petrik [-*Petrik*] loc. cit. 204). In contrast, adducing proof of a particular non-pecuniary loss is not necessary in the context of illegal deprivation of liberty (jail) (BH 2002/186); the illegal detention imports non material damage *per se*. By contrast, a person, whose facial lacerations have healed completely, does not suffer non-material damage (*Benedek* loc. cit. 1330). An award of compensation for non-material loss was rejected in a case which concerned a woman, who having been forced to her knees and had a leg pressed to her back, had her hair was forcibly cut (*Lábady* loc. cit. 54). This extremely restrictive

approach which is called the "liability law theory" appears to have ceded ground to the "personal rights theory" in the discussions surrounding the reform of the Civil Code. The latter rationale holds that breach per se of a subjective right will suffice for an award of reparation (see further *Boytha*, Polgári Jogi Kodifikáció 2003, 3-6 and *Petrik*, Polgári Jogi Kodifikáció 2003, 6-8). There is a proposal to abolish a claim for compensation for non-material damage while introducing a claim for satisfaction in the form of damages for pain and suffering in the part dealing with the vindication of the rights of the individual. It is proposed to introduce an irrebutable presumption that all infringements of personality cause non-material loss (http://www.parlament.hu/irom38/05949/05949.pdf)

4. In ROMANIAN legal writing, it has been observed that every personal injury imports damage (*Lupan*, Răspunderea civilă, 73) but no positive outcome, with respect to the creation of an actionable head of redressable damage, can be gleaned from this statement

5. On the basis of CC §1293, a distinction is drawn under AUSTRIAN law between "real" and calculable damage (Koziol/Bydlinski/Bollenberger [-*Karner*], ABGB^{2}, § 1293, no. 1). The real damage means the adverse impact accruing to the legally recognised interest; the calculable damage corresponds to the pecuniary quantification of that damage. Reparation is only exceptionally awarded in cases where no calculable damage has (at least not yet) materialised e.g. in the shape of an "abstract annuity" in cases of reduced earning capacity. This annuity is geared at compensating the dimished prospects on the jobmarket. In this context, there is no need to adduce that this has already eventuated (OGH 22 September 1983, ZVR 1984/325 p. 347; OGH 20 January 2002, JBl 2003, 242; for a discussion on the parameters of this claim, see also OGH 15 July 1987, SZ 41/157). The view has been expressed in legal commentary that the claim is one for the recovery for non-pecuniary loss (*Apathy and Riedler*, Bürgerliches Recht III^{3}, no. 14/9). Moreover, a type of compensation for "injury as such" may be seen in the heatedly discussed cases which deal with 'compensation for pain and suffering without pain being felt' (e.g. OGH 26 July 2006, ZVR 2006/202 p. 498: a paraplegic woman, who was wheelchair bound, was injured in her right knee where she could feel no pain). In contrast to earlier decisions, nowadays reparation is awarded in cases of this kind, and not only in cases where the inability to feel pain is a consequence of the injury suffered but also in cases where this inability was already extant. This stance of the courts has been criticised (Schwimann [*Harrer*], ABGB VI^{3}, § 1325, no. 80; *Huber*, ZVR 2000, 221). Moreover, mention should be made of recovery of socalled "fictive" nursing costs. The injured party can claim the costs of professional care that would have been required in the event that his or her relatives voluntarily care for him or her (OGH 26 February 1998, ZVR 1998/128 p. 373; OGH 21 June 2001, 2 Ob 148/01f). For the remainder, compensation for pain and suffering is always awarded as a lump sum and should not be commuted to a daily rate (CA Linz 11 January 2002, ZVR 2002/68 p. 275; *Kossak*, ZVR 2001, 227). Legal practioners use works referring to comparable cases as a guide ("Schmerzensgeld" tables), but the courts are not bound by these tables and they merely act as an evaluative guide. There is no fixed upper limit on the compensation that can be awarded for non-material loss (OGH 20 February 1975, RZ 1975/68).

6. In PORTUGAL, *dano corporal*, *dano funcional* and *dano biológico* are all used synonymously and defined as the somatic and psychological devaluation of the person (CA Oporto 3 May 2007; CA Oporto 29 June 2006; STJ 29 November 2005; *Álvaro Dias*, Dano corporal, 99). A number of authors are inclined to adopt the view that such damage imports non-material loss (*Antunes Varela*, Obrigações em geral I^{10}, 601; *Sousa Dinis*, RPDC XIII [2004-14] 9). Other authors consider this damage a *tertium*

genus; namely, an amphibious creature which cannot be classed as either pecuniary or non-pecuniary damage (*Álvaro Dias*, RPDC X [2001-11] 37, 47; *id.*, RPDC IX [2000-10] 71, 86). The courts appear to vacilliate between classifying such damage as non-material harm (so CA Lisbon 12 June 2006; CA Coimbra 26 April 2005; CA Oporto 7 April 1997, CJ XXII [1997-2] 205; STJ 8 March 1979, BolMinJus 285 [1979] 290) and qualifying it as future pecuniary loss (so STJ 5 July 2007; STJ 17 November 2005; STJ 22 September 2005; STJ 6 May 1999). At any rate , it is clear that grave personal injury in and of itself, independent of any economic loss or pain, grounds a claim for redress (*Álvaro Dias*, RPDC X [2001-11] 37, 47, 53; STJ 17 November 2005; STJ 10 October 2002; STJ 14 October 2004; STJ 29 April 2004; STJ 6 May 2003; STJ 22 September 2005; STJ 16 January 2003).

7. Statutory rules which fix a minimum threshold for an award of compensation for the infringement of incorporeal personality rights can be encountered in GREECE (see note *9* under VI.–5:203 and note *9* under VI.–6:203).

8. In the NORDIC countries, while the notion of "injury as such" is unknown, parallels, at least in part, can be drawn between that notion and the concept of reparation for grave violations to the rights of personality of the injured party. FINNISH Damages Liability Act chap. 5 § 6 provides that, e.g. causing great anguish to and vilifying another, grounds a claim for compensation. Such damage is not placed within the receptacle of compensation for pain and suffering but is a separate compensatable head of damage. This remains the case even if the damage has its roots in the violation of the victim's bodily intergrity. Similarly, the corresponding SWEDISH provision on violations of human dignity is based on an objective assessment of the damage (see e.g. HD 6 July 2007, NJA 2007, 540 [sexual abuse of a sleeping child]). An affront to dignity is sufficient; the cause of action does not depend on subjective pain or suffering (*Hellner and Radetzki*, Skadeståndsrätt[7], 392). Similarly, DANISH EAL § 26 provides that a grave violation in the context of an unlawful deprivation of liberty, violation of the honour or person of another is a separate compensatable head of damage.

Section 3: Prevention

VI.–6:301: Right to prevention

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

(a) reparation would not be an adequate alternative remedy; and

(b) it is reasonable for the person who would be accountable for the causation of the damage to prevent it from occurring .

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

COMMENTS

Prevention is better than cure. This Article is a corollary to and a concretisation of VI.–1:102 (Prevention). Both rules must be read together. The underlying idea is that someone faced with imminent damage must be able under the law on non-contractual liability (and not only if the requisites of other branches of the law, for instance the law of property, are satisfied) to take positive action to prevent the damage from happening. Prevention is better than cure. Moreover a person who simply lets the damage happen and then claims reparation may be exposed to a plea of contributory fault and consequently to a reduction of compensation.

Forms of prevention. Damage prevention can take various forms. The person under threat can resort to self-help and then try to recover the costs from the person responsible for the threat (see VI.–6:302 (Liability for loss in preventing damage)). Alternatively, the person under threat can require the person responsible for the threat to remove or neutralise the source of danger. This latter type of claim is the subject-matter of this Article. (On the relationship to VI.–5:202 (Self-defence, benevolent intervention and necessity) see the Comments under VI.–1:102 (Prevention)).

Paragraph (1). The right to oblige another to perform a positive act in order to protect the interests of the claimant can only exist within certain narrow borders; otherwise, it would lead to intolerable restrictions of personal freedom. This is to be weighed up against the security interests of potential injured parties and in doubt takes priority over the latter. Therefore, it is not only required (in VI.–1:102 (Prevention)) that the claimant is under threat of imminent danger but it is also made clear that the claimant is entitled to claim positive action to prevent the damage only where a subsequent claim for damages would not be a sufficient remedy and where it is reasonable to impose the burden of removing the source of damage on the other person. The right to become *personally* active in the prevention of damage and then claim the costs incurred from the other party remains unaffected by this. Its requisites are dealt with in VI.–6:302 (Liability for loss in preventing damage).

Reparation not an adequate remedy. Whether reparation, especially monetary reparation, is a sufficient alternative remedy, depends on the circumstances of each individual case. First and foremost, it depends on whether damage irreparable by other means is imminent, on the type and measure of the imminent damage, on how high the probability of its materialisation

seems to be from a factual and a legal perspective and whether the other person will be in a financial position to repair it.

Illustration 1
Neighbour X has built a swimming pool on her land. After it has been filled, the swimming pool starts to leak; the escaping water causes damage in the garden of Neighbour Y. Along with monetary reparation the latter requests precisely described measures for repair so that such an occurrence cannot recur. However, under the circumstances of the case the risk that another water leak will occur is rather slight. A right to have specific repairs carried out has not been established

Illustration 2
Politician P requests Publishers A to stop the printing of a publication that contains information on P damaging to his reputation. Due to the short time span, it is not possible to check to a sufficiently precise degree whether A has a defence at his disposal; in particular it is unclear whether the requisites of VI.–5:203 (Protection of public interest) are met. P does not have a claim under VI.–1:102 (Prevention).

Illustration 3
The facts are the same as in illustration 1 under VI.–6:101 (Aim and forms of reparation). The abused boy can also request of his abuser that he not appear in public with a naked torso until the removal of the tattoo. During this period, monetary reparation would not be a sufficient remedy.

Paragraph (2). Paragraph (2) ensures freedom of activity for those persons who might potentially occasion damage. The abatement of the source of danger through positive action may be claimed only where it does not burden the potential injuring person unreasonably. A cricket club may only be required to fence in the playing field for the purpose of protecting the neighbourhood from "flying balls" to a degree which guarantees stability against collapse in case of a storm and does not unreasonably burden the club financially; anything else would amount to banning the game of cricket completely. The remaining risk must be borne by the neighbours. The manufacturer of a certain product may not be compelled by ultimate consumers to carry out certain improvements to the product, in order to mitigate the risk of damage; the producer must be left the freedom to decide on suitable measures. This even applies where the claimant wants the product for personal or professional reasons. In contrast, it is reasonable for a house owner to be required to secure loose roof tiles which are in danger of falling on to a neighbour's land. The measure is simple, there is no sensible alternative and it is directed at a precisely defined class of persons, whose fear of considerable harm is justifiable (consequently, it would be unreasonable if every random street user were able to pester the owners of the adjacent houses with the argument of being under threat when passing the house).

NOTES

1. An action to end a continuing disturbance is recognised under FRENCH and BELGIAN tort law, therefore an injured party may file a claim requiring the *suppression de l´illicite* (*le Tourneau and Cadiet*, Droit de la responsabilité et des contrats, nos. 2441-2446; Ronse [*-de Wilde/Claeys/Mallems*], Schade en schadeloosstelling I^2, nos. 302-303 pp. 223-224). French CC art. 9(2) additionally, contains a general preventative remedy to protect against every *atteinte à l´intimité de*

la vie privée. Incidentially, the person concerned may only claim an interim injunction to ward off the threat of imminent damage pursuant to the measures contained in the Code of Civil Procedures dealing with *procédures de référé* (CCP arts. 809(1), 849(1)). Furthermore, in Belgium, once stringent requirements are satisfied, the courts may prescribe measures geared towards anticipating the commission of immediate damage (*Dirix*, Het begrip schade, no. 62 p. 51).

2. The orthodox view in SPANISH tort law is that the function of tort law is not a preventative or punitive one; it is solely compensatory (Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Pantaleón*], Código Civil II^2, art. 1902 p. 1971-1972). More recent legal scholarship points out that modern tort law can no longer dismiss the appropriateness of a remedy geared towards preventing the commission of an unlawful act, either from the viewpoint of efficiency or protection of the individual (*Llamas Pombo,* FS Díez-Picazo II, 2203, 2211). CCP arts. 721 et seq govern the *tutela inhibitoria cautelar*. It entitles the plaintiff to obtain an interim ruling from the court that obliges the defendant to perform a positive or a negative act in order to prevent the occurrence of a damage. However, this remedy is regarded as inadequate as it does not give rise, of itself, to a general independent claim to prohibitory injunctive relief (*Llamas Pombo* loc.cit. 2219). Moreover, tort law does not permit such a claim. A *tutela inhibitoria del daño* is restricted by law to a number of specific cases, namely: safeguarding possession; preventative legal protection in respect of a threat emanating from neighbouring land (CC art. 389 in conjunction with CCP art. 250(6); preliminary proceedings in order to obtain judgment for the "demolition of constructions, buildings, trees or columns or analogous objects that are ruinous and threat to cause damage to the plaintiff"; see CA Huelva 23 September 2005, BDA JUR 2006/30245 and Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Pantaleón*], Código Civil I^2, art. 389 p. 1064) and to the *acción negatoria* which is recognised under environmental law (*Salvador and Santidumenge,* PJ 1988, no. 10, 117; TS 3 December 1987, RAJ 1987 (5) no. 9176 p. 8507; CATALAN CC art. 546-14). A claim for prohibitory injunction can also be encountered in CC art. 7(2) (abuse of right), in Act 1/1982 on the protection of honour, privacy and one´s own image art. 9(2) and under intellectual property law (Copyright Act art. 139; Patents Act art. 63; Trademarks Act art. 41). On numerous occasions, the Supreme Court has stated that a claim of a prohibitory injunction to prevent the realisation of an imminent danger is the "logical and legal" corollary of a damages claim and this rationale provides the basis for the claim for injunctive relief (e.g. TS 16 January 1989, RAJ 1989 (1) no. 101 p. 102 and TS 15 March 1993, RAJ 1993 (2) no. 2284 p. 2958). CA Murcia 13 July 2006, BDA JUR 2006/258763 concerned a dispute between neighbours which centred on a leaking swimming pool. The claim which was directed at requiring the owner to undertake repairs was rejected on the grounds that it was based on tort law and it could not be proven that there was a probability of future damage .

3. Similarly, under ITALIAN law, the use of the *tutela inibitoria preventiva* is restricted and it is employed to vindicate a number of legally protected interests, in particular, property interests (CC art. 949), possession (CC art. 1170), servitudes (CC art. 1079, *actio confessoria*) and the right to one's own name or one's own image (CC arts. 7 and 10). According to CC art. 844, a court is permitted to grant an order directed at the cessation of emissions which, upon examination of local conditions, exceed reasonable limits (see further, Cass.sez.un. 15 October 1998, no. 10186, Giust.civ.Mass. 1998, 2086). Pursuant to CC art. 1172, neighbours can require that the other adopt preventative measures to, *inter alia*, protect against buildings in danger of collapse. Further claims to prohibitory injunctive relief can be found in regulations geared

towards protecting intellectual property rights (*Codice della proprietà industriale* art. 124), consumer protection in the context of unfair contract terms (CC art. 1469sexies?), the protection of businesses against unfair competitive practices of their competitors, and finally, protection of trade unions against employers (*Statuto dei Lavoratori* [Act of 20 May 1970, no. 300, Gazz. Uff. 27 May 1970, no. 131] art. 28). That these individual provisions permitting prohibitory injunction relief pave the way, by analogy, for a general claim (or an "atypical" one) to a tutela inibitoria, while not uncontroversial, nowadays appears to be the prevailing legal view (*Di Majo*, La tutela civile dei diritti III[4], 142-143; Cass. 25 July 1986, no. 4755, Giust.civ.Mass. 1986, fasc. 7).

4. A remedy, directed at preventing damage from occurring is recognised under HUNGARIAN tort law, namely in CC § 341. However, this provision only entitles the person whose rights are threatened to seek relief before a court. The court can call a halt to the dangerous activity or can order the person responsible to adopt appropriate measures to eliminate the threat and, if necessary, provide security. CC § 341 is based on the preventative function accorded to liability law. This claim does not depend upon blameworthiness; the only necessary requirements is that the damage is imminent and the person endangered requires protection. Typical fields of application for this claim include environmental law and competition law (CC § 341(2)). However, there is a dearth of case law on CC § 341 (Gellért [-*Kemenes*], A Polgári Törvénykönyv Magyarázata[6], 1236; Petrik [-*Harmathy*], Polgári jog II[2], 579; *Petrik*, Kártérítési jog, 86-88). BH 1990/424 made clear that CC § 341(1) may only be invoked against a person from whom the threat emanates; BH 2005/103 held that CC § 341(1) claim could also be raised in the contractual law context. In turn, a special type of prohibitory injunction can be found in property law and law on possession (CC §§ 115(2), 190(1)), as well as in relation to particular property rights (e.g. CC § 161(2), (3) [usufruct]). Numerous other provisions require, based on their wording, that the injury has already been inflicted; here, the claim for prohibitory relief is geared towards the prevention of further injury (e.g. CC § 84(1)b [personality rights]; Act no. LVII/1996 on the Prohibition on Unfair Competitive Practices and Restrictions on Competition § 86(2)b; Patent Act [Act no. XXXIII/1995] § 35; Trademark Act [Act no. XI/1997] § 27; Copyright Act [Act no. LXXVI/1999] § 94). The interlocutory injunction is a feature of administrative law and is regulated in CPC § 156. CC § 341(1) has largely been left untouched by the reform of the Hungarian Civil Code; however, it is proposed to repeal CC § 341(2) (http://www.parlament.hu/irom38/05949/05949.pdf)

5. BULGARIAN law does not recognise a general tortious clam permitting injunctive relief. However, claims for prohibitory injunctions which are directed towards ending unlawful activity, are regulated in a large number of supplementary statutes (e.g. Competition Act art. 7(1)(viii); Copyright Act art. 95(1)(ii); Patent Act art. 28(1)(iii)). Recourse is had to the *actio negatoria* in order to protect against breaches (also of a temporary nature) of property rights. This largely corresponds to the legal position in ROMANIA (*Lupan*, Răspunderea civilă, 70). CPC art. 581 governs the particulars of the jurisdiction under administrative law conferred on the President of the Court, enabling the award of an interloctury injunction in respect to pending proceedings.

6. GERMAN CC § 908 permits an injunction to be granted in order to compel the adoption of necessary protective measures,in the event that there is a threat that a neighbouring building will collapse or there is a danger that parts of a neighbouring building will become detached. There is no need to wait for damage to occur; the mere threat of danger entitles a claimant to injunctive relief (see further Soergel [-*Baur*],

BGB[13], § 908, no. 6; Erman [-*A. Lorenz*], BGB II[12], § 908 no. 5; BGH 8 February 1972, NJW 1972, 724). According to CC § 1004(1)(ii), an owner is entitle claim a prohibitory injunction requiring the defendant to cease interfering with his property. This entails that the defendant must ensure that the threatened breach does not materialise (Staudinger [-*Gursky*], BGB[13], § 1004 no. 211), which also connotes that he or she may be required to adopt positive measures if this is the only means by which the damage can be prevented (BGH 12 December 2003, NJW 2004, 1035, 1037). In contrast to the express wording of the provision, contemporary legal scholarship and the courts consider that the owner has a general claim to injunctive relief under CC § 1004(1)(ii) in the case of a mere initial threat of damage and therefore, this claim is not only confined to cases where there is a risk that the damage will reoccur (*Gursky* loc. cit. no. 213). Several other prohibitory injunction claims can be found in supplementary statutes outside the confines of the Civil Code, for example, provisions which safeguard against unfair competitive practices and those that afford protection against breaches of intellectual property rights. The Civil Code contains provisions which afford a claim for a prohibitory injunction in cases concerning the protection of the rights to one's own name (CC § 12), possession and an array of limited proprietary rights. A general claim to prohibitory injunctive relief exists for the protection of every enumerated absolute right contained in CC § 823(1).

7. According to AUSTRIAN law, a distinction must be drawn between three legal remedies: the prohibitory injunction, (abatement of a nuisance i.e the claim for the removal or elimination of a source of disturbance and self-help being the *ultima ratio* (CC §§ 19, 344, 1101 and 1321). A threat to an absolute right grounds a claim for prohibitory injunctive relief (OGH 13 April 1983, SZ 56/63; OGH 28 March 2000, SZ 73/57). If the breach is already extant, then only the danger of recurrence and the need for legal protection are required, whereby the danger of recurrence is presumed in a case invovling a breach of an absolute right (OGH 23 June 2005, 6 Ob 84/05d). There is no general statutory provision governing prohibitory injunctions regulation; it is expressly envisaged that this remedy will only come to the fore in certain defined cases (OGH 5 December 1978, SZ 51/171), e.g. in CC §§ 43, 339, 364 and 523; Ccom § 37(2) and UWG § 14). The question, whether, nowadays, it remains worthwhile to continue to draw a distinction between the remedial injunction as such (which comes to the fore where the breach has already been initiated) and a preventative prohibitory injunction (in the context of a threat of a breach) is increasingly doubted (Schwimann [-*Harrer*], ABGB VI[3], Pref. to §§ 1293 no. 39). Whether a successful claim for a prohibitory injunction requires a fault on the part of the defendant was unclear for a long period of time (see OGH 23 July 1997, ecolex 1998, 124 and OGH 31 August 1983, SZ 56/124; see further *Hirsch*, JBl 1998, 541). Today, for the most part, this question is answered in the negative (*Koziol*, Haftpflichtrecht I[3], no. 4/10; *Apathy and Riedler*, Bürgerliches Recht III[3], no. 13/15; OGH 18 October 1991, 8 Ob 612/91; OGH 26 January 2006, 6 Ob 273/05y).

8. PORTUGUESE CC art. 1350 provides that "if a building or other construct threatens to collapse in part or in full and the collapse could result in damage to neighbouring property, the owner is entitled in accordance with art. 492 to demand the person responsible for the damage to take the measures necessary to eliminate the danger". This provision is based on German CC § 908 (note 6 above) (*Pires de Lima and Antunes Varela,* Código Civil Anotado III[2], note 2 under art. 1350). For the remainder, a general rule governing the duty to prevent the realisation of a danger is abset but there is an array of specific norms which give voice to this line of thought (STJ 8 July 2003 mentions, although these norms predominantly govern liability, *inter alia,* CC arts. 492, 493, 502, 1347-1350 and 1352). The notion that civil liability should not be

simply confined to its compensatory function (*função reparadora)* stems from environmental law, namely, on the principle of prevention (*princípio da prevenção*) which is contained in the Framework Law on the Environment (*Lei de Bases do Ambiente*, Gesetz no. 11/87 of 7 April 1987) art. 3(a) (see further *Meira Lourenço*, A função punitiva da responsabilidade civil, 323). Loc. cit. art. 40(4) confers a right on every citizen, whose right to a healthy and ecologically sound environment is directly breached or where there is a threat of such a breach, to require the removal of the damaging cause and claim compensation. Where a breach of corporeal or incorporeal personality rights is threatened, CC art. 70 provides for diverse remedies, which can be carried into effect under administrative law by availing of CCP arts. 381 et seq, i.e. by means of *procedimento cautelar comum*, see CA Lisbon 20 January 2005, CJ XXX (2005-1) 97.

9. According to DUTCH CC art. 3:296 in conjunction with art. 6:168(1), a judge is conferred with a discretion to "reject a claim for the prohibition of unlawful conduct, on the grounds that this conduct must be tolerated in the interests of a countervailing public interest"; the injured party retains his or her claim for damages (see further T&C Vermogensrecht [-*Lindenbergh*], art. 6:162, note 6 and art. 6:168 notes 1-2). Similarly, ESTONIAN LOA § 1055 does not recognise a general claim for injunctive relief under tort law. LOA § 1055(2) largely corresponds to VI.–6:301(1)(a); there are no express rules regulating the content of VI.–6:301(1)(b) and VI.–6:301(2). However, the right to remove a source of danger may arise from necessity (LOA § 1045(2) and (3)).

10. The NORDIC legal orders do not recognise a general right to claim prevention. According to the SWEDISH Code of Judicial Procedure chap. 15 § 3 injunctive relief can be obtained *inter alia* for the protection of one's real and intellectual property rights (e.g. HD 14 October 1982, NJA 1982, 633). FINNISH Code of Judicial Procedure chap. 7 § 3 contains a similar provision. In a similar fashion, in DENMARK, claims for injunctive relief belong to the realm of administrative law. CCP § 641(1) concerns the protection of every "right" of the claimant. For example, this embraces landlord-tenant disputes and disputes arising between neighbours (HD 5 December 1980, UfR 1981, 362), moreover, labour (HD 28 October 1929, UfR 1930, 142) and intellectual property law (HD 24 February 1994, UfR 1994, 397), see in more detail D-Karnov 2005 III (-*Rothe*), Retsplejelov, § 641 no. 2487. According to CCP §§ 642 and 643, a claim for an injunction must be rejected: if the general sentencing rules and rules governing damages claims afford adequate protection; if the defendant provides sufficient security, or if granting the injunction would be amount to a disproportionate measure. The initiation cermonies of the Freemasons are regarded as a "private matter" (CP § 264d) of this organisation, therefore, it was possible for them to restrain a television station from broadcasting on this matter (HD 3 June 1982, UfR 1982, 750).

Illustration 1 is taken from CA Murcia 13 July 2006, BDA JUR 2006/258763; **illustration 2** from *Greene v. Associated Newspapers Ltd.* [2004] EWCA Civ 1462, [2005] QB 972; and **illustration 3** from CFI Groningen 31 May 2002, LJN AE3727, note *van der Hoek*, NJB 2006 no. 29 p. 1618.

VI.–6:302: Liability for loss in preventing damage

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

COMMENTS

Fundamentals. A person, who is active in averting imminent damage in a reasonable manner or restricting its extent is exercising a right under VI.–1:102 (Prevention) and therefore has a right to reparation of the costs incurred. This basic rule is affirmed in every Member State. It is also an indirect consequence of VI.–5:102 (Contributory fault and accountability). This is because VI.–5:102 is based on the idea that a person who has not looked after his or her own affairs with sufficient care may not request full reparation. Conversely, a person who actually does look after the preservation of his or her goods and interests when they are threatened by another person must then be able to claim reparation for the costs of doing so. They have been ultimately caused by a danger for which the other person bears responsibility.

Systematic significance. Beyond its material content, this Article in fact has inherent systematic significance. With its insertion into this Book, the character of the rule as part of the law on non-contractual liability is underscored. What is involved here is not a rule which belongs in the law of benevolent intervention in another's affairs or one whose results could also be achieved with the instruments of this branch of the law. This is because a person who makes expenditure for the avoidance or mitigation of personal damage does not act or in any case does not primarily act for the purpose of benefiting the potential injuring person (see V.–1:101 (Intervention to benefit another)); the person in fact wants to help himself or herself. VI.–6:302 has further significance for the general rule of causation in VI.–4:101 (General rule): the intervention described in VI.–6:302 does not break the chain of causation between the conduct of the potential injuring person and the loss (which in this case lies in the expenditure incurred to avoid an otherwise threatening damage). The present Article is to be distinguished systematically from VI.–2:209 (Burdens incurred by the state upon environmental impairment) by the fact that under the present Article a damage within the meaning of Chapter 2 must not yet have arisen; by contrast, VI.–2:209 (Burdens incurred by the state upon environmental impairment) clarifies that the expenditure (which is more precisely described therein) constitutes a legally relevant damage.

Illustration 1

P parks her vehicle directly in front of the entrance to G's garage and goes off to a hairdresser's. G needs the use of his car. After inquiring at neighbouring properties without success as to the whereabouts of the person in charge of P's vehicle, G telephones a recovery service which tows P's vehicle across to the opposite side of the road. The costs of this undertaking are less than if G had hired a taxi or a rented car in order to reach the distant airport from which G is due to fly. G cannot demand compensation under the rules of benevolent intervention in another's affairs because he acted predominantly in his own interest and was not acting in pursuit of an overriding public interest. However, he does have a claim to compensation under VI.–6:302. By acting as he did G has avoided a loss resulting from an infringement of his property rights. Whether P was agreeable to the measure or not plays no role.

Reasonably incurred expenditure. The expenditure incurred must be reasonable in relation to the threatened damage. Therefore, it is limited to the amount which would have resulted in damages, had the damage actually arisen or been exacerbated in the manner feared. The right to compensation does not however depend on the success of the measures taken. VI.–6:302 consciously follows the formulation in V.–3:101 (Right to indemnification or reimbursement). There as here, all that matters is that a reasonable neutral observer would have acted as the claimant did under the circumstances. If the claimant acted carelessly in the course of a reaction which in itself was sensible and reasonable then it may be that the claim will fall to be reduced under the rules on contributory fault.

Illustration 2
Upstream, large quantities of water plants up to 12 metres long are cut-back and simply thrown into the water by a company responsible for the maintenance of clean waters. They float downstream to an aqueduct connected to a hydroelectric power station, threatening to block it. The company which operates the station removes these plants. While it cannot base its claim for reparation of the costs incurred on the argument that it benevolently intervened for the maintenance company, it has a good claim under VI.–1:102 (Prevention) read with the present Article, if the company would have been liable in negligence for the imminent (considerable) damage.

Illustration 3
An abnormally large, long and recognisably unsound tree on X's land falls down, knocking over electrical power lines on its way down. The power lines supplied electricity to a drying facility for tobacco on the neighbouring land. In order to limit the extent of the damage, the company operating the drying facility arranges for the installation of provisional electric cables. Along with the damages for the tobacco rendered unusable and for the destroyed cables, it is also entitled to reparation for the costs of the provisional solution.

Illustration 4
In a poster campaign, an advertising business, X, created the impression that a competitor would work together with it under its direction. In reality, the competitor had ended the co-operative work a long time ago due to a dispute and had prohibited X from using its name. At the same time as bringing an action, the competitor placed advertisements in several daily newspapers in which it corrected X's misleading indications. It did this because it had been constantly quizzed about X's advertisement at a conference of all the advertising businesses in the country and loss of turnover was imminent; customers' reactions had been so emphatically negative that a slow-down of orders had become highly likely. The requested judgment would have been granted even if the advertisements had not been published in time to be able to effectuate prevention. The competitor can claim reparation from X for the costs of the advertising campaign, which were reasonable.

NOTES

1. In FRANCE and BELGIUM the question of liability for expenditure in the course of preventing damage is barely the subject of analysis. That is explained by the fact that in such cases a legally relevant damage is recognised in any case. That the loss is actually caused by the injured party seeking to avert an impending damage only becomes relevant if the injured party commits a *faute* in doing so: see e.g. CA Brussels

June 1998, Tijdschrift voor Aansprakelijkheid en Verzekering in het Wegverkeer 1999, 225 (the injured party, confronted with the tortfeasor's bad driving, reacted so ineptly in taking evasive action as to turn his vehicle over; claim reduced by 50%).

2. In SPAIN too the issue of compensation for loss in preventing damage is hardly addressed as such. Such expenditure is as a rule damage within meaning of CC art. 1902 and as such recoverable in tort law (e.g. CA Cáceres 6 November 2006, BDA JUR 2007/46155: the collapse of an enormous tree which was located on the defendant's land, caused severe damages to the plaintiff's power line that affected the dry place where the plaintiff treated tobacco for commercial purposes. In order to limit the extent of his losses, the plaintiff installed a provisional power line; the costs of that installation were included in his heads of damage).

3. In ITALY reparation for the cost of averting a (greater) damage seem to depend on the existence of a precedent damage: CC art. 2056 in conjunction with art. 1227. However, in Cass. 12 April 1980, no. 2331, Giust.civ. 1980, I, 2226 a company which as a result of profound chemical changes to the water was compelled to opt for a more expensive bridge construction was entitled to compensation for the additional costs as against the party responsible for the pollution; a greater loss would have been sustained if the work had been suspended.

4. HUNGARIAN law has detailed rules on reduction of claims in the case of contributory fault (CC § 340), but does not have a rule on the obligation to bear the costs in those cases in which the creditor discharges his duty to mitigate damage. Such a rule does not appear necessary here either because such costs can be considered damage within the meaning of the general norm on tort law liability. That view is supported by CC § 355(4), under which the party causing damage is obliged to reimburse the costs which are necessary for diminishing or eliminating the injured party's economic and non-economic loss. The legal position in ROMANIA is unclear because the claim under tort law to reparation possibly fails for the reason that the costs of averting damage are not regarded as a direct consequence of the tortious conduct. CZECH and SLOVAK CC § 419, on the other hand, correspond with VI.–6:302: "A person who averted threatening damage shall be entitled to a compensation of usefully spent costs and of damages suffered therein; this right may be exercised even against the person in whose interest he acted; the compensation shall be given maximally in the extent corresponding to the damage that was averred".

5. Under GERMAN CC § 249(2)(i) in the case of personal injury and property damage the injured party instead of claiming reinstatement of the status quo ante can claim the monetary sum necessary to achieve that. That includes reparation for his expenditure (Palandt [-*Heinrichs*], BGB[67], Pref. to § 249 no. 82). The duty to make reparation under CC § 249(1) also embraces expenditure of the injured party so far as that was necessary in the circumstances (BGH 6 April 1976, BGHZ 66, 182, 192; BGH 24 April 1990, BGHZ 111, 168, 175). The obligation to compensate for expenditure extends to costs which are incurred to prevent a specific impending damage or to minimise it if compensation for the damage which that expenditure was to prevent or minimise would itself have been recoverable (BGH 30 September 1993, BGHZ 123, 303, 309; MünchKomm [-*Oetker*], BGB[5], § 249 no. 172; Staudinger [-*Schiemann*], BGB[13], § 249 no. 57). Expenditure arising in connection with measures taken to fulfill one of the duties to mitigate arising under CC § 254 (Contributory fault) must even be compensated in the event that those measures were unsuccessful though not due to the fault of the injured party (*Oetker* loc. cit. no. 69). In the German Supreme Court case dated 13 November 2003, BGH Report 2004, 305, the operator of a hydroelectric plant removed a large number of aquatic plants washed up ashore, up to 12m in length

which should have been cut down by the defendant further upstream. A claim for expenditure based on benevolent intervention in another's affairs was rejected; howeve. a tort law claim was regarded as feasible in principle but was rejected on the facts of the instant case.

6. According to AUSTRIAN law, costs incurred to prevent damage from occuring are regarded by legal scholarship (*Koziol*, Haftpflichtrecht I[3], no. 2/21; Rummel [-*Reischauer*], ABGB II[2], § 1293 no. 10 and § 1304 no. 45) and constant jurisprudence of the courts (OGH 8 March 1994, SZ 67/35; OGH 16 March 2004, SZ 2004/36) as constituting a so-called "positive damage", provided that they serve a purpose. These costs may be recovered even if the measures adopted are unsuccessful. The test is what a reasonable person would have done in the same circumstances (OGH 11 January 1927, SZ 9/10 [however, the *ratio* of this case is based on benevolent intervention in another's affairs]; OGH 10 February 1960, EvBl 1960/161; OGH 30 August 1988, JBl 1989, 46). The recoverability of socalled contingency costs and reserve costs is contentious. Contingency costs encompass costs incurred to prevent probable damage (video cameras, store detectives). Such claims will fail for lack of causation (*Koziol and Welser*, Bürgerliches Recht II[13], 310). For example. a wife's claim against her violent husband (soon to be ex-husband) for the costs of an alarm system, security locks and an ex- directory number because of a failure to establish the requisite causation (OGH 28 April 1998, JBl 1999, 49; for criticism see Schwimann [-*Harrer*], ABGB VI[3], Pref. to §§ 1293 no. 41). By contrast, claims for pro-rata share of the costs associated with the maintenance, purchase and upkeep of replacements, the so-called *Reservehaltungskosten* (as a rule the costs incurred by passenger transport companies for keeping a spare vehicle in reserve in order to tide them over if one of their vehicles is involved in an accident) are resolved according to the law on benevolent intervention (OGH 9 April 1987, JBl 1988, 319; OGH 6 December 2001, 2 Ob 272/01s; *Reischauer* loc. cit. § 1323 no. 11a; Koziol/Bydlinski/Bollenberger [-*Danzl*], ABGB[2], § 1323 no. 18).

7. Pursuant to GREEK law, whether expenses incurred directed at averting an impending damage are recoverable depends on whether, having regard to provisions on contributory fault (CC art. 300) such expenditure may be deemed to have been necessary (*Kalavros*, Perivallon kai idiotiko dikaio, http://www.law.uoa.gr/epaek/perivallon_kai_idiotiko_dikaio). The recovery of costs, spent as a precautionary measure in order to prevent loss accruing to the claimant's patrimony is controversial. For the most part, the view held is that such a claim will fail for lack of causation. (*Kalavros* loc.cit.). If, in the context of environmental damage, measures are taken to avert future damage occurring, then, in this case, liability arising under the rules governing benevolent intervention in another's affairs (CC art. 736) should be considered by the courts (*Kalavros* loc.cit.).

8. DUTCH CC art. 6:96(2) expressly provides that "reasonable costs incurred to prevent or mitigate damage, the incurrence of which could have been expected, having regard to event founding liability" is a compensatable head of damages (see further *inter alia*. Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 414 p. 335). ESTONIAN LOA does not contain a similar rule. Nonetheless, the incurrence of such costs may be recovered under tort law provided that there is proof of causation.

9. The issue of the recoverability of costs incurred to avert impending damage appears to have only been rarely discussed in SWEDEN. HD 22 February 1947, NJA 1947, 82 which concerned costs incurred by a buyer of cattle when he discovered an infectious outbreak in his herd. The costs associated with the measures taken to contain the infection to a section of the herd were regarded as recoverable (see *Håstad*, Tjänster

utan uppdrag, 144, 150). HD 31 December 1946, NJA 1946, 758 I-II held that the costs associated with the slaughter of vixens who as a result of noise generated by military exercises killed their pups, were recoverable. The general view that they were no longer suitable for breeding prompted the slaughter of the vixens. The Court held that these costs were recoverable even though the view held by the breeders was not borne out by scientific evidence (see further *Andersson*, Skyddsändamål och adekvans, 489). FINNISH Environmental Damages Liability Act (*Lag om ersättning för miljöskador* of 19 August 1994, no. 737) § 6 confers a right to claim the costs of measures taken by the claimant which were necessary to prevent damage occurring. Measures includes carrying out necessary investigations. This corresponds in all essential points to the DANISH Act on the Compenstion of Environmental Damage (*lov om erstatning for miljøskader* of 6 April 1994, no. 225) § 2 no. 4.

10. Under ENGLISH law the expenses of averting imminent danger of probable damage for which another would be responsible in tort law can be obtained *before the damage is averted* where a court awards damages, quantified as the cost of preventing the potential danger, in lieu of a *quia timet* injunction to prevent the tort (and thus the [more costly] damage) occurring: see *Hooper v. Rogers* [1975] Ch 43 (where the defendant had excavated a track on a slope and resultant soil erosion threatened removal of support to the claimant's farmhouse). *After the event* a claim for loss sustained with a view to minimising possible future damage is generally subsumed within the basic rules on liability in tort (including the requirement of a causal link) and are regarded as a correlative of the duty to mitigate loss, though typical losses such as medical expenses or hiring substitutes are rarely considered in this light: cf. Charlesworth and Percy (-*Cooper*), Negligence[11], para. 4-36; *McGregor*, Damages[17], paras. 2-049–2-050. The approach of IRISH law is fundamentally the same: see *McMahon and Binchy*, Torts[3], para. 2.47. Such loss can be claimed under the common law from the person who would be responsible in tort law for the damage, provided the claimant's act is not "extraneous or extrinsic" so as to break the chain of causation and render the damage too remote: Clerk and Lindsell (-*Burrows*), Torts[19], para. 29-10; *McGregor*, Damages[17], para. 6-061; and for IRISH law *Hogg v. Keane* [1956] IR 155, 158 (Maguire CJ: the plaintiff, who injured herself fleeing from a parked car when the defendant in his vehicle negligently collided with it, would be entitled to damages if she could connect her injuries with the accident by showing her fright was reasonable). The claimant can thus recover reasonable expenses incurred in preventing (further) damage: see, for example, *Dee Conservancy Board v. McConnell* [1928] 2 KB 159 (costs of raising and removing the defendant's boat which sank due to the defendant's negligence and was obstructing navigation of the river for which the claimants were conservators). A claimant may recover even if his conduct is ultimately based on a mistaken judgment; an unsuccessful attempt to avert or mitigate loss which actually aggravates the damage sustained by the claimant will not amount to a *novus actus interveniens*, provided it was reasonable conduct of the claimant to avoid (further) loss: Charlesworth and Percy (-*Cooper*), Negligence[11], para. 4-36; *Burrows*, Remedies[3], p. 127; *McGregor*, Damages[17], para. 6-061; *Sayers v. Harlow Urban District Council* [1958] 1 WLR 623 (claimant could recover damages for injury sustained in attempting to climb over the door of a lavatory cubicle after the defendants negligently locked her in); *Lloyds & Scottish Finance Ltd. v. Modern Cars & Caravans (Kingston) Ltd.* [1966] 1 QB 764, 782 per *Edmund Davies* J (in the context of contractual, rather than tortuous, liability, but approving the general proposition set out in the contemporary edition of *McGregor*, Damages). SCOTS law on these issues is similar (see *Walker*, Delict[2], 217-218). In particular, recovery is possible where the pursuer's reasonable, but mistaken conduct has exacerbated the

damage: see *Walker* loc. cit. 217, and *S.S. "Baron Vernon" v. S.S. "Metagama"* 1928 SC (HL) 21, 25-26 (Viscount Haldane: no breach of the duty to minimise damage if there is a mere error of judgment in difficult circumstances) (*dicta* equally authoritative in English law).

Illustration 2 is taken from BGH 13 November 2003, BGHReport 2004, 305; **illustration 3** from CA Cáceres 6 November 2006, BDA JUR 2007/46155; and **illustration 4** from OGH 8 March 1994, SZ 67/35=RS0023516.

CHAPTER 7: ANCILLARY RULES

VI.–7:101: National constitutional laws

The provisions of this Book are to be interpreted and applied in a manner compatible with the constitutional law of the court.

COMMENTS

Chapter 7 in overview. Chapter 7 provides ancillary rules, which essentially clarify that certain legal issues in the field of non-contractual liability are not the subject matter of these model rules. The interaction of these matters with the law on non-contractual liability is partially too complex and also partially too sensitive from a policy perspective to be able to pronounce on them in model rules. Therefore, issues of the involvement of constitutional law - especially fundamental rights - in the law on non-contractual liability remain out of the equation (VI.–7:101). Further, the model rules of this Book do not themselves define the term "statutory provisions" (VI.–7:102) (Statutory provisions), they are silent on questions on the liability of the State (VI.–7:103) (Public law functions and court proceedings), do not probe into labour law (VI.–7:104) (Liability of employees, employers, trade unions and employers associations) and do not pronounce on issues that result from the interplay between insurance law and the law on liability (VI.–7:105) (Reduction or exclusion of liability to indemnified persons). In so far as they do not already fall outside the subject field of the model rules due to I.–1:101 (Intended field of application), of course other matters are intentionally not enumerated in Chapter 7. In particular, the working teams did not find a sufficient reason for including in the catalogue of exceptional rules further privileges from liability for individual professional groups.

VI.–7:101. This Article picks up the rule in I.–1:102 (Interpretation and development) paragraph (2) for the purposes of this Book. Strictly speaking, this is perhaps unnecessary. However, the influence of fundamental rights on the law on private liability is particularly strong, which is why an express statement and a somewhat more definite formulation appeared helpful. Not only are the rules of this Book to be interpreted in the light of the respective applicable constitutional law, in fact their application falls under the general proviso that they are congruent with the constitutional protection of fundamental rights. This is not only a constitutional statement, but also one of the law on non-contractual liability. It becomes particularly clear in connection with the evaluation of infringements of personality rights by the press. Here, like everywhere else, it is a self-evident aspect of the present branch of the law that it seeks to protect fundamental rights (like freedom of press) and not infringe them.

NOTES

1. The precise details of the impact that constitutional rules have on civil liability cannot be depicted here in their entirety. A number of pointers will have to suffice. According to FRENCH law, the principle that every person who suffers damage as a consequence of a *faute civile* is entitled to compensation enjoys constitutional protection (Conseil constitutionnel 22 October 1982, D. 1983 jur. 189, note *Luchaire*). BELGIAN Const.

art. 25 is one of those provisions which exert a strong influence over the private law, in that, in the context of torts committed by the press, it provides that liability must be imposed on defendants in a particular sequential order. For SPAIN, ever since the Constitution came into force in 1978, it is beyond doubt that the principle that statutes must be construed in manner that is compatible with the constitution is one of the tenets of CC art. 3(1) (Organic Act on Judiciary Power [*Ley Orgánica 6/1985, del poder judicial*, of 1 July 1985] art. 5; Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Salvador*], Código Civil I[2], 25). The practice of assessing the compensation of victims of traffic accidents by adverting to actuarial tables was deemed compatible with the Constitution. This ruling does not impinge upon the fact that the right to claim compensation where corporeal and incorporeal personality rights are culpably infringed is guaranteed by the Constitution (TC 29 June 2000, no. 181, BDA RTC 2000/181). This constitutional protection is also afforded to claims for compensation for non-pecuniary loss for breaches of the right to an intimate sphere committed by the press (TC 17 September 2001, no. 186, BDA RTC 2001/186). It remains to be said that the presumption of innocence is only a feature of criminal law and is not a feature of private law (TC 13 December 1993, no. 367, BDA RTC 1993/367; TS 19 June 1997, RAJ 1997 (3) no. 5420 p. 8287; TS 13 February 2003, RAJ 2003 (1) no. 1045 p. 1998).

2. See notes II16 und V36 under VI.–2:101 (Meaning of legally relevant damage) on the constitutionally inspired re- orientation under ITALIAN law in the field of liability for non-economic loss. With respect to GERMANY, the BVerfG 18 January 2001, NJW 2001, 1639 held that requiring a media company to pay damages for the publication of an article which had the knock-on effect of impinging on its economic basis did not infringe on the freedom of the press. AUSTRIAN CC § 1330 confers a right on the person concerned to claim compenstion if the claimant's right to honour is infringed by a defamatory statement. However, this right may be abridged by the right to freedom of expression (Const. art. 13; ECHR art. 10) which may, to a certain degree, justify exaggerated or provocative statements (OGH 14 March 2000, JBl 2000, 664; OGH 18 August 2004, SZ 2004/127; OGH 28 November 1997, ÖJZ 1997, 956).

3. In SWEDEN, as in other countries, state liability has been extended for violations of the ECHR. The courts accepted an independent claim flowing from the Convention itself, granting a right to claim non-pecuniary damages for state violations of the Convention regardless of a statutory basis under national law (HD 9 June 2005, NJA 2005, 462; HD 21 September 2007, NJA 2007, 584). The Convention does not, however, apply between two private parties. The Supreme Court rejected the claim of a private individual, based on the ECHR initiated against her insurance company who had subjected her to covert surveillance (HD 29 October 2007, NJA 2007, 747). By contrast, the NORWEGIAN courts are more inclined to rely on the ECHR when they are called upon to determine a claim between private individuals involving a breach of the right to respect for private life (HD 7 May 2007, Rt 2007, 687; HD 10 April 2008, HR-2008-647-A).

VI.–7:102: Statutory provisions

National law determines what legal provisions are statutory provisions.

COMMENTS

The Articles of this Book use the expressions "statute" or "statutory provisions" on many occasions (see VI.–2:202 (Loss suffered by third persons as a result of another's personal injury or death) paragraph (2)(c), VI.–3:102 (Negligence) sub-paragraph (a), VI.–3:206 (Accountability for damage caused by dangerous substances or emissions) paragraph (5)(b)and VI.–5:401 (Contractual exclusion or limitation of liability) paragraph (4)). In each case, statutes in a material sense are what is meant by "statutes", not necessarily parliamentary statutes (see Comments under VI.–3:102 (Negligence)). Such norms, which are binding for all, take a diverse spectrum of outward forms. Their detailed classification and distinction from individual regulations on the one hand and sets of rules without normative character on the other (the usual of example of which would be the safety regulations of public insurance or maintenance bodies), cannot be provided by these model rules. Clarifying this is the aim of the present Article.

NOTES

1. Most of the Member States differentiate between different types of law-making, between Acts in the strict sense and Laws in a wider sense (including Public General Acts and Measures, secondary legislation and recognised rules of customary law). The FRENCH approach regards Law in the wider sense as connoting a legal norm emanating from the State, the breach of which entails some legal sanction (*Carbonnier*, Droit civil I, p. 13 no. 5). A law in the wider sense must be in writing, may not be *ad hominem* and must be an expression of the general will (*Déclaration des droits de l'homme et du citoyen* of 1789, art. 6); it is abstract, general and permanent. Acts in the strict sense are parliamentary enactments; they can also be stem from a referendum. Acts in the strict sense are not necessarily Laws in the wider sense (*Ghestin*, Traité de droit civil, Introduction générale[4], no. 244; *Chabas*, Lecon de droit civil I(1)[12], no. 66), because the former may solely be directed at a specific person. Regulations made by central and local government (*règlements*) and International Conventions can be only Laws in the wider sense. As regards Regulations, a distinction is drawn between *règlements autonomes* (Const. art. 37) and *règlements d'exécution* or *règlements administratifs*. *Règlements d'exécution* are made by Ministers, while decrees made by Prefects and Mayors are designated *arrêtés*. In the BELGIAN hierarchy of norms (detailed by *Hansenne*, Introduction au droit privé, no. 34) the Constitution ranks before Acts; below these are the *décrets* of the *Conseils des Communautés et des régions* (which in the region Bruxelles-Capitale are designated *ordonnances*). *Décrets* and *ordonnances* have the same effect as an Act in the strict sense for the localities in which they operate.
2. SPANISH CC art. 1(1) sets out the following hierarchy of legal sources: (i) law (*ley*), (ii) custom (*costumbre*) and (iii) general principles of law (*principios generales del Derecho*). According to current understanding, the concept of *ley* includes (*Gordillo Cañas*, ADC 1988, 469-515) the Constitution as well as the decisions of the *Tribunal Constitucional* on the constitutionality of a statute ranked below the Constitution. *Ley* also embraces an enactment of the national parliament (*Cortes Generales*) as well as

an enactment emanating from the (regional) Autonomous Parliaments (*Parlamentos autonómicos*), furthermore it encompasses regulations and other legal norms, which may be enacted by the central government and automonous regions once particular requirements are met. In the context of private law, regional law is becoming increasingly significant. Whilst legislative competence principally lies exclusively with the national legislature, those automonous regions which traditionally have their own civil law are permitted to 'conserve, modify and develop' the state private law (Const. art. 149(1)(no. 8a). In a similar manner, ITALIAN disp. prel. art. 1 designates Acts, Regulations and Custom or usage as sources of law. Laws of a constitutional character? regulate the issue of governmental decrees having the force of law (disp. prel. art. 2).

3. In HUNGARY, statutes may only be enacted by parliament. The competence to regulate a particular area derives from the Constitution. CC § 685 is numbered among the "statutory provisons" in the sense of the terminology employed in the Civil Code alongside Acts, governmental regulations and legislation made by automonous adminstrative bodies under the authority conferred on them by law. According to ROMANIAN Const. art. 73(1) Acts in the strict sense are Constitutional Acts, Acts to amend and supplement the Constitution and ordinary Acts of the legislature (*legi ordinare*), and moreover include Parliamentary Resolutions which only pertain to a particular case. By virtue of Const. art. 115, the central government, if authorised by an enabling statute, may issue an ordinance (*ordonanţă*); the government also has the power to issue ordinances in a situation of emergency (*ordonanţă de urgenţă*) (Const. art. 115 (4)). Matters involving great technical detail may be regulated by governmental decrees (*Hotărârea Guvernului*) and orders (*Ordin*); this method is utilised, for example, in the context of the law on motor liability insurance. A number of decrees and decree laws stemming from the time prior to change in the system of government remain in force, e.g. Decree 167/1958 on Limitation Periods .

4. According to GERMAN EGBGB (Introductory Law to the Civil Code) art. 2, the concept of "statute" for the purposes of private law is defined as "every legal norm". GREEK CC art. 1 arrives at the same result, as it provides that "legal norms are contained in statutes and rules of custom and usage." In a similar fashion, AUSTRIAN Law differentiates between Acts in a strict sense (Acts of Parliament) and Law in a wider sense. Laws in a wider sense embrace every general abstract norm and include all norms, which are made on the basis of a authority conferred in primary legislation. Laws in a wider sense also include protective laws in the sense of CC § 1311. Even technical guidelines can also be included within this rubric provided that they were declared as binding in an Act in the strict sense or in a Regulation (Schwimann [-*Harrer*], ABGB VI^3, § 1311, no. 9). The notion of "statutory provision" (*disposição legal*) under PORTUGUESE CC art. 483(1) embraces, according to CC art. 1(2) all general provisions which stem from the competent state body. These include Acts of Parliament, Ordinances and regional legislative decrees (Const. art. 111(1)). Statutes emanating from the *Assembleia da República* are called *leis*, the government issues *decretos-lei*. *Leis* and *decretos-lei* have the same normative effect (Const. art. 112(2)). The government is conferred with an independent legislative competence in all matters which are not exclusively accorded to the parliamentary domain (Const. art. 164). As regards the civil law, the precise demarcation of competences may be derived from Const. arts. 161(c) und (d), 198(1).

5. According to DUTCH Const. art. 81 statutes shall be passed jointly by the government and the *Staten-Generaal*. If the Constitution refers to "statute", it always refers to Acts in the strict sense. Laws in the wider sense can also be passed by other competent bodies, provided that they are empowered to do so by the Constitution or by an Act in

a strict sense; if the same perequisites are satisfied, this competence can be delegated further. Laws in the wider sense embrace, in particular, *algemene maatregelen van bestuur* (generally binding governmental regulations established by Royal Decree [Const. art. 89]); *ministeriële regelingen* (generally binding Minsterial Orders); *provinciale verordeningen* (generally binding regulations of the provinces); *gemeentelijke verordeningen* (generally binding regulations of municipalities) and Regulations of water boards and public bodies.

6. In the NORDIC countries the term "statute" (or "statutory provisions") refers to all enacted legal instruments, whether by parliament, the government, municipalities or public authorities. Therefore, when it comes to ascertaining the extent of the duty of care in negligence, recourse may be had to a large spectrum of special statutory rules on the protection of the interest concerned; reliance may also be placed on rules of custom (*Hellner and Radetzki*, Skadeståndsrätt[7], 128; *von Eyben and Isager*, Lærebog i erstatningsret[6], 66; *Saxén*, Skadeståndsrätt, 15; *Hagstrøm*, TfR 1980, 292-366).

VI.–7:103: Public law functions and court proceedings

This Book does not govern the liability of a person or body arising from the exercise or omission to exercise public law functions or from performing duties during court proceedings.

COMMENTS

Relationship with I.–1:101(2). This Article absorbs the rule in I.–1:101 (Intended field of application) paragraph (2), concretising and extending it for the purposes of the law on non-contractual liability. This Book neither concerns itself with issues of liability for the erroneous exercise of sovereign power nor with questions of liability for damage in connection with conducting court proceedings. The same applies to matters relating primarily to procedure or enforcement (I.–1:101(2)(h)).

Person or body exercising public law functions. Remaining excluded from the scope of application of this Book is the liability of the State and its institutions as well as the personal liability of its office holders for the exercise or the failure to exercise sovereign power in breach of duty.

> *Illustration*
> X, a prison inmate and perpetrator of violence, is let out on parole on many occasions and, after a period of time, even let out for one year. During this time, he abducts a woman and forces her to perform sexual acts. Neither the issue of whether the State is liable for the wrongful omission of its officials, nor the question of whether one of them is personally liable, is governed by these rules.

What exactly is to be understood under the exercise of public authority is to be decided in conformity with the criteria developed on EC Treaty art. 45(1). Remaining borderline cases must be left to the respective *lex fori* for demarcation; whether it is possible for uniform criteria on the demarcation between the realisation of public functions on the one hand and private law (fiscal) duties on the other, could not be verified.

Performing duties during court proceedings. Moreover, this Book contains no statement on the liability of judges or the liability of lawyers and expert witnesses for their activities in court. In this area of their professional activity, all three professional groups typically enjoy privileges from liability, which remain unaffected by the rules of this Book. The term “court” includes arbitration tribunals, see I.–1:103 (Definitions) paragraph (1) in conjunction with Annex I, keyword “Court”.

NOTES

1. Die Haftung des Staates, seiner Einrichtungen und Beamten unterliegt in vielen Mitgliedstaaten einem eigenen Regime und nicht selten auch einer eigenen Gerichtsbarkeit. In FRANCE entscheiden grundsätzlich die Verwaltungsgerichte; über die von Fahrzeugen verursachten Schäden aber die Zivilgerichte (Gesetz of 31 December 1957). Der Staat haftet für jedes, nicht nur für ein schweres Verschulden, das er bzw. ein Beamter in Ausübung seiner Kompetenzen begeht (CE 7 February 2003, no. 223882, *Secrétaire d’Etat au logement v. SNC Empain Graham*). Unter dem

Verfassungsergänzungsgesetz no. 79-43 of 18 January 1979 ist der Staat auch für ein persönliches Verschulden seiner Richter und Staatsanwälte verantwortlich; er kann sie in einem speziellen Verfahren vor der Zivilrechtsabteilung des Kassationshofes in Regress nehmen (Ordonnance no. 58-1270 of 22 December 1958, art. 11-1; Cass.civ. 5 March 1980, Bull.civ. 1980, I, no. 79, RTD civ 1980, 771, obs. *Durry*; Cass.civ. 5 May 1982, D. 1983, I.R. 1956, obs. *Julien*; Cass.civ. 30 January 1996, D. 1997, 83, note *Legrand*). Den Richtern und Staatsanwälten stehen insoweit die Beamten der Kriminalpolizei gleich (Cass.civ. 9 March 1999, Bull.civ. 1999, I, no. 84), nicht aber die Laienrichter, für die besondere Regeln bestehen. Ein persönliches Verschulden liegt vor bei Rechtsverweigerung, Vorsatz, Betrug, Gebührenüberhebung und einem schwerwiegenden beruflichen Fehler (Code de l'organisation judiciaire art. L. 141-1; CA Versailles 27 July 1989, JCP éd. G 1990, II, 21450, note *Estoup*; Cass.civ. 3 July 1990, JCP éd. G 1990, IV, 336; Cass.civ. 10 May 1995, I.R. 1995, 143). Schärfere Regeln bestehen für Fehler in Vormundschaftssachen (CC art. 473). Rechtsanwälte haften nach den allgemeinen Regeln (Gesetz no. 71-1130 of 31 December 1971 art. 26; sie müssen sich gegen Haftpflicht versichern [loc. cit. art. 27]).

2. In BELGIUM muss für den Bereich der Staatshaftung zwischen den drei Gewalten unterschieden werden. Für die Exekutive gilt das Prinzip der Einheit der *faute*, wonach die öffentliche Hand in ihrem Bereich denselben Anforderungen genügen muss, wie jeder andere in seinem (*Leclercq*, concl. under Cass. 25 October 2004, R.W. 2006-07, 1486). Eine Verwaltungsbehörde oder ein sonstiger Träger von Exekutivgewalt begeht folglich eine *faute* i.S.d. CC arts. 1382 und 1383, wenn sie bzw. er bei einer Entscheidung die allgemeine Sorgfaltspflicht oder eine gesetzliche Vorschrift verletzt, ohne sich auf einen besonderen Haftungsausschlussgrund (z.B. auf einen unvermeidlichen Irrtum) berufen zu können (Cass. 14 January 2000, R.W. 2001-02, 1096, note *Van Oevelen*). Jede gesetzwidrige Auslegung oder Anwendung einer Norm durch die Exekutive verpflichtet den Staat zur Haftung für hierdurch einem Dritten verursachte Schäden. Seit Cass. 19 December 1991, Pas. belge 1992, I, 316 trifft den Staat zudem aus CC arts. 1382 und 1383 auch eine Haftung für Schäden *résultant d'une faute commise par un juge ou un officier du ministère public lorsque ce magistrat a agi dans les limites de ses attributions légales ou lorsque celui-ci doit être considéré comme ayant agi dans ces limites, par tout homme raisonnable et prudent.* Dies gilt allerdings nur, wenn die fehlerhafte Entscheidung wegen Verletzung einer Rechtsnorm durch eine andere, rechtskräftige Entscheidung aufgehoben oder vernichtet wird und wenn die fehlerhafte Auslegung oder Anwendung des Rechts eine *faute* konstituiert (Cass. 26 June 1998, www.cass.be). Eine Staatshaftung kann schließlich auch für Fehler in der Ausübung der gesetzgebenden Gewalt enstehen (grundlegend Cass.ass.pl. 1 June 2006, R.W. 2006-07, 213, concl. *De Swaef*, note *Van Oevelen*). Cass. 28 September 2006, no. de rôle c020570F hat eine Staatshaftung sogar mit dem Argument bejaht, die Legislative habe dadurch eine *faute* begangen, dass sie die Justiz nicht mit den erforderlichen Finanzmitteln ausgestattet habe, um Zivilverfahren in angemessener zeitlicher Frist zu bewältigen. Zahlreiche Einzelheiten der Staatshaftung sind mit Gesetz of 10 February 2003 (*Loi relative à la responsabilité des et pour les membres du personnel au service des personnes publiques*, Monit. belge 27 February 2003) neu geregelt worden, insbesondere finden über loc. cit. art. 3 die allgemeinen Regeln der Arbeitgeberhaftung (CC art. 1384(3)) auch auf die Staatshaftung Anwendung. Richters und Staatsanwälte haften persönlich nur im Falle von Rechtsbeugung (*prise à partie*, Code judiciaire arts. 1140-1147), betrügerischem Verhalten und Rechtsverweigerung. Rechtsanwälte haften nach den allgemeinen Regeln (CFR Brussels 27 February 1986, no. JB00131_1; CA Brussels 3 March 1987, RGDC 1987, 1869).

3. Unter LUXEMBURGIAN Gesetz of 1 September 1988 über die Haftpflicht des Staats und der öffentlichen Körperschaften art. 1(1) haften der Staat und die übrigen öffentlichen Körperschaften im Rahmen ihrer Verwaltungstätigkeit für alle Schäden, die ihre Ursache in einem Fehler ihrer Gerichts- oder Verwaltungsbehörden haben (näher *Ravarani*, La responsabilité civile[2], no. 120). Die Staatshaftung folgt also den Regeln des allgemeinen bürgerlichen Rechts der Haftung für *faute* (*Ravarani*, La responsabilité civile[2], p. 414 no. 500). Unter besonderen Umständen tritt zudem eine Haftung auch ohne den Nachweis eines Fehlverhaltens ein (loc. cit. arts. 1(2) und (2)). Richter und Staatsanwälte haften persönlich nur unter sehr engen Voraussetzungen; das gilt auch für die Haftung im Regresswege gegenüber dem Staat. Die Rechtslage deckt sich weitgehend mit der in Belgien. Dasselbe gilt für die Haftung der Rechtsanwälte (näher *Ravarani* loc. cit. no. 258).

4. In SPAIN extracontractual liability of public administration is governed by Act on the general regime of Public Administrations (Act 30/1992, *de régimen jurídico de las Administraciones Públicas y procedimiento administrativo común*, of 26 November 1992 [as amended] - LRJ-PAC) arts. 139-146. Loc. cit. art. 139(1) provides that "individuals shall be entitled to compensation by the relevant Public Administration for all damage sustained to any of their goods and rights", if the damage is the result "of the normal or abnormal functioning of the public services". The rule applies to all public law bodies and it embraces all sorts of activities of the Public Administration, even if in a private law relationship (loc. cit. art. 144); only the liability arising from court proceedings has its own regime (see below). All natural and legal persons are protected, including civil servants and (other) bodies exercising public law functions. The liability is direct in the sense that the civil servant or public employee that caused the damage cannot be taken to court, unless either he/she was criminally liable or he/she caused the damage with intention or gross negligence. In the latter case the Public Administration may seek reimbursement under loc. cit. art. 145(2), in the former its liability is of a subsidiary nature (TS 19 November 2001, RAJ 2002 (2) no. 2775 p. 4806; Reglero Campos [-*Busto Lago*], Tratado de responsabilidad civil[3], 1721). The civil servant's conduct must be 'in the exercise or on the occasion of public functions' (TS 25 June 1997, RAJ 1997 (3) no. 5834 p. 8983). Liability is strict (loc. cit. arts. 139-146), the only defence being *force majeure*. Const. art. 121 states that "damage caused by either a judicial mistake or by the abnormal functioning of the Public Administration of Justice shall entitle [the victim] to a compensation by the State". Organic Act on Judiciary Power (*Ley 6/1985, Orgánica del Poder Judicial*, of 1 July 1985 [LOPJ]) art. 252 develops this provision further. Advocates are not within that regime, unless appointed by the State. Zur persönlichen Haftung von Richtern des Verfassungsgerichtshofes see TS 23 January 2004, RAJ 2004 (1) no. 1 p. 17. Damage caused by an Act of Parliament may also be compensated under LRJ-PAC arts. 139-146. A typical case would be an infringement of EC law (e.g. TS 12 June 2003, RAJ 2003 (5) no. 8844 p. 16562).

5. ITALIAN Const. art. 28 bestimmt, dass die Angehörigen des öffentlichen Dienstes nach Maßgabe des geltenden Straf-, Zivil- und Verwaltungsrechts für Amtspflichtverletzungen persönlich haften. Die zivilrechtliche Haftung erstreckt sich in solchen Fällen auch auf den Staat oder die Körperschaft, in deren Dienst der betreffenden Beamte oder Angestellte steht (Alpa and Mariconda [-*Alpa and Mariconda*], Codice civile commentato IV, sub art. 2043, XIII, § 62, p. 2398). Es gelten die Regeln des allgemeinen Deliktsrechts, soweit sie nicht mit der öffentlichrechtlichen Natur des Beklagten unvereinbar sind (Cass. 7 February 1974, no. 330, Giur.it. 1974, I, 1, 1158; Cass. 29 November 1973, no. 3245, Giur.it. 1974, I, 1, 1343). Die Haftung setzt eine schuldhaft (Cass.sez.un. 22 July 1999, no. 500, Foro

it. 1999, I, 2478; Cass. 29 March 2004, no. 6199, Giust.civ.Mass. 2004, fasc. 3; Cass. 23 July 2004, no. 13801, Giust.civ.Mass. 2004, fasc. 7-8) unrechtmäßige Ausübung des öffentlichen Amtes (z.B. Cass. 10 February 2005, no. 2705, Giust.civ.Mass. 2005, fasc. 2), Kausalität und ein Handeln im Rahmen der institutionellen Zwecke des Staates oder der Körperschaft voraus (Cass. 17 September 1997, no. 9260, Foro it. 1998, I, 1217; Cass. 18 March 2003, no. 3980, Giust.civ.Mass. 2003, 538). Auch Vorsatztaten können dem Staat zugerechnet werden, wenn zwischen der Tat und der öffentlichen Aufgabe des Beamten oder Angestellten ein *nesso di occasionalità necessaria* besteht (Cass. 14 May 1997, no. 4232, Giust.civ.Mass. 1997, 732). Der Staatsdiener haftet persönlich neben dem Staat, dem er im Innenverhältnis ggflls. Regress schuldet. Für einige Ausbildungsberufe, die in Staatseinrichtungen ausgeübt werden, gelten Sondergesetze mit teilweise abweichenden Regelungen. Act 13 April 1988, no. 117 (Gazz. Uff. 15 April 1988, no. 88) *Risarcimento dei danni cagionati nell'esercizio delle funzioni giudiziarie e responsabilità civile dei magistrati* regelt den Ersatz der in der Ausübung von Gerichtsfunktionen verursachten Schäden und die zivilrechtliche Haftung der Richter und Staatsanwälte. Die Staatshaftung tritt hier bei Vorsatz, grober Fahrlässigkeit und Rechtsverweigerung ein. Nichtvermögensschäden werden nur im Falle der Freiheitsentziehung ersetzt (loc. cit. art. 2(1)). Richter und Staatsanwälte haften (im Regresswege) nur gegenüber dem Staat (loc. cit. art. 7); anders ist das nur, wenn sie sich einer Straftat schuldig gemacht haben (loc. cit. art. 13).

6. HUNGARIAN CC § 349(1) regelt die Haftung für Schäden durch die öffentliche Verwaltung; auf durch Richter oder Staatsanwälte verursachte Schäden ist die Regelung entsprechend anzuwenden (CC § 349(3)). Die Haftung tritt nur ein, wenn der Schaden nicht durch ein ordentliches Rechtsmittel abgewendet werden konnte. Haftungsschuldner ist das jeweilige Organ (die jeweilige Körperschaft), der das Verhalten der handelnden natürlichen Person zugerechnet wird; CC § 349(1) enthält letztlich also nur eine Sonderform der Arbeitgeberhaftung (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1296; Petrik [-*Wellmann*], Polgári jog II[2], 606/3; *Ujváriné*, Felelősségtan[7], 141). Die Haftung setzt nach den allgemeinen Regeln (CC § 339) Vorwerfbarkeit voraus. Hier wird geprüft, ob so verfahren worden ist, wie es unter den konkreten Umständen im Allgemeinen erwartet werden konnte. Die fehlerhafte Auslegung einer Rechtsvorschrift genügt für sich genommen ebenso wenig wie eine fehlerhafte Beweiswürdigung; es wird vielmehr eine offensichtliche und schwerwiegende Rechtsverletzung verlangt (*Benedek* loc. cit. 1304; *Wellmann* loc. cit. 608; *Petrik*, Kártérítési jog, 170). Under BULGARIAN law haften Verwaltungs- und Justizbeamte nur im Falle von Vorsatz und grober Fahrlässigkeit.

7. ROMANIAN Const. art. 52 gibt i.V.m Gesetz no. 554/2004 über die öffentlichrechtliche Streitigkeit art. 1 jedermann einen Anspruch auf Ersatz seiner materiellen und immateriellen Schäden, wenn er durch die öffentliche Verwaltung in einem seiner Rechte (nicht: in einem bloßen Interesse) verletzt wird. Es handelt sich um eine strikte Haftung; der jeweilige Funktionsträger haftet persönlich aber nur im Falle eines vom Geschädigten zu beweisenden Verschuldens (loc. cit. art. 13(1)). Für Justizirrtümer in Strafverfahren besteht ein Sonderregime (Const. art. 52(3) i.V.m. CCrimProc arts. 504-507. POLISH CC arts. 417, 417^1, 417^2 and 418 regeln Fragen der Staatshaftung unmittelbar im Anschluss an die deliktsrechtliche Grundnorm (CC art. 415). Under art. 417(1) the State Treasury, territorial self-government unit or another legal person exercising public authority by virtue of law shall be liable for damage inflicted by unlawful activity or cessation thereof which occurred in exercise of such authority. Die Haftung für gesetzgeberisches Unrecht ist Gegenstand einer ausführlichen Regelung in CC art. 417^1.

8. GERMAN CC § 839 regelt nur die persönliche Haftung von Beamten im staatsrechtlichen Sinn, allerdings ohne Unterschied, ob sie im hoheitlichen oder im fiskalischen Bereich tätig werden (BGH [Great Senate in Civil Matters] 19 December 1960, BGHZ 34, 99, 104). Es handelt sich um eine abschließende, alle anderen auf dem Verschuldensprinzip aufbauende Haftungsregeln verdrängende *lex specialis* (Soergel [-*Vinke*], BGB[13], § 839, no. 12). CC § 839 begründet einerseits auch eine Haftung für reine Vermögensschäden, enthält aber auch spezifische Haftungsbeschränkungen (CC § 839(1)(ii) [Subsidiarität], § 839(2) [Richterprivileg] und § 839(3) [Schadensabwendungsobliegenheit durch Gebrauch eines Rechtsmittels]). Von der persönlichen Haftung des Beamten ist die Haftung öffentlich-rechtlicher Körperschaften unter Const. art. 34 zu unterscheiden. Sie umfasst nur hoheitliche Tätigkeiten, tritt in diesem Bereich jedoch an die Stelle der persönlichen Beamtenhaftung (Palandt [-*Sprau*], BGB[67], § 839, nos. 1, 12). Der Beamte haftet im Anwendungsbereich von Const. art. 34 nur gegenüber dem Staat, nicht auch gegenüber dem Bürger, und gegenüber dem Staat auch nur im Falle von Vorsatz oder grober Fahrlässigkeit. Const. art. 34 erweitert den Kreis der Personen, für welche die Staatshaftung eintritt, auf alle von der jeweiligen Körperschaft mit hoheitlichen Aufgaben betraute Personen (näher *Medicus,* Schuldrecht II[14], no. 913; BGH 23 November 1995, BGHZ 131, 200, 203); es handelt sich um eine gesetzliche Schuldübernahme, durch welche die persönliche Haftung der Handelnden im Außenverhältnis erlischt.

9. Under AUSTRIAN *Amtshaftungsgesetz* (AHG) § 1 haftet die jeweilige Körperschaft (Bund, Land, Gemeinde) nach den Bestimmungen des bürgerlichen Rechts für Schäden am Vermögen oder an der Person, welche die als ihre Organe handelnden Personen in Vollziehung der Gesetze einem Dritten rechtswidrig und schuldhaft zufügen. Das betrifft sowohl verwaltungsbehördliches als auch richterliches Handeln, nicht aber legislatives Unrecht (OGH 15 October 2004, SZ 2004/148). Geschuldet ist grundsätzlich nur Geldersatz (im Gegensatz zur Naturalrestitution); eine Haftung für entgangenen Gewinn setzt ein grobes Verschulden voraus. Einige Spezialgesetze verzichten für ihren Bereich allerdings völlig auf das Verschuldenserfordernis (zur rechtswidrigen Freiheitsentziehung siehe z.B. OGH 18 June 1975, SZ 48/69). Die Haftung für fehlerhafte Rechtsprechung ist vielfach begrenzt, eine Haftung für höchstrichterliche Entscheidungen ist gänzlich ausgeschlossen, falls sie darauf hinausliefe, dass ein Untergericht die Entscheidung eines Obersten Gerichtshofs überprüfen müsste (AHG § 2(3); see OGH 25 August 1993, SZ 66/97 and OGH 25 February 1997, SZ 70/32). Eine Haftung des Staates für fehlerhafte untergerichtliche Entscheidungen, die nicht mehr mit einem Rechtsmittel bekämpft werden können, setzt materiell die Abweichung von einer klaren Gesetzeslage voraus. In Kindschaftssachen kann sie auch aus einer unzureichenden Überwachung eines beteiligten Rechtsanwaltes folgen (OGH 14 July 1992, SZ 65/108). Vorschriften über die Haftung wegen legislativen Unrechts, insbesondere infolge fehlender oder magelhafter Umsetzung von Gemeinschaftsrecht, gibt es bislang noch nicht.

10. Rechtsanwälte fallen nach der neueren Rechtsprechung (A.P. 18/1999, EEN 67/2000, 230 = EllDik 40/1999, 1290 = DEE 11/1999, 1172) nicht in den Anwendungsbereich der strikten Haftung von Dienstleistungserbringern unter GREEK Law 2251/1994 (as amended by Act no. 3587/2007) . Das wird mit der besonderen Stellung des Rechtsanwaltes, der ein Amt ausübe, begründet. Folglich unterliegt seine Haftung weiterhin den Vorschriften in Introductory Act to the Civil Procedure Law art. 73.

11. PORTUGAL verfügt mit Gesetz no. 67/2007 “Civil liability of the State and other public corporate bodies” of 31 December 2007 über eine umfangreiche Regelung des Staatshaftungsrechts. Hinzu kommt CC art. 501, der eine strikte Haftung des Staates

und anderer juristischer Personen des öffentlichen Rechts bei Ausübung privatrechtlicher Tätigkeiten vorsieht. Under Law no. 67/2007 art. 11 the State and other public corporate bodies are liable for "special and abnormal losses resulting from specially dangerous administrative services or things", es sei denn, der Schaden beruht auf höherer Gewalt oder einem Verschulden des Geschädigten oder eines Dritten.

12. In the NETHERLANDS folgt das Recht der Haftung für unerlaubtes Staatshandeln (*onrechtmatige overheidsdaad*) grundsätzlich den allgemeinen Regeln des CC art. 6:162. Allerdings beansprucht das Verwaltungsrecht in einigen Fallgruppen Anwendungsvorrang. Die Zivilgerichte dürfen in ihrem Zuständigkeitsbereich verwaltungsbehördliches Handeln am Maßstab "der allgemeinen Grundsätze angemessener Verwaltung" prüfen (HR 27 March 1987, NedJur 1987 no. 727 p. 2454; Asser [-*Hartkamp*] Verbintenissenrecht III[12], nos. 266-271c; Parlementaire Geschiedenis VI, 1347). ESTONIA hat die Regeln der Staatshaftung in einem State Liability Act zusammengefasst.

13. SWEDISH Damages Liability Act chap. 3 § 2 provides for state (and municipal) liability for personal injuries, property damage, pure economic loss and violations within chap. 2 § 3 (infringements of human dignity etc), if caused by negligence in the course of exercising duties of a public authority. Der Fahrlässigkeitsstandard ist gegenüber den normalen Regeln des Privatrechts objektiviert; personal characteristics of individual public servants are irrelevant. Negligence may be "anonymous": der Geschädigte muss weder die Fahrlässigkeit eines einzelnen Beamten beweisen noch beweisen, dass er oder sie von dem Verhalten eines anderen Beamten Kenntnis hatte. Negligent conduct may be found based on separate actions or omissions by several servants or authorities which in total amounts to negligent conduct. The requirement that the damage must have been caused in the course of exercising public authority has caused several difficult questions of delimitation (see e.g. HD 20 July 1987, NJA 1987, 535. Damages Liability Act ch. 3 § 3 extends state liability to pure economic losses caused by negligently given information or advise (see in more detail *Bengtsson*, Det allmännas ansvar enligt skadeståndslagen, *passim*; *Hellner and Radetzki*, Skadeståndsrätt[7], 443). State liability for infringements of the Eur.Conv.Hum.Rights is exclusively based on the Convention itself and includes liability for non-economic losses (e.g. HD 9 June 2005, NJA 2005, 462; HD 21 September 2007, NJA 2007, 584; *Crafoord*, ERT 2000, 519-547; *Andersson*, JFT 2007, 377-414). FINNISH Damages Liability Act chap. 3 § 3 corresponds to Swedish Damages Liability Act chap. 3 § 2; a specific rule on liability for wrongful information or advise does not exist, however. On the rules governing state liability in DENMARK see *Gomard*, UfR 2004 B, 383-390. In all the Nordic countries public bodies share the same vicarious liability as other employers (*von Eyben and Isager*, Lærebog i erstatningsret[6], 128; Swedish Damages Liability Act chap 3 § 1; Finnish Damages Liability Act chap. 3 § 1).

14. ENGLAND hat die frühere Immunität von Barristers und Solicitors für fahrlässiges Verhalten im Zusammenhang mit der Führung eines Prozesses (*Rondel v. Worsley* [1969] 1 AC 191; *Saif Ali v. Sydney Mitchell & Co. (a firm)* [1980] AC 198) abgeschafft (*Arthur J. S. Hall & Co. (a firm) v. Simons* [2002] 1 AC 615). Es herrscht aber nach wie vor große Zurückhaltung gegenüber der Annahme, ein Anwalt habe fahrlässig gehandelt (*Moy v. Pettman Smith* [2005] UKHL 7; [2005] 1 WLR 581). Die Rechtslage in IRELAND ist nicht ganz klar; es scheint eine Neigung zu bestehen, sich dieser neueren englischen Rechtsprechung anzuschließen (*McMahon and Binchy*, Torts[3], no. 14.167). Besondere Immunitäten genießen in beiden Ländern die Staatsoberhäupter (für ausländische Staaten, Regierungsvertreter, Militärs etc. siehe den englsichen State Immunity Act 1978 bzw. den Visiting Forces Act 1952).

The **illustration** is taken from HR 28 May 2004, JOL 2004, 279, RvdW 2004, 78.

VI.–7:104: Liability of employees, employers, trade unions and employers associations

This Book does not govern the liability of:

(a) employees (whether to co-employees, employers or third parties) arising in the course of employment;

(b) employers to employees arising in the course of employment, and

(c) trade unions and employers' associations arising in the course of industrial dispute.

COMMENTS

1. **General.** This Article is another example of the application of I.–1:101 (Intended field of application) paragraph (2). Issues on the border between the law on non-contractual liability and individual and collective labour law are removed from the scope of application of this Book. This is an area of great sensitivity in legal and social policy, to whose great complexity justice cannot be done by these model rules.

Individual labour law. Therefore, on the one hand, all issues remain excluded from these rules which relate to the personal liability of employees for damage caused by them in the course of their work. This applies to harming colleagues from the same establishment, as well as to damage to the detriment of the employer and of third parties, whether they are employees themselves or not (sub-paragraph (a)). The reason for remaining silent on the liability between members of the same enterprise is to be primarily found in the circumstance that in many legal systems this problem area is subject to a specific regime of occupational accident insurance, which for its part demands priority of application over the general law on non-contractual liability. Issues on the relationship to third parties remain out of the equation because the field covering the personal liability of employees *vis à vis* external parties is (i) very controversial from a general policy perspective and because they (ii) are not capable of consistent development without considering the internal relationship between the employer and employee, which is subject to the rules of the law on labour contracts. Therefore, issues of joint and several liability shared between employer and employee also fall under this exclusionary rule in cases in which the personal liability of the employee for damage occasioned to third parties results from the applicable law. Sub-paragraph (b) follows the same philosophy for the reverse situation (claims of the employer against the employee). The qualification of the relevant legal issue as falling under either non-contractual liability law or labour law is not decisive here.

Collective labour law. Sub-paragraph (c) covers issues of non-contractual liability in connection with industrial disputes. Thus, it covers not only liability for the consequences of a strike, but also liability for counter-measures (including lock-outs) on the part of the employer in the context of disputes over working conditions and pay.

NOTES

1. According to the jurisprudence of the FRENCH Court of Cassation, an employee's personal liability vis á vis a third party is only triggered under CC art. 1382, if his *faute* bears no relation to his duties of employment (Cass.soc. 9 November 2005, pourvoi 04-14419). The same holds true where injury is caused to a work colleague. Under Code du travail art. L1234-9 *harcèlement moral* (workplace "bullying") is considered a crime. Therefore, superiors are personally liable to their subbordinates if

they repeatedly subject them to such practices (Cass.soc. 21 June 2006, Bull.civ. 2006, V, no. 223 p. 212); presumably, the same applies in the context of intercollegial relations. An employee only incurs personal liability vis á vis the employer if they were gravely at fault in causing the damage (a *faute lourde*) (Cass.soc. 11 March 1998, Bull.civ. 1998, V, no. 135 p. 100; Cass.soc. 12 June 2002, pourvoi 00-41954); a *faute grave* will not suffice. The existence of a *faute lourde* is usually only given in cases where the employee intended to cause damage (Cass.soc. 5 December 1996, Bull.civ. 1996, V, no. 424 p. 306). An employer is not liable for damage which the employee causes to a third party in the course of the performing his functions (not: outside those functions; see. above), if the former has not exceeded the limits of his mandate and does not intentionally commit a criminal offence or other *faute d'une particulière gravité* (Cass.ass.plén. 25 February 2000, Bull.ass.plén. 2000, no. 2 p. 3; SemJur 2000 II 10295, concl. *Kessous*, note *Billiau*; Resp. civ. et assur. 2000, 4, note *Groutel*; Rev.jur.soc. 2002, Chron. 711-718, note *Desportes*; see also *Mouly*, D. 2006, 2756 and *Großerichter and Rageade*, ZEuP 2002, 611-628). Conversely, employers are subject to a contractual *obligation de sécurité de résultat* in respect of their employees physical and mental health (Cass.soc. 21 June 2006, pourvois 05-43.914 - 05-43.919, no. 1733; Cass.soc. 29 June 2005, D. 2005, 2565, note *Bugada*; Bull.civ. 2005, V, no. 219), however, this is only of practical effect, if, under the Act of 9 April 1898 on Work Accidents, the employee cannot exceptionally solely on claim under his social insurance. Employers enjoy immunity from civil liability; claims of employees are only admissible in cases where damage is caused intentionally, clandestine employment and workplace and commuting accidents connote exceptions to this rule (*le Tourneau*, Droit de la responsabilité et des contrats [2006/2007], no. 76). However, the social insurer can take recourse agaisnt the employer's liability insurer under the provisions of the Code de sécurité sociale art. L452-3(3) (see further Cass.civ. 17 April 2008, pourvois 07-13592 and 07-13593). The compensation entitlement under social insurence provisions will be increased if it can be established that the employer is guilty of a *faute inexcusable* (inexcusable fault; see for an analysis of this notion, in particular Cass.ass.plén. 24 June 2005, D. 2005, I.R. 1881; JCP éd. E 2005, no. 1201, note *Morvan* und Cass.soc. 31 October 2002, Bull.civ. 2002, V, no. 336); conversely, compensation will be lowered if the employer is guilty of such fault (*le Tourneau* loc. cit. nos. 3565-3566). Liability for damage occasioned by strike action (on this concept, cf. Cass.soc. 2 February 2006, Bull.civ. 2006, V, no. 52 p. 46) is only of relevance in cases where a *faute lourde* is committed (Cass.soc. 7 July 1983, pourvois 81-40191 und 81-40194; CA Reims 23 October 2002, pourvoi 01/00290). Trade unions are only liable for their fault and are not liable for fault committed by their members (Cass.civ. 26 October 2006, pourvoi 04-11665). A lock-out is qualified as an unlawful act, as a *rétorsion illicite* (Cass.soc. 25 September 2001, pourvoi 99-43628; however, on the temporary shutdown of factory, see Cass.soc. 4 July 2000, Bull.civ. 2000, V, no. 262 p. 207; Cass.soc. 22 February 2005, pourvoi 02-45879).

2. BELGIAN Act of 3 July 1978 on Contracts of Employment, provides, under art. 18(1), that an employee, who in the course of performing his contractual duties causes damage to his employer or a third party is only liable for intention or gros negligence; ordinary negligence only grounds a liability claim if it involved a error which was habitually committed (loc. cit. art. 18(2); see further Cour de travail Brussels 22 November 2005, JTT 2006, 218). Employers are not legally insulated by this regulation; they are then liable under CC art. 1384(3), if the employee is not personally liable under the provisions of loc. cit. art. 18 (Cass. 18 November 1981, RW 1982-83, 859). A special rule governs the liability of civil servants and other public service employees. According to the Act of 10 April 1971 on Occupational

Accidents art. 46, an employer will only incur liability vis á vis his employees, once very restricted prerequisites are met; in essence, the cases covered are grave fault, occupational and commuting accidents and damage to property. Liability may be imposed for strike involvement if a criminal offence is committed (socalled *voies du fait*); in principle, a lock-out is permitted (Cass. 7 May 1984, JTT 1984, 292; RW 1984-85, 2194; Pas. belge 1984, I, 1092.

3. According to LUXEMBURGIAN *Code du travail* of 31 July 2006 art. L 121-9, an employee is only liable for damage that he causes to a third party, other employees or to his employer in the event of gross negligence. In the context of occupational accidents, the employer is liable for intentional or criminal acts vis á vis his employees; in all other cases, the employee's social insurance is responsible for a compensation pay-out (*Code des assurances sociales* arts. 92 ff, CA Luxembourg 9 November 2004, pourvoi 363/04), the exception that the damage is caused by a vehicle which is covered by liability insurance. The social insurer has a recourse action against the employer in cases where the latter would be directly liable to the employee (see further *Ravarani*, La responsabilité civile[2], no. 1215).

4. According to SPANISH CC art. 1903(4), employers are liable for damage which an employee inflicts on a third party. Parallel to this, the employee's personal liability (under CC art. 1902) remains unaffected (Reglero Campos [-*Gómez Calle*], Tratado de responsabilidad civil[3], 461, 497; CA Pontevedra 9 March 2006, BDA JUR 2006/127086). Whether issues which concern the liability of an employer vis á vis his employees fall to resolved by civil or labour courts remains contentious, despite a provision in the Act on Labour Procedure art. 2(a) and LOPJ art. 9(5) which would appear to have come down in favour of exclusive jurisdiction of the Labour Courts in these matters (in favour of labour Court jurisdiction TS [4th chamber] 10 December 1998, RAJ 1998 (5) no. 10501 p. 15488; in favour of jurisdiction by the civil courts TS [1st chamber] 4 March 2002, RAJ 2002 (3) no. 5242 p. 9227; TS 31 December 2003, RAJ 2004 (1) no. 367 p. 661). The practical consequence of this can be seen primarily in the context of the set-off of the recovery of tort damages against benefits derived from a collateral sources, in particular, social benefits which are off-set against the damages in tort damages (see e.g. TS 9 March 2006, RAJ 2006 (2) no. 1882 p. 4474; see further the notes to VI.–6:103 (Equalisation of benefits) and VI.–7:105 (Reduction or exclusion of liability to indemnified persons)). Strike and lock out in the course of industrial disputes are permitted (Const. art. 37(2)). Organic Act on trade-union freedom, of 2 August 1985 art. 5 makes clear that trade unions are liable for torts commited by them, however, they ae not liable for the delictual acts of their memebers. Royal Decree 17/1977 of 4 May 1977 art. 7 provides for a definition of lawful strike. Courts seem to be reluctant to find trade unions liable in tort (e.g. TS 14 February 1990, RAJ 1990 (1) no. 1088 p. 1288; TS 30 June 1990, RAJ 1990 (5) no. 5551 p. 7196; TS 6 July 1990, RAJ 1990 (5) no. 6072 p. 7843); CC art. 1902 does in any event not apply to a lawful strike, unless there is an abuse of the right to strike (TS 3 April 1991, RAJ 1991 (3) no. 3248 p. 4394; TSJ Galicia 26 April 2005, RAJ (TSJ y AP) 2005 (2) no. 1548 p. 2987).

5. Pursuant to ITALIAN Presidential Decree of 30 June 1965, no. 1124 (*Testo unico delle disposizioni per l'assicurazione obbligatoria contro gli infortuni sul lavoro e le malattie professionali,* Suppl.ord. alla Gazz. Uff. 13 October 1965, no. 257) art. 10(1) the employer is exempt from from personal liability towards his employees; delictual liability gives way to mandatory insurance against work related accidents. Exceptions to the rule (essentially envisaged for the commission of criminal offences) are specified individually; the insurer is also liable in these instances, however, can seek contribution from the employer (loc. cit. art. 11). Pursuant the reform heralded by

Decreto legislativo 23 February 2000, no. 38 (Gazz. Uff. 1 March 2000, no. 50) art. 13(1) and (2), today, the social security carrier will also compensate the *danno biologico*, if a certain degree of severity of injury is attained; the extent of compensation to be awarded is specified in tables.

6. Pursuant to HUNGARIAN CC § 348, the employer is liable for damage inflicted on a third party that his employee causes in connection with his employment; according to CC § 350(5), the employer's claim to contribution is governed by Labour Code provisions (Act no. XXII/1992). The provisions of the latter set forth that employees are liable to their employers for damage which is intentionally or negligently caused by violating employment related duties (loc. cit. § 166(1)). The employer bears the onus of proof (loc. cit. § 166(2)). In the event that the employee has been merely negligent, the quantum of damages is restricted to half the average monthly wage. Collective wage agreements or the contract of employment may provide otherwise (loc. cit. § 167). If the employee acted with intent to cause damage, then s/he is subject to unrestricted liability (loc. cit. § 168). Special rules apply in the case particular professions and employees in supervisory roles (loc. cit. §§ 169-173, § 192/A). In contradistinction the aforementioned, employers are subjected to a strict liability regime with respect to their liability towards their employees (loc. cit. § 174(1)), unless the employer proves that the damage was caused by an unavoidable event which lies outside the employer's field of activity or by conduct of the employee which the employer could not prevent (loc. cit. § 174(2)). The employee's contributory fault operates to reduce liability (loc. cit. § 174(3)). Employers who do not employ more than ten are permitted to exculpate themeselves from liabilityby proving an absence of fault (loc. cit. § 175). Act no. VII/1989 on Strikes § 1(1) provides for a right to strike and abuse of this right is naturally proscribed (loc. cit. § 1(3)).

7. GERMAN CC § 276 does indeed proceed from the assumption that liability will be incurred for intention and all manifestations of neglience, however, important exceptions to this general rule are envisaged for employment relationships (Palandt [-*Weidenkaff*], BGB[67], § 611, no. 152). Employees are not answerable for cases of slight negligence vis á vis their employer, in contradistinction to this, employees are, in principle fully liable, for gross negligent and intentional conduct (see further e.g. Staudinger [-*Richardi*], BGB [New Edition 2005], § 611, no. 588). In the context of "medium" negligence, loss is apportioned between the employer and employee based on an evaluation what is fair and reasonable in the circumstances of the case (BAG 27 September 1994, NJW 1995, 210; further particulars Erman [-*Edenfeld*], BGB I[12], § 611, no. 340). Factors are taken into consideration include the intensity of fault, above all the dangerousness per se of the activity carried out, the extent of damage caused, the insured risk, the position of the employee in the company and the salary that he received (BAG 27 September 1994 loc. cit.; BGH 11 March 1996, NJW 1996, 1532). If the employee injures a third party during the course of his employment, the general tort law liability pursuant to CC § 823(1) governs this state of affairs (BGH 19 September 1989, BGHZ 108, 305; BGH 21 December 1993, NJW 1994, 852; critical on this point *Katzenstein*, RdA 2003, 346). However, the employee may claim a right tto be exempted from liability as against his employer, if and insofar as the former would not be liable vis á vis his employer for the same damage (see further e.g. *Edenfeld* loc. cit. no. 344). The same holds true for the case that an employee causes damage to the property of a work colleague (*Weidenkaff* loc. cit. no. 154). Personal injury is covered by the statutory accident insurance; employers are only liable to their employees or vis á vis the social security carrier in exceptional circumstances (Social Security Code Book VII §§ 104-105, 110-111).

8. According to AUSTRIAN law, the liability of employers and employees to third parties is determined by general civil law prinicples liable to third parties. The internal relationship between employee and employer is, however, specifically governed by the *Employees' Liability Act* (DHG) § 2. An employee is not liable towards his employer for damage which is caused as a result of slight misbehaviour (*culpa levissima*). In all other cases of negligent infliction of damage, the judge can reduce the amount of compensation if the circumstances of the case so require. Conversely, the employer's liability vis á vis the employee and his or her dependents is only triggered in cases of intentional conduct (General Act on Social Insurance [ASVG] § 333). In all other cases, the social security carrier takes the place of the employer. The justification for this insulation from liability lies in the fact that the accident insurance is financed by employers, however, the privilege extends further than the actual payments made by the latter, which, in this respect leaves the injured party without any rights (OGH 22 December 2004, ÖJZ LSK 2005/125 [compensation for pain and suffering; dependant's compensation for pain and suffering]; OGH 11 November 2004, ÖJZ 2005, 390; OGH 21 May 2005, SZ 2005/58).

9. Under GREEK law, according to the general civil law rules, the employee (in addition to the employer, see CC art. 922) is personally and direct liable for damage which they cause to a third party. The employer and employee are jointly and severally liable (*Vrellis*, in: von Bar [ed.], Deliktsrecht in Europa, Griechenland, 19; Georgiades and Stathopoulos [-*Stathopoulos*], art. 922, no. 41). The internal relationship between employee and employer is governed by the terms of the contract of employment, which generally gives the employer who performs in advance a right to seek contribution from the employee. If this right is not regulated in the contract, the employer has a claim against the employer under CC art. 927 (*Stathopoulos* loc.cit. no. 44).

10. As a general rule, the mutual obligations of employer and employee in the NETHERLANDS are derived from CC art. 7:611 (duty to act with act), a standalone cause of action has emerged therefrom, which even envisages that claims can be made for non-pecuniary loss (CFI Utrecht 29 June 1994, JAR 1994 no. 182 [employer vs employee]; HR 26 Juni 1998, JAR 1998, no. 199 [employee vs employer]). The employee will only incur liability in cases of intent and conscious negligence. The foregoing is also true for cases where the employee is delicually liable to a third party. CC art. 6:170(3) supplements this insulation from liability by providing for a rule which sets forth that the employer can only seek contribution from his employee in cases where the latter has acted with intent or conscious negligence. The onus of proof rests on the employer (CFI Zwolle 8 November 1995, JAR 1996, no. 59; HR 10 May 1996, JAR 1996, no. 131; Asser [-*Hartkamp*] Verbintenissenrecht III[12], no. 139 p. 161; Asser [-*Hartkamp*] Verbintenissenrecht I[12], no. 342 p. 261). The employer continues to be strictly liable for occupational accidents vis á vis his employee under CC art. 7:658; however, the former may adduce proof that the damage, *inter alia*, was a product of the negligence of the employee (see HR 9 January 1987, NedJur 1987, no. 948 p. 3258) or that he exercised the " required care " in order to meet the obligations under the employment relationship (HR 24 June 1994, NedJur 1995, no. 137 p. 574). Additionally, in this context, general tort law provisons continue to apply (*Hartkamp* III[12] loc. cit.; *id*. I[12], no. 451c p. 407). Legal strikes are protected under the European Social Charter art. 6(4). In contrast, under national law, delictual liability for occupation of the works may be incurred if this action was unlawful (HR 19 April 1991, NedJur 1991, no. 690 p. 2967).

11. According to SWEDISH and FINNISH Damages Liability Act chap. 4 § 1, an employee is only liable for damage caused by him through error or through an

omission during the course of performing his duties of employment to the extent that special grounds are extant which justify the imposition of liability. In this context, regard is had to the nature of the act, the status of the person causing damage, the interests of the injured party and all other relevant circumstances. Liability may be imposed if e.g. the employer lacks insurance and is insolvent and there is a pressing interest for the injured person to receive damages (*Hellner and Radetzki*, Skadeståndsrätt[7], 271; *Saxén*, Skadestånd vid avtalsbrott, 159). Liability may also be triggered in the case of intention (Diebstahl) or gross negligence. DANISH EAL § 19(3) provides that the employee is not liable for property damage which is covered by the injured party's or the employer's insurance, unless gross negligence or intent is at hand. In other instances the employer may seek recourse from the employee if it is considered reasonable, having regard to the accountability, the position of the employee and other circumstances (EAL § 23 (1)). As a general rule, the employee is not liable vis-à-vis his or her employer. Liability towards third parties is subject to a judicial power to reduce liability (EAL § 23(2)), which refers to the factors listed in EAL § 23(1); in addition, once the same pre-requisites are met, the employee can seek contribution from his employer, in the event that the employee is liable to pay compensation to a third party. Whether the same can be said of the employer's right to seek contribution from his employee is likewise contingent upon the application of an equitable balancing test governed by EAL § 23(1) (*von Eyben and Isager*, Lærebog i erstatningsret[6], 129). In all the Nordic countries an employee who suffers personal injury at work may seek compensation from the general public social insurance scheme as well as the special social insurance scheme for industrial injuries. Employees often also enjoy protection under a private collective industrial injury insurance scheme. In Sweden and Finland they may also seek a tort law based compensation, from which, however, compensation received under the aforementioned insurance schemes is deducted (*Hellner and Radetzki* loc cit. 291); tort law based liability is only excluded by the Danish Work Injury Insurance Act (*Lovbekendtgørelse* 2006-03-07, no. 154, *om arbejdsskadesikring*) (*von Eyben and Isager* loc. cit. 335).

12. The liability of trade unions and employers' associations is regulated in labour law. Liability for collective actions by trade unions has traditionally been practically inexistent, save for collective actions which amount to a criminal offence (*Hellner and Radetzki* loc. cit. 71; *Kleineman*, Ren förmögenhetsskada, 267). *Gustafsson v. Sweden*, ECHR [GC] 25 April 1996, App. no. 15573/89, refused to find that SWEDEN violated ECHR art. 11, where an employer was unable to avail of a measure of protection under national liability law where an attempt was made, by means of an all-out blockade of his business, to force him to sign a collective labour agreement with a trade union (*Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet et al*, ECJ 18 December 2007, C-341/05, ECR 2007, I-11767, however, decided in a similar case, in favour of a Latvian company that this connoted an unlawful discrimination). In addition, *Evaldsson and others v. Sweden*, ECHR 13 February 2007, App. no. 75252/01, refused to find that there was a violation of the freedom of disassociation (i.e the right *not* to be forced to join a trade union) where a number of employees who were not trade union memebers were forced to pay fees to a trade union, this right to receive fees was derived from the collective labour agreement with the employer; however, it should be note that this forced contribution was deemed to fall foul of the guarantee of property. The DANISH trade union practice requiring employers to only employ trade union members did not withstand the Convention (*Sørensen and Rasmussen v. Denmark*, ECHR [GC] 11 January 2006, App. nos. 52562/99 and 52620/99. For FINLAND see Supreme Court 16 March 1999, KKO 1999:39 (a trade

union publically called for a boycott of a hotel because the cleaning firm employed by the hotel chain refused to enter into a collective labour agreement. The Supreme Court held that the trade union was not liable. The boycott was not unlawful nor did it infringe against public policy, moreover, no unlawful means had been employed).

13. ESTONIA has regulated issues of liability arising inconnection with industrial relations primarily in the Employment Contracts Act and other labour legislation. The ENGLISH and Scottish law confers an extensive immunityfrom civil action on trade unions and those empowered to carry out their functions where industrial action is taken (Trade Union and Labour Relations (Consolidation) Act 1992, s. 20). In respect of causes of actions giving rise to liability which are not enumerated in the Act, the amount of damages awarded is restricted commensurate with the number of members, unless proceedings for personal injury or a number of other torts, expressly particularised in the Act, are brought (loc. cit. s. 22). Additionally, a restriction is also placed on the enforcement of awards against certain property (loc. cit. s. 23), which also operates to the benefit of employers' associations (loc. cit. s. 130). Under IRISH law, within the framework of industrial action, a far-reaching restiction is placed on tort actions against trade unions and employer's associations (Industrial Relations Act 1990, s. 13).

VI.–7:105: Reduction or exclusion of liability to indemnified persons

If a person is entitled from another source to reparation, whether in full or in part, for that person's damage, in particular from an insurer, fund or other body, national law determines whether or not by virtue of that entitlement liability under this Book is limited or excluded.

COMMENTS

Channelling of liability. This Book ultimately leaves untouched those rules of national law which displace the rules of civil liability in certain spheres by way of an insurance regime under which the injured person loses the claim to damages under the law on non-contractual liability and in its place receives a claim against an insurer, a fund or another institution. Thus, this does not involve situations in which a right to reparation passes to an insurer by operation of law. This is because in these cases the right remains preserved and it is solely a change of creditor which takes place. Cases of mere *de facto* channelling of liability to an insurer (by which it is open to the injured person to decide between a claim against the injuring person and a claim against the insurer) are also not in issue here. In fact, VI.–7:105 only pertains to the *de jure* channelling of liability by rules that relieve the injuring person of liability where and because the injured person is indemnified by a third party, in particular by an insurer.

Examples. To the extent that such rules relate to the law on occupational accidents, they are already covered by VI.–7:104 (Liability of employees, employers, trade unions and employers associations). However, they are in no way restricted to this branch of the law; in fact, they may also be encountered in other matters, for instance, liability in the health sector, liability for road accidents or quite simply where liability between private persons for negligent damage to property is excluded if and in so far as the owner is insured against the damage or destruction of the thing. It is also conceivable that rules might provide, for example, that a claim cannot be made against the keeper of a motor vehicle on the basis of strict liability and that the victim must instead obtain redress from the keeper's insurer because it would be regarded as an abuse of law to go against the keeper directly and personally. VI.–7:105 also encompasses such rules as channel liability *de jure* to a legal entity, where for example the liability of teachers in a private school is channelled to the State.

NOTES

1. Under the FRENCH Education Code (Code de l'éducation), art. L 911-4, the liability of the State is substituted for the personal liability of teachers at public and semi-private schools; recourse may not be had to the teachers themselves (e.g. Cass.civ. 13 December 2001, Bull.civ. 2001, II, no. 189 p. 133; Rev.trim.dr.civ. 2002, 312, with a note by *Jourdain*). Similar rules exist for damage arising from a *faute* in the process of appointing a guardian (*tutelle*) under CC art. 473. Reparation due as a result of a road accident is provided under the statute of 5 July 1985 (the so-called. *loi Badinter*) by a compulsory insurance of the vehicle. Case law has repeatedly emphasised that the rules of this statute are *d'ordre public* (Cass.civ. 13 January 1988, Bull.civ. 1988, II, no. 15 p. 8; D. 1988 jur. 293, with a note by *Groutel*; Cass.civ. 20 April 1988, Bull.civ. 1988, II, no. 87 p. 45; D. 1988 jur. 580, with a note by *Lambert-Faivre*; Cass.civ. 5 July 1989, Bull.civ. 1989, II, no. 144 p. 73; Cass.civ. 6 December 1989, Bull.civ. 1989, II, no. 213 p. 111; see *Viney*, L'indemnisation des victimes d'accidents

de la circulation, no. 10), from which it may be deduced that a personal liability of the *gardien* of the vehicle is precluded. For liability arising out of accidents at work see the notes to the preceding Article.

2. In SPAIN some state and regional provisions provide for social benefits to patients infected with HIV or with haemophilia and other congenital diseases related to blood coagulation. These laws normally contain as a requirement a previous waiver of any claim against any public health administration or against their staff (see, for instance, the Act on social benefits for persons with haemophilia and other congenital diseases related to blood coagulation who have developed hepatitis C as a result of medical treatment within the scope of the public health system [*Ley* 14/2002 of 5 June 2002] art. 3(5)). GERMANY provides for a substitution of liablity by insurance protection only in relation to compensation for damage sustained in workplace accidents. Employers and fellow employees in the same company are not liable for the losses sustained by the insured person, his dependants and his next of kin (Social Security Code, Book VII §§ 104 and 105). Their claims are directed against the body responsible for the statutory accident insurance unless the damage is caused intentionally. A right of recourse for the insurance against the person causing the damage requires the latter to have acted intentionally or with gross negligence (Social Security Code, Book VII §§ 110, 111). AUSTRIA is another country in which claims to reparation as between employees are cut away because the damage is covered by a social insurance of the injured party; the person causing the damage is also not liable to the social insurance fund in a case of mere negligence. In the context of liability on equitable grounds under CC § 1310 regard is had to whether the injured person can obtain compensation from another source. If that is the case because, for example, the damage which has occurred is covered by fire insurance, liability may be disapplied (OGH 30 March 1999, SZ 72/59). Art. 64 (1) lit. a of the PORTUGUESE Motor Insurance Liability Decree Law provides that claims arising out of a road accident can only be asserted against the other party's compulsory liability insurance if they do not exceed the maximum limits that compulsory insurance will cover; if the person responsible does not have insurance, then according to art. 62, claims must be asserted against the Fundo de Garantia Automóvel and person incurring civil liability. Under the ESTONIAN LOA § 140(1) the extent of the reparation may be reduced on grounds of equity and as part of those considerations insurance coverage is to be taken into account.

3. All the NORDIC countries rely on far-reaching insurance schemes for specific areas. However, they differ on the issue of whether to allow or exclude parallel claims in tort (for a general overview see *von Eyben*, ScandStudL 41 [2001] 193-232; *Hellner*, AmJCompL 34 [1986] 613-633; *Ussing*, AmJCompL 1 [1952] 359-372). DANISH law predominantly adopts the latter approach. One example among many is to be found in EAL § 19(1). The provision excludes a claim to reparation for damage to property to the extent that the damage is covered by property insurance or a loss-of-use insurance. However, liability is excluded only for the benefit of private individuals (i.e. not also for the benefit of businesses or public bodies) and if the property damage did not result from intentional or grossly negligent conduct. In the two other countries, by contrast, the basic rule is that although persons are not in general obliged to seek compensation through tort law in order to benefit from the insurance scheme, they may also opt out of the alternative insurance scheme and seek damages under tort law. However, the option to invoke the tort law claim is often of limited practical importance: enforcing claims under the relevant insurance scheme is typically less expensive and more promising because the requirements for substantiating the claim are less demanding.

BOOK VII

UNJUSTIFIED ENRICHMENT

CHAPTER 1: GENERAL

VII.–1:101: Basic rule

(1) A person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment.

(2) This rule applies only in accordance with the following provisions of this Book.

COMMENTS

A. General

Overview. Paragraph (1) provides for a non-contractual obligation. Its effect is that a person who has obtained an unjustified enrichment is obliged in certain circumstances to restore it or transfer it or pay its money equivalent to the person at whose disadvantage the enrichment was obtained. Paragraph (2) makes it clear that this basic rule must be read in conjunction with the following provisions of this Book. They determine the circumstances in which such an obligation arises, the meaning of "enrichment" und "disadvantage", the measure of liability, the existence of any defences, and the relationship of this norm to other legal rules with the same or a similar effect.

A single general norm. Paragraph (1) sets out a rule of general application which provides the only foundation of a claim under this Book. In this regard the structure is comparable to that adopted in the Book on non-contractual liability for damage (DCFR Book VI), where there is also a single basis for liability rather than a multitude of separate heads of liability for distinct torts or delicts.

Scope. Paragraph (1) gives effect to a basic norm which is comprehensive in nature, embracing all liabilities arising out of the autonomous law of unjustified enrichment. It is immaterial for these purposes whether the enrichment claim arises out of a performance under a failed contractual arrangement (in other words: where the parties have failed to conclude a valid and unimpeachable contract) or some wrongdoing such as taking or using without the consent of the entitled person. The basic rule applies both to enrichments conferred by the claimant and enrichments not conferred by (i.e. enrichments extracted from) the claimant. The basic norm is accordingly phrased in wide terms so as to encompass what in the present European legal systems is often addressed by several complementary discrete rules, sometimes encroaching on other areas of law.

Operation only in conjunction with the other provisions of the Book. Paragraph (1) of the Article is not free-standing. The application of the basic rule is fleshed out and qualified by later provisions. Paragraph (2) makes it clear that the basic rule cannot be applied in isolation

from the other Chapters of the Book. The meaning of the basic rule is thus anchored by the later provisions and its manner of application can only be determined by a consideration of the ensuing Articles. These define or amplify the various elements invoked by the basic rule, such as "unjustified", "enrichment", "disadvantage", and "attributable". In so doing they render its application to specific cases more certain (a particularising function) and control its sphere of operation (a constraining function).

Elements of the basic rule. The basic norm sets out all the elements which must be present to support a claim in the law of unjustified enrichment, leaving their content to be determined in the subsequent Chapters. Thus in order for a claim to arise under this Book, the following conditions must be satisfied. First, there must be a "person" who is the debtor and "another" who is the creditor of the enrichment claim (see B below). Second, the potential debtor of the claim must have 'obtained' some benefit (see C below). Third, the enrichment must be "unjustified". Whether an enrichment is justified or unjustified is determined by the rules set out in Chapter 2 (When enrichment unjustified). Fourth, the benefit obtained by the potential debtor must amount to an "enrichment". Fifth, the potential creditor of the claim must have sustained a "disadvantage". These two matters are governed by the rules in Chapter 3 (Enrichment and disadvantage). Finally, the enrichment must be "attributable" to this disadvantage. This last aspect is addressed by the rules in Chapter 4 (Attribution).

Content of the obligation; defences. If all the elements of the basic rule are established and the matter is not affected by defences (as to which see Chapter 6 of this Book), the debtor in the enrichment claim is obliged, in favour of the creditor of the claim, "to reverse the enrichment". The manner in which this liability to reverse the enrichment is to be discharged as well as the extent of that liability is governed by the provisions in Chapter 5 (Reversal of enrichment). Finally, Chapter 7 (Relation to other legal rules) contains (among others) provisions which restrict the scope of application of the basic rule.

How the basic rule works. In each case in which a liability under unjustified enrichment might be considered to arise it must be determined whether the elements of the basic norm are satisfied, whether there is a defence and, if that is not the case, what is the content of the liability. The following illustrations indicate how this functions in relation to typical groups of cases.

> *Illustration 1*
> By mistake a purchaser P makes a second bank transfer of the purchase price to V, the vendor, an employee of P's having already effected a bank transfer of the purchase price the day before. V is enriched because he has obtained a right against his bank B to payment of the sum credited to his bank account (VII.–3:101 (Enrichment) paragraph (1)(a)). (That enrichment is justified in relation to B, but in relation to P it is not justified because V did not have any right against P to this (second mistaken) payment and P did not intend to make a gift to V. The matter turns on the (missing) ground of justification in relation to P (VII.–2:101 (Circumstances in which an enrichment is unjustified) paragraph (1)(a) and (b)). That V's enrichment (in the form of the credit to his account) is justified in relation to V's bank does not affect the matter. P has sustained a disadvantage because P's bank has (correctly) deducted the corresponding amount from P's account (VII.–3:102 (Disadvantage) paragraph (1)(a)). The enrichment of V is attributable to the disadvantage of P: P transferred part of its patrimony to V (VII.–4:101 (Instances of Attribution) paragraph (a)). Technically speaking, of course, P did not transfer its claim against its bank to V, but the precise

technical arrangements for the bank transfer are not material here: from the economic and legal standpoint the banks in this case have only served as machinery for effecting a cashless method of payment which can be equated with a cash transfer. (Had P deposited cash at V's bank to the credit of V's account, the case would have come within VII.–4:101 (Instances of attribution) paragraph (d)). The subject-matter of V's enrichment is a transferable asset: bank account credits can be reversed by bank transfer. Consequently V is obliged to P to transfer back the second payment (VII.–5:101 (Transferable enrichment) paragraph (1)).

Illustration 2
A debtor D intends to pay a debt due to D's creditor C by means of an electronic funds transfer. By mistake D enters into the on-screen formula the wrong bank sorting code which results in the money being credited to the account of X, a person completely unknown to D: at the bank branch with the sort code which D entered by mistake X has an account with the same number as C's account number at C's bank. D has a claim against X to re-transfer of the money. This follows from the same reasoning as in Illustration 1.

Illustration 3
A is constructing a housing estate for B on the latter's land. A commissions a sub-contractor C to supply and install all the electric cookers and hot water tanks for the houses. C performs his contract with A. However, as A has become insolvent in the meantime, C demands payment from B. Under the applicable property law, B has become owner of the appliances and has thus been enriched by acquiring property rights in them (VII.–3:101 (Enrichment) paragraph (1)(a) and (b)). C is disadvantaged correspondingly: (VII.–3:102 (Disadvantage) paragraph (1)(a) and (b)). The enrichment of B is not justified in relation to C under VII.–2:101 (Circumstances in which an enrichment is unjustified) paragraph (1)(a) because the acquisition of ownership by operation of law only creates a right of title (i.e. a right to retain the thing) and not a right to be able to retain the thing without having to make a compensatory payment. However, the enrichment of B is nonetheless justified in relation to C (and not just in relation to A: see VII.–2:101 (Circumstances in which an enrichment is unjustified) (1)(a)) under VII.–2:102 (Performance of obligation to third person). That C made a mistake as to the solvency of A when he rendered the contractual performance does not change the situation: a mistake of this type does not destroy the ground of justification (see VII.–2:103 (Consenting or performing freely)).

Illustration 4
Contrary to a prohibitory rule, X, who lacks the professional qualification required by statute for providing legal services, advises Y in a legal matter in return for payment. Y is enriched by being advised; X is correspondingly disadvantaged by rendering a service (VII.–3:101 (Enrichment) paragraph (1)(b) and VII.–3:102 (Disadvantage) paragraph (1)(b)). The enrichment of Y is unjustified (VII.–2:101 (Circumstances in which an enrichment is unjustified) paragraph (2)). It may be assumed that the contract between X and Y for the remunerated provision of legal advice is void (II.–7:302 (Contracts infringing mandatory rules)). Nor can a justification be found in the law on benevolent intervention in another's affairs (VII.–2:101 (Circumstances in which an enrichment is unjustified) paragraph (1)(a)). Y is therefore seemingly obliged to pay to X the agreed price or, if this is less than the agreed price, the objective value of such unqualified legal advice (VII.–5:102) (Non-transferable enrichment)). However, the purpose of the prohibition of unqualified remunerated legal advice is the protection of

those seeking legal advice, and the market for provision of legal advice, from persons who have omitted to satisfy the requirements of legal training. Consequently X has no claim at all to recompense (VII.–6:103 (Illegality)).

Illustration 5
E, who operates a radio station, publishes advertising material for its station featuring a prominent (manipulated) photograph of D, a Formula One Grand Prix world champion, listening to a portable radio on which the radio station's logo is clearly visible. The evident intent of the publication is to encourage the view that D is an avid listener to and an endorser of E's radio broadcasts. E is enriched by making use of an asset of D (VII.–3:101 (Enrichment) paragraph (1)(c)) – namely D's right of personality. As D would have a right to prevent E using a photo of himself for its commercial purposes without his consent (see VI.–1:102 (Prevention)), D would be entitled to permit commercial use of his image and reputation in this manner in return for a fee; such rights have the quality of an "asset". D is disadvantaged correspondingly (VII.–3:102 (Disadvantage) paragraph(1)(c)). The case is one of infringement by E, to E's commercial advantage, of D's rights (VII.–4:101 (Instances of attribution) paragraph (c)). E's enrichment is unjustified since D's disadvantage in suffering the use of his right of personality was sustained without his consent (VII.–2:101 (Circumstances in which an enrichment is unjustified) paragraph (1)(b)).

Illustration 6
In an advertisement X uses a photograph of a famous politician, Y, who has recently resigned a ministerial position after only a short time in office following a disagreement with the premier on policy. The image is in a series of fifteen other photographs which depict the members of the cabinet who are still in office. The picture of Y is crossed through. The accompanying slogan reads: "We also lease cars to staff on probation." Under the general rules on protection of rights of personality the claimant Y must accept that his image be used for the purposes of such satire. No right of Y has been infringed; Y has suffered no legally relevant damage (cf. VI.–2:203 (Infringement of dignity, liberty and privacy)). Consequently Y has suffered no disadvantage; there has been no use of a right of Y (cf. VII.–3:102 (Disadvantage) paragraph (1)(c)). Hence Y has no claim to recompense under the law of unjustified enrichment.

B. Parties: "a person"; "another"

General. The basic rule envisages two parties, one of whom has obtained an unjustified enrichment and the other of whom has sustained a disadvantage to which the enrichment is attributable. The effect of the rule is to bind those parties one to another in a relationship of legal obligation, the enriched party being obliged to reverse the enrichment and the disadvantaged party having a corresponding right to the reversal. The only necessary connection between them is the obligation to reverse the unjustified enrichment arising *ex post facto* from the circumstance that the one has obtained an enrichment without justification at the other's expense.

Absence of need for prior connection. It may be the case, but need not necessarily be so, that before the enrichment was obtained the parties were connected by a contractual or other legal relationship. An enrichment claim may arise between persons who are connected to one another merely as a result of the transfer of benefit which has generated that claim.

Illustration 7
D, a bank, is instructed by its customer X to make a payment to the credit of E's account at another bank. D carries out the bank transfer, but as a result of its own mistake D subsequently repeats the transfer payment so that E is paid a second time. D has a claim against E under this Book for the reversal of E's enrichment arising out of the second (mistaken) transfer. It is immaterial that there was no pre-existing legal relationship between D and E.

Absence of need for direct transfer. Equally it is immaterial whether the unjustified enrichment was directly conferred by the creditor of the enrichment claim on the debtor (or directly extracted by the latter from the former) or whether instead the enrichment is mediated through a third party (as where an act of a third party results in a transfer of ownership from claimant to enriched person) or the result of a chain of transactions where the claimant's enrichment of a third party is linked to that third party's enrichment of the ultimately enriched person. Third party situations are further explained in the Comments to VII.–2:102 (Performance of obligation to third person).

Illustration 8
D is entitled to the estate of a deceased person, which includes a claim against X, a debtor of the deceased. Nonetheless E succeeds in obtaining a certificate of inheritance for that estate and on the strength of the certificate collects payment of the debt from X. Because of the special effect of a certificate of inheritance, X is regarded as a matter of law as having discharged the debt to the deceased's successor, even though E was not entitled to the debt. E is enriched by obtaining the payment from X (VII.–3:101 (Enrichment) paragraph (1)(a)). D is disadvantaged by losing the right to performance from X, which D has inherited from the deceased creditor (VII.–3:102 (Disadvantage) paragraph (1)(a)). E's enrichment is attributable to D's disadvantage under VII.–4:103 (Debtor's performance to a non-creditor; onward transfer in good faith) because X's payment to E extinguished D's right to performance. The enrichment is unjustified under VII.–2:101 (Circumstances in which an enrichment is unjustified) paragraph (1) because E had no entitlement to the payment in relation to D (only in relation to X, by virtue of the certificate of inheritance) and D did not consent to the loss of the claim against X.

Illustration 9
Following a divorce, A makes a holograph change to his will to benefit C in place of B, his ex-wife. Under the applicable law the automatic consequence of this change is that B also loses the right to the proceeds of A's own life insurance with the insurer X; that right passes to C. X, however, is not informed of the change in the will and therefore pays the lump sum under the life insurance to B; the payment discharges X's liability under the life insurance contract. C has a claim against B on the basis of unjustified enrichment. The reasoning is the same as in *illustration 8*.

Natural persons and legal persons. Precisely because the terms are not qualified in the basic rule, the disadvantaged claimant ("another", i.e. another person) and the enriched party ("a person") may be either natural or legal persons. The same holds for other parties referred to in the subsequent provisions, be it a "third person", "representative" or "intervener".

Persons without full legal capacity. Equally, the terms enriched or disadvantaged "person" (and correspondingly "third person", "representative" and "intervener") are not in any way

restricted to persons having full legal capacity. Model cases for the possible application of the law of unjustified enrichment will involve enrichments conferred by or on under age persons. By reason of their minority, they lack full contractual capacity and therefore may easily come to enrich another or be enriched by another in the absence of a binding legal obligation justifying the enrichment. The same is true for the reversal of transfers by legal persons acting beyond the powers contained in their founding instrument (such as a gift for purposes or in circumstances not contemplated by that instrument).

C. Mode of enrichment: "obtains"

Application to both active and passive enrichment. The term "obtains" is intended to have a neutral meaning and to denote merely that the relevant benefit has reached the patrimony or person of the potential debtor in the enrichment claim. It therefore includes cases of wilful appropriation, but does not necessarily imply any positive act of acquisition. Passive receipt, absorption, or enjoyment of an enrichment is equally an 'obtaining' for the purposes of the article. Thus the enrichment may be conferred by the claimant or a third party entirely without the enriched person's knowledge (e.g. where funds are transferred to another's bank account by mistake or goods are deposited on another's publicly accessible premises). However, if the other elements of the enrichment claim are established, the manner in which the enrichment is obtained – and in particular whether or not the enriched person consented to their enrichment – could be material in determining the extent of the enriched party's liability. That is because if the enrichment cannot be reversed by a transfer, an innocent enriched person who would otherwise be compelled to pay for an enrichment which they never requested is worthy of protection. This aspect is addressed in VII.–5:102 (Non-transferable enrichment).

No requirement of wrongful enrichment. Equally it is immaterial for these purposes whether the enrichment is wrongful or not – whether it is the result of the enriched person's own wrongful act or the wrongful intervention of a third party who has passed the benefit to the enriched person. The term "obtains" is not qualified and therefore as a matter of principle no distinction is drawn as to the lawfulness of the mode of acquisition. Whether the acquisition was wrongful plays a role, however, in so far as it may be material to other elements of the enrichment claim – in particular in determining whether, as between the parties, the enrichment is justified or not, whether the enrichment is attributable to the disadvantage, and whether the enriched person has a defence. See further VII.–2:103 (Consenting or performing freely), VII.–4:101 (Instances of attribution) paragraph (c), VII.–4:105 (Attribution resulting from an act of an intervener) and VII.–6:103 (Illegality).

D. Content of liability: "obliged to reverse the enrichment"

Transferable and non-transferable enrichments. The basic rule creates an obligation to reverse the enrichment. As already indicated (see A above), the manner in which and the extent to which an enrichment is to be reversed is determined by subsequent provisions. The starting proposition is that enrichments which are transferable (e.g. things) are to be restored *in natura*, while non-transferable enrichments are to be reversed by paying their objective value. In relation to used items, both aspects may apply in relation to one and the same thing.

Illustration 10

A is supplied by B with a motor vehicle. Due to a latent disagreement, no valid contract of sale has been concluded. B has a claim against A for a return of what A has received by virtue of the supply of the car, i.e., depending on the applicable law of property and in particular transfer of title, possession of the vehicle or possession and

ownership of the vehicle (VII.–5:101 (Transferable enrichment) paragraph (1)) and, moreover, recompense for use of the car. The obligation to pay in respect of the latter arises from VII.–5:102 (Non-transferable enrichment) if A has not acquired ownership of the vehicle. If, on the other hand, A was also owner during the period of possession of the vehicle, she is only liable to pay in respect of the benefit of using what became her own vehicle if she was in bad faith or if she has made a saving (VII.–5:104 (Fruits and use of an enrichment)).

Personal and proprietary claims. The basic rule confers on the disadvantaged person a personal right to reversal of the enrichment. Whether the enrichment claim ought to have a quasi-proprietary effect, whereby the claimant obtains priority over the enriched party's others creditors in the event of bankruptcy, for example, is not determined in this Book. The matter is left open: see VII.–7:101 (Other private law rights to recover) paragraph (2). A disadvantaged person who has retained ownership of the asset whose possession constitutes the other's enrichment may be able to proceed against the enriched person to recover possession on the basis of proprietary rights. That possibility is left open in VII.–7:101 (Other private law rights to recover) paragraph (3). This Book does not limit those rights to vindicate property in any way.

NOTES

I. Bereicherungsrechtliche Einheitsmodelle vs. einzelne Rechtsbehelfe

1. Zu den nationalen Konzepten von "Bereicherungsrecht" see PEL Unj.Enr. Introduction *B8-40*. Dort ist auch näher beschrieben, welche Rechtsordnungen der Mitgliedstaaten der EU mit einem bereicherungsrechtlichen "Einheitstatbestand" arbeiten und welche dem entgegengesetzen Modell folgen, also den Stoff auf eine Vielzahl von einzelnen Rechtsbehelfen verteilen. Für die zweite Gruppe von Jurisdiktionen ist dort gleichfalls dargelegt worden, ob sie mit mehreren *bereicherungsrechtlichen* Rechtsbehelfen operieren oder ob sie den überwiegenden Teil des in diesem Buch behandelten Rechtsstoffes anderen Rechtsgebieten zuordnen und welche das sind.
2. Hinsichtlich der Verbreitung des bereicherungsrechtlichen Subsidiaritätsprinzips in den Jurisdiktionen der Europäischen Union darf gleichfalls auf die Landesberichte in PEL Unj.Enr. Introduction B8-40 verwiesen werden. Weitere Einzelheiten finden sich in den notes under VII.–7:101 (Other private law rights to recover).

II. Voraussetzungen des allgemeinen Bereicherungsanspruchs

3. In den Rechtsordnungen des *Code Napoléon* ist zwischen der (gesetzlich geregelten) *action en répétiton de l´indu* als Rechtsbehelf zur Rückgängigmachung einer ungeschuldeten Zahlung und der (richterrechtlich geschaffenen) *action de in rem verso* als Rechtsbehelf zur Rückgängigmachung einer *enrichissement sans cause* zu unterscheiden. Die Letztere setzt nach FRANZÖSISCHEM und nach BELGISCHEM Recht (i) eine Bereicherung des Beklagten, (ii) eine Verarmung des Klägers, (iii) einen kausalen Zusammenhang zwischen diesen beiden Ereignissen und (iv) die Abwesenheit einer *cause* (eines rechtlichen Grundes) für den Vermögenszuwachs voraus. Außerdem darf eine Klage aus *enrichissement sans cause* (v) nicht an ihrer Subsidiarität scheitern. Die seit Cass.req. 15 June 1892, D.P. 1892.1.596; S. 1893.1.281, note *Labbé* in Frankreich und seit Cass. 27 May 1909, Pas. belge 1909, I, 272, concl. *Terlinden* in Belgien anerkannte *action de in rem verso* wird als eine

quasivertragliche Rechtsfigur gedeutet und auf Gerechtigkeit und Billigkeit (*équité*) zurückgeführt (z.B. *Bénabent*, Les obligations[10], no. 482 p. 331). Seit Cass.civ. 18 October 1898, D. 1899, I, 105 steht auch für Frankreich fest, dass die *action de in rem verso* nicht irgendeine Bereicherung, sondern eine Bereicherung ohne rechtfertigenden Grund (*sans cause légitime*) voraussetzt, und seit Cass.civ. 12 May 1914, S. 1918.1.41, note *Naquet*, dass es sich um eine lediglich subsidiäre Klage handelt (näher z.B. Aubry and Rau [-*Ponsard and Dejean de la Bâtie*], Droit civil français VI[7], no. 317 p. 477; *Flour/Aubert/Savaux*, Droit civil II[9], no. 41 p. 36; *Marty and Raynaud*, Les obligations I[2], no. 394 p. 410). Für das Verhältnis zwischen der Verarmung des Klägers und der Bereicherung des Beklagten genügt nach herrschender Auffassung ein *lien de causalité*, also der Nachweis, dass sich die Bereicherung nicht ohne die Verarmung zugetragen hätte (*Ponsard and Dejean de la Bâtie* loc. cit.; *Romani*, Enrichissement sans cause, nos. 67-69; *Starck/Roland/Boyer*, Obligations II[6], no. 2194 p. 770; *Delebecque and Pansier*, Droit des obligations[3], no. 475 p. 244-245; *Carbonnier*, Droit civil IV[21], no. 307 p. 510). Mit dieser Kausalitätsformel werden nicht nur die Zweipersonenverhältnisse unmittelbarer, sondern auch die Dreipersonenverhältnisse mittelbarer Bereicherungen erfasst, also Situationen, in denen die Bereicherung auf ihrem Weg zum Bereicherten bereits ein oder mehrere andere Vermögen durchlaufen hat. Allerdings soll, so wird gesagt, die Bereicherung solchenfalls meistens in der Beziehung zu dem Dritten eine *cause légitime* finden (*Ponsard and Dejean de la Bâtie* loc. cit. no. 317 p. 478; *Romani* loc. cit. no. 70). Im Schrifttum wird auch vorgeschlagen, statt von einem *lien de causalité* von einem *lien de connexité* zu sprechen, um klarzustellen, dass es genügt, dass ein und dasselbe dritte Ereignis sowohl die Verarmung als auch die Bereicherung verursacht haben (*Flour/Aubert/Savaux* loc. cit. no. 41 p. 36; *Marty and Raynaud* loc. cit. no. 400 p. 420; *Ponsard and Dejean de la Bâtie* loc. cit. no. 317 p. 477; ähnlich auch Cass.civ. 26 January 1972, Bull.civ. 1972, III, no. 65 p. 47 und Cass.civ. 12 July 1994, Bull.civ. 1994, I, no. 250 p. 181; D. 1995 jur. 623, note *Tchendjou*; RTD civ 1995, 373, obs. *Mestre*; RTD civ 1995, 407, obs. *Patarin*). In der Praxis jedenfalls scheitern Klagen aus *enrichissement sans cause* nur selten an fehlender Kausalität zwischen Verarmung und Bereicherung (z.B. Cass.civ. 25 May 1992, Bull.civ. 1992, I, no. 165 p. 113; JCP éd. G. 1992, IV, 2129; JCP éd. G. 1992, I, 3608, obs. *Billiau*; RTD civ 1993, 580, obs. *Mestre*).

4. Nach der Rechtsprechung der SPANISH Gerichte setzt eine Bereicherungsklage voraus: (i) dass der Beklagte einen Vermögensvorteil erworben hat, mit dem (ii) eine entsprechende Verarmung auf Seiten des Klägers korreliert, (iii) dass zwischen Bereicherung und Entreicherung eine zureichende kausale Verbindung besteht, und dass es (iv) an einem die Bereicherung rechtfertigenden Grund fehlt (z.B. TS 5 December 1980, RAJ 1980 (2) no. 4736 p. 3802; TS 28 January 1956, RAJ 1956 (1) no. 669 p. 418; TS 15 June 2004, RAJ 2004 (3) no. 3847 p. 7922). Das noch in früheren Entscheidungen aufgestellte Erfordernis der Bösgläubigkeit des Bereicherten (z.B. TS 5 July 1948, RAJ 1948 no. 1117 p. 633) ist schon im Jahre 1951 fallengelassen worden (TS 6 June 1951, RAJ 1951 no. 1877 p. 1281). Zwischen Bereicherung und Verarmung muss ein Kausalzusammenhang bestehen: der Vorteil des Beklagten muss eine Folge des Nachteils oder des Schadens sein. Ursprünglich wurde “eine perfekte Verbindung der Bereicherung und der Entreicherung aufgrund einer unmittelbaren Vermögensverschiebung vom Kläger in das Vermögen des Beklagten“ verlangt (TS 28 January 1956 loc. cit.; TS 27 March 1958, RAJ 1958, no. 1456 p. 940), später jedoch eine “zureichende“ Verbindung für ausreichend angesehen (TS 30 March 1988, RAJ 1988 (3) no. 2570 p. 2472). Ein Kausalzusammenhang darf folglich, wie unter französischem Recht, auch dort bejaht werden, wo eine “indirekte“

Bereicherung ihren Weg zunächst durch das Vermögen anderer nimmt, bevor sie sich im Vermögen des Beklagten niederschlägt, also z.B. dort, wo ein Dritter Schulden des Bereicherten tilgt. Kein Kausalzusammenhang zwischen Nach- und Vorteil besteht dagegen dort, wo der Marktpreis für günstig gekaufte Ware nach ihrem Erwerb dramatisch ansteigt (TS 23 September 1953, RAJ 1953 (2) no. 2277 p. 1458). "Nicht [ungerechtfertigt] bereichert" ist schließlich, "wer aufgrund eines legalen Vertrages erwirbt, der nicht ungültig geworden ist, oder aufgrund eines legitimen Rechts, das ohne Missbrauch ausgeübt worden ist, oder aufgrund eines Urteils", und es sind auch nicht die infolge einer gesetzgeberischen Entscheidung "indirekt Begünstigten ... ungerechtfertigt bereichert" (TS 28 January 1956 loc. cit.). Die Bereicherungsklage dient dazu, den Vorteil des Schuldners abzuschöpfen, darf aber weder über diesen Vorteil noch über den Nachteil des Klägers hinausgehen; maßgeblich ist der jeweils niedrigere Maßstab (TS 25 November 1985, RAJ 1985 (3) no. 5898 p. 4988; TS 5 October 1985, RAJ 1985 (3) no. 4840 p. 4085). In Zweifelsfällen greift man zur Lückenfüllung auf Analogien zu bestehenden gesetzlichen Regelungen anderer Rückabwicklungsregime zurück, insbesondere auf das Recht der *condictio indebiti* (CC arts. 1895 ff; näher z.B. *Albaladejo*, Derecho Civil II(2)[10], 917 und *Puig Brutau*, Compendio II[2], 619). Geschuldet wird grundsätzlich Wiederherstellung in Natur, hilfsweise Wertersatz. Letzterer muss auch Wertsteigerungen einer Sache zwischen dem Zeitpunkt ihres Empfanges und der Verurteilung zur Ausgleichszahlung berücksichtigen (TS 1 December 1980, RAJ 1980 (2) no. 4732 p. 3796). Mehrere Bereicherte haften gesamtschuldnerisch (TS 10 November 1981, RAJ 1981 (2) no. 4471 p. 3352). Der Bereicherungsanspruch verjährt in fünfzehn Jahren (CC art. 1964; TS 5 May 1964, RAJ 1964 (1), no. 2208 p. 1380; TS 12 April 1955, RAJ 1955 (1) no. 1126 p. 602).

5. Der Bereicherungsanspruch des ITALIAN law findet sich in CC arts. 2041 und 2042. Er hat nach CC art. 2041(1) vier Voraussetzungen: (i) eine Bereicherung (*arricchimento*), (ii) einen Schaden (*danno*), (iii) den Kausalzusammenhang zwischen Bereicherung und Schaden und (iv) das Fehlen einer *giusta causa* für die Bereicherung des einen und den Schaden des anderen. Außerdem darf dem Kläger – dies folgt aus CC art. 2042 - keine andere Klagemöglichkeit zur Verfügung stehen als die aus CC art. 2041 (s. zu alledem Cass. 8 November 2005, no. 21647, Giust.civ.Mass. 2005, 11). Bereicherung und Schaden müssen ihren Grund in demselben *fatto generatore* haben (Cass. 8 November 2005 loc. cit.); nur dann „entspricht" i.S.v. CC art. 2041 der Schaden der Bereicherung. Problematisch sind, wie überall, die Fälle der sogen. indirekten Bereicherung (*arricchimento indiretto*), weil sie stets die Frage aufwerfen, ob sich der Verarmte an seinen Vertragspartner halten muss oder im Wege der Direktkondiktion unmittelbar gegen den tatsächlichen Empfänger des Vermögensvorteils vorgehen kann (siehe zu den unterschiedlichen Grundpositionen einerseits z.B. *Trabucchi*, Arricchimento (azione di), 52, 75; *D'Onofrio*, Dell'arricchimento senza causa[2], 593; Cass. 18 February 1987, no. 1753, Giust.civ.Mass. 1987, fasc. 2 und andererseits z.B. *Trimarchi*, L'arricchimento senza causa, 43-44, 79, 107-109; *Breccia*, L'arricchimento senza causa I[2], 1009; Cass. 10 January 1993, no. 1686, Giur.it. 1994, I, 1, 626 und 1860; Cass. 17 February 1984, no. 1189, Giust.civ.Mass. 1984, fasc. 2; Cass. 22 May 1982, no. 3137, Giust.civ.Mass. 1982, fasc. 5). Sind die Bereicherung und der Schaden unterschiedlich hoch, dann kommt es auf den jeweils niedrigeren Betrag an (*D'Onofrio* loc. cit. 589). Viel diskutiert wird, anhand welcher Kriterien die Abwesenheit einer *giusta causa* zu ermitteln ist (Übersicht über die Diskusssion bei Cian and Trabucchi [-*Zaccaria*], Commentario breve[6], sub art. 2042, V 1). Umstritten ist bereits, ob die *giusta causa* in Bezug auf den Vorgang der Vermögensverschiebung oder allein in Bezug auf das

Resultat zu prüfen ist (für Letzteres *D'Onofrio* loc. cit. 591; vgl. zu dieser These *Breccia* loc. cit. 985). Andere meinen, es komme nur darauf an, ob es an einem wie auch immer beschaffenen schutzwürdigen Interesse an dem Behaltendürfen des Vorteils fehle (*Bianca*, Diritto civile V, 818). Wieder andere formulieren, eine Vermögensverschiebung habe dann eine *giusta causa*, wenn ihre Modalitäten den Grundsätzen der Rechtsordnung genügen (*Nicolussi*, Lesione del potere di disposizione e arricchimento, 449-450). Die Rechtsprechung drückt sich konkreter dahin aus, dass es dann nicht an einer *iusta causa* fehle, wenn die Bereicherung ihren Grund in einem wirksamen Vertrag oder einem anderen Schuldverhältnis (Cass. 30 March 2001, no. 4722, Giust.civ.Mass. 2001, 634; Cass. 9 November 1992, no. 12076, Giust.civ.Mass. 1992, fasc. 11; Cass. 8 October 1990, no. 9859, Giust.civ.Mass. 1990, fasc. 10) oder im Gesetz hat (Cass. 22 June 2000, no. 8481, Giust.civ.Mass. 2000, fasc. 1372; Cass. 18 December 1981, no. 6714, Giust.civ.Mass. 1981, fasc. 12). Der Begriff des *danno* des CC art. 2041 ist im Übrigen enger als in der deliktsrechtlichen Generalklausel des CC art. 2043. Denn in CC art. 2041 bedeutet er stets eine Vermögensverminderung (*Zaccaria* loc. cit. V 3).

6. Auch in AUSTRIA ist zwischen verschiedenen "Bereicherungs"ansprüchen zu unterscheiden. Zu den Regelungen über die Rückforderbarkeit einer irrtümlich geleisteten Nichtschuld (CC §§ 1431-1434), die im Zentrum des dortigen Bereicherungsrechts stehen, treten an verstreuter Stelle weitere Fälle der Rückforderbarkeit von Zuwendungen hinzu (näher Schwimann [-*Honsell and Mader*], ABGB VII², Vorbem zu §§ 1431 ff, no. 6). Das ABGB folgt insoweit den verschiedenen Kondiktionen des römischen Rechts. Das erschwert zwar den Überblick, doch mildert CC § 1437 die Abgrenzungsschwierigkeiten zwischen den einzelnen Anspruchsgrundlagen erheblich: hier werden die Rechtsfolgen grundsätzlich aller Kondiktionen einheitlich in einer einzigen Regelung zusammengeführt. Obwohl das ABGB selber den Ausdruck "Bereicherungsrecht" an keiner Stelle verwendet, ist es für Rechtsprechung (statt vieler z.B. OGH 18 September 1991, JBl 1992, 594) und Schrifttum (z.B. Schwimann [-*Mader*], ABGB VII^3, Vorbem zu §§ 1431 ff; Rummel [-*Rummel*], ABGB II(3)^3, Vor § 1431 no. 1) doch ganz selbstverständlich, all diese verschiedenen Anspruchsgrundlagen unter jenem Begriff zu diskutieren. Gemeinsam ist ihnen, dass sie auf Rückführung eines ungerechtfertigt durch Leistung oder auf Ausgleich eines durch Verwendung erlangten Vorteils gerichtet sind und keinen Schaden des Benachteiligten (des *Verkürzten*) voraussetzen. Außerdem werden alle diese Fälle dadurch zusammen gehalten, dass entweder der Benachteiligte aus besonderem Grund rechtlich schutzwürdig ist oder dass die Rechtsordnung die Zuwendung mißbilligt (Koziol/Bydlinski/Bollenberger [-*Koziol*], ABGB, Vor § 1431 no. 1). Diese allen Kondiktionen gemeinsamen Prinzipien werden als analogiefähig angesehen; CC §§ 1431 ff werden folglich von Lehre und Rechtsprechung auch als "allgemeines Bereicherungsrecht" bezeichnet (z.B. OGH 18 September 1991 loc. cit.; Rummel [-*Rummel*] ABGB I^3, § 877 no. 5).

7. PORTUGUESE CC art. 473(1) umfasst sämtliche Fälle ungerechtfertigter Bereicherungen. Der Umstand, dass die in CC art. 473(2) erwähnten Beispiele für die *obrigação de restituir por enriquecimento sem causa* nur Fälle der Leistungskondiktion betreffen, ändert nichts daran, dass CC art. 473(1) auch die sogen. Nichtleistungskondition einschließt (STJ 6 December 2006, CJ [ST] XIV [2006-3] 154; *Pires de Lima and Antunes Varela*, Código Civil Anotado I^4, note 1 under art. 473, p. 435; *Almeida Costa*, Obrigações^{10}, 490, fn. 1; *Menezes Leitão*, Enriquecimento sem causa^2, 663). Die einzelnen Rückforderungsrechte werden bereicherungsrechtlich nicht getrennt; auch die *condictio indebiti* ist weder eine autonome Klage noch an spezifische Voraussetzungen geknüpft (STJ 11 May 2000,

CJ [ST] VIII [2000-2] 54; STJ 18 June 1996, BolMinJus 458 [1996] 347 [mit Hinweisen zu CC arts. 476-478]). CC art. 473 nennt drei Voraussetzungen für eine erfolgreiche Bereicherungsklage (*acção de enriquecimento sem causa*). Es bedarf (i) einer Bereicherung (*enriquecimento*) des Beklagten, die (ii) auf Kosten eines anderen (*à custa de outrem*) geschah und für die es (iii) an einem rechtfertigenden Grund fehlt (*sem causa justificativa*). Eine Bereicherung besteht in einem beliebigen Vermögensvorteil (STJ 24 June 2004, Processo 03B3105). Eines Schadens oder einer Verarmung der anderen Seite bedarf es nicht (*Gomes*, Conceito de enriquecimento, 383, 402 mit Nachweisen aus der neueren Rechtsprechung; anders noch STJ 14 January 1972, BolMinJus 213 [1972] 214). Zwar wird im Rahmen der Leistungsbereicherung eine solche Verarmung nach wie vor wie selbstverständlich festgestellt (STJ 2 July 1976, BolMinJus 259 [1976] 206; CA Oporto 4 March 2002, CJ XXVII [2002-2] 176; STJ 22 May 2001, CJ [ST] IX [2001-2] 95), doch ist für die Eingriffsbereicherung (*enriquecimento por intervenção*) inzwischen klargestellt, dass es nur darauf ankommt, dass die Bereicherung "auf Kosten" des Klägers erfolgte, nicht darauf, dass er einen Vermögensschaden erlitt (STJ 24 February 2005, Processo 04B460; STJ 24 June 2004, Processo 03B3105). Was unter einer *causa* zu verstehen ist, sagt CC art. 473 nicht. Sicher ist jedoch, dass es sich um die Frage handelt, ob die Bereicherung gerechtfertigt war oder nicht (näher STJ 29 May 2007, Processo 07A1302). Große praktische Bedeutung kommt allerdings auch in Portugal dem Prinzip der Subsidiarität des allgemeinen Bereicherungsanspruchs zu (CC art. 474). Er steht dann nicht zur Verfügung, wenn es das Gesetz dem Benachteiligten ermöglicht, auf anderer Grundlage Ersatz oder Rückerstattung zu verlangen. Sind die Voraussetzungen einer anderen Anspruchsgrundlage (Delikt, Geschäftsführung ohne Auftrag, Vindikation, Nichtigkeitsrecht) erfüllt, dann scheidet ein Anspruch aus Bereicherungsrecht aus. Das Subsidiaritätsprinzip ist von der Rechtsprechung häufig bestätigt (z.B. STJ [Assento] 28 March 1995, BolMinJus 445 [1995] 67; STJ 20 September 2007, Processo 07B2156), aber auch häufig kritisiert worden (z.B. STJ 23 March 1999, CJ [ST] VII [1999-1] 172, BolMinJus 485 [1999] 396; dazu *Menezes Leitão* loc. cit. 992-993). Unter CCP art. 469 wird allerdings auch ein auf Bereicherungsrecht gestützter *pedido subsidiário* für zulässig gehalten, wonach das Gereicht den subsidiären Klagantrag prüft, wenn dem Hauptantrag nicht stattgegeben werden kann (STJ 18 December 2002, Processo 02B4011; STJ 30 October 2003, Processo 03B2593; STJ 29 May 2007, Processo 07A1302).

8. Zu den Voraussetzungen des allgemeinen Bereicherungsanspruchs under GERMAN law siehe die Angaben in PEL Unj.Enr. Introduction, nos. *B21*, *C52*, *72*, *89*, *108* and *124*.

9. Der allgemeine Bereicherungsanspruch aus GREEK CC art. 904 hat (i) das Bestehen einer Bereicherung zur Voraussetzung. Der Bereicherte kann eine juristische oder eine natürliche Person sein, volljährig oder minderjährig (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 4; *Georgiades Ast.*, Enochiko Dikaio I, 351; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 26). Jede Verbesserung der Vermögenslage stellt eine Bereicherung dar, gleich, ob es sich um eine Mehrung der Aktiva oder um eine Minderung der Passiva handelt (*Stathopoulos* loc. cit. no. 5; CA Athens 1101/1996, Arm 50 [1996] 1329; CA Athens 8350/1993, NoB 42 [1994] 86; A.P. 1095/1973, NoB 22 [1974] 777; A.P. 560/1974, NoB 23 [1975] 147). Die Bereicherung muss (ii) zu Lasten einer anderen Person erfolgt sein. Inhaber des Anspruchs aus CC art. 904 ist derjenige, "aus dessen Vermögen oder zu dessen Schaden" die Bereicherung erfolgte. Diese alternative Formulierung bereitet allerdings insbesondere in Dreipersonen-Verhältnissen Probleme, weil hier die Bereicherung aus dem Vermögen einer anderen Person als der geschädigten stammen kann (näher

Stathopoulos loc. cit. no. 19; *Deliyannis and Kornilakis* loc. cit.). Maßgeblich ist dann das Kriterium des Schadens (*Stathopoulos*, Axiosis adikaiologitou ploutismou, 194; *Mantzoufas*, Triprosopoi enochikai sxeseis, 98 und 155). Der Begriff des "Schadens" wird im Bereicherungsrecht weiter verstanden als im Deliktsrecht. Es genügt bereits eine Rechtsverletzung bzw., wie man sagt, ein "abstrakter" Schaden; ein realer Verlust ist nicht Anspruchsvoraussetzung (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 20; *Deliyannis and Kornilakis* loc. cit. 28; CA Athens 2073/1987, NoB 35 [1987] 1067). Zwischen Bereicherung und Schaden muss (iii) ein ursächlicher Zusammenhang bestehen (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 25; *ders*., Axiosis adikaiologitou ploutismou, 205; *Litzeropoulos*, Stoicheia Enochikou Dikaiou II, 385; *Kavkas and Kavkas*, Enochikon Dikaion II(2)[7], 636). Die Bereicherung darf (iv) nicht mit rechtlichem Grund erfolgt sein. Ein Rechtsgrund zum Behaltendürfen der Bereicherung kann sich natürlich schon aus dem Gesetz ergeben. Solch einen gesetzlichen Rechtsgrund stellt z.B. CC art. 1041 (ordentliche Ersitzung) dar, nicht dagegen nach herrschender Meinung CC art. 1036 (gutgläubiger Erwerb vom Nichtberechtigten), bei dem freilich in der Regel ein anderer Behaltensgrund gegeben sein wird (*Stathopoulos*, Axiosis adikaiologitou ploutismou,63). Als gesetzlicher Rechtsgrund wird auch der "allgemeine Geist der Rechtsordnung" genannt (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 61 mit Beispielen). Gerechtfertigt ist eine Bereicherung aber vor allem, wenn sie auf dem wirksamen Willen der Person beruht, zu deren Lasten der Vermögensvorteil erworben wurde (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 29; *Georgiades Ast.* loc. cit. 353). Anfechtung und Rücktritt beseitigen diesen Rechtsgrund (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 35). Rechtfertigend wirkt auch die Einwilligung in einen rechtlichen Nachteil; eine konkludente Einwilligung durch die Entgegennahme einer Gegenleistung für die eigene Leistung genügt (z.B. *Stathopoulos*, Axiosis adikaiologitou ploutismou, 101). Haben beide Parteien eines nichtigen synallagmatischen Vertrages ihre Leistungen bewirkt, kann aber eine Seite das Empfangene nicht mehr zurückgegeben, darf die andere Seite das ihr Bewirkte folglich behalten; zu einer Rückabwicklung kommt es nur, wenn *beide* Parteien zu ihr rechtlich in der Lage sind (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, nos. 42 and 88). Schließlich und (v) setzt der allgemeine Bereicherungsanspruch aus CC art. 904 nach in der Rechtsprechung vorherrschender Auffassung die sogen. "Unmittelbarkeit der Vermögensverschiebung" voraus. Es wird mithin verlangt, dass der Bereicherungsschuldner seinen Vorteil unmittelbar aus dem Vermögen des Bereicherungsgläubigers erlangt hat (*Deliyannis and Kornilakis* loc. cit. 31). Das Unmittelbarkeitserfordernis soll eine Rolle sowohl im Rahmen des Bereicherungsausgleichs in Mehrpersonenverhältnissen als auch in Fällen spielen, in welchen es in Leistungsketten und ähnlichen Situationen nacheinander zu mehreren nichtigen Verträgen kommt (A.P. 629/1974, NoB 23 [1975] 175; A.P. 665/1975, NoB 24 [1976] 59; CA Athens 4704/1979, NoB 27 [1979] 1000; CA Athens 5339/1979, Arm 34 [1980] 28; CA Athens 268/1980, NoB 28 [1980] 863; CA Thessaloniki 392/1989, Arm 43 [1989] 129; CA Athens 4388/1987, EllDik 31 [1990] 383; CA Thessaloniki 2516/1995, EllDik 38 [1997] 926). Im neueren Schrifttum regt sich hieran allerdings zunehmend Kritik; man verweist auf den Text des CC art. 904, der das Kriterium der Unmittelbarkeit der Vermögensverfügung nicht enthalte, und auf die Rechtslage in anderen Ländern (*Filios*, Enochiko Dikaio II(2)[3], 173; *Deliyannis and Kornilakis* loc. cit. 34; Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 67; *ders*., Axiosis adikaiologitou ploutismou, 213; *ders*., Geniko Enochiko Dikaio A(1)[2], 286; *Georgiades Ast.* loc. cit. 352).

10. HUNGARIAN CC § 361(1) formuliert den allgemeinen (und subsidiären) Bereicherungsanspruch in ähnlicher Weise wie VII.–1:101 (Basic rule): "Wer zu Lasten eines anderen ohne rechtlichen Grund einen Vermögensvorteil erlangt, muss diesen Vorteil zurückerstatten". Der Anspruch setzt also einen rechtsgrundlosen Vermögensvorteil (eine Bereicherung ohne rechtlichen Grund) voraus, der auf Kosten eines anderen zustandegekommen ist (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1387). Andere formulieren, der Bereicherunganspruch habe vier Voraussetzungen: einen Vermögensvorteil des Bereicherungsschuldners, einen Vermögensnachteil des Bereicherungsgläubigers, einen Kausalzusammenhang zwischen Vor- und Nachteil und das Fehlen des rechtlichen Grundes (Petrik [-*Bíró*], Polgári jog II[2], 650). Eine Bereicherung liegt nur im Falle eines Vermögensvorteils vor. A person is enriched by acquisition of property or other "*in rem*" rights, claims or rights of remainders, by recruitment of already existing rights, by being spared expenses, by being made free from obligations or liabilities, by having work done. Disadvantage is not only a decrease in assets, but also the loss of expected profit (*Bíró* loc. cit. 651; vgl. auch BH 1997/590 [Disadvantage durch Anspruchsverlust infolge unberechtigter Aufrechnung]). Die Bereicherung des einen muss sich weder der Art noch der Höhe nach mit dem Nachteil des anderen decken (*Benedek* loc. cit. 1391). Der Anspruch zielt (nur) auf Herausgabe des erlangten Vermögensvorteils; es spielt keine Rolle, dass er geringer ist als der Nachteil des Gläubigers (*Bíró* loc. cit.). If the enrichment is independent from the loss suffered by the other person or with the loss of one person the other one does not gain anything or the person's enrichment does not constitute a loss for anybody the unjustified enrichment attributed to another`s disadvantage cannot be ascertained. The enrichment is without justification if the enriched person does not have any legal rights to keep the advantage (*Benedek* and *Bíró* loc. cit.).

11. POLISH CC art. 405 enthält eine mit Hungarian CC § 361(1) nahezu wortidentische Formulierung: "Whoever without legal grounds has gained a material benefit at the expense of another person shall be obliged to return that benefit in kind and, if that is impossible, to return its value." Ähnlich wie VII.–1:101 (Basic rule) enthält CC art. 405 vier Anspruchsvoraussetzungen: eine Bereicherung einer Person, einen Nachteil einer anderen Person, einen Zusammenhang zwischen der Bereicherung und dem Nachteil und die Grundlosigkeit der Bereicherung (*Radwański and Olejniczak*, Zobowiązania - część ogólna[2], 218; Pietrzykowski (-*Pietrzykowski*), Kodeks cywilny I[4], art. 405 no. 4). Jeder Vermögensvorteil stellt eine Bereicherung dar. Sie kann z.B. in dem Erwerb eines Rechts, in dem Erhalt einer Dienstleistung oder in der Befreiung von einer Schuld bestehen. In der Person des Bereicherungsgläubigers hat man es dagegen mit einer Minderung von Vermögensgegenständen oder einer Mehrung von Verbindlichkeiten zu tun (*Radwański and Olejniczak* loc. cit.; *Pietrzykowski* loc. cit. no. 7). Zwischen Bereicherung und Nachteil muss kein kausaler Zusammenhang bestehen; es genügt, dass sie beide ihre Ursache in demselben dritten Ereignis haben (Supreme Court 18 December 1968, I CR 448/68 [unpublished]; *Radwański and Olejniczak* loc. cit. 219; *Pietrzykowski* loc. cit. no. 9, Radwański (-*Ohanowicz*), System prawa cywilnego III(1), 485). "Ohne rechtlichen Grund" erfolgt eine Bereicherung, wenn sie nicht durch Rechtsgeschäft, Verwaltungsakt, Gerichtsentscheidung oder Gesetz gerechtfertigt ist (Supreme Court 17 November 1998, III CKN 18/98 [unpublished]; Bieniek [-*Kołakowski*], I[5], art. 405 no. 6, *Radwański and Olejniczak* loc. cit. 219-220). Ein Sonderfall einer ungerechtfertigten Bereicherung ist der Empfang einer nicht zustehenden Leistung (CC art. 410).

12. Auch SLOVENIAN CC art. 190(1) entspricht weithin VII.–1:101 (Basic rule). Jede Person, die ohne rechtlichen Grund auf Kosten einer anderen bereichert worden ist,

muss ihr entweder das Erlangte in Natur herausgeben oder, falls das nicht möglich ist, seinen Wert ausgleichen. CC art. 190(2) fügt hinzu, dass die Bereicherung auch im Wege einer Leistung erfolgt sein kann. Das Gesetz führt also die Leistungskondiktion und den Versionsanspruch in einem einheitlichen Tatbestand zusammen. In der Lehre werden sie freilich weiterhin unterschieden. Als Schulbeispiel der Versionsklage gelten Fälle, in welchen die Bereicherung nicht auf einer Handlung, sondern auf einem von außen kommenden Ereignis, z.B. einem Naturereignis, beruht. Unter BULGARIAN CC art. 59 hat der allgemeine Bereicherungsanspruch vier Voraussetzungen: (i) die Bereicherung einer Person auf Kosten einer anderen, (ii) eine der Bereicherung entsprechende Verarmung des Anspruchstellers, (iii) die Rechtsgrundlosigkeit der Bereicherung und (iv) die Abwesenheit einer anderen Klagemöglichkeit zum Schutz des Verarmten. Es ist nicht erforderlich, dass die Bereicherung durch die Verarmung des Anspruchstellers verursacht wurde. Eine Bereicherung erfolgt rechtsgrundlos, wenn es an einem spezifischen Grund zu ihrem Behaltendürfen fehlt. Solch ein Grund kann sich aus einem Rechtsgeschäft, aus einem Verwaltungsakt, aus einem gesetzlichen Schuldverhältnis oder unmittelbar aus Gesetz ergeben (*Takov*, FS Apostolov, 424). Wer einen ihm aus anderem Rechtsgrund zustehenden Anspruch verjähren lässt, kann nicht auf den allgemeinen Bereicherungsanspruch zurückgreifen (Anordnung no. 1 des Obersten Gerichtshof of 28 May 1979, Plenum, P. 9).

13. Für den Bereicherungsanspruch des DUTCH Law gelten dieselben grundsätzlichen Voraussetzungen: Bereicherung, Schaden (oder Verarmung), Kausalität zwischen Bereicherung und Schaden sowie die Rechtsgrundlosigkeit der Bereicherung (*Scheltema*, Verbintenissenrecht II, art. 212, no. 3 p. 14-24; *van Maanen*, Ongerechtvaardigde verrijking, 11-19). "Wer auf Kosten eines anderen ungerechtfertigt bereichert ist, ist, soweit dies angemessen ist, verpflichtet, dessen Schaden bis zum Betrag seiner Bereicherung zu ersetzen" (CC art. 6:212). Die mit einer "juristischen" Bereicherung normalerweise verbundene "wirtschaftliche" Bereicherung muss rückgängig gemacht werden, wenn es für die Letztere an einer Legitimation aus dem gesetzlichen System fehlt (*Nieskens-Isphording*, Het fait accompli in het vermogensrecht, 1991, zitiert nach *van Maanen* loc. cit. 19).

14. In the NORDIC countries dient "Bereicherungsrecht" nur zur Füllung von Lücken im Gesetz. A statutory "basic rule" does not exist, und es ist sogar fraglich, ob sich ein Anspruch überhaupt auf das Prinzip der ungerechtfertigten Bereicherung stützen lässt (verneinend insbesondere *Hellner*, Obehörig vinst, 165, 170, 182; kritisch auch *Vinding Kruse*, Restitutioner, 145; *id.*, Erstatningsretten[5], 268 and *Gomard*, Forholdet mellem Erstatningsregler i og uden for kontraktsforhold, 437; bejahend aber *Karlgren*, Obehörig vinst och värdeersättning, 19; *Ussing*, Erstatningsret, 229; *Ussing*, UfR 1950 B, 137-159; *Hakulinen*, Obligationsrätt, 358). Das Konzept der ungerechtfertigten Bereicherung (*berigelsekrav* in DENMARK, *obehörig vinst* in SWEDEN) scheint zwar in einigen Anspruchsgrundlagen als Begründungselement auf (z.B. im Rahmen der *condictio indebiti* und in den Fällen des unrechtmäßigen Gebrauchs fremden Eigentums), doch sieht man bislang keine Notwendigkeit, es zu einem eigenständigen Rechtsgebiet auszubauen (*Hellner*, JFT 1982, 483-487; *Hult*, Condictio indebiti, 59). Das wird unter Hinweis auf die insoweit abweichende Rechtslage in Deutschland u.a. mit der Abwesenheit des *Abstraktionsprinzips* begründet. Auch bedürfe, so wird gesagt, das Recht der Rückabwicklung unwirksamer Verträge feinerer Instrumente als sie das Recht der ungerechtfertigten Bereicherung anbieten könne; insbesondere sollten "Zwischenlösungen" auf der Grundlage allgemeiner Billigkeitserwägungen möglich sein (*Grönfors and Dotevall*, Avtalslagen[3], 177). Klagen aus ungerechtfertigter Bereicherung gegen vertragsfremde Dritte wären mit allgemeinen

vertragsrechtlichen Prinzipien unvereinbar (*Hellner/Hager/Persson*, Speciell avtalsrätt II(2)[4], 127; dagegen aber *Ulfbeck*, Kontrakters relativitet, 185).

15. In ESTONIA ist gesagt worden, ein Zweck des Bereicherungsrechts bestehe darin, die Ungerechtigkeit zu beseitigen, die entstehe, wenn jemand zum Vorteil eines anderen etwas tue, wozu er weder aus Vertrag noch aus Gesetz verpflichtet sei (Supreme Court 13 December 2005, judgement no. 3-2-1-133-05 in civil matters). Das Bereicherungsrecht ist Gegenstand von LOA chapter 52. LOA § 1027 stimmt weitgehend mit VII.–1:101 (Basic rule) überein. LOA § 1027 ist aber nicht als selbständige Anspruchsgrundlage, sondern als Ausdruck eines allgemeinen Prinzips konzipiert. Die nachfolgenden Vorschriften regeln drei verschiedene Fallgruppen. Es geht um ungerechtfertigte Bereicherungen infolge (i) der Erfüllung nichtexistenter oder erloschener Verpflichtungen, infolge (ii) der Verletzung fremder Rechte und infolge (iii) von Verwendungen oder sonstiger Vorteile für die bereicherte Person, darunter die Bezahlung von deren Schulden. Für jede dieser Fallgruppen stellt das Gesetz eigene Anspruchsvoraussetzungen auf. Der Begriff der Leistung (*sooritus*) steht für jede bewusste und gewollte Mehrung fremden Vermögens (*Tampuu*, Juridica 2002, 455). Die Voraussetzungen eines Anspruchs aus Leistungskondiktion nennt LOA § 1028: der Bereicherte muss "etwas" erlangt haben, das Erlangte muss ihm zur Erfüllung einer gegenwärtigen oder zukünftigen Verbindlichkeit zugeflossen sein, und es muss hierfür an einem Rechtsgrund fehlen. Die Bereicherungshaftung wegen Rechtsverletzung (LOA § 1037) setzt neben dieser Verletzung (z.B. des Rechts auf Eigentum) eine Bereicherung auf Kosten des Rechtsinhabers voraus. LOA § 1041 regelt die Bereicherungsansprüche im Falle der Erfüllung einer fremden Schuld; im Wesentlichen kommt es darauf an, dass die Schuldtilgung ohne Rechtsgrund erfolgte. LOA § 1042 bringt sodann noch Einzelheiten zur Verwendungskondiktion. Bereicherungsrechtliche Spezialregelungen finden sich auch noch in anderen Gesetzen, insbesondere im Bancruptcy Act and im Civil Enforcement Act. LITHUANIAN CC arts. 6.237-6.242 regeln einzelne Fälle der Rückforderbarkeit ungeschuldeter Zuwendungen und anderer Vermögensvorteile. CC art. 6.242(1) ("unjust enrichment") schließt diesen Abschnitt mit folgender Formulierung ab: "A person in bad faith who has enriched himself without any legal cause at the expense of another must indemnify the latter for his damages in the amount of the unjust enrichment." LATVIAN CC arts. 2369-2392 folgen derselben Regelungstechnik. CC art. 2391 gewährt "a general reclaim on grounds of enrichment". Die Vorschrift lautet: "(1) No one has the right to unjustly enrich himself or herself at the expense of another person. (2) If a person has suffered losses therefrom, he or she may demand the return of that by which or the amount whereby the other person has been enriched".

III. Voraussetzungen spezifischer Rückforderungsansprüche, insbesondere der condictio indebiti

16. Die Rechtsordnungen des *Code Napoléon* unterwerfen den allgemeinen Bereicherungsanspruch dem Subsidiaritätsprinzip. Er wird insbesondere durch die *action en répétition de l'indu* verdrängt; außerdem unterliegt die Rückforderung von Ware und Geld, die aufgrund eines später mit Wirkung *ex tunc* angefochtenen und für nichtig erklärten Vertrages geleistet wurden, in FRANCE dem Anfechtungsrecht, in dessen Rahmen allerdings nötigenfalls die Regelungen über die Zahlung des Nichtgeschuldeten lückenfüllend herangezogen werden. Die Voraussetzungen einer Klage wegen *paiement de l´indu* sind in France und in Belgium weitgehend identisch. Es bedarf sowohl in Frankreich als auch in Belgien (i) einer "Zahlung", und es muss diese Zahlung (ii) ungeschuldet sein. FRANCE verlangt (iii) für den Fall des *indu subjectif* zusätzlich, dass die Zahlung irrtümlich erfolgte (*Flour/Aubert/Savaux*, Droit

civil II[11], no. 26 p. 25). In BELGIUM dagegen ist der Irrtum keine materiellrechtliche Anspruchsvoraussetzung. Er spielt vielmehr nur dann eine Rolle, wenn es sich darum handelt, das Ungeschuldetsein der Zahlung nachzuweisen (Cass. 18 September 1970, Pas. belge 1971, I, 48).

17. Auch SPAIN verfügt über ein selbständiges Regime der Zahlung des Nichtgeschuldeten. Der Rückforderungsanspruch aus CC art. 1895 hat nach allgemeiner Auffassung drei Voraussetzungen: Es muss sich (i) um eine Zahlung handeln, d.h. der "Zahlende" (der *solvens*) muss *solvendi causa* or *solvendi animo* geleistet haben (TS 30 January 1986, RAJ 1986 (1) no. 341 p. 291; *Díez-Picazo*, Fundamentos II[5], 515; *Albaladejo*, Derecho Civil II[12], 909). Die Zahlung muss sich (ii) auf eine nicht existierende Schuld bezogen haben. Die Lehre pflegt insoweit drei Arten des *indebitum* zu unterscheiden (z.B. *Gullón Ballesteros*, FS Batlle Vázquez, 367, 368-371): das *indebitum ex persona* (wo zwar eine Schuld besteht, der Schuldner jedoch an eine andere Person als den Gläubiger leistet), das *indebitum ex re* (wo das Geleistete entweder nicht oder nicht in der entsprechenden Höhe [TS 21 November 1957, RAJ 1957 (1) no. 3632 p. 2420] geschuldet ist) und das *indebitum ex causa* (bei dem es sich um Leistungen auf einen nichtigen Vertrag handelt). Für den zuletzt genannten Fall (*indebitum ex causa*) steht mit CC art. 1303 allerdings eine eigene Anspruchsgrundlage zur Verfügung. Schließlich ist (iii) erforderlich, dass sich der *solvens* über das Bestehen einer Schuld irrt (TS 10 June 1995, RAJ 1995 (3) no. 4914 p. 6589; *Díez-Picazo* loc. cit.; *Gullón Ballesteros* loc. cit. 369 and 372). Es macht freilich keinen Unterschied, ob es sich dabei um einen Tatsachen- oder um einen Rechtsirrtum handelt (*Albaladejo* loc. cit.). Hinsichtlich des Anspruchsumfanges unterscheiden CC arts. 1896 and 1897 zwischen gut- und bösgläubigen Empfängern. Ein bösgläubiger *accipiens* haftet nach CC art. 1896 nicht nur auf die Rückgabe der empfangenen Sache bzw. die Erstattung ihres Wertes, sondern auch auf Herausgabe der Früchte bzw. der Zinsen, auf Ersatz für die Verschlechterung oder den Verlust der Sache (was freilich nur bei individuellen Sachen eine Rolle spielt, weil andernfalls die Maxime *genus numquam perit* eingreift: *Gullón Ballesteros* loc. cit. 376) und auf Ausgleich weiterer Schäden des *solvens*. Ein gutgläubiger *accipiens* haftet dagegen nach CC art. 1897 für die Verschlechterung oder den Verlust der Sache "oder dessen, was zu ihr gehört" nur insoweit, als er noch bereichert ist (z.B. deshalb, weil er für die Beschädigung der Sache von einem Dritten Ersatz erlangt hat.

18. Das ITALIAN Zivilgesetzbuch unterscheidet (wie Rechtsprechung und Literatur in France) zwischen dem *indebito oggettivo* (CC art. 2033) und dem *indebito soggettivo* (CC art. 2036). Eine objektive Nichtschuld liegt vor, wenn die Leistung aufgrund eines nicht existierenden oder unwirksamen Rechtstitels erfolgt. Bei einer subjektiven Nichtschuld liegt zwar ein Rechtstitel vor, jedoch nimmt der Leistende irrtümlich an, selber der Schuldner zu sein. Die Unterscheidung zwischen den beiden Formen lässt sich nicht stets einfach durchhalten (vgl. z.B. einerseits Cass. 10 March 1995, no. 2814, Giur.it. 1995, I, 1, 228 und andererseits Cass. 20 September 1971, no. 2611, Foro it. 1972, I, 1, 1818). Für CC art. 2033 (objektive Nichtschuld) genügen eine "Zahlung" und die Abwesenheit eines den Erwerb tragenden Rechtsgrundes, einer *causa adquirendi* (Cass. 13 April 1995, no. 4268, Rep.Giur.it. 1995, voce Indebito no. 7; Cass. 4 February 2000, no. 1252, Giust.civ.Mass. 2000, 242; Cass. 1 August 2001, no. 10498, Giust.civ.Mass. 2001, 1519). Nicht erforderlich ist ein Irrtum des Leistenden; folglich kommt es auch weder auf die Entschuldbarkeit eines tatsächlich vorliegenden Irrtums (Cass. 27 February 1998, no. 2209, Rep.Giur.it. 1998, voce Lavoro (Rapporto di) nos. 606, 707) noch darauf an, ob der "Zahlende" wenigstens mit *animus solvendi*, d.h. in dem Bewusstsein leistete, Schuldner zu sein (Cass. 15 November 1994, no. 9624, Rep.Giur.it. 1994, voce Indebito no. 4; Cass. 14 June 1967,

no. 1339, Foro it. 1967, I, 1390 = Giur.it. 1968, I, 1, 576, note *Moscati* [betr. Zahlungen zu dem alleinigen Zweck, eine Strafe zu vermeiden]). Für die Zahlung einer subjektiven Nichtschuld wird dagegen verlangt, dass der Leistungsempfänger tatsächlich Gläubiger einer solchen Forderung ist und dass der Leistende aufgrund eines entschuldbaren Irrtums meint, ihr Schuldner zu sein (*Moscati*, Riv.Dir.Civ. 1975, I, 3114; Cass. 4 May 1978, no. 2078, Foro pad. 1978, I, 100). Der Rückforderungsanspruch ist ausgeschlossen, wenn sich der Gläubiger gutgläubig der Schuldurkunde entledigt oder die zu seinen Gunsten für die Forderung bestellten Sicherheiten aufgibt (CC art. 2036 verdrängt CC art. 2033: *Levi*, Il pagamento dell'indebito, 117-118); in diesem Fall tritt allerdings der Leistende in die Rechte des Gläubigers ein (CC art. 2036(2)). Für den Irrtum trägt der Leistende die Beweislast; der Irrtum gilt als ein wesentliches Begründungselement des Anspruchs auf Rückforderung einer subjektiven Nichtschuld (*Levi* loc. cit. 120; Cass. 20 September 1971, no. 2611, Giur.it. 1972, I, 1, 1818). Denn der Gläubiger, so wird gesagt, erhält, was ihm zusteht, und gewöhnlich ist unerheblich, wer die Schuld erfüllt. Auch Dritte sind grundsätzlich befugt, fremde Schulden zu tilgen. Der Irrtum darf schließlich nicht unentschuldbar sein. Entschuldbar ist er, wenn er nicht auf grober Fahrlässigkeit beruht (*de Cupis*, Giur.it. 1984, IV, 70). CC art. 2037 bringt sodann Vorschriften über die Rückgabe einer "bestimmten Sache" (einer *cosa determinata*). Der bösgläubige Empfänger haftet nach dieser Vorschrift auch dann auf Wertersatz, wenn die Sache ohne sein Verschulden untergegangen ist; der gutgläubige Empfänger haftet dagegen, selbst wenn Beschädigung oder Untergang auf sein Verhalten zurückgehen, nur im Umfange einer ihm noch verbliebenen Bereicherung. CC art. 2038 handelt von der Veräußerung der unberechtigterweise erhaltenen Sache.

19. AUSTRIAN CC § 1431 hat die Leistung einer Nichtschuld und den Irrtum über das Bestehen des Leistungsgrundes zur Voraussetzung. CC § 1432 schließt von der Rückforderbarkeit aus: Leistungen auf eine verjährte Schuld, auf eine Schuld, die nur wegen eines Formmangels unwirksam war, Leistungen auf eine bloße Naturalobligation und (dies folgt freilich schon aus CC § 1431) wissentliche Zahlungen einer Nichtschuld. Für Personen, die nicht voll geschäftsfähig sind, gelten diese Einschränkungen nicht (CC § 1433). Der Nichtschuld steht die "noch ungewisse Schuld" gleich (CC § 1434: Leistung auf eine bedingte Forderung vor Bedingungseintritt); allerdings kann eine Zahlung vor Fälligkeit nicht wieder zurückgefordert werden (loc. cit. second sentence). CC § 1435 betrifft die Kondiktion wegen nachträglichem Wegfall des Leistungsgrundes; ein Irrtum ist nicht erforderlich. Die Vorschrift wird analog auf Fälle angewandt, in denen es um einen nicht eingetretenen Leistungszweck geht (z.B. bei Dienstleistungen außerhalb eines Vertragsverhältnisses). CC § 1435 relativiert durch seinen Verzicht auf das Irrtumserfordernis die Bedeutung der CC §§ 1431-1434. Im Rahmen von CC § 1431 kann sich der Irrtum auch auf die Person des Gläubigers beziehen (OGH 31 January 1985, SZ 58/19; OGH 27 November 1968, SZ 41/163).

20. Zu PORTUGAL, GERMANY and GREECE s. die Angaben oben unter *II7-9*.

21. Auch dem HUNGARIAN law ist die Zahlung des Nichtgeschuldeten als selbständiges Rechtsinstitut fremd. Die *condictio indebiti* gehört zu den Kernmaterien des Bereicherungsrechts. Vorrang vor ihm beanspruchen allerdings die Regeln der Vertragsungültigkeit, welche die Rückabwicklung nichtiger bzw. angefochtener Verträge regeln (Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1388). Die beiden Regime unterscheiden sich im Wesentlichen dadurch, dass nur das Bereicherungs-, nicht aber auch das Ungültigkeitsrechts den Einwand des Wegfalls der Bereicherung zulässt (*Weiss*, A szerződés érvénytelensége a polgári jogban, 113-114; *Vékás*, JbOstR XIX [1978], 249). Dadurch wird es notwendig, zwischen Leistungen

auf nicht existierende und Leistungen auf ungültige Verträge zu unterscheiden. Nur die ersteren unterliegen dem Bereicherungsrecht (Petrik [-*Petrik*], Polgári jog II[2], 409; *Kisfaludi*, Az adásvételi szerződés[2], 127-128; BH 2001/168 und BH 1975/86). In die erste Gruppe gehören z.B. Leistungen auf wegen eines Dissenses tatsächlich nie zustandegekommene, in die zweite Leistungen auf mit *ex tunc* Wirkung angefochtene Verträge (näher zum Begriff der ungültigen Verträge *Kemenes*, A szerződés érvénytelensége, 64).

22. POLISH CC art. 410 regelt die "nicht zustehende Leistung" als einen Sonderfall des Bereicherungsrechts (*Serda*, Nienależne świadczenie, 45; *Ohanowicz*, Niesłuszne wzbogacenie, 248; *Radwański and Olejniczak*, Zobowiązania - część ogólna[2], no. 658 p. 220); die Voraussetzungen des allgemeinen Bereicherungsanspruches aus CC art. 405 müssen folglich auch hier gegeben sein. Eine Leistung steht jemandem gemäß CC art. 410 § 2 in vier Fällen nicht zu: (i) wenn derjenige, der sie erbracht hat, zu ihr allgemein oder gegenüber demjenigen, dem er sie erbracht hat, nicht verpflichtet gewesen ist (*condictio indebiti*), (ii) wenn der Rechtsgrund der Leistung entfallen ist (*condictio causa finita*), (iii) wenn der mit der Leistung beabsichtigte Zweck nicht erreicht worden ist (*conditctio causa data causa non secuta*), und (iv) wenn das zur Vornahme der Leistung verpflichtende Rechtsgeschäft nichtig gewesen und auch nach Erfüllung der Leistung nicht wirksam geworden ist (*condictio sine causa*) (*Radwański and Olejniczak* loc. cit.). CC art. 411 regelt vier Fälle des Ausschlusses des Rückgewähranspruches, darunter in no. 1 den Fall, dass der Leistende wusste, dass er nicht zur Leistung verpflichtet ist. SLOVENIAN LOA art. 86 sieht vor, dass rechts- und sittenwidrige Verträge nichtig sind. Nichtig sind auch Verträge, deren Gegenstand objektiv unmöglich zu verwirklichen oder unbestimmt und unbestimmbar ist. LOA art. 87(1) knüpft daran die Rechtsfolge, dass alles, was aufgrund einer solchen Vereinbarung geleistet wurde, von der anderen Seite in Natur, oder, falls das unmöglich ist, dem Wert nach herausgegeben werden muss. LOA art. 96 sieht dieselbe Rechtsfolge für Leistungen vor, die auf einen wegen arglistiger Täuschung, Irrtums oder Gewaltandrohung angefochtenen und aufgehobenen Vertrag erbracht wurden. Im BULGARISCHEN Recht gehört die *condictio indebiti* zu LOA art. 55(1) (rechtsgrundlose Leistung) und LOA art. 56 (irrtümliche Erfüllung einer fremden Schuld) (näher *Goleminov*, Neosnovatelno obogatyavane, 39). LOA art. 55(1) setzt voraus, dass das Nichtgeschuldete vom Bereicherten aufgrund einer in Wahrheit niemals existenten, einer nichtigen oder einer durch Anfechtung vernichteten Rechtsbeziehung empfangen wurde. LOA art. 56 handelt von Fällen, in welchen der Anspruchsteller irrtümlich in der Meinung leistet, eine eigene Schuld zu begleichen, sei es auch nur in der Annahme, hierzu als Bürge verpflichtet zu sein. Der Irrtum muss nicht entschuldbar sein (*Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 590).

23. Neben den allgemeinen Bereicherungsanspruch stellt DUTCH CC art. 6:203 das Recht der "ungeschuldeten Zahlung". Die entsprechende Forderung zielt auf die Rückabwicklung von Leistungen (der Begriff der "Zahlung" umfasst die Hingabe von Ware, Geld, Rechten und Dienstleistungen), die objektiv ohne rechtfertigenden Grund (*sine causa*) erbracht worden sind. Es ist nicht erforderlich, dass die Leistung (Zahlung) irrtümlich erfolgte; auf den Leistungswillen der zahlenden Person kommt es nicht an (Parlementaire Geschiedenis VI, 804-805; Asser [-*Hartkamp*], Verbintenissenrecht III[12], nos. 321-322 p. 340-342; *Scheltema*, Onverschuldigde betaling, 11, 31-34). Nicht voll geschäftsfähige Personen sind nur insoweit zu Rückgewähr, Herausgabe von Früchten, Aufwendungs- und Schadenersatz verpflichtet, wie ihnen das Empfangene tatsächlich genützt hat (CC art. 6:209).

24. In the NORDIC countries *condictio indebiti* constitutes an independent regime pertaining to the restitution of mistaken payments. Es umfasst Zahlungen an einen falschen Empfänger, double-payment, and overpayment. Das Recht der *condictio indebiti* wird meistens nicht als ein bloßer Anwendungsfall von Bereicherungsrecht, sondern als ein selbständiges Gebiet verstanden (siehe für SWEDEN *Hult*, Condictio indebiti, 52, und für DENMARK *Vinding Kruse*, Restitutioner, 203; anders für FINLAND aber *Hakulinen* Obligationsrätt, 365; siehe auch *Serlachius*, TfR 1903, 137-174 and *Roos*, JFT 1992, 75). In SWEDEN a general rule is asserted, that a mistaken payment shall be restituted. However, an assessment is made in the individual case with regards to the good faith of the recipient, possible negligence on the part of the performing person and other factors. Bei einer freiwilligen Zuwendung in Kenntnis der Abwesenheit einer Leistungsverpflichtung fehlt es an einer irrtümlichen Zahlung. Also, the payment of a prescribed claim cannot be subject to *condictio indebiti* (*Hult* loc.cit. 73; *Rodhe*, Obligationsrätt, 688). Auch kann einem gutgläubigen Empfänger zugestanden werden, das Empfangene zu behalten, wenn er sich darauf eingerichtet (HD 31 May 2001, NJA 2001, 353) oder es verbraucht hat. Das gilt jedenfalls bis zu dem Zeitpunkt, zu dem ihm die leistende Partei über ihren Irrtum aufgeklärt hat. Liegt zwischen der Leistung und der Information nur eine kurze Zeitspanne, the recipient can normally not claim to have accommodated to the payment. Generell gilt, dass der Empfänger durch die Pflicht zur Rückgewähr nicht schlechter gestellt werden darf, als er stünde, wenn er die irrtümliche Leistung niemals empfangen hätte (HD 30 December 1970, NJA 1970, 539). Arbeitnehmer und Verbraucher genießen oft einen besonderen Schutz vor Rückabwicklungsansprüchen (Swedish Labour Court 8 November 2006, AD 2006, no. 105; HD 12 April 1984, NJA 1984, 280). In die Gesamtabwägung werden aber auch noch weitere Faktoren eingestellt, etwa das Vertrauen des Empfängers darauf, dass seine Forderung mit der Zahlung endgültig beglichen ist, und die Frage, welche der beiden Parteien die beste Übersicht über die der Zahlung zugrundeliegenden Modalitäten hatte. So kommen Fahrlässigkeitserwägungen und die Frage ins Spiel, welche Partei das Risiko einer Fehlzahlung tragen sollte (*Karlgren*, SvJT 1940, 330, 339; *Hult* loc.cit. 83; HD 10 February 1933, NJA 1933, 25). Dieser Ansatz kommt auch in Fällen zum Tragen, in welchen Banken bei der Durchführung von Überweisungen im Kundenauftrag ein Fehler unterläuft, see HD 30 March 1994, NJA 1994, 177; HD 17 September 1999, NJA 1999, 575; *Hellner*, Obehörig vinst, 205; *id.*, JT 1999-2000, 409-415). In DENMARK wird selbst die Aufstellung einer allgemeinen Regel vermieden, wonach irrtümliche Zahlungen zurückverlangt werden können. Stattdessen wird auf die Umstände des jeweiligen Einzelfalls abgestellt, was am Ende zu ganz ähnlichen Ergebnissen führt wie in Sweden. Wesentlich sind vor allem die Frage nach der Gutgläubigkeit des Empfängers und der Fahrlässigkeit des Leistenden, um zu entscheiden, wer das Risiko der irrtümlichen Zahlung tragen soll (*Vinding Kruse* loc. cit. 206; *Gomard*, Obligationsret III, 171; *von Eyben/Mortensen/Sørensen*, Obligationsret II, 137; *Ravnkilde*, Betalningskorrektioner, 89; HD 4 May 1982, UfR 1982, 580). Es wird dagegen nicht darauf abgestellt, ob sich der Empfänger auf das Behaltendürfen des Geleisteten "eingerichtet" hat; however, passivity of the performing party may be seen as an indicator of the recipient's good faith (Eastern CA 27 February 1975, UfR 1975, 648). In FINLAND stellt die Rechtsprechung demgegenüber einen direkten Zusammenhang zwischen unjustified enrichment and *condictio indebiti* claims her (e.g. Supreme Court 8 October 1986, KKO 1986 II 126). Das Konzept der ungerechtfertigten Bereicherung dient allerdings auch hier mehr zur theoretischen Erklärung der entsprechenden Regel als zu ihrer tatbestandlichen Präzisierung. Es scheint, als habe sich das finnische Recht allmählich dem

schwedischen angenähert und jedenfalls auf der Basis eines allgemeinen Vernünftigkeitstests zunehmend Einzelfallabwägungen Raum gegeben (*Roos* loc. cit.). The obligation to reverse the payment can be reduced. The grounds for such a reduction include the good faith of the recipient, the parties' economic and social circumstances, the purpose of the payment, and the passivity of the person performing it.

IV. Terminology

25. In den Mitgliedstaaten der EU fehlt es bislang auch an einer einheitlichen Terminologie; die Begriffe für die an dem Schuldverhältnis beteiligten Personen, für den Vor- und den Nachteil und für den erforderlichen Nexus zwischen diesen beiden Elementen des bzw. der bereicherungsrechtlichen Ansprüche variieren von Land zu Land. FRENCH bzw. BELGIAN and LUXEMBURGIAN CC arts. 1376-1381 (*paiement de l´indu* bzw. *onverschuldigde betaling*) verzichten auf begrifflich präzise Vorgaben zur Bezeichnung sowohl des Empfängers der Zahlung (z.B. CC art. 1376: *celui qui reçoit*) als auch des Zahlenden (z.B. CC art. 1377: *une personne qui a acquitté une dette).* Rechtsprechung und Schrifttum weichen deshalb für ihre Zwecke zumeist auf das Begriffspaar *solvens* und *accipiens* aus (*Bénabent*, Les obligations[10], no. 468 p. 318; *van Gerven*, Verbintenissenrecht II[7], 224); manchmal ist aber auch moderner von *payeur* und *payé* die Rede (*Malaurie/Aynès/Stoffel-Munck*, Les obligations, no. 1042 p. 540). Im Rahmen der *enrichissement sans cause* bzw. der *verrijking zonder oorzaak* nennt man die Parteien *l´appauvri* und *l´enrichi* (bzw. *verarmde* und *verrijkte*). Auch die Formulierung für den fehlenden Rechtsgrund ist in den beiden Rechtsgebieten unterschiedlich: *indu* bzw. *onverschuldigd* und *sans cause* bzw. *zonder oorzaak*. Der Nachteil des Klägers ist im Rahmen der *enrichissement sans cause* die "Verarmung", im Rahmen des *paiement de l´indu* im Begriff des *paiement* enthalten: "*Paiement*" ist eine Leistung zugunsten eines anderen. Das umfasst den Nachteil des *solvens*. Unterschiede zwischen Frankreich und Belgien existieren insoweit nicht; auch in Belgien bezeichnet der Begriff der Zahlung nicht nur die Übergabe von Geld oder von einzelnen Sachen, sondern z.B. auch falsche Buchungen auf Bankkonten, Aufrechnungen oder die Überlassung immaterieller Werte (Roodhooft [-*Roodhooft*], Bestendig Handboek Verbintenissenrecht V, no. 2207; *Leclercq*, JT 1976, 105, 106 no. 10).

26. Der SPANISH CC hat, wie dargelegt, ebenfalls kein eigenes Bereicherungsrecht ausgebildet. Es wurde erst von Lehre und Rechtsprechung entwickelt, die sich hierbei auch auf die mittelalterlichen *Partidas* stützten, welche das Verbot der ungerechtfertigten Bereicherung – verblüffend modern – bereits dahin formuliert hatten, dass sich niemand ohne Grund auf Kosten eines anderen bereichern darf (*Nadie puede enriquecerse sin causa a costa de otro*; zitiert nach *Núñez Lagos*, El enriquecimiento sin causa en el Derecho español, 9; siehe ferner TS 28 January 1956, RAJ 1956 (1) no. 669 p. 418 und, allerdings mit einer nicht ganz identischen Fassung der *Partidas*, *Álvarez-Caperochipi*, El enriquecimiento sin causa[3], 18). Für den fehlenden Rechtsgrund verwendet das moderne Schrifttum eine Vielzahl von Formulierungen: *enriquecimiento injustificado, enriquecimiento sin causa, enriquecimiento injusto* (näher *Díez-Picazo and de la Cámara Alvarez*, Dos estudios sobre el enriquecimiento sin causa, 36, 43). Die Terminolgie der CC arts. 1895 und 1896 zur *condictio indebiti* wird als nicht ganz glücklich empfunden (*Díez-Picazo and de la Cámara Alvarez* loc. cit. 114-116). Die Abschnittsüberschrift spricht von *cobro de lo indebido* ("receipt" of what is not owed). CC art. 1895 lautet demgemäß: "If a thing is received when there was no right to claim it and which, through an error, has been without any reason delivered, it arises the obligation to restore it". The concept of

"payment" is not mentioned here. Es findet sich nur in CC art. 1896 (speaking of a person "who accepts an undue payment"). Some authors conclude from this apparent contradiction that CC art. 1895 acknowledges a broader *condictio* than the classical *condictio indebiti*, including e.g. performances which are not *credendi causa* (*Díez-Picazo and de la Cámara Alvarez* loc. cit. 115-116). *Compilación del Derecho Civil Foral de Navarra* Gesetz 508 schließlich lautet: "Derjenige, der einen von einer anderen Person empfangenen Gewinn ohne Grund erwirbt oder behält, ist zur Rückerstattung verpflichtet".

27. Das ITALIENISCHE Recht ordnet im Rahmen der Zahlung einer Nichtschuld (*pagamento dell'indebito*) eine *ripetizione* an. Der fehlende Rechtsgrund kommt in dem Wort *indebito* zum Ausdruck. Für den Zahlenden und den Zahlungsempfänger gibt es im Gesetz keine feste Terminologie. In der Literatur ist durchweg von *solvens* und *accipiens* die Rede (z.B. Alpa and Mariconda [-*Sirena*], Codice civile commentato IV, sub arts. 2033 ff). Für die Bereicherungsklage spricht CC art. 2041 das Fehlen des Rechtsgrundes mit den Worten *senza una giusta causa* an. Der Nachteil des Klägers wird in derselben Bestimmung als "Schaden" bezeichnet. Der notwendige Nexus zwischen der Vermögensmehrung und der Vermögensminderung kommt in dem Erfordernis einer "*correlativa*" *diminuzione patrimoniale* auf der Seite des Verarmten zum Ausdruck.

28. Das AUSTRIAN ABGB kennt noch kein selbständiges Bereicherungsrecht; es verfügt weder über einen einheitlichen Bereicherungstatbestand noch über eine einheitliche Terminologie. Der Anspruchsinhaber wird vom Gesetz teils 'Eigentümer' (CC § 1041), teils 'Geber' (CC § 1435) und manchmal auch nur 'jemand' (CC §§ 1431 ff) genannt. In Anlehnung an CC § 934 (*laesio enormis*) nennen Rechtsprechung und Lehre den Anspruchsinhaber heute durchweg den '*Verkürzten*', den Anspruchsgegner den *Bereicherten* (z.B. *Koziol and Welser*, Bürgerliches Recht II[13], 273; *Apathy and Riedler*, Bürgerliches Recht III[2], no 15/1; OGH 22 August 1951, SZ 24/204). Die Notwendigkeit einer Verbindung zwischen dem Vorteil des Bereicherten und dem Nachteil des Verkürzten wird vom Gesetz nicht gesondert hervorgehoben, steckt für den Bereich der Leistungskondiktionen aber in dem Wort 'Zurückfordern' und für den Bereich der Verwendungskondiktion (CC § 1041) in dem Erfordernis, dass die Sache des Verkürzten 'zum Nutzen eines anderen' verwandt worden sein muss (*Koziol and Welser* loc.cit.; Koziol/Bydlinski/Bollenberger [-*Koziol*], ABGB[2], § 1041 no. 1).

29. PORTUGUESE CC arts. 473-482 tragen die Überschrift *enriquecimento sem causa*; im Schrifttum ist auch die Rede von *enriquecimento injusto* (ungerechte Bereicherung) oder von *locupletamento à custa alheia* (Bereicherung auf fremde Kosten) (z.B. *Antunes Varela*, Obrigações em geral I[10], 471). CC art. 473 erhebt zur Voraussetzung, dass die Bereicherung *injustamente* erlangt wurde. Der Einfluss deutschen Rechtsdenkens ist nicht gering; er zeigt sich auch der Formulierung, dass die Bereicherung *à custa de outrem* (auf Kosten eines anderen) erfolgt sein muss (STJ 24 June 2004, Processo 03B3105). Gelegentlich finden sich in der Rechtsprechung sogar deutsche Begriffe mit portugiesischer Übersetzung (z.B. in STJ 24 June 2004 loc.cit. *teoria da afectação ou destinação* ["*Zuweisungslehre*"], *atribuições patrimoniais* ["*Vermögenszuwendungen*"], *deslocações patrimoniais* ["*Vermögensverschiebungen*"], *conteúdo da destinação* ["*Zuweisungsgehalt*"] und *enriquecimento por intromissão ou usurpação* ["*Eingriffskondiktion*"]). Der Anspruchsberechtigte wird vom Gesetz meistens *empobrecido* ("Verarmter") genannt (z.B. CC arts. 474, 479(1) und 480), der Anspruchsgegner *enriquecido* (Bereicherter) (z.B. CC arts. 480(a) und 481(1)). Für die *condictio indebiti* hat hat sich teilweise eine eigene Terminologie erhalten; CC arts. 476-478 verweisen gelegentlich auf die

repetição do indevido (die Rückforderung des Ungeschuldeten) und das *direito de repetição* (den Rückforderungsanspruch).

30. Zur Terminologie des GERMAN law siehe die Angaben in PEL Unj.Enr. Introduction *B21*, *C52*, *89* and *108*.

31. Das GREEK CC enthält einen eigenen Abschnitt mit der Überschrift "ungerechtfertigte Bereicherung" (arts. 904-913). Das griechische Bereicherungsrecht folgt weitgehend deutschen Vorbildern (*Schlechtriem*, Restitution und Bereicherungsausgleich in Europa I, ch. 1, no. 51). CC art. 904 spricht von demjenigen, der "reicher wurde" (οποιος εγινε πλουσιοτερος); im Schrifttum ist meistens von dem "Bereicherten" die Rede (z.B. Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 4), während der Anspruchsberechtigte entweder "Gläubiger" oder "Geschädigter" genannt wird (*Stathopoulos* loc.cit. no. 17). Die Bereicherung muss "aus dem Vermögen eines anderen oder zu dessen Schaden" erfolgt sein. Mit dieser Formulierung übernahm der griechische Gesetzgeber die Terminologie des Ersten Entwurfes zum deutschen BGB (*Xelidonis*, Arm 2000, 309, 316 mit fn. 23). CC art. 905 spricht vom "Empfänger" der Leistung, CC art. 907 vom "Geber", CC art. 908 vom "Empfänger".

32. HUNGARIAN CC § 361(1) kleidet die allgemeine Bereicherungsklage in die Worte: "Wer zu Lasten eines anderen ohne rechtlichen Grund einen Vermögensvorteil erlangt, muss diesen Vorteil zurückerstatten". Die Formulierung deckt sich also weithin mit der in VII.–1:101 (Basic rule). Der erforderliche Nexus zwischen Vermögensvorteil und –nachteil wird allerdings in den Worten "zu Lasten" ausgedrückt, die ihrerseits vorwiegend dahin verstanden werden, dass sie eine kausale Verbindung fordern. BULGARIAN LOA arts. 55 ff sind mit den Worten "ungerechtfertigte Bereicherung" (*неоснователно обогатяване*) überschrieben. Das Gesetz hat damit die seinem Vorgänger noch bekannte Kategorie der Quasiverträge aufgegeben (näher *Goleminov*, Neosnovatelno obogatyavane, 26). SLOVENIAN LOA art. 190 spricht von dem "ungerechtfertigt Gewonnenen" (*neupravičena pridobitev*) bzw. der "Bereicherung".

33. Das POLNISCHE Recht hat den Begriff der "ungerechtfertigten Bereicherung" (*niesłuszne wzbogacenie*) erstmalig im Obligationengesetzbuch aus dem Jahre 1933 verwandt (näher Radwański [-*Ohanowicz*], System prawa cywilnego III(1), 474). Das Zivilgesetzbuch aus dem Jahre 1964 führte (in Buch III, fünfter Titel) den Ausdruck "grundlose Bereicherung" (*bezpodstawne wzbogacenie*) ein, weil man die Abwesenheit einer *causa* als das zentrale Merkmal des Bereicherungsrechts hervorheben wollte. Die Bereicherung nennt das Gesetz in CC art. 405 "Vermögensvorteil" (*korzyść majątkowa*); ein begriffliches Äquivalent zu dem in diesen PEL Unj.Enr. Verwendung findenden "disadvantage" fehlt. In der Lehre ist oft von "Verarmung" (*zubożenie*) bzw. "dem Verarmten" die Rede (z.B. *Radwański and Olejniczak*, Zobowiązania – część ogólna.[2], 218). Den erforderlichen Nexus zwischen dem Vor- und dem Nachteil umschreibt man zumeist mit den Worten *związek między wzbogaceniem a zubożeniem* ("Zusammenhang zwischen der Bereicherung und der Verarmung") (*Radwański and Olejniczak* loc. cit. 219; *Ohanowicz* loc. cit. 485; Pietrzykowski [-*Pietrzykowski*], Kodeks cywilny I[4], art. 405 no. 4). CC arts. 410-413 behandeln die *nienależne świadczenie*, die "nicht zustehende Leistung".

34. DUTCH CC art. 6:203 spricht im Rahmen der ungeschuldeten Zahlung (*onverschuldigde betaling*) einerseits von der Person, "die gegeben hat" (*degene die heeft gegeven*), und andererseits von dem "Empfänger" (*ontvanger*) der Zahlung. Im Rahmen der Bereicherungsklage aus CC art. 6:212 ist im Gesetz dagegen von dem "Bereicherten" (*verrijkte*) und dem "anderen" (*ander*) die Rede. Auch die Formulierung für die Rechtsgrundlosigkeit ist nicht einheitlich, nämlich *zonder*

rechtsgrond im ersten und *ongerechtvaardigd* im zweiten Fall. Voraussetzung der Bereicherungsklage ist ein Schaden (*schade*) des Klägers. Das Recht der ungeschuldeten Zahlung umschreibt den erforderlichen Nachteil des Klägers nicht mit einem selbständigen Oberbegriff. Es arbeitet vielmehr, je nach Kontext, mit einem Wort für den weggegebenen Gegenstand, also "Gut" (*goed*: CC art. 6:203(1)), eine "Summe Geld" (*geldsom*: CC art. 6:203(2)) und "Leistung anderer Art" (*prestatie van andere aard*: CC art. 6:203(3)); vgl. zu alledem Asser (-*Hartkamp*), Verbintenissenrecht III[12], no. 317 p. 337; Parlementaire Geschiedenis VI, 803.

35. In den NORDIC coutries existiert eine allgemein anerkannte bereicherungsrechtliche Terminologie nicht. Die kontinentaleuropäische Begrifflichkeit wird oft scharf kritisiert, darunter auch der Begriff der Bereicherung, see note II14 above.

V. Burden of proof

36. In FRANCE obliegt es dem Kläger, die Anwendungsvoraussetzungen der *action en répétition de l´indu* zu beweisen; dazu gehört auch der Nachweis des ungeschuldeten Charakters der Zahlung (Cass.civ. 16 November 2004, Bull.civ. 2004, I, no. 276 p. 232). In einem Reisekostenstreit zwischen einer Krankenkasse und einem Krankenpfleger muss also die Krankenkasse im Rückforderungsprozess beweisen, dass dem Pfleger die an ihn ausgezahlten Reisekosten nicht zustanden; dagegen muss der Pfleger, wenn er aktiv Zahlung noch ausstehender Reisekosten begehrt, beweisen, dass ihm die Reisekosten zustehen (Cass.soc. 9 December 1993, Bull.civ. 1993, V, no. 311 p. 211). Der Beweis kann jeweils mit allen rechtlich zulässigen Beweismitteln geführt werden (Cass.civ. 29 January 1991, Bull.civ. 1991, I, no. 36 p. 22). In BELGIEN ist die Ausgangslage dieselbe (Cass. 12 April 1973, Pas. belge 1973, I, 780). In der Lehre findet sich allerdings die Auffassung, dass hinsichtlich des Beweises der Zahlung CC art. 1341 mit der Folge zu beachten sei, dass Zahlungen, deren Wert € 375,- übersteigen, schriftlich bewiesen werden müssten. Der Irrtum des *solvens* kann dagegen auch durch Zeugen bewiesen werden (*Brunet/Servais/Resteau*, RPDB XI, v° Quasi-contrat, no. 273 p. 44). Hinsichtlich des Beweises des ungeschuldeten Charakters der Zahlung kann CC art. 1341 ebenfalls eine Rolle spielen, etwa dann, wenn der Kläger zu seinen Gunsten eine Novation behauptet. Trägt er dagegen lediglich vor, als Nichtschuldner gezahlt zu haben, so stehen ihm hierfür alle rechtlichen Beweismittel offen (*Brunet/Servais/Resteau* loc. cit.). Hinsichtlich der *enrichissement sans cause* wird in FRANCE zwischen den "materiellen" oder "positiven" und den "rechtlichen" oder "negativen" Anwendungsvoraussetzungen unterschieden. Materielle Anwendungsvoraussetzungen sind die Bereicherung eines Vermögens (*enrichissement*), die Minderung eines anderen Vermögens (*appauvrissement*) und die Kausalität zwischen diesen beiden Vorgängen (der *lien de causalité*). Rechtliche Anwendungsvoraussetzungen sind die Abwesenheit eines Rechtsgrunds (*absence de cause*) und der subsidiäre Charakter der *actio de in rem verso*. Die materiellen Voraussetzungen hat der Kläger zu beweisen (*Romani*, Enrichissement sans cause, no. 29). Über die Beweislast hinsichtlich der rechtlichen Voraussetzungen herrscht in der Lehre dagegen Uneinigkeit. Die Mehrzahl der Autoren stimmt der Rechtsprechung des Kassationshofes (Cass.civ. 19 January 1988, Bull.civ. 1988, I, no. 16 p. 11) darin zu, dass der Kläger die Abwesenheit des Rechtsgrunds zu beweisen habe (*Sériaux*, Droit des obligations[2], no. 90 p. 325). Eine Mindermeinung vertritt jedoch die genau umgekehrte Ansicht (*Bénabent*, Les obligations[10], no. 485 p. 333). Die BELGISCHE Lehre folgt der herrschenden Ansicht in Frankreich. Der Beweis kann mit allen rechtlichen Beweismitteln geführt werden (Roodhooft [-*Roodhooft*], Bestendig Handboek Verbintenissenrecht V, no. 2291).

37. SPANISH CC arts. 1900 and 1901 regeln Fragen der Beweislast im Rahmen der *condictio indebiti*. The *solvens* has to prove both payment (CC art. 1900(1)) and error (CC art. 1900(2); see TS 31 May 2006, BDA RJ 2006/3322). CC art. 1901, however, facilitates the proof of the error. Ein Irrtum wird widerleglich vermutet, wenn die gelieferte Sache nicht geschuldet oder schon geleistet war. Die Notwendigkeit, einen Irrtum zu beweisen, entfällt sogar ganz, wenn der Beklagte bestreitet, die Sache empfangen zu haben (CC art. 1900). Auf die allgemeine Bereicherungsklage findet die gewöhnliche Beweislastregel in CCP art. 217 Anwendung (TS 15 June 2004, RAJ 2004 (3) no. 3847 p. 7922). Thus, the plaintiff must prove the increase in the defendant´s assets (TS 8 July 1999, RAJ 1999 (3) no. 4764 p. 7355) and the decrease in his or her assets. However, the burden of proving the existence of *causa* is said to be on the defendant (*Albaladejo*, Derecho Civil II(2)[10], 917).

38. ITALIAN CC art. 2697, wonach jeder, der "ein Recht bei Gericht geltend machen will, ... die Tatsachen beweisen [muss], die dessen Grundlage bilden", und wonach die tatsächlichen Voraussetzungen eines Verteidigungsmittels vom Beklagten bewiesen werden müssen, gilt auch im Recht der Zahlung einer Nichtschuld (CC arts. 2033 ff) und im Recht der ungerechtfertigten Bereicherung (CC arts. 2041-2042). Der Kläger hat folglich Leistung an den *accipiens* und ihre Rechtsgrundlosigkeit zu beweisen (Cass. 12 July 2005, no. 14597, Giust.civ.Mass. 2005, 6; Cass.sez.lav. 13 November 2003, no. 17146, Giust.civ.Mass. 2003, 11; Cass. 15 July 2003, no. 11073, Nuova giur. civ. comm. 2004, I, 447, note *Moscati*; Cass.sez.lav. 23 August 2000, no. 11029, Giust.civ.Mass. 2000, 1823; Cass.sez.trib. 21 July 2000, no. 9604, Giust.civ.Mass. 2000, 1592). Die Behauptungen, es sei um die Erfüllung einer Naturalobligation gegangen (CC art. 2034) oder die Leistung sei unter Verstoß gegen die guten Sitten erbracht worden (CC art. 2035), sind dagegen vom Beklagten zu beweisen. Beim *indebito soggettivo* (CC art. 2036) obliegt dem Kläger zusätzlich der Beweis eines entschuldbaren Irrtums (*Moscati*, Pagamento dell'indebito, sub art. 2036, 423-424; Cass. 30 August 1962, no. 2728, Foro it. Mass. 1962, no. 2728; anders *Schlesinger*, Riv.Dir.Com. 1957, I, 58, 70). Dagegen muss der Beklagte beweisen, dass er sich der Schuldurkunde oder der für die Forderung erhaltenen Sicherheit entledigt hat; der gute Glauben wird vermutet (Alpa and Mariconda [-*Sirena*], Codice civile commentato IV, sub art. 2036, VII, §§ 16-17, p. 2326). Aus CC art. 2037 folgt, dass die Unmöglichkeit der Rückgabe einer bestimmten Sache vom *accipiens* zu beweisen ist, und zwar auch dann, wenn der *solvens* Wertersatz in der Annahme verlangt hat, die Rückgabe der Sache werde unmöglich sein (Cass. 14 June 1996, no. 5512, Giur.it. 1997, I, 1, 642). Im Rahmen des Anwendungsbereichs von CC art. 2039 trägt der *solvens* die Beweislast hinsichtlich des von dem geschäftsunfähigen *accipiens* erlangten Vorteils; der *accipiens* dagegen muss seine mangelnde Geschäftsfähigkeit und den Umstand beweisen, dass der *solvens* von ihr Kenntnis hatte oder hätte haben müssen (*Moscati* loc. cit. sub art. 2039, 563). Im Rahmen der Bereicherungsklage aus CC art. 2041 obliegt dem Kläger der Beweis, dass er einen Vermögensnachteil erlitten hat, durch welchen der Beklagte bereichert worden ist (Cass. 28 October 2005, no. 21096, Giust.civ.Mass. 2005, 7-8; Cass.sez.lav. 10 March 1994, no. 2356, Resp.civ. e prev. 1994, 645). Gegebenenfalls hat der Kläger auch die Grundlage seines Rechtstitels zu beweisen, z.B. dass er Eigentümer des Gutes war, dessen Verlust den Schaden ausmacht, oder dass er der Urheber des plagiierten Werkes ist (*Sirena* loc. cit. sub art. 2041, XII, § 65, p. 2351-2352). Bei einer Bereicherung der öffentlichen Verwaltung hat der Kläger zu beweisen, dass die Verwaltung die Nützlichkeit des Werkes oder der Leistung anerkannt hat (Cass. 9 March 2006, no. 5069, Giust.civ.Mass. 2006, 3).

39. Auch in AUSTRIA hat der Kläger alle Anspruchsvoraussetzungen zu beweisen (OGH 23 January 1957, 7Ob13/57), d.h. die Bereicherung des Beklagten, ihre

Rechtsgrundlosigkeit (OGH 14 October 2003, ÖBA 2004, 552; CFI Vienna 28 November 1994, ZVR 1995/145 p. 338) und, im Rahmen der *condictio indebiti*, i.d.R. auch den Irrtum des Leistenden (OGH 27 November 1968, SZ 41/63). Im Falle der Zahlung einer objektiven Nichtschuld wird der Irrtum allerdings *prima facie* vermutet (OGH 7 July 1987, WBl 1987, 312; OGH 14 October 2003, JBl 2005, 100).

40. Unter PORTGUESE CC art. 342(1) hat der Kläger alle Voraussetzungen seiner Bereicherungsklage zu beweisen. Im Recht der Leistungsbereicherung muss der Kläger also die Bereicherung des anderen Teils, seine eigene Verarmung, den Kausalzusammenhang zwischen diesen beiden Ereignissen und die Abwesenheit eines Rechtfertigungsgrundes für die Bereicherung beweisen (STJ 2 July 1976, BolMinJus 259 [1976] 206). Der Kläger muss also z.B. beweisen, dass es sich nicht um eine Freigiebigkeit handelte (STJ 29 May 2007, Processo 07A1302). Im Zweifel wird vermutet, dass die Bereicherung mit Rechtsgrund und deshalb der Nachteil des Klägers nicht *sine causa* geschah (STJ 29 May 2007 loc. cit.; *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], note 1b under art. 473, p. 456). Bei Klagen aus Eingriffsbereicherung ist der Beweis eines Schadens nicht erforderlich (STJ 29 April 1992, RLJ 125 [1992-1993] 86, note *Mesquita* loc. cit. 158; STJ 23 March 1999, CJ [ST] VII [1999-1] 172 = BolMinJus 485 [1999] 396; STJ 18 February 2002, Processo 02B4011). Ein Patentinhaber kann wegen Verletzung seines Patents aus Eingriffsbereicherung auch dann vorgehen, wenn er nicht beabsichtigte, seine Erfindung zu verwerten (STJ 22 April 1999, CJ [ST] VII [1999-2]) 58).

41. Nach den Grundsätzen der Beweislastverteilung des GERMAN law hat jede Seite die ihr günstigen Voraussetzungen zu beweisen. Dem Bereicherungsgläubiger obliegt es deshalb, alle anspruchsbegründenden Voraussetzungen zu beweisen, und dem Bereicherungsschuldner obliegt der Beweis der tatsächlichen Voraussetzungen seiner Einwendungen (BGH 6 December 1994, NJW 1995, 727, 728; BGH 14 December 1994, BGHZ 128, 167, 171; Palandt [-*Sprau*], BGB[67], § 812, no. 103). Gewisse Besonderheiten gelten allerdings hinsichtlich des fehlenden Rechtsgrundes (CC § 812(1)(i) first alternative). Zwar muss auch dieses "negative" Merkmal grundsätzlich vom Bereicherungsgläubiger bewiesen werden. Der Bereicherungsschuldner muss allerdings im Rahmen des Zumutbaren die Umstände darlegen, aus denen er ableitet, das Erlangte behalten zu dürfen (BGH 18 May 1999, NJW 1999, 2887, 2888; *Sprau* loc. cit.). Sodann obliegt es dem Bereicherungsgläubiger, den vom Schuldner behaupteten konkreten Rechtsgrund auszuräumen (BGH 21 October 1982, NJW 1983, 626; BGH 3 February 1995, NJW-RR 1995, 916, 917; *Reuter and Martinek*, Ungerechtfertigte Bereicherung, 757). Der Bereicherungsgläubiger muss aber nicht alle theoretisch in Betracht kommenden Rechtsgründe ausschließen (BGH 20 May 1996, NJW-RR 1996, 1211; BGH 27 September 2002, NJW 2003, 1039). Behauptet der Bereicherungsgläubiger, dass er zur Erfüllung einer bestimmten Verbindlichkeit geleistet habe, diese aber nicht existiere, so muss er ihr Nichtbestehen beweisen (RG 11 July 1901, RGZ 49, 50; BGH 6 December 1990, NJW-RR 1991, 574, 575). Entsprechendes gilt jeweils für die *condictio ob causam finitam*, bei welcher sich die Beweislast des Bereicherungsgläubigers auf den Wegfall des Rechtsgrundes bezieht. Bei der *condictio ob rem* muss bewiesen werden, dass ein Erfolg vorausgesetzt war, welcher nicht eingetreten ist (Erman [-*Westermann*], BGB II[11], § 812, no. 90; *Sprau* loc. cit.). Wer ein *indebitum* geleistet hat, muss dagegen nicht beweisen, sich geirrt zu haben (CC § 814). Bei der Nichtleistungskondiktion hat der Bereicherungsgläubiger zu beweisen, dass der Bereicherungsschuldner die betreffende Vermögensposition (durch die Handlung eines Dritten oder auf andere Weise) ohne Rechtsgrund erlangt hat (*Westermann* loc. cit.). Der Bereicherungsschuldner dagegen muss beweisen, die Bereicherung durch die Leistung eines Dritten erhalten zu haben, so dass eine Haftung

gegenüber dem Bereicherungsgläubiger aus Nichtleistungskondiktion ausscheidet (*Sprau* loc. cit. no. 106).

42. Auch under GREEK law obliegt es dem Bereicherungsgläubiger, alle anspruchsbegründenden Voraussetzungen zu beweisen, auch wenn es sich dabei um negative Tatbestandsmerkmale handelt. Der Bereicherungsgläubiger hat folglich zu beweisen: (i) die Bereicherung des Beklagten, (ii) dass diese Bereicherung zu Lasten des Klägers erfolgt ist, und (iii) dass sie nicht auf einem Rechtsgrund beruht (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, nos. 118 und 120; A.P. 1440/2000, EllDik 42 [2001] 731). Die Beweislast für den Wegfall einer Bereicherung obliegt dagegen dem Beklagten (A.P. 401/1960, NoB 8 [1960] 1071; A.P. 785/1964, NoB 13 [1965] 706). Auch im Rahmen von CC art. 905 ist der Beklagte dafür beweispflichtig, dass der Kläger freiwillig und in Kenntnis der Nichtschuld geleistet hat (*Stathopoulos* loc.cit. art. 905, no. 2).

43. Unter HUNGARIAN Bereicherungsrecht muss der Kläger (anders als im Deliktsrecht, wo die Vorwerfbarkeit vermutet wird) alle Anspruchsvoraussetzungen beweisen (Petrik [-*Bíró*], Polgári jog II^2, 650). Dazu gehört auch die Abwesenheit des Rechtsgrundes. Eine Ausnahme wird für den Fall der Zweckverfehlungskondiktion vorgeschlagen; hier müsse der Bereicherte beweisen, dass der Zweck tatsächlich erreicht worden sei. Dem Bereicherten soll auch der Beweis obliegen, dass auf eine noch nicht fällige Forderung geleistet worden sei (*Bíró* loc. cit. 655). Im POLNISCHEN Recht gilt die allgemeine Regel, dass die Beweislast für eine Tatsache denjenigen trifft, der aus ihr Rechtsfolgen ableitet (CC art. 6). Im Bereicherungsrecht trifft die Beweislast folglich den Bereicherungsgläubiger. Ausnahmen von dieser Regel werden weder in der Literatur noch in der Rechtsprechung thematisiert. Unter BULGARIAN Law muss der Kläger beweisen, dass der Bereicherungsgegenstand aus seinem Vermögen stammt, an den Beklagten gelangt ist und dass die Bereicherung ohne Rechtsgrund erfolgte. Der Kläger muss dagegen nicht beweisen, irrtümlich geleistet zu haben (*Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 587); anders ist das nur, wenn er aus CC art. 56 (Irrtümliche Zahlung einer fremden Schuld) klagt. Auch im SLOVENIAN law muss der *solvens* alle Tatbestandsvoraussetzungen des LOA art. 190(1) beweisen. In den Fällen der Eingriffsbereicherung (der Versionsklage) muss der Entreicherte zusätzlich den Kausalzusammenhang zwischen der Bereicherung und dem Ereignis beweisen, aus dem sie nach seiner Behauptung herrührt (*Šinkovec and Tratar*, Obligacijski zakonik s komentarjem in sodno prakso, art. 190, p. 190).

44. Unter DUTCH CCP art. 150 trägt jede Partei die Beweislast für die tatsächlichen Voraussetzungen der von ihr geltend gemachten Rechtsfolge, sofern sich nicht ausnahmsweise aus besonderen Regeln oder aus Redlichkeit und Billigkeit (*redelijkheid en billijkheid*) etwas anderes ergibt. Daraus folgt, dass der Kläger alle Voraussetzungen des von ihm geltend gemachten Bereicherungsanspruchs beweisen muss, darunter auch die Bereicherung des Beklagten (HR 26 January 2001, NedJur 2002 no. 118 p. 905).

45. Auch in the NORDIC countries gilt das allgemeine Prinzip, wonach eine Person, die etwas unter dem Gesichtspunkt der *condictio indebiti* (bzw. der ungerechtfertigten Bereicherung) zurückfordert, die tatsächlichen Voraussetzungen für diesen Anspruch beweisen muss (SWEDISH HD 17 September 1999, NJA 1999, 575). Den genauen Rechtsgrund für den geltend gemachten Anspruch muss die klagende Partei jedoch nicht vortragen (HD 8 February, NJA 1993, 13; see also *Ravnkilde*, Betalningskorrektioner, 81, 90; *Roos*, JFT 1992, 75, 79).

Illustration 2 from CA Dresden 19 March 2007, WM 2007, 1023; **illustration 3** from BGH 31 October 1963, BGHZ 40, 272; **illustration 4** from BGH 25 June 1962, BGHZ 37, 258; **illustration 5** from *Irvine v. Talksport Ltd* [2003] EWCA Civ 423, [2003] 2 All ER 881; **illustration 6** from BGH 26 October 2006, WRP 2007, 83; **illustration 7** from BH 1997/87 (similarly BH 2005/401); and **illustration 9** from TS 23 March 2006, RAJ 2006 (2) no. 1824 p. 4347.

CHAPTER 2: WHEN ENRICHMENT UNJUSTIFIED

VII.–2:101: Circumstances in which an enrichment is unjustified

(1) An enrichment is unjustified unless:

(a) the enriched person is entitled as against the disadvantaged person to the enrichment by virtue of a contract or other juridical act, a court order or a rule of law; or

(b) the disadvantaged person consented freely and without error to the disadvantage.

(2) If the contract or other juridical act, court order or rule of law referred to in paragraph (1)(a) is void or avoided or otherwise rendered ineffective retrospectively, the enriched person is not entitled to the enrichment on that basis.

(3) However, the enriched person is to be regarded as entitled to an enrichment by virtue of a rule of law only if the policy of that rule is that the enriched person is to retain the value of the enrichment.

(4) An enrichment is also unjustified if:

(a) the disadvantaged person conferred it:

(i) for a purpose which is not achieved; or

(ii) with an expectation which is not realised;

(b) the enriched person knew of, or could reasonably be expected to know of, the purpose or expectation; and

(c) the enriched person accepted or could reasonably be assumed to have accepted that the enrichment must be reversed in such circumstances.

COMMENTS

A. Enrichments unjustified for want of legal basis or consent: para. (1)

Overview. This Article provides that an enrichment is unjustified unless one of two conditions is satisfied. An enrichment is justified if it is a benefit to which the enriched person was entitled (vis-à-vis the disadvantaged person) under a juridical act (such as a contract), a court order or a rule of law. Alternatively an enrichment is justified if the disadvantaged person has consented to the disadvantage, provided that consent is free and not based on error. VII.–2:103 (Consenting or performing freely) sets out the circumstances in which a disadvantaged person's consent is to be regarded as not having been given freely – namely, where it is affected by incapacity, fraud, threats or unfair exploitation.

Absence of legal basis, not unjust factors. This Article takes as a starting point the notion that an enrichment is unjustified unless one of two broad exceptions applies. By virtue of this provision any enrichment which is not supported either by some legal basis, such as a contractual right against the disadvantaged person, or by the disadvantaged person's consent, is regarded as unjustified. In other words, an enrichment is unjustified unless it is justified by a contract (or other juridical act) with the disadvantaged person or a court order or rule of law or the disadvantaged person's consent. There is therefore no catalogue of particular matters which trigger an absence of justification ('unjust factors'); such an approach takes the converse starting point that an enrichment is justified and looks to identify a reason for treating it otherwise.

Two alternative justifications. In order to constitute an "unjustified" enrichment both the exceptions in paragraphs (1)(a) and (1)(b) must be negated. Thus, despite the broad wording of paragraph (1)(a), an enrichment for which there is no legal basis will only be unjustified if the disadvantaged person did not confer the enrichment voluntarily or, if it was conferred voluntarily, this was induced by some mistake (e.g. as to the existence of a binding obligation to do so), fraud, threats, or the like vitiating factor. This ensures that a person who is *sui juris*, and who has conferred the enrichment in full awareness of the situation and free of imposition has no claim under this Book.

Effect of paragraph (2). Paragraph (1)(a) indicates the legal bases which justify an enrichment: (i) contract or other juridical act; (ii) court order; or (iii) rule of law. Para. (2) qualifies this notion of a legal basis. It makes it clear that there is a legal basis only if the juridical act, court order, or rule of law is valid. A juridical act, court order or rule of law which is void from the outset, or voidable and avoided, or in some other manner rendered ineffective retrospectively, does not establish a legal basis. Indeed it is precisely for cases such as these, where the contract is void and one or both of the parties perform their apparent obligations arising out of that contract, that the law of unjustified enrichment is intended to be applicable.

Effect of paragraph (3). An entitlement to an enrichment by virtue of a rule of law only constitutes a justification for the enrichment if that entitlement is more than merely formal – i.e. it is the policy of the law that the enriched person should have the benefit of and not merely the title to the enrichment.

Relationship to paragraph (4). Paragraph (4) expands the notion of what is meant by "unjustified" beyond those enrichments brought within the definition by paragraph (1). Paragraph (4) provides that if its requirements are met, an enrichment is also unjustified if it is conferred for a purpose which is not achieved or with an expectation which is not realised. Such enrichments are of course unjustified under paragraph (1) in any case if there was no legal basis for the enrichment. Paragraph (4) extends the notion of "unjustified" by including enrichments conferred for a failed purpose or a disappointed expectation even where there was a legal basis for the enrichment. If the restrictive conditions of paragraph (4) are satisfied, such enrichments are unjustified notwithstanding that they were provided by the disadvantaged person in performance of a contractual obligation owed to the enriched person.

Relationship to VII.–2:102 (Performance of obligation to third person). VII.–2:102 (Performance of obligation to third person) provides that enrichments conferred in or arising from the performance of an obligation owed to a third person are as a rule justified. This has the consequence that generally any claim under the law of unjustified enrichment will be against the other party to the (void) obligation. A claim against the actual recipient will as a rule fail. The disadvantaged person must instead direct the enrichment claim against the contractual partner.

Prestations by both parties. Where both parties to a contract which is of no effect have performed their apparent obligations under it, both prestations will be unjustified and accordingly both of the parties will ordinarily have individual claims to a reversal of the unjustified enrichment which their respective performance under the contract brought about. In such a case, of course, possibilities for set-off may arise, depending on the nature of the claims. Where a service is provided or assets are used in exchange for a payment, reversal of

the enrichment in receiving the service can necessarily only involve a money payment because the enrichment is of its nature not transferable (see VII.–5:102 (Non-transferable enrichment)), so that the possibility of set-off exists. This assumes that the liability in respect of the non-transferable enrichment is something other than the price paid, which in view of paragraph (3) of that later Article (establishing a minimum liability of the agreed price if the contract genuinely fixed the price for the enrichment) will not always be the case. If the contract is a genuine agreement (though void for technical reasons) and fully performed, and the enrichment on both sides is either money or non-transferable, the parties may ultimately be unaffected by enrichment law.

B. Justification under a contract or other juridical act

(a) General

Entitlement under a juridical act. Subject to the possible application of paragraph (4), an enrichment is justified under paragraph (1)(a) if the enriched person is entitled to it as against the disadvantaged person by virtue of a juridical act.

Juridical act. Juridical acts of relevance here are those which grant or oblige a party to provide some benefit or confer on the other party (or a third party) a right to that benefit. Besides contracts, this includes acts of assignment and the creation of trusts and testamentary dispositions. However, by far and away the most important type of juridical act in this context is a contract and the following comments clarify the operation of this rule primarily against that background.

(b) In particular: entitlement under a contract

General. If the parties have concluded a valid contract for the provision of goods or services, the contents of that contract will govern the recipient's liability in respect of the supply. The enrichment is justified by virtue of the contract and no question of liability under this Book arises. It is therefore not possible for a party to a valid contract to escape a bad bargain by contending that the other party is liable (e.g. to return the goods or to pay the higher market price for them) under enrichment law. Conversely, where the parties have not determined their affairs in advance by contract, there remains scope for the contention that an enrichment is unjustified.

> *Illustration 1 (see further illustration 45)*
> D, who has cohabited with E, claims recompense for expenses which D incurred in renovating E's property during the period of their cohabitation. The parties did not live together in a registered civil partnership and had not concluded any contract specifically regulating the financial aspects of their cohabitation; nor can their *de facto* domestic partnership be regarded as a form of contract of partnership, which presupposes an intention to undertake a profit-making venture in the nature of a business. While E consented to the renovation, an intention to enter into a legally binding arrangement on the part of D and E, who settled their affairs informally during their period of intimacy, is not discernible. Since E was not entitled to this benefit by virtue of any contract, D, who consented freely to the disadvantage and without error, may have a claim under this Book if D can establish that E's enrichment is unjustified under paragraph (4).

Valid concluded contract without a specific determination of the price. The principle that an enrichment provided by one party to another under a valid contract is justified applies even where the parties have not specifically determined the price of the goods or services to be supplied. Provided that the parties have reached a sufficient agreement so as to have concluded a valid contract, the recipient's liability will be governed by contract law which fills the gap left by the parties. Where the parties fail to agree a specific price, the rules of contract law imply an obligation to pay a reasonable price: II.–9:104 (Determination of price). Enrichment law will apply only where there is no valid contract. This may be the case because the parties still intend to agree a specific price between themselves. Indeed, more generally, the absence of an agreement on price may be a sign that the parties are still negotiating. Thus the borderline between contract and enrichment law is between a concluded contract on the one hand and, on the other hand, an absence of agreement or an incomplete agreement falling short of a valid contract. If the contract is valid, it is immaterial whether its contents have been expressly agreed or must be filled out by resort to legal rules or implied terms.

Illustration 2
E commissions D, a joiner, to undertake work on repairing an attic. It is agreed that the work should be completed within an extremely tight time frame. Although it is understood that the professional work will be remunerated, nothing is explicitly agreed about the price. D completes the work. D has a claim in contract law, and not under this Book, for a reasonable price for the work done. Since the parties intended to be legally bound and that E would pay D for the work, D and E concluded a valid contract. Where the parties fail to agree a specific price, the rules of contract law imply an obligation to pay a reasonable price: II.–9:104 (Determination of price). The reasonable price for the work takes account of the terms under which the service was provided – i.e. the "added value" which D provided by completing the job within a narrow time frame.

Partial invalidity. Where an enrichment is obtained as a result of a contractual right and that right is effective only in part, the enrichment will be justified under this Article only in so far as the right is valid and it will be unjustified in accordance with this Article to the extent of the invalidity. Hence goods or services supplied under a partially void or avoided contract will be a justified enrichment so far as supported by the valid part of the contract and otherwise unjustified.

Illustration 3
The lease between L and T contains a provision apparently conferring on the landlord L the right to increase the rent due from the tenant T. L makes use of this apparent right on several occasions and T pays the increased rent. Under the law governing the lease the rent adjustment clause is void. Since the validity of the contract is otherwise unaffected, the enrichment of L is justified as regards the sums which were due as rent under the original terms of the lease, but is not justified as regards the additional sums paid over and above that on the basis of the supposed rent increase.

Illustration 4
D obtains a loan from E of € 20,000. € 35,000, representing principal, interest and a penalty for early re-payment, is repaid. D subsequently succeeds in obtaining a court order determining that interest and the penalty for early re-payment together constituted an extortion and reduces the sum due under the contract to € 28,000. To this extent D's repayment to E is justified. E's enrichment is not justified to the extent

of the residual € 7,000 which was paid in respect of a contractual right which retrospectively was without effect.

Entitlements not specifically enforceable. Provided there is a valid juridical act, it is immaterial whether the obligation to provide the enrichment which arises under the juridical act (or the corresponding right to have the enrichment conferred) is specifically enforceable in the particular circumstances of the case.

Unenforceable entitlements. The same applies even where the entitlement, though legally recognised and valid, is not capable of producing legal sanctions in the event of a default – in other words, there is not even a right to compensation for non-performance. An entitlement which is entirely unenforceable – that is to say, a right to the enrichment which the creditor cannot enforce because the debtor is entitled to refuse performance – is nonetheless an entitlement within the sense of this article if in the eyes of the law the right arising from the juridical act is legal in nature and more than a merely moral claim. A material distinction is thus between cases where the debtor's obligation under the juridical act has determined or expired before performance (in which case there is no entitlement at the time of performance) and cases where the creditor is merely precluded from suing for performance (in which case there is a subsisting entitlement at the time of performance).

Performance not yet due. An enrichment conferred by a premature performance of an obligation under a contract – that is to say, a tender of performance of the debtor's contractual obligation before performance is actually due – may nonetheless be an enrichment to which the enriched person is entitled by virtue of the contract. This will be the case where the creditor actively accepts early performance or is not entitled to refuse it. That the creditor could not compel performance until performance became due is immaterial since paragraph (1) justifies enrichments obtained as a result of the performance of obligations which are not enforceable. Any enrichment which accrues to the creditor from the fact that performance is undertaken before it was due is in principle justified under this Book. Of course the juridical act itself may make provision for the legal consequences of early performance.

Illustration 5
Company D employs E as its agent to acquire nuts and bolts of various types for use in D's manufacturing business. Under the terms of their agreement D is to place E in funds necessary to make the required acquisitions by the 16th of each calendar month. Following a change in its banking arrangements, D transfers the necessary funds on the 1st, rather than the 15th of each month, as it had previously invariably done. Transfer of the funds was not due until the 15th. However, as acceptance of funds before they are due will not prejudice E's interests, E must accept D's performance before it is due (III.–2:103 (Early performance)). Premature payment was therefore a performance of D's obligation to place E in funds by the 15th. The benefit which flows to E from early payment (such as any interest accruing on the deposit in the period between receipt and onward transmission) is an enrichment resulting from D's (premature, but accepted) discharge of an obligation under the juridical act. The enrichment is justified as against D by virtue of the contract between them. There is no liability under this Book. Any obligation of E to account to D for interest will depend on an express or implied term of the agreement between them imposing on E an obligation to account for the benefit of funds paid in advance and will be contractual. A right to recover under contractual rules is unaffected by this Book: see VII.–7:101 (Other private law rights to recover).

Obligation to suffer another's enjoyment. No distinction is drawn between enrichments resulting from an active performance and those resulting from the discharge of obligations to remain passive. In both cases the creditor has an entitlement to the benefit of the enrichment: whether the enrichment is to be conferred by the debtor or taken by the creditor (the debtor being obliged to suffer the creditor's interference) is immaterial.

Illustration 6
D leases a flat to E. The terms of the lease include permission to sub-let. E makes use of this right to sub-let. D has no claim against E under this Book because E is merely exercising rights conferred by D under a valid contract. Indeed, quite aside from this justification, the effect under property law rules of the contract of lease granting the right to occupy or sub-let D's flat may be such that when E sub-lets he can be seen to be making use of his own assets and is not enriched at D's expense at all.

Illustration 7
D pawns jewels with E, a pawnbroker. E is entitled under the terms of the pledge to retain the jewels until the money borrowed by D is repaid with interest and to sell them in the event that D fails to discharge her debt of repayment by an agreed redemption date out of the proceeds of sale. Retention and disposal of the jewels (and retention of the relevant amount of the proceeds of sale) in accordance with the terms of the pledge are enrichments to which E is entitled under the contract of pledge.

Performance as condition of another's liability. Entitlement by virtue of a contract extends to the case where a person is admittedly not obliged to render a performance, but does so in order to render another liable to confer some benefit. This situation arises, for example, where a contract binds one party only when the other does some act or omits to do some act but does not oblige the other party to do or not to do the act (a so-called unilateral contract). The significant aspect of the transaction for present purposes is that the promisee is not bound to fulfil the condition of the promise, although doing so will thereby render the promise unconditionally binding: the performance rendered by the promisee remains one which the promisee was never bound to undertake. At the same time, the behaviour of the promisee, which the other party's promise has induced, may well enrich the promisor – for example, it may amount to the rendering of a service. Such enrichments are nonetheless to be regarded as coming within the notion of enrichments to which the promisor is entitled by virtue of a contract, even though the person performing was not bound to do so.

Illustration 8
E hangs up in a local supermarket a poster on which E offers a specified reward to anyone finding and returning a dog of hers which has strayed. D sees the poster. He subsequently finds the dog and returns it to E. E has obtained a justified enrichment. However, D has a contractual claim against E based on the offer of the reward accepted by actings. (If the case is analysed as a unilateral binding promise rather than a contract the result is the same because of the reference in the Article to "other juridical act").

Illustration 9
E, a home owner, negotiates with D, an estate agent, with a view to D's assistance in finding a buyer for E's home. It is agreed between the parties that D is not bound to make any effort to find a buyer, but if D should do so E is to pay a commission based

on a specified percentage of the purchase price. D subsequently advertises the property and is contacted by an interested purchaser to whom E's property is sold as a result. E's enrichment in the form of the service rendered by D is justified. D's claim against E is contractual, based on the terms of the agreement between them.

Rationale. For the purposes of enrichment law at least, the case is functionally one of or comparable to performance of a contractual obligation and ought to be assimilated to any (other) performances under a contract. The policy of confining the parties to a valid contract to the rewards (and risks) envisaged by the terms of the contractual agreement applies to such a promise as much as to a typical bilateral contract. If the promisee has been prompted to act by the promise of reward held out to it by the other party and rendered binding by the promisee undertaking the required condition, it is unnecessary - and would be improper – to superimpose an entitlement to recompense under the law of unjustified enrichment. The promisee's redress must be the enforcement of the promise. A promisee who has misjudged the arduousness of the task to be rendered or the meagreness of the reward offered ought not to be entitled to more (for example, the actual value of the service provided). The same holds where the promisee commences to fulfil, but fails fully to fulfil, the condition set out in the promise: the promisee ought to bear the risk of failure in view of the promisee's free decision to gamble the promise of reward against the burden of discharging the condition of the promise. In such cases the principles which apply to incomplete performance of an entire contractual obligation ought correspondingly to apply to the incomplete venture to render a unilateral promise binding.

Illustration 10
E, a manufacturer of drinks and confectionery, advertises a competition for advertising slogans for its latest product, Slosh. A prize of € 1,000 is offered to the winning entrant composing the most innovative slogan. It is a term of the offer that competitors agree to E using their slogans in publicity for the product. D, the winning competitor, produces a slogan which is used by E worldwide in its marketing for Slosh with recognised success. D cannot claim more than the contractually agreed € 1,000 even though D has rendered a service to E worth considerably more than € 1,000. Notwithstanding that D was not obliged to produce a slogan, E's enrichment is one to which E was entitled by virtue of the contract concluded between them.

(c) Scope of the entitlement

Justification as to part of enrichment only. Where the enrichment conferred is above and beyond that which was dictated by the terms of the juridical act, the entitlement under the juridical act extends only to part of the enrichment. Accordingly the enrichment is justified only as to part, the excess being unjustified and a liability to reverse the enrichment may arise unless the matter is regulated by contract.

Illustration 11
D is contractually obliged to E to pay € 500 and arranges for a bank payment to discharge this debt. As a result of a mistake for which D alone is responsible, D instructs her bank to transfer € 5,000 to E's bank account. As D was obliged to pay to E € 500, the enrichment is justified to this extent. The balance of € 4,500 is unjustified under this Article.

Incomplete performance. Conversely, a person does not cease to be entitled to an enrichment merely because the enriched person is entitled to much more. A case in point is

the incomplete performance by one party of an obligation. Where the enrichment results from a tender of performance which, so far as it goes, conforms to the contract, it will be covered by the entitlement and a justified enrichment, even though a completion of the performance is outstanding. It does not matter whether the obligation is discharged *pro tanto* or is an entire and indivisible obligation, discharged only when the performance is complete. The latter case is where one party fails to completely discharge the obligations, but has nonetheless enriched the other party to the contract by the partial performance, the non-performance of the outstanding remainder is not excused and the right to a counter-performance is contingent on a complete discharge of the obligations under the contract. If there is no termination of the contract by the enriched party in view of the other party's non-performance, the enrichment conferred does not give rise to an obligation to give recompense. This will rarely be unjust because (i) the usual remedy for the disadvantaged party will be simply to complete the work and claim the agreed reward for the complete performance of the contractual obligation and (iii) in cases where further performance is no longer possible and the risk of frustration was not the disadvantaged person's, obligations under the contract are automatically extinguished under III.–3:104 (Excuse due to an impediment) paragraph (4) (applicable where the impediment is "permanent"), and in that case the disadvantaged person is entitled to a reversal of the benefit conferred under the rules in III.–5:111 (Right or authorityto assign) to III.–5:115 (Rights transferred to assignee).

Illustration 12
D, a building firm, contracts with E, a property developer, to construct a luxury block of flats for a fixed price payable on completion. After excavation work on the land and constructing the foundations, D realises that it has seriously underestimated its costs and that the contract is no longer economic for it. As E refuses to renegotiate the contract, D stops building. Although this work has not discharged the obligation to construct the building, it was nonetheless something to which E was entitled under the contract. Accordingly E has obtained a justified enrichment.

Illustration 13
E, the owner of a mansion, commissions D, an internationally renowned artist, to paint a mural on one of the internal walls of the building. It is a term of the contract that the wall will be painted by no one other than D (see III.–2:107 (Performance by a third person) paragraph (1)) and that the agreed remuneration will be paid only when the painting is complete according to the agreed design. After starting work but before completion, D dies as a result of self-induced intoxication. As the impediment to completion is the result of D's own misadventure and not due to matters outside D's control, the failure to finish painting is not excused (see III.–3:104 (Excuse due to an impediment) paragraph (1)). D's successors have no claim under the law of unjustified enrichment for a payment of the value of the incomplete painting since D conferred the enrichment on E under a valid contract and the enrichment is accordingly justified.

Role of good faith in extreme cases. There may be extreme cases in which the benefit conferred is very substantial and the outstanding performance disproportionately small. If in such circumstances it is unjust for one party to take the benefit and rely on the fact that counter-performance is not due (because there has not been complete performance), there could be a breach of the party's duty to act in accordance with good faith and fair dealing (III.–1:103 (Good faith and fair dealing)) if the enriched party insists on the absence of a contractual obligation to provide recompense for the partial performance received. There may be said to be a failure to do what good faith and fair dealing requires in the circumstances of

the case in the enriched party's refusal to renegotiate the terms of the contract. In this way contract law caters adequately for any extreme case.

Deviations from contractual terms. Since justification of the enrichment depends upon an entitlement under the contract, an enrichment is as a rule unjustified if it falls outside the scope of the entitlement. Hence, for example, where a contractual performance tendered is outside the four corners of the contract (e.g. because the party tendering has made a fundamental mistake as to what was required) so that what the enriched person has received is not what was due, this Article regards the enrichment as unjustified. However, where in such a case the rules governing the juridical act regulate or oust a claim to restitution – and this is particularly the case where one party's performance of contractual obligations is not tangential and is merely sub-standard, where the exclusion of a right to restitution may be implicit in the fact that a party is confined to other remedies (e.g. repair) – those rules take priority. See VII.–7:101 (Other private law rights to recover) paragraph (3).

(d) Validity of the juridical act

General. A legal basis for an enrichment – an entitlement to the enrichment based on a juridical act – depends on the validity of the juridical act. Only if the juridical act is valid is it capable by itself of supporting an entitlement to an enrichment and providing a ground of legal justification for the enrichment. A requirement that the juridical act be valid is not expressly spelled out in the wording of paragraph (1)(a). The principle is indicated by pointing out the opposite: that there is no entitlement and no justification for the enrichment where the contract is void or avoided or is otherwise rendered ineffective with retrospective effect: see paragraph (2).

Valid contracts. The existence of the valid contract provides a justification for the enrichments which arise out of it. Hence, where an enrichment is conferred by one party on another as a result of the due performance of an unimpeachable valid contract, there can be no claim under the law of unjustified enrichment (for a return of the benefit conferred or payment of its value).

Rationale. Since this rule excludes an "absence of justification" and so denies an essential element of the enrichment claim, the rule has the effect (from a functional point of view) of excluding the application of the law of unjustified enrichment to the consequences of a proper performance of a valid contract. This is compelled by the policy consideration that parties to a legally binding agreement should be confined to the contractually agreed rewards for their performances. The point is of significance where a party has sold for too little and the agreed reward is less than the real market value of a performance: parties in such a case should not be entitled to escape a (legally binding) bargain to pursue a more lucrative claim under the law of unjustified enrichment.

Illustration 14

D concludes a contract with E for the sale of 1,000 tonnes of thermal coal at an agreed price of $75 per tonne. At the time stipulated for delivery to E, the prevailing market price of thermal coal has risen to $98 per tonne. As a result, E will make an economic gain under this transaction of $23,000 and D will make a corresponding economic loss. D delivers the coal. D has a contractual claim for payment of the agreed price. However, although E has made a gain at D's expense, D has no claim under the law of unjustified enrichment (either for return of the coal or payment of its current market

value). E's acquisition of the coal is an enrichment to which E is entitled from D under the contract of sale.

In particular: matters not affecting the validity of the contract. In particular, if the enriched person is entitled to the enrichment under a contract which is valid (or voidable, but not avoided), the existence of matters such as a mistake, fraud, threat, or the like, are irrelevant. Such matters are relevant within the terms of the law governing the juridical act (i.e. contract law) in determining whether or not the contract or other juridical act is valid and accordingly whether the enrichment is justified. A mistake or fraud inducing a contract, for example, will not establish a right under this Book to a reversal of an enrichment conferred in performance of that contract if the mistake or fraud is not sufficient to establish a right to avoid the contract or if the right to avoid is not exercised. If, despite some factor undermining the consent of one or more of the parties to it, the contract remains valid, the enrichment will be justified, subject to paragraph (4), and there will be no liability under this Book.

Illustration 15
D, a property developing company, concludes a contract with E, an owner of vacant land, to purchase a large greenfield site for the development of luxury housing. From reports in the local press E, but not D, is aware that in future years there may be a risk of increased noise pollution at this site as permission has been granted for expanded use of a nearby airfield. Quite how dramatic that risk would be is, however, difficult to assess. The purchase price is within the range of possible prices a vendor might reasonably hope for from a purchaser with knowledge of this imprecise risk. Since E was not aware and could not reasonably be expected to have been aware that D lacked this public knowledge, the contract is not voidable (II.–7:201 (Mistake) paragraph (2)). D cannot demand a repayment of all or any of the purchase price paid to E on the ground that it would not have entered into the contract or not have entered into it at that price if it had been told of the airfield's permission. The enrichment is justified.

Illustration 16
Shortly before his niece's wedding, D promises to make a donation of € 20,000 to his niece, E, as a wedding present. After fulfilling his promise, D discovers that the man his niece has married is a wealthy property tycoon. Had he known of the bridegroom's affluence at the time, D would not have made a gift of the money. It is supposed, for present purposes, that the binding nature of D's promise of a donation was not vitiated by D's mistaken assumption as to the financial position of E's future husband: the risk of such a mistake was assumed by D since he failed to inquire as to the financial position of the future bride and groom before making his promise: cf. II.–7:201 (Mistake) paragraph (2). As D is not entitled to avoid the promise to make a gift, the payment is justified as E had an entitlement to it by virtue of a juridical act. This is unaffected by the fact that E obtained the money from D because D parted with it while labouring under a mistake. The mistake did not affect the validity of the promise.

In particular: donations. Where an enrichment is conferred by one party on another as an unimpeachable donation, the enrichment is justified and there is no possibility of a claim under the law of unjustified enrichment (whether for a return of the benefit conferred or payment of its value). Just as enrichment law cannot be used by one party to defeat a valid onerous contract which that party regards as a bad bargain, so the law of unjustified enrichment cannot be invoked to unwind a valid but regretted donation.

Illustration 17
D makes a gift to E of a large shareholding in a family company. D is subsequently disappointed by E's lack of business enterprise and regrets the gift, but cannot avoid the donation on grounds of mistake or on grounds of changed circumstances. D has no right under this Book to demand a reversal of E's enrichment. E has obtained the enrichment under a gift from D and accordingly it is justified by virtue of E's entitlement as against D under that juridical act.

Illustration 18
In order to avoid anticipated inheritance taxation, D, an elderly person, decides to make a gift of certain investments to his son, X, and his son's wife, E, jointly instead of leaving the property to them in his will. After D has made the gift, the relationship between X and E deteriorates and later ends in divorce. As part of the divorce settlement between the parties, X retains a one-third, E a two-third share in the investments. D regrets the gift, in view of the changed circumstances, so far as it relates to E's benefit. Nonetheless, the risk of such an outcome was assumed by D and thus D cannot revoke the donation. D has no claim under this Book against E if the continuance of the marriage between the donees was not a condition of the gift.

Voidable contracts not avoided. A contract which might be avoided, but which has not been, continues to have full effect, entitles each party to the performance due from the other party and provides a legal justification for the enrichments so conferred – notwithstanding that the contract might have been avoided. (This follows by implication *e contrario* from paragraph (2), which indicates that a person is not entitled if the juridical act is avoided.) Thus an enrichment obtained as a result of the other party's performance of obligations under a contract which is voidable but which is not in fact avoided is justified. This might be the case, for example, where a right to avoid the contract is lost by affirming it under II.–7:211 (Confirmation). Such contracts fall to be treated like any other contract which remains valid and fully operative. The contract remains valid for all purposes and the fact that a party may have other contractual remedies to obtain redress for being induced to conclude the contract, such as a right to damages under II.–7:214 (Damages for loss), is irrelevant here. The crucial fact is that the contract is not impeached and continues to subsist.

Rights to withhold performance. A juridical act supports an entitlement to an enrichment even though the performing party had (but did not exercise) a right to withhold performance. As in the case of a right to avoid a contract, the fact that a person bound by an obligation had a right to withhold performance will not render unjustified an enrichment which the person confers pursuant to a juridical act; the existence of the right (which one party fails to exercise) does not deprive the other party of the entitlement under the contract.

Illustration 19
D, an owner of shares, agrees to sell them to E. It is a term of the contract that transfer and payment are to be simultaneous. E fails to pay the purchase price on the agreed day, but assures D that he will pay soon. Notwithstanding that D has a right to withhold performance under III.–3:401 (Right to withhold performance of reciprocal obligation), D transfers the shares to E. D has no right to reclaim the shares under this Book. D's enrichment of E is justified: E's entitlement under the (valid) contract of sale to a transfer of the shares did not cease to exist merely because D had a right to withhold performance. Any right to a return of the shares will arise under contract law

from an exercise by D of a right to terminate the contractual relationship for E's non-performance in a continued failure to pay.

Unenforceable (but valid) contractual obligations. Hence another case where liability in respect of an enrichment will be excluded under this Book because the enrichment is justified by reason of the recipient's entitlement under a valid juridical act is where legal rules provide that in given circumstances a contract is valid but unenforceable. The effect is to allow parties to perform their agreement and to prevent recovery of enrichments conferred. That this may result in a windfall benefit is a matter of legislative policy: the absence of a restitutionary claim is intended to provide an incentive to shun conclusion of a contract which will be rendered unenforceable by mandatory rules.

Illustration 20
As a result of X's negligence, E's car is damaged. While the car is being repaired, E hires a car from D. It is agreed that payment of hire charges will not be due until E takes legal action against X to recover compensation. Under the applicable national consumer credit legislation, the agreement to postpone payment of the hire charges constitutes a provision of consumer credit and the hire contract is unenforceable for want of compliance with prescribed formalities. As the contract for use of the car is valid, though unenforceable, D was obliged to make the car available for E's use (though D was entitled to refuse performance). Consequently E's use of the car is an enrichment to which E was entitled under a valid (though unenforceable) contract. E's enrichment is accordingly justified. E is therefore not liable under the law of unjustified enrichment to pay to D a reasonable fee for the use of the car. That D is not able to enforce the contractual right to the agreed counter-performance does not render the enrichment unjustified. This is a matter of policy, rooted in the unenforceability of the agreement. For the like reason the enrichment is not unjustified by virtue of paragraph (4): E, who is to have the benefit of the protection of consumer credit legislation, is to not be regarded as having accepted the enrichment must be reversed in these circumstances for the purposes of sub-paragraph (c) of that paragraph.

Satisfaction of claims subject to prescription. Another case where the existence (but non-exercise) of a right to withhold performance does not affect the underlying validity of the juridical act (and correspondingly the enriched person's entitlement to the enrichment conferred) is that of prescription. Under the rules governing extinctive prescription the creditor's right to claim performance is lost by failing to assert it within time (see DCFR Book III Chapter 7). The effect of prescription is not to extinguish the obligation, but merely to entitle the debtor to refuse performance (III.–7:501 (General effect)). The fact that the creditor's right to claim performance of an obligation is time-barred does not deny its enduring existence since prescription only affects its enforceability. An enrichment which is obtained by a creditor as a result of the debtor's voluntary performance of a time-barred claim is therefore a justified enrichment. This rule gives effect to the principle in III.–7:501 (General effect) paragraph (2) that a debtor cannot reclaim a performance simply because it is rendered after the period of prescription has expired.

Illustration 21
D, an events organiser, owes E, a hotel, outstanding sums in respect of accommodation provided to D's clients. After the period of prescription has expired, D responds to a further "final" demand of E's for payment. D cannot reclaim the payment from E. The money has been transferred in performance of a valid

contractual obligation, albeit that at the time of performance E's right ceased to be enforceable because prescription entitled D to refuse performance.

Obligations ceasing to have effect for the future only. Where, after an enrichment has been conferred, the juridical act conferring the entitlement to the enrichment ceases to have effect, but (unlike avoidance of a contract) the juridical act does not cease to have effect retrospectively, the enrichment remains justified by virtue of the entitlement under the juridical act. The juridical act has only ceased to have effect for the future. Thus, while a debtor of an outstanding obligation is no longer obliged to perform, a debtor who has performed before the obligation ceased to have effect is still regarded as having performed a valid obligation. Precisely because the right to the enrichment remains intact as regards the past, the enrichment conferred in performance of the juridical act before it ceased to have effect for the future is regarded as a justified enrichment under these rules. (This follows by *e contrario* reasoning from paragraph (2), which provides that there is no entitlement if the juridical act is retrospectively without effect.) This state of affairs invariably arises in the context of a relationship whose ramifications are to be unwound, if at all, in the special context of that legal relationship. Whatever rights to reversal of enrichment there ought to be will be provided for by the rules governing that relationship. Those rules would not have sliced the effectiveness of the juridical act on a temporal plane (past – effective; future – ineffective) without special cause and without regard to the ramifications. Either there will be a special regime for reversal of benefits or a deliberate policy to leave past benefits where they are. In either case it will be those rules which will determine whether there are rights to recover benefits and, if so, what those rights entail. This Book does not disturb those rights: see further VII.–7:101 (Other private law rights to recover) paragraph (3). Cases in point are termination of a contractual relationship and withdrawal from or revocation of contracts or other juridical acts.

Void juridical acts. Turning to instances where the juridical act is without effect so that no entitlement to the enrichment can subsist under paragraph (1), a first obvious case is where the juridical is void *ab initio*. This is provided for expressly in the wording of paragraph (2). Subject to the other rules of this Book (and in particular the protection of third parties to the transaction under the following Article), the enrichment is unjustified and the other party to the transaction will be liable to reverse that enrichment. This principle applies regardless of the ground of invalidity; it is sufficient that an agreement is for some reason void as a contract.

Grounds of invalidity of contracts. Reasons why a contract may be void are not to be found in the law of unjustified enrichment. These are a matter of contract law, both in the general principles of contract law and in the specific rules governing particular types of contract. One reason might be non-compliance with an essential formality requirement. While there is in general no requirement of form for a contract according to these rules (II.–1:106 (Form)), rules relating to specific contracts may, by way of exception, introduce such rules (see, for example, IV.G.–4:104 (Form)). Equally a contract may be void as a result of rules governing illegality or the capacity of a party. The latter is relevant not merely to natural persons who are minors or who lack sufficient mental capacity to act, but also to legal persons in so far as the law provides that a transaction beyond its powers is without effect for want of capacity to undertake it.

Voidable juridical acts which are avoided. In accordance with paragraph (2), there is no entitlement under a juridical act to an enrichment if that juridical act is avoided with

retrospective effect. For the purposes of enrichment law, an initial validity which retrospectively is inoperable is disregarded. The paragraph makes explicit the proposition that an enrichment is not justified merely because an entitlement to it subsisted at the time it was conferred if, retrospectively, the entitlement is annulled.

Illustration 22
D, a collector of a particular model of cars, negotiates with E for the purchase of a used motor car. He asks E, the owner, which original parts have been replaced and E assures him that only tyres, certain cables and peripheral parts have been changed. In fact, as E knows and has deliberately concealed, several cylinders, some panelling and both wheel axles have been substituted. Taking into account what E has told him, D agrees to buy the car for € 32,000, though he would not have bought the car had he known the truth. D later discovers the truth and gives E notice of avoidance of the contract based on E's fraud, returning the car. E's enrichment (receipt of money) is unjustified under this Article. The fact that at the time of enrichment (from the standpoint of that moment in time) D was obliged to pay does not render the payment a justified enrichment because the right to payment was annulled with retrospective effect.

Grounds of avoidance of contracts. Grounds of avoidance of contracts are not to be found in the law of unjustified enrichment. These too are a matter of contract law. Basic and generally applicable grounds of avoidance of contracts and other juridical acts are to be found in DCFR Book II Chapter 7 (Grounds of invalidity). There are also specific grounds for the avoidance of specific contracts. For example, a guarantor has a right to avoid a personal security granted after the creditor has breached a pre-contractual duty to inform the guarantor: IV.G.–4:103 (Creditor's pre-contractual duties) paragraph (3).

Exercise of right to avoid and failure to avoid a contract. An enrichment can only be unjustified under this paragraph if the entitlement to the enrichment is in fact avoided. As already indicated, the fact that the disadvantaged person is or was entitled to set the obligation aside will not suffice to render the enrichment unjustified: the bare existence (past or present) of a right of avoidance is not enough. The right must have been exercised. An exercise of the right of avoidance will require the disadvantaged person to give notice of avoidance to the other party to the contract (who need not necessarily be the enriched person) (II.–7:209 (Notice of avoidance)) unless the parties have agreed a more liberal mechanism for avoidance (II.–1:102 (Party autonomy)). The right of avoidance may be lost due to lapse of time (II.–7:210 (Time)) or confirmation of the contract (II.–7:212 (Effects of avoidance) paragraph (2)) or (which may amount to an implied confirmation) pursuit of the alternative remedy of damages for non-performance by the other party (non-accumulation of these remedies being implicit in II.–7:216 (Overlapping remedies)).

Juridical acts otherwise rendered ineffective retrospectively. Avoidance of a contract is not the only manner in which a contract may become ineffective with retrospective effect. The notion of a juridical act "without effect" in this sense extends to any case where legal rules dictate that a juridical act assessed from the standpoint of the time of its creation as valid is rendered of no effect back-dated to the time of creation. A case in point might be where parties to a contract agree that the effect of a given condition being fulfilled is to render their agreement null and void from the outset. A contractually agreed retrospective effect of a resolutive condition might fall within paragraph (2) – with the consequence that an enrichment obtained by one party is unjustified in relation to the party which provided it. Of

course in such cases it is possible that what is agreed is not that the contract is of no effect, but rather that there is a (contractual) right to a return of benefits conferred. In that case there is a mere modification of the obligations under a contract (from counter-performance to restitution) in the same manner as termination of a contractual relationship: the contract remains valid, but the terms of the obligations are transformed. If that is so, the enrichments resulting from prior performances remain justified because the contract is not "without effect". The matter is one of contract law and enrichment law does not come into play.

Illegal contracts which are without effect. Particular care is required in relation to enrichments conferred pursuant to contracts which are vitiated by illegality. II.–7:301 (Contracts infringing fundamental principles) and II.–7:302 (Contracts infringing mandatory rules) set out a range of possible effects on the validity of a contract, depending on the particular illegality in question. Where the contract is declared to have been of no effect – that is to say, the contract is regarded as having been void *ab initio* – the reasoning set out above regarding void contracts applies. This is the situation with respect to contracts contrary to principles recognised as fundamental to the laws of the Member States of the EU: see II.–7:301 (Contracts infringing fundamental principles). If, at the other extreme, the contract is declared to have full effect, there is no difficulty: this is simply a valid contract and the enrichments resulting from a due performance of the contract will be justified on the basis of an entitlement to the enrichment under a valid juridical act. Where the contract is merely declared to be modified, there is no retrospective ineffectiveness and the contract is not "without effect". The enrichments arising from performance of the contract will again be justified accordingly. Any right to reversal of such enrichments – for example because a right to a counter-performance is converted by considerations of public policy into a right to restitution – will be governed entirely by contract law. The same holds where the contract has partial effect in the sense that it gives rise to an obligation but no corresponding right to performance: this is merely a particular case of an unenforceable obligation where the debtor has a right to refuse performance. A further possibility is that the contract vitiated by illegality is in effect voidable, since it may be impeached by only one party (the party for whose protection the rule on illegality exists). In that case the situation is the same as for contracts voidable on any other basis.

Suspensive conditions not fulfilled. A juridical act may be created on the basis that it is subject to a suspensive condition – in other words, it is conditional upon the occurrence of an uncertain future event so that the rights and obligations take effect only if the event occurs: see III.–1:106 (Conditional rights and obligations) paragraph (1). Usually some period of time – either a fixed or ascertainable period or, if no particular definite or indefinite period is envisaged, a reasonable period of time whose parameters are determined by the nature of the condition or policy considerations – is prescribed by the parties or legal rules as the period during which the condition must be satisfied in order for the rights and obligations to take effect. At some stage it will emerge that a condition which has hitherto not been fulfilled is no longer capable of fulfilment. Where for any reason the condition cannot be fulfilled (that is to say, a party may treat the condition as not having been fulfilled (see III.–1:106(4)) or has become impossible of fulfilment, the conditional right can no longer become binding. Any enrichment which has been obtained by performance of the corresponding conditional obligation while it was in suspense and before it irretrievably failed to become binding is to be regarded, in accordance with paragraph (2), as an enrichment obtained as a result of a juridical act which is without effect. The benefit received by the other party to the contract is without justification.

Illustration 23
D sends to E1 and E2 a wedding present in view of their prospective marriage. On the eve of the wedding the relationship between E1 and E2 irretrievably breaks down when E2 discovers E1 has been concurrently involved with another woman. The wedding is cancelled. D's gift was expressly or impliedly subject to the suspensive condition that E1 and E2 were to marry. Accordingly D's gift is without effect. The enrichment of E1 and E2 by D is unjustified. D can demand a return of the present.

(e) Entitlement as against the disadvantaged person

Entitlement as against third party insufficient. In order for an enrichment to be justified it is essential that the entitlement to the enrichment is an entitlement against the disadvantaged person. An enrichment is not justified merely because the enriched person has contracted for it if the contract is not with the disadvantaged person. Where, for example, funds are mistakenly credited to a wrong bank account, the account holder's enrichment is not justified in relation to the transferor or depositor of the money merely because the account holder is entitled to the sum as against the account holder's banker.

Protection of persons dealing with non-entitled third parties in good faith. However, an enriched person who has paid a third party in good faith for the benefit received is deserving of protection. Moreover, there is a public interest in the commercial circulation of property, which is impeded where an acquirer in good faith cannot rely on the apparent 'title' of a seller of goods of services. This consideration is taken care of in two ways under this Book. Firstly, there may be an entitlement to the enrichment by virtue of a rule of law (as to which, see below). Secondly, VII.–6:102 (Juridical acts in good faith with third parties) makes provision for cases where the enriched person is an innocent party deserving of complete exculpation from unjustified enrichment liability by virtue of dealings for value and in good faith with a third party. Finally, in any case to which that defence is not available (e.g. because the enriched person has not paid a third party in order to receive the benefit), good faith may nonetheless operate to limit liability, either on the basis of the defence of a change of position under VII.–6:101 (Disenrichment) or even where the third party has not made any countervailing outlay if the enrichment can only be reversed by a monetary payment (on the basis of VII.–5:102 (Non-transferable enrichment)).

Illustration 24
X, a caretaker of a building employed by D, lets out a vacant flat rent-free to a friend E. E was unaware that X did not have the authority of his employer to let out the flat. D claims rent from E for the period of her occupation of the flat. E's enrichment is not the result of any entitlement against D, since in so far as he purported to let out the flat on D's behalf or with its permission X, who had only custody of the flat, acted with neither express, implied nor apparent authority. E's enrichment is justified as against X, but this does not justify the enrichment in relation to D. However, what, if anything, E is liable to pay D in reversal of the unjustified enrichment will depend on the application of VII.–5:102 (Non-transferable enrichment).

Illustration 25
E, a butcher, purchases pork from X, which (unknown to E) has been stolen from D's supermarket. The pork is rendered into sausages and sold to E's customers. Under the governing property law, since the pork was stolen, E acquired no property in the meat under the contract of purchase with X, but acquired ownership (and was correspondingly enriched by an increase in assets) as a result of processing the meat

and rendering it into sausages. However, since E was not entitled to this enrichment as against D it is unjustified in relation to D. The fact that E transacted with X in respect of the meat does not justify E's enrichment, but may enable E to establish the defence under VII.–6:102 (Juridical acts in good faith with third parties).

Discharge of one solidary debtor by another. A particular case where the satisfaction of one person's entitlement may enrich another who is not entitled to the enrichment is where one solidary debtor discharges more than its share of the debt. That situation can arise because, as against the creditor, each solidary debtor is bound to render the performance in full (see III.–4:102 (Solidary, divided and joint obligations) paragraph (1)). If the creditor obtains performance from one of a plurality of solidary debtors, the entire debt is discharged. The creditor's enrichment is justified in accordance with this Article because of the entitlement to payment in full from any of the debtors. However, the same is not true of the enrichment of the co-debtors, whose share of the debt has been discharged by the performing debtor: the discharge of their liability to the mutual creditor is not justified by any entitlement in the sense of paragraph (1)(a) because no debtor has a right against the co-debtors for payment of that debtor's share; in the internal relationship between the co-debtors, each is liable for the appropriate share. An entitlement to contribution is provided for within the law governing the internal relationship of solidary debtors set out in Book III Chapter 4 – specifically under III.–4:107 (Recourse between solidary debtors). That rule is unaffected by this Book in accordance with VII.–7:101 (Other private law rights to recover).

C. Justification under a court order or rule of law

(a) General

Entitlement under a court order or rule of law. Subject to the qualification in paragraph (3) and the possible application of paragraph (4), an enrichment is also justified (under paragraph (1)(a)) if, as against the disadvantaged person, the enriched person is entitled to it by virtue of a court order or rule of law.

Court order. A court order will ordinarily give effect to an entitlement or exercise a judicial discretion, provided for by law, which has the effect of conferring an entitlement. An entitlement under a court order provides a justification for an enrichment because the policy considerations which might ordinarily require recompense for the advantage conferred on the benefited party do not arise or have already been addressed by the legal rules which prompted or authorised the making of the order. It remains important, however, to identify the precise scope and effects of the court order since any patrimonial transfer beyond its terms and unsupported by it is in principle unjustified.

Illustration 26
An unmarried cohabiting couple separate. A court order made under the applicable family law grants the woman the terraced house belonging to the man. The court order transferring the home does not preclude a claim under this Book in respect of the woman's use of the house after separation and before title is transferred.

Illustration 27
An insurance company is obliged under the terms of an order made by an appellate court to pay a policy holder € 100,000 and it complies with the court order. The final court of appeal subsequently sets aside the decision of the lower appellate court and

reduces the amount payable to € 50,000. The insurer may demand restitution of the overpayment of € 50,000.

Rule of law in general. The source of the legal rule is immaterial. The term "rule of law" is intended to be understood in a neutral and undogmatic sense embracing primary and secondary legislation and rules recognised or applied in judicial decisions.

Extra-contractual obligations. Entitlement by virtue of a rule of law includes an entitlement to reparation, reversal of an enrichment, a handing over of profits and other remedies under the law on non-contractual liability arising out of damage caused to another, unjustified enrichment, benevolent intervention in another's affairs and other legal relationships arising by operation of law.

In particular: benevolent intervention. This paragraph also has the effect of excluding from the law of unjustified enrichment those enrichments which are conferred on the enriched person as the result of a benevolent intervention in the enriched person's affairs. Such an intervention may be regarded as an enrichment of the principal: the principal benefits from the service rendered or the work done by the intervener. There is a corresponding disadvantage of the intervener who provides the service or does the work. Nonetheless, independent of paragraph (1)(b), a benevolent intervener has no claim under this Book for the value of services or work benefiting the principal because the principal is entitled to that benefit on the basis of a rule of law. The benevolent intervener's sole claim to recompense for rendering the service is under the rules of benevolent intervention, which restricts a right to remuneration to those cases where "the intervention is reasonable and undertaken in the course of the intervener's profession or trade" (V.–3:102 (Right to remuneration)). That claim is unaffected by these Articles: see VII.–7:101 (Other private law rights to recover).

Requirements of benevolent intervention. The exclusion of an intervener's claim on this basis presupposes that, as regards the activity which has resulted in the enrichment, the particular requirements for a (justified) benevolent intervention are satisfied (as to which see V.–1:101 (Intervention to benefit another)). Those requirements will not be satisfied if intervention is officious, that is to say without good reason (for example, because it was knowingly conducted in contravention of the principal's wishes), or was conducted primarily for reasons other than to benefit the principal (for example, because the intervener sought chiefly to appropriate benefit for himself or herself). On the other hand it should not be overlooked that the absence of a reasonable ground for intervening is not fatal to the existence of a benevolent intervention if the principal subsequently approves the act without delay detrimental to the intervener. The potential for ratification makes it possible for an intervention to be characterised in law, with retrospective effect, as a benevolent intervention.

Effect of the rule. The effect of the provision in this Book is to confine the benevolent intervener (the disadvantaged person) to the rights conferred by the law of benevolent intervention in another's affairs. The exclusion of the law of unjustified enrichment prevents the latter from undermining the values enshrined in the former.

Illustration 28
Seeing flames through a window, D rushed to put out with a fire extinguisher a fire which threatened to take hold in the house of a neighbour, E. D has rendered a service to E. E is accordingly enriched by receipt of the service. However, D has no claim

under this Book against E. D conferred the enrichment in the course of a benevolent intervention in E's affairs. Any right of D against E is governed by the law of benevolent intervention.

Rationale. Were the law of unjustified enrichment to apply, an intervener might assert a claim to payment of the value of that service or work. Under the law of benevolent intervention in another's affairs, however, the intervener does not necessarily have a claim for the value of work done. In general, so far as the service rendered is concerned, the intervener is to be regarded (in keeping with the benevolent intention) as essentially conferring a gratuity on the principal, having only a claim for reimbursement of expenditure (or indemnification for obligations incurred): see V.–3:101 (Right to indemnification or reimbursement). Only where the intervention is conducted in the course of the intervener's profession or trade does the intervener have a claim to remuneration equal to the value of the performance undertaken: see V.–3:101. Conversely, an enrichment claim might well be restricted in the circumstances of the case (where typically the principal has not consented to or authorised the intervention) to a mere claim to the principal's patrimonial saving: see VII.–5:102 (Non-transferable enrichment). The difference between a claim to the value of the service rendered and the principal's actual patrimonial saving will be significant where the intervention was conducted properly, but failed to achieve the desired object.

Significance of ratification. This differential treatment of work done in the course of benevolent intervention highlights the significance of ratification. In converting an intervention into a benevolent intervention, approval of the act done by the intervener destroys any enrichment claim which the intervener might have and generates instead a claim under the law of benevolent intervention, so far as the latter affords one. The exact circumstances of the case will determine which of principal and intervener ultimately benefits from this transition from one set of principles to the other.

Entitlement under property law rules. An entitlement by virtue of a rule of law will typically take the form of a right under property law which is effective against third parties generally - and thus against the disadvantaged person, even if the enrichment has not resulted from any involvement of the disadvantaged person.

(b) Entitlement to the benefit of the enrichment under a rule of law: paragraph (3)

General. The mere fact that a rule of law has entitled an enriched person to an enrichment and that that entitlement is effective against the disadvantaged person does not in itself justify the enrichment. The entitlement must be such that the enriched person is immune from liability under this Book because the rule of law entitles that person to the benefit of the enrichment – the right to retain it without liability to compensate for the gain. For these purposes it must be appreciated that entitlements under a rule of law have differentiated significance, depending on the nature and context of the rule.

Enrichment with liability under other rules. In one set of cases, a right to reversal of the enrichment or to some compensatory transfer is provided for under other rules of private law. A right under this Book would at best merely duplicate and at worst contradict that other regime and is accordingly excluded by regarding the enrichment as justified. Since in such cases the statutory or other rules authorising the enrichment have simultaneously fixed the quantum of liability, it would contradict those rules to set a different tariff under this Book.

They confer an entitlement to the benefit of the enrichment because they stipulate the terms of that entitlement.

Illustration 29
Statute provides that where a gratuitous performance of a dramatic work is undertaken (other than in and for the benefit of a school) a reasonable fee is to be paid. Whether this is a fee to be assessed according to market principles or whether considerations of social purpose, fairness or equity may play a role in determining the proper level of the fee is a matter of statutory interpretation. Whatever the proper construction of this statutory rule, the enrichment of the performers is justified under this Article because the statute provides a mechanism which is implicitly a complete regime for compensation of the copyright holder. An alternative liability under this Book, which might exceed the statutory liability, contradicts the purpose of the statutory rule because that rule is intended to set the level of compensation due for the enrichment obtained.

Enrichment without liability. In other cases, for reasons of policy, no compensation is awarded at all under the regime entitling the recipient to the enrichment. It is the intention of the statutory rule that the enriched person should enjoy a windfall – an enrichment without obligation to account for it. The effect of this Article in such a case is to exclude a right to reversal of the enrichment under this Book (subject to paragraph (4)) and so to confer a positive right to retain the enrichment without any obligation to account for it. Again the enriched person is to be regarded as being entitled under the rule of law to the benefit of the enrichment.

Exclusion of enrichment claim need not be explicit. It is immaterial whether the statute or other rule of law or the court order indicates explicitly that the entitlement to the enrichment carries the benefit of that enrichment. An entitlement to the benefit will arise whenever liability under enrichment law would contradict the purposes of the legal rule or court order. It is enough if this contradiction is implied or can be deduced by inference, based on an assessment of the function of the statute or other legal rule, or the court order.

Entitlement to enrichment, but subject to liability under this Book. On the other side of the line stands the case where there is a right to have the enrichment by operation of legal rules, but the statutory regime is silent on the question of accounting for the benefit and liability under this Book would not contradict the entitlement to the enrichment. These are cases where there is nothing in the legal rule and its context which dictates that the enriched person should not be liable as a matter of the law of obligations to reverse the enrichment conferred by operation of law; the rule itself does not negate the notion that the benefited party should pay for the benefit gained. In other words, the entitlement under the rule of law is based on considerations of legal certainty or simplification or to protect the position of third parties and there is nothing in such considerations which also implies that the entitled party should have an economic benefit as well.

Illustration 30
The social security department pays child benefit to M, the mother of the child J who is recorded in a social register as being entitled to receive the sum on behalf of J. In fact, following a divorce, the father F has custody and consequently also the right to receive the child benefit. M is obliged to pay the benefit received to F because the registration in the social register is of a purely formal character and does not confer

any substantive justification for retention of child benefit payments in relation to the person who is entitled to custody.

Transfer of title rules. Property law rules which stipulate that title is to transfer to another in given circumstances – such as the rules on acquisition in good faith from non-owners and the rules on mixing and accession – provide a case in point. They confer an entitlement on the enriched person: as a matter of property law – in relation to the disadvantaged person as well as others – the enriched person is the holder of the property right in the asset concerned. This in itself, however, does not dictate that the enriched person who has acquired a property right under a rule of law should necessarily be immune from an enrichment claim. The entitlement must be such that it precludes personal liability under enrichment law to account for the benefit obtained. Whether a given rule of property law merely passes formal title without intending to address the economic balance between the parties concerned or whether it also intends to confer real benefit in addition depends on the particular rule and the reason for the law recognising a transfer of title in the circumstances. Where title to another's property has been obtained without sacrifice on the part of the acquirer, the starting point may be the assumption that only a nominal and not a substantive entitlement is conferred, so that the enriched person should account for the windfall unless there are other policy considerations encapsulated in the rule on transfer of title which point against liability under this Book. Conversely, property law rules which are intended to protect a purchaser or one who has already sacrificed something of value to obtain the enrichment may be taken as a rule as entitling the enriched person to the benefit of the enrichment. That remains so if the property law rules themselves provide for some mechanism whereby a divested owner can reclaim property from a good faith acquirer on satisfying some condition (e.g. compensating the acquirer) because such a regime clearly assumes there is otherwise no (contingent) liability to give up the acquired benefit.

Illustration 31
X hires from D musical equipment. X subsequently sells the equipment to E. That X was not entitled to dispose of the equipment does not affect the validity of X's contract with E: see II.–7:102 (Initial impossibility or lack of right or authority to dispose). Under the applicable rules of property law, E acquires property in the equipment by virtue of E's purchase in good faith and for value. E's enrichment is justified in relation to X because E was entitled to it as against X by virtue of the contract with X. While E's contract with X does not as such entitle E to the enrichment as against D, E's enrichment is also justified as against D by virtue of the property law rules governing acquisition in good faith (which have been brought into play by D's purchase from X). Those rules entitle E not only to title to the property formerly vested in D, but also to the benefit.

Unsolicited goods sent to or services rendered to a consumer. A second instance where a right to the benefit of the enrichment and a corresponding exclusion of enrichment liability arises from the rule that where unsolicited goods are sent to a consumer by a business (and likewise where unsolicited services are rendered) the consumer is not as a rule liable in respect of the supply: see II.–3:401 (No obligation arising from failure to respond), which takes up the principle in EC Directive 97/7. II.–3:401(1)(b) explicitly provides (for the case where the goods or services are not supplied in error or similar circumstances) that "no non-contractual obligation arises from the consumer's acquisition, retention, rejection or use of the goods or receipt of benefit from the services". That excludes liability under this Book.

Illustration 32

A consumer receives unsolicited goods which have been deliberately sent through the post by a business enterprise in the course of its professional activities with the intent of inducing the consumer to pay for them. No liability arises under this Book.

Discharge of bankrupt. A further case where enrichment liability will be expressly or impliedly excluded by statutory rules is where a bankrupt is discharged of outstanding debts as a result of the process of bankruptcy.

Illustration 33

As a result of rules of bankruptcy, a bankrupt is discharged of all debts. The bankrupt is enriched thereby because of the decrease in liabilities. The creditors are disadvantaged by a corresponding decrease in assets since their claims against the bankrupt are extinguished. This enrichment is justified by virtue of the rules on bankruptcy. The bankrupt is entitled to the benefit of the enrichment under a rule of law (the statutory rules on bankruptcy). It would contradict the purpose of those rules if the bankrupt were to come under a fresh liability to pay the former creditors the debts which have been discharged by operation of the statutory rules.

Acquisitive prescription. Another case where liability under this Book is impliedly excluded by statutory rules is where a person acquires a right by prescription. Property law rules enabling a person in adverse possession to obtain an indefeasible title to property over time aim to promote legal certainty and to encourage right-holders to assert their entitlements promptly. Such rules would be undermined if the law of unjustified enrichment were to enable the former owner to assert a claim under the law of obligations for a return of the property which legal rules have vested in the new owner. This would effectively extend the period over which a dispute as to ownership could be conducted, contrary to the goal of setting a prescribed time period for such disputes.

Statutory rights to encroach on property rights. There are many cases where legislation provides, in the broader public interest, for encroachments on the property of another. These may well amount to authorisations to make use of another's property and thus to obtain an enrichment. Often it will be explicit or implicit that the authorised encroachment is not one for which the persons authorised are liable to give an account of the benefit obtained.

Illustration 34

An enactment provides that persons who need to enter adjacent land in order to carry out works to their own land, but who do not have consent to enter that adjacent land, may apply to court for a court order authorising access. Statute provides that the terms and conditions of the access order granted by the court may include a provision requiring the applicant to pay a fair and reasonable sum as consideration for the privilege of entering the land, unless the works are to be carried out to residential land. E obtains an access order enabling her to effect repairs to her home by entering D's land. Although E may use D's land in entering on it and making repairs from there, E's enrichment is justified: E is entitled to do so under a court order; and since the statute precludes in such circumstances an obligation to pay a fee for the privilege as a term of the order, an equivalent liability under enrichment law is likewise excluded. E is entitled to the benefit of the enrichment.

Further examples. It would be extremely arduous to compile a complete list of those instances within the scope of this Article where the entitlement to the enrichment is such that any liability to make restitution or pay compensation to the disadvantaged person is explicitly or implicitly excluded. The following further illustration can serve only to outline the practical width of this rule.

Illustration 35
Statutory provisions permit teachers to make anthologies for specified educational purposes of limited amounts of certain types of published material which is subject to copyright. Although teachers who exercise this privilege (and their employers) make use of another's asset (namely, the copyright enjoyed by the copyright holder), their enrichment is justified under this Article. The purpose of the statutory provision is to promote the use of literature in education and to relieve educational institutions of the burden of acquiring (potentially costly) permission to make copies. The purpose of the statutory provision would be defeated if teachers (or their employers) were to be obliged under this Book to pay a reasonable fee for making copies. The legislation intended their enrichment to be as of right and gratuitous and thus also to confer the benefit of the enrichment.

D. Consent to the disadvantage: paragraph (1)(b)

(a) Consent to the disadvantage

Meaning of consent. Consent for the purposes of this Article means a bare consent. However, a consent to a disadvantage only justifies an enrichment if that consent is not vitiated by matters such as fraud, threats or unfair exploitation – in other words if it is a consent which is freely given. A further requirement is that the consent be "without error". Consent includes the case where a person sustains a disadvantage as a result of acts or omissions of another which the disadvantaged person has authorised.

Deliberate enrichment of another. Accordingly a disadvantage will be sustained with consent if the disadvantaged person has acted knowingly to confer the enrichment or has authorised a third party to effect this.

Incidental benefit to others from acts within own sphere. Since it is consent to the disadvantage rather than agreement to the enrichment which establishes the justified nature of the enrichment under paragraph (1)(b), cases of incidental benefit to others resulting from the pursuit of one's own interests will as a rule be justified enrichments. Where people act to advance their own affairs, within their own property sphere, they consent to their side of the disadvantage-enrichment equation. The fact that others may be enriched as a result and that that outcome was neither intended nor envisaged is immaterial.

Illustration 36
D, a landowning company, establishes an irrigation system for the benefit of its land. That system also happens to improve the irrigation of adjacent land belonging to E. E's enrichment (in so far as D has done work which benefited both D and E) is not unjustified under this Article because D undertook the work voluntarily and thus consented to doing the work. D's ignorance of the fact he was coincidentally benefiting E does not amount to an error.

Similarly, a squatter who improves property to make it more comfortable, knowing it belongs to another (and who therefore makes no mistake as to title), will do so at his or her own risk. There is consent to the disadvantage which results to the benefit of the landowner.

(b) Error

General. Paragraph (1)(b) provides that an enrichment is not justified by consent to the disadvantage if that consent is affected by error. While the error may be either of fact or law (see below), it must be causative of the disadvantage and not merely coincidental. It is also important to distinguish between mistakes as to an existing state of affairs (which are errors in the sense of these rules) and mere mispredictions as to possible future outcomes or events.

Error of fact or law. The disadvantaged person's error may be either of fact or of law. This is in keeping with the spirit of the rules on mistake in contract law where mistakes of either fact or law may be operative to generate a right to avoid the contract (II.–7:201 (Mistake) paragraph (1)). There seems to be no compelling reason why any distinction between errors of fact and errors of law should be made in the context of enrichments conferred otherwise than in satisfaction of rights under valid juridical acts.

Inexcusable errors. There is no requirement that the error be excusable (i.e. neither self-induced nor grossly negligent). Where the error is not obvious to the enriched person, the disadvantaged person will in any event carry the risk that the enriched person has or acquires a defence to the claim (in particular: by virtue of a subsequent disenrichment in good faith). Gross negligence in making an error may be relevant to the plausibility of the claimant's case that the claimant was actually in error when the enrichment was conferred, but this is a matter for the tribunal finding the facts. Admittedly, the excusable or inexcusable nature of a mistake is material in limiting the right to avoid a contract (see II.–7:201 (Mistake) paragraph (2)(a)), but this further restriction may be of limited import. Moreover, that restriction is merely part of the general logic that contracts are not lightly to be unravelled and that one party should not be able to escape a bargain primarily on the basis of that party's own carelessness. By contrast, an "inexcusable" error is largely only relevant to the law of unjustified enrichment when there is no contractual or other entitlement which can justify the enrichment; if there is a binding juridical act, whose efficacy is unaffected by the mistake, the mistake will have no bearing and (unless paragraph (4) applies) the enrichment will be justified. Paragraph (1)(b) is thus largely concerned with the cases where there is no binding contract between the parties which governs the enrichment. Indeed, it will usually be the case that by virtue of the disadvantaged person's (careless unilateral) mistake, the enriched person has simply received a windfall. In that context the legitimate expectations of the other party are less extensive in comparison (they can relate only to the legitimacy of the enrichment, not a whole legal relationship) and are adequately safeguarded by circumscribing the extent of liability (especially where the enrichment can only be reversed by monetary payment) and by broad defences (especially that of change of position in good faith reliance on the apparently justified nature of the enrichment).

Unilateral errors. There is equally no requirement either that the error be bilateral or that the enriched person should have been aware of the error. The knowledge, actual or constructive, of the enriched person that the enrichment is being conferred in error is not relevant to the absence of justification for the enrichment. Of course the principle is expressed in II.–7:201 (Mistake) paragraph (1)(b)(ii) (in the case where the other party neither caused nor shared the same mistake) that a contract is not to be thrown over if the other party had no cause to know

of the mistake. This protects an innocent party from being 'surprised' by an obscure (that is to say, private or secret) mistake made by their counterpart. However, that is again in the context of determining whether a contract is binding. Such a restriction is not intrinsically compelling where, as here, an enrichment is often conferred outside the context of a (void or valid) contract. The policy concern outside the contractual context is a narrower one, namely that the consequences of a unilateral mistake should not be shifted to an innocent party to the latter's detriment. Again, therefore, an absence of knowledge of the error on the part of an innocent recipient is a reason for protecting the enriched person, for example, if the enrichment cannot be reversed except by payment (because the enrichment is by its nature not transferable) or because the enriched person has sustained a disadvantage in reliance in good faith on the supposition that it was permissible to retain the enrichment without liability to account for it. The concern to protect the innocent recipient is not a sufficient reason for allowing enriched persons a windfall if they are able, without pain, to reverse the enrichment. Such considerations are therefore properly addressed by the rules governing the extent of liability and the existence of defences, rather than by categorising the enrichment as justified at the outset, and in this draft are taken up in later Articles of this Book: see VII.–5:101 (Transferable enrichment) and VII.–5:102 (Non-transferable enrichment). It must be remembered that if the error is truly causative, the only reason the enriched person has obtained the enrichment is because of the claimant's error; the enriched person was never 'truly' meant to have it. As a matter of principle this is the proper test of justification.

Requirement of a causative error. The enrichment must have been conferred on the basis of an error. Whatever the nature of the error, it must be causative in a 'but for' sense if the consent is not to justify the enrichment. The fact that the claimant was mistaken as to some present fact or legal position at the time of the enrichment will not be relevant if the enrichment would still have been conferred even if the disadvantaged person had not been mistaken. Mere ignorance of a true state of facts or law is consequently not an error relevant to paragraph (1)(b). There is an additional requirement that knowledge of the true situation would have modified behaviour so as to forestall the disadvantage being sustained.

Awareness of disadvantage, but error as to terms. The requirement that the error be causative does not mean that paragraph (1)(b) is inapplicable simply because the claimant was fully aware of sustaining a disadvantage. In the usual cases involving error the disadvantaged person will indeed appreciate that some sacrifice is being made. The disadvantage will be triggered by an error as to who is being enriched or as to the extent of the enrichment being conferred on an intended beneficiary.

> *Illustration 37*
> By mistake D pays money into E's bank account. D intended to pay creditor X, but by mistake entered E's details on the deposit slip. E's enrichment is obtained as a result of an error by D within the terms of paragraph (1). D (it is assumed) would not have given the instruction for that transfer had D appreciated that it was E and not X (whom D intended to pay) who stood to benefit from the transfer. The fact that D would still have parted with the same sum had the instruction been completed properly (because D would have paid X) is immaterial.

Illustrative types of relevant error. In broad terms there may be error as to who is being enriched (misdirected performance), or the extent of the enrichment (excessive performance), or the reason for the enrichment. Typical errors may therefore include the following scenarios. Firstly, there may be a flawed assumption by the disadvantaged person of an obligation to

confer the enrichment on the enriched person, although there is in fact no question of an obligation to do so. For example, a person who pays a debt twice is mistaken when paying for the second time in supposing that there is an obligation to pay. It will be irrelevant whether the disadvantaged person supposes that there is an obligation to the enriched person to confer the enrichment. The belief might well be that there is an obligation to a third party to enrich the enriched person. Secondly, a claimant may have wished to benefit a third party whom the claimant supposed was bound to perform an obligation to enrich the recipient. The claimant may thus have wrongly assumed that in enriching the recipient the claimant was discharging an obligation of the third party. Thirdly, the disadvantaged person may be mistaken as to the identity of the person being enriched (e.g. where wrong account details are entered in transferring money between bank accounts) or as to the extent of the enrichment being conferred (e.g. where the wrong sum is entered in a bank transfer).

Compromises and submission to doubtful claims. A case of potential difficulty is where one party makes a transfer in order to end or avoid a dispute. There is no difficulty where the compromise amounts to a juridical act (contract). In that case there will be an entitlement on the part of the recipient based on the terms of the compromise. We are concerned here with residual cases in which payment and acceptance of the payment do not amount to a juridical act. Explicitly or implicitly, the would-be creditor making the demand asserts that the disadvantaged party is under an obligation to confer an enrichment (e.g. to make the payment invoiced). The supposed debtor, it is assumed, has, at the very least, some doubt about the apparent creditor's claim (that is to say, the existence or extent of any obligation) and, in some cases, may hotly contest this. The "debtor" nonetheless complies with the demand and makes an unconditional payment. It is subsequently established that the creditor was not in fact entitled. (Where the creditor was entitled in part, but not to the extent demanded, the same question is raised *pro tanto*.) In such circumstances the transferor will not generally be able to show that the transfer was made in error. Usually the disadvantaged party will have paid simply to avoid the aggravations that would arise from creating a confrontation or from prolonging a dispute. The transfer is made from reasons of greater convenience, on a cost-benefit analysis, to dispose of the demand, to avoid the irritation of on-going controversy and perhaps avert the threatened prospect of litigation. In such a case the payer has not made the payment with and because of a belief that there is an obligation to do so as such. There has been no causative error involved precisely because in making the payment or agreeing to a compromise the payer was not acting under the false impression that there was any obligation to pay. The payment is made not because of the supposition of an obligation, but rather because of the intransigence of the demand. For the payer it may ultimately have been immaterial whether there was in fact an obligation; what was decisive was the annoyance of the allegation and it was to eliminate the nuisance (not the obligation as such – whose very existence may have been contested) that the enrichment was conferred. It will therefore be immaterial in those circumstances whether the payer privately considered all along that there was no obligation, or considered the matter was unclear and had no decided view of the issue, or had in the end inclined towards the view which the other party had alleged. The payer's belief as to the existence of the obligation has simply ceased to be the determining factor in conferring the enrichment. The determining factor is rather the presence of the demand. The same principles will apply if the transferor had a suspicion that there was no obligation to pay, but (whether from laziness or for other reasons) has declined to make further inquiry into the matter. In that case there is an affirmative belief that there is no obligation, but this is again coupled with a doubt and the fundamental motivation for the transfer (to eliminate the demand) is again decisive. The case is of course otherwise if the payment is made with a reservation, since in that case there is no settlement of the demand and an indication that the supposition of an obligation is the entire basis for the enrichment.

Mispredictions. An error within the scope of paragraph (a), whether of fact or law, must be as to a present matter. This provision does not embrace mere mispredictions of future outcomes. An error as to a present matter includes, for example, errors as to another party's intentions (this being an error as to their present state of mind). By contrast, an erroneous anticipation of how another will behave is not an error within this paragraph. It is a mere misprediction of a future event. An enrichment conferred with some express or secret hope that it will induce or lead to a given outcome is not conferred under a mistake of present fact. Rather it is a mistaken anticipation of a future state of affairs, a misjudged expectation. As such it constitutes a mere misprediction and not an error within the meaning of paragraph (1). The exclusion of mispredictions is implied by the special conditions attached to paragraph (4). If a misprediction sufficed to nullify consent to a disadvantage, then an enrichment could be unjustified according to paragraph (1)(a) – notwithstanding a supporting legal basis - so by-passing in such instances (i.e. where there is no valid juridical act in the background) the stringent requirement that the enriched person must have known of the failed purpose or disappointed expectation.

(c) Absence of consent

Categories of enrichment without consent. A prime instance of absence of legal justification for an enrichment (falling within paragraph (1)) is where the enrichment is obtained from the disadvantaged person without the latter's consent to the loss of property or use of rights. Broadly three types of situation may be envisaged where this may occur. These are (i) where an act of nature has effected the enrichment, (ii) where a third party, such as a stranger or other intermeddler acting without authority, has effected some transfer of value (i.e. has extracted benefit from the disadvantaged person and passed that benefit on to the enriched person), and (iii) where the enriched person has extracted benefit from the patrimony of the disadvantaged person without the latter's permission. In the latter case the acts of the stranger or the enriched person may or may not be in bad faith and interference with the claimant's rights need not necessarily be tortious.

Illustration 38
E uses a photograph of D, an internationally renowned footballer, in its advertising promotion to launch a new beverage. The company did not contact D to obtain his permission for the use of his image and name in the endorsement of the product. D's disadvantage in suffering the use of his rights of personality is without his consent. The enrichment of the E company is unjustified under this Article.

Illustration 39
Sheep belonging to farmer E break through a hedge at the boundary of D's land and graze on D's pastures. D's disadvantage in (unwittingly) providing grazing for E's sheep is without D's consent. D's enrichment of E is unjustified under this Article.

E. Purpose not achieved; expectation not realised: paragraph (4)

(a) General

Overview. Paragraph (4) provides that an enrichment which the disadvantaged person has conferred in order to achieve some purpose or for the fulfilment of some expectation is unjustified in specified circumstances if the intended purpose is not achieved or the expectation is not fulfilled.

Relationship to paragraph (1). This Article only sets out circumstances in which an enrichment is unjustified. It operates to enlarge the ambit of "unjustified", buttressing the rule in paragraph (1). Accordingly an enrichment which is unjustified under paragraph (1) is unaffected by this provision. (Indeed an enrichment may be unjustified under both provisions.) Where, however, an enrichment is justified according to paragraph (1), it may nonetheless be unjustified according to paragraph (4) so as to support an enrichment claim (notwithstanding that there was an entitlement to the enrichment under a juridical act or rule of law). This will be in limited cases only, however, since a mere disappointment of an expectation or frustration of a purpose which a (valid) juridical act was intended to fulfil will not form the basis for a claim under this Book if the rules governing the juridical act itself constitute a complete regime governing rights to recover benefits conferred (e.g. by termination of a contractual relationship). See further VII.–7:101 (Other private law rights to recover).

Illustration 40
D makes a payment to E. The purpose of the payment, as disclosed by the documentation for the transaction, is to benefit X by discharging a debt which X owes to E. E notifies D, however, that the payment is not accepted in discharge of X's debt. X has not authorised the payment and fails to ratify it. It is assumed that in the circumstances D's payment does not discharge the debt which X owes to E. E's enrichment obtained from D is unjustified under paragraph (4). This is so even though D made no mistake (D knew he was not obliged to make the payment) and merely mispredicted that E would accepted the payment as a discharge of X's debt, so that D consented freely to the disadvantage.

(b) Conferment for a purpose not achieved or with an expectation not realised: sub-paragraph (a)

General. The typical instance of a purpose or expectation which forms the basis for one person enriching another is the expectation of some reward for doing so, whether in exchange or as a consequence. However, the provision is not confined to cases in which the enrichment was conferred with a view to a counter-enrichment which ultimately does not materialise.

Illustration 41
A father F helps his daughter's fiancé, E, by making substantial contributions towards construction of the latter's house which is to be the future matrimonial home. The young couple's relationship breaks down; they separate shortly before the marriage is due to be concluded. The purpose of the contributions made by the father, namely to contribute to his daughter's future matrimonial home, is frustrated. F can demand recompense from E for the value of the work which F provided in the construction of E's house.

Causative purpose or expectation. The purpose or expectation must constitute the basis for the enrichment. In other words, it must be causative. An enrichment which the disadvantaged person would have conferred in any case, independent of the particular purpose not achieved or the expectation not fulfilled, does not come within the terms of the paragraph. In such circumstances it would be impolitic to regard the enrichment as unjustified because the disadvantaged person is in no need of protection unless the enrichment is predicated by the purpose or expectation (i.e. where it can be said that 'but for' the purpose or expectation the enrichment would not have been conferred).

Failure of negotiations. This paragraph is of particular relevance where, prior to the conclusion of contractual negotiations, an enrichment is conferred with a view to the benefits to which the disadvantaged person would be entitled under the anticipated contract. In such a case the disadvantaged person – not being contractually obliged to do so – may well have enriched the other party in order to induce the conclusion of a contract and thus obtain an enforceable right to some benefit in return.

(c) The enriched person's awareness of the purpose or expectation: sub-paragraph (b)

General. It is not a condition of the application of paragraph (4) that the purpose or expectation be a shared one (although that is, of course, one possible scenario). It is, however, a requirement that the enriched person was or ought to have been aware of the disadvantaged person's purpose or expectation at the time of conferring the enrichment. This limitation ensures that the ambit of the Article is confined to sensible proportions since the purpose or expectation must necessarily be either communicated to the enriched person or else, from an objective standpoint, easily identifiable in the circumstances. This limitation provides the safeguard that those who venture to advance their interests without either making this apparent or concluding a contractual agreement will do so at their own risk. This goes some way to creating an incentive to clarify legal relations before undertaking some measure which will enrich another.

> *Illustration 42*
> After their divorce and the sale of the matrimonial home the man moves into the flat occupied by his ex-spouse. An attempted reconciliation is unsuccessful. Subsequently the man demands recompense from his ex-wife for the sums which he spent at his own initiative discharging his ex-wife's debt with a mail-order business. Even if those payments were made in the precise expectation that there would be a long-term continuation of the relationship, an unjustified enrichment claim could only be conceivable if as a very minimum the ex-wife knew of the discharge of her debt. Only then could it be arguable (and a matter for proof) that she was at least capable of sharing her ex-husband's expectation in making the payment.

(d) The enriched person's acceptance that the enrichment must be reversed: sub-paragraph (c)

General. A final restriction contained within the Article is the requirement that the enriched person accepts or may be regarded as accepting that there must be a reversal of the enrichment if the purpose is not achieved or the expectation not fulfilled. That requirement is not satisfied if the disadvantaged person manifestly meant to take the risk of failure. The conferment of an enrichment by the disadvantaged person as part of what is patently a purely speculative enterprise is inconsistent with the notion that the enriched person has accepted an obligation to reverse the enrichment. Manifest speculation by the disadvantaged person implies rather that the enrichment may be accepted by the recipient on the basis it is "without strings attached".

> *Illustration 43*
> D makes a living by cleaning cars in a car park, without obtaining the car owners' permission in advance, and soliciting afterwards for remuneration when the owners return to their cars. E sees D cleaning her car and rightly supposes that D hopes to be paid, but does not intervene to stop D. Afterwards E drives off without paying D. The

service which has been rendered is not an unjustified enrichment. Although D cleans the car only because he hopes to be paid for his service, D intends to take the risk that he will not be paid. E cannot be regarded as having accepted that D must be paid for his service.

Illustration 44
D is a professional locator of heirs. By following up published notices and various means of research he locates persons entitled to shares of deceased person's estates which have not been claimed. Having found that E is entitled to a share in the estate of X, D contacts him, arranges a meeting at which he outlines E's entitlement, and offers to disclose full details in exchange for a specified percentage of E's interest. E considers D's terms exorbitant and rejects the offer. From the information D has already disclosed, E is able to make his own inquiries so as to enforce successfully his claim to a share of X's estate. D claims from E the value of the service he provided in disclosing information enabling E to assert his rights in respect of X's estate. The claim is made on the basis that D conferred this enrichment only in order to obtain from E a contractual promise to reward him for full disclosure and that the enrichment is therefore unjustified under this article. D's claim must fail. The enrichment is not unjustified. The requirements of paragraph (4) are not satisfied because D assumed the risk that, despite the information, E would not agree to his offer. E cannot be regarded as having accepted that he would have to pay for the information obtained during the negotiations. If the negotiations were terminated contrary to good faith, D might be entitled under II.–3:301 (Negotiations contrary to good faith and fair dealing) paragraph (3). The redress in that case, however, is not restitutionary, but rather compensatory as reparation for loss.

Illustration 45
The facts are as in illustration 1. Whether the enrichment is unjustified under paragraph (4) will depend on whether the parties can be regarded as having assumed that E must give recompense for the enrichment if the relationship broke down. This in turn will depend on the scale of D's investment in the property, since it may be assumed that a minor contribution would be merely part and parcel of D's enjoyment of the shared home. The greater D's expense, the less realistic is the notion that D assumed the risk that he would short-changed in the event the relationship failed.

NOTES

I. Zuwendungen an den Vertragspartner in Erfüllung wirksamer Rechtsgeschäfte

(a) Der Grundsatz

1. Leistungen in Erfüllung einer wirksamen vertraglichen oder anderweitigen Verbindlichkeit können grundsätzlich nirgendwo zurückverlangt werden, auch nicht der Profit, den die andere Seite aus einem ihr günstigen Vertragsschluss zieht, vgl. für FRANCE Cass.com. 18 January 1994, Bull.civ. IV, no. 27 and Cass.com. 29 March 1994, Bull.civ. IV, no. 128. Eine Bereicherung, die aus einem Rechtsgeschäft herrührt, ist gerechtfertigt (Cass.civ. 28 May 1986, Bull.civ. III, no. 83). Im Rahmen des Rechts der *répétition de l'indu* scheitert der Rückgabeanspruch an der Existenz einer "Schuld". Keinen Rückgabeanspruch hat zwar auch, wer freiwillig eine bloße Naturalobligation erfüllt (CC art. 1235(2)). Das wird jedoch so aufgefasst, dass sich

die Naturalobligation solchenfalls in eine echte zivilrechtliche Verpflichtung umwandelt (Cass.civ. 14 January 1952, D. 1952.177, note *Leonan*; Cass.civ. 14 February 1978, Bull.civ. I, no. 59). Darin bestätigt sich mithin erneut der Grundsatz, dass Leistungen in Erfüllung einer wirksamen (vertraglichen oder anderweitigen) Verbindlichkeit nicht zurückverlangt werden können. Das entspricht auch der Rechtslage in BELGIUM. Niemand ist ungerechtfertigt bereichert, wenn seine Bereicherung (und die Verarmung des Klägers) ihren Grund in einem wirksamen Vertrage haben (Cass. 20 September 1984, Pas. belge, 1985, I, 97).

2. Das SPANISH Recht der *Leistungskondiktion* nimmt implizit seinen Ausgangspunkt bei dem Grundsatz, dass ein Vermögenszuwachs nur dann als effektiv und endgültig anzusehen ist, wenn ihm ein rechtmäßiger und sicherer Zweck zugrundeliegt (*Díez-Picazo and de la Cámara Alvarez*, Dos estudios sobre el enriquecimiento sin causa, 115-116). Damit wird zugleich gesagt, that an increase of assets which arises from the performance of a valid and enforceable obligation need not be reversed (*Díez-Picazo*, Fundamentos I[6], 122); alles andere wäre eine Verletzung des Prinzip der Bindung an Verträge (CC arts. 1091 and 1113). Der Verkäufer eines Grundstücks, der mit seinem Käufer vereinbart, dass dieser einen höheren Preis zu zahlen habe, falls die zuständige Behörde es erlauben sollte, mehr Quadratmeter zu bebauen als zwischen den Parteien bislang angenommen, hat gegen den Käufer einen vertraglichen Anspruch auf den entsprechend höheren Preis, sobald die Behörde positiv entscheidet; mit einem Ausgleich für eine ungerechtfertigte Bereicherung hat der Anspruch auf den höheren Preis nichts zu tun (TS 1 March 2007, BDA RJ 2007/1618).

3. Unter ITALIAN CC art. 1372(1) hat ein Vertrag zwischen den Parteien Gesetzeskraft. Eine Leistung auf einen wirksamen Vertrag ist geschuldet, ein Anspruch auf Rückerstattung des Geleisteten folglich grundsätzlich ausgeschlossen. In AUSTRIA wird es zwar für unmöglich angesehen, in einer einzigen Definition zu formulieren, wann eine Vermögensverschiebung rechtsgrundlos ist (*Koziol and Welser*, Bürgerliches Recht II[13], 273), doch ist klar, dass ein Vertrag ein Rechtsgrund zum Behaltendürfen des Empfangenen darstellt. Eine Korrektur von Verträgen mit Hilfe des Bereicherungsrechts ist unzulässig (OGH 9 July 1992, JBl 1993, 107; OGH 20 January 2000, JBl 2000, 590). Der Vertrag rechtfertigt die Vermögensverschiebung aber natürlich nur, wenn er mit dem Leistenden besteht (OGH 19 December 2003, JBl 2004, 382); andererseits muss sich dieser aber auch an seinen Vertragspartner halten, kann also z.B. keine Versionsklage gegen eine Frau erheben, deren (inzwischen insolventer) Mann im eigenen Namen den Auftrag erteilt hatte, ihr Haus zu reparieren (OGH 10 March 1981, JBl 1982, 429). Einen Anspruch aus Leistungskondiktion hat i.d.R. nur, wer infolge mangelhafter Willensbildung schutzwürdig ist (CC §§ 877, 1431, 1434, 1435). Auch kann unter CC § 1174 nicht zurückverlangt werden, was wissentlich zur Bewirkung einer unmöglichen (CC § 878) oder unerlaubten Handlung (CC § 879) hingegeben wurde.

4. Unter PORTUGUESE CC art. 473 ist ein Vertrag zwischen dem Bereicherten und dem Benachteiligten die wichtigste *causa justificativa* für die entsprechende Vermögensverschiebung (*Almeida Costa*, Obrigações[10], 500). Das stimmt in der Sache mit CC art. 474 überein, wonach der Bereicherungsanspruch ausgeschlossen ist, wenn ihn das Gesetz dem Benachteiligten versagt oder wenn es der Bereicherung andere Wirkungen beimisst (*Gomes*, Conceito de enriquecimento, 473). Zuwendungen an den Vertragspartner in Erfüllung des Vertrages sind gesetzeskonform und deshalb nicht rückforderbar. Eine dem Mieter vertraglich erlaubte Untervermietung löst zugunsten des Vermieters keinen Bereicherungsanspruch auf den Erlös aus (STJ 22 May 2001, CJ [ST] IX [2001-2] 95); zu ihr kommt es nur im Falle einer unerlaubten Untervermietung (STJ 30 October 2003, Processo 03B2593). Auch under GERMAN

Law setzt jeder Anspruch aus ungerechtfertigter Bereicherung die Abwesenheit eines die Vermögensverschiebung rechtfertigenden Grundes voraus (Palandt [-*Sprau*], BGB[67], § 812, no. 68). Im Bereich der *Leistungskondiktion* kommt es darauf an, ob der (erlaubte) Leistungszweck erreicht oder verfehlt wurde. Der typische Fall ist die Erfüllung einer vertraglichen Pflicht. Sie begründet einen Rechtsgrund zum Behaltendürfen des Empfangenen und schließt damit zugleich ein Rückforderungsrecht aus (Erman [-*Westermann*], BGB II[11], § 812, no. 44; *Sprau* loc.cit. no. 69). Under GREEK law stellt der Wille des Benachteiligten den entscheidenden Rechtsgrund dar. Er äußert sich typischerweise in einem Vertrag, durch den sich eine Partei der anderen zur Erbringung der versprochenen Leistung verpflichtet. Der Vertrag muss eine causa haben, also den Grund angeben, welcher die Übernahme der schuldrechtlichen Verpflichtung rechtfertigt (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 37).

5. In HUNGARY folgt derselbe Grundsatz bereits aus CC § 198(1) (wonach aus einem Vetrag die Verpflichtung zur Erbringung und die Berchtigung zur Forderung einer Leistung folgen). POLISH CC unterwirft nur denjenigen der Verpflichtung, eine Bereicherung herauszugeben, der sie ohne rechtlichen Grund erhalten hat. Das ist der Fall, wenn die Bereicherung weder auf ein Rechtsgeschäft, noch auf ein Gesetz, noch auf eine Gerichtsentscheidung oder einen Verwaltungsakt gestützt werden kann (Supreme Court 17 November 1998, III CKN 18/98, unpublished; Bieniek [-*Kołakowski*] I[5], art. 405, no. 6; Pietrzykowski [-*Pietrzykowski*] Kodeks cywilny I[4], art. 405, no. 10). Ein wirksamer Vertrag beinhaltet folglich die Rechtsgrundlage zum Behaltendürfen des zu seiner Erfüllung Erhaltenen. So verhält es sich selbstverständlich auch in BULGARIA. Ein Bereicherungsanspruch kommt dagegen in Betracht, wenn die Schuld im Leistungszeitpunkt bereits erloschen oder wenn mehr gezahlt wurde als unter den Umständen geschuldet war, z.B. weil die anspruchsreduzierende Wirkung eines Mitverschuldens übersehen wurde (*Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 584).

6. Im Sinne von DUTCH CC art. 6:203 erfolgt eine Leistung ohne Rechtsgrund, wenn es für sie an einer Rechtfertigung fehlt (Parlementaire Geschiedenis VI, 805; Asser [-*Hartkamp*], Verbintenissenrecht III[12], no. 322 p. 341; *Vriesendorp*, Verbintenissen uit de wet en schadevergoeding, no. 294). Gültige Rechtsgeschäfte bilden einen solchen die Leistung rechtfertigenden Grund; sie schließen die Anwendbarkeit des Rechts der *onverschuldigde betaling* aus. Anders ist das nur im Falle einer Zuvielleistung hinsichtlich des überschießenden Teils (*Hartkamp* loc.cit. no. 324 p. 343). Auch anfechtbare, aber nicht angefochtene Rechtsgeschäfte bilden einen zureichenden Rechtsgrund zum Behaltendürfen des Empfangenen. ESTONIA LOA § 1028(1) provides that if a person receives anything from another in performance of an obligation, the transferor may reclaim it from the recipient only if the obligation does not exist or ceases to exist. Leistungen auf einen wirksamen Vertrag sind bereicherungsrechtlich nicht rückforderbar, es sei den, es handelt sich um Zuvielleistungen oder Doppelzahlungen (*Tampuu*. Lepinguväliste võlasuhete õigus, 61). Substituted performance of obligation with the consent of the obligee is considered as fulfilment of the obligation (LOA § 89) and thus also cannot be reclaimed.

7. Der Grundstz der Nichtrückforderbarkeit gilt natürlich auch in the NORDIC countries. Im Falle einer wesentlichen Änderung der Umstände nach Abschluss des Vertrages kann es allerdings zu Korrekturen aus allgemeinen Billigkeits- oder Gerechtigkeitsgründen kommen. Contracts Act § 36 (der in allen drei Staaten gilt) sieht die Möglichkeit vor, einen Vertrag ganz (das ist die Ausnahme) oder teilweise für nichtig zu erklären, wenn er, gemessen entweder an den Umständen im Zeitpunkt

des Vertragsschlusses oder an später eingetretenen Umständen unconscionable conditions enthält. Die Regelung soll schwächere Vertragsparteien schützen, insbesondere Verbraucher. Eine vergleichbare Regel findet sich in the so-called doctrine of tacit assumptions. Sie betrifft nach Vertragsschluss fehlgeschlagene Erwartungen einer Partei und sieht die Möglichkeit einer Nichtigerklärung des Vertrages vor, falls eine Billigkeitsüberprüfung zu dem Ergebnis führt, dass diese Partei das Risiko, dass ihre Erwartung fehlschlägt, nicht tragen sollte. Im Gegensatz zu Contracts Act § 36 führt the rule on tacit assumptions *ex nunc* zu einer vollständigen Unwirksamkeit des Vertrages (*Adlercreutz*, Avtalsträtt I[11], 291; *Gomard*, Obligationsret I[4], 159).

8. Zu den vertragsrechtlichen Rückawicklungsregimen (insbesondere Rücktritt, Widerruf, Rückforderung nach Minderung) siehe die notes under VII.–7:101 (Other private law rights to recover).

(b) Schenkungen

9. Auch schenkweise erbrachte Leistungen können grundsätzlich nicht zurückverlangt werden. Anders ist das nur dann, wenn ein spezifisch schenkungsrechtlicher Ausnahmetatbestand vorliegt. Unter FRENCH law ist die *donation* ein Vertrag unter Lebenden (CC art. 894). Eine Schenkung ist grundsätzlich nur mit Zustimmung des Beschenkten widerruflich (*Malaurie and Aynès*, Les successions, les libéralités[2], no. 430 p. 217). Ein einseitiger Widerruf kommt gemäß CC art. 953 nur in Betracht wegen Nichterfüllung von mit der Schenkung verbundenen Auflagen, wegen groben Undanks und der Geburt von Kindern nach Vollzug der Schenkung (CC arts. 960-966). Bis auf einige Abweichungen im Detail entspricht das auch der Rechtslage in BELGIUM; allerdings sind dort die CC arts. 960-966 aufgehoben worden. Im Falle des wirksamen Widerrufs muss der Beschenkte dem Schenker das Empfangene *in natura* herausgeben bzw., wenn das nicht möglich ist, Wertersatz leisten (*de Page*, Traité élémentaire de droit civil belge VIII(1)[2], no. 674 p. 778).

10. In SPAIN gilt die Grundregel, dass auch Schenkungen grundsätzlich nicht zurückverlangt werden können, unabhängig von der anhaltenden Diskussion über die Frage, ob eine Schenkung ein Vetrag ist (näher *Albaladejo*, Derecho Civil II[12], 573; López/Montés/Roca [-*Roca i Trias*], Derecho de Obligaciones y Contratos, 413); wirksame Schenkungen sind bindend und verbleiben dem Beschenkten (TS 21 May 1984, RAJ 1985 (2) no. 2499 p. 1885; *Roca i Trias* loc.cit. 418; see also CATALAN CC art. 531-8). Widerruflich sind Schenkungen nur unter den Voraussetzungen der CC arts. 644-653, d.h. im Falle der ingratitude of the done (CC arts. 648-651), der nachträglichen Geburt eines Kindes des im Zeitpunkt der Schenkung kinderlosen Schenkers (CC arts. 644-645) und der Nichterfüllung von mit der Schenkung verbundenen Auflagen (CC art. 647; see TS 19 October 1973, RAJ 1973 (2) no. 3800 p. 3022 und Compilación del Derecho Civil de NAVARRA Ley 162). Catalan CC arts. 531-7 to 531-22 stimmen mit dem gemeinspanischen Recht überein, kennen zusätzlich aber noch das Rückforderungsrecht wegen einer Verarmung des Schenkers (Catalan CC art. 531-15).

11. In ITALY sind Schenkungen Verträge (CC art. 769) und als solche grundsätzlich bindend (CC art. 1372). Einseitige Widerrufsgründe (CC art. 800) sind der grobe Undank und das Hinzukommens von Kindern. Schenkungen, die zur Belohnung eines bestimmten Verhaltens oder in Hinblick auf eine bestimmte Ehe vorgenommen worden sind, können weder wegen Undanks noch wegen Hinzukommens von Kindern widerrufen werden (CC art. 805). Erst das Urteil, mit welchem dem Antrag auf *revocazione* stattgegeben wird, beseitigt (mit obligatorischer, nicht mit dinglicher Wirkung: *Torrente*, La donazione, 585) den Erwerbstitel. Bereicherungsrecht kommt

gleichwohl nicht zur Anwendung, weil das Schenkungsrecht die Rechtsfolgen der *revocazione* in CC arts. 807 und 808 abschließend regelt.

12. Auch in AUSTRIA stellt eine Schenkung einen Rechtsgrund dar, der eine bereicherungsrechtliche Rückforderung grundsätzlich ausschließt. Allerdings können Schenkungen wesentlich leichter angefochten (CC § 901: Motivirrtum) bzw. widerrufen werden (CC §§ 947 [Verarmung], 948 [Undank], 1247 [Ausbleiben der Eheschließung] und 709 [Nichterfüllung einer Auflage]) als andere Verträge. Dann entfällt die *causa* und es entsteht ein Kondiktionsanspruch. Außerhalb des Anwendungsbereichs von CC § 1247 (Brautgeschenke) liegt zudem die Beweislast dafür, dass es sich um eine auf einem Verpflichtungswillen beruhende Schenkung gehandelt hat, beim Zuwendungsempfänger (OGH 15 January 1958, SZ 31/8; OGH 25 June 1986, SZ 59/222). Es besteht eine allgemeine Vermutung, dass eine Leistung nicht unentgeltlich erfolgt (OGH 14 November 1990, JBl 1991, 309, note *Apathy*). Problematisch ist die Abgrenzung zwischen Schenkungen und solchen Leistungen, die in Erwartung eines späteren Erfolgs oder des Fortbestands einer bestimmten Situation getätigt werden, weil Letztere den Regeln der Zweckverfehlungskondiktion (CC § 1435 analog) unterliegen. Praktische Bedeutung erlangt diese Frage insbesonders bei Fragen des Ausgleichs nach Auseinanderbrechen einer nichtehelichen Lebensgemeinschaft (die nicht dem Familien-, sondern allein dem Schuldrecht unterliegen: *Deixler-Hübner*, ÖJZ 1999, 201, 206). Eine Schenkung wird hier nur angenommen, wenn die Zuwendung nach dem Willen des Leistenden ohne Erwartung einer Gegenleistung und aus reiner Freigiebigkeit erfolgt. Das könne bei Aufwendungen zur Bestreitung des täglichen Lebens vermutet werden, nicht jedoch bei langfristigen Anschaffungen (wie z.B. dem Erwerb eines Pkw: OGH 16 April 1996, SZ 69/89) oder beim Bau eines Hauses (OGH 20 April 1980, SZ 53/71).

13. PORTUGUESE CC art. 940 qualifiziert die Schenkung als einen Vertrag; eine wirksame Schenkung ist deshalb ein Rechtfertigungsgrund im Sinne des Bereicherungsrechts (CC art. 473; siehe CA Lisbon 8 February 2000, BolMinJus 494 [2000] 391). Gegenstand einer Schenkung kann auch die Übernahme einer Verpflichtung sein. Die *revogação das doações* ist Gegenstand von CC arts. 969-979. Sie verdrängen das Bereicherungsrecht, weil sie eine selbständige Regelung der Rückgewährpflicht (*restituição*) enthalten (CC art. 978). Es geht u.a. um den Widerruf wegen groben Undanks (CC arts. 970 und 974), Wenn ein Schenkungsvertrag nichtig ist (z.B. wegen Nichteinhaltung der Form für Verträge über Immobilien, vgl. STJ 5 July 2007, Processo 07A1839), erfolgt die Rückabwicklung über das Nichtigkeitsrecht (CC art. 289(1)). Dasselbe gilt für Schenkungen, die kraft Gesetzes nichtig sind, z.B. Schenkungen fremder Güter (CC art. 954) sowie Schenkung unter Ehegatten, die zwingend (CC art. 1720(1)) im Güterstand der Gütertrennung leben (CC art. 1762).

14. In GERMANY ist gleichfalls unbestritten, dass auch Schenkungen einen Rechtsgrund zum Behaltendürfen des Erhaltenen darstellen (Palandt [-*Sprau*], BGB[67], § 812, no. 69). Unter CC § 530(1) kann eine Schenkung allerdings wegen groben Undanks widerrufen werden, was den Rechtsgrund entfallen lässt und zugunsten des Schenkers einen Anspruch aus ungerechtfertigter Bereicherung erzeugt (CC § 531(2)). Unter CC § 528(1) kann ein Schenker, der nach der Vollziehung der Schenkung so verarmt, dass er außerstande ist, sich oder seine unterhaltsberechtigten Angehörigen zu unterhalten, vom Beschenkten die Herausgabe des Geschenkes nach den Vorschriften über die Herausgabe einer ungerechtfertigten Bereicherung fordern. Der Beschenkte kann die Herausgabe durch Zahlung des für den Unterhalt erforderlichen Betrags abwenden. GREEK CC arts. 496 ff stimmen damit in den wesentlichen Punkten überein, allerdings kann hiernach auch Arbeitskraft geschenkt werden, wenn derjenige, der sie annimmt, durch sie Aufwendungen erspart (CFI Thessaloniki 2044/1967, EllDik 9

[1967] 620). Eine Schenkung stellt einen Rechtsgrund i.S.v. CC art. 904 dar (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 31). Sie kann nach denselben Regeln wie in Germany widerrufen werden; im Falle des Widerrufs ist die erbrachte Leistung nach Bereicherungsrecht zurückzugewähren (CC art. 509). Ausgeschlossen ist der Widerruf, wenn die Schenkung aus besonderer moralischer Pflicht erfolgt ist (CC art. 512).

15. Auch HUNGARIAN CC § 582 erlaubt den Widerruf einer Schenkung wegen Verarmung des Schenkers bzw. wegen groben Undanks des Beschenkten, außerdem den Widerruf wegen des Nichteintritts eines mit der Schenkung verfolgten Zwecks. Der Rückforderungsanspruch ist grundsätzlich auf dasjenige beschränkt, was sich noch im Vermögen des Beschenkten befindet (CC § 582(4)). Nicht zulässig ist die Rückforderung eines Geschenks "in gewöhnlicher Größe" (CC § 582(5)). Unter POLISH Recht ist die Schenkung ein Vertrag (CC art. 888 § 1), dessen Erfüllung einen Rechtsgrund i.S.v. CC art. 405 darstellt; ein bereicherungsrechtlicher Rückforderungsanspruch besteht folglich nicht. Allerdings ist der Beschenkte im Fall der Verarmung des Schenkers verpflichtet, ihm "innerhalb der Grenzen einer vorhandenen Bereicherung" Unterhalt zu gewähren (CC art. 897). Im Fall eines groben Undanks des Beschenkten kann der Schenker seine Schenkung widerrufen (CC art. 898 § 1), was zu einem Rückgabeanspruch "gemäß den Vorschriften über die ungerechtfertigte Bereicherung" führt (CC art. 898 § 2). BULGARIAN LOA art. 227(1) kennt gleichfalls das Widerrufsrecht wegen groben Undanks, außerdem ein Widerrufsrecht für den Fall, dass der Beschenkte dem Schenker den von ihm benötigten Unterhalt nicht leistet. Auf übliche Geschenke und auf Geschenke, die als Belohnung gewährt wurden, finden diese Widerrufsrechte keine Anwendung (LOA art. 227(2)). Der Beschenkte haftet nach den Regeln des Bereicherungsrechts (LOA art. 227(5) i.V.m. art. 59; siehe näher die Anordnung no. 1 des Plenums des Obersten Gerichtshofs of 28 May 1979). Das SLOVENIAN LOA folgt ganz ähnlichen Regeln. Im Falle eines begründeten Schenkungswiderrufs (LOA arts. 539-541: Verarmung, grober Undank, Hinzukommen von Kindern) ist das Geschenkte im Umfang der noch vorhandenen Bereicherung zurück zu gewähren (LOA art. 542(1)), see Juhart and Plavšak (-*Podgoršek*), Obligacijski zakonik III, art. 542, p. 498.

16. Auch unter DUTCH CC arts. 7:175-188 ist die Schenkung ein Vertrag. Er bildet als solcher einen rechtlichen Grund zum Behaltendürfen des Empfangenen i. S. v. CC art. 6:203 (Parlementaire Geschiedenis VI, 805). Das entspricht der Rechtslage in ESTONIA. Unter Estonian LOA § 268(1) kann allerdings das in Erfüllung eines unentgeltlichen Vertrages Geleistete nach den Vorschriften des Bereicherungsrechts zurückverlangt werden, wenn einer der in LOA § 267(1)-(3) genannten Ausnahmetatbestände erfüllt ist. Widerrufsgründe sind grober Undank des Beschenkten, Verarmung des Schenkers und der Verstoß gegen eine mit der Schenkung verbundene Auflage. Der Widerrufsgrund des groben Undanks scheint in der Praxis der wichtigste zu sein (*Varul/Kull/Kõve/Käerdi*, Võlaõigusseadus II, §§ 208-618, Kommenteeritud väljaanne, 139). Der Rückforderungsanspruch setzt den Beweis einer vollzogenen Schenkung voraus (Supreme Court 21 May 2005, judgement no. 3-2-1-129-05 in civil matters).

17. In the NORDIC countries the general rules on invalid contracts are applied. In SWEDEN wird hinsichtlich der Vernichtung eines unentgeltlichen Vertrages danach unterschieden, ob die entsprechende Erklärung vor oder nach der Erfüllung abgegeben wird. Act on certain Gratuitous Promises (*lag [1936:83] angående vissa utfästelser om gåva*) § 5 erlaubt den Widerruf einer Schenkung wegen Verarmung des Schenkers und wegen groben Undanks des Beschenkten nur, wenn die Schenkung noch nicht bewirkt worden ist. In allen Nordic countries findet jedoch Contracts Act § 36 (on

unconscionable conditions) und the doctrine on tacit assumptions auch auf Schenkungen und andere unentgeltliche Verträge Anwendung (*Hellner/Hager/Persson*, Speciell avtalsrätt II(1)[4], 264; *Jensen and Rasmussen*, Familie Retten, 18).

(c) Vorzeitige Leistungen und Teilleistungen

18. Das Grundprinzip der Nichtrückforderbarkeit von Leistungen, die in Erfüllung eines Vertrages erbracht wurden, gilt zumeist auch für vorzeitige Leistungen und für Teilleistungen, die noch nicht ausreichen, um einen Anspruch auf die Gegenleistung auszulösen. In FRANCE wird deshalb zwischen der *inexistence* einer Schuld und der fehlenden Fälligkeit (*inexigibilité*) einer existierenden Schuld unterschieden. Leistungen auf noch nicht fällige Schulden können nicht zurückgefordert werden (CC art. 1186). Das entspricht sowohl der Rechtslage in BELGIUM als auch in SPAIN (CC art. 1126(1)). Auch eine vorzeitige Leistung ist eine Leistung, die auf einem Rechtsgrund basiert; sie ist folglich nicht i.S.d. *condictio indebiti* "ungeschuldet". Die Vorleistung unterscheidet sich gerade in diesem Punkt von einer Leistung auf einen aufschiebend bedingten Vertrag (Albaladejo [-*Montés Penadés*], Comentarios al Código Civil y compilaciones forales XV(2), arts. 1126 and 1127, p. 101; *Díez-Picazo*, Fundamentos II[4], 506). Ein *solvens*, der vorfristig leistet, ohne dass er den hinausgeschobenen Leistungszeitpunkt kennt, kann den Gläubiger unter CC art. 1126(2) allerdings für die fragliche Zeitspanne auf "interest or fruits" in Anspruch nehmen. Das wird mit dem Gedanken der ungerechtfertigten Bereicherung begründet (*Montés Penadés* loc.cit. p. 107-108). Zum Schutz der Erwerber von Eigenheimen sieht *Ley* 57/1968 of 27 July 1968 *sobre percepción de cantidades anticipadas en la construcción y venta de viviendas* einen Anspruch auf Rückzahlung des im Voraus bezahlten Kaufpreises nebst 6% Zinsen vor, falls die Baugesellschaft mit der Fertigstellung bzw. Übergabe des Gebäudes in Verzug gerät. Die Erben eines Verstorbenen, der Unterhaltsvorauszahlungen erhalten hatte, sind nicht verpflichtet, diese zurück zu zahlen (CC art. 148(2)). Unter CC arts. 1157 and 1169(1) kann der Gläubiger Teilleistungen zurückweisen; nimmt er sie an, so läuft das aber auf eine stillschweigende vertragliche Vereinbarung hinaus, die einen Rückzahlungsanspruch ausschließt.

19. ITALIAN CC art. 1185(2) sagt ebenfalls ausdrücklich, dass der Schuldner nicht zurückfordern kann, was er vorzeitig geleistet hat; das gilt selbst dann, wenn er die Erfüllungsfrist nicht kannte. Er kann dann jedoch in den Grenzen des erlittenen Verlusts dasjenige zurückfordern, um das der Gläubiger durch die vorzeitige Zahlung bereichert wurde. Der Umfang des Anspruchs unterliegt folglich den Grundsätzen der allgemeinen Bereicherungsklage (Cass. 16 Febraury 1985, no. 1330, Giust.civ.Mass. 1985, fasc. 2). Die Grundregel (keine Rückforderung) ergibt sich aus der Überlegung, dass die Leistung in Erfüllung eines bestehenden Schuldverhältnisses erfolgte (*Di Majo*, Dell´adempimento in generale, sub art. 1185, p. 199); dasselbe gilt für die Nichtrückforderbarkeit von Teilleistungen (*Moscati*, Pagamento dell'indebito, 122 fn. 6(I)(c)). Auch unter CC art. 1181 kann der Gläubiger eine Teilleistung allerdings grundsätzlich ablehnen. Er soll sogar berechtigt sein, eine zunächst gegebene Zustimmung zu widerrufen, falls der Schuldner die ausstehenden Leistungsteile nicht rechtzeitig oder korrekt erbringt (so *Giorgianni*, L'inadempimento, 41).

20. Wer auf eine bestehende, aber noch nicht fällige Verpflichtung leistet, kann das Geleistete auch unter AUSTRIAN CC § 1434 second sentence nicht zurückverlangen; die Leistung erfolgt nicht ohne Rechtsgrund und der spätere Eintritt der Leistungspflicht steht bereits fest (OGH 13 June 1990, ecolex 1990, 567). Ein Kreditnehmer, der eine zu hohe Kreditrate gezahlt hat, kann den Überschuss nicht

zurückfordern; er wird ihm nur auf die nächste Rate angerechnet. Eine Rückforderung kommt erst dann in Betracht, wenn das Gezahlte den insgesamt geschuldeten Betrag übersteigt (OGH 26 January 2005, SZ 2005/10). Der Rückforderungsausschluss betrifft auch die aus der vorzeitigen Leistung gezogenen Nutzungen, insbesondere den Zwischenzins (Rummel [-*Rummel*], ABGB II(3)[3], § 1434 no. 4; kritisch Koziol/Bydlinski/Bollenberger [-*Koziol*], ABGB[2], § 1434 no. 2). Für Verbraucherkredite gilt Consumer Protection Act (KSchG) § 12a, wonach der Konsument bei vorzeitiger Rückzahlung einen Anspruch auf Ermäßigung der Kreditkosten (Zins und laufzeitabhängige Kosten) hat. Keine vorzeitige, sondern eine ungewisse – und daher kondizierbare – Leistung ist nach h.M. die Vorleistung im Falle eines nur Zug-um-Zug zu erfüllenden Vertrages (OGH 5 March 1987, RdW 1987, 194; OGH 15 September 2000, 7Ob 108/00h).

21. PORTUGUESE CC art. 476(3) schließt die Rückforderung vorzeitiger Leistungen aus. Ein Schuldner, der sich in einem entschuldbaren Irrtum bezüglich des Fälligkeitstermins befand, kann jedoch die Bereicherung herausverlangen, die der Gläubiger durch die vorzeitige Erfüllung erlangt hat. Man folgt also der Lösung des italienischen Rechts (*Menezes Leitão*, Enriquecimento sem causa[2], 480). Wer irrtümlich in Erfüllung einer aufschiebend bedingten Verpflichtung zahlt, hat dagegen bis zum Bedingungseintritt ein Rückforderungsrecht (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], note 8 under art. 476, p. 464). Darlehensnehmer dürfen das Kapital grundsätzlich vorfristig zurückzahlen, freilich nur incl. der Zinsen bis zum Ablauf der vereinbarten Laufzeit (CC art. 1147; näher CA Lisbon 4 July 1991, BolMinJus 409 [1991] 863). Teilleistungen dürfen nur erbracht werden, wenn sie vereinbart wurden oder Gesetz bzw. den Gebräuchen entsprechen (CC art. 763(1)); aus dem Prinzip der *indivisibilidade da prestação* (STJ 7 January 1993, CJ [ST] I [1993-1] 13) folgt, dass der Gläubiger eine Teilleistung ablehnen darf (*Menezes Cordeiro*, Obrigações II, 441). Besonderheiten gelten, falls die Teilleistung eine Folge einer teilweisen Unmöglichkeit der Erfüllung ist (CC arts. 793 und 802). Bei unverschuldeter Unmöglichkeit reduziert sich die Haftung auf die mögliche Teilleistung und es wird die Gegenleistung des Gläubigers proportional reduziert (CC art. 793(1)).

22. GERMAN CC § 813(2) betrifft Verbindlichkeiten, welche bereits entstanden, jedoch ganz oder teilweise noch nicht fällig bzw. noch nicht durchsetzbar sind (Palandt [-*Sprau*], BGB[66], § 813, no. 5). Wird eine solche Verbindlichkeit vorzeitig erfüllt, so ist die Rückforderung ausgeschlossen, weil es sich nicht um die Erfüllung einer Nichtschuld gehandelt hat. Auch die Erstattung von Zwischenzinsen kann nicht verlangt werden. CC § 813(2) betrifft aber nicht Leistungen auf aufschiebend bedingte Verbindlichkeiten; sie entstehen erst im Zeitpunkt des Bedingungseintritts (*Sprau* loc.cit.). Teilleistungen gehören zum Regelungsgegenstand des Rechts der Leistungsstörungen (CC §§ 280 ff; vgl. Auch CC § 434(3)), welches das Bereicherungsrecht verdrängt (*Sprau* loc.cit. Einführung vor § 812, no. 12). GREEK CC art. 905 second sentence gleicht German CC § 813(2). Die Vorschrift wird allerdings für problematisch gehalten, weil sie die Rückforderung auch dann ausschließt, wenn der Erfüllungszeitpunkt noch sehr weit in der Zukunft liegt und selbst einen Zinsanspruch abschneidet (Georgiades and Stathopoulos [-*Stathopoulos*], art. 905, no. 10).

23. Unter POLISH CC art. 457 gilt eine durch Rechtsgeschäft bestimmte Frist für die Vornahme einer Leistung im Zweifel als zugunsten des Schuldners vereinbart. Der Schuldner darf also vor Ablauf der vereinbarten Frist leisten, der Gläubiger aber die Leistung noch nicht verlangen (Pietrzykowski [-*Popiołek*], Kodeks cywilny II[4], art. 457, no. 1). Leistet der Schuldner vor Fristablauf, so ist eine bereicherungsrechtliche

Rückforderung ausgeschlossen (CC art. 411 no. 4). Teilleistungen darf ein Gläubiger gemäß CC art. 450 nur ablehnen, wenn die Annahme einer solchen Leistung sein berechtigtes Interesse verletzen würde. In HUNGARY setzt eine vorzeitige Erfüllung eine Einigung zwischen den Parteien voraus (CC § 282(2); see *Bíró*, A kötelmi jog és a szerződéstan közös szabályai[6], 403; *Petrik* [-*Bíró*], Polgári jog II, 653). Ausnahmen gelten allerdings für Geldleistungen (CC § 292(2)) und für (andere) teilbare Leistungen (CC § 285); sie können weder zurückverlangt werden noch besteht ein Anspruch auf die Zwischenzinsen. Gegenteilige Vereinbarungen sind nichtig. "Rechtsgrundlos" i.S.v. SLOVENIAN LOA art. 190(1) sind Vorleistungen, wenn und soweit sie sich auch auf einen Zeitraum beziehen, für den der Behaltensgrund später wegfällt, also etwa dann, wenn ein Mieter die Miete für ein Jahr im Voraus zahlt, das Mietverhältnis aber schon nach fünf Monaten durch Kündigung endet (Juhart and Plavšak [-*Polajnar Pavčnik*], Obligacijski zakonik II, art. 190, 46). Auch für BULGARIA wird gesagt, dass vorzeitige Leistungen keinen Rückforderungsanspruch auslösen, weil sie nicht ungeschuldet erbracht werden (*Goleminov*, Neosnovatelno obogatavyane, 43; *Kojucharov*, Obligazionno pravo I, 165). Zwischenzinsen freilich können geltend gemacht bzw. abgezogen werden (LOA art. 70(3)).

24. Under DUTCH law sind solche Leistungen nicht ungeschuldet, die eine Partei trotz eines bestehenden (aber nicht ausgeübten) Leistungsverweigerungsrechts erbringt. Es leistet also nicht ungeschuldet, wer leistet, obwohl die andere Seite vorleistungspflichtig war, und es leistet auch nicht ungeschuldet, wer erfüllt, ohne sich auf ein ihm zustehendes Leistungsverweigerungsrecht zu berufen (vgl. CC art. 6:248(2)). CC art. 6:39(2) stellt außerdem klar, dass vorzeitige Leistungen nicht aus Bereicherungsrecht zurückverlangt werden können. Die Bestimmung einer Leistungszeit dient nämlich dem Interesse des Schuldners, nicht dem des Gläubigers (art. 6:39(1); see Asser [-*Hartkamp*] Verbintenissenrecht III[12], no. 325 p. 343; CFI Amsterdam 3 November 1923, NJ 1923, 1253). Das Grundprinzip der Nichtrückforderbarkeit von Leistungen, die in Erfüllung eines Vertrages erbracht wurden, gilt auch für Teilleistungen, die noch keinen Anspruch auf die Gegenleistung auslösen. Leistungen auf noch nicht fällige Schulden können nicht zurückgefordert werden.

25. Das ESTONIAN LOA enthält zwar keine ausdrückliche Regelung zu dieser Frage, doch ergibt sich auch hier die Nichtrückforderbarkeit vorzeitiger Leistungen aus allgemeinen bereicherungsrechtlichen Grundsätzen. Außerdem lässt sich dieses Ergebnis auch aus LOA §§ 76(4) and 84(1) ableiten, die es dem Gläubiger verwehren, vorzeitige Leistungen abzulehnen.

26. In the NORDIC countries an early performance does not constitute a mistaken performance which could justify a *condictio indebiti*. Bei der Erfüllungshandlung handelt es sich um eine bewusste, nicht um eine irrtümliche Leistung, und es handelt sich um eine Leistung auf eine bestehende Schuld. Zur Begründung der Nichtrückforderbarkeit wird außerdem argumentiert, dass einer Erfüllung die wichtige Funktion zukomme, die Rechtsbeziehung zwischen den Parteien endgültig zum Erlöschen zu bringen (*Hult*, Condictio indebiti, 64; HD 10 February 1933, NJA 1933, 25; *Ravnkilde*, Betalningskorrektioner, 84).

(d) Zuvielleistungen; Leistungen an den falschen Empfänger

27. Wird mehr geleistet als geschuldet, oder wird an eine Person geleistet, die nicht Gläubigerin der Forderung ist, so ist dagegen ein Rückforderungsanspruch überall unproblematisch gegeben. Unter FRENCH, BELGIAN and LUXEMBURGIAN CC art. 1377 steht jeder Person, die eine Schuld befriedigt hat, weil sie sich irrtümlich als Schuldnerin betrachtete, ein Rückforderungsrecht gegen den Gläubiger zu; dieses

Recht erlischt allerdings, wenn der Gläubiger seinen Titel anschließend vernichtet hat. Freiwillige Zahlungen erfolgen nicht irrtümlich. Eine Gesellschaft, die einer anderen Gesellschaft finanziell hilft und weiß, dass sie dazu nicht verpflichtet ist, kann keine Rückzahlung fordern (Cass.com. 8 June 1979, Bull.civ. 1979, IV, no. 187); desgleichen nicht ein Arbeitgeber, der einem Arbeitnehmer freiwillig mehr zahlt als der Arbeitsvertrag vorsieht (Cass.soc. 24 June 1971, Bull.civ. 1971, V, no. 481). Die Rückforderbarkeit von Zuvielleistungen bzw. von Leistungen an einen falschen Empfänger wird in Frankreich noch dadurch erleichtert, dass der *solvens* einen Irrtum in aller Regel nicht mehr beweisen muss (Cass.ass.plén. 2 April 1993, Bull.civ. 1993, I, no. 9 p. 326; D. 1993, 373, note *Jéol*; Cass.civ. 20 January 1998, Bull.civ. 1998, I, no. 18; Cass.soc. 14 October 1993, Bull.civ. 1993, V, no. 236. Nach belgischer Auffassung (Cass. 26 June 1998, Pas. belge 1998, I, 824) setzt die *répétition de l'indu* einerseits eine Zahlung und andererseits die Rechtsgrundlosigkeit dieser Zahlung voraus; daraus folgt, dass auch unter belgischem Recht Zuvielleistungen und Zahlungen an einen falschen Empfänger zurückverlangt werden können. Dasselbe Ergebnis folgt aus CC art. 1376, wonach derjenige, der irrtümlich oder wissentlich etwas unberechtigt erhält, es demjenigen zurückgeben muss, von dem er es ohne Rechtsgrund erhalten hat. Besonderheiten gelten allerdings im französischen Bankrecht. Zahlt eine Bank mit *négligence fautive* irrtümlich doppelt an einen Kunden, dann scheint ihr Rückforderungsanspruch gegen ihn ausgeschlossen zu sein (Cass.com. 12 January 1988, Bull.civ. 1988, IV, no. 22).

28. In SPAIN behaupten zwar einige Autoren, dass es sich bei Zuvielleistungen durch einen Schuldner an seinen Gläubiger nicht um eine ungeschuldete Zahlung handele, so dass die CC arts. 1895 ff (*condictio indebiti*) keine Anwendung fänden (López/Montés/Roca [-*Capilla Roncero*], Derecho de Obligaciones y Contratos, 291), doch sind the prevailing legal doctrine and the courts genau gegenteiliger Auffassung: the difference between what was paid and what was due can be claimed back CC arts. 1895 ff (TS 21 November 1957, RAJ 1957 (1) no. 3632 p. 2420; TS 21 May 1980, RAJ 1980 (1) no. 1957 p. 1491; TS 2 October 2000, RAJ 2000 (4) no. 8131 p. 12552; *Gullón Ballesteros*, FS Batlle Vázquez, 367, 371; *Albaladejo*, Derecho Civil II[12], 909). Die Zahlung an eine Person, die nicht der Gläubiger ist, stellt einen klaren Fall der *condictio indebiti* dar. Es bestehen allerdings Ausnahmen von der Grundregel der Rückforderbarkeit (*Gullón Ballesteros* loc.cit. 368), nämlich bei Leistungen an einen Scheingläubiger (*acreedor aparente*, CC art. 1164), insbesondere im Fall der Zession (CC art. 1527), und in der Situation des CC art. 1163(2), in der die Leistung an einen Nichtgläubiger dem Gläubiger ausnhamsweise zum Vorteil gereicht.

29. In ITALY werden auf Zuvielleistungen und Leistungen an einen falschen Empfänger die Regeln über die Zahlung einer Nichtschuld angewandt (Cass. 29 October 1973, no. 2821, Giur. it. 1975, I, 1, 174; Cass. 12 March 1984, no. 1690, Giur.it. 1985, I, 1, 638; Cass. 21 July 2000, no. 9604, Rep.Giur.it. 2000, voce Indebito, no. 4). Ausnahmen betreffen auch hier den Schutz eines Schuldners, der an einen Scheingläubiger zahlt; sofern die Zahlung den Schuldner befreit, ist der Scheingläubiger dem wahren Gläubiger zur Herausgabe des Empfangenen verpflichtet (CC art. 1189(2)). Ob der Schuldner trotz der Befreiungswirkung selber gegen den Scheingläubiger vorgehen kann, ist streitig (verneinend *Di Majo*, Dell´adempimento in generale, 285; bejahend *Cannata*, L'adempimento delle obbligazioni[2], 117).

30. Zuviel- und Fehlleistungen fallen in den Anwendungsbereich von AUSTRIAN CC § 1431 (*condictio indebiti*): es fehlt an einer Verbindlichkeit, und der Leistende kann die Zahlung zurückfordern, wenn er sich über den Bestand der Verbindlichkeit irrte (*Koziol and Welser*, Bürgerliches Recht II[13], 277). Da es jeweils nur auf den überzahlten bzw. fehlgeleiteten Teilbetrag ankommt (so schon *von Zeiller*, Commentar

zum ABGB IV, § 1431 no. 4), stellen sowohl die Doppelzahlung (OGH 15 December 1981, SZ 54/187) als auch die Zuvielleistung hinsichtlich des überschießenden Teils (OGH 13 January 1981, SZ 54/2: Überweisung von DM 2944 statt ÖS 2944) und die Zahlung einer bestehenden Schuld an den falschen Gläubiger (OGH 31 January 1985, SZ 58/19) eine ungeschuldete Leistung i.S.v. CC § 1431 dar. Der Leistende muss sich zwar geirrt haben, doch genügt auch ein schuldhafter Irrtum (OGH 9 October 1980, SZ 53/130). Dem Irrtum steht es gleich, wenn die Leistung 'unter Vorbehalt' erfolgt, weil der Leistende Zweifel an der Höhe der Schuld oder der Person des Gläubigers hatte (*Koziol and Welser* loc.cit.). Es darf sich die Leistung aber aus der Sicht des Empfängers (OGH 12 July 1995, 7Ob 18/95) nicht wie ein Schuldanerkenntnis darstellen (OGH 18 May 1971, SZ 44/75). Einen Sonderfall der Zuvielleistung regelt CC § 1436: war der Schuldner verpflichtet, nach seiner Wahl eine von zwei Sachen zu leisten und leistet er irrtümlich beide, so kann er wählen, welche er zurückfordert, es sei denn, mit der ersten Leistung ist bereits Erfüllung eingetreten (weil mit ihr die Ausübung des Wahlrechts einher ging). In PORTUGAL werden Zuvielleistungen oder Doppelzahlungen über das Recht der *condictio indebiti* rückabgewickelt (CC art. 476(1)); see *Menezes Leitão*, Enriquecimento sem causa[2], 472; STJ 14 January 1972, BolMinJus 213 (1972) 214 und STJ 8 July 1997, CJ (ST) V (1997-2) 144. Unter CC art. 1214(3) darf ein Werkunternehmer ohne Zustimmung des Bauherren den vereinbarten Leistungsumfang nicht ändern und den Preis enstprechend erhöhen. Die Ansprüche des Werkunternehmers sind in einem solchen Fall auf eine dem Bauherrn verbleibende Bereicherung beschränkt. Leistungen an eine Person, die nicht der Gläubiger der Forderung ist, sind unter CC art. 1214 ausdrücklich bereicherungsrechtlich rückabzuwickeln. Der Schuldner kann eine Leistung an einen Nichtgläubiger aber nur dann zurückverlangen, wenn die Leistung keine schuldbefreiende Wirkung hat (CC art. 476(2) i.V.m. CC arts. 769 und 770).

31. In GERMANY wird angenommen, dass dann, wenn eine Verbindlichkeit nur in geringerer Höhe bestand als der Schuldner meinte, der überschießende Teil der Bereicherungsgegenstand ist und als solcher herausgegeben werden muss (*Reuter and Martinek*, Ungerechtfertigte Bereicherung, 131). Grundsätzlich besteht ein Rückforderungsanspruch auch dann, wenn eine Schuld zwar bestand, die Leistung aber an eine Person erbracht wurde, die nicht Gläubigerin der Forderung ist. Von diesem Grundprinzip gibt es aber eine Reihe von Ausnahmen, z.B. zum Schutze eines Schuldners, der nach einer ihm unbekannten Zession an den Zedenten leistet (CC § 816(2)). Zuvielleistungen und Leistungen an einen Nichtgläubiger stehen der Leistung auf eine Nichtschuld gleich, welche nach CC § 812(1)(i) first alternative rückabzuwickeln ist (Palandt [-*Sprau*], BGB[66], § 812, no. 71). Auch unter GREEK law besteht im Falle der Zuvielleistung ein Anspruch auf Rückgabe des Überschusses; es handele sich inswoeit um eine Nichtschuld (Georgiades and Stathopoulos [-*Stathopoulos*], art. 905, no. 3). Entsprechendes gilt bei Leistungen an den falschen Gläubiger, sofern sie nicht ausnahmsweise ein Erlöschen der Schuld bewirken (*Stathopoulos* loc.cit. no. 78).

32. Zuvielleistungen, Doppelzahlungen und Leistungen an einen falschen Empfänger werden auch in HUNGARY and BULGARIA (LOA art. 55(1) first alternative; see *Goleminov*, Neosnovatelno obogatyavane, 45) bereicherungsrechtlich ausgeglichen. LOA art. 56 regelt den Bereicherungsausgleich in Fällen der irrtümlichen Erfüllung einer fremden Verbindlichkeit; die Vorschrift setzt voraus, dass der *solvens* glaubt, dass er entweder eine eigene Verpflichtung gegenüber dem *accipiens* oder die Verpflichtung eines Dritten zu erfüllen habe (*Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 589). In die erste Gruppe gehören Zahlungen an den falschen Gläubiger, in die zweite Sachverhalte, in welchen der *solvens* sich über das

Bestehen eines Haftungsgrundes irrt, z.B. weil er irrtümlich annahm, den von einem Dritten verursachten Schaden ersetzen zu müssen.

33. Da es in solchen Fällen an einem Rechtsgrund für die Zuwendung fehlt, wird in den NIEDERLANDEN auf Zuviel-, Doppel- und Fehlleistungen das Recht der ungeschuldeten Zahlung (CC art. 6:203) angewandt. Es genügt, dass der überschießende Betrag rechtsgrundlos geleistet wurde; dass im Übrigen zwischen den Parteien ein Vertrag bestand, hindert die Anwendung des Rechts der ungeschuldeten Zahlung auf das zuviel Geleistete nicht (Asser [-*Hartkamp*] Verbintenissenrecht III[12], no. 324 p. 343). So liegen die Dinge auch in ESTONIA. The amount exceeding the agreed debt is seen as performance of a non-existing obligation (LOA § 1028(1)). Wages Act (*Palgaseadus* of 1 March 1994, RT I 1994, 11,154; 2007, 54, 362) art. 37 sieht vor, dass ein Arbeitgeber, der infolge eines Kalkulationsirrtums mehr Lohn zahlt als er schuldet, den überzahlten Betrag nur während der nachfolgenden drei Monate vom Lohn einbehalten darf, und dies auch nur, wenn die Überzahlung unstreitig ist. Andere Überzahlungen können nur zurückverlangt werden, wenn sie auf einer Täuschung durch den Arbeitnehmer beruhen.

34. In the NORDIC countries cases where a person performs more than was owed to the creditor or to a person who in fact was not the creditor, constitute the core situations for a claim based on *condictio indebiti* (see note III24 under VII.–1:101).

II. Rückforderbarkeit von Zuwendungen an den Vertragspartner in vermeintlicher Erfüllung eines angefochtenen Vertrages

35. Für Zuwendungen an den Vertragspartner in Erfüllung eines angefochtenen Vertrages lautet der Ausgangspunkt in FRANCE, dass der Anfechtende in die Lage zurückversetzt werden muss, in der er sich befunden hätte, wenn der Vertrag nie geschlossen worden wäre. Aus dieser Pflicht zum Ersatz des "negativen Interesses" ergibt sich auch das Recht zur Rückforderung des Geleisteten (*Fabre-Magnan*, Les obligations, no. 155 p. 405). In BELGIEN verweist man dagegen auf das Recht der *enrichissement sans cause* bzw. des *paiement de l'indu*. Ist der Vertrag vor Anfechtung bereits (ganz oder teilweise) erfüllt worden, so kann das Geleistete (je nach dem Gegenstand der Leistung) entweder über das Recht der *enrichissement sans cause* oder über das Recht des *paiement de l'indu* zurückverlangt werden (*von Kuegelgen*, Réflexions sur le régime des nullités et des inopposabilités, 612-613; Cass. 8 December 1966, Pas. belge 1967, I, 434). Nach der Lehre von der *remise des choses en leur pristin état* soll es sich, technisch gesprochen, hierbei aber nicht wirklich um die Anwendung von Bereicherungsrecht, sondern um die Übertragung von dessen Grundwerten in das allgemeine Vertragsrecht handeln. CA Liège 26 May 2003, no. JL035Q1_1, no. de rôle 2000RG919, meint, es handele sich um den Ersatz des "negativen Schadens" (*dommage négatif*). Dem Betroffenen stünde ein Ersatz für alle von ihm im Hinblick auf den Vertragsschluss *sans cause* unternommenen Anstrengungen zu (näher *Wery*, RCJB 2003/1, no. 22 p. 110). Der Wert dessen, was zurückgefordert werden kann, bemisst sich nach den Prinzipien der *enrichissement sans cause* (Cass. 24 March 1972, Pas. belge 1972, I, 693).

36. Die Rechtslage in SPAIN ist einigermaßen kompliziert. Im Ausgangspunkt wird gewöhnlich zwischen der *nulidad de pleno derecho* (Nichtigkeit von Rechts wegen) und der *anulabilidad* (Anfechtbarkeit) unterschieden. Diese Unterscheidung ist zwar im Gesetz nicht angelegt, entspricht aber herrschender Meinung und Rechtsprechung, wobei zugleich klar ist, dass dies nicht die einzigen Nichtigkeitsgründe des spanischen Rechts sind (*Delgado Echeverría and Parra Lucán*, Las nulidades de los contratos, 29, 34, 36-42). Die Anfechtunsklage (CC arts. 1300-1314) does not require the claimant to

prove that he was aggrieved (TS 13 May 1992, RAJ 1992 (2) no. 3983 p. 5261). Ein anfechtbarer Vertrag ist nach herrschender Auffassung gültig, aber nur von beschränkter Wirksamkeit (*Díez-Picazo*, Fundamentos I[6], 592-595; TS 27 February 1997, RAJ 1997 (1) no. 1332 p. 20750; anders [der Vertrag sei als von Anfang an unwirksam anzusehen] *Delgado Echeverría and Parra Lucán* loc.cit. 54-60 and Menéndez and Díez-Picazo [-*Miquel González*], Comentarios a la Ley sobre condiciones generales de la contratación, 474-475). Auf den Umfang des Rückforderungsanspruches hat dies allerdings keine Auswirkungen, weil die Folgen eines (durch Klage) angefochtenen Vertrages dieselben sind wie die eines von Anfang an nichtigen Vertrages (*Delgado Echeverría and Parra Lucán* loc.cit. 203-204; anders allerdings *López Beltrán*, La nulidad, 46-47). Auch ein angefochtener Vertrag hat nach CC arts. 1303 ff mindestens noch die Wirkung, dass er den Parteien ein gegenseitiges Recht auf Rückforderung des jeweils Geleisteten gewährt. CC art. 1303 wird trotz seines Wortlauts sowohl auf die *anulabilidad* (für die er konzipiert ist: *Díez-Picazo*, La liquidación de las nulidades contractuales, § 1) als auch auf die *nulidad* angewandt (TS 26 July 2000, RAJ 2000 (5) no. 9177 p. 14227; TS 30 November 2000, RAJ 2000 (5), no. 9319 p. 14441). Der Rückforderungsanspruch hat seinen Rechtsgrund folglich in beiden Fällen weder im Recht der *condictio indebiti* noch im Bereicherungsrecht; dass der Supreme Court gleichwohl auf den Gedanken der ungerechtfertigten Bereicherung Bezug nimmt, um die Anwendbarkeit von CC art. 1303 auf die *nulidad* argumentativ zu stützen (TS 22 September 1989, RAJ 1989 (5) no. 6351 p. 7343; TS 30 December 1996, RAJ 1997 (2) no. 2182 p. 3325; TS 30 November 2000 loc. cit.), ändert daran nichts. Es bewirkt allerdings, dass die Beziehung zwischen den Rückforderungsansprüchen aus CC art. 1303 und dem Bereicherungsrecht in jüngerer Zeit zunehmend unklar geworden ist. Eine neue Lehre spricht sich vor diesem Hintergrund dafür aus, ein allgemeines bereicherungsrechtliches System der *condictiones* zu entwickeln, zu denen auch die *condictio de prestación* ("*Leistungskondiktion*") zähle, welche ihrerseits aber als ein Stück Vertragsrecht zu klassifizieren sei (*Díez-Picazo and de la Cámara Alvarez*, Dos estudios sobre el enriquecimiento sin causa, 100-104; *Miquel González*, Enriquecimiento injustificado, 2807; TS 8 January 2007, BDA RJ 2007/812; TS 23 February 2007, BDA RJ 2007/1475 [*obiter*] and CA Ciudad Real 30 March 2004, BDA JUR 2004/128779). Praktische Folgen kann diese Neuorientierung vor allem in Fällen erlangen, in denen der Empfänger den geleisteten Gegenstand weiterveräußert hat. Denn die *condictio de prestación* contained within CC arts. 1303 is considered dogmatically a case of *condictio indebiti* (*Delgado Echeverría and Parra Lucán* loc.cit. 234-235; *Díez-Picazo*, La liquidación de las nulidades contractuales, § 2; TS 31 October 1984, RAJ 1984 (3) no. 5158 p. 4053), was wiederum die Anwendbarkeit von CC art. 1897 (Pflicht zur Erlösherausgabe bzw. zur Abtretung des Anspruchs gegen den Erwerber) eröffnet (*Delgado Echeverría and Parra Lucán* loc.cit. 270-271; *Díez-Picazo* loc.cit. § 2). Außerdem muss das Recht der *condictio indebiti* ohnehin die Lücken schließen, die sich dadurch ergeben, dass CC art. 1303 zu dem Problem der Rückabwicklung von Leistungen schweigt, die in einem *facere* or *non facere* bestehen (*Díez-Picazo*, Fundamentos I[6], 125; López/Montés/Roca [-*Capilla Roncero*], Derecho de Obligaciones y Contratos, 293) (freilich wäre in einem solchen Fall auch eine analoge Anwendung von CC art. 1307 denkbar: *Díez-Picazo*, La liquidación de las nulidades contractuales, § 3; *Delgado Echeverría and Parra Lucán* loc.cit. 256-257). CC art. 1303 folgt im Übrigen drei Grundsätzen: (i) Der Rückforderungsanspruch steht nur den Vertragsparteien, nicht einem Dritten zu (TS 27 March 1963, RAJ 1963 (1) no. 2121 p. 1313); anders ist das nur im Falle der CC arts. 1301 *in fine* and 1322 (Zustimmungserfordernis des Ehepartners; Anspruch auch des übergangenen

Ehepartners: TS 15 October 1984, RAJ 1984 (3) no. 4866 p. 3783). (ii) Der Rückforderungsanspruch aus CC art. 1303 is a personal claim which can only be exercised against the other party to the contract; it has no proprietary effect (*Delgado Echeverría and Parra Lucán* loc.cit. 243). Eine Ausnahme von diesem Grundsatz findet sich in CP art. 111 nur für bestimmte Straftaten. (iii) CC arts. 1303 and 1308 finden auf alle Arten von Verträgen, nicht nur auf Kaufverträge über bewegliche Sachen Anwendung (TS 22 November 1983, RAJ 1983 (3) no. 6492 p. 4994; *Delgado Echeverría and Parra Lucán* loc.cit. 254). Rückgabepflichtig sind unter CC art. 1303 auch die Früchte der Sache. CC art. 451 beschränkt diese Pflicht allerdings auf bösgläubige Besitzer. Diese Regel wird nach wohl herrschender Meinung auch im Rahmen von CC art. 1303 angewandt (TS 10 February 1970, RAJ 1970 (1) no. 792 p. 570; TS 26 July 2000 loc. cit.; *Delgado Echeverría and Parra Lucán* loc.cit. 258-259).

37. Under ITALIAN law hat die (gerichtliche) Annullierung (*annullamento*) eines Vertrages rückwirkende Kraft. Das führt zur Anwendbarkeit der Regeln über die Zahlung einer Nichtschuld. Die rückwirkende Kraft der Annullierung gilt ab Eintragung der Klage auch gegenüber Dritten, es sei denn, die Annullierung hat ihren Grund in fehlender Geschäftsfähigkeit (CC art. 1445). *Annullamento* und *nullità* werden einander im Recht der Zahlung einer Nichtschuld gleichgestellt (Cass. 31 January 1966, no. 359, Giust.civ. 1966, I, 869). Eine Leistung in Kenntnis des Unwirksamkeitsgrundes wird als Heilung des Vertrages angesehen (CC art. 1444(2)). Unter AUSTRIAN CC § 877 sind die Parteien eines (wegen Irrtums, List oder Drohung) angefochtenen Vertrages einander verpflichtet, das Empfangene zurückzugeben. Es handelt sich um eine *condictio sine causa,* die entweder als eine eigene Fallgruppe innerhalb der Leistungskondiktion (*Apathy and Riedler*, Bürgerliches Recht III^{2}, no. 15/13) oder als ein Sonderfall der *condictio causa finita* (CC § 1435) verstanden werden kann. Jedenfalls setzt CC § 877 keinen Irrtum des Leistenden voraus. Auch derjenige, der sein Anfechtungsrecht kannte, kann das Geleistete kondizieren (OGH 29 November 1990, ecolex 1991, 238).

38. In PORTUGAL hat das jeweilige Unwirksamkeitsregime grundsätzlichen Vorrang vor dem Recht der ungerechtfertigten Bereicherung. Die Rückforderung von Leistungen in vermeintlicher Erfüllung eines angefochteten bzw. nichtigen Vertrages unterliegt deshalb CC arts. 285-294. Das Bereicherungsrecht wird in solchen Fällen als überflüssig betrachtet; der Rückerstattungsanspruch sei eine unmittelbare Folge der Unwirksamkeit (*Pires de Lima and Antunes Varela*, Código Civil Anotado I^{4}, note 1 under art. 289, p. 265). Anfechtung und Nichtigerklärung eines Rechtsgeschäfts wirken *ex tunc* (CC art. 289(1)); folglich ist alles Geleistete (in Natur bzw., wenn das nicht möglich ist, dem Werte nach) zurückzuerstatten. Ein anfechtbares Rechtsgeschäft kann durch Bestätigung geheilt werden (CC art. 288). Die Anfechtung muss innerhalb bestimmter Fristen klageweise geltend gemacht werden (CC art. 287).

39. GERMANY unterwirft die Rückabwicklung eines (mit Wirkung *ex tunc*: CC § 142) angefochtenen Vertrages dagegen dem Bereicherungsrecht; Uneinigkeit besteht wegen CC § 814 (Rückforderungsausschluss bei Kenntnis der Nichtschuld) nur im Hinblick auf die Frage, ob der Rückforderungsanspruch seinen Rechtsgrund in der *condictio indebiti* oder in der *condictio ob causam finitam* hat (dann ware CC § 814 nicht anwendbar), vgl. Palandt (-*Sprau*), BGB^{66}, § 812, no. 77 und BGH 4 April 1990, BGHZ 111, 125, 130). Auch in GREECE erfolgt die Rückabwicklung nach erfolgter Anfechtung über das Bereicherungsrecht (*Schlechtriem*, Restitution und Bereicherungsausgleich in Europa I, ch. 3 nos. 330 and 542). HUNGARY begreift die Anfechtung als eine Form der Ungültigkeit. Der Vertrag wird infolge der Anfechtung mit Wirkung *ex tunc* zum Zeitpunkt seines Abschlusses unwirksam (CC § 235(1)). Die Rückabwicklung unterliegt der vertragsrechtlichen Vorschrift des CC § 237.

BULGARIAN LOA art. 55(1) unterscheidet zwischen der Rückforderung eines rechtsgrundlos erworbenen Vermögensvorteils und der Rückforderung eines Vorteils, der aufgrund eines nachträglich entfallenen Rechtsgrundes erworben wurde. Die Rückforderung gehört in die erste Fallgruppe, wenn nach der Anfechtung geleistet wurde; erfolgt die Anfechtung dagegen nach der Leistung, geht es um einen Fall aus der zweiten Gruppe (*Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 583). SLOVENIAN LOA art. 96 enthält zwar eine selbständige Vorschrift über die Rückabwicklung angefochtener Verträge, doch handelt es sich hierbei nach herrschender Meinung um eine Verweisungsnorm. Sie will, ähnlich wie LOA art. 87, nicht ein eigenständiges Restitutionsregime etablieren, sondern die Anwendbarkeit des Bereicherungsrechts eröffnen (Juhart and Plavšak [-*Polajnar Pavčnik*], Obligacijski zakonik I, art. 97, p. 532). In ROUMANIA wendet man auf die Rückabwicklung angefochtener Verträge je nach den Umständen entweder das Recht der Bereicherung ohne rechten Grund (*actio de in rem verso*) oder das Recht der *condictio indebiti* an. Auf die Letztere wird aber nur bei von beiden Seiten bereits erfüllten synallagmatischen Verträgen abgestellt, weil in einer solchen Situation die Voraussetzungen der allgemeinen Bereicherungsklage nicht mehr als erfüllt angesehen werden (*Dogaru and Drăghici,* Drept civil, 196).

40. In the NETHERLANDS stellt eine Leistung auf einen infolge Anfechtung oder aus anderem Grunde von Anfang an nichtigen Vertrag eine Leistung ohne Rechtsgrund mit der Folge dar, dass die Rückabwicklung CC arts. 6:203-211 (ungeschuldete Leistung) unterliegt (näher Parlementaire Geschiedenis VI, 806; Asser [-*Hartkamp*] Verbintenissenrecht III[12], no. 318 p. 338; HR 20 April 1917, NedJur 1917 p. 600; HR 25 February 1926, NedJur 1926 p. 361). Komplikationen enstehen aber deshalb, weil nicht alle Anfechtungen *ex tunc* wirken und weil der Richter in einigen Fällen die Rechtswirkungen einer Anfechtung nach Ermessen modifizieren kann. Problematisch ist auch, dass einige Anfechtungsgründe mit anderen Gründen für die Beendigung eines Vertrages konkurrieren und deshalb im Einzelfall die für die letzteren vorgesehenen Rückabwicklungsmechanismen Vorrang beanspruchen können. Anfechtbare, aber nicht angefochtene Rechtsgeschäfte bleiben gültig. Zur Anfechtung berechtigen jedenfalls bestimmte Willensmängel (CC arts. 3:44 [rechtswidrige Drohung, Betrug, missbräuchliche Ausnutzung bestimmter Umstände: siehe z.B. HR 29 May 1964, NedJur 1965 no. 104 p. 385] und 6:228 [Irrtum]). Man kann sich zeitgleich sowohl auf Irrtum als auch auf einen der anderen Anfechtungsgründe berufen; außerdem kann der Irrende statt anzufechten auch Aufhebung des Vertrages wegen Nichterfüllung verlangen, z.B. dann, wenn der Verkäufer dem Käufer bestimmte Eigenschaften der Kaufsache vorgespiegelt hat. Im Kaufrecht kommt es auch wegen CC arts. 7:17 und 7:23 besonders häufig dazu, dass der Käufer zwischen seinen anfechtungs- und seinen gewährleistungsrechtlichen Rechtsbehelfen wählen kann. Das besondere Anfechtungsregime der *actio Pauliana* (Gläubigerbenachteiligung) ist in CC art. 3:45 geregelt; zahlreiche Sondervorschriften über die Anfechtbarkeit der Rechtsgeschäfte einer juristischen Person finden sich im zweiten Buch des Zivilgesetzbuches. Ein besonderes Anfechtungsregime gilt unter CC arts. 6:229 und 6:230 für Verträge, die zu dem Zweck geschlossen werden, ein zwischen den Parteien vermeintlich bestehendes Rechtsverhältnis zu erweitern. Auf Verlangen einer Partei kann der Richter hier statt der Vernichtung des Vertrages auch seine Anpassung an die Umstände des Einzelfalls anordnen. Ein weiteres spezielles Anfechtungsregime ist in CC arts. 6:233 und 6:234 zum Schutz vor vorschneller Bindung an Allgemeine Geschäftsbedingungen kodifiziert.

41. ESTONIAN GPCCA §§ 86-89 nennen die allgemeinen Unwirksamkeitsgründe für Rechtsgeschäfte (insbesondere Verstoß gegen ein Gesetz oder die guten Sitten).

Gemäß GPCCA § 90(1) kann ein Rechtsgeschäft (mit Wirkung *ex tunc*) annulliert werden, wenn es unter dem Einfluss eines relevanten Irrtums abgeschlossen wurde oder infolge fraud, threat or violence zustandekam; außerdem in allen Fällen eines groben Ungleichgewichts von Leistung und Gegenleistung (Wucher). Was auf der Basis eines solchen Vertrages erlangt wurde, muss nach den Vorschriften des Rechts der ungerechtfertigten Bereicherung zurückgegeben werden (GPCCA § 84(1)). This corresponds to LOA § 1028(1) under which performance of an obligation that ceased to exist amounts to an unjustified enrichment. The declaration of annulment must be made within certain time limits. Unter LOA § 1034(1) darf sich der Empfänger einer Leistung aus einem gegenseitigen Vertrag nur dann auf den Wegfall seiner Bereicherung berufen und gleichwohl dasjenige, was er geleistet hat, zurückfordern, wenn der Vertrag wegen mangelnder Geschäftsfähigkeit oder infolge von Drohung oder Gewalt nichtig ist.

42. Zur Rechtslage in den NORDIC countries see PEL Unj.Enr. Introduction C78. Die Rückabwicklung angefochtener Verträge folgt vertragsrechtlichen Regeln.

III. Rückforderbarkeit von Zuwendungen an den Vertragspartner in vermeintlicher Erfüllung eines aus anderem Grunde nichtigen Vertrages

(a) Der Grundsatz

43. Die Rückforderbarkeit von Zuwendungen an den Vertragspartner in vermeintlicher Erfüllung eines aus anderem Grunde nichtigen Vertrages folgt gewöhnlich denselben Regeln wie die Rückforderbarkeit von Zuwendungen unter einem mit Wirkung *ex tunc* angefochtenen Vertrag. Nur einige wenige Besonderheiten sind zu beachten. Unter FRENCH CC art. 1131 ist eine Verpflichtung unwirksam, wenn sie grundlos (*sans cause*), mit einer Scheinbegründung (*fausse cause*) oder wegen eines rechtswidrigen Grundes (*cause illicite*) eingegangen wurde. Ohne Grund ist z.B. ein Vertrag über die Versicherung einer bereits verbrannten Sache (Cass.civ. 27 February 1990, Bull.civ. 1990, I, no. 52), oder ein Leibrentenvertrag, wenn der Käufer weiß, dass der Verkäufer in sehr kurzer Frist sterben wird. In der BELGIAN Rechtsprechung ist die *cause* als die Daseinsberechtigung der eigenen Verpflichtung definiert worden (CA Liège 28 June 2002, no. JL026S2_1, no. de rôle 1998/RG/14). Der jeweilige Einsatz der Parteien muss einen Grund haben, sonst ist der Vertrag nichtig. Folglich führten die allgemeinen Regeln über die ungerechtfertigte Bereicherung und die Prinzipien des CC art. 1131 zu identischen Ergebnissen (CA Liège 26 May 2003, no. JL035Q1_1, no. de rôle 2000RG919). Besteht bei einem aleatorischen Vertrag (wie dem Leibrentenvertrag) in Wahrheit gar kein Unsicherheitsfaktor (in diesem Fall: der Todeszeitpunkt), so ist der Vertrag mangels *cause* nichtig, und zwar selbst dann, wenn die speziellen Voraussetzungen der CC arts. 1974 und 1975 nicht erfüllt sind (Cass. 20 June 2005, no. JC056K4_1, no. de rôle C040549F). SPANISH CC art. 1303 ist applicable to both void and avoided contracts (see *II39* above). Die Gerichte können die Rückabwicklung eines nichtigen Vertrages sogar ohne einen entsprechenden Parteiantrag anordnen (TS 24 February 1992, RAJ 1992 (1) no. 1513 p. 1883; TS 11 February 2003, RAJ 2003 (1) no. 1004 p. 1906). CC art. 1303 setzt im Übrigen nichts anderes als den Nachweis voraus, dass die betreffende Leistung auf einen nichtigen Vertrag hin erbracht worden ist (*Delgado Echeverría and Parra Lucán*, Las nulidades de los contratos, 228). Abgesehen von den Sonderregeln für Verträge, die wegen fehlender Geschäftsfähigkeit oder wegen eines Gesetzesverstoßes nichtig sind (CC arts. 1304 and 1305-1306), existiert ein rückabwicklungsrechtliches Sonderregime außerdem auch für Verträge, die wegen eines Verstoßes gegen strafrechtliche Vorschriften unwirksam sind (CP arts. 109-111; see e.g. TS 27 October 2001, RAJ

2001 (5) no. 9348 p. 14784); in Fällen dieser Art kann ein Rückforderungsrecht sogar gegen Dritte gerichtet sein, der Anspruch also eine quasi-dingliche Wirkung entfalten (näher *Delgado Echeverría and Parra Lucán* loc.cit. 326).

44. In ITALY sind die aufgrund eines nichtigen Vertrages erbrachten Leistungen nach den Regeln des Rechts der Zahlung einer Nichtschuld zurückzugeben; prozessual bedarf es dafür (anders als in Spanien) eines entsprechenden Parteiantrages (Cass. 1 August 2001, no. 10498, Giust.civ.Mass. 2001, 1519). Dass das Recht auf Erhebung der Nichtigkeitsklage nicht verjährt, bedeutet nicht, dass auch der Rückforderungsanspruch unverjährbar wäre (CC art. 1422; see Cass. 1 August 2001, no. 10498 loc. cit.). Die Anwendbarkeit der Regeln über die Zahlung einer Nichtschuld ist zeitweilig mit dem Argument bekämpft worden, die *condictio indebiti* betreffe nur Fälle, in welchen die Parteien nie in einer rechtlichen Beziehung zueinander gestanden hätten (so z.B. *Barcellona*, Riv.trim.dir.proc.civ. 1965, 11, 28; *Gazzoni*, Riv.Dir.Civ. 1973, I, 287 und *Argiroffi*, Riv.Dir.Civ. 1976, II, 610); die Existenz eines nichtigen Vertrages genüge bereits, um bei Untergang oder Verschlechterung einer individuellen Sache die Anwendbarkeit von CC art. 2037 auszuschließen (*Stolfi*, Teoria del negozio giuridico, 71). Die Rechtsprechung ist dem jedoch nicht gefolgt (Cass. 12 March 1973, no. 685, Foro it. 1974, I, 2783). Ein weiteres Koordinierungsproblem zwischen dem Nichtigkeitsrecht und dem System der CC arts. 2033-2040 (Zahlung einer Nichtschuld) betrifft die Rechtsstellung eines Dritten, der das vom *solvens* Geleistete vom *accipiens* erworben hat. Denn die Nichtigkeit kann grundsätzlich jedermann gegenüber geltend gemacht werden, das Recht der Zahlung einer Nichtschuld operiert aber grundsätzlich nur zwischen *solvens* und *accipiens*. Die heute herrschende Lehre hält aber gleichwohl an der Anwendbarkeit des Rechts der Zahlung einer Nichtschuld fest. Das Gesetz gestatte nicht, zwischen verschiedenen *condictiones* zu unterscheiden; außerdem folge der Rückforderungsanspruch nun einmal nicht aus Vertrag, sondern aus Gesetz (*Moscati*, Pagamento dell'indebito, arts. 2028-2042, p. 136, 141).

45. AUSTRIAN CC § 877 wird (i.V.m. CC §§ 1431 und 1435) über seinen Wortlaut hinaus auch auf die Rückforderung von Leistungen auf einen wegen Dissenses, Scheingeschäfts (OGH 12 February 1970, SZ 43/38), Geschäftsunfähigkeit (OGH 18 June 1985, SZ 58/105; OGH 24 June 1982, SZ 60/119) oder aus anderem Grunde nichtigen Vertrages angewandt. Wegen des Irrtumserfordernisses muss allerdings zwischen verschiedenen Nichtigkeitsgründen unterschieden werden. Eine Rückforderung im Fall des Dissenses setzt einen Irrtum über die Wirksamkeit der Verpflichtung voraus (CC § 1431; Koziol/Bydlinski/Bollenberger [-*Bollenberger*], ABGB^{2}, § 877 no. 2). Ist der Vertrag wegen ursprünglicher Unmöglichkeit nichtig, so wird demjenigen, der irrtümlich auf diesen Vertrag geleistet hat, eine *condictio indebiti*, andernfalls eine Kondiktion wegen Zweckverfehlung (CC § 1435) gewährt. Bei gesetz- oder sittenwidrigen Verträgen kommt es dagegen nicht auf den Irrtum, sondern auf den Zweck der Verbotsnorm an (*Koziol and Welser*, Bürgerliches Recht II^{13}, 280): wer bewuchert wurde, kann die Zinsen selbst dann zurück fordern, wenn er sie in Kenntnis der Gesetzwidrigekit des Vertrages gezahlt hat (*Rummel*, ÖJZ 1978, 258). Andererseits kann ein Darlehen nicht zurückgefordert werden, das zur Finanzierung eines verbotenen Spiels gegeben wurde (CC § 1174(2); näher OGH 2 June 1986, SZ 59/177; OGH 26 July 1990, SZ 63/139; OGH 6 September 1995, 7Ob 579/95). Für PORTUGAL ist in Ergänzung zu *II41* above nur noch darauf hinzuweisen, dass die Nichtigkeit eines Vertrages jederzeit von jedermann geltend und vom Gericht von Amts wegen ausgesprochen werden kann (CC art. 286). Die Nichtigkeitswirkungen treten *ipso jure* und unabhängig vom Willen der Parteien ein; freilich ist es in der Praxis das (lediglich deklaratorische, nicht constitutive)

Nichtigkeitsurteil, welches den Rechtschein eines wirksamen Vertrags endgültig zerstört (Schlechtriem, Restitution und Bereicherungsausgleich in Europa I, ch. 3, no. 165 mit fn. 488). Die wichtigsten Nichtigkeitsgründe finden sich in CC arts. 220 (Formmangel), 240(2) (Simulation), 244(2) (geheimer Vorbehalt), 245 (nicht ernst gemeinte Erklärung), 246 (fehlendes Erklärungsbewusstsein; Zwang), 280 (Unmöglichkeit, Unbestimmtheit, Verstoß gegen die guten Sitten oder den *ordre public*) und 294 (Verstoß gegen zwingendes Gesetzesrecht). Im Falle der Nichtigkeit richten sich die Rückforderungsansprüche nach CC art. 289, nicht nach Bereicherungsrecht.

46. Unter GERMAN law bedeutet *Nichtigkeit*, dass das betreffende Rechtsgeschäft zu keinem Zeitpunkt die bezweckten Rechtswirkungen hervorbringen konnte. Nichtigkeit wirkt *ex tunc* gegenüber jedermann, bedarf keiner Geltendmachung und ist im Prozess von Amts wegen zu berücksichtigen (Palandt [-*Heinrichs*], BGB[66], Überblick vor § 104, no. 27). Die Rückabwicklung nichtiger Verträge erfolgt nach den Regeln des Bereicherungsrechts (CC § 812(1) first sentence, first alternative. Die Rückabwicklung nichtiger Dienst- und Geschäftsbesorgungsverträge wird von der Rechtsprechung allerdings oft über das Recht der Geschäftsführung ohne Auftrag vollzogen; eine Anwendung des Bereicherungsrechts scheidet dann aus, weil die berechtigte Geschäftsführung ohne Auftrag einen Rechtsgrund i.S. CC § 812 darstellt (BGH 30 September 1993, NJW 1993, 3196; BGH 10 April 1969, NJW 1969, 1205, 1207). Bei in Vollzug gesetzten Gesellschafts- und Arbeitsverträgen können die meisten Nichtigkeitsgründe nur mit Wirkung *ex nunc* geltend gemacht werden (*Heinrichs* loc.cit. no. 36). In GREECE ist teils von "ungültigen", teils von "unwirksamen", teils von "nichtigen" und teils von "mangelhaften" Verträgen die Rede. Als Oberbegriff dient heute wohl die "Ungültigkeit" (*Avgoustianakis*, NoB 39 [1991] 1340, 1365). Er umfasst sogen. "Nichtgeschäfte" (z.B. im Falle des Dissenses), nichtige und angefochtene Geschäfte (*Papantoniou*, Genikes Arches tou Astikou dikaiou, 417; *Georgiades*, Genikes Arches Astiku dikaiu, 285). Nichtige (ungültige) Rechtsgeschäfte gelten als nicht vorgenommen (CC art. 180). Die Rückabwicklung bereits erbrachter Leistungen unterliegt dem Bereicherungsrecht (*Schlechtriem*, Restitution und Bereicherungsausgleich in Europa I, ch. 3, no. 38).

47. Die Nichtigkeit ist eine der beiden in HUNGARIAN CC § 234(1) genannten Ungültigkeitsarten. Auf die Nichtigkeit kann sich jedermann berufen; sie muss nicht in einem besonderen Verfahren oder innerhalb einer bestimmten Frist geltend gemacht werden. Die rückabwicklungsrechtlichen Folgen sind Gegenstand der vertragsrechtlichen Vorschriften in CC § 237. SLOVENIAN LOA art. 190(3) qualifiziert demgegenüber die in diesen Fällen einschlägige *condictio sine causa* als ein Stück Bereicherungsrecht. So verhält es sich auch unter BULGARIAN LOA art. 55(1) first alternative. Alle Leistungen auf ein nichtiges Rechtsgeschäft sind i.S.d. Bestimmung "ohne Grund" empfangen.

48. ESTONIAN courts have dealt with a number of cases where the lendor of a loan denied to pay the agreed interest settled, alleging that the high percentage of the interest was contrary to good morals. The Supreme Court found that the unproportionally high interest rate alone was not a sufficient ground for invalidity; rather, a party must prove that the interest rate is a result of gross disparity, and must annul the transaction on that reason (Supreme Court 29 January 2007, judgment no. 3-2-1-137-06 in civil matters, with further references). Nichtigkeit bedeutet Unwirksamkeit *ex tunc*; Basis des Rückforderungsanspruchs ist das Bereicherungsrecht (LOA § 1028(2)). Die Rückforderung ist ausgeschlossen, wenn ihre Gewährung dem Zweck des Nichtigkeitsgrundes widersprechen würde (LOA § 1028 (3)).

49. Zur Rechtslage in den NORDIC countries see PEL Enj.Enr. Introduction C78. Die Rückabwicklung nichtiger Verträge folgt vertragsrechtlichen Regeln.

(b) Besonderheiten zugunsten Geschäftsunfähiger

50. Ist der Vertrag nichtig, weil eine oder beide Parteien nicht voll geschäftsfähig waren, so kann die Rückforderung unter bestimmten Voraussetzungen eingeschränkt oder ausgeschlossen sein. Unter FRENCH CC art. 1241 i.V.m art. 1312 ist eine geschäftsunfähige Person nur dann zur Rückgabe des Erlangten verpflichtet, wenn sie im Zeitpunkt der Klageerhebung durch die "Bezahlung" noch tatsächlich bereichert ist. Unter CC art. 1310 muss ein Minderjähriger allerdings alles, was er erhalten hat, restituieren, wenn der Erwerb auf einem Delikt oder Quasidelikt beruht. Diese Regel soll im Wege der Analogie auf sämtliche nicht voll geschäftsfähige Personen anwendbar sein (*Ghestin*, Régime des créances et des dettes, no. 841). Das entspricht der Rechtslage in BELGIUM. Belgian CC arts. 1241 und 1310 stimmen mit den entsprechenden Vorschriften des französischen CC überein; Belgian CC art. 1312 findet schon seinem Wortlaut nach auch auf *interdits* (CC art. 489) Anwendung; die Vorschrift umfasst alle nicht voll geschäftsfähigen Personen (*de Page*, Traité élémentaire de droit civil belge II(1)^{3}, no. 823).

51. SPAIN quailifies incapacity as a case of *anulabilidad*. Under CC art. 1304 ist der Rückforderungsanspruch auf die Sache oder den Preis beschränkt, durch welche der Geschäftsunfähige bereichert ist. Das entspricht der Regelung des CC art. 1163, wonach Zahlungen an einen Geschäftsunfähigen oder an einen Minderjährigen nur wirksam sind, wenn sie zu seinem Vorteil erfolgen (näher zum Verhältnis dieser beiden Regeln *Delgado Echeverría and Parra Lucán*, Las nulidades de los contratos, 282). CC art. 1304 kommt nur zur Anwendung, wenn sich die Unwirksamkeit des Vertrages aus der fehlenden Geschäftsunfähigkeit des Leistungsempfängers ergibt. Die Rechtsprechung wendet die Regel andererseits auch in den Fällen of so-called natural incapacity an, obwohl dies ein Fall ist which is usually considered an example of *nulidad* (TS 9 February 1949, RAJ 1949 no. 99 p. 67; TS 15 February 1952, RAJ 1952 no. 288 p. 203; *Delgado Echeverría and Parra Lucán* loc.cit. 283-284). Die Frage, was der nicht geschäftsfähige Empfänger zu resituieren hat, entscheidet sich nach dem *modelo diferencial*. Es kommt auf eine tatsächlich noch vorhandene Wertsteigerung im Vermögen des Empfängers an; eine Ersparnis genügt (*Carrasco Perera*, ADC 1988, 5, 92-97). Der bloße Erhalt der Sache oder des Preises reichen für eine Bereicherung nicht aus (TS 15 February 1952 loc. cit.). Die Beweislast dafür, dass der Minderjährige oder die geschäftsunfähige Partei noch bereichert ist, trägt nach der Rechtsprechung der Kläger (TS 9 February 1949 loc. cit.; kritisch *Díez-Picazo*, Fundamentos I^{6}, 601).

52. Unter ITALIAN CC art. 1443 ist eine geschäftsunfähige Person nur insoweit zur Herausgabe verpflichtet, als die empfangene Leistung zu ihrem Vorteil verwendet worden ist. Eine entsprechende Regelung findet sich im Recht der ungeschuldeten Leistung (CC art. 2039); der Schutz umfasst auch bösgläubige Geschäftsunfähige. Das Gesetz vermutet widerleglich, dass geschäftsunfähige Personen nicht in der Lage sind, aus einer empfangenen Leistung denselben Nutzen zu ziehen wie ein Geschäftsfähiger. Folglich hat der *solvens* die Beweislast dafür, dass im konkreten Fall eine Ausnahmesituation vorliegt. CC art. 1443 ist auf Fälle zugeschnitten, in welchen die Geschäftsunfähigkeit bereits im Zeitpunkt des Vertragsschlusses vorlag, CC art. 2039 auf Fälle der Geschäftsunfähigkeit im Zeitpunkt der *acceptio*. AUSTRIAN CC § 1433 hebt den Kondiktionsausschluss für formungültige Verpflichtungen, Naturalobligationen und wissentliche Zahlungen einer Nichtschuld (CC § 1432) für Geschäftsunfähige wieder auf. Aus CC § 151(3) (wonach bei altersüblichen

Geschäften Minderjähriger die Erfüllung den Mangel der Geschäftsfähigkeit heilt), wird aber geschlossen, dass Minderjährigen in diesen Fällen kein Rückforderungsrecht zusteht; CC § 1433 soll dagegen wieder gelten, wenn der Minderjährige in den Fällen des CC § 151(2) mit ihm zur freien Verfügung überlassenen oder aus eigenem Erwerbseinkommen stammendem Geld bezahlt hat (Rummel [-*Rummel*], ABGB II(3)[3], § 1433 no. 1; Koziol/Bydlinski/Bollenberger [-*Koziol*], ABGB[2], § 1433 no. 2; contra Schwimann [-*Mader*], ABGB VII[3], § 1433 no. 2). Ist die bereicherte Person geschäftsunfähig, so haftet sie nur, wenn die Leistung bei ihr noch vorhanden ist oder zu ihrem Vorteil verwendet wurde (OGH 24 June 1987, SZ 60/119; OGH 15 May 1991, JBl 1992, 39); der Geschäftsunfähige kann sich stets auf den nachträglichen Wegfall der Bereicherung berufen (OGH 12 February 2002, SZ 2002/21).

53. Under PORTUGUESE law sind in der Regel Minderjährige (CC art. 123) und Entmündigte (CC art. 138) geschäftsunfähig; Minderjährige und Entmündigte unterliegen grundsätzlich denselben Regeln (CC art. 139). Die Geschäftsunfähigkeit berechtigt zur Anfechtung der Willenserklärung, ist aber kein Nichtigkeitsgrund. Für das Rückforderungsrecht unter CC arts. 289 und 290) ist das zwar ohne Belang. Es kann aber im Rahmen von CC art. 287 eine Rolle spielen, wonach nur die Partei, in deren Interesse das Gesetz die Anfechtbarkeit vorsieht, sie auch gerichtlich geltend machen kann. Unter CC art. 289(1) kann ein Minderjähriger nur dann Rückzahlung des Kaufpreises verlangen, wenn der Kaufvertrag wirksam angefochten wurde; es muss also Anfechtungsklage (CC art. 125) erhoben werden. Der Minderjährige kann sich, da die Rückabwicklung nicht bereicherungsrechtlichen Regeln folgt, aber nicht auf eine zwischenzeitliche Entreicherung berufen. Die entsprechende Regelung im alten portugiesischen Zivilgesetzbuch und im Entwurf ist nicht in das Gesetz übernommen worden, möglicherweise aus Versehen (Schlechtriem, Restitution und Bereicherungsausgleich in Europa I, ch. 3, no. 300 mit fn. 899). Zu den Rechtsgeschäften, die ein Minderjähriger wirksam tätigen kann, gehören u.a. Rechtsgeschäfte des täglichen Lebens, die seiner natürlichen Einsichtsfähigkeit entsprechen und nur geringwertige Ausgaben oder Verfügungen mit sich bringen (CC art. 127(1)).

54. Under GERMAN CC § 105(1) sind Willenserklärungen eines Geschäftsunfähigen nichtig; die Rückabwicklung bereits erbrachter Leistungen erfolgt deshalb über das Bereicherungsrecht. Geschäfte eines volljährigen Geschäftsunfähigen sind nach CC § 105a allerdings wirksam, wenn es sich dabei um ein Geschäft des täglichen Lebens handelt, das mit geringwertigen Mitteln bewirkt werden kann und bewirkt worden ist; insoweit ist eine Rückforderung folglich ausgeschlossen. Besonderheiten gelten ferner im Arbeits- und Gesellschaftsrecht. Hat ein Geschäftsunfähiger einen Arbeitsvertrag geschlossen und bereits Arbeit geleistet, so soll er unter CC § 242 (Treu und Glauben) trotz der Nichtigkeit des Vertrages seinen Anspruch auf das vereinbarte Entgelt behalten. Ähnliche Einschränkungen der Nichtigkeitsfolgen sollen zugunsten geschäftsunfähiger Personen gelten, die einen gemäß CC § 105(1) unwirksamen Gesellschaftsvertrag geschlossen und der Gesellschaft Arbeit oder Kapital zur Verfügung gestellt haben. Der bereicherungsrechtliche Schutz von nicht voll geschäftsfähigen Personen wird über die Nichtanwendung der sogen. “Saldotheorie” verwirklicht. Sie kann im Ergebnis dazu führen, dass sich eine Partei eines gegenseitigen Vertrages nicht auf eine Entreicherung hinsichtlich des Empfangenen berufen und gleichzeitig das Geleistete zurückfordern kann. Einer nicht voll geschäftsfähigen gutgläubigen Partei bleibt ihr bereicherungsrechtlicher Herausgabeanspruch in vollem Umfang erhalten (Palandt [-*Sprau*], BGB[67], § 818, no. 49). Bei der Frage der Gut- bzw. Bösgläubigkeit wird überwiegend zwischen Leistungs- und Eingriffskondiktion differenziert. Im Rahmen der Leistungskondiktion

kommt es auf die Kenntnis des gesetzlichen Vertreters (typischerweise die Eltern eines Minderjährigen), im Rahmen der Eingriffskondiktion auf den Minderjährigen selbst an. In diesem Fall werden die Regeln über die persönliche Haftung von Minderjährigen aus Delikt entsprechend angewendet (*Sprau* loc.cit. § 819, no. 4; BGH 7 January 1971, BGHZ 55, 128). Handelt es sich nicht um eine beschränkt geschäftsfähige (z.B. Kinder zwischen 7 und 17 Jahren), sondern um eine vollständig geschäftsunfähige Person, entscheidet stets der Kenntnisstand des gesetzlichen Vertreters (MünchKomm [-*Lieb*], BGB[4], § 819, no. 7). Unter GREEK CC art. 130 sind die Rechtsgeschäfte einer geschäftsunfähigen Person (CC art. 128: Kinder vor Vollendung des 10. Lebensjahres und Personen, die unter vollständiger gerichtlicher Betreuung stehen) absolut nichtig. Dasselbe gilt für die Geschäfte einer im maßgeblichen Zeitpunkt geistig gestörten Person (CC art. 131). Absolut nichtig sind auch Rechtsgeschäfte von Minderjährigen, die das 10. Lebensjahr bereits vollendet haben, sofern sie durch sie nicht lediglich rechtliche Vorteile erlangen (A.P. 419/1971, NoB 19 [1971] 1118; CFI Athens 14296/ 1974, NoB 24 [1976] 332). Der bereicherungsrechtliche Rückforderungsanspruch gegen solche Personen kann im Einzelfall an ihrem besonderen Schutzbedürfnis scheitern (*Stathopoulos*, Axiosis adikaiologitou ploutismou, 263). Außerdem kann sich ein Minderjähriger nach beiderseitigem Leistungsaustausch auf einen Wegfall seiner Bereicherung berufen und trotzdem das Geleistete zurückfordern, wenn sein Vertragspartner von der Geschäftsunfähigkeit Kenntnis hatte (Georgiades and Stathopoulos [-*Stathopulos*], art. 904, no. 100).

55. HUNGARIAN CC §§ 13/B (beschränkt geschäftsfähige und geschäftsunfähige Minderjährige) und 16/A (entmündigte Personen) regeln die sog. relative Nichtigkeit, d.h. eine Nichtigkeit, auf welche sich nur die Partei berufen kann, welche die Rechtsordnung schützen will. Allerdings haftet derjenige, der die andere Seite hinsichtlich seiner Geschäftsfähigkeit täuscht, auf Schadenersatz und kann deshalb sogar zur Erfüllung des Vertrages verpflichtet werden. Der Schutz der nicht voll geschäftsfähigen Person verwirklicht sich durch das ihr eingeräumte Wahlrecht. Sie kann darauf verzichten, die Nichtigkeit geltend zu machen; dann ist der Vertrag faktisch wirksam. Oder sie macht die Nichtigkeit geltend; dann wird der Vertrag nach den gewöhnlichen Nichtigkeitsregeln rückabgewickelt. BULGARIAN LOA art. 58 beschränkt die bereicherungsrechtliche Haftung von Personen, welche nicht voll geschäftsfähig sind, auf dasjenige, was sich noch in ihrem Vermögen befindet. Hat der nicht voll geschäftsfähige Empfänger den empfangenen Gegenstand weiterveräußert, ohne schon Zahlung für ihn empfangen zu haben, kann sich der *solvens* mit der allgemeinen Bereicherungsklage nur gegen den Dritten wenden (*Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 593). Für den Schutz des LOA art. 58 ist erforderlich, aber auch genügend, dass der *accipiens* im Zeitpunkt der gerichtlichen Geltendmachung des Kondiktionsanspruchs nicht voll geschäftsfähig war (so jedenfalls *Goleminov*, Neosnovatelno obogatyavane, 80; anders aber noch *Vassilev* loc.cit. 592). Das SLOVENAIN LOA kennt einen besonderen bereicherungsrechtlichen Schutz für nicht voll geschäftsfähige Personen nicht. Allerdings beschränkt LOA art. 98 ihre anfechtungsrechtliche Haftung auf den Fall, dass sie der anderen Seite vorgetäuscht haben, geschäftsfähig zu sein.

56. Unter DUTCH CC art. 6:209 treffen einen Geschäftsunfähigen, der eine ungeschuldete Leistung empfangen hat, die Verpflichtungen zur Rückgabe der empfangenen Sache (bzw. ihres Wertes) und der Früchte nur insoweit wie ihm das Empfangene tatsächlich zum Vorteil gereicht hat oder in den Gewahrsam seines gesetzlichen Vertreters gelangt ist. Dem entspricht CC art. 6:31 (Erfüllung von Verbindlichkeiten im Allgemeinen); für geschuldete wie für ungeschuldete Leistungen gilt folglich dieselbe Regel. Um

eine ungeschuldete (rechtsgrundlose) Leistung handelt es sich, wenn der gesetzliche Vertreter das von der geschäftsunfähigen Person vorgenommene Rechtsgeschäft gemäß CC art. 3:32(2) angefochten und dadurch *ab initio* vernichtet hat. Der Schutz des Geschäftsunfähigen hängt nicht von seiner Gutgläubigkeit ab. Denkbar ist allerdings, dass der Geschäftsunfähige bzw. seine Eltern oder sein Vormund aus Delikt haften. Dem Geschäftsunfähigen hat eine Leistung tatsächlich zum Vorteil gereicht, wenn sie seinem Lebensunterhalt diente oder ihm anderweitig körperlich oder geistig nützlich war (näher CFI Zwolle 31 May 2006, LJN AY5733). Bei der Rückabwicklung von Leistungen auf einen gegenseitigen Vertrag ist CC art. 6:278 zu beachten, wonach zwischenzeitliche Veränderungen des Wertverhältnisses von Leistung und Gegenleistung durch eine Nachzahlung kompensiert werden müssen. CC art. 6:209 hat in der Praxis bislang nur eine geringe Rolle gespielt. Auch under ESTONIAN LOA § 1034(1) kann eine geschäftsunfähige Person dem gegen sie gerichteten Rückforderungsanspruch den Wegfall der empfangenen Bereicherung entgegengehalten.

57. Die NORDIC countries regeln die Folgen eines Vertrages, der wegen fehlender Geschäftsfähigkeit (Minderjährigkeit; nicht geschäftsfähige Erwachsene under guardianship) unwirksam ist, in besonderen Gesetzen (SWEDEN: Parental Code [*föräldrabalk*] chap. 9 § 7; FINLAND: Act on Guardianship [*lag om förmyndarskap* of 1 April 1999/442]; DENMARK: Act on Guardianship [*lovbekendtgørelse* of 20 August 2007, no. 1015, *værgemålslov*]). Die jeweilige Leistung ist *in natura* oder, wenn das nicht möglich ist, dem Werte nach zu restituieren. Der geschäftsfähige Partner kann sich nicht auf seinen guten Glauben berufen. Die geschäftsunfähige Person muss nur dann Wertersatz leisten, wenn die ihr erbrachte Leistung ihrem Unterhalt diente oder ihr aus anderem Grunde nützlich war. Ist das der Fall, hat sie das Empfangene aber unwirtschaftlich verwendet, so kann ihre Pflicht zum Wertersatz gemindert werden. Für den Wertersatz soll es nicht auf eine Bereicherung der geschäftsunfähigen Partei, sondern allein auf den Zweck und den Nutzen der empfangenen Leistung ankommen (*Adlercreutz*, Avtalsrätt I[11], 231; *Lejman*, SvJT 1949, 641, 653). Die genannten Regeln verfolgen freilich den generellen Zweck, geschäftsunfähige Personen auf die von ihnen ersparten Aufwendungen haften zu lassen (*Vinding Kruse*, Restitutioner, 324).

(c) Besonderheiten für den Fall der Nichtigkeit wegen eines Formmangels

58. In einigen Ländern existieren Sonderregeln, welche die Rückforderbarkeit von Leistungen auf Verträge, die wegen eines Formmangels nichtig oder unwirksam sind, einschränken. FRANCE and BELGIUM zählen zwar nicht zu dieser Gruppe. Zu bedenken ist aber, dass ein Vertrag in beiden Rechtsordnungen wegen eines Formmangels rechts- bzw. gesetzwidrig sein kann. Belgische Gerichte wenden z.B. im Falle von Werkverträgen, die nichtig sind, weil der Unternehmer nicht über die erforderlichen schriftlichen Genehmigungen verfügt, die aus den *nemo auditur propriam turpitudinem allegans*- und *in pari causa turpitudinis cessat repetitio*-Grundsätzen abgeleitete Rückforderungssperre an (CA Brussels 9 Juni 2006, no. °JB0669B_1, no. de rôle 2005 AR 632; CA Liège 4 February 2003, no. JL03241_1, no. de rôle 2001RG349). In SPAIN führt ein Verstoß gegen ein gesetzliches Formerfordernis nach traditioneller, wenngleich nicht unbestrittener Auffassung zur *nulidad* of the contract (*Díez-Picazo*, Fundamentos I[6], 578; Albaladejo [-*Carrasco Perera*], Comentarios al Código Civil y compilaciones forales I(1), art. 6 p. 834-837). Ebenfalls umstritten ist, ob ein Verstoß gegen die Regeln, welche zum Schutz von Verbrauchern Schriftform verlangen, die *nulidad* oder lediglich die *anulabilidad* of the contract bewirkt (näher *Delgado Echeverría and Parra Lucán*, Las nulidades de los

contratos, 50; López/Montés/Roca [-*Valpuesta Fernánedez*], Derecho de Obligaciones y Contratos, 247).

59. Auch ITALY kennt keine rückabwicklungsrechtlichen Sonderregeln für formnichtige (CC art. 1325 no. 4) Verträge. Wer auf einen lediglich mündlich geschlossenen Grundstückskaufvertrag zahlt, kann den Kaufpreis zurück verlangen (Cass. 5 August 1947, no. 1445, Foro it. 1948, I, 464). Verbraucherkreditverträge unterliegen nach *Decreto legislativo* 1 September 1993, no. 385 (Suppl.ord. no. 92 alla Gazz. Uff. of 30 September 1993, no. 230 - *Testo unico delle leggi in materia bancaria e creditizia*) arts. 124 i.V.m. 117(1) der Schriftform; dem Verbraucher ist eine Kopie der Vertragsurkunde auszuhändigen. Die Nichtigkeit des Vertrages kann nur vom Verbraucher geltend gemacht werden (loc.cit. art. 127(2); sog. *nullità relativa*). Sonstige spezielle Vorschriften hinsichtlich der Rückforderbarkeit von Leistungen auf formunwirksame Verträge existieren nicht (*Vettori*, Materiali e commenti sul nuovo diritto dei contratti, 643-644). Wie überall, so sind auch in AUSTRIA Verträge grundsätzlich formfrei wirksam (CC § 883). Das ist nur dann anders, wenn die Parteien eine Form vereinbaren oder sie vom Gesetz vorgeschrieben wird. Letzteres ist nur selten der Fall; insbesondere unterliegen weder der Grundstücks- und der Unternehmenskauf noch Miet- und Kreditverträge einer besonderen gesetzlichen Form. Auch CC § 1432 misst Formvorschriften nur geringe Bedeutung zu, weil die Vorschrift ausdrücklich anordnet, dass Zahlungen auf eine Schuld, die nur wegen eines Formmangels ungültig ist, nicht zurückgefordert werden können. Die Vorschrift beruht auf der Überlegung, dass Formvorschriften nur vor Übereilung schützen wollen und dass es dieses Schutzes im Falle der Erfüllung nicht mehr bedarf (Schwimann [-*Mader*], ABGB VII^3, § 1432 no. 7). Bei der Verletzung von Formvorschriften, deren Zweck darüber hinausgeht (Information des Schuldners, Schutz Dritter) kommt es deshalb zu einer teleologischen Reduktion von CC § 1432 (*Apathy and Riedler*, Bürgerliches Recht III^2, no 15/7; Rummel [-*Rummel*], ABGB II(3)^3, § 1432 no. 5; contra *Mader* loc.cit.). Die Kondiktion bleibt möglich, wenn nach dem Zweck der Formvorschrift die Vermögensverschiebung selbst verhindert werden soll. So soll es z.B. bei der Verletzung der Form für Eheverträge (OGH 16 September 1959, SZ 32/108) liegen, nicht aber bei der Verletzung der Form von Bürgschafts- und Schenkungsverträgen (OGH 26 February 1996, SZ 69/40). Im letzteren Fall wird der Formmangel ohnehin durch Erfüllung geheilt. Bei Verträgen, für welche die Parteien eine Form vereinbart hatten, kann in der Annahme der Erfüllung außerdem eine konkludente Aufhebung der Formvereinbarung zu sehen sein (OGH 19 March 1974, JBl 1975, 161). Bei bei gegenseitigen Verträgen greift die Kondiktionssperre des CC § 1432 erst ein, wenn beide Seiten geleiset haben, es sei denn, die Form soll nur einen der Vertragspartner schützen (*Mader* loc.cit. no. 10).

60. Under PORTUGUESE CC art. 219 bedürfen Rechtsgeschäfte grundsätzlich keiner Form. Anders ist das nur, wenn das Gesetz (CC art. 220) oder die Parteien (CC art. 223; vgl. STJ 15 June 1999 BolMinJus 388 [1989] 473) etwas anderes vorschreiben. Verträge, die ohne Einhaltung der nötigen Form geschlossen werden, sind, sofern das Gesetz keine andere Rechtsfolge vorsieht, nichtig (CC art. 220). Im Mittelpunkt der rückabwicklungsrechtlichen Erörterungen stehen formnichtige Darlehensverträge. Nach CC art. 1143 bedürfen Darlehensverträge über € 20.000,- der notariellen Form, und Darlehensverträge über € 2.000,- der Unterschrift des Darlehensnehmers. Die Anwendung des Bereicherungsrechts wird auch hier abgelehnt (STJ 18 January 2007, Processo 06B4633; siehe bereits STJ 31 March 1993, BolMinJus 425 [1993] 534); die Rückabwicklung richtet sich nach Nichtigkeitsrecht (CC art. 289(1)). Unter den Voraussetzungen von CC art. 293 kann ein nichtiger Vertrag allerdings auch in einen wirksamen Vertrag umgedeutet werden. Eine solche *conversão* ist z.B. bei

formnichtigen Grundstückskaufverträgen zugunsten eines wirksamen Verkaufsversprechens (CC art. 410) denkbar (STJ 15 October 1996, BolMinJus 460 [1996] 727; STJ 18 June 1996, BolMinJus 458 [1996] 281; *Hörster*, Parte geral, 600).

61. Auch in GERMANY bedürfen Rechtsgeschäfte grundsätzlich keiner Form; Ausnahmen müssen gesetzlich (z.B. CC §§ 311b(1), 518(1), 766) oder vertraglich bestimmt sein. Bei Nichteinhaltung der entsprechenden Formvorschrift ordnet CC § 125 die Nichtigkeit des Rechtsgeschäfts an. Allerdings führt die Erfüllung des Vertrages in einer Reihe von Fällen zur Heilung des Formmangel (z.B. §§ 311b(1)(ii), 518(2), 766 third sentence). Bei vollzogenen Gesellschafts- und Arbeitsverträgen wirkt die Geltendmachung eines Formmangels nur *ex nunc* (Palandt [-*Heinrichs*], BGB[66], § 125, no. 10). Die bereicherungsrechtliche Rückabwicklung einer Leistung auf eine formungültig eingegangene Verpflichtung erfolgt über CC § 812(1)(i) first alternative (Erman [-*Westermann*], BGB II[11], § 812, no. 46). Wird eine Leistung auf einen formnichtigen Vertrag in der Erwartung erbracht, dass der formgültige Abschluss demnächst nachgeholt wird, so handelt es sich bereicherungsrechtlich um eine *condictio ob rem* (CC § 812(1)(ii) second alternative). Das hat die Nichtanwendbarkeit von CC § 814 (Rückforderungsausschluss bei Kenntnis der Nichtschuld) zur Folge (Staudinger [-*W. Lorenz*], BGB [1999], § 812, no. 110). Oft handelt es sich um Grundstücksgeschäfte, bei denen der Käufer auf den formnichtigen Vertrag Leistungen erbracht hat, um den Verkäufer in Erwartung der Heilung des Formmangels zur Erfüllung zu veranlassen (RG 12 March 1920, RGZ 98, 237, 240; BGH 26 September 1975, NJW 1976, 237, 238; BGH 26 October 1979, NJW 1980, 451). Ein Vertrag, der unter Verletzung einer gesetzlichen (wichtig besonders CC art. 369: Grundstücksgeschäfte) oder vertraglichen Form (CC art. 159(2)) geschlossen wurde, ist auch unter GREEK CC art. 159 nichtig; erbrachte Leistungen sind bereicherungsrechtlich (CC art. 904) rückabzuwickeln. Wird in einer notariellen Urkunde über den Verkauf eines Grundstücks ein geringerer als der vereinbarte Preis angegeben, so soll daraus nicht die Nichtigkeit des ganzen Vertrages folgen, sondern nur die Nichtigkeit des nicht beurkundeten Vertragsteils. Der Verkäufer kann also nicht auf Zahlung des tatsächlich vereinbarten Preises klagen; der Käufer sei durch Zahlung nur des beurkundeten Preises auch nicht ungerechtfertigt bereichert. Hat der Käufer dagegen den vereinbarten Preis bereits bezahlt, beschränkt sich sein Rückforderungsanspruch auf den Betrag, um den der gezahlte Preis den objektiven Wert des Grundstücks übersteigt (A.P.1566/2001, NoB 50 [2002] 1662; Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 44).

62. Auch unter HUNGARIAN CC § 217(1) ist ein Vertrag, der den gesetzlichen oder vertraglichen Formanforderungen nicht entspricht, nichtig, sofern nicht das Gesetz eine andere Rechtsfolge vorsieht. Die vertragliche Vereinbarung einer bestimmten Form muss ausdrücklich erfolgen; der Mangel einer nur vertraglich vereinbarten Form wird durch die Annahme der Erfüllung oder einer Teilerfüllung geheilt (CC § 217(2)). Unter Arbeitsgesetzbuch (Gesetz no. XXII/1992) § 76(2) muss der Arbeitsvertrag schriftlich niedergelegt werden. Für die Einhaltung dieser Form ist der Arbeitgeber verantwortlich. Deshalb kann sich auf die Ungültigkeit des Arbeitsvertrages wegen Nichteinhaltung dieser Form nur der Arbeitnehmer berufen, und dies auch nur innerhalb von 30 Tagen ab dem Arbeitsbeginn. Gesetz no. CXII/1996 über die Kreditinstitute und Finanzunternehmen § 213 betrifft den Verbraucherdarlehensvertrag. Er ist nichtig, wenn er die in dieser Vorschrift genannten Angaben nicht enthält; die Nichtigkeit kann allerdings nur vom Verbraucher geltend gemacht werden. Das BULGARISCHE Recht betrachtet den Mangel einer gesetzlich vorgeschrieben Form als Nichtigkeitsgrund (LOA art. 26(1)), mit der Folge, dass Leistungen auf einen solchen Vertrag als grundlos empfangen im

Sinne der *condictio indebiti* (LOA art. 55(1) first alternative) zurückzugewähren sind. Auch in SLOVENIA führt der Mangel einer gesetzlich vorgeschriebenen Form zur Nichtigkeit des Vertrags, es sei denn, dass dies dem Zweck der Formvorschrift widerspricht (LOA art. 55(1); siehe dazu Juhart and Plavšak [-*Polajnar Pavčnik*], Obligacijski zakonik I, art. 55, p. 370). Wirksam wird ein wegen Fehlens der Schriftform formnichtiger Vertrag dagegen in der Regel durch Erfüllung, es sei denn, die Wirksamkeit ist mit dem Zweck der Formvorschrift unvereinbar (LOA art. 58). Der Verstoß gegen eine vertraglich vereinbarte Form führt zur Nichtigkeit (LOA art. 55(2)); erbrachte Leistungen sind nach den Regeln des Bereicherungsrechts rückabzuwickeln.

63. Rechtsgeschäfte, die nicht der gesetzlich vorgeschriebenen Form genügen, sind auch unter DUTCH CC art. 3:39 nichtig, es sei denn das Gesetz ordnet eine andere Rechtsfolge an. Was für die Hauptverträge gilt, gilt auch für Vorverträge (CC art. 6:226). Formvorschriften, die der Gültigkeit eines Vertrages entgegenstehen, finden sich z.B. in CC art. 7A:1576i (Mietkauf); Gesetz über kollektive Arbeitsverträge (*Wet op de collectieve arbeidsovereenkomst*) art. 3; CC art. 37:2 (Kauf eines Wohnhauses); CC art. 7:766 (Bau eines Wohnhauses); CC arts. 7:613, 653, 619 und 667 (individuelle Arbeitsverträge). Einige Formmängel bewirken nur den Ausschluss bestimmter Beweismittel vor Gericht, andere anstelle der Nichtigkeit die Anfechtbarkeit des Geschäfts (siehe CC arts. 3:40, 4:108 und 109. Bei (nach der Grundregel) formnichtigen Verträgen stehen dem Richter einzelne besondere Gestaltungsbefugnisse zu (näher Asser [-*Hartkamp*] Verbintenissenrecht II[12], no. 59 p. 57-58, no. 217-219 p. 214-217).

64. ESTONIAN GPCCA § 83(1) geht von denselben Grundsätzen aus: Der Verstoß gegen eine gesetzliche Formvorschrift führt zur Nichtigkeit des Vertrages, es sei denn, das Gesetz sieht eine andere Rechtsfolge vor oder der Zweck der Formvorschrift steht der Nichtigkeitsfolge entgegen. Formvorschirften unterliegen grundsätzlich der Privatautonomie, sofern das Gesetz nicht auch insoweit etwas anderes vorsieht (LOA § 11(1)). Zwingenden Rechts sind typischerweise Formvorschriften zugunsten von Verbrauchern; Grundstücksgeschäfte bedürfen der notariellen Form. Besondere bereicherungsrechtliche Vorschriften über die Rückabwicklung formnichtiger Verträge existieren nicht.

65. Zur Rückabwicklung formnichtiger Verträge sind in the NORDIC countries kaum Besonderheiten zu beachten. Allerdings gilt für Verbraucherkreditverträge zumindest in SWEDEN die allgemeine Regel, dass ein Verstoß gegen die gesetzlich vorgesehene Form nur insoweit zur Unwirksamkeit führt, als die entsprechende Vertragsklausel dem Verbraucher zum Nachteil gereicht (Consumer Credit Act [*konsumentkreditlag* 1992:830] § 9).

(d) Besonderheiten für gesetz- und sittenwidrige Verträge

66. See notes under VII.–6:103 (Illegality).

(e) Besonderheiten für einzelne Vertragstypen

67. In einigen Rechtsordnungen finden sich Sonderregeln, welche die bereicherungsrechtliche Rückabwicklung bei einzelnen Verträgen, insbesondere bei Arbeitsverträgen, Gesellschaftsverträgen und anderen Dauerschuldverhältnissen, trotz Nichtigkeit bzw. Unwirksamkeit einschränken oder ausschließen. Unter FRANZÖSISCHEM Recht kann ein Arbeitsvertrag z.B. nichtig sein, weil er mit einem Ausländer geschlossen wurde, der sich in Frankreich ohne Aufenthalts- und Arbeitserlaubnis aufhält. In solchen Fällen soll dem Arbeitnehmer trotz der Nichtigkeit bei Kündigung des Arbeitsverhältnisses (wegen der fehlenden

Genehmigungen) ein Recht auf die ausstehende Vergütung, auf kündigungsbezogene Entschädigung, auf Abrechnung und ein Arbeitszeugnis zustehen (Cass.soc. 26 January 1983, Bull.civ. 1983, V, no. 33). Der Arbeitgeber könne sich nicht rückwirkend auf die Nichtigkeit berufen (ebenso im Falle eines Arbeitnehmers, der nicht über das erforderliche Diplom verfügte, bereits Cass.soc. 14 Juni 1967, Bull.civ. 1967, V, 474). Zu den Besonderheiten im Falle der Zuvielleistung von Lohn siehe bereits oben note *I27*.

68. SPANISH Workers' Statute (*Estatuto de los Trabajadores; Real Decreto Legislativo* 1/1995 of 24 March 1995) art. 9(2) provides that "if the labor contract is void, the employee is entitled to claim the remuneration for the work done as if the contract were valid". Schrifttum und Rechtsprechung begründen diese *lex specialis* zu CC arts. 1303 ff (TS [Labor Chamber] 5 October 1994, RAJ 1994 (4) no. 7748 p. 10126) mit dem Gedanken der ungerechtfertigten Bereicherung (*Concheiro del Río*, El enriquecimiento injusto en el Derecho laboral, 85, 259; TS [Administrative Chamber] 28 May 1991, RAJ 1994 (4) no. 4215 p. 5791; TSJ La Rioja 16 March 2004, BDA AS 2004/1295; TSJ Comunitat Valenciana 29 November 2001, BDA JUR 2002/267328). Workers' Statute art. 9(2) wurde z.B. in Fällen angewandt, in welchen der Arbeitnehmer keine Aufenthaltserlaubnis hatte (TS [Administrative Chamber] 28 May 1991 loc.cit.) (heute stellt dies allerdings keinen Nichtigkeitsgrund [*nulidad*] mehr da; es sollte der Arbeitnehmerschutz bei Arbeitsunfällen verbessert werden: TS 9 June 2003, RAJ 2003 (3) no. 3936 p. 7268). Außerhalb von Arbeitsverträgen muss im Rahmen der Rückabwicklung von unwirksamen oder mangelhaften Dauerschuldverhältnissen zwischen Kündigung, Nichtigkeit und Anfechtbarkeit unterschieden werden. Die Kündigung wirkt nur *ex nunc* und lässt deshalb den Rechtsgrund für bereits erbrachte Leistungen unberührt (TS 1 May 1950, RAJ 1950 no. 728 p. 431; *Díez-Picazo*, Fundamentos II[4], 724). Bei nichtigen Dienstleistungsverträgen scheint die herrschende Meinung dagegen an CC art. 1307 festzuhalten, wonach der Wert der erbrachten Dienstleistung nach objektivem Maßstab zu vergüten ist (*Delgado Echeverría and Parra Lucán*, Las nulidades de los contratos, 256-257; *Díez-Picazo*, La liquidación de las nulidades contractuales, § 3; *López Beltrán*, La nulidad, 65; CA Ciudad Real 30 March 2004, BDA JUR 2004/128779). Siehe im Übrigen auch noch note *IV76* below.

69. Unter ITALIAN CC art. 2126 haben die Nichtigkeit und die Annullierung eines Arbeitsvertrages keine Wirkung für die Zeit, während der das Arbeitsverhältnis tatsächlich ausgeführt worden ist, es sei denn, die Nichtigkeit beruht auf der Unerlaubtheit des Gegenstandes oder des Rechtsgrundes der Tätigkeit. Ein Verstoß gegen Vorschriften, welche den Arbeitnehmer schützen sollen, berührt seinen Lohnanspruch nicht. CC art. 2126 betrifft aber nur abhängig Beschäftigte, nicht Dienstleistungen selbständiger Unternehmer (Cass. 25 March 1995, no. 3496, Rep.Giur.it. 1995, voce Arricchimento senza causa no. 17; Cass. 27 November 1995, no. 12259, Rep.Giur.it. 1995, voce Lavoro (Rapporto) no. 631; Cass.sez.un. 3 April 1989, no. 1613, Foro it. 1989, I, 1420); in solchen Fällen beschränkt sich der Anspruch auf einen bereicherungsrechtlichen Wertausgleich (Cass. 19 August 1992, no. 9675, Foro it. 1993, I, 428). CC art. 2126 findet gleichfalls keine Anwendung, wenn ein Arbeitnehmer nach dem Ablauf eines befristeten Vertrages weiter arbeitet (Cass. 29 April 1968, no. 1330, Rep.Giur.it. 1968, voce Lavoro (Rapporto di) no. 283). Die Gegenausnahme "unerlaubter Gegenstand" betrifft nur Fälle, in welchen der Vertrag gegen die öffentliche Ordnung, gegen "ethische Grundprinzipien" der Rechtsordnung verstößt (Cass. 23 April 1981, no. 2434, Giust.civ.Mass. 1981, fasc. 4; Cass. 22 April 1983, no. 2779, Giust.civ.Mass. 1983, fasc. 4); der Vertrag muss auf ein unerlaubtes, typischerweise strafbares Tun gerichtet sein (Cass. 27 November 1987, no. 8830,

Giust.civ.Mass. 1987, fasc. 11). Auch dann stehen dem Arbeitnehmer aber noch die Regeln des Rechts der ungerechtfertigten Bereicherung bzw. der Zahlung einer Nichtschuld offen (nach denen aber im Falle eines Verstoßes gegen die guten Sitten ein Anspruch ausgeschlossen sein kann: Cass. 27 November 1987 loc.cit.). Ein "unerlaubter Rechtsgrund" ist z.B. gegeben, wenn jemand in einer Apotheke zum Verkauf von Arzneimitteln eingestellt wird, die nur ein Apotheker abgeben darf (Cass. 23 July 1983, no. 5093, Giur.it. 1984, I, 1, 266). Wird eine Wohnung aufgrund eines nichtigen Mietvertrages genutzt, so findet ein Wertausgleich nach den Grundsätzen des Bereicherungsrechts statt (*Breccia*, Il pagamento dell'indebito, 774; *Moscati*, Pagamento dell'indebito, arts. 2033-2040, 155-180; anders [*condictio indebiti*] CFI Bologna 1 December 1964, Giur.it. 1965, I, 2, 826). Cass. 3 May 1991, no. 4849, Giur.it. 1991, I, 1, 1314 entschied, dass eine Partei, welche die Immobilie tatsächlich genutzt hat, nicht Rückzahlung des Mietzinses verlangen könne, weil sie sich dadurch ungerechtfertigt bereichern würde. Da die Nutzung der Immobilie nicht rückgängig gemacht werden könne, müsse dem Vermieter auch der Mietzins verbleiben. Ist ein formnichtiger Beförderungsvertrag durchgeführt worden, kommen dieselben bereicherungsrechtlichen Prinzipien zur Anwendung: jede Seite behält das Empfangene; ein Rückausgleich findet nicht statt (CFI Milan 3 July 1997, Riv.giur.circ.trasp. 1998, 519).

70. Für den Bereicherungsausgleich bei Dauerschuldverhältnissen, insbesondere Arbeitsverhältnissen, hat auch die AUSTRIAN Rechtsprechung besondere Regeln entwickelt. Der Tendenz nach soll ein bereits in Vollzug gesetztes Dauerschuldverhältnis entgegen den allgemeinen Regeln nicht als *ex tunc* unwirksam sondern als *ex nunc* beendet anzusehen sein, es sei denn, der Vertragsschluss wurde durch List oder Zwang herbeigeführt (Rummel [*Rummel*]. ABGB I[3], § 859 no. 27). Für Arbeits- und Dienstleistungsverträge ist außerdem zu beachten, dass die Bereicherung in analoger Anwendung von CC § 1152 nicht nach dem Vorteil des Bereicherten bemessen, sondern in Höhe eines angemessenen Entgelts ausgeglichen wird. Der Anspruch des Arbeitgebers auf Rückzahlung zu viel gezahlten Lohnes wird der kurzen vertraglichen (nicht der langen bereicherungsrechtlichen) Verjährungsfrist unterworfen (OGH 17 May 2000, RdW 2001, 106; vgl. auch OGH 27 January 1988, SZ 61/16 [Zweckverfehlungskondiktion]). Ein Mieter von Wohnraum kann selbst bestimmte Leistungen zurückfordern, von denen er wusste, dass sie nicht geschuldet waren. Dazu gehören überhöhte Mietzinszahlungen und die sogen. "Ablöse" an den Vormieter, see MRG § 27(3).

71. Under PORTUGUESE Labour Code art. 115(1) a labour contract which is declared void or annulled produces the same effects as if it were valid during the time in which it was performed by the parties. Die Nichtigkeit eines Arbeitsvertrages wirkt ex nunc; er wird behandelt, als wäre er während der Zeit seiner Erfüllung wirksam gewesen (*Martinez*, Código do Trabalho anotado[4], note 3 under art. 115, p. 255; STJ 22 March 2007, Processo 07S364). Das ist nur dann anders, wenn the contract has an object that is contrary to the law, disturbs the peace or is offensive to decency. In einem solchen Fall verliert die Partei, die sich des Verstoßes bewusst war, alle Vorteile aus dem Arbeitsvertrag; sie gehen auf das *Instituto de Gestão Financeira da Segurança Social* über (Labour Code art. 117(1). Die Rechtsfolgen ungültiger Arbeitsverträge haben die Theorie viel beschäftigt, scheinen aber die Praxis kaum vor Probleme zu stellen, weil man sich dort mit zahlreichen anderen Instrumenten (Probezeit, Informationspflichten etc.) zu helfen gewusst hat (*Gomes*, Direito do trabalho I, 515). Labour Code art. 115(1) betrifft allerdings nur Individualarbeitsverträge; die Rückabwicklung von Leistungen aufgrund eines nichtigen kollektiven Arbeitsvertrages verbleibt dem allgemeinen Nichtigkeitsregime (STJ 23 January 2008, Processo 07S2186).

72. Under GERMAN law können bei in Vollzug gesetzten Gesellschafts- und Arbeitsverträgen die meisten Nichtigkeitsgründe nur mit Wirkung *ex nunc* geltend gemacht werden (Palandt [-*Heinrichs*], BGB[66], Überblick vor § 104, no. 36; § 125, no. 10). Auch andere Dauerschuldverhältnisse (z.B. Miete und Pacht, Darlehen, Verwahrung und Versicherung) sind dadurch gekennzeichnet, dass aus ihnen während ihrer Laufzeit ständig neue Leistungs-, Neben- und Schutzpflichten entstehen. Im Gegensatz zu Arbeits- und Gesellschaftsverträgen, bei denen die genannten Rückabwicklungsbeschränkungen weithin anerkannt sind, wird aber bei den anderen Dauerschuldverhältnissen, insbesondere bei Miete und Pacht, die Frage noch kontrovers diskutiert, ob auch bei ihnen die Geltendmachung von Nichtigkeits- und Anfechtungsgründen Beschränkungen unterworfen ist (verneinend *Heinrichs* loc.cit.; bejahend jedenfalls für die Anfechtung Erman [-*Palm*], BGB I[11], § 142, no. 10). Bei Geschäften, die wegen Wuchers nichtig sind (CC § 138(2)), wird unterschieden. Bei Darlehensverträgen kommt eine (gerichtliche) Herabsetzung des wucherischen Zinses auf ein vertretbares Maß nicht in Betracht, bei einem wucherischen Mietzins für Wohnraum wird sie dagegen zumeist für möglich gehalten (*Heinrichs* loc.cit. § 138 nos. 75-76; *Palm* loc.cit. § 138 no. 55). Versicherungsvertragsgesetz §§ 16 ff gewähren dem Versicherer im Falle eines nicht zu vertretenden Irrtums über gefahrrelevante Umstände ein Rücktrittsrecht; das Anfechtungsrecht unter CC § 119 wird hierdurch ausgeschlossen (BGH 22 February 1995, NJW-RR 1995, 725). Auch in GREECE wird vorgeschlagen, die Rückforderung von Lohn, der auf einen nichtigen Arbeitsvertrag gezahlt wurde, dadurch auszuschließen, dass der Nichtigkeit nur *ex nunc*-Wirkung beigemessen wird (Georgiades and Stathopoulos [-*Poullos*], art. 649, nos. 57-58). Ist der Lohn noch nicht gezahlt, so scheint die Rechtsprechung dem Arbeitnehmer aber nur einen bereicherungsrechtlichen Anspruch zu gewähren (A.P. 677/1971, NoB 20 [1972] 283; A.P. 456/1973, NoB 21 [1973] 1329; A.P. 579/1977, NoB 26 [1978] 203). Im Schrifttum wird andererseits auch für bereits in Vollzug gesetzte nichtige Gesellschaftsverträge behauptet, dass eine Rückabwicklung *ex tunc* ausgeschlossen sei (Georgiades and Stathopoulos [-*Minoudis*], art. 741, no. 16).

73. Die HUNGARIAN Rechtslehre fasst alle Dauerschuldverhältnisse (Gesellschaft, Miete, Wohnungsmiete, Pacht, Leihe) mit den Dienstleistungsverträgen in dem Begriff der “ursprünglich irreversiblen Verträge” zusammen (*Weiss*, A szerződés érvénytelensége a polgári jogban, 417). Die Rückgabe des Geleisteten ist in solchen Fällen entweder physisch unmöglich oder wirtschaftlich sinnlos. CC § 237(2) sieht deshalb einen lediglich *ex nunc* wirkenden Ausgleichsmechanismus vor. Das Gericht erklärt den ungültigen Vertrag für die Zeit bis zu der Entscheidung für wirksam. (Es kann auch einen Wuchervertrag für gültig erklären, indem es den unangemessenen Vorteil der begünstigten Partei beseitigt und die Rückerstattung der ohne Gegenleistung bleibenden Leistung verfügt.) Die Wirksamkeitserklärung ändert aber nichts daran, dass tatsächlich erbrachte irreversible Leistungen nach bereicherungsrechtlichen Grundsätzen dem Werte nach ausgeglichen werden müssen (BH 1998/39: Forschungsvertrag), (BH 1990/30 und BH 2002/29: Werkvertrag), (BH 2001/168: Pachtvertrag). Zu den Besonderheiten des Arbeitsrechts s. bereits note *III62* above. Unter BULGARIAN Labour Code art. 74(1) kann das Gericht einen gegen das Gesetz oder einen Tarifvertrag verstoßenden Arbeitsvertrag für unwirksam erklären. Das hat allerdings für einen bei Vertragsschluss gutgläubigen Arbeitnehmer keine rückwirkende Bedeutung; die Unwirksamkeitserklärung wirkt in seinem Fall *ex nunc* (Labour Code art. 75(1)). War der Arbeitnehmer bösgläubig, so steht ihm hinsichtlich der von ihm bereits erbrachten Arbeitsleistungen dagegen nur ein Bereicherungsanspruch zu (Supreme Court 8 February 1990, decision no. 23 in civil matters no. 839/89).

74. ESTONIAN Employment Contracts Act (*Eesti Vabariigi töölepingu seadus* of 1 July 1992, ECA) §§ 129-131 bringen besondere Vorschriften über Arbeitsverträge, die von Minderjährigen oder Personen geschlossen werden, welche infolge einer geistigen Behinderung nicht oder nicht voll geschäftsfähig sind. Such contracts may be declared invalid by the labour dispute resolution body. Handelt es sich um einen nicht voll geschäftsfähigen Arbeitgeber, so muss der Arbeitnehmer ihm alles zurückgeben, was er unter dem Arbeitsvertrag erhalten hat, kann aber den Lohn jedenfalls in Höhe des von der Regierung für die entsprechende Tätigkeit festgesetzten Mindestlohnes behalten. Wird der Arbeitsvertrag für unwirksam erklärt, weil der Arbeitnehmer nicht voll geschäftsfähig ist, so berührt das seine Ansprüche aus dem Vertrag nicht.

75. In the NORDIC countries, as a general rule, the unwinding of long-term contracts (including labour contracts) only affects the future relationship of the parties; voidness or invalidity of such contracts are effective merely *ex nunc* so that there is no room for restitution of past performances (*Hellner/Hager/Persson*, Speciell avtalsrätt II(2)[4], 56; *Karlgren*, Obehörig vinst och värdeersättning, 91; *Jørgensen*, Kontraktsret II, 128). Voidness/invalidity and termination of long-term contract have similar effects (*Jørgensen*, Kontraktsret I, 120; see also *Hellner/Hager/Persson* loc.cit. 185). SWEDISH Consumer Services Act (*konsumenttjänstlag* [1985:716]) § 29(1) and FINNISH Consumer Protection Act (*konsumentskyddslag* 20 January 1978/38) chap. 8 § 9(5) modifizieren diesen Grundsatz allerdings dahin, dass für in der Vergangenheit erbrachte Leistungen auf eine bewegliche Sache oder ein Grundstück ein angemessener Ausgleich in Geld zu zahlen ist. Hiernach muss z.B. ein Bauherr, der von dem Vertrag mit dem Werkunternehmer zurückgetreten ist, die von diesem bereits erbrachten Leistungen angemessen vergüten (näher *Hellner/Hager/Persson* loc.cit. 138; *Bryde Andersen and Lookofsky*, Obligationsret I[2], 238; ähnlich DANISH HD 9 January 1942, UfR 1942, 252).

IV. Auflösende und aufschiebende Bedingungen

(a) Rückforderbarkeit bei Eintritt einer auflösenden Bedingung

76. Leistungen auf einen Vertrag, der infolge des Eintritts einer auflösenden Bedingung seine Wirksamkeit verloren hat, können nach allen Rechtsordnungen zurück verlangt werden. Unter FRENCH CC art. 1183 führt das Eintreten einer auflösenden Bedingung ex tunc zur Beseitigung der vertraglichen Verbindlichkeit, so dass der Fall so anzusehen ist, als habe es nie einen Vertrag gegeben. Folglich ist das bereits Empfangene zurückzugeben. Das entspricht der Rechtslage in BELGIUM. Under SPANISH CC art. 1113(2) an obligation subject to a resolutive condition is immediately enforceable. Tritt die auflösende Bedingung ein, so hat das den Verlust schon erworbener Rechte zur Folge (CC art. 1114). CC art. 1123(1) stellt klar, dass diese Wirkung *ex tunc* eintritt: das Empfangene ist zurückzugeben. Ist eine empfangene Sache verloren gegangen oder zerstört worden, so wird CC art. 1122 (suspensive condition) anwendbar: fällt dem Schuldner Fahrlässigkeit zur Last, so muss er Schadenersatz zahlen; andernfalls erlischt seine Verpflichtung. Im Schrifttum stößt diese Lösung des Gesetzes allerdings auf Kritik; sie sei zu simpel (*Díez-Picazo*, Fundamentos II[4], 368). Vor allem im Rahmen von Dauerschuldverhältnissen restitution should not have retroactive effect (*Díez-Picazo* loc.cit. 367; López/Montés/Roca [-*Verdera Server*], Derecho de Obligaciones y Contratos, 106).

77. Wer ein Recht unter einer auflösenden Bedingung erwirbt, darf es under ITALIAN law während der Schwebezeit ausüben, doch kann der andere Vertragsteil bestimmte Rechtshandlungen zur Sicherung seiner Rückfallposition vornehmen (CC art. 1356(2)). Tritt die Bedingung ein, so wirkt dies in Ermangelung einer abweichenden

Vereinbarung oder besonderer Umstände auf den Zeitpunkt des Vertragsschlusses zurück (CC art. 1360). Dritten gegenüber wirkt der Bedingungseintritt stets *ex tunc* und dinglich (näher und auch zu den Einschränkungen dieser Grundregel durch Vorschriften über den gutgläubigen Erwerb *Roppo*, Il contratto, 626-630). Ist ein auf dauernde oder regelmäßig wiederkehrende Durchführung gerichteter Vertrag auflösend bedingt, so kommt dem Bedingungseintritt allerdings mangels gegenteiliger Vereinbarung keine Wirkung hinsichtlich der bereits erbrachten Leistungen zu (CC art. 1360(2)). Der Bedingungseintritt lässt auch die Gültigkeit der Verwaltungshandlungen unberührt, welche die berechtigte Partei innerhalb der Schwebezeit vornahm (CC art. 1361). Ersatz für gezogene Früchte ist erst ab Bedingungseintritt geschuldet. Im Übrigen bewirkt der Eintritt einer auflösenden Bedingung den Wegfall der *causa solvendi* und löst deshalb Rückerstattungsansprüche aus (*Moscati*, Pagamento dell'indebito, 124 mit fn. 6; Cass. 16 March 1943, no. 621, Giur.it. 1943, I, 1, 245; Cass. 7 February 1962, no. 234, Foro it. 1962, I, 676).

78. In AUSTRIA gehören Rückforderungsansprüche bei Eintritt einer auflösenden Bedingung in den Anwendungsbereich der *condictio causa finita* (CC § 1435; see Schwimann [-*Mader*], ABGB VI^{3}, § 1434 no. 1). OGH 15 January 1987, SZ 60/6 betraf einen Fall, in welchem die auflösende Bedingung (das Ausbleiben einer Genehmigung für ein Grundstücksgeschäft) erst nach 11 Jahren eintrat. Das Gericht meinte, dass sich der aus den erbrachten Leistungen gezogene Nutzen gegenseitig aufhebe, sodass der Käufer weder Zinsen noch einen Inflationsausgleich verlangen könne. Das Gericht hat diese Rechtsprechung trotz kontroverser Diskussion im Schrifttum später noch mehrfach bestätigt (OGH 22 April 1997, SZ 70/69; OGH 29 September 1998, SZ 71/162). Under POTUGUESE CC art. 270 können die Parteien die Wirkungen ihres Rechtsgeschäfts einem zukünftigen ungewissen Ereignis unterstellen; bei dieser Bedingung kann es sich (was durch Auslegung zu ermitteln ist: *Pires de Lima and Antunes Varela*, Código Civil Anotado I^{4}, note 2 under art. 270, p. 250) um eine *condição suspensiva* oder um eine *condição resolutiva* handeln. Auflösende Bedingungen wirken in Ermangelung einer anderen Parteiabrede *ex tunc* (CC art. 276). Anders ist das nur bei Verträgen, die dauernde oder regelmäßig wiederkehrende Leistungen zum Gegenstand haben (CC art. 277(1) i.V.m. art. 434(2). Das Rückforderungsregime ist dem des Rücktrittsrechts gleichgestellt (CC art. 433) und unterliegt dem allgemeinen Ungültigkeitregime (siehe CC art. 434(2)). Die Anwendung der Regeln zur ungerechtfertigen Bereicherung ist deshalb ausgeschlossen (STJ 15 March 2005, Processo 05B314).

79. GERMANY klassifiziert die Rückforderung von Leistungen, die aufgrund eines auflösend bedingten Vertrages (CC § 158(2)) vor Bedingungseintritt erbracht worden sind, als einen Fall der *condictio ob causam finitam* (CC § 812(1)(ii) first alternative; see Staudinger [-*W. Lorenz*], BGB [1999], § 812, no. 94). Denn im Zeitpunkt der Leistung bestand ein Rechtsgrund für ihre Erbringung; er ist erst nachträglich durch den Bedingungseintritt endgültig weggefallen. Eine Bedingung i.S.d. CC § 158 setzt voraus, dass die Parteien den Eintritt oder den Fortbestand der Rechtswirkungen ihres Rechtsgeschäfts von einem künftigen, objektiv ungewissen Ereignis abhängig machen (Erman [-*Armbrüster*], BGB I^{11}, Vor § 158, no. 1). Im Falle der auflösenden Bedingung tritt die Rechtsänderung nach ganz herrschender Auffassung *ex nunc* ein (*Armbrüster* loc.cit. § 158, no. 5; Palandt [-*Heinrichs*], BGB^{66}, § 159, no. 1; BGH 26 September 1996, BGHZ 133, 331, 334). Die Anwendbarkeit der Regeln über die *condictio ob causam finitam* ist freilich nicht völlig unbestritten. Es wird auch argumentiert, dass Parteien, die eine auflösende Bedingung vereinbaren, die Möglichkeit eines späteren Wegfalls des Geschäfts voraussähen. Deshalb könne eine Rückgewährpflicht als stillschweigend vereinbart angesehen werden; des

Bereicherungsrechts bedürfe es folglich nicht mehr (*Medicus*, Schuldrecht II[13], no. 647). Die Rechtslage in GREECE entspricht der Sichtweise der herrschenden Auffassung in Germany, see Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 92.

80. In HUNGARY wird gesagt, Bedingungen beträfen die zeitliche Wirksamkeit des Vertrages (*Bíró*, A kötelmi jog és a szerződéstan közös szabályai[6], 309, *Weiss*, A szerződés érvénytelensége a polgári jogban, 168). Der Eintritt einer auflösenden Bedingung führe zum Erlöschen seiner Wirksamkeit. Erbrachte Leistungen werden nachträglich rechtsgrundlos (CC § 228(2)). Für die Rückabwicklung erbrachter Leistungen finden sich keine ausdrücklichen gesetzlichen Bestimmungen. Seit einiger Zeit scheint die Meinung vorzuherrschen, dass die Rückabwicklung nach den Regeln des Bereicherungsrechts zu erfolgen habe (*Kemenes*, A szerződés érvénytelensége, 55, 70). Die Reformvorschläge zum neuen Zivilgesetzbuch haben sich dieser Auffassung angeschlossen (http://irm.gov.hu/download/otodiktervezet.pdf/otodiktervezet.pdf). Under BULGARIAN LOA art. 55(1) erfüllt der Eintritt einer auflösenden Bedingung ausdrücklich einen der drei Tatbestände der *condictio indebiti*. Auch in SLOVENIA führt der Eintritt einer auflösenden Bedingung *ipso facto* und mit Wirkung *ex tunc* zum Erlöschen des Vertrages (LOA art. 59(3); see *Šinkovec and Tratar*, Obligacijski zakonik s komentrajem in sodno prakso, art. 59, p. 62). Bereits erbrachte Leistungen sind nach LOA art. 190(3) rückabzuwickeln.

81. Under DUTCH law können Leistungen auf einen Vertrag, der infolge des Eintritts einer auflösenden Bedingung erloschen ist, nicht über das Recht der ungeschuldeten Zahlung (*onverschuldigde betaling*) zurückgefordert werden, weil CC art. 6:24 insoweit ein spezielleres Rückgewährschuldverhältnis geschaffen hat. Allerdings gehen dessen Regeln kaum ins Detail; zur Lückenfüllung muss deshalb im Wege der Analogie doch wieder auf das Recht der ungeschuldeten Zahlung zurückgegriffen werden (Nieuwenhuis/Stolker/Valk (-*Valk*), T & C Burgerlijk Wetboek[6], art. 6:24, no. 1 p. 2141). Under ESTONIAN GPCCA § 102 führt der Eintritt einer auflösenden Bedingung zum Erlöschen der Wirkungen des Rechtsgeschäfts. Eine auflösende Bedingung gilt als ausgeblieben, wenn die begünstigte Partei ihren Eintritt treuwidrig verhindert hat (GPCCA § 104). Eine während der Schwebezeit getroffene Verfügung wird bei Bedingungseintritt in der Regel unwirksam (see also GPCCA § 106). Die Rückabwicklung richtet sich nach den bereicherungsrechtlichen Vorschriften des LOA. Rechte gutgläubiger Dritter bleiben allerdings unberührt (GPCCA § 106(3)).

82. Auch in the NORDIC countries ist anerkannt, dass ein Vertrag beim Eintritt einer auflösenden Bedingung rückabgewickelt werden muss (*Adlercreutz*, Avtalsrätt I[11], 105). SWEDISH Land Code (*jordabalk*) chap. 4 §§ 3-4 erlauben auch für Grundstücksgeschäfte aufschiebende und auflösende Bedingungen, verlangen aber Schriftform und begrenzen die Wirksamkeit solcher Bedingungen auf zwei Jahre, es sei denn, sie beziehen sich auf die Erfüllung der Zahlungsverpflichtung.

(b) Rückforderbarkeit bei Nichteintritt einer aufschiebenden Bedingung

83. Rückforderbar sind grundsätzlich überall auch Leistungen auf einen Vertrag, der mangels Eintritts einer aufschiebenden Bedingung nicht wirksam geworden ist. Under FRENCH, BELGIAN and LUXEMBURGIAN CC art. 1181 fehlt es in einem solchen Fall an einem Schuldverhältnis; gleichwohl erbrachte Leistungen sind folglich nach den allgemeinen Regeln zurückzugewähren (Cass.ass.plén. 2 April 1993, Bull.civ. 1993, I, no. 9 p.326). Eine aufschiebende Bedingung gilt allerdings auch dann als erfüllt, wenn die Partei, die der Bedingungseintritt zu einer Leistung verpflichtet hätte, den Eintritt der Bedingung verhindert (CC art. 1178).

84. Under SPANISH CC art. 1113 ist ein Vertrag vor Eintritt der vereinbarten aufschiebenden Bedingung nicht durchsetzbar; ein Schuldner, der vor Bedingungseintritt leistet, kann das Geleistete vom Gläubiger zurück verlangen (CC art. 1121(2)). Dieser Rückforderungsanspruch wird als eine besondere, von der *condictio indebiti* durch das Fehlen des Irrtumselementes unterschiedene Kondiktion qualifiziert (*Díez-Picazo*, Fundamentos II[4], 358); gesondert zu prüfen sei allerdings, ob ein Leistungsaustausch zwischen Parteien eines aufschiebend bedingten Vertrages darauf hinausliefe, dass sie sich stillschweigend auf eine Aufgabe der Bedingung geeinigt hätten (*Díez-Picazo* loc.cit.; *Gullón Ballesteros*, FS Batlle Vázquez, 367, 370). Under CC art. 1120(1) kommt dem Eintritt einer aufschiebenden Bedingung rückwirkende Bedeutung zu, sofern es sich um die Verpflichtung zur Übergabe einer Sache oder Geld handelt. Bei Dienstleistungen oder Unterlassungspflichten entscheidet das Gericht whether there is retroactive effect or not (CC art. 1120(2)). Zahlt eine Bank ein hypothekarisch gesichertes Darlehn aus, obwohl der Vertrag die Darlehnsgewährung von der Mitteilung des land registers abhängig gemacht hatte, dass das Grundtsück nicht weiter belastet ist, so kann die Bank, welche die Auszahlung rückgängig macht, nachdem sie den Fehler bemerkt hat, nicht auf erneute Auszahlung verklagt werden (TS 27 September 1999, RAJ 1999 (4) no. 7081 p. 11085).

85. Unter ITALIAN CC art. 1360 wirkt der Eintritt einer aufschiebenden Bedingung auf den Zeitpunkt des Vertragsabschlusses zurück, es sei denn, die Parteien haben etwas anderes vereinbart. Ob das Geleistete während der Schwebezeit zurückverlangt werden kann, scheint streitig zu sein. CA Naples 13 January 1970, Dir. e giur. 1970, 240 hat die Auffasung vertreten, dass eine Rückforderung nur in Betracht komme, wenn sicher sei, dass die Bedingung nicht eintreten werde. In der Lehre wird dagegen gesagt, die Rückforderung sei nur dann ausgeschlossen, wenn der *solvens* gewusst habe, dass die Erfüllung noch nicht geschuldet war (*Moscati*, Pagamento dell'indebito, 123 mit fn. 6). AUSTRIAN CC § 1434 stellt die Leistung einer bedingten Schuld der Leistung einer Nichtschuld gleich (näher *Koziol and Welser*, Bürgerliches Recht II[13], 277); sie kann folglich kondiziert werden, sobald die Bedingung endgültig ausgefallen ist (OGH 12 November 1979, JBl 1981, 148; *Apathy and Riedler*, Bürgerliches Recht III[2], no. 15/6). Praktisch bedeutsam sind insbesondere Leistungen auf einen Vertrag, dessen Wirksamkeit von einer öffentlichen Genehmigung abhängt. Da CC § 1434 als ein Sonderfall des CC § 1431 verstanden wird, ist das Irrtumserfordernis zu beachten: die Rückforderung ist ausgeschlossen, wenn die Leistung entweder in Kenntnis der ausstehenden Genehmigung (Rummel [-*Rummel*], ABGB II(3)[3], § 1434 no. 2) erfolgt oder wenn der Leistende verpflichtet ist, die Genehmigung einzuholen, dies aber unterlassen hat (OGH 13 March 1957, SZ 30/15).

86. Auch under PORTUGUESE CC art. 270 können die Parteien vermittels einer aufschiebenden Bedingung die Wirkungen eines Rechtsgeschäfts einem zukünftigen ungewissen Ereignis unterordnen. Der Rückforderungsanspruch aus CC art. 276 ist auf die Wiederherstellung des früheren Zustands gerichtet. Man habe es bei Leistungen während der Schwebezeit mit einem *pagamento indevido* zu tun (*Menezes Leitão*, Enriquecimento sem causa[2], 472). Folglich können sie, wenn die Bedingung ausbleibt, nach den Regeln des Bereicherungsrechts zurückverlangt werden (STJ 18 June 1996, BolMinJus 458 [1996] 347). Das entspricht der Rechtslage in GERMANY and GREECE. Bei Nichteintritt einer aufschiebenden Bedingung wird der bis dahin bestehende Schwebezustand beseitigt und das Rechtsgeschäft endgültig wirkungslos. Man spricht vom Ausfall der Bedingung. Ausgefallen ist die Bedingung nicht nur, wenn sie objektiv nicht mehr eintreten kann, sondern auch dann, wenn der Zeitraum, innerhalb dessen ihr Eintritt zu erwarten war, verstrichen ist (Erman [-*Armbrüster*],

BGB I[11], § 158, no. 10; Georgiades and Stathopoulos [-*Kritikos*], art. 201, no. 4). Wie bei Leistungen vor Eintritt der Bedingung erfolgt auch bei endgültigem Ausfall der Bedingung eine Rückabwicklung nach CC § 812(1)(i) first alternative.

87. Ist der Vertrag wegen einer aufschiebenden Bedingung (noch) unwirksam, werden aber trotzdem bereits Leistungen erbracht und bleibt die Bedingung aus, so erfolgten die Leistungen auch unter HUNGARIAN CC § 228(1) rechtsgrundlos. Ihre Rückabwicklung obliegt nach heutiger Auffassung den Vorschriften über die ungerechtfertigte Bereicherung und den unrechtmäßigen Besitz, see note *IV76* above. Dem entspricht die Rechtslage under BULGARIAN LOA art. 55(1). Keinen Kondiktionsanspruch hat dagegen die Partei, welche den Bedingungseintritt treuwidrig verhindert hat. In solchen Fällen wird der Bedingungseintritt fingiert (LOA art. 25(1); näher *Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 586). Leistungen auf einen aufschiebend bedingten Vertrag sind, auch wenn sie vor Bedingungseintritt erfolgen, unter SLOVENIAN LOA art. 59(2) wohl als mit Rechtsgrund erbracht anzusehen; der bereicherungsrechtliche Rückforderungsanspruch entsteht erst bei endgültigem Ausbleiben der Bedingung.

88. Under DUTCH CC art. 6:25 unterliegt die Rückforderung von Leistungen, die vor Bedingungseintritt und bei seinem Ausbleiben auf einen aufschiebend bedingten Vertrag erbracht werden, den Regeln des Rechts der ungeschuldeten Zahlung (Verbintenissenrecht I [-*Busch*], Art. 6:25, no. 3-5 p. 2). In ESTONIA übernimmt das Recht der ungerechtfertigten Bereicherung im LOA diese Aufgabe. Eine aufschiebende Bedingung gilt auch dann als eingetreten, wenn ihr Eintritt von der begünstigten Partei wider Treu und Glauben verhindert wird (GPCCA § 104). Verfügungen während der Schwebezeit sind vorbehaltlich der Rechte gutgläubiger Dritter bei Bedingungseintritt nichtig (GPCCA § 106).

89. For the the NORDIC countries see note *IV82* above. Eine Partei, die zu ihrem Vorteil treuwidrig den Eintritt einer aufschiebenden Bedingung verhindert, haftet der anderen Seite auf Schadenersatz (*Adlercreutz*, Avtalsrätt I[11], 105).

V. Entsprechende Anwendbarkeit auf nichtvertragliche Obligationen

90. Auch Leistungen auf nur scheinbar existierende nichtvertragliche Obligationen können grundsätzlich in allen Rechtsordnungen zurück gefordert werden. FRENCH Gerichte haben z.B. bestätigt, dass zwischen dem Lebensgefährten einer nichtehelichen Lebensgemeinschaft und den Eltern der Partnerin weder eine Unterhaltspflichtschuld noch eine entsprechende Naturalobligation besteht; folglich können die entsprechenden Beistandsleistungen nach CC art. 1305 zurück verlangt werden (Cass.civ. 18 July 1995, Petites affices 21 July 1997, note *Hauksson-Tresch*). Desgleichen kann ein Versicherer, dessen Haftpflichtschuld von der Berufungsinstanz als wesentlich geringer eingestuft wird, den nach Abschluss der ersten Instanz an den Geschädigten ausgezahlten Betrag in Höhe der Zuvielzahlung über die Regeln der *répétition de l'indu* zurück fordern (Cass.civ. 20 January 1998, Bull.civ. 1998, I, no. 18; D. 1999, 500, note *Martin*). Mit den Mitteln der *action en répétition de l'indu* werden auch zu viel gezahlten Sozialleistungen (Cass.civ. 22 November 2005, no. de pourvoi 04-30583) und Steuern (Cass.civ. 24 February 2005, no. de pourvoi 03-20040) zurück gefordert. Ebenso verhält es sich in BELGIUM (Cass. 27 March 2006, no. JC063R"_3, no. de rôle S050022F; Cass. 3 January 2005, no. JC05133_1, no. de rôle S040118F ; Cass. 29 September 2003, no. de rôle S020047F ; Cass. 26 June 1998, no. JC986Q2_4, no. de rôle F970071F).

91. Die Regelung in SPANISH CC arts. 1895-1901 betrifft alle irrtümlichen ungeschuldeten Leistungen, auch solche auf inexistente außervertragliche

Schuldverhältnisse. Standardfälle betreffen undue payments of the Social Security Administration to employees (e.g. TS 9 March 1999, RAJ 1999 (2) no. 2753 p. 4265; TSJ Extremadura 15 March 2002, BDA JUR 2002/151478; see *Concheiro del Río*, El enriquecimiento injusto en el Derecho laboral, 53-65, 264). Die *condictio indebiti* ist auch auf Rückforderungsansprüche von Verbrauchern angewandt worden, die auf Musik CD´s and DVD´s Gebühren gezahlt hatten, die nur gewerbliche Nutzer zahlen müssen (CA Málaga 19 September 2006, BDA AC 2006/1569). Auch für ITALIAN CC art. 2033 ist unumstritten, dass sich der Begriff der ungeschuldeten Zahlung sowohl auf vertragliche als auch auf außervertragliche Schuldverhältnisse bezieht (*Cian and Trabucchi*, Commentario breve[6], Vor Artt. 2033, II). Geläufige Beispiele aus der Rechtsprechung betreffen ungeschuldete Steuerzahlungen an die Finanzverwaltung (z.B. Cass.sez.trib. 22 May 2006, no. 11987, Giust.civ.Mass. 2006, 5; Cass.sez.trib. 12 July 2006, no. 15840, Giust.civ.Mass. 2006, 7-8; Cass.sez.un. 13 September 2005, no. 18120, Dir. e giust. 2005, 39).

92. Die Regelungen über die Leistungskondiktion sind auch in AUSTRIA sowohl auf vertragliche als auch auf außervertragliche Obligationen anwendbar, etwa auf die Erfüllung einer vermeintlichen Unterhaltsschuld oder einer Schuld aus Delikt. CC § 877 (List oder Drohung) wird auf außervertragliche Obligationen entsprechend angewandt (*Koziol and Welser*, Bürgerliches Recht II[13], 278). PORTUGUESE CC art. 476(1) (*repetição do indevido*) bezieht sich gleichfalls auch auf Leistungen, die in Erfüllungsabsicht auf eine tatsächlich nicht bestehende außervertragliche Obligation erbracht wurden (*Menezes Leitão*, Enriquecimento sem causa[2], 472). Der Begriff der Obligation in CC art. 476(1) deckt sich mit dem in CC art. 397; *obrigação* ist die juristische Verbindung, durch die eine Person einer anderen gegenüber zur Erbringung einer Leistung verpflichtet ist (*Almeida Costa*, Obrigações[10], 506; *Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], note 1 under art. 476, p. 463). Dem enstpricht die Rechtslage in GERMANY and in GREECE (Georgiades and Stathopoulos [-*Stathopoulos*], art. 905, no. 3). German CC § 812(1)(i)first alternative erfasst alle Fälle von Leistungen auf eine in Wirklichkeit nicht bestehende Verbindlichkeit. Sie kann ihren Sitz im Schuld-, Sachen-, Familien- oder Erbrecht haben, und es ist auch gleicgültig, ob der Leistende meinte, sie stamme aus Vertrag oder aus Gesetz (Staudinger [-*W. Lorenz*], BGB [1999], § 812, no. 81).

93. In HUNGARY ist zwischen der Rückabwicklung nicht existierender und der Rückabwicklung ungültiger Verträge zu unterscheiden. Entsprechendes gilt für nicht existierende nichtvertragliche Obligationen. Ihre Erfüllung fällt - als ungeschuldete Leistung - unter das Bereicherungsrecht, sofern vor ihm kein anderes Rückabwicklungsregime Vorrang beansprucht. Besonderen Bestandsschutz genießen Unterhaltszahlungen. Gemäß CC § 362 kann eine zum Lebensunterhalt gewährte und hierfür genutzte Zuwendung nicht zurückgefordert werden, es sei denn, sie wurde durch eine strafbare Handlung erlangt oder das Gesetz ordnet eine andere Rechtsfolge an. Under BULGARIAN LOA art. 55(1) unterliegt es gleichfalls keinem Zweifel, dass auch Leistungen auf eine inexistente Forderung aus einem gesetzlichen Schuldverhältnis kondiziert werden können. Ein Beispiel liefert die Zuvielleistung von Schadenersatz, weil das Mitverschulden des Opfers (LOA art. 51(2)) nicht berücksichtigt wurde (*Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 584).

94. Auch the NETHERLANDS wickeln Leistungen auf inexistente außervertragliche Obligationen vermittels des Rechts der ungeschuldeten Zahlung (CC arts. 6:203 ff) ab (Asser [-*Hartkamp*] Verbintenissenrecht III[12], no. 326 p. 343; *Vriesendorp*, Verbintenissen uit de wet en Schadevergoeding[2], no. 294 p. 277). Dazu gehören auch Leistungen aufgrund eines später vernichteten verwaltungsbehördlichen Beschlusses

oder eines aufgehobenen Urteils oder einer aufgehobenen einstweilige Verfügung (*kort geding*). Dasselbe gilt für Leistungen zur Abwehr einer Beschlagnahme (CFI 's-Hertogenbosch 24 April 1925, NedJur 1925 p. 1351) oder einer Strafverfolgung (HR 19 February 1931, NedJur 1931, p. 1501). Vgl. aus der Rechtsprechung ferner HR 19 February 1999, NedJur 1999, no. 367 p. 1984; HR 19 May 2000, NedJur 2000, no. 603 p. 4192 und HR 30 January 2004, NedJur 2005, no. 246 p. 2289.

95. Pursuant to ESTONIAN LOA § 3 kann eine Obligation auf einem Vertrag, aber auch aus jedem anderen Rechtsgrund erwachsen. Der Begriff schließt also auch außervertragliche Obligationen ein. LOA chapter 52 (on unjustified enrichment law) use the term "obligation" in exactly this sense. Folglich kann z.B. unter LOA § 1028 eine Schadenersatzzahlung zurück verlangt werden, wenn der Zahlende irrtümlich annahm, zum Ersatz verpflichtet zu sein, während die Ersatzpflicht in Wahrheit jemand anderen traf. Ein besonderer Bestandsschutz besteht allerdings unter Family Law Act (*Perekonnaseadus* of 1 January 1995, RT I 1994, 75, 1326; 2006, 14, 111) § 72(2) für ungeschuldet erbrachte Unterhaltsleistungen. Sie können nur zurück verlangt werden, wenn die entsprechende gerichtliche Entscheidung auf einer Täuschung durch den angeblich Unterhaltsberechtigten beruht.

96. Auch in the NORDIC countries sind die Regeln der *condictio indebiti* nicht auf die Rückabwicklung von Leistungen auf vertragliche Schuldverhältnisse beschränkt. Unter dem allgemeinen Recht der *condictio indebiti* kommt es freilich dann nicht zu einer Rückabwicklung, wenn the person performing the payment lead the recipient to believe that there was an obligation to discharge, wenn die Zahlung in billigender Inkaufnahme der Abwesenheit einer Schuld erfolgte oder wenn der Empfänger Grund zu der Annahme hatte, dass der Zahlende die Existenz einer Schuld geprüft hatte. Zahlungen aufgrund eines Rechtsirrtums konnten ursprünglich nicht zurückverlangt werden (*Ussing*, Enkelte Kontrakter, 439), doch scheint sich insoweit ein Auffassungswandel zu vollziehen, zumindest in SWEDEN (*Hult*, Condictio indebiti, 86), wenn auch wohl noch nicht in DENMARK (*von Eyben/Mortensen/Sørensen*, Obligationsret II, 141). Ob ein Rechtsprechungswandel die Annahme eines Rechtsirrtumes tragen kann, ist zweifelhaft; jedenfalls kommt ihm keine rückwirkende Bedeutung zu, so dass auf ihn auch keine *condictio indebiti* gestützt werden kann (Danish Eastern CA 13 April 1992, UfR 1992, 763 [Änderung einer Rechtsauffassung im Kontext des Pfandrechts]; similarly Swedish HD 28 February 1942, NJA 1942, 39 [Aufhebung einer gerichtlichen Vaterschaftsfeststellung; kein Rückforderungsrecht des Scheinvaters für die zurückliegende Zeit]). Wer auf eine zweifelhafte Rechtslage hin zahlt, ohne ihre gerichtliche Klärung abzuwarten, zahlt auf eigenes Risiko, wenn er nicht unter dem Vorbehalt der Rückforderung zahlt (Swedish HD 17 February 1961, NJA 1961, 18 [Bank zahlt in der Annahme auf eine nicht bestehende Deliktsschuld, sich nicht erfolgreich verteidigen zu können; keine Rückforderung]).

VI. Court order and rule of law

97. Allgemein anerkannt ist, dass das Recht zum Behaltendürfen des Empfangenen seinen Grund auch in einer Gerichtsentscheidung oder unmittelbar in einer gesetzlichen Regelung haben kann. Allerdings muss im letzteren Fall oft noch geprüft werden, ob für den erworbenen und nicht rückgabepflichtigen Titel ein Ausgleich in Geld geschuldet ist. Unter FRENCH CC art. 2262 z.B. führt ein den Anforderungen von CC art. 2229 genügender dreißigjähriger ununterbrochener Besitz zum Eigentumserwerb (siehe Cass.civ. 15 June 1976, Bull.civ. 1976, III, no. 262). Ein Anspruch aus *répétition de l'indu* ist dann ausgeschlossen (Cass.com. 1 March 1994, Bull.civ. 1994, IV, no. 89). Kürzere Fristen gelten beim Eigentumserwerb infolge gutgläubiger Ersitzung (CC art. 2265: zehn bzw. zwanzig Jahre). Es entsteht nach Fristablauf ein

"gerechter Titel", wenn ein Nichteigentümer Eigentum auf einen gutgläubigen Empfänger übertragen wollte (Cass.civ. 30 October 1972: Bull.civ. 1972, III, no. 575). Ein Ausgleich in Geld ist nicht vorgesehen. Unter *Code de la consommation* (Consumer Protection Code) art. L122-3 ist die entgeltliche Lieferung unbestellter Ware oder die Erbringung unbestellter Dienstleistungen an Verbraucher untersagt. Für den Verbraucher entstehen aus solchen Leistungen keine Verpflichtungen; er kann gleichwohl erbrachte Zahlungen mit Zinsen zurück verlangen. Ob der Verbraucher seinerseits einen bereicherungsrechtlichen Ausgleich zu zahlen hat, wurde bislang nicht entschieden, dürfte aber nach dem klaren Gesetzeswortlaut zu verneinen sein.

98. BELGIAN CC arts. 2262 und 2262*bis* unterscheiden sich in einigen Punkten von ihrem französischen Vorbild. CC art. 2262 unterwirft den Eigentumsherausgabeanspruch einer dreißigjährigen Verjährung, auch wenn der Besitzer keinen Titel erworben hat oder bösgläubig ist. CC art. 2262*bis* betrifft die Verjährung von Forderungsrechten. Dagegen stimmen Belgian und French CC art. 2229 wörtlich überein. Die Kombination der drei genannten Bestimmungen führt letztlich freilich zu identischen Ergebnissen. Eine Verpflichtung, für das nicht herausgabepflichtige Eigentum einen Ausgleich in Geld zu zahlen, besteht nicht. Für LUXEMBURG hat CFI Luxemburg 28 April 1988, Pas. luxemb. 27 (1987-1989) 284 entschieden, dass derjenige, der aufgrund einer später vom Berufungsgericht aufgehobenen einstweiligen Verfügung Unterhalt bezahlt hat, den entsprechenden Betrag als rechtsgrundlos geleistet zurück fordern kann.

99. Auch in SPAIN ist anerkannt, dass das Recht zum Behaltendürfen eines Vermögensvorteils seinen Grund unmittelbar im Gesetz haben kann (*Díez-Picazo*, Fundamentos I[6], 122; *Miquel González*, Enriquecimiento injustificado, 2806). Ein Beispiel liefert *Ley* 7/1996, of 15 January 1996, *de ordenación del comercio minorista* (retail trade regulation) art. 42, which provides that a consumer who has received an unsolicited good is not obliged to return it. An exception to this rule is the case where the provider has sent the good by mistake. Rechtsgründe zum Behaltendürfen des Erlangten liefern ferner die Regeln über prescriptive acquisition (*usucapión*) and good faith acquisition *a non domino* in Fällen, in denen der Veräußerer infolge der Unwirksamkeit seines vorangegangenen Erwerbsgeschäfts keinen Titel hatte (Real Estate Act [*Ley Hipotecaria*] art. 34; CC art. 464). CC art. 1295(2) bringt insoweit eine Sonderregelung für den Rücktritt. Für den bereicherungsfesten Erwerb des Dritten genügt hier allein schon der gute Glaube. In den Fällen der *usucapión* und des gutgläubigen Erwerbs ist der Dritterwerber nicht zu einer Ausgleichszahlung verpflichtet. Das ist anders z.B. in den Fällen des CC art. 360 (Bauen mit fremdem Material auf eigenem Grund; Eigentumserwerb, Wertersatz und bei Bösgläubigkeit obendrein Schadenersatz; see *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 281) und der CC arts. 361-364 (Grundstücksüberbau in gutem Glauben; Wahlrecht des Grundstückseigentümers zwischen der Zahlung von Wertersatz bei Behalt der Konstruktion und Inanspruchnahme des Überbauenden auf Abriss). Ähnliche Regeln finden sich in CC art. 383 (on specification). Auch im Recht des geistigen Eigentums finden sich eine Reihe von Regeln, welche einen Wertausgleich für die Nutzung fremder Rechte ausdrücklich ausschließen, z.B. bei der Reproduktion eines berühmten Gemäldes in einem Schulbuch (CA Barcelona 31 October 2002, BDA JUR 2004/54771; see. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonization of certain aspects of copyright and related rights in the information society art. 5(3)(a)). Dass auch Gerichtsentscheidungen einen Rechtsgrund zum Behaltendürfen des Empfangenen darstellen können, zeigt sich vielfach besonders im Zusammenhang mit Unterhaltsvereinbarungen zwischen geschiedenen Ehegatten; sie werden erst durch

gerichtliche Genehmigung wirksam (CC art. 90). Fehlt es an einer solchen Vereinbarung, muss das Gericht den Unterhalt festsetzen und auch eine Regelung über die Nutzung der Wohnung treffen (CC arts. 96 and 97).

100. In ITALY lautet der Ausgangspunkt, dass eine Bereicherung, die aufgrund Gesetzes erworben wurde, im Zweifel mit *giusta causa* erlangt ist. Desgleichen sind Bereicherungen aus rechtskräftigen gerichtlichen Entscheidungen mit Rechtsgrund erworben (Alpa and Mariconda [-*Sirena*], Codice civile commentato IV, sub art. 2041, V, § 25). Auch im Falle von Ersitzung und gutgläubigem Erwerb besteht in der Regel keine Ausgleichspflicht. Wer dagegen auf seinem Grund mit fremden Materialien Baulichkeiten, Anpflanzungen oder Werke geschaffen hat, muss ihren Wert ausgleichen, wenn entweder der Eigentümer der Materialien nicht auf Trennung besteht oder sich eine Trennung nicht schadlos durchführen lässt (CC art. 935(1)). Auch für den Fall, dass ein Dritter die Werke mit fremden Materialien geschaffen hat, deckt sich die italienische Rechtslage mit der spanischen (CC arts. 936 and 937). Hat jemand gutgläubig und ohne innerhalb von drei Monaten auf den Widerspruch des Nachbarn zu stoßen über die Grundstücksgrenze gebaut, kann das Gericht dem Überbauenden das Eigentum am Gebäude und den Besitz am Grundstück zusprechen; der Überbauende muss dann dem Grundeigentümer den doppelten Wert der in Anspruch genommenen Fläche vergüten (CC art. 938). Einen den gesetzlichen Eigentumsverlust ausgleichenden Anspruch auf den objektiven Wert kennen die Vorschriften über Verbindung, Vermischung und Verarbeitung (CC art. 939 and 940). Die Vorschriften über den Verbraucherschutz im Falle unbestellt zugesandter Waren bzw. unbestellt erbrachter Dienstleistungen finden sich in Decreto Legislativo 6 September 2005, no. 206 (Suppl.ord. no. 162 alla Gazz. Uff., 8 October 2005, no. 235) art. 57; s. näher CFI Genua 11 November 2002, Contratti I 2003, 437 und *de Marzo*, I contratti a distanza, 46.

101. Auch in AUSTRIA kann sich die Rechtfertigung einer Vermögensverschiebung aus einem rechtskräftigen Urteil (OGH 6 April 2006, 2 Ob 256/05v) oder unmittelbar aus dem Gesetz ergeben. Geläufige Beispiele sind der gutgläubige Erwerb (OGH 28 July 1998, SZ 71/128), die Ersitzung und die Verjährung (OGH 5 June 1970, SZ 43/98). In Fällen, in denen ein gesetzlicher Eigentumserwerb unabhängig von Gut- oder Bösgläubigkeit eintritt (CC §§ 371, 416 und 417 [Vermischung etc.]), rechtfertigt das Gesetz aber nur den Eigentumswechsel als solchen, nicht auch die mit ihm verbundene Wertverschiebung (*Koziol and Welser*, Bürgerliches Recht II[13], 287). Ein Urteil stellt auch dann einen Rechtsgrund dar, wenn es fehlerhaft ist (OGH 14 December 1955, 7 Ob 543/55). Auch under PORTUGUESE CC art. 473(1) stellt ein gerichtliches Urteil einen Rechtsgrund zum Behaltendürfen des Erlangten dar (STJ 22 November 2007, Processo 07A3835). Eine Bereicherungshaftung ist aber natürlich auch ausgeschlossen, "wenn das Gesetz dem Verarmten (...) den Erstattungsanspruch versagt", CC art. 474. Beispiele liefern der Rückforderungsausschluss bei Zahlung vorläufigen Unterhalts (CC art. 2007(2)) und das Recht zum Behaltendürfen des Erlangten, wenn die entsprechende Schuld verjährt ist (CC art. 304(2)). Gesetzliche Behaltensgründe stellen ferner die Vorschriften über den Eigentumserwerb dar, darunter diejenigen zur Ersitzung (CC art. 1294). Die Vorschriften über den gutgläubigen Erwerb kennen für einzelne Fallgruppen eigene Ausgleichsmechanismen (CC arts. 1287 ff), darunter CC art. 1301 (Eigentumsherausgabeanspruch gegen einen gutgläubigen Dritten, der die Sache von einem Händler gekauft hat; Anspruch des Dritten gegen den Eigentümer auf Wertersatz). Verbraucher können unverlangt zugesandte Waren bzw. unbestellt erbrachte Dienstleistungen nach den gemeinschaftsrechtlichen Regeln ausgleichlos behalten: *Lei de Defesa do Consumidor*

(*Lei* 24/96 of 31 July 1996) art. 9(4); *Decreto-Lei no.* 143/2001 of 26 April 2001 art. 29(2), näher *Dias Oliveira*, Proteção dos consumidores, 140.

102. In GERMANY wird bereicherungsrechtlich je nachdem unterschieden, ob es sich bei der jeweiligen Rechtsänderung nur um einen formellen Vorgang handelt oder ob sie vom Gesetz auch als materiell gerechtfertigt gewollt war (Palandt [-*Sprau*], BGB[67], § 812, no. 96; Staudinger [-*S. Lorenz*], BGB [2007], § 812, no. 28). Ein bereicherungsrechtlicher Ausgleich ist folglich bei Verbindung, Vermischung und Verarbeitung (CC § 951) sowie im Fundrecht (CC § 977) vorgesehen. Bereicherungsfest sind dagegen der entgeltliche (CC § 816(1)(ii)) gutgläubige Erwerb vom Nichtberechtigten, der Erwerb infolge Zeitablaufs und Ersitzung (*W. Lorenz* loc.cit., Vorbemerkung zu §§ 812 ff., nos. 28, 36, 38). Gerichtsurteile dagegen haben zwar (es sei denn, es handelt sich um Gestaltungsurteile) nur deklaratorische Wirkung und schaffen deshalb als solche noch keinen Rechtsgrund (Erman [-*Westermann and Buck-Heeb*], BGB II[12], § 812, no. 79). Allerdings rechtfertigt die Rechtskraft der Entscheidung das Behalten des Zugesprochenen (*Sprau* loc.cit. no. 98). Eine Bereicherungsklage kann also nicht darauf gestützt werden, der Rechtsstreit sei unrichtig entschieden worden (*W. Lorenz* loc.cit. § 812, no. 91). Das ist nur dann anders, wenn nach der letzten mündlichen Verhandlung, in der noch zum Sachverhalt hätte vorgetragen werden können, neue Tatsachen eingetreten sind, auf welche sich die materielle Rechtskraftwirkung der Entscheidung nicht erstreckt (BGH 17 February 1982, BGHZ 83, 278, 280; BGH 11 March 1983, NJW 1984, 126, 127; BGH 2 March 2000, NJW 2000, 2022, 2023). Der Rechtslage in Germany ähnelt die in GREECE. Gesetzvorschriften stellen dann, aber auch nur dann einen Rechtsgrund dar, wenn die jeweilige Rechtsänderung als gerechtfertigt gewollt war (Überblick bei Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, nos. 59-60). Ein Beispiel ist die Ersitzung unter CC art. 1041. Keinen Rechtsgrund zum Behaltendürfen der Bereicherung stellt dagegen CC art 1036 (gutgläubiger Erwerb vom Nichtberechtigten) dar. Bereicherungsfest ist nach griechischer Auffassung nur der entgeltliche gutgläubige Erwerb; für ihn entfaltet aber nicht CC art. 1036, sondern die Gegenleistung die bereicherungsrechtlich rechtfertigende Wirkung (*Stathopoulos* loc.cit. no. 63).

103. Auch HUNGARY kennt eine Reihe von eigenständigen Ausgleichsmechanismen für bestimmte Fälle des Eigentumsverlustes. Dazu gehören die Regeln über die Rechtsfolgen der Verarbeitung, der Verbindung und der Vermischung (CC §§ 133-135). Umfangreiche und detaillierte Vorschriften regeln den Bau auf fremdem Grund, den Bau mit fremdem Material (CC §§ 136-138) und den Überbau (CC §§ 109 und 110). Die Ersitzung verpflichtet wie üblich nicht zu einem Wertausgleich.. SLOVENIAN LOA art. 195 schließt einen Anspruch aus ungerechtfertigter Bereicherung ausdrücklich aus, wenn es um eine Zuwendung an eine gutgläubige Person geht und die Zuwendung wegen einer Körperverletzung, eines Gesundheitsschaden oder wegen der Tötung eines Menschen erfolgt ist. Ein gutgläubiger *accipiens* ist durch die Kondiktionssperre dem *solvens* gegenüber geschützt. Allerdings kann der solvens bereicherungsrechtlich gegen den Schädiger vorgehen (näher *Cigoj*, Teorija obligacij, 258). Under BULGARIAN LOA art. 59(1) haftet auf Wertausgleich nach bereicherungsrechtlichen Grundsätzen, wer eine fremde Sache durch Vermischung, Verbindung oder Verarbeitung zu Eigentum erworben hat (näher *Goleva*, Obligazionno pravo[4], 293). Den gutgläubigen Erwerber einer beweglichen Sache trifft eine solche Bereicherungshaftung dagegen nicht; der ehemalige Eigentümer muss sich nach Delikts- und Bereicherungsrecht an den Verfügenden halten (*Vassilev*, Bulgarsko Veshtno pravo[2], 206). Leistungen auf aufgehobene Urteile und kassierte Schiedssprüche können wiederum mit der

Bereicherungsklage zurückgefordert werden (*Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 585).

104. Zum DUTCH law siehe bereits note *V94*. ESTONIAN LOA § 1027 sagt nicht ausdrücklich, was unter der Abwesenheit eines Rechtsgrundes für die jeweilige Vermögensverschiebung zu verstehen sei. Gleichwohl unterliegt es keinem Zweifel, dass das Gesetz selber einen solchen Rechtsgrund schafft, wo es den Rückforderungsanspruch ausschließt (wie z.B. in LOA § 99(1) bei Verbrauchern unbestellt zugesandter Ware oder ungeschuldet erbrachter Dienstleistung; ein Bereicherungsrechtsanspruch setzt hier eine Irrtum des Lieferanten voraus). Einen bereicherungsrechtlichen Bestandsschutz genießen unter Ccom (*Äriseadustik* of 1 September 1995) arts. 158 and 280 auch die Gesellschafter bestimmter Kapitalgesellschaften für zuviel ausgezahlte Gewinne, es sei denn, die überzahlten Beträge sind zur Befriedigung der Gesellschaftsgläubiger erforderlich. Ausgeschlossen ist auch die Rückforderung einer auf der Grundlage eines unwirksamen Vertrages übertragenen beweglichen Sache, wenn sie der Empfänger fünf Jahre lang ununterbrochen in gutgläubigem Eigenbesitz gehabt hat (Law of Property Act [Asjaõigusseadus of 1 December 1993] § 110); bei Immobilien beträgt die entsprechende Ersitzungsfrist 30 Jahre. Andere Beispiele für den gesetzlichen Ausschluss von Ansprüchen aus ungerechtfertigter Bereicherung liefern das Fundrecht (Law of Property Act § 100) und das Recht des gutgläubigen Erwerbs vom Nichtberechtigten (Law of Property Act § 95(1)). Schließlich ist auch anerkannt, dass ein Gerichtsurteil einen Rechtsgrund zum Behaltendürfen des Empfangenen darstellen kann (Supreme Court 9 June 2006, civil matter no. 3-2-1-25-06; Supreme Court 19 October 2004, civil matter no 3-2-1-107-04).

105. Court orders and statutory provisions may in the NORDIC countries exclude a right to vindication or other restitution of property. SWEDISH HD 28 February 1942, NJA 1942, 39 might be seen as an example. Die Klage eines Mannes, dessen Vaterschaft in einer früheren Entscheidung festgestellt worden war, auf Rückzahlung des an die Mutter und das Kind gezahlten Unterhalts wurde abgewiesen, obwohl inzwischen gerichtlich festgestellt worden war, dass er doch nicht der Kindsvater sei. Einen gesetzlichen Rechtsgrund zum Behaltendürfen des Erlangten stellt z.B. die Ersitzung von Grundeigentum dar, die sich in Sweden (bei Gutgläubigkeit) schon nach Ablauf von zehn, sonst nach Ablauf von zwanzig Jahren vollzieht (Land Code [*jordabalken*] chap. 16 §§ 1 und 2). (In DENMARK tritt Eigentumserwerb durch Ersitzung sowohl bei Mobilien als auch bei Immobilien erst nach Ablauf von zwanzig Jahren und nur bei Gutgläubigkeit ein, [*Danske lov* 5-5-1]; FINLAND kennt den Eigentumserwerb durch Ersitzung nicht mehr). Die Möglichkeit des gutgläubigen rechtsgeschäftlichen Erwerbs vom Nichtberechtigten ist dagegen nicht nur in Sweden (Land Code [*jordabalken*] chap. 18; Act concerning Good Faith Acquisitions of Movable Things [*lag* (1986:796) *om godtrosförvärv av lösöre*]), sondern auch in Finland (Land Code [*jordabalken*] chap. 13 § 4; Ccom [*handelsbalken*] chap. 11 § 4) gesetzlich anerkannt, und zwar sowohl für Immobilien als auch für Mobilien. In Denmark existieren entsprechende gesetzliche Vorschriften nur für Immobilien (Act on Land Registry [*Lovbekendtgørelse* 2006-03-09 no. 158 *om tingslysning*] §§ 1, 5 and 7); die Möglichkeit des gutgläubigen Erwerbs von Mobilien ist nur das Ergebnis einer richterrechtlichen Rechtsentwicklung (Einzelheiten bei *Mortensen*, Tingsretten, 176). Danish Act regarding certain consumer contracts [*Lov om vise forbrugeraftaler*, 2004-06-09 no. 451] § 8 clearly states that the consumer may keep unsolicited goods delivered to him or her unless delivery is made by mistake. In Sweden und Finland existiert diese Regel dagegen bislang nicht; klar ist nur, dass such conduct does not result in a binding contract (*Adlercreutz*, Avtalsrätt I[11], 70).

VII. Freiwillige Zuwendungen und Leistungen auf eine Naturalobligation

106. Zur Rückforderbarkeit freiwilliger Zuwendungen und von Leistungen auf eine sogen. Naturalobligation siehe die notes under VII.–2:103.

VIII. Rückforderbarkeit wegen Zweckverfehlung

107. Obwohl der Code Napoléon keineswegs alle *condictiones* des römisches Rechts geregelt hat, geht die Lehre traditionell davon aus, dass sie Bestandteil des FRENCH law geworden sind (*Demogue*, Traité des Obligations en général III, no. 129). Man ist deshalb der Auffassung, dass Zahlungen auf eine künftige *cause*, die sich nicht verwirklicht hat, grundsätzlich im Wege einer *action en répétition* zurück verlangt werden können, und zwar unabhängig von einem Irrtum des Zahlenden und auch unabhängig davon, ob die Zuwendung in dem Willen erfolgte, eine Naturalobligation zu erfüllen oder sonst aus einem Gefühl von Billigkeit, Feinfühligkeit oder Ehre geschah (Aubry and Rau [-*Ponsard and Dejean de la Bâtie*], Droit civil français VI[7], nos. 309-310 pp. 465-466). Ein gesetzliches Beispiel findet sich in CC art. 1088 (Schenkung wegen bevorstehender Heirat; Eheschließung bleibt aus). In der BELGISCHEN Rechtslehre (*de Page*, Traité élémentaire de droit civil belge III(2)[3], no. 4 p. 9) ist unter Berufung auf *Demogue* sogar behauptet worden, CC arts. 1235 und 1376 würden alle *condictiones* des römischen Rechts einbeziehen, die nicht die Nichtigkeit von Verträgen beträfen. Daher sei auch die *condictio causa data causa non secuta* Teil des belgischen Rechts (*de Page* loc.cit. no. 8 p. 15).

108. Die moderne SPANISH Lehre zum Bereicherungsrecht anerkennt neben der Leistungs- und der Eingriffskondiktion auch the so-called *condictio por inversión o desembolso*. Sie betrifft Fälle, in denen eine Person einer anderen etwas zuwendet, ohne dazu vertraglich oder sonst rechtsgeschäftlich verpflichtet zu sein (*Díez-Picazo*, Fundamentos I[6], 128; *Miquel González*, Enriquecimiento injustificado, 2807). Mit dem Konzept der *condictio por inversión o desembolso* wird eine kohärente wissenschaftliche Klassifikation mehrerer Spezialregelungen des Zivilgesetzbuches angestrebt. Im Näheren unterscheidet man, in Anlehnung an den deutschen Sprachgebrauch, zwischen der *condictio de regreso* (*Rückgriffskondiktion*) and the *condictio por impensas* (*Verwendungskondiktion*). Erstere betrifft die ungeschuldete Erfüllung fremder Verbindlichkeiten; that area is adequately governed by CC arts. 1158 and 1210. The *condictio por impensas* is regulated by CC arts. 453 and 454 (assessment of possession) and CC arts. 360 ff (accession). Einige Fälle, die in den Anwendungsbereich dieser Vorschriften fallen, werden jedoch mehr und mehr unter dem Aspekt des Rechts der ungerechtfertigten Bereicherung analysiert (zustimmend *Quesada Sánchez*, La Ley, 2005 (4) 1719, 1730; kritisch zu diesem Trend dagegen *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 50; 270). In TS 27 March 1958, RAJ 1958 (1) no. 1456 p. 940 hatte der Kläger, who was about to marry the daughter of the defendant, invested some money to improve an apartment. Nach der Auflösung der Verlobung verklagte er den Vater seiner ehemaligen Verlobten und Eigentümer der Wohnung. Der Supreme Court gab dieser Klage auf Ersatz des Wertes der Verbesserungen aus ungerechtfertigter Bereicherung statt. Ganz ähnlich entschied CA Badajoz 1 October 2003, BDA JUR 2004/48273, wo die Erben eines jungen Mannes, der gestorben war, bevor er seine Verlobte heiraten konnte, den entsprechenden Anspruch geltend gemacht haben. Der Klage wurde gleichfalls unter dem Gesichtspunkt der ungerechtfertigten Bereicherung stattgegeben. Auf das Prinzip der ungerechtfertigten Bereicherung stützte schließlich auch TS 30 July 1996, RAJ 1996 (3) no. 6411 p. 8566 seine Entscheidung zugunsten einer Witwe, deren Mann, Gemeinderatsmitglied in einem kleinen Ort, der Gemeinde aus seinen

privaten Mitteln die Finanzierung zweier Tennisplätze ermöglicht hatte, die im Eigentum der finanziell angeschlagenen Gemeinde verblieben.

109. Die ITALIAN Rechtsprechung operiert verhältnismäßig häufig mit der im Schrifttum durchaus umstrittenen (näher *Belfiore*, La presupposizione, *passim*) Kategorie der *presupposizione*. Der Ausdruck bezeichnet eine (tatsächliche oder rechtliche, gegenwärtige, vergangene oder zukünftige) Lage objektiver Natur, die von den Parteien bei Vetragsschluss vorausgesetzt wurde und wirksam blieb, auch wenn sie im Vertrag selber keine Erwähnung fand (Cass. 5 January 1995, no. 191, Giust.civ.Mass. 1995, 34). Für die Lehre von der *presupposizione* ist eine gesetzliche Grundlage nur schwer zu finden; gelegentlich scheint sie auf CC art. 1467 gestützt zu werden (z.B. von Cass. 24 March 2006, no. 6631, Giust.civ.Mass. 2006, 3). Bleibt eine erhebliche "Voraussetzung" aus (oder liegt sie von Anfang an nicht vor), so führt das nach einigen Entscheidungen zur Vertragsaufhebung (Cass. 24 March 2006, no. 6631, Giust.civ.Mass. 2006, fasc. 3; Cass. 17 May 2005, no. 10340, Obbligazioni e contratti 2005, 3, 265; Cass. 29 September 2004, no. 19563, Giust.civ.Mass. 2004, 9), nach anderen zur Unwirksamkeit (Cass. 24 March 1998, no. 3083, Giur.it. 1999, I, 1, 511), zur Anfechtbarkeit (CFI Pavia 24 February 1973, zitiert bei *Belfiore* loc. cit. 132; CFI Palermo 28 March 1981, Giur.mer. 1981, 885; CFI Palermo 15 January 1981, Giur.it. 1982, I, 2, 539), zur *caducazione* (Cass. 11 March 2006, no. 5390, Giust.civ. 2006, II, 2331) oder (wegen Fehlen des Rechtsgrundes) zur Nichtigkeit des Vertrages (CA Torino 2 December 1987, Riv.Notar. 1990, 201; Cass. 6 December 1988, no. 6617, Giust.civ.Mass. 1988, fasc. 12; Cass. 11 August 1990, no. 8200, Giust.civ.Mass. 1990, fasc. 8 [Nichtigkeit, wenn die vorausgesetzte Lage schon beim Abschluss des Vertrages nicht besteht; Aufhebbarkeit, wenn die vorausgesetzte Lage später wegfällt; ebenso Cass. 8 August 1995, no. 8689, Giust.civ.Mass. 1995, 1498 und Cass. 5 January 1995, no. 191, Giust.civ.Mass. 1995, 34]). Gelegentlich wird eine *presupposizione* auch noch einer stillschweigend vereinbarten Bedingung gleichgestellt (CFI Isernia 18 November 2005, Giur.mer. 2006, 3, 563). Die Rückerstattungsansprüche richten sich naturgemäß nach dem jeweils angewandten Unwirksamkeitsregime.

110. In AUSTRIA wird gesagt, eine Vermögensverschiebung könne ihre Rechtfertigung auch in einer rechtlich nicht bindenden reinen Zweckvereinbarung finden (*Koziol and Welser*, Bürgerliches Recht II[13], 275). Wird dieser Zweck verfehlt, kommt eine *condictio causa data causa non secuta* in Betracht. Sie wird auf eine Analogie zu CC § 1435 gestützt. Beispiele liefern die Leistung von Geld (OGH 19 March 1980, 3 Ob 531/79) oder Arbeit (OGH 26 February 1963, SZ 36/30) in Erwartung der versprochenen Einsetzung zum Erben, Leistungen im Vertrauen auf die nachfolgende Eheschließung (OGH 2 February 1967, SZ 40/15; OGH 23 June 1969, SZ 42/94; OGH 18 January 1989, SZ 62/5) oder den Fortbestand der Ehe (OGH 14 May 1975, SZ 48/59: Hausbau). Die bloße Zweckvereinbarung muss aber deutlich von einem Schenkungsvertrag (zu Geschenken zwischen Verlobten siehe zudem CC § 1247) unterschieden werden. Ausgeschlossen ist die Kondiktion wegen Zweckverfehlung, wenn dem Leistenden bei Leistung bekannt war, dass der Zweck nicht erreicht werden kann (CC § 1174(1) analog), z.B. dann, wenn die Lebensgefährtin ihrem Partner gegenüber die Eheschließung wiederholt ausgeschlossen hat (*Deixler-Hübner*, ÖJZ 1999, 201, 206). Für Dienstleistungen, die den vereinbarten Zweck verfehlen, ist ein Bereicherungsausgleich auch dann geschuldet, wenn der Empfänger aus ihnen keinen bleibenden wirtschaftlichen Nutzen erlangt (OGH 2 September 1998, 9 ObA 207/98a; OGH 15 January 1981, JBl 1981, 543; OGH 1 July 1986, 14 Ob 101/86 [unentgeltliche Haushaltsführung durch die geschiedene Frau]). PORTUGUESE CC art. 473(2)*in fine* enthält eine ausdrückliche Regelung der *condictio ob rem* bzw. der

condictio causa data causa non secuta. Die bereicherungsrechtliche Haftung hat hiernach auch das zum Gegenstand, was wegen Nichteintritts eines Erfolgs erlangt wurde. CC art. 475 (dessen Auslegung weithin mit der von German CC § 815(2) übereinstimmt: *Menezes Leitão*, Enriquecimento sem causa[2], 529) schließt die Pflicht zur Rückerstattung aus, wenn der Leistende im Leistungszeitpunkt wusste, dass der Erfolg nicht eintreten konnte oder wenn er seinen Eintritt treuwidrig verhindert hat (siehe STJ 11 December 2003, Processo 03B34831; STJ 12 September 2006, Processo 06A1999). Die Rückforderung wird z.B. gestattet, wenn eine Leistung vor Vertragsabschluss in der Erwartung erbracht worden ist, es komme zum Vertragsschluss, dieser aber scheitert; desgleichen dann, wenn in Erwartung eines nicht einklagbaren Vorteils eine Vorleistung erbracht worden ist, etwa für das Versprechen, als Erbe oder Vermächtnisnehmer eingesetzt zu werden, oder in der Erwartung, dass ein Verbrechen nicht bei der Polizei zur Anzeige gebracht werde (*Schlechtriem*, Restitution und Bereicherungsausgleich in Europa I, ch. 2, no. 203 p. 200; *Menezes Leitão* loc.cit. 512).

111. Auch GERMAN CC § 812(1)(ii) second alternative erwähnt ausdrücklich den Fall, dass der mit einer Leistung nach dem Inhalte des Rechtsgeschäftes bezweckte Erfolg nicht eintritt (*condictio causa data causa non secuta* oder *condictio ob rem*). Die in der preceding note genannten Beispiele stammen überwiegend aus der deutschen Rechtsprechung: Rückforderung einer Leistung zur Abwendung einer dann doch erstatteten Strafanzeige (BGH 23 February 1990, NJW-RR 1990, 827); Verfehlung des Schenkungszwecks bei einer Zweckschenkung (BGH 23 September 1983, NJW 1984, 233); Schenkung an Schwiegersohn zum Hauserwerb in Erwartung intakt bleibender Ehe (CA Düsseldorf 30 March 1995, NJW-RR 1996, 517; see also CA Oldenburg 5 November 2007, FamRZ 2008, 1440). Es kommt darauf an, dass über den mit jeder Leistung notwendig verfolgten Zweck hinaus ein besonderer zukünftig eintretender Erfolg rechtlicher oder tatsächlicher Natur nach dem Inhalt des Rechtsgeschäfts von den Beteiligten vorausgesetzt, aber nicht eingetreten ist (Palandt [-*Sprau*], BGB[67], § 812, no. 86). Über die Zweckbestimmung muss tatsächlich Einigkeit bestanden haben; nicht erforderlich ist, dass sie den Charakter einer vertraglichen Bindung trägt (BGH 17 June 1992, NJW 1992, 2690; BGH 10 November 2003, NJW 2004, 512, 513). Auch GREECE anerkennt die Figur der Zweckverfehlungskondiktion (*Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 40; Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 92), für Verlobungsgeschenke ist sie in CC art. 1348(1) gesetzlich besonders geregelt. Hat der Leistende treuwidrig die Verfehlung des Zwecks herbeigeführt, wird Zweckerreichung in Analogie zu CC art. 207 fingiert (CA Thessaloniki 1426/1984, Arm 39 [1985] 469). Ausgeschlossen ist die Kondiktion auch, wenn der Leistende im Leistungszeitpunkt bereits wusste, dass der angestrebte Zweck nicht erreicht werden konnte (CC art. 905 analog; see *Deliyannis and Kornilakis* loc.cit. 81).

112. Das HUNGARIAN CC kennt eine Zweckverfehlungskondiktion nicht. CC § 361(1) ermöglicht die Rückforderung von Anzahlungen auf einen später nicht zustande gekommenen Vertrag. Leistungen in Erwartung späterer Heilung eines formnichtigen Vertrages lassen sich nach den Vorschriften des Ungültigkeitsrechts beurteilen, bei deren Lückenhaftigkeit unter Rückgriff auch auf das Bereicherungsrecht. Die Voraussetzungen, unter denen ein Geschenk wegen des späteren Wegfalls des bezweckten Erfolgs zurückverlangt werden kann, sind im Schenkungsrecht geregelt (CC § 582(3); näher *Schlechtriem*, Restitution und Bereicherungsausgleich in Europa I, ch. 1, no. 77 p. 48); eine Anwendung von Bereicherungsrecht kommt daneben nicht mehr in Betracht. In BULGARIA gehört die *condictio causa data causa non secuta* dagegen in den Anwendungsbereich von LOA art. 55(1); es handelt sich um eine

anerkannte bereicherungsrechtliche Figur (*Goleminov*, Neosnovatelno obogatyavane, 64; *Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 586). Dasselbe trifft für SLOVENIA zu. Wer z.B. einer Braut ein Hochzeitsgeschenk macht, soll es zurückverlangen können, wenn die Eheschließung ausbleibt (Juhart and Plavšak [-*Polajnar Pavčnik*], Obligacijski zakonik II, art. 190, p. 46).

113. Unter DUTCH CC art. 6:203 sind Leistungen, für die es in Ermagelung einer Verbindlichkeit an einem Rechtsgrund fehlt, zurückzugewähren. An einer Verbindlichkeit fehlt es auch dann, wenn in der fehlgeschlagenen Erwartung eines späteren Vertragsschlusses im Voraus geleistet wird. Ein Bauunternehmer, der in Erwartung des Aufrages schon mit der Arbeit beginnt, hat unter (den im Einzelnen natürlich noch näher zu prüfenden Voraussetzungen des) CC art. 6:210 grundsätzlich einen Anspruch auf Wertersatz; freilich dürfte es regelmäßig an der dafür erforderlichen *redelijkheid* und *billijkheid* fehlen. Nicht zurückforderbar sollen Schenkungen in Erwartung einer dann ausbleibenden Eheschließung der Kinder sein (*Scheltema*, Verbintenissenrecht II, art. 6:203, no. 6 p. 28; Asser [-*Hartkamp*] Verbintenissenrecht III[12], no. 321 p. 340; Parlementaire Geschiedenis VI, 804; anders aber wohl CA Amsterdam 24 October 1956, NedJur 1957 no. 368 p. 685). Das ESTONIAN law scheint die Zweckverfehlungskondiktion nicht zu kennen, vgl. *Tampuu*, Lepinguväliste võlasuhete õigus, 66.

114. Das naheste Äquivalent zur Zweckverfehlungskondiktion ist in SWEDEN and in DENMARK die sogen. doctrine of tacit assumptions (Swedish: *förutsättningsläran*, Danish: *forudsætningslæren*); in FINLAND scheint sie allerdings bislang keine Rolle zu spielen (*Kivimäki and Ylöstalo*, Lärobok i Finlands civilrätt, 339; *Wilhelmsson*, SvJT 1989, 451-459). The doctrine of (tacit) assumptions ('*Geschäftsgrundlage*') is concerned with assumptions made by parties to juridical acts, which either fail due to subsequent circumstances or were wrong from the beginning. The effect of its application is invalidity or voidness of the relevant juridical act, and, consequently, the reversal of performances made. Es kann sich entweder um eine individuell-subjektive oder um eine unter den Umständen typische (objective) Voraussetzung handeln. Die Voraussetzungslehre existiert in in vielen Schattierungen (näher *Adlercreutz*, Avtalsrätt I[11], 274). Sie setzt im wesentlichen voraus, dass es (i) ohne diese Voraussetzung nicht zu dem Rechtsgeschäft gekommen wäre; (ii) dass dieser Umstand der anderen Partei bekannt war oder bekannt gewesen sein muss; und (iii) dass es angemessen erscheint, der anderen Partei das Risiko des Ausbleibens des Umstandes aufzubürden. Das Hauptanwendungsfeld der Voraussetzungslehre ist das Vertragsrecht; sie ist darauf jedoch nicht beschränkt. Manchmal wird sie auch als eine Form der ergänzenden Vertragsauslegung verstanden oder im Kontext von Contracts Act § 36 (unconscionable conditions) erörtert (HD 24 June 1996, NJA 1996, 410; *Hellner/Hager/Persson*, Speciell avtalsrätt II(2)[4], 60; *Jørgensen*, Kontraktsret I, 170). Die Voraussetzungslehre soll nicht auf die eigentliche Erfüllungshandlung anwendbar sein, weil es sich bei ihr nicht um ein Rechtsgeschäft handele; ihr Verhältnis zur *condictio indebiti* ist streitig geblieben (näher *Vinding Kruse*, Restitutioner, 271; *Jørgensen*, UfR 1963, 157-176; *Lehrberg*, Förutsättningsläran, 283, 384; see also Swedish HD 23 May 1925, NJA 1925, 184 and HD 4 March 1926, NJA 1926, 129 [Veräußerung eines Rechts zum Bäumefällen; anschließendes staatliches Verbot, die Bäume zu schlagen]). HD 30 December 1999, NJA 1999, 793 wies das Argument einer Bank zurück, sie habe in der Annahme geleistet, dass sich das Zielkonto im Plus befinden würde; eine solche Zahlung erfolge auf eigenes Risiko. In CA Skåne and Blekinge 28 February 1967, SvJT 1967, 63 hatte eine Frau Schulden ihres Mannes übernommen und im Austausch hierfür Sachwerte erhalten. Da die Schulden in Wahrheit schon bezahlt worden waren, erhielt der Mann einen finanziellen Ausgleich.

Das Stichwort ungerechtfertigte Bereicherung fiel aber nicht (ähnlich CA Västra Sverige 9 July 1971, SvJT 1972, 1). In HD 27 October 1989, NJA 1989, 614 war der Frau im Scheidungsverfahren die Hälfte der Lebensversicherung des Mannes übertragen worden. Die Versicherungspolice ließ eine solche Übertragung aber gar nicht zu. Das Gericht wies die Klage der Frau, ihr in entsprechender Höhe einen Ausgleich zu zahlen, mit der Begründung ab, die Voraussetzungslehre berechtige nur zur Rückforderung von bereits Geleistetem, begründe aber keine neue Obligation oder einen Anspruch auf Schadenersatz. In DENMARK dürfte es dagegen im Ermessen des Gerichts stehen, auch einen solchen Anspruch zu gewähren (*Lynge Andersen/Madsen/Nørgaard*, Aftaler og mellemmænd[2], 263).

Illustration 1 is inspired by a combination of Civ. 1ère, 5 March 2008, pourvoi no. 07-13902, Civ. 1ère, 25 June 2008, pourvoi no. 06-19556, Civ. 1ère, 24 September 2008, pourvoi no. 06-11294 and Civ. 1ère, 24 September 2008, pourvoi no. 07-11928; **illustration 2** is derived from CA Fejér, Gf. 40 037/2991/11; **illustration 3** is taken from BGH 20 July 2005, NJW-RR 2005, 1464; **illustration 4** is taken from STJ 22 May 2001, CJ (ST) IX (2001-2) 95; **illustration 25** is similar to BGH 11 January 1971, BGHZ 55, 176; **illustration 26** is taken from Swedish HD 11 April 2006, NJA 2006, 206; **illustration 27** is taken from Cass.civ. 20 January 1998, Bull.civ. 1998, I, no. 18; D. 1999, 500, note *Martin*, and Cass.civ. 26 April 2007, JCP éd. E no. 25 of 21 June 2007, no. 1800 p. 33; **illustration 28** is taken from Bulgarian Supreme Court no. 1329 of 26 June 1984, judgment in civil matters no. 638/84 (second chamber); **illustration 35** is similar to CA Barcelona 31 October 2002, BDA JUR 2004/54771; **illustration 41** is inspired by CA Frankfurt/Main 13 December 2004, FamRZ 2005, 1833, and similarly TS 27 March 1958, RAJ 1958 no. 1456 p. 940; **illustration 42** is taken from CFI Haarlem 9 July 2003, NJF 2003, no 54; LJN no. AI1183; **illustration 44** is similar to Cass.civ. 31 January 1995, Bull.civ. 1995, I, no. 59, OGH 3 October 1996, RdW 1997, 275 and BGH 23 September 1999, NJW 2000, 72.

VII.–2:102: Performance of obligation to third person

Where the enriched person obtains the enrichment as a result of the disadvantaged person performing an obligation or a supposed obligation owed by the disadvantaged person to a third person, the enrichment is justified if:

(a) the disadvantaged person performed freely; or

(b) the enrichment was merely the incidental result of performance of the obligation.

COMMENTS

A. General

Overview. This Article creates an exception to the preceding Article and so narrows the range of enrichments which may be regarded as unjustified and giving rise to an enrichment claim under the basic rule. The exceptions are two in number. Firstly, an enrichment which is conferred by the disadvantaged person under an obligation to a third party is justified, but this exception applies only if there is free consent (to the performance) on the part of the disadvantaged person; paragraph (a). Secondly, an enrichment is also justified, even if there was no obligation to confer the benefit on the recipient, if such benefit is an incident of discharging an obligation to a third party: paragraph (b).

Relation to VII.–2:101 (Circumstances in which an enrichment is unjustified). This Article operates as an exception to VII.–2:101 (Circumstances in which an enrichment is unjustified) in that it provides a justification for enrichments which are otherwise unjustified. Accordingly, this Article has no relevance to enrichments which are already regarded as justified under VII.–2:101 (Circumstances in which an enrichment is unjustified). This excludes all enrichments which are justified under paragraph (1) of that Article (and not unjustified under paragraph (4) of that Article) because the enriched person was entitled to the benefit of the enrichment by virtue of a contract or other juridical act or, as the case may be, a rule of law or court order.

B. Performance under obligation to a third party: para. (a)

General. Paragraph (a) provides that a person who freely performs to the enriched person in compliance with an obligation owed to a third person confers a justified enrichment. The existence of an obligation to provide the enrichment precludes the disadvantaged person from claiming its reversal. That applies regardless of whether the obligation is valid or void (or avoided). This ensures that performances rendered under a contract normally give rise to liabilities only between the parties to that contract, even though a third party may have obtained a benefit as a result. It reflects the policy that reversal of unjustified enrichments resulting from a given ineffective juridical act is as a rule a matter only for those who concluded that juridical act. A party who has performed a contractual obligation must generally seek redress from the other party to the bargain – in contract law if the contract is valid and under enrichment law if it is not.

Illustration 1

X, a customer of bank D, instructs the bank to transfer funds to the credit of E, a football club of which X is the chairperson and to whom X is indebted. The bank makes a payment to the credit of E in accordance with X's instruction. D was mistaken at the time of transfer as to X's creditworthiness and would not have made the transfer if it had known the true situation as regards the state of X's financial arrangements.

Nonetheless D has no enrichment claim against E. D's right to repayment of the money transferred is exclusively against X, to whom D was contractually obliged to effect the transfer. That D's contractual claim against X may be worthless if X is insolvent does not affect the matter.

Illustration 2
D is engaged by X, the vendor of computer equipment, to correct a defective installation of pre-installed software on a network of computers sold by X to E and operating in E's premises. After D has completed the work, but before any payment by X to D, X becomes subject to insolvency proceedings. D has no enrichment claim against E because any enrichment of E is the result of D's performance of a contractual obligation to X to perform to E. D is confined to a contractual claim against X, even if D's claim against X is virtually worthless. D took on this risk of insolvency when contracting with X.

Illustration 3
D contracts with X, a tenant of a building owned by E, to install a new heating system and carries out the work. E may have been enriched in so far as under the applicable property law the heating system may have become part of E's property. Even if the contract between D and X is void or avoided (so that D has no contractual claim against X for remuneration of the service provided), D still has no claim under enrichment law against E, assuming there is nothing like fraud, threats or unfair exploitation affecting the matter. Since E's enrichment results from D discharging an obligation to X, the enrichment is justified in relation to E, as a third party to the obligation, even though the obligation was of no effect. The enrichment is only unjustified in relation to X. D has an enrichment claim against X.

Illustration 4
T is a tenant of land let by L. The rent is relatively low, but T is obliged under the terms of the lease to renovate and convert a building on the land. T procures for this purpose from bank B a loan which T intends to finance by sub-letting the land to third parties. The loan is secured by a charge over the land granted by L. After the conversion of the building is finished, L resolves to sell the land. T is agreeable to the sale provided the loan is repaid out of the proceeds of sale. B releases the charge when L procures an alternative security, namely a guarantee from bank X. In breach of the agreement with T, L fails to pay off the loan. After unsuccessfully seeking re-payment from T, who has defaulted on the loan, B successfully sues X on the basis of the guarantee. Y (the assignee of X) has no claim under this Book against T, even though T is undoubtedly enriched by X's discharge of his debt to B (decrease in liabilities). However, X benefited T in the performance of an obligation which X owed to L, L having procured the guarantee of T's debt as a replacement security. Having paid B, X (and thus Y as successor to X's right) had a contractual claim against L on the terms of the agreement under which X undertook to L to enter into the guarantee of T's debt to B.

Performance of an obligation owed to a third party. While the obligation owed to the third party need not be valid, it is critical that what the disadvantaged person has done to benefit the enriched person lies within the four corners of the obligation. The immunity of a third party to a juridical act from an enrichment claim by the disadvantaged person depends on the enrichment being conferred in compliance with that obligation. An enrichment of another which is not covered by even a void or avoided obligation to a third party is not within the

purview of this Article. An enrichment is therefore not justified under this Article merely because the disadvantaged person wrongly supposed there was an obligation to a third party to perform. A case in point here is where the performing party meant to discharge the obligation and tendered the performance with that in mind, but in fact did something which had nothing to do with the contract. A direct claim against the other party to the contract would often be a nonsense: what has been done was not at the contractual partner's bidding. Where the enrichment conferred is not envisaged by the terms of the juridical act – for example, because it departs from them in some fundamental manner (such as conferring benefit on the wrong person) – the disadvantaged person may seek reversal of the enrichment directly from the recipient.

Illustration 5
X instructs his bank, D, to make a payment to Y. As a result of carelessness for which D is solely responsible, D makes a corresponding payment to E instead of Y (though meaning to pay Y). D may reclaim under this Book the money paid to E by mistake. E has not been enriched by D's compliance with an obligation to a third party (X) because D was not required to pay E under the terms of the mandate.

Illustration 6
A debtor D granted a debiting facility to company C, a contractual creditor. Via its bank B1, C causes D's account at the bank B2 to be debited with certain sums. Because C's performance is sub-standard, D objects to the debit and, since the debit functions only on the basis of ratification, B2 is obliged to credit D's account, as B2 is obliged to do under the terms governing the debit facility. However, under the terms of the inter-bank framework agreement regulating the debit facility, B2 can no longer reclaim the sums from B1: although D objected to the debit within the time period allowed under its contract with B2, the debit was reversed after the expiry of the period provided for by the framework agreement. B2 has a direct claim under this Book against C. B2's transfer which benefited C was not made in performance of a contractual obligation to D since there was no authorisation for the transfer (D not ratifying the debit). The enrichment of C is not justified as against B2.

Rationale. This Article rests on the policy consideration that as a rule a party who incurs a (real or apparent) obligation to another must look for redress from the party to whom the obligation was owed (be it a right to counter-performance under a valid contract or a right to reversal of the enrichment of the apparent creditor). The rationale is that the parties to the contract have sought themselves out and, as regards any restitutionary claims arising out of the failure of their purported contractual agreement, ought to look only to their counterpart for recompense since in the usual case it was from that other party (and not any other person who may be directly or incidentally benefited) that the disadvantaged party expected its counter-performance. As a rule it would be impolitic to permit a party who has performed an obligation under a contract which is without effect to claim redress under the law of unjustified enrichment from someone other than the other party to the contract. To do so would provide the performing party with a windfall – a right not bargained for – and an opportunity to circumvent the risk of insolvency of the contractual counterparty which was willingly accepted when the bargain was concluded. Accordingly, where a party performs an obligation under a contract which is void or avoided, the claim in enrichment law must normally be made against the other party to the contract.

Exception. An exception to this fundamental principle is made only where the underlying juridical act (by virtue of which the third party to the transaction has benefited) is void (or avoided) and the disadvantaged person's obligation is vitiated by incapacity, fraud, threats, or unfair exploitation. In this case the assumption underpinning the primary rule that the performing party has sought out the contractual partner and accepted the risk of disappointment is challenged because the consent to those risks has been extracted rather than entered into freely.

Illustration 7
D solemnly undertakes to X to pay € 500 to E and subsequently performs the undertaking. The undertaking is void as a binding promise if D lacks contractual capacity. In that case D has an enrichment claim against E in respect of the payment. In view of D's lack of capacity, the enrichment is unjustified, notwithstanding that E is a third party to the juridical act.

Illustration 8
X, who has stolen E's car, brings it to D's garage. Supposing X to be the owner, D agrees to effect various necessary repairs at usual rates. After completing the repairs, but before the car is collected, the true situation emerges. X has absconded. D demands payment for the services from E. Although D was contractually bound to X to render the service, the contract is voidable for fraud and D avoids the contract. D may have an enrichment claim against E. Admittedly any enrichment of E results from D's performance of a contractual obligation to X, but as that obligation is (retrospectively) without effect and as the enrichment is obtained as a result of X's fraudulent misrepresentation, the exception applies and E's enrichment is not justified in relation to D.

No exception for error. A distinction of importance is that in contrast to the factors which prevent a disadvantaged person from freely consenting to a disadvantage or freely performing an obligation (incapacity, fraud, threats and unfair exploitation), error is only relevant in the context of consent to the disadvantage (i.e. for paragraph (1)(b) of VII.–2:101 (Circumstances in which an enrichment is unjustified)). If the performance of an obligation is based on an error (including an error which vitiates an underlying juridical act), the enrichment may nonetheless be justified. This restriction on the relevance of error is to be viewed as the reverse side of the significance of incapacity, fraud, threats and unfair exploitation. Those factors – unlike mistake – are regarded as so fundamental as to justify encroaching on the principle that reversal of enrichments in the context of a (void or avoided) contract should take place only between the parties to that contract and that enrichment liability is not to be imposed on third parties to that contract. In the case of fraud and other serious vitiating factors, a person who has benefited directly from the disadvantaged person's performance of an obligation to another is deprived of immunity from an enrichment claim in order that in suitable cases (i.e. where that third party has benefited gratuitously and is otherwise not deserving of protection) the disadvantaged party may proceed directly against the recipient of the benefit. This will be of particular importance in cases of fraud, where the deceiving contractual partner may have absconded and a claim to reversal of the enrichment solely in the contractual line is more or less worthless, while the end recipient is ascertainable and still in possession of a bounty.

Illustration 9
S has agreed to act as surety for M's debt with the bank B1. Under the contract of suretyship S authorises B1 to debit the debt, should it fall due, directly from S's

account with bank B2. B1 acts on this debit authority. B2 pays B1, although the account of S is not sufficiently in credit to cover the sum debited; S is insolvent. B2 has no enrichment claim against B1. B2 has performed freely and rendered a contractual performance to S. While B2 may not have checked whether S's account was sufficiently in credit and would not have paid B1 had it known the state of S's account, this is merely a matter of error and does not affect the fact that B2 performed freely.

Third parties with a right to performance. A difficult question arises where there is a contract for the benefit of a third party by virtue of which the third party is entitled (under Book II, Chapter 9, Section 3 (Effect of stipulation in favour of third party) to compel performance of an obligation under the contract for the benefit of the third party. Is the third party in such circumstances to be regarded as a party to the obligation? An affirmative answer has the effect that the enrichment is potentially unjustified in relation to the third party, from whom the performing party may then be able to demand a reversal of the enrichment. A negative answer will as a rule immunise the third party from a direct enrichment claim of the performing party, who must look for recourse from the other party. Since the third party can demand performance it seems natural to regard that party as a party to the obligation and fitting that the third party should take the burden associated with the benefit – i.e. a liability to give back (directly to the performing party) the enrichment which the third party had a right to demand (directly from the performing party). If that is the outcome, the other party to the obligation and the third party must be regarded as solidarily liable for the reversal of the enrichment. However, the better view must be that a mere right to demand performance cannot in itself render a person a party to the obligation (which category extends to assignees). Such rights are subject to the defences which the performing party may have vis-à-vis the other party to the obligation (see II.–9:302 (Rights, remedies and defences) paragraph (b)), so that the mere holder of a right to a performance is not a party to the obligation in a complete sense. Pointing in favour of the latter view, by contrast, is the apparent illogic that the purpose of conferring on a third party a right to performance is to enhance the position of the third party and to regard the third party as a party to the obligation would have the seemingly curious result that the third party is burdened with a liability under unjustified enrichment law which would not otherwise have existed. In other words, the third party is 'better off' if a mere beneficiary without any colour of right to a performance. Moreover, the other party to the obligation may have a defence to an enrichment claim of the performing party and that defence could be circumvented if the performing party is able to sue the third party directly for a reversal of the enrichment.

Assignees and other creditors. The same principle applies in cases where performance is rendered to an assignee or where the performing party is instructed to perform directly to a creditor of the other party to the contract. The situation is otherwise only where the assignee is not a mere assignee but a person who has taken over obligations as well as rights of a party to the transaction. A party who is substituted may be a party to the obligation where an assignee alone would not be.

Illustration 10
D concludes with X a contract for the purchase of a quantity of paper which is to be imported by X from a manufacturer, Y. According to Y's specifications, which X has passed on to D, the paper is suitable for use in printing. After the contract is concluded, X's right to payment of the purchase price by D is assigned to E and D is given notice of the assignment. D pays the purchase price to E. It is later discovered

that contrary to the mutual assumption of D and X the paper is of an inferior grade and cannot be used for printing. D avoids the contract on grounds of mutual mistake. D has no claim against E under the law of unjustified enrichment for repayment of the price. E's enrichment is justified because it resulted from D's performance under D's contract with X. It is immaterial in this case that the contract was without effect. D's unjustified enrichment claim is against X.

Illustration 11
E contracts to purchase a quantity of sugar from X, who covers that contract with an option for X to buy sugar from D. X exercises the option and orders D to deliver directly to E. D makes the delivery to E. Even if D's contract with X is without effect D has no unjustified enrichment claim against E. E's enrichment is justified under this Article because it is obtained as a result of D's performance of a contractual obligation with X, and E is a third party to that contract. D has only a claim against X.

Further applications. The principle may apply even where the disadvantaged person, by conferring a benefit on the recipient, has unwittingly performed an obligation owed to a third party. Such a situation may arise due to statutory rules (such as rules for the protection of a debtor acting in good faith) which in special circumstances enable a performance that would otherwise normally not constitute a performance nonetheless to discharge the obligation.

Illustration 12
D, a debtor, pays the creditor, E. Unknown to D, E had earlier assigned the right against D to the assignee X. E (having assigned the right) was not entitled to the enrichment from D. D was mistaken in assuming the existence of an obligation to pay E, when it was in fact X who was entitled to payment. However, D cannot demand a repayment from E. Although D has not paid the creditor (X), D is nonetheless discharged from the obligation: see III.–5:119 (Performance to person who is not the creditor) paragraph (1). D has discharged the obligation to the new creditor (the assignee X) in performing to the former creditor (assignor E). E's enrichment is justified under this Article in relation to D. E's liability is to X.

C. Incidental benefit to enriched person from performance to a third party: para. (b)

General. Paragraph (b) provides that a person who incidentally enriches another while freely performing an obligation owed to a third person confers a justified enrichment on the person incidentally enriched. As in the case of paragraph (a), this applies regardless of whether the obligation is valid or void (or avoided). These two provisions may be regarded as a composite, protecting the third party from an enrichment claim in most cases where a legal relationship (especially a contractual one) between the disadvantaged person and a third party was the essential reason for the enriched person being enriched. The notional boundary between the two provisions lies in the fact that whereas paragraph (a) is essentially concerned with the case where the object of the performance is to benefit the enriched person (as a third party to the juridical act), paragraph (b) comes into play where the enrichment of the third party to the juridical act was not the object of the performance, merely an (incidental) outcome.

Illustration 13
As a result of E's negligence, X's car is damaged. While the car is being repaired, X hires a car from D. It is agreed that payment of hire charges will not be due until X

takes action against E to recover compensation. However, under the applicable national consumer credit legislation, the agreement to postpone payment of the hire charges constitutes a provision of consumer credit and the hire contract is unenforceable for want of compliance with prescribed formalities. Consequently X is able to make use of the car without any contractual or enrichment liability to D to provide recompense. As a result of X being able to use the car hired from D without having to pay for that use, X's consequential loss arising from the damage to the car under repair is mitigated. It is assumed that this correspondingly reduces the sum of compensation due from E to X in respect of the negligent causation of the damage. E is therefore enriched by a decrease in liabilities. D has ultimately conferred a benefit on E. However, E's enrichment is justified in relation to D: E obtained the enrichment as a result of D's discharge of a valid (though unenforceable) obligation to X.

Illustration 14
X, the owner of a disused workshop, commissions D to clear it out and prepare it for a change of use. As a result of an error (for which X is responsible) contained in the fax sent to D, X provides D with the wrong unit number and D clears out and prepares disused premises owned by E. E was not entitled to this enrichment – either against D or against X. However, D's contract with X is valid as a contract to refurbish the premises referred to in the fax (see *inter alia* II.–7:201 (Mistake)) and D was therefore obliged to X to provide this benefit. D's enrichment of E is justified; it results from D's discharge of an obligation owed to X. Consequently D has a contractual claim against X, but no enrichment law claim against E. Any enrichment liability of E will be to X: X did not consent to the disadvantage (incurring a contractual debt to D) without error, because X was mistaken as to the details of the performance due under the agreement.

NOTES

I. Nichtrückforderbarkeit von Zuwendungen an einen accipiens in Erfüllung eines wirksamen Schuldverhältnisses zwischen solvens und seinem Gläubiger

1. Zuwendungen, die ein Schuldner (der *solvens*) in Erfüllung einer wirksamen Obligation nicht an seinen Gläubiger, sondern an einen Dritten (den *accipiens*) erbringt, kann der *solvens* im Grundsatz nach keiner Rechtsordung vom *accipiens* zurückverlangen. Bei funktionaler Betrachtung gibt es von diesem Grundsatz zwar Ausnahmen, doch sind sie typischerweise gerade nicht bereicherungsrechtlich konzipiert. So haben Subunternehmer under FRENCH Gesetz of 31 December 1975 (*Loi no. 75-1334 relative à la sous-traitance*, JO of 3 January 1976, 148) art. 12 im Falle der Insolvenz des Haupt- oder Generalunternehmers einen Erfüllungsanspruch gegen den Werkbesteller (den Bauherren) in Höhe des ausstehenden Werklohnes. (Diese *action directe* wird sogar mit der Folge als *loi de police* i.S.v. CC art. 3 qualifiziert, dass sie sich auch gegenüber einem von den Parteien vereinbarten ausländischen Recht durchsetzt: Cass.ch.mixte 30 November 2007, D. 2008, 5, note *Delpech.*) Der Anspruch des Subunternehmers gegen den Bauherren kann aber nur auf die genannte gesetzliche Sonderbestimmung, nicht auf das Recht der ungerechtfertigten Bereicherung gestützt werden (Cass.civ. 9 December 1992, pourvoi n° 91-11210, Bull.civ. 1992, III, no. 319 p. 197; Cass.civ. 13 July 1993, pourvoi no. 91-17634; Cass.civ. 25 March 1998, pourvoi no. 96-18641). Dieses folgt vielmehr

dem Grundprinzip der Nichtrückforderbarkeit bei Leistungen in Erfüllung eines wirksamen Schuldverhältnisses. Es wird auf den in CC art. 1165 verankerten Grundsatz der Relativität des Vertrages gestützt. (Under CC art. 1236 kann außerdem jede interessierte Person die Verpflichtung einer anderen wie ein Mitschuldner oder Bürge erfüllen. Selbst eine Person, die kein eigenes Interesse an dem Schicksal der fremden Verpflichtung hat, kann sie unter bestimmten weiteren Voraussetzungen erfüllen [Cass.civ. 31 January 1989, Bull.civ. 1989, I, no. 51 p. 33]. Die Zahlung erfolgt auch dann nicht ohne Rechtsgrund, führt folglich gleichfalls nicht zu einem Rückforderungsrecht gegen den *accipiens*, vgl. Cass.civ. 8 December 1976, Bull.civ. 1976, I, no. 396 und Cass.com. 21 January 2003, pourvoi no. 99-13474). Unter BELGIAN CC art. 1798 (i.d.F. von 1990) haben Subunternehmer, die mit der Errichtung eines Gebäudes oder sonstigen Werkes beauftragt sind, einen direkten Anspruch gegen den Bauherren in Höhe seiner gegenüber dem Generalunternehmer noch verbliebenen Schuld. Der Direktanspruch setzt voraus, dass der Generalunternehmer noch über die Forderung gegen den Bauherren verfügen kann; der Direktanspruch des Subunternehmers erlischt deshalb im Fall der Insolvenz des Generalunternehmers (Cass. 27 May 2004, no. JC045R3_1, no. de rôle C020435N).

2. Auch in SPAIN können Schulden durch Zahlung an eine andere Person als den Gläubiger des *solvens* erfüllt werden. Abgesehen vom Fall des Vertrages zugunsten Dritter (teilweise geregelt in CC art. 1257(2)), bei dem die Leistung an den Dritten zugleich die Schuld gegenüber dem Vertragspartner des Leistenden tilgt, ist ein Schuldner unter CC art. 1162 auch befreit, wenn er an einen *accipiens* leistet, den der Gläubiger zur Entgegennahme der Leistung ermächtigt hat. CC art. 1163(2) ermöglicht eine Leistung an einen Dritten sogar ohne Zustimmung des Gläubigers, wenn diese Leistung dem Gläubiger zum Vorteil gereicht. In all diesen Fällen bringt die Zahlung an den *accipiens* das Schuldverhältnis zwischen dem *solvens* und seinem Gläubiger zum Erlöschen; ein Rückforderungsrecht besteht folglich nicht. Auch CC art. 1163(2) schließt eine *condictio indebiti* aus (*Díez-Picazo*, Fundamentos II[4], 496). Thus, increase of assets that arises from performance to a third person under a valid and effective contract cannot be reversed (see *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 290 and 330 sowie, wenn auch etwas vorsichtiger formulierend, *Díez-Picazo and de la Cámara Alvarez*, Dos estudios sobre el enriquecimiento sin causa, 63). Dasselbe Ergebnis lässt sich mittelbar auch aus den vertragsrechtlichen Regelungen der CC arts. 1573 and 487 ableiten. Hier ist vorgesehen that the lessor is not obliged to reverse the profits arising from the improvements made by the lessee during the lease contract. Diese Regel soll sich nach herrschender Auffassung ohne Schwierigkeiten auch auf die Vertragspartner des lessee ausdehnen lassen (*Martínez de Aguirre Aldaz*, CCJC 38 [1995], 613, 628; *Álvarez-Caperochipi*, El enriquecimiento sin causa[3], 167; anderer Auffassung *Jiménez Horwitz*, FS Díez-Picazo II, 2073, 2084). Subunternehmern gewährt allerdings auch Spanish CC art. 1597 eine *acción directa* gegen den Bauherren. Der Anspruch ist der Höhe nach auf den Betrag begrenzt, welchen der Besteller des Werkes dem Generalunternehmer schuldet. Die Vorschrift betrachtet, so wird gesagt, "den Schuldner meines Schuldners auch noch als meinen Schuldner" (TS 11 October 1994, RAJ 1994 (4) no. 7479 p. 9739; TS 10 March 2005, RAJ 2005 (2) no. 2225 p. 4727). Ihr Zweck besteht folglich gerade nicht darin, eine ungerechtfertigte Bereicherung des Bestellers rückgängig zu machen (*Carrasco Perera/Cordero Lobato/González Carrasco*, Derecho de la construcción y la vivienda[5], 351; TS 4 November 2004, RAJ 2004 (4) no. 6484 p. 13143), sondern darin, einer eng begrenzten schutzbedürftigen Personengruppe aus Billigkeit einen besonderen rechtlichen Vorteil zu verschaffen (*Carrasco Perera/Cordero Lobato/González Carrasco* loc.cit.; Bercovitz Rodríguez-

Cano [-*Rodríguez Morata*], Comentarios al Código Civil[2], 1885). Ein Widerspruch zu VII.–2:102 besteht deshalb aus der Sicht des allgemeinen Bereicherungsrechts nicht. Allerdings hat TS 12 July 2000, RAJ 2000 (4) no. 6686 p. 10232 the so-called doctrine of *enriquecimiento indirecto* ('indirect enrichment') entwickelt. A hatte einen Frachter an B verkauft, der noch vor vollständiger Zahlung des Kaufpreises C damit beauftragt hatte, den Frachter umzubauen. After C had completed the work, A terminated the contract with B for failure to pay the price. Da B auch nicht an C zahlte, nahm C den A aus ungerechtfertigter Bereicherung in Anspruch. Der Supreme Court gab diesem Anspruch im Gegensatz zu den Vorinstanzen für den Fall statt, dass B insolvent war. Es habe sich um einen ersatzpflichtigen *enriquecimiento indirecto* gehandelt. Die Entscheidung ist im Schrifttum teilweise auf Zustimmung (*Jiménez Horwitz* loc.cit., *id.*, FS Albaladejo I, 2527-2532) gestoßen, überwiegend aber schweigend übergangen worden (allgemeine Kritik an der Lehre von der indirekten Bereicherung allerdings schon bei *Álvarez-Caperochipi* loc. cit. 164-167). Auch CA La Rioja 20 November 2003, BDA JUR 2004/31327 hat sich TS 12 July 2000 loc. cit. angeschlossen. Dieses Urteil ist allerdings mit zahlreichen anderen Entscheidungen des Supreme Court schlechterdings unvereinbar (z.B. TS 14 February 1998, RAJ 1998 (1) no. 984 p. 1560; TS 20 September 1989, RAJ 1989 (5) no. 6323 p. 7318; TS 14 December 1994, RAJ 1994 (5) no. 10111 p. 12935 and TS 4 November 2004, RAJ 2004 (4) no. 6484 p. 13143, followed by CA Barcelona 30 December 2002, BDA JUR 2003/165784) und deshalb in seiner Bedeutung schwer einzuschätzen. Das Verhältnis der genannten Rechtsprechungslinien zueinander ist nicht klar; es lässt sich derzeit nur sagen, that the doctrine of the so-called *enriquecimiento indirecto* has not been unequivocally adopted by the Tribunal Supremo. Nach der Mehrzahl seiner Entscheidungen gilt anscheinend auch heute noch der Grundsatz, dass enrichments that arise from performance of an enforceable obligation owed to the creditor of the *solvens* under a valid and effective contact cannot be reversed by means of an unjustified enrichment claim.

3. ITALIAN CC art. 1188(1) bestimmt, dass die Zahlung an den Gläubiger oder an seinen Vertreter oder an die vom Gläubiger bezeichnete oder gesetzlich oder gerichtlich zum Empfang ermächtigte Person zu erfolgen hat. Die an eine nicht zum Empfang berechtigte Person erfolgte Zahlung befreit den Schuldner nur, wenn sie der Gläubiger genehmigt oder wenn er daraus Nutzen gezogen hat (CC art. 1188(2)). Der *adiectus solutionis causa* ist nicht selbst klagebefugt (Cass. 19 October 1955, no. 3307, Giust.civ. 1956, I, 1327); es handelt sich lediglich um die Person, von der der Schuldner mitgeteilt hat, dass sie berechtigt ist, die Leistung mit schuldbefreiender Wirkung entgegen zu nehmen (Cass. 18 June 1987, no. 5353, Giust.civ.Mass. 1987, fasc. 6; Cass. 20 January 1983, no. 568, Giust.civ.Mass. 1983, 190). Solche Leistungen können natürlich nicht zurückgefordert werden. Die Anweisung begründet die Pflicht, an den Dritten zu zahlen; die *adiectio* nur eine entsprechende Befugnis. Beim Vertrag zugunsten eines Dritten (CC art. 1411) erwirbt der Dritte vorbehaltlich einer gegenteiligen Abmachung ein Recht gegen den Versprechenden. Sowohl im Verhältnis zwischen Versprechenden und Versprechensempfänger als auch im Verhältnis zwischen dem Versprechensempfänger und dem Dritten bedarf es einer *causa*; liegt sie vor, schließt sie eine Rückforderung gleichfalls aus. Under AUSTRIAN law sind Leistungen, die der Vordermann in einer Vertragskette dadurch erbringt, dass er direkt an den Gläubiger seines Gläubigers liefert oder zahlt, grundsätzlich durch die jeweiligen Verträge gedeckt. Eine *actio de in rem verso* (zu ihr und der älteren Rechtsprechung *Koziol and Welser*, Bürgerliches Recht II[13], 288) wird von der neueren Rechtsprechung abgelehnt (OGH 15 July 1999, 6 Ob 2/99h; kritisch aber *Koziol and Welser* loc.cit.). Eine Werkstatt, in welche der zahlungsunfähige

Mieter das reparaturbedürftige Auto des Eigentümers bringt, hat also keinen Anspruch gegen den Letzteren (kritisch *Wilburg*, JBl 1992, 545, 550; auch *Perner/Spitzer/Kodek*, Bürgerliches Recht[2], 356 betrachten die Frage der actio de in rem verso wieder als "offen"). Der Direktanspruch des solvens gegen den Dritten ist freilich dann nicht ausgeschlossen, wenn die Lieferung oder Zahlung ohne gültige Anweisung des Gläubigers des *solvens* ausgeführt wurde (OGH 15 December 1987, SZ 60/272).

4. Under PORTUGUESE law können Zuwendungen an einen Dritten in Erfüllung eines wirksamen Vertrages zwischen dem *solvens* und seinem Gläubiger schon deshalb nicht zurückverlangt werden, weil ein wirksamer Vertrag *per se* ein Rechtfertigungsgrund für die Vermögensverschiebung ist (STJ 30 May 2006, Processo 06A825). Eine schuldbefreiende Leistung an einen Dritten unterliegt der *condictio indebiti* nicht (CC art. 476(2) i.V.m. art. 770). Wer unter welchen Voraussetzungen an eine schuldnerfremde Person zahlen darf, regeln CC arts. 767-769, ferner CC arts. 464ff (Recht der Geschäftsführung ohne Auftrag). Handelt der solvens aus Freigiebigkeit, so kommt zwischen ihm und der durch die Befreiung von ihrer Schuld gegenüber dem accipiens begünstigten Person im Zweifel ein Schenkungsvertrag zustande (CC arts. 940 und 945); selbst wenn das wegen CC art. 768(2) (Zurückweisung der Freigiebigkeit) einmal nicht der Fall sein sollte, bleibt eine *repetição do indevido* des *solvens* gegenüber dem *accipiens* ausgeschlossen (*Pires de Lima and Antunes Varela*, Código Civil Anotado II[3], note 2 under art. 767, p. 12). Im Rahmen des Vertrages zugunsten Dritter (CC arts. 443-451) übernimmt der *promitente* gegenüber dem *promissário* die Verpflichtung, eine Leistung zu Gunsten eines Dritten zu erbringen. Neben dem Versprechensempfänger erwirbt auch der Dritte einen eigenen Leistungsanspruch (CC art. 444). Für einen bereicherungsrechtlichen Rückforderungsanspruch ist auch dann kein Raum (Einzelheiten bei *Menezes Leitão*, Enriquecimento sem causa[2], 569, 586; vgl. auch STJ 24 October 2006, Processo 06A2496). Ein Vertrag für eine erst zu benennende Person (CC arts. 452-456; *contrato para pessoa a nomear*) kommt zustande, wenn sich einer der Vertragsschließenden das Recht vorbehält, einen Dritten als Berechtigten oder Verpflichteten zu benennen. Anders als beim Vertrag zugunsten Dritter rückt hier die benannte Person rückwirkend in die Rechtsstellung der den Vertrag schließenden Person ein; diese scheidet aus dem Vertrag aus. Der Vertrag kann auch bedingt werden (näher STJ 23 January 1986, BolMinJus 353 [1986] 429). Besondere bereicherungsrechtliche Fragestellungen wirft er aber nicht auf.

5. Unter GREEK CC art. 417 kann die Leistung an den Gläubiger oder an eine von ihm, vom Gericht oder vom Gesetz ermächtigte Person erfolgen; see A.P. 470/1999, EllDik 41 (2000) 53. Durch eine Leistung an eine andere Person als den Gläubiger wird die Schuld auch dann erfüllt, wenn der Gläubiger die Leistung genehmigt oder sie ihm zum Vorteil gereicht (CC art. 417(2); see A.P. 1170/1997, EllDik 40 [1999] 602). Eine Leistung, durch die eine Schuld erfüllt wird, kann nicht kondiziert werden (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 78).

6. Auch in HUNGARY kann ein *solvens* eine Zahlung nicht vom *accipiens* zurückverlangen, wenn sie in Erfüllung einer Pflicht gegenüber dem Gläubiger des *solvens* erfolgte. Der Dritte wird quasi als "Leistungsort" angesehen. Schwierigkeiten bereitet nur der Fall, dass der *solvens* seine Zahlung irrtümlich an einen "falschen" *accipiens* erbringt. Die Rückforderungsansprüche richten sich dann nach den Umständen des Einzelfalls; u.a. ist zu prüfen, ob der *accipiens* in einem solchen Fall überhaupt bereichert ist, was wiederum davon abhängen kann, ob er dem Gläubiger des *solvens* eine Gegenleistung erbracht hat oder schuldet (BH 2005/115). Der Vertrag zugunsten Dritter (CC § 233) unterliegt den allgemein üblichen Regeln. In

BULGARIA ist zweifelhaft, ob die Direktkondiktion des einen Vertrags mit einem anderen erfüllenden *solvens* gegen den *accipiens* grundsätzlich ausgeschlossen ist. *Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 600 will einen solchen Direktanspruch jedenfalls dann gewähren, wenn ein Händler (B) dem Pächter eines landwirtschaftlichen Betriebes (C) Saatgut liefert, das C nicht bezahlt. Dann soll der Verpächter (A) auf Kosten des B ungerechtfertigt bereichert sein.

7. DUTCH CC art. 6:30 bestimmt, dass eine Verbindlichkeit grundsätzlich auch durch eine andere Person als den Schuldner erfüllt werden kann. Die Vorschrift findet aber keine Anwendung, wenn der *solvens* in Erfüllung einer Pflicht gegenüber seinem Gläubiger an den Dritten zahlt. Beim Streckengeschäft (A ist Schuldner des B, B Schuldner des C, A zahlt auf Anweisung des B direkt an C) wird bereicherungsrechtlich überwiegend der *delegans* (B), nicht der *delegataris* (C) als Leistungsempfänger i.S.v. CC art. 6:203 angesehen. Die Zahlung des *solvens* an den *accipiens* (oder *delegataris*) hat ihren Rechtsgrund dann in dem Vertrag zwischen *solvens* und *delegans*; sie erfolgt m.a.W. nicht ungeschuldet (näher *Schoordijk*, Onverschuldigde betaling, 23-30). Andere meinen jedoch, dass im Falle des Streckengeschäfts beide Verpflichtungen in ihrer Gesamtheit den Rechtsgrund bilden. Folglich könne der *solvens* von dem Empfänger das Zugewandte bereits dann kondizieren, wenn auch nur eine dieser Verpflichtungen unwirksam sei. Allerdings sei ein gutgläubiger *delegataris* zu schützen; ihm gäbe bereits sein Vertrag mit dem *delegans* einen Grund zum Behaltendüfen (*Hartkamp*, WPNR 2004, no. 6596, p. 851, 853; Asser [-*Hartkamp*] Verbintenissenrecht III[12], no. 330; *Scheltema*, RM-Themis 2000, 126–132; *Schoordijk* loc.cit.). Bei der sogen. titulierten Delegation (Schuldübernahme [CC art. 6:155], Verträge zugunsten Dritter [CC art. 6:253(1)], Bürgschaft [CC art. 7:850], Zession) lägen die Dinge ähnlich. Auch hier ist der *delegans* Schuldner des *delegataris* (oder *accipiens*). Der *solvens* nimmt die Schuld des *delegans* auf sich, weil er letzterem selber schuldet; die Leistung des *solvens* an den *delegataris* hängt aber zugleich von der Wirksamkeit des Verhältnisses zwischen *delegans* und *delegataris* ab. Auf einen Mangel in diesem Verhältnis kann sich deshalb auch der *solvens* berufen.

8. Under ESTONIAN law performances made to a third party under a valid contract may not be reclaimed. Die Grundregel lautet vielmehr, dass die Rückabwicklung nur innerhalb der jeweiligen Rechtsbeziehung stattfindet (*Hussar and Kivisild*, Juridica IV/2005, 272). When a bank (A), upon its customers's (B) instruction (a payment order under LOA § 703), transfers money to B's creditor (C) without realising that B's account contained insufficient funds, C's enrichment is justified (zur Beziehung zwischen der Bank und ihren Kunden in einem solchen Fall siehe noch LOA § 715(2)). Hat die Bank (A) die Weisung ihres Kunden (B) ausgeführt, ist dessen Vertrag mit seinem Gläubiger (C) aber unwirksam, dann scheint ein Anspruch der Bank gegen (C) gleichfalls ausgeschlossen zu sein (*Tampuu*, Lepinguväliste võlasuhete õigus, 76). Ein Vertrag zu zugunsten Dritter (LOA § 80) berechtigt den Dritten zum Behaltendürfen der Leistung. Hat er allerdings auf das ihm unter dem Vertrag eingeräumte Recht verzichtet (LOA § 80(8)), dann ist für eine schon erbrachte Leistung ein Bereicherungsausgleich geschuldet. Der Leistende kann sich sowohl an den Dritten (LOA § 1028) als auch an seinen unmittelbaren Vertragspartner (LOA § 1030(1)) halten (*Varul/Kull/Kõve/Käerdi*, Võlaõigusseadus I, 246).

9. Die Lösung der NORDIC Rechtsordnungen stimmt mit der unter diesem Article überein. A contracting party may not seek compensation from a third party when the contract fails, even if the third party indirectly enjoys an advantage from the performance of the contract (*Hellner/Hager/Persson*, Speciell avtalsrätt II(2)[4], 127; *Karlgren*, Obehörig vinst och värdeersättning, 45; *Bryde Andersen and Lookofsky*,

Obligationsret I[2], 427; *Hellner*, FS Goode, 167-190). Verträge zugunsten Dritter können, müssen dem Dritten aber nicht ein eigenes Forderungsrecht einräumen (*Jørgensen*, Kontraktsret I, 86; *Adlercreutz*, Avtalsrätt I[11], 139; *Zackariasson*, Direktkrav, 183). Eine Direktkondiktion des *solvens* gegen den Dritten (den *accipiens*) schließt die herrschende Meinung in beiden Fällen grundsätzlich aus (*Hellner*, Obehörig vinst, 378; *Vinding Kruse*, Restitutioner, 140; *Ussing*, UfR 1937 B, 108-115; *Hakulinen*, Obligationsrätt, 198). Ein Direktanspruch wird auch dort abgelehnt, wo ein Subunternehmer in Erfüllung seines Vertrages mit dem Generalunternehmer direct an dessen Vertragspartner liefert (*Hellner/Hager/Persson* loc cit. 143; HD 30 October 2007, NJA 2007, 758; *Vinding Kruse* loc.cit. 160, 181; *Ulfbeck*, Kontrakters relativitet, 175, 329).

II. Rückforderbarkeit von Zuwendungen an einen Dritten in Erfüllung eines unwirksamen Vertrages?

10. In der alternativen Fallgestaltung leistet der Schuldner (der *solvens*) auf einen unwirksamen Vertrag mit seinem (Schein-)Gläubiger an den *accipiens*. Auch hier ist die verbreitetste Regel die, dass sich der *solvens* rückabwicklungsrechtlich grundsätzlich an seinen eigenen Vertragspartner (den Scheingläubiger) halten muss. Selbst der Direktanspruch des Subunternehmers gegen den Bauherren (note 1 above) besteht nach FRENCH Cass.civ. 17 February 1999, pourvoi no. 96-21875 nicht, wenn der Vertrag des Subunternehmers mit dem Generalunternehmer nichtig ist; der Bauherr könne in einem solchen Fall höchstens noch aus Deliktsrecht haften, doch setze das eine *faute* voraus. Sie habe in dem fraglichen Fall aber allein den Generalunternehmer getroffen. Im Übrigen unterliegen Rückgabeansprüche infolge einer Annullierung des Vertrages nach Cass.civ. 24 September 2002, Bull.civ. 2002, I, no. 218; D. 2003, 369, note *Aubert* nicht dem Recht der *répétition de l'indu*, sondern dem Nichtigkeitsrecht. Wurde ein nichtiger Vertrag ausgeführt, so ist zwischen den Vertragsparteien der status *quo ante* wiederherzustellen; ist das nicht *in natura* möglich, so ist die Leistung nach ihrem Wert zu vergüten (Cass.civ. 29 February 1972, Bull.civ. 1972, IV, no. 77 p. 73; Cass.civ. 16 March 1999, Bull.civ. 1999, I, no. 95; Defrénois 1999, 1325, obs. *Delebecque*). So verhält es sich auch in BELGIUM (*de Page*, Traité élémentaire de droit civil belge II(1)[3], no. 817).

11. In SPAIN restitutionary claims arising from *nulidad* or *anulabilidad* (CC art. 1303) or from rescission or termination (CC arts. 1295 and 1124) are personal claims that can be only addressed to the contractual party, but not to a third person, see, for nullity and avoidance, *Delgado Echeverría and Parra Lucán*, Las nulidades de los contratos, 242-245, 268, and for rescission and termination CC art. 1295(2) [wonach es nicht zu einer Vertragsaufhebung kommt, wenn sich die Sachen, die Gegenstand des Vertrages sind, rechtmäßig im Besitz eines gutgläubigen Dritten befinden], sowie *Díez-Picazo*, Fundamentos I[6], 614). Eine Ausnahme von dieser Grundregel findet sich aber in CP art. 111, which provides for a restitutionary claim with proprietary effect when the invalid contract amounts to a crime or misdemeanor. In den "normalen" Fällen dagegen, in welchen der *solvens* (A) in vermeintlicher Erfüllung seines unwirksamen (aber nicht strafbaren) Vertrages mit (B) an den *accipiens* (C) liefert und Letzterer an den gelieferten Gegenständen (kraft Gesetzes oder Vertrages) Eigentum erwirbt, führt die Analogie zu den Regeln des Eigentumsrechts zu einem Ausschluss auch der *Eingriffskondiktion* (näher *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 288) gegen den *accipiens*. Die *Eingriffskondiktion* established in CC arts. 360, 375, 379(2) and 383(1) in the context of accession soll A (basically, a subcontractor) nur gegen B, nicht gegen C zustehen (*Basozabal Arrue* loc.cit. 290, pointing out that the contract between C and B is *causa* for C to retain the

enrichment). Sollte C ausnahmsweise kein Eigentum erworben haben, haftet er nach dieser Logik dem solvens A dagegen auch bereicherungsrechtlich, kann aber B in Regress nehmen. Ersteres wird u.a. damit begründet, dass C kondiktionsrechtlich nicht starker geschützt werden dürfe als eigentumsrechtlich, und das nur diese Lösung mit den Regeln des Rechts des Eigentümer-Besitzer-Verhältnisses korrespondiere (*Basozabal Arrue* loc.cit. 290-291). In Fällen, in welchen es sich nicht um den Wertersatz für Güter, sondern um Geldersatz für Dienstleistungen handelt, tragen diese Analogien allerdings nicht. Hier dürfte selbst die *acción directa* des Subunternehmers gegen einen Bauherren aus CC art. 1597 ausgeschlossen sein, weil sie (wie in France) einen wirksamen Vertrag zwischen dem *solvens* (A) und seinem Vertragspartner (B) voraussetzt (Bercovitz Rodríguez-Cano [-*Rodríguez Morata*], Comentarios al Código Civil[2], 1886). Ein Ausgleich für solche Dienstleistungen kommt also nur unter CC art. 1307 in Betracht, und hierbei handelt es sich um einen persönlichen Anspruch gegen den Vertragspartner (B), nicht gegen den tatsächlichen Empfänger der Dienstleistung (C).

12. In ITALY ist Ausgangspunkt CC art. 1372(2), wonach Verträge nur in den gesetzlich vorgesehenen Ausnahmefällen für oder gegen Dritte wirken, so dass auch die Rückabwicklung eines Vertrages grundsätzlich auf die Vertragsparteien beschränkt bleibt. Im Näheren ist aber zwischen verschiedenen Fallgestaltungen zu unterscheiden. Für das Recht der Dienst- und Arbeitsleistungen ist CC art. 1676 zu beachten, der denjenigen, die in Abhängigkeit von einem Werkunternehmer "ihre Tätigkeit oder Dienstleistung" zur Verfügung stellen, einen Direktanspruch auch gegen den Besteller des Werkes in Höhe des Betrages haben, den der Werkunternehmer ihnen schuldet (näher Cass. 10 July 1984, no. 4051, Giur.it. 1985, I, 1, 616). Unternehmer und Werkbesteller haften insoweit als Gesamtschuldner (Cass. 27 September 2000, no. 12784, Giust.civ.Mass. 2000, 2008; Cass. 6 March 1985, no. 1857, Giust.civ.Mass. 1985, fasc. 3); der Werkbesteller wiederum hat einen bereicherungsrechtlichen Regressanspruch gegen den Werkunternehmer (*Cian and Trabucchi*, Commentario breve[6], sub art. 1676, I, § 7). CC art. 1676 findet freilich weder auf Subunternehmer, noch auf diejenigen Anwendung, die Ware auf eine Baustelle liefern (CFI Lodi 18 April 2005, Corriere del merito 2005, 876). Es erscheint unter Berücksichtigung von CC art. 2126 (Arbeitnehmerschutz bei nichtigem Arbeitsvertrag) zwar vertretbar, einem Gehilfen, dessen Vertrag mit dem Werkunternehmer nichtig ist, auch einen bereicherungsrechtlichen Direktanspruch gegen den Werkbesteller zu gewähren, doch liegt zu dieser Frage bislang wohl noch keine Entscheidung vor. In Fällen, in welchen ein Subunternehmer auf einen unwirksamen Vertrag mit dem Generalunterunternehmer eine Dienstleistung (ein *facere*) zugunsten des Bauherren erbringt, ist fraglich, wer Adressat des bereicherungsrechtlichen Wertausgleichsanspruches ist. Gegen einen Direktanspruch gegen den tatsächlichen Empfänger der Dienstleistung sprechen sowohl der nach CC art. 2041 erforderliche Kausalnexus zwischen Bereicherung und Nachteil als auch die Subsidiarität der Bereicherungsklage (CC art. 2042). Bereicherung und Nachteil müssen ihre Ursache in demselben *fatto generativo* haben, was in den Fällen des sog. *arricchimento indiretto* (also z.B. bei einer von einer anderen Person als dem Eigentümer der Sache in Auftrag gegebenen Reparatur: *Cian and Trabucchi* loc.cit. sub arts. 2041-2041, IV, § 3) typischerweise nicht der Fall ist. Folglich kommt ein Direktanspruch gegen den tatsächlichen Empfänger der Dienstleistung grundsätzlich nicht in Betracht (Cass. 10 February 1993, no. 1686, Giur.it. 1994, I, 1, 626; Cass. 17 February 1984, no. 1189, Giust.civ.Mass. 1984, fasc. 2); der Dienstleistungserbringer muss sich an seinen vermeintlichen Vertragspartner halten. Im Schrifttum wird diese Regel allerdings intensiv und kontrovers diskutiert (Nachweise bei *Cian and Trabucchi* loc.cit. sub arts.

2041-2041, IV, § 3). Auch wenn ein Subunternehmer aufgrund eines nichtigen Kaufvertrages mit einem anderen Unternehmer Ware direkt an dessen Kunden (z.B. einen Bauherren) liefert, vollzieht sich die Rückabwicklung grundsätzlich innerhalb der Vertragsbeziehungen. Ein Anspruch auf Wertausgleich gegen den Kunden nach den sachenrechtlichen Ausgleichsmechanismen für einen gesetzlichen Eigentumsverlust (CC arts. 936 und 937) ist außerordentlich zweifelhaft, weil CC art. 936 erkennbar nur eine Zweipersonenbeziehung im Blick hat. Die Vorschrift ist zwar ohne weiteres anwendbar, wenn der Vertrag zwischen Lieferant und neuem Eigentümer nichtig ist oder angefochten wurde (*Bianca*, Diritto civile VI, 366; Cass. 26 November 1988, no. 6380, Dir. e Giur. Agr. 1989, 87), doch besagt das nichts für die Situation, in welcher der Vertrag zwischen dem Lieferant und einem Dritten (der gleichzeitig Vertragspartner des neuen Eigentümers ist) unwirksam ist. CC art. 937 schließlich umfasst zwar auch Fälle, in welchen der Grundstückseigentümer einen (wirksamen) Vertrag mit jemandem geschlossen hat, der fremde Materialien verwendet und einbaut (Cass. 22 January 1998, no. 803, Giust.civ.Mass. 1998, 131); ist der Grundeigentümer gutgläubig, haftet er in einem solchen Fall dem ursprünglichen Eigentümer der Materialien nur in Höhe des Betrages, den der Grundeigentümer noch seinem eigenen Vertragspartner schuldet (CC art. 937(3)). Aus dieser Vorschrift lässt sich jedoch ebenfalls nichts für die Situation ableiten, in welcher der Eigentümer seine eigenen Materialien aufgrund eines Vertrages mit einem anderen auf dem Grundstück des Grundeigentümers einbaut.

13. Die Grundregel des AUSTRIAN Rechts lautet, dass bereicherungsrechtliche Rückabwicklungen den rechtlichen Leistungs-, nicht den tatsächlichen Lieferbeziehungen folgen, selbst im Falle des Doppelmangels. Denn es gilt, das Risiko der Schuldnerinsolvenz nicht zu verlagern (*Koziol and Welser*, Bürgerliches Recht II[13], 282; OGH 24 November 1976, SZ 49/145; OGH 14 December 1983, SZ 56/186; OGH 31 January 1985, SZ 58/19). Nur wenn der *solvens* auch auf ein Schuldverhältnis mit dem Empfänger leistet, kann er auch direkt bei ihm kondizieren (z.B. ein Bürge, der auf eine nichtige Hauptschuld an den Gläubiger zahlt: *Koziol and Welser* loc.cit. 284). Sonst ist er gegen den Dritten auf den Vindikations- und einen evtl. Verwendungsanspruch beschränkt; ein Anspruch aus Leistungskondiktion scheitert ganz einfach an der Abwesenheit einer Leistung i.S.v. CC § 1431 (kritisch allerdings *Spielbüchler*, JBl 2001, 38). Umgekehrt kann ein Schuldner, der im Falle einer unwirksamen Zession gutgläubig an den Zessionar leistet, das Geleistete nach herrschender (freilich gleichfalls nicht unbestrittener) Auffassung nur vom Zessionar wieder zurück verlangen (*Karollus*, JBl 1994, 573; contra *Markowetz*, ÖJZ 2001, 581; differenzierend *Holzner*, JBl 1995, 401). Under PORTUGUESE CC art. 478 (subjektive Nichtschuld) kann ein *solvens*, der eine fremde Verpflichtung in der irrigen Überzeugung erfüllt, dem Schuldner dieser Verpflichtung gegenüber hierzu verpflichtet zu sein, das Geleistete nicht vom *accipiens* zurückverlangen; er hat nur das Recht, von dem auf diese Weise befreiten Schuldner dasjenige zu fordern, womit dieser ungerechtfertigt bereichert ist. Ein Direktanspruch gegen den *accipiens* besteht nur, wenn dieser den Fehler kannte, als er die Zuwendung erhielt. Im Übrigen aber ist die ihm zugeflossene Mehrung seines Vermögens als gerechtfertigt anzusehen, weil ihr eine *causa solvendi* zugrundeliegt (*Menezes Leitão*, Enriquecimento sem causa[2], 534). Für den Fall der Unwirksamkeit des Vertrages zwischen dem *solvens* und seinem Auftraggeber folgt das Prinzip der Rückabwicklung innerhalb der jeweiligen Vertragsbeziehung im Übrigen bereits aus CC art. 289: die Pflichten zur Rückgewähr von Leistung und Gegenleistung sind nach portugiesischer Auffassung eine unmittelbare Folge der Unwirksamkeit des Rechtsgeschäfts und betreffen folglich nur die daran beteiligten Personen (*Menezes Leitão* loc.cit. 445).

14. Die GREEK Rechtsprechung akzeptiert, dass der Schuldner, der auf einen unwirksamen Vertrag an einen Dritten leistet, einen Bereicherungsanspruch gegen den vermeintlichen Gläubiger hat, wenn der Dritte als Vertreter des Gläubigers handelte (A.P. 691/1973, NoB 22 [1974] 178; CA Athens 2229/1977, Arm 31 [1977] 642). Es wird aber auch die Auffassung vertreten, dass der Rückforderungsanspruch des Schuldners gegen den vermeintlichen Gläubiger voraussetzt, dass das an den Dritten Geleistete den vermeintlichen Gläubiger tatsächlich erreicht; andernfalls müsse sich der Schuldner an den Dritten halten (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 78).

15. In HUNGARY folgt die Rückabwicklung ungültiger Verträge dem vertragsrechtlichen Regime des Ungültigkeitsrechts (CC §§ 237 ff); ein Ausgleich findet also stets nur zwischen den Vertragsparteien statt. Ein *solvens* kann gegen den *accipiens* allerdings im Wege der Vindikation vorgehen, wenn dieser kein Eigentum an der gelieferten Ware erworben hat, weil der Vertrag zwischen dem *solvens* und dem Dritten ungültig ist und es an einem anderen Erwerbstatbestand für den *accipiens* fehlt (*Vékás*, Magyar Jog 2003, 385, 386f; Gellért [-*Petrik*], A Polgári Törvénykönyv Magyarázata[6], 428; *Pomeisl*, Gazdaság és Jog 11/2004, 3). Ein Bereicherungsanspruch des *solvens* gegen den *accipiens* scheitert in der Regel schon daran, dass der *accipiens* nach ungarischer Auffassung gar nicht bereichert ist: er wird die ihm gelieferte Ware entweder schon an seinen eigenen Vertragspartner (den Dritten) bezahlt haben oder diesem zumindest Zahlung schulden. In beiden Fällen ergibt sich eine ausgeglichene Bilanz. Zudem wird der Vertrag zwischen dem *accipiens* und dem Dritten als Rechtsgrund zum Behaltendürfen der Zuwendung des *solvens* verstanden, vgl. CC § 361(1). Selbst wenn dieser Vertrag (ebenfalls) ungültig sein sollte, scheidet eine Direktkondiktion des *solvens* gegen den *accipiens* aber aus. Denn Letzterer muss solchenfalls das Empfangene dem Dritten zurückgewähren, was bei der bilanziellen Betrachtungsweise des ungarischen Rechts wiederum zu dem Ergebnis führt, dass der *accipiens* auch in seiner Beziehung zum *solvens* nicht als bereichert anzusehen ist. In BULGARIA wird bei Verträgen zugunsten Dritter die Leistung an den Dritten selbst dann dem *solvens* (z.B. einer Lebensversicherung) gegenüber für kondiktionsfest angesehen, wenn dessen Vertrag mit dem Versprechensempfänger angefochten oder sonst unwirksam ist. Ein Vetrag zugunsten Dritter entfaltet zugunsten des Dritten Wirkung bereits mit Abschluss des Vertrages zwischen Versprechendem und Versprechensempfänger (*Kalaydjiev,* Obligazionno pravo, Obshta chast[4], 157). Der *solvens* muss sich deshalb rückabwicklungsrechtlich gemäß LOA art. 55(1) an den Versprechensempfänger halten (see LOA art. 22(3)).

16. Im DUTCH law lautet der Ausgangspunkt, dass ein solvens (A), der auf einen unwirksamen Vertrag hin an einen Dritten (C) zahlt oder liefert, nicht den Dritten, sondern nur seinen eigenen Vertragspartner (B) in Anspruch nehmen kann, und zwar aus CC art. 6:203. Mängel im Verhältnis (A) zu (B) berühren die Rechtsstellung des (C) nicht. Das ist jedenfalls dann gesichert, wenn der Vertrag zwischen dem *accipiens* (C) und dem *delegans* (B) wirksam und der *accipiens* (oder *delegataris*) gutgläubig ist. Der *accipiens* soll dagegen dann nicht geschützt sein, wenn er kein Recht gegen den *delegans* hat, weil der Vertrag zwischen ihnen unwirksam ist; in diesem Fall soll der *solvens* die Zahlung bzw. Lieferung über CC art. 6:203 vom *accipiens* zurückverlangen können (*Schoordijk*, Onverschuldigde betaling, 47). Der *solvens* wird an diesem Rückforderungsrecht allerdings kein Interesse haben, weil er dem *delegans* gegenüber entweder über CC art. 6:34(1) (hatte der *solvens* einen vernünftigen Grund, an den *accipiens* zu zahlen, dann erlischt nach CC art. 6:34 die Schuld des *solvens* gegenüber dem *delegans*) oder ganz einfach deshalb geschützt ist, weil der *solvens* durch die Lieferung bzw. Zahlung an den *accipiens* seine (des A) Schuld gegenüber

(B) erfüllt hat. Folglich hat im Ergebnis nur der *delegans* ein Interesse und ein Recht, den *delegataris* aus Bereicherungsrecht in Anspruch zu nehmen: der *delegans* ist verarmt, weil er von dem *solvens*, jedenfalls, sofern dieser gutgläubig an den *accipiens* geleistet hat, nichts mehr verlangen kann (CC art. 6:34(1)), und der *delegataris* ist durch die Zuwendung des *solvens* als bereichert anzusehen. Sind allerdings bei einem Streckengeschäft (B kauft bei A und verkauft die Ware weiter an C; B bittet A, die Ware direkt bei C abzuliefern) beide Verträge nichtig, dann soll der *solvens* (A) nach herrschender Meinung die Ware vom *accipiens* (C) nicht 'nur' vindizieren, sondern auch kondizieren können (näher zu alledem *Schoordijk* loc.cit.; *Scheltema*, Onverschuldigde betaling, no. 3.6.1.3, p. 104, *van Dunné*, Verbintenissenrecht II[5], 663; *Scheltema*, Verbintenissenrecht II, art. 6:203, no. 11.2, p. 54 und no. 11.3 pp. 55-64; Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 192; *id.*, Verbintenissenrecht III[12], no. 330; *id.*, WPNR 2004, no. 6596, p. 851, 853 und 854; *Scheltema*, RM-Themis 2000, 124–128). Ist in einem Vertrag einem gutgläubigen Dritten ein Recht eingeräumt worden und war dieser damit einverstanden, dann hat der *solvens* gegen den Dritten auch dann kein Rückforderungsrecht, wenn der Vertrag mit dem *delegans* unwirksam ist (CC art. 3:36). In solchen und anderen Fällen der sogen. titulierten Delegation kann der *solvens* (Versprechender, Bürge, Schuldübernehmer etc.) dem *accipiens* gegenüber allerdings geltend machen, unter dem "Druck der Umstände", d.h. unfreiwillig geleistet zu haben (CC art. 6:30 und HR 22 April 1983, NedJur 1984, no. 726 p. 2561). Der *solvens* kann folglich in einem solchen Fall das Geleistete vom *accipiens* als ungeschuldet zurückverlangen (Nieuwenhuis/Stolker/Valk [-*Valk*], T & C Burgerlijk Wetboek[6], art. 6:30, no. 1, p. 2144; *Brunner and de Jong*, Verbintenissenrecht algemeen, no. 77, p. 60; Parlementaire Geschiedenis VI, 158; *van Dunné*, Verbintenissenrecht I[5], 641-642; siehe ferner *Cahen*, Overeenkomst en derden, 46-53). Besteht bei einer Schuldübernahme der Anspruch des Gläubigers gegen den Schuldner nicht und hat der Übernehmer gleichwohl geleistet, so steht ihm gegen den Gläubiger natürlich ein Rückforderungsrecht aus CC art. 6:203 zu. Denselben Anspruch soll aber auch der alte Schuldner haben, weil er seine Schuld gegenüber dem Gläubiger durch den Schuldübernehmer habe tilgen wollen. War dagegen die Schuldübernahme nichtig, kann der Übernehmer nach Leistung an den gutgläubigen *accipiens* nur gegen den wahren Schuldner vorgehen bzw. mit der Zahlung aufrechnen. Bei einem Doppelmangel soll sich der Schuldübernehmer sowohl an den *accipiens* als auch an den wahren Schuldner halten können (*Schoordijk* loc.cit. 89-90; teilweise anders *Scheltema*, Onverschuldigde betaling, 118-119). Ähnlich ist die Lage im Bürgschaftsrecht. Ist der Vertrag zwischen Hauptschuldner und Gläubiger nichtig, dann steht dem Bürgen gegen den Gläubiger ein Rückforderungsrecht aus CC art. 6:203 zu; er kann aber auf vertraglicher Grundlage auch direkt gegen den Hauptschuldner vorgehen, der sich seinerseits an den accipiens halten kann, weil er i.S.v. CC art. 6:204 über den Bürgen an ihn ungeschuldet geleistet hat. Ist der Vertrag zwischen Bürge und Hauptschuldner unwirksam, dann steht dem Bürgen ein Rückforderungsrecht aber nur gegen den Hauptschuldner zu. Im Falle des Doppelmangels soll der Bürge wiederum einen Anspruch gegen beide anderen Parteien haben (*Schoordijk* loc.cit. 92; *Scheltema* loc.cit. 119-123).

17. ESTONIAN LOA § 1029 provides that if a transferor performs an obligation with respect to a third party at the order of an obligee or person whom the transferor erroneously believes to be an obligee, the transferor may only demand that that which is transferred be returned by the obligee or person whom the transferor erroneously believed to be an obligee. This provision applies, for example in cases of deficient bank transfers. It has been suggested, however, that when a payment order is lacking, is performed in an amount exceeding that what was ordered, or is forged, a direct

claim of the bank against the recipient is justified (*Hussar and Kivisild*, Juridica IV/2005, 272). In a case where a board member instructed the company shortly before it's bancruptcy to transfer a sum of money to a third person as payment of the company's debt to the board member, the Supreme Court has found that if the third person when accepting the performance knew or should know of the fact that the performance may be recovered in bancruptcy proceedings (e.g. the court may revoke transactions which were concluded by the debtor before the declaration of bankruptcy and which damage the interests of the creditors), the liquidator may demand recovery on the basis of the principle of good faith (LOA § 6) (Supreme Court 19 December 2007, civil matters no. 3-2-1-115-072). A performance made under an invalid contract for the benefit of a third party may be recovered both from the third party and the other contracting party (LOA § 1030(1)). However, if the other party or a person believed to be a party of that contract is not aware and does not have to be aware that the contract or the obligation does not exist, the return of that which is delivered may only be demanded from the recipient (LOA § 1030(2)). Also, in exceptional cases, when the performance is directed only to the third person and the contracting party has no right to claim performance, the transferor should be granted a claim only against the third person (*Tampuu*, Lepinguväliste võlasuhete õigus, 77). A representative of the recipient is not liable of returning that which was transferred, as he is not the true recipient (Supreme Court 8 May 2006, civil matters no. 3-2-1-32-06).

18. Die Rückabwicklung von auf einen in Erfüllung eines nichtigen Vertrages an einen Dritten erbrachte Leistungen ist in the NORDIC countries bislang kaum diskutiert worden. Es scheint aber selbst in den Fällen, in denen der Dritte ein eigenes Forderungsrecht hat, bei der allgemeinen Regel zu verbleiben, dass sich jeder an seinen Vertragspartner halten muss. Der Dritte ist in diesem Sinn kein Vertragspartner; Versprechender und Versprechensempfänger können den Vertrag bis zum Fälligwerden der Leistung grundsätzlich noch aufheben oder ändern (*Arnholm*, Sammansatte aftaler, 137; *Adlercreutz*, Avtalsrätt I[11], 140). Ist aber erst einmal auf den Vertrag geleistet, kann der *solvens* das Geleistete nicht vom *accipiens* mit dem Argument zurückverlangen, der Vertrag sei unwirksam gewesen. Das kann vielleicht auch mit einer Analogie zum Recht der Einkaufskommission begründet werden, weil auch hier der Verkäufer keinen direkten Zahlungsanspruch gegen den Kommittenten hat; der Kommissionär hat zwar für dessen Rechnung, aber eben im eigenen Namen gehandelt (*Hellner*, FS Goode, 167, 183; *Zackariasson*, Direktkrav, 63).

Illustration 1 is taken from A.P. 1239/2005, DEE 11 (2005) 1210; similarly BH 2005/115; **illustration 4** is taken from CA Koblenz 21 February 2005, NJW-RR 2005, 1491; **illustration 6** is taken from BGH 11 April 2006, NJW 2006, 1965; **illustration 9** is taken from Polish Supreme Court 11 September 1997, III CKN 162/97, OSNC 1998 (2) 31.

VII.–2:103: Consenting or performing freely

(1) If the disadvantaged person's consent is affected by incapacity, fraud, coercion, threats or unfair exploitation, the disadvantaged person does not consent freely.

(2) If the obligation which is performed is ineffective because of incapacity, fraud, coercion, threats or unfair exploitation, the disadvantaged person does not perform freely.

COMMENTS

Absence of free consent: incapacity, fraud, threats and unfair exploitation

General. This Article provides that a person does not consent to a disadvantage or perform an obligation freely if the consent or obligation is affected by incapacity, fraud, coercion, threats or unfair exploitation. Where the consent or performance is so affected, the justifying grounds in the previous Articles which depend on free consent or a freely given performance do not apply.

Overlapping grounds for absence of free consent. In given circumstances there may be several reasons why the disadvantaged person cannot be said to have consented freely to their disadvantage. Nothing turns on this. If any one of incapacity, fraud, coercion, threats or unfair exploitation is made out, the enrichment will not be justified on the basis of free consent.

Meaning of fraud, coercion, threat and unfair exploitation. The notions of fraud, coercion, threats and unfair exploitation invoked in II.–7:205 (Fraud) to II.–7:207 (Unfair exploitation) (the latter referring to taking grossly unfair advantage or excessive benefit) will be material here. However, they are not directly applicable since those provisions are formally concerned only with rights to avoid contracts. Moreover, those terms themselves are not explicitly defined in DCFR Book II; a particular meaning of the concepts may be derived implicitly from those provisions and that meaning must then be transposed to situations where there is no contract at all. So, for example, fraud will occur where the disadvantaged person is led to confer the enrichment by another's representation (or non-disclosure of information which good faith and fair dealing required be disclosed) which was made with knowledge or belief that it was false and was intended to induce the disadvantaged person to make a mistake (cf. II.–7:205(1), (2)). A threat must be of imminent and serious harm. A consent or performance will be affected by unfair exploitation if the enrichment is obtained as a result of a person exploiting the disadvantaged person's situation of distress or vulnerability.

Source of the fraud, threat or unfair exploitation. A second consideration is that the provisions of Book II Chapter 7 Section 2 are focused on demarcating the circumstances in which the vitiating factors of fraud, coercion, threats, and unfair exploitation impact on the validity of the contract. As in the case of mistake, those restrictions are not to be regarded as carried over to this Book, where the concern is not with determining the binding character of a promise, but rather the restitutionary effect of a prestation conferred. Here, for example, it suffices generally that someone has induced the enrichment by fraud, irrespective of whether that was the enriched person or a third person. This is in contrast to the restrictions of II.–7:208 (Third persons), where, if the contractual partner has already acted on the contract, a right to avoid the contract based on the fraud or threats of a third person is made out only if the contractual partner is responsible for the third person's acts or assented to that person's involvement in the contract formation or knew or ought to have known of the relevant facts. Thus VII.–2:103 applies where the disadvantaged person's consent to the disadvantage or

performance of the obligation is affected by fraud, coercion, threats or unfair exploitation vis-à-vis the disadvantaged person regardless of the source of the abuse constituting the vitiating factor. The person perpetrating the fraud, coercion, threat or unfair exploitation need not be the enriched person. Nor need the defect in the disadvantaged person's consent to the transaction have been induced by a third party acting on behalf of the enriched person. The source of the fraud, threat or unfair exploitation may be a person unconnected with the enriched recipient of the benefit.

Rationale. The choice here of rules which are less restrictive than in Book II Chapter 7 is deliberate. VII.–2:103, in contrast to the provisions of Book II, applies to cases where there is no contract or other juridical act involved at all. In that case there is no *a priori* reason why the provisions in Book II should demarcate the outer boundaries of a right to reclaim an enrichment. Given that the existence of an obligation to confer an enrichment constitutes a justification for that enrichment (except for cases within paragraph (4) of VII.–2:101 (Circumstances in which an enrichment is unjustified)) there is every reason to read the concepts in VII.–2:103 in wide terms.

> *Illustration 1*
> E, pretending to be X, asks D, a debtor of X, to pay an outstanding debt which is repayable on demand. D pays to E in compliance with that demand to discharge the debt. It is assumed that although D is a victim of E's fraudulent impersonation, D is not protected and the debt to X is not discharged. Consequently X retains the right right to payment of the debt against D. E is enriched by D's payment. That enrichment is unjustified under the terms of this Article since it was obtained as a result of a fraud practised on D, is not obtained as a result of D's free consent to the disadvantage and accordingly is not justified under paragraph (1) of this Article. D has an enrichment claim against E.

Scope of the two paragraphs. In their scope the two paragraphs of VII.–2:103 are complementary. Paragraph (1) is to be understood as a qualification of VII.–2:101 (Circumstances in which an enrichment is unjustified) paragraph (1)(b). It determines the circumstances (other than the disadvantaged person's mistake) in which a consent to a disadvantage does not suffice to provide a legal justification for an enrichment. This will be in issue only in those cases in which there is no binding contract or other valid juridical act concluded between the parties, since whenever there is a valid juridical act the enrichment will be justified under VII.–2:101 (Circumstances in which an enrichment is unjustified) paragraph (1)(a). Paragraph (2) of VII.–2:103 has the function of qualifying VII.–2:102 ((Performance of obligation to third person) lit. (a). It determines the circumstances in which an enrichment which has been conferred as a result of the disadvantaged person's performance of an obligation to a third party (and which is not a merely incidental result of that performance) is nonetheless not justified. The existence of a valid or apparent legal relationship with a third party which prompted the performance thus does not deprive the disadvantaged person of a direct claim under this Book against the recipient of the performance if the obligation to perform was vitiated by fraud, threats or one of the other factors listed here. It is thus applicable only where the enrichment has been conferred by the disadvantaged person in compliance with the terms of some (valid or ineffective) contractual or other obligation owed to a third party.

NOTES

I. Freiwillige Vermögenshingabe

1. Freiwillige Vermögenshingaben können grundsätzlich auch dann nicht zurückverlangt werden, wenn ihnen (mangels *animus donandi*) nicht einmal ein Schenkungsvertrag zugrundeliegt. Deshalb kann z.B. under FRENCH law eine Gesellschaft, die zu dem Zweck zahlt, einer anderen Gesellschaft zu helfen und dabei weiß, dass sie zu dieser Zahlung nicht verpflichtet ist, das Gezahlte nicht wieder vom Empfänger (über die Regeln der *répétition de l'indu*) zurückverlangen (Cass.com. 8 June 1979, Bull.civ. 1979, V, no. 187 p. 153). Dasselbe gilt, falls ein Arbeitgeber seinem Arbeitnehmer (Cass.soc. 24. Juni 1971, Bull.civ. 1971, V, no. 481 p. 404) oder eine Aktiengesellschaft ihrem Vorstandsvorsitzenden (Cass.com. 24 February 1987, D. 1987, 244, note *Bénabent*) freiwillig mehr zahlt als geschuldet. Die Freiwilligkeit der Zuwendung ist für den Rückerstattungsanspruch, wie gesagt wird, ein *obstacle total* (*Bénabent*, Les obligations[10], no. 474).). Erfolgt die Zuwendung allerdings unfreiwillig, steht ihrer Rückforderung nichts entgegen (Cass.com. 15 December 1987, Bull.civ. 1987, IV, no. 280 p. 209). Dasselbe gilt bei einer irrtümlichen Überzahlung, z.B. einer fehlerhaft zu hoch berechneten Kündigungsentschädigung (Cass.soc. 7 December 1993, Bull.civ. 1993, IV, no. 306 p. 208). Die BELGISCHE Rechtsprechung zur *répétition de l'indu* verlangt vom Kläger den Beweis, den gezahlten Betrag irrtümlich und nicht bewusst (*en connaissance de cause*) gezahlt zu haben (CA Liège 19 March 2003, no. °JL033J1_1, no. de rôle 1999/RG/16).

2. Auch in SPAIN lässt sich das Grundprinzip nachweisen, wonach freiwillige Vermögenshingaben kondiktionsfest sind, unfreiwillige aber nicht. Consent, as a general rule, must not be affected by error, fraud or threats (*Díez-Picazo and Gullón*, Sistema I[11], 486). Under CC art. 1798 können demgemäß freiwillig bezahlte Wett- und Spielschulden nur dann zurückverlangt werden, wenn fraud oder incapacity vorlagen (näher *Díez-Picazo*, Fundamentos II[4], 68-69; Bercovitz Rodríguez-Cano [-*Trujillo Díez and Marín López*], Comentarios al Código Civil[2], 2088). Der Ausdruck 'fraud' (*dolo*) wird dabei weiter interpretiert als im Vertragsrecht (*Trujillo Díez and Marín López* loc.cit. 2090). Vor allem aber kommt das hinter CC art. 1798 liegende allgemeine Prinzip auch in Fällen zur Anwendung, die nichts mit Spiel oder Wette zu tun haben, see, for instance, CA Pontevedra 13 October 2005, BDA JUR 2006/25151 (der Kläger hatte zu hohe Pensionszahlungen von seiner Sozialversicherung erhalten und sie zurückzahlen müssen; die Klage aus ungerechtfertigter Bereicherung gegen seine inzwischen geschiedene Frau, die von dem Konto, auf das die Überzahlungen geflossen waren, Geld abgebucht hatte, scheiterte, weil der Kläger in diese Kontobewegungen eingewilligt hatte und weil his consent 'was not affected by error or fraud' (FJ 2)). However, it should be note that this consent – the one that justifies an increase of assets – cannot be within Spanish law conceived abstractly. It is therefore generally admitted that vices of consent, i.e. absence of free consent, do not play any role in the performance of an obligation. If a debtor pays his obligation to the creditor under fraud or threats, this payment or performance is valid and effective; der Schuldner kann zwar wegen des gegen ihn begangenen Delikts auf Schadenersatz klagen, ihm steht aber kein restitutionary claim im Hinblick auf das Gezahlte zu (*Díez-Picazo* loc.cit. 474; Bercovitz Rodríguez-Cano [-*Bercovitz*] loc.cit. 1399). An exception to this is probably CC art. 1160, according to which the performance of an obligation of deliver a thing is invalid if affected by incapacity (see in more detail *Díez-Picazo* loc.cit. 479 and *Bercovitz* loc.cit. 1398).

3. In ITALY sind Fragen der Freiwilligkeit der Vermögenshingabe eng mit der Frage nach der Rechtfertigung einer Vermögensverschiebung verbunden. Zwar kann eine kondiktionsfeste Zahlung auch ohne *animus solvendi* erfolgen (*Breccia*, L'arricchimento senza causa I[2], 930, fn. 1; *di Majo*, Riv.Dir.Civ. 1994, I, 781), doch setzt eine wirksame Vermögensverschiebung eine *causa* voraus (*Moscati*, Pagamento dell'indebito, sub arts. 2033-2040, 186). Nach Auffassung des überwiegenden Schrifttums soll es deshalb zur Rechtfertigung der Bereicherung nicht genügen, dass die Entreicherung freiwillig (mit *volontarietà*) erfolgte (Alpa and Mariconda [-*Sirena*], Codice civile commentato IV, sub art. 2041, V, § 29). Der Kassationshof freilich ist in diesem Punkt anderer Ansicht (Cass. 14 May 2003, no. 7373, Giust.civ.Mass. 2003, fasc. 5; Cass. 21 November 1996, no. 10251, Giust.civ.Mass. 1996, fasc. 1558; Cass. 6 March 1986, no. 1456, Giust.civ.Mass. 1986, fasc. 3); seine Rechtsprechung liegt auf der Linie von VII.–2:103. (Die Frage wird vor allem relevant bei Leistungen, die *affectionis vel benevolentiae causa* erbracht werden. Für sie wird im Schrifttum behauptet, dass sie nur bezüglich ersparter Aufwendungen, nicht aber bezüglich der Mehrung des Vermögens des Begünstigten rechtfertigend wirkten.) Für Arbeit, die im Rahmen eines Familienunternehmens geleistet wird, wurde in CC art. 230 eine umfassende Regelung geschaffen (zu ihr *Sirena* loc.cit.); einem Sonderregime unterliegen auch Leistungen einer nicht geschäftsfähigen Person (CC art. 428(1))

4. AUSTRIAN CC § 1174(1) schließt die Kondiktion ausdrücklich für den Fall aus, dass jemand wissentlich eine Nichtschuld leistet. Dabei ist allerdings vorausgesetzt, dass die Leistung weder auf Zwang noch auf List beruht (OGH 4 March 1970, SZ 43/60; OGH 28 September 1988, SZ 61/207); bei Zwang und Drohung entfällt die Irrtumsvoraussetzung der *condictio indebiti* (Rummel [-*Rummel*], ABGB II(3)[3], § 1431 no. 6). Für einen "Zwang" genügt es, dass die (überhöhte) Leistung auf äußeren Druck erfolgt, z.B. im Hinblick auf eine angedrohte Zwangsvollstreckung (OGH 4 March 1970, SZ 43/60; OGH 21 March 1979, EvBl 1979, 171) oder Kündigung der Wohnung (OGH 28 September 1988 loc.cit.). Kondiziert werden kann auch die erzwungene Erfüllung einer Naturalobligation (Koziol/Bydlinski/Bollenberger [-*Koziol*], ABGB[2], § 1432 no. 1). PORTUGUESE STJ 11 May 2000, CJ (ST) VIII (2000-2) 54 hat das Rückforderungsbegehren eines Restaurantbetreibers gegen die Telefongesellschaft in einem Fall abgelehnt, in welchem der Kläger Telefonschulden seines Vorgängers beglichen hatte, nachdem die Gesellschaft die Unterbrechung der Telefonverbindung angekündigt hatte. Die Zahlung sei nicht nur in Kenntnis der Fremdheit, sondern auch freiwillig (CC art. 403(2)) erfolgt, weil die Gesellschaft vertraglich zu dieser Ankündigung berechtigt gewesen sei und es sich deshalb bei Letzterer nicht um eine Drohung im Rechtssinne gehandelt habe. Ein Rückzahlungsanspruch bestehe weder aus CC art. 476 (weil die fremde Schuld tatsächlich bestanden habe), noch aus CC art. 477 (weil der Kläger gewusst habe, dass es nicht um eine eigene Schuld ging), noch aus CC art. 478 (weil der Kläger wusste, dass er auch dem Voreigentümer nicht zur Begleichung von dessen Schuld verpflichtet war). Der Kläger trete aber gemäß CC art. 592 in die Rechte der Telefongesellschaft gegen den früheren Restaurantbetreiber ein. CC art. 304(2) schließt die *repetição do indevido* ausdrücklich aus, wenn jemand freiwillig eine verjährte Forderung erfüllt; dasselbe gilt unter CC art. 403(1) für die freiwillige Erfüllung einer Naturalobligation, see *infra II15*. CC art. 2089 schließlich berechtigt einen Erbschaftsverwalter, die Aktiva der Erbschaft einzutreiben, wenn entweder mit einer Verzögerung eine Gefahr für den Nachlass verbunden ist oder wenn die Zahlung spontan (=freiwillig) erfolgt: die Frewiwilligkeit ist mithin auch hier ein Rechtsgrund zum Behaltendürfen des Empfangenen.

5. GREEK CC art. 905 und GERMAN CC § 814 schließen Bereicherungsansprüche auf Grund von Leistungen aus, wenn der Leistende gewusst hat, dass er zur Leistung nicht verpflichtet war (see *infra III27*). Die Regelung betrifft nur die freiwillige Erfüllung einer Nichtschuld; die Beweislast für die Freiwilligkeit trägt der *accipiens* (*Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 86; *Kavkas and Kavkas*, Enochikon Dikaion III, 653; Palandt [-*Sprau*], BGB[67], § 814, nos. 1, 11; Erman [-*Westermann and Buck-Heeb*], BGB II[12], § 814, nos. 9, 13). Nicht ausgeschlossen ist die Rückforderbarkeit einer Leistung, welche zur Vermeidung eines drohenden Nachteils unter Druck oder Zwang erfolgt (*Sprau* loc.cit. no. 5; Staudinger [-*S. Lorenz*], BGB [2007], § 814, no. 8; MünchKomm [-*Lieb*], BGB[4], § 814, no. 12; BGH 12 July 1995, NJW 1995, 3052, 3054).

6. Das HUNGARIAN Bereicherungsrecht kennt keine ausdrückliche Kondiktionssperre für freiwillige Vermögenshingaben; die Frage ist nicht geregelt und muss deshalb nach allgemeinen Grundsätzen beantwortet werden. Im Kontext des Werkvertragsrechts hat die Rechtsprechung für überobligationsmäßige Leistungen eine Lösung im Recht der Geschäftsführung ohne Auftrag gesucht (XXXII. számú Polgári Elvi Döntés [PED] a vállalkozói díjjal kapcsolatos egyes kérdésekről). Im Übrigen können bewusst ungeschuldet erbrachte Leistungen wohl oft als Schenkung oder als Leistungen unter Verzicht auf eine Gegenleistung gewürdigt werden. So liegt es wohl auch, wenn jemand einem Rechtsverlust nachträglich zustimmt. Ein Rechtsverzicht bedarf einer einseitigen Willenserklärung, deren materielle Wirksamkeitsvoraussetzungen allerdings besonders streng geprüft werden (CC § 207(4); see *Bíró and Lenkovics*, Általános tanok, 192 and BH 2004/236); er unterliegt wie jede andere Willenserklärung auch dem Anfechtungsrecht (CC § 199; siehe für unentgeltliche Verträge zudem CC § 210). Insgesamt, so scheint es, sucht man die Begründung für die Nichtrückforderbarkeit freiwilliger Vermögenszuwendungen in erster Linie im Vertragsrecht. BH 1997/483 z.B. betraf einen Fall, in welchem der Kläger in eine Immobilie investiert und dafür einen Bereicherungsausgleich verlangt hatte. Der Anspruch wurde abgelehnt, weil die Investition einer Verabredung zwischen den Parteien widersprochen hatte und das Bereicherungsrecht dem Vertragsrecht subsidiär sei.

7. Anders als das ungarische Zivilgesetzbuch schließt SLOVENIAN LOA art. 191 die Rückforderbarkeit erbrachter Leistungen ausdrücklich aus, falls die leistende Partei wusste, dass sie die Leistung nicht schuldete. Der Rückforderungsausschluss kommt nicht zum Zuge, wenn es sich um eine Zahlung unter Vorbehalt oder unter Zwang handelt. Er soll auch dann nicht eingreifen, wenn jemand zwar weiß, dass die Schuld nicht mehr besteht, er die vorangegangene Erfüllung aber nicht beweisen kann und aus Sorge vor Nachteilen doppelt zahlt (Standardbeispiel: Mieter verliert nach Barzahlung die Quittung und zahlt aus Angst vor der Kündigung ein zweites Mal: *Cigoj*, Teorija obligacij, 257). BULGARIAN LOA art. 55(2) enthält demgegenüber nur eine Kondiktionssperre für bewusst in Erfüllung einer moralischen Verpflichtung hingegebene Leistungen; die Beweislast trifft den accipiens (*Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 582). Allerdings sollen Verwandte, die einem anderen anstelle des vorrangig Verpflichteten Unterhalt geleistet haben (Beispiel: Großeltern versorgen statt der Eltern ein Enkelkind), ihren Bereicherungsanspruch gegen den primär Verpflichteten behalten (Anordnung no. 1 des Plenums des Obersten Gerichtshofs of 28 May 1979).

8. Dafür dass eine freiwillige Vermögenshingabe grundsätzlich auch dann nicht zurückverlangt werden kann, wenn ihr keine Schenkung zugrundeliegt, findet sich im DUTCH Zivilgesetzbuch zwar keine allgemeine Regelung, doch dürfte sich das Prinzip aus CC art. 6:210(2) ableiten lassen. Hiernach schuldet der *accipiens* nur dann

Wertersatz für Leistungen, die ihrer Art nach nicht zurückgewährt werden können, wenn ihm der Umstand, dass die Leistung erbracht wurde, zuzurechnen ist, oder wenn er sich bereit erklärt hatte, für sie eine Gegenleistung zu erbringen. Tilgt der *solvens* freiwillig eine fremde Schuld, ist ein Rückforderungsrecht gegen den *accipiens* aus CC arts. 6:203 bzw. 6:212 schon deshalb ausgeschlossen, weil der *accipiens* aus seinem Vertrag mit dem Schuldner einen Rechtsgrund zum Behaltendürfen des Empfangenen haben soll. Ein Ausgleichanspruch gegen den befreiten Schuldner scheitert restitutionsrechtlich wiederum daran, dass Empfänger der Leistung nicht er, sondern der *accipiens* ist. Wer aus eigenem Antrieb freiwillig eine fremde Schuld begleicht, hat deshalb in der Regel kein Rückgriffsrecht gegen den Schuldner (Asser [-*Hartkamp*] Verbintenissenrecht I[12], nos. 192 and 194; *Scheltema*, Verbintenissenrecht II, art. 6:203, no. 11.3 p. 55; art. 6:210, no. 3 p. 11 and art. 6:212, no. 6.3 p. 34). In CFI Haarlem 9 July 2003, NJF 2003, no. 54 z.B. hatte ein Mann, der nach der Scheidung für kurze Zeit wieder mit seiner geschiedenen Frau zusammengezogen war, ihre Schulden bei einem Versandhandel beglichen. Sein Ausgleichsanspruch gegen die Frau aus ungeschuldeter Leistung scheiterte, weil sie nicht Empfängerin der Zahlung war, und der Anspruch aus ungerechtfertigter Bereicherung scheiterte, weil der Mann freiwillig und aus eigener Initiative gezahlt hatte, nämlich deshalb, "weil er Schulden nicht mochte". Auch Versuche, nach einer gescheiterten Liebesbeziehung Geschenke oder andere Ausgaben für Urlaub, Haushalt etc. aus dem Recht der ungerechtfertigten Bereicherung zurückzufordern, sind durchweg gescheitert, sei es, dass als Rechtfertigungsgrund die "Freigiebigkeit innerhalb einer Beziehung" (CFI Zutphen 16 August 2007, LJN BB7229; vgl. auch CA Amsterdam 2 May 2002, NedJur 2005, no. 110 p. 1022), die Erfüllung einer "moralischen Verpflichtung" (CA Leeuwarden 27 March 2002, NedJur 2002, no. 575 p. 4270; s. auch CFI Haarlem loc.cit.) oder der frühere Bestand einer Ehe zwischen den Beteiligten (CFI Maastricht 25 February 2002, LJN AE2701) angesehen wurde. Zu beachten ist schließlich, dass CC art. 6:2 (Prinzip von Treu und Glauben; *redelijkheid* and *billijkheid*) auch auf die Ansprüche aus CC art. 6:203 (ungeschuldete Zahlung) Anwendung findet. Es erlaubt dem Empfänger, sich darauf zu berufen, dass der solvens beim accipiens den Rechtsschein hervorgerufen hat, das Zugewandte behalten zu dürfen.

9. Auch das ESTONIAN LOA kennt keine dem VII.–2:103 ausdrücklich entprechende Vorschrift. Wie in den Niederlanden, so sollte allerdings auch hier das Prinzip von Treu und Glauben der Rückforderung einer freiwillig und bewusst ohne Rechtsgrund erbrachten Zuwendung entgegenstehen (*Tampuu*, Lepinguväliste võlasuhete õigus, 75). Solche Zuwendungen können aber natürlich die Voraussetzungen einer Schenkung oder einer Geschäftsführung ohne Auftrag erfüllen. Bei einer rechtswidrigen Geschäftsführung kommt ein Ausgleichsanspruch nach den Vorschriften des Bereicherungsrechts nur dann in Betracht, wenn der gestor ohne Verschulden vom Vorliegen eines Rechtfertigungsgrundes für die Geschäftsführung ausging (LOA § 1024(4)).

10. In the NORDIC countries a free performance made in the knowledge that there is no underlying obligation can normally not be reversed (*Hult*, Condictio indebiti, 73; *Ussing*, Enkelte Kontrakter, 428). Dasselbe gilt grundsätzlich für Leistungen, die in Kenntnis der Nichtigkeit des zugrundeliegenden Vertrages erbracht werden; denn hier kann die Freiwilligkeit der Vermögenszuwendung vermutet werden (*Arnholm*, Almindelig avtaleret, 344). Zwar ist streitig, ob schon die Leistung als solche als Rechtsgeschäft qualifiziert werden darf (näher *Illum*, UfR 1939B, 168, 234; *Arnholm*, Privatrett I, 200), doch scheint heute anerkannt, dass die Regeln des Vertragsgesetzes über unwirksame Verträge zumindest entsprechend angewandt werden dürfen, wenn eine Leistung infolge von incapacity, fraud, coercion, threats or unfair exploitation

erbracht wurde und ihr kein Vertragsschluss vorausging (*Hagstrøm and Aarbakke*, Obligasjonsrett[2], 673; *Adlercreutz*, Avtalsrätt I[11], 27). In a two-party constellation this simply results in an obligation to return what has been received. However, where the performance was unlawfully induced by another person than the *accipiens*, the latter may be protected if in good faith. That is the case in situations of coercion (Contract Act § 29), fraud (§ 30) and unfair exploitation (§ 31); but not with regards to duress (§ 28) if the *accipiens* is immediately informed of the duress after it has come to an end. SWEDISH HD 17 September 1999, NJA 1999, 575 betraf den Rückforderungsanspruch einer Bank, die infolge einer arglistigen Täuschung durch einen ihrer Kunden eine Überweisung an einen gutgläubigen Dritten getätigt hatte; die Klage wurde u.a. unter Hinweis auf Contract Act § 30 abgewiesen. Zu dem Zeitpunkt, in welchem Gutgläubigkeit gegeben sein muss, siehe im Übrigen Contract Act § 39

II. Leistung auf Naturalobligationen

11. Ausgeschlossen ist die Rückforderung einer freiwilligen Vermögenszuwendung insbesondere dann, wenn es sich dabei um die Erfüllung einer sogen. "natürlichen Verbindlichkeit" handelt; es ist oft geradezu der Zweck dieser Kategorie, die Rückforderung einer Leistung auf eine aktiv nicht durchsetzbare Forderung auszuschließen. FRENCH, BELGIAN and LUXEMBURGIAN CC art. 1235(2) stellen demgemäß klar, dass die freiwillige Erfüllung einer Naturalobligation keine ungeschuldete Zahlung darstellt (see *Carbonnier*, Droit civil IV[21], no. 303 p. 504).

12. In SPAIN finden die *obligaciones naturales* dagegen nur in *Compilación del Derecho Civil Foral de Navarra Ley* 510 Erwähnung, nicht im Zivilgesetzbuch. Im Schrifttum wird zwar diskutiert, ob einige Sonderbestimmungen des Zivilgesetzbuches im Sinne einer stillschweigenden Anerkennung der Lehre von den Naturalobligationen gelesen werden sollten, insbesondere CC art. 1798 (Nichtrückforderbarkeit bezahlter Spiel- und Wettschulden), CC art. 1756 (keine Rückforderung der Zahlung von im Vertrag nicht vereinbarten Zinsen; see TS 14 April 1999, RAJ 1999 (2), no. 2584 p. 4016 [die Regel beruhe auf der Existenz einer Naturalobligation]) und das Prinzip, dass die Rückforderung von Leistungen auf verjährte Forderungen ausgeschlossen ist. Die dogmatische Qualifizierung dieser Fälle als 'natural obligation' ist aber zweifelhaft geblieben (*Lacruz Berdejo and Rivero Hernández*, Elementos II(1)[4], 21; *Díez-Picazo*, Fundamentos II[4], 68-72). TS 17 October 1932, RAJ 1932-1933 (1), no. 1235 p. 522 (wo ein Mann von einem 16jährigen Mädchen, mit dem er eine Affäre gehabt hatte, an sie erbrachte regelmäßige Geldzahlungen zurückforderte) benutzte stattdessen die Kategorie der 'moralischen Schuld', um den Rückforderungsausschluss zu begründen. Die sogen. 'natural obligations' können seit diesem Urteil auch mit CC art. 1901 in Verbindung gebracht und mit den 'moralischen Schulden' ineinsgesetzt werden (*Lacruz Berdejo and Rivero Hernández* loc.cit. 21-24; *Díez-Picazo and de la Cámara Alvarez*, Dos Estudios sobre el enriquecimiento sin causa, 174; *Díez-Picazo and Gullón*, Sistema II[9], 531). Denn die Vorschrift vermutet für das Recht der *condictio indebiti* einen Irrtum des Zahlenden, wenn entweder eine Schuld niemals bestanden hatte oder bereits beglichen war; der *accipiens* kann jedoch beweisen, dass der Leistung eine Schenkung oder ein anderer Rechtsgrund zugrundegelegen hat. Ein solcher 'anderer' Grund ist auch die Erfüllung einer moralischen (oder 'natürlichen') Schuld. Neuere Entscheidungen sehen das ebenso (CA Pontevedra 13 October 2005, note *I2* above; CA Granada 12 February 2001, BDA JUR 2001/124701 [kein Anspruch einer Frau, die ihren Neffen vor seinem Tode gepflegt hatte, gegen dessen Erben auf Vergütung ihrer Dienstleistungen; dagegen Anspruch wegen der verauslagten Beerdigungskosten aus *negotiorum gestio*, CC art. 1894, bejaht]; CA Jaén 12 April 2000, BDA AC 2000/3507 [kein Rückforderungsanspruch of an elderly

couple, das zu seinem Neffen gezogen war und Geld und eine Waschmaschine mitgebracht hatte, nach dem Verlassen des Hauses; die persönliche Basis der Beziehung war zwar zerstört, doch könne nicht zurückverlangt werden, was das Ehepaar auf der Grundlage einer *obligación natural*, einer 'moral relationship' hingegeben habe]; CA Madrid 18 December 2002, BDA JUR 2003/82662 [fünfjährige Fortzahlung nachehelichen Unterhalts trotz erfolgreicher Abänderungsklage; keine *condictio indebiti,* weil der Kläger nicht etwa irrtümlich, sondern allein zu dem Zweck weitergezahlt habe, seiner geschiedenen Frau zu helfen; CC art. 1901 zitiert und die Leistung als Erfüllung einer *obligación natural* qualifiziert]). Manchmal wird das Konzept der moralischen bzw. natürlichen Obligation allerdings auch in einem überraschenden und dafür nicht besonders geeigneten Kontext verwandt, z.B. in TS 10 October 1963, RAJ 1963 (2) no. 4080 p. 2608 (Mieter behält die Sache nach Ablauf der Mietzeit in Gebrauch; keine Rückforderung des in dieser Zeit gezahlten Mietzinses, weil damit eine moral obligation erfüllt worden sei) und in CA Sevilla 2 March 2005, BDA JUR 2005/139206 (Wohnungskäufer nutzt Gemeinschaftseinrichtungen, u.a. das Schwimmbad der Wohnanlage, und zahlt dafür anteilig; nach langer Zeit stellt sich heraus, dass das Appartment gar nicht Teil dieser Wohnanlage war; keine Rückforderung der Zahlung, weil mit ihr eine *obligación natural* erfüllt worden sei).

13. ITALIAN CC art. 2034 schließt die Rückforderung einer Zuwendung aus, wenn sie aus freien Stücken zur Erfüllung einer sittlichen oder sozialen Pflicht geleistet wurde; anders ist das nur, wenn der Leistende geschäftsunfähig war. Den genannten Pflichten stehen diejenigen gleich, mit denen nach dem Gesetz kein Klageanspruch, sondern nur eine Rückforderungssperre korrespondiert. Sittliche und soziale Pflichten gründen in gesellschaftlicher Ethik (*Bianca*, Diritto civile IV, 778); nicht erfasst sind nach h.M. Pflichten der individuellen Ethik sowie Pflichten aus Gefälligkeitsregeln und guten Manieren (Alpa and Mariconda [-*Sirena*], Codice civile commentato IV, sub art. 2034, I, § 3). Beispiele für nichtklagbare Forderungen, die im Erfüllungsfalle aber einen Rechtsgrund zum Behaltendürfen des Empfangenen geben, finden sich u.a. in CC art. 1933 (Spielschuld) und in CC art. 2940 (Zahlung auf eine verjährte Schuld). CC art. 2034 steht der Rückforderung aber nicht entgegen, wenn die Leistung (z.B. durch Gewalt oder arglistische Täuschung) erzwungen wurde oder auf einem Irrtum des *solvens* beruhte (*Bianca* loc.cit. 786). In AUSTRIA wird gesagt, eine Naturalobligation unterscheide sich von echten Verpflichtungen nur dadurch, dass sie nicht durchsetzbar sei; im Übrigen stelle sie aber einen gültigen Rechtsgrund dar (*Apathy and Riedler*, Bürgerliches Recht III^2, no. 15/6). Was auf eine Naturalobligation geleistet wurde, kann folglich nicht zurückgefordert werden. Das betrifft insbesondere Leistungen auf formunwirksam eingegangene und auf verjährte Verpflichtungen (CC § 1432). Nur Geschäftsunfähige können auch Leistungen auf eine Naturalobligation kondizieren (CC § 1433).

14. PORTUGUESE CC art. 476(1) stellt die Anwendung der Regeln über die *condictio indebiti* unter den Vorbehalt der "Vorschriften über die Naturalobligationen" und verweist damit auf CC arts. 402 und 403. Gemäß CC art. 402 wird eine Obligation dann für natürlich gehalten, wenn sie sich auf eine Pflicht bloß moralischer oder sozialer Natur stützt, die zwar nicht gerichtlich einklagbar ist, aber dennoch einer Gerechtigkeitspflicht entspricht. Leistungen auf solche Pflichten können nicht zurückverlangt werden, es sei denn, der Leistende war geschäftsunfähig (CC art. 403(1)) oder die Leistung war nicht "frei von aller Nötigung" (CC art. 403(2)), d.h. nich frei von Zwang (*coacção física*, CC art. 246) und Drohung (*coacção moral*, CC art. 255). Ein bloßer Irrtum genügt zur Rückforderbarkeit nicht (*Gomes*, Conceito de enriquecimento, 537). Die freiwillige Erfüllung einer Gerechtigkeitspflicht ist eine

causa justificativa im Sinne des Bereicherungsrechts (*Menezes Leitão*, Enriquecimento sem causa[2], 477); dass der *solvens* Kenntnis von der Nichtdurchsetzbarkeit der Obligation hatte, ändert daran nichts (*Galvão Telles*, Obrigações[7], 53). Dass Unterhaltsleistungen in Erfüllung einer Naturalobligation erbracht werden können, folgt aus CC art. 495(3), wonach im Fall von Tod oder Körperverletzung auch derjenige zum Schadenersatz berechtigt ist, dem der Verletzte in Erfüllung einer Naturalobligation Unterhalt gewährt hatte. Wer sich um die medizinische Versorgung seines im Koma liegenden Bruders und um dessen anschließende Beerdigung kümmert, soll gegen die Erben aber dann einen Anspruch auf Bereicherungsausgleich haben, wenn er von Anfang an mit einer Erstattung rechnete (CA Oporto 4 March 2002, CJ XXVII [2002-2] 176). Sind Spiel und Wette gesetzmäßig, dann sind auch sie Quellen einer Naturalobligation (CC art. 1245; see *Pereira Coelho*, Obrigações, 79, fn. 3).

15. In GERMANY werden Verbindlichkeiten, die zwar freiwillig erfüllt, jedoch nicht gegen den Willen des Schuldners durchgesetzt werden können, teils "unvollkommene Verbindlichkeiten", teils "Naturalobligationen" (BGH 25 May 1983, BGHZ 87, 309, 314), "Moralobligationen" oder "Schulden ohne Haftung" genannt (näher *Schulze*, Die Naturalobligation, 162 ff). Solche Verbindlichkeiten sind wirksame Erwerbsgründe mit der Folge, dass das freiwillig Geleistete nicht nach CC §§ 812 ff zurückgefordert werden kann. Dem steht nicht entgegen, dass die Erfüllung einer Naturalobligation auch nicht im Wege von Aufrechnung, Abtretung oder Schuldanerkenntnis durchgesetzt werden kann. Beispiele liefern Forderungen aus Spiel und Wette (CC §§ 762 und 763) sowie aus der Vereinbarung eines Ehemäklerlohnes (CC § 656). CC § 814 schließt zudem die Rückforderung dessen aus, was aus sittlicher Pflicht oder aus Rücksicht geleistet worden ist. In eine Sondergruppe gehören verjährte Forderungen, weil bei ihnen weder die Aufrechnung noch die Abtretung ausgeschlossen ist und sie deshalb nicht zu den "unvollkommenen Verbindlichkeiten" zählen; außerdem können sie, sofern nicht der Schuldner die Leistung verweigert (CC § 214(1)), auch klageweise geltend gemacht werden. Erfüllt der Schuldner eine verjährte Forderung, so kann er das Geleistete freilich auch dann nicht zurückfordern, wenn er vom Eintritt der Verjährung nichts gewusst hatte (CC § 214(2), eine Ausnahme von CC § 813(1)). GREEK CC arts. 272(2), 845(2) und 906 schließen die Rückforderung in denselben Fällen aus, in denen sie auch im deutschen Recht ausgeschlossen ist. CC art. 906 betrifft den Fall, dass die Leistung aus sittlicher Pflicht oder aus Rücksichtnahme auf den Anstand erfolgte.

16. Auch in HUNGARY sieht man die *naturalis obligatio* nicht als Nichtschuld an. Dass ihre Erfüllung nicht mit staatlicher Hilfe durchgesetzt werden kann, ändere nichts daran, dass sie einen Rechtsgrund zum Behaltendürfen des Empfangenen liefere (*Bíró*, Kötelmi jog – közös szabályok, szerződéstan[8], 72; BH 1998/422; BH 1993/29). Gemäß CC § 204(1) sind Naturalobligationen in diesem Sinn (i) die sich aus einem Spiel oder einer Wette ergebenden Forderungen, sofern nicht das Spiel oder die Wette auf Grund einer staatlichen Genehmigung abgewickelt wurden; (ii) Forderungen aus einem Darlehen, das zu Spiel- oder Wettzwecken versprochen oder gewährt wurde, und (iii) Forderungen, deren Geltendmachung durch ein staatliches Organ durch eine Rechtsvorschrift ausgeschlossen ist. SLOVENIAN LOA art. 192 bestimmt, dass eine Leistung nicht zurückverlangt werden kann, deren Erfüllung einer Naturalobligation oder einer sittlichen Pflicht entsprach (see Supreme Court 7 May 1993, VS II Ips. 586/92). Hierzu rechnen insbesondere Spiel- und Wettschulden (LOA art. 272(2); see Juhart and Plavšak [-*Polajnar Pavčnik*], Obligacijski zakonik II, art. 192, p. 52) sowie wohl auch verjährte Forderungen; jedenfalls können Leistungen auf sie gleichfalls nicht zurückverlangt werden (LOA art. 335). Dem entspricht die Rechtslage in

BULGARIA. Man unterscheidet aber zwischen der Erfüllung einer Naturalobligation und der Erfüllung einer moralischen Schuld. Letztere weise überhaupt keinen rechtlichen Charakter auf, weshalb ein *solvens*, der nur in Erfüllung einer moralischen Verpflichtung geleistet habe, das Geleistete soll rückfordern können, wenn er von ihr keine Kenntnis gehabt habe (*Kalaydjiev*, Obligazionno pravo, Obshta chast[4], 45-47)

17. In the NETHERLANDS gelten die Regeln über die freiwillige Vermögenshingabe grundsätzlich auch für die freiwillige Erfüllung natürlicher Verbindlichkeiten (Parlementaire Geschiedenis VI, 829-833; Asser [-*Hartkamp*] Verbintenissenrecht III[12], nos. 322 and 362). Die Zahlung aufgrund einer Naturalobligation erfolgt nie ungeschuldet (CC arts. 6:3-5) und begründet deshalb auch keinen Bereicherungsanspruch. Auf Naturalobligationen finden alle Regeln des 6. Buches des Zivilgesetzbuches Anwendung, die sich nicht mit der Durchsetzbarkeit der Verbindlichkeit und den Rechtsfolgen ihrer Nichterfüllung befassen Die Erfüllung einer Naturalobligation ist keine Schenkung. (*Hartkamp* loc.cit. no. 331 p. 348).

18. ESTONIAN LOA § 1032(2)(i) schließt die Rückforderung von Leistungen auf eine unvollkommene Verbindlichkeit aus. An imperfect obligation is an obligation which the debtor may perform but the performance of which cannot be required by the creditor (LOA § 4(1)). The LOA defines the following as imperfect obligations: (i) an obligation arising from gambling, except for an obligation arising from a lottery or betting organised on the basis of a permit; (ii) a moral obligation the performance of which complies with public *mores*; (iii) an obligation assumed to secure performance of an imperfect obligation; (iv) an obligation which is an imperfect obligation pursuant to law.

19. *Obligatio naturalis* or moral obligation, i.e. an obligation one is not legally obliged to perform, are dealt with in the NORDIC literature, where it is accepted that they need not be reversed (*Vinding Kruse*, Restitutioner, 263; *Gomard*, Obligationsret I[4], 7; *Hult*, Condictio indebiti, 88; *Hakulinen*, Obligationsrätt, 31). Various instances are subsumed under the notion of *obligatio naturalis*, amongst them the performance of a prescribed obligation, the performance of an obligation which is not binding due to lack of form, or a gambling debt (*Gomard*, Obligationsret III, 172, 186). With regards to claims resulting from gambling, it is however generally held in legal writing that such obligations are void, as *pactum turpe*, and that they cannot be claimed in a court of law. For the same reason a court will also not deal with a claim to reverse payments already made (*Adlercreutz*, Avtalsrätt I[11], 282; *Jørgensen*, Kontraktsret I, 55; *Hakulinen* loc cit. 34). Nevertheless, SWEDISH HD 13 December 1989, NJA 1989, 768 granted the reversal of bets made by poker players during a poker game which was interrupted by a police raid. The Court argued that the opposite position would result in an unwarranted enrichment for the organizer of the poker game, who had not accepted the bets in his own name but for the purpose of paying them to the winners of the game. It was said that this was not a gambling debt *per se*. If the performance of an *obligation naturalis* is induced by fraud etc. the general rules on invalid contracts remain applicable, however.

III. Verschulden der disadvantaged person als Rechtfertigungsgrund zum Behaltendürfen for the enriched person

20. In einigen Rechtsordnungen darf der Empfänger jedenfalls bestimmten *solvens* entgegenhalten, dass sie die rechtsgrundlose Zahllung verschuldet hätten und deshalb die alleinige Verantwortung für sie trügen. Der Gedanke taucht oft im Recht der sogen. subjektiven Nichtschuld auf, kann sich aber auch auf andere Weise Bahn brechen, etwa in der Gewährung von aufrechenbaren Schadenersatzansprüchen, die

den *accipiens* davor schützen, eine bereits weggefallene Bereicherung ausgleichen zu müssen. In FRENCH Cass.civ. 17 October 1996, Bull.civ. 1996, V, no. 328 p. 232 z.B. hatte die *Caisse primaire d´assurance maladie* gegen eine versicherte Frau auf Erstattung ihr ungeschuldet erbrachter Leistungen geklagt; die Beklagte hatte darauf mit einer auf *dommages-intérêts* gerichteten Widerklage reagiert. Die Widerklage war erfolgreich; die Krankenkasse musste den durch ihre *faute* verursachten Schaden ohne Rücksicht darauf ersetzen, dass diese *faute* nicht schwer (*grossière*) und der Schaden abnormal war. Cass.soc. 14 June 1979, Bull.civ. 1979, V, no. 546 p. 401 betraf einen ähnlichen Sachverhalt; es war ein knappes Jahr lang eine zu hohe Rente aus- und weitergezahlt worden, obwohl der Empfänger die zahlende Kasse alsbald auf den Fehler aufmerksam gemacht hatte. Der Empfänger sah seinen Schaden darin, dass er die zum Konsum bestimmten Zahlungen tatsächlich verbraucht hatte. Der Kassationshof kassierte allerdings die auf der Aufrechnung mit dem angeblichen Schadenersatzanspruch beruhende Klagabweisung des Berufungsgerichts; der Erstattungsanspruch aus der *action en répétition de l´indu* dürfe jedenfalls nicht vollständig verweigert werden, und zwar unabhängig von der Schwere der Fahrlässigkeit des *solvens*. In Cass.civ. 18 May 1994, Bull.civ. 1994, I, no. 179 p. 132 hatte ein Ehemann im laufenden Scheidungsverfahren die seiner Frau ausgestellte Vollmacht gegenüber der Bank widerrufen und die Bank beauftragt, seine Frau davon in Kenntnis zu setzen. Die Bank unterließ jedoch diese Mitteilung und die Frau hob weiteres Geld von dem Konto ab. Der Mann erhielt es von der Bank zurückerstattet; sie klagte gegen die Frau, die wiederum im Wege der Widerklage den gleichen Betrag gegen die Bank als Schadenersatz geltend machte. Klage und Widerklage wurden stattgegeben; die Frau habe davon ausgehen können, die abgebuchten Beträge für ihren Lebensunterhalt ausgeben zu dürfen.

21. Nach Auffassung von BELGIAN Cass. 22 May 2006, no. de rôle S050008F, unterläuft einer Familienausgleichskasse ein schweres Verschulden, wenn sie Eltern glauben lässt, dass ihnen für mehrere Jahre ein Recht auf erhöhte Familienausgleichsleistungen zusteht. Der daraus resultierende Schaden decke sich der Höhe nach mit dem überzahlten Betrag; beide Forderungen wären infolge der Aufrechnung erloschen. CA Brussels 3 March 2006, no. de rôle 2002 AR 2274, betraf eine Zuvielleistung durch den belgischen Staat; der Auszahlung war eine unzureichende Kontrolle vorausgegangen. Der Rückzahlungsanspruch wurde gleichwohl gewährt, weil sich die Verwaltung gesetzwidrig verhalten habe und gezwungen gewesen sei, den gesetzwidrigen Zustand zu beenden. Andere allgemeine verwaltungsrechtliche Grundsätze (Prinzipien der guten Verwaltung, der Rechtssicherheit und des Schutzes berechtigten Vertrauens) berechtigten nicht zum Behaltendürfen der Subvention. Cour du travail de Liège, section de Namur, 17 January 2006, no. de rôle 7541-04 betraf zu hohe Sozialleistungen an Schwerbehinderte. Die Rückforderung war unter einem *arrêté du Gouvernement wallon* ausgeschlossen, weil die Überzahlung auf einem Verschulden der zuständigen Agentur beruht hatte. Nach Cour du travail de Bruxelles 23 June 2005, no. de rôle 40587 kann eine Familienkasse, die irrtümlich zu hohe Familiensozialleistungen auszahlt, ihre Entscheidung zwar korrigieren, doch darf diese Korrektur nur dann rückwirkend erfolgen, wenn der Bezieher beim Empfang des Geldes bösgläubig war.

22. Under SPANISH CC art. 1895 gehört der Irrtum des *solvens* zu den unverzichtbaren Voraussetzungen eines Anspruchs aus *condictio indebiti* (TS 10 June 1995, RAJ 1995 (3) no. 4914 p. 6589; TS 26 December 1995, RAJ 1995 (5), no. 9207 p. 12262). Wer die Berechnungsmethoden seines Vertragspartners zur Ermittlung der auf geliefertes Öl abzuführenden Steuern genau kennt und nicht dagegen protestiert, kann deshalb Überzahlungen nicht mit dem Argument zurückfordern, ihm seien falsche Beträge in

Rechnung gestellt worden (TS 31 May 2006, RAJ 2006 (3) no. 3322 p. 7600; see also TS 13 March 2007, RAJ 2007 (1) no. 692 p. 1803). Das hätte er wissen müssen; die Zahlung erfolgte fahrlässig. Keinen Rückforderungsanspruch hat auch ein Mann, der für eine Weile den Unterhalt für ein behindertes gemeinsames Kind noch nach dessen Tod auf das Konto seiner geschiedenen Frau einzahlt (CA Madrid 12 March 2002, BDA JUR 2002/150868). Im Schirifttum finden sich allerdings gewichtige Stimmen, die meinen, dass das spanische Recht hinsichtlich der Rückforderung von ohne Irrtum rechtsgrundlos erbrachten Leistungen eine echte Lücke aufweise (*Díez-Picazo and de la Cámara Alvarez*, Dos estudios sobre el enriquecimiento sin causa, 107); auch in solchen Fällen sei deshalb eine Kondiktion möglich, und zwar entweder als allgemeiner Bereicherungsanspruch (z.B. auf der Grundlage einer angeblich existierenden *condictio sine causa generalis* under CC art. 1901: *Lacruz Berdejo and Rivero Hernández*, Elementos II(2)[4], 427; López/Montés/Roca, [-*Capilla Roncero*], Derecho de Obligaciones y Contratos, 291) oder in einer ausdehnenden Anwendung der Regeln der *condictio indebiti* (*Díez-Picazo and de la Cámara Alvarez* loc.cit. 115-116; Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Ballarín Hernández*], Código Civil II[2], 1957). TS 22 June 2007, BDA RJ 2007/5427 [FJ 3] hat sich zu dieser zuletzt genannten Ansicht in einem obiter dictum zustimmend geäußert und erwogen, die Lehre von der Ausdehung des Anwendungsbereichs der *condictio indebiti* mit dem Konzept einer *condictio sine causa generalis* zu verknüpfen; TS 14 June 2007, BDA RJ 2007/5120 hingegen scheint dem skeptisch gegenüber zu stehen.

23. Under ITALIAN CC art. 2036 kann nur jemand, der eine fremde Schuld "in der entschuldbar irrigen Meinung" gezahlt hat, selber der Schuldner zu sein, das Geleistete vom Gläubiger zurückverlangen (subjetive Nichtschuld). Der Irrtum ist nicht entschuldbar, wenn der *solvens* bei Anwendung der erforderlichen Sorgfalt hätte erkennen können, dass er nicht der Schuldner war (*Moscati*, Pagamento dell'indebito, arts. 2028-2042, p. 421-422). Dann überwiegt das Interesse des *accipiens* am Behaltendürfen des Empfangenen das Rückforderungsinteresse des *solvens*. CC art. 2036 ist eine Sanktion für dessen Fahrlässigkeit (*Moscati* loc.cit.; *Breccia*, L'arricchimento senza causa I[2], 941), soll gerade deshalb aber auch nicht anwendbar sein, wenn der *accipiens* bösgläubig war, d.h. wusste, dass der *solvens* in entschuldbarem Irrtum zahlte (*Moscati* loc.cit. 423). Entschuldigt ist der Irrtum des *solvens* auch, wenn er vom Gläubiger oder vom wahren Schuldner arglistig verursacht wurde (*Moscati* loc.cit.). Bei der Rückforderung von Zahlungen auf eine objektive Nichtschuld (CC art. 2033) gehört der Irrtum des Klägers dagegen nicht zu den Anspruchsvoraussetzungen (*Albanese*, Il pagamento dell'indebito, 199; Cass. 10 March 1995, no. 2814, Giur.it. 1996, I, 1, 228; Cass. 11 March 1987, no. 2525, Giust.civ. 1987, I, 1967; Cass.sez.lav. 6 November 1984, no. 5620, Giust.civ.Mass. 1984, fasc. 11); allerdings meinen manche, die Rückforderung könne u.U. gegen das aus Treu und Glauben abzuleitende Verbot des *venire contra factum proprium* verstoßen (Übersicht bei *Cian and Trabucchi*, Commentario breve[7]), sub art. 2033, § 5). Trifft den Staat oder eine seiner Einrichtungen bei der Auszahlung des später zurückgeforderten Betrages ein Verschulden, so neigen die Verwaltungsgerichte dazu, diesen Rückforderungsanspruch unter Hinweis auf das Prinzip der Korrektheit der Verwaltung abzuweisen (TAR Lombardia 4 March 1981, no. 271, Tributi 1981, 503; Cons. Stato 26 July 1978, no. 762; Cons. Stato 1978, I, 1076; Cons. Stato 30 March 1976, no. 1; Cons. Stato 1976, I, 273). In AUSTRIA stellt das Verschulden des Leistenden grundsätzlich weder eine Anspruchsvoraussetzung noch einen Grund dar, den Kondiktionsanspruch auszuschließen. Insbesondere kommt es für die *condictio inedebiti* nicht darauf an, ob der Leistende seinen Irrtum verschuldet hat (OGH 9 October 1980, SZ 53/130). Ein Thema ist aber die Schutzwürdigkeit der Parteien.

Deshalb ist die Kondiktion ausgeschlossen, wenn der Leistende weiß, dass er die Leistung nicht schuldet (CC § 1432) oder dass er zur Erreichung eines unerlaubten Zweckes leistet (CC § 1174(1) first sentence), z.B. indem er ein Darlehen für ein verbotenes Spiel gewährt (CC § 1174(2)). Hinsichtlich der Höhe des geschuldeten Ersatzes wird zwischen redlichen und unredlichen Empfängern unterschieden (CC § 1437 i.V.m § 330). Gutgläubig verbrauchte Leistungen müssen nicht erstattet werden (OGH 23 April 1929, SZ 11/86; OGH 22 April 1997, SZ 70/69; OGH 30 January 2001, JBl 2001, 381: gutgläubig empfangenes überhöhtes Arbeitsentgelt bzw. überhöhte Unterhaltsleistungen). In Ausnahmefällen werden außerdem Nachteile, die der Benachteiligte verschuldet hat, in einer Billigkeitskorrektur des Ergebnisses von seinem Ausgleichsanspruch abgezogen (OGH 25 October 1988, SZ 61/218).

24. Für die Rückforderung einer objektiven Nichtschuld setzt auch PORTUGUESE CC art. 476(1) einen Irrtum nicht voraus (*Antunes Varela*, Obrigações em geral I[10], 508). Wer aber nicht *animo solvendi*, d.h. in Kenntnis der Nichtschuld leistet, fällt von vornherein nicht unter diese Vorschrift, so dass es nicht zu einem *venire contra factum proprium* kommen kann (*Menezes Leitão*, Enriquecimento sem causa[2], 467; STJ 11 May 2000, CJ [ST] VIII [2000-2] 54). Im Bereich der subjektiven Nichtschuld verlangen CC arts. 476(3) und 477 für den Rückforderungsanspruch gegen den Gläubiger einen entschuldbaren Irrtum (*erro desculpável*) und CC art. 478 für den Rückforderungsanspruch gegen den Schuldner eine irrige Überzeugung (*convicção errónea*). CC art. 476(3) betrifft vorzeitige Leistungen. CC art. 477 schützt den gutgläubigen *accipiens*; er haftet nicht auf Rückzahlung, wenn er von dem Fehler des Leistenden nichts wusste und sich seiner Schuldurkunde oder seiner Sicherheit begeben hat (näher *Gomes*, Conceito de enriquecimento, 521, 550).

25. In GERMANY ist es Sache des Bereicherungsschuldners zu beweisen, dass der Zahlende bewusst und ohne Irrtum auf eine Nichtschuld geleistet hat; das folgt aus CC § 814 (see Palandt [-*Sprau*], BGB[67], § 814, no. 10). Erforderlich ist der Nachweis positiver Kenntnis der Rechtslage zum Zeitpunkt der Leistung. Ein bloßes Kennenmüssen reicht nicht aus, selbst dann nicht, wenn die Unkenntnis auf grober Fahrlässigkeit beruht (BGH 7 May 1997, NJW 1997, 2381, 2382). Die Kenntnis von Einwendungen gegenüber der Verbindlichkeit steht der Kenntnis der Nichtschuld gleich. Nicht ausgeschlossen ist die Rückforderung einer Leistung, die ausdrücklich unter Vorbehalt erbracht und angenommen wurde (BGH 17 February 1982, BGHZ 83, 278, 282). So verhält es sich auch in GREECE (A.P. 410/1962, NoB 10 [1962] 1319).

26. Das HUNGARIAN Bereicherungsrecht zählt das Verschulden bzw. den Irrtum der benachteiligten Person nicht zu den Rechtsgründen, welche ein Behaltendürfen des Empfangenen rechtfertigen (BH 1992/25: Pflicht zur Rückzahlung eines Geldbetrages bejaht, obwohl das die Ausschreibung organisierende Unternehmen, das die Auszahlung veranlasst hatte, den Beklagten fälschlicherweise dahin informiert hatte, dass er die Ausschreibung gewonnen habe). In einigen Fallkonstellationen wird gleichwohl angenommen, dass der *solvens* auf eigenes Risiko geleistet und deshalb kein Rückforderungsrecht habe. BH 2002/29 hat das z.B. für unbestellt erbrachte Arbeit zur Errichtung eines Holzhauses entschieden. Der Kläger, der sich zur Tilgung seiner Schulden dem Beklagten gegenüber zur Errichtung eines fertigen Holzhauses verpflichtet hatte, habe auf eigenes Risiko gehandelt, als er sich auf die Lieferung der Materialien beschränkt und die Aufbauarbeiten einem Bekannten überlassen hatte. Dessen Arbeitszeit müsse der Beklagte nicht vergüten; seine Bereicherungshaftung sei auf den Betrag beschränkt, um den die Wertsteigerung des Grundstücks die Schuld des Klägers überstiegen habe. Für den Sonderfall, dass der Benachteiligte die Bereicherung der anderen Seite durch ein verbotenes oder gegen die guten Sitten verstoßendes Verhalten selbst herbeigeführt hat, sieht CC § 361(3) vor, dass diese

Bereicherung vom Gericht auf Antrag des Staatsanwaltes dem Staat zugesprochen werden kann; diese Vorschrift wird aber nach der Reform des Zivilgesetzbuches voraussichtlich entfallen (Vékás [-*Vékás*], Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez, 1145). Unter BULGARIAN LOA art. 56 gehört die Entschuldbarkeit des Irrtums nicht zu den Voraussetzungen eines Rückforderungsanspruchs wegen irrtümlicher Erfüllung einer fremden Schuld (näher *Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 590).

27. Auch in the NETHERLANDS wird gesagt, Verschulden oder Irrtum des Verarmten seien für den Bereicherten kein Grund, das Empfangene zu behalten. Allerdings kann sich im Einzelfall und nach Abwägung aller Umstände eine Rückabwicklungssperre aus CC art. 6:2 (*redelijkheid* and *billijkheid*) ergeben. Dem entspricht die Rechtslage in ESTONIA; ein Fehler of the disadvantaged person does not preclude an unjustified enrichment claim. Eine Ausnahme von diesem Grundsatz findet sich allerdings in Wages Act § 37. It allows the employer to reclaim wages or compensation only within three months from the date of payment and only if payment occurred due to a calculation error. Amounts otherwise paid to an employee or transferred to an employee's bank account erroneously are not subject to reclamation, except in the case where payment was based on false information or forged documents knowingly presented by the employee.

28. In the NORDIC countries setzt ein Anspruch aus *condictio indebiti* einen Irrtum des Leistenden über das Vorhandensein einer Schuld voraus. Die Frage, ob der Rückforderungsanspruch besteht, wird aber erst nach Abwägung aller Umstände entschieden. In diesem Zusammenhang wiederum wird vor allem in SWEDEN intensiv diskutiert, unter welchen Umständen Fahrlässigkeit des Leistenden den *accipiens* berechtigt, die Leistung zu behalten (*Hult*, Condictio indebiti, 83; *Karlgren*, SvJT 1940, 330, 331, 339; *Gorton*, JFT 2005, 452-470). Es handelt sich um einen zwar wichtigen, aber nur um einen Abwägungsfaktor unter mehreren. Vor allem fließt auch eine evtl. Fahrlässigkeit des *accipiens* in die Gesamtabwägung ein. Der Sorgfaltsmaßstab variiert; bei Banken und öffentlichen Einrichtungen ist er besonders hoch (see e.g. HD 3 January 1991, NJA 1991, 3 I and II; HD 30 March 1994, NJA 1994, 177). Im Ergebnis entscheidet sich die *condictio indebiti*-Haftung anhand der Antwort auf die Frage, wer das Irrtumsrisiko tragen soll. In DENMARK kommt es im Wesentlichen auf die Gut- bzw. Bösgläubigkeit des Empfängers an, für welche indirekt auch die Frage einer Fahrlässigkeit des Leistenden relevant werden kann (*Ravnkilde*, Betalingskorrektioner, 93; *von Eyben/Mortensen/Sørensen*, Obligationsret II, 138). In FINLAND wird auf ähnliche Fragen abgestellt, wie in Sweden, wenn auch der Aspekt der Fahrlässigkeit des solvens weniger stark herausgestrichen wird (*Roos*, JFT 1992, 75). Für alle nordischen Rechtsordnungen gilt, dass die Beweislast dafür, dass der *solvens* freiwillig und in Kenntnis des Nichtbestehens einer Schuld geleistet hat, beim recipient liegt (*Arnholm*, Streiftog i obligasjonsretten, 185). Es kann insoweit schon der Nachweis genügen, dass der *solvens* im Bewusstsein der Unsicherheit der Rechtslage und ohne Anbringung eines Rückforderungsvorbehaltes zahlt (*Rodhe*, Obligationsrätt, 83; *Vinding Kruse*, Resitutioner, 264; *Karlgren* loc cit. 340; *von Eyben/Mortensen/Sørensen* loc.cit. 141; *Roos* loc cit. 79). Nicht rückforderbar ist eine Leistung, wenn der Leistende bei ihrer Erbringung übersehen hat, dass er mit einem eigenen Anspruch hätte aufrechnen können (*Lindskog*, Kvittning[2], 579; Swedish HD 16 March 1988, NJA 1988, 94). See, however, also Danish SH 10 December 1971, UfR 1972, 283 (Bank zahlt in Kenntnis ihrer Aufrechnugsmöglichkeit noch bereits gewährten Kredit an eine in diesem Zeitpunkt bereits insolvente Gesellschaft aus, um ihr die anstehenden Lohnzahlungen zu ermöglichen; bevorzugte Befriedigung aus der Insolvenzmasse gewährt).

IV. Leistungen an Dritte aufgrund rechtlich unwirksamer Willensbildung

29. Eine spezifische Regel des Inhalts, wonach ein *solvens* (A), der infolge von Täuschung, Drohung oder Zwang einen Vertrag mit einem anderen (B) schließt, unter dem er an den *accipiens* (C) leisten muss, das Geleistete direkt von dem *accipiens* zurückverlangen kann, fehlt in den meisten Rechtsordnungen. Rechtsprechung zu dieser Frage scheint es gleichfalls kaum zu geben; die Rechtslage ist oft unklar. Ähnliches gilt für die Situation, in welcher der Vertrag zwischen (A) und (B) unwirksam ist, weil (A) geschäftsunfähig war. Unter FRENCH CC art. 1111 berechtigt gegen den Leistenden ausgeübte Gewalt auch dann zur Anfechtung und mit ihr zur Rückforderung des Geleisteten, wenn die Gewalt von einer anderen Person als dem Vertragspartner ausging. *Dol* berechtigt dagegen zwar nur dann zur Anfechtung, wenn die Täuschung von dem Vertragspartner herrührt (Cass.com. 1 April 1952, D. 1952, 380 and 685, note *Cooper-Royer*; Cass.com. 22 July 1986, Bull.civ. 1986, IV, no. 163), doch ist nicht klar, welche Bedeutung dieser Regel für einen Direktanspruch gegen den Dritten (den *accipiens*) auf Rückzahlung des Empfangenen beigemessen werden darf. In BELGIEN ist nur gesichert, dass den irrtümlichen Zahlungen solche Zahlungen gleichstehen, welche zur Vermeidung von Verfolgung oder unter Druck erfolgen (*Graulich*, Théorie générale des obligations, p. 51, no. 240). Spezielle Regeln with regard to restitution in three-party relations existieren jedoch ebensowenig wie in SPAIN, wo erneut Rechtsprechung zu dem hier diskutierten Problem zu fehlen scheint (CA Cantabria 12 January 2006, BDA JUR 2006/90530 bestätigt zwar die Rückabwicklung innerhalb der Leistungsbeziehung (A)-(B), doch ergibt sich aus der Entscheidung nicht, aus welchem Grunde der Vertrag zwischen (A) und (B) gerichtlich angefochten und für nichtig erklärt worden war).

30. In ITALY scheint man an der Rückabwicklung innerhalb der Leistungsbeziehung unter Ausschluss eines Direktanspruches gegen den dritten Zahlungsempfänger (C) selbst dann festzuhalten, wenn der *solvens* geschäftsunfähig ist (*Breccia*, Il pagamento dell'indebito, 961-962; *Trimarchi*, L'arricchimento senza causa, 84). In AUSTRIA wird unterschieden: Leistet der *solvens* aufgrund eines Vertrags zu Gunsten Dritter unmittelbar an den Dritten und wird der Vertrag erfolgreich angefochten, so kann der *solvens* unmittelbar beim Dritten kondizieren (CC § 1431). Leistet der *solvens* dagegen in Erfüllung eines angefochtenen Vertrages mit seinem unmittelbaren Vertragspartner, so kann er auch nur ihn aus Leistungskondiktion in Anspruch nehmen; die Direktlieferung oder –zahlung an den Dritten ändert daran nichts. Der Dritte kann alerdings nur unter engen Voraussetzungen (CC § 367 analog, see Schwimann [-*Mader*], ABGB VI[3], vor § 1431 no. 31) gutgläubig Eigentum erwerben und bleibt deshalb oft einem Vindikationsanspruch des solvens ausgesetzt, der sich bei Unmöglichkeit der Herausgabe in einem Verwendungsanspruch fortsetzt (CC § 1041; see Rummel [*Rummel*], ABGB II(3)[3], vor § 1431 nos. 14 and 35; *Mader* loc.cit.). In PORTUGAL ist der Bereicherungsausgleich in Dreiecksbeziehungen Gegenstand intensiver wissenschaftlicher Diskussion (näher z.B. *Menezes Leitão*, Enriquecimento sem causa[2], 533). Ausgangspunkt ist auch in den Fällen rechtlich mangelhafter Willensbildung grundsätzlich die Rückabwicklung innerhalb der Leistungsbeziehung (*Antunes Varela*, Obrigações em geral I[10], 506). Das Gesetz sieht einen Direktanspruch gegen den Dritten ausdrücklich nur für den Sonderfall des unentgeltlichen Erwerbs vor (CC art. 289(2)). Im Schrifttum wird darüber hinaus aber ein Direktanspruch gegen den Empfänger (C) auch dann befürwortet, wenn der Leistende geschäftsunfähig war oder infolge von Täuschung, Zwang oder Drohung gezahlt hat (*Gomes*, Conceito de enriquecimento, 463-464; siehe auch *Almeida Costa*, Obrigações[10], 505).

31. Vereinbaren zwei Personen die Erbringung einer Leistung an einen Dritten, so wird es sich häufig um einen Vertrag zugunsten Dritter i.S.v. GERMAN CC § 328 handeln. Die Zuwendung des Versprechenden an den forderungsberechtigten Dritten stellt i.d.R. sowohl eine Leistung des Versprechenden an den Versprechensempfänger (Deckungsverhältnis) als auch eine Leistung des Versprechensempfängers an den Dritten (Valutaverhältnis) dar. Die bereicherungsrechtliche Rückabwicklung richtet sich nach diesen Leistungsbeziehungen; bei einem mangelhaften Deckungsverhältnis kann sich der Versprechende folglich trotz CC § 334 (Einwendungen gegenüber dem Versprechensempfänger wirken auch gegenüber dem Dritten) kondiktionsrechtlich nur an den Versprechensempfänger halten. Eine Direktkondiktion gegen den Dritten kommt nur bei Unentgeltlichkeit der Leistung im Valutaverhältnis in Frage (Anwendung des Rechtsgedankens aus CC § 822), außerdem dann, wenn das Forderungsrecht gegen den Versprechenden nach der Parteivereinbarung ausschließlich dem Dritten zustehen soll (näher Palandt [-*Sprau*], BGB[67], § 812, no. 57; MünchKomm [-*Lieb*], BGB[4], § 812, nos. 129 ff).

32. In HUNGARY erfolgt die anfechtungsrechtliche Rückabwicklung eines Vertrages auch im Falle von Täuschung oder Drohung (CC § 210(4)) zwischen den Vertragsparteien (CC § 237). Es ist aber, wenn der Vertrag zwischen (A) und (B) erfolgreich angefochten wurde, ein bereicherungsrechtlicher Anspruch gegen den *accipiens* (C) wegen ungeschuldeter Leistung denkbar, weil (A) im Verhältnis zum *accipiens* ohne Rechtsgrund gezahlt hat. (A) kann zwar nicht doppelten Ausgleich verlangen, aber gegen (B) und (C) aus je unterschiedlichem Rechtsgrund vorgehen. Ist (A) von (B) durch Täuschung, Drohung oder Zwang zu einem Vertrag mit (C) veranlasst worden, kann A seinen Vertrag mit (C) nur dann anfechten, wenn (C) bösgläubig war (CC § 210(4)). Die Rückabwicklung erfolgt in diesem Fall im Verhältnis (A) zu (C) (CC § 237).

33. In the NETHERLANDS hängt die Entscheidung von der Frage ab, ob der Rechtsgrund für die Zuwendung von (A) an (C) nur in dem Vertrag zwischen (A) und (B), nur in dem Vertrag zwischen (B) und (C) oder in beiden zusammengenommen zu sehen ist; nur im letzteren Fall ist eine Direktkondiktion (A) gegen (C) möglich. Nach herrschender Lehre schließt ein wirksamer Vertrag zwischen (B) und (C) ein Rückforderungsrecht des (A) gegen (C) jedenfalls dann aus, wenn Letzterer gutgläubig ist (*van Dunné*, Verbintenissenrecht II[5], 663; *Scheltema*, Verbintenissenrecht II, art. 6:203, no. 11.2 p. 54 and no. 11.3 p. 55; Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 192 and Verbintenissenrecht III[12], no. 330; *Schoordijk*, Onverschuldigde betaling, 23-30, 47). ESTONIAN LOA § 1030 gibt einem *solvens*, der auf einen nichtigen Vertrag zugunsten eines Dritten geleistet hat, einen Rückforderungsanspruch sowohl gegen seinen Vertragspartner als auch gegen den Dritten; zwischen verschiedenen Nichtigkeitsgründen wird dabei nicht differenziert. Die beiden Ansprüche können sich nach ihrem Ziel (Rückgabe *in natura*; Wertersatz) und ihrem Umfang unterscheiden. A fraudulent party to a contract may not rely on the defence of disenrichment, must pay interest for the money received and pay damages for loss of profits (LOA § 1035(3)). Liegen die Voraussetzungen eines Vertrages zugunsten Dritter nicht vor, so bleibt der *solvens* grundsätzlich auf einen Rückforderungsanspruch gegen seinen Vertragspartner beschränt (LOA § 1029). Die Rechtsprechung gewährt aber einen Direktanspruch gegen den Empfänger, der von der Abwesenheit des Rechtsgrundes im Verhältnis (A) zu (B) wusste; dieser Anspruch folge aus dem Prinzip von Treu und Glauben (Supreme Court 21 May 2002 and 19 December 2007, civil matter no 3-2-1-115-07).

34. In the NORDIC countries gehören die Fälle des VII.–2:103 zu den Regelungsgegenständen des Vertragsrechts. Die Rückabwicklung erfolgt

grundsätzlich zwischen den Vertragsparteien, allerdings können coercion, fraud or unfair exploitation (Contracts Act §§ 29-31) auch dem Drittempfänger gegenüber geltend gemacht werden (*Arnholm*, Sammansatte aftaler, 142). HD 16 October 1975, NJA 1975, 517 entschied, dass ein *solvens*, der von seinem Vertragspartner durch Täuschung zur Direktlieferung an einen Dritten veranlasst wird, das Geleistete von dem Dritten auch dann zurückverlangen kann, wenn dieser gutgläubig war; see *Hellner*, FS Goode, 167, 183).

CHAPTER 3: ENRICHMENT AND DISADVANTAGE

VII.–3:101: Enrichment

(1) A person is enriched by:

(a) an increase in assets or a decrease in liabilities;

(b) receiving a service or having work done; or

(c) use of another's assets.

(2) In determining whether and to what extent a person obtains an enrichment, no regard is to be had to any disadvantage which that person sustains in exchange for or after the enrichment.

COMMENTS

See Comments to following Article.

NOTES

See Notes to following Article.

VII.–3:102: Disadvantage

(1) A person is disadvantaged by:

(a) a decrease in assets or an increase in liabilities;

(b) rendering a service or doing work; or

(c) another's use of that person's assets.

(2) In determining whether and to what extent a person sustains a disadvantage, no regard is to be had to any enrichment which that person obtains in exchange for or after the disadvantage.

COMMENTS

ARTICLES 3:101 AND 3:102

A. General

Twin provisions. VII.–3:101 (Enrichment) and its mirror-image twin VII.–3:102 (Disadvantage) address the second and third elements essential to establishing an unjustified enrichment claim: namely, the existence of the other party's enrichment and a disadvantage on the part of the claimant. While the claimant's disadvantage and the enriched person's enrichment need not be of the same type, the types of benefit or detriment which may constitute an enrichment or disadvantage are fundamentally the same, as is reflected in the corresponding wording of the two rules. Moreover, in simple cases, where the enrichment is furnished directly by or obtained directly from the disadvantaged party, the claimant's disadvantage and the enriched person's enrichment are simply different sides of the same coin. For that reason these two Articles may be considered together, taking VII.–3:101 as the focus of these comments.

Overview. Paragraph (1) of each Article sets out a definition based on an exhaustive enumeration: VII.–3:101 (Enrichment) lists the types of benefit which are recognised as constituting enrichments relevant to the application of the basic rule, and VII.–3:102 does the same for the notion of disadvantage. Moreover, each Article also sets out (in paragraph (2)) the principle that enrichments and correspondingly disadvantages are, as it were, the individual positive (or, as the case may be, negative) items on a balance sheet; enrichment or disadvantage is not the "bottom line" figure representing the balance itself (i.e. the aggregate of all positive and negative entries).

Relation to Chapter 4 (Attribution). In applying these Articles, account must be taken of the rules in Chapter 4 (Attribution). While this Chapter defines what constitutes an enrichment and a disadvantage, those rules impact upon the question as to who is enriched and who has suffered a disadvantage since in given circumstances they may have the effect, for example, of shifting an enrichment or a disadvantage from one person to another (see VII.–4:102 (Indirect representation)).

Relation to other Chapters. These Articles are concerned solely with the issue of whether or not a given person is enriched or disadvantaged. If a person is not enriched within the meaning of VII.–3:101, then that person cannot be obliged under this Book: there is no liability because there is simply no enrichment to reverse. Equally, if the claimant has sustained no disadvantage within the meaning of VII.–3:102, any enrichment of another has not been at the claimant's expense and there is no entitlement under this Book. The existence

of both an enrichment of another and a disadvantage of the claimant, however, does not dictate that the enriched person is liable under this Book. That is so even if Chapter 2 establishes that the enrichment is unjustified. It must be established in addition, in accordance with Chapter 4, that the enriched person's enrichment is attributable to the claimant's disadvantage. Furthermore, the rules in Chapters 5 and 6 must be applied in order to ascertain what quantum of liability, if any, arises.

B. Increase in assets or decrease in liabilities: paragraph (1)(a) of VII.–3:101

Change in assets or liabilities, not change in value. Paragraph (1)(a) of VII.–3:101 provides that a person is enriched by "an increase in assets or a decrease in liabilities". In essence, any beneficial adjustment to either the positive or negative sides of the patrimonial balance sheet – the arrival of a new positive entry or the removal of a negative entry – constitutes an enrichment. However, the definition only embraces a change in substance. It does not extend to a mere change in the value of assets (which are themselves unchanged). There must be an increase or decrease in the quantum of subject-matter not a mere re-appraisal in how the market appreciates an otherwise unaffected quantum. Some new asset must enter or some old liability must leave the patrimony. On the other hand, benefits which do not involve a change in assets or liabilities may nonetheless amount to an enrichment under the other paragraphs of this Article – in particular where a service is rendered or work is done.

> *Illustration 1*
> D, the owner of a field which abuts a garden attached to E's house, has been lawfully using the field to store scrap material. The pile of junk is a substantial eye-sore and E has found it difficult to find a buyer for the house and garden at an acceptable price. Following a change in business plans, D clears the field for more sightly commercial use and E is subsequently able to sell the house. Evidence from valuers indicates that the improved outlook from E's garden added some € 4.000 to the purchase price. E is not enriched under this paragraph. E has not obtained any asset. The benefit was merely an increase (before sale) in the value of existing property rights. (Nor has D rendered a service or done work for E: see C below.)

Meaning of asset. "Assets" are defined in the Annex to the DCFR as anything of economic value, including property, rights having a monetary value, and goodwill.

Criteria. An unstated criterion for present purposes is that an asset must in some manner be recognised as "belonging" to one party, for it is this which generates the sense that one person's gain of that asset is at the expense of another. This implies that an asset must be an item, whether tangible or intangible, to which an element of protected exclusivity attaches. Secondly, it must be something which is capable of commercial exploitation. That is to say, it must be something for whose grant or use a person would be prepared to pay; it must be a right or an equivalent which is of potential economic benefit. 'Asset' is thus an umbrella term for all such forms of economically valuable positions which are legally protected.

Examples. The term certainly includes money and property rights including intellectual property rights and any other form of right, such as a contractual right e.g. a receivable ('book money'), a right to compensation for damage, a right to benefit under a trust, and even a right under the law of unjustified enrichment itself. It will not matter whether the property

concerned is tangible or intangible, moveable or immoveable, and the distinction between proprietary, quasi-proprietary and pure personal rights is equally irrelevant here. It is likewise immaterial whether the right is characterised as essentially procedural or ancillary to some other right: the goodwill of a business or a right to correction of a register of title, for example, may constitute an asset. Moreover, confidential and valuable information may also constitute an asset in so far as its "owner" is entitled to restrict its use or circulation. An example in this category would be an outline for an invention or device which is not yet patented and therefore only an inchoate intellectual property right. A compelling factor is thus whether the "owner" of the "asset" is entitled to prevent infringements or adverse interference.

Illustration 2
D makes a payment by bank transfer. Because D makes a mistake, payment is made to E's account, which is in credit. E is enriched under this paragraph by receipt of the funds. E's personal right as account holder and creditor of the bank is enlarged to the extent of the increase in the balance (which is the sum E can demand be paid out by the bank).

Illustration 3
E acquires at an auction a car belonging to the estate of a famous person and with a personalised number plate bearing his initials ('TAC 1'). The auctioneers neglect to hold back the personalised number plate, which was not part of the sale, but which as a result of the failure to reserve a right of retention under the statutory scheme governing personalised number plates passes to E with the change in title to the car. E is enriched by acquiring the right to use and retain the personalised number plate, an asset which has a market value of some £ 15,000.

Illustration 4
D pays € 4,000 to X as a "sweetener" in order to induce X to conclude a contract for the sale of a farm to E, the partner of D's daughter. X subsequently sells his farm to E at the prevailing market price. Afterwards the relationship between E and D's daughter breaks down and D seeks to recover from E the sum which D paid to X. D's claim must fail because E was not enriched by D. The payment of the sweetener did not increase E's rights (vis-à-vis X, as prospective seller); it merely secured a chance to negotiate and purchase which E already enjoyed. D did not increase E's assets. The acquisition of the farm itself is referable to E's contract with X.

Mode of increase in assets. Provided that a given acquisition constitutes an increase in assets, it will be immaterial for the purposes of this Article how that acquisition has come about. An acquisition of property, for example, will be an increase in assets amounting to an enrichment whether this is an acquisition of title by transfer (sale, assignment, etc) or by any other means (e.g. accession). However, this does not prevent the mode of increase in assets being relevant in other contexts, such as whether or not the enrichment is justified, whether it is attributable to a disadvantage, and what is the measure of any liability of the enriched person. In that context the lawfulness of an acquisition will be especially material.

Illustration 5
D constructs a building on E's land. E is enriched under this paragraph. E has obtained an increase in assets: the building has become part of E's immoveable property by accretion to the land. It is immaterial, for the purposes of this Article, whether D

requested the building and whether C knew the land belonged to E; such matters are relevant under other Articles of this Book.

Decrease in liabilities. Paragraph (1)(a) also provides for enrichment in the form of a reduction in liabilities. The typical instance will be where a debt which a person owes is fully or partially discharged. This increases the net balance of that person's patrimonial wealth and therefore merits treatment as an enrichment quite as much as a positive gain. It can hardly be material whether the recipient's bank account is in credit and merely enhanced (increase in assets) or overdrawn and the debt fully or partly cleared (decrease in liabilities). The notion of liabilities extends beyond contractual debts and thus includes, for example, non-contractual obligations or other obligations under private law. Nor is there any requirement that the creditor has in fact demanded performance of the obligation: the bare existence of a liability and its reduction suffices. On the other hand, there will be no decrease in liabilities if the supposed liability is entirely spurious: there must be a legal obligation to perform (e.g. to compensate or provide recompense). The same applies correspondingly where a legal liability has been waived by the creditor beforehand.

Illustration 6
A small amount of oil from X's oil tank flows into the soil of neighbouring premises belonging to N. The local authority undertakes the remedial action which in its view is necessary to deal with the pollution. Quite aside from VII.–7:103 (Public law claims) (according to which this Book need not necessarily apply to enrichments conferred in the exercise of public law functions), the local authority has no claim against X under this Book. If X were liable to N to make reparation for the damage caused, then the local authority's measures – in providing reparation in specie – would admittedly have reduced that liability. However, if under the applicable law a non-contractual liability in the circumstances presupposes that X caused the damage intentionally or negligently (i.e. there is no strict liability) and no negligence on X's part can be established, the liability of X which has been decreased by the claimant is non-existent. In such circumstances X has not been enriched.

C. Receipt of a service or having work done: paragraph (1)(b) of VII.–3:101

General; rationale. Paragraph (1)(b) of VII.–3:101 caters for an alternative form of benefit within the definition of enrichment in the form of the receipt of a service or having work done. The rationale for treating the receipt of a service as an enrichment is that whenever the market recognises a certain type of performance as valuable, the provider of that performance has necessarily rendered something valuable to the recipient and a transfer of value has taken place. Of course, where the service is unsolicited, the recipient may not feel 'better off' as a result. Such considerations (which may reduce or exclude liability on the part of the unwitting recipient) are taken up in later rules – in particular VII.–5:102 (Non-transferable enrichment).

Change in patrimonial balance immaterial. A service or work may (but need not) also result in a change to the balance of the enriched party's patrimony. A service which takes the form of 'pure consumption' or enjoyment is nonetheless an enrichment. A construction service (which adds a new structure to property), a treatment service (which merely improves the condition of existing property) and a transportation service (which merely relocates the person or property) are all services in the sense of this paragraph.

Composite notion of service or work. The concept of 'service' is an appreciably difficult one with rather vague boundaries. Its uncertain definition raises the prospect that taken by itself it might be too narrow in scope in bringing in certain benefits within the notion of enrichment. This is the reason for the extension of the paragraph to include "having work done", which is intended to embrace benefits similar in nature to services. The notion of 'service or work' may best be regarded as a composite intended to capture a particular range of intangible benefits.

Notion of service. The service concept normally assumes meaning in the context of contractual (or at any rate commercial) activity. A contract for the supply of services, for example, is in large part defined by contradistinction to an employment contract on the one hand and other specific contracts, such as a contract for the sale of goods, on the other. The notion of contract for the supply of a service put forward in the provisions specific to contracts for services (IV.C.–1:101 (Scope) paragraph (1)) operates without a definition of the core element of "services". They refer only to particular forms of services: paragraph (2) refers to construction, processing, storage, design, information or advice, and treatment, while IV.C.–1:102 (Exclusions) refers to transport, insurance, provision of a security and the supply of a financial product or a financial service. It may be taken that a service is an act or omission of a type normally undertaken for remuneration (cf. EC Treaty art. 50(1)).

Services by agreement, but without a binding contract. In a contractual context one may assume that a service is undertaken in order to render benefit to a recipient. The difficulty in the present context, of course, is that there may not be a contractual relationship between the parties to the enrichment claim. This is not problematic where both parties have proceeded (mistakenly) on the footing that their relationship is one of contract, for it will be their view of the economic activity undertaken which would clearly characterise it as a service; the actual existence of a contract cannot be essential to the provision of a service if both parties regard the performance as a service. There is at least in that case an agreement for services and the identity of the service can be ascertained.

> *Illustration 7*
> D, a lawyer, undertakes to act for E in pursuing a claim against a third party on a conditional fee basis, D to be paid a fixed share of E's compensation if and only if E's litigation is successful. After E's claim succeeds and settlement is made by the third party, E disputes D's entitlement to the agreed share of the compensation. Although neither party appreciated this, the agreement between D and E was prohibited by the relevant national law applicable in this particular case. There was no valid contract for services: II.–7:302 (Contracts infringing mandatory rules). (It is assumed that national law provides the agreement is void as a contract.) Under the law of unjustified enrichment, D has rendered a service to E in conducting the litigation and E is accordingly enriched in the sense of this paragraph. Whether the illegality of the transaction also affects liability under this Book is determined by VII.–6:103 (Illegality).

Unsolicited services. Enrichment by receipt of a service extends beyond 'remunerative work agreed upon by the parties' to cases where the service provider alone intends to provide a service on the basis of an assumption that this fulfils a request for a service or where there has been a genuine request, but it has not come from the party to whom the service is provided. Thus whether the mistake of the parties is bilateral or unilateral does not affect the qualification of work done as a service.

Illustration 8

Guest X at a hotel, operated by D, gives an instruction for some clothes to be cleaned and pressed during the day, while he is out of his room. The staff in the hotel make a mistake and take away similar clothes from the room of guest E, which are then returned cleaned and pressed. E is enriched under this paragraph. Of course, the fact that E is so enriched is not by itself determinative of whether E is liable to pay the value of that service (or any lesser sum) in order to reverse the enrichment.

Services provided unwittingly. A converse case is where the enriched person alone wishes to have the benefit of a service. In other words, the disadvantaged person provides a benefit to another unwittingly. If the service provider customarily provides the service to others on a fee-paying basis, it will usually be clear that the provider would have acted differently (for example, by acting so as to exclude benefit to the recipient) if aware of the true circumstances. Where the recipient has sought out the benefit in such circumstances, it will be just to regard that benefit as a service and an enrichment within this paragraph.

Illustration 9

E, a stowaway passenger on an aeroplane being flown by the D airline, flies from Hamburg to Munich. E is enriched within this paragraph. The benefit conferred (namely a flight from Hamburg to Munich) is a benefit of a type normally only provided to passengers in exchange for remuneration. It is immaterial whether E has made any saving of expenditure. For example, even if E would not have flown at all, had it not been possible to fly for free (because E merely took an opportunist advantage of lax security for the sheer thrill of the ride) E is still enriched under this paragraph. Although E in such a case has saved nothing, E is enriched by receipt of a service.

Incidental benefits in pursuit of own interest. Where there is neither an appreciation that benefit is being conferred on the part of the provider nor an active involvement on the part of the recipient in bringing about the benefit, its provision will not amount to the receipt of a service or work within the meaning of this paragraph. An exploitation of a state of affairs 'after the fact' is not a receipt of a service.

Illustration 10

A stream runs through land belonging to farmer D and, further downstream, land belonging to farmer E. In order to make better use of the water supply, D erects a filter which has the effect of cleansing the stream of debris. This improves the water supply for E as well as for D. D has nonetheless not enriched E within the meaning of paragraph (1)(b).

Illustration 11

D and E own neighbouring properties in a remote rural area. D enters into a contract with the X cable company for the installation of cable communications. This involves the company in building a cable 'backbone' spur from the highway across country to D's property. Subsequently E engages X to lay cable to E's own property. Since the X company (which owns the cable) is able to connect E to the freshly laid spur, E's costs of connection are considerably lower than D's. In obtaining a connection, E has taken advantage of the work which D had commissioned X to undertake. D has nonetheless not enriched E within the meaning of paragraph (1)(b).

D. Use of another's assets: paragraph (1)(c) of VII.–3:101

General. Paragraph (1)(c) of VII.–3:101 caters for a third type of benefit within the definition of enrichment in the form of the use of another's asset. The term "asset" in this paragraph bears the same meaning as in paragraph (a) (as to which, see B above). In determining who, if anyone, is enriched under this heading (and correspondingly who, if anyone, is disadvantaged under the corresponding paragraph (1)(c) in VII.–3:102), it will be important to identify whose asset is being used.

> *Illustration 12*
> Company D constructs a waste water channel running from its property. Under statutory rules the channel becomes State property. Subsequently E makes use of the channel under the terms of a statutory regime. Although E profits as a matter of fact from the fruits of D's expenditure, D has no claim under this Book against E. E has not made use of D's assets. Rather E has made use of State property. Nor will D have a claim against the State if the State's enrichment is justified because the State is entitled by law to the benefit of its enrichment (the increase in assets as a result of acquiring the channel) – i.e. if the regime governing the expropriation provides its own mechanism for compensating D.

Assets capable of use. The paragraph necessarily applies only to those assets which are capable of use. In principle this encompasses all transferable absolute rights, such as property rights including rights to intellectual property. However, the right need not be capable of transfer and it will suffice that the right is one which another person might be licensed to use. This will therefore embrace relative rights and non-transferable absolute rights, such as contractual rights and rights of personality. Use of another's asset will likewise cover one person's exploitation of another's confidential information or an invention or design which might be, but has not yet been, converted into a fully-fledged intellectual property right. Conversely, there will be no use of an asset within the meaning of this paragraph if public policy considerations preclude even a notional commercialisation of use.

> *Illustration 13*
> E occupies a caravan, which D rents from X. E is enriched in using D's asset, namely the right of D vis-à-vis X to occupy the caravan. It is immaterial whether or not D's contract with X prohibits or permits D to transfer this right or whether the right of D amounts to a proprietary right of possession.

> *Illustration 14*
> An inventor, D, enters into negotiations with a manufacturer, E, with a view to the possible exploitation of D's patent for a carpet grip. In the course of negotiations D outlines a new alternative design for an improved carpet grip. After the negotiations fail, E commences production of carpet grips based on the design outlined (but not patented) by D. D has a claim under this Book. E has made use of an asset of D and that enrichment was unjustified. D's alternative design, while not an intellectual property right in the sense of the patent, was nonetheless protected in law in so far as D was entitled to prevent use of the information disclosed in confidence to E. That right to control exploitation of the information was an asset of D's.

Irrelevance of authority of right-holder to license use. While a right must be susceptible of commercial exploitation in order to constitute an asset, there is no requirement that the holder

of the right which the enriched person has exploited must personally be in a position to authorise another to use it. The *de facto* use of a right which *de jure* the enriched person could not be authorised to use is nonetheless a use of an asset within the meaning of this paragraph. The right-holder need not have the power to assign or sub-license the exercise of the right, but it is essential that the right must be of a sort which, were it not restricted by the terms of its grant to the right-holder or by the limited capacity of the right-holder, could be made the subject-matter of contractual licence in exchange for some valuable benefit. In this way the requirement of potential commercialisation relates to the intrinsic nature of the right and not, as such, to whether the right-holder has a power of or capacity to assign it or permit another's use. Where the holder cannot transfer or license another to use an asset, the requirement of commercial exploitability is fulfilled, for example, if the right was valuable in grant (i.e. a grantor could have demanded value for it and a grantee would have been willing to pay for the grant). Of course it may well be that a personal right will not have been granted for value, but it is the notional possibility of a purchase price which matters, rather than whether or not the right-holder actually did have to pay for the grant of the right. A right may be valuable, even though it is granted gratuitously.

> *Illustration 15*
> X is the owner of a small cottage, inherited from his father (F), which X has hitherto only used as a holiday home. As X would like to provide D, an elderly gentleman who during his long working life had given loyal service to F as his gardener, with a retirement home, it is formally and irrevocably agreed that D can occupy the cottage for the rest of his life. After a long spell in hospital, D returns to find E is in occupation of the cottage. E is enriching herself within the terms of paragraph (1)(c) in using D's right to occupy the cottage for life. That D acquired this right gratuitously from X is immaterial because a notional owner of the cottage could have demanded and a notional occupier for life would have been prepared to pay a reasonable price for the grant of the right.

Irrelevance of right-holder's intention to use or commercialise use. Since the question of enrichment by making use of another's assets turns only on the intrinsic potential for commercialisation, the presence or absence of any concrete desire of the right-holder to commercialise the possible use of the right is not material in determining that a person who has used the right is enriched. The home dweller who is prevented from using the property by squatters rarely intends to licence the unwelcome occupants, but that does not affect the point that the squatters have enriched themselves by rent-free occupation of another's property. Equally it is immaterial whether the right-holder would personally have used the asset.

> *Illustration 16*
> In the preceding example, E is enriched by occupying the cottage while D was in hospital, regardless of (a) whether D needed the cottage for his own use and (b) whether D had any intention of giving up possession in exchange for payment.

> Likewise, where a person has published pictures of a naked individual without that individual's consent, the publisher has exercised a valuable right which the individual featured in the pictures was able to license, even though a licence to that end might well be the very last thing the individual would have desired. In each case it is immaterial that the victim would never have dreamed of permitting the act done: the 'transfer of value' has taken place (against the victim's will) and an enrichment claim may simply make the best of an unwanted state of affairs.

Irrelevance of utility to enriched person. The use of an asset is an enrichment independent of whether this has produced any specific monetary gain or saving for the enriched person. Such matters may be relevant in the context of VII.–5:102 (Non-transferable enrichment), in determining the extent of the enriched person's liability if the enriched person is in good faith. Conversely, if the enrichment is in bad faith, the market value of a right to use (and not the actual benefit extracted from it) will provide a benchmark for the quantum of liability. In the case of publication of sexually explicit pictures of certain individuals, for example, the victims are entitled to claim a licence fee from the publisher even if publication to interested voyeurs is gratuitous.

Meaning of use. A use of an asset imports as a minimum an exercise of another's right or exploitation of the asset of that other. That in turn presupposes an intention to do the act which amounts to the utilisation of the asset. The requirement that another's asset be used also contains a further inherent qualification. It involves the limitation that the enriched party has in effect displaced another's (potential) enjoyment. Only then is a right or other asset belonging to another actually exercised rather than simply imitated. A further requirement contained within the notion of use of another's asset for the purposes of unjustified enrichment law is that the exercise of the right or exploitation of the asset must be of such a form that use is made of the asset: the act of interference with another's asset must be directed towards extracting utility from the subject-matter.

An intentional act. The requirement of an intention to do the act amounting to use of the asset does not mean, however, that there must be a deliberate will to displace the entitled party's enjoyment and avail oneself of something one positively knows belongs to another. The requirements of intention in the sense of Book VI (Non-contractual liability arising out of damage caused to another) - where (leaving aside the case of foresight of an almost certain outcome) an intention to cause the damage is required (see VI.–3:101 (Intention) paragraph (a)) - do not govern here. Such notions of fault are not material to this Book. Persons who occupy land under the misapprehension it is their own or that it is ownerless exercise the rights of the landowner or other person entitled to possession and so make use of another's asset simply because (i) they occupy with an intention to occupy that land and (ii) that land (as it happens) is not available for their use.

Displacement of another's use. Displacement of another's use may be either complete or partial, both spatially and temporally. Thus the exercise of another's right for a time is as much a use of that asset as its exhaustive or extinctive exercise. Where the right exercised is one of physical use, as in occupation of premises or possession of a thing, the use will generally be self-evident since such control of the thing generally displaces the corresponding use of another. Use of an asset will be no less present when the physical use is limited and displacement correspondingly partial, as in the case where a person in effect creates a right of way over another's land. Use by the owner is displaced to this extent, even though the owner's possession of the land is only marginally disturbed overall. Correspondingly, however, this is not a use of the whole asset which is at the owner's disposal, but rather a use of a component right – the right to give permission to cross the land. There is likewise a use of another's property where possession is shared.

Illustration 17
Every Saturday a market trader, E, parks a van on the forecourt of the premises owned by business D (which does not operate at weekends). E has made use of D's asset and

is enriched within the meaning of this paragraph. It is immaterial that E's use does not interfere with D's actual use of the forecourt. To the extent of E's use, D's possible use of the space occupied by the van is displaced.

Illustration 18
E becomes acquainted with D, who represents herself to be a woman in financial and social need following a series of misfortunes. E agrees to let D occupy a room in his home rent-free and to have the shared use of other domestic facilities. E subsequently discovers that D is an habitual fraudster who preys on naïve young men like himself. D has enriched herself not merely in respect of the exclusive occupation of the room in which she lodges, but also in respect of her shared use of the other amenities in the dwelling.

Intangible property rights. This principle applies in a similar manner even when the property right exercised is intangible. A marginal encroachment may amount to a use of an asset.

Illustration 19
Without permission to do so, E reproduces a text whose copyright is vested in D. E is enriched within the meaning of paragraph (1)(c): E has made use of D's copyright. Although E's act did not preclude D from making or permitting copies at the same time, E has nevertheless made use of D's copyright because E's act necessarily prevented D's effective decision, at the point in time of reproduction, whether that copy should be made or not.

Apparent infringements. The situation is otherwise where the infringement is apparent only and the rights of the supposedly disadvantaged person are intact and unaffected. In that case there is no enrichment (and correspondingly no disadvantage).

Illustration 20
X, a debtor of D, is induced by E's fraud to pay to E sums due to D, E pretending to be collecting the debt on D's behalf. Although X has paid in good faith, X's debt to D is not discharged by the payment. E is of course enriched by X's payment (increase in assets). However, E is not enriched under paragraph (1)(c) in the sense that E has used an asset of D (namely D's right to payment of the debt by X). E has not used that asset because the debt of X to D has not been discharged by the payment to E. D is not prejudiced by the payment. Equally, and for the same reason, E's enrichment is attributable to X, not D: contrast VII.–4.103 (Debtor's performance to a non-creditor; onward transfer in good faith), which applies where a right against the debtor is lost. The case is otherwise if D ratifies X's misdirected performance: see further VII.–4:104 (Ratification of debtor's performance of a non-creditor).

Illustration 21
E takes D's car and transfers it to X in circumstances in which X does not acquire title to the car in accordance with statutory provisions on acquisition in good faith. E has not been enriched by making use of D's right to dispose of title to the car because there has been no transfer of title: X has not acquired ownership. E has merely made use, for a limited period, of D's right to possess the car. The case is otherwise if D ratifies E's purported disposition of the car: see further VII.–4:106 (Ratification of intervener's acts).

Mode of use. Any manner of using an asset which satisfies the foregoing criteria comes within the scope of paragraph (1)(c). In particular, where the asset concerned is property, that property may be used not merely by possession of the thing, but also by other modes of exercising any of the constituent rights, such as a disposition or disposal of the thing. A person who transfers title to another's property to a purchaser in good faith who thereby acquires ownership is enriched by making use of a valuable right of the original owner – the right to transfer title. This is true in a case of gift (so far as the applicable property law allows a non-entitled party to make an effective donation of another's property) no less than in the case of sale because in making an effective gift of another's property the giver purports to appropriate the property quite as much as if the appropriation was for personal use.

Illustration 22
E, a wayfarer, plucks and consumes an apple growing on a tree in D's orchard. E is enriched by appropriation and consumption of the apple.

Illustration 23
E takes D's car and transfers it to X in circumstances in which X acquires title to the car in accordance with statutory provisions on acquisition in good faith. E has been enriched by making use of D's right to dispose of the car.

Illustration 24
E, an electricity generator, purchases coal from D, which is burned in order to generate energy. It subsequently emerges that the contract is void due to non-compliance with regulatory requirements. Even if E did not acquire any property right in the coal, E will have been enriched by destroying it for its business purposes since in that case E has made use of D's rights in the coal.

Interferences not amounting to a use. Not every interference with another's property will amount to a use of that property within the meaning of this paragraph. The requirement of an intentional act of user excludes, among other things, the causation of loss or damage to property or person by a merely inadvertent act. Moreover, a use presupposes that the right is purposefully exercised in order to extract some economically recognisable advantage. A mere wanton act of destroying property, for example, does not by itself constitute an exercise of another's right in this qualified sense of use. Consequently interferences with the rights of others which are not the result of a deliberate act or which are not calculated to appropriate the economic benefits which may be derived from exercising the right do not come within the notion of use of an asset for the purposes of the law of unjustified enrichment. Such matters are the preserve of the law on non-contractual liability for damage.

Illustration 25
E maliciously scratches a parked car belonging to D. E is not enriched within the meaning of this paragraph. D has no claim against E under this Book. Assuming the requirements of VI.–1:101 (Basic rule) are satisfied, D has a claim for reparation. The position is no different if the scratch was accidental and the result of E's negligence or if E was motivated by a thirst for revenge, anarchistic desires, or a perverse thrill from causing destruction. However, the case is otherwise for the law of unjustified enrichment, for example, if E is a professional artist who is working on D's car to produce an elaborate etching. In such a case E has appropriated the bodywork of the car as the basis for the artwork.

Illustration 26
E agrees with D to store some of D's furniture while D's flat is being renovated. D indicates that she will collect it in three weeks time. Forgetful of the arrangement, E goes away on holiday for two weeks just at the time D is due to collect and the furniture can only be collected after E has returned. D demands a fee from E calculated on the basis of hire of equivalent furniture for the period of E's holiday. D cannot base such a claim on this Book. E has not been enriched within the meaning of this Article. E has never used the furniture and never purported to exercise a right to determine its use. E has merely stored the furniture for a period longer than the parties' agreement contemplated. Any liability of E arises under the law of non-contractual liability for damage and (if the parties intended to enter a legally binding relationship: cf. II.–4:101 (Requirements for the conclusion of a contract)) the law of contract.

E. Non-merger of enriched person's concurrent or subsequent disadvantage with the enrichment: paragraph (2) of VII.–3:101

General. The definition of enrichment in paragraph (1) of VII.–3:101 identifies certain forms of benefit (increase in assets, decrease in liabilities, receipt of a service, use of an asset) as constituting enrichments. In this way enrichment is defined in terms of the accretion of particular items which in themselves are valuable. Enrichment is not defined in terms of things which have actually made the enriched person better off. Rather it is defined in terms of receipt or assumption of benefits which are of intrinsic value (in other words, benefits which by themselves tend to make a notional recipient better off). Paragraph (2) of VII.–3:101 buttresses that definition by making it clear that a person is enriched simply because such a benefit has been obtained. No regard is to be had to any concurrent or subsequent disadvantage. The function of the paragraph is thus essentially one of reinforcement, to prevent the rigour of the first paragraph being diluted by other notions of "enrichment" which would not be suited to the rules contained in this Book.

Enrichment as improvement to net wealth. The function of this approach is best illustrated by contrasting an alternative model of enrichment. Enrichment might be defined in terms of the improvement of an individual's net aggregate patrimonial position, reflecting an increase in the surplus or reduction in the deficit of assets minus liabilities. The effect of defining enrichment in terms of the extent to which the individual is 'better off' is that whenever an individual obtains at the same time both a positive adjustment to assets and an equal and opposite adjustment to liabilities, there will be no enrichment because there is no net improvement to the bottom line of the balance sheet. That approach would not be workable for this draft because it would necessitate special rules to bring within the scope of the law of unjustified enrichment the reversal of benefits conferred pursuant to void or avoided contracts where there is no 'net' enrichment. This may occur if the bargain struck by the parties comes close to the market ideal of an efficient and mutually advantageous transaction and both parties have performed before it is discovered that the contract is void or it is avoided. In order that each party may start from the position of having a claim to restitution of the performance given and a corresponding liability to restore what has been received, it is necessary to adopt an approach to enrichment where one looks separately at each adjustment to the 'balance sheet' rather than to their composite effect.

Enrichment on an itemised approach. This is one reason why the draft adopts an 'itemised' approach to enrichment and disadvantage. Paragraph (2) of VII.–3:101 (in conjunction with the corresponding paragraph (2) of VII.–3:102) gives effect to an itemised approach by

treating enrichments and disadvantages as distinct matters and excluding a definition of enrichment in terms of an overall improvement in the patrimonial balance. An enrichment is any positive item (within paragraph (1) of VII.–3:101) which is added to the balance sheet and a disadvantage is any negative item (within paragraph (1) of VII.–3:102), regardless of any countervailing movements of value. That enables a situation of exchange to be addressed as a conjunction of two sets of enrichments and disadvantages moving in opposite directions rather than as a single composite transaction.

Illustration 27
S, a provider of services, and P, the purchaser, perform their undertakings under a contract which, it transpires, is void. S is enriched by receipt of the purchase price (increase in assets) and simultaneously disadvantaged by performing the service. P is correspondingly both enriched (receipt of the service) and disadvantaged (decrease in assets: loss of money). Each party potentially has a claim under the law of unjustified enrichment. The value of the service and the amount of the purchase price are immaterial in determining whether a party is enriched or disadvantaged and whether a party has a claim: each is both a claimant in respect of that which was transferred to the other party and a debtor to a claim in respect of that which was received.

Comparison. Of course, where each party to a failed transaction is at the same time both a claimant and a debtor under this Book, there may be scope for set-off. This may result in a resolution of the two claims by one party paying the other the difference in value between the two performances. In such circumstances the approach to the enrichment concept adopted in these model rules and the net enrichment approach will produce essentially the same outcome. Nonetheless, the two models do differ in so far as the net enrichment model is only capable of serving economic goals in reversing the enrichment. The natural redress following a net enrichment approach is monetary payment fixed by reference to the net increase in wealth. This does not logically lend itself in cases of mutual transfers to reversals by return *in specie* of the benefit conferred. It does not facilitate reversal of an enrichment where a party who has transferred a thing to another is eager to recover that thing for sentimental, rather than economic, reasons. In such a case a pure net enrichment approach tends to imply at most a claim or liability measured by the difference in economic value between performance and counter-performance because that is the measure of the enrichment. It effectively compels a set-off. An itemised approach allows for a claim to the thing transferred and this has the potential to protect the broader interest of the claimant in the transfer of the thing as such based on, for example, sentimental attachment or wider business interests.

Contemporaneous and subsequent disadvantage. The principle of paragraph (2) is directed foremost at the case where there is an exchange (i.e. where enrichment and disadvantage coincide or are contemporaneous), as in illustration 26. However, the principle is not so confined - as the wording indicates ("in exchange for or after the enrichment"). Any subsequent disadvantage (a disenrichment) is to be disregarded for the purposes of identifying the existence of the enrichment, although it may be crucial for the purposes of the defence under VII.–6:101 (Disenrichment). That is because the concern at this stage is with identifying the enrichment and not with fixing the quantum of liability.

Illustration 28
D puts banknotes, amounting to € 400, into an envelope which she hands to E as payment for E's invoice for work done by E on D's instruction. The payment due according to the invoice was € 250. Subsequently D discovers that, no doubt because

of a failure to separate properly several new banknotes, she has considerably overpaid E. E, however, on opening the envelope and discovering the magnitude of the sum enclosed, assumed that D had enclosed a gratuity and promptly spent € 200 on a new coat for his wife. E is enriched under this article by the acquisition of € 400. This is unaffected by his subsequent disbursement of € 200 for the benefit of his wife. (E's enrichment is justified to the extent of € 250 and unjustified in respect of the € 150 which was not due: see VII.–2:101 (Circumstances in which an enrichment is unjustified). However, whether E is liable to make any payment to D is to be determined in the light of VII.–6:101 (Disenrichment), in which context it must be considered whether the subsequent expenditure on the coat (as a disenrichment) satisfies the requirements of that defence.

Illustration 29
By mistake, D pays € 200 into E's bank account. Because D had previously spoken about possibly making a gift to E, E assumes that the money is a present. He withdraws the money from his bank account in cash, intent on treating himself to a new jacket. In the shopping centre he meets a friend who is collecting money for a charity, X. With an acute sense of guilt about his rampant consumerism, E hands over to the charity a € 50 note. E is enriched by € 200. His subsequent payment of € 50 to X is irrelevant to determining the enrichment. However, E's liability to D under the law of unjustified enrichment will be reduced to € 150 if E can establish the defence of disenrichment in good faith on the basis that he has sustained a disadvantage (an outlay of € 50) in the reasonable belief that his enrichment was justified and that this outlay is one which he would not otherwise have made.

NOTES

ARTICLES 3:101 AND 3:102

I. Ermittlung der Bereicherung und des Nachteils: Bilanzierung oder Einzelbetrachtung?

1. Die Frage, ob es für das Vorhandensein einer Bereicherung und/oder eines Nachteils darauf ankommt, dass die Vermögensbilanz insgesamt verbessert bzw. verschlechtert wurde (die Betroffenen also mehr erhalten als weggegeben bzw. umgekehrt mehr verloren als erhalten haben), oder ob stattdessen auf den Erwerb bzw. den Verlust des jeweils einzelnen Gutes bzw. der jeweils einzelnen Leistung abzustellen ist, wird von den europäischen Rechtsordnungen unterschiedlich beurteilt. Für das FRENCH law der *enrichissement sans cause* hat Cass.civ. 23 January 2001, Bull.civ. 2001, I, no. 9 p. 6; D. 2001 I.R., 746; D. 2001 Somm.Comm. 2940, obs. *Vareille* die Frage im erstgenannten Sinn beantwortet. Der *actio de in rem verso* könne nur stattgegeben werden *dans la mesure où les prestations fournies, ayant excédé les exigences de la piété filiale, ont réalisé à la fois un appauvrissement pour l´enfant et un enrichissement corrélatif des parents*. Daran habe es gefehlt, weil der Sohn für seine den Eltern erbrachten Dienstleistungen eine Gegenleistung erhalten hatte. Das entspricht der lange schon herrschenden Rechtslehre, wonach auf die gesamte Vermögenslage des *accipiens* abzustellen ist um zu ermitteln, ob er bereichert ist: in Betracht zu ziehen sei nur die Nettobereicherung (so schon *Demogue,* Traité des Obligations en général III, no. 151 p. 241). So sieht man die Dinge auch in BELGIUM. Als Bereicherung komme nur das in Betracht, was nach Abzug des

korrespondierenden Verlustes das Vermögen des Bereicherten mehrt (*de Page*, Traité élémentaire de droit civil belge III(2)[3], no. 37 p. 47). Die Theorie der Nettobereicherung ist freilich nicht mehr völlig unumstritten (gegen sie insbesondere *Filios*, L'enrichissement sans cause en droit privé français, 145, 149.

2. Für SPAIN ist zwischen den verschiedenen *condictiones* zu unterscheiden. Die allgemeine Regel lautet, dass für die Frage, ob eine Person bereichert ist, consequent or subsequent disadvantages which this person sustains in exchange for or after the enrichment nicht zu berücksichtigen sind (*Carrasco Perera*, ADC 1988, 5, 92 and 96, der zur Begründung u.a. auf CC art. 451 verweist, wonach der gutgläubige Besitzer nicht seine Nettobereicherung, sondern den Wert der gezogenen Nutzung restituieren muss). (i) Im Rahmen der sogen. *condictio de prestación* ('*Leistungskondiktion*') wird zwischen der *condictio indebiti* (restitution of performances rendered *solvendi causa*) and restitutionary claims arising from void or avoided contracts unterschieden. (a) Für die Letzteren gilt unter CC arts. 1303-1308 das Prinzip der *restitutio in integrum*, das wiederum der Grund für die Nichtanwendung der Regeln über die *condictio indebiti* in diesen Fällen ist (*Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 203-204). Parties are obliged to reverse what they received under the void or avoided contract regardless of both their good or bad faith and any advantage or disadvantage sustained in exchange. CC arts. 1303 and 1307 do not allow for a reduction or a suppression of the principle of reciprocal restitution arising from void or avoided contracts; an introduction to Spanish law of a kind of *Saldotheorie* is, in this context, impossible (*Basozabal Arrue* loc.cit. 217; anders allerdings *Díez-Picazo*, Fundamentos I[6], 129). Das bestätigt auch ein Vergleich mit CC art. 1304 which only by way of an exception provides for a 'net enrichment approach': eine geschäftsunfähige Person ist hiernach ausdrücklich "nur insoweit zur Erstattung verpflichtet, als sie um die empfangene Sache oder den Preis bereichert ist". (Das wiederum entspricht CC art. 1163, wonach Zahlungen an eine geschäftsunfähige Person nur insoweit wirksam sind, als sie ihr zum Vorteil gereichen.) Zur Bestimmung dieser Bereicherung stellt die herrschende Lehre auf das *modelo diferencial* ab, das seinerseits auf das *in quantum factus sit locupletior*-Prinzip gestützt wird: keine Bereicherung ohne eine tatsächliche Vermögensmehrung oder Ersparnis (*Carrasco Perera* loc.cit. 105, 92-97; *Delgado Echeverría and Parra Lucán*, Las nulidades de los contratos, 286). Der bloße Empfang einer Sache oder des Preises ist deshalb noch keine Bereicherung (TS 15 February 1952, RAJ 1952 no. 288 p. 203; *Delgado Echeverría and Parra Lucán* loc.cit. 287). Die Beweislast für das Vorhandensein einer Bereicherung des Geschäftsunfähigen liegt bei der anderen Vertragspartei (TS 9 February 1949, RAJ 1949 no. 99 p. 67; anders allerdings *Díez-Picazo* loc.cit. 601). (b) Im Rahmen der *condictio indebiti* ist die Rechtslage, wenn der *accipiens indebiti* gutgläubig ist, wegen der Sonderregelung in CC art. 1897 nicht ganz klar. Hiernach muss der good-faith *accipiens* zwar eine empfangene spezifische Sache (ohne Früchte: *Díez-Picazo*, Fundamentos II[4], 519; Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Ballarín Hernández*], Código Civil II[2], 1961; abweichend *Basozabal Arrue* loc.cit. 212-213) *in natura* herausgeben. Ist das nicht möglich, so muss er einen für sie erhaltenen Ersatz aber nur insoweit auskehren, als er durch ihn noch bereichert ist. Man hat es hier mit einer weiteren Ausnahmeregel zu tun, welche auf die Nettobereicherung abstellt (*Díez-Picazo* loc.cit. 520; anders aber wohl *Carrasco Perera* loc.cit. 99 and 102. Auf eine verbliebene Netto- oder Bilanzbereicherung scheint im Kontext der *condictio indebiti* auch CC art. 1899 abzustellen: A paid by error an amount to B, with whom he does not have any legal relationship. B, however, thought that what A paid to him was the debt that C had with him; consequently, B, who is in good faith, does not proceed against C and the claim is barred by

prescription. CC art. 1899 excludes the *condictio indebiti* of A against B, but entitles A to claim against C. The legal prevailing doctrine points out that this claim (A against C) covers no more than C's 'net enrichment' (*Gullón Ballesteros*, FS Batlle Vázquez, 367, 383; *Ballarín Hernández* loc. cit. 1965). (ii) Im Anwendungsbereich der *condictio por intromisión en derecho ajeno* (restitution upon interference with another's assets; *Eingriffskondiktion*) bestimmt sich die Bereicherung grundsätzlich nach dem Marktwert des Gebrauchs der fremden Sache bzw. des fremden Rechtsguts (see CC arts. 360, 451 and 455 sowie *Carrasco Perera* loc.cit. 100 and *Basozabal Arrue* loc.cit. 264; *Díez-Picazo and de la Cámara Alvarez*, Dos estudios sobre el enriquecimiento sin causa, 122; *Díez-Picazo*, Fundamentos I[6], 130 meinen allerdings, die Bereicherung sei auch in einem solchen Fall nach der *Saldotheorie* zu bestimmen). Verfügt jemand über eine fremde Sache und ist der Verkaufserlös höher als der Marktwert, so steht zwar auch der überschießende Betrag dem Eigentümer der Sache zu, doch soll er umgekehrt dem Verfügenden aus einer *condictio* based on expenditures under CC arts. 453, 454, 360 et seq. haftbar sein, wenn der erhöhte Verkaufserlös allein auf das persönliche Geschick des Verfügenden zurückzuführen ist (*Carrasco Perera* loc.cit. 98; *Basozabal Arrue* loc.cit. 298). Im Ergebnis verbleibt es dann also bei einer Abrechnung nach dem objektiven Marktwert. Liegt der erzielte Preis unter dem wahren Marktwert, so kann die benachteiligte Person Ausgleich des Differenzbetrages nach den Regeln des Deliktsrechts verlangen (*Basozabal Arrue* loc.cit. 298). (iii) Im Anwendungsbereich der übrigen Kondiktionen (CC art. 1158(3): *condictio de regreso*, reimbursement upon payment of another's debt; and *condictio por impensas* (CC arts. 453. 454, 360 ff: restitution for expenditure on another's assets) it is generally admitted that the 'net enrichment approach' determines whether and to what extent a person is enriched (*Carrasco Perera* loc.cit. 100, who explains that the 'net enrichment approach' also governs all cases of *enriquecimiento impuestos* [aufgedrängte Bereicherungen]). CC art. 458 provides for a general rule by which the possessor is not obliged to pay the value of improvements that do not longer exist (see e.g. TS 6 December 1985, RAJ 1985 (3) no. 6520 p. 5538). Im Falle der Bezahlung fremder Schuld ist nach CC art. 1158(3) nur dann auf eine reale Nettobereicherung abzustellen, wenn der Schuldner der Zahlung durch den Dritten widersprochen hatte (TS 12 November 1987, RAJ 1987 (5) no. 8397 p. 7847; CA Pontevedra 2 January 2007, BDA JUR 2007/66713; CA Cantabria 7 November 2006, BDA JUR 2006/284920; Bercovitz Rodríguez-Cano [-*Bercovitz*], Comentarios al Código Civil[2], 1395).

3. Im System der Zahlung einer Nichtschuld versteht die ITALIAN Lehre unter *pagamento* die Leistung von Geld, die Leistung einer nur der Gattung nach bestimmten Sache und die Leistung einer spezifischen Sache (*Moscati*, Pagamento dell' indebito, 156; Cass. 2 April 1982 no. 2029, Giust.civ.Mass. 1982, fasc. 4). Leistungen, die in einem bloßen *facere* oder in der Erbringung einer Rechtshandlung bestehen, unterliegen dagegen nach überwiegender Auffassung dem Bereicherungsrecht. Im Sinne des Letzteren (CC art. 2041) kann eine "Bereicherung" vielfältige Formen haben. Sie kann in einem Vermögenszuwachs, einer Ersparnis von Aufwendungen (*D'Onofrio*, Dell'arricchimento senza causa[2], 584-586; *Barbiera*, L'ingiustificato arricchimento, 284; *Breccia*, L'arricchimento senza causa I[2], 999-1001), der Befreiung von einer Schuld (*Breccia* loc.cit. 1000) oder der Vermeidung eines Vermögensverlustes (*Gallo*, Arricchimento senza causa e quasi contratti, 30-31) bestehen, nicht jedoch in einem lediglich 'moralischen Vorteil' (*D'Onofrio* loc.cit. 586). Ursache einer Bereicherung können eine Leistung, das Verhalten eines Dritten oder ein Naturereignis sein (Cian and Trabucchi [-*Zaccaria*], Commentario breve, sub art. 2042, II 3). Bei der Feststellung einer Bereicherung scheint sich ein Wandel zu

vollziehen. An die Stelle des ursprünglich auf eine "Sache" bezogenen konkreten Bereicherungsbegriffs (sogen. *concezione reale*) tritt zunehmend die sog. *concezione patrimoniale*, unter der eine Gesamtbetrachtung der Vermögensverhältnisse nötig ist, um das Vorhandensein einer Bereicherung festzustellen (*Breccia* loc.cit. 1001).

4. PORTUGUESE CC arts. 473(2) und 479 beziehen sich lediglich auf "das Erlangte", definieren den Begriff der Bereicherung aber nicht. Sie besteht nach herrschender Auffassung in der Erlangung irgendeines Vermögensvorteils (*Antunes Varela*, Obrigações em geral I[10], 481), d.h. entweder in einer Mehrung der Aktiva, einer Minderung der Passiva, der Nutzung bzw. dem Verbrauch eines fremden Rechts oder einer fremden Sache oder der Ersparnis von Aufwendungen (*poupança de despesas*). Einige Autoren meinen, die Bereicherung bestünde in der Differenz zwischen dem Vermögen vor und nach der Wertsteigerung bzw. in dem ausgebliebenen Wertverlust (*Galvão Telles*, Obrigações[7], 195). Andere meinen, der Vermögensvorteil könne sowohl objektiv und auf die einzelne Zuwendung bezogen, d.h. als *enriquecimento real*, als auch wert- oder bilanzmäßig als *enriquecimento patrimonial* bestimmt werden (näher *Pereira Coelho*, O Enriquecimento e o dano, 36; *Antunes Varela* loc.cit.; *Almeida Costa*, Obrigações[10], 491). Die Diskussion spielt vor allem bei der Berechnung der Rückerstattungspflicht unter CC art. 479 eine Rolle. Nach CC art. 479(1) muss der Bereicherte alles herausgeben, was er auf Kosten des Verarmten erlangt hat, und zwar entweder *in specie* oder, wenn das nicht möglich ist, dem Wert nach. Unter CC art. 479(2) soll die Verpflichtung zur Rückerstattung jedoch 'das Maß der Bereicherung' zu den dort jeweils näher bestimmten Zeitpunkten nicht überschreiten. CC art. 479(2) beschränke die Haftung des Gutgläubigen auf den *enriquecimento patrimonial*, während im Rahmen von CC art. 479(1) bereits ein *enriquecimento real* genüge (*Gomes*, Conceito de enriquecimento, 109; *Menezes Leitão*, Enriquecimento sem causa[2], 829).

5. Nach herrschender GERMAN Rechtsauffassung ist der Bereicherungsanspruch auf "das Erlangte", nicht auf die (bilanzielle) "Bereicherung" des Empfängers gerichtet (*Larenz and Canaris*, Schuldrecht II(2)[13], § 71 I 1; *Koppensteiner and Kramer*, Ungerechtfertigte Bereicherung[2], § 12 I a; MünchKomm [-*Lieb*], BGB[4], § 812, no. 339; Staudinger [-*S. Lorenz*], BGB [2007], § 812, no. 65). Denn CC § 812(1) first sentence verpflichtet den Bereicherungsschuldner zur Herausgabe dessen, was er rechtsgrundlos "erlangt" hat; auch CC § 816(1) first sentence ordnet die Herausgabe des "Erlangten" an. Auch AUSTRIAN CC §§ 1041, 1431 ff stellen nicht auf eine Gesamtbetrachtung, sondern auf den einzelnen konkreten Vermögenserwerb ab. Alles, was sich als Vorteil im Vermögen des Schuldners niederschlägt, ist eine Bereicherung; auf Nutzen und Gebrauch kommt es nicht an (OGH 4 November 1981, SZ 54/164; OGH 23 November 2005, SZ 2005/168). Under GREEK law stellt jede Verbesserung der Vermögenslage eine Bereicherung dar, gleich, ob es sich um eine Mehrung der Aktiva oder eine Minderung der Passiva handelt (CA Athens 1101/1996, Arm 50 [1996] 1329; CA Athens 8350/1993, NoB 42 [1994] 86; A.P. 1095/1973, NoB 22 [1974] 777; A.P. 560/1974, NoB 23 [1975] 147). Eine Bereicherung kann auch in der Befreiung bzw. dem Nichtentstehen von Pflichten und Lasten (*Mantzoufas*, Enochikon Dikaion, 497; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 24; *Kavkas and Kavkas*, Enochikon Dikaion II(2)[7], 634) und in der Ersparnis von Aufwendungen (z.B. im Falle der Benutzung fremder Rechtsgüter) liegen (*Stathopoulos*, Axiosis adikaiologitou ploutismou, 175; *Deliyannis and Kornilakis* loc.cit. 25; A.P. 604/1973 NoB 22 [1974] 27). Zur Bestimmung des Umfanges der Bereicherung wird das gesamte Vermögen des Beklagten vor und nach dem bereichernden Vorgang verglichen; die Differenz stellt die Bereicherung dar (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no.5; CA Athen 8350/1993 loc.cit.).

6. HUNGARIAN CC § 361(1) operiert mit dem Begriff des Vermögensvorteils, nicht mit dem Begriff der Bereicherung oder dem Begriff des Empfangenen. Deshalb herrscht in der Rechtsprechung eindeutig eine bilanzielle Gesamtbetrachtung vor: ein mit dem Erworbenen korrespondierender Nachteil schließt das Vorhandensein eines Vermögensvorteils aus (BH 1999/172 [wer für einen empfangenen Wechsel Ware weggebenen hat, ist nicht bereichert]; BH 1994/552 [wenn eine Bank ohne Zustimmung des Klägers mit dessen Geld eine tatsächlich bestehende Schuld des Klägers begleicht, erleidet der Kläger in seiner Bilanz keinen Vermögensverlust]; BH 1976/220 [der klagende Frachtführer hatte dem Beklagten irrtümlich zu viel Zement ausgeliefert, dem Verfrachter aber den Gegenwert (noch) nicht erstattet; folglich war der Kläger im Verhältnis zum Empfänger bereicherungsrechtlich nicht benachteiligt]). Im BULGARIAN Bereicherungsrecht ist zu berücksichtigen, dass der Anspruch aus LOA art. 59(1) der Höhe nach auf die Verarmung der kondizierenden Partei beschränkt ist. Im Rahmen von LOA art. 55(1) spielt der Nachteil des Kondiktionsgläubigers für die Kalkulierung der Höhe seines Anspruchs dagegen keine Rolle (*Goleminov*, Neosnovatelno obogatyavane, 181).

7. Für ROMANIA ist wiederum zwischen der Leistung des Nichtgeschuldeten (*acţiunea în repetiţiune - condictio indebiti*) und der allgemeinen Bereicherungsklage (der *actio de in rem verso*) zu unterscheiden. Im Recht der *acţiunea în repetiţiune* geht es um die Rückgabe des einzelnen Leistungsgegenstandes, real oder dem Wert nach. Das subsidiäre Bereicherungsrecht dagegen stellt auf die Abschöpfung eines Wertzuwachses und damit auf die Gesamtbilanz des Empfängers ab (*Adam*, Drept civil, 214-218).

8. Im DUTCH Law finden sich Anhänger sowohl der sogenannten ‘objektiven‘ als auch der ‘subjektiven‘ Methode zur Berechnung einer Bereicherung bzw. einer Verarmung. Die Befürworter der objektiven Methode bestimmen die Bereicherung durch einen Vergleich der aktiven Vermögensbestandteile des Empfängers mit dem Zustand, in welchem sie sich ohne den bereicherungsrechtlich relevanten Vorgang befunden hätten (*Scheltema*, Verbintenissenrecht II, art. 212, no. 3 pp. 14-24; *Vriesendorp*, Verbintenissen uit de wet en Schadevergoeding[2], no. 312 p. 295; *Salomons*, WPNR 2001 no. 6467 pp. 993-995). Die objektive Methode entspricht der Lösung dieser model rules; sie verneint den Eintritt einer Bereicherung nicht allein deshalb, weil im Gegenzug eine Schuld entsteht (Asser [-*Hartkamp*], Verbintenissenrecht III[12], no. 355 p. 372). Die subjektive Berechnungsmethode (für sie u.a. *Engelhard and van Maanen*, WPNR 2001 no. 6446 p. 490) operiert dagegen mit einer auf das gesamte Vermögen abstellenden Bilanzbetrachtung. Es scheint jedoch, dass es den Vertretern dieser Auffassung vorwiegend um die Methode zur Feststellung einer Verarmung geht (niemand sei verarmt, der im Gegenzug für das weggebene Vermögen eine Forderung erwerbe); zugleich streben sie eine Konkretisierung des Billigkeitskriteriums in CC art. 6:212 an (*Engelhard and van Maanen*, NTBR 1998, 309-314). Es dürfte sich hierbei jedoch um eine Mindermeinung handeln; in der Rechtsprechung scheint sie noch nirgendwo aufgegriffen und befolgt worden zu sein.

9. In SWEDEN and DENMARK (weniger stark die Kritik in FINLAND seit *Hakulinen*, Obligationsrätt, 359; see further *Roos*, JFT 1992, 75, 80) steht man dem Konzept der ungerechtfertigten Bereicherung nicht zuletzt wegen der Schwierigkeiten kritisch gegenüber, die man dort mit dem Begriff der Bereicherung hat. (*Vinding Kruse*, Restitutioner, 158, 189 even thought that the logic of unjustified enrichment was circular, weil der Begriff zugleich Voraussetzung und Grund der Haftung sei; gegen ihn zwar *Hellner*, Obehörig vinst, 148, 194, doch meinte auch er, dass a general principle, that no one shall make an unjustified enrichment at another’s expense, be meaningless by itself). Immerhin ist klar, dass es bei der Rückabwicklung

unwirksamer Verträge nicht (nur) um Schadenersatz, sondern auch um Wertersatz geht und dass dieser je nach den Umständen des Einzelfalls (z.B. Swedish Parental Code chap 9 § 7: Haftung Minderjähriger nur auf den tatsächlich gezogenen Vorteil, wenn eine Sache nicht in specie zurückgegeben werden kann) beschränkt werden muss. Im Übrigen hat insbesondere die Swedish Rechtsprechung einiges zur Klärung des Bereicherungsbegriffs geleistet. Die meisten Fälle betrafen Überweisungen, die eine Bank irrtümlich, ohne Anweisung oder ohne zureichende Kontodeckung durchgeführt hatte (e.g. HD 30 March 1994, NJA 1994, 177; HD 17 September 1999, NJA 1999, 575; HD 30 December 1999, NJA 1999, 793). In allen Fällen hatte der Empfänger einen Anspruch gegen die Person, on whose behalf the bank had carried out the transfer. Der Supreme Court nahm jeweils an, der Empfänger sei nicht bereichert worden. Dagegen hat sich im Schrifttum zwar Kritik geregt (*Hellner*, JT 1999-2000, 409), doch spricht diese Rechtsprechung verhältnismäßig eindeutig für einen bilanzierenden Bereicherungsbegriff. Das bestätigt sich in HD 30 December 1999 loc.cit., wo eine Bereicherung mit dem Argument bejaht wurde, dass der Schuldner insolvent war und der Gläubiger längst nicht mehr mit einer Bezahlung seiner Forderung gerechnet habe.

10. ESTONIAN LOA § 1027 defines enrichment as “that which is received” from another person without legal basis. Das Gesetz sagt zwar nicht ausdrücklich, that the enrichment must have occurred “at the expense” of the other person, doch zählen Rechtsprechung und Schrifttum auch dieses Element zu den Voraussetzungen eines Bereicherungsanspruches (*Tampuu*, Lepinguväliste võlasuhete õigus, 59). Ungerechtfertigt ist es, etwas zu empfangen, was einer anderen Person zusteht (Supreme Court 16 May 2007, civil matter no. 3-2-1-46-07). Das “Erlangte” kann aus jeder Art von geldwertem Vermögensvorteil bestehen (*Tampuu*, Juridica 2002, 454). The Administrative Chamber of the Supreme Court (decision of 17 June 2004, administrative matter no. 3-3-1-17-04) hat in einem Fall, in welchem the Health Insurance Fund einer Frau ein Medikament ersetzt hatte, das nicht auf der Liste der ersatzfähigen Medikamente gestanden hatte, dem Rückforderungsanspruch des Fund entgegengehalten, dass das Medikament die Arbeitsfähigkeit der Frau erhalten und deshalb dem Fund andere Aufwendungen erspart hatte. The Civil Chamber of the Supreme Court (decision of 15 June 2005, civil matter no. 3-2-1-67-05) hat darauf hingewiesen, dass von dem Bereicherungsanspruch der Klägerin wegen unberechtigter Nutzung ihres Landes der Wert der Arbeitsleistungen als ersparte Aufwendungen abzuziehen sei, den die Beklagte dort erbracht hatte. Wer in der berechtigten Annahme, Eigentümer einer Sache zu sein, Aufwendungen auf sie macht, muss die Sache nur gegen Ersatz des Wertes dieser Aufwendungen herausgeben (LOA § 1033(2)). Ist ein Vertrag nichtig, dann können gleichartige Rückforderungsansprüche gegeneinander aufgerechnet werden, so dass im Ergebnis nur die Partei, die mehr erhalten hat, als die andere, den Saldo schuldet (Supreme Court 20 December 2005, civil matter no. 3-2-1-136-05).

II. Instances of Enrichment

11. Nach FRANZÖSISCHER Rechtsauffassung besteht eine Bereicherung in dem Erwerb eines Gutes oder einer Dienstleistung und in der Verwirklichung einer Ersparnis infolge der Vermeidung einer andernfalls erforderlichen Ausgabe (*Bénabent*, Les obligations[10], no. 488; *Malinvaud*, Droit des obligations[7], no. 499 p. 331). Jeder in Geld messbare Vorteil stellt eine Bereicherung dar (Planiol and Ripert [-*Esmein*], Traité pratique de droit civil VII[2], p. 51 no. 753). Auch in BELGIUM besteht eine Bereicherung in einem Vermögensvorteil jedweder Art. Es kann sich um den Erwerb von Gütern und Rechten oder um die Befreiung von Verbindlichkeiten handeln,

desgleichen um die Erhöhung des Wertes einer Sache, um die vorübergehende Nutzung einer Sache, um Dienstleistungen (incl. Unterricht), um die Vermeidung oder Reduzierung eines Schadens oder einer Haftung (*de Page*, Traité élémentaire de droit civil belge III(2)[3], no. 37). Dienstleistungen unterliegen in beiden Ländern dem Rückabwicklungsregime der *enrichissement sans cause*, nicht dem der *répétition de l'indu*.

12. In SPAIN versteht man unter einer Bereicherung jeden vermögenswerten Vorteil, den eine Person erlangt (*Díez-Picazo*, Fundamentos I[6], 118). Ähnlich wie im Deliktsrecht wird auch im Bereicherungsrecht unterschieden zwischen (i) *lucrum* (or *damnum*) *cessans* (a non-decrease of assets) and (ii) *lucrum emergens* (an increase of assets) (*Díez-Picazo* loc.cit. 119; see on (i) TS 6 October 2006, RAJ 2006 (5) no. 6650 p. 14529; TS 9 February 2006, RAJ 2006 (1) no. 546 p. 1303 and TS 25 May 2007 RAJ 2007 (3) no. 3437 p. 7598 [A hatte C's Hypothekenschuld gegenüber der Bank B abgelöst, um C's Eigentum zu erwerben, was jedoch scheiterte, weil auf dem Grundstück noch eine vorrangige weitere Hypothek lag; A klagte erfolgreich gegen B auf Rückzahlung; B sei, on the basis of *damnum cessans*, bereichert gewesen, weil sie mit ihrer Forderung gegen den insolventen C ausgefallen wäre] and on (ii) e.g. TS 18 November 2005, RAJ 2005 (6) no. 7733 p. 16863 [wo der Erwerb eines apartments als *lucrum emergens*, d.h. als enrichment qualifiziert wurde]). Eine Bereicherung ist sowohl die Mehrung eines Vermögens (Erwerb einer Sache oder eines Rechtes, auch eines Anwartschaftsrechtes [*Álvarez-Caperochipi*, El enriquecimiento sin causa[3], 83], Erwerb des Besitzes einer Sache [*Núñez Lagos*, El enriquecimiento sin causa en el Derecho español, 114], Werterhöhung einer Sache) als auch die Abwendung einer Vermögensminderung (Schuldtilgung; see TS 28 January 1956, RAJ 1956 (1), no. 669, p. 418). Auch die Nutzung fremder Sachen, Rechte oder Leistungen stellt eine Bereicherung dar. Vorausgesetzt wird jedoch stets, dass der Vorteil zureichend sicher in Geld bemessen werden kann (*Lacruz Berdejo*, Rev.Crit.Der.Inm. 1969, 5851). Eine Bereicherung soll ferner in dem Erwerb jedweder vorteilhaften Rechtsstellung bestehen können, darunter die vertragliche Anerkennung des Bestehens oder Nichtbestehens einer Schuld oder die Verbesserung des Ranges eines Grundpfandrechtes (*Núñez Lagos* loc.cit.). Unter dem Ausdruck *damnum cessans* oder negative Bereicherung werden die Ersparnis von Aufwendungen, der Verbrauch einer fremden Sache oder die Entgegenahme der einem anderen zustehenden Leistung zusammengefasst (*Núñez Lagos* loc.cit. 117). Auch Dienstleistungen konstituieren eine Bereicherung, z.B. Dienstleistungen, die die langjährige Lebensgefährtin eines Mannes in seinem Haushalt erbringt (TS 17 June 2003, RAJ 2003 (3) no. 4605 p. 8825) oder vertragslose Dienstleistungen eines Fachmannes (*Núñez Lagos* loc.cit. 121).

13. In ITALY ist nach wie vor umstritten, welche Bedeutung dem Recht der Zahlung einer Nichtschuld (CC arts. 2033 ff) im Rahmen von Dienstleistungen (Leistungen, die auf ein *facere* gerichtet sind) zufällt. Ein Teil der Lehre hält in solchen Fällen nur das Recht der ungerechtfertigten Bereicherung (CC art. 2041) für anwendbar (*D'Onofrio*, Dell'arrichimento senza causa[1], 264; *Breccia*, L'arricchimento senza causa I[2], 929). Andere meinen, es müsse auch in solchen Fällen zu einer Rückabwicklung kommen, doch stützt man sich dann auf ein allgemeines Prinzip; denn die Unanwendbarkeit von CC arts. 2033 ff wird auch von dieser Lehre (*Moscati*, Pagamento dell' indebito, 168) und vor allem von der Rechtsprechung (Cass. 2 April 1982, no. 2029, Giust.civ.Mass. 1982, fasc. 4; Cass. 24 November 1981, no. 6245, Giust.civ.Mass. 1981, fasc. 11; Cass. 4 February 2000, no. 1252, Giust.civ.Mass. 2000, 242) vertreten. Die Höhe des Ausgleichanspruches könne, je nach den Umständen, nach dem objektiven Wert der Dienstleistung oder nach dem für sie vereibarten Entgelt bemessen werden. Der

gutgläubige *accipiens* schuldet nach dieser Auffassung nur den jeweils niedrigeren Betrag (*Moscati* loc.cit. 175). Zur Nutzung fremder Vermögensgegenstände findet sich Einiges im Besitzrecht. Unter CC art. 1148 verbleiben dem gutgläubigen Besitzer bis zum Tag der Klageerhebung die Früchte; die nach diesem Zeitpunkt gezogenen Früchte muss er ebenso herausgeben wie diejenigen, die er bei Anwendung der Sorgfalt eines guten Familienvaters hätte ziehen können. Für den bösgläubigen Besitzer gilt dies entsprechend von Anfang an. CC arts. 1148-1152 gelten aber nicht für den detentor (Cass. 28 June 2000, no. 8796, Giust.civ.Mass. 2000, 1427; Cass. 27 February 1996 no. 1533, Giust.civ.Mass. 1996, 264). Eine Analogie kommt wohl hinsichtlich des bösgläubigen Detentors in Betracht (*Sacco*, L'arricchimento ottenuto mediante fatto ingiusto, 43, 64), während der gutgläubige Detentor nach den Regeln des Bereicherungsrechts haften soll (*Sacco* loc.cit. 185; *Breccia* loc.cit. 1001). Die Verletzung von Patent- und Urheberrechten unterliegt eigenen Regeln, die neben der Haftung auf eine angemessene Lizenzgebühr auch eine Gewinnabschöpfung vorsehen (näher zum Verhältnis von Schadenersatz und Bereicherungsausgleich in solchen Fällen u.a. Cass. 1 February 1980, no. 773, Giur.it. 1980, I, 1, 1011 und Cass. 1 October 1975, no. 3097, Foro it. 1976, I, 386 [Ablehnung der Bereicherungsklage unter dem Gesichtspunkt der Subsidiarität]). Die unerlaubte kommerzielle Nutzung eines fremden Bildes folgt ausschließlich den Regeln des Deliktsrechts (Cass. 1 December 2004, no. 22513, Giust.civ.Mass. 2004, fasc 12), das es seinerseits aber ermöglicht, Auflagensteigerungen in die Berechnung des Schadenersatzes einfließen zu lassen (CFI Monza 26 March 1990, Foro it. 1991, I, 2862). Um die Vermeidung einer ungerechtfertigten Bereicherung soll es auch in CC art. 1775 gehen, der den Verwahrer einer sache verpflichtet, aus ihr gezogene Früchte herauszugeben (Cass. 29 November 1994, no. 10209, Giust.civ.Mass. 1994, fasc. 11). Unter CC art. 1526(1) hat ein Verkäufer unter Eigentumsvorbehalt nach Rücktritt von dem Vertrag Anspruch auf eine billige Vergütung für den Gebrauch der Sache. CC art. 1591 verpflichtet den Mieter, der die Sache nicht rechtzeitig zurück gibt, zu einer Ausgleichszahlung in Höhe des vereinbarten Mietzinses; hierbei soll es sich um einen vertraglichen Anspruch handeln (Cass. 2 March 2000, no. 2328, Giur.it. 2000, 1788; Cass. 10 Febraury 1999, no. 1133, Giur.it. 2000, 56). Aus alledem wird das allgemeine Prinzip abgeleitet, dass der Rechtsinhaber vom Verletzer die von ihm unerlaubt gezogenen Früchte und den objektiven Wert der Nutzung herausverlangen kann (*Sacco* loc.cit. 59 and 64). Auch Ersparnisse sind in diesen Fällen ausgleichspflichtig (*Breccia* loc.cit. 1000; *Trimarchi*, L'arricchimento senza causa, 145-147; CA Venice 29 October 1948, Rep.Giur.it. 1949, 1760).

14. Unter AUSTRIAN CC § 1431 kann eine Bereicherung in jedem von der Verkehrsauffassung als vermögenswert angesehenen Objekt oder persönlichen Vorteil bestehen (Rummel [-*Rummel*], ABGB II(3)[3], vor § 1431 no. 7); das gilt selbst für die Information eines Maklers über eine Gelegenheit zum Kauf einer bestimmten Sache (OGH 15 Febrauary 1956, JBl 1956, 473) und für die Unterlassung von Wettbewerb (OGH 13 April 1988, WBl 1988, 436). Entsprechendes gilt für CC § 1041, siehe z.B. OGH 24 February 1998, WBl 1998, 273 (Ausnutzung des Bekanntheitsgrades einer Person) und OGH 20 March 2003, SZ 2003/24 (Stimmenimitation zu Werbezwecken im Rundfunkt). Selbstverständlich kann eine Bereicherung auch in der Ersparnis von Aufwendungen bestehen (OGH 19 November 1974, SZ 47/130; OGH 14 June 1995, SZ 68/115). Auch PORTUGAL operiert mit einem weiten Bereicherungsbegriff. STJ 24 June 2004, Processo 03B3105 z.B. sagt, dass eine Bereicherung 'prinzipiell' in der Erlangung eines vermögenswerten Vorteils jedweder Art besteht, also in der Mehrung der Aktiva, der Minderung der Passiva, der Nutzung oder dem Verbrauch einer fremden Sache oder der Ausübung eines fremden Rechts. Die Formulierung, dass der

Vorteil ‘prinzipiell‘ einen Vermögenscharakter aufweisen müsse, soll wohl die Antwort auf die Frage offenhalten, ob auch ein bloß moralischer oder spiritueller Vorteil genügen könne (verneinend *Menezes Leitão*, Enriquecimento sem causa[2], 829; bejahend *Almeida Costa*, Obrigações[10], 494). Für die Bereicherung durch Leistung stellt die Hingabe einer Sache zweifellos den Grundfall dar, doch sind Bereicherungen durch Dienstleistungen nicht aus dem Anwendungsbereich der Leistungskondiktion ausgeschlossen (*Menezes Leitão* loc.cit. 618; *Vaz Serra*, BolMinJus 82 [1959] 5, 256). Anerkannt ist ferner, dass auch Eingriffe in fremde Rechte zum Bereicherungsausgleich verpflichten (*Pereira Coelho*, O enriquecimento e o dano, passim; *Oliveira Ascensão*, Direito de autor e direitos conexos, 628; *Menezes Leitão* loc.cit. 684). Die Rechtsprechung hat das für Fälle der Verletzung von Marken und Patentrechten bereits bestätigt (STJ 24 February 2005, Processo 04B4601; STJ 22 April 1999, CJ [ST] VII [1999-2] 58-60), noch nicht aber für Verletzungen des allgemeinen Persönlichkeitsrechts. Keine Bereicherungshaftung löst die Bereicherung durch ein Naturereignis aus (*Menezes Leitão* loc.cit. 827). Das wird aus CC art. 1327 geschlossen, wonach dem Eigentümer alles gehört, was seiner Sache durch ein Naturereignis hinzugefügt wurde.

15. “Erlangt“ i.S.v. GERMAN CC § 812(1) ist alles, was gegenständlich fassbar ist; der Wert spielt keine Rolle (*Medicus,* Schuldrecht II[14], no. 673; MünchKomm [-*Lieb*], BGB[4], § 812, no. 342; Staudinger [-*S. Lorenz*], BGB [2007], § 812, no. 65). Das “erlangte Etwas“ kann aber ebensogut nichtgegenständlicher Natur sein. Es kann sich also z.B. handeln um den Erwerb von Forderungen, dinglichen Rechten und Besitz, um die Inanspruchnahme von Dienst- und Werkleistungen sowie um den Verbrauch, Gebrauch oder Nutzung fremder Sachen oder Rechte. Dasselbe gilt für die Befreiung von Verbindlichkeiten und von dinglichen Lasten (Palandt [-*Sprau*], BGB[67], § 818, nos. 16 ff.). CC § 812(2) stellt ausdrücklich klar, dass das Erlangte auch in der vertraglichen Anerkennung des Bestehens oder Nichtbestehens eines Schuldverhältnisses bestehen kann. Ein vermögenswertes “etwas” i.S.v. CC § 812 erwirbt deshalb auch der Gläubiger eines abstrakten Schuldversprechens (BGH 22 July 2008, ZIP 2008, 1669). Die Rechtslage unter GREEK CC art. 904 entspricht in allen wesentlichen Punkten derjenigen in Germany (z.B. *Stathopoulos*, Axiosis adikaiologitou ploutismou, 176; Georgiades and Stathopolos [-*Stathopoulos*], art. 904, no. 10).

16. Auch im HUNGARIAN CC fehlt eine Legaldefinition der Begriffe Bereicherung bzw. Nachteil. Die Bereicherung bzw. der Nachteil müssen nach CC § 361(1) allerdings zwingend Vermögenscharakter haben. Dazu gehören z.B. der Besitzerwerb, der Erwerb von Vermögensrechten und Anwartschaften, die Erweiterung eines bereits bestehenden Rechts, die Ersparnis von Kosten und Aufwendungen, die Befreiung von Verbindlichkeiten und Lasten, die Inanspruchnahme der Arbeitskraft eines anderen und die Nutzung einer fremden Sache (Petrik [-*Bíró*], Polgári jog II[2], 650; Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1391). Dienst- und Werkleistungen stellen deshalb einen besonders häufigen Fall der Anwendung bereicherungsrechtlicher Vorschriften dar, weil die entsprechenden Verträge gemäß CC § 205(2) schon dann nichtig sind, wenn die Parteien keinen Preis ausgemacht hatten (z.B. BH 1998/39 [Forschungsvertrag], BH 1990/30, BH 1992/188 und BH 2002/29 [Werkvertrag]); die Vorschrift betrifft aber gleichermaßen auch andere Verträge, z.B. BH 2001/168 (Pacht), BH 1979/214 (Kauf), BH 1996/163 (Planung) und BH 1979/161 (Kommissionsvertrag). Die Aufwendung von Arbeit als solche begründet dann keine Bereicherung, wenn sie nicht zu einer Wertsteigerung führte oder für den Empfänger in dem Sinn nutzlos war, dass er keine Kostenersparnis davon hatte (BH 1997/400 und BH 1983/291). Vgl. ferner BH 2002/29 (Ersatz für die

Materialkosten für den Bau eines Holzhauses; kein Ersatz für die Arbeitsleistung) und BH 1997/483 (Investition in eine Immobilie trotz gegenteiliger vertraglicher Absprache; Vorrang des Vertrages, außerdem keine Werterhöhung des Grundstücks). Eine Bereicherung kann andererseits auch in der unberechtigten Nutzung einer fremden Werbefläche liegen (CFI Csongrád, 1. Gf. 40 177/2002/3). Der Nachteil bzw. die Entreicherung werden nach denselben Kriterien ermittelt wie die Bereicherung. Einen bereicherungsrechtlich relevanten Nachteil erleidet z.B. ein Arbeitnehmer, dessen Arbeitgeber von seinem Gehalt das von der Behörde für einen bestimmten Zeitraum ausgezahlte Arbeitslosengeld abzieht (BH 1997/590). Denn die Entreicherung kann sowohl in einer tatsächlichen Vermögensminderung als auch im Ausbleiben einer Vermögensvermehrung bestehen (*Bíró* loc.cit. 651).

17. Für BULGARIA ist gesagt worden, eine Bereicherung könne sich auf dreifache Weise einstellen: durch einen Vermögenszuwachs, durch eine Minderung der Passiva und durch eine Ersparnis von Kosten (*Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 597). Noch keinen Vermögenszuwachs stelle aber der bloße Besitzerwerb dar; hinzukommen müsse eine Nutzung der Sache oder die Ziehung von Früchten aus ihr (*Goleminov*, Neosnovatelno obogatyavane, 99). Der Begriff des ‘grundlos Empfangenen‘ (LOA art. 55(1)) umfasst Geld, bewegliche und unbewegliche Sachen, die dem *accipiens* mit dem Ziel der Eigentumsübertragung gegeben wurden, Wertpapiere und Forderungen (*Vassilev* loc.cit. 581). Ersatz für entgangene Nutzungen kann nur im Rahmen der allgemeinen Bereicherungsklage (LOA art. 59) verlangt werden. Der wichtigste Fall der Minderung der Passiva ist die Tilgung von Schulden des Bereicherten gegenüber einem Dritten, z.B. die Tilgung einer Unterhaltsschuld (Auslegungsentscheidung no. 12 des Obersten Gerichtshofs of 22 March 1971, Plenum).

18. Das (subsidiäre) Bereicherungsrecht der ROMANIAN Rechts stellt einerseits auf einen Vermögenszuwachs und andererseits auf eine Vermögensminderung ab. Es wird auch auf die Rückabwicklung von *facere*-Obligationen angewandt (*Dogaru and Drăghici*, Drept civil, 365). Eine Bereicherung setzt einen in Geld messbaren Vermögensvorteil voraus. Bereichert ist z.B. eine Miteigentümergemeinschaft, wenn ein Mieter Verwendungen auf eine im gemeinschaftlichen Eigentum der Beklagten stehende Sache macht (*Adam*, Drept civil, 215). Einen Bereicherungsanspruch kann auch die Erbringung vertraglich nicht geschuldeter Mehrleistungen begründen, sofern sie zur Durchführung der eingegangenen Verpflichtung erforderlich sind (Supreme Court 2 December 2004, commercial chamber, decision no. 5197). Die *actio de in rem verso* kann ferner auf eine unberechtigte Grundstücksnutzung gestützt werden (Supreme Court 23 March 2006, commercial chamber, decision no. 1179), nicht aber auf die bloße Vorenthaltung einer rückgabepflichtigen Sache (Supreme Court 24 January 2007, commercial chamber, decision no. 331: Anspruch nur aus Deliktsrecht). Eingriffe in fremde Persönlichkeitsrechte werden grundsätzlich nicht bereicherungs-, sondern deliktsrechtlich ausgeglichen (*Adam* loc.cit. 260).

19. Ein bereicherungsrechtlicher Anspruch setzt natürlich auch in the NETHERLANDS eine Bereicherung voraus (Parlementaire Geschiedenis VI, 829). Nach herrschender Meinung ist dieser Begriff nicht in erster Linie juristisch, sondern ökonomisch zu verstehen, und dies vor allem deshalb, weil der Bereicherungsanspruch auf Schadenersatz zielt und weil Schadenersatz gemäß CC art. 6:103 in Geld zu erbringen ist. Der Wert der Bereicherung und der Wert der Verarmung begrenzen diesen Anspruch, der außerdem dem Gebot der *redelijkheid* genügen muss. Nicht bereichert ist ein Mann, wenn der zukünftige Schwiegervater Geld an den Verkäufer eines Bauernhofes nur deshalb überweist, um den Verkäufer dazu zu überreden, den Hof (zum regulären Marktpreis) an den jungen Mann zu verkaufen, der sich anschließend

aber doch nicht zu der Ehe entschließen kann (CA Amsterdam 24 October 1956, NedJur 1957 no. 368 p. 685; see illustration 4 above). Die Erscheinungsformen einer Bereicherung (*verrijking*) sind zahlreich und entziehen sich einer allgemeinen Definition; jede Vermögensmehrung ist eine Bereicherung (Parlementaire Geschiedenis VI, 831). Zahlreiche Beispiele werden genannt: die Vermeidung eines drohenden Schadens (Parlementaire Geschiedenis VI loc.cit.; HR 10 December 1999, LJN no. AA3841), der Empfang von Geld, Gütern oder Dienstleistungen, die Einräumung eines Kredits (CFI Zutphen 29 April 2004, LJN no. AO8611), der gesetzliche Eigentumserwerb an einem Gebäude (HR 29 January 1993, NedJur 1994, no. 172 p. 728), während einer Ehe unbezahlt erlangte Arbeit (HR 4 December 1987, NedJur 1988, no. 610 p. 2162), Verbesserungen einer Mietwohnung (HR 25 June 2004, RvdW 2004, no. 89 p. 791; HR 30 September 2005, RvdW 2005, no. 106 p. 961) oder eines Betriebsgebäudes (HR 25 June 2004, RvdW 2004, no. 89 p. 791), eine Bodensanierung (HR 25 March 2005, RvdW 2005, no. 49 p. 487), die Ersparnis von Aufwendungen (HR 14 October 1994, NedJur 1995, no. 720 p. 3629; Asser [-*Hartkamp*] Verbintenissenrecht III[12], no. 354a p. 371), das Freiwerden von einer Schuld (*Vriesendorp*, Verbintenissen uit de wet en Schadevergoeding, no. 312, p. 295), die Nutzung einer fremden Sache (*Scheltema*, Verbintenissenrecht II, art. 6:212, no. 3) der Erwerb von goodwill und eines zusätzlichen Kundenstamms (HR 15 March 1996, NedJur 1997, no. 3 p. 22-37; but see also HR 2 February 2001, NedJur 2001, no. 319 p. 2389). Zusätzlich zu dem Vorhandensein einer Bereicherung ist stets zu prüfen, ob ein Ersatz für sie angemessen (*redelijk*) ist. Daran fehlt es z.B. im Falle des Bauens auf fremden Grund, wenn der Eigentümer von diesem Bau keinen Nutzen hat, ihn vielmehr abreißt und ein neues Gebäude errichtet (HR 30 September 2005, RvdW 2005, no. 106 p. 961).

20. Aus ESTONIAN LOA § 1032(2) (wonach Wertersatz geschuldet ist, wenn das Erlangte nicht in Natur herausgegeben werden kann) wird geschlossen, dass eine Bereicherung in einem geldwerten Vermögensvorteil besteht. Typische Beispiele liefern der Erwerb von Geld, Eigentum oder Besitz, der Erwerb eines Rechts oder eines Gesellschaftsanteils. Schon eine bloße Eintragung im Grundbuch genügt aber für das Vorhandensein einer Bereicherung (Supreme Court 1 December 2005, decision no. 3-2-1-129-05). Weitere Beispiele sind die Befreiung von einer Schuld und die Ersparnis von Aufwendungen. Für Verwendungen auf fremde Sachen findet sich in LOA § 1042 eine Sonderreglung, wonach bei der Feststellung einer Bereicherung u.a. zu berücksichtigen ist, ob die Verwendungen aus der Sicht des Eigentümers nützlich waren (näher Supreme Court 21 March 2005, decision no. 3-2-1-16-05). Auch der Erhalt eines Schuldanerkenntnisses begründet eine Bereicherung (Supreme Court 23 January 2006, decision no. 3-2-1-146-05), desgleichen Dienstleistungen, der Eingriff in fremde Rechte (see LOA § 1037(1)) und die Vorenthaltung des Besitzes (LOA §§ 1037-1040).

21. For ENGLAND and IRELAND *Tettenborn*, Restitution[3], 6 proposes that a defendant ought to be regarded as being enriched where (i) he receives money; (ii) he obtains property with a monetary value; (iii) he is saved expense or loss that would otherwise be incurred; (iv) he has property improved so that it is worth more; (v) services are rendered to him. However (i) can be modified in the case of trusts – if monies are obtained through a valid trust and the recipient accepts that he has no power to deal with it except in accordance with the terms of that trust, he will not be regarded as being enriched (*Portman Building Society v. Hamlyn Taylor Neck* [1998] 4 All ER 202; see also *Tettenborn* loc.cit. 6-13. The receipt of property is also unproblematic – where someone acquires ownership of property or land then there is a gain which is equivalent to the value of the asset. Positive and negative enrichment can increase net

assets, with a large number of claims in restitution arising out of claims for expenses saved, such as contribution or the compulsion to pay the defendants liabilities. These will include claims which were based on releasing someone from an obligation, such as paying off a joint mortgage by the one party (*Ker v. Ker* (1869) 4 IrEqR 15). Improving the defendant's property can also enrich him. This can arise in two ways – necessitous intervention or through beneficial service. In the former, the defendant ought to be precluded from denying that he is richer – he may of course have other arguments as to why he should not make restitution, such as his not wanting the improvement, but this should not allow his saying that he has not been enriched at all (*Tettenborn* loc.cit. 199-212). An example may be seen where A loses his dog, only for B to find it. B feeds and cares for the dog until A reclaims it. Can B claim reimbursement for feeding the animal? However beneficial, Irish cases have tended to hold necessitous payment or beneficial services do not give rise to relief (*O'Callaghan v. Ballincollig Holdings Ltd*, unreported, 31/3/93 (*Blayney* J)). There are notable exceptions to the general rule of non recovery, namely the agency of necessity (*Flannery v. Dean* [1995] 2 ILRM 393); bailment (*The Winson* [1982] AC 939); trustees for reasonable costs; liquidator and receivers; supplying necessaries to incompetents (*Re Pike* (1889) 23 LR Ir 9 – police have claim for restitution to costs incurred in looking after the house of a woman prior to her relatives coming forward); Sale of Goods (Ireland) Act 1893, s. 2 (an incompetent is liable to pay a reasonable price for necessary goods sold to him); performance of a public duty. Peculiar to Ireland is the notion of salvage – a salvager may have claim to restitution in law. Thus where a person with an interest in property incurs necessary expense for its preservation to the advantage of others also interested, he may obtain restitution of the enrichment of the other parties. This can also be applied to volunteers (*Rathdonnell (Lord) v. Colvin* [1952] IR 297). As regards services, it may be argued that where services are rendered which in effect improve the property then they may count as an enrichment. The rendering of services to the defendant can count as enrichment but are the most difficult to quantify. Problems could arise where there has been no actual accretion to the wealth of a defendant. *Birks* favoured pure services being regarded as enrichment independent of any financial "end product" (*Birks*, An Introduction to the Law of Restitution[1], 109. This would apply where services were in fact rendered to the defendant, especially where requested or freely accepted. Thus in *Planché v. Colburn* (1831) 8 Bing 14 a book was commissioned and cancelled. The defendants were disbarred from claiming a non-benefit, they were in fact enriched and liable to make restitution. Irish courts will also regard services as capable of bringing an enrichment, as in the case of *Premier Dairies v. Jameson*, High Court, 1/3/1983, *McWilliam* J, who stated that there is no difference in principle where benefits were given to the defendant at the cost to the plaintiff (unreported case, see *O'Dell*, Annual Review of Irish Law [1997] 609-610).

III. Disadvantage

22. Die FRENCH Rechtslehre bezeichnet den für einen Anspruch aus *enrichissement sans cause* erforderlichen Nachteil des Klägers als Verarmung (*appauvrissement*). Eine Verarmung besteht in einem tatsächlichen Vermögensverlust oder in dem Entgang eines Gewinns (*Bénabent*, Les obligations[10], no. 487 p. 333; *Terré/Simler/Lequette*, Les obligations[9], p. 1022 no. 1067). Auch eine unbezahlt erbrachte Dienstleistung begründet eine Verarmung (*Malinvaud*, Droit des obligations[7], no. 499 p. 331; *Malaurie/Aynès/Stoffel-Munck*, Les obligations[2], p. 569 no. 1064; *Terré/Simler/Lequette* loc.cit.), z.B. die Leistung eines Genealogen, der einen Erben sucht (CFI Vannes 11 December 1967, GazPal 1968, 1, 162) oder eine vertragslose

Lehrtätigkeit (*Mazeaud and Chabas*, Leçons de droit civil II(1)[6], p. 804 no. 699). Der Begriff der Verarmung entspricht spiegelbildlich dem der Bereicherung (*Malaurie/Aynès/Stoffel-Munck* loc.cit.). Die Rechtslage in BELGIUM stimmt mit der in France überein (*de Page*, Traité élémentaire de droit civil belge III(2)[3], no. 38). Jeglicher Wertverlust stellt eine Verarmung dar, ganz gleich, ob er auf der Hingabe von Zeit, Arbeit oder Kapital oder auf der Eingehung einer Verbindlichkeit beruht (*Dekkers*, Précis de droit civil belge II, p. 180 no. 314).

23. Auch in SPAIN the plaintiff must sustain an *empobrecimiento* (an impoverishment) which is linked to the enrichment of the defendant (*Díez-Picazo*, Fundamentos I[6], 120; TS 15 June 2004, RAJ 2004 (3) no. 3847 p. 7922). Ein *empobrecimiento* ist jeder ökonomische Nachteil. Es kann sich z.B. handeln um die Lieferung einer Sache, um die Erbringung einer Dienstleistung oder um einen entgangenen Gewinn, etwa eine entgangene Nutzungsgebühr (*Díez-Picazo* loc.cit. 121; *Núñez Lagos*, El enriquecimiento sin causa en el Derecho español, 125). Die Rechtsprechung unterscheidet zumeist zwischen einer Verarmung infolge eines *daño positivo* und einer Verarmung by frustration of a profit (TS 15 December 2005, BDA RJ 2005/1223; TS 15 June 2004, RAJ 2004 (3) no. 3847 p. 7922). An einer Verarmung soll es aber fehlen, wenn jemand im eigenen Interesse, im eigenen Namen und zum eigenen Vorteil die Bereicherung eines anderen verursacht (TS 22 March 1978, RAJ 1978 (1) no. 1055 p. 920 [Verwendungen eines Besitzers auf das Haus eines anderen, in dem er unrechtmäßig wohnte]). Eine Bereicherungsklage soll auch dann scheitern, wenn der Nachteil seine Ursache in einer unmoralischen oder rechtsiwdrigen Handlung des Klägers hat (*Díez-Picazo and Gullón*, Sistema II[9], 578 mit dem Beispiel einer Großmutter, die einer gerichtlichen Entscheidung zuwider die Kinder nicht herausgibt; sie könne nicht später von den Eltern Ersatz der Unterhalts- und Ausbildungskosten verlangen).

24. ITALIAN CC art. 2041 spricht von der Entreicherung als Schaden. Es handelt sich um den Verlust oder die Wertminderung von Vermögensgegenständen (*Breccia*, L'arricchimento senza causa I[2], 1004) und um entgangenen Gewinn (*Trabucchi*, Arricchimento (azione di),, 52, 71; *Breccia* loc.cit. 1005). Auch der objektive Wert einer erbrachten Leistung oder einer persönlichen Anstrengung zugunsten eines Anderen wird als Entreicherung angesehen (*Breccia* loc.cit.), desgleichen die unerlaubte Nutzung einer Sache durch einen Fremden (*Breccia* loc.cit. 1006; *Trimarchi*, L'arricchimento senza causa, 48-49; anders noch *Trabucchi* loc.cit.) und das Verletztwerden in einem eigenen Recht (so jedenfalls *Gallo*, Arricchimento senza causa e quasi contratti, 35). Die Entreicherung muss der Bereicherung entsprechen: zwischen beiden muss ein Kausalzusammenhang bestehen, und ersatzpflichtig ist nur der jeweils niedrigere Betrag (*D'Onofrio*, Dell'arricchimento senza causa[2], 589).

25. PORTUGUESE CC art. 473 setzt voraus, dass die jeweilige Bereicherung "auf Kosten" eines anderen (*à custa de outrem*) erlangt worden ist. Einer "Verarmung" oder eines "Schadens" bedarf es nach dem Wortlaut dieser Bestimmung zwar gerade nicht (näher *Gomes*, Conceito de enriquecimento, 402), doch muss mit der Bereicherung des Beklagten irgendein *sacrifício económico* des Klägers in Kausalzusammenhang stehen (*Almeida Costa*, Obrigações[10], 495; *Antunes Varela*, Obrigações em geral I[10], 488). Dass es für den Anspruch aus ungerechtfertigter Bereicherung nicht auf einen Schaden ankommt, spielt vor allem in der Rechtsprechung zum Bereicherungsausgleich bei Verletzung fremder Rechte eine wichtige Rolle (STJ 24 Februray 2005, Processo 04B4601; STJ 23 March 1999, CJ [ST] VII [1999-1] 172). Der Begriff der 'Verarmung' schleicht sich allerdings auch heute noch gelegentlich in Formulierungen sowohl der Lehre (z.B. *Galvão Telles*, Obrigações[7], 198) als auch der Rechtsprechung ein (z.B. STJ 20 March 2001, CJ [ST]

IX [2001-1] 176). In AUSTRIA legt man Wert auf die Feststellung, dass Bereicherungsansprüche keinen Schaden voraussetzten (OGH 16 June 1972, SZ 44/92; OGH 17 March 1982, SZ 55/37). Bei der Leistungskondiktion habe der Gläubiger zwar stets etwas weggegeben, doch seien im Rahmen von CC § 1041 Fälle denkbar, in welchen dem Vorteil des Bereicherten kein Verlust des Gläubigers gegenüberstehe, z.B. dort, wo unerlaubte Werbung mit dem Bild eines Tenors getrieben und dadurch sein Bekanntheitsgrad erhöht wird (OGH 23 October 1990, WBl 1991, 137).

26. GERMAN CC § 812(1) verpflichtet denjenigen zur Herausgabe, der etwas "auf Kosten" des Bereicherungsgläubigers erlangt hat. Für die Leistungskondiktion hat dieses Merkmal keine eigenständige Bedeutung; eine Leistung erfolgt immer "auf Kosten" des Leistenden (*Fikentscher and Heinemann*, Schuldrecht[10], no. 1421; *Medicus*, Schuldrecht II[14], no. 632; *Koppensteiner and Kramer*, Ungerechtfertigte Bereicherung[2], § 4 IV 1; BGH 29 May 1967, BGHZ 48, 70, 73; BGH 27 May 1971, BGHZ 56, 228, 239). In den Fällen der sogen. Eingriffskondiktion liegt eine Bereicherung "auf Kosten" eines anderen vor, wenn der Schuldner in den *Zuweisungsgehalt* eines Rechts des Gläubigers eingegriffen hat (sogen. "Zuweisungstheorie", see *Medicus* loc.cit. no. 713; *Larenz and Canaris*, Schuldrecht II(2)[13], § 69 I 1 b; BGH 24 November 1981, BGHZ 82, 299, 306; BGH 9 March 1989, BGHZ 107, 117, 120). Es genügt, das der Bereicherungsgegenstand unter Ausnutzung einer geschützten Vermögensposition des Berechtigten erlangt wurde (MünchKomm [-*Lieb*], BGB[4], § 812, no. 249; *Medicus* loc.cit.; *Koppensteiner and Kramer* loc.cit. § 9 I 5). Der Bereicherungsschuldner ist folglich dann auf Kosten des Bereicherungsgläubigers bereichert, wenn er eine Nutzungs- oder Verwertungsmöglichkeit in Anspruch nimmt, für deren Einräumung der Berechtigte hätte Zahlung verlangen können (*Lieb* loc.cit. no. 250). Es kommt aber nicht darauf an, dass der Bereicherungsgläubiger die Sache auch tatsächlich selbst nutzen wollte; die abstrakte Nutzungs- und Verwertungsmöglichkeit genügt (*Lieb* loc.cit.; Erman [-*Westermann and Buck-Heeb*], BGB II[12], § 812, no. 68). GREEK CC art. 904 verlangt, dass die Bereicherung aus dem Vermögen einer Person oder zu deren Schaden erfolgt ist. Diese Formulierung des Gesetzes gilt heute als wenig gelungen (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, nos. 17, 19; *Deliyannis and Kornilakis*, Eidiko Enochiko Dikaio III, 2). Entscheidend ist das Vorhandensein eines Schadens (*Stathopoulos*, Axiosis adikaiologitou ploutismou, 194). Der Begriff wird im Recht der ungerechtfertigten Bereicherung aber sehr viel weiter verstanden als im Deliktsrecht. Insbesondere bedarf es keines realen Verlustes; die bloße Rechtsverletzung genügt (Georgiades and Stathopoulos [-*Stathopoulos*], art. 904, no. 20; *Deliyannis and Kornilakis* loc.cit. 28). Man spricht von einem bloß "abstrakten" oder "hypothetischen" Schaden (CA Athens 2073/1987, NoB 35 [1987] 1067).

27. In HUNGARY kommt es wesentlich auf eine tatsächliche Vermögensminderung oder auf das Ausbleiben einer Vermögensmehrung an (Petrik [-*Bíró*], Polgári jog II[2], 651). Auch die für einen anderen geleistete Arbeit begründet jedoch einen Nachteil, und zwar unabhängig davon, ob der Kläger andere Verdienstmöglichkeiten gehabt hätte (Szladits [-*Személyi*], Magyar magánjog IV, 756). Eine Bereicherung ist folglich auch dann auf Kosten des eines anderen erfolgt, wenn dieser keinen tatsächlichen Vermögensnachteil erlitten hat. Das ist z.B. bei der rechtsgrundlosen Nutzung eines fremden Grundstücks der Fall, dessen Eigentümer es weder vermieten noch selber nutzen wollte (*Vékás*, JbOstR XIX [1978] 243, 246). Allerdings ist in solchen Fällen der Anwendungsvorrang der CC §§ 193-195 (über den rechtsgrundlosen Besitz) vor dem Bereicherungsrecht zu beachten (*Vékás*, FS György, 331, 352). BULGARIA verlangt eine Verarmung des Anspruchstellers. Der Begriff wird aber sehr weit

verstanden und umfasst neben der Minderung der Aktiva, dem Zuwachs der Passiva, der Wertminderung einer Sache und dem entgangenen Gewinn auch die Erbringung von Dienstleistungen (*Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 598). So liegen die Dinge auch in ROMANIA. Lehrbuchbeispiele nennen den unbezahlt gebliebenen Unterricht und andere Arbeits- und Dienstleistungen ebenso wie Zahlungen, Schuldbefreiungen, Wertminderungen einer Sache und die entgangene Nutzung einer Sache (*Adam*, Drept civil, 216; *Dogaru and Drăghici*, Drept civil, 373.

28. Im DUTCH law muss die verarmte Person wiederum einen "Schaden" erlitten haben, denn das Bereicherungsrecht gewährt einen Anspruch auf Schadensersatz. Erneut geht es um eine Minderung der Aktiva, um eine Zunahme der Passiva und um die Erbringung von Dienstleistungen. Der Schaden kann in der Aufwendung von Zeit oder Vermögen und in entgangenem Gewinn bestehen. Es soll allerdings ein Mann keinen Schaden erlitten haben, der auf dem Grundstück seiner inzwischen von ihm getrennt lebenden Frau Arbeitsleistungen erbracht hat, wenn nicht feststeht, dass er ohne diese Arbeiten andere Einkünfte erzielt hätte (CA Leeuwarden 27 March 2002, NedJur 2002, no. 575 p. 4270). Verarmt soll dagegen eine Person sein, die ein ihr zustehendes zinsloses Darlehen nicht abruft (HR 26 February 1986, NedJur 1986, no. 776 p. 2945). Siehe zum Begriff des Schadens im Kontext des Bereicherungsrechts ferner Asser (-*van der Grinten and Kortmann*), De Vertegenwoordiging I[8], no. 139 p. 164; Parlementaire Geschiedenis VI, 829; Asser (-*Hartkamp*), Verbintenissenrecht III[12], no 354 p. 370; HR 22 November 2002, NTBR 2003, 223 und HR 11 April 1986, NedJur 1986 no. 622 p. 2313.

29. In ESTONIA ergibt sich der Begriff des Nachteils ganz einfach aus der Umkehrung dessen, was eine Bereicherung konstituiert; das Ausbleiben eines Vermögensvorteils, die Belastung mit einer Schuld oder die Aufwendung von Kosten. Es ist allerdings möglich, tatsächlich aufgewandten Kosten diejenigen gegenüber zu stellen, die ohne den entreichernden Vorgang angefallen wären, und, falls Letztere höher gewesen wären, einen Nachteil zu verneinen (Supreme Court 17 June 2004, decision no. 3-3-1-17-04 in administrative matters).

30. In the NORDIC countries existieren allgemeine Defintionen von Bereicherung und korrespondierendem Nachteil nicht, die Analyse erfolgt jeweils fallgruppenweise (see notes under VII.–4:101 (Instances of attribution)). Im Falle des unerlaubten Gebrauchs fremder Sachen a reasonable compensation for the value of using the asset is assessed. Das Schrifttum spricht aber nicht von ungerechtfertigter Bereicherung, sondern von Wertersatz. Wertersatz sei eine Ausgleichsform "zwischen" Schadenersatz- und Bereicherungshaftung (*Karlgren*, Obehörig vinst och värdeersättning, 55). Die SWEDISH Rechtsprechung freilich hat die Ausgleichspflicht für die Nutzung fremder Sachen durchaus based on the "principles of unjustified enrichment" (HD 8 February 1993, NJA 1993, 13; HD 2 July 2007, NJA 2007, 519). In diesen Entscheidungen klingt auch die dichotomy of enrichment and disadvantage an, welche VII.–3:101 und 3:102 zugrundeliegt. Darauf, ob der Rechtsinhaber sein Gut tatsächlich nutzen wollte, kommt es in allen Nordic countries nicht an (*Hellner*, Obehörig vinst, 229; *Hellner and Radetzki*, Skadeståndsrätt[7], 420; *Vinding Kruse*, Erstatningsretten[5], 278; *Ussing*, Erstatningsret, 174; *Roos*, JFT 1992, 75, 84). Strittig ist aber geblieben, ob Merkmale wie "Nachteil" oder "auf Kosten" überhaupt eine sinnvolle Funktion ausüben würden; schließlich müsse jede Bereicherung von jemandem stammen (so *Hellner*, Obehörig vinst, 170; anders *Vinding Kruse*, Restitutioner, 158).

31. In IRELAND any enrichment must be at the plaintiff's expense (see *In re PMPA Insurance Co Ltd* [1986] ILRM 524, per *Lynch* J, where a bank misdirected funds

intended for one company to another, which the disadvantaged party could claim under restitution). This has been described as the notion of interceptive subtraction (*O'Dell*, Annual Review of Irish Law (1997), 611). Where defendants are enriched by the services of a particular plaintiff, who acted under a mistake, that enrichment will be unjust and the defendants obliged to make restitution (*Rogers v. Louth County Council* [1981] ILRM 144; *O'Connor v. Listowel Urban District Council* (1957) Ir.Jurist R. 43). A defendant who deliberately breaks a contract because he calculates that a profit will still be made once the damages for breach of contract are subtracted will be guilty of an unjust enrichment (*Hickey & Company Ltd v. Roches Stores (Dublin) Ltd (No.1)* unreported, 14/7/76 (*Finlay* P)), see *Clark*, Contract Law in Ireland[4], 464.

Illustration 2 is taken from Cass.civ. 16 May 2006, JCP 2006, IV, 2277; **illustration 3** is from *McDonald v. Coys of Kensington* [2004] EWCA Civ 42, reported *sub nom. Cressman v. Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775; **illustration 4** is from CA Amsterdam 24 October 1956, NedJur 1957 no. 368 p. 685; **illustration 6** is from HR 25 März 2005, JOL 2005, 180; RvdW 2005, no. 49*;* **illustration 9** is inspired by BGH 7 January 1971, BGHZ 55, 128; **illustration 12** is from BH 1991/278; similarly BH 1992/584; **illustration 14** draws on *Seager v Copydex* [1967] 1 WLR 923 (CA); **illustration 15** is inspired by HR 30 September 2005, RvdW 2005, no. 106 p. 961.

CHAPTER 4: ATTRIBUTION

VII.–4:101: Instances of attribution

An enrichment is attributable to another's disadvantage in particular where:

(a) an asset of that other is transferred to the enriched person by that other;
(b) a service is rendered to or work is done for the enriched person by that other;
(c) the enriched person uses that other's asset, especially where the enriched person infringes the disadvantaged person's rights or legally protected interests;
(d) an asset of the enriched person is improved by that other; or
(e) the enriched person is discharged from a liability by that other.

COMMENTS

A. General

Overview. This Article, together with the following articles of this Chapter, addresses a further element of the claim for reversal of an unjustified enrichment, namely the requirement that the enriched person's enrichment is attributable to the claimant's disadvantage. It determines that in certain (relatively straight-forward) circumstances the required connection between enrichment and disadvantage is established. Broadly speaking, it addresses those cases in which the disadvantaged party has directly conferred the enrichment on the enriched party or where the enriched party has extracted the enrichment directly from the disadvantaged party.

Particular instances of attribution. The particular cases catered for in the Article are identified as instances of attribution of enrichment and disadvantage. They are applications of the general requirement of attribution within specific contexts. In this regard they flesh out in concrete cases what is meant by attribution, thus giving more structure and content to the application of the basic rule. Not least for reasons of efficiency they necessarily concentrate on situations which may be formulated at a relatively high level of abstraction.

Non-exhaustive list. The Article purports to do no more than provide a positive list of some scenarios in which a given enrichment is attributable to a given disadvantage. The notion of "attribution" is not defined, nor is the list provided by the Articles in this Chapter an exhaustive enumeration. The latter emerges from the wording of this Article, which indicates an attribution "in particular" where the enumerated instances apply. It should be evident, however, that in so far as a scenario is addressed by the Articles in this Chapter and attribution is affirmed by them, these rules decide the point. The list is imperative, so far as it goes, and not merely suggestive.

Other scenarios. Accordingly an enrichment may be connected to a disadvantage in a manner which is not set out in this or the following Articles. A case in point is where an asset is transferred from the disadvantaged person to the enriched person not by the act of the disadvantaged person or the enriched person or by the act of a third party, but by an act of nature. There will always be a sufficient element of attribution where enrichment and disadvantage are in mirror image, the claimant's right or enjoyment having become the enriched person's (with no change of form taking place), regardless of how this has been

brought about. These Articles therefore allow for a residual set of scenarios which may be worked out on a case by case basis through juristic interpretation. Reasoning by analogy may be a fruitful source for development. However, interpretation must necessarily be constrained by a regard for the sense of the rules in so far as they do address an appreciable range of scenarios. A construction which would make a key ingredient of a particular rule redundant as a requirement for linking one person's enrichment with another person's disadvantage will tend to undermine rather than enhance the coherence of the rules. For this reason where one or more elements of the specific instance are missing the implication must ordinarily be, *e contrario*, that the enrichment is not to be regarded as attributable to the claimant's disadvantage.

Variety of possible attributions. In applying this Article and the following rules of this Chapter it may be helpful to bear in mind that out of one set of facts – especially if these are involved or if they concern three or more parties – a person may be enriched or disadvantaged in more than one way and that enrichment may be attributable to the disadvantage of one person, though not to the disadvantage of another. The question of attribution, like the question of justification, cannot be examined globally and must be considered from the standpoint of a given pairing. In triangular or chain arrangements of transactions, where A's position in relation to B may depend on A or B's position to C, so that the relation between several or indeed all pairings may have to be considered serially, the complexity of the case is inescapable. This legal complexity is simply a facet of the parties' economic interconnection.

Relation to other Chapters. This Article is concerned solely with the issue of whether or not an enrichment is attributable to a disadvantage. While attribution is an essential element of a claim, its presence does not conclusively determine that the enriched person is liable to reverse the enrichment, even if the enrichment is unjustified, and has nothing to say on the question of quantum of liability.

B. Direct transfer: paragraph (a)

An asset of the disadvantaged person. Paragraph (a) presupposes that the asset which has become vested in the enriched person was the asset of the disadvantaged person. It therefore does not apply where the enriched person's gain is the effect of a transfer by a third party of an asset of the third party unless, looking at the substance of the transaction, the third party is acting only as a cipher who in material terms is merely forwarding on an asset of the disadvantaged person.

> *Illustration 1*
> Parents E1 and E2 receive payments of child benefit paid by a public body in respect of their grown up son D, but the money is not applied for D's maintenance. D has no claim under this Book that the money received be transferred to him. The enrichment of E1 and E2 is attributable to transfers by the public body, not D.

Meaning of asset. "Asset" has the same meaning as in Chapter 3. For an elaboration, see Comment B on VII.–3:101 (Enrichment) and VII.–3:102 (Disadvantage). Since, however, paragraph (a) presupposes that the asset is transferred, this paragraph is necessarily confined to property and other rights capable of transfer.

Transfer by the disadvantaged person. An asset is transferred for the purposes of

paragraph (a) if what has been done by the disadvantaged person has had the effect of vesting the property or other right in the enriched person. In effecting the transfer the disadvantaged person may have used a representative. Their involvement will not frustrate the application of paragraph (a); mere ciphers are to be disregarded.

C. Rendering a service or doing work: paragraph (b)

General; meaning of service and work. Paragraph (b) presents little difficulty of application, once it is appreciated that a service may be rendered even where only one or other of the parties is aware that benefit is being conferred. The composite notion of 'service and work' which applies in Chapter 3 also applies here. For an elaboration, see Comment C on VII.–3:101 (Enrichment) and VII.–3:102 (Disadvantage).

D. Use of another's assets: paragraph (c)

Meaning of asset. "Asset" has the same meaning as in Chapter 3. Since, however, paragraph (c) presupposes that the asset is used, this paragraph is necessarily confined to rights, such as property rights, which are capable of being used. This therefore includes rights of personality which are susceptible to economic exploitation.

Meaning of use. The notion of "use" of an asset is likewise the same as in Chapter 3 and is elucidated in Comment C on VII.–3:101 (Enrichment) and VII.–3:102 (Disadvantage).

Infringements of rights and legally protected interests. The wording of paragraph (c) indicates, in a non-exhaustive manner (signalled by the word "especially"), a typical scenario in which a use of another's assets may occur – namely, where there is an infringement of rights or legally protected interests. This may take the form, for example, of appropriation of property or (partial) usurpation of property rights. The inclusion of 'legally protected interests' addresses the case, for example, where the enriched person has made use of a trade secret or other confidential information, but has not infringed any (intellectual property) right as such. In such cases the circulation of the information may be legally protected – sufficient to make it an asset in the hands of the disadvantaged person – but its exploitation is not necessarily an infringement of a right.

Illustration 2
X has misappropriated a vehicle belonging to A, who is subsequently indemnified by the insurer, I. By operation of law, I acquires title to the vehicle as a result. X sells the vehicle to Y who in turn disposes of it to Z, who purchases in good faith. Under the applicable property law Z acquires ownership of the vehicle. I has a claim under this Book against Y. In effecting a transfer of title to Z, extinguishing I's rights in the vehicle, Y has made use of a right of I: Y is enriched under VII.–3:101 (Enrichment) paragraph (1)(c) and I is correspondingly disadvantaged (VII.–3:102 (Disadvantage) paragraph (1)(a) and (c)), and the enrichment is attributable to the disadvantage under paragraph (c) of this Article.

Illustration 3
Under a contract with bank B, E deposits certain jewels in a safe deposit box. E and D agree that D may make use of E's facility at the bank and accordingly certain jewels belonging to D are also deposited in the safe deposit box. Subsequently the bank is robbed and E's safe deposit box is emptied by the thieves. B, who has no knowledge of the private agreement between D and E, pays compensation to E based on the value

of the entire contents of the deposit box, thus compensating E for D's loss as well. E's enrichment is attributable to a disadvantage of D: E has (passively) made use of D's assets in that E has claimed compensation for the loss of property which belonged to D and has thus, for the purposes of this rule, made use of D's title to the jewels.

E. Improvement of another's assets: paragraph (d)

Meaning of asset. "Asset" has the same meaning as in Chapter 3. Since, however, paragraph (d) presupposes that the asset is improved, this paragraph is necessarily confined to rights, such as property rights, which are capable of being enlarged or supplemented.

Asset of the enriched person. In determining whether or how this paragraph applies, it will be important to determine to whom the asset belongs at the time it is improved. It is the owner of the asset who will be enriched, not subsequent acquirers of the asset (albeit that the owner's unjustified enrichment liability may devolve under other rules on successors in title to the asset).

Illustration 4
An elderly lady, A, living on the terms of a right of habitation in a house belonging to her sister, B, invests considerable sums in the improvement of the property. B subsequently sells the house at undervalue to her son, S. A has no claim under this Book against S based on the investment in the property. A improved an asset of B, not an asset of S.

F. Discharge of another's liability: paragraph (e)

Meaning of liability. "Liability" has the same meaning as in Chapter 3. For an elaboration, see Comment B on VII.–3:101 (Enrichment) and VII.–3:102 (Disadvantage). Discharge of the liability need not be due at the time the enrichment is conferred. A debt which is repayable only on demand is nonetheless a liability extinguished even if no demand for payment has yet been made by the creditor.

Illustration 5
D pays a cash deposit into E's bank account at the X bank. E's account was overdrawn and the deposit has reduced the overdraft. D's disadvantage in the decrease in assets (loss of money) is attributable to E's enrichment in the decrease in liabilities (reduction of overdraft) because D has discharged a liability of E (E's liability to the X bank in respect of the overdraft).

NOTES

I. Transfer of assets

1. The European legal systems in the main identify the necessary nexus between the enrichment and a corresponding disadvantage by means of groups of cases. The obligation to restitute an unjustified patrimonial acquisition arises under FRENCH, BELGIAN and LUXEMBURGIAN CC art. 1235(1) primarily from the law on *paiement de l'indu*, where, however, the notion of "payment" is to be understood in the sense of a transfer of an asset. The voluntary fulfilment of a (legally unenforceable) moral obligation, however, excludes the right to restitution (CC art.

1235(2)). The reversal of performances rendered under a contract which has been avoided or is otherwise void is effected by the relevant regime governing the invalidity (*Bénabent*, Les obligations[10], no. 488). SPAIN operates with a very elaborate system of *condictiones*, which include the so-called *condictio de prestación* (explored in detail in *Díez-Picazo and de la Cámara Alvarez*, Dos estudios sobre el enriquecimiento sin causa, 103; *Díez-Picazo*, Fundamentos I[6], 124; *Miquel González*, Enriquecimiento injustificado, 2807; López/Montés/Roca [-*Capilla Roncero*], Derecho de Obligaciones y Contratos, 293). In the context of unjustified enrichment law the concept of *prestación* signifies a *desplazamiento patrimonial*, i.e. an application of patrimony for the purpose of performing a (supposed) obligation (*Díez-Picazo* loc. cit. 124). The Supreme Court has expressly approved this notion of prestation (TS 8 January 2007, RAJ 2007 (1) no. 812 p. 2146 [FJ 7]). The *condictio de prestación* comprises (i) the *condictio indebiti* (reversal of performances rendered by mistake, but *solvendi causa*: CC arts. 1895-1901; see TS 14 June 2007, BDA RJ 2007/5120 [FJ 2] and TS 22 February 2007, RAJ 2007 (2) no. 2233 p. 5283 [FJ 4], both of which underline the proposition that *condictio indebiti* belongs to the *condictio de prestación*); (ii) claims for restitution arising from void or avoided contracts (CC arts. 1303-1308; as to its systematic classification as part of the *condictio de prestación* see TS 23 February 2007, RAJ 2007 (1) no. 1475 p. 3172 [FJ 2]); (iii) restitutionary claims arising from termination of contract (CC arts. 1123 and 1122 [rules on restitution triggered by a resolutive condition; extended to restitution on termination for breach of contract]); and (iv) restitutionary claims arising from rescission of the contract (CC art. 1295).

2. ITALY regulates the law on *condictio indebiti* in CC arts. 2033 ff. It distinguishes between payment of a debt which objectively is not due (CC art. 2033) and the payment of a debt which is subjectively not due (CC art. 2036). CC art. 2037 governs the duty to pay value in lieu in the event that the thing required to be returned has been destroyed or has deteriorated; CC art. 2038 deals with the cases of disposition oft he thing acquired without a legal basis. The concept of 'payment' (*pagamento*) in CC art. 2033 has the meaning of 'prestation'. This wide meaning of the term is underpinned by the formulation of CC arts. 1188-1190 and also by CC arts. 2034 and 2035. The latter refer explicitly to *prestazione*.

3. The law of unjustified enrichment in PORTUGUESE CC arts. 473 ff focuses on the reversal of performances rendered: see CC art. 473(2). These include the *condictio indebiti*, the *condictio ob causam finitam* and the *condictio causa data causa non secuta* (or *condictio ob rem*). CC arts. 476-478 provided for detailed regulation; the *condictio indebiti* is regarded as the core of the law of unjustified enrichment. CC arts. 475, 476, 477, 478 and 480 expressly require a *prestação*; the notion of a *pagamento* is no longer to be found. It is only CC arts. 473(1), 474, 479 and 482 (*Menezes Leitão*, Enriquecimento sem causa[2], 441, fn. 1317) which are not confined to the law on reversal of performances rendered.

4. Under GERMAN law wird die Übertragung eines vermögenswerten Gutes mit der sogen. Leistungskondiktion rückabgewickelt. Sie umfasst die *condictio indebiti* (CC § 812(1) first sentence, first alternative), die *condictio ob causam finitam* (CC § 812(1) second sentence, first alternative), die *condictio ob rem* (CC § 812(1) second sentence, second alternative), die *condictio ob turpem vel iniustam causam* (CC § 817 first sentence) sowie Leistungen auf einredebehaftete Forderungen (CC § 813(1)). Eine *Leistung* ist jede bewusste und zweckgerichtete Mehrung fremden Vermögens (BGH 23 October 2003, NJW 2004, 1169; BGH 24 February 1972, BGHZ 58, 184, 188; BGH 31 October 1963, BGHZ 40, 272, 277). Der Leistungsbegriff legt die Parteien des Kondiktionsverhältnisses fest. Denn nach ihm bestimmt sich, wer als Leistender

und wer als Leistungsempfänger anzusehen ist. Es kommt nicht darauf an, wer wem in tatsächlicher Hinsicht etwas zugewendet hat.

5. The HUNGARIAN law of unjustified enrichment does not differentiate between restitution of performances rendered and restitution in other cases. Many of the questions which in the context of these rules are resolved as issues of attribution of an enrichment to a disadvantage do not fall within the scope of application of the law of unjustified enrichment in Hungary because they are subject to special regimes which displace the subsidiary unjustified enrichment law. Soweit es einschlägig ist, a causal connection is required between the relevant patrimonial benefit and the disadvantage. The statute is formulated in terms of a requirement that the enrichment be "at the expense of" the disadvantaged person. That element is lacking if the benefit and disadvantage ocurr independently of one another. A merely indirect causal connection may nonetheless suffice (Petrik [-*Bíró*], Polgári jog II[2], 651), but this is not a well-defined criterion for demarcation. In BH 1991/278 the claimant procured the construction of a sewage canal at his own expense and for his own purposes, which by virtue of statutory provisions became state property. Der Beklagte hatte später aufgrund behördlicher Genehmigung einen Anschluss an diesen Kanal gelegt. Der bereicherungsrechtliche Ausgleichsanspruch des Klägers wurde mit der Begründung abgelehnt, der Beklagte habe sich nicht auf seine Kosten bereichert (ähnlich auch BH 1992/584, nur ging es hier um eine elektrische Leitung). Für das Recht der Rückabwicklung eines transfer of an asset stehen im Übrigen folgende Anspruchsgrundlagen zur Verfügung: (i) die Vindikation, falls die Sache noch vorhanden und der Vertrag nichtig ist, (ii) in allen übrigen Fällen das Recht der ungerechtfertigten Bereicherung, sofern nicht ein Sonderregime mit Anwendungsvorrang eingreift (wie z.B. die Regeln über die Rückabwicklung ungültiger (CC § 237) und aufgehobener bzw. aufgelöster Verträge (CC §§ 319-321). Irrtümliche Zahlungen unterliegen dem Bereicherungsrecht.

6. Im DUTCH law kann die Rückgängigmachung eines transfer of assets gleichfalls auf verschiedene Anspruchsgrundlagen gestützt werden: das Recht der ungeschuldeten Leistung (CC arts. 6:203-211), die Vindikation (CC art. 5:2) und das Bereicherungsrecht (CC art. 6:212), letzteres insbesondere dann, wenn der Benachteiligte sein Eigentum aufgrund gesetzlicher Vorschriften verloren hat. CC art. 6:203(1) bestimmt ausdrücklich, dass derjenige, der einem anderen ohne Rechtsgrund 'ein Gut' gegeben hat, berechtigt ist, dies von dem Empfänger als ungeschuldet geleistet zurückzuverlangen; die Formulierung geht auf ältere Rechtsprechung des Supreme Court zurück (HR 13 April 1962, NedJur 1964 no. 366 p. 832; HR 23 November 1984, NedJur 1985 no. 816 p. 2665; see Asser [-*Hartkamp*], Verbintenissenrecht III[12], no. 315 p. 336). Die Rückgabepflicht umfasst sowohl die Rückübertragung von Eigentum als auch die physische Rückgabe einer Sache, ferner bestimmte Nebenpflichten (wie die Korrektur einer Registereintragung oder die Benachrichtigung des Schuldners bei nichtiger Zession). Entgangene Nutzung kann mit der Bereicherungsklage (CC art. 6:212) geltend gemacht werden, sofern mit ihr eine entsprechende Bereicherung des Beklagten korrespondiert. Wann immer die Rückgängigmachung einer ungeschuldet erbrachten Leistung unmöglich ist, bestimmt sich der Ausgleichanspruch nach der Höhe der Bereicherung des Beklagten (*Hartkamp* loc. cit. no. 317 p. 337, no. 334 p. 351, no. 344 p. 358; Parlementaire Geschiedenis VI, 803). Im Falle der Vertragsanfechtung ensteht die Restitutionsverpflichtung wegen CC art. 3:53(1) bereits ab dem Zeitpunkt der Leistung. Hat der Schuldner den Grund der Anfechtung nicht zu vertreten, schuldet er keinen Ausgleich über den Betrag hinaus, der ihm als Bereicherung verbleibt (CC arts. 6:204 und 205 i.V.m. arts. 6:74 und 6:78); andernfalls haftet er auf Schadenersatz (CC art. 6:205; näher Parlementaire

Geschiedenis VI, 811-813; Asser [-*Hartkamp*] Verbintenissenrecht I[12], no. 351 pp. 371-372 and III[12], no. 334, pp. 351-352).

7. In the NORDIC countries it has been discussed that certain situations require the establishment of a connection between enrichment and disadvantage (*Hellner*, Obehörig vinst, 163; *Vinding Kruse*, Restitutioner, 159). Claims arising from the unwinding of void or avoided contracts, from termination and *re vindicatio* werden freilich gerade nicht als bereicherungsrechtliche Ansprüche verstanden, was wiederum bedeutet, dass sich auch keine Fallgruppe "transfer of assets" herausgebildet hat. Die genannten Ansprüche sind in erster Linie auf Herausgabe *in natura* und sekundär auf Schadenersatz gerichtet (*Karlgren*, Obehörig vinst och värdeersättning, 29; *Grönfors and Dotevall*, Avtalslagen[3], 177; *Hov*, Kontraktsret I, 186; see Swedish HD 9 February 2004, NJA 2004, 52). However, enrichment considerations may indirectly arise, in the form of compensation to the claimant for the use and the fruits of the object in question as well as in the context of compensation to other persons for money invested in the object. Außerdem weisen die von der *condictio indebiti* erfassten Fälle eine Nähe zu VII.–4:101(a) auf. *Condictio indebiti* does not, however, involve a particular requirement of attribution of an enrichment to a specific disadvantage; what is required is that the payment was intended to discharge a debt. Another instance bearing an affinity to the transfer of assets are cases concerning the onward bank transfers for one person to another person, although where the bank actually covers the transfer it may instead be categorized as payment of another's debt (see VII.–4:101(e)). Die zuletzt genannten Fälle sind mehrfach Gegenstand schwedischer Entscheidungen gewesen (e.g. HD 30 March 1994, NJA 1994, 177; HD 17 September 1999, NJA 1999, 575; HD 30 December 1999, NJA 1999, 793). Sie haben sich auf das Schuldverhältnis zwischen dem Anweisenden und dem Anweisungsempfänger konzentriert und entschieden, dass es an einer ungerechtfertigten Bereicherung fehlte, weil die Überweisung durch die Banken die Schuld des Anweisungsempfängers gegenüber dem Angewiesenen zum Erlöschen gebracht habe.

II. Besonderheiten bei der Erbringung von Dienstleistungen

8. Die Rückabwicklung rechtsgrundlos erbrachter Dienstleistungen unterliegt nicht selten einem anderen Regime als die Rückforderung rechtsgrundlos hingegebener Sachen. In FRANCE and BELGIUM wird insoweit hauptsächlich das Recht der *enrichissement sans cause* angewandt, see notes under VII.–2:101 and 3:102. Dienst- und Arbeitsleistung begründen ebenso wie die Benutzung des Gutes eines anderen und die Begleichung seiner Schulden eine Bereicherung in der Form der Ersparnis von Aufwendnungen bzw. Kosten (siehe z.B. zur Arbeitsleistung einer Ehefrau Cass.civ. 26 October 1982, Bull.civ. 1982, I, no. 302 und zur Arbeitsleistung einer Lebensgefährtin Cass.civ. 19 May 1969, Bull.civ. 1969, I, no. 187). Die Höhe des Ausgleichs liegt im Ermessen des Tatrichters (Cass.civ. 19 May 1969 loc.cit.)

9. SPANISH CC arts. 1303-1308 (Rückabwicklung im Falle nichtiger oder angefochtener Verträge) äußern sich nicht zur Rückabwicklung von Verträgen, die auf ein *facere* (Dienst- und Arbeitsleistungen) bzw. auf ein *non facere* (Unterlassen, sogen. negative obligations) gerichtet sind. Daraus darf nach herrschender Aufassung aber nicht darauf geschlossen werden, dass Dienstleistungen ersatzlos dem Empfänger verbleiben. Vielmehr sei CC art. 1307 (restitution im Falle des Verlustes der unter dem nichtigen Vertrag hingebenen Sache) mit der Folge analog anzuwenden, dass die Dienstleistung ihrem Wert nach vergütet werden müsse (*Delgado Echeverría and Parra Lucán*, Las nulidades de los contratos, 256-257; *Díez-Picazo*, La liquidación de las nulidades contractuales, § 3; *id.*, Fundamentos I[6], 580; *López Beltrán*, La nulidad, 65). So sehen es auch TS 17 May 1973, RAJ 1973 (1) no. 2338 p. 1867 and CA

Ciudad Real 30 March 2004, BDA JUR 2004/128779. TS 8 January 2007, RAJ 2007 (1) no. 812 p. 2146 wendet dagegen die *condictio de prestación* in einem Fall an, in welchem sich eine Familie auf der Basis eines nichtigen Vertrages um einen Nachbarn gekümmert hatte. Er hatte ihr im Gegenzug versprochen, die Familie in seinem Testament zu bedenken, und ihr sogar Vollmacht über das Grundstück gegeben, welche die Familie aber zu ihren eigenen Gunsten missbrauchte. Schwierigkeiten bereitet die Bestimmung des Wertes einer Dienstleistung. Hierzu wird teils auf den von den Parteien ausgehandelten Betrag und teils auf den objektiven Wert der erbrachten Tätigkeit abgestellt (näher *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 218-219; *Delgado Echeverría and Parra Lucán* loc.cit. 256; *López Beltrán* loc.cit. 65). As far as labour contracts are concerned, Workers' Statute (*Estatuto de los Trabajadores,* Real Decreto Legislativo 1/1995 of 24 March 1995) art. 9.2 provides that "if the labour contract is void, the employee is entitled to claim the remuneration for the work done as if the contract were valid". This rule, which has to be supplement with CC arts. 1303 ff (TS [Labour Chamber] 5 October 1994, RAJ 1994 (4) no. 7748 p. 10126), finds its rationale in the doctrine of unjustified enrichment (*Concheiro del Río*, El enriquecimiento injusto en el Derecho laboral, 85, 259; TS [Administrative Chamber] 28 May 1991, RAJ 1994 (4) no. 4215 p. 5791; TSJ La Rioja 16 March 2004, BDA AS 2004/1295; TSJ Comunitat Valenciana 29 November 2001, BDA JUR 2002/267328).

10. In ITALY ist nach wie vor umstritten, ob sich die Regeln über die Zahlung einer objektiven Nichtschuld nur auf Leistungen beziehen, die in einem 'Geben' bestehen, oder auch auf *facere*- Leistungen. Soweit Letzteres verneint wird, wendet man das allgemeine Bereicherungsrecht an (CC art. 2041). Das ist der Standpunkt z.B. von Cass.sez.lav. 19 August 1992, no. 9675, Foro it. 1993, I, 428 und von Cass. 8 November 2005, no. 21647, Giust.civ.Mass. 2005, 11). Die Gegenposition (das Recht der Zahlung einer Nichtschuld umfasse auch Dienstleistungen) wird dagegen z.B. vertreten von Cass. 2 April 1982, no. 2029, Giust.civ.Mass. 1982, fasc. 4 und von Cass. 23 May 1987, no. 4681, Giust.civ.Mass. 1987, fasc. 5).

11. Die Subsidiaritätsregel in PORTUGUESE CC art. 474 blockiert die Anwendbarkeit des Bereicherungsrechts in allen Fällen, in welchen es das Gesetz dem Benachteiligten ermöglicht, auf andere Weise Ersatz zu erlangen. Wichtig ist das vor allem für die Rückabwicklung nichtiger bzw. unwirksamer Rechtsgeschäfte (*Menezes Leitão*, Enriquecimento sem causa[2], 444; *Almeida Costa*, Obrigações[11], 503). Sie unterliegt CC arts. 285-294. Unter CC art. 289(1) treten Nichtigkeit bzw. Unwirksamkeit mit der Folge *ex tunc* ein, dass alles Geleistete zurückzuerstatten ist, und zwar entweder in Natur oder, wenn das nicht möglich ist, dem Wert nach. Unter die zweite Alternative fällt auch die Rückabwicklung unwirksamer Dienstleistungsverträge. Innerhalb des Bereicherungsrechts käme man mit CC art. 479(1) allerdings zu demselben Ergebnis (Wertersatz, see *Antunes Varela*, Obrigações em geral I[10], 511-512). Dienstleistungsverträge in diesem Sinn sind auch der Auftrag, die Verwahrung und der Werkvertrag (CC art. 1155), nicht jedoch der Arbeitsvertrag (CC art. 1152). Bei ihm kommt eine Abwicklung nur *ex nunc* in Betracht. Under Labour Code art. 115(1) a labour contract which is declared void or annulled produces the same effects as if it were valid during the time in which it was performed by the parties, see *Martinez*, Código do Trabalho anotado[4], note 3 under art. 115, p. 255; STJ 22 March 2007, Processo 07S364).

12. Die bereicherungsrechtliche Rückabwicklung rechtsgrundlos erbrachter Dienstleistungen unterliegt in GERMANY den allgemeinen Vorschriften zur Leistungskondiktion. Die ältere Lehre, wonach die Bereicherung bei Dienstleistungen nur in der Ersparnis von Aufwendungen liegen könne, ist inzwischen der Auffassung

gewichen, dass die Bereicherung unmittelbar in der Dienstleistung liege und die Frage, ob Aufwendungen erspart worden sind, erst im Kontext der Prüfung eines Wegfalls der Bereicherung (CC § 818(3)) aufzuwerfen ist. Für diese Ansicht spricht nicht nur die Systematik des Gesetzes, sondern auch die Regelung der CC §§ 819(1), 818(4), wonach der Bösgläubige unabhängig von der Ersparnis von Aufwendungen haftet (näher Staudinger [-*S. Lorenz*], BGB [2007], § 812, no. 72; MünchKomm [-*Lieb*], BGB[4], § 812, no. 357; Erman [-*Westermann and Buck-Heeb*], BGB II[12], § 812, no. 9).

13. In HUNGARY unterliegt die Rückabwicklung ungültiger Verträge einem vertragsrechtlichen Sonderregime. Für Vertragsbeziehungen, in welchen sich (wie bei Dienstleistungsverträgen) der frühere Zustand nicht wiederherstellen lässt, ist in CC § 237(2) first sentence vorgesehen, dass das Gericht den Vertrag für die zurückliegende Zeit für wirksam erklärt und über die Erstattung gegenleistungslos erbrachter Leistungen entscheidet (näher Gellért [-*Harmathy*], A Polgári Törvénykönyv Magyarázata[6], 881-895; Petrik [-*Petrik*], Polgári jog II[2], 406/6-414; *Kemenes*, Polgári Jogi Kodifikáció 2/2002, 7). Soweit sich die Regelungen des Vertragsrechts (z.B. im Hinblick auf den Ersatz von Verwendungen) als lückenhaft erweisen, können ergänzend die Vorschriften des Bereicherungsrechts und diejenigen zum rechtsgrundlosen Besitz herangezogen werden (*Vékás*, Magyar Jog 2003, 385, 387; *Kemenes*, Gazdaság és Jog 10/2001, 18, 19; *Kemenes*, Polgári Jogi Kodifikáció 2002, 7, 19; *Pomeisl*, Gazdaság és Jog 11/2004, 3, 5-7). Von den ungültigen sind die nicht existierenden Verträge zu unterscheiden; bei Letzteren erfolgt die Rückabwicklung erbrachter Leistungen über das Bereicherungsrecht (*Petrik* loc. cit. 409; *Kisfaludi*, Az adásvételi szerződés[2], 127). Die Rechtsprechung hat sich mit einer Vielzahl solcher Fälle insbesondere im Kontext von Arbeitsleistungen auseinandergesetzt und die Anwendbarkeit des allgemeinen Bereicherungsrechts bestätigt (BH 1979/161, BH 1981/512, BH 1983/208, BH 1987/452, BH 1990/30, BH 1992/188, BH 1996/163, BH 1998/39, BH 2001/168, BH 2002/29). Den Anspruchsumfang bestimmt das Gericht nach Ermessen unter Berücksichtigung der aktuellen Marktlage, bei Werkverträgen oft nach Einschaltung eines Sachverständigen (näher BH 1987/452). In die Berechnung fließt ein, ob das Werk fehlerhaft oder fehlerfrei war; ein Unternehmergewinn wird dagegen nur sehr geringfügig eingerechnet. Überhaupt nicht ausgeglichen wird die reine Arbeitsleistung, sofern sie weder zu einer Werterhöhung noch zu einem anderen Nutzen für den Beklagten geführt hat (BH 1997/400, BH 1983/291).

14. BULGARIAN LOA art. 55(1) differenziert nicht zwischen den verschiedenen Arten rechtsgrundloser Leistungen, sondern zwischen den verschiedenen Unwirksamkeitsgründen. POLISH CC art. 405 sagt, dass überall dort, wo die Herausgabe des Erlangten in Natur unmöglich ist, sein Wert ersetzt werden muss. Das betrifft auch Dienstleistungen. Ihr Wert ist objektiv, d. h. nach ihrem Marktpreis zu bestimmen (*Ohanowicz*, Niesłuszne wzbogacenie, 365; *Serda*, Nienależne świadczenie, 214; *Łętowska*, Bezpodstawne**,** 136). Bei mangelhaften Dienstleistungen wird wohl darauf abgestellt, ob sie trotz ihrer Mangelhaftigkeit zu einer Ersparnis von Aufwendungen bzw. zu einer objektiven Mehrung des Vermögens des Empfängers geführt haben (*Serda* loc.cit. 215; anders aber *Łętowska* loc.cit. 137).

15. DUTCH CC art. 6:203(3) sagt, dass auch derjenige, der ohne Rechtsgrund eine Leistung anderer Art (als durch die Hingabe von Geld oder eines Gutes) erbracht hat, gegen den Empfänger einen Anspruch auf Rückgewähr hat. Mit ‘Leistungen anderer Art’ sind in erster Linie Dienstleistungen gemeint. CC art. 210(1) erstreckt die Anwendbarkeit der CC arts. 6:204-209 (Vorschriften über Gut- und Bösgläubigkeit sowie zur Geschäftsunfähigkeit im Falle der Hingabe von Geld und Gütern) erneut auf "andere Leistungen“. Auf Dienstleistungen anwendbar ist auch das Bereicherungsrecht (CC art. 6:212). Der Anspruch aus CC art. 6:203 kann für den Leistenden aber

günstiger sein, z.B. im Falle des Transports eines "blinden Passagiers", wo der Bereicherungsanspruch am Fehlen eines Schadens des Beförderers scheitern kann (Parlementaire Geschiedenis VI, 804; zu weiteren Einzelheiten siehe Asser [-*Hartkamp*] Verbintenissenrecht III[12], nos. 320-321 pp. 339-341).

16. In ESTONIA services rendered without a contract may in certain circumstances be regarded as *negotiorum gestio*. Where that is the case, unjust enrichment provisions do not apply; such services are not rendered without a legal basis. In all other cases rendering a service is considered as a performance (*sooritus*); consequently LOA §§ 1028-1036 (unjustified enrichment law) apply. LOA § 1032(2) ordnet an, dass wann immer die Rückgabe einer Leistung in Natur unmöglich ist, der Empfänger ihren gewöhnlichen Wert in dem Zeitpunkt zu erstatten hat, in welchem der Rückforderungsanspruch anetstanden ist. Under GPCCA § 65, the usual value of an object is deemed to be the value of the object unless otherwise prescribed by law or a transaction. The usual value of an object is its average local selling price (market price).

17. In the NORDIC countries, a person who without contract renders a service to or carries out work for another does not enjoy protection under damages liability, unless the rendering of the service is the result of duress or coercion etc. directed at the performing person. Deshalb werden andere Ausgleichsmechanismen gesucht. Sofern es auch nicht möglich ist, einen stillschweigenden Vertragsschluss zu bejahen, wird ein Anspruch aus ungerechtfertigter Bereicherung erwogen (*Hellner*, Obehörig vinst, 310 with references). Der Anwendungsbereich des Bereicherungsrechts in Situationen, die sich auch nicht als *negotiorium gestio* begreifen lassen, wird jedoch für äußerst schmal angesehen (*Hellner* loc cit. 361). Die Wirkungen der Nichtigkeit bzw. der Anfechtung treten bei in Vollzug gesetzten Dienstleistungsverträgen im Übrigen in aller Regel nur *ex nunc* ein, was wiederum bedeutet, dass in solchen Fällen no restitutionary compensation is recognized (*Hellner/Hager/Persson*, Speciell avtalsrätt II(2)[4], 56; *Karlgren*, Obehörig vinst och värdeersättning, 91; *Jørgensen*, Kontraktsret II, 128).

III. Nutzung fremder Sachen und Rechte

18. Die unerlaubte Nutzung fremder Sachen und Rechte (unter Einschluss der Verfügung über sie) führt zwar in allen Rechtsordnungen zu Ausgleichsverpflichtungen, doch können diese ihren Grund in durchaus unterschiedlichen Haftungsregimen haben. Für FRANCE ist entschieden worden, dass Personen, die unerlaubt eine fremde Wohnung oder ein fremdes Haus 'besetzen', dem Eigentümer nach den Regeln der *enrichissement sans cause* in Höhe des objektiven Mietwerts auf eine *indemnité d'occupation* haften (Cass.com. 19 May 1985, Bull.civ. 1985, IV, no. 141 p. 122). Die unerlaubte Nutzung einer fremden Sache oder eines fremden Rechts stellt eine Bereicherung in der Form der Ersparnis von Kosten dar (*Bénabent*, Les obligations[10], no. 488; *de Page*, Traité élémentaire de droit civil belge III(2)[3], no. 37). Allerdings ist stets das *principe de subsidiarité* zu beachten, wonach eine *action de in rem verso* nur erhoben werden kann, wenn dem Kläger keine andere Anspruchsgrundlage zur Verfügung steht (Cass.com. 10 October 2000, Bull.civ. 2000, IV, no. 150 p. 136). Solche speziellen Anspruchsgrundlagen finden sich insbesondere im Recht des gewerblichen und geistigen Eigentums mit seinen Instrumenten zur Abschöpfung rechtswidrig gezogener Gewinne (näher – und auch zum Verhältnis zum allgemeinen Deliktsrecht – *Tafforeau*, Droit de la propriété intelectuelle, no. 353 sowie für BELGIUM *Puttemans*, Droits intellectuels et concurrence déloyale, 294). Fälle der unerlaubten Werbung mit dem Bild oder dem Namen eines anderen können sich als Verstoß gegen das Recht auf Schutz des Privatlebens unter French CC art. 9

darstellen. Die Feststellung einer Verletzung dieses Rechts genügt schon *per se* zur Begründung eines Entschädigungsanspruchs (Cass.civ. 5 November 1996, Bull.civ. 1996, I, no. 378). So liegt es auch unter LUXEMBURGIAN Gesetz of 11 August 1982 *(loi concernant la protection de la vie privée*) art. 1, mit dem French CC art. 9 in das luxemburgische Recht übernommen wurde.

19. Under the so-called *condictio por intromisión en derecho ajeno*, SPANISH law conceives several unjustified enrichment claims arising out of interference with another's asset. This *condictio* is well established; it is of a non-subsidiary nature and clearly distinguishable from a claim based on tort law, see TS 12 April 1955, RAJ 1955 (1) no. 1126 p. 602 (which acknowledged a *condictio* for exploitation of another´s mine); TS 28 January 1956, RAJ 1956 (1) no. 669 p. 418 (appropriation of another's bank account; application of the doctrine of unjustified enrichment) and TS 10 March 1958, RAJ 1958 (1) no. 1068 p. 686 (*condictio* arising out of disposition of another´s asset). Modern legal doctrine (in particular *Díez-Picazo and de la Cámara Alvarez*, Dos estudios sobre el enriquecimiento sin causa, 116-117 and *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 262-267, 292-300) distinguishes between a *condictio* based on incorporation, disposition or consumption of another's assets (CC arts. 360, 375, 379(2), 383(1)) and a *condictio* based on unlawful use of another's assets (CC arts. 451 and 455). The latter has played an important role ever since TS 10 March 1958 loc.cit. (which decided that the *condictio* arises from the mere fact of an unlawful increase of assets; the defendant's good faith is not a defence). It is based on the general principle of unjustified enrichment and obliges the person who disposed of another's thing to reverse the enrichment to its former owner. The defendant has to reverse the price which he received; the latter is seen as an indicator of the objective value of the sold asset (TS 5 May 1964, RAJ 1964 (1) no. 2208 p. 1380). Die an sich klare Unterscheidung zwischen Bereicherungs- und Deliktsrecht ist freilich in späteren Entscheidungen nicht immer präzise durchgehalten worden, weil Schadenersatz und Bereicherungsausgleich (Herausgabe des erzielten Preises) entweder zu einem einzigen Anspruch vermengt (TS 3 July 1981, RAJ 1981 (2) no. 3043 p. 2501) oder weil der deliktische Schadenersatz auch auf die Herausgabe des Erlangten erstreckt wurde (e.g. in TS 8 May 1998, RAJ 1998 (2) no. 3709 p. 5352). Im allgemeinen ist die bereicherungsrechtliche Natur der *condictio* based on use of another's asset aber auch in der Rechtsprechung anerkannt, see e.g. TS 24 January 1975, RAJ 1975 (1) no. 95 p. 99 (Ausbeutung einer Mine nach Ablauf der Pachtzeit) und CA Barcelona 26 November 2004, BDA JUR 2005/15139 (Nutzung von Computern nach Vertragsrücktritt des anderen Teils wegen Nichtzahlung der Leasingraten; *condictio por intromisión*). Zahlreiche Sondergesetze bringen Regeln zur Haftung bei der Verletzung gewerblicher Schutzrechte und Urheberrechte. Sie werden durchweg im Sinne der Lehre von der dreifachen Schadensberechnung, der *método triple de cómputo del daño* interpretiert (näher *Basozabal Arrue*, ADC 1997, 1287; *Fernández-Nóvoa*, El enriquecimiento injustificado en el Derecho industrial, 9; *Portellano Díez*, La defensa del derecho de patente, 55). Nach ihr kann der Rechtsinhaber alternativ auf Ersatz entgangenen Gewinns, auf Herausgabe des Verletzergewinns oder auf Zahlung der entgangenen Lizenzgebühr klagen. Allerdings findet sich in Unfair Competition Act (LCD) art. 18(6) ein klar von der deliktischen Schadenersatzhaftung (LCD art. 18(5)) abgegrenzter Tatbestand der bereicherungsrechtlichen *condictio por intromisión*. Es wird deshalb vertreten, dass es auch in den beiden zuletzt genannten Alternativen der sogen. dreifachen Schadensberechnung in Wahrheit um Bereicherungsansprüche gehe, die sich unmittelbar auf LCD art. 18(6) stützen ließen und folglich kein Verschulden voraussetzen würden (*Fernández-Nóvoa* loc.cit. 14 and

17-31; *Portellano Díez* loc.cit. 76-80; anders aber wohl CFI Alicante 14 July 2006, La Ley 2006 [4] 424 [der Anspruch auf die entgangene Lizenzgebühr sei ein deliktischer Anspruch, obwohl er der Logik des Bereicherungsrechts folge] und CA Barcelona 31 May 2007, BDA JUR 2007/294389). Der Anspruch aus LCD art. 18(6) setzt die Verletzung eines absoluten Rechts (nach CA Barcelona 24 February 2005, BDA JUR 2007/38863 trotz der insoweit vorhandenen Spezialgesetzgebung auch eines Urheberrechts) oder einer vergleichbaren Rechtsposition voraus; ein Beispiel für die Letztere liefert eine exclusive staatliche Lizenz zum Betrieb eines regulären Busservices auf einer bestimmten Strecke (TS 29 December 2006, RAJ 2007 (2) no. 1714 p. 3897). Im Schrifttum wird inzwischen zunehmend anerkannt, dass mit der *condictio por intromisión* auch Eingriffe in andere unkörperliche Persönlichkeitsrechte erfasst werden können, sofern ihnen ein *contenido de atribución* (ein *Zuweisungsgehalt* im Sinne der deutschen Rechtslehre) innewohnt (*Díez-Picazo*, Fundamentos I[6], 126). Das wiederum wird für das Recht am eigenen Bild bejaht, für das Recht auf Schutz der Privatsphäre diskutiert und für den Ehrenschutz verneint (*Pantaleón*, La Ley 1996 [2] 1689, 1694; *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 170-178). Gesetz 1/1982 über den Schutz der Ehre, der Privatsphäre und das Recht am eigenen Bild art. 9(3) sieht außerdem vor, dass bei der Berechnung des deliktischen Schadenersatzanspruches wegen der Verletzung eines der von diesem Gesetz geschützten Rechte ein evtl. Verletzergewinn berücksichtigt werden soll; es handelt sich hierbei um eine Sonderform der Berechnung des immateriellen Schadenersatzes (*Basozabal Arrue* loc.cit. 173). In der Rechtsprechung wird der Schadenersatz wegen der Verletzung des Rechts am eigenen Bilde allerdings zumeist auf der Basis der entgangenen Lizenzgebühr berechnet (z.B. CA Bizkaia 28 November 2000, BDA JUR 2001/254481 and CA Madrid 30 March 2006, AC 2006 [2] no. 811 p. 201).

20. Die unbefugte Nutzung einer fremden Sache stellt, sofern die Handlung vorsätzlich oder fahrlässig erfolgt, natürlich auch in ITALY ein Delikt dar. Das Bereicherungsrecht wird relevant, wenn es entweder an einem Verschulden oder an einem Vermögensschaden fehlt (*Breccia*, Il pagamento dell'indebito, 1005; *Trimarchi*, L'arricchimento senza causa, 48; Cass. 23 December 1993, no. 12737, Giust.civ.Mass. 1993, fasc. 12 [rechtswidrige Nutzung einer fremden Immobilie]). Die bereicherungsrechtliche Haftung ist aber natürlich im Gegensatz zur Deliktshaftung auf die Höhe der erlangten Bereicherung begrenzt (CC art. 2041). Sie ist den Regeln des Eigentümer-Besitzer-Verhältnisses (CC arts. 1148 ff) subsidiär (CC art. 2042). Die Rechtsfolgen der Verletzung von gewerblichen Schutzrechten sind vor allem in Gesetzbuch über das Gewerbliche Eigentum (CPI i.d.F. von 2006) art. 125(1) geregelt, der es erlaubt, auch den Verletzergewinn in die Schadensberechnung einzubeziehen. Der Schadenersatz für den entgangenen Gewinn umfasst der Höhe nach mindestens den Betrag der entgangenen Lizenzgebühr (loc. cit. art. 125(2)).

21. Ähnlich wie Spain kennt auch PORTUGAL das Konzept der Eingriffsbereicherung. Sie betrifft die Rückabwicklung von Vermögensvorteilen, die durch einen Eingriff in fremde Rechtsgüter erlangt wurden, insbesondere durch Nutzung, Fruchtziehung, Verbrauch oder Verfügung über sie (*Menezes Leitão*, Enriquecimento sem causa[2], 663). Die Eingriffskondiktion unterliegt wie alles Bereicherungsrecht der Subsidiaritätsregel in CC art. 474 und kommt deshalb vor allem dann zur Anwendung, wenn es an einer der Voraussetzungen der deliktischen Haftung für die Verletzung fremder Rechte fehlt (*Antunes Varela*, Obrigações em geral I[10], 502). So sieht es auch der Supreme Court, der sich freilich gegen eine abweichende Rechtsprechung der Instanzgerichte hat durchsetzen müssen (z.B. STJ 24 February 2005, Processo 04B4601 [Gewährung eines Bereicherungsanspruchs wegen

Markenrechtsverletzung]). Ein Bereicherungsanspruch wird bei unbefugter Nutzung fremder Sachen vor allem dann bejaht, wenn zwar eine Bereicherung auf Kosten des Eigentümers vorliegt, dieser aber keinen Schaden erleidet (*Pereira Coelho*, O Enriquecimento e o dano, 14). So kann es z.B. bei der widerrechtlichen Besetzung einer fremden Wohnung liegen; der Anspruch auf Ausgleich des *enriquecimento por intervenção* folgt aus der Grundnorm des CC art. 473 (STJ 29 April 1992, RLJ 125 [1992-1993] 86; STJ 23 March 1999, BolMinJus 485 [1999] 396; STJ 6 December 2006, CJ [ST] XIV [2006-3] 154). Wird eine Klage nur auf Deliktsrecht gestützt, liegen dessen Voraussetzungen aber nicht vor, kann das Gericht von Amts wegen Bereicherungsrecht anwenden und der Klage auf dieser Grundlage stattgeben (STJ 6 December 2006 loc.cit). Eine Haftung für den Eingriff in fremde Rechte kommt aber auch nach CC art. 472 (unechte Geschäftsführung ohne Auftrag, *gestão imprópria de negócios*) in Betracht. Der Rechtsinhaber kann die Handlung genehmigen und auf diese Weise den Anspruch auf Herausgabe des Erlangten aus CC art. 465 aktivieren (*Menezes Leitão*, Responsabilidade do gestor, 232). Ohne eine Genehmigung verbleibt es bei der Anwendung des Bereicherungs- (CC art. 472(1)) bzw. (im Falle der Feststellung eines Verschuldens) des Deliktsrechts (CC art. 472(2)). Bei der Verfügung über fremde Sachen kommt es nur selten zu einer Bereicherunsghaftung. Denn der nicht legitimierte Verkauf einer fremden Sache ist grundsätzlich nichtig (CC art. 892) und bewirkt deshalb keinen Eigentumsübergang (CA Coimbra 8 March 1994, BolMinJus 435 [1994] 918). Das ist nur in gesetzlich geregelten Ausnahmefällen anders, z.B. im Immobiliarsachenrecht (Grundstücksregistergesetz art. 17(2)). Wirksam ist der Verkauf fremder Sachen ferner, wenn es sich dabei um ein Handelsgeschäft i.S. von Ccom art. 467 handelt.

22. In GERMANY erfolgt der bereicherungsrechtliche Ausgleich wegen der Nutzung einer fremden Sache oder der Verletzung eines fremden Rechts, insbesondere eines Persönlichkeitsrechts, über die allgemeine Eingriffskondiktion (CC § 812(1) first sentence, second alternative, see e.g. Palandt [-*Sprau*], BGB[67], § 812, no. 11). Wie bei Dienstleistungen besteht auch hier nach heute wohl herrschender Meinung das erlangte "Etwas" nicht in der Ersparnis von Aufwendungen, sondern in dem nichtgegenständlichen Vorteil selbst (Staudinger [-*S. Lorenz*], BGB [2007], § 812, no. 72; MünchKomm [-*Lieb*], BGB[4], § 812, no. 357; Erman [-*Westermann and Buck-Heeb*], BGB II[12], § 812, no. 9). Die Nutzung fremden Eigentums durch einen unrechtmäßigen Besitzer unterliegt dem Sonderregime des Eigentümer-Besitzer-Verhältnisses (CC §§ 987 ff), das Anwendungsvorrang beansprucht (CC § 993). Im allgemeinen Bereicherungsrecht richtet sich der Ausgleichsanspruch für gezogenen Nutzungen nach dem Verkehrswert des Gebrauchs (CC § 818(2)), d.h. nach der Vergütung, die bei ordnungsgemäßer Inanspruchnahme des fremden Rechts zu zahlen gewesen wäre; der Verletzergewinn muss dagegen nur im Falle der Bösgläubigkeit herausgegeben werden (*Sprau* loc.cit. § 818, nos. 18, 23; *S. Lorenz* loc.cit. § 818, nos. 26, 28; *Lieb* loc.cit. § 818, nos. 18, 44, 50; BGH 24 November 1981, BGHZ 82, 299, 307; BGH 18 December 1986, BGHZ 99, 244, 248). Die Grundlage für die Gewinnabschöpfung ist dann im Recht der rechtswidrigen Geschäftsführung ohne Auftrag (CC §§ 687(2) first sentence, 681 second sentence, 667) zu finden. Verfügungen eines Nichtberechtigten, welche dem Berechtigten gegenüber wirksam sind, werden bereicherungsrechtlich über CC § 816(1) abgewickelt. Hier wird von der Rechtsprechung die gesamte Gegenleistung (einschließlich eines etwaigen Gewinns) als dasjenige angesehen, was i.S.v. CC § 816(1) "durch die Verfügung erlangt" worden ist (BGH 8 January 1959, BGHZ 29, 157, 159; näher und teilweise kritisch *Medicus*, Schuldrecht II[14], no. 705; *Sprau* loc.cit. § 816 no. 23).

23. Das HUNGARIAN Law kennt eine dem deutschen und dem spanischen Konzept der Eingriffskondiktion vergleichbare Lehre nicht. Probleme aus dieser Fallgruppe werden zumeist in sachen-, personen- und urheberrechtlichen Vorschriften gelöst, die ihrerseits auf das Bereicherungsrecht weiterverweisen. Dieses kann aber auch ohne eine solche "Zwischennorm" zur Anwendung kommen, etwa dort, wo eine Frau, die selber nicht an der Tat beteiligt war, von einer Unterschlagung ihres Mannes profitiert (BH 2000/546). Der rechtsgrundlose Besitz und die Folgen der Nutzung fremder Sachen sind Gegenstand der sachenrechtlichen CC §§ 193-195; das Bereicherungsrecht kommt in diesem Bereich nur zum Zwecke der Lückenfüllung zur Anwendung (*Vékás*, FS György, 331, 352). Geregelt werden die Beziehungen zwischen rechtmäßigem und unrechtmäßigem Besitzer (*Vékás*, JbOstR XIX [1978], 243, 245; *Vékás*, Magyar Jog 2003, 385, 398; *Schlechtriem*, Restitution und Bereicherungsausgleich in Europa I, 48). Ausgleichsansprüche infolge der unberechtigten Nutzung einer fremden Immobilie sind von der Rechtsprechung aber keinesfalls nur auf das Recht des unrechtmäßigen Besitzes (so BH 2005/359: Anspruch auf eine Nutzungsgebühr gegen bösgläubige Besitzerin aus CC § 195(3)), sondern auch unmittelbar auf das Bereicherungsrecht gestützt worden (z.B. BH 2001/168). Ausgleichsansprüche bei gesetzlichem Eigentumsverlust (z.B. Verarbeitung und Verbindung, CC §§ 133-135) sind gleichfalls Gegenstand sachenrechtlicher Vorschriften, die bei Bösgläubigkeit des Handelnden auf das Bereicherungsrecht weiterverweisen und ihm so den Einwand der Entreicherung abschneiden. Unmittelbar dem Bereicherungsrecht unterstehen andere Formen der Ausnutzung fremden Eigentums, see e.g. BH 2005/143 (Verbreitung unautorisierter Fotografien eines einzigartigen Hauses für Werbezwecke; kein Schadenersatz, aber Bereicherungsausgleich nach CC § 361(1) und CFI Csongrád, 1. Gf. 40 177/2002/3 (rechtsgrundlose Nutzung einer fremden Werbefläche; Bereicherungsausgleich in Höhe des üblichen Mietzinses unabhängig vom Nachweis eines Schadens). Zum Schutz der Immaterialgüterrechte existiert auch in Ungarn eine umfangreiche Spezialgesetzgebung, die sich ausdrücklich auch Fragen des Bereicherungsausgleichs zuwendet. Bei der Verletzung von privatrechtlichen Persönlichkeitsrechten kommt es typischerweise zu einem Ausgleich immaterieller Schäden; das Gericht kann dem Verletzer nach CC § 84(2) sogar eine an eine gemeinnützige Organsiation zu leistende Geldstrafe auferlegen. Über bereicherungsrechtliche Ansprüche scheint in diesem Zusammenhang bislang zwar noch nicht entschieden worden zu sein, doch dürften sie in dem neuen Zivilgesetzbuch (dort § 84) ausdrücklich anerkannt werden (http://www.parlament.hu/irom38/05949/05949.pdf). Das geltende Recht kennt auch keine ausdrückliche Regelung des Bereicherungsausgleichs im Falle der unberechtigten Verfügung über fremdes Gut. Dem ursprünglichen Eigentümer steht in solchen Fällen nur ein schuldrechtlicher Anspruch gegen den Verfügenden zu (*Lenkovics*, Dologi jog, 132-134), und zwar in erster Linie ein Schadenersatzanspruch aus Delikt (BH 1997/119, BH 1988/70) und nur ergänzend auch ein Anspruch aus ungerechtfertigter Bereicherung (*Menyhárd*, Polgári Jogi Kodifikáció 2004, 24, 30).

24. Das BULGARIAN Law kennt die Eingriffskondiktion, schränkt ihren Anwendungsbereich aber durch das Prinzip der Subsidiarität der allgemeinen Bereicherungsklage (LOA art. 59(2)) erheblich ein. Immerhin kommt sie zur Anwendung, wenn der Tatbestand eines Delikts nicht erfüllt ist, z.B. dort, wo ein Miteigentümer die Sache allein nutzt (Supreme Court 8 December 1994, decision no. 1808, civil matter no. 2027/93).

25. In POLAND kommen im Falle der rechtsgrundlosen Nutzung fremder Vermögensgegenstände in erster Linie die Vorschriften zum Eigentümer-Besitzer-Verhältnis (CC arts. 224-230) zur Anwendung; sie verdrängen das Bereicherungsrecht

(Supreme Court 11 May 1972, III CZP 22/72, OSN 1972, no. 12, pos. 213). Unter CC arts. 224 § 2 und 225 hat der Eigentümer gegen den bösgläubigen Besitzer Anspruch auf Zahlung einer Nutzungsvergütung in Höhe des marktüblichen Miet- bzw. Pachtzinses (Supreme Court 23 May 1975, II CR 208/75, LEX no. 7707; Supreme Court 10 July 1984, III CZP 20/84, OSNC 1984, no. 12, pos. 209). Der Schutz von (körperlichen wie unkörperlichen) Persönlichkeitsrechten ist Gegenstand der CC arts. 23 und 24; die Rechtswidrigkeit einer Verletzung dieser Rechte wird vermutet (CC § 24 § 1 first sentence). Der Betroffene kann wegen seiner immateriellen Schäden Ausgleich in Geld (allerdings nur im Falle des Verschuldens der anderen Seite: CA Warsaw 13 January 1999, I ACa 1089/98, Wokanda 2000, no. 3, pos. 42; *Radwański and Olejniczak*, Zobowiązania – część ogólna[7], p. 173 no. 395) oder Zahlung an eine gemeinnützige Organsiation (CC art. 24 § 1 third sentence) verlangen. Man darf vermuten, dass in die Höhe dieses Ausgleichsbetrages auch ein Verletzergewinn eingerechnet wird. Bei einer rechtswidrigen Verfügung über seine Sache kann der Eigentümer von dem verfügenden Besitzer nach CC arts. 224 und 225 Ersatz für ihren 'Verlust' verlangen; der Begriff des 'Verlustes' umfasst auch den Rechtsverlust (*Dybowski*, Ochrona własności w polskim prawie cywilnym, 193; Pietrzykowski [-*Skowrońska-Bocian*], Kodeks cywilny I[4], art. 224, no. 13; Radwański and Dybowski [-*Gniewek*], System prawa prywatnego III, p. 516, no. 197; a. A. *Rudnicki*, Komentarz do kodeksu cywilnego II[6], art. 224 no. 3). Die Haftung unter diesen Vorschriften setzt allerdings Bösgläubigkeit voraus und ist der Höhe nach auf den Wert der Sache beschränkt (*Gniewek* loc.cit. 515, no. 192; *Dybowski* loc.cit. 191). Schadenersatz wegen entgangenen Gewinns gewährt nur das Deliktsrecht, einen Anspruch auf Gewinnherausgabe nur das Bereicherungsrecht (*Dybowski* loc.cit. 188, 196: Haftung auf Herausgabe des erzielten Gewinns aus CC art. 406 CC).

26. Zu DUTCH CC art. 6:203 siehe schon oben note *II15*. Unter diese Vorschrift fällt auch die unerlaubte Nutzung einer fremden Sache (Asser [-*Hartkamp*], Verbintenissenrecht III[12], no. 321, p. 340; *Nieskens-Isphording*, NTBR 1998, 239; *Zwalve*, RM-Themis 1998, 206); der Begriff der 'Leistung' scheint in solchen Fällen sehr weit ausgedehnt zu werden. Geschuldet ist der Marktwert der Nutzung (CC art. 6:210(2); see *Scheltema*, Onverschuldigde betaling, 203; *Hartkamp* loc.cit. no. 333, p. 350. CC art. 6:211 ordnet an, dass ein Geldausgleich für Leistungen, die nicht in Natur restituiert werden können, dann ausgeschlossen ist, wenn nicht nur die Leistung selber, sondern auch die Zahlung von Geld für sie eine unerlaubte Handlung darstellen würde. Unter CC art. 6:212 ist ein Käufer, der wegen eines Mangels der Kaufsache vom Vertrag zurücktritt, zu einem Bereicherungsausgleich für den Gebrauch der Sache verpflichtet (Parlementaire Geschiedenis VI, 136; siehe aber auch HR 20 September 2002, NedJur 2004, no. 458 p. 3819 [keine Haftung auf Bereicherungsausgleich, wenn der aus Nichterfüllung in Anspruch genommene Schuldner mangels Mahnung auch nicht auf Schadenersatz wegen Verzuges haftet]).

27. Under ESTONIAN law unauthorised use of another's assets must be compensated since the use is regarded as a gain derived from that asset. Bei der Übertragung von Eigentum, however, the principle of abstraction must be taken into account. Die Unwirksamkeit des schuldrechtlichen Vertrages zieht nicht die Unwirksamkeit des Verfügungsgeschäftes nach sich (GPCCA § 6(4)). Der Empfänger hat in einem solchen Fall also eine eigene Sache genutzt, nicht die Sache eines anderen. Dieser hat aber einen bereicherungsrechtlichen Anspruch auf Rückübertragung des Eigentums, der sich auch auf die gezogenen gains erstreckt (LOA §§ 1028 and 1032(1)). Nur wenn das Verfügungsgeschäft selber nichtig ist, verbleibt das Eigentum beim Veräußerer; er kann die Sache dann mit Hilfe der *rei vindicatio* (LPA § 80) zurückverlangen und aus LPA § 85(1) i.V.m. LOA §§ 1037-1040 Herausgabe der

gains verlangen. Das betrifft alle unrechtmäßigen Besitzer, gleichgültig, ob sie bös- oder gutgläubig sind. 'Gains' umfasst die Früchte und alle sonstigen Vorteile aus dem Gebrauch der Sache (GPCCA § 62(1)). Es wird vermutet, dass jemand, der eine fremde Sache nutzt, Aufwendungen erspart hat (Supreme Court 20 December 2005, judgement in civil matter no. 3-2-1-136-05). Unbefugte Verfügungen über seine Sache kann der Berechtigte genehmigen und anschließend den Verfügenden auf Ersatz des Marktwertes der Sache in Anspruch nehmen (LOA § 1037(2)). Vielfache Verweisungen auf das Recht der ungerechtfertigten Bereicherung finden sich in den Sondergesetzen zum Urheberrecht und zum gewerblichen Rechtsschutz; der Rechtsinhaber kann jeweils nach Maßgabe der LOA §§ 1037 and 1039 Herausgabe des vom Verletzer Erlangten verlangen. Auch bei der Verletzung von Persönlichkeitsrechten kommen Ansprüche aus ungerechtfertigter Bereicherung in Betracht. Nach vorherrschender Ansicht wohnt auch Persönlichkeitsrechten ein ökonomischer Wert inne, so dass insoweit LOA § 1037 anwendbar sei (*Tampuu*. Lepinguväliste võlasuhete õigus, 82).

28. In the NORDIC countries there is an established claim for a reasonable compensation, separate from tort law, with regards to the use of another's asset. In SWEDEN such a claim is based on the principle of unjustified enrichment. Although no particular requirement of attribution has been identified, the claim is described as being against someone who is foreclosing the property right holder from using the asset himself (HD 2 July 2007, NJA 2007, 519; see also HD 11 April 2006, NJA 2006, 206). In DENMARK the claim is considered to have some affinity with unjustified enrichment, warranting a reasonable compensation for use (*Vinding Kruse*, Erstatningsretten[5], 268). In FINLAND such a claim is explicitly identified as an unjustified enrichment claim (*Roos*, JFT 1992, 75, 84). The good faith of the infringing person excludes liability for the fruits that person has extracted, but nevertheless results in liability for a reasonable compensation for the use itself (Supreme Court 24 August 1983, KKO 1983 II 104; Supreme Court 29 September 1985, KKO 1985 II 140 [reasonable rent as compensation for use of a building]). Also bad faith situations are sometimes dealt with under unjustified enrichment. With regards to Sweden and Denmark, it is clear that the bad faith (intention/negligence) of the infringing person grants a damages claim for the loss suffered by the right holder (*Agell*, Skadeståndsansvaret vid obehöriga förfoganden över annans egendom, 202; *Vinding Kruse* loc cit. 264; *Gomard*, Forholdet mellem erstatningsregler i og uden for kontraktsforhold, 437). Ein Bereicherungsausgleich wegen der Nutzung der Sache wird hierdurch aber jedenfalls in Sweden nicht ausgeschlossen (*Agell* loc cit. 208; for Denmark see *Vinding Kruse*, Restitutioner, 293, 378). Ob dieser Anspruch auf Herausgabe der gesamten Bereicherung des Verletzers gerichtet oder der Höhe nach durch den objektiven Wert der Nutzung zu beschränken sei, wird nach wie vor streitig diskutiert. Sicher ist nur, dass der Anspruch nicht voraussetzt, dass der Rechtsinhaber den Gegenstand tatsächlich selber nutzen wollte (*Hellner*, Obehörig vinst, 226; *Ussing*, Erstatningsret, 174; *Karlgren* loc cit. 43; *Hellner and Radetzki*, Skadeståndsrätt[7], 420; *Roos*, JFT 1992, 75 at 84). Danish Insolvency Act [*Konkursloven* no. 1259 of 23 October 2007] § 75 regulates the recovery from a person who has received performance from the insolvent debtor in violation of the Act, and determines the compensation to correspond to the enrichment of that person, but not beyond the loss of the insolvency estate.

IV. Improvement of another's asset

29. Auch der Anspruch auf Ausgleich von Verwendungen auf eine fremde Sache kann seinen "Sitz" in durchaus verschiedenen Rechtsgebieten haben. Unter FRENCH law

umfasst der Anspruch auf *revendication* nicht nur die Sache selbst, sondern auch deren Zubehör, Zuwächse (*accroissements*) und Früchte (*Zenati and Revet*, Les biens[2], no. 172). Nach CC art. 1381 hat der Eigentümer dem Besitzer umgekehrt alle notwendigen Ausgaben zu ersetzen, die er zur Erhaltung der Sache getätigt hat, und zwar unabhängig von Gut- oder Bösgläubigkeit des Besitzers. Nur notwendige Ausgaben sind ersatzpflichtig. Sind Verwendungen auf Immobilien nur nützlich (werterhöhend), aber nicht unentbehrlich gewesen, kann der Eigentümer wählen, ob er den Wert der geleisteten Arbeit oder die Werterhöhung seines Grundstücks ausgleicht. Fehlt es an einer Werterhöhung, entfällt die Ersatzpflicht; der Eigentümer kann sogar Entfernung der Verwendungen und Schadenersatz verlangen (*Mazeaud and Chabas*, Leçons de droit civil II(2)[8], no. 1605). Die Haftung des Eigentümers auf Ersatz der notwendigen Verwendungen (d.h. der Unterhaltungskosten der Sache) wird als eine der Haftung aus ungerechtfertigter Bereicherung ähnliche Billigkeitslösung gedeutet (*Zenati and Revet* loc.cit. no. 173). Der Rechtslage in France entspricht die in BELGIUM (*Hansenne*, Les biens I(1), no. 267) und in LUXEMBURG.

30. The modern approach to SPANISH Unjustified Enrichment Law kennt in Anlehnung an die deutsche Lehre auch eine *condictio por impensas* (restitutionary claim based on expenditures) und versucht, sie mit CC arts. 453-454 and 361 zu koordinieren (*Díez-Picazo and de la Cámara Alvarez*, Dos Estudios sobre el enriquecimiento sin causa, 131-132; *Díez-Picazo*, Fundamentos I[6], 128; *Miquel González*, Enriquecimiento injustificado, 2808; *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 50). Die Gerichte scheinen dagegen den Verwendungsersatz sogar unmittelbar auf das Konzept der ungerechtfertigten Bereicherung zu stützen (kritisch dazu u.a. *Carrasco Perera*, ADC 1987, 1055, 1065; befürwortend aber *Quesada Sánchez*, La Ley 2005 [4] 1719, 1730). Das folgt u.a. aus TS 27 March 1958, RAJ 1958 (1) no. 1456 p. 940 (Bereicherungsanspruch eines Mannes gegen den Vater seiner Braut bejaht, nachdem die Verlobung auseinandergegangen und deshalb die Investitionen in das dem Vater gehörende Haus für den Mann verloren waren; Ausgleich in Höhe der Wertsteigerung des Hauses) und aus TS 30 July 1996, RAJ 1996 (3) no. 6411 p. 8566 (a citizen of a small village, who also was one of the members of City Council, decided – taking into account that at that moment the City Council had financial problems – to finance the construction of two tennis courts on land belonging to the village; his widow's unjustified enrichment claim was admitted).

31. Auch under ITALIAN law kann die Verbesserung einer fremden Sache eine rechtsgrundlose Bereicherung darstellen. Ihr Ausgleich erfolgt aber in erster Linie über die Regeln zum Besitz und zum Eigentümer-Besitzer-Verhältnis. Dem bösgläubigen Besitzer steht ein Verwendungsersatzanspruch nur zu, wenn die vorgenommenen Verbesserungen im Zeitpunkt der Rückgabe der Sache noch vorhanden sind (CC art. 1150(2)). Der Eigentümer hat entweder den Wert der Verwendungen oder die Höhe der Wertsteigerung seiner Sache auszugleichen, je nachdem, welcher Betrag der geringere ist. Ein gutgläubiger Besitzer hat dagegen Anspruch auf Ersatz in Höhe des Wertzuwachses der Sache. Die Vorschriften des Eigentümer-Besitzer-Verhältnisses über Verwendungsersatz finden allerdings nur auf einen Besitzer im technischen Sinn, nicht auch auf einen *detentore* Anwendung (Cass. 21 December 1993, no. 12627, Rep.Giur.it. 1993, voce Possesso (in materia civile), no. 66, col. 2993); in Ermangelung anderer spezieller Regeln (wie z.B. in CC arts. 935-937, im Nießbrauchs-, Pacht-, Miet- und Wohnungseigentumsrecht) verbleibt es insoweit beim allgemeinen Bereicherungsrecht.

32. Unter dem Einfluss der deutschen Rechtslehre hat sich auch in PORTUGAL die sogen. Aufwendungskondiktion (*enriquecimento por despesas efectuadas por outrem*) etablieren können, zu deren Unterkategorien die Verwendungskondiktion

(*enriquecimento por incremento de valor em coisas alheias*) und die Rückgriffskondiktion (*enriquecimento por pagamento de dívidas alheias*) gehören (*Menezes Leitão*, Enriquecimento sem causa[2], 791-814). Verwendungsersatzansprüche finden sich hauptsächlich im Sachenrecht, dessen Vorschriften in einigen Fällen auf das Bereicherungsrecht weiterverweisen (CC arts. 1273(2), 1334(2), 1341 und 1538(2)). Unter CC art. 1273(1) haben sowohl der gut- als auch der bösgläubige Besitzer Anspruch auf Ersatz notwendiger Verwendungen und auf Wegnahme nützlicher Verbesserungen, sofern die Wegnahme ohne Beschädigung der Sache möglich ist. Ist die Wegnahme nicht ohne Beschädigung der Sache möglich, so ist der Eigentümer dem Besitzer nach den Regeln der ungerechtfertigten Bereicherung zum Wertersatz verpflichtet (CC art. 1273(2)). Verliert eine bösgläubige Person Eigentum nach den Tatbeständen des gesetzlichen Eigentumserwerbs über Verbindung, Vermischung u.ä., so haftet der Eigentümer, der die Sache behalten will, gleichfalls nur nach Bereicherungsrecht (CC arts. 1334(2) und 1341). Deshalb haftet z.B. der Staat einer politischen Partei, die ein staatliches Gebäude widerrechtlich okkupiert und mit einem Pavillon ausgebaut hatte, den der Staat weiter nutzte, statt ihn abzureißen (CA Oporto 16 April 1991, CJ XVI [1991-2] 263; *Menezes Leitão* loc.cit. 801, fn. 2166). Erlischt ein Erbbaurecht und geht infolgedessen das Eigentum an dem Gebäude auf den Grundstückseigentümer über, so ist dieser zum Ausgleich nach bereicherungsrechtlichen Vorschriften verpflichtet (CC art. 1538(2)). CC art. 215(1) gewährt demjenigen, der Früchte herausgeben muss, einen Anspruch auf Ausgleich der investierten Produktions- und Erntekosten bis zur Höhe des Wertes der Früchte; auch das wird als ein Fall der Aufwendungskondiktion verstanden (*Menezes Leitão* loc.cit. 799).

33. Im Sinne der GERMAN Terminologie sind *Verwendungen* Aufwendungen auf fremdes Gut. Die bereicherungsrechtliche Rückabwicklung erfolgt über die sogen. Verwendungskondiktion, die einen Sonderfall der sogen. *Nichtleistungskondiktion* (CC § 812(1) first sentence, second alternative) darstellt. Die Verwendung darf aber nicht den Gegenstand einer *Leistung* darstellen. Nicht um eine Leistung geht es insbesondere, wenn der Verwendende nicht weiß, dass es sich um eine fremde Sache handelt, oder wenn er die Verwendung selbst nutzen will (wie z.B. der Dieb). Die Verwendungskondiktion ist anderen, spezielleren Ausgleichsmechanismen (insbesondere des Sachenrechts: CC §§ 994 ff) subsidiär (näher *Medicus*, Schuldrecht II[14], no. 716; Erman [-*Westermann and Buck-Heeb*], BGB II[12], vor § 812, no. 13; § 812, no. 73).

34. HUNGARY regelt das Recht der Verwendungen auf fremde Sachen zunächst in einer Reihe von Spezialvorschriften des Vertragsrechts, insbesondere im Recht der Miete beweglicher Sachen (CC § 427), der Leihe (CC § 584(4): Verweis auf das Recht der Geschäftsführung ohne Auftrag mit teilweiser Weiterverweisung auf das Bereicherungsrecht) und der Wohnraummiete (CC § 434(2) i.V.m. Gesetz no. LXXVIII/1993 über einzelne Vorschriften bezüglich der Vermietung und Veräußerung von Wohnungen und anderen Räumlichkeiten [*1993. évi LXXVIII. törvény a lakások és helyiségek bérletére, valamint az elidegenítésükre vonatkozó egyes szabályokról*]). Die Parteien können Abweichendes vereinbaren und dadurch auch bereicherungsrechtliche Ausgleichsansprüche ausschließen (BH 2000/70; BH 1994/593). Weitere Regelungen zum Verwendungsersatz finden sich in sachenrechtlichen Vorschriften, die gleichfalls nicht selten auf das Bereicherungsrecht weiterverweisen. Zu ihnen gehören im Nießbrauchsrecht CC §§ 159(1) und 162(2) und im Recht des rechtsgrundlosen Besitzes CC § 194, wonach dem bösgläubigen Besitzer notwendige und dem gutgläubigen Besitzer auch nützliche Verwendungen zu erstatten sind. Daneben besteht ein Wegnahmerecht, an dessen Stelle ein

Bereicherungsanspruch tritt, wenn die Wegnahme nicht ohne Beschädigung der Sache möglich ist (näher *Menyhárd*, Dologi jog, 508). Ausführlich geregelt sind die Rechtsfolgen des Bauens auf fremden Grund (CC §§ 137 ff) und des Bauens über die Grenze (CC §§ 109ff); nur bei Bösgläubigkeit des Überbauenden unterliegen seine Ausgleichsansprüche unter den Voraussetzungen von CC § 110(1)(a) dem Bereicherungsrecht. Bereicherungsrecht bzw. das Recht der Geschäftsführung ohne Auftrag kommen, je nach den Umständen, zur Anwendung, wenn der Verwender irrig meint, im Rahmen eines wirksamen Vertrages zu handeln, außerdem in allen übrigen Fällen, die keiner der bisher genannten Fallgruppen angehören (z.B. BH 1997/400: nach Versteigerung seines Ackerlandes investiert der frühere Eigentümer noch Arbeit darauf; Bereicherungsanspruch nur deshalb abgelehnt, weil der neue Eigentümer durch die Arbeit nicht bereichert worden sei).

35. Gutgläubige Besitzer, die Verwendungen auf eine fremde Sache machen, haben unter BULGARIAN LPA art. 72(1) gegen deren Eigentümer einen Anspruch auf Ausgleich der dadurch bewirkten Werterhöhung; für sie kommt es auf den Zeitpunkt der gerichtlichen Entscheidung an. Der bösgläubige Besitzer kann, je nachdem, welcher Betrag der geringere ist, nur entweder die Werterhöhung oder die aufgewandten Kosten verlangen (LPA art. 74(2)). Problematisch ist, dass die genannten Vorschriften unter einem Besitzer nur den Eigenbesitzer, nicht auch den Fremdbesitzer oder Detentor verstehen, obwohl auch der Letztere ähnlich geschützt sein sollte (näher *Tzonchev*, Podobreniyata, 30; *Goleminov*, Neosnovatelno obogatyavane, 100). Supreme Court 2 December 1968, Auslegungsentscheidung no. 85 der Generalversammlung der Zivilkammern (zitiert nach *Tzonchev* loc.cit. 42) hat dem bloßen Detentor jedoch Ansprüche aus LPA art. 72(1) versagt und ihm stattdessen einen bereicherungsrechtlichen Anspruch aus LOA art. 59 gewährt. Auch dieser komme aber nur in Betracht, wenn der Kläger wenigstens Fremdbesitzer (Detentor) gewesen sei; sonst verbleibe es bei den Regeln der Geschäftsführung ohne Auftrag. SLOVENIAN LOA art. 194 verpflichtet den Bereicherten auf Ausgleich notwendiger (*expensae necessariae*) und nützlicher Verwendungen (*expensae utiles*). Handelte der Verwender bösgläubig, steht ihm ein Ausgleich für nützliche Verwendungen nur bis zur Höhe der dem Eigentümer verbleibenden Wertsteigerung der Sache zu.

36. Wird auf fremdem Grund gebaut oder werden sonst Verwendungen auf eine fremde Sache gemacht, so besteht under DUTCH law die Bereicherung in der Wertsteigerung der Sache, nicht in dem Wert der Aufwendungen; sind Letztere geringer, bleibt der Bereicherungsanspruch aber auf sie begrenzt. Ein über Bereicherung und/oder Verarmung hinausgehender Schadenersatzanspruch besteht nur im Falle einer unerlaubten Handlung des Bereicherten (HR 29 January 1993, NedJur 1994 no. 172 p. 728; Asser [-*Hartkamp*] Verbintenissenrecht III[12], no. 364 p. 383). Unter CC art. 6:212(2) bleibt eine Bereicherung außer Betracht, deren Wert durch Umstände vermindert wurde, die außerhalb der Risikosphäre des Bereicherten liegen. Das ist wichtig, weil der Wert der Bereicherung grundsätzlich zum Zeitpunkt ihrer Entstehung berechnet wird. Wird die Sache jedoch beschädigt oder vernichtet, ohne dass dem Bereicherten dies zuzurechnen ist, so bleibt die Bereicherung bis zur Höhe dieses Betrages unberücksichtigt. Spezielle Normen zur Abschöpfung ungerechtfertigter Bereicherungen infolge von Verwendungen finden sich im Pacht- und im Nießbrauchsrecht (CC arts. 3:220 und 5:96). Auch die mietrechtliche Regelung in CC art. 7:216(3) wird auf den Gedanken der ungerechtfertigten Bereicherung gestützt (HR 25 June 2004, NedJur 2005 no. 338 p. 3078); sie ist im Bereich der Wohnraummiete zwingenden Rechts (CC art. 7:242(2)). Wesentlich durch familienrechtliche Überlegungen überlagert ist die Rechtsprechung zum Verwendungsersatz zwischen Ehegatten. Wer die gemeinsame Wohnung verbessert hat, sie dann aber verlässt, kann

je nach den Umständen einen Bereicherungsanspruch gegen den anderen Ehepartner haben (HR 11 April 1986, NedJur 1986, no. 622 p. 2312). Ist das Haus, in welchem die Eheleute wohnen, auf den Namen der Frau eingetragen, dann soll sie jedoch nicht durch die Wertsteigerung ungerechtfertigt bereichert sein, die aus den von ihrem Mann vorgenommenen Verbesserungen resultiert (HR 22 May 1987, NedJur 1988, no. 231 p. 913; HR 12 June 1987, NedJur 1988; no. 150 p. 635; -*Scheltema*, Verbintenissenrecht II, art. 6:212, no. 6.3, p. 42).

37. Auch das ESTONIAN law gewährt einen Verwendungsersatzanspruch in Höhe der Bereicherung des Eigentümers der Sache. Bei der Feststellung der Bereicherung wird u.a. gefragt, ob die Verwendungen für den Eigentümer, gemessen an seinen Absichten, nützlich waren. Maßgeblich ist der Zeitpunkt der Rückgabe der Sache bzw. der Zeitpunkt, zu welchem der Eigentümer sonst in der Lage war, die Wertsteigerung der Sache für sich zu nutzen (LOA § 1042(1)). Der Verwendungsersatzanspruch ist jedoch ausgeschlossen, wenn der Eigentümer Wegnahme der Verwendungen verlangt und diese ohne Beschädigung der Sache möglich ist, wenn der Verwender den Bereicherten nicht rechtzeitig über seine Absicht, Aufwendungen auf dessen Sache zu machen, unterrichtet hat, wenn der Bereicherte den Verwendungen widersprochen hat oder ihre Vornahme vertraglich oder gesetzlich untersagt war. LOA § 1042 setzt voraus, dass die Sache nicht dem Verwender gehörte. Ist der Verwender (in Anwendung des Abstraktionsprinzips) trotz nichtigen Kaufvertrages Eigentümer geworden und hat er Grund zu der Annahme gehabt, dieses Eigentum dauerhaft behalten zu dürfen, so muss er die Sache nur gegen Zahlung eines Ausgleiches für die auf sie gemachten Verwendungen zurückgeben (LOA § 1033(2)). Das umfasst auch solche Kosten, welche der Kläger nicht investiert hätte.

38. In the NORDIC countries werden Verwendungsersatzansprüche vorwiegend im Zusammenhang mit der Rückabwicklung nichtiger, angefochtener or terminated contracts und als Gegenrechte des herausgabepflichtigen Besitzers im der Vindikation geprüft (*Karlgren*, Obehörig vinst och värdeersättning, 29). In SWEDEN, the right to receive compensation for costs relating to property which has been in ones possession, can be found in several contexts. Firstly, general maintenance of the property is to be compensated. Secondly, a distinction is made between necessary (costs which the owner could not have avoided), useful (costs which nevertheless have increased the value of the property) and excessive costs (see Land Code chap. 5 § 3; correspondingly FINNISH Land Code chap. 3 § 4). Excessive costs are never to be compensated, nützliche Kosten sind ersatzpflichtig solange der Besitzer gutgläubig ist, aber nicht über den Betrag der Wertsteigerung der Sache hinaus (*Karlgren* loc cit. 101; see also Swedish HD 11 December 1987, NJA 1987, 845 II and some specific insolvency rules to the same effect, such as DANISH Insolvency Act § 75; Swedish Insolvency Act chap. 4 § 15(3) and FINNISH Recovery to Bankruptcy Estate Act § 18). Der Käufer einer rückgabepflichtigen und der Verkäufer einer nicht rechtzeitig entgegengenommenen Sache sollen einen Ausgleich für nützliche Verwendungen unter dem Recht der *negotiorum gestio* verlangen können (*Håstad*, Tjänster utan uppdrag, 80). Necessary maintenance cost should be compensated regardless of good faith (*Hellner*, Obehörig vinst, 374). Work done may be qualified as (necessary or useful) costs (*Lennander*, Återvinning i konkurs[3], 358). The support for a claim concerning improvements of another's asset is more limited in DENMARK, although its been asserted that a right to compensation for such investments exists in case of good faith improvements and that the compensation is limited to the enrichment of the rights holder, i.e. the increase of value due to the improvements and possible savings made (*Vinding Kruse*, Erstatningsretten[5], 272).

V. Tilgung fremder Schuld

39. Unter FRENCH, BELGIAN and LUXEMBURGIAN CC art. 1236 darf jede interessierte Person (wie z.B. ein Bürge oder ein Mitschuldner) die Schuld eines Dritten erfüllen. Eine Person, die kein eigenes Interesse an der Schuldtilgung hat, darf nur im Namen des Schuldners und für ihn handeln; handelt sie im eigenen Namen, darf sie den Gläubiger nicht ersetzen. Wer wissentlich die Schuld eines Dritten erfüllt hat und deshalb gegen ihn vorgehen will, muss nach French Cass.civ. 17 June 2003, pourvoi no. 01-00608 und Cass.civ. 12 June 2001, pourvoi no. 99-15646 beweisen, dass *la cause dont procédait ce paiement impliquait pour le débiteur l'obligation de lui rembourser les sommes ainsi versée*. Die Freiwilligkeit der Schuldtilgung sperrt andernfalls jeglichen Bereicherungsausgleich. Denkbar ist aber natürlich ein Ausgleichsanspruch auf der Grundlage eines stillschweigend geschlossenen Auftragsvertrages oder, ihm im Ergebnis gleichkommend, einer Geschäftsführung ohne Auftrag (Luxemburgian Supreme Court 26 October 1965, Pas. luxemb. 20, 39).

40. SPANISH theory of *condictiones* conceives a *condictio de regreso* (reimbursement claim based on payment of another's debt; *Rückgriffskondiktion*). Die Vorschriften über die Tilgung fremder Schulden (CC arts. 1158, 1159, 1209 and 1210) unterscheiden je nachdem, ob der Zahlende an der Schuldtilgung ein Interesse hat oder nicht. Nur im ersten Fall tritt der Zahlende im Wege der Subrogation an die Stelle des Gläubigers (CC art. 1210(3)). Hat der Zahlende kein Interesse an der Schuldtilgung, so kann er, wenn er für Rechnung des Schuldners leistet, von ihm gemäß CC art. 1158 das Geleistete verlangen, sofern er nicht gegen den ausdrücklichen Willen des Schuldners geleistet hat. Nach herrschender Auffassung in der Lehre gewährt CC art. 1158 zwei verschiedenen Bereicherungsansprüche (see, instead of many, Bercovitz Rodríguez-Cano [-*Bercovitz Rodríguez-Cano*], Comentarios al Código Civil[2], 1394-1395; abweichend aber *Del Olmo García*, Pago de tercero y subrogación, 80-83): the *acción de reembolso* (reimbursement claim) when the debtor ignored the payor's payment (CC art. 1158(2)), und an unjustified enrichment claim when the payor paid against the debtor's will (CC art. 1158(3)). Um einen Bereicherungsanspruch handelt es sich in dem zuletzt genannten Fall, weil er sich ausschließlich auf die Nettobereicherung des Schuldners bezieht (see notes under VII.–3:102).

41. Unter ITALIAN CC art. 1180(1) kann jeder die Schuld eines anderen auch gegen den Willen des Gläubigers tilgen, es sei denn, der Gläubiger hat ein Interesse an persönlicher Erfüllung durch den Schuldner. Der Gläubiger kann allerdings die ihm vom Dritten angebotene Leistung ablehnen, wenn der Schuldner dem Gläubiger gegenüber widerspricht (CC art. 1180(2)). Besteht zwischen dem Schuldner und dem zahlenden Dritten kein vorrangig zu beachtendes Schuldverhältnis und handelt der Dritte auch nicht in Geschäftsführung ohne Auftrag, kann er den Schuldner unter den Regeln über die ungerechtfertigte Bereicherung in Anspruch nehmen.

42. Auch PORTUGUESE CC art. 767(1) erlaubt die Tilgung einer fremden Schuld. Jeder Dritte kann die Leistung erbringen; eines besonderen Rechtfertigungsgrundes bedarf es nicht (*Menezes Leitão*, Enriquecimento sem causa[2], 804, fn. 2169). Das Gesetz sieht deshalb zahlreiche Ausgleichsmechanismen vor, die ihrerseits kaum Raum für eine (subsidiäre) Rückgriffskondiktion (*enriquecimento por pagamento de dívidas*) lassen (*Menezes Cordeiro*, Obrigações II, 198-199; *Menezes Leitão* loc.cit. 805). Vorrang vor ihr haben jedenfalls vertragliche Ausgleichsansprüche (z.B. aus CC art. 1167(c) (Auftragsvertrag)), Ansprüche aus einer berechtigten Geschäftsführung ohne Auftrag (CC art. 468(1)), Ansprüche aus dem Recht der irrtümlichen Leistung in den Fällen einer subjektiven Nichtschuld (CC arts. 477 und 478) und Ansprüche, welche der Leistende im Wege der Surrogation erwirbt (z.B. CC arts. 592, 589 und 590). Im

Allgemeinen gilt, dass ein Rückgriffsanspruch des Leistenden gegen den Schuldner nur dann besteht, wenn er unter eine dieser Fallgruppen fällt (so implizit auch STJ 11 May 2000, CJ [ST] VIII [2000-2] 54). Ein Ausweichen auf das Bereicherungsrecht soll höchstens in *hipótese rara*, in seltenen Ausnahmefällen in Betracht kommen (*Menezes Cordeiro* loc.cit. 199; *Menezes Leitão* loc.cit. 804).

43. Wenn ein Dritter an einen Gläubiger mit der Folge leistet, dass dessen Schuldner frei wird, steht dem Dritten gegen den befreiten Schuldner unter den Voraussetzungen von GERMAN CC § 812(1) first sentence, second alternative eine sogen. *Rückgriffskondiktion* zu. Sie allerdings ist anderen Ausgleichsmechanismen subsidiär, insbesondere den zahlreichen Vorschriften, welche die Frage mit der Technik der Legalzession lösen (e.g. CC §§ 268(3), 426(2) und 774(1), der Regelung zum Gesamtschuldnerausgleich in CC § 426(1) und der Regelung über den Aufwendungsersatz im Recht der Geschäftsführung ohne Auftrag (CC §§ 683, 670), see *Medicus*, Schuldrecht II[14], no. 719 and Staudinger (-*S. Lorenz*), BGB [2007], § 812, nos. 2, 42).

44. Unter HUNGARIAN law kann als ungeschuldet zurückverlangt werden, was jemand rechtsgrundlos auf eine vermeintlich eigene Schuld geleistet hat. Situationen, in welchen ein Dritter bewusst eine fremde Schuld tilgen will, fallen dagegen unter CC § 286. Hiernach muss der Gläubiger die von einem Dritten angebotene Erfüllung akzeptieren, wenn der Schuldner zustimmt und die Leistung weder personengebunden ist noch Kenntnisse oder Fähigkeiten erfordert, über die der Dritte nicht verfügt. Die Zustimmung des Schuldners ist nicht erforderlich, falls der Dritte ein gesetzliches Interesse an der Erfüllung hat. Andernfalls stellen Leistungen des Dritten an den Gläubiger keine Erfüllung dar; der Dritte hat gegen den Gläubiger einen Rückforderungsanspruch nach bereicherungsrechtlichen Vorschriften (Gellért [-*Harmathy*], A Polgári Törvénykönyv Magyarázata[6], 1032-1034). Hat die Leistung des Dritten dagegen die Schuld zum Erlöschen gebracht, so kommt es darauf an, ob der Dritte im Interesse des Schuldners oder im eigenen Interesse gehandelt hat. Im letzteren Fall dürfte der Dritte von Rechts wegen die Forderung des Gläubigers gegen den Schuldner erwerben (*Harmathy* loc.cit.). Dafür gibt es zwar keine ausdrückliche gesetzliche Grundlage, doch gründet man dieses Ergebnis auf eine entsprechende Interpretation von CC § 286(2) (Petrik [-*Kisfaludi*], Polgári jog II[2], 479; Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1183; *Bíró*, Kötelmi jog – közös szabályok, szerződéstan[8], 164). Hat der Dritte im Interesse des Schuldners gehandelt, so kann es sich dabei um eine berechtigte Geschäftsführung ohne Auftrag gehandelt haben (*Benedek* loc.cit. 1186; Szladits [-*Személyi*], Magyar magánjog IV, 755). War die Schuldtilgung unter den Umständen des Einzelfalls "angebracht", so wird der Tilgende so angesehen, als habe er als Beauftragter des Schuldners gehandelt (CC § 486(2); see BH 1993/111 and BH 1982/480); andernfalls steht dem Tilgenden nur ein Anspruch aus ungerechtfertigter Bereicherung zu (CC § 486(3); see *Bíró*, A megbízási szerződés, 108-114).

45. Under BULGARIAN LOA art. 73(1) kann jeder Dritte die Verbindlichkeit eines Schuldners tilgen, es sei denn, es handelt sich um eine Schuld *intuitu personae*. LOA art. 73(1) betrifft Leistungen aller Art, nicht nur Geldleistungen (*Kalaydjiev*, Obligazionno pravo, Obshta chast[4], 233). Weder Gläubiger noch Schuldner können der Leistung durch den Dritten widersprechen (*Kalaydjiev* loc.cit. 234). Nur wenn er ein berechtigtes Interesse an der Leistungserbringung nachweist, erwirbt der Dritte allerdings im Wege der Subrogation den Anspruch des Gläubigers gegen den Schuldner (LOA art. 74). In allen übrigen Fällen kommt es darauf an, ob der Dritte als Auftragnehmer, als Geschäftsführer ohne Auftrag, als Schenker oder als *solvens*

anzusehen ist (*Apostolov*, Obligazionno pravo. Obshto uchenie za obligazionnoto otnoshenie, 178).

46. Under DUTCH CC art. 6:30 kann eine Verbindlichkeit auch von einer anderen Person als dem Schuldner erfüllt werden. Dazu ist erforderlich, dass der Dritte mit dem Ziel zahlt, den Schuldner zu befreien. Denn wenn der Dritte in der irrtümlichen Annahme leistet, selber der Schuldner zu sein, hat diese Leistung keine schuldbefreiende Wirkung und kann als ungeschuldet vom Gläubiger zurückverlangt werden (CC art. 6:203). In den Fällen des CC art. 6:30 ist der Empfänger dagegen berechtigt, die Leistung zu behalten. Der *solvens* muss sich an den Schuldner halten, und zwar entweder auf der Basis eines zwischen ihnen bestehenden Vertrages, auf der Basis der Regeln über die Geschäftsführung ohne Auftrag (CC art. 6:198) oder auf der Basis der Regeln über die ungerechtfertigte Bereicherung (CC art. 6:212, see Asser [*–Hartkamp*] Verbintenissenrecht III[12], no. 330 p. 345; *Vriesendorp*, Verbintenissen uit de wet en Schadevergoeding[2], no. 292 p. 275; *Scheltema*, Verbintenissenrecht II, art. 6:212, no. 6.2 p. 22).

47. Auch under ESTONIAN LOA § 78(1) a third party may perform the obligation of the obligor in part or in full. In the absence of a legal basis such a performance is usually regarded as *negotiorum gestio* (LOA ch. 51). Die Vorschriften des Bereicherungsrechts (LOA § 1041) kommen zur Anwendung, wenn es sich um eine unberechtigte und vom Schuldner (dem principal im Sinne des Rechts der Geschäftsführung ohne Auftrag) auch nicht nachträglich genehmigte Geschäftsführung ohne Auftrag handelt. Voraussetzung ist aber, dass der *gestor* weder wusste noch wissen musste, dass er ohne rechtfertigenden Grund handelte und deshalb gutgläubig war. Andernfalls steht ihm auch ein Bereicherungsanspruch nicht zu (Supreme Court 1 November 2006, civil matter no. 3-2-1-91-06).

48. In SWEDEN führen ungeschuldete und unerbetene Zahlungen fremder Schulden grundsätzlich nicht zu einem Ausgleichsanspruch gegen den Schuldner (HD 23 November 1910, NJA 1910, 622; similarly HD 28 April 1920, NJA 1920, 234 and HD 29 December 1945, NJA 1945, 728). Zwar ist darauf hingewiesen worden, dass die Motivationen für solch freiwillige Zahlungen ganz unterschiedlich sein können und die generelle Ablehnung eines Ausgleichsanspruches deshalb zu unangemessenen Ergebnissen führen könne (HD 21 May 1973, NJA 1973, 286 [dissenting opinion JustR *Hessler*]; see also *Håstad*, Tjänster utan uppdrag, 109), doch scheint die Existenz eines Ausgleichsanspruches weiterhin davon abzuhängen, ob es auf vertraglicher oder gesetzlicher Grundlage zu einem Übergang des Anspruchs des Gläubigers gegen den Schuldner auf den Zahlenden kommt (HD 21 May 1973 loc.cit.; *Håstad* loc cit. 116; *Hellner*, Obehörig vinst, 378, 387). In DENMARK the assessment of performance of another's debt is more uncertain, although its been argued that a restitutionary claim for the enrichment should be granted (*Ussing*, Erstatningsret, 224; *Vinding Kruse*, Erstatningsretten[5], 272). In FINLAND, the right to receive restitution for performing another's debt is a recognized claim, and not as restricted as in Sweden; the claim is not necessarily defined as a right of recourse but instead as a restitutionary claim of an enrichment (*Roos*, JFT 1992, 75, 94).

Illustration 1 is taken from CA Naumburg 20 Decmeber 2005, NJW-RR 2006, 1154; **illustration 2** is from CA Leeuwarden 10 August 2005, NJF 2005, 393; LJN no. AU0823; **illustration 3** is based on CA Barcelona 16 February 2006, BDA JUR 2006/111578; **illustration 4** is taken from HR 30 September 2005, RvdW 2005, no. 106 p. 961.

VII.–4:102: Indirect representation

Where a representative does a juridical act on behalf of a principal but in such a way that the representative is, but the principal is not, a party to the juridical act, any enrichment or disadvantage of the principal which results from the juridical act, or from a performance of obligations under it, is to be regarded as an enrichment or disadvantage of the representative.

COMMENTS

Overview. This Article addresses globally issues of enrichment, disadvantage and attribution in situations involving representatives who deal with third parties on behalf of their principal, but in their own name or otherwise in such a way as not to indicate an intention to bind the principal. The purpose of the Article is to ensure that in such cases an essential policy is not disturbed – namely, that the reversal of enrichments conferred by parties to a transaction which is without effect is a matter only for the parties to that transaction. It does so by essentially collapsing the legal position of principal and representative in relation to third parties into one, ascribing enrichments obtained and disadvantages sustained by the principal to the representative because the representative is the third party's contractual partner.

Indirect representation. This Article applies only where a contract is concluded (or another juridical act done) on behalf of an undisclosed or unidentified principal in such a way that the representative is, but the principal is not, a party to it. The representative will have acted in the representative's own name or otherwise in such a way as not to indicate an intention to affect the legal position of a principal (see II.–6:106 (Representative acting in own name)) or will have failed to reveal the identity of an unidentified principal (see II.–6:108 (Unidentified principal)). This Article has no application where the contract is concluded by a representative in such manner as to bind the principal directly (as to which see II.–6:105 (When representative's act affects principal's legal position)).

The problem of the principal who is not a party to the transaction. The difficulty which the Article seeks to address arises where it is the representative and not the principal who is a party to the transaction with the third person. Difficulty may arise, for example, if the representative, by virtue of authority granted by the principal, has power to dispose of or otherwise make use of an asset of the principal. The effect of a performance of the contract with a third party (such as a contract to sell or let out the principal's goods) will be to inflict a disadvantage on the principal and to enrich the third person (purchaser, hirer, etc). The policy of confining reversal of enrichments obtained under a void contract to the parties to that contract demands that the third person return the goods or account for the value obtained to the representative, the third person's contractual partner. However, in the absence of this Article the disadvantage sustained is not that of the representative, but rather that of the principal. It should be the representative and not the principal to whom the third party's restitution is due. Conversely, performance by the third party may well have directly enriched the principal, but this should not facilitate a claim by the third party directly against the principal (with whom the third party never entered into legal relations).

Illustration 1

P authorises I to sell a specified sculpture. In conformity with his agreement with P, I negotiates a sale with T. I does not disclose that he is only acting as an agent. The contract is concluded between I and T, see II.–6:106 (Representative acting in own

name), consistent with P's instructions. As a result of performance of the obligations under the sale contract, the purchase money is paid into P's account (as provided for by the terms of the contract) and the sculpture is delivered to T. It later emerges that the contract is void for failure to comply with rules governing the movement of cultural artefacts. In accordance with this Article, it is I, not P, who has a claim against T under this Book for a return of the sculpture and it is I, not P, who is liable under this Book to T to return the purchase price. P's disadvantage in loss of the sculpture is treated as a result of this Article as a disadvantage of I, not P, and P's enrichment in acquiring the purchase price is treated as a result of this Article as an enrichment of I, not P.

Illustration 2
A consumer T concludes with I a contract for the hire-purchase of a car. Unknown to T, I is acting on P's instructions and the car belongs to P. The hire-purchase contract is void due to failure to comply with required statutory formalities, this being the mandatory effect prescribed by law. Although P suffers a disadvantage in that use is made of his car, I and not P is entitled to a return of the car because P's disadvantage is to be regarded as a disadvantage of I, the party purporting to perform the contract. Any claim of P will be against I by virtue of their agency relationship.

Internal relationship of representative and principal. The purpose of the provision is only to ensure that restitutionary claims arising out of a failed transaction between one party to a contract and another party who is an indirect representative are confined to those parties. The rules of this Article thus necessarily only apply in relation to claims by or against the third party. It leaves the internal rights and obligations of the principal and the representative unaffected, except in so far as their content depends on rights and obligations vis-à-vis third parties. There is an impact on the internal relationship between principal and representative only because the existence of rights or liabilities of the representative vis-à-vis the other contract party necessarily must have a bearing on the internal relationship. Thus, for example, the fact that a representative will have an enrichment claim against the third party for a return of the principal's property will generate a liability for the representative to account to the principal. Conversely, the liability of the representative vis-à-vis the third party to reverse enrichments of the principal will create in favour of the representative a right of indemnification by the principal. Hence, the representative will be both debtor and creditor of enrichment claims vis-à-vis the third party and will have both corresponding rights against and obligations to the principal under the internal relationship between principal and agent.

Insolvency or fundamental non-performance of the representative. Exceptions to the principle that unjustified enrichments are to be restored by and to the contractual partner (the representative) and not a hidden participant in the transaction (the principal) can only be justifiable in special circumstances where a direct legal relationship materialises between principal and third party. Under the PECL such exceptional cases were provided for in PECL arts. 3:302 and 3:303, whereby a principal or third party was justified in taking over the intermediary's claims in the event of the intermediary's insolvency or fundamental non-performance. These exceptional cases, which raised difficult questions of policy and for which practitioners acquainted with the recurring problems of representation in a commercial context doubted that the PECL rules provided an appropriate solution, have not been carried forward into these model rules. Accordingly there are no exceptions to the rule set out in this Article.

NOTES

1. Unter FRENCH and BELGIAN law sind die vertraglichen Beziehungen zwischen dem Mittelsmann und seinem Auftraggeber (dazu Cass.civ. 1 December 1971, D. 1972 248) streng von den Beziehungen zwischen dem Mittelsmann (dem Strohmann) und dem Dritten zu trennen (Cass.soc. 17 July 1958, Bull.civ. 1958, IV, no. 940). Der Strohmann ist der unmittelbare Vertragspartner des Dritten; dieser hat sich infolgedessen nur mit dem Strohmann auseinanderzusetzen (Belgian Cass. 17 May 2002, no. de rôle C010330F). Das gilt auch im Falle der Unwirksamkeit des Vertrages zwischen dem Mittelsmann und dem Dritten. Nimmt dagegen jemand mit Vertretungsmacht eine Leistung für einen anderen an, so muss der Leistende seinen Rückforderungsanspruch aus *répétition de l'indu* unmittelbar gegen den Prinzipal richten (Cass.com. 18 March 2008, pourvoi no. 06-20930; Cass.soc. 5 February 1981, Bull.civ. 1981, V, no 112; Cass. 8 December 1994, JT 1995, 296).

2. In SPAIN ist das concept of 'indirect representation' allgemein anerkannt. Regeln hierzu finden sich sowohl im Recht des Auftragsvertrages (CC art. 1717) als auch im Recht der Kommission (Ccom art. 246); beide betreffen eine Mittelsperson, die einen Vertrag on behalf of an undisclosed or unidentified principal schließt (*Díez-Picazo and Gullón*, Sistema I[11], 580). Dem Dritten gegenüber ist nur die Zwischenperson berechtigt und verpflichtet; ihr Verhältnis zu dem principal richtet sich dagegen nach den diese Beziehung betreffenden Regeln. Verkauft also jemand Ware an einen Einkaufskommissionär, so haftet ihm auf den Kaufpreis nur der Kommissionär, nicht auch der Kommittent (TS 12 July 2006, RAJ 2006 (4) no. 4512 p. 10038; TS 4 July 2000, RAJ 2000 (4) no. 6678 p. 10221). "Ausgenommen" von der Grundregel, dass dem Dritten gegenüber nur die Zwischenperson verpflichtet ist, ist nach CC art. 1717(2) *in fine* allerdings "der Fall, in dem es sich um Sachen handelt, die dem Auftraggeber gehören". Was das genau bedeutet, ist nicht vollständig klar. Teilweise wird gesagt, dass die Vorschrift dem Dritten nur dann einen Direktanspruch gegen den principal geben will, wenn der Dritte von der Vertretung Kenntnis erlangt hat (*Díez-Picazo and Gullón* loc.cit. 581). TS 4 July 2000 loc.cit. stimmt damit zumindest insoweit überein, dass dort ein Vertragsanspruch gegen die Zwischenperson (die mangelhaftes Olivenöl des principal verkauft hatte) gewährt wurde, ohne zugleich eine Klage gegen den principal zur Voraussetzung zu erheben. CA Barcelona 24 April 2003, BDA JUR 2003/254230 dealt with a restitutionary claim between a principal and a third party arising out of termination of a contract: P agreed with I that I would try to sell P's motorbike in I's motorbikes' shop; I would get a benefit of the sale price. I managed to sell the motorbike to T. Afterwards, T, however, terminated the sales contract as the seller did not provide him with the necessary license to run the motorbike. Therefore, T returned the motorbike to I, who returned it, in turn, to P. To get the money paid for the motorbike, T brought a claim against P. This direct claim was admitted on the basis of CC art. 1717(2) *in fine*. Im Übrigen verbleibt es aber für die Rückabwicklung nichtiger oder angefochtener Verträge bei der Grundregel des CC art. 1303, wonach nur die Vertragsparteien (intermediary and third party), nicht aber außenstehende Personen (wie der principal) das Geleistete zurückfordern können (TS 27 March 1963, RAJ 1963 (1) no. 2121 p. 1313; *Delgado Echeverría and Parra Lucán*, Las nulidades de los contratos, 237). Es gibt allerdings Bestrebungen im Schrifttum, diese strikte Regel jedenfalls durch eine entsprechende Anwendung von CC art. 1717(2) *in fine* abzuschwächen (*Díez-Picazo/Roca Trias/Morales*, Los Principios del Derecho Europeo de Contratos, 214-217; *Fernández Gregoraci*, ADC 2002, 1717, 1742-1749).

3. In ITALY kommt es jeweils darauf an zu bestimmen, wem eine Zahlung (Leistung) juristisch zuzurechnen ist, nicht darauf, wer sie tatsächlich erbracht bzw. erhalten hat oder aus wessen Vermögen sie stammt. Bei der echten Stellvertretung findet die Rückabwicklung also im Verhältnis principal/Dritter, bei der indirekten Stellvertretung im Verhältnis intermediary/Dritter statt (*Breccia*, Il pagamento dell'indebito, 944-945; Cass. 27 May 1995, no. 5926, Giust.civ.Mass. 1995, 1094; Cass. 19 July 2004, no. 13357, Giust.civ.Mass.2004, fasc. 7-8; Cass 23 July 2004, no. 13829, Giust.civ.Mass.2004, fasc. 7-8). Auch in AUSTRIA stellen Lehre und Rechtsprechung auf die rechtliche Leistungsbeziehung ab; sie legt die Parteien des Bereicherungsausgleichs fest (Rummel [-*Rummel*], ABGB II(3)[3], vor § 1431 no. 11). Die Frage, auf welche Rechtsbeziehung geleistet werden sollte, wird aus der Sicht des Zuwendungsempfängers beurteilt (OGH 31 January 1985, SZ 58/19; str.). Bei der echten Stellvertretung ist der Vertretene der Kondiktionsgegner (OGH 24 October 1990, SZ 63/189). Hat ein *falsus procurator* in fremdem Namen gehandelt, war er aber zur Entgegennahme der Leistung nicht berechtigt, so haftet nur er unter CC § 1041 (*Unger*, ÖBA 2002, 606). Dasselbe gilt, wenn ein Vertreter eine Leistung für sich und im eigenen Namen annimmt (OGH 24 September 1995, SZ 68/174).

4. PORTUGUESE CC arts. 1180-1184 regeln die indirekte Stellvertretung (Vertragsschluss im eigenen Namen aber für Rechnung eines anderen) im Rahmen des Rechts des Auftragsvertrages. Dieses Regime des *mandato sem representação* findet auch auf den Kommissionsvertrag Anwendung (Ccom art. 267; see *Neto*, Código Comercial Anotado[12], note 1 to art. 267, p. 151); es spielt ferner im Recht der Geschäftsführung ohne Auftrag eine Rolle (CC art. 471). Ein im eigenen Namen handelnder *mandatário sem representação* erwirbt alle Rechte und trägt alle Pflichten aus dem von ihm geschlossenen Vertrag (CC art. 1180). Er muss aber das Erworbene auf den *mandante* übertragen (CC art. 1181), der seinerseits den *mandatário* entschädigt bzw. von den eingegangenen Verpflichtungen freistellt (CC art. 1182). Nur der *mandatário* ist legitimiert, die Rechte aus dem Vertrag mit dem Dritten geltend zu machen; nur ihm, nicht dem *mandante* stehen auch die aus der Ungültigkeit eines solchen Vertrages folgenden Restitutionsansprüche zu (*Pires de Lima and Antunes Varela*, Código Civil Anotado II[3], note 3 to art. 1180, p. 746).

5. Hat jemand (etwa Kommissionär) im eigenen Namen, aber auf fremde Rechnung kontrahiert, so ist, falls dieser Vertrag unwirksam ist, auch unter GERMAN law ein Bereicherungsausgleich zwischen dem Prinzipal (dem Kommittenten) und dem Vertragspartner des Kommissionärs ausgeschlossen. Die Rückabwicklung erfolgt vielmehr im Leistungsverhältnis, d.h. zwischen Kommissionär und Drittem. Letzterer kann seine Leistung an den Kommissionär nicht beim Kommittenten kondizieren (Staudinger [-*S. Lorenz*], BGB [2007], § 812, no. 33; Palandt [-*Sprau*], BGB[67], § 812, no. 47). Ein Anspruch gegen den Letzteren ließe sich nur begründen, wenn man in Analogie zu CC § 822 eine Versionsklage zuließe, was aber von der ganz herrschenden Meinung abgelehnt wird (Erman [-*Westermann and Buck-Heeb*], BGB II[12], § 812, no. 18, § 822, no. 1; *Reuter and Martinek*, Ungerechtfertigte Bereicherung, § 13 II; *Koppensteiner and Kramer*, Ungerechtfertigte Bereicherung[2], § 5 III).

6. Das derzeit noch gültige HUNGARIAN Zivilgesetzbuch regelt zwar die Kommission, nicht aber die mittelbare Stellvertretung im allgemeinen (was sich in Zukunft ändern soll: http://www.parlament.hu/irom38/05949/05949.pdf). Schon heute aber gilt, dass aus Verträgen mit dem Dritten nur der zwar für fremde Rechnung, aber im eigenen Namen handelnde sogen. mittelbare Stellvertreter berechtigt und verpflichtet wird (see – im Zusammenhang des Kommissionsrechts – CC §§ 507, 509(1) und 513). Auch im Falle der Ungültigkeit eines Kaufvertrages zwischen Kommissionär und Drittem wird der Vertrag nur zwischen diesen beiden Personen rückabgewickelt; ein Direktanspruch

gegen den Kommittenten scheidet aus (BH 2003/248). Dieses Ergebnis wird auch durch den Umstand erhärtet, dass die Rückabwicklung unwirksamer Verträge nach ungarischer Rechtsauffassung ein Stück Vertragsrecht ist (ausführlich und mit Hinweisen zu teilweise abweichenden Stimmen Petrik [-*Köles*], Polgári jog III, 794/5). Die Regel, dass die Rückabwicklung eines Kommissionsgeschäftes zwischen den Vertragsparteien, d.h. zwischen Kommissionär und Drittem zu erfolgen hat, gilt auch in BULGARIA. Der Vertretene kann die vom mittelbaren Vertreter erworbenen Rechte nur geltend machen, wenn sie ihm von Letzterem übertragen worden sind; andernfalls kommt dem Kommittenten gegen den Dritten auch kein Anspruch aus *condictio indebiti* zu.

7. Bei der echten oder direkten Stellvertretung treffen die Folgen des Rechtsgeschäfts auch unter DUTCH law unmittelbar den Vertretenen (CC art. 3:66(1)). Er allein ist deshalb auch Inhaber einer Forderung aus ungeschuldeter Leistung (*onverschuldigde betaling*). Der Vertreter selber kann einen Anspruch aus ungerechtfertigter Bereicherung (*ongerechtvaardigde verrijking*) haben, allerdings nur in dem seltenen Fall, dass das Geleistete aus seinem eigenen Vermögen stammt und er auch nicht über einen Ausgleichsanspruch gegenüber dem Prinzipal verfügt. Handelt jemand im vermeintlichen Auftrag eines Prinzipals zur Erfüllung einer vermeintlichen Schuld des Prinzipals gegenüber dem Dritten, so soll sich der Zahlende auf einen Irrtum über das Bestehen einer Vollmacht berufen können, der ihn berechtigt, als im Rechtssinne unbefugter Vertreter direkt bei dem Dritten zu kondizieren (*Schoordijk*, Onverschuldigde betaling, 132). Nimmt ein befugter Vertreter im Namen seines Prinzipals eine *onverschuldigde betaling* an, so trifft der Rückforderungsanspruch allein den Prinzipal (CC art. 3:66 i.V.m. art. 6:203). Eine Haftung des Vertreters aus *ongerechtvaardigde verrijking* ist zwar theoretisch denkbar, wird aber in aller Regel am Fehlen einer Bereicherung scheitern; der Dritte hat nur die Möglichkeit, die sich noch beim Vertreter befindlichen Sachen im Wege des Arrestes (*derdenbeslag*) zu sichern (Parlementaire Geschiedenis VI, 810). Bei der indirekten oder mittelbaren Stellvertretung, bei der die Zwischenperson im eigenen Namen handelt, ist früher ein Direktanspruch des Prinzipals gegen den Dritten aus *onverschuldigde betaling* befürwortet worden. Es zeigte sich jedoch (insbesondere im Kontext von HR 11 November 1955, NedJur 1957, no. 605 p. 1185 und HR 10 January 1969, NedJur 1969, no. 190 p. 469), dass hierdurch betrügerisches Handeln erleichtert wurde. Seit der Reform des Zivilgesetzbuches im Jahre 1992 gilt deshalb auch in den Niederlanden die Regel, dass Leistungen durch einen indirekten Stellvertreter nur ihm zugerechnet und folglich auch nur von ihm als ungeschuldet i.S.v. CC art. 6:203 zurückgefordert werden können. Der Prinzipal kann höchstens dann (aus *ongerechtvaardigde verrijking*) direkt gegen den Dritten vorgehen, wenn der Prinzipal einen Schaden erlitten und im Verhältnis zur Zwischenperson einen Anspruch auf dasjenige hat, was ihr aus CC art. 6:203 gegenüber dem Dritten zusteht. Eine solche Konstruktion ist freilich in der Lehre keineswegs unumstritten, weil sie eine Vielzahl neuer Abgrenzungsprobleme heraufbeschwört, insbesondere zu der Regelung in CC art. 6:30 (Leistung durch Dritte) (näher *Schoordijk* loc.cit. 136; *Scheltema*, Verbintenissenrecht II, art. 203, note 10). Diskutiert wird auch, dass der Prinzipal aus *ongerechtvaardigde verrijking* gegen den Empfänger vorgehen kann, wenn die Zwischenperson insolvent geworden ist. Im Falle eines Kommissionsvertrages zwischen Mittelsperson und Prinzipal ist der Kommissionär dem Kommittenten gegenüber verpflichtet, die Forderung aus *onverschuldigde betaling* im Interesse des Kommittenten einzuklagen; tut er das nicht, kann der Kommittent die Forderung des Kommissionärs aus CC art. 6:203 durch schriftliche Mitteilung an Kommissionär und Dritten auf sich überleiten (Parlementaire Geschiedenis VI, 809; *Schoordijk* loc.cit.;

Scheltema loc.cit.). Nimmt ein mittelbarer Stellvertreter eine Leistung in eigenem Namen für den Prinzipal an, so ist die Klage aus ungeschuldeter Leistung wiederum allein gegen den mittelbaren Stellvertreter zu richten HR 10 Januar 1969 loc. cit.). Hat der mittelbare Stellvertreter das Empfangene aber bereits an den Prinzipal ausgekehrt, so haftet dieser dem Dritten aus *ongerechtvaardigde verrijking.*

8. Under ESTONIAN law besteht ein Anspruch auf Rückabwicklung eines unwirksamen Vertrages nur zwischen den Parteien dieses Vertrages. LOA § 1028(1) macht das deutlich, indem die Vorschrift den Bereicherungsausgleich auf die an der Leistungsbeziehung beteiligten Personen beschränkt. Es kommt also darauf an, ob die Mittelsperson mit Vertretungsmacht in fremdem oder nur für fremde Rechnung aber im eigenen Namen handelt. Im letzteren Fall stehen auch evtl. Bereicherungsansprüche allein der Mittelsperson zu.

VII.–4:103: Debtor's performance to a non-creditor; onward transfer in good faith

(1) An enrichment is also attributable to another's disadvantage where a debtor confers the enrichment on the enriched person and as a result the disadvantaged person loses a right against the debtor to the same or a like enrichment.

(2) Paragraph (1) applies in particular where a person who is obliged to the disadvantaged person to reverse an unjustified enrichment transfers it to a third person in circumstances in which the debtor has a defence under VII.–6:101 (Disenrichment).

COMMENTS

A. General

Overview. This Article adds further content to the requirement of the basic rule that the enrichment be attributable to the claimant's disadvantage by providing for a further instance in which that requirement can be said to be satisfied. It is concerned with the case where the enriched person obtains from a third person something which the disadvantaged person should have obtained. In other words, the performance of the third person is misdirected or intercepted or the third person has innocently forwarded to the enriched person that which was due to be restored to the disadvantaged person. The rule stated presupposes a debtor performing to someone other than the creditor which (in given circumstances) has the result that the debtor is discharged. By this means the payee obtains the fruits of the claim (against the debtor) which the creditor has lost.

A particular instance of attribution. The wording of paragraph (1) ("also") makes it clear that this Article merely adds another case in which attribution is made out. (For general comments on the notion of attribution and the non-exhaustive nature of the provisions in Chapter 4, see Comment A on VII.–4:101 (Instances of attribution)). In this context it is important to note than an e contrario interpretation is compelling, as the following comments outline: in comparable cases in which the requirements of this Article are not satisfied, the assumption must be that the enrichment is not attributable to the disadvantage.

B. The disadvantaged person's loss of a right against the third person

General. This Article applies only if the claimant has lost a right against the third person in respect of the benefit gained by the enriched person. The decisive factor is whether the disadvantaged person's claim against the debtor is extinguished. On the other hand, it is immaterial for these purposes whether or not the enriched person can be regarded as having used the disadvantaged person's claim.

Partial loss of a right. The required loss of a right need not be entire. A diminution or reduction in the extent of a right is a partial loss of a right and may be connected to an enrichment in accordance with this Article. Where the third party has rendered a partial performance to the enriched person and is partially liberated from the obligation to the claimant, the enrichment of that person will be attributable to the pro tanto disadvantage of the claimant so as to bring this Article into play.

Rules protective of a third party. Loss of a claim against a third person may arise, for example, because of the operation of protective rules intended to ensure that a debtor acting in good faith is liberated from the debt, even though the performance has been to the wrong

party.

Illustration 1
E makes an immediate assignment to D of a debt due to E from X. Notwithstanding that no notice of the assignment has yet been given to X, the assignment is effective to transfer to D the right which E has against X: III.–5:114 (When assignment takes place) paragraph (1) and III.–5:113 (New creditor). X pays E the sum due on the debt before notice of the assignment can be given to X. X is discharged, notwithstanding that X has paid the assignor rather than the assignee, because X had no knowledge of the assignment: III.–5:119 (Performance to person who is not the creditor) paragraph (1). Accordingly D loses the claim against X and is disadvantaged by a decrease in assets. E is enriched by an increase in assets (the money received from X). E's enrichment is attributable to D's disadvantage under this Article.

Illustration 2
W makes an immediate assignment to D of a debt due to W from X. No notice of the assignment is given to X, but the assignment is nonetheless effective to transfer the claim. Notwithstanding this assignment, W subsequently makes another immediate assignment to E. E gives X notice of this (second) assignment. X, who has no knowledge of the earlier assignment, performs to E. E has priority over D by virtue of prior notification to the debtor (III.–5:121 (Competition between successive assignees) paragraph (1)). Accordingly X is discharged by paying E: III.–5:121 (Competition between successive assignees) paragraph (2). D's right to performance is extinguished. Consequently E's enrichment (receipt of X's performance) is attributable to D's disadvantage (loss of a right against X). However, the fact the enrichment is attributable to the disadvantage does not answer the question whether the enrichment is unjustified or whether E has a defence under Chapter 6.

Illustration 3
D is a holder of certain bearer securities, on presentation of which X is liable to pay a fixed sum. The securities are taken by E who uses them to obtain payment from X. As X has paid in good faith to the holder of the bearer securities, X's debt to D is extinguished. E has been enriched by making use of D's asset (the securities). E's enrichment is attributable to D's disadvantage under this paragraph: E has obtained a sum from X (which was due to D) in circumstances where D has lost the right against X.

Illustration 4
W has died leaving his estate to trustees X1 and X2 on trust for his deceased nephew's children in equal shares. Two of the children, E1 and E2, are personally known to the trustees. However, the trustees X1 and X2 recognise it is possible there are also children of whose existence they do not know. The trustees make appropriate advertisements in order to solicit claims. As no responses are forthcoming, they distribute the estate on the footing that E1 and E2 alone are entitled. In fact, the nephew had also fathered child D, who sometime later gains knowledge of her great uncle's disposition. Although the trustees X1 and X2 were obliged to distribute a one-third share to D, the effect of the measures taken by the trustees X1 and X2 in accordance with the rules of the applicable trust law is to provide them with a complete defence to any claim by D. The distribution by the trustees X1 and X2 of D's share to E1 and E2 has had the effect of destroying D's right against X1 and X2. As to one-third each E1 and E2 have obtained an enrichment which is attributable under this

paragraph to D's disadvantage in her loss of rights against the trustees X1 and X2 (the third parties).

Illustration 5
D is entitled to the estate of a deceased person, which includes a claim against X, a debtor of the deceased. Nonetheless E succeeds in obtaining a certificate of inheritance for that estate and on the strength of the certificate collects payment of the debt from X. Because of the special effect of a certificate of inheritance, X is regarded as a matter of law as having discharged his debt to the deceased's successor, even though E was not entitled to the debt. E's enrichment (in obtaining the proceeds of D's claim against X) is attributable to D's disadvantage (in losing the claim).

Third party performing binding instructions. The provision may also apply where directions are given as to the destination of certain assets. The essential elements are that the claimant, in exercise of a right to designate the destination of an asset, gives a direction to a the third person (who is obliged to implement that instruction) in favour of the recipient, the third person duly implements the instruction and the recipient is accordingly benefited. Typical cases are where a bank is directed by a customer to make a bank transfer or where a seller of goods who is obliged to deliver to the purchaser's order is required to deliver them to another. In each case the claimant has given a binding instruction to the third person to enrich the recipient which the third person, in discharge of its obligation to the claimant, has implemented. As a result the claimant loses a right to the enrichment which is correspondingly gained by the recipient.

Illustration 6
D, a purchaser of goods, agrees with X, the vendor, that X will deliver the goods to D or such other person as D nominates. D sends a fax to X instructing X to deliver to E. In fact D intended the goods to be delivered to Y and inserted E's name on the fax by mistake. X discharges its obligation under the contract of sale by delivering to E in accordance with the faxed instruction from D. E is enriched by the delivery and this is attributable to D's loss of rights of performance against X which X has extinguished by performance to E. The case would be otherwise if the mistake in delivering to E rather than Y was that of X since in that case X would not discharge its obligation to D (to deliver to Y). In that case D would not lose the right to performance vis-à-vis Y; there would be no decrease in assets for D and thus D would sustain no disadvantage.

Disappointed expectation insufficient. There can be no attribution of enrichment to disadvantage if the claimant had no right against the third person to an enrichment: a disappointed expectation of benefit does not in any case amount to a disadvantage because the frustration of an expectation is not a loss of an asset.

Illustration 7
Intending to make a gift to his friend D, X delivers an envelope by hand to the home of E, D's neighbour, by mistake. D has no claim against E. Although D has not obtained the money which X intended for him, E's enrichment is attributable to the disadvantage of X, not D. X has sustained a decrease in assets in that it was his money which has been lost. D has not lost any right against X to the money: assuming that X had not bound himself to make the gift, D had no right to be given the money, and in any case in these circumstances a defective performance by X of a binding promise of donation would not extinguish D's right to performance of the promise.

Illustration 8
X engages Y to draft her will according to specified instructions. As a result of a mistake by Y, X's will omits a legacy to her friend D. X executes the will in the erroneous assumption that the will gives full effect to her wishes and subsequently dies. The money which X intended to leave to D passes under the will to X's cousin, E. Since D never had any right to any legacy and had only a hope that X would remember him in her will, D has suffered no disadvantage. E's enrichment in acquiring the legacy is therefore not attributable to any disadvantage of D. Any rights which D has will lie outside the law of unjustified enrichment. D may be entitled under the law of succession to have X's will corrected to give effect to X's true intentions. If that is not the case, then it may be that D has a claim in the law of obligations against Y on the basis that D's frustrated expectation constitutes an actionable damage caused by Y. It will be up to the law of contract to determine whether any claim against Y exists on the basis that D is entitled to damages for loss caused by Y's non-performance of the contractual obligation to X to prepare a will according to X's intent, D being seen as a third party in whose favour Y and X impliedly agreed that Y should be obliged to render performance. (See II.–9:301 (Basic rules) and II.–9:302 (Rights, remedies and defences)). It will be up to the law of non-contractual liability for damage caused to another to determine whether D has suffered a legally relevant damage which can be regarded as caused by Y's failure to exercise reasonable care in the preparation of the will. (See especially VI.–2:101 (Meaning of legally relevant damage) paragraph (1)(c): "violation of an interest worthy of legal protection").

Subsistence of right precludes application without ratification. Equally, the Article cannot apply if the claimant has such a right and has not lost it. Without loss of a right there is no disadvantage and thus there can be no question of attribution in relation to the enrichment. In such cases, however, the claimant can bring the Article into operation by ratification: see further VII.–4:104 (Ratification of debtor's performance to a non-creditor).

Illustration 9
X, a debtor of D, is induced by the fraud of E to pay to E sums due to D, E pretending to be collecting the debt on D's behalf. E's enrichment is not attributable to any disadvantage of D. Although X has paid in good faith, X is not discharged from liability to D and is still obliged to perform to D. Since D still has the right against X, D has sustained no disadvantage. E's enrichment is attributable to the disadvantage of X, who paid E as a result of the fraud. The case is otherwise only if D ratifies X's payment to E: see further VII.–4:104 (Ratification of debtor's performance to a non-creditor).

Illustration 10
D has a life insurance policy with the X company. Under the terms of the insurance contract D is entitled to make a unilateral and revocable nomination of a beneficiary to whom X may pay the proceeds of the policy on D's death. D makes such a nomination in favour of E. Subsequently D revokes the nomination without making a new one, so that X remains contractually obliged to pay the proceeds on D's death to D's successors. On D's death, X fails to notice the revocation and pays the proceeds of the policy to E. D's successors have no claim under the law of unjustified enrichment against E. The payment by X to E has not discharged X's obligation under the insurance contract to pay D's successors. D's successors have not lost any right and so

have not suffered any disadvantage to which E's enrichment is attributable. The case is otherwise only if D's successors ratify X's payment to E: see further VII.–4:104 (Ratification of debtor's performance to a non-creditor).

Illustration 11
X, a bank, makes a transfer to E's account at the Y bank and debits the sum transferred from D's account. However, D had given no instructions for such a bank transfer, the bank having made a mistake on the basis of an instruction from a different customer. (The situation would be the same if D had given instructions for a transfer which were duly countermanded and X made the transfer in oversight or if X had duplicated a single authorised transfer by mistake.) D has no claim against E. D has not lost any rights; D is entitled under the contract with X to a correction of D's bank account. X was not obliged to D to make the payment and it is therefore X who has suffered a disadvantage to which E's enrichment is attributable.

Reduction in value of right insufficient. The mere fact that a claim against the third party has depreciated in value as a result of the third party benefiting the enriched person is not sufficient to bring this Article into play. A depreciation of the claim is not a disadvantage to which the enrichment is attributable. The claimant in such a case has not suffered the requisite decrease in assets because he or she is still able to enforce the right against the third party. This corresponds with the basic principle in VII.–3:101 (Enrichment) and VII.–3:102 (Disadvantage) that a mere change in value of an asset does not amount to an enrichment or disadvantage, as the case may be (see Comment B on those Articles).

Illustration 12
X, who owes D € 1 million and other creditors € 2 million, pays € 1 million to E, meaning to put the money beyond the reach of all creditors. Immediately following this payment X is declared bankrupt. As a consequence of the transfer and subsequent insolvency, D's right against X has become virtually worthless. E's enrichment, however, is not attributable to a disadvantage of D. Before the transfer D had a right to payment from X. That right continued to exist after the transfer to E; the effect of the transfer was merely to make performance improbable and thus to devalue D's claim. D has no claim against E in the law of unjustified enrichment. D's redress lies in the law on bankruptcy in setting aside X's payment to E, so as to bring that sum back into the patrimony available for X's creditors and thus to enhance the value of D's right to a proportionate share of the insolvent estate of X.

Effect of insolvency of debtor. The proper response of the legal system in a case such as the last is to ensure that any improper disposition by the third party is reversed in favour of the creditors generally. This is a matter for bankruptcy law, not the law of unjustified enrichment. To hold otherwise would mean that the law of unjustified enrichment might be used by creditors to circumvent the bankruptcy law restrictions on when pre-bankruptcy dispositions may be reversed.

Incurring a debt as an alternative to loss of a right. The Article may apply for the analogous case where, instead of losing a right against a debtor, a person sustains a disadvantage in coming under an obligation to a third party as a result of that third party conferring an enrichment on the enriched person.

C. In particular: onward transfer in good faith: paragraph (2)

Onward transfer as specific application. Paragraph (2) relates to a specific case which falls within the terms of the rule in paragraph (1), but which is made explicit because its deduction from that rule is not transparent. It relates to the case where a person has obtained an unjustified enrichment and then disposed of it in circumstances where the defence of change of position provided for by VII.–6:101 (Disenrichment) will be available. In essence, this is the case where the enriched person is in good faith (in obtaining and disposing of the enrichment) and the disposition is gratuitous. Precisely because the end recipient of the enrichment has received a gratuitous benefit which, in a sense, it was not the enriched person's to give away (since the enriched person was liable under this Book to return it), the end recipient in turn comes under a liability to make restitution. The effect of the disposition by the originally enriched person has been to destroy the disadvantaged person's claim against that first recipient and at the same time to enrich the end recipient: the end recipient's enrichment is attributable to the disadvantaged person's loss of the claim against the originally enriched person.

NOTES

I. Grundfall: Bereicherungsausgleich bei schuldbefreiender Leistung an einen vermeintlichen Gläubiger

1. Unter FRENCH CC art. 1690(1) ist eine Zession Dritten gegenüber nur im Falle der Abtretungsanzeige an den Schuldner wirksam; der Schuldner kann den Zessionar außerdem durch eine in öffentlicher Urkunde erfolgende Annahme "in den Besitz" der Forderung setzen (CC art. 1690(2)). Ohne Anzeige und Annahme wirkt die Zession nur zwischen Zedent und Zessionar (Cass.civ. 12 June 1985, Bull.civ. 1985, III, no. 95, RTD civ 1986. 350, obs. *Mestre*). Unter BELGIAN CC art. 1690 (i.d.F. des Gesetzes of 6 July 1994) ist die Abtretungsanzeige nur erforderlich, um der Zession dem Schuldner gegenüber Wirksamkeit zu verleihen; im Verhältnis zu anderen Dritten ist die Zession dagegen grundsätzlich auch ohne Abtretungsanzeige wirksam. Allerdings wirkt eine Zession solchen Gläubigern des Zedenten gegenüber nicht, an welche der Schuldner schon vor der Abtretungsanzeige wirksam geleistet hat. Die Zession stellt sich in beiden Rechtsordnungen als ein Vertrag dar, und zwar, je nach den Umständen, entweder als ein Kaufvertrag, eine Schenkung oder eine *dation en paiement* (eine Schuldtilgung mit einem anderen als dem ursprünglich geschuldeten Gegenstand) (*Bénabent*, Les obligations[10], no. 727; *de Page*, Traité élémentaire de droit civil belge IV(1)[3], no. 372). Unter CC art. 1135 verpflichten Verträge zu allem, was die Billigkeit, die Gepflogenheit und das Gesetz der eingegangenen Verbindlichkeit ihrer Natur nach beimessen. Daraus wiederum kann abgeleitet werden, dass ein Zedent, der von dem Schuldner bezahlt worden ist, vertraglich verpflichtet sein kann, das Empfangene unmittelbar an den Zessionar weiterzuleiten. In Fällen, in welchen es zwischen wahren Gläubiger und einem Scheingläubiger an einem Vertrag fehlt, kommt dagegen in erster Linie ein Schadenersatzanspruch des wahren Gläubigers gegen den Scheingläubiger in Betracht. Nach French CC art. 730-5 haftet auf Schadenersatz, wer wissentlich und bösgläubig einen unrichtigen Erbschein geltend macht. Die Haftung des Nichtberechtigten gegenüber dem Berechtigten folgt CC art. 1382. Cass.civ. 13 July 1974, pourvoi no. 73-10393, Bull.civ. 1974, III, no. 280 p. 212 bestätigt das insoweit, als hiernach die Verletzung der Pflicht, die Rechtsverhältnisse an einem Grundstück im Register korrekt zu veröffentlichen, dem

Rechtsinhaber die Möglichkeit gibt, den Unberechtigten bzw. den Scheingläubiger auf Schadenersatz aus CC art. 1382 in Anspruch zu nehmen.

2. Auch in SPAIN stellt sich die Zession als ein schuldrechtlicher Vertrag und der Forderungsübergang als eine Folge dieses Vertrages dar. Die einschlägigen Regeln findet man deshalb vorwiegend im Recht des Kaufvertrages (CC arts. 1528-1536). Eine echte *Abtretung* i.S. eines vom Schuldgrund abgelösten Verfügungsgeschäftes kennt das spanische Recht nicht (*Pantaleón Prieto*, ADC 1988, 1033, 1034-1038; *Díez-Picazo*, Fundamentos II[4], 805-806). Während die Übereignung beweglicher Sachen auf dem *titulus* and *modus* System aufbaut, setzt an assignment of claims lediglich eine Vereinbarung zwischen den Parteien voraus (*Pantaleón Prieto* loc.cit. 1060). Auch eine Benachrichtigung des Schuldners ist zum Forderungsübergang nicht erforderlich (TS 26 March 2007, RAJ 2007 (2) no. 2347 p. 5580 at FJ 2); CC art. 1527 sagt lediglich, dass der Schuldner befreit ist, wenn er den Gläubiger befriedigt, bevor er von der Abtretung Kenntnis erlangt (see für den Fall der Aufrechnung auch CC art. 1198). Zwar ist gelegentlich behauptet worden, dass fehlende Benachrichtigung des Schuldners die (relative) Unwirksamkeit der Abtretung ihm gegenüber zur Folge habe (see, for instance, CA Barcelona, 22 April 1999, BDA AC 1999/889), doch lässt sich diese Auffassung aus dem Gesetz nicht begründen (*Pantaleón Prieto* loc.cit. 1064-1065). CC art. 1527 geht über CC art. 1164 (see below) insoweit noch hinaus, als im Rahmen von CC art. 1527 den assignee die Beweislast für die Kenntnis des Schuldners trifft (TS 30 July 1994, RAJ 1994 (3) no. 6308 p. 8053). Der Schuldner, der gutgläubig an einen Scheingläubiger geleistet hat, kann auf den ihm von CC art. 1527 gewährten Schutz aber auch verzichten und von dem assignor (dem jetzigen Scheingläubiger) Rückzahlung des Geleisteten nach den Regeln der *condictio indebiti* (CC arts. 1895 ff) verlangen bzw. mit dem entsprechenden Anspruch aufrechnen (TS 26 March 2007 loc.cit.; TS 20 February 1995, RAJ 1995 (1) no. 887 p. 1237). In welcher Form der assignee gegen den assignor an unjustified enrichment claim geltend machen kann, ist nicht völlig klar. Es kann sich entweder um die allgemeine Klage aus ungerechtfertigter Bereicherung oder um eine *condictio* arising out of interference with another's assets handeln (hierfür insbesondere *Díez-Picazo*, Fundamentos I[6], 127; *Miquel González*, Enriquecimiento injustificado, 127), die ihrerseits auf CC art. 360 zurückgeführt wird. Es wird aber auch vorgeschlagen, dass der assignee in entsprechender Anwendung von CC art. 1186 im Wege der Subrogation die *condictio indebiti* des Schuldners gegen den Scheingläubiger erwirbt (*Pantaleón Prieto* loc.cit. 1068); dasselbe soll im Falle einer *doble cesión* (as in illustration 2 above) gelten (*Pantaleón Prieto* loc.cit. 1084). Unter dem schon erwähnten CC art. 1164 ist ein Schuldner befreit, wenn er gutgläubig an den Besitzer einer Forderung leistet. "Besitzer einer Forderung" im Sinne dieser Vorschrift ist jeder, der den Rechtsschein erweckt, ihr Inhaber zu sein (Bercovitz Rodríguez-Cano [-*Bercovitz Rodríguez-Cano*], Comentarios al Código Civil[2], 1406). CC art. 1164 sagt aber nichts zu den Ansprüchen des wahren Gläubigers gegen den Scheingläubiger. Die Gerichte scheinen sie auf die allgemeine Klage wegen ungerechtfertigter Bereicherung zu stützen (e.g. CA Santa Cruz de Tenerife 23 May 2007, BDA JUR 2007/287536 and CA Valladolid 7 July 1998, BDA AC 1998/6217 [*obiter*]). Dass der wahre Gläubiger einen unjustified enrichment claim gegen den Scheingläubiger habe, entspricht auch der herrschenden Auffassung im Schrifttum (*Bercovitz Rodríguez-Cano* loc.cit.; Albaladejo [-*Bercovitz and Valladares*], Comentarios al Código Civil y compilaciones forales XVI(1)[2], 103). *Lacruz Berdejo and Rivero Hernández*, Elementos II, 139 meinen zwar, es handele sich um eine *condictio indebiti* (Subrogation in die Rechte des Schuldners), doch ist für eine Subrogation in einem solchen Fall weder eine gesetzliche Grundlage ersichtlich (*Bercovitz and Valladares* loc.cit. 103) noch dürfte dem Schuldner in

diesen Fällen (anders als in den Fällen des CC art. 1527) überhaupt ein Rückforderungsrecht zustehen. TS 11 March 1964, RAJ 1964 (1) no. 1367 p. 1367 hat zwar den Anspruch des wahren Gläubigers gegen den Scheingläubiger einmal sowohl auf *condictio indebiti* als auch auf *negotiorum gestio* gestützt, doch ist die dogmatische Bedeutung dieses Urteils nur schwer zu gewichten. Nach den neueren Entwicklungen im spanischen Bereicherungsrecht lässt sich im Übrigen auch zu CC art. 1164 die Ansicht vertreten, der wahre Gläubiger habe gegen den Scheingläubiger eine *condictio* based on interference with another's assets.

3. ITALIAN CC art. 1264 knüpft die Wirksamkeit einer Abtretung dem Schuldner gegenüber an seine Zustimmung oder daran, dass ihm eine Abtretungsanzeige zugestellt worden ist. Von einem Schuldner, der noch vor dem Zugang der Abtretungsanzeige an den Zedenten zahlt, wird aber nur widerleglich vermutet, dass er gutgläubig zahlte; er ist folglich dann nicht befreit, wenn der Zessionar beweist, dass der Schuldner im Leistungszeitpunkt bereits Kenntnis von der Abtretung hatte (Cass. 21 December 2005, no. 28300, Giust.civ.Mass. 2005, fasc. 12). Anderen Personen gegenüber wirkt die Abtretung nur, wenn sie ein sicheres Datum hat (CC art. 1265). Die Abtretung kann dem Schuldner sowohl durch den Zedenten als auch durch den Zessionar angezeigt werden; den Schuldner trifft in der zweiten Alternative allerdings die Obliegenheit, sich der Korrektheit der Anzeige zu vergewissern. Ob das Recht, Erfüllung zu verlangen, unbeschadet der Schuldnerschutzvorschriften grundsätzlich bereits mit der Abtretung (und nicht erst mit der Abtretungsanzeige) auf den Zessionar übergeht, ist umstritten (dafür Cass. 2 February 2001, no. 1510, Giust.civ. 2001, I, 1856; Cass. 21 January 2005, no. 1312, Giust.civ.Mass. 2005, fasc. 1; dagegen Cass. 26 April 2004, no. 7919, Giust.civ.Mass. 2004, fasc. 4; Cass. 21 December 2005, no. 28300, Giust.civ.Mass. 2005, fasc. 12; Cass. 16 June 2006, no. 13954, Giust.civ.Mass. 2006, fasc. 6); im Schrifttum wird die Auffassung bevorzugt, dass sich die Übertragungswirkung zwischen den Parteien bereits unmittelbar mit dem Vertragsschluss einstellt (näher *Bianca*, Diritto civile IV, 583-585). Der Zessionar hat gegen den Zedenten, an welchen der Schuldner gutgläubig und deshalb befreiend geleistet hat, einen Ausgleichsanspruch, der teils unmittelbar auf die Regeln über die Rückforderung des Nichtgeschuldeten, teils auf eine Analogie zu ihnen gestützt wird (*Cian and Trabucchi*, Commentario breve[8], sub art. 2033, IV, § 2). Je nach den Umständen wird außerdem eine Vertrags- bzw. eine Deliktshaftung des *accipiens* erwogen (*Perlingieri*, Della cessione dei crediti, 220; (Cendon [-*Bianca*], Commentario al codice civile IV(1), sub art. 1264, § 5).

4. Zahlt ein Schuldner an den Zedenten, bevor er von der Zession Kenntnis hatte (CC art. 583), so ist der Schuldner auch unter PORTUGUESE law befreit und der Zedent ungerechtfertigt bereichert (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], note 1 under art. 473, p. 455). Den Anspruch auf Ausgleich dieser ungerechtfertigten Bereicherung hat der Zessionar (*id.*, note 4 to art. 476, p. 463; *Antunes Varela*, Obrigações em geral I[10], 478; STJ 24 June 2004, Processo 03B3105). Die theoretische Ableitung dieses unbestrittenen Ergebnisses bereitet freilich einige Schwierigkeiten (näher *Menezes Leitão*, Enriquecimento sem causa[2], 591). Für den Sonderfall, dass neben dem Bürgen auch der Schuldner (ohne Kenntnis von der Leistung des Bürgen) den Gläubiger bezahlt, sieht CC art. 645 einen Bereicherungsanspruch des Bürgen gegen den Gläubiger vor. Es handelt sich dabei aber nicht um einen Anspruch aus ungeschuldeter Leistung, weil der Bürge im Zeitpunkt seiner Zahlung zu ihr (noch) verpflichtet war (*Pires de Lima and Antunes Varela* loc. cit. note 2 under art. 645, p. 663). Im Falle der Leistung an den Zedenten werden sowohl eine Leistungs- als auch eine Eingriffsbereicherung diskutiert (*Menezes Leitão* loc.cit. 599, fn. 1652). Ein allgemeines Prinzip der schuldbefreienden

Wirkung von an Scheingläubiger geleisteten Zahlungen kennt das portugiesische Recht im Übrigen nicht (*Menezes Leitão* loc.cit. 156, fn. 308).

5. Under GERMAN CC § 816(2) ist, wenn an einen Nichtberechtigten eine Leistung bewirkt wird, die dem Berechtigten gegenüber wirksam ist, der Nichtberechtigte dem Berechtigten zur Herausgabe des Geleisteten verpflichtet. Es handelt sich um einen besonders geregelten Fall der sogen. *Eingriffskondiktion* (Palandt [-*Sprau*], BGB[67], § 816, no. 20). Der Eingriff liegt in der Annahme der Leistung durch einen Nichtberechtigten (Erman [-*Westermann and Buck-Heeb*], BGB II[12], § 816, no. 14). Voraussetzung ist, dass der Schuldner trotz Zahlung an den falschen Gläubiger von der Leistungspflicht befreit wird. Das ist normalerweise natürlich nicht der Fall (CC § 362(1)). Die wichtigste Ausnahme von dieser Grundregel findet sich in CC § 407(1), wonach ein Zessionar eine Leistung, die der Schuldner in Unkenntnis der Abtretung an den bisherigen Gläubiger bewirkt, gegen sich gelten lassen muss. Weitere Bespiele finden sich in CC §§ 566 c, 567 b, 581, 1056 und 2135. Es geht im Wesentlichen um Fälle, in denen der Schuldner (z.B. ein Mieter oder Pächter) keine Kenntnis von dem Gläubigerwechsel infolge einer Veräußerung des gemieteten oder gepachteten Gegenstandes hatte. Ein anderes Beispiel findet sich in CC § 851 (Sachbeschädigung; Deliktsschuldner zahlt an den Besitzer, den er ohne grobe Fahrlässigkeit für den Eigentümer der Sache hält).

6. Das HUNGARIAN Zivilgesetzbuch verfügt über eine German CC § 816(2) entsprechende Vorschrift nicht, weil das Problem zumindest teilweise zessionsrechtlich geregelt ist. Unter CC § 328(3) ist die Abtretung dem Schuldner anzuzeigen. Bis zu diesem Zeitpunkt ist der Schuldner berechtigt, an den Altgläubiger zu leisten; danach muss er an den Zessionar leisten, wenn die Anzeige vom Zedenten stammt (CC § 328(4)). Hat der Zessionar die Zession angezeigt, darf der Schuldner einen entsprechenden Nachweis verlangen (BH 2002/364); andernfalls handelt er auf eigene Gefahr (BH 2005/16) und trägt das Risiko, von dem angeblichen Zessionar das Geleistete aus ungeschuldeter Leistung zurück zu erhalten. Unter den Voraussetzungen von CC § 287 kann der Schuldner durch gerichtliche Hinterlegung des geschuldeten Geldbetrages erfüllen, bleibt aber verpflichtet, bei der Überwindung der Unsicherheiten hinsichtlich der Person des Gläubigers mitzuwirken (BH 2002/364; Petrik [-*Bíró*], Polgári jog II[2], 545). Auf Urkunden und Dokumente mit sog. 'öffentlicher Glaubwürdigkeit' kann sich der Schuldner bis zum Beweis des Gegenteils verlassen. Hat der Schuldner befreiend an den Zedenten geleistet, haftet dieser dem Zessionar aus CC § 330(1). Es handelt sich um eine bürgenähnliche Haftung, für die genügt, dass der Schuldner nicht mehr in Anspruch genommen werden kann (Vorschläge zur Reform dieser Regelung bei Vékás [-*Gárdos*], Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez, 847, 854). Hat der Schuldner befreiend an einen tatsächlich nicht legitimierten Zessionar geleistet (z.B. weil seine Scheinlegitimation auf einer für den Schuldner nicht erkennbaren Urkundenfälschung beruhte), so kommt eine Haftung des vermeintlichen Zessionars gegenüber dem wahren Gläubiger sowohl aus Delikt als auch aus ungerechtfertigter Bereicherung in Betracht.

7. Zahlt ein Schuldner noch nach Zugang der Abtretungserklärung an den Zedenten, so kann er das Geleistete von ihm aus BULGARIAN LOA art. 55(1) (ungerechtfertigte Bereicherung) zurückfordern (*Vassilev,* Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 583). Hat der Schuldner dagegen gutgläubig (ohne Kenntnis von der Zession, Kenntnis kann im Einzelfall schon vor Zugang der Abtretungsanzeige vorliegen: *Kalaydjiev*, Obligazionno pravo, Obshta chast[4], 496) an den Zedenten geleistet, so ist der Schuldner befreit (LOA art. 99(4)). Infolgedessen erwirbt der Zessionar einen Anspruch aus *condictio indebiti* gegen den Zedenten.

Entsprechend liegt es, wenn ein Schuldner seine Leistung an eine Person erbringt, von der er unter den Umständen annehmen durfte, dass sie die Leistung fordern durfte (LOA art. 75(1) first sentence), z. B. an den Inhaber eines Ladescheins (Gesetz über den Eisenbahntransport art. 92). Auch hier hat der wirklich Gläubiger einen Kondiktionsanspruch gegen den Leistungsempfänger (LOA art. 75(1) second sentence; see *Kalaydjiev* loc.cit. 238). Auch unter POLISH CC art. 405 hat der Zessionar einen Bereicherungsanspruch gegen den Zedenten, an den der Schuldner (unter CC art. 512) gutgläubig und deshalb schuldbefreiend geleistet hat. Strittig ist nur, ob der Schuldner auf den Schutz durch CC art. 512 verzichten und das Geleistete vom Zedenten zurückverlangen kann (dafür ***Ohanowicz,*** Niesłuszne wzbogacenie, 202; dagegen ***Serda,*** Nienależne świadczenie, 62).

8. Auch unter DUTCH CC art. 6:36 kann der wahre Berechtigte gegen denjenigen Rückgriff nehmen, der die Leistung unberechtigt empfangen hat. Damit korrespondiert CC art. 6:34, wonach der Schuldner, der an einen Nichtberechtigten geleistet hat, dem Berechtigten entgegenhalten kann, dass er aus vernünftigem Grund angenommen hatte, an den Berechtigten zu leisten, so dass er von seiner Schuld befreit sei. CC art. 6:34 ist natürlich eine Ausnahme von der Grundregel, wonach schuldbefreiend nur an den wahren Gläubiger geleistet werden kann. Die Hauptbedeutung von CC art. 6:34 liegt im Zessionsrecht, für das zwischen der *stille cessie* und der Zession unter Benachrichtigung des Schuldners zu unterscheiden ist. Die stille Zession ist erst durch CC art. 3:94(3) im Jahre 2004 wieder in das niederländische Recht eingeführt worden. Bei ihr ist der Schuldner solange geschützt, wie er nicht vor seiner Leistung eine Abtretungsanzeige (durch Zedent oder Zessionar) erhält (Kamerstukken II, 2002/2003, 28 878, no. 3, p. 4); bis zu diesem Zeitpunkt ist der Schuldner gemäß CC art. 3:94 als gutgläubig (*Verhagen and Rongen*, WPNR 2003, no. 6546, 679, 689; *Biemans*, WPNR 2004, no. 6584, 532, 536-537) und der Zedent als allein zur Einziehung der Forderung befugt anzusehen. Die Einziehungsbefugnis geht erst mit Zugang der Abtretungsanzeige beim Schuldner auf den Zessionar über. In den Fällen, in welchen die Abtretungsanzeige (CC art. 3:94(1)) Wirksamkeitsvoraussetzung der Zession ist, kommt es bis zu diesem Zeitpunkt nicht zu einem Gläubigerwechsel, so dass der Schuldner nicht einmal des Schutzes durch CC art. 6:34 bedarf. Der Zessionar hat aber gleichwohl bereits einen Rückgriffsanspruch gegen den Zedenten aus CC art. 6:36; außerdem kann der Schuldner vom *accipiens* verlangen, das Empfangene an den Zessionar auszukehren. Leistet der Schuldner trotz Abtretungsanzeige an den Altgläubiger, so wirkt diese Leistung grundsätzlich nicht schuldbefreiend. Der Schutz durch CC art. 6:34 kann nur ins Spiel kommen, wenn, bei Mehrfachzessionen, der Schuldner auf eine falsche Mitteilung durch einen der Neugläubiger an einen früheren Forderungsinhaber zahlt (näher *Biemans* loc. cit.). CC art. 6:34 spielt außerhalb der Zessionsfälle vor allem dort eine Rolle, wo ein Schuldner an einen durch eine öffentliche Urkunde (z.B. durch einen Erbschein) legitimierten Scheingläubiger zahlt. Auch dann muss der wahre Rechtsinhaber auf dem Wege über CC art. 6:36 den nur scheinbar Berechtigten in Regress nehmen. Die erbrechtliche Vorschrift des CC art. 4:187 bestätigt diese allgemeinen Grundsätze.

9. Under ESTONIAN law notice is not a prerequisite for the validity of assignment (LOA § 170). Ein Schuldner, der gutgläubig an den Zedenten einer Forderung zahlt, wird durch diese Zahlung befreit; er wird so behandelt, als habe er an den richtigen Gläubiger geleistet (LOA § 169(1)). Der Zedent aber darf diese Leistung nicht behalten; er muss sie als ungerechtfertigte Bereicherung an den Zessionar herausgeben. Der Zessionar hat auch die Möglichkeit, eine ursprünglich nicht schuldbefreiende Leistung des Schuldners an den Zedenten zu genehmigen, ihr somit

Erfüllungswirkung beizumessen und sie anschließend vom Zedenten herauszuverlangen (LOA § 1037(4)).

II. Durchgriff bei Entreicherung durch Schenkung

10. Die Frage, ob dem Benachteiligten eine Direktkondiktion gegen diejenige Person zustehen sollte, an welche der Bereicherte den empfangenen Gegenstand weiterverschenkt hat, wird nicht überall ausdrücklich erörtert. In SPANISH TS 7 February 1997, RAJ 1997 (1) no. 685 p. 1061 hatte eine Nießbraucherin (B) das Grundstück eines anderen (A) an eine dritte Person (C) verkauft, die an ihm gutgläubig Eigentum erwarb. B verschenkte den erzielten Kaufpreis an ihre Tochter (D). A verklagte B erfolgreich aus Delikt (aus heutiger Sicht läge es allerdings näher, diesen Anspruch aus einer *condictio* based on disposal of another's asset [see CC art. 360] zu gewähren) und D erfolgreich aus ungerechtfertigter Bereicherung. Der Klage gegen D wurde mit der vergleichsweise undifferenzierten Begründung stattgegegeben, dass alle Voraussetzungen eines Anspruchs aus ungerechtfertigter Bereicherung gegeben wären: eine Bereicherung, eine Verarmung und die Abwesenheit eines Rechtsgrundes für die Vermögensmehrung. Letzteres war aber natürlich das eigentliche Problem, denn im Verhältnis B-D hatte eine Schenkung vorgelegen. Auch war weder Raum für eine *acción pauliana* (CC arts. 1111(2), 1290 ff) noch für eine *acción subrogatoria* unter CC art. 1111(1). Bei dieser Ausgangslage ist es nach wie vor ungewiss, ob das spanische Recht der Regel in VII.–4:103(2) zustimmt oder nicht.

11. ITALIAN CC art. 2038 entspricht VII.–4:103(2): Wenn die Sache von einem gutgläubigen Empfänger untentgeltlich an einen Dritten übertragen wurde, haftet der Dritte in den Grenzen seiner Bereicherung unmittelbar dem *solvens* (CC art. 2038(1)). Es wird allerdings die Auffassung vertreten, dass dieser Anspruch dann nicht besteht, wenn der *accipiens* anbietet, den Wert der Sache zu bezahlen (*Trimarchi*, L'arricchimento senza causa, 97; *Breccia*, Il pagamento dell'indebito, 960-961). Wurde ihm die Sache von einem bösgläubigen Empfänger geschenkt, haftet der Dritte (in den Grenzen seiner Bereicherung) dem *solvens* nur, wenn dieser den bösgläubigen *accipiens* erfolglos verklagt hat (CC art. 2038(2)). Der Dritte kann im Wege der Direktkondiktion auch dann nicht in Anspruch genommen werden, wenn die Sache zwar noch *in natura* bei ihm vorhanden ist (CC art. 2041(2)), der *solvens* aber ihren Wert vom *accipiens* erlangen kann (*Trimarchi* loc. cit., *Breccia* loc.cit.). Die Stellung des Dritten ist m.a.W. besser, wenn er von einem bösgläubigen *accipiens* erwirbt. Denn dann haftet der Dritte dem *solvens* nur subsidiär.

12. Unter PORTUGUESE CC art. 481(1) tritt der Dritte, wenn er die Sache von dem Bereicherten unentgeltlich empfangen hat, an seine Stelle, allerdings nur in den Grenzen seiner Bereicherung. Dieser zuletzt genannte Schutz entfällt im Falle der Bösgläubigkeit (CC art. 481(2)). Sind sowohl der *accipiens* als auch der Dritte bösgläubig, haften sie dem solvens unter CC art. 493 als Gesamtschuldner (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], note 1 under art. 481, p. 469). Auch GERMAN CC § 822 entspricht VII.–4:103(2). Wendet der *accipiens* das Empfangene unentgeltlich einem Dritten zu und ist der *accipiens* wegen dieser Entreicherung von der Haftung aus ungerechtfertigter Bereicherung befreit (was Gutgläubigkeit des *accipiens* voraussetzt: CC §§ 818 und 819), so haftet der Dritte "wie wenn er die Zuwendung von dem Gläubiger ohne rechtlichen Grund erhalten hätte". CC § 822 begründet eine Ausnahme vom Grundsatz der Einheitlichkeit des Bereicherungsvorganges, wonach unmittelbar durch ein und denselben Vorgang das Vermögen des Bereicherungsgläubigers gemindert und das des Bereicherungsschuldners gemehrt worden sein muss (Palandt [-*Sprau*], BGB[67], § 822, no. 1; § 812, no. 35; MünchKomm [-*Lieb*], BGB[4], § 822, no. 1; § 812, no. 17).

13. GREEK CC art. 913, POLISH CC art. 407, ESTONIAN LOA § 1036 and LITHUANIAN CC art. 6.239 gleichen der deutschen Regelung in allen wesentlichen Zügen.

14. Den Einwand des Wegfalls der Bereicherung kennt auch HUNGARIAN CC § 361(2). Er setzt voraus, dass die Bereicherung in keiner Form (Kaufpreis, Schadenersatz bei Verlust etc.) mehr im Vermögen des Bereicherten vorhanden ist und auch nicht nutzbringend für ihn ausgegeben wurde (BH 1993/500: für Lebensunterhalt verbrauchtes Geld; BH 1987/312: für dauerhafte Verbrauchsgüter und teure Reisen verbrauchtes Geld; Wegfall der Bereicherung jeweils verneint). Ist die Bereicherung dagegen (durch Schenkung oder ersatzlosen Verlust) tatsächlich weggefallen und war der Bereicherte sowohl bei ihrem Erwerb als auch im Zeitpunkt der Schenkung an den Dritten gutgläubig (CC § 361(2)), so entfällt seine Haftung. Die Frage der Bereicherungshaftung des Dritten ist im Gesetz nicht ausdrücklich geregelt; sie muss nach den allgemeinen Vorschriften beantwortet werden. In Betracht kommt oft ein Vindikationsanspruch, weil der gutgläubige Erwerb von Sachen ein entgeltliches Erwerbsgeschäft voraussetzt (an dem es hier gerade fehlt). In Betracht kommt ferner eine Herausgabeklage nach den Vorschriften des Besitzrechts, die dem berechtigten Besitzer nicht nur einen Anspruch gegen jedweden unrechtmäßigen Besitzer, sondern selbst gegen den nicht zum Besitz berechtigten Eigentümer gewähren (CC § 188(2)). Schließlich kann sich der *solvens* – insbesondere dann, wenn es sich um die Leistung von Geld handelte – auch unter den allgemeinen Vorschriften des Bereicherungsrechts direkt an den Dritten halten. Denn sie setzen (anders als z.B. in Germany) nicht voraus, dass die erlangte Bereicherung unmittelbar auf dem Nachteil des Anspruchstellers beruht bzw. von ihm verursacht wurde (Petrik [-*Bíró*], Polgári jog II[2], 651).

15. Ausgangspunkt für das DUTCH law ist der Umstand, dass ein *accipiens*, der das Empfangene verschenkt, den Rückforderungsanspruch des *solvens* nicht mehr erfüllen kann. Die Rechtsfolgen dieser Nichterfüllung hängen davon ab, ob der *accipiens* gut- oder bösgläubig war. Denn unter CC art. 6:74(1) verpflichtet jede Pflichtverletzung bei der Erfüllung einer Verbindlichkeit den Schuldner zu Schadenersatz, es sei denn, die Pflichtverletzung kann dem Schuldner nicht zugerechnet werden. Für die Haftung des Dritten ist CC art. 3:86(1) zu beachten, wonach der gutgläubige Erwerb beweglicher Sachen die Entgeltlichkeit des Erwerbsgeschäfts voraussetzt. Wer nur unentgeltlich erwirbt, bleibt also dem Vindikationsanspruch des *solvens* (CC art. 5:2) ausgesetzt, wenn dessen (unwirksames) Geschäft mit dem *accipiens* die Eigentumsverhältnisse an der Sache unberührt gelassen hat (see CC art. 3:84). Denkbar ist auch ein Bereicherungsanspruch gegen den Dritten aus CC art. 6:212; die dogmatische Konstruktion dieses Anspruches ist bislang freilich nicht abschließend geklärt (näher Asser [-*Hartkamp*] Verbintenissenrecht I[12], nos. 211-214 p. 157-167; *Wammes*, WPNR 1991, no. 6004 p. 297; *Scheltema*, Onverschuldigde betaling, 88-90).

Ilustration 1 is inspired by CFI Bilbao 26 July 2004, BDA JUR 2004/263555 and **illustration 8** on *White v. Jones* [1995] 2 WLR 187.

VII.–4:104: Ratification of debtor's performance to a non-creditor

(1) Where a debtor purports to discharge a debt by paying a third person, the creditor may ratify that act.

(2) Ratification extinguishes the creditor's right against the debtor to the extent of the payment with the effect that the third person's enrichment is attributable to the creditor's loss of the right against the debtor.

(3) As between the creditor and the third person, ratification does not amount to consent to the loss of the creditor's right against the debtor.

(4) This Article applies correspondingly to performances of non-monetary obligations.

(5) Other rules may exclude the application of this Article if an insolvency or equivalent proceeding has been opened against the debtor before the creditor ratifies.

COMMENTS

A. General

Overview. This Article addresses globally issues of enrichment, disadvantage and attribution in situations involving an attempt by a debtor to discharge an obligation owed to a creditor by performing to a third person. It is a sister provision to VII.–4:103 (Debtor's performance to a non-creditor; onward transfer in good faith). That Article is concerned with cases where there is an effective discharge of the debt by performance to a non-entitled party: it recognises that there may be a claim against the recipient who has got what was due to the claimant. This Article is concerned with performances to a non-entitled party which are ineffective to discharge the debt. It confers on the creditor a power to ratify the attempted discharge of the debt. Ratification renders the performance to the third person effective and paves the way for a possible enrichment claim by the (former) creditor against the recipient.

> *Illustration 1*
> X, a debtor of D, is induced by the fraud of E to pay to E sums due to D, E pretending to be collecting the debt on D's behalf. Although X has paid in good faith, X's debt to D is not discharged by the payment. However, since X's payment to E was intended by X as a discharge of the debt to D, D may ratify X's performance to E under this article. If D ratifies, X is discharged of liability to D. D has an enrichment claim against E. E's enrichment is attributable to D's disadvantage because, as a result of the ratification of X's misdirected performance to E, D has lost a claim against X and E has gained the fruits of that claim.

Rationale. This provision enables a creditor who ought to have received a given benefit a direct action to obtain that benefit from the person to whom the debtor misdirected the performance. It avoids the necessity for a more circuitous reversal of enrichment (recipient pays to debtor, debtor forwards to creditor) or a further agreement between creditor and debtor (debtor assigns to creditor, in lieu of performance, the debtor's enrichment claim against the recipient).

B. Scope

Payment of debts and other performances. For the sake of simplicity, the provision is worded in terms of ratification of a debtor's payment to another. However, as paragraph (4) makes explicit, the provision applies equally in respect of non-monetary obligations which the

debtor purports to discharge by performing to a person who is not in fact the creditor.

Possible exclusion in cases of insolvency. Paragraph (5) provides that this Article may be excluded by other rules if an insolvency or equivalent proceeding has been opened against the debtor before the creditor ratifies. Where a debtor has performed to the wrong person and has become insolvent, a subsequent ratification has the effect of privileging the claimant creditor and immunising that creditor from the effect of the insolvency. Before ratification the debtor has an enrichment claim against the recipient and that is an asset in the insolvent debtor's estate, while the unsatisfied creditor has merely a claim against the insolvent debtor's estate for the unpaid debt. The claimant is therefore merely entitled to a dividend from an insolvent estate. After ratification the disappointed creditor has a direct enrichment claim against the recipient of the mistaken payment which, assuming the recipient is solvent, is a valuable asset, while the other creditors of the insolvent debtor have no claim to a share of the money due from the wrongly paid recipient. This shifting of the relative positions of creditors post-insolvency raises policy issues which may justify excluding the operation of this Article. As in the case of the sister provision (VII.–4:103 (Debtor's performance to a non-creditor; onward transfer in good faith)), the operation of unjustified enrichment law ought not to disturb the policy decisions of insolvency law; its rules have priority over ratification under this Article.

C. Ratification

Entitlement to ratify. Ratification by a creditor of a debtor's misdirected performance is possible only where the debtor has attempted to pay the debt to the creditor. Where a debtor has not discharged the debt as a result of a misdirected performance, the ordinary response is a right in the debtor for restitution under this Book from the recipient. To permit the creditor a direct action against the recipient is an exceptional remedy. It is justified where it was the creditor's claim which the debtor meant to satisfy when the debtor paid to the third party recipient. On the other hand, a creditor should not be able to usurp the debtor's right of recovery from the recipient simply because it would be advantageous for the creditor (in particular: because the debtor has since become insolvent). There must be an intention on the part of the debtor to pay a debt owed to the claimant before the claimant can ratify the payment.

> *Illustration 2*
> X, who owes D1 € 100, intends to make a gift of € 50 to D2. X intends to pay D2 by way of bank transfer. By mistake, X pays € 50 into E's bank account instead of D2's. D1 cannot ratify X's payment to E. X did not pay to E in attempted performance of the debt due to D1, but rather as a misdirection of an intended gift to D2. D2 cannot ratify the payment either if (it is assumed) X was not obliged to make the gift to D2. E is liable to reverse the enrichment to X.

> *Illustration 3*
> X is liable to pay D a specified sum under the terms of an insurance. However, X makes the payment in fact to E (the deceased person's successors, who are not in fact entitled to the payment under the terms of the policy because they did not know the deceased personally). D can ratify the payment to E and demand the sum paid to him.

Effect of ratification. Ratification has the following effects. It renders the attempted performance of the obligation effective. That extinguishes the debtor's liability to the creditor and the creditor's claim against the debtor. Accordingly it enables the normal rule contained

in VII.–4:103 (Debtor's performance to a non-creditor; onward transfer in good faith) (which is applicable to effective discharges of debt by misdirected performance) to be applied. The recipient's enrichment (in having received the fruits of the claim) is attributable to the former creditor's loss of the claim against the debtor. This is provided for by paragraph (2). The further rule (contained in paragraph (3)) that ratification does not operate in relation to the recipient as a consent to the loss of the claim ensures that the enrichment is not regarded as justified by virtue of the ratification.

NOTES

1. Unter FRENCH, BELGIAN and LUXEMBURGIAN CC art. 1239(1) hat der Schuldner an den Gläubiger, seinen Bevollmächtigten (*quelqu'un ayant pouvoir de lui*) oder denjenigen zu leisten, der gesetzlich oder gerichtlich zur Entgegenhame der Leistung befugt ist. Zahlungen an einen Nichtberechtigten sind wirksam, wenn der Gläubiger sie ratifiziert (vgl. Cass.civ. 18 March 1974, Bull.civ. 1974, III, no. 132 p. 100) oder von ihnen profitiert hat (CC art. 1239(2)); die Möglichkeit der Ratifizierung ist nicht auf Geldzahlungen beschränkt. Da in der Regel das Eigentum an Sachen bereits mit dem Abschluss des Kaufvertrages auf den Käufer übergeht, steht dem wahren Gläubiger gegen den nichtberechtigten Empfänger einer beweglichen Sache unabhängig von einer Genehmigung ein Vindikationsanspruch zu. Bei Zahlungen an ein Nichtberechtigten wird geprüft, ob zwischen ihm und dem Berechtigten ein Rechtsverhältnis besteht, das den Herausgabeanspruch begründet (z.B. Cass.com. 12 July 1993, Bull.civ. 1993, IV, no. 303 p. 216: Wechselübergabe an den Geschäftsführer der Gläubigerin, der das Geld für eigene Zwecke verwendet).
2. Auch in SPAIN ist zwischen schuldbefreienden und nicht schuldbefreienden Leistungen an einen Nichtberechtigten zu unterscheiden. Leistungen an einen Nichtberechtigten wirken z.B. schuldbefreiend unter CC art. 1164 (gutgläubige Leistung an einen Scheingläubiger), aber auch unter CC art. 1163(2), und zwar insoweit als sie dem Gläubiger "nützlich" wurden. Diese Regelung entspricht French CC art. 1239(2) und Italian CC art. 1188(2) (während sich das Äquivalent zu French CC art. 1239(1) in Spanish CC art. 1162 findet). Dem Gläubiger wird eine Zahlung des Schuldners an einen Nichtberechtigten insbesondere dann "nützlich", wenn der Nichtberechtigte sie an den Berechtigten weiterleitet (CA Valencia 10 April 2007, BDA AC 2007/1190). Zwar erwähnt Spanish CC art. 1163(2) gerade nicht die Genehmigung der Leistung an den Nichtberechtigten, doch scheint diese Möglichkeit im Schrifttum geradezu für selbstverständlich gehalten zu werden (*Díez-Picazo*, Fundamentos II[4], 496; Bercovitz Rodríguez-Cano [-*Bercovitz Rodríguez-Cano*], Comentarios al Código Civil[2], 1405; Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Cristóbal Montes*], Código Civil II[2], 188). Man stützt dieses Ergebnis nicht auf die Behauptung, dass man im Falle der Genehmigung von der "Nützlichkeit" der Leistung für den Gläubiger ausgehen dürfe, sondern darauf, dass CC art. 1162(2) (Erfüllungswirkung im Falle der Leistung an eine autorisierte Person) die Möglichkeit der Ratifizierung impliziere (so wohl auch TS 28 December 1994, RAJ 1994 (5) no. 10388 p. 13299). Die Frage des Bereicherungsausgleichs zwischen Gläubiger und Nichtberechtigtem wird dagegen so gut wie nicht problematisiert, vielleicht deshalb nicht, weil angenommen wird, dass sie sich in der Regel nach einem Rechtsverhältnis richten wird, das zwischen Gläubiger und Nichtberechtigtem schon vor der Genehmigung bestand. Fehlt es daran, dürften dieselben Regeln zur Anwendung kommen, die auch den Bereicherungsausgleich zwischen dem wahren und dem Scheingläubiger beherrschen (see notes under the previous Article), also entweder ein

allgemeiner Bereicherungsanspruch oder a *condictio* based on interference with another's assets, namely disposition of another's claim. Ältere Rechtsprechung, in der es um Schuldnerzahlungen an die 'Marxists Committees' ging, welche die Kontrolle über von ihnen enteignete Gesellschaften übernommen hatten, ist heute nur noch von begrenzter Bedeutung. Die Gesellschaften hatten, nachdem die Komitees aufgelöst und sie wieder die Kontrolle über ihr Unternehmen übernommen hatten, die Zahlungen an diese Komitees genehmigt und dadurch ihren Anspruch gegen die Schuldner verloren (e.g. TS 20 May 1944, RAJ 1944, no. 940 p. 537 and TS 27 April 1945, RAJ 1945 no. 685 p. 417). Bestand die Leistung des Schuldners in der Hingabe einer Sache, wird der wahre Gläubiger sie in den allermeisten Fällen vom Nichtberechtigten vindizieren können.

3. Auch in ITALY wird die Frage der bereicherungsrechtlichen Restitution kaum diskutiert. Sicher ist, dass der Gläubiger eine Leistung an einen Nichtberechtigten genehmigen und dadurch den Schuldner von seiner Schuld befreien kann. Der Schuldner ist auch dann befreit, wenn der Gläubiger aus der dem Nichtberechtigten erbrachten Leistung Nutzen gezogen hat (CC art. 1188(2)). Die Genehmigung kann ausdrücklich oder stillschweigend erfolgen; sie wirkt auf den Zeitpunkt der Zahlung zurück (näher *Cian and Trabucchi*, Commentario breve[8], sub art. 1188, VII). Auch in PORTUGAL gilt prinzipiell, dass die Leistung an den Gläubiger bzw. an seinen Vertreter erbracht werden muss (CC art. 769). Leistungen an Dritte befreien den Schuldner grundsätzlich nicht (CC art. 770); er kann sie aber bei dem Dritten kondizieren (CC art. 476(2); näher *Menezes Leitão*, Obrigações II[4], 152). Genehmigt der Gläubiger dagegen die Leistung, so ist der Schuldner befreit (CC art. 770(b)). Die Ratifizierung bedarf keiner Form (CC art. 219; see *Antunes Varela*, Obrigações em geral II[7], 32). Sie begründet nach wohl herrschender Auffassung keinen Bereicherungsanspruch des Ratifizierenden gegen den Nichtberechtigten. Die schuldbefreiende Wirkung der Ratifizierung wird vielmehr einer nachträglichen Mehrung des Gläubigervermögens mit der Folge gleichstellt, dass es an einer Rechtsgrundlage für eine *condictio indebiti* fehle (*Menezes Leitão*, Enriquecimento sem causa[2], 479).

4. Zu GERMAN CC § 816(2) siehe bereits die notes under the previous Article. Es wird überwiegend angenommen, dass der Berechtigte die für CC § 816(2) erforderliche Wirksamkeit der Leistung an den Nichtberechtigten durch Genehmigung auch selber herbeiführen kann (Palandt [-*Sprau*], BGB[67], § 816, no. 21; Erman [-*Westermann and Buck-Heeb*], BGB II[12], § 816, no. 17; *Larenz and Canaris*, Schuldrecht II(2)[13], § 69 II 3 d; MünchKomm [-*Lieb*], BGB[4], § 816, no. 60; BGH 10 November 1982, BGHZ 85, 267, 272; BGH 6 April 1972, NJW 1972, 1197, 1199). Der Berechtigte kann also wählen, ob er weiterhin den durch die Zahlung nicht befreiten Schuldner oder (z.B. weil dieser zwischenzeitlich insolvent geworden ist) an seiner Stelle den nichtberechtigten Empfänger in Anspruch nehmen will. Erhebt der Gläubiger Herausgabeklage gegen den nichtberechtigten Empfänger, so liegt darin eine konkludente Genehmigung der Fehlleistung des Schuldners (BGH 15 May 1986, NJW 1986, 2430). Das Wahlrecht führt im Ergebnis allerdings zu einer Bevorzugung des Gläubigers in der Insolvenz des Schuldners und stößt deshalb zunehmend auf Kritik (Staudinger [-*S. Lorenz*], BGB [2007], § 816, no. 32; *Koppensteiner and Kramer*, Ungerechtfertigte Bereicherung[2], § 9 III 4 b; *Reuter and Martinek*, Ungerechtfertigte Bereicherung, § 8 III 3). Außerdem nimmt die Genehmigung natürlich auch dem Schuldner die Möglichkeit, Leistungen an den falschen Empfänger selber zu kondizieren.

5. Das HUNGARIAN Zivilgesetzbuch enthält nur wenige Vorschriften über die Genehmigung von Rechtsgeschäften, die ein anderer im Rechtskreis des

Genehmigenden vornimmt (z.B. im Recht der Stellvertretung: CC § 221); eine allgemeine Regelung existiert nicht. Zwar kann man durch einseitige Willenserklärung auf ein entstandenes Recht verzichten; man kann dadurch aber jemand anderen nur verpflichten, wenn Rechtsvorschriften dies ermöglichen (CC § 199) oder die Betroffenen eine entsprechende Vereinbarung treffen. Daraus wird man folgern müssen, dass die Genehmigung einer Leistung an einen Scheingläubiger diesem gegenüber nur das Angebot auf Abschluss eines den Ausgleich mit umfassenden Vertrages beinhaltet, aber keinen Anspruch auf einen Bereicherungsausgleich begründet. Auch in BULGARIA wirkt die Leistung an einen Nichtberechtigten natürlich grundsätzlich nicht schuldbefreiend. Ausgenommen von dieser Grundregel sind nach LOA art. 75(1) und (2) gutgläubige Leistungen an einen Scheingläubiger, die Genehmigung und der Fall, dass der Berechtigte von der Leistung an den Nichtberechtigten profitiert, etwa deshalb, weil Letzterer sein eigener Gläubiger ist (näher *Kalaydjiev*, Obligazionno pravo, Obshta chast[4], 236). Die bereicherungsrechtlichen Folgen einer Genehmigung sind dieselben wie im Falle einer schuldbefreienden Leistung an einen Scheingläubiger.

6. Unter DUTCH CC art. 6:32 ist der Schuldner befreit, wenn der Gläubiger die Leistung an einen Nichtberechtigten genehmigt oder durch sie einen Vorteil erlangt hat. Die Genehmigung wirkt auf den Leistungszeitpunkt zurück. Sie kann ganz oder teilweise, ausdrücklich oder stillschweigend erteilt werden. Die Genehmigung schließt einen Rückforderungsanspruch des Schuldners gegen den Nichtberechtigten aus CC art. 6:203 aus (*Scheltema*, Onverschuldigde betaling, 89; Asser [-*Hartkamp*] Verbintenissenrecht I[12], no. 209; Parlementaire Geschiedenis VI, 161) und begründet einen Rückgriffsanspruch des Berechtigten gegen den Nichtberechtigten aus CC art. 6:36, see note *I8* under the previous Article.

7. ESTONIAN LOA § 1037(4) stimmt mit VII.–4:104 überein. Der Berechtigte kann eine Leistung an den Nichtberechtigten genehmigen. Dadurch wird der Schuldner befreit und der Berechtigte erwirbt gegen den Nichtberechtigten einen bereicherungsrechtlichen Ausgleichsanspruch.

Illustration 3 draws on CA Santa Cruz de Tenerife 23 May 2007, BDA JUR 2007/287536.

VII.–4:105: Attribution resulting from an act of an intervener

(1) An enrichment is also attributable to another's disadvantage where a third person uses an asset of the disadvantaged person without authority so that the disadvantaged person is deprived of the asset and it accrues to the enriched person.

(2) Paragraph (1) applies in particular where, as a result of an intervener's interference with or disposition of goods, the disadvantaged person ceases to be owner of the goods and the enriched person becomes owner, whether by juridical act or rule of law.

COMMENTS

Overview. This Article adds a further set of cases in which the requirement of the basic rule that the enrichment be attributable to the claimant's disadvantage is satisfied. In essence it concerns the case where, as the result of an act of interference by a third person, the enriched person obtains from a third person something which belonged to the disadvantaged person.

A general principle and a specific application. Paragraph (1) sets out a general principle, asserting that in such circumstances the enrichment is attributable to the disadvantage if the third person's interference has been effective to transfer to the enriched person what was the disadvantaged person's. Paragraph (2) seeks to render the abstract rule of paragraph (1) more concrete by spelling out what amounts to the usual application of the principle in paragraph (1). This is where property rights of the disadvantaged person are extinguished and those rights are vested in the enriched person, all as a result of the third person's interference.

Typical cases. Typical cases are where, exceptionally, the enriched person has acquired the disadvantaged person's property from a non-entitled party or where a third party has mixed or joined A's property with B's in circumstances where one will become the complete owner of the whole.

Illustration 1
X steals bricks from the premises of D, a supplier of building materials. X uses the bricks in building a house extension on land belonging to a friend E. E is enriched by acquiring ownership of the bricks through accession to the land and the enrichment is attributable to D's disadvantage (loss of ownership of the bricks) brought about by X's making use of D's right as owner to dispose of the bricks.

Illustration 2
X pours oil belonging to the D company into a reserve belonging to E, where it is mixed with E's stock of oil. If under the applicable rules of property law E is owner of the increased stock, E's enrichment is attributable to D's disadvantage in the loss of the oil added to E's reserve.

Illustration 3
X, who is in possession of goods belonging to D, purports to dispose of them to E. In the circumstances and under the applicable rules of property law, E, who is in good faith, acquires title to the goods. E's enrichment is attributable under this Article to D's disadvantage in losing ownership. Whether E's enrichment is justified or E has a defence to liability is addressed by other Articles under this Book.

A particular instance of attribution. The wording of paragraph (1) ("also") makes it clear that this Article merely adds another case in which attribution is made out. (For general comments on the notion of attribution and the non-exhaustive nature of the provisions in Chapter 4, see Comment A on VII.–4:101 (Instances of attribution)). In this context it is important to note than an e contrario interpretation is compelling, as the following comments outline: in comparable cases in which the requirements of this Article are not satisfied, the assumption must be that the enrichment is not attributable to the disadvantage.

Meaning of use. The notion of use of an asset, which as paragraph (2) implies includes effecting a disposition, is the same as in VII.–3:101 (Enrichment) and VII.–3:202 (Disadvantage). See Comment C to those Articles.

Unauthorised collection of another's debt. Where a person collects payment from a creditor's debtor, without authority to do so, this may have the effect of "disposing" of the creditor's claim against the debtor. This may be either because the payment is made in circumstances in which the debtor is entitled to protection (and thus discharge from the debt), notwithstanding that he has not paid the true creditor, or because the creditor ratifies the act of the person improperly collecting payment. Such cases may be regarded as instances of "use of another's assets". Since this proposition is not self-evident to all legal traditions, however, the legal problems which this situation raises are dealt with separately in the last two preceding articles (VII.–4:103 (Debtor's performance to a non-creditor; onward transfer in good faith) and VII.–4:104 (Ratification of debtor's performance to a non-creditor)).

Deprivation and accrual. This Article only applies if the disadvantaged person has been deprived of rights. If a non-entitled party purports to exercise rights of the disadvantaged person, but fails to achieve the desired effect, no use is made of the disadvantaged person's right, no asset is lost by the disadvantaged person and no asset is gained by the enriched person. As a rule this will be because on the one hand the party purporting to exercise the disadvantaged person's rights lacks authority to do so and on the other hand the party contracting with the non-entitled party is not able to take the benefit of any statutory rules which override the lack of authority (such as the rules on acquisition in good faith, e.g. because the recipient is in bad faith or the property has been stolen). Indeed in such circumstances, the prospective claimant and the prospective debtor to the enrichment claim are not in fact enriched or disadvantaged. An enrichment, disadvantage and attribution can then only occur if there is a ratification under the following article (VII.–4:106 (Ratification of intervener's acts)).

Illustration 4
X purports by a contract to assign to E copyright which is in fact the copyright of D. The transaction is effective as a contract between the parties to it, but has no effect on D's copyright. X has purported to make use of D's right as copyright owner to dispose of that intellectual property. D has no enrichment claim against E (or X). Because D has not lost the copyright and E has not gained it there is neither disadvantage for D nor an attributable enrichment for E (nor has X made use of D's rights).

NOTES

1. Unter FRENCH and BELGIAN CC art. 2279 wird vermutet, dass der Besitzer einer beweglichen Sache deren Eigentümer ist. Wer eine bewegliche Sache verloren hat

oder wem sie gestohlen wurde, kann sie innerhalb von drei Jahren beim Besitzer vindizieren. Hat der Besitzer eine solche Sache jedoch auf einer Messe, einem Markt (nicht einem Flohmarkt: CA Lyon 8 November 2001, JCP 2003, IV, 1203), anlässlich eines öffentlichen Verkaufs oder aus den Händen eines Kaufmanns, der mit Sachen dieser Art handelt, gekauft, so kann sie der ursprüngliche Eigentümer nur zurück verlangen, wenn er dem Besitzer den Kaufpreis erstattet (CC art. 2280(1)). Den erstatteten Kaufpreis kann er wiederum nur auf der Basis von CC art. 1382 (Deliktsrecht) von dem Veräußerer zurückfordern, also nur bei Nachweis einer *faute* (Cass.civ. 11 February 1931, D.P. 1931, 1, 129, note *Savatier*). Auch in Belgium sieht man das so (CFI Bruxelles 13 April 1932, J.C.B. 1932, 453; *Hansenne,* Les biens I(1), no. 248 p. 257). Ein Anspruch aus ungerechtfertigter Bereicherung wird nicht gewährt. Deliktsrechtlicher Natur ist auch der Anspruch des Erstkäufers eines Grundstücks gegen den Zweitkäufer, der seinen Erwerb in Kenntnis des vorangegangenen Verkaufs als erster in das Grundstücksregister eintragen lässt und auf diese Weise Eigentum erwirbt (Cass.civ. 4 March 2004, Bull.civ. 2004, II, no. 82 p. 72).

2. Auch das SPANISH law kennt zahlreiche Fälle, in welchen es zu einem Eigentumsverlust ohne Zustimmung des Eigentümers kommt. Dazu gehören die gesetzlichen Erwerbstatbestände, unter ihnen die specification (CC art. 383). Wer gutgläubig eine fremde Sache so bearbeitet, dass eine neue Sache entsteht, erwirbt das Eigentum an ihr, muss aber zur Vermeidung einer ungerechtfertigten Bereicherung (*Díez-Picazo*, Fundamentos III[4], 280) dem Eigentümer des Ausgangsmaterials dessen Wert ersetzen. Es handelt sich um eine *condictio por intromisión en derecho ajeno* (*Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 277). Übersteigt der Wert des Ausgangsmaterials den Wert der neuen Sache, kann der Eigentümer auch Bezahlung der investierten Arbeit anbieten und Herausgabe der Sache verlangen. If the intervener acts in bad faith, kann der Eigentümer entweder Herausgabe der Sache oder Schadenersatz verlangen; zur Zahlung eines Ausgleichs für die investierte Arbeit ist er nicht verpflichtet. Weitere Sonderregeln betreffen die Verbindung beweglicher Sachen zu einer neuen Sache (CC arts. 375-380; see TS 13 December 1949, RAJ 1949 no. 1472 p. 875); auch hier steht demjenigen, der sein Recht verliert, ein Bereicherungsausgleich zu (CC art. 375; see *Basozabal Arrue* loc.cit.), es sei denn, er handelte bösgläubig (CC art. 379(2)). Der Ausgleich im Fall der Vermischung (confusion) (CC arts. 381 and 382) folgt ähnlichen Prinzipien. CC art. 360 verpflichtet denjenigen, der mit fremden Materialien auf eigenem Land baut, im Falle der Gutgläubigkeit zu Wertersatz und bei Bösgläubigkeit darüber hinaus zu Schadenersatz. Für rechtsgeschäftliche Eigentumsübertragungen gilt zwar der Grundsatz *nemo plus iura ad alium transferre potest quam ipse habet* (the so-called *nemo dat* principle) (see *Díez-Picazo* loc. cit. 805 and TS 11 October 2006, RAJ 2006 (5) no. 6693 p. 14649), der wiederum die Abwesenheit eines einheitlichen Regelwerkes über *adquisiciones a non domino* bewirkt hat. Gleichwohl wird in der Lehre versucht, die gesetzlich geregelten Ausnahmefälle auf einige übergreifende Prinzipien zurück zu führen (see in particular *Díez-Picazo* loc.cit. 806-807; *Díez-Picazo and Gullón*, Sistema III[6], 75). Ein gutgläubiger Erwerb from a *non dominus* setzt hiernach ein entgeltliches Erwerbsgeschäft voraus (das wird aus *Ley Hipotecaria* art. 34 geschlossen). Er kommt bei Immobilien unter *Ley Hipotecaria* art. 34 in Betracht, sofern das Landregister den Veräußerer als Inhaber des Rechts ausweist, der Erwerb entgeltlich erfolgt, der Erwerber die wirkliche Rechtslage nicht kennt und seinen Erwerb in das Register eintragen lässt. Für Mobilien formuliert CC art. 464, dass der gutgläubig erworbene Besitz einem Titel gleichstehe. Die Einzelheiten sind sehr umstritten, aber es ist akzeptiert, dass es sich auch hierbei um eine Form der *non domino* acquisition handele (*Díez-Picazo and Gullón* loc.cit. 76 and 215). Die

genannten Fälle des gutgläubigen Erwerbs rechtfertigten wiederum die Entwicklung einer auf CC art. 360 gestützten *condictio* arising out of disposal of another's asset (*Díez-Picazo and de la Cámara Alvarez*, Dos estudios sobre el enriquecimiento sin causa, 126-127; *Basozabal Arrue* loc. cit 292-300; see also Spanish notes under VII.–4:101 above). Sie ist auf die Herausgabe des durch den Veräußerer erzielten Preises gerichtet (TS 10 March 1958, RAJ 1958 (1) no. 1068 p. 686). Mit ihr konkurriert allerdings im Falle eines Verschuldens ein Anspruch aus Delikt, der möglicherweise (dies scheint nicht abschließend geklärt) den parallelen Bereicherungsanspruch verdrängt (see *Díez-Picazo*, Fundamentos del Derecho Civil Patrimonial III[4], 469).

3. Unter ITALIAN CC art. 535(2) ist der gutgläubige Besitzer, der in gutem Glauben eine Erbschaftssache veräußert hat, zur Herausgabe des erzielten Preises oder der sonstigen Gegenleistung an den Erben verpflichtet. Unter CC art. 1776 gilt Entsprechendes für den gutgläubigen Erben eines Verwahrers, der eine verwahrte Sache gutgläubig veräußert. CC art. 184(3) verpflichtet einen im gesetzlichen Güterstand der Gütergemeinschaft lebenden Ehegatten, der ohne die Zustimmung des anderen über gemeinschaftliches Gut verfügt hat, den ursprünglichen Zustand wieder herzustellen oder, wenn das nicht möglich ist, den entsprechenden Wert in die Gemeinschaft zu zahlen. CC art. 2920 verpflichtet einen Gläubiger, der bösgläubig die Zwangsvollstreckung in Schuldnervermögen betreibt, zu Schadenersatz und Kostenerstattung. CC art. 2038 schließlich verpflichtet denjenigen, der eine unberechtigterweise erhaltene Sache in gutem Glauben veräußert, die erzielte Gegenleistung herauszugeben; war er bösgläubig, so ist er zu Herausgabe in Natur oder Wertersatz verpflichtet. Im Schrifttum wird aus diesen Einzelfallregelungen das allgemeine Prinzip abgeleitet, dass jemand, der in einer fremden Rechtssphäre Handlungen vornimmt, die dem Berechtigten gegenüber wirksam sind, dem Letzteren auf Herausgabe der durch die Rechtsverletzung gezogenen Bereicherung verpflichtet sei (*Sacco*, L'arricchimento ottenuto mediante fatto ingiusto, 112; ähnlich *Nicolussi*, Lesione del potere di disposizione ed arricchimento, 209-211). Das wird vor allem in den Fällen bedeutsam, in denen sich das Gesetz nicht ausdrücklich zu den Ausgleichsansprüchen desjenigen äußert, der durch die Verfügung eines anderen ein Recht verloren hat, insbesondere in CC art. 1153 (gutgläubiger Erwerb des Eigentums an beweglichen Sachen bei Besitzerlangung und Vorhandensein eines geeigneten Titels). Auch hier ist heute m.a.W. ein bereicherungsrechtlicher Ausgleichsanspruch des ursprünglichen Rechtsinhabers anerkannt (*Breccia*, L'arricchimento senza causa I[2], 992; *Sacco* loc.cit. 175-176). Der Anspruch soll allerdings der Höhe nach auf den Wert der Sache beschränkt sein (*Barbiera*, L'ingiustificato arricchimento, 140; see also *Trimarchi*, L'arricchimento senza causa, 51-78). Bei Vorsatz oder Fahrlässigkeit trifft den Verfügenden natürlich eine deliktische Haftung. Der Erwerbende haftet aus Delikt (ggflls. zusammen mit dem Verfügenden als Gesamtschuldner), wenn er die Sache unüberlegt erworben oder sich oberflächlich verhalten hat (Cass. 16 June 1981, no. 3899, Rep.Giur.it. 1981, voce Responsabilità civile, no. 96, col. 3192).

4. In PORTUGAL wird je nachdem unterschieden, ob der Eigentumserwerb in der Person des interveners oder bei einem Dritten eintritt. In der ersten Konstellation geht es typischerweise um gesetzliche Erwerbstatbestände; sie lassen Ausgleichsverpflichtungen in Höhe mindestens des Wertzuwachses unberührt (CC arts. 1268, 1333 und 1538, näher *Pereira Coelho*, O enriquecimento e o dano, 36; *Menezes Leitão*, Enriquecimento sem causa[2], 668-671, see further notes under VII.–4:101). Die zweite Konstellation tritt vergleichsweise selten auf, weil Verfügungen über fremde Sachen in der Regel unwirksam sind (näher von Bar [-*Seabra and Xavier*], Sachenrecht in Europa III, 366, 369). CC arts. 892 (Kaufvertrag) und 856(1) (Schenkung) sagen zwar, dass der Veräußerer dem gutgläubigen Erwerber die

Nichtigkeit nicht entgegenhalten kann, doch hat das lediglich schuldrechtliche Bedeutung; insbesondere bleibt hiervon der Vindikationsanspruch des wirklichen Eigentümers (CC art. 1331) unberührt. Der Käufer wird auf seinen Rückzahlungsanspruch gegen den Verkäufer (CC art. 894; see *Menezes Leitão* loc.cit. 451; STJ 29 June 2006, Processo 06B2141) und auf die Möglichkeit verwiesen, die Sache nach Ablauf der dafür vorgesehen Fristen zu ersitzen (CC arts. 1294-1300). Eine erbrechtliche Ausnahmevorschrift ist CC art. 2076(2). Hiernach können bestimmte Güter von einem Scheinerben gutgläubig durch Kauf erworben werden; der gutgläubige Scheinerbe haftet seinerseits dem wahren Erben nach den Regeln der ungerechtfertigten Bereicherung.

5. Gegenstand von GERMAN CC § 816(1) sind Verfügungen (vor allem Veräußerungen und Belastungen) eines Nichtberechtigten, die dem Rechtsinhaber gegenüber wirksam sind. Es geht im Wesentlichen um Fälle des gutgläubigen Erwerbs (CC §§ 932 ff., 1207, 892, 1138, 2366; Ccom § 366). Erfolgt die Verfügung entgeltlich, haftet der Verfügende dem Berechtigten gegenüber auf das durch die Verfügung Erlangte (CC § 816(1) first sentence); erfolgt die Verfügung unentgeltlich kann der Bereichtigte bereicherungsrechtlich direkt gegen den Dritterwerber vorgehen (§ 816(1) second sentence). Der Verfügende ist in diesem Fall nicht mehr bereichert (näher *Medicus*, Schuldrecht II[14], no. 702). Über die Frage, was genau unter dem ”durch die Verfügung Erlangten“ zu verstehen ist, herrscht keine Einigkeit. Manche meinen, der Anspruch müsse auf den objektiven Wert des Erlangten beschränkt werden, weil eine Gewinnabschöpfung nur unter den Voraussetzungen von CC § 687(2) (rechtswidrige Geschäftsführung ohne Auftrag) möglich sei. Der Verfügende habe in Wahrheit nicht die Gegenleistung, sondern Befreiung von seiner eigenen Schuld erlangt (*Medicus* loc.cit. no. 705). Die Rechtsprechung und die herrschende Meinung sehen das jedoch anders und beziehen den Anspruch auf die gesamte vom Verfügenden erhaltene Gegenleistung unter Einschluss des erzielten Gewinns. Das wird mit dem Wortlaut des Gesetzes und damit begründet, dass durch die Verfügung auch das Recht des Berechtigten verletzt worden sei, den Gegenstand gewinnbringend zu vermarkten (RG 28 June 1916, RGZ 88, 351, 359; BGH 8 January 1959, BGHZ 29, 157, 159; BGH 1 October 1975, WM 1975, 1179, 1180; RGRK [-*Heimann and Trosien*], BGB[12], § 816, no. 12; Palandt [-*Sprau*], BGB[67], § 816, no. 23; differenzierend *Larenz and Canaris*, Schuldrechts II(2)[13], § 72 I 2). Die Rechtslage in GREECE entspricht weithin derjenigen in Germany. Auch hier ist umstritten, ob der Herausgabeanspruch des wahren Berechtigten gegen den Verfügenden auf den objektiven Wert der Sache beschränkt ist oder auch den darüber hinaus gehenden Preis umfasst. A.P. 479/1962, NoB 11 (1963) 109 entschied, dass ein Mieter, der die Mietsache unerlaubt untervermietet, dem Vermieter aus CC art. 904 i.V.m. arts. 909, 911 zur Herausgabe des auf diese Weise erzielten Mietzines verpflichtet ist.

6. Der gutgläubige Erwerber haftet auch nach HUNGARIAN Rechtsauffassung schon deshalb dem Eigentümer gegenüber nicht aus Bereicherungsrecht, weil ein solcher Erwerb mit Rechtsgrund geschieht. Im Grundsatz ist ein gutgläubiger Erwerb vom Nichtberechtigten zwar ohnehin ausgeschlossen; er muss vom Gesetz ausdrücklich ermöglicht werden (CC § 117(1)). Für bewegliche Sachen finden sich solche Ausnahmen jedoch in CC §§ 118 und 119 (näher *Menyhárd*, Dologi jog, 299), und im Immobiliarsachenrecht ist der entgeltliche gutgläubige Eigentumserwerb möglich, wenn er sich auf eine entsprechende Eintragung im Grundbuch stützt (näher *Zlinszky*, Polgári Jogi Kodifikáció 1/2005, 18, 19; *Kazay*, Gazdaság és Jog 9/2005, 12, 13, 17). Bewegliche Sachen können gutgläubig von einem Händler erworben werden, wenn das Geschäft entgeltlich ist (CC § 118(1)). Ein gutgläubiger Erwerb gestohlener Sachen ist nicht ausgeschlossen (BH 1996/48). Der ursprüngliche Eigentümer kann

vom Dieb und vom Händler Schadenersatz verlangen (*Lenkovics*, Dologi jog, 133), sofern auch Letzterer deliktisch handelte (BH 1997/119). Außerhalb des Handelsverkehrs kann Eigentum gutgläubig und entgeltlich von einer Person erworben werden, welcher der Eigentümer die Sache anvertraut hat (CC § 118(2)); es darf sich in diesem Fall aber nicht um eine gestohlene Sache handeln (*Lenkovics* loc.cit.; *Menyhárd* loc. cit. 305; BH 1978/197). Das Gesetz gewährt dem ursprünglichen Eigentümer allerdings ein auf ein Jahr befristetes Rückkaufsrecht. Gegen den Veräußerer kommt wiederum nur ein Anspruch aus Delikt in Betracht. Eigentum an Geld und bestimmten Inhaberpapieren (BH 1999/75) geht durch Übergabe und aufgrund eines gültigen Titels über (CC § 119); der ursprüngliche Eigentümer hat folglich nur einen schuldrechtlichen Ausgleichsanspruch gegen den unberechtigt Verfügenden (*Lenkovics* loc.cit.; *Petrik*, Tulajdonjogunk ma, 142); dabei kann es sich auch um einen Schadenersatzanspruch handeln (BH 2005/115: Zahlung mit gestohlenem Geld; Haftung nur des Diebs, nicht des Empfängers, auch nicht aus ungerechtfertigter Bereicherung). Aus ungerechtfertigter Bereicherung haftet, wer unberechtigt über fremde Aktien verfügt (BH 2003/66). Zahlreiche Sondervorschriften regeln die Ausgleichsansprüche infolge des gesetzlichen Erwerbs fremden Eigentums, darunter CC § 133 über die Verarbeitung.

7. Verfügt jemand über eine fremde Sache und ist diese Verfügung dem Eigentümer gegenüber wirksam, so ergibt sich dessen Ausgleichsanspruch in BULGARIA aus der allgemeinen Bereicherungsklage (LOA art. 59(1)), see *Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 600 and *Goleva*, Obligazionno pravo[4], 292. Die Bereicherung des Verfügenden erfolgt hier zweifelsfrei “auf Kosten” des früheren Eigentümers.

8. Under ESTONIAN LOA § 1037(1) a person who violates the right of ownership, another right (such as a right of usufruct, personal right of use or intellectual property rights) or the possession of an entitled person by disposal, use, consumption, accession, confusion or specification thereof without the consent of the entitled person or in any other manner is obliged to compensate the usual value of anything received by the violation to the entitled person. Wer also z.B. kraft Gesetzes by way of accession (LPA § 107) Eigentum an gestohlenem Baumaterial erwirbt, muss dem ursprünglichen Eigentümer den Wert erstezen. Similarily, a person who has stolen a leased computer must compensate to the lessee the value of advantage of use which the lessee was deprived of (*Tampuu*, Lepinguväliste võlasuhete õigus, 82).

Illustration 4 draws on TS 19 April 2007, RAJ 2007 (2) no. 2071 p. 4932.

VII.–4:106: Ratification of intervener's acts

(1) A person entitled to an asset may ratify the act of an intervener who purports to dispose of or otherwise uses that asset in a juridical act with a third person.

(2) The ratified act has the same effect as a juridical act by an authorised representative. As between the person ratifying and the intervener, ratification does not amount to consent to the intervener's use of the asset.

COMMENTS

A. General

Overview. This Article addresses globally issues of enrichment, disadvantage and attribution in situations involving an attempt by a person to dispose or otherwise use an asset belonging to another in a transaction with a third person. It is a sister provision to VII.–4:105 (Attribution resulting from an act of an intervener). That Article is concerned with cases where there is an effective disposition or other use of the claimant's asset: it recognises that there may be a claim against the recipient who has got what was the claimant's. This Article is concerned with ineffective dispositions or other use. It confers on the owner of the asset a power to ratify the attempted disposition or use. Ratification renders the transaction with the third person effective and paves the way for a possible enrichment claim by the asset's (former) owner against the intervener.

> *Illustration*
> E takes D's car and transfers it to X in circumstances in which X does not acquire title to the car in accordance with statutory provisions on acquisition in good faith. E has purported to dispose of an asset belonging to D in a juridical act with a third person (X) and therefore D may ratify under this Article. If D ratifies E's purported disposition to X, the purported transfer will be effective: X will acquire and D will lose title to the car. D will be disadvantaged by a decrease in assets. X will be enriched by an increase in assets. E will be enriched by having made use of D's asset. By virtue of this Article E's enrichment will be attributable to D's disadvantage.

Rationale. The purpose of the Article is to facilitate a claim against an intervener either where it would be impolitic for the claimant to proceed against the end recipient, or where recovery from the intervener is a more worthwhile remedy. The latter may be the case where the ultimate recipient's liability would in any case be diminished (for example, due to gratuitous disposal of the asset received in good faith, giving rise to a defence under VII.–6:101 (Disenrichment)) or where the intervener can be made to account for a substitute enrichment (for example, the proceeds of disposing of the claimant's asset on what, from the claimant's standpoint, were favourable terms). The provision is justified by the fact that the intervener attempted to achieve the outcome which the disadvantaged person permits by means of the ratification. Thus ratification only brings about the state of affairs which the intervener in any case intended to effect. It is not in contradiction of the intervener's intention as manifested in the juridical act with the third party.

Meaning of use. The notion of use of an asset, which as the wording of paragraph (1) indicates includes effecting a disposition, is the same as in VII.–3:101 (Enrichment) and VII.–3:202 (Disadvantage). See Comment C to those Articles.

B. Ratification

Authorisation of the disposition or use. In accordance with paragraph (2), ratification has the following effects. It renders the purported disposition or other use effective. That confers on the third person who dealt with the intervener the rights which the intervener has purported to confer: an attempted sale becomes an effective sale, for instance, as much as if the intervener had been acting as an authorised representative. Accordingly the ratifying party loses the assets disposed of or is burdened with the rights granted to the third party.

Justification of the third party's enrichment. In relation to the third party recipient, the ratifying party has no enrichment claim. The intervener is treated as an authorised representative so that, in accordance with VII.–4:102 (Indirect representation), the disadvantage sustained is not regarded as that of the ratifying party, but of the representative. The enrichment of the third party is justified in relation to the representative by the juridical act between them: see VII.–2:101 (Circumstances in which an enrichment is unjustified) paragraph (1)(a).

No justification of the intervener's use of the asset. In relation to the intervener, however, the ratification does not operate as a consent to the disadvantage sustained. The converse would entirely frustrate the purpose of this rule, which is to facilitate a claim against the intervener. The intervener is enriched by using the disadvantaged person's asset (e.g. by effecting the disposition of the asset to the third party). The intervener's use of the claimant's asset is attributable to the claimant's disadvantage under paragraph (c) of VII.–4:101 (Instances of attribution).

Law on liability for non-contractual damage. As between intervener and disadvantaged person, ratification is not a consent to the disadvantage not just for the purposes of this Book, but also for the purposes of the rules on non-contractual liability for damage. Where concurrent obligations arise because the intervener is liable under both this Book and Book VI, the rule in VII.–7:102 (Concurrent obligations) paragraph (1) applies.

NOTES

1. Zu der Rechtslage in den Mitgliedstaaten siehe bereits die notes under VII.–4:104 (Ratification of debtor's performance to a non-creditor). Für SPAIN ist ergänzend darauf hinzuweisen, dass *Díez-Picazo and de la Cámara Alvarez,* Dos estudios sobre el enriquecimiento sin causa, 127 die Möglichkeit einer Genehmigung für grundsätzlich gegeben halten; sie laufe darauf hinaus, dem *verus dominus* an option between vindication and *condictio* zu geben. *Carrasco Perera,* ADC 1988, 5, 100-101 dagegen hält es für verfehlt, dem Eigentümer einen Anspruch gegen den intervener auf den erzielten Erlös zu geben. Allerdings lässt sich dem entgegenhalten, dass unter CC art. 1897 *in fine* auch der Schuldner einer Leistungskondiktion, der die Sache weiterverkauft hat, den erzielten Erlös bzw. den Anspruch auf den Erlös herausgeben muss. Die Vorschrift zeigt zugleich, dass der *solvens indebiti* in Fällen, in denen der *accipiens indebiti* acted in bad faith, nicht zwingend auf seinen Vindikationsanspruch gegen den Dritten verwiesen wird, vielmehr hierauf verzichten und stattdessen a *condictio* against the *accipiens* for the price obtained geltend machen kann (*Díez-Picazo,* Fundamentos II[4], 520-521). In der Substanz läuft das auf eine Ratifizierung hinaus.

2. Unter GERMAN law hat der Berechtigte die Möglichkeit, die Verfügung eines Nichtberechtigten zu genehmigen. Sie wird dadurch auch dann wirksam, wenn es sich um eine gestohlene Sache handelte (CC § 935) oder der Erwerber bösgläubig war (*Medicus*, Schuldrecht II[14], no. 701; *Larenz and Canaris*, Schuldrecht II(2)[13], § 69 II 1 c; MünchKomm [-*Lieb*], BGB[4], § 816, no. 25; BGH 6 May 1971, BGHZ 56, 131). Durch die Genehmigung erlangt der Berechtigte dann einen Bereicherungsanspruch gegen den nichtberechtigt Verfügenden aus CC § 816(1) first sentence. Klagt der Eigentümer gegen den Verfügenden auf Erlösherausgabe, so soll darin bereits eine konkludente Genehmigung zu sehen sein (BGH 25 January 1955, LM § 816 BGB no. 6; RG 12 March 1923, RGZ 106, 44, 45; RG 28 October 1926, RGZ 115, 31, 34). Die Genehmigung bewirkt zwar den Verlust des Vindikationsanspruches gegen den Erwerber, schließt aber Deliktsansprüche gegen den Verfügenden nicht aus (BGH 6 November 1990, NJW 1991, 695; see also BGH 29 April 1968, NJW 1968, 1326).

3. Im Gegensatz zum German (und auch zum ESTONIAN law, see notes under VII.–4:104) haben andere Rechtsordnungen die Möglichkeit und die Rechtsfolgen einer Genehmigung im Wesentlichen nur im Recht der Vertretung ohne Vertretungsmacht geregelt. Dazu gehören ITALY, PORTUGAL, the NETHERLANDS, BULGARIA und HUNGARY (CC § 221). Die Genehmigung hat zur Folge, dass der Scheinvertreter als echter Vertreter anzusehen ist (BH 2005/21; BH 2004/181; BH 1994/501; BH 1994/148; BH 1993/181). Die Situation ist aber mit der in VII.–4:106 ins Auge gefassten nicht vergleichbar, weil die vertretungsrechtliche Genehmigung zu einem Vertrag zwischen dem Eigentümer und dem Käufer führt.

VII.–4:107: Where type or value not identical

An enrichment may be attributable to another's disadvantage even though the enrichment and disadvantage are not of the same type or value.

COMMENTS

Overview. This provision has a very limited function. Its purpose is simply to exclude a limitation which might otherwise be wrongly supposed to be a part of the scheme of the rules. It supplements the rules in paragraph (2) of each of VII.–3:101 (Enrichment) and VII.–3:102 (Disadvantage). Those rules make it clear that the concepts of enrichment and disadvantage are defined in terms of individual items of patrimonial displacement, rather than the net overall effect on patrimonial wealth – in other words, entries in the accounts and not the overall balance. VII.–4:107 adds the clarification that the enrichment need not be the mirror image of the claimant's disadvantage.

Non-equivalence of enrichment and disenrichment immaterial. While enrichment and disenrichment are exact opposites from a conceptual point of view, this does not mean that in any particular case they must in fact be of an equal and opposite nature. In many instances that will indeed be the case. D's provision of a service to E enriches E because E receives a service and disadvantages D because D provides it. Likewise, E's making use of D's right amounts to an enrichment of E and at the same time a disadvantage of D because D suffers E's use of the right. Nonetheless, this kind of exact correspondence is in no way a requirement of the basic rule. It may equally arise, for example, that the enrichment takes one form of patrimonial enrichment (e.g. liberation from an obligation which the claimant has discharged – a decrease in liabilities), while the claimant's disenrichment takes another (e.g. disbursement of money – a decrease in assets). Payment of cash into an overdrawn account would be a classic example of this. Where third parties are involved there is even more potential for enrichment and disadvantage to take different forms: the disadvantage which the claimant has sustained in benefiting a third party may be attributable to the enrichment which the enriched person has received from the third party, but the benefits received and conferred by the third party may be very different.

Illustration 1:
Y is a friendly society, engaged in procuring the construction of social housing, and X is its chairman. Acting on behalf of the society, X commissions a building company B to construct a luxury villa for himself and his family. B's invoices are satisfied out of an account of Y. Initially the invoices are covered by payments into the account which X makes. X later ceases to make payments into the account, but B's invoices continue to be met from Y's account until X's scheme is exposed. X has been enriched by the receipt of a service and assets from B (construction of the villa and building materials used in the construction). Y has sustained a disadvantage in making payments (to B).

Illustration 2:
D, ein Hausrazt, verliert infolge einer Gesetzesänderung die einzige Apothekenlizenz, die für den betreffenden Ort vergeben wird. E erlangt eine neue Lizenz und in ihrer Folge auch den gesamten Klientenbestand. Bereicherung und Nachteil sind verschieden; die Bereicherung des E erfolgt allerdings nicht ohne Rechtsgrund.

NOTES

1. Zur Rechtslage in den Mitgliedstaaten siehe bereits die notes under VII.–3:101 (Enrichment) and VII.–3:102 (Disadvantage), ferner die notes under VII.–4:101 (Instances of Attribution).

Illustration 1 is taken from TS 15 June 2004, RAJ 2004 (3) no. 3847 p. 7922; **illustration 2** draws on HR 15 March 1996, NedJur 1997, no. 3 p. 22.

CHAPTER 5: REVERSAL OF ENRICHMENT

VII.–5:101: Transferable enrichment

(1) Where the enrichment consists of a transferable asset, the enriched person reverses the enrichment by transferring the asset to the disadvantaged person.

(2) Instead of transferring the asset, the enriched person may choose to reverse the enrichment by paying its monetary value to the disadvantaged person if a transfer would cause the enriched person unreasonable effort or expense.

(3) If the enriched person is no longer able to transfer the asset, the enriched person reverses the enrichment by paying its monetary value to the disadvantaged person.

(4) However, to the extent that the enriched person has obtained a substitute in exchange, the substitute is the enrichment to be reversed if:

(a) the enriched person is in good faith at the time of disposal or loss and the enriched person so chooses; or

(b) the enriched person is not in good faith at the time of disposal or loss, the disadvantaged person so chooses and the choice is not inequitable.

(5) The enriched person is in good faith if that person neither knew nor could reasonably be expected to know that the enrichment was or was likely to become unjustified.

COMMENTS

A. General

Overview. This Article sets out the measure of liability and particularises the required mode of reversal of the unjustified enrichment, provided for by the basic rule, where that enrichment consists of a transferable asset. The starting proposition is that the enriched person is required to transfer the asset to the disadvantaged person (paragraph (1)). A transfer in specie is thus the primary response of the law of unjustified enrichment if the enrichment takes the form of a transferable asset. However, in certain circumstances the enriched person may elect instead to pay the monetary value of the enrichment (paragraph (2)). The Article also deals with the case where the enrichment has been disposed of or lost and accordingly can no longer be returned in specie. In that case (so far as liability continues, notwithstanding the loss or disposal: see the defence in VII.–6:101 (Disenrichment)) the starting point is that the enriched person must pay the monetary value of the enrichment (paragraph (3)). However, where the enriched person has traded the asset, there is a possibility that the liability to reverse the enrichment will switch to the substitute representing the proceeds of that trade (paragraph (4)). The switch results from an election of a party; quite which party may make that election depends on the circumstances. Those circumstances include whether the enriched person is in good faith – a matter defined for these (and other) purposes in paragraph (5).

B. Transfer: paragraph (1)

Transferable asset. This Article only applies where the enrichment which was obtained takes the form of a "transferable asset". The term "asset" in this paragraph bears the same meaning as in VII.–3:201 (Enrichment) paragraph (1)(a),(c) and VII.–3:202 (Disadvantage) paragraph (1)(a),(c) (as to which, see Comment B on those Articles). An asset will not be transferable in the sense of paragraph (1) if the asset is not by its nature transferable, if it is

impossible or unlawful to transfer it, or for any other reason transfer must be regarded as out of the question. The issue of transferability must be considered from a pragmatic standpoint. A merely legal or theoretical possibility of transfer will not suffice if the asset would be sterile in that condition or if, in order to prevent it being sterile, the enriched person would be compelled to transfer more than the asset (and thus to sustain a disadvantage going beyond a reversal of the enrichment).

Illustration 1
E has made unauthorised use of D's bricks in constructing a building on E's land and is liable to D under this Book in respect of the acquisition of the bricks. It would be barely feasible for E to return the bricks as such without damaging either the building or the bricks themselves (either of which would be a waste of resources). The bricks are not a transferable asset. Nor is the building a transferable asset. While it might be possible under the applicable rules of immovable property law to transfer ownership of the building as such (leaving rights in the soil beneath in E), this would be a useless asset without rights of access to the building over E's land, but to grant such rights of access would subtract from E's patrimony more than corresponds with E's enrichment. (This is quite aside from the fact that the building as such represents more than the bricks, since it is also in part the product of E's labour in constructing it.) Since the enrichment is non-transferable, the mode of reversal of the enrichment and the measure of liability is determined by VII.–5:102 (Non-transferable enrichment).

Place of performance. This Article does not regulate issues of place of performance. Such matters will determine in effect who bears the burden of the cost of transfer, such as paying for collection or delivery by a carrier. The question of where the obligation to transfer is to be fulfilled – whether the enriched person is obliged to hand over at the disadvantaged person's place of residence or business or need only make the asset available for collection at his own place – will be determined by the general rules governing place of performance of non-contractual obligations: see III.–2:101 (Place of performance).

C. Election to pay monetary value instead: paragraph (2)

Election to pay value. Paragraph (2) provides that instead of making a transfer the enriched person may elect to pay the monetary value of the enrichment, notwithstanding that it relates to a transferable asset, if a transfer of the asset would cause the enriched person unreasonable effort or expense. There may be circumstances in which, given the cost of transfer involved, no constructive or proper purpose would be served by legal rules insisting on a specific transfer. This is in keeping, for example, with the policy underlying the right to specific performance of a contractual obligation, though the details differ (see III.–3:302 (Enforcement of non-monetary obligations)). It is predicated on the basis that the legal system should not compel a transfer in specie where complete justice would be done by an award of equivalent value enabling the claimant to obtain a fully adequate substitute. In such circumstances there is no need to interfere more profoundly with the liberties of the debtor than to compel a payment of value.

Uniqueness of the asset. One factor relevant to determining whether the costs of transfer will be unreasonable is whether the asset transferred is unique. Here regard must be had not merely to the physical and economic or marketable characteristics of the thing concerned. If the enrichment has particular sentimental value (e.g. because it was the favourite material thing of a deceased member of the family), then it may be irreplaceable. Obviously tangibles whose value is almost entirely sentimental (such as love letters) or which are intrinsically

unique (such as holograph manuscripts or original artwork) are not enrichments which can reasonably be obtained from another source; payment of its economic value will not enable the disadvantaged person to obtain a fully comparable replacement.

Illustration 2
As a result of undue influence exercised by E over D, D is induced to make a gift to E of a valuable collection of nineteenth century portraits of family ancestors. D subsequently avoids the gift on grounds of undue influence. Assuming that transfer would be both possible and lawful, D is entitled to demand restitution of the portraits. The goods are unique and are of special significance to D. D cannot obtain the like assets from another source. It cannot be maintained that E would suffer unreasonable effort or expense in restoring the paintings.

Election by the enriched person. Where the power of election arises, the decision whether or not to transfer is one for the enriched person to make. The claimant cannot insist on a monetary payment if the asset is transferable. The primary remedy for reversal of the enrichment where the asset is transferable is one of transfer and if the enriched person is willing and able (even though not compellable) to transfer, then the disadvantaged person must accept that, unless the parties come to some agreement. The disadvantaged person cannot in effect convert an obligation to restore an asset into a forced purchase by the enriched person by demanding cash value in lieu of a transfer – to the detriment of an enriched person who is willing to surrender the asset.

Illustration 3
D, the parents of a young girl, acquire from E a horse in part exchange for a pony, which is now too small for D's daughter. It emerges that the contract is void. The parents may only demand – in return for the horse acquired – the benefits which they conferred on E, namely the pony and the sum of money provided in addition. Although they have no interest in the pony as such, they cannot demand that E pay its value instead.

Monetary value. The meaning of monetary value of an enrichment is explained in VII.–5:103 (Monetary value of an enrichment; saving).

D. Liability to pay monetary value transfer no longer possible: paragraph (3)

General. There can be no question of reversing an unjustified enrichment by transferring the asset if the enriched party no longer has the asset to transfer. This may be due to loss of the asset or its destruction or because it has been given or sold away. In this case, the enriched party is obliged to reverse the enrichment by paying the monetary value of the enrichment instead.

Modifications of liability to pay the monetary value of the enrichment obtained. The principle that the enriched party who can no longer return a transferable enrichment must pay the monetary value of what was obtained is subject to two modifications. Firstly, it may be that the enriched person has disposed of the enrichment in good faith and gratuitously (or at least for less than its full monetary value). In such circumstances liability may be reduced by virtue of the defence of disenrichment: see VII.–6:101 (Disenrichment). Secondly, where the enriched party obtains some benefit in exchange for disposing of the enrichment, such as a

price or a right to a price under a sale of the transferable asset, an election might be made that the proceeds from the disposal of the enrichment (e.g. the price or claim against the buyer for payment of the price) should be handed over instead. Whether it is the disadvantaged person or the enriched person who may make the election that the enrichment be reversed by transferring the substitute will depend on whether the enriched person disposed of the enrichment in good faith. If such an election is made, the form and potentially also the measure of liability is altered. See Comment C above.

Illustration 4
X, a tax adviser, sells the practice with its goodwill to Y, another tax adviser. The contract of sale is void. However, clients of the practice who have since had their affairs dealt with by Y wish to continue consulting Y, whom they much prefer to X. Y is no longer in a position to restore the goodwill of the business to X. Y is therefore liable to X to make a payment corresponding to the value of the goodwill which cannot be restored.

Partial disposition, loss or destruction of the enrichment. The principle of paragraph (3) applies to the extent that the enriched person is not able to transfer the asset. If only part of the asset is disposed of or lost or destroyed and some part remains which can be transferred, there will be an obligation to transfer the retained part alongside an obligation to pay the monetary value of the part which can no longer be transferred.

Illustration 5
V sells P a plot of land. After registration of the transfer, P partitions the land and re-sells one parcel. It later emerges that the contract of sale between V and P was void. P must transfer to P the retained land and pay the monetary value of the parcel of land which P sold on.

E. Election that substitute be transferred; good faith: paragraphs (4)-(5)

General. Paragraph (4) provides that in defined circumstances, where the enriched person has traded the original unjustified enrichment for some benefit in exchange, the enriched person comes under a liability to transfer the substitute. This is a departure from the principle set out in paragraph (3) that where the enriched person is no longer able to transfer the unjustified enrichment the monetary value is to be paid. When paragraph (4) applies the enriched person is instead liable once again to make a transfer in specie – in this instance, however, a transfer of the substitute.

Election. The rule that an enriched person reverses an enrichment by transferring the substitute is not automatic. It applies only where an election is made. A party who is entitled to make that election may choose not to exercise this option and instead may rely on the underlying rule (under the preceding paragraph) that liability in a case where the original enrichment has been disposed of is a liability to pay its monetary value. Moreover, it depends on the circumstances which of the parties has the right to make the election. Where the enriched person was in good faith when disposing of the enrichment, it is the enriched person who is entitled to elect in favour of the substitute. Otherwise (i.e. where the enriched person was in bad faith by the time of the disposition) it falls to the disadvantaged person to choose. In the latter case, however, the choice is subject to the rider that it must not be inequitable.

Rationale where the enriched person is in good faith. Considerations of fairness justify the

right of an enriched person who has been in good faith throughout to elect to hand over the substitute instead of paying the value of the original enrichment. The rule protects the position of the innocent enriched person. It presupposes that the enriched person has defensibly changed position on the basis that the enrichment was apparently justified. If the enriched person were to be subject to the normal rule in paragraph (3) which applies when the original enrichment can no longer be transferred, the enriched person would be compelled in effect to purchase the substitute by paying the value of the original enrichment. This would not be equitable: the enriched person should have the option of surrendering the substitute. This policy – that an innocent recipient of an enrichment is not to be forced into paying to keep it – is also reflected in the special rules governing an enrichment which from the outset is a non-transferable enrichment: see VII.–5:102 (Non-transferable enrichment). This is distinct from the defence in VII.–6:101 (Disenrichment) which is available only to the extent that the value received by the innocent enriched person in exchange is less than the value of the original enrichment.

Rationale where the enriched person is not in good faith. Where the enriched person is not in good faith by the time the enrichment is lost or disposed of, the right of the disadvantaged person to demand the substitute rather than the value of the original enrichment is justified by the countervailing considerations. The rule prevents an enriched person who is (or ought to be) aware of the primary obligation to reverse the enrichment in specie from profiting from a default on that obligation. An enriched person cannot knowingly trade a transferable enrichment for an above market price, pay its monetary value (the market price) and pocket the difference. Precisely because of the culpable nature of the behaviour, the enriched person has no cause to complain if forced to surrender that benefit into which the original enrichment has been converted. Where the enriched person is not innocent, there is nothing to countervail the need to give full protection to the disadvantaged person who may have been deprived of the opportunity to obtain that benefit because kept out of having the asset which ought to have been restored. The enriched person who has culpably traded away what was due to be returned to the disadvantaged person may be regarded as a sort of wrongful (unauthorised) manager of another's affairs. Conferring on the disadvantaged person a right of election enables the 'victim' to adopt the proceeds of that 'self-interested' (rather than benevolent) intervention.

Good faith at the time of loss or disposal. In order for the enriched person to be able to exercise the election in favour of surrender of the substitute, the enriched person must be in good faith at the time of disposal of the enrichment: see paragraph (4)(a). Conversely, where the enriched person is not in good faith at the time of its disposal, the disadvantaged person has the right of election: see paragraph (4)(b). The critical time for determining whether the enriched person is in good faith is thus the moment at which the enrichment is disposed of or lost. The requirement of good faith therefore presupposes that there were good grounds to assume that the enrichment was justified and that this assumption continued until it was acted upon by disposing of the enrichment, or endured until the enrichment was lost. Hence, if (whether on or after acquiring the enrichment) the enriched person learns of the facts demonstrating or indicating that the enrichment is unjustified, the enriched person will cease to be in good faith and if the enrichment is nonetheless disposed of or lost (a) cannot insist on handing over the proceeds in lieu of the monetary value of the original enrichment and (b) runs the risk that the disadvantaged person will elect to demand the proceeds rather than the monetary value of the original enrichment.

Meaning of good faith. The notion of good faith is defined correspondingly in paragraph (5).

The enriched person is not in good faith if aware that the enrichment is unjustified or aware of the facts which are likely to result in it becoming unjustified retrospectively. The latter covers the case, for example, where the enrichment results from another's performance of an obligation under a contract and the enriched person knows of the grounds (be it a mistake, fraud, duress, or the like) which entitle that other party to avoid that contract. Actual knowledge of the facts rendering the enrichment unjustified (or making it likely that it will become unjustified) is not required. It suffices that the enriched person ought to be aware of those facts - that is to say, had the enriched person behaved properly, as a reasonable person would, the enriched person would have appreciated that the enrichment was or was likely to become unjustified because such facts as were evident pointed to a reasonable need for further inquiry. An enriched person will not be in bad faith merely by failing to look behind the apparent facts and double check the integrity of the transaction if everything points towards the enrichment being justified. There is no requirement that the recipient of an enrichment treat it sceptically if in all appearance it seems correct. Nor is the enriched person expected to undertake laborious research where there is some room for doubt if a simple appropriate inquiry seems to confirm the correctness of the enrichment. However, an enriched person is not entitled to feign blindness to obvious facts which cast suspicion on the justification for the enrichment; nor may the enriched person place blind faith in an enrichment whose justification can only be supported by a flight of fantasy.

Restriction of the enriched person's right of election. The principle set out in VII.–5:102 (Non-transferable enrichment) paragraph (3) serves by analogy as a further implied condition for the existence of the enriched person's right of election. That provision is concerned with non-transferable enrichments and contemplates that an enriched person who has obtained the enrichment in good faith, but on the basis that a price was to be paid or the understanding that the enrichment had a certain value, is at least liable to pay that price or value if (i) that agreement as to the price or value is a genuine one, not vitiated by issues of consent and (ii) the price or value does not exceed the monetary value of the enrichment. The underlying reason for that rule is to ensure that a person who contemplated a certain liability for the enrichment at the time of its voluntary appropriation may legitimately be held to that contemplation so long as this does not exceed the enrichment actually obtained. The same reasoning ought to apply where the enriched person obtains the enrichment in good faith under an agreement genuinely fixing a price or value for that enrichment and subsequently disposes of it to procure a substitute. At the time of disposition, the enriched person assumed that the agreed price or value of the enrichment was to be paid. Consequently, if the enriched person has made an economically unprofitable swap, obtaining something less valuable in exchange for that which the enriched person obtained under the (void) agreement with the disadvantaged person, the enriched person should not be permitted to shift that loss on to the other party, for that would simply confer a windfall on the enriched person. If the enriched person accepted the enrichment knowing that a price was to be paid and that price was fixed genuinely in the agreement, that represents a minimum level to which liability to reverse the enrichment may sink. Before making the swap, the enriched person considered that there was an obligation to pay a (genuinely agreed) price for it, so that any subsequent dealings with the asset should be regarded (to the extent of that agreed price) as at the enriched person's own risk.

Apportionment of substitute. A person enriched without justification will be liable in respect of a substitute only to the extent that it is truly the product of the original enrichment – and not in so far as it is derived from other economic inputs (such as the contributions of third parties or the enriched person's own wealth or efforts). Where the enriched person trades an

unjustified enrichment together with other goods or services, the benefit obtained in exchange is only partly to be regarded as standing in the shoes of the original enrichment. The substitute is therefore to be apportioned as between the two parts which do and do not represent the original unjustified enrichment. The apportionment is to be made on the basis of the proportionate value of those different economic inputs for which the substitute was obtained in exchange.

Rationale for apportionment. Fairness requires that a substitute enrichment which is the product of more than just the original enrichment be apportioned as between the different economic factors for which it was exchanged. An unjustifiably enriched person is liable to reverse the enrichment, but should not be under an obligation to make a sacrifice of wealth going beyond this. To the extent that the substitute represents economic input other than the original enrichment the disadvantaged person has no claim on it. To force the enriched party to surrender the entire substitute in such circumstances would amount to a penalty for the enriched person and an undeserved windfall for the disadvantaged person.

NOTES

I. Der Anspruch auf Rückgabe des Empfangenen

1. Under FRENCH, BELGIAN and LUXEMBURGIAN CC art. 1379 sind Sachen in Natur zurückzugeben. Wenn das infolge von Verlust oder Beschädigung nicht möglich ist, muss der bösgläubige Empfänger ihren Wert ersetzen, während der gutgläubige Empfänger nur dann auf Wertersatz haftet, wenn er den Verlust oder die Beschädigung verschuldet hat. Hat ein gutgläubiger *accipiens* die Sache verkauft, haftet er dem *solvens* lediglich auf den Kaufpreis (CC art. 1380).

2. Auch in SPAIN wird gesagt, dass die *condictio de prestación* in erster Linie auf Rückgewähr *in specie* ausgerichtet ist (CC art. 1303 and CP art. 111; see *Díez-Picazo*, Fundamentos I[6], 129). Das gilt auch für die Rückforderung von Leistungen auf void or avoided contracts (TS 6 October 1994, RAJ 1994 (4) no. 7459 p. 9703; TS 11 February 2003, RAJ 2003 (1) no. 1004 p. 1906). Der Benachteiligte kann auch hier nicht auf Wertersatz klagen, wenn der Bereicherte Übergabe der Sache in Natur anbietet (CA Bizkaia 1 February 2001, AC 2001 [1] no. 253, p. 391). So verhält es sich ebenfalls im Anwendungsbereich der *condictio indebiti* (CC arts. 1895 ff.; see *Gullón Ballesteros*, FS Batlle Vázquez, 367, 374; Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Ballarín Hernández*], Código Civil II[2], 1957). Ist eine Rückübertragung der Sache in natura nicht möglich, wird die für nichtige bzw. angefochtene Verträge konzipierte Vorschrift des CC art. 1307 (Wertausgleich plus Früchte) angewandt. Sie betrifft nach ihrem Wortlaut zwar nur den Verlust der Sache, wird aber auf alle Fälle der rechtlichen oder tatsächlichen Unmöglichkeit der Rückübertragung der Sache angewandt (TS 6 October 1994 loc. cit.; TS 6 June 1997, RAJ 1998 (1) no. 376 p. 592; TS 11 February 2003 loc. cit.; *Díez-Picazo*, La liquidación de las nulidades contractuales, 117; *Delgado Echeverría and Parra Lucán*, Las nulidades de los contratos, 256). Entscheidend ist der Marktwert der Sache (TS 6 June 1997 loc.cit.; TS 11 February 2003 loc.cit.; *Díez-Picazo*, Fundamentos I[6], 129).

3. ITALIAN CC art. 2041(2) legt fest, dass in allen Fällen, in welchen die Bereicherung eine bestimmte Sache zum Gegenstand hat, der Empfänger verpflichtet ist, sie in Natur zurückzugeben, sofern sie im Zeitpunkt der Klage noch vorhanden ist. Für das Recht der Zahlung einer Nichtschuld findet sich dieselbe Regel in CC art. 2037(1)). Ein

bösgläubiger *accipiens* haftet unter CC art. 2037(2) auch für den unverschuldeten Untergang oder die Verschlechterung der Sache. Er hat ihren Wert zu ersetzen; im Falle der Verschlechterung kann der *solvens* aber auch Herausgabe der Sache und einen Ausgleich für die Wertminderung verlangen. Der gutgläubige *accipiens* haftet dagegen stets nur in den Grenzen einer ihm verbliebenen Bereicherung (CC art. 2037(3)). Hat ein bösgläubiger *accipiens* die Sache veräußert, muss er sie entweder in Natur zurückgeben oder ihren Wert ersetzen (CC art. 2038(2)). Entscheidend ist der Wert zu dem Zeitpunkt, in dem er die Sache erhalten hat. Das Wahlrecht soll dem Schuldner zustehen, weil nur er abschätzen könne, ob er die Sache tatsächlich zurückerlangen könne (*Nicolussi*, Lesione del potere di disposizione e arricchimento, 114-115).

4. Unter GERMAN CC § 812(1) richtet sich der Herausgabeanspruch auf das erlangte "Etwas". Es kommt ganz konkret darauf an, was der Kondiktionsschuldner durch den bereichernden Vorgang erlangt hat. Das Bereicherungsrecht schützt nicht nur ein allgemeines Vermögensinteresse des Gläubigers, sondern sein Interesse daran, gerade denjenigen Gegenstand zurückzuerhalten, der sich numehr beim Kondiktionsschuldner befindet (näher MünchKomm [-*Lieb*], BGB[4], § 812, no. 339; Staudinger [-*S. Lorenz*], BGB [2007], § 812, no. 65). Ist allerdings die Herausgabe wegen der Beschaffenheit des Erlangten nicht möglich oder ist der Empfänger aus einem anderen Grunde zur Herausgabe außerstande, so hat er nach CC § 818(2) den Wert zu ersetzen. Das ist etwa der Fall bei empfangenen Dienstleistungen, Gebrauchsvorteilen, Verbrauch oder Veräußerung der Sache (Palandt [-*Sprau*], BGB[67], § 818, no. 17). Dem entspricht die Rechtslage unter PORTUGUESE CC art. 479(1); Wertersatz ist nur geschuldet, wenn *restituição em espécie* nicht möglich ist, see *Menezes Leitão*, Enriquecimento sem causa[2], 884). (Beispiele liefern Dienstleistungen, Verwendungen auf fremde Sachen, die Nutzung, der Verbrauch und die Veräußerung einer Sache sowie die Befreiung von einer Schuld: *Antunes Varela*, Obrigações em geral I[10], 511). Im Schrifttum wird allerdings eine analoge Anwendung von CC art. 566 befürwortet, wonach der Deliktsschuldner den Geschädigten in Geld entschädigen darf, wenn ihn eine Wiederherstellung in Natur (*reconstituição natural*) übermäßig belasten würde (*Gomes*, Conceito de enriquecimento, 119, 122). Zu einem Wertersatz in Geld kommt es auch dann, wenn – bei Gattungsschulden – Sachen von gleicher Art und Güte zurückgegeben werden könnten (*Menezes Leitão* loc. cit. 885).

5. Unter HUNGARIAN CC § 361(1) muss der erlangte Vorteil zurückerstattet werden. Das hat *in specie* zu geschehen, sofern das nicht unmöglich ist; im letzteren Fall ist (vorbehaltlich eines Wegfalls der Bereicherung) Wertersatz zu leisten (CC § 363(2)). Ist die Sache beim Schuldner noch in Natur vorhanden, sind allerdings eigentums- und besitzrechtliche Herausgabeansprüche (CC §§ 115(3), 193(1)) für den Gläubiger in der Regel vorteilhafter. BULGARIAN LOA art. 57(1) legt fest, dass die Restitution grundsätzlich in *natura* erfolgt. Die Vorschrift betrifft die bereicherungsrechtliche Rückgewähr von Sachen außerhalb vertragsrechtlicher Rückforderungsansprüche. Sie steht in freier Anspruchskonkurrenz zur Vindikation (Property Act art. 108, see *Goleminov*, Neosnovatelno obogatyavane, 75) und ist für den Kläger insoweit vorteilhafter, als er unter dem Kondiktionsanspruch davon entlastet ist, sein Eigentumsrecht an der Sache zu beweisen. Ist die Sache untergegangen, weiterveräußert oder verbraucht worden, so wandelt sich der bereicherungsrechtliche Herausgabeanspruch in einen Wertersatzanspruch (LOA art. 57(2)). Der bösgläubige Bereicherungsschuldner hat den Marktwert oder, im Fall der Weiterveräußerung, den erzielten Kaufpreis zu zahlen; der gutgläubige Bereicherungsschuldner haftet nur in den Grenzen seiner Bereicherung und darf die Früchte behalten. Hat der Dritte das Eigentum nicht (gutgläubig) erworben, kann der Eigentümer zwischen einem

Vindikationsanspruch gegen ihn und einer Kondiktion gegen den Veräußerer wählen (näher *Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 593). Auch SLOVENIAN LOA art. 190(1) geht von dem Prinzip der Herausgabe in Natur aus. Nur wenn und soweit sie nicht möglich ist, kann der Bereicherungsgläubiger Ausgleich in Geld verlangen (Juhart and Plavšak [-*Polajnar Pavčnik*], Obligacijski zakonik II, art. 190, 46). Der bösgläubige accipiens haftet auch auf Herausgabe bzw. Wertersatz für gezogene Früchte (LOA art. 193).

6. Dem entspricht in allen wesentlichen Zügen die Rechtslage in POLAND: Herausgabe in Natur (CC art. 405) und Wertersatz, falls sie unmöglich ist (Pietrzykowski [-*Pietrzykowski*], Kodeks cywilny I[4], art. 405, no 16; *Radwański and Olejniczak*, Zobowiązania część ogólna[2], p. 222, no. 665). Bei Veräußerung, Verlust oder Beschädigung erstreckt sich die Herausgabepflicht auf alles, was für die Sache erlangt worden ist (CC art. 406). Es kann sich dabei um Geld, aber auch um eine andere Sache handeln (Supreme Court 6 July 1967, III CR 117/67, OSN 1968, no. 4, pos. 67). Die bereicherte Person kann im Gegenzug Herausgabe ihrer Aufwendungen verlangen; CC art. 408 bringt dazu eine aufwendige Regelung, die im Kern zwischen notwendigen und bloß nützlichen Aufwendungen und zwischen gut- und bösgläubigen Bereicherungsschuldnern unterscheidet. Das Gericht kann, wenn der Bereicherungsgläubiger zu Aufwendungsersatz verpflichtet ist, anordnen, dass an die Stelle seines Herausgabeanspruchs in Natur ein um die Höhe des geschuldeten Aufwendungsersatzes verminderter Wertersatzanspruch tritt (CC art. 408 § 3). Für die Bestimmung der Höhe des Anspruchs stellt CC art. 409 auf den Wert der Sache im Zeitpunkt der Entscheidung ab. Grund und Grenzen dieses "Prinzips der Aktualität der Bereicherung" sind allerdings sehr umstritten.

7. DUTCH CC arts. 6:204-209 betreffen die Rückabwicklung einer ungeschuldeten Leistung durch *ongedaanmaking* ("Rückabwicklung in Natur"); CC art. 6:210(2) die Rückabwicklung dem Werte nach, falls das *ongedaanmaking* unmöglich ist. Wurden Güter (Definition in CC art. 3:1) aufgrund eines unwirksamen Vertrages geliefert, verbleibt das Eigentum i.d.R. beim *solvens* (CC art. 3:84(1)); die Klage richtet sich deshalb lediglich auf Rücklieferung (CC arts. 3:89-97). Bei beweglichen Sachen erfolgt die Rücklieferung durch Übergabe, sofern nicht besondere Registereintragungen erforderlich sind (CC art. 3:89). Den Schuldner treffen auch die allgemeinen Nebenpflichten desjenigen, der zu einer Lieferung verpflichtet ist. Gattungssachen (*genots*) sind nach den Regeln über den Wertersatz (CC art. 6:210(2)) auszugleichen (für Geld siehe die Sondervorschrift in CC art. 6:203(2)); es sind Sachen von gleicher Art, Menge und Güte zurückzugeben. In allen Fällen, in welchen Rückgabe in Natur nicht möglich ist, kommt es auf die Ursache dieser Unmöglichkeit und darauf an, ob der *accipiens* beim Empfang gut- oder bösgläubig war. Unter CC art. 6:204(1), einer *lex specialis* zu CC art. 6:74, wird dem Emfpänger die Unmöglichkeit der Rückgabe nicht zugerechnet, wenn er mit ihr (noch) nicht rechnen musste. CC art. 6:204(1) betrifft Verlust und Wertminderung von Sachen. Liegt dagegen ein Zurechnugsgrund vor, verbleibt es bei der allgemeinen Schadenshaftung unter CC arts. 6:74. Sie schließt eine Haftung auf erlangte Vorteile (z.B. Veräußerungsgewinne) ein (CC art. 6:78). Im Falle der Wertminderung ist neben der Rückgabe der Sache ein Ausgleich für den Wertverlust in Geld zu entrichten (CC art. 6:278). Ein bösgläubiger Empfänger gerät mit dem Erhalt der Sache *ex lege* in Verzug (CC art. 6:205), so dass er zusätzlich Ersatz des Verzögerungsschadens schuldet (CC art. 6:85). Die Klage aus ungerechtfertigter Bereicherung (CC art. 6:212) ist zwar eine Schadenersatzklage, doch kann auch Schadensersatz *in natura* erbracht werden (CC art. 6:103), was wiederum bedeutet, dass der Unterschied zwischen der Klage aus

ungeschuldeter Leistung und derjenigen aus ungerechtfertigten Bereicherung gering ist.

8. Under ESTONIAN law muss die bereicherte Person dasjenige zurückgeben 'was sie erhalten hat. Diese Pflicht zur Rückgabe in specie schließt die Rückübertragung von Besitz ein, desgleichen die Rückgängigmachung (Löschung) einer unrichtigen Grundbucheintragung (Supreme Court 1 December 2005, civil matter no. 3-2-1-129-05). Die Herausgabepflicht schließt die Pflicht zur Herausgabe gezogener Früchte ein. Bei Zerstörung, Verbrauch oder Beschädigung ist der erlangte Ersatz zu ersetzen, andernfalls Wertersatz nach dem Wert im Zeitpunkt der Entstehung des Bereicherungsanspruchs. Ein Wahlrecht wie in VII.–5:101(2) kennt das Estonian LOA nicht. Es kann sich aber aus dem allgemeinen Prinzip von Treu und Glauben ergeben, und es ist außerdem (für die öffentliche Hand) ausdrücklich vorgesehen in State Liability Act (*Riigivastutuse seadus*, RT I 2001, 47, 260; 2006, 48, 360) § 22

II. Erwerb eines Ersatzes für die Bereicherung

9. Unter FRENCH and BELGIAN CC art. 1380 muss derjenige, der eine Sache, die er zwar gutgläubig, aber rechtsgrundlos erhalten hat, weiterverkauft, dem *solvens* den Kaufpreis herausgeben. Hat ein Dritter eine Sache des Eigentümers verkauft und ist die Veräußerung dem Eigentümer gegenüber wirksam, kann er vom Dritten Herausgabe des Kaufpreises verlangen (Cass.civ. 16 March 1999, pourvoi no. 96-20877; Cass. 17 November 1983, Pas. belge, 1984, I, 295-297). In Fällen dieser Art verwandelt sich ein ursprünglich auf Sachherausgabe gerichteter Anspruch in einen Geldanspruch; das Geld tritt an die Stelle der Sache (de Page, Traité élémentaire de droit civil belge III(2)3, 62). Immer dann, wenn die Herausgabe in Natur nicht möglich ist, erfolgt sie *par équivalent* (CA Liège 26 May 2003, no. de rôle 2000RG919, decision no. F-20030526-4).

10. Für SPAIN and ITALY siehe bereits die notes under I2-3. Bei Verfügungen über fremde Sachen hat der Verfügende unter Spanish law den erzielten Kaufpreis herauszugeben, see note 2 under VII.–5:102 below. Ein allgemeines Prinzip, wonach der Bereicherte auch das Surrogat seiner Bereicherung herauszugeben habe, existiert aber nicht. Vor allem verbleibt dem Bereicherten dasjenige, was er mit empfangenen Geld erworben hat. Denn es gehört ihm (*Carrasco Perera*, ADC 1988, 5, 70-72; TS 19 October 1973, RAJ 1973 (2), no 3800, p. 3022 [Widerruf der Schenkung von Geld mit Wirkung ex tunc; Anspruch nur auf das Geld mit Zinsen, nicht aber auf das damit erworbene Grundstück]). In der umgekehrten Situation – der accipiens veräußert in gutem Glauben die ihm gelieferte Sache – muss der *accipiens* dagegen unter CC art. 1897 entweder den erzielten Kaufpreis oder den Anspruch auf ihn an den solvens übertragen. Ob es sich hierbei um einen Anspruch auf ein Surrogat oder lediglich um eine Methode zur Berechnung des Wertes der Bereicherung handelt, ist freilich offen (näher *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 296). Der Anspruch auf das sogen. stellvertretende commodum unter CC art. 1186 anderseits ist zwar auf die Herausgabe eines Surrogats gerichtet; CC art. 1186 findet jedoch im Bereicherungsrecht keine Anwendung (*Díez-Picazo*, Fundamentos II[4], 658).

11. Unter GERMAN CC § 818(1) erstreckt sich der Bereicherungsanspruch auch auf bestimmte Surrogate für das ursprünglich Erlangte (BGH 27 February 2007, NJW 2007, 3127, 3130). Zu ihnen gehört dasjenige, was der Empfänger auf Grund eines erlangten Rechtes erworben hat, d.h. Surrogate, welche der Empfänger in bestimmungsgemäßer Ausübung des Rechts erlangt (das auf Grund einer rechtsgrundlos erhaltenen Forderung eingezogene Geld, der Gewinn aus einem rechtsgrundlos erlangten Los, der Erlös aus der Verwertung eines rechtsgrundlos

erhaltenen Pfandrechts [Staudinger [-*S. Lorenz*], BGB [2007], § 818, no. 17; Palandt [-*Sprau*], BGB[67], § 818, no. 14] oder einer Grundschuld [BGH 29 September 1989, NJW 1990, 392]). CC § 818(1) umfasst jedoch nicht das sogen. *commodum ex negotiatione*, also das rechtsgeschäftliche Surrogat (BGH 11 April 1957, BGHZ 24, 106, 110; BGH 11 October 1979, BGHZ 75, 203, 206; BGH 8 October 1990, BGHZ 112, 288, 294): hat jemand rechtsgrundlos Geld erhalten und mit ihm ein Los gekauft, verbleibt ihm der darauf entfallende Gewinn (*S. Lorenz* loc.cit.; *Sprau* loc.cit.). Desgleichen tritt eine mit rechtsgrundlos empfangenem Geld (nichtiger Darlehensvertrag) erworbene Eigentumswohnung nicht an die Stelle des Geldes (BGH 18 November 1982, NJW 1983, 868, 870). Zu den herausgabepflichtigen Surrogaten gehört ferner das, was vom Empfänger als Ersatz für die Zerstörung, Beschädigung oder Entziehung des erlangten Gegenstandes erworben wurde. Das betrifft im wesentlichen Leistungen durch Versicherungen. Das PORTUGUESE Schrifttum teilt diese Ansichten. Obwohl in CC art. 479(1) eine German CC § 818(1) gleichende Vorschrift fehlt, schließt man aus der Formulierung, dass alles herauszugeben sei, was auf Kosten des Verarmten erlangt wurde (*tudo quanto se tenha obtido à custa do empobrecido*), auf dieselben Ergebnisse (*Antunes Varela*, Obrigações em geral I[10], 511; *Menezes Leitão*, Enriquecimento sem causa[2], 883). Geschuldet ist also auch in Portugal das *commodum ex re* (Früchte, Vorteile aus der Sache, Surrogate, Versicherungsleistungen etc), nicht aber das *commodum ex negotiatione* (*Menezes Leitão* loc.cit.).

12. In SLOVENIA wird gesagt, dass ein *accipiens*, der für den ihn bereichernden Gegenstand einen Ersatz erlangt, den Letzteren herausgeben muss. Als Hauptbeispiel dient der aus der Weiterveräußerung einer Sache erzielte Kaufpreis. Der gutgläubige *accipiens*, der die Sache verschenkt, ist dagegen dem *solvens* bereicherungsrechtlich nicht mehr verantwortlich (*Cigoj*, Teorija obligacij, 260). In HUNGARY sind Surrogate entweder als erlangte Vorteile i.S.v. CC § 361(1) oder als Vorteile zu qualifizieren, die dem Schuldner den Einwand des Wegfalls der Bereicherung (§ 361(2)) abschneiden (Petrik [-*Bíró*], Polgári jog II[2], 654/1, 654/4). Denn eine Bereicherung ist nicht weggefallen, wenn sie sich lediglich in anderer Form im Vermögen des Bereicherten erhalten hat, und sei es auch in der Form ersparter Aufwendungen (BH 1987/312 und BH 1993/500: Verwendung überzahlten Geldes für Verbrauchsgüter und teure Reisen bzw. für Lebensunterhalt; keine Entreicherung).

13. Das DUTCH law kennt nur wenige Surragotions- oder Substitutionsregeln (z.B. in CC arts. 3:167 3:213(1), 3:229(1) und 3:283). Sie finden sich im Familienrecht und im Recht der Verwertung von Sicherheiten, nicht aber im Bereicherungsrecht (zu CC art. 6:90 s. sogleich). Zur Begründung wird auf andernfalls drohende Konflikte mit den allgemeinen Regeln über den Eigentumserwerb verwiesen (*Perrick*, WPNR 2008, no. 6753, 345-353); auch handele es sich bei der Rückgabe von nur der Gattung nach bestimmten Sachen nicht um eine Substitution, sondern um eine Form des Wertersatzes (*Scheltema*, Onverschuldigde betaling, 153-154; *Russchen*, WPNR 1994, no. 6154, 713). Im Ergebnis freilich besteht auch under DUTCH law die Verpflichtung des gutgläubigen *accipiens*, der die Sache weiterverkauft, den erzielten Kaufpreis herauszugeben. Sie folgt zwar nicht aus CC arts. 6:74 und 6:204 (Haftung für zurechenbare Verletzung der Rückgabepflicht), aber sie ergibt sich aus CC art. 6:78, der eine schadensrechtliche Haftung auf den erlangten Vorteil nach bereicherungsrechtlichen Vorschriften auch für den Fall vorsieht, dass die Verletzung der Rückgabepflicht dem *accipiens* nicht zugerechnet werden kann (bei verderblichen Sachen besteht sogar eine Verwertungspflicht mit der Folge, dass der Erlös an die Stelle der Sache tritt: CC art. 6:90, see Parlementaire Geschiedenis VI, 318; *Perrick*

loc.cit.; Asser [-*Hartkamp*], Verbintenissenrecht III[12], no. 333, p. 350 and Verbintenissenrecht I[12], no. 383 p. 304).

14. Under ESTONIAN LOA § 1032(1) erstreckt sich der Bereicherungsanspruch auch auf den Ersatz, den der Schuldner für die Zerstörung, den Verbrauch, die Beschädigung oder die Verwertung der Sache erlangt hat. Dazu gehören Versicherungsleistungen, Schadenersatzansprüche und Verkaufserlöse. Wurde die Sache dagegen gegen eine andere getauscht, so besteht kein Anspruch auf Herausgabe der eingetauschten Sache; es bleibt dann bei einem Geldanspruch in Höhe des Wertes der weggebenen Sache (*Tampuu*, Lepinguväliste võlasuhete õigus, 95 and 107).

III. Definition des guten Glaubens

15. FRENCH and BELGIAN CC arts. 1378-1380 unterscheiden ausdrücklich zwischen Personen, die das Nichtgeschuldete *de mauvaise foi* bzw. *de bonne foi* erlangt haben. Der bösgläubige Empfänger haftet u.a. auch auf Zinsen und andere Früchte. Das Gesetz, so wird gesagt, gebe damit dem Richter ein billigkeitsrechtliches Korrekturinstrument an die Hand (*Albiges*, De l'équité en droit privé, no. 341). Der Tatrichter entscheidet in souveränem Ermessen. Gutgläubig ist, wer nicht weiß, dass die ihm erbrachte Leistung ohne Rechtsgrund erfolgte (*Bénabent*, Les obligations[9], no. 479 p. 317; Labour Court Mons 3 January 2001, no de rôle 11507). Auch in SPAIN hängt, wenn der *accipiens* die Sache nicht mehr in Natur herausgeben kann, der Umfang seiner Haftung von Gut- und Bösgläubigkeit ab (CC arts. 1896 and 1897). Ein *accipiens* ist jedenfalls gutgläubig, wenn er nicht wusste, dass die ihm erbrachte Leistung nicht geschuldet war (*Gullón Ballesteros*, FS Batlle Vázquez, 367, 374; Paz-Ares/Díez-Picazo/Bercovitz/Salvador [-*Ballarín Hernández*], Código Civil II[2], 1960). Anders als im Rahmen des Eigentümer-Besitzer-Verhältnisses (CC art. 433) wird für das Recht der Leistungskondiktion allerdings angenommen, dass auch ein *accipiens*, der das fehlende Besitzrecht fahrlässig verkennt, als bösgläubig anzusehen ist (*Díez-Picazo and Gullón*, Sistema II[9], 532; *Gullón Ballesteros* loc.cit. 374). Wer gutgläubig empfangen hat, dann aber den fehlenden Rechtsgrund erfährt, steht ab diesem Zeitpunkt unter dem strengen Regime der Bösgläubigenhaftung (TS 22 January 2001, RAJ 2001 (1) no. 1324 p. 2147).

16. ITALIAN CC art. 1147(1) definiert: "Gutgläubiger Besitzer ist, wer besitzt, ohne zu wissen, dass er das Recht eines anderen verletzt". Diese Definition des guten Glaubens findet auch für das Recht der Zahlung einer Nichtschuld Verwendung. Einzelheiten sind allerdings nach wie vor umstritten. Im Falle der Zahlung einer objektiven Nichtschuld besteht der gute Glaube in der Unkenntnis der Tatsache, dass die Zahlung nicht geschuldet war; im Falle der Zahlung einer subjektiven Nichtschuld dagegen in der Unkenntnis des Irrtums des *solvens* (näher *Breccia*, Riv.Dir.Civ. 1974, I, 130). Nach CC art. 1147(2) ist nicht gutgläubig, wessen Unwissenheit auf grober Fahrlässigkeit beruht. Der *accipiens indebiti* kann sich aber nicht auf das *mala fides superveniens non nocet* Prinzip des CC art. 1147(3) berufen: Wie in Spanien, so gilt auch in Italy ab Eintritt der Bösgläubigkeit das verschärfte Ersatzregime (Cass. 5 July 1997, no. 6074, Giust.civ.Mass. 1997, 1145). Der bösgläubige Empfänger haftet auf Wert und Zinsen, der gutgläubige nur auf seine Bereicherung, und auf Zinsen erst ab dem Tag der Klagezustellung (CC art. 2037(2); Cass. 20 March 1982, no. 1813, Rep.Giur.it. 1982, voce Indebito no. 8). Der bösgläubige Empfänger haftet auch dafür, dass er die Sache ohne Verschulden nicht oder nicht unbeschädigt zurückgeben kann; er ist nur befreit, wenn der Leistungsgegenstand auch beim Gläubiger untergegangen wäre (CC art. 1221(1)).

17. In GERMANY gelten dieselben Grundsätze. Gut- bzw. Bösgläubigkeit des Bereicherungsschuldners wirken sich auf den Umfang seiner Haftung aus. Nach

herrschender Meinung gilt das auch im Falle der Veräußerung einer rechtsgrundlos erworbenen Sache: der gutgläubige *accipiens* haftet nur auf den Wert der empfangenen Sache, nicht aber auf den mit ihr erzielten Gewinn (see note *II11* above), der bösgläubige Bereicherungsschuldner muss dagegen unter CC §§ 819(1), 818(4), 285 den gesamten Veräußerungserlös herausgeben (BGH 11 October 1979, BGHZ 75, 203; Palandt [-*Sprau*], BGB[67], § 818, no. 52; Staudinger [-*S. Lorenz*], BGB [2007], § 818, no. 50; näher *Reuter and Martinek,* Ungerechtfertigte Bereicherung, § 18 I, p. 631). Bösgläubigkeit i.S.v. CC § 819(1) bedeutet positive Kenntnis der Tatsachen, aus denen sich das Fehlen des Rechtsgrundes ergibt, und Wissen um die Rückgabepflicht (BGH 12 July 1996, BGHZ 133, 246, 249; BGH 17 June 1992, BGHZ 118, 383, 392). Fahrlässige Unkenntnis bzw. Kennenmüssen reichen nicht aus, auch nicht im Falle der groben Fahrlässigkeit (wie unter CC § 932(2) im Rahmen des gutgläubigen Erwerbs vom Nichtberechtigten). Auch bloße Zweifel am Fortbestand des Rechtsgrundes begründen keine Bösgläubigkeit. Allerdings genügt Kenntnis der Anfechtbarkeit eines Rechtsgeschäfts (CC §142(2)); ficht die andere Seite tatsächlich an, gilt deshalb die verschärfte Haftung rückwirkend (CC § 142(1)) bereits ab dem Zeitpunkt der Kenntnis von der Anfechtbarkeit und deren Rechtsfolgen (*Sprau* loc.cit. § 819, no. 2; *S. Lorenz* loc.cit. § 819, no. 5).

18. *Boa fé* im Sinne von PORTUGUESE CC arts. 119(3), 243(2), 1260(1) und 1340(4) bedeutet grundsätzlich Unkentnis der in den genannten Vorschriften bezeichneten Tatsachen (*Menezes Cordeiro*, Da boa fé no Direito Civil I, 23). Unter CC art. 1260(1) ist demgemäß der Besitz gutgläubig, wenn der Besitzer beim Besitzerwerb nicht wusste, dass er das Recht eines anderen verletzte; der gute Glaube endet mit Klagezustellung (CCP art. 481(a)) oder Erlangung der Kenntnis über die Abwesenheit des Rechtgrundes (*Menezes Leitão*, Enriquecimento sem causa[2], 902; *Menezes Cordeiro* loc.cit. 490; CA Oporto 22 July 1986, CJ XI [1986-4] 221). Bereicherungsrechtlich führt der böse Glaube zu einer Verschärfung der Rückerstattungspflicht (CC art. 480). Der bösgläubige Bereicherungsschuldner haftet nicht nur für den schuldhaften Untergang oder die schuldhafte Verschlechterung der Sache, sondern auch für schuldhaft nicht gezogene Früchte und für die gesetzlichen Zinsen. CC art. 480 setzt anders als die meisten übrigen Rechtsordnungen also zwar Verschulden voraus, doch handelt es sich nach herrschender Meinung um eine Haftung aus widerleglich vermutetem Verschulden (CC art. 799 analog, see *Menezes Leitão* loc.cit. 902).

19. Auch unter SLOVENIAN law ist gutgläubig, wer den Mangel des Rechtsgrundes nicht kennt. Der gute Glaube wird vermutet; Bösgläubigkeit des *accipiens* muss vom *solvens* bewiesen werden (Juhart and Plavšak [-*Polajnar Pavčnik*], Obligacijski zakonik II, art. 193, 53). Unter BULGARIA LOA ist der gutgläubige Bereicherungsschuldner bei Veräußerung, Verbrauch oder Untergang der Sache nur zur Herausgabe desjenigen verpflichtet, was sich anstelle der Sache noch in seinem Vermögen befindet; wer sich gutgläubig des Dokumentes begeben hat, das seine Forderung verkörperte, oder wer gutgläubig eine Sicherheit aufgegeben hat, haftet dem Bereicherungsgläubiger gar nicht; der Letztere tritt allerdings in die Rechte des Schuldners ein (LOA art. 56, see *Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 590). Nach HUNGARIAN Auffassung ist gutgläubig, wer die wirkliche Rechtslage weder kennt noch bei Aufwendung der erforderlichen Sorgfalt kennen muss (*Bíró and Lenkovics*, Általános tanok, 201; *Lábady*, A magyar magánjog (polgári jog) általános része, 308). Der Bösgläubige kann sich nicht auf den Wegfall der Bereicherung berufen(CC § 361 (2)); außerdem haftet er auf die aus dem Bereicherungsgegenstand gezogenen Nutzungen (CC §§ 363(1), 195).

20. DUTCH CC art. 3:11 stellt klar, dass guter Glaube abwesend ist, wenn ein vernünftiger Empfänger hätte wissen müssen, dass ihm die Leistung nicht zusteht. Guter bzw. böser Glaube beziehen sich sowohl auf tatsächliche als auch auf rechtliche Aspekte. Wer zwar nicht alle Tatsachen kennt, aber wissen muss, dass die Leistung rechtsgrundlos erfolgt, ist nicht gutgläubig: findet sich auf dem eigenen Konto Geld, von dem man nicht weiß, wer es überwiesen oder eingezahlt hat, ist man ebensowenig gutgläubig wie wenn auf eine Forderung doppelt gezahlt wird. Abgestellt wird auf den Maßstab eines vernünftigen *accipiens* (Asser [-*Hartkamp*], Verbintenissenrecht II[12], no. 302, p. 306; *Scheltema*, Onverschuldigde betaling, 163).

21. ESTONIAN GPCCA § 139 stellt die allgemeine Regel auf, dass guter Glaube vermutet wird. Gutgläubigkeit entfällt nicht nur bei positiver Kenntnis, sondern grundsätzlich auch schon bei fahrlässiger Unkenntnis der relevanten Tatsachen. Im Sinne des Bereicherungsrechts ist bösgläubig, wer entweder die Abwesenheit eines Rechtsgrundes kennt oder sich (im Falle der Eingriffskondiktion) des Umstandes bewusst war, dass es an einem rechtfertigenden Grund für die Verletzung der Rechtsposition eines anderen fehlte. Dem bösgläubigen Bereicherungsschuldner ist die Berufung auf einen Wegfall seiner Bereicherung abgeschnitten; außerdem haftet er auf einen den Wert der empfangenen Sache überschreitenden Veräußerungserlös, auf Zinsen für empfangenes Geld und auf Ersatz desjenigen, was bei ordentlicher Verwaltung mit dem Bereicherungsgegenstand hätte verdient werden können.

Illustration 3 draws on CA Bizkaia 1 February 2001, AC 2001 (1) no. 253 p. 391; **illustration 4** is derived from BGH 5 July 2006, BGHZ 168, 220; **illustration 5** is taken from TS 11 February 2003, RAJ 2003 (1) no. 1004 p. 1906.

VII.–5:102: Non-transferable enrichment

(1) Where the enrichment does not consist of a transferable asset, the enriched person reverses the enrichment by paying its monetary value to the disadvantaged person.

(2) The enriched person is not liable to pay more than any saving if the enriched person:

(a) did not consent to the enrichment; or

(b) was in good faith.

(3) However, where the enrichment was obtained under an agreement which fixed a price or value for the enrichment, the enriched person is at least liable to pay that sum if the agreement was void or voidable for reasons which were not material to the fixing of the price.

(4) Paragraph (3) does not apply so as to increase liability beyond the monetary value of the enrichment.

COMMENTS

A. General

Overview. This Article sets out the measure of liability and particularises the required mode of reversal of the unjustified enrichment, provided for by the basic rule, where the enrichment which is obtained does not consist of a transferable asset. The enrichment is to be reversed by monetary payment. Depending on the circumstances, the scale of that payment may be any of (i) the full value of the enrichment (paragraph (1)), (ii) the amount which the enriched person has saved by having the benefit of the enrichment (paragraph (2)), or (iii) an amount agreed to be paid for the enrichment (paragraph (3)).

Enrichments which are not transferable assets. This Article will apply only where the enrichment which has been obtained without justification does not take the form of an asset which is transferable. It thus addresses all the cases which fall outside the scope of the preceding Article. (As to the transferability of assets, see Comment B on VII.–5:101 (Transferable enrichment)). It applies where the enrichment takes the form of an increase in assets, but that asset is not transferable. It will also apply where the unjustified enrichment is by its nature not transferable. This is the case where the enrichment has taken any form other than an increase in assets – in other words, a decrease in liabilities, receipt of a service or work, or a use of an asset of the disadvantaged person.

B. Basic liability: paragraph (1)

Monetary value as maximum liability. The basic liability of a person who is enriched other than by receipt of a transferable asset is to pay the monetary value of the enrichment. This basic liability also represents the maximum liability under this Article. The first alternative measure of liability provided for in paragraph (2) is of relevance only in so far as it reduces liability ("The enriched person is not liable to pay more than ...."). Likewise, the third possible measure of liability set out in paragraph (3) operates, when applicable, only in so far as it does not increase liability beyond the basic measure of liability: this is explicitly stated in paragraph (4). Under this Article, therefore, the enriched person is never liable to pay more than the monetary value of the enrichment.

Monetary value. The meaning of monetary value of an enrichment is explained in VII.–5:103 (Monetary value of an enrichment; saving).

C. Reduced liability: paragraph (2)

Reduced liability. Paragraph (2) provides for a lesser quantum of liability for the enriched person based on what the enriched person has in fact saved as a result of the enrichment. If the saving made by the enriched person exceeds the monetary value of the enrichment, this paragraph will not operate to increase liability beyond the basis measure. It can serve only to reduce liability.

Measure of liability: saving. When this paragraph applies, the liability is to pay no more than the enriched person has saved as a result of obtaining the enrichment. The meaning of a saving is explained in VII.–5:103 (Monetary value of an enrichment; saving).

Circumstances in which liability is reduced. The provision applies if the enriched person did not consent to the enrichment. In other words, the enrichment occurred without the enriched person's request or participation. It will also apply if the enriched person consented to the enrichment, but was in good faith. The notion of good faith which is defined in paragraph (5) of VII.–5:101 (Transferable enrichment) applies correspondingly here. See Comment E to that Article for details. Accordingly the enriched person is protected by paragraph (2) if having no reason to know that the enrichment was or would be unjustified.

Rationale. The purpose of this paragraph is to protect the innocent recipient of a non-transferable enrichment. Whereas the innocent recipient of a transferable asset can reverse the enrichment by the (usually) comparatively painless task of returning the enrichment (that is to say, making it available to the disadvantaged person), the innocent recipient of a non-transferable enrichment can necessarily only reverse the enrichment by a monetary payment and is therefore compelled in effect to purchase what they have enjoyed. A liability to pay the monetary value of the enrichment has the potential to produce injustice if the enrichment was thrust on the enriched person or if the enrichment was accepted in circumstances where it could not be appreciated that there would be a liability to pay for its (full) value. Limiting the liability is required in order to do justice to the negative aspect of the principle of party autonomy: individuals are not to be forced into exchanges without their consent. In such a case the liability of the enriched person ought generally to be limited to the extent to which the enriched person is, in point of fact, better off. Liability to this extent will leave the enriched person no worse off as a result of the reversal of enrichment; it simply strips away the actual gain, if any.

> *Illustration*
> Making a mistake as to the address of a new client, D cleans E's windows. E had not requested this service and the cleaning takes place in E's absence. E has not consented to the enrichment and accordingly E's liability in respect of the unjustified enrichment is governed by paragraph (2) of this article. E is liable only for what E has saved. E will have a saving and will be liable accordingly if, for example, (i) E was in the habit of commissioning window cleaning on an ad hoc basis, cleaning was due, and E was able to postpone the next cleaning, or (ii) E cancelled a scheduled window cleaning with another firm without penalty. If, on the other hand, E's windows had just been cleaned, or are cleaned shortly afterwards by a regular contractor without regard to C's additional service, E will have saved nothing and liability will be nil.

D. Intermediate liability: paragraphs (3) and (4)

Measure of liability under paragraph (3). Although as a rule an enriched person who has obtained a non-transferable enrichment in good faith should not be made to pay more than what has been saved, there is one situation in which a reduction of liability to this extent would go too far. Paragraph (3) addresses that situation and provides for a measure of intermediate liability – liability which is less than payment of the full monetary value of the benefit, but more than any actual saving resulting from it. The measure of liability under paragraph (3) is determined by a price or value fixed by the agreement pursuant to which the enrichment was provided.

Intermediate liability. The provision operates as a brake on the reduction of liability from monetary value to actual savings, fixing liability at a point in between. It applies only when it results in the circumstances in an intermediate measure of liability. If the price or value agreed was more than the market value of the enrichment (representing its monetary value), the enriched person will not be liable to pay the agreed price, only the lesser sum which is the monetary value as monetary value always constitutes the maximum liability. This rule is provided for expressly in paragraph (4). It follows that paragraph (3) will not be applicable if the enriched person made a bad bargain and agreed to pay more than the objective worth of the enrichment. If the enriched person has actually saved more than the agreed payment, this paragraph will again be immaterial because the enriched person will remain liable to pay what has been saved. Actual savings are in all cases a minimum liability (unless that measure too would exceed the monetary value of the enrichment). Paragraph (3) is only material if what the enriched person genuinely agreed to pay is more than what has been saved, but less than the market value of the benefit obtained.

Rationale. If the enriched person solicited the enrichment on the basis that a price ought to be paid, that may be relevant as showing the enriched person's preparedness to pay for the benefit actually received. It might be, for example, that the enriched person bargained for the enrichment under an agreement which, it later transpires, was void as a contract. Clearly the price agreed under the contract cannot automatically serve as the measure of the enriched person's liability since otherwise reversal of the enrichment would amount to indirect enforcement of the contract – in direct contradiction of the rules invalidating the contract and giving rise to the unjustified status of the enrichment in the first place. On the other hand, if the enriched person accepted an enrichment in the assumption that it would have to be paid for, there is no hardship in compelling the enriched person to pay the agreed price for the enrichment, provided that the agreed price does not exceed the actual value of the enrichment and the fixing of the price is unaffected by the reasons impairing the validity of the contract. In other words, the basic liability (payment of the monetary value of the enrichment) can be reinstated to the extent that it does not exceed the enriched person's expectations of liability at the time the enrichment was accepted.

A price or value genuinely fixed. A key limitation on imposing intermediate liability (in place of reduced liability measured by actual savings) is that the enriched person should not be held to an estimation of the value of an enrichment which suffers from a defect of consent. If the contract was induced by fraud, for example, or if the enriched person suffers from reduced legal capacity, the enriched person cannot properly be made to pay according to the assessment of the worth of the benefit to be received since that assessment, like the contract, will be tainted by the fraud or lack of capacity. This concern is addressed in this paragraph by the requirement that the price or value of the enrichment be genuinely fixed: the reasons for which the agreement is void or voidable as a contract must not be such as to relate to or cast

doubt upon the fixing of the price. The requirement will not be satisfied if the contract was void or voidable (and avoided by the enriched person) for reasons which are relevant to the ability to judge properly the value of the enrichment received. The case is otherwise if the contract is void only for some technical reason which has no bearing on the content of the agreement because the parties' judgements are not affected.

NOTES

1. In FRANCE and BELGIUM werden Fragen zum Haftungsumfang grundsätzlich als Tatsachenfragen verstanden; sie unterliegen deshalb der souveränen Entscheidungsbefugnis des Tatrichters (z.B. Cass.civ. 3 December 2002, pourvoi no. 01-11032 und CA Anvers 8 April 1987, Pas. belge 1987, II, 145). Dienstleistungen fallen nach herrschender Auffassung nicht unter den Begriff des *paiement* i.S.d. Rechts des *paiement de l´indu.* Ihre Rückabwicklung unterliegt vielmehr dem Recht der *enrichissement sans cause.* Eine ausgefeilte Lehre des Schutzes vor einem *enrichissement imposé* scheint es nicht zu geben. Der Grundgedanke ist aber auch dem französischen Recht geläufig und wird in dem Prinzip ausgedrückt, dass niemand aus seiner eigenen *faute* einen Vorteil ziehen darf; die *faute* des Verarmten wird zum Rechtfertigungsgrund für den Bereicherten, die Bereicherung zu behalten (Cass.civ. 23 January 1978, JCP 1980, I, 1, 19365, note *Thuillier*; *Wernecke,* Abwehr und Ausgleich aufgedrängter Bereicherungen, 279-288). Der Verbraucherschutz vor unbestellten Waren und Dienstleistungen ergibt sich aus Code de la consommation art. L122-3.

2. In SPAIN gilt wie unter VII.–5:102 die Grundregel, dass der Bereicherungsausgleich dem Werte nach erfolgt, wenn Rückgewähr *in specie* nicht möglich ist (*Carrasco Perera*, ADC 1988, 5, 97). CC arts. 645, 650, 457, 1185, 1147, 1303 and 1295 sind Ausdruck dieses Prinzips. Kann der *accipiens* eine empfangene Leistung entweder nicht mehr zurückerstatten oder handelt es sich um eine Dienstleistung, so ist Wertersatz geschuldet, auch im Falle der Rückabwicklung nach den Regeln des Nichtigkeitsrechts (CC art. 1307), see generally *Díez-Picazo*, Fundamentos I[6], 129). Größere Schwierigkeiten bereitet die Festlegung des Haftungsumfanges im Recht der *condictio por intromisión en derecho ajeno*. Zumeist wird heute vorgeschlagen, Vorschriften des Besitzrechts (insbesondere CC arts. 451 ff and 353 ff) entsprechend anzuwenden (*Díez-Picazo and de la Cámara Alvarez*, Dos estudios sobre el enriquecimiento sin causa, 121; *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 221). Aus ihnen, insbesondere aus CC art. 455 und dem dort Verwendung findenden Begriff der *frutos percibidos* ('fruits obtained') wird geschlossen, dass der Wert der Nutzung der Sache das richtige Maß für die Haftung aus Eingriffsbereicherung sei (*Basozabal Arrue* loc.cit. 263). Das bestätigten auch CC arts. 1547 and 1553(2) (unwirksamer Mietvertrag; Rückgabe der Sache und Nutzungsausgleich in Höhe des vereinbarten Mietzinses), TS 10 November 1966, RAJ 1966 (2) no. 4881 p. 3106 (unwirksamer Kaufvertrag; Nutzung der Maschine als Fruchtziehung im zivilrechtlichen Sinn) und mehrere instanzgerichtliche Entscheidungen (z.B. CA Barcelona 26 November 2004, BDA JUR 2005/15139). Bei Verfügungen über fremde Sachen soll zwar der erzielte Erlös herausgabepflichtig sein (TS 10 March 1958, RAJ 1958 (1) no. 1068 p. 686; *Díez-Picazo,* Fundamentos I[6], 126; *Basozabal Arrue* loc.cit. 296-297), doch lasse sich auch dies als Bestätigung dafür deuten, dass sich der Nutzungswert in allen Fällen, in denen der Bereicherte mit einem Preis einverstanden war, nach diesem Preis berechnen lasse (*Basozabal Arrue* loc.cit. 296). Zum Schutz vor *enriquecimientos impuestos* (aufgedrängten Bereicherungen) wird vorgeschlagen, nötigenfalls mit einem bilanziellen oder 'net enrichment

approach' zu operieren (*Carrasco Perera* loc. cit. 100; *id.*, CCJC 1986, 3215, 3223; see also TS 25 November 1985, RAJ 1985 (3) no. 5898 p. 4987 [der Umfang einer Bereicherung dürfe nicht nur nach dem bestimmt werden, was der Bereicherte empfangen habe, sondern auch danach, ob der Kläger eine echte Verarmung erlitten habe]). Für den Versuch einer Systematisierung der gesetzlichen Lösungen im Rahmen der *condictio por impensas* siehe *Basozabal Arrue* loc. cit. 321-322. Aus der Summe dieser Regeln folge, dass jemand, der bösgläubig Aufwendungen auf fremde Sachen mache, grundsätzlich keinen Bereicherungsausgleich verlangen könne; ebenso im Ergebnis TS 3 March 2003, RAJ 2003 (2) no. 2536 p. 4695 [Haftung für eine bösgläubig aufgedrängte Bereicherung ausdrücklich abgelehnt]; TS 29 October 2007, BDA RJ 2007/8641 and CA Guadalajara 21 February 2007, BDA JUR 2007/132619. In Übereinstimmung mit VII.–5:102(3) scheinen die Gerichte schließlich den Wert einer empfangenen Bereicherung unter Berücksichtigung des von den Parteien vereinbarten Preises zu bestimmen (see, for instance, for tenancy and lease contracts CA Ciudad Real 30 March 2004, BDA JUR 2004/128779; CA Barcelona 18 January 2007, BDA JUR 2007/177992 and CA Barcelona 26 November 2004 loc. cit.). Ein vereinbarter Preis wird als ein brauchbares Indiz für den Wert einer Bereicherung angesehen, die nicht in Natur zurückgegeben werden kann (see also TS 6 June 1951, RAJ 1951 no. 1877 p. 1281).

3. In ITALY ist umstritten, ob sich die Rückabwicklung von *facere*-Leistungen nach dem Recht der Zahlung einer Nichtschuld oder nach Bereicherungsrecht richtet; die jüngere Rechtsprechung geht den letzteren Weg (Cass. 13 November 1991, no. 12093, Giust.civ.Mass. 1991, fasc. 11; Cass. 10 June 1992, no. 7112, Giust.civ.Mass. 1992, fasc. 6; Cass. 19 August 1992, no. 9675, Foro it. 1993, I, 428; CFI Milan 3 July 1997, Riv.giur.circ.trasp. 1998, 519). Bei der Feststellung der Höhe der Rückerstattungspflicht wird regelmäßig auf den sich aus der Vereinbarung ergebenden Preis, sonst auf den Marktwert der Leistung Bezug genommen. Für Arbeitsverträge sieht CC art. 2126 ausdrücklich vor, dass die Vertragsnichtigkeit nur ausnahmsweise *ex tunc* wirkt; es bleibt also auch hier bei dem vereinbarten Lohn. Für die Rückabwicklung eines nichtigen Pachtvertrages (in diesem Fall nach den Regeln der *condictio indebiti*) soll es zwar nach CFI Bologna 1 December 1964, Giur.it. 1965, I, 2, 826 auf den vereinbarten Pachtzins, nicht auf den Nettogewinn des Pächters ankommen. Doch hat Cass. 3 May 1991, no. 4849, Giur.it. 1991, I, 1, 1314 entschieden, dass die Rückzahlung des Mietzines für eine Immobilie den Mieter ungerechtfertigt bereichern würde, weshalb der Nichtigkeit in solchen Fällen nur ex nunc-Wirkung beizumessen sei. CFI Milan 3 July 1997 loc. cit. prüft die Rückabwicklung eines nichtigen Beförderungsvertrages nach Bereicherungsrecht und kommt zu dem Ergebnis, dass die erbrachten Leistungen mangels Verarmung unberührt bleiben sollten. Gesetzliche Regeln zum Problem der aufgedrängten Bereicherung finden sich u.a. in CC arts. 936 und 937, die umfangreiche Regelung zu Anpflanzungen bzw. zum Bauen auf fremdem Grund treffen; eine vertiefte Diskussion der allgemeinen Problematik scheint sich nicht entwickelt zu haben.

4. Under PORTUGUESE CC art. 479(1) muss alles zurückgegeben werden, was auf Kosten des Verarmten erlangt wurde. Das schließt die Haftung für den Wert von Dienstleistungen und Nutzungen ein; zwischen der Leistungs- und der Eingriffsbereicherung wird insoweit nicht unterschieden (*Menezes Leitão*, Enriquecimento sem causa[2], 811). Anerkannt ist auch, dass namentlich bei der Kondiktion von Aufwendungen der Bereicherte vor einer Haftung vor einer aufgedrängten Bereicherung geschützt werden muss (*Menezes Leitão* loc.cit). Das Gesetz befasst sich mit dem *enriquecimento forçado* vor allem im Recht der Geschäftsführung ohne Auftrag und im Recht des Eigentümer-Besitzer-Verhältnisses,

gelegentlich aber auch im Vertragsrecht (*Gomes*, Conceito de enriquecimento, 316, 322; *Menezes Leitão* loc.cit. 810). Ein Beispiel findet sich in CC art. 1214, wonach die Leistung eines Werkunternehmers als mangelhaft anzusehen ist, wenn sie gegen oder ohne eine Weisung des Werkbestellers (z.B. des Bauherren) erfolgt; dieser kann das veränderte Werk zwar akzeptieren, wird dadurch aber nicht verpflichtet, einen höheren Preis zu zahlen oder seine Bereicherung auszugleichen (CC art. 1214(2) mit Sonderregelung in (3)). Beim Bauen und Pflanzen auf fremden Grund (CC arts. 1333-1343) bleibt der Eigentümer dagegen, wenn er nicht Entfernung des Bauwerkes verlangt, zu einem Bereicherungsausgleich auch dem Bösgläubigen gegenüber verpflichtet (Kritik daran bei *Gomes* loc.cit. 337). Ebenso liegt es, wenn Verwendungen auf eine Sache nicht ohne deren Zerstörung oder Beschädigung entfernt werden können (CC art. 1273), was Züge einer *imposição de enriquecimento* trägt (*Menezes Leitão* loc. cit. 811). Einer Haftung aus ungerechtfertigter Bereicherung ist ferner der Geschäftsherr ausgesetzt, wenn eine ihm erbrachte auftragslose Geschäftsführung seinem Interesse oder Willen widerspricht (CC art. 468(2)). STJ 22 January 2008, Processo 07A4154 lehnt jedoch ein *indemnização* für nützliche Verbesserungen in einem gemieteten Büro mit der Begründung ab, dass die Maßnahmen die zukünftige Vermietung der Immobilie eher erschwert als erleichtert hätten (see further STJ 3 April 1984, BolMinJus 336 [1984] 420; CA Lisbon 30 January 1992, CJ XVII [1992-1] 150). Urteile, die sich direkt auf das Konzept des *enriquecimento forçado* beziehen, scheint es freilich nicht zu geben.

5. GERMAN CC § 818(2) ordnet den Wertersatz für den Fall an, dass Herausgabe in Natur wegen der Beschaffenheit des Erlangten nicht möglich oder der Empfänger aus einem anderen Grunde zur Herausgabe außerstande ist. Zu ersetzen ist der objektive Verkehrswert (näher MünchKomm [-*Lieb*], BGB[4], § 818, no. 44), d.h. der Wert, den die Leistung nach ihrer tatsächlichen Beschaffenheit für jedermann hat (BGH 24 November 1981, BGHZ 82, 299, 307). Das wiederum ist der Betrag, den ein Dritter am Markt für sie zahlen würde (BGH 5 July 2006, NJW 2006, 2847, 2852). Der der Vermögensverschiebung zu Grunde liegende (unwirksame) Vertrag kann ein Anhaltspunkt für die Bemessung sein. Bei Dienstleistungen bemisst sich der Wertersatz nach der üblichen, hilfsweise nach der angemessenen, und jedenfalls höchstens nach der vereinbarten Vergütung (Palandt [-*Sprau*], BGB[67], § 818, nos. 18, 21). Das Problem der sogen. aufgedrängten Bereicherung tritt insbesondere (aber nicht nur) bei Verwendungen auf, die ohne Billigung des Bereicherungsschuldners oder sogar gegen dessen ausdrücklichen Willen erfolgen. Denn die Verpflichtung zum Wertersatz könnte hier im wirtschaftlichen Ergebnis zu einer Art “Vertragsschluss” gegen den Willen des Bereicherten führen oder ihn dazu nötigen, durch Veräußerung des Gegenstandes Liquidität zu schaffen (*Lieb* loc.cit. § 812, no. 307). Zur Lösung dieses Problems ist eine große Zahl von Vorschlägen erarbeitet worden (Überblick bei *Lieb* loc.cit. nos. 311 ff). Zumeist wird empfohlen, das Problem durch eine Subjektivierung des Wertbegriffs in CC § 818(2) zu lösen und darauf abzustellen, ob der Schuldner die objective Wertsteigerung tatsächlich nutzt und sie auf diese Weise für seine Zwecke realisiert. Bei der Errichtung eines Gebäudes auf fremdem Grund soll der Eigentümer der Bereicherungshaftung entgehen können, wenn er die Wegnahme der verbauten Materialien gestattet (BGH 21 December 1956, BGHZ 23, 61, 65; BGH 8 December 1971, WM 1972, 389, 391; BGH 12 April 1961, LM § 951 BGB no. 14). Es wurde der Verwendungsersatzanspruch aber auch mit dem Argument verneint, der Eigentümer könne ihm seinen auf Entfernung des errichteten Werkes gerichteten Schadenersatz- (CC §§ 823, 249) oder Beseitigungsanspruch (CC § 1004) einredeweise entgegenhalten (BGH 17 September 1954, LM § 1004 BGB no. 14; BGH 17 February 1965, NJW 1965, 816; BGH 27 April 1966, WM 1966, 765, 766).

6. HUNGARIAN CC § 363(2) bestätigt die Verpflichtung zum Wertersatz, wenn eine Bereicherung nicht in Natur herausgegeben werden kann. Eine allgemeine Regelung zum Schutz vor aufgedrängten Bereicherungen besteht nicht; die Problematik scheint bislang auch nicht systematisch aufgearbeitet zu sein. Es finden sich allerdings zahlreiche Einzelentscheidungen, in denen der Gedanke aufscheint, insbesondere im Kontext von vertragswidrigen Zuvielleistungen (z.B. BH 1997/483; BH 1994/338 und BH 1975/465 zu Investitionen von Mietern). Im Fall einer geduldeten, aber unbestellten Mehrarbeit durch einen Werkunternehmer hat BH 1982/58 einen Bereicherungsanspruch bejaht (ähnlich auch BH 2002/29); protestiert der Werkbesteller dagegen gegen die Mehrabeit, so entsteht ein Bereicherungsanspruch nicht (BH 1983/291). Zur Ermittlung des Wertes einer Dienstleistung darf grundsätzlich auf den von den Parteien vereinbarten Preis zurückgegriffen werden, es sei denn, der in den Vertragsentwurf eingesetzte Preis ist streitig geblieben und geradezu der Grund dafür gewesen, dass es nicht zu einem Vertragsschluss gekommen ist (BH 1982/300). SLOVENIAN LOA art. 191 enthält insofern eine Bestimmung zum Schutz vor einer aufgedrängten Bereicherung, als hiernach eine Leistung in Kenntnis einer Nichtschuld nur dann zurück verlangt werden kann, wenn sie unter dem Vorbehalt der Rückforderung erfolgt. Wer allerdings nur deshalb doppelt zahlt, weil er den Nachweis der früheren Zahlung verlegt hat, bleibt zur Kondiktion berechtigt (Juhart and Plavšak [-*Polajnar Pavčnik*], Obligacijski zakonik II, art. 191, 50).

7. Die Verpflichtung zur Rückgabe von Leistungen ”anderer Art“ (Handlungen, Unterlassungen, Gebrauchsgewährung) ist unter DUTCH CC art. 6:210(2) auf Wertersatz gerichtet. Ein solche Verpflichtung zum Wertersatz muss angemessen sein, und sie entsteht nur in drei Fällen: (i) wenn der Empfänger durch die Leistung bereichert wurde, (ii) wenn ihm die Leistungserbringung zuzurechnen ist, oder (iii) wenn er sich bereit erklärt hat, eine Gegenleistung zu erbringen. Sinn der Regelung ist es zu verhindern, dass dem Empfänger eine Ausgleichsverpflichtung aufgezwungen wird (Parlementaire Geschiedenis VI, 816). CC art. 6:210(2) strebt für den Fall, dass der Leistungsempfänger eine Gegenleistung versprochen hat, eine Abstimmung mit dem Rücktrittsrecht an (wo stets ein Anspruch auf Wertersatz für erbrachte Dienstleistungen besteht: CC art. 6:272). Allerdings darf es nicht zu einer Restitution kommen, wenn sie darauf hinausliefe, dass der Restitutionsschuldner mit ihr zu der Begehung einer unerlaubten Handlung genötigt würde (CC art. 6:211). Ein Käufer, der wegen einer Schlechterfüllung des Verkäufers vom Vertrag zurücktritt, kann bereicherungsrechtlich verpflichtet sein, für den zwischenzeitlichen Gebrauch der Sache einen Ausgleich nach CC art. 6:212 zu zahlen (Parlementaire Geschiedenis VI, 136; Asser [-*Hartkamp*], Verbintenissenrecht III[12], no. 320 p. 338; *Scheltema*, Onverschuldigde betaling, 203-207).

8. Kann der Gegenstand einer Bereicherung seiner Natur nach nicht zurückgegeben werden (Dienstleistung, Nutzung, verarbeitetes Baumaterial etc), so ist er auch under ESTONIAN law dem Wert nach zu ersetzen; es kommt auf den Wert im Zeitpunkt der Entstehung des Bereicherungsanspruchs an. Wertausgleich ist in Geld geschuldet, sofern sich die Parteien nicht auf eine andere Erfüllungsmodalität einigen (LOA § 89). Rechtsgrundlose Verwendungen auf eine fremde Sache begründen dann keinen Ausgleichsanspruch, wenn sie unter Umständen vorgenommen werden, in denen zuvor das Einverständnis des Eigentümers eingeholt werden konnte oder in denen er der Maßnahme widersprochen hat (LOA § 1042 (2) and (3)). Ein für eine Dienstleistung vereinbarter Preis ist, wenn es für sie keinen Rechtsgrund gibt, grundsätzlich nicht bindend, kann aber als Indikator für ihren objektiven Wert herangezogen werden.

VII.–5:103: Monetary value of an enrichment; saving

(1) The monetary value of an enrichment is the sum of money which a provider and a recipient with a real intention of reaching an agreement would lawfully have agreed as its price. Expenditure of a service provider which the agreement would require the recipient to reimburse is to be regarded as part of the price.

(2) A saving is the decrease in assets or increase in liabilities which the enriched person would have sustained if the enrichment had not been obtained.

COMMENTS

General. This Article defines for the purposes of this Book the concepts of the monetary value of an enrichment and a saving. These concepts feature in fixing the measure of the enriched person's liability when the enrichment is not or is no longer transferable and can therefore only be reversed by a monetary payment. In every case it will be critical to identify the enrichment whose value is to be assessed.

> *Illustration 1*
> *At E's request, D builds an extension to E's house. The extension adds some value to E's property, but the costs of the extension exceed the increase in value. If the service rendered by D was an unjustified enrichment of E, E is liable to pay the value of the service received, notwithstanding that this is less than the value of the addition to his property. E was enriched by the receipt of a service; the addition to his land is merely the consequence of D rendering that service and its lesser value cannot therefore serve to limit E's liability in these circumstances.*

Time at which value to be assessed. The point in time which is critical for determining the value of the unjustified enrichment is the moment in which the requirements of VII.–1:101 (Basic rule) are satisfied. It is at this moment that the liability to reverse the enrichment arises and thus necessary to determine the quantum of liability (in so far as this must be fixed in monetary terms). As a rule this will be the moment at which the (unjustified) enrichment was received, even if the lack of justification is not apparent until some later time. Where a non-transferable enrichment, such as a service, is conferred in performance of a contract which is subsequently avoided, the time for assessing the value of the enrichment is therefore the time of performance and not the later time at which the contractual obligation is set aside: the avoidance has retrospective effect and the enrichment is thus to be regarded as without legal justification when it was conferred (see VII.–2:101 (Circumstances in which an enrichment is unjustified), paragraph (2)).

Monetary value. The definition of monetary value in paragraph (1) takes as its bench mark the objective value of the enrichment determined as the price which would be agreed in a hypothetical sale as the outcome of negotiations between parties genuinely interested in a sale. Where there is a market for the asset or service concerned, there will be mechanisms for determining what that market value is – whether by resort to price listings or similar data or expert valuations. The monetary value may be more or less than a price actually agreed between the disadvantaged person and the enriched person since that price may reflect the outcome of an inequality in bargaining power, superior skills in negotiations, the unusual needs of one of the parties and other peculiarities.

Illustration 2
D undertakes repair work in E's building under the terms of an agreement, but the contract is void as D lacked the required professional qualification to undertake the work. The price agreed was based on the assumption that D was qualified to undertake the work. While D is liable to repay the price received from E, D is entitled to set off a payment equal to the value of the benefit which E has received. The value of the services in fact rendered will take account of the fact that D lacked the requisite qualification and that the work was not done to the required standard; full account is to be taken of defects in the work done.

In particular: composite price of services. The second sentence of paragraph (1) provides a clarification in determining the price of services where the service provider is to incur expenditure in performing the service the costs of which are to be covered by the client, such as building materials to be integrated into the building. In such cases the monetary value of the service equals the total which the client would have to pay, regardless of the fact that typically such sums would be divided into the heads of (i) remuneration for the service provider and (ii) payments on account of materials or reimbursement of fees incurred or similar entries. For the purposes of unjustified enrichment law it is the total cost of obtaining the service which matters, rather than the particular way in which that sum might be allocated to the individual aspects of the service provider's economic output. Where, for example, a bank is instructed to make a payment transfer, the value of that banking service will equal the fee charged together with the sum transferred, since the sum transferred will be recouped from the instructing client's funds.

Saving. A saving, as defined in paragraph (2), represents the amount by which the patrimony of the enriched person has avoided a diminution because the enrichment has been obtained. It occurs whenever (a) the enriched person has received a service or used another's assets, (b) were it not for that enrichment, the enriched person would have procured a benefit of that nature and (c) to do so the enriched person would have had to have paid money or have incurred a debt. There will be no saving if, for the enriched person, the benefit is a pure windfall. Rather a saving presupposes that the benefit has (at least in part) substituted for something which the enriched person would have obtained in any event.

NOTES

1. Während Fragen zur Höhe des bereicherungsrechtlichen Ausgleichsanspruchs in FRANCE überwiegend als Tatsachenfragen gedeutet und deshalb dem tatrichterlichen Ermessen überantwortet bleiben (z.B. Cass.civ. 3 December 2002, pourvoi no. 01-11032), gilt in SPAIN, dass sich der Bereicherungsausgleich in allen Fällen, in welchen der Gegenstand der Bereicherung nicht zurückgegeben werden kann, nach dessen objektivem Marktwert richtet (*Díez-Picazo*, Fundamentos I[6], 129). Die Gerichte sind deshalb häufig auf Sachverständigengutachten angewiesen (e.g. TS 5 May 1964, RAJ 1964 (1) no. 2208 p. 1380 [Wert von Kohle, über welche der Beklagte rechtswidrig verfügt hatte; es käme nicht auf den geringeren – weil seinerzeit noch staatlich festgelegten – Preis der Kohle im Zeitpunkt der ersten Verkaufstranche an]; CA Jaén 23 November 2007, BDA JUR 2008/93208 [Wert der Ersetzung von Obstbäumen durch Olivenbäume]; CA Málaga 25 July 2002, BDA JUR 2002/279327 [Wert der unerlaubten Nutzung von business premises für einen Zeitraum of 15 years]). Besondere Rechtsregeln zur Bestimmung des Wertes einer Bereicherung

scheint es zwar nicht zu geben, doch wird auch in Spanien oft darauf abgestellt, auf welchen Preis sich zwei rational handelnde Parteien geeinigt hätten (see note *III19* under VII.–4:101); die Rechtslage in Spain deckt sich damit weithin mit VII.–5:103. Es kommt zu einer *reconstrucción hipotética*, mit welcher der Preis ermittelt wird, auf welchen sich der Rechtsinhaber und der Rechtsverletzer wahrscheinlich geeinigt hätten (*Portellano Díez*, La defensa del derecho de patente, 169-172; *Fernández-Nóvoa*, El enriquecimiento injustificado en el Derecho industrial, 52; CA Barcelona 24 February 2005, BDA AC 2005/1094; CA Barcelona 16 February 2004, BDA AC 2004/892; CA Alicante 18 July 2007, BDA JUR 2007/336503; CA Alicante 9 January 2007, BDA AC 2007/1398 [es komme nicht auf die übliche Lizenzgebühr, sondern auf das Entgelt an, dass der Rechtsinhaber üblicherweise für die Verwertung seiner Rechte verlangt habe]). Ersparte Aufwendungen (*ahorro de gastos*) werden oft auch als *enriquecimiento indirecto* aufgefasst. Sie bestehen in der Vermeidung einer Verringerung des Vermögens des Bereicherten und sind als solche ausgleichspflichtig, wenn der Bereicherte diese Kosten sonst selber gehabt hätte (*Díez-Picazo* loc. cit. 120; TS 13 February 2002, RAJ 2002 (2), no. 3195 p. 5580; CA Madrid 5 February 2008, BDA JUR 2008/113690; CA Málaga 16 November 2004, BDA JUR 2005/147829; CA Alicante 13 October 2004, BDA JUR 2005/23856; CA Málaga 4 November 2002, BDA JUR 2003/71196). Diese Rechtsprechung hat den Anwendungsbereich des spanischen Bereicherungsrechts significant verbreitert, weil es auf diese Weise auf Eingriffsbereicherungen anwendbar wurde (*Álvarez-Caperochipi*, El enriquecimiento sin causa[3], 177-178).

2. Auch in ITALY wird gesagt, der *arricchimento* (die Bereicherung) könne sowohl in einer Vermögensmehrung als auch in der Ersparnis von Aufwendungen (*D'Onofrio*, Dell'arricchimento senza causa[2], 584-586; *Barbiera*, L'ingiustificato arricchimento, 284; *Breccia*, L'arricchimento senza causa I[2], 999-1001), mithin in der Vermeidung eines Vermögensverlustes bestehen (*Gallo*, Arricchimento senza causa e quasi contratti, 30-31). Unter einem *danno* wird dementsprechend sowohl ein aktueller Verlust als auch entgangener Gewinn verstanden (*Breccia* loc.cit. 1005-1006). Kann eine spezifische Sache nicht mehr zurückgegeben werden, folgt der Wertersatz den Regeln der CC arts. 2037 und 2038. Wertersatz bedeutet Ersatz des objektiven Marktwerts; im Falle der Veräußerung ist allerdings die erzielte Gegenleistung herauszugeben (CC art. 2038(1)). Zum Ausgleich von rechtsgrundlos erbrachten Dienstleistungen wird in der Rechtsprechung oft auf den von den Parteien vereinbarten Preis Bezug genommen (z.B. Cass. 3 May 1991, no. 4849, Giur.it. 1991, I, 1, 1314). Besteht (für Angehörige der freien Berufe) eine Gebührentabelle, wird sie in der Regel den "objektiven Marktwert" widerspiegeln (Cass.sez.un. 10 February 1996, no. 1025, Foro it. 1996, I, 1245).

3. Zu PORTUGAL siehe bereits die notes under VII.–3:101 and 3:102. Auch hier ist anerkannt, dass eine Bereicherung in der Ersparnis von Aufwendungen, in einer *poupança de despesas* bestehen kann (STJ 21 September 2006, Processo 06B2035; *Antunes Varela*, Obrigações em geral I[10], 511). Ein Beispiel liefert der Fall eines Unternehmers, der die erforderlichen Nacharbeiten an dem von ihm fehlerhaft hergestellten Werk unterlässt. Eine Klage aus ungerechtfertigter Bereicherung soll in einem solchen Fall auch nicht an ihrer Subsidiarität gegenüber dem Vertragsrecht scheitern (STJ 18 May 2006, Processo 06A1157).

4. Zur Ermittlung des Wertes einer nicht in Natur rückgabefähigen Bereicherung under GERMAN law see note *5* under the previous Article. Streitig ist, ob in den Fällen des unbefugten Ge- oder Verbrauchs fremder Sachen und Rechte sowie bei rechtsgrundlos erbrachten Dienstleistungen die Ersparnis von Aufwendungen den Kondiktionsgegenstand bildet oder ob das "erlangte Etwas" i.S.v. CC § 812(1)

unmittelbar in dem nichtgegenständlichen Vorteil selbst zu sehen ist. Letzterenfalls erlangt das Konzept der ersparten Aufwendungen letztlich nur im Rahmen der Verteidigungsgründe (Wegfall der Bereicherung: CC § 818(3)) Relevanz (näher Staudinger [-*S. Lorenz*], BGB [2007], § 812, no. 72). Wenn das ursprünglich Erlangte nicht oder nicht mehr herausgegeben werden kann, besteht nach CC § 818(3) eine Bereicherung u.a. dann fort, wenn der Empfänger durch Verwendung des Erlangten notwendige Aufwendungen erspart hat, die er andernfalls aus seinen sonstigen Mitteln hätte finanzieren müssen (BGH 17 January 2003, NJW 2003, 3271). Die Bereicherung ist dagegen weggefallen, wenn das Empfangene für Luxus, zur Verbesserung des Lebensstandards oder sonst außergewöhnliche Dinge ausgegeben wurde (Palandt [-*Sprau*], BGB[67], § 818, no. 34).

5. Das HUNGARIAN Bereicherungsrecht (zu dem nicht die Rückabwicklung unwirksamer Verträge gehört) spricht in CC § 363(2) nur die allgemeine Regel aus, das der Anspruch auf Wertersatz gerichtet ist, falls Rückgabe in Natur nicht möglich ist. Die Rechtsprechung stellt auf den objektiven Marktwert ab, der oft mit der Hilfe von Sachverständigen ermittelt wird (z.B. BH 1987/452). Zur Höhe des Bereicherungsausgleichs bei der unberechtigten Nutzung eines fremden Grundstücks siehe BH 2001/168, und zur Nutzung von Werbeflächen an Haltestellen für öffentliche Verkehrsmittel Csongrád Megyei Bíróság 1. Gf. 40 177/2002/3. BH 2005/143 spricht ersparte Nutzungsgebühren im Falle des unerlaubten Fotografierens eines einzigartigen Hauses für Werbezwecke zu, BH 1998/39 den von einem Sachverständigen geschätzten Marktwert einer Sache, die das Ergebnis der Forschungsarbeit des Klägers war, nicht jedoch Ersatz für Kosten und Arbeit. Haben Dienstleistungen des Benachteiligten dem Beklagten keine Aufwendungen erspart, wird bereits die Entstehung einer Bereicherung verneint (BH 1997/400, BH 1983/291). Ersparte Aufwendungen fließen also in die Ermittlung einer Bereicherung ein, nicht erst in die Feststellung eines Wegfalls der Bereicherung. Für SLOVENIA erwähnt *Cigoj*, Teorija obligacij, 260 die Ersatzpflicht für ersparte Aufwendungen und bildet als Beispiel diejenigen Kosten, die der *accipiens* zu tragen gehabt hätte, wenn er die Sache, welche den ursprünglichen Gegenstand seiner Bereicherung bildete, hätte mieten oder, falls es sich um eine verbrauchbare Sache handelte, hätte kaufen müssen.

6. In den drei Fällen, in welchen unter DUTCH CC art. 6:210 (Zahlung einer Nichtschuld) Wertersatz geschuldet ist (see note *7* under the previous Article), kommt es auf den Zeitpunkt des Leistungsempfangs an; geschuldet ist aber nicht mehr, als unter den Umständen 'angemessen' ist. Der Wert der Leistung ist grundsätzlich nach den Regeln des Bereicherungsrechts zu bemessen. Bei Leistungen auf einen nichtigen Vertrag kommt es deshalb gewöhnlich auf den vereinbarten Preis an. Sonst ist auf den Wert abzustellen, welche der Leistung im Wirtschaftsleben normalerweise zuerkannt wird, d.h. auf ihren "objektiven" Marktwert. Der (möglicherweise geringere) "subjektive" Nutzen für den Empfänger kann ggflls. im Rahmen der Angemessenheitsklausel Berücksichtigung finden, die sich nicht nur auf den Grund-, sondern auch auf die Höhe des Wertersatzanspruches bezieht. Für das Bereicherungsrecht bestimmt CC art. 6:212(2), dass eine Bereicherung insoweit außer Betracht bleibt, als ihr Wert durch Umstände gemindert wurde, die nicht in die Risikosphäre des Bereicherten fallen. Der für die Höhe eines Anspruchs aus ungerechtfertigter Bereicherung maßgebliche Zeitpunkt ist also zwar grundsätzlich derjenige, in welchem die Bereicherung entsteht, doch sind spätere Wertminderungen unter den Voraussetzungen von CC art. 6:212(2) zu berücksichtigen (näher zu alledem Asser [-*Hartkamp*], Verbintenissenrecht III[12], nos. 343-344, pp. 357-358, nos. 359-363, pp. 383-385; *Scheltema*, Onverschuldigde betaling, 203-207;

Nieuwenhuis/Stolker/Valk [-*Hijma*], T & C Burgerlijk Wetboek[6], art. 6:212, nos. 4-6, pp. 2456-2457).

7. Under ESTONIAN LOA § 1032(2) the monetary value of a non-transferable enrichment is the usual value thereof at the time when the right to reclaim accrued (the time when the performance was received, not the time of avoidance or the time when the claim is made). In case of enrichment by violation of another person's right, the value of enrichment is the usual value of anything received by the violation at the time of the violation (LOA § 1037). Pursuant to GPCCA § 65, the usual value of an object is deemed to be the value of the object unless otherwise prescribed by law or contract. The usual value of an object is its average local selling price (market price). A person who incurs costs with regard to an object of another person without a legal basis therefor may demand compensation of the costs to the extent to which the person on whose object the costs are incurred has been enriched thereby, taking into consideration, inter alia, the fact of whether such costs are useful to the person and the intentions which that person had in regard to the object. Determination of the extent of enrichment shall be based on the time when the person on whose object costs were incurred has the object returned or is able to make use of its increased value in any other manner (LOA § 1042(1)). Supreme Court 5 December 2007, civil matter no. 3-2-1-107-07 hat in einem Fall des Bauens auf fremden Grund entschieden, dass der Gläubiger die Bereicherung des Schuldners nicht nur nach der Wertsteigerung von dessen Grundstück, sondern auch nach dem Wert der für die (ohnehin geplante) Baumaßnahme erforderlichen Baumaterialien berechnen könne.

Illustration 1 is taken from Estonian Supreme Court 5 December 2007, civil matter no. 3-2-1-107-07; **illustration 2** from Belgian Cass. 11 September 2008, no. C.06.0666.F.

VII.–5:104: Fruits and use of an enrichment

(1) Reversal of the enrichment extends to the fruits and use of the enrichment or, if less, any saving resulting from the fruits or use.

(2) However, if the enriched person obtains the fruits or use in bad faith, reversal of the enrichment extends to the fruits and use even if the saving is less than the value of the fruits or use.

COMMENTS

General. This provision provides for collateral obligations which extend the main obligation to reverse the original enrichment to enrichments arising out of the retention (fruits) or use of that enrichment. It thus enlarges the basic liability under VII.–5:101 (Transferable enrichment) (in relation to fruits, which can be transferred) and VII.–5:102 (Non-transferable enrichment) (in relation to use of the enrichment, which is non-transferable). In contrast to the provisions governing substitutes, the liability to reverse the enrichment from obtaining fruits or use of an enrichment is (i) additional rather than alternative to liability to reverse the original enrichment and (ii) automatic, rather than dependent on any election by the claimant.

Measure of liability. The measure of liability for fruits and use is the same. In each case the enriched person is liable to hand over the fruits or pay the monetary value of the use if the enriched person was in bad faith when that benefit was obtained. If, however, the enriched person was in good faith at that time, liability is limited to any saving which the enriched person has obtained. The notion of saving is set out in VII.–5:103 (Monetary value of an enrichment; saving) paragraph (2).

Bad faith. The notion of good faith which is defined in VII.–5:101 (Transferable enrichment) paragraph (5) applies correspondingly here. A person who is not in good faith at the time that the fruits or use are obtained is in bad faith at that time. The differential treatment based on the presence or absence of good faith is justified by the consideration that an enriched person who knows or ought to know that an unjustified enrichment must be returned must appreciate that there is no entitlement to any consequential benefits and therefore may justly be held accountable for those further benefits. By contrast the enriched person who obtains such consequential benefits in good faith, not appreciating and having no cause to appreciate that the enrichment is to be reversed, is acting excusably. This favouring of the enriched person in good faith mirrors the like differences drawn in the defence of change of position (VII.–6:101 (Disenrichment)), where there is a diminution of the enrichment to be reversed.

Fruits. The fruits of an asset may be either natural (such as the young born to livestock) or legal (income such as dividends, interest or rent). The liability to reverse them is governed by VII.–5:101 (Transferable enrichment) so that if the fruits cease to be transferable, a liability to pay their monetary value or to hand over a substitute may arise in the same manner as it would for the enrichment from which they stem.

Use. Where assets are returned after a period of possession or other use, a collateral obligation to make payment may arise out of the use made of the asset itself. Such payments will effectively correlate to and compensate for wear and tear. Use of the enrichment must be distinguished from an enrichment which itself consists of a use. This Article is relevant where, for example, an asset is sold which, under the applicable property law rules, does not

re-vest in the transferor if the underlying contract of sale is avoided. The core liability is to re-transfer the asset. In addition the transferee will be liable under this Article in respect of use of the asset between transfer and re-transfer. Where by contrast one party is enriched by leasing another's property, the only liability is under VII.–5:102 (Non-transferable enrichment) since the use of the property is the enrichment itself, and this Article has no application.

NOTES

1. Under FRENCH, BELGIAN and LUXEMBURGIAN CC art. 1378 muss der bösgläubige Empfänger einer ungeschuldeten Zahlung ab dem Empfang sowohl das Kapital als auch die Früchte bzw. Zinsen erstatten. Der gutgläubige *accipiens* muss dagegen nach FRENCH Rechtsauffassung Zinsen (erst) ab dem Zeitpunkt der Geltendmachung des Anspruchs zahlen. Das wird aus CC art. 1153 i.V.m. art. 1378 geschlossen (Cass.com. 16 December 1980 [zweites Urteil von diesem Tag], D. 1981, 380, note *Berr*; Cass.civ. 12 February 1985, Bull.civ. 1985, III, no. 30). Wird der gutgläubige Empfänger erst später bösgläubig, beginnt die Pflicht zur Zinszahlung mit diesem Zeitpunkt (Cass.civ. 22 March 2005, Bull.civ. 2005, I, no. 152). Sie trifft auch die öffentliche Hand; die *répétition de l'indu* gilt nicht nur im Privatrecht (Cass.com. 16 Dezember 1980 [erstes Urteil], D. 1981, 380, note *Berr*). Erhebt der Staat unter Verstoß gegen das Gemeinschaftsrecht Steuern oder Abgaben, so ist er bösgläubig (Cass.civ. 11 December 1985, Bull. civ. 1985, I, no. 347). In BELGIUM wird CC art. 1378 dahin verstanden, dass der gutgläubige Empfänger überhaupt nicht auf Zinsen haftet (Cass. 18 October 1979, Bull.Ass. 1980, 133; Cass. 10 November 2004, JT 1995, 262), während die LUXEMBURGISCHE Rechtsprechung der französischen folgt (Cour 23 May 2001, Pas. luxemb. 32 [2002] 139).
2. Unter SPANISH CC art. 1303 hat derjenige, der aufgrund eines nichtigen Vertrages eine Sache empfangen hat, die Sache mit Früchten (bzw. Zinsen) herauszugeben. CC art. 1295(1) bringt eine gleichlautende Vorschrift zur *rescisión*. In beiden Vorschriften wird nicht zwischen gut- und bösgläubigen Rückerstattungsschuldnern unterschieden. Das kontrastiert in auffälliger Weise mit den Vorschriften zum Eigentümer-Besitzer-Verhältnis (CC arts. 451(1), 455) und zur Leistungskondiktion. (CC art. 1896(1) verpflichtet nur den bösgläubigen Empfänger zur Herausgabe von Früchten und zum Ersatz für pflichtwidrig nicht gezogenen Früchte, was zumeist dahin verstanden wird, dass der gutgläubige Bereicherungsschuldner gezogene Früchte behalten darf; bösgläubig i.S.d. Leistungskondiktion ist allerdings, anders als im Eigentümer-Besitzer-Verhältnis (CC art. 433) bereits ein *accipiens*, der das fehlende Besitzrecht fahrlässig verkennt, see note *III15* under VII.–5:101.) Es besteht heute weithin Einigkeit darüber, dass der Widerspruch zwischen den verschiedenen Rückabwicklungsregimen beseitigt werden sollte, allerdings ist umstritten, wie das geschehen soll (schöner Überblick bei *Berg*, Die Rückabwicklung gescheiterter Verträge im spanischen und deutschen Recht, 175). Eine oft vertretene Ansicht geht dahin, die Vorschriften des Eigentümer-Besitzer-Verhältnisses im Rahmen von CC arts. 1303, 1295(1) analog anzuwenden (TS 14 June 1976, RAJ 1976 (1) no. 2752 p. 2042; TS 28 November 1998, RAJ 1998 (5) no. 9698 p. 14178). Es findet sich aber auch die genau umgekehrte Auffassung, dass das strenge Regime der Rückabwicklung nichtiger Verträge *de lege lata* unabhängig von Gut- oder Bösgläubigkeit zu einer Rückgewähr gezogener Früchte verpflichte; möglicherweise ist das sogar als die heute herrschende Meinung zu qualifizieren (*Carrasco Perera*, ADC 1987, 1055, 1118-1120; *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho

ajeno, 214-221; TS 6 July 2005, BDA RJ 2005/9532; TS 23 June 2008, BDA RJ 2008/4266; TS 27 June 2008, BDA RJ 2008/3312). Den genannten Widerspruch muss dann der Gesetzgeber auflösen.

3. Unter ITALIAN CC art. 2033 schuldet der bösgläubige Empfänger einer Nichtschuld ab dem Tag des Empfangs Zinsen und Früchte, der gutgläubige Empfänger dagegen erst ab dem Tag der Zustellung der Klage. CC art. 1148(2), wonach der verklagte Besitzer auch auf die Früchte haftet, die er nach Zustellung der Klage bei sorgfältigem Wirtschaften noch hätte ziehen können, bleibt neben CC art. 2033 anwendbar (Cass. 7 April 1982, no. 2138, Giur.it. 1983, I, 1, 976, note *Moscati*; Cass. 1 August 1992, no. 9167, Giur.it. 1993, I, 1, 1268). Umgekehrt haftet der *solvens* dem *accipiens* nach besitzrechtlichen Regeln für Aufwendungen und Verbesserungen (CC art. 2040 i.V.m. CC arts. 1149, 1150, 1151 und 1152). Die Pflicht zur Rückgewähr von Geld begründet eine Geldwertschuld. Der bösgläubige Empfänger hat gleichwohl den Wertverlust durch Inflation als Schaden auszugleichen (Cass. 13 June 1991, no. 6702, Rep.Giur.it. 1991, voce Indebito no. 4; Cass. 15 May 1991, no. 5421, Rep.Giur.it. 1991, voce Previdenza sociale no. 270).

4. Auch PORTUGAL unterscheidet zwischen natürlichen Früchten und Rechtsfrüchten (Erträgen), see CC art. 212(2). Früchte einer Sache sind alles, was sie regelmäßig und ohne Substanzverlust produziert (CC art. 212(1)). Dem gutgläubigen Besitzer gehören alle Früchte bis zu dem Zeitpunkt, in welchem er bösgläubig wird (CC art. 1270(1)). Auch bereicherungsrechtlich haftet er nicht auf sie, weil CC art. 1270 einen Rechtsgrund zum Behaltendürfen der Früchte darstellt (*Pereira Coelho*, O enriquecimento e o dano, 82-83). CC art. 1270 ist eine Ausnahme von dem allgemeinen Prinzip des Bereicherungsrechts (CC art. 473) und darf wegen dieser Eigenschaft als *norma excepcional* (CC art. 11) nicht analog auf die Eingriffsbereicherung angewandt werden (*Pereira Coelho* loc.cit.). Bei ihr steht der Ausgleich für Fruchtziehung und Nutzung des Gegenstands vielmehr im Mittelpunkt des Anspruchs (STJ 24 February 2005, Processo 04B4601). Der bösgläubige Besitzer muss nicht nur alle Früchte herausgeben bzw. dem Werte nach ersetzen, sondern auch diejenigen, die er schuldhaft nicht gezogen hat (CC art. 1271). Diese sachenrechtliche Regelung findet ihr bereicherungsrechtliches Pendant in CC art. 480. Auch hiernach haftet der bösgläubige Bereicherungsschuldner auf alle gezoggenen und auf die schuldhaft nicht gezogenen Früchte, außerdem muss er Geld nach dem gesetzlichen Zinssatz (STJ 2 May 1985, BolMinJus 347 [1985] 370; STJ 22 April 1999, CJ [ST] VII [1999-2] 58) verzinsen.

5. GERMAN CC § 818(1) erstreckt die Herausgabepflicht des Bereicherungsschuldners auf gezogene Nutzungen, d.h. auf die Sach- oder Rechtsfrüchte und auf die sonstigen Vorteile, die der Gebrauch des Gegenstandes mit sich bringt (CC §§ 100, 99). Die Herausgabepflicht ist auf tatsächlich gezogene Nutzungen beschränkt, bezieht sich also nicht auf schuldhaft nicht gezogene Nutzungen (Palandt [-*Sprau*], BGB[67], § 818, no. 8; BGH 4 June 1975, BGHZ 64, 322, 323; BGH 8 October 1987, BGHZ 102, 41, 47). Schuldhaft nicht gezogene Nutzungen müssen nur der bösgläubige und der verklagte Empfänger vergüten (CC §§ 818(4), 819(1), 292, 987(2)). Der gutgläubige unverklagte Bereicherungsschuldner haftet also z.B. nicht, wenn er rechtsgrundlos erlangtes Geld auf einem unverzinslichen Girokonto belässt. Tatsächlich erwirtschaftete Zinsen sind aber als Nutzungen herauszugeben (BGH 6 March 1998, BGHZ 138, 160, 163; BGH 15 February 2000, NJW 2000, 1637). Zu ersetzen sind auch ersparte Aufwendungen in der Form ersparter Kreditzinsen, wenn es das rechtsgrundlos erhaltene Geld dem Schuldner ermöglichte, ein Darlehen oder eine andere Schuld zu tilgen; zwischen erzielten und ersparten Zinsen wird m.a.W. nicht differenziert (BGH 6 March 1998 loc.cit.; *Sprau* loc.cit. no. 10; Staudinger [-*S.*

Lorenz], BGB [2007], § 818, no. 11). Eine Pflicht zur Herausgabe von Nutzungen trifft auch denjenigen, der auf Grund eines nichtigen Kauf- oder Mietvertrags den Bereicherungsgegenstand gebraucht. Der Gebrauchsvorteil kann natürlich nicht *in natura* herausgegeben werden; für ihn ist folglich Wertersatz (CC § 818(2)) zu leisten.

6. Das HUNGARIAN Bereicherungsrecht verweist in CC § 363(1) hinsichtlich des Nutzungsersatzes auf die sachenrechtlichen Regeln zum rechtsgrundlosen Besitz (CC § 195). Diese wiederum unterscheiden je nach Bös- bzw. Gutgläubigkeit des unrechtmäßigen Besitzers (näher Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1398-1400; Petrik [-*Bíró*], Polgári jog II[2], 654/4-655). Unter CC § 195(1) haftet der rechtsgrundlose Besitzer nur auf die noch vorhandenen Nutzungen; hat er die Sache gutgläubig und entgeltlich erworben, so entfällt selbst diese Haftung (see *Vékás*, JbOstR XIX [1978], 243, 247) bis zu dem Zeitpunkt, in dem er gerichtlich oder vor der zuständigen Behörde in Anspruch genommen wird (CC § 195(2)). Ab dem Zeitpunkt der Inanspruchnahme gelten CC §§ 196-197 (Herausgabe vorhandener, Ersatz verbrauchter und schuldhaft nicht gezogener Nutzungen: CC § 196(3)). Das entspricht der Regelung für den bösgläubig rechtsgrundlosen Besitzer (CC § 195(3)). Dem Anspruch auf Nutzungsausgleich steht auch bei Bösgläubigkeit der Anspruch auf Ersatz notwendiger Verwendungen (CC § 363(1)) gegenüber. SLOVENIAN LOA art. 193 bestätigt die Pflicht des Bereicherungsschuldners zur Herausgabe von Früchten und Zinsen ab dem Zeitpunkt der Bösgläubigkeit bzw. der Klageerhebung. Die sachenrechtlichen Regeln (unter Law of Property Act art. 59(2) erwirbt der gutgläubige Besitzer an den abgetrennten Früchten Eigentum) schließen die Bereicherungshaftung für den Zeitraum ab Klageerhebung nicht aus (Juhart and Plavšak [-*Polajnar Pavčnik*], Obligacijski zakonik II, art. 193, 53).

7. Auch das DUTCH Recht der ungeschuldeten Leistung verweist in CC art. 6:206 auf Vorschriften des Eigentümer-Besitzer-Verhältnisses (CC arts. 3:120, 121, 123 and 124) zur Haftung für gezogene Früchte, für Kosten und Schäden. Das erklärt sich daraus, dass der *solvens* oft zwischen der Vindikation (CC art. 5:2) und dem Anspruch aus ungeschuldeter Leistung wählen kann und beide deshalb in den Rechtsfolgen angenähert wurden. Dem gutgläubigen *accipiens* stehen gemäß CC art. 3:120(1) die bereits getrennten Sach- und die fälligen Rechtsfrüchte zu (zum Begriff der Früchte siehe CC art. 3:9). Er kann vom *solvens* gemäß CC art. 6:207 u.a. Transportkosten, gezahlten Einfuhrzoll und andere Nachteile ersetzt verlangen, die ihm ohne den Empfang der ungeschuldeten Leistung nicht entstanden wären. Der bösgläubige Empfänger haftet dagegen auf die genannten Früchte, außerdem nach den Vorschriften des Deliktsrechts auf Schadenersatz, und die in CC art. 6:207 genannten Ansprüche sind ihm genommen (CC art. 3:121). Die auf das Gut gemachten Aufwendungen kann er nur nach den Vorschriften des Bereicherungsrechts (CC art. 6:212) ersetzt verlangen (CC art. 6:121(2)). See Nieuwenhuis/Stolker/Valk [-*Hijma*], T & C Burgerlijk Wetboek[6], arts. 6:206-208, pp. 2448-2451; Asser [-*Hartkamp*], Verbintenissenrecht III[12], nos. 338-340, pp. 355-356; *Vriesendorp*, Verbintenissen uit de wet en Schadevergoeding[2], no. 298, p. 282).

8. Under ESTONIAN LOA § 1032(1) ist der *accipiens* zur Herausgabe des Erlangten und aller daraus gezogenen Vorteile verpflichtet. Das schließt die Haftung auf Früchte und Gebrauchsvorteile ein (GPCCA § 62(1)). Von demjenigen, der eine fremde Sache nutzt, wird vermutet, dass ihm diese Nutzung einen Vorteil gebracht hat. Das betrifft insbesondere Gebäude (Supreme Court 20 December 2005, civil matter no. 3-2-1-136-05); bei ihnen wird der Gebrauchsvorteil im Zweifel nach der marktüblichen Miete berechnet. Das Gericht darf den Wert von Nutzungen unter den Voraussetzungen von CCP § 233(2) schätzen. Der Anspruch des *solvens* ist aber nach dem Prinzip von Treu und Glauben auf den Betrag beschränkt, den der *solvens* nach den Regeln ordentlicher

Verwaltung selber hätte erwirtschaften können (Supreme Court 15 June 2005, civil matter no. 3-2-1-67-05). Nicht mehr zu den erstattungspflichtigen Früchten gehören diejenigen, die aus einer Sache erwirtschaftet werden, welche mit rechtsgrundlos erworbenem Geld gekauft wurde (Supreme Court loc.cit.). Ein bösgläubiger Empfänger haftet auch auf Zinsen, außerdem muss er den *solvens* für schuldhaft nicht gezogene Nutzungen entschädigen (LOA § 1035(3)). In case of enrichment by violation of other person's rights the amount of enrichment is the usual value of anything received by the violation at the time of the violation (LOA § 1037(1) and (3)). The violator must also compensate for advantage of use (Supreme Court 30 November 2005, civil matter no. 3-2-1-123-05) and for proits which the owner would have received had the owner been in possession of the thing (LPA § 85(2)). LITHUANIAN CC art. 6.240(1) provides that a person who has received property without due legal grounds shall be bound to return it and reimburse in total the income that he has received or should have received from this property from the time he became aware or should have become aware that the property he received was not due. An interest at the rate of five percent per annum shall be payable for the sum of money unjustifiedly received.

CHAPTER 6: DEFENCES

VII.–6:101: Disenrichment

(1) The enriched person is not liable to reverse the enrichment to the extent that the enriched person has sustained a disadvantage by disposing of the enrichment or otherwise (disenrichment), unless the enriched person would have been disenriched even if the enrichment had not been obtained.

(2) However, a disenrichment is to be disregarded to the extent that:

(a) the enriched person has obtained a substitute;

(b) the enriched person was not in good faith at the time of disenrichment, unless:

(i) the disadvantaged person would also have been disenriched even if the enrichment had been reversed; or

(ii) the enriched person was in good faith at the time of enrichment, the disenrichment was sustained before performance of the obligation to reverse the enrichment was due and the disenrichment resulted from the realisation of a risk for which the enriched person is not to be regarded as responsible;

or

(c) paragraph (3) of VII.–5:102 (Non-transferable enrichment) applies.

(3) Where the enriched person has a defence under this Article as against the disadvantaged person as a result of a disposal to a third person, any right of the disadvantaged person against that third person is unaffected.

COMMENTS

A. General

Overview. This Article provides for a change of position defence based on disenrichment. It defines the notion of disenrichment, sets out the conditions under which a disenrichment sustains the defence, and establishes the extent of the reduction in liability.

Burden of proof. It falls to the enriched person to establish all the elements of the defence. In particular the enriched person must show that the circumstances set out in paragraph (2) – in which a disenrichment is to be disregarded – do not apply. The enriched person (E) must therefore show, according to the required standard of proof, (a) that E has sustained a disadvantage, (b) that this would not have been sustained if E had not obtained the enrichment, (c) that E has not received an enrichment in exchange for the disenrichment, and (d) either (i) that E neither knew nor ought to have known that the enrichment was unjustified or (ii) one of the two exceptions cases where good faith is not required applies. Moreover, in order that E's claim is not restricted by the terms of paragraph (2)(c) of this Article, E must also establish, should the point arise, (e) (i) that E did not obtain the enrichment under an agreement, or, (ii) if there was an agreement that agreement did not genuinely fix a price or value for the enrichment.

B. Notion of disenrichment

(a) Forms and manner of disenrichment

General. The first condition for the application of the defence, contained in paragraph (1) of the Article, requires the enriched person to establish the disenrichment. The enriched party must have sustained a material detrimental change in economic position. Without some element of 'debit' from the patrimonial account there is no case for protecting the enriched person from the claim to reverse the enrichment. It is only if a disadvantage has been suffered that reversal of the enrichment would leave an enriched person worse off than before enrichment.

Forms of disenrichment. The wording of paragraph (1) makes it clear that disenrichment may take the form either of disposal of the enrichment obtained or sustaining some other disadvantage. As a matter of principle disenrichment may take any form of disadvantage (within the meaning of the term in VII.–3:102 (Disadvantage)). For this purpose the rules determining what constitutes a disadvantage giving rise to the claim against the enriched person, will be equally material here. The decisive matter is that, trusting to the apparent justification of the enrichment and accordingly the right to retain it, the enriched party has parted with wealth or sustained an additional burden (which would not otherwise have been done) so that the enriched person must retain the enrichment if not to be worse off as a result.

Disposal of the enrichment. The form of disenrichment which typifies the defence (and which is given particular recognition by its explicit mention in the wording of the Article) is the disenrichment which arises where the enriched person has disposed of the enrichment itself. This may be described simply as disposal of the asset gained. This form of disenrichment necessarily supposes that the enrichment is by its nature transferable or otherwise capable of disposal. Disposal of the enrichment then constitutes a decrease in assets and thus a disadvantage within the meaning of paragraph (1)(a) of VII.–3:102 (Disadvantage). An enrichment is disposed of in this sense whenever title to that asset is vested by the enriched person in another.

> *Illustration 1*
> Despite the effective revocation of a bank mandate which S had granted to her brother B and had entitled B to operate S's account at the bank X, B nonetheless withdraws money from the bank and hands this over to S. On discovering its mistake and not knowing that B has given the money to S, X apologies to S for the lapse and credits S's account with the sum which it allowed to be withdrawn. Because the money withdrawn was handed over to her, S has suffered no loss and thus has no contractual claim against X for damages. X has an unjustified enrichment claim for repayment of the sum credited to S's account: the compensation was given in error and without obligation and thus without legal justification. B was disenriched when he handed the money over to S and has a defence under this Article if he was in good faith, i.e. if he was unaware of the revocation of the bank mandate. If B was in bad faith and has no defence, X has concurrent claims under this Book against both B and S.

Other disadvantages. Since what matters is the overall 'bookkeeping' balance of assets and liabilities – that something of value has been set off against the value of an enrichment - the defence is open to the enriched person whenever, instead of disposing of the enrichment itself, that person's 'minus' corresponding to the 'plus' of the enrichment consists of some other act of disenrichment. Disposal of the enrichment itself thus represents only a specific instance of

a general requirement. Any other (equally causally related) disadvantage within the meaning of VII.–3:102 (Disadvantage) will potentially suffice to bring the defence into play.

Illustration 2
E receives from trustees of a trust fund the sum of € 25,000, paid to him ostensibly as a beneficiary under the trust established by a distant relative. Determined to make the most of his unexpected windfall, E spends € 250 on jewellery as a present for a friend. He also makes a gift of his car (worth € 5,000) to his daughter, planning to purchase a replacement using his newly acquired wealth. As he anticipates that the remainder of the sum received from the trustees will produce an equivalent income, E allows his son to occupy rent-free for two months a flat belonging to E which has just become vacant and which E would otherwise have let for € 500 per month. Unknown to E, the trustees had no authority to make the payment and on realising their mistake claim re-payment from E. As the trustees were not obliged to pay E and did so by mistake, E's enrichment is unjustified; it is also attributable to the trustees' disadvantage. E is liable to reverse the enrichment, but may have a defence under this Article in view of his partial disposal of the enrichment (outlay on the jewellery), his other patrimonial loss (gift of the car) and his permitting another to make use of his rights (allowing the son to occupy the flat in lieu of renting it). Assuming the other requirements of the defence are made out, E is obliged to pay back only the balance of € 18,750.

In particular: other loss of the assets; loss of other assets. The range of possible disadvantages includes a decrease in assets such as consuming or exhausting the enrichment or permitting it to disintegrate (so far as the nature of the enrichment allows this), or disposing of other patrimonial benefits (for example, other property or rights or money). Disposal of other assets is clearly the only form of disenrichment possible when the enrichment is not by its nature transferable. It may be equally material in any case where the enrichment has not in fact been disposed of, even if it is transferable.

Illustration 3
A debtor X discharges the debt with creditor E using money which X has stolen from D. D's claim is against X. D has no unjustified enrichment claim against E. E was enriched by receipt of the money, but was also disenriched in losing the claim against X (which was extinguished by the payment) and the disenrichment was in good faith.

Illustration 4
D, who was ordered by a court to pay a sum, paid the sum due by mistake to E. Coincidentally a court had awarded E an equivalent sum due from X and hence E assumed that the money received from D was the payment of X's debt. As a result E released his rights under a court order securing his claim over X's patrimony. D's claim against E under this Book is subject to the defence under this Article.

In particular: incurring obligations. Alternatively, instead of a decrease in rights, reducing the positive side of the economic balance, the disenrichment might take the form of incurring obligations (typically money debts), so as to add to liabilities. The enriched person might assume that the enrichment can be used to finance a fresh debt or at any rate that the enrichment will liberate other liquid assets which can be used to finance the debt. Thus there may be a patrimonial loss (and hence disadvantage) in the form of an increase in debts where the enriched person obtains more credit and thus incurs new or enhanced obligations. The defence may then operate in relation to the obligation to pay interest which is incurred. (The

defence is excluded in relation to the obligation to repay the principal sum since this disadvantage is offset by receipt of the principal itself. This is an effect of paragraph (2)(a)).

In particular: allowing use of one's rights. The disenrichment might equally take the form of permitting another to use one's rights: the enriched person is then disenriched by making available to another (a third party) the possession or occupation of property which would otherwise have been used by, or would have generated an income for, the enriched person.

Manner of disenrichment: voluntarily and involuntarily sustained disadvantage. As with the form of disenrichment, the manner of sustaining a disadvantage is not in principle restricted to particular modes of reducing the patrimonial balance. A "disposal" of the enrichment might be a transfer of the property or assignment of the right, if the enrichment takes a transferable form, but an enrichment will also be disposed of in any case where it is voluntarily extinguished, for example by release of personal rights to the debtor. Moreover, while the concept of "disposal" by the enriched person necessarily implies a voluntary act, the umbrella concept of disenrichment (disadvantage sustained) embraces voluntary and involuntary disenrichments alike. That is because what matters is simply the overall balance of the enriched person's wealth. Aside from the required connection between disenrichment and retention of the enrichment, the precise mechanism whereby changes to that balance occur is not of the essence. A deprivation of an enrichment caused by acts of nature or third parties therefore falls squarely within the terms of the Article. The exact cause of the loss or destruction is immaterial.

> *Illustration 5*
> On behalf of D, an incapacitated person whose patrimony is being administered by X, a purported gift of shares in a foreign company is made by X to E. The transfer of shares is duly registered. The shares are subsequently expropriated by the relevant state. D subsequently regains full legal capacity and claims from E payment of the value of the shares, transfer no longer being possible, on the basis that X had no authority to make the donation (a fact unknown to E). E has a complete defence under this Article because, in losing the shares, E sustained a disenrichment equal to the enrichment.

(b) Fault in causing the disenrichment

Fault in general. An involved question is what role fault in bringing about the disenrichment should play within the framework of these rules. Fault involved in the process of disenrichment may be (i) fault of the disadvantaged claimant; (ii) fault of third parties; or (iii) fault of the enriched person. Different considerations apply in these three cases.

Fault of the disadvantaged claimant. In the first case, where the fault is that of the disadvantaged claimant, if the enriched party suffers a disenrichment because the claimant was largely responsible for bringing the disenrichment about, the claimant hardly has any grounds for objecting to the defence of disenrichment. In that case, therefore, the basic rules apply unaffected by considerations of fault.

Fault of a third party: claim of enriched person against third party. The same applies where the fault is that of a third party and the risks must be allocated between the disadvantaged person and the enriched person: whenever the enriched person is "innocently" disenriched, the risk of frustration of the claim must lie with the disadvantaged claimant. The

difference here, however, is that that fault may generate a claim (most especially within the law on non-contractual liability for damage, but potentially also under, for example, the law of benevolent intervention in another's affairs or other rules of private law) against the third party in respect of the loss. If the asset constituting the enrichment has been damaged or destroyed after it was obtained and the third party who has brought about or is responsible for the damage or destruction is liable to the enriched person as the person entitled to the asset, that right of the enriched person against the third party for reparation in respect of the damage done is something obtained "in exchange for sustaining the disenrichment". Accordingly, although the enriched persons sustains a disenrichment, there is a simultaneous counter-enrichment which constitutes a substitute. In these circumstances the defence is excluded to the extent of the claim of the enriched person against the third party: see paragraph (2)(a).

Relationship to VII.–5:101, paragraphs (3) and (4). This exclusion of the defence of disenrichment under paragraph (2)(a) (where the enriched person is disenriched by loss or destruction of the asset constituting the enrichment, but gains a claim against the third party at fault in causing the loss or destruction) operates to preserve the enriched person's liability to reverse the enrichment. It does not determine how that liability is to be reversed. This is resolved by paragraphs (3) and (4) of VII.–5:101 (Transferable enrichment). A lost or destroyed asset cannot by its nature be transferred and accordingly, by default, liability takes the form of a payment of the value of the asset: paragraph (3). Where the enriched person was (still) in good faith when the asset was lost, they may elect instead to transfer the substitute: paragraph (4)(a). In this manner the "innocent" enriched person may pass on to the disadvantaged person the risks associated with the substitute (i.e. that the claim against the third party will prove worthless). If this is regarded as the normal case, the exclusion of the defence of disenrichment under paragraph (2)(a) of the present Article is of limited impact, since the right to choose to surrender the substitute in lieu of paying the value of what was lost or destroyed restores balance to the distribution of risks. Conversely, however, if the enriched person is not in good faith, that risk cannot be forced onto the disadvantaged person; an enriched person who is no longer in good faith bears the risk of loss or destruction of the asset which should already have been transferred. The right of election in that instance rests with the disadvantaged person (see VII.–5:101(4)(b)), who may prefer the solvency of the enriched person to the uncertainties of the claim against the third party.

Fault of a third party: direct claim of disadvantaged person. Of course, if entitlement to the relevant asset vis-à-vis third parties has not passed from the disadvantaged person to the enriched person, it may well be that it is the disadvantaged person who acquires a (direct) claim against the person at fault, but at the same time there will be no relevant disenrichment simply because there was no substantial enrichment in the first place.

Illustration 6

E, a farmer, receives a sheep dog as a gift from D, a dog breeder. The twelve year old son of a neighbour, X, shoots the dog dead while practising with his father's air rifle. It is assumed that X is liable for the damage caused to E and, under the rules in Book VI, must pay compensation at least equal to the value of obtaining a replacement dog. D claims from E the value of the dog, because D had made a gift of the wrong dog by mistake and has avoided the gift. (It is assumed that D is entitled to avoid the gift for mistake.) Assuming that ownership of the dog passed under the gift, but reverted on avoidance, then (assessed retrospectively) at the time of the shooting, D was owner of the dog, E being merely liable (under VII.–1:101 (Basic rule) of this Book as well as any applicable property law rules) to return possession of the dog to E (which was all

that E enjoyed). X is directly liable to E under the law on non-contractual liability for damage to E's property. The case would be otherwise if under the applicable property law ownership of the asset did not revert on avoidance (or at any rate not in relation to third parties). In that case, where E remains owner, E was liable under the law of unjustified enrichment to transfer to D property in the dog. X has shot E's dog and is liable to E for damage to E's property. Although the death of the dog means that E has sustained a disenrichment (loss of the dog), E has acquired a substitute enrichment in the form of the right of action against X and to that extent is denied the benefit of this defence: see paragraph (2)(a)).

Fault of the enriched person. Although it is a more controversial case, the source of origin of the fault causing the disenrichment should as a matter of principle be regarded as irrelevant even where the destruction or other loss is caused by the fault of the enriched person. The purpose of this defence is to protect the enriched person who has acquired an enrichment and deals with it on the reasonable assumption that it is available to be disposed of, free of obligation to account for it to another or to compensate another in respect of it. In order that the defence can operate the person who disposes of the enrichment and later relies on this defence must have acted in that state of mind which implied a freedom to look upon the enrichment completely as that person's own. If the person, instead of making a gift of the property to another, decides to destroy it, that is that person's prerogative. The party enriched by receipt of Chippendale furniture who resolves to chop it into firewood and ignite it on a bonfire may well not appreciate the value of the enrichment, but the defence is not excluded by deliberate maltreatment. The reasonableness of the enriched person's behaviour in making use of what seems to be available to dispose of freely is not a requirement of the defence that he has disposed of the enrichment in all innocence of an obligation to transfer it to the claimant (though of course in given circumstances out-of-character or perverse behaviour by an otherwise reasonable actor may well suggest a calculating and far from innocent state of mind). Equally loss caused by careless acts or omissions which result in a maltreatment or damage to the asset obtained are also covered. This flows out of the same basic principle, underlying this defence, that those taking enrichments in good faith are entitled to deal freely with what they suppose to be theirs to keep, without risk of subsequent penalty. That freedom extends to the liberty to be careless with assets which are apparently 'one's own' (i.e. in respect of which there seems to be no personal obligation to return them or account for their value).

Illustration 7
D has transferred a ship to E. Although the agreement for the transfer is vitiated, (it is assumed) title to the ship does not revert to D when D avoids the underlying agreement. Due to E's failure to keep the ship in a seaworthy condition, it has already sunk by the time D demands its return. E sustains a disenrichment when the ship is lost and, if E had no reason to know that the transfer could be avoided, has a defence under this Article to D's claim for payment of its value, notwithstanding that E's want of care is responsible for the loss of the ship. Note, however, that if the transfer was part of a bargain, paragraph (2)(c) of this Article (invoking paragraph (3) of VII.–5:102 (Non-transferable enrichment)) will restrict the scope of the defence.

Disenrichment by improvement of the enrichment obtained. The Article does not make any special provision for the case where the enriched person improves the asset which the enriched person is liable to return. Special provision appears to be unnecessary as the issues which such improvements raise can be adequately addressed under the rules of this Book without more. The expenditure (decrease in assets) or labour (service or work done) which the

enriched person has expended in effecting the improvement is a disadvantage and is capable of constituting a disenrichment triggering the defence under this Article. Of necessity the disadvantage can only be incurred by reason of the enrichment having been obtained since the disadvantage is focused on improving the enrichment. Accordingly the proviso in paragraph (1) cannot apply. Critical will be whether the disenrichment will be disregarded or discounted in accordance with the rules in paragraph (2). Whether the improvement therefore gives rise to a defence so as to limit the enriched person's liability pro tanto, based on the value of the expenditure or labour invested in improving the enrichment, will normally turn on whether the improvement was effected in good faith, i.e. whether the enriched person appreciated or ought to have appreciated that there was a liability to return the asset. If the enriched person is in bad faith, there will be no defence. Moreover the scope in that case for a counterclaim under this Book will be restricted. While the enriched person will have enriched the disadvantaged person by effecting the improvement, the enrichment will be justified if the enriched person knew that there was an obligation to reverse the enrichment by returning the asset. Effecting improvements to the asset with that state of mind will amount to a free and unmistaken consent to the disadvantage (expenditure or labour) for the purposes of VII.–2:101 (Circumstances in which an enrichment is unjustified) paragraph (1)(b).

C. Disenrichments excluded from the defence

General. Paragraphs (1) and (2) provide for four categories of case where a disenrichment in good faith does not support the defence or where the impact of the disenrichment is restricted for the purposes of the defence. Paragraph (1) contains the requirement that there must be a nexus between the disenrichment and the enrichment. Paragraph (2)(a) discounts an enrichment in so far as there is a counter-enrichment serving as a substitute for the enrichment disposed of. Paragraph (2)(b) contains the general requirement that the disenrichment must have been in good faith, but in two exceptional cases even a disenrichment in bad faith gives rise to the defence under this Article. Finally, paragraph (2)(c) restricts the defence where the enriched person had obtained the enrichment under an agreement which genuinely attributed a price or value to the enrichment, so that the enriched person contemplated from the outset a liability to pay for it.

(a) Absence of nexus between disenrichment and enrichment

Disenrichment independent of enrichment. The mere fact that the enriched person has suffered some disadvantage is not sufficient to trigger the defence of change of position. The rationale for the defence (which fixes its scope) is the need to protect the enriched person who relies detrimentally on an apparent justification for the enrichment. The disadvantage must be of specific relevance to the obligation to reverse the enrichment and that in turn requires that the disadvantage would not have been sustained but for the existence of the enrichment. In other words, disenrichment must be causally connected to acquisition or retention of the enrichment. Effect is given to this requirement in the proviso to paragraph (1).

Basis of comparison. The disenrichment is not relevant if it is one which would have taken place even if the enrichment had not been obtained. The comparison is between the post-disenrichment status quo and a hypothetical projection of the status quo ante into the future on the assumption the enriched person was never enriched. If the disadvantage which the enriched person has subsequently suffered was one which, independent of the enrichment, the enriched person would (willingly or involuntarily) have sustained anyway, it is not causally related to the enrichment and not material. Surrendering the enrichment, despite the disadvantage, will not make the enriched person worse off than if never enriched at the outset.

Illustration 8
As a result of a mistaken bank transfer from D, the balance of E's current account is increased by € 200 to € 1,200. On the following day, E withdraws € 150 in order to purchase a birthday present for his granddaughter. D subsequently demands the re-payment of € 200. E has no defence under this Article if the additional inflow of € 200 did not influence his expenditure. This might be because (i) he was oblivious of the transfer, e.g. he never examined the state of his bank account before making the withdrawal, or (ii) he always spends about €150 on a birthday present for his granddaughter, regardless of the state of his finances, or (iii) he would have decided to spend the same sum on his granddaughter's present even if the balance of the account had been €1,000 at the time of withdrawal.

This fundamental test applies regardless of whether the disadvantage takes the form of disposition of the enrichment or any other form. For the purposes of exposition it is helpful to consider first disadvantages sustained involuntarily (theft, destruction) and then turn to those occurring voluntarily (disposition, expenditure).

Involuntary loss of the enrichment. The requirement of causal connection will usually be satisfied where the disadvantage takes the form of loss of the enrichment as such. Where the asset concerned is stolen or destroyed, the enriched person sustains a loss which could necessarily only be suffered by virtue of the fact that that asset had been obtained: the existence of the enrichment is self-evidently a prerequisite for its disappearance. The manner of involuntary loss (be it as a result of an act of nature or the wrongdoing of third parties) is not in itself important.

Unconnected hardship: involuntary loss of other patrimony. As a rule, the position is otherwise if it is some *other* asset of the enriched person (and not the asset which constitutes the enrichment as such) which is stolen or destroyed. A reduction in other wealth, subsequent to or contemporaneously with the enrichment, may be merely coincidental and not causally related to obtaining or retaining the enrichment. It is therefore generally immaterial that the enriched person happens to have lost something of equal value to the enrichment and the enriched person may well be unable to establish the defence under this Article. Such misfortune, unconnected as it is to the enrichment, is no more relevant to an obligation to surrender an unjustified enrichment than it is to an increasingly cash-strapped debtor's contractual obligation to pay or a financially hard-pressed wrongdoer's obligation to compensate for damage wrongfully caused.

Illustration 9
As a result of abusive and public hectoring by her husband, D is induced to pawn her jewels at E's pawnbrokers. As E was aware that D's husband was unfairly exploiting D, the contract of pledge between D and E is voidable: see II.–7:207 (Unfair exploitation) and II.–7:208 (Third persons) paragraph (2). D subsequently demands the return of her jewels. E asserts that he has a defence of change of position because, following a 'smash and grab' theft at his premises, valuables have been stolen and, while he retains D's jewels, he has lost others of equivalent value. E has no defence under this article. The theft suffered by E was unconnected to his possession of D's jewels.

Voluntary disenrichments not predicated by the enrichment. Not every case in which the

enriched person deliberately parts with the enrichment will satisfy the causative test. The nature of such a disposal and its motivation must be considered. If it can be established that, if not enriched, the enriched person would in any case have made some transfer of wealth having the same value, by resorting to other assets, the disenrichment must be disregarded. In such a case, the mere coincidental fact that the enriched person has chosen to deploy the particular assets constituting the enrichment rather than some other assets in order to make this "inevitable" expenditure ought not to affect the restitutionary obligation. The expenditure must be exceptional – one which would not have been made in the ordinary course of things.

Obligatory expenditure: pre-existing obligations. One category of case, therefore, where the disbursement does not establish the defence is if the enriched person was already obliged (contractually or otherwise) to pay and would therefore have had to pay, even if the enrichment was not available for that purpose. That is so even if, in the absence of the enrichment, the enriched person would not in fact have been in a position to perform the contractual obligation. The disadvantage must be regarded from a normative point of view as having been predicated by the debt rather than the presence of the enrichment obtained. In any case the decrease in liabilities which results from extinguishing the debt is itself an enrichment which offsets the disadvantage in spending the original enrichment: it is a case of a substitute which precludes the defence from operating (see paragraph (2)(a)).

Illustration 10
D is compelled by E's duress to hand over a cash sum of € 500 which E deposits into her current account. E's account immediately prior to the transfer was overdrawn and the transfer reduces E's overdraft. E cannot assert a defence under this Article on the basis that she is disenriched in that she has disposed of the cash by reducing her overdraft. She was contractually obliged to her bank to repay the overdrawn sum and had to discharge that obligation even if not enriched by D. In any case E retains the benefit of the original enrichment in the form of a decrease in liabilities.

Obligations incurred after the enrichment. The position is different for the discharge of debts sustained subsequent to the enrichment (as contrasted with pre-existing debts). The crucial issue is whether there was a relevant disadvantage suffered in incurring the debt in the first place. That in turn raises the issue of whether, in the absence of the enrichment, the enriched person would have incurred the obligation. The basic rule applies: if the enriched person would not have entered into the undertaking if not enriched, the debt incurred is a relevant disadvantage for the purposes of this Article. However, where a debt is incurred in return for some benefit, that benefit may trigger the operation of paragraph (2)(a), so that its effect in reducing liability under this Book will be at least partially muted.

Illustration 11
D, a finance company, overpays its customer E € 100 per month over a six month period before it realises its mistake. On seeing his apparent additional income, which E attributes to a pay rise, E takes out a second instalment mortgage with a bank in order to finance an extension to his home. Repayments of the mortgage commit E to paying € 120 per month. As E would not have taken out the mortgage if he had not supposed his salary had been raised by a comparable amount, E has sustained a disadvantage in incurring the debt which satisfies the requirement of causal relevance set out in this Article. That disadvantage is of course substantially offset by the principal of the loan (a substitute within paragraph (2)(a)), so that only the liability in

respect of interest under the loan contract is capable of reducing liability under this Book.

Exceptional relevance of pre-existing obligations. The situation is also different where the obligation is one whose content is enlarged by the acquisition of the enrichment, such as an obligation to dispose of all available funds (or all funds from a given source) which extends to the enrichment in question. A typical example would be a promise to transfer after-acquired property of a given category, the obligation only biting in effect as and when the promisor actually obtains property of that category. In this case the enriched person disposing of the enrichment in compliance with such an obligation (caught in the assumption that it is available to dispose of and that there is no prior restitutionary obligation) has apparently no choice but to make the disbursement. The causative prerequisite is satisfied.

Necessary or usual expenditure and exceptional or extraordinary disbursements. As a rule of thumb, a disposition which amounts to necessary expenditure – expenditure which the enriched person would have had to make in any case – must be disregarded. The enriched person, even if using the enrichment for that purpose, still has the benefit of it and indeed is still enriched because the use of the unjustified enrichment for some necessary reason will have simply saved the equivalent value in other resources. Hence payment of normal outgoings will not found the defence under this Article. Disbursements by individuals to pay for ordinary costs of living, such as money spent on rent, weekly grocery shopping, utility bills (fuel or heating, water, and the like) must be disregarded. Similar observations can be made in relation to businesses for their normal overheads. Moreover, this proposition extends to other usual outgoings, even where these are not essential to basic living or operation of the business, if they are not actually motivated by the fact that there is additional affluence due to the enrichment. This refers to recreational expenditure or outlay on entertainment (theatre, concerts, cinema, etc), meals in restaurants or weekend breaks, outings and holidays, and the like, which merely conform to the normal pattern of life of indulging in such activities "from time to time" as opposed to "only when extra money is available".

Independent liberality: gifts uninfluenced by the enrichment. The same applies correspondingly to donations. Gifts made in the ordinary course of events will tend not to give rise to the defence because these are disbursements which the enriched person would in fact make in any case. Gratuitous dispositions will only come within the scope of this Article to the extent that they are referable back to the enrichment. That will be the case where the donor has decided to make the gift or has increased the amount of the gift only because of the assumption that the unjustified enrichment would not have to be reversed and formed part of the donor's disposable wealth.

Other exceptional disbursements. In any case where the enriched person has spent money in a way which is out of the normal pattern, it must be determined in each case whether the enriched person, in the light of this newly found wealth, has inflated the person's customary style of gracious living. There must be a reliant adaptation to the apparent entitlement to the enrichment in order for the defence to apply. When the new wealth is the reason for acquiring durable luxury goods, it must be recognised that the goods acquired may exclude or limit the effect of the defence by virtue of paragraph (2)(a). It is extraordinary "consumed" expenditure which is of most relevance to the defence.

Disenrichments prior to enrichment (anticipatory reliance). The examples hitherto given

have assumed a change of position after receipt of the enrichment in reliance on an apparently justified entitlement to the enrichment. An issue arises where a person makes disbursements in anticipation of an enrichment to come. If the subsequently enriched person knew or ought to have known that the transaction was for any reason void or vitiated, that person will know or should know that any enrichment conferred pursuant to it will be unjustified. In that case the anticipatory disposition in reliance on an 'entitlement' to the enrichment will be at that person's own risk: paragraph (2)(b). The question is whether a defence can be made out if the reliance was in good faith, untainted by actual or constructive knowledge of the legal transaction's deficiency.

No general exclusion of anticipatory reliance. In setting out a requirement of causal connection to the enrichment neither the wording nor the principles of this defence makes it an absolute requirement that enrichment precede disadvantage. In certain circumstances the conditions of the defence may be fulfilled by a disenrichment in anticipation of an enrichment which the person at that time supposed would be obtained and reasonably supposed would be a justified enrichment. A distinction needs to be drawn between different scenarios of anticipatory reliance. There is a difference between reliance on a current entitlement to (a past or future) benefit and a further reliance on an act being done in the future (e.g. a voluntary payment being made) which would in any case be necessary to establish an entitlement (a prediction of a future event). Where the latter is at stake there is more than a change of position in the sense of anticipatory reliance on an entitlement; there is a gamble. There is no need for the law of unjustified enrichment to discount the enriched person's preparedness to take risks. An enriched person who is a risk taker does not merit the protection of the defence; liability is merely the realisation of the risk run.

Disenrichment in expectation of a voluntary enrichment. A first class of case of anticipatory reliance is where, for example, in advance of an anticipated gift funds are spent on some exceptional luxury item (such as an additional holiday). As with disbursements in anticipation of an inheritance, this is an expenditure of future capital based on a mere expectancy. If the prospective donor is not obliged to confer the enrichment, the prospective donee's outlay of assets is a disadvantage sustained in the knowledge that there is no legal entitlement to the expected enrichment and no guarantee that it will be received. If the prospective donor is not obliged to make the gift, the anticipated accretion to wealth is necessarily precarious, depending on a transformation of the goodwill of the prospective donor towards the chosen donee from benevolent intention to execution. The would-be donee must accept the risk involved in spending money in 'reliance' on the future gift. The subsequently enriched person has therefore not trusted in the soundness of the enrichment later received (that is to say, the underlying validity of the transaction which supports and justifies it) but has only gambled on a hope. No reliance could have been placed on an actual entitlement because no such entitlement had (apparently) been conferred. The position is comparable to that of a punter betting on the favourite and spending the expected winnings before the race is run.

> *Illustration 12*
> On several occasions during his lifetime, D indicated to E, his nephew, that on his (D's) death he would be leaving E his house and landed estate. Assuming that D, who is in the final stages of a terminal illness, would not change his mind and knowing the considerable value of the property that would then come into his hands, E enters into a contract with a firm of builders, B & Co, for the construction of a swimming pool on the estate. Shortly afterwards, D dies. A will is found, leaving D's land to E, and in

accordance with its terms E is registered owner of the land. In fact, it is subsequently identified that the will is void for failure to comply with all of the applicable formality requirements and under the rules of intestate succession it is D's wife, W, who inherits the property. W claims a transfer of the land from E. E asserts that he has changed his position in that he has incurred a contractual liability to B & Co, is not in a position to perform, and consequently must pay damages equal to their positive (profit) interest in performance of the obligations under the contract (see III.–3:701 (Right to damages) to III.–3:702 (General measure of damages)). E has no defence under this Article. Even though E would not have contracted with B & Co if he had not supposed he would become entitled to D's land, E's disadvantage was incurred before he was enriched and without any obligation on the part of D to confer it. Accordingly E did not rely on any entitlement to the enrichment and his disadvantage is not causally connected to the enrichment in the sense of paragraph (1).

Disenrichment in expectation of performance under an apparent obligation. The situation will be different, however, where the disadvantaged person has given an assurance of enrichment which might reasonably be understood as constituting a unilateral contractual undertaking to enrich (though in fact that undertaking is for some reason void or voidable). In contrast to the preceding scenario, therefore, there is here a supposition of entitlement to the enrichment (a legal right to obtain a justified enrichment). Moreover, at the time of disenrichment the promisee may legitimately consider that there is an existing enrichment – the holding of a legally binding enforceable promise of enrichment.

Disbursements in context of bargain but in own interest. A final and difficult situation is where the enriched person has incurred costs because of the bargain with the claimant, but they are not directed towards fulfilling the supposed contractual obligation to the claimant. Instead they are directed towards the protection of the enriched person's own commercial interests. (If, by contrast, the disadvantage consists of a performance of obligations under the agreement, that will give rise to a counter-claim in enrichment law and does not need to be factored into the defence of change of position.) Mistakenly supposing the agreement with the claimant to be perfectly valid, the enriched person, for example, takes out insurance or makes other hedging arrangements to protect against non-performance of the 'obligation', or makes arrangements with a third party in respect of receipt of the enrichment which is apparently due from the claimant under the terms of their bargain. A distinction must be drawn between disbursements made in order to guard against the risk that the other party or the enriched person will fail to perform under the contract on the one hand and on the other hand disbursements made purely in view of the benefit to be received (such as property insurance or advance payments of storage charges, so far as irrecoverable). The former are made in view of the contract and not the enrichment as such. Only the latter come within the scope of the defence.

(b) Substitutes

Counter-enrichment. If the enriched person has disposed of the enrichment in order to acquire some other asset, or has obtained some other benefit in return for the disenrichment, the defence is likewise excluded; see paragraph (2)(a). The enriched person who has obtained something in exchange for the disenrichment is not worse off as a result of the disenrichment and therefore does not need the benefit of the defence. In some circumstances the disadvantaged person may claim the proceeds of disposal: see paragraph (4)(b) of VII.–5:101 (Transferable enrichment).

(c) Disenrichments which are not in good faith

Disenrichment in bad faith. As a rule a disenrichment is material only if sustained by the enriched person in good faith (para. (2)(b)). The disenrichment will not have been in good faith if the enriched person either knew or should have known that the enrichment was unjustified: see paragraph (5) of VII.–5:101 (Transferable enrichment).

Actual or constructive awareness of absence of justification. Save for the exceptional case addressed in the proviso, the element of good faith is thus essential to the defence of disenrichment. It is the enriched person's excusable ignorance of the obligation to restore the enrichment to the claimant which renders it unjust to overlook the fact that the enriched person would be worse off (compared with the position before "innocent" receipt or acquisition of the enrichment) if made to restore the enrichment or to pay its full value although no longer having it or its equivalent value. The material question therefore is whether, at the time that the disenrichment takes place, the enriched person should have appreciated that there would be a liability to surrender the enrichment. Expressed positively, the enriched person is eligible to make out a defence of change of position if the enriched person reasonably supposed that the enrichment received was owned and available to be to dispose of – that it was obtained with legal justification.

Constructive knowledge. The requirement that this supposition must be reasonable dictates that constructive knowledge of an obligation to surrender the enrichment precludes the defence of disenrichment in good faith as much as an actual knowledge of such an obligation.

> *Illustration 13*
> E, having fraudulently deceived D into letting him appropriate her diamond ring, makes a gift of the ring to his betrothed X. E knew or ought to have known at the time of acquisition by deceit (and thus also at the time of disenrichment) that the enrichment was unjustified. The requirement of good faith as a precondition of the defence of change of position prevents E from immunising himself from an enrichment claim by D by making a voluntary donation of his choice in this way. E should appreciate that his duty is to return the ring to his victim; his perhaps irreversible breach of obligation in presenting it to a third party can hardly constitute an exculpation. As D would not have made a gift of the ring to X, the exception recognised by paragraph (2)(b) does not apply and the defence is inapplicable. E is liable to pay the value of the ring.

False supposition of justification. The good faith aspect of the defence of disenrichment thus requires in substance that the enriched person (wrongly but reasonably) supposes there is some legal justification for the enrichment. The full spectrum of possible suppositions is implied by the terms of Chapter 2 which sets out when an enrichment is or is not with legal justification. Typically the enriched person must suppose either (i) that there was a right to the enrichment as against the disadvantaged person (e.g. under a valid contract) or alternatively (ii) that the disadvantaged person consented to the disadvantage freely and without error.

> *Illustration 14*
> A, an elderly and quite naive man, believes the story which is told to him by B, the employee of a bank C, that for reasons of checking internal scrutiny in the bank, it is necessary that a sum of € 2,000 will be credited to A's account which A is to withdraw immediately and hand back to B. In this manner B makes use of the inexperienced A

for the purposes of B's criminal scheme. A is unjustifiably enriched in relation to C because B was not authorised to make the transfer. However, it is conceivable that A may be able to establish that in the circumstances A acted throughout in good faith and that consequently the onward transfer of the money to B constituted a disenrichment within the scope of this defence.

Exception: where the disadvantaged person would have been disenriched too. While good faith at the time of disenrichment is generally required, there are cases where the absence of an innocent state of mind should not deprive the enriched person of the defence of change of position. Exceptionally the defence is still available, even in a case where the enriched person was aware of an obligation to reverse the enrichment, if the disadvantaged person would also have been disenriched, even if the enrichment had been reversed. This is set out in the first proviso to paragraph (2)(b). The concluding words of that paragraph envisage the case where the disenrichment was unavoidable in the sense that even if the enriched person had behaved as would normally be required – namely, reversed the enrichment and transferred the asset back to the claimant – the same disadvantage would have been sustained by the claimant. In that case the disadvantage is causally independent of the failure to reverse the enrichment. The enriched person should not be deprived of the right to resist the claim for reversal of the enrichment if the disadvantage sustained was (in this technical sense) inescapable. However, this sense of 'inevitability' of the disadvantage is not to be confused with that which is relevant in paragraph (1). For the purposes of paragraph (1), the enriched person must show that the disadvantage was dependent on the existence of the enrichment: it was only sustained by the enriched person because of the enrichment. For the purposes of paragraph (2)(b), by contrast, the enriched person must show that the disadvantage was independent of the location of the enrichment: the disadvantage would have been sustained, whoever had the enrichment.

Exception where the enriched person does not bear the risk of loss. A second exception where good faith at the time of disenrichment is not required, set out in the second proviso to paragraph (2)(b), concerns the case where the disenrichment takes the form of loss of the enrichment due to the realisation of a risk for which the enriched person is not to be regarded as responsible. This exception protects an enriched person who has obtained the enrichment in good faith, but becomes aware that the enrichment is unjustified (and thus ceases to be in good faith) before the loss occurs. An enriched person who learns of the unjustified nature of the enrichment has a reasonable time in which to perform the obligation to reverse the enrichment: see III.–2:102 (Time of performance) paragraph (1). During that period, the enriched person is not to be regarded as an insurer of the asset to be returned. If the asset is lost without fault on the part of the enriched person, the enriched person may invoke the defence of disenrichment and is not liable to pay its value.

Illustration 15

E orders a computer hard drive from supplier D. After completing the transaction, D by mistake sends a second hard drive to E. On opening the package, E realises that D has made a mistake, but does not send it back immediately as she is due to leave for a short trip. On returning home, E discovers that her house has been broken into and the hard drive has been stolen. E has a defence under this article. E received the enrichment in good faith. E was not obliged to return the hard drive immediately; performance of the obligation to reverse the enrichment was not yet due. The risk of loss from theft was not a risk for which E was responsible, assuming that E had taken ordinary precautions in protecting her premises during her absence.

(d) Agreement genuinely fixing the price or value of the enrichment

Defence restricted in case of genuine agreement. The general rule that a disenrichment in good faith triggers the defence is subject to a further limitation. If the enriched party accepts the enrichment under an agreement and that agreement genuinely fixes a price or value for the enrichment, that amount represents a liability to which the defence will not apply: see paragraph (2)(c), pointing to paragraph (3) of VII.–5:102 (Non-transferable enrichment).

Rationale. The reason for this ceiling on the defence is that at the time the enrichment was obtained the enriched person envisaged in any case that such a sum would be due to the other party. The enriched person took on the enrichment knowing that it would have to be paid for at the agreed price. To that extent the enriched person does not merit the benefit of a defence of disenrichment. The enriched person is aware at the time of acquisition that to this extent the risk of any disposal of the enrichment must be accepted; the assumption is that there is a liability to pay the agreed amount at the time of the disposal. An outcome of this nature is achieved in some European legal systems by means of the so-called *Saldotheorie*.

D. Extent of the defence

General pro tanto reduction. Under paragraph (1), the liability of the enriched person is reduced to the extent of the disenrichment. The protection which the defence provides is the minimum reduction in liability which is necessary to prevent the enriched person from being worse off as a result of the change of position. The enriched person has a defence only to the extent of the disadvantage sustained.

Rationale. This principle follows from the rationale whereby the enriched person merits protection only to prevent the enriched person being worse off in comparison with the status quo before enrichment. If, after sustaining the disadvantage, the enriched person remains "better off" then there is still scope to that extent for the enriched person to disgorge the enrichment. Hence, if the enriched person has disposed of only a fraction of the enrichment, there remains a residual liability.

Illustration 16

E, living at 43, Midget Gardens, receives a Black Forest gateau and a bottle of champagne brought to her door by the D delivery company. As there is no accompanying card, she assumes her husband is up to his familiar romantic tricks and settles down, together with her seven teenage daughters, to devour the cake. In fact D's dyslexic driver made a mistake and the gifts were in fact destined for F who resides at 34, Magnet Drive. At the end of his shift, the driver realises his mistake and shamefacedly returns to E. The cake has been consumed in good faith and E is not liable to account for it. However, since the champagne bottle remains unopened, this must be handed over.

E. Rights against onward recipient: paragraph (3)

General. This provision may be regarded as unnecessary, but it serves as a reminder that where a person gratuitously and in good faith disposes of an enrichment taking the form of a transferable asset and so has the benefit of this defence, that in itself may provide the basis for a claim by the disadvantaged person against the (new) recipient. This is on the basis that the (originally) enriched person was obliged under this Book to reverse the enrichment, but the

making of the onward transfer extinguishes the liability because of this defence, so that the enrichment of the new recipient is attributable to the disadvantaged person's loss of an enrichment claim against the originally enriched person: see paragraph (2) of VII.–4:103 (Debtor's performance to a non-creditor; onward transfer in good faith) and Comment C to that Article.

NOTES

1. Ob das FRENCH law den Verteidigungsgrund des Wegfalls der Bereicherung akzeptiert, ist zweifelhaft. Das liegt daran, dass es nach herrschender Auffassung bereits für die Frage, ob eine Bereicherung vorliegt, auf eine bilanzielle oder "Netto"-Betrachtung ankommt (see notes under VII.–3:102). Es fehlt also im Sinne der *actio de in rem verso* bereits an einer Bereicherung, wenn das Erlangte durch einen Verlust aufgezehrt wurde (Aubry and Rau [*Esmein and Ponsard*], Droit civil français VI[7], § 442*ter*, p. 476). Es wird freilich für selbstverständlich gehalten, dass erlangte Gattungssachen stets in gleicher Art, Güte und Menge zurückzuerstatten sind (JClCiv [*Pin*], arts. 1370-1381, Enrichissement sans cause, fasc. 40 no. 17) und dass der Bereicherte dem Verarmten gegenüber frei wird, wenn eine spezifische Sache zufällig untergeht (*Pin* loc.cit. no. 35). Auf die Haftung des bösgläubigen Bereicherten wird dagegen CC art. 1378 (*répétition de l'indu*) analog angewandt; er bleibt auf den ursprünglichen Betrag seiner Bereicherung haftbar (*Terré/Simler/Lequette*, Les obligations[9], no. 1074-1 p. 1030; *Pin* loc.cit.). Der Ausgangspunkt in BELGIUM ist derselbe (*de Page*, Traité élémentaire de droit civil belge III(2)[3], no. 37 p. 47), allerdings scheint man der analogen Anwendung der CC arts. 1378 und 1379 auf das Recht der enrichissement sans cause kritisch gegenüber zu stehen (*de Page* loc.cit. no. 50 p. 63). Für das Recht der Zahlung des Nichtgeschuldeten sieht CC art. 1302 das Erlöschen des Anspruches vor, falls eine bestimmte Sache ohne Verschulden des gutgläubigen Schuldners bei ihm untergeht oder falls sie auch bei rechtzeitiger Rückgabe an den Gläubiger untergegangen wäre.
2. Wie das französische so verfügt auch das SPANISH Zivilgesetzbuch nicht über eine allgemeine Regelung zum Wegfall der Bereicherung (see, from a comparative point of view, *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 221; *Carrasco Perera*, ADC 1988, 5, 109). Die Regeln, die über das Vorhandensein einer Bereicherung entscheiden (see notes to VII.–3:102), legen auch hier zugleich den Haftungsumfang fest. There are, however, exceptions in which Spanish law recognises a kind of change of position defence based on disenrichment. Das wichtigste Beispiel findet sich mit CC art. 1899 im Recht der *condictio indebiti.* Danach ist ein gutgläubiger *accipiens*, der das anspruchsbegründende Dokument vernichtete, den Anspruch gegen seinen wahren Schuldner verjähren ließ oder Sicherheiten für seinen Anspruch aufgab, von der Rückgewährpflicht befreit. Zahlt also z.B. D irrtümlich an E eine Summe Geldes und nimmt E gutgläubig an, damit werde eine Schuld des X beglichen, so dass E seine Forderung gegen X nicht weiter verfolgt und sie verjährt oder infolge der Freigabe einer Sicherheit nicht mehr realisiert werden kann, dann verliert D seinen *condictio indebiti* Anspruch gegen E (see TS 28 December 1999, RAJ 1999 (5) no. 9147 p. 14388). Von solchen Spezialnormen abgesehen, ist der Wegfall der Bereicherung vom spanischen Recht aber nicht als Verteidigungsgrund ausgestaltet; die Entwicklung vergleichbarer Ergebnisse muss vielmehr auf diejenigen Vorschriften gestützt werden, welche die Bereicherung ausnahmsweise auf der Grundlage eines bilanziellen oder 'net enrichment approach' festgestellt sehen wollen (see notes under VII.–3:102). Zu ihnen

zählt CC art. 1304 im Recht der Rückabwicklung nichtiger Verträge, der die Haftung geschäftsunfähiger Personen auf die noch vorhandene Bereicherung begrenzt. Auch im Rahmen der *condictio de regreso* (reimbursement based on payment of another's debt) (CC art. 1158(3)) und der *condictio por impensas* (Verwendungskondiktion) (CC arts. 453, 454, 360 ff) wird allgemein auf einen bilanziellen Bereicherungsbegriff abgestellt (*Carrasco Perera* loc.cit. 100). CC art. 458 stellt die allgemeine Regel auf, dass derjenige, der den Besitz erhält, nicht verpflichtet ist, für Verbesserungen zu zahlen, die beim Erwerb der Sache nicht mehr vorhanden sind. Für das Recht der *condictio indebiti* bestimmt CC art. 1897, dass ein gutgläubiger accipiens, der eine spezifische Sache erhalten hat, die zwischenzeitlich beschädigt oder zerstört wurde oder verloren ging, nur in Höhe seiner Bereicherung verpflichtet ist. Auch hier dürfte der Gedanke des Wegfalls der Bereicherung seinen Ausdruck in einer bilanziellen Bestimmung des Bereicherungsbegriffs finden (*Díez-Picazo*, Fundamentos II[4], 520; *Carrasco Perera* loc.cit. 99 and 102).

3. Auch in ITALY konzentriert sich das Gesetz auf Fälle, in welchen eine rechtsgrundlos erhaltene Sache beim *accipiens* untergeht, sich verschlechtert oder von ihm weiterverkauft wird. Seine Haftung folgt je nachdem, ob er gut- oder bösgläubig empfangen hat, unterschiedlichen Regeln. Ein expliziter Verteidigungsgrund des Wegfalls der Bereicherung existiert zwar nicht. Allerdings wird selbst der bösgläubige *accipiens* befreit, wenn er beweist, dass der Leistungsgegenstand auch beim *solvens* untergegangen wäre (CC art. 1221(1)), und der gutgläubige *accipiens* ist erst gar nicht dafür verantwortlich, dass er die Unmöglichkeit der Rückgabe verursachte: er haftet stets nur begrenzt auf seine Bereicherung (CC art. 2037(3)). Sie wiederum ist nicht höher als der Wert der empfangenen Sache (Cass. 12 March 1973, Rep.Giur.it. 1973, voce Indebito nos. 2-4, no. 7). Die Geldabwertung muss berücksichtigt werden (Cass. 19 January 1977, no. 258, Rep.Giur.it. 1977, voce Indebito (pagamento dell') no. 5). Die Haftung des ursprünglich gutgläubigen *accipiens* bleibt erhalten, wenn er, nachdem er bösgläubig geworden ist, die Sache an einen Dritten veräußert; der *solvens* kann, falls der Dritte noch nicht gezahlt hat, auch direkt gegen ihn vorgehen (CC art. 2038; vgl. auch Cass. 17 April 1993, no. 4553, Foro it. 1994, I, 1752), es sei denn, der *accipiens* erklärt sich bereit, den Wert der Sache zu zahlen (*Breccia*, Il pagamento dell'indebito, 799). Im Schrifttum wird zwar empfohlen, bei der Rückabwicklung eines gegenseitigen Vertrages, unter dem beide Leistungen bereits ausgetauscht worden sind, *de lege ferenda* der Saldotheorie zu folgen, sieht dafür *de lege lata* im Gesetz jedoch keine ausreichende Grundlage (*Breccia*, Riv.Dir.Civ. 1974, I, 190-191; *Trimarchi*, L'arricchimento senza causa, 139-140). Das AUSTRIAN Zivilrecht kennt gleichfalls keine generelle Regelung, mit deren Hilfe sich der Bereicherte gegen die Kondiktion mit dem Argument verteidigen könnte, dass die Bereicherung nachträglich weggefallen sei. Sobald sie einmal im Vermögen des Bereicherten manifest geworden ist, befreit der nachträgliche Wegfall der Bereicherung nicht mehr (ständige Rechtsprechung seit OGH 6 April 1976, JBl 1977, 36; bestätigt u.a. durch OGH 4 November 1981, SZ 54/156 und OGH 18 June 1985, SZ 58/105). Der Bereicherungsanspruch gründet sich allein darauf, dass der Bereicherte eine Sache ohne rechtlichen Grund 'empfangen' hat (OGH 20 February 1975, 6 Ob 242/74). "Wie ganz allgemein der Anspruch auf den Ersatz des Wertes bestehen bleibt, wenn der zunächst eingetretene Nutzen später wegfällt, ist auch jener Bereicherte ersatzpflichtig, der die Sache veräußert oder verschenkt hat" (OGH 12 February 2002, SZ 2002/21). Es ist auch "unerheblich", ob der Bereicherte von dem Bereicherungsgegenstand "einen nützlichen oder verlustbringenden Gebrauch gemacht hat", und ob von diesem Gebrauch "noch ein Nutzen vorhanden ist oder nicht" (OGH 4 November 1981, SZ 54/164). Auch der nachträgliche Wegfall des Nutzens lässt die bereits eingetretene

Bereicherung m.a.W. nicht entfallen (OGH 4 November 1981, SZ 54/156; OGH 23 November 2005, SZ 2005/168).

4. PORTUGAL akzeptiert den Wegfall der Bereicherung (*diminuição ou desaparecimento do enriquecimento*) als Verteidigungsgrund zugunsten des gutgläubigen Bereicherten. Seine Haftung geht nicht über das Maß seiner aktuellen Bereicherung hinaus (CC arts. 479(2), 480). Dieser Grundsatz hat seine Wurzeln in German CC § 818(3) (*Schlechtriem*, Restitution und Bereicherungsausgleich in Europa I, no. 292 p. 252) und verwirklicht sich in dem Prinzip der Haftung auf die effektive Nettobereicherung (*enriquecimento patrimonial*). Entscheidend ist die Differenz zwischen der aktuellen Situation des Begünstigten und der hypothetischen, in der er sich ohne den Bereicherungsvorgang befunden hätte (*Antunes Varela*, Obrigações em geral I[10], 513; STJ 15 November 1995, BolMinJus 451 [1995] 387; vgl. auch CC art. 566(2) und dazu STJ 25 September 2008, Processo 08P2860). Die Rückabwicklung unwirksamer Verträge unterliegt aber dem Ungültigkeitsregime, nicht dem subsidiären Bereicherungsrecht, und das Recht der Rückabwicklung ungültiger Verträge kennt den Einwand des Wegfalls der Bereicherung nicht (CC art. 289(1); see *Menezes Leitão*, Enriquecimento sem causa[2], 448). Es ist streng auf die Rückgabe des Erlangten ausgerichtet (*Menezes Leitão* loc. cit. 447; *Gomes*, Conceito de enriquecimento, 110). Das ist der wichtigste Unterschied zwischen den beiden Regelungskomplexen (*Pires de Lima and Antunes Varela*, Código Civil Anotado I[4], note 1 under art. 289, p. 265; kritisch *Gomes* loc.cit. 609). Der bösgläubige Bereicherungsschuldner haftet dagegen im Ergebnis nicht anders als die Parteien eines unwirksamen Vertrages (CC art. 479(1)). Für die Rückabwicklung eines synallagmatischen Vertrages wird die *Saldotheorie* für überflüssig angesehen, weil der Einwand des Wegfalls der Bereicherung von vornherein abgeschnitten ist; bei Untergang der Sache bleibt Wertersatz geschuldet (CC art. 289(1); see *Menezes Leitão* loc. cit. 451, fn. 1335). Nur im Falle der Nichtigkeit eines Kaufvertrages infolge des Umstandes, dass der Verkäufer fremde Güter verkauft hat, kann der gutgläubige Käufer Rückerstattung des Kaufpreises verlangen, ohne bei Verlust der Kaufsache selber zu einer Leistung an den Verkäufer verpflichtet zu sein (CC art. 894), nur hier ist die Haftung einer Vertragspartei auf ihre noch vorhandene Bereicherung begrenzt (*Menezes Leitão* loc.cit. 451, fn. 1336). Dem Ungültigkeitsregime unterliegt selbst die Rückabwicklung von Verträgen mit Minderjährigen; auch ihnen steht deshalb der Einwand des Wegfalls der Bereicherung nicht zur Verfügung (*Schlechtriem* loc.cit. no. 300, p. 560). Die Rechtsprechung zur Höhe der geschuldeten Bereicherung ist freilich schwierig zu analysieren, weil die Berechnung in der Regel auf das Vollstreckungsverfahren (CCP art. 661(2)) verschoben wird (z.B. STJ 6 December 2006, CJ [ST] XIV [2006-3] 154; STJ 24 February 2005, Processo 04B4601).

5. GERMAN CC § 818(3) anerkennt den Verteidigungsgrund des Wegfalls der Bereicherung. Die Vorschrift schließt (sofern nicht der Bereicherungsschuldner eigene Aufwendungen erspart hat und deshalb in Wahrheit gar nicht entreichert ist) sowohl die Pflicht zur Herausgabe des Erlangten als auch die Wertersatzpflicht aus. Geschützt ist natürlich nur der gutgläubige Bereicherungsschuldner (CC §§ 818(4), § 819). Ist ein nichtiger gegenseitiger Vertrag (insbesondere ein Kaufvertrag) bereits von beiden Seiten erfüllt worden, die Kaufsache aber später beim Käufer ersatzlos weggefallen, so wird es als unangemessen empfunden, dem Käufer zwar den Anspruch auf den Kaufpreis zu geben, dem Verkäufer aber jeden Ausgleich zu verwehren (CC § 818(3)). Dem tragen Rechtsprechung und Lehre mit der sogen. Saldotheorie Rechnung, wonach auch der Bereicherungsschuldner (im Beispiel: der Verkäufer) eine Entreicherung reklamieren kann, nämlich den Wert des an den Käufer gelieferten Wagens, mit der Folge, dass der Verkäufer nur den “Saldo”, d.h. seine

Nettobereicherung schuldet. Dies gilt nur dann nicht, wenn es sich um einen nicht schutzwürdigen Schuldner handelt (arglistige Täuschung), der Gläubiger geschäftsunfähig und deshalb schutzwürdiger ist als der Schuldner, oder wenn der Untergang der Sache auf einem vom Gläubiger zu vertretenden Sachmangel beruht. In diesen Fällen wird nicht "saldiert", sondern es wird jede Kondiktion je für sich geprüft (sogen. *Zweikondiktionentheorie*, see Palandt [-*Sprau*], BGB[67], § 818, no. 46).

6. HUNGARIAN CC § 361(2) stellt die Grundregel auf, dass eine Person die Bereicherung nicht zurückerstatten muss, wenn sie sie vor der Rückforderung verloren hat. Ein solcher Wegfall der Bereicherung ist allerdings solange zu verneinen, wie sie noch in irgendeiner Form im Vermögen des Bereicherten vorhanden ist. Es fehlt deshalb an einem Bereicherungswegfall, wenn der Bereicherte das Erlangte verkauft oder seinetwegen Schadenersatz erhalten hat. Eine im eigenen Interesse verbrauchte Bereicherung ist nicht weggefallen (BH 1993/500 [für Lebensunterhalt verbrauchtes Geld]; BH 1987/312 [für dauerhafte Verbrauchsgüter und zum Teil für teure Reisen ausgegebenes Geld]). Ein Wegfall der Bereicherung ist deshalb regelmäßig nur zu bejahen, wenn der Bereicherte das Empfangene verschenkt hat oder wenn es gestohlen wurde oder sonst ersatzlos untergegangen ist (Petrik [-*Bíró*], Polgári jog II[2], 654/1; Gellért [-*Benedek*], A Polgári Törvénykönyv Magyarázata[6], 1393-1395). Auf den Verteidigungsgrund des Wegfalls der Bereicherung kann sich im Übrigen nur berufen, wer im Zeitpunkt des Wegfalls gutgläubig war und entweder nicht mit einer Rückgabepflicht rechnen musste oder keine Verantwortung für den Untergang der Sache trägt (z.B. BH 2003/66 [gutgläubiger Erwerber von Aktien veräußert sie zu einem Zeitpunkt, in dem er bereits mit der Rückgabe rechnen musste]; vgl. auch BH 1992/541). Zuwendungen, die zum Lebensunterhalt gewährt und genutzt wurden, sind unter CC § 361(2) besonders privilegiert. Zu bedenken ist, dass die Rückabwicklung ungültiger Verträge nicht dem Bereicherungs-, sondern dem Vertragsrecht unterliegt und dass dieses den Verteidigungsgrund des Wegfalls der Bereicherung nicht kennt.

7. Dem BULGARIAN Bereicherungsrecht ist der Verteidigungsgrund der Entreicherung unbekannt; auch hier fließt sein sachlicher Gehalt bereits in die Frage ein, ob der Beklagte tatsächlich bzw. "aktuell" bereichert ist (see *Goleminov*, Neosnovatelno obogatyavane, 185 mit eingehender rechtsvergleichender Analyse). Ansätze der Lehre vom Wegfall der Bereicherung finden sich in LOA art. 58 (betr. die Rückgewähr einer Bereicherung von einer geschäftsunfähigen Person) und in LOA art. 57(2) (Weiterveräußerung durch gutgläubigen *accipiens*). Hat z. B. eine nicht voll geschäftsfähige Person den Kaufgegenstand an einen Dritten weiterveräußert, soll der Bereicherungsgläubiger auf eine Kondiktion gegen den Dritten beschränkt sein (*Vassilev*, Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 593). Unter SLOVENIAN law kann sich der *accipiens* zu seiner Verteidigung darauf berufen, über die Sache gutgläubig verfügt zu haben; er haftet in diesem Fall nur bis zu der Grenze dessen, was er von dem Dritten erhalten hat; hat *accipiens* die Sache in gutem Glauben verschenkt, ist er von der Haftung frei (*Cigoj*, Teorija obligacij, 260).

8. Ein gutgläubiger *accipiens*, der die empfangene Sache weiterveräußert, kann seine dem *solvens* gegenüber bestehende Herausgabepflicht zwar nicht mehr erfüllen, haftet dem *solvens* gegenüber aber gleichwohl nicht aus Pflichtverletzung, weil der *accipiens* unter DUTCH CC art. 6:74(1) dartun kann, dass ihm die Pflichtverletzung nicht zugerechnet werden kann. Denn solange er nicht mit der Verpflichtung rechnen musste, das Gut zurückzugeben, musste er für es auch nicht wie ein sorgfältiger Schuldner Sorge tragen (CC art. 6:204(1)). Allerdings wird er im Normalfall mit dem empfangenen Kaufpreis bereichert sein, den er als Schadenersatz unter den Vorschriften des Bereicherungsrechts herausgeben muss (CC art. 6:78(1)), d.h. beschränkt auf den objektiven Marktwert der empfangenen Sache. Eine

Gewinnabschöpfung findet im Bereicherungsrecht nicht statt (CC art. 6:104, see Asser [-*Hartkamp*], Verbintenissenrecht I[12], no. 447, p. 397; *Scheltema*, Onverschuldigde betaling, 170). Auch für das Bereicherungsrecht bestimmt im Übrigen CC art. 6:212(2), dass eine Wertminderung des Erlangten, welche dem Bereicherten nicht zugerechnet werden kann, außer Betracht bleibt. CC art. 6:212(3) fügt hinzu, dass eine Wertminderung dem Bereicherungsschuldner auch dann nicht zugerechnet werden kann, wenn sie zu einer Zeit geschieht, zu welcher der Bereicherte nicht vernünftigerweise mit einer Schadenersatzpflicht rechnen musste. Anspruchsmindernd zu berücksichtigen sind außerdem solche Ausgaben des gutgläubigen (Asser [-*Hartkamp*] Verbintenissenrecht III[12], no. 366 p. 385; *van Maanen*, Ongerechtvaardigde verrijking, 47; *Vriesendorp*, Verbintenissen uit de wet en schadevergoeding[2], no. 321 p. 302-304) Schuldners, die er ohne die Bereicherung nicht gehabt hätte. CC art. 6:212(3) ist ein Pendant zu CC art. 6:204 (see above) und zugleich eine Konkretisierung von CC art. 6:75 (Begriff der Zurechnung).

9. ESTONIAN LOA §§ 1033, 1035 and 1038 enthalten eine eingehende Regelung der Folgen des Wegfalls der Bereicherung. Der Schuldner ist frei, wenn der Bereicherungsgegenstand zerstört oder verbraucht wurde oder aus irgendeinem anderen Grunde nicht mehr im Vermögen des Schuldners vorhanden ist und ihn fortdauernd bereichert; es darf sich also auch nicht um eine fortwirkende Bereicherung in der Form ersparter Aufwendungen handeln (Supreme Court 17 June 2004, administrative matter no. 3-3-1-17-04). Je nach den Umständen des Einzelfalles kann der Schuldner selbst dann Aufwendungen erspart haben, wenn er die Sache verschenkt hat und wenn feststeht, dass er ohne sie etwas anderes verschenkt haben würde (*Tampuu*, Lepinguväliste võlasuhete õigus, 98-99). Im Falle der Nichtigkeit eines gegenseitigen Vertrages kann sich der Bereicherte nach beiderseitigem Leistungsaustausch nur dann auf den Wegfall seiner eigenen Bereicherung berufen, wenn er in der Geschäftsfähigkeit eingeschränkt war oder von der anderen Seite durch Täuschung oder Zwang zum Abschluss des Vertrages verleitete worden ist. Auf einen Wegfall der Bereicherung kann sich ferner nicht berufen, wer im Zeitpunkt ihres Wegfalls bereits von der Rückgabepflicht wusste oder mit ihr rechnen musste. Im Falle der Eingriffsbereicherung kann der Verteidigungsgrund des Bereicherungswegfalls ebenfalls nur demjenigen zugute kommen, der weder wusste noch wissen musste, dass er unerlaubt über ein fremdes Recht verfügte.

Illustration 1 draws on CA The Hague 20 December 2005, publ. 26 September 2006, LJN no. AY8847; **illustration 3** is inspired by judicial observations in BH 2005/115; **illustration 4** is based on TS 28 December 1999, RAJ 1999 (5) no. 9147 p. 14388, and **illustration 14** on STJ 10 November 1981, BolMinJus 311 (1981) 353.

VII.–6:102: Juridical acts in good faith with third parties

The enriched person is also not liable to reverse the enrichment if:

(a) in exchange for that enrichment the enriched person confers another enrichment on a third person; and

(b) the enriched person is still in good faith at that time.

COMMENTS

General. A provision of this nature is necessary to protect enriched persons in a number of exceptional situations where they will otherwise find themselves under an enrichment liability although they were not a party to the transaction out of whose circumstances the unjustified enrichment essentially arises. It gives effect to the same basic policy considerations protecting good faith acquirers of property (whose enrichments are justified by a rule of law under VII.–2:101 (Circumstances in which an enrichment is unjustified)). Provision to this effect is needed because the rules on good faith acquisition have a limited scope of application. Protection is needed outside that scope where the innocent enriched person who has given value in exchange for the benefit does not acquire a property right.

Illustration 1

As a result of X's improper pressure, D is coerced into selling a boat to X. D subsequently avoids the sale to X and under the applicable rules of property law avoidance of the contract of sale re-vests property in the boat in D. D demands a fee for use of the boat from E, who has chartered it from X. E is enriched in making use of D's boat. He has, however, paid X, with whom he dealt in good faith to obtain the use of the boat. If E has not acquired a property right by his good faith dealings with X (e.g. because the right of a charterer is not characterised as a property right), E will have infringed D's rights by making use of D's asset. That enrichment is not justified by a rule of law (since the property law rules on good faith acquisition do not apply). However, E has the defence under this Article by virtue of his payment to X in good faith in return for use of the boat.

Direct recipients. One field of application of this Article is where the disadvantaged person was obliged to perform to the enriched person under an obligation to a third party, which obligation is void or avoided and affected by fraud, threats or unfair advantage (e.g. of that third party) or the disadvantaged person's own lack of capacity. This forms an exceptional case where the disadvantaged person has a direct claim against the enriched person, notwithstanding that the enriched person is a third party to the underlying juridical act, because the disadvantaged person has not performed freely. See VII.–2:102 (Performance of obligation to third person) in conjunction with VII.–2:103 (Consenting or performing freely) paragraph (2).

Illustration 2

By fraudulent misrepresentations X, a rogue, induces D to transfer money to E, whom X purports to represent. When E receives the money, E provides X with goods because X has deceived E into believing that he represents D. E has obtained an enrichment (money) which is unjustified in relation to D. However, E has a defence under this Article since E conferred a counter-enrichment on X (goods) in exchange for the enrichment obtained.

Indirect recipients. A second category of case concerns situations in which the enrichment is brought about on the basis of a mediated involvement of the parties to the enrichment claim – i.e. where the enriched person has not received or taken the enrichment directly from the disadvantaged person.

Illustration 3
X takes D's bricks without D's permission and uses them to construct a building on E's land. As a result of X's intervention, E's enrichment (the bricks becoming part of E's property on being fixed to the land) is attributable to D's disadvantage in losing property in the bricks: see VII.–4:105 (Attribution resulting from an act of an intervener) and in particular paragraph (2). However, E will have a defence under this Article if E had contracted X to construct the building and pays or has paid him, assuming that E neither knew nor ought to have known that X had no right to use the bricks.

Illustration 4
By mistake D makes a payment to X. X in turn makes a gift of the money to E. Although D has an unjustified enrichment claim against X, the onward transfer of the money to E – if made by X in good faith – may entitle X to the benefit of the defence under VII.–6:101 (Disenrichment). If (by virtue of that defence to D's claim) X's onward transfer of the money to E has the effect of extinguishing X's liability to D, E's acquisition of the money is an enrichment which is attributable to D's loss of the enrichment claim against X: VII.–4:103 (Debtor's performance to a non-creditor; onward transfer in good faith) paragraph (2).

Exchange. The defence only applies in so far as an enrichment is conferred in exchange for the one obtained. This means in particular that the enrichment which is actually obtained must be the enrichment contemplated by the transaction with the third party. The mere fact that the enriched person has benefited a third party in the expectation of receiving something which is indeed received from the disadvantaged person will not protect the enriched person if the covering transaction is more limited in scope.

Illustration 5
Under the terms of a lease of a hotel complex D is obliged to pay her landlord, X, a year's rent equal to 20% of the income from the complex, subject to a minimum liability of € 28,000. X assigns its claim to rent to its bank, E, and gives D notice of the assignment. D makes a payment to E to discharge her obligation to pay rent, but by mistake pays some € 54,000 rather than the mere € 28,000 which is in fact due. D is entitled to repayment from E of the excess. Even if X represented to E that the rent due was € 54,000 and thereby induced E to accept the assignment in lieu of a debt due from X to E, E's enrichment as regards the excess payment remains unjustified in relation to D. The defence under this Article does not apply to the excess, notwithstanding that E has enriched X (by releasing X from its debt). Properly analysed, E's enrichment of X was not in exchange for a payment from D as such (the enrichment conferred by D), but rather in exchange for X's claim against D. That the value of this claim was misrepresented so that E expected from D a sum greater than that to which E was in fact entitled does not prejudice D.

Good faith. The notion of good faith applicable for the purposes of this Article is the same as in VII.–5:101 (Transferable enrichment) paragraph (5).

Illustration 6
X, an employee of a public finance body D, has authority to make transactions relating to an account containing public funds in order, among other things, to reimburse travel expenses incurred by those acting in the public service. He misuses this authority to pay money from the account to a prostitute E in satisfaction of debts which he owes her. The prostitute E could not sensibly assume that her services might legitimately be paid for from a public account on the instructions of her debtor. She should have appreciated that the bank payment was wrongful. Consequently, E is liable to repay the money to D.

Extent of the defence. In contrast to the defence under VII.–6:101 (Disenrichment), this defence, if established by the enriched person, is a complete defence. Liability is excluded entirely and not merely reduced by the amount of the enriched person's disadvantage (the enrichment which the enriched person conferred on the third party). This promotes legal certainty and the commercial circulation of property more effectively than merely limiting enrichment liability on a pro tanto basis. Having effectively purchased the benefit in good faith, the recipient is assured that there will be no unjustified enrichment liability to any third parties.

NOTES

1. Da die ROMANISCHEN Rechtsordnungen nicht über eine in sich geschlossene Regelung des Rechts der ungerechtfertigten Bereicherung verfügen, hat der Gesetzgeber dort auch kein einheitliches System der Verteidigungsgründe gegenüber Ansprüchen aus ungerechtfertigter Bereicherung aufgestellt. Auch die in diesem Article geregelten Situationen werden demgemäß nicht in der Perspektive eines Verteidigungsgrundes analysiert, sondern im Kontext anderer Regelungszusammenhänge, oft solchen des Sachenrechts. Wenn etwa X und E vereinbaren, dass X auf dem Grundstück des E ein Haus bauen soll, X hierfür aber gestohlene Baumaterialien des D verwendet, so ist under SPANISH law für die Antwort auf die Frage, ob E dem D gegenüber haftet, zunächst CC art. 365 zu konsultieren. Danach muss der Grundstückseigentümer dem Dritten (D) Wertersatz für dessen Materialien zahlen, wenn und insoweit derjenige, der sie verwendet hat, zahlungsunfähig ist. E würde dem D unter CC art. 365 insoweit haften, als D mit seiner *condictio* gegen X ausfällt. Es ist freilich zweifelhaft, ob CC art. 365 wirklich den Fall umfassen will, in welchem zwischen dem Grundeigentümer und dem Verwender der Materialien ein Vertrag besteht (see *Díez-Picazo*, Fundamentos III[4], 264 and *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 290); dieser Vertrag, so die genannten Autoren, gäbe dem Grundeigentümer vielmehr einen Rechtsgrund zum Behaltendürfen der Materialien. Anders wäre das nur, wenn der Vertrag zwischen E und X nichtig wäre; dann würde E dem D unmittelbar haften und müsste X in Regress nehmen.
2. Auch unter ITALIAN law kann der Entreicherte nur in wenigen Ausnahmesituationen (mit der *actio surrogatoria*) direkt gegen den tatsächlichen Empfänger der Leistung vorgehen (*Trimarchi*, L'arricchimento senza causa, 103). Sonst aber folgt der Bereicherungsausgleich den Leistungsbeziehungen. CC art. 937(3) sieht allerdings für Fälle, in welchen ein Bauwerk mit Materialien eines Dritten geschaffen wird, eine gesamtschuldnerische Haftung des Verwenders und des bösgläubigen

Grundeigentümers in Höhe des Wertes der Materialien vor. Der entreicherte (ursprüngliche) Eigentümer der Materialien kann solchen Wertersatz auch vom gutgläubigen Grundeigentümer verlangen, doch ist der Anspruch auf den Preis begrenzt, den dieser für die gelieferten Materialien noch schuldet. Hat er den Preis bereits bezahlt, haftet er dem ursprünglichen Eigentümer gar nicht mehr. Das Letztere entspricht im Kern der Lösung in VII.–6:102.

3. PORTUGAL kennt wie Italy die *acção sub-rogatória* (CC arts. 606(2) und 609), die es dem Entreicherten in den dort genannten Fällen erlaubt, direkt gegen den tatsächlichen Empfänger der Leistung vorzugehen (*Antunes Varela*, Obrigações em geral I^{10}, 495, fn. 2). Die sachenrechtlichen Vorschriften zum sogen. Zuwachs an Immobilien (CC arts. 1339-1343) arbeiten mit einer komplizierten Verweistechnik, darunter ausdrückliche Verweise auf das Recht der ungerechtfertigten Bereicherung. CC art. 1342 regelt den Fall des Bauens mit fremden Materialien auf fremdem Grund nach italienischem Vorbild (*Pires de Lima and Antunes Varela*, Código Civil Anotado III^2, 168, note 1 under art. 1342). Die Vorschrift bringt eine Ausnahme von der sonst nahezu durchweg beachteten Voraussetzung der Unmittelbarkeit der Vermögensverschiebung (*Gomes*, Conceito de enriquecimento, 438, fn. 719). Der Bereicherungsanspruch besteht aber dann nicht, wenn der Einbau aufgrund Vertrages erfolgte (STJ 30 May 2006, Processo 06A825). Denn eine Durchgriffskondiktio wird nur im Fall des CC art. 481 (unentgeltliche Veräußerung) akzeptiert (*Menezes Leitão*, Enriquecimento sem causa^2, 858, 861).

4. BULGARIA kennt den Verteidigungsgrund des Wegfalls der Bereicherung nicht. In der Konstellation der illustration 1 under this Article muss D den Vertrag mit X wegen Betrugs anfechten, woraufhin er den Leistungsgegenstand von X aus LOA art. 55(1) zurückfordern kann. E dagegen kann sich nicht auf eine Entreicherung durch die Leistung an X berufen; sie gewährt ihm keinen Verteidigungsgrund (*Goleminov*, Neosnovatelno obogatyavane, 185). E muss vielmehr gleichfalls das Rechtsgeschäft anfechten, unter dem er an X geleistet hat und gegen ihn vorgehen. Im Falle des Bauens mit gestohlenem fremden Material muss sein ursprünglicher Eigentümer, dessen Eigentum durch Einbau unterging (LPA art. 92), entweder im Wege des Deliktsrechts gegen den Verfügenden oder im Wege des Bereicherungsrechts gegen den Grundeigentümer vorgehen. Diesem scheint es nichts zu nutzen, dass er den Verfügenden bereits bezahlt hat (*Stavrou*, Vuprosi na bulgarskoto veshtno pravo, 678-679).

5. Die Lösung unter DUTCH law ist nicht völlig eindeutig. HR 29 January 1993, NedJur 1994, no. 172 p. 728 spricht eher für eine andere Lösung als VII.–6:102. Es ging um einen Sohn, der einen Unternehmer damit beauftragt hatte, auf dem Grundstück des Vaters einen Stall zu bauen. Der Unternehmer klagte erfolgreich gegen den Vater, der die Pläne gekannt hatte. Dass der Vater bereits Geld für den Stallbau an seinen Sohn gezahlt hatte, wurde nicht als Verteidigungsgrund akzeptiert; der Vater habe damit rechnen müssen, an den Werkunternehmer zahlen zu müssen. Auf diesen Umstand dürfte es nach niederländischer Auffassung entscheidend ankommen.

6. Under ESTONIAN LOA § 1038 darf der durch einen Eingriff bösgläubig Bereicherte Erwerbskosten nicht von seiner Bereicherung abziehen. Der gutgläubige Bereicherte kann sich hinsichtlich der Erwerbskosten dagegen auf einen Bereicherungswegfall berufen.

Illustration 5 on A.P. 946/2002, XrID 2 (2002) 689; and **illustration 6** on BGH 21 October 2004, NJW 2005, 60.

VII.–6:103: Illegality

Where a contract or other juridical act under which an enrichment is obtained is void or avoided because of an infringement of a fundamental principle (within the meaning of II.–7:301 (Contracts infringing fundamental principles)) or mandatory rule of law, the enriched person is not liable to reverse the enrichment to the extent that the reversal would contravene the policy underlying the principle or rule.

COMMENTS

General. This Article draws on the provisions in Book II, Chapter 7, Section 3 (Infringement of fundamental principles or mandatory rules). Those provisions envisage that illegality may have varying impact on the efficacy of a contract, depending on the precise nature and purpose of the illegality and the other circumstances. This Article provides a correspondingly open tool for judicial recognition that a disadvantaged person should not be entitled to recover under this Book in view of an applicable mandatory rule or a fundamental principle.

Illegality and justification. Where the enrichment is obtained by virtue of a contract, a prior question before any issue of a defence under this Article can arise is whether the enrichment is justified – which question will turn on the validity of the contract and accordingly the effect which the illegality has had on the status of the contract. II.–7:303 (Effects of nullity or avoidance) expressly provides that restitution where a contract is rendered ineffective on grounds of illegality is governed by the law of unjustified enrichment.

Illustration 1
E employs D to undertake cleaning services, but D (as E knows) does not have a work permit. Although D has undertaken the work agreed to be done, E refuses to pay D. Whether or to what extent the contract of employment is valid depends on the application of the provisions in Book II, Chapter 7, Section 3 (Infringement of fundamental principles or mandatory rules). Only if the contract is void is E's enrichment in the receipt of a service unjustified and accordingly only then does the question arise whether E has a defence against D's claim under this Book on the basis of this Article.

Illustration 2
D is in the business of supplying radar speed trap detectors which D markets for sale to drivers who are anxious not to exceed the permitted speed on stretches of road which are subject to speed traps. Whether or not the use of such equipment on the highway for the purposes of identifying the existence of speed traps constitutes a criminal offence, its use may be contrary to public policy since it tends to encourage drivers to rely on the fact they will be warned of such devices with the result that they may effectively drive at excess speeds until warned without risk of detection. A contract for the supply of such equipment, where both parties are aware that it will be used for this purpose, is therefore arguably contrary to public policy. On the basis that under the rules of the provisions in Book II, Chapter 7, Section 3 (Infringement of fundamental principles or mandatory rules) the contract is void, this Article will determine whether there will be restitution of the equipment and the price paid – i.e. whether D (the supplier) and E (the recipient of the equipment under a void contract to buy from D) will be able to enforce a reversal of the other's enrichment. The legal consequence will be the same for both claims.

Criterion. This Article envisages that whether or not there is a (complete or partial) defence to an enrichment claim based on illegality will depend on whether in the particular circumstances reversal of the enrichment would support or contradict the policy of the law in recognising the illegality.

Relevant factors. In determining whether the enriched person should have a defence on the basis of illegality the following considerations (which are also relevant in determining whether any underlying contract is valid or enforceable: see II.–7:302 (Contracts infringing mandatory rules)) will be particularly material: (a) the culpability of each party; (b) the purpose of the principle or rule which has been infringed; (c) the category of persons for whose protection the principle or rule which has been infringed exists; (d) any sanction that may be imposed under the rule infringed; (e) the seriousness of the infringement; and (f) the closeness of the relationship between the infringement and the act.

Illustrative application. In applying these factors to the first illustration, the hardship to the employee arising from the supply of work without any recompense must be weighed up against the aim of the rules striking down such contracts, which is essentially to protect the proper market for the supply of labour. The balance of these factors tends towards permitting the employee to claim in respect of their work, albeit only to the extent of the value of their actual work – a value which takes account of the unlawfulness (i.e. the precariousness) of the employment and is thus less than the price for such service on the ordinary labour market. In the second illustration, the aim of the rule striking at the validity of the contract is to deter the supply and use of such equipment. Refusing a claim for the value of the equipment ensures that the supplier has no incentive to conduct a business of supplying the equipment; allowing recovery of the equipment (and return of the price paid), by contrast, allows the status quo ante to be restored to the supplier, by contrast, is consistent with the policy of discouraging the supply and use of the equipment to the public.

Illustration 3
D lends E a sum of money which D knows E intends to use to acquire heroin in Marocco. After E has purchased the drugs, D demands repayment of the sum lent. The contract of loan is void under II.–7:302 (Contracts infringing mandatory rules) because of the purpose of the loan contract known to both parties. E has a defence to D's claim under this Book for a return of the capital – not in order to protect E (whose case is without merit and as a result obtains a windfall), but rather to deter future lenders from financing traffic in drugs.

NOTES

1. *Nemo auditur propriam turpitudinem allegans* und *in pari causa turpitudinis cessat repetitio* betreffen im FRENCH and BELGIAN law Verträge, die wegen *immoralité* nichtig sind (*Bénabent*, Les obligations[10], no. 233). Niemand soll sich zur Begründung eines Rückforderungsanspruches darauf berufen können, selber sittenwidrig gehandelt zu haben (*nemo auditur*). Die *illicéité* des Vertrages findet bei der Feststellung seiner Sittenwidrigkeit Berücksichtigung, ist aber nicht schon für sich allein ausschlaggebend. Bei der Feststellung der Sittenwidrigkeit kommt dem Tatrichter ein breites Ermessen zu (*Malinvaud*, Droit des obligations[9], no. 407). Die Rückforderung kann z.B. ausgeschlossen sein, wenn ein Werkunternehmer, dem die erforderliche

Genehmigung zum Betrieb seines Gewerbes fehlt, auf einen wegen der fehlenden Genehmigung unwirksamen Vertrag leistet (CA Brussels 9 June 2006, no. JB0669B_1, no. de rôle 2005 AR 632; CA Liège 4 February 2003, no. JL03241_1; no. de rôle 2001RG349).

2. SPANISH CC arts. 1305 and 1306 bringen im Rahmen des Rechts der Rückabwicklung nichtiger Verträge ausführliche Vorschriften für den Rückforderungsausschluss von mit *causa torpe* oder *turpis causa* erbrachten Leistungen. Das sind Leistungen auf einen sittenwidrigen Grund, der rechtlich nicht genügt to support the contract. Anders als in France und Belgium stehen *nemo auditur propriam turpitudinem allegans* and, above all, *in pari causa turpitudinis cessat repetitio* also ausdrücklich im Gesetz, wenn auch nicht (wie in Compilation of 'Foral Civil Law' of Navarra Act art. 510(2)) im Bereicherungsrecht oder zumindest im Recht der *condictio indebiti*, sondern im Vertragsrecht (*Delgado Echeverría and Parra Lucán*, Las nulidades de los contratos, 290). CC art. 1305 schließt Rückforderungsansprüche aus Verträgen aus, die eine Straftat zum Inhalt haben; CC art. 1306 betrifft Leistungen aufgrund einer nicht mit Strafe bedrohten *causa torpe*. CC art. 1305 unterscheidet weiter zwischen Fällen, in welchen sich das Verhalten beider Parteien als Straftat erweist, und solchen, in denen nur eine Seite eine Straftat begeht. Im ersten Fall kommt es zu einem vollständigen Rückforderungsausschluss für beide Seiten; außerdem zu einer Konfiskation des Vertragsgegenstandes nach den Regeln des *Código Penal*. Es ist zwar umstritten, ob auch für den Rückforderungsausschluss (und nicht nur für die Konfiskation) eine vorherige strafrechtliche Verurteilung nötig ist (bejahend *Díez-Picazo*, Fundamentos I[6], 583, verneinend *Delgado Echeverría and Parra Lucán* loc.cit. 302-303), doch umgehen die Zivilgerichte dieses Problem meistens dadurch, dass sie statt CC art. 1305 den CC art. 1306 anwenden (e.g. CA Girona 13 November 2005, BDA JUR 2006/51579). Erweist sich nur das Verhalten einer Partei als strafbar, so bleibt unter CC art. 1305 die unschuldige Partei zur Rückforderung ihrer Leistung berechtigt. Fehlt es auf beiden Seiten an einer Straftat, ist der Vertrag aber gleichwohl sittenwidrig, so kommt es unter CC art. 1306 für den Rückforderungsausschluss vor allem auf den Grad des Verschuldens der jeweiligen Partei an (näher *Delgado Echeverría and Parra Lucán* loc.cit. 305). Unbeschadet des Wortlauts der Vorschrift courts tend to extend CC art. 1306 to any contract whose *causa* or whose *object* are illegal (e.g. TS 2 April 2002, RAJ 2002 (2), no. 2485 p. 4295 [wegen CC art. 1306 kein Wertersatz für die aus einer Apotheke gezogenen Nutzungen; die Apotheke war nur zum Schein übertragen worden, um Lizenzerfordernisse zu umgehen]; TS 31 May 2005, RAJ 2005 (3) no. 4251 p. 8862 [rechtswidrige Übertragung einer Marktlizenz; wegen CC art. 1306 kein Anspruch auf Rückforderung des Kaufpreises]). Trotz ihres Standortes im Vertragsrecht sollen die CC arts. 1305 und 1306 nach *Delgado Echeverría and Parra Lucán* loc. cit. 306 auch im Recht der *condictio indebiti* und im Rahmen der allgemeinen Bereicherungsklage Anwendung finden; sie sollen sogar einem entsprechenden Vindikationsanspruch entgegenstehen (ebenso *Carrasco Perera*, ADC 1987, 1055, 1067). Zu beachten ist andererseits, dass den CC arts. 1305 und 1306 besondere Vorschriften vorgehen können, insbesondere *Estatuto de los Trabajadores* [Workers' Statute] art. 9.2, wonach Arbeitnehmer ihren Lohnanspruch für die Vergangenheit nicht deshalb verlieren, weil der Arbeitsvertrag nichtig ist. Unter dieser Vorschrift sollen z.B. Arbeitnehmer geschützt sein, deren Arbeitsvertrag wegen fehlender Aufenthaltsgenehmigung nichtig ist (TS [Administrative Chamber] 28 May 1991, RAJ 1991 (4) no. 4215 p. 5791) (inzwischen begründet ein solcher Mangel allerdings keine *nulidad* des Arbeitsvertrages mehr: TS 9 June 2003, RAJ 2003 (3) no. 3936 p. 7268).

3. ITALIAN CC art. 2035 bestimmt, dass derjenige, der eine Leistung zu einem Zweck vorgenommen hat, welcher auch für ihn selbst als Verstoß gegen die guten Sitten zu werten ist, das Gezahlte nicht zurückfordern kann. Beispiele hierfür sind Glücksspiel und Wette, die Inanspruchnahme der Dienste einer Prostituierten (CA Trento 16 May 1955, Rep.Giur.it. 1956, voce Indebito no. 8) oder einer Ehevermittlung (Cass. 25 March 1966, no. 803, Foro it. 1966, I, 1963), das Akzeptieren des vertraglichen Verbots, eine bestimmte Person zu heiraten (Cass. 30 May 1953, no. 1633, Foro it. 1954, I, 194) und betrügerische Vereinbarungen zu Lasten Dritter. Auch eine Bereicherungsklage ist ausgeschlossen (*Moscati*, Pagamento dell' indebito, 366). Den Zweck des CC art. 2035 hat der Kassationshof einmal darin gesehen, dass die "Untersuchung skandalöser Tatsachen" vermieden werden solle (Cass. 11 April 1949, no. 868, Giur.it. 1950, I, 1, 242). Die rein faktische Bevorzugung des *accipiens* hat das Gericht damit erklärt, dass in den Fällen des CC art. 2035 das Verhalten des *solvens* noch anstößiger sei als das des Empfängers (Cass. 29 April 1961, no. 985, Foro it. 1962, I, 765). Vom Text des CC art. 2035 werden jedenfalls nur sittenwidrige Handlungen erfasst; bloße Rechtswidrigkeit oder der Verstoß gegen zwingendes Recht genügen für sich allein nicht. Erforderlich ist ferner, dass beide Parteien den Zweck verfolgten, welcher den Vertrag als sittenwidrig erscheinen lässt. Verstößt nur der Beweggrund einer Partei gegen die guten Sitten, so bleibt der Vertrag ohnehin wirksam (Ausnahme: CC art. 788: unerlaubter Beweggrund bei Schenkung). Fällt ein sittenwidriges Motiv (Darlehen zum Betrieb eines nicht genehmigten Spielcasinos) mit einem anständigen Motiv zusammen (Darlehen aus Freundschaft), dann hängt es von den weiteren Umständen ab, ob der Kondiktionsausschluss eingreift oder nicht (siehe einerseits [Rückforderung erlaubt] Cass. 20 June 1960, no. 1627, Foro it. 1961, I, 89 und andererseits Cass. 17 June 1950, no. 1555, Rep.Giur.it. 1950, Voce Giochi e Scommesse, no. 4 [Kondiktion ausgeschlossen]). Sittenwidrig i.S.v. CC art. 2035 sind desgleichen entgeltliche Verträge über das Austragen eines fremden Kindes (Leih- bzw. "Mietmutterschaft"; *maternità surrogata*) (CFI Monza 27 October 1989, Giur. civ. comm. 1990, I, 335); Verträge, die aus Solidarität und einem *spirito di liberalità* geschlossen werden, sind dagegen wirksam (CFI Rome, ord. 14-17 February 2000, Riv.it.med.leg. 2000, 593).

4. Im PORTUGUESE CC findet sich die *nemo auditur propriam turpitudinem allegans*-Regel nicht; die Rückabwicklung gesetzes- oder sittenwidriger Verträge folgt dem allgemeinen Unwirksamkeitsregime (*Schlechtriem*, Restitution und Bereicherungsausgleich in Europa I, no. 503, p. 657). Rechtsgeschäfte, deren Gegenstand rechtlich unmöglich oder gesetzeswidrig ist, sind unter CC art. 280 nichtig, desgleichen Rechtsgeschäfte, die gegen den *ordem pública* oder die guten Sitten verstoßen CC art. 280 konkretisiert CC art. 294, wonach die gegen zwingende Gesetzesvorschriften abgeschlossenen Rechtsgeschäfte nichtig sind, es sei denn, das Gesetz ordnet eine andere Rechtsfolge an (wie z.B. in CC art. 1306). Es ist jeweils zu prüfen, ob die Nichtigkeitsfolge erforderlich ist, um den Gesetzesweck zu verwirklichen (*Hörster*, Parte geral, 520; *Schlechtriem* loc.cit. no. 502, p. 656).

5. GERMAN CC § 817 second sentence schließt den bereicherungsrechtlichen Rückforderungsanspruch für den Fall aus, dass sowohl dem Leistenden als auch dem Empfänger der Leistung ein Verstoß gegen ein gesetzliches Verbot oder gegen die guten Sitten zur Last fällt. Der Anwendungsbereich der Vorschrift erstreckt sich nach nahezu einhelliger Auffassung über den Wortlaut hinaus auch auf den Fall, dass nur dem Leistenden ein solcher Verstoß zur Last fällt, und bezieht sich außerdem nicht nur auf die von CC § 817 first sentence gewährte *condictio ob turpem vel iniustam causam*, sondern auf jedwede Leistungskondiktion (Palandt [-*Sprau*], BGB[67], § 817, no. 12; *Medicus*, Schuldrecht II[14], no. 659). Sehr streitig ist dagegen, ob CC § 817

second sentence auf nichtbereicherungsrechtliche Ansprüche analog angwandt werden darf. Die Rechtsprechung hat das– meist unter Hinweis auf den Ausnahmecharakter der Vorschrift – bislang stets abgelehnt (BGH 31 January 1963, BGHZ 39, 87, 91; BGH 9 October 1991, NJW 1992, 310, 311; BGH 8 January 1975, BGHZ 63, 365, 368); im Schirfttum ist das teils auf Zustimmung, teils auf Ablehnung gestoßen (näher z.B. MünchKomm [-*Lieb*], BGB[4], § 817, no. 26 und Erman [-*Westermann and Buck-Heeb*], BGB II[12], § 817, no. 11). Es werden aber umgekehrt auch teleologische Reduktionen von CC § 817 second sentence praktiziert, z.B. bei Darlehensverträgen, die wegen wucherischer Zinssätze nichtig sind. Es wird angenommen, dass CC § 817 second sentence in einem solchen Fall nicht dazu führt, dass der Darlehensgeber sein Kapital überhaupt nicht mehr zurückerhält, sondern nur dazu, dass der Darlehensgeber das Kapital für die vereinbarte Zeit zinslos zur Verfügung stellen muss: Leistungsgegenstand sei nicht die Übereignung von Geld, sondern seine Überlassung auf Zeit (*Medicus* loc.cit. no. 661; *Sprau* loc.cit. nos. 15 and 21). Außerdem wird eine Beschränkung des Anwendungsbereichs von CC § 817 second sentence nach dem Schutzzweck der verletzten Norm befürwortet. Das spielt insbesondere im Kontext von Fällen der Schwarzarbeit eine Rolle, um dem Arbeiter doch zu einer angemssenen Vergütung verhelfen zu können (näher *Westermann and Buck-Heeb* loc.cit. no. 15).

6. Verträge, die gegen das Gesetz oder die guten Sitten verstoßen, sind unter HUNGARIAN CC § 200(2) grundsätzlich ungültig. Ihre Rückabwicklung unterliegt folglich den Vorschriften des Ungültigkeitsrechts. Der Gegenstand der rückgabepflichtigen Sache kann allerdings vom Gericht auf Antrag der Staatsanwaltschaft dem Staat zugesprochen werden (CC § 237(4)). Die Vorschrift wird heute jedoch kaum noch angewandt und soll mit der Reform des Zivilgesetzbuches abgeschafft werden (http://irm.gov.hu/download/eotodikkonyv.pdf/eotodikkonyv.pdf). BULGARIA hat die entsprechenden Vorschriften des LOA (art. 34(2)-(5)) bereits im Jahre 1993 aufgehoben. Eine VII.–6:103 ähnelnde Vorschrift findet sich nur in Ccom art. 717d(3), wonach jemand, der sich gesetzeswidrig an der Verwertung einer Insolvenzmasse beteiligt, die vorausbezahlten Geldbeträge nicht zurückfordern kann. SLOVENIAN CC art. 87(2) bestätigt dagegen erneut das *nemo auditur suam turpitudinem allegans*-Prinzip. If a contract is null and void because in terms of its content or purpose it contravenes fundamental moral principles the court may entirely or partly reject a claim by the dishonest party for the reimbursement of that provided to the other party; in ruling the court shall consider the extent to which one or both of the parties acted in good faith and the significance of the interests under threat.

7. DUTCH CC art. 6:211 wird manchmal *huurmoordenaarsclausule* ("killing provision") genannt. Die Vorschrift schließt auch die Rückabwicklung von Leistungen auf Verträge mit einem strafbaren oder sittenwidrigen Inhalt aus. Solche Leistungen können nicht in Natur zurückgegeben und sollen auch nicht in Geld bewertet werden. Die Gegenleistung dagegen kann grundsätzlich zurückgefordert werden, es sei denn, die Rückforderung verstößt gegen Treu und Glauben. Solch ein Rückforderungsrecht hat z.B. das Opfer einer Erpressung. Die Vorschriften über den schuldrechtlichen Rückforderungsausschluss gelten grundsätzlich auch für den Vindikationsanspruch aus CC art. 5:2 (CC art. 6:211(2)): die Nichtigkeit des Erwerbstitels hat in diesem Fall ausnahmsweise nicht auch die Nichtigkeit der Übertragung zur Folge (Parlementaire Geschiedenis VI, 821; Asser [-*Hartkamp*] Verbintenissenrecht III[12], no. 345, p. 359; *van Kooten*, NTBR 1995, 101; HR 28 June 1991, NedJur 1992, no. 787 p. 3395-3405; HR 2 February 1990, NedJur 1991, no. 265 p. 1117; HR 7 September 1990, NedJur 1991, no. 266 p. 1122).

8. Under ESTONIAN GPCCA § 84(1), a void transaction has no legal consequences from inception. That which is received on the basis of a void transaction shall be returned pursuant to the provisions concerning unjust enrichment unless otherwise provided by law. A transaction which is contrary to good morals or public order is void (GPCCA § 86), and a transaction contrary to a prohibition arising from law is void if the purpose of the prohibition is to render the transaction void upon violation of the prohibition, especially if it is provided by law that a certain legal consequence must not arise (GPCCA § 87). Pursuant to LOA § 1028 (2)(iii) a transferor does not have the right to reclaim that which is received by the recipient from the recipient if the reclamation of that which is received as a result of a void transaction would be contradictory to the provision which prescribes the nullity of the transaction or to the objective of such provision. Thus for example, a contract for the sale of narcotica, prohibited weapons or medical product to be used as doping in sports, or the transfer of a bribe is void; the reversal, however, would be contrary to the provisions of the Penal Code.

Illustration 1 draws on BGH 31 May 1990, BGHZ 111, 308; **illustration 2** on BGH 23 February 2005, NJW 2005, 1490; and **illustration 3** on CA Girona 13 November 2005, BDA JUR 2006/51579.

CHAPTER 7: RELATION TO OTHER LEGAL RULES

VII.–7:101: Other private law rights to recover

(1) The legal consequences of an enrichment which is obtained by virtue of a contract or other juridical act are governed by other rules if those rules grant or exclude a right to reversal of an enrichment, whether on withdrawal, termination, price reduction or otherwise.

(2) This Book does not address the proprietary effect of a right to reversal of an enrichment.

(3) This Book does not affect any other right to recover arising under contractual or other rules of private law.

COMMENTS

A. Exclusivity of contractual rules: paragraph (1)

General. This Book does not apply in so far as contractual rules purport to address comprehensively an issue of restitution – either by granting a right to restitution or by excluding such a right. In that case the matter is governed by the contract law solution. Where, however, the rules of contract law are silent on the issue of reversal of an enrichment, this Book continues to apply.

Exclusion of a right to reversal of enrichment. Where contract law envisages that there should be no reversal of an enrichment and that the matter should be addressed by contract law rules by means of different remedies, it would contradict that regime if unjustified enrichment law were to compel a reversal of the enrichment.

Deviation from terms of the obligation. This Article will be relevant where the enrichment is not ordinarily justified because the performance which has given rise to it did not conform to the contract and accordingly the enriched person had no entitlement to the enrichment under the juridical act for the purposes of paragraph (1) of VII.–2:101 (Circumstances in which an enrichment is unjustified). If a tender of performance does not conform to the contract, the legal consequences are a matter in the first instance for contract law. A right to reversal of the enrichment under this Book may be excluded because the recipient of the goods or services wishes to exercise other remedies, such as a right to repair or replacement, or the provider of the service may have a right to insist on an opportunity to repair without being under an obligation to replace the goods provided. Equally, an obligation on the part of the recipient to reverse the enrichment obtained may be displaced by contract law because this would otherwise contradict the logic of the right to performance. The very fact that a right to reversal of benefit arises where the contractual relationship is terminated indicates that a benefit conferred by a performance which falls short of what is due (a tender of performance which is a non-performance) should not *per se* give rise to restitutionary claims. The matter depends on the rules on termination of the contractual relationship or interaction with other contractual remedies.

Illustration 1
D, a garage, agrees with E to respray E's car metallic blue. As a result of a mix-up, D sprays the car metallic grey. E is not under an obligation to pay D in respect of the service provided. Rather D is under an enduring obligation (unless and until the contractual relationship is terminated) to re-spray the car the correct colour.

Obligations ceasing to have effect for the future only. Where a contractual relationship is terminated, or a party withdraws from a contract, or in some other way the contractual relationship is ended without retrospective effect, extinguishing only the parties' outstanding obligations and rights to performance, this Book regards enrichments conferred before the termination or equivalent as being justified precisely because there is no retrospective impact on the contractual obligations; the entitlement to the enrichment which has already been satisfied is unaffected. See Comment B on VII.–2:101 (Circumstances in which an enrichment is unjustified). It will be for the special rules governing the termination of contractual relationships, or other prospective terminations of obligations, to determine what right, if any, a party has to recover in respect of the benefits conferred on the other party.

Contractual relationships terminated for non-excused non-performance. The primary specific instance is the exercise of a right to terminate a contractual relationship. Such a right may be expressly agreed by the parties: see III.–1:108 (Variation or termination by agreement). A right to terminate a contractual relationship arising from a valid contract may also arise by operation of law as a result of the other party's non-performance of obligations. Termination will not avoid the contract retrospectively; it merely discharges the parties from their future obligations: see III.–3:509 (Effect on obligations under the contract) paragraph (1). Thus the contract remains effective and an enrichment which was obtained under the contract before termination is not obtained under a contract which is rendered ineffective retrospectively. Because its primary effects are confined to future operation of the contract, termination merely prevents the contract from providing a justification for any subsequent enrichment (i.e. an enrichment obtained as a result of a performance after termination). III.–3:510 (Restitution of benefits received by performance) and following Articles entitle each party to claim restitution of benefits conferred under the contract before termination. An effect of VII.–7:101 is to express the principle that those rules are not affected by this Book. The availability of a claim under contract law for reversal of benefits confirms that there is no need for a parallel regime under this Book.

Illustration 2
D and E conclude a contract by which E, the owner of premises, agrees to enter into a lease of them with D. It is part of the agreement of the parties that D will make improvements to the premises. D commences work on the improvements, but because they are being completed too slowly E terminates the relationship. D's claim for any benefit conferred on E by virtue of improvements to E's property is governed by the rules setting out the restitutionary consequences of termination of a contractual relationship and correspondingly this Book does not apply.

Contractual relationships terminated for excused non-performance (frustrated contracts). Where a contractual relationship is terminated for excused non-performance (i.e. in essence frustrated), the obligations of the parties which were originally agreed are re-fashioned by contract law into contractual obligations to restore or make payment for benefits obtained. This is achieved by allowing a party to resort to the remedy of termination (III.–3:101 (Remedies available) where the other party is impeded from performing and the non-

performance excused on that basis (see III.–3:104 (Excuse due to an impediment)). Termination for excused non-performance (as in the case of termination for non-excused non-performance) enables the parties to recover under III.–3:510 (Restitution of benefits received by performance) and following articles benefits conferred under the contract. Here again enrichments obtained as a result of a performance before the frustration remain justified (and an enrichment claim correspondingly excluded) because they have been conferred under a contract which, despite termination of the resulting relationship for non-performance, remains valid: on termination the obligations of the parties are discharged only in respect of future performance. The contract is not rendered ineffective with retrospective effect. In this regard whether termination is for an excused or a non-excused non-performance is immaterial for the purposes of the rules in this Book since the effects of termination are the same.

Exercise of a right of withdrawal. A second case where a contractual obligation may cease to have effect for the future only is where a contractual relationship comes to an end as the result of the exercise of a right of withdrawal. The effect of exercising a right of withdrawal is not to annul the contract retrospectively, but only to end the contractual relationship from the time the right is exercised: II.–5:105 (Effects of withdrawal) provides that withdrawal terminates the contractual relationship and (in slightly modified form) the general restitutionary rules for termination of contracts apply. Accordingly, an enrichment obtained as a result of one party performing an obligation under a contract which is subsequently cancelled is an enrichment to which a person is entitled by virtue of a valid contract and is justified under VII.–2:101(1)(a) (Circumstances in which an enrichment is justified). Rights to restitution of benefits conferred before withdrawal remain a matter of contract law.

Obligations subject to resolutive conditions. Another case where an obligation may cease to have effect for the future only is where it is made conditional upon the occurrence of an uncertain event so that the obligation comes to an end if the event occurs: see III.–1:106 (Conditional rights and obligations) paragraph (1). The effect of fulfilment of such a resolutive condition is that the obligation comes to an end (unless the parties otherwise agree): III.–1:106(3). For the purposes of the law of unjustified enrichment, the situation is the same as for contractual relationships coming to an end by the operation of a right of termination or withdrawal: the determination of the obligation does not render the entitlement void with retrospective effect. Accordingly an enrichment conferred in performance of a contractual obligation subject to a resolutive condition which is subsequently fulfilled is justified, notwithstanding that the contractual obligation later comes to an end. III.–1:106 (5) provides that the restitutionary effects are likewise regulated by the contract law rules set out in III.–3:510 (Restitution of benefits received by performance) to III.–3:514 (Liabilities arising after time when return due). The case is otherwise only for performances rendered after the condition has been fulfilled and the contractual obligation has ended or if the agreed effect of the contract is to make the contract retrospectively null.

Deviations from contract to which contract law rules do not apply. Paragraph (1) only applies in so far as the rules governing the juridical act regulate or oust a claim to restitution. Hence where the contractual performance tendered is outside the four corners of the contract (e.g. because the party tendering has made a fundamental mistake as to what was demanded) and contract law is silent on the matter of restitution (neither granting a restitutionary claim against the other party to the contract, nor excluding such a claim), the enrichment is not justified, even though a valid contract is part of the background to the case.

Illustration 3
X, a customer of a bank, instructs D, the bank, to make a payment to Y. As a result of its own carelessness, D makes a payment in the correct amount to E (instead of Y) in the mistaken assumption that this was the instruction given by X. E's enrichment is obtained as a result of D's attempted discharge of an obligation (owed by D to X), but the performance was not in conformity with the terms of the obligation and does not discharge it. The rules of contract law do not confer on D a right of restitution in respect of this payment; nor do they exclude it. Under contract law the payment is simply a non-performance which has conferred no benefit on X. Accordingly, this Book applies so that D has a right to reversal of the enrichment against E.

Frustrated purpose or disappointed expectation. The principle that this Book grants no right to reversal of the enrichment where the contract is valid and a right to reversal of the enrichment under contract law depends on termination of the contractual relationship (since it would contradict the insistence of contract law on termination if a right were granted) applies even where the disadvantaged person has conferred the benefit without obtaining anything in return – in other words, where there is a complete failure of counter-performance. If the contract is valid, but an expectation of the disadvantaged person is disappointed or a purpose of the enrichment frustrated (and the enrichment unjustified under paragraph (3) of VII.–2:101 (Circumstances in which an enrichment is unjustified), notwithstanding that the recipient has an entitlement under the contract), the fact that the claimant never receives in return what was anticipated under the contract will not found a claim under this Book. Given that the enrichment has been conferred in performance of an obligation under a subsisting contract, any redress in that case is contractual by exercising a right to terminate the contractual relationship for fundamental non-performance.

Illustration 4
D, a purchaser of goods, pays a deposit to E, the vendor, in accordance with the terms of the contract of sale. Before delivery falls due, D notifies E that she will not accept delivery. If D is in anticipatory breach of her obligation to take delivery, E has a right to retain the deposit. Although D paid the deposit to E only as part of a performance in exchange for E's goods, D has no claim under the law of unjustified enrichment to a return of the deposit even though she has not obtained the counter-enrichment she expected at the time of payment of the deposit.

B. Proprietary effect of a right to recover: paragraph (2)

Proprietary claims. This Book provides for a personal claim to reversal of an enrichment. It does not determine in what circumstances a proprietary claim (be it vindication of property or a claim in the nature of proprietary tracing) should exist. Such matters are not addressed by this Book. Nor does this Book determine what rights to recover (including rights under this Book) ought to be regarded as having proprietary effect (so that an enrichment creditor has priority over unsecured personal creditors of the enriched person).

C. Rights to recover under other private law rules: paragraph (3)

General. Specific rights to recover in respect of benefits conferred may be encountered in all fields of private law. This includes rights which arise under contract law where this Book would regard the enrichment as justified and would therefore not grant an enrichment claim. Property law confers a right to vindicate property which may operate concurrently with a right to reversal of the enrichment where the enrichment is possession of another's property.

Regard must be had also to rights elsewhere in the law of obligations, such as the right of reparation under rules on non-contractual liability for damage (and see especially VI.–6:101 (Aim and forms of reparation) paragraph (4), providing for recovery of an advantage obtained by the person causing the damage), the right of a principal against a benevolent intervener to delivery up of all that the intervener has obtained in the course of the benevolent intervention (V.–2:103 (Obligations after intervention) paragraph (1)) and rights of recourse between solidary debtors.

Illustration 5
D sells an appliance for weighing animal feed to E, an agricultural business. It transpires that the contract is void and under the applicable property law title to the appliance is regarded as not having passed. D sues E for surrender of the appliance on the basis of D's (retained) ownership. D also demands compensation from E for the deprivation of use from the time of transfer of possession to E to its return. D may legitimately sue on the basis of non-contractual liability for damage caused to another, invoking VI.–2:206 (Loss upon infringement of property or lawful possession) paragraph (2)(a), if the other requirements of liability under VI.–1:101 (Basic rule) are satisfied (in particular: negligence on the part of E in relation to the infringement of D's proprietary rights). Alternatively, D may assert an unjustified enrichment claim: see VII.–3:101 (Enrichment) paragraph (1)(c), VII.–3:102 (Disadvantage) paragraph (1)(c) and VII.–4:101 (Instances of attribution) paragraph (c). Neither this Book (VII.–7:101) nor Book VI (see VI.–1:103 (Scope of application) paragraph) (d)) prevent the concurrence of the claims under the rules on non-contractual liability for damage or under the rules on unjustified enrichment.

Illustration 6
A partner in a firm honours a bill of exchange which is a partnership debt. The partner has a right of recourse against the other partners on the basis that she has discharged more than her share of the solidary debt owed by the partners to the creditor: see III.–4:107 (Recourse between solidary debtors). A claim under this Book does not arise because in making the payment (and thus conferring benefit on the other partners, who were thereby also discharged) the partner discharged his own liability: see VII.–2:102 (Performance of obligation to third person).

NOTES

I. Subsidiarität der Haftung aus ungerechtfertigter Bereicherung?

1. Das Recht der *enrichissement sans cause* unterliegt in FRANCE und BELGIUM dem *principe de subsidiarité*: die *action de in rem verso* kann nur unter der Voraussetzung geltend gemacht werden, dass dem Kläger keine andere Anspruchsgrundlage zur Verfügung steht (z.B. Cass.com. 10 October 2000, Bull.civ. 2000, IV, no. 150, p. 136). Keinen subsidiären Charakter hat dagegen die *action en répétition de l´indu* (Cass.civ. 19 October 1983, Bull.civ. 1983, I, no. 242 p. 216). Der konkrete Inhalt des bereicherungsrechtlichen Subsidiaritätsprinzips ist freilich schwierig zu fixieren. Sie bedeutet allgemein, dass die *action de in rem verso* nur ausnahmsweise geltend gemacht werden kann; es handelt sich bei ihr lediglich um einen *mécanisme correcteur* (*Fabre-Magnan*, Les obligations, 968). Häufig wird (aber auch das ist umstritten, see *Viney*, JCP éd. G 1998, II, 10102) behauptet, dass die *action de in rem verso* nur zur Überwindung eines *obstacle de fait*, nicht aber zur Überwindung eines

obstacle de droit (wie z.B. der Verjährung eines konkurrierenden Anspruchs) eingesetzt werden dürfe (*Malaurie/Aynès/Stoffel-Munck*, Les obligations[2], no. 1071 p. 574). Ob mit ihr Beweisschwierigkeiten im Kontext eines anderen Anspruchs ausgewichen werden kann, ist gleichfall umstritten; die neuere Rechtsprechung des Kassationshofes bejaht das (Cass.civ. 5 March 2008, pourvoi no 07-13902). Schon Cass.civ. 4 April 2006, D. 2006, 1187 hat es abgelehnt, die Bereicherungsklage eines Mannes gegen seine ehemalige Lebenspartnerin daran scheitern zu lassen, dass er die von ihm in erster Linie behauptete *promesse de cession* nicht beweisen konnte; die hierauf gestützte Klagabweisung durch das Berufungsgericht habe die *principes régissant l´enrichissement sans cause* verletzt. Auch die BELGIAN Rechtsprechung folgt dem Subsidiaritätsprinzip und verhindert mit ihm die Umgehung kürzerer anderweitiger Verjährungsvorschriften (Cass. 25 März 1994, Pas. belge 1994, I, 305). Allerdings soll die Möglichkeit der Klage gegen einen Dritten die *action de in rem verso* nicht sperren (CA Liège 16 February 1939, Pas. belge 1939, I, 1637).

2. Eine ausdrückliche Vorschrift zur Frage der Subsidiarität der allgemeinen Bereicherungsklage findet sich auch in SPAIN nicht. Soweit Ausprägungen besonders geregelt sind, unterliegen die entsprechenden Ansprüche nicht dem Subsidiaritätsprinzip (e.g. Unfair Competition Act [*Ley 3/1991,* of 10 January, *de competencia desleal*] art. 18(6) and Compilation of 'Foral Civil Law' of Navarra Act 508 [Rubio Torrano [-*Egusquiza Balmaseda*], Comentarios al Fuero Nuevo, 1733]). Der *Tribunal Supremo* hat auch die Subsidiarität der allgemeinen Bereicherungsklage mehrfach ausdrücklich verneint (e.g. TS 12 April 1955, RAJ 1955 (1) no. 1126 p. 602 [*condictio* based upon interference with another's assets: unlawful exploitation of another's mine]; TS 10 March 1958, RAJ 1958 (1) no. 1068 p. 686 [unlawful disposition of another's barbed wire]; TS 24 January 1975, RAJ 1975 (1) no. 95 p. 99 [exploitation of another's mine beyond the lease contract]; TS 14 December 1994, RAJ 1994 (5) no. 10111 p. 12935 [*la acción de enriquecimiento injusto no tiene naturaleza subsidiaria*]). Unter dem Einfluss der französischen Rechtsprechung (*Álvarez-Caperochipi*, El enriquecimiento sin causa[3], 116; *Díez-Picazo*, Fundamentos I[6], 122) hat der *Tribunal Supremo* jedoch nicht nur in seiner älteren Rechtsprechung mehrfach die Geltung des Subsidiaritätsprinzips auch für Spain behauptet (e.g. TS 12 January 1943, RAJ 1943 no. 17 p. 19 and TS 22 December 1962, RAJ 1962 (2) no. 4966 p. 3386); er ist hierauf auch in neueren Entscheidungen wieder zurückgekommen (TS 19 February 1999, RAJ 1999 (1) no. 1055 p. 1655; TS 22 February 2007, RAJ 2007 (2) no. 2233 p. 5283). Im Schrifttum wird gesagt, dass man das Subsidiaritätsprinzip nur dann akzeptieren müsse, wenn man das Bereicherungsrecht allein auf Billigkeit und soziale Gerechtigkeit zurückführen wolle; andernfalls käme man ohne es aus (*Álvarez-Caperochipi* loc.cit. 116; *Díez-Picazo* loc.cit. 123). Die letztere Ansicht dürfte heute die vorherrschende sein (*Lacruz Berdejo*, Rev.Crit.Der.Inm. 1969, 599-601; *Álvarez-Caperochipi* loc. cit. 118-120; *Díez-Picazo* loc.cit. 122; *Miquel González*, Enriquecimiento injustificado, 2806; *Pasquau Liaño*, CCJC 1999, 893; *Basozabal Arrue*, Enriquecimiento injustificado por intromisión en derecho ajeno, 336). Die Rechtslage bleibt unklar, wohl auch deshalb, weil courts have been resorting to subsidiarity with different meanings. Manchmal wird gesagt, die allgemeine Bereicherungsklage müsse subsidiär sein, weil sie sich aus allgemeinen Rechtsprinzipien und nicht aus dem Gesetz ergäbe (TS 30 April 2007, RAJ 2007 (2) no. 2396 p. 5676). Manchmal wird das Subsidiaritätsprinzip bemüht, um zu verhindern, dass über das Bereicherungsrecht kürzere vertragsrechtliche Verjährungsfristen umgangen werden (TS 19 February 1999 loc. cit.); manchmal geht es darum, den Anwendungsvorrang spezialgesetzlicher Vorschiften zu sichern (wie in CA Valencia 30 May 2007, BDA JUR 2007/260076; anders aber CA Ourense 23

November 2001, BDA JUR 2002/22015); und manchmal wird der Begriff der Subsisdiarität in dem Sinn verwandt, dass eine Bereicherungsklage gegen einen Drittbereicherten nur in Betracht kommt, wenn der Hauptschuldner insolvent ist (in diesem Sinn TS 12 July 2000, RAJ 2000 (4) no. 6686 p. 10232 und TS 22 October 2002, RAJ 2002 (5) no. 8774 p. 16027).

3. Für ITALY ergibt sich die Subsidiarität der Bereicherungsklage unmittelbar aus CC art. 2042. Die Vorschrift bestimmt, dass ein Anspruch wegen Bereicherung nicht erhoben werden kann, wenn der Geschädigte einen anderen Anspruch geltend machen kann, um für den erlittenen Nachteil entschädigt zu werden. Die Bereicherungsklage kann auch dann nicht erfolgreich erhoben werden, wenn der andere Anspruch verjährt oder verwirkt (Cass. 5 April 2001, no. 5072, Giust.civ.Mass. 2001, 715), *in concreto* unbegründet ist oder nur gegen einen Dritten besteht (Cass. 9 May 2002, no. 6647, Giust.civ.Mass. 2002, 795: Anspruch gegen *falsus procurator* schließt Bereicherungsanspruch gegen den Prinzipal aus). Ob das Subsidiaritätsprinzip für Bereicherungsansprüche auch dann besteht, wenn zwar ein anderer haftet, aber insolvent ist, wird unterschiedlich beurteilt (näher Alpa and Mariconda [-*Sirena*], Codice civile commentato IV, sub art. 2041 I, 1). Der Zweck des CC art. 2042 besteht u.a. darin zu verhindern, dass der Betroffene für denselben Nachteil mehrfach entschädigt wird. Die Vorschrift verhindert aber nicht die Ergänzung einer Entschädigung, sofern durch eine solche Ergänzung ein anderer Nachteil ausgeglichen werden soll. Mit der Bereicherungsklage kann deshalb der vom Bereicherten durch eine Rechtsverletzung gezogene Gewinn herausverlangt werden, obwohl derselbe Anspruch vom Deliktsrecht nicht gewährt wird (see *Albanese*, Resp.civ. e prev. 2004, 538).

4. Subsidiär ist die allgemeine Bereicherungsklage auch in BULGARIA (LOA art. 59(2)). Sie steht nicht zur Verfügung, falls der Verarmte einen Anspruch aus Vertrag, Delikt, Geschäftsführung ohne Auftrag, Leistungskondiktion oder unter sachenrechtlichen Vorschriften geltend machen kann. Ansprüche des Verarmten gegen Dritte schließen Ansprüche aus LOA art. 59(1) dagegen nicht aus (*Vassilev,* Obligazionno pravo, Otdelni vidove obligazionni otnosheniya, 600). In zahlreichen anderen Ländern ist die Bereicherungsklage dagegen nur in dem Sinne “subsidiär”, dass sie nicht zum Zuge kommt, wenn zwischen den Parteien ein wirksamer Vertrag oder ein Schuldverhältnis aus berechtigter Geschäftsführung ohne Auftrag besteht (so z.B. in GERMANY and in ESTONIA). Es handelt sich hier aber nicht um eine konkurrenzrechtliche Subsidiarität, sondern darum, dass es bereits an der Voraussetzung fehlt, dass es sich um eine “ungerechtfertigte” Bereicherung handeln muss.

5. Für die übrigen Rechtsordnungen siehe die eingehenden Landesberichte in PEL Unj.Enr. Introduction B8-40.

II. Bereicherungshaftung und Vertragshaftung

6. Nichtigkeit ist in FRANCE und BELGIUM die Rechtsfolge der Nichtbeachtung einer der für den betreffenden Vertrag gesetzlich vorgesehenen Entstehungsvoraussetzungen. Der *Code civil* operiert insoweit sowohl mit dem Begriff der *nullité* als auch mit dem der *rescission*; sie werden als Synonyme verwandt. Im heutigen Schrifttum hat sich *nullité* als allgemeine Bezeichnung für die verschiedenen Fälle der Nichtigkeit durchgesetzt; *action en rescision* beschreibt i.d.R. die Form der *nullité*, die auf ein eklatantes Missverhältniss zwischen Leistung und Gegenleistung (*lésion*) reagiert (Rép.Dr.Civ. [-*Picod*], VII^2, v° *Nullité* [1998], no. 16) (z.B. CC arts. 1674 ff: *rescision de la vente pour cause de lésion*). Die Besonderheit der *action en réscision* besteht oft darin, dass die begünstigte Partei den Vertrag durch das Angebot

retten kann, die Benachteiligung auszugleichen (z.B. CC arts. 1681-1682; see *Wéry*, Vue d'ensemble sur les causes d´extinction des contrats, 5, 23). Neben der Nichtigkeit kennen das französische und das belgische Recht eine ganze Reihe von zusätzlichen Instrumenten zur Bewältigung von Fragen, die aus Unzulänglichkeiten im Zusammenhang mit dem Vertragsschluss oder der Vertragserfüllung resultieren. Dazu gehört in FRANCE die *inopposabilité* (fehlende Drittwirksamkeit); sie hat ihre Ursache wie die Nichtigkeit in der Verletzung einer gesetzlichen Vorschrift zum Zeitpunkt des Vertragsschlusses. Zu einer *inopposabilité* kommt es, wenn die verletzte Norm ausschließlich dem Schutz von Drittinteressen dient. Der Vertrag ist dem jeweiligen Dritten gegenüber unwirksam, bleibt aber zwischen den Parteien gültig (*Picod* loc.cit. no. 10). Die *résolution*, die *résiliation*, die *révocation*, die *caducité* und die *réfaction* sind Sanktionen für Ereignisse, die sich nach wirksamem Vertragsschluss einstellen; die Rechtsprechung scheint sich dieser ausdifferenzierenden Terminologie allerdings nicht immer konsequent zu bedienen (*Mazeaud and Chabas*, Leçons de droit civil II(1)[9], no. 723 p. 846). *Nullité* und *résolution* (Vertragsaufhebung) wirken beide *ex tunc* (see CC art. 1183(1), wo für den Eintritt einer *condition résolutoire* gesagt wird, sie *remet les choses au même état que si l´obligation n´avait pas existé*) und zeitigen deshalb nahezu identische Rechtsfolgen (Cass.com. 26 June 1990, Bull.civ. 1990, IV, no. 190 p. 129: *la résolution d´un contrat synallagmatique emporte la remise des parties dans l´état où elles se trouvaient antérieurement*). Die *résolution* des Vertrages kann insbesondere dann gerichtlich (CC art. 1184) ausgesprochen werden, wenn ein unsicheres Ereignis eintritt, das von den Vertragsparteien zur auflösenden Bedingung gemacht wurde, oder wenn eine der Vertragsparteien ihre vertraglichen Pflichten nicht erfüllt (*Picod* loc.cit. nos. 14-15). Für Verträge mit wiederkehrenden Leistungen (*contrats successifs*) eignet sich die *ex tunc*-Wirkung der *résolution* nicht; deshalb wird bei ihnen i.d.R. nur die *résiliation* gerichtlich ausgesprochen. Sie wirkt *ex nunc* (eingehend *Bénabent*, Les obligations[9], no. 399 p. 265; anders allerdings Cass.civ. 7 June 1995, Bull.civ. 1995, I, no. 244 p. 171) und kommt nur in Betracht, wenn es sich nicht um eine nachträgliche Leistungsstörung handelt (Cass.civ. 30 April 2003, Bull.civ. 2003, III, no. 87 p. 80). Von *résiliation* ist auch die Rede, wenn die Parteien einen bereits in Vollzug gesetzten Vertrag in gegenseitigem Einvernehmen beenden. Sind unter dem Vertrag noch keine Leistungen erbracht worden, spricht man von *révocation*. Auch sie wirkt *ex nunc* (*Mazeaud and Chabas* loc.cit. no. 723 p. 847) und bleibt ohne Einfluss auf die Rechte Dritter (*Bénabent* loc.cit. no. 310 p. 226). Einseitig beendet werden Verträge durch Kündigung (z.B. CC art. 1780(2)). Alle unbefristeten Verträge können unilateral beendet werden, vorausgesetzt, die Beendung erfolgt nicht missbräuchlich und respektiert die jeweilige Kündigungsfrist (*Sériaux*, Droit des obligations[2], no. 48 p. 192). Der *résiliation* ist die *caducité* (Unwirksamkeit eines Vertrages) nah verwandt; beide werden manchmal sogar gleichgesetzt (*Bénabent* loc.cit. no. 341 p. 247). Die *caducité* führt mit Wirkung *ex nunc* zur Aufhebung eines rechtsgültig entstandenen Vertrages (*Terré/Simler/Lequette*, Les obligations[8], no. 82 p. 96). *Caducité* ist die Folge des nachträglichen Wegfalls eines wesentlichen Elementes, das im Abschlusszeitpunkt zur Gültigkeit des beitrug (*Yester-Ouisse*, JCP éd. G. 2001, I, 290, no. 3). Die richterliche Minderung der vertraglichen Gegenleistung im Falle einer Schlechterfüllung ist die *réfaction* des Vertrages (z.B. CC arts. 1644 [Kauf] und 1722 [Miete]). Sie wird in einigen wenigen Fällen auch ohne gesetzliche Grundlage ausgesprochen (z.B. Cass.com. 15 December 1992, Bull.civ. 1992, IV, no. 421 p. 296).

7. Auch in BELGIUM wirkt die *résolution/ontbinding* ex tunc; der Begriff entspricht dem des französischen Rechts (*Stijns*, De gerechtelijke en de buitengerechtelijke

ontbinding van overeenkomsten, no. 15 p. 46). *Résiliation* findet in zwei Bedeutungen Verwendung. Der Ausdruck beschreibt die einvernehmliche Vertragsaufhebung durch die Parteien (CC art. 1134(2)) und, in einigen gesetzlich vorgesehenen Fällen (z.B. CC arts. 1794 [Werkvertrag] und 2004 [Auftrag]), auch die einseitige Vertragsaufhebung (*Wéry*, Vue d'ensemble sur les causes d´extinction des contrats, 5, 24). Die einvernehmliche Vertragsaufhebung (*résiliation amiable/wederkerige opzegging*) wirkt nur für die Zukunft (*Stijn*s loc.cit. no. 18 p. 51). Die Parteien können aber auch vertraglich ein einseitiges Kündigungsrecht vereinbaren (*Stijns* loc.cit. no. 18 p. 52). Daneben akzeptiert die belgische Rechtsprechung ein einseitiges Kündigungsrecht bei allen unbefristeten und bei allen sehr langfristigen Verträgen (Cass. 9 March 1973, Pas.belge 1973, I, 640). Es wird auch vorgeschlagen, *résiliation* für alle Fälle der *résolution* zu verwenden, in denen sie ausnahmsweise nicht *ex tunc* wirkt (*Moreau-Margrève*, JT 1968, 241; dagegen aber *Stijns* loc.cit. no. 20 p. 54 und *Wéry* loc.cit. no. 25 p. 34), was bei Sukzessivlieferungsverträgen der Fall sein kann (Cass. 8 October 1987, RCJB 1990, 379, note *Fontaine*). Bei einseitigen Verträgen findet oft anstelle von *résolution* und *résiliation* der Ausdruck *révocation/herroeping* Verwendung (*van Gerven*, Verbintenissenrecht I[6], 196). Die *caducité/verval* von Verträgen und anderen Rechtsgeschäften wurde mit Cass. 28 November 1980, RCJB 1987, 70, note *Foriers*, in das belgische Recht eingeführt (ohne allerdings den Begriff zu benutzen). Sie wurde zeitweilig unter denselben Voraussetzungen ausgesprochen wie in France, see Cass. 16 November 1989, RW 1989-90, 1259 und Cass. 12 December 1991, Pas. belge 1992, I, 284, concl. *Janssens de Bisthoven*). Cass. 21 January 2000, JT 2000, 573 hat die Feststellung der *caducité* aber auf Fälle beschränkt, in denen der Vertrag infolge des Wegfalls seines Gegenstandes nicht mehr *in natura* erfüllt werden kann. *Caducité/verval* führt lediglich *ex nunc* zum Wegfall des Vertrages (*van Ommeslaghe*, RCJB 1988, 33, 44; nuancierend *Foriers* loc.cit.). Schließlich kann es, wie in France, auch auf der Grundlage der *risicoleer/théorie des risques* zu einer vertraglichen Rückabwicklung kommen. Cass. 27 June 1946, Pas. belge 1946, I, 270) entschied, dass dann, wenn die Verpflichtung der einen Partei infolge von *force majeure* erlischt, auch die andere Partei befreit ist und deshalb, wenn sie vorgeleistet hat, das Geleistete zurückfordern kann.

8. In SPAIN wird unter der neuen Lehre nicht mehr scharf zwischen vertraglichen und außervertraglichen Restitutionsansprüchen unterschieden. Die Fallgruppenbildung orientiert sich vielmehr an einzelnen *condictiones*. Die *condictio de prestación* (see notes under VII.–4:101) z.B. wird dogmatisch als ein Stück Bereicherungsrecht verstanden, ist gesetzlich aber vorwiegend im Vertragsrecht geregelt (nur die *condictio indebiti* findet sich im Recht der Quasiverträge), see *Díez-Picazo*, Fundamentos I[6], 125). Das gilt insbesondere für die Rückabwicklung nichtiger Verträge (CC arts. 1303-1308). TS 23 February 2007, RAJ 2007 (1) no. 1475 p. 3172 spricht deshalb of "the condictio de prestación of art. 1303 CC". In ähnlicher Weise werden auch restitutionary claims arising from termination of synallagmatic contracts (CC art. 1124), whose regulation is usually inferred from CC arts. 1123 and 1122 (obligations subject to resolutive conditions) als Fälle der *condictio de prestación* eingeordnet (*Díez-Picazo* loc.cit. 124). Unter Compilation of 'Foral Civil Law' of Navarra Act 508 stellen sie sogar ein Stück Bereicherungsrecht dar (TSJ Navarra 11 March 1997, BDA RJ 1997/1851; TSJ Navarra 8 October 1998, BDA RJ 1998/8598). Als ein Fall der *condictio de inversión* wird dagegen der Ausgleichsanspruch des Händlers bzw. des Handelsvertreters bei der Beendigung eines Distributionsvertrages qualifiziert (TS 15 January 2008, BDA RJ 2008/1393; TS 22 June 2007, BDA RJ 2007/5427; TS 16 May 2007, BDA RJ 2007/4616). Im Übrigen gilt: die *resolución por incumplimiento* (CC art. 1124) führt im spanischen Recht zur Unwirksamkeit *ex tunc*, es sei denn, es

handelt sich um Dauerschuldverhältnisse oder Sukzessivlieferungsverträge (TS 10 July 1998, RAJ 1998 (4) no. 6600 p. 9830; TS 24 May 1999, RAJ 1999 (2) no. 3927 p. 6087; *Díez-Picazo and Gullón*, Sistema II[6], 271; differenzierend *Lacruz Berdejo and Rivero Hernández*, Elementos II(1)[4], no. 128B). Die Rückabwicklung erfolgt nach herrschender Auffassung nach CC 1123(1) (*Díez-Picazo*, Fundamentos II[5], 723; *Díez-Picazo and Gullón* loc.cit. 249; *Fernández González-Regueral*, Resolución por incumplimiento, 173; TS 28 June 1977, RAJ 1977 (2) no. 3053 p. 2263; TS 7 July 1982, RAJ 1982 (2) no. 4219 p. 2744; TS 6 February 1984, RAJ 1984 (1) no. 576, p. 426). In der Rechtsprechung wird aber häufig auch (wie bei der Nichtigkeit) die Formel von der *restitutio in integrum* bemüht: die *resolución* verpflichte zur Wiederherstellung des Zustandes, der bestanden hätte, wenn der Vertrag nicht geschlossen worden wäre (TS 15 June 1995, RAJ 1995 (3) no. 4858 p. 6506; TS 23 October 1995, RAJ 1995 (4) no. 7104 p. 9518; TS 23 January 1999, RAJ 1999 (1) no. 419 p. 646), was dann die Anwendbarkeit der Regeln über Nichtigkeit und *rescisión* (CC arts. 1303 und 1295) zur Folge hat (TS 11 February 1992, RAJ 1992 (1) no. 1207 p. 1531; TS 17 April 1997, RAJ 1997 (2) no. 2914 p. 4414). Ob der Grund für die Rückabwicklung in einem Abschlussmangel oder in einer Leistungsstörung liegt, macht bei dieser Sichtweise praktisch keinen Unterschied mehr. Unstreitig jedenfalls ist, dass die Parteien durch die *resolución* von ihren Leistungspflichten befreit werden und dass sie einander die bereits erbrachten Leistungen (*in natura*) zurückzugewähren haben (TS 6 February 1984, RAJ 1984 (1) no. 576 p. 426; *Fernández González-Regueral* loc.cit. 175).

9. Die ITALIAN Rechtsprechung wendet auf Rückerstattungsansprüche infolge der *risoluzione* des Vertrags im Kern die allgemeinen Regeln über die Zahlung einer Nichtschuld an (e.g. Cass. 1 August 2001, no. 10498, Giust.civ.Mass. 2001, 1519; Cass. 4 February 2000, no. 1252, Giust.civ.Mass. 2000, 242; Cass. 13 April 1995, no. 4268, Giust.civ.Mass. 1995, 834; see *Breccia*, Il pagamento dell'indebito, 934 and *Moscati*, Pagamento dell'indebito, 119). Die These, dass möglichst viele Erscheinungsformen der Rückabwicklung von Leistungen ohne valide rechtliche Basis unter das Dach eines einzigen Regimes gebracht werden sollten, wird auch mit CC arts. 1463, 1360(2), 1373(2) und 1458(1) begründet (*Moscati* loc.cit. 145). Schwierig ist aber bis heute die Koordinierung des Aufhebungsrechts mit dem Recht der Zahlung einer Nichtschuld in Situationen geblieben, in welchen der *accipiens* nicht in der Lage ist, die Sache *in idem corpus* zurückzugeben (*Nicolussi*, Lesione del potere di disposizione e arricchimento, 137). Teilweise wird deshalb befürwortet, das Recht der Zahlung einer Nichtschuld jedenfalls nicht auf Rückerstattungsansprüche infolge der *risoluzione per inadempimento* und der *risoluzione per eccessiva onerosità sopravvenuta* anzuwenden (näher *Nicolussi* loc.cit. 148). Besondere Arten der *risoluzione* sind *revoca* und *recesso*. *Revoca* (Widerruf) ist ein einseitiges Rechtsgeschäft zur Aufhebung eines anderen einseitigen Rechtsgeschäftes (wie z.B. der Vollmacht oder des Angebots auf Abschluss eines Vertrages) oder zur Aufhebung eines Vertrages, der im überwiegenden Interesse nur einer der Parteien geschlossen wurde (wie z.B. der Auftragsvertrag). *Recesso* dagegen bezeichnet den einseitigen Rücktritt von einem beliebigen Vertrag (CC art. 1373). Die *revoca* führt zur Unwirksamkeit des Rechtsgeschäfts *ex tunc*, der *recesso* wirkt dagegen meistens *ex nunc* (*Bianca*, Diritto civile III[2], 734). Der *recesso* ist einer der gesetzlich zugelassenen Gründe für eine Vertragsaufhebung (CC art. 1372). Man unterscheidet zwischen dem *recesso convenzionale* (vertraglich vorbehaltenes Rücktrittsrecht) und dem *recess legale*. Die Wirkung des *recesso convenzionale* unterliegt der Parteidisposition (CC art. 1373(4)); er kann allerdings nicht wirksam für Verträge mit dinglichen Wirkungen vereinbart werden (Cass. 16 November 1973, no. 3071,

Rep.Giur.it. 1973, voce Obbligaz. e contr. 95, 110, 111, 222; str.). Gesetzliche Rücktrittsrechte bestehen typischerweise bei Dauerschuldverhältnissen (CC arts. 1569, 1596(2), 1616, 1750(2), 1771(1), 1810, 1833(1), 1834, 1845(3), 1855, 1899(1), 2118), wo sie durchweg *ex nunc* wirken, im Falle einer Nichterfüllung durch die andere Partei und im Falle wesentlicher Umstandsänderungen (Überblick bei *Roppo*, Il contratto, 552). In einigen wenigen Fällen kann diese Form des Rücktritts auch *ex tunc* wirken, d.h. zur Wiederherstellung des status quo ante verpflichten.

10. In AUSTRIA folgt die Rückabwicklung von Leistungen, die auf einen Vertrag erbracht wurden, welcher durch Rücktritt oder Widerruf beseitigt wird, den Regeln des Bereicherungsrechts. Beruht die Vermögensverschiebung auf einem zunächst wirksamen Rechtsgrund, fällt dieser jedoch nachträglich weg, so steht dem Leistenden die *condictio causa finita* zu (CC § 1435). Beispiele liefern die Aufhebung wegen nachträglicher Unmöglichkeit (CC §§ 920 und 1447), der Wegfall der Geschäftsgrundlage, der Schenkungswiderruf (CC § 948), der Rücktritt (CC § 921; ConsProtA § 4), die Wandlung wegen Mangelhaftigkeit der Leistung (CC § 932; see OGH 25 October 1994, JBl 1995, 322) sowie Vorleistungen auf ein Dauerschuldverhältnis im Kündigungsfall (OGH 28 April 1905, GlUNF 3038). Auch die Rechtsfolgen der Wandlung richten sich also grundsätzlich nach den bereicherungsrechtlichen Regeln der CC §§ 1431 ff, sofern dem nicht anwendungsvorrangige vertragliche Sonderregeln entgegenstehen (näher Rummel [-*Rummel*], ABGB II(3)^{3}, Pref. to § 1431 no. 25). Bei Dauerschuldverhältnissen steht anstelle des Rücktrittsrechts aber wiederum in aller Regel nur das *ex nunc* wirkende Kündigungsrecht zur Verfügung (OGH 27 November 1962, SZ 35/120; OGH 26 September 1991, JBl 1992, 186). Eine Rückabwicklung nach Bereicherungsrecht kommt hier folglich nur dann in Betracht, wenn der Rücktritt ausnahmsweise *ex tunc* wirkt, etwa dann, wenn sich ein Irrtum auch auf die Bemessung der Gegenleistung ausgewirkt hat (see OGH 16 November 1971, MietSlg. 23.071; OGH 27 January 1982, MietSlg. 35.089; OGH 15 November 1989, JBl 1990, 321).

11. PORTUGAL unterscheidet je nachdem, ob die Nichterfüllung bzw. der Verzug dem Schuldner zurechenbar ist (CC arts. 798 ff) oder nicht (CC arts. 790 ff). Die Unmöglichkeit der Leistung einer Partei befreit auch die andere von ihrer Pflicht zur Gegenleistung und gibt ihr, falls sie vorgeleistet hat, das Recht auf Rückforderung des Geleisteten nach den Vorschriften des Bereicherungsrechts (CC art. 795(1)). Die Regelung gleicht der für eine stillschweigend vereinbarte auflösende Bedingung (*condição resolutiva tácita*). Sind Nichterfüllung oder Verzug dem Schuldner zuzurechnen, so kann der Gläubiger vom Vertrag zurücktreten und zusätzlich die Rückerstattung seiner evtl. bereits erbrachten Leistung verlangen; CC art. 479(2) (Wegfall der Bereicherung) ist dann nicht anwendbar (CC art. 801(2); see *Pires de Lima and Antunes Varela*, Código Civil Anotado II^{3}, note 2 under art. 795, p. 50). Der Rücktritt (CC arts. 432-439: *resolução do contrato*) führt zur einseitigen Beendigung des Vertrages; er kann nur auf einen Grund gestützt werden, der sich nach dem Vertragsschluss einstellt (*Antunes Varela*, Obrigações em geral II^{7}, 275). Der Rücktrittsgrund kann sich aus dem Gesetz oder einer vertraglichen Vereinbarung ergeben (CC art. 432(1)). Raum für das Recht der ungerechtfertigten Bereicherung bleibt nicht (STJ 20 January 2000, Processo 99B777). Das Rückabwicklungsverhältnis richtet sich vielmehr nach dem Regime der unwirksamen Verträge (CC arts. 289 und 290; see *Brandão Proença*, Resolução do contrato, 205). Wer das Empfangene nicht mehr zurückgeben kann, verliert das Rücktrittsrecht (CC art. 432(2)). Der Rücktritt wirkt nur dann nicht *ex tunc*, wenn diese Rechtsfolge dem Willen der Parteien oder dem Zweck der gesetzlichen Regelung widersprechen würde (CC art. 434(1)). Nur *ex nunc* wirken im Gegensatz zum Rücktritt der Widerruf (*revogação*, CC arts. 406(1),

265(2), 1170), die Kündigung eines Dauerschuldverhältnisses (*denúncia* bzw. *resolução de um contrato de execução continuada ou periódica*, CC art. 434(2)) und die Kaduzität (*caducidade*, CC arts. 1051, 1141 und 1174). Ein Mietvertrag wird z.B. durch die Zerstörung oder Enteignung der vermieteten Sache und durch den Tod des Mieters kaduziert (CC art. 1051). See *Almeida Costa*, Obrigações[11], 321.

12. Das GREEK law definiert den Rücktritt als die Rückgängigmachung eines schuldrechtlichen Vertrages durch einseitige Erklärung einer Partei aufgrund einer entsprechenden gesetzlichen oder vertraglichen Befugnis (*Stathopoulos*, Geniko Enochiko Dikaio A(1)[2], 1197; *Georgiades*, Enochiko Dikaio, Geniko meros, 511). Man unterscheidet zwischen gesetzlichen und vertraglichen Rücktrittsrechten. Gesetzliche Rücktrittsrechte finden sich in zahlreichen Vorschriften, z.B. in CC arts. 382-384, 386, 401 und in Verbraucherschutzgesetz arts. 3 und 4. Das Rücktrittsrecht betrifft nur die Verpflichtungsgeschäfte des Schuldrechts, nicht dinglich wirkende Verträge; für sie muss nötigenfalls eine auflösende Bedingung vereinbart werden. Der Rücktritt bewirkt das Erlöschen der Leistungspflichten; bereits erbrachte Leistungen sind nach den Regeln des Bereicherungsrechts (*condictio ob causam finitam*) zurückzugeben; jedoch beanspruchen CC arts. 391-393 Anwendungsvorrang. Der Rücktritt beseitigt das Schuldverhältnis nach herrschender Meinung mit *ex tunc*-Wirkung (CA Athens 5183/2001, EllDik 2002, 245; anders aber Georgiades and Stathopoulos [-*Papanikolaou*], art. 389, no. 8), jedenfalls kommt ihm insoweit Rückwirkung zu, dass die Empfänger der erbrachten und nach Ausübung des Rücktritts zurückzugewährenden Leistungen auch in der Zeit vor der Ausübung des Rücktritts nicht als Berechtigte angesehen werden dürfen (*Stathopoulos* loc.cit. 1210). Die Verweisung der rücktrittsrechtlichen Vorschriften auf das Bereicherungsrecht bezieht sich insbesondere auf CC arts. 908 ff, die den Haftungsumfang regeln. Ist Rückgewähr *in natura* nicht möglich, wird Wertersatz geschuldet. CC art. 912 (strengere Haftung ab dem Zeitpunkt, zu dem mit der Rückgabepflicht gerechnet werden musste), ist auch im Rücktrittsrecht anwendbar (*Papanikolaou* loc.cit. no. 16). Der Rücktritt ist u.a. ausgeschlossen, wenn die Rückgabe der Sache infolge unverschuldeter Zerstörung oder erheblicher Verschlechterung unmöglich geworden ist (CC art. 391). Vorrang vor den allgemeinen Rücktrittsvorschriften haben die eingehenden Spezialregeln der CC arts. 540 ff für das Kaufrecht. Nicht notwendig identisch mit der allgemeinen Terminologie ist der Rücktrittsbegriff im Anwendungsbereich des speziell geregelten Verbrauchervertragsrechts.

13. Auch HUNGARY unterscheidet zwischen vertraglichen und gesetzlichen Rücktrittsrechten. Der Rücktritt hebt den Vertrag rückwirkend zum Zeitpunkt des Vertragsschlusses auf; bereits erbrachte Leistungen sind zurückzuerstatten (CC §§ 319(3), 320(1)). Voraussetzung ist eine entsprechende Rücktrittserklärung an die andere Vertragspartei. Es ist der Zustand wieder herzustellen, der ohne den Vertrag bestanden hätte; die Rücktrittsfolgen decken sich deshalb mit denen, die das Gesetz für das Recht der ungültigen Verträge vorsieht (BH 2004/320). Für das vertraglich vorbehaltene Rücktrittsrecht gelten einige besondere Vorschriften. Es darf insbesondere dann nicht ausgeübt werden, wenn der Rücktrittsberechtigte die empfangene Leistung nicht oder nur in einem Zustand zurückgeben kann, der ihren Wert beträchtlich verringert (CC § 320(3)). Ausgeschlossen ist der Rücktritt bei Dauerschuldverhältnissen; zu deren Beendigung steht nur das Kündigungsrecht zur Verfügung. Das Verbrauchervertragsrecht operiert dagegen wiederum mit dem Rücktrittsrecht; die Rechtsfigur des Widerrufs ist auf den Widerruf eines Angebotes zum Abschluss eines Vertrages beschränkt (CC § 214(2)). Auch im BULGARISCHEN Recht wirkt der Rücktritt *ex tunc*; nur bei

Dauerschuldverhältnisses ist das wiederum anders (LOA art. 88(1). Rücktritt und Kündigung werden aber terminologisch nicht scharf unterschieden.

14. Den Verfassern des ESTONIA LOA lag viel daran, das Recht der Vertragsbeendigung klar zu strukturieren und alles zu vermeiden, was zu terminologischer Konfusion führen könnte (*Kõve*, Juridica IV/2003, 230). Das Gesetz kennt deshalb für die einseitige Vertragsbeendigung *ex nunc* nur die Kündigung (*ülesütlemine*, LOA §§ 195 ff) (als den Mechanismus zur Beendigung von Dauerschuldverhältnissen) und den Widerruf (*taganemine*, LOA §§ 188 ff); letzterer beendigt Verträge, die auf einen einmaligen Leistungsaustausch gerichtet sind. Kündigung und Widerruf befreien die Parteien mit Wirkung für die Zukunft von ihren Leistungspflichten. Sie unterscheiden sich im Umfang dessen, was zurück zu gewähren ist. Im Falle der Kündigung müssen nur Vorausleistungen zurückerstattet werden. Im Falle des Widerrufs kann dagegen jede Partei alles von ihr Geleistete zurückverlangen, ferner Früchte und erzieltes Einkommen, sofern sie selber das Empfangene zurückgewährt. Interest shall be paid on money refunded as of the moment of receipt of the money. In Fällen, in welchen eine Partei den empfangenen Gegenstand verarbeitet und in denen sich erst zu diesem Zeitpunkt herausstellt, dass ihr ein Widerrufsrecht zusteht, bleibt sie zur Herausgabe einer ungerechtfertigten Bereicherung verpflichtet (LOA § 190(2).

15. Zu weiteren Fragen des Verhältnisses zwischen Bereicherungs- und Vertragsrecht siehe die notes under VII.–2:101.

III. Bereicherungshaftung und Vindikation

16. In FRANCE und BELGIUM ist für die Bestimmung des Verhältnisses zwischen Bereicherungsrecht und Vindikation in einem ersten Schritt die Bestimmung des gegenständlichen Anwendungsbereichs des zivilen Eigentumsrechts wichtig. Aus der Systematik des Gesetzes (weniger aus dem Text des CC art. 544) folgt, dass es das Eigentumsrecht auf körperliche Gegenstände beschränken wollte (*de Page and Dekkers*, Traité élémentaire de droit civil belge V[2], no. 1134 p. 997; Rép.Dr.Civ. [-*Sériaux*], VIII[2], v° Propriété [2001], no. 26 ; see also Cass.req. 25 July 1887, S. 1888, 1.17, note *Lyon-Caen*; D. 1888, 1.5, note *Sarrut* [das *droit d´auteur* sei kein Eigentumsrecht i.S.d. Code civil]). Die herrschende Meinung hält an diesem Konzept bis heute fest (see *Sériaux* loc.cit.; *Mazeaud and Chabas*, Leçons de droit civil II(2)[8], no. 1351 p. 117). Die Beschränkung des Eigentumsbegriffs auf körperliche Gegenstände ist allerdings seit Jahrzehnten heftig umstritten. Seit dem *Code de la propriété intellectuelle* (1992) hat sich in Frankreich der Begriff *propriété intellectuelle* als Oberbegriff für die Immaterialgüterrechte durchgesetzt, und Entsprechendes gilt heute auch für Belgium (*de Page and Dekkers* loc.cit.). Diese Entwicklung hat noch einmal zu der Frage Anlass gegeben, ob Immaterialgüterrechte in den zivilrechtlichen Eigentumsbegriff des CC art. 544 integriert werden könnten; sie ist überwiegend erneut verneint worden (*Terré and Simler*, Les biens[5], no. 35 p. 35; *Edelman*, D. 1992, Chron. 91; *de Page and Dekkers* loc.cit.; *Malaurie and Aynès*, Les biens[5], no. 412 p. 117; *Mazeaud and Chabas* loc.cit.). Eine analoge Debatte wird – mit demselben Ergebnis - über die Frage geführt, ob ein Eigentumsrecht an schuldrechtlichen Ansprüchen (ein *propriété des créances*) existiere (bejahend z.B. *Zenati*, Rev.trim.dr.civ. 1996, 422-425, verneinend aber u.a. *Sériaux* loc.cit. no. 21; *Mazeaud and Chabas* loc.cit.; *Larroumet*, D. 1998 Jur. 92, 93). Wenn folglich auch weiterhin davon auszugehen ist, dass das Eigentumsrecht i.S.v. CC art. 544 auf körperliche Gegenstände beschränkt bleibt, können Vindikations- und Kondiktionsansprüche nur dort in Konkurrenz zueinander treten, wo es um die Rückforderung einer rechtsgrundlos weggegebenen bzw. empfangenen Sache geht. Wird eine Sache aufgrund eines unwirksamen Kaufvertrages geliefert, verbleibt das

Eigentum beim Verkäufer. Wegen ihrer Subsidiarität muss dann die *action de in rem verso* der Vindikation weichen. Dasselbe gilt aber nicht für die *action en répétition de l´indu*, die gerade keinen subsidiären Charakter hat (Cass.civ. 19 October 1983, Bull.civ. 1983, I, no. 242 p. 216). Die *action en revendication* dient der Feststellung des Eigentums an der Sache und wirkt, anders als die *action personnelle en restitution* auch Dritten gegenüber (*Zenati and Revet*, Les biens[2], p. 202, no. 166; *Hansenne*, Les biens I(1), p. 591, no. 636). Erstere setzt den (oft schwierigen) Beweis des Eigentums voraus; letztere nicht.

17. In SPAIN ist heute anerkannt, dass Vindikation (CC art. 348(2)) and *condictio* frei konkurrieren; ihr Verhältnis unterliegt nicht dem Subsidiaritätsprinzip (TS 12 April 1955, RAJ 1955 (1) no. 1126 p. 602; *Basozabal Arrue*, Enriquecimiento por intromisión en derecho ajeno, 336). Der Kondiktionsanspruch kann aber ein Folgeanspruch des Vindikationsanspruches sein, insbesondere dort, wo es durch Verarbeitung oder Verbindung zu einem gesetzlichen Eigentumsverlust kommt, see e.g. CA Málaga 4 December 2007, BDA JUR 2008/83624 (D verlangt nach der Trennung von seiner ehemaligen Freundin E erfolgreich Möbel aus Eigentum und Wertersatz für verlegtes Parkett im Wege eines unjustified enrichment claim). Da Spain dem kausalen Übereignungssystem folgt, können Ansprüche auf die Rückgewähr geleisteter Sachen grundsätzlich auch auf die Vindikation gestützt werden. Sie setzt freilich nicht nur den Nachweis des Eigentums des Klägers und des Besitzes bzw. der Detention des Beklagten, sondern auch die Möglichkeit voraus, die Sache zu identifizieren (was z.B. bei Gattungssachen i.d.R. ausgeschlossen ist), see *Álvarez-Caperochipi*, El enriquecimiento sin causa[3], 30. Der Bereicherungsanspruch hat demgegenüber den Vorteil, dass er nicht davon abhängt, dass die Sache *in natura* zurückgegeben werden kann (*Álvarez-Caperochipi* loc.cit. 67-70). Umgekehrt ist die Vindikation ausgeschlossen, wenn das Gesetz an anderer Stelle (z.B. im Nichtigkeitsrecht: CC arts. 1305 und 1306) die Restitution trotz Ungültigkeit des Titels aus übergreifenden Gründen (Sittenwidrigkeit; Gesetzesverstoß) ausschließt (*Carrasco Perera*, ADC 1987,1055, 1066).

18. In AUSTRIA unterbleibt aufgrund des kausalen Übereignungssystems im Falle der rechtsgrundlosen Leistung idR. auch der Eigentumserwerb des Bereicherten. Dem *solvens* steht deshalb auch die Eigentumsklage aus CC § 366 offen. Sie konkurriert frei mit Ansprüchen aus Bereicherungsrecht; der Bereicherte ist sowohl nach CC § 366 als auch nach CC §§ 1041-1042 bzw. §§ 1431-1432 zur Herausgabe der Sache verpflichtet (OGH 29 February 1984, SZ 57/44; OGH 15 January 1992, SZ 65/5; *Apathy and Riedler*, Bürgerliches Recht III[2], no. 15/3). In der Praxis wird die Klage aber nur selten auf das Eigentumsrecht gestützt, weil der Nachweis des Eigentums erhebliche Anforderungen stellt. Buchgeld kann, da es sich dabei um eine Forderung handelt, ohnehin nicht im Wege der Vindikation zurückgefordert werden, und bei Barzahlungen geht das Eigentum häufig durch Vermischung unter (Schwimann [-*Honsell and Mader*], ABGB VII[2], Pref. to §§ 1431 ff. no. 15). Für die Kondiktion ist das Eigentum des Leistenden an der zurückgeforderten Sache dagegen unerheblich (OGH 4 November 1991, SZ 54/156; *Apathy and Riedler* loc.cit. no. 15/4; *Koziol and Welser*, Bürgerliches Recht II[12], 269). Außerdem kann mit der *rei vindicatio* nur die Herausgabe der Sache selbst, nicht aber Nutzungs- oder gar Wertersatz verlangt werden. Die *rei vindicatio* ist deshalb für den Kläger i.d.R. nur dann gegenüber einem Bereicherungsanspruch vorteilhaft, wenn der Bereicherte nach Leistungsempfang zahlungsunfähig geworden ist.

19. In PORTUGAL wird das Verhältnis der Bereicherungs- zur Eigentumsherausgabeklage wegen der Subsidiarität der Bereicherungsklage (CC art. 474) als problematisch empfunden, see *Gomes*, Conceito de enriquecimento, 88, 428).

Die Rechtsprechung scheint neuerdings einer freien Konkurrenz der beiden Anspruchsgrundlagen zuzuneigen (STJ 18 December 2002, Processo 02B4011), die Lehre ist weiterhin uneins (gegen die Subsidiarität der Bereicherungsklage gegenüber der Vindikation z.B. *Menezes Leitão*, Enriquecimento sem causa[2], 464-465; für sie *Leite de Campos*, A subsidiariedade da obrigação de restituir o enriquecimento, 360). Die *acção de reivindicação* (CC art. 1311(1)) ermöglicht es dem Eigentümer, gerichtlich von jedem Besitzer oder Detentor der Sache die Anerkennung seines Eigentumsrechts und damit die Herausgabe dessen zu verlangen, was ihm gehört. Die Eigentumsherausgabeklage unterliegt nicht der Verjährung (CC art. 1313); sie findet auf andere dingliche Rechte mit Anpassung an deren Besonderheiten entsprechende Anwendung. Da auch Portugal dem kausalen Übereignungssystem folgt (CC art. 408(1)), übeträgt ein unwirksamer Vertrag kein Eigentum: der Verkäufer bleibt Eigentümer und kann die Sache vindizieren. Da das portugiesische Recht auch den gutgläubigen Erwerb vom Nichtberechtigten nicht kennt (auch nicht die *posse vale título*-Regel), scheint sich die Geltendmachung von Vindikationsansprüchen in der Praxis geradezu aufzudrängen. Der Eigentümer ist jedoch mit dem oft sehr komplizierten Nachweis seines Eigentums belastet (CC art. 342). Deshalb ist es für ihn oft günstiger, sich auf die besitzrechtlichen Vorschriften der CC arts. 1276-1286) zu stützen (*Carvalho Fernandes*, Direitos reais, 93, 250).

20. In HUNGARY kann sich der Anspruchsteller frei zwischen der Geltendmachung der Bereicherungs- und der Eigentumsherausgabeklage entscheiden. Die Bereicherungsklage ist nur gegenüber anderen schuldrechtlichen Ansprüchen subsidiär (*Petrik and Bíró*, Polgári jog II[2], 653). Die Eigentumsherausgbaeklage verjährt nicht (CC § 115(1); sie ist nur durch die Ersitzung (CC § 121(1)) beschränkt. Wie andere schuldrechtliche Ansprüche verjährt der Bereicherungsanspruch dagegen nach Ablauf von fünf Jahren. In POLAND ist die Frage des Verhältnisses zwischen der Vindikation und dem Bereicherungsrecht sehr umstritten. Die Rechtsprechung vertritt seit Supreme Court 15 September 1945, C I 116/45, PiP 1946, no. 2, p. 120 überwiegend die Auffasung, dass der Bereicherungsanspruch gegenüber der Vindikation subsidiär sei. Ein Bereicherungsanspruch komme nur in Betracht, wenn es keine andere Anspruchsgrundlage für den angestrebten Vermögensausgleich gäbe oder wenn der entsprechende Anspruch nur mit erheblichen Schwierigkeiten realisiert werden könne (Supreme Court 27 April 1995, III CZP 46/95, OSNC 1995, no. 78, pos. 114).

21. In ESTONIA entscheidet das Abstraktionsprinzip über das Verhältnis von Vindikation (LPA § 80) und Leistungskondiktion (LOA §§ 1028-1036). Dem *solvens* steht nur dann neben der Kondiktion auch ein Eigentumsherausgabeanspruch zu, wenn nicht nur der schuldrechtliche Vertrag, sondern auch die dingliche Verfügung unwirksam war (Supreme Court 20 December 2005, civil matter no. 3-2-1-136-05). Im Normalfall freilich bleibt das Verfügungsgeschäft von der Unwirksamkeit des Verpflichtungsgrundes unberührt (GPCCA § 6(4)); in diesem Fall bleibt der solvens auf einen Anspruch aus ungerechtfertigter Bereicherung beschränkt.

IV. Sonstige privatrechtliche Ansprüche

22. Unter den sonstigen privatrechtlichen Ansprüchen, die mit denen aus Bereicherungsansprüchen konkurrieren können und unter VII.–7:101(3) von den Letzteren unberührt bleiben, spielen diejenigen aus benevolent intervention in another's affairs, Delikt und aus den Ausgleichsmechanismen des Sachenrechts eine besondere Rolle. Im Verhältnis zur berechtigten Geschäftsführung ohne Auftrag ist das Bereicherungsrecht grundsätzlich schon deshalb subsidiär, weil eine solche Geschäftsführung einen Rechtsgrund i.S.d. Bereicherungsrechts darzustellen pflegt. Je

weiter das Recht der Geschäftsführung ohne Auftrag reicht, desto schmaler wird also der Anwendungsbereich des korrespondierenden Bereicherungsrechts. So sind zwar in FRANCE und BELGIUM geschäftsführungsrechtliche Ansprüche bei Verwendungen auf vermeintlich eigene Sachen ausgeschlossen (*Mazeaud and Chabas*, Leçons de droit civil II(1)[9], no. 675 p. 808; *de Page*, Traité élémentaire de droit civil belge II(1)[3], no. 1074 p. 1137), doch wird bei eigennützigen Verwendungen auf fremde Sachen in France inzwischen die Anerkennung einer sog. *gestion d'affaires intéressée* diskutiert, und entschieden ist, dass Verwendungen auf im Miteigentum stehende und deshalb nur teilweise fremde Sachen einen Anspruch aus CC art. 1375 rechtfertigen können (CA Paris 21 May 1986, RTD civ 1986, 786, note *Giverdon;* see also CA Paris 14 October 1997, Juris Data 1997-023144). In Belgium wird aber nach wie vor nur die *gestion d´affaires désintéressée* akzeptiert; der Geschäftsführer darf nicht primär im eigenen Interesse gehandelt haben (*Stijns/Van Gerven/Wéry*, JT 1996, 689, 697). Das soll aber schon dann nicht der Fall sein, wenn ein Abschleppunternehmer das Unfallfahrzeug einer ins Krankenhaus eingelieferten Fahrerin zu seiner Garage transportiert; er habe dann sowohl Anspruch auf die Transportkosten als auch auf Abstellgebühren (CA Brugge 10 June 1985, TBR 1986, 70). Zu einer besonders engen Interaktion von Deliktsrecht und Bereicherungsrecht bzw. dem Recht der Zahlung einer Nichtschuld kommt es in France in den Fällen, in welchen dem Leistenden ein Verschulden unterläuft. Cass.civ. 17 October 1996, Bull.civ. 1996, V, no. 328 p. 232 betraf ungeschuldet von einer Krankenkasse erbrachte Leistungen. Die Empfängerin brauchte sie nicht zurück zu erstatten, weil angenommen wurde, dass die Kasse mit der Zahlung eine deliktische *faute* (CC art. 1382) begangen habe, so dass die Frau mit einem Schadenersatzanspruch in Höhe der empfangenen Leistung habe aufrechnen können. Cass.soc. 14 June 1979, Bull.civ. 1979, V, no. 546 p. 401 hatte in einem nahezu identischen Fall noch ähnlich argumentiert, im Ergebnis aber entschieden, dass dem Inhaber der *action en répétition de l´indu* der Erstattungsanspruch nicht vollständig verweigert werden dürfe.

23. In SPAIN wird gesagt, dass es sich sowohl bei der Geschäftsführung ohne Auftrag als auch bei der ungeschuldeten Leistung um quasivertragliche Schuldverhältnisse aus rechtsgrundlos erbrachten Leistungen handele (*Pasquau Liaño,* La gestión de negocios ajenos, 426). Die Geschäftsführung ohne Auftrag beträfe in der Regel die Leistung eines Dienstes, die ungeschuldete Leistung die Übergabe einer Sache. Dem Recht der Geschäftsführung ohne Auftrag gebühre als der spezielleren Regelung der Vorrang (*Pasquau Liaño* loc.cit. 419). Große praktische und auch theoretische Bedeutung kommt dagegen dem Recht des Eigentümer-Besitzer-Verhältnisses zu. CC arts. 360, 375, 379(2), 383(1) und vor allem CC arts. 451-455 have not only been used to compose a *condictio* based on incorporation, disposition, consumption or use of another's asset (*condictio por intromisión*), but also to compose a *condictio* based on payment of another's debt and other expenditures (*condictio por inversion o desembolso*), see *Díez-Picazo and de la Cámara Alvarez*, Dos estudios sobre el enriquecimiento sin causa, 121-127, 132; *Díez-Picazo*, Fundamentos I[6], 126-127, 128; *Miquel González*, Enriquecimiento injustificado, 2807-2808; CA Barcelona 26 November 2004, BDA JUR 2005/15139). CC arts. 451 ff (die Vorschriften zum Eigentümer-Besitzer-Verhältnis) stellen die allgemeine Regelung der Besitzrestitution dar. Sie ergänzen das teilweise lückenhafte Recht der Leistung des Nichtgeschuldeten, u.a. in Fragen der Rückgabe von Früchten durch den *accipiens indebiti* (*Carrasco Perera*, ADC 1987, 1055, 1106, 1115). CC arts. 453, 454 und 456 differenzieren zwischen notwendigen, nützlichen und luxuriösen Verwendungen. Notwendige Verwendungen (*gastos necesarios*) sind solche, die zur Erhaltung (*conservación*) der Sache erforderlich sind (CC art. 455). Der Begriff *gastos* drückt aus, dass es in erster

Linie um einen Ausgleich für Aufwendungen des Verwenders geht, nicht um einen Ausgleich für den Wertzuwachs des Empfängervermögens. Anspruch auf Ersatz notwendiger Verwendungen hat selbst der bösgläubige Besitzer; ein Zurückbehaltungsrecht wegen solcher Verwendungen steht aber nur dem gutgläubigen Besitzer zu (CC art. 453(1)). Nützliche Verwendungen sind nichtnotwendige Verwendungen, durch die der Wert der Sache erhöht wird, z.B. durch die Ablösung einer Hypothek. Anspruch auf Ersatz nützlicher Verwendungen hat nur der gutgläubige Besitzer (CC art. 453(2)). Sie müssen sich im Zeitpunkt der Rückgabe der Sache noch werterhöhend auswirken (CC art. 458). Luxusverwendungen schließlich sind Verwendungen, die eine Sache verändern oder verschönern, aber ihren Wert nicht erhöhen (TS 22 April 1983, RAJ 1983 (2) no. 3651 p. 2856). Sie müssen weder dem gutgläubigen (CC art. 454) noch dem bösgläubigen Besitzer (CC art. 455 second sentence) erstattet werden, können von ihnen aber weggenommen werden, wenn das ohne Beschädigung der Sache möglich ist.

24. Der Aufwendungsersatzanspruch des auftragslosen Geschäftsführers gegen den Prinzipal ist unter ITALIAN CC art. 2031 unabhängig von Be- und Entreicherung der Beteiligten auf Ersatz aller Kosten des Geschäftsführers gerichtet; eine Klage aus ungerechtfertigter Bereicherung ist insoweit weder nötig noch möglich, zumal sie am Subsidiaritätsprinzip (CC art. 2042) scheitern würde, see *Trimarchi*, L'arricchimento senza causa, 41-42. Einen Aufwendungsersatzanspruch hat auch der Besitzer, der zur Rückgabe von unberechtigt gezogenen Früchten verpflichtet ist. Der Anspruch ist auf Ersatz der Aufwendungen gerichtet, die zu Produktion und Einbringung der Früchte erforderlich waren (CC art. 1149 i.V.m. art. 821(2)). Der Besitzer einer Sache kann für den Zeitraum, für den er die Früchte herausgeben muss, auch Erstattung der Kosten für ordentliche Ausbesserungen der Sache verlangen (CC art. 1150(4)). Aufwendungen für außerordentliche Ausbesserungen kann auch der bösgläubige Besitzer erstattet verlangen (CC art. 1150(1)), desgleichen einen Ausgleich für die Verbesserungen der Sache, die im Rückgabezeitpunkt noch vorhanden sind (CC art. 1150(2)). Der Anspruch des gutgläubigen Besitzers bemisst sich nach dem Wertzuwachs der Sache, der Anspruch des bösgläubigen Besitzers entweder nach dem Wertzuwachs oder nach seinen Kosten, je nachdem, welcher dieser Beträge der geringere ist (CC art. 1150(3)).

25. Das PORTUGIESISCHE Recht der unerlaubten Geschäftsführung ohne Auftrag operiert an zahlreichen Stellen mit Verweisungen auf das Recht der ungerechtfertigten Bereicherung, z.B. in CC arts. 468(2) und 472(1)). Während die echte, berechtigte Geschäftsführung ohne Auftrag in ihrem Anwendungsbereich das Recht der ungerechtfertigten Bereicherung verdrängt, besteht freie Anspruchskonkurrenz zwischen der unechten (angemaßten) Geschäftsführung und der Eingriffskondiktion (*Menezes Leitão*, Enriquecimento sem causa[2], 920). Auch stehen Ansprüche aus Delikt und aus Eingriffstkondiktion in freier Anspruchskonkurrenz. Die Verjährung des Anspruches aus Delikt bewirkt weder die Verjährung des dinglichen noch die des bereicherungsrechtlichen Herausgabenanspruches (CC art. 498(4); see STJ 11 May 2005, Processo 05S4753).

26. Das HUNGARIAN Recht der Geschäftsführung ohne Auftrag verweist mehrfach auf die Vorschriften des Bereicherungsrechts. Eine unangebrachte Einmischung in die Angelegenheiten eines anderen berechtigt den Geschäftsführer nur, Erstattung seiner Kosten nach den Regeln der *ungerechtfertigten Bereicherung* zu verlangen (CC § 486(3)). Leistet z.B. ein Werkunternehmer mehr als das vertraglich Vereinbarte und ist diese Mehrleistung unangebracht, dann haftet der Kunde für sie nur nach Bereicherungsrecht (*Vékás*, JbOstR XIX [1978], 243, 251). Wer sich wissentlich die Angelegenheiten eines anderen als eigene anmaßt und von dem anderen nach den Regeln des Rechts der Geschäftsführung ohne Auftrag in Anspruch genommen wird,

hat insoweit eine ähnliche Rechtsstellung; er kann unter den genannten Voraussetzungen nach den Regeln der *ungerechtfertigten Bereicherung* mit seinen Kosten aufrechnen (CC § 487).

27. POLISH CC art. 414 entspricht insoweit VII.–7:101(3), als danach die Vorschriften des Bereicherungsrechts diejenigen über die Verpflichtung zum Schadenersatz unberührt lassen. Schwieriger gestalten sich die Konkurrenzfragen zwischen dem Bereicherungsrecht und dem Recht des Eigentümer-Besitzer-Verhältnisses bei Aufwendungen auf eine fremde Sache. CC art. 408 bringt eine aufwendige Regelung der Ansprüche des Bereicherungsschuldners zum Ausgleich seiner auf den erlangten Vorteil getätigten Aufwendungen. Der Anspruch ist grundsätzlich auf Ersatz der notwendigen Aufwendungen gerichtet; für nützliche Aufwendungen kann nur insoweit Ersatz verlangt werden, wie sie den Wert des Bereicherungsgegenstandes im Zeitpunkt seiner Herausgabe noch erhöhen. Ist der Bereicherungsgläubiger zum Aufwendungsersatz verpflichtet, kann das Gericht anstelle der Herausgabe in Natur Wertersatz in Geld unter Abzug des Wertes der Aufwendungen anordnen (CC art. 408 § 3). CC art. 226 betrifft demgegenüber den Aufwendungsersatz im Eigentümer-Besitzer-Verhältnis. Der gutgläubige Eigenbesitzer kann Ersatz notwendiger Aufwendungen insoweit verlangen, als sie nicht durch die Vorteile, die er aus der Sache erhalten hat, gedeckt werden. Den Ersatz anderer Aufwendungen kann er nur insoweit verlangen, als sie den Wert der Sacher im Zeitpunkt ihrer Herausgabe an den Eigentümer übersteigen. Der bösgläubige Besitzer hat nur Anspruch auf Ersatz notwendiger Aufwendungen; der Dieb oder sonstige bösgläubige Eigenbesitzer kann notwendige Aufwendungen sogar nur insoweit verlangen, als der Eigentümer durch sie bereichert sein würde. Die Lage des Besitzers ist unter CC art. 226 ist folglich schlechter als die des Bereicherungsschuldners unter CC art. 408. Daraus wird geschlossen, dass es sich bei CC art. 226 um eine die bereicherungsrechtliche Regelung verdrängende *lex specialis* handele (Supreme Court 11 May 1972, III CZP 22/72, OSNCP 1972, no. 12, pos. 213; Supreme Court 25 May 1986, IV CR 29/86, OSNCP 1987, no. 2-3, pos. 44; Bieniek [-*Kołakowski*] I[5], art. 405, no. 2; Pietrzykowski [-*Skowrońska-Bocian*] Kodeks cywilny I[4], art. 226 no. 14).

28. SLOVENIAN LOA art. 196 bringt innerhalb des Bereicherungsrechts die Regel, dass derjenige, der eine eigene oder eine fremde Sache zu Gunsten eines Dritten verwendet, einen Anspruch gegen den Dritten auf Herausgabe der Sache bzw. auf Ersatz ihres Wertes hat. Dieser Anspruch ist einem Anspruch aus berechtigter Geschäftsführung ohne Auftrag schon nach dem Wortlaut der Vorschrift subsidiär (see Juhart and Plavšak [-*Polajnar Pavčnik*], Obligacijski zakonik II, art. 196, 56). Ansprüche aus anderen Versionsklagen und Ansprüchen aus Geschäftsführung stehen dagegen in freier Anspruchskonkurrenz, z. B. dann, wenn jemand die gesetzlich begründete Pflicht eines anderen tilgt (*Polajnar Pavčnik* loc.cit. art. 197, 57). Freie Anspruchskonkurrenz besteht auch im Verhältnis zum Deliktsrecht. Als eine das Bereicherungsrecht verdrängende *lex specialis* wird dagegen die Verwendungsersatzklage aus LPA art. 48 qualifiziert (*Juhart/Tratnik/Vernčur,* Stvarno pravo, 295).

29. Im DUTCH law sollen Ansprüche aus Geschäftsführung ohne Auftrag (CC art. 6:198) und Ansprüche aus ungerechtfertigter Bereicherung (CC art. 6:212) frei konkurrieren, z.B. dann, wenn die Tilgung einer fremden Schuld die Voraussetzungen beider Vorschriften erfüllt. Das Recht der Geschäftsführung ohne Auftrag wolle Ansprüche aus ungerechtfertigter Bereicherung nicht ausschließen (so jedenfalls *Scheltema*, Verbintenissenrecht II, art. 212, no. 9, p. 68-69; art. 198, no. 4, p. 12; anders aber wohl *van Maanen*, Ongerechtvaardigde verrijking, 43, der meint, dass das Bestehen einer Forderung aus Geschäftsführung ohne Auftrag eine Verarmung bzw. einen Schaden

i.S.d. Bereicherungsrechts entfallen lasse). Klagen auf Herausgabe einer Sache können schuldrechtlich auch auf das Deliktsrecht gegründet werden (CC art. 6:103: Schadenersatz *in natura*), und umgekehrt kann selbst der Anspruch auf die Rückgewähr einer ungeschuldeten Leistung letztlich in einen Schadenersatzanspruch münden, nämlich dann, wenn die Rückgabeverpflichtung aus CC art. 6:203 nicht erfüllt werden kann, so dass man es mit einer Pflichtverletzung zu tun hat (CC art. 6:74). Forderungen aus Delikt, aus ungerechtfertigter Bereicherung und aus ungeschuldeter Leistung stehen zueinander in freier Anspruchskonkurrenz, aber natürlich kann dieselbe Leistung nicht mehrfach verlangt werden (*Scheltema* loc.cit. art. 203, no. 15, p. 81 und art. 212 no. 9; Asser [-*Hartkamp*], Verbintenissenrecht III[11], no. 337, p. 341; HR 13 May 1977, NedJur 1978, no. 154, p. 529; CA The Hague 23 February 1989, NedJur 1990, no. 595, p. 2449). Wo eine Klage aus Delikt möglich ist und den insoweit höheren Beweisanforderungen entsprochen werden kann, wird regelmäßig diese bevorzugt, weil sie für den Kläger in aller Regel günstiger ist (*Scheltema* loc.cit.). Das hängt auch damit zusammen, dass der Schadenersatzanspruch aus CC art. 6:212 im Gegensatz zu dem deliktischen Schadenersatzanspruch aus CC art. 6:162 der Höhe nach durch Verarmung und Bereicherung begrenzt ist. Der Anspruch auf Gewinnherausgabe aus CC art. 6:104 ist dementsprechend auf das Deliktsrecht beschränkt.

30. In ESTONIA verdrängt das Recht der *negotiorum gestio* (LOA ch. 51) das Recht der ungerechtfertigten Bereicherung. Das Recht der ungerechtfertigten Bereicherung findet aber in einigen Sonderfällen ergänzende Anwendung, z.B. dann, wenn der Geschäftsführer ohne Verschulden irrig annahm, zur Geschäftsführung berechtigt zu sein (LOA § 1024(4)). In that case the principal is obliged to transfer that which is received as a result of the intevention pursuant to the provisions concerning unjustified enrichment. Der Vorrang des Rechts der Geschäftsführung ohne Auftrag ist praktisch bedeutsam, weil Leistungen unter nichtigen Dienstleistungsverträgen nach geschäftsführungsrechtlichen, nicht nach bereicherungsrechtlichen Regeln rückabgewickelt werden sollen (*Tampuu*, Lepinguväliste võlasuhete õigus, 67). Zwischen dem Delikts- und dem Bereicherungsrecht herrscht dagegen grundsätzlich freie Anspruchskonkurrenz (LOA § 1044(1)). If a plaintiff has both a claim for compensation of damages and an unjustified enrichment claim against the person who violated his rights, he may choose between the two claims (Supreme Court 25 September 2006, civil matter no. 3-2-1-70-06). Das Bereicherungsrecht kann für den Kläger aber insbesondere deshalb günstiger sein, weil es weder den Nachweis eines Verschuldens der anderen Seite noch eines Schadens des Klägers voraussetzt (see Supreme Court 13 December 2006, civil matter no. 3-2-1-124-06).

Illustration 2 is derived from BH 2006/193; **illustration 5** is derived from Bulgarian Supreme Court no. 1023 of 17 July 1968, judgment in civil matters no. 4017/58, third chamber; **illustration 6** is inspired by STJ 27 January 1988, BolMinJus 473 (1998) 474.

VII.–7:102: Concurrent obligations

(1) Where the disadvantaged person has both:

(a) a right under this Book to the reversal of an unjustified enrichment; and

(b) (i) a right to reparation for the disadvantage (whether against the enriched person or a third party); or

(ii) a right to recover under other rules of private law as a result of the unjustified enrichment,

the satisfaction of one of the rights reduces the other right by the same amount.

(2) The same applies where a person uses an asset of the disadvantaged person so that it accrues to another and under this Book:

(a) the user is liable to the disadvantaged person in respect of the use of the asset; and

(b) the recipient is liable to the disadvantaged person in respect of the increase in assets.

COMMENTS

General. The function of this provision is to prevent double recovery in a range of cases. These are firstly where the disadvantaged person has an enrichment claim and also another private law claim (against the same or a different person) which ought to be regarded as alternative (paragraph (1)). Such private law claims may take the form of a right to compensation or other reparation for damage caused arising out of the same disadvantage giving rise to the enrichment claim or a right of recovery which, like the enrichment claim, serves to reverse an enrichment. The second instance is where the disadvantaged person has enrichment claims against several enriched persons, but in respect of the same disadvantage (paragraph (2)).

Claims with different bases. In so far as an enrichment claim and a claim for reparation relate to the same disadvantage, any discharge of one claim also goes towards the discharge of the other. For example, where E has made use of D's asset, D may claim compensation for the deprivation of the property and will also have an enrichment claim based on a notional fee for the hire of the asset. D cannot demand payment of both sums since if D had the use (the basic point of reference for the loss in the reparation claim) D could not at the same time have hired the asset out to another (the basic point of reference for determining the quantum of liability for the enrichment claim: see VII.–5:102 (Non-transferable enrichment) paragraph (1) and VII.–5:103 (Monetary value of an enrichment; saving)). To have the benefit of both claims would involve a contradiction.

Illustration
D, a bus company, has an exclusive franchise to operate a bus line from O to P. E, a competitor, has a franchise to operate a long-distance bus line from O to Q. Contrary to the terms of its franchise and in infringement of D's exclusive franchise, E's coaches make regular stops at P to transport passengers between O and P. D has a claim against E for loss of profit under the rules of the applicable competition law. D also has a claim under this Book for a fee equal to the value of E's enrichment – the use of D's franchise – or, depending on whether E is in bad faith, the profits which E has obtained as a result of the infringement. D is not entitled to recover both sums, since the claims arise in respect of the same disadvantage, but D is free to claim the greater of the two amounts due.

Claims against different persons. Paragraph (2) applies where a person has been enriched by making use of an asset of the disadvantaged person in such a manner that the asset has vested in another, who is correspondingly enriched by the increase in assets. In the usual case only one of the two claims will be meaningful for the disadvantaged person. If the recipient is a good faith acquirer who has given value for the enrichment, the enrichment will be justified by the property law rules on good faith acquisition or, in other cases, the recipient will have the benefit of the defence in VII.–6:102 (Juridical acts in good faith with third parties). In such a case only the claim against the user will yield benefit to the claimant. This paragraph therefore only applies in limited situations. Recovery on the basis of one claim reduces the other because the disadvantaged person cannot be permitted to recover both in respect of the claim against the transferor (enriched in making use of a right to dispose of an asset, for example) and the recipient (enriched in obtaining the asset). Otherwise the disadvantaged person would have the value of the asset twice over. The internal relationship between transferor and recipient will depend among other things on the terms of the contract or other juridical act between them.

NOTES

1. Soweit Ansprüche aus ungerechtfertigter Bereicherung überhaupt frei mit Ansprüchen aus anderem Rechtsgrund konkurrieren (see Notes under VII.–7:101 (Other private law rights to recover)), ist in allen Rechtsordnungen selbstverständlich, dass der Umstand, dass das Anspruchsziel auf mehrere Anspruchsgrundlagen gegründet werden kann, nicht zu double oder gar mehrfach recovery führen darf. Siehe bereits die notes under VII.–7:101.
2. In SPAIN ist nicht nur der bereicherungsrechtliche Anspruch gegen a bad faith intervener auf Gewinnherausgabe gerichtet (see Notes under VII.–5:104 (Fruits and use of an enrichment)), sondern in einigen Fällen auch der Deliktsanspruch. To avoid double recovery as well as undercompensation in such cases, e.g. within patent law, werden zwei Grundregeln vorgeschlagen. Es dürfe (i) nur das als "echte" Bereicherung des Patentverletzers angesehen werden, was nach Abzug seiner deliktischen Schadenersatzverpflichtung übrig bleibe. Wenn der Verletzergewinn geringer sei, als der geschuldete Schadenersatz, sei auch bereicherungsrechtlich stets mindestens der tatsächliche Verlust des Rechtsinhabers auszugleichen (*Portellano Díez*, La defensa del derecho de patente, 190). Die Gerichte sind sich des Problems der double recovery aber möglicherweise nicht immer zureichend bewusst gewesen. TS 29 December 2006, RAJ 2007 (2) no. 1714 p. 3897 (see the *illustration* under the Article)

decided that both the tort law claim and the unjustified enrichment claim are different and compatible. Consequently, E was obliged (i) to compensate D for his actual damage and for lost profits; and (ii) to reverse to D the profits obtained by the unlawful practice. (However it might have been the case that within the enforcement-period of this decision the amounts concerning the lost profits (based on Unfair Competition Act art. 18(5) (tort) and Unfair Competition Act art. 18(6) (unjustified enrichment) had been correspondingly reduced to avoid overcompensation of the claimant.) TS 5 February 2008, BDA RJ 2008/4029 gewährte dagegen dem verletzten Inhaber eines Markenrechts nur einen nach der entgangenen Lizenzgebühr berechneten Schadenersatzanspruch aus Delikt; der Bereicherungsanspruch aus Unfair Competition Act art. 18(6) wurde mit der ausdrücklichen Begründung verneint, dass eine doppelte Kompensation vermieden werden müsse. Likewise, *Díez-Picazo*, ADC 2007, 1601, 1610 suggests that in the context of cases of interference with another's rights the aggrieved party is only entitled to either a tort law claim or a *condictio* against the intervener.

3. Under PORTUGUESE CCP art. 469 kann der Kläger den geltend gemachten Anspruch auf mehrere Anspruchsgrundlagen stützen; das Gericht ist verpflichtet, den subsidiär geltend gemachten Anspruch (das *pedido subsidiário*) zu berücksichtigen, wenn dem primären Klagebegehren nicht stattgegeben werden kann, z.B. weil ihm die Einrede der Verjährung entgegensteht (STJ 10 November 1981, BolMinJus 311 [1981] 353; STJ 17 October 2006, Processo 06A2741; STJ 16 September 2008, Processo 08B1644). Entsprechendes gilt, wenn der primär geltend gemachte Anspruch aus Vertrag oder Delikt unbegründet ist, aber der subsidiär erhobene Anspruch aus ungerechtfertigter Bereicherung durchgreift (STJ 18 May 2006, Processo 06A1157).

4. Also, under ESTONIAN law a plaintiff may have both a claim for compensation of damages and an unjustified enrichment claim against the violator of his or her rights. In such cases the amount of the enrichment claim must be taken into account in determining the amount of the claim on compensation of damage, and *vice versa*, in order to avoid any enrichment of the plaintiff.

The **illustration** is taken from TS 29 December 2006, RAJ 2007 (2) no. 1714 p. 3897.

VII.–7:103: Public law claims

This Book does not determine whether it applies to enrichments which a person or body obtains or confers in the exercise of public law functions.

COMMENTS

General. Among the Member States some legal systems have different sets of rules governing unjustified enrichment law for private law and public law cases and this Article respects that tradition. It leaves it to those public law rules to determine whether and in what fashion the rules of this Book should also extend to unjustified enrichment claims in the public law field or whether a completely different, specifically public law regime should govern. It is not the function of these private law model rules to determine to what extent, if any, they are also apt for the public law sphere. This is in keeping with and broadens the general principle that these model rules are not intended to be used or used without modification or supplementation, in relation to rights and obligations of a public law nature: see I.–1:101 (Intended field of application) paragraph (2).

Contexts. Where specifically public law principles of unjustified enrichment law apply, these usually take the form of special modifications of the basic private law rules for public law cases. In addition, however, there may be special regimes for particular categories of public law cases, such as, for example, for repayment of fees or tax to public authorities where less was due to the state or no sum was due at all, or for recovery of social security payments which were excessive or to which the recipient was not entitled. Such rules can take proper account of the complications specific to the public law field – for example, due to the fact that the legislation underpinning the authority to demand the sum is struck down under constitutional or administrative law or that the revenue raised has been factored into budgetary planning.

Scope. The priority of possible public law regimes of unjustified enrichment law envisaged by the Article relates to (a) claims between public law bodies, (b) claims by individuals against public law bodies (e.g. in respect of overpaid tax), and (c) claims by public law bodies against individuals (e.g. in respect of overpaid welfare benefits).

NOTES

1. Mit der *action en répétition de l'indu* können staatliche Stellen sowohl nach der FRENCH als auch nach der BELGIAN Rechtsprechung überzahlte Sozialleistungen (Altersversorgung, Arbeitslosengeld etc) zurückgefordern (Cass.civ. 22 November 2005, pourvoi 04-30583; Cass. 27 March 2006, no. de rôle S050022F; Cass. 3 January 2005, no. de rôle S040118F; Cass. 29 September 2003, no. de rôle S020047F). Umgekehrt können Bürger mit dieser Klage auch gegen den Staat vorgehen, z.B. wegen zu viel gezahlter Steuern (Cass.civ. 24 February 2005, pourvoi 03-20040; Cass. 26 June 1998, no. de rôle F970071F).
2. In SPAIN dagegen the legal regime of restitutionary claims arising out of public law relationships is usually to be found in a public law rule, with no apparent connection to the Spanish CC or other private law rules. Thus public law rules set out a wide array of restitutionary claims based on unjustified enrichment. General Budgetary Act (*Ley*

47/2003, General Presupuestaria) of 26 November 2003, BOE no. 284 of 27 November 2003 art. 77, for instance, lays down the duty of the beneficiary of public benefits to reverse to the public Administration what he or she received from the latter by mistake, General Act on Taxation (*Ley 58/2003, General Tributaria*) of 17 December 2003, BOE no. 302 of 18 December 2003 art. 221 the duty of the tax authority to reimburse overpaid taxes. However, public law courts have, under the general doctrine of unjustified enrichment, extended the duty to reverse an unjustified enrichment to many other areas, such as extra work done under an implicit or explicit order of the public body, but beyond the contractual agreement (e.g. TS 25 February, RAJ 1991 (2) no. 1536 p. 2085; TS 28 April 2008, BDA RJ 2008/2486). Today, public law courts frequently refer to the (civil) doctrine of unjustified enrichment as developed by the civil chambers of the *Tribunal Supremo* and apply the 'principle that interdicts unjustified enrichments' (e.g. TS 2 April 1986, RAJ 1986 (3) no. 4214 p. 4045 andTS 28 April 2008 loc. cit.).

3. In ITALY haben sich schwierige Fragen der Zuständigkeitsabgrenzung zwischen den Zivil- und Verwaltungsrechten gestellt (dazu Cass.sez.un. 25 July 2006, no. 16896, Giust.civ.Mass. 2006, 7-8). In der Sache aber kann (und muss) der Staat, sofern nicht ein Sondergesetz Vorrang beansprucht, Zuvielleistungen (wie z.B. überzahlte Bezüge von Angestellten des öffentlichen Dienstes) nach den Regeln der Zahlung einer Nichtschuld (CC arts. 2033 ff) zurückfordern. Der gute Glauben des *accipiens* steht der Forderung nicht entgegen, allerdings dürfen die Lebensbedürfnisse des Schuldners nicht beeinträchtigt werden (Administrative Court Lazio Roma, 17 November 2006, no. 12593, TAR 2006, 11; Consiglio Stato 22 June 2006, no. 3962, Foro amm. CDS 2006, 6, 1792). Klagt ein Privatrechtssubjekt aus ungeschuldeter Leistung gegen den Staat, weil der mit der zuständigen Verwaltung abgeschlossenen Vertrag unwirksam war (was wegen besonderer verwaltungsrechtlicher Gegebenheiten in Italien nicht selten vorkommt), so prüft die Rechtsprechung üblicherweise, ob die zuständige öffentliche Körperschaft (z.B. eine Gemeinde) die ihr erbrachte Leistung als nützlich anerkannt hat (z.B. Cass. 28 October 2005, no. 21079, Giust.civ.Mass. 2005, 10; Cass. 21 September 2005, no. 18586, Giust.civ.Mass. 2005, 7/8). Es soll zwar schon eine implizite Anerkennung durch konkrete Nutzung der Leistung genügen. Allerdings kann eine solche Anerkennung nur nach dem Zeitpunkt der Leistungserbringung und nur von dem zuständigen Organ der Körperschaft erklärt werden (Cass. 16 September 2005, no. 18329, Giust.civ.Mass. 2005, 6).

4. In AUSTRIA ist anerkannt, dass CC §§ 1431 ff analog angewandt werden können, wenn eine Leistung ihren scheinbaren Rechtsgrund nicht in einem Vetrag oder einer privatrechtlichen Regelung, sondern in einer Vorschrift des öffentlichen Rechts hat (VwGH [verstärkter Senat] 30 June 1965, JBl 1966, 436). Zuständig sind dann aber die Verwaltungsgerichte (Schwimann [*Mader*], ABGB VI^3, no. 20; see OGH 14 June 1989, SZ 62/105) (Ausnahme: Enteignungssachen). Bei Rückforderungsansprüchen eines Hoheitsträgers gegen ein Privatrechtssubjekt gehen der analogen Anwendung des Bereicherungsrechts allerdings spezielle Grundsätze des öffentlichen Rechts vor, insbesondere sind die zum Schutze der Privatperson erlassenen verfahrensrechtliche Vorkehrungen zu beachten (Rummel [-*Rummel*], ABGB II(2)^3, vor § 1431 no. 28). Im Verhältnis zwischen dem Träger der Sozialversicherung und den Versicherten scheitert die Anwendung des privatrechtlichen Bereicherungsrechts zumeist an dem Anwendungsvorrang der spezielleren Regeln des Social Security Act (*ASVG*); für eine Analogie zu CC §§ 1431 ff ist hier nur noch zum Zwecke der Lückenfüllung Raum.

5. PORTUGAL verfügt über eine Reihe von öffentlichrechtlichen Spezialnormen quasibereicherungsrechtlichen Inhalts. Unter General Social Security Act (*Bases Gerais do Sistema de Segurança Social*, Lei no. 4/2007 of 16 January 2007) art. 60(2)

sind ungerechtfertigt gezahlte Sozialleistungen zurückzuerstatten, und *Lei Geral Tributária* (DL no. 398/98 of 17 December 1998) art. 43 begründet den Anspruch auf Rückerstattung ungeschuldet gezahlter Steuern. Ansprüche dieser Art unterliegen dem jeweiligen Spezialregime unter komplementärer Anwendung der Regeln des Zivilgesetzbuches (loc.cit. art. 2(d)). Ansprüche aus ungerechtfertigter Bereicherung können Gegenstand der allgemeinen Verwaltungsklage sein (*Código de Processo nos Tribunais Administrativos*, Lei 15/2002 of 11 September 2002, art. 37(2) lit. I; see STA 14 July 2008, Processo 0386/07 [Ansprüche eines Arichitekten wegen Leistungen, die über das vertraglich Geschuldete hinausgingen]).

6. Im BULGARIAN Recht unterliegen Rückforderungsansprüche wegen nichtgeschuldet oder zu viel gezahlter Steuern und die Rückforderung unberechtigt ausgezahlter Sozialversicherungsleistungen dem Restitutionsregime der sogen. Steuer-Sozialversicherungsverfahrensordnung (art. 118(1)). Ihren Regeln unterliegen auch staatliche Rückforderungsansprüche aus unberechtigt empfangenen Subventionen (see loc.cit. art. 162(2)(vi)). Auch SLOVENIA verfügt über spezielle öffentlichrechtliche Rückforderungsregime. Ein Beispiel ist Steuerverfahrensgesetz art. 96, der die Rückforderung von zu viel gezahlten Steuern regelt.

7. Pursuant to ESTONIAN Administrative Procedure Act (*Haldusmenetluse seadus*) § 69(1), things, money and other benefits transferred to a person on the basis of an administrative act which is repealed retroactively shall be returned or compensated for according to the private law provisions concerning unjustified enrichment. In addition, State Liability Act § 22(1) states that a person may request a public authority to return a thing or money transferred without legal basis in a public law relationship unless otherwise provided by law; if the return of a thing received without legal basis is not possible or involves excessive costs, the entitled person may request compensation for the value of the thing in money. The provisions of private law apply to unjustified enrichment in a public law relationship, unless otherwise regulated by the State Liability Act and if it is not in conflict with the nature of the public law relationship. A public authority may request from a person the return of a thing or money transferred without legal basis in a public law relationship on the bases and pursuant to the procedure provided by private law (State Liability Act § 22(3)). Supreme Court 17 June 2004, administrative matter no 3-3-1-17-04, however, decided that submission of claim by a public authority against a recipient, who for the intended purposes has consumed the enrichment, may be contrary to good morals. Under Taxation Act § 33 a person who has paid a greater amount of tax than prescribed by law has the right, within three years as of the date on which excess payment occurred, to apply to the tax authority for the overpaid amount to be refunded or set off.

8. ENGLAND (pointer): *Deutsche Morgan Grenfell v. Her Majesty's Commissioners of Inland Revenue* [2006] UKHL 49, note *Manner*, ZEuP 2007, 872-887: Rechtsirrtum dem Tatsachenirrtum nun auch auch im Verhältnis Bürger und Staat gleichgestellt.

BOOK VIII

ACQUISITION AND LOSS OF OWNERSHIP OF GOODS

CHAPTER 1: GENERAL PROVISIONS

Section 1: Scope of application and relation to other provisions

VIII.–1:101: Scope of application

(1) This Book applies to the acquisition, loss and protection of ownership of goods and to specific related issues.

(2) This Book does not apply to the acquisition or loss of ownership of goods by:

(a) universal succession, in particular under the law of succession and under company law;
(b) expropriation and forfeiture;
(c) separation from movable or immovable property;
(d) division of co-ownership, unless provided by VIII.–2:306 (Delivery out of the bulk) or VIII.–5:202 (Commingling);
(e) survivorship or accrual, unless covered by Chapter 5 of this Book;
(f) real subrogation, unless covered by Chapter 5 of this Book;
(g) occupation;
(h) finding; or
(i) abandonment.

(3) This Book applies to the acquisition and loss of ownership of goods by extrajudicial enforcement in the sense of Book IX or the equivalent. It may be applied, with appropriate adaptations, to the acquisition and loss of ownership of goods by judicial or equivalent enforcement.

(4) This Book does not apply to:

(a) company shares or documents embodying the right to an asset or to the performance of an obligation, except documents containing the undertaking to deliver goods for the purposes of VIII.–2:105 (Equivalents to delivery) paragraph (4); or
(b) electricity.

(5) This Book applies, with appropriate adaptations, to banknotes and coins that are current legal tender.

COMMENTS

A. General

Function of this Article. This Article defines the scope of application of Book VIII on "acquisition and loss of ownership of goods". The scope is delimited on different levels: with regard to the assets covered, it is restricted to goods and does not extend to immovable

property or other assets such as intellectual property rights or rights to performance of an obligation. With regard to the type of property right covered, the scope is – basically – limited to the right of ownership (proprietary security rights being regulated in Book IX and trusts being covered by Book X). All this already follows from the basic circumscription contained in paragraph (1) of this Article, which states that this Book applies to the acquisition, loss and protection of ownership of goods and to specific related issues. Further limitations apply with regard to certain modes of acquisition or loss of ownership (spelled out in paragraphs (2) and (3)) as well as regarding certain types of movable assets (paragraphs (4) and (5)). On the other side, the scope of Book VIII extends to "specific related issues", which had to be used as a short-cut expression in order not to overload the text of the Article. This basically refers to certain issues regarding possession, such as definitions and protection of possession, to consequential questions arising on restitution of goods to their owner, and to some (limited) issues on co-ownership.

Issues of central importance, no complete Book on property law regarding movables. Book VIII certainly covers property law issues of central practical as well as dogmatic importance. For instance, it determines under which circumstances ownership passes under a contract for the sale of goods, and provides good faith acquisition principles. Many issues addressed in this Book, such as the principle of speciality (identification), are general matters of property law. However, Book VIII does not provide a full set of rules on "property rights in movable assets"; it is confined to important segments. Details emerge from the subsequent Comment B.

B. Scope of Book VIII in general (paragraph (1))

Reasons and criteria for delimitation. There are several reasons for choosing the scope as it stands. Covering the whole area of property law, based on a comparative analysis of almost all European legal systems, would simply have been impossible in terms of time and research capacities. Second, these model rules in general are not intended to be used (except where otherwise provided) in relation to the ownership of, or rights in security over, immovable property (I.–1:101 (Intended field of application) paragraph (2)(f)). Then, not only for organisational matters of dividing workload, but also for well-founded policy reasons of treating functionally comparable issues together, all matters of security rights relating to movable assets are left to Book IX on proprietary security rights. With regard to the potentially remaining issues, above all a criterion of transaction-affinity was important. The central part of Book VIII, therefore, is Chapter 2 on the "derivative" transfer of ownership of goods, such as that based on a contract for the sale of goods, this certainly being the most important issue from the viewpoint of the internal market. The issues dealt with in the other Chapters of this Book are grouped around and supplement the central transfer issue, e.g. by addressing situations where a valid transfer, for one reason or the other, fails. Another criterion is that Book VIII should cover those issues which supplement other parts of these model rules on a property law level because they are needed to develop final solutions to important practical situations. This will be discussed more closely in Comment B below.

(a) Assets covered: goods, not immovable property, intellectual property or rights to performance

Goods. Book VIII applies to "goods", which is a bit narrower than "movables" in the sense of Book IX. The term "goods" is defined in VIII.–1:201 (Goods); see the Comments on that Article. There is, however, one important reservation to be observed: pursuant to VIII.–1:102 (Registration of goods), the question whether ownership and the transfer of ownership in

certain categories of goods may be, or may have to be, registered in a public register must be left for national law to decide. Also, the effects of such registration, as determined by national law, have priority over the respective rules of this Book.

Immovable property. As mentioned above, Book VIII does not apply to immovable property. This converges with I.–1:101 (Intended field of application) paragraph (2)(f). Practically, covering immovable property as well would have been unrealistic. It would have required, among other things, a complete analysis of European land registration systems, including rather technical and procedural details. The results could have been considerably different as compared to the analysis carried out in relation to goods. For example, the importance of publicity could be weighed in a completely different way where reliable means of providing publicity (in particular, by registration) are available.

A specific issue regarding the demarcation between movable and immovable property is, however, addressed in VIII.–1:301 (Transferability) paragraph (2).

Intellectual and industrial property rights. Also, Book VIII does not apply to intellectual and industrial property rights. Technically, this follows from the restriction to "goods" in the sense of VIII.–1:201 (Goods). The reasons for this choice partly converge with what has been said in relation to immovable property: covering this area would simply have been unrealistic. Also, it would have made no sense to focus on transfer and protection aspects only.

Rights to performance of an obligation. Some European legal systems perceive the transfer of a right to performance of an obligation as a matter of property law. Another approach is to deal with this issue within the law of obligations. These model rules, as PECL did before, contain a separate Chapter on assignment in Book III on obligations and corresponding rights (see Book III Chapter 5 on transfers of rights and obligations).

Further exclusions and clarifications as to assets covered. Paragraph (4) of this Article contains further exclusions, or partly rather clarifications, with regard to company shares, certain documents and electricity. Paragraph (5) deals with money. See the related Comments E and F below.

(b) Rights covered: ownership

General; ownership. As indicated above, Book VIII does not deal with all kinds of proprietary rights. It focuses on the right of "ownership" within the meaning of the definition provided in VIII.–1:202 (Ownership). For a description, see the Comments on that Article. This choice was to provide model rules for the practically most important property law areas concerning the trade in goods: proprietary security rights as regulated in Book IX, and issues of transfer (including protection in the contractual partner's insolvency), which are governed by Book VIII.

Proprietary security rights and retention of ownership devices. All matters of security in movable assets are subject to Book IX. See IX.–1:101 (General rule) on the scope of Book IX and the general policy expressed in VIII.–1:103 (Priority of other provisions) paragraph (1). This applies to classic proprietary security devices, such as the pledge; it also applies to retention of ownership and functionally comparable devices. Retention of ownership, as far as aspects of security are concerned, is, therefore, outside the scope of this Book. Only with

regard to the position of an acquirer subject to a retention of ownership device, this Book provides some additional rules in VIII.–1:204 (Limited proprietary rights) subparagraph (c) and in VIII.–2:307 (Contingent right of transferee under retention of ownership). Indirectly, however, certain provisions in particular of Chapter 5 of this Book are highly relevant for proprietary security rights, since Book IX partly refers to these provisions; cf. the overview provided in VIII.–5:101 (Party autonomy and relation to other provisions) Comment E.

Other limited proprietary rights. Further, Book VIII does not contain detailed rules on other limited proprietary rights, such as proprietary rights to use (e.g. usufruct rights) or to acquire (e.g., a right of pre-emption with effect *in rem*). Limited proprietary rights are, however, recognised for certain purposes relevant to matters covered in this Book; see VIII.–1:204 (Limited proprietary rights) and the Comments on that provision.

(c) Issues covered: transfer and protection, plus supplements

General: acquisition, loss and protection, and specific related issues. According to paragraph (1) of this Article, Book VIII applies to the acquisition, loss and protection of ownership of goods and to specific related issues. Evidently, this is a short-cut formula of a descriptive nature and needs some further clarification. The following Comments list these issues and briefly explain why they are included in Book VIII.

Central issue: transfer (Chapter 2). As already mentioned above, the "derivative" transfer of ownership, regulated in Chapter 2, forms the core of Book VIII. It, above all, supplements and, in a sense, continues the provisions on contracts for the sale of goods, as provided in Book IV.A of these model rules, on a property law level. It need hardly be said that this is a kind of transaction happening several millions of times each day in Europe, thus being of central practical importance. But it is not only sales. Rules for the transfer of ownership are also necessary with regard to contracts for donation. Ownership of goods must also be "transferred" where goods have already been delivered, but delivered in such a defective state that the contractual relationship is terminated, with the result that the goods must be returned to the original debtor under III.–3:511 (Restitution of benefits received by performance). There are, of course, further examples.

Good faith acquisition (Chapter 3). A transfer under Chapter 2 may fail where the transferor lacks the right or authority to dispose of the property: *nemo dat quod non habet*. This requires an answer to the question whether, and if so, under which preconditions, a transferee may nevertheless deserve protection in terms of making a valid acquisition. This issue is dealt with by Chapter 3 on good faith acquisition. It is ancillary to Chapter 2 in a legal sense, since it applies only where a valid transfer would otherwise fail due to the transferor's lack of right or authority. In terms of transaction costs, however, the solution to this question is of considerable importance, having a major impact on whether and to what extent buyers are advised to undertake investigations about the provenance of goods they intend to purchase.

Acquisition by continuous possession (Chapter 4). There are cases where both a valid transfer under Chapter 2 and immediate acquisition based on good faith acquisition under Chapter 3 fail. E.g., the contract between the acquirer and the seller who lacks the right or authority to dispose is invalid; or the goods are obtained under a contract of donation. This raises the next question, namely whether a valid acquisition should nevertheless be possible after a certain time of possessing the goods. Solutions are provided by Chapter 4 on

acquisition of ownership by continuous possession. This Chapter, in the first place, provides fall-back provisions in relation to Chapters 2 and 3. It does, however, go beyond, pursuing a general aim of providing legal certainty.

Acquisition by production, combination or commingling (Chapter 5). Chapter 5 deals with consequences – on the level of property law as well as with regard to compensation claims – of production, combination and commingling. This issue is included, first, because it can arise in several instances related to a transfer context (see VIII.–5:101 (Party autonomy and relation to other provisions) Comment A). In particular, the rules on production have considerable practical importance where material transferred subject to retention of ownership is used for production before payment of the price. In this respect, Book IX on security rights in movables, which basically covers all issues of retention of ownership devices, refers back to Chapter 5 of this Book. Also regarding other types of security rights, the rules of Book IX largely build upon the provisions of Chapter 5. Besides the parallels as to content, dealing with these issues in Book VIII is hence also supported by an argument of symmetry in coverage.

Protection of ownership (Chapter 6). VIII.–6:101 (Protection of ownership) contains central rules on the protection of ownership. Above all, the owner is entitled to recover possession of the property from any person who has no right to possess it in relation to the owner. In particular, this right is valid and effective where that other person is insolvent. Given that a right of revindication is not self-evident from a comparative perspective, including these provisions makes sense for practical reasons; but also to make clear what exactly is transferred or otherwise acquired under the other Chapters of this Book. In addition, the right of revindication serves an important function in providing a clear and complete picture of the consequences of subsequent avoidance of a contract, based on which property has already been transferred to the acquirer. It, therefore, also supplements the rules of Book II Chapter 7 on grounds of invalidity, and Book VII on unjustified enrichment.

Protection of possession (Chapter 6), possession in general. Given that rules on the protection of ownership are covered by Book VIII, much speaks in favour of adding rules on protection of possession as well. In practice, these rules serve an important supplementary function in relation to the ownership-rules in many countries. Arguably, this area would otherwise be incomplete from a practical perspective. This of course requires detailed rules on the concept and relevant forms of possession. Such rules are included in Chapter 1 of this Book. Also, these general possession rules operate as a central tool in other Chapters of this Book; especially in Chapter 2 (regarding the definition of delivery) and in Chapter 4 on acquisition by continuous possession.

Consequential questions on restitution of goods (Chapter 7). Chapter 7, finally, supplements the protection-rules as well as other parts of these model rules (again, e.g. the rules on the effects of avoidance). They can be important in order to solve a number of practical cases and – against the comparative background in this area – make important proposals in terms of internal coherence and simplification. See also VIII.–7:101 (Scope of application) Comment A2.

(d) Areas not covered

Further modes of acquisition and loss of ownership. Paragraph (2) of this Article contains exceptions and clarifications as to further modes of acquisition and loss of ownership. See Comment C below.

Co-ownership and co-possession. This Book only contains fragmentary provisions on co-ownership; see the Comments on VIII.–1:203 (Co-ownership). The existing rules are covered by the broad formula of "specific related issues". Also, Book VIII does not, or at least not explicitly, deal with co-possession. However, protection of co-ownership and co-possession will be possible under the rules of Chapter 6.

C. Exclusion of specific modes of acquisition and loss (paragraph (2))

General. Paragraph (2) of this Article lists specific modes of acquisition or loss of ownership which are not covered by this Book. The reasons for excluding these areas differ. Partly, they are outside the scope of these model rules in general. Others have been kept out because they are of rather inferior importance in view of the primary task of providing rules which can be used in a transfer context. Time pressure certainly was another reason for keeping the scope narrow.

Universal succession (paragraph (2)(a)). This Book does not cover acquisition of ownership by "universal succession". This term means succession to an entire estate or to the entire assets and liabilities of another person, whether natural or juridical. There are two main practical examples: first, the exception covers universal succession at death as provided under national laws of succession. Excluding this area corresponds to the policy of the provisions governing the scope of application of these model rules in general, which state that these rules "are not intended to be used, or used without modification or supplementation … in relation to … wills and succession" (I.–1:101 (Intended field of application) paragraph (2)(b)). Second, the exception applies to mergers and split-ups under company law, where a company's ownership in its movable assets is transferred to a new or other company (cf. the policy expressed in I:–1:101 paragraph (2)(g)). These two examples are explicitly mentioned in the text of the provision. Paragraph (4)(a) adds another exception regarding the company law area, namely for the transfer of company *shares*.

Expropriation and forfeiture (paragraph (2)(b)). I.–1:101 (Intended field of application) paragraph (2)(b) provides that the these model rules "are not intended to be used, or used without modification or supplementation, in relation to rights and obligations of a public law nature". Paragraph (2)(b) of this Article supplements this provision with respect to the acquisition and loss of ownership of goods under specific rules which are either of a public law character, or at least closely associated with public law principles and policies, namely on expropriation and forfeiture. These rules have not been considered any more closely when developing Book VIII, and it would be inappropriate to give any directions in this respect, although, theoretically, the transfer rules provided by Chapter 2 of this Book could be made applicable to these cases as well: the entitlement to the transfer of ownership in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(d) could arise from a court order or decision of another competent authority and regard has to be paid to paragraph (4) of that basic transfer provision which ensures that ownership passes at the time determined by a court order (or rule of law; or, here: order of another competent authority) itself. E.g., with regard to expropriation, a requirement of having paid compensation to the expropriated owner may be made a prerequisite applicable under the

rules governing such acquisitions of ownership. However, whether the whole system Book VIII Chapter 2 would appear appropriate for such purposes, or after making specific adaptations, cannot be evaluated here.

Also, the rules of Chapter 3 on good faith acquisition are not intended to be applied in the areas of expropriation and forfeiture. For instance, the true owner may have had no chance to participate as a party in expropriation proceedings, which may cause a different weighing of the interests of the true owner and the good faith acquirer as compared to other good faith acquisition constellations. With respect to Chapter 4, however, nothing prevents a possessor of goods who obtained possession by, say, expropriation of another (which legally failed for some reason), to acquire ownership by continuous possession after a certain period of time as provided by that Chapter. Chapter 4 stands on its own. All the requirements are laid down there; it is irrelevant whether possession was obtained under circumstances covered by paragraph (2)(b) of the present Article or not. Acquisition does not take place "by" expropriation or forfeiture, but independently thereof after at least ten years.

Separation from other asset (paragraph (2)(c)). This book does not regulate acquisition of ownership by separation from movable or immovable property. Traditionally, there usually is a rule that the owner of the main property will acquire ownership of the separated item upon separation, e.g. the owner of a field will be the owner of the crop once harvested. The same may apply to a person entitled to a usufruct right, but there may be a different rule for a person "only" entitled to a right of *usus* (acquisition upon perception). These issues have been regarded as of subordinate importance, given that the starting point and focus of this project is the derivative transfer of ownership under, e.g., a contract for the sale of goods. Cf. also VIII.1:301 (Transferability) paragraph (2) and the Comments on that provision.

Division of co-ownership (paragraph (2)(d)). This Book does not provide a full set of rules on co-ownership so that most of this area is left to national law (cf. VIII.–1:203 (Co-ownership) Comment A). This applies, among other things, to the rules on dividing co-ownership between the co-owners, by which co-ownership is terminated and transformed into sole ownership of the goods held by one of the former co-owners or by a third person. Paragraph (2)(d) of this Article spells out that the rules provided by this Book do, in principle, not apply to such acquisition of (sole) ownership. Under national law, the division of co-ownership often involves court proceedings and selling the property in an auction, unless the co-owners agree on another form of division. Book VIII does not deal with such issues and there does not seem to be any need to do so. Where co-ownership is created under VIII.–5:203 (Combination), these national provisions are to be applied for division.

In two rules, however, Book VIII provides for a mode of simplified division of co-ownership, without involving court proceedings or a special agreement of the parties. These rules provide a right to divide co-ownership by physically separating a respective quantity from a bulk of fungible goods. For this reason, paragraph (2)(d) of this Article contains a reservation for VIII.–2:306 (Delivery out of the bulk) and VIII.–5:202 (Commingling).

Survivorship and accrual (paragraph (2)(e)). Survivorship is a doctrine applicable in common law countries where property is held on joint tenancy. A surviving party having a joint interest with others in an estate may take over the whole (or a bigger proportion), in particular where one of the partners dies. The property automatically accrues to the surviving co-owner(s). "Accrual" may also address situations where a partner of a company withdraws,

retires, etc. The provisions of this Book are not intended to apply to such acquisitions. The term "accrual", however, may also cover "accession" of a subordinate part to the principal part upon combination of these two, which is a situation expressly regulated by Chapter 5 of this Book. The present subparagraph, therefore, makes a reservation for Chapter 5.

Real subrogation (paragraph (2)(f)). Real subrogation is a very important concept in some legal systems; for instance, in France and Belgium. It may be applied, in particular, with respect to retained ownership, where the buyer resells the goods, in order to extend the security right to proceeds. It may also be used with regard to restitution, providing for a right to proceeds where another's goods have been sold; or with regard to the assignment of claims. Book VIII does not deal with such a concept on a general basis. Some rules in Chapter 5 – in particular: the rules on extending a security right to the proceeds of a sale, VIII.–5:204 (Additional provisions as to proprietary security rights) paragraph (2) – however, might be interpreted as a form of real subrogation. Therefore, Chapter 5 is excluded from the exemption spelled out in paragraph (2)(f).

Occupation (paragraph (2)(g)). Ownerless property may traditionally be acquired by any person by occupation, i.e. by taking it into possession with the intention to keep it as one's property. This is left to national law. The issue is not important for the primary purposes of this Book. The same applies to comparable forms of acquisition by a unilateral act, however named (perception etc.).

Finding (paragraph (2)(h)). Further, acquisition of ownership as a consequence of finding property which has been lost by another is not covered by this Book. The basic approach usually is that the finder is under specific duties of either returning the goods to the person who lost them or of handing them over to a public authority which keeps lost goods for a certain period in order to give their owner a chance to recover possession of them. If the owner does not claim the property after a certain time, many national legal systems provide for a right of the finder to acquire ownership of the goods. This, as well as a right to a finder's reward, is intended to work as an incentive for a finder to comply with the specific duties imposed by law. Upon a closer look, the rules in the European legal systems differ in many details. Given this and the remoteness of the issue from the central tasks Book VIII is intended to fulfil, it was agreed that finding would be kept out of this Book.

Abandonment (paragraph (2)(i)). Corresponding to the comprehensive right to dispose of the property, an owner may traditionally also abandon it, i.e. may give up possession of the goods with the intention of terminating the proprietary right. The right of ownership thereby ceases and the goods become ownerless. It has not been thought necessary to regulate this issue in the framework of this Book.

D. Acquisition and loss of ownership by way of enforcement (paragraph (3))

General. I.–1:101 (Intended field of application) paragraph (2)(h) provides that these model rules "are not intended to be used, or used without modification or supplementation … except where otherwise provided, in relation to … matters relating primarily to procedure or enforcement". Explicit regulations on enforcement issues are, in particular, provided in Chapter 7 of Book IX which deals with the enforcement of proprietary security rights. Under that Chapter, enforcement may be judicial or extrajudicial. In particular, realisation may be effected by selling the encumbered assets, which implies a transfer of ownership of these

goods to the acquirer, or ownership of the collateral may be appropriated by the secured creditor. As to extrajudicial enforcement, cf. IX.–7:207 (General rule on realisation) in conjunction with IX.–7:211 (Sale by public or private auction or by private sale) and IX.–7:216 (Appropriation of encumbered asset by secured creditor)).

Extrajudicial enforcement (sentence 1). In principle, the provisions of Book VIII are fully applicable to the acquisition and loss of ownership of goods by way of extrajudicial enforcement in the sense of Book IX Chapter 7. However, reference is to be made to the general rule of VIII.–1:103 (Priority of other provisions) paragraph (1), under which the provisions of Book IX have priority over the provisions in Book VIII. For instance, where the secured creditor fails to comply with certain duties required by Book IX Chapter 7 – e.g., the notification requirements under IX.–7:208 (Notice of extra-judicial disposition) to IX.–7:210 (Time and contents of notice), or the duty to realise a commercially reasonable price under IX.–7:212 (Commercially reasonable price) – the general principle is that the position of a third party buyer of the collateral is not affected by any violation of these provisions (cf. the Comments on these provisions). These rules taking priority, the general transfer principle expressed in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(c), namely that the transferor (here: secured creditor) must have "authority to transfer the ownership" may, consequently, not be applied in such a way that a failure to comply with these provisions would affect the secured creditor's authority to dispose, by which the transfer would become invalid, and the third party buyer's acquisition would fall (unless good faith acquisition principles would counteract).

The rules on acquisition and loss of ownership under Book VIII are also intended to apply where extrajudicial enforcement is carried out under rules of national law which are functionally equivalent to those of Book IX.

Judicial enforcement (sentence 2). With regard to judicial enforcements**,** on the other hand, it is clear that this Book, in principle, does not intend to interfere with national enforcement law. On the other hand, some of the principles of Book VIII could also be applied there, if compatible with a particular national legal system, and provided appropriate adaptations are made where necessary. Basically, this is already expressed in I.–1:101 (Intended field of application) paragraph (2)(h), but the idea is repeated for reasons of clarity by paragraph (3) sentence 2 of this Article. Adaptations may, for example, be necessary where national rules on judicial enforcement provide that the "fall of the hammer" (the acceptance of the highest bid in an auction) does not only bring about the conclusion of a contract for sale, but also effects the transfer of ownership. Here, the delivery concept generally adopted in Chapter 2 of this Book may prove to be unsuitable, as it requires a voluntary act of the transferor, which may cause practical difficulties in forced sales. Also, applying the good faith acquisition rules in Chapter 3 of this Book to judicial enforcement proceedings may be appropriate with certain adaptations, e.g., again relating to the time of acquisition (such as making the fall of the hammer decisive instead of delivery).

"Equivalents" to judicial enforcement refers to other enforcement systems run "by the state" in a wide sense, for instance operated by police authorities without involving a court.

E. Exclusion of specific types of assets (paragraph (4))

General. Paragraph (4) serves a clarifying function in relation to the types of assets covered by Book VIII. Most issues are already settled by the definition of "goods" provided by VIII.–

1:201 (Goods) which limits the scope of this Book to corporeal movable assets. This already excludes immovable property, intellectual and industrial property rights and rights to the performance of an obligation (cf. Comment B above). The list of exceptions provided by paragraph (4) of this Article is reduced to such assets which – in the everyday meaning of the word – will not be considered to be "goods", but may cause doubts against the broad definition of goods being corporeal movables. A comparable question arises in relation to banknotes and coins, which are also corporeal and movable. This issue is expressly regulated by paragraph (5) of this Article.

Company shares (paragraph (4)(a)). I –1:101 (Intended field of application) paragraph (2)(g) provides that these model rules are "not intended to be used, or used without modification or supplementation. … except where otherwise provided, in relation to … the creation, capacity, internal organisation, regulation or dissolution of companies and other bodies corporate or unincorporated". Paragraph (4)(a) supplements this general rule by excluding the transfer, other acquisition of, and the protection of rights in, *shares in* an existing company. Company law has been kept out entirely from the research carried out in this project. A clarification as to this Book's scope is however useful since shares in a company may be incorporated in certain documents, like securities, which, as such, are "corporeal" and "movable".

Documents embodying rights (paragraph (4)(a)). A comparable, and partly overlapping, issue is addressed by the second type of asset mentioned in paragraph (4)(a) of this Article, namely "documents embodying the right to an asset or to the performance of an obligation". Again, there is a general rule in I.–1:101 (Intended field of application) paragraph (2)(g), which provides that these model rules are "not intended to be used, or used without modification or supplementation. … except where otherwise provided, in relation to … bills of exchange, cheques and promissory notes and other negotiable instruments". Paragraph (4)(a) of this Article conclusively clarifies the matter for Book VIII. Partly, these fields are governed by specific rules serving specific purposes, in particular needs of celerity and safety in commercial transactions. Partly, these purposes are served by specific transfer means and effects, like endorsement and "abstract" effects, which are not compatible with some approaches opted for in this Book. Also, some of these areas are subject to international harmonisation instruments, like the 1930 Geneva Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes. There is no use in touching this field. It was also left completely outside the project.

Paragraph (4)(a) of this Article makes a proviso for documents containing the undertaking to deliver goods for the purposes of VIII.–2:105 (Equivalents to delivery) paragraph (4). Book VIII "applies" to these documents in the sense that transferring these documents constitutes an equivalent to delivery in the sense of that Article, the result of which is that ownership of the goods "represented" by the document passes to the transferee, provided all the other general transfer requirements are met. This is not intended to imply that the transfer of such a document itself is necessarily governed by the rules of Chapter 2 of this Book. That may follow separate rules which may, e.g., require endorsement in the case of certain forms of a bill of lading. See also VIII.–2:105 (Equivalents to delivery) Comment E.

Electricity (paragraph (4)(b)). Paragraph (4)(b) of this Article clarifies that this Book does not apply to electricity. This refers to electricity "contained" in a power grid. The background is a technical one. Electricity does not "move", in a physical sense, from a specific supplier to a specific customer. Rather, a specific voltage must constantly be kept in the network by

suppliers feeding the network and suppliers taking electricity therefrom. Also, electricity will not be regarded as "corporeal", notwithstanding being measurable. Accordingly, transfer rules envisaging physical delivery from one to another do not fit. On the other hand, book VIII does apply where electricity is contained in a corporeal movable body, like a battery.

F. Money (paragraph (5))

Money in general; cases clearly covered or clearly not covered. The classification of "money" in terms of being an object of transfer under private law may be manifold. This is apparent when posing the question whether, or to what extent, it may be covered by Book VIII. Bank account money is definitely not included, this being a claim against the bank and not a corporeal asset. To this extent, the scope of Book VIII clearly deviates from Book IX. On the other hand, banknotes and coins of *former* currency, i.e. money which is not used as current legal tender anywhere (like "Deutsche Mark" coins which have been replaced by the Euro), are intended to be covered by Book VIII from the outset; i.e. without any reservation of "appropriate adaptations". Such items are treated as "goods". They may be subject to trade, as single items as well as forming parts of collections. Also, there may be cases where banknotes or coins actually being current legal tender are functionally traded as "goods". For example, a collection of all Euro- and Eurocent-coins from all States of the Euro-zone is offered for sale in exchange for a price. For such "goods", Book VIII also applies without restrictions. With regard to the wording of paragraph (5), which provides that Book VIII applies with appropriate adaptations, one may say that in such a case, simply no modification is necessary.

Applicability to banknotes and coins that are current legal tender only with appropriate adaptations: underlying reasons. With regard to current banknotes and coins, as long as they serve the function of legal tender, Book VIII will only apply with "appropriate adaptations". This will be the case where money is paid as a price in exchange for goods or services, but also where money is stolen and, e.g., commingled with other money. There should be no difference whether the banknotes or coins are current legal tender in the respective country where they are received (or possessed) or whether they are current legal tender somewhere else. There are two main reasons for mentioning "appropriate adaptations". The first one is simple prudence. Comparative research as well as the drafting deliberations when preparing this Book always focused on goods, and it would not be reasonable to copy the result to money without thorough consideration. Second, a better approach would arguably even be to take into account both bank account money and current banknotes and coins right from the beginning and to strive for coherent solutions. However, the fact that this has not been possible does not necessarily preclude the application of the results achieved under the present Book as long as it is made clear that these results may be overridden in any case where another solution is found to be more appropriate. This approach underlies paragraph (5) of this Article.

Applicability in detail: basic overview. In a rough analysis of the main principles of Book VIII, it appears that the rules, at least basically, fit the transfer of current banknotes and coins. As stated above, "appropriate adaptations" may be necessary and can, for instance, also be based on consistency arguments relating to bank account money. As to substance, in particular the delivery concept in chapter 2 seems quite all right with banknotes and coins, and applying good faith acquisition rules (Chapter 3) to money is quite usual. In some countries, however, the requirements for good faith acquisition of money are less strict than for other assets (in order to serve full negotiability), e.g. with regard to the standard of good faith; or by establishing no "for value" requirement; or by providing that stolen money can be acquired in good faith without any exceptions. As mentioned above, the policies for Chapter 3

of Book VIII have been developed with a view to “goods” and policies may prove to be not fully identical. This may require adaptations to be made. Chapter 4 on acquisition by continuous possession of money does not seem to create problems, although it would have very little practical importance in relation to money. Regarding Chapter 5, the “commingling” rule provided in VIII.–5:202 (Commingling) appears to provide a fair solution also where money owned by different persons is commingled: these persons acquire co-ownership in proportion to the value of their contributions and each co-owner is allowed to separate an amount corresponding to that co-owner’s share. Chapter 6 on remedies does not seem to create additional problems; the only – but practically important – problem for the owner will be to identify the owned banknotes or coins. Also Chapter 7 will hardly create any problems, since it refers to Books VI and VII; some questions will not arise at all, e.g. improvements to money.

VIII.–1:102: Registration of goods

(1) Whether ownership and the transfer of ownership in certain categories of goods may be or have to be registered in a public register is determined by national law.

(2) The effects of such registration, as determined by national law, have priority over the respective rules of this Book.

COMMENTS

A. General

General approach. Book VIII does not aim to establish a system of registration for goods. Whereas in Book IX a system of registration for proprietary security rights in movables is introduced, the acquisition and transfer of the right of ownership of the movable itself cannot be registered in accordance with any rules of the DCFR. This lack of a possibility to register the ownership of goods under these model rules does not, however, exclude the possibility and effect of registration of ownership on the basis of national registration rules or international conventions. This means that national or international registration rules, which may exist for certain categories of goods in certain countries, can principally be combined with the application of Chapter VIII on the acquisition and loss of ownership of goods.

B. The rule in detail

Paragraph (1): national law determines the categories of goods to which ownership-registration applies. The term 'national law' includes rules of autonomous national origin as well as rules stemming from European or international sources which are considered to be or to have become part of national law (for instance in the case of international conventions by ratification). Such registration systems may apply to vehicles like ships, aircraft or cars or to other specific types of movables. It is important that the registration has some significance or effect with respect to right of ownership of the goods. If it does not contain information pertaining to the ownership of the goods, it will not overlap with the rules of Book VIII and, therefore, is not addressed by this paragraph. The rules of Book VIII do not restrict or prescribe the categories of goods which have to be registered for the purpose of acquisition or transfer of ownership or for the purpose of achieving other effects of private law. It is a highly political decision to introduce or abolish a registration system for the ownership of certain types of movables, because such decisions have an important impact on the trade with such goods. The introduction of a registration system is costly and burdensome, for the parties as well as for the state or other institutions involved, and it will be justified only for very few categories of goods – which are valuable, long-lasting, and important for the economy, and trade without registration would be too insecure for the market participants. Only where these and maybe other requirements are fulfilled, will the beneficial effects of such registration systems outweigh their costs and other disadvantages. The difficult answer to the questions in which countries and with respect to which goods these requirements will or will not be met can only be given by political institutions on national or European levels, but not by the drafters of these rules.

Paragraph (1): 'may be or have to be registered'. The national or international rules of registration may create a duty of a person to register certain goods and their owner(s) or may just give a person a possibility to register on a facultative basis. Equally the consequences and effects of such a duty or possibility to register and the following registration may differ considerably in the national or international systems.

Paragraph (2): different types of systems in terms of their effect. The registration of ownership of certain goods may have different effects. These effects are prescribed by the national or international rules. They characterise the respective system and cannot be separated from it. It is impossible to isolate the duty of registration (paragraph (1]) and provide uniform effects for all national registrations by Book VIII. Therefore, Book VIII must also step back with respect to the legal effects of such national registration systems and must let them prevail over its own rules of acquisition, transfer and loss of ownership.

Where the registration has only administrative or similar effects, but no effects with respect to the proof of, creation of, transfer or loss of ownership and no other private law effects with respect to the parties dealing with the movable, no conflict or overlap with the rules of Book VIII may occur. For such non-private law effects it is, therefore, not necessary to exclude the model rules of Book VIII and to give the national or international rules priority.

Where, on the other hand, the registration rules have private law effects, two differentiations have to be made. The registration of ownership may have either '*constitutive'* or '*declaratory'* effect. The registration may be part of a system where ownership is acquired by *delivery* (or delivery equivalent) or the registration may form part of a system where ownership is transferred by contract (or other juridical act etc.) alone without the requirement of delivery. In delivery systems the registration may be considered an equivalent of delivery. Thus, the transfer and acquisition of ownership may require the registration of ownership of this particular movable. In such a case registration has constitutive effect. The delivery system may also give the acquirer the choice to either register or receive delivery of the movable, either alternative being sufficient for the transfer of ownership to the transferee. In the case of *consensus* or consent systems delivery as well as registration will not have constitutive effect for the acquisition of ownership, because under such systems ownership is acquired by consent (e.g. contract) alone. The effects of registration under such systems will, therefore, be declaratory with respect to the acquisition or transfer of ownership, but may have additional proprietary effects in certain constellations, as for instance in cases of multiple transfers (A sells the goods first to B, then to C, the goods are registered for C only). Finally it is also possible that delivery systems provide registration duties or possibilities for certain categories of goods, but accord only declaratory effects to such registrations. In such cases the goods are acquired by delivery or delivery equivalent, a subsequent registration only provides information about the already existing ownership of the transferee. The declaratory effects of registration may be important in private law with respect to third persons who rely on the information given by the register.

Paragraph (2): partial exclusion of Book VIII rules. The rules of Book VIII principally apply to all categories of goods (subject to the exceptions mentioned in VIII.–1:101 (Scope of application)), even to goods for which national or international rules have established or will establish a registration system. With respect to these categories of goods (for which registration is provided) the rules of Book VIII do not interfere with a person's duty or option to register as created by national or international law. Additionally the rules of Book VIII concerning the acquisition, transfer and loss of ownership of registered goods will be modified by the respective national or international rules if and as far as these rules provide differently from the Book VIII rules. If, for instance, national rules provide that ownership of a certain category of movables can only be acquired by registration of the new owner, rules of Book VIII which provide that ownership can be transferred by agreement as to the time ownership is to pass or by delivery or an equivalent to delivery cannot be applied. In such a

case, for the sake of consistency, the national (international) legal system will also be given priority with respect to the question of whether a valid contract or other juridical act must exist as a requirement for the transfer. Book VIII (Chapter 2) requires such a contract, other juridical act or rule of law, some national systems do not (e.g. Germany, Greece).

If, on the other hand, national rules provide that certain goods have to be registered with declaratory effect only and that ownership of these goods is transferred by conclusion of a contract (or other juridical act etc.), then also these rules will have priority over the conflicting rules of Book VIII Chapter 2 (requiring delivery, a delivery equivalent or an agreement as to the time ownership passes in addition). But the Member State adopting the rules of Book VIII will, of course, be free to provide in such cases of declaratory registration that the requirements of delivery or an equivalent under Chapter 2 of Book VIII will have to be met for such categories of goods as well. The following sentence can be used as a general rule for drawing the line between national rules and the rules of Book VIII. Whenever the declaratory or other private law effects of registration may be combined with the rules of Book VIII without causing any contradictions or any interferences with the substance of the national registration system, the rules of Book VIII will also apply to categories of goods that have to be registered.

National and international systems of registration. National registration systems may, in particular, exist for ships and vessels, aircraft, railway rolling stock or motor vehicles. More detailed information is provided in the Notes to this Article. On an international level, the 2001 Cape Town Convention on International Interests in Mobile Equipment establishes an international registration system for “international interests” (security rights, retention of ownership or rights under a leasing agreement) in airframes, aircraft engines and helicopters, railway rolling stock and space assets. In case of conflict, national provisions transposing this Convention prevail over the rules provided by Book VIII; see also VIII.–1:103 (Priority of other provisions) Comment D.

VIII.–1:103: Priority of other provisions

(1) In relation to a transfer, or retention, of ownership for purposes of security, the provisions of Book IX apply and have priority over the provisions in this Book.

(2) In relation to a transfer of ownership for purposes of a trust, or to or from a trust, the provisions of Book X apply and have priority over the provisions in this Book.

COMMENTS

A. General

Function of this Article; relation to other parts of these model rules. This Article clarifies the relation of Book VIII to some other parts of these model rules with which an overlap can easily occur, namely to the provisions of Book IX on proprietary security rights and of Book X on trusts. In order not to undermine particular policies of these Books, the present Article spells out, as a general rule, that the provisions of the named Books have priority over the provisions of Book VIII. Other parts of these model rules, on the other hand, are intended to "co-exist" with the provisions of this Book without one superseding the other. The latter applies, e.g., to the general provisions of Books I to III, to the rules on contracts for the sale of goods as provided in Book IV.A, to the rules on benevolent intervention in another's affairs (Book V), as well as to Book VI on non-contractual liability and Book VII on unjustified enrichment. With regard to some Chapters of this Book, however, specific rules also provide that other parts of these model rules take priority; see VIII.–5:101 (Party autonomy and relation to other provisions) paragraph (5) and VIII.–7:101 (Scope of application), both spelling out this effect in relation to Book V on benevolent intervention.

Concept of "priority over the provisions in this Book". The approach adopted regarding the relation to Books IX and X is that the provisions of these Books "apply and have priority over the provisions in this Book" (i.e. Book VIII). This does not mean that, where an overlap with these Books occurs, Book VIII would be inapplicable as a whole. Rather, the provisions of Book VIII are intended to apply, but only to the extent they are compatible with the rules of Books IX and X.

Mandatory character. This Article is mandatory and cannot be deviated from by agreement of the parties. This is necessary, taking into account the purpose of this Article, i.e. safeguarding that the policies of Books IX and X cannot be undermined.

B. Priority of Book IX on proprietary security rights (paragraph (1))

Priority of Book IX; scope of principle. Paragraph (1) of this Article provides that in relation to a transfer, or retention, of ownership for purposes of security, the provisions of Book IX apply and have priority over the provisions in this Book. This effect is spelled out, in particular, for transfers of ownership for security purposes in the sense of IX.–1:102 (Security right) paragraph (3)(a) and for the retention of ownership as a device for securing payment (cf. IX.–1:103 (Retention of ownership devices: scope)). The principle, however, is intended to be a general one. It applies to all Chapters of Book VIII, i.e. not only to transfers under Chapter 2, but also to the rules on good faith acquisition (Chapter 3), acquisition by continuous possession in the sense of Chapter 4 (which could, theoretically, become relevant with regard to acquisition free of encumbrances in the form of a proprietary security right) and production, combination and commingling (Chapter 5). With regard to Chapter 5, the

relation is further specified in VIII.–5:101 (Party autonomy and relation to other provisions) paragraphs (3) and (4); see Comment E on that Article.

Examples of remaining scope of Book VIII. As mentioned above, the approach of Book IX taking priority means that the provisions of Book VIII will apply to the extent that Book IX does not contain specific provisions and the rules of Book VIII are compatible with the concepts of Book IX. For example, VIII.–2:307 (Contingent right of transferee under retention of ownership) contains provisions on the legal position of a transferee acquiring goods subject to a retention of ownership device. Or, where parties who transfer ownership for security purposes agree that, upon the payment of the secured debt, ownership will fall back to the transferor, VIII.–2:203 (Transfer subject to condition) may be applied to the extent that it is consistent with Book IX. Also, IX.–2:112 (General matters of property law) partly refers back to the provisions of Book VIII. The same approach is applied in some of the substantive rules of Book IX; e.g. IX.–2:307 (Use of encumbered goods for production or combination), IX.–2:308 (Use of goods subject to a retention of ownership device for production or combination) and IX.–2:309 (Commingling of assets subject to proprietary security), which are closely synchronised with the provisions of Chapter 5 of Book VIII.

C. Priority of Book X on trusts (paragraph (2))

General principle. The same general principle applies in relation to Book X on trusts. The provisions of Book X prevail where ownership of goods is transferred to or from a trust, or where a transfer otherwise serves the purposes of a trust. Again, the provisions of Book VIII may be applied to the extent that they are compatible with the trust law principles.

D. Priority of EU instruments and international instruments

General principle. Also, EU instruments and relevant international instruments to which Member States are parties, are, in principle, intended to have priority over the provisions of this Book. This is a general principle of these model rules and it suffices to spell this out in the Comments only. However, there are only a few examples at the moment. VIII.–4:102 (Cultural objects) paragraph (2) repeats the policy in relation to international conventions in the area covered by that Article. The 2001 Cape Town Convention on International Interests in Mobile Equipment (cf. VIII.–1:102 (Registration of goods) Comment B) may be relevant with regard to certain issues of retention of ownership, as well as with regard to the rules on vesting the encumbered object in the chargee in or towards satisfaction of the secured rights (cf. Article 9 of the Convention). Bills of exchange and promissory notes, for which the 1930 Geneva Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes provides uniform rules, is outside the scope of this Book (cf. VIII.–1:101 (Scope of application) Comment E).

VIII.–1:104: Application of rules of Books I to III

Where, under the provisions of this Book, proprietary effects are determined by an agreement, Books I to III apply, where appropriate.

COMMENTS

A. General

General idea and function of this Article. In some – prominent – places, this Book allows the parties to determine effects on the level of property law by "agreement". These provisions are special applications of the general principle of party autonomy. As to substance, such agreements may well fall within the definition of "contract" in the sense of II.–1:101 (Meaning of "contract" and "juridical act"). However, using the term "agreement" is considered to read more smoothly in some of these provisions, and it allows – as will follow from Comment B below – the making of reservations in order to avoid unintended effects which could perhaps occur when using the term "contract" instead. The function of this Article, then, is to make the general "contract law" provisions contained in Books I to III applicable to these "agreements" as well.

Comparative background. There are some parallel phenomena to be found in European legal systems. E.g., where a legal system employs the concept of a "real agreement" (cf. VIII.–2:101 (Requirements for the transfer of ownership in general) Comments A and D) – which does, however, not apply under Book VIII – this "real agreement is considered to be a contract, to which general rules of contract law apply. For example, these agreements are subject to the general rules on avoidance for mistake.

B. The rule in detail

Agreement determining proprietary effects. There are basically two types of "agreements" covered by the present Article. First, the Article applies to "agreements as to the time ownership is to pass" in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e) and VIII.–2:103 (Agreement as to the time ownership is to pass). This type is also addressed in VIII.–2:302 (Indirect representation) paragraph (3)(c), and where parties agree on a condition in the sense of VIII.–2:203 (Transfer subject to condition). Second, VIII.–5:101 (Party autonomy and relation to other provisions) provides that the consequences of production, combination or commingling can be regulated by party agreement. See also VIII.–5:204 (Additional provisions as to proprietary security rights) paragraph (3).

Meaning of reference to Books I to III. The purpose of this Article is to make the general rules of Books I to III applicable to such "agreements". This applies, for instance, to the rules on: formation of a contract (Book II Chapter 4), representation (Book II Chapter 6), validity (Book II Chapter 7), interpretation (Book Chapter 8), contents and effects (Book II Chapter 9), and on conditions and time limits (III.–1:106 (Conditional rights and obligations) and III.–1:107 Time-limited rights and obligations)). With regard to Book I, I.–1:110 (Computation of time) may be used for interpreting the parties' agreement as to a time ownership is to pass. With regard to Book III, one may, e.g., also think of an arrangement between an owner of material and a producer under which the latter undertakes to produce certain products from the owner's material for a certain price, including an agreement that the owner of the material will become the owner of the products, the producer however being granted far-reaching

security rights in these objects. But then, the producer does not start the production process. The owner of the material will be able to terminate the contractual relationship under Book III Chapter 5. The present Article will make sure that such termination also affects the agreement as to the proprietary consequences of production.

Reservation: "where appropriate". There may, however, be certain rules in Books I to III, the application of which would be inappropriate, either in general or under the specific circumstances of an individual case. In order to avoid unreasonable results, the Article contains a proviso for such cases.

Section 2: Definitions

VIII.–1:201: Goods

"Goods" means corporeal movables. It includes ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases.

COMMENTS

A. General

Function of the Article; general idea of definition. This Article provides a definition of the term "goods", which is of central importance throughout the whole Book VIII. In so doing, the Article also supplements the general scope of application rule of VIII.–1:101 (Scope of application). The definition is the one used throughout these model rules. (See the Annex of definitions.)

Purpose of containing a definition. Given that the definitions in the Annex are incorporated into these model rules by the general provision in I.–1:108 (Definitions in Annex), one may well question whether it is necessary to repeat the definition here. This is, however, considered useful for purposes of clarity, since this term is one of the most central ones in the whole Book VIII. The same applies to the definition of "ownership" in the subsequent Article.

B. The rule in detail

Corporeal movable assets, including animals, liquids and gases. The central criteria for assets to be covered by this Book are that they are "corporeal" (tangible) and "movable" (as opposed to immovable). Immovable property has been kept out of the entire project (cf. VIII.–1:101 (Scope of application) Comment B). The state of aggregation of corporeal movable items is, however, immaterial: "goods" covers solids, liquids and gases. The term also applies to animals, which is not intended to imply any ethical values, but simply is to be seen against the background of the content this Book: the transfer of ownership and other property law matters.

Ships, vessels, hovercraft or aircraft, space objects. These specific assets are, for purposes of clarification, listed in the definition of goods as provided in the Annex. Since there would be no sense in applying a different definition, they are listed here as well. However, with regard to the rules governing the transfer of ownership, some of these examples may fall within the reservation provided by VIII.–1:102 (Registration of goods), e.g. ships may be transferred by entry in a ship register under national law.

Reference to clarifications contained in VIII.–1:101. Also, reference is to be made to VIII.–1:101 (Scope of application) which, in paragraphs (3) and (4), contains clarifications as to the kinds of assets covered by this Book which, partly, can also be said to constitute exceptions from the present Article: documents (paragraph (4)(a) of the named Article) and money (paragraph (5)) would, in principle, be corporeal movable assets. See VIII.–1:101 (Scope of application) Comments E and F.

VIII.–1:202: Ownership

"Ownership" is the most comprehensive right a person, the "owner", can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property.

COMMENTS

A. General

Function of the Article. This Article defines the right of "ownership", this virtually being the most central term in the whole Book. The rule, therefore, defines what is transferred or otherwise acquired, and to what the means of protection provided by VIII.–6:101 (Protection of ownership) relate. The definition is in fact used throughout the DCFR(see the Annex) but this is the obvious place to express it in the model rules(cf. also VIII.–1:201 (Goods) Comment A). This is its natural home. Indirectly, using this term as a central reference point throughout this Book also implies a major policy choice as to method, content and presentation of the rules contained in this Book; see the discussion of a "functional approach" in Comment A below. Against this background, adopting a definition in Book VIII is also important to make the effects of the subsequent Chapters understandable.

Comparative background. A definition of the style and content of this Article is quite common in "continental" European legal systems following a Roman law tradition. The perception in these legal systems is that ownership is a right *in rem*, i.e. a right of a person directly related to an asset (as opposed to a right of a person directed against another person, who is under an obligation to perform any kind of act or omission), an absolute right, being effective against everyone (*erga omnes*). The concept is, as such, not equally rooted in the common law tradition, where title is viewed as a relative, rather than absolute, matter. As to the particular contents of the right, the common law concept is, however, not so remote from a civil law understanding, also associating "property" or "title" with the greatest possible interest in a thing, consisting of a "bundle" of various "incidents" or "aspects" which, as such, largely correspond with the ones listed in the present Article. None of the incidents is individually necessary, though, and individual incidents of property can be transferred from the bundle to other parties without the transferee becoming the "owner". There is also a common understanding in that such incidents re-vest in the owner once any lesser interests granted in respect of the thing terminate (sometimes described as the "flexibility" of ownership). With regard to Nordic legal systems, it can be observed that a concept of ownership comparable to the definition provided in the present Article is quite commonly used as a description outside situations of transfer or other acquisition. It is, however, not usual to deduce specific legal consequences from qualifying a person as "the owner". In particular, when it comes to a transfer of the right, e.g. under a contract for the sale of goods, Scandinavian legal systems treat all "aspects" of "ownership" separately and independently from one another, so that different points in time may be decisive for different aspects to "pass". This is called a "functional approach"; see also VIII.–2:101 (Requirements for the transfer of ownership in general) Comment A and the structure of the general discussion provided there in Comment C. The provisions of this Book, in general, do not follow such an approach although a functional analysis of the issues is employed and a few exceptions are recognised to the basically unitary approach adopted; cf. VIII.–2:101 Comment G.

B. The rule in detail

Comprehensive and exclusive right over property. "Ownership" is defined as the most comprehensive right a person, the "owner", can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property. The definition builds upon the idea of a legal relation between a person and a thing, the right provided by this legal relation being maximally comprehensive and of exclusive character. The exclusive character corresponds to specific means of protection provided by property law, but also under general rules of the law of obligations. The text provides examples of the "aspects" or "incidents" comprised by the right of ownership; cf. the following Comments. See also the more detailed discussion of these aspects in the context of a transfer: VIII.–2:101 (Requirements for the transfer of ownership in general) Comment C.

In particular: right to use, enjoy, modify and destroy. The owner is entitled to deal with the property in any kind of factual way. The owner may use it (drive a car) or simply have it without using it. The owner may decide whether to use it personally or make its use available to another (e.g., by letting the goods on lease). The owner is also allowed to affect the substance of the property, covering mere adaptations and modifications as well as destruction – e.g. painting a car, modifying an item of clothing, drinking wine.

In particular: right to dispose. The owner is also entitled to dispose of the property. This covers the owner's power to validly transfer title of the goods to another and to validly create limited proprietary rights in the property. This incident, the owner's "right to transfer the ownership", is addressed as a general transfer requirement in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(d). Also, the owner can, based on the comprehensive right to dispose, grant such a possibility to another person, in which case this Book speaks of "authority" to dispose; cf. VIII.–2:101 Comment H.

In particular: right to recover, including separation in insolvency. Based on the exclusive character of ownership, the owner is entitled to specific means of protection. The most central device in this respect, which is also addressed explicitly by the text of this Article, is the right to recover possession of the property from any other person holding it without being entitled to do so. This is provided for by VIII.–6:101 (Protection of ownership) paragraph (1). It is essential that this right is also valid as against the current holder's creditors in the latter's insolvency (right of separation) as well as against creditors of such other person who seek to enforce their claims in the property outside insolvency proceedings. If, therefore, in a transfer situation, the transferee has already acquired ownership of the goods while they are still in the hands of the transferor and the transferor becomes insolvent, the transferee has a right to separate the goods and is thereby protected as against the transferor's general creditors. Details are discussed in VIII.–2:101 (Requirements for the transfer of ownership in general) Comment C.

In particular: other means of protection. In addition, the owner is entitled to property law protection where another person interferes with the owner's rights in any other way than by dispossession, or where such interference is imminent; see VIII.–6:101 (Protection of ownership) paragraphs (2) and (3). Interferences with the owner's property may also trigger protection under the rules of Book VI on non-contractual liability for damage and under the provisions of Book VII on unjustified enrichment. See VIII.–2:101 (Requirements for the transfer of ownership in general) Comment C for a closer description.

So far as consistent with applicable laws. However, this does not mean that the owner's rights are unlimited. Rather, other rules of law may provide restrictions, which is expressly stated in the present Article. Such rules of law may exist on a constitutional level, like the European Convention on Human Rights; or be of a public law character (e.g., certain restrictions on use and alienation applicable to weapons or toxic substances, or rules concerning specific cultural objects); or be part of private law, such as the restrictions applicable to self-help under VIII.–6.202 (Self-help of possessor).

So far as consistent with rights granted by the owner. Also, the owner may by virtue of the right to dispose "give away" the right to exercise certain aspects of the property right. The owner may, e.g., create a usufruct right in the object in favour of another person. If so, the owner is legally bound to respect that right and cannot, as long as this right persists, dispose of the property free of that right.

VIII.–1:203: Co-ownership

Where "co-ownership" is created under this Book, this means that two or more co-owners own undivided shares in the whole goods and each co-owner can dispose of that co-owner's share by acting alone, unless otherwise provided by the parties.

COMMENTS

A. General

Function of the Article. This Article defines the concept of "co-ownership" for the purposes of this Book; these purposes, however, being rather limited ones. Since general rules on co-ownership are not provided (cf. Comment A below), the only function is to provide a definition applicable to those – rare – provisions under which co-ownership is created in this Book. These provisions are VIII.–2:305 (Transfer of goods forming part of a bulk), VIII.–5:202 (Commingling) and VIII.–5:203 (Combination). Taking into account the restricted role matters of co-ownership play in Book VIII, there is no need for further regulation in a definition rule; in particular, there is no need to make choices of which types of co-ownership to acknowledge.

Comparative background. The concepts of co-ownership – in a wide sense – available in the European legal systems differ to a considerable degree. In particular, there are differences as to whether co-owners hold shares or are entitled to the whole; and with regard to the co-owners' possibilities to dispose of their interests. Details are reflected in the Notes on this Article.

No general rules of co-ownership. Book VIII does not provide a full set of rules on co-ownership. That would encompass, in particular, definitions of those kinds of co-ownership which are acknowledged; rules on the creation, administration and division of co-ownership (involving court proceedings in many countries); and rules on the transfer and other acquisition of co-ownership rights. Given the indicated differences in the national legal systems in Europe and the time pressure the whole project was subject to, such rules were not developed. Also, some aspects of this area were not considered to be of primary importance having regard to the fact that the central issue to be covered by this Book should be matters of transfer and supplementing rules of acquisition.

Accordingly, Book VIII only contains segments of the law of co-ownership: apart from the definition provided by this Article, there are some rules on the creation of co-ownership in particular instances closely linked to transfers or other modes of acquisition covered by this Book (see Comment B below); and two specific rules on the division of co-ownership created under some of these provisions, cf. VIII.–1:101 (Scope of application) paragraph (2)(d) in conjunction with VIII.–2:306 (Delivery out of the bulk) and VIII.–5:202 (Commingling).

B. The rule in detail

Scope: creation of co-ownership under Book VIII. This Article defines what is to be understood by "co-ownership" where other rules of this Book provide for the creation of co-ownership rights. This is the case in two particular areas only: first, where fungible goods contained in an identified bulk are purported to be transferred before the goods themselves are identified. For such situations, VIII.–2:305 (Transfer of goods forming part of a bulk)

provides that the "transferee" acquires co-ownership of the goods in the bulk. The second field of application is Chapter 5 on production, combination and commingling. There, co-ownership may be created under VIII.–5:202 (Commingling) and VIII.–5:203 (Combination).

Concept of co-ownership in the sense of this Article. Unless the parties agree otherwise, the creation of co-ownership under this Book means that two or more co-owners own undivided shares in the whole goods and each co-owner can dispose of that co-owner's share by acting alone. In particular, it is material that all co-owners have a right in the whole goods, not – as long as co-ownership exists – in a part of them only. Second, for practical reasons, the type of co-ownership right adopted under this Article is such that each co-owner can freely dispose of that co-owner's right alone, without being dependent on any consent or co-operation of other co-owners.

Party autonomy, different forms acknowledged by national law accepted. It is not intended by this Book to impose restrictions in terms of accepting only a limited number of co-ownership types. This is not necessary for the purposes of this Book. Consequently, it impliedly accepts other forms of co-ownership as may be provided by national law. Also, parties are allowed to choose such other types by agreement when the creation of co-ownership, as such, follows from the provisions of this Book ("unless otherwise provided by the parties"). This leeway of party autonomy is intended to be confined by the rules of the applicable national law.

VIII.–1:204: Limited proprietary rights

Limited proprietary rights in the sense of this Book are:

(a) security rights if characterised or treated as proprietary rights by Book IX or by national law;

(b) rights to use if characterised or treated as proprietary rights by other provisions of these model rules or by national law;

(c) rights to acquire in the sense of VIII.–2:307 (Contingent right of transferee under retention of ownership) or if characterised or treated as proprietary rights by other provisions of these model rules or by national law;

(d) trust-related rights if characterised or treated as proprietary rights by Book X or by national law.

COMMENTS

A. General

Function of the Article. This Article defines the term "limited proprietary rights", which is used as a reference term in some provisions of this Book. As the term is also used in Book IX, the definition used here is also reproduced in the Annex for wider use for the purpose of the model rules. Some of the provisions in this Book use the term "proprietary rights" which comprises both the right of ownership (including co-ownership rights) and limited proprietary rights in the sense of this Article. These references to "limited proprietary rights" or "proprietary rights" in general are made in the following provisions: VIII.–2:102 (Transferor's right or authority) paragraph (2), which protects acquirers of proprietary rights in the case of ratification of colliding dispositions made by a person originally lacking authority to dispose; VIII.–3:102 (Good faith acquisition of ownership free of limited proprietary rights), which regulates the good faith acquisition free of such limited proprietary rights; VIII.–4:301 (Acquisition of ownership) paragraph (2), which deals with the parallel issue in the field of acquisition of ownership by continuous possession; and VIII.–5:101 (Party autonomy and relation to other provisions) which allows the parties to create proprietary rights as a consequence of production, combination and commingling.

Concept of limited proprietary right in general. The concept of "limited proprietary rights" is a traditional feature in "continental" European legal systems. Under this tradition, going back to ancient Roman law, it refers to rights *in rem*, i.e. rights of a person directly related to an asset (as opposed to a right of a person directed against another person, who is under an obligation to perform any kind of act or omission). The essential aspect for the purposes of this Book is that a limited proprietary right has effect against everyone (*erga omnes*) i.e. against the owner as well as against other persons. It is, therefore, an exclusive right, traditionally linked to special means of protection. Being effective as against the owner of the asset, it limits the owner's right to dispose of the property (cf. VIII.–1:202 (Ownership)); unrestricted ownership can, however, traditionally be acquired in good faith. As to the content, this exclusive position is limited to the scope of the respective right: it may, e.g., be a right to use; or to preferential satisfaction.

The concept of a "limited proprietary right" is not to be mixed up with the concept of a "limited-right-possessor" in the sense of VIII.–1:207 (Possession by limited-right-possessor).

No full set of rules on limited proprietary rights; references to national law. This Book does not provide a full set of rules on limited proprietary rights, containing, in particular, a detailed typology including rules on the particular contents of such rights, rules on their creation, transfer and protection. It must, therefore, build on, and refer to, national law in this respect. Some of these areas are covered by separate Books within these model rules, namely proprietary security rights (Book IX) and trusts (Book X), to which reference is also made in subparagraphs (a) and (d). In addition, these subparagraphs spell out a reference to national law as well, which (in the fictitious case that these model rules were applicable law) makes sense for cases of an international character involving, e.g., goods from a non-European country, so that it is for the rules of private international law to decide which (national) law is to be applied with regard to a specific right in these goods. Also, the reference to national law could make it possible – although not intended – that the rules of Book VIII could stand alone, without other parts of these model rules.

The reference to national law also implies that this Book does not take a particular stand on the question whether, and if so, in which way, a principle of a *numerus clausus* (closed list) of proprietary rights should be adopted. Deciding on this matter does not appear necessary for the purposes of this Book.

B. Particular limited proprietary rights

Proprietary security rights (subparagraph (a)). In particular, this Article accepts as limited proprietary rights "security rights if characterised or treated as proprietary rights by Book IX or by national law". There is no sense in defining and listing which types of rights are covered in detail, and under which preconditions they qualify. This is primarily for Book IX to decide (as to the additional reference to national law, see the preceding paragraph). It is therefore stated that these other provisions of law must "characterise or treat" a security right as proprietary so as to be covered by the present Article. One may say that, e.g., Book IX does not itself define what a "proprietary" right is, but rather assumes this being a given term. Book IX does, however, spell out the decisive effects. For reasons like this, the double formula "characterised or treated as proprietary rights" is used. The same applies to the subsequent subparagraphs.

Proprietary rights to use (subparagraph (b)). Second, this Article covers rights to use if characterised or treated as proprietary rights by other provisions of these model rules or by national law. This refers, e.g., to traditional types emerging from Roman law, like the "*usus*" (right to use) or "*usus fructus*" (right to use and reap fruits) in an asset, which are accepted as proprietary rights in many European legal systems. At least in relation to immovable property, some legal systems also acknowledge proprietary rights by which a person has a right to a certain active performance against the owner of an asset. In case national law accepts such rights also in relation to goods, they are intended to be covered by subparagraph (b) as well. The reference to "other provisions of these model rules" leaves leeway to these model rules to create and define such rights. With regard to the right of a lessee under a contract for the lease of goods as governed by Book IV.B, however, the Study Group deliberately left it open whether such right should be characterised as "proprietary" in the sense of this Article. With regard to one practically important aspect, a comparable effect is expressly provided: where ownership passes from the lessor to a new owner, the new owner of the goods is substituted as a party to the lease if the lessee has possession of the goods at the time ownership passes (IV.B.–7:101 (Change of ownership and substitution of lessor)).

Rights to acquire (subparagraph (c)). This subparagraph probably is the only one with a somewhat programmatic character. It covers "rights to acquire" (sc. ownership or a functionally equivalent position) and primarily addresses the position of a buyer, or other acquirer of goods, subject to a retention of ownership device in the sense of Book IX (cf. IX.–1:103 (Retention of ownership devices: scope)). The position of such acquirers as against the creditors of the transferor is expressly clarified in VIII.–2:307 (Contingent right of transferee under retention of ownership). The present subparagraph supplements that Article by stating that such rights to acquire have a proprietary character, which implies, e.g. that the holder of such a right can use the asset under the agreed terms and can protect the right against third persons. If the formal "owner" of the asset disposes of the goods without being authorised by the right-holder to dispose free of that right, the right to acquire is intended to keep on encumbering the property and bind the acquirer, unless the latter acquires free of encumbrances in the sense of VIII.–3:102 (Good faith acquisition of ownership free of limited proprietary rights). Other examples may be provided by national law; e.g., where such rules accept that a right of pre-emption has a proprietary character under specific circumstances.

Trust-related rights (subparagraph (d)). The last subparagraph covers trust-related rights if characterised or treated as proprietary rights by Book X or by national law. The regulation scheme corresponds to the one employed in subparagraph (a).

VIII.–1:205: Possession

(1) Possession, in relation to goods, means having direct physical control or indirect physical control over the goods.

(2) Direct physical control is physical control which is exercised by the possessor personally or through a possession-agent exercising such control on behalf of the possessor (direct possession).

(3) Indirect physical control is physical control which is exercised by means of another person, a limited-right-possessor (indirect possession).

COMMENTS

A. General idea

Possession and proprietary right. Articles VIII.–1:205 to VIII.–1:208 define the notion of possession and its several qualifications. Because of the frequent circulation and the various types of use of movables on the market, the person holding a movable (having direct physical control over it) is quite often not the owner of the movable. The European legal systems protect not only the position of holders of rights in rem (proprietary rights) in the movable (i.e. the owner, the pledgee, the holder of a usufruct right etc.), but also the position of persons having actual physical control over a movable as a mere factum not necessarily based on a right in rem. These persons are usually defined as "possessors". The position of a possessor can – but does not necessarily have to – coincide with the position of the holder of a right in rem in the movable. The protection of the legal position of a possessor as such differs from the protection of the position of the holder of a proprietary right in the movable. Mere possession is usually not considered to constitute a right in rem in the movable. Nevertheless, the position of a possessor is recognised as a legal position from which certain rights of the possessor and other legal consequences may follow.

Possession in other parts of Book VIII. A notion of "possession" or something similar (mere physical control over a movable or physical control combined with a certain intention) is needed in many parts of Book VIII: the transfer of ownership based on the transferor's right or authority (Chapter 2), good faith acquisition of ownership (Chapter 3), acquisition of ownership by continuous possession (Chapter 4), protection of ownership and protection of possession (Chapter 6) and the relationship between owner and possessor (Chapter 7).

Different categories of 'possession'. The particular purposes of these Chapters require different categories of possession or physical control: sometimes only actual physical control is important and the particular intention of the person exercising this control does not matter (e.g. partly in Chapter 2, self-help in Chapter 6), whereas other chapters protect only a more restricted group of persons exercising physical control. Most of the remedies in Chapter 6 (VIII.–6:203, 6:204, 6:301, 6:302, 6:401) are designed to protect only persons exercising physical control themselves or through a third person in their and this person's own interest (owner-possessors and limited-right-possessors) and not persons holding a movable without any particular own interest (possession-agents). The requirements for the acquisition of ownership by continuous possession (Chapter 4) are even more restrictive: The person acquiring by continuous possession must be exercising physical control with the intention to do so like an owner (owner-possessor): mere limited-right-possessors and possession-agents are not able to acquire the movable by continuous possession.

The analysis of the different categories of persons exercising physical control over a movable which have to be addressed in the different chapters mentioned above leads to the conclusion that three different categories have to be distinguished:

Owner-possessors (OPs): are persons exercising physical control over a movable (themselves or through a third person) with the intention of doing so like an owner – as e.g. owners, thieves, acquirers in good faith and acquirers by prescription (= continuous possession).

Limited-right-possessors (LRPs): are persons exercising physical control over a movable (themselves or through a third person) with the intention of doing so in their own interest and also for the owner-possessor as indirect possessor (e.g. the owner), based on a specific legal relationship between them and the owner-possessor which gives them the right to hold the movable (e.g. a contract of lease, a limited right *in rem* as *usufruct*). In other situations, the 'own interest' of the LRP is not so obvious: as for instance where the LRP is a storage company that stores goods for the owner. Here the interest of the owner-possessor is dominating, the LRP's interest in holding the goods is reduced to the interest in getting the agreed price paid for the storage. In some cases both types of limited-right-possessors need to be protected against dispossession and interference with their physical control in the same way as owner-possessors (recovery of goods, protection order, reparation for damage caused by another).

Possession-agents (PAs): are persons exercising physical control over goods with the sole intention of doing so for the owner-possessor (e.g. the owner) or the limited-right-possessor (e.g. the lessee), but without a particular own interest and without a particular legal relationship with respect to this movable – as e.g. employees or finders in good faith on their way to deliver the movable to the owner or competent institution, which will search for the owner. These persons are acting exclusively on behalf of the respective OP or LRP. They can, for instance, take delivery for the possessor (the transferee), or can exercise physical control for or rather *of* the possessor, in other circumstances. But, in the absence of any own interest in holding the movable, possession agents will not be qualified as 'possessors' themselves. They are only the 'long arm' of the two other categories of possessors, OP and LRP. Thus no particular possession protection under Chapter 6 is granted to them. PAs will be only allowed to exercise immediate self-help (VIII.–6:202) as a 'third person' against a person who takes away the goods or otherwise interferes with them.

B. Interests at stake and policy considerations

Protection of possession as temporary legal regime. The particular rules on *possession* and its legal protection can be best characterised as a temporary order, a preliminary form of regulation and protection of the exercise of power over goods, as opposed to the regulation of *ownership*, which constitutes, by contrast, a permanent order based on the universal power of the owner over an object (*usus, fructus, abusus*). The aim of the latter is the definite resolution of all disputes over the right of ownership.

Falling-apart of ownership and actual physical control. The regulation of possession as a separate legal category follows from the fact that the position of a person exercising actual physical control over a movable does not necessarily coincide with the position of the owner. This causes a split between the position of ownership and the position of possession. This is perfectly consistent, if one takes into account the fact that the actual physical control over the

object is not a prerequisite to the right of ownership, though a consequence of the powers accorded to the owner by law.

Illustration 1
Farmer A leases to neighbour B a mowing machine for a period of six months and delivers it to B.

Illustration 2
A receives a loan from B and as security creates a pledge in B's favour in a precious diamond ring A which A has inherited. A delivers the ring to B.

Illustration 3
A sells and delivers a car to B. The contract of sale is invalid, which is unknown to A and B. B continuous to possess the movable.

Illustration 4
B is A's driver and, for the performance of the duties of the employment, A has provided B with a car, as well as all necessary tools and products for its usual maintenance.

Illustration 5
A loses her wristwatch while taking a walk in the City Park; B finds the lost wristwatch.

Special function and character of remedies which protect possession. In the illustrations above, B is in actual physical control of the movable, but is not the owner of the movable. B can hold the movable for various reasons, for a shorter or a longer period of time, depending on the particular constellation. In most legal systems in Europe, B's factual position, the exercise of actual control over the movable, which may or may not be based on a particular right to hold the movable, is accorded special protection against third persons who dispossess B or otherwise interfere with B's possession. This protection is generally granted to possessor B irrespective of B's legal entitlement or proprietary right to hold the movable. This protection is, in some legal systems, also extended to avert unlawful interferences with B's possession by the owner (owner-possessor) personally, if B has a right to hold the movable (e.g. under a lease contract). The special protection remedies based on possession (see Chapter 6) are usually quick remedies, because they do not require an examination of the underlying proprietary rights. Their aim is to protect peaceful possession and to provide a quick – albeit legally controlled – reaction to stop unlawful interferences with a peaceful position of physical control over goods. The rules on protection of possession facilitate the continuous financial exploitation of movables by giving the possessors quick remedies at hand which they can use to defend their position, instead of having to have recourse to time-consuming litigation based on proof of ownership. The remedies which protect possession are something in-between self-help and the remedies based on rights *in rem* (e.g. ownership): They are much quicker than the latter, but – unlike the former – they are based on a formal procedure administered by the state (most often through the court system) and cannot be exercised by the individual alone.

C. Comparative overview

Notion of possession. The notion of possession is common to all European legal systems. Although differences may appear from system to system, the concept of possession in all of

them attaches to the *factum* of exercising actual physical control over a movable; the existence of a particular right to do so is in this respect irrelevant. Possession in most legal systems consists of two elements: the *corpus*-element, relating to the actual physical control exercised over the movable, and the *animus*-element, which refers to the intention with which the possessor exercises physical control: the possessor may have the intention to behave with respect to the movable like an owner (e.g. the thief or the buyer under an invalid sales contract) or the intention to make use of the movable in accordance with a limited right with respect to the movable (e.g. a proprietary security right or a *usufruct*, or a contractual right arising out of a contract of lease or storage). The different types of intention constitute different types of possession.

Different types of possession and 'detention'. The limited-right-possessor and the possession-agent of these model rules are commonly known in most legal systems as 'detainer' or 'detentor' (*détenteur, Inhaber*), as e.g. in France, Belgium, Italy, Austria, Greece. In Germany, a distinction is made between the indirect and the direct possessor (*mittelbarer und unmittelbarer Besitzer*). The German 'direct possessor', when possessing for an indirect possessor (e.g. owner), corresponds to the 'detainer' of the above mentioned systems. German law distinguishes two types of direct possessors (*Besitzmittler und Besitzdiener*), which roughly correspond to the LRP and PA of this Book. The Common Law systems include LRPs, PAs and OPs in a general notion of possession. In most legal systems, the notion of the possession-agent can also be found in a context similar to the one regulated by the present rules, namely with a minimum of rights with respect to the object.

D. General notion of direct and indirect possession – the *corpus* element

Direct or indirect physical control (paragraph (1)). Preceding the provisions on the respective categories or types of possession, a general definition of possession is provided, so as to stress the main aspect of the notion, which is found in all forms of possession, namely the exercise of physical control over a movable, either in a direct or in an indirect manner (by means of persons qualifying as LRPs). This is the *corpus* element of possession, the physical element of the notion, which can be traced in a tangible manner and is always present, irrespective of the intention of the possessor.

The definition clarifies the possibility of exercising physical control over a movable by means of others. Thus, possession can be functionally organised on several levels, i.e. an owner-possessor still exercises control over the movable and is in (indirect) possession, when a limited-right-possessor (e.g. a lessee) in turn exercises control over the movable by means of the LRP's own (sub-)limited-right-possessor or possession-agent, e.g. in case of a sub-lease.

A distinction must be made between 'having physical control' (see VIII.–1:205 paragraph (1)) and 'exercising physical control' (see VIII.–1:205 paragraphs (2) and (3)): *Possession* always means to 'have' physical control (paragraph (1)) and to 'exercise' it in some way: directly or indirectly through another person. There are only two types of persons who qualify as 'possessors' in the sense of '*having* control': owner-possessors (OPs, VIII.–1:206) and limited-right-possessors (LRPs, VIII.–1:207), whereas 'possession-agents' (PAs, VIII.–1:208) never have control themselves. They are not 'possessors' in the legal sense. They only '*exercise'* possession on behalf of a possessor (OP or LRP).

Direct possession (paragraph (2)). Paragraph (2) defines 'direct possession' as physical control exercised either by the 'direct' possessor in person (e.g. owner A holds the goods

personally, they are on A's premises) or by a different person, a possession-agent (PA), on the direct possessor's behalf (e.g. B who is possessor A's driver takes A's car to X for repair). It is true that in the second case – from a physical point of view ('*corpus*') – the actual physical control is with B (PA) and not with A (owner). However, B exercises this control without any independent purpose or interest, B is only the 'long arm' of owner A. In the absence of any independent '*animus*' on the side of B, there is no need to attribute any legal relevance to the fact that possession-agent B is holding the goods instead of owner A personally. The legal concept of possession which triggers some legal consequences of its own does not have to be extended to B where B is only acting on behalf of A. The legal institution of possession as well as its legal consequences have to be attributed to A alone. Thus, where a possession-agent is holding the movable, the movable is not in 'possession' of the PA in the legal sense, but is still in direct possession of the person on behalf of whom the PA is holding the movable.

Indirect possession and 'co-possession' (paragraph (3)). One can distinguish the following situations in which direct and indirect possession with respect to the same movable co-exist:

> OP in indirect possession, while LRP is in direct possession: in physical control personally or PA in physical control which is attributed as direct control to the LRP.
>
> OP in indirect possession, while LRP is also in indirect possession, and the LRP's sub-LRP is in direct possession.

The respective chains of LRPs and PAs after the OP could also be longer: as for instance OP, first LRP, sub-LRP, PA of sub-LRP in direct possession.

It is important to note that in all cases of indirect possession two or more persons are in 'possession' (in '*co-possession*') of the goods. 'Co-possession' here does not designate the same as the German term '*Mitbesitz'* which means possession by two possessors of the same rank.

E. Mandatory character of the rules

The rules on possession as set out above are clearly of a mandatory nature. If they were *ius dispositivum* and the parties could depart from them by stipulations in their contract, this would create a great deal of uncertainty within all fields of law in which the notion of possession is needed: protection of ownership and possession, transfer of ownership, good faith acquisition, acquisition by continuous possession. In order to avoid these uncertainties, the rules must be of a mandatory character.

VIII.–1:206: Possession by owner-possessor

An "owner-possessor" is a person who exercises direct or indirect physical control over the goods with the intention of doing so as, or as if, an owner.

COMMENTS

The required intention of the owner-possessor (OP) is the intention to exercise physical control as, or as if, an owner. The definition abides by what is commonly perceived as "possession" throughout most of the European legal systems. Two prerequisites must be met: the exercise of physical control over the object, commonly known as the corpus-element, and the intention of the person to exercise this control as or like an owner, which is the animus-element. The formulation "as, or as if, an owner" was preferred to the alternative formulation "as an owner" to stress the fact that the person exercising the control need not necessarily be the owner: also the thief or a buyer without a valid contract is an OP. The aim of possession regulation in all the examined legal systems has always been to regulate the actual physical power over the object, irrespective of the relevant legal relationships. Consequently, the decisive element is whether the OP considers himself or herself to be the owner, either in bad or in good faith. The element of good faith will be crucial with respect to a series of further matters, like the OP's possibility to acquire ownership by means of good faith acquisition (Chapter 3) or by acquisition by continuous possession (Chapter 4).

OPs often do not exercise physical control themselves but through another person who exercises this physical control for them. This is clarified in the text of the Article. The rules of Book VIII distinguish between two categories of persons acting 'for' the owner-possessor:

> The possession-agent (PA), mentioned in VIII.–1:205 paragraph (2) and defined in VIII.–1:208, 'possesses' only on behalf of the OP (as direct possessor) without any interest of his or her own in holding the movable. Therefore, the PA's physical control is completely attributed to the owner-possessor who is held to be in 'direct' physical control (direct possession) – in the legal sense.
>
> The limited-right-possessor (LRP), mentioned in VIII.–1:205 paragraph (3) and defined in VIII.–1:207, on the other hand, possesses the movable 'for' the owner-possessor only in so far as the LRP respects the owner's superior proprietary right in the movable in general, but has an interest of his or her own in the possession of the movable, which is very strong in the case of a lessee, and less strong in the case of a storage company or the like. Direct possession by an LRP and indirect possession by the owner-possessor at the same time is, therefore, the typical case of indirect possession by an OP (see also above Comments).

VIII.–1:207: Possession by limited-right-possessor

(1) A "limited-right-possessor" is a person who exercises physical control over the goods either:

(a) with the intention of doing so in that person's own interest, and under a specific legal relationship with the owner-possessor which gives the limited-right-possessor the right to possess the goods; or

(b) with the intention of doing so to the order of the owner-possessor, and under a specific contractual relationship with the owner-possessor which gives the limited-right-possessor a right to retain the goods until any charges or costs have been paid by the owner-possessor.

(2) A limited-right-possessor may have direct physical control or indirect physical control over the goods.

COMMENTS

A. The limited-right-possessor

The limited-right-possessor (LRP) is a person holding the movable on the basis of a legal bond with the owner-possessor, which also shapes the LRP's intention to hold the movable (the *animus*-element of the possession). The legal relationship gives the LRP a 'right to possess' the movable or a 'right to retain' the movable. The LRP's intention is limited to the right the LRP exercises with respect to movable, and not comparatively unrestricted like the OP's intention to exercise all the powers of an owner. The LRP intends to use the movable in accordance with this (limited) right in his or her own interest or to the order of the OP and, at the same time, to hold the movable "for the owner-possessor". Holding "for the owner possessor" means that the LRP acknowledges the OP's right in the movable and does not want to hold the movable with the *animus* of an OP in the sense of VIII.–1:206.

B. Requirements of limited-right-possession

Thus, the notion of limited-right-possession requires three things: the corpus element consisting of direct or indirect possession according to VIII.–1:205; the existence of a specific legal or contractual relationship that gives the LRP a valid right to possess or retain the movable in relation to the owner-possessor; and an intention of the LRP to hold the movable in the LRP's own interest or to the order of the OP (animus-element).

C. Two types of limited-right-possessors

The 'classical' limited-right-possessor is described in (a) This covers the holder of a proprietary (pledge, proprietary right to draw fruits or to use otherwise, lease in some systems) or obligatory (lease in other systems) right to possess and use the movable in a limited way in the LRP's own interest. This right may arise out of a contractual relationship with the owner or out of a legal relationship with the owner created by operation of law. The LRP at the same time respects the superior right of ownership of the indirect OP. This right of ownership is, however, not superior when it comes to the question of who should be in direct possession of or eventually use the goods. The question of the right to possess and eventually use the goods is answered by the specific legal relationship between OP and LRP. This specific contractual (or other) right to possess (and use) the goods has priority over the OP's right of ownership.

A second type of LRP is described in (b). In cases of storage by warehouses and the like the LRP has a right to possess the goods, the right arising from a contract with the OP. But this contract does not give the LRP the right to use the goods in the LRP's own interest. Therefore, it cannot be said that the LRP of type (b) possesses the goods in his or her own interest. The LRP possesses them mainly 'to the order of the owner-possessor' and keeps and stores them as the owner instructs, in the owner's rather than in the LPR's interest. The only interest the LRP of type (b) has in the possession of the goods is a monetary interest – an interest in being paid for the storage and the costs (or damages) incurred. This interest is expressed in a 'right to retain the goods' until all charges and costs have been paid by the OP. It is clear of course that the LRP of type (b) also respects the superior right of ownership of the indirect OP.

D. Specific legal or contractual relationship

Paragraph (1)(a) and (b) of the Article refer to the existence of a 'specific legal relationship' or 'specific contractual relationship' which gives the LRP the required right to possess (a) or to retain (b) the goods. Such a specific legal (contractual) relationship may be a contract of lease, a usufruct relationship (= right to draw fruits) arising from a contract with the OP or by operation of law, a (possessory) security right as a right in rem (by contract or operation of law), a storage agreement, etc. This legal (contractual) relationship must give the LRP the right to possess the movable (either directly or indirectly, the right may be prorietary or obligatory) or in cases of (b) a right to retain the movable for payment of charges and costs. In certain legal systems (e.g. France, Greece), when the legal relationship is a limited right in rem, there is a further distinction drawn between the (owner-)possessor and the quasi-possessor, whereby the (owner-)possessor possesses with the animus of an owner, whereas the quasi-possessor possesses with the animus of a beneficiary of the respective right in rem. Such a further differentiation would, however, be rather superfluous in the context of the present rules. The position of a "quasi-possessor" is considered to be subordinate to that of the possessor, which also holds true for the limited-right-possessor in the sense of the rules of Book VIII; moreover, both obligatory rights and limited rights in rem to possess a movable lead, though in a different way, to the same result, which is a partial encroachment on the absolute right of ownership. Within the context of Book VIII, there is no need to distinguish between LRPs on the basis of a proprietary right and LRPs on the basis of an obligatory right to possess the movable. Therefore, this differentiation is not pursued further here.

In paragraph (a) cases, the legal bond between the owner-possessor and the limited-right-possessor need not necessarily be restricted to an agreement (contract). The specific legal relationship entitling the LRP to hold the movable may be either an agreement, such as the ones described above, or a relationship created otherwise by law. In the latter case, the LRP may have the right to possess the movable by virtue of an *ex lege* right of retention or a lien. In paragraph (b) cases, which are mainly storage cases, the relationship is usually a contractual one and the right to hold the goods to the order of the OP is an obligatory right. However, the right to retain the goods once it arises (when the OP does not pay in due time) may be a proprietary security right in the sense of Book IX which gives the LRP also the right to possess and to use the goods in a restricted way in the sense of paragraph (a). In such a case – after the right to retain has come into existence and is exercised by the LRP – the LRP has to be qualified as an LRP of type (a).

E. No different legal consequences for LRPs types (a) and (b)

The differentiation between LRPs of type (a) and type (b) does not trigger any different legal consequences in Book VIII. It is made only to be able to define more precisely which persons fall into the category of an LRP and which do not. Within book VIII all LRPs are treated in the same way (see particularly Chapter 6 below).

F. Validity of specific legal (contractual) relationship

In order to constitute limited-right-possession the right of the LRP to possess or eventually retain the movable must really exist. If the underlying legal relationship is invalid and the possessor, therefore, has no right to possess or retain the movable, two constellations are possible:

> The possessor is aware of the fact that there is no valid (limited or absolute) right to possess the movable, but nevertheless intends to hold the movable as if he or she were the owner or LRP of the movable.
>
> The possessor believes that there is a valid limited right to possess the movable and therefore has the intention to hold the movable in accordance with this (putative) right.
>
> Possessors who intend to hold the movable as if they were the owner have, of course, to be qualified as owner-possessors (VIII.–1:206). Possessors who intend to hold the movable like an LRP without having such a limited right to possess or retain should be treated as owner-possessors, by analogy, irrespective of the bad or good faith with respect to the existence of such a right. Just as an OP who is not the owner arrogates – in bad or in good faith – the right to behave like an owner, so the possessor without a limited right to possess arrogates – in bad or good faith – the right to behave like an LRP. Both possessors do not have the right that shapes their intentions. They should be, therefore, treated as the same category of possessors (OPs).

G. Protection of LRPs

In accordance with the majority view among legal systems, LRPs, having a right to hold or retain the movable and an interest of their own to do so, should benefit from better means of protection of their physical control over the movable than a mere "possession-agent" (VIII.–1:208) who also has physical control of the movable but without a right and an interest of his or her own to do so. I. e. LRPs should be partly afforded the same legal protection as owners and owner-possessors (see Chapter 6 below). Therefore, a distinction between LRPs and PAs has to be made in the definitions section.

H. 'Direct' and 'indirect' limited-right-possession

Paragraph (2) of the Article refers to the possibility of 'direct' and 'indirect' possession of the respective type. An LRP can exercise possession 'directly' by holding the goods personally or through a possession-agent (PA). If the LRP hands the goods over to a second LRP (sub-LRP) with whom LRP 1 has a specific legal relationship in the sense of VIII.–1:207, LRP 1 will be 'indirect' possessor of the goods, while LRP 2 (the sub-LRP) will be 'direct' possessor. Thus, the goods have two indirect possessors, LRP 1 and OP, and one direct possessor, LRP 2.

Another case of 'indirect' possession can be seen in the following facts. LRP 1 and LRP 2 conclude a separate contract each with the OP. Both contracts qualify as specific legal

relationships in the sense of VIII.–1:207. For instance, LRP 2 has a contract with the OP granting a security right to LRP 2. LRP 1 may hold a security right in the same movable. There may or may not be an additional legal relationship between LRP 1 and LRP 2 which provides that LRP 2 holds the movable also for LRP 1. If there is, then LRP 2 has the intention to possess the movable partly for the 'indirect' possessor LRP 1. Thus, the goods have two indirect possessors, LRP 1 and OP, and one direct possessor, LRP 2. If LRP 2, who has a legal relationship only with the OP, does not know of LRP 1, then LRP 2 is the LRP of the OP, not of LRP 1. In this case, the intention ('*animus'*) of LRP 2 does not include LRP 1 and so LRP 2 cannot hold the goods for LRP 1. LRP 1 is not in possession of the goods.

Illustration 6
B leases the movable from the OP A and then subleases it to C. In this case B as well as C have to be seen as LRPs in the sense of VIII.–1:207. B is an 'indirect' LRP, because he exercises his physical control through another LRP, namely C. For C to qualify as an LRP it is sufficient to have a specific legal relationship to LRP B which gives him the right to hold the movable in his own interest. A direct relationship to OP A is not required. C has the intention to hold the movable for B, and may, if he has the respective knowledge, have the intention to hold the movable for A as well. For A to be in indirect possession, a chain of sub-LRPs suffices. The later sub-LRPs in the chain only have to have the intention to possess for their respective contract partner (the former LRP), not for OP A.

Illustration 7
B stores the movable of possessor A. The movable is in the actual physical control of B's employee C, and not in B's own actual physical control. In this case B has to be seen as an LRP and C as a PA. B is a "direct" LRP, because she exercises her physical control through another person, namely C, who is not an LRP, but a PA.

Illustration 8
A is the owner of a motorcycle and he rents it simultaneously to B and C. Only one of them can acquire possession in the form of physical control over the motorcycle. If A delivers the motorcycle to B, B is the LRP of the movable. C is no LRP because he only has the right to possess the movable, but has no possession (*corpus*).

Illustration 9
A is the owner of a motorcycle, he rents it to B and at the same time he grants a security right in the motorcycle to C, informing both B of the security right in the motorcycle, and C that B – as the lessee of A – holds the motorcycle. B as a lessee is the LRP of the movable, A is the OP of the movable. Depending on the relationship to B (and A), C is either no possessor, because he does not have possession (*corpus*), or C is 'indirect' possessor (LRP), because B also holds the movable for C. In this case B has the intention (*animus*) to hold the movable also for LRP C. Thus, C is the LRP of the movable with respect to the OP, B is also LRP with respect to the OP, but at the same time he is also the direct LRP of indirect LRP C, because B exercises his possession not only for the OP A, but also for the LRP C.

Illustration 10
A grants a security right in her golden necklace to B and hands it over to B. Later on, A grants a security right in the same necklace to C and informs him that B holds the necklace. The solution is the same as in illustration 9. A is the OP of the movable, B is

the direct LRP. C can be qualified as indirect LRP only in case B also holds the movable for C (*animus*).

VIII.–1:208: Possession through a possession-agent

(1) A "possession-agent" is a person:

(a) who exercises direct physical control over the goods on behalf of an owner-possessor or limited-right-possessor without the intention and specific legal relationship required under Article VIII.–1:207 (Possession by limited-right-possessor) paragraph (1); and

(b) to whom the owner-possessor or limited-right-possessor may give binding instructions as to the use of the goods in the interest of the owner-possessor or limited-right-possessor.

(2) A possession-agent may, in particular, be:

(a) an employee of the owner-possessor or limited-right-possessor or a person exercising a similar function; or

(b) a person who is given physical control over the goods by the owner-possessor or limited-right-possessor for practical reasons.

(3) A person is also a possession-agent where that person is accidentally in a position to exercise, and does exercise, direct physical control over the goods for an owner-possessor or limited-right-possessor.

COMMENTS

A. The 'animus' or intention of a possession-agent (PA).

The possession-agent is a person who exercises physical control over a movable, this control being completely attributed to the OP or LRP for whom the PA holds the movable. The PA who holds the movable creates direct possession in the OP or LRP for whom the PA acts. The reason for this complete attribution of the PA's physical control to the OP or LRP is the lack of any interest of the PA to possess the movable. Decisive for the qualification of a person exercising physical control over a movable ('*corpus*') as PA is again the intention of this person, in combination with the non-existence of a specific legal relationship in the sense of VIII.–1:207.

The PA must have the intention to exercise the physical control 'on behalf' of an OP or LRP and must not have an intention referring to any personal interest in holding the movable, as described in VIII.–1:207 or in VIII.–1:206.

B. Absence of specific legal relationship in the sense of VIII.–1:207.

In addition the PA may or may not be acting in accordance with a legal relationship with the OP (LRP), for instance a contract of employment. But this legal relationship should certainly not be a legal relationship in the sense of VIII.–1:207 paragraph (1): i.e. not a 'specific legal relationship' referring to the question of possession of the particular movable and creating the possessor's right to possess (and use) or right to retain the movable in the possessor's own interest.

C. Optional element of 'binding instructions'.

It is very often the case that the PA receives binding instructions on how to keep and use the goods in the interest of the OP or LRP. But this is not a requirement for qualification as PA. The mentioning of these instructions in paragraph (1)(b) has the same purpose as the

exemplary list in paragraph (2) – to describe typical cases of PAs in order to clarify which different types of persons may qualify as PAs (while always meeting the requirements of paragraph (1)(a)).

D. Exemplary list in paragraph (2).

Paragraph (2) of the Article contains an exemplary, non-exhaustive, list of typical categories of PAs.

Paragraph (a) refers to employees and those exercising a similar role. The PA is often integrated in the sphere of influence of the OP or the LRP (e.g. household, business, etc.) as an employee or in a similar function. This means that the PA does some work for the OP or LRP and, for purposes of accomplishing the tasks, needs to be in physical control of certain movables belonging to the OP or LRP. There may be a legal relationship between the OP or LRP and the PA, like a contract of employment. In performance of the duties under this contract, the PA exercises physical control over certain goods of the OP or LRP. Such a legal relationship must not be confused with the 'specific legal relationship' described in VIII.–1:207 paragraph (1). This latter relationship is 'specific' because it has as its object the question of possession, use or retention of a particular movable. The legal relationships that may exist under paragraph (2)(a) of the present Article are much more general: they do not have as their sole content the possession of a particular movable.

If somebody employs a driver and gives the driver a car so as to perform her duties according to her employment contract, the car cannot be considered the object of a right on behalf of the driver. The case is different if a particular contract has been concluded between the OP (or LRP) and the person in physical control concerning the use of the object –. if e.g. a lease agreement exists between the employer and the driver (whereby the rental fee could consist in a reduced salary for the driver) which allows the driver to use the car also for her private purposes. Then the driver, when using the car for her private purposes, must not be considered as a PA, but as an LRP.

Paragraph (b) refers to persons who are for whatever reasons in the vicinity of the OP's or LRP's goods and are given physical control for practical reasons, without any closer relationship of integration to the household or business of the OP or LRP. For instance, the owner of a sick cat asks her neighbour or friend X, who happens to drop by her house in the morning, to take the cat to the vet. When he does so, X is the PA of the cat.

E. Persons in physical control of the goods by coincidence (paragraph (3)).

Paragraph (3), in fact, adds another case to the exemplary list commenced in paragraph (2). A person may come into contact with a movable and start to exercise physical control over it merely by chance. This describes the case of a finder in good faith who does not have the intention to keep the movable as if the owner (OP) but simply wants to keep the movable temporarily in the interest of its owner, whom the finder does not know yet. By holding the movable for the owner, the finder (PA) conveys 'direct' possession of the movable to the owner. Before the movable is found by such a good faith finder, the owner does not possess the movable (lack of direct or indirect physical control).

F. No ‘indirect’ possession-agents.

The PA can only be in direct physical control, no indirect version of a ‘possession-agency’ exists. In the normal case, the PA will have direct physical control of the movable (which is actually considered as the OP’s or LRP’s direct possession, the PA is not personally in possession). As soon as the PA’s ‘possession-agency’ is terminated, whether by the unlawful intrusion of a third person or by or with the consent of the OP or the LRP, the PA’s relationship to the movable is terminated as well. In another type of case, the PA, who is e.g. the employee of the OP (or the LRP), may leave the movable for safekeeping or storage for some time, thus surrendering physical control to the keeper or the person storing the movable. The safekeeping or storage company will exercise direct physical control over the movable in the sense of VIII.–1:207 (LRP), while the PA is no longer PA with respect to the movable. The company acts as the LRP of the OP or LRP and not of the (former) PA. The same applies when the PA hands the goods over to another PA – the PA of the OP or the PA of another person to whom the OP has sold the goods: The possession-agency of the first PA is terminated: now the possession of the OP or the new owner (buyer) is constituted by the physical control of the second PA.

Section 3: Further general rules

VIII.–1:301: Transferability

(1) All goods are transferable except where provided otherwise by law. A limitation or prohibition of the transfer of goods by a contract or other juridical act does not affect the transferability of the goods.

(2) Whether or to what extent uncollected fruits of, and accessories or appurtenances to, goods or immovable assets are transferable separately is regulated by national law. Chapter 5 remains unaffected.

COMMENTS

A. General

Function of the Article. This Article is the only provision of Section 3, which provides further general rules applicable to the whole of Book VIII. It addresses the issue of transferability, i.e. the question of whether parties can, provided they fulfil all requirements set forth by the relevant rules of law, bring about a transfer of ownership, or another mode of validly acquiring ownership of the goods (such as good faith acquisition under Chapter 3). "Transferability" of the goods is listed as one of the general transfer requirements in paragraph (1)(b) of the basic transfer rule in VIII.–2:101 (Requirements for the transfer of ownership in general). In part, namely in addressing the question of whether goods "linked" to immovable property are transferable separately, i.e. without also transferring the property of the immovable asset, paragraph (2) of the present Article also touches the issue of how to delimit movable from immovable assets.

B. Transferability in general (paragraph (1))

General rule: all goods are transferable. The general policy of this Article is to ensure that goods may be kept in circulation. Barring goods from the market is considered to run against the general economic interests of society. Exceptions may only apply where substantive reasons of public policy so require. Such exceptions must, therefore, be provided by law.

Exceptions provided by law. As indicated, substantive reasons of public policy may require providing exceptions from the general rule of transferability of goods. If so, exceptions may be provided by law. Such reasons may, e.g., be rooted in piety and ethics, such as a traditional rule exempting *res sacrae* from commerce. Or, the reason may lie in particular dangers emerging from the goods, which may be the case, e.g., regarding drugs, specific weapons or nuclear material. Whether and to what extent the transfer of such goods should be prohibited is a matter of national law, primarily national public law. Transferability may be excluded in general, or there may be certain restrictions.

Exceptions provided by parties ineffective. Pursuant to the general policy of maximum transferability sentence 2 of paragraph (1) provides that contractual limitations or prohibitions of alienation do not affect the transferability of the goods. The same applies to prohibitions or restrictions of alienations provided by a unilateral juridical act where the transfer is based on such act. This means that such clauses have no effect with regard to the validity of the acquisition made by the acquirer, nor any effect against third parties. Where a clause of non-

alienation has been agreed upon but ownership is nevertheless transferred, the transfer as such is valid. The effect such agreement may have *inter partes* is, however, not addressed by the present Article, but is a matter for contract law to decide. The transferee may, therefore, be obliged to pay damages to the party entitled under the non-alienation agreement.

Although the approach, as a general policy, is quite clear, sentence 2 is not intended to deal with effects on enforcement, cf. I.–1:101 (Intended field of application) paragraph (2)(h)). This issue has been stressed with regard to donations: in some legal systems, the donee's creditors are not entitled to take enforcement measures against property subject to such a restraint. It is for the national enforcement law to decide whether enforcement can be effectively made in such a situation.

C. Transferability of goods linked to other assets (paragraph (2))

General approach: reference to national law. Paragraph (2) provides that, generally, the question of whether or to what extent uncollected fruits of, and accessories or appurtenances to, goods or immovable assets are transferable separately is regulated by national law. All cases covered by this rule have in common that, in one way or the other, a "link" between the asset in question and another asset exists, so that the question arises whether the one can be transferred independently from the other. Uncollected fruits are items not yet separated from their "mother-item". The terms "accessories" and "appurtenances" may overlap and there is no need to define them strictly for the purposes of this Book. They intend to address, first, a strong physical combination between these two items (perhaps best described by "accession"), as well as "combinations" which are merely created by the owner's will or dedication ("appurtenances"). The latter may, in particular, appear in relation to immovable property, e.g. a tractor being dedicated by the farmer to belong to the farm. An example for a link in a physical sense could be water pipes built into a house. Uncollected fruits are, e.g., a crop standing on the field, growing timber in a forest etc. (both becoming movable assets at least in the future). National legal systems partly draw different borderlines regarding these issues. Where the question is on the "link" between an asset and an immovable asset, there is a general policy within these model rules not to touch such issues (cf. I.–1:101 (Intended field of application) paragraph (2)(f)). This approach is followed by leaving the question to national law. In general, i.e. also with respect to movable assets, leaving these issues to national law matches with the general rules on this Book's scope of application, which excludes some forms of acquisition which probably would be of importance in the present context, namely acquisition of ownership by separation and by occupation (cf. VIII.–1:101 (Scope of application) paragraphs (2)(c) and (g)).

Reservation for Chapter 5. Facts constituting "accession" may also fall within the scope of the rules of Chapter 5 on production, combination and commingling. The rules of that Chapter are intended to be conclusive in the sense that they spell out all effects of such events which may be relevant for the question of transferability. The result will either be sole ownership or co-ownership of the resulting item or unit, both types of rights being transferable; cf. VIII.–1:202 (Ownership) and VIII.–1:203 (Co-ownership). In this respect, no restriction or reference to national law is needed.

CHAPTER 2: TRANSFER OF OWNERSHIP BASED ON THE TRANSFEROR'S RIGHT OR AUTHORITY

Section 1: Requirements for transfer under this Chapter

VIII.–2:101: Requirements for the transfer of ownership in general

(1) The transfer of ownership of goods under this Chapter requires that:

(a) the goods exist;

(b) the goods are transferable;

(c) the transferor has the right or authority to transfer the ownership;

(d) the transferee is entitled as against the transferor to the transfer of ownership by virtue of a contract or other juridical act, a court order or a rule of law; and

(e) there is an agreement as to the time ownership is to pass and the conditions of this agreement are met, or, in the absence of such agreement, delivery or an equivalent to delivery.

(2) For the purposes of paragraph (1)(e) the delivery or equivalent to delivery must be based on, or referable to, the entitlement under the contract or other juridical act, court order or rule of law.

(3) Where the contract or other juridical act, court order or rule of law defines the goods in generic terms, ownership can pass only when the goods are identified to it. Where goods form part of an identified bulk, VIII.–2:305 (Transfer of goods forming part of a bulk) applies.

(4) Paragraph (1)(e) does not apply where ownership passes under a court order or rule of law at the time determined in it.

COMMENTS

A. General

(a) Preliminary introduction

Brief introduction to subject matter, function and scope of this Article. This Article comprises the basic rule for the transfer of "ownership" as regulated by Chapter 2 of this Book, which in turn constitutes the central subject matter of Book VIII as such. "Transfer" in the sense used here is a form of "derivative" acquisition: An existing right of ownership, relating to goods, passes from one person to another person. The transferor is either the owner of the goods, or a person having the authority to dispose of the goods (cf. the title of Chapter 2: transfer of ownership based on the transferor's right or authority). Such transfer may be based on a contract for sale, which will be the most important field of application in practice, and will often operate as the paradigmatic case when discussing these model rules; or it may be based on other types of contract, like barter, or donation. But the scope of the provision goes further, encompassing transfers based on a court order or a rule of law, such as an obligation to return goods under unjustified enrichment principles or an obligation to transfer goods resulting from benevolent intervention in another's affairs. Hence, the present Article and Chapter 2 as a whole serve an important function of completing major other parts of these model rules, bringing about the ultimate effect towards which many obligations created by

contract as well as by operation of law are directed, namely the transfer of property of the goods concerned. Within Chapter 2 as such, this Article serves as a basic rule setting forth all major requirements for a transfer of ownership. The other Articles of this Chapter specify these basic principles further with regard to the requirements (Section 1) or effects (Section 2) of a transfer, or address particular issues arising in special transfer situations (Section 3).

Impact of registration under national law. Book VIII does not create a system of registration for the purposes of a transfer of ownership. It does, however, accept that national legislation partly has established, or may yet establish, such provisions. The general approach taken by Book VIII is that where national law establishes a registration system which concerns the right of ownership and the transfer of ownership (in contrast to registration merely for administrative purposes) and the register is publicly accessible, irrespective of whether registration is obligatory or optional, the effects of such registration "have priority over the respective rules of this Book"; see VIII.–1:102 (Registration of goods) paragraph (2). This does not mean that Chapter 2 of this Book is automatically excluded as a whole. The national rules have priority over the rules of Chapter 2 only where the effects of these national rules and those of the present Chapter are incompatible. In particular, it may be provided that the transfer of goods subject to the relevant registration system in general, or once the respective item has been registered there, can only be effected by an act of registration, by which paragraph (1)(e) of the present Article as well as Articles VIII.–2:103 (Agreement as to the time ownership is to pass) to VIII.–2:105 (Equivalents to delivery) would be rendered ineffective. The issue is further discussed in the Comments on VIII.–1:102 (Registration of goods).

Terminology. The parties referred to in the present Article and throughout the whole Chapter 2 are the "transferor" on the one side and the "transferee" on the other. These two terms are neutral, deliberately avoiding any implications of particular types of contracts (like "seller" and "buyer"), focussing on the central effect under property law, namely the transfer (and acquisition) of title. The transferee is the one who acquires the ownership of the goods by virtue of the rules set out in this Chapter. The transferor, on the other hand, may be the owner of the property who undertakes to transfer the property to the transferee and effects this transfer by virtue of the owner's right to dispose (cf. VIII.–1:203 (Ownership)). But this is not necessarily so: also a person who does not "own" the property in the sense of the named Article, but has authority to dispose of it (which may, e.g., have been granted by the owner or by a rule of law) is understood as being the "transferor" in the sense of this Article (for more details, see Comment H below). Another term deserving preliminary explanation at this stage is the "entitlement to the transfer of ownership" in the sense of paragraph (1)(d) of this Article. One may briefly describe this "entitlement" of the transferee as the mirror image of the transferor's obligation to transfer ownership, the term "obligation" having been avoided in the black letter text for reasons discussed below (Comment H). It is important not to mix up this concept of the transferee's "entitlement" with the transferor's "right or authority to transfer the ownership" in the sense of paragraph (1)(c) of this Article. The latter refers to the basic principle *nemo dat quod non habet*, i.e. to a requirement relating to the transferor alone; the former addresses the legal bond between the two parties. The concept of an "agreement as to the time ownership is to pass" in the sense of paragraph (1)(e) of this Article most probably is self-explaining. Practically, such agreement may relate to a point in time after delivery (in particular: the time of payment of the purchase price where the parties have stipulated for a retention of ownership in the traditional sense) as well as to a time before delivery, e.g. the moment of the conclusion of the underlying contract itself (cf. the traditional concept of a *constitutum possessorium* available in most countries following a delivery principle).

"Delivery" means an act directed towards a transfer of property where the goods themselves are moved; "equivalents to delivery", on the other hand, are acts to the same effect where the goods themselves are not moved. As to details, see the Comments on VIII.–2:104 (Delivery) and VIII.–2:105 (Equivalents to delivery).

(b) Comparative background: main differences

General. The starting points for the rules on transfer of "ownership" in the European legal systems have significant differences, and these discrepancies occur on several levels. These are briefly introduced in the subsequent Comments, the focus being confined to basically describing the different concepts as such. Closer comparative information in the sense of discussing which concept has been adopted in which particular legal system(s) is provided in the Notes to this Article.

Unitary transfer approach versus functional approach. One crucial distinction, although hardly reflected on in large parts of Europe, relates to the question what exactly passes under the relevant property law rules. In most European countries, one will find rules defining the right of ownership (comparable to the definition in VIII.–1:202 (Ownership)) and, second, rules defining a particular moment in time when this right of ownership passes from the transferor (owner) to the transferee. At this very moment in time, all "aspects" related to the right of ownership under the said definition, like the owner's right to recover possession of the property from another person, even if that other person is insolvent (i.e. protection as against that other person's general creditors), the right to legally dispose of the goods in the sense of alienating them or creating limited proprietary rights in them, the right to use, alter or consume the goods and related rights to claim damages or the reversal of an unjustified enrichment from a third party interfering with these rights, pass to the transferee. Such an approach may be called a *"unitary" approach*, meaning that one moment in time is decisive in many relations. This kind of approach certainly is the predominant starting point in "continental" European legal systems. As to the practical effects, the same description essentially may be given in relation to English law, although common law basically does without a tradition of defining a "right of ownership", and certain central concepts, such as a right of revindication, do not exist. However, the scope of this unitary approach is not necessarily the same in all these European legal systems: e.g., in some countries, risk, as a rule, passes with property whereas in others it does not. Also, some effects which would, in principle, follow from a clear cut unitary rule are often counteracted by specific provisions, such as by providing the transferor of unpaid goods with a right to retain, or a statutory lien, where "ownership" already passes with the conclusion of a contract for sale.

The Nordic countries, on the other hand, deliberately do not adhere to such a "unitary" way of thinking. Their laws follow a *"functional" approach*, which is based on the assumption that the various aspects of what one could describe as "ownership" can pass independently from one another at different points in time. For one aspect, the conclusion of the underlying contract may be decisive, for another one, delivery or payment of the price may be. Who has the "right of ownership" is actually considered to be of no importance. Rather, emphasis is placed on distinguishing different types of conflicts, such as the question of whether and as of which time a buyer of goods is protected against the seller's general creditors in case the latter becomes insolvent; or whether or under which conditions a seller is protected against the buyer's general creditors in case payment of the purchase price has not been made; or whether and under which preconditions the original "owner" of goods has a right to recover the goods from a person having bought these goods from a third person who was not authorised to dispose of them. A person may have a "better right" in one conflict against another person,

but lose a conflict in another relation. The rules on the transfer of these various "aspects" and different conflict situations are partly laid down in specific statutory provisions, but have mostly been developed by court practice and legal writing by taking into account existing (often fragmentary) legislation and, first and foremost, by weighing the different interests involved in the specific conflict situation.

Transfer by delivery versus "consensual" transfer. The next difference, which is usually the one primarily discussed, is that in some countries, the transfer of the right, in principle, requires a transfer of possession (delivery), whereas in other legal systems, the conclusion of the underlying contract – paradigmatically: a contract for sale – itself suffices. The latter concept is often referred to as the "consensual" system, which term will also be used for the purpose of discussion within these Comments, although it does not fit well where the entitlement to transfer is not created by contract (i.e., by *consensus* of the parties) but by other means, such as by operation of law as in the case of unjustified enrichment. However, it seems that the concept of an immediate transfer at the moment an entitlement other than arising by contract (or other juridical act) comes into existence is hardly ever applied in the European legal systems (except in some contexts of the law of successions). In principle, the question of whether the transfer is effected by delivery or by mere consensus arises on both the unitary and the functional approaches. In the former case, the question is whether "ownership" passes in the one or other way; in the latter, the question may relate to each single "aspect" and may be answered differently in relation to different conflict situations. This brief summary should not create the impression that the conclusion of a contract and delivery are the only possible acts to which a transfer may be tied. There are also other events which may be decisive, for instance the "identification" of generic goods, however defined in detail, which can be seen as a general transfer requirement and, in particular, defers the moment of transfer in relation to generic goods where the transfer generally is "consensual". Theoretically, the moment of payment could also be made decisive, but, as such, scarcely is under the existing European legal systems; it may, however, become relevant if the parties so agree, which is, in fact, frequently done by contracting for a retention of ownership.

Despite the different starting points, certain tendencies of convergence may be observed. It has already been pointed out that where a consensual approach applies, national legislators often regard it as necessary to protect the interests of an unpaid seller by establishing a right to retain or a statutory lien, which gives the transferor a favourable position as long as delivery has not been effected (and partly, rights to retake possession are granted even after delivery has been made). In practice, also the requirement of identification frequently aligns the transfer of generic goods with the moment of delivery. Further, consensual systems such as French law traditionally accept certain third party effects only upon delivery, in particular where it comes to multiple transfers to different transferees. It is also noteworthy that the *possession vaut titre* principle has great importance in consensual systems, but this is not the same in delivery systems. In countries following the principle of transfer by delivery, on the other hand, it is usually accepted that the parties to the transaction may agree on a transfer before delivery, even on a transfer at the moment the underlying contract itself is concluded, by stipulating for a so-called *constitutum possessorium* (i.e. an agreement under which the transferor undertakes to exercise possession for the transferee).

Party autonomy. It already follows from the foregoing that most European legal systems leave great room for party autonomy, both in deviating from the moment of delivery and in postponing the transfer under a consensual system. There is however one country where – up to now – delivery is a strict requirement at least in one specific relation. Under Swedish law –

unless a consumer sale is at hand or a (complicated and seldom used) procedure of notifying the transfer in public and registering it with a special public authority is observed – a buyer of goods is not protected as against the seller's general creditors until the seller's ability to lay hands on the goods has been cut off, which practically means that delivery (or notification of a third party if the goods are in that person's possession) must have been made. A *constitutum possessorium* is not effective in relation to the buyer's protection against the seller's creditors. However, this principle has been abolished where a consumer buys goods from a professional seller where, now, a consensual rule applies provided the goods are sufficiently specified. Also, with regard to the remaining scope of the strict delivery requirement, the Swedish Supreme Court has recently suggested changing the law towards a consensual approach by an act of legislation.

Causal versus abstract transfer. Another classical difference relates to the question whether a transfer must necessarily be based on a valid obligation – or, phrased in the terminology of this Article: on a valid entitlement to the transfer of ownership. Traditionally, two concepts are available. Under most European legal systems, a transfer in fact does require such a valid entitlement (obligation), e.g., arising from a contract for sale. As a consequence, if the underlying contract is void, the right of ownership can not be transferred, and if the contract is avoided after the transfer has already taken place, the right of ownership falls back to the former owner with retroactive effect; property is thus treated as never having passed to the transferee. This approach is traditionally called a "causal" transfer. Under German law, on the other hand, and in some countries following the German model, a valid underlying obligation is not required. Consequently, where that obligation (entitlement) is void or avoided, ownership nevertheless passes to the transferee and, where it already has been transferred, it does not re-vest automatically. Under this model, the transfer is based on a second juridical act, the so-called "real agreement" (see the following paragraph), the validity of which is independent of the existence or validity of an underlying contract: the transfer is "abstract". This does not, however, mean that under German law, a transferee may finally keep property obtained under a void contract. The transferee will be obliged to return the property under unjustified enrichment principles. But until it has been returned, the transferee will be the legal owner of the asset with all the consequences which follow under the unitary approach. In particular, the transferee (who is obliged to re-transfer the ownership) can validly dispose of the goods and transfer them to a third party (who then acquires ownership derivatively, i.e. from the legal owner, without any need to resort to good faith acquisition principles); and the transferee's general creditors may levy execution in the goods or have them sold as part of their debtor's patrimony in case the transferee goes bankrupt.

The concept of a separate "real agreement". As indicated, several European legal systems have adopted the concept of a "real agreement" in the sense that a transfer requires a contractual agreement separate from the "underlying contract" (e.g., a contract for sale) or other legal basis of the transfer (e.g., an obligation arising from unjustified enrichment law). This concept occurs in all countries where the transfer is "abstract" in the abovementioned sense; there, it is an indispensable vehicle for implementing the abstraction principle. But the real agreement concept has also been adopted in a number of countries which follow the causal transfer approach. There, consequently, if the transfer is based on a sale or other contract, two agreements with two different contents are required for bringing about a valid transfer: the "underlying contract" (contract for sale) and the real agreement, the latter's validity however being dependent on the former's. As to the content, the difference between these two types of agreement may be summarised as follows. The "underlying contract" (e.g. contract for sale) produces the transferor's obligation to transfer the ownership and the

corresponding right of the transferee to get the property transferred. Within the "real agreement", on the other hand, the parties do not create an obligation but agree to affect the proprietary right as such: The transferor declares to transfer the ownership and the transferee declares to accept it. Practically, such a real agreement is most often concluded implicitly. Due to this "invisible" nature, it is subject to dispute in some countries whether, if delivery is made at a time after conclusion of the underlying contract, the real agreement should be assumed to be concluded upon the making of the underlying contract, or upon delivery. In any case, being a (special type of) contract, the real agreement is subject to the general rules of contract law, meaning that the real agreement may, e.g., be avoided under general contract law rules, or can be concluded subject to a condition (the most frequent condition being full payment of the purchase price: retention of ownership).

B. Brief introduction to the approach taken in Chapter 2

Disputed subject matter. Some fundamental issues relating to the basic rule of this Chapter were disputed throughout the period of developing these rules. There was no unanimity within the Study Group on the concepts and policies pursued. In particular, representatives of the Nordic countries have been constantly critical of an orientation towards a unitary approach. And a considerable number of members of the Study Group's Co-ordinating Committee, including even the majority of the working group's advisory board, have favoured a consensual rather than a delivery-based transfer system. The overall majority is, however, in agreement with the working group's approach. It has however been agreed that arguments from all sides will be reflected in these Comments on Chapter 2.

Main approach taken in Chapter 2. The basic approach suggested in Chapter 2 is to adopt a non-mandatory delivery system, or, put differently, a "delivery-default-rule". The primary rule thus is that party autonomy prevails, i.e. the transferor and the transferee can regulate the transfer according to their needs and preferences. Subject to a general requirement of identification provided for by paragraph (3) of this Article, they can, for example, agree that the transfer will take place upon conclusion of the underlying contract although delivery is to be made later, or agree on a transfer upon delivery or any other condition, such as payment of a price. This primary rule is reflected in paragraph (1)(e) of this Article which refers to an "agreement as to the time ownership is to pass" and states that ownership will pass when the conditions are met. Where there is no such agreement, default rules apply, and these default rules are based on a delivery approach. The default rules address different practical situations that may occur, such as delivery in a narrow sense where physical control over the goods themselves is transferred from one party to the transaction to the other (VIII.–2:104 (Delivery) paragraph (1)), or situations where an independent carrier is involved (VIII.–2:104 (Delivery) paragraph (2)). Further, "equivalents to delivery" are established, meaning that certain default rules address situations where the goods themselves need not be moved, but the same effect as delivery of the goods is achieved by some other means. These rules, all contained in VIII.–2:105 (Equivalents to delivery), address situations where the goods are already in the hands of the transferee, or in the hands of a third party (e.g. a warehouse or a lessee), or where not the goods themselves but certain means of obtaining the goods are handed over to the transferee (such as keys to a warehouse or container where the goods are stored), or where documents "representing" the goods are delivered. The common idea behind these default rules is that they define circumstances under which there is a high probability that the parties intend property to pass unless there is an agreement to the contrary.

This non-mandatory default approach basically is a unitary approach in the sense of the description given in Comment A above, i.e. what passes to the transferee is the right of

ownership in the sense of VIII.–1:202 (Ownership) comprising all aspects linked to this right, which certainly is the majority approach in Europe. However, there has been agreement when developing this Chapter that this unitary approach should be open to exceptions where better arguments are considered to speak for a deviating solution. There are some particular rules which may be seen as examples of a willingness to depart from unitary thinking where there is good reason to do so, for instance VIII.–2:201 (Effects of the transfer of ownership) paragraph (4) which aims to provide an efficient solution protecting an unpaid transferor's interests where ownership has already been transferred before delivery (see there). Further, VIII.–2:201 (Effects of the transfer of ownership) paragraphs (2) and (3) contain a number of clarifications which show that that the unitary approach pursued by the present Chapter is not as far-reaching as a unitary approach can theoretically be (and, partly, historically was in some countries).

Chapter 2 provides a "causal" transfer system, which is reflected in paragraphs (1)(d) and (2) of the present Article and is addressed in more detail by VIII.–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation). The concept of a separate "real agreement" has not been adopted. Finally, it should be remembered that national registration rules may override parts of the above stated principles; see Comment A above.

Structure of this Article and Chapter 2 in general. Paragraph (1) of the present Article lists the general requirements for a transfer of ownership under Chapter 2. The first three requirements of the goods being existent and transferable (subparagraphs (a) and (b)) as well as the transferor's right or authority to dispose (subparagraph (c)) are rather self-evident and do not contain any particular policy choice. Subparagraph (d), together with paragraph (2), addresses the "causal" approach mentioned above, and also clarifies the broad scope of the present Chapter in listing contracts and other (in particular: unilateral) juridical acts, court orders and rules of law as possible grounds for a transfer under these rules. Subparagraph (e) of paragraph (1) implements the named "delivery-default-approach". It is supplemented by paragraph (3) which spells out the general requirement of identification. Paragraph (4) only has a clarifying function and states that, of course, a court order or rule of law may itself provide when ownership of goods is to pass, in which case the "delivery-default-approach" does not apply.

Some of the requirements listed in this general rule are regulated in more detail in the subsequent rules of Chapter 2. Chapter 2 of this Book is divided into three sections, the first dealing with the requirements for a transfer of ownership, the second dealing with the effects of the transfer, and the third dealing with a number of special situations which may occur in the context of a transfer.

In particular, the requirement of the transferor's right or authority to dispose (paragraph (1)(c) of this Article) is supplemented by some specific details provided for in VIII.–2:102 (Transferor's right or authority) and the non-mandatory delivery approach laid down in paragraph (1)(e) of this Article is further specified in VIII.–2:103 (Agreement as to the time ownership is to pass), VIII.–2:104 (Delivery) and VIII.–2:105 (Equivalents to delivery). In the second section on effects of the transfer, VIII.–2:201 (Effects of the transfer of ownership) first states that the transfer basically follows a unitary approach (paragraph (1): one point in time is decisive for internal as well as for external relations) but continues by clarifying that the unitary approach does not cover and decide everything it theoretically could cover. Partly, these clarifications may be considered superfluous, but taking into account the different

traditions governing this area in the European legal systems, addressing such issues directly in the black letter text has been regarded as preferable. The next Article, VIII.–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation) takes up an issue already addressed in paragraphs (1)(d) and (2) of the present Article, namely the "causal" transfer approach, being supplemented with rules relating to the effects of termination, withdrawal and revocation of a donation. Again, since several of these issues are regulated differently in the European legal systems, it seems preferable to address these issues explicitly, although some of the results may also be derived from an interpretation of other Articles of this Chapter. The same holds true for VIII.–2:203 (Transfer subject to condition). Section 3, finally, comprises special constellations. Again, it has been a policy to provide explicit rules where the European legal systems diverge or the consequences could otherwise remain unclear. This applies to VIII.–2:301 (Multiple transfers), VIII.–2:302 (Indirect representation) and VIII.–2:303 (Passing of ownership in case of direct delivery in a chain of transactions). The next Article, VIII.–2:304 (Passing of ownership of unsolicited goods), supplements II.–3:401 (Unsolicited goods or services) on a property law level. The following two Articles, VIII.–2:305 (Transfer of goods forming part of a bulk) and VIII.–2:306 (Delivery out of the bulk) deal with the specific situation that fungible goods are contained in an identified bulk and the parties intend to transfer a certain quantity of them before identification of the goods in the strict sense has taken place. The rules provide for the creation of a right of co-ownership in the whole goods contained in the bulk and deal with certain consequential issues. Finally, VIII.–2:307 (Contingent right of transferee under retention of ownership) clarifies two practically important aspects relating to the rights of a transferee under a retention of ownership which turned out to be unclear or disputed in some European legal systems.

Structure of the Comments on this Article. Taking into account the very different starting points in the European legal systems and the fact that two policy decisions proved to be disputed, the Comments on this Article will first try to provide a general discussion of the main principles and structure elements, including some of the major issues outlined above, before considering the technical details of the paragraphs of the Article (Comment H).

C. General discussion of the delivery approach versus a consensual approach, including further options

(a) General

Introduction; overview. The question of whether delivery or the mere conclusion of the underlying contract, or a further alternative, should be regarded as decisive for a transfer of "ownership" (or a certain "aspect" of it) becomes relevant where delivery is intended to take place some time after the conclusion of the contract. The issue can be discussed with various focuses, many of them being reflected or at least touched upon in the following. After addressing some general points, the following discussion will point at the somewhat limited potential scope of a consensual approach and the conclusions which may be drawn from that (section (b)). Then, the implications of the consensual-versus-delivery (etc.) choice will be discussed separately with regard to single "aspects" of ownership. First, special emphasis will be laid on the aspect of the transferee's protection against the transferor's general creditors (section (c)), which proved to be the main issue in the discussions within the Study Group. Then, the converse issue of the unpaid transferor's protection as against the transferee's general creditors will be discussed (section (d)), followed by an analysis of the "passing" of the "owner's" right to dispose (section (e)) and the right to recover possession from a third person, the right to use the property and related rights against third persons, including rights to

claim damages or the reversal of an unjustified enrichment from a third person (section (f)). These discussions largely involve precisely focusing on specific types of conflicts and "aspects" of "ownership", comparable to an analysis under a "functional approach". Whether or to what extent it finally appears advisable to formulate the preferred rules in a structure and language coherent with a functional approach, will be summarised and discussed below, in Comment G on this Article. Since the discussion in this part of these Comments will often concentrate on the two main options of "delivery" and "conclusion of the contract" only and thereby neglects the hypothetical "payment" options to a certain extent, the arguments concerning this alternative will be summarised and evaluated in a separate section (g) below. There will also be a summary of hypothetical consumer protection issues, see section (h).

Further options: payment. Although consensual and delivery-based solutions certainly dominate the *status quo* in the European legal systems as well as the related discussions, these two options are not the only ones potentially available. In particular, the criterion could be whether payment of a counter-performance – where relevant under the concrete transaction, such as a contract for sale – has been made or not. This idea may suggest itself in terms of an equal treatment of both parties to the transaction, and it may also suggest itself against the background that often the preference for a consensual rule is in fact supported by the argument that protection will be provided for pre-paying buyers. In detail, several nuances of a "payment" rule can be thought of. Ownership (or a certain kind of protection) could pass only upon full payment, or already upon partial payment, or – theoretically – even proportionally according to payments effected. Also, one could limit a payment rule so that payment would be decisive only before delivery of the goods is made, but then ownership would pass upon delivery unless otherwise agreed by the parties (so that the transferor would have to contract for a kind of retention of ownership device in case payment is to be made after delivery). Or, payment could be made a general default rule, so that a retention of ownership (after delivery) would already follow from the black letter text and would only be excluded if so provided by party agreement. These options will, to some extent, be taken into account throughout the following discussion which will, however, primarily relate to the classical dichotomy of mere consent and delivery. As mentioned above, a summary and concluding discussion of the payment options will be provided later.

Quantitative arguments from comparative survey; recent trends. Potentially, simply counting the European countries following the one or the other approach could amount to at least some indication of a preferable option. But this does not prove fruitful for present purposes; first, because there is no clear majority in one or the other direction (except that "payment rules" do not play a considerable role in present European legal systems). And second, even if one tried to identify only recent trends over the past years, the outcome would be ambivalent. In Sweden, for instance, a certain trend moving away from the (mandatory) delivery requirement – or rather: cut-off of the transferor's factual power over the goods – for the transferee's protection in the transferor's insolvency, towards a consensual approach (which however appears the only alternative discussed) can be observed in recent legislation (regarding consumer sales), doctrinal writing and court practice. In France, on the other hand, delivery is said to gather more and more importance in commercial practice as well as in legislation, primarily safeguarding the unpaid seller's interests. It may also be noteworthy that in the Study Group's discussions on this subject , representatives of the diverse countries did not necessarily favour the approach in force in their own legal system.

"Natural" solution, "ordinary people's expectations". It has also proven more or less pointless to ask which solution appears to be the most "natural" or "what ordinary people

expect" (or: what ordinary business people expect), not because it is considered adequate to ignore ordinary people's expectations, but simply because expectations of ordinary people seem to vary in a pan-European perspective. Such expectations are probably influenced by various parameters, including, among other things, the situations people envisage when being asked about such issues (depending on the kind of goods, how the respective field of commerce is usually organised and whether they rather identify with the transferor's or the transferee's role, or with the role of a third person) and their – sometimes limited, but still to a certain degree existing – experience regarding economic and legal customs in their home countries. There is, so far, no reliable empirical survey available which could be used as a basis for taking such kinds of arguments more fully into consideration. However, what definitely seems worthwhile is to use the actual or hypothetical expectations of "ordinary people" as a kind of test question in relation to an approach which appears preferable based on other arguments, in order to verify whether this approach proves workable and generally acceptable.

(b) Limited applicability of consensual approach

Remark as to importance of the following arguments. The following comments list a number of instances where the consensual rule remains inapplicable, partly for reasons of logical coherence with general principles of property law, such as the requirement of identification, and partly because the consequences, although applying the principle would be possible from a theoretical viewpoint, would be considered too far-reaching. As a consequence, the consensual approach has a more limited potential scope of application as compared with a delivery approach. To a certain – but not decisive – degree this in itself may be used as an argument in favour of a delivery system (cf. the following paragraphregarding the significant practical importance of transfers of generic goods). In particular, however, the question arises in what respect transactions falling within the potential scope of a consensual rule differ from other transactions so as to justify treating them differently in relation to certain advantages a consensual rule is argued to have. The latter kind of argument will be taken up repeatedly in subsequent sections of these Comments .

Generic goods. According to the general requirement of identification expressed in paragraph (3) of the present Article, where the underlying contract (or other juridical act, court order or rule of law) defines the goods in generic terms, ownership can pass only when the goods are identified. It is commonly accepted in the European legal systems that a proprietary right cannot attach an asset as long as it is unclear to which asset it shall relate. Consequently, a rule stating that ownership (or whatever proprietary "aspect" of ownership) passes upon conclusion of the underlying contract (or creation of another legal basis) cannot be applied to situations where the goods subject to the transfer are only defined generically but it is still unclear which particular items will finally be transferred. The same applies to a rule providing that the transfer occurs upon (full or partial) payment, where this payment is made before identification.

This raises the question which other criterion should then be regarded decisive. One may say that this other criterion should be identification itself, as this is the earliest moment in time possible and, thereby, comes closest to the original starting point of a transfer upon conclusion of the underlying contract. This would, evidently, put much weight on defining what exactly constitutes identification. This is not easy (see Comment H) and this criterion might bring about a certain amount of insecurity. Another option could be spelling out that the standard default rule for generic goods is delivery, which would be a simpler rule to apply.

Second, taking into account the importance of contracts for generic goods in many economic spheres(including the supply of raw materials, the area of wholesale transactions and much distance selling), one may put forward the question whether it is wise to establish a general rule (transfer by mere consent) which is inapplicable to these large parts of the economy. Although comprehensive empirical information is lacking, it is probably not incorrect to assume that the majority of transactions in the European Union, in terms of absolute figures and in terms of total turnover, concern contracts for generic goods.

A delivery approach, on the other hand, allows transfers of generic goods and transfers of specific goods to be treated alike, which may appear preferable unless certain reasons demand the opposite. At the time of delivery, identification generally has already occurred or takes place at that very moment. The rule is comparatively easy to apply. Insecurity and lack of predictability related to the precise requirements of identification are not totally avoided, since, under the approach proposed under the present Chapter, the parties are free to stipulate that the transfer will take place at an earlier time than delivery; but practically, such insecurities are considerably reduced.

Future goods (goods to be manufactured). A second field where a transfer upon the conclusion of the underlying contract does not work concerns goods which do not yet exist at that time but still have to be produced. The present Article explicitly spells out that a transfer requires that the goods exist (paragraph (1)(a); besides, the identification requirement could be applied where the product is defined in generic terms). Again, the same applies to a rule providing that the transfer shall take place at the moment of payment, if payment is made before the goods exist. This, too, is an area of considerable practical importance.

If the general rule was agreed to be a transfer upon conclusion of the contract, one would have to clarify which time should be decisive in cases where that rule cannot apply. The answer is not self-evident. It could be the moment when the product is put into a deliverable state, which could have the advantage of being a clear-cut rule and rather simple to apply. But – depending on the underlying policy pursued by the hypothetical choice in favour of a consensual approach – one may well ask whether such a rather late moment in time would be consistent with these underlying policies and whether ownership (or a certain aspect of it) should not pass already when the goods are at least partly finished; e.g. where a boat is to be produced and the hull already exists when the transferor goes bankrupt. Again, however, one may ask whether or not an even earlier stage of the production process may suffice as well, going back, e.g., to the moment when the first two planks have been combined (or even further back, to the moment of mere identification of material dedicated to the actual production). It obviously seems hard to identify a reasonable criterion of demarcation for designing a *default* rule along the lines of a basically consensual approach. The issue, again, is rather simple to deal with under a delivery-based approach. Delivery will occur when the product is finished; and if earlier, it is still a very simple criterion to identify. And where the parties contractually agree that ownership is to pass at an earlier stage, it is up to them to define this moment or relevant conditions in the terms of the contract. Such contractual stipulation may range from the mere appropriation of material even before the construction process itself has started (in which case the parties rather agree to transfer the material and create an additional obligation to perform the work, than on a transfer of the product) to the completion of the last stroke of the brush, or actual delivery, or whatever.

Transfer of goods owned by a third person. The following examples certainly are of lower practical importance, but are listed for the purpose of completeness. It is, for example, possible under these model rules to establish a valid contract on the sale of goods which are not, or not yet, owned by the transferor. Also in this case, the consensual approach cannot be applied, even where the goods concerned are specific: at the time the contract is concluded, the transferor has no right (or authority) to legally dispose of the goods (paragraph (1)(c)). Again, the same applies under a payment rule if the price is paid before the transferor acquires the right or authority. However, no major problems seem to result from this observation. Delivery, on the other hand, does of course not cure a lack of the right or authority to dispose, but – where the transferor has not meanwhile acquired such right or authority – the transferee may acquire by virtue of VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership).

Alternative obligations. Another instance to be addressed in this context are alternative obligations (cf. III.–2:105 (Alternative obligations or methods of performance)). Where the transferor is bound to transfer one of two or more goods, it is perhaps not logically excluded to provide the transferee with proprietary protection in relation to all hypothetical objects of performance so that no other creditor of the transferor may seize these goods. But this may go a bit far in terms of constituting a general default rule, e.g. considering that third party creditors would be prevented from attaching all these goods in enforcement proceedings outside bankruptcy. Traditionally, the consensual model is not strictly applied, but the transfer is postponed up to the moment when the party entitled to choose the performance exercises the right of choice. Further difficulties do not seem to arise, unless perhaps where the choice is on the transferor and one of two goods perish so that ownership in the remaining object can pass automatically. Here there may be cases where it is doubtful whether or not such effect takes place because it is unclear whether the goods have been "sufficiently damaged".

Contract under suspensive condition. Certain difficulties may also arise where the contract underlying the transfer has been concluded subject to a suspensive condition, which turns on an uncertain event which may or may not occur in future. Due to this element of uncertainty, an immediate transfer upon conclusion of the contract as such does not work. Consensual systems tend to solve this by assuming that the occurrence of the event has a retroactive effect in the sense that ownership is deemed to have passed at the moment of conclusion of the contract.

(c) Transferee's protection against the transferor's creditors

General: method, subject matter. The following sections (c) to (f) try to analyse the advantages and disadvantages of the consensual approach, and the delivery approach respectively, by addressing the single "aspects" of the right of ownership, which become important in different typical conflict situations, separately and – as far as possible – independently from one another. To a certain degree, therefore, the discussion follows a functional approach (although some of the subsequent issues or "aspects" are traditionally only little discussed, if at all, in Nordic legal systems). The first of these "aspects" to be discussed is as from when the transferee (e.g., a buyer) is protected against the transferor's (e.g., seller's) general creditors. As this way of phrasing the issue is, perhaps, not the most common one in all European countries, it should perhaps be clarified a little. There is no doubt that under a valid contract for sale (or under another legal relationship obliging one party to a transfer of ownership), the transferee is entitled to demand that the other party to this transaction, the transferor, transfers the goods. Still, this entitlement may be frustrated by the transferor's other creditors in basically two situations. The first is that one of these other

creditors enforces a right against the transferor by attaching the goods sold to the transferee. The result will be that this other creditor may have the goods sold and satisfy the right, whereas the transferee does not get these goods, but may proceed against the transferor under the rules on non-performance of the latter's obligation (in particular, by claiming damages, so that at least some kind of equivalent for the goods is obtained). The second situation is the more critical one where the transferor is insolvent. Then, all creditors who are not particularly protected – mainly by either having a proprietary security right or a right to separate specific assets from the insolvent debtor's estate – will sustain a loss, receiving only a dividend. From an economic viewpoint, it is basically this second situation that matters in the present context. The question is whether the transferee (already) has a right to separate the goods from the transferor's estate or whether the transferor's general (i.e., unprotected) creditors can lay their hands on these goods and proportionally distribute the goods' value amongst them. This issue certainly was the most intensively debated one throughout the process of developing the rules of Chapter 2. Traditionally there are also other sets of rules dealing with conflicts between these groups of parties, namely the *actio Pauliana* and similar concepts, under which the transferor's creditors can "avoid" a transaction or otherwise treat it as ineffective (cf. VIII.–2:201 (Effects of the transfer of ownership) paragraph (3)(a)). Such devices are not discussed in the context of the present Article.

Although the scope of Chapter 2 is wider, the discussion will often focus on the practically most important area, i.e. transfers based on bilateral contracts under which both parties are bound to exchange performances, the paradigmatic example being a contract for the sale of goods. As to the possible alternative solutions, the primary focus of the discussion will, again, be a default rule stating that the relevant "aspect" of ownership passes with the conclusion of this contract (consensual model) on the one side, and a default rule under which the relevant "aspect" passes upon delivery on the other side. Other hypothetical alternatives, in particular concepts under which payment is decisive will be touched on occasionally. The discussion of the consensual model will have to be restricted to specified goods (which already exist and in relation to which the transferor has a right or authority to dispose).

It must be stated right at the beginning that there are well-grounded arguments for both solutions and that it is not intended to create the impression that, although in an overall assessment a preference for a default rule following the delivery approach is argued (and it is therefore necessary to point out the advantages of this approach as compared to the other), the consensual model would be considered unreasonable or to create serious impediments to economy and should therefore be rejected from the outset. The preference is a relative one, and certainly depends on the weight given to the various arguments. If one weighs certain arguments differently, another outcome could also be argued.

As to the structure of the discussion, we try to deal with arguments put forward in favour of the consensual model first and then switch to arguments favouring the delivery model. A strict distinction is however hard to draw, since counter-arguments related to the one model will often appear as arguments supporting the other. The following arguments stem partly from published discussions relating to existing national legal systems in Europe and partly from the discussions within the Study Group.

Consensual model coincides with "natural expectations" of the parties, etc. It is sometimes stated that ordinary people – or ordinary business people – consider it "natural" that a buyer (or other transferee) acquires a right to separate the (specific) goods upon concluding the contract for sale, this right being valid also in relation to the transferor's

creditors. On its own, as has already been pointed out, such a statement is not very helpful. It must be completed by some additional substantive arguments.

Consensual model: transferor and creditors sufficiently protected by right to withhold performance. One of the most frequently used arguments is that the transferor's creditors should be content with receiving the transferee's counter-performance. It is argued that the transferee should be protected against the transferor's creditors from the conclusion of the contract, but should be able to exercise the right to separation only when the transferor has been fully paid. As long as payment is not made, the transferor may withhold performance (delivery) under the general rule of III.–3:401 (Right to withhold performance of reciprocal obligation), which should also have effect in favour of the transferor's general creditors. The effect of such a model is that – typically – the full value of the goods concerned will be left to the general creditors in any case: either the transferee pays the price in exchange for the goods, or the transferor is not paid but retains the goods, which can eventually be sold. This has the appearance of being a fair solution as between these two parties. There is, however, a certain problem in explaining why one type of creditor (the transferee of specified goods) should necessarily be entitled to 100 % of what is due while other creditors in the transferor's insolvency only receive a (normally small) dividend. This issue will be more thoroughly discussed below.

Consensual model: protection of pre-paying transferee. Along with the argument discussed above, the most frequent argument in favour of a consensual model seems to be that this model grants protection to a transferee who, for whatever reason, pays all or part of the purchase price before taking delivery. It is partly argued that a particular need for such protection exists with regard to consumers, who, if a buyer was only protected as from taking the goods into possession, would often lose the goods and their pre-payment due to ignorance of the legal rules. It is also stated that there may exist legitimate and well-motivated reasons for a buyer not to take the goods into possession immediately upon conclusion of the contract: there may be lack of space for storing the goods at the moment, or the object may still need to be completed or repaired by the seller. Also, it is pointed out that down-payments fulfil an important task to secure the transferor's claim for damages if the transferee later withdraws from taking delivery, or otherwise does not pay, and it is argued that, therefore, it would be desirable that a down-payment can be made by a transferee straight away in reliance on a right to acquire full protection against the transferor's creditors by paying the outstanding amount. These are strong arguments. Against them it may be said that such immediate protection, or protection upon full or partial payment, is also possible under a system where the transferee is basically protected as from delivery, but the parties can also agree on an earlier transfer. Apart from this, one may question in what respect such pre-payments of buyers of specified goods are more worthy of protection than all other kinds of advance performances, which usually involve taking a risk unless special protection is arranged, and other types of creditors who have no chance to obtain such security. This issue will also be taken up again in more detail below.

In the context of favouring the consensual model for the sake of protecting pre-paying buyers, it is also sometimes stated that protecting a pre-paying buyer only upon taking delivery would cause an undue over-protection of the seller's creditors in allowing them to take both the money and the goods. Put this way, however, the argument is misleading: the delivery model corresponds to the principle of equal treatment of all creditors in the transferor's insolvency, which the consensual model does not.

It should also be added that where the protection of pre-paying transferees is seen as the main argument for adopting a consensual approach, this argument is inapplicable where the transferee in fact does not perform in advance. If protection of the transferee's payment (in particular: before delivery) is considered to be a main policy, however, this would speak more in favour of a "payment rule" than in favour of protecting the transferee automatically upon conclusion of the contract.

Consensual model: transferor has no specific interest in the goods whereas the transferee has. One may try to develop an argument in favour of the consensual model by addressing the kind of interests the parties may have in the goods transferred. Whereas – except in some cases of donation – it would obviously go to far to say that the transferor simply intends to get rid of the goods and therefore has no interests in them at all (for which reason, then, immediate protection may be given to the transferee), it is perhaps generally correct to say that a person willing to transfer a particular item of property does not have a specific interest in this very object (any longer) but rather an interest in its value, as reflected in the price agreed upon. The transferee, on the other hand, especially where the contract concerns specific goods, may have a specific interest in exactly this object (chosen e.g. to satisfy a personal or business need). Based on this observation, the argument could be made that the transferee's specific interest should be given preference against any interests on the transferor's side. (One may add that the argument, as far as the transferor is concerned, will typically apply only to situations where the transferor voluntarily decided to transfer the goods, i.e. where the basis of the transfer is a contract.)

One would, however, have to give an explanation why a "specific" interest in certain goods should be valued higher than "mere" value interests. Such an explanation probably does not exist, since the one can be transformed into the other, and *vice versa*, by agreeing on a price. But – based on this – the argument could be formulated in terms that no one else would pay a better price than the person with such specific interest, which may also result in a benefit for the transferor's creditors. This argument will be discussed further below. Another argument which can, perhaps, be built on the transferee's "specific interest" is that giving preference to the transferee could result in a common benefit on a macro-economic level. In both respects, however, broadly generalising the existence of significant "specific interests" and putting much weight on their possible effects would certainly not be realistic.

Consensual model: transferee pays best price – efficiency and benefit for transferor's creditors. One aspect that may be brought forward in support of a consensual model and partly can be linked with the idea of specific interests the transferee may have in the goods is that it is usually more efficient to sell and transfer the goods to the one who has already concluded a binding contract (the transferee) than to sell off the goods in liquidation proceedings. Apart from double efforts, the prices to be achieved in such enforcement sales will often be less attractive (for the transferor's general creditors), which may be based on general distrust, the goods growing older in the meantime, limitation or exclusion of the buyer's rights in case the goods do not conform with the contract, or other reasons. The original transferee, on the other hand, especially if particularly interested in acquiring these very goods, may pay an attractive price immediately. This may result in an additional benefit for the transferor's general creditors, if one compares this way of proceeding with the option of liquidating the goods in insolvency proceedings. However, this may not be brought as an argument against a delivery-based approach where the applicable insolvency law provides that the insolvency administrator may choose whether to stick to the contract (so that the transfer takes place as originally agreed upon, and the agreed price is paid), or to terminate it

(so that the goods may be sold in liquidation and the original transferee's claim for damages will be discharged only proportionally), by which the original buyer is treated as any other unprotected creditor. This latter approach may also enable the insolvency administrator to collect even more money for the benefit of all general creditors.

Consensual model: macro-economic benefit from protecting transferee. The fact that the buyer (or other transferee) of a specific asset may have a particular interest in this asset may give rise to an argument that leaving these goods to the transferee will typically be more efficient on a macro-economic level in the sense that the transferee has the best opportunities to exploit the goods successfully, which means an optimal allocation of resources and may cause a maximum increase of welfare in the overall economy. There may be a point in such reasoning in some situations. But it should probably not be generalised too much nor its strength be overestimated. There may also be cases where, after leaving the sold goods to the insolvency creditors, a third person buys these goods at a low price in an execution sale and manages to use the goods even more profitably.

Consensual model: both parties usually want an immediate transfer. Also, it is sometimes argued that it is usually in the interest of *both* parties to the transaction to give the transferee immediate protection against the transferor's general creditors, which, of course, is itself used as an argument for the consensual approach and, second, also forms the basis for further arguments (see below). The argument must be specified a bit in order to be more than a general assertion. It can certainly be assumed that one party, the transferee, will be interested in being protected against the transferor's creditors as soon as possible. The second assumption underlying the argument discussed here is that the transferor, though not actively favouring such an immediate protection of the transferee, will at least have no interests against such a solution. For the transferor, it is assumed, it will be sufficient to have some security for the payment of the price, which is another question under a "functional approach" and could, therefore, also be subject to another rule than the consensual principle. In particular, it may be sufficient for the transferor to have a right to retain the goods in possession until the price is paid. It has already been pointed out that this solution involves an unequal treatment of creditors in insolvency insofar as one creditor (the transferee of specified goods) will always receive 100 % whereas all other unprotected creditors only receive a dividend. The argument discussed in the present Comment, therefore, must make the assumption that the transferor (typically) does not care about the other creditors' interests and is willing to act to their disadvantage. It must also presuppose that the transferor has no further interests in letting the general creditors prevail over the transferee. This issue will be taken up again below, where it will be argued that there indeed exist reasons for the transferor to identify with the general creditors' interests and, therefore, not to yield to the transferee's preference for an immediate protection. One may add that in those European countries where delivery is the main rule but the parties can agree on an immediate transfer by establishing a *constitutum possessorium*, such agreements are rather seldom made in practice.

Consensual model: requirement for contracting out of a delivery rule would be a trap for ordinary people and would create additional transaction costs. Where the alternative to a consensual principle (regarding the transferee's protection against the transferor's general creditors) is a delivery rule with a possibility for the parties to establish an immediate transfer (or any other time of transfer) by party agreement, this approach of a delivery-default-rule is partly criticised for only creating a "trap for ordinary people" (consumers as well as ordinary business) or a privilege for those who can afford legal advice, respectively. It may be said that contracting out of a delivery model increases transaction costs. The argument that parties

(transferees) are "trapped" by a legal rule they are not aware of may become valid under two preconditions: First, it presupposes that both parties – and this primarily means not only the transferee, but also the transferor – would actually want to contract out of a delivery regime if fully informed about their legal possibilities. This has already been doubted with regard to the transferor. The second premise is that transferees typically do not know about the range of possibilities of legally designing a transfer (in particular: the possibility to contract for an immediate transfer), or – which probably is the way proponents of this argument would prefer to put it – that transferees typically do not know that they need to establish a certain agreement with the transferor in order to achieve the desired result, i.e. being protected as against the transferor's general creditors upon conclusion of the contract. The latter assumption will certainly have some substance, depending on various parameters such as a person's experience in legal matters, the quality of generally accessible legal information (e.g. examples of standard terms provided by national chambers of commerce, information provided by organisations protecting consumer interests, etc.) or the rules provided in the respective national legal system today. It is then a question of how the law should react to such a lack of information, given that such lack of information exists. The view adopted here is that the law should nevertheless adopt a solution balancing the interests of *all* parties involved, i.e. including the transferor and the transferor's general creditors, which is considered to be achieved best by a delivery-based approach. In other words, taking into account all the other arguments analysed with regard to the issue of the transferee's protection against the transferor's general creditors, information deficits which may typically exist with transferees are not valued so highly as to supersede the arguments put forward for a delivery solution. It does, by the way, also seem clear that even if a consensual model was adopted, there would remain considerable information deficits in practice. For example, many transferees will not know that they will remain unprotected when pre-paying for *generic* goods.

Consensual model: increasing transaction costs resulting from alternative security for pre-payment. The delivery model adopted in Chapter 2 puts a buyer of specified goods in the same position as other general creditors in that the buyer must, if so advised, counter the risks of performing in advance by seeking some security for the pre-payment. This is partly used as an argument against this approach (and in favour of the alternative consensual model) by stating that the delivery approach causes an increase of transaction costs in the form of costs for such security devices, e.g. bank guarantees. One may put it like this. It should, however, be observed that under the delivery model adopted here, the parties can also agree on a transfer upon conclusion of the contract, or upon payment, in which case such transaction costs do not arise. Also, seeking alternative devices for securing pre-payment will largely be inevitable under a consensual system as well, where the transaction concerns unspecified goods. In the end, one may also say that if a seller wants to benefit from advance payment, this is nothing but a form of taking credit and, as with other forms of credit, it is both a legitimate interest of the creditor to ask for security and a normal consequence that the debtor either pays for obtaining security from a third party or uses the debtor's own property for security purposes (which, here, could be simply agreeing on a transfer upon payment).

Consensual model: protection of good bargain. A transfer (in the sense of the transferee being protected as against the transferor's creditors) upon consensus is sometimes favoured also for the reason of providing *in rem* protection of a buyer's interests when the buyer has made a good bargain: the buyer can separate the goods from the seller's estate in exchange for paying a comparably low price. If so, the (other) general creditors may sustain a loss in two respects. First, the bankrupt's estate does not increase by any pre-payment the buyer of such

goods may have advanced so that one creditor (the buyer of these specified goods) receives full counter-performance by paying once, whereas all other general creditors only receive a dividend. Second, the price paid by that buyer is low; perhaps the goods could have been sold for a better price in an execution sale. One has to ask whether this is a policy goal worth being pursued. This could be argued in view of enabling the buyer to gain maximum benefit from exploiting the goods, and of possible macro-economic benefits this may have (which, as noted above, are not regarded as very persuasive). On the other side, there is at least some indication from insolvency law in so far as "very good bargains", under certain additional requirements, can be set aside by the transferor's creditors under the rules of the so-called *actio Pauliana* which, in one way or the other, are adopted in most or even all European legal systems. These are, of course, rules for certain qualified cases and apply irrespectively of whether a consensual or a delivery transfer model is opted for, but one could try to derive some guidance in so far as in an insolvency situation, where people normally lose, at least the default rule should not be that one creditor wins. It is not intended to put much weight on this kind of argument, which certainly is open to criticism on several levels (such as that contractually departing from delivery is nevertheless allowed, and this would only be possible for the "very clever ones", i.e. those who both manage to negotiate a good bargain and to reach agreement about a transfer before delivery). But it shows that a policy of protecting good bargains in insolvency would not be self-evident.

Consensual model: party autonomy rule will anyway erode delivery principle. Another argument put forward against the approach followed by Chapter 2 is that allowing the parties to deviate from the delivery principle by party agreement, which, according to general rules, also includes agreements concluded impliedly by conduct (cf. VIII.–1:104 (Application of rules of Books I to III), II.–4:102 (How intention is determined)), brings about the risk of eroding the delivery principle. It is argued that – if these model rules were applied in court proceedings – courts, especially courts from countries which traditionally had a consensual transfer model, may tend to accept implied agreements on a transfer before delivery, e.g. in order to protect consumers. Such a risk can, of course, not be denied completely. But it accords with generally accepted principles of interpretation (cf. I.–1:102 (Interpretation and development)) that the objectives and goals underlying a legal provision are to be taken into account in its application. Given the motivations and typical party interests discussed in these Comments, this should prevent courts from inventing deemed consents about immediate transfers where no clear evidence in that direction is at hand. See the general rules on interpretation of contracts as provided by Chapter 8 of Book II; cf. also below, Comment H.

Consensual model: clarity and simple application. Finally, the consensual model is sometimes supported by stating that it is easier to ascertain when a binding contract of sale has been concluded (in which case the transfer would occur at this moment in time) than assessing an agreement as to a transfer prior to delivery (which would be necessary to contract out of a delivery rule). But obviously, this kind of argumentation is not directed against a delivery rule as such. To the contrary, delivery in the sense of a physical change related to the goods usually is rather easy to assess, and the same will usually apply to the equivalents to delivery provided for by VIII.–2:105 (Equivalents to delivery). One must also take into account that applying a consensual model can be all but simple when it comes to generic and future goods. As to the critical point regarding the delivery system, i.e. the parties' option to deviate by agreement, it will be up to the parties to make this contractual deviation as clear as necessary.

Non-mandatory delivery model: general remark on impact of insolvency law principles. The question of the transferee's protection against the transferor's general creditors is most relevant when the transferor becomes insolvent. It therefore suggests itself that basic principles of insolvency law, which are common in more or less all European legal systems, are taken into account when evaluating which solution to adopt as a default rule. The most important principle in this respect is that creditors of the insolvent person should, in general, be treated equally. This general principle will repeatedly play an important role in the discussion in the subsequent Comments. Second, a particularly relevant feature of insolvency law, which also has to be seen in the context of the principle of equal treatment of creditors, is that where reciprocal obligations arise from a contract established before the opening of insolvency proceedings and these obligations are both not, or not fully, performed when insolvency proceedings commence, it is a quite common rule in the European legal systems that the insolvency administrator (in a broad sense) has some right to choose whether to uphold such a legal relationship or to terminate it. Details vary from country to country, but as to the basic idea, the European legal systems coincide (see the Notes to VIII.–2:201 (Effects of the transfer of ownership)). The effects of this right to choose are further discussed in the following paragraph. Taking into account this background, the default rule adopted in Chapter 2 of this Book aims to adequately balance the interests of all persons involved, i.e. not only the transferor's and the transferee's interests, but also the interests of the transferor's insolvency creditors.

The insolvency administrator's right to choose whether to uphold or terminate the obligations under an unfulfilled bilateral contract in particular. As mentioned above, the administrator in insolvency (or other person serving functionally similar tasks) may decide whether to fulfil or terminate the obligations under a bilateral contract not fully performed by both parties. If the insolvency administrator chooses to uphold the contractual relationship, both parties to the transaction have to perform their outstanding obligations in full, which means that – focusing on the situation relevant here, i.e. that the transferor is insolvent – the transferee will get what was contracted for and thereby is "protected" in the sense used in the present discussion. If the insolvency administrator, on the other hand, terminates the contractual relationship, the European legal systems roughly coincide in that the other party to the (bilaterally unperformed) contract, with regard to pre-payments this party may have issued, will be satisfied only with the dividend all general creditors receive from the bankrupt's estate. In countries following a delivery approach, this means that a pre-paying transferee remains "unprotected" as against the transferor's creditors (unless ownership has already been transferred): the transferee must be content with a dividend. In European legal systems following a consensual model (like France, Belgium or Italy), on the other hand, the traditional view is that ownership of specific goods already passes upon conclusion of the contract and, therefore, the right to choose does not apply (because the alienator's obligation to transfer the ownership is already fulfilled and so no bilaterally unfulfilled contract is at hand). The transferee will have to pay the outstanding price and may demand delivery of the goods. As will be reflected in more detail in the Notes on VIII.–2:201 (Effects of the transfer of ownership), this view is, however, disputed in modern Belgian doctrine (where it is partly argued that the transferee will be protected only upon delivery) and is uncertain under English law, where the traditional understanding is that the administrator (or equivalent officer) may opt for refusing to perform the outstanding contractual obligation to deliver the goods, in which case the transferee remains unprotected even though English sales law provides for a passing of property upon conclusion of the contract, if not otherwise agreed by the parties. Whether the buyer may be granted an order of specific performance (delivery of the goods) based on property rights appears to be not fully settled in relation to movables under English law. These (partial) uncertainties with regard to the consensual approach's interaction with the

insolvency administrator's right to choose are not used here as a positive argument. It is just pointed out that if – contrary to the proposals made in Chapter 2 – a consensual system was opted for, these associated areas of insolvency law would have to be checked and, if necessary, adapted in order to achieve the intended results.

Delivery model: transferee of specific goods is a general creditor like others. At the beginning, it should be clarified that – unless ownership has already passed under a contractual agreement for an immediate transfer or a rule of law to this effect – a transferee of specific goods who has concluded a contract for sale but has not yet taken delivery and against whom, therefore, the transferor is simply obliged to transfer the ownership, is nothing but a general creditor of the transferor. In the following Comments, this will be underlined with regard to the principle of equal treatment of creditors. This is important not only on a substantive, but also on a more terminological level. If a transferee (especially in case of pre-payment) is not granted particular protection in insolvency because a delivery model is opted for, this does not mean that the general creditors are "preferred" over the transferee; the transferee is just treated as one of them.

Delivery model: equal treatment of creditors (why should a transferee of specific goods be treated preferentially to others?). It has already been pointed out above that a consensual principle can only be applied to a transfer of specific goods which already exist. This means that one type of creditor, namely a transferee of specified existing goods, will always receive the performance due under the contract in exchange for paying the agreed price, whereas all other unsecured creditors run the risk of receiving no counter-performance and of losing any advance performance they may have made. This raises the question of why a buyer of specific goods deserves more protection than, e.g., a buyer of generic goods. Also, why should a buyer (of a specific item) who paid in advance be treated preferentially to a person who gave credit under other circumstances, without stipulating for any security device. Also, service providers, who often perform in advance, obtain no comparable protection unless they contractually demand some security (such as a bank guarantee). Under a consensual model, the buyer of specific goods would even be preferred over creditors who have never contracted with the debtor and, therefore, have never chosen this person voluntarily as their contractual partner. This applies, in particular, to those having a claim under the law on non-contractual liability for damage and to alimentay creditors (such as children). They are all restricted to a dividend, whereas the transferee of specific goods gets 100 %, although it may well be argued that it would be more adequate to let the risk of a debtor's insolvency be borne by someone who voluntarily entered into a legal relationship with this person. A satisfactory answer to the question why all this should be so is, however, not provided. In the absence of a sufficient explanation for preferring buyers of specific goods, much speaks in favour of applying the general principle (an aspect of justice) of treating similar cases alike, which supports the delivery principle. The latter can be applied to specific, generic and future goods and allows an equal treatment of all creditors who perform in advance. Also, it increases the dividends paid to those creditors who did not undertake any performance to the debtor, but whose rights correspond to the debtor's delictual or alimentary obligations. Ultimately, the delivery rule is much more in conformity with the general principle of equal treatment of all creditors in insolvency.

Delivery model: performing in advance means taking risk; principle of contemporaneous performance as well-balanced starting point. As will be discussed in more detail below, the difference between a consensual and a delivery principle will be economically most important where the transferee of specified goods has already paid, fully

or in part, before delivery. Under a delivery model, in case of full pre-payment as well as where the transferee paid only part of the price and the insolvency administrator decides to terminate the contractual relationship, the pre-paying transferee, being an ordinary insolvency creditor, will usually only regain a small percentage of the pre-payment. This means that, under a delivery model, performing in advance means taking a risk. Following up on what has been discussed in the previous Comment, this may be turned into an argument in favour of a delivery approach: All other types of creditors, if they perform in advance, also face this risk of losing the value of their own performance, unless they contract for a security right. This principle applies to a person who grants credit over a certain amount of money, it applies to service providers, and to buyers of generic goods, etc. It would, therefore, be coherent in terms of applying the same values to comparable cases to apply the same principle to buyers of specific goods. Also, the seller of goods who performs (delivers the goods) before being paid the price is in the same situation and takes the risk of losing the value of the performance in the event of the buyer's insolvency. The seller may decide either to deliberately accept this risk or to contract for a security (e.g., a retention of ownership). Adopting a non-mandatory delivery rule for the transferee's protection as against the transferor's creditors would, therefore, also result in an equal treatment of both parties to the transaction (transferor, transferee) in relation to the other party's creditors.

This corresponds to a generally well-accepted contract law principle, namely that, unless otherwise agreed, reciprocal obligations are to be performed contemporaneously and, if the other party does not perform, each party has a right to withhold performance. This principle is explicitly stated in VIII.–3:401 (Right to withhold performance of reciprocal obligation). Opting for a non-mandatory delivery rule for the transferee's protection as against the transferor's creditors (and, *vice versa*, for the transferor's protection as against the transferee's creditors, see below) would mean to continue, or uphold, this principle also on a property law level: The general default rule will be that the obligations of both parties (delivery and transfer of ownership; payment of price) are performed at the same time. If one party does not perform, the other may withhold performance. The parties can however deviate from this principle by agreement. If one party agrees to perform in advance, it will be in the sphere of this party's own responsibility to decide whether to bear the resulting risks, or to ask for a security. In the case of a pre-paying buyer, such security can be an agreement on a transfer before delivery, or another form of security.

Different scenarios under the non-mandatory delivery approach in detail: only transferor has (fully) performed. In order to give a clear picture of the approach taken under this Chapter and of how the policy choices discussed so far, and the relevant insolvency law principles, apply to the different practical scenarios, the following Comments will provide an overview of the typical constellations which may appear in practice. The first one is rather unproblematic and is just mentioned for the sake of completeness: Where the transferor (seller) has already delivered the goods to the transferee (buyer) and, subsequently, the transferor goes bankrupt, the buyer remains under the obligation to pay the price agreed under the contract. This result is the same irrespective of whether a consensual or a delivery principle is chosen. In the end, two performances of – typically – equal value are exchanged.

In detail: none of the parties has yet performed. In the next constellation, namely where none of the parties has performed anything so far, certain differences between the consensual and the delivery model do occur. They are, however, not too striking from an economic point of view. In this situation, the insolvency administrator will have the right to choose whether to perform or terminate the contractual obligations. Unless performing the obligation to deliver

would be particularly burdensome, or the contract has been a bad bargain for the transferor, or exceptionally another buyer who offers a considerably better price is in sight, or the sold goods are specifically needed for carrying on the business activities, the administrator will tend to opt for performing the contract obligations. The administrator will thus earn a reasonable price in exchange for the goods; the transaction is neutral from the transferor's creditors' perspective. The creditors take the money instead of the goods. This result is identical to the one achieved under a consensual model. The bankrupt's estate typically saves costs which otherwise would have arisen when efforts for selling off the goods in execution sales would have to be undertaken, and the price achieved by the original sale will typically be higher than the hypothetical result of a forced sale. In this situation, there usually is no way to achieve a better result for the (other) general creditors. It is therefore no problem (it cannot be avoided) that one of them (the buyer) parts with 100 % of an investment. Contrary to other situations discussed in this context, the buyer has, however, not advanced payment and has therefore taken no risk. Also, the same solution applies with regard to contracts for specific as well as for generic goods. Where, exceptionally, the insolvency administrator opts for terminating the contractual relationship, neither of the parties is bound to perform. This will be a disadvantage for the buyer where the buyer has made a good bargain or sustains additional loss, but the loss will usually be relatively small in relation to the total value of the mutual performances.

In detail: transferor still in possession of goods, transferee has fully paid. If, on the other hand, the goods are not yet delivered but the buyer paid the full price before the transferor becomes insolvent, insolvency law does not confer any right to choose on the insolvency administrator. Being bound to act in the interests of the insolvency creditors and treating them equally, the insolvency administrator will not deliver the goods to the buyer, but liquidate them on account of the creditors. The buyer's pre-payment will be lost to a great extent: irrespective of how the respective insolvency law rules are construed in detail, the contractual relationship will probably be terminated for the seller's failure to deliver, and the buyer's claim for repayment of the purchase price, or damages, will only be a claim against the bankrupt's estate, to be fulfilled by a certain (regularly low) percentage. As mentioned above, this is the general risk taken by each party who performs first without contracting for a security.

One may describe this situation as one where "the creditors take the money and the goods", which is sometimes used as an argument for criticising the delivery approach, being suggestive of over-protection of the transferor's creditors while the prepaying transferee gets "nothing". Some proponents – seemingly in order to stress the alleged over-protective effect of a delivery principle – add that the creditors lay their hands on the money and the goods "which the transferor himself is unable to". Such an impression would, however, be misleading in two respects: First, the pre-paying transferee is not left with nothing, but receives a proportionate part of the claim, the total value of the estate however being increased by the pre-payment contribution, inuring to the benefit of all creditors (including the buyer). Second, of course none of the creditors receives more than is due, just as the transferor could not keep the goods plus the paid price, but only one performance in exchange to the other. Rather, all creditors, including the pre-paying buyer, are treated equally. The following (heavily simplified) illustration shows the difference between a consensual and a delivery approach.

Illustration 1
When insolvency proceedings are commenced, the debtor S holds in possession two specific goods, each of a value of € 1.000, and certain other movable assets with a total value of another € 2.000. The two specific goods have already been sold, but not yet delivered, to buyers B1 and B2, who already have paid the full purchase price of € 1.000 to S. This means that S's estate, including all movable assets and the money received from B1 and B2 has a value of € 6.000. – On the other side, S is bound to perform obligations of a total value of € 12.000 to his creditors: Both B1 and B2 are entitled to receive € 1.000 (originally: the sold specific goods, or repayment of the purchase price they already paid), and in addition there are two other creditors, namely one unsecured credit giver C3 entitled to payment of € 5.000, and a tort victim C4 entitled to damages of another € 5.000.

Under a *consensual* system, the two buyers B1 and B2 are entitled to receive delivery of the purchased goods, each worth € 1.000, so that each of them gets out the same value as invested by prepaying (100 %). Consequently, the value of the two specific goods which have already been sold before commencement of the insolvency proceedings (i.e. € 2.000) has to be deducted from S's estate, which then amounts to € 4.000. This value is shared equally between the remaining creditors C3 and C4, so that each of them receives € 2.000 (40 %).

Under a *delivery* system, on the other hand, the undelivered specified goods sold to B1 and B2 form part of the bankrupt's estate, which under these circumstances amounts to € 6.000. This amount is distributed proportionally among all creditors. In the given example, each creditor receives 50 % of that creditor's claim, i.e. B1 and B2 get € 500 each and C3 and C4 receive € 2.500 each. The fact that both the goods bought, and the money paid, by B1 and B2 go into the bankrupt's estate does not result in any preference of the other general creditors C3 and C4 as against B1 and B2. Rather, all four creditors are treated equally.

In detail: transferor still in possession of goods, transferee has partly paid. The last typical situation is that specific goods are already sold but not delivered, and the price for them has already been partly paid. In this situation, none of the parties has fulfilled the obligations in full, so that it is for the transferor's insolvency administrator to decide how to serve the principle of equal treatment of creditors best. The administrator may choose to uphold the contract, i.e. to keep the part of the price already received and earn the rest while giving the goods to the buyer. Or, the administrator may choose to terminate the contractual relationship, in which case no additional money comes in, but what has already been received, as well as the sold goods themselves, can be used for proportionally satisfying all creditors. For the latter option, the insolvency administrator must take into account the hypothetical price which may be achieved when selling off the goods to a third party in an execution sale or otherwise, which may, depending on the circumstances, be lower than the total price which would be received from the original buyer. The administrator must also take into account all costs which probably must be incurred in order to find a new buyer (e.g., costs for organising an execution sale, or costs of a sales agent, perhaps additional storage costs, costs for further maintenance or management, etc.). In short, the total income to be achieved when upholding the contract (pre-payment plus outstanding price) must be held up against the hypothetical total income when terminating (the pre-payment already received from the original buyer plus the price to be achieved in an alternative sale minus additional costs to be incurred). However, where these two results are the same, and even where the hypothetical total income in case of termination is higher, the insolvency administrator has to consider that in the case of

termination there is one additional creditor (the original buyer with a claim for re-payment or damages) to be satisfied from the overall assets. Depending on how much the original buyer already paid (and, therefore, is to be repaid after proportional reduction), opting for upholding the contract may still be better for the other creditors than termination.

Sticking to the contract will typically be a reasonable choice where only a small part of the price has been paid and no "better buyer" is in sight (e.g. where the original buyer already offered an above-average price). Terminating the contractual relationship, on the other hand, may suggest itself e.g. where a considerable part of the price has already been paid, or, where only a small part has been paid but the original contract was a bad bargain for the seller and a better buyer could be found without incurring many costs.

Illustration 2
Before the commencement of insolvency proceedings, S has sold specific goods to B which have not yet been delivered. The price S and B agreed upon is € 1.000, of which B has already made a down-payment of € 50. If the goods were, alternatively, sold to another person (in an execution sale or otherwise, as most appropriate under the individual circumstances), the insolvency administrator must realistically expect that the price to be achieved will only be € 960. In addition, organising such a sale to a third party and keeping the goods until they can finally be delivered to a new buyer will cause further costs of approximately € 30, so that, all in all, alternatively selling the goods to a third person will only achieve € 930. Further, S's estate comprises other assets worth € 19.000, and S has obligations against other creditors amounting to € 100.000.

If, given these facts, the insolvency administrator opts for upholding the original contract with B, the total receipts in exchange for the goods will be € 1.000 (€ 50 advance payment, € 950 to be paid in order to get the goods delivered). This amount is then to be distributed among the remaining creditors (B has already been satisfied by 100 %). In this example, total assets of € 20.000 (€ 1.000 price received from B plus € 19.000 other assets) are to be distributed amongst creditors claiming € 100.000. Consequently, the other creditors receive 20 % of their claims. This is the percentage which the insolvency administrator must oppose to the percentage of satisfaction to be achieved when terminating the contractual relationship.

Opting for the termination, on the other hand, would lead to the following result: The total receipts after having sold the goods to another buyer will only be € 980 (€ 50 advance payment made by B, a price of € 960 to be achieved when selling the goods to another buyer, minus additional costs of € 30). This amount is then to be distributed among all other creditors *and* B. In our example, total assets of € 19.980 (the € 980 resulting from the goods in question plus € 19.000 other assets) are to be distributed amongst creditors (including B) claiming € 100.050. In the end, all creditors, including B, receive 19,97 % of their claims.

Since in this case, the result of termination will be less favourable for the other creditors, the insolvency administrator will opt for upholding and fulfilling the contract with B.

Illustration 3
The facts are identical with those given in *illustration 2*, except that B already pre-paid € 500.

Opting for a continuation of the contract with B will lead to the same result as achieved in *illustration 2*: The total receipts in exchange of the goods will also be € 1.000 (€ 500 advance payment, € 500 still to be paid). B will be satisfied by 100 %, the other creditors receive 20 % of their claims.

Here, terminating the relationship with B will lead to a more favourable result for the other creditors. The total receipts after having sold the goods to another buyer will be € 1.430 (€ 500 advance payment made by B, plus the same price of € 960 and deduction of additional costs of € 30). Again, this amount is to be distributed among all other creditors and B. Total assets of € 20.430 (€ 1.430 resulting from the goods plus € 19.000 other assets) are to be distributed amongst creditors claiming € 100.500 (including B's claim for € 500). In the end, all creditors, including B, receive about 20,33 % of their claims.

Since this is more than could be achieved by upholding the contract with B, the insolvency administrator will opt for termination.

Delivery model serves optimal satisfaction of creditors by giving insolvency administrator's right to choose a broader scope. The illustrations and Comments provided above both show that a delivery model does not necessarily frustrate a buyer's expectations when concluding the contract and how important the function of the insolvency administrator is in the present context. The question of how the general creditors' interests are served best can not be answered schematically by providing either continuation or termination of the contract as a general guideline, but may need a careful weighing involving a number of factors. This may be turned into an additional argument in favour of a delivery model, or, in fact, a variation of the general equal treatment argument, namely that it is desirable to have a default rule which, first, leaves such important choices to a decision-maker who serves a common interest (the optimal satisfaction and equal treatment of the creditors), and second, broadens the practical scope of the administrator's right to choose. In both respects, the delivery model appears preferable as against the consensual approach. Since opting for termination will seldom be the preferable choice where the transferee has not paid anything in advance, the area where the right of termination will practically be exercised is, as stated above, where the counterparty has taken a risk by performing in advance. But still, there is no automatic "punishment" of pre-performing transferees. They may still benefit from the insolvency administrator's discretion and be allowed to receive 100 % of their counter-performance, but only where this, at the same time, serves the creditors.

No significant difference as to kind of performance. There are some minor arguments to be added which, in a broad sense, fit the context of equal-treatment-arguments, however rather focusing on the question whether the kind of performance rendered by the insolvent debtor may give rise to an appropriate differentiation. For example, when criticising the delivery model for allowing the creditors to "take the goods and the money" it is sometimes argued that such effect should not be allowed because in other situations, such as where a service provider receives a pre-payment before going bankrupt, the debtor's creditors are also unable to take the money as well as an additional value. This is, however, not considered convincing. Pre-payment for generic goods is an obvious example that this phenomenon exists and must be accepted also in other areas. As to service providers, the point is simply

that such a person has "assets" other than goods which can either be directed to the original contract party or be directed to a third party under a new contract in exchange for new money flowing into the bankrupt's estate. The "asset" a service provider has is the workforce and ability to render a service, which, economically, has a value similar to goods. As long as the business goes on, this workforce can, metaphorically, be converted into money. In relation to the administrator's right to choose, etc., there is no significant difference to a sale of goods. A second argument occasionally put forward so as to justify a consensual model is that a sale of specific goods is not comparable to other situations because other creditors have no right to a transfer of specified assets. As an observation, this is correct. As an argument, it is circular.

Non-mandatory delivery model: equal treatment argument not only defensible when delivery is mandatory requirement; functions of a default rule. It has sometimes been argued that a delivery model based on equal treatment arguments as presented above could be acceptable, but only if the delivery requirement was mandatory. Otherwise, the policy of equal treatment could not be upheld since the parties could undermine it by agreeing on an immediate transfer. This kind of reasoning is, of course, correct in so far as the scope of the insolvency administrator's right to choose between upholding and abandoning the contract would be further extended, and the general creditors' percentage of satisfaction in bankruptcy would, as a tendency, increase if the parties had no possibility at all to bring about any transfer before delivery. But this would go too far. Party autonomy is a fundamental principle of these model rules in general (for contract law, cf. I.–1:102 (Party autonomy)). Exceptions must be justified by strong reasons, which do not exist in the present context (it would, e.g., go without saying that the alternative consensual principle would also not be mandatory with regard to the transferee's protection against the transferor's creditors). In particular, the equal treatment policy cannot be said to be betrayed. No one will question that creditors, in general, have, and should have, a possibility to secure their claims. A bank may require a mortgage, a personal security or a proprietary security right in movable assets before disbursing a loan. A seller of goods may stipulate for a retention of ownership device before delivering the sold goods to the buyer. A pre-performing service provider may demand a bank guarantee, etc. Similarly, a buyer who agrees to pay the whole or a part of the price in advance may require an agreement to an immediate transfer, or a transfer upon payment, or another form of security. The point is that it will be in the buyer's sphere of responsibility, just as in the case of other creditors in other situations, to decide whether to bear the typical risk of performing in advance, or to make performance dependent on a security. This, also, is an aspect of equal treatment in a wide sense.

As to equal treatment in the usual, more narrow, sense, namely of providing optimal and equal protection to those creditors who did not contract for any security granting a right of separation or preferential satisfaction in insolvency, the delivery model obviously serves these creditors' interests much better than other hypothetical default rules, in particular to granting the transferee full protection from the conclusion of the contract. The purpose of optimal and equal satisfaction will be achieved each time the default rule applies; and this means very often. This will not only be the case where parties are unaware of any possibility of regulating the issue by agreement, or forget to do so in the particular case, but also where one party (usually, the transferee) intends to contract for a transfer before delivery but the other party refuses, and situations where perhaps even both parties retrospectively claim that an agreement on a transfer before delivery has been established, but no reliable evidence can be produced. The experience from national legal systems which have adopted such a non-mandatory delivery model is that agreements on a transfer before delivery occur rather exceptionally. Also, it has already been mentioned that courts should not be allowed to accept

implied agreements on an immediate transfer where sufficient evidence in this direction is not at hand.

In this context, it is also important to underline the intended purpose of a default rule in property law. In general, default rules aim at bringing about an adequate balance of the interests of the parties involved. This should, of course, be the same in a property law context. The only special aspect is that there are not only the interests of the two parties to the transaction, but also the interests of third parties involved. In the present context, it is the transferor's creditors' interests that are to be taken into account when striking the balance. This may sound banal, but it is important to stress this since otherwise it would be easy to argue that the best default rule would be one where both parties to the transaction receive 100 % of the counter-performance they envisage under the contract (which would, for specific goods, speak for a consensual model). These deliberations will also play a role in the next Comment.

Non-mandatory delivery model: transferor's interests may be parallel to those of creditors. As already discussed above, the non-mandatory delivery approach has been criticised by arguing that usually both parties to the transaction will be content with an immediate transfer (in the sense that the transferee has full protection against the transferor's creditors) so that one must expect that informed parties will regularly agree on such an immediate transfer (the transferor's interest of receiving full payment being secured by a right to withhold performance in case payment is not made or tendered). This presupposes that a typical transferor does not care about the general creditors' interests and has no personal interest in protecting the creditors' interests against the transferee. Such an assumption must, however, be questioned. It is evident that under a rule which does not automatically separate sold specific goods from the estate but keeps them in where fully paid, or leaves discretion to the insolvency administrator where the goods are partly paid before delivery, the general creditors, typically, receive a higher dividend. This can also be in the interest of the transferor. The point is that when speaking about the transferor's insolvency, one should not only think of liquidation; where business activities discontinue, it may perhaps be without relevance for the insolvent party whether the creditors get a more or less attractive percentage. But modern tendencies in insolvency law seek to provide possibilities to continue business activities, and with respect to these legal facilities it certainly matters by which percentage general creditors can be satisfied. E.g., national insolvency regulations may provide for a compulsory settlement if the debtor can discharge at least 20 % of the debts within two years. Against such a background, one may put forward the argument that a fully informed transferor in fact has an interest in increasing the estate available for general creditors as much as possible and, therefore, that the transferor's interests are parallel to those of the general creditors.

Delivery model: one rule appropriate for various situations. To a certain extent, the aspect to be discussed here is only a repetition of arguments already discussed previously. They nevertheless should not be omitted in the present context. A (non-mandatory) delivery model has the advantage of providing one rule which can be applied to practically all situations involving a transfer of corporeal movable property. This has already been discussed at some length in relation to generic goods, future goods, and other situations where a consensual approach cannot be, or usually is not, used. It also fits where a transfer is based on another kind of obligation, e.g. an obligation arising from a unilateral juridical act or from a rule of law, such as under unjustified enrichment rules, or an obligation to re-transfer goods after termination of a contractual relationship. Further, an immediate transfer before delivery would certainly not be argued to be of need from a policy point of view where the basis is a

validly concluded contract for donation. Here, there will probably be agreement that the value of the property should be shared by all creditors instead of being exclusively attributed to someone who has promised no counter-performance whatsoever. Delivery, on the other hand, fits better (and may be supplemented by national insolvency law rules in the tradition of the classical *actio Pauliana*, allowing the creditors to treat the transfer as ineffective within a certain period of time). All in all, this broad applicability may be considered as an advantage in terms of simplicity and clarity, both for parties to orientate themselves before carrying out a transfer and for applying the law after the relevant acts have already taken place, and in terms of providing equal solutions for comparable situations.

The role of "publicity" in the sense of providing reliable information to third parties as a basis for taking decisions. Traditionally, providing publicity has perhaps been the main argument for a delivery rule in those national legal systems where the delivery rule is applicable. The idea is not restricted to these legal systems; it also appears in the *possession vaut titre* principle of the French tradition. The basic idea is that exercising physical control over certain goods, which is visible to the outside world, "informs" other people as to which assets belong to the person in possession. In particular, potential contractual partners of this person may, on this basis, evaluate whether the person is sufficiently creditworthy. Under this idea, the potential creditors may trust in being satisfied from these goods, if the potential debtor does not perform the contractual obligations properly. Another aspect, which is however not equally relevant in the present context of the transferee's protection against the transferor's general creditors, is that the transferee may trust in the transferor having a right (or authority) to validly dispose of the goods possessed, so that the transferee may validly acquire rights in these goods.

Today, there is a broad understanding that, with regard to (unregistered) movable property, the value of a publicity principle in the named sense is heavily eroded. This is, in particular, caused by modern commercial practices frequently applied in the field of acquisition financing, like buying goods under reservation of ownership, or employing financial leasing, etc. This observation is frequently made for today's national legal systems. It could, however to a limited extent, also be made under a system as provided by Book IX of these model rules, where the effectiveness of acquisition finance devices basically requires registration, taking into account that registration is not required where goods are supplied to a consumer, and, for the rest of the cases, registration can be made within 35 days after delivery (cf. IX.–3:107 (Registration of acquisition finance devices)). Also, the external appearance based on physical control may be incorrect because the goods in question are leased under an outright leasing contract in the sense of Book IV.B, or borrowed gratuitously. Finally, the possibility of deviating from the delivery rule for a transfer of ownership, as also accepted under the present Chapter, and, in some countries, the possibility of creating non-possessory proprietary security devices (like a transfer of ownership for security purposes in Germany), may further undermine the reliability of any "information" arising from physical control over goods. Of course, there may be significant differences as to whether physical control and ownership of particular goods statistically tend to coincide or not, depending, e.g., on the type and age of the goods (new cars being frequently acquired under a retention of ownership device, whereas an old TV set may perhaps typically be owned by its possessor), market usages and other circumstances. But obviously, generalisations of a kind that could serve as a basis for legal rules can hardly be made. In the course of developing these model rules, it was therefore agreed that the publicity idea in the classic sense should not play an important role for justifying a decision as to the transfer concept.

Especially with regard to the aspect of protecting the creditors of the person exercising physical control, the publicity idea is subject to further criticism. Even if one could rely on the person exercising physical control over goods being their owner, the argument of protecting creditors on the basis of "publicity" could not be applied to "old" creditors, i.e. to persons who have made their decision about granting credit before their debtor acquired control over the thing. The idea may, if at all, only work in relation to "new" creditors who make their dispositions at a time their debtor actually has control over the asset; with regard to "old" creditors it could only work where they make new decisions for which their debtor's possession may operate as a basis, e.g. where a decision has to be made whether to enforce the claim or to prolong the credit. Second, even where the publicity idea is applied to a "new" creditor who makes a decision now, when the debtor has the goods in possession and given the debtor, at that time, is really the owner of these goods, this may still change in the course of time until this creditor actually seeks to enforce the claim. When the credit has to be repaid later, the goods can be lost, destroyed, seized by another creditor or sold off, and the purchase price received in turn may be used up, again seized by another etc. In other words, exercising physical control over goods cannot provide any protection against future loss of assets.

For the sake of clarity, it should be added that there is nothing to be said against letting publicity play a much more important role where sufficient means for providing reliable information exist. This may be the case where an appropriate system of registration exists for certain kinds of goods (such as for ships). VIII.–1:102 (Registration of goods), therefore, contains a reservation for national rules providing such a registration system. Also, publicity may well play an important role regarding the transfer of immovable property, where an appropriate land register is established. If so, much may speak in favour of making registration a mandatory transfer requirement.

Physical control as a reasonable starting point for burden of proof. In contrast to the "prospective" functions of publicity (in the sense of providing a basis for future-oriented decisions) discussed above, the aspect of exercising physical control over the goods may well serve other functions that are relevant in a transfer system. In particular, the question of where the goods are physically placed can be a reasonable starting point for the burden of proof when – retrospectively – assessing whether a transfer has already taken place or not. Although the same kind of facts – physical control over the goods – are relevant, there are significant differences to the classic publicity idea: the aim is not to protect the expectations of parties who have their own interests in the goods (directly or indirectly, such as where the interest concerns the general creditworthiness of the person exercising physical control). Rather, the function is to provide a simple and workable starting point for assessments made by a person who has no such interests (e.g., a judge or an enforcement authority), or for a person who may serve particular collective interests, but appears on the scene only after the relevant acts have occurred (like an insolvency administrator who has to sort out to which customers to deliver goods, which obligations are not to be discharged and in relation to which contracts the right to choose should be exercised).

In this respect, a non-mandatory delivery rule provides a plausible starting point in placing the burden of proof as to the question of whether the parties already intended the transfer to occur (i.e., in relation to the requirements set out in paragraph (1)(e) of the present Article): Where the goods are already in the hands of the transferee, which is easy to assess, it is quite likely that the parties intended that the transfer be completed (here: that the transferee's creditors should be protected as against the transferor's creditors). It would be on the transferor (or the transferor's creditors) to prove the contrary. Where there has been no transfer of possession of

the goods themselves, but the facts required by one of the equivalents to delivery provided for by VIII.–2:105 (Equivalents to delivery) can be established, it is still plausible that the parties intended "ownership" to pass (here: the transferee to be protected) upon the relevant act. If the transferor, or the transferor's creditors, assert the contrary, it is up to them to provide sufficient evidence. Where, finally, the goods are still in the hands of the transferor, the burden of proof as to an agreement that property has already passed to the transferee is placed on the latter.

Together with other arguments discussed above, this scheme of distributing the burden of proof as to the parties' intention to transfer the goods fits the non-mandatory delivery approach opted for under the present Chapter. In this respect, a special reduced form of publicity-akin ideas may be used as an argument supporting the approach taken in this Chapter.

Delivery: manifest caesura also from the parties' perspective. It may be added that, also from the perspective of the parties to the transaction (transferor and transferee), delivery is a manifest event so that it will be quite plausible that legal consequences are tied to it. The same can be said for the equivalents to delivery provided for by VIII.–2:105 (Equivalents to delivery). It is not argued that these events are necessarily more manifest than the conclusion of a contract, or effecting payment, so that one can turn it into an argument strongly favouring the delivery approach (although it may, depending on how the relevant rules are shaped in detail, cf. Comment H below, possibly be argued that delivery may be more manifest than individualisation of generic goods). But in any event, it is at least of a certain value that delivery is no secret, or implausible, event from the perspective of the parties. Also, this aspect is perhaps not most important in relation to the particular question of the transferee's protection against the transferor's creditors. But it has certain relevance in signalising to the transferee that now, when delivery has occurred or is tendered, pay can be made without the risk of losing the value of the performance to the transferor's creditors.

Arguments put forward in favour delivery (cutting off the transferor's control over the goods) as a mandatory requirement. There are a couple of additional arguments in favour of a delivery rule which have been put forward especially in Swedish doctrine and court practice, where the requirement of delivery – or rather a requirement that the seller's physical control over the goods must have been cut off effectively – has traditionally been a mandatory prerequisite for granting the transferee protection against the transferor's creditors. These arguments are not used here, because the delivery model proposed in the present Chapter is intended to be non-mandatory and the arguments do not fit in such a context. They should nevertheless be briefly mentioned.

(i) One argument is that a mandatory delivery requirement makes it unnecessary to distinguish between outright transfers and transfers of ownership for security purposes where, based on general principles of the law on proprietary security rights in movables, it is necessary that the security giver has lost the power to factually dispose of the goods (or that registration has been made under the relevant rules). Under the model adopted in the present Chapter, any practical difficulties in distinguishing between outright transfers and security transfers, given that the goods concerned are still in possession of the "transferor" and the "transferee" (or both) argue that there has been an agreement on transferring outright ownership to the transferee before delivery (VIII.–2:103 (Agreement as to the time ownership is to pass)) will be solved quite naturally on the basis of burden of proof rules. The person who claims a right to separation from the transferor's estate must prove that the relevant requirements are

fulfilled. In particular, the transferee will have to prove that (a) the parties really concluded the contract, that (b) thereby (or at another time prior to delivery) a property right was intended to be transferred and (c) that this property right was outright ownership, without a security purpose.

(ii) Another argument is that the mandatory Swedish delivery (cutting off) rule effectively prevents acts defrauding the transferor's creditors. Such acts could either be *simulated* transfers, i.e. a "formal" agreement really concluded between the parties at that time which, however, internally was agreed never to be carried out in reality (e.g., a farmer who fears that enforcement proceedings will be carried out in the near future, agrees with a cousin to pretend that they herewith transfer the horses to the cousin but leave them in possession of the "transferor" and invoke this agreement when a creditor shows up). Or, the fraudulent attempt could be made by *subsequently "construed"* transfers which, in fact, did not take place but are now pretended to have taken place, with the same intention that the creditors will be prevented from enforcing their claims against the transferor. Such acts are intended to be "neutralised" from the outset, as they anyway could not be effective without cutting off the purported "transferor's" physical control over the goods. Such purposes cannot be fulfilled by the non-mandatory delivery model adopted in the present Chapters. There are, however, other legal means to tackle such fraudulent acts. The general contract law rule of II.–9:201 (Effect of simulation) provides that the parties' true intention prevails, i.e. no transfer takes place. This rule directly applies to the contractual "entitlement" of the transferee in the sense of paragraph (1)(d) of the present Article and, with regard to the "agreement as the time ownership is to pass" (paragraph (1)(e)) it is applicable by virtue of VIII.–1:104 (Application of rules of Books I to III). The transfer, thus, will be ineffective in relation to the transferor's creditors. A transferee from the transferee could, however, possibly be protected under paragraph (2) of the said II.–9:201 (Effect of simulation). In addition, also for situations where the parties' fraudulent intentions cannot be indubitably verified, there are insolvency law rules entitling the creditors to treat a transfer as ineffective, and similar provisions applicable outside insolvency proceedings (*actio Pauliana* and similar concepts). Since these general rules govern the issue in relation to all other kinds of performances, the same may well be applied to transfers of corporeal movable assets. Where the parties cannot produce sufficient evidence that they have in fact agreed on a transfer before delivery, a valid transfer will have to be denied anyway. Also, one may question whether the risk of parties betraying their creditors in a way discussed here is that imminent today. For consumer contracts, this has been answered in the negative by the Swedish legislator and a consensual approach has been adopted recently. All in all, this risk is not considered strong enough to cause a change towards a mandatory delivery system.

(iii) A third purpose the non-mandatory delivery model will not fulfil is to help counteract the potential temptation of an economically troubled person to dispose repeatedly of the same asset (there may be a typical preference to take such risks among people in such situations). This possible function primarily prevents valid double dispositions, but may indirectly also prevent the creation of new claims (of second transferees or security takers) against the debtor.

(d) Unpaid transferor's protection against transferee and transferee's creditors

General; comparative background. Another aspect of "ownership" occurring in a transfer situation is that the transferor, at some stage, will lose the possibility of resorting to the goods

for the purpose of protecting the interest in receiving the counter-performance due under the relevant legal relationship (e.g., payment of the price under a contract of sale, or re-payment of the price where both performances must be returned after termination of the contract). This is, so to say, the opposite question to the one discussed above. Again, the question affects not only the transferee, who is bound to effect performance anyway, but also the transferee's general creditors, who will be affected if the transferee becomes insolvent. This issue is, however, a clearly less controversial one when looked upon from a comparative perspective taking into account the solutions offered in the European legal systems. Where the legal system provides for a "unitary" delivery approach, it already follows from this starting point that the transferor does not lose protection as against the transferee's creditors before delivery is made. Under consensual systems, on the other hand, one can observe a clear tendency to counteract the effects which would, in principle, follow from the consensual approach: the unpaid seller is usually granted protection at least while having physical control of the goods, by exercising a right of retention, or a statutory lien, or an equivalent device. Some consensual systems go even further and provide rights to take back unpaid goods even for a certain period after delivery. Besides, under some legal systems (also delivery systems), the seller's protection is also extended by a right of stoppage in transit.

Options and discussion. One can identify four basic approaches to this issue. (i) The first option would be to let the transferor's protection cease when the contract between the two parties is concluded (or another legal relationship is established on which the transfer is based). As indicated above, such a solution is, however, not even applied in the European consensual systems of today. The transferor would have to deliver the goods even if it is clear that no counter-performance would be received. This solution is not considered adequate and will not be further considered. (ii) The second option is to protect the transferor until full payment has been received or, at the latest, until delivery is made. This is the solution nowadays adopted in countries basically following a consensual rule (some of them, however, granting even further protection). (iii) For the third option, the starting point would be protecting the transferor until delivery. However, if full payment has been received before, there is nothing left to be protected. Functionally, this solution therefore equals the second option discussed above. (iv) Finally, the solution could be protecting the transferor even after delivery, provided payment has not yet been made. There are many ways in which such an approach could be implemented in detail. The transferor could, e.g., be entitled to take back the goods within a certain time limit (e.g., eight days after delivery has been made). Instead of a right of separation (e.g. of demanding that the goods be physically returned), the transferor could also be given a right of receiving preferential payment. The strongest protection would be a right to preferential payment or even to separate the goods until payment is actually made. The latter would mean that a retention of ownership would be provided for, *ex lege*, as a default rule, so that it would always apply unless the parties have agreed otherwise. Such broad protection is, however, considered to go too far. As discussed above in relation to the transferee's protection against the transferor's creditors, performing in advance generally means taking a risk. Like other creditors, a transferor of goods can make advance performance depend on a security, which is in this case even relatively easy to bring about, namely by agreeing on a retention of ownership. In this respect, it appears preferable to treat a seller of goods in the same way as other creditors. Further, a rule providing for a retention of ownership by operation of law would not fit the principles adopted in Book IX which provide that a retention of ownership device, like other forms of proprietary security rights, must be agreed upon.

The rule adopted. As seen above, options number (i) and (iv) are not suitable while options number (ii) and (iii) are functionally equivalent. As in the end, after having analysed the different aspects of a transfer of ownership in detail, the basic rule contained in paragraph (1) of the present Article can be phrased in terms of a unitary delivery rule, it seems appropriate that the transferor's protection as against the transferee's creditors should also be phrased in this way, i.e. as described in option (iii). As to substance, this rule has the advantage of being easy to apply, both for the parties themselves and for a person subsequently charged with assessing the case. Taking into account the result achieved for the opposite issue of the transferee's protection as against the transferor's creditors, this solution provides equal protection to both parties to the transaction in relation to the other party's creditors. It further fits the principle of equal treatment of creditors in that each party who performs first without seeking a security takes a risk.

Where, due to the non-mandatory character of the delivery approach adopted in this Chapter, the parties have agreed on a transfer before delivery, the transferor may still be protected by a right to withhold performance provided by contract law (III.–3:401 (Right to withhold performance of reciprocal obligation)). With regard to such situations, reference is made to a special rule contained in VIII.–2:201 (Effects of the transfer of ownership) paragraph (4) which deals with the consequences of the contractual relationship being terminated for the transferee's failure to pay the price.

(e) Right to dispose

General; comparative background. The right to legally dispose of a piece of property is another central aspect of the right of "ownership" (cf. VIII.–1:202 (Ownership)). "Disposing of" the asset in the sense addressed here means effectively transferring or creating proprietary rights in the asset, such as, in particular: transfer the right of ownership; to create a proprietary security right in the asset; or to create a proprietary right to use in relation to the asset. In a transfer situation, the question arises at which point in time this "right to dispose" passes from the transferor to the transferee. The issue becomes important when the transferor, after an obligation to transfer the goods to a particular other person, the transferee, has been created, purports to create or transfer proprietary rights in the same object in favour of another person. It is then the question whether the transferor may *still* validly bring about such a transaction. Second, the issue may become relevant where the transferee intends, in turn, to dispose of the asset in favour of another person and it is not fully clear whether the transfer (between transferor and transferee) has *already* been completed. In particular, the question of who can validly dispose of the asset can be practically relevant for situations of multiple dispositions (e.g., double sale) and good faith acquisition. The comparative background can briefly be described as follows: In unitary systems, the right to dispose follows the right of "ownership", i.e. in delivery systems, it will generally pass upon delivery, whereas under a consensual system, where the transfer concerns specified goods, it will already pass upon the conclusion of the contract (or with identification). Interestingly, the issue seems to be very little discussed in the Nordic countries, which follow a functional approach (so that, theoretically, a completely different point in time than the one chosen for, e.g., the transferee's protection against the transferor's creditors, could be decisive).

Advantages of delivery approach. When trying to evaluate this issue on its own, it appears that two instances can be identified where a delivery principle seems preferable to a consensual principle or a principle under which the right to dispose could pass upon payment when made before delivery. The first situation is that the goods are still under the transferee's physical control and the transferee does not pay the price as agreed in the contract. The

transferor may ultimately terminate the contractual relationship. Thereafter, the transferor will usually have to sell the goods to another buyer, which makes it necessary to be in a position to confer good title on this other buyer. If a consensual principle applied, the right to dispose would already have passed to the transferee. Under a delivery approach, on the other hand, the right to dispose is still with the transferor so that the goods can be resold right away. The same effect could, however, also be achieved under a consensual model if termination had retroactive proprietary effect. This would be possible, but somewhat inconsistent with the general approach taken for Chapter 2, where termination does usually not have retroactive proprietary effect (cf. VIII.–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation) paragraph (3)). Also, there could be consequential problems where, in the meantime, the transferee conferred rights on third parties in good faith. Besides the delivery rule, the first situation would also be solved adequately by a rule making the right to dispose pass upon payment or at latest delivery.

Second, a delivery rule also provides an easy handling of situations where the seller of generic goods, before delivery, detects that the object already selected for the buyer is defective. The seller can unilaterally replace the object of performance without having lost the right to dispose of the item chosen first. In addition, one may repeat that the consensual rule would not work for generic goods before identification occurred, goods to be manufactured and further cases discussed above. All in all, the delivery principle appears to be preferable also in this respect.

(f) Recovery of possession from third person, rights to use and related rights against third persons

General. This section comprises a discussion of further aspects of the right of "ownership". Although it is intended to discuss them individually, it is hard to separate them strictly. Under "unitary" systems, these aspects will be linked to the right of ownership and the respective right will pass when ownership passes. In countries adhering to a "functional" approach, one can again observe that these issues are rarely discussed. Once more, it is repeated that a consensual rule could not be applied where, e.g., the transfer concerns generic or future goods.

Right to obtain or recover possession from third party. One important right of an owner is to exercise proprietary remedies to recover possession of the goods if they have got into the hands of a person who is not entitled to possess them; cf. the general right to "revindicate" the goods under VIII.–6:101 (Protection of ownership) paragraph (1). The issue may become relevant in different situations, such as where the goods have been unlawfully removed from the transferor's place of business before delivery, or where the transferor lost them and another person finds them, or where a third party who has, e.g., leased or borrowed the goods, does not hand them back. When evaluating whether such an entitlement should be conferred to the transferee immediately upon conclusion of the contract, or only when delivery is effected, arguments in favour of a consensual approach could be that the transferor anyway intends to part with the goods, so that it could be considered "natural" if the transferee could reclaim the goods from the third party. It has also been argued that the transferee may have an interest in exercising such a right if the transferor does not, because, e.g., unwilling or unable to do so (due to illness or absence, etc.). On the other hand, it may be argued that practically, the transferee's interests in claiming the return of the goods may be limited. The transferee would bear all the risks of judicial proceedings, i.e. would lose time; would bear the risk of losing the lawsuit; would probably be forced to incur further costs and would face the risk of

not being able to recover such costs from the third party. Practically, it may be easier for a transferee to terminate the contractual relationship when delivery cannot be effected in due time and claim damages for any loss resulting from procuring substitute goods.

In addition, the transferor may have better access to evidence when the goods were taken, or got lost, from the transferor's sphere of control. Depending on the situation, it may also be easier for the transferor to find out where the goods are actually placed. There is a further argument in favour of a delivery model (or rather, against a consensual approach): if only the transferee had a right to demand the return of the goods, the transferor would lose the right to withhold performance of the obligation to deliver in case the transferee does not pay.

In the end, it seems that there are stronger arguments in favour of a delivery model. Note that with regard to double transfer situations, a special rule is proposed in VIII.–2:301 (Multiple transfers) paragraph (2) sentence 2.

Right to demand a protection order against third persons otherwise interfering with the property. Where property is interfered with otherwise than by dispossession, VIII.–6:101 (Protection of ownership) paragraphs (2) and (3) provides the possibility of issuing a protection order, by which the court can prohibit future interference, order the cessation of existing interference, or order the removal of traces of past interference. To a considerable extent, the evaluation regarding this aspect of ownership is similar to the one on vindication above. Since there is, however, no interference with the transferor's right to withhold performance, the result is more open. Again, one may argue that if the transferor does not (does not want to, or is unable to) make use of any protection right, it may be in transferee's interest to exercise such a right. It would, however, not be reasonable if *only* the transferee could exercise such a right. Before delivery, the transferee perhaps does not even know that an interference is imminent or has already taken place, whereas the transferor usually will, may typically be able to take (at least more) effective steps to prevent interference, and will typically be closer to evidence. Also, the transferor is obliged to deliver the goods in conformity with the contract or other legal relationship, so that there exist certain incentives to undertake reasonable steps so as to prevent damage. Otherwise, the transferee can withdraw from the contract, perhaps even terminate the contractual relationship for anticipated non-performance, and claim for damages. In the end, following the patterns of a delivery model would also be all right with respect to this issue of protection against third parties; adding a subsidiary right to demand such protection for the transferee could also be contemplated.

Right to use the goods. A further aspect of the right of ownership is the owner's right to (exclusively) use the object in a factual sense (driving a car, taking pictures with a camera, permitting another person to use the object). Evaluating the hypothetical rules governing the "transfer" of this aspect is difficult, since there are a lot of different forms of use imaginable and it may be advisable to distinguish between certain kinds of goods, such as, apart from specific and generic, new and used goods. As long as identification of generic goods has not taken place, granting a right to use to the transferee is of course out of the question. And, even if a transferee of specific goods had already acquired the exclusive right to use, it could, in most cases, not be exercised before delivery of the goods. In this respect, it may be said that it will in most cases be more efficient to let the right to use remain with the transferor until the goods are delivered. Also, if the transferee already had the exclusive right to use before delivery, the question would come up how to protect this right efficiently against third party interferers. It has already been noted that granting an exclusive right to proceed against third party interferers to the transferee does not appear very advisable. The point is that, depending

on the circumstances (such as: new or used goods, kind of use, risk of wear and tear or damage occurring by ordinary use), the transferee may rather have a legitimate interest that the transferor *abstains* from using the goods than an interest in using the goods personally before delivery. This is very plausible where, e.g., a new car is sold, the value of which may considerably decrease when being used. However, since this is basically an issue between the transferor and the transferee, and since the existence as well as the coverage of such a term of non-usage may vary considerably from case to case, it appears preferable to leave this internal question to contract law, which provides the necessary flexibility, and let the external relation (e.g., the right to seek a protection order, or to claim the reversal of an unjustified enrichment) be covered by the delivery rule. This coincides with the needs which come up in some special situations. With regard to goods still to be manufactured when the contract is concluded, it may be necessary to use them for test purposes before delivery. Also, if a contractual relationship is terminated for non-payment before the goods are delivered, the transferor should have the right to use for e.g. demonstration purposes. This issue basically is parallel to the one discussed in relation to the right to dispose. Where national enforcement law provides for a possibility to enforce claims by way of sequestration of the debtor's assets – which is, however, not so frequent in relation to goods –there would even be a coherency argument: the solution for the right to use would have to correspond to the solution for the transferee's protection against the transferor's creditors.

Right to modify the goods and "right to destroy". Under general rules, an owner is further entitled to affect the substance of the goods; e.g., by modifying them in any way, or, most radically, by destroying them, as in the case of consumption. The issue is quite close to the aspect of the "right to use", as these two areas are sometimes hardly separable from one another. When discussed in relation to a transfer situation, the "right to destroy" of course becomes a rather academic issue. In relation to the transferee, the transferor is evidently not allowed to destroy the goods which are covered by the obligation to transfer, neither before nor after delivery. But that can be left to contract law. The transferor who destroyed the goods before delivery would be liable for non-performance of the obligation to deliver. Also with regard to ordinary modification scenarios, one may very well live with handling the issue basically under contract law. Depending on the circumstances, there may be a contractual prohibition of modification, at least of a modification to the detriment of the goods, and damages may be claimed for non-performance of any such obligation. In this respect, it does not matter much whether a delivery or a consensual approach is chosen. However, a certain argument in favour of a delivery approach could be that at least the seller should be allowed to repair the sold goods (whether new or used) if a defect is detected before delivery, and this should not formalistically amount to an infringement with the transferee's property right.

Right to fruits. A similar evaluation can be provided in relation to the owner's right to reap fruits from the goods. It sometimes can hardly be kept apart from the "right to use" in a reasonable way (e.g. where the use of goods is let to another person and a price is earned under a contract for lease). The evaluation goes in a similar direction. With regard to the internal relation between the transferor and the transferee, the issue should be left to contract law rules. With regard to the external relations, such as seeking a protection order or being entitled to issue a claim for the reversal of an unjustified enrichment, the delivery approach may usefully apply.

Right to claim damages from a third party. Under the traditional concept of ownership, an owner has, following from the exclusive right to the property, not only proprietary remedies but also certain rights under the law of obligations. In particular, the owner traditionally has a

right to claim damages from any third party who unlawfully impairs the piece of property or otherwise causes a loss in relation to it. The loss may relate to the substance of the asset (a car is destroyed in an accident; fuel is consumed) or follow from the owner being prevented from using the goods. An arguable advantage of a consensual concept could be that the person who finally receives the goods has the right to claim damages "from the beginning" as legal proceedings may take a longer period of time. This would however presuppose that the transferee is still interested in receiving the goods despite the damage, which may possibly be the case where the goods are unique or otherwise very important to the transferee, and the damage is not so serious as to frustrate the transferee's interests in the transaction. Practically, however, a transferee will often have no interest in initiating legal proceedings against a third person with regard to goods not yet even received. It will be simpler to resort to the rights arising from the contractual relationship, i.e. to demand performance from the transferor, or to terminate the contractual relationship in case the goods are not tendered in a quality conforming to the contract. A delivery principle may have the advantage that, typically, the person in possession of the goods will have better possibilities to prevent the goods from being damaged and if damage occurs, this person may have better information and evidence to start judicial proceedings against a third party who has caused the damage. Additionally, the person who holds the goods can more easily comply with a duty to mitigate damage which may arise from principles of non-contractual liability for damage (in fact, a duty to minimise the damage can only work if it is addressed to someone who can undertake such steps). Finally, although the passing of risk is a different and independent issue, a delivery model may also fit together more easily with the rules on the passing of risk under a contract for sale, which are also based on a delivery principle (cf. Chapter 5 of Book IV.A). It also proves that the rules on non-contractual liability for damage are apt to provide adequate solutions for situations where, irrespective of the right of ownership still resting with the transferor, the economic loss is sustained by the transferee because the latter already bears the risk of loss. See VIII.–2:201 (Effects of the transfer of ownership) paragraph (3(b) and Comment D on that Article. With regard to loss sustained by being prevented from using the goods, similar arguments as to the possibility to prevent or mitigate damage and access to evidence can be brought forward. The issue can also hardly be separated from the distribution of the right to use and the right to fruits as such, discussed above.

Right to claim reversal of unjustified enrichment. Resorting to the remedies provided for under unjustified enrichment principles is another right traditionally linked to the right of ownership. This approach is also followed by the unjustified enrichment rules provided by Book VII of these model rules. According to VII.–3:101 (Enrichment) Comment B, it will be the "owner" of an asset who can claim the reversal of an unjustified enrichment. Unjustified enrichment law is geared to an element of protected exclusivity, an entitlement to prevent infringements or adverse interference. Taking into account the analysis in the previous Comments, this will speak in favour of applying a (general) delivery approach also in this relation. When trying to develop independent arguments (without recurring to solutions argued for other "aspects" of the right of ownership), one may perhaps say, again, that a person exercising physical control over the property may more easily prevent any unauthorised use or consumption by a third party, and it may therefore be more efficient to link the access to legal protection to these abilities. These are, however, not considered to be very compelling arguments. In some situations, namely where the third party's enrichment correlates with physical damage to the goods, it may in fact be preferable for a transferee to stick to the rights under the contract (as discussed for the right to claim damages). With regard to unjustified enrichment remedies, there exist specific risks that the disadvantaged person will not be compensated for the full amount of the disadvantage if the enriched party (third party) acted in good faith; in particular, there is a limitation to any "saving" of the enriched

party under VII.–5:102 (Non-transferable enrichment) paragraph (2) and a defence of disenrichment under VII.–6:101 (Disenrichment). It may be easier, and less risky, to proceed against the other contracting party. All in all, it appears that choosing a delivery approach is also an adequate solution in this context.

(g) Conclusive remark on payment rule

General. As pointed out above, delivery or the conclusion of a contract (and identification regarding generic goods) are not the only possibilities when designing a transfer rule. One could also think of making payment of the price the decisive turning point. This would not be unreasonable in so far as, for example, many arguments put forward in favour of a consensual model are, in fact, based on the goal of protecting pre-paying buyers. Also, with regard to the transferor's protection against the transferee's creditors, payment of the price is the crucial aspect. Since payment could be made before or after delivery, in full or in part, there are, however, several hypothetical options to consider.

Transfer upon payment, even after delivery. The most radical option would be to let a transfer take place, as a general (default) rule, when payment has been effected in full – even if that happened after delivery. This option has already been rejected with regard to the aspect where it would be most important, namely the transferor's protection against the transferee's creditors. It does not seem suitable either with regard to other aspects, e.g. when it comes to claiming the return of the goods unlawfully removed, by a third party, from the transferee's place of business before the price has been paid.

Transfer upon payment, or at latest upon delivery. The more reasonable option would be to let ownership (or specific aspects of it) pass when payment is made before delivery, or where payment is not made before that time, upon delivery. Still, there are a number of options as to how such a rule could be shaped in detail. The transfer could occur only when full payment is effected, or upon payment of a certain percentage, or upon any payment. Or, theoretically, the right could "pass" step by step, proportionally to payments made, by creating co-ownership in the goods which is, step by step, transformed into sole ownership of the transferee. The latter option may appear "fair" in a certain sense, but is impractical in a number of instances, starting from administration issues with regard to, e.g., the use of the goods (the majority shifting gradually), protection against third parties, and even the question how to wind up the transaction when it turns out that the full price will never be paid. Defining a certain percentage of payment upon which the full right would pass would be better, but would always have a certain arbitrariness. A concept which, in fact, received considerable support in the course of developing the basic rule for Chapter 2 was that in a contract for the sale of goods, under which the buyer has agreed to pay the price or part of the price in advance of delivery, the parties are taken to intend that ownership of the goods is to be transferred when payment (including partial payment) is made, unless it is shown that the parties have established another arrangement. This would mean that ownership would pass when at least a part of the price is paid. However this approach was rejected by the majority of the Study Group's Co-ordinating Committee, which approved the delivery-based concept adopted in Chapter 2. The most important arguments are similar to those already discussed in relation to the consensual principle as a possible solution for the transferee's protection against the transferor's creditors. Performing in advance, in general, means to take a risk; the principle of treating the creditors equally has been given preference. With regard to some other "aspects" of ownership, namely the transferor's protection against the transferee's creditors and, partly, the right to dispose, a payment rule of this type appeared to be adequate, but not more adequate than a delivery-based model. However, where it comes to protection

against third parties (right of revindication, right to claim damages, etc.), criteria like physical control and the transferee's option to terminate the contractual relationship, if the transferor's obligations are not performed as required, are usually of importance. Such criteria are independent from payment. In summary, it is considered preferable to start from a delivery principle. In addition, the argument could be brought forward that a payment rule, which would be a new concept in the European arena, could lack acceptance. This has, however, not played any considerable role in the evaluation process.

(h) No specific consumer protection arguments

General. Taking into account the model rule character of this project, it has been contemplated whether there are any specific issues of consumer protection to be taken into account. If so, this may either be an additional argument when deciding on the general transfer rules, or specific transfer rules for transactions involving a consumer could be adopted. However, the second option (specific transfer rules for consumers) never received much support throughout the discussions on the present Chapter. There appears to be agreement, or at least a strong majority view, that there are no sufficient reasons to treat transfers involving consumers differently from other transfers. Consumer protection arguments have, on the other hand, been brought forward when discussing the general transfer model. They were usually directed towards supporting the consensual model. These views did not, however, attract a majority.

Consumer can be either party. One aspect to consider is that consumers can find themselves in either position of the scheme. They may act as a transferee (which appears to be the position consumers are most frequently associated with); but the consumer can also act as a transferor (e.g., when selling a used car to a car dealer, or to another consumer). There will often be consumers among the general creditors of a transferor; e.g., consumers who ordered generic goods from a distance seller who became insolvent (which is significant because in that situation, consumers may often find themselves "on the seller's side"). In the same way, consumers may be among the general creditors of a transferee. When the discussion is about implementing consumer protection policies when choosing the general transfer model, this makes it hard to say that going down a particular route is in the interest of consumer protection.

Consensual rule and consumer protection. If it were to be decided, contrary to the proposals made here, that protecting consumers by property law means *should* be a main policy, the question would come up to what extent such a policy could be served efficiently by opting for a consensual principle, or a payment rule, respectively. One may think, in particular, of situations like distance selling or purchasing a new car, where (partial) pre-payment may be asked from the consumer. One must take into account that such transactions will often be contracts for generic goods (in the case of motor vehicles, they sometimes do not even exist yet) and, as repeatedly stated above, a consensual approach cannot provide protection to the transferee before the goods have been identified. In the case of distance selling, for example it will be doubtful whether opting for a consensual principle would put a consumer-buyer in a much more favourable position as compared to a delivery-based transfer model. All in all, it is of course obvious that a consensual (or payment) rule would, on the whole, be preferable to buyers (including consumers, where acting in this role). But the weight the consumer protection aspect adds in this respect is not regarded as sufficient to outweigh the advantages of the system opted for.

D. General discussion of requirement of a separate real agreement

(a) General

General; the concept of a "real agreement". Especially from the perspective of continental European legal systems, another basic issue as to the concept of a transfer system is whether or not to adopt the concept of a so-called "real agreement". The basic idea of this concept is that the existence of a mere obligation – or, phrased in the terminology of this Article, of the transferee's "entitlement as against the transferor to the transfer of ownership by virtue of a contract or other juridical act, a court order or a rule of law" (cf. paragraph (1)(d) of this Article) – does not suffice to make the transfer effective. There is at that stage only an obligation to effect the transfer on the transferor's side, and a respective right on the transferee's side to demand that such a transfer be effected. The real agreement concept means that, irrespective of (or in addition to) this named first requirement, the parties have to conclude a *separate contract*, the content of which is an agreement to actually dispose of the proprietary right, i.e. an agreement to transfer the right of ownership and to obtain ownership, respectively. This (second) contract is the "real agreement".

As reflected in more detail in the Notes to this Article, there are a couple of continental legal systems – usually systems which have adopted a delivery approach – where the real agreement concept is recognised, either in the text of the statutory transfer rules itself, or, more often, by court practice and legal writing. Where already the contract produces proprietary effects, as under the French tradition, the concept is not needed. It is also unfamiliar in common law systems and in the Nordic countries and is partly considered to be superfluous. For the purposes of these model rules, the choice depended on an analysis of whether such a constructive device could achieve sufficient practical advantages to justify its adoption.

In the following, it will be argued that the adoption of a real agreement concept is not required. The basic transfer rule provided by the present Article is, therefore, silent on this issue.

Further details as to the real agreement concept. It is noteworthy that in those legal systems which have adopted the real agreement concept, it rarely happens that the real agreement concerning a transfer of movable property is concluded explicitly. Regularly, it is assumed that the parties have concluded the real agreement *impliedly by conduct*. From a critical point of view, it may be argued (and, in fact, partly is argued also in these countries) that assuming the existence of a separate real agreement is, therefore, more or less fictitious; or, at least artificial and remote from everyday life. Another issue, which is of course related to this "invisible" nature of the real agreement, is that it is not self-evident at *which point in time* such an agreement should be deemed to be concluded. The traditional view in most countries (if the matter is discussed at all) seems to be that the real agreement is concluded upon delivery. At least in one country (Austria), a modern approach, on the other hand, assumes that where the basis of the transaction is a contract, the real agreement regularly is concluded already when the underlying contract is established. If it was decided to adopt a real agreement approach, these issues would have to be clarified.

Concept not needed. The concept of a real agreement is not indispensable from a logical perspective. The underlying entitlement to transfer does not necessarily need an additional contract to become effective in property law; rather, the effect of a passing of ownership can simply result from a rule of law, provided specific requirements are fulfilled. This approach is

followed for the purposes of the present Chapter. Where the transfer is based on a contract, the same result could, regularly, also be achieved by interpreting the parties' statements and conduct when concluding this contract. A person who, e.g., agrees to sell goods under a contract of sale is, apart from undertaking to transfer the ownership (i.e., from consenting to the creation of an obligation), usually also declaring consent to the result of the whole transaction being performed (i.e., in particular, that ownership will pass to the buyer). Likewise, the transferee will at least implicitly declare consent to becoming the owner.

(b) Practical advantages a real agreement concept may have

Prevention of a passing of ownership without consent. One hypothetical purpose the real agreement concept may serve is to ensure that a transfer will not take place without the consent of the parties. This accords, in fact, with a main policy of these model rules in general, corresponding to constitutional principles and to the general principle of party autonomy. Even where a contract has been concluded which may operate as a basis for a transfer (e.g. a contract for sale), it should not be possible for the transferee to unilaterally remove the goods from the seller's premises and thereby bring about a passing of title. If a real agreement was required as a separate transfer requirement *and* the real agreement was deemed to be concluded only at the moment of delivery, such a concept could prevent a passing of ownership in such a situation. Under the transfer model adopted here, however, a real agreement concept is not needed in order to reach this result. Under paragraph (1)(e) of the present Article, the transfer either requires an "agreement as to the time ownership is to pass", so that both parties have to give their assent to the transfer becoming effective and conditions set out in this agreement must be met, or "delivery or an equivalent to delivery" must be carried out. Delivery, as well as the named equivalents to delivery, cannot be brought about without a voluntary act performed by the transferor. Technically, this effect is achieved by VIII.–2:104 (Delivery) requiring that "the transferor gives up and the transferee obtains possession of the goods". The same principle applies in the cases governed by VIII.–2:105 (Equivalents to delivery) paragraph (3), i.e. where means enabling the transferee to obtain possession (e.g. keys to a container) are handed over, and paragraph (4), i.e. where a document representing the goods is transferred. Also VIII.–2:105 (Equivalents to delivery) paragraph (2) requires a voluntary act performed by the transferor, namely giving notice to a third party who exercises physical control over the goods. In the case of VIII.–2:105 (Equivalents to delivery) paragraph (1), finally, where the goods are already in the possession of the transferee, the named effect is achieved by the requirement that the transfer must be "based on, or referable to", the entitlement to transfer the ownership (cf. paragraph (2) of the present Article). Consequently, a real agreement concept is not required in *this* respect.

Technical construction of a retention of ownership. In those legal systems which have adopted the real agreement concept, a retention of ownership is, usually, construed by concluding the real agreement subject to the condition of full payment of the purchase price. Accordingly, this technical function is traditionally named as one of the advantages the real agreement concept brings about. However, a comparative law perspective shows that legal systems which have not adopted a real agreement concept manage to accept retention of ownership devices. Under these model rules, Book IX on proprietary security rights provides its own requirements for an effective creation of a retention of ownership. Introducing a real agreement concept to Book VIII is not required in this respect.

Possibility of unilaterally imposing a retention of ownership. If a real agreement concept was adopted *and* the real agreement was deemed to be concluded at the time of delivery, the transferor could use this concept for unilaterally bringing about a "retention of ownership",

without having previously agreed so with the transferee when concluding their underlying contract (under which the transferor is obliged to perform in advance). Technically, this would work as follows. Upon delivery, the transferee would (at least implicitly) declare that the passing of ownership was accepted, as originally envisaged under the contract. If, now, the transferor (explicitly) declared that ownership was transferred only under the suspensive condition of full payment of the price, there would be a *dissensus* in the real agreement and, therefore, no ownership would pass (since a valid real agreement would be required to let ownership pass). The effect would be functionally comparable to a situation where a retention of ownership device was agreed upon from the beginning (which however was not the case). Depending on which policy is pursued, this could be seen as an advantage and, in turn, be brought forward as an argument in favour of the real agreement concept as such. However, such a policy is not favoured here. Modalities of payment, as well as security devices etc., should basically be fixed when the contract as such is concluded, this being the time for both parties to calculate their risks and benefits from the transaction. And in particular, an approach opening up possibilities for unilaterally imposing equivalents to proprietary security rights would run against basic policies underlying Book IX on proprietary security rights, which require that security rights as well as retention of ownership devices be based on a "contract for proprietary security" (cf. IX.–1:101 (General rule) paragraph (1); the possibility to create security rights by unilateral juridical acts in paragraph (2)(b) of the named Article refers to juridical acts undertaken by the security provider, not by the secured creditor). Accordingly, a real agreement concept is not needed for this purpose either.

Further, it should be added that the transferor, theoretically, could also avert a valid transfer, even if delivery is made, for completely other reasons than securing the right to payment, and even if no legitimate reason existed at all, by explicitly withholding agreement to a transfer when delivery is made. This does, however, not cause significant practical problems in those legal systems which have adopted the real agreement concept, and the transferee could both withhold payment and enforce the right to get the property transferred by judicial proceedings. But it may be noted that the real agreement concept, *if* this kind of agreement is considered to be concluded at the time of delivery, at least potentially carries the risk of granting inappropriate over-protection to the transferor and the transferor's creditors. If, on the other hand, the real agreement were regarded as concluded at the same time as the underlying contract is concluded, the real agreement would, from that time on, have binding effect so that subsequent declarations, even if expressed explicitly, could not undermine its validity and effectiveness.

Security for payment where performances are to be exchanged contemporaneously. There is also no real practical need for a real agreement concept where, under the contract or other legal relationship, the mutual performances are scheduled to be made contemporaneously, but the transferee refuses or fails to tender performance. In such a situation, the transferor may withhold delivery under the general rule of III.–3:401 (Right to withhold performance of reciprocal obligation). Allowing the transferor to deliver the goods while retaining ownership by refusing to conclude the real agreement is not preferable. See the reasoning above.

Special situation: goods are already in possession of transferor when entitlement to transfer ownership arises (in particular: re-transfer after termination). The general right to withhold performance referred to above could be without effect where the goods are already in possession of the transferee at the time the entitlement to transfer ownership comes into existence. This is the case under VIII.–2:105 (Equivalents to delivery) paragraph (1), the

classic *traditio brevi manu*. The issue is unproblematic where the transfer is based on a contract, because there the transferor nevertheless has a chance to safeguard the interest in receiving the purchase price by including suitable provisions in the contract, e.g. by agreeing on a retention of ownership. It is, however, not self-evident whether the transferor's interests are sufficiently protected where the entitlement to transfer does not arise from the (bilateral) conclusion of a contract, but from a rule of law. The main practical example seems to be an entitlement to *re-transfer* ownership after a contractual relationship, under which ownership of the goods already passed to the transferee, has been terminated. For the sake of avoiding terminological confusion regarding a situation of transfer and re-transfer, the following discussion will use the terms "seller" and "buyer", a contract for the sale of goods obviously being the main practical example. The following discussion will distinguish two main cases, depending on the ground for termination and the party exercising the right to terminate. In both cases, a real agreement concept could protect the buyer's (re-transferor's) interest in not being deprived of ownership – or, functionally, of not being deprived of the possibility of withholding performance until the outstanding part of the counter-performance is tendered – by *not concluding* the real agreement until the counter-performance is tendered or secured.

(i) The first category comprises cases where the contractual relationship, after the goods have been delivered and ownership has passed to the buyer, is terminated on the ground of non-payment. Here, termination is effected by the transferor.

> *Illustration 4*
> Car dealer S has sold a car to buyer B on credit without agreeing on a retention of ownership device. The car has been delivered and ownership has passed to B. After some time, B, who in the meantime failed to pay the agreed instalments, brings the car back to S for a service check. While the car is in S's garage, S terminates the contractual relationship for non-payment. Termination gives rise to an obligation to re-transfer ownership from B to S under III.–3:511 (Restitution of benefits received by performance). As the car is already in the possession of S, VIII.–2:105 (Equivalents to delivery) paragraph (1) will, generally, effect an immediate re-transfer to S.

If B has not paid anything to S so far, there will be no problem. There is nothing that S would have to return to B, and B does not have and does not need any right to withhold performance. There is, however, a certain disadvantage for B where the purchase price has already been partially paid. Ownership of the car is re-transferred immediately and as the car already is in S's possession, B cannot withhold its re-delivery in order to exercise some pressure to obtain re-payment of the (partially paid) purchase price. If there was thought to be any practical need to protect B in such situations, one could discuss whether the concept of a real agreement was an adequate way of providing such protection. Yet, from a balancing of interests point of view and taking into account the rules on termination in more detail, B does not seem to deserve much additional protection. First, B has caused the risky situation by not keeping up the instalments and by returning the car to S. Second, termination for delay in payment regularly requires that the creditor (S) has given a notice fixing an additional period of time of reasonable length (III.–3:503 (Termination after notice fixing additional time for performance), unless the late payment amounts to a fundamental non-performance (III.–3:502 (Termination for fundamental non-performance)). Accordingly, the potential re-transferor B is warned in advance. Knowing that there is a prospect of termination, B still has a chance to react (by either paying or taking back the car to secure the future claim for repayment of the price paid so far). In such cases, therefore, the practical need of a real agreement concept will be rather limited. It should be added that, under a real agreement concept, the buyer could –

temporarily – avoid the re-transfer by explicitly refusing to conclude the real agreement even where the whole purchase price is re-paid immediately.

One could, however, not reproach the buyer for stopping payment if the buyer, for justified reasons, assumes that the car has been delivered in a defective state, and returns it to the seller in order to get the facts clarified. Practically, the seller will normally not intend to terminate the contractual relationship in such a situation, but this may change if the dispute about there being a defect remains unsettled. Again, the buyer will have to be warned by receiving an advance notice of termination and can remove the car from the seller's place of business. If the buyer, in such a situation, nevertheless leaves the car with the seller in order to have additional examinations carried out, or in order to have it repaired, one may well discuss whether such conduct of the parties may be interpreted in the sense of giving rise to an implied term to return the car to the buyer in case keeping the car with the seller affects other interests of the buyer than those which should originally be served by handing over the car to the seller. In case of termination, the buyer would have an interest in getting the car back in order to secure the right to receive re-payment of the partially paid price (while the original interest underlying the handing over of the car to the seller was to receive the performance due under the contract). Then, the seller's obligation to return the car to the buyer would, so to say, override the seller's right to get the goods re-transferred after termination. Technically, the case can be solved by the seller's retention of possession in the sense of VIII.–2:105 (Equivalents to delivery) paragraph (1) not being "referable to" the seller's entitlement to the re-transfer of ownership as long as the partially paid purchase price is not repaid to the buyer (cf. paragraph (2) of the present Article). Again, a real agreement concept does not appear to be necessary for reaching an adequate result.

(ii) The second category of situations comprises cases where the buyer terminates the contractual relationship because the goods have been delivered in a (fundamentally) defective state; cf. III.–3:502 (Termination for fundamental non-performance).

> *Illustration 5*
> S has sold and delivered a car to B. Ownership has passed, B has already paid the purchase price. After some time, a defect occurs which amounts to a fundamental lack of conformity under the contract for sale. B returns the car to S's garage and first demands repair. As S is not successful in repairing the defect within a reasonable time, B terminates the contractual relationship. As the car is already in the possession of S, the rule in VIII.–2:105 (Equivalents to delivery) paragraph (1) could, if applied literally, effect an immediate re-transfer of ownership to S. B would then have no possibility to withhold the car until the purchase price is re-paid to him.

It is clear that the buyer, in the end, has caused the potential risks arising from such a situation by exercising the right of termination while the car was in the possession of the seller. However, since the basic origin of the problem is that the seller failed to perform contractual obligations properly, it nevertheless seems preferable to protect the buyer from losing a security. A real agreement concept could help in so far as ownership would not pass from the buyer to the seller unless the former gave assent. This solution would work but it would still require certain interpretative efforts, in particular as to construing a real agreement at a later time when re-payment of the purchase price has been made.

Another solution to the problem could be to interpret a notice of termination, if issued by the buyer under circumstances like those described in *illustration 5*, in such a way that it intends

to give rise to restitutionary obligations to be performed (only) contemporaneously. Such contemporaneous performance is a basic concept underlying III.–3:511 (Restitution of benefits received by performance) paragraph (1) which states that where, after termination, both parties have obligations to return, the obligations are reciprocal. Technically, again, the seller's retention of possession in the sense of VIII.–2:105 (Equivalents to delivery) paragraph (1) is not "referable to" the seller's entitlement to the re-transfer of ownership as long as the purchase price is not repaid to the buyer (cf. paragraph (2) of the present Article). A need for a real agreement concept does not arise.

Protection of a transferor lacking capacity at the time of delivery. The real agreement being understood as a contract, it requires legal capacity of the parties. Therefore, it could protect a transferor subject to an incapacity (e.g., a minor or mentally handicapped person) in certain situations. The first example is that the transferor lacks capacity at the time of delivery but a valid contract has been concluded prior to delivery, either because the transferor did not lack capacity at that time, or because the contract has been concluded or ratified by a legal representative of the person subject to an incapacity, as the applicable law may provide. Here, the real agreement could only produce a protective effect if it is deemed to be concluded at the time of delivery (or to be maintained up to that time). The other situation is that the entitlement to the transfer of ownership arises from a rule of law and the transferor lacks capacity when effecting delivery. In such situations a transferor subject to an incapacity may run the risk of delivering the object without, factually, being able to make use of the right to withhold performance in the sense of III.–3:401 (Right to withhold performance of reciprocal obligation) when the other party fails to tender counter-performance. The person subject to an incapacity possibly does not know about the right to withhold performance or may not have the intellectual abilities to assess the circumstances. The effect of a real agreement requirement would be that in such a situation, a legal representative (as may be required under national law) of the person subject to an incapacity would have to give assent to the transfer (to the real agreement) and could, on this occasion, evaluate the risks with respect of the transferee's solvency.

Here, the real agreement concept would have some practical benefit, limited to rather exceptional cases, though. However, this advantage has not been considered sufficient in order to adopt the real agreement concept as a general transfer requirement. One reason certainly is the limited scope of this advantage; another one is, as pointed out above, that the real agreement would even create an over-protection of the transferor, as the possibility to refuse the conclusion of the real agreement would not be restricted to cases where the other party does not pay. Finally, the risk of effecting performance without being able, due to a lack of capacity, to evaluate the risks of not receiving one's counter-performance is not a specific problem of property law arising only where ownership of goods is to be transferred. It is a general matter of the law on obligations and corresponding rights and it may, perhaps, be solved under general rules.

Extending the transferor's creditors' rights to treat the transfer as ineffective in the transferor's insolvency. National insolvency law rules, and partly also rules applicable outside insolvency situations, provide the creditors' rights to treat a transfer as ineffective under certain circumstances, e.g. where the transfer has been a gratuitous one and occurred within a certain period of time before the commencement of insolvency proceedings, or where the transaction was intended to be to the detriment of the creditors (so-called *actio Pauliana* and comparable concepts). These rules usually impose certain time limits, and given that the underlying contract related to such a transaction could be concluded a long time before

delivery is made, and a real agreement could be deemed to be concluded at the time of delivery, a real agreement concept could have the effect that, under these rules, a juridical act (the real agreement) could be set aside where the other juridical act (the contract for sale, or donation) could not, because it was concluded outside the relevant time limits. This could be considered a further advantage of a real agreement concept. However, it has not been considered adequate to adopt a real agreement concept for this reason. Primarily, it is an issue of insolvency law under which preconditions, and within which time limits, transactions should be subject to a right to be set aside. At least some national insolvency laws also accept that factual acts (like delivery) can be covered by these rules. Accordingly, no argument in favour of a real agreement concept is developed from these instances.

Technical vehicle for implementing an "abstraction principle". Finally, a strong argument for adopting a real agreement concept could be put forward if it was decided to adopt a principle that the transfer may take place independently from there being no valid entitlement to transfer the ownership, but based on the mere agreement "that ownership shall pass". Such an "abstract" transfer principle is, however, not favoured here. Accordingly, this potential argument does not arise.

(c) Conclusion

Real agreement concept not needed. It emerges from the discussion in the previous Comments that there is hardly any practical need for a real agreement concept under the framework of these model rules. It has also become obvious that the concept partly would have over-protective effects. It is, therefore, not adopted.

E. General discussion of a "causal" versus an "abstract" transfer system

(a) General

General; "causal" and "abstract" transfer concept. This part of the Comments refers to another basic distinction usually made when "classifying" different transfer systems: the causal – abstract dichotomy. Under a "causal" approach, a valid transfer requires to be based on a valid obligation to transfer or, as it is phrased in paragraph (1)(d) of the present Article, that "the transferee is entitled as against the transferor to the transfer of ownership by virtue of a contract or other juridical act, a court order or a rule of law". Under an "abstract" transfer system, such an "entitlement to the transfer" in the sense of paragraph (1)(d) is not required. In addition to the other prerequisites (like the transferor's right or authority to dispose, and delivery etc., cf. paragraphs (1)(a) to(c) and (e) of the present Article), the transfer just requires a valid real agreement in the sense discussed above. As a result, ownership also passes when the underlying contract is void or avoided, as long as the real agreement is valid. In such a case, the legal systems employing the abstract transfer principle, however, provide for an obligatory claim to re-transfer ownership. Since the practical differences between the two approaches, above all, come up where the goods have already been delivered and the underlying contract is avoided subsequently, e.g. on account of mistake, fraud, coercion or threats, one may functionally phrase one part of the issue also in terms of protecting the transferor against the transferee's creditors after delivery. In a wider sense, the issue is then not only confined to cases of avoidance, but could be extended to the question of whether other means of setting aside a contractual relationship, like termination or withdrawal, should have retroactive proprietary effect (equivalent to the effect of a "causal" transfer rule) or not. These issues are discussed in the context of VIII.–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation). In the present context, the main focus will be on avoidance. Another conflict where the causal/abstract dichotomy plays

a role is the conflict between the transferor and a (potential or actual) acquirer from the transferee. This is discussed furrther below.

The principle of abstraction is employed in German law and, following this model, in Greece and Estonia. The other European countries can be said to employ a causal transfer model, although the question is not identified as a particular issue in all legal systems. Details are reflected in the Notes.

Hypothetical alternative concepts. Theoretically, opting either for a causal or for an abstract model are not the only possible solutions. One could, for example, try to analyse in which particular instances either a retroactive proprietary effect (in the sense that ownership is treated as never having passed from the transferor to the transferee), or the mere creation of an "entitlement to transfer ownership" (which would only take effect upon delivery or another instance provided by paragraph (1)(e) of this Article), or perhaps an immediate, but not retroactive, "automatic" re-transfer by operation of law appears to be most adequate. The outcome could be different solutions according to criteria like: which rule is used to set aside the contract and which policies underlie this rule (public policy or protection of one of the parties); the weight of the respective ground of setting aside the contract (e.g., fraud or threats probably being more severe instances than simple mistake); or whether it was the transferor or the transferee who exercised the relevant act entitling the other party to set aside the contractual relationship and whether it appears justified that this party, or the other party, and the parties' creditors, may benefit from, e.g., a retroactive proprietary effect. Such an approach could suggest itself if one tries to arrive at solutions by weighing the relevant interests involved, as promoted by a "functional approach". Accordingly, such options were, to a certain extent, discussed during the process of developing the present Chapter. The result, however, was a clear preference for adopting simple and clear-cut rules such as providing retroactive proprietary effect for all cases of avoidance in the sense of Book III Chapter 7, and triggering a mere obligation to retransfer in cases of termination, withdrawal and revocation of a donation. The main argument for this simple solution obviously was to provide clarity and legal certainty.

The rule adopted: causal transfer. For the reasons reflected below in section (b) of these Comments, a causal approach was adopted. This rule is implemented in paragraph (1)(d) of the present Article. Also paragraph (2) of this Article relates to the same principle. The principle is further clarified in VIII.–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation).

(b) Evaluation

Protection of commerce; conflict A – C. The policy behind the abstraction principle is commonly described as providing protection of commerce. Future purchasers from the transferee (for the purpose of the following discussion: the third person C) are not forced to investigate the validity of the underlying contract between transferor (A) and transferee (B), which is regularly considered to cause difficulties. As the issue concerns situations where, either from the beginning or retrospectively (after avoidance), the contract between A and B is invalid, the situations discussed here are potentially – namely: if an abstract transfer system is not adopted or where a re-transfer has already taken place when B purports to transfer to C – (also) covered by Chapter 3 on good faith acquisition. These rules exactly serve the purpose of striking a balance between protection of commerce in general (protection of C) and the interests of the original owner A who may ultimately lose his right of ownership if protection

is granted to C. Accordingly, the question comes up why, i.e. for which particular policy reasons, it should be necessary to decide one and the same type of conflict differently from the general rules provided for such conflicts, namely those on good faith acquisition. Also, as a matter of principle, it seems preferable to solve that conflict in the relation in which it occurs, i.e. in the relation A – C (which means to deal with it under good faith acquisition principles) and not in the relation A – B (which would be the case under an abstraction principle). Chapter 3 will then be the place for fine-tuning the requirements as to C's good faith adequately; see also the following Comment. Further, good faith acquisition rules may decide whether to adopt further general requirements under which a sub-purchaser (C) appears to be worthy of more protection, such as a requirement that the purported transfer in the relation B – C must be for value.

Only C in good faith deserves protection. In particular, a third party acquirer (C) from the transferee only deserves protection when acting in good faith. Under Chapter 3 on good faith acquisition, this is an indispensable requirement. Under the abstraction principle, however, C would acquire ownership (without being obliged to re-transfer it) even if C actually knew that the contract between A and B was invalid. This seems to be an inadequate over-protection of C (or "commerce" in general).

Conflict between transferor (A) and transferee's (B's) creditors. As pointed out above, the legal systems adhering to an abstraction principle do not at all provide that where the underlying "entitlement to the transfer" (the contract between A and B) is invalid, ownership of the goods remains, once and for all, with the transferee. On the contrary, the transferee B will be under an obligation under the law on unjustified enrichment to re-transfer the property to the original transferor A. To this extent, the difference between the causal and the abstract approach basically comes up when B becomes insolvent before re-transferring the goods to A. In other words, the conflict can be described as one between the transferor (A) and the transferee's (B's) general creditors. Since avoidance cases are rooted in special defects affecting the validity of the contract, the adequate policy is considered to be that the transferee's creditors should, so to say, step into their debtor's shoes. This policy fits a causal approach. A right to choose whether to fulfil outstanding mutual obligations under a bilateral legal relationship or to "terminate" this relationship apparently only exists in relation to contracts, not for situations of a re-transfer.

Publicity. Since, under an abstraction principle, avoidance of a contract only creates an obligation to re-transfer, but the transferee, for the time being (usually until delivery) remains the owner, this approach obviously fits better to the idea of publicity than a causal approach, under which ownership retroactively reverts to the transferor. This may speak in favour of the abstract transfer approach. However, as noted above, publicity is considered not to play an important role under this Chapter in general. Accordingly, this argument does not carry much weight in the present context either.

Difficulties for abstraction policy due to voidability of real agreement. The real agreement – which is traditionally used as a central technical vehicle to implement an abstraction principle – is understood to be a contract and, consequently, is subject to general contract law rules. If this concept was adopted in the present Chapter, this would follow from the general rule in VIII.–1:104 (Application of Books I to III). Consequently, the real agreement would, among others, be subject to the provisions on invalidity as provided by Chapter 7 of Book II. In particular, the general rule on avoidance on account of mistake (II.–7:201 (Mistake)) would apply to the real agreement. This would lead to a problem well

known in those legal systems where the abstraction principle is adopted: although the validity of the real agreement is intended to be independent from the validity of the underlying entitlement to transfer ownership, the real agreement may happen to be voidable for exactly the same reason which causes the voidability of the underlying contract. If the real agreement is avoided as well, the transfer necessarily falls. Obviously, such a double avoidance undermines the policies which may be pursued by an abstraction principle. And obviously, the question of how the relevant rules on avoidance of a contract are shaped in detail plays a considerable role in this respect. Arguably, II.–7:201 (Mistake) would bear the "risk" (depending on the perspective one takes) of opening up a rather broad scope for double avoidances. The rule deliberately does not distinguish between different categories of misapprehension; it is equally applicable to mistakes of facts and of law (cf. Comment H on that Article). If, e.g., a buyer of a used car is entitled to avoid the contract for sale because she was in the mistaken belief, caused by the other party, that the car had never before been involved in an accident and had never had major repairs, which was explicitly revealed to be of significant importance to the buyer before the contract was concluded, the buyer most probably could, for the same reasons, also avoid the real agreement: she would not have concluded this agreement had she known about the true properties of the car. Depending on the circumstances, it could also be argued that the real agreement is voidable because one party erroneously believes that the underlying contract is perfectly valid, although it is subject to a right of avoidance. This may be the case where, e.g., the other party caused this mistake (as to the validity of the underlying contract), but also where both parties made the same mistake; see II.–7:201 (Mistake) paragraph (1)(b). Given this legal environment, an abstraction principle would most likely not work efficiently. This is another, and perhaps conclusive, argument for not adopting it in these model rules.

F. Conclusive remark on the role of party autonomy

Considerable importance. Freedom or party autonomy is a fundamental principle underlying these model rules. It plays a considerable role regarding transfers of ownership under this Chapter. Whereas the framework set out by the basic rule in this Article is mandatory, it leaves much room for the parties to design their transfer within that framework. This applies, first and foremost, to the time of the transfer, which can, basically, be freely stipulated by the parties. See paragraph (1)(e) of this Article, which allows the parties to agree on any time or condition, subject to general limitations such as the prerequisite of identification for generic goods. However, there is considerable scope for party agreements also within this general identification requirement, since even where the transferor holds a stock of equivalent goods, the description of the object of performance may be made more and more precisely, which often, but not always, may make an earlier transfer possible. Also where future goods are to be transferred before delivery, the parties may agree at which stage of completion the transfer will occur.

Party agreements indirectly affecting third parties. Especially with regard to the non-mandatory character of the delivery rule adopted in paragraph (1)(e) of this Article and the consequence that the parties may, on this basis, bring about an outright transfer at any time before delivery without this being "visible" to other persons, it has been argued by some that this should not have effect on third parties. It should, however, be noted that this is nothing extraordinary. In particular, the alternative model of a consensual transfer would not essentially differ in this respect. For some situations, if one considers that third parties should be able to rely on an apparent situation, good faith acquisition rules may provide protection to a certain extent.

G. Conclusive remark on a functional versus a unitary-based approach

Unitary starting point, but not as far-reaching as hypothetically possible, and open to exceptions. The working group in charge of preparing Book VIII tried to make use of the functional approach as a working method. This certainly turned out to be helpful in many instances. It may also facilitate future discourse in property law matters. However, it became apparent throughout the course of developing the rules of this Book that many European lawyers would in fact face difficulties if confronted with a statutory text phrased in a functional approach style.

As to substance, the analysis carried out as to whether a consensual or a (non-mandatory) delivery approach appears preferable in different situations showed that the latter approach would be either preferable, or at least equally workable, in almost all instances examined. With regard to the choice between a "causal" or "abstract" – or a more differentiated – transfer approach, there was a clear majority in favour of broad, simple and clear-cut rules. Given all this, it is preferred to phrase the rules of Chapter 2 more in the style of a unitary transfer approach, by setting out requirements for a transfer of "ownership" in the sense of the definition provided by VIII.–1:202 (Ownership), taking place at one particular moment as defined by the rules of this Chapter. At the same time, the unitary starting point will not determine all questions which might arise. For this reason, VIII.–2:201 (Effects of the transfer of ownership) contains a number of clarifications which, in conjunction with the definition of ownership, make clear what is linked, and what is not linked, to a transfer of ownership. In addition, the policy has been to be prepared to adopt exceptions to the basically unitary approach whenever this seemed appropriate. The latter is the case, e.g. with regard to the special rule contained in VIII.–2:201 (Effects of the transfer of ownership) paragraph (4), with regard to VIII.–2:301 (Multiple transfers) paragraph (2), with regard to VIII.–2:304 (Passing of ownership of unsolicited goods) paragraph (3) and, arguably, with regard to VIII.–2:307 (Contingent right of transferee under retention of ownership). The way of dealing with a re-transfer of ownership upon termination, while the goods are already in possession of the former transferor, may also be mentioned in this context, although no formal exception in the rules was thought necessary as the matter can be dealt with by interpretation

General reasons for this drafting style. Shaping these rules in a unitary-oriented drafting style would, of course, not have been possible if the preferences as to substance had been very different. However, as has been pointed out above, the analysis carried out in the previous Comments allows this to be done. It is then a matter of taste and other factors how to structure and present the Articles. Representatives, in particular, of the Nordic countries would have preferred to describe each problem separately in plain, simple and direct language which, it was argued, would be easier for ordinary people and ordinary lawyers to grasp. One would, then, have one rule stating that under a contract for the sale of goods, the buyer, provided the contract is for specific goods, has a right to separate these goods in the seller's insolvency under certain requirements (e.g., those listed in paragraph (1) of this Article). One would have an additional rule for generic goods (probably defining under which circumstances identification is brought about), possibly another one for goods to be manufactured – all that for the question of the buyer's protection against the seller's creditors in the latter's insolvency. The same question would presumably have to be regulated separately for other contracts than sales (e.g., donations in the sense of Book IV.H), transfers based on a unilateral juridical act, on a rule of law (possibly different solutions for different rules of law) or on a court order. Then, other conflict situations would have to be regulated separately, e.g. the requirements for a seller to retain the goods if payment is not made as agreed under the contract; the same issue for transfers based on other legal grounds, etc. Then there would have

to be something on the right to dispose, rights to use, and protection against third parties and so on.

Since these model rules aim at presenting solutions for a very large range of patrimonial relations, many of which have property law implications, the number of such "simple and direct" rules would have to be considerable. Nordic legal systems adhering to a functional approach manage to do without such a huge number of single rules. They manage to do so because they, in their statutory provisions, simply leave a lot of issues unregulated. In their legal tradition, this works without causing major problems and without causing considerable uncertainty. Court practice and legal writers step in. Still, a number of issues seem to remain largely undiscussed (e.g., the passing of a "right to dispose", issues like the right to use etc.). Yet, these model rules in general follow a codification-like approach. Compatibility with other parts, such as unjustified enrichment law, non-contractual liability for damage, sales and proprietary security rights, is considered to be of major importance. There is, however, no example of a codification-oriented, functional approach-based set of rules on the issues related to a "transfer of ownership" of movable property in Europe. One could try to develop that in a project like this, but presumably, many people would consider this to be quite risky. Certainly, reading a rule phrased in terms of a "transfer of ownership" may cause difficulties in understanding for a Scandinavian lawyer. On the other hand, if there were just a couple of rules for "main cases", continental European lawyers would be insecure about remaining gaps; and if there were a lot of separate detailed rules (as adumbrated above), it could in turn be difficult for people to identify which rule exactly fits the case in question. Legal cultures differ. The attempt made here is to analyse the issues individually as far as feasible, but to phrase the result in a unitary approach, as far as possible. This is intended to serve consistency, workability and predictability.

As pointed out already, opting for a unitary-based model partly also appears preferable from the viewpoint of other parts of these model rules (e.g. the rules on unjustified enrichment).

H. The basic rule in detail

General. This Article, primarily in its paragraph (1), contains the basic requirements for a derivative transfer of ownership. It implements the policy decisions and conceptual approaches discussed in the foregoing Comments. Many of the following Articles are linked to one of the rules set out in this Article and regulate the respective principles in more detail.

The requirements provided by paragraphs (1) to (3) of this Article must be fulfilled cumulatively in order to effect a transfer of ownership. This effect (the transfer of ownership) is already spelled out in paragraph (1); it is however repeated and further clarified in VIII.–2:201 (Effects of the transfer of ownership). Where the requirement of paragraph (1)(c) is not met, good faith acquisition under Chapter 3 may take place provided the additional prerequisites set out there are fulfilled.

Parties: transferor and transferee, owner. This Article, as well as the subsequent Articles of this Chapter, speaks of the "transferor" as the one party to the transaction and the "transferee" as the other. Evidently, the transferee is the one who is to acquire the right of ownership by virtue of the transfer. The transferor, on the other hand, may – and most often will – be the owner of the property who personally undertakes (or is otherwise bound) to transfer it; but not necessarily so. The transferor in the sense of this Chapter can also be a person who is not the owner, but who is authorised to legally dispose of the property in that

person's own name. Such authority may be granted either by the owner or by a rule of law. In such cases, the acts carried out by the transferor will affect the right of the owner: ownership directly passes from the owner to the transferee (acquirer). The legal relationship based on which the transferee is entitled to demand the transfer of ownership in the sense of paragraph (1)(d) of this Article will, however, exist between transferee and transferor.

Where a representative in the sense of Book II Chapter 6 acts on behalf of the transferor, or on behalf of the transferee, the parties in the sense of this Chapter are nevertheless the transferor and the transferee, respectively (cf. II.–6:105 (When representative's act affects principal's legal position)). For the purposes of Chapter 3 on good faith acquisition, also the person who, without having a right or authority to dispose of the property, purports to transfer the ownership is named a "transferor"; see VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership) paragraph (1) and the Comments on that rule.

(a) Goods must exist (paragraph (1)(a))

General. Paragraph (1)(a) of this Article provides that a transfer of ownership can only take effect when the goods concerned exist. This requirement is not fulfilled both where the goods do not exist yet and where they do not exist any longer. The rule does not preclude that certain acts required for the transfer, e.g. the conclusion of a contract under which the transfer is undertaken, may be carried out in advance. Parallel requirements are provided for assignments of a right to the performance of an obligation (cf. III.–5:104 (Basic requirements) paragraph (1)(a)) and for the creation of proprietary security rights (cf. IX.–2:102 (Requirements for creation of security rights in general) subparagraph (a)).

Certain flexibility provided by party agreement. As to goods to be manufactured in future, certain flexibility exists in so far as it is up to the parties to define what they consider as the "goods" to be transferred. If they, e.g., agree that a ship is to be transferred when semi-finished (practically to be defined more closely), then the half-finished ship fulfils the requirement of "existing goods" in the sense of this Article. The parties do not have to wait until the ship is finished completely. Further, they can agree that any material added to the ship in the shipbuilding process from that time onwards will be transferred to the buyer of the ship upon being combined with the already existing hull.

(b) Goods must be transferable (paragraph (1)(b))

General. The content of paragraph (1)(b) is self-evident. A transfer cannot take place where the goods are not transferable in a legal sense. This is, however, only exceptionally the case. The issue is regulated by VIII.–1:301 (Transferability). The assignment chapter contains a parallel rule in III.–5:104 (Basic requirements) paragraph (1)(b). The same applies to proprietary security rights, cf. IX.–2:102 (Requirements for creation of security rights in general) subparagraph (b) and IX.–2:104 (Specific issues of transferability, existence and specification).

(c) Transferor must have the right or authority to transfer (paragraph (1)(c))

General. Paragraph (1)(c) embodies a basic principle of property law. A person cannot transfer more rights than that person has, as expressed in well-known Latin maxims like *nemo dat quod non habet*, or *nemo plus iuris transferre potest quam ipse habet*. This principle is extended in so far as also a person who is not the owner may validly transfer ownership of a

piece of property if so authorised by the owner or a rule of law. VIII.–2:102 (Transferor's right or authority) specifies the general requirement stated in this subparagraph further with regard to some details. As mentioned above, where the person purporting to undertake the transfer has neither a right nor an authority to transfer the ownership, good faith acquisition under Chapter 3 may take place.

Again, a parallel rule applies to assignments (III.–5:104 (Basic requirements) paragraph (1)(c)). See also IX.–2:105 (Requirements for granting of security right) subparagraph (b).

Transferor's right to dispose. The term "right to transfer the ownership" is intended to address the owner of the property. The owner's right to legally dispose of the property is a basic element already in the definition of the right of ownership; see VIII.–1:202 (Ownership). The owner may also grant authority to dispose to another person (see next Comment) which, however, is not considered to preclude the owner from exercising the right to dispose personally (as long as the goods have not been transferred by that other person). However, the owner's right to dispose may be limited to the extent that the asset is encumbered with a limited proprietary right of a third party. The owner can then still dispose of the right of ownership, but the other person's limited proprietary right remains unaffected.

Transferor's authority to dispose. A transfer of ownership may also be validly brought about by a person who is not the owner of the goods, provided that this person has "authority to dispose". Such authority to dispose can be granted by the owner (as a derivative of the owner's own right to dispose). A main practical example is a sale by commission. The commission agent does not own the goods, but is granted authority to legally dispose of the goods by their owner, the principal. The commission agent concludes, in the agent's own name, a contract for sale with a third party, and transfers ownership of the goods (also in the agent's own name) to the buyer. The transaction is effective since it is based on the commission agent's authority to dispose. See also VIII.–2:302 (Indirect representation) and the Comments on that Article. Authority to dispose can also be granted within certain limits. E.g., authority to dispose can be granted with the restriction that a certain minimum price must be achieved, or that certain other acts are performed. For example, where a producer of goods sells products to a trader subject to retention of ownership, the producer may grant the trader authority to dispose of the goods (free of any rights of the producer) subject to the condition that the trader's rights against the customers are assigned to the producer for security purposes.

The transferor's authority to dispose may also be granted by a rule of law. E.g., a secured creditor may have authority to dispose of the encumbered asset under the rules on extra-judicial enforcement of proprietary security rights; cf. IX.–7:207 (General rule on realisation) in conjunction with IX.–7:211 (Sale by public or private auction or by private sale) and IX.–7:213 (Buyer's rights in the assets after realisation by sale).

(d) Transferee's entitlement as against the transferor to the transfer of ownership (paragraph (1)(d))

General: entitlement. The transfer must be based on a legal relationship between the transferor (in the sense discussed above) and the transferee, by virtue of which the latter is "entitled" to the transfer of ownership as against the former. The formula used in this subparagraph corresponds to VII.–2:201 (Circumstances in which an enrichment is unjustified). In principle, the transferee's "entitlement" corresponds to an obligation (in the

sense of Book III) of the transferor to transfer the ownership, but the concept is neutral in terms of any particular state of performance. The entitlement exists and persists as from the time of its creation, regardless of whether performance has already been made or not. In terms of facilitating a common understanding from the perspectives of different legal traditions, the term "entitlement" has been considered advantageous in so far as it lacks the "prospective" connotation of "obligation", which is, e.g., in some traditions questioned with regard to a spontaneous gift from hand to hand which is made without there being any prior obligation to make it. Similarly, different views on whether an "obligation" is present could be brought forward regarding a case where a person puts glass bottles into a recycling bin. The concept of "entitlement" is intended to cover all this. An obligation to transfer may have arisen in advance, or the parties may agree to carry out the same kind of transaction immediately, be it a transfer in exchange for a counter-performance, or a gratuitous transfer. A mere "real agreement", without the parties' consent as to the economic purpose of the transaction, would not fit this concept.

Entitlement must be "valid". At the same time, the requirement of there being an "entitlement to transfer" imtegrates the "causal" transfer approach into the basic transfer rule. Where there is no valid entitlement to the transfer of ownership, a transfer cannot take place even though all other requirements set out in paragraph (1) of this Article are fulfilled; and where the entitlement is extinguished retrospectively after the transfer has already been carried out, the transfer falls. This issue is regulated in more detail in VIII.–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation). The "causal" approach is further underlined by paragraph (2) of this Article where it is stated that the delivery or equivalent to delivery must be "based on, or referable to" the transferee's entitlement.

By virtue of a contract or other juridical act. Subparagraph (d) also lists the four possible bases of an entitlement to the transfer of ownership. Entitlement by virtue of a contract certainly is the most important category in practice. In particular, an entitlement to the transfer of ownership of goods in the sense of this Article may arise from a contract for sale (IV.A.–2:101 (Overview of obligations of the seller) subparagraph (a)) or donation (IV.H.–3:101 (Obligations in general) paragraph (1)(b)). "Other juridical acts" are basically unilateral juridical acts undertaken by the transferor in the sense of II.–4:301 (Requirements for unilateral juridical act), where the party doing the act intends to be legally bound to transfer ownership. In such a case, the potential transferee is not forced to accept the passing of property. The passing of property can, e.g., be prevented by factual means such as by refusing to take delivery, or by rejecting the right by notice to the transferor (II.–4:303 (Right or benefit may be rejected). Other juridical acts may be those provided for by the (national) law of successions, which do not lead to universal succession but cause an obligation to transfer goods to a certain person, e.g. a legacy.

By virtue of a court order. The transferee's entitlement to the transfer and the transferor's obligation to transfer, respectively, may also be established by a court order. For instance, one spouse may be ordered to transfer certain goods, such as household equipment, to the other spouse by a divorce judgment.

By virtue of a rule of law. Finally, the transferee's entitlement as against the transferor may result from a rule of law, provided the requirements set out in the respective provision are fulfilled. Two important examples are the disadvantaged person's right to get an unjustified enrichment reversed under Book VII and the right of restitution of benefits received by

performance which arises as a consequence of the termination of a contractual relationship (III.–3:511 (Restitution of benefits received by performance) paragraphs (1) and (3)). See also III.–3:205 (Return of replaced item) and the benevolent intervener's duty to hand over anything obtained as a result of the intervention under V.–2:103 (Obligations after intervention). Theoretically, the entitlement may also result from an obligation to effect reparation under the rules on non-contractual liability for damage.

(e) Agreement as to time ownership is to pass, delivery or equivalent to delivery (paragraph (1)(e))

General. Subparagraph (e) implements the non-mandatory delivery model discussed above. The main rule, therefore, is that the transferor and the transferee may decide themselves when ownership will be transferred by concluding an "agreement as to the time ownership is to pass". In this case, ownership passes when the conditions set out in this agreement are fulfilled, provided that the other general requirements of this Article – such as the preceding subparagraphs of paragraph (1) and the identification requirement in paragraph (3) – are met as well. The parties can agree on a point in time before or after delivery of the goods. In particular, they can agree that ownership will pass immediately upon the conclusion of the underlying contract, or at the point in time when payment is made. This principle is repeated in VIII.–2:103 (Agreement as to time ownership is to pass) and will be discussed further in the Comments on that Article. The "agreement as to time" in the sense of the present subparagraph also covers cases where the parties have made the transfer dependent on a condition. In this respect, the present Article is supplemented by VIII.–2:203 (Transfer subject to condition). Where the parties, on the other hand, have not concluded such an agreement as to the time ownership is to pass, default rules apply. The default rule in paragraph (1)(e) provides that ownership passes upon delivery or where the prerequisites constituting an equivalent to delivery are fulfilled. These terms are defined more closely in the subsequent provisions, namely VIII.–2:104 (Delivery) and VIII.–2:105 (Equivalents to delivery), and will be discussed in the related Comments. The reasons for choosing this model have alredy been fully discussed.

Functionally – to a certain extent – comparable requirements are provided in the rules on assignment (III.–5:104 (Basic requirements) read with II.–1:102 (Party autonomy)) and on proprietary security rights, where IX.–2:105 (Requirements for granting of security right) subparagraph (d) requires that the secured creditor and the security provider agree on the granting of the security right in order for the security right to be created and, in addition, the secured creditor must generally acquire possession or be registered in order for the security right to become effective (IX.–3:102 (Methods of achieving effectiveness)).

Hierarchy when applying the default rule system. As mentioned above, the party autonomy rule has priority over the default rules requiring delivery or an equivalent to delivery when the parties carry out their transfer. Retrospectively, when assessing whether a transfer has already taken place, the possession aspect immanent in the delivery concept gains importance in so far as the delivery rule will be the starting point for the distribution of the burden of proof. Accordingly, if the goods are already in the hands of the transferee, ownership will be taken to have passed unless it is shown that the parties have agreed on a later transfer, e.g. upon payment in case of a retention of ownership. On the other hand, if the goods are still with the transferor, it will be on the transferee (or the transferee's creditors) to assert, and provide sufficient evidence for this assertion, that the parties have agreed on a transfer before delivery and that the conditions of this agreement have been met. If the

transferee manages to prove only that a contract giving a right to the transfer (in the sense of paragraph (1)(d)) has been concluded, this will not suffice. It is certainly not intended that courts undermine the delivery principle adopted in this Chapter by presuming the existence of implied agreements on an immediate transfer in the sense of a consensual transfer approach. Where there is no sufficient evidence that an agreement to this effect has been made, the default rules must be applied. Depending on the circumstances, however, it may be easier to make it plausible that ownership was intended to pass before delivery where also payment was made before delivery.

The equivalents to delivery provided for in VIII.–2:105 (Equivalents to delivery) are designed to cover specific situations where the goods themselves are not moved from the transferor to the transferee, but it is nevertheless typical that the parties intend to bring about a transfer of ownership. In the case covered by paragraph (1) of the named Article, a physical handing over of the goods themselves has already taken place before. In the other situations, a physical handing over of the goods themselves will typically follow. Regarding the issue of the burden of proof, this means that where the goods are not yet in the hands of the transferee and no agreement as to a prior transfer of ownership is on hand or can be proved, a transfer will nevertheless be accepted where the requirements of one of these equivalents are fulfilled and sufficient evidence can be provided in this respect. Otherwise, one will have to await delivery of the goods themselves in order to accept a transfer.

Reference to other paragraphs of this Article. Paragraph (2) of this Article provides that the delivery or equivalent to delivery must be based on, or referable to, the transferee's entitlement. Paragraph (4) clarifies that, of course, a party agreement, delivery or an equivalent to delivery is not necessary where a court order or a rule of law itself determines the time of the transfer based on it. Both rules are discussed in the relevant Comments below.

(f) Delivery or equivalent to delivery must be based on, or referable to, the transferee's entitlement (paragraph (2))

General. Paragraph (2) of this Article requires that there must be a certain inner link between the "factual" criteria of delivery or an equivalent to delivery and the legal bond between the transferor and the transferee, by virtue of which the latter is entitled to the transfer. The delivery or equivalent to delivery must be "based on, or referable to" the underlying entitlement. The function of this rule is, mainly, merely a clarifying one, but in some – rather exceptional – cases it may also serve a normative "corrective" function.

Accentuation of the causal approach. As already indicated above, paragraph (2) underlines the "causal" transfer approach adopted under this Chapter . This idea is more explicitly repeated in VIII.–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation), but it is considered preferable to make this issue clear already in the basic rule.

Protection from transfer to take place where equivalent to delivery is not referable to entitlement. Exceptionally, there may occur situations where a party to the transaction is in a situation where an entitlement to the transfer has arisen and, also, the requirements of an equivalent to delivery are fulfilled, but an effective transfer should nevertheless be denied because the one is not sufficiently related to the other. The main example will be where the entitlement arises from a rule of law and the goods are already in the hands of the transferee, so that VIII.–2:205 (Equivalents to delivery) paragraph (1) would apply, but the transferor

would thereby be prevented from using the protective remedy of withholding delivery of the goods. Cases where this may become relevant include a termination of a contractual relationship when the sold goods are temporarily with the seller. One may solve such cases by denying the "referable to" requirement. This should, however, only be applied exceptionally.

Terminology: based on, or referable to. The "based on" formula corresponds with the purpose of accentuating the causal approach as described above. However, where the transferee is already in possession at the time when the underlying entitlement arises (cf. VIII.–2:105 (Equivalents to delivery) paragraph (1)), the "based on" terminology was not considered ideal. One may, however, say that the retention of possession is "referable to" the entitlement arising in such a situation (cf. also VIII.–2:105 (Equivalents to delivery) Comment B with *Illustration 2*. At the same time, the "referable to" formula helps to solve the (minor) problems addressed in the previous Comment.

(g) Identification of generic goods (paragraph (3))

General. All European legal systems acknowledge a *principle of speciality* in property law: a proprietary right can exist only when it is clear in which object it exists. As a consequence, the transfer of goods which are defined by generic terms in the underlying entitlement ("generic goods") requires that the goods are identified (individualised, appropriated to the contract). The national rules differ in detail. In many countries, the issue of identification is rather little discussed with regard to the transfer of property (it is often more intensively discussed with regard to the parallel issue in the context of the passing of risk). Theoretically, the scale may cover identification only in the transferor's head (when deciding to take a specific asset to fulfil the obligation to the transferee), identification by notice to the other party, identification by both parties' consent, or identification only when this is obvious to third parties. Also, it could be required that the act of identification must be irrevocable. In the present Article, the identification requirement is deliberately not regulated in too much detail in order to keep a certain flexibility if need be. It is only stated that where the goods are defined in generic terms, they must be identified to the transferee's entitlement.

Proposed understanding: no standardised requirements, rather a matter of proof. The proposed understanding of the requirement is that there is no need to adopt, by way of interpretation, certain standardised requirements such as that the other party must give assent, or must be given notice, or that the act of identification must be irrevocable. It may play a certain role that under the delivery-based approach adopted in this Chapter, the identification requirement does not have the function of deciding when ownership of generic goods usually *does* pass. Rather, since the parties must contract out of the delivery-default-rule in order to achieve a transfer before delivery, it may be sufficient that it *becomes clear* which goods are affected by the transfer. This is enough so that ownership *may* pass. The burden of proof as to the fact that certain goods have been selected rests with the person who asserts that the transfer took place.

In this perspective, it will hardly suffice that a selection took place internally "in the transferor's head", as it is hard to imagine how sufficient plausible evidence could be provided for this. In view of the function of the rule discussed above, it should, on the other hand, not be impossible to bring about identification by a unilateral act (the decisive aspect being that identification becomes sufficiently clear retrospectively). The contrary could be accepted if the possibility of unilaterally identifying the goods caused a particular risk to the other party, or that party's creditors, or to the identifying party's creditors. But this does not

seem to be the case. The transferee would be negatively affected if the risk of loss under the contract of sale passed to the transferee unreasonably early. But this is another issue and regulated independently in Chapter 5 of Book IV.A. For the transferor's creditors, the fact that the goods leave the transferor's patrimony at an early stage may of course be a negative implication. But the most crucial fact in this respect is that the transferor agreed on a transfer before delivery. Identifying the goods to the transferee's entitlement can never have the effect that the transfer occurs at an earlier time than stipulated in the agreement as to the time ownership is to pass. When, and by which means, identification is made after this agreed point in time does not put additional risks or disadvantages on the transferor's creditors. In order to defend the transferor's unilateral possibility to make identification, one may also invoke a certain parallel to the rules on alternative obligations which provide that the choice belongs to the debtor (alone) unless the terms regulating the obligation provide otherwise (cf. III.–2:105 (Alternative obligations or methods of performance)). Finally, it is considered that the act of identification need not necessarily be irreversible. One would otherwise exclude a number of practically important situations, for instance, where identification is made by separating, marking or even packaging the goods, as long as the transferor has these goods in possession: the transferor could remove the marking or packaging, or could return separated items to the stock from which they were taken. The point is that where a potentially reversible act of identification is not reversed subsequently, the transferee should arguably not be put in a worse position than where an irreversible act had been made. If, on the other hand, the transferor actually reverses an original act of identification and nobody gets to know of this, a judge will anyway not accept that identification had occurred. Finally, where the transferor reverses an act of identification but the transferee succeeds in proving that identification had already been made before, the transferor will arguably not deserve specific protection, so that it appears reasonable to accept a valid transfer to the transferee.

When delivery in the sense of VIII.–2:104 (Delivery) is made, there will regularly be no question that identification in the sense of paragraph (3) has occurred.

Sentence 2: reference to rules on transfer of goods forming part of a bulk. VIII.–2:305 (Transfer of goods forming part of a bulk) contains an extension of the identification rule provided by the present Article. Where generic goods to be transferred are contained in a specified bulk, they are not themselves identified (so that ownership in specific items might pass), but at least the bulk is identified. The named rule, therefore, opens up the possibility of acquiring co-ownership in the mass or mixture contained in that bulk. For details, see the Comments on that provision.

(h) Clarification concerning court orders or rules of law determining the time of the transfer themselves (paragraph (4))

Purpose of the rule. Paragraph (4) clarifies that the requirement of there being delivery or an equivalent to delivery (unless the parties have determined the time of the transfer by agreement) does not apply where the transfer takes place under a court order or a rule of law and the court order or rule of law itself determines when ownership passes. This is probably self-evident but is, nevertheless, spelled out explicitly for clarification purposes.

VIII.–2:102: Transferor's right or authority

(1) Where the transferor lacks a right or authority to transfer ownership at the time ownership is to pass, the transfer takes place when the right is obtained or the person having the right or authority to transfer has ratified the transfer at a later time.

(2) Upon ratification the transfer produces the same effects as if it had initially been carried out with authority. However, proprietary rights acquired by other persons before ratification remain unaffected.

COMMENTS

A. General

Function of the rule. This Article supplements paragraph (1)(c) of the basic rule contained in VIII.–2:101 (Requirements for the transfer of ownership in general) which requires that the transferor has the right or authority to transfer the ownership. The standard cases addressed by the general rule are that the transferor's right or authority to dispose exists when the transferee's entitlement to the transfer of ownership is created, or at least at the time ownership would pass subject to the fulfilment of the other general requirements, i.e., basically, at the time agreed upon by the parties, or upon delivery. The present Article deals with situations where the transferor still lacks the right or authority to dispose at that time.

Brief overview of cases regulated. Where the transferor lacks a right or authority to transfer the ownership at the time ownership is to pass, there is still a possibility that the transfer takes place at a later time. The present Article defines two alternative requirements. The first alternative is that the transferor, later, acquires the right to dispose personally (i.e., acquires ownership of the goods in question). This alternative is discussed in Comment B below. The second alternative is that the true owner, or another person actually authorised by the owner, ratifies the transfer at a later time (see Comment C below).

B. Subsequent acquisition of right to dispose

Rationale; comparative background. Where a person disposes of property without having the right to do so, but acquires this right at a later point in time, this person should be bound by the earlier dispositions although they were ineffective originally. Therefore, the transfer should become valid when the missing requirement (the right to dispose) is fulfilled subsequently. A rule of this kind exists in many European legal systems.

How the rule works. The transfer takes place when the transferor, who did not have the right of ownership originally, subsequently acquires ownership and thereby obtains the right to dispose. Ownership then passes to the transferee at, and with effect as of, this very moment (*ex nunc* effect).

Illustration 1
A sells goods to B; ownership is to pass upon delivery. Before delivery is made to B, B sells the goods on to C. They agree that ownership will pass upon the conclusion of this contract. This will, however, not be possible since at that time, A is still the owner. However, at the moment B receives the goods and thereby acquires ownership of them, ownership immediately passes to C.

C. Ratification

General. The second rule provided for by this Article is that, where a person lacking authority has purported to transfer the ownership, this transfer becomes valid when the transfer is ratified either by the owner of the goods (i.e. the person having the right to transfer) or by a person actually authorised to dispose of the property. The underlying idea is that nothing should speak against the validity of a transfer initially carried out without the transferor having sufficient authority provided that all parties involved – i.e., the transferor and the transferee, who have already consented to the transfer, and the owner of the goods, who will be affected by it – agree. In this sense, one may say that the fundament of the rule is serving the idea of party autonomy. Whereas this principle is rather simple in relation to these three parties involved, the issue becomes more complicated where there are other persons who, between the purported transfer carried out without authority and its subsequent ratification, have acquired rights in the same goods from the person whose right has been alienated. This issue appears to be little discussed in many European legal systems. Where it is discussed or even regulated by statute, the solutions differ as to details. They have in common, however, that such other persons are protected in one way or the other.

The rules on representation contain a parallel provision in II.–6:111 (Ratification) paragraph (2), which provides that upon ratification, the act originally carried out without authority "is considered as having been done with authority, without prejudice to the rights of other persons".

Ratification. As mentioned above and expressly stated in the text of this Article, ratification may be made by the owner himself or by a person legally authorised to transfer the goods. Parallel to II.–6:111 (Ratification), ratification can be made by express declaration addressed to the transferor (who acted without authority) or to the third party transferee. Also, ratification may be implied from acts of the owner (or authorised person) which unambiguously demonstrate an intention to adopt the transfer; cf. II.–6:111 (Ratification) Comment A.

Effect of ratification in general (paragraph (2) sentence 1). The general effect of ratification, as stated by paragraph (2) sentence 1, is that the transfer becomes valid retrospectively, i.e. as if it had initially been carried out with authority (*ex tunc* effect). As a consequence, for instance, if the transferee has meanwhile transferred rights to another person, these rights become valid. The rule corresponds to the parallel provision in II.–6:111 (Ratification) paragraph (2).

Rights acquired by third persons before ratification remain unaffected (paragraph (2) sentence 2). The most problematic issue addressed by this Article is how to deal with proprietary rights which meanwhile – i.e. between the purported transfer undertaken by the person lacking authority and the ratification of this transfer – were acquired by third parties in relation to the owner of the goods. Such acquisitions doubtlessly were valid originally, since they were made from the owner. However, upon the preceding transfer to another person being ratified retroactively (sentence 1), the owner would, retrospectively, have to be treated as a non-owner, which could make the acquisition of this third party ineffective, or make it dependent on the fulfilment of good faith acquisition rules (requiring, *inter alia*, the taking of possession and that the acquisition is for value; cf. VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership)).

Illustration 2
A authorises C to dispose of certain goods, owned by A, under specific limits. C, exceeding these limits, concludes a contract for the sale of these goods with B1 on July 1. On August 1, A himself concludes a contract for the sale of the same goods with B2. At that time, the goods are still in possession of A. Both contracts have been concluded with the agreement that ownership passes immediately. Now, A ratifies the contract concluded with B1 (who, say, agreed to pay a better price).

Illustration 3
A authorises C to dispose of certain goods, owned by A, under specific limits. C, exceeding these limits, concludes a contract for the sale of these goods with B1 on July 1. They agree that ownership passes upon conclusion of the contract, but leave the goods in possession of A. On August 1, the bank B2, a creditor of A, seizes these goods when enforcing a claim against A. Thereafter, A ratifies the contract concluded with B1.

The approach opted for in sentence 2 is that proprietary rights acquired by other persons before ratification remain unaffected. In *Illustrations 2* and *3* above, B2 would, therefore, prevail. With regard to "double transfer" situations (such as in *illustration 2*), this solution is considered justified in so far as B1's "right" can only be "created" by A by breaching the pre-existing contract with B2 (by ratifying the contract between C and B1). Ratifying the contract with B1 bears an element of wrongfulness as against B2. It seems to make more sense to require the good faith of B1 (if B1, in the case of *Illustration 2*, first takes delivery of the goods) than the good faith of B2 (which would be necessary for B2 to acquire if the rule in sentence 2 were not adopted). In general, the good faith acquisition rules of VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership) – which could alternatively be employed to solve the issue – are not considered to protect B2 sufficiently.

With regard to situations like the one in *Illustration 3*, the proposed approach appears justified because it prevents the owner from depriving creditors of seizable assets. Also in these situations, subsequently ratifying the contract with B1 would bear an element of wrongfulness as against B2.

This solution appears to be coherent with the representation rule in II.–6:111 (Ratification) paragraph (2), which also has a proviso for the rights of other persons.

VIII.–2:103: Agreement as to the time ownership is to pass

The point in time when ownership passes may be determined by party agreement, except where registration is necessary to acquire ownership under national law.

COMMENTS

A. General

Function of the rule. This Article, on the one hand, repeats what has already been stated in the basic rule in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e), namely that the parties to the transaction are free to determine the time of the transfer of ownership by agreement. The rules on delivery and equivalents to delivery provided for in the subsequent Articles are only default rules. On the other hand, the present Article serves the function of clarifying the relation of the party autonomy rule to other transfer rules. Under the concepts adopted in this Chapter, however, there is only a need for such a clarification in relation to those rules of national law which require registration in order to acquire ownership. See VIII.–1:102 (Registration of goods). Theoretically, there could be further reservations for situations where, e.g., documents representing the goods have been issued or the goods are in the possession of a third party. But it is not intended that a transfer by agreement as to the time ownership is to pass is precluded in such situations; cf. VIII.–1:105 (Equivalents to delivery) paragraphs (2) and (4) with Comments C and E.

Comparative background. Virtually all European legal systems allow the parties to determine the time of transfer by agreement. This is evidently so with regard to agreements on a point in time after delivery; but also where the parties agree that the transfer shall take place before delivery, such an agreement is effective (subject to exceptions in double transfer situations, and subject to a general exception with regard to the transferee's protection against the transferor's creditors in Sweden, unless a consumer sale is involved). In those countries which follow a consensual approach, it goes without saying that the parties may also agree on any later point in time for the transfer becoming effective. And where the legal system requires delivery, it is widely accepted that the parties may establish a so called *constitutum possessorium*, i.e. an agreement under which the transferor undertakes to possess the goods for the transferee, which is considered to be sufficient to bring about a transfer of ownership. One can, therefore, say that the rule stated in this Article is an (almost) generally accepted one in Europe.

Concept of agreement as to time ownership is to pass. The agreement in the sense of this Article is on the *time* when ownership is to pass. Although this, practically, can hardly be strictly separated from agreeing *that* ownership will pass (at the relevant time), which would equal a "real agreement", it is clear that the latter concept is not required under these model rules (see the Comments on VIII.–2:101 (Requirements for the transfer of ownership in general)). The concept of an agreement as to the time ownership is to pass is deliberately designed to have a wide coverage, encompassing agreements on any time before or after delivery of the goods. A prominent example is the classic *constitutum possessorium* already mentioned above. Where the parties, e.g., agree that the transferor, from now on, leases the goods from, or stores the goods for, the transferee, this also implies an agreement that from now on, the transferee is the owner and the transferor will hold the goods as a limited-rights-possessor for the transferee (cf. VIII.–1:207 (Possession by limited-right-possessor)); or in other words: that ownership of the goods passes immediately.

Illustration 1
S intends to sell his sailing boat sooner or later. However, he would like to undertake one ultimate cruise of three weeks. B is interested in the boat. She does not mind if she gets it handed over only three weeks later, provided that S obeys certain guidelines as to the use of the boat and pays at least a small price for using it. They conclude a contract for sale and agree that S leases the boat for three weeks' time. This implies the intention of the parties that ownership passes to B and S henceforth possesses the boat for B.

However, it is by no means required that the agreement involves any arrangement about possession; it is not even required that any of the parties has possession at all. In this respect, the concept of an agreement as to the time ownership is to pass exceeds the classic construction of a *constitutum possessorium*. There is no obvious reason why it should not be possible to effect a transfer where, at the moment, neither of the parties is in possession of the goods.

Illustration 2
Goods owned by S have been stolen. There is hardly any hope of recovering them. B, a specialised detective, makes an offer to S to buy these goods for a certain price (considerably lower than the market value). Subsequently, he will try to trace the stolen goods at his own risk and expense and, if successful, will sell the goods off. There is no reason why it should not be possible for S and B to carry out the transfer now, although neither of them currently is in possession of the goods.

Illustration 3
S lost his valuable Rolex wrist watch when swimming in a lake. He does not exactly know where this happened and anyway, he would not be able to dive that deep to recover the watch. B, a hobby diver, offers to buy the watch for a relatively low price because he would like to keep it for himself. Also, he would like to proceed against a third person in case another person finds the watch before him. Again, S and B should be able to transfer ownership of the watch right now. The present Article makes this possible.

For the purpose of clarification, it should be added that an agreement on a *constitutum possessorium* is exclusively covered by the present Article and does not (also) fall within VIII.–2:104 (Delivery). The latter rule requires that the "transferor gives up" possession, which would not be the case under a *constitutum possessorium* where the transferor continues to possess in the capacity of a limited-rights-possessor (e.g., as a lessee). Also where the parties agree that the transferor will henceforth exercise physical control as a possession-agent for the transferee (cf. VIII.–1:208 (Possession through a possession-agent)), e.g. where an employee sells her car to the employer and it is agreed that she will keep on using it, such transaction is covered (only) by the present Article. This may be of certain – technical – importance in order not to undermine the clear order of rule and exception between the delivery rule and the party autonomy rule.

Form of agreement. There are no specific requirements as to the form and manner of concluding an agreement in the sense of this Article. In particular, it is not required that the agreement must be recorded in a written document or must be concluded expressly. It may also be implied from the parties' conduct (cf. II.–4:102 (How intention is determined)).

Technically, this follows from VIII.–1:104 (Application of rules of Books I to III). As to substance, it is maintained that strict formalism would hinder the parties' flexibility to regulate the transfer of ownership according to their individual needs and often would produce inappropriate results. The fact that there are no formal requirements does not, however, make it permissible to undermine the delivery-default-approach..

When agreement can be made. An agreement as to the time ownership is to pass can be concluded at any time from the creation of the underlying entitlement to transfer ownership (VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(d)) until any form of delivery or an equivalent to delivery (VIII.–2:104 (Delivery), VIII.–2:105 (Equivalents to delivery)) occurs, because then, ownership would pass upon delivery (or equivalent) in the absence of an agreement. In principle, the parties can also conclude the agreement as to the time ownership passes *before* the underlying entitlement comes into existence. Where the transfer is based on a contract, the agreement as to time will regularly be made at the same time as the underlying contract is concluded, but it can also be concluded separately at a later time. It is further possible that the parties first agree that ownership will pass with delivery but later (before delivery) agree that ownership will pass at another point in time. The later agreement replaces the first one.

The agreement can also be made in advance when the goods do not yet exist or are not yet owned by the transferor ("anticipated" agreement).

Burden of proof; no undermining of delivery rule. As repeatedly pointed out above, it is neither intended, nor would it be permissible under general rules of interpretation, that the delivery-default-approach be undermined by an inflationary accepting of implied agreements as to an immediate transfer. In order to accept a deviation from the delivery rule, clear evidence must be provided for the fact that an agreement as to that time of transfer has been concluded validly and on time. The burden of proof as to the existence of such an agreement lies with the one who asserts it; e.g., where a transfer prior to delivery is claimed: on the transferee. Compare VIII.–2:101 (Requirements for the transfer of ownership in general) Comments C and H.

General limits. As also discussed above, the effect of an agreement as to the time ownership is to pass is also limited by general rules, such as that the goods must exist at the time ownership is intended to pass or that generic goods must be identified (VIII.–2:101 (Requirements for the transfer of ownership in general) paragraphs (1)(a) and (2); cf. also Comment C on that Article). The general requirements set out in the basic rule must always be fulfilled. Further, the agreement cannot have "retroactive" effect in the sense that the parties could agree that ownership "has passed" before this agreement is concluded. Further, where a transfer serves the purpose of security, or of a trust, the rules of Books IX and X have priority over the rules of Book VIII, which may impose further limitations on the effects of party agreements in the sense of the present Article (cf. VIII.–1:103 (Priority of other provisions)).

Reservation for registration. National law may provide registration systems for the transfer of ownership of certain goods (e.g. ships). These systems vary considerably, for which reason it was necessary to take the approach that national law prevails in this respect (see VIII.–1:102 (Registration of goods)). The present Article ties in with this principle and clarifies that

the parties cannot determine the time of the transfer by agreement where registration is necessary to acquire ownership under national law.

B. Examples of agreements as to time ownership is to pass

Any time or condition. In principle, the parties can determine that the transfer of ownership will take place at any time as from the making of this agreement (the transfer of course depending on the fulfilment of the other general requirements set forth by (VIII.–2:101 (Requirements for the transfer of ownership in general), see above). The fixed date may be a calendar date or be determined relatively (e.g., "in a week's time"), or be determined by a certain event (e.g., "upon delivery of the goods", "upon payment of the purchase price"). The agreement on "time" includes agreements on conditions. See also VIII.–2:203 (Transfer subject to condition) and the Comments on that Article.

In particular: transfer upon payment, retention of ownership. In particular, the parties may agree that ownership will pass upon full or partial payment of the purchase price due under a contract for sale. This may be regarded as suitable in order to synchronise each party's risks resulting from the possibility of the other party becoming insolvent in other cases than where payment is scheduled to be made upon delivery. The parties may also agree that payment will bring about the transfer of ownership (only) if it is made before delivery. Where the parties agree that payment will be made only after delivery and the agreement in the sense of this Article provides that ownership will pass when payment is received, this will constitute a retention of ownership, which is of course possible under the present Article. However, the effects of such an agreement, as far as all matters of security are concerned, are governed by Book IX (cf. VIII.–1:103 (Priority of other provisions) paragraph (1)), which take priority over the rules of Book VIII. In particular, the effectiveness of such an agreement vis-á-vis certain third parties depends, at least in general, on registration (cf. IX.–3:107 (Registration of acquisition finance devices)). With regard to the buyer's rights under such an agreement, see VIII.– VIII.–2:307 (Contingent right of transferee under retention of ownership). The rules of Book IX may also be of relevance with regard to an anticipated agreement to re-transfer ownership upon payment of the secured debt where ownership is transferred for security purposes.

In particular: transfer upon conclusion of contract or any other time before delivery. The parties may always agree that the transfer will take place at the moment the underlying contract is concluded This is, however, not generally considered to correspond to the typical interests of a seller (and the seller's creditors).

Agreement when goods are in possession of a third party. When goods are in the possession of a third party (e.g., a warehouse keeper) and the transferor assigns the contractual right (e.g., resulting from the contract for storage) to recover the goods from this third party to the transferee, this will typically also imply an agreement that ownership will pass upon the assignment becoming effective. See VIII.–2:105 (Equivalents to delivery) Comment C.

VIII.–2:104: Delivery

(1) For the purposes of this Book, delivery of the goods takes place when the transferor gives up and the transferee obtains possession of the goods in the sense of VIII.–1:205 (Possession).

(2) If the contract or other juridical act, court order or rule of law involves carriage of the goods by a carrier or a series of carriers, delivery of the goods takes place when the transferor's obligation to deliver is fulfilled and the carrier or the transferee obtains possession of the goods.

COMMENTS

A. General

Function of the rule. This Article concretises the notion of "delivery" used in the basic rule of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e).

Comparative background. A rule along the lines of the basic delivery rule provided for by paragraph (1) of this Article is quite common in those legal systems which follow a delivery-based transfer concept. Some details may vary; e.g., the modern understanding of the (mandatory) Swedish rule concerning the transferee's protection as against the transferor's creditors is to stress the aspect of cutting off the transferor's factual power to control the goods (instead of requiring that the transferee must also have taken possession). Indirectly, delivery in the sense of the basic rule of paragraph (1) is also important in those consensual transfer systems which employ a *possession vaut titre* rule. The specific rule on delivery involving an independent carrier as contained in paragraph (2) of this Article, however, is not such a common one in Europe. Some legal systems provide that the transfer occurs upon shipment of the goods (comparable to the approach taken here), whereas others let ownership pass when the goods are handed over to the transferee.

Reservation for the "purposes of this Book". The definitions of "delivery" provided by this Article are without prejudice to other parts of these model rules. For example, a different definition is provided in the rules on contracts for the sale of goods (see IV.A.–2:201 (Delivery)). See also the qualified definition of "delivery" in the Annex.

B. The general delivery rule (paragraph (1))

General. Under the concept adopted in this Chapter, the acts constituting delivery in the sense of this Article, i.e. the transferor giving up and the transferee obtaining possession, are characterised as factual acts. They do not imply, or need to be accompanied by, an agreement of the parties that (herewith or at a later point in time) "ownership shall pass" in the sense of a "real agreement" concept. Nevertheless, the acts performed by the parties to the transaction must be voluntary acts. This is a fundamental principle, although cases where this may become relevant usually are of a rather theoretical nature. E.g., where a valid contract for sale has been concluded and the transferee unilaterally removes the goods from the transferor's premises without the latter's consent, or forces the transferor to hand over the goods by violence or the threat of violence, this will not bring about a valid transfer.

For reason of clarification, it may be added that agreements on a *constitutum possessorium* are exclusively covered by VIII.–2:103 (Agreement as to the time ownership is to pass). See Comment A on that Article.

Recourse to the concept of possession, including indirect possession. The central vehicle employed by the basic delivery rule in paragraph (1) of this Article is the concept of possession as regulated in VIII.–1:205 (Possession) and the subsequent Articles. This is a common drafting technique in many European legal systems. Possession being possible both when physical control over the goods is exercised directly and when it is exercised indirectly, the concept allows a wide range of practically important situations to be covered by using a short formula. Consequently, the parties may carry out the acts of giving up and obtaining possession of the goods either personally, or by making use of any kind of intermediary in the sense of VIII.–1:207 (Possession by limited-right-possessor) or VIII.–1:208 (Possession through a possession-agent), and the exact qualification of such a person is immaterial in the present context (both limited-rights-possessors and possession-agents being covered). Indirect possession may be involved on the transferor's side as well as on the transferee's. Evidently, such cases are of enormous practical importance.

Illustration 1
E, an employee working in the seller's (S's) shop, hands over the goods to the buyer (B). Delivery is made through a possession-agent of S.

Illustration 2
Company B buys a new car. B sends the employee E to fetch the car from seller S. Delivery is taken by a possession-agent of B.

Illustration 3
B, a leasing company, concludes a contract for financial leasing with its customer C. B buys the relevant goods (e.g., a car) from seller S, whereby the parties agree that the goods will be handed over directly to C. On the transferee's (B's) side, delivery in the sense of this Article is taken by means of the limited-rights-possessor C, who possesses the goods for B.

Requirements of delivery: transferor giving up and transferee obtaining possession. Delivery in the sense of paragraph (1) is defined by the double requirement that the transferor gives up and the transferee obtains possession. In standard cases, the meaning of this concept will be unproblematic.

Illustration 4
B buys books in S's bookstore. Delivery is made by S handing over the books to B, who thereby assumes possession of the goods. Both acts relevant under this Article evidently take place at the same time.

The rule also covers situations where one of the parties is not present.

Illustration 5
S sells his used bike to B. They agree that S will not lock his garage and B will fetch the bike while S has gone to work. Delivery occurs when B takes the bike from the garage.

Illustration 5 shows that it makes sense to require more than that the transferor makes the goods available to the transferee (as is sufficient for performance delivery in the sense of the sales law rules, cf. IV.A.–2:201 (Delivery) paragraph (1). Before the transferee takes control of the goods, the transferor could re-assume exclusive control at any time (by locking the garage again). This would contradict the purposes of the delivery-requirement in the situations discussed in the Comments to VIII.–2:101 (Requirements for the transfer of ownership in general), such as, e.g., the transferee's protection as against the transferor's general creditors and, vice versa, the transferor's protection as against the transferee's creditors; the right to dispose as well as the entitlement of resorting to protective remedies.

In general, the aspect of the transferee obtaining possession is to be understood in a rather broad sense. It is not necessarily decisive that the transferee physically lays hands on the goods. Rather, it is decisive that the goods are brought into the transferee's sphere of control which, often, must be assessed by the "common opinion".

> *Illustration 6*
> Milkman S places a bottle of milk in front of B's door. Ticket seller S places the concert tickets ordered by B in B's letter box while B is not at home. The paper boy places the newspapers at B's letter box or at her doorstep. Delivery takes place in all of these cases because the goods are brought into B's sphere of influence.
>
> *Illustration 7*
> B constructs a house and orders bricks from supplier S. S places the ordered bricks at B's building site on a late Friday afternoon when no one is there. Again, the requirements for delivery in the sense of this Article are fulfilled.

Providing one definition of "delivery" for all "aspects" of a transfer of ownership runs the risk of a potential criticism from a functional perspective. Even if it is basically decided to apply a delivery-model, it could be argued that the most suitable understanding of "delivery" is not necessarily the same in all the relevant situation. Such a criticism is correct in principle. It is, however, considered that the present rule is workable with regard to all the relevant situations. As has been shown with regard to the requirement of the transferee obtaining possession, the requirements can be applied somewhat flexibly. One must also take into account that some of the ownership-aspects can hardly be kept strictly apart. Occasionally, moreover, adaptations have been included in the black letter rules ; see VIII.–2:304 (Passing of ownership of unsolicited goods) paragraph (3) and Comment B to that Article.

Delivery in case of joint possession. Where the transferor and the transferee are in joint possession of the goods, delivery in the sense of this Article does not occur until the transferee has become the sole possessor. If the parties want to make the right of ownership pass at an earlier point in time they have to make an agreement pursuant to VIII.–2:103 (Agreement as to the time ownership is to pass).

C. Delivery involving carriage by a third party carrier (paragraph (2))

Different situations involving transport; coverage of the rule. Often, a transaction requires that the goods be transported from the transferor to the transferee. The transport may be undertaken by one of the parties (e.g. by means of a truck or transport van owned by the company), which will be covered by paragraph (1) of this Article and does not create any further difficulties. Or, transportation can be made by means of a third party, i.e. a carrier.

These situations are covered by paragraph (2). In the latter category, again three sub-constellations may be distinguished: The terms of the contract (other juridical act, court order or rule of law) may provide (i) that the transferor fulfils the obligation to deliver by putting the goods at the transferee's disposal at the transferor's place of business (e.g., under an Incoterms ex-works clause); (ii) that the transferor is obliged to dispatch the goods to the transferee, and fulfils the obligation by doing so (e.g., under an F-term or C-term); or (iii) that the transferor is obliged to have the goods carried to the transferee (delivery at destination; e.g., under D-terms). Combinations of these three sub-categories may occur; in particular the transferor may be obliged to carry out the transport to a certain place of shipment, e.g. a harbour, which is defined as the place of performance under the terms of the contract (e.g., under FAS or FOB).

Technically, the three categories outlined above are covered by the formula "if the contract or other juridical act, court order or rule of law involves carriage of the goods by a carrier or a series of carriers". This formula is co-ordinated with the sales law provision of IV.A.–2:201 (Delivery) paragraph (2).

Policy of the rule. The underlying idea of this paragraph is that the possession-based concept of the general delivery rule in paragraph (1) should not necessarily be decisive for the transfer of ownership. As will emerge from the subsequent Comment, the possession concept would, in carriage cases, often make the transfer dependent on which one of the parties concluded the contract of carriage with the carrier. This is considered to be too formal a criterion. Rather, delivery should take place when the transferor's obligation to deliver under the relevant legal relationship is fulfilled. This may bring about practical simplifications, such as a co-ordination with the passing of risk (although it is not proposed to strictly tie the passing of ownership to the passing of risk, which would not be reasonable, e.g., in the case of the transferee's delay in acceptance). This may further make things easier where the goods are damaged by a third party while being in transit. Letting the transfer run parallel to the performance of the transferor's obligation to deliver will presumably also appear feasible from the perspective of the parties. If not, they may agree on a different solution.

Why the delivery-concept of paragraph (1) should not govern these cases. Attempts to achieve the appropriate result under a possession-concept, as generally followed in paragraph (1), would face the difficulty that the carrier will be regarded as a limited-rights-possessor either for the transferor or for the transferee, depending on who concluded the contract of carriage with the carrier (cf. VIII.–1:207 (Possession by limited-right-possessor)). If so, in all cases where the contract of carriage was concluded with the transferor, delivery in the sense of paragraph (1), i.e. the transferor giving up and the transferee obtaining possession, would not occur before the carrier has handed over the goods to the transferee.

The problem is probably most obvious in the situation (situation (ii) in the above list) where the transferor is obliged to dispatch the goods to the transferee, and fulfils the obligation by using a carrier. Under the possession concept, the carrier could be a limited-rights-possessor for the transferor (if the latter concluded the carriage contract; e.g., under a CFR-term), the result being that the transferor would be regarded as the "possessor" in the sense of the basic delivery rule in paragraph (1) of this Article. Or, the carrier could be a limited-rights-possessor for the transferee (if the latter concluded the carriage contract; e.g., under a FOB-term), with the result that the transferee would be regarded as the "possessor" in the sense of the basic delivery rule in paragraph (1). Only in the second case would the intended result be achieved under paragraph (1).

However, the problem is not restricted to this situation (ii). There may also be situations where the transferor is able to achieve cheaper prices for transportation and the parties to the contract for sale agree, for this reason, that the transferor will negotiate and conclude the contract of carriage with the carrier, even in a situation where the parties have agreed that the obligation to deliver will be fulfilled by handing over the goods at the transferor's place of business (as in the ex-works case), but the transferor will charge the transferee with the transportation costs. It seems clear that the question of who formally concludes the contract with the carrier – and who is, therefore, to be regarded a possessor – should not be the decisive aspect. Vice versa, it is theoretically possible that the contract between the transferor and the transferee obliges the former to deliver at destination (situation (iii)) but the parties agree, for the simple reason that the transferee can achieve a better price, that the latter concludes the contract with the carrier.

Accordingly, the special rule for situations involving transport by a third party carrier covers all situations (i) to (iii).

First requirement of delivery in the sense of paragraph (2): transferor's obligation to deliver is fulfilled. Technically, paragraph (2) provides two requirements in order to achieve the effect outlined above. The first one is that the transferor's obligation to deliver is fulfilled, which refers to the terms regulating the relevant entitlement to the transfer of ownership (arising from a contract or other juridical act, a court order or a rule of law). In particular, where the transfer is based on a contract, the place of performance may follow from the terms of the contract, or from relevant default rules such as IV.A.–2:201 (Delivery) paragraph (2). This requirement implements the main policy as outlined above.

Second requirement of delivery in the sense of paragraph (2): carrier or transferee obtains possession. The second requirement is a functional equivalent to the "transferee obtains possession"-requirement in paragraph (1). In contrast to the general delivery rule of paragraph (1), however, the "transferor gives up" element is not mentioned. The reason is that where the transferor concluded the contract of carriage, the transferor would, formally, still be regarded as an indirect possessor and, hence, would not "give up" possession (as required by paragraph (1)). Therefore, the rule only provides that delivery takes place when the carrier obtains possession (i.e. in the form of a limited-right-possessor in the sense of VIII.–1:207 (Possession by limited-right-possessor)) or, which is relevant for situation (iii), the transferee obtains possession (in the sense of VIII.–1:205 (Possession)). Where the transferor's obligation to deliver requires delivery at destination but the transferee formally concludes the contract of carriage, a prior transfer of ownership is prevented by the first requirement that the transferor must have fulfilled the obligation to deliver.

Relation to rule on delivery of documents (VIII.–2:105 (Equivalents to delivery) paragraph (4). This issue is discussed more fully below, VIII.–2:105 (Equivalents to delivery) Comment E. In short, both rules are applicable without one superseding the other as a matter of principle. Unless the parties have agreed otherwise, ownership passes when the requirements of either of the rules are fulfilled.

VIII.–2:105: Equivalents to delivery

(1) Where the goods are already in the possession of the transferee, the retention of the goods on the coming into effect of the entitlement under the contract or other juridical act, court order or rule of law has the same effect as delivery.

(2) Where a third person possesses the goods for the transferor, the same effect as delivery is achieved when the third party receives the transferor's notice of the ownership being transferred to the transferee, or at a later time if so stated in the notice. The same applies where notice is given to a possession-agent in the sense of VIII.–1:208 (Possession through possession-agent).

(3) The same effect as delivery of the goods is achieved when the transferor gives up and the transferee obtains possession of means enabling the transferee to obtain possession of the goods.

(4) Where a person exercising physical control over goods issues a document containing an undertaking to deliver the goods to the current holder of the document, the transfer of that document is equivalent to delivery of the goods. The document may be an electronic one.

COMMENTS

A. General

Function of the rule. This Article concretises the short-cut term of "equivalents to delivery" used in the basic rule of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e). The Article contains four separate rules, each of them addressing one specific practical situation. Where the requirements of one of these special rules are fulfilled, this has the same effect as if "delivery" in the sense of VIII.–2:104 (Delivery) was carried out, i.e. that ownership of the goods passes unless otherwise agreed by the parties (hence the notion: "equivalent to delivery"). The rules of this Article, therefore, have the character of special default rules. If a situation covered by one of the paragraphs (2) to (4) of this Article is present, but the further requirements for bringing about an effect equivalent to delivery are not fulfilled (e.g., the goods are placed with a third party, but this third party does not receive a notice as required by paragraph (2) of this Article), the general default rule will apply and ownership will pass upon delivery of the goods themselves (unless a contrary agreement is made in the meantime).

Common characteristics of "equivalents to delivery". The four rules of this paragraph have in common that they cover a certain special situation where the goods themselves are not "moved" and no act in relation to the goods themselves occurs. However, the parties undertake other acts which typically imply the intention of carrying out the transfer of ownership and such intention will also appear to be plausible from an outside or *ex post* perspective.

Burden of proof. As with VIII.–2:103 (Agreement as to the time ownership is to pass), the burden of proof as to the fulfilment of the requirements of any of the rules provided in this Article lies with the one who invokes it. This will regularly be the transferee (or the transferee's creditors, or a sub-purchaser). With regard to the situations covered by paragraphs (2) to (4), the application of the relevant rule will be favourable to the transferee because it may bring about an earlier transfer than if the general delivery rule would have to be applied. If one of the requirements set out in these paragraphs cannot be proved, the general default rule of VIII.–2:104 (Delivery) will apply, unless the transferee succeeds in

proving that the parties have in fact concluded an agreement in the sense of VIII.–2:103 (Agreement as to the time ownership is to pass) with the content that ownership passes at the time asserted.

B. Goods already in possession of transferee (paragraph (1))

General. The rule in paragraph (1) contains a necessaary simplification of the delivery concept. Where the goods are already in the possession of the transferee, it would be too formalistic and remote from the parties' expectations (and also from third parties' expectations) to require a second act of delivery. Rather, ownership, in principle, passes when all other general transfer requirements are met; in particular, when the underlying entitlement to transfer the ownership comes into existence.

> *Illustration 1*
> Farmer B has borrowed a harvester from farmer S since his own one was not working. After handing the machine over to B, S receives an attractive offer to purchase a new harvester. As S does not need the old machine any longer, they agree that B buys the old harvester, which is currently in his possession. In the absence of any contrary agreement, ownership will pass upon the conclusion of this contract.

Comparative background. As to its basic ideas, the solution adopted in the paragraph goes back to ancient Roman law (so called *traditio brevi manu*) and is commonly accepted in the national legal systems following a delivery approach. Since the goods are in the hands of the transferee already upon conclusion of the underlying contract, the identical practical result is achieved under a consensual approach. The present paragraph is, therefore, rooted in a broad congruence within the European legal systems.

How the rule works in detail. Paragraph (1) provides that the effect of a passing of ownership is triggered by the "retention of the goods on the coming into effect of the entitlement under the contract or other juridical act, court order or rule of law". The main aspect in this formula is the coming into effect of the underlying entitlement, e.g. upon the conclusion of a contract for sale as between the parties. Ownership passes at this time. The further element of the "retention of the goods" rather has the function of fitting this "equivalent to delivery" into the framework formed by the other general transfer requirements. The retention of the goods is "based on, or referable to" the underlying entitlement to the transfer in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (2). This is intended to make the rule easier to read and apply, e.g. where the underlying entitlement arises from a rule of law.

> *Illustration 2*
> A sporting goods store (S) sells a new bicycle to buyer B. Ownership passes upon delivery. B finds that the bicycle does not work as well as it should as soon as he takes it out for his first ride and returns it to S. The problem is that incompatible parts have been fitted to the frame by an inexperienced employee of the seller, although they are all good valuable parts in perfect condition which could be used in assembling other bikes. The seller recognises the problem immediately and fits correct parts. The bike is returned to B with all the moving parts replaced. Obviously, the buyer should not be allowed to keep, and possibly sell, valuable parts in addition to getting a new bike. For this purpose, III.–3:205 (Return of replaced item) provides that a debtor (here: S) who has remedied a non-conforming performance by replacement has a right (and an

obligation) to take back the replaced item at the debtor's own expense. This rule also applies to "partial replacements" as on hand in the present example. Upon the initial handing over of the bike for repair, it might not be known whether replacement of any parts would be needed, as opposed to some adjustment. But when the seller discovers the problem when the bike is in his possession and takes off and retains the old parts and puts on the new, there is an equivalent to delivery in the sense of this paragraph because the rule of law entitling the seller to the replaced parts comes into effect in the particular situation, and the retention of the old parts is referable to this rule of law.

A transfer under paragraph (1) of this Article is, of course, subject to all the general transfer requirements; e.g., that generic goods must be identified. Where the (future) transferee holds several identical goods for the transferor (e.g., under a contract for storage in the sense of Book IV.C Chapter 5) and then concludes a contract for buying one of them, the transfer will not take place before identification.

Immanent risk: loss of security for payment. As outlined above, the approach adopted in paragraph (1) is a commonly accepted one, and it is commonly maintained that the effect produced by the rule meets the intentions of the parties. The rule does, however, imply a certain risk for the transferor: since the goods are already in the hands of the transferee, the transferor has, in principle, no possibility to withhold performance of the obligation to deliver if the transferee fails to tender the due counter-performance (cf. III.–3:401 (Right to withhold performance of reciprocal obligation)). This is not considered to be inappropriate where the underlying entitlement arises from a contract. Here, the transferor voluntarily enters into a transaction in a situation where it is obvious that the goods are in the transferee's possession. The transferor will typically be alerted to any danger and can be expected to obtain protection, if this is thought necessary, by agreeing on a retention of ownership device or other security. Where, however, the entitlement arises from a rule of law, perhaps even without the transferor being "warned" in advance, an effect of immediate transfer irrespective of the transferor's potential interests of securing a counter-performance could be unsatisfactory. However, it appears possible to solve such situations by different means, in particular by resorting to the requirement that an equivalent to delivery must be "based on, or referable to" the underlying entitlement. This is discussed in the Comments to VIII.–2:101 (Requirements for the transfer of ownership in general) to which we refer. Where the transfer is based on a court order, it may be that the court itself will take sufficient care of the transferor's legitimate interests. If not, an approach comparable to the one discussed for transfers under a rule of law could be contemplated.

C. Goods in possession of third person (paragraph (2))

(a) General

Situations covered. Paragraph (2) covers situations where the goods are under the physical control of a third party who possesses the goods for the transferor; e.g., a lessee, a storer, or a holder of a possessory proprietary security right, all of them being limited-right-possessors in the sense of VIII.–1:207 (Possession by limited-right-possessor). The transfer is intended to be brought about without immediately delivering the goods from this third person to the transferee. Accordingly, "delivery" in the sense of the basic rule of VIII.–2:104 (Delivery) paragraph (1) will not take place. Rather, it is intended that the goods will remain with the third person for the time being. Paragraph (2) provides that the transfer can be made by the transferor giving notice to the third party in possession. The same principles apply where physical control is exercised in the capacity of a possession-agent in the sense of VIII.–1:208

(Possession through a possession-agent), e.g. by an employee (who is not treated as a possessor under the definition provided by the latter rule).

Illustration 3
S has leased her goods to X for a period of one year. After eleven months, S sells the goods to B. B may acquire ownership if S gives notice to X that ownership is transferred to B.

Illustration 4
Car dealer S sells a car to B subject to reservation of ownership. The purchase price is financed by the bank X which regularly co-operates with S in such matters. In turn, S's retained ownership is to be transferred to X as security for payment. Since administration takes some time, the car is already delivered to B when X pays the price to S. S may transfer the retained ownership to X by giving notice to B.

Comparative background. The situation covered by paragraph (2) of this Article is not subject to explicit regulation in all European legal systems. In those (delivery-based) legal systems where the issue is regulated, the main concepts are that ownership is transferred either (i) by giving some kind of notice or order to the third party holder (sometimes with additional requirements), which seems to be the solution in the majority of tradition-systems; or (ii) by assigning the transferor's (contractual) right to recover the goods to the transferee (by an assignment in the sense of Book III Chapter 5). Under the latter concept, it is not required that the third party holder is informed about the transfer of ownership (although such information is regularly given in practice).

Both notice approach and assignment approach possible under these model rules. As to substance, these model rules accept both approaches outlined in the previous Comment. The notice approach is explicitly adopted in paragraph (2) of this Article. Covering the assignment approach, on the other hand, does not require adopting a specific rule: it is already covered by VIII.–2:103 (Agreement as to the time ownership is to pass) which, as a general rule, also applies where the goods are in the hands of a third person. Strictly speaking, the concepts are of course not fully identical. But comparably to parties agreeing that the transferor henceforth exercises possession for the transferee (*constitutum possessorium*), the agreement on assigning (at once or at a later time) a contractual right to recover the goods from a third party exercising possession for the transferor will typically imply an agreement that ownership of the goods will, as from that time, rest with the assignee. Alternatively, the parties (transferor and transferee) could even confine themselves to concluding an agreement that ownership will pass at any time when the goods are in possession of a third person, without issuing any notice or making any act of assignment (VIII.–2:103 (Agreement as to the time ownership is to pass)). Talking in terms of harmonisation, covering both the notice approach and the assignment approach also has the advantage that parties from all European countries could continue their practices as they are used to do. Taking into account that publicity is not considered to have central importance under the approach adopted in this Chapter, the fact that alternative methods can be applied and that the third party exercising physical control does not necessarily know who is the legal owner of the goods does not appear to cause major problems. Practically, the parties to the transfer will regularly inform the third party possessor anyway.

(b) The rule in detail

Notice. The term "notice" in this paragraph is to be understood in the sense of the general rule of I.–1:109 (Notice). The notice can be given by any means appropriate to the circumstances. In general, it becomes effective when it reaches the addressee and it can be revoked up to this time. Giving notice is, like making delivery of the goods themselves, intended to be a voluntary act. As to its content, the notice in the sense of this Article has the character of information. It states that ownership passes from the transferor to the transferee. The notice in the sense of this paragraph is not an "order" to which the third party is bound, and the rule does not require that the addressee must make any declaration of consent or "acceptance". When the third person exercising control over the goods receives the notice (before its receipt, the notice could still be revoked), the transferor has made a clear voluntary statement giving up control of the goods, comparable with conduct constituting delivery.

Person giving the notice. Paragraph (2) requires that it is the transferor who issues the notice to the third party. This corresponds to the general idea that the transfer must be based on a voluntary act. If the transferee could also give this notice, the transferor would be deprived of the possibility of withholding performance if the other party fails to pay (cf. III.–3:401 (Right to withhold performance of reciprocal obligation)). Also, the situation could remain somewhat doubtful, which of course would be unsatisfactory in terms of publicity, if publicity was considered a basic principle. But the aspect of clarity appears to carry weight even though publicity is not held to be very important, simply because of the practical difficulties a default rule like this could create for the third party exercising control if the transferor subsequently claims the contrary. The default rule should mark a rather clear case. Where notice is given by the transferee, it is still possible for the parties (in particular, the transferee) to prove that a valid entitlement to transfer and an agreement as to ownership passing while the goods are in the hands of the third party exist (VIII.–2:103 (Agreement as to the time ownership is to pass)). But this requires the providing of evidence as to the existence of such an agreement, or that other acts have been undertaken from which such an agreement can be implied, e.g., an assignment of the contractual right to recover possession of the goods.

Person receiving notice. Notice must be given to the person exercising possession (e.g., a warehouse keeper, or secured creditor). Sentence 2 is added in order to cover possession-agents in the sense of VIII.–1:208 (Possession through a possession-agent), e.g., employees, who, for reasons irrelevant in the present context, are not defined as "possessors".

Time of transfer. Under the default rule of this paragraph, the transfer takes place at the time when the third party in possession receives the notice, or at any later time stated in the notice. The transferor's act of issuing the notice is not regarded sufficient, *inter alia* because the notice could be revoked until received by the addressee.

Relation to rule on delivery of documents (paragraph (4) of this Article). In particular where goods are stored in a warehouse, it may happen that the warehouse keeper issues a document containing an undertaking to deliver the goods to the current holder of the document. If so, the question arises how paragraphs (2) and (4) of this Article relate to each other. This issue is discussed more fully below. In short, both rules are applicable without one superseding the other as a matter of principle. Unless the parties have agreed otherwise, ownership passes when the requirements of either of the rules are fulfilled.

Effect on position of third party in possession. This paragraph is not intended to affect negatively the legal position of the third party exercising physical control. These model rules contain provisions which have the effect that the legal position of a third party in possession does not deteriorate through a transfer based on this paragraph (or a transfer by agreement, e.g., where the parties agree on an assignment of the transferor's contractual right to the return of the goods). For instance, where the third party holder is a lessee, IV.B.–7:101 (Change in ownership and substitution of lessor) provides that the new owner of the goods is substituted as a party to the lease if – which is fulfilled in the situations relevant in the present context – the lessee has possession of the goods at the time ownership passes. Where an assignment of the transferor's contractual rights against the third party possessor is involved (which may also be the case in situations covered by paragraph (2) of this Article, if the assignor gives notice to the third party), III.–5:116 (Effect on defences and rights of set-off) paragraph (1) provides that the debtor (i.e. the third party possessor) may invoke against the assignee all substantive and procedural defences which the debtor could have invoked against the assignor. In addition, where the third person is a storer in the sense of Book IV.C Chapter 5, IV.C.–5:106 (Payment of the price) provides that the storer may withhold the thing until the client pays the price, for which purpose III.–3:401 (Right to withhold performance of reciprocal obligation) applies accordingly. Finally, if the third party exercising possession does so based on a limited proprietary right, this right is – so to say by definition – valid as against the acquirer.

D. Delivery of means enabling the transferee to obtain possession of the goods (paragraph (3))

Basic idea; means. "Means enabling the transferee to obtain possession of the goods", in the sense of this provision, are for instance: keys to a room, container or stockroom where the goods are stored; keys to a safe; or other tools providing access to the goods. By acquiring possession of such means, the transferee is given the possibility of assuming physical control of the goods themselves at any time. The transferee is put in a similar position as if physical control of the goods themselves had been given. Accordingly, the provision of such means is given an effect equivalent to delivery in the sense of VIII.–2:104 (Delivery) paragraph (1) provided that the transferor, on the other hand, gives up access. The difference basically is that the transferee's actual taking over of the goods themselves may happen later. But the exclusive possibility of doing so draws a sufficiently clear picture.

Therefore, it is maintained that, unlike in a minority of European legal systems, this rule should not be restricted to cases where corporeal delivery is impossible or impracticable.

Comparative background. Most European legal systems do not contain an explicit rule comparable to this Article. Some cases may be covered by the general delivery rule. For the sake of clarity, this Article nevertheless adopts the approach in a separate paragraph.

Transferor giving up, and transferee obtaining, possession of the means. Corresponding to the basic delivery rule in VIII.–2:104 (Delivery) paragraph (1) the default rule provided for in the present paragraph requires that the transferor gives up possession of the means of access to the goods, and the transferee obtains possession of such means. The latter aspect does not seem to raise additional issues to those already discussed in the Comments to VIII.–2:104 (Delivery). The aspect of the transferor giving up possession requires further discussion. E.g., in case there are two keys to the place where the goods are stored and the parties agree that only one of them should be handed over to the transferee, the requirements

of this provision are intended not to be met. Neither from the perspective of the parties to the contract nor from the perspective of an independent person, like a judge assessing the case, is it sufficiently clear that the transferor has lost access to the asset. The parties could, in such a case, transfer ownership pursuant to VIII.–2:103 (Agreement as to the time ownership is to pass) and make sure that they can provide evidence for such an agreement. Where, on the other hand, the transferor secretly keeps one of the existing keys whereas the transferee thinks that all existing keys have been handed over, an exception seems to be justified and ownership should pass. There is no reason to protect the transferor (or the transferor's creditors) in such a situation.

Codes (pure information). Where the transferor, instead of handing over keys or other physical tools, communicates a code (e.g., a combination of numbers or letters) providing access to the goods, there is no full parallel to corporeal tools, which are first held only by the transferor and then only by the acquirer. Information, at least the knowledge of a code, often cannot be deleted; the transferor cannot "forget on demand". However, not subsuming codes under "means" in the sense of this paragraph would probably neglect the practical needs of current commerce. And if codes were excluded here, the next question would immediately be whether telling a code has to be seen as an "agreement as to the time ownership is to pass" in the sense of VIII.–2:103 (Agreement as to the time ownership is to pass), which is rather likely unless another purpose for providing the code is shown (such as access only for test purposes or inspection). Hence, it is proposed not to exclude codes and comparable means from this paragraph, the term "means" apparently being broad enough and open to future technical developments. The reference to "giving up possession", which partly does not seem to fit so well with information, may, however, favour the interpretation that telling a code is sufficient only when it is clear from the circumstances that the transferor will not make use of it any more. This may be the case, e.g., where it is envisaged that the transferee will change the code immediately.

E. Transfer of document containing the undertaking to deliver the goods (paragraph (4))

General. In commercial practice, it often happens that a transfer of goods is linked to the transfer of certain documents, e.g. a bill of lading or a warehouse keeper's warrant. The dogmatic perception, as well as the accepted number of such documents varies to a certain degree. In some legal systems, it is stressed that the main function of such documents is to provide (and transfer) constructive possession of the goods represented by them. In others, it is maintained that where certain, strictly limited types of such documents are issued, the right to the goods can be transferred only by transferring the document, so that the transfer of such documents replaces delivery. Some legal systems tend to accept a more open list of documents available for these purposes, and may allow the list to be extended by local practices. Some countries now accept electronic documents, others do not. In relation to some of these documents, the term "document of title" has become common, perhaps, however, with slightly different implications in different legal systems. In preparing the present provision, therefore, choices had to be made, in particular, as to whether the list of accepted types of such documents should be an open one or a cosed one and as to how this provision should relate to other transfer rules adopted under this Chapter.

Open list, electronic documents included. The approach adopted in paragraph (4) of this Article is based on an open list of documents, which is considered to fit better to the needs of commercial practice and is open to future developments. Sentence 2 of this paragraph clarifies

that it makes no difference whether the document is of physical or electronic nature. This is in line with recent developments (cf., for instance, Article 17 UNCITRAL Model Law on Electronic Commerce). The open list approach also fits better to the broad party autonomy rule provided by the present Chapter, under which the parties can, anyway, agree on any time for the transfer to take place (unless that rule were agreed to be restricted in relation to transfers by documents).

Requirements as to the document. Paragraph (4) provides two requirements as to the documents covered. First, a document within the meaning of this rule must be issued by the person exercising physical control over the goods. This may, e.g., be a warehouse-keeper or a carrier. Second, as to the content of the document, the rule just names the basic element one can find with all such documents, namely that they contain the undertaking to deliver the goods to the current holder of the document.

Transfer of goods upon transfer of documents. Different to other default rules, paragraph (4) does not link the transfer of the goods to giving up, and obtaining, possession of the goods themselves or means providing access to them, but to the "transfer" of a related document. However, "transfer" in the sense of this Article also implies that there must be a voluntary act of giving up control over the document, and that the transferee obtains control over the document (so that, e.g., stealing the document does not transfer any right). Regarding some kinds of documents, there may, however, exist additional prerequisites for transferring them; in particular, endorsement may be required. Such additional requirements are not defined in the present paragraph; this obviously would not make sense. However, it is essential that without all requirements for a valid transfer of the document being fulfilled, there can be no transfer effect as to the goods themselves. This is intended to be taken care of by the "transfer of that document" formula. The formula has to be applied flexibly, taking into account the modalities of the relevant system, when electronic documents are used.

Relation to other transfer rules: no exclusivity of transfer by document. When examining the European legal systems, the question arises whether certain other forms of transfer should be restricted or even excluded once a "document of title" has been issued. Under German law, for instance, a transfer by assignment of the right to recover the asset from a third party is restricted in so far as such a transfer is said to require (also) the transfer of the document, in order not to undermine the rules on a transfer by documents of title. With regard to the rules adopted in this Chapter, the question of how paragraph (4) of this Article relates to other transfer rules arises basically with regard to: VIII.–2:103 (Agreement as to the time ownership is to pass), including implied agreements where the contractual right to get the goods delivered is assigned; VIII.–2:104 (Delivery) paragraph (2) for cases involving an independent carrier; and paragraph (2) of the present Article, under which goods in possession of a third party can be transferred by notice. The solution inherent in the rules of this Chapter is that paragraph (4) does not exclude any of these other transfer rules. Ownership will, therefore, pass once the requirements for either of these rules are fulfilled, always subject to any contrary agreement made by the parties. This is based on the broad application of the party autonomy principle as well as on the broad coverage of documents within paragraph (4). Also, practical experiences show that exclusively embodying any possibility to transfer goods in a specific document may have its downsides. E.g., where goods are transported by ship and the ship reaches its destination before the bill of lading arrives, there may be a practical need to deliver the goods to the transferee in order to avoid unreasonable costs which could arise if the ship had to await the arrival of the bill of lading. The cargo is handed over to the transferee against a letter of indemnity in order to secure the carrier against liabilities which

could arise from effecting delivery before the bill of lading is presented. For such situations, it should, for example, also be possible to transfer ownership by giving notice under paragraph (2) of this Article or by letting the parties agree on another suitable time.

This approach also appears acceptable with regard to other practical results. Where there is only one seller and one buyer (i.e., a two-party constellation) and a document containing the undertaking to deliver to the person presenting this document has been issued, there do not seem to be any substantive obstacles against allowing the parties to agree on a passing of ownership prior to, or later than, handing over the document.

In three-party constellations, where the transferor purports to transfer the same goods two times to different buyers (e.g. by transferring under an agreement as to time to the first buyer and by handing over a document to the second buyer; or by handing over one document to the one and another to the other buyer), problems can be solved by the regular rules on double disposition (cf. VIII.–2:301 (Multiple transfers)): The first transfer is valid, the second one is undertaken by a non-owner, so that the second buyer does not acquire ownership from the seller, but could possibly acquire based on the rules on good faith acquisition. This is a general issue, not a specific problem of a transfer by documents. In practice, it may turn out that there is only little risk of a conflict between two different buyers, one of them receiving the document and the other acquiring the goods themselves, not knowing that there is any document, where the goods are held by specific types of third parties. Depending on the circumstances, a potential transferee may expect from the third party's type of business that this person will usually issue documents. If so, and goods are offered without related documents being presented, the buyer may have reason to be suspicious and may wish to check with the third party before proceeding further. The third party, on the other hand, once it has issued such a document, will ensure in its own interest that only the buyer who can present the document can take delivery.

F. Acts not covered

Handing over single items only symbolising a bigger entity no equivalent to delivery. This Article – and, in particular, paragraph (3) of this Article – does not cover the physical handing over of single items which only symbolise a bigger entity, without enabling access to and physical control over the entire assets. Examples would be handing over one book of a library (*pars pro toto*) or handing over car documents only, without the keys and the car itself. There is no sufficient act of giving up possession in relation to the rest of the entire object or objects. However, such an act may be accompanied by an agreement that ownership is to pass at the time of this symbolic act. Where such intention can be proved, the transfer will already follow from VIII.–2:103 (Agreement as to the time ownership is to pass) so that a separate default rule is not necessary.

Marking the goods for the transferee no equivalent to delivery. In a minority of European legal systems, the same effect as delivery is achieved where the goods are marked for the transferee, e.g. by putting a plate on the goods, at least where it is impossible or unreasonable to hand them over physically. Such a rule is not adopted in the present Article. Such cases are left to VIII.–2:103 (Agreement as to the time ownership is to pass). However, the fact that the goods have been marked may make it easier to prove that such an agreement has been established.

Section 2: Effects

VIII.–2:201: Effects of the transfer of ownership

(1) At the time determined by Section 1, ownership passes within the limits of the transferor's right or authority to dispose, with effect between the parties and with effect against third persons.

(2) The transfer of ownership does not affect rights and obligations between the parties based on the terms of a contract or other juridical act, court order or rule of law, such as:

(a) a right resulting from the passing of risk;
(b) a right to withhold performance;
(c) a right to fruits or benefits, or an obligation to cover costs and charges; or
(d) a right to use or an obligation not to use or otherwise deal with the goods.

(3) The transfer of ownership does not affect rights of or against third parties under other rules of law, such as:

(a) any right of the transferor's creditors to treat the transfer as ineffective arising from the law of insolvency or similar provisions; or
(b) a right to claim reparation under Book VI from a third party damaging the goods.

(4) Where ownership has been transferred but the transferor still has a right to withhold delivery of the goods (paragraph (2)(b)), terminating the contractual relationship while exercising the right to withhold performance has retroactive proprietary effect in the sense of the following Article.

COMMENTS

A. General

Function of Section 2 in general. After the general requirements of a transfer of ownership have been set out in the previous Section 1 of this Chapter, the present Article deals with the effects such a transfer has in general. The two subsequent Articles deal with specific further issues related to the effects of a transfer, namely with the impact of possible defects occurring either upon the conclusion of the contract and with the effects of different types of rights to "set aside" a contract or contractual relationship (VIII.–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation)), and with the effects different kinds of conditions may have on a transfer (VIII.–2:203 (Transfer subject to condition)). Partly, these provisions supplement the general transfer requirements as set out in VIII.–2:101 (Requirements for the transfer of ownership in general) and placing some of these rules in Section 1 would have been equally reasonable.

Function and structure of the Article. Paragraph (1) of this Article spells out the general effects linked to the fulfilment of the transfer requirements set out in Section 1. As will be discussed more fully below, it basically implements a unitary transfer approach, meaning that one specific point in time is decisive for the passing of various "aspects" linked to the right of "ownership". The following paragraphs (2) and (3) are intended to serve a clarifying function, in order to avoid misunderstandings as to the range of this unitary approach. These rules correspond with the law of many European legal systems and, depending on one's background and perspective, may perhaps be regarded as superfluous. However, since the starting points and traditions as to the transfer of movable property are so different in Europe,

including provisions of such a clarifying character is considered appropriate. Besides these clarifying provisions, this Chapter is also open to exceptions from the unitary starting point. Paragraph (4) of this Article, which provides a specific effect where the transferor terminates the contractual relationship while the goods are retained after ownership has already passed, is one of these instances.

B. Effects of transfer in general (paragraph (1))

(a) General

Reference to time; unitary transfer approach. Paragraph (1) of this Article, in conjunction with the definition of "ownership" contained in VIII.–1:202 (Ownership) and the basic rule of VIII.–2:101 (Requirements for the transfer of ownership in general), is one of the basic provisions in implementing the "unitary" transfer approach – or perhaps rather: the unitary-nucleus approach – adopted in this Chapter (cf. section (b), below). For a general description of the "unitary" approach as opposed to a "functional" transfer approach, see the Comments on VIII.–2:101 (Requirements for the transfer of ownership in general). In principle, the rules of Section 1 define one specific moment in time for the transfer of ownership; namely the point in time when all requirements set out in Section 1 are fulfilled. This moment depends on the individual facts of each case, e.g., on whether the parties have agreed on a specific time when ownership is to pass and on whether the goods exist and are identified at that time; or, on whether the goods have already been delivered or on the fulfilment of the requirements for any equivalent to delivery. At this point in time, "ownership" in the sense of VIII.–1:202 (Ownership) passes to the transferee.

Reference to transferor's right or authority to dispose. A transfer of ownership under this Chapter requires the transferor's right or authority to transfer the ownership; see VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(c). The transferor's right or authority to dispose may, however, be limited in other respects. For example, where the goods are encumbered with an effective proprietary security right of a third party, ownership of the goods may well be transferred, but the encumbrance prevails. Equally, where the goods are encumbered with a third person's proprietary right to use and the transferor is not permitted, by the holder of this right, to transfer the goods free of this encumbrance, the transferor's right or authority to dispose will be "limited", in the sense of this paragraph, with respect to this right to use. In other words, the rule is a special application of the *nemo dat* principle.

(b) Range of the unitary-based approach

Effect as between the parties and effect against third parties. When ownership passes, it passes entirely. There is, as such, no distinction between an "effect as between the parties" (however defined) and an "effect against third parties" (whoever covered). As to its content, the rule implicitly refers to the definition provided for in VIII.–1:202 (Ownership). The former owner loses, and the transferee acquires, the exclusive right to use, enjoy, modify, destroy, dispose of and recover the property. This exclusive attribution is, on the one hand, protected by property law remedies; cf. VIII.–6:101 (Protection of ownership). This includes protection as against third parties who, like a thief, unlawfully possess or use the asset, but also implies, in particular, protection as against the general creditors of the other party to the transaction. The element of exclusive attribution is, on the other hand, also a key link to other areas of private law, if autonomously chosen so by the rules governing these areas. In particular, unjustified enrichment law under Book VII ties itself to this kind of protected exclusivity and the right-holder's entitlement to prevent infringements or adverse interference

(cf. VII.–3:101 (Enrichment) Comment B). Similarly, the rules on non-contractual liability for damage provide that loss caused to a person as a result of an infringement of that person's property right is legally relevant damage. The latter rule is, in full coherence with the implications of "ownership" in the sense of this Book, further specified in that "loss" includes being deprived of the use of the property, and in that an "infringement" of a property right includes destruction of or physical damage to the subject-mater of the right (property damage), disposition of the right, interference with its use and other disturbance of the exercise of the right (VI.–2:206 (Loss upon infringement of property or lawful possession)). For a discussion of the underlying policy considerations for choosing the present non-mandatory delivery approach in relation to these aspects, see the Comments on VIII.–2:101 (Requirements for the transfer of ownership in general).

Law of obligations may provide its own effects. As will be discussed more fully in the Comments on paragraphs (2) and (3) of this Article, the concept of "ownership" and the rules on the passing of ownership do not "absorb" issues regulated by other parts of law, in particular by the law of obligations as provided by other Books of these model rules. For instance, the rules on the passing of the risk under a contract for sale, being a question of the effect of external events on the rights and obligations existing between the two parties, are covered by Chapter 5 of Book IV.A and are not affected by the rules on the passing of ownership.

Some exceptions from unitary approach adopted under this Chapter. Also, this Chapter adopts a few exceptions to the basic unitary approach where this, with regard to concrete interests involved in the specific situations, is found more appropriate than sticking to the general approach. One example is paragraph (4) of this Article; others can be found with regard to double dispositions (VIII.–3:101 (Multiple transfers)) and a buyer's right to become owner by paying although a seller who has retained ownership becomes insolvent (VIII.–2:307 (Contingent right of transferee under retention of ownership).

No accountability linked to ownership. Since this issue was subject to discussions during the drafting process of this Book and could provoke misunderstandings if not clarified explicitly, it should be stressed that ownership as such, or the transfer of ownership, does not by itself create any liability for damage caused to another by the object of the transfer. Under these model rules, the fact that a person is the owner of a piece of property does not constitute accountability. This is so under Book VI of these model rules, and Book VIII does not intend to change anything in this respect.

Tax law issues not intended to be decided. Also, it should be clarified that this Book does not intend to decide issues of tax law. Tax law may decide autonomously which facts are essential for the respective taxation purposes. It may follow the classification of who is to be regarded as an owner under the private law rules, but it may decide to follow other approaches, e.g. taking a more economic perspective.

C. Clarifications as to relation to rights and obligations between the parties (paragraph (2))

General. The purpose of this rule, as well as of the following paragraph (3), is to clarify that, although Chapter 2 basically follows a "unitary" transfer concept, the unitary concept does not govern all issues one can think of. With regard to the internal relation between the transferor and the transferee, contract law rules or an interpretation of the individual terms of

a contract can lead to partially different results. The same applies where the legal relationship has a basis other than a contract (i.e., a unilateral juridical act, court order or rule of law) and relevant provisions exist. The list in paragraph (2) provides an indication of rules which may become relevant in this respect. The list is not conclusive ("such as"). For instance, a right of stoppage in transit, where this has a contractual character under the applicable law, or a right to "suspend" performance after delivery (such as under Article 71 (2) CISG)), will, as between the transferor and the transferee, not be affected by the rules on a transfer of ownership.

Risk (subparagraph (a)). The passing of the risk, e.g. under a contract for sale, is not characterised as a property law issue under these model rules. It merely affects the rights and obligations in the internal relation as between transferor and transferee; in particular whether a buyer must pay the price although the goods will not be received due to a fortuitous event. As to contracts for sale, these issues are regulated in Chapter 5 of Book IV.A. and are not affected by the rules on the transfer of ownership.

Right to withhold performance (subparagraph (b)). The general rule of III.–3:401 (Right to withhold performance of reciprocal obligation) entitles a party to a contractual or other legal relationship to withhold performance provided certain prerequisites are fulfilled. Subparagraph (b) clarifies that this right is not affected by the rules on the transfer of ownership.

Internal distribution of fruits and benefits, internal distribution of costs and charges (subparagraph (c)). The parties may, irrespective of when ownership passes under the rules of this Chapter, agree that, e.g., certain fruits or benefits derived from the object of transfer will go to the transferor, or the transferee, respectively. For example, where a pregnant cow is sold, the parties may agree that the calf will belong to the buyer, no matter whether it is born before or after the ownership of cow passes. This agreement has binding effect on the parties, but where, e.g., the seller becomes insolvent before the cow has been transferred, the question of whether the seller's creditors can lay their hands on the cow as well as on the calf will be decided by the property law rules of this Chapter. Further, the parties may internally regulate who shall bear the costs of maintaining the goods until ownership is transferred. This question is not necessarily reserved to property law.

Internal right to use, or obligation not to use (subparagraph (d)). Also, the terms of the contract (or other legal basis) may provide a right to use, or an obligation to abstain from using, the goods as between the parties. For instance, where a new car is sold but will be delivered only later, the contract may provide that the seller, notwithstanding that ownership is to pass upon delivery, is not allowed to use the car, because this would cause a decrease in value and would create the risk of the car being damaged before delivery.

D. Clarifications as to rights of or against third parties (paragraph (3))

General. In a similar way, paragraph (3) clarifies that other parts of the law regulating rights of or against third parties are not deactivated by the transfer rules, but may, in turn, prevail and lead to a different solution than what would be arrived at when linking the issue to the transfer rules. The two subparagraphs of this paragraph provide important examples.

Transferor's creditors' right to treat transfer as ineffective (*actio Pauliana* and similar concepts). National insolvency laws usually provide creditors with a right to treat certain transactions made by the debtor as ineffective, provided that they have been to the detriment of the creditors, that they have been carried out within a certain time before the opening of insolvency proceedings and that certain additional requirements are fulfilled. Such additional requirements may be, e.g., that the other party to the transaction intended to put the creditors at a disadvantage; that the other party knew of the debtor's insolvency; or that the transfer was gratuitous. In some countries, a creditor may exercise such a right even outside bankruptcy proceedings. These rules serve important purposes with which this Book does not intend to interfere. This is clarified by subparagraph (a) of this Article.

Right to claim reparation under Book VI from a third party damaging the goods where person suffering economic loss is not the owner (subparagraph (b)). This subparagraph refers to situations where the party who is not (yet) the owner suffers an economic loss due to a third person damaging the sold goods. In particular, this issue occurs where the transferor is still the owner of the goods but the transferee already bears the risk of loss. This may be the case because of an agreement established between the parties, or where a buyer fails to take over the goods in good time (cf. IV.A.–5:102 (Time when risk passes) Comment C). The purpose of subparagraph (b) is to clarify that the fact that ownership of the goods has not yet passed to the transferee does not prevent the latter from claiming damages from the third party who causes the damage. That the transferee may do so already follows from the regime of Book VI. The transferee will, in such a case, suffer a "loss resulting from a violation of an interest worthy of legal protection" in the sense of VI.–2.101 (Meaning of legally relevant damage) paragraph (1)(c). The transferor, on the other hand, whereas still being "the owner", will not be considered to have suffered a "*loss caused as a result* of an infringement of that person's property right" in the sense of VI.–2:206 (Loss upon infringement of property or lawful possession) paragraph (1). Accordingly, the transferee, who must pay the price to the seller but does not receive the goods (or only receives goods in a damaged condition), will have a right to reparation against the third party who caused the loss by damaging the goods. This, also, is supported by the "considerations of public policy" provision in VI.–2:101 (Meaning of legally relevant damage) paragraph (3), as it would not be fair and reasonable to let the third party escape from liability. Again, the property law level is not decisive for the outcome of the case.

E. Effect of termination exercised when withholding delivery after transfer of ownership (paragraph (4))

General; situations covered. The rule in paragraph (4) can be said to constitute an exception from the general unitary approach. Technically, it does so by providing a specific effect where the transferor terminates the contractual relationship in a specific situation, namely where the delivery of the goods may be withheld by the transferor but ownership has already passed to the transferee based on an agreement. The rule could also be described as a special provision dealing with the transferor's protection against the transferee and the transferee's creditors, under which the question who owns the goods is not decisive. The rule envisages situations like the following.

> *Illustration*
> Seller and buyer agree that the goods will be stored at the seller's premises for three weeks after the conclusion of the contract. As the buyer wants to be safe from the risk of the seller's insolvency, they agree on an immediate transfer of ownership. Payment

(covering the price for the goods as such and additional storage costs) is to be made when the goods are physically delivered three weeks later. But the buyer does not pay.

Transferor still has a right to withhold delivery of the goods. Whether the transferor, despite the fact that ownership has already passed to the transferee, still has a right to withhold delivery of the goods is a matter of contract law, not a matter for this Book. See the general rules provided by III.–3:401 (Right to withhold performance of reciprocal obligation). Under a contract for the sale of goods in the sense of Book IV.A, the seller, among others, has to perform two main obligations –transfer the ownership of the goods and deliver the goods. Whereas the obligation to transfer the ownership is already fulfilled in the cases covered by this paragraph, the obligation to deliver the goods is not fulfilled. It appears, therefore, that the transferor is entitled to withhold delivery until the reciprocal obligation of paying the purchase price is fulfilled or payment is tendered. The text of the paragraph makes reference to paragraph (2)(b) of this Article, where it is stated that the existence of such a right to withhold performance is not affected by the rules on the transfer of ownership.

Termination of the contractual relationship. The technical vehicle of providing protection to the transferor in such situations is providing a special effect to the termination of the contractual relationship. Usually, it will be the transferor who terminates the contractual relationship for the other party's failure to pay. However, the rule is not restricted to this situation. It should also apply where the parties, in a situation as described above, mutually agree to terminate the contractual relationship. It should also apply where the transferee is insolvent and the insolvency administrator decides to "terminate" the contractual relationship which is, at the time of the commencement of the insolvency proceedings, not fully performed by both of the parties.

Retroactive proprietary effect of termination. Paragraph (4) provides that in the situations covered by this rule, termination – exceptionally – has retroactive proprietary effect. The concept of such retroactive proprietary effect is defined in VIII.–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation) paragraph (2). Ownership is treated as never having passed to the transferee. This is an exception in so far as in all other situations, termination has no such retroactive proprietary effect, but only triggers an obligation to re-transfer the ownership to the (former) transferor (cf. VIII.–2:202 (3)).

This approach is chosen for practical reasons. Where the contract with the original transferee fails, the transferor will have to sell off the goods to another buyer (and seek to recover any loss from the original transferor). The transferor would find it difficult to attract other buyers if he could not dispose of the goods and confer good title immediately. Becoming the owner immediately upon termination, the transferor will regain the right to dispose. As far as this effect is concerned, the same result could also be achieved if ownership re-vested in the transferor immediately, but without retroactive effect. The concept of retroactivity is, however, needed to give the transferor priority over sub-purchasers of the transferee, if the transferee has sold and transferred the goods to a third person before receiving delivery and paying the price. Where the transferee has not paid for the goods and the transferor still possesses them, it appears preferable to let the transferor (who has only transferred ownership in order to give the transferee security in case the transferor should become insolvent) prevail over such third party sub-purchasers. Finally, the retroactive proprietary effect of termination also provides protection to the transferor in case the transferee becomes insolvent.

Since the effect of termination in general and the concept of "retroactive proprietary effect" are, in general, only regulated in the following Article VIII.–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation), this paragraph could have been placed in that Article. However, it is placed here because the context is the transferor's right to withhold performance.

F. Note on transferor's right of stoppage in transit

Right of stoppage in transit not explicitly provided for. These model rules – neither in Books III, IV.A nor VIII – do not contain any provision on a right of a seller (transferor for value) to stop the transport of goods which have already been handed over to the carrier – so that ownership of the goods may already have passed to the transferee – but which have not yet been handed over to the transferee, for the reason that payment has not been made properly or the risk exists that proper payment will fail. Many European legal systems provide for such a right of stoppage in transit. As to its technical construction, as well as with regard to its effects (only as between the parties, or also against third parties), however, the respective rules differ. Partly, these provisions are part of sales law; in other countries, they are part of insolvency law. In the latter legal systems, the buyer being insolvent is an indispensable requirement for the rule to apply; in others, something like a strong indication of a risk of non-performance suffices. Also, there are countries which have abolished this kind of right, mainly because recent experience showed that there was not much practical need for it any longer, since most often, the seller secures the right to payment by means of a retention of ownership device or a documentary letter of credit.

At a rather late stage of the drafting history of this Chapter, there was some discussion whether a right of stoppage in transit should be adopted in Book VIII, in the present Article. There was, however, no clear view on whether such a right is practically needed today or not. In the end, no provision was adopted in the present context. However, this does not mean that this Book would not acknowledge such a right. Where sales law provisions are applied which contain a right of stoppage in transit, it will be accepted by paragraph (2) of this Article. Where it is provided by insolvency law rules, it may fall within paragraph (3).

VIII.–2:202: Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation

(1) Where the underlying contract or other juridical act is invalid from the beginning, a transfer of ownership does not take place.

(2) Where, after ownership has been transferred, the underlying contract or other juridical act is avoided under Book II, Chapter 7, ownership is treated as never having passed to the transferee (retroactive proprietary effect).

(3) Where ownership must be re-transferred as a consequence of withdrawal in the sense of Book II, Chapter 5, or termination in the sense of Book III, Chapter 3, or revocation of a donation in the sense of Book IV.H, there is no retroactive proprietary effect nor is ownership re-transferred immediately. VIII.–2:201 (Effects of the transfer of ownership) paragraph (4) remains unaffected.

(4) This Article does not affect any right to recover the goods based on other provisions of these model rules.

COMMENTS

A. General

Function of the rule. In its paragraphs (1) and (2), this Article repeats and further clarifies the "causal" transfer approach already implemented by VIII.–2:101 (Requirements for the transfer of ownership in general) paragraphs (1)(d) and (2). The present Article makes this approach most explicit by directly spelling out its effects; in particular, by defining the concept of a retroactive proprietary effect in paragraph (2). The latter concept is also referred to by the other Articles of this Section. Paragraph (3), then, spells out that other remedies bringing a contractual relationship to an end, namely withdrawal, termination and revocation of donation, do not trigger such retroactive proprietary effect. It appears advisable to state this explicitly since in a couple of legal systems, the termination of a contractual relationship and the revocation of a contract for donation traditionally have retroactive proprietary effect. This Article, thereby, comprises a compilation of the effects of all these remedies in property law.

B. Initial invalidity and subsequent avoidance (paragraphs (1) and (2))

General. Paragraphs (1) and (2) both concern cases where the underlying entitlement is affected by a "defect" from the beginning, either causing it to be invalid all the time or to be valid for the time being, but becoming invalid retrospectively upon avoidance. The rules correspond to a widespread approach in many European countries that, where such defects affecting the "root" of a contract are present, the transfer cannot have effect under property law.

Initial invalidity (paragraph (1)). Paragraph (1) covers all cases where the underlying entitlement to transfer ownership (VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(d)) is invalid from the beginning. This may be the case, for instance, where the underlying contract was concluded by an agent without authority, or where the contract is invalid under the relevant rules of national law because one of the parties was subject to incapacity when concluding the contract. Further, the rule will apply where the underlying contract is void under II.–7:301 (Contracts infringing fundamental principles). As to the effect of nullity under the latter provision, II.–7:303 (Effects of nullity or avoidance) paragraph (2) refers to Book VIII. It is clarified that no transfer of ownership can take place

where the underlying entitlement is subject to such nullity, irrespective of whether this is found out before, or after delivery or any other act required for a transfer is carried out.

Obviously, this rule is most important where the underlying entitlement is based on a contract. It also, however, covers entitlements by virtue of any other juridical act, court order or rule of law, although the latter issues may be of rather academic nature. Whether a defect affects a court order or a rule of law in a way causing the entitlement to be "invalid" or "voidable" in the sense of this Article must be decided by the applicable (national) law.

Subsequent avoidance (paragraph (2)). Paragraph (2) covers situations where ownership has already passed to the transferee but, subsequently, the underlying contract or other juridical act is avoided. "Avoidance" is to be understood in the sense of Book II Chapter 7, including avoidance under II.–7:201 (Mistake), II.–7:205 (Fraud), II.–7:206 (Coercion or threats), II.–7:207 (Unfair exploitation) and II.–7:302 (Contracts infringing mandatory rules). In all these cases, ownership is treated as never having passed. The same applies, although this is not explicitly stated in this Article, where the underlying contract or other juridical act is avoided *before* delivery is made, which theoretically may happen, e.g., where the contract is avoided but an employee, who does not know this, delivers the goods. There seems to be no need for stating this explicitly in the black letter text.

Paragraph (2) only applies to contracts and other juridical acts. A concept of "avoidance" strictly comparable to the one in Book II Chapter 7 does not to exist in relation to court orders or rules of law. Whether other legal means of eliminating, in particular, a court order, should have a comparable effect in property law, must be decided by national law.

Concept of retroactive proprietary effect. Upon avoidance, ownership is treated as never having passed to the transferee. This concept of a "retroactive proprietary effect" applies in many European legal systems. If the transferee has become insolvent in the meantime, the transferor can nevertheless separate the goods from the transferee's estate. Also, since the right to dispose is treated as never having passed to the transferee, a third person who has "acquired" rights in the goods from the transferee (e.g., a sub-buyer, or a person who has been granted a proprietary security right) cannot acquire these rights derivatively. However, good faith acquisition is possible provided that the relevant requirements are fulfilled.

C. Withdrawal, termination and revocation (paragraph (3))

General. Where a right of withdrawal, termination or revocation of a donation is exercised after ownership has already passed to the transferee, paragraph (3) provides for that this neither has retroactive proprietary effect in the sense of paragraph (2) nor the effect of an immediate (automatic) re-transfer of ownership. Rather, the transferee is under a mere obligation to re-transfer the ownership to the (former) transferor. It seems advisable to state this explicitly in the text of the Article, as the termination of a contractual relationship as well as the revocation of a donation traditionally has retroactive proprietary effect in some European legal systems. In the present Chapter, however, the general policy rather was to avoid retroactive proprietary effects, unless specific reasons speak for the contrary solution. In addition, when analysing the interests of the parties involved, one can develop further arguments for the solution adopted in this paragraph. See the following Comments.

Termination. Under Book III Chapter 3, a contractual relationship can be terminated mainly as a sanction of the other party's delay in performance (III.–3:503 (Termination after notice fixing additional time for performance)) or where the other party's non-performance is fundamental (III.–3:502 (Termination for fundamental non-performance)). As mentioned above, such termination does not have any immediate, or even retroactive, effect as to property, but triggers an obligation to re-transfer the ownership of the goods to the (former) transferor. This seems to be justified because the (former) transferor – in the following discussion: a seller under a contract for the sale of goods – does not appear to be in need of specific legal protection. There are basically two situations where the contractual relationship may be terminated. Either, the seller terminates the contractual relationship for the buyer's failure to pay. In a situation covered by paragraph (3) of this Article, the seller has delivered the goods to the buyer without being paid and without securing the right to payment by agreeing on a reservation of ownership. In doing so, the seller has taken a risk, and it seems reasonable to treat the seller in the same way as any other creditor of the buyer, meaning that any claim for the return of the goods will only be discharged by a dividend in the buyer's insolvency. This solution is considered preferable in terms of the principle of equal treatment of creditors . If the buyer has already sold the goods to a sub-purchaser, the latter may take preference over the seller in the sense that, irrespective of whether the buyer is insolvent or not, taking delivery from the buyer will confer good title to the sub-purchaser whereas the original seller must seek to recover the value of the goods. Where the buyer already is insolvent, the sub-purchaser will be able to take delivery only if payment has not been made in full and the insolvency administrator chooses to uphold this contract because this appears advantageous to the general creditors (including the former seller).

If, on the other hand, the buyer terminated the contractual relationship, this will either be because the seller is in delay in delivering the goods or has delivered non-conforming goods. In the first situation (delay) ownership usually has not passed; and if it has, there is no need to give the seller more protection than an obligatory right to the re-transfer of ownership. Where the termination is caused by the seller's failure to deliver conforming goods and this failure amounts to a fundamental non-performance there again seems to be no reason for providing the seller with more than an obligatory right to have the goods re-transferred.

Withdrawal. A right to withdraw usually has the purpose of protecting the transferee (buyer). Again, and for similar reasons, there seems to be no need for providing the seller with specific protection; the seller can reasonably be expected to bear the risk of the buyer becoming insolvent. Partly, the right of withdrawal is a sanction for the seller employing problematic distribution techniques by which extra customers may have been acquired. This can be said, e.g., where withdrawal is exercised under II.–5:201 (Contracts negotiated away from business premises). There also does not seem to be a need to provide a seller with better protection than other creditors where the seller failed to comply with information duties under Book II Chapter 3 Section 1. The right to withdraw from a timeshare contract under II.–5:202 (Timeshare contracts) is outside the scope of Book VIII. In addition, the solution of giving the transferor "only" an obligatory right to have the goods re-transferred can be supported by an argument of dogmatic consistency: II.–5:105 (Effects of withdrawal) provides that withdrawal "terminates" the contractual relationship and that the restitutionary effects of such termination are the same as in the case of termination under Book III Chapter 3. It may, therefore, be argued that the proprietary effects should also be parallel.

Revocation of donation. Also, the revocation of a donation should have no retroactive or immediate proprietary effect but should trigger a mere obligation to re-transfer the ownership

of the goods (as spelled out by IV.I.–4:103 (Consequences of revocation) paragraph (2)), even though the donee did not pay any price for receiving the goods. This is the very character of a donation. The donor is free to decide whether to donate or not. Where the donation is revoked because of the donee's ingratitude (IV.I.–4:201 (Ingratitude of the donee)), the origin of such revocation is a specific risk inherent in donations, a problem of "choosing the right person", which arguably may be placed on the donor. In the cases of revocation on the ground of impoverishment (IV.I.–4:202 (Impoverishment of the donor)) or a subsequent change of essential circumstances (IV.I.–4:203 (General clause)), an additional aspect is that typically a long time has passed and parts of the donated assets may have been transferred to third parties. Providing the revocation with retroactive proprietary effect would, in principle, invalidate these third party acquisitions, and it may be doubtful whether good faith acquisition principles could help a third party acquirer where the latter knows, or could know, that the goods were once donated. Confining the donor to an obligatory right to the re-transfer of the goods, or their value, therefore, seems preferable in terms of legal certainty and protecting the free flow of commerce.

D. Other rights to recover not affected (paragraph (4))

Purpose of this paragraph. Where ownership re-vests in the transferor with retroactive proprietary effect, the transferor may demand the return of the goods under VIII.–6:101 (Protection of ownership) paragraph (1). Paragraph (4) of this Article makes it clear that any right to recover the goods based on other provisions of these model rules remains unaffected. In particular, the transferor may also demand the return of the goods under the rules of Book VII on unjustified enrichment.

VIII.–2:203: Transfer subject to condition

(1) Where the parties agreed on a transfer subject to a resolutive condition, ownership is re-transferred immediately upon the fulfilment of that condition, subject to the limits of the re-transferor's right or authority to dispose at that time. A retroactive proprietary effect of the re-transfer cannot be achieved by party agreement.

(2) Where the contract or other juridical act entitling to the transfer of ownership is subject to a suspensive condition, ownership passes when the condition is fulfilled.

COMMENTS

A. General

Function of the rule. The rules of the present Article can be said to be mere applications of the general rule that ownership may be transferred at any time agreed by the parties (VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e) and VIII.–2:103 (Agreement as to the time ownership is to pass)). The rule on resolutive conditions in paragraph (1) does, however, imply a basic policy choice, the solutions offered in the European legal systems differing considerably in this respect. The Article applies to conditions agreed upon by the parties or introduced into another juridical act.

Concepts of suspensive and resolutive condition. The concepts of suspensive and resolutive conditions employed by this Article are defined in III.–1:106 (Conditional rights and obligations). A condition depends on the occurrence of an uncertain future event. In the case of a suspensive condition, the conditional right (or obligation) takes effect upon fulfilment of the condition; in the case of a resolutive condition, it comes to an end upon fulfilment of the condition.

B. Transfer subject to resolutive condition (paragraph (1))

General. Paragraph (1) applies to transfers made subject to a resolutive condition. This means that (i) the underlying contract or other juridical act must contain a resolutive condition; and, in addition, (ii) the parties have agreed that ownership of the goods will re-vest in the original transferor upon fulfilment of the condition. Element (i) alone will not suffice, as will be evident from examples of resolutive conditions where no re-transfer is intended at all (e.g. a newspaper has been ordered under a contract subject to a resolutive condition – nothing is to be reversed after that time). The text of paragraph (1) also clarifies that the parties must have agreed upon this consequence, which means that it will not be possible to include such a condition unilaterally where the underlying contract does not provide so. Where, exceptionally, the transfer takes place based on a unilateral juridical act, the transferee may either accept the property subject to the condition imposed by the transferor – in which case the transferee "agrees", for the purposes of this paragraph, to the future re-transfer in case the condition is met – or may reject it.

Comparative background. With regard to transfers subject to a resolutive condition, the European legal systems offer a variety of solutions. Also, the issue is a quite disputed one in some countries. In some legal systems, especially in the French tradition, the occurrence of the condition has retroactive proprietary effect. In other countries an immediate re-transfer "*ex nunc*" takes place and dispositions of the property which have been made in the meantime are automatically invalidated, subject however to the rules on good faith acquisition. Another

solution is that where delivery is made in the performance of a conditional obligation, the right so acquired is subject to the same condition, and the conditional right returns to the transferor by operation of law at the moment when the condition is fulfilled. Finally, it is sometimes argued that the fulfilment of the condition should have no effect in property law.

Basic policy considerations. The following policy considerations served as starting points when developing the rules of this paragraph. The approach should (a) limit retroactive proprietary effects where no specific need for them exists (retroactive proprietary effects should rather be the exception); (b) strive for consistency within these model rules in general (in particular, with III.–1:106 (Conditional rights and obligations) and the rules of Book IX on proprietary security rights) and (c) strive for consistency with the system of the present Book. All of this applies unless other important arguments are found which could favour another solution.

General rule: no retroactive proprietary effect, but immediate "automatic" re-transfer within the limits of the re-transferor's right or authority to dispose. Based on the policy aspects outlined above, paragraph (1) provides that the fulfilment of a resolutive condition does not have retroactive proprietary effect, but causes an immediate "automatic" re-transfer of ownership to the (former) transferor. The re-transfer takes place "subject to the limits of the re-transferor's right or authority to dispose at that time". The latter formulation corresponds to the general rule of VIII.–2:201 (Effects of the transfer of ownership) paragraph (1) and provides that the re-transferor can only return what the re-transferor still has at the time when the condition is fulfilled. If, therefore, the original transferee – who should now re-transfer the ownership – has meanwhile transferred ownership of the goods to a third person, the third person's acquisition remains valid and ownership cannot be returned. The original transferor may claim the reversal of any enrichment resulting from that sub-sale, or damages. Or, where the original transferee has effectively granted a proprietary security right in the goods to a third person, ownership of the goods will automatically re-vest in the original transferor, but the goods will remain encumbered with the third party's security right.

Arguments in favour of this general rule. The solution adopted in paragraph (1) is obviously consistent with policy (a) as outlined above (no retroactive proprietary effect). Also, it is consistent with policy (c), namely to provide a solution which is compatible with the concepts underlying Book VIII: As to substance, agreeing on a re-transfer of ownership upon the fulfilment of a resolutive condition is nothing but an "agreement as to the time ownership is to pass" in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e) and VIII.–2:103 (Agreement as to the time ownership is to pass). In the present case, the agreement concerns the conditional re-transfer of ownership to the original transferor, and it is made in advance ("anticipated"), at the time when the contract for the original transfer is concluded.

As to policy (b), i.e. achieving consistency with other parts of these model rules such as those on resolutive conditions, there is consistency in so far as III.–1:106 (Conditional rights and obligations) paragraph (3) provides that, upon fulfilment of the condition, the relevant right or obligation comes to an end, which means a prospective (*ex nunc*) effect (see also Comment G on III.–1:106). As to restitutionary consequences, III.–1:106 (5) refers to Book III, Chapter 3, Section 5, Sub-section 4, i.e. III.–3:511 (Restitution of benefits received by performance) and the subsequent Articles on restitution in case of termination. Taking into account these rules, the general consequence where obligations have already been performed before the resolutive condition is fulfilled will be that an obligation to return any benefit received is triggered. With

regard to the re-transfer of ownership, such obligation will operate as an "entitlement to transfer" in the sense of the general transfer rule in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(d). This fits smoothly to the general framework created both by these model rules in general and Book VIII in particular.

The concept is also coherent with the aproach taken in Book IX on proprietary security rights. E.g., regarding transfers of ownership for security purposes, the concept of an automatic re-transfer upon the condition of full payment of the credit seems to coincide with a common practice in the credit markets and does not seem to create problems with the rules of Book IX. Where, on the other hand, the parties agree that ownership will re-vest in the seller if the buyer does not pay at the agreed date, VIII.–1:103 (Priority of other provisions) paragraph (1) ensures that such an agreement will be subject to the rules of Book IX and these rules have priority over the provisions of Book VIII (a re-transfer in the sense of the present Article of course also being a "transfer" in the sense of the named VIII.–1:103).

If, in a specific constellation, the parties wish the fulfilment of the condition to trigger only an obligation to re-transfer, this should be perfectly possible under the general principle of party autonomy. They can agree on this effect under the general rule of VIII.–2:103 (Agreement as to the time ownership is to pass), or they can agree on a right to repurchase or an equivalent device providing a comparable effect.

Mandatory exclusion of retroactive proprietary effect (sentence 2). A second question is whether the rule outlined above should be mandatory or whether the parties may deviate by agreement. Whereas nothing seems to speak against allowing the parties to agree on a re-transfer taking effect later than the fulfilment of the resolutive condition, sentence 2 of this paragraph provides that the rule is mandatory in the sense that no retroactive effect can be established by party agreement. Allowing the parties to agree on retroactive proprietary effects would require substantive policy reasons backed by a clear preference of the former transferor's interests as against the interests of other parties involved. Compelling reasons of this kind, however, do not seem to exist. Rather, the interests of third parties, be they parties who acquired rights from the "conditional" transferee or creditors in the latter's insolvency or other enforcing creditors, argue against party autonomy in this respect.

Also, policy (c) above supports this approach, as retroactive proprietary effects cannot be agreed upon elsewhere under Book VIII. One could of course argue that party autonomy is one of the most central principles of the general transfer rule in VIII.–2:101 (Requirements for the transfer of ownership in general) and that, for that reason, parties should be free to establish retroactive proprietary effects if they wish to do so. But it should be noted that the "agreement as to the time ownership is to pass" is just one of a number of requirements for a transfer, another being the existence of an "entitlement as against the transferor" (in other words: an obligation to transfer), and no transfer can take effect before such obligation arises. The obligation to re-transfer arises (only) upon fulfilment of the condition; cf. III.–1:106 (Conditional rights and obligations) paragraph (5) in conjunction with III.–3:511 (Restitution of benefits received by performance) paragraph (1). It is of course clear that the general rules on conditions in III.–1:106 are default rules and open to party agreement, but this does not seem to impose any binding guidelines for the level of property law.

Finally, it should be considered that if parties, in order to serve specific purposes, wish to create special patrimonies under these model rules, they are free to make use of the trust rules

as provided by Book X. When this is taken into account, there appears to be little practical need for additional legal features under Book VIII; there even could be a risk of undermining trust law policies.

In particular: effect on third parties. A further important issue which is relevant to a decision on the mandatory or default character of the rule is the question of the effect a transfer subject to a resolutive condition may have on third parties – such as parties acquiring rights from the transferee (sub-buyer, security taker etc.), creditors in the transferee's bankruptcy or other creditors enforcing their claims against the transferee outside bankruptcy. The comparative survey shows that in all legal systems at least some protection is given to good faith acquirers. Under the approach chosen in this paragraph, third parties who have acquired rights from the transferee before the condition is met, as well as creditors in the latter's bankruptcy, etc., are protected. As mentioned above, the transferee can only re-transfer ownership "subject to the limits of the transferee's right or authority to dispose at the time of the re-transfer", which refers to a general principle followed throughout Chapter 2, namely that a person cannot transfer more rights than the person has (cf. the general transfer rule in VIII.–2:201 (Effects of the transfer of ownership) paragraph (1)). This means, for instance, that where a proprietary security right has been created and has become effective in the goods before the condition is fulfilled, the goods will stay encumbered by this security right when they are re-transferred to the former transferor. If the transferee has violated any agreement not to create such a right in the goods, as established between the transferor and the transferee, the transferee may be held liable for non-performance of an obligation. But the free flow of commerce would not be restricted. This appears to be an adequate solution.

In particular: mandatory character also applicable to donations. It has been contemplated whether an exception from the mandatory character of sentence 2 should be adopted for donations. However, such a solution was not considered convincing, one argument being that such a possibility could be used for defrauding the transferee's creditors. Another argument is, as mentioned above, that these model rules provide for other features by which parties can create a special property for specific purposes, namely Book X on trusts. Accordingly, practical needs that may exist in this respect can be served by other means.

C. Transfer subject to suspensive condition (paragraph (2))

Special application of agreement as to the time ownership is to pass. A transfer of ownership subject to a suspensive condition does not create comparable difficulties. As to substance, this is nothing but a special form of a party agreement in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e) and VIII.–2:103 (Agreement as to the time ownership is to pass), the particularity being that it is yet uncertain whether the agreed point in time will come or not. A most common example in this respect is the agreement on a retention of ownership, the parties agreeing that ownership will pass when (and only if) the price is paid in full. All aspects related to the security function of this device are regulated by Book IX (cf. VIII.–1:103 (Priority of other provisions) paragraph (1)). The transfer aspect as such is, however, covered by paragraph (2) of the present Article. Regarding the buyer's right to achieve this transfer by paying the price as required under the terms of the contract, see also VIII.–2:307 (Contingent right of transferee under retention of ownership).

D. Note on transfer subject to time limit

Transfers subject to suspensive or resolutive time limits may be treated like transfers subject to condition. Formally, this Article only covers transfers subject to a (suspensive or

resolutive) condition in the sense of III.–1:106 (Conditional rights and obligations). It does not speak of transfers subject to a time limit in the sense of III.–1:107 (Time-limited rights and obligations). The difference between a condition and a time limit in the sense of the named provisions basically only is that a time limit relates to an event which is certain to occur (e.g., a calendar date, a person's death, etc.). However, the principles established in this Article can also be applied to transfers subject to time limits. This is obvious for transfers subject to a suspensive time limit, which is identical to an agreement as to time ownership is to pass. With regard to transfers subject to a resolutive condition, the Study Group's Co-ordinating Committee was hesitant to adopt a rule parallel to the one contained in paragraph (1) of this Article, because some members expressed concerns about impliedly introducing new types of proprietary rights. However, under the approach adopted in paragraph (1), no such risks occur. What the parties essentially agree upon is nothing but an agreement as to the time ownership is to pass back to the original transferor (cf. VIII.–2:103 (Agreement as to the time ownership is to pass)). The re-transfer can only take place in relation to what is still in the hands of the re-transferee, subject to the limits of this party's right or authority to dispose at that time. Accordingly, it is suggested that this Article may be applied to transfers subject to any kind of time limit by way of analogy.

Section 3: Special constellations

VIII.–2:301: Multiple transfers

(1) Where there are several purported transfers of the same goods by the transferor, ownership is acquired by the transferee who first fulfils all the requirements of Section 1 and, in the case of a later transferee, who neither knew nor could reasonably be expected to know of the earlier entitlement of the other transferee.

(2) A later transferee who first fulfils all the requirements of Section 1 but is not in good faith in the sense of paragraph (1) must restore the goods to the transferor. The transferor's entitlement to recovery of the goods from that transferee may also be exercised by the first transferee.

COMMENTS

A. General

Function of the rule. This Article addresses a standard situation discussed in all European legal systems, namely that the transferor purports to transfer the same goods to different persons one after another.

> *Illustration 1*
> S, the owner of specified goods, concludes a contract for the sale of these goods with B1. For the time being, the goods are left at S's place of business. Later, S concludes a contract for the sale of the same goods with B2.
> The facts can be varied or further specified in several respects: in particular, the goods may have been delivered either to B1 or B2. Especially in the latter case, it may also be of relevance whether B2 was in good faith or in bad faith (however these terms may be defined in detail) as to the non-existence of B1's earlier entitlement.

However a set of rules governing situations of this kind may be structured in detail, it may be characterised as addressing the interface between derivative transfers and original acquisitions based on good faith acquisition principles. Also the present Article, which covers the "transfer aspects" of the problem, must be seen in conjunction with the relevant rules on good faith acquisition, i.e. VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership).

The present Article primarily addresses the conflict between the "transferees", namely who will ultimately receive and be entitled to keep the goods. However, it also affects the purported transferees' relation to the transferor. For the sake of clarity, the subsequent discussion will employ the terms used in *illustration 1*. The parties will, therefore, be called "S" (the transferor), "B1" (the transferee whose entitlement to the transfer of ownership in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(d) is created first) and "B2" (the transferee whose entitlement comes into existence only later).

Comparative background. Although the starting points in the European legal systems differ considerably by either following a delivery-based or consensual approach, the solutions arrived at for the present problem accord to a certain extent. Under a delivery system – unless

S and B1, or possibly S and B2, agree on an immediate transfer – the general rule is that the transferee who first takes delivery of the goods will acquire the ownership. However, this result may be reversed if B2 took delivery in bad faith. Depending on the respective national rules on non-contractual liability for damage, B1 may, in such a situation, have a right to reparation from B2. Such reparation may be reparation in kind, in which case B2 is under an obligation to transfer the ownership of the goods to B1. The requirements for such a right to arise are, however, rather restrictive in some legal systems (e.g., restricted to cases where B2 induced S to breach S's contractual obligation as against B1; or where B2 at least had actual knowledge of B1's prior entitlement to the transfer). In short, under such a system delivery, and the acquisition of ownership resulting from it, will only be of interim relevance in some situations: where B2 acts in bad faith (perhaps to be specified further), a final solution will be provided by the law of obligations.

In the countries following a consensual approach, on the other hand, the second transferee traditionally acquires ownership if that transferee takes delivery in good faith. The technical means for arriving at this solution may vary. It may be based, in particular, on a concept that the mere conclusion of the contract S–B1 suffices only to effect a "transfer of ownership *inter partes*", but actual delivery is required in order to make this transfer "opposable to third parties in good faith"; or in a *possession vaut titre* rule (or both); or simply on good faith acquisition rules. Under such a concept, the issue of a second transferee in bad faith may be solved by property law itself.

In relation to multiple transfers, consensual systems tend to move towards a delivery approach. Conversely, the approach adopted in this Article slightly shifts away from the delivery starting point by including a good faith requirement. This may be seen as a kind of compromise solution; it is, however, adopted for certain substantive reasons, as will be discussed below.

Primary options under a delivery-based transfer system: general. Given that the basic transfer approach adopted in Chapter 2 requires delivery of the goods (or an equivalent) unless the parties have agreed otherwise, adopting a rule along the lines of the consensual tradition outlined above would certainly be inconsistent. However, comparable results can be achieved by way of modification of the basic delivery approach, namely by inserting an additional requirement that a later transferee (B2, or B3, B4, as the case may be) can only acquire if in good faith as to the non-existence of B1's prior entitlement. In the following, this option (called option 2) will briefly be compared with the "traditional" delivery-based approach providing that, where B2 takes delivery first, ownership passes to B2 irrespective of whether B2 acts in good or bad faith, but B1 may proceed against B2 under principles of non-contractual liability for damage in case B2 acted in (some kind of) bad faith (option 1).

Under both models, B1 has contractual claims against S in case S delivers the goods to B2. In some situations, B1 may well be content with a claim for damages. On a general level, it may also be said that the issue is about the protection of a transferee (B1) who has taken a certain risk by leaving the goods with the transferor.

Cases solved equally under both options. In some situations, options 1 and 2 lead to identical results. This is the case, first, where S and B1 agreed on an immediate transfer of ownership. Here, ownership passes to B1 and B2 can acquire ownership only if the requirements of good faith acquisition are fulfilled, which basically means that B2 must take

delivery in good faith and for value (cf. VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership)). The second situation where both approaches converge is where no prior transfer has been agreed upon by either of the parties and B1 takes delivery first. Then, B1 will acquire ownership, being the transferee who first fulfils all requirements provided by Section 1 of this Chapter. Also, the same result applies where B2 takes delivery in good faith: B2 will acquire ownership, fulfilling all requirements provided by Section 1.

The following Comments will focus on the situations where different results are achieved.

Option 1: general delivery approach, however reversed by non-contractual liability in case later transferee acts in "bad faith". If multiple transfer situations were governed by the (non-mandatory) delivery approach employed by this Chapter in general, without any exceptions or modifications, and B2 acquired by agreement on an immediate passing of ownership, the goods being left with S, B1 can (only) acquire ownership under good faith acquisition principles. B1, therefore, would acquire only if B1 neither knew nor could reasonably be expected to know that the transferor had already transferred ownership.

A second situation to be discussed here is that B2 is the first to take delivery, however knowing, or having reason to know of, B1's prior entitlement. B2 being the one who first fulfils all transfer requirements of Section 1, would become the owner of the goods. However, B1 could have a chance to proceed against B2 under the principles of non-contractual liability for damage. Provided the requirements for non-contractual liability under Book VI are fulfilled, it would be possible for B1 to claim the transfer of ownership of the sold goods from B2: VI.–6:101 (Aim and form of reparation) provides that reparation is to reinstate the person suffering legally relevant damage (B1) in the position that person would have been in had the legally relevant damage not occurred; in principle, reparation may be in kind (i.e. by transferring ownership to B1). The "problem" (in B1's perspective), however, is to find a rule stating that the failure to acquire ownership of the goods (because of acquisition by B2) constitutes "legally relevant damage" in the sense of Book VI. VI.–2:206 (Loss upon infringement of property or lawful possession) will not be applicable exactly for the reason that B1 did not acquire the goods. There is only one rule which may apply, namely VI.–2:211 (Loss upon inducement of non-performance of obligation) which is, however, very narrow (as compared to the general good faith criterion employed by option 2, and as compared to the solutions some delivery-based legal systems have accepted under their rules on non-contractual liability). The latter Article would require that B2 *induces* S to breach S's obligation towards B1. Accordingly, the rule would, for instance, not be applicable where S already intends to breach S's obligation against B1 (e.g. S actively offers the goods to B2, without the latter's initiative) and B2, knowing these facts, just "takes advantage" of this (existing) breach of S's obligation. Also, B2 would have to *intend* S to fail to perform S's obligation against B1. In short, given the contnet of the relevant provisions of Book VI, adopting option 1 would mean that B1 could demand the transfer of the goods from B2 only under very limited conditions, which practically are hard to prove.

Option 2: delivery approach, acquisition of later transferee being excluded in case of "bad faith". If, on the other hand, multiple transfer situations were governed by a (non-mandatory) delivery approach, modified in so far as B2 must be in good faith in order to acquire ownership of the goods, the situations discussed in the previous Comment would be solved as follows. Where S is still in possession and "transfers" the goods to B2, who is in bad faith, by agreeing on an immediate transfer, this transfer would not take place and B1 –

when taking delivery from S at a later point in time – will acquire ownership without depending on the fulfilment of good faith acquisition requirements (e.g. a transfer for value).

Where B2 first takes delivery, but is in bad faith as to the existence of B1's prior entitlement, B2 will simply not acquire ownership and B1 may still demand a transfer of ownership from S. This solution has certain advantages as compared to option 1 discussed above. First, it is possible to let B1 win the conflict with B2 in many more situations than the rules on non-contractual liability for damage would allow, since a simple definition of good faith could be employed instead of the inducement requirement. Also, this option provides better protection of B1 in case B2 goes bankrupt. Finally, solving the conflicts within property law itself may, as such, be considered advantageous as compared to making a "detour" to the rules on non-contractual liability for damage. Whether such a rule provides a workable solution will, however, depend on certain details, which will be discussed in the following Comment.

B. How the rule works in detail

Scope: several purported transfers of the same goods. As already mentioned above, this Article applies where two or more persons (transferees) are entitled, as against the same person (transferor), to the transfer of ownership of the same goods. It is immaterial whether these entitlements are based on a contract, other juridical act, court order or a rule of law (cf. VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(d)), the case of main practical relevance however being multiple dispositions by contract. The "same goods" are specified goods, so that it is impossible for the transferor to comply with all existing entitlements.

The scope left to the basic delivery rule; unproblematic cases. In principle, the present Article follows the general (non-mandatory) delivery approach applied in the whole Chapter 2. This means that, as the rule states expressly, ownership passes to the transferee who first fulfils all the requirements of Section 1. There is only an exception where the later transferee is in bad faith at the time when these general transfer requirements would be fulfilled in relation to that later transferee.

The general delivery rule will, therefore, be applicable, first, where S and B1 have agreed on an immediate transfer of ownership and, second, where neither B1 nor B2 have agreed on a transfer prior to delivery and B1 takes delivery first. These cases have already been discussed in Comment A above.

Transferor still owner, later transferee in good faith. The second part of paragraph (1) modifies the basic delivery approach in so far as a later transferee (i.e. any transferee whose entitlement to the transfer of ownership comes into existence later than the first entitlement) must be in good faith at the time the general transfer requirements are fulfilled in relation to that later transferee. The definition of good faith employed by this Article ("who neither knew nor could reasonably be expected to know") corresponds to the general formula of good faith used by VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership); see there for more detailed discussion. One important aspect is that a buyer, unless there are specific indications, is under no duty to investigate whether the goods have previously been sold to another person. The result of this concept is that the scope of "bad faith" is still much broader than what could be achieved by applying VI.–2:211 (Loss upon inducement of non-performance of obligation). Consequently, the first transferee (B1) will have a right to the goods more frequently than under the alternative concept (option 1, see

above). This is not an unusual result from a comparative perspective: as briefly outlined above, it is quite common that consensual legal systems employ their general good faith acquisition principles.

Under paragraph (1) of this Article, a later transferee in good faith can acquire both by (first) taking delivery of the goods and by agreeing on the transfer taking place before delivery, e.g. upon conclusion of the underlying contract. This is different under good faith acquisition principles (cf. VIII.–3:101 (1)(b)); but the present Article is not a good faith acquisition rule in the sense of providing original acquisition from a non-owner, but a specific transfer rule, building upon the general transfer requirements.

Good faith must relate to the non-existence of the prior entitlement(s) of the other transferee(s).

Transferor still owner, later transferee in bad faith (paragraphs (1) and (2)). Where the later transferee, who first fulfils all the general transfer requirements of Section 1, is in bad faith at that time, that later transferee is precluded from acquiring ownership under paragraph (1) of this Article. This does not cause specific problems where the parties have agreed on a transfer before delivery and the transferor is still in possession of the goods.

> *Illustration 2*
> S, the owner of specified goods, concludes a contract for the sale of these goods with B1. For the time being, the goods are left at S's place of business. Later, S concludes a contract for the sale of the same goods with B2, who knows that the goods have already been sold to B1 but offers a better price. B2, also, does not want to take delivery at the moment, but agrees with S that ownership of the goods will pass upon the conclusion of their contract.

In this case, the transferor, who still owns the goods, can transfer the goods to the first transferee under the terms agreed in their contract (or provided by the other legal ground underlying the transfer). If this is done, ownership will, derivatively, pass to the first transferee and the later transferee may resort to a claim for damages for non-performance of the obligation to transfer against the transferor (which, however, may be reduced or even barred by reason of the later transferee's contributory fault).

Where, on the other hand, the goods have already been delivered to the later transferee, the transferor still remains the owner of the goods pursuant to paragraph (1) of this Article.

> *Illustration 3*
> The facts are identical to those in *Illustration 2*. However, B2 does not agree on an immediate transfer, but takes delivery of the goods before B1 approaches S and demands the delivery of the goods.

In contrast to situations like the one in *Illustration 2*, the transferor (S) in the first place is unable to effect delivery to the first transferee. S may transfer ownership by giving notice to B2 under VIII.–2:105 (Equivalents to delivery) paragraph (2), but in general, it may be impractical for B1 to approach B2 – who typically wants to keep the goods – in order to get the goods handed over. This might mean entering into a dispute with B2 and incurring additional costs, e.g. for transportation. Depending on the circumstances, it may be more

practical to stick to the original relationship with S and demand delivery under the terms of the contract. Therefore, S has the right to recover possession from B2 (paragraph (2) sentence 1), so that S can effect delivery to B1. In a certain sense, sentence 1 of paragraph (2) repeats what already follows from the general rule in VIII.–6:101 (Protection of ownership) paragraph (1), namely that an owner can demand that the property be returned from any person who has no right to possess it. But it deliberately states that the later transferee "must restore" the goods to the transferor in order to avoid any doubts whether B2, based on the valid entitlement to the transfer of ownership existing between B2 and S, has a "right to possess the goods" in the sense of VIII.–6:101 (1) as long as the underlying legal relationship between S and B2 exists. In particular, where the purported transfer between S and B2 is based on a contract, it is immaterial whether the contractual relationship has been terminated (which could be done by S, if B2 does not pay; or by B2, since S fails to confer ownership on B2) or not. It would be unsatisfactory, and against the policy underlying this Article, if B2 could rely on the contract with S and thereby prevent the transfer of the goods to B1 where, e.g., B2 has fully paid and S, therefore, could not terminate the contractual relationship in order to recover possession of the goods.

In addition, paragraph (2) sentence 2 provides that the transferor's entitlement to recover the goods from the later transferee (B2) may also be exercised by the first transferee (B1). The wording of this special provision is coordinated with VIII.–6:101 (Protection of ownership) paragraph (1) and implies that B1's right is a proprietary remedy, so to say, a special authorisation to exercise the owner's general claim of revindication. This specific right is introduced, on the one hand, in order to provide B2 with effective means of protection in case the transferor (who has already acted dishonestly by disposing of the goods a second time in favour of B2) refuses to co-operate. Otherwise, it would not be of much help to B1 that S still has the ownership of the goods and could, theoretically, demand the goods back from B2 in order to deliver them to B1, or transfer ownership to B1 by giving notice to B2. It also helps B1 where B2 or S or both are insolvent. Third, the direct right against the later transferee is intended to help B1 in case B2 has already paid the whole or part of the price to S and, now that this transaction has to be reversed, invokes a right to withhold performance of the obligation to return the goods to S under the general rule of III.–3:401 (Right to withhold performance of reciprocal obligation). Such a right may be effective as against S, which is for the law of obligations to decide. Sentence 2 of paragraph (2) is intended to ensure that no such right to withhold performance may be set up against B1. This may put B2 in a less favourable position in relation to S. However, in relation to B1, it is clear that B2 – who acted in bad faith – is not worthy of legal protection.

In case there are several purported transferees and all of them intend to proceed against the later transferee in possession, the wording already makes it clear that only the first transferee (B1) can exercise the right granted by paragraph (2) sentence 2.

In particular: insolvency of later transferee in possession. As already indicated, the solution adopted in this Article – being a "property law solution" without falling back on obligatory rights to be exercised against B2 – is considered to be advantageous where B2 becomes insolvent before returning the goods either to S or to B1. It appears more justified to protect the first transferor, whose acquisition was intended to be frustrated by a dishonest act, than to protect B2 and B2's general creditors, who should rather step into B2's shoes instead of profiting from B2's bad faith. As noted above , the right of separation can be exercised by S or B1.

In particular: insolvency of transferor. Finally, the approach adopted in this Article is also intended to provide B1 with protection in case (also) the transferor S becomes insolvent. As long as the goods are still in the possession of B2, B1 can exercise the direct claim against B2 provided for by paragraph (2) sentence 2. For reasons discussed below, B1's right against B2 is intended to have priority over S's claim, in case S also demands the return of the goods from B2 under paragraph (2) sentence 1. Pursuant to the policy underlying this Article, however, B1 is entitled to separate the goods also where, after the purported transfer to B2 has taken place, they still are in possession of the transferor S (because S and B2 agreed on an immediate transfer) or have returned to S under paragraph (2) sentence 1. The reason for preferring B1 as against S's general creditors lies in the function of this Article: from S's perspective (and the perspective of S's creditors), it is irrelevant whether the goods are validly transferred to B2 or B1; in either case, the goods part from S's patrimony. The purpose of this Article is not to confer an enrichment upon the transferor's estate. The technique that S retains the ownership although B2 would, formally, have already fulfilled all general transfer requirements just serves the purpose of abridging the alternative "detour" of letting B2 acquire the ownership – in which case S's creditors would also have no chance to lay their hands on the goods – and letting B1 proceed against B2 based on mere obligatory rights. For these reasons, B1's right should also be valid as against S's creditors.

This, however, only applies where the goods would already have been transferred to B2 had this transfer not been prevented by paragraph (1) of this Article. There is no general rule that ownership is treated as having passed "upon conclusion of the contract" (or whatever other specific time) in case a double disposition in favour of another transferee in bad faith occurs, which obviously would be inconsistent. The general effect of the transfer of ownership to B1 will only occur when the general requirements are fulfilled in relation to B1. The effect of this Article before B1 obtains possession (or S transfers the goods to B1 by way of giving notice to B2, or by agreeing with B1 that ownership will, now, pass at a specific point in time) is only to provide B1 with a particular proprietary right to delivery (separation) of the goods from B2 or S. Of course, this right can only be exercised if B1 pays the agreed price to S.

VIII.–2:302: Indirect representation

(1) Where an agent acting under a mandate for indirect representation within the meaning of IV.D.–1:102 (Definitions) acquires goods from a third party on behalf of the principal, the principal directly acquires the ownership of the goods (representation for acquisition).

(2) Where an agent acting under a mandate for indirect representation within the meaning of IV.D.–1:102 (Definitions) transfers goods on behalf of the principal to a third party, the third party directly acquires the ownership of the goods (representation for alienation).

(3) The acquisition of ownership of the goods by the principal (paragraph (1)) or by the third party (paragraph (2)) takes place when:

(a) the agent has authority to transfer or receive the goods on behalf of the principal;
(b) there is an entitlement to transfer by virtue of a contract or other juridical act, a court order or a rule of law between the agent and the third party; and
(c) there has been an agreement as to the time ownership is to pass or delivery or an equivalent to delivery in the sense of Article VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e) between the third party and the agent.

COMMENTS

A. General

Function of the rule. This Article deals with situations where a transfer of ownership of goods involves a mandate for indirect representation. This may occur in two situations. Either, the agent (who will be called the intermediary in these Comments) transfers goods, in the intermediary's own name but on behalf of the principal, to a third party. For the purposes of the following discussion, this will be called "representation for alienation". In this respect, the present Article serves a "didactical" purpose only. As to substance, the rule is already implied in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(c), which provides that ownership may also be transferred by a person who is not the owner of the goods but has been granted authority to transfer the ownership. In the second situation, the intermediary acquires goods from a third party in the intermediary's own name, but on behalf of the principal: "representation for acquisition". With regard to this situation, the present Article provides for a special default rule, namely that the ownership of the goods directly passes from the third person to the principal (without entering the intermediary's patrimony). In the first place, therefore, the function of the Article is to regulate between which persons ownership passes (paragraphs (1) and (2)); also, the Article clarifies the time when ownership passes (paragraph (3)).

Direct and indirect representation. This Article addresses indirect representation, which has to be distinguished from (direct) representation in the sense of Book II Chapter 6. Roughly speaking, direct representation means that where a person (the representative) acts in the name of a principal and within the scope of authority granted by the principal or a rule of law, the act carried out by the representative affects the legal position of the principal in relation to the third party as if it had been done by the principal. The representative's acts are immediately effective and binding *vis-à-vis* the principal; see, above all, III.–6:105 (When representative's act effects principal's legal position).

Illustration 1
P is a cheese producer. P agrees with I that I will sell, in P's name, 100 kg of mozzarella to T for a certain price. I concludes a sales contract with T in the name of P

and delivers the cheese to T. On the basis of this contract between P and T the ownership of the cheese directly passes from P to T (direct representation).

However, in commercial practice, it is also common that the intermediary acts on order and on account of, but not in the name of, the principal. This frequently happens, e.g., where transactions are carried out by a commission agent. In general, one traditionally speaks of "indirect representation". Indirect representation can either be disclosed, when the third party knows that the intermediary is acting on behalf of a principal; or undisclosed, if the third party does not know that the intermediary is acting on behalf of a principal. There may be different reasons for a principal to carry out transactions by way of indirect representation. For instance, the principal may wish to conduct the transaction in a discreet fashion, or to secure more advantageous contractual conditions or prices. It can also be that the reputation or known solvency of the intermediary will increase the chances that the third party will be willing to enter into the transaction. Also, using indirect representation may be in the interest of the intermediary, e.g. where the intermediary is an expert in the relevant market and does not want to disclose the names of customers to the principal.

Illustration 2
P wishes I to sell the mozzarella to T in I's own name instead of in P's name. Being a relatively small-scale producer, P thinks that potential buyers would prefer to enter into a deal with I. I, in his own name, sells and delivers 100 kg of P's mozzarella to T. Before doing so, I informs T that he is acting on account of the producer P (disclosed indirect representation).

Illustration 3
P is an amateur art collector, and an outsider to the art trading circuit. P wishes to acquire a specific valuable painting that belongs to T, the owner of an art gallery. Wishing the transaction to be discreet, and fearing that T would take advantage of the disparity by asking a very high price, or that T would not trust his creditworthiness, P agrees with I, a professional art dealer, that she will acquire the painting in her own name, thus preventing T from trying to obtain a very high price at P's expense, or from not accepting the deal for fear of lack of solvency (undisclosed indirect representation).

Indirect representation for acquisition and for alienation. For the purposes of this Article, two categories of indirect representation are distinguished (cf. paragraphs (1) and (2)). The one category is "indirect representation for acquisition". The intermediary intervenes on behalf of the principal in the acquisition of goods from the third party: P (buyer) – I – T (seller). The other category is "indirect representation for alienation". The intermediary intervenes on behalf of the principal in the transfer of goods to the third party: P (seller) – I – T (buyer).

The discussion in the following Comments will employ the following abbreviations: P is short for "principal", I for "intermediary" and T for the "third party".

Comparative background. A plain picture is hard to provide in brief, so that reference must be made to the Notes on this Article for more details. However, with regard to representation for alienation, European legal systems accept a direct transfer from the principal to the third party where the principal has granted the intermediary authority to dispose of the principal's property. In the converse direction, i.e. regarding representation for acquisition, the solutions

are more diverse and, often, unclear or disputed. There are countries which, in principle, do not accept a direct transfer from the third party to the principal, so that the transfer is made, first, to the intermediary who, then, passes on ownership to the principal. However, it is then often accepted that the principal and the intermediary may agree on an anticipated *constitutum possessorium*, so that ownership passes to the principal at the moment it is acquired by the intermediary. In some countries, it is sometimes argued that in such a case, ownership would not rest with the intermediary for a "logical second", which would amount to a direct passing of ownership at least in these specific situations. Also, in some of these countries there exist specific rules on commission under which, in the end, the goods a commission agent received from a third party in the course of fulfilling the commission contract are treated as if they belonged to the principal in relation to the commission agent and the agent's creditors. Very generally speaking, this shows that even in countries which basically apply a two-step transfer approach, there are at least some tendencies towards a direct transfer approach in representation for acquisition. In other countries, it is explicitly acknowledged that the principal acquires directly from the third party. As to common law systems, where the basic distinction is rather made between disclosed and undisclosed agency than between direct and indirect representation, one can perhaps say that at least comparable results may be achieved by accepting that the principal may have beneficial interests in goods acquired by the intermediary.

Within the structural framework of these model rules, a choice has to be made between the two options already mentioned above: a two-step transfer approach under which the intermediary acquires ownership for some interim stage, and a direct transfer between the third party and the principal. The arguments will be discussed in Comment B below.

Related provisions in other parts of these model rules. Reference should be made to III.–5:401 (Principal's option to take over rights in case of agent's insolvency) and III.–5:402 (Third party's counter-option). On the history, see III.–5:401 Comment B. These two provisions are of importance for achieving a balance of the interests involved in transactions carried out by means of an indirect representative (see Comment B below). As to the delimitation of this Article's scope of application, reference is made to the definitions provided by IV.D.–1:102 (Definitions) on mandate contracts; cf. Comment C below.

B. Discussion of "two-step transfer" versus "direct transfer" approach

General: options; authority to dispose already implies solution for representation for alienation. As mentioned above, the two basic options in this field are to provide either a direct transfer between principal and third party; or a two-step transfer, under which a transfer takes place both in the relations P – I and I – T, so that the intermediary acquires ownership for some time. With regard to representation for alienation, however, a direct transfer solution is already accepted by VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(c), which provides that ownership may also be transferred by a person who is not the owner of the goods but has been granted authority to transfer the ownership. Such a granting of authority to dispose will usually be contained, e.g., in a commission contract, where the commission agent agrees to sell goods for the owner in the agent's own name. Also in other cases of indirect representation, the granting of authority to dispose will usually follow from an interpretation of the underlying contract or other juridical act determining the legal relation between the principal and the intermediary. In the case of representation for alienation, the principal's right of ownership of the goods is, therefore, not affected by handing over the goods to the intermediary. It will only be lost when directly passing to the

third party. However, the parties (P and I) are not precluded from agreeing otherwise: they may well choose to transfer ownership to I first, who then transfers the goods further to T.

The following sections (a) to (c) briefly discuss the main issues of relevance when choosing between a two-step transfer and a direct transfer. They also deal with representation for alienation, for the purposes of illustration and of testing the result already achieved under the general rules.

(a) Protection of, or against, the intermediary's general creditors

Representation for acquisition: principal's perspective. Under a two-step transfer approach, if the third party has already delivered the goods to the intermediary and the intermediary becomes insolvent before delivering the goods to the principal, the goods will form part of the intermediary's estate. The principal cannot separate the goods from the estate, which of course is unfavourable in particular where the principal has already advanced money to the intermediary to enable the latter to pay the purchase price to the third party. Also, the principal cannot make use of the direct action provided by III.–5:401 (Principal's option to take over rights in case of agent's insolvency), as the third party can invoke the defence that there has already been performance to the intermediary. That Article only entitles the principal to take over the rights to performances which are still due to the intermediary. Under a direct transfer approach, on the other hand, the principal acquires ownership directly from the third party as soon as the goods are delivered to the intermediary, and the principal can rely on the ownership-protection remedies and separate the goods by virtue of VIII.–6:101 (Protection of ownership) paragraph (1), provided the principal refunds, or already has refunded, the purchase price to I. Thereby, the principal is protected against losing the goods in the intermediary's insolvency, which certainly is considered to be the main advantage of the direct transfer approach. As under a two-step approach, the principal will, however, remain unprotected if the principal has paid the intermediary in advance, the intermediary becomes insolvent before effecting payment to the third party, and the third party did not deliver the goods to the intermediary. In this case, the principal may think of resorting to III.–5:401 in order to take over the intermediary's rights under I's contract with the third party. But the unpaid T may invoke the right to withhold performance (cf. III.–3:401 (Right to withhold performance of reciprocal obligation)), which T could have invoked as against I (III.–5:401 paragraph (3)). P, consequently, would have to pay twice in order to get the goods from T. The result, as such, is not inappropriate. It mirrors the general principle that a person who performs in advance takes a risk.

Representation for acquisition: third party's perspective. In this relation, the two approaches do not differ. T will lose the goods when delivering them to I without taking a security. This is the general risk of giving credit. From T's perspective, it is rather immaterial whether the insolvent I or the principal has acquired the goods (the two-step approach may be slightly advantageous for him if P has prepaid and, now that the goods also fall within I's estate, the dividend for all creditors, including T, is a little higher). It may thus be observed that under a direct transfer approach, it is dangerous for the seller (T) to extend credit to an intermediary who buys the goods, but less dangerous for the buyer (P) to extend credit to the intermediary if the intermediary obtains possession of the goods.

Representation for acquisition: intermediary's and intermediary's creditors' perspective. A potential argument against a direct transfer approach is that it, by attributing the value of the goods to the principal rather than to the intermediary, could discriminate

against the intermediary and the intermediary's creditors. There would certainly be a problem if the intermediary, due to a direct acquisition by the principal, ran the risk of losing both the goods and the payment the intermediary is entitled to receive from the principal. However, there are other rules which may provide some protection in that respect. In particular, where the intermediary acts under a contract of commercial agency, IV.E.–2:401 (Right of retention) provides a right of retention over the goods of the principal in order to secure the commercial agent's rights to remuneration, compensation, damages and indemnity, until the principal has fulfilled the corresponding obligations. This rule fully fits to the situations relevant here. The goods which can be retained are goods owned by the principal (due to the "direct transfer" approach, once they are delivered to the intermediary). The rule applies when the agency relation is still ongoing, as well as when it has ended. The right to retain provided by this rule is effective against the owner (principal) as well as against third parties (sub-buyers from the principal, even if they already have acquired ownership); see IV.E.–2:401 (Right of retention) Comment A. A right of retention amounts to a proprietary security right (IX.–1:102 (Security right) paragraph (2)(c) and IX.–2:114 (Right of retention of possession)). It can, therefore, be enforced under the general rules of Book IX if the principal does not pay in due time. Given this, one may summarise that the intermediary is not treated unfairly by a direct transfer rule, since – if the right to retention is exercised – the goods are economically only given away against payment of their value (and additional payment for the work carried out). Seen from the perspective of the intermediary's creditors in the latter's insolvency, the principal is, however, still treated preferentially in so far as the principal, once the intermediary obtains the goods, never loses the money paid to the intermediary, even if it has been paid in advance, which normally means taking a risk from which general creditors may profit (cf. the Comments on VIII.–2:101 (Requirements for the transfer of ownership in general)). The right of retention referred to above is, however, only provided for commercial agency relations in the sense of IV.E.–3:101 (Scope) and other contractual relationships covered by Part E of Book IV (cf. IV.E.–1:101 (Contracts covered). One may, however, think of analogies. Also, the general rule of III.–3:401 (Right to withhold performance of reciprocal obligation) should at least help with regard to the reimbursement of the price paid for the goods and a remuneration for the intermediary's work.

Representation for alienation: principal's perspective. As already mentioned, in a situation of representation for alienation, the principal (owner) will regularly grant authority to dispose to the intermediary, so that P remains the owner and ownership only passes to the third party (T) when transferred to T by I. If the intermediary becomes insolvent before, the principal can separate the goods from I's estate. This would not be the case if the P and I, based on the principle of party autonomy, agree that P transfers ownership of the goods to I for the purpose of transferring it further to T. If T already received the goods, resorting to III.–5:401 (Principal's option to take over rights in case of agent's insolvency) in order to receive payment may be of help for P in such a constellation. But T will be able to invoke a defence to the extent that T has already paid to I; to this extent T has already discharged T's obligations under the contract.

Representation for alienation: third party's perspective. There is also not much to be said in this respect, since a transfer from P to I will not happen that frequently in practice. Under III.–5:402 (Third party's counter-option), the third party (T) can demand delivery from the principal only if the latter opts for taking over the intermediary's contractual rights against T. If so, T arguably could, instead of invoking a defence to the extent T has already paid to I, choose to take the goods by paying a second time to P.

(b) Effects of invalidity or avoidance of one of the contracts

Representation for acquisition. The choice between a "two-step" transfer and a "direct transfer" approach may potentially affect the solution of cases where one of the contracts is invalid (from the beginning) or avoided subsequently. Under both approaches, where the intermediary acts as a representative for acquisition, the invalidity (avoidance) of the contract I – T will, in general, cause the property to re-vest in T (although good faith acquisition principles may possibly create exceptions). Ownership will definitely fall back to T where both contracts are invalid. However, where only the contract P – I is invalid, the two-step transfer approach rather clearly leads to the result that ownership stays with I. A straight-forward formalistic application of the direct transfer approach, on the other hand, would lead to the result that ownership would stay with T, which would be somewhat surprising since T entered into a valid contract with I, delivered the goods to I and would, under the contract, still be obliged to transfer the ownership to I (again). Arguably, there are two other possible solutions to this situation. Either P may ratify the transfer, which should be possible by applying VIII.–2:102 (Transferor's right or authority) and II.–6:111 (Ratification) by way of analogy, e.g. upon taking delivery of the goods. Or, since the direct transfer approach mainly serves the purpose of protecting the recipient but this purpose cannot be achieved where the principal's contract is and remains invalid, the "direct transfer rule" is not applied and I acquires validly from T. This seems to be the appropriate solution, even though the intermediary perhaps never intended to acquire these goods personallt. If this is accepted, both approaches lead to the same result.

Representation for alienation. There are also no striking differences with regard to representation for alienation. Where both contracts are invalid, P definitely remains the owner; where only the contract P – I is invalid, the same will apply unless T acquires in good faith. If only the contract I – T is invalid, the direct transfer approach will cause the ownership to remain with P, which is adequate, whereas under the two-step approach (if chosen by the parties), I has acquired ownership of the goods. This is rather unproblematic here, since I can still sell the goods to another person in the capacity of an indirect representative.

(c) Further aspects; summary of evaluation

Simplicity, practicability, facilitating indirect representation. Proponents of a direct transfer approach usually highlight its simplicity and practicability as further advantages. This does not necessarily refer to the fact that there is simply one transfer less involved, but primarily to the observation that the intended economic effect of the whole transaction is achieved at once. It is also common to stress that the intermediary, in reality, has no interest in acquiring ownership of the goods. What matters for the intermediary (in a representation for acquisition) is to be paid or refunded for the price paid to the third party and to receive payment for the service provided. Ownership is not needed for securing these interests, as long as other legal means sufficiently take care of them. Finally, providing the principal (both in representation for alienation and in representation for acquisition) with a safe position as against the intermediary's creditors may facilitate indirect representation in general and serve the commercial interest of carrying out transactions by way of indirect representation.

Other general arguments. In a certain sense, adopting a direct transfer approach also may be said to promote party autonomy: it is easier to achieve a contractual deviation from the direct transfer rule if the principal and the intermediary agree that the goods are to be transferred by a separate step also in their internal relation, than to achieve a direct transfer effect when starting from a two-step model. Some further general arguments that might be

brought forward against a direct transfer concept are considered to carry only little if any weight. In particular, the third party will have no general interest that ownership is acquired by a particular person, the intermediary. What is important is the fulfilment of the counter-performance and that possible later obligations such a right for repair or replacement will be fulfilled. But these are not property law matters. Also, it might be argued that, in case of representation for acquisition, an "authority to acquire" on behalf of the future owner – parallel to the intermediary's "authority to dispose" when transferring goods to the third party – may appear uncommon for many countries. However, other countries have been familiar with this rule for a long time and a two-step transfer rule could be equally surprising from their perspective.

Summary of evaluation. The conclusion is that the practical advantages of the direct transfer approach, in particular of providing the principal with a safe position and the possible effects following therefrom, prevail. On the other hand, the direct transfer model appears to produce no considerable disadvantages. It is, therefore, adopted both in the case of representation for alienation and of representation for acquisition.

C. The rule in detail

Scope. Both paragraphs (1) and (2) require that an agent acts under a "mandate for indirect representation" within the meaning of IV.D.–1:102 (Definitions). Pursuant to subparagraph (e) of that Article, a mandate for indirect representation is a mandate under which the agent is to act in the agent's own name or otherwise in such a way as not to indicate an intention to affect the principal's legal position. A "mandate" is the authorisation and instruction given by the principal as modified by any subsequent direction (IV.D.–1:102(a)). It need not be given by a contract but may be given by a unilateral juridical act.

Direct transfer between principal and third party. Paragraph (1) – for the case of representation for acquisition – and paragraph (2) – for representation for alienation – implement the "direct transfer" approach. In the first case, ownership passes directly from the third party to the principal, without entering the intermediary's patrimony (even though the goods are delivered to the intermediary). In the second case, ownership passes directly from the principal (owner) to the third party. As mentioned above, this is just an express repetition of the general principle that ownership maybe transferred by a person other than the owner who has been validly authorised to transfer the ownership. For the policies underlying the choice of this approach, see Comment B above.

Paragraph (3): requirements for, and time of, the transfer. Paragraph (3) of this Article clarifies how the general transfer requirements set out in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1) are to be applied where the transfer is made by an intermediary; at the same time, it regulates the time when the transfer becomes effective: namely when all requirements are fulfilled. The fact that subparagraphs (a) and (b) of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1) – namely, that the goods must exist and must be transferable – are not repeated in this Article does not mean anything as to substance. They also apply of course, but it is unnecessary to repeat them here because there do not exist any particularities with regard to these requirements when it comes to indirect representation. Ownership passes when all requirements are met.

Agent's authority to transfer or receive the goods (paragraph (3)(a)). A transfer by way of representation for alienation requires that the intermediary has authority to transfer the

ownership of the goods. This is already stated in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(c) and just repeated here. The "authority to receive" the goods is intended to constitute the corresponding element for representation for acquisition. In the case of representation for alienation, the intermediary's authority to dispose makes it possible that the intermediary affects the principal's patrimony so as to transfer property out of that patrimony, based on a contract concluded in the intermediary's own name. Equally, in the case of representation for acquisition, the intermediary's authority to receive allows the intermediary to affect the principal's patrimony so as to transfer property into that patrimony, again based on a contract concluded in the intermediary's own name. Such authority will usually be implied in the contract of mandate, or unilateral authorisation given by the principal.

Entitlement between intermediary and third party (paragraph (3)(b)). The entitlement to the transfer of ownership in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(d) must exist in the relation between the intermediary and the third party. It may be based on any of the different legal grounds listed in the text of the Article; however, being entitled by virtue of a contract is the most relevant category here. Subparagraph (b) applies both to representation for alienation and to representation for acquisition. Since there does not occur any transfer between the principal and the intermediary, unless the parties agree otherwise, the entitlement-requirement is not mentioned in this relation. However, the intermediary's authority must validly exist.

Agreement as to time, delivery or equivalent (paragraph (3)(c)). Subparagraph (3)(c), finally, provides that the general transfer requirements of an agreement as to the time ownership is to pass, or, in the absence of such agreement, delivery or an equivalent to delivery, must exist in the relation between the intermediary and the third party. This refers to VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e). It goes without saying and also follows from the reference to the general transfer rule that in case of an agreement as to the time ownership is to pass, the conditions of this agreement must be met in order to let property pass. This rule applies both to representation for acquisition and to representation for alienation.

VIII.–2:303: Passing of ownership in case of direct delivery in a chain of transactions

Where there is a chain of contracts or other juridical acts, court orders or entitlements based on a rule of law for the transfer of ownership of the same goods and delivery or an equivalent to delivery is effected directly between two parties within this chain, ownership passes to the recipient with effect as if it had been transferred from each preceding member of the chain to the next.

COMMENTS

A. General

Function of the rule. This Article addresses a situation which frequently occurs in practice: A sells good to B, who in turn resells them to C. For practical reasons, however, the goods are delivered directly from A to C. Under a delivery-based transfer system, this raises the question how a transfer of ownership of these goods is brought about. To a large extent, the issue may be considered to be of an academic nature, but it also implies some aspects that may be of practical relevance (cf. Comment B below), for which reason it seems appropriate to address it in a specific Article in model rules like these. With regard to the structural elements used in the transfer concept of this Chapter, the present Article supplements both the delivery rules of VIII.–2:104 (Delivery) and VIII.–2:105 (Equivalents to delivery), which basically presuppose that delivery is made from each transferor to the respective transferee, and the rules on the transferee's entitlement (VIII.–2:101 (Requirements for the transfer of ownership in general) paragraphs (1)(d) and (2)) which, in general, are also based on this assumption.

> *Illustration 1*
> A concludes a contract for the sale of goods with B, who resells them to C, and C sells them to D. The goods are still in A's possession. In order to keep transaction costs low, the goods are delivered – in the sense of VIII.–2:104 (Delivery) – directly from A to D.

> *Illustration 2*
> A concludes a contract for the sale of goods with B, who resells them to C, and C sells them to D. The goods are placed in Y's warehouse. A gives notice to Y that ownership of the goods now passes to D. Or, A transfers documents issued by Y, which contain the undertaking to deliver the goods to the current holder of the document, to D. In this case, there is an equivalent to delivery in the sense of VIII.–2:105 (Equivalents to delivery) paragraphs (2) or (4), respectively.

As to substance, this Article spells out two effects: first, that the acquisition of ownership by the last transferee in the chain is valid; second, that ownership passes with effect as if it had been transferred from each preceding member of the chain to the next.

Comparative background. The situation addressed in this Article is usually not expressly regulated by statute. Solutions usually follow from general transfer principles; in many countries, the issue is only little discussed or not discussed at all. However, one can identify a general principle in so far as it is generally accepted that, where direct delivery is made based on a chain of contracts (or other legal grounds), the last person's acquisition will be valid. Also, it appears that the usual conception is that ownership passes "along the chain" of

(contractual or other) entitlements, both in consensual systems (where the transfer already follows from the conclusion of the contract) and under delivery-based systems. Dogmatic concepts differ to a certain extent, as can be seen from the Notes to this Article. However, the idea that ownership could pass directly from the person effecting delivery to the person taking delivery (in *Illustrations 1* and *2*: from A to D) is at least discussed in some countries.

Options: direct transfer or transfer "along the chain". Taking into account the comparative survey as well as evident practical needs, there is virtually no question that a transfer of ownership by way of direct delivery should be possible. The only issue to discuss is whether the transfer should be regarded as occurring directly (in the examples given above: from A to D) or "along the chain" (i.e., A–B–C–D); in the latter case, B and C may be deemed to become owners for a "logical second".

B. Discussion of the options

General; avoiding artificial constructions and consistency. Arguments may be put forward on different levels. For instance, the concept of a transfer along the chain, since it implies at least one immediate acquisition and sub-transfer by which the person in the middle acquires ownership "for a logical second", may be regarded fictitious; and it may be argued that such artificial constructions should be avoided. On the other hand, it may be argued that transfers in a chain should be treated alike as far as possible, irrespective of whether delivery is made from one member to the next or directly from the first to the last member, the latter only being carried out for reasons of practical simplification. Both views could, depending on subjective preferences, claim to be a "natural" approach; the latter view may also invoke an argument of consistency.

The possibility under this Chapter to contract out of the delivery regime and to bring about the transfer by agreeing on a certain time ownership is to pass does not necessarily speak for the one or other option. If, e.g., A and B agree on an immediate transfer while the goods remain with A, ownership will be regarded to have passed to B, and to further pass on from B, under both approaches.

The following Comments will concentrate on aspects where the practical results of the two approaches may, at least potentially, differ.

Protection of insolvent middle person's creditors. One of the situations where the two approaches potentially differ is where one of the persons "in the middle" becomes insolvent, so that in principle, the fact that this person acquires ownership could be considered advantageous for that person's general creditors (at least under the conceptual thinking of a unitary approach). The following discussion will primarily focus on the most frequent constellation that the legal basis of all transactions in the chain is a contract for the sale of goods.

> *Illustration 3*
> Facts as in *illustration 1*. After all contracts in the chain A–B–C–D have been concluded, but before delivery is made from A to D, C becomes insolvent and bankruptcy proceedings are opened.

Wherever one considers ownership to be placed in such a situation, basic insolvency law principles should arguably not be rendered inapplicable. At the time when insolvency proceedings are commenced, both contracts between B and C, and between C and D, are not fulfilled at least on the respective transferor's side. Depending on whether the respective counter-performance, i.e. payment of the price from C to B and from D to C, has already been fully performed at that time or not, C's insolvency administrator may have a right to choose between adopting (fulfilling) each of these two contracts or terminating them. Suppose both payments have not yet been made in full (so that a right to choose would exist) and the insolvency administrator opts for upholding the contracts, because C sold the goods to D for a better price than C is obliged to pay to B and, therefore, executing both contracts would increase the bankrupt's estate, there will be an unaffected chain of contracts from A to D, and all these contracts must be fulfilled irrespective of whether a "direct transfer" or a "transfer along the chain" approach applies in property law. If D took a risk and prepaid a considerable part of the price to C before insolvency proceedings are commenced, the insolvency administrator may opt for termination in order to increase the estate to the benefit of C's general creditors. Placing the goods with C in such a situation may fit easily to a "transfer along the chain" approach (e.g. where insolvency law provides that as from the commencement of insolvency proceedings, dispositions made by the debtor are ineffective as against creditors). It may cause difficulties under a "direct transfer" concept. Making it possible for D to invoke a "direct acquisition of ownership" from A for the purpose of protecting a pre-paying buyer (only because the buyer took delivery from someone else) would appear strange in terms of equal treatment, consistency, and a balancing of interests. Although this is just a small extract of possible scenarios in an insolvency context, it shows that the "along the chain" approach has advantages in this respect. It may be added that for B (a particular creditor of the insolvent C), it seems to be immaterial which concept is applied. It may also be added that where the underlying entitlements to the transfers arise from other legal grounds than from a contract (under which both parties owe a performance to the other), a right to choose does not apply.

Transfer subject to retention of ownership or other encumbrance. The transfer system should make sure that if one of the parties within the chain agrees to transfer the goods only subject to a retention of ownership (or agrees to retain a limited proprietary right in the goods), this transferee's retained ownership or other encumbrance is preserved. Again, this easily goes together with a rule that ownership passes along the chain. A direct transfer rule would need an additional provision. This additional rule would, at least for this particular issue, re-assimilate the direct transfer concept to a transfer "along the chain".

Invalidity of contracts in the chain. Another aspect rather speaking for the "along the chain" solution are cases where one or more contracts within the chain turn out to be invalid or are avoided after delivery. This will give rise to unjustified enrichment claims (unless good faith acquisition principles apply). These claims will "follow the contracts". If ownership passed along the chain as well, both devices will coincide in so far as a certain party within the chain will get the goods based on the unjustified enrichment principles and the proprietary remedies. If, on the other hand, ownership passed "directly", there should – under a causal transfer approach – be no doubt that the invalidity of one of the contracts in the chain will affect the last person's acquisition. Also in this respect, the direct transfer concept would have to be assimilated to a transfer concept along the chain.

All in all, it appears that the concept of a "transfer along the chain" is preferable. It is, therefore, explicitly adopted in the present Article.

C. The rule in detail

Chain of entitlements to transfer same goods. This Article applies where there is a chain of contracts or other juridical acts, court orders or entitlements based on a rule of law for the transfer of ownership of the same goods and delivery or an equivalent to delivery is effected directly between two parties within this chain. A "chain" within the meaning of this Article exists where several (at least three) persons are legally tied towards each other in a way that the first is obliged to transfer ownership to the second, the second to the third, and so on. Compare *illustration 1* above. Although the main practical examples doubtlessly are contracts, the rule equally applies to entitlements based on other legal grounds; the wording refers to the general concept of an entitlement to the transfer of ownership established by VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(d). It is immaterial in which chronological order these entitlements are created and the obligations become due. The entitlements must concern the "same goods"; that may be specific goods owned by the first transferee A. However, the goods may also be defined in generic terms in some or in all relations in the chain, provided that the generic terms used by the parties are compatible with each other.

Delivery or equivalent effected directly. Further, delivery of the goods, or an equivalent to delivery in relation to the goods, must be effected directly between two parties in the chain, evidently not being two direct contracting partners. Delivery may, e.g., be made from A to C or from A to D, etc. The terms refer to VIII.–2:104 (Delivery) and VIII.–2:105 (Equivalents to delivery), including the latter Article's paragraph (1) which addresses the case that the transferee (e.g., D) already possesses the goods.

Effect: as if transferred from each preceding member of chain to the next. The Article states that where the preceding requirements are fulfilled, ownership passes to the recipient with effect as if it had been transferred from each preceding member of the chain to the next. This implements the "along the chain" approach discussed above. It does not seem necessary to spell out that ownership rests with each person in the middle for a "logical second". It suffices to provide that the effects are "as if" the transfer was made from one to the other, and so on, at the moment when the first person in the chain effects delivery (or equivalent) to the last member.

VIII.–2:304: Passing of ownership of unsolicited goods

(1) If a business delivers unsolicited goods to a consumer, the consumer acquires ownership subject to the business's right or authority to transfer ownership. The consumer may reject the acquisition of ownership; for these purposes, II.–4:303 (Right or benefit may be rejected) applies by way of analogy.

(2) The exceptions provided for in II.–3:401 (No obligation arising from failure to respond) paragraphs (2) and (3) apply accordingly.

(3) For the purposes of this Article delivery occurs when the consumer obtains physical control over the goods.

COMMENTS

A. General

Function of the rule. This Article supplements II.–3:401 (No obligation arising from failure to respond) on a property law level. The named rule provides that, subject to certain exceptions, if a business delivers unsolicited goods to, or performs unsolicited services for, a consumer, no contract arises from the consumer's failure to respond or from any other action or inaction by the consumer in relation to the goods and services; and that no non-contractual obligation arises from the consumer's acquisition, retention, rejection or use of the goods or receipt of benefit from the services. The effect of such business practice on the ownership of the unsolicited goods is not addressed by II.–3:401, nor is it directly addressed by Article 9 of Directive 97/7/EC on the protection of consumers in respect of distance contracts, which is incorporated by II.–3:401. This gap is filled by the present Article, which completes the private law sanctions for this problematic commercial practice.

Comparative background and main policy questions. Whereas the Directive's impact on the level of the law of obligations has triggered a broad discussion in many EU Member States, its effects on the property law level remained unclear and disputed and were only little discussed in many countries. In a number of legal systems, delivery of unsolicited goods is treated as an unconditional gift; in some others, it has been contemplated whether the business should be granted a certain time to recover the goods before the consumer acquires ownership of them. Details are reflected in the Notes. Against this background, the main policy questions were whether the consumer should acquire "ownership" of the goods at all, and if yes, against whom such acquisition should be valid and when it should take place (immediately or after a certain time, giving the business a chance to take the goods back).

Basic idea. The basic idea underlying this Article is to carry the Directive's policy into effect on a property law level, namely by sanctioning an unfair commercial practice with the effect that it becomes so unattractive for businesses that the practice is abandoned. To this end, the rule provides that the consumer acquires ownership of the goods, and that this acquisition takes place immediately. This being a specific rule with a specific purpose, the scope of this Article equals the scope of II.–3:401 (No obligation arising from failure to respond). Unlike some European legal systems, this Article does not employ a "donation language", in order to avoid possible misunderstandings and consequential problems (e.g., related to the revocation of donations, etc.).

Place of provision. One could, certainly, discuss at length which would be the most appropriate place for this provision. The transfer is not based on a bilateral contract. Rather,

acquisition of ownership takes place by operation of law. However, placing the rule in Section 3 of Chapter 2 fits since the mode of acquisition of ownership is derivative, not original.

Relation to unjustified enrichment law. Also, it has to be clarified that acquisition of ownership by the consumer does not amount to an unjustified enrichment. This Article provides a sufficient entitlement in law for the transfer to be justified. See also II.–3:401 (No obligation arising from failure to respond) paragraph (1)(b).

B. The main rule in detail (paragraph (1))

Scope: business delivering unsolicited goods to consumer. The requirements for this Article to apply are identical to those used in II.–3:401 (No obligation arising from failure to respond) paragraph (1). The transferor must be a "business", and the transferee a "consumer" in the sense of the definitions provided by I.–1:105 ("Consumer" and "business"). Goods must be delivered without being ordered by the consumer. "Delivers", in this Article, is not to be understood in the sense of VIII.–2:104 (Delivery), but in the sense in which it is used in II.–3:401. This is made clear by paragraph (3) of the present Article which provides that delivery occurs when the consumer obtains physical control over the goods (because he or she is then in the situation that he or she must decide whether to enter into a contract or not). In the end, this means that the consumer does not acquire ownership before "delivery" in the given sense has taken place. This, also, may be considered to constitute a "functional aspect" in the general unitary-oriented approach adopted in this Chapter justifying a minor exception to the general rules. For further general issues, see the Comments on II.–3:401 (No obligation arising from failure to respond). For the exceptions to the present Article, see Comment C below.

Time of acquisition. As mentioned above, one can think of different approaches as to the time when the consumer's acquisition of ownership takes place. In those countries where the issue of acquisition of ownership of unsolicited goods is explicitly regulated or discussed more closely, ownership passes immediately upon delivery (often following from characterising the delivery of unsolicited goods as an unconditional gift). Another option could be giving the sender a chance to pick up the goods, at least with regard to more valuable goods; or providing a general time limit of, e.g., six months. However, taking into account the policy of preventing businesses from executing unfair commercial practices, the most simple and effective solution is an immediate acquisition by the consumer. Acquisition of ownership takes place upon fulfilment of the general requirements set out in Chapter 2 Section 1, physical delivery in the sense used here of course being the most relevant aspect. Upon delivery, the consumer is "entitled to the transfer of ownership" in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (d) by virtue of the present Article itself. Should the business state, in its communication accompanying the unsolicited goods, that ownership of the goods only passes upon payment of the purchase price, this will remain ineffective.

Right to reject (sentence 2). As a matter of principle, no one should be forced to acquire any right. Accordingly, the consumer has the right to reject the acquisition of the right of ownership. This is catered for by applying II.–4:303 (Right or benefit may be rejected), which regulates the rejection of a right conferred by unilateral juridical act, by way of analogy. According to this rule, the result of such rejection is that the right is treated as never having accrued. Rejection is executed by notice to the maker of the act. This rule also applies for the acquisition of ownership, not only for reasons of consistency, but also because this promotes

much more clarity than a merely internal rejection by will. Sending the goods back to the supplier will of course constitute such rejection.

Effects of acquisition of ownership. It is clear that the consumer's acquisition must be good as against the sender (business). Also, in order to give the consumer all possibilities of disposing of the goods, the consumer must be in a position to transfer title to another person, whether for a price or gratuitously. Therefore, the acquisition must be valid also in a question between this new acquirer (who acquired from the consumer) and the sender. This may appear to be a far-reaching consequence. It is only justified by the specific policy pursued by this Article (cf. Comment A above).

The business's general creditors – who may wish to levy execution on the delivered goods – should, in principle, be in the same position as the business itself. They should, therefore, have no rights in the goods. Under specific circumstances, the business's creditors may be provided with some protection under other general rules, namely under national (mainly: insolvency law) rules allowing the creditors to treat their debtor's transactions as ineffective in the sense of an "*actio Pauliana*" or comparable concepts, provided that the requirements set out in these provisions are fulfilled (e.g. an intention of defrauding creditors; gratuitous transactions, which may well be a matter of discussion with regard to unsolicited goods). It is, however, up to these national rules to decide which solution to adopt.

No effect against original owner if business acted without right or authority to dispose. Where the business itself has not acquired the goods validly, the position of the original owner should not deteriorate This Article's policy is to restrict certain commercial practices, but the original owner did not take part in, and does not benefit from, such practice(if the original ownere took advantage of the unsolicited delivery transaction, this may constitute a ratification in the sense of VIII.–2:102 (Transferor's right or authority)). This is catered for by the reference to the business's right or authority to transfer. The consumer cannot acquire the goods in good faith without paying a price (cf. VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership)).

C. Exceptions (paragraph (2))

General. As mentioned above, this Article aims at completing private law sanctions for business activities covered by II.–3:401 (No obligation arising from failure to respond) on a property law level. But this is it. The present Article does not intend to cover a broader scope than the named provision. Therefore, paragraph (2) of the present Article makes sure that the exceptions set out in II.–3:401 (2) and (3) also apply for the purposes of the transfer of ownership. The idea is to have completely identical scopes for all rules entitling the consumer to keep the goods, dispose of them, etc.

Exception for supply by way of benevolent intervention in another's affairs. II.–3:401 (No obligation arising from failure to respond) paragraph (2) makes an exception for goods supplied to a consumer by way of benevolent intervention in another's affairs. Such situations will be rare. Paragraph (2) of the present Article adopts this exception by way of reference, the idea not being that the consumer will be precluded from acquiring ownership under all circumstances, but that it must be up to the policies governing the applicable rules of Book V to decide whether ownership will pass to the consumer, and whether the business will have any rights resulting from delivering the goods.

Exception for supply in error. II.–3:401 (No obligation arising from failure to respond) paragraph (2) also makes an exception for goods supplied to a consumer in error or in such other circumstances that there is a right to reversal of an unjustified enrichment. Paragraph (2) of the present Article also makes this exception applicable by way of reference. One could discuss whether in such cases, the consumer should acquire ownership of the goods in the first place, but be under an obligation to transfer the goods back to the business under the provisions of Book VII on unjustified enrichment. However, the aim of the present Article is indeed to preclude a transfer of ownership in cases of error, etc., since the consumer's acquisition of ownership is meant as a form of "punishment" for unfair commercial practices which, however, is not appropriate where the business acted in error. One must take into account that the function of the consumer's acquisition of ownership, *inter alia*, is to enable the consumer to pass on title to a third person by way of donation. In such situations, depending on the circumstances, recovering the full value of the goods under unjustified enrichment principles may be problematic. Under the present concept, tracing the goods would be possible where delivery was made in error, since the third person acquired the goods from a non-owner and will not be protected by good faith acquisition principles, the latter requiring acquisition for value (cf. VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership)).

Delivery of excess quantity under contract for sale of goods. Paragraph (2) also refers to II.–3:401 (No obligation arising from failure to respond) paragraph (3), which provides that the said Article is subject to the rules on delivery of excess quantity under a contract for the sale of goods. The relevant rules on contracts for sale provide that in such a case, the buyer may decide to retain or refuse the excess quantity. If the buyer decides to keep it, he or she must pay for it at the contractual rate, subject to an exception where the consumer believes on reasonable grounds that the seller has delivered the excess quantity intentionally and without error, knowing that it had not been ordered (IV.A.–3:302 (Early delivery and delivery of excess quantity)). For the purposes of the present Article, adopting the reservation spelled out in II.–3:401(3) means that where the consumer decides to keep the goods and is under an obligation to pay the price, ownership of the excess goods of course also passes to the consumer, but based on the general rules of Sections 1 and 2 of this Chapter, and not by operation of law under the specific rule of the present Article.

VIII.–2:305: Transfer of goods forming part of a bulk

(1) For the purposes of this Chapter, "bulk" means a mass or mixture of fungible goods which is identified as contained in a defined space or area.

(2) If the transfer of a specified quantity of an identified bulk fails to take effect because the goods have not yet been identified in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (3), the transferee acquires co-ownership in the bulk.

(3) The undivided share of the transferee in the bulk at any time is such share as the quantity of goods to which the transferee is entitled out of the bulk as against the transferor bears to the quantity of the goods in the bulk at that time.

(4) Where the sum of the quantities to which the transferees are entitled as against the transferor and, if relevant, of the quantity of the transferor exceeds the total quantity contained in the bulk because the bulk has diminished, the diminution of the bulk shall first be attributed to the transferor, before being attributed to the transferees in proportion to their individual shares.

(5) Where the transferor purports to transfer more than the total quantity contained in the bulk, the quantity in excess of the total quantity of the bulk to which a transferee is entitled as against the transferor shall be reflected in the transferee's undivided share in the bulk only if the transferee, acquiring for value, neither knew nor could reasonably be expected to know of this excess. Where, as a result of such purported transfer of a quantity in excess of the bulk to a transferee in good faith and for value, the sum of the quantities to which the transferees are entitled as against the transferor exceeds the total quantity contained in the bulk, the lack of quantity shall be attributed to the transferees in proportion to their individual shares.

COMMENTS

A. General

Function of this Article and the following VIII.–2:306 (Delivery out of the bulk). This and the following Article contain specific provisions on the transfer of fungible (generic) goods forming part of an identified "bulk", e.g., goods stored in a certain container or warehouse, or oil contained in a specific tank, etc. Technically, they provide a certain exception to, or rather modification of, the general requirement of identification as set out in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (3). The latter rule provides that where the contract or other juridical act, court order or rule of law defines the goods in generic terms, ownership can pass only when the goods are identified to it. Regarding fungible goods contained in a bulk, this would mean that ownership of them cannot yet be transferred because the identification requirement is not satisfied. The parties could, therefore, wait until delivery of the single items owed to the specific transferee is made (or until any other event bringing about the identification of the goods). However, a transferee may wish to acquire a position in which there is some protection against the transferor's insolvency, and perhaps, a position in which "the goods" (or a respective quantity of goods) can be validly disposed of before that time. For such cases, the present Article provides for a possibility for the transferee to become co-owner of the whole goods contained in the bulk, which is possible against the background of the identification principle where (not the individual goods themselves, but) at least the quantity of the goods intended to be transferred, and the bulk this quantity is contained in, are identified. Under the present Article, such acquisition of an undivided share will take place if the parties have agreed on a transfer prior

to the identification of the goods; typically, where they have agreed on an immediate transfer upon the conclusion of the contract. The undivided share in the bulk provides the transferee with a comparable protection as long as the goods are contained in the bulk. This is, however, only an interim stage. At the end of the day, it is of course intended that a respective quantity of goods is delivered out of the bulk and the transferor's co-ownership share in the bulk is transformed into sole ownership of the delivered goods. The issues related to this stage of delivery out of the bulk are regulated in VIII.–2:306 (Delivery out of the bulk).

The main policy can be summarised as giving effect to party autonomy as far as possible, i.e. as far as the identification principle canbe applied in a modified form.

Usually, the rules on the transfer of goods forming part of an identified bulk will apply to situations where not only one transferee acquires an undivided share in the whole bulk, but several transferees do. Therefore, the rules must also address the effects of such transfer on other co-owners.

Comparative background. Comparable rules on "bulk sales" only exist in a minority of European legal systems; above all, in United Kingdom law. The context there is slightly different to the rules provided for in these Articles, since the Sale of Goods Act 1979 basically provides for a consensual transfer system, and the buyer's acquisition of an undivided share in the bulk is made dependent on payment. Also, there are some different policy choices regarding the rules on taking delivery out of the bulk. However, it is considered useful to implement the main approach suggested by United Kingdom law, i.e. providing for a possibility of acquiring an undivided share in the whole goods as a means of interim protection, into these model rules.

Basic structure of the "bulk sale" rules. The two Articles intend to address all relevant issues of this concept step by step in the black letter text. Paragraph (1) of the present Article provides for a definition of the term "bulk". The following paragraph (2) contains the main rule, namely that the transfer of a specified quantity of an identified bulk results in the creation of co-ownership of the whole goods contained in the bulk. Paragraph (3), then, provides the basic rule for calculating the undivided shares of the co-owners. The following paragraphs, finally, regulate special situations which may occur, but do not necessarily occur, in the context of the transfer of goods forming part of a bulk. Paragraph (4) deals with the case of subsequent shrinkage of the bulk (e.g., by some goods being stolen, or otherwise vanishing), whereas paragraph (5) addresses the case of "excess dispositions" made by the transferor, i.e. a special situation of multiple transfers.

The following Article, then, deals with issues arising at the stage of taking delivery out of the bulk. Paragraph (1) of that Article expressly states that a transferee is allowed to take delivery of a respective quantity out of the bulk – which is not self-evident, since taking delivery of certain goods that are held in co-ownership of several persons may formally constitute an infringement of the other co-owners' property rights. Paragraph (2) deals with the acquisition of ownership in cases where a transferee takes delivery of a quantity to which that transferee is entitled under the contract, but which exceeds the quantity of goods corresponding to the transferee's undivided share, e.g. because of a diminution of the bulk.

For the purposes described above, paragraph (5) of the present Article and VIII.–2:306 (Delivery out of the bulk) paragraph (2) provide for specific good faith acquisition rules.

Relation to Chapter 5. As to the relation of these two Articles to the rules of Chapter 5 on production, combination and commingling – in particular: to VIII.–5:202 (Commingling) – see VIII.–5:101 (Party autonomy and relation to other provisions) Comment C. There is no direct overlap between these two sets of rules.

B. Definition of "bulk" (paragraph (1))

Mass or mixture of fungible goods. Paragraph (1) defines the term "bulk" for the purposes of Chapter 2 (the term is only used in this and the subsequent Article, and in the reference contained in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (3)). There are two decisive criteria; the first being that the goods are "fungible" (or interchangeable). This does not necessarily mean "of exactly the same kind and quality" but will depend on the respective understanding in the relevant market segment. E.g., scrap metal of different form may be regarded as "fungible" when being traded by a scrap dealer. The goods may be solid, liquid or gaseous ("mass or mixture"). Also, the quantity contained in the bulk may vary by new goods being added to the bulk and others being removed therefrom (e.g. for the purpose of effecting delivery to one of the transferees).

Identified as contained in defined space or area. The second decisive criterion is that these goods are placed in a "defined space or area", the emphasis rather lying on "defined" than on "space or area". The space or area may be closed (a tank or container, a specific depot or stockroom, a factory building) or non-roofed (a stockyard, a fish basin, or even a specific grazing land), it may move (a ship, a goods wagon) or not. Theoretically it is not even decisive that the transferor has exclusive access to that space or area, although in practice some element of exclusivity will regularly exist and some kind of separation makes sense. The material aspect is that the location, however defined, allows identifying which goods are placed there at a given moment in time, so that a relation between a quantity sold and the total quantity contained in the bulk can be established.

C. Main rule: creation of co-ownership (paragraph (2))

Specified quantity of identified bulk. This Article applies where the parties agree to transfer a specified quantity of the identified bulk. This contains two elements: First, the rule addresses the transfer of a *quantity*, which may be defined by number, weight or other measure. The main practical function of the rule becomes evident when it is considered what the parties could do without it. According to general rules on co-ownership – which are not regulated in these model rules, but will exist under national law – the parties could transfer an undivided share in the bulk by agreeing on a certain proportion (in the sense of a fraction or percentage) of the goods contained in the bulk. However, this is not the usual case. Normally, one will buy e.g. 10.000 tons of oil (a certain quantity), not 35 % of the oil contained in a particular tank. Second, the quantity subject to the transfer must be *part of an identified* bulk. A transfer of "100 bottles Barolo DOCG 2004 stored in my wine cellar in X" will fall within this Article; a transfer of "100 bottles Barolo DOCG 2004" will not (but be subject to the general transfer rules on generic goods; i.e. if a transfer before identification was agreed upon, ownership will pass upon identification).

Agreed time of transfer before identification. Further, paragraph (2) of this Article requires that the transfer "fails to take effect because the goods have not yet been identified", which is the case where the parties have agreed on a transfer before identification takes place. The paradigmatic example is that the parties agree that ownership of the goods will pass

immediately upon the conclusion of the contract; but the agreement could be on any other date before identification is made. In the latter case, the effects spelled out by this Article will occur only at that later time.

Under the approach adopted in this Chapter, it is necessary that the parties agree to *transfer* the ownership of the goods to the transferee at a time covered by the rule. It will not suffice that the parties just conclude a contract for the sale of such goods. This corresponds to the general approach that the default rule under this Chapter is a transfer upon delivery, not upon the conclusion of the underlying contract. Although the usual sphere of application of the bulk-rules will concern contracts for the sale of goods, the Article applies, in principle, also to transfers based on a unilateral juridical act, a court order or a rule of law.

Differing from United Kingdom law, payment of the price (at least partial payment) is not required.

If no transfer prior to identification is agreed upon by the parties, the transfer of ownership will take place upon delivery, without requiring specific extra rules.

Consequence: acquisition of co-ownership. Where these criteria are fulfilled, paragraph (2) provides that the transferee acquires co-ownership in the bulk. Before that, the bulk may have been under the transferor's sole ownership; or there may have already existed co-ownership of the goods in the bulk so that, now, the transferee assumes a certain share (corresponding to the quantity transferred) which formerly belonged to the transferor.

D. Calculation of the undivided shares: general rule (paragraph (3))

Mechanism of calculation: relation of quantity to which transferee is entitled to quantity of goods in bulk. Paragraph (3) provides that the undivided share of a transferee in the bulk at any time is such share as the quantity of goods to which the transferee is entitled out of the bulk as against the transferor bears to the quantity of the goods in the bulk at that time. Applying this mechanism, therefore, requires two facts: first, the quantity out of the bulk to which the transferee is entitled; and second, the total quantity of goods contained in the bulk at the time the share is calculated. The formulation used for the first aspect, the "entitlement" of the transferee as against the transferor, corresponds to the concept of "entitlement" used in paragraph (1)(d) of the general transfer rule (VIII.–2:101 (Requirements for the transfer of ownership in general)), i.e. the transferee has a right as against the transferor to demand the transfer of ownership of a specific quantity by virtue of a contract or other juridical act, a court order or a rule of law, and the transferor, correspondingly, is under an obligation to transfer this quantity. This is the general terminology employed in this Chapter; "entitlement", therefore, does not refer to a proprietary right, but to a right to performance. The second factor in the calculation mechanism is the total quantity of goods in the bulk. This may be established by whatever method is appropriate. In practice, such calculation will often not be made all the time, but when the existence of proprietary rights becomes material, in particular when the transferor is insolvent and the bulk is going to be liquidated.

Establishing the relation of these two factors, the transferee's quantity is transformed into a proportion which constitutes the transferee's undivided share in the whole goods.

Illustration 1
X buys 2.000 units out of a bulk containing 9.000 units and agrees on an immediate transfer. The undivided share of X is 2/9 of the bulk.

Situations covered by this general calculation rule ("at any time"): acquisition of share. The general calculation rule provided by paragraph (3) applies to a number of different situations, addressed by the words "at any time" in text of the Article. First of all, this calculation method applies where the undivided share is acquired (as provided by paragraph (2)); cf. *Illustration 1* above. The same applies where a transferee, e.g. a buyer in a permanent business relationship with that seller, already owns a share in the bulk and subsequently agrees on the "transfer" of further items. There is however one exception in the context of the acquisition of undivided shares, namely where more quantities are "transferred" than contained in the bulk. These constellations are governed by a special provision in paragraph (5) of this Article.

Subsequent increase of bulk. Second, the general calculation rule applies to any subsequent increase of quantity in the bulk. The quantity may increase for various reasons. The main case, generally, will be that the transferor adds further items to the bulk (e.g., produces new units and adds them to the stockroom, which is defined as "the bulk", or buys further items and adds them to the bulk for the purpose of reselling).

Illustration 2
S produces transistor radios of a certain type and stores them in a stockroom at his business premises. Currently, there are 10.000 radios stored in that stockroom. Customer B buys 1.000 radios from the stockroom, agreeing on an immediate transfer of ownership. B's share will be 1/10. Before the radios are delivered to B, S produces another 2.000 radios and adds them to the stockroom, which now contains 12.000 items. B's share now is 1/12.

Theoretically, in increase may also be brought about by another person adding goods to the bulk. Where this happens without a prior agreement as to the proprietary consequences, the commingling rule of VIII.–5:202 (Commingling) will apply and regulate the calculation of that person's undivided share in the bulk. The quantity out of the bulk to which the transferee is entitled will, however, not be affected by such an event, whereas the calculation of the share is adapted accordingly (as in *illustration 2*).

An increase may, however, also occur by an "act of nature", without any other person contributing with further units. Then, the question arises to whom the additional quantities shall be attributed. The general rule of paragraph (3) implies the choice that such increase is attributed to the transferor. In other words, a transferee's proportion cannot exceed a percentage representing the goods "transferred" to that transferee.

Illustration 3
Seller S runs a fish-farming enterprise and keeps fish in a defined basin. The price is calculated by weight. When the contract for sale with buyer B is concluded, the basin contains 1.000 fish with an average weight of 1 kilo. B buys 100 kilos and contracts for an immediate transfer; B therefore owns a share of 1/10. Due to extensive feeding, the fish have an average weight of 1,1 kilos one week later. B's share now is 1/11. The increase of 100 kilos belongs to S (it is not divided proportionally between all co-owners).

The result in *illustration 3* is justified, because, on the one hand, B only pays for 100 kilos, and, on the other hand, S has to take care of the fish and also, according to paragraph (4), bears the risk of shrinkage in the first place.

Voluntary legitimate diminution of bulk by transferor. The general calculation rule further applies to all situations where the transferor voluntarily reduces the number of goods contained in the bulk. This will be the case, in particular, where the transferor delivers single items to other transferees who already owned undivided shares in the bulk, or where the respective transferee takes partial delivery. This is, so to say, the ordinary course of business, and is expressly allowed by VIII.–2:306 (Delivery out of the bulk) paragraph (1). Upon such delivery, the shares of the remaining transferees are to be recalculated, which does, however, not affect the quantity to which their shares correspond. Pursuant to the policy underlying the provision, the transferor may also take out a quantity corresponding to the transferor's own undivided share, or consume a respective quantity. The transferees' shares will be recalculated according the general rule of paragraph (3).

Illustration 4
Facts as in *illustration 1*. The undivided share of customer X is 2/9 of a bulk of 9.000 units. X then takes delivery of 1.000 units, leaving 8.000 units in the bulk of which only 1.000 units are now due to X. X's share is now 1/8 of the bulk.

Cases of "involuntary" shrinkage are regulated by paragraph (4) of this Article.

E. Diminution of the bulk (paragraph (4))

Risk of shrinkage primarily placed on transferor. Paragraph (4) deals with cases where the total quantity in the bulk is "involuntarily" reduced; for instance, where some goods perish or are stolen. For these situations, the general calculation rule of paragraph (3) is partly modified. In principle, the transferees holding undivided shares in the bulk keep a share corresponding to the quantity they are entitled to. All shares formally are to be recalculated according to the reduced total quantity contained in the bulk, but as to substance, the shortfall only affects the share of the transferor, until it reaches zero. In principle, this already follows from paragraph (3), but is repeated in paragraph (4).

Illustration 5
A bulk contains 10.000 units. X, Y and Z by separate contracts buy 2.000, 3.000 and 1.000 units, respectively, and acquire respective shares in the bulk according to paragraphs (2) and (3), so that X holds 2/10, Y 3/10, Z 1/10 and the seller S the rest of 4/10. 4.000 units are then accidentally destroyed, leaving 6.000 units in the bulk. According to paragraphs (3) and (4) of this Article, X will now own 2/6 (which corresponds to the 2.000 units X bought), Y 3/6 and Z 1/6. The transferor S has no longer any share in the bulk.

Shrinkage subsidiarily to be born by transferees. Where, however, the diminution eats up more than corresponding to any share still remaining to the transferor, the general rule established in paragraph (3) would not work: the added quantities to which the single transferees are entitled would exceed the total quantity contained in the bulk. Paragraph (4), therefore, provides that to the extent that the shrinkage cannot be attributed to the transferor, the transferees, as the remaining co-owners, bear the shortfall proportionally.

Illustration 6
A bulk contains 12.000 units. X, Y and Z by separate contracts buy 2.000, 3.000 and 5.000 units, respectively, and acquire respective shares in the bulk according to paragraphs (2) and (3), so that X owns 2/12, Y 3/12, Z 5/12 and the seller S the rest of 2/12. Thereafter, 6.000 units are accidentally destroyed, leaving 6.000 units in the bulk.

The sum of the quantities to which X, Y and Z are entitled would be 10.000, which exceeds the remaining quantity of 6.000 still contained in the bulk. According to paragraph (4), the diminution is, in the first place, attributed to S, who thereby loses his whole share, and then attributed to X, Y and Z in proportion to their undivided shares. The internal proportion between X, Y and Z will remain a ratio of 2 : 3 : 5, being however related to a reduced total quantity. Their shares, therefore, are 2/10, 3/10 and 5/10, respectively (10 in the denominator being the sum of 2 + 3 + 5).

Underlying policy. In the absence of any agreement to the contrary – which is always possible according to general principles – the risk of partial destruction of the goods primarily rests with the transferor. The underlying policy consideration is that the goods, at the time they perish or are stolen or destroyed, are still in the sphere of control of the transferor,who typically has the best chances to take adequate precautions. Also, this distribution of risk corresponds to the general principles that would apply if the present Article did not exist. In the case of generic goods, B would still be the owner of the goods, and also under the rules on the passing of risk under a contract for the sale of goods, the risk would be on the transferor.

Special constellations. The result achieved by applying paragraph (4) would be questionable if the damage to the goods was caused by one of the transferees. In practice, this is most likely to happen in the course of taking delivery. Then, an adequate result can be arrived at by applying VIII.–2:306 (Delivery out of the bulk). If the respective transferee finally takes delivery of the damaged goods, or abstains from taking delivery of a quantity corresponding to the goods that transferee destroyed, there is no problem, because quantities “reserved” for other transferees are not affected (if further quantities are also damaged, the co-owners may claim damages under the general rules of Book VI). If, however, the transferee who destroyed some of the goods takes delivery of other, non-damaged, goods, this is no problem as long as the transferor still owns a respective share in the bulk to which this quantity corresponds. If the respective transferee takes delivery of quantities “reserved” for the other transferees, it appears justified to treat the destruction as if this transferee had taken delivery of this quantity (by applying paragraph (1) of VIII.–2:306 by way of analogy) and to solve the question of whether the transferee validly acquired the excess quantity by resorting to VIII.–2:306 (2), meaning that this transferee could acquire only when being in good faith as to the non-existence of possible negative effects for the other transferees.

F. “Transfer” of quantity exceeding quantity in the bulk (paragraph (5))

Acquisition in respect of excess only in good faith (sentence 1). Paragraph (5) deals with a specific kind of “multiple transfer”. The transferor purports to transfer more than what – after deduction of the quantities already represented in undivided shares of other transferees – is still contained in the bulk. Parallel to the approach adopted in the general rule of VIII.–2:301 (Multiple transfers), the later transferee, to the extent that the transfer would exceed the total quantity available to transferees, can only acquire when being in good faith. The standard of good faith (“neither knew nor could reasonably be expected to know”) corresponds to the

general good faith acquisition rule in VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership). In this paragraph, good faith must relate to the non-existence of the excess disposition. The formula "shall be reflected in the transferee's undivided share" takes care of the possibility that a transferee may partly acquire under general rules (to the extent there is no excess) and partly depends on the good faith requirement.

> *Illustration 7*
> A bulk contains 10.000 items, of which 9.000 have already been "transferred" to other transferees who now own respective undivided shares in the bulk. Now, B buys another 2.000 items from that bulk and agrees on an immediate transfer, not knowing that half of that would constitute an excess. Rather, the seller confirms, plausibly, that there is no problem with other buyers. With respect to the 1.000 actually contained in the bulk, B acquires a share under the general rule of paragraph (3). With regard to the other 1.000 exceeding the total quantity, B's acquisition depends on whether B is in good faith or not. There being no general duty to investigate, B will be regarded as being in good faith So B will acquire a share also with respect to this quantity.
>
> The calculation of this share (and the re-calculation of the shares of all other co-owners) is regulated by sentence 2 of paragraph (5). See below.

Parallel to the general good faith acquisition principles established in VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership) paragraph (1)(c), this paragraph requires that the good faith acquisition with respect to the excess must be for value. It is, of course, also required that the goods exist, that the goods are transferable and that there is a valid entitlement to the transfer of ownership on which the agreement as to the passing of ownership is based or to which it is referable; cf. VIII.–2:101 (Requirements for the transfer of ownership in general) paragraphs (1)(a), (b) and (d) and paragraph (2). However, it does not appear to be necessary to state this in the black letter rule; it should already follow from the fact that this Article is part of Chapter 2.

Calculation of shares (sentence 2). Sentence 2 of paragraph (5) regulates the calculation of the undivided shares of all co-owners, including the "new" co-owner who just acquired under the good faith acquisition rule established by sentence 1. The method of calculation conforms to the one employed by paragraph (4) after the transferor's share has been "eaten up". The shares of all co-owners are reduced proportionally.

> *Illustration 8*
> Facts as in illustration 7; the previous transferees are X and Y, who bought 4.000 and 5.000 items, respectively. Now, B buys another 2.000 in good faith. The total bulk contains 10.000.
>
> X, Y and B will own shares of 4/11, 5/11 and 2/11, respectively. This corresponds to 3.636,36 pieces for X, 4.545,45 pieces for Y and 1.818,18 pieces for B.

Underlying policy; subsequent increase of bulk. This approach implies a choice against a strict "first come, first served" principle on the level of the interim stage of acquiring undivided shares. It has been preferred to apply good faith acquisition principles also in this situation, on the one hand because this is consistent with VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership) and VIII.–2:301 (Multiple

transfers), on the other hand also because the outcome is less arbitrary as to the transferees' priority in time. On the other hand, there appears to be no reason for *permanently* excluding a subsequent transferee, who was not in good faith as to the non-existence of an excess, from acquiring an undivided share. Once sufficient quantities are added to the bulk and, therefore, the reason for limiting the acquisition of undivided shares to good faith acquirers ceases to apply, a transferee who originally acted in bad faith may well acquire a protected status. Technically, this may be achieved by applying the restrictive rule of paragraph (5) only as long as the underlying policy so requires. Thereafter, acquisition may take place pursuant to the general rules of paragraphs (2) and (3).

VIII.–2:306: Delivery out of the bulk

(1) Each transferee can take delivery of a quantity corresponding to the transferee's undivided share and acquires ownership of that quantity by taking delivery.

(2) Where the delivered quantity exceeds the quantity corresponding to the transferee's undivided share, the transferee acquires ownership of the excess quantity only if the transferee, acquiring for value, neither knew nor could reasonably be expected to know of possible negative consequences of this excess for the other transferees.

COMMENTS

A. General

Function of the rule. This Article builds upon the previous VIII.–2:305 (Transfer of goods forming part of a bulk) and presupposes that a transferee has acquired an undivided share in a bulk of goods. It deals with the second step of a transaction involving goods in a bulk, namely the transformation of the co-ownership shares of the individual transferees into sole ownership of specific goods which are finally delivered to each transferee.

Basic policy choice: no far-reaching "first come, first served" principle, but adjusted good faith acquisition principles. This Article implies a policy choice deviating from the example of United Kingdom law, which incorporates a far-reaching "first come, first served" principle at the stage of taking delivery. The effect, under United Kingdom law, is that it is immaterial whether a transferee who takes delivery of a quantity to which that transferee is entitled under the contract knows or can reasonably be expected to know that there has been a shortfall (so that this transferee's undivided share actually corresponds to a smaller quantity than the contractual quantity) and the transferor may be unable to fulfil the transferor's contractual obligations towards all transferees. This principle, in United Kingdom law, has been adopted for practical reasons, in order to avoid uncertainties and disputes. As a consequence, also claims for compensation between the transferees are excluded. This approach has not been taken over into the present Article, which follows the good faith pattern (cf. also VIII.–2:305 (Transfer of goods forming part of a bulk) Comment F. However, the practical concerns underlying the United Kingdom rule are taken seriously. The interests at stake are balanced by an appropriate adjustment of the good faith acquisition rule in paragraph (2). See Comment C below.

B. Right to take delivery and acquisition of ownership (paragraph (1))

Transferee's right to take delivery. Paragraph (1) of this Article explicitly states that each transferee has a right to take delivery of a quantity corresponding to that transferee's undivided share (as determined by VIII.–2:305 (Transfer of goods forming part of a bulk)). Such a right to take delivery is not self-evident in relation to other co-owners, because all co-owners have property rights in all goods and, in principle, each act of separation could constitute an infringement of these other co-owners' property rights. Paragraph (1), therefore, has the function of avoiding the result that taking delivery would constitute such an infringement. The same technique is applied in VIII.–5:202 (Commingling). Additionally, the rule implies a very moderate aspect of the "first come, first served" idea, namely that the transferee may take and acquire items of better than average quality without triggering any rights of the others.

In a standard situation, the quantity corresponding to the share will match the quantity to which the transferee is entitled as against the transferor under the contract (or other juridical act, court order or rule of law, cf. VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(d)). The quantity corresponding to the transferee's share may, however, be lower than the quantity due under the contract in case there have been a diminution of the bulk or excessive dispositions by the transferor (cf. VIII.–2:305 (Transfer of goods forming part of a bulk) Comments E and F. Then, the transferee may have a right to delivery of the full quantity under the contract (or other obligatory ground) as against the transferor, but for the purposes of this Article, the right to take delivery without infringing the other co-owners' property rights will, however, only exist to the extent corresponding to the transferee's undivided share in the bulk.

Acquisition of ownership. By taking delivery of a quantity corresponding to the transferee's undivided share, the transferee acquires ownership of the goods delivered. At this time, the prior co-ownership right in a bulk of goods is transformed into sole ownership in specific items. As in VIII.–5:202 (Commingling) paragraph (2), this rule provides for a special and simplified form of division of co-ownership: it does not require any consent of the other co-owners nor is it necessary to commence any judicial proceedings. The interim stage created by VIII.–2:305 (Transfer of goods forming part of a bulk) ends upon taking delivery. It is not necessary to let the transferee become sole owner already in case identification in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (3) is made prior to delivery because the co-ownership right already provides the transferee with the same quality of protection as if the transferee were sole owner of specific goods already. The parties may, however, agree otherwise.

C. Delivery in excess of quantity corresponding to undivided share (paragraph (2))

Acquisition in respect of excess only in good faith. The transformation of the transferee's co-ownership right into sole ownership cannot take place to the extent that the transferee takes delivery of a bigger quantity than the quantity corresponding to the transferee's undivided share. Such an excess situation may occur where there has been a shrinkage situation or in case of excessive dispositions by the transferor (see the references in Comment B above). Under paragraph (2), acquisition of sole ownership with regard to the exceeding quantity is, however, possible where the transferee takes delivery for value and in good faith. The principle is similar to the one employed in VIII.–2:305 (Transfer of goods forming part of a bulk) paragraph (5), but differs – with practically important consequences – regarding the reference point of goods faith (see Comment C below). It is, however, not superfluous to include a second good faith acquisition rule also at this later stage of taking delivery because, e.g., the shrinkage or multiple disposition situation may have occurred only after the respective transferee has acquired an undivided share; or, where the multiple disposition has occurred before, the transferee may have been in good faith first (thus acquiring some share, but smaller than the quantity bought) but may be in bad faith at the time of delivery.

Technically, where a transferee takes delivery in excess of the quantity corresponding to the transferee's undivided share when in bad faith, all transferees holding undivided shares (including the one taking delivery) will continue to be co-owners of the whole quantity possessed by that transferee. The transferee may, however, separate a quantity corresponding to the share and thereby become sole owner of that part (paragraph (1)) while the others remain co-owners of the rest.

Good faith with respect to possible negative consequences of excess for other transferees. The good faith acquisition rule in paragraph (2) is specifically adjusted in order to meet concerns of practicability (cf. Comment A above). The reference point of good faith is not the existence of the excess. It must be considered that the transferee acquires from a person who, originally, certainly was the owner of the goods (or had authority to dispose of them); the risk faced by the transferees is that the transferor disposed excessively, or a shortfall has occurred, so that the transferor is unable, at that point in time, to fulfil all contractual obligations. It also has to be taken into account that the bulk rules will usually be applied in situations where a lot of customers enter into comparable transactions with the transferor, and it may be virtually impossible for a transferee to supervise the transferor's business relations, and to supervise the total quantity of goods in a bulk where, as in a commodity trade, goods may be constantly added, and taken away, from the bulk. It may, therefore, happen that a transferee well knows that there has been an event of shrinkage, and may even know that at the very moment, the transferor would be unable to fulfil all obligations of delivery, but it is very likely that in the ordinary course of events, since the bulk is scheduled to be filled up again soon, the transferor will be able to fulfil all obligations towards other transferees when they become due. The policy underlying paragraph (2) is that such buyers should make a valid acquisition, in order not to undermine the functioning of such specific markets. Therefore, good faith, under this paragraph, must relate to (the non-existence of) "possible negative consequences of this excess for the other transferees". Accordingly, the transferee will be in bad faith where the transferee could reasonably be expected to know that the transferor will not succeed in filling up the bulk again in time so that other transferee will not receive their quantity. This may, in particular, be the case where the transferee has reason to assume that the transferor is going to be insolvent, so that suppliers are likely to stop delivering further goods to the transferor.

Parallel to what has been discussed in VIII.–2:305 (Transfer of goods forming part of a bulk) Comment F, the bad faith handicap should cease to be effective when, at a later point in time, the total quantity of goods in the bulk increases so much that all other transferees, who could suffer from the preferential delivery to the respective transferee, receive what they are entitled to.

How this is supposed to work in practice and why the good faith approach makes sense. The – modified – good faith approach adopted in this Article might be criticised for being too impractical for everyday business activities, since it is unlikely that later delivery takers would like to test issues of good faith or bad faith of previous transferees, for which reason a strict "first come, first served" policy might be argued to be more pragmatic. However, the point seems to be that the difference between the "first come, first served" principle and the good faith approach adopted here will not become relevant in many cases. As long as there is no insolvency of the transferor, the other transferees will simply enforce their contractual rights to delivery. And where no other items can be taken from this very bulk, the buyer will have a claim for damages (non-fault based) and reparation could be made "in kind" by delivering an equivalent item from some other source (if available). That will normally be simpler for the later delivery takers than testing the good or bad faith of previous delivery takers and finding out about any excess taken by the previous transferees, with all the risks of litigation emerging from this. But when the transferor becomes insolvent, clarifying the business activities may make sense and here, the "solidarity principle" implied in the good faith approach may clearly gain importance in terms of striving for an adequate and well-balanced solution. It will be closer to the equal treatment idea than a strict "first come, first served" principle.

Consequences regarding non-contractual liability for damage and unjustified enrichment law. As indicated in Comment A above, the adoption of the "first come, first served" principle in United Kingdom law was also intended to preclude the other transferees from claiming compensation from a transferee who took delivery of a quantity due under the contract, but exceeding that transferee's undivided share. This approach is not followed here. Liability will only be excluded where the respective transferee acted in good faith in the sense of paragraph (2) and hence did not act unlawfully. In other situations, where the transferee taking delivery acted intentionally or negligently with regard to the possible negative consequences for the other transferees, the "excess taking" transferee may be held liable under Book VI, the infringement of the other transferees' undivided shares constituting a legally relevant damage in the sense of VI.–2:206 (Loss upon infringement of property or lawful possession). Similarly, the other transferees will be entitled to proceed against the "excess taking" transferee under unjustified enrichment principles of Book VII. Here also, the good faith acquisition rule provided for by this Article is intended to draw the line of demarcation. Where the prerequisites of this rule are fulfilled, the transferee acquires validly and this enrichment is not "unjustified" due to an entitlement by virtue of a rule of law in the sense of VII.–2:101 (Circumstances in which an enrichment is unjustified) paragraphs (1)(a) and (3). Otherwise, the other transferees may resort to unjustified enrichment law, in particular for the purpose of tracing the value of the quantities formerly corresponding to their undivided shares where the "excess taking" transferee in bad faith has meanwhile disposed of the goods in such a way that the "true co-owners" cannot reach them any longer.

VIII.–2:307: Contingent right of transferee under retention of ownership

Where the transferor retains ownership of the goods for the purposes of a "retention of ownership device" in the sense of IX.–1:103 (Retention of ownership devices: scope), the transferee's right to pay the price under the terms of the contract and the transferee's right to acquire ownership upon payment have effect against the transferor's creditors.

COMMENTS

A. General

Function of the rule. This Article addresses two aspects concerning the position of a transferee acquiring goods subject to a retention of ownership device in the sense of IX.–1:103 (Retention of ownership device: scope) which are not fully settled in some European legal systems. Depending on the background, they may, therefore, be regarded as serving a rather clarifying function, or as strengthening the legal position of such acquirer. In short, the aim is to provide such an acquirer a safe position if he continues paying the price complying with the terms of the contract. The reason is that the acquirer agreed not to acquire ownership immediately, but to provide the transferee a kind of security for his claim for payment (the retention of ownership device), but this should not put the transferee's own acquisition on risk provided that he fulfils his contractual obligations properly. In other words, the fact that the transferor formally remains to be the "owner" of the goods should not have the consequence that the transferee loses the goods to the transferor's creditors as long as he continues paying off the price under the contractual terms. With regard to the content as well as regarding the phrasing, this Article may be seen as a "functional approach" exception to the "unitary-oriented" approach adopted in this Chapter in general.

This Article is supplemented by VIII.–1:204 (Limited proprietary rights) subparagraph (c) which states that rights to acquire in the sense of the present Article are characterised as limited proprietary rights.

Scope: retention of ownership devices. This Article applies to all situations where ownership is retained by the owner of supplied assets in order to secure a right to performance of an obligation; cf. the definition provided by IX.–1:103 (Retention of ownership devices: scope) paragraph (1). Paragraph (2) of that Article provides a list of examples, e.g. retention of ownership by a seller under a contract for sale, or ownership of the supplier under a contract of hire-purchase, or ownership of the leased assets under a contract of leasing, provided that according to the terms of the contract, the lessee at the end of the lease period has an option to acquire ownership of, or a right to continue to use, the leased asset without payment or for merely nominal payment (financial leasing). This understanding is also relevant for the scope of the present Article, as long as, in the end, the transferee acquires ownership (or has an option to acquire ownership). The granting of a mere right to use is outside the scope of this Book. One may, however, contemplate applying the present Article by way of analogy in such cases.

Place of the provision. The present Article addressing the "acquisition side" (transferee's perspective) of a retention of ownership device in contrast to its security function (transferor's perspective), it is placed in Book VIII and not in Book IX. Within Book VIII, the issue fits to the "special constellations" addressed in Section 3 of Chapter 2.

B. The rule in detail

Transferee's right to pay the price under the terms of the contract. This Article provides two particular rights a transferee subject to a retention of ownership device has as against the transferor's creditors and the transferor's insolvency administrator representing these creditors. First, the transferee must have a right to stick to the contract by paying off the transferor under the terms established in their contract. Spelling out this effect is considered important in particular with regard to the transferor's insolvency administrator, who, under virtually all European insolvency law systems, has a right to choose whether to terminate or to stick to a contract which has not been fully performed by both of the parties (or similar requirements). Such requirements would formally be fulfilled in the situation of a sale subject to a retention of ownership, or equivalent device covered by IX.–1:103 (Retention of ownership devices: scope): the transferee has not paid the full price, the transferor has not transferred full ownership. The intended effect of the present rule is that the transferee's right to acquire ownership of the goods by continuing payment under the contractual terms has priority over the insolvency administrator's right to terminate the contractual relationship. The position of the transferor's general creditors is not considerably weakened. The value of the goods will part from the transferor's estate only if the full price is paid in return. The transferee shall be able to keep the goods since entering the agreement on a retention of ownership device is motivated by enabling the transferor to receive a security (whereas the transferee would have had nothing against acquiring ownership immediately upon delivery), so that it appears well justified to treat such a transferee more preferably than a person who took a risk by performing in advance. As mentioned above, the present issue is not fully settled in some European legal systems, for which reason this rule is regarded as a practically important clarification, worth being spelled out in European model rules.

Transferee's right to acquire ownership upon payment. The second aspect catered for by this Article is that the transferee's right to acquire ownership after having paid what has been agreed to pay under the contract has effect against the seller's creditors. Accordingly, the transferor's creditors cannot seize the goods despite the transferor formally still retains the right of ownership, neither in the case that the transferor becomes insolvent nor by individual seizure by a single creditor outside insolvency. Or, more accurately, one should say that the transferee's right to acquire takes priority over any rights created by an act of seizure by the transferor's creditors. If the transferee pays what he has to pay, he will acquire unencumbered ownership. If he fails to pay, the goods will fall within the transferor's estate and can be attached by his general creditors, or an individual creditor's right to the realisation of the asset, created by an act of seizure, can be exercised. The principle spelled out in this Article also comprises the transferee's right to possess and use the goods as well as the transferee's right to alienate his contingent right in the goods. This also follows from including the transferee's contingent right into the definition of limited proprietary rights in VIII.–1:204 (Limited proprietary rights) subparagraph (c).

CHAPTER 3: GOOD FAITH ACQUISITION OF OWNERSHIP

VIII.–3:101: Good faith acquisition through a person without right or authority to transfer ownership

(1) Where the person purporting to transfer the ownership (the transferor) has no right or authority to transfer ownership of the goods, the transferee nevertheless acquires and the former owner loses ownership provided that:

(a) the requirements set out in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraphs (1)(a), (1)(b), (1)(d), (2) and (3) are fulfilled;
(b) the requirement of delivery or an equivalent to delivery as set out in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e) is fulfilled;
(c) the transferee acquires the goods for value; and
(d) the transferee neither knew nor could reasonably be expected to know that the transferor had no right or authority to transfer ownership of the goods at the time ownership would pass under VIII.–2:101 (Requirements for the transfer of ownership in general). The facts from which it follows that the transferee could not reasonably be expected to know of the transferor's lack of right or authority have to be proved by the transferee.

(2) Good faith acquisition in the sense of paragraph (1) does not take place with regard to stolen goods, unless the transferee acquired the goods from a transferor acting in the ordinary course of business. Good faith acquisition of stolen cultural objects in the sense of VIII.–4:102 (Cultural objects) is impossible.

(3) Where the transferee is already in possession of the goods, good faith acquisition will take place only if the transferee obtained possession from the transferor.

COMMENTS

A. General remarks

Purpose and effect of the rule. VIII.–3:101 deals with situations where ownership is "transferred" by a person who is not entitled to do so in the sense of VIII.–2:101 and VIII.–2:102 (i.e. by a person without a right or authority to transfer ownership). Although there will be no transfer of ownership in a strict sense in such situations (see the principle "nemo dat quod non habet" or "nemo plus iuris transferre potest quam ipse habet" which underlies Chapter 2), the transferee may acquire ownership under certain requirements, provided he is in good faith. At the same time, the right of the previous ("real") owner is extinguished.

Persons involved and terminology. In the following, the relevant persons will be referred to as A (the [previous] owner), B (the person transferring ownership without a right or authority) and **C** (the transferee who acquires ownership in good faith). In one respect, this may be a simplification: In addition to B, there may be several people "transferring" the asset, from one to the other, without right or authority (B1 sells to B2, B2 sells to B3), who do not meet the requirements of good faith acquisition before C does so.

As to the parties of the transaction B–C, the draft uses the same terminology as the general provisions on derivative transfers in Chapter 2. The good faith acquirer C is, therefore, called the "transferee" and the seller B is called the "transferor". It is obvious that this wording has

to be understood in a rather broad sense here, as in case of good faith acquisition, ownership is not "transferred" by B, since he is not entitled at all. The function of the rule rather is that A's ownership is extinguished and "new" ownership (of C) is created by operation of law. This can be described as an "original" acquisition (as opposed to "derivative" acquisition).

The terminology is nevertheless used, in the first place for reasons of simplicity and rea dability, and in the second place for reasons of structural and terminological coherence, as the rule requires that, except the seller's lack of right or authority, all other transfer requirements set out in Chapter 2 have to be met. These rules, which are referred to in VIII.–3:101 paragraph (1) (a), use the terms "transferor" and "transferee".

Two types of situations covered. The rule therefore may apply to the following situations: (a) On the one hand, there are situations where A lost his asset or it was stolen from him or A entrusted the asset to B based on a contract (deposition, renting, pledge etc), and B (or B2, who "acquired" from B) transfers the goods to C. (b) On the other hand, there are situations where there has been a contract between A and B, which could, in principle, operate as a basis for a transfer of ownership, but did not for some reason, as may be: the contract A – B was invalid from the beginning or has been avoided with retroactive effect (VIII. –2:202 paragraphs [1] and [2]), with the avoidance taking place either before the transfer to C or after such transfer; or the contract A–B has been for a specific asset, but the wrong asset has been delivered to B, who transfers it to C.

This rule does not cover situations where an *entitled* person transfers the same asset to different transferees; this issue is regulated by VIII.–2:301 (Multiple transfers).

Where the movable is encumbered with limited proprietary rights of a third person and the transferor has no right or authority to dispose of the asset free of that person's right, the question whether the third party's right is extinguished and the transferee acquires ownership free of encumbrances is governed by VIII.–3:102.

Relationship to international conventions and EC law. As a general rule, the provisions of the international instrument will prevail over the provisions of the present book. This rule also applies to the relationship between VIII.–3:102 and Article 29 (3) and (4) of the Cape Town Convention on International Interests in Mobile Equipment, where the position of the buyer (conditional buyer, lessee) of an asset encumbered with an international interest is regulated without according any relevance to the good faith criterion (the decisive requirement being prior registration).

As to the relation to EC instruments, Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State has to be taken into account. This directive, however, does not contain rules on property law. According to article 12 of that directive, "ownership of the cultural object after return shall be governed by that law of the requesting Member State". – Therefore, the provisions of this Chapter will be applicable.

B. General policy of good faith acquisition

Balancing the interests of A and C – individual level. The effect of good faith acquisition is that the good faith acquirer C, who thinks that he has fulfilled all requirements for a transfer of ownership, is protected by acquiring ownership and the real owner A is expropriated.

Therefore, the provisions on good faith acquisition need to balance the interests of the concrete parties A and C (*individual level*). The decision has two consequences: Primarily, it regulates whether and under which prerequisites A can claim the recovery of his asset from C. A second consequence is that the unsuccessful acquirer C who is not entitled to keep the asset may, in principle, enforce claims against B. In the opposite case, where A can no longer claim recovery of the goods because C successfully acquired in good faith, A will try to get reimbursed by B. Thus, C or A bears the risk of B's solvency. To find out who and where B is, may be difficult in certain cases (risk of identity and insolvency of B).

Policy issues on a general level. At the same time, a balancing of interests is also necessary on a more *general level*. The existence of good faith acquisition rules places a certain risk on all owners of movable assets (all As), and protects the interests of all market participants intending to acquire movable assets (all potential Cs and further acquirers from Cs). Or, as it is often formulated, it serves the protection of commerce as such. On such a general level one can also say that there is a general interest in the negotiability of goods.

Doctrinal explanations of good faith acquisition. The discussion on the doctrinal justification of good faith acquisition in the single national legal systems can be described as an almost endless one. This paper can only reflect some basic ideas: One of the classical ways of justifying good faith acquisition is to stress the legitimising function of possession, assuming that the acquirer can conclude from the seller's possession that the seller has a right of ownership ("publicity approach" in the classical sense). Such an automatic conclusion may, however, be unrealistic nowadays. Thus, sometimes the focus is laid on the acquirer's (C's) taking possession or the transferor's (B's) factual power to transfer possession to C. In other legal systems, which require that the original owner A has entrusted the asset to B, it is often stressed that A should bear the risk of that person's misbehaviour, as it was A who chose that person. Similar tendencies can be observed where the effect of good faith acquisition is based on the idea of *estoppel*, meaning that an owner A who transferred possession to B and sets additional indicia of B's ownership is prevented from recovery where the acquirer C can conclude from A's acts that B was owner or at least had authority to dispose. It is argued quite often that there is a practical or economic need of protecting commerce, as it would be too burdensome, costly and insecure if each acquirer was forced to undertake detailed investigations as to the asset's origin. Not having a good faith acquisition rule would create considerable legal uncertainty, even in numerous cases where the transferor was, in fact, entitled to transfer ownership. Thus, good faith acquisition would also serve the aim of promoting legal certainty. The arguments put forward in favour of the owner's protection and against good faith acquisition center on the important function of the legal concept of ownership in our legal, economic and social systems. Private Ownership is protected on the level of constitutional law, it is the basis of our economic system, it contributes to the efficiency of our markets. In the light of the importance of the concept of ownership, a loss of ownership or, more precisely, – as in the case of good faith acquisition – an expropriation of owner A in favour of C needs a solid justification.

Political decision in favour of good faith acquisition. It is hard or almost impossible to find one common or dominating doctrinal approach explaining why and to what extent a good faith acquirer should prevail over the original owner, especially in the context of European harmonisation. The literature and legal sources in the Member States differ considerably on that issue. The main starting point of this Chapter is a policy decision assuming a certain need to protect and promote commerce by some form of goods faith acquisition of goods. This can additionally be legitimised by the idea of reduction of transaction costs, as it can be presumed

that detailed investigations as to the relation A – B are rather costly for C; but not only for the concrete acquirer C, but also for also for all further acquirer's from C and, as there often is more than one person that is interested in the asset, for all other potential acquirers. In relation to the considerable benefits achieved by a good faith acquisition rule on the markets and for good faith acquirers, it may seem justified to place the risk of B's insolvency and B's identity on A (and the owners in general). But it should be stressed again that the main basis of the present rule is a political decision.

C. Requirements for the transfer relationship B – C

(a) Transfer requirements of VIII.–2:101 and delivery to acquirer (VIII.–3:101(1)(a) and (b))

Requirements of VIII.–2:101. VIII.–3:101(1)(a) provides that the requirements set out in VIII.–2:101 paragraphs (1)(a), (1)(b), (1)(d), (2) and (3) have to be fulfilled by the transfer relationship that exists between B and C. As to paragraphs (1)(a) and (1)(b), it is evident that also for the purposes of an acquisition of ownership under Chapter 3 the goods to be acquired must exist and be transferable. Paragraphs (1)(d) and (2) refer to the "title" which operates as the basis of the intended transfer between B and C: C must have a right against B to receive transfer of the goods stemming from a contract, an other juridical act, a court order or a rule of law. This "title" or "obligatory basis" of the transfer of ownership of the goods must refer exactly to the goods that are transferred (for instance delivered) to C. It must operate as the basis of the transfer (see paragraph (2)). Where the contract of sale between B and C (= obligatory basis of transfer) is inexistent, invalid or avoided for some reason, no good faith acquisition can occur. Special restrictions as to the transfer apply in the case of fungible (= generic) goods according to VIII.–2:101(3): The earliest point in time ownership can pass is the identification of the goods to the contract (or other obligatory basis). Only in the case of bulk sales (see VIII.–2:305) a pre-stage of full ownership can be created before identification.

Avoidance of contract B–C. If the contract between B and C is avoided with retro-active effect (as for instance in cases of mistake or fraud) after all the requirements set out in VIII.–3:101 had been fulfilled, the ownership acquired by C in accordance with this Article is destroyed retro-actively as well. This follows from the general principle underlying VIII.–3:101 and VIII.–3:102: These provisions provide a substitute only for the missing right or authority of the transferee to transfer ownership or to transfer free of encumbrances. All the other requirements of a regular transfer of VIII.–2:101 have to be present.

Requirement of possession by B – requirement of possession by C. VIII.–3:101 paragraph (1) (b) fixes the requirement of delivery or a delivery equivalent to C, meaning that the possession of C must be instituted. What VIII.–3:101(1) does not require is the existence of possession by B. The decision for this differentiation was made in view of new forms of commerce, especially the practice of distance selling. In a distance selling context the possession of B is no longer visible to the good faith buyer. B's possession can therefore no longer exercise its legitimizing function for C. It can no longer cause C's justified belief that possessor B is also the owner or authorized seller of the goods. In distance selling relationships the function of B's actual possession is taken over by B's capacity to send the goods to C and to constitute C's possession. C is now justified in his belief that B as a person who can provide him with the possession of the goods has also the right or authority to dispose in that way over the goods.

Thus, VIII.–3:101(1) practically does not abolish the requirement of B's possession, which is found in many traditional civil law codifications of the Member States, but rather brings it into a more modern form. In the usual case, B's capacity to cause delivery of the goods to C is based on B's possession of the goods anyway. B himself or a person possessing the goods for him will deliver the goods to C. This requirement of prior possession by B is also indirectly embodied in VIII.–3:101(1)(b) by reference to the delivery and delivery equivalents of Chapter 2. VIII.–2:104 and 2:105 always require a relationship between the transfer of possession to the transferee and transferor. For the special case of VIII.–2:105(1) the requirement of obtention of possession from the transferor is added by VIII.–3:101(3) (see Comments below).

Mere agreement does not suffice. VIII.–3:101(1)(b) also provides that not all forms of transfers that are considered valid and effective under the circumstances of VIII.–2:101 et sequ. also qualify for a good faith acquisition by the transferee under VIII.–3:101. VIII.–2:101 paragraph (1) (e) mentions three types of requirements: actual delivery, delivery equivalents and an agreement as to the time ownership is to pass. VIII.–3:101(1)(b) refers only to actual delivery (see VIII.–2:104) and to the delivery equivalents (see VIII.–2:105), but not to the agreement at to the time ownership is to pass. The restricted reference wants to exclude such mere agreements without any change of possession from VIII.–3:101. Thus, good faith acquisition under VIII.–3:101 requires some physical manifestation or change in addition to an obligatory basis for the transfer (see VIII.–3:101(1)(a)): the transfer of possession to C (VIII.–2:104), C's already existing possession (VIII.–2:105(1)), a notice to a third person holding the movables (VIII.–2:105(2)), delivery of means to obtain possession (VIII.–2:105 [3]) or delivery of a document of title (VIII.–2:105(4)). If B and C agree on an immediate transfer but leave the goods in B's possession, no good faith acquistion by C will occur.

Arguments for this solution. The requirement of B's possession or – in the modernized form – of C's possession of the goods wants to set a minimum level for the justification of C's belief that B is the rightful or authorized transferor of the movable and, at the same time, as an objective restriction to C's possibility to acquire protects owner A. Where B is not able to provide C with the possession of the goods, no C – no matter how strongly he might have believed in B's right or authority to transfer – will be protected in his good faith, in his belief. This solution seems justified not only because it is in line with the law of most European countries, but rather because in cases where B stays in possession of the goods after their transfer to C – (i) C must normally be suspicious and – (ii) A has no possibility to prevent the transfer of his goods to C because the goods are never moved away from B. A transferor (B) who is not willing to give the movable out of his hands may want to avoid delivery in order to hide the fact from owner A that he illegally disposed of A's goods. This strategy of hiding illegal behaviour of owner A should not be supported by law.

(b) Transfer for value (VIII.–3:101(1)(c))

For value – paragraph (1) (c): balancing of party interests. The consequence of good faith acquisition for A – namely expropriation – is so severe that only good faith acquirers who would equally suffer a significant disadvantage by not allowing good faith acquisition deserve protection. This is not the case where good faith acquirers have not given any value or are not under an obligation to give value for the goods: this is the case where C received the goods as a gift (donation). In balancing the interests of A and donee C, the interests of A would clearly prevail. This assessment is not considerably changed even in cases where C has made expenses on the asset or further investments as a consequence of his "acquisition": C, being obliged to surrender the movable to A, will have a claim against A for recovery of necessary

expenses for keeping and preserving the movable, and he may withhold the movable until this compensation is paid.

Additional reasons for adopting the "for value" restriction. A rule excluding good faith acquisition for gratuitous transfers does not interfere with the general aim to protect commerce: First of all, gratuitous transfers are not very common in business life. Second, parties will have no difficulties to understand and to accept that they may not expect special protection when acquiring gratuitously (even if the "for value" requirement may cause difficulties with mixed donations, it will at least be clear to each party that such a mixed donation is at stake and that special protection maybe should not be expected). Protecting A can also be seen as the majority approach in the European legal systems. A person acquiring gratuitously may acquire ownership after a certain time by continuous possession (see rules of Chapter 4). C, therefore, is not totally unprotected (but the owner's interests prevail at least for some time).

Mixed donations. Donations involving only the payment of a "symbolic" or otherwise proportionally low price are clearly excluded from good faith acquisition. This follows from the policy reasons explained above. "Mixed donations" do not occur frequently in business practice. The main field of application of such mixed donations seems to be the family circle. The legal systems are generally sceptical of transfers among family members and subject their validity and effect to additional requirements. Where such a transaction between two family members is nevertheless effective it seems to be fair to protect A's interests as long as the value owed by C is lower than 50% of the value of the goods. A rule according to which in cases of doubt with respect to the evidence or the interpretation of the contract A's interests will prevail, may apply as well. In business circumstances a mixed donation may be qualified as donation and not as sale in accordance with the DCFR rules on donations and sales, when the main economic purpose or effect of the transaction is that of gratuitous transfer rather than transfer for value.

Alternative solutions. Where good faith acquisition is not limited to transfers for value, as in this rule, a special regime to protect A's interests in donation cases more than in transfer of value cases would have to be set up. As the following deliberations show, the setting up of such a supplementary protection scheme in favour of A would have been quite a complicated endeavour and was, therefore, rejected by the drafters.

a) A could be granted a right to buy back the goods from C for the price C had to pay to B – even if it was zero. Thus, in donation cases, A could claim recovery of "his" asset for nothing (except compensation for expenses). This would, of course, solve the "for value" problem in an elegant way, the requirement would be superfluous. However, the right to buy back causes problems on other levels, and was therefore not adopted by Chapter 3 (see point F below). In addition, such a solution might cause difficulties in C's insolvency, as the relevant (national) insolvency law might prohibit or prevent the creation or imposition of obligations to C's estate without the receipt of any counter-performance. There are no good reasons why C's estate (not having paid anything for the asset) should be entitled to keep the movable while A is (finally) expropriated.

b) Under German law, the former owner has the right to claim back the asset based on unjustified enrichment (§ 816 (1) S 2 BGB). Such a rule should not be adopted either. It has a rather singular status in Europe and is even questioned by a number of German scholars. It

would also be doubtful whether such a rule would fit to the general concept of unjustified enrichment within the ECC. Last but not least, the rule would place the risk of C's insolvency on A, which is not considered to be an adequate result.

Duty to pay or actual payment. To meet the "for value" requirement, it is sufficient that the acquirer is obliged to pay a price; it is not necessary that he already paid. This seems to be the majority approach in the European legal systems. In a system where only actual payment counts, cases of partial payment by C create considerable complications that can be avoided by the rule adopted here.

(c) Requirement of good faith (VIII.–3:101(1)(d))

Object of good faith. In a comparative law perspective, there are different solutions as to what C exactly has to believe in: Must C think that B is the owner of the goods, or may he also think that B is not the owner himself, but that B is a person to whom the owner has granted authority to dispose (for instance, that B is a commissioner for the owner)?

VIII.–3:101(1)(d) provides that it shall suffice that B relies, in good faith, on one of these alternatives. VIII.–2:101 and VIII.–2:102 provide that ownership can be (derivatively) transferred by any person having a "right or authority to transfer ownership"; this applies to the owner as well as to other people (for details, see Comments to VIII.–2:102). As good faith acquisition seeks to protect an acquirer who in good faith assumes that he has fulfilled all requirements set out in Chapter 2, it seems clear that good faith in the transferor's authority to dispose must suffice. Technically, this requirement is laid down by repeating the words "right or authority" in VIII.–3:101(1)(d).

Point in time when C has to be in good faith. VIII.–3:101(1)(d) provides that C has to be in good faith "at the time ownership would pass under VIII.–2:201", that is to say when all requirements set out in Chapter 2 are fulfilled. In the regular case, that will be the time of delivery (or an equivalent to delivery etc). This is also the approach taken in the majority of the Member States. It is justified by the general aim to protect an acquirer who in good faith assumes that he has fulfilled all requirements set out in Chapter 2. Such an acquirer will assume to acquire ownership at the time provided in VIII.–2:201.

This approach has two consequences: It is not necessarily required that C believes that B is owner (or has authority to dispose) at the time the contract B – C is concluded. C may be in good faith also in situations where it is clear, at the time of the contract, that first B has to buy the object himself. In other situations, where B is in possession of the goods right from the beginning, C has reasons to doubt B's right or authority and there are no additional circumstances occurring before ownership should pass, C will continue to be in bad faith up to the time decisive under Article 2:201 and therefore will not acquire ownership.

The second consequence is that if C gets information destroying his good faith *after* the time decisive under VIII.–2:201 (usually: delivery), ownership has already passed to C and such a later falling away of good faith has no consequence at all. This may seem to be a harsh consequence where good faith breaks away only a very short time after the time decisive under VIII.–2:201. Yet, requiring good faith during the whole time C possesses the object after delivery would, in result, mean to abolish good faith acquisition and to establish a special type of acquisition by continuous possession instead. Other rules restricting the time

good faith has to be present after the time following from VIII.–2:201 would seem to lack substantive justification. But first and foremost, such uncertainty would run against the goal of protecting commerce.

Standard of good faith. The national legal systems differ in that issue: In some systems good faith is excluded by definition of law or court practice only when C acts grossly negligent; other systems exclude good faith also in case of slight negligence.

The weighing of interests between A, who is expropriated, and C, who profits from good faith acquisition, suggests that the standard of good faith should be a rather strict one. C should only be protected if he has not been negligent in any way; even slight negligence should exclude good faith. The acquirer will, therefore, be in bad faith if there are, objectively, substantial reasons to doubt B's right or authority to dispose. The lack of B's right or authority does not have to be almost self-evident. It is enough that C has reasons to be suspicious. VIII.–3:101 paragraph (1) realizes this idea by employing the usual words "could reasonably be expected to know" in point (d) and by stating in the comments here that these words should be given a wide interpretation in the sense that they achieve a rather strict standard of good faith. Where C has actual knowledge of B's lacking right or authority, it is clear that he cannot be regarded to be in good faith, even if the individual circumstances of the case would, under an objective standard, not suffice for C to be "reasonably expected to know".

Flexibility of general standard of good faith. The rule is still somewhat flexible. There will be a number of cases where C should be suspicious only when special circumstances are obvious to him (such as: very low price; suspicious conduct of B; certain category of goods in special circumstances, like mobile phones sold on certain second hand markets); otherwise, he can be in "passive" good faith, without being expected to undertake further investigations. There will be other situations, where C should not be regarded to be in good faith unless he collected specific information (so that, if such information is not provided by B or other sources, he may be expected to undertake certain investigations himself). Courts in several Member States decided that C – when he buys new products of a certain kind from B – should expect (at least where C is a professional party) that B himself has bought them under a reservation of title clause, because this is the usual practice on this particular market. C would be obliged to ask for evidence that B has paid (or there has not been a retention of title clause in the previous sales contract). It would not be wise to draft individual rules on such duties of investigation, neither as to certain categories of goods, nor as to the intensity of investigations. The interpretation of the general clause should rather be made dependent on the circumstances of the particular case thus providing more flexibility than detailed rules. Thus, the fine tuning and final adaptation of the standard is left to the courts. The judge may, within his assessment, decide that under the given circumstances C should have made certain investigations. As a second step, the judge has to examine whether these investigations were carried out. If it is shown that C did not undertake these measures, he will be in bad faith. If it is shown that he made sufficient investigations, the judge will look at their results and then decide whether C is to be regarded in good faith or not.

Good faith standard and protection of commerce. This – rather strict – standard of good faith is not regarded inadequate to the detriment of C or of commerce in general. Where investigations are required, there can only be an obligation to undertake reasonable measures, taking into account the costs and realistic opportunities to receive information. Court practice will be able to develop certain guidelines (as it did in the existing legal systems as well) and

parties can gather information on main guidelines. Where C has voluntarily undertaken further investigations and now has reasons to be suspicious, he can, without facing any negative consequences, decide to abstain from buying. There is no reason to make good faith acquisition possible in such situations.

Good faith standard and overall approach of VIII.–3:101. The strict good faith requirement, furthermore, fits into the general concept of the present rule of good faith acquisition: Where the objectve restrictions of good faith acquisition set up by VIII.–3:101 (e.g. stolen goods can be acquired in ordinary course of business) end and open up a space for good faith acquisition by C, which at first sight seems to be wider than in a number of EU jurisdictions, the strict good faith requirement provides the necessary balance. It would lead to inappropriate results in a number of cases if good faith acquisition was available too easily in a number of situations (e.g. stolen goods). There also is no general restriction of good faith acquisition as to certain types of acquisitions (such as purchase from a professional salesman, on a public auction etc). This is no problem with a strict good faith requirement; otherwise, there could be a certain risk of inappropriate results.

General acceptability of strict good faith standard. Finally, the drafters of Book VIII assume that the rule proposed has good chances to be accepted by general public. It will generally be appreciated that owners (that is almost each individual) will not lose their right too easily, and in particular that a slightly negligent buyer will not prevail. But also commerce should accept that there is no good reason to protect negligent players (which might amount to a distortion of competition to the detriment of careful players). It may be noted that the most recent law reforms, that is the new codification in the Netherlands and the new Commercial Code in Austria, both opt for a strict standard of good faith (excluding slight negligence); the same is true for the 1986 Act on good faith acquisition in Sweden. As far as Austria is concerned, the (Austrian) working group did not hear of any protest from economic lobbies.

Proof of good faith with respect to negligence. A considerable number of jurisdictions provide a presumption of good faith. VIII.–3:101 provides that the burden of proof shall be on C and that there is no presumption of good faith in favour of C. There are arguments for this solution on different levels:

a) Balancing of interests: Starting from a balancing of the interests of A and C, taking into account that good faith acquisition of C means expropriation of A and an exceptional opportunity for C to acquire ownership (*a non domino*), there is a strong argument to place the burden of proof on C and not to favour him by a presumption of good faith. C wants to assert that he has acquired the goods and thus deprived A of his right of ownership (involuntarily). The general rule should be that C has to deliver evidence of all the prerequisites for his acquisition.

b) General principles of the law of evidence: The proposed rule coincides with basic ideas that can be found throughout the law of evidence: C is much closer to the act of acquisition, which took place between B and C, and it is, therefore, much easier for him to give evidence for the concrete circumstances. For A, on the other hand, it will often be difficult to investigate the relation B – C; sometimes this may almost be impossible for him. That supports a solution placing the burden of proof on C. Additionally, it regularly causes severe problems (or is even impossible) to prove a negative. If the burden of proof was on A, he would have to prove the absence of good faith on the side of C. This also speaks for placing the burden of proof on C.

There is a general principle that he who wants to benefit from a specific provision has to provide facts and evidence that support his case. Historically (and in some countries even nowadays as well), good faith acquisition is nothing but a defence against the "real" owner's claim for recovery of the goods (see VIII.–6:101). From this point of view, it seems quite natural that the transferee has to prove the requirements for his acquisition. In a material sense, this is true also for the present scope of good faith acquisition, since good faith acquisition, as stated above, is an exceptional opportunity "to acquire ownership from a non-owner".

c) Prevention of inappropriate expansion of good faith acquisition: Together with the strict standard of good faith, placing the burden of proof on C and not presuming good faith is a major tool of preventing an inappropriate expansion of good faith acquisition.

Proof of good faith with respect to actual knowledge. As to actual knowledge, the burden of proof can be on A. That rule applies to – rather exceptional – cases where C had, objectively, no reason to know but actually knew of B's lack of right or authority. Otherwise C would have to prove a negative. In this case, A can more easily prove the alleged circumstances from which follows that C must have known of B' lack of right or authority to transfer.

Rule on burden of proof in black letter text. Taking into account the strong tradition of a presumption of good faith in the majority of European systems, it seems advisable to – exceptionally – regulate rules on evidence and presumptions in the black letter text. Otherwise there could be the risk that courts which are familiar with a presumption of good faith today would continue to apply that rule.

D. Relationship A–B: how A loses possession (paragraph (2) stolen goods)

Different ways of A's loss of possession. As has been pointed out above, owner A may have lost possession of the goods in various ways. The question to be discussed here is whether good faith acquisition should be excluded or otherwise restricted (for instance, postponed for a certain period of time) in some of these situations. In a comparative perspective, one can say that the majority of the European legal systems provide a restriction in that respect in some way, mostly excluding good faith acquisition with regard to stolen goods, often with regard to lost goods as well. A couple of legal systems express this by requiring an act of "entrusting" the goods (A to B).

The range of possible constellations can be described as follows: The most radical way of losing possession is by virtue of a possession breaking crime, i.e. robbery or theft committed by B. There are other situations where A only loses his asset, without any interference by B, and B finds it. A further category are constellations where A entrusted the asset to B on a contractual basis, but with the purpose of re-taking possession of the asset at a later time, either granting a contractual right to use (lease, gratuitous lending), or based on a security agreement (pledge) or simply to store the asset (deposition). But B in breach of his contractual obligations transfers the goods to C (which will amount to a criminal offence as well). Furthermore, there are situations where there was a contract between A and B, which could, in principle, operate as a basis for a transfer of ownership, but did not because of a defect in

the contract: Such a defect may be that the contract A – B is avoided with retroactive effect (either before transfer to C or after such a transfer) on account of mistake, fraud or threat, the contract is void because of illegality, usury, defect in representation or lack of capacity. Or the contract A – B has been for a specific asset, but the wrong asset has been delivered to B, who transfers it to C.

Exclusion of good faith acquisition of stolen goods. VIII.–3:101 paragraph (2) excludes good faith acquisition only with regard to goods that have been robbed or stolen from the owner A. As a consequence C could acquire such goods by continuous possession only (if not excluded there as well: see VIII.–4:101(3) and VIII.–4:102).

By protecting the owner in case of theft or robbery, the draft adopts the majority approach in Europe. A justification may be found in the fact that A has not contributed to the loss of possession in any way, at least in the typical case. Theft and robbery are severe offences against the owner and his right of ownership. The general expectations of citizens seem to be that law should take maximum efforts to ensure that such actions cause as few harm to the owner as possible. To a similar effect, it is sometimes argued that an acceptance of good faith acquisition in cases of theft and robbery would render criminal activities more attractive than the opposite rule.

Lost and entrusted goods. Lost goods, which are treated by some legal systems in the same way as stolen (robbed etc) goods, are not excluded from the general possibility of goods faith acquisition by paragraph (1). In cases of entrusted goods and lost goods, the owner A contributes to the loss of possession in some way by either choosing and trusting a person not worth being trusted in (in case of entrusted goods), or by acting negligently (in case of lost goods). Here, it may be justified to let protection of commerce prevail, and the good faith acquirer in particular, who has reason to believe that he has fulfilled all requirements for acquiring the asset. In case of entrusted goods, the risk placed on A will be limited to the risk of B's insolvency, as the identity of B (being A's contractual partner) normally will be clear to A.

Void or avoided contract. Where the transfer A – B is based on a void or avoided contract, VIII.–3:101 lets the protection of commerce prevail as well. Again, A knows B and only faces the risk of B's insolvency, a kind of risk that A, who intended to sell the asset to B, may have checked in his own interest before deciding to sell. In mistake cases, which are presumed to be the main cases here, some kind of negligence on A's side may exist as well.

E. Counter-exception of paragraph (2): in the ordinary course of business, cultural objects

Rule of ordinary course of business in general. In a considerable number of Member States good faith acquisition is possible only in certain types of privileged situations of transfer. Frequent examples are the public auction, a (particular type of) market, or – more generally – acquisition from a professional salesman. In these jurisdictions, good faith acquisition is excluded in all other cases.

VIII.–3:101(2) choses a different approach, which in many cases might, however, lead to the same results as a wide definition of a privileged situation (as especially the ordinary course of business as a privileged situation). VIII.–3:101(1) defines the general requirements of good

faith acquisition without any limitation to special situations of transfer and trade. Thus, goods that are not stolen goods (lost goods, entrusted goods etc), can be acquired in good faith in whatever place and time. In the case of non-stolen goods, acquisition is, however, additionally limited by the good faith requirement itself. If time, place or other circumstances of the transfer must make the transferee suspicious, he will be unable to acquire because of lack of good faith. In cases of stolen goods, VIII.–3:101(2) provides that acquisition is only possible in a privileged situation: that of a transfer in the ordinary course of business. The transfer of stolen goods outside this ordinary business circumstances is ruled out completely, because it is almost certain that stolen goods sold in a non-ordinary way must make the transferee suspicious, and the protection of the owner in case of stolen goods should generally be stronger.

Rule more flexibly adaptable to individual circumstances than traditional privileged situations. An analysis of the traditional privileged situations rules employed by some Member States shows that they are not reliable indicators for the unworthiness of protection of C outside these situations. Why should a transferee acting in good faith be worthy of protection only if he buys on a public auction, or a public market of some kind? Depending on the circumstances (which constitute C's good faith) C may also be worthy of protection when acquiring the goods outside such situations. VIII.–3:101 provides a strict category of privileged situation only in case of stolen goods where every transfer outside the ordinary course of business is qualified as suspect from the outset. This seems to be very close, if not convergent, to the result achieved by mere application of the good faith requirement alone. In all other cases (non-stolen goods) not the type of situation of transfer is deceisive but the circumstance from which good or bad faith follows in general. Thus, the approach of VIII.–3:101 is more flexibly adaptable to the circumstances of the individual case than the traditional approach relying on a few privileged situations alone.

Public auction. The rationale of this rule is usually stated as the particular trust a buyer can have in an institution authorised by the state (especially: a court). On closer examination, however, there is no reason to assume that courts or other public authorities take special efforts in examining the origin of the goods sold at such auctions. On the contrary, the public institutions are forced to keep costs as low as possible. Consequently, it is not more likely that the transferor is owner when the asset is sold in a public auction as compared to other sales. It would also not be reasonable to assume that the real owner has significantly good chances to detect his asset due to the public procedure before the auction takes place.

In addition, one would have to define what "public auction" really means. The views in the Member States differ on that issue. The scope might cover execution sales as well as – due to views expressed in some Member States – sales by private auction houses (like Sotheby's) or even internet auctions (like ebay).

Public markets. Market overt rules may have been important in former times. Nowadays, there are no good reasons to privilege acquisitions on a public market as compared to acquisitions elsewhere. One cannot say, for instance, that it is more likely to buy from the owner on a second hand market than in a store (rather to the contrary). Regarding other kinds of public markets, for instance where agricultural products are sold directly by their producers, the problem of an acquisition from a non-owner will very seldom arise at all.

Ordinary course of business. The reasons for adopting the counter-exception of transfer in the ordinary course of business in case of stolen goods do not lie in the (false) assumption that there is a certain supervision by public authorities that guarantees or makes it very likely that all goods sold by businessmen are owned by their sellers (or are sold by authorized transferors). Markets where private sellers offer their goods have extremely expanded with the recent development of electronic commerce on the internet. It cannot be said that these markets are suspicious market from the outset. Therefore, no general exclusion of such markets was adopted in VIII.–3:101 paragraph (1). For the category of stolen goods, it seems, however, accurate to state that the majority of such goods are not sold in the ordinary course of business, i.e. not by professional businesses with a licence or permission to exercise their trade or profession. Regarding the need for enhanced protection of owners in case of stolen goods, it seems fair to outrule any acquisition from a "private" seller including "black" sellers acting without a licence or permission. The latter sellers should also not be assumed to be part of the ordinary course of business. Acquisitions on "black" markets are excluded from VIII.–3:101 additionally by the good faith requirement (A buyer on such a market cannot be in good faith). Transferees buying in the ordinary course of business (consumers and business customers alike) can assume that the goods they buy are not stolen goods, in the first place. Only where special circumstances that must cause C's suspicion are present such an acquisition will fail. The exception must be seen as a measure to protect commerce on all "ordinary course of business" markets which justify the transferees reliance in the vast majority of cases. This generous measure to protect commerce is counter-balanced by a strict standard of good faith in VIII.–3:101 paragraph (1) (d) which in turn protects the interests of owners.

No necessity of special protection of consumers. Where stolen goods are bought on the ordinary markets there seems to be no reason to treat consumer contracts more favorably than business to business contracts. In the ordinary course of business contracts are normally made in a reliable environment, no matter whether the customer is a consumer or a business. Particular circumstances might cause suspicion in ordinary course of business situations. What circumstances should make which person or category of persons suspicious can be more flexibly decided on the basis of the good faith requirement than by a crude distinction between consumer and business sales.

Cultural objects. "Cultural objects" as defined by VIII.–4:102 (by reference to Article 1 (1) Council Directive 93/7/EEC) are considered, throughout Book VIII, to be a special category of goods where the bond of ownership is worthy of a stronger protection as compared to "ordinary" goods:

VIII.–4:102: Cultural objects

(1) Under this Chapter, acquisition of ownership of goods qualifying as a "cultural object" in the sense of Article 1 (1) of Council Directive 93/7/EEC, regardless of whether the cultural object has been unlawfully removed before or after 1 January 1993, or not removed from the territory of a Member State at all, requires continuous possession of the goods:

(a) for a period of 30 years, provided that the possessor, throughout the whole period, possesses in good faith; or

(b) for a period of 50 years.

(2) Member States may adopt or maintain in force more stringent provisions to ensure a higher level of protection for the owner of cultural objects in the sense of this paragraph or in the sense of national or international regulations.

COMMENTS

Therefore, the acquisition of ownership of cultural objects – unlawfully removed from the owner – is more strongly limited under the rules of Chapters 3 and 4 than in case of other goods. In situations of acquisition of ownership by continuous possession (Chapter 4), the time periods are considerably longer than for other goods. And, in addition, Member States may have even more stringend rules. In situations of good faith acquisition (Chapter 3) stolen cultural objects may not be acquired on the basis of the rule of VIII.–3:101, at all, also not if "transferred" in the ordinary course of business. In VIII.–3:101 situations, there is no opening clause for more stringend rules of the Member States, because such a clause does not seem to be necessary. Not stolen goods are normally not "unlawfully removed" from the owner and, therefore, do not fall under the definition of VIII.–4:102 paragraph (1). For stolen cultural objects no stronger sanction than the exclusion of good faith acquisition under all circumstances is possible.

A. Relation A – C: no right to buy back

Additional instrument to protect interests of owners is not necessary. Considering the system of interest balancing embodied in VIII.–3:101, a right of A to buy back the movable despite the good faith acquisition by C does not seem necessary. The main instruments of protecting ownership are the strict standard of good faith and the burden of proof on C. In the view of the drafters of Book VIII this is a very effective and clear concept of protecting the owners' interests in a good faith acquisition situation. An additional right of A to buy back his goods from C does not seem necessary.

Disadvantages of buy back right. A's right to buy back the goods would run against the goal of legal certainty and protection of commerce, since a buyer, despite being in good faith, never could be really sure whether he can keep the asset permanently or not. If he makes investments not only *on* the asset (such expenses could be compensated within the purchase price A had to pay) but *for* the asset, e.g. if he builds a garage for the car bought from B, C runs the risk that such investments might get frustrated. Furthermore, there would also be practical problems for C when confronted with a demand to buy back: If he needs the asset in his current business, he could suffer further losses until he can replace it by another object (C will, in principle, be entitled to recover such losses from B, but there might be a row of practical problems). Additional problems could be created by the need to find a fair definition of the price that has to be paid by A.

The practical advantages for A are limited: Goods usually decrease in value by lapse of time, and it therefore will regularly not be very attractive for A to pay C the price C formerly paid to B (the value will have decreased in the meantime). The practical experiences in Sweden, where such a right to buy back is provided, point in the same direction: The right to buy back is exercised only in very few cases. In addition, a right to buy back does not relieve A from the necessity to enforce his claims against B (who may be insolvent). It therefore seems adequate not to implement such a right to re-purchase.

B. Transferee already in possession of the goods (paragraph [3])

Clarification referring to VIII.–2:105 paragraph (1) situations. VIII.–3:101 paragraph (3) provides an additional requirement or clarification for a special situation of transfer: Where – for whatever reason – C is already in possession of the goods, when the remaining prerequisites for the transfer are created, i.e. especially when the contract of sale is concluded between B and C, the appropriate delivery equivalent (VIII.–3:101 paragraph [1] [b]) is described by VIII.–2:105 paragraph (1). In these cases no real delivery is possible any more. It can be considered as a delivery substitute that the transferee is holding the goods when the contract of sale comes into force. All other delivery equivalents of VIII.–2:105 and, of course, delivery itself in VIII.–2:104 are defined by reference to the transferor giving up possesion of the goods, of means, of documents or the transferor giving notice to a third person possessing the goods. Only VIII.–2:105 paragraph (1) does not include the requirement that the transferee must have previously obtained his possession from the transferor. This additional requirement is not necessary for purposes of ordinary transfers under Chapter 2, where there is no falling apart of the owner (and person authorized) on the one hand and the transferor on the other hand. And consequently the issue of C's good faith does not arise.

Good faith excluded. For good faith acquisition situations, it is considered practically impossible that a transferee can be in good faith when he did not obtain possession from his transferor. The object of C's good faith is the transferor's ownership or authority, C must believe B to be the owner (or the person authorized by A). If C has not been provided with possession by B, but by someone else, he must become suspicious of B's right or entitlement. Only for cases where B successfully pretends to be the authorized seller for owner A and C is justified in believing this, the restriction of VIII.–3:101 paragraph (3) could be extended a little bit. In these cases C should probably not be excluded from good faith acquisition if he obtained possession from A (provided C is in good faith). However, the opposite interpretation of the restriction in these cases seems to be also attractive. Where transferor B does not have the power to provide C with possession himself, but someone else (including A) did this before for other reasons than this transfer (B-C), the central justification for C's good faith acquisition is lacking: The basis or main justification for C's belief in B's right or authority is B's capacity to deliver the goods to C. If this basis is lacking, C should not be able to acquire the goods. See Comments above.

VIII.–3:102: Good faith acquisition of ownership free of limited proprietary rights

(1) Where the goods are encumbered with a limited proprietary right of a third person and the transferor has no right or authority to dispose of the goods free of the third person's right, the transferee nevertheless acquires ownership free of this right provided that:

(a) the transferee acquires ownership in a manner provided for in Chapter 2 or the preceding Article;

(b) the requirement of delivery or an equivalent to delivery as set out in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e) is fulfilled;

(c) the transferee acquires the goods for value; and

(d) the transferee neither knew nor could reasonably be expected to know that the transferor had no right or authority to transfer ownership of the goods free of the third person's right at the time ownership passes. The facts from which it follows that the transferee could not reasonably be expected to know of the transferor's lack of right or authority have to be proved by the transferee.

(2) Paragraphs (2) and (3) of the preceding Article apply for the purposes of this Article.

(3) Where the goods are transferred by notice as provided for in VIII.–2:105 (Equivalents to delivery) paragraph (2), the notified person's limited proprietary rights in the goods are not extinguished.

(4) For the purposes of the application of this Article to proprietary security rights, IX.–6:102 (Loss of proprietary security due to good faith acquisition of ownership) paragraph (2) applies in addition to this Article.

COMMENTS

A. Scope and function of VIII.–3:102, relationship to VIII.–3:101

Purpose of VIII.–3:102. This rule is designed to cover all cases where a movable, which is encumbered with a "limited proprietary right" of a third person, is transferred to a person that, in good faith, assumes that such a right of a third person does not exist. The consequence of the rule is that such a transferee may, under certain prerequisites, acquire the movable free of this right. By this, the third person's right is extinguished. The effect, therefore, is that freedom of encumbrances (of limited proprietary rights) is acquired in good faith. As for the substantive justification of this Article, see the Comments on VIII.–3:101 above. The issues are parallel ones.

"Limited proprietary rights". The term "limited proprietary right" is defined in VIII.–1:204. Examples of limited proprietary rights are security rights in movables according to Book IX, rights to use a movable if characterized as proprietary by the relevant provisions. The notion "limited proprietary right" differs from the notion of "limited right" in the provision on the "limited right possessor" in VIII.–1:207 insofar as VIII.–1:207 covers all rights to retain, possess and use a movable irrespective of their proprietary or obligatory character. Whereas the notion of VIII.–1:204 covers all limited rights in a movable irrespective of possession or use, but only if they are proprietary in character. Only limited *proprietary* rights are appropriate for a treatment that is similar to the treatment of the right of ownership (VIII.–3:101) in cases of good faith of the acquirer. In the Comments the third person is referred to as "X". The acquirer in good faith is called "C".

Acquisition of ownership not regulated by VIII.–3:102. The right of ownership, as such, is acquired on the basis of other rules, which may either be the rules on "derivative" acquisition

(transfer) in Chapter 2 or the rule on good faith acquisition of ownership in VIII.–3:101. VIII.–3:102 does not regulate the issue in which way the transferee acquires ownership in the movable. It only answers the question of whether limited proprietary rights of third persons survive the transfer of ownership to C or whether they do not survive.

Examples for the differentiation between acquisition of ownership and acquisition free of encumbrances. The following examples illustrate that ownership may be acquired in two different ways, while VIII.–3:102 applies to the limited proprietary rights alone.

> *Illustration 1*
> B is the owner of a movable and grants X a usufruct right or a security right in that movable. B sells the movable to C, not disclosing X's right. As B is the owner of the object, C will acquire ownership under Chapter 2 (ownership is transferred, in the strict sense, from B to C). The question to be assessed under VIII.–3:102 is whether C acquires without the burden of X's right or not. Provided that C is in good faith with regard to the object's freedom of encumbrances, X's right is extinguished.

> *Illustration 2*
> B stores a movable for A, who has granted a usufruct right or a security right in that movable to X. B sells the movable to C, neither disclosing that he is not the owner of the object nor disclosing X's right. As B is not the owner of the asset, C may acquire ownership under Article 3:101 if he can assume, in good faith, that B has a right or authority to transfer ownership. However, *C may be in good faith in respect of B's right or authority to transfer ownership, but there might be reasons to doubt as to the object's freedom of encumbrances*. This question is dealt with by VIII.–3:102. Provided that C is in good faith with regard to the object's freedom of encumbrances, X's right is extinguished, otherwise C acquires ownership (in good faith), but limited by X's still existing right.

VIII.–3:102 regulates these two constellations – as they address the same legal question – in one Article. This structure shall help to ensures that different questions (extinction of a former owner's right of ownership and extinction of a third person's limited proprietary right) are kept apart and solved independently.

Two or more proprietary rights in the same movable. Where there is more than one limited proprietary right in one and the same movable, the test under VIII.–3:102 is to be made for each right independently.

Basic structure: Coherence with Article 3:101. As both VIII.–3:101 and VIII.–3:102 result in an extinction of another person's (A or X) proprietary right in favour of the acquisition of this right by a good faith acquirer (C), it seems necessary to regulate these two issues in a coherent manner. Therefore, the main structure and terminology of VIII.–3:102 is copied from VIII.–3:101. Different rules are only developed where the different nature of limited proprietary rights or the different interests of the parties require so.

B. Requirements for good faith acquisition (paragraph (1))

Title for acquisition of ownership of the goods. According to VIII.–3:102 paragraph (1) (a) the transferee must first acquire ownership of the goods. Thus, the requirement of VIII.–3:101 paragraph (1) (a), i.e. the obligatory basis (the title) of the transfer, has to refer to the

acquisition of ownership, either in the circumstances of Chapter 2 (ownership derived from owner) or in the circumstances of VIII.–3:101 (good faith acquisition). No particular title for the "acquisition free of limited proprietary rights" is required.

Delivery or delivery equivalent. According to VIII.–3:102 paragraph (1)(b) the forms of transfer are restricted with respect to the general rule of Chapter 2 (VIII.–2:101), just in the same way as they are restricted in VIII.–3:101 paragraph (1)(b). There must be delivery (VIII.–2:104) or a delivery equivalent (VIII.–2:105), a mere agreement as to the time ownership will pass is not sufficient. The capacity of the transferor to deliver the goods to C or to provide for a delivery equivalent has a legitimizing function for the belief (good faith) of C and the good faith acquisition as such. This general idea can be also applied to the issue of good faith acquisition free of encumbrances: The third person X (holding the limited proprietary right) will often have the right to possess the movable and thus prevent the transferor B from delivering the movable to the acquirer C. Whenever the transferor communicates explanations to B why he cannot provide C with the possession of the goods, C should become suspicious and can no longer be in good faith. The inability of B to deliver the goods to C (or to provide a delivery equivalent) must alert C and instigate two questions in C's mind: (i) Is B really the owner of the goods or the authorized person to transfer the goods? (ii) Is B really entitled to transfer the goods without any encumbrances of third persons?

Acquisition for value. VIII.–3:102 paragraph (1)(c) provides that also here the transferee must acquire the goods for value (see VIII.–3:101 paragraph [1] [c]). Why the for value requirement was adopted for the basic rule of VIII.–3:101 in the first place, is explained in the Comments to that rule. If it seems a fair and balanced solution for the conflict of interests between A and C to let C – who received the goods as a gift – bear the risk that the transfer has no effect because of A's ownership, it must seem equally fair and just for donee C to assume the risk of acquiring goods that are burdened with the right of X. The consequence for donee C in VIII.–3:101 is much harsher than the consequence in VIII.–3:102: In VIII.–3:101 he has to surrender the whole movable to owner A. In VIII.–3:102 he only has to accept that the ownership in the movable he acquired is restricted by the proprietary right of X.

Requirement of good faith. In cases of VIII.–3:102 the object of good faith is not the right of ownership or authority to transfer ownership of the transferor (like in VIII.–3:101), but rather the right or authority of the transferor to transfer ownership of the goods free of the limited proprietary rights of a third person X. Whenever the transferee C knew or should have known of the existence of such rights of a third person, he must normally assume that there is no right or authority of the transferor to transfer the goods to him without these third person rights. Thus, C's actual or constructive knowledge of the existence of such rights of X plays a crucial role in determining the good or bad faith of C. The standard of good faith is a rather stringent one: see the Comments to VIII.–3:101. The burden of proof is regulated in the same way as in VIII.–3:101 (see the Comments to that Article): The burden of proof as to the absence of negligence has to be borne by transferee C. The burden of proof as to the existence of actual knowledge has to be borne by the holder of the limited proprietary right X.

C. Exceptions as to stolen goods and cultural objects (paragraph [2])

Reference to VIII.–3:101 paragraph (2): goods stolen from owner. The value judgement embodied in VIII.–3:101 paragraph (2) that stronger protection should be granted to the interests of owners whose goods have been stolen must be re-interpreted to find adequate

application to the situations regulated by VIII.–3:102. Where goods have been stolen from the owner A and not been acquired by C in the ordinary course of business, C will not acquire ownership in the first place. Thus, the question whether he acquires free of encumbrances under VIII.–3:102 does not arise at all (see VIII.–3:102 paragraph [1] [a]). The same argument applies to stolen cultural objects who cannot be acquired in good faith. Where goods are stolen from owner A and are acquired in good faith by C in the ordinary course of business, the question arises whether this theft should have any effect on the possibility of extinction of the right of X. Because VIII.–3:102 does not deal with the protection of the rights and interests of A, but rather with the protection of the rights and interests of X. The answer seems easy: Where the stolen goods are acquired in the ordinary course of business, the stolen-exception is switched off anyway. Thus, it can also no longer apply in the circumstances of VIII.–3:102.

Reference to VIII.–3:101 paragraph (2): goods stolen from third person. As stated above VIII.–3:102 balances the interests of C and X and asks the question of whether X's right(s) should be extinguished in favour of C. In case of X, the goods which are in possession of X cannot be "stolen" in the the ordinary sense, because X is not the owners of the goods, but only a holder of a limited proprietary right in the goods. Nevertheless the dispossession of X can also have a criminal background – parallel to the criminal intention of a thief: The removal of the goods from X can enable the dispossessor to use the goods illegally to the effect of drawing financial benefit from them. In this respect it does not make any difference whether the dispossessor is the owner of the goods or another person. Therefore, the word "stolen" has to be re-interpretated for the purposes of VIII.–3:102 as "unlawfully removed from X with the intention to draw financial benefit from the dispossession".

Goods unlawfully removed from X with the described intention and afterwards transferred to C must be subject to a restriction of good faith acquisition. Where such goods are not transferred to C in the ordinary course of business, C cannot acquire them free of encumbrances, because the interests of X deserve a stronger protection than in other cases. The same must apply to cultural objects unlawfully removed from X with the intention to draw financial benefit.

D. Special situations of transfer (paragraphs [2] and [3])

Transferee already in possession. VIII.–3:102 paragraph (2) refers to VIII.–3:101 paragraph (3). In order to maintain the legitimizing function of the capability of the transferor to deliver the goods to the transferee and in order to provide the necessary justification for C's belief (good faith), the transferee must have obtained the goods from the transferor, in cases where the transferee was already in possession when the transfer occurred. This idea can be also expanded to the situations covered by VIII.–3:102. This provision makes the function and purpose of the delivery (delivery equivalent) requirement of VIII.–3:102 paragraph (1) (b) complete.

Transfer by notice in VIII.–3:102 paragraph (3). The transfer by notice is defined as a delivery equivalent in VIII.–2:105 paragraph (2). In these cases the transferor does not possess the goods directly but through a third person. In order to transfer the transferor's indirect possession to the transferee the third person must be notified that she from now on has to possess the goods for the transferee. In these situations, both transferor and transferee are necessarily aware of the fact that such a third person exists and that she possesses the goods. The fact that a third person possesses the goods is a reliable indicator of the existence

of limited proprietary rights of that person in the goods. Such rights can be, for instance, the right of retention of a person storing the goods for remuneration, a lien created by operation of law, or a possessory proprietary security right created by contract. Transferor C must be aware of the likeliness of the existence of such rights and can, therefore, not be in good faith with respect to the non-existence of such rights. Thus, he can never acquire the goods free of the limited proprietary rights of the third person in possession of the movable.

CHAPTER 4: ACQUISITION OF OWNERSHIP BY CONTINUOUS POSSESSION

Section 1: Requirements for acquisition of ownership by continuous possession

VIII.–4:101: Basic rule

(1) An owner-possessor acquires ownership by continuous possession of goods:

(a) for a period of ten years, provided that the possessor, throughout the whole period, possesses in good faith; or

(b) for a period of thirty years.

(2) For the purposes of paragraph (1)(a):

(a) a person possesses in good faith if, and only if, the person possesses in the belief of being the owner and is reasonably justified in that belief; and

(b) good faith of the possessor is presumed.

(3) Acquisition of ownership by continuous possession is excluded for a person who obtained possession by stealing the goods.

COMMENTS

A. General

Acquisition of ownership by continuous possession. The majority of European legal systems, especially the civil law countries, provide rules on the acquisition of ownership by continuous possession. Under this concept, the right of ownership can be acquired based on possession for a certain period of time. Most other European countries recognise concepts with at least functionally comparable effects. Chapter 4 adopts this approach, first, because it fulfils an important supplementary function where a transfer under Chapter 2 or a good faith acquisition under Chapter 3 fails. There are, however, many other instances where it may appear desirable to avoid unclear property positions for the sake of legal certainty. Acquisition by continuous possession is, therefore, adopted as a general concept. .

Concept traditionally going beyond the scope of this Book. The concept of acquisition by continuous possession has a much broader scope in many European legal systems. Whereas Book VIII of these model rules only relates to goods and the acquisition of the right of ownership, the concept traditionally extends to immovable property and the acquisition of limited proprietary rights, in particular proprietary rights of use. In many countries, the practical importance of the concept will be much higher in these other areas. The underlying ideas are, however, similar in all of these areas, so that it may be useful to take these model rules into account also when developing rules for those other fields. It should be clarified, though, that the interests involved and the underlying policy considerations may be weighed somewhat differently with regard to immovables and other types of rights. The rules contained in this Chapter have been developed exclusively with a view on the acquisition of ownership of goods.

Terminology. Chapter 4 employs the term “acquisition of ownership by continuous possession” because it spells out the basic idea of this concept in a very direct way. The

frequently used term "acquisitive prescription" has been avoided in order to stress the difference to the concept of ("extinctive") prescription in the sense of Book III Chapter 7 and to prevent any possible misunderstandings in this respect. See also III.–7:101 (Rights subject to prescription) Comment A. In essence, however, that term could be used synonymously.

Extinctive prescription of rei vindicatio and similar concepts. In some Member States, the owner's right to recover possession of the goods from any other person exercising physical control without being entitled to do so is subject to ("extinctive") prescription. To a certain extent, the effects of this approach are functionally similar to those provided for by acquisition of ownership by continuous possession: The possessor is protected against claims from the original owner. In common law countries, such a limitation of the (tort law based) claims for protecting property are the general basis for achieving results comparable to those achieved by acquisition of ownership by continuous possession. In other countries, this concept applies in addition to the rules on acquisition of ownership by continuous possession. Practically, this often opens up the acquisition of a position comparable to the ownership by a person possessing in bad faith even where, under the relevant rules of national law, acquisition of ownership by continuous possession would require good faith. These model rules, however, do not adopt such a concept. In terms of legal certainty and clarity there does not appear to be much sense in leaving a "naked" right to the owner, without any possibility to exercise this right, while conferring a kind of "protected nothing" on another person. Rather, the entitlement to recovery based on a property right should only terminate with the absolute right itself; cf. also III.–7:101 (Rights subject to prescription) Comment D. Since these model rules explicitly recognise acquisition by continuous possession also in bad faith, there also does not seem to be any practical need for adopting a "prescription approach" in this respect. The comparative survey also shows that the falling apart of formal ownership and protected possession has been subject to criticism in national legal writing. Furthermore, these model rules do not adopt an approach existent in Dutch law, which grants ownership to the person who is in possession of the goods at the moment when the limitation period of the *rei vindicatio* elapses. This would mean that the owner might lose ownership even though the current possessor does not fulfil the general requirements of acquisition by continuous possession, e.g. because possession was interrupted for such a long period of time that cure under VIII.–4:103 (Continuous possession) paragraph (1) is no longer possible, or where the current possessor is unable to produce sufficient evidence for applying VIII.–4:206 (Period of a predecessor to be taken into account). Since one of the main policy considerations of the concept of acquisition by continuous possession is to provide legal certainty, it appears more favourable to make the expropriation effect of this concept dependent on the acquirer's fulfilment of all requirements (including, in particular, the abidance by the respective time limit). The idea of sanctioning the owner's inactivity, which may be put forward in favour of the named alternative concept, should not be regarded as sufficient in this respect.

Finding not covered. Finding, i.e. a situation where the owner, or someone holding goods for the owner, involuntarily lost physical control over these goods and another person finds and obtains physical control over them, being aware of the fact that they are another's property, has traditionally been regulated separately in the European legal systems. In most Member States, the finder may acquire ownership of the goods, provided he complies with certain legal duties, and the original owner does not appear and reclaim the goods within a certain period of time. Usually, this period is shorter than the relevant time limit under the rules on acquisition by continuous possession. The potential overlap of the scopes of these two regimes is intended to be solved in favour of the (national) rules on finding, which usually pursue specific policies. Often, the finder is provided with certain incentives – such as

a finder's reward, the reimbursement of expenses and, as already mentioned, a possibility to acquire ownership of the lost item – in order to comply with duties such as having to inform the owner or competent public authority and handing over the found goods to either of the two, which, as a whole, is intended to increase the owner's chances to recover his property. Taking into account these special policies and the various differences in the related national rules, acquisition of ownership by finding has been excluded from the scope of Book VIII from the outset; see VIII.–1:101 (Scope of application) paragraph (2)(h). Due to these special policies, also the question of whether a finder, who does not comply with the duties imposed on him by national law, may acquire ownership under VIII.–4:101 (Basic rule) paragraph (1)(b) by keeping these goods in his possession for thirty years should depend on whether this would be compatible with these (national) rules and their underlying policies, respectively; cf. also Comment I below.

B. Scope of application

General. Under these model rules, acquisition of ownership by continuous possession is possible in a number of different constellations. This largely converges with the rules of law in the European legal systems, but goes beyond some of them mainly because the possessor's bad faith does not exclude acquisition of ownership altogether. The following Comments provide an indicative overview.

Acquisition from a non-owner. One major field of application are purported transfers where the requirements for good faith acquisition from a non-owner have not been met. This may, in particular, be the case where acquisition under VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership) fails because the possessor obtains possession of the goods by way of a donation, so that the "for value" requirement is not fulfilled; where the goods have been stolen and the counter-exception of VIII.–3:101(2) does not apply; or where the possessor has not been in good faith when taking delivery (or is unable to produce sufficient evidence for being in good faith at that time). Also, acquisition under Chapter 4 may take place in favour of a person who "acquired" the goods from a deceased non-owner under the (national) laws of succession.

Acquisition under invalid contract. Another group of constellations comprises cases where the possessor "acquired" the goods under a contract – in particular: a contract for sale – which was invalid for any reason but the goods nevertheless remained under the control of the possessor for the required period of time. This may be the case, in particular, where one of the parties lacked legal capacity at the time the contract was concluded; where the contract has been concluded by way of (direct) representation in the sense of Book II Chapter 6 and the representative acted without authority; or where the contract was void or subsequently avoided in the sense of Book II Chapter 7.

Control of goods obtained under a legal relationship other than one of acquisition. A further group of cases has in common that the possessor obtained physical control of the goods under a legal relationship which, itself, was not aimed at the possessor acquiring ownership, but the possessor subsequently changed his mind so as to possess the goods as, or as if he was, an owner in the sense of VIII.–1:106 (Possession by owner-possession). This prior legal relationship may, in particular, be a contract for storage, for the lease of goods, or any contract establishing a gratuitous right of use. The fact that physical control of the goods has been obtained for different reason does not exclude acquisition of ownership by continuous possession. It may, however, have an impact on the length of the required period

of time, since it will usually be quite unlikely that such a person possesses the goods in good faith.

Further instances. The following examples are more likely to occur in textbooks than in court, but have been added to complete the picture of this Chapter's scope. Acquisition of ownership under Chapter 4 may further occur where the possessor thinks that certain goods belong to no one and occupies them, while they were in fact someone else's property. It is also imaginable that someone finds an object and wrongfully believes that it is his own property, e.g. because he lost an object of the same kind some time ago. Also, it could happen that seller and buyer conclude a contract for the sale of item A, but erroneously delivery of item B is made, A and B looking very much alike, so that the error remains undetected for a while. Also in such a case, acquisition of ownership could (only) occur by continuous possession. A thief is excluded from acquiring by continuous possession by virtue of a special rule in VIII.–4:101 (Basic rule) paragraph (3). A person knowingly obtaining the loot from a thief may, however, acquire the goods under the general rules on acquisition by continuous possession in bad faith. On these two latter issues, see Comment I below.

Registered goods: national law may have priority. Some legal systems contain separate rules on the acquisition of ownership by continuous possession for "registered goods". In particular, a different period of prescription is provided, whereby the period sometimes is longer, and sometimes shorter, than the "ordinary" period. This leads to the question of how "registered goods" should be treated under Chapter 4. As follows from VIII.–1:102 (Registration of goods) and is more closely elaborated in the Comments on that provision, Book VIII does not create a registration system of its own. Rather, where national law establishes a registration system, which concerns the right of ownership and the transfer of ownership (in contrast to registration merely for administrative purposes) and the register is publicly accessible, whereby registration may be obligatory or optional, the effects of such registration "have priority over the respective rules of this Book"; see VIII.–1:102 paragraph (2). This general approach also applies to acquisition by continuous possession under Chapter 4. This does not mean that Chapter 4 of this Book is automatically excluded as a whole. The national rules shall have priority over the rules of Chapter 4 only where the effects of these national rules and those of Chapter 4 are incompatible. In particular, another period for the acquisition by continuous possession and, possibly, additional requirements for acquisition may be applicable. It is unavoidable that this may lead to certain inconsistencies. However, providing a fully developed proposal for the interaction of registration and acquisition of ownership by continuous possession would presuppose developing a comprehensive (uniform) registration system. Since this proved impossible within the framework of developing these model rules (due to constraints on time and research capacities), the general approach of VIII.–1:102 had to be applied to acquisition by continuous possession as well.

C. Structure of Chapter 4

Section 1. The first Section spells out all basic requirements for the acquisition of ownership by continuous possession. The central provision is VIII.–4:101 (Basic rule), its paragraph (1) containing the general prerequisites. All following provisions in that Article and the rest of Sections 1 to 3 are, in principle, supplementary rules in relation to the basic provision in paragraph (1). Paragraph (3) of VIII.–4:101 provides a general exception to the right to acquire ownership by continuous possession for a person who obtained possession by theft. VIII.–4:102 (Cultural objects) contains a special rule relating to the acquisition of cultural objects, which is not excluded, but made more difficult by imposing longer time limits.

Finally, VIII.–4:103 (Continuous possession) contains some additional details as to the requirement of "continuous possession".

Section 2. The following Section comprises additional regulations which have in common that they relate to the calculation of the period required for acquisition of ownership by continuous possession. Most of them provide for a suspension, postponement of expiry or a renewal of the period, while the last provision allows for the taking into account of the possession period of a predecessor for the purpose of acquiring ownership by continuous possession.

Section 3. VIII.–4:301 (Acquisition of ownership) and VIII.–4:302 (Extinction of rights under rules on unjustified enrichment and non-contractual liability for damage) spell out the effects of acquisition by continuous possession. For the purpose of clarity, the effect which is, in principle, already spelled out in VIII.–4:101 (Basic rule) paragraph (1) is elaborated on more explicitly in this Section.

D. Interests underlying, and functions and policies of, the rules on acquisition by continuous possession

General. The rules on acquisition of ownership by continuous possession may affect, and have to balance, the interests not only of the original owner and the possessor of the goods, but also of various categories of third persons or even society in general. The following Comments will first briefly summarise the main interests at stake and then discuss the main functions and general policy considerations of the rules.

Perspective and interests of the original owner. Naturally, the main interest of the owner is to keep his property. For him, acquisition of ownership by continuous possession has far-reaching consequences, namely expropriation without any right to compensation. In this respect, losing ownership by virtue of another's acquisition by continuous possession is comparable to losing ownership by reason of another's good faith acquisition under Chapter 3 – but the practical consequences tend to be even worse: In many situations comparable to those covered by Chapter 3, i.e. where the possessor obtained the goods from a non-owner (cf. Comment A above, the elapsing of a long period of time will typically make it more difficult, or sometimes even impossible, for the original owner to proceed against the third-party non-owner. There may be practical problems such as difficulties in finding out this person's current domicile or place of business; a former company may have ceased to exist; or the third party may now be insolvent. Also, the providing of evidence to support any kind of claim against the responsible third party may now be extremely difficult. In addition, problems of a legal character may arise. In particular, claims against the third party, especially claims for damages or for the reversal of unjustified enrichment, may by now have prescribed under Book III Chapter 7. In mere two-party-constellations, where the owner himself conferred physical control of the goods to the possessor under a contract for storage or lease etc. (cf. Comment A above), the rules on prescription under Book III Chapter 7 and VIII.–4:302 (Extinction of rights under rules on unjustified enrichment and non-contractual liability for damage) provide that the original owner does not even have a theoretical chance to proceed against anyone. Only where an intended transfer failed due to a defect in the underlying obligation), the owner's loss caused by an acquisition of ownership by continuous possession may be counter-balanced by taking into account the fate of the owner's counter-claim for reversing the purchase price. This last issue will be dealt with more closely below. In all types of constellations, finally, the owner may be *de facto* prevented from exercising his right

simply because he is unable to find out where (in whose hands) the goods are. In contrast to immovable property, this risk is rather high with regard to movables, in particular where goods have been stolen.

Against the background of these rather harsh consequences, it is obvious that if it is agreed that a concept of acquisition by continuous possession is necessary at all, it will be in the owner's interest to statutorily provide for, at least, a rather long period for such acquisition. Also, any kind of exception or restriction will be advantageous to him.

Perspective and interests of the owner-possessor. An owner-possessor in the sense of VIII.–1:206 (Possession by owner-possessor), i.e. a person who possesses goods in the belief of being their owner, or at least with the intention of using the assets as if he were their owner, will typically be interested in remaining unchallenged in possession. In the present context, the owner-possessor will be interested in remaining unchallenged by any "holder of older rights" in the goods, in particular in being protected against claims of the original owner. The legitimacy of such a typical interest, however, varies considerably. With regard to a thief who wants to use the stolen goods himself, one will have to admit that hardly anything will speak for providing such a person with legal protection. Such reservations will gradually decline in the course of cutting across the spectrum from the position of a possessor in qualified bad faith on its one end, to the position of a possessor in good faith on its other end, and according to the individual facts of the case there may be additional arguments for protecting the possessor to the disadvantage of the original owner. E.g., the possessor may be considered worthy of protection where he has paid a purchase price for obtaining the goods (which may be difficult to recover after the lapse of a long period of time) or when he has already incurred expenditure on the goods and runs the risk of losing his investments. Also, the possessor may have developed a close "personal relationship" to the goods.

Another aspect which may be relevant in this context is that the possessor may run into difficulties in providing sufficient evidence that he made a valid acquisition after the passing of several years. Such difficulties may arise when the possessor is challenged by the former owner, but even more importantly, when he intends to dispose of the asset and the prospective buyer wants to verify whether the seller has a valid title. A similar problem may arise where the possessor intends to exercise rights linked to the right of ownership, e.g. the right to recover possession from a third party under VIII.–6:101 (Protection of ownership), the right to bring a claim under Book VI where a third party damaged the goods (cf. VI.–2:206 (Loss upon infringement of property or lawful possession)) or the right to bring a claim under Book VII for the reversal of an unjustified enrichment that another person derived from the goods. In all of these situations, a rule providing that the possessor will acquire ownership at least by virtue of having possessed the goods for a certain period of time may be very helpful for the possessor.

Perspective and interests of the parties' general creditors. The general creditors of the original owner and the possessor have corresponding interests. Naturally, each side will be interested in maintaining, or increasing, the respective party's estate for the purpose of satisfying claims out of it.

Interests of persons (potentially) acquiring rights related to the goods from the possessor. A special group of creditors is the one that intends to acquire rights concerning the goods from the possessor. The main example will be a person who contemplates buying the

goods from the possessor, but one may also think of a potential secured creditor who intends to establish a proprietary security right, or a potential lessee. Such persons will have an interest in obtaining a safe position, i.e. a position which will remain uncontested by persons having formerly held rights in the goods, which will establish a safe basis for legal relations created with further third parties. If the possessor has doubtlessly acquired ownership of the goods, he can provide these third parties with such a safe position. If, on the other hand, the possessor's entitlement to the goods was not that clear, the third person may be forced to undertake additional investigations, which could render the whole transaction inefficient. Generally speaking, one may say that creating secure proprietary positions will be in the interest of the general public or "commerce" as such in order to avoid uncertainty and, therefore, in order to enable the parties to a transaction to assess their benefits and risks. In particular, uncertainty could make it extremely risky (or expensive) to buy old and precious movables.

Functions and policies of acquisition of ownership by continuous possession; general. The concept of acquisition by continuous possession is traditionally rooted in several policy considerations, of which the following Comments attempt to provide a summary. One aspect is that the owner's "inactivity" may be sanctioned after the lapse of a long period of time. Most other aspects revolve around the idea of legal certainty, which may appear in different facets. Historically, as Roman law did not recognise the possibility of an immediate good faith acquisition from a non-owner, the area now covered by these rules also had to be taken care of by the concept of acquisition by continuous possession. This is not necessary under these model rules. Rather, regard is to be paid to the possible supplementary function the concept of acquisition by continuous possession may have in relation to immediate good faith acquisition in the sense of Chapter 3.

Sanction for owner's inactivity and related policies. One of the policy considerations relevant for the concept of acquisition by continuous possession is the idea that the owner's "inactivity" regarding the recovery of his property may be sanctioned after the lapse of a long period of time. Formulated positively, the owner is intended be motivated to use (recover) his property. In a certain sense, this may also promote the efficient use of assets. Many of these ideas show parallels to the underlying principles of prescription in the sense of Book III Chapter 7. There, also nothing is lost immediately, but the holder of a right is advised not to wait too long with exercising his right. This parallel, however, should only be drawn subject to a certain reservation. Especially with regard to corporeal movable property, the owner may, in many situations, not even know where his goods have been placed. He may undertake reasonable or even unreasonably intensive investigations but fail. In such a case, an argument based on the owner's "inactivity" is a weak one. In a case of the prescription of a right to the performance of an obligation, on the other hand, the identity of the debtor will usually be known (otherwise, III.–7:301 (Suspension in case of ignorance) may be invoked), so that an "inactivity" argument will typically be justified. One may add that an argument based on the owner's inactivity will also be more acceptable with regard to immovable property, where it is at least clear where the asset is located. Also, in some other situations regarding movables, e.g. in the case of acquisition under an invalid contract, the argument may be more persuasive. But it is hard to generalise it. Accordingly, its importance, when developing the rules of Chapter 4, has been limited. Indirectly, it is certainly of some relevance with regard to some of the extension rules in Section 2, where the owner is regarded as being unable to exercise his right, such as in the cases addressed by VIII.–4:201 (Extension in case of incapacity) and VIII.–4:202 (Extension in case of impediment beyond owner's control), or where the owner attempted to solve the conflict with the possessor either by seeking the help of a court (VIII.–

4:203 (Extension and renewal in case of judicial and other proceedings)) or by way of initiating direct negotiations, VIII.–4:204 (Postponement of expiry in case of negotiations).

Legal certainty. The most important underlying policy consideration for acquisition of ownership by continuous possession is the promotion of legal certainty. This includes the protection of individual interests, such as those of the owner-possessor himself, who may have already made investments related to the goods, or who intends to dispose of the assets or to proceed against third parties, and faces difficulties in providing evidence for his right to the goods after the lapse of a long period of time (regarding the recovery of goods by a possessor in good faith, also VIII.–6:301 (Entitlement to recover in case of better possession) may be invoked here). The idea of legal certainty, however, extends to a protection of commerce as such, since continuous possession may provide a clear basis for dispositions over property, ensuring a protected position for potential buyers or creditors seeking to create a security right in the asset . This may reduce investigation costs related to the verification of the transferor's entitlement, or costs of insuring oneself against this risk. In short, the concept of acquisition of ownership by continuous possession may help to reduce transaction costs. Generally speaking, if there was no acquisition by continuous possession and uncertainties were to remain regarding the current possessor's entitlement, also the risk of unpredictable court decisions, as well as litigation costs, would most likely be increased. The existence of a clear rule on acquisition of ownership by continuous possession may, on the other hand, prevent people from entering into uncertain legal disputes, so that one may even speak of a kind of peace-keeping function in society, serving "public interests". One may also mention the benefit of the protection of the owner-possessor's general creditors, who may believe that the goods belong to the owner-possessor (which, of course, is open to the general critique regarding the publicity function of possession, cf. VIII.–2:101 (Requirements for the transfer of ownership in general) Comment C).

Possessor in good faith more worthy of protection, or acquisition in bad faith not to be facilitated, respectively. If only the policy considerations listed in the two Comments above were to underlie the rules on acquisition of ownership by continuous possession, one could not explain the difference between the rules governing continuous possession in good faith and possession in bad faith. Where possession in bad faith results in an acquisition of ownership at all in the European legal systems, it requires the lapse of a much longer period. This means that subjective aspects on the possessor's side are, after all, regarded as being quite important. One can probably identify different sub-aspects of this rather general policy consideration: Taking into account the expropriation effect on the original owner, it can be argued that only (or all the more) a possessor in good faith should benefit from the advantage of obtaining a quasi-unchallengeable position. Another reason for this policy could be the intention to avoid giving incentives to potentially dishonest people to abuse the concept of acquisition by continuous possession by knowingly remaining in possession of another's property. Such an approach presupposes that the concept of acquisition by continuous possession can already be justified sufficiently by other policy considerations, and would rather aim at limiting it to a socially and economically adequate level. The idea would, however, only be applicable to qualified cases of bad faith, in particular actual knowledge and wilful blindness. In the end, it is probably best to assume that a combination of several general deliberations underlies the idea of differentiating between good faith and bad faith possessors.

E. Overview of main requirements

Main requirements. Acquisition of ownership by continuous possession requires uninterrupted possession throughout a certain period of time. The main requirements of acquisition under Chapter 4 are:

> ***Possession.*** Possession has to be understood in the sense of VIII.–1:206 (Possession by owner-possessor), i.e. requiring both a *corpus*-element and an *animus rem sibi habendi*. See Comment F.
>
> ***Continuous possession.*** Possession must be uninterrupted, i.e. the owner-possessor must, in principle, possess throughout the whole period, the lapse of which is required for the acquisition of ownership. This issue is further regulated in VIII.–4:103 (Continuous possession); see also Comment F.
>
> ***For a certain period.*** The owner-possessor acquires ownership after the lapse of a certain period of time. The length of the period differs depending on whether the possessor is in good or bad faith (see Comments F, G and H below). Section 2 of this Chapter deals with different instances that may cause different kinds of a "prolongation" of the period (extension or renewal) or allow the taking into account of a predecessor's possession period already elapsed.
>
> ***Possession may not be obtained by theft.*** Actively dispossessing the former holder of the goods (whether that is the owner or another person) excludes the possibility to make an acquisition of ownership by continuous possession. This exception aims at limiting the possibility of acquiring by continuous possession in bad faith where such acquisition would be considered highly inappropriate in the light of the qualified misconduct of the owner-possessor. See paragraph (3) of this Article and Comment I below.

Requirements not adopted. Some legal systems provide further requirements for the acquisition of ownership by continuous possession, like the need for a "valid title" or the fact that possession must be "public" and "unequivocal". Such requirements have not been adopted in these model rules. The reasons for this are discussed in Comment J below.

F. Possession

Owner-possessor. In Chapter 4, the term "possession" is to be understood in the sense of VIII.–2:106 (Possession by owner-possessor). The main aspect is that the possessor must exercise physical control over a movable with the intention to do so as an owner (as, or as if being the owner; *animus rem sibi habendi*). It is not decisive that the possessor subjectively believes to be the rightful owner. The buyer who perfectly knows that the contract under which he acquired the goods is void or voidable but intends to keep the goods for himself is covered, as well as a buyer who has no reason to know of such defect. Also, a thief would be covered by the requirement of owner-possession, but is excluded from the scope of acquisition by continuous possession by a special exception in VIII.–4:101 (Basic rule) paragraph (3). A person who exercises physical control over the goods as a limited-right-possessor in the sense of VIII.–2:107 (Possession by limited-right-possessor) does not have such an intention to possess as an owner. There is, consequently, no need to turn such a person's position into one characterised by a right of ownership after the lapse of a certain period of time, neither from this person's perspective nor in the interest of other persons (the latter will, should the limited-right-possessor change his mind and sell the property in his own

name, be sufficiently protected by VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership)). The same applies to a possession-agent in the sense of VIII.–1:208 (Possession through a possession-agent). Since the external appearance of these different forms of "possession" may possibly be hard to discern in practice, it seems that the prerequisite of "owner-possession" is not so much rooted in the policy of promoting legal certainty in the sense of the protection of third parties. It is, however, a common criterion in the European legal systems and shows that also the possessor's own interests are regarded as an important basis for justifying the concept of acquisition by continuous possession.

Change of category of possession possible. It is, however, possible and acceptable for the purposes of this Chapter that a limited-right-possessor or possession-agent turns into an owner-possessor by changing his intention from exercising physical control for another to possessing for himself. If so, the period required for acquiring ownership by continuous possession begins to run with this change of intention. It is, however, hard to imagine that such a possessor will be in good faith in the sense of paragraph (2)(a) of this Article, so that the qualifying period for acquisition of ownership will usually be thirty years. This should be long enough for the owner to react and reclaim his goods (even if the possessor should, exceptionally, be in good faith, the period of ten years should suffice). If there has existed a legal relationship between the owner and the possessor already, it would at least pose no difficulty for the owner to find out against whom to proceed. As an example for a change of intention in the sense discussed here, one may think of a warehouse keeper who, during or after the expiry of the contract period, decides to retain the stored goods for himself. Since the policy decision that acquisition in bad faith shall be excluded only in very limited cases has been reached (see paragraph (3) of this Article and Comment I below), it seems consistent not to exclude the possibility of acquisition under Chapter 4 in such situations, which appear to be comparable to retaining purchased goods knowing that the contract is void, rather than to cases of theft (where the counter-party often is unknown). There may, perhaps, be certain reservations against this approach where a former limited-right-possessor or possession-agent deliberately tries to conceal his changed intention and, externally, appears to continue holding the goods on the same basis as he did before. But such conduct will typically fail to result in acquisition under Chapter 4, either because the possessor will fail in proving that he has exercised control with the relevant intention for the required period, or because his conduct may be interpreted as an acknowledgement of the owner's right (compare Comment F and VIII.–4:205 (Ending of period in case of acknowledgement)), especially where he, as lessor, paid a price to the owner, or received a payment from the owner for storing the goods, or where the content of what he communicated to the owner of the goods proves the contrary. Further examples for a change of intention in the present context could be: After the expiration of a contract providing a gratuitous right to use the goods, the borrower erroneously believes that the lender has donated the goods to him. Where a private person agrees to store goods for another, it may occur that both parties forget the agreement and the storing party (or that party's heirs), upon coming across these things, believe they are that party's property or part of the estate.

Owner-possession may be exercised through another person. Pursuant to the general concept of possession – as is also reflected in the text of VIII.–1:206 (Possession by owner-possessor) by referring to "direct or indirect physical control" – and practical needs, the owner-possessor does not have to exercise physical control personally throughout the whole period. He can exercise control indirectly through a limited-right-possessor or possession-agent. The applicability of this principle should not be restricted to the time after the

acquisition of possession, but should apply also as from the moment when owner-possession is obtained for the purposes of this Chapter.

Acknowledgement of owner's right. Once an owner-possessor declares to acknowledge the owner's right, he will normally cease to be an owner-possessor in the sense of VIII.–1:206 (Possession by owner-possessor) because he does not possess "as, or as if (being) an owner" any longer. He will, consequently, not fulfil the requirement of continuous owner-possession as provided by this Article. A new period may only start if he, contrary to the acknowledgement, later resumes possession for himself. For purposes of clarification, and in order to avoid problems which may arise in specific situations, the case of acknowledgement is addressed in a special rule in VIII.–4:205 (Ending of period in case of acknowledgement).

Continuous possession. In principle, the acquisition of ownership by continuous possession requires continuous possession throughout the whole qualifying period. This is a common approach in the European legal systems. Under certain conditions, however, involuntary loss of possession can nevertheless be treated as continuous possession. VIII.–4:103 (Continuous possession) paragraph (1) contains a more detailed regulation on this issue. Paragraph (2) of the named Article also contains a presumption in favour of the possessor: The owner-possessor is presumed to have possessed throughout the whole period when he proves that he was in possession at the beginning and at the end of the period. See there.

For a certain period. The length of the period differs, depending on whether the owner-possessor is in good or in bad faith. In the former case, ten years of possession are required, in the latter case, these model rules require possession for a period of thirty years. The reason for this differentiation is simply that a bad faith possessor does not deserve such a strong protection as against the rightful owner, who will lose his right as a consequence of an acquisition under this Chapter. An exception is provided for cultural objects where a general policy is favoured that acquisition by continuous possession should be possible only subject to the meeting of stricter requirements. Therefore, the named periods are extended under VIII.–4:102 (Cultural objects). For details, see Comments G and H below and the Comments on VIII.–4:102. (Section 2 of this Chapter contains additional provisions as to the calculation of the qualifying period for the acquisition of ownership, and in particular rules on the extension and renewal (interruption) of the period. See VIII.–4:201 (Extension in case of incapacity) to VIII.–4:205 (Ending of period in case of acknowledgement). VIII.–4:206 (Period of predecessor to be taken into account), on the other hand, facilitates an acquisition of ownership under this Chapter by allowing the owner-possessor to take the period of his predecessor into account, provided that the general requirements have been fulfilled both by the predecessor and the successor in possession.

G. Acquisition by continuous possession in good faith

General. The approach that continuous possession in good faith may result in an acquisition of ownership, or at least in obtaining a position protected against claims of the original owner of the property can be said to form part of the common core of European private law. As compared to possession in bad faith, it appears relatively easy to accept that the typical interests of the owner-possessor, potential acquirers and other public interests linked to the concept of acquisition by continuous possession (see Comment D above) prevail over the owner's interests after the lapse of a certain period of time, provided that the possessor acted in good faith. Despite this common approach, the European legal systems show differences particularly as to the length of the period and the relevance of further additional requirements

(cf. Comment J below), but also the meaning of the prerequisite of good faith itself is far from being uniform.

(a) Good faith

Meaning of good faith. For the purposes of this Chapter, the owner-possessor is in good faith if he "possesses in the belief of being the owner and is reasonably justified in that belief"; see paragraph (2)(a) of this Article. The reference to "being the owner" means that doubts or knowledge excluding good faith may relate to all circumstances that might lead the possessor to question whether his position is one of having acquired ownership, for example his predecessor's right of ownership or authority to dispose, or the validity of the contract or other legal ground underlying the purported acquisition. The named definition makes clear that good faith is excluded where the possessor has actual knowledge of the fact that he is not the owner, as well as in cases of wilful blindness and negligent ignorance, having regard to the particular facts and circumstances of the case. No differentiation is made between slight and gross negligence. The rule is not intended to spell out any general duty to undertake investigations. Such a duty may, however, result from the individual circumstances of the case. Practically, the required standard of care may be higher at the time of the acquisition of possession than at a later point in time at which the possessor has already been exercising control over the goods for a couple of years without any reason to doubt his entitlement. General guidelines are difficult to provide; the provision is intended to be applied flexibly according to the individual circumstances, taking into account information accessible before and when possession was obtained as well as information having only become available later, and information open to the public as well as special information exclusively accessible to the possessor. The mere possibility that something may have gone wrong with an acquisition – which, in fact, can never be excluded with full certainty – shall of course not exclude good faith in the sense of this Article. Even where the owner reclaims the goods from the possessor, this will not necessarily exclude good faith if the possessor has had very good reasons to believe that his own acquisition is valid and that the (purported) owner's claim lacks a legal basis. The owner will, therefore, be advised to present plausible reasons for the existence of his claim's legal basis already before initiating judicial proceedings, in order to avoid the possibility of losing his right by virtue of the lapse of the shorter period required for an acquisition in good faith.

Good faith throughout the whole period. The European legal systems have adopted different approaches as to when good faith is required. Under some of them, good faith is essential only at the moment of the acquisition of possession (so that any subsequent doubt or even positive knowledge does not prevent acquisition in the short period), whereas others require good faith throughout the whole qualifying period for acquisition of ownership. These model rules follow the latter approach, which is regarded as more adequate especially when balancing the harsh expropriation effect the concept of acquisition by continuous possession has for the owner against the legitimate interests of the possessor. There may be, for instance, situations where someone receives a gift and does not have any reasons to doubt the donor's ownership at that time, but the circumstances change shortly after acquiring possession when the possessor obtains additional information about the object, e.g. someone tells him about a newspaper article reporting that this asset has been stolen. Under such circumstances, the law should not encourage the possessor to keep the goods until the (shorter) period for acquisition in good faith has elapsed. Rather, he should attempt to clarify the situation and, if possible, return the object to its owner. The general interest of legal certainty, which may exceptionally justify an expropriation of the owner, should prevail only under the fulfilment of the same prerequisites as would be required if the possessor had been in bad faith right from the

beginning. – Other arguments, which might be put forward in favour of the alternative solution are not considered as being sufficiently important within the framework of these model rules: The potential argument that good faith throughout the whole period may be difficult to prove should be outweighed by the presumption of good faith provided for by paragraph (2)(b) of this Article. Also, the fact that the period for acquisition in good faith – ten years – is a rather long one under this Article and that it may, therefore, be more likely that the possessor has incurred expenditure on the goods, does not cause a need for a facilitated form of the acquisition of ownership where the possessor has not been in good faith throughout the whole period. Such expenditure is to be reimbursed under VIII.–7:104 (Expenditure on, or parts added to, the goods during possession) and it is all the more justified that the possessor carries the risk of such investments where he makes them when no longer being in good faith (cf. the Comments on the named Article).

Burden of proof as to good faith: options available. The European legal systems provide different answers to the question of whom the burden of proof regarding the good or bad faith of the owner-possessor is to be imposed upon. Most legal systems provide a general presumption of good faith (for the purposes of these Comments and paragraph (2) (b) of this Article, no terminological difference is made between a "presumption" and the imposition of the "burden of proof"). The opposite solution would consist in placing the burden of proof as to good faith throughout the whole period on the possessor. But there are also compromise solutions. Some countries provide for a rule stating that good faith shall be presumed in case the possessor has obtained possession based on a valid obligation (arising from a valid contract or other juridical act, a court order or a rule of law). A further alternative consists in the concept that the owner-possessor must only prove that he was in good faith when he obtained possession, and if he succeeds in this, there is a presumption that he was in good faith throughout the rest of the period as well. Any of the presumptions mentioned here are to be understood as being rebuttable presumptions.

Discussion and justification of the proposed solution (presumption of good faith). As with all other rules of Chapter 4, the decision on which approach to adopt as to the burden of proof must attempt to balance conflicting interests, in particular, on the one hand, the owner's interest in not losing his right, and, on the other hand, the general interest of establishing legal certainty by facilitating the clarification of uncertain property positions, which converges with the good faith possessor's individual interests. With regard to the owner's interests, it must be taken into account that having to provide evidence for facts, from which the non-existence of the possessor's good faith may be deduced, may be particularly burdensome, or almost impossible, in some situations. This may especially be the case where the possessor "acquired" from a non-owner because the owner usually has no direct information about the circumstances of this "acquisition" (whereas the possessor took part in this act and, therefore, typically has better access to evidence). Based on this consideration, no presumption of good faith has been included in VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership). The problem will not arise in the same way where the possessor obtained the goods directly from the owner (e.g. under an invalid contract or where possession was retained after the termination of a contract for lease; cf. Comment B as to its scope of application). Taking into account the rather clear majority solution arrived at in the European legal systems, and the fact that the period of ten years required for the acquisition of ownership by continuous good faith possession is rather long, so that the owner, at least theoretically, has had some time to recover the possession of his property, it is suggested that the good faith of the possessor is presumed regarding the moment in time of obtaining possession as well as for the rest of the period. After that time, the difficulties in providing

evidence as to the circumstances of obtaining possession will typically have increased considerably also for the possessor. Above all, the general policy aim of legal certainty may be said to have a higher value after this rather long period has elapsed. Also, Chapter 4's function of supplementing the good faith acquisition rules of Chapter 3 may be considered as best served by this proposed solution. Taking into account the model rule character of these provisions, it should, however, be mentioned that if a shorter period for acquisition by continuous possession was chosen, a different solution as to the burden of proof issue might be contemplated as well.

How the presumption of paragraph (2)(b) works. The presumption of good faith spelled out in paragraph (2)(b) is to be understood as a rebuttable presumption (cf. the definition of "presumption" in the Annex). The owner must, therefore, assert facts, and provide sufficient evidence for them, from which it follows that the possessor was not in good faith neither when obtaining possession nor at any later time during the qualifying period. E.g., the owner may prove that there have been sufficient reasons to realise that the contract, on the basis of which the goods were acquired, was invalid, or that the facts presented by the possessor about his acquisition of possession are very likely to be false. Also, the owner may provide evidence showing that new facts became available after possession had been obtained, that the possessor could reasonably have been expected to know of these facts and that these new facts were of such quality that the possessor should have had reason to doubt the legitimacy of his acquisition.

(b) Period of ten years

Length of period. Evidently, the determination of the length of the qualifying period for acquisition of ownership is a suitable instrument for balancing the interests involved in continuous-possession situations. Taking into account the comparative survey, it is also obvious that there is the quite uniform approach in Europe that a possessor in good faith is considered much more worthy of protection than a possessor in bad faith and, therefore, the period for acquisition in good faith may be much shorter – although the general ("public") interest of safeguarding legal certainty as to property positions remains the same irrespective of the possessor's good or bad faith. Still, determining the length of the period involves a certain measure of arbitrariness. Most European legal systems provide for a period ranging from three years – which seems to be the most frequently chosen solution – to ten years for the acquisition in good faith, but some even provide for a period of forty years in certain circumstances. To a certain extent, of course, the duration of the period may depend on the existence or non-existence of additional requirements for the acquisition by continuous possession, such as the existence of a "valid obligation" ("valid title") for acquiring ownership. But still, it is difficult to provide a generalised picture. During the drafting history of this Article, periods between three and ten years have been contemplated (for non-registerable goods, cf. Comment B). Finally, the majority in the Study Group's Co-ordinating Committee decided in favour of a ten-year period. There are two main arguments put forward for this solution: First, especially where goods have been stolen (but the current possessor is in good faith), shorter periods are considered not to be long enough for the owner to recover his goods. This has been the practical experience in Sweden, where the law, for this reason, has been changed from a three-year to a ten-year period. Theft is, however, not the only case in which this rationale may apply. Similar difficulties may (perhaps not that typically) occur in other situations where possession of the goods has been transferred, or otherwise passed, to several persons one after another. Second, the expropriating effect for the owner is seen as a heavy sanction in general, which has by itself been considered to speak against a short(er) period. One may add that, to a certain extent, providing for a rather long period will also fit to

the approach of not adopting additional requirements for the acquisition by continuous possession, which could also have a certain corrective function (cf. Comment J below). – Evidently, however, the long minimum period of ten years reduces the practical relevance of the concept of acquisition of ownership by continuous possession to durable goods. Many things will simply not exist any more after ten years.

No inappropriate results in case of void and avoided contracts: general. The approach of providing for a rather long ten-year period for acquisition of ownership might be contested if it had inappropriate side effects. One aspect, which had to be taken into closer consideration when developing this Article is the ten-year-period's impact on the unwinding of void or avoided contracts (after performances have been exchanged). The underlying reason why this is an issue is that avoidance of a contract has two effects: Under the property law provision of VIII–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation) paragraphs (1) and (2), ownership is never transferred or reverts to the transferor with retrospective effect. Accordingly, the seller is entitled to restitution of the goods under VIII.–6:101 (Protection of ownership). The second consequence is that the mutual performances have to be reversed under the rules of unjustified enrichment (Book VII). These obligations will be subject to prescription in the sense of Book III Chapter 7. The interrelation of these rules with the ten-year period for acquisition by continuous possession is reflected in the following Comments.

Avoidance within ten years. Under these model rules, prescription of a right to performance of an obligation occurs after the lapse of a period of three years (III.–7:201 (General period)). This period will also apply to unjustified enrichment claims. Where, like under a contract for sale, both parties to a contract have performed mutual obligations and, subsequently (e.g. after nine years), this contract is avoided, the relatively long ten-year period for acquisition of ownership by continuous possession should not have the effect that the buyer must restore the goods to their owner while, due to the prescription rules of Book III Chapter 7, not being entitled to recover the purchase price he paid. Such effect, however, does not occur: According to III.–7:203 (Commencement) paragraph (1), the period of prescription begins to run from the time when the debtor's performance is due. In the present context, this means that the three-year prescription period, which the obligation to repay the price is subject to, starts to run when avoidance becomes effective. Consequently, the buyer has, from this moment onwards, a period of three years to reclaim his money. This is long enough. The fact that the periods provided for in the prescription rules under Book III Chapter 7 of these model rules are shorter than the periods for acquisition by continuous possession, therefore, does not place any inadequate disadvantage on the buyer. Accordingly, the difference in the length of the periods is, in itself, no argument against the imposition of a ten-year period for acquisition of ownership by continuous possession.

Avoidance after more than ten years. These model rules do not provide for any absolute time limit for the avoidance of a contract. II.–7:210 (Time) only sets forth that notice of avoidance must be given within reasonable time after the avoiding party gained, or could have reasonably been expected to gain, knowledge of the relevant facts. This implies that a party may possibly be entitled to avoid the contract even after the lapse of ten years. Furthermore, it is clear from the Comments that the prescription rules of Book III Chapter 7 do not apply to a party's right to give notice of avoidance; see III.–7:101 (Rights subject to prescription) Comments B and D. Taking into account this legal framework, avoidance of a contract for sale, after the buyer has possessed the goods in good faith for more than ten years, leads to a situation where (1) the contract is treated as never having existed and obligations to reverse

performances arise from unjustified enrichment law (meaning that the price and – in principle – the purchased goods are to be restored); and at the same time (2) the buyer has fulfilled the prerequisites of acquisition by continuous possession in good faith under the present Article. As none of the involved sets of rules (avoidance with retroactive effect, unjustified enrichment, acquisition under the present Chapter 4) is inapplicable as a matter of principle, a provisional result may be described as follows: The seller's unjustified enrichment claim for recovering the sold goods will be extinguished by VIII.–4:302 (Extinction of rights under rules on unjustified enrichment and non-contractual liability for damage) upon acquisition of ownership by continuous possession, i.e. after ten years of possession. Also, the seller cannot demand restitution of the goods based on a right of ownership under VIII.–6:101 (Protection of ownership) – which, in principle, would be the consequence of avoidance with retroactive proprietary effect, see VIII.–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation) paragraph (2): This possibility was extinguished upon fulfilment of the requirements for acquisition under Chapter 4. Whereas this means that the seller cannot recover the sold goods, he continues, in principle, to be under an obligation to return the purchase price to the buyer under the unjustified enrichment rules. This would be a questionable result. It is, however, intended that this problem, with regard to avoided contracts, is to be solved by applying the general rule of III.–3:401 (Right to withhold performance of reciprocal obligation) paragraph (1) by way of analogy. This rule states that a creditor, who is to perform a reciprocal obligation at the same time as, or after, the debtor performs, has a right to withhold performance of the reciprocal obligation until the debtor has tendered performance or has performed. This rule applies to all kinds of reciprocal obligations (cf. III.–3:401 Comment A), including unjustified enrichment claims. As mentioned above, the seller's unjustified enrichment claim will be extinguished by VIII.–4:302 upon acquisition of ownership by continuous possession (accordingly, reciprocal obligations in the strict sense do not exist). Nevertheless, the seller shall be entitled to withhold performance of his obligation to repay the purchase price. Pursuant to the proposed analogy, the buyer may either keep the goods (which he has already acquired) and accept that the seller keeps the price paid for them, or he may chose to restore the goods to the seller and to have the purchase price repaid to him. The rules on acquisition of ownership by continuous possession do not have the aim of resulting in an unfair preference of one party over the other in case of avoided contracts. This should be taken into account when interpreting the relevant rules. Third parties who have acquired rights from the buyer after the ten-year period for acquisition by continuous possession has elapsed are not affected: They have validly acquired from the owner. In practice, this may prohibit the buyer from opting for a return of the goods.

Contract invalid from the beginning. In case the contract is not avoided after exchange of performances, but was void from the beginning, the claims to reverse performance under unjustified enrichment law arise at the moment performance is rendered. When the buyer obtains a secure legal position under this Article by having possessed the goods in good faith for a period of ten years, the mutual unjustified enrichment claims will already have prescribed under Book III Chapter 7, by virtue of the application of the three-year period of prescription provided for by III.–7:201 (General period), which begins to run as soon as the relevant performance has been received (cf. III.–7:203 (Commencement) paragraph (1)). Accordingly, also the buyer will be barred from reclaiming the purchase price he paid. The problem of there being inappropriate results for one of the two parties to a synallagmatic contract does not occur.

H. Acquisition of ownership by continuous possession in bad faith

Why acquisition of ownership by continuous possession in bad faith at all. The European legal systems are quite divided on the question of whether a possessor in bad faith should be able to acquire ownership, or some other position legally protected as against the owner, by continuous possession. In about half of the countries where acquisition in bad faith (or the application of a comparable concept) is possible in principle, one can observe the existence of exceptions for certain forms of "qualified bad faith", for example where possession has been obtained by a violent or other criminal act. Also, there are sometimes additional general requirements for acquisition, such as possession having to be "public" or "peaceful", which *inter alia* also operate to the effect that certain constellations of possession in bad faith will not lead to an acquisition of ownership (cf. Comment J below). The issue can probably be discussed endlessly with good arguments on both sides, involving arguments of ethical, economical and legal character. As already discussed more generally in Comment D above, the interests of the original owner (i.e. not to lose his right to the object) are quite neutral in respect of the possessor's state of mind and honesty, except that a person possessing in bad faith might undertake particular efforts to conceal the goods, which may, at least typically, make it more difficult for the rightful owner to find and recover his goods. The dishonest possessor's personal worthiness of protection, on the other hand, considerably declines with the extent of his bad faith increasing. Only from the perspective of third parties, "commerce" or "society" in general, the policy considerations in favour of legal certainty, the general interest of stability regarding proprietary positions and the "peace-keeping" function of possession, i.e. avoiding uncertain litigation after the lapse of a long period of time, may speak in favour of acquisition by continuous possession in bad faith. It has been decided by the Study Group's Co-ordinating Committee to let these interests prevail in principle after the lapse of a long period of time. For extreme situations of qualified bad faith like theft and robbery, however, an exception is considered to be justified (see paragraph (3) of this Article and Comment I below), which in a way also reflects the majority approach in Europe.

Technical implementation of the rule, paragraph (1)(b). As already discussed on a general basis in Comment A, it is clearly preferred not to employ the concept of an ("extinctive") prescription of the owner's right to recovery of the goods, but to regulate the issue in terms of the "real" acquisition of ownership by continuous possession. The rule under which acquisition by possession in bad faith is made possible is paragraph (1)(b) of this Article, which requires (1) owner-possession (2) exercised continuously (3) for a period of thirty years. The term "bad faith" is not mentioned in the text of the Article. It just follows *e contrario* from paragraph (1)(a) that paragraph (1)(b) will practically be left to be applied to possessors in bad faith (but see VIII.–4:206 (Period of a predecessor to be taken into account) Comment B). The mentioned exception for cases of "qualified bad faith" is provided for in paragraph (3) of this Article.

Thirty-year period. The period for acquisition of ownership by continuous possession is thirty years. This appears to be the maximum standard period established for such situations in the European legal systems (where acquisition by continuous possession is possible at all). The length of the period reflects, above all, the possessor's limited worthiness of protection in relation to possessors in good faith who already have to possess for the rather long period of ten years. Also, the thirty-year period reflects the abovementioned difficulties in justifying, and reservations existing against, acquisition by continuous possession in bad faith in general.

I. Exclusion of acquisition by a thief, paragraph (3)

Policy. Paragraph (3) constitutes an exception to the general possibility of acquisition of ownership by continuous possession in bad faith. This exception mirrors the struggle in striking a balance between the general aim of promoting legal certainty and a generally accepted ethical understanding of not supporting or legally recognising certain types of criminal behaviour, as it goes without saying that a criminal does not deserve any legal protection at all. With regard to the owner, who would lose his right to the object in case acquisition by continuous possession was possible in this case, the exception rule also takes into account that in case of theft, it may be particularly difficult for the owner to find out about the place where the goods are currently kept. In order not to take away too much from the goal of legal certainty, however, the exception is deliberately kept narrow. It does not provide that acquisition under Chapter 4 be excluded for stolen goods in general. Only the thief himself shall be covered. The thief's heirs, persons purchasing the goods from the thief and limited-right-possessors retaining the goods for themselves are not prevented from acquiring by continuous possession. The scope of the rule and situations which, to a certain extent, may appear comparable in terms of the criminal element involved but are not intended to be covered, are explored in more detail in the Comments below.

Theft. Paragraph (3) excludes acquisition of ownership by continuous possession for a person "who obtained possession by stealing the goods". It is not decisive whether the dispossessed person was the owner or some other person, as it is the qualified illegal act which triggers this exception. The term "stealing" corresponds to the term "stolen goods" in VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership) paragraph (2). It is not intended to refer to any criminal law implications under national law. For the purposes of this Article, a person "steals" goods where the physical control formerly exercised by another person is actively interrupted, regardless of whether or not this act of dispossession is accompanied by violence or performed secretly. It is, however, essential that the "thief" knows that the goods which he takes into his possession are another's property and that he is not allowed to do so. The reference to "stealing" the goods is intended not to be restricted to the person who performs the physical acts of such dispossession: also a person who participates in the act of dispossession, instigates the act or materially assists in some other way (like in driving a getaway car) is considered to be covered by paragraph (3). This is not explicitly spelled out in the text of the Article, but corresponds to VI.–4:102 (Collaboration), which is seen to express a general principle. Thereby, especially a person who "orders" the theft and keeps the loot for himself in exchange for the payment of a price to the "principal offender" is excluded from the possibility of becoming owner by continuous possession. In all cases, since the rule in paragraph (3) is phrased as an exception, the burden of proof as to the fact that a theft in the abovementioned sense has occurred, will be on the owner. Practically, this may be a burden difficult to discharge after the lapse of a long period of time. Again, this has a favourable effect for legal certainty, but leaves the door open for justice to prevail. – Despite employing the same terminology, the exception provided for by paragraph (3) of the present Article is much narrower as compared to the exception for stolen goods in VIII.–3:101 paragraph (2). As described above, the exception regulated in the present Article only excludes acquisition by the thief himself and his accomplices, whereas VIII.–3:101(2) excludes any acquisition under that Article, provided that the goods were once stolen. Under the latter rule, the qualification "stolen" is, so to say, eternally attached to the goods, and prevents good faith acquisition even by persons in "perfect good faith". This difference may be explained by the fact that good faith acquisition under Chapter 3 is a much more radical means as compared to acquisition under Chapter 4, since the rightful owner is

expropriated immediately. From that perspective, it appears reasonable that exceptions from acquisition under Chapter 3 are wider than those to Chapter 4.

No circumvention by transfer and re-transfer. Circumventing paragraph (3) by transferring stolen goods to a third party and re-transferring them to the thief must be impossible (irrespective of whether or not the third party is aware of the goods' origin). The wording of the Article already points in this direction by addressing the "person who obtained" possession under the relevant circumstances. The need for such "personal qualification", in the light of the underlying policy, should not be circumventable by an interim transfer and re-transfer. Furthermore, this result should follow from the general principle that circumventing activities shall have no effect.

No extension to person knowingly selling stolen goods or persons knowing that the goods have been stolen in general. When taking the criminal energy involved as a parameter, one may argue that a person who receives stolen goods in order to sell them should be put on the same level as the thief himself. However, for such a person acquisition by continuous possession after a period of at least thirty years does not seem to be a practical issue, because the goods will already be sold before that time. Eventually, the abovementioned extension of the notion of "stealing" to instigators (Comment I) may be applicable, as instigation will not necessarily have to relate to a particular asset. From the aspect of individual worthiness of protection, one may also contemplate extending the exception in paragraph (3) to any person who actually knows that the goods have been stolen. Such approach has, however, not been adopted for the following reasons: It has been a basic choice to permit acquisition of ownership by continuous possession in bad faith for the sake of general legal certainty. In order not to undermine this basic choice, exceptions should be narrow and the criminal energy involved should probably be comparable to the case of theft. This will already be doubtful in case of "mere" knowledge of a former theft. Also, if an exception were adopted for actual knowledge of the fact that the goods have been stolen, one can assume that any possessor would routinely assert that he did not know about this fact. The original owner, bearing the burden of proof as to the possessor's actual knowledge, would perhaps be induced to attempt initiating useless litigation. Rather, it will correspond to the general idea of legal certainty to bar uncertain litigation after a long period of time.

Limited-right-possessor refusing to return the goods after end of legal relationship not covered. Another question is how to treat a lessee, borrower, pledgee or custodian who intentionally refuses to return the goods after the relevant contract has ended and decides to keep them as if they were his property. Such behaviour constitutes a criminal act in many legal systems and the criminal energy involved may be considered to come close to the case of "theft" in the abovementioned sense (Comment I). However, there is a certain difference in that this dishonest person is known to its former contracting partner (paradigmatically: the owner himself), which typically makes it easier to recover the goods (if they are still there, or can be traced) or, at least, to receive compensation for the loss. Against this background, it appears justifiable to let legal certainty prevail.

Finder who keeps goods for himself. National provisions on finding usually impose certain duties on a finder of a movable property. Normally, there is a duty to hand over the goods to the person who lost them or to a competent authority, or at least to give notice to the person having suffered the loss or such competent authority that the goods have been found. The finder is often provided with certain incentives (like a finder's reward or the possibility to acquire ownership in case the owner does not claim the goods) in order to increase the

owner's chances to re-obtain the lost property. It may correspond to such policies underlying the national laws on finding that a finder who does not comply with such duties but keeps the found goods for himself shall, in no circumstances, benefit from such behaviour. If so, this policy may also speak against a possibility to acquire ownership by continuous possession (after thirty years). As these model rules exclude the complex of acquisition of ownership by finding – see VIII.–1:101 (Scope of application) paragraph (2)(h) such policies have not been incorporated into these model rules. Therefore, it appears advisable to let the question of whether a finder, who intentionally keeps the goods for himself, may ultimately acquire ownership under this Chapter depend on whether this result would be compatible with the national rules on finding and the policies underlying these rules. Where, on the other hand, someone finds an object and mistakenly assumes that it is his own property, keeping the movable should of course not exclude the possibility of acquisition of ownership by continuous possession after ten or thirty years, the length of the period depending on this person's good faith or bad faith. Further, where a finder first intends to return the found goods or to hand them over to the competent authority, but then undertakes no further steps and, still, intends to keep them for the rightful owner, being willing to return the object in case the owner shows up himself, the finder cannot even be regarded as an owner-possessor. Such person will, therefore, never acquire ownership under Chapter 4.

Thief's heirs, donees and similar cases not covered. A consequential question as to the exclusion of thieves is how to treat a possessor who received the goods from the thief gratuitously, either *inter vivos* (by donation) or under the law of succession (the thief's heir or legatee). Evidently, one can argue that such a person has not made any counter-performance in order to obtain the goods and, therefore, should not be treated better than his predecessor. Against the background of the general aim of promoting legal certainty, however, such extension of the exception in paragraph (3) has not been adopted. Unlike in the case of a thief, these cases partly involve no criminal energy at all, or, where bad faith actually is on hand, it would become difficult to draw a well-justified line between such a case and the remaining cases of acquisition by continuous possession in bad faith.

Functionally comparable criteria in European legal systems. The exception for thieves provided for in paragraph (3) of this Article corresponds to a common approach followed in many European legal systems. The concepts, within the framework of which this result is achieved, are different though. In many countries, a thief is precluded from acquiring already by virtue of a general requirement of good faith (which, however, is presumed most frequently). In some countries, there is an explicit exception for persons who have obtained possession by a criminal act, by unlawfully depriving the former possessor of possession, or similarly. Further, many legal systems provide that possession must be "peaceful", "unequivocal", or must not have been obtained "*vi, clam, precario*"; cf. Comment J below. All of the mentioned prerequisites exclude, in the first place, acquisition by a thief. Of course, many of these concepts extend considerably beyond the case of theft. Also, it must be noted that establishing criteria like "peaceful", "unequivocal" or "*nec vi, nec clam, nec precario*" has a significant impact on the burden of proof. The owner-possessor must establish that he did not steal the goods (so that he must, e.g., provide evidence for having purchased or inherited them), whereas under the present Article, the owner must prove that the possessor obtained the goods by stealing them.

J. Requirements not adopted

General. In addition to the general prerequisites adopted in this Article, i.e. (1) owner-possession (2) exercised continuously (3) for a certain period of time while (4) good faith may

be a relevant criterion (and certain exceptions for qualified bad faith apply), some legal systems set forth further requirements for acquisition of ownership by continuous possession. When developing these model rules, these further requirements also had to be examined and evaluated in order to decide whether adopting them appeared useful and adequate. As the simplicity and workability of the concept may certainly suffer from including further prerequisites, the general aim was to adopt requirements only if they appear to be workable and serve a particular function. For the reasons summarised below, the following preconditions found in some legal systems have not been adopted.

Valid obligation (valid title). In a number of legal systems, acquisition of ownership by continuous possession for a short period of time is only possible if it is based on a valid obligation ("valid title") which, as such, would be suitable for an acquisition of ownership; for example, an entitlement to the transfer arising from a contract for sale, donation or barter, universal succession of an heir, or legacy. In some countries, also a "putative title" is sufficient to enjoy the benefit of being able to acquire in the shorter period. However, in almost all of these European legal systems acquisition of ownership by continuous possession is also possible without such a valid title (only that the period will be longer). Details will be reflected in the Notes. The requirement of a "valid title" goes back to Roman law (*iusta causa usucapionis*), where acquisition of ownership by continuous possession served an important function in enabling a valid acquisition from a non-owner to occur, because a possibility of immediate acquisition of ownership based on good faith – like the one provided for under Chapter 3 of this Book did not exist. This also shows that if this criterion was adopted (as a prerequisite for acquisition after the lapse of a "short" period, such as the ten-year period provided by paragraph (1)(a)), the basic function of such a rule would be to serve as a fall-back provision for cases where immediate good faith acquisition under Chapter 3 is impossible. The rule's scope would mainly encompass donations received from a non-owner, the acquisition of stolen goods (where not possible under Chapter 3) and would facilitate acquisition where the transferee's good faith is difficult to prove. Hence, such provision would cure (only) the transferor's lack of ownership or authority to dispose, but not any additional defects in the acquisition. Allowing a "putative title" to suffice would allow the inclusion of further situations, e.g., acquisition under an invalid contract for sale, or where erroneously an object, different to the one which has been bought, is delivered, and the transferee is in good faith.

Possible substantive functions of valid title requirement. When analysing which concrete functions the requirement of a "valid title" may serve within the framework of these model rules and whether there is any particular need to include this requirement to solve specific problems, one will see that a "putative title" does not add much to the criterion of good faith. A strict "valid title" requirement, the fulfilment of which must be proven by the possessor, on the contrary, would in fact exclude certain constellations from the scope of acquisition by continuous possession – whereby these deliberations build upon the assumption that, pursuant to the common core of the European legal systems, a "valid title" requirement would only be imposed on acquisition in the short period, not on acquisition after possession for a period of thirty years under paragraph (1)(b) of this Article: The "valid title" prerequisite would, of course, exclude acquisition by a thief – but only if this requirement were to be applied to acquisition in the "long" period of thirty years, which is, as just mentioned, not taken into closer consideration against the background of the comparative survey. Therefore, if excluding the thief is a policy within the framework of these model rules, a separate rule must be incorporated anyway; see VIII.–4:101 (Basic rule) paragraph (3). The same approach would have to be followed if further situations of acquisition in bad faith (irrespective of

whether a "valid title" exists or not) were to be intended to be excluded. But such further exceptions, e.g. for cases where a lessee decides to keep the goods for himself, are not intended to be provided (cf. Comment I). Evidently, a "valid title" requirement would be directly relevant where a contract for the transfer of goods has actually been established, but suffers from a defect that causes its invalidity. For example, it would exclude acquisition of ownership by continuous possession (in the short period), irrespective of the buyer's good faith, in case the seller lacked capacity when concluding the contract. However, protection of persons subject to an incapacity is already achieved by special extension rules in VIII.–4:201 (Extension in case of incapacity). If, on the other hand, the contract is invalid for other reasons, such as a defect in representation, there appears to be no need to give the owner more than ten years to detect this defect and to recover the asset (this evaluation might possibly differ if a considerably shorter period was adopted). Within the present framework the "valid title" requirement would, accordingly, partly counteract existing policy decisions; and where this would not be the case, it would not add much substantive importance. It is, therefore, advisable not to adopt this requirement.

Possible impact of valid title requirement on burden of proof rule. A "valid title" requirement may, however, indirectly have a certain practical impact on the presumption of good faith provided by VIII.–4:101 (Basic rule) paragraph (2)(b). Where the potential acquirer must prove that a valid contract was established, this implies that he must provide evidence as to details of this agreement (such as the identity of other party to the contract, the price and the date of the agreement) and perhaps also of additional circumstances (such as the reasons which led the acquirer to assume that the seller, if the seller was a very elderly person, was nonetheless not subject to an incapacity at that time). This may, depending on the individual facts and the possessor's ability to produce evidence after the lapse of a period of at least ten years, constitute a considerable obstacle. Second, even if the possessor is able to overcome this hurdle, the necessity of disclosing more details about the circumstances of the contract's conclusion may render the possessor vulnerable when it comes to the assessment of good faith; e.g. where the validity of a contract can be proved but it emerges that the seller was a person with a questionable reputation and the price was unreasonably low, so that the acquirer should have doubted the seller's right to the goods. Such interaction may, depending on the circumstances and also depending on how much of an inquisitorial system is incorporated in the relevant civil procedure law, take the edge off the presumption of good faith to a certain degree. However, as these are rather indirect effects, and even difficult to generalise, this possible impact is not considered to be sufficient reason for incorporating a "valid title" requirement.

Public possession. A number of legal systems, apparently influenced by the French civil code, require that continuous possession must be "public". In essence, this means that the possessor does (at least) not hide the goods, or (even) possesses in a way that is transparent to "the public". The main function of such rule certainly is that the owner shall have a chance to find the object and reclaim it. However, nowadays, as far as movable assets are concerned, putting much weight on such an idea appears a little unrealistic, especially where the goods have been stolen, but also in other situations. Another difficulty in this respect is how to define "public" when it comes to applying this criterion in practical cases. E.g., what about a painting situated in a private house – should it be decisive whether or not the painting is placed in the living room, where it may be seen by guests, or in the bedroom; whether guests are invited frequently or not; or whether it can easily be seen through a window when walking past the house, etc.? In (probably most) countries, where a "public possession" requirement was adopted, it is recognised that it must be applied in accordance with the nature of the

goods concerned, and that it is practically dispensed with in cases of assets, which are normally not possessed "in public" (e.g., financial instruments). A second possible function of the named requirement is closely related to good faith: Someone who hides an object seems suspicious. Substantially, however, this does not add anything important to the general good faith requirement, which is necessary for acquisition in the short period (since good faith is not only necessary when obtaining possession). Again, though, there is a practical difference with regard to the burden of proving good faith: If "public possession" is adopted as a requirement for acquisition by continuous possession, its fulfilment must be proved by the possessor. Where there is no such requirement but everything turns on the possessor's good faith as such, and the rightful owner must prove the absence of good faith, the risk of failing to provide evidence is on the owner. In this respect, a formalised concept of good faith could, in principle, help to limit the "risk" of substantially incorrect results caused by the presumption of good faith. Nevertheless, the requirement is not adopted in these model rules, by reason of its practical difficulties in application and the somewhat anachronistic underlying considerations mentioned above, as well as due to policy considerations aiming at promoting legal certainty in a comprehensive sense (as described in Comment D above), which lead to the general decision of allowing acquisition of ownership by continuous possession also in bad faith. Exceptions to this policy have been agreed on to be very restricted, being concretely limited to cases of theft in the sense of VIII.–4:101 (Basic rule) paragraph (3). By the way, these will be the most prominent examples of a possessor hiding the goods.

Unequivocal possession. The requirement of unequivocal, or unambiguous, possession which can be found in a handful of countries also originates from the French civil code. The traditional understanding is that there must be no doubt about the origin of the possession, or its exclusive nature. A main practical example, relating mainly to the first aspect, is that a close relative, or e.g. a secretary, of a deceased person possesses certain goods of the latter after his death and asserts that he has received them as a gift, physically handed over to him by its giver. Where, however, the basic policy decision has been to promote legal certainty also where a person possessed in bad faith for a period of thirty years, it would certainly go too far to already strictly exclude any acquisition in a case of doubt (vagueness of facts). The question, in other situations, should then rather be solved on the basis of the general prerequisites: If it in fact turns out that the goods have been stolen, the exception of VIII.–4:101 (Basic rule) paragraph (3) shall apply. If not, the goal of general legal certainty prevails. Another example, relating to the aspect of exclusivity of possession, is a situation of co-possession where the owner has no reason to suspect that the counter-party has changed his mind and now intends to possess "as if" being the (sole) owner. One must say that it is rather unlikely that such a constellation will persist for more than (at least) ten years. And if so, one will be able to solve such cases within the scope of the requirement of owner-possession in the sense of VIII.–1:206 (Possession by owner-possessor) which with regard to the intention to exercise physical control "as if (being) an owner", as well as regarding the factual aspect of exercising such control must be proved by the potential acquirer. Again, a separate requirement of "unequivocal" possession does not appear to be needed.

Peaceful possession. This term, which again stems from French legal tradition, is used with somewhat different meanings in the legal systems having adopted it. As far as it relates to "undisputed" possession in the sense that the rightful owner did not initiate successful legal proceedings against the possessor during the period required for acquisition, this policy is also recognised by these model rules, but formulated more directly as a rule concerning the calculation of the period only; see VIII.–4:203 (Extension and renewal in case of judicial and other proceedings). As far as it means that the possessor did not employ violence when taking

possession, this aim has also been adopted, namely in VIII.–4:101 (Basic rule) paragraph (3). Lastly, the prerequisite of "peaceful" possession seems to be used in the sense that a possessor is expected to defend himself (in the manner typical for a normal diligent possessor) against the violence of third parties against his possession. If he does not do so, he will not possess "peacefully". In this understanding, there seems to be no need for adopting such requirement in Chapter 4. If violence exercised by a third party leads to a loss of possession (and possession is not recovered in due time in the sense of VIII.–4:103 (Continuous possession) paragraph (1)), already the fulfilment of the prerequisite of continuous owner-possession will be lacking. Where, on the other hand, the attack does not lead to (permanent) dispossession, the mere possibility that the possessor perhaps fears to seek the help of a competent authority (because he knows or assumes that he does not rightfully own the goods, and that this could be detected) should not exclude acquisition by continuous possession when there is a policy that also possession in bad faith, with the one exception of VIII.–4:101 paragraph (3), shall lead to an acquisition of ownership.

Exclusion of possession obtained by violence, secretly or precariously (*nec vi, nec clam, nec precario*). These criteria, going back to ancient Roman law, partly repeat what is expressed in other words as to some of the criteria dealt with above. Violent acquisition of possession in the sense of overcoming physical resistance will clearly be excluded by VIII.–4:101 (Basic rule) paragraph (3); the same will apply to secretly obtained possession by theft. In other situations, the level of bad faith required by the (narrow) exception of that rule will not be reached, so that the policy of legal certainty will prevail.

VIII.–4:102: Cultural objects

(1) Under this Chapter, acquisition of ownership of goods qualifying as a "cultural object" in the sense of Article 1 (1) of Council Directive 93/7/EEC, regardless of whether the cultural object has been unlawfully removed before or after 1 January 1993, or not removed from the territory of a Member State at all, requires continuous possession of the goods:

(a) for a period of 30 years, provided that the possessor, throughout the whole period, possesses in good faith; or

(b) for a period of 50 years.

(2) Member States may adopt or maintain in force more stringent provisions to ensure a higher level of protection for the owner of cultural objects in the sense of this paragraph or in the sense of national or international regulations.

COMMENTS

A. General

Policy, length of period. Cultural objects are widely considered to have a special status, involving various public interests. Based on this view, the Study Group's Co-ordinating Committee decided that with regard to cultural objects, acquisition of ownership by continuous possession should be allowed only subject to the fulfilment of stricter preconditions, no difference being made as to whether the case is a merely domestic one, one involving an unlawful removal from a state's territory, or whether any other element of fundamental injustice (such as expropriation out of racial motivation) is involved. This special protection for owners of cultural objects is achieved by extending the qualifying periods to 30 years for acquisition in good faith and to 50 years for acquisition in bad faith. The other policy considerations, in principle, remain the same as discussed in the Comments on VIII.–4:101 (Basic rule), but the owner's interest in keeping the goods is additionally restrained by public interests in those goods (e.g. in making these goods accessible to everyone in a museum, or in preserving the object for the purpose of scientific research, etc.).

Legal framework and purpose of this Article. As will be shown in more detail in the following Comments and in the Notes, there exist various further rules in the national legal systems, incorporating Council Directive 93/7/EEC but being also partly based on international conventions that intend to govern only cases of an international character (UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995; UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970). But not all EU Member States are party to these conventions, and, partly, these conventions allow the national provisions prevail. For this reason, it would be a difficult task, involving complex political impacts, to create genuinely uniform rules on the acquisition of cultural objects by continuous possession. Since the regimes on time limits imposed by these instruments are quite different and partly leave it up to the member states to impose even longer time limits and, as mentioned above, by far not all EU Member States have ratified the named Conventions, it would also be practically impossible to adopt just the time limit regime of, e.g., the UNIDROIT Convention, that is to apply to cases of acquisition of ownership under the present Article, without potentially ignoring fundamental standards existent in some of the Member States. Also, these time limits are rather phrased in terms of prescription rules, i.e. limiting the owner's or other requesting party's right, which is a concept quite different to the possession-based one used in this

Chapter. Against this background, this Article only establishes a system of minimum standard protection and leaves other rules untouched, which provide a higher standard of protection to the owner of a cultural object.

B. Definition of cultural objects in the sense of paragraph (1)

General. Developing an overall suitable definition of the term "cultural object" is particularly difficult. This is already clear from a comparison between the definitions employed by international and EC instruments, which are summarised below. The definition used in this Article should, in any case, coincide with one of the definitions already existing in international or EC regulations. There is seen to be no sense in reinventing the wheel and introducing a further model. Accordingly, there are basically three possibilities, the first providing a more narrow, but clearly-shaped definition, the second providing a rather broad definition, and the third being a combination of these two.

The chosen option: definition of Council Directive 93/7/EEC. This Article adopts the definition provided in Article 1 (1) Council Directive 93/7/EEC. This definition is the narrowest one, but it has the advantage of serving legal predictability much better than the UNESCO Convention discussed below. The definition of the Directive contains two main prerequisites: First, in order to qualify as a "cultural object" it must be classified as being among the "national treasures possessing artistic, historic or archaeological value", as determined by national legislation or administrative procedures. Second, the goods must either form an integral part of a public collection listed in the inventories of a museum or similar institution, or an integral part of the inventories of ecclesiastical institutions; or the object must fall under certain categories listed in an Annex to the Directive. This Annex imposes certain minimum-age requirements on the various categories (e.g. 50 years for pictures, 100 years for books), that partly also have to exceed a particular value (listed in the Annex to this Directive, e.g. 150.000 ECU for pictures). Furthermore, these categories are much narrower than those of the UNESCO and the UNIDROIT Convention.

Irrelevance of removal from territory, irrelevance of date. In addition to the definition provided by Article 1 (1) Council Directive 93/7/EEC, paragraph (1) of this Article clarifies that it is immaterial "whether the object has been unlawfully removed before or after 1 January 1993, or not removed from the territory of a Member State at all". This clarification has been included because of Article 13 of the Directive, which states that the Directive shall apply only to cultural objects unlawfully removed from the territory of a Member State on or after 1 January 1993. For the purposes of Chapter 4 of this Book, however, it is only decisive that the object fulfils certain qualitative requirements, as outlined above. Any removal or non-removal from the territory of a Member State, as well as any aspect of time is irrelevant.

Policy underlying this choice. The policy of proposing this definition is to provide as much legal certainty as possible, which is achieved, in particular, by the classification requirement, but also by the second requirement of either being registered in certain inventories or forming part of a rather clearly and narrowly defined list of categories.

Alternative option: definition of the UNIDROIT Convention 1995. A second hypothetical alternative would be adopting the definition contained in the 1995 UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects. This definition is, to a large extent, similar to the definition used in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

Contrary to the UNESCO Convention, the UNIDROIT Convention does not include a requirement of designation by a competent authority of the relevant state. This definition, which is cited in the Notes, is a rather wide one. In particular, there is no requirement of "classification" by a competent authority, nor must the goods be registered in certain inventories. The relevant categories listed in the Annex to the UNIDROIT Convention are much broader, and no limits as to value are included. This alternative could have the advantage of a much broader protection of cultural objects. Furthermore, the UNIDROIT Convention is the instrument most closely related to acquisition of ownership by continuous possession. But, evidently, it lacks legal certainty, for which reason the definition of Council Directive 93/7/EEC is to be preferred.

Alternative option: definition of the UNESCO Convention 1970. A midway solution could be to follow the definition of the UNESCO Convention, which is, in principle, the same as used by the UNIDROIT Convention, but, additionally, requires a specific act of designation by the relevant state. For the reasons already mentioned, however, the definition of Council Directive 93/7/EEC is to be preferred.

C. Relation to other rules of law

Minimum standard of protection for owners of cultural objects. As paragraph (2) of this Article spells out explicitly, the permission of acquisition of ownership of cultural objects after an extended period of continuous possession shall be without prejudice to the applicability of other rules of law providing for a higher standard of protection for owners of cultural objects. It is also stated explicitly that the higher level of protection permissible under paragraph (2) includes protection effected by the adoption of a wider definition of the term "cultural object" itself. Such higher level of protection may be provided by genuine, non-harmonised national law (which could, for instance, exclude the possibility of the acquisition of ownership of cultural objects by continuous possession from the outset, or make it dependent on the fulfilment of additional stricter preconditions). For certain situations, a higher level of protection has, as to their practical effects, already been established by those national provisions implementing Council Directive 93/7/EEC. Although it will not be the owner of the object, but the Member State from whose territory the object has been unlawfully removed, who has a right to the return of the object under that Directive, it may theoretically happen that such a request is lawfully made after the period for acquisition under the present Article has already elapsed: Article 7 of the Directive provides a one-year time period, the running of which commences with the requesting Member State's becoming aware of the location of the cultural object and the identity of its "possessor" or "holder". In addition, there is an absolute thirty-year time period, starting to run as from the moment in time of the object's unlawful removal from the requesting Member State's territory. This time limit is, however, not applicable to objects forming part of certain public collections and ecclesiastical goods, in which cases proceedings may be initiated at least up to 75 years since the unlawful removal. However, the possessor is entitled to fair compensation provided that he exercised due care and attention in acquiring the object. Further, a higher level of protection may be, and partly is already, provided by national regulations implementing the named Conventions prepared by UNIDROIT and UNESCO, respectively. It is immaterial whether such rules already exist or are adopted in future.

Protection under the international Conventions in particular. Apart from the named Directive, above all the 1995 UNIDROIT Convention provides for special rules for the restitution or return of stolen or illegally exported cultural objects in situations of an international character (the 1970 UNESCO Convention aims at preventing the illicit import,

export and transfer of ownership of cultural property more indirectly and does not directly provide any private law means, or other means directed at the return of such goods). The UNIDROIT Convention establishes separate sets of rules for "stolen" and "illegally exported" cultural objects, both differing from each other, basically with regard to the person or entity entitled to make the claim or request, and with regard to the regime of time limits applicable (partly allowing the Contracting States to retain longer periods possibly provided for in their laws). Details are provided in the Notes on this Article. In both cases, the possessor of the cultural object is entitled to payment of fair and reasonable compensation, provided that he was in good faith in the sense that he neither knew nor ought reasonably to have known that the object was stolen, or, at the time of acquisition, that the object had been illegally exported.

Interaction of this Article and the 1995 UNIDROIT Convention in particular. Since the rules of the UNIDROIT Convention are the most relevant in the context of acquisition of ownership by continuous possession because of their partial private law character, the interaction of these rules provided that there is a case of an international character falling within the scope of applicability of the Convention is on hand with those proposed ones under the present Book VIII shall be described briefly in the following. The main effect can be summarised in the observation that the possessor of a cultural object enjoys continuously increasing protection with the lapse of time: Before the qualifying period for acquisition of ownership under VIII.–4:102 (Cultural objects) elapses, the possessor must return the goods to their owner under VIII.–6:101 (Protection of ownership) without being entitled to receive any compensation (except for what he may be entitled to under VIII.–7:104 (Expenditure on, or parts added to, the goods during possession)). If the qualifying period for acquisition of ownership under VIII.–4:102 has already elapsed so that the possessor has already acquired ownership under this Article – but the time limits imposed by the Convention have not, the possessor (i.e. the new owner) must return the goods. He is, however, entitled to compensation under the rules imposed by the Convention, provided that he is in good faith in the abovementioned sense. After also the time limits of the Convention (or the longer time limits imposed by national law, as permitted by the Convention) have expired, the possessor (who has acquired under the present Chapter 4) may keep the object.

VIII.–4:103: Continuous possession

(1) Involuntary loss of possession does not exclude continuous possession for the purpose of VIII.–4:101 (Basic rule), provided that possession is recovered within one year or an action which leads to such recovery is instituted within one year.

(2) Where the owner-possessor is in possession of the goods at the beginning and at the end of the period there is a presumption of continuous possession for the whole period.

COMMENTS

A. Paragraph (1)

General. In principle, acquisition of ownership under Chapter 4 requires continuous possession throughout the whole period; see VIII.–4:101 (Basic rule) paragraph (1). Physical control over the goods may be exercised by the owner-possessor himself or for him by means of another person, see VIII.–4:101 Comment F. If the possessor gives up owner-possession voluntarily, e.g. by transferring possession to another person (such as a buyer) or by abandoning the goods, there evidently is no possibility (and no need to) acquire ownership under this Chapter. According to the general prerequisites set out in this Chapter, the same would (if the present Article did not exist) also apply where possession is lost involuntarily.

Involuntary loss of possession. Paragraph (1) of this Article provides for an exception to the abovementioned principle. If the owner-possessor involuntarily loses possession, but recovers it within one year or institutes an action within one year which leads to such recovery, the interruption of possession will not be taken into account for the purposes of acquisition under Chapter 4. This means that the time that will have elapsed until the recovery of possession will, under the named prerequisites, be counted for the period of "continuous possession" required under VIII.–4:101 (Basic rule), or VIII.–4:102 (Cultural objects), as the case may be. In other words, the time in which the potential acquirer lacked possession is treated as if he had exercised possession continuously. A comparable rule can be found in most of the European legal systems. In the great majority of legal systems, as in paragraph (1) of this Article, the period for re-obtaining possession is one year. This period corresponds with the period of VIII.–6:203 (Entitlement to recover as protection of mere possession), which provides for a possessor's right to recover the goods from another person who unlawfully deprived the possessor of possession, irrespective of who has the better right to the goods. The synchronisation of these two rules makes sense, as unlawful dispossession by a third person will be the main practical example for applying the fiction provided by paragraph (1) of this Article. However, the possessor is of course not restricted to this particular remedy. The term "action" is intended to address any judicial or administrative proceedings or act directed at the recovery of possession. These courses of action are equated with recovering possession by the possessor himself, because people should, for evident reasons, not be prevented from making use of the competent public authorities. For that reason, the point in time of the institution of the action is relevant for the one-year period. Then, the proceedings may well last longer than one year as from the loss of possession. It is only decisive that they lead to the recovery of the goods, so that the possessor can subsequently continue to exercise possession.

Justification; impact on owner and third parties. Paragraph (1) appears justified, apart from serving the interests of the owner-possessor himself, since from the perspective of third parties the possessor reacts in the way any rightful title-holder is expected to act. From the aspect of legal certainty, there is therefore no need to require the anew starting of the period;

rather, the contrary is the case. With regard to the interests of the owner, the possessor's loss of possession is of rather fortuitous, or neutral, character. If, and this seems to be the only exception, it is the rightful owner who (unlawfully) dispossesses the owner-possessor in the "last minute" (in order to avoid the latter's acquisition of ownership under Chapter 4), the owner may defend himself against the possessor's claim under VIII.–6:203 (Entitlement to recover as protection of mere possession) by resorting to paragraph (4) of that Article in order to prevent the possessor from recovering the goods. Any kind of claim or counterclaim brought by the owner in such proceedings will, in addition, trigger a suspension of the period under VIII.–4:203 (Extension and renewal in case of judicial and other proceedings).

B. Paragraph (2)

Presumption of continuous possession. Especially with regard to movable property, providing evidence that possession has been exercised every day over a period of ten or even thirty years may obviously create considerable difficulties. Paragraph (2) facilitates the proving of possession by the owner-possessor throughout the whole qualifying period for acquisition of ownership. If he can prove that he held the goods in the capacity of an owner-possessor at the beginning and at the end of the period, there is a rebuttable presumption that he possessed continuously throughout the whole period. It is, then, up to the owner to prove that possession was interrupted (for a longer period than permitted by paragraph (1)). A comparable rule is provided for in many, but not all, European legal systems.

Section 2: Additional provisions as to the period required for acquisition of ownership

VIII.–4:201: Extension in case of incapacity

(1) If an owner who is subject to an incapacity is without a representative when the period required for the acquisition of ownership by another by continuous possession would begin to run, the commencement of the period against that person is suspended until either the incapacity has ended or a representative has been appointed.

(2) If the running of the period has already begun before incapacity occurred, the period does not expire before one year has passed after either incapacity has ended or a representative has been appointed.

(3) The running of the period is suspended where the owner is a person subject to an incapacity and the owner-possessor is that person's representative, as long as this relationship lasts. The period does not expire before one year has passed after either the incapacity has ended or a new representative has been appointed.

COMMENTS

A. Terminology in Section 2

General. Most of the rules contained in this Section, namely VIII.–4:201 (Extension in case of incapacity) to VIII.–4:205 (Ending of period in case of acknowledgement) deal with the extension or renewal (interruption) of the qualifying period for acquisition of ownership. Book III Chapter 7 (Sections 3 and 4) contains similar provisions for the prescription of rights to the performance of an obligation. For the sake of consistency, the terminology of the present Section 2 follows the terminology employed in Book III. For more details, see III.–7:301 (Suspension in case of ignorance) Comment A.

Extension of period. "Extension" appears in two sub-forms: "suspension" and "postponement of expiry". They have in common that the time elapsed so far, i.e. before the relevant ground of extension arises, is still added to the qualifying period for acquisition of ownership.

Suspension of period. "Suspension" has the effect that the period, during which the ground for suspension exists, is not accounted for in calculating the qualifying period for acquisition of ownership. When the cause of suspension ends, the old period for acquisition of ownership continues to run. Where the period has not even started to run before the ground for suspension occurred, the period only starts to run after the cause of suspension has ended.

Postponement of expiry. Where a "postponement of expiry" is provided for, the qualifying period for acquisition of ownership continues to run while the ground for postponement exists, but only elapses after the expiry of a certain extra period of time.

Renewal of period. "Renewal" of the qualifying period for acquisition of ownership means that the time elapsed so far is not taken into account at all: the period begins to run anew (provided that the possessor continues to hold the goods as an owner-possessor). Civil law

systems usually call this effect an "interruption" of the period. Book III Chapter 7 prefers the term "renewal", which is followed for reasons of terminological consistency.

B. Coherence with Book III Chapter 7 on the prescription of rights to the performance of an obligation

General approach. As to terminology and structure, the rules of Section 2 follow the named provisions of Book III Chapter 7 as much as possible for the purpose of coherency. As to content, however, the rules of the present Section are based on an independent analysis of the interests involved. This analysis shows that there are, in fact, differences to be observed in a couple of instances. For this reason, solving the issues addressed in the present Section 2 by way of a general reference to the provisions on prescription in Book III (as can be found in a number of legal systems) was regarded as inappropriate. Rather, each area shall be dealt with in accordance with its own underlying considerations. This is also intended to be seen as an advice given to legislative bodies. The current experience in legal systems, which apply the same set of suspension and renewal rules both to prescription and (where existent) acquisition of ownership by continuous possession, often is that the main focus in the discourse clearly lies on the area of prescription, whereby, usually unintentionally, peculiarities arising only in the context of acquisition of ownership by continuous possession are sometimes concealed.

Criteria not adopted. Some criteria triggering an extension or a renewal of the period under Book III Chapter 7 or in some European legal systems have not been adopted in the following rules of Section 2. These instances are, however, partly discussed in the Comments on the subsequent Articles. For instance, this Chapter does not adopt a rule comparable to III.–7:301 (Suspension in case of ignorance), see VIII.–4:202 (Extension in case of impediment beyond owner's control) Comment B. Also, there is no equivalent to III.–7:306 (Postponement of expiry: deceased's estate). As to the situations addressed by III.–7:402 (Renewal by attempted execution), see VIII.–4:203 (Extension and renewal in case of judicial and other proceedings) Comment F. As to acquisition by continuous possession between spouses, other family members or household members in general, see VIII.–4:201 (Extension in case of incapacity) Comments F-H.

C. Terminology relating to incapacity

Incapacity. Incapacity in the sense of this Article covers situations where a person, due to this person's mental condition, is unable to take care of his legal interests sufficiently. The paradigmatic example is a minor, i.e. a person under a certain age (often 18 years). These model rules do not deal with the question at which age minority in that sense ends. This is, therefore, intended to be decided by the respective rules of national law. Other examples of persons subject to an incapacity are persons suffering a mental illness, elderly people with a deteriorated state of mind due to age, or victims of accidents lying in a coma. The same notion of "person subject to an incapacity" is used in III.–7:305 (Postponement of expiry in case of incapacity). As to the practical relevance of this Article, if one can suppose that minors will in many countries be automatically represented by their parents, or one of them, the main focus of at least paragraphs (1) and (2) of this Article may in the first place be elderly people and persons suffering a mental handicap or illness. Paragraph (3) may also be of relevance in relation to minors.

Representative. The European legal systems seem to provide rather different concepts of "legal representative". The term is not defined more closely in the text of this Article. Again, it is the same as in III.–7:305 (Postponement of expiry in case of incapacity) and the

applicable national law will step in. Depending on the applicable law, the "representative" may be the parent(s) of the minor, a legal guardian or other type of representative. Where the text of the Article and the following Comments refer to the fact that a representative is "appointed", this is intended to be understood in a broad sense, including a formal appointment made by a court or other competent public authority, as well as an "automatic appointment" provided for by law, e.g. where national law states that the parents are the legal representatives of their child. With regard to cases other than those concerning minors, regard should be had to the fact that under (at least) some national legal systems, a representative is not necessarily appointed to manage all legal affairs of the person subject to the incapacity, but the appointment may be restricted to the purpose of managing only some kinds or particularly defined legal affairs. In such a case, the application of this Article will very much depend on whether the protection of the person's interests against losing ownership of goods by way of another's acquisition by continuous possession falls within the scope of the representative's appointment. If not, the person subject to the incapacity is to be treated as "without representative" for the purposes of this Article. Further, national law may provide that legal incapacity is deemed to continue for the duration of the appointment of a representative, even if the person's state of mind has meanwhile improved. Any rule of that or similar kind is intended to be respected by this Chapter.

Terminology: extension, suspension and postponement of expiry. As to these notions, see Comment A. The headline uses "extension" as a collective term for "suspension" and "postponement of expiry".

D. Basic policy decision: no, medium or even "strict" relevance of incapacity

Main options. The first basic question is whether acquisition of ownership by continuous possession to the detriment of a person subject to an incapacity should (a) be possible without any further restrictions at all, even where the person subject to the incapacity has no representative; (b) be possible in principle, but only subject to the fulfilment of additional preconditions, which aim at protecting that person's interests; or (c) be excluded from the outset, even if there is a legal representative to take care of the legal affairs of the person lacking legal capacity. All three options actually exist in the European legal systems, the latter (c), however, being regarded rather critically nowadays in the countries which have adopted it (i.e. France and Belgium, where the running of the period is suspended for as long as incapacity lasts).

Preferred solution: appointment of representative decisive criterion. In perhaps most of the European legal systems, acquisition of ownership by continuous possession to the detriment of a person subject to an incapacity is permitted, provided that a legal representative exists. This Article adopts this general approach, which, by the way, is also taken in III.–7:305 (Postponement of expiry in case of incapacity). The underlying considerations basically are that option (c) considerably runs against the interest of legal certainty (from the possessor's as well as from the general public's perspective) without any urgent need for such protection. Typically, one may presume that representatives take care of their children's (or clients') legal affairs with due diligence. Option (a), on the other hand, is rejected on the ground that a person subject to an incapacity deserves special protection in the present context, since otherwise, e.g., defects arising from the contract's invalidity due to incapacity could easily be "cured" by the lapse of time, even if they are clearly to the disadvantage of that person. Option (a) could even operate as a certain incentive to damnify persons lacking

legal capacity, especially elderly people, by concluding disadvantageous contracts with them, which obviously runs against the fundamental principle of solidarity and social responsibility. Also, in certain situations where possession of goods has been lost it may be necessary to undertake investigations, which may ask too much of a person subject to an incapacity. The preferred option (b), however, appears to provide a suitable compromise between the two policies of individual protection of persons lacking legal capacity on the one hand, and legal certainty on the other hand.

Situations for which regulation appears necessary. Pursuant to the policy considerations outlined above, this Article regulates (only) the "remaining cases", i.e. those where no representative has been appointed when the period would begin to run (paragraph (1)); where the lack of capacity occurs only after the qualifying period for acquisition of ownership has begun to run (paragraph (2)); and where the representative himself is the potential acquirer by continuous possession (paragraph 3)).

E. Suspension in case of initial lack of capacity, paragraph (1)

General; decisive moment in time. Paragraph (1) addresses the situation where an owner subject to an incapacity has no representative at the moment when the period for the acquisition by continuous possession would start to run (if no suspension was provided for). The decisive aspect for the application of this rule is, therefore, the owner's incapacity at the moment when the owner-possessor obtained possession; possibly, when the first predecessor in the sense of VIII.–4:206 (Period of a predecessor to be taken into account) obtained possession. This will often converge, or roughly converge, with the moment when the owner himself lost possession (such as where goods are transferred in performance of an invalid contract).

Purpose of the suspension rule (as opposed to postponement of expiry). The rule builds upon the general idea that the point in time when possession is lost by the owner subject to the incapacity, and the immediate period of time thereafter, will usually be particularly critical with regard to the risk of ultimately losing the right to the object. In order not to lose, or to recover the goods, the owner first has to detect that something goes, or already went, wrong. Regaining possession may require undertaking investigations, or requesting help from other people, institutions or authorities, to find out where the goods are located. It may be necessary to secure evidence, or to look for legal advice. A person subject to an incapacity may typically not only be overburdened with the appropriate taking care of his legally relevant interests when such a situation is on hand. In addition, that person's inactivity (or inefficient activity) at that time may make it much more difficult for a legal representative, who is appointed at a later point in time, to get an overview of the facts. There may be even greater difficulties in gathering evidence and the chance to recover the goods may be reduced considerably. The legal system, from a standardised perspective, must even face the possibility that no progress has been made with respect to recovering the property as long as its owner who is subject to an incapacity is left on his own. It is, therefore, suggested that the effect of a rule governing these situations be a suspension of the period for acquisition, meaning that the person's representative, when appointed later, or the person himself after regaining legal capacity, can take advantage of the full limitation period to re-obtain the goods. This, deliberately, is a stricter effect than the postponement of expiry provided for by paragraph (2), where the owner initially had legal capacity and, therefore, was able to react himself in the first place. (The practical need for a suspension rule in the situations covered by paragraph (1) would, however, be clearly more urgent if the period for acquisition was shorter than it actually is under these model rules; e.g. if the period for acquisition in good faith was only three years).

It cannot be denied that this choice gives the owner's interests priority over the general interests of legal certainty, since the total period necessary to acquire by continuous possession may be extended for years. This is, however, considered appropriate in view of the general idea that an expropriation effect, as achieved by acquisition by continuous possession, should be considered as an exception, and be imposed only under the precondition that the affected party had or has a realistic chance to protect its interests. The suspension effect also coincides with the majority approach adopted in those legal systems which provide for protection by way of extending the period for acquisition in the case of the owner's incapacity.

Illustration 1
O, an elderly woman, living on her own with few social contacts and no relatives taking care of her, owns a set of precious old sterling cutlery. Her neighbour N looks after her from time to time and helps her with shopping etc. Occasionally, N's daughter D, who meanwhile lives in another city helps out when visiting her parents. One day, after O's state of mind has deteriorated to such degree that lack of legal capacity is on hand, D discovers O's cutlery, persuades O to sell it for a price considerably lower than its actual value and takes possession of the goods. No one else obtains knowledge of this incident. Two months later, on the occasion of the wedding of her niece P, D gives the cutlery as a gift to P, who is in good faith. Only eight years later, after O had to move to an old people's home, a legal representative is appointed. She dies after another five years, i.e. thirteen years after P had taken possession in good faith. Only after O's death, her relatives detect that the valuable sterling cutlery, which had been owned by the family for generations, is missing. Suppose the contract between O and D was void for O's lack of capacity. Has P acquired ownership by having possessed the cutlery in good faith for more than ten years?

Under VIII.–4:101 (Basic rule), the period for acquisition would begin to run upon P's taking possession of the goods (the period of D being in possession before transferring to P is not taken into account for acquisition after the lapse of a period of ten years; see VIII.–4:206 (Period of a predecessor to be taken into account) paragraph (2)). If the present Article only provided for a postponement of expiry in the situations covered by its paragraph (1), the period for acquisition would already have elapsed in favour of P, since a representative was appointed only after the lapse of eight years. However, since O had been unable to take care of her interests already from the beginning (when selling to D in a state of incapacity) and the legal representative did not even know of the existence of these precious items in the first place, clarifying the relevant facts and regaining the property would have been a difficult task to fulfil, and would not have been possible in the present example. However, since paragraph (1) of this Article establishes a suspension rule for cases like this, the period for acquisition only starts to run after the lapse of the first eight years. Accordingly, the new owners (O's heirs) still have at least a chance to reconstruct the occurrences and recover the property.

Differences to III.–7:305 (Postponement of expiry in case of incapacity). There are basically two differences between the concept adopted in the present Article and the one in the corresponding rule on the prescription of rights to the performance of an obligation. First, III.–7:305 does not provide for a suspension of the period, only for a postponement of expiry for an additional period of one year after a legal representative has been appointed or after the incapacity has ended. Apart from a certain indication in the comparative survey, the main reason for establishing a different solution in Book VIII lies in the reason that the risks of losing ownership of a tangible movable asset typically seem to be higher and more diversified

than the risk of "losing" a right to the performance of an obligation, which is directed only against one debtor. Whereas it is usually clear who the debtor of an obligation is (and if not, III.–7:301 (Suspension in case of ignorance) will apply to the advantage of the creditor), it may be extremely difficult for the owner (or his representative, after having been appointed) to investigate who is in possession of the owner's goods. It is therefore considered that the aspect of having lacked capacity in a very critical phase, i.e. between the owner's loss of possession and the possessor obtaining control, may carry more weight in the context of the present Chapter. The second difference to III.–7:305 is that the suspension effect does not work "in both directions" but only in favour of the owner lacking capacity. There appears to be no reason why an owner-possessor lacking capacity should acquire by continuous possession only after the lapse of a longer period of time. The same observation applies to paragraph (2) of this Article.

End of suspension. The suspension effect provided by this paragraph persists until a legal representative is appointed; alternatively, until the incapacity ends (by reaching the age of majority, or, in case of mental illnesses etc., until this illness has been cured).

F. Postponement of expiry in case of subsequent lack of capacity, paragraph (2)

General. Paragraph (2) applies where the owner of the goods had legal capacity "in the first phase", i.e. when the period for acquisition started to run in favour of the possessor, but lacks legal capacity at a later point in time. In such a situation, many European legal systems also protect the owner by an extension of the period for acquisition of ownership. As to the kind of such extension, variations can be observed. Some legal systems provide for a suspension of the period, others a postponement of expiry. As to the parallel question relating to the prescription of the right to the performance of an obligation, III.–7:305 (Postponement of expiry in case of incapacity) paragraph (1) provides for a postponement of expiry with an extra period of one year after either capacity has ended or a representative has been appointed. The same approach is adopted in the present VIII.–4:201 (Extension in case of incapacity) paragraph (2). This means that when such "subsequent" incapacity occurs, the period for acquisition, in principle, continues to run. The possessor can, however, not acquire ownership by continuous possession as long as the owner's incapacity has not ended and the owner is without a legal representative. Additionally to the requirement of expiration of the relevant period of ten or thirty years, at least one year must have elapsed as from the point in time when either the owner regained legal capacity or a representative was appointed. Depending on when this is the case, the total period necessary for the possessor's acquisition may exceed the standard period of ten or thirty years, or no extra time will be needed for the possessor to acquire.

Illustration 2
Owner O had legal capacity when valuable jewels were stolen from her house, which subsequently were (privately) sold to Lady P who henceforth possessed them in good faith, trusting in (well-faked) documents presented by the seller. Eight years later, O becomes subject to an incapacity due to gradually increasing dementia and a legal representative is appointed after another one and a half years, i.e. after a total time of nine and a half years of P possessing in good faith. Shortly thereafter, Lady P wears the jewels on the occasion of visiting an opera premiere at the Salzburg Summer Festivals. A photo of her appears in the yellow press and friends of O believe to recognise the jewels. Under paragraph (2) of this Article, O's representative will have one year as from his appointment to reclaim the property from Lady P. In other words,

P would acquire ownership of the goods only after ten and a half years of having them in her possession.

Illustration 3
Same facts as in *Illustration 2*, but O's representative is appointed already after eight and a half years after P taking possession. Here, the postponement of expiry rule does not cause an extension of the total period of ten years, as already one and a half years have passed since the representative's appointment when the ten-year period for the acquisition of ownership by continuous possession expires.

Purpose of the postponement of expiry rule (as opposed to suspension). In the situations covered by paragraph (2), the owner had legal capacity initially, i.e. when he himself lost possession and the owner-possessor obtained possession. He typically had, therefore, some time to attempt to re-obtain the goods, to undertake investigations and to inform the competent authorities, if regarded as necessary. Although the fact that incapacity occurs at some later stage is considered to require some means of legal protection, it is at least more likely than under the situations covered by paragraph (1) of this Article that the owner has at least noticed that something went wrong and reasonable steps have already been taken, which may also provide a much better basis for additional attempts to be undertaken by the representative, after having been appointed, or by the owner himself, after the incapacity has ended. What appears to be needed, for a representative just having been appointed or the owner himself, after having regained capacity, is to have some time before the expiration of the period for acquisition, in order to get an overview of the person's legal affairs, and to take adequate measures for the recovery of the goods. A postponement of expiry rule granting an additional period as from the representative's appointment, or the end of the incapacity, respectively, seems perfectly apt to serve these functions, while at the same time interfering with the general goal of legal certainty as little as necessary. Paragraph (2) suggests a one-year period before expiry, which corresponds to the one-year period under III.–7:305 (Postponement of expiry in case of incapacity) paragraph (1). This may also be seen as a compromise on length against the background of the comparative survey, e.g. Germany providing a six-month period whereas Austria provides a two-years period. Regarding the situations covered by paragraph (2) of this Article, it should also be mentioned that under specific circumstances, a suspension rule would be even riskier for the owner than the postponement of expiry rule provided by the present Article. This may be the case where the lack of legal capacity occurs only shortly before the period would expire. In that case, a representative might have very little, perhaps too little, time to react in time after having been appointed. Under the present paragraph (2), there always is at least one year to do so. Taking into account the long periods of ten and thirty years established under these model rules, this aspect, however, is only of rather little weight in justifying the proposed solution.

Possibility of restrictive interpretation regarding very short periods of incapacity. There are situations where a person lacks legal capacity only for a very short period of time, e.g. where a person is put under anaesthetic for a couple of hours in order to undertake a medical operation, or where a person lacks capacity only as a result of having consumed too much alcohol or drugs. Where such an event happened within the last year of the period for acquisition, the "automatic" granting of another year as from the time of this event would appear inappropriate in the light of the policy of this rule. In such situations, granting a minimum one-year period for obtaining an overview of that person's legal affairs is not needed. The person having been subject to such short-term incapacity can, so to say, continue the situation that was interrupted a few hours before. Accordingly, paragraph (2) shall not be applicable in such situations. This result is intended to be achieved by a restrictive

interpretation of paragraph (2) in accordance with the policy underlying this paragraph. The effect is not reflected in the text of the present Article itself, as developing an adequate formula appeared to be impossible or would, like providing for an extension for a "reasonable time" after incapacity has ended, bear the risk of considerably hampering legal certainty. Depending on the circumstances, applying paragraph (2) in the light of its policy may either lead to granting the full one-year period before expiry or not.

Illustration 4
O must undergo a medical operation which involves being put under anaesthetic for five hours when P, who is in good faith, has possessed goods owned by O for already for nine years and ten months. Although O will be "subject to an incapacity" for five hours, the expiry of the (ten-year) period for acquisition shall not be postponed under paragraph (2) of this Article. Paragraph (2) is not to be applied in this situation in accordance with its underlying policy considerations, which justify the granting of an extra period (only) where there might be a need for obtaining a (new) overview regarding that person's legal affairs.

G. Owner-possessor himself is representative, paragraph (3)

Policy. The representative of a person subject to an incapacity must act in that person's interest. The idea that the representative may acquire the property of the person subject to an incapacity by continuous possession would not fit to this special relationship, but would rather constitute a paradigmatic conflict of interests. Accordingly, acquisition by the representative himself should be impeded (whereas full exclusion would arguably overshoot the mark with regard to general goal of legal certainty). The same policy is, in principle, followed by the parallel provision in III.–7:305 (Postponement of expiry in case of incapacity) paragraph (2). In contrast to that rule, however, also paragraph (3) of the present Article does not operate "in both directions". Only the owner subject to the incapacity is protected against losing his right. Regarding the opposite situation, namely the person subject to the incapacity acquiring the representative's goods, there are no restrictions comparable to the general rules. Compare also Comment H below.

Sentence 1. According to the named policy, the first sentence of paragraph (3) regulates that the period for acquisition of ownership does not run as long as the relationship of representation subsists. This suggestion goes further than the respective rule in III.–7:305 (Postponement of expiry in case of incapacity) paragraph (2), which only provides for a postponement of expiry for an additional period of one year. However, the approach suggested here seems justified due to the idea that, as long as the respective relationship lasts, the representative must let the interests of the person subject to the incapacity prevail over his own interests.

Sentence 2. The rule in sentence 2 supplements sentence 1 to cover such cases where the period for acquisition of ownership has already elapsed to a large extent when the representative is appointed and, therefore, will completely elapse very soon after the appointment or regaining of capacity. Here, the person formerly having been subject to the incapacity, or the new representative, respectively, shall be granted some extra time to investigate the relationship with the former representative. III.–7:305 (Postponement of expiry in case of incapacity) paragraph (2) achieves the same effect (the postponement rule however being the general one there).

H. Other cases of acquisition of ownership by continuous possession within the family

General. The situation addressed by paragraph (3) of this Article and the related Comment G above may occur in a family relation (between minor and parent) or outside such a relation. Taking into account the comparative survey, there is reason to analyse whether an extension of the period for acquisition of ownership by continuous possession should also be provided with regard to other situations which may occur in family relations, or similar situations where the owner and the potential acquirer live in the same household. These situations are discussed in the subsequent Comments H to J. In the end, however, no such additional rule is proposed to be adopted. Though, some situations can seemingly be solved sufficiently adequately by applying this Article or other provisions of these model rules, which will be discussed in the relevant context below.

Acquisition between minor brothers and sisters. According to an approach taken in some European legal systems, children represented by the same person (e.g. their parents) cannot acquire by continuous possession from each other because, due to a potential conflict of interests, they are regarded as non-represented in that respect. Provided that such an analysis is also to be arrived at under these model rules, the named situations could be covered by VIII.–4:201 (Extension in case of incapacity) paragraph (1): Then, the period for acquisition of ownership would begin to run only when, for one of the children, a different representative has been appointed or when one of them has attained the age of majority. Where the children have originally had different representatives (which may apply in patchwork-family constellations), paragraph (2) of this Article could be applied. An additional rule would not be necessary. Arguably, the result described above can be achieved within the framework of these model rules. There is, however, no provision directly spelling out that two principals being represented by the same person are automatically to be regarded as being unrepresented when a conflict of interests occurs. Rather, II.–6:109 (Conflict of interests) paragraphs (1) and (2)(a) provide that where one person acts as a representative both for the (one) principal and the third party, the principal(s) have a right to avoid the contract under the precondition that the other party knew or could reasonably be expected to have known of the conflict of interests. Evidently, this solution cannot be applied literally to the situation of acquisition of ownership between brothers and sisters: Most often, there will be no contract between the two which could be avoided, but also if one applies the underlying idea on a more general level, namely that the potentially disadvantaged party should take the initiative to protect his interests, the conflict cannot be resolved. Since both children lack capacity, they could not be expected to take any initiative protecting their interests, due to their very lack of capacity, without, again, being represented by their legal representative. Functionally, this equals both persons being subject to an incapacity due to non-representation. It is, therefore, intended that the situations addressed here are solved, in the manner described above, by application of VIII.–4:201. In addition, where children live in the same household, it may be practically difficult to establish the requirement of (sole) owner-possession in a sufficiently clear way (see also Comment H below for a similar problem between spouses). This difficulty may impede acquisition by continuous possession even where the problem of double representation does not exist (or does not exist any longer).

Minor's acquisition against the representative. Another situation is that a child possesses goods belonging to one of the parents as, or as if the goods were, his own property. The child may, for instance, erroneously believe that an item, e.g. a TV-set, stereo equipment or computer placed in the child's room, has been transferred to him by donation, whereas the parent just intended to allow the child to use the goods, not intending to alienate the property.

It is, however, not considered that the parents require particular additional protection in such situations. They can take care of their interests themselves, and taking into account the rather long periods for acquisition of ownership, the practical relevance of the issue appears to be rather limited in general. It may be added that the hypothetical argument of a need to "maintain the peace in the family" is regarded to be rather week in a context like this (cf. Comment I below). All the parent needs to do is to say something like "you know it's mine", and the child will usually either acknowledge the parent's right or be in bad faith from that day on, so that the child can only acquire after the elapse of a period of thirty years. In addition, establishing sole owner-possession in a sufficiently clear manner may be practically difficult also in these constellations.

I. In particular: no suspension between spouses and registered partners

Suspension between spouses. Suspension (sometimes also postponement of expiry) of the period for acquisition of ownership between spouses is an almost uniform approach at least in the civil law jurisdictions. A major purpose is said to be the maintenance of "peace in the family". A side effect is that such a rule avoids problems that can easily occur where owner and possessor live together in the same household, in which cases it will often be difficult to discern whether there is sole possession by one spouse or co-possession by both spouses. If such functions were to be regarded important, which will be discussed below, a specific rule could be adopted (providing that "the running of the period is suspended as between spouses and registered partners for as long as the relevant relationship subsists"). One would, then, also have to clarify whether the suspension (or postponement of expiry) should terminate when the partners separate, even if they do not divorce formally (which may appear adequate from a "peace-keeping" standpoint), or whether the formal family status (marriage/divorce) should operate as the decisive criterion (which may be preferable from the aspect of legal certainty).

Registered partners. Some legal systems recognise "registered partnerships", having the same private-law implications as marriage. There is a formal act of establishment of such a partnership and it may, analogously to the divorce of a married couple, be dissolved by another formal act. The partners may, depending on the relevant national rules, be of different or the same sex. Provided that the applicable national law recognises such a form of partnership, it would be a logical consequence of the underlying policy that such a partnership would also be treated equally to marriage with regard to acquisition of ownership by continuous possession.

Rule not needed. Yet, it appears that an extension rule for spouses (or similar relationships between adults) is not needed. The reasons are given in the following.

Aspect of "peace in the family" not that relevant for acquisition of ownership by continuous possession. As mentioned above, suspension (or postponement of expiry) of the period for acquisition of ownership between spouses is a widespread approach in the European legal systems. It should, however, be noted, that mostly the relevant rules of suspension and renewal are applicable both to the ("extinctive") prescription of rights to the performance of an obligation and to acquisition of ownership by continuous possession. When the issue is dealt with in literature or in the legislation process, the focus, most of the time, is on the issue of ("extinctive") prescription. Taking this into account when reconsidering the underlying policy of this suspension rule, it seems that the "peace-keeping" function is more important for the prescription of a right to performance than for acquisition of ownership by

continuous possession: It can be of severe detriment to matrimony if one spouse has to institute a lawsuit against the other spouse in order to avoid the prescription of a right to performance of an obligation. It might be regarded as understandable but see the critique in III.–7:305 (Postponement of expiry in case of incapacity) Comment F that a legislator accepts that this may cause the creditor to take no steps rather than to risk his/her marriage, and therefore decides to impose a suspension of prescription in order to avoid such potential problems for his citizens. Typically, judicial actions are brought when harmony has ceased to exist. Then, according to the rationale of such rule, it should not be too late to assert one's right. In order to avoid acquisition of ownership by continuous possession, on the other hand, it is normally not necessary to institute a lawsuit against the other spouse: Simply making it clear that a specific asset is one's own property will suffice, as such acquisition by continuous possession can, if it does not lead to an acknowledgement (see VIII.–4:205 (Ending of period in case of acknowledgement)), only take place after the lapse of a period of thirty years due to the other party's bad faith. Where the partner exercising physical control continuously accepts that the goods are the other spouse's property, a period for acquisition of ownership by continuous possession does not even start to run. Taking into account, furthermore, that acquisition of ownership cannot take place before a period of ten years has elapsed, there appears to be no significant practical need for a rule providing for suspension between spouses (or other partners).

No parallel provision in Book III Chapter 7. The respective rules on the prescription of rights to the performance of an obligation do not contain any special provisions on suspension in case of obligations existing as between spouses (cf. III.–7:305 (Postponement of expiry in case of incapacity) Comment F). Accordingly, one may also argue against a suspension rule in the context of matrimony or registered partnerships for reasons of consistency: In a system where the peace-keeping aspect is not even regarded as important enough in relation to prescription of rights to the performance of an obligation, it should not be decisive for acquisition of ownership by continuous possession either, where arguably the general interest of legal certainty plays an even more important role than in the case of a right to performance.

Practical difficulties can be solved by other criteria. As indicated in Comment I, a rule providing for suspension as between spouses will also minimise practical difficulties in determining who is in possession when the owner and the other party live together in the same household: If suspension takes place, no dispute arises. The main question, however, should not be whether disputes on practically difficult issues take place or not. The main concern must be whether such practical difficulties provoke inadequate results, i.e., an inadequate risk for the owner of losing his right of ownership. But this does not seem to be the case if a suspension rule for spouses or registered partners is not be adopted: It is up to the person asserting the acquisition of ownership by continuous possession to prove that he or she qualifies as an owner-possessor in the sense of VIII.–1:206 (Possession by owner-possession). The fact that physical control has been exercised with the intention of doing so as an owner must be sufficiently clear to the outside world, in order to be provable before a court with a sufficient chance of success. Where both parties live together in the same household and the object in question is situated in this household, such evidence may be hard to provide in particular in relation to the beginning of the period, which is at least ten years. With regard to the ten-year period, a second hurdle may be good faith (which, however, is presumed). Accordingly, as several quite practical risks are placed on the possessor, there seems to be no need to adopt a rule like the one in question.

J. Further cases: unmarried couples, other household members

Suspension rule extending to partnerships similar to marriage. If, on the other hand, the purpose of "keeping peace in the family" was regarded as really important in the context of acquisition of ownership by continuous possession, one probably should discuss an extension of the spouses-rule to non-married couples (and to couples of the same sex who did not enter into a legally recognised form of a registered partnership). There would be some internal logic in supporting such an approach because the named rationale of the rule is, in principle, not based on a certain (family law) status but on a relation of "piety", or trust and confidence, which will typically exist between non-married partners in the same way; cf. also III.–7:305 (Postponement of expiry in case of incapacity) Comment F. The main problem would then be how to draw the line of demarcation. Different to the case of marriage or a registered partnership, it is practically difficult to determine when a relationship of this kind starts (and, partly, when it ends). Another issue would be that such a solution is somewhat disputed in some European legal systems. The main argument for not adopting any such rule is, however, that the need to protect the "peace in a family" (or in family-like relation) does not appear convincing as such (see Comment I above).

Extension of period as between persons sharing the same household. If, contrary to the position taken in Comment I, it was regarded as important to avoid difficulties in determining who is in possession, one could even think of introducing a general suspension rule for persons sharing the same household, applicable to goods kept in that household. A rule of that kind exists in a minority of European legal systems, being a historical relic from the times in which it was common that servants were living in the same household. Today, a rule of that kind would, however, also apply to students sharing an apartment (their academic success though being questionable, as at least ten years are required for acquisition by continuous possession), or adult brothers and sisters living together in the same household. A practical need for such rule does not seem to be in sight. From a policy point of view, in particular with regard to the aim of promoting legal certainty, a rule of that kind should not be adopted.

VIII.–4:202: Extension in case of impediment beyond owner's control

(1) The running of the period is suspended as long as the owner is prevented from exercising the right to recover the goods by an impediment which is beyond the owner's control and which the owner could not reasonably have been expected to avoid or overcome. The mere fact that the owner does not know where the goods are does not cause suspension under this Article.

(2) Paragraph (1) applies only if the impediment arises, or subsists, within the last six months of the period.

(3) Where the duration or nature of the impediment is such that it would be unreasonable to expect the owner to take proceedings to assert the right to recover the goods within the part of the period which has still to run after the suspension comes to an end, the period does not expire before six months have passed after the time when the impediment was removed.

COMMENTS

A. General

Policy. As one of the ideas of acquisition of ownership by continuous possession is that the owner had, at least in theory, a chance to recover his property within (at least) ten years (cf. VIII.–4:101 (Basic rule) Comment D), it would appear unduly harsh to let acquisition of ownership by continuous possession take effect against an owner who was prevented from being active by an impediment beyond his control. The rationale behind this Article is somewhat similar to the rationale of VIII.–4:201 (Extension in case of incapacity), extending the idea to persons who cannot make use of their rights for reasons other than legal incapacity (see Comment B below).

Corresponding rule in III.–7:303 (Suspension in case of impediment beyond creditor's control). Book III Chapter 7 establishes practically the same rule for the prescription of rights to the performance of an obligation. This provision has been followed in its major concept as well as regarding drafting details. In applying the two rules, however, regard should be had to any possible difference in the involved interests, which might exist between these two scopes of application.

Terminology: extension, suspension, postponement of expiry. Regarding these terms and concepts, see Comment A of the Comments on Section 2 in general. The headline uses "extension" as a collective term for "suspension" and "postponement of expiry".

B. Paragraph (1)

Situations covered. The rule should be interpreted in a rather strict way. An impediment beyond one's control occurs, for instance, when being kidnapped, cut off from the outside world by a natural phenomenon (avalanches, floods) or in the case of the inactivity of the courts. Someone who is sent to prison (in a civilised country), on the other hand, is not considered to be covered by this rule, as there will be possibilities to pursue one's interests also in such a situation. The mere fact that the owner does not find out where his property is does not constitute an impediment in the sense of the present Article either. For the sake of clarity, the latter aspect is explicitly mentioned in the second sentence of paragraph (1). If this case was not excluded, the whole concept of acquisition of ownership by continuous

possession, and the general goal of promoting legal certainty, would be severely undermined. For the same reason, Chapter 4 of Book VIII does not adopt a general rule corresponding to III.–7:301 (Suspension in case of ignorance). The term "exercising the right to recover the goods" refers to VIII.–6:101 (Protection of ownership) and VIII.–6:301 (Entitlement to recover in case of better possession), but may include other judicially or administratively enforceable remedies. VIII.–6:203 (Entitlement to recover as protection of mere possession) is practically irrelevant due to its short time limit of one year.

Suspension concept. As for the situations covered by the present Article, the concept of suspension (with further specifications in paragraphs (2) and (3)) seems preferable to the hypothetical alternative concept of a general postponement of expiry rule plus an additional period of, e.g., six months. The proposed concept regularly adds less time to the qualifying period, which is preferable in the light of the general aim of legal certainty. Also, in the situations covered by this provision, the owner regularly does not need an extra period of time just to get an overview of his or her legal affairs, as is the case in the constellations of incapacity covered by VIII.–4:201 (Extension in case of incapacity). It, therefore, does not seem necessary to add more time to the qualifying period than was taken away by the event beyond the owner's control. This, exactly, is achieved by the suspension concept. Exceptional situations are taken care of by paragraph (3) of this Article.

The question of actively hiding the goods. One could discuss whether the suspension rule of this Article should be applicable where, in addition to the mere fact that the owner is unable to locate the goods, this is caused by the possessor by actively hiding them. In a certain sense, such conduct of the possessor is of course "beyond the owner's control", because the owner cannot prevent the possessor from trying to hide the goods (once he can, he will most probably have the goods in his hands). But that would not fit to the policy outlined above, i.e. to restrict the rule to a narrow group of cases, namely where the owner's freedom of action as such is excluded by an external event. As to substance, the question, therefore, is about *extending* the rule in this Article to such situations. Basically, there are three alternatives of how to treat a person who did not steal the goods himself, but knows that they have been stolen and, by further keeping them instead of trying to return the goods, in one way or the other prevents the real owner from recovery: First, one could exclude such person from acquisition by continuous possession altogether. This option is not preferred for the reasons provided in VIII.–4:101 (Basic rule) Comment I. The second and less far-reaching option would cover these cases by the suspension rule of the present Article. However, the risk of this becoming a standard matter of litigation, provoking uncertainty and, perhaps, avoidable costs would probably occur in a similar way as under the first option. For the sake of legal certainty, the third alternative is preferred, namely not to extend the suspension rule of this Article to a possessor actively hiding the goods, so that acquisition is possible after thirty years under VIII.–4:101paragraph (1)(b)).

C. Paragraphs (2) and (3)

Restriction to impediments within last six months (paragraph (2)). If the impediment preventing the recovery of the goods has ceased to exist well before the end of the period for acquisition of ownership, there seems to be no compelling reason to extend the period: The owner still has time enough to take appropriate steps. Therefore, paragraph (2) limits this Article's scope of application to impediments that arise or subsist within the last six months of the period. This limitation also promotes the idea of legal certainty. The approach has been adopted from III.–7:303 (Suspension in case of impediment beyond creditor's control) paragraph (2).

Postponement of expiry in exceptional situations (paragraph (3)). The rule in the third paragraph has been adopted from III.–7:303 (Suspension in case of impediment beyond creditor's control), which has been amended accordingly. It is intended to cover extreme situations only, where it is necessary for the owner to regain an overview of his legally relevant affairs after the impediment has ceased to exist. To a certain degree, such situations are comparable to situations covered by VIII.–4:201 (Extension in case of incapacity) paragraph (2), where an owner recovering from a state of legal incapacity is granted a postponement of expiry for the duration of one year. The length of the period adopted in the present Article (six months) corresponds to III.–7:303(3). Also, the following illustration has been borrowed therefrom.

> *Illustration*
> O is abducted and held in an unknown location by his abductors, without any means of communication to the outside world, for over three year. The abduction took place two weeks before the period for acquisition of ownership of goods owned by O would have elapsed in favour of possessor P. In these circumstances, it would practically not be sufficient to give O two weeks to start proceedings after being released. Except for a need for mental and perhaps physical recovery, he will have to practically reorganise his whole life. The period of prescription will not expire until a period of six months after the time of release has elapsed.

No parallel to III.–7:303 (Suspension in case of impediment beyond creditor's control) paragraph (4). Contrary to the rules governing the prescription of rights to the performance of an obligation, this Article does not explicitly state that an impediment in the sense of this Article "includes a psychological impediment". In III.–7:303(4), such a clarification has been inserted with the intention to cover cases such as those where childhood victims of sexual or other abuse are psychologically unable to report or react to the abuse until very much later. Such rule appears necessary to prevent, in particular, the prescription of claims for damages under Book VI. A comparable need does not, however, exist with regard to the risk of losing one's right of ownership by another acquiring by continuous possession.

VIII.–4:203: Extension and renewal in case of judicial and other proceedings

(1) The running of the period is suspended from the time when judicial proceedings are begun against the owner-possessor or a person exercising physical control for the owner-possessor, by or on behalf of the owner, contesting the owner-possessor's ownership or possession. Suspension lasts until a decision has been made which has the effect of res judicata or until the case has otherwise been disposed of. Suspension has effect only in relation to the parties to the judicial proceedings and persons on whose behalf the parties act.

(2) Suspension under paragraph (1) is to be disregarded when the action is dismissed or otherwise unsuccessful. Where the action is dismissed because of incompetence of the court, the period does not expire before six months have passed from this decision.

(3) Where the action is successful, a new period begins to run from the day when the effect of res judicata occurs or the case has otherwise been disposed of in favour of the owner.

(4) These provisions apply, with appropriate adaptations, to arbitration proceedings and to all other proceedings initiated with the aim of obtaining an instrument which is enforceable as if it were a judgment.

COMMENTS

A. General

Common core. The rule is, in its very basics, a very common one and features in many European legal systems. Most legal systems provide for a renewal (interruption) of the period for acquisition in case of judicial proceedings. Sometimes, the interruption effect is "latent" in the form of an exclusion of good faith in the case of an action filed against the owner-possessor. Some countries have adopted a suspension approach. The latter is also the case under the parallel provision of III.–7:302 (Suspension in case of judicial and other proceedings) on the prescription of rights to the performance of an obligation.

Basic policy. The concept of acquisition of ownership by continuous possession can, *inter alia*, be justified as being a sanction on the owner for being inactive with regard to his property for a certain period of time; see VIII.–4:101 (Basic rule) Comment D. Where the owner, so to say, performs what the law expects him to do, i.e. to institute judicial proceedings against the possessor, acquisition of ownership by continuous possession must not operate against him.

Overview of how the Article works. The basic function of this Article can be summarised as follows: When judicial proceedings against the owner-possessor (or a person exercising physical control for the owner-possessor) are initiated, this leads to a suspension of the period for the duration of these legal proceedings, i.e. this time does not count towards the period for acquisition of ownership (paragraph (1)). When these proceedings have ended, one has to basically distinguish between three constellations:

(i) Paragraph (2) governs the situation in which the claimant loses the proceedings. Then, the suspension provided for under paragraph (1) is to be disregarded retrospectively and the qualifying period has to be calculated as if the suspension never occurred. A special rule (postponement of expiry for another six months as from the judicial decision) is provided for the case when the action is dismissed because it was filed with an incompetent court

(paragraph (2) second sentence). In this case, the claimant is given another six months to bring the action before the competent court. If he does so, paragraph (1) will apply again.

(ii) If, on the other hand, the action was successful, the court decision will cause an anew commencement of the running of the qualifying period. The owner has another 30 years (because the possessor will be in bad faith after the judgment) to recover the goods (paragraph (3)). This rule also covers the case where the proceedings do not end with the rendering of a judgment but (if provided by national procedural law) by the defendant acknowledging the right of the owner.

(iii) In the remaining situations, where the proceedings are not continued and the case is not decided in favour of either party, but is solved in another way, the period continues to run again upon the reaching of such a solution (paragraph (1) second sentence). One may think of constellations where the proceedings as such are suspended, which can occur under the procedural rules of (at least) some legal systems.

B. Suspension for the duration of judicial proceedings, paragraph (1)

Only judicial acts covered. Paragraph (1) states that suspension takes place (only) in the case of judicial proceedings. As under III.–7:302 (Suspension in case of judicial and other proceedings), extra-judicial acts, such as reclaiming one's property back in writing or orally, are not covered. Such acts may, however, be of a different kind of legal relevance: On the one hand, such acts may destroy the possessor's good faith so that he can only acquire after a period of thirty years. On the other hand, such acts may lead to negotiations about ownership, which trigger a separate postponement of expiry rule (VIII.–4:204 (Postponement of expiry in case of negotiations)). As to arbitration proceedings, see Comment D below. As to mediation proceedings, see VIII.–4:204 Comment B.

First effect of initiating proceedings: suspension. As pointed out above, the institution of judicial proceedings against the owner-possessor causes suspension of the period for acquisition of ownership. This effect is of somewhat preliminary character, as it finally depends on the outcome of the proceedings: if the claimant (i.e. the person who is or purports to be the rightful owner) loses the case, suspension is deemed to never having taken place; if the claimant wins the case, suspension is "transformed" into a renewal of the period at the end of the proceedings. Nevertheless, it is adequate to provide for a suspension effect for the time of the proceedings (as compared to a retrospective renewal), commencing as from the initiation of the proceedings, provided that they have been won. The duration of the proceedings should not play a decisive role for acquisition of ownership by continuous possession. For reasons of clarity, it is stated that suspension begins with the commencement of the proceedings. The second sentence of paragraph (1) states that suspension lasts until a decision with *res judicata* effect has been made or until the case has otherwise been decided. This has been adopted from III.–7:302 (Suspension in case of judicial and other proceedings) paragraph (2). Compare the Comments on that provision.

Contesting the possessor's ownership or possession. The suspension effect should naturally only take place where the subject matter of the proceedings is the possessor's right of ownership or possession, e.g. in case the owner institutes an action based on VIII.–6:101 (Protection of ownership), VIII.–6:203 (Entitlement to recover as protection of mere possession) or VIII.–6:301 (Entitlement to recover in case of better possession) or brings a

declaratory claim. Furthermore, the rule covers enforcement proceedings initiated on the basis of a judgment in the sense of paragraph (3).

Proceedings begun by or on behalf of the owner. According to the basic idea of the suspension rule in paragraph (1), the owner is required to assert his right actively in judicial proceedings in order to achieve the suspension effect. Usually, the owner himself will be the active part and institute the proceedings. However, there may also be situations where the possessor institutes a declaratory action against the owner (which will not happen that frequently, but is possible). If, in such a situation, the owner brings a counter-claim, there will be no doubt that suspension must occur in such way as if the owner had issued his action first. Yet, the same effect should be achieved also where the owner does not take any such steps and "just" asserts his right as a defendant in proceedings initiated against him. Insisting on any specific kind of procedural conduct is regarded to be too formalistic in view of the underlying policy of this Article. The formulation "proceedings begun against the owner-possessor … by or on behalf of the rightful owner" shall be interpreted in the light of these considerations, where necessary.

Proceedings against the owner-possessor, limited-right-possessor or possession-agent. It is suggested that the action may be brought against the owner-possessor or another person exercising physical control for the owner-possessor. With regard to the policy underlying this Article, the main point is that the owner is active, i.e. takes steps to recover the goods or files a declaratory action. It should not have a negative effect to "sue the wrong person". Someone detaining the goods for the owner-possessor in the sense of VIII.–1:207 (Possession by limited-right-possessor) or VIII.–1:208 (Possession through a possession-agent) belongs to the possessor's sphere as well and the effect regarding acquisition of ownership by continuous possession must be the same.

Suspension only in relation to the parties to the proceedings and persons on whose behalf the parties act (third sentence). The possessor's right of ownership may be contested not only in proceedings against the rightful owner, but also in proceedings between the owner-possessor and a third person, who has no relationship with the rightful owner whatsoever. This may be the case, for example, where the owner-possessor attempts to recover possession of the goods from such a third person, e.g. a thief, under VIII.–6:101 (Protection of ownership), or where the owner-possessor's right to the goods is a preliminary question, e.g. for an unjustified enrichment claim or a tort claim against the third person. Sentence 3 makes it clear that such proceedings, in which the rightful owner is in no way involved, have no suspension effect in favour of the owner, the basic idea being that suspension is to be triggered by the taking of action by the owner (the solution may be different if the third party manages to involve the rightful owner in these proceedings).

C. When the claimant loses the proceedings, paragraph (2)

(a) General (sentence 1)

Basic rule when claimant loses the proceedings ("the action is dismissed or otherwise unsuccessful"). This Article deviates from III.–7:302 (Suspension in case of judicial and other proceedings) in so far as the effect of suspension in favour of the owner only occurs when the action is successful (which, of course, can only be assessed retrospectively, when the final judgment has been passed).

Illustration 1:
P bought goods from a private person nine years ago and has since then possessed them in good faith. After these nine years, a certain O brings a claim against P, pretending the goods have been stolen from him and asserting to be their true owner. However, the owner does not manage to persuade the court. He loses the case before the court of first instance, but appeals to the court of next instance. The court of appeal refers the case back to the court of first instance for additional finding of facts etc. A final judgment, dismissing O's claim, is given after four years of proceedings.

If the proceedings had full suspension effect (irrespective of the outcome of the proceedings), acquisition of ownership by continuous possession (in good faith) could only take place after a total time of 14 years. Under this Article, however, acquisition of ownership by continuous possession will formally take place after ten years (which turns out, however, only after the end of the proceedings, that is, after a total time of thirteen years). The proposed rule seems to be the majority approach in those legal systems, which recognise an interruption or suspension in cases of judicial proceedings. The advantage of this solution is, as becomes obvious in *Illustration 1*, that it corresponds better to the aim of legal certainty. The settling of the unclear property position takes effect as early as possible.

Details; differences to prescription rules. Besides the main effect of the rule in sentence 1, as pointed out above, the rule may also be relevant with regard to former judicial proceedings over the goods, which have occurred between the parties. In that respect, it also illustrates a certain difference between the context of acquisition of ownership by continuous possession and the context of prescription of a right to performance under Book III Chapter 7: Where the action concerning a right to performance of an obligation is dismissed, it is now authoritatively settled that there is no claim that could be subject to prescription (see III.–7:302 (Suspension in case of judicial and other proceedings) Comment A). This cannot necessarily be said of the right of ownership in the context of acquisition by continuous possession. The first action the owner has instituted may have been an action based on an unlawful interference with possession (VIII.–6:203 (Entitlement to recover as protection of mere possession)) or another remedy for which the ownership of the asset does not have to be proved. Where such an action is dismissed, there is nothing to be said about the right of ownership. This means that the owner can still bring a claim based on his right of ownership under VIII.–6:101 (Protection of ownership). The second paragraph of the present Article makes sure that the duration of such prior proceedings (which have been lost by the claimant) is not added to the total qualifying period. The rule works in favour of the possessor in that the remaining time of the period will be as short as possible.

(b) Action filed at an incompetent court (sentence 2)

The problem. A special constellation to be considered is the case where a person, in fact, is the rightful owner and also brings an action to protect his right in due time, but before a court lacking jurisdiction.

Illustration 2:
The qualifying period for acquisition of ownership has been running for nine years and eleven months. Now the owner brings an action against the possessor, but files it with an incompetent court. One and a half months later the court makes a decision dismissing the claim for lack of jurisdiction.

There are basically three possibilities of how to deal with this situation, which are addressed in the following Comments.

Alternative (1): suspension. One possibility is to provide that the period is simply suspended for as long as the (incompetent) court deals with the matter and continues to run when the court formally and finally declares its incompetence. This approach is followed by III.–7:302 (Suspension in case of judicial and other proceedings), for the prescription of rights to the performance of an obligation. Regarding the period for acquisition of ownership by continuous possession, this approach is, e.g., followed by case law and legal literature in Germany. Under these model rules, this effect could be achieved by explicitly stating that a lack of jurisdiction is excluded from paragraph (2) sentence 1 of this Article.

Alternative (2): postponement of expiry. A midway solution is provided by, e.g., Swiss and Dutch law: A claim filed with an incompetent court does not suspend the qualifying period for acquisition of ownership but triggers a postponement of expiry of the period for, e.g., 60 days (under Swiss law) or six months (under Dutch law) as from the date the court's decision becomes non-appealable. As will be discussed below, the latter solution has been adopted in this Article. A comparable approach is now also adopted in III.–7:302 (Suspension in case of judicial and other proceedings) paragraph (2) second sentence, which applies to all cases where judicial proceedings end without a decision on the merits (for which lack of jurisdiction is a main example). For the purposes of Chapter 4, however, a particular practical need for extending the rule to other hypothetical situations in addition to lack of jurisdiction was considered not to exist, so that the original wording was kept. As to an arbitration court's decision on its incompetence (in particular because of an invalidity of the arbitration agreement) see below, Comment E. As to mediation proceedings ending without a settlement, see VIII.–4:204 (Postponement of expiry in case of negotiations) Comment B.

Alternative (3): no extension effect at all. The strictest approach, from the owner's perspective, would be to provide that an action brought before an incompetent court has no effect of renewal or extension whatsoever. This view is defended, e.g., in Austria (unless the court refers the action to the competent court). In these model rules, such an effect could be achieved by deleting any special rule in the second sentence of paragraph (2). Then, the owner's action would have to be regarded as "unsuccessful" in the sense of the first sentence of paragraph (2). In the case of *illustration 2*, the ten-year period would have passed already and acquisition of ownership by continuous possession would have taken place.

The preferred option: postponement of expiry for six months as from the decision declaring lack of jurisdiction. The draft follows the Dutch model (cf. Comment C above), providing for a postponement of expiry for six months as from the dismissal for lack of jurisdiction; or, more precisely: as from the date this decision becomes non-appealable. Accordingly, if the claimant files the action towards the end of the qualifying period and it turns out that he did so before the wrong court, there are always at least six more months to file the action again at the competent court. This seems adequate, as the owner (claimant), in principle, complied with what the law expects from him, in bringing a judicial action against the possessor, asserting his right of ownership (or possession). There has been made a certain mistake only as to identifying the competent court, which should, as such, not be sanctioned with a loss of ownership. The owner still is bound to file the action again at a competent court within a certain period, for which six months seem appropriate. As to the length of the period, cf. also VIII.–4:202 (Extension in case of impediment beyond owner's control) paragraph (2), VIII.–4:204 (Postponement of expiry in case of negotiations) and the named III.–7:302

(Suspension in case of judicial and other proceedings) paragraph (2) second sentence. The rule only has an effect when the judicial proceedings take place towards the end of the qualifying period. If the situation arises before, so that the court's decision is made (and becomes effective) before the last six months of the period, the running of the period for acquisition of ownership is not affected at all. That makes this solution preferable to a rule providing for a suspension of the period also in a case of dismissal for lack of jurisdiction, as the aim of legal certainty is best served if the qualifying period is affected as little as possible.

D. When the claimant (owner) wins the proceedings, paragraph (3)

Effect when the owner succeeds in the proceedings: renewal of period. If the claimant wins the case, the owner-possessor must hand over the movable. If the owner-possessor refuses to do so and decides to continue possessing the goods with the intention of holding them as if being their owner, he will possess in bad faith, which means that acquisition of ownership by continuous possession is only possible after thirty years. Paragraph (3) explicitly states that the period of possession elapsed until now will not count for that purpose, but a new period of thirty years starts to run as from the moment when the decision has *res judicata* effect. The same applies if the case has otherwise been disposed of in favour of the claimant (owner) under the relevant national rules of civil procedure.

Renewal instead of suspension. In contrast to the renewal concept employed by paragraph (3) of this Article, III.–7:302 (Suspension in case of judicial and other proceedings) provides for a suspension of the period in relation to the parallel question on the prescription of rights to the performance of an obligation. In general, the suspension concept is more in line with the idea of legal certainty, as the total period for acquisition of ownership is shorter. The motivation for nonetheless choosing a different concept in the present Article shall be explained a little further in the following: The rightful owner who has already obtained an enforceable judgment has done almost all the law can expect him to do in order to avoid the consequence of another's acquisition of ownership by continuous possession. There is no reason for imposing sanctions for being inactive. A suspension rule could lead to unreasonable results for the rightful owner, even if a postponement of expiry of the period (e.g. for one or two years as from the judgment) was provided additionally. The period for the acquisition of ownership would continue to run even where a competent court, in judicial proceedings, found that the owner-possessor is not the owner, and the owner-possessor must know that he has to return the goods. The owner-possessor could even try to delay the restitution of the movable until the remaining period for the acquisition of ownership by continuous possession elapses. It is obvious that a possessor who has been ordered to make restitution of the goods does not deserve the same level of protection as he may have deserved before anymore. When it comes to legal certainty in the sense of the protection of third parties, it must of course be admitted that this goal is not served best by triggering a new thirty-year period starting with the final judgement. But most often, this will be a rather theoretical problem: Where the owner already has an enforceable judgment and the possessor does not restore the goods voluntarily, the owner will initiate enforcement proceedings against him within a relatively short period of time. Typically, he will recover possession in this way. Moreover, one may argue that the fact that property has been affected by judicial proceedings and the existence of an enforceable judgment may also serve to provide some information or "warnings" to third persons.

Additional justification with regard to differences to the prescription context. The divergence between the renewal approach in this Article and the suspension concept in the parallel rule in III.–7:302 (Suspension in case of judicial and other proceedings) must also be

seen in the light of a major difference existing between these two contexts: Where the proceedings are about a right to the performance of an obligation, a judgment in favour of the claimant establishes a new right with a prescription period of ten years; see III.–7:202 (Period of a right established by legal proceedings). In the context of acquisition of ownership by continuous possession, however, there is no parallel mechanism regarding the right of ownership when the owner succeeds against the possessor in court proceedings. There is no "new ownership" created, which might be subject to a new period of acquisition. But the renewal concept employed by the present Article functionally leads to a comparable result, as another thirty years would have to pass until the owner could lose his right by the continuous possession of another person. This may serve as an additional reason why deviating from the suspension concept provided for under Book III Chapter 7 is justified.

E. Other proceedings, paragraph (4)

Arbitration proceedings, paragraph (4). The parallel provision in III.–7:302 (Suspension in case of judicial and other proceedings) paragraph (3) explicitly extends that rule to, *inter alia*, arbitration proceedings. A parallel approach is taken here for the sake of consistency, though it is clear that such proceedings are not often initiated in practice with regard to acquisition of ownership by continuous possession. Anyway, it is possible that parties go before an arbitration court once a dispute about ownership has occurred. As to the wording, paragraph (4) of the present Article uses the formulation "and all other proceedings initiated with the aim of obtaining an instrument which is enforceable as if it were a judgment", which was employed in Article 14:302 (3) PECL. This formula is narrower than the new one in III.–7:302 paragraph (3) which explicitly opens up, in particular, for applicability to mediation proceedings. See below.

Arbitration court declaring to be incompetent. With regard to arbitration proceedings, there is perhaps only one situation deserving specific attention, namely where one of the parties contests the validity of the arbitration agreement when proceedings have been initiated before an arbitration tribunal. If the arbitration court accepts this argumentation and, therefore, refuses to pass a judgment because of its lack of competence, there is a practical need for ensuring the existence of some additional minimum period for the parties to be able to file an action with an ordinary court. This need is satisfied with the application of the postponement of expiry rule of paragraph (2) sentence 2 (incompetence of the court) with appropriate adaptations, as provided for by paragraph (4).

Mediation proceedings covered by other rules. Unlike III.–7:302 (Suspension in case of judicial and other proceedings) paragraph (3), this Article does not equate mediation proceedings to judicial proceedings. They are intended to be covered by VIII.–4:204 (Postponement of expiry in case of negotiations) and, in case the possessor agrees to respect the owner's right in the course of these proceedings, by VIII.–4:205 (Ending of period in case of acknowledgement). Practically, most of the results are not strikingly different to what would be achieved if mediation proceedings were covered by the present Article. For a closer discussion, see the Comments on VIII.–4:204).

F. Institution of enforcement proceedings

General: covered by general rules of this Article. This Article does not contain any explicit rules regulating the effect of enforcement proceedings initiated after the owner obtained an enforceable judgment. There is not much practical need for such rules, as paragraph (3) provides for a renewal of the period and this will give the owner thirty more

years to recover the property. However, enforcement proceedings are intended to be covered by the general rules of paragraphs (1) to (3) of this Article. The wording of paragraph (1) ("judicial proceedings … contesting the owner-possessor's … possession") is considered to be broad enough to be applied to these situations as well (should, under a certain legal system, enforcement proceedings be of an administrative rather than judicial nature, the rule should nonetheless be applied according to its underlying policy of demanding those steps being taken by the owner which, under the relevant legal system, are required to recover his goods). This will, in particular where the owner-possessor tries to hide the goods, operate in favour of the owner.

Details. Applying the general rules of paragraphs (1) to (3) of this Article to enforcement proceedings initiated by the owner after having obtained an enforceable judgment or other legal instrument has the following effects: The period for acquisition is suspended as from the date the owner formally seeks enforcement of his right to recover possession of the goods (paragraph (1)). Should the owner subsequently withdraw the application for enforcement, or the relevant authority dismisses the enforcement claim, paragraph (2) will be applied accordingly so that the suspension effect provided for by paragraph (1) is to be disregarded; suspension is considered to have never taken place. Where the application for enforcement is accepted by the competent authority, the owner's enforcement is to be qualified as being "successful" in the sense of paragraph (3) of this Article. This means that a new thirty-year period for acquisition of ownership by continuous possession begins to run (renewal). The latter effect is intended to free the owner from having to make repeated enforcement applications towards the end of the period so as to avoid an acquisition by the (successfully hiding) possessor after the period has elapsed. The same effects are, sometimes in other words, achieved in quite many European legal systems (in some countries, where the possessor's good faith is a general prerequisite for acquiring ownership by continuous possession, such a rule is not provided for explicitly; but comparable effects are achieved in so far as a possessor who is subjected to enforcement proceedings will be considered to be in bad faith, which excludes acquisition by continuous possession from the outset). For the purpose of interpretation of this Article, it is important to stress that where the owner seeks enforcement and this application is accepted, the enforcement is to be regarded "successful" in the sense of this Article even where the execution finally (actually) fails in recovering the goods. Enforcement measures being just "actually unsuccessful" in this sense are not intended to qualify as "unsuccessful" in the sense of paragraph (2), which would turn the policy of the Article upside down.

VIII.–4:204: Postponement of expiry in case of negotiations

If the owner and the owner-possessor or a person exercising physical control for the owner-possessor negotiate about the right of ownership, or about circumstances from which acquisition of ownership by the owner-possessor may arise, the period does not expire before six months have passed since the last communication made in the negotiations.

COMMENTS

A. Negotiations

Function and policy. In a certain sense, this Article supplements VIII.–4:203 (Extension and renewal in case of judicial and other proceedings), which is limited to judicial and arbitration proceedings. Extra-judicial acts, such as claiming back one's property orally or in writing, may destroy good faith and therefore "extend" the period necessary for acquiring ownership by continuous possession to thirty years, but have no suspension or interruption effect. However, where the owner took such extra-judicial steps and the possessor did not reject the owner's demand as a matter of principle, but enters into negotiations (see below), it would be unfair as against the owner if the possessor could, after such negotiations have failed, rely on the time that has elapsed while carrying out these negotiations for the purpose of acquisition of ownership by continuous possession. For this reason, this Article safeguards that the owner has at least another six months to bring an action for recovery of his goods before a court. The postponement of expiry concept employed by this Article makes it possible to interfere with the general interest of legal certainty as little as possible, since the period for acquisition continues to run in principle, but does not end before the abovementioned period of six months has passed as from the last communication made in these negotiations. The postponement of expiry concept is also a quite widespread one in the European legal systems.

Relation to III.–7:304 (Postponement of expiry in case of negotiations); length of period. III.–7:304 provides a parallel postponement of expiry rule for the prescription of rights to the performance of an obligation. That rule, however, postpones the expiry of the period for one year instead of six months. This has been considered as being too long for the acquisition of ownership by continuous possession, taking into account that the periods under this Chapter are already rather long. Therefore, a period of six months has been provided in this Article. This is also seen as a kind of compromise between the one-year period provided for in III.–7:304 and the extra periods provided for in some Member States, which are, in part, no longer than two or three months.

Negotiations. Realistically, the practical importance of this rule will be much smaller in respect of acquisition of ownership by continuous possession than in respect of the prescription of rights to performance of an obligation. One may, however, think of situations where, for example, the owner shows up, reclaiming his property, and the possessor declares that he is not convinced of the claimant's ownership, but that he is willing to verify the facts put forward by the owner, and the parties subsequently agree to try to solve the issue. The owner will then try to present additional evidence and so on. A peculiarity of such negotiations, as compared to negotiations about a right to performance, is that the parties will typically not meet "somewhere in the middle". The negotiations will, if they reach a result as to substance, either end with the full acknowledgement or waiver of the right, or the negotiations will be terminated, which triggers the six-month period of the postponement of expiry. If the possessor acknowledges the owner's right, the prerequisites of VIII.–4:205

(Ending of period in case of acknowledgement) will be fulfilled, meaning that the current period for acquisition ends but possibly, if the possessor nevertheless continues possessing the goods in the capacity of an owner-possessor, a new period (of thirty years) may commence. Where the purported owner waives his right in those negotiations, he probably was not the owner, but if he really were, such an act may constitute an abandonment of the goods so that the current possessor might acquire the goods immediately by occupation. These issues are, however, not covered by Book VIII of these model rules. However, these two hypothetical outcomes of an agreement may be combined with further stipulations, such as an obligation of the owner to pay a certain reimbursement for all efforts undertaken by the possessor during the period of possession. Or the parties may agree that the current possessor may keep the goods against payment of a certain amount. But that would, provided that the transferor really had ownership of these goods, constitute an ordinary transfer under Chapter 2 of this Book.

B. Mediation proceedings in particular

Mediation proceedings covered by this Article. As mentioned in VIII.–4:203 (Extension and renewal in case of judicial and other proceedings) Comment E, mediation proceedings are intended to be covered by the present Article on negotiations. This implies a choice not to follow an approach taken in III.–7:302 (Suspension in case of judicial and other proceedings) paragraph (3), which makes mediation proceedings subject to the same rules as judicial proceedings. This choice is primarily based on specific effects, which are considered to be more favourable for an owner who is party to mediation proceedings in a situation where he may be about to lose his right to the goods by reason of another's acquisition by continuous possession. Formally, mediation proceedings may certainly be covered by this Article, since such proceedings, according to the definition provided in III.–7:302 paragraph (4), are "structured proceedings whereby two or more parties to a dispute attempt to reach an agreement on the settlement of their dispute with the assistance of a mediator". In other words, the parties undertake negotiations in a specifically structured process, conducted and assisted by a neutral third person.

Main practical effects of this approach. When comparing the approach of governing mediation proceedings with this Article to the alternative approach of governing them with the rules provided in VIII.–4:203 (Extension and renewal in case of judicial and other proceedings), the following main results are achieved: (i) As long as mediation proceedings (negotiations) are carried out, both concepts safeguard that the period cannot expire to the detriment of the owner. (ii) Where, as a consequence of these proceedings, the owner "succeeds" in the sense that the possessor acknowledges the owner's right to the goods, the practical result of the two approaches will fully converge: VIII.–4:203 paragraph (3) provides for a renewal of the period, which practically means a thirty-year period due to the possessor's bad faith. The same triggering of a new thirty-year period will be achieved if mediation proceedings are subjected to the present Article VIII.–4:204 (Postponement of expiry in case of negotiations), in which case such conduct of the possessor will constitute an "acknowledgement" in the sense of VIII.–4:205 (Ending of period in case of acknowledgement). (iii) The most crucial scenario with regard to mediation proceedings, however, is that these proceedings fail in the sense that no settlement is achieved. The usual step parties will take in such a situation will be to bring their dispute before a court. The present Article VIII.–4:204 guarantees that the owner has at least six months to initiate such judicial proceedings. At the same time, since the period of acquisition continued to run throughout the negotiations, the total period for acquisition of ownership by continuous possession will not be extended too far, which appears preferable from the perspective of promoting legal certainty in general. Under the alternative concept of VIII.–4:203, the official

end of mediation proceedings would have to be subsumed under the phrase of “the case has otherwise been disposed of”, the effect being that suspension ends. If the mediation proceedings started a rather long time before the period would have expired but also lasted for a long time, the effect of suspension will be that the total period for acquisition is also extended for a long time, which appears less favourable in terms of legal certainty. On the other hand, if the mediation proceedings started only towards the very end of the period, the owner may be prohibited from instituting judicial proceedings within the (short) remaining time before the period expires. For this reason, governing mediation proceedings by the present Article (VIII.–4:204), which safeguards a minimum period of six months for taking appropriate steps, is preferred.

VIII.–4:205: Ending of period in case of acknowledgement

The period ends when the owner-possessor, or a person exercising physical control for the owner-possessor, acknowledges the owner's right to the goods. A new period begins to run when the former owner-possessor continues to exercise direct or indirect physical control with the intention of doing so as, or as if, an owner.

COMMENTS

A. General

Common core. There is a common understanding in the European legal systems that the running of the period in favour of an owner-possessor stops if the possessor acknowledges the owner's right of ownership. Technically, this is often expressed in terms of a renewal ("interruption") of the period, meaning that the time already elapsed is no longer taken into account, but rather a new period for the acquisition by continuous possession may commence running if this person continues to hold the property as an owner-possessor after the acknowledgement. The rule is often parallel, or identical, to the one regulating the case of acknowledgement in relation to the prescription of rights to performance of an obligation, a rule of the latter kind also being adopted in III.–7:401 (Renewal by acknowledgement).

Explicit rule adopted for purpose of clarification. One may argue the present Article to be superfluous because where an owner-possessor declares to acknowledge the owner's right, he usually ceases to possess as an owner-possessor in the sense of VIII.–1:206 (Possession by owner-possessor) and therefore fails to meet the general requirement of continuous owner-possession set out in VIII.–4:101 (Basic rule) paragraph (1). At least as from the moment of the declaration of the acknowledgement, this person will not be regarded as possessing "as, or as if (being), an owner", but rather as holding the goods for the owner. A new period may start running only if that person, contrary to the former acknowledgement, subsequently changes his mind and henceforth possesses the goods in the capacity of an owner-possessor. It is, however, considered preferable to express the effect of an acknowledgement clearly in an Article. This also makes it easier to deal with situations where the "correct" application of the owner-possession concept may remain doubtful. These cases will be rather hypothetical, and could most probably be solved by application of general principles, though providing an explicit rule will be the simplest solution. (One may, for instance, ask how to treat a person who "externally" acknowledges the owner's right while at the same time "internally" intending to possess for himself. Or, one may ask how to treat a possessor who openly communicates to the owner something comparable to the following statement: "Yes, I perfectly know you own these goods. Nevertheless, I continue to possess your goods as if they were my own property in order to acquire ownership of them by continuous possession.")

B. The rule in detail

Acknowledgement. An acknowledgement in the sense of this Article may be any statement or declaration, regardless of whether made explicitly or impliedly by conduct, expressing the possessor's awareness that the owner's right exists. Specific form requirements do not exist. E.g., it must be sufficient that the possessor declares his willingness to return the goods.

Illustration 1

P has possessed O's goods for 29 years and ten months. In order to avoid losing his right by acquisition by continuous possession, O demands the goods back. P pretends

to need them urgently for another four months and promises to return them thereafter. This constitutes an acknowledgement in the sense of this Article so that P does not acquire the goods after the expiration of a total period of thirty years. Rather, a new period (of again thirty years, because P is clearly not in good faith) begins to run after the making of the acknowledgement, provided that P continues to keep the goods for himself.

Subject of acknowledgement ("owner's right to the goods"). According to the text of this Article, the acknowledgement relates to "the owner's right to the goods". This is intended to be interpreted in a broad sense. Of course, the prerequisite is fulfilled where the possessor directly acknowledges that the owner "owns" the goods. But that should not be the decisive aspect. It must equally suffice that the possessor acknowledges any kind of superior right to the goods, e.g. under a contract for lease, storage, or gratuitous lending of the goods. In other words, it suffices that the possessor declares to act as a limited-right-possessor in the sense of VIII.–1:207 (Possession by limited-right-possessor), or as a possession-agent in the sense of VIII.–1:208 (Possession through a possession-agent), for the owner.

Illustration 2
Years ago, after O had an accident, and as from that time could no longer use his sailing boat, O and P agreed that P be allowed to use O's boat in return for a very low, symbolic fee payable annually. After some time, P intends to keep the boat for himself, but continues to pay the annual fee. Each payment constitutes an acknowledgement in the sense of this Article.

Acknowledgement by owner-possessor or a person exercising physical control for the owner-possessor. Furthermore, it should not be decisive that the declaration of acknowledgement be made by the owner-possessor himself. As mentioned previously (VIII.–4:101 (Basic rule) Comment F), owner-possession in the sense of the abovementioned provision may be exercised by means of another person, i.e. a limited-right-possessor or a possession-agent. As the text of the present Article states expressly, it shall suffice that the act of acknowledgement is made by that intermediary. There are at least two reasons for this: On the one hand, the whole Article very much roots in the idea that where the owner's right to the goods is acknowledged, there appears to be no need or reason for the owner to institute any proceedings against the holder of the goods in order to protect his right. The rule intends to protect the owner's reliance on an apparently clear situation where such appearance has been created by the person exercising control over the goods. The second reason builds upon the concept of owner-possession: Owner-possession is on hand where the intermediary person exercises physical control over the goods *for* the owner-possessor. Once the person exercising physical control declares to acknowledge the owner's right and this is inconsistent with regarding the (former) owner-possessor as being the true title-holder, the intermediary will rather possess for the owner than for the (former) owner-possessor, whose owner-possession may thereby considered to have been broken.

Effect of acknowledgement and commencement of new period. Sentence 1 of this Article is not phrased in terms of a "renewal" rule but simply states that the period for acquisition "ends" upon the making of an acknowledgement. A new period does not commence automatically but may start to run only if the possessor, after having acknowledged the owner's right, again changes his mind and conduct by possessing "for himself". Therefore, speaking of a "renewal" would be rather misleading in the context of an acknowledgement. In that respect, there is a certain difference to the parallel rule related to the prescription of rights

to the performance of an obligation in III.–7:401 (Renewal by acknowledgement): For the prescription of such a right to performance, no subjective element in relation to the debtor's state of mind is required, so that a new period will start to run automatically whenever the prerequisite for renewal is fulfilled. For the starting anew of a period for acquisition by continuous possession, on the contrary, the subjective element of possessing with the intention of doing so as, or as if being, an owner, must always be fulfilled in addition.

VIII.–4:206: Period of a predecessor to be taken into account

(1) Where one person succeeds another in owner-possession and the requirements set out in this Chapter are fulfilled cumulatively by the predecessor and the successor in possession, the period of the predecessor is taken into account in favour of the successor.

(2) A successor in good faith may take into account the period of a predecessor in bad faith only for acquisition under VIII.–4:101 (Basic rule) paragraph (1)(b).

COMMENTS

A. General rule, paragraph (1)

Basic idea. The rule, in terms of its basic principle, embodies an approach common in Europe: It is not decisive that owner-possession, which finally leads to acquisition of ownership by continuous possession, is exercised by one and the same person throughout the whole period for acquisition. Rather, the period having elapsed in favour of one owner-possessor may be taken into account in favour of the next owner-possessor, provided that both possessors fulfil the general requirements of Chapter 4 and that owner-possession is transferred voluntarily or in another generally recognised manner. The rule supports the idea of legal certainty in several nuances: The possibility of acquiring ownership after a shorter period of time of exercising possession for oneself is certainly in the interest of the owner-possessor. The same applies to legal certainty from the perspective of third parties, because a relatively safe legal position can be established more easily. Also, as there is no incentive to keep goods in the possession of one particular person for a very long time in order to establish such a safe legal position, the free flow of commerce is also, at least to a limited degree, facilitated in the sense that goods are to be transferred when this is most reasonable from an economic point of view. From the perspective of the owner's interests, on the other hand, the rule is relatively neutral: Apart from the fact that it may, in some situations, be practically more difficult to identify where one's property is located, the owner's position is not affected irrespective of whether or not property has never been transferred by the first owner-possessor, whether it has been transferred once or several times, or whether one of the possessors died. In some cases, the additional difficulties in "tracing" his property may, however, be considerable.

Succession in possession. Unlike some legal systems, this Article makes no difference between the ways in which a subsequent owner-possessor "succeeded" the former. "Succession in possession" in the sense of this Article covers "universal succession" based on the (national) law of succession (often called a "general title"), as well as succession based on a contract directed at the transfer of these goods ("particular title"), such as a contract for sale, barter or donation. Furthermore, one may think of situations where the goods, being in the hands of the first owner-possessor, are made subject to execution proceedings and a new owner-possessor obtains possession by way of a forced sale (provided that this does not already lead to an immediate good faith acquisition by the latter).

Cumulative fulfilment of all requirements. As stated expressly in the text of this Article, its application presupposes that both the predecessor and the successor in possession fulfil all requirements of Chapter 4. This basically means that both must exercise possession in the capacity of an owner-possessor, i.e. that both possess "as, or as if" being the owner of the goods. Possession must be exercised continuously. Also, neither of them must have obtained possession by stealing the goods; cf. VIII.–4:101 (Basic rule) paragraphs (1) and (3) and

VIII.–4:103 (Continuous possession). The fulfilment of these prerequisites must be proved by the person asserting the application of this Article.

Effect of paragraph (1). The rule provides that the period of possession by the first possessor is to be taken into account in favour of the successor in possession. In other words, the first possessor's period of possession is added to the time period of possession by the second possessor.

Illustration 1
O owns a collection of stamps, which is stolen by P1. Two months later, P1 sells the stamps to P2 who is in good faith and keeps the goods until his death five years later. P2 is succeeded by his heir P3 who takes possession of the entire property of P2, but, as he is not interested in stamps at all, donates the collection to his nephew P4 two years after P2's death. P4 possesses the stamps for another four years. All possessors except P1 possessed in good faith.

P1's two-month period cannot be taken into account in the sense of this Article because P1 does not fulfil the general requirements set out in Chapter 4 (he is excluded from acquiring by continuous possession under VIII.–4:101 (Basic rule) paragraph (3)). All other possessors, P2 to P4, fulfil the general prerequisites of Chapter 4 and succeed one another in owner-possession in the sense of this Article. Therefore, the periods of five years (P2), two years (P3) and four years (P4) are counted together (eleven years). P4 acquired ownership by continuous possession ten years after P2 had purchased the goods from P1.

B. Good faith and bad faith possessor, paragraph (2)

The problem. VIII.–4:101 (Basic rule) paragraph (1) provides for different periods for the acquisition of ownership by continuous possession in good faith (ten years) and bad faith (thirty years), respectively. As long as both the predecessor(s) and the successor are either all in good faith (such as in *Illustration 1*) or all of them possess in bad faith, no problem as to calculating the whole period for acquisition will arise: It will either be ten or thirty years. What remains to be solved is how to apply the principle expressed by paragraph (1) of this Article to situations where one of the possessors is in good faith but another possesses in bad faith.

First basic choice: qualification of predecessor not to be adopted automatically. In quite many European legal systems there is a rule often applying only to "succession by general title" providing that the successor continues possession subject to the same qualities and defects as the predecessor. Under such a rule, if the predecessor was in bad faith, a successor in good faith would automatically be treated as if he were a possessor in bad faith and could, therefore, only acquire after possessing for a long period (if at all). Likewise, where the predecessor possessed in good faith but the successor is in bad faith, the latter could invoke the more favourable rules for acquisition in good faith, and acquire after expiration of the short period. It is suggested not to follow this approach, but to treat each possessor based on the individual merits of his possession. Since it is generally agreed that the state of mind (good faith or bad faith) of the possessor benefiting from the concept of acquisition of ownership by continuous possession shall be one of the decisive factors in the framework of Chapter 4 (cf. VIII.–4:101 (Basic rule) Comment D), it appears to be consistent to apply this approach also to the context covered by the present Article. In particular, it would appear unreasonable to let a possessor in bad faith benefit from the coincidence that he had a

predecessor who was in good faith, and let him acquire after a total period of ten years. Applying the suggested approach makes it possible to avoid undue preferential treatment of the possessor as well as avoiding inequitable harshness to the owner, who is ultimately expropriated by the concept of acquisition by continuous possession.

Predecessor in good faith, successor in bad faith. The first (and simpler) category of cases comprises situations where the first possessor was in good faith whereas the second one possesses in bad faith. Such situations will perhaps not occur that frequently, but are possible. They may arise where, after the first owner-possessor possessed in good faith, his predecessor has, from the outset, knowledge of information about the goods' origin which causes him to possess in bad faith. Also, the second owner-possessor may have been in good faith initially but may have obtained such additional information only subsequently (but before the lapse of a total period of ten years of good faith possession). In this case, no additional rule needs to be provided. The relevant period for the second possessor will be the long thirty-year period. Nothing speaks against applying paragraph (1) as it stands. The bad faith successor can therefore acquire ownership after a total period of thirty years (taking into account a maximum of ten years minus the one day of good faith of the predecessor). The successor in bad faith will be treated in the same way as if the predecessor lacked good faith as well.

Predecessor in bad faith, successor in good faith. The second category of cases comprises situations where the first possessor was in bad faith, but is succeeded by a possessor in good faith. The first possessor must not, however, be a thief (cf. paragraph (1) of the present Article in conjunction with VIII.–4:101 (Basic rule) paragraph (3)). This second category of cases obviously needs specific regulation, which should mainly tackle two questions. These are addressed in the subsequent Comments.

Impermissibility of taking bad faith predecessor's period into account for the purpose of acquisition under VIII.–4:101 (Basic rule) paragraph (1)(a). The first issue is whether the successor in good faith should be allowed to take advantage of any period of possession by a predecessor in bad faith in acquiring under VIII.–4:101 paragraph (1)(a), i.e. after a total period of only ten years. This would mean that if the bad faith predecessor had been in possession for over ten years, this would result in an immediate acquisition by his good faith successor as soon as the latter takes possession. This would be considered problematic because the owner's chances to recover his property would be extinguished all of a sudden. There are several alternatives how one could deal with this issue. One possibility could be to apply the short ten year period (according to the current possessor's good faith) and, in principle, to allow the good faith successor to benefit from his predecessor's period of possession by resorting to paragraph (1) of this Article though subject to an additional rule safeguarding that the owner has at least a minimum period of time to recover his goods after the successor in good faith obtained possession. For example, one could provide that the ten-year period does not expire before one or two years have passed as from the successor in good faith having obtained possession. However, since the expropriation effect on the owner is a harsh consequence and the possessor in bad faith, due to his actual or imputed knowledge, or doubts, has in some way "prevented" the goods from being returned to their owner (by actively hiding them or simply disregarding the fact that the goods belong to someone else), paragraph (2) of this Article provides that the period of a bad faith predecessor may not be accounted for in favour of a good faith possessor for the purpose of acquisition after a total period of ten years (*Illustration 2*). However, nothing in this Article prevents the second possessor from invoking VIII.–4:101 paragraph (1)(a) by itself, provided that he himself has

possessed for a period of ten years in good faith, so that applying the present Article is not necessary (*Illustration 3*).

Illustration 2
P1 has possessed O's goods for twelve years in bad faith, when he donates them to P2, who is in good faith. Although a period of more than ten years of owner-possession has elapsed and P2 is in good faith, he is prevented from adding P1's twelve years to his period of possession, the latter being determined by VIII.–4:101 (Basic rule) paragraph (1)(a). Consequently, P2 has not acquired ownership by continuous possession so far.

Illustration 3
P1 has possessed O's goods for twelve years in bad faith, when he donates them to P2, who is in good faith. P2 possesses the goods for another eleven years (in good faith). Here, P2 fulfils all requirements of VIII.–4:101 (Basic rule) paragraph (1)(a) himself. He acquired ownership after ten years as from obtaining possession. The permissibility of taking a predecessor's period into account is irrelevant in this case.

Good faith successor may take bad faith predecessor's period into account for acquisition under VIII.–4:101 (Basic rule) paragraph (1)(b). The second issue is whether the successor in good faith should necessarily be restricted to the possibility of acquiring only after ten years of possessing for himself (as discussed in Comment B) or whether he can take into account his bad faith predecessor's period at least for acquiring after a total period of thirty years, i.e. for invoking VIII.–4:101 paragraph (1)(b). This will be favourable for the successor in good faith where the bad faith predecessor has possessed for more then twenty years. He just has to possess for the remaining time period to complete the required thirty-year period of possession, instead of being forced to possess for at least another ten years for himself (cf. *Illustration 4*). The solution of allowing the good faith successor to resort to acquisition in the long period is adopted in paragraph (2) of this Article. The choice is based on the consideration that the owner would also lose his right to the goods if both the predecessor and the successor had been in bad faith. Accordingly, a successor in good faith should not be worse off. The result is, above all, also favourable in terms of legal certainty because with this solution, once continuous succession(s) in possession for at least a period of thirty years can be established, there is no need to investigate whether previous possessors were in good faith or not. The solution further corresponds with the existing law in some European legal systems, such as French and Belgian law, and is also advocated in the Netherlands. (And functionally, where the predecessor was in bad faith, it also corresponds with the rule frequently existing for "acquisition by general title", namely that the successor is deemed to continue possession in the same capacity as his predecessor.)

Illustration 4
P1 has possessed O's goods for 25 years in bad faith, when he donates them to P2, who henceforth possesses the goods for another six years in good faith. Here, P2 may add P1's period to his own period of possession and acquires ownership under VIII.–4:101 (Basic rule) paragraph (1)(b) after a total period of thirty years. P2 does not have to wait until he himself will have possessed the goods for ten years.

Section 3: Effects of acquisition of ownership by continuous possession

VIII.–4:301: Acquisition of ownership

(1) Upon expiry of the period required for the acquisition of ownership by continuous possession the original owner loses and the owner-possessor acquires ownership.

(2) When the owner-possessor knows or can reasonably be expected to know that the goods are encumbered with a limited proprietary right of a third person, this right continues to exist as long as this right is not itself extinguished by expiry of the respective period, or a period of 30 years (VIII.–4:101 (Basic rule) paragraph (1)(b)) or 50 years (VIII.–4:102 (Cultural objects) paragraph (1)(b)) has passed.

COMMENTS

A. Acquisition of ownership, paragraph (1)

General. Paragraph (1) of this Article spells out the basic effect of the expiration of the relevant period. Provided that all prerequisites of Sections 1 and 2 of this Chapter are fulfilled, the owner-possessor acquires the right of ownership of the goods. At the same time, the original owner loses his right of ownership. This is the approach traditionally taken in civil law countries. In principle, the effect of acquisition of ownership is already spelled out in VIII.–4:101 (Basic rule) paragraph (1), but is repeated in Section 3, which comprises all provisions related to the effects of acquisition by continuous possession. Additional effects are regulated in paragraph (2) of this Article and in VIII.–4:302 (Extinction of rights under rules on unjustified enrichment and non-contractual liability for damage).

Effects of acquisition of ownership. The rule that the owner-possessor "acquires ownership" is intended to be understood in a "unitary" sense, meaning that the acquisition of the right has effect as against the former owner as well as against third persons. In particular, the new owner is now protected against the former owner's claims for recovery of possession of the goods, which certainly is the most common effect of acquisition by continuous possession and comparable concepts from a comparative perspective. Also, the new owner now has relatively simple means of asserting his right to the goods against third parties, in situations where his right of ownership may be of importance, such as when re-obtaining possession from a third party interferer (like a thief), when bringing claims for damages under Book VI on non-contractual liability, when bringing claims based on unjustified enrichment under Book VII, or where the owner-possessor intends to sell or pledge the goods to a third party who, of course, wants to obtain a good title: As discussed above in VIII.–4:101 (Basic rule) Comment D, acquisition of ownership by continuous possession fulfils an important fall-back function in situations where it is hard to prove that ownership has been acquired in another way (*probatio diabolica*). Conversely, such potential acquirers now have a (or an additional) ground for relying on their transferor's right to the goods, which may, as a tendency, reduce transaction costs and have a positive impact on the free flow of commerce and legal certainty in general. See further VIII.–4:101 Comment D. Finally, acquisition of ownership by continuous possession may also have effects on third parties to whom the owner-possessor has already granted or transferred limited proprietary rights *before* the period of acquisition elapsed. This last issue is dealt with more closely in the following Comment.

Retroactive effect or *ex nunc* effect. In a couple of legal systems it is explicitly stated that once the period for acquisition of ownership by continuous possession has elapsed, ownership is vested in the owner-possessor with "retroactive effect", i.e. as if the possessor had acquired ownership already at the moment he took possession of the goods. In other legal systems, this question does not seem to be discussed at all, arguably because it appears self-evident that acquisition of ownership takes place at the time of, and therefore produces effects only as from, the expiration of the period (*ex nunc* effect). It is deliberately intended not to take a final position on this issue in the text or the Comments on these model rules, but to leave this issue to further discussion and development. One reason is that comprehensively regulating the issue would presuppose also dealing with the modes of acquiring other kinds of limited proprietary rights, such as proprietary rights of use, which however fall outside the scope of these model rules. Yet, what can be done is to provide a short discussion on the basic practical effects of such a dogmatic question, and to give a brief description of how the issues *could* perhaps be tackled, by taking into account certain general principles which are, in some way, inherent in these model rules: One consequence the "retroactive effect" approach intends to achieve is to grant to the possessor all fruits and uses he obtained before the expiration of the period (by deeming him to be "the owner" retrospectively). This issue is touched on by VIII.–4:302 (Extinction of rights under rules on unjustified enrichment and non-contractual liability for damage) which, however, opts for the opposite solution (see there). The second main effect relates to third parties to whom the owner-possessor has granted or transferred limited proprietary rights in the goods before the period has elapsed (i.e., as a non-owner). In that respect, the retroactivity approach has the effect that, upon the possessor's acquisition of ownership, such third parties' rights become valid retrospectively, so that they are deemed to have existed ever since they were "created". This certainly meets the practical interests of such third parties, and in a certain sense, the needs of legal certainty in general. But the retroactivity approach is not the only way to protect such interests. Taking into account some general principles inherent in these model rules, also a solution along the following lines could be contemplated (as mentioned already, this is intended to be seen as a contribution to further discussion, not as a proposed solution): Depending on the relevant provisions (which are outside Book VIII and mostly outside the scope of these model rules anyway), a third party deriving a limited proprietary right from the owner-possessor may possibly acquire such a right under one of the relevant provisions on (immediately) acquiring such type of right in good faith, e.g. under IX.–2:106 (Good faith acquisition of security right) for proprietary security rights. Or, acquisition by continuous possession (or exercise) of such a right may be possible under national law, such as in the case of proprietary rights of use in many countries. Under these provisions, the third party may possibly acquire a safe position long before the owner-possessor acquires ownership under the present Chapter, and that right will remain valid as against the original owner even if the owner acts in time and prevents the owner-possessor from acquiring ownership. In other cases, a principle inherent in VIII.–2:102 (Transferor's right or authority) may provide a solution, namely that where the "transferee" (here: the owner-possessor before expiration of the period for acquisition) lacks the right or authority to grant or transfer a right in the goods at the time this right is purported to be established, that right becomes valid when the grantor obtains the necessary right or authority. In other words, the former lack of the owner-possessor's right to dispose may be deemed to be cured as from the owner-possessor's acquisition of ownership. A retroactive effect is not provided for by that rule (for the case that ownership is obtained after having disposed of it). At first sight, the practical effect appears comparable to the one of the retroactivity approach. Priorities between different third-party rights could be determined according to the chronological order of their purported establishment.

B. Effect on limited proprietary rights, paragraph (2)

General. The goods acquired by continuous possession may have been encumbered with the limited proprietary right of a third party (e.g., a security or a usufruct right). Acquisition of ownership by continuous possession does not necessarily mean that such rights are extinguished at the same time. Both issues, the acquisition of ownership of the goods, and the question of whether such third-party rights in the goods are maintained or extinguished, are to be treated separately. With regard to the possible extinguishment of the third-party right, there are again two different grounds: First, the third party's right may be terminated as a consequence of (the possessor's) acquisition of ownership by continuous possession. In this case, ownership is acquired free of that third-party right. This rule impliedly underlies the first part of paragraph (2) and is explicitly addressed at its end (by reference to the expiry of the long thirty- or fifty-year periods). The following Comments will only deal with this first issue. Second, the right may terminate (or cease to be enforceable) by virtue of prescription, i.e. as a consequence of the qualified inactivity of the right-holder, if so provided under the relevant rules of law. This is addressed in the middle part of paragraph (2) ("as long as this right is not itself extinguished by expiry of the respective period").

Caveat. As indicated, the fate of third-party rights in the property after the lapse of a long period of time can be determined by various aspects of law. These model rules touch on the issue only as a side effect of discussing acquisition of ownership by continuous possession, but do not fully deal with the issue, which would include a fully elaborated set of rules for limited proprietary rights and, in particular, rules on the (possible) prescription of such rights. Therefore, a thorough review and perhaps further development of paragraph (2) will most probably prove useful, where this can be based on a broader analysis of the different approaches and underlying interests.

Effect of acquisition in good faith as to ownership and freedom from encumbrances. Depending on the possessor's good or bad faith with respect to the right of ownership and the non-existence of the limited proprietary right of a third person, several different constellations may occur, which are briefly discussed in the following Comments. If the possessor is in good faith with respect to his right of ownership and as to the non-existence of any encumbrances, he will also acquire ownership free of encumbrances. The rule does not make any differentiation as to when the third party's limited proprietary right has been created, it therefore also applies where the third party's right has been created (by the real owner) only after the owner-possessor already took possession. With regard to movable property, this will not happen that frequently. And if so, the third party who accepts to acquire a right in an asset which is not present because possession is exercised by the owner-possessor takes a risk. The solution promotes legal certainty in vesting unencumbered ownership in the owner-possessor.

Effect of acquisition in good faith as to ownership but in bad faith as to freedom of encumbrances. If, on the other hand, the possessor was in good faith as to being the owner, but knows or can reasonably be expected to know that a limited proprietary right of a third party exists, the right of ownership will be acquired after ten years of possession. The third party's right, however, will continue to exist after these ten years, though it may be rendered unenforceable by respective prescription rules (cf. Comment B). Finally, the right may be extinguished by possession for a period of thirty years, as would be the case if the possessor was in bad faith both with regard to ownership and the freedom from encumbrances. This is expressed at the end of paragraph (2). Again, legal certainty is provided in that after the expiry of the long period, unencumbered ownership is vested in the possessor.

Effect of acquisition in bad faith as to ownership but in good faith as to freedom of encumbrances. Where the possessor is in bad faith with regard to his right of ownership but is in good faith as to the non-existence of any encumbrance, he may acquire ownership free of encumbrances after a period of thirty years. With regard to the right of ownership, this clearly follows from the general rules. But the same period should also be applied in respect of the encumbrance: Before the possessor acquires ownership, the third party's right encumbers the property of the rightful owner. It would appear a bit strange if the owner who, suppose, recovers the goods after fifteen years would be freed of the encumbrance just because the owner-possessor meanwhile (for a period of more than ten years) had no reason to know of it. Likewise, there is not much reason for allowing a possessor in bad faith to take advantage of the concept of acquisition by continuous possession before the lapse of a period of thirty years.

Effect of acquisition in bad faith as to ownership and freedom from encumbrances. Where the possessor is in bad faith both with respect to the ownership right as well as with respect to the encumbrance, the thirty-year period will apply in relation to both aspects.

VIII.–4:302: Extinction of rights under rules on unjustified enrichment and non-contractual liability for damage

Upon acquisition of ownership, the original owner loses all rights to recover the goods and all rights to payment of the monetary value of the goods or for any future use of the goods under the provisions on unjustified enrichment (Book VII) and non-contractual liability for damage (Book VI).

COMMENTS

A. Function of the rule

Policy. The rule aims at drawing a clear line: once ownership is acquired (so that the asset does not have to be restored), all liabilities as to the value of the substance of the asset and for the use made of it subsequent to that time are extinguished. This may be described as an "*ex nunc*" effect of acquisition on such rights under the law of obligations. Rights resulting from the former use of the goods, at the time when the owner-possessor was still under an obligation to restore the property are, accordingly, not affected by this Article. They may, however, become unenforceable under the rules on prescription of rights to the performance of an obligation, whereby III.–7:301 (Suspension in case of ignorance) limb (a) and III.–7:307 (Maximum length of period) may be of particular importance, according to the circumstances of the case. Thereby, the original owner does not necessarily lose all rights immediately, while the property status of the goods is settled for the sake of legal certainty.

Types of rights excluded under this Article. In the first place, the rule aims at explicitly excluding rights related to the value of the goods under unjustified enrichment law, which are partly said to be effective against the new owner in some European legal systems (although the issue lost much of its practical relevance by the shortening of prescription periods). This approach fits to the unjustified enrichment rules of Book VII, where VII.–2:101 (Circumstances in which an enrichment is unjustified) states that a "rule of law" (like acquisition under the present Chapter) may "justify" the enrichment and therefore preclude its reversal. The principle is, however, explicitly stated in this Article, since VII.–2:101 paragraph (3) leaves it to the policy of the respective rule of law whether the enriched person shall be regarded as entitled to finally retain the enrichment. Second, since Chapter 4 of this Book also allows for acquisition of ownership by continuous possession in bad faith, so that the circumstances under which the owner-possessor holds the goods may constitute non-contractual liability for damage under Book VI, also these claims are excluded explicitly. The reference to Books VI and VII is intended to comprise, as far as relevant, the provisions of Chapter 7 of this Book, which basically refer to Books VI and VII.

B. Details

Exclusion of physical restoration. According to VII.–5:101 (Transferable enrichment), where the enrichment consists of a transferable asset, the enriched person would have to transfer this asset to the disadvantaged person. In order to avoid possible misunderstandings, the present Article explicitly states that the new owner, after having acquired ownership by continuous possession, is not under any obligation to restore the goods to their original owner. The clarification also relates to VI.–6:101 (Aim and forms of reparation), in order to exclude claims for reparation in kind (i.e. restoration of the goods) on the basis of non-contractual liability in case of acquisition by continuous possession in bad faith.

Exclusion of obligation to pay the monetary value for the substance of the goods. Equally, it is also explicitly excluded that the new owner, after acquisition of ownership by continuous possession, may be held liable for compensating the original owner in money for the value of the property that the latter lost to the possessor. This provides legal certainty for the possessor.

Exclusion of obligation to pay for using the goods after acquisition by continuous possession. Third, all monetary claims aimed at compensating the original owner for the possessor's benefits that he obtained from using the goods after having acquired by continuous possession are excluded. Once the new owner has acquired the goods, he shall have all entitlements of an owner, including the enjoyment of use. "Use" is to be understood in a broad sense for the purposes of this Article. It comprises use in a narrow sense (e.g. driving a car) as well as benefits from alienating (a price received when selling) or consuming the goods (e.g. burning fuel).

Benefits before expiration of period. Another question concerns benefits the owner-possessor obtained from using the asset or deriving fruits from it before the expiration of the qualifying period for acquisition of ownership. As the possessor regularly has no right of use before expiration of the period, the benefit will be regarded as an unjustified enrichment under VIII.–7:103 (Fruits from, use of, and other benefits derived from the goods during possession) and the provisions of Book VII. Having prevented the owner from using the property himself may also give rise to a right to reparation under Book VI. As mentioned in Comment A above, this Article does not extinguish such obligations. They may, however, have partly ceased to be enforceable by prescription under Book III Chapter 7.

No explicit exclusion of contractual obligations to return. This Article does not explicitly exclude contractual claims that the (former) owner may have to recover the goods. This issue is of a rather hypothetical nature, but is discussed controversially in some countries. For example, the owner may have lent the goods to another person, who, subsequently, believes that they are his own property. Such a person will regularly not be in good faith, but could acquire by continuous possession after the lapse of a period of thirty years. Here, the question arises whether contractual claims for recovery should also be excluded (like unjustified enrichment claims) or not. There may be arguments in both directions. Legal certainty may speak for clarity after the passing of thirty years, whereas the special relationship established by a contract could speak for the contractual claim for recovery to prevail. Practically, the contractual right to have the goods restored will most often have already become unenforceable under the prescription rules of Book III Chapter 7, since the time limits provided there are much shorter than the thirty-year period necessary for acquisition under Chapter 4. Also, in case the parties to the contract should have established any agreement to the effect that prescription of the contractual obligation to return be deferred, this will usually include an (implicit) acknowledgement of the owner's right in the sense of VIII.–4:205 (Ending of period in case of acknowledgement). Within the framework of these model rules, the issue does not appear to deserve regulation.

CHAPTER 5: PRODUCTION, COMBINATION AND COMMINGLING

Section 1: General provisions

VIII.–5:101: Party autonomy and relation to other provisions

(1) The consequences of production, combination or commingling can be regulated by party agreement. The provisions of Section 2 apply where production, combination or commingling takes place:

(a) without the consent of the owner of the material; or

(b) with the consent of the owner of the material, but without a party agreement as to the proprietary consequences.

(2) An agreement in the sense of paragraph (1) may provide for:

(a) proprietary rights as recognised by this Book; and

(b) a right to payment or other performance.

(3) The effects of production, combination and commingling as to goods subject to a retention of ownership device are regulated by Book IX.

(4) Proprietary security rights created under Section 2 of this Chapter are subject to the provisions on proprietary security rights in Book IX, unless provided otherwise in Section 2. Proprietary security rights created by a party agreement under paragraph (1) are subject to the provisions on proprietary security rights in Book IX except as provided otherwise by VIII.–5:204 (Additional provisions as to proprietary security rights) paragraph (3).

(5) This Chapter does not affect the applicability of the rules on non-contractual liability for damage (Book VI). The rules on benevolent intervention in another's affairs (Book V) have priority over the provisions of this Chapter.

COMMENTS

A. General

Situations addressed in Chapter 5. This Chapter deals with the property law results and other consequences where goods, or goods and labour contributions, of at least two different persons are, in one way or the other, joined in a physical sense. More specifically, the Chapter covers situations where either (a) goods belonging to one person are transformed into a new movable asset by work undertaken by another person ("production") or (b) goods belonging to different persons are physically put together. The latter category (b) comprises different sub-constellations: (i) It may be rather easy to separate these items from one another and restore each item to its owner. For this situation, Chapter 5 does not contain any specific rule. The property rights in each item therefore remain unaffected; Chapter 5 impliedly refers to the general rule of VIII.–6:101 (Protection of ownership), under which each owner can re-obtain possession of his property. When this right is exercised by one (or more) of the owners involved, the combined entity, mass or mixture is (wholly or partly) dissolved. The remaining constellations are characterised in a way that physically separating the individual items would be impossible or at least economically unreasonable. For the purposes of Chapter 5, they are further subdivided into situations where (ii) it is at least possible and economically reasonable to divide the mass or mixture into proportionate quantities ("commingling") and (iii) all other

situations where the latter is not the case ("combination"). This Chapter does not deal with the legal fate of movable property being attached to land and is not intended to provide any guidelines for parallel questions arising in that area. As to the terminology employed in this Chapter (production, commingling, combination), cf. also Comment A on each of the subsequent Articles.

Brief overview on issues solved differently in European legal systems and main policy issues. As one can see from the comparative survey in the Notes to this Chapter, the European legal systems partly show considerable differences as to the solutions provided for the issues covered by this Chapter. Apart from differences in terminology, it is evident that the substantive lines of demarcation between the different categories employed by the individual legal systems do not fully converge and are somewhat uncertain in a number of countries. In particular, however, the legal consequences deviate to a significant degree, varying from awarding sole ownership to one party to awarding sole ownership to the other party, or providing co-ownership of the parties involved, partially with special rules on the division of such co-ownership. The aspect whether a certain person acted in good faith or in bad faith carries different weight in the diverse legal systems. And, first and foremost, there exist completely different understandings as to whether the statutory (or other legal) rules applicable to these occurrences are of mandatory character or can be altered by party agreement. It is evident that these questions also constitute main policy issues to be dealt with in Chapter 5. Besides, one must decide about whom to burden with the risk that the act of above all production or combination will be economically successful. Against this background of considerable diversity in the European legal systems, it seems advisable to develop the proposed rules based on a careful analysis of the interests involved in the said situations. Apparently, some of the solutions proposed in this Chapter are new developments and do not coincide with any example provided by an existing European legal system.

Main approach: default rules, provisions on proprietary security rights take priority in case of overlap. The basic policy decision taken in this Chapter is that the proprietary and other consequences of production, combination and commingling may be regulated by an agreement of the parties involved. This is explicitly spelled out in the first sentence of paragraph (1) of this Article, and further specified in paragraph (2). Consequently, the provisions set out in Section 2 of this Chapter are mere default rules. They apply where either the parties have not made any agreement as to the consequences of these occurrences in advance, or where such agreement has been made, but remained incomplete in the sense that the consequences have not been sufficiently determined (e.g., the owner of material consented to another's request to use the material for creating a new object, but the parties did not regulate the proprietary consequences of such act or the calculation of any compensation payable to the owner of the material). For understanding the policies underpinning the subsequent Articles it is very important to see that in many situations of practical importance, such as where employees produce goods for their employer, there will exist an agreement as to these consequences, so that the case will be governed by the party autonomy rule spelled out in the present Article, and VIII.–5:201 (Production) to VIII.–5:204 (Additional provisions as to proprietary security rights) will not come into play at all. The actual scope of application of Section 2 of this Chapter is, therefore, rather limited. There is, however, one major restriction to this general party autonomy rule, namely that the mandatory provisions of Book IX on proprietary security rights remain unaffected. This may, in particular, be relevant where goods subject to a retention of ownership device become involved into production, combination or commingling. The said principle is generally expressed in VIII.–1:103

(Priority of other provisions) paragraph (1) and further specified in paragraphs (3) and (4) of the present Article.

Function of Chapter 5 within Book VIII and these model rules in general. The situations covered by Chapter 5 do not necessarily occur in a transfer context, which is the primary focus of Book VIII. Some rules, VIII.–5:202 (Commingling) and VIII.–5:203 (Combination), may even be applicable without any interference of men, i.e. caused by an act of nature or other coincidence. There are, however, a number of instances where the issues covered by Chapter 5 indirectly become relevant for transfer situations, such as where goods owned by different persons are first irreversibly combined, or transformed into new goods in a production process, and then sold, so that one will have to clarify who may validly dispose over these new goods. Also, it may happen that goods are transferred based on a contract for sale and subsequently are used to produce a new movable object by their new owner. Here, VIII.–5:201 (Production) may come into play "retrospectively" if the said contract for sale is avoided, cf. VIII.–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation) paragraph (2). Further, the producer may have "acquired" the material from a non-owner and good faith acquisition under VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership) may have failed (because the goods have been stolen, are acquired gratuitously or because the purchaser was not in good faith). This shows that there is a certain demand for supplementing the transfer rules with norms like those in Chapter 5. In most European legal systems, the main practical relevance of such rules concerns goods purchased under retention of ownership. If such goods are used, e.g., in production before the purchase price has been paid, the producer uses material owned by another person, the seller. Also under these model rules, the practical importance of the rules contained in Chapter 5 for goods subject to retention of ownership devices will be considerable. Although the effects of production, combination and commingling as to goods subject to a retention of ownership device are deliberately left to Book IX on proprietary security rights (see paragraph (3) of the present Article) in order not to undermine that Book's specific policies and technical means, including registration requirements and the concept of priorities, the relevant provisions of Book IX largely refer back to the rules of the present Chapter. See IX.–2:308 (Use of goods subject to a retention of ownership device for production or combination), and IX.–2:309 (Commingling of assets subject to proprietary security) paragraph (2). In any event, taking into account the model rule character of these proposals, the policies pursued and the solutions adopted in the present Chapter may be of interest as a source of inspiration for the context of retention of ownership devices in general.

Overview on structure of Chapter 5. This Chapter consists of two Sections, the first one comprising only the present Article which spells out the central party autonomy rule (paragraph (1) sentence 1 and paragraph (2)) and defines the scope of application of Section 2, i.e. where no or no complete party agreement as to the proprietary consequences of production, commingling and combination has been established (paragraph (1) sentence 2 with limbs (a) and (b)). The present Article also clarifies the relation between this Chapter and other parts of these model rules: Paragraphs (3) and (4) deal with the relation to Book IX on proprietary security rights. Paragraph (5) sentence 1 clarifies that the rules of Book VI on non-contractual liability for damage can always be resorted to in addition. Paragraph (5) sentence 2 finally clarifies that the specific policies of Book V on benevolent intervention are not interfered with. Section 2 of this Chapter comprises the default rules of VIII.–5:201 (Production) to VIII.–5:204 (Additional provisions as to proprietary security rights). The default character of these provisions is made clear by paragraph (1) sentence 1 of the present

Article, which has already been mentioned above. The named default rules distinguish three categories of events, each of them regulated by a separate Article, namely VIII.–5:201, VIII.–5:202 (Commingling) and VIII.–5:203 (Combination). The last Article, VIII.–5:204 serves as a common supplement for VIII.–5:201 and VIII.–5:203, under which a proprietary security right can arise in favour of an owner of material who loses his ownership of the respective goods. This last Article provides some specific regulation regarding this special security right, e.g. as to its effectiveness (no registration required), extends the security right to proceeds in case the security right in the goods themselves is extinguished by a good faith acquisition made by another person, and deals with priorities.

B. Overview of the relation between production, combination and commingling, and other provisions of these model rules

General; criteria for distinguishing the three categories production, commingling and combination. As already outlined in Comment A above, Chapter 5 differentiates between three categories of facts, each of them corresponding to one of the subsequent Articles: production, commingling and combination. In addition, it may happen that none of these specifically regulated categories applies, but the case is to be solved by applying the owner's general right to recover possession of his goods in the sense of VIII.–6:101 (Protection of ownership), or by applying unjustified enrichment rules as determined by Book VII. For determining which category to apply, the following criteria are to be taken into consideration: Did one of the contributions consist of the *performance of labour (work)*? If so, is the result to be considered *"new goods"*? If so, *how important was that labour contribution* for achieving the final result? In a number of constellations (namely all cases except those covered by VIII.–5:201 (Production) paragraph (1)), it will be important whether the "unified entity" *can be physically separated in an economically reasonable way* (so that each person recovers the very object he contributed). If not, is it at least possible and economically reasonable to separate the "unified entity" *into proportionate quantities* (so that not exactly the same items are restored, but a quantity equivalent to each person's contribution)?In this context, one may already anticipate that the scope of VIII.–5:201 converges to a rather high degree with the concepts incorporated in many European legal systems. The demarcation between VIII.–5:202 (Commingling) and VIII.–5:203 (Combination), on the other hand, is not that familiar taking into account the existing legal systems.

First tests: party agreement, Book IX to be applied. Practically, when dealing with a particular case, the first question to ask will be whether the parties involved have established a (valid) agreement which already regulates the proprietary effects, and, if relevant, any monetary compensation payable between the parties, before the relevant event however it would have to be classified under Chapter 5 occurred. If so, this agreement will govern the case (paragraph (1) sentence 1 of this Article) and there is no practical need in further classifying the situation according to the rules set out in this Chapter. One will, however, have to check whether Book IX on proprietary security rights is to be applied, either because the effect of a party agreement functionally amounts to the creation of a security right, or because goods subject to already existing proprietary security rights (such as goods acquired subject to a reservation of ownership device) are affected by that agreement. If so, the rules of Book IX have to be obeyed, whereby it may be noteworthy that Book IX itself sometimes differentiates according to the categories set out in the present Chapter. Compare, e.g., IX.–2:309 (Commingling of assets subject to proprietary security), under which a security right is automatically extended to co-ownership shares created under VIII.–5:202 (Commingling), in contrast to IX.–2:307 (Use of encumbered goods for production or combination) which provides that, in case of VIII.–5:201 (Production) and VIII.–5:203 (Combination), the

preservation of a security right in material in principle requires an agreement of the parties. The following Comments will only deal with situations where no party agreement in the sense of paragraph (1) of this Article has been concluded.

Another primary test: applicability of Book V. It is obvious that where a benevolent intervener in the sense of Book V effects an act amounting to production, combination or commingling in the sense of this Chapter, there will be no advanced party agreement as to the consequences of this act but the proprietary and other consequences established under the present Chapter may counteract the specific purposes and policies underpinning Book V. For this reason, paragraph (5) sentence 2 of this Article provides that the rules of Book V have priority over the provisions of this Chapter. This can lead to full, or only partial, inapplicability of Chapter 5, depending on the circumstances of the case and whether or not the policies of Book V are compatible, or incompatible, with the rules of this Chapter (and their related policies).

> *Illustration 1*
> Both neighbours A and B have an apple orchard. They usually produce apple juice from their apples. A gets heavily insured in an accident and cannot take care of the fruits, nor is he able to give instructions. Therefore, B, acting with the intention of benefiting A, reaps A's fruits and produces juice from these fruits for A.
>
> It is obvious that according to B's intention, and the principles underlying Book V, A and not the "producer" B shall be regarded as the owner of the juice. In so far, Book V must prevail over VIII.–5:201 (Production). Also, the question whether and to what extent B may ask for any indemnification or reimbursement must be decided under Chapter 3 of Book V.

In *Illustration 1*, Book V takes priority both in relation to the proprietary and the compensation effects of VIII.–5:201 (Production). An example where the property law level will not be affected is provided in *Illustration 17* below.

Labour performed, results are "new goods": production. Within the categories defined by Chapter 5, VIII.–5:201 (Production) takes priority over the subsequent Articles VIII.–5:202 (Commingling) and VIII.–5:203 (Combination). One will, therefore, first test whether the production rule is applicable, which requires (i) that (at least) one contribution consists of "material" (i.e. goods) and another person's contribution consists of the performance of labour (work), and (ii) that the result is to be considered "new goods" in the sense of VIII.–5:201 (Production). If so, the latter provision applies. (It may, eventually, refer further to VIII.–5:202 (Commingling) or VIII.–5:203 (Combination), see Comment B below).

> *Illustration 2*
> P (the producer) builds a ship by using raw materials owned by another person O. Or, P makes a suit out of cloth owned by O. Or, the artist P forms a sculpture from O's marble. In all these cases, VIII.–5:201 (Production) will apply.

Labour performed, but no "new goods" produced. Where goods owned by one person are subject to work performed by another person but the result of this work is not to be qualified as "new goods" in the sense of VIII.–5:201 (Production), the general production rule of VIII.–5:201(1), which awards sole ownership to the producer, does not apply. According to VIII.–5:201(3), the result will, in the first place, depend on whether there is only one owner of

material involved, or more than one owner. In the first case, i.e. where there is just the person performing work in relation to material owned by one other person, the owner of the material will remain to be the sole owner of the goods involved. In other words, there is no change with regard to the right of ownership. This may apply where there is no further material involved at all; or where there are several pieces of material involved, but all of them are owned by the same person. The person performing the labour contribution, on the other hand, may be entitled to a certain compensation (in a non-technical sense) under the principles of unjustified enrichment of Book VII (cf. *Illustration 3*) or under the rules on benevolent intervention as determined by Book V (cf. *Illustration 17* below), as the case may be. *Illustration 4* shows that a "compensation" for the work may also be due under a contract, but in such cases the proprietary consequences will normally already be determined, at least implicitly, by an agreement of the parties. However, Chapter 5 may step in if the contract is invalid.

Illustration 3
P without having entered into a valid contract with O, nor acting as a benevolent intervener cleans O's car. In that, P performs labour in relation to goods owned by O, but without turning them into "new goods" (the car remains a car). The production rule of VIII.–5:201 (Production) paragraph (1) does not apply and O of course remains the owner of his car. P may, however, be entitled to payment of the monetary value of his work under the unjustified enrichment rules of Book VII (cf. VIII.–5:201(3)).

Illustration 4
P repairs O's computer under a contract for processing in the sense of IV.C.–4:101 (Scope). Again, work is performed in relation to goods owned by another person. However, in such situations, it will already follow from the terms of the contract, at least impliedly, that O will stay the owner of his asset, cf. paragraphs (1) and (2) of the present Article. But the illustration shows that even if hypothetically no such agreement could be identified, or if the contract is void, the adequate result would be achieved: No change as to the property in the computer will take place because the "new goods" requirement of VIII.–5:201 (Production) would not be satisfied. If the contract is valid as such, P will be entitled to a price under that contract. If the contract is invalid altogether, O will also remain the owner and he will be entitled to a payment according to the unjustified enrichment rules (VIII.–5:201(3)).

The other group of situations involves goods belonging to different owners which, as a consequence of the labour contribution, cannot be separated in an economically reasonable way. One of the owners of the material may be the person performing the work. In all these cases (unless a contractual agreement exists or benevolent intervention is at hand, cf. above), the labour contribution is to be compensated according to VIII.–5:201 (Production) paragraph (3) sentences 2 and 3, i.e. by application of the rules of Book VII on unjustified enrichment. With regard to the material contributions, the property law effects regarding the unified entity as well as the possible question of compensation for the value of such goods will be determined, by way of the reference spelled out in VIII.–5:201(3) sentence 1, by applying VIII.–5:203 (Combination) (*Illustration 5*) or VIII.–5:202 (Commingling) (*Illustration 6*).

Illustration 5
Erroneously believing to be obliged to do so under a contract, P sprays paint either owned by himself or by a third party X on O's car. Although P performs labour, there are no "new goods" produced, so that VIII.–5:201 (Production) paragraph (3) refers to VIII.–5:203 (Combination) in order to determine any proprietary consequences of that

act. The car will constitute the principal part, the paint the subordinate part in the sense of VIII.–5:203 paragraph (2). Accordingly, O will remain the sole owner of the painted car. The owner of the paint will be entitled to payment in accordance with VIII.–5:203(2) sentence 2 (secured by a security right in the car, cf. VIII.–5:203 Comment C). The value of the labour as such will be compensated under unjustified enrichment principles, cf. VIII.–5:201 paragraph (3).

Illustration 6
Grain owned by two farmers A and B is inseparably mixed in a silo. It was transported there and put into the silo by a third person P, which involved a certain work effort. Whether there will be any compensation in relation to P's work will be determined according to unjustified enrichment principles (VIII.–5:201 (Production) paragraph (3)). There may be some benefit for the farmers, e.g. if the grain is now stored closer to potential customers, etc., or no benefit at all, in which case P's efforts may be frustrated according to general unjustified enrichment principles or, at least, pursuant to the saving-cap provided for under VII.–5:102 (Non-transferable enrichment) paragraph (2). The effects as to the property in the grain will be determined under VIII.–5:202 (Commingling), which is referred to by VIII.–5:201 paragraph (3).

Labour performed and new goods created, but labour is of minor importance. Since VIII.–5:201 (Production) paragraph (1) awards sole ownership to the producer where "new goods" are created as a result of the labour contribution, and this has been considered a too far-reaching consequence when the labour contribution was only of minor importance, an exception has been adopted in VIII.–5:201(2)(a). The consequences are regulated by paragraph (3) of that Article: If there was only material of one owner involved, this person acquires the new goods. If there were goods of more than one owner involved (one of them, again, may be the person carrying out the work), the rule as for situations where no "new goods" have been created refers further to VIII.–5:202 (Commingling) and VIII.–5:203 (Combination), respectively. Again, the person contributing the labour may be entitled to a monetary compensation, reflecting the value of his work, under unjustified enrichment principles; cf. VIII.–5:201 paragraph (3). Different results may be achieved in case the parties provided so by agreement in the sense of paragraphs (1) and (2) of this Article.

Goods of different owners physically put together, but separation into original constituents still possible and economically reasonable. The following Comments deal with those rules which, as such, do not require any labour contribution. These rules may also be applicable by way of reference if a labour contribution is involved, but is either of minor importance or does not create "new goods". The first constellation to be addressed in this context is where goods owned by different persons are physically put together in one way or the other (cf. *Illustrations 7* and *8*) but it is still possible and economically reasonable to take this "unit" apart and restore each part back to its owner. For such situations, Chapter 5 does not contain any specific rule. Rather, the property rights in each of these single items remain unaffected and each owner may recover his item. In so far, Chapter 5 impliedly refers to the general rule of VIII.–6:101 (Protection of ownership). With regard to situations where a "possessor" adds parts to goods owned by another, which he would be obliged to return, see also VIII.–7:104 (Expenditure on, or parts added to, the goods during possession) Comment D (*"ius tollendi"*). It may well be that single items sustain a certain damage when being disassembled or separated (as long as such losses do not render a dissolution of the entity economically unreasonable). Such losses can be liquidated under Book VI on non-contractual liability for damage, which is always intended to be applicable in addition (cf. paragraph (5) sentence 1 of this Article).

Illustration 7
A's tyres are mounted on B's car. They can be removed easily. Accordingly, there is no "combination" in the sense of VIII.–5:203 (Combination) where the owner of the principal part (the car) would acquire the subordinate part (the tyres), but A and B remain the owners of their respective property.

Illustration 8
Sheep or cattle owned by different farmers are brought to the same range for the summer period. Each animal is marked with an individual number which allows identifying it when the animals return to their respective owners. There will, therefore, be no "commingling" in the sense of VIII.–5:202 (Commingling) which would lead to co-ownership in the mass of sheep or cattle. Each farmer remains sole owner of his animals.

Separation into each owner's original items impossible or economically unreasonable, but separation into proportionate quantities possible and economically reasonable: commingling. The category of commingling first and foremost becomes relevant with regard to goods of the same kind and quality. It may happen that such goods, belonging to different owners, are mixed in a way that it is impossible to identify which singe item was contributed by which person. Or, such identification may theoretically be possible, but that would be unreasonable from an economic point of view. But it may at least be possible and economically reasonable to divide the whole mass or mixture into proportionate quantities, corresponding to the quantities contributed by each person, and to return that quantity to each contributor. In that case, the special rule of VIII.–5:202 (Commingling) applies. It is, however, not strictly confined to goods of exactly the same kind and quality, but may also apply to slightly different goods, depending on the circumstances. See further the Comments on that Article. Separating the mixture into the respective quantities usually does not affect the quality of the items involved. The commingling may have occurred in a form of physically linking the single parts to each other, such as in case of the commixture of liquids, or the single items may just be stored or placed in the same space or area, and it is immaterial whether or not there is any physical contact between the items (e.g. fish kept in the same basin).

Illustration 9
Oil owned by different persons (A, B, C, D) is mixed in a tank. Obviously, it would be impossible to identify which drop of oil was contributed by A, B, C and D, respectively, and to return each drop to its original owner. Even if that were possible, such procedure would be completely unreasonable. Under VIII.–5:202 (Commingling), each contributor will become co-owner of the mixture proportionate to the value of his contribution, and may separate the respective quantity out of the mixture. The rule may also be applicable if the oil of the different contributors was not of exactly the same quality.

Other situations where separation into each owner's original items is impossible or economically unreasonable: combination. The remaining situations where it would be impossible or economically unreasonable to separate a unit formed of goods owned by different persons into its original constituents are covered by VIII.–5:203 (Combination). The difference to VIII.–5:202 (Commingling) is that a separation into proportionate quantities is not possible (or economically reasonable) in these situations. The typical case will be that the original items are physically connected in such a way that taking them apart would cause such

damage to the single constituents that their value would be reduced considerably as compared to the value of the combined entity. As indicated above, VIII.–5:203 does, itself, not require any contribution of work but may theoretically also apply where the combination is effected by an act of nature. Practically, however, this rule's major field of application will be cases where the combination is effected by the performance of work (being performed by a person also contributing with goods or by a third person), but the labour contribution is either of minor importance in the sense of VIII.–5:201 (Production) paragraph (2)(a) or no "new goods" are produced, so that VIII.–5:203 applies by way of the reference spelled out in VIII.–5:201(3). Compare *Illustration 5* above and *Illustration 10* below. With regard to the proprietary effects of combination, VIII.–5:203 basically distinguishes two categories of cases: Where one component part is to be regarded as the "principal part", whereas the other part or parts form "subordinate parts", the person who contributed with the principal part will acquire (sole) ownership of the combined entity, while the other owners will be awarded a right to monetary compensation for their goods, secured by a special proprietary security right in the combined entity. See VIII.–5:203(2). Where, on the other hand, no "principal part" can be identified, co-ownership will emerge; see VIII.–5:203(3).

> *Illustration 10*
> A integrates spare parts, owned by himself, into a machine owned by B. These parts cannot be removed without partly destroying them; also, the work effort for taking the machine apart again would be considerable. The case falls within VIII.–5:203 (Combination), to which VIII.–5:201 (Production) paragraph (3) refers because despite of the labour contribution involved no "new goods" are created (the machine remains this kind of machine). Within VIII.–5:203, paragraph (2) will be applied as the machine as such constitutes the "principle part" and the spare parts will be "subordinate parts", so that B, the owner of the machine, acquires these new parts as well.

Specific rules for producers and certain persons effecting a combination with a specifically qualified grade of bad faith. Although thereby no further "category" in addition to production, combination and commingling in the sense of this Chapter is established, regard should be had to specific rules provided for in VIII.–5:201 (Production) paragraph (2)(b) in conjunction with paragraph (3), and VIII.–5:203 (Combination) paragraph (4). These rules have in common that a person who uses goods owned by another person for production or combination while actually knowing that the goods are owned by another and that this other person does not consent to that act, does not acquire sole ownership in the product, or in the combined entity, respectively. These exceptions primarily cover thieves, but go beyond the case of theft. They include, however, a counter-exception where the value of the labour (in case of production), or the value of that person's principal part (in case of combination) is much higher than the value of the (other) material. Where the said exception applies in a production case, VIII.–5:201 paragraph (3) refers further to VIII.–5:202 (Commingling) or VIII.–5:203. (If the exception applies in a combination case, a specific rule is contained in VIII.–5:203 paragraph (4). Details are discussed in the Comments on VIII.–5:201 and VIII.–5:203.

Short reference as to relation to Books VI and VII. Chapter 5 of this Book does not interfere with the rules on non contractual liability provided for in Book VI of these model rules. To the contrary, the rules of Book VI are regarded an important supplement to the provisions of this Chapter in order to achieve adequate results in a number of practical cases where the person effecting production, commingling or combination acted with intention or

negligence when interfering with another person's property rights. Compare paragraph (5) sentence 1 of this Article. The relation between this Chapter and Book VII on unjustified enrichment has, partly, already been touched in the previous Comments where it was stated that in certain cases, the unjustified enrichment rules are employed for calculating monetary claims compensating for the loss of certain property rights. In contrast to Book VI, Book VII however is not always applicable in addition to the rules of this Chapter. It only applies where explicitly provided so. With regard to other situations, this Chapter employs a separate regime of calculating compensation claims which is intended to supersede the unjustified enrichment principles. Compare Comment H below and the references provided there.

C. Overview of relation to other provisions of Book VIII

Relation to the rules on the transfer of goods forming part of a bulk. VIII.–2:305 (Transfer of goods forming part of a bulk) and VIII.–2:306 (Delivery out of the bulk) provide for special rules on the transfer of goods forming part of an identified bulk, "bulk" meaning a mass or mixture of fungible goods which is identified as contained in a defined space or area. Where a buyer of a certain quantity out of that bulk agrees on an immediate transfer of ownership, before the goods are separated from the bulk and appropriated to that buyer's contract, VIII.–2:305 awards him co-ownership in the bulk. These rules do not directly overlap with the provisions of Chapter 5, although both sets of rules may, depending on the circumstances, be applicable to a practical situation one after the other. In particular, VIII.–5:202 (Commingling) may be relevant in this respect, under which rule, also, co-ownership in a mass or mixture of fungible goods may be created. The difference lies in that VIII.–5:202, like the other rules on production and combination, regulates the effects of a certain physical change in relation to the goods involved. This change (like inseparably commixing the goods) may lead to certain proprietary consequences, like the creation of co-ownership in the case of VIII.–5:202. The bulk sale rule of VIII.–2:305, on the other hand, does not imply any physical change but presupposes that there already exists a mass or mixture of fungible goods contained in a defined space or area. It is irrelevant how this bulk has been created and whether one person is the sole owner of all goods in the bulk or whether several persons are co-owners. Such co-ownership may have been established by VIII.–2:305 itself, or in another way by party agreement, decision of a court or a rule of law, one such rule of law actually being the commingling rule of VIII.–5:202. Another difference lies in the functions of the two rules: VIII.–2:305 is a transfer rule, the transferee's undivided share representing the quantity of goods he bought, and the creation of co-ownership being a transitory means of gradually transferring property rights to the buyer. VIII.–5:202, on the other hand, rather serves a preservative function, safeguarding that everyone gets back what he already had before. However, both rules are supplemented with quite similar provisions on dividing co-ownership in VIII.–2:306 (Delivery out of the bulk) and VIII.–5:202 paragraph (2), both being based on the principle that each co-owner has a right to separate a quantity corresponding to his undivided share from the mass or mixture. Whereas the bulk transfer rules also adopt special good faith acquisition provision in VIII.–2:305(5) and VIII.–2:306(2), there are no property law implications of a party's good faith within VIII.–5:202.

Relation to good faith acquisition under Chapter 3, general. Unlike good faith acquisition under Chapter 3, acquisition under Chapter 5 does not effect an expropriation of the original owner. From an economic perspective, rather, property rights already existing at the moment of production, combination and commingling are preserved partly by special means. Where both the rules of Chapter 3 and Chapter 5 may be relevant in one and the same case, the interrelations between these two Chapters are, mostly, not particularly difficult. Where someone first acquires goods in good faith from a non-owner and these goods will afterwards

be involved into production, commingling or combination under this Chapter, the good faith acquirer will simply be regarded as the (new) rightful owner of the respective goods and the relevant rule of Chapter 5 will apply without any peculiarities. Also where first, e.g., production in the sense of Chapter 5 occurs and a good faith acquisition in the sense of Chapter 3 takes place subsequently, no particular difficulties arise. The producer may lose his (new) right of ownership in the same way as any other owner may do. Also the (former) owner of material which was used in production in the sense of VIII.–5:201 (Production) may lose the special proprietary security right granted under that Article by another person's good faith acquisition free of encumbrances in the sense of VIII.–3:102 (Good faith acquisition of ownership free of limited proprietary rights). For this case and the parallel constellation that may take place after combination in the sense of VIII.–5:203 (Combination), however, VIII.–5:204 (Additional provisions as to proprietary security rights) paragraph (2) provides that the security right automatically extends to the proceeds of the sale. See there.

Relation to exclusion of good faith acquisition of stolen goods in particular. Some further clarification may be useful with regard to the relation between Chapter 5 and VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership) paragraph (2), under which good faith acquisition of ownership does not take place in relation to stolen goods (subject to a counter-exception for acquisitions from a transferor acting in the ordinary course of business). First, where stolen goods are involved in production, combination or commingling, their true owner and not the thief will acquire the rights awarded to an owner of the material under Chapter 5. In other words, Chapter 5 does not (in an economic sense) take anything away from an owner whose property was stolen. Then, the question arises what shall happen if the produced, combined or commingled new entity is subsequently purchased by a buyer in good faith: Will the qualification "stolen" be maintained in relation to the respective property right representing the stolen goods after production, combination or commingling, so that the purchaser in good faith may not acquire this right, or free from this right, under the principles of Chapter 3? The good faith acquisition rules of Chapter 3 do not address these situations explicitly, which requires to fall back on the policies pursued by the exception rule of VIII.–3:101(2) and by the rules of Chapter 5. The exception for stolen goods in VIII.–3:101(2) intends to grant the rightful owner additional time to recover his property in a situation where, typically, particular efforts are undertaken to prevent the owner from retrieving his goods. Usually, such additional time will be at least ten years, after which time acquisition of ownership by continuous possession under VIII.–4:101 (Basic rule) paragraph (1)(a) can take place. The rules of Chapter 5, on the other hand, only intend to distribute proprietary rights between those persons who contributed to the result (i.e. the owners of the goods involved, and the processor, as the case may be). But they are rather policy-neutral as to the relation to other persons and, in this context, do not intend to further facilitate good faith acquisitions by subsequent buyers. Consequently, where stolen goods are involved in commingling or combination in a way that co-ownership emerges under VIII.–5:202 (Commingling) or VIII.–5:203 (Combination), the qualification "stolen" will be upheld in relation to the respective undivided co-ownership share representing the stolen goods, and a subsequent good faith acquisition by a third party will be prevented by VIII.–3:101(2). This means that if the good faith acquisition requirements are fulfilled with regard to co-ownership shares which do not represent stolen goods, co-ownership between this good faith acquirer and the original owner of the stolen goods will be arrived at. This corresponds to the wording of VIII.–3:101(2), if one applies this rule to the acquisition of an undivided co-ownership share.

Illustration 11
A has stolen fuel from B and commixes it with fuel owned by C and D (but which A erroneously believes to be his own one). B, C and D each "contribute" the same quantity. This leads to co-ownership of B, C and D, each for 1/3, according to VIII.–5:202 (Commingling). Then, A sells not acting in the ordinary course of his business the whole mixture to E who takes delivery in good faith. E can acquire "ownership" in relation to the shares formerly owned by C and D, but he cannot acquire B's share representing the stolen goods. Accordingly, B and E will become co-owners for shares of 1/3 and 2/3, respectively.

The other situation to deal with is that stolen goods are involved in production or in combination in such a way that the producer, or the owner of the principal part, respectively, acquire sole ownership in the new entity, and the other owners of material are granted a proprietary security right in this entity; see VIII.–5:201 (Production) paragraph (1) and VIII.–5:203 (Combination) paragraph (2). The question will be whether a subsequent buyer in good faith can take the new entity free of these (other) owners' proprietary security rights. Parallel to VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership) paragraph (2), the general rule on good faith acquisition free of encumbrances in VIII.–3:102 (Good faith acquisition of ownership free of limited proprietary rights) provides for an exception for stolen goods. The policy approach regarding production should be the same as discussed above. It would be odd if the owner of stolen goods would be protected in case co-ownership is created (see above), but not where he "only" gets a proprietary security right in the new entity, which solution has been adopted on very similar policy considerations as co-ownership, but simplified as to certain practical difficulties co-ownership would bring about (see VIII.–5:201 Comment C). Consequently, a good faith acquirer may not acquire free of the encumbrance (security right) reflecting the stolen objects. A different result will be arrived at where the producer (or person effecting the combination) sold the new or combined goods in the ordinary course of his business.

Illustration 12
A buys goods which have formerly been stolen from B (so no good faith acquisition may take place at that stage) and uses them for producing new goods. Under VIII.–5:201 (Production), A will become sole owner of the product but is obliged to payment to B, secured by a proprietary security right. If now A outside the ordinary course of his business sells the product to C, who is in good faith, C acquires ownership of the goods (derivatively), but these goods are still encumbered by B's security right.

Where, finally, the producer himself, or the person effecting the combination and who himself owns the principal part, has stolen the goods used as material, the exceptions provided for by VIII.–5:201 (Production) paragraphs (2)(b) and (3), and by VIII.–5:203 (Combination) paragraph (4) come into play in addition. The latter case is parallel to co-ownership constellations discussed above with *Illustration 11*. In case of production, the producer will not acquire ownership of the product so that the owner of the stolen goods either becomes sole owner of the product or becomes co-owner together with other owners of material. The qualification "stolen" will apply to the respective owner's co-ownership share and prevent good faith acquisition parallel to what has been discussed above.

Relation to acquisition by continuous possession under Chapter 4. Comparable to good faith acquisition under Chapter 3, acquisition of ownership by continuous possession under

Chapter 4 has the effect of an expropriation without compensation of the rightful owner, which is not the case under the rules of Chapter 5. As pointed out in the previous Comment, possessing the relevant object for the period of time required by Chapter 4 will also make it possible to acquire (or acquire free of) property rights representing "stolen" goods. There is one more issue to be addressed regarding the interrelation of these two Chapters, namely that a person already possessed another's material before production, commingling or combination occurred, and continues possessing the result of that event in a manner capable for acquisition under Chapter 4. Although this situation is not expressly addressed in the black letter rules, the fact that production, commingling or combination occurred in the meantime will not interrupt the running of the period for acquisition under Chapter 4, but the periods elapsed before and after the respective event can be counted together for the purposes of acquisition under Chapter 4. Chapter 5 is neutral in that respect, even though it may practically be more difficult for the original owner to retrieve his property once it has been involved in production etc. But there is a number of hypothetical events which may impede the owner's recovery, and taking into account the rather long periods applicable under Chapter 4 it appears preferable to let that Chapter's general aim of legal certainty prevail.

Relation to rules on protection of ownership and possession under Chapter 6. It has already been pointed out that in all situations where no change of the proprietary positions under Chapter 5 takes place (in particular, where no new goods have been produced and the new entity can be physically separated in an economically reasonable way), each person remains to be the owner of his goods and can take back his property under the general rules, in particular under the general right of revindication under VIII.–6:101 (Protection of ownership). Where, however, a change of the proprietary positions under one of the rules of Chapter 5 has already taken place, the protection rules of Chapter 6 will apply (only) in relation to the new proprietary rights.

Relation to Chapter 7. The scopes of Chapter 5 and Chapter 7 on the rights between an owner of goods and a possessor of these goods who, at the time of the events addressed under Chapter 7, was obliged to return the goods to their owner, may overlap in a great number of situations. In general, it is intended that the rules of Chapter 5, which bring about a change in the proprietary positions regarding the goods concerned, take priority over the provisions of Chapter 7. See VIII.–7:101 (Scope of application) paragraph (3) and Comments B and G on that provision. See also VIII.–5:203 (Combination) Comments D and E for certain calculation issues regarding combination. See further VIII.–7:104 (Expenditure on, or parts added to, the goods during possession) Comment D for situations where no change as to the proprietary positions has taken place and the "possessor" may take away parts he added to the owner's goods (*ius tollendi*).

D. Party autonomy and scope of this Chapter (paragraphs (1) and (2))

(a) General

Comparative background. As can be seen in more detail from the Notes to this Article, the majority of European legal systems accepts that the respective rules on production, commingling and combination can be altered by a contractual agreement between the parties involved. Or, in other words, the relevant national provisions have the character of default rules. There is, however, also a considerable number of legal systems where it is held that the respective rules are mandatory. Partly, this is disputed, and in a couple of further countries, the issue is unclear or hardly discussed. Where the mandatory character is favoured, this is often supported by the argument that the rules, due to their function of attributing ownership

to one (or several) of the parties involved, yield an *erga omnes* effect, which would require a mandatory character. But even in these countries, or at least in some of them, a considerable practical demand for certain flexibility is evident especially with regard to the rule on production, in particular because it frequently happens that goods (e.g. raw materials) are purchased under retention of ownership and shall be converted into a product before the purchase price has been paid (i.e., when the seller still "owns" these goods) and the seller has an eminent interest not to lose his security. This is particularly the case in German law. There, it has been accepted that the parties at least are allowed to establish a contractual agreement as to who of them is to be regarded the "producer" in the sense of the mandatory provisions. Also, it is accepted that the parties may stipulate for an anticipated *constitutum possessorium*, whereby ownership in the product is immediately (re-)transferred to the supplier of the material. By such means, the result of the mandatory rule may in fact be reversed.

Basic policy. These model rules explicitly follow the majority approach by stating that the consequences of production, combination and commingling can be regulated by party agreement; see paragraph (1) sentence of this Article. This decision is based on the evident practical demand indicated above and is coherent with the strong role the principle of party autonomy generally plays in Book VIII, in particular in the central transfer rules of Chapter 2. For the purposes of these model rules, there does not seem to be much sense in arriving at this result by making a detour via party agreements on who shall be regarded the "producer" etc. It has also been stressed already in the context of the transfer rules of Chapter 2 (see VIII.–2:101 (Requirements for the transfer of ownership in general) Comment C) that the purpose of providing "publicity" only carries very limited importance in relation to a transfer or, in the present context: production, commingling or combination of movable property. Besides, "publicity" could, in the present context, only be provided if the respective rule safeguarded that the person in possession also is to be regarded the owner in a legal sense. This is, however, not the case in all situations where the respective rules grant sole ownership to another person (e.g. because that other person contributed with the principal part) or lead to the creation of sole ownership (or the creation of proprietary security rights, as is partly suggested under the rules of this Chapter). There is, however, a certain limitation to the principle of party autonomy in that the mandatory rules of Book IX on proprietary security rights are granted priority. See Comment E below.

Time of agreement. A party agreement in the sense of paragraphs (1) and (2) of this Article can be established before or upon production, commingling and combination. If no agreement in this sense has been made by that time (or only an incomplete agreement has been established), the default rules of Chapter 5 will apply and proprietary rights will be allocated accordingly. Also thereafter, the parties can stipulate for the same content in a subsequent agreement. But, to the extent that this deviates from the default rules, this contract may (only) operate as a basis for an ordinary transfer under Chapter 2, for the creation of proprietary security rights, as the case may be, or for rights to payment according to the contract. The subsequent agreement will not take effect retrospectively.

Parties to the agreement. As to the parties who must consent so as to establish a valid agreement in the sense of paragraphs (1) and (2) of this Article, it is decisive that those parties enter the agreement who would otherwise be affected in their proprietary positions by the subsequent Articles of Chapter 5. E.g., in case of production, this will be the (future) producer and the owners of the material involved. In case of commingling, it will be all owners of the respective goods, etc.

"Agreement" subject to rules on general contract law. As to the conclusion, validity, interpretation etc. of an agreement in the sense of paragraphs (1) and (2) of this Article, the general contract law rules apply accordingly. With regard to an agreement directly addressing proprietary effects, this is clarified by the general rule of VIII.–1:104 (Application of rules of Books I to III); see there. Regarding the creation of obligations and corresponding rights, this already follows from Books I to III themselves.

(b) Possible content and examples of relevant party agreements

General. As paragraph (2) clarifies explicitly and will be discussed in more detail below, a party agreement in the sense of this Article may relate to the level of property law as well as to the law of obligations. In particular, the parties may regulate (i) that one party becomes sole owner of the new entity or (ii) that co-ownership shall emerge, including the calculation of the undivided co-ownership shares. The parties may also agree (iii) on the creation of proprietary security rights (which will, however, be subject to the provisions of Book IX, cf. paragraph (4) of this Article). On the level of obligations, the parties may, in particular, provide that (iv) one party must pay a certain amount of money to another party, especially where that other party who does not acquire ownership (or only has a right to a smaller share than under the dispositive rules). Theoretically, there are numerous additional possibilities, some of which being mentioned in the Comments below. The party autonomy principle also applies to situations where Chapter 5 itself does *not* provide any proprietary changes, in particular where a new entity could be separated into its original constituents in an economically reasonable way (so that VIII.–5:202 (Commingling) and VIII.–5:203 (Combination) do not apply. Technically, this will rather constitute an ordinary transfer in the sense of Chapter 2, taking effect when the relevant act addressed in the party agreement is performed, than an effective agreement in the sense of Chapter 5. But that practically makes no difference. The relevant agreement will then constitute an agreement as to the time ownership is to pass in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e) and VIII.–2:103 (Agreement as to the time ownership is to pass). The priority of Book IX will, of course, also apply in that case.

Agreement as to proprietary consequences, paragraph (2)(a). As mentioned above, agreements as to the proprietary consequences of production, combination or commingling will typically provide for sole ownership of one of the parties or co-ownership of all (or some) contributors, eventually combined with the creation of proprietary security rights similar to the default concept provided in Section 2 of this Chapter. Where co-ownership is established, this means that the co-owners own undivided shares in the whole goods and each co-owner can dispose of his share by acting alone, unless otherwise provided by the parties; see VIII.–1:203 (Co-ownership). The parties may of course also determine a certain ratio of the undivided shares. If they do not and nothing else can be determined by applying the principles of interpretation as provided by Book II Chapter 8, the ratio will be proportionate to the value of the respective contributions, which can seen as a general principle both applied in VIII.–5:202 (Commingling) and VIII.–5:203 (Combination). The parties may also vary the scopes of application of the categories of production, commingling and combination, providing, for instance, that the consequences of VIII.–5:201 (Production) apply also where the result of the work would not pass the "new goods" test under that Article. But this is just a variation of what has already been said in the previous Comment. Theoretically, the parties may also create a proprietary right to use the new entity, or create a trust subject to the rules of Book X. This Article does not, however, in itself establish freedom to invent new categories of property rights. Paragraph (2)(a) implicitly refers to VIII.–1:202 (Ownership), VIII.–1:203 and VIII.–1:204 (Limited proprietary rights), which again refers further to other Books of

these model rules and national law. In other words, agreements in the sense of paragraph (2)(a) must be "within the system" (which may, according to the references to national law in VIII.–1:204, already be a rather wide one). Similarly, the party autonomy rule is not intended to open up for constructions such as attributing ownership of one part, which is inseparably combined with another person's goods, shall belong to one person, while the rest of the entity shall belong to another. Compare the principle expressed in VIII.–1:301 (Transferability) paragraph (2) (the reference to Chapter 5 made there not being intended to paralyse the above made statement). As to an agreement under which a third party shall acquire ownership, see below.

Agreement as to obligations and corresponding rights, paragraph (2)(b). According to limb (b) of paragraph (2), the party agreement may also establish obligations and corresponding rights. Usually, this will be a right to payment, such as some kind of compensation for the value of another person's material, or a counter-performance for work performed, in particular in the context of production. The amount payable and all modalities of payment are subject to the parties' agreement and general rules which may be applicable in that respect. The parties are, however, also free to stipulate for other than monetary obligations, e.g. the owner may be obliged to lease out the product to the other party etc. All this concerns the usual case that the obligations agreed upon only relate to parties to this agreement. If the parties in the sense of Chapter 5 (i.e. those persons contributing to production, commingling or combination) should agree that a third party shall acquire ownership upon production, commingling or combination, such a stipulation in favour of a third party (cf. Book II Chapter 9 Section 3) may operate as an entitlement of the third party to acquire ownership in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(d). In addition, an agreement as to the time ownership is to pass (which could be fulfilled by simply assenting to the other parties' agreement), delivery or an equivalent to delivery would be required under paragraph (1)(e) of that Article, so that some sort of consent of the third party would be essential for acquiring ownership.

Typical example of agreement: labour contract. In a lot of practically important situations, parties will regulate the consequences of production (or other events covered by this Chapter) by agreement, whether expressly or impliedly. In particular, where employees produce new goods from material owned and provided by their employer, it usually follows already from the labour contract at least from an interpretation thereof under the principles of Book II Chapter 8 that the employer, not the employees, will be the owner of the products. Also, the labour contract will regulate the price (wage) the employees are entitled to receive for their labour contributions. Consequently, the default rule of VIII.–5:201 (Production), which would lead to the opposite result of acquisition of ownership by the employees in absence of the contrary agreement, will not apply due to the party autonomy rule of the present Article. From the same party agreement's purposes it follows that where the material used by the employees is not owned by their employer, but by a third party who did not consent to production, the employer (and not the employees) are to be regarded as "the producer" in the external relationship with the owner of the material. See also VIII.–5:201 Comment B.

Typical example of agreement: production ordered by the owner of material. Where, on the other hand, the owner of material hands the material over to another person in order to produce new goods out of the material, whereupon the new goods are to be returned to the owner of the material, the agreement between these parties will either determine explicitly, or will have to be interpreted in the sense that the owner of the material shall, upon production, acquire (sole) ownership of the new product. The same will apply where the final products

shall not be returned to the owner of the material in a physical sense, but shall be otherwise disposed of according to the order of the material-owner. The person performing labour, on the other hand, will regularly stipulate for a price for production. This will usually constitute a contract of construction in the sense IV.C.–3:101 (Scope) paragraph (2)(a) which extends the relevant provisions to contracts under which a movable thing is constructed following a design provided by the client. The "constructor" (the person producing the new goods in the sense of VIII.–5:201 (Production)) may withhold delivery of the products to the owner in case the latter does not pay, cf. III.–3:401 (Right to withhold performance of reciprocal obligation). Such situations will also be covered by the party autonomy rule of paragraph (1).

Illustration 13
O is an agricultural company specialised on high quality organic food and other eco-products and markets its products under a well known label. O decides to extend its product range further by offering eco-pullovers made of the wool of their sheep. As O does not own any textile factory itself, O contracts with the factory P that O will deliver wool and P will produce the pullovers in exchange for an agreed price. The contract also states (or if not doing so explicitly, it will be interpreted accordingly) that O will own the pullovers from the moment they are produced. This agreement in the sense of paragraphs (1) and (2)(a) of the present Article supersedes the default rule of VIII.–5:201 (Production).

(c) Remaining scope of VIII.–5:201 to VIII.–5:204

General. It follows from the foregoing that the actual scope of application of the default rules provided for in Section 2, i.e. in VIII.–5:201 (Production) to VIII.–5:204 (Additional provisions as to proprietary security rights), is rather limited because party agreements in the abovementioned sense are of major practical importance. Another important restriction follows from this Chapter's subsidiarity in relation to Book IX on proprietary security rights; see Comment E below. One may say that the default rules of Chapter 5 just fill the gaps left open by the party autonomy rule and Book IX, but of course it may also serve as an important model and may provide guidelines on how parties may find an adequate reconciliation of interests when establishing such a party agreement. The following Comments give an overview on the main constellations.

Production etc. without consent of the owner of the material. The main group of situations, which have also been primarily envisaged when developing the default rules of Section 2, are such where production, commingling or combination takes place without the consent the owner, or all other owners of the goods involved; see paragraph (1)(a). This particularly includes, but is not restricted to, situations where the rightful owner of the material does not even know where his goods are located physically and, therefore, can neither avert the production, commingling or combination, nor can make sure that a party agreement as to the consequences of such event be established in advance. Accordingly, the default rules apply where, e.g., the goods have been stolen by the producer; where a person uses another's goods in the mistaken belief of being the rightful owner of the goods himself; but also where the producer (or person effecting commingling or combination) actually knows that he does not own the goods, but erroneously believes that the rightful owner authorised him to use these goods in production, commingling or combination.

Production etc. with consent of contributors, but without agreement as to proprietary consequences. Another situation where the default rules of Section 2 apply is where the owner of the material actually consented to the fact that production, commingling or

combination will be undertaken, but the parties did not establish any agreement regulating the proprietary and other consequences of that act; see paragraph (1)(b). These consequences will then be determined by the relevant default rule.

Illustration 14
Two salesmen agree to store their merchandise, which is of the same kind and quality (like oil, grain, fruits) in the same container, silo, tank or warehouse. But they do not regulate the further effect as to property etc. These issues will be determined by VIII.–5:202 (Commingling).

Illustration 15
Artist O agrees with artist P, who uses the same studio, that P may use O's equipment and material in case he needs it. They are in a common understanding that in such a case, P will replace the material or compensate O accordingly, but nothing precise is agreed upon. And they in fact never thought of issues like property rights. At this stage it is unclear which material P will use, and whether he will use any material of O at all. In case P thereafter uses some of O's material, the consequences will be determined by VIII.–5:201 (Production) paragraph (1).

Production etc. with consent of contributors and with agreement as to proprietary consequences, but without agreement as to obligations. There may, theoretically, also be situations where all owners of material consented to production, commingling or combination be undertaken, and all contributors also agree on the proprietary effects thereof in the sense of paragraph (2)(a), e.g. that the producer or another party shall acquire sole ownership, but no agreement as to obligations in the sense of paragraph (2)(b) is established. This case is not mentioned in paragraph (1) sentence 2, which makes sense in so far as the rights to payment provided by some of the default rules of Section 2 will only fit where also the agreed proprietary consequences, in particular the attribution of ownership or co-ownership, correspond to the concepts underlying the relevant default rules. Where this is the case, however, the solutions of Section 2 regarding the creation of obligations and corresponding rights may serve as a guideline for interpreting the parties' agreement, or may be applied by way of analogy. Regard should be had to the fact that the rules on the calculation of the monetary claims provided for by VIII.–5:201 (Production) paragraph (1) and VIII.–5:203 (Combination) paragraph (2) and (3) contain a certain distribution of economic risks and it should be checked carefully whether this distribution corresponds to the purposes pursued by the parties. Compare VIII.–5:201 Comment D and VIII.–5:203 Comment D.

E. Relation to Book IX on proprietary security rights (VIII.–1:103 (1), VIII.–5:101(3) and (4))

General policy. Book IX provides extensive regulation on proprietary security rights. It follows, in a certain sense, a functional approach by covering not only such types of proprietary rights as generally recognised as designed to serve as security, such as the pledge, but also other proprietary rights which are either intended by the parties to the contract to entitle the secured creditor to preferential satisfaction of his secured right from the encumbered asset or have this effect under the agreement; cf. IX.–1:102 (Security right) paragraph (2). This broad approach is deliberately chosen in order to achieve an equal treatment of functionally similar devices, and in order to pursue certain policies as comprehensively as possible. Such specific policies exist, in particular, with regard to the security rights' effectiveness in the sense of opposability against certain third parties (cf. IX.–3:101 (Effectiveness as against third persons)), where, in relation to goods, in general either

possession or registration is required; cf. IX.–3:102 (Methods of achieving effectiveness). Here, striving for completeness of the register is an important policy, which means that exceptions, also in relation to security rights potentially falling within Book VIII, should be kept relatively narrow. Also, Book IX implies specific policies regarding the extension of a security right to other assets, or with regard to the priority regime. In this respect, Chapter 5 of Book VIII aims at interfering with Book IX as little as possible, in order not to undermine that Books general policies. In other respects, such as regarding enforcement provisions applicable to security rights created by operation of law under Section 2 of this Chapter, Books VIII and IX may rather supplement each other. Also, the consequences of production, combination and commingling on (already existing) security rights in the material involved in such an act are not covered by Chapter 5 of this Book. These issues are regulated by IX.–2:307 (Use of encumbered goods for production or combination) and IX.–2:309 (Commingling of assets subject to proprietary security), which are however closely synchronised with the provisions of the present Chapter.

Priority of Book IX under VIII.–1:103(1) (Priority of other provisions). The named policy is, to a certain extent, already realised by the general provision of VIII.–1:103 paragraph (1) which states that in relation to a transfer, or retention, of ownership for purposes of security, the provisions of Book IX apply and have priority over the provisions Book VIII. This implies, for instance, that a transfer of ownership for security purposes will be subject to Book IX on security rights, and so will the further legal destiny of the goods subject to such a transaction, including being involved in production, commingling or combination. The principle inherent in this rule also applies, e.g., where the parties involved in a process of production, commingling or combination establish an agreement the effect of which is providing a proprietary security right to one of them. Such situations are more specifically addressed by paragraph (4) sentence 2.

Goods subject to retention of ownership device, paragraph (3). The rules of Chapter 5 could, based on their broad wording, be applied to production, combination and commingling of goods purchased subject to retention of ownership in the classical sense, provided the price has not been paid when the respective event occurs: The material is still owned by the seller when it is used for production by the buyer, or is combined or commingled with other goods owned by the buyer and, perhaps, also other persons' goods. The general policy throughout the development of these model rules was, however, that it should be up to Book IX and that Book's underlying policies and concepts to decide upon the effects the production, commingling or combination involving such goods shall have. For this reason, paragraph (3) of the present Article makes clear that such constellations shall be exclusively covered by Book IX. This shall ensure that different situations can be treated based upon their own merits and specific policy implications. Note that reference is made to "retention of ownership devices" in the sense of Book IX, which does not only cover retention of ownership in the "classical" sense that the seller retains the right of ownership in the sold goods, but also functionally equivalent devices such as financial leasing (cf. IX.–1:103 (Retention of ownership device: scope)). All these cases shall be treated alike also in the context of production, combination and commingling. The main practical effect of this different treatment is that where goods subject to a retention of ownership device are involved in production or combination effected by the other party, or a third party, the security in the original goods does not automatically extend to the new or combined goods, but only if so provided by an antecedent agreement of the parties of the contract for proprietary security; see IX.–2:308 (Use of goods subject to a retention of ownership device for production or combination), in particular paragraph (2). If no such agreement has been established, the

buyer, hirer-purchaser, lessee or consignee will acquire the rights granted to the "owner" of the respective goods under VIII.–5:201 (Production) or VIII.–5:203 (Combination), respectively; see the named IX.–2:308 paragraph (1). Another important consequence of the reference to Book IX spelled out in paragraph (3) of the present Article is that any security rights which the holder of the retention of ownership device acquires in the new products or combined assets or in the buyer's, hirer-purchaser's, lessee's or consignee's right to payment against the owner of these assets must fulfil the requirements of Chapter 3 of Book IX in order to be effective as against third persons (cf. IX.–2:308 Comment C). Practically, this means that the contractual extension of the security right must be registered, unless the secured creditor holds possession of the new or combined assets. Where goods are commingled and co-ownership emerges under VIII.–5:202 (Commingling), on the other hand, the former security rights in these goods automatically continue as encumbrances of the undivided shares in the commingled mass or mixture; cf. IX.–2:309 (Commingling of assets subject to proprietary security) paragraph (1) in conjunction with paragraph (2). Priority is not affected by such occurrences, see IX.–4:103 (Continuation of priority) paragraph (1)(b); a separate act of registration is neither necessary for effectiveness (provided the contractual extension has been registered once, which will usually happen when registering the original security right as such) nor for priority so that the superpriority of the holder of the retention of ownership device (IX.–4:102 (Superpriority) paragraph (1)) is maintained.

In all other respects than those already discussed above, the consequences of production and combination of goods subject to a retention of ownership device are identical as those provided by Chapter 5 of this Book. This follows from IX.–2:308 (Use of goods subject to a retention of ownership device for production or combination) paragraph (1) which refers back to the rules of Chapter 5 of Book VIII in general. The reference also covers VIII.–5:204 (Additional provisions as to proprietary security rights). As a consequence, for example, the security right in the new or combined goods (provided the extension to these assets has been agreed upon, see above) automatically extends to the proceeds of the sale where the security right in the goods is extinguished by a third party's good faith acquisition (see VIII.–5:204 paragraph (2)). This improves the secured creditor's position as compared to the general rules of Book IX under which the extension of a security right to proceeds would, in principle, require that the parties have so agreed (cf. IX.–2:306 (Proceeds of the originally encumbered assets) paragraph (3)).

Proprietary security rights created by operation of law under this Charter (paragraph (4) sentence 1). Paragraph (4) of this Article deals with proprietary security rights created upon production, combination or, as the case may be, commingling (which may be relevant for contractually created security rights). The first sentence relates to proprietary security rights created under Section 2, i.e. under VIII.–5:201 (Production) paragraph (1) or VIII.–5:203 (Combination) paragraphs (2) and (3). Again, it is spelled out that such security rights, in principle, are subject to the provisions of Book IX. A general rule correlating to this reference is IX.–1:101 (General rule) paragraph (2)(c), which states that Book IX is applicable, with appropriate adaptations, to "security rights in movable assets implied by patrimonial law, if and in so far as this is compatible with the purpose of the law". The named Articles on production and combination constitute such provisions of patrimonial law which provide for a creation of proprietary security rights by operation of law. Contrary to other examples falling within the named general rule (cf. IX.–1:101 Comment C), any adaptations and limitations are intended to be spelled out by Chapter 5 of this Book directly, so that the reference to Book IX bears the character of a full reference unless explicitly provided by the present Chapter. A full reference will, e.g., apply to issues like enforcement. On the other

hand, paragraph (4) sentence 1 of the present Article provides a reservation for deviating regulations provided by Section 2 of this Chapter. This refers to: (i) the rules on the *creation* of the security rights as mentioned above, which is an automatic, or *ex lege*, creation as compared to a (primarily) contractual creation under Book IX. Another main difference concerns (ii) the *effectiveness* of these security rights as against third parties, which does not require possession or registration, see VIII.–5:204 (Additional provisions as to proprietary security rights) paragraph (1). Nothing, however, speaks against a voluntary registration of the security right, which may help to prevent a good faith acquisition free of the encumbrance due to impeding the third person's good faith. Further, (iii) the security right created under Section 2 automatically *extends to the proceeds of a sale* of the product or combined goods, if a third party acquires these new or combined goods free of the security right by virtue of a good faith acquisition; see VIII.–5:204(2) in contrast to IX.–2:306 (Proceeds of the originally encumbered assets) paragraph (3) (cf. also Comment E above). Finally, (iv) VIII.–5:204(3) contains a special rule on *priority* which deviates from the general rule of Book IX, under which the time of the competing security rights becoming effective would be decisive (IX.–4:101 (Priority: general rules)). Under the said VIII.–5:204(3), a proprietary security right created under the Articles on production and combination takes priority over any other security right which has previously been created, by the producer or by the owner of the principal part, in the new or combined goods. See in more detail in the Comments to the named Article.

Proprietary security rights created by party agreement under paragraph (1) (paragraph (4) sentence 2). A security right may also be established by an agreement of the parties under the party autonomy rule of paragraphs (1) and (2) of this Article. For example, the parties may even agree on exactly the same consequences as provided by the relevant rule of Section 2, but wish to record this explicitly in their written contract document for the purpose of clarity. Such security rights established by party agreement will be subject to the rules of Book IX with just one exception, namely the special priority rule provided for by VIII.–5:204 (Additional provisions as to proprietary security rights) paragraph (3). The other exceptions applicable to the statutory security rights under Section 2, as listed in the previous Comment, do not apply. In particular, this means that (possession or) *registration* is required for achieving effectiveness as against third parties in any case where the security right is based on a party agreement. This choice may appear problematic to a certain extent where the party agreement provides exactly the same (or a more limited) security right as the default rule system of Section 2 would have provided in lieu of such agreement (and in which case registration would not be required). One may well argue that an owner of material who did foresee the possibility that production etc. could occur and was careful enough to regulate the property law consequences in advance, but "only" failed to register his security right, should not be put in a worse position than someone who did not even try to reach an agreement. However, the prevailing policy was agreed to be striving for completeness of the register, and reducing exceptions unless inadequate. In this perspective, someone who did foresee the possibility of production (etc.) and even established an agreement as to the proprietary consequences may be regarded less worthy of protection than material-owners in the situations for which the rules of Chapter 5 are designed primarily, i.e. where the owner of material did not even consent to the production or combination . A certain disadvantage for the owner of the material is that registration of a security right requires costs and some efforts. However, registering the security right will be of benefit for the owner of the material as well, as this makes it more difficult, or even impossible, for third parties to acquire the product free of encumbrances in good faith. The same distinction between security rights created under Section 2 of this Chapter and security rights created by party agreement is repeated in IX.–2:307 (Use of encumbered goods for production or combination) paragraph (3).

F. Relation to Book VI on non-contractual liability for damage (paragraph (5) sentence 1)

General: Book VI always applicable in addition. Paragraph (5) sentence 1 makes clear that the owner of material can, in addition to the rights granted by Chapter 5, also resort to the rules on non-contractual liability for damage under Book VI, provided that the requirements set out there are fulfilled. The main requirement is that the person causing a legally relevant damage acted intentionally or negligently. The rule corresponds to a virtually unanimous approach in the European legal systems, which practically serves an important supplementary function in relation to the consequences provided by the rules on production, combination and commingling: A co-ownership share proportionate to the value of the respective material may, depending on the circumstances, not cover all losses the owner of the goods had. Also, a claim for compensation of the market value, whether secured by a security right or not, may be less than the damage this owner actually sustains; see Comment F below for examples. Applicability of Book VI also serves an important function of pursuing justice, as liability is placed where negligence (or even intention) occurred, but where the property law rules provided by Chapter 5 do not, or only partly, react thereto. The working group preparing Book VIII would even have much sympathy for keeping any distinction as to the parties' good faith or bad faith outside the property law level and outweigh these issues by application of Book VI. In that, issues with a potentially high affinity for disputes could be kept out of property law to the benefit of legal certainty and the marketability of products. But see the exceptions for effecting production or combination in a specifically qualified grade of bad faith in VIII.–5:201 (Production) paragraphs (2)(b) and (3) and VIII.–5:203 (Combination) paragraph (3) with VIII.–5:201 Comment E and VIII.–5:203 Comment F.

Examples. Paragraph (5) sentence 1 is of main importance where Book VI is applicable in addition to the default rules of Section 2 (it may, however, also be relevant where the parties have regulated the proprietary consequences of production, commingling or combination by party agreement, but something goes wrong in whatever relation). Additional loss which is not recoverable under the rules of Section 2 themselves may be sustained in different respect: Especially where co-ownership emerges proportionate to the value of the respective parts at the moment of commingling or combination, the value represented by these shares may be lower than the market value of each single contribution if the result is less valuable than the added values of the single contributions. Where, in such a situation, one party (or a third person) caused the commingling or combination intentionally or negligently, the difference in value can be claimed from that person based on Book VI.

Illustration 16
Each A, B and C own a quantity of 5.000 tons of oil. Without being entitled to do so, D puts these quantities in his tank containing also 5.000 tons of oil owned by himself. A, B, C and D will become co-owners each of one fourth of the whole quantity under VIII.–5:202 (Commingling) and each of them can separate 5.000 tons of oil under that rule. But suppose the quality of D's oil was lower than the quality of the other quantities, and therefore the value of the 5.000 tons which A, B and C can separate from D's tank is lower than the value of their original quantities. Or, D's tank is contaminated and the value of the oil placed there decreases for this reason. Then, A, B and C can recover their additional loss from D under the rules on non-contractual liability for damage under Book VI.

In commingling cases like the one in *Illustration 16*, additional loss recoverable under Book VI may also consist of costs incurred for separating the corresponding quantity from the mass or mixture, and transportation costs for returning the quantity from the place of commingling, if relevant. Eventually, also reparation in kind in the sense that the person who negligently caused the commingling must separate the quantities and restore them to the original owners may be demanded under VI.–6:101 (Aim and forms of reparation) paragraph (2). The same principles will apply where a "combined" entity does not fall within the combination rule because its constituents can still be separated in an economically reasonable way in the sense of VIII.–5:203 (Combination) paragraph (1). Here, also damage (including a mere diminution in value) sustained as a result of dissembling is recoverable.

An owner of material used for production, or the owner of a subordinate part used for combination, may sustain additional loss for instance in connection with procuring substitute goods. Their price may have increased after the moment of production or combination, or additional transportation costs etc. must be incurred for obtaining substitutes.

G. Relation to Book V on benevolent intervention in another's affairs (paragraph (5) sentence 2)

General. Book V on benevolent intervention in another's affairs may apply to a very wide range of completely different situations, which have in common, though, that the "intervener" acts with the predominant intention of benefiting another. It provides specific duties and specific rights of such interveners, basically built upon a common policy of providing incentives to act and to render assistance where there seems need for help, in contrast to promoting an attitude of "looking the other way". Situations where these policies call for application may also arise within the scope of Section 2 of this Chapter, if a benevolent intervener involves another's goods in production, combination or commingling. It is obvious that the policies of Book V and the specific motivation of the acting person should in some way affect the outcome and that the particularities of such cases may require different results than would be achieved under Section 2 of this Chapter. It is, however, not that simple to draw an exact line of how far such interferences should go. The general approach taken by paragraph (5) sentence 2 is that the rules of Book V "have priority" over the provisions of Chapter 5. This means that Section 2 of Chapter 5 is not necessarily replaced altogether. Its rules may partially remain applicable, depending on whether the two sets of rules and their underlying policies are compatible with regard to the individual case, or not. Where and to the extent they prove incompatible, Book V will supersede. For a closer analysis, it will be useful to distinguish between a level of obligations and corresponding rights on the one hand, and a level of property law on the other.

Obligations and corresponding rights arising from production, commingling or combination. As far as obligations arising from the events covered by Section 2 are concerned, it is quite evident that the principles of Book V should supersede the respective rules of Section 2. This may, in particular, be relevant in combination cases where the benevolent intervener inseparably adds "subordinate parts" to the "principal part" owned by the principal, as VIII.–5:203 (Combination) paragraph (2) sentence 2 would "only" grant compensation under the unjustified enrichment principles. The unjustified enrichment approach taken in that rule implies attributing a risk on the acting person (see below, VIII.–5:203 Comment D)), whereas the rules of Book V tend to stimulate benevolent acts by limiting the risks following from such an intervention. Whether or to what extent a benevolent intervener has any right to indemnification, reimbursement or even remuneration should,

therefore, exclusively decided by the rules of Book V Chapter 3. They do, therefore, take priority over VIII.–5:203(2).

Illustration 17
P's boat, which is tied in a remote small harbour, is heavily damaged by a storm. I, who passes by when looking after his own boat, realises that P's boat is about to sink and provisionally repairs it with his own material, intending to prevent the owner of the boat from a major loss. Suppose there was no possibility to contact (perhaps not even to identify) P in advance and the material cannot be separated (in an economically reasonable way) later. The situation potentially falls within VIII.–5:203 (Combination) (VIII.–5:201 (Production) is not relevant since no "new goods" are created). Under paragraph (2) of VIII.–5:203, P will remain the owner of the (repaired) boat including I's material. This proprietary result perfectly fits with I's intention, so no conflict between Chapter 5 of Book VIII and Book V occurs. However, regarding the calculation of monetary claims the intervener I may have against P, Book V shall take priority and exclusively decide these issues. P shall not be entitled to resort to any defences which might be applicable under unjustified enrichment law, such as under VII.–6:101 (Disenrichment). This will not only apply in relation to the material I used for repair, but also with regard to the work he performed in the course of his intervention.

Property rights arising from production, commingling or combination. A more difficult issue is whether or to what extent the principles of benevolent intervention may also affect the proprietary consequences Section 2 of Chapter 5 would otherwise establish. There are basically two options. The first option is leaving all property law matters exclusively to Section 2 of this Chapter and letting the principles of benevolent intervention come in only at a second stage. In a case like *Illustration 1* (see Comment B) above, where the intervener produces juice for another person from that person's fruits, this would mean that the intervener would acquire ownership in the juice pursuant to VIII.–5:201 (Production) and would subsequently be under an obligation to transfer ownership of the product to the other person under V.–2.103 (Obligations after intervention) paragraph (1). This may be the understanding in a couple of legal systems (however, the reservation must be made that detailed research in this area could not be carried out and the following proposal may not be seen as the result of a comparative synopsis, but rather as a contribution to further discussion). But in certain most probably quite limited situations such approach may appear as a detour which neither meets the interests of the parties, nor the policies of the relevant provisions, and therefore could be avoided. In the case of *Illustration 1*, for instance, it appears questionable why the intervener should become owner of the produced juice meanwhile: The material (fruits) is owned by the principal, the intervener does not intend to acquire the product and he has no sovereignty interests (see Comment H below and VIII.–5:201 Comment C) in the new goods he intended to produce for the principal. In a system where publicity (in the sense of providing trustworthy information as to a person holding goods in possession being their owner) is not intended to play a significant role (cf. VIII.–2:101 (Requirements for the transfer of ownership in general) Comment C and VIII.–5:201 (Production) Comment C) and more direct solutions instead of correcting proprietary results by means of the law of obligations are sometimes striven for, it may appear more suitable to simplify the solution also for this case. The effect of the benevolent intervention principles may, in this case, be described as rendering VIII.–5:201(1) inapplicable, so that ownership remains with the owner of the material, despite it being transformed into new goods. Note that there is no ownership right forced on someone, but the original ownership right (in the material) exceptionally survives the transformation into new goods in order to avoid a passing and re-transfer of

ownership. Situations where principles of benevolent intervention may take priority over the property law rules of Chapter 5 are, however, considered to be exceptional.

H. General policies pursued in Chapter 5 and relation to Book VII on unjustified enrichment

Main interests and basic policy of preserving proprietary equivalent for value of goods. There are typically two main interests involved in a situation of production, commingling or combination. They can be described as "value interests" and "sovereignty interests". The former means that each contributor, may he be the owner of goods involved in the respective process, or perform labour contributions, is interested in not being deprived of the value of his contribution. As two or more contributions are joined together and thus the result ideally forms an addition of the values involved, there is, in principle, no need to expropriate one party to the benefit of another. More specifically, however, the interest will be not only obtaining an equivalent to the value of one's contribution, but being provided protection for receiving such equivalent in the other party's insolvency. The other main interest is not primarily related to the value, but rather to the respective thing as such, its properties and function it may serve, due to these properties, for the person holding it. Such sovereignty interests will, originally, typically exist in relation to the material owned by each respective party. But these goods may cease to exist. After production, e.g., the new goods will primarily be of interest for the one who produced them, for instance where the new goods have been produced for the personal needs of the producer. Based on these interests, it is a basic policy of Section 2 to provide each party with a proprietary equivalent for the value of that part's goods. The aspect of prevailing sovereignty interests may be relevant for deciding on which proprietary consequences to adopt in detail.

Further policies regarding proprietary consequences. Further, it has been an aim to provide practically workable solutions in the sense that less efficient concepts are avoided where possible and the smooth flow of commerce with regard to the new entity is not obstructed. For instance, this has been an argument against co-ownership solutions in a couple of instances, because this requires a typically unwanted common administration of the new asset, time and efforts for dividing co-ownership etc. (cf. VIII.–5:201 (Production) Comment C; but see VIII.–5:202 (Commingling) Comments A and C). The aspect of "publicity", on the other hand, has not been an important guideline for developing these rules, although some results achieved in Section 2 may coincide with this idea.

Good faith or bad faith of parties involved. In a number of European legal systems the question of whether the parties, in particular the acting person in a case of production, were in good faith or in bad faith is material for the proprietary consequences of the event. For reasons to be discussed more closely below, the working group preparing Book VIII tried to avoid this and proposed to shift all issues of bad faith from the property law level to reparation under the principles of non-contractual liability for damage under Book VI, which is always applicable in addition to the present Chapter. It did, however, not fully succeed with this approach, and certain exceptions for a person effecting production or combination in a particular grade of bad faith, namely when actually knowing that the goods used are owned by another person and that this other person does not consent, have been imposed by the Study Group's Co-ordinating Committee. As a result, one may say that the model rules of Section 2, as they stand today, also imply a policy that a person in such "qualified" bad faith shall not acquire (sole) ownership of the new or combined goods benefiting from a criminal act. Closer

on these issues below, VIII.–5:201 (Production) Comment E and VIII.–5:203 (Combination) Comment F.

Policies regarding the calculation of monetary claims replacing a right of ownership. Despite there being a general aim of providing each owner of material with some equivalent for the value of the goods he may lose, there is certain room for calculating these claims replacing the former ownership right. Such margin exists, in particular, where the value of the resulting product is lower than the added value of all contributions. As the default rules of Section 2 mainly apply to situations where the owner of the relevant material did not consent to production, combination or commingling, there is a policy of placing the risk of economically inefficient production and combination on the person who effected the act. The calculation rules of VIII.–5:201 (Production) paragraph (1) and VIII.–5:203 (Combination) paragraph (2) are built upon this policy. See there for a closer discussion of this approach.

Relation to unjustified enrichment law. The unjustified enrichment principles of Book VII leave it to the property law rules to decide whether an acquisition of ownership under property law provisions "justifies" the acquirer's enrichment in the sense of VII.–2:101 (Circumstances in which an enrichment is unjustified) paragraphs (1) and (3), immunising the acquirer against claims under Book VII; compare VII.–2:101 Comment C. The clear decision underlying Section 2 of the present Chapter is that economically, each party should in general keep what it contributed, which means that where, e.g., sole ownership is conferred to one person as a result of production, the value of the other party's contribution must be returned to the latter. As mentioned in the previous Comment, however, Section 2 contains its own regime of monetary compensation which is deliberately chosen for certain policy reasons. In order not to undermine this approach, unjustified enrichment principles shall not be generally applicable in addition to Chapter 5, but only where the unjustified enrichment rules are regarded to fit appropriately to the policies of Chapter 5 and, therefore, this Chapter itself refers to Book VII on unjustified enrichment. See VIII.–5:201 (Production) paragraph (3) and VIII.–5:203 (Combination) paragraph (2). Differences between the unjustified enrichment approach and the "equal to value" approach are discussed in VIII.–5:201 Comment D.

Section 2: Default rules and supplementary provisions

VIII.–5:201: Production

(1) Where one person, by contributing labour, produces new goods out of material owned by another person, the producer becomes owner of the new goods and the owner of the material is entitled, against the producer, to payment equal to the value of the material at the moment of production, secured by a proprietary security right in the new goods.

(2) Paragraph (1) does not apply where:

(a) the labour contribution is of minor importance; or

(b) the producer knows that the material is owned by another person and that the owner of the material does not consent to the production, unless the value of the labour is much higher than the value of the material.

(3) In the cases covered by paragraph (2) and in cases where no new goods are produced, ownership remains with the owner of the material or, where there is more than one such owner, the attribution of ownership is determined by application of VIII.–5:202 (Commingling) or VIII.–5:203 (Combination). The person contributing labour is entitled to the reversal of any enrichment subject to the provisions of Book VII. For the purposes of this paragraph, VII.–2:101 (Circumstances under which an enrichment is unjustified) paragraph (1)(b) does not exclude the entitlement of a person contributing labour to a reversal of the enrichment.

COMMENTS

A. General

Overview. Production in the sense of this Article probably is the most important category of the default rules provided by Section 2. The rule applies where a person, the producer, performs labour on goods owned by (at least) one other person and this results in the creation of "new goods". As an additional requirement for the production rule to apply, the labour contribution must be of more than "minor importance". As to the differentiation between the three categories production, commingling and combination, see VIII.–5:101 (Party autonomy and relation to other provisions) Comment B. Note that the provisions on production, commingling and combination regulated in Section 2 are default rules and do not apply where the parties have regulated the consequences of these events by agreement; see VIII.–5:101 paragraphs (1) and (2) and Comment D on that Article. Also note that production involving goods subject to a retention of ownership device is governed by Book IX which, however, refers back to Chapter 5 of this Book to a considerable degree; cf. VIII.–5:101 Comment E.

Terminology: production. The term "production" has been chosen for the simple reason that "processing", which in general may be used synonymously, is already used, in a different meaning, by the principles in Chapter 4 of Book IV.C on services contracts. Processing within the meaning of Book IV.C covers services performed on an existing (*inter alia*) movable thing, in particular where the service provider undertakes to repair, maintain or clean existing goods (cf. IV.C.–4:101 (Scope)), whereas under the present Article, the creation of new goods is characteristic. "Production" should, however, not be understood to be restricted to industrial or other professional production. It applies to all situations where goods of one person are transformed into new goods by labour performed by another.

Structure of this Article. Paragraph (1) of this Article contains the main rule for production: the requirements for this rule's application (supplemented by the negative requirement that the labour contribution must not be of mere minor importance, paragraph (2)(a)) and the consequences of production on the property law level (acquisition of ownership by the producer, creation of proprietary security rights for the owners of material) and on the level of obligations (material-owner's right to payment). Paragraph (2)(b) provides for an exception from the general production rule for thieves and similar cases, namely where the producer actually knows that the material is owned by another person and that this other person did not consent to production. Paragraph (3), finally, regulates the proprietary and obligatory consequences for all cases excluded from the general rule of paragraph (1). With regard to contributions consisting of material, paragraph (3) partly refers further to VIII.–5:202 (Commingling) and VIII.–5:203 (Combination). Regarding the "producer's" labour contribution, reference is made to unjustified enrichment law. As to the proprietary security rights created under paragraph (1), supplementary provisions are regulated by VIII.–5:204 (Additional provisions as to proprietary security rights).

Comparative background and main policy issues. In most European legal systems, application of the rules on production presupposes that "new goods" have been produced from another person's material. In most countries, the producer acquires sole ownership in the product, provided that a certain ratio between the value of his labour performance and the value of the original material is exceeded. This ratio however varies, so that in some jurisdictions, the producer only acquires ownership of the product if his labour contribution was clearly more valuable than the other party's material; or each time the value of the labour contribution exceeds 50 % of the new goods' value; or always unless the value of the material was clearly higher. Where sole ownership of the producer emerges, the owners of the material have, with certain differences in detail, a right to compensation for the value of their goods. In a small minority of countries, on the other hand, the general rule is that the producer and the owner(s) of the goods become co-owners of the product. Considerable differences also exist with regard to the question how to treat a producer who acted in bad faith. In a couple of jurisdictions, this has no effect on the level of property law; sometimes the judge can establish a different solution, sometimes the law is unclear or doubtful. In some countries, a producer in bad faith can, as a rule, not acquire ownership of the product, and in some of them he will not even get compensated for the value of his labour performance. In some countries, a certain party (e.g. the owner of material in case the producer acted in bad faith) can chose whether to acquire ownership of the product or to leave the right of ownership to the other party and demand compensation of the own contribution. Against this background, the main policy issues apparently are how to distribute the property rights in the new product and how to meet the material-owner's value interest adequately when taking into account the producer's sovereignty interests (cf. VIII.–5:101 (Party autonomy and relation to other provisions) Comment H). Also, it is important to decide whether or to what extent it shall be relevant if the producer acted in bad faith. As to details, there are choices to be made regarding the calculation of the monetary compensation an owner of material may demand if he loses his right of ownership to the producer.

B. General requirements for application (paragraph (1) and paragraph (2)(a))

Conjunction of labour and another's goods; priority over commingling and combination. As mentioned above, production in this sense occurs where new goods result from a "conjunction" of labour performed by one person and material owned by another.

Where, at the same time, the requirements for VIII.–5:202 (Commingling) or VIII.–5:203 (Combination) are fulfilled, the present Article on production takes priority.

> *Illustration 1*
> P, a modern artist, creates a sculpture from Lego bricks owned by A, B and C without their consent. The Lego bricks all look the same so that it is unclear which bricks were taken from A, B and C, respectively. The sculpture could easily be taken apart without damaging the bricks and a quantity equivalent to A, B and C's contributions could easily be restored to them. Nonetheless, VIII.–5:201 (Production) takes priority over VIII.–5:202 (Commingling).

On the other hand, if a case involves labour contributions, this does not automatically mean that the production rule applies. Where work is performed, but either no "new goods" are created or the labour contribution is only of "minor importance", the present Article refers further to VIII.–5:202 (Commingling) and VIII.–5:203 (Combination), or, in case there just has been one other owner of material involved, that person will remain being the owner of his material. See also VIII.–5:101 (Party autonomy and relation to other provisions) Comment B.

Material. The term "material" is used synonymously to "goods" and corresponds to a quite traditional terminology in many legal systems. However, the main reason for using another notion than "goods" simply is that the rule also speaks of "new goods" in the sense of the result of production, and referring to "goods" in two different meanings has been avoided for the sake of easier understanding. Anyway, "material" must be movable material at the beginning of the transformation process. Quarrying out stones from a rock is, therefore, not covered by the present Chapter. This corresponds to the scope of the whole Book VIII.

Goods owned by another person – production involving own goods. The wording of paragraph (1) only addresses situations where the producer uses goods owned by another person. In practice, it will often happen that the producer *also* uses some own material. However, paragraph (1) does not cater to this situation because in that respect, no change of property takes place and no obligation of the producer to compensate for the value of the goods arises as against himself. The rule implies that the producer who also uses own material, or of course also if he uses solely own material, will be the owner of the product as well, but there was seen no need to spell this out explicitly. This principle also applies where the producer has stolen some of the other material (or at least knows that he does not own it and that the owner does not consent), so that the exception under paragraph (2)(b) and paragraph (3) applies: The producer will always be treated as an owner in relation to those goods which are really owned by himself (as to the application of this principle to cases covered by paragraph (3) of this Article, see also Comment F below).

Labour. "Labour" (or "work", which could be used synonymously in this context) is intended to be understood in a wide sense. It comprises actual workforce of a natural person as well as work performed by machines for a certain person. It is also intended to cover preparation activities, as long as they relate to the particular activity of production, like planning a production process or developing and designing the future product. As in some areas these preparation costs can be much higher than the efforts for manufacturing in the physical sense, all such expenditures are to be taken into account when assessing whether or not a labour contribution is of "minor importance" in the sense of paragraph (2)(a), i.e. when deciding whether the production rule of paragraph (1) is applicable. The threshold function of paragraph (2)(a) also shows that it is appropriate to explicitly define the producer's labour

contribution as a criterion for production in the sense of this Article. This is not completely obvious from a historical and comparative perspective, as in some legal systems (e.g. English and Irish law and also Roman law, which is quite important as it widely serves as a common foundation in this area), "specification" (production) is defined rather by emphasizing a fundamental change in substance (i.e. a result) than by (also) stressing another person's labour contribution. The present Article, however, is based on the idea that a contribution made by the producer (i.e. the labour) is "transformed" into a proprietary right.

Producer. It is not easy to give an exact definition of who is to be regarded as "the producer" in the sense of this Article. This does not necessarily have to be the person who undertakes the physical acts effecting the transformation from the original material to the "new goods"; rather one may say that the producer will be the person, whether natural or juristic, in whose name and on whose account the relevant acts are undertaken, although this also may be imprecise. In the end, this must be decided according to the common opinion, applying an objective perspective and taking into account the facts of the individual case. For instance, where employees, in the course of their employment, create new goods from material owned by someone else than their employer, the employing enterprise will be regarded as "the producer" in relation to the owner of the material. This also means that if the owner of the material seeks to regulate the consequences of production by party agreement, he must contract with the employer (and of course does not have to enter into contractual relationships with each single employee who may be involved in the production process). Where a buyer subject to a retention of ownership device transforms the goods into something new, he (and not the supplier) will be regarded as the producer in the sense of this Article. IX.–2:308 (Use of goods subject to a retention of ownership device for production or combination), which is primarily applicable due to the reference in VIII.–5:101 (Party autonomy and relation to other provisions) paragraph (3), refers back to the present Article. If, which may happen theoretically, more than one independent producers act together in the production process, they will usually do so on the basis of a contractual agreement based on which it will be possible to decide who is to be regarded as "the producer" in relation to the owners of the material. Where this is not the case (and all the labour contributions, counted together, are of more than minor importance), the suggested solution is applying VIII.–5:203 (Combination) by way of analogy regarding the internal relation between the producers. Accordingly, if one labour contribution constitutes a "principal contribution", this producer shall acquire sole ownership and the other shall have a right to payment, secured by a proprietary security right. If not, they can become co-owners. An alternative would be to let all producers acquire co-ownership in any case, but it practically seems preferable to achieve a simpler and more efficient solution (in the sense of avoiding practical difficulties which may follow from co-ownership solutions) also in this case.

New goods, general. Paragraph (1), under which the producer acquires sole ownership in the product, requires that the result of different persons' labour and material are "new goods". In principle, this requirement appears unanimously in virtually all European legal systems. To a certain degree there are, however, different views expressed as to which criteria shall be decisive for constituting "new goods". Despite these uncertainties, which perhaps can never be fully avoided and will also appear in relation to the present Article, it is evident that the requirement fulfils an important function and, therefore, is also adopted in this Article: it constitutes a borderline for labour contributions to be transformed into proprietary rights. There are also other borderlines under the present Article, in particular the requirement that the labour contribution must not be of mere minor importance. But the latter has a somewhat different scope, focussing on the producer's contribution as such, while the "new goods"

requirement addresses the quality of the product as compared to the quality of the material. For a number of instances, no changes in the proprietary position shall be effected irrespective of the value of the work performed. In particular, the "new goods" requirement has the consequence that maintenance activities or mere reparation of existing goods are excluded from the production rule (e.g. restorations of works of art).

Criteria relevant for constituting new goods. Taking into account the difficulties arising everywhere when trying to define the requirement of "new goods", these model rules do not attempt to provide a definition in the black letter text. Rather, a number of criteria, taken from the comparative survey, is listed in the following for the purpose of illustrating what *may* be relevant in the present context. The following overview does not intend to be conclusive, nor does it intend to provide any weighting of the named criteria. Fulfilling only one of these criteria may, in a particular case, suffice to constitute new goods, whereas it may also happen that a certain criterion is clearly fulfilled and the constitution of "new goods" must nevertheless be denied. In the end, the common opinion will be decisive. Relevant criteria evidently overlapping each other to a certain extent may be:

(i) *Change in form, external appearance or design*. Such a change often indicates that new goods are created.

> *Illustration 2*
> Grapes are transformed into wine. A wedding gown is made from silk.

These criteria, however, do not necessarily have to be decisive: There are cases where the form does not change, though a new thing is created. This is especially the case for liquids.

> *Illustration 3*
> Water and oxygen are put together to create hair bleach (hydrogen peroxide), which is a new product, but the form is still the same (liquid).

On the other hand, also opposite cases may occur, namely where the form changes but no new movable is created.

> *Illustration 4*
> A gold ingot has been melted to a gold nugget. Though the form is different, no new thing has been created. The production rule may also be inapplicable because the "labour contribution" is of minor importance.

(ii) *Change of function or usage*. Where the result is able to serve an independent function or usage as compared to the original material, this will also indicate that the entity constitutes "new goods" in the sense of this Article.

> *Illustration 5*
> Timber is transformed into furniture.

(iii) *Change in essence or character*. A considerably changed "essence" or character of the new asset as compared to the material also indicates "new goods".

Illustration 6
A motor cycle is assembled from individual components in a way that the result is considered a unique model which needs a special authorisation from the Technical Inspection Agency. The novelty of the result may be approved because the economic impact of the produced asset is, compared to the raw materials, totally different.

Illustration 7
A picture painted on another person's canvas. A sculpture made from marble.

(iv) *Change of name*. Also a new name may serve as an indicator for a change in essence. *Illustrations 6* and *7* may also serve as examples in this respect.

(v) *Increase in value*. A mere increase in value, even where the value is greatly increased, should not necessarily make "new goods", but the value criterion may be used as one possible factor among others. As in some legal systems where this criterion is used, the aspect of a considerable increase in value should mainly be applied where solely recurring to other criteria would remain doubts whether the change was "fundamentally enough".

Exclusion of labour contributions of minor importance, paragraph (2)(a). Even where "new goods" are created, the production rule of paragraph (1) of this Article shall not apply if the labour contribution was only of "minor importance". The underlying idea is that, taking into account that applying paragraph (1) leads to the acquisition of sole ownership by the producer, providing a certain minimum level in order to allow the labour contribution triggering consequences in property law has been considered adequate. As briefly mentioned in Comment A above and reflected in more detail in the Notes on this Article, a certain threshold in relation to the labour contribution's value is also provided for in addition to the common "new goods" requirement in many European legal systems. But these national rules often mean a threshold of, or of about, 50 % of the value of the final product, which is definitely not intended by the present Article. The function, in fact, is a different one. Whereas the traditional approach in the (vast majority of) national legal systems is that the producer, provided the relevant threshold is exceeded, shall acquire sole ownership while the owners of the material are left with a mere obligatory right to compensation and therefore will remain unprotected in the producer's insolvency, the model proposed by the present Article takes care of the material-owners' value interests in any case by providing them with a proprietary security right in the product. The threshold rule, therefore, does not have to balance "black or white" alternatives in the sense that one party runs the risk of losing about half of the value of the new goods; it really is intended to provide a minimum level, the starting point in fact having been to exclude "1 % labour contributions" from the scope of the general production rule. A certain flexibility must however be left to the courts when applying a rule like this. Although a fixed percentage is deliberately not provided, it is clear that the importance of the labour contribution must be very low for the exception in paragraph (2)(a) to apply. It should also be clarified that not only value may matter (which is reflected in the neutral word "importance"). Also the grade of change from the original material to the final product may be taken into account when applying this rule, taking into account that the material-owners' sovereignty interests will typically decline the less this party could use the product due to the transformation and change of function it underwent.

Low importance of labour contribution, but producer uses own material in addition. Where the labour contribution's importance is rather low so that it is doubtful whether the "minor importance" test would be passed but the producer also used own material in the

course of production, one may think of taking this into account in favour of the producer. Such an approach may be advocated by the argument that the production rule of this Article and the combination rule of VIII.–5:203 (Combination) paragraph (2) are based on somewhat comparable ideas, so that the importance of labour contributions and material contributions may eventually be added in order to exceed the borderline for acquisition of sole ownership.

Increase in value no separate requirement. In some countries it is disputed whether the application of the production rule requires that the "new goods" are more valuable than the original material. In case of production, an increase in value will regularly take place (cf. also Comment B above as regards the concept of "new goods"), but there seems to be no substantial need for adopting that as an additional requirement. The most important aspect is that cases where "production" exceptionally leads to a *decrease* in value can be solved adequately. In fact, there exist a number of vehicles to avoid inappropriate results: In some cases, the "new goods" requirement will prevent a change regarding the ownership of the material, namely where the common opinion considers the result of the labour process, to which material X was subject to, as "damaged or destroyed X" and not as a new product Y. This will, in particular, be the case where the intended production fails completely. In some other situations, the exception for labour contributions of "minor importance" may help. In both cases, the person effecting the transformation will not acquire any ownership at all; the consequences are further regulated by paragraph (3) of this Article. Where none of these exceptions applies, paragraph (1) safeguards that the material-owners' claims for payment, each of them secured by a proprietary security right, "eat up" the whole value of the product, so that, economically, nothing is left for the producer, despite he formally acquires ownership (which still may make certain sense in view of his prevailing sovereignty interests, e.g. because he is a market participant in the respective area and may be best able to sell the product). The principles of non-contractual liability for damage will be applicable in addition, cf. VIII.–5:101 (Party autonomy and relation to other provisions) paragraph (5).

No requirement that restoration to the status quo ante must be impossible or economically unreasonable. Unlike VIII.–5:202 (Commingling) and VIII.–5:203 (Combination), the production rules in most European legal systems do not require that restoration of the "new goods" to the *status quo ante* must be impossible or economically unreasonable. The present draft follows this approach. There is of course a common understanding that undoing a production process would typically be economically inefficient. As the value of the labour contribution would necessarily be destroyed completely, the total value after restoration would most often be considerably lower than the value of the product. One may put this argument also in terms of equal treatment of the contributors: In case of restoration, the producer would not receive anything. While the owners of the material would get their material back, the work performed cannot be reversed. The processor would, therefore, not be treated equally to the owners of the material. It is, therefore, evident that from the producer's point of view, any rule preventing restoration to the *status quo ante* seems preferable. From the material-owners' perspective, of curse the contrary may be true. However, under the present Article's solution, the owners of the material will always be secured, with proprietary effect, equal to the value of their material. Any additional loss may, provided the relevant requirements are fulfilled, be recovered under Book VI on non-contractual liability for damage.

C. Proprietary consequences (paragraph (1))

General. As mentioned above, most European legal systems provide for acquisition of ownership by the producer, the owners of material being compensated by some (obligatory)

claim for monetary compensation as against the producer. A small minority of countries provides for co-ownership of the producer and the owners of the material. The following comments will first discuss different options available, taking into account the typical interests involved, namely value interests and sovereignty interests, and the aim of providing workable and efficient solutions (cf. VIII.–5:101 (Party autonomy and relation to other provisions) Comment H). This will not only involve models already existing in Europe, but extend to further options which are not implemented in any legal system today. The issue how to deal with producers who act in bad faith will, following the structure of the proposed Article, be discussed in Comment E below.

(a) Options

Sole ownership of the producer, owners of material being awarded an obligatory claim for compensation. This solution is the most wide-spread one in Europe. The main advantage typically pronounced in this context is that this approach takes care of the producer's interests in the best way. As already mentioned, the producer may have an interest in the new goods not only for the capital he invested (the value of his work), but also for sovereignty interests. The latter will typically apply where new goods are produced for the personal needs of the processor. Where, e.g., timber is used for manufacturing furniture specifically shaped and designed for being placed in the producer's house, no one will have better use of it than the producer. Perhaps, no one may even have *any* use of it except the producer, depending on the individual circumstances. The sovereignty interests' argument is not equally applicable where the producer manufactures on a massive scale with the intention to sell the products. Certainly, the producer has an economic interest regarding the value of his work also in this case, but so have the owners of material. Typically, however, the argument of sovereignty interests will still be applicable in a certain modified sense as a professional producer will have experience and access to the relevant market to distribute the new goods and may, therefore, achieve good prices without incurring ineffective costs (such as, e.g., employing an agent for selling off the new goods). (The latter argument could, of course, also be used in favour of a rule creating co-ownership between the producer and the owners of material, as long as marketing the products is organised by the producer, since the marketing abilities could then also be of benefit for the other co-owners. But that might raise other difficulties.) The owners of the material, on the other hand, are typically said to have no genuine interest in the new goods as such, but only an economic interest in the value of their material, which could be safeguarded by an obligatory claim for compensation. Where this claim for payment (however to be calculated) is a mere obligation, however, this solution has the obvious disadvantage (from the material-owner's perspective) that it does not provide any protection in case the producer (the new owner) goes bankrupt. It should be observed that the rules of Chapter 5, in particular, cover situations where production (etc.) takes place without consent of the owner of the material, so that the owner of the material may have had neither the chance to evaluate the risk of the other person's insolvency, nor to take precautions. In that respect, production might in fact result in an "expropriation".

Another basic advantage of a solution providing sole ownership to the processor can be seen in its simplicity. It is argued to promote legal certainty for the parties involved as well as for subsequent buyers or "commerce" in general, and to be favourable in terms of guaranteeing low information costs for third party acquirers as to the fact of who is the owner. However, such assessment is not necessarily correct, depending on the detailed shape of the applicable rule and on the circumstances of the individual case. It depends on the particular content of the rule in the sense that it may make a major difference whether it is necessary that, e.g., the value of the labour must exceed the value of other persons' material (which, approximately, is

the case in many countries, cf. Comments A and B above), or the producer becomes sole owner irrespective of his own contribution's importance. The value ratio and the fact who owned which material are typically hard to identify for a third party interested in obtaining rights in the product. Also, it may generally be observed that possession does not necessarily converge with a proprietary entitlement; but as long as the law provides that the producer acquires (sole) ownership, this problem will typically be of reduced relevance. However, the whole argumentation is considerably put into perspective since under these model rules, the effects of production, commingling and combination may generally be determined by party agreement; see VIII.–5:101 (Party autonomy and relation to other provisions) paragraph (1).

A definite advantage of sole ownership, as compared to co-ownership solutions, is that no separation of co-ownership must take place, which may save time, negotiation efforts and costs. On the other hand, a clear disadvantage of a mere sole ownership solution, in particular if the value of the work must exceed about 50 % of the product's value, would be that a certain degree of arbitrariness in borderline cases cannot be denied.

Sole ownership (or co-ownership) of material-owner(s), producer has obligatory claim for compensation. Vice versa, it would of course also be possible to neglect the producer's contribution completely and to let the owner of the material become sole owner of the product or, in case goods of more than one owner are involved, provide co-ownership of the material owners. This is, in fact, the solution in many countries where the certain threshold of the labour contribution's importance (usually approximately 50 % of the product's value) is not exceeded. Obviously, the producer's sovereignty interests would not be served by such a solution, and his interests in relation to the value of his labour contribution will if the owner is under a mere obligation to pay an equivalent to that value be taken care of (only) if the owner of the material is not insolvent. The ownership relations would regularly not be identifiable easily for third parties and whether sole ownership, which at least has the advantage of simple administration, emerges would depend on whether the producer uses material of just one or of more than one other persons. This brief summary already shows that this solution perhaps should be avoided if another solution catering for the involved interests adequately can be applied, or where there exist serious reasons for prohibiting an acquisition of ownership by the producer (e.g. because he has stolen the material).

Co-ownership of producer and owner(s) of material. Co-ownership of the producer and the owner, or owners, of the material is provided by a minority of European legal systems. Under this approach, each contribution is transformed into, and represented in, a proprietary right in the new goods. Accordingly, such solution has the advantage of being a "fair" one as between the contributing parties in terms of their respective value interests. Nothing is taken away from the producer; all contributors are treated alike. In particular, each contributor is protected in any other contributor's insolvency. Sovereignty interests in the sense discussed above, on the other hand, are not that efficiently catered for. One person, the producer, may wish to use the product (or to sell it in the course of his business), which is not completely prohibited by the co-ownership concept, but will require an agreement of all co-owners or, at least, a majority of them. In principle, co-ownership requires common administration under the relevant provisions of national law (administration issues not being dealt with in these model rules), which makes this solution somewhat more complicated. Also, determining the co-owners' undivided shares may be difficult in practice, at least if the value of the production activity is hard to determine under the relevant rules. Where this is the case, the co-ownership solution may lead to some uncertainty between the contributing parties as well as for third parties, and, if so, may provoke an additional risk of disputes, or investigation costs for third

parties. Disputes as to the proportions of the undivided shares may of course cause a number of consequential difficulties.

Also, it is clear that co-ownership will regularly be an interim stage. The parties will strive for either acquiring sole ownership in the product, or having it sold and receiving an equivalent amount of money. This implies a certain disadvantage of the co-ownership solution as compared to sole ownership, as the process of division may be time-consuming and may cause additional efforts. Under the relevant national rules on co-ownership, division of co-ownership will regularly be possible if the parties so agree, or may be effected in court proceedings. Both may take a long time and require additional costs. Negotiations may be blocked by certain co-owners who try to stipulate for a higher price than there contribution would actually be worth.

Another problem is that co-ownership may complicate selling the asset to a third party and thus constitute a certain impediment to commerce. Each co-owner can only transfer his or her own undivided share, which, from the buyer's perspective, is regularly less attractive than acquiring sole ownership. To acquire full ownership, the third party must negotiate with all co-owners, which may result in additional transaction costs. It also implies the risk that one co-owner refuses to transfer his share. If so, or if one of the co-owners tries to negotiate for an inadequately high price, selling the asset may be postponed until co-ownership gets divided, which may be regarded inefficient. Actually, this may cause the product to be economically "blocked" from the market for a certain while.

Co-ownership and right to buy out. The further alternatives are, in a way, variations of, or compromise solutions between, the main concepts discussed above. One option could be starting with a broad co-ownership approach, but providing the producer a right to "buy out" the other parties' property rights. As soon as the producer pays, the respective material-owner's share accrues to the producer. This would combine the proprietary protection of the material-owners' value interests as achieved by the co-ownership concept with a possibility to meet the producer's sovereignty interests. Also, some of the practical disadvantages of co-ownership (like common administration of the new goods) could be minimised if, and as soon as, the right to buy out is exercised. In principle, the right to buy out would serve the function of providing a simplified and accelerated means of dividing co-ownership. However, these theoretical advantages can be practically limited or even be undone if disputes arise as to the calculation of the compensation to be paid to the material-owners. As long as such disputes are not settled or decided upon, no one can say for sure whether paying a certain amount is sufficient to extinguish the other party's co-ownership right. In that respect, this concept does not differ so much from the ordinary co-ownership model under which it would (also) be necessary to reach an agreement as to the division of co-ownership. Of course no simplification would be achieved if the producer does not even intend to exercise the right to buy out. Also, one would have to provide regulations on how long such a right may be exercised etc.

Rights to choose. Further alternatives consist in providing a certain party, or several parties, with a right to chose whether to acquire ownership in the product or to let this party's property right accrue to the other party for a monetary compensation. In the initial stage, co-ownership of all parties involved will be the appropriate starting point. If the right to choose is placed on the producer, this will equal the "right to buy out" model described above. Other right to choose concepts are provided in some countries where the producer acted in bad faith. Then, the right to choose is placed on the owner of the material. This may work pretty well where

just one owner of material is involved, but can cause difficulties where there are more of them. One owner of material may, for example, be interested in acquiring sole ownership in the product because he intends to use it in a certain way. But if thereafter another owner of material also opts for "ownership", the solution must probably be that co-ownership between these two is created; the original motivation of the first material-owner will be frustrated.

Sole ownership of the producer and proprietary security rights for the owners of material. This option, which has finally been favoured, will be discussed below in the subsequent Comments.

(b) The proposed solution: sole ownership of the producer and proprietary security rights for the owners of material

How the concept works. The solution proposed in these model rules does, as such, not exist in any European legal systems today. Nevertheless, it is suggested as a model taking care of the different interests adequately and avoiding certain disadvantages of other options which have been discussed above. The concept works as follows: Upon production, the producer acquires sole ownership of the new goods, which corresponds to the majority approach in Europe. At the same time, the owner(s) of material acquire an obligatory claim for payment to be calculated according to rules discussed below in Comment D as against the producer. This, in essence, is also nothing new. The specific additional aspect is that this right to payment is secured by a proprietary security right in the new goods, which is created by operation of law at the moment of production. In principle, this proprietary security right follows the provisions of Book IX on proprietary security rights, unless provided otherwise by Section 2 of this Chapter (cf. VIII.–5:101 (Party autonomy and relation to other provisions) paragraph (4) sentence 1). The security right created under this Article constitutes a statutory security right in the sense of IX.–1:101 (General rule) paragraph (2)(c), which states that the provisions of Book IX also apply, with appropriate adaptations, to "security rights in movable assets implied by patrimonial law, if and in so far as this is compatible with the purpose of the law"; see IX.–5:101 Comment E. For further details as to this proprietary security right, see Comment C below and VIII.–5:204 (Additional provisions as to proprietary security rights), which supplements the Articles on production and combination.

Reasons for choosing this model. The proposed concept combines a number of advantages of the options discussed above, while avoiding the disadvantages as far as possible. In the first place, it serves the processor's sovereignty interests as discussed *supra* in Comment C. At the same time, it takes care of the material-owners' value interests by providing not only a right to payment equivalent to the value of each material contribution, but also protection in the producer's insolvency due to the proprietary security right. An expropriation effect (in an economic sense) is thus avoided. This idea is regarded a main policy consideration underlying the proposed concept. Also when focussing on the relation between the owners of the material and the producer's general creditors, each side basically keeps what it had (the value of the goods, or workforce, respectively). The producer's general creditors are restricted to their debtor's contribution, i.e. what is left after economically subtracting the protected values of the former material-owners. They do not benefit disproportionately high from the coincidence (seen from their perspective) of the producer involving other persons' goods in a production process.

It is considered to be positive that safeguarding the parties' monetary interests does not require creating co-ownership as a typically interim stage and that, accordingly, the practical

difficulties necessarily connected with a co-ownership concept can be minimized or even avoided. There is, therefore, no need for a joint administration of the product, which would, at least as a tendency, anyway not be promising to work so well (one may assume that the willingness towards a fruitful co-operation is limited where one of the co-owners transformed another's goods into something else without the owner's consent). Also, the time, costs and efforts which may be necessary for dividing co-ownership may be saved (cf. Comment C above).

The proposed concept should also have at least slight advantages where the new goods are to be transferred to a third party. The third party may acquire ownership by negotiating with just one party, i.e. the producer. As compared to the "buy out" model discussed in Comment C, clarity about the producer's ability to transfer sole ownership is provided irrespective of any disputes as to the calculation of monetary compensation. Such disputes may still be a certain issue where it comes to the question whether the material-owner's security right has already been extinguished by effecting a certain payment to the former owner of the material. But it is at least clear who may validly dispose of the whole asset, and the "equal to value" approach for calculating these claims (discussed below in Comment D) should provide a rather clear and workable calculation method.

To a certain extent, "sole ownership plus security right" model even coincides with the traditional publicity aspect, but only in in so far as the new goods are typically placed with the producer and this person is the one who acquires sole ownership. This is, however, not considered to form a main argument for the present solution, as the conclusions one may draw from the "external appearance" of possession are anyway doubtful. And obviously, publicity is not at all promoted by creating "hidden" proprietary security rights for the material-owners. The latter aspect is, however, not regarded as an objection. One should always take into account that a main alternative would have been the creation of "hidden" co-ownership rights, which virtually makes no difference in *this* relation. Potential third party acquirers may be protected by VIII.–3:102 (Good faith acquisition of ownership free of limited proprietary rights). As to the risk this rule creates for the material-owners and their security rights, see the next Comment and VIII.–5:204 (Additional provisions as to proprietary security rights) paragraph (2).

Supplementary rules as to proprietary security right. It is very important to stress also in relation to the intended model-rule-function of these provisions that a concept like this requires that certain conditions regarding the regime of proprietary security rights either exist or are provided for in additional rules; and where such supplementary rules must be included, that they do not interfere too heavily with the rest of the security rights system. VIII.–5:204 (Additional provisions as to proprietary security rights) provides such regulations. First, it is important that a proprietary security right created under paragraph (1) of this Article takes effect, also in relation to third parties, without any act of taking possession, or registration, by the secured creditor (i.e. the former owner of material). Otherwise the concept could not work for material-owners who do not even know that their goods have been used in production. Second, due to this lack of publicity, the secured creditor runs the risk that the security right may be extinguished by a third party's goods faith acquisition. It is no key policy to counteract this risk (a very similar risk would also occur if the material-owners would acquire co-ownership of the product); but the proposed concept provides an extension of the security right to the proceeds of such a sale to a third party. Finally, there may be issues concerning the priority regime between this and other security rights which have been granted, in the producer's future goods, to other secured creditors before the product is actually created. The

named VIII.–5:204 contains such provisions in its paragraphs (1) to (3). See there for a closer discussion.

D. Material-owner's right to payment (paragraph (1))

General. Upon production, the owner of the material acquires a right to payment, as against the producer, equal to the value of his goods at the moment of production. The obvious purpose is to compensate the material-owner for the loss of his property, and in order to make this right more effective, the proprietary security right discussed above secures this right to payment. As such, the material-owner's right to payment is nothing unusual. Paragraph (1) simply provides that there is an obligation arising by operation of law at the moment of production. In all other respects, this obligation is subject to the general rules on obligations and corresponding rights as provided under Book III, including prescription (for the latter, see Comment D below). Such a right to monetary compensation is, in one way or the other, provided by all European legal systems where (or in case that) ownership of the product accrues to the producer. In detail, there are, however, certain differences as to the calculation of this monetary claim. A number of legal systems directly spell out that compensation must be made "for the value" of the goods used in production. Other legal systems refer to their (national) principles of unjustified enrichment, under which, again, calculation according to the goods' objective market value often is a guiding principle, but sometimes also the subjective benefit of the enriched party (i.e. the producer) is decisive, which can lead to a lower, or even higher, amount of compensation as compared to the market value. This shows that there is a certain policy choice to be made in the course of developing these model rules. The main issue regarding this choice is on whom the risk that the production process turns out not to be successful in an economic sense shall be placed, i.e. who shall bear the economic "loss" when the added value of the goods used for production and the expenditure for the production process itself exceed the value of the final product. Vice versa, there is also the issue who, the producer alone or (also) the owners of the material, shall take the benefit where production turns out to be very successful in the sense that the value of the new goods is (significantly) higher than the added values of all contributions. In addition, account must be given to some detailed effects of the unjustified enrichment principles provided by Book VII of these model rules, to which reference would be given in case the preferred option was to apply an unjustified enrichment concept (e.g., the defence of disenrichment). These issues will be discussed in the following Comments. As mentioned previously, reparation under the principles of non-contractual liability for damage may always be demanded in addition provided the relevant prerequisites are fulfilled; see VIII.–5:101 (Party autonomy and relation to other provisions) paragraph (5). However, the right to such additional payment, if any, is not secured by the proprietary security right established under paragraph (1) of the present Article. The security right "only" covers a right to payment as calculated according to the "equal to value" approach provided by paragraph (1) of this Article.

Right to payment equal to the value of the material. As to the calculation of this right to payment, paragraph (1) provides that payment is to be made "equal to the value" of the material, i.e. the goods used for production, at the moment of production. If, for example, the goods owned by material-owner O had a market price of € 1.000 at that time, O's claim against the producer will also be € 1.000. The reasons for choosing this calculation regime are the following: First, this method exactly corresponds to the material-owner's value interests, the safeguarding of which has been a main policy consideration throughout this Chapter. A second important rationale is that the "equal to value" approach places the risk of an economically unsuccessful production on the one who effected the production, i.e. on the producer. The former material-owners will always be entitled to a sum equal to the value of

their former material (secured by a proprietary right in the new goods), while the producer, in an economic sense, takes the rest. If this rest is less than the producer himself invested, it will be the producer's loss. In the extreme case that production process did not add any value to the original material, but the resulting product is even less valuable than the original goods, the producer will not get out anything, while being obliged, as against each material-owners, to pay the full value of their former goods. In principle, by the way, such a scenario has no specific impact on the proprietary security rights created under this Article: They arise, as always, by operation of law and cover the whole claims. However, upon enforcement, the former co-owners suffer a reduction proportionate to the values of their respective goods, because the proceeds of a forced sale will not cover the sums due under paragraph (1) to 100 %.

On the other hand, the "equal to value" approach brings about that the chances of achieving an economic benefit from the production are also placed on the producer. Where, e.g. the value of the goods involved is € 1.000 and the costs for production are also € 1.000, but the product can be distributed on the market for € 2.500, the benefit of € 500 goes to the producer. This distribution of risks and corresponding chances appears adequate since both are placed on the acting person, who can decide whether the production shall be carried out at all, on the production methods and marketing strategies, where relevant. To a certain extent, this distribution of the economic risk may operate as an incentive for effecting production efficiently. It is true that this idea is not equally sustainable in all situations that may fall under this rule. It should, e.g., not be stressed too heavily where a producer acts in the erroneous belief that he is the rightful owner of the goods. But where, e.g., raw materials acquired subject to a retention of ownership device are used for production and the supplier has contractually extended his security right to the product (cf. VIII.–5:101 (Party autonomy and relation to other provisions) Comment E), pronouncing the incentive idea truly makes sense.

Finally, the "equal to value" approach proves rather simple to apply. All that is needed is finding out about the market value of the relevant goods at the moment of production. This is an objective criterion, no subjective circumstances (like the producer's subjective benefit, as might become relevant if an unjustified enrichment concept was opted for) are to be taken into account. This tends to minimise disputes among the parties involved, and also provides safer grounds for third parties who are interested in acquiring rights in the product, and who must calculate how much they eventually have to pay to former owners of material in order to acquire unrestricted title.

At the moment of production. Calculation of the material's value is to be made as of the time when production was effected (i.e. when the material-owners lost ownership of their respective goods). This appears to be a widespread approach in Europe. Subsequent developments regarding the value of the respective kind of material may, for instance, be considered under the rules on non-contractual liability for damage where the respective requirements are fulfilled. This may be relevant, e.g., where substitute goods must be obtained and the prices for such goods have meanwhile increased.

Why no unjustified enrichment concept. Alternatively to the "equal to value" approach suggested above, the material-owner's claim for "compensation" could be calculated according to the rules of Book VII on unjustified enrichment. Such approach could be favoured in terms of internal coherence within these model rules. The unjustified enrichment rules do, however, produce different results in a couple of instances. But taking into account

the policy underpinnings identified for Chapter 5, sticking to a straight-forward "equal to value" approach has been considered preferable. This choice is primarily based on the policies of protecting the material-owners' value interests and of placing economic risks on the producer, in this context not only being the risk of inefficient production but also the risk of the new goods being damaged after production when they are typically in the hands of the producer. The difference between these two concepts roots in their different perspectives: Whereas a policy of safeguarding former owners' value interests takes the material-owners' perspective and seeks to preserve their economic balance, unjustified enrichment law would take the producer's perspective and ask to what extent the producer is enriched.

In terms of Book VII, the producer who acquires ownership of the product is considered to having obtained a "non-transferable enrichment"; compare VII.–5:102 (Non-transferable enrichment) Comment B with *Illustration 1* (bricks built into another's house). The main rule for such non-transferable enrichments actually converges with the approach suggested above: the enriched person (here, the producer) has to pay the monetary value of the non-transferable asset to the disadvantaged person (owner of material); see VII.–5:102(1) and the definition of "monetary value" in VII.–5:103 (Monetary vale of an enrichment; saving). But there are differences. The one main divergence appears where the producer (enriched person) acted in good faith at the time of production. He will then not be liable to pay "more than any saving" according to VII.–5:102(2)(b) (the alternative in limb (a) will be practically irrelevant for production). This saving-cap is a kind of subjective criterion. In the words of the related Comments, its function is to take care of the individual circumstances of the "innocently" enriched person who is, in effect, compelled to purchase what he has enjoyed. The goal is to leave the enriched person no worse off as a result of the reversal of the enrichment; only the actual gain is to be stripped away, compare VII.–5:102 Comment C. One may argue whether these policy considerations are fully compelling where the producer, out of his free will, used another's goods for production, however believing, for justified reasons, to own these goods himself or to be authorised to use them. Practically, the saving-cap approach bears the risk that the owners of the material are not entitled to payment of the full market value where the same effect, from the producer's perspective, could also have been achieved otherwise by cheaper means. As this is not intended pursuant to the guiding policies of Chapter 5, an approach always being geared to the goods' monetary value appears preferable.

A second problem would be created by VII.–6:101 (Disenrichment), under which in short the enriched person (producer) would be released from reversing the enrichment to the extent he has sustained a disadvantage ("disenrichment"), provided that the producer was in good faith at the time of the disenrichment. Such a defence is considered to go too far in the light of the policy consideration of preserving the material-owner a (proprietary) equivalent to the value he lost due to production. Rather, risks are intended to be placed on the one who effected the production and either still has the new goods in his sphere of control at the moment the disenrichment occurs, or at least is closer to the new goods than the former owners of the material. It has to be taken into account that the scope of the defence provided by VII.–6:101 is rather wide: It would apply, e.g., where the new goods are subsequently stolen, or where they are destroyed (without involving any lack of reasonable care as well as where the producer, still being in good faith, destroys the new goods on purpose); compare VII.–6:101 Comment B with *Illustration 6*. Also, the defence of disenrichment would apply where the product is consumed by its new owner, and eventually even where the latter gives it away as a donation or where he gives one of his other assets away as a donation because, as a result of now having obtained the new goods, he considers not to need that other asset any longer. However, for reasons mentioned above, it seems more adequate to let the former material-

owners' value interests prevail in such situations. A general reference to Book VII for the purpose of calculating the material-owners' rights to payment is, therefore, not suggested.

Prescription of the right to payment. As other rights to performance, the right to payment arising under paragraph (1) of this Article is subject to the general prescription period of three years (III.–7:201 (General period)) which, in principle, begins to run at the moment of production, this being the time when the debtor has to effect performance in the sense of III.–7:203 (Commencement) paragraph (1). But the running of the period will be suspended if, and as long as, the creditor (i.e. the former owner of the material) does not know of, and could not reasonably be expected to know of, the fact that production in the sense of the present Article has taken place or of the identity of the producer (cf. III.–7:301 (Suspension in case of ignorance)). For the impact of these prescription issues on the proprietary security right see VIII.–5:204 (Additional provisions as to proprietary security rights) Comment E.

E. Exception for producer knowingly using another's goods against that person's will (paragraph (2)(b))

Producer's bad faith in general: comparative background. The following Comments discuss how to treat a person who produced new goods in bad faith, meaning that he actually knew, or can reasonably be expected to have known, that he did not own the material he used and that the owner did not consent to production. The question arises whether, and if yes, to what extent the rules for such cases should deviate from the general concept outlined above. Apart from a unanimous correspondence as to that the rules on non-contractual liability for damage are always applicable (cf. VIII.–5:101 (Party autonomy and relation to other provisions) Comment F), the range of solutions provided in the European legal systems is enormous. As reflected in more detail in the Notes on this Article, there are countries where a producer in bad faith can, as a rule, not acquire ownership of the product, and in some of them he will not even get compensated for the value of his labour contribution. According to other approaches, the owner of the material has a right to choose whether to cede the property to the producer while being compensated for the value of the goods, or to acquire ownership of the product. Regarding the latter option, some legal systems provide that the producer in bad faith has no right to be compensated for the value of his labour contribution, while others grant such right. There is also a functionally similar solution where first co-ownership emerges and the party in good faith (the material-owner) may choose whether to assume sole ownership against payment to the producer or to cede his share to the producer and being compensated by the latter. In a considerable number of legal systems, on the other hand, the producer's bad faith has no impact on the level of property law (so that, regularly, the producer acquires sole ownership). Bad faith may, however, often affect the calculation of the producer's monetary compensation, in particular where unjustified enrichment principles are applied.

Basic guidelines. Throughout the process of preparing these rules, there has been consent in that any kind of exception for producers in bad faith, if provided at all, must be of a rather narrow scope, i.e. narrowed down to a qualified degree of bad faith. The reasons are manifold. One aspect to take into account is that the negative consequences for the owners of material are already reduced considerably under paragraph (1) of this Article, which provides for a proprietary security right protecting the material-owners' value interests. Second, if each grade of bad faith, starting from slight negligence, would trigger a deviating regime, this would severely undermine the basic rule of paragraph (1), which is explicitly based on the policy of taking into account the producer's value interests and sovereignty interests. One must be aware of that, in a majority of cases of production without the material-owner's

consent, it will at least be easy to argue that some kind of "bad faith" existed. In one way or the other, the producer could often have doubts about his entitlement to use the material, even if he uses another's material erroneously and not on purpose. This shows a third risk, besides the undermining effect, namely that uncertainty and a relatively high quantity of litigation about the producer's "good faith" or "bad faith" must be expected. As long as such disputes with effect on the proprietary consequences remain unsettled, the new goods may practically be taken out of commerce for the uncertainty who may rightfully dispose of them. Ultimately, ethical arguments speaking against a producer in bad faith acquiring sole ownership of the new goods are most compelling where the producer has stolen the material or a comparable degree of criminal intent is involved. For these reasons, the options finally taken into closer consideration were (a) a narrow exception designed for thieves and comparable cases (eventually subject to counter-exceptions), and (b) no exception for producers in bad faith at all, meaning that the general rule of paragraph (1) would apply, supplemented by the rules of Book VI on non-contractual liability for damage.

(a) The exception provided by paragraph (2)(b)

General; arguments for adopting an exception. Whether any exception from the main production rule for thieves and comparable persons should be adopted at all has been a disputed issue during the process of developing the rules of Chapter 5. For reasons discussed below in Comment E, the working group in charge of preparing this Book pleaded for abstaining from the adoption of an exception rule, but this approach did not succeed in the Study Group's Co-ordinating Committee where a (slight) majority opted in favour of the concept now implemented in paragraphs (2)(b) and (3). Anyway, the basic policies underlying the exception rule doubtlessly carry weight. They relate to the fundamental ethical and legal principle that no one should benefit from committing a criminal act. In this respect, it has been argued that a thief (or comparable person) is not worthy of legal protection and Chapter 5 should not open up for "private confiscations" but rather create some preventive effect. By contrast, the owners of the material may be considered worthy of particular protection in case their property has been stolen.

Scope of the exception: actual knowledge. According to paragraph (2)(b), the general production rule does not apply where the producer actually "knows that the material is owned by another person and that the owner of the material does not consent to the production" (which, again, is subject to a counter-exception discussed in Comment E below). This means, in the first place, that any case of mere negligent behaviour is not covered and, therefore, falls within paragraph (1). In particular, the general production rule of paragraph (1) will apply to situations where the producer perfectly knows that he is not the owner of the material but erroneously believes, for whatever reason, to be authorised to use the goods for production. It is not decisive whether the producer also knows the identity of the goods' owner. He must just know that the owner is another person. The exception rule, therefore, covers the person who himself has stolen the goods, but goes beyond. It also applies to a person who knows that the goods have been stolen by another, a dishonest finder who uses lost goods for production, and a person who knowingly acquired such goods from a finder, etc. In principle, it also applies to a person who, in contrast to a "thief" in a narrow sense, acted out of an urgent need, with the intention of reimbursing the owner of the material as soon as possible, or of returning goods of the same kind to the latter immediately (cf. the discussion in Comment E below). In all cases, the burden of proof as to the producer's actual knowledge will be on the owner of the material. Apparently, this may be a hard task to fulfil, but that is just another means of keeping the practical importance of this rule low (and, in *that* respect, is not seen as a disadvantage by the working group).

Counter-exception: much higher value. The counter-exception included at the end of paragraph (2)(b) roots in the awareness that any exception along the lines described above, however drafted in detail, may lead to inappropriate results in some situations. These situations are actually difficult to confine precisely, but it appears evident that a common sense of justice demands for a deviation from the exception rule in one way or the other. For example, it has been discussed whether Picasso, who has been "kissed by the Muse" and "feels like painting", but has no equipment at hand except he takes canvas and paint belonging to one of his colleagues (who is absent), should not become the owner of the masterpiece he creates, because he knew he took another's material and he knew there has been no prior consent? Furthermore, should this be the solution even if the artist intended to reimburse the owner as soon as possible and, accordingly, never intended to put a permanent disadvantage on the owner of the material? Evidently, the creation of pieces of art from another's material appears as a main example for production in textbooks all over Europe and there seems to be a common understanding that the circumstances, including the artist's state of mind in relation to the material, are of rather secondary importance for the result. Naturally, the problem is not restricted to works of art; but the example illustrates the difficulties in developing adequate lines of demarcation.

There may be a number of approaches for tackling this problem. For instance, one could try to solve such cases by letting the producer acquire ownership where he acted with the *intention of reimbursing* the owner of the material as soon as possible. Alternatively, the rule could be to exempt the producer from acquiring ownership only if he had no good reasons to believe that the owner if the latter knew of the production *would have consented* to the production; or in other words, the decisive issue could be the producer's expectation that the owner would not object. Both approaches do appear "fair" in the sense that the situations covered may be characterised by a considerably lower degree of bad faith. However, there seems to be a great risk that practically, such criteria would open up for standard excuses which would be raised regularly but would be considerably critical to decide upon (since one's intention is a mere internal fact, and another's hypothetical decision involves a vast number of circumstances and subjective preferences). This may provoke a (relatively) high number of litigation and a lack of predictability of judicial decisions. For these reasons, such approaches were not further pursued.

Instead, a more objective criterion has been opted for, namely a significant difference in value of the contributions involved. Where the value of the labour contribution is "much higher" than the value of the material, the producer will become the owner even where he knowingly used another's material without that other's consent. "The material", which is to be put in relation to the value of the labour contribution, means the stolen material (or material otherwise covered by the exception of paragraph (2)(b)) which is not necessarily all material used for production. For example, where the producer used material of a total value of € 300, of which goods worth € 50 have been stolen, which he knew, and the labour contribution had a value of € 700, only the goods worth € 50 are to be opposed to the labour contribution of € 700. Material not covered by paragraph (2)(b), i.e. the further material worth € 250, remains neutral in this comparison; the reasons for the exception made by this paragraph are not fulfilled in relation to this further material. Yet, the term and concept of a "much higher" value still remains somewhat indefinite. In the example given above, it will certainly be fulfilled. Generally one may think of differences like 90 % to 10 %. The decisive idea may perhaps best be described in that the stolen (etc.) material appears rather unimportant in relation to the labour contribution.

Brief overview of consequences where exception applies. The consequences applying where the producer knowingly used another's material without that other's consent are provided by paragraph (3) of this Article. In brief, the producer's labour contribution does neither lead to him acquiring ownership, nor co-ownership, nor a proprietary security right. Where there has just been one owner of material involved, that person will become sole owner of the product. In case there have been more material-owners, ownership is distributed among them according to VIII.–5:202 (Commingling) or in the usual case VIII.–5:203 (Combination). This also applies where the thief (or similar person) also used material owned by himself. In any case, the producer is, however, entitled to payment for his labour contribution on a mere obligatory basis. For this purpose, unjustified enrichment rules are applied which, in the present context, safeguard that the producer bears the risks of the economic success of the production process and take care of the material-owners' interests according to their individual circumstances. Nevertheless, it is deliberately intended that the producer, even if he was a thief, should not be precluded from re-obtaining at least the material-owners' subjective enrichment (so that there will not, vice versa, remain a permanent enrichment on the material-owners' side). For this reason, a clarification regarding VII.–2:101 (Circumstances under which an enrichment is unjustified) paragraph (1)(b) has been included. The rules of paragraph (3) of this Article will be discussed in more detail below, Comment F. In any event, the owners of the material can proceed against the producer under the provisions of Book VI on non-contractual liability for damage.

(b) Alternative concept favoured by the working group: deletion of paragraph (2)(b)

General. As has been indicated above (Comment E), the working group preparing Book VIII has a quite critical view towards the model adopted in paragraph (2)(b) and would rather favour deleting that subparagraph; the effect being that the general production rule of paragraph (1) would also apply where the producer knowingly used another's material without that other's consent. This alternative approach shall be discussed briefly in the following Comments, the reasons supporting this view being roughly divisible in two groups of arguments: first, the solution adopted in paragraph (2)(b) as any exception creates difficulties in itself; and second, it appears that the interests of the other parties can anyway be taken care of adequately under the model laid down in paragraph (1) in conjunction with non-contractual liability for damage under Book VI.

Problems inherent in the concept of paragraph (2)(b). Although the legitimacy of the general aim of preventing thieves (and comparable persons) from benefiting from a criminal act is beyond doubt, it is questionable whether an exception rule applying to such persons brings about much more practical protection as compared to the general production rule adopted in paragraph (1) of this Article. The material-owners' value interests which a are doubtlessly worthy of protection against theft and similar acts are already safeguarded by their right to demand payment equal to the value of their material in connection with the proprietary security right. The additional impact of cases where the producer knowingly uses another's goods without that person's consent will, especially in cases of stolen goods, mainly consist of the owner's typical difficulties in tracing the stolen goods and preventing production, since a thief will typically undertake particular efforts in hiding the goods. But the same will apply to the product. There is probably no significant difference between the practical difficulties in determining whether one has a right of ownership, or co-ownership (in case material of more than one other persons has been used) in some product, or a proprietary security right. Also, it is clear that the criterion of the producer's actual knowledge (required

not only in relation to the lack of ownership, but also to the lack of the owner's consent) is a hard task to prove for the owner(s) of the material, and one may ask whether it is wise to enter into judicial proceedings about this issue (with all cost risks related) while the "alternative" offered by paragraph (1) on which one will also fall back should the case be lost practically provides about the same protection. Of course, the uncertainties related to the property in the product also affect third parties who would, in principle, be interested in buying the product (although such uncertainties are a little reduced by the burden of proof being placed on the owner of the material).

The complexity and dispute-affinity of this Article also increases due to the counter-exception for labour contributions of "much higher value". This adds a third grade of differentiation according to value relations, in addition to the distinction between labour contributions of "minor importance" and "other" labour contributions (which serves a particular function, cf. Comment B above). The specific element of justice inherent in the "much higher value" criterion is, however, not so easy to grasp. The difficulties in finding a stringent and workable delimitation between the exception rule preventing an acquisition of ownership and a workable counter-exception to that rule have already been pointed out (cf. Comment E).

Since the producer, where the exception of paragraph (2)(b) applies, is restricted to a mere obligatory right as against the material-owner(s) (namely to payment under unjustified enrichment principles), one may also question whether the rule provides an adequate balance between the general creditors of material-owners and the producer and his general creditors, respectively: Strangely, the fact that the producer unlawfully used the material for production will have the effect that the general creditors will be satisfied to a higher degree in the material-owner's insolvency than where paragraph (1) is applicable or no production takes place at all. The product (if only one owner's material was used) or the respective former owner's undivided share in the product, will form part of the bankrupt's estate including the "additional" value originating from the producer's labour contribution, which increases their percentage of satisfaction. The producer will be treated as one of these general creditors and receive a dividend only.

Finally, it may be added that a deterrent effect, in the sense of preventing potential producers from using another's goods for production, will practically be non-existent.

Paragraph (1) may provide adequate results. Contrary to some solutions adopted in the European legal systems today, the general production rule proposed in paragraph (1) already applies a fairly balanced model also for cases covered by paragraph (2)(b). Many aspects to be named here have already been pointed out with a different perspective above: The material-owners' value interests are already taken care of by the proprietary security right provided for by paragraph (1). Whether the owner of material has any further interests in the product as such can hardly be assessed on a general basis, but generally one will say that this will rather not be the case. If so, it is questionable whether paragraph (2)(b) brings about any practical benefit for the material-owner as compared to paragraph (1). The thief (or comparable person covered by paragraph (2)(b)), on the other hand, does not really benefit in an economic sense from using other persons' goods in production, at least not to the disadvantage of the material-owners: To the extent the creation of the product involves something illegitimate, the product is encumbered by the proprietary security right representing the value of the material-owners' goods. The potential additional value of the product does, if one may say so, not result from the unlawful taking of another's material, but

from the particular skills and creativity of the producer (which, as such, lack implications of specific illegitimacy).

This, of course, shall not mean that the particularly dishonest behaviour of the producer in cases covered by paragraph (2)(b) shall be regarded acceptable. The working group just proposes to sanction this behaviour with other means, namely by resorting to the rules on non-contractual liability for damage under Book VI and criminal law sanctions, as the case may be. When deleting the exception rule of paragraph (2)(b), the present Article could, therefore, still provide adequate solutions the concept however being less complicated and easier to handle not only for the material-owners (cf. the risk of litigation discussed above) but also for third parties. Compare also the general aspects like the relation to the producer's general creditors and the simplification effect of sole ownership as compared to co-ownership (where there are more than one owners of material) discussed in Comment C above.

F. Consequences in situations exempted from general rules (paragraph (3))

General. Paragraph (3) regulates the consequences, for the level of property law as well as in relation to resulting obligations, of situations not governed by the general production rule in paragraph (1). It may partly be considered to serve a rather clarifying function, in particular in relation to situations where the labour contribution is of minor importance or where no new goods are produced. Taking into account the variety of solutions offered in the European legal systems, determining the consequences in the black letter text proves to be important in particular where the exception provided in paragraph (2)(b) applies. Since the rules for these three cases however after having been analysed on their individual merits each are the same, they are jointly regulated in one paragraph. As the scope of paragraph (3) is wide and also covers situations where no "new goods" are produced, the neutral term "person contributing labour" is used instead of "producer".

Proprietary consequences where there is only one owner of material. Where the person performing labour only used material owned by one other person (and did not use any material owned by himself), paragraph (3) sentence 1 provides that ownership "remains" with that owner of material. This is obvious where no "new goods" have been produced (cf. VIII.–5:101 (Party autonomy and relation to other provisions) Comment B with *Illustrations 3* and *4*). Where production is on hand, the owner of the former material becomes the owner of the product.

Proprietary consequences in case of more than one owners of material. Where, on the other hand, the person performing labour used material owned by more than one person which may either mean that he used goods owned by several other persons, or also used material owned by himself paragraph (3) sentence 1 refers to VIII.–5:202 (Commingling) and VIII.–5:203 (Combination). According to these rules, the owners of material involved may either become co-owners of the result, or one of them acquires sole ownership and the others have a right to payment, secured by a proprietary security right. Examples are provided by *Illustrations 5* (combination) and *6* (commingling) in VIII.–5:101 (Party autonomy and relation to other provisions) Comment B.

It may be noteworthy that under this rule, also a thief may become co-owner of the resulting entity, if and to the extent to he used also material owned by himself. He may not, however, become sole owner, even if he (besides his labour contribution) owned most of the material

himself and these goods would constitute the "principal part" in the sense of VIII.–5:203 (Combination) paragraph (2). This follows from VIII.–5:203(4).

Compensation in respect of material owned by person contributing labour. As indicated above, where the person contributing labour also contributed with material (and this does not create co-ownership in the resulting entity), compensation for the value of these goods will be due under VIII.–5:203 (Combination), to which paragraph (3) of this Article refers (VIII.–5:202 (Commingling), to which paragraph (3) also refers, is not relevant in this context because it always leads to the creation of co-ownership).

Illustration 8
P steals material from O and produces new goods. In the production process, he also uses some own material, but only worth 2 % of the whole material involved in production. Due to the exception provided in paragraph (2)(b) of this Article, O will not acquire ownership of the product. Paragraph (3) refers to VIII.–5:203 (Combination) which provides, in its paragraph (2), that the owner of the "principal part" shall become sole owner of the combined goods. This will apply to O. With respect to his own material, however, P will be entitled to payment against O. Since the thief effected the production himself, that amount is to be calculated according to VIII (Commingling) paragraph (2), first alternative of sentence 2, which states that payment must only be made equivalent to O's enrichment. A corresponding rule applies in relation to the compensation of the thief's labour contribution (see the following Comments).

Reversal of enrichment resulting from labour contribution: general. Where the value of the product or, where no "new goods" have been produced: of the amended original goods exceeds the value of the material, paragraph (3) sentence 2 provides that the person performing the labour contribution is entitled to the reversal of any enrichment resulting from this labour contribution subject to unjustified enrichment provisions of Book VII. This right is directed against the owner of the (new or original) goods, or their co-owners, respectively. Book VII is referred to as a whole, with one exception addressed in Comment F below. In particular, Book VII will govern the calculation of the enrichment claim: Within the framework of the provisions of Book VII, a material-owner will regularly in particular in case of theft or other situations covered by the exception of paragraph (2)(b) be treated as an "enriched person in good faith" who "did not consent to the enrichment" (production). The general rule being that reversal of the enrichment means to pay its monetary value, the named qualification will trigger a somewhat subjective test for calculating the amount to be paid: The owner of the goods will not have to pay "more than any saving"; see VII.–5:102 (Non-transferable enrichment) paragraph (2) and Comment D above for a general description of this concept (however with the opposite view of the producer being the enriched person). The "saving"-criterion takes into account the personal needs and the individual circumstances of the enriched person (here: the material-owner). This approach is considered to be an adequate one in the present context, compare *Illustrations 9* and *10*. It will apply irrespective of there being just one or several owners of material.

Illustration 9
O runs a recycling enterprise, employing advanced technologies for transforming scrap into reusable metal. P steals scrap stored at O's premises and recycles it in his own factory. O will remain the owner of the metal under paragraphs (2)(b) and (3) sentence 1 of this Article (assume that the metal has not been inseparably combined with metal

owned by P himself). P's labour efforts will be compensated subject to unjustified enrichment principles (paragraph (3) sentence 2). Suppose the metal's quality is the same as if O himself had recycled it, but P's production methods are much more costly, the "saving" criterion will safeguard that O does not have to compensate the producer for more than he himself would have had to invest for achieving the same result.

Illustration 10
P has stolen material of great value from O. The increase in value caused by the production subsequently performed by P is considerable, but does not exceed the "much more valuable" threshold imposed by paragraph (2)(b). Under paragraph (3), O will be the owner of the product but would, in principle, have to pay the additional value to P. Suppose fulfilling such an obligation to return the enrichment would force O to take out a loan: The "saving"-limitation of VII.–5:102 (Non-transferable enrichment) paragraph (2) will entitle the material-owner to deduce credit costs from the "enrichment" he is obliged to reverse. Similar results may be achieved by applying the rules of Book VI on non-contractual liability for damage, losses of such kind being consequences of property infringements in the sense of VI.–2:206 (Loss upon infringement of property or lawful possession).

Also, in case the new goods are destroyed and the owner of the material has no benefit of it, he can resort to the defence of "disenrichment" as provided for by VII.–6:101 (Disenrichment).

Special rule concerning VII.–2:101 (Circumstances under which an enrichment is unjustified) paragraph (1)(b). Sentence 3 of paragraph (3) is only relevant for cases falling within the exception of paragraph (2)(b), i.e. where the producer actually knew that he used another's property and the owner did not consent. It has already been pointed out that the producer, in such a situation, should at least be entitled to some equivalent representing the value of his labour contribution, whereby the unjustified enrichment principles, including the "saving"-cap discussed above, ensure that the interests of the material-owners (who become owners of the product) are not affected inadequately. However, the unjustified enrichment principles contain one provision which, if applied in the light of the Comments on that provision, could exclude all rights of the producer to be compensated for his labour contribution from the beginning: Under VII.–2:101 paragraph (1)(b), an enrichment is not "unjustified", which means that no liability under unjustified enrichment law may arise at all, if "the disadvantaged person consented freely and without error to the disadvantage". Under the intended understanding of this rule (cf. VII.–2:101 Comment D), a producer who actually knows that the material is owned by another person (and that the owner did not consent) could well fall within the "consented freely and without error" criterion when creating new goods out of it (compare the parallel case of knowingly improving another's property). This interpretation is, perhaps, not beyond doubts, and arguably different results should be achieved e.g. where the producer acts under a mistake of law in the sense that he assumed to become the owner of the product despite having stolen the material. But the risk would remain that there are situations where the owner(s) of the new goods would take the improvement completely for free. Evidently, however, it would not appear reasonable to make that radical distinctions between, e.g., cases where the producer acted under a mistake of law and other situations. And in particular, the counter-exception for "much more valuable" labour contributions would become a turning point which virtually could not be justified at all: Below this benchmark, the producer would get literally nothing (not even a monetary compensation for the value he added), but when he exceeds it, he would become sole owner

of the product (however being obliged to compensate the material-owners). Therefore, sentence 3 of paragraph (3) clarifies that the named VII.–2:101(1)(b) does not exclude the producer's entitlement to a reversal of the enrichment. A parallel problem arises with regard to VIII.–5:203 (Combination) paragraph (2) and VIII.–7:104 (Expenditure on, or parts added to, the goods during possession) paragraph (1) where, however, a compromise solution is adopted. See the Comments on these provisions.

VIII.–5:202: Commingling

(1) Where goods owned by different persons are commingled in the sense that it is impossible or economically unreasonable to separate the resulting mass or mixture into its original constituents, but it is possible and economically reasonable to separate the mass or mixture into proportionate quantities, these persons become co-owners of the resulting mass or mixture, each for a share proportionate to the value of the respective part at the moment of commingling.

(2) Each co-owner can separate a quantity equivalent to that co-owner's undivided share out of the mass or mixture.

COMMENTS

A. General

Basic idea. The default rule provided in this Article applies where goods owned by different persons are "commingled" in a certain sense. The rule can best be explained by starting with a look on its effects: It provides the creation of co-ownership, proportionate to the values of the respective contributions (paragraph (1)), and a simplified mode of dividing co-ownership, namely by physically separating a quantity corresponding to the respective undivided share from the mass or mixture (paragraph (2)). The requirements defining the rule's scope of application are, one could say, built around these legal effects, shaped to address those situations where the named legal effects appear suitable. The central case, which has also been the starting point when developing this rule and where it will certainly have its strongest persuasive power, is the commingling of fungible goods in the sense of goods of the same kind and quality: Upholding a right of ownership in the strict sense will be technically impossible because the single items will become unidentifiable by the process of commingling. However, a practically similar effect can be provided by paragraphs (1) and (2) of this Article; the creation of co-ownership taking care of the value interests of all the owners of goods contributing to the mass or mixture and, at the same time, each co-owner's sovereignty interests being catered for by allowing the co-owner to take out a quantity corresponding to his original quantity whenever he so wishes (as to these interests in general, see VIII.–5:101 (Party autonomy and relation to other provisions) Comment H; see also VIII.–5:201 (Production) Comment C). Further, the practical difficulties typically inherent in co-ownership solutions (cf. VIII.–5:201 Comment C) are considerably reduced or even non-existent where fungible goods are concerned: Joint administration, if impractical, is not necessary where each contributor can separate a respective quantity any time and thereby becomes sole owner of that quantity. Since quantities are a relatively simple criterion for determining undivided shares, there will regularly be little dispute or negotiation about separation, and trading the goods involved in commingling will not be impeded considerably, since any co-owner can dispose of his share and the buyer may simply take out the goods instead of the original co-owner. These advantages partly decrease where the Article's scope extends to goods of not exactly the same, but similar kind or quality; and even more where goods of clearly different kind are commingled. There are, however, also other arguments involved in these areas (cf. Comment B below). The criteria delimitating the Article's scope of application, finally, cover all these situations by confining themselves to stressing the decisive difference to VIII.–5:203 (Combination): The rule applies where it is, just like under VIII.–5:203, impossible or economically unreasonable to separate the resulting mass or mixture into its original constituents; but in contrast to VIII.–5:203, it is at least possible and economically reasonable to separate the mass or mixture into proportionate quantities, which is necessary for applying the simplified separation regime of paragraph (2).

Terminology: commingling. "Commingling" has been agreed upon as a neutral term for situations where goods of all states of aggregation, solids, liquids or gases, are put together or connected with each other in a way provided by paragraph (1). It replaces, or rather forms an umbrella term for, traditional terms like "commixture" relating to solids and "confusion" relating to mixed liquids and gases.

Comparative background. There is no common European ground in a stricter sense for the present Article, but in some countries, comparable results are achieved at least for goods of the same kind and quality. In most legal systems, the same rules apply as for combination in the sense of VIII.–5:203 (Combination). In some countries it is argued that the "principal part" rule does not apply where goods of the same kind are commingled, but there are also disputes reported as to whether the larger part should be regarded as the "principal part" whereby the owner of that quantity would acquire sole ownership of the mass or mixture. Sporadically, also a rule granting sole ownership to the possessor of the mass or mixture occurs. This is the case in Austria (where the main rule, however, provides for co-ownership) and where the possession vaut titre rule applies (French case law however heading in the opposite direction by accepting a right to vindication where unidentified generic goods are commingled). Apart from goods of the same kind, a general rule providing co-ownership as the primary solution appears to exist only in one country (Austria).

Relation to other provisions. The present Article is subsidiary in relation to VIII.–5:201 (Production), meaning that where "new goods" are created by mixing different goods (unless the labour contribution is of minor importance) or by putting goods of the same kind together in a way that would theoretically be easy to undo, VIII.–5:201 will apply (see there, Comment B with *Illustration 1*). At the same time, it is a special rule in relation to VIII.–5:203 (Combination) and is therefore placed in between these two. The differentiation between the three categories production, commingling and combination is further discussed in VIII.–5:101 (Party autonomy and relation to other provisions) Comment B. As to the relation of this Article to VIII.–2:305 (Transfer of goods forming part of a bulk) and VIII.–2:306 (Delivery out of the bulk) see VIII.–5:101 Comment C. Where the parties have regulated the effects of commingling by prior agreement, this agreement is relevant. See VIII.–5:101 Comment D.

B. Scope of application

General. This Article may apply to solids, liquids and gases, irrespective of how the commingling takes place. The commingling may be effected by one of the owners of the goods involved, or by an independent third person (cf. *Illustration 1* below); theoretically, the commingling may also be effected by the goods themselves (cf. *Illustration 2*) or by another fortuitous event (e.g., such as in *Illustration 3*). This implies that the present Article does not presuppose the performance of any labour contribution. It may, however, be applicable also where labour is involved, cf. VIII.–5:201 (Production) paragraph (3) and the overview provided at VIII.–5:101 (Party autonomy and relation to other provisions) Comment B; see also Comment B below. As the following illustrations show, commingling regularly involves that the single items become non-identifiable. The possibility of identifying the original constituents, or at least of identifying each group of constituents originally belonging to one and the same owner, is, however, not adopted as a requirement for the application of this Article. The decisive criterion is the impossibility to separate the original constituents from the mass or mixture. Physical separation would be a second step after having identified the

single items. Where identification is impossible (or economically unreasonable), carrying out a physical separation will be as well.

Illustration 1
Wheat owned by the farmers A, B and C is put into a silo. As it will be impossible (or at least economically unreasonable) to identify which piece stems from which farmer and to restore it to that person, the present Article applies. It is irrelevant whether the mixing was effected by one of the parties, by all of them (each placing his own wheat in the silo) or by another person D.

Illustration 2
Both A and B run a fish farm, breeding fish of the same kind in vicinal basins. After torrential rain, the basins overflow and fish partly swim from one basin to the other. Provided it would be impossible or economically unreasonable to identify and restore each fish to either A or B, the present Article will apply.

Illustration 3
A and B own metal stored close to each other. During a fire, the metal amalgamates. Provided the block can be separated without economically unreasonable efforts, the present Article applies.

A practically important supplement to the commingling rule of the present Article is VIII.–5:101 (Party autonomy and relation to other provisions) paragraph 5 which provides that the rules of Book VI on non-contractual liability for damage may always be resorted to in addition. Any loss an owner of commingled goods may suffer from that event, e.g. additional costs for effecting separation or transportation, or resulting from a decrease in quality etc., may be liquidated under these rules. The property law level is, however, not affected by any person's negligent or even intentional act (see also Comment C below).

Goods owned by different persons; relevance of labour. As with all other categories regulated in Chapter 5, this Article requires that contributions of at least two persons are involved. Only the contribution of goods is relevant for this Article. The performance of labour does not count within this Article, but may result in a right to payment under unjustified enrichment principles, against the co-owners of the commingled goods. Compare VIII.–5:201 (Production) paragraph (3) (no new goods created) and Comment F on that Article; see also VIII.–5:101 (Party autonomy and relation to other provisions) Comment B with Illustration 6.

Separation into original constituents impossible or economically unreasonable; general. The first requirement for this Article to apply is that "it is impossible or economically unreasonable to separate the resulting mass or mixture into its original constituents". This exactly matches with the prerequisite set out in VIII.–5:203 (Combination) paragraph (1), although the latter's formulation is slightly abridged. The function of this criterion is to draw the dividing line between situations where a change in the property relations takes place and other situations where, despite goods owned by different persons may have been placed, e.g., in the same room or container, each person remains the owner of his individual goods. In the latter case, no specific regulation as to proprietary consequences is necessary and each owner is entitled to separate these goods under general principles, such as by resorting to the remedy of revindication under VIII.–6:101 (Protection of ownership).

Illustration 4
Bananas owned by the agricultural companies A, B and C, packed in boxes of the same size and external appearance, are shipped in one and the same container. If it is possible to identify which box is owned by A (or one of the other companies), e.g. because the box itself is marked with the company's label, or the bananas placed inside are marked, or it is possible and economically reasonable to identify the bananas by other means, for instance because each company produced a different sort, the requirements set out by this Article are not fulfilled and no change in the proprietary relations takes place. Each company can separate its boxes under VIII.–6:101 (Protection of ownership) paragraph (1). If, on the other hand, the boxes cannot be identified (e.g. no labels are placed there and it cannot be clarified which boxes have been placed at which parts of the container), the present Article applies. It may also happen that identification is possible (and economically reasonable) only with regard to parts of the boxes. Then, the present Article does not apply to these items, but to the rest.

Another example where separation into the mass's original constituents is possible and economically reasonable is given in *Illustration 8* to VIII.–5:101 (Party autonomy and relation to other provisions), see there in Comment B.

Separation into original constituents impossible. "Separation" in the sense of this Article may be effected by whatever means. The range covers any form of physically taking and removing single items and, as the case may be, any kind of mechanical (e.g. sieving), physical (e.g. heating) or chemical process. "Impossibility" to separate the mass or mixture into its original constituents is intended to be understood in a literal, i.e. rather strict, sense. Where such separation is theoretically possible, but no one would realistically think of undertaking such an act because it would be unreasonably costly, one will apply the criterion of "economical unreasonableness"; see next Comment.

Illustration 5
Fuel of identical quality owned by A and B is mixed in a tank. Separation into the mixture's original constituents will be "impossible" in the sense of this Article because it is virtually excluded to return each drop of fuel to its (former) owner.

It is by the way not necessary that the single items physically touch each other. "Impossibility" in the sense of this requirement may also occur where identical goods owned by different persons are placed in the same room or stockyard and, since no one remembers where exactly which goods have been placed, or because the goods move (e.g., animals), identification becomes impossible after a while.

Separation into original constituents economically unreasonable. Since "Impossibility" is a rather narrow concept, the criterion of most practical importance is that a separation into the original constituents would be "economically unreasonable". This criterion is to be understood in an objective way. High costs of separation are not intended to be regarded as "reasonable" just because the other party (or a third person) effected the commingling negligently and, therefore, would have to cover the costs of separation under the principles of non-contractual liability for damage. The basic idea of this test is to weigh the economic efforts or other disadvantages of effecting separation which will, under the present Article, basically be the costs of separation only, since the goods will usually not be damaged by separating them into proportionate quantities as against the parties' interests in maintaining

the original property status (i.e. each person maintaining his ownership right in that person's individual goods) by effecting such separation. The latter, i.e. the interests in maintaining the proprietary *status quo*, of course depend on the alternative which would otherwise apply. In the context of this Article, therefore, the hypothetical separation costs must be held against the interests in not becoming co-owner of the mass or mixture under this Article, including the facilitated possibility of dividing co-ownership by physical separation of a respective quantity under paragraph (2). From this follows that, especially in case of commingling of fungible goods, where both the value interests as well as the sovereignty interests of the owners typically are almost non-affected, relatively low separation costs can already be "unreasonable". This may change to a certain extent the more the single items or quantities differ from each other in quality or even in kind, since the single contributor's sovereignty interests may be affected to a higher degree. This also shows that, despite the concept in principle equals the one applied in VIII.–5:203 (Combination), a certain percentage of costs already being considered as "unreasonable" under the present Article may still be "reasonable" under VIII.–5:203. A fixed borderline, e.g. in the sense of a certain amount or percentage, cannot be provided seriously. One will always have to take into account the individual circumstances or the case.

Separation into proportionate quantities possible and economically reasonable. The second requirement for this Article to apply is that "it is possible and economically reasonable to separate the mass or mixture into proportionate quantities". This criterion draws the line of demarcation to VIII.–5:203 (Combination). Evidently, the criterion is associated with the effects of the present Article, namely the creation of co-ownership supplemented by a facilitated procedure of dividing co-ownership (i.e. by physical separation of a respective quantity by each co-owner, see paragraph (2)). "Proportionate quantities" are quantities of the mass or mixture which correspond to the respective co-owners' undivided shares. As to the concepts of "possible" and "economically" reasonable", the principles correspond to what has been described above in Comment B. The costs for separating the mass or mixture into proportionate quantities are to be held up against the parties' interests in the result of such separation, namely the creation of co-ownership and the possibility to divide co-ownership under paragraph (2), since this will be the regular result when applying the present Article. In many situations, the critical question will rather be whether separation into proportionate quantities is possible at all; if so, it will often not create unreasonable costs. The opposite may apply, for instance, where pieces of metal of rather low value have melt into one another. Where the test provided by the present Article is not passed, VIII.–5:203 will apply. Typical constellations where a separation into proportionate quantities in the sense of this provision is possible and reasonable are briefly discussed in the subsequent Comments.

In particular: fungible goods. As already pointed out in Comment A above, this Article in the first place applies to the commingling of fungible goods, i.e. goods of the same kind and quality. One can say that each party's interests in the quantity will basically be the same as this party's interests in the original items. For a closer discussion, see the named Comment.

> *Illustration 6*
> Oil of the same quality is mixed in a tank. Grain of the same kind and quality is mixed in a silo. Coal is commingled during transport. It may, e.g., be theoretically possible to determine the origin of each piece of coal by some chemical method, but that would be economically unreasonable.

Commingling of "similar" goods. In the course of developing these rules, the solution found adequate for goods of the same kind and quality has first been extended to the commingling of similar goods, i.e. goods of the same kind but of different quality (e.g. crude oil of slightly different quality, coffee beans of different quality etc.) and – which can hardly be distinguished clearly – goods of different, but similar kinds. The underlying idea has been that the interests of the parties may be served much better when applying the solution provided by the present Article than when applying VIII.–5:203 (Combination) where, in particular, one party would acquire sole ownership if that party's contribution is to be considered the "principal part" (or where co-ownership may also be created, but would have to be divided under the applicable national rules, which may require judicial separation in case no agreement can be reached between the parties).

Illustration 7
Hundreds of thousands of barrels of crude oil, owned by different companies and partly being of different quality, are inseparably mixed in tank. Even if company A owned only three percent of the whole oil, the value may still be considerable. The interests of company A may be served better by becoming co-owner of the mixture under the present Article (which maintains its possibilities to trade "its" quantity of oil) than getting a mere claim for payment, however secured by a proprietary security right in the whole mixture, if another company owned 97 % and that would be considered the "principal part" under VIII.–5:203 (Combination) paragraph (2), if that rule was applicable instead of the present Article.

A second reason for opening up for "similar goods" relates to practical difficulties which could easily arise if the rule was strictly confined to goods of the "same kind and quality". Compare the banana-example in *Illustration 4* above. What is "the same" could hardly be defined precisely. One would most probably apply something like the common understanding of reasonable market participants which would already imply a certain extension to value judgements.

Commingling of different goods. The final step of extending the rule, which as such does not correspond to examples presently existing in the European legal systems, concerns cases where goods of different kind are commingled. One main aim and achievement of this approach certainly is that all kinds of uncertainties which would otherwise remain in relation to drawing the necessary distinction between the rules of VIII.–5:203 (Combination) and the present Article are eliminated.

Illustration 8
Wheat owned by A and barley owned by B are mixed inseparably. It would, however, be easily possible to divide the mass into proportionate quantities. If the present Article would only apply to fungible and similar goods, there would be uncertainty whether wheat and barley are "similar" (both being grain, but of different kind) or whether the case should be solved under the rules of VIII.–5:203 (Combination) (if they also covered "commingling" of different goods). The wide scope of the present Article makes it superfluous to determine whether, e.g., the result is to be regarded "polluted wheat" (in which case the "principal part" rule of VIII.–5:203(2) would otherwise apply in favour of the wheat owner A), "barley of reduced quality" or "muesli ingredients" (in which case perhaps applying the commingling rule would appear feasible). Such insecurity does not arise under the present shape of this Article. In addition to this practical advantage of considerably simplifying the finding of the

applicable rule, the solution also appears acceptable. A and B become co-owners of the mixture and each can take out a respective quantity whenever he so wishes.

There are however also cases where applying a "principal part" rule as provided by VIII.–5:203 (Combination) paragraph (2) may be considered appropriate as an alternative concept. These situations were, however, also considered to be solved adequately by the concept of the present Article, a main factor in the final decision certainly being that this categorisation achieves getting rid of all uncertainties in delimitation. Where co-ownership emerges and one of the co-owners has no practical interests of taking parts of the result, it may be quite likely that the parties negotiate on some other result (e.g. one party taking over the other party's quantity in exchange for a price). Also the rules of non-contractual liability for damage may help to achieve an adequate final result.

Illustration 9
Wine owned by A is inseparably mixed with sulphite owned by B. The mixture can, however, easily be separated into proportionate quantities so that the present Article is applied. If alternatively VIII.–5:203 (Combination) would apply to such cases, the wine would be regarded the "principle part" and A would acquire sole ownership of the mixture. Under the present Article, however, A and B will become co-owners. If B is not interested in trading wine (or drinking the quantity himself), he may arrange with A to take over his quantity. Different to other situations where co-ownership is to be divided, paragraph (2) of the present Article caters for that none of the parties can impede the division by trying to negotiate for an unreasonably high price. The other party can go away with his quantity any time so that the risk of inappropriate pressure being exercised in negotiations is minimised.

C. Consequences of commingling (paragraphs (1) and (2))

Creation of co-ownership; calculation of shares. Provided the prerequisites discussed above are fulfilled, the owners of the goods involved in the commingling become co-owners of the resulting mass or mixture. Co-ownership is to be understood in the sense of VIII.–1:203 (Co-ownership), meaning that each co-owner acquires an undivided share in the whole mass or mixture and each co-owner can dispose of that share by acting alone. The policy of this concept has already been highlighted in Comment A above, to which can be referred: The undivided share in the mass or mixture represents each owner's value interests in the original goods, and forms an interim stage for the owners' sovereignty interests which, in principle, can be freely exercised as soon as separation under paragraph (2) has been effected. The shares are calculated "proportionate to the value of the respective part at the moment of commingling". Where the commingled goods are fungible, this means that the proportions correspond with the quantities involved. Where, on the other hand, quantities contributed by one co-owner are more valuable than others (e.g. oil of better quality), the undivided share of that co-owner will be bigger than what would correspond to his quantity. In such a situation, i.e. where goods of a better quality are mixed with other goods of lower quality, it is also clear that the value of the share will usually be lower than the value of the original goods, thus the respective owner's value interests not being met fully. Any loss resulting from this decrease in value may be liquidated under the rules of Book VI on non-contractual liability for damage.

Subsequent shrinkage, increase. Where the whole quantity contained in the mass or mixture subsequently shrinks (e.g. parts of the goods are destroyed or stolen), the undivided shares remain the same. The risk will be borne collectively in proportion to the shares. Unlike under VIII.–2:305 (Transfer of goods forming part of a bulk) paragraph (4), the risk is not

primarily placed on one party only. The reason is that the named provision is a transfer rule, which implies certain grounds for placing the risk on the seller, whereas the present Article does not involve any transfer; cf. also VIII.–5:101 (Party autonomy and relation to other provisions) Comment C. If, on the other hand, the quantity of the goods increases by an act of nature (e.g. like worms breed for fishing multiplying), the co-owners take the additional quantity proportional to their undivided shares.

Relevance of the parties' good or bad faith. Unlike in VIII.–5:201 (Production) paragraph (2)(b) and VIII.–5:203 (Combination) paragraph (4), the question of whether the parties act in good faith or in bad faith, or whether any kind of particular degree of bad faith is involved, bears no importance on the level of property law. The result will always be co-ownership. One reason is that co-ownership may easily be re-transformed into sole-ownership under paragraph (2), which usually corresponds to the *status quo ante*. The party acting in (particular) bad faith would not take any considerable advantage from his unlawful act. As to consequences under Book VI, see Comment C below.

Co-ownership favourable as against sole-ownership of the possessor. These model rules deliberately do not follow an approach occasionally occurring in European legal systems, namely awarding sole ownership of the whole mass or mixture of unidentifiably commingled goods to the person exercising physical control over that mass or mixture, i.e. its possessor. On a policy level, co-ownership is clearly favourable because it serves the value interests of all parties. Apart from where the said concept is built upon a *possession vaut titre* principle, which is as such not followed by these model rules, it seems that the "ownership for the possessor" approach can only be explained or justified against the background of lacking evidence for the ownership in quantities involved. But this is another level and should not assume the character of a rule of substantive law. This choice also corresponds to a certain trend in Europe, cf. developments in French (and Belgium) case law and doctrine, respectively, and the change made by the Dutch legislator when enacting the new civil code (formerly the person effecting the commingling becoming sole owner) as reflected in the joint Notes on VIII.–5:202 and VIII.–5:203. Also in Germany, the Supreme Court has ruled against the opinion that sole ownership of the possessor should emerge where it is impossible to determine the ratio of the respective values.

Simplified mode of division: physical separation of quantity equivalent to share. As pointed out above, the peculiarity of this Article is that co-ownership can be separated in a simplified way (cf. Comment A and *passim*). Each co-owner is allowed to take out (separate) a certain quantity from the resulting mass or mixture, by which that person acquires sole ownership in the goods contained in this separated quantity. Accordingly, that person's undivided share will be extinguished fully or partly, depending on whether that co-owner separates the whole quantity due to him or only a part of it. The quantity which may be separated under paragraph (2) is "equivalent to that person's share" in the sense of Comment C. Where the goods are fully fungible, the quantity will correspond to the quantity formerly contributed. Where a shrinkage of the mass or mixture has occurred, the quantity referred to by paragraph (2) is the reduced quantity corresponding to the respective share after shrinkage. Since paragraph (2) explicitly states that each co-owner "can" separate the respective quantity, any act of separation is allowed by law and does not constitute an interference with the other co-owners' property rights or lawful possession. Of course, separation must be exercised with due care so that remaining quantities sustain no damage.

Separated quantity exceeds equivalent to share. Where the mass or mixture has diminished but a co-owner separates a quantity he originally contributed i.e., more than what would correspond to his undivided share after shrinkage that (former) co-owner is to be treated as a non-owner in relation to the excess. Technically, the goods he takes out would still be subject to co-ownership, his own share corresponding to the quantity he would rightfully be entitled to under the principles discussed in the previous Comment, and the rest of the shares corresponding to the proportion of all other co-owners holding shares in the original mass or mixture. Good faith acquisition does not apply because there is no "entitlement to a transfer of ownership" in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(d) in conjunction with VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership) paragraph (1)(a). Paragraph (2) of the present Article does not serve any transfer function but as the other rules of Section 2 of this Chapter intends to maintain what already existed. See also VIII.–5:101 (Party autonomy and relation to other provisions) Comment C.

Costs of separation, loss resulting from shrinkage or decrease in value. In principle, each party bears its costs of separation itself. However, where another person effected the combination under circumstances which give rise to liability under Book VI, these costs may be recovered under the principles of non-contractual liability for damage. The same principles apply where the quantity of the whole mass or mixture has been reduced by shrinkage: Generally, each co-owner bears the loss proportionally, but that result may change by resorting to Book VI where applicable. Also, where goods of higher quality are commingled with goods of lower quality, the owner of the more valuable contribution may sustain a loss: Often value of the resulting mass or mixture will be lower than the amount resulting from adding the single values. Also such loss primarily falls upon the respective co-owner, but may be shifted to another person under Book VI.

Further consequences: damages under Book VI. In addition to the rights conferred under the present Article, a party sustaining any further loss may resort to the remedies provided by Book VI on non-contractual liability for damage. Such loss may be the costs of separation or other instances discussed in the previous Comment (see also VIII.–5:101 (Party autonomy and relation to other provisions) Comment F with *Illustration 16*), but may also encompass costs for detecting the goods unlawfully removed from the owner's premises, transportation costs and other damage.

VIII.–5:203: Combination

(1) This Article applies where goods owned by different persons are combined in the sense that separation would be impossible or economically unreasonable.

(2) Where one of the component parts is to be regarded as the principal part, the owner of that part acquires sole ownership of the whole, and the owner or the owners of the subordinate parts are entitled, against the sole owner, to payment subject to sentence 2, secured by a proprietary security right in the combined goods. The amount due under sentence 1 is calculated according to the rules on unjustified enrichment (Book VII); or, where the owner of the principal part effects the combination, is equal to the value of the respective subordinate part at the moment of combination.

(3) Where none of the component parts is to be regarded as the principal part, the owners of the component parts become co-owners of the whole, each for a share proportionate to the value of the respective part at the moment of combination. If, in the case of more than two component parts, one component part is of minimal importance in relation to other parts, the owner of this part is entitled, against the co-owners, only to payment proportionate to the value of the respective part at the moment of combination, secured by a proprietary security right in the combined goods.

(4) Paragraph (2) does not apply where the person who owns the principal part effects the combination, knowing that a subordinate part is owned by another person and that the owner of the subordinate part does not consent to combination, unless the value of the principal part is much higher than the value of the subordinate part. The owners of the component parts become co-owners, the shares of the owners of subordinate parts being equal to the value of their respective parts at the moment of combination.

COMMENTS

A. General

Overview of scope and relation to other provisions. This Article, as the previous provisions of Section 2 of this Chapter, is a default rule and only applies where the parties have not regulated the consequences of combination by prior agreement (cf. VIII.–5:101 (Party autonomy and relation to other provisions) paragraph (1) and Comment D on the named Article). It regulates, roughly speaking, the inseparable conjunction of at least two goods owned by different persons. The Article is subsidiary in relation to VIII.–5:201 (Production), meaning that where "new goods" are created by joining different goods and involving a labour contribution of more than minor importance, the named Article on production will apply. Also, the present Article is subsidiary in relation to VIII.–5:202 (Commingling) which applies where the mass or mixture of goods cannot be separated into its original constituents, but at least into proportionate quantities. As to the differentiation between the three categories production, commingling and combination, see further VIII.–5:101 Comment B. Although the present Article does not require any contribution of work, the main practical application will be cases where, apart from linking corporeal movable items towards each other, labour is performed by one person, but the result does not constitute "new goods" so that VIII.–5:201 paragraph (3) refers to the present Article.

Main content and structure. The Article applies where goods owned by different persons are "combined" in the sense that separation into their original constituents would be impossible or economically unreasonable (paragraph (1)). It contains two main rules: The primary rule (paragraph (2)) is that where one of the component parts (i.e. the contribution of

one of the owners of goods involved) is to be considered the "principal part", the owner of this part will become sole owner of the whole combined entity. The owners of other goods involved ("subordinate parts") are, however, not expropriated in an economic sense: the new owner is obliged to pay a certain compensation for the value of their goods, to be determined under a special regime regulated in the second sentence of paragraph (2), and this right to payment is secured by a proprietary security right in the combined goods. The other main rule (paragraph (3)) applies where no "principal part" can be identified. Basically, this triggers the creation of co-ownership between the owners of the various parts. Labour contributions, where involved, do not have any effect on the property law level. They may result in a right to be compensated under unjustified enrichment principles; cf. VIII.–5:201 (Production) Comment F. For situations where the person effecting the combination acts with a particular grade of bad faith, namely in case he knows that another part is not his own property and the owner of that part does not consent to the combination, paragraph (3) contains a special rule which has the purpose of preventing that person from becoming the sole owner of the combined entity. As that could only be the case where the person effecting the combination owns the "principal part", the rule is restricted to this situation. Where this exception applies, co-ownership will emerge. The concept is parallel to the exception in VIII.–5:201 paragraphs (2)(b) and (3) and, corresponding to the production rule, also includes a counter-exception for situations where the principal part is of "much higher value". The working group responsible for preparing Book VIII is, however, quite critical towards the whole exception rule of paragraph (3); compare Comment F below. Supplementary rules on the statutory proprietary security rights created under this Article are contained in VIII.–5:204 (Additional provisions as to proprietary security rights).

Terminology: combination. The category regulated by this Article is called "combination". This term comprises all situations covered by the present Article, irrespective of the goods' state of aggregation and irrespective of whether the single parts still can be identified in the new entity, or lost their individuality, etc.. For describing the effect of paragraph (2), also the term "accession" could be used.

Comparative background and main policy issues. Despite there being differences in detail, the relevant rules in the European legal systems roughly converge to the extent that they apply where separating the new entity would be impossible or at least unreasonable in an economic sense. Often, the same rules also apply to what is covered by VIII.–5:202 (Commingling); in particular, the commingling of goods of different kind is generally covered by "combination" rules in the national legal systems. In a few countries, a subordinate part may still be separated from a principal part if the former was much more valuable. As to substance, many countries provide that the owner of the "principal part" becomes sole owner of the combined entity (often named accession), partly also providing that where no principal part can be identified, co-ownership shall emerge (in some other countries, the goods are to be sold in that case). In many other countries, the relation of rule and exception between the "principal part" approach and the "co-ownership approach" is reversed so that basically co-ownership will be created. This is, e.g., a trend observable in German court practice where judges try to avoid a loss of ownership as much as possible. In a few countries, the issue of whether the combination was effected in good faith or in bad faith may also be an issue. Sometimes, the person combining goods in bad faith must accept that the other part may be separated even if that causes damage to the component parts. Another approach adopted is that the other party may choose between assuming ownership of the combined entity and ceding the ownership to the party in bad faith in exchange of a compensation. The question of whether a party was in good faith or in bad faith may also affect the amount of compensation payable if one party

acquires sole ownership by accession. Often, the relevant rules on unjustified enrichment are applicable. Taking into account this comparative background, there is a certain indication for adopting a "principal part" approach on the one hand and a "co-ownership approach" on the other hand. It must be clarified, however, which rule shall be the general one; this will depend, in particular, on how the parties' value interests can be served adequately. Another issue to consider is how the subordinate part owner's right to compensation shall be calculated. In addition, there is a general question of how a person effecting combination in bad faith shall be treated. Another question, which has however already been dealt with in VIII.–5:202 (Commingling) Comment B above, is how to delimitate the scopes of VIII.–5:202 and the present VIII.–5:203. As to a general overview of the typical interests involved in the situations covered by this Chapter, and general policies pursued in this relation, see VIII.–5:101 (Party autonomy and relation to other provisions) Comment H.

B. Scope of application (paragraph (1))

General. Parallel to what has been said in VIII.–5:202 (Commingling) Comment B, combination in the sense of this Article may be effected by one of the parties, a third person or occur by coincidence. In principle, this Article may apply to solids, liquids and gases. Practically, however, it will mainly apply to solids, since in case of liquids and gases, a separation into proportionate quantities in the sense of VIII.–5:202 will regularly be possible and economically reasonable. But there may be exceptional cases, e.g. where separation into quantities would be dangerous and could not be done without taking costly precautions. As mentioned above in Comment A, it is irrelevant whether or not the single parts still can be identified in the new entity.

Goods owned by different persons. Corresponding to the principles discussed in VIII.–5:202 (Commingling) Comment B, the present Article requires that goods of at least two different owners are combined. Labour contributions, where at hand, are irrelevant for the proprietary result, but may trigger compensation under unjustified enrichment principles; cf. Comment A above and VIII.–5:201 (Production) Comment F.

Separation into original constituents impossible or economically unreasonable. For a discussion of this Article's central requirement that "separation would be impossible or economically unreasonable" we can largely refer to the parallel provision in VIII.–5:202 (Commingling) and Comment B on that Article. Although the formulation in paragraph (1) of the present Article is a bit shorter than under the preceding Article ("into its original constituents" not being mentioned explicitly), the concept, in principle, is exactly the same. The decisive distinction between the present Article and VIII.–5:202 thus is that under the present VIII.–5:203, a separation "into proportionate quantities" is impossible or economically unreasonable; on the latter criteria, see VIII.–5:202 Comment B. As stressed above, the function of the requirement that separation into the original constituents must be impossible or economically unreasonable is to draw the line of demarcation between situations where joining goods of different owners results in some proprietary change and situations where there is no such change. In the latter case, each party remains the owner of his goods and can separate them from the unified something under general rules (cf. VIII.–6:101 (Protection of ownership)).

Although the concepts of "impossible" and "economically unreasonable" are identical in principle, applying the latter involves certain peculiarities as compared to VIII.–5:202 (Commingling): The main difference is that what must be weighed against the parties'

interests in maintaining the proprietary *status quo* are not only the costs of separation but also other economic disadvantages, namely the potential decrease in value resulting from the single parts being damaged in the course of separation. This potential loss, which is to be added to the costs of effecting separation as such, is the difference between the value of the combined (non-separated) goods and the added values of each component part after hypothetically having effected the separation. This sum, as said above, must be held against the parties' interests in remaining sole owners of each specific part, or in other words, their interests in the case not being governed by paragraphs (2) to (4) of the present Article. In that respect, it must be taken into account that under the present Article, in contrast to some rules applicable under existing national law in Europe, the value interests of all parties involved are served by either providing co-ownership of all parties involved or, where one party acquires sole ownership, by granting proprietary security rights in the combined entity in favour of the other parties. This means that the interests in getting one's part separated generally must be other than value interests, which as a tendency reduces the probability that separation is allowed. This also applies where single parts are very valuable. In this way, the present Article promotes the preservation of newly created economic entities and serves efficiency at a macro-economic level while, at the same time, serving the value interests involved. Under VIII.–5:202 on the other hand, which of course also serves the parties' value interests, the total value of the goods is normally not affected by separating the mass or mixture into proportionate quantities.

Illustration 1
A motor owned by A is assembled in a used car owned by B (without any agreement existing on the consequences), the work being performed by C. This is a standard case discussed in relation to the national combination rules. Under these model rules, one will first have to state that the labour performed by C does not lead to the creation of "new goods" in the sense of VIII.–5:201 (Production), for which reason the latter provision does not apply but refers (in its paragraph (3)) to the present Article. The decisive question for applying VIII.–5:203 (Combination) is whether separating the motor from the car would be "economically unreasonable". It should be stressed that this question cannot be answered in a general way but has to be assessed according to the facts of each individual case, so that sometimes separation may be regarded economically unreasonable whereas in other cases it may not. Generally speaking, the main costs to be considered in a case like this will be the costs for effecting separation as such, i.e. the work efforts of a mechanic. Presumably, neither the motor itself nor the car would suffer any considerable damage (if so, however, such loss would also have to be taken into account).

Illustration 2
Tyres owned by A are mounted on B's car. This case is also discussed frequently in the context of combination. Under the present Article, combination in the sense of paragraph (1) would not occur because the tyres can be demounted easily and with very low costs, without causing any damage to the tyres nor to the car.

C. Proprietary consequences where "principal part" rule applies (paragraph (2))

(a) Options in general

Options for proprietary consequences. Potential options for the proprietary consequences of situations covered by Section 2 of this Chapter have already been discussed in more detail in VIII.–5:201 (Production) Comment C for the purposes of production in the sense of that

Article. The options are basically the same in the present context as well, so that a general reference to the named Comments may be made. This Comment may confine itself to repeating that co-ownership of course takes care of all parties' value interests but may complicate matters in certain other relations, such as administration of the common asset, dividing co-ownership and selling the combined goods to a third party. Providing sole ownership to one person and leaving the others with mere obligatory claims, on the other hand, does not provide any protection in the new owner's insolvency. The others' value interests can, however, be taken care of if the sole ownership approach is combined with proprietary security rights granted to the (former) owners of subordinate parts. A sole ownership approach also may appear preferable with respect to the idea of serving sovereignty interests, i.e. interests related to the goods as such, other than interests in their value. Of course, each contributor may have such sovereignty interests in his original goods. In a certain sense and to a certain degree, such sovereignty interests might even best be served by allowing physical separation. But accepting that new entities shall not be separated where economically unreasonable, one may say that where sole ownership is given to the owner of the "principal part" (where existent), that part's sovereignty interests in his original goods will often basically continue in relation to the combined goods dominated by that party's principal asset. Regarding the publicity aspect, which is anyway not intended to be given much importance, one may add that the person acquiring sole ownership under a "principal part" rule will not necessarily be the person exercising physical control, whereas in case of production, the goods will at least typically be in the hands of the producer after that event.

(b) The rule adopted in paragraph (2)

General. The rule adopted in paragraph (2) is that where one contribution to the resulting combination can be regarded as the "principal part" and the other contribution(s), as a consequence, are to be considered as "subordinate part(s)", the owner of the principal part will acquire sole ownership. This can be described as a more or less general approach in the European legal systems. Contrary to the existing European legal systems, though, it is suggested that the (former) owners of subordinate parts shall acquire proprietary security rights in the combined asset, parallel to the solution opted for in VIII.–5:201 (Production) paragraph (1). As in the named production rule, this concept intends to combine a number of advantages offered by the different proprietary options while avoiding disadvantages as far as possible. It tries to take into account at least the principal part-owner's sovereignty interests (whereas the sovereignty interests of the subordinate part-owners could typically only be served when allowing physical separation) while respecting the value interests of the involved owners in relation to all combined parts. Also, the general creditors of the principal part-owner are economically restricted to their debtor's contribution as the rest of the value is reserved for the former owners of subordinate parts as long as the debts have not been paid off. Co-ownership, which would basically be equivalent to the proposed solution with regard to the parties' value interests, is avoided for its practical disadvantages, such as possible difficulties in jointly administering the combined goods, time and costs required for dividing co-ownership (which would regularly only be an interim stage, safeguarding the parties' value interests, but to be dissolved when the value-issue is settled). Also, difficulties resulting from potential disputes in the process of division of co-ownership, creating an impediment to commerce, are minimised. For a more detailed discussion, reference is made to VIII.–5:201 Comment C on the parallel issue in the context of production. Also, in some cases discussed below (e.g. *Illustration 8*), a co-ownership solution would simply be regarded un-natural. One can therefore summarise that, within the present Article, a "sole ownership & security right" approach is generally striven for where it seems possible to implement it (namely where a principal part can reasonably, i.e. without arbitrariness, be identified). Otherwise, co-

ownership will be applied. As to the general relation of the principal part rule to the co-ownership rule, see also Comment C below. Another exception has been adopted for rather ethical reasons where a particular grade of bad faith is at hand; see paragraph (4) and Comment F below.

Principal part – subordinate part; general. Although the distinction between the "principal part" ("main part", "dominant part" etc.; terminology differs) on the one hand and "subordinate parts" ("minor parts" etc.) is a rather common concept in the European legal systems, certain nuances and disputes can be observed regarding the interpretation of these criteria in court practice and doctrine. The terms are usually not defined in the statutory texts. Also in respect of the present Article, it appears preferable not to include any definition but to leave certain flexibility and discretion in applying the rule, whereby inspiration may well be drawn from the discussions on existing national law, however in the light of the aims and basic concepts of these model rules. One general guideline following from the general choices underlying this Article is, for instance, that there is no need to broaden the scope of the co-ownership rule of paragraph (3) as opposed to the scope of paragraph (2)'s sole ownership approach out of a motivation of protecting the subordinate part owners' value interests; these are already catered for by the security right concept (cf. Illustration 6 below). As a tendency, the notion of "principal part" may therefore be interpreted rather broad; see also Comment C below.

Criteria for determining a "principal part". The following criteria may be taken into account when assessing whether the contribution of a certain person is to be regarded as the principal part in the sense if this Article. The list of criteria, which a are all borrowed from national discussions, is explicitly intended to be of indicative character only. Obviously, overlaps may occur. None of the named criteria is intended to be decisive on its own and often, the "common opinion" however hard to grasp will be regarded ultimately decisive.

If one of the parts can be regarded as constituting the *essence* of the resulting combination, this will be an argument for treating this part as a principal part. One can ask whether the other parts of the combined entity could be lacking without affecting the essence of the thing.

> *Illustration 3*
> Fresh paint is sprayed on a car in order to repair damage to the paintwork. The car remains a car and is regarded as the "essence", as compared to the paint, by the common opinion.
>
> *Illustration 4*
> Screws owned by A are used when repairing a machine owned by B. Provided it would be economically unreasonable to remove them, paragraph (2) of this Article will apply, the machine constituting the principal part.
>
> *Illustration 5*
> A new motor owned by A is assembled into B's car. Provided dissembling the motor would be economically unreasonable (cf. Comment B with *Illustration 1* above), the "essence" criterion may speak in favour of regarding the car as the principal part, notwithstanding the motor's value.

It may be an aspect that other parts have only a supplementary *function* in relation to the part in question.

Illustration 6
A technical machine owned by A is incorporated into a casing or frame owned by B in a way that separation would be unreasonable. This case had to be decided by the German Supreme Court who argued that if the machine can perform its primary purpose without the frame, it should be regarded as a principal thing (e.g., the frame serves only as decoration, to give the machine a better look). If, to the contrary, the frame has other functions as well, e.g. protection of the machine and the persons operating the machine, the German Supreme Court held that the frame cannot be regarded as an accessory (subordinate pat). The same was argued where the operating of the machine would only be possible after incorporating it into the frame.

This reasoning shows the Supreme Court's concern of interpreting the principal part-rule narrowly in order to leave a broad scope of application to the co-ownership solution for the sake of protecting the value interests of the owner of the frame. The latter will not apply as a guiding motivation under the present Article (see above) and it is very likely that this may affect the result notwithstanding the fact that taking into account the supplementary function as a criterion for determining the principal part appears reasonable also for the purposes of this Article.

The *value* of the parts may also be a certain indicator, but corresponding to a broad understanding in the European legal systems it should not be regarded decisive. One must take into account that mere value interests are already taken care of by the creation of security rights under the present system.

Illustration 7
A stone of certain value owned by A is placed on a golden ring owned by B. The work is carried out by goldsmith C who contracted for a price with B (which implies an agreement in the sense of VIII.–5:101 (Party autonomy and relation to other provisions) that C will certainly not become the owner). Suppose separating the items would be unreasonable. Normally, the ring will be considered as the principal part under the common opinion. There may, however, also be cases where, e.g., the stone owned by A is a unique diamond, much more valuable than the ring as such. Here, if the task under a contract between A and C will, from an objective perspective, will rather be to "make something out of the diamond", the stone's value could operate as an indicator that rather the stone should be regarded as the principal part. There may perhaps also be cases where no principal part can be identified so that co-ownership emerges under paragraph (3).

Relation between principal part rule (paragraph (2)) and co-ownership rule (paragraph (3)). A question partly linked to the interpretation of the "principal part" concept is how the scopes of paragraph (2) and paragraph (3) shall relate. Theoretically, there are three alternatives: (i) The first would be applying the "sole ownership & security rights" approach to all cases; or in other words: deleting paragraph (3) where co-ownership is provided. If this option was chosen, the judge would always be forced to identify one part as the "principal" or dominant one, no matter whether or not there still is any plausible reasoning available for this decision. The owner of this part would then acquire sole ownership of the whole entity; the other(s) get a claim for compensation and a proprietary security right. Such a "black or white" concept (either the one or the other person will acquire sole ownership) may be regarded simpler in so far as no division of co-ownership must take place. On the other hand, in cases where it is difficult to determine which contribution should be regarded the principal one, the

parties (and third parties) will be left in uncertainty and even if they go to court, there is still an evident risk of arbitrariness where both parts are more or less equally important. (ii) A second option would be to apply the "sole ownership & security rights" approach only in a rather limited number of cases where, taken to extremes, the identification of a principal part is so self-evident that one simply cannot ignore it (e.g. where paint is sprayed on a car) in other words: to leave relatively broad room for co-ownership. (iii) The third option is to leave just a rather narrow field "in the middle" where both parties become co-owners (for instance, if the value of one part is 45 and the value of the other is 55 and there is no other criterion applicable besides the value). If, on the other hand, a principal part can be more or less clearly and reasonably identified, the "sole ownership & security rights" approach applies. It has already been indicated that the present Article intends to follow the third model. The value interests of the owners of subordinate parts are, as mentioned repeatedly, already taken care of by the security right; so the argument of value-protection does not speak in favour of a broad co-ownership concept. The purpose and advantage of having a rather narrow co-ownership rule in the middle is that harsh and hardly justifiable decisions in borderline cases can be avoided more easily.

How the "sole ownership & security right" concept works technically. The concept is the same as provided under VIII.–5:201 (Production) paragraph (1). See Comment C of that Article for a more detailed explanation.

Note regarding very small contributions. The concept proposed under paragraph (2) may appear a bit queer, at least at first sight, when it comes to very small contributions which, under any existing property law regime in Europe, would not result in any proprietary consequence whatsoever.

> *Illustration 8*
> A's paint is sprayed on B's car in order to repair damage to the paintwork. Assume the paint is worth 1/1000 of the car's value.

The question arises whether providing the owner of the by far less valuable contribution with a proprietary security right is adequate or, if not, whether some kind of limitation should be incorporated. Before trying to find a suitable borderline, which would evidently be problematic anyway, it suggests itself to analyse whether granting a proprietary security right in cases like *Illustration 8* causes any considerable practical problems: (i) A mini-security right would definitely become relevant when the owner of the principal part becomes insolvent and the debt has not been paid (or where the combined goods are attached and liquidated in a forced sale by one of the creditors outside bankruptcy). This, however, does not create considerable problems, as the difference between getting the whole claim discharged (by means of the security right created under paragraph (2)) and proportionate satisfaction which could otherwise be achieved in bankruptcy will not be considerable in absolute terms. (ii) A second aspect that may seem a bit strange is that the person entitled to the mini-security can of course also enforce the security right under general rules (see Chapter 7 of Book IX), i.e. he may have the combined asset sold. But this is not that striking either. Also if no proprietary security right was provided, A could, in the case of *Illustration 8*, enforce his right to payment in the whole patrimony of B, including the car. (iii) One may add that as long as the combined asset is not subject to enforcement (be it in its owner's insolvency or where the former subordinate part owner enforces the security right himself), the existence of the proprietary security right as such does not affect the principal part-owner. The debt will once be paid, or it prescribes, and nothing remains from the security right.

There is, however, one last potential problem, namely the situation where the combined goods are going to be alienated, so that the question arises whether or to what extent the potential existence of small proprietary security rights may create an impediment to commerce. It is obvious that, for instance, a used car may have undergone numerous small reparations, the price of which may partly have remained unpaid, and it is also obvious that the policy should not be that each buyer of a used car should find himself confronted with a whole list of proprietary security rights in his new car, the existence and extension of which he can never be really sure of. But, one will have to consider that such repairs will usually be made under a contract concluded between the (former) owner of the item and a service provider and that the contract may either contain an (express or implied) agreement in the sense of VIII.–5:101 (Party autonomy and relation to other provisions) that the service provider will not acquire any proprietary interests in the combined asset, or, if that agreement should provide the creation of a proprietary security right (e.g., equivalent to the present default rule), this security right will be subject to the provisions of Book IX (cf. VIII.–5:101(4) second sentence). In the latter case, Book IX Chapter 3 provides that the security right will be effective as against third persons only if, or as long as, the secured creditor (the service provider) is in possession of the combined entity or if the security right is registered; cf. IX.–3:101 (Effectiveness as against third persons) and IX.–3:102 (Methods of achieving effectiveness). Such registration will hardly ever be made in respect of very low debts so that a security right created by the service provider will usually not be effective as against a potential acquirer. This will also apply where the service provider agreed on a retention of ownership device in relation to the goods to be combined with the client's principal part and the client is a consumer: IX.–3:107 (Registration of acquisition finance devices) paragraph (3) does provide that "where a credit for assets supplied to a consumer is secured by an acquisition finance device, this proprietary security is effective without registration." But "this exception does not apply to security rights in proceeds and other assets different from the supplied asset" so that an extension to the combined entity would require registration which will regularly not be made.

There are, consequently, basically only two remaining situations where the combined asset to be acquired by a third person may be encumbered by an effective security right of the service provider: First, where the service provider used goods owned by someone else without that person's consent, in which case the present Article applies. This situation is, however, of low practical importance. Second, a security right created under Book IX itself may still exist and be effective where the supplier of the service provider delivered the material subject to a retention of ownership device, these two persons have entered into an agreement for extending the security to products or combined assets in the sense of IX.–2:308 (Use of goods subject to a retention of ownership device for production or combination) and the security right has been registered (cf. Comment C on the named Article). Even then, however, the potential third party acquirer (and this is to say, commerce in general) will largely be protected by good faith acquisition rules. In particular, IX.–6:102 (Loss of proprietary security due to good faith acquisition of ownership) paragraph (2) has the effect that a third party acquirer is not expected to search the register if he buys in the transferor's ordinary course of business. Also, he is not expected to know of entries not filed against the transferor but, e.g., against the person from whom the transferor acquired the asset (which will apply, e.g., in relation to material "acquired" subject to a retention of ownership device by the service provider that has been contractually extended to products and combined assets; see above). Such rights are filed against the service provider, not against the potential transferor of the combined asset (the client).

After all, it appears that there does not seem to be a practical need for treating very small contributions different from subordinate parts of a certain higher value.

D. Subordinate part owner's right to payment (paragraph (2))

General. Where a principal part exists and the owner of that part, therefore, acquires sole ownership of the combined asset, the owners of subordinate parts acquire a right to payment as against the principal part owner. The right to payment arises when the ownership in the original item is lost, i.e. at the moment of combination, and in principle serves the purpose of compensating the owners of subordinate parts for the value of their property. It is subject to the general rules on obligations and corresponding rights as provided under Book III (as to prescription, cf. VIII.–5:201 (Production) Comment D on the parallel issues arising there). The proprietary security right conferred by the first sentence of paragraph (2) relates to this right to payment. Similar as in case of production, there is, however, certain leeway for calculating this right to payment. Also here, the main policy issue has been on whom to place the risk of economically unsuccessful combinations, i.e. where the value of the combined asset is lower than the added single values of the former parts as such (cf. VIII.–5:201 Comment D). As in case of production, the choice has been placing this risk on the person who effected the combination. This policy is reflected in the two different calculation methods provided by the second sentence of paragraph (2). At the same time, this approach helps synchronising the present Article with the policies pursued in Chapter 7 of this Book, namely regarding situations where a possessor of goods which he must restore to their owner, adds subordinate parts to the owner's principal part. See below in Comment D.

Owner of principal part effects combination: payment equal to value of subordinate parts. The situation that combination is effected by the owner of the principal part, i.e. by the person who hereby acquires sole ownership in the combined asset, is regulated in the second alternative of paragraph (2) sentence 2. This rule provides that the subordinate part owners must be compensated "equal to the value of the respective subordinate part at the moment of combination". It corresponds to the approach taken in the parallel case of production: Also there, the parties who lose their right of ownership have a right to be paid "equal to value" as against the person who effected the relevant act and thereby acquired sole ownership of the new entity. The effect achieved by this approach is to place the risk of economically unsuccessful combinations on the principal part owner, who is responsible for effecting combination. At the same time, the value interests of the subordinate part owners are fully taken care of, also with regard to subsequent loss of the combined asset after combination. For a closer discussion of the concept, compare VIII.–5:201 (Production) Comment D. That a person "effects" combination in the sense of this rule covers, of course, not only carrying out the respective act oneself, but also situations where the principal part owner contracts with a third person to bring about the combination.

Combination effected by subordinate part owner or by third party: payment under unjustified enrichment principles. All situations where someone other than the owner of the principal part effected the combination are regulated by the first alternative of paragraph (2) sentence 2, which basically refers to the principles of unjustified enrichment. This rule covers situations where the combination is effected by the owner of a subordinate part, where a third person was responsible for effecting combination and where combination occurred by coincidence or an act of nature. Most often, the practical effect of this approach will be identical to what would be achieved by the "equal to value" concept employed by the second

alternative of paragraph (2) sentence 2. But there are three differences, one occurring where the disadvantaged party (i.e. the subordinate part owner effecting the combination) falls within the "consented freely and without error to the disadvantage" formula of VII.–2:101 (Circumstances under which an enrichment is unjustified) paragraph (1)(b) which will be discussed more closely below; the other two differences being relevant when the enriched person, i.e. the owner of the principal part to whom sole ownership of the combined asset accrues, is in good faith. These two further differences will be discussed in the following: first, the owner of the principal part will not be obliged to pay "more than any saving" which means that, in case that person has a smaller benefit of the combined asset than what would correspond to the added market values of all parts at the moment of combination, the owners of subordinate parts may receive less than the objective value of their goods at that time. Second, the principal part owner (enriched person) can raise the defence of disenrichment in the sense of VII.–6:101 (Disenrichment) to the extent he has sustained a disadvantage after combination (e.g., the combined asset was destroyed), provided he was still in good faith at the moment of this disenrichment. These concepts are further discussed in the context of production, so that reference can be made to VIII.–5:201 (Production) Comment D for a closer description. Contrary to the context of production and cases where the owner of the principal part himself effected the combination, however, the unjustified enrichment concept is deliberately chosen for the scope of the first alternative of paragraph (2) sentence 2. This is on the one hand motivated by protecting the principal part-owner's interests, who obtained an enrichment without his consent. While unjustified enrichment law safeguards that this person does not retain an undue benefit, obtaining the enrichment should also not result in further disadvantages. Where the person effecting the combination was the owner of the subordinate part in question, the unjustified enrichment approach also pursues the policy that the risk of inefficient combinations should be placed on the person who had it in his hands whether or not to bring about the factual result. The same goes for subsequent deterioration and other instances amounting to a "disenrichment". Since, in these situations, the said principles of distributing risks converge with the general principles of unjustified enrichment law, there is evidently no reason for deviating from the latter.

These policy considerations do, however, only partly apply where the combination is effected by a third person (who does not own any material involved in the combination), as well as in relation to subordinate part-owners where *another* subordinate part-owner effected the combination: The principal part-owner's worthiness of protection is the same as discussed above; but the respective subordinate part owner did not contribute with any act which, out of itself, would justify putting him into a less favourable position as compared to the "equal to value" approach. Nevertheless, the proposed approach corresponds to general principles of these model rules, as established by Book VII. Also, the respective subordinate part-owner may proceed against the responsible person under the rules on non-contractual liability for damage. It will be quite easy for such other owners of subordinate parts to demonstrate that they sustained a loss and to quantify that loss (i.e. the difference between the market value and the principal part-owner's subjective benefit). But the respective subordinate part-owner must establish the acting person's negligence. However, solving the problem via Book VI seems to be a good approach in so far as the problem is solved exactly in the relationship where it occurs, i.e. between the person effecting the combination and the respective subordinate part-owner who sustains a loss therefrom. There is no detour over the relationship with the principal part owner (i.e. the calculation of monetary claims against that person).

Synchronisation with Chapter 7. Opting for the unjustified enrichment approach *inter alia* for situations where the owner of a subordinate part effects the combination also fits to the

policy choices made in relation to Chapter 7 of this Book. See VIII.–7:104 (Expenditure on, or parts added to, the goods during possession) Comments B for a closer discussion of the question how to compensate a possessor of goods, which he would be obliged to return to their owner, for parts added to, or other expenses made on, these goods. The named provision overlaps with the present Article where the "possessor" contributes with a subordinate part to the "owner's" principal part. Sentence 2 of the present Article does not only refer to Book VII but also to VIII.–7:104, where applicable, i.e. where the owner of the respective subordinate part (possessor) himself effected the combination. The purpose of this reference is to cover VIII.–7:104(1) sentence 2, which safeguards that VII.–2:101 (Circumstances under which an enrichment is unjustified) paragraph (1)(b) does not exclude a possessor's entitlement to a reversal of the enrichment where the possessor knows that the goods are owned by another and incurs expenditure on, or adds parts to, the goods for the purpose of the possessor's own benefit. The reasons for this choice are discussed in VIII.–7:104 Comment B. A parallel approach is followed in VIII.–5:201 (Production) paragraph (3) sentence 3; cf. Comment F on that Article.

E. No principal part identifiable: co-ownership (paragraph (3))

General. Paragraph (3) is intended to be understood as an exception where no "principal part" can be identified (cf. Comment C above). If so, the owners of the goods involved (neutrally named "component parts") become co-owners of the combined entity, subject to an exception for very small contributions provided under paragraph (3) sentence 2. In both cases, the value interests of the parties involved are provided proprietary protection. Co-ownership is acquired by operation of law at the time of combination. The rule impliedly refers to VIII.–1:203 (Co-ownership) which provides that each co-owner acquires an undivided share in the combined asset and each co-owner can dispose of that share by acting alone. Further rules on co-ownership created under this Article are not contained in these model rules. In particular, division of co-ownership has not been regulated any closer, *inter alia* because auf the central role judicial proceedings play in this respect unless the parties reach an agreement on the division of co-ownership in many countries. There is, however, a short overview on this subject matter provided in the Notes to this Article. A simplified mode of dividing co-ownership as provided by VIII.–5:202 (Commingling) paragraph (2) evidently is out of question in the present context.

Calculation of shares. The undivided shares of the co-owners are calculated "proportionate to the value of the respective part at the moment of combination". This appears to be a wide spread approach in European legal system where co-ownership emerges in the case of combination and has the advantage of taking care of the value interests of all co-owners equally. It also corresponds with the mode of calculation adopted in VIII.–5:202 (Commingling). However, this approach constitutes a certain incoherence within the system of Chapter 5, since all contributors are treated alike irrespective of who effected the combination. In other rules except VIII.–5:202 (Commingling) where the separation into proportionate quantities in most cases secures that everyone gets back what he had the risks of the production or combination being economically inefficient or the new entity being subsequently destroyed are usually placed on the person who effected the relevant act. This approach could, theoretically, also be implemented in paragraph (3) of this Article by employing the calculation scheme adopted in paragraph (4) sentence 2, i.e. providing that the shares of all owners of component parts who did not effect the combination are calculated "equal to their value" at the moment of combination. Still, paragraph (3) sticks to the traditional "proportionate to value" approach. One aspect in this relation certainly is that with regard to the situations covered by VIII.–5:201 (Production) paragraphs (1) and (3) and VIII.–

5:203 (Combination) paragraphs (2) and (4), the scope of solutions offered in the European legal systems is broader than in the present context, so that a policy choice had to be taken anyhow. Another aspect is that especially in the case of VIII.–5:203(2), a synchronisation with Chapter 7 of this Book had to be found (cf. Comment D above), which facilitated the choice towards an unjustified enrichment concept placing the risk on the person effecting the combination. But that was not necessary with regard to paragraph (3) of this Article (cf. Comment E below).

Further loss sustained by owners of component parts; subsequent damage. Where one of the owners of component parts sustains additional loss, e.g. because the method of calculating the undivided shares described above does not cover the full market price of his goods, or because additional costs must be expended for obtaining substitute goods, these losses may be liquidated from the person who effected the combination under the rules of Book VI. Where the combined asset deteriorates or gets damaged, the co-owners, in principle, bear the loss proportionally in relation of their undivided shares. If, however, one of them, or a third person, is accountable for such damage, recovery may be made again by resorting to reparation under Book VI.

Special rule for component parts of minimal importance, paragraph (3) sentence 2. Sentence 2 of paragraph (3) contains a special rule for situations where two or more parts of more or less equal, or at least considerable, importance and, in addition, further goods which are only of minimal importance are involved in the combination.

> *Illustration 9*
> Goods owned by A, B, C and D are combined in a way that co-ownership emerges under paragraph (3) of this Article. A's and B's goods are each worth 40 %, C's goods are worth 19 % and D's goods are worth 1 % of the total value of the combined asset.

D's contribution is "minimal" in the sense of paragraph (3) sentence 2. The purpose of this rule is to practically facilitate division of co-ownership by party agreement while, at the same time, fully respecting and protecting the value interests of the owner of such a minimal part. The latter aspect is achieved by replacing the co-ownership share which would be acquired under sentence 1 by a right to monetary compensation of exactly the same value, secured by a proprietary security right in the combined goods. This model has practical advantages in so far as division of co-ownership by party agreement is typically easier the less parties are involved. In particular, the owners of the more important parts (in *Illustration 9*: A, B and C) will typically be interested in separating co-ownership quickly; long negotiations and disputes would keep the combined goods "out of commerce". If, in such a situation, a further person with a small co-ownership share was involved in the negotiations as well, this person could be tempted to give his assent only if he receives an excessive price. Such risks are avoided by the additional rule in the second sentence of paragraph (3).

Relation to Chapter 7. In principle, this Article may overlap with Chapter 7 also where co-ownership emerges under paragraph (3), the decisive aspect under VIII.–7:101 (Scope of application) being that the possessor adding his own goods to other goods had to return these other goods to their owner at the moment he effected this combination. Unlike situations where the possessor combines his own "subordinate part" to the owner's "principal part", where a synchronisation between paragraph (2) of the present Article and VIII.–7:104 (Expenditure on, or parts added to, the goods during possession) had to be striven for (cf. Comment D above), the situations covered by paragraph (3) of this Article are characterised

in that a return of the combined asset to "its owner" will not take place anyway due to the creation of co-ownership. It is therefore no problem to let paragraph (3) supersede the unjustified enrichment-orientated provision of VIII.–7:104. This effect is spelled out by VIII.–7:101(3).

F. Exception from acquisition of sole ownership where person effecting combination knowingly uses another's goods without that other's consent (paragraph (4))

General. Paragraph (4) of this Article has been introduced as a parallel provision to VIII.–5:201 (Production) paragraph (2)(b). The discussion of the present rule can therefore be kept relatively short by referring to details discussed in VIII.–5:201 Comment E. Also in the present context, it was clear that, if any exception for parties acting in bad faith was to be adopted at all, such exception shall be a narrow one because, in particular, the "sole ownership & security right" concept of paragraph (2) of this Article provides quite sufficient protection for the owners of subordinate parts and uncertainty resulting from disputes about bad faith should be kept limited, if not avoided completely (cf. VIII.–5:201 Comment E). Like in the case of VIII.–5:201(2)(b), the policy underlying the exception in paragraph (4) is that no one should benefit from committing a criminal (or close to criminal) act. Also, it may be emphasized that the working group preparing Book VIII was not at all in favour of adopting paragraph (4) but did so according to a majority decision in the Study Group's Co-ordinating Committee (cf. also VIII.–5:201 Comment E).

Scope of exception. Pursuant to the policy outlined above and parallel to the rule in VIII.–5:201 (Production) paragraph (2)(b), paragraph (4) of this Article aims at preventing a person acting in particular bad faith (see below) from assuming an ownership right at the expense of the owners of other parts involved in the combination. The effect to be avoided, therefore, is that such a person acquires sole ownership under paragraph (2) of this Article. From this follows that the scope of paragraph (4) is restricted to situations where the combination is effected by the person who owns the "principal part". For other situations there is no need for such exception: If a subordinate part-owner effects combination with such unlawful intent, ownership will be acquired by another person anyway (paragraph (2)) and where co-ownership under paragraph (3) is created, the person effecting combination in particular bad faith will not take a bigger proportion of ownership than he had before. The second aspect to be discussed in relation to the rule's scope is that the person effecting the combination must actually know that a (i.e. at least one) subordinate part is owned by another person and that this other person does not consent to the combination. The provision primarily addresses the thief who uses the stolen goods for combining them with his own goods, but has a broader scope. For details as to the requirement of actual knowledge and the situations covered by this criterion, reference may be given to VIII.–5:201 Comment E. The burden of proof as to the existence of actual knowledge lies on whom who asserts this fact. This will regularly be the owner of the respective component part. As to the counter-exception for situations where the principal part is of "much higher value" see Comment F below.

Creation of co-ownership, calculation of shares (sentence 2). The consequence provided by the exception of paragraph (4) is that all owners of component parts become co-owners of the combined asset. This also includes the thief (or other person covered by the criterion of actual knowledge). It is noteworthy that the policy underlying this rule parallel to VIII.–5:201 (Production), in case the producer in particular bad faith also uses material of his own is to prevent the person in bad faith from acquiring a bigger portion of ownership by the

specifically unlawful act, but not to take away any ownership right this person lawfully had. Regarding the calculation of the co-owners' undivided shares, however, the bad faith of the person effecting the combination does bear significance. Sentence 2 of paragraph (4) places the risk of economically inefficient combinations on the person who effected the combination in particular bad faith. The owners of subordinate parts acquire a share "equal to the value" of their respective component part at the moment of combination. This guarantees that these owners' value interests are met fully, even where the overall value of the combined asset is less than the added single values of all component parts. The share of the principal part owner corresponds to what is economically left after "deduction" of the subordinate part-owners' shares. Nevertheless, the result will usually be that the person who effected the combination in a qualified degree of bad faith is the majority shareholder due to the dominating position of his principal part. This (or a comparable) scheme of calculating the shares is also needed in order to avoid the result that the person effecting combination in a qualified degree of bad faith would be put in a better position under paragraph (4) than he would have been under paragraph (2) had he acted in good faith. A specific rule along the lines of paragraph (3) sentence 2, providing the owner of a "minimal" part "only" a right to payment secured by a proprietary security right, is not adopted in paragraph (4). Where such a "minimal" part has been stolen (etc.), however, the counter-exception of "much higher value" may result in the principal part-owner acquiring sole ownership (see *Illustration 10* below).

Counter-exception: much higher value. Paragraph (4) contains the same counter-exception as provided in VIII.–5:201 (Production) paragraph (2)(b): Paragraph (2) of the present Article applies and the owner of the principal part, who effects the combination in the particular bad faith, acquires sole ownership of the combined asset if "the value of the principal part is much higher than the value of the subordinate part". "The subordinate part" just means the part(s) in relation to which the requirements set out for the exception under paragraph (4) sentence 1 of this Article are fulfilled, i.e. the part which has been stolen or is otherwise knowingly used without its owner's consent (cf. VIII.–5:201 Comment E for the parallel question arising in production cases). The concept of "much higher value" is copied from VIII.–5:201(2)(b). It must be considerably more than what suffices to constitute a "principal part". Despite all vagueness remaining, the counter-exception doubtlessly serves an important task in avoiding unreasonable results in some constellations.

> *Illustration 10*
> A, the owner of a car, steals an aerosol can owned by B and sprays the paint on the car body. If the exception rule of paragraph (4) contained no counter-exception, B would become co-owner of the car.

Critique and alternative proposal: deletion of paragraph (4). As mentioned above (Comment F), the working group preparing this Book rather favours deleting the whole paragraph (4) and covering all "principal part" cases by paragraph (2), irrespective of that part's owner's good faith or bad faith. To a large extent, the arguments are parallel to those brought forward in the context of the working group's preference of deleting VIII.–5:201 (Production) paragraph (2)(b) as well (for a closer discussion, see Comment E on that Article): The exception rule of paragraph (4) of the present Article hardly brings about more practical protection to the owner(s) whose goods have been stolen (etc.). Being entitled to demand payment of the full market value, secured by a proprietary security right, would perfectly meet the subordinate part-owners' value interests, which are basically to be regarded their main interests. In relation to all additional loss they may sustain, resorting to the rules of non-contractual liability for damage under Book VI is the appropriate means; co-ownership is

of no help in such regard. Looked upon from the opposite perspective, the principal part-owner who knowingly used another's subordinate part would not really benefit in an economic sense in case the general rule of paragraph (2) was applicable. Apart from these value-based deliberations, the owner of a subordinate part who invokes the exception of paragraph (4) runs considerable procedural risks, in particular because the other party's actual knowledge regularly is particularly difficult to establish. All kinds of uncertainties may also have negative effects on third parties. Evidently, the counter-exception of a "much higher value", apart from adding a third level of differentiation (subordinate part, principal part, principle part of much higher level), contributes to increasing this Article's complexity and dispute-affinity. Last but not least, the result achieved under the exception rule does not only lack an addition in terms of practical protection for the other co-owners, it actually leads to rather impractical consequences: Due to the importance of his principal part, the thief (or similar person) will most often be the majority shareholder in the combined asset. This means that depending on the relevant rules of national law he may administer the combined asset according to his will (e.g., if the relevant administration rules let a simple majority suffice in administrative issues). Reaching an agreement about dividing co-ownership which is what the subordinate part owners will try to achieve in order to realise their value interests may also be rather complicated, taking into account the majority owner's favourable position regarding administration and the particular honesty this person has already proven. One can expect that the other co-owners will often have to enter judicial proceedings for dividing the co-ownership. For all these reasons, also taking into account that the comparative survey does not provide a strong indication for deviating from the general rule of paragraph (2), deleting paragraph (4) appears to be a favourable solution.

VIII.–5:204: Additional provisions as to proprietary security rights

(1) A proprietary security right created under the preceding Articles on production and combination is effective against third persons without requiring possession by, or registration of, the former owner of the material or of the component part.

(2) If the proprietary security right in the new or combined goods is extinguished by a third party's good faith acquisition (Chapter 3), the security right extends to the proceeds of the sale. Paragraph (1) applies accordingly.

(3) A proprietary security right created under the preceding Articles on production and combination takes priority over any other security right which has previously been created, by the producer or by the owner of the principal part, in the new or combined goods. The same applies to equivalent security rights created by agreement between the former owner of the material and the producer, or between the former owner of the subordinate part and the owner of the principal part.

COMMENTS

A. General

Scope and purpose of this Article. This Article provides supplementary provisions which appear necessary for the approach of protecting certain parties' interests by granting proprietary security rights to work efficiently. To the extent provided by the present Article, the security rights created under this Section deviate from the general rules on proprietary security rights as provided by Book IX; cf. VIII.–5:101 (Party autonomy and relation to other provisions) paragraph (4) sentence 1. The rules of the present Article apply to all cases where, under the preceding provisions of this Section, a former owner of goods acquires such a proprietary security right, i.e. in case of VIII.–5:201 (Production) paragraph (1) and VIII.–5:203 (Combination) paragraphs (2) and (3) sentence 2.

B. Effectiveness without possession or registration (paragraph (1))

The general rule provided by Book IX. Book IX on proprietary security rights distinguishes between "creation" and "effectiveness" of a proprietary security right. "Creation" of security rights in the sense of Section 2 of this Chapter is effected by operation of law at the moment of production, or combination, respectively (cf. VIII.–5:201 (Production) Comment C and VIII.–5:203 (Combination) Comment C). For providing protection as against third parties, in particular as against other (later) secured creditors and against the producer's or the principal part-owner's general creditors in that person's insolvency, a proprietary security right also needs to be "effective" in the sense of Chapter 3 of Book IX; see IX.–3:101 (Effectiveness as against third persons) paragraph (1). The usual methods of achieving such effectiveness as far as relevant in the present context are holding possession of the encumbered asset (i.e. the new or combined goods) or registration of the security right pursuant to Chapter 3 Section 3 of Book IX; see IX.–3:102 (Methods of achieving effectiveness). Details and exceptions (such as for goods supplied to a consumer under an acquisition finance device, cf. IX.–3:107 (Registration of acquisition finance devices) paragraph (3)) may be neglected in the present context. The method which would be practically relevant for security rights created under Section 2 of the present Chapter if not excluded by the present Article would be registration. Possession would not be an appropriate alternative at least in cases of production, as it is usually the producer (and not the secured party, which is the former owner of the material) who has physical control over the new goods. The same would apply where the owner of the principal part effects combination.

Necessity for adaptation for purposes of Section 2. If proprietary security rights created under Section 2 were subject to a registration requirement as described above, there would be an eminent risk that the target of protecting the owners' value interests against the producer's (principal part-owner's) creditors would be missed. One has to consider that Section 2 of Chapter 5 in particular also covers situations where the owner of the material (i.e. the secured party) does not even know that production or combination has taken place, or who the producer (or the owner of the principal part in case of combination) is, and would, therefore, be practically excluded from filing a registration notice. There are basically two options how to solve this problem: Either registration must be made at least within a certain period of time, e.g. three months, from the moment when the owner of material obtained actual knowledge of the fact that production (or combination) occurred and of the identity of the producer (or owner of the principal part). This, as a tendency, could help to make the register more complete (although completeness could not be achieved). However, the time limit for such subsequent registration should not be too short, because the owner of the material, when suddenly being informed of what happened to his goods, may need to obtain legal advice in order to know what to do, etc. The other option, which was preferred for the present Article, is to do without a requirement of registration (and possession) for achieving effectiveness as against third parties altogether. One must take into account that filing notices in the register would create certain costs and efforts for the secured party (the former owner of the goods). In particular, the owner of the goods involved in production or combination might be required to undertake an initial enrolment in the register (cf. IX.–3:304 (Authentication as requirement for declarations to the register)), the costs of which he would basically have to bear himself (cf. IX.–3:332 (Distribution of costs)). After all, one may well assume that such constellations where registration after some months could still be made would be so rare that the aim of making the register as complete as can be would not seriously be impeded by not requiring possession or registration from the beginning. Of course, nothing is to be said against "voluntary" registration of security rights created under Section 2 of this Chapter, which offers the former owner of goods used in production or combination a possibility of reducing the risk of losing his right due to a third person's good faith acquisition.

C. Extension to proceeds (paragraph (2))

Extension of security right to proceeds (paragraph (2) sentence 1). A proprietary security right in the new or combined goods may vanish as a consequence of good faith acquisition, when the producer (or the principal part-owner) sells these goods to a third party who does not know nor has reason to suspect that such security right exists. Such good faith acquisition free of encumbrances is provided for in VIII.–3:102 (Good faith acquisition of ownership free of limited proprietary rights) and is further specified in IX.–6:102 (Loss of proprietary security due to good faith acquisition of ownership) paragraph (2). In order to maintain the security as much as possible in such a situation, paragraph (2) of the present Article provides that the security right shall extend to the proceeds of such a sale. The term "sale" is intended to encompass also other dispositions for value than contracts for the sale of goods in a narrow sense, provided this disposition leads to a good faith acquisition extinguishing the security right in the goods (otherwise, the security right in the goods remains enforceable against the acquirer and there would be no need to "double" the encumbered assets). According to the drafting history of this provision, the term "proceeds" is intended to cover (i) the producer's (principal part-owner's) claim for payment of the price against his buyer (as long as the latter has not paid) and (ii) the price received from the buyer once the latter paid. This right will, of course, only be enforceable as long as the paid sum is identifiable within the producer's (principal part-owner's) patrimony. As to a possible extension to further kinds of proceeds,

see Comment E below. Although this was not subject to discussion when preparing this Chapter, one could contemplate adopting a parallel rule for co-ownership shares created under VIII.–5:203 (Combination).

No possession or registration needed for extension of security right in proceeds (paragraph (2) sentence 2). Finally, the same deliberations as discussed for the security right in the new or combined goods as such apply to the extension of the security rights to the proceeds of a sale (cf. Comment B above). Neither possession nor registration is required for achieving effectiveness in relation to the extension of the proprietary security right to the proceeds of a sale.

D. Priority over security rights earlier created in new or combined goods (paragraph (3))

The problem. This paragraph deals with situations where a producer (or the owner of the principal part in case of combination) has already concluded prior to production or combination an agreement to create a security right in the new or combined goods in favour of a third party. Under the rules of Book IX, such an agreement between the producer or principal part owner (as security giver) and a third party as the secured creditor (e.g., a bank) may be validly concluded before the encumbered asset comes into existence. Such agreements on the creation of security rights in future goods may be registered and priority is generally determined by the time of that registration; see IX.–4:101 (Priority: general rules) paragraphs (1) and (2)(a). This means that, under the general regime of Book IX, such a preceding security right of a third party, whereas formally being created only at the time the relevant asset comes into existence (cf. IX.–2:102 (Requirements for creation of security rights in general) limb (a) and Comment B on that Article) would have priority over a security right created under Chapter 5.

Priority of security right created under Section 2. As the main policy of Chapter 5 is to preserve some form of property law protection (cf. VIII.–5:101 (Party autonomy and relation to other provisions) Comment H), the statutory proprietary security right provided for by the rules on production and combination must have priority over the contractual security rights previously granted to a third party. This is spelled out explicitly in paragraph (3) sentence 1. The rule is not only justified by the said policy of maintaining some kind of proprietary protection equivalent to the former ownership right in the goods involved in production or combination. There also is a strong parallel to acquisition finance devices (especially retention of ownership devices), which are also granted "superpriority" by IX.–4:102 (Superpriority) paragraph (1). In both situations, the security provider (producer or principal part-owner; buyer under retention of ownership) increases his assets by "taking in" another's goods (material used in production or combination; or goods acquired subject to a retention of ownership device), but has not yet paid the full equivalent for these new assets to the person from which he received them. Metaphorically, he has not "earned" these assets to the extent the former owner's security right still exists. This also shows that the "superpriority" proposed by paragraph (3) of the present Article does not frustrate any legitimate expectations of the producer's (principal part owner's) other creditors: Before having paid the monetary equivalent to the former owner of the goods involved in production or combination, the producer (principal part owner) is not entitled to the full value of the new or combined goods. Economically, the producer is only entitled to the value of his work, as reflected in the new goods, and the principal part-owner is entitled to the value of his own component part. In so far, the material-owner's (principal part owner's) proprietary security right created under

Section 2 of this Chapter does not interfere with another creditor's global security right. The producer's (principal part owner's) other creditors cannot legitimately expect that the producer (principal part owner) could increase his assets (and, thereby: their collateral) by the value of unpaid material used for production or combination without the prior owner's consent. Finally, this solution corresponds with the solution that would be achieved if VIII.–5:201 (Production) and VIII.–5:203 (Combination) paragraph (2) provided for co-ownership between the producer and the owners of material, and between the owner of the principal part and the owners of subordinate parts, respectively: The producer (owner of the principal part) could create a security right only in "his" undivided share, whereas undivided shares of other co-owners, i.e. shares of the former owners of the material, or of subordinate parts, respectively, would remain unaffected. Where the effect provided for under this paragraph shall be avoided, the producer (or principal part owner, respectively) may try to reach a party agreement in the sense of VIII.–5:101 paragraphs (1) and (2) with the owners of the other goods involved.

Priority of equivalent contractual security right. The same priority regime shall apply where a security right equivalent to the one created under the default rules of Section 2 of this Chapter is created by an agreement between the owner of the respective material or subordinate part on the one side, and the producer or principal part-owner on the other side. It would not be adequate to "punish" a material-owner (or an owner of a subordinate part) for regulating the effects of production or combination in an agreement by putting him in a worse position regarding priority. Also here, the parallel to retention of ownership devices, which are also granted superpriority by the named IX.–4:102 (Superpriority) paragraph (1), is evident (see also Comment G on the named Article). This rule is explicitly spelled out in the second sentence of paragraph (3). Party agreements in the sense of this paragraph are agreements in the sense of VIII.–5:101 (Party autonomy and relation to other provisions) paragraphs (1) and (2), i.e. agreements concluded before or upon production or combination. "Equivalent" security rights are such that grant the secured creditor (i.e. the former owner of material or of a subordinate part) the same, or less, protection as that person would be provided with if Section 2 of this Chapter applied. This particularly includes the amount of the secured claim. To the extent the secured claim exceeds the amount calculated under the respective rules of Section 2 of this Chapter, no superpriority in the sense of this paragraph is provided, but the general rules on priority apply (see Chapter 4 of Book IX).

E. Further issues relating to proprietary security rights created under Section 2

Relation to already existing proprietary security rights in the material. A further issue, which however does not require specific regulation in Chapter 5 of this Book, is the question how the *ex lege* security rights created under Section 2 of Chapter 5 relate to proprietary security rights which, at the moment of production or combination, already existed in the material or single component parts. This issue is regulated by Book IX itself. The first rule to observe is IX.–2:307 (Use of encumbered goods for production or combination) paragraphs (1) and (2). Under these rules, security rights in the encumbered material may be extended (a) to the product or the combined asset (which is relevant where the security provider effects production himself, or where he owns the principal part himself, respectively), or (b) to the right to payment to which the security provider is entitled as former owner of the goods under the rules of Section 2 of this Chapter (which is relevant where a third party effects production or owns the principal part in case of combination) only if the parties, i.e. the owner of the respective material as the security provider and the respective secured creditor, so agree. This agreement must be registered in order to achieve effectiveness as against third parties (cf.

IX.–2:307 Comment D). Provided such agreement has been made, the security right originally created in the respective goods automatically extends to the product (combined asset) or the material owner's right to payment without requiring any further act, and provided the security right was effective in relation to the original goods, effectiveness is preserved without any additional registration. Also, the priority of the security right in the original goods is preserved by virtue of IX.–4:103 (Continuation of priority) paragraph (1)(b).

Where the security right, under the principles summarised above, extends to the material-owner's right to payment as against the producer or principal part-owner, the security right also extends to that former owner's proprietary security right in the new or combined goods (as created under Section 2 of this Chapter). This effect is explicitly spelled out by IX.–2:307 (Use of encumbered goods for production or combination) paragraphs (4). As a result, the secured creditor (third party holding a security right in the former material or subordinate part) is entitled to enforce the proprietary security right created under this Section (i.e., in favour of the former owner of the material or subordinate part). As a general principle, this is also laid down in IX.–2:301 (Encumbrance of right to payment of money) limb (c).

As a practical effect, payments made by the producer (principal part-owner) to one former owner of material, or by one former owner of material to one of his pre-existing secured creditors, do not affect the position of another former owner of material and his pre-existing secured creditors, respectively. Metaphorically, each former owner of material used in production or combination constitutes a "branch" which is entitled to a certain amount of payment by the producer (principal part-owner). Payments made within such a branch never affect other branches (another former owner of material and his preceding secured creditors).

Extension of security right to certain proceeds of originally encumbered asset. In addition to the case explicitly regulated by paragraph (2) of this Article, the proprietary security right created in the new or combined goods also extends to certain other proceeds of the originally encumbered asset as far as provided for by general rules of Book IX. Pursuant to IX.–2:306 (Proceeds of the originally encumbered assets) paragraph (1), the security right extends to rights to payment due to a defect, damage or loss of the originally encumbered asset, including insurance proceeds.

Enforcement of security right created under Section 2. As to enforcement of security rights created under this Section, the general enforcement rules of Chapter 7 of Book IX will apply. Generally, enforcement may be exercised after an event of default (cf. IX.–7:101 (Secured creditor's rights after default) paragraph (1), which basically means any non-performance of the debtor of the obligation covered by the security right (i.e., the producer or principal part-owner); cf. IX.–1:201 (Definitions) paragraph (5). This basically means that the secured obligation must be due (which will be the case immediately upon production or combination) and has remained unpaid. Enforcement may be made judicially or extra-judicially, in the latter case subject to restrictions applying where the security provider (producer, principal part-owner) is a consumer; cf. IX.–7:103 (Extra-judicial and judicial enforcement) paragraph (2): the consumer must have agreed to extra-judicial enforcement after default. In case the security provider is a consumer, any enforcement proceedings must be initiated by delivering an enforcement notice in textual form at least ten days before the beginning of enforcement; cf. IX.–7:107 (Enforcement notice to consumer).

Time limits. The former owner's right to payment under VIII.–5:201 (Production) paragraph (1) and VIII.–5:203 (Combination) paragraphs (2) and (3) sentence 2 are subject to the general three years period of prescription provided by III.–7:201 (General period). As top details, especially as to commencement and suspension of this period on the ground of ignorance, see VIII.–5:201 Comment D. Accordingly, the proprietary security right practically created under the named provisions becomes ineffective (unenforceable) after three years from production or combination (or later, where suspension applies). This seems to be adequate, as the situation where the asset is encumbered is not prolonged eternally and, on the other hand, the former owner of the goods involved in production or combination will have a practically realistic period of time to enforce his right.

CHAPTER 6: PROTECTION OF OWNERSHIP AND PROTECTION OF POSSESSION

Section 1: Protection of ownership

VIII.–6:101: Protection of ownership

(1) The owner is entitled to obtain or recover possession of the goods from any person exercising physical control over these goods, unless this person has a right to possess the goods in the sense of VIII.–1:207 (Possession by limited-right-possessor) in relation to the owner.

(2) Where another person interferes with the owner's rights as owner or where such interference is imminent, the owner is entitled to a declaration of ownership and to a protection order.

(3) A protection order is an order which, as the circumstances may require:

(a) prohibits imminent future interference;
(b) orders the cessation of existing interference;
(c) orders the removal of traces of past interference.

COMMENTS

A. General approach in Chapter 6

Legal remedies of owners and possessors. Chapter 6 of Book VIII determines which remedies are available to full owners of a movable and to parties who directly or indirectly exercise physical control over a movable (possessors, see VIII.–1:205 to VIII.–1:208) when another person interferes with their legally protected positions with respect to the movable.

Basic differences between remedies protecting ownership and remedies protecting possession. The protection of the legal position of an owner as a holder of the full right in rem with respect to the movable considerably differs from the protection of the legal position of a mere possessor: the first type of protection aims at a final solution of a legal dispute over a right in rem, it protects and enforces a permanent order with respect to the proprietary right of ownership; whereas the protection of possession is only of temporary nature, its main aim is to protect the former possessor and the owner against the negative consequences of unlawful infringements of the actual possession of a movable. It gives the possessor certain rights against the unlawful intruder: self-help, claim for recovery, protection order. Thereby, a person who wants to realize his or her claim to possess the movable is forced not to act unlawfully, on his or her own initiative, by simply taking away the movable from the actual possessor, but, instead, to enforce his/her claim in court. The rules on protection of possession thus promote the peaceful resolution of disputes over the right to possess a movable by use of court proceedings, and give the peaceful possessor, who has not acted unlawfully when obtaining his possession, the advantageous position of a respondent in a court litigation over the right to possess. For the relationship between the protection of ownership and the possession remedies see the Comment F.

B. Sources and scope of application

Sources and relation to other fields of law. The sources for the present Chapter consist mainly in the property law provisions of the European legal systems as they have been developed by literature and court decisions over the years. Occasionally, other fields of law must also be taken into consideration, especially the rules on civil procedure and non-contractual liability for damage of the EU Member States, as well as Book VI of the DCFR on Non-Contractual Liability Arising out of Damage Caused to Another.

C. Basic principles and guidelines of remedies

Obligatory rights to possess protected. The European legal systems vary as to the means of protection of ownership and possession. Whereas the common law systems treat the position of a possessor as a right with effect against third parties (*in rem*), the majority of the other systems recognize a restricted catalogue of rights *in rem* (like ownership, security rights, *usufruct* etc) which does not include mere possession. Nevertheless most of these systems afford to persons with an obligatory right (*in personam*) to exercise physical control over a movable ("limited-right-possessors" in the terminology of this Book) a special protection against third persons infringing that right which is similar to the protection afforded to the holder of a right *in rem* (e.g. the owner): namely remedies in tort, an entitlement to recovery and to protection orders against the third person. Thus, in these systems, the position of limited-right-possessors is protected as a "quasi-right *in rem*". The rules of Chapter 6 follow the majority trend in the Member States' legal systems in granting limited-right-possessors possessory remedies (VIII.–6:203, VIII.–6:204), as well as the partly rights-based remedies of VIII.–6:301 and VIII.–6:302 (better right to possess or better possession).

Types of remedies. With respect to the kinds of remedies available to a possessor we decided to follow the majority approach among the EU Member States and to depart from the minority Common Law approach (Great Britain, Ireland): In the Common Law systems no special remedies for the protection of ownership and possession are available, all infringements of the owner's/possessor's legal position are treated as torts. The only remedies available there are, therefore, tort remedies (in most cases damages in money, only in exceptional cases also recovery and the like). To the contrary, the continental legal systems provide remedies in tort when certain types of qualified possession are violated (especially in cases of proprietary rights to possess [e.g. ownership], of limited-right-possessors, who have a [limited proprietary or obligatory] right to possess the movable, and occasionally also in cases of persons acquiring by continuous possession) AND in addition particular ownership and possession remedies. (For the relationship between the protection of ownership and the possession remedies see Comment F.)

These latter remedies normally differ from tort law remedies in two ways: on the level of the prerequisites for the claim, they do not require any evidence of fault or negligence on the side of the violator, and on the level of the nature of remedies. The main remedies in this area are the recovery of the movable and a protection order against interferences with possession other than total dispossession. Money damages are only available under the torts provisions, but not in this field of law.

D. Terminology

Definition of possession. This Chapter is based on the definitions set out in Chapter 1 VIII.–1:205 – 1: Direct as well as indirect possession are recognized (VIII.–1:205). The owner-

possessor (VIII.–1:206) is abbreviated by the letters "OP", the limited-right-possessor (VIII.–1:207) by "LRP", the possession-agent (VIII.–1:208) by "PA".

E. Possession as a "right", a "proprietary right" or a mere "*factum*"?

Legal nature of possession. The fact that certain legal remedies are made available to "possessors" to protect their position against intruders raises the question of the nature and character of the legally protected position, namely the "possession" or, in other words, the question of whether the positions of an owner-possessor, a limited-right-possessor and a possession-agent (see VIII.–2:205-2:208) can be qualified as an entitlement or right *in rem* (proprietary right) or, rather, as a mere factual position and not as a right, or as a mere *obligatory* right.

With regard to the intensity of protection of the positions of owners, owner-possessors, limited-right-possessors and possession-agents with respect to a movable one can distinguish between the following four types:

> (1) *possession-agents*: the only protection remedy available to them is immediate self-help (VIII.–6:202): The PA can act as a 'third person' in the sense of that article, thus helping the possessor to recover his movable immediately. All other remedies have to be exercised by the respective owner-possessor or limited-right-possessor.
>
> (2) *owner-possessors in bad faith* who are not owners and cannot acquire by acquisitive prescription (in good faith) as e.g. the thief: the protection remedies available to them are self-help (VIII.–6:202) and the possessory remedies of VIII.–6:203 and VIII.–6:204.
>
> (3) *limited-right-possessors, potential acquirers by continuous possession in good faith* and *owners who do not or cannot provide evidence of their ownership right*: the protection remedies available to them are self-help (VIII.–6:202), the possessory remedies of VIII.–6:203 and VIII.–6:204 and the partly rights-based remedies of VIII.–6:301 and VIII.–6:302 (better right to possession or better possession).
>
> (4) *owners* who can provide evidence of their ownership right: they are protected by all remedies of Chapter 6 (VIII.–6:101, 6:102, VIII.–6:202-6:204, VIII.–6:301-6:302) including the remedy of VIII.–6:101 of protection of ownership.

The last position 4 of owners is certainly a right in rem. Position 1 of a possession-agent is the weakest position of all; the protection of this position against third persons is minimal (self-help). It seems, therefore, not recommendable to qualify this position as a right *in rem*. Under our proposed terminology in VIII.–1:205-208 the possession-agent is not even a 'possessor'. Position 2 of the thief-possessor or owner-possessor in bad faith is protected only by the entitlement to self-help and the possessory remedies of VIII.–6:203 and VIII.–6:204 (with the restriction of VIII.–6:203 paragraph [3]). Position 2 will be defeated by every right to possess (positions 4 and 3: VIII.–6:101, VIII.–6:301, VIII.–6:302) and every better possession that was not acquired by theft or otherwise in bad faith (position 3: VIII.–6:301, VIII.–6:302). For the purposes of the Books of the CFR, it does not seem necessary to consider position 2 as a right *in rem*.

With respect to position 3 it can be stated that the protection is partly rights-based in the following sense:

> The limited-right-possessor may have a proprietary right to possess the movable (e.g. a security right), but he always has an obligatory right to hold the movable which he can assert against the possessor (owner) as well as against third persons who do not have a better right to possess (VIII.–6:301, VIII.–6:302).
>
> The potential acquirer by continuous possession in good faith has not yet acquired ownership, but he will acquire it after the lapse of the time period prescribed in Chapter 4. He, therefore, has a right in rem which is in the state of growth or in the pre-birth state (in statu *nascendi*) and which can be defended against third persons whose possession is of an inferior quality (VIII.–6:301, VIII.–6:302).

It has to be noted, however, that within position 3 the intensity of protection is stronger for the position of a limited-right-possessor than for that of a potential acquirer by continuous possession in good faith. The limited-right-possessor can assert his right to possess the movable even against the owner and any other person having no right to hold the movable, whereas the position of the potential acquirer by prescription will be defeated by the position of the owner or any right to hold (possess) the movable derived from the owner.

The respective "right" connected to position 3 is not as complete or comprehensive as the right of ownership, but, in some cases, it nevertheless seems to bear the characteristics of a right *in rem*. In a minority of legal systems the position of a possessor (LRP) having a right to possess (e.g. lessee, pledgee, storage) is right-out qualified as a right *in rem*. But the majority of legal systems provides legal protection for certain types of LRPs, especially those with a right not only to possess, but also *to use the movable in their own interest*, (sometimes also for the acquirer by continuous possession in good faith) that is very close to the protection of a proprietary right (in tort and property law).

The right of a lessee as an obligatory or proprietary right. Throughout all legal systems, irrespective of their dogmatic approach which either qualifies the right of a lessee as obligatory or proprietary, the resulting legal consequences for a lessee are almost the same. It would, therefore, be unproblematic to qualify the right of a lessee to possess and use the movable as a proprietary right (right in rem). This qualification would make sense for future private law codifications. It seems, however, not necessary for the purposes of the DCFR to determine the precise dogmatic category in which the right of a lessee does or should fall.

The proprietary concept (favoured by our working group) would mean that the right of the lessee to hold and use the movable would be treated like other limited rights *in rem* in a movable (as for instance security rights and *usufruct* rights). The proprietary right of the lessee would come into being when he obtains possession of the movable. This would mean that the lessee's right to possess and use the movable would have to be respected by subsequent buyers of the movable (good faith acquisition free of encumbrances requires the lessor to be in direct possession of the movable when he sells it). The lessee who leases from a non-owner would be able to acquire the proprietary right of lease under the general conditions for good faith acquisition in VIII.–3:101. The lessee's proprietary right would have priority over subsequent security rights of creditors and over the claims of general creditors of the lessor (buyer). According to IV.B.–7:101 (Change in ownership and substitution of lessor)

paragraph (1) the contractual position of a lessee in possession of the goods remains essentially unchanged by the passing of ownership to a new owner.

F. General idea of VIII.–6:101

Protection of ownership in general. The law protects ownership and enforces ownership rights. This is a constitutional imposition in many countries, and is also established by the first additional protocol to the European Convention on Human Rights. The law grants a vast array of remedies aimed at enforcing ownership rights: specific property law remedies, tort remedies and can even give rise to administrative or criminal sanctions.

Resort to the protection of ownership may be necessary when there is an interference or trespass to the owner's legitimate enjoyment of the thing, and the owner needs to assert his right of exclusive enjoyment of the movable (*ius excludendi omnes alios*). Normally, the owner needs to resort to a court of law or other authority to enforce his right, though, in limited circumstances, he can resort to self-help or direct action in order to defend his right of ownership.

Protection of ownership and protection of possession. In most legal systems, an action for the protection of possession (VIII.–6:203, 6:204) is the easiest, quickest and most common path to protect one's ownership against dispossession or interferences. But the owner is always also free to bring an action for the recovery of possession or the protection against interferences based on his ownership right. The attractiveness for the owner of the claim based on his ownership right depends on the difficulties he may or may not have to bring sufficient evidence of his ownership right and also on the time he is able to invest in the litigation. In some legal systems, the requirements for the proof of ownership in the respective rules of civil procedure are quite strict (probatio diabolica), in others they are not (e.g. France). These rules intend to interfere with the procedural law of the Member States as little as possible and, therefore, leave the issues of proof of ownership to the legal systems of the Member States. In some legal systems, the protection of ownership concentrates on the protection of proprietary rights (ownership remedies); in others, the second track of protection of mere possession is more frequently used. These rules, therefore, provide for both tracks: ordinary litigation based on the proprietary right of ownership and simplified litigation based on possession.

This article contains the specific ownership remedies on the basis of the proprietary right of ownership. It provides for three different types of remedies: recovery, declaration of ownership, and protection order against interferences.

G. Interests at stake and policy considerations

Interests involved. A rule on the protection of ownership must strike a balance between the interests of the owner and those of the possessor exercising physical control over the movable. The interests of the owner are of foremost social and economical importance in a capitalistic society. Thus, the owner tends to enjoy a particularly strong position as regards the movable. His interests lie in a swift and certain recovery of the goods and public reassurance of his rights in the goods, according to a framework of certainty and stability regarding his property status. The major obstacle to the owner is the discharging of the burden of proof of ownership and identification of the movable.

The interests of the possessor are *prima facie* not as strong; however, they can be valued more highly than the interests of the owner in so far as the possessor has a right to hold the movable (that can be asserted successfully against the owner) based on a legal ground of a real (*usufruct*, security) or obligatory nature (lease, processing, loan, storage etc.). In addition, as the possessor is not always acting in bad faith, he may deserve some degree of protection, e.g. with regard to the ownership in the fruits of the movable and/or compensation for the costs incurred for reasonable improvements to the movable (see Chapter 7 of Book VIII).

H. Comparative analysis

(a) Remedies of the Owner

The dominant trend. The legal systems of PORTUGAL, SPAIN, ITALY, AUSTRIA, GERMANY and THE NETHERLANDS provide similar solutions and remedies regarding the protection of ownership. These systems contain two classes of remedies: (1) *rei vindicatio*, in which the claimant requests the prompt return of the goods and recovers possession, and (2) declaratory actions, whereby the claimant has his ownership recognised by a court of law and/or obtains the declaration of the inexistence of a right of ownership in the goods by the respondent and, in some cases, an injunction to refrain from further interference.

These systems differ slightly in several aspects:

- stringency of the burden of proof to be discharged by the claimant/owner;
- compensation regime of the possessor as regards fruits and improvements;
- compensation of losses incurred by the owner because of deprivation of possession (tort/unjustified enrichment);
- injunction mechanisms and interlocutory measures;
- limitation of actions.

The 'possession vaut titre' approach. In FRANCE, BELGIUM and LUXEMBURG, the system of protection of ownership is quite different, due to the principle "en fait de meubles, la possession vaut titre", which creates a very strong presumption that the possessor is indeed the owner, and protects the possessor in good faith (but for lost or stolen movables) from actions for the protection of ownership. A rei vindicatio action ("revendication") is only possible against a possessor in bad faith or against a good faith possessor if the movable was lost or stolen. However, against the limited-right-possessor (LRP), the most likely path is an action based on the non-performance of the underlying contract.

Casuistic approach. In SWEDEN and other Nordic countries the regime of protection of ownership is also different. In the Swedish legal system there are no strict categories of actions, and the courts follow a case by case approach as to the protection of ownership, whose effects may include injunctions, interlocutory measures and summary proceedings.

Only tort remedies. In ENGLAND/WALES the common law does not provide any remedies other than those of tort law, consisting of the recovery of the market value of the thing and the losses relating to the interference. Only in exceptional cases, the courts will order the restitution of the movable to the owner.

(b) Limitation of actions

No limitation but for acquisition by continuous possession. In PORTUGAL, ITALY and AUSTRIA there is no limitation period for actions for the protection of ownership, unless

someone else has obtained ownership of that movable through acquisition by continuous possession. This is in principle the case also in GERMANY, but only for the *rei vindicatio* action.

Other limitation periods.

SPAIN	6 years or less in case of adverse prescriptive acquisition
FRANCE, BELGIUM	30 years/3 years if the possessor is in good faith
NETHERLANDS	20 years
GERMANY	3 years (*actio negatoria* only)

(c) Preferred opinion

Reasons for the choices made by the working group. The working group opted for the dominant trend as regards the protection of ownership, consisting of three possible claims: recovery of the movable (actio rei vindicatio), declaration of ownership, and protection order against interferences by a third person. The latter remedy allows for several possible orders: prohibition of future interference, the cessation of an existing interference and removal of traces of past interferences. Several of these demands can be combined in one single protection order.

This system is the dominant approach in most countries and is the most likely to receive acceptance on a European scale.

As to the reasons for this choice, there follows an analysis of the "odd ones out", and an explanation of why the working team did not favour them.

In the *possession vaut titre* systems approach, though the person in possession of the movable enjoys a very strong position, the protection of ownership works in practice in a similar way to the "dominant" trend. In addition, the working team did not adopt the *possession vaut titre* principle for the possession system, and as such it would make no sense to adopt it here.

The approach of the common law, allowing tort remedies only, is also not followed, as it only provides indirect protection of the owner's rights. Specific property law remedies give the owner a faster, simpler, hurdle-free and more far-reaching protection than tort law, a fact that is justified by the interests connected to the particularly strong legal position of the owner regarding the movable, by the stability of rights *in rem*, as well as by the need of legal certainty as to who holds rights in the movable. In particular, tort remedies are insufficient for the prevention of future interference with the movable.

A casuistic approach such as in the Nordic systems would not be likely to conform to the interests of legal certainty and stability of property rights. Likewise, the approach of the common law restricting stringently the recovery of the movable would also hardly be acceptable on a European scale.

Finally, concerning the limitation of actions for the protection of ownership, they are limited under the terms of VIII.–4:201, concerning acquisition by continuous possession, as the former owner loses and the possessor acquires ownership.

I. VIII.–6:101(1): receipt and recovery of physical control

Illustration 1
A parked his bicycle in front of a store without locking it. B walks away with that bicycle. One year afterwards, A recognises his bicycle parked and locked in a watched parking lot. A is entitled to an action against B for the recovery of the physical control of the bicycle.

Illustration 2
C sold his motorcycle to D; however, the bicycle is being repaired by E. C hands over the keys to D. E, however, refuses to deliver the motorcycle to D. D has an action against E in order to obtain possession of the bicycle.

Obtain and recover. VIII.–6:101 paragraph (1) is a specific property law remedy that entitles the owner, who is not in possession of the movable, to "*recover"* it. This is the classical *actio rei vindicatio*. This rule applies to cases where the owner was deprived of his possession. Situations, where the owner was never in (direct) possession of the movable, such as when ownership passed, but the movable is in possession of a third person (VIII.–2:105 paragraph [2]), or the movable stayed in the possession of the seller (VIII.–2:103), could be interpreted as situations, where the owner was in indirect possession of the movable already when the act of dispossession occurred. In these cases, a violating third party could be seen as dispossessing not only the direct possessor (seller or other), but also the owner as the indirect possessor of the movable. If, however, no dispossession by a third person occurred, but the third holder of the movable (VIII.–2:105 paragraph [2]) or the seller (VIII.–2:103) simply refuses to deliver the movable to the owner, even though his right to possess (keep) the movable has ended, the words "dispossession" and "recovery of possession" do not seem completely appropriate. To make it absolutely clear that also receipt of *direct* physical control of the owner for the first time is covered by VIII.–6:101 paragraph (1), the word '*obtain*' was used in addition. VIII.–6:101 paragraph (1) in addition applies to cases where no dispossession of the owner ever occurred: E.g. the owner lost the movable, or he entrusted the movable to someone who refuses to give it back or who gave the movable to a third person.

Physical control. Instead of the words 'physical control' also the word 'possession' could be used. This follows from the definitions in VIII.–1:205-1:208. The words are synonymous in this context. The claim may be directed against a 'person exercising physical control' over the goods. This means that it may be directed against direct and indirect possessors of the movable (OPs and LRPs in the sense of VIII.–1:206 and 1:207) and against possession-agents (PAs, VIII.–1:208) who exercise this control on behalf of the possessor.

Claimant and respondent. The person entitled to the remedy of 6:101(1) (claimant) is the owner. He may have been in direct or indirect possession of the movable before and then been deprived of his possession by the other person (respondent). But 'dispossession' by the respondent is not a prerequisite for the claim. An owner who has lost his movable or whose movable has been stolen is entitled to claim back the movable from every current possessor who does not want to return it (finder, thief or other person without a right to possess the movable that can be asserted successfully against the owner). In these cases the owner was not "dispossessed" by the respondent. Respondent can be any person who exercises physical control over the movable, whether directly or indirectly, (OP or LRP) or a person who

exercises physical control on behalf of a possessor as possession-agent (PA). No legal capacity or fault (negligence or other) on the side of the respondent are required.

Ownership: The owner bears the burden of correctly identifying the goods and of proving his ownership right in the goods. This may be, in the case of goods, a difficult burden to discharge, as most usually, transactions of movables are not documented in a written form, movables circulate quickly, are often mass-produced, and, as such, their identification can be difficult. If the time period prescribed in Chapter 4 for acquisition by continuous possession has elapsed, the proof of ownership can be discharged on that basis. The particular requirements for the proof of ownership are left to the provisions of the Member States.

> *Illustration 3*
> A must prove that he has bought the bicycle, and produces the receipt of its acquisition at a store as proof of ownership. Fortunately the receipt includes an accurate description of the bicycle, originally intended for guarantee purposes. In addition, A had had his name engraved in the frame. A should succeed in proving ownership of the bicycle in his claim against B.

Right to possess the movable. However, the owner is not entitled to recover or obtain possession against another person who has a valid right to possess the goods, such as a lease contract, a possessory pledge, an other possessory security right in the goods, or a right of retention, etc. The right to possess the movable must be binding on the owner, as e.g. when the owner concluded a contract of lease with the other person from which results a right to possess and use the movable. A right to possess the movable which is derived from a third person, as e.g. the thief of the movable, will generally not be binding on the owner, but only upon the thief. It can, therefore, not be used as a defence by the possessor of the movable against an action for recovery of the owner according to VIII.–6:101 paragraph (1).

The right to possess the movable is formulated as a defence. The burden of proof with respect to the existence of such right is, thus, placed on the holder of such right. The owner does not have to prove that no such right exists.

> *Illustration 4*
> F rents out a bicycle to G for 1 year. After 3 months F claims the restitution of the bicycle. The claim does not prevail, as G has a valid contractual right (lease) to possess the thing. Similarly, if H stored his bicycle at a storehouse and does not pay the deposit, the storehouse has a right to withhold delivery until payment is received.

Remedy of 'recovery' and damages. The legal consequences of the remedy of VIII.–6:101 paragraph (1) are the acknowledgement of the owner's property right in the movable and the recovery (or obtaining) of possession of the movable, i.e. the inescapable duty of the third person to restitute the movable, and, in some circumstances, also give adequate reparation under the provision of VIII.–6:401 and VI.–2:206 (Loss upon infringement of property or lawful possession).

Illustration 5
A prevailed in his claim against B for recovery of the bicycle. He is acknowledged as the legitimate owner of the bicycle. B must therefore transfer the physical control of the bicycle to A. B might also be liable for damages.

J. VIII.–6:101(2): other interferences

Interference. VIII.–6:101(2) deals with other interferences with the owner's rights than the complete dispossession of the movable by the other person without a right to possess. It covers present, past and future inferences. Future interferences are only covered, if the interference is "imminent": this means that it is a clear that the interference will occur in the immediate future.

The provision also includes "imminent" dispossessions, because they can be considered as "interference with the owner's rights" as well (see also VIII.–6:202(1)).

Declaration and protection order. VIII.–6:101(2) entitles the owner to a declaration that he is the owner of the movable, and to a protection order. This protection order may prohibit ongoing or imminent acts of interference with the movable, including the removal of physical traces of the interference. This is similar to the classical notion of actio negatoria.

Illustration 6
A catches his neighbour B, on several occasions, red-handed trying to pick the lock of his valuable mountain bicycle and prevents him from succeeding in it. Though A remains in physical control over the bicycle, in order to assert his ownership and clear any doubts, he resorts to the action for declaration of ownership and prohibition of further interference.

Illustration 7
B shears several of A's sheep without A's permission.

Illustration 8
B sometimes drives A's car without his permission.

Rare situation for movables. Mere interferences with the right of ownership are much less frequent and of much less practical importance in the field of movables than in the field of immovables. As demonstrated in the illustrations 6-8 above, they might nevertheless occur, and were, therefore, subjected to a regulation which is parallel to the regulation found in many Member States, at least in the field of immovable property.

Nature of 'interference'. 'Interferences' in the sense of this article are only physical interferences. Immaterial nuisances in the sense of VI.–3:206 (Accountability for damage caused by dangerous substances or emissions), such as noises, smells, radiation and other such emissions, are much more likely to affect immovables. Only in very rare circumstances such interferences could also cause detriment to movables.

Illustration 9
K owns a top ranking racing horse. L regularly flies a helicopter near the stables where the horse is lodged. The noise produced by the helicopter can cause anxiety and stress to the horse, reducing his racing performance.

However, immaterial nuisances are generally not simple and exclusive interferences with movable property. In such cases, the rules on tort liability, as set out in Book VI, seem to provide adequate and appropriate remedies for the owner of the movable. A rule ordering L, in the above illustration, to stop the interference, namely to stop flying his helicopter over K's racing horse, would have to be qualified in many ways, because L's activity does not only relate to the movable, but also to K's land over which he flies, and to the reasons for which L flies his helicopter. A simple protection order, taking only into account that L interferes with the movable, would be too strict and simplistic, and, thus, seems inappropriate to deal with cases of immaterial interferences which can normally not be strictly reduced to the fact that they also cause interferences with the ownership in movables.

K. VIII.–6:101(3): Protection order

Types of protection orders. The protection order may include three types of demands:

(a) the prohibition of imminent future interference;

(b) the cessation of existing interference and

(c) removal of traces of past interference.

Several of these demands can be combined in one single protection order.

Future interference. Future interferences must be "imminent" in order to justify an order prohibiting future interferences: this means that it is clear that the interference will occur in the immediate future. See also the use of the word "impending" in VI.–1:102 (prevention: "Where legally relevant damage is impending, this Book confers on a person who would suffer the damage a right to prevent it. […]) and III.–3:504 (Termination for anticipated non-performance: […] "it is otherwise clear that there will be such a non-performance of the obligation"). In all these cases, there is a very high probability that the damage, non-performance or interference will occur. The provision also includes "imminent" dispossessions, because they can be considered as "interference with the owner's rights" as well (see also VIII.–6:202 paragraph [1]).

Existing interference. The protection order may also include the demand that presently still ongoing interferences have to be terminated (order of cessation of existing interference).

Past interference. Where an interference is in itself terminated, but "easily removable traces" of the interference are still left on the movable of the owner, the protection order will also extend to these removable traces and order that they must be removed by the interferer. It must be noted here, that the terms 'removal of traces' was used here in the sense of 'easily' removable traces in order to distinguish it from 'damage' that was inflicted on the movable. The reparation of damages in money or otherwise is regulated in Book VI and cannot become part of a protection order. As opposed to "damage", which results in a destruction or change

of parts of the substance of the movable, 'removable traces' are physical objects that are left on the movable as a result of the interference without causing damage to the substance of the movable, like e.g. dust, dirt or mud. They can be easily removed because they do not effect the substance of the movable. The 'removable' traces are considered to be part of the interference itself, their removal is not difficult and is a much less severe remedy than the reparation of damage to the substance of the movable. It was, therefore, considered to be adequate to grant this remedy together with the other demands of the protection order, also in view of the fact that the requirements for the protection order are less strict than the requirements for the reparation of damage, especially with respect to the fault or negligence requirement, which does not form part of VIII.–6:101. In many legal systems, the removal of physical objects that are left on the property as a result of the interference (in German "Beseitigungsanspruch"), is a well known remedy in the field of protection of ownership and possession of land (immovables) and is partly also extended to movables. It is, however, clear that this remedy is of much less practical importance in the field of movables than in the field of immovables.

Illustration 10
N sometimes uses his neighbour M's car without his authorisation. M requires the declaration of his ownership right in the car, as well as the termination of an ongoing interference (N has taken the car for already one day and has not returned it yet), the prohibition of future interference (M fears that otherwise N will "borrow" his car repeatedly) and that N cleans the car, as it is usually soiled, muddy and dirty after N's excursions with the car.

Interferer has removed fruits or other objects from the movable. In addition, it can happen that the interferer takes away something from the movable. Such situations are covered by VIII.–Chapter 7.

Illustration 11
N has taken away five of M's sheep without authorisation. N shears the five sheep he has taken away from M and some other of M's sheep which stay on M's premises. N is obliged to restore M's five sheep according to VIII.–6:101 paragraph (1), to terminate ongoing interferences and to abstain from future interferences (if they are imminent) in accordance with VIII.–6:101 paragraph (2). And N will have to restore the wool or its value in accordance with the provisions of Chapter 7 of Book VIII.

L. Relationship to other parts of the DCFR

Relationship to other rules. VIII.–6:101 and 6:102 deal only with specific property law remedies. The remedies under Book VI on Non-Contractual Liability Arising out of Damage Caused to Another and in particular under VI.–2:206 (Loss upon infringement of property or lawful possession) are granted in addition to these remedies (see VIII.–6:401).

Some rights to possess or retain can be found in other parts of the DCFR:

- III.–3:401 (Right to withhold performance of reciprocal obligation)

- IV.B.–3:101 (Availability of goods) (providing that the lessor of goods has the duty to enable the lessee to obtain physical control of the goods);

- IV.C.–5:106 (Payment of the price) paragraph (2) (providing that a storer of goods may withhold the goods until the client pays the price);

- IV.C.–5:110 (Liability of the hotel-keeper) paragraph (6) (providing that a hotel-keeper may withhold the luggage of the client until the client pays for the service).

M. Character of the rules

Nature of rules. VIII.–6:101 and 6:102 are mandatory rules.

VIII.–6:102: Recovery of goods after transfer based on invalid or avoided contract or other juridical act

(1) Where goods are or have been transferred based on a contract or other juridical act which is invalid or avoided, the transferor may exercise the right of recovery under paragraph (1) of the preceding Article in order to recover physical control of the goods.

(2) Where the obligation of the transferee to restore the goods to the transferor, after a transfer based on an invalid or avoided contract or other juridical act, is one of two reciprocal obligations which have to be performed simultaneously, the transferee may, in accordance with III.–3:401 (Right to withhold performance of reciprocal obligation), withhold performance of the obligation to restore the goods until the transferor has tendered performance of, or has performed, the transferor's reciprocal obligation.

(3) The preceding paragraphs also apply where the transfer was based on a contract or other juridical act subject to a resolutive condition in the sense of VIII.–2:203 (Transfer subject to condition or time limit) paragraph (1) and this condition is fulfilled.

COMMENTS

A. Restitution of movable if obligation is invalid, ineffective or avoided

Obligatory and proprietary claim for recovery. VIII.–6:102 paragraph (1) clarifies that, in the case of an unsuccessful transfer of the goods based on a contract or other juridical act which is invalid or avoided, the owner will be able to choose between his obligatory claim to recover the movable from the transferee (following from contract law or the law of unjustified enrichment) and his proprietary claim of recovery based on his right of ownership in the sense of VIII.–6:101 paragraph (1).

Contract or other juridical act invalid or avoided. This provision refers to VIII.–2:202, which distinguishes between two different consequences of the invalidity or cancellation of a contract or underlying other juridical act of the transfer of a movable: (a) If the underlying contract (juridical act) is invalid from the beginning, or it was 'avoided' (e.g. for mistake) later on, this has the effect that the ownership is deemed to have never passed to the transferee. In all these cases, the claim for recovery of the movable based on the owner's proprietary right of ownership according to VIII.–6:101 paragraph (1) is available to the owner (as an alternative to his right to claim recovery on an obligatory basis). (b) If the underlying contract or other juridical act is 'terminated' in the sense of Book III, or terminated as a consequence of a 'withdrawal' in the sense of Book II, or revoked in the sense of Book IV (donation), there is no retro-active proprietary effect nor is ownership retransferred immediately. Thus, the transferee remains the owner of the transferred movable. The right of recovery under VIII.–6:101 paragraph (1) is not available to the transferor in these cases, because he is no longer the owner of the movable.

B. Right to withhold the goods

Right to withhold performance of the obligation to restore. VIII.–6:102 paragraph (2) deals with cases in which VIII.–6:102 paragraph (1) is applicable and the obligation of the transferee to restore the movable to the transferor/owner (based on an obligatory or a proprietary right of the owner) is linked to a reciprocal obligation of the transferor/owner owed to the transferee which has to be performed simultaneously. VIII.–6:102 paragraph (2) provides that the bond of simultaneous performance between the two reciprocal obligations extends also to the claim of the owner based on his ownership according to VIII.–6:101

paragraph (1). This rule applies when simultaneous performance of two reciprocal obligations is owed in accordance with III.–2:104. The bond of simultaneous performance leads to the consequences of III.–3:401: namely the right of the transferee to withhold his performance (here restoration of the movable to the transferor/owner based on VIII.–6:101 paragraph [1]) until the transferor/owner has performed his obligation or has tendered performance. In accordance with III.–3:401 paragraph (2) this right to withhold can be also exercised by the transferee as long as it is clear that there will be a non-performance by the transferor/owner of his reciprocal obligation when his performance becomes due.

C. Resolutive condition

Application to resolutive condition in the sense of VIII.–2:203 paragraph (1). VIII.–2:203 paragraph (1) determines the effect of a so-called 'resolutive condition' that is included by the parties in their contract of sale or in another contract or juridical act that underlies the transfer of ownership. If the parties do not provide otherwise, such a resolutive condition has the effect that ownership is re-transferred automatically at the point in time when the condition is fulfilled. This means that, unlike in cases of an invalid or avoided contract, ownership is not re-transferred with a retro-active effect, but only with an effect *ex nunc* (from now on). Nevertheless, this effect conveys immediate ownership on the transferor. Thus he will be able to use this ownership as a basis for his claim of recovery of the movable in the sense of VIII.–6:101 paragraph (1). Therefore, VIII.–6:102 paragraph (3) provides that the case of a resolutive condition must be treated just like cases of invalid or avoided contracts or other juridical acts.

Section 2: Protection of mere possession

VIII.–6:201: Definition of unlawful dispossession and interference

A person depriving the possessor of possession or interfering with that possession acts "unlawfully" under this Section, if the person acts without the consent of the possessor and the dispossession or interference is not permitted by law.

COMMENTS

A. General idea

Central idea of 'unlawfulness'. The main aim of the provisions of Section 2 is to protect a possessor against 'unlawful' dispossession and against other 'unlawful' interferences with his possession, which do not amount to complete dispossession. Thus, the three legal remedies granted to possessors in VIII.–6:202 – 6:204 (self-help, recovery, and protection order) share one common requirement: the 'unlawfulness' of the dispossession or interference undertaken by the other person, against whom the remedies are directed. Therefore, the term 'unlawful' is defined in the first article of Section 2.

B. Interests at stake and policy considerations

Possession remedies. The regime of special possession protection remedies of Section 2 aims at protecting possessors by providing simple and quick means to regain their possession or to stop unlawful interferences. These remedies, as all other remedies of private law, have to be enforced in a legal proceeding before a competent court or other public authority, as is the case in VIII.–6:203 and 6:204, in order to provide a reasonable protection also to the interests of the other person, against whom the remedies are directed. VIII.–6:202 (self-help) allows only one narrow exception to that general principle of rights enforcement. In this case, the protection of the interests of the other person is taken into account by requiring an immediate and proportionate action in relation to the unlawful infringement of the claimant's possession.

C. Comparative overview

Comparative overview. In certain legal systems (e.g. Austria, Germany, Switzerland, Greece) the assertion of possession remedies of whichever nature explicitly requires an initiative of the interferer/dispossessor which is unlawful and against the will of the possessor (in German "*verbotene Eigenmacht"*). In France and Belgium, although the possessory remedies are suitable only for the protection of real estate, the facts giving rise to such remedies usually consist in the so-called "*trouble possessoire*", which is every action affecting or menacing one's exercise of possession rights. In general terms, the enactment of possession remedies is usually triggered by actions which are objectively regarded as affecting, in a negative way, one's possession over a movable and there is no cause justifying them, like e.g. the possessor's consent or imposition by law.

D. Acting without the possessor's consent unless permitted by law

Consent. Any dispossession or interference with possession is considered "unlawful" if it is undertaken against the will, or in other words, "without the consent" of the possessor and if it is not permitted by law. Normally, the consent of the direct possessor will suffice to make the

intervention of the other person legal. In some situations the consent of the indirect possessor may also be sufficient, especially if the indirect possessor, with respect to his relationship to his direct possessor, has the right to allow the intervention of the other person: e.g. the lessee (who is an LRP according to VIII.–1:207) gives his consent to the interference with his direct possession by a third person. If thereby the position of the owner (lessor) is not infringed (interfered with), no consent of the owner is needed.

Can a mere interior change of mind amount to an 'unlawful' dispossession? Usually the dispossession (or interference) is an exterior physical act, meaning that the other person actively takes away or interferes with the movable. But the provision also includes the 'unlawful' mere interior change of mind of a person who is already in possession of the movable, if (exterior) evidence for this change of mind can be produced: Such a change of mind is unlawful, for instance, in case of an LRP (VIII.–1:207) who decides to possess the movable like an owner (VIII.–1:206) and to refuse the return of the movable to the lessor after the term of the lease has expired. The same applies to the employee of the owner or the finder (PA of the owner: VIII.–1:208) of a movable who decides to keep the movable as an OP (VIII.–1:206) and not to give it back to the owner.

The reason for this is that such an LRP or finder (PA) acts without the consent of the possessor when he deprives this possessor of his possession: When the LRP or PA decides to act further on as an OP himself, he denies the former OP's indirect (or direct) possession and, thus, no longer possesses for the latter, but for himself. This change of mind of the LRP or PA leads to a dispossession of the former OP by depriving him of his indirect (or direct) possession without his consent. A finder who never had the intention to hold the movable for the owner (or other former holder) – in comparison to a finder who initially was in good faith (PA) and later on changed his mind – cannot be literally said to dispossess the owner by a change of mind, because in such a case the owner lost possession and never regained it by means of an honest finder (PA). However, this case should not be treated any differently with respect to the means of possessory protection that are available to the (former) possessor against an unlawful dispossessor or interferer. Thus also such a finder is considered to act unlawfully in the sense of VIII.–6:201, as well.

No right of self-help without exterior physical act. It must be noted here, that the possessory remedies which require an unlawful dispossession or interference by the other person are, in principle, the following: self-help (VIII.–6:202), recovery (VIII.–6:203) and protection order (VIII.–6:204). The right of self-help is, however, restricted to exterior physical acts of dispossession and interference, and does not include a dispossession by the mere change of mind of the current possessor, as described in the paragraph above. The reason for that is that the physical reaction of self-help can only be defined and justified as a reaction to a real physical attack to the possession of the movable. An exterior physical reaction of self-help to a mere interior change of mind cannot be considered proportionate from the outset. Example: A lessee refuses to return the movable after the period of the lease has expired. The lessor cannot simply go to the lessee and take the movable away from him against his will. He will have to seek enforcement of his right to recovery of the movable in court: either on the basis of VIII.–6:203, VIII.–6:101 or on the basis of his contractual remedies.

Permission by law. A dispossession or interference without the consent of the possessor will be considered 'unlawful' only if it is not permitted by some other provision(s) of law. Such right or permission to dispossess or interfere without the possessor's consent will usually be

based on public law: e.g. judicial execution proceedings, expropriation by public law. With respect to rights arising out of a private law relationship (e.g. contractual rights) the person acting against the will of the current possessor will not act 'unlawfully', as long as his course of action complies with the prerequisites of self-help (VIII.–6:202), which also constitutes a permission by the law. Outside the narrow limits of self-help, a person who claims possession based on a provision of private law such as, for instance, a contractual right or an ownership right to possess the movable, is not allowed to dispossess the current possessor of a movable on his own initiative, but is required to enforce his entitlement in a court proceeding. Consequently, any 'private' dispossession or interference against the will of the current possessor will be considered 'unlawful' despite the obligatory or proprietary right of the dispossessor or interferer to possess the movable.

E. Character of the rule

Mandatory rule. The rule is mandatory; any default rule in this field would inevitably render the cases of dispossession/interference with one's possession unbearably ambiguous and would therefore confine the scope of application of possessory protection and diminish its efficiency.

VIII.–6:202: Self-help of possessor

(1) A possessor or a third person may resort to self-help against another person who unlawfully deprives the possessor of possession of the goods, or who otherwise unlawfully interferes with that possession, or whose act of unlawful dispossession or interference is imminent.

(2) The means of self-help are limited to such immediate and proportionate action as is necessary to regain the goods or to stop or prevent the dispossession or interference.

(3) Under the restrictions of paragraphs (1) and (2) self-help may be also directed against an indirect owner-possessor who unlawfully deprives the limited-right-possessor of possession or interferes with that possession in violation of the specific legal relationship between owner-possessor and limited-right-possessor. This rule applies equally to an indirect limited-right-possessor who unlawfully deprives the other limited-right-possessor of possession or interferes with that possession.

(4) Where a person in the exercise of a right of self-help conferred by this Article causes legally relevant damage to the person depriving the possessor of possession or interfering with that possession, VI.–5:202 (Self-defence, benevolent intervention and necessity) applies.

COMMENTS

A. General idea

Situations addressed in this Article. The self-help regulation in possessory protection aims at providing a quick remedy that will be able to avert recourse to judicial measures, provided that the persons entitled to it are in a position to react promptly and proportionately and wish to do so. Self-help follows from the very character of possession as a temporary order for regulating relationships concerning movables in contrast to proper rights *in rem*.

B. Interests at stake and policy considerations

Aim and restrictions of self-help. The main aim of the provision of VIII.–6:202 is to protect the interests of a possessor who is unlawfully deprived of his possession or whose possession is otherwise unlawfully disturbed. The possessor may resort to immediate action to protect his possession. The interests of the other person who unlawfully interferes with the possessor's possession are safeguarded by the strict limits to which the possessor's right of self-help is subjected, namely the requirements of immediate and proportionate action necessary under the circumstances to prevent or stop the interference.

The view that, under certain circumstances, the victim of an unlawful infringement of possession cannot be reasonably expected to wait for public authorities or the courts to protect his interest in the movable, but may have to resort to self-help measures is expressed by the defences granted to possessors and owners by the European legal systems in the fields of criminal law and torts. These defences are available if the possessor, in the course of the (proportionate) protection of his interests in the movable, causes some damage or harm to the aggressor or the aggressor's property. The possessory self-help remedy is a consequent continuation of this view in the field of property law. The possessor, who catches the thief red-handed and dispossesses the thief, may not even inflict any harm upon the thief in doing so. Under these circumstances, the (former) possessor's act of dispossession cannot be considered 'unlawful' in the sense of VIII.–6:201, but should be permitted by the law. This

permission is provided in VIII.–6:202. If the (former) possessor inflicts any additional harm upon the thief, his act of dispossession will only be permitted under the restrictions of VIII.–6:202 paragraph (2). These restrictions are again in line with the criminal law and tort law defences of self-help: If the reaction of the former possessor in the protection of his interests in the movable is not proportionate, it will not constitute a defence against his criminal or tort law liability vis-à-vis the thief.

C. Comparative overview

Different approaches in European legal systems. Self-help in the context of protection of possession is not specifically regulated in all European legal systems. Specific possessory regulation of self-help can be found e.g. in Germany, Austria, Greece, Portugal, Hungary, Latvia, and the Czech Republic. But generally the recourse to the general self-help rights as provided by civil law or criminal law is not precluded. Spanish, Portuguese, Dutch, French and Belgian law make no reference to emergency rights with respect to possession protection, whereas English law is particularly cautious with affirming such a possibility. In those legal systems, where possessory self-help is separately regulated, it is controversial whether it should be treated as a specific emanation of the general regulation of self-help or as a specific regulation (with whichever implications this may have for the scope of application of each). Usually, the specific possessory self-help remedies are considered as autonomous regulations, and not all prerequisites set by the general rules must be observed, though some may apply. Some common traits can be noted: Where self-help is permitted, the self-help reaction of the possessor must abide by a certain standard of necessity and be reasonable and proportionate to the damage inflicted. Self-help is permitted only within explicitly strict time limits.

D. Persons entitled to self-help

Possessors and third persons may exercise self-help. Self-help may be exercised by all categories of 'possessors' of a movable in the sense of VIII.–1:205-208: owner-possessors and limited-right-possessors, whether direct or indirect possessors, as well as by third parties wishing to help someone defend his property or possession. Possession-agents (VIII.–1:208) are not 'possessors' themselves, but they can react in self-help as 'third persons' in the sense of VIII.–6:202 paragraph (1). This wide personal scope was chosen due to the characteristic of self-help as an immediate reaction to dispossession/interference or to an attempt to dispossess/interfere. It certainly would not be practical, if the LRPs or PAs in cases of dispossession and the like had to contact their OP and ask him to take the necessary measures for self-help. In most cases the OP would arrive much too late for immediate and necessary reactions. The wide personal scope serves the best interest of all three categories of persons: the OP, the LRP and the PA. The OP maintains his (direct or indirect) control over the object, the LRP remains able to hold the object and either use it as agreed or return it to the OP according to their agreement, the PA continues exercising his duties with respect to his employer or other OP/LRP. Furthermore, allowing a third person to act in protection of one's possession (of whichever kind) renders the protection accorded by those provisions more effective. This extension to third persons is in accordance with the provision on self-defence in VI.–5:202, which also allows a third person to act in protection of the legitimate interests of a person other than himself.

E. Persons against whom self-help is directed

Past, present or imminent dispossession or interference. The person against whom the self-help may be directed is a person who unlawfully (in the sense of VIII.–6:201) dispossesses the possessor or otherwise interferes with his possession or whose act of

unlawful dispossession or interference is imminent. In accordance with VIII.–6:101 paragraph (2) an act is imminent, when it is clear that the dispossession or interference will occur in the immediate future. See also the use of the word 'impending' in VI.–1:102 (prevention: "Where legally relevant damage is impending, the Book confers on a person who would suffer the damage a right to prevent it. […]) and III.–3:504 (anticipated non-performance: […] "it is clear that there will be a fundamental non-performance"). In all these cases, there is a very high probability that the damage, non-performance or interference will occur.

The reason to include imminent dispossessions and interferences was the following: In this stage the dispossession or interference can often be averted by means which involve only a minor degree of force, whereas it might be much harder for the (former) possessor to reverse a dispossession (or stop an interference) that already occurred. In the light of this observation, it seems unreasonable to force the possessor whose dispossession is imminent to refrain from any defence reaction until the dispossession actually occurs. If the possessor can prevent the dispossession or interference, before it occurs, with proportionate means (see point F. below), he should be allowed to do that, instead of having to wait for the actual occurrence of the unlawful act, which probably can be stopped only by a considerably stronger reaction than the proportionate defence reaction to an imminent intrusion.

Unlawful act. The act of the person must be 'unlawful' in the sense of VIII.–6:201 (see Comment D to VIII.–6:201). However, the defence reaction of self-defence requires by its nature (real action and re-action) an exterior physical act by the intruder, a visible act directed against the defending possessor's possession. A mere change of mind of an LRP or PA who is already in possession of the movable without an additional physical act of dispossession or interference will not suffice as a basis for self-defence. The reason for that is that the physical reaction of self-help can only be defined and justified as a reaction to a real physical attack to the possession of the movable. An exterior physical reaction of self-help to a mere interior change of mind cannot be considered proportionate from the outset.

> *Illustration*
> A lessee refuses to return the movable after the period of the lease has expired. The lessor cannot simply go to the lessee and take the movable away from him against his will. He will have to seek enforcement of his right to recovery of the movable in court: either on the basis of VIII.–6:203, 6:101 or on the basis of his contractual remedies.

Fault and legal capacity. The unlawful dispossession or interference does not require any fault (negligence or other) on the part of the acting person. No legal capacity of the person is required, because the dispossession or interference is not a legal act, but a factual act.

F. Restrictions on self-help in VIII.–6:202 paragraph (2)

Restrictions in general. The act of self-help must be an immediate and proportionate reaction in view of the particular circumstances of the case. If the act is not immediate and proportionate in the sense of VIII.–6:202 paragraph (2), the act of the defence of the (former) possessor is itself an unlawful dispossession or interference with the possession of the other person, and will trigger all the consequences of an unlawful dispossession or interference as laid down in Book VIII Chapter 6 and other Books.

Immediate action. The act of self-help must be "immediate": This means that the (former) possessor's defence must be a quick reaction to the unlawful dispossession or interference that

occurred. The classical case is that the (former) possessor catches the dispossessor or interferer red-handed and immediately intervenes to regain his full possession. When the act of dispossession is already completed in the sense that the dispossessor has already brought the movable to a safe place after the unlawful dispossession and he is no longer fleeing with his loot, any later self-help action is precluded because it is no longer an immediate reaction. After an interference has been terminated, no self-help right exists. For future dispossessions and interferences the unlawful act must still be imminent. Without that no self-help right exists.

The time frame of immediate reaction depends on two factors: (a) the time when the defending possessor acquires knowledge of the dispossession or interference, and (b) the objective limitation of the time frame irrespective of the defender's knowledge of the unlawful intrusion. (a) When the defending possessor becomes aware of the interference/dispossession, he must react immediately. When he reacts to an ongoing interference or completed dispossession, of which he has been informed from the very start, only several days after he has become aware of it, his reaction will no longer be immediate. (b) If the defending possessor does not become aware of the unlawful intrusion before the dispossession is completed or the interference terminated, he has no prolonged right of self-help, but his late reaction will be unlawful because of lack of immediacy. He has no other right than to claim recovery of the movable or a protection order against the interference in a court proceeding.

Proportionate action. The proportionality requirement set out by VIII.–6:202 paragraph (2) provides for a double restriction of the self-help reaction:

> the defending possessor's action must be proportionate *and*
>
> he may use no action of a higher degree of force than is necessary to regain his full possession (or avert the imminent intrusion).

The determination has to be made with regard to the particular circumstances of the case.

The proportionality of a defence reaction depends, in large parts, on the *value of the movable*, and on the *seriousness of the infringement* (as for instance the degree of force that is used by the other person and whether the other person's interference is rather harmless and restricted or results in a full dispossession). If the value of movable is low, or if the infringement is harmless, there will exist no extra-judicial self-help reaction that can be considered proportionate, altogether. In such a case, the question of necessity of the means does not arise at all.

The requirement of necessity to stop or avert the intrusion must not be misunderstood in the sense that the means necessary to stop a particular intrusion is also always a lawful and proportionate means. Only if *more than one proportionate means* to stop or avert the intrusion exist in the particular case, the right to self-help is limited to those or to the means that are or is necessary to stop or avert the intrusion. This means that the self-defender must choose the *means which least interferes* with the interests of the other person. The self-defender may not resort to a higher degree of force than is necessary to stop or avert the intrusion.

This means that the defending possessor's reaction may be unlawful mainly for two reasons:

The circumstances are such that all extra-judicial means necessary to regain full possession (or to avert the imminent intrusion) would be disproportionate. Then the defending possessor does not have the right to react in self-defence (e.g. he could only stop the thief by inflicting serious physical harm to the latter). The question of whether a means is necessary to stop or avert the intrusion does not arise.

The circumstances may be such that several extra-judicial means to stop the interference or to regain full possession are available to the defending possessor. In this case, the defending possessor may only resort to the particular means that is the least harmful to the intruder and still helps to stop the intrusion. If he chooses any other means, his reaction will be considered unlawful.

When determining the proportionality of the defence action in the above described sense, the possibility of the defending possessor to turn to the competent public authority (e.g. police) or the courts for help has to be taken into account. If the circumstances are such that it can be reasonably expected from the defending possessor to turn to these authorities for help instead of taking action himself, because this would constitute a reasonable means to regain full possession (or avert the intrusion), any self-defence would be disproportionate.

G. Self-help by the direct possessor against the indirect possessor (VIII.–6:202(3))

Relationship between OP and LRP. VIII.–6:202(3) makes clear that an LRP may not only exercise his right of self-help against 'third persons', but also against the indirect OP or LRP (as e.g. the lessor) who violates the (direct) LRP's contractual or proprietary right to possess the movable. When the indirect OP (or LRP) dispossesses the direct LRP or interferes with the latter's possession he commits a breach of his legal relationship with the direct LRP which gives the LRP the right to possess the movable. The direct LRP can make use of the remedies for breach of contract, but he may also resort to the possession remedies of VIII.–6:202-6:204. The latter remedies will enable the direct LRP to defend his possession and enforce his right to possess in a quicker and more efficient way than by the recourse to the remedies for breach of contract.

The fact that the indirect OP or LRP has a contractual (or other legal) duty to respect the right of possession of the direct LRP does not exclude the idea that this duty cannot only be enforced by contractual (or other obligation-related) remedies in a court proceeding, but also by the quicker and more efficient possessory remedies of VIII.–6:202-6:204. On the contrary, a contractual relationship creates a regime of particular duties between the parties which have to be respected and complied with in good faith, whereas such elevated regime of duties, respect and trust does not exist between persons outside a contractual relationship. It, therefore, seems adequate and just to grant the efficient possessory regime of sanctioning infringements of possession not only as a means of protection against third intruders (extra-contractual), but also against intrusions by a person who has the contractual duty to respect the possessor's right to possess the movable.

Different approaches in European legal systems. The European legal systems are divided on the point of whether the particular possession protection remedies should also be made available to the direct LRP to defend his right to possess the movable against the person

(indirect OP, LRP) from whom he derives this right: Some exclude these rights and thus restrict the direct LRP to the remedies for breach of contract, whereas the majority of legal systems seems to allow such exercise of the possession remedies. The rule follows this majority trend for the above-mentioned reasons.

Possession-agents. VIII.–6:202(3) excludes the PA who does not have a right of his own to possess the movable in his own interest. The PA has a right of self-help against intruders as a 'third person', but not against a dispossession or interference by his OP or LRP. The PA's right to react against third persons in self-help is an efficient means to protect the legitimate interests of the person for whom he holds the movable (OP or LRP) against any third intruders. The PA is in possession of the movable, whereas his OP or LRP is not. It will, therefore, be the PA who is the first to discover the (imminent) dispossession or interference and the first (and probably only one) who is able to take immediate and proportionate action against the intrusion.

H. Relation to other parts of the DCFR

VI.–3:206 (Accountability for damages caused by dangerous substances or emissions): 'Immaterial' interferences such as those mentioned in VI.–3:206 – radiation, smells, heat, light etc.– are very rare in the area of movables; they mainly affect the enjoyment and possession of immovable property. The remedy of a liability for damages as set out in VI.–3:206, therefore, seems to offer sufficient protection for the owner or LRP of a movable.

VI.–5:202 (Self-defence, benevolent intervention and necessity): VIII.–6:201 paragraph (4) is of merely declaratory nature: it stresses that, if in the process of self-help the defending possessor causes legally relevant damage in the sense of tort law (VI.–2:201) to the other person, VI.–5:202 which provides a specific defence against liability in tort, will apply. According to VI.–5:202, an action of self-defence constitutes a defence against liability in tort, if the defender acts 'in reasonable protection of a right or of an interest worthy of legal protection of' himself or a third if the person suffering the damage is accountable for endangering the right or interest protected. Ownership and possession of a movable can be considered 'interests worthy of legal protection'. A person unlawfully dispossessing the defender or interfering with his possession 'endangers' this right/interest. The requirement of 'reasonable protection' is similar to or congruent with the proportionality test of the self-help action set out in VIII.–6:202 paragraph (2). Therefore, a possessor or third person acting within the limits of VIII.–6:202 in defending his possession when he causes legally relevant damage to the intruder will be exempted from liability on the basis of VI.–5:202.

I. Character of the rule

Mandatory rule. The rule is of a mandatory nature. Of course, the (former) possessor can always waive or not use his right of self-help.

VIII.–6:203: Entitlement to recover as protection of mere possession

(1) Where another person unlawfully deprives an owner-possessor or a limited-right-possessor of possession, the possessor is, within the period of one year, entitled to recover the goods, irrespective of who has the right or better position in terms of VIII.–6:301 (Entitlement to recover in case of better possession) to possess the goods. The period of one year starts to run at the time of dispossession.

(2) The right to recover may also be directed against an indirect owner-possessor who unlawfully deprives the limited-right-possessor of possession in violation of the specific legal relationship between them. This rule applies equally to an indirect limited-right-possessor who unlawfully deprives the other limited-right-possessor of possession.

(3) The right to recover is excluded if the person seeking to exercise it unlawfully deprived the other person of possession within the last year.

(4) Where the other person in the sense of paragraph (1) invokes an alleged right or better position in terms of VIII.–6:301 (Entitlement to recover in case of better possession) to possess the goods as a defence or counter-claim, the obligation to return the goods according to paragraph (1) may be replaced by an obligation to hand the goods over to the court or other competent public authority, or to a third person pursuant to an order of the competent authority.

COMMENTS

See Comments on following Article.

VIII.–6:204: Entitlement to protection order to protect mere possession

(1) Where another person unlawfully interferes with the possession of goods or such interference or an unlawful dispossession is imminent, the owner-possessor or the limited-right-possessor is, within the period of one year, entitled to a protection order under VIII.–6:101 (Protection of ownership) paragraph (3), irrespective of who has the right or better position in terms of VIII.–6:301 (Entitlement to recover in case of better possession) to possess, use or otherwise deal with the goods. The period of one year starts to run from the time when the interference began or, in cases of repeated interferences, from the time when the last interference began.

(2) The protection order may also be directed against an indirect owner-possessor who unlawfully interferes with the possession of a limited-right-possessor in violation of the specific legal relationship between them. This rule applies equally to an indirect limited-right-possessor who unlawfully interferes with the possession of a subsidiary limited-right-possessor in violation of the specific legal relationship between them.

(3) Where the other person in the sense of paragraph 1 invokes an alleged right or better position to possess, use or otherwise deal with the goods as a defence or counter-claim, the court order may be suspended until, or replaced by, a decision on the existence of such alleged right or better position.

COMMENTS

A. General idea

Claim for recovery and protection order. The remedies provided in cases of unlawful dispossession or other unlawful interference with one's possession can be divided into two types depending on which form of possession infringement is at hand: entitlement to recovery, if possession was entirely removed, and protection order against interference for all other forms of interference with possession that do not reach as far as complete dispossession. The distinction between those two types of remedies is found in the majority of legal systems in the Member States (though the said remedies do not always apply to movables).

Protection of ownership and protection of possession. Chapter 6 distinguishes between two main categories of remedies: possessory protection remedies (VIII.–6:202 - 6:204) and protection remedies based on the right of ownership (VIII.–6:101). The protection of the legal position of an owner as a holder of the full right in rem with respect to the movable considerably differs from the protection of the legal position of a mere possessor (possessory remedies): the first type of protection aims at a final solution of a legal dispute over a right in rem, it protects and enforces a permanent order with respect to the proprietary right of ownership.

Aims and functions of particular possession remedies. The protection of possession is only of temporary nature, its main aim being to protect the former possessor and the owner against the negative consequences of unlawful infringements of the actual possession of a movable. The rules on protection of possession give the possessor certain rights against the unlawful intruder: self-help, claim for recovery, protection order. Thereby, a person who wants to realize his claim to possess the movable is forced not to act unlawfully, on his own initiative, by simply taking away the movable from the actual possessor but, instead, to enforce his claim in court. The rules on protection of possession thus promote the peaceful resolution of disputes over the right to possess a movable by use of court proceedings, they

restrict private force, and give the peaceful possessor, who has not acted unlawfully (VIII.–6:201) when obtaining his possession, the advantageous position of a respondent in court litigation over the right to possess. For the relationship between the protection of ownership and the possession remedies see also Comment F to VIII.–6:101.

Right to possess is not a requirement. The phrase 'irrespective of his or the other person's right or better position [...] to possess the movable' was inserted to clarify that the possessory entitlement does not touch the merits or final outcome of a case with respect to the underlying rights to possess. The right to possess the movable or a 'better possession' in the sense of VIII.–6:301 is not taken into account here. The main subject of the possessory remedies is the unlawful act that infringes the possession of the possessor (private force), irrespective of the underlying rights of the parties to possess the movable. The former possessor only has to prove his possession and the unlawful violation of his possession by the other person. If the other person raises a defence or counter-claim based on his better right or position to possess the movable, VIII.–6:203 paragraph (4) applies. Then the court will deal with the question of the right to possess, but the respondent cannot keep the movable and has to prove his right.

The remedies of Section 3 of Chapter 6 are based on a better right or position to possess the movable. They rank between the fully right-based remedies of ownership protection (Section 1) and the merely possession-based remedies of Section 2.

B. Interests at stake and policy considerations

Quick results. The policy goal of the provision is to secure a speedy outcome of the litigation, as a result of the distinction between possessory protection and ownership protection, as well as to restrict private force and to secure a peaceful enforcement of rights. *Speedy outcome*: possession is a temporary order; consequently there is no reason why the parties should indulge in a long and perhaps costly litigation procedure, so as to prove the right that entitled them to exercise physical control over the object. Usually the procedural laws of the Member States provide a simplified and accelerated procedure for the enforcement of such type of possessory remedies, at least as far as the requirements of proof are concerned.

Restriction of private force and promotion of peaceful enforcement of rights. Even a person having a better right to possess the movable may not dispossess the current possessor unlawfully, but has to obtain the current possessor's consent or enforce his right in a court proceeding on the merits. An unlawful dispossession that cannot be reversed by means of a legal remedy would put the unlawful dispossessor in a very favourable position with respect to the ensuing court proceeding over a claim of the former possessor to restore the movable. The unlawful dispossessor would – due to his unlawful act – be in the position of a respondent, and the former possessor, as a claimant, would have to prove his ownership or better right or position to possess the movable. Thus, every peaceful person who does not exercise private force would have to prove his better right or position to possess the movable as claimant in a court proceeding against the current possessor (respondent).

The rules of possessory protection ensure that the unlawful dispossessor cannot benefit from his unlawful act in the way described above. He is forced to stay in the position of a claimant who has to prove his better entitlement to possess the movable. This gives to the possession that was not – within a year (see below) – obtained in the unlawful way defined by VIII.–6:201, a certain protection, which crystallizes in the fact that the more favourable position of a respondent in litigation over the right to possess is secured for the person in current (peaceful)

possession. This protection is in line with the presumption "*la possession vaut titre*" of the Romanist legal systems.

C. Comparative overview

Protection remedies in the Member States. With respect to the protection of possession, two main tendencies can be discerned in the examined legal orders: (a) Either specific legal remedies for the protection of possession exist, usually a remedy against interferences and a remedy against dispossession (such is the case in Germany, Spain, Portugal, Italy, Greece, Malta, Austria) or, (b) in the countries where the principle "*en fait des meubles, la possession vaut titre*" applies (France, Belgium), the possessor is treated in the same way as the title holder, namely the owner, and has the same remedies as the owner. The Netherlands have a mixed system: Although the protection of possession system alludes to the principle "*la possession vaut titre*", it also has elements from the so-called *actio publiciana*, in that the "better" possession is favoured; besides, tort law remedies are alternatively at the disposition of the possessor, who was a victim of interference, thus bridging the gap between property and tort law. In English law, possession is protected by means of the action on trespass and the action on conversion in tort law (the latter has certain similarities with an action on dispossession). In Sweden possession protection is regulated in a fragmentary way through provisions of the Penal Code which demonstrate a rather tortuous character. In Hungary, an administrative procedure precedes the recourse to judicial remedies; the administrative procedure constitutes the actual possessory protection, while judicial protection is always on the merits.

D. VIII.–6:203(1) and VIII.–6:204(1): Requirements and persons entitled to remedy

Unlawful dispossession or interference. VIII.–6:203(1) requires an unlawful dispossession by the other person, VIII.–6:204(1) requires an unlawful interference of possession or an imminent interference by the other person. For the term 'interference' see Comment J to VIII.–6:101. The term 'imminent interference' also comprises an 'imminent dispossession' (see Comment J to VIII.–6:101), whereas a dispossession that already occurred is covered by VIII.–6:203. For the definition of the term 'imminent' see Comment K to VIII.–6:101. For the definition of the term 'unlawful' see VIII.–6:201. Unlawful dispossessions include physical acts of dispossession as well as an interior change of mind of a former LRP or PA and the finder in bad faith (they all have the animus of an OP; see Comment D to VIII.–6:201).

Persons entitled to the remedies. The persons entitled to exercise the possessory remedies of VIII.–6:203 und VIII.–6:204 are owner-possessors (OPs) and limited-right-possessors (LRPs). Possession-agents (PAs) are not 'possessors' in the sense of VIII.–1:205 to 1:208 and should be entitled to exercise self-help alone (VIII.–6:202), because in such cases a quick reaction is of essence and the circumstances usually do not allow the PA to inform the OP or LRP of the intrusion in time. These conditions are not present, however, with respect to the possessory judicial remedies. In the event that possessory remedies are necessary, they must be initiated within the period of one year; the abundance of time provides sufficient grounds for granting those remedies only to OPs and LRPs, who have an interest of their own in the exercise of control over the movable. It seems reasonable to expect from mere PAs to inform their OPs or LRPs for whom they hold the movable of the infringement in order to enable them to take the required judicial steps against the third person, instead of expecting from PAs to take the judicial steps themselves.

In case of a relationship of limited-right-possession (e.g. contract of lease or storage) both the OP (e.g. the lessor) and the LRP (e.g. the lessee) have an interest in the recovery of the movable by the LRP or the termination of the interference. It seems to be in the interest of both parties that both of them have the possibility to resort to the respective possessory remedies against the third person.

Person against whom the remedy is directed: The claim may be directed against the person who unlawfully dispossessed the former possessor provided that this person is still in direct or indirect possession (physical control) of the movable.

Illustration 1
B steals the movable from A and keeps it. The claim may be directed against B as the direct possessor of the movable.

Illustration 2
B steals the movable from A and afterwards hands it over to C for safekeeping. The claim may be directed against B as the indirect possessor of the movable. It can, however, not be directed against C, because C did not unlawfully dispossess the former possessor.

Illustration 3
B steals the movable from A and afterwards sells it to C. B is no longer in direct or indirect possession of the movable. The claim cannot be directed against B. The claim cannot be directed against C, because C did not unlawfully dispossess the former possessor. A can claim recovery from C under VIII.–6:101.

No fault or legal capacity required. Just as in cases of self-help the unlawful dispossession or interference does not require fault or legal capacity on the side of the intruder. Therefore, the claims for recovery or a protection order may be also directed against persons who initially were not aware of the unlawfulness of their action of dispossession or interference. However, their intrusion will become intentional once the possessor claims back his goods from the intruder (or claims cessation of the interference) and the formerly unaware intruder does not fulfil this claim. At this point, the (former) possessor can make use of the remedies mentioned in VIII.–6:203 and 6:204.

Illustration 4
B takes A's umbrella, erroneously thinking that it is his own. When A approaches B and explains to him that the umbrella was his and that he wanted it back, B refuses to give back the umbrella. A is entitled to recovery against B under VIII.–6:203.

Illustration 5
While attempting to escape, thief T puts A's movable in B's bag. B does not notice that and walks away with the movable. If T has lost physical control over the movable, the claim for recovery can no longer be directed against T. This is not the case where T knows where B is and can cause him to give the movable back to T. Initially A cannot claim recovery from B because B did not dispossess A. When B, however, refuses to give the movable back to A, A is entitled to recovery against B under VIII.–6:203. By keeping the movable, B assists in the unlawful action of T.

No identity between initial unlawful dispossessor and later possessor required, if later unlawful possession forms part of initial unlawful dispossession. This means that one has to distinguish between the following situations:

> (a) A, the owner, was unlawfully dispossessed by B. B is still in direct or indirect possession of the goods. A is entitled to recovery against B under VIII.–6:203, no fault, not even negligence on the side of B is required. It is sufficient that he refuses to give the goods back.
>
> (b) A, the owner, was unlawfully dispossessed by B. B asks C to store the goods for him so that the police will not find the stolen goods in his (B's) house. A is entitled to recovery against B and C under VIII.–6:203 (provided they refuse to give back the goods to A on a voluntary basis). C's refusal to surrender the goods to A forms part of B's initial act of dispossession. By storing the goods and refusing to give them back to the owner, C assists in the unlawful action of B. The same applies to *illustration 5* above.
>
> (c) A, the owner, was unlawfully dispossessed by B. B sells the goods to C. C is in good faith and takes in no way part in the initial unlawful dispossession. A is not entitled to recovery against B or C under VIII.–6:203, because B is no longer in possession, whereas C's possession is not unlawful in the sense of VIII.–6:203, because it does not form part of the initial unlawful dispossession by B. A can claim recovery from C under VIII.–6:101.

E. VIII.–6:203 paragraph (1) and VIII.–6:204 paragraph (1): Objective limitation period of one year

Why a relatively short limitation period is needed. As a general policy, which is derived from practical drafting reasons and is in full accordance with the traditions of the legal systems of the Member States, prescription periods and similar time limits should not be prescribed in the substantive provisions themselves. When the rights resulting from the various provisions of private law or a contract are terminated by prescription, this is to be regulated in a separate chapter. In the case of the possessory remedies of VIII.–6:203 and 6:204, however, the relatively short prescription period is an integral part of the particular provisional character of the remedy which aims at a simplified and accelerated enforcement in cases of violation of possession. This particular character distinguishes the possessory remedies from other rights and rights-based remedies, which are subject to the ordinary prescription periods, or – as may be the case with the ownership right – to no prescription period at all (extinction only by acquisition of ownership by continuous possession). Besides, the fact that the prescription periods found in most European legal systems are more or less the same, namely one year, makes it feasible to establish a prescription period of that length already in the substantive provisions without giving rise to controversy.

Subjective and objective time limits. In the legal systems of the Member States possessory remedies are usually formulated for movables and real estate with uniform requirements for both categories. With respect to the time limit, two different regulation techniques can be discerned:

(1) A shorter *subjective time period* (e.g. one month) which starts to run when the person entitled to the possessory remedy gains knowledge of the dispossession or interference and of the identity of the third person.

(2) A longer *objective time period* (usually of one year for both movables and immovables) which starts to run at the moment the dispossession or interference takes place.

Ad (1): The main policy objective underlying the *subjective* time period is to ensure that the OP or LRP is able to enforce the remedies provided in his favour, even if he becomes aware of the infringement (dispossession or interference) and of the identity of the infringer only a considerable time after the dispossession or interference occurred/began. As long as he is unaware of the infringement, he does not have the possibility to resort to remedies against the infringer. And it is equally evident from the nature of the remedy that the claimant must also know the identity of the infringer in order to be able to take judicial steps against him.

Ad (2): In the European legal systems, the most frequently used time limit is the *objective* limitation period of one year starting to run with the occurrence of the dispossession or interference. An OP or LRP who knows of the dispossession/interference and who knows the third person, will have one year to go to court and institute a proceeding against the dispossessor/interferer. Considering the temporary character of the possessory protection remedies and the purpose of their speedy enforcement in an accelerated procedure, the period of one year seems to be an adequate objective time limit.

Why only an objective limitation period was provided. An objective period of one year, which does not take into account the respective knowledge of the possessor of the infringement, balances the need for a restricted ability of the possessor to enforce the possessory remedies, on one hand, and the consideration of cases in which the possessor may not be able to gain knowledge of the infringement promptly, on the other hand. Besides, the solution proposed is in accordance with the majority of European legal systems providing specific judicial possessory remedies.

Considering the temporary character of the possessory protection remedies and the purpose of their speedy enforcement in an accelerated procedure, as well as the need for a prompt resolution of disputes arising in the field of relations *in rem*, it seems to be inappropriate to render the aforementioned objective period provided by VIII.–6:203 paragraph (1) and 6:204 paragraph (1) "*relative*" by giving an OP or LRP who obtains the required knowledge only after a year or even later (e.g. even after several years) whichever additional period to react. Therefore, the absolute character of the one year limitation period is not subject to specific exceptional regulations allowing relativity as to its exact extent depending on the subjective knowledge of the possessor.

Limitation period for interferences. With respect to interferences, one has to bear in mind that, contrary to dispossession, it is rather hard to determine the exact point in time when they take place. It can be that an interference is ongoing through a series of acts which constitute, however, a uniform interfering course of action or is repeated by several acts, which form different instances of interference; e.g. A is, on a daily basis, throwing away garbage in B' truck; C has been repeatedly, at irregular intervals, destroying the tyres of D's car for reasons

of personal revenge, whereas E does the same with the car of F only once as an act of vandalism.

Generally, a protection order makes sense and will be granted only if the interference is still present (ongoing) or is still imminent. An interference that is already terminated cannot be averted any longer by a court order. However, with respect to the removable traces an interference left on the movable (see Comment K to VIII.–6:101), a protection order still makes sense when the act of interference itself is terminated. It seems inappropriate to let the limitation period of one year start at the moment of termination of an interference for two reasons: (a) Once an interference is terminated (and no removable traces are left), no protection order will be granted. (b) An interference may last for some years, whereas the possessor is in the position to resort to judicial remedies against it from the very beginning of the interference. Therefore, the general rule must be that the period of prescription starts to run at the moment in which the interference began.

However, in cases of repeated interferences, it seems unfair to let the prescription period start with the beginning of the first interference for the following reason: If several acts of interference occur in the course of time, the possessor often cannot know for sure if the interferer plans to continue disturbing his possession or not. Therefore, VIII.–6:204 paragraph (1) *in fine* provides that, in cases of repeated interferences, a new period starts each time a new interference begins.

Protection of the possessor after the lapse of the limitation period of one year. It is important to note, however, that the OP or LRP is not without legal protection against the infringer, even after the period of one year has elapsed. He then has the possibility to claim recovery or a protection order against the interferences on the basis of his better right or better possession (VIII.–6:301, 6:302), on the basis of his ownership (VIII.–6:101), or on the basis of a contractual right. What is limited here, is only the particular remedy of recovery or protection order against interferences based on the mere fact that a possession was violated by an unlawful act (private force) but not all other remedies based on rights to possess the movable. See the formulation "irrespective […]" explained in paragraph 4 of Comment A above.

F. VIII.–6:203(1) and VIII.–6:204(1): The remedies – recovery and protection order

'Recovery' (VIII.–6:203) means that the third person has to hand over the movable to the claimant. The remedy is similar to the remedy provided for in VIII.–6:101(1) ("entitled to obtain or recover physical control"). The requirements for the two remedies, however, differ decisively (VIII.–6:101: right of ownership; VIII.–6:203: unlawful dispossession; rights are irrelevant). The different formulation with respect to the remedies of recovery and *receipt or* recovery of physical control results from the fact that in VIII.–6:101 the other person is not required to have committed an act of dispossession himself, no act of dispossession is required to have taken place at all (see Comment I to VIII.–6:101), whereas in VIII.–6:203 the requirement of an unlawful dispossession by the other person is crucial.

The 'protection order' (VIII.–6:204) is the same remedy as the protection order in VIII.–6:101 paragraph (3). Comment K to VIII.–6:101 also applies here.

G. VIII.–6:203(2) and VIII.–6:204(2): The relationship between direct and indirect possessor

Protection of direct LRP against unlawful OP/LRP. As explained in Comment G to VIII.–6:202, the (direct) LRP should be protected against his indirect possessor, who is an OP or LRP, when the latter violates the direct possessor's right (conferred by contract or by law) to possess the movable. The direct LRP can defend his possession by self-help (VIII.–6:202) and the possessory remedy of VIII.–6:203, where the indirect possessor unlawfully dispossesses the LRP. These remedies offer the LRP a quicker and probably less costly relief than the judicial procedure based on his contractual right to possess the movable. With the exception of a few countries (for instance France), this is also the dominant solution in the EU Member States. The OP also cannot assert his right of ownership successfully against his LRP (VIII.–6:101) because his claim for recovery is blocked by the LRP's contractual (or other) right to possess the movable.

Right to possess must be valid. From the definition of the LRP in VIII.–1:207 follows that the LRP must have a valid right to possess the movable, otherwise he would not qualify as an LRP, but would be treated in analogy to VIII.–1:206 as an OP (see Comment F to VIII.–1:205-208). Therefore, the provisions of VIII.–6:203 paragraph (2) and 6:204 paragraph (2) also only apply to possessors with a valid right to possess the movable in relation to the indirect possessor.

H. VIII.–6:203(3): exclusion of remedy in case of unlawful dispossession by claimant within the past year

Initial unlawful dispossessor excluded from remedy. VIII.–6:203(3) addresses the case of a thief or other person A who unlawfully dispossessed possessor B within the last year. Afterwards the former possessor B in his turn unlawfully deprived person A (an OP) of his possession. This will be, for example, the case when the initial possessor B is not entitled to exercise self-help according to VIII.–6:202, because his dispossession of the thief A does not comply with the immediacy or proportionality requirement laid down in VIII.–6:202(2). As the initial possessor is not or no longer entitled to self-help, he acts 'unlawfully' when he deprives the thief A of his possession (and may be liable for damage to the thief which was caused as a consequence of his unlawful act).

The lawful way to effect restoration of the movable to the initial possessor would have been to exercise the possessory remedy of VIII.–6:203 within one year or to make use of any other claim based on a right to possess. However, it does not seem just to permit A, the thief or other initial unlawful dispossessor, to rely on the unlawful act of the initial possessor B for the following reason: A himself was the one who initiated the unlawful course of action. A acted unlawfully in the first place. The unlawful act committed by the initial possessor B was only a reaction to the thief's initial infringement of possession. This reaction occurred in a relatively short period of time (one year) after the initial dispossession by the thief A. For this reason, the thief's entitlement to recovery of the movable is excluded under these circumstances. This rule is derived from the 'unlawful possession objection' ("*fehlerhafter Besitz*") of the German law family. It is also partly consistent – in a sense, as the other side of the coin – with the "*ano e dia*" ("a year and a day") rule found in the Portuguese and the Spanish legal systems, according to which a possessor must have exercised his possession rights for at least a year, before he can rely on the possession remedies.

I. VIII.–6:203(4) and VIII.–6:204(3): Enforcement of right or better position to possess

Relation of possessory remedy to right-based remedy. In cases of dispossession, where it is foreseeable that the other person will invoke or actually invokes a right to possess the movable by raising a *defence* or *counter-claim* (see remedies of VIII.–6:101, 6:301), it might seem unreasonable for the judge to order that the movable is first to be returned to the initial possessor (OP or LRP) according to VIII.–6:203(1) and will subsequently have to be given back to the other person, when the latter wins the litigation based on his right to possess the movable. This evaluation applies even more strongly to cases where, from the very start, the facts point with considerable certainty towards the conclusion that the other person has such a right to possess, whereas the initial possessor (claimant) does not have such a right.

No return of the goods to claimant in cases of defence or counter-claim based on right to possess. Therefore, in such cases (cases of defence or counter-claim based on right to possess), the judge is able, according to VIII.–6:203(4), to order that the movable has to be handed over to a third person, or to the court or a competent authority, who will hold the movable for the person that will finally win the procedure on the underlying better right to possess the movable until this decision on the merits is reached. VIII.–6:203 paragraph (4) allows the judge to link a proceeding pursuant to VIII.–6:203 (merely possessory) with a proceeding pursuant to VIII.–6:301 (better possession), VIII.–6:101 (ownership) or a proceeding over an obligatory right to receive delivery of the movable. If the other person, as respondent, invokes such other entitlement to possess the movable, the movable will, on a provisional basis, be kept by the court, public authority or third person, and will be handed over to the claimant (initial possessor), if he wins the proceeding, or to the respondent (other person), if he prevails with his counter-claim.

Protection order ceased or replaced in cases of interference. When it is possible to link a claim based on the protection of mere possession with a counter-claim based on a right to possess in cases of dispossession, this should be also possible in cases of interference (see VIII.–6:204(3)). In these cases no final protection order will be rendered by the court. The order will be ceased and, if necessary, finally replaced by a decision on the existence of a right or better position to interfere.

J. Character of the rule

Mandatory rule. The rule is mandatory. The person entitled to the possessory remedies can waive or not use the remedies.

Section 3: Protection of better possession

VIII.–6:301: Entitlement to recover in case of better possession

(1) A former owner-possessor or former limited-right possessor is entitled to recover possession of the goods from another person exercising physical control over them, if the former possession was "better" than the current possession of the other person in the sense of paragraph (2).

(2) The former possession is "better" than the current possession if the former possessor is in good faith and has a right to possess, while the other person has no right to possess, the goods. Where both persons are in good faith and have a right to possess the goods, the right derived from the owner prevails over a right derived from an owner-possessor who is not the owner; if this does not apply, the older rightful possession prevails. Where both persons are in good faith, but neither has a right to possess the goods, the current possession prevails.

COMMENTS

See Comments on following Article.

VIII.–6:302: Entitlement to protection order in case of better possession

Where another person interferes with the possession, or such interference or a dispossession is imminent, the owner-possessor or the limited-right-possessor, who is in good faith, is entitled to a protection order under VIII.–6:101 (Protection of ownership) paragraph (3), unless the other person would, in case of dispossession, have a better possession in the sense of Article VIII.–6:301 (Entitlement to recover in case of better possession) paragraph (2), or the third person has a better right to use or otherwise deal with the goods than the owner-possessor or limited-right-possessor.

COMMENTS

A. General idea

Protection of 'better' possessors who have problems to prove their right to possess: The remedies stipulated in Section 3, VIII.–6:301 and 6:302, constitute an effort to bridge the gap between 'pure' possessory protection (VIII.–6:202-6:204), based upon the *factum* of a person exercising actual physical control over a movable, and the protection based upon one's ownership right in a movable (VIII.–6:101). These legal remedies are not meant to prolong the possessory protection remedies, which are, as stated above, restricted to one year. They are intended to respond to particular practical needs, namely the lack of protection of a former possessor, when he can no longer assert the possession remedies and no *proof of an ownership right* in the sense of VIII.–6:101 can be provided. Under these circumstances, a former possessor (OP or LRP) should not be left without any protection against a current possessor, if the former possessor clearly has a better entitlement to possess the movable than the current possessor. Such better entitlement or position to possess the movable seems to be present when the former possessor has a right to possess the movable, whereas the current possessor does not have such a right, or where the former possessor is an acquirer by continuous possession in good faith (VIII.–4:101(1)(a)), whereas the current possessor is an OP in bad faith (e.g. the thief).

B. Interests at stake and policy considerations

'***Actio publiciana***' **and similarity to protection of ownership.** The remedies of VIII.–6:301 and 6:302 share a similarity with the "a*ctio publiciana*" of Roman law and its further developments in the various legal systems of the Member States. The aim of these provisions is to offer for certain categories of 'qualified' or 'better' owner-possessors and limited-right-possessors, who do not qualify for the protection of ownership under VIII.–6:101, because they are not (yet) owners, or because they are owners but cannot prove their ownership, a special protection remedy against 'less qualified' other persons who are in current possession of the movable. This special protection exceeds the limits of the mere possessory remedies of VIII.–6:203 and 6:204 and bears a certain similarity to the protection of ownership (VIII.–6:101) – albeit not requiring the proof of ownership.

Persons protected. The better-possession-remedies of VIII.–6:301 and 6:302 are designed to protect especially the following categories of persons:

(1) *limited-right-possessors* with an obligatory right or/and a limited right *in rem* to possess the movable against a current possessor without a right to possess, or against a current possessor with a right to possess which is derived from an OP who is not the owner;

(2) *potential acquirers by continuous possession in good faith* (before the completion of the period of ten years of VIII.–4:101 paragraph [1][a]) against a current possessor in bad faith without a right to possess;

(3) *owners, who cannot or do not want to provide evidence of their ownership* (as required by VIII.–6:101). They can prevail under VIII.–6:301 and 6:302, if they prove to be in good faith and the other person was in bad faith, or the other person was in good faith, but has no right to possess.

C. Comparative overview

Forms of qualified possession in the Member States. The '*actio publiciana'* appears in a variety of 'modern' forms in the contemporary legal systems of the Member States. Several tendencies can be noted: for instance, there are those legal systems concentrating mainly on a possessor having a title (e.g. a contract of sale), or even a putative title, and being in good faith as to his title and the way he obtained possession; the protection also extends to acquirers by continuous possession in good faith (Austria; Greece: only for immovables). Austrian law also shows an interesting aspect in that the *actio publiciana* has come to answer to new needs and actually even transcends its traditional scope by offering a *quasi in rem* position to obligatory rights, such as the lease (right to possess, LRP).

As to those legal systems, on the other hand, which substantially departed from the classical *actio publiciana*, namely Germany, Portugal and Spain, further distinctions must be made: Good faith still plays a role in GERMAN CC § 1007, but no right to possess is necessary for this remedy. In Portuguese and Spanish law, the good or bad faith of the possessor are not mentioned, but three elements are decisive: the actual possession, the seniority of it and the existence of a title (like e.g. a contract of sale).

Position of 'actio publiciana' in relation to possessory protection and ownership protection. With respect to the relationship of the actio publiciana to claims based upon other legal bases, it is interesting to note the differences and the various reasons for which the claimant will choose the one or the other remedy. With respect to ownership claims the substantial advantage of the actio publiciana lies within the much more convenient evidence requirements; it is in any case far easier to prove one's possession or its acquisition in good faith than the whole trail of owners up to original ownership acquisition. With respect to the relationship to possessory remedies, on the other hand, a series of factors must be taken into account: in possessory claims one has to prove solely that he possesses (in case of interference) or he possessed (in case of dispossession), whereas in the actio publiciana the claimant also has to prove that he was in good faith and that the other requirements for his better position to possess are present; possessory claims are usually limited by one year, whereas the actio publiciana will normally be subject to the longer general prescription periods; finally, while a judgement on ownership remedies (VIII.–6:101) constitutes res judicata with respect to the right of ownership, it is disputed what will be covered as res judicata by the judgement in case of an actio publiciana: In Greece, it simply covers the existence of the prerequisites of good faith acquisition by continuous possession, in Austria it is controversial whether it contains a presumption of ownership or not, in Spain the ruling

consists in a mere interim measure without prejudice to the parties' right to bring forward new claims at a further stage of the procedure.

D. VIII.–6:301(1) and VIII.–6:302: requirements in general

Comparison to VIII.–6:203, 6:204, 6:101. The better-possession-remedies of VIII.–6:301 and 6:302 have to be distinguished from the possessory remedies of VIII.–6:203 and 6:204: Unlike the *possessory remedies*, they have to be enforced in an ordinary proceeding and are not subjected to a particularly short limitation period; moreover, their scope of application is wider, in that they do not require an unlawful dispossession by the current possessor (respondent). The most important and useful aspect from a practical point of view lies in the fact that, unlike the *ownership remedies* of VIII.–6:101, the claimant does not have to prove his ownership.

Proof of former possession/of interference with possession, of good faith and of better right or position to possess. In the cases of VIII.–6:301 and 6:302 the claimant has to prove his (former or current) owner-possession or limited-right-possession, the current possession by the other person (VIII.–6:301), or, in cases of interferences (VIII.–6:302), the interference or imminent interference, and his good faith. And the claimant will finally prevail only if he can prove a better right or position to possess (or [VIII.–6:302] otherwise deal with) the movable than the right or position proved by the other person (respondent). In comparing the relative quality of the possession of the first owner-possessor/limited-right-possessor (claimant) and of the other person (respondent), not only the good faith of both persons, but also their right to possess plays a considerable role.

No unlawful dispossession by respondent required. Unlike the possessory remedy of VIII.–6:203 paragraph (1) and in line with VIII.–6:101 (protection of ownership), VIII.–6:301 paragraph (1) does not require an unlawful dispossession by the other person (respondent). The case may well be that the current possessor (the other person) obtained his possession in an entirely peaceful way, e.g. because the movable was lost and he found it.

Comparison of quality of possession of claimant and respondent. The entitlement to the better possession remedy of VIII.–6:301 is finally decided on the basis of a comparison between the respective qualification of the owner-possession/limited-right-possession of the claimant and the person currently in physical control of the movable (other person). If the possession of the other person is less qualified than that of the claimant, the other person will have to surrender the movable to the former possessor, irrespective of the manner in which the other person obtained physical control over the movable.

Illustration 1
A is the owner or LRP of a movable. A loses the movable on a journey. B, who does not know A, picks up the movable and wants to keep it for himself or wants to deliver it to the competent institution. B never deprived A of his owner-possession or limited-right-possession, because A himself lost the movable and was not in physical control of the movable when B picked it up. A has a right to possess the movable, whereas B has not. Therefore, A will prevail over B under VIII.–6:301.

Illustration 2
A is the LRP of a movable. He has a contract of lease with the owner. B steals the movable. C, who is in good faith, purchases the movable from B, but does not acquire

it by good faith acquisition. C himself did not unlawfully deprive A of his limited-right-possession. With respect to the movable, C qualifies as a potential acquirer by continuous possession in good faith. C's right to possess the movable is derived from the contract with the thief B. A's right to possess the movable is based on the relationship of limited-right-possession with the owner. Therefore, A has the better right to possess the movable, since it can be traced to the owner, and will prevail over C's right. B's right to possess the movable (under his contract with the owner) must of course be still valid and not terminated when B sues C.

VIII.–6:301, however, also covers cases, in which the other person unlawfully deprived the OP or LRP of his possession. If, in *illustration 2*, the thief B keeps the movable, A can enforce his entitlement under VIII.–6:301 against B.

E. VIII.–6:301(1) and VIII.–6:302: persons entitled to 'better possession' remedies – OP or LRP in good faith

Protection requires former 'possession' in the sense of an OP or LRP. The persons entitled to the better possession remedies of VIII.–6:301 and 6:302 are owner-possessors (OPs) and limited-right-possessors (LRPs) in the sense of VIII.–1:206 and 1:207, but not possession-agents (PAs, VIII.–1:208). For the reasons explained in Comment D to VIII.–6:203 and 6:204, the protection granted to PAs should be limited to the remedy of self-help. The persons protected by section 3 are OPs (direct and indirect) and LRPs (direct and indirect) whose owner-possession or limited-right-possession is "more qualified" than that of the other person.

Good faith of OP and LRP and valid right of LRP. One indispensable element of this 'qualification' is the 'good faith' of the claimant. The OP or LRP must reasonably believe that he has a right to possess the movable. The right the OP must reasonably believe to have is the right of ownership. An OP who is not the owner is in good faith if he neither knew nor could be reasonably expected to know that he is not the owner (see VIII.–3:101 [1][d]). An LRP will qualify as an LRP in the sense of VIII.–1:207 only, if his right to possess the movable (of an obligatory or proprietary nature) really exists (see Comment F to VIII.–1:205 – 1:208). The LRP must be in good faith with respect to the entitlement of his OP/LRP to grant such a right. He must for instance believe that his pledgor or lessor is the owner of the movable and, therefore, entitled to grant him a pledge or a lease.

The burden of proof with respect to his good faith lies on the claimant.

Remedy. The remedy granted by VIII.–6:301 is the 'recovery of physical control': This means that the other person has to hand over the movable to the claimant (former possessor). The remedy is similar to the remedy provided for in VIII.–6:101 paragraph (1) ("entitled to obtain or recover physical control") or the remedy of recovery on VIII.–6:203. The remedy in cases of interference according to VIII.–6:302 is the protection order defined in VIII.–6:101 paragraph (3).

F. VIII.–6:301(1) and VIII.–6:302: persons against whom the remedies are granted

Person who exercises physical control. The protection is granted against another person in physical control (possession) of the movable or another person interfering with the movable.

Like in VIII.–6:101, no act of unlawful dispossession on the side of the other person is required. The other person may be in direct or indirect possession of the movable (OP, LRP), or exercise physical control on behalf of a possessor like the PA.

Relationship between OP and his LRP. The protection is not granted against the owner and/or other indirect owner-possessor of the movable, who unlawfully deprives his LRP of his limited-right-possession in violation of the specific relationship between him and the limited-right-possessor. In this point, VIII.–6:301 differs from VIII.–6:203 paragraph (2) (recovery) and VIII.–6:202 paragraph (3) (self-help). The reason for this differentiation is the special character of the remedies of self-help and possessory recovery: They offer a much quicker termination of the unlawful dispossession than the ordinary legal remedies and should, therefore, be granted to LRPs against their indirect possessors in addition to their contractual remedies. The remedy of VIII.–6:301 does not offer the LRP any additional advantage in comparison to a remedy based on the breach of contract. Therefore, the LRP seems to be sufficiently protected against the unfaithful indirect owner-possessor by his contractual remedies and does not need the additional protection of VIII.–6:301.

G. VIII.–6:301(1) and VIII.–6:302: proof of 'better possession' or 'better right to use or otherwise deal with the movable'

Proof of better possession. The burden of proving the (better) quality of *his own* owner-possession or limited-right-possession is on the claimant. The burden of proving the (better) quality of *his* owner-possession or limited-right-possession is on the respondent.

> *Illustration 3*
> A somehow loses physical control over a movable, which he formerly held in good faith. C gets the movable as a gift from B. A demands recovery of the movable from C on the basis of VIII.–6:301. C proves that he meets all the requirements of acquisition by continuous possession in good faith according to chapter 4, but the period of ten years of owner-possession by C has not yet elapsed. A can rebut this evidence by proving that he has a contractual right (derived from the owner) to possess the movable. In this case, A will prevail over C because he has the better possession according to VIII.–6:301(2).

Thus, the central feature of the better-possession-remedies of VIII.–6:301 and 6:302 is a comparison between the respective quality of the owner-possession or limited-right-possession of the claimant and the owner-possession or limited-right-possession of the respondent. Claimant and respondent have to bring evidence as to the respective quality of their possession. If the respondent is not able to bring any evidence as to his good faith, his right to possess, or otherwise better possession, it will be sufficient for the claimant to establish that he formerly possessed the movable in good faith. If the respondent brings evidence of his good faith and of his right to possess or otherwise qualified possession, the claimant can rebut this evidence by proving that his right to possess can be traced back to the actual owner, whereas this is not the case for the respondent.

Proof in cases of interference. In the case of interferences in VIII.–6:302, it seems difficult to define what the respondent, who is not in owner-possession or limited-right-possession of the movable, but merely interferes with the owner-possession/limited-right-possession of the claimant, will have to prove in order to prevail over the claimant. As an argumentum a maiori ad minus, it seems evident that a respondent who has a right to possess the movable, whereas

the claimant does not have such a right, should not only be allowed to keep the movable (VIII.–6.301), but that he should also be allowed to otherwise interfere with the claimant's possession. Therefore, VIII.–6:302 refers to the determination of the better owner-possession or limited-right-possession in the (hypothetical) case of dispossession in VIII.–6:301. In addition, the other person (respondent) should also prevail, if he cannot prove a better (hypothetical) owner-possession or limited-right-possession in the sense of VIII.–6:301, but he can prove a right to cause exactly that sort of interference, which the claimant wants to avert or prohibit by his claim under VIII.–6:302.

Illustration 4
A is the LRP of C's truck. C concluded a contract with B, allowing (and obliging) B to paint and repair his truck. If A wants to prohibit B from interfering with the truck on the basis of VIII.–6:302, B can defend himself by invoking his contractual right to (use or otherwise) deal with the movable.

Illustration 5
A, as the owner or limited-right-possessor of a sheep, grants to B a right of *usufruct,* which entitles B to acquire ownership of the milk and the wool of the sheep. If A changes his mind and wants to prohibit B from taking possession of the milk or the wool, in breach of his relationship with B, B will prevail over A by invoking his contractual as well as his right *in rem* to take the milk and the wool of the sheep.

H. VIII.–6:301(2): determination of 'better possession'

The two 'persons' mentioned in VIII.–6:301 paragraph (2), the quality of whose possession is to be compared, are the former owner-possessor or limited-right-possessor (claimant) and the other person (respondent) in the sense of VIII.–6:301 paragraph (1).

(a) other person in bad faith

Respondent in bad faith. In order to prevail against the other person, a person must be in *good faith* with respect to his right to possess (see Comments E and G *supra*). A former OP or LRP who is in good faith will always prevail over another person who is not in good faith. The good faith of the OP relates to his ownership, the good faith of the LRP relates to the ownership of the person from whom he directly or indirectly derives his right to possess (see Comment E *supra*).

(b) former possessor with right (to possess) and third person without a such a right

VIII.–6:301(2) sentence 1: "The former possession is "better" than the current possession if the former possessor is in good faith and has a right to possess, while the other person has no right to possess the goods."

Only claimant has a right to possess. If both, claimant and respondent, are in good faith, the claimant who has a (valid, not putative) right to possess the movable will prevail over another person who does not have such a right. The respective right may be an obligatory right (e.g. a contract of lease, storage etc between the OP and the LRP) or a right *in rem* (e.g. *usufruct,* security right).

Illustration 6
A is the lessee of the movable, on the basis of a contract of lease with owner O. The movable is stolen by an unknown thief. Respondent B purchases the movable from X. B is in good faith, he reasonably believes X to be the owner, and thinks his contract of sale with X is valid (B is a potential acquirer by continuous possession in good faith in the sense of VIII.–4:101(1)(a)). B's contract with X is invalid. Thus, B does not have a right to possess the movable, whereas A has a right to possess the movable. A will prevail over B, because his limited-right-possession is "better" than B's owner-possession in the sense of VIII.–6:301(2).

(c) former possessor AND third person have a right to possess

VIII.–6:301(2) sentence 2: "Where both persons are in good faith and have a right to possess the goods, the right derived from the owner prevails over a right derived from an owner-possessor who is not the owner; if this does not apply, the older rightful possession prevails."

Claimant must have been in possession. In all cases where two rights to possess the movable are compared, it must be kept in mind that no right to possess the movable is ever protected under VIII.–6:301, if the claimant (or respondent) has not yet obtained possession of the respective movable. This follows from the basic structure of the better-possession-remedy of VIII.–6:301: The claimant was (formerly) in owner-possession or limited-right-possession, and the respondent ('other person') is currently in physical control of the movable, when the claimant resorts to the remedy of VIII.–6:301. A claimant who rented the movable from the owner, but the movable was never delivered to him, is not entitled to recovery, according to VIII.–6:301, against another person currently in physical control of the movable (who probably also rented the movable from the owner); the claimant must, even for a short period, have been in possession of the movable.

Right to possess. Persons who have a 'right to possess' in the sense of this paragraph are LRPs (VIII.–1:207) and OPs (VIII.–1:206) who have a valid title (contract of sale) for the acquisition of ownership giving them a relative right to possess the movable with respect to the seller, but who did not acquire ownership for some other reason: e.g. because the movable they attempted to acquire from the non-owner was stolen. Thus the right to possess the movable in the sense of this section can be a contractual right, a right created by operation of law, a right in rem, or a mere obligatory right.

If both, the claimant and the respondent, are in good faith and have an obligatory or *in rem* right to possess the movable, further distinctions must be made.

(i) Right derived from the owner versus right derived from someone else

Right derived from owner or someone else. The formulation 'derived from' means that the OP or LRP directly or indirectly derives his right to possess the movable from that person (from the owner or an OP who is not the owner). The sub-LRP of the LRP of the owner has a right to possess the movable finally going back to the owner (= derived from the owner), even though he has a contract only with the first LRP. If the movable is stolen and sold by the thief to a person X (who may be in good or in bad faith), and B acquires the movable by sale from X in good faith, B has a right to possess the movable based on the sales contract with X. However, B's right is derived from the thief, who is an owner-possessor in bad faith.

Illustration 7
A is the lessee of the movable, on the basis of a contract of lease with the owner O. The movable is stolen by an unknown thief. Respondent B is a potential acquirer by continuous possession in good faith who purchased the movable from X. The sales contract between B and X is valid. B does not have a right to possess the movable which is better than the right of A, because A's right is derived from the owner, whereas B's right is derived from the thief. A will prevail over B, because A's limited-right-possession is 'better' than B's owner-possession in the sense of VIII.–6:301 paragraph (2).

(ii) Older possession if rights to possess are derived from the same person

Rights to possess derived from the same person. The distinction with respect to the origin of the right to possess (see (a) supra) does not apply, if both persons, claimant and respondent, have a right to possess that is derived from the same person.

Illustration 8
The owner O concludes a contract of lease, first with A, then with B. He delivers the movable to A B afterwards deprives A of his limited-right-possession. Solution: A will prevail.

Illustration 9
The owner O concludes a contract of lease with A and delivers the movable to A. A few months later O sells the movable to B. B deprives A of his limited-right-possession. Solution: A will prevail.

Illustration 10
The owner O concludes a contract of lease, first with A, then with B. He delivers the movable to B, A afterwards deprives B of his limited-right-possession. Solution: B will prevail.

Illustration 11
The owner O concludes a contract of lease with A, but does not deliver the movable to A. A few days later O sells the movable to B and delivers the movable to B. A afterwards deprives B of his owner-possession. Solution: B will prevail.

Illustration 12
The owner O concludes a contract of lease, first with A, then with B. A few days later A sub-leases the movable to C. O delivers the movable to C. B deprives C of his limited-right-possession. Solution: C will prevail.

Illustration 13
The thief T (or the finder F who keeps the movable for himself) concludes a contract of sale, first with A, then with B. He delivers the movable to A. B afterwards deprives A of his owner-possession. Solution: A will prevail.

The option seems to be to let the 'older right' prevail over the 'younger right', or, alternatively, to let the 'older possession' prevail. It has to be noted that a right that is 'older', but was never substantiated by delivery of possession cannot be defended under VIII.–6:301, because the person entitled to recovery under VIII.–6:301 must be the 'former possessor'. In *illustrations 8, 9* and *13*, A has the older right *and* the older possession; it is, therefore, clear

that A's right should prevail. In *Illustrations 10, 11* and *12*, B and C have the younger right, but the older possession, because the owner O delivered the movable to them, and not to A.

Relationship to VIII.–2:301. The solution provided here is in line with the basic rule of VIII.–2:301 on Multiple Transfers. The transferee who first fulfils all general requirements of transfer, i.e. a valid entitlement (contract or other) and delivery (transfer of possession to him), prevails. He will become owner and – provided he is in good faith with respect to existence of the earlier entitlement of the other transferee – will not be subjected to any claim for recovery by the former owner or the other transferee. Thus, in general, not the prior contract (right) will be decisive, but, rather, the prior receipt of possession.

Older rightful possession prevails. For these reasons, VIII.–6:301 paragraph (2) provides that the limited-right-possessor or owner-possessor with a right to possess and the 'older rightful possession' prevails. The word 'rightful' was inserted to make clear that this provision deals with the possession of two parties who both have a right to possess; thus, if they possess, they possess in accordance with that right. The solution of illustrations 10, 11 and 12 is therefore: B (10, 11) or C (12) will prevail over A, because O delivered the movable to B (or C) first and A only obtained possession after B (C). A's possession is, therefore, younger than the possession of B and C. The rule 'the older rightful possession prevails' applies only where both persons (claimant and respondent) are in good faith and their respective rights to possess the goods are not in one case derived from the owner and in the other case from the non-owner (see VIII.–6:301 paragraph (2) 'if this does not apply'). Thus, their rights to possess can both be derived from the same person, owner or non-owner, or from two different co-owners or two different non-owners.

(d) neither former possessor nor the other person have a right to possess the movable

VIII.–6:301(2) sentence 3: "Where both persons are in good faith, but neither has a right to possess the goods, the current possession prevails."

Current possession prevails. If both, claimant and respondent, are in good faith, but neither of them has a right to possess the movable (because e.g. their contracts are invalid), no remedy will be granted to the former possessor on the basis of VIII.–6:301. The current possessor will prevail. This rule is congruent with the principle of "*beati possidentes*" found in several legal systems. In view of the fact that the other person (current possessor) will – because of the good faith requirement – never be a person that unlawfully deprived the former possessor (OP) of his possession, while both persons lack a right to possess, no reason can be found for a remedy that orders the recovery of the movable by the former possessor.

I. VIII.–6:302: Remedies against interference or imminent Interference

References to other provisions. For the question of 'better possession' in cases of interference with possession and the respective burden of proof see Comments G and H *supra*. For the term 'interference' see Comment J to VIII.–6:101. The term 'imminent interference' also comprises an 'imminent dispossession' (see Comment J to VIII.–6:101), whereas a dispossession that already occurred is covered by VIII.–6:301. For the definition of the term 'imminent' see Comment K to VIII.–6:101.

Comparison to other remedies; no declaration of right possible. The remedy granted by VIII.–6:302 "protection order" is the same remedy as the protection order in VIII.–6:101(3). Comment K to VIII.–6:101 also applies here. See also VIII.–6:204(1). VIII.–6:204(1) (possessory remedy) and VIII.–6:302 (better possession remedy) differ from VIII.–6:101 paragraph (2) (ownership remedy) in so far as no declaration of a right (of ownership) – as in VIII.–6:101(2) – can be demanded under VIII.–6:204(1) (possessory remedy) and VIII.–6:302 (better possession remedy). The remedy of declaration is clearly inappropriate with respect to a possessory remedy, because no 'right' is under dispute there. The opinions in the European legal systems, which know an actio publiciana type of remedy, are divided over the question of whether a judgement on such a remedy can constitute res iudicata with respect to the existence of such a 'right' in the movable. In our view, a declaration would only make sense if the basis for the protection granted by VIII.–6:301 and 6:302 was clearly the existence of a right in or with respect to the movable (which is the case in VIII.–6:101). However, VIII.–6:301 and 6:302 cover also situations in which the (former) possessor (claimant), who is entitled to the better possession remedies, has no right in rem in the movable or not even an obligatory right to possess the movable. Moreover, a declaration of a right seems to be only necessary in cases of basic rights in rem, like the right of ownership (VIII.–6:101), because they demand to be respected by everybody. A right to such a declaration of a right with respect to the movable was, therefore, not provided.

J. Character of the rule

Mandatory rule. The rule is mandatory. The person entitled to the better possession remedies can waive his right to enforce the remedies or simply not make use of it.

Section 4: Other remedies

VIII.–6:401: Non-contractual liability

The owner and the limited-right-possessor are entitled to reparation for an infringement of their right of ownership, or their right to possess the goods under the terms of VI.–2:206 (Loss upon infringement of property or lawful possession).

CHAPTER 7: CONSEQUENTIAL QUESTIONS ON RESTITUTION OF GOODS

VIII.–7:101: Scope of application

(1) This Chapter applies where the situations covered by the subsequent Articles occur while the goods are possessed by a person against whom, at that time, the owner is entitled to obtain or recover possession of the goods.

(2) Where the requirements for the application of Book V are fulfilled, the provisions of that Book apply and have priority over the provisions of this Chapter.

(3) The provisions of Chapter 5 have priority over the provisions of this Chapter.

COMMENTS

A. General

Introduction as to situations covered. The issues dealt with in this Chapter have in common that they arise in a situation where physical control over the goods is exercised by a person other than the owner and the owner is entitled, as against this person, to obtain or recover possession of the goods by "revindication" in the sense of VIII.–6:101 (Protection of ownership) paragraph (1). There may be various reasons why the person exercising physical control over the goods has no right to possess them; we may think of a thief as well as of someone who purchased the goods from a non-owner but did not acquire in good faith, or of a person who purchased the goods from the owner under a contract which turns out to be void, or is avoided with retroactive effect. These different instances will be explored more closely below, Comment B. In the following discussion, the two parties will generally be referred to as the "owner" on the one side and as the "possessor" on the other side. For the purposes of this Chapter, there are basically three questions that may arise in such situations. (a) If the goods are damaged while they are under the physical control of the possessor, or if they are even destroyed or get lost: will the possessor be liable for the damage? This question may also appear where revindication in the sense of VIII.–6:101) does not make sense because the goods are completely destroyed or lost. (b) In case the possessor obtains any fruits from, or makes use of, the owner's goods while the possessor has them in possession: is the possessor under an obligation to return these benefits to the owner and, if so, to what extent? (c) Where the possessor incurs expenditure on the goods, or improves them: will the possessor be entitled to reimbursement of the expenditure from the owner when the latter reclaims the goods? Or will there be other means of protection available for the possessor, for instance a right to remove corporeal parts that the possessor added to the owner's goods, before they are returned? These issues (a) to (c) are dealt with in the subsequent Articles VIII.–1:102 to VIII.–1:104. The numbering (a) to (c) will be used throughout the Comments on this Article in order to facilitate understanding. The following discussion will focus on the scope of application as described by paragraph (1). The relation to Book V on benevolent intervention in another's affairs as addressed in paragraph (2), which is of limited importance as compared to other issues, will be taken up in Comment E, below.

Why Book VIII contains regulations on these issues. Chapter 7 serves an important supplementary function in relation to other parts of Book VIII, in particular to the transfer rules of Chapter 2, the provisions on good faith acquisition in Chapter 3 and those on protection of ownership in Chapter 6. Since questions like the ones listed in Comment A can easily appear in any situation where goods must be returned to their owner, these model rules

should provide clear answers on how to deal with such cases in practice. As will be pointed out in more detail below in Comment C and in the Notes on Chapter 7, a great number of European legal systems contain a specific set of rules regulating these issues in a property law context, the main general tendency of which can be summarised as the granting of certain privileges to a "possessor in good faith", as compared to the general rules that would govern the case if no such special set of rules existed, the latter primarily being general rules on non-contractual liability for damage and unjustified enrichment. Against this background it is evident, firstly, that there are certain policy issues to be decided within the scope of these model rules in order to find the most adequate balance between the owner's and the possessor's interests. Secondly, if Book VIII was completely silent about these issues, the question could come up whether they are intended to be left to the general rules of other parts of these model rules, i.e. mainly to Book VI on non-contractual liability for damage and Book VII on unjustified enrichment, or whether these issues should be left to the different (property law or other) regimes applicable under the national laws. It is noteworthy that Book VII presupposes that there may be additional rules to be taken into account when dealing with issues covered in the present Chapter, and explicitly provides that such other rules will take precedence over the unjustified enrichment rules; see VII.–7:101 (Other private law rights to recover) paragraph (3) and Comment C to that provision. Accordingly, including a set of rules like Chapter 7 of this Book seems to be the appropriate way of dealing with the issue within the framework of these model rules.

B. Scope of application, paragraph (1)

General criterion of owner's right to obtain or recover possession at the time the relevant event occurs. The general requirement for Chapter 7 to apply is that the owner is entitled, as against the possessor, to obtain possession of the goods by virtue of "revindication" in the sense of VIII.–6:101 (Protection of ownership) paragraph (1). This prerequisite must be fulfilled at the moment when the relevant event occurs, i.e. when (a) the act or omission causing damage to the goods takes place, (b) the respective benefit is obtained by the possessor, or (c) when the possessor incurs expenditure on the goods. This is important for distinguishing the scope of Chapter 7 from other rules of law governing similar questions in other situations.

Illustration 1
P takes advantage of the fact that the owner (O) of a sailing boat stays abroad for four weeks, and uses O's boat, without permission of the latter, for a nice sailing tour in the Stockholm archipelago. After that, P returns the boat in an undamaged condition. He, however, saves the cost of leasing a sailing boat for that time. Chapter 7 will apply since the owner would have had a right to demand the return of the boat all the time P had it in possession, and since the benefit from using the boat was obtained at that time. O's rights in relation to these benefits will be governed by VIII.–7:103 (Fruits from, use of, and other benefits derived from the goods during possession).

Illustration 2
O, a car rental firm, owns a number of cars and provides its customer P with a temporary right to use one of these cars under a contract for the lease of goods in the sense of Book IV Part B. If the car is damaged during the lease period, the question of whether the lessee P is liable for that damage will be assessed according to the rules governing the lease of goods, i.e. one has to assess whether the lessee handled the car with such care as can reasonably be expected in the circumstances, as provided for by IV.B.–5:104 (Handling the goods in accordance with the contract), and award

damages in accordance with Book III, Chapter 3 (Remedies for non-performance). Also, where the lessee has incurred expenditure on the goods for the purpose of preserving them, the lessee's right to reimbursement will be assessed according to IV.B.–5:105 (Intervention to avoid danger or damage to the goods). Chapter 7 of Book VIII will not apply, although a possessor (P) has physical control over the owner's (O's) goods at the time the car is damaged. But P, at this time, has a right to possess the car in the sense of VIII.–1:207 (Possession by limited-right-possessor) in relation to the owner O, which excludes the owner's right to recover possession at the relevant time; compare VIII.–6:101 (Protection of ownership) paragraph (1).

However, it should be immaterial whether the owner formally invokes the remedy provided for by VIII.–6:101 (Protection of ownership) paragraph (1). Only the "abstract" entitlement to such remedy is decisive. The owner may, e.g., also resort to VIII.–6:301 (Entitlement to recover in case of better possession), or the goods may be returned voluntarily without the owner even knowing that they have meanwhile been in the hands of another person (cf. *Illustration 1*). The wording "obtain or recover possession of the goods", parallel to VIII.–6:101 paragraph (1), also covers the hypothetical situation of the owner never having been in possession of the goods so far.

Point in time when entitlement to recover must exist. As already stated, the prerequisite for the owner's entitlement to obtain or recover possession of the goods in the sense of VIII.–6:101 (Protection of ownership) paragraph (1) must exist at the time the relevant event occurs. With regard to (a) the issues covered by VIII.–7:102 (Loss of, or damage to, the goods during possession), this relates to the time when the possessor's act or omission causing damage to the goods, or other event for which the possessor is liable under paragraph (2) of the named provision, takes place. It does not matter if, as a result of this event, a right to recover possession as against this person no longer exists because the goods are completely destroyed, got lost or have been alienated to a third party. Similarly, regarding (b) the issues covered by VIII.–7:103 (Fruits from, use of, and other benefits derived from the goods during possession), one will also take into account the time of the event from which the benefit arises. For example, where the possessor uses the owner's coal for heating and so receives a benefit , it is irrelevant that there may be no coal left to return to the owner. Where fruits or other benefits disappear at a later time, this may possibly have an impact on the extent of the enrichment to be reversed, see VIII.–7:103 Comment B, but will not affect the applicability of Chapter 7 as such. Finally, regarding (c) the issues covered by VIII.–7:104 (Expenditure on, or parts added to, the goods during possession), one will look at the time when the relevant act involving the incurring of expenses, or improvement effort, is undertaken by the possessor. Again, where the effect of this act is reduced or extinguished or, conversely, an additional effect appears at a later time (e.g. where the owner later sells the property and obtains an additional enrichment due to the improvements made by the possessor), this may have an impact on the extent of the owner's obligations as against the possessor see VIII.–7:104 Comment B, but will not affect the applicability of Chapter 7 as such. Another instance where the "at that time" formula becomes relevant is this Chapter's application to transfers based on avoided contracts; see Comment B, below.

Purpose; application by analogy. *Illustration 2*, above, illustrates the purpose of the requirement of an "entitlement to revindication" in the sense of the present provision. It ensures that where a specific legal relationship exists which already addresses the issues covered by this Chapter, those rules will apply and Book VIII, Chapter 7 does not interfere. This should, however, not exclude applying certain rules of Book VIII, Chapter 7 by analogy

where a legal relationship providing the possessor with a right to possess does exist, but some of the issues regulated in the present Chapter are not regulated by the rules governing that legal relationship and do not follow from an interpretation of the contract. But whether such an analogy is appropriate must be decided primarily by having regard to the nature and purposes of that legal relationship. The question may, for instance, come up where a storer (possessor) uses the stored goods owned by the client without the latter having authorised such use in the sense of IV.C.–5:103 (Protection and use of the stored thing).

Non-exhaustive list of examples. The following Comments will provide a non-exhaustive overview of situations which, under these model rules, may fall within the "entitled to obtain or recover possession of the goods" test of Chapter 7. This shows that the potential field of application of Chapter 7 is rather broad and the subject matters are quite diverse. It should be underlined, and will also follow from the Notes on Chapter 7, that not all of these situations are necessarily subject to a separate set of rules governing the "owner's" relation to a "possessor" under those national legal systems which contain such a specific set of rules (see Comment C, below). It may also be worth noting, since this will play a certain role in some of the policy considerations concerning the subsequent Articles, that some of the e situations listed in this Comment involve only two parties, i.e. the owner and the possessor, whereas others are three-party constellations.

Transfer based on void or avoided contract. The prerequisites set forth in this Article will be fulfilled where the owner transfers the goods based on a contract which is void from the beginning, e.g. because of legal incapacity of one of the parties where the consequence of invalidity is provided for by the relevant national law, and a relevant event as listed under (a) to (c) in Comment A above takes place while the transferee possesses the goods. The same will apply where the contract between transferor and transferee is avoided with retroactive proprietary effect. Technically, this follows from VIII.–2:202 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation) paragraph (2), which provides that where the underlying contract or other juridical act is avoided under Book II Chapter 7, ownership is deemed to have never passed to the transferee. For the purposes of this Article, this means that the owner, retrospectively, is deemed to have been entitled to recover possession all the time since delivery to the transferee (possessor) was made. As will be expanded on in more detail below when discussing the policies of the individual Articles of this Chapter, this is not intended to be the mere result of an interaction with certain other rules, but rather is based on deliberate choices made when establishing the substantive proposals for Chapter 7; compare VIII.–7:103 (Fruits from, use of, and other benefits derived from the goods during possession) Comment B.

Invalid or avoided right of use. The owner will also be entitled to recover possession of the goods in the sense of this Article, where the goods have been handed over to the possessor based on an initially invalid, or subsequently avoided, right of use. One may think of an invalid contract for the lease of goods in the sense of Book IV Part B, or of a right of usufruct as provided for by national law.

Right to use goods has ended. Chapter 7 may also apply where a right of use was, originally, validly established, but has already ended when the relevant event occurs. This may be the case, for example, where goods are used by the former lessee (possessor) after the end of the agreed lease period and the requirements for a prolongation of the lease contract under IV.B.–2:103 (Tacit prolongation) are not met.

Theft, unauthorised use, confusion of goods. Chapter 7 will also apply in the case of theft in the sense of an (intended) permanent dispossession, which is one of the paradigmatic examples of an owner being entitled to have the goods returned from the possessor (thief). Moreover, the requirements of this Article will be fulfilled where the possessor does not intend to dispossess the owner permanently, but just uses the owner's goods temporarily and the relevant event occurs during that time (cf. *illustration 1*, above). Chapter 7 will furthermore apply where a person erroneously confuses that person's own goods with those of another person, e.g. where someone, by mistake, takes another's coat or umbrella from the cloakroom in a restaurant.

Finding not intended to be covered. Formally, the prerequisite that the owner is entitled to recover the goods from the possessor will also be met in the case of finding, i.e. where someone deliberately assumes physical control of another's property which has been lost by that other person. However, this area of law is governed by a special regime in most European countries, which pursues specific policies. In particular, the finder is mostly provided with certain incentives such as a finder's reward, reimbursement of expenses and, perhaps, a possibility to acquire ownership of the lost item in order to comply with duties such as informing the owner or a competent public authority and handing over the found goods to the latter, which, as a whole, will increase the owner's chances to recover the property. Taking into account these special policies and the various differences in the related national rules, acquisition of ownership by finding has been excluded from the scope of Book VIII from the beginning; see VIII.–1:101 (Scope of application) paragraph (2) limb (h). This exclusion should be understood in a broad sense. Besides the issue of acquiring ownership, it also applies to related issues such as reimbursement of the finder's expenses. Finding, therefore, is intended to be exempted from Chapter 7 altogether by virtue of the named rule. This, however, does not exclude applying the rules of Chapter 7 by analogy to the extent that national law is silent about an issue regulated in this Chapter, provided that this is compatible with the purposes of the respective national legal framework governing this area.

Goods obtained from a non-owner for the purpose of acquisition provided that the possessor did not acquire ownership. The owner (A) will furthermore be entitled to recover the goods from a possessor (C) who "acquired" them from a non-owner (B), provided that neither good faith acquisition under Chapter 3 nor acquisition by continuous possession under Chapter 4 has taken place. Taking into account the basic rules of VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership), Chapter 7 may apply, in particular, where the contract between non-owner B and good faith acquirer C is void or avoided; where the possessor did not acquire for value (contract of donation in the relation B–C); where C was not in good faith; where C "acquires" stolen goods unless purchased from a transferee acting in that person's ordinary course of business; or in case stolen cultural objects are "acquired". In relation to Chapter 4, the main prerequisite for Chapter 7 to apply is that the relevant period for acquisition by continuous possession has not yet elapsed. It may be notable that such situations of a failed acquisition from a non-owner have, since the times of ancient Roman law, played an important role in the historical development of specific legal rules favouring a possessor in good faith, which exist in many European legal systems today (see Comment C, below, and the Notes on this Chapter).

Right of use granted by a non-owner. Since the model rules do not provide for any good faith acquisition with regard to rights of use, Chapter 7 may generally apply where, e.g., a non-owner (B) leases the owner's (A's) property to a third person (the possessor C). The

owner will be entitled to recover the goods from the possessor irrespective of whether the latter uses the goods in exchange for a price and whether the possessor is in good faith or not. This will be different where national law provides for good faith acquisition of a proprietary right of use, compare VIII.–1:204 (Limited proprietary rights) limb (b).

Service provided to third party: garage cases etc. One may finally consider situations where an "unauthorised" person, such as a thief of goods, enters into a contract with another person and hands the goods over to that person who, in performance of the obligations under that contract, improves the goods. For example, a garage-owner repairs a stolen car under a contract concluded with the thief who, however, does not pay the price. Such a situation may also fall within the scope of Chapter 7 since the garage-owner – like the thief – will have no right to possess as against the owner at the time the car is repaired.

C. Different approaches in the European legal systems

Application of general rules of the law of obligations. As will follow in more detail from the Notes on the subsequent Articles, some European legal systems tend to solve the issues covered by Chapter 7 with general rules; that is to say, basically with the relevant provisions on non-contractual liability for damage and unjustified enrichment. This applies, for instance, to the common law countries, to the Nordic countries and, to some extent, to French law.

Specific rules in a property law context. In many other European legal systems, being influenced by the Roman law tradition, the issues (a) to (c) are addressed by a specific set of rules, dealing with these issues as a kind of annex to the owner's right to revindication or in a section on possession. The Roman law heritage results in certain main differentiations which still appear as basic structural elements today. The main dividing line in most legal systems is a differentiation between possessors in good faith and possessors in bad faith (whereby "good faith" does not necessarily mean the same in all countries). Often, a differentiation between events taking place before or after the initiation of legal proceedings against the possessor (derived from the Roman *litis contestatio*) is added. With regard to expenses (issue (c)), the differentiation between "necessary", "useful" and other ("sumptuary") expenses has become a common feature. On a very general level, the common core of these national rules can be summarised as a tendency to privilege a possessor in good faith, as compared to the results that would be achieved if such special rules did not exist. For the purposes of discussing the policy issues of Chapter 7 in the subsequent Comments, this approach will be called the "owner-possessor relationship" approach, a term which is borrowed from German legal terminology. It should be added, as will also follow from the Notes, that in hardly any legal system is this set of rules applied to all the situations listed above in Comment B. The situation of unwinding synallagmatic contracts, for instance, is deliberately left to unjustified enrichment law in most countries. In several countries, difficulties arise in so far as the relation of these specific owner-possessor relationship rules to the general law on non-contractual liability for damage non-contractual liability and unjustified enrichment law is unclear or disputed.

D. General approach taken in Chapter 7

Reference to general rules of Books VI and VII. Providing a mere restatement of commonly accepted European principles seems to be unrealistic in this area, due to the stated differences between the national legal systems. The general approach taken in Chapter 7 is to resolve issues (a) to (c) by basically referring to the general rules on non-contractual liability for damage (Book VI), unjustified enrichment (Book VII) and, although it is only

occasionally relevant, benevolent intervention in another's affairs (Book V). A specific set of rules along the traditional lines of the owner-possessor relationship approach (cf. Comment C) is not adopted. Rather, the general non-contractual liability non-contractual liability and unjustified enrichment principles are supplemented or slightly modified where a different result appeared preferable, taking into account the comparative background. However, the latter is the case in quite a limited number of instances.

General reasons for this approach. The proposed approach has mainly been developed by way of an evaluative comparison of the results achieved under the European legal systems and the results that would be arrived at if the issues were left to the general principles already existing within these model rules (Books VI and VII). This analysis will be reflected in the Comments on the subsequent Articles of Chapter 7. Besides, more general aspects have been taken into account, such as the question of coherence, which arises almost inevitably in the present context. Adopting a specific regime of, for example, rules following the patterns of the owner-possessor relationship tradition, would presuppose that there exist good reasons for treating a possessor of a corporeal movable asset differently from someone who, e.g., uses an intellectual property right in good faith, but without being entitled to do so, so that liability under Book VII will arise. Furthermore, striving for simplicity was regarded as attractive where a deeper analysis shows that ultimately no further layer of law is needed. This may be the case because either comparable results can be achieved also by applying general rules, or the policies underlying the owner-possessor relationship rules appear questionable and the results achieved under general rules are considered to be preferable.

Still a separate Chapter. One may question whether a separate Chapter in Book VIII is really needed where the general approach is to subject the issues dealt with here to general rules provided elsewhere. There is evidently a point in that. The main explanation for Chapter 7 existing in its present form will have to be seen in its character of a model law. As already pointed out in Comment A above, there is, on the level of substance, a certain value in having a defined place for testing the general rules of Books VI and VII within the specific context of the situation where an owner is entitled to recover goods from another person. Also, on a more technical level, there is some value in clarifying that these issues are not intended to be left to the different concepts which may be applicable under current national laws. Finally, the relevant parts of these model rules are expressly pointed out to the reader of the black letter text.

E. Relation to Book V on benevolent intervention, paragraph (2)

Situations covered by Book V. Situations where a person other than the owner exercises physical control over goods may also fall within the scope of Book V on benevolent intervention in another's affairs. According to V.–1:101 (Intervention to benefit another), Book V basically presupposes that this person exercising physical control acts "with the predominant intention of benefiting another" (in the context relevant here: with the predominant intention of benefiting the owner of the goods concerned). That means that the person exercising control actually knows that he or she is not the owner. E.g., someone detects that goods owned by another are exposed to a risk of sustaining damage, and takes them with the intention of preserving them in the interest of the owner, who is absent. One may discuss whether such a person will, at the time of the benevolent intervention, be subject to the owner's entitlement to recover possession in the sense of paragraph (1) of this Article. If the owner shows up and demands the goods back, the answer will clearly be in the affirmative; but according to the current situation, the owner does not. Rather, the intervener is not allowed to discontinue the intervention without good reason, V.–2:101 (Duties during

intervention) paragraph (2). The intervener may, therefore, be under a duty to keep the goods under his or her control. It should, however, be irrelevant how such situations are to be treated under paragraph (1) since there are clear policy reasons, as reflected below, to subject these cases to Book V, which is therefore spelled out explicitly in paragraph (2).

Policy and main effects of the reference to Book V. Book V pursues specific policies by specific means. People should not be discouraged from helping others where necessary; rather, incentives to act in such a way are to be established. For this reason, there is a clear preference that, in any situation of possible overlap, Book V should apply and not be displaced by any specific property law-related rules or general non-contractual damage non-contractual liability or unjustified enrichment law rules. There do not seem to be any good reasons why an intervener who, while "possessing" corporeal movable property for the benefit of the owner, causes damage to these goods, or incurs expenses on the asset for the benefit of its owner, should be governed by a regime other than the one governing other benevolent interveners. Rather, a "possessing" intervener who causes damage to the goods, should be liable as against the owner (principal) under the specific rules of Book V, in particular under V.–2:102 (Reparation for damage caused by breach of duty) which provides for a special possibility to reduce or exclude the intervener's liability in its paragraph (2). VIII.–7:102 (Loss of, or damage to, the goods during possession) which refers to the general rules of Book VI on non-contractual liability for damage is superseded. Equally, the rules of Book V Chapter 3 (Rights and authority of intervener) should apply where an intervener in the sense of Book V incurs expenditure on the goods. One effect is that the success of the venture is not essential, provided that and in so far as the expenditure was reasonably incurred for the purposes of the intervention, cf. V.–3:101 (Right to indemnification and reimbursement), which differs from the results achieved under this Chapter (see VIII.–7:104 (Expenditure on, or parts added to, the goods during possession)).

F. Character of the rules

Non-mandatory character. The rights and obligations arising under Chapter 7 (in conjunction with the referred rules of Books V, VI and VII) are subject to the principle of party autonomy in the sense of II.–1:102 (Party autonomy) and can, therefore, be varied by party agreement, subject to the general limitations to this principle under the relevant provisions of these model rules. This applies to subsequent settlements as well as to agreements made in advance. The latter are unlikely to appear in a couple of situations covered by Chapter 7, but one may think of an agreement between the parties to a contract for the lease of goods establishing a certain liability regime for the case where the goods are not returned in due time after expiration of the lease contract.

G. Relation to Chapter 5, paragraph (3)

General. The scope of Chapter 7 and the scope of Chapter 5 on production, combination and commingling may overlap in a number of cases because the events covered there will often consist of an act undertaken by someone who, at that time, possesses the goods without being entitled to them as against the owner. In general, it is intended that the rules of Chapter 5, which can be regarded as the more specific ones and may bring about a change in proprietary positions, take precedence over the rules of Chapter 7 in so far as the results would not be compatible.

Particular instances. This means that where "new goods" are produced out of the owner's material, VIII.–5:201 (Production) will apply and take precedence over VIII.–7:104

(Expenditure on, or parts added to, the goods during possession), which could otherwise be applied if one regards the transformation into "new goods" as an expenditure on the existing goods. Where the labour contribution is of minor importance or no new goods are produced, the results provided for by VIII.–5:201 (Production) paragraph (3) which refers to VIII.–5:202 (Commingling) and VIII.–5:203 (Combination) – and VIII.–7:104(1) actually converge (cf. VIII.–5:203 Comment D). Where a possessor commingles the owner's goods with the possessor's own ones or with the goods of other owners, VIII.–5:202 will regulate the proprietary consequences of this event. However, if this causes a loss to the owner, the owner's rights resulting therefrom will be subject to VIII.–7:102 (Loss of, or damage to, the goods during possession) which, in turn, basically refers to the rules on non-contractual liability for damage of Book VI. Finally, VIII.–5:203 will take precedence over VIII.–7:104 (Expenditure on, or parts added to, the goods during possession) with regard to the proprietary effects if the possessor physically adds any items to the owner's goods. Where the possessor's part – which will be the practically most important case – constitutes a "subordinate part" in relation to the owner's "principal part", the calculation of the possessor's claim for payment which may arise from such an occurrence is identical to the one provided by VIII.–7:104 paragraph (1). See VIII.–5:203 paragraph (2) sentence 2 and Comment D on that Article. Where, on the other hand, combination results in the creation of co-ownership, VIII.–5:203 (Combination) paragraph (3) prevails; cf. Comment E on that Article. With regard to maintenance costs incurred by the possessor, no overlap between Chapters 5 and 7 occurs. See also VIII.–7:104 Comment D regarding the possessor's right to remove added parts and VIII.–5:101 (Party autonomy and relation to other provisions). Comments C and H on the relation between Chapter 5 and Chapter 7 (and unjustified enrichment law) in general.

NOTES

1. The DUTCH CC art. 3:120 regulates the legal consequences of possession in good faith, while CC art. 3:121 provides for the legal consequences of possession in bad faith. Some of those rules refer to the law on unjustified enrichment and non-contractual liability for damage on-contractual liability. Pursuant to CC art. 6:275, the rules of CC arts. 3:120 and 3:121 regarding the restitution of fruits and the reimbursement of costs and compensation for damage apply *mutatis mutandis* to the case of the setting aside of a synallagmatic contract and the obligation to reverse performance which have already been received under the contract. This provision was necessary because the creditor of that obligation is not the owner of the object. As the setting aside of a contract does not have proprietary effect, the acquirer is obliged to transfer the ownership of the object back to the original transferor (Faber/Lurger [-*Salomons*], National Reports VI: The Netherlands, 138).
2. A similar structure can be found in the SWISS CC. CC arts. 938-939 regulate the position of the possessor in good faith in the case of restitution, while art. 940 provides for the rules on possession in bad faith. These articles do not refer to the provisions of the law on unjustified enrichment and non-contractual liability , although the possessor in bad faith is *de facto* treated according to the principles of unjustified enrichment and non-contractual liability law. The general rules dealing with the restitution of the goods to their rightful owner (CC arts. 938-940) also apply to situations where the contract is void or avoided with retroactive effect (*ex tunc*; Faber/Lurger [-*Foëx/Marchand*], National Reports VI: Switzerland, 67).
3. The ITALIAN legislator considers the possession of another person's goods as being something unlawful. In principle, the provisions of non-contractual liability and

unjustified enrichment law are applicable. However, the possessor in good faith receives a better treatment with regard to the restitution of the fruits or the reimbursement of the expenses incurred on the goods, since the legislator, nonetheless, considers it unjust to subject a person, who used the goods in the firm belief of being the owner, to further "punishment" in addition to having to return the goods (*Tomassetti*, Il possesso, in Giurisprudenza critica 2005, 462).

4. In AUSTRIA, the position of the possessor in good faith and the possessor in bad faith is regulated in CC §§ 329 ff. The main aim of these rules is to mitigate the responsibility of, and to provide certain privileges for, a possessor in good faith. The rules provided in CC §§ 329 ff are regarded as problematic to a great extent. Partly, the black letter text is simply misleading. The norms do not form a consistent set of rules which is fully compatible with other parts of the Civil Code. As a consequence, interpretation has always been highly controversial. The main problem is the relationship of these rules to the rules on unjustified enrichment. According to the prevailing opinion, the unjustified enrichment rules prevail in the end, but applying them is all but simple. A second difficulty is the exact relationship to the rules on non-contractual liability for damage. On the other hand, the relationship to the rules of *negotiorum gestio* (benevolent intervention in another's affaires, *Geschäftsführung ohne Auftrag*, CC §§ 1035 ff) is rather clear. As these rules only apply if the possessor wants to act in the owner's interest, there is almost no overlap. The main point of discussion in legal writing and case law is how to bring CC §§ 329 ff in line with other parts of the Civil Code (Faber/Lurger [-*Faber*], National Reports I: Austria, 193).

5. There is no common concept for all situations under ESTONIAN law. The rules which have to be applied depend on the conflict situation: they will either be the provisions of unjustified enrichment and non-contractual liability law, or the separate set of rules provided in PropLA §§ 84-88. The latter provisions apply when the relationship between the owner and the possessor is neither based on a preceding contractual relationship nor on a relationship of unjustified enrichment or *negotorium gestio*. Those rules set forth certain modifications to the general law on non-contractual liability for damage and unjustified enrichment. With regard to void and avoided contracts, the rules of unjustified enrichment and non-contractual liability law are applicable (Faber/Lurger [-*Kullerkupp*], National Reports I: Estonia, 103).

6. The same distinction is made under LITHUANIAN law. In situations where the owner has no right of an obligatory nature against the possessor of the thing, the property law rules provided for by CC arts. 4.95 and 4.97 apply. If there is an obligation between the owner and the unlawful possessor, the rules on restitution regulated in Book 6 "Law on Obligations" are applied (Faber/Lurger [-*Mikelenas*], National Reports III: Lithuania, 70).

7. Also in the CZECH REPUBLIC, situations of transfer based on a void or avoided contract are regulated by the rules on unjustified enrichment. However, at the same time another claim based on CC § 126 is admitted. The owner is entitled to claim the restitution of the thing, irrespective of the previous obligatory relationship based on the (invalid, avoided) contract or the unjustified enrichment relationship (Faber/Lurger [-*Tichý*], National Reports VI: Czech Republic, 70).

8. A similar approach is followed in SLOVENIA. In the case of void and avoided contracts, every party has to return to the other party everything it has received under the contract (Code of Obligations, art. 187/II). In the remaining situations, a separate set of rules provided in Code of Property Law arts. 95-96 applies (Faber/Lurger [-*Rudolf*/*Rijavek*/*Keresteš*], National Reports I: Slovenia, 105).

9. This is likewise the case in HUNGARY. If the transfer is based on a void or avoided contract, the situation is regulated according to the principle of *in integrum restitutio* (CC § 237(1)): objective restoration of a situation in which no agreement has been entered into. With regard to the other situations, a separate set of rules (rules on possession without legal grounds; CC arts. 193-195) is applicable (Faber/Lurger [-*Szilagyi*], National Reports III: Hungary, 94).

10. Also BELGIAN law makes a distinction between situations where restitution is due after a retroactive termination of a translative agreement (*restitutio status quo ante*) and situations where the owner and the possessor had no contractual relationship (Faber/Lurger [-*Cauffman/Sagaert*], National Reports IV: Belgium, 98-104).

11. The SPANISH CC provides for a special set of rules in articles 451 ff. These rules are applicable as long as no special rules have to be applied on the basis of a specific relationship between the parties (Faber/Lurger [-*González Pacanowska/Díez Soto*], National Reports V: Spain, 91). In cases of annulled contracts, it has been acknowledged that the provisions set forth in CC art. 1.303 do not exclude the application of CC art. 451 (STS 10 February 1970, RJ. 792; STS 14 June 1976, RJ. 2752).

12. The GREEK CC, too, contains special regulations with regard to the restitution of goods (CC arts. 1096-1100). In some situations, however, the provisions on wrongful acts (non-contractual liability law) and unjustified enrichment apply in parallel with this special set of rules. For instance, if the underlying sales contract is avoided but the real transaction is valid, the possessor has to restitute the movable as well as the fruits derived from the movable according to the rules on unjustified enrichment, CC arts. 904 and 908 (Faber/Lurger [-*Klaoudatou*], National Reports III: Greece, 145). The possessor in bad faith is also liable on the basis of the provisions on non-contractual liability and unjustified enrichment. These provisions are applicable in parallel with the regulations on the possessor's liability provided for in CC art. 1096 ff (*Georgiadis*, Property Law I, 594).

13. The GERMAN CC provides for a separate set of rules regarding the restitution of goods to the owner (*Eigentümer-Besitzer Verhältnis*; CC §§ 987-1003). The aim of this special set of rules is to protect the undisputed possessor in good faith from the rules on unjustified enrichment and non-contractual liability for damage. If the general provisions of unjustified enrichment and non-contractual liability law were applicable, the possessor in good faith would be held liable, even in a case of slight negligence and would be obliged to restitute all the benefits derived from the goods, regardless of fault (Bamberger/Roth [-*Fritzsche*], BGB II, § 987, no. 3). The German regulation regarding the owner-possessor relationship is heavily criticised in legal writing. The CC §§ 987-1003 are regarded as unclear and complex. Moreover, due to numerous amendments of the law, the rules are not coherent and are sometimes contradictory. It gives rise to problems of interpretation (Bamberger/Roth [-*Fritzsche*], BGB II, § 987, no. 2; Staudinger [-*Gursky*], BGB[2006], vor § 987, no. 1; other opinion: Münchener Kommentar [-*Medicus*], BGB[4], vor §§ 987-1003, no. 22). Whether such a separate set of rules was necessary for the regulation of those conflicts or whether they could have been regulated under the ordinary rules of the law of obligations, is a matter of dispute in German legal writing (see for references in Staudinger [-*Gursky*], BGB[2006], vor § 987, no. 1).

14. PORTUGUESE law regulates the effects of possession in a separate set of rules: CC arts. 1268–1275.

15. Unlike most civil law jurisdictions, the laws in ENGLAND and WALES, as well as in IRELAND, basically do not contain any property law remedies of revindication. The

practical legal means of protecting ownership against interference by third parties is the tort of conversion. Prior to its recognition, restitution was seen as being a part of the law of contract. Essential pre-conditions of the obligation to make restitution are settled. There must be an enrichment of the possessor at the expense of the owner in circumstances in which the law will require restitution (i.e. whether the enrichment was "unjust" is relevant here) and there should be no reason why restitution should not be granted (Faber/Lurger [-*Gardiner*], National Reports II: Ireland, 87).

16. No specific rules are to be found in SWEDISH and FINNISH law regulating cases where damage or loss occurs during possession. Restitutionary claims can nevertheless be based on the general law on non-contractual liability (see for SWEDEN: *Skadeståndslagen;* and for FINLAND: *Vahingonkorvauslaki/Skadeståndslagen*). If someone is liable for damages, this will be solved based on the *culpa*-principle.

VIII.–7:102: Loss of, or damage to, the goods during possession

(1) Where the goods are lost, are destroyed or deteriorate during possession in the sense of VIII.–7:101 (Scope of application), the rights of the owner resulting from such loss or damage are determined by Book VI.

(2) For the purposes of this Article, intention or negligence as to possessing the goods despite the owner's entitlement to obtain or recover possession suffice to establish accountability in the sense of Book VI, Chapter 3.

COMMENTS

A. General

What is covered. This Article covers all situations where the owner of the goods, as a result of the other person's possession of them, sustains any loss. The loss may consist, for example, of the value of the goods where they get lost or destroyed during possession and, for that reason, cannot be returned to their owner. The same applies where returning the goods is impossible because they have been consumed, e.g. food eaten up or fuel oil used for heating, or where the goods have been alienated to another person. The loss may consist of a diminution of the goods' value where they are damaged or deteriorate during possession. In any case, the owner may also sustain a loss through being unable to use the asset while it was in the possession of the other person, or being prevented from using it in the future because it cannot be returned. As to situations which fall within the scope of Book V on benevolent intervention in another's affairs, see VIII.–7:101 (Scope of application) paragraph (2) and Comment E on that Article.

Relevant time. As to the relevant point in time ("during possession"), see VIII.–7:101 (Scope of application) Comment B.

Main approaches in European legal systems and basic policy issues. Common law provides for strict liability and where, as a result of the exclusively tort law based protection of property, the goods are not returned to the owner but a claim for damages is granted, the issue of the subsequent deterioration of the goods does not play any important role. In the Nordic countries, where the goods are returned to the person having a better right in them, the issues covered by this Article will generally be solved under the respective rules on non-contractual liability for damage. Applying a *culpa* principle, these rules will generally lead to the result that a person possessing in good faith, who, without negligence, believes himself or herself to be entitled to possess, will not be liable for damage occurring to the goods. This also applies in several "continental" European countries which, for issues (b) and (c) as listed in VIII.–7:101 (Scope of application) Comment A, have established rules along the lines of an owner-possessor relationship tradition (cf. VIII.–7:101 Comment C). Others extend separate owner-possessor relationship rules also to issue (a) and establish, in the first place, a differentiation between possessors in good faith and possessors in bad faith (in part, adding further sub-differentiations as may be seen from the Notes). Such legal systems regularly contain a rule explicitly spelling out that a possessor in good faith is not liable under the relevant rules on non-contractual liability for damage. In some countries, the liability of a possessor in bad faith – sometimes under the condition of additional qualifications – is extended to fortuitous events, unless the damage would also have occurred had the property still been in the possession of the owner. From this overview, the main policy questions will be, in the first place, whether strict liability or another regime, establishing requirements such

as intention and negligence as provided for by Book VI, should apply. A strict liability approach would imply that even a possessor in good faith could be held liable, at least in principle. In case such an approach is not favoured, one may consider whether there are any substantive differences between the "good faith" criterion and an approach as taken by Book VI, which may have a certain impact on the wording employed in this Article. This group of questions will be dealt with in Comment B below. Second, even if no general strict liability approach is adopted, one will have to decide how to deal with someone who is in "bad faith" with regard to entitlement to possess but does not act with intention or negligence in relation to the event finally causing damage to the goods (e.g. a thief storing the stolen goods in an apartment where they are destroyed by fire, the thief however being in no way responsible for the fire). This issue will be discussed in Comment C.

B. The main rule (paragraph (1))

Reference to Book VI on non-contractual liability for damage. Paragraph (1) states that the rights of the owner as against the possessor are determined by the rules on non-contractual liability for damage (Book VI). Basically, this means that the possessor may be liable if he or she causes legally relevant damage intentionally or negligently; see VI.–1:101 (Basic rule). This, in the first place, is a choice against a general strict liability approach. In that, Book VIII follows the basic decision taken for Book VI. There is no obvious reason why damage caused to goods by another person in possession should be subject to a stricter liability regime than, e.g., loss in the form of personal injury. Technically, this approach is also a choice against phrasing the rule in terms of a differentiation between a possessor in good faith and a possessor in bad faith. The following Comments show that this does not imply any important differences as to substance. Finally, the proposed approach brings about some additional advantages, which will also be addressed below.

How the rule works with a person who, in good faith, believes himself or herself to be the owner of the goods. An owner-possessor in the sense of VIII.–1:206 (Possession by owner-possessor) who is in good faith, believes himself or herself to be the rightful owner and is reasonably justified in doing so. This implies that such a possessor may believe himself or herself to be entitled to damage, destroy or abandon the goods, cf. VIII.–1:202 (Ownership). The decisive aspect for the question whether or not such acts trigger liability under Book VI will be the point of reference of the requirements of intention and negligence. From the concept of accountability in Book VI it follows that this reference point is not the possessor's act or omission as such (e.g. throwing a bottle of champagne against the hull of a ship; driving a car too fast so that it crashes) but the causation of legally relevant damage. Applied to our constellations, "legally relevant damage" is not the actual physical deterioration or destruction of the asset, but the loss to the owner. However, since the possessor in good faith assumes himself or herself to be the owner which includes, as pointed out above, the assumption of being "entitled" to do damage to his or her own asset, the possessor's act will not qualify as intentional in the sense of VI.–3:101 (Intention) nor as negligent in the sense of VI.–3:102 (Negligence), even if the possessor destroyed the goods on purpose or the damage occurred because the possessor did not take reasonable care. See VI.–3:101 Comment B with illustration 2.

No specific rule excluding liability of owner-possessor in good faith needed. The result achieved in the previous Comment coincides with what is stated explicitly by a specific rule in some countries dealing with the issue in an owner-possessor relationship context. A possessor in good faith is not liable as against the owner for loss sustained by the latter. To this extent, a specific rule, in addition to the rules of Book VI, is not needed. Also other

arguments which are put forward in favour of a specific rule in some legal systems do not have much persuasive power within the context of these model rules. In German law, for instance, where the acquirer acts in "good faith" in the sense of the good faith acquisition rules and where the acquirer is slightly negligent as to the predecessor's lack of entitlement, and the same meaning of the term "good faith" also applies to the owner-possessor relationship rules, a kind of symmetry argument envisaging the protection of commerce is traditionally put forward. It is argued that it would be an inadequate differentiation if a person who purchases goods from a non-owner in slight negligence regularly acquired ownership in "good faith", but would be exposed to full non-contractual liability for damage where the goods have been stolen or lost (so that good faith acquisition is excluded under the relevant national good faith acquisition provisions). Against this background, the explicit exclusion of non-contractual liability under the German owner-possessor relationship is said to be justified in order to provide at least some protection in the case of a slightly negligent "acquisition" of stolen goods. Such an argument cannot, however, be brought forward in relation to these model rules, since good faith acquisition is excluded in relation to any form of negligence, see VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership).

How the rule works with a person who, in good faith, believes himself or herself to be entitled to use the goods. Where the possessor, in good faith, believes himself or herself to be entitled to the mere use of the goods (in contrast to good faith related to a right of ownership in the goods), the possessor must, anyway, respect another person's property right and expect to be liable, should he or she cause damage to the goods. There is, in other words, no reasonably justified belief to be entitled to damage the goods. Applying the general liability regime of Book VI will, therefore, be an appropriate solution. As for examples, see the situations described in VIII.–7:101 (Scope of application) Comment B.

How the rule works with a possessor in bad faith. Where, on the other hand, a possessor is in bad faith, the possessor knows or has reason to assume that the goods must be returned. This applies to a person who possesses as, or as if, an owner in the sense of VIII.–1:206 (Possession by owner-possessor) as well as to someone who purports to be entitled to merely use the goods. Where such a person destroys the goods on purpose or as a consequence of acting carelessly, there is no question that the requirements of intention or negligence, respectively, in the sense of Book VI will be fulfilled and liability under that Book arises. There is no need to correct this result. It converges with the results arrived at under the European legal systems. As to the question how the current Article works in relation to a person who is in bad faith as to the entitlement to possess, but has no reasonable possibility of preventing the event actually causing the damage, see Comment C below.

Further implications of the general reference to Book VI. The reference to Book VI should be understood as being a general one. It comprises general principles such as causation as well as more specific provisions of Book VI. For instance, a possessor under the age of eighteen may be held liable only to the extent permitted by VI.–3:103 (Persons under eighteen) and the possessor's liability to compensate can be reduced, where this is fair and reasonable, under the provisions of VI.–6:202 (Reduction of liability); as to the latter rule, see also Comment C below. Also VI.–5:102 (Contributory fault and accountability) applies, which allows flexible solutions where the owner also contributed to the occurrence or extent of the damage.

C. The function of paragraph (2)

Situations addressed. Paragraph (2) addresses situations where the possessor is in bad faith, so that there may be liability under this Article in principle, but where the damage itself results from a fortuitous event, i.e. independent of any act or omission attributable to the possessor.

> *Illustration*
> A thief, P, steals three valuable paintings from a museum and stores them in a house. Before P is able to sell them, an arsonist sets the house on fire, which destroys the paintings. P is not present when the fire takes place and has no way of preventing the paintings from being destroyed.

Policy underlying the proposed rule. As can be seen from the Notes, the national legal systems in Europe differ as to the question whether a possessor in bad faith is liable for fortuitous events. Taking into account the regime of Book VI, it may be arguable that a possessor who actually knows that the goods must be returned will be under an extended duty of care in order to preserve the property. As long as such reasoning is possible and the damage occurs as a consequence of not meeting the relevant standard of care, paragraph (2) of the present Article has no substantive effect. It seems, however, preferable to extend liability also to situations where such argumentation does not help. This, in the first place, applies where the possessor knows about the lack of entitlement: With regard to the loss equivalent to the value of the goods (cf. Comment A above), the issue is in some way comparable to the issue of the passing of risk, arising in contract law. Taking into account that the possessor should have returned the goods from the beginning and positively knows this, it seems preferable to place the risk on the possessor rather than on the owner. Phrasing the rule in terms of a rule on non-contractual liability instead of in terms of a risk rule, however, makes it possible to cover also additional losses which may occur, e.g., in relation to being deprived of use after the goods were destroyed (any loss from being deprived of use before the goods were damaged will be covered by the general rules of Book VI anyway). Second, it seems preferable not to limit the provision to cases of actual knowledge because, on the one hand, the deliberations about the passing of risk may be considered all the more appropriate the more careless the possessor was with regard to the lack of entitlement, and, on the other hand, Book VI happens to provide a provision which makes it possible to mitigate the possessor's burden flexibly where necessary (see Comment C below). Again, referring to Book VI provides appropriate solutions where there is contributory negligence on the part of the owner (cf. Comment B above).

How the rule works. In order to achieve the functions described in Comment C above, paragraph (2) provides that the requirement of accountability in the sense of VI.–1:101 (Basic rule) and Book VI Chapter 3 is satisfied if the intention or negligence test is fulfilled with regard to the non-entitled possession itself. This means that possessing the goods in bad faith may be sufficient to trigger liability, even if there is no intention or negligence in relation to the event actually producing the damage. This coincides with a couple of legal systems, but may possibly appear a bit harsh at first sight when it comes to possessors whose degree of negligence with regard to the entitlement to possess is rather low, whereas the loss caused is rather high. But this problem can be solved internally by the rules of Book VI (see below, Comment C), which actually facilitates the choice for a full reference to the rules of Book VI in general. Also, due to this general reference to Book VI, accountability is not the only prerequisite for liability. Where there is not even a causal nexus between possession and the occurrence of the damage, i.e. where the goods would also have sustained the same damage if

they had remained in the possession of their owner, no liability will arise; cf. VI.–1:101 and VI.–4:101 (General rule). This restriction corresponds to the solution provided for in many national legal systems which have adopted such a liability for fortuitous events.

Reduction of liability under VI.–6:202 possible. As mentioned above, any degree of fault (intention, gross or even slight negligence) in relation to the possessor's lacking entitlement to possess suffices to fulfil the general requirements for liability under paragraph (2). However, where, in particular in the case of a possessor who is only slightly negligent as to the non-existence of the right to possess, liability would appear disproportionate, VI.–6:202 (Reduction of liability) provides for a flexible instrument to reduce the possessor's liability. The requirements set forth in this provision fit very well with the purposes of paragraph (2) of the present Article: The general guidelines being fairness and reasonableness, liability may be reduced wholly or in part provided that full liability would be disproportionate when having regard to a number of aspects. The first requirement is that the damage must not have been caused intentionally. Whereas intention in relation to the event ultimately causing the damage will not exist in the situations covered by paragraph (2) (see Comment C above), this basic value judgement can be taken into account when applying the rule to a person who possesses goods while actually knowing that the owner is entitled to recover them. Further aspects to be taken into account when applying the "disproportionate" test are, first, the "accountability of the person causing the damage". In the situations covered by paragraph (2) of the present Article, the degree of accountability is "weakened" not only by the fortuitous nature of the event finally causing the damage, but may be lowered in particular where the possessor was only slightly negligent with regard to the right to possess. Second, regard must be had to the extent of the damage, and third, to the means of preventing it, again facilitating a reduction of compensation due to the absence of means to prevent the damage caused by the fortuitous event. This instrument appears flexible enough to cope with the wide range of hypothetical variations that may underlie paragraph (2). The defence established by VI.–5:302 (Event beyond control), on the other hand, will play no important role in the present context. As can be seen from the Comments on that provision, it is designed for operating in the realm of strict liability.

NOTES

I. Overview

1. Under SLOVENIAN and SWISS law, the possessor in good faith cannot be held liable.
2. In BELGIUM, GERMANY, ESTONIA, GREECE and HUNGARY, the possessor in good faith is only liable for damages which occurred after the initiation of the *rei vindicatio*. In principle, the same applies in AUSTRIA; however, in some situations, as in case of the consumption of the goods, the rightful owner could claim for damages under the provisions on unjustified enrichment. Under DUTCH law, the possessor in good faith is liable as from the time when informed by the rightful owner that the latter is enforcing the ownership right. In SPAIN, in order to be able to claim for damages it has to be proved that the possessor in good faith acted with fraudulent intent. Also in PORTUGAL, the possessor in good faith is liable, if he or she acted culpably.
3. In LITHUANIA and ITALY, the possessor in good faith is regarded as liable for every deterioration or loss of the goods.

4. In BELGIUM, the NETHERLANDS, ESTONIA, SLOVENIA and HUNGARY, the possessor in bad faith is liable for all losses, except for those which would also have occurred if the goods had remained in the possession of the rightful owner. The same holds true under SWISS law; however a special regulation applies to the possessor in bad faith who does not know to whom the goods have to be returned: the possessor in this case is liable only for damage caused by fault.

5. In SPAIN, the possessor is liable for every deterioration or loss of the goods, even if caused by *force majeure*, provided that the possessor fraudulently delayed the delivery of the goods to their rightful owner. Under GERMAN and GREEK law, the possessor is only liable for damages caused by fault; however, if possession has been obtained through an illegal act (in GERMANY: criminal act or unlawful dispossession (*verbotene Eigenmacht)*), the possessor is liable for any kind of damage, including fortuitous events and accidental losses.

6. In AUSTRIA, the possessor in bad faith is liable for all losses caused by the possession. It is matter of dispute to what extent the possessor is also to be liable for accidental loss or deterioration.

7. Under ITALIAN, PORTUGUESE, CZECH and LITHUANIAN law, the possessor in bad faith is regarded as liable for every deterioration or loss of the goods.

8. The issue of damage or loss during possession in SWEDEN and FINLAND is solved without the use of specific property law concepts. The area is, therefore, not specifically regulated. Property law is not codified in a single law or code, and most of its parts are not regulated at all. The solutions are found in general laws or principles, as well as in Supreme Court decisions: The question of damages is solved through the national Tort Law Act (SWEDEN: *Skadeståndslagen*; FINLAND: *Vahingonkorvauslaki/Skadeståndslagen*), based on the *culpa*-principle, its rules not only being applicable to property law issues. There, the important question is not the possessor's state of mind, but whether the possessor has caused the damage or loss by negligence or wilful intention (Faber/Lurger [-*Kuusinen*], National Reports V: Finland, 75 f). If damage has been caused by negligence, the possessor will be liable under non-contractual liability law.

9. According to the NORWEGIAN legislation, the person with the physical control will normally not be liable if the movable subject to restitution is lost or damaged by an accident. If restitution results from the voidness of a contract, the possessor must not, however, be responsible for the contract's invalidity and must not have caused the damage negligently. If the contractual relationship is terminated, the possessor is not liable as long as not to blame for the loss. In other situations, the question of liability will be, just as in SWEDEN and FINLAND, answered according to whether the possessor has been negligent or not. If he or she has been negligent, he or she will be liable according to the rules of non-contractual liability law (*Hov*, Avtaleslutning og ugyldighet[3], 188 and Faber/Lurger [-*Færstad*], National Reports V: Denmark/Norway, 80 f).

10. Damages are also an adequate form of compensation under common law in ENGLAND and WALES. The owner of a movable has no right to the specific restitution of it and must, instead, be content with an award of damages representing the value of the thing lost. If the possessor nevertheless retains the owner's movable, the court has, as an extraordinary remedy, discretion to order specific relief (TIGA 1977 s.3(2)(a) and Faber/Lurger [-*Frisby/Jones*], National Reports II: England, 9 f and 106). In equity, the position is different. The owner can establish an equitable title to the movable and on that basis seek a declaration from the court that the party in possession holds the chattel on trust for the owner. The owner can thereafter ask the

court to order the retransfer of the movable to him or her (Faber/Lurger [-*Frisby/Jones*], National Reports II: England, 106). Damages are awarded to the owner, reflecting the value of the movable at the time of conversion. The subsequent deterioration of the movable will normally not matter. If, however, the court grants specific relief, then subsequent losses might be compensated by means of damages for consequential loss (s.3(2)(a) TIGA 1977).

11. The relevant area of law does not seem to be fully regulated in CYPRUS, as there is no comprehensive single property law code, and there are no specific rules regarding an owner's rights when the possessor has damaged or lost the movable. CYPRUS has a "mixed" legal system. Practically, English law is applied in all areas of law, which are not expressly regulated by legislation. One can, therefore, find legal solutions using English legal sources (Faber/Lurger [-*Laulhé Shaelou/Stylianou/Anastasiou*], National Reports II: Cyprus, 4 ff). See further the notes for ENGLAND and WALES.

12. In SCOTLAND, the former possessor can, at the most, be held liable to restitute the value of the thing (Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 175). In this area of law, it appears that legal scholars seldom share the same standpoint and every problem produces a multitude of different opinions and solutions. Some of the deviant opinions will be presented below.

13. In IRELAND, the consequences arising from damage sustained in relation to goods which have to be restored to their owner are complex and at common law, there is a wide variety of claims that can be brought in the case of the misuse of goods, such as tort claims, claims for breach of contract and claims for restitution. The claims often overlap and the area of law is often unclear and lacks consistency. The law has been reformed in ENGLAND by the Torts (Interference with Goods) Act 1977, but no legislative reforms have taken place in IRELAND (Faber/Lurger [-*Gardiner*], National Reports II: Ireland, 84). There are a number of defences to a restitutionary claim, such as the defence of change of position. It involves a denial that the defendant has been enriched on the basis that the enrichment is no longer in his or her hands. In IRELAND, this defence has been recognised in two cases (*Murphy v A.G.* (1982) IR 241 and *McDonnell v Ireland*, unreported Supreme Court of July 23 1997; see also Faber/Lurger [-*Gardiner*], National Reports II: Ireland, 96).

II. Possession in good faith

14. According to the SWISS CC art. 938, the possessor in good faith is entitled to use the goods according to his or her presumed right. Hence, such a possessor is not liable for any damage to the rightful owner's movable. A possessor who believes himself or herself to be the owner, is allowed to damage or destroy the goods, or to alienate them to a third person. The rightful owner can claim neither the purchase price nor the difference between the purchase price and the price that has been paid by the possessor in good faith to obtain the goods (*Steinauer*, Les droits réels I[4], no. 507). The possessor is in good faith if the possessor has good reasons to believe that the possession is lawful (Honsell [-*Stark*], Basler Kommentar[2], vor art. 938-940, no. 8). Good faith is required throughout the whole period, not only at the moment of acquisition. Hence, a possessor in good faith may become a bad faith possessor; for instance, on finding out that the transfer of possession was not based on a valid title (*Steinauer*, Les droits réels I[4], no. 501).

15. Also in SLOVENIA, the good faith possessor is not liable for any deterioration or destruction of the movable, and does not have to pay for using it (Code of Property Law art. 95/II). In the case of an avoided or void contract, every party has to return to the other everything it has received (Code of Obligations, art. 187/II).

16. According to BELGIAN law, the good faith possessor is only liable for losses caused by an occurrence which took place after the initiation of the *rei vindicatio*. This rule is justified by the idea that the possessor was, until that time, entitled to believe that the goods belonged to him or her. Even if the loss was caused intentionally, the possessor does not have to compensate the owner, provided that it occurred before the initiation of the action. Once the revindication action has been initiated, the possessor is, to a certain extent, obliged to safeguard the goods which may have to be returned. Hence, as from this moment, the possessor is liable for losses caused negligently or intentionally, but not for losses due to *force majeure* (*Hansenne*, Les biens, no. 673). CC art. 550 provides that the possessor is in good faith if he or she possesses as an owner on the basis of an entitlement to transfer property, of the defects of which he or she is not aware. The good faith ends as soon as the possessor gets to know of the defects. The judge evaluates whether the possessor possesses in good or in bad faith (*Van Neste*, Beginselen van Belgisch Privaatrecht V2, no. 251). With regard to restitution after retroactive termination of a translative agreement, most scholars do not make a distinction between the debtor in good faith and the debtor in bad faith. The debtor of the restitutionary obligation is bound by an obligation of result (of effecting restitution). If the goods have perished or the value of the goods has diminished beyond the reduction in value that would have been caused by normal "*usure*", the possessor will have to repair the goods at his or her own expense (*Starosselets*, T.B.B.R. 2003, 67, no. 26). However, the debtor of the restitutionary obligation is discharged if the object has perished due to *vis maior* (*Starosselets*, T.B.B.R. 2003, 67, no. 36). It must be taken into account that the obligation to make restitution is only one side of the mutual obligation. If the debtor of the restitutionary obligation is discharged, the other party (seller) is entitled to refuse repayment of the price (*Limpens*, La vente, no. 1782; *Starosselets*, T.B.B.R. 2003, 67, no. 36).

17. In GERMANY, the possessor in good faith is not liable for damage or loss of the goods. This follows from CC § 993 (1), second sentence. The possessor is in good faith if he or she neither knows that he or she is not entitled to possess the goods, nor was grossly negligent at the moment of acquisition. However, the possessor in good faith is liable for damage, consumption, deterioration or loss that occurred after the initiation of the legal proceedings (CC § 989), caused by his or her own fault (intentionally or even with slight negligence); cf. also note 39. Compensation is owed according to CC §§ 249 ff (*Wieling*, Sachenrecht I^{2}, § 12 III 2). If there is a decrease in value because the thing has been used, the rightful owner is entitled to claim either compensation for damage or the restitution of the benefits (see note 45 to VIII.–7:103; Soergel [-*Stadler*], BGB^{13}, § 989, no. 14; Bamberger/Roth [-*Fritzsche*], BGB II, § 989, no. 6). There is no deterioration if the goods have to be used in order to maintain them; e.g. exercising a horse (Soergel [-*Stadler*], BGB^{13}, § 989, no. 5). When a thing is encumbered with a limited right *in rem*, it is considered that the thing is changed in a disadvantageous way, resulting in compensation having to be paid (Soergel [-*Stadler*], BGB^{13}, § 989, no. 6). With regard to the possessor in good faith who obtained possession through a criminal act or unlawful dispossession (*verbotene Eigenmacht*), see note 39.

18. The GREEK CC distinguishes between the period before and the period after the initiation of the legal proceedings. As long as legal proceedings have not been initiated, the good faith possessor is not liable for the loss of, or deterioration to, the goods (CC art. 1100), since the possessor believes himself or herself to be the lawful owner of the movable asset. However, this does not cover the case where the possessor in good faith alienates the goods, resulting in an enrichment. The owner then has a claim based on the provisions of unjustified enrichment. Regarding the period

following the initiation of the legal action, the good faith possessor is liable to compensate the owner if the movable, due to the possessor's fault, was destroyed or damaged or, due to some other reason, cannot be restituted (CC art. 1097). The regulation regarding the impossibility of restitution due to the fact that the possessor has alienated the goods to a third person, depends on whether the acquirer obtained ownership or not. If the acquirer obtained ownership, the possessor is liable according to CC art. 1097 f and, possibly, also according to the provisions of unjustified enrichment and non-contractual liability law and *negotiorum gestio*. If the acquirer did not obtain ownership, the original owner may claim the goods from the acquirer. This, however, does not mean that the owner is to be burdened with the expenses and hurdles of claiming the goods from the third party. The owner could claim compensation from the possessor according to CC art. 1097 f. If the possessor alienated the goods after the legal action was brought, the decision of the court can be enforced against the third party. If the owner does not enforce the claim against the third party, the owner can claim compensation from the possessor according to CC art. 1097 f.

19. In HUNGARY, the possessor in good faith is not liable for damage which occurred during the period before the claim for restitution was initiated. From the moment when possession is reclaimed, the possessor is only liable if the damage is imputable to him or her (Faber/Lurger [-*Szilagyi*], National Reports III: Hungary, 96). Nevertheless, if it is obvious that the possessor became a bad faith possessor when the legal proceedings were initiated, the possessor will be liable as a possessor in bad faith (see note 36).

20. Under ESTONIAN law, the possessor in good faith is not liable for the destruction or the decrease in value of the goods, provided that it occurred before the possessor became aware of the filing of the action for restitution. The possessor is only liable for such damage caused by his or her fault after becoming aware of the owner's claim for restitution (PropLA § 84(3)). The possessor is in good faith if the possessor did not know nor was supposed to know about circumstances constituting a basis for reclamation pursuant to the provisions on unjustified enrichment (LObligA § 1035(4)).

21. The general idea of the AUSTRIAN CC § 329 is to treat the good faith possessor like an owner with respect to all kinds of liability (Schwimann [-*Klicka*], ABGB II^{3}, § 329, no. 1). Hence, a possessor in good faith who uses, consumes or even destroys the movable, is not liable under non-contractual liability law any more than an owner would be The meaning of 'good faith' is defined in the general rule of CC § 326. According to the prevailing opinion, a possessor lacks good faith when the possessor positively knows that he or she is not the owner, and in any case of negligent ignorance of the lack of ownership, including slight negligence. However, the Supreme Court decided that, as to situations where the goods have to be restored due to a void or avoided contract, the possessor is to be treated like a good faith possessor even if *both* parties knew that the contract would be void and, nevertheless, exchanged performances. The argument was that both parties could assume an understanding that they would not interfere with the other party's rights (OGH 18 September 1991, JBl 1992, 594; OGH 29 May 2001, JBl 2002, 789 (*Holzner*), both regarding immovable property). According to CC § 338, the possessor who was originally in good faith is considered to be in bad faith as from the moment of official receipt, via the court, of the service of process (*Klagszustellung*), provided that the possessor loses the lawsuit. However, the possessor in good faith could be under an obligation to compensate the owner for damage if, and to the extent that, the possessor obtained a benefit from the goods (e.g. by consumption). According to the prevailing opinion in case law and legal writing, the rules on unjustified enrichment prevail over CC § 329 in two-party constellations. As to three-party constellations, the prevailing opinion differentiates

between whether the possessor 'acquired' or 'used' gratuitously or for value. An acquirer who did not pay for acquiring or using the property must reverse the enrichment to the owner under the unjustified enrichment rules, e.g. must pay for using or consuming the asset if this resulted in damage, or surrender the purchase price received when selling the object to another person; while such obligation does not exist if the possessor paid for acquiring or using the movable because then CC § 329 applies (Kletečka/Schauer [-*Lurger*], ABGB, § 329, no. 3; Rummel [-*Spielbüchler*], ABGB I[3], § 329, nos. 1 f). For more details: see note 47 to VIII.–7:103.

22. In SPAIN, this issue is regulated in CC art. 457. According to this provision, the possessor in good faith is not liable for the deterioration or loss of the goods, except in cases where it is proved that the possessor acted with fraudulent intent. This article raises some questions about the possessor's good faith: how can a possessor be in good faith when acting fraudulently? In legal writing, different explanations have been given for this apparent inconsistency. For some legal scholars, the formula refers to the intentional destruction of the thing (but it has to be remembered that the possessor considers himself or herself to be the legitimate possessor); for others, it refers to the damage caused by an abusive exercise of right (CC art. 7(2)), or to the damage intentionally caused when, still being in good faith, the possessor had reason to suspect that he or she would have to restore the thing (e.g. after receiving a judicial summons) (Faber/Lurger [-*González Pacanowska/Díez Soto*], National Reports V: Spain, 95).

23. According to the PORTUGUESE CC art. 1269, the possessor in good faith is only liable for loss and damage, if he or she acted culpably. The possessor is in good faith if ignorant of the fact that another person's right is being infringed (CC art. 1260).

24. According to the prevailing opinion in CZECH law, the possessor in good faith is not liable for damage to, or loss of, the goods. Only a minority opinion admits claims for damages against the possessor in good faith. The amount of compensation should equal the market value (Faber/Lurger [-*Tichý*], National Reports VI: Czech Republic, 72). Situations of transfer based on a void or avoided contract are regulated by the rules on unjustified enrichment. Anyone who has been unjustifiably enriched must return what was acquired (Faber/Lurger [-*Tichý*], National Reports VI: Czech Republic, 70).

25. Under DUTCH law, the legal basis for liability of the possessor towards the owner is non-contractual liability law. This is explicitly stated in CC art. 121(1) with regard to the possessor who is not in good faith (see note 32). See, for more details: Faber/Lurger [-*Salomons*], National Reports VI: The Netherlands, 139 ff.

26. Under LITHUANIAN law, the owner has the right to claim damages on the basis of non-contractual liability law (Faber/Lurger [-*Mikelenas*], National Reports III: Lithuania, 71). In case the goods are restored to the owner after the avoidance or termination of a contract between the parties, the CC arts. 6.147-6.148 apply. In case of damage, loss or alienation of the goods, the possessor is bound to compensate for the value of the goods at the time when the thing was received, lost or alienated, or the value at the time of its restitution, whichever is lower (CC art. 6.147). If the goods are destroyed by *force majeure*, the debtor (possessor) is bound to assign to the creditor (owner) a claim for indemnity for the lost thing or to deliver to the owner the indemnification received for it (CC art. 6.148). If the thing has suffered partial loss or any other decrease in value, the debtor is bound to pay to the creditor the monetary equivalent of such loss or decrease in value, unless it has resulted from normal wear and tear of the thing (Faber/Lurger [-*Mikelenas*], National Reports III: Lithuania, 72).

27. In ITALY, the possessor who is obliged to return the goods and their fruits can be held liable for the deterioration of the goods or for the impossibility to return them (Faber/Lurger [-*Greco*], National Reports I: Italy, 45). If the possessor is not in the position to return the goods, either because they have been sold to another person or because they were lost, a distinction is made between the period before and the period after the initiation of the legal proceedings. The possessor, who sold the goods after the initiation of the *vindicatio*, has to pay compensation of a sum equal to the economic value of the goods, as well as having to compensate for the potential damage inflicted on the owner. In case the goods are destroyed after the initiation of the proceedings, the owner will receive compensation of an amount equal to the economic value of the goods. Finally, if the object was either sold or destroyed before the beginning of the proceedings, the owner cannot recover the goods, but can only bring an action based on the contractual agreement that was perhaps concluded with the possessor, an action for damages, or an action for unjustified enrichment, in order to obtain compensation in the amount of their economic value (Faber/Lurger [-*Greco*], National Reports I: Italy, 44).

28. In SCOTLAND, if ownership is lost by no fault of the possessor, irrespective of his or her state of mind the possessor will be liable only to the extent of any enrichment (*Bell*, Principles of the Law of Scotland[4], § 537; nevertheless, see also *Ferguson v Forrest* (1639) Mor 4145, where the possessor was held liable even though the movable was destroyed without any fault of the possessor). If a possessor in good faith consumes, sells or destroys the goods, he or she is also liable only to the extent of the enrichment (Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 175 f). This standpoint has not been left unquestioned in Scotland. Some authorities state that the good faith possessor should be liable for the value of the goods, "probably" calculated at the time of the act of deprivation, while a bad faith possessor "may" also be liable for profits resulting from the wrongful act (*Carey Miller/Irvine*, Corporeal Moveables[2], 243). These authorities are said to be unsupported by case law (Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 176; *Faulds v Townsend* (1861) 23 D 437 at 439 and *North West Securities v Barrhead Coachworks* 1976 SC 68). When the property is sold, the owner can sue a good faith possessor only for the profit generated by the resale (Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 177). Another opinion brought forward is that it is difficult to impose an obligation on someone who believes the property to be his or hers (*Gordon*, Scottish Land Law, § 14.59).

29. There are no specific rules governing the liability of possessors who damage another's property in SWEDEN, FINLAND and NORWAY. Under the general rule, the existence of a right to claim damages can, however, be justified by the rules of non-contractual liability law (for SWEDEN: *Skadeståndslagen (1972:207*); for NORWAY: *Skadeserstatningsloven*, *lov* nr. 69/1969; for FINLAND: *Vahingonkorvauslaki/Skadeståndslagen* 31.5.1974/412), which are based on the *culpa* principle. The question of liability is solved irrespective of property law principles. Good or bad faith has no significance. It is the negligence that constitutes liability (*Hellner/Johansson*, Skadeståndsrätt). The conclusion is that a possessor in good faith can hardly be seen as being negligent and, therefore, will normally not be liable for damages.

30. In ENGLAND and WALES, where the tort law liability is basically a strict one, the only defences a possessor might be able to raise, in an attempt to reduce exposure to liability, concern issues of causation and remoteness (Faber/Lurger [-*Frisby/Jones*],

National Reports II: England and Wales, 107). This would mean that the issue of good or bad faith probably is of little importance in ENGLAND and WALES.

31. Also in IRELAND, the primary determinant in calculating damages in tort is the consideration that the owner should be placed in the same position as if the loss had never occurred. This general rule also seems to apply in restitution cases and where the possessor was in good faith as to the possession (Faber/Lurger [-*Gardiner*], National Reports II: Ireland, 84 and 91).

III. Possession in bad faith

32. Under DUTCH law, a possessor who is not in good faith (the DUTCH Civil Code avoids using the words *bad faith*; *Asser*, Goederenrecht[14] I, no. 129) is liable for damages caused to the goods pursuant to the rules on non-contractual liability for damage (CC art. 3:121(1)). It refers to damage suffered by the rightful owner due to the possessor's unlawful possession. This covers fruits, which have not been collected by the possessor, as well as damage which would not have occurred if the owner had remained in possession of the goods (Nieuwenhuis/Stolker/Valk [-*Rank-Berenschot*], B.W.[3], art. 3:121, no. 2; *Pitlo*, Goederenrecht[12], no. 398). Hence, if the possessor proves that damage would also have occurred, had the goods remained in the possession of the rightful owner, there is no liability. For the notion of good faith see note 31 to VIII.–7:103.

33. Under BELGIAN law, the bad faith possessor is liable for all losses, regardless of whether they were caused fraudulently or negligently, or whether they are the result of *force majeure*, and regardless of whether those losses occurred before or after the initiation of the *rei vindicatio*. However, the possessor is not liable for accidental losses if it is proved that these would also have occurred if the goods has remained in the possession of the real owner (arg. CC art. 130(2)). A possessor is regarded as being in bad faith if he or she knew that the possession of the goods was unlawful (*Hansenne*, Les biens, no. 673). With regard to restitution after the retroactive termination of a translative agreement, see note 16.

34. According to the ESTONIAN PropLA § 84(1), the bad faith possessor has to compensate the owner for damage resulting from the destruction or decrease in value of the thing according to the rules of non-contractual liability law (LOA §§ 1043 ff). A person who obtained possession of a movable arbitrarily is liable for destruction and deterioration of the movable, except where such destruction or deterioration would also have occurred had the movable remained in the owner's possession (PropLA § 84(2)). In cases where the goods have to be restored because the contract is void or avoided, the transferee has to compensate the transferor for damage resulting from the loss or deterioration of the goods, where such loss or deterioration was caused by the fault of the transferee, and provided that the transferee knew or should have known about the circumstances constituting the basis for a reclamation pursuant to the provisions on unjustified enrichment (Faber/Lurger [-*Kullerkupp*], National Reports I: Estonia, 107).

35. In SLOVENIA, the bad faith possessor has to compensate for any loss in the form of deterioration or destruction of a movable, unless this would also have occurred had the movable remained in the possession of the rightful owner (Code of Property Law art. 96/III). In the case of an avoided or void contract, every party has to return to the other everything it has received (LOA art. 187/II).

36. Under HUNGARIAN law, the possessor in bad faith is liable for all damage that would not have occurred if the goods had remained in the possession of the entitled person (Faber/Lurger [-*Szilagyi*], National Reports III: Hungary, 96).

37. Under SWISS law, the possessor is not entitled to dispose of the goods and is therefore liable for all damage resulting from the unlawful possession (CC art. 940 (1)) even damage which occurred coincidentally (*Steinauer*, Les droits réels I[4], no. 519; Honsell [-*Stark*], Basler Kommentar[2], art. 940 no. 6). There should be a causal connection between the unlawful possession and the damage. Therefore, it is considered that the possessor is free from liability when the goods would also have been damaged or destroyed, had they remained in the possession of their rightful owner (*Steinauer*, Les droits réels I[4], no. 521; Honsell [-*Stark*], Basler Kommentar[2], art. 940, nos. 6 and 8). The lessee who does not return the leased object to its owner is considered to be a possessor in bad faith in terms of CC art. 940 (*Steinauer*, Les droits réels I[4], no. 519a; Honsell [-*Stark*], Basler Kommentar[2], Pref. to art. 938-940 no. 9). A particular regulation applies when the possessor in bad faith does not know to whom the goods have to be returned (CC art. 940(3)) and cannot find this out easily even when making reasonable investigations (*Steinauer*, Les droits réels I[4], no. 518). In this case the possessor is liable only for damage caused by his or her fault or by a person under his or her responsibility. Hence, there is no liability for any accidental loss (Honsell [-*Stark*], Basler Kommentar[2], art. 940 no. 13).

38. In SPAIN, the possessor in bad faith is liable for every deterioration or loss of the goods; even when caused by *force majeure*, but only in cases where the possessor fraudulently delayed the restitution of the goods to their rightful owner (CC art. 457). The possessor's bad faith has to be proved by the owner (Faber/Lurger [-*González Pacanowska/Díez Soto*], National Reports V: Spain, 93).

39. Under GERMAN law, the possessor in bad faith is liable for all damage, deterioration or loss of the goods caused by his or her fault (CC §§ 989 f; *Schwab and Prütting*, Sachenrecht[30], no. 538). The same rules apply to a possessor in good faith after the initiation of the legal proceedings (CC § 990; see *supra* note 17). The possessor is in bad faith if he or she, at the moment of acquisition, knew or, due to gross negligence, did not know that he or she was not entitled to possession, or if he or she finds this out during the possession (Soergel [-*Stadler*], BGB[13], § 990, nos. 3-6 and no. 25; MünchKomm [-*Medicus*], BGB[4], § 990 no. 1 and no. 9). When the possessor in bad faith defaults on restoring the goods, he or she is liable for all damage, including damage caused accidentally (without fault), unless it would also have occurred if the goods had been returned to the owner in time (*Wieling*, Sachenrecht I[2], § 12 III 3 b; Soergel [-*Stadler*], BGB[13], § 990 no. 27). The possessor who obtained possession through a criminal act (theft, robbery, concealment, deceit, etc) or unlawful dispossession is liable according to the provisions of non-contractual liability law (CC § 992). As a consequence, such a possessor is also liable for damage and loss caused accidentally. This rule may also cover situations where the possessor actually was in good faith in the sense of CC §§ 987 ff; e.g. where a person erroneously takes another's hat in a restaurant (as to this problem, *Wieling*, Sachenrecht I[2], § 12 III 5). The limitation period of the *rei vindicatio* is 30 years, whereas the period of prescription under non-contractual liability law is only 3 years, which is a disadvantage for the rightful owner (*Schwab and Prütting*, Sachenrecht[30], no. 541).

40. Under GREEK law, the liability of the bad faith possessor is the same as the liability of the good faith possessor after the proceedings for restitution have been initiated (CC art. 1098, see above note 18). A precondition for liability is, besides the bad faith of the possessor, also the possessor's fault regarding the deterioration, destruction or non-restitution of the goods. Fault is defined in accordance with CC art. 330 ff (liability arising from fault; *Filios*, Property Law, 250). If the possessor is in bad faith and is also in default, the liability is extended and the possessor, therefore, is obliged, besides performing, also to pay compensation for the damage suffered by the owner by reason

of the delay (CC art. 343(1), *Georgiadis*, Property Law I, 599). If possession has been obtained through an illegal act, the possessor is liable for any kind of damage, including fortuitous events in the meaning of CC art. 344 (Faber/Lurger [-*Klaoudatou*], National Reports III: Greece, 149).

41. In AUSTRIA, with regard to non-contractual liability law consequences, the possessor in bad faith is liable for all losses caused by the possession (CC § 335), including lost profits, the effect of which is a wider liability than under the general rule of CC § 1324 (which requires gross negligence in order to recover lost profits). Liability covers not only damage to the property itself, but also consequential damages caused by the fact that the owner lacked physical control over the goods (Kletečka/Schauer [-*Lurger*], ABGB, § 335; no. 4). There is some dispute as to the extent to which the possessor in bad faith is also liable for accidental loss or deterioration. The legal scholar *Spielbüchler* argues that such aggravated liability should presuppose that the possessor had actual knowledge of the lack of entitlement. From his point of view, negligent causation of loss leads to liability under the general rules of non-contractual liability law (Rummel [-*Spielbüchler*], ABGB I[3], § 335, no. 1). As to the unjustified enrichment consequences of using or consuming the other party's property, the same principles apply as described in note 68 to VIII.–7:103.

42. Under LITHUANIAN law, the owner can claim damages on the basis of non-contractual liability law. According to the general principle of full compensation for damage, the owner is entitled to be compensated for all kinds of damage, such as direct damage e.g. the value of the thing, and lost profits (CC arts. 6.249 and 6.263; Faber/Lurger [-*Mikelenas*], National Reports III: Lithuania, 71-72). If the goods are restored to their owner due to the avoidance or termination of a contract between the parties, CC arts. 6.147-6.148 apply. If the person liable to make restitution has been in bad faith, or the need for restitution is due to that person's fault, he or she is bound to return the highest possible value of the thing in case the goods are lost or alienated (CC art. 6.147). If the goods are destroyed by *force majeure*, the debtor in bad faith, or the debtor whose fault is the reason for the restitution, is obliged to return the equivalent of the value of the property, calculated in accordance with the rules provided in CC art. 6.147, except in cases where the debtor proves that the thing would have been destroyed even if it had remained in possession of the owner (CC art. 6.148). If the thing has suffered partial loss or any other decrease in value, the debtor is bound to pay the creditor the monetary equivalent of such loss or decrease in value, unless it results from normal wear and tear (Faber/Lurger [-*Mikelenas*], National Reports III: Lithuania, 72).

43. In SCOTLAND, one opinion brought forward is that a possessor in bad faith generally will be liable for the value of the thing. As stated above, the possessor will be liable to the extent of the enrichment only where the property is lost during possession by no fault of the possessor (*Bell*, Principles of the Law of Scotland[4], § 537; however, see also *Ferguson v. Forrest* (1639) Mor 4145). If the movable has been damaged or deteriorated by the fault of the possessor, the possessor in bad faith "might" be liable in compensation. In the case of damage, he or she will be liable for the reduction in value, while in the case of deterioration, the possessor should be liable only *in quantum lucratus* (*Reid*, Unjustified enrichment and Property Law, at 178, who seems to be in accordance with *Rankine*'s opinion, see *Rankine*, The Law of Land-ownership in Scotland[4], 93). The only thing which can safely be said is that the law is very uncertain and unsatisfactory.

44. Under CZECH law, the possessor in bad faith is liable for the loss or deterioration of the movable (Faber/Lurger [-*Tichý*], National Reports VI: Czech Republic, 72).

45. In ENGLAND and WALES, it seems that bad faith has only a small significance. As stated above, a good faith possessor might limit liability by raising issues of causation and remoteness, and might be successful in doing so issues that a bad faith possessor will not be able to raise (Faber/Lurger [-*Frisby/Jones*], National Reports II: England and Wales, 107).

46. In IRELAND, the restitutionary remedies are used with reference to the possessor's gain and the effect, in many cases, is the restoration to the owner of what he or she has lost. But, if the possessor has committed a wrong against the owner, the possessor may be required to surrender the benefits to the owner rather than to restore what the owner has lost: If the assessment of damages is confined to considerations of loss, the injured party would leave the profits generated by the movable to the wrongdoer; therefore, damages should be assessed so as to deprive him or her of that profit. This reflects the fundamental principle of restitution that no possessor should profit from his or her wrongdoing (Faber/Lurger [-*Gardiner*], National Reports II: Ireland, 91).

47. In ITALY, the possessor who is obliged to return the goods and their fruits may be held liable for the deterioration of the goods or for the impossibility to return them (see note 27).

48. The issue of bad faith as such has no significance in SWEDEN, FINLAND and NORWAY. The liability is assessed according to whether someone has been negligent according to the *culpa* principle. One can, of course, claim that someone who is in bad faith must be seen as being negligent, and therefore should have to pay damages to the owner. There are numerous court decisions specifying the few rules contained in the Swedish Tort Law Act. In SWEDEN, if the goods have been alienated by an unauthorised sale by the possessor, the damages may well be assessed with reference to what the possessor gained from the sale (*Hellner/Johansson*, Skadeståndsrätt[6], 423; *Hellner*, Om obehörig vinst, 241 ff and *Karlgren*, Obehörig vinst och värdeersättning, 48 ff). However, the primary determinant in calculating damages for the total loss of a movable is the cost of buying the same type of movable anew, subject to deductions for age and use. The estimated utility value or selling price is used only exceptionally. In cases of partial detriment suffered by a movable, the damage is either assessed with reference to the cost of repair, or to the difference in the value of the movable before and after the detriment (*Hellner/Johansson*, Skadeståndsrätt[6], 420 ff).

49. The PORTUGUESE CC is silent about the legal consequences for the possessor in bad faith in cases of loss or deterioration. *A contrario sensu*, it can be argued that the possessor is liable for any loss or deterioration of the movable even if it did not result from his or her act or omission. Some legal scholars allow the defence that the loss or deterioration would have occurred anyway, irrespective of who might have possessed the thing. This interpretation is based on (1) the provision of the old civil code article 496, allowing this defence and the lack of reasons given in the *travaux préparatoires* of the CC of 1966 as to remaining silent on this issue and (2) the coherence of the risk regime with the *mora creditoris* of CC art. 807, where such a defence is allowed (*Mesquita*, Direitos Reais, 119; *de Lima/Varela*, Código Civil anotado[2] III, 36).

VIII.–7:103: Fruits from, use of, and other benefits derived from the goods during possession

Where the possessor obtains fruits from, makes use of, or derives other benefits from the goods during possession in the sense of VIII.–7:101 (Scope of application), the rights of the owner resulting from such benefits are determined by Book VII.

COMMENTS

A. General

What is covered: fruits, use and other benefits. This Article covers all situations where the possessor derived any kind of benefit from the owner's goods during, or as a result of, the possession. That may, for example, be benefits from using the goods (e.g., the thief starts a taxi business with the stolen car). Or, benefits may be derived in the form of "fruits" the possessor collected from the asset. The fruits may be "natural" (e.g., wool sheared from another's sheep) or "legal" (e.g., rent received from leasing the owner's goods to a third person). "Other benefits" may be derived from the consumption or disposal of the goods (e.g., the possessor uses the owner's coal for heating or sells it to a third party and receives a purchase price in return). All of these terms are not intended to be understood in any specific technical sense; they rather serve descriptive purposes. For the purposes of the reference spelled out in this Article, it is immaterial which rule will cover the case under the unjustified enrichment principles of Book VII, i.e. whether VII.–5:101 (Transferable enrichment), VII.–5:102 (Non-transferable enrichment) or VII.–5:104 (Fruits and use of an enrichment) will be applicable. What matters is that any kind of benefit derived from the owner's goods is covered.

Relevant time. As to the relevant point in time ("during possession"), see VIII.–7:101 (Scope of application) Comment B.

Main approaches in the European legal systems and basic policy issues. As reflected in more detail in the Notes on this Article, the range of solutions offered in the European legal systems extends from generally obliging the possessor to reverse any enrichment (which is, for instance, discussed within the scope of restitution and tort principles in the common law jurisdictions) to "immunising" a possessor in good faith against claims brought on the basis of unjustified enrichment principles. The latter is a general approach in the countries following an owner-possessor relationship tradition (cf. VIII.–7:101 (Scope of application) Comment C), although certain differences exist in particular with regard to different categories of fruits. Also, in these countries, a possessor in bad faith will, in turn, be obliged to reverse any benefit received from the owner's goods. In addition, some legal systems require the possessor in bad faith to compensate the owner for fruits the possessor failed to collect. In some countries, a further differentiation practically relevant for possessors in good faith – is made in so far as a person who obtained possession gratuitously (in particular, by way of gift from a non-owner) must reverse the benefits obtained from the property to its owner, so that the "immunisation" rule only applies to possessors who obtained possession for value. The basic policy question, therefore, is whether a possessor in good faith should be privileged by the establishment of an "immunisation" against claims brought on the basis of unjustified enrichment principles, which would otherwise arise under Book VII.

B. The proposed approach: Reference to Book VII on unjustified enrichment

Overview. This Article spells out that the owner's rights in relation to any benefits derived from the goods during possession are determined by the general rules on unjustified enrichment as provided for in Book VII. Briefly summarised, these rules will operate as described below, where the focus is laid on Chapters 5 and 6 of Book VII (reversal of enrichment, defences), since the general requirements in VII.–1:101 (Basic rule) seem to be rather unproblematic in the present context. Basically, there are two main levels of differentiation. The first differentiation relates to the category of benefit: it may consist of a transferable enrichment, a non-transferable enrichment or fruits and use of an enrichment. The second differentiation is whether the enriched person, i.e. the possessor, is in good faith or in bad faith. These two criteria are explored in more detail below. The main policy considerations leading to the solution adopted will be summarised in Comment C. The issue of whether a possessor in bad faith should be liable for fruits the possessor failed to collect is dealt with later in this Comment.

Categories of benefit. Where the enrichment – at the moment it is received – consists of a transferable asset, e.g. coal received as a gift from a non-owner, the basic rule spelled out in VII.–5:101 (Transferable enrichment) paragraph (1) is that the enriched person (the possessor) is obliged to transfer this asset to the disadvantaged person (the owner of the coal). The present Article will come into play where, e.g., the possessor has obtained a benefit from the coal by burning it for heating purposes (consumption of the asset). Then, the enriched person is no longer able to transfer the asset (the coal) and must reverse the enrichment by paying its monetary value to the disadvantaged person, see VII.–5:101 paragraph (3). If, e.g., the possessor alienated the coal to another person and receives a purchase price in return, this price may be reversed as a substitute according to VII.–5:101 paragraph (4). Second, where the enrichment does not consist of a transferable asset (e.g. the purported lessee's use of a car under an invalid contract for lease), the basic rule is that the enriched person (the possessor) must pay the enrichment's monetary value to the disadvantaged person, see VII.–5:102 (Non-transferable enrichment) paragraph (1). This liability may be reduced to the enriched person's "saving" (see below). Third, the benefit may consist of "fruits or use" which the possessor obtains in addition to the asset which is primarily regarded as "the enrichment" in the sense of Book VII (e.g., wool sheared from another's sheep). Then, VII.–5:104 (Fruits and use of an enrichment) applies, providing that such benefits have to be handed over to the disadvantaged person; but again, a "saving" cap applies where the possessor was in good faith (see below).

Good faith or bad faith of the enriched person (possessor). As mentioned above, the second important criterion under the unjustified enrichment rules of Book VII is whether the enriched person, i.e. the possessor, is in good faith or in bad faith. The main consequences of this distinction relate, first, to the calculation of the monetary claim where the enrichment is non-transferable: An enriched person who was in good faith is not liable to pay "more than any saving", VII.–5:102 (Non-transferable enrichment) paragraph (2). The saving cap takes care of the individual circumstances of the innocently enriched person who is, in effect, compelled to purchase what has been enjoyed. The goal is to leave the enriched person no worse off as a result of the reversal of the enrichment; only the actual gain is to be stripped away, cf. VII.–5:102 Comment C. The same principle applies where the benefit consists of fruits or use in the sense of VII.–5:104 (Fruits and use of an enrichment). A second effect of the good faith criterion is that an enriched person in good faith is entitled to a defence of disenrichment under VII.–6:101 (Disenrichment). This rule provides that the possessor in good faith is not liable to reverse the enrichment to the extent that he or she has sustained a

disadvantage which removes or diminishes the enrichment, e.g. where the sheared wool is destroyed by a fire before it can be transferred to the owner of the sheep.

No extra rule for fruits a possessor in bad faith failed to collect. Including an extra rule imposing a general obligation on a possessor in bad faith to compensate the owner for fruits the possessor failed to collect, as presently exists in some European legal systems, would go beyond the general principles of Books VI and VII without any particular need to do so. There does not seem to be any special justification why an owner of goods should be in a better position than a holder of some other right who was deprived of using the right by another person. Chapter 7, therefore, contains no such additional rule. Where, however, the owner can sufficiently show that he or she would have collected such fruits if he or she had had possession of the property, so that a loss has actually been sustained in this respect, liability under Book VI may arise.

C. Main policy reasons for not "immunising" a possessor in good faith

General. As pointed out above, the main policy issue with regard to this Article is whether or not to exempt a possessor in good faith from obligations under unjustified enrichment law. The proposed approach is not to provide for such an "immunisation" of a good faith possessor. The following Comments summarise the reasons for this decision. One of the starting points certainly was that these model rules, in Book VII, already contain a fully developed set of unjustified enrichment principles which are, in principle, fit for governing the issues covered by this Article. Deviating from these general principles when it comes to benefits derived from the possession of goods owned by another would, therefore, presuppose the existence of good reasons for doing so. Such potential reasons have been analysed while preparing the present Article, but have finally been considered not to be compelling. A discussion of the two most important arguments in that respect is provided in the following comments.

With regard to possessors in bad faith, there is even less difficulty. A comparative overview shows no major discrepancies throughout the European legal systems. It has, therefore, been considered unproblematic to subject such cases to the unjustified enrichment principles established by Book VII.

No "immunisation" of possessor in good faith as compensation for possessor's efforts. A rather prominent rationale, already put forward in Roman law, is that the possessor in good faith may keep the fruits as a schematic compensation for the efforts to produce such fruits (*pro cultura et cura*). Put differently, the purpose of the rule immunising the possessor in good faith is that the additional value created by the possessor's efforts (i.e. the fruits) is not transferred to the owner under unjustified enrichment principles, since this would result in the owner becoming unjustly enriched in turn. Such an approach may be advocated in terms of simplicity and practicability. It does, however, not harmonise with certain basic concepts of the unjustified enrichment principles of Book VII. First, there may be a problem with the requirement of attribution as provided for by VII.–1:101 (Basic rule) and VII.–4:101 (Instances of attribution). In many usual cases, fruits (or other benefits) actually are a kind of "combination" of (the possibility to use) the owner's property and the possessor's efforts. To the extent that the fruits or other benefits have their origin in particular efforts undertaken by the possessor (so that they actually originate from something else than the owner's property), one may argue that the requirement of attribution will not be satisfied, which should exclude any obligation to reverse in that respect. Second, as indicated above, if the fruits are already in

the hands of the owner, the value of the possessor's efforts would constitute an unjustified enrichment of the owner which, in principle, would have to be handed over to the possessor. The effect would be comparable. Third, with regard to a possessor in good faith, the saving cap regulated in VII.–5:102 (Non-transferable enrichment) paragraph (2), VII.–5:103 (Monetary value of an enrichment; saving) and VII.–5:104 (Fruits and use of an enrichment) will operate in the same direction. The saving corresponds to the value of the possessor's ability to use the owner's property because these goods did not have to be purchased or otherwise made available in order to generate the fruits or other benefits. Consequently, the possessor will be under an obligation to reverse only in so far as the value of the fruits or other benefit exceeds the efforts invested. It is of course not the task of these Comments to explore in detail how these different levels of argumentation interrelate under the framework of Book VII. The main point is that they all lead to the adequate result that the economic benefit derived from goods belonging to one person and efforts undertaken by another is divided up between these two. This provides a more flexible solution than the ones envisaged by many historical legislators who basically contemplated two alternatives, namely awarding all fruits (or all fruits of a certain kind, respectively) either to the possessor (if in good faith) or to the owner.

No "immunisation" of possessor in good faith as compensation for purchase price paid to third party. Another important argument for "immunising" the possessor in good faith against unjustified enrichment claims is that the possessor should in some way be compensated for a purchase price which was paid to a third party and which will not be recovered from the owner upon vindication. But this argument is not persuasive either. First, it obviously fails where the possessor obtained possession gratuitously. Applying unjustified enrichment law, on the other hand, will lead to adequate results. The possessor in good faith, who paid nothing at all for possessing the goods, has to reverse the benefits derived, but not more than any saving in the sense of VII.–5:102 (Non-transferable enrichment) paragraph (2) and VII.–5:104 (Fruits and use of an enrichment). If the enrichment does not exist anymore, there will be the defence of disenrichment under VII.–6:101 (Disenrichment). Accordingly, applying the unjustified enrichment principles never takes away more than the possessor in good faith actually gained from the movable. This result can also be observed in those legal systems which apply a special rule for the gratuitous acquisition of possession. Secondly, the argument does not fit two-party relations in general (as to the various situations referred to in the following, cf. VIII.–7:101 (Scope of application) Comment B): Even where the possessor paid a price for obtaining possession (e.g., in the case of an invalid purchase from the owner or an invalid contract for lease with the owner), the owner as the other contracting party is of course also obliged to return what the owner received (i.e., the price) under unjustified enrichment principles. This result does not need any correction.

In the remaining three-party constellations (purchase from a non-owner, right of use granted by a non-owner), the argument is valid provided that the possessor (i) has actually paid a price to the third party and (ii) neither recovers it from this third party nor from anyone else. Conversely, where or in so far as the possessor is able to recover the price paid, either from the seller or from another third party such as an insurance company, as the case may be, the argument may not justify any deviations from the general unjustified enrichment rules. But even in the remaining case where the possessor in good faith paid a price to the third party and does not recover it, there are arguments for applying general unjustified enrichment law rules, i.e. for placing the risk on the possessor rather than on the owner, by obliging the possessor to return not only the goods themselves but also the benefits derived from them. We must be aware of the fact that under these model rules, the whole issue is mainly about (i)

stolen goods which have not been purchased in the ordinary course of the seller's business, or (ii) situations where the possessor "acquired" from the seller under a void or avoided contract. In the first case, one can say that the risk should rather be placed on the person who voluntarily contracted with the dishonest third party. That is the possessor who purchased from the thief (or from someone who obtained possession from the thief, etc.); the owner typically did not enter into any voluntary contact with the thief. In the second case, the risk may be placed on the person who obtained possession under an invalid contract. In both cases, the possessor does not necessarily lose the value of the goods and the benefits. The possessor can claim damages from the seller who was unable to confer good title. The issue is that the possessor bears the risk of the seller's insolvency. There is also a third situation (iii), namely where the possessor derives a right of use from a non-owner. Where this non-owner is a thief, the same arguments will apply as where the goods are purchased from a thief. But the owner could also have entrusted the goods to the third party and, therefore, be in a situation somewhat comparable to the possessor's, since both contracted with the dishonest third party. In these situations, however, the unjustified enrichment rules themselves already provide protection for the possessor in good faith. Under VII.–6:102 (Juridical acts in good faith with third parties), the enriched person (the possessor) is not liable to reverse the enrichment (a monetary equivalent to the use made of the goods) if the enriched person, in exchange for that enrichment, conferred another enrichment on a third party (the price paid to the non-owner) and was in good faith at that time. Compare VII.–6:102 (Juridical acts in good faith with third parties) Comment with *Illustration 1*. As the purpose of that rule is to provide supplementary protection outside the scope of the good faith acquisition rules (cf. VII.–6:102 Comment), it will not be applicable in the two situations dealt with above, namely (i) where the good faith possessor was prevented from acquiring ownership in good faith because the goods were stolen or (ii) the contract by which the possessor bought the goods was invalid.

Further aspects. It appears, therefore, that additional "owner-possessor relationship" rules which put the possessor in good faith in a more favourable position than under the unjustified enrichment rules of Book VII are not needed. This, obviously, is also preferable in terms of coherence between the different parts of these model rules. Also, applying unjustified enrichment rules to the unwinding of void or avoided contacts (cf. VIII.–7:101 (Scope of application) Comment B), independently of the involved parties' good or bad faith, appears favourable because these rules can provide a well-balanced regime for *both* obligations to return (not only for the one relating to the goods) by taking into account possible interrelations between these two and specific situations that may arise. One of such specific questions is what should happen if one of the performances cannot be reversed physically due to an event which cannot be attributed to either of the parties (e.g., the car transferred under a void contract for sale is destroyed before restitution). Such questions are a particular matter of dispute in unjustified enrichment law in some countries. Applying unjustified enrichment law to both obligations to return makes it possible for these model rules to take a stand on this issue. Generally, Book VII follows an "itemised" approach, looking at the individual enrichment of each party, and rejects a "net" approach in calculating the enrichment; see VII.–3:102 (Disadvantage) Comment E.

NOTES

I. Overview

1. In BELGIUM, the NETHERLANDS, SPAIN, ITALY, GREECE, SLOVENIA, LITHUANIA and HUNGARY, the possessor in good faith is entitled to keep the fruits

collected before the initiation of the *rei vindicatio*. In SWITZERLAND and PORTUGAL, the possessor is entitled to keep the fruits as long as they were collected while the possessor was still in good faith. Under GERMAN law, the possessor in good faith is entitled to keep the benefits, but there are two exceptions: (1) in case of an excess of fruits and (2) when the possessor obtained possession gratuitously.

2. A similar approach is followed in AUSTRIA, but according to the prevailing opinion, in the majority of cases this has to be adapted under the rules of unjustified enrichment. In ESTONIA, too, the possessor in good faith is obliged to return all benefits. However, the possessor is relieved of the duty to return what he or she received or to compensate the value thereof in case of subsequent disenrichment.

3. Under CZECH law, it depends on whether the owner claims restitution based on an unjustified enrichment claim (possessor is entitled to keep the proceeds) or on the basis of the *rei vindicatio* (possessor has to reverse the proceeds).

4. Under DUTCH, HUNGARIAN and LITHUANIAN law, the possessor in bad faith has to return all the collected fruits as well as compensate for those which have not been collected. Also in GREECE, the possessor in bad faith is obliged to restitute all collected benefits as well as compensate for those which, culpably, have not been collected. The possessor who obtained possession through an illegal act is also liable under non-contractual liability law: even in the case of slight negligence.

5. In BELGIUM, the possessor in bad faith is obliged to return all fruits collected as well as compensate for those which he or she neglected to collect, unless it can be proved that the owner would not have been able to collect them either. In SPAIN, the possessor in bad faith is obliged to return the fruits received as well as compensate for those which the rightful owner could have received.

6. The possessor in bad faith has to return all the fruits (advantages, benefits) and also has the duty to pay the value of the fruits which could have been collected, if the possessor had acted with ordinary care (ITALY); as a diligent possessor (PORTUGAL); if the goods had been used in an appropriate way (SWITZERLAND); according to the rules of proper management (GERMANY); in the context of a regular economic activity (ESTONIA). In GERMANY, the possessor who obtained possession through a criminal act or unlawful dispossession is liable according to the provisions of non-contractual liability law. The possessor has to reverse all benefits, even though the rightful owner would not have collected them.

7. Under SCOTTISH law, a right to restitution covers not only the recovery of the movable itself but also of its fruits and accessories (Scottish Law Commission, Recovery of Benefits Conferred under Error of Law (Scot Law Com Discussion Paper 95 (1993) vol. 2, para. 2.156 vi)). This means that, for example, if a cow is the subject of restitution, her calf must also be returned. The rule will apply when the transfer is based on a void contract, where a void right of use has been granted, and where the property has been stolen. If a right has been avoided, a possessor is entitled to the fruits collected prior to such avoidance. Conversely, in cases where a right has terminated, the possessor will have a right to the fruits up until this point in time (Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 173). Since the maxim *accessorium sequitur principale* (i.e. where two things are connected, the accessory follows the principal) is recognised in respect of natural fruits, an action for restitution in relation to the natural fruits generated by a thing owned by the claimant is no more than an action for revindication (*Carey Miller/Irvine*, Corporeal Moveables in Scots Law[2], 49 f; *Bell*, Principles of the Law of Scotland[4], § 1298; *Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 173). Another opinion is that industrial fruits and artificial profits do not fall

under the scope of the rules on restitution, meaning that products manufactured by the thing are probably not subject to restitution (Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 173 f). This distinction has not been left unquestioned. The Scottish Law Commission doubts whether there is a distinction between natural and civil fruits: What matters in determining the extent of the right of recovery is the enrichment of the possessor and whether he or she was in good or bad faith during possession (Scottish Law Commission, Recovery of Benefits Conferred under Error of Law, vol. 2, para. 2.141). For the distinction between natural and civil fruits, see section II of these Notes.

8. Under AUSTRIAN law, the possessor in bad faith must reverse all benefits, even those which the rightful owner would not have obtained and must compensate for the fruits which could have been collected but were not. An exception is provided for the possessor who made significant efforts to obtain the benefits.

9. Under CZECH law, the possessor in bad faith is obliged to return any enrichment that has been acquired unjustifiably and to the detriment of the rightful owner. In SLOVENIA, the possessor in bad faith has to return all the fruits which have been separated during the possession.

10. The NORWEGIAN Property Law Act contains a general rule providing for an entitlement to benefits in all situations where someone other than the rightful owner has had physical control over the movable (*Lov om hendelege eigedomshove* 1969/17 § 15; for considerations on a good faith possessor's right to the fruits, prior to the enactment of this law, see *Braekhus/Haerem*, Norsk tingsrett, 560 ff). According to this rule the possessor is entitled to obtain the benefits ("*avling, avdrått og anna som tingen kastar av seg*") stemming from the movable as long as he or she was in non-negligent good faith regarding his or her right to the movable. Where a contract has been terminated, the Sale of Goods Act provides that the buyer is not entitled to obtain the benefits and, therefore, has to return them to the seller (*Lov om Kjop*, 13.05.1988, § 65 nr 27). Apart from these two rules, Norwegian law does not regulate issues of fruits and use during possession.

11. The situation of a possessor obtaining fruits or making use of goods during possession is not regulated in SWEDEN and FINLAND. However, it has been discussed in SWEDISH legal literature whether the concept of unjustified enrichment could be applied to such cases. It has been said to be a concept not really needed in SWEDEN, since it is rather a problem partly created by the ownership concept. With the SWEDISH functional approach, the concept of unjustified enrichment is not needed to the same extent as in other jurisdictions based on a civilian law tradition (Faber/Lurger [-*Martinson*], National Reports V: Sweden, 23 f and 46 f). Among legal scholars there is another, less predominant view, stating that the concept of unjustified enrichment is, however, very useful and that it could be used in a number of situations (Faber/Lurger [-*Martinson*], National Reports V: Sweden, 46 f and *Karlgren*, Obehörig vinst och värdeersättning). The Supreme Court has been considering unjustified enrichment in other areas (see for example, JustR *Munch* in NJA 1988 s. 144, with further references to *Hessler* in SvJT 1955 s 38 ff, *Hult*, Lärobok I värdepappersrätt 6 ed., 97 ff and *Agell*, Växel, check och materiell fordran, 17 ff. See also the Appeal Court decision RH 1998:56, where a car had been repaired without a binding contract. The court held that redress for unjustified enrichment is only available in a very limited number of regulations and cases: Consumer Service Act § 8 (*Konsumenttjänstlagen*) only covers reasonable and economically sensible additional work and the repair carried out in the above case was found to be made outside of that Act's scope of application). One can, perhaps, state that the concept exists, but nevertheless, is seldom, or hardly ever, used.

Besides the concept of unjustified enrichment, a possessor in SWEDEN and FINLAND has, under certain conditions, an obligation to return benefits obtained to a bankruptcy estate (for SWEDEN, see *Konkurslagen* chap. 4 § 15*;* see also Faber/Lurger [-*Martinson*], National Reports V: Sweden, 73 ff). In FINLAND, there are few situations where the possessor has an obligation to return obtained benefits, as in the mentioned example where an asset is recovered by a bankruptcy estate. One can, nevertheless, find legal scholars considering the distinction of natural benefits and civil fruits, as well as a Supreme Court decision clarifying the possessor's right to keep obtained benefits and fruits (Faber/Lurger [-*Kuusinen*], National Reports V: Finland, 73 ff).

12. There are a few rules in DANISH law covering fruits obtained and use during possession, in a law from 1683 (*Lov nr* 11000 *af* 15/04/1683). The rules have partly been applied analogously, or further developed by legal doctrine.

13. In ENGLAND and WALES, there is not much authority on the issue of fruits and benefits. In a recent case, there was an indication that a claim in conversion can lead to the recovery of benefits enjoyed by the possessor at the owner's expense. The damage would then be based not only on the value of the movable at the time of the conversion but also on any benefit the possessor has gained by using the movable (*Kuwait Airways Corpn v Iraqi Airways Co*. (2002) 2 AC 883, at 1094). Such a claim would appear to be based on general principles of restitution and particularly the fact of the possessor's unjust enrichment (Faber/Lurger [-*Frisby/Jones*], National Reports II: England and Wales, 108).

14. CYPRUS has adopted a part of the English doctrine of restitution, which includes the right of the owner to claim for benefits derived in the form of fruits and use: one part states that unjustified enrichment is not in itself a cause of action, but can be applied in cases of restitution (see *Minerva Finance and Investment Ltd v Georgio Georgiadi*, Civil Appeal no. 9493. vol. 1D (1998) 2173 SC). The requirements for the rules on compensation to be applied to unjustified enrichment are that a person does something lawfully for another person, not intending to do so gratuitously and that the person for whom the act is done must enjoy the benefit of it. If these requirements are fulfilled, the person enjoying these benefits has to "…make compensation to the…(owner)… in respect of, or to restore, the thing so done or delivered" (Faber/Lurger [-*Laulhé Shaelou/Stylianou/Anastasiou*], National Reports II: Cyprus, 22 f and *Ismini Kyriakou Hi Loizi and Others v Irini Iona*, Civil Appeal No. 4366. Vol. 2 (1983) 11 CLR).

15. Also in IRELAND, there is not much authority on the issue. It, however, seems that there are relevant considerations in the assessment of damages, such as the need to deprive a wrongdoer from the possibility of profiting from his or her act (Faber/Lurger [-*Gardiner*], National Reports II: Ireland, 91).

II. Fruits and uses

16. The DUTCH CC art. 3:9 provides for a definition of natural and civil fruits. Natural fruits are things which are regarded as being fruits of other things according to common opinion (*verkeersopvatting*) (e.g. fruits of a fruit tree, eggs of a hen, the calf of a cow etc.; *Pitlo*, Goederenrecht[12], no. 393). Civil fruits are rights, which are regarded as being fruits of goods according to common opinion (e.g. interest, rent payments and proceeds of pledges) (Nieuwenhuis/Stolker/Valk [-*Huijgen*], B.W.[3], art. 3:9, no. 2). The old civil code also mentioned industrial fruits, but this distinction had no relevance and, therefore, it has not been taken over into the new code. For this reason, natural fruits include industrial fruits (Nieuwenhuis/Stolker/Valk [-*Huijgen*], B.W.[3], art. 3:9, no. 4; for more details see *Asser*, Goederenrecht[14] I, nos. 74-77).

17. BELGIAN law distinguishes between fruits and products. Fruits are the regular and periodical gains produced by goods, which do not reduce the latter's value or size (*Van Neste*, Beginselen van Belgisch Privaatrecht V[2], no. 250; *Hansenne*, Les biens I, nos. 265 and 280). A distinction is usually made between natural fruits and civil fruits. The civil code also mentions industrial fruits. Natural fruits are the fruits produced by the soil itself, the offspring of animals (CC art. 583). Civil fruits are, for instance, interest and rent payments (CC art. 584). Industrial fruits of land are those obtained as a result of cultivation (CC art. 583). Products, on the other hand, are non-periodical gains produced by goods, which result in a decrease in the size and value of the goods themselves, e.g. minerals or stones extracted from a quarry (*Hansenne*, Les biens I, no. 280).

18. FINNISH law distinguishes between natural benefits and civil fruits. Natural benefits are those products which are generated by the asset in question, for instance, plants, corn and harvest, and which do not form a fixture or fittings of the asset. Civil fruits are economic profits and interest, such as rent and interest income. Different from benefits and fruits are those withdrawals from property, which diminish the value of the property itself, decreasing its size or value (Faber/Lurger [-*Kuusinen*], National Reports V: Finland, 73 f).

19. In SCOTLAND, there is a distinction between natural and civil fruits: i.e. between fruits resulting directly from the thing which is the object of restitution and those fruits resulting from exploitation of the thing (Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 173).

20. The SPANISH civil code classifies fruits (*frutos*) in three categories: natural, industrial and civil fruits. According to the CC art. 355, natural fruits are the spontaneous products of the soil, as well as the offspring and other products of animals; industrial fruits are those produced by land as a result of cultivation or labour; civil fruits are the rent income generated by buildings, the lease payments generated by land and other property, and sums of perpetual or life annuities or other similar income. Since, nowadays, the distinction between natural and industrial fruits has lost its practical relevance, legal writing simplifies this classification, differentiating only between two kinds of fruits: natural and civil fruits. According to CC art. 357, only those fruits which are manifested or born are deemed to be natural or industrial fruits (STS 6 March 1965, RJ. 1436); as to animals, it is sufficient that they are in their mother's womb, even though they have not been born yet. Sometimes the word *productos* ("products") is used in relation to those things which are not periodically produced and the obtaining of which results in a diminution in the substance of the thing (e.g. the minerals extracted from a mine: STS 30 June 1950, RJ. 1235 which denied that the products of a mine could be considered as industrial fruits). Under SPANISH law, these products may also be included in the concept of fruits (STS 6 March 1965, RJ. 1436; STS 23 January 1947, RJ. 21), although, in some respects, they are subject to specific rules.

21. In the ITALIAN civil code, one can distinguish between two kinds of fruits: natural fruits (*frutti naturali*) and civil fruits (*frutti civili*). The CC art. 820(1) defines natural fruits as being those derived directly from the thing, with or without human intervention. As examples, the article provides agricultural products, wood, newly-born animals as well as products of mines, quarries and turf pits. As to civil fruits, the CC art. 820(3) defines these as being derived from a thing, serving as consideration for the benefit another person derives from it. Interest on capital, rent under an emphyteusis or lease agreement, life annuities as well as any other investment income, are examples of civil fruits.

22. PORTUGUESE law distinguishes between natural and civil fruits. Natural fruits (*frutos naturais*) are those that originate directly from the movable, while civil fruits (*frutos civis*) consist of the revenue or value generated by the movable as the consequence of a legal relationship or transaction (CC art. 212(2)).

23. SLOVENIAN law recognises both natural and civil fruits (Code of Property Law art. 20/II).

24. Under SWISS law, benefits are all material and immaterial advantages enjoyed by the possessor, natural and civil fruits, use etc. The question whether, in the case of the alienation of the goods, the purchase price should be regarded as a benefit, is still a matter of dispute under SWISS law. From an economic point of view, the purchase price replaces the thing in question. However, it is considered that alienation, destruction and deterioration should not be treated differently (Honsell [-*Stark*], Basler Kommentar^{2}, art. 938, nos. 4-5).

25. Under AUSTRIAN law, three categories can be distinguished. Natural fruits (*natürliche Früchte*), which result directly from the movable; they can be separated physically. A classical example is the calf born to a cow. Civil fruits (*Zivilfrüchte*) are profits or interests that the movable produces as a consequence of a legal relationship between the possessor and a third party, e.g. the rent received under a leasing contract. Other benefits are also considered to be covered by the relevant rules, such as the possibility of the use of a car by the possessor (*Gebrauchsnutzen*) (Klang [- *F. Bydlinski*], ABGB IV/2^{2}, 517; Kletečka/Schauer [-*Lurger*], ABGB, § 330, no. 1).

26. The GERMAN Civil Code uses the word "*Nutzungen*" (benefits). It covers fruits as well as the advantages resulting from the use of something (CC § 100; *Wieling*, Sachenrecht I^{2}, § 12 IV): direct fruits, such as milk, newly-born animals, fruit as well as coal, gravel or mineral water; or indirect fruits, like rent. Advantages resulting from the use of the goods are benefits in *natura,* obtained through the possession of those goods; e.g. the use of a car or a machine, the wearing of clothes, the use of an animal as a means of transport or for sporting purposes (Soergel [-*Stadler*], BGB^{13}, § 987, no. 11).

27. Benefits in the sense of the property law regulations of the GREEK civil law (CC art. 961 and 962) are understood to be: (1) natural fruits of a thing, being the products thereof, e.g. organic products from animals (milk, meat etc.) or from the ground (trees, fruits, seeds, plants etc.); (2) everything that is extracted from the thing in conformity with its purpose. Those are the inorganic products of the ground (e.g. sand, marble, gravel etc.); (3) fruits of a right, being the revenues that the right generates, according to its use, for the person entitled to the right (e.g. usufruct, tenancy etc.); (4) civil fruits, which are the proceeds that a thing or a right generates, by virtue of a legal relationship, for the person granting this right (e.g. lease agreement, loan etc); (5) any advantage achieved by the use of the thing or the right (Faber/Lurger [-*Klaoudatou*], National Reports III: Greece, 144).

28. According to the ESTONIAN GPCCA § 62, the benefits of goods include the fruits of the thing as well as the advantages resulting from its use. The provision distinguishes between natural and civil fruits. Natural fruits are the products of a thing generated by the force of nature or with human intervention (GPCCA § 62 (2)). Civil fruits are the income receivable from a thing or right pursuant to the purpose thereof or as a consequence of a legal relationship (GPCCA § 62 (3)).

29. The LITHUANIAN CC art. 4.18 speaks of "income". "Income" includes fruits, profit, interest, etc. (Faber/Lurger [-*Mikelenas*], National Reports III: Lithuania, 70).

30. CZECH law does not distinguish between different categories of benefits. The more general term "accrual" is used, instead of "fruits" (see CC section 135a; Faber/Lurger [-*Tichý*], National Reports VI: Czech Republic, 72).

III. Possession in good faith

31. According to the DUTCH CC art. 3:120(1), the good faith possessor is entitled to all separated natural and civil fruits, which have become exigible during possession. It is considered to be unfair that the possessor in good faith, who can keep the collected fruits, should be obliged to pay compensation to the rightful owner for using the goods on the basis of unjustified enrichment (CC art. 6:212). Therefore, it is considered, based on CC article 3:121(1) and (3) *per analogiam*, that the good faith possessor has a right to use the asset until the rightful owner has claimed the restitution of the property (*Snijders*, Goederenrecht[4], no. 142). Pursuant to CC art. 6:275, the rules of CC arts. 3:120 and 3:121 regarding the restitution of fruits and the compensation payable for costs and damage apply *mutatis mutandis* in the case of the setting aside of a synallagmatic contract.

32. As a general rule, under BELGIAN law the fruits of movables are subject to the CC art. 2279 (*possession vaut titre*). However, the civil code also contains special rules concerning the fruits of movables as well as immovables in CC art. 549 ff. These rules will usually give the possessor less protection and the possessor will therefore prefer to claim on the basis of the protection granted by CC art. 2279. However, there are cases in which CC articles 549 ff offer better protection to the possessor than CC art. 2279. This will, for example, be the case if the rightful owner revindicates a stolen or lost movable within the period of three years according to CC art. 2279(2) (*Hansenne*, Les biens I, no. 282). The CC art. 549 provides that a mere possessor is entitled to keep the fruits, provided that the possession is in good faith (for the notion of good faith, see note 16 to VIII.–7:102). This applies only to fruits collected during the good faith possession, and neither to the fruits collected before that time, nor to those collected after the initiation of the *rei vindicatio*, unless they follow from an additional value which the possessor added to the goods. The fruits are then considered as a kind of compensation for the expenses incurred on the goods (Cass. 17 June 1852, *Pasicrisie* 1853, I, 435; *Van Neste*, Beginselen van Belgisch Privaatrecht V[2], no. 252). Moreover, the possessor in good faith is only entitled to the fruits, not to the products (*Hansenne*, Les biens I, no. 280). The question whether the debtor of a restitutionary claim will be able to invoke CC art. 549 if in good faith is uncertain. The application of this provision is difficult to bring into accordance with the obligation to restore the situation as if no contract had ever been entered into, if the termination of the agreement has retroactive effects. Most of the BELGIAN legal writers argue that this argument prevails in such a way that the debtor of the restitutionary claim is not entitled to keep the fruits. He or she could not be considered as a possessor in good faith (*De Page*, II, no. 872; *Laurent*, Principes, XIX, no. 64; *Limpens*, La vente, no. 1785). Complete restitution would, according to this view, also include restitution of the fruits. However, this comes into conflict with FRENCH case law and legal writing, where CC art. 549 is applied to obligations to make restitution (Cass. fr. 20 June 1967, D. 1968, 32, J.C.P. 1968, II, no. 15262, note J.A. and Rev. trim. dr. civ. 1968, 337, note *Bredin*; *Baudry-Lacantinerie*, Traité, XIV, no. 1969).

33. According to the SPANISH CC art. 451, the possessor in good faith is entitled to the fruits which were received before the possession was legally interrupted. Natural and industrial fruits are considered as having been received as from the time they were collected or severed (art. 451(2) and 472). Civil fruits are deemed to accrue every day (art. 451(3) and 474) and, therefore, belong to the good faith possessor in proportion to

the period of possession. It is a matter of dispute whether possession is regarded as being legally interrupted as from the filing of the claim, as from the moment of the possessor's reply to the claim or as from the moment the possessor is summoned before the court. This last opinion is followed by the majority of case law (*López Frías*, Jurisprudencia civil comentada. Código Civil, 1087 with reference to case law). The possessor is not entitled to the fruits once possession is in bad faith. However, the legal interruption of possession provided for by CC art. 451 does not necessarily make the possessor *mala fide*. Hence, the good faith possessor, who is ordered to return the goods will be authorised to keep the fruits collected up until the point in time of the legal interruption, but will be obliged to hand over the fruits received during the proceedings. The possessor in good faith is not obliged to return the fruits which could have been collected by their rightful owner (Faber/Lurger [-*González Pacanowska/Díez Soto*], National Reports V: Spain, 93). Some legal authors have pointed out that the "use" of a thing is a "value" that may be claimed as damage or on the basis of unjustified enrichment (*Carrasco*, Restitución de provechos, ADC 1988, 62 *et seq*). The CC art. 452 has a regulation regarding fruits which have still not been collected at the time when the possessor's good faith ceases to exist. The possessor has a right to claim reimbursement of the expenses of cultivation, in proportion to the time of the possession in good faith. The owner of the thing may give the possessor in good faith the right to finish cultivation and to collect the existing fruits, as compensation for expenses incurred. A possessor in good faith who refuses to accept this compromise loses the right to be compensated in any other way.

34. In DENMARK, a possessor in good faith has the right to keep all fruits of the property obtained up to the time of the *rei vindicatio* (DL 5-5-4, *Lov* nr 11000 of 15/04/1683: The rule is applicable to immovables but is applied to movable property analogously). The decisive criterion is whether the fruits are obtained before the initiation of the *rei vindicatio*. However, the possessor is not allowed to keep fruits obtained before the initiation of the *rei vindicatio*, but only where the due day would have been subsequent to such initiation (*Vinding Kruse*, Ejendomsretten 1^3, 742 f).

35. According to the rules of the SWEDISH Bankruptcy Act (*Konkurslagen*), a possessor who has to return the movable to the bankruptcy estate also has to return its fruits obtained as from the time revindication proceedings were initiated (*Konkurslagen* chap. 4 § 15). *E contrario*, this means that a possessor in good faith can keep fruits obtained before such action was filed. The possessor "should" (*bör*) also pay for his or her beneficial use of the movable (Karnov [-*Lennander*] 2006/07, 3446 no. 162). Irrespective of these rules, an obligation to reverse fruits and benefits may arise from unjustified enrichment law, which is, however, an uncertain basis in Swedish law (see section I of these Notes).

36. NORWEGIAN law provides that a possessor who obtained benefits from another's property while being in good faith, i.e. while believing, without negligence, to be entitled to these benefits, may keep them without being obliged to reverse the benefits to the owner of the property; see *Lov om hendelege eigedomshove* 1969/17 § 15 and *Falkanger/Falkanger*, Tingsrett[6], 404 ff (the discussion centres on immovables, but is also applicable to movable property).

37. Under FINNISH law, a good faith possessor who has acquired property through a valid acquisition may, as a general rule, "in some certain cases", have a better right to the benefits and fruits generated by the movable up until the time good faith ceases to exist (see Supreme Court ruling KKO 1984 II 125 and Faber/Lurger [-*Kuusinen*], National Reports V: Finland, 74 f). However, according to some special regulations (see, for example, Act on Recovery § 17.1 and TakSL § 5), a good faith possessor

might, in some cases, have the obligation to return all benefits and fruits as from the time of commencing possession (Faber/Lurger [-*Kuusinen*], National Reports V: Finland, 74 f).

38. Under ITALIAN law, the possessor in good faith is entitled to keep the natural and civil fruits collected before the initiation of the claim. The fruits obtained after the initiation of legal proceedings should be reversed to the rightful owner in case of the restitution of the goods (CC art. 1148).

39. In GREECE, the possessor who took possession of the movable in good faith and continued to exercise possession in good faith, is entitled to keep the benefits deriving from the goods before the initiation of the legal proceedings for restitution (CC art. 1100). In case the underlying sales contract is avoided but the real transaction is valid, the possessor has to return the movable and the fruits deriving from the movable according to the CC art. 904, 908 (unjustified enrichment). Regarding the benefits collected after the initiation of the proceedings, the owner can claim the restitution of those benefits from the possessor in good faith. The possessor is also liable for the benefits which he or she culpably failed to collect after the initiation of the proceedings but which could have been collected according to the rules of proper management (CC art. 1096).

40. In SLOVENIA, fruits are regarded as components of a movable and share the same fate as the object until they are separated. The right of separation normally belongs to the owner. A good faith possessor can obtain ownership of the fruits by virtue of their separation and is only obliged to return fruits which have not yet been separated (Code of Property Law art. 95/I). Good faith can be lost by the initiation of an action (Faber/Lurger [-*Rudolf*/*Rijavek*/*Keresteš*], National Reports I: Slovenia, 106). In the case of void and avoided contracts, every party has to return to the other everything received (Code of Obligations art. 187/II).

41. In LITHUANIA, the possessor in good faith is entitled to keep the benefits which were received up until the time when he or she found out or should have found out that the possession was unlawful, or obtained knowledge about the initiation of judicial proceedings regarding the revindication of the movable. The owner who recovers the property is entitled to claim from the good faith possessor all the income which was received or should have been received as from the time indicated above (CC art. 4.97). Good faith is presumed. The possessor is in good faith if convinced that nobody has more rights to the thing (CC art. 4.26). If the goods have to be restored due to the avoidance or termination of a contract between the parties, all fruits and income belong to the person bound to make restitution. This person bears all expenses incurred in the production of those fruits and revenues (CC art. 6.151).

42. In HUNGARY, the possessor in good faith is not liable for the benefits obtained during the period before the legal proceedings for recovery were initiated. Furthermore, a possessor who has acquired possession for value is not even obliged to surrender the existing benefits. However, the position changes as from the time when the legal proceedings are initiated. As from this time, the rules on “responsible custody” (CC §§ 196-197) will apply. According to these rules, the possessor is obliged to return all benefits which collected, or to pay the value of the benefits which could have been collected. The possessor can deduct these benefits from expenses incurred (Faber/Lurger [-*Szilagyi*], National Reports III: Hungary, 95). Nevertheless, if it is obvious that the possessor is in bad faith as from the initiation of legal proceedings, he or she will be liable as a possessor in bad faith (see note 54). If the transfer is based on a void or avoided contract, the situation is regulated according to the principle *in integrum restitutio* (CC § 237 (1)).

43. In SWITZERLAND, the possessor in good faith is entitled to keep the natural and civil fruits, provided that they were collected while the possessor was still in good faith. The person who believes himself or herself to be the rightful owner has the right to use the object without having to pay any compensation (CC art. 938; *Steinauer*, Les droits réels I[4], no. 504). For the notion of good faith, see note 14 to VIII.–7:102.

44. In PORTUGAL, the possessor in good faith is entitled to keep the natural and civil fruits collected during the possession in good faith (CC art. 1270). The main reason is that: "The good faith possessor acted in the conviction of being the holder of a right in the movable, and as such it would be unfair to oblige him to return the harvested fruits, as he was expecting them and organised his activity based on that expectation" (*de Lima/Varela*, Código Civil anotado[2] III, 37). For the meaning of good faith, see note 23 to VIII.–7:102.

45. According to the GERMAN CC § 993(1), the possessor in good faith is entitled to keep the benefits, even those which he or she still has in possession. This provision, however, provides for an exception in the case of an excess of fruits (*Übermaßfrüchte*). Furthermore, the possessor in good faith is obliged to return all benefits to the rightful owner, if possession was obtained gratuitously (CC § 988). Restitution has to be effected according to the rules on unjustified enrichment. If the possessor incurred some expenses on the goods, the defence of disenrichment may be available (*Schwab/Prütting*, Sachenrecht[30], no. 533; *Wieling*, Sachenrecht I[2], § 12 IV 4; Bamberger/Roth [-*Fritzsche*], BGB II, § 988, no. 11). As to the definition of good faith, see note 17 to VIII.–7:102. Also the benefits collected by the possessor in good faith after the initiation of legal proceedings have to be handed over to the rightful owner (CC § 987 (1)). The proceedings are considered to be initiated with the notification of the summons (Soergel [-*Stadler*], BGB[13], § 987, no. 4). If the fruits still exist, the possessor has to restitute these *in natura*. Otherwise, the possessor is obliged to pay the value of those benefits. The possessor is also liable for the benefits which he or she culpably failed to collect after the initiation of the proceedings but which could have been collected according to the rules of proper management (CC § 987(2)). It is irrelevant whether the rightful owner would have collected these fruits if still in possession of the goods (*Wieling*, Sachenrecht I[2], § 12 IV 2 a; Bamberger/Roth [-*Fritzsche*], BGB II, § 987, no. 65). If the possessor incurred any expenses in order to obtain the benefits these costs may be deducted from the amount of compensation (*Wieling*, Sachenrecht I[2], § 12 IV 2 a bb).

46. In SCOTLAND, according to one legal scholar, a claim against a good faith possessor lies not in the enrichment received at the owner's expense but in the enrichment surviving. Thus, if a possessor in good faith has increased his or her spending, the possessor is not liable for this increase (*Stair*, Institutions of the Laws of Scotland[2], I.7.10). Other opinions brought forward, and as a separate defence for a good faith possessor, are that a good faith possessor becomes the owner of the fruits upon separation or, slightly narrower, that the possessor is liable only for the fruits remaining unconsumed by the time of the claim to recover the principal thing (*Stair*, Institutions of the Laws of Scotland[2], I.7.10 and Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 174). A good faith possessor need not prove consumption, a presumption of consumption can be drawn from the collection of the fruits (*Ferguson v Lord Advocate* (1904) 14 SLT 52). Depending on the kinds of fruits, this presumption is not always applicable.

47. The AUSTRIAN CC § 330 provides that the possessor in good faith acquires ownership of natural fruits by separating them from the property. The rule can be understood as a *lex specialis* to the general provision of CC § 405, which provides

that, by separation, ownership of fruits is acquired by the owner of the property (Klang [-*Klang*], ABGB II^2, 405). Civil fruits are primarily attributed to the possessor in good faith under the double prerequisite that they have already been 'collected' and that they have become due during 'quiet possession', i.e. as long as the possessor has not been sued (cf. CC § 338; Klang [-*Schey*/*Klang*], ABGB II^2, 96 f). As to the notion of good faith, see note 21 to VIII.–7:102. It is, however, a matter of dispute whether or to what extent this result is to be adapted under the rules on unjustified enrichment. According to the prevailing opinion, such a modification must be made in the majority of cases (Klang [-*Wilburg*], ABGB VI^2, 474 f; Kletečka/Schauer [-*Lurger*], ABGB, § 330, no. 3; OGH 22 April 1997, SZ 70/69, concerning immovable property. Arguing for a stricter observation of the principles provided for by CC § 330: Rummel [-*Spielbüchler*], ABGB I^3, § 330, no. 1). The prevailing view is based on the *ratio legis* the legislator had in mind when introducing CC § 330: The possessor in good faith should be entitled to keep the fruits, first, as compensation for the purchase price paid to a third party and which is not recovered from the owner (CC § 333). Second, keeping the fruits was seen as a schematic way of compensating the possessor for the efforts expended to obtain such fruits (*Zeiller,* Commentar II/1 69 f). Therefore, the range of situations where CC § 330 can be applied literally (i.e. the possessor may keep the fruits) is reduced to those to which the referred argumentation fits (for more details, see Faber/Lurger [-*Faber*], National Reports I: Austria, 188 f). The obligation to reverse under unjustified enrichment law applies both to natural and civil fruits. As indicated above, it also applies to other benefits the possessor may have obtained from the movable, particularly by using it (see note 25). In the latter case, the possessor is obliged to pay a sum equivalent to the price of using the property (*Benützungsentgelt*), which is, according to the prevailing opinion, to be calculated based on the individual benefit the good faith possessor had from utilisation (Schwimann [-*Klicka*], ABGB II^3, § 330, no. 2; Kletečka/Schauer [-*Lurger*], ABGB, § 330, no. 3). Fructification costs are to be deducted from the benefit which has to be reversed under unjustified enrichment law (Kletečka/Schauer [-*Lurger*], ABGB, § 330; no. 4). As to unjustified enrichment claims under AUSTRIAN law, it should also be mentioned that, in general, the obligation to reverse the enrichment is not extinguished if the enrichment ceases to exist subsequently (no defence of 'disenrichment'). There is no delictual liability of a possessor in good faith for fruits consumed; nor for fruits he or she could have collected but did not (*Iro,* Sachenrecht^3, no. 7/5).

48. The ESTONIAN regulation distinguishes between two-party and three-party constellations. Regarding the former, the possessor will be obliged to compensate the owner for the usual value of the benefits received as a result of use, if the possessor keeps using the movable even though the contractual relationship has terminated. In cases where the goods have to be restored because the contract is void or has been avoided, anything received plus any profits gained therefrom have to be restored (LObligA § 1028). If the transferred movable has been destroyed, consumed, damaged or seized, the owner may claim the transfer of what the possessor acquired in return for it (LObligA § 1032). In general, the possessor is relieved of the duty to return what was received or to compensate for the value thereof in the case of subsequent disenrichment (LObligA § 1033(1)). However, this defence is not applicable in cases of synallagmatic contracts (LObligA § 1034(1)). Further, the defence of disenrichment is not applicable where the destruction, consumption or damaging of the goods has occurred after the transferee became aware or should have become aware of circumstances constituting a basis for reclamation pursuant to provisions on unjustified enrichment (LObligA § 1035(1) and (2)). In case of the involuntary loss of possession of the movable by the owner (e.g. theft), the rules on *condictio* against

intervention (LObligA §§ 1037–1040) usually apply. The person who violated the owner's rights by disposition, use, consumption, combination, commingling, production or otherwise is liable to compensate the owner for the usual value of what that person received as a result of the violation. The violator is relieved of such duty if he or she was not aware nor was supposed to be aware of the lack of entitlement with regard to the movable, in so far as no longer enriched by the value gained as a result of the violation by the time of learning about the filing of the compensation claim (LObligA § 1038). In three-party constellations, the provisions of the PropLA, regarding the delivery of and the compensation for fruits (§ 85(1)), make an explicit reference to LObligA §§ 1037–1040, i.e. the provisions on *condictio* against intervention (see above). Thus, the same rules apply to relations between an owner and the violator of the owner's rights as apply to the relationship between the owner and a possessor who is bound by neither a contractual nor a non-contractual relationship. If a non-entitled person has disposed of the movable without the actual owner's consent and the requirements for good faith acquisition have not been met, the owner may, instead of directing a claim against the third-party possessor, demand from the non-entitled person compensation for the usual value of that which the latter received. However, in the case of a gratuitous transfer by a non-entitled person, the third-party acquirer is required to deliver to the rightful owner what was received, even if the conditions for good faith acquisition were met (LObligA § 1040). The acquirer in good faith may rely on the defence of disenrichment (Faber/Lurger [-*Kullerkupp*], National Reports I: Estonia, 104-106).

49. According to the CZECH CC § 458 (2) (restitution on the basis of an unjustified enrichment claim), the possessor in good faith is entitled to all proceeds; this includes also fruits (Faber/Lurger [-*Tichý*], National Reports VI: Czech Republic, 72). However, if the owner claims the restitution of the goods on the basis of the *rei vindicatio*, all fruits (proceeds) must be reversed, regardless of whether the possessor is in good or bad faith (Faber/Lurger [-*Tichý*], National Reports VI: Czech Republic, 70).

50. Under CYPRUS law, the possessor's good or bad faith is not a criterion. See further section I of these Notes.

51. For ENGLAND, WALES and IRELAND, see section I of these Notes.

IV. Possession in bad faith

52. In the NETHERLANDS, the possessor who is not in good faith is not entitled to the fruits (CC art. 3:121 (1)) but is obliged to deliver all the collected fruits to their rightful owner. If not able to deliver these fruits, the possessor is liable according to the rules on non-contractual liability for damage (*Asser*, Goederenrecht[14] II, no. 123). The possessor who is not in good faith is liable for damage suffered by the rightful owner due to the unlawful possession by the possessor. This covers also the fruits which have not been collected by the possessor (Nieuwenhuis/Stolker/Valk [-*Rank-Berenschot*], B.W.[3], art. 3:121, no. 2).

53. In SCOTLAND, a possessor is likely to be liable for all fruits consumed or other benefits obtained during the period of possession (*Carey Miller/Irvine*, Corporeal Moveables in Scots Law[2], 243). There appears to be no authority in SCOTLAND on the liability of a possessor who has not acquired the fruits that the movable could have generated. But, since a good faith possessor is entitled to the fruits generated, the imposition of such liability will be restricted to a bad faith possessor anyway (Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 175 and *Carey Miller/Irvine*, Corporeal Moveables in Scots Law[2], 106 f).

54. In HUNGARY, the bad faith possessor is obliged to return the existing benefits and pay the value of any benefits which he or she consumed or failed to collect (Faber/Lurger [-*Szilagyi*], National Reports III: Hungary, 96).

55. In LITHUANIA, the possessor in bad faith is obliged to restitute or reimburse all income that he or she received or should have received throughout the whole period of possession (CC art. 4.97). Hence, the possessor in bad faith is not entitled to any benefit (Faber/Lurger [-*Mikelenas*], National Reports III: Lithuania, 70). As good faith is presumed, the owner has to prove that the possessor was in bad faith, i.e. that the possessor knew or should have known that there was no right to obtain possession of the goods or that another person had more rights in the goods in question (CC art. 4.26). In the case of the restitution of a thing according to the rules of the law of obligations (e.g. avoidance or termination of a contract between the parties), CC art. 6.151 provides a special rule. If the person bound to make restitution is in bad faith or if the restitution is due to that person's fault, there is an obligation not only to return the fruits and income but also to indemnify the creditor for any benefit has derived from the thing. Nevertheless, the creditor must compensate the debtor for the necessary expenses incurred in producing the fruits and income (see note 50 to VIII.–7:104).

56. Under GREEK law, the possessor who was in bad faith at the moment of obtaining possession of the movable, or who has become aware later that there was no entitlement to possess, is obliged to hand over the collected fruits which still exist, a sum equivalent to the value of the fruits alienated or consumed and the equivalent of the benefits which were culpably not collected (CC art. 1098). It is not the time of the initiation of the legal action which is decisive for the possessor's liability, but a moment prior to such initiation, namely the moment when the possessor became a possessor in bad faith (*Georgiadis*, Property Law I, 592). The bad faith possessor who is also in default is liable for all damage that occurred while in default and, therefore, also for the benefits which, without fault, were not collected (CC art. 1098 s. 2 and art. 343(1)). He or she is also liable for the accidental impossibility of performance. On the other hand, if it is proved that the damage would also have occurred if the movable had been returned in time, the possessor is not liable. Besides these duties, such a possessor is, in addition, obliged to pay an equivalent of the value of the fruits he or she could not collect, as well as the equivalent of the value of the fruits which were destroyed while he or she was in default. There is also liability for the accidental perishing of a movable (Faber/Lurger [-*Klaoudatou*], National Reports III: Greece, 146). A possessor who obtained possession based on an illegal act is also liable to compensate the owner according to the provisions on unlawful acts (CC art. 1099). He or she has to compensate for all fruits irrespective of the moment of the initiation of legal proceedings for restitution or his or her bad faith. Hence, the possessor is also liable in case of slight negligence (Faber/Lurger [-*Klaoudatou*], National Reports III: Greece, 146). The liability of the possessor, on the basis of the provisions on unlawful acts, is concurrent with the regulations on the possessor's liability according to CC art. 1096 ff (*Georgiadis*, Property Law I, 594).

57. According to the BELGIAN CC art. 549, the possessor in bad faith is obliged to return the fruits together with the movable to the rightful owner, who is revindicating the property. The possessor in bad faith has to return all fruits collected, regardless of whether he or she still has them or has already consumed them; in the latter case, he or she has to pay an equivalent of the value of the consumed goods. Case law and legal writing unanimously accept that the possessor in bad faith even has to pay an equivalent to the fruits he or she has neglected to collect. Moreover, he or she must pay compensation to the owner for fruits obtained by a third person in good faith to

whom the goods have been transferred, even if the third party's good faith subsequently ceased to exist (*Hansenne*, Les biens I, no. 269). However, the possessor in bad faith does not have to restitute the fruits he or she failed to collect, if it can be proved that the owner would not have been able to collect them either (*Hansenne*, Les biens I, no. 272). In cases where restitution has to be performed in the form of compensation, it is acknowledged in legal writing that the value of the fruits should be calculated with reference to the moment of restitution (*Hansenne*, Les biens I, no. 270). The FRENCH legislator has explicitly taken up this view in CC art. 549. It is generally accepted that the possessor in bad faith may be held liable to pay the interest generated by the fruits to the rightful owner as compensation for damage. The interest accrues as from the moment when the possessor in bad faith collected the fruits (*Hansenne*, Les biens I, no. 271; De Page/Dekkers, VI, no. 155). Nevertheless, the possessor in bad faith is entitled to request compensation for the production costs (*Van Neste*, Beginselen van Belgisch Privaatrecht V[2], no. 251; referring to CC art. 548: the fruits belong to the owner of the goods, who is under an obligation to compensate the possessor for the costs of, for example, ploughing, cultivation and sowing). This rule is based on the theory of necessary costs (see notes 28 and 55 to VIII.–7:104) and, more generally, on the principle of unjustified enrichment (*Hansenne*, Les biens I, no. 273).

58. Under SPANISH law, the possessor in bad faith is obliged to compensate the rightful owner for the fruits received, as well as for those which the rightful owner could have received (CC art. 455). The possessor has the right to claim the reimbursement of the necessary expenses of production, because otherwise the rightful owner would be unjustifiably enriched (see notes 48 to VIII.–7:104). Besides, the CC art. 356 provides for a general rule according to which "he who receives the fruits has the obligation to pay the expenses incurred by a third person on their production, collection and preservation".

59. In ITALY, the possessor in bad faith is not regarded as being socially justified to keep fruits belonging to another person. In this case, if possession results from a delict, the possessor is liable under the law of delict and the restitution of the goods and their fruits has a compensatory nature. However, if possession has been obtained by means of a wrongful transfer, the possessor can bring actions for the protection of possession, the result of which will depend on the good or bad faith of the possessor. The possessor in bad faith will always have to return the fruits (CC art. 2033) and also has to pay the value of the fruits which he or she would have collected if acting with ordinary care (Faber/Lurger [-*Greco*], National Reports I: Italy, 44).

60. Under SWISS law, the bad faith possessor has to compensate the rightful owner for all advantages (not only fruits) enjoyed from using the movable (*Steinauer*, Les droits réels I[4], no. 516). He or she has to pay an equivalent monetary compensation sum for using the goods. If the fruits still exist, the possessor has to hand them over *in natura* but otherwise is obliged to pay the value of those advantages, even if the fruits have been lost accidentally (Honsell [-*Stark*], Basler Kommentar[2], art. 940, no. 11). Furthermore, the possessor is also liable for the fruits he or she neglected to collect (CC art. 940(1)). Compensation is, however, only owed for fruits, which would have been collected if the possessor had used the thing in an appropriate way (*Steinauer*, Les droits réels I[4], no. 517). Moreover, it is sometimes argued that the rightful owner cannot claim for compensation if the fruits would not have been collected anyway even if the owner had remained in possession of the goods, since in such case the owner has not suffered any damage (Honsell [-*Stark*], Basler Kommentar[2], art. 940, no. 10; other opinion: *Steinauer*, Les droits réels I[4], no. 517). It should be added, however, that the CC art. 940(3) states that as long as the possessor does not know to

whom the goods have to be returned, he or she is only liable for damage caused by fault (see note 37 to VIII.–7:102).

61. Under PORTUGUESE law, the possessor in bad faith must return all fruits produced by the movable during the possession (CC art. 1271) and is also obliged to compensate the owner for the value of the fruits that the movable could have potentially generated had the possessor acted with the care of a "diligent owner" (CC art. 1271; STJ 21 January 1972, BMJ 213, 231; *de Lima/Varela*, Código Civil anotado[2] III, 39). The rationale is that the bad faith possessor is responsible vis-à-vis the owner for all avoidable damage and detriment caused by the bad faith possession (*Rodrigues*, A Posse, 314).

62. As described above, NORWEGIAN law provides that a possessor must have been in non-negligent good faith in order to obtain the benefits. As from the time the owner has brought a claim for the revindication of the movable and the possessor's good faith, therefore, has ceased to exist, the possessor has to compensate the owner for the yield and use he or she benefited from, though being able to deduct costs. As for the time prior to the bringing of the revindication action, the possessor only has to compensate the owner for the profit that does not constitute a yield or use (*Lov om hendelege eigedomshove* 1969/17 § 15).

63. In DENMARK, a possessor has no right to the obtained fruits as from the time he or she qualifies as a possessor in bad faith (*Vinding Kruse*, Ejendomsretten[3], 743 f; DL 5-2-89 11 sept. 1839 § 2 and *lov* nr 397, 12 july 1946 § 22). A possessor in bad faith is also liable for all fruits he or she failed to obtain (*Vinding Kruse*, Ejendomsretten[3], 744 and DL 6-15-12).

64. In FINLAND, a possessor in bad faith has no right to keep the benefits or fruits generated by the movable (Faber/Lurger [-*Kuusinen*], National Reports V: Finland, 74 f and Supreme Court ruling KKO 1984 II 125).

65. In GERMANY, the possessor in bad faith is liable for the benefits pursuant to CC § 987 - i.e. as a possessor in good faith after the introduction of legal proceedings (CC § 990 (1)) – and is obliged to return all benefits. As to the definition of bad faith, see note 39 to VIII.–7:102. If the fruits still exist, the possessor must hand them over *in natura* but otherwise must pay a sum equivalent to the value of those benefits. Moreover, the possessor in bad faith is also liable for the benefits which, due to fault, he or she failed to collect but could have collected according to the rules of proper management (*Schwab/Prütting*, Sachenrecht[30], no. 532). The possessor who obtained possession through a criminal act or unlawful dispossession is liable according to the provisions of non-contractual liability law (CC § 992) and, according to the prevailing opinion, has to return all benefits collected and those which wee culpably not collected, even though the rightful owner would not have collected them (*Schwab/Prütting*, Sachenrecht[30], no. 535; *Baur/Stürner*, § 11, no. 14. For another opinion, see *Wieling*, Sachenrecht I[2], § 12 IV 6 who argues that compensation is limited to fruits which would have been collected by the rightful owner; otherwise, there is no unjustified enrichment).

66. In SWEDEN, *Konkurslagen* chap. 4 §§ 5 and 15 provide that where a movable has to be returned to a bankruptcy estate, a bad faith possessor must reverse not only the fruits obtained after the initiation of the revindication proceedings, but also the fruits obtained as from the time he or she obtained possession of the movable. Irrespective of insolvency, a claim for restoring fruits and compensation for use may be based on unjustified enrichment which is, however, a disputed concept in SWEDISH law (see section I of these Notes).

67. In ESTONIA, the same distinction concerning the possessor in bad faith and the possessor in good faith is made (see note 28). In the case of two-party constellations, the possessor will be obliged to pay to the owner the usual value of the benefits received in the form of use, if the possessor keeps using the movable even though the contractual relationship is terminated. However, according to LObligA § 1039, the owner may further claim from a possessor in bad faith, the transfer of any revenues received as a result of the violation, in addition to the usual value of that which was received. In cases where the goods have to be restored because the contract is void or avoided, anything received plus any profits gained therefrom have to be restored (LObligA § 1028). If the transferred movable has been destroyed, consumed, damaged or seized, the owner may claim the transfer of what the possessor acquired in return for it (LObligA § 1032). Disenrichment will not relieve the transferee, if, at the time the disenrichment occurred, the transferee knew or should have known about circumstances constituting a basis for reclamation pursuant to the provisions on unjustified enrichment. If the transferee was aware or should have been aware of such circumstances either at the time of disenrichment or before the disenrichment took place, the transferee is liable to deliver to the transferor the gains derived from the goods, to pay interest in case money was received and to compensate for any uncollected profits that the transferee could have obtained in the course of regular economic activity (management) (LObligA § 1035 (3)). Also PropLA § 85(2) provides that the possessor who obtained possession by way of arbitrary action is additionally required to compensate for gains that the owner would have received if still in possession of the thing (Faber/Lurger [-*Kullerkupp*], National Reports I: Estonia, 104-106). For three-party constellations, see Note 48 above.

68. Under AUSTRIAN property law, the possessor in bad faith does not acquire ownership of any fruits (CC § 335). According to the general rules of CC §§ 404 ff, ownership is acquired by the owner of the principal asset. As a consequence, the owner is entitled to recover the fruits based on the right of ownership. Unjustified enrichment law provides that the possessor in bad faith must hand over all benefits gained from the movable to its owner (CC §§ 335, 1437). This may also apply to benefits which the owner would not have obtained (Schwimann [-*Klicka*], ABGB II^3, § 335, no. 1; Kletečka/Schauer [-*Lurger*], ABGB, § 335, no. 1; OGH 30 January 1996, JBl 1996, 653). This principle, however, may be subject to an exception: The possessor in bad faith may be entitled to parts of the fruits in case they could only be generated due to the significant efforts of the bad faith possessor (OGH 4 December 1968, JBl 1969, 272; for further examples, see Kletečka/Schauer [-*Lurger*], ABGB, § 335, no. 1). The possessor who has consumed or sold the goods is obliged to pay at least the market price. Also, a consideration for using the object (*Benützungsentgelt*) is to be calculated irrespective of the possessor's subjective benefit (Kletečka/Schauer [-*Lurger*], ABGB, § 335, no. 3). Regarding the costs of producing the fruits, however, the same outcome as for the possessor in good faith should result. Such costs have to be deducted from the benefit to be reversed under unjustified enrichment law (Kletečka/Schauer [-*Lurger*], ABGB, § 330, no. 4). According to the CC § 335, the possessor in bad faith is also liable for fruits not collected, and under non-contractual liability law, the possessor in bad faith is liable if he or she caused damage to fruits.

69. Under SLOVENIAN law, the bad faith possessor is not entitled to the fruits, but has to return all the fruits to the owner (Code of Property Law art. 96/I). The possessor in bad faith has to compensate the owner for all the fruits he or she has separated or that were separated by somebody else during the possession (Code of Property Law art. 96/II).

70. Under CZECH law, the possessor in bad faith is obliged to return any enrichment that has been acquired unjustifiably to the detriment of the rightful owner. If this is not

possible, the possessor must provide compensation in money (CC section 458(1)). As a consequence, the possessor has no defence. This is a strict liability regime. Regardless of the reason why the goods have to be restituted, the possessor is obliged to perform (Jehlička/Švestka/Škárová [-*Pokorný/Salač*], Občanský zákoník – komentář[9], 666).

71. In IRELAND, a wrongdoing possessor may be obliged to pay damages covering not only what the owner has lost but also the profits and benefits obtained by the wrongdoing possessor. This prevents him or her from profiting from the wrongful act (Faber/Lurger [-*Gardiner*], National Reports II: Ireland, 91).

72. For ENGLAND and WALES, see section I of these Notes.

VIII.–7:104: Expenditure on, or parts added to, the goods during possession

(1) Where the possessor incurs expenditure on, or adds parts to, the goods during possession in the sense of VIII.–7:101 (Scope of application), the rights of the possessor to reimbursement of such expenditure or for such addition are determined by Book VII.

(2) The possessor is entitled to retain the goods in order to secure the rights referred to in paragraph (1). Sentence 1 does not apply where the possessor knows of the owner's entitlement to obtain or recover possession at the time when expenditure is incurred on, or parts are added to, the goods.

COMMENTS

A. General

Situations covered by paragraph (1). Paragraph (1) of this Article covers all situations where the possessor incurs expenditure on the owner's goods during possession or physically adds parts to them. One may think, e.g., of expenses made for the purpose of the preservation of the goods, such as repainting a boat where this is absolutely necessary in order to prevent its deterioration, as well as of repainting a car where this is absolutely unnecessary, but the possessor simply likes the new colour better than the old one. Also, one may think of ordinary maintenance costs, such as the costs of feeding animals, or costs incurred for improving the other's property, such as the costs of training a horse for show jumping competitions. The term "expenditure" is to be understood in a broad sense. It covers monetary expenses as well as work or any other performance. The Article further covers situations where the improvement (or potential improvement) consists of a part physically added to the owner's property, such as a new radio or GPS system installed in the owner's car. In relation to the broad meaning of "expenditure", as outlined above, adding corporeal parts to the goods appears just as a subcategory of incurring expenditure; it is, however, mentioned explicitly for the purpose of clarity. It is immaterial whether the possessor carried out these acts personally or whether another person, such as a service provider, performed them on the possessor's account. Also, the Article intends to address situations where such expenses have been incurred but the efforts turn out to have failed, either because the intended effect was not achieved from the beginning or because the effect was achieved originally, but had disappeared before the goods were returned to their owner. In all these situations the question arises whether and to what extent such expenditures (in the broad sense) are to be reimbursed by the owner upon retaking possession of the goods.

Relevant time. As to the relevant point in time when the act of incurring expenses or adding parts must be undertaken in order to apply this Article ("during possession"), see VIII.–7:101 (Scope of application) Comment B.

Main approaches as to reimbursement in European legal systems and basic policy issues. By way of a rough summary of important divergences to be found in the European legal systems, one may point out that in some countries, the issues covered by this Article are dealt with under an unjustified enrichment approach, basically making the possessor's right to reimbursement depend on the owner's subjective benefit. This basically is the case in French law and in English law, as far as restitution principles are applied. Where tort law is applied, English law provides for the possibility of reducing the quantum of damages according to the value of the improvements (only) if the improver acted in the mistaken but honest belief that there was a good title to the goods. In those countries which deal with these issues according

to the patterns derived from an owner-possessor relationship tradition (cf. VIII.–7:101 (Scope of application) Comment C), usually two basic distinctions are made. The first distinction relates to certain types of expenses: "necessary" expenses, i.e. expenditures which are indispensable to maintain the property, are distinguished from other expenses, which are often divided into "useful" and "sumptuary" expenses. Secondly, in many, but not all, countries it is important whether the possessor, upon incurring the expenses, was in good faith or in bad faith. Details vary, but a main characteristic of this approach is that where the possessor made necessary expenses in good faith, the owner must reimburse these expenses irrespective of whether or not the owner subjectively benefits from them. In other situations, reimbursement is often restricted in one way or another, taking into account the objective increase in value or the owner's subjective benefit. In most countries even a possessor in bad faith who made other than "necessary" expenses may be reimbursed in one way or the other. The main policy issues, therefore, will be whether a possessor in good faith should be reimbursed for certain expenses (like "necessary" expenses) regardless of whether the owner derives any benefit from them; in other words: whether a possessor in good faith should be privileged as compared to the legal position under the general unjustified enrichment principles that are provided for by Book VII. Second, it will have to be decided whether (or to what extent) possessors in bad faith, or in certain types of qualified bad faith, should be excluded from a right to reimbursement.

Right to retain, paragraph (2). Paragraph (2) provides that the possessor who has a claim for reimbursement under paragraph (1) is entitled to retain the goods as a security for such a claim. A comparable right exists in many European jurisdictions, sometimes with certain exceptions. Paragraph (2) will be dealt with more closely in Comment C below.

Possessor's right to remove added parts (ius tollendi). Also, many legal systems contain a rule that the possessor is entitled to remove improvements made to the asset (such as a new radio installed in the owner's car), provided that the asset can be returned to the owner in its previous condition. This idea goes back to Roman law (so called *ius tollendi*). Chapter 7 does not provide for such a right explicitly but presupposes that it exists under the precondition that the possessor is still to be regarded as the owner of that part (or otherwise has a better right to it than the owner of the "main" goods). The issue is discussed in some more detail in Comment D, below, and is also reflected in the Notes to this Article.

Relation to Chapter 5. As to the relation between this Article and Chapter 5, in particular to VIII.–5:203 (Combination), see VIII.–7:101 (Scope of application) paragraph (3) and Comment G on that Article. See also Comments D below and VIII.–5:203 (Combination) Comment D.

B. Reimbursement of expenditure and for added parts

Overview. The following Comments will deal with the issues covered by paragraph (1), the main idea being that the possessor's rights to reimbursement of expenditure on, or for parts added to the goods, are determined by Book VII. The Comments will first describe how the reference to unjustified enrichment law works (subsection (a)) and subsequently justify the policy of not privileging possessors (in particular: those in good faith) who incur "necessary expenses", as compared to their legal position under the general unjustified enrichment principles. This requires dealing more closely with some main arguments put forward in favour of the alternative owner-possessor relationship approach (subsection (b)). After that, the Comments focus on the specific policy question of how to deal with a possessor who acts

in bad faith, in particular with a possessor who actually knows that the goods are owned by another person (subsection (c)). As to situations which fall within the scope of Book V on benevolent intervention in another's affairs, see VIII.–7:101 (Scope of application) paragraph (2) and Comments E on that Article.

(a) Effect of the reference to Book VII in paragraph (1)

How the main criteria relevant under Book VII work in general. Under Book VII, as relevant for the purposes of this Article, the two most relevant criteria regarding the reversal of an enrichment are: whether the enrichment is transferable or not, and whether the enriched person is in good faith or not. Compare VIII.–7:103 (Fruits from, use of, and other benefits derived from the goods during possession) Comment B, the category of "fruits and use" of the enrichment however not being relevant in the present context. When applying unjustified enrichment principles to the issues covered by this Article, i.e. expenditure made on goods, the enriched person is the owner of these goods. This has the consequence that the enriched person will almost automatically be regarded as being enriched in good faith in the sense of VII.–5:101 (Transferable enrichment) paragraph (5): In most cases, the owner, who is not in possession of the goods, will simply not know that an improvement is made to, or other expenses are incurred on, the property at the time these events take place. This will have some relevance when applying several rules, as will emerge from the following. Where the enrichment is transferable (e.g., the possessor put a new radio into the owner's car, which can still be removed), the enriched person (owner) is basically obliged to transfer the asset to the possessor. But the owner may choose to pay the monetary value of the enrichment if a transfer would cause an unreasonable effort or expense for the owner; see VII.–5:101 paragraphs (1) and (2). These rules apply regardless of the enriched person's good faith or bad faith. Where the enrichment is non-transferable (as, e.g., in the case of maintenance costs incurred), the owner must, in principle, pay the objective monetary value of the enrichment, VII.–5:102 (Non-transferable enrichment) paragraph (1). But in the majority of constellations, the owner will not have to pay "more than any saving", as the owner will be considered as being in good faith or not having consented to the enrichment (VII.–5:102 paragraph (2)). The function of this feature will be discussed more closely in subsection (b), below. In addition, the owner in good faith may generally raise the defence of disenrichment (VII.–6:101 (Disenrichment)) if, for instance, the improvement made by the possessor does not exist any more when the owner recovers possession.

Differences to criteria relevant under the owner-possessor relationship tradition. As follows from the foregoing, the criteria relevant within the adopted approach differ from those traditionally used in the countries which follow an owner-possessor relationship tradition (cf. Comment A above): The distinction between "necessary" and "other" ("useful" and "sumptuary") expenses is not used as a structural element and has no relevance as such. Also, the distinction between a possessor in good faith and a possessor in bad faith is – basically – immaterial. Book VII differentiates between enriched persons in good faith and in bad faith; the state of mind of the disadvantaged person is of no importance, except for certain persons actually knowing that they are not entitled to the property and who, therefore, are considered to "consent freely and without error to the disadvantage" in the sense of VII.–2:101 (Circumstances in which an enrichment is unjustified) paragraph (1)(b).

How Book VII works in case of performance of an obligation to a third person ("garage cases" etc.) in particular. In particular instances the general regime described above is subject to an important reservation. Due to VII.–2:102 (Performance of obligation to third person) sub-paragraph (a), an enrichment is "justified" – meaning that no reversal of the

enrichment may take place from the beginning – "where the enriched person obtains the enrichment as a result of the disadvantaged person performing an obligation or a supposed obligation owed by the disadvantaged person to a third person" if "the disadvantaged person performed feely". Within the potential scope of Chapter 7 (cf. VIII.–7:101 (Scope of application) Comment B), such a situation may occur, e.g., where a garage owner (possessor) enters into a contract with a non-owner for repairing a car (apparently owned by the latter) and, by way of performing the obligation arising from that contract, enriches the owner of the car. Another relevant situation may occur where goods are leased from a non-owner and the lessee must, under IV.B.–5:105 (Intervention to avoid danger or damage to the goods) paragraph (1), take necessary measures for the maintenance or repair of the goods because it is impossible or impracticable for the lessor, but not for the lessee, to ensure that these measures are taken. In both situations, the disadvantaged person who is in possession of the goods (garage owner; lessee) performs an obligation towards a third person (the client, the non-owner of the car; or the lessor, respectively), thereby enriching the owner of the goods. Whether the disadvantaged possessor is entitled to a reversal of the enrichment as against the owner will depend on whether the possessor "performed freely" in the sense of VII.–2:102 sub-paragraph (a). As follows from VII.–2:103 (Consenting or performing freely) paragraph (2), no "free" performance will take place (only) if the obligation which is performed is ineffective because of incapacity, fraud, coercion, threats or unfair exploitation. Practically speaking, where the disadvantaged possessor can be regarded as "defrauded" in the sense of these provisions (so that the circumstances establish a ground for avoidance under II.–7:205 (Fraud)), he or she may proceed against the owner under the unjustified enrichment principles, as described above. Where he or she is in mere error, this is not possible. The rationale of this general policy established by Book VII is that "the parties to the contract have sought themselves out and, as regards any restitutionary claims arising from the failure of their purported contractual agreement, ought to look only to their counterpart for recompense since in the usual case it was from that other party (and not any other person who may be directly or incidentally benefited) that the disadvantaged party expected its counter-performance". Compare VII.–2:102 (Performance of obligation to third person) Comment B. Book VIII respects this basic policy decision by its general reference to Book VII.

(b) Policy considerations as to not privileging possessors who incur "necessary" expenses in relation to unjustified enrichment principles

Overview of main issues. When comparing the results under the unjustified enrichment approach presented above with those resulting from the traditional distinctions employed by many owner-possessor relationship regimes, two main differences appear to exist. Both relate, above all, to "necessary expenses", in particular where the possessor acted in good faith. The first problem arises where the owner's benefit, due to the individual circumstances of that person, is smaller than the value of the possessor's expenditure. The second problem arises where the improvement achieved (or intended to be achieved) by the possessor's expenditure does not exist (any longer) when the goods are returned to their owner. These two issues will be discussed below. Since this analysis does not reveal any compelling reasons for deviating from the unjustified enrichment principles of Book VII, its outcome has become an important argument, along with considerations of coherence, for adopting the approach presented above in subsection (a).

Owner's subjective benefit smaller than value of expenditure. The first issue relates to the extent of liability where the benefit to the owner (enriched person), due to the individual circumstances of that person, is less than the expenses incurred by the possessor. Where expenditures are "necessary" from an ex ante perspective, legal systems following an owner-

possessor relationship tradition provide a right to full reimbursement. Under Book VII, on the other hand, the owner who did not consent to the enrichment is only obliged to pay his or her "saving", i.e., subjective circumstances of the owner are taken into account, provided that the enrichment is non-transferable (which often is the case with regard to "necessary" expenses); cf. VII.–5:102 (Non-transferable enrichment) paragraph (2). The latter concept is less favourable to the possessor (i) where the owner would not have incurred such expenses by reason of personal needs and preferences (see *Illustration 1* below). Potentially, there can also be some differences (ii) where the owner would have decided to undertake the same kind of preservation measure as well, but could have achieved the same result with less effort because of individual special knowledge or skills, so that the "saving" is smaller than the value of the possessor's expenses.

> *Illustration 1*
> P, being in good faith, buys a riding horse from a thief and incurs all necessary expenses of feeding and keeping it for two years. Then the horse's owner O finds it. O would have been unable to ride the horse during the past two years because a traffic accident has forced him into a wheel chair. He therefore intended to sell the horse before it was stolen (alternatively, O would have sold the horse because he lost his job and could not afford keeping a horse any longer). A settlement between O and P fails and O reclaims his horse. P insists on being reimbursed for the necessary expenses she incurred on the horse.

The owner-possessor relationship rule providing that necessary expenses (incurred by a possessor in good faith) must always be reimbursed may force the owner to pay for investments he or she would never have made. This contradicts the principle that the owner is free to do whatever he or she likes with the asset, cf. VIII.–1:202 (Ownership). The rule is based on the assumption that the owner always benefits from "necessary" expenses. As *Illustration 1* shows, this is, however, a simplified way of looking at the substantial question. The unjustified enrichment rules of Book VII take a more differentiated approach, in particular by introducing the "saving" cap in VII.–5:102 (Non-transferable enrichment). This is a major policy decision of the unjustified enrichment law of Book VII, explicitly based on the policy of party autonomy, i.e. on the principle that the enriched person (provided that he or she did not consent or is in good faith) should not be forced into exchanges without consent; cf. VII.–5:102 Comment C. Having regard to this, it appears preferable to apply the unjustified enrichment principles instead of providing a strict "necessary expenses are to be reimbursed" rule. It should however be stated that in many situations, where necessary expenses actually correlate with the owner's benefit, the practical results will basically be the same.

Effect where improvement or benefit disappeared or the purpose of expenditure incurred failed from the beginning. The second issue concerns situations where no improvement or benefit exists when the goods are returned to their owner. Under most legal systems following an owner-possessor relationship concept, expenses must be reimbursed if they were "necessary" at the time they were incurred, which is usually assessed by applying an objective standard from an ex ante perspective. As a consequence, expenses must also be reimbursed by the owner (i) where the expenditure originally resulted in an improvement but the benefit is extinguished subsequently (such as in *Illustration 2* below) and (ii) where the possessor could reasonably expect that the expenditure would lead to the intended (necessary) effect, but in fact the efforts failed and no improvement was achieved. Under the unjustified enrichment principles, the owner (enriched person) will certainly not be regarded as being

enriched from the beginning in constellation (ii). In constellation (i), the owner can, provided that he or she is regarded as being enriched "in good faith" (which is the usual case, see Comment B above), raise the defence of disenrichment under VII.–6:101 (Disenrichment) because the positive effect on the property has now disappeared.

Illustration 2
P, in good faith, buys a sailing boat from a thief. After a while, the upper part of the wooden cabin starts leaking and P undertakes the necessary repair measures in order to prevent further damage occurring to the boat. Before the boat's owner O finds it, the cabin is destroyed by fire.

The owner-possessor relationship approach described above would impose on the owner the risk of investments made by another person being unsuccessful. This, again, may be considered to come into conflict with the owner's right to decide what should happen with the assets. The unjustified enrichment approach, on the other hand, puts the possessor into the position he or she would be in if he or she was the true owner (as was actually believed to be the case, if the possession was in good faith): the owner would have to bear the risk of unsuccessful investments. Based on this, one can argue that a possessor in bad faith should certainly not be in a better position. Also, the unjustified enrichment approach will put the risk of accidental loss (in relation to improvements and expenditure) on the party who has physical control over the item, i.e. the possessor. This party, typically, has better possibilities of preventing the occurrence of damage – an argument which, also in other contexts, is quite frequently used in relation to the distribution of risks. The argument, finally, that necessary expenses should always be reimbursed in order to provide an incentive for the possessor to take reasonable preventive measures for the benefit of the owner, will not work where the possessor assumes himself or herself to be the owner (regardless of whether such assumption is made in good faith or in bad faith). Hence, such a rule does not seem to receive sufficient support. Rather, it appears appropriate to apply general unjustified enrichment principles, containing the policy that a subsequent disenrichment is to be taken into account in favour of an enriched person in good faith, also in the context of this Article, where the enrichment consists of expenditures made on corporeal assets.

(c) Possessor actually knowing that goods are owned by another

Different possible solutions. A further policy issue relates to the question of how to deal with a possessor in bad faith, and in particular with possessors who definitely know that they do not own the asset but nevertheless incur expenditure on it, usually for the purpose of improving their own use. The solutions offered to this problem in a comparative perspective are quite different: Under English law, for instance, no reimbursement or equivalent allowance with respect to the owner's tort claim will be granted. In most civil law countries, on the other hand, "necessary" expenses and also "useful" expenses will be reimbursed, partly subject to certain limitations (such as those deriving from references made to the relevant provisions on unjustified enrichment or benevolent intervention). Subjecting the issue to the unjustified enrichment principles of Book VII, as provided for by the main rule in paragraph (1) sentence 1 of this Article, would mean that VII.–2:101 (Circumstances under which an enrichment is unjustified) paragraph (1)(b) comes into play. Under this provision, an enrichment is not "unjustified", which means that no liability under unjustified enrichment law may arise at all, if "the disadvantaged person consented freely and without error to the disadvantage". Under the intended understanding of this rule (cf. VII.–2:101 Comment D), a possessor in bad faith who actually knows that the property does not belong to him or her will fall within the "consented freely and without error" criterion when incurring expenses on that

property. Therefore, such a possessor will never be entitled to any reversal under unjustified enrichment principles and the owner, upon the return of the asset, will be entitled to retain this enrichment without paying any compensation. Alternatively, one could contemplate following the approach of most civil law countries. Based on what has been discussed in subsection (b) above, this could be done by making VII.–2:101 (Circumstances under which an enrichment is unjustified) paragraph (1)(b) inapplicable – unless the possessor really intended to enrich the owner gratuitously – so that all the other unjustified enrichment provisions may apply also where the possessor actually knows that the goods are not his or her property. In principle, this would be compatible with Book VII insofar as VII.–7:101 (Other private law rules to recover) paragraph (3) allows deviations from the rules of Book VII if regarded as suitable by the other Books of these model rules.

Discussion of the two policy choices. The alternative option of excluding VII.–2:101 (Circumstances under which an enrichment is unjustified) paragraph (1)(b) for the purposes of this Article could be supported on the ground that it follows a widespread approach in Europeand by the argument that such a possessor's acts should rather be sanctioned by criminal law, where relevant or trigger liability under the principles of non-contractual liability for damage, where and in so far the owner has sustained a loss. It may be argued that unjustified enrichment law, at least for the present purposes, need not develop any punitive effect. The policy pursued by VII–2:101 (Circumstances under which an enrichment is unjustified) paragraph (1)(b), namely that a disadvantaged person who is in such qualified bad faith incurs expenditures at his or her own risk (cf. Comment D to that provision), will in principle also be pursued by the "saving" cap established by VII.–5:102 (Non-transferable enrichment) paragraph (2). Under this approach, the policy would be to protect the owner economically from being forced into an unwanted transaction. But, where and to the extent that the owner actually derives a benefit, this approach would not exempt the owner from an obligation of reversal just because the disadvantaged party acted with a particular degree of bad faith. In other words, the owner would be prevented from earning a windfall, whereas subjective elements on the possessor's (disadvantaged person's) side would be sanctioned by other means. This kind of approach was originally favoured by the working group preparing Book VIII. Given the comparative law background, this would already have been a compromise between those legal systems which grant a possessor who actually knows that he or she is not the owner full compensation for necessary expenses and those legal systems where such a possessor does not receive any compensation at all.

However, since this approach would mean a deviation from general unjustified enrichment law principles provided by Book VII, it was finally decided not to follow that approach but to solve the issue in full coherence with Book VII, including the special rule of VII.–2:101 (Circumstances under which an enrichment is unjustified) paragraph (1)(b). One main argument, besides the coherence argument, was that this is an issue of public policy, namely of preventing opportunistic claims by people who have spent money for their own purposes with their eyes wide open (the paradigmatic example used in this relation being a thief who incurs expenditure on the stolen property to make the use of it more comfortable). Also, accepting this choice has been made easier by taking into account that the owner must, in certain circumstances (namely when proceeding against the possessor for a monetary equivalent for the latter's use of the goods), give an allowance for certain expenditure even under the unjustified enrichment principles and under the principles of non-contractual liability for damage, which may be employed alternatively. See the next Comment.

How paragraph (1) works technically when applied to a possessor who actually knew of the lack of entitlement when incurring expenditure. The basic effect of the full reference to Book VII including VII–2:101 (Circumstances under which an enrichment is unjustified) paragraph (1)(b) is that a person falling within paragraph (1)(b) has no independent claim for reimbursement of any expenditure incurred while being in possession of the owner's goods. If a thief, or other person actually knowing that the goods are owned by another, incurs expenditure for the primary purpose of serving his or her own benefit, e.g. for the purpose of maintaining the asset in a condition enabling it to be used from then on, or simply to make its possession more comfortable, he or she cannot proceed against the owner under Book VII. The owner, on the other hand, is entitled to vindicate the goods under VIII.–6:101 (Protection of ownership) paragraph (1) or to recover possession of the goods under Book VII. However, if the owner, besides recovering the goods, additionally seeks to recover a payment for the possessor's use of the goods for the period of the unlawful possession, Book VII provides that the owner will not be able to recover such payment – a notional hire fee under VII.–5:102 (Non-transferable enrichment) paragraph (1) – without giving an allowance for the saving obtained from the possessor's expenditure. Technically, this allowance is provided for by the defence of disenrichment in VII.–6:101 (Disenrichment) paragraph (2)(b)(i) because the enriched person (owner) would also have been disenriched even if the enrichment had been reversed (e.g., where the stolen car would also have been serviced or repaired by its owner, or food for a stolen horse would have been bought). If the owner claims under Book VI (instead of proceeding under Book VII), then essentially the same result follows. Under VI.–6:101 (Aim and forms of reparation) paragraph (1), the owner would be put into the position he or she would have been in if the possessor had not deprived the owner of the use of the property. For instance, if the stolen goods needed repair this would mean that the owner would have to be compensated for the lack of use of goods which are not running very well, so that compensation could be calculated as a notional cost of hiring such goods which needed to be repaired or serviced at the lessee's (owner's) expense. In short, the thief will have no independent claim but can deduct the expenditure incurred, to the extent it brings a saving to the owner, from the payments due to the latter.

Practically, however, it may still happen that the approach now chosen in paragraph (1) of this Article assimilates to the one originally favoured by the working group (cf. the previous Comment). Given that according to VII–2:101 (Circumstances under which an enrichment is unjustified) Comment D, an error in the sense of the "consented freely and without error" formula of paragraph (1)(b) of that Article also may be a mistake of law, it may be possible for the possessor to argue that the expenditure was incurred in the mistaken belief that at least necessary expenses must be compensated in any event – which is the rule of law today in many European legal systems.

C. Right to retain, paragraph (2)

General. Many European legal systems provide the possessor with some right to retain physical control over the goods until the right to be reimbursed for expenditure made on the property is satisfied or such performance is tendered. In most of these countries, this right is limited in its scope by either excluding possessors in bad faith in general or by providing exceptions (only) for certain qualified situations, such as where possession was obtained by intentionally committing an unlawful act. In a number of countries, the "legal nature" and, often related to this question, the effects of this right to retain physical control are unclear or disputed. For the purposes of Chapter 7, adopting such a right appears to be perfectly adequate in principle. Given the uncertainties existing in many legal systems, the aim is to offer a proposal with efficient as well as clear-cut effects.

Scope of right to retain, sentence 2. There is a rather clear tendency in civil law jurisdictions to exclude at least possessors in "qualified" bad faith from a right to retain. This Article follows this tendency by limiting the scope of paragraph (2) to possessors who do not know of the owner's entitlement to obtain or recover possession (sentence 2). While also excluding possessors acting with merely negligent ignorance may be considered to constrain this – generally reasonable – instrument of balancing the parties' interests too much and may give rise to numerous disputes about the applicability of such right, excluding a possessor who is perfectly aware of his or her lack of entitlement appears adequate. Given that the reference to Book VII spelled out in paragraph (1) of this Article also covers VII.–2:101 (Circumstances under which an enrichment is unjustified) paragraph (1)(b) by which an independent claim of a person who "consented freely and without error to the disadvantage" is excluded from the outset (and, therefore, cannot be secured by a right of retention under paragraph (2) of the present Article), sentence 2 of this paragraph takes care of cases which are not already absorbed by the named provision. The scope of the two rules does not necessarily converge fully; e.g., sentence 2 of the present Article will also apply where a thief can argue that he or she acted under a mistake of law with regard to the reimbursement of expenses (cf. Comment B, last paragraph, above). Also, the discussion below may be helpful to give a full illustration of the approach originally favoured by the working group with regard to paragraph (1) of this Article. As to substance, excluding a possessor who knows of the owner's entitlement to recover possession from a right to retain the goods may already be supported by reference to the general principle of good faith and fair dealing. The proposed solution does not itself deprive the "knowing" possessor of any right to reimbursement (but see the effect of VII.–2:101 (Circumstances under which an enrichment is unjustified) paragraph (1)(b) as described above). However, it appears more adequate to place on such a possessor the risk of the owner's insolvency (which is, essentially, the substantive subject matter underlying the right to retain) than to expose the owner to the factual risks such retention may imply, especially when being exercised by a person who explicitly showed a readiness to act unlawfully. There may be a risk that such a possessor misuses the right in order to claim unreasonably high reimbursement, or merely pretends to have incurred certain expenditure in order to make use of the asset further on in the dispute, or seeks to alienate the asset to a third party. One should also consider that the effects of a right to retain in the sense of this Article are rather far-reaching. Finally, there is a certain coherency argument relating to the right of set-off (this instrument serves a somewhat comparable function in not only securing, but even discharging mutual obligations), where III.–6:108 (Exclusion of right to set-off) sub-paragraph (c) excludes the right of set-off in relation to a "right arising from an intentional wrongful act". The latter formulation will roughly go in the same direction as the formulation used in this Article. One could put forward a counter-argument against all kinds of restrictions of a right to retain possession, namely that the availability of such right would provide an incentive to incur such expenditures as are absolutely necessary to prevent the goods from sustaining damage – which would finally also be in the interest of the owner. However, this argument is not considered to be strong enough to outweigh the others. A certain pressure not to let the goods deteriorate will already follow from the possessor's liability under the rules on non-contractual liability for damage; cf. VIII.–7:102 (Loss of, or damage to, the goods during possession).

General principle of good faith and fair dealing applies. The availability as well as the modalities of the exercise of the right to retain will furthermore be determined by III.–1:103 (Good faith and fair dealing) which is intended to apply also to the right of retention under paragraph (2). This may, for instance, have the effect that no right to retain may be exercised where the possessor's claim is sufficiently secured by other means and withholding the goods

would be inappropriate under the circumstances. Also exercising the possessor's right of enforcement will be subject to the general duty of acting in accordance with good faith and fair dealing.

Effect of right of retention. In order to provide an effective means of protecting the possessor's interests, hence also putting pressure on the owner to solve any dispute seriously and efficiently, it is proposed that the right conferred on the possessor be a "right of retention" in the sense of IX.–2:114 (Right of retention of possession). The latter rule provides that "where according to agreement or under other law a person is entitled as against the owner of an asset to retain possession of this asset as security for a right to performance, this right of retention of possession gives rise to a possessory security right." Paragraph (2) sentence 1 of the present Article operates to the effect of providing a statutory basis for a right of retention as required by the cited rule. The main consequences of establishing a proprietary security right are, first, that the right is effective also against third persons which may be important to safeguard efficiency. Since the security right is "possessory", registration is not required in order for it to be effective against third parties; cf. IX.–3:102 (Methods of achieving effectiveness) paragraph (2)(a). Second, the possessor ultimately has a right of enforcement, i.e. should the owner constantly refuse to pay due reimbursement, the possessor may sell the goods and have the claim satisfied by the proceeds of the sale. This is regarded as preferable in order to avoid long-lasting stalemate situations. As already mentioned, when it comes to enforcement, particular regard must be given to acting in accordance with good faith and fair dealing, taking account of the statutory nature of this right of retention and all the circumstances of the case.

D. Possessor's right to remove added parts (ius tollendi)

General. Many European legal systems explicitly provide for a right of the possessor to remove corporeal parts which the possessor had attached to the property before (or even after) returning the asset to the owner, provided that thereby no damage is done to the item so that it can be returned to its owner in its previous condition. The rule is founded on a Roman law tradition (the so called *ius tollendi*). In some countries, this right is restricted to certain categories of expenditure ("sumptuary" or "useful" expenses), is unavailable to possessors in bad faith, or is unavailable in so far as the owner can avert the exercise of the possessor's right to remove by compensating the latter for the expenditure. From a policy point of view, there is hardly anything to be said against such a right, provided that the goods sustain no damage. This being the substantive interest of the owner, it should also be immaterial whether the possessor has added these parts in good faith or in bad faith. It is noteworthy that these model rules already provide a similar effect by two general rules. On the one hand, the possessor, as long as ownership of the respective part does not pass to the owner of the "main" item or co-ownership emerges under VIII.–5:203 (Combination), will be entitled to have the added part separated and returned under the general rule of VIII.–6:101 (Protection of ownership); see also Comment D below. On the other hand, unjustified enrichment rules – which are applicable under this Article, cf. Comment B above – provide that the enriched person (the owner) reverses the enrichment by transferring the asset to the disadvantaged person (the possessor) where the enrichment consists of a transferable asset; see VII.–5:101 (Transferable enrichment) paragraph (1). This provision will often apply where corporeal parts are added to the owner's goods. Compare also paragraph (2) of that Article, under which the enriched person may choose whether to transfer the asset or to pay its monetary value if a transfer would cause the enriched person unreasonable effort or expense.

Extent of such right: limitation to situations where possessor remains owner of the part or applicability beyond. Should the possessor's right to remove parts be confined to what already follows from the named general rules – basically meaning that the possessor can remove what the possessor still owns – or should it go beyond that. In the former case, spelling out a *ius tollendi* explicitly in the black letter text would mean nothing more than repeating general principles; in the latter case, this would mean establishing a special right to (re-)acquire ownership by separation (or occupation after separation). The whole issue appears to be only little or even not discussed at all in many legal systems. However in Germany, for instance, the latter concept applies. When discussing this issue under the framework of these model rules, one must be aware of the fact that the scope of an "additional" right of removal in the sense of the re-acquisition of ownership would be rather limited in practice. It could vest an additional option in the possessor only where physical separation of the part would be possible, but "economically unreasonable" in the sense of VIII.–5:203 (Combination) – since the possessor would otherwise be protected anyway by being the owner of the parts – and the owner's goods could still be returned to the latter in their previous condition. Therefore, exercising such a right, where possible at all, would rarely be efficient for the possessor. One should also take into account the policy of VII.–5:203 (Combination) which intends to preserve new entities where dividing them would be economically inefficient. In that respect, offering a "broad" *ius tollendi* would create a problem of coherence, because one would have to explain why such a right to separate the entity should be allowed within the scope of Chapter 7, i.e. where the person is "in possession" of the combined entity, having added a part thereto, but not as a general rule applicable to all situations covered by VIII.–5:203. Such a specific justification can hardly be found. Taking into account the interests of the parties, one may first say that demounting parts under circumstances where this is already qualified as "economically unreasonable" could be quite likely to run against the interests of the owner of the "principal" goods since there may well be a certain risk of these goods sustaining damage. On the other hand, where the owner is also interested in having these additions removed, the owner will be able to reach this result by the operation of VII.–5:101 (Transferable enrichment), in which case the interests of both parties converge. Second, when taking the perspective of the possessor, VIII.–5:203, in providing a monetary claim secured by a proprietary security right, offers quite efficient protection in many situations. The problem that this claim for compensation would be considerably lower than the possessor's expenditure due to the "saving" cap introduced by the unjustified enrichment principles (see Comment B above) should not arise. This kind of limitation is only provided for "non-transferable" enrichments in the sense of VII.–5:102 (Non-transferable enrichment). Where a *ius tollendi* is discussed, however, the enrichment will always be a "transferable" one, and VII.–5:101 (Transferable enrichment) does not provide a saving cap. Rather, the monetary value of the enrichment must be transferred (VII.–5:101 paragraph (2)). This obligation, as mentioned above, will be secured by a security right under VIII.–5:203 (Combination) paragraph (2). It is therefore proposed that no right of removal in excess of what is provided by the other general rules of Books VII and VIII is needed. Against this background, there is also a clear decision against providing the owner with a right to avert the possessor's exercise of the (remaining) right to remove his or her property by refunding the value of the expenditure (cf. the overview in Comment D above), because this would force the possessor into an exchange without consent.

Right implicitly accepted, but no need for explicit regulation. Based on the foregoing analysis, it is proposed that there is no need to spell out a *ius tollendi* explicitly in the black letter text. Where the possessor remains the owner of the added part, it already follows from VIII.–6:101 (Protection of ownership). It may also follow from another rule of law, such as VIII.–6:301 (Entitlement to recover in case of better possession), provided that the possessor

has a better right to the respective part than the owner of the goods that are to be returned. Although the black letter text remains silent about the issue, it is intended that the act of removing the part – which, in many cases, practically presupposes laying one's hands on the owner's property – does not in itself constitute an unlawful infringement of the owner's property right.

Illustration 3
P, who possessed a car without entitlement and must return it to its owner O, has fitted new tyres on to the car. Since removing the tyres is not "economically unreasonable" in the sense of VIII.–5:203 (Combination), P remains the owner of the tyres and is allowed, under the principle expressed by VIII.–6:101 (Protection of ownership), to remove the tyres before returning the car to O. Of course, P would have to return the car with the old tyres (or tyres of an equivalent standard and condition) on the wheels.

NOTES

I. Overview

1. With regard to the reimbursement of expenses, many countries distinguish according to, first, the possessor's good or bad faith, and second, whether the expense can be classified as "necessary", "useful" or "sumptuary" (see Notes 2-7). In other countries, no such differentiation is made as a matter of principle (see Notes 8-10).

2. Under BELGIAN law, necessary expenses as well as useful expenses have to be reimbursed to the possessor in good faith. Regarding useful expenses, only the enrichment has to be reimbursed. Maintenance costs are usually covered by the revenues the goods produce and do not have to be reimbursed. Also in GERMANY, the possessor in good faith is entitled to claim reimbursement of all necessary expenses, with the exception of ordinary costs of maintenance incurred during the period in which the benefits were enjoyed. The possessor in good faith can also claim compensation for useful expenses, provided that the increase in value still exists at the moment of restitution. In AUSTRIA, both useful and necessary expenses have to be reimbursed in so far as the possessor in good faith does not obtain the benefits anyway; with regard to useful expenses, the objective increase in value has to be compensated. The same holds true for SPAIN. As far as useful expenses are concerned, the owner has the option to either reimburse the amount of the costs or to pay a sum equivalent to the increase in value. In GREECE, the possessor in good faith has the right to claim reimbursement of necessary and useful expenses as well as expenses made for the discharge of burdens encumbering the goods. The possessor cannot claim an amount higher than the enrichment, or an amount higher than the sum of the incurred expenses. Under HUNGARIAN, SLOVENIAN and SWISS law, the rightful owner has to reimburse all the necessary and useful expenses to the possessor in good faith. However, the fruits and other benefits enjoyed by the possessor during possession have to be deducted from the amount of compensation. In SLOVENIA, luxury expenses only have to be reimbursed if they have contributed to the total value of the goods. Also in LITHUANIA, all expenses incurred in relation to the thing, which have not been covered by the income received from it, have to be reimbursed. In the NETHERLANDS, the possessor in good faith is entitled to claim reimbursement of all expenses; however, the judge may reduce the amount of compensation when full compensation would result in an unreasonable benefit for the

possessor. The expenses have to be reimbursed in so far as they have not already been covered by the benefits enjoyed during possession.

3. Under ITALIAN, PORTUGUESE and CZECH law, the necessary expenses have to be reimbursed to the possessor in good faith according to the rules on unjustified enrichment. In ITALY, the possessor in good faith is also entitled to the reimbursement of extraordinary expenses and for improvements; the amount of compensation is equal to the increase in value of the goods. In PORTUGAL, useful expenses have to be reimbursed, if the removal of the relevant parts is impossible. In ESTONIA, the possessor in good faith is entitled to claim reimbursement of necessary expenses, unless possession was obtained by way of an arbitrary act. Other expenses (useful and luxury) may be reimbursed if the requirements of unjustified enrichment are met.

4. Under SPANISH, LITHUANIAN and CZECH law, the possessor in bad faith is only entitled to claim reimbursement of necessary expenses. The same rule applies in SWITZERLAND, provided that the rightful owner would have incurred these expenses too.

5. In SLOVENIA, the possessor in bad faith has a right to claim reimbursement of necessary expenses as well as the useful costs, provided that these costs also benefit the owner. Under BELGIAN law, the necessary expenses as well as the useful expenses have to be reimbursed to the possessor in bad faith. Regarding useful expenses, only the enrichment has to be reimbursed. In ESTONIA, necessary expenses are reimbursed to the possessor in bad faith, unless the possessor obtained possession as a result of an arbitrary act; whereas the reimbursement of useful and luxury costs is subject to the provisions on unjustified enrichment.

6. Under DUTCH and HUNGARIAN law, the possessor in bad faith may, as a general rule, claim reimbursement of expenses incurred on the goods according to the rules on unjustified enrichment. Also in ITALY, necessary and extraordinary expenses have to be reimbursed to the possessor in bad faith according to the rules on unjustified enrichment. With regard to improvements, the possessor in bad faith has a right to reimbursement equalling either the increase in value of the goods or the expenses incurred, whichever sum is lower. In PORTUGAL, the necessary expenses have to be reimbursed to the possessor in bad faith according to the rules on unjustified enrichment; useful expenses have to be reimbursed, if their withdrawal is impossible.

7. In GERMANY, AUSTRIA and GREECE, the possessor in bad faith is entitled to reimbursement of expenses under the rules on benevolent intervention in another's affairs.

8. The rules on expenses in FINLAND are scattered across fragmentary acts of legislation and most of the rules are suggestions made in legal literature. This means that there is no specific regulation of the issue of expenses incurred on goods during possession (Faber/Lurger [-*Kuusinen*], National Reports V: Finland, 76).

9. There are no rules on this matter in NORWAY and SWEDEN, and it is therefore unclear whether a possessor may be reimbursed for expenses incurred on the goods during possession. A claim might, however, be successful on the basis of the rules on unjustified enrichment (for NORWAY, see Rt 1956, 1242 and *Hagstrom/Aarbakke*, Obligasjonsrett, 436; for SWEDEN, compare section I of the Notes on VIII.–7:103).

10. In ENGLAND and WALES, as well as in IRELAND, the issue of improvements of and expenses incurred on the goods by the possessor is primarily dealt with in a tort law context. See sections III and IV of these Notes.

II. Expenses

11. The 'costs' to which the DUTCH CC arts. 3:120-121 refer are costs that have really been incurred at the expense of the possessor (HR 7 oktober 1994, NJ 1995, 62). Under the regimen of the old civil code, a distinction was made between *impensae necessariae, utiles et voluptuosae*, i.e. costs necessary for the preservation of the goods, useful costs and embellishment costs: this distinction was not been repeated in the new civil code of 1992. In principle, the reimbursement of all costs can be claimed, even if they did not enrich the owner, but in the case of costs which did not lead to a direct increase in the value of the thing the court may reduce the reimbursement (*Schoordijk*, Vermogensrecht in het algemeen naar Boek 3 van het nieuwe B.W., 390; Parl.Gesch. Boek 3, 450).

12. Under BELGIAN law, necessary expenses are those that are necessary for the preservation of the goods (e.g. insurance premiums, repair costs, taxes); useful expenses are those, which have resulted in an increase in the value of the goods. Luxury expenses are those that are made from mere personal choice and only have a subjective utility (*De Page*/*Dekkers*, Traité VI, no. 149). Legal scholars usually add another category of costs: maintenance costs (*Hansenne*, Les biens, no. 675; *De Page*/*Dekkers*, Traité VI, no. 152).

13. NORWAY distinguishes between necessary maintenance costs and other expenses. Necessary maintenance costs are those expenses, the incurring of which is necessary in order for the possessor to be able to use the movable as intended (Faber/Lurger [-*Færstad*], National Reports V: Denmark/Norway, 82).

14. FINLAND recognises three types of expenses; necessary, useful and luxury expenses incurred on the movable. Necessary are those expenses, which are needed to maintain the property – expenses that a responsibly acting person would not have neglected to incur – whereas useful expenses are those which increase the value of the property. To be considered a useful expense, the improvement has to be "significant". Luxury expenses are costs incurred from mere personal choice , only benefiting the individual incurring them (Faber/Lurger [-*Kuusinen*], National Reports V: Finland, 76 ff).

15. SWISS law differentiates between three kinds of expenses: (1) necessary expenses are those which have to be incurred for the purposes of the preservation of the object's value and utility, as well as for its proper exploitation (CC art. 647*c*; e.g. repair of a car's brakes, provision of food for an animal); (2) useful expenses are those which, without being necessary, increase the value of the object or improve its performance and utility (CC art. 647*d*; e.g. restoration of a painting); (3) luxury expenses are merely aimed at embellishing the object or at making its use more comfortable (CC art. 647*e*; e.g. coating a couch with new fabric, while the old one is still in a good condition). Generally, expenses are costs incurred on goods in order to maintain, repair, modify or embellish them, costs incurred in paying charges relating to them (payment of taxes, mortgage interest), or costs incurred to protect them (payment of insurance fees). However, the expenses could also be made *in natura* or take the form of work done on the goods (*Steinauer*, Les droits réels I[4], nos. 509-510).

16. PORTUGUESE law recognises three different categories of expenses: necessary, useful and sumptuary (CC art. 216). The first category includes expenses that are necessary to prevent the loss, destruction or deterioration of the thing, the second category is made up of expenses that do not qualify as necessary but increase the value of the thing, and sumptuary expenses are those not qualifying as necessary or useful, having been incurred by the possessor from mere personal choice.

17. AUSTRIAN CC §§ 331, 332 differentiate between three types of expenses: Necessary expenses (*notwendige Aufwendungen*) are indispensable for the preservation of the property. Useful expenses (*nützliche Aufwendungen*) are not necessary, but result in a durable improvement of the profitability. Luxury expenses (*Luxusaufwendungen, Verschönerungsaufwand*) do not result in any objective increase in value.

18. ESTONIAN GPCCA § 63 also defines three types of expenses. The expenses are (a) necessary, if the object is thereby preserved or protected from complete or partial destruction; (b) useful, if the object is thereby significantly improved; (c) sumptuary, if the main objective thereof is to improve the the comfort, amenity or beauty of the object.

19. Under SLOVENIAN law, one can distinguish between necessary costs for the maintenance of goods, beneficial costs increasing the value of the movable and costs incurred for the pleasure of the possessor or for the purpose of decorating the goods (Code of Property Law arts. 95-96).

20. The GREEK CC distinguishes between the following categories of expenses: (1) necessary expenses, which are expenses incurred in order to maintain the goods in a condition adequate for their proper use (CC art. 1101; e.g. the provision of food for animals, repairs done to a house, painting a boat); (2) expenses incurred for the settlement of charges encumbering the thing (CC art. 1101); (3) useful expenses, which are expenses, as a result of which the value of the thing was increased (CC art. 1103); (4) sumptuary expenses, which are expenses made for special aesthetical reasons (*Spyridakis*, Property Law 3, 177).

21. GERMAN law distinguishes between necessary expenses (*notwendige Verwendungen*) and other expenses increasing the value of the goods (*sonstige wertsteigernde (nützliche) Verwendungen*). Necessary expenses are measures needed to maintain the object or repair it, or measures required for an adequate utilisation of the goods (e.g. necessary repairs, periodically incurred maintenance costs such as expenditure for animal food, car service). It is a matter of dispute whether work performed by the possessor personally should be considered as an expense. Case law considers valuable manpower as a cost, which may be reimbursed by the owner (BGH 24 November 1995, NJW 1996, 921; BGH 24 June 2002, NJW 2002, 2875), whereas a more restrictive approach is followed in legal writing by accepting manpower as an expense only in a limited number of situations subject to the fulfilment of some additional requirements (Soergel [-*Stadler*], BGB[13], § 994, no. 2: provided that the possessor would have incurred the expense also in any other way; see *Schwab/Prütting*, Sachenrecht[30], no. 551 for more references). Useful expenses are those, which result in an objective increase in value (*Schwab/Prütting*, Sachenrecht[30], no. 554). It is a matter of dispute whether measures changing the original state of the object exclusively have to be considered as expenses in the sense of CC §§ 994 and 996. The Supreme Court had to deal with this question in a case where a building was constructed on an undeveloped piece of land. The court decided that such costs are not covered by the notion of "expenses" and rejected the claim based on unjustified enrichment (BGH 26 February 1964, NJW 1964, 1125; confirmed by BGH 29 September 1995, NJW 1996, 52). It has been argued in legal writing that this decision implies a far-reaching protection of the owner's interests to the disadvantage of the possessor in good faith. The notion "expenses" is interpreted in a broad way and includes all expenditures which benefit the goods and increase their value (*Schwab/Prütting*, Sachenrecht[30], no. 555; Bamberger/Roth [-*Fritzsche*], BGB[2] II, § 994, no. 21).

22. ITALIAN law distinguishes between expenses incurred for the production and yielding of fruits (CC art. 1149), the costs of ordinary acts of maintenance (CC art. 1150(4)) as well as extraordinary expenses (CC art. 1150(1)), and improvement costs (CC art. 1150(2)).

23. SPANISH law knows the concept of 'expenses' as opposed to 'improvements'. Expenses are the costs incurred on a thing; improvements refer to the actual increase in the value or utility of a thing. There may be expenses which do not result in improvements; similarly, there may be improvements which are not the consequence of the incurring of any expenses (e.g. improvements having arisen naturally). The legal regulation governing both of them is, however, the same in many respects. Necessary expenses are those which are indispensable for the preservation of the thing, so that neglecting to incur them would result in the destruction or deterioration of the thing. They also include expenses needed to maintain the productivity of the goods (STS 28 February 1968, RJ. 1391; STS 4 April 1968, RJ. 2034; STS 4 March 1960, RJ. 947), as well as the payment of taxes and public contributions (STS 27 January 1975, RJ. 263; STS 10 April 1956, RJ. 1927). Useful expenses or improvements are those which, not being necessary, contribute to an increase in the profits or the value of the thing. Luxury expenses or improvements are those which serve to adorn or embellish the thing, or to provide more comfort or a better use (Faber/Lurger [-*González Pacanowska/Díez Soto*], National Reports V: Spain, 94).

24. Under SCOTTISH law, expenses are only subject to reimbursement if they are not, so to say, of a "fanciful sort", or are only "suited … to the particular taste and humour of the late possessor" (*Hume*, as cited in *Reid*, The Law of Property Law in Scotland, 141). There must be a value added to the movable and the expenses recoverable are those classified as necessary and profitable. Necessary are those expenses that typically enrich the owner in the form of a saving and are described by Rankine as "outlay necessary for the upkeep of the subject" (*Rankine*, The Law of Land-ownership in Scotland[4], 88, n 64). "Useful" or "profitable" are those expenses that are not necessary, like those incurred when upgrading or repairing a thing which is in a state of neglect (Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 183), provided there is a value added to the movable.

25. Under CZECH law, there is no legal basis for compensation claims beyond necessary expenses. Only necessary expenses have to be reimbursed based on the rules of unjustified enrichment (CC section 458(3)). Necessary expenses are useful costs of maintenance incurred when possessing the thing. Regarding reimbursement for improvements, there is only one court decision: the court ruled that the amount of compensation payable is equal to the difference between the value of the thing before and after the improvement was made (Faber/Lurger [-*Tichý*], National Reports VI: Czech Republic, 72).

26. Under SWEDISH law, there are no generally applicable categories of expenses. In some statutes, however, such categories are used. The term "reasonable" (*försvarliga*) costs appears in Sale of Goods Act (*Köplagen*) and the term "necessary" in chap. 11 § 3 and chap. 12 § 8 *Handelsbalken*. The Bankruptcy Act uses the terms "necessary or useful" (*nödvändig eller nyttig*) (*Konkurslagen* chap. 4, § 15).

27. CYPRUS law does not appear to provide any categories of expenses.

III. Reimbursement in the case of possession in good faith

28. In BELGIUM, only the necessary and useful expenses must be reimbursed, regardless of whether the possessor is in good or bad faith, while luxury expenses do not have to be reimbursed. Regarding necessary expenses, it is argued that the owner would also

have incurred these costs if the owner had remained in possession of the goods. Even if the benefit of these expenses had disappeared due to *force majeur*, the costs have to be reimbursed. With regard to useful expenses, the owner would perhaps not have incurred these expenses, but gets back a movable which is now more valuable. Hence, according to the principles of unjustified enrichment, the owner has to reverse the enrichment (the additional value). The additional value is not assessed at the moment when the costs have been incurred, but at the date when the owner reclaims the goods (*De Page*/*Dekkers*, Traité VI, no. 150). Maintenance costs are usually covered by the revenues that the goods produce, and since the possessor in good faith is entitled to keep the fruits yielded up to the moment of the introduction of the action of revindication (see note 32 to VIII.–7:103), it is considered logical to burden such a possessor with the maintenance costs (*Hansenne*, Les biens, no. 675; *De Page*/*Dekkers*, Traité VI, no. 152). With regard to restitution after the retroactive termination of a translative agreement, the restitution debtor may not claim any reimbursement for an increase in value of the object that has resulted solely from economic developments (*Starosselets* T.B.B.R. 2003, 67, no. 24). The debtor can, however, claim reimbursement for the improvements that were effected by the debtor's activity, regardless of good or bad faith. (*De Page*, II, no. 828; *Starosselets*, T.B.B.R. 2003, 67, no. 24; *contra*: *Hansenne*, no. 721).

29. If the property is held in good faith in FINLAND, the possessor has the right to be reimbursed for improvements that are considered necessary or useful. The owner does not have the obligation to reimburse luxury expenses incurred on the movable. The rules on how to calculate the reimbursement sum payable are somewhat unclear and are particularly open for discussion when useful expenses are concerned. The possessor can nevertheless only claim the difference between the expenses incurred and the benefits acquired during possession (Faber/Lurger [-*Kuusinen*], National Reports V: Finland, 76 ff).

30. In GERMANY, the possessor in good faith is entitled to claim reimbursement of all necessary expenses, with the exception of ordinary costs of maintenance incurred during the period in which the benefits were enjoyed (CC § 994(1)). It is not required that the expense also actually benefits the rightful owner; e.g. if the possessor brought an injured racehorse to a veterinary surgeon to be cured, this was a necessary cost, although the horse is still paralysed. Also, if the result of the incurring of the necessary expenses disappears after a while, reimbursement is nevertheless due; e.g. if the roof of a house has been repaired and the house burns down subsequently, the repair costs have nevertheless to be reimbursed (*Wieling*, Sachenrecht I[2], § 12 V 4 a). If the possessor is entitled to keep the benefits, reimbursement of the ordinary costs of maintenance cannot be claimed. It is not possible for the possessor to prove that the sum of the expenses incurred is higher than the benefits enjoyed, or that the benefits were not enjoyed at all; for instance, the possessor who never drove the car possessed cannot claim reimbursement of the road tax that he or she paid (*Wieling*, Sachenrecht I[2], § 12 V 4 a aa). The possessor in good faith may also claim reimbursement of expenses, which have increased the value of the goods (useful expenses), provided that the increase in value still exists at the moment when the property is restored to its owner (CC § 996). Expenses incurred on whim, which do not increase the value of the object, do not have to be reimbursed (*Schwab/Prütting*, Sachenrecht[30], no. 554). Regarding expenses incurred after the initiation of the legal proceedings, CC § 994(2) provides that the possessor in good faith only has a claim for reimbursement according to the rules on benevolent intervention in another's affairs (*Geschäftsführung ohne Auftrag*; CC §§ 683-684). Hence, the real or presumed intention of the rightful owner is decisive. However, the intention of incurring expenses is often accepted regarding

necessary expenses, as it is seen as generally being in the interest of the owner (*Schwab/Prütting*, Sachenrecht[30], no. 553). If the requirements set forth in CC § 683 are not fulfilled, the possessor can, according to CC § 684, claim compensation on the basis of the provisions on unjustified enrichment (*Wieling*, Sachenrecht I[2], § 12 V 5; Soergel [-*Stadler*], BGB[13], § 994, no. 9). *Gursky*, on the other hand, takes the view that the rules on unjustified enrichment do not apply in this case. CC § 994(2) only refers to benevolent intervention in another's affairs, not to unjustified enrichment (Staudinger [-*Gursky*], § 994, no. 26). With regard to useful expenses, the possessor who already received the service of process is not entitled to claim compensation. The owner's enrichment is considered to be justified. The legislator explicitly stated that the application of the unjustified enrichment rules is to be excluded (*Wieling*, Sachenrecht I[2], § 12 V 6).

31. Under AUSTRIAN law, a possessor in good faith is entitled to reimbursement of necessary and useful expenses (CC § 331; see note 21 to VIII.–7:102 for a definition of the good faith possessor). There are two limitations: First, the possessor is not entitled to more than was expended. Second, the possessor may only claim reimbursement in so far as the improvement still exists. The underlying principle is that the risk of subsequent loss of the improvement is placed on the possessor who, in good faith, believes he or she is the owner and therefore faces the same risks as an owner (*Iro*, Sachenrecht[3], no. 7/8; OGH 9 July 1997, SZ 70/136 (immovable property)). As far as useful expenses are concerned, the prevailing opinion states that the objective increase in value is decisive, not the owner's subjective preferences (OGH 9 July 1997, SZ 70/136; Kletečka/Schauer [-*Lurger*], ABGB, § 331, nos. 1 f; Rummel [-*Spielbüchler*], ABGB I[3], § 331, no. 1; contrary *Koziol/Welser*, Grundriss I[13], 347). It is also assumed that the possessor is entitled to reimbursement of the expenses only in so far as these have not already been covered by the fruits the property produced and other benefits derived from it (Kletečka/Schauer [-*Lurger*], ABGB, § 331, no. 1; Rummel [-*Spielbüchler*], ABGB I[3], § 331, no. 1). Consequently, expenses which do not lead to an objective increase in value (luxury expenses) are not to be reimbursed.

32. Under SPANISH law, the possessor in good faith can claim reimbursement of the necessary expenses (CC art. 453(1)). The rightful owner cannot choose to pay the increase in value instead of the amount of expenses incurred (STS 14 April 1998, RJ. 2145). Useful expenses also have to be reimbursed to the possessor in good faith. In relation to these expenses, the rightful owner has an option to either reimburse the costs or to pay the possessor a sum equivalent to the increase in value of the goods (CC art. 453(2)). Reimbursement does not have to be made for improvements which did not result from expenses incurred by the possessor (CC art. 456), or for improvements which have ceased to exist at the time the rightful owner takes the goods back (CC art. 458). Mere luxury expenses need not be refunded (Faber/Lurger [-*González Pacanowska/Díez Soto*], National Reports V: Spain, 95).

33. Under GREEK law, the possessor in good faith has the right to claim reimbursement of expenses incurred before the bringing of the legal action (CC art. 1101). This applies to necessary expenses, expenses made for the settlement of charges encumbering the asset and useful expenses. Sumptuary expenses are not reimbursed (Faber/Lurger [-*Klaoudatou*], National Reports III: Greece, 151). According to the prevailing opinion, the amount of reimbursement is calculated according to the following criteria: the possessor cannot claim a higher amount than the enrichment, or a higher amount than the sum of the expenses incurred (*Filios*, Property Law, 259; *contra*: *Georgiadis*, Property Law I, 609). From *Georgiadis*' point of view, there are two ways to proceed with the calculation: an abstract calculation and a calculation in

connection to the function and position of the goods in the owner's estate. Regarding expenses incurred after the initiation of the legal proceedings, the CC art. 1102 provides that a possessor in good faith only has a claim for reimbursement according to the rules on benevolent intervention in another's affairs (*Georgiadis*, Property Law I, 612-613; *Spyridakis*, Property Law 3, 177γα ff). The reimbursement is limited to the necessary expenses and the expenses incurred for the settlement of charges encumbering the thing (CC art. 1102).

34. Under HUNGARIAN law, the possessor in good faith may claim the reimbursement of necessary expenses, as well as useful expenses that have not been covered by the benefits the possessor received. Reimbursement has to be paid, even if the costs incurred do not appear to have enriched the rightful owner (Faber/Lurger [-*Szilagyi*], National Reports III: Hungary, 95).

35. Under SLOVENIAN law, the good faith possessor is entitled to a reimbursement of all costs that have been necessary for the maintenance of the movable (Code of Property Law art. 95/III) and can also claim the reimbursement of all useful costs that have contributed to an increase in the value of the movable (Code of Property Law art. 95/IV). These claims for reimbursement are set off against the benefits that the possessor has obtained from the movable (Code of Property Law art. 95/V). Costs incurred by the good faith possessor on whim or for the purposes of the embellishment of the movable are only reimbursed if they have increased the overall value of the goods (Code of Property Law art. 95/VI).

36. According to the SWISS CC art. 939(1), the possessor in good faith is entitled to claim reimbursement of all necessary and useful expenses. However, fruits and other benefits derived by the possessor during possession have to be deducted from the reimbursement sum (CC art. 939(3); *Steinauer*, Les droits réels I[4], nos. 511-511a; Honsell [-*Stark*], Basler Kommentar[2], art. 939, no. 6). The actual expenses incurred on the goods have to be reimbursed, not the increase in value of the goods at the moment of restitution. The reimbursement should also cover the interest payable on the sum of the expenditure as from the moment it was incurred (*Steinauer*, Les droits réels I[4], nos. 511b; Honsell [-*Stark*], Basler Kommentar[2], art. 939, nos. 4-5).

37. In LITHUANIA, where the thing is revindicated according to the rules of property law, the possessor in good faith has the right to claim compensation for all expenses incurred in relation to the thing which have not been covered by the income received from the thing. If the parts added as improvements cannot be separated, or when the thing was improved in a different way, the possessor in good faith has the right to claim reimbursement of expenses resulting from such an improvement, though this cannot exceed the increase in value of the thing (CC art. 4.97). Equally, in the event of the restitution of the goods according to the rules of the law of obligations, the expenses for the care and custody of the goods incurred by the person who is bound to return the property are to be reimbursed in accordance with the provision of the CC art. 4.97 regarding the revindication of a thing (CC art. 6.150).

38. The DUTCH CC art. 3:120(2), first sentence, provides as a general principle that the good faith possessor should be compensated for all expenses incurred on the goods (see note 31 to VIII.–7:103 as to the definition of a good faith possessor). The goods may have been repaired, improved or maintained. It is also possible that the possessor had to pay compensation for damage caused to a third person or incurred costs in bringing an action to recover the goods. It is not important whether or not the rightful owner is enriched or benefits from such costs (*Pitlo*, Goederenrecht[12], no. 395). However, the judge may reduce the amount of reimbursement when full reimbursement would result in an unreasonable benefit to the possessor; for instance,

where the costs of repairing the damage suffered by the possessor could be covered by insurance (*Pitlo*, Goederenrecht[12], no. 395). The unreasonable benefit has to be proved by the rightful owner and must be evaluated in the context of the relationship between possessor and owner. (Nieuwenhuis/Stolker/Valk [-*Rank-Berenschot*], B.W.[3], art. 3:120, no. 3). Furthermore, CC art. 3:120 (2) states that costs and other damage have to be reimbursed in so far as the possessor has not been reimbursed yet by the fruits and other benefits that derived from the possession. The owner can be freed from the obligation to reimburse by transferring the property to the possessor, who is obliged to cooperate (*recht van abandon*; CC art. 3:122).

39. In SWEDEN, a possessor who has to return a movable to a bankruptcy estate has a right of reimbursement provided that there are no particular reasons against granting the possessor such a right (chap. 4 § 15 *Konkurslagen*). In principle, this rule applies equally to possessors in good faith and possessors in bad faith. As to the latter, see further section IV of these Notes. Outside the scope of application of the Bankruptcy Act, there are some rules giving the possessor a right to retain as long as the possessor has a right of reimbursement. There is no requirement of good faith in the Sale of Goods Act: If the possessor has owed a duty to take care of the movable and has had to incur expenses by virtue of this duty, he or she also has a right to retain the movable until the expenses have been reimbursed (*Köplagen* § 75; see Karnov [-*Herre*] 2006/07, 568 note 307-308). But, if there are costs of storage, necessary expenses incurred on the movable during storage or useful expenses incurred with the consent of the person handing over the movable for storage, the possessor has to believe in good faith that the person handing over the movable has a right to do so (*Handelsbalken* chap. 12 § 8; Karnov [-*Herre*] 2006/07, 499 note 20). If a movable has been handed over to be repaired, the possessor has a right of retention, if the repairer believed in good faith that the person handing over the movable was the owner of it (*Håstad*, Sakrätt avseende lös egendom[6], 72; NJA 1936 s. 650 and NJA 1948 s 10). However, in relation to necessary costs there is no good faith requirement (*Håstad*, Sakrätt avseende lös egendom[6], 72 f and NJA 1987 s. 312).

40. In SCOTLAND, a right to reimbursement of expenses presupposes that the possessor has expected to benefit from the improvements, either permanently or at least for a substantial period of time and has been disappointed in that expectation. This excludes possession with so short a term to run that donation to the owner must necessarily have been presumed (*Reid*, The Law of Property in Scotland, 141). Reimbursement will be awarded to the extent of the owner's enrichment by the time the owner resumes possession, or when good faith ceases, whichever occurs earlier, but is limited to the loss suffered by the possessor (*Bell*, Principles of the Law of Scotland[10], § 538). The enrichment is assessed objectively. The recoverable expenses are those classified as necessary and useful, or profitable (Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 183 f).

41. In ITALY, expenses incurred in the production and yielding of fruits (CC art. 1149) and costs of ordinary maintenance (CC art. 1150(4)) have to be reimbursed to the possessor, who is obliged to restitute the fruits (i.e. the possessor in good faith from the date of the *vindicatio*; see note 38 to VIII.–7:102) not exceeding the value of the fruits which are owed to the owner. The reimbursement is based on the principles of unjustified enrichment. The possessor is also entitled to the reimbursement of extraordinary expenses (CC art. 1150(1)), because the incurring of these expenses benefits the owner. Regarding improvements, the possessor in good faith has a right to a reimbursement equal to the increase in value of the goods (CC art. 1150(2)).

42. In ENGLAND and WALES, when the possessor acted in the mistaken but honest belief that he or she had good title to the movable then an allowance should be attributable to the possessor when damages are being assessed (TIGA 1977 Act s.6(1)). This allowance is available also to the good faith possessor who did not improve the movable him- or herself. The rationale for the granting of such an allowance is that the possessor paid a price that reflects the value of the improvements made to the movable by the former possessor (TIGA 1977 Act s.6(2) and Faber/Lurger [-*Frisby/Jones*], National Reports II: England and Wales, 10).

43. In IRELAND, if the possessor has acted in the mistaken but honest belief that he or she had a right to the goods, an allowance will be made for the amount of the expenditure incurred for the purpose of making the improvement. The assessment will be made at the time of the conversion rather than at the time of the judgment (Faber/Lurger [-*Gardiner*], National Reports II: Ireland, 84 f and *Greenwood v Bennet* (1973) QB 195). Even the buyer of a stolen movable who improves it or spends money on its preservation may have some remedies (Faber/Lurger [-*Gardiner*], National Reports II: Ireland, 101). If the movable is somewhat unique and not an ordinary article of commerce replaceable in the market, the court will order specific redelivery and consequential damages. In these cases, it is suggested that the court will order the reimbursement of the improver to the extent of the costs incurred on the improvement (*Greenwood v Bennett* (1973) 1 QB 195). Another case suggests that where the court orders the return of a movable, the possessor is entitled to a fair and just allowance for the improvement of the movable while it was possessed (*Webb v Ireland* (1988) IR 353). Such allowance should not be ordered, according to two legal scholars, if the result were that the owner had to sell the movable in order to pay the allowance (*Palmer and Hudson*, Improving stolen chattels in Palmer & McKendrick, Interests in Goods, chap. 36). Where the movable is not unique, the court will order damages and may then order a credit for the improvements the buyer made (Faber/Lurger [-*Gardiner*], National Reports II: Ireland, 101 f).

44. In PORTUGAL, the possessor in good faith as well as the possessor in bad faith has the right to receive reimbursement of necessary expenses. Regarding useful expenses, both the good and the bad faith possessor have the right to remove their improvements, provided that they can be removed without causing damage to the movable thing (CC art. 1273). If removal is impossible, the useful expenses have to be reimbursed to the possessor (Faber/Lurger [-*Caramelo-Gomes*], National Reports IV: Portugal, 97). The amount of reimbursement is calculated according to the rules on unjustified enrichment provided by CC art. 479. Sumptuary expenses are not subject to compensation. Only the possessor in good faith is entitled to undo the effects of incurred expenses, in so far as this is possible without causing damage to the movable (CC art. 1275).

45. In the CZECH REPUBLIC, the possessor has a right to claim compensation for necessary expenses, based on the rules on unjustified enrichment (CC § 458(3)). Good faith is not a requirement (Faber/Lurger [-*Tichý*], National Reports VI: Czech Republic, 73).

46. In ESTONIA, the right of the possessor, who has to restore the thing to its rightful owner on the basis of PropLA § 80 (claim of the owner against anyone possessing a thing belonging to him without a legal ground), to receive reimbursement of expenses incurred is regulated in PropLA § 88. According to the first paragraph, the possessor is entitled to claim reimbursement of the necessary expenses incurred on the thing, unless possession was obtained by way of an arbitrary act. Other expenses (useful and sumptuary) may be reimbursed if the requirements set forth by LObligA § 1042

(unjustified enrichment) are met. According to this provision, the possessor may demand reimbursement of the costs to the extent to which the owner has been enriched, taking into consideration, *inter alia*, the question of whether such costs are useful for the owner and in accordance with the owner's intentions with regard to the thing in question. In cases where the goods have to be restored because the contract is void or avoided, the transferee (possessor) is entitled to claim reimbursement of incurred costs, unless he or she knew or should have known, at the time of transfer, about the circumstances constituting a basis for restitution pursuant to the provisions on unjustified enrichment, or where the costs were incurred after he or she became aware, or should have become aware, of such circumstances (Faber/Lurger [-*Kullerkupp*], National Reports I: Estonia, 109).

47. In CYPRUS, there appears to be no general rule on the matter but the question is dealt with within the scope of the issue of void contracts. Where a contract is declared void, the person who has improved the property during possession has a right to compensation for the improvements made. In one case, where the agreement was void due to the transfer of immovable property by an infant, it was held that it would be contrary to "natural justice" not to order the payment of reimbursement for the improvements (see *Anthoulla Papadopoulou v Xenophon Polykarpou*, Civil Appeal No. 4686. vol 1 (1973) 352 CLR and Faber/Lurger [-*Laulhé Shaelou/Stylianou/Anastasiou*], National Reports II: Cyprus, 36). It seems that restitution remedies, such as reimbursement for improvements, are only available where the original contract is terminated or contracts become ineffective due to mistake, impossibility, lack of writing or lack of capacity (see *Kier (Cyprus) Ltd v. Trenco Constructions Ltd*, Civil Appeal No. 5770. vol. 1 (1981) 30 CLR and Faber/Lurger [-*Laulhé Shaelou/Stylianou/Anastasiou*], National Reports II: Cyprus, 37). Good or bad faith does not seem to play any important role in deciding the outcome.

IV. Reimbursement in case of possession in bad faith

48. In SPAIN, the bad faith possessor is entitled to the reimbursement of the necessary expenses incurred on the goods for the purpose of their preservation, but cannot claim reimbursement of useful and luxury expenses (CC art. 455).

49. The FINNISH compensation rules distinguish between constellations where property is held in good or bad faith. A bad faith possessor only has a right to be reimbursed expenses that are considered necessary, but not useful or luxury expenses (Faber/Lurger [-*Kuusinen*], National Reports V: Finland, 76 f).

50. In LITHUANIA, the possessor in bad faith is only entitled to the reimbursement of the necessary expenses related to the thing (CC art. 4.97). Where restitution of the movable is based on the rules of the law of obligations, the expenses for care and custody of the goods incurred by the person who is bound to return the property are also reimbursed in accordance with the abovementioned provisions of CC art. 4.97 (CC art. 6.150).

51. According to the leading case in SCOTLAND, there is a distinction between a direct claim and a counter-claim (*Barbour v Halliday* (1840) 2 D 1279). The court rejected the bad faith improver's claim, but left open the possibility for a counterclaim for the reimbursement of the cost of the materials and other expenses in an action brought by the owner to recover possession. Such a counterclaim was allowed in another case (*Paterson v Greig* (1862) 24 D 1370). Moreover, a direct claim for the reimbursement of necessary expenses will probably succeed (Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 183 f).

52. According to the CZECH CC § 458 (3), the possessor in bad faith is also entitled to claim reimbursement of the necessary expenses incurred on the goods, since good faith is not a requirement.

53. In SWITZERLAND, the possessor in bad faith can only claim the reimbursement of the necessary expenses, provided that the rightful owner would have made these expenses too (CC art. 940 (2)).

54. In ENGLAND and WALES, an improver who has not acted in good faith may still benefit from an allowance by the application of common law (*Clerk and Lindsell*, Torts[19], § 17-97 and Faber/Lurger [-*Frisby/Jones*], National Reports II: England and Wales, 10). See further section III above.

55. As BELGIAN law does not distinguish between possessors in good and bad faith as regards the reimbursement of expenses incurred on the goods by their possessor, the same regulations apply to possessors in bad faith and possessors in good faith (see note 28, above).

56. Under SLOVENIAN law, the bad faith possessor has a right to claim reimbursement of necessary expenses that would also have burdened the rightful owner if the owner had had possession (Code of Property Law art. 96/IV). The possessor is also entitled to compensation for useful costs, provided that these costs also benefit the owner (Code of Property Law art. 96/V). A bad faith possessor is not entitled to claim reimbursement of expenses that have been incurred on whim or for the purpose of embellishing the movable. However, the possessor is allowed to remove such items, if this does not damage the movable in question (Code of Property Law art. 96/VI).

57. In ESTONIA, with regard to the bad faith possessor's entitlement to reimbursement of such expenses, the same regulation applies as for the possessor in good faith. Necessary expenses are reimbursed, unless the possessor obtained possession as a result of an arbitrary act (PropLA § 88(1)); whereas the reimbursement of useful and luxury costs is subject to the provisions on unjustified enrichment (see note 46, above). For cases of void or avoided contracts, see also note 46.

58. Under DUTCH law, a possessor who is not in good faith may claim reimbursement of expenses incurred on the movable itself or on the collection of its fruits according to the rules on unjustified enrichment (CC art. 3:121(2)). Hence, the bad faith possessor's entitlement to reimbursement of expenses is more restricted. The reimbursement sum is determined by three factors: (a) the owner's enrichment, (b) the possessor's disenrichment and (c) reasonableness. The owner's enrichment allows the taking into account of a possible decrease in value. With the standard of reasonableness it is possible to assess the level of bad faith, the utility of the expenses to the owner, the inconvenience for the owner due to lacking the goods in question, etc. Furthermore, the possessor who is not in good faith is not entitled to claim reimbursement of damages he or she had to pay to a third person under non-contractual liability law (*Pitlo*, Goederenrecht[12], no. 398). Also in these situations, the owner has the option, according to CC art. 3:122, to transfer the goods to the possessor instead of making a reimbursement (Nieuwenhuis/Stolker/Valk [-*Rank-Berenschot*], B.W.[3], art. 3:121, no. 3).

59. Under HUNGARIAN law, the possessor in bad faith may claim reimbursement of expenses according to the rules on unjustified enrichment (Faber/Lurger [-*Szilagyi*], National Reports III: Hungary, 96).

60. In PORTUGAL, the same rules apply to possessors in good faith as to possessors in bad faith (see *supra* note 44). A possessor in bad faith, however, is not entitled to withdraw sumptuary expenses.

61. In ITALY, as mentioned above (see note 41), the owner has to reimburse expenses incurred in the production and yielding of the fruits (CC art. 1149), as well as ordinary maintenance costs (CC art. 1150(4)), to the possessor who is obliged to restitute the fruits, though not exceeding the value of the fruits which are owed to the owner. The possessor is also entitled to the reimbursement of extraordinary expenses (CC art. 1150(1)), regardless of good or bad faith, since the incurring of these costs benefits the owner and the reimbursement is based on the principles of unjustified enrichement. With regard to improvements, the possessor in bad faith has a right to a reimbursement equal to either the increase in value of the goods or the expenses incurred, whichever sum is lower (CC art. 1150(2)).

62. Under SWEDISH law, when the movable has to be returned to a bankruptcy estate and the possessor has incurred necessary or useful expenses on the movable, the possessor has a right to reimbursement if there are no particular reasons against giving him or her that right (*Konkurslagen* chap. 4 § 15). Reasons against giving the possessor this right may be that a bad faith possessor has incurred expenses that are too burdensome for the estate. These expenses will not be reimbursed (Karnov [-*Lennander*] 2006/07, 3446 no. 160. See also NJA 1932 s. 534).

63. The AUSTRIAN CC § 336 states that a possessor in bad faith is entitled to reimbursement of expenses under the rules of *negotiorum gestio* (benevolent intervention in another's affairs, *Geschäftsführung ohne Auftrag*, CC §§ 1035 ff). The prevailing opinion modifies this rule in so far as expenses, which remain fruitless are not to be reimbursed (*Koziol/Welser,* Grundriss I[13], 347 f; *Iro,* Sachenrecht[3], no. 7/9; see also Kletečka/Schauer [-*Lurger*], ABGB, § 336, nos. 1 f*; contra*: Klang [-*Schey*/*Klang*], ABGB II[2], 100 f). Whether expenses are useful (and, therefore, are to be reimbursed) is assessed according to the individual preferences of the owner (common opinion, cf. CC § 1037; see references in Kletečka/Schauer [-*Lurger*], ABGB, § 336 no. 3). To this extent, a different rule applies as compared to the one applying to possessors in good faith. Luxury expenses are not to be reimbursed (cf. CC § 1038).

64. In GERMANY, the same rule applies to possessors in bad faith as applies to possessors in good faith after the initiation of the legal proceedings (CC § 994 (2)). According to this provision, the possessor in bad faith may claim the reimbursement of necessary expenses based on the rules on benevolent intervention in another's affairs (see note 30, above; Münchener Kommentar [-*Medicus*], BGB[4], § 994, no. 19).

65. Under GREEK law, the reimbursment of expenses incurred by a possessor in bad faith is subject to the regulations on benevolent intervention in another's affairs. The reimbursement is limited to the necessary expenses and the expenses incurred for the settlement of charges encumbering the thing (CC art. 1102).

V. Right to retain

66. In AUSTRIA, someone who is under a duty to surrender a thing is entitled to retain it as security for due claims for reimbursement of expenses made on the asset, or for a claim for compensation arising from damage caused by the asset. The party can retain the property until the other party tenders performance (so-called *Zug-um-Zug Prinzip*). This is provided by a general rule in CC § 471 ABGB, which is referred to by CC § 334. It is irrelevant whether the possessor is in good or bad faith (Klang [-*Schey*/*Klang*], ABGB II[2], 99; Rummel [-*Hofmann*], ABGB I[3], § 471, no. 4 with further references). However, a right to retain is excluded with regard to property which has been removed without permission or fraudulently, which has been borrowed, let on

lease or deposited (CC § 1440 sentence 2). For more details see Faber/Lurger [-*Faber*], National Reports I: Austria, 199.

67. Under ESTONIAN law, the possessor's right to retain the movable is explicitly regulated with regard to synallagmatic contracts. In case a synallagmatic contract is void or avoided, the parties have the duty to return what they received under the contract or compensate each other for the value simultaneously. Each party is entitled to withhold performance until the other party has performed, offered to perform, or secured or confirmed the performance (LObligA § 1034 (3) in conjunction with LObligA § 111(1)). Where there is no such relationship between the parties, the possessor's right to retain the movable until the owner reimburses the expenses incurred may be derived from LObligA § 110. The prerequisite of such a right of retention is the existence of a sufficient link between the claim (for reimbursement or similar) and the obligation to deliver the movable (Supreme Court 20 December 2005, no. 3-2-1-136-05 as cited in Faber/Lurger [-*Kullerkupp*], National Reports I: Estonia, 110).

68. Under GREEK law, the possessor has the right to retain the movable until satisfied in respect of the reimbursement of the expenses incurred during possession (CC art. 1106). The expenses must be reimbursed according to CC articles 1101-1103 or on the basis of other provisions (Georgiadis-Stathopoulos [-*Georgiadis*], Civil Code V, 613). The court decides, within the scope of the *rei vindicatio*, that the possessor has to deliver the goods under the condition that the owner concurrently reimburses the expenses incurred on the asset (Faber/Lurger [-*Klaoudatou*], National Reports III: Greece, 152). This right of retention is not granted to a possessor who acquired the asset through an illegal act (CC art. 1106). The right of retention is an obligatory right and cannot be exercised against third parties (Georgiadis-Stathopoulos [-*Georgiadis*], Civil Code V, 613).

69. According to the GERMAN CC § 1000, the possessor has a right to retain the goods until reimbursement of the expenses. This right is not granted to the possessor who obtained possession through an intentionally committed unlawful act. Besides, the right of retention is excluded when its exercise would violate the principle of "equity and good faith" (*Treu und Glauben*). For instance, when the cost that has to be reimbursed is very low compared to the value of the goods in question (*Wieling*, Sachenrecht I^2, § 12 V 8 a).

70. According to the HUNGARIAN CC § 193 (2), the possessor is entitled to retain the goods until the claims for reimbursement are satisfied. However, the possessor who acquired the goods by committing a criminal act or in another violent or fraudulent way is not allowed to retain the goods.

71. Under NORWEGIAN law, the possessor may retain the movable if there is a natural connection between the claim he or she wants to secure and the reason why he or she has physical control over the movable. The possessor also needs to fulfil the requirements for a good faith acquisition in order to retain the movable (Faber/Lurger [-*Færstad*], National Reports V: Denmark/Norway, 83).

72. Under SWISS law, the possessor in good faith has a right to retain the goods until the expenses have been reimbursed (CC art. 939(1)). This provision does not grant a real right of retention in terms of CC art. 895 ff, but a right to refuse to make delivery (*Steinauer*, Les droits réels I^4, no. 512). Whether the possessor in bad faith also benefits from a right of retention is disputed among legal scholars. It is not mentioned in CC art. 940, but some legal scholars argue that CC art. 939 (1) should apply by way of analogy (*pro*: *Steinauer*, Les droits réels I^4, no. 522; *contra*: Honsell [-*Stark*], Basler Kommentar^2, art. 940, no. 12).

73. The DUTCH CC art. 3:120(3) grants the possessor in good faith a right to retain the goods (*retentierecht*), as long as the amount due has not been received. The bad faith possessor, on the other hand, does not enjoy such a right (*Pitlo*, Goederenrecht[12], no. 398; Nieuwenhuis/Stolker/Valk [-*Rank-Berenschot*], B.W.[3], art. 3:121, no. 3).

74. In SLOVENIA, the good faith possessor has a right to retain the movable until all necessary and useful costs have been reimbursed (Code of Property Law art. 95/VII). A possessor in bad faith does not have such right (Juhart et al. [-*Vrenčur*], Commentary on the SPZ, art. 96, 492).

75. Under SPANISH law, only the possessor in good faith has a right to retain the goods until been reimbursed for the necessary and useful expenses (CC art. 453).

76. ITALIAN CC art. 1152(1) grants the possessor in good faith a right of retention, as long as the expenses incurred for improvements and repairs have not been reimbursed, since such expenses are considered as an act benefiting the goods. However, the good faith possessor does not have any right to retain the goods with regard to the expenses incurred for the production and yielding of the fruits, since the possibility to keep the fruits is an alternative way to recover compensation (Faber/Lurger [-*Greco*], National Reports I: Italy, 47).

77. In PORTUGAL, the possessor in good faith has a right to retain the movable until payment of the expenses (CC arts. 754 and 756). The right of retention requires that the possessor of the movable obtained possession in a lawful way or, at least, at the time of acquiring possession was unaware of the unlawfulness of the acquisition and was in good faith (CC art. 756).

78. In FINLAND, the concept of retaining the movable is known as a security for reimbursement or other equivalent payment that may relate to the object. But there are no legal rules on this matter. Nevertheless, if the possessor has physical control over the object and has claims against the owner, he or she may well retain the movable (Faber/Lurger [-*Kuusinen*], National Reports V: Finland, 78).

79. A right to retain under DANISH law presupposes that there is a connection between the possessor's possession of the movable and the demand for payment (*Mortensen*, Indledning til tingsretten[2], 63 and *Vinding Kruse*, Ejendomsretten 3[3], 1684). In contractual situations there are, for example, rights to retain contained in the Sale of Goods Act (*Købeloven* §§ 36 and 57). As to non-contractual situations, the law is less clear. It is said that a person who is in, or obtains possession of, a movable and suffers damage from another's property has a right to retain the property. This general rule might be applicable also in non-contractual situations, depending on the circumstances of each situation (*"må afgøres efter sagens natur"*; *Vinding Kruse*, Ejendomsretten 3[3], 1686 f). In a situation where the owner is incapable of protecting his or her property and someone else incurs expenses in order to prevent serious damage to the property, the possessor has a right of retention until the expenses have been reimbursed (*Vinding Kruse*, Ejendomsretten 3[3], 1683).

80. There are several legal sources giving a possessor the right to retain a movable in SWEDEN (such as, for example: *Handelsbalken* (HB) chap. 11, § 3 and chap. 12 § 8, Sale of Goods Act (*Köplagen*) § 75). However, the terminology used is confusing. The Swedish legislator does not clearly distinguish between retention and a statutory right of pledge. A right to retain may very well include the right to sell the movable (as in, for example, *Lagen* (1970:980) *om retentionsrätt för fordran hos hotellgäst*; see also, *Millqvist*, Sakrättens grunder, 158 ff; *Rodhe*, Handbok i sakrätt, 443 ff and *Håstad*, Sakrätt avseende lös egendom[6], 350). The common opinion seems to be that there is no general right outside the scope of application of these rules (*Håstad*, Sakrätt avseende lös egendom[6], 350 and *Millqvist*, Sakrättens grunder, 159). Some

possibilities to use these analogously exist, especially the two rules in HB, but there is no unwritten general rule providing a right to retain another person's property (*Millqvist*, Sakrättens grunder, 159; *Undén*, Svensk sakrätt i lös egendom, 235 and NJA 1985 s. 205). It is, however, uncertain to what extent an analogous application is possible and whether the rules can be applied to non-contractual situations. As for the abovementioned examples, chap. 11 § 3 HB gives a borrower a right to retain, if he or she incurred necessary expenses with the owner's consent. One legal scholar extends this rule's scope of application also to "useful" (*"nyttiga"*) costs not consented to by the owner (*Undén*, Svensk sakrätt[10], 236). Under HB chap. 12 § 8, a possessor storing the movable has the right to retain the object pending payment of necessary expenses on the movable or storage costs. The right exists even where the movable was stored without the owner's consent if the person storing the movable was in good faith as to the possessor's right to the movable (Karnov [-*Herre*] 2006/07, 499 no. 20). *Undén* suggests that the possessor's fee and costs other than those qualifying as necessary should give the owner the same right to retain (*Undén*, Svensk sakrätt[10], 236). Sale of Goods Act § 75 gives a possessor – who can also be the seller or the buyer, where the party is in charge of taking care of the goods for the other party's account – the right to retain up until his or her justifiably incurred (*"försvarliga"*) costs of care have been reimbursed or acceptable security has been provided to the possessor. Other less commonly used rules are *Kommissionslagen* (1914:45) §§ 6, 31-37 and 39; *Handelsagentlagen* (1991:351) §§ 15 and 16; *Lagen* (1985:982) *om näringsidkares rätt att sälja saker som inte har avhämtats*; *Bostadsrättslagen* (1991:614) chap. 7 § 16a; *Sjölagen* (1994:1009) chap. 3 §§ 36, 39 and 43, chap. 13 § 20, chap. 15 § 11; *Vägtransportlagen* (1974:610) §§ 20 and 25; *Ägofredslagen* (1933:269) §§ 22-28 and *Lagen* (1919:426) *om flottning i allmän flottled* §§ 33 and 68.

81. The BELGIAN CC does not provide for a general right of retention. It only recognises certain applications of it (e.g. CC articles 570, 867, 1612, 1673, 1749, 1948, 2028, 2087). According to a part of legal writing, followed by case law, the possessor in good faith has a right of retention with regard to the reimbursement sums due from the owner who claims the property back (*De Page/Dekkers*, Traité VI, nos. 153 and 186).

82. Under LITHUANIAN law, neither the possessor in good faith nor the bad faith possessor has a right to retain the movable until the reimbursement of the expenses has been made (Faber/Lurger [-*Mikelenas*], National Reports III: Lithuania, 73).

83. It is unclear whether there is a right to retain the movable in SCOTLAND. There is no case law on the issue of movable property (Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 185 f). In some older cases regarding land, a possessor who had carried out improvements was allowed to retain it until the expenses had been reimbursed (*Binning v Brotherstones* (1676) Mor 13401 and *York Buildings Co v Mackenzie* (1797) 3 Pat 618). A legal scholar confers the right to retain in cases of land (*Bankton*, Institute of the Law of Scotland, I.8.15; I.9.42 and II.9.68). However, there is also some case law where the courts have rejected the existence of a right to retain (*Duke of Gordon v Innes* (1824) 3 S 10; *Agnew v Earl of Stair* (1824) 3 S 229 and *Sinclair v Sinclair* (1829) 7 S 242). *Reid* states, with certainty and with references to *Bankton*, that there is a right of retention of or lien in the objects improved. This right is not confined to cases of unlawful possession (*Reid*, The law of Property in Scotland, 141 f).

84. There seems to be no authority on the issue of the retention of property in ENGLAND and WALES. This might be due to the fact that an owner under common law has, in principle, no right to specific restitution of the movable and must usually be content

with an award of damages representing the value of the lost thing (Faber/Lurger [-*Frisby/Jones*], National Reports II: England and Wales, 106).

VI. Right to remove improvements

85. In ENGLAND and WALES, as well as in IRELAND, if the improvement has become part of the movable, it will belong to the owner of the movable (Faber/Lurger [-*Frisby/Jones*], National Reports II: England and Wales, 108). The improvements have become a part when a separation is either impossible or impracticable, or when something smaller has been joined into a larger movable, so that the identity of the smaller succumbs to the larger (the principal) (Faber/Lurger [-*Frisby/Jones*], National Reports II: England and Wales, 81; Faber/Lurger [-*Gardiner*], National Reports II: Ireland, 56; *Bell*, Modern law of Personal property in England and Ireland, 72 f and *Bridge*, Personal Property Law[3], 106 ff). It has been said that the principal "probably" is the one with the greatest value (Faber/Lurger [-*Gardiner*], National Reports II: Ireland, 55). Size and purpose can also be important (Faber/Lurger [-*Frisby/Jones*], National Reports II: England and Wales, 80). If the improvement has not become a part of the movable, the improver is entitled to remove the improvement (Faber/Lurger [-*Frisby/Jones*], National Reports II: England and Wales, 108).

86. There is no authority on the issue in CYPRUS. Though, one can assume that the courts in CYPRUS will follow the ENGLISH law of combination. See further the Notes for ENGLAND.

87. In SCOTLAND, the right to remove improvements depends on whether combination ("accession") has occurred or not. If the improvements have acceded to the principal – if there is an "indissoluble union" between the principal thing and the accessory attached by the possessor – the owner of the principal becomes the owner of the accessory too (*Reid*, The Law of Property Law in Scotland, 473 f). If combination has not occurred, ownership of the attachment remains with its owner: Separation is not only permitted but obligatory (*Bell*, Principles of the Law of Scotland[4], § 537). The owner of the principal has therefore an obligation to restore the attachment to the possessor (Faber/Lurger [-*Carey Miller/Combe/Steven/Wortley*], National Reports II: Scotland, 179 ff and *Carey Miller/Irvine*, Corporeal Moveables in Scots Law[2], 80).

88. A possessor should probably have a right to remove improvements in NORWAY and SWEDEN as long as no combination has occurred. SWEDEN does not have specific rules for combination, but it has been said that if the movables simply can be separated from each other, without significant costs or loss of value, each owner "should" remain the owner of his or her contribution (*Håstad*, Sakrätt avseende lös egendom[6], 47). A right to remove an improvement will therefore probably be possible only for as long as it can be separated from the other movable. In NORWAY, the rules on combination apply when two or more movables are combined in such a way that they no longer are viewed as different movables; for example, if it is impossible or too expensive to separate them. The reasonableness of separation costs will have to be assessed by taking into account the type of movable in each particular case (*Rådsegn* 7 *frå Sivillovbokutvalet* (Oslo 1963) 19 f). Other circumstances to take into account are whether it is possible for the owner to acquire another movable and the owner's need for the movable (Faber/Lurger [-*Færstad*], National Reports V: Denmark/Norway, 46 and *Braekhus/Haerem*, Norsk tingsrett, 549 ff). For further information, see Notes on VIII.–5:104.

89. In DENMARK, the owner of a movable has a right to demand to have it separated from any other movable, if the movables can be separated without causing a substantial loss of value. Where the possessor was in bad faith as to the right to work

on the movable, separation can be demanded even if this will cause a substantial loss of value, if the produced movable is, so to say, a normal piece of merchandise (*"en almindelig handelsvare"*) and not a piece of art (*Vinding Kruse*, Ejendomsretten[3], 443). Another scholar shares this approach, but seems to suggest a slightly stricter rule as to separation, where the manufacturer is in bad faith (*Illum*, Dansk tingsret[3], 383 f), meaning that according to the latter approach there are fewer situations where separation would be possible.

90. A possessor in FINLAND has, "in most cases", a right to detach objects from the main object if this is possible without causing damage or other harm to it (Faber/Lurger [-*Kuusinen*], National Reports V: Finland, 77 f). This will, of course, mostly be important regarding luxury expenses incurred on the property, or regarding useful expenses incurred by a bad faith possessor – expenses that are not reimbursed to the possessor.

91. Under BELGIAN law, it is accepted that the possessor is allowed to remove everything that can be removed, i.e. without damaging the substance of the goods (*De Page/Dekkers*, VI, no. 150).

92. Under DUTCH law, the right to remove improvements (*ius tollendi*) is regulated in CC art. 3:123. All changes or additions made to the goods can be removed by the possessor, regardless of whether or not the possessor is in good faith, under the precondition that the thing can be returned to its previous state. As a consequence, the possessor loses the right to claim reimbursement of the costs incurred in making these changes or additions (Nieuwenhuis/Stolker/Valk [-*Rank-Berenschot*], B.W.[3], art. 3:123, no. 1; *Asser*, Goederenrecht[14] II, no. 122a). If the changes or additions cannot be removed without deterioration of the goods, the possessor is not allowed to exercise this right (*Pitlo*, Goederenrecht[12], no. 399).

93. According to the GREEK CC art. 1104, the possessor has the right to remove assets, which have been joined to the movable, subject to restitution (*ius tollendi*), regardless of whether the possessor was acting in good or bad faith and whether or not the improvement is a necessary, useful or sumptuary one. It is also of no relevance whether the possessor was the owner of the attached movable or not (*Spyridakis*, Property Law 3, 177 ε). The *ius tollendi* is excluded in the following cases (CC art. 1104): (1) where the attachment constitutes a usual disbursement for the purpose of maintenance, for which the possessor is not entitled to claim reimbursement since he or she enjoyed the benefits resulting therefrom; (2) where the possessor draws no advantage from removal; (3) where the possessor receives a sum equivalent to the value that would have been attributable to the other thing after separation.

94. Under GERMAN law, the possessor is, in any case, entitled to remove his or her property, which has been combined with the object that has to be returned to its rightful owner, as long as it has not become an essential component part (*wesentlicher Bestandteil*) of the object. In such situations, the possessor is still regarded as the owner of this part (*Prütting*, Sachenrecht[33], no. 561). In addition, the CC § 997(1) grants such a right of removal in relation to essential component parts, provided that the previous state is restored (CC § 997(1) in conjunction with CC § 258). This means that the possessor is entitled to separate his or her part and to acquire ownership by way of occupation (*Prütting*, Sachenrecht[33], no. 561; Soergel [-*Stadler*], BGB[13], § 997 nos. 1-3). According to the CC § 997(2), the right cannot be exercised if the possessor is not entitled, according to the CC § 994(1) second sentence, to claim reimbursement of the expenses incurred, if such separation is useless for him or her (e.g. wallpaper), or if he or she receives compensation at least equal to the value that the component part would have for him or her after separation. Both the possessor in good faith and

the possessor in bad faith are entitled to exercise this right (*Prütting*, Sachenrecht[33], no. 561; Bamberger/Roth [-*Fritzsche*], BGB II, § 997, nos. 8 and 17-19).

95. The ESTONIAN PropLA § 88(2) grants the possessor a right to remove the improvements made to the thing, provided that the thing can be returned to its previous state. Such a right is unavailable if it is impossible to remove the improvements without damaging them or if the possessor is reimbursed for the expenses incurred in the course of these improvements. It seems that this right can be exercised by a possessor in good faith as well as one in bad faith.

96. Under SLOVENIAN law, a possessor who cannot claim for the reimbursement of costs incurred on a whim or for the purpose of embellishing the movable is allowed to remove such improvements, provided that this does not cause any damage to the goods (Code of Property Law art. 96/VI).

97. In HUNGARY, the possessor is entitled to remove improvements, provided that the original state of the goods can be restored (Faber/Lurger [-*Szilagyi*], National Reports III: Hungary, 95).

98. The AUSTRIAN CC § 332 provides that a possessor in good faith can remove luxury 'improvements' before restoring the goods to their owner. This rule also applies to a possessor in bad faith (Schwimann [-*Klicka*], ABGB II[3], § 336, no. 3; Kletečka/Schauer [-*Lurger*], ABGB, § 336, no. 4). The good faith possessor may also remove useful improvements (Klang [-*Schey*/*Klang*], ABGB II[2], 98; Kletečka/Schauer [-*Lurger*], ABGB, § 331, no. 3). This right (*ius tollendi*) can be exercised under the prerequisite that the substance of the property is not damaged, or, at least, the *status quo ante* is restored. (Kletečka/Schauer [-*Lurger*], ABGB, § 332, no. 2).

99. Useful and sumptuary expenses are qualified as improvements (as they increase the value of the movable thing) under PORTUGUESE law. The good faith as well as the bad faith possessor is entitled to remove the improvements resulting from useful expenses, provided that this is possible without causing damage to the movable (CC art. 1273). With regard to improvements resulting from sumptuary expenses, only the possessor in good faith has the right to remove them (CC art. 1275).

100. In SPAIN, both the possessor in good faith and the one in bad faith have the right to remove the luxury improvements (*ius tolliendi*), provided that the goods do not suffer any injury thereby. The rightful owner who recovers the property can prevent the exercise of the *ius tolliendi* by refunding the amount paid for the improvements, if the possessor is in good faith, or by paying a sum equal to the value of the goods at the time possession is recovered (CC arts. 454-455).

101. According to the SWISS CC art. 939(2), the possessor in good faith is entitled to remove improvements (which are regarded as being luxury expenses and, therefore, not reimbursable under CC art. 939(1)) under three conditions: (1) the right has to be exercised before the restitution of the object; (2) separation is possible without causing damage to the object; (3) the rightful owner does not propose to reimburse the luxury expenses (*Steinauer*, Les droits réels I[4], no. 513). With regard to the possessor in bad faith, such a right has not explicitly been provided by law. However, some legal scholars take the view that the CC art. 939(2) should apply by way of analogy to possessors in bad faith for useful and luxury expenses (*pro*: *Steinauer*, Les droits réels I[4], no. 522a; *contra*: Honsell [-*Stark*], Basler Kommentar[2], art. 940, no. 12).

102. In LITHUANIA, the possessor in good faith has the right to keep the parts that have been added to improve the thing, provided that they cannot be separated without causing damage to the thing (CC art. 4.97).

BOOK IX

PROPRIETARY SECURITY IN MOVABLE ASSETS

CHAPTER 1: GENERAL RULES

Section 1: Scope of application

IX.–1:101: General rule

(1) This Book applies to the following rights in movable property based upon contracts for proprietary security:

(a) security rights; and

(b) ownership retained under retention of ownership devices.

(2) The rules of this Book on security rights apply with appropriate adaptations to:

(a) rights under a trust for security purposes;

(b) security rights in movable assets created by unilateral juridical acts; and

(c) security rights in movable assets implied by patrimonial law, if and in so far as this is compatible with the purpose of the law.

COMMENTS

A. Security rights and retention of ownership devices

Paragraph (1) introduces a basic distinction upon which these rules are based: security may be provided by security rights or by retention of ownership devices. These two basic techniques are defined and specified by the three following articles.

B. Contractual security (paragraph (1))

Generally, the security devices covered by these rules (*i.e.* security rights and retention of ownership devices) are based upon a contract for proprietary security, commonly called a security agreement. In practice, this security agreement is usually part of a broader instrument, especially of a loan contract concluded between the creditor who is to be secured and the debtor as provider of the security. If the security is to be provided by a third person, this also will usually be agreed upon in a clause of the loan contract; but there may also be an additional contract for proprietary security between the creditor to be secured and this third party security provider in which both the terms of the credit to be secured and the terms of the pertinent security right are regulated.

The parties to the security agreement are usually the creditor of the obligation to be secured and the debtor of this obligation. However, since a security right need not be provided by the debtor, the security provider may also be a third person. In such a case, there may even be two

or three security agreements: one between the secured creditor and the debtor, another between the secured creditor and the security provider, and a further one between the debtor and the security provider.

Since the security agreement is a contract and as such has no proprietary effect, it is open to party autonomy. The parties are free to fix the details of the proprietary security device to be created, such as the asset or assets to be encumbered, whether the encumbered asset is to remain in the security provider's possession or is to be delivered to the secured creditor, insurance of the encumbered assets, and so on.

However, the rules of this Book do not apply only to security devices based upon agreement. They also apply to proprietary security rights based upon one of several non-contractual sources, see paragraph (2).

C. Non-contractual security rights (paragraph (2))

General. The present rules are primarily intended to apply to *contractual* security devices, *i.e.* retention of ownership devices and security rights that are based upon a contract for proprietary security. However, there are also a few non-contractual sources of security rights in movable assets to which the rules on contractual security rights ought to be applied in order to fill a gap which otherwise would arise.

Trust for security purpose (paragraph (2)(a)). Occasionally, a trust is used for the purpose of creating a security, *e.g.* by the debtor or other security provider transferring the assets to be encumbered to the secured creditor or a third person as trustee for security purposes. Another example may be the trust receipt which aims to achieve a similar purpose. The rules of Book X on trusts explicitly provide that in their application to a trust serving security purposes those rules are subject to the provisions of this Book on proprietary security (X.–1:202, so that any conflict is avoided.

Creation by unilateral juridical act (paragraph (2)(b)). It is conceivable that a security provider might create a security right by unilateral juridical act. Even although this is unlikely to happen very often in practice, the situation should be regulated.

Security right implied by patrimonial law (paragraph (2)(c)). In many countries legislation provides for statutory security rights, especially if commercial services are involved, without regulating details. Such details are then supplied by applying relevant rules of the general regime of security rights – in so far as this is compatible with the purpose of the relevant statutory regime. Paragraph (2)(c) confirms that this supplementation of various national statutory regimes is to be continued. See also the examples in IV.C.–5:106 (Payment of the price) paragraph (2) and IV.E.–2:401 (Right of retention).

However, the application of the present rules must be compatible with the other law; and the application is permitted only so far as this compatibility goes.

Right of retention of possession. Reference must also be made to IX.–2:114 (Right of retention of possession). This provision covers all cases in which a person under a contract or rule of law is entitled to retain an asset as security for a right to performance, especially the

payment of money for work done on an asset of the debtor, such as inspection, repair and other services performed at the service provider’s place of business. In all these cases there arises a possessory security right governed by the relevant rules of this Book.

IX.–1:102: Security right in movable asset

(1) A security right in a movable asset is any limited proprietary right in the asset which entitles the secured creditor to preferential satisfaction of the secured right from the encumbered asset.

(2) The term security right includes:

(a) limited proprietary rights of a type which is generally recognised as designed to serve as proprietary security, especially the pledge;

(b) limited proprietary rights, however named, that are based upon a contract for proprietary security and that are either intended by the parties to entitle the secured creditor to preferential satisfaction of the secured right from the encumbered asset or have this effect under the contract; and

(c) other rights which are regarded as security rights under the rules of this Book, such as the right referred to in IX.–2:114 (Right of retention of possession) and the rights covered by paragraph (3).

(3) A transfer or purported transfer of ownership of a movable asset which is made, on the basis of a contract for proprietary security, with the intention or the effect of securing satisfaction of a secured right can create only a security right in the asset for the transferee.

(4) Paragraph (3) applies in particular to:

(a) a security transfer of ownership of corporeal assets;

(b) a security assignment;

(c) a sale and lease-back; and

(d) a sale and resale.

COMMENTS

A. General remark

It is not easy to delimit the scope of application of Book IX because a uniform term for all security rights in movable assets is lacking – not only on the European level, but also in most member states. The reason is historical. In the 19th century, proprietary security in movables was restricted, in most member states, to possessory security, i.e. the pledge (pignus) which due to its Roman origin was recognised throughout Europe. However, with the industrial revolution the need for non-possessory security became urgent because industry and increased trade could not develop unless encumbered assets, such as raw material, semi-finished products or trade inventory, were left with the debtor or the security provider. Each European country since the late 19th and in the course of the 20th century developed various types of non-possessory proprietary security, usually for special situations only, with or without requiring registration. This colourful picture essentially still is valid today, although one can observe a slow trend to generalise the multitude of special laws on the national level. However, a generally accepted terminology has rarely been achieved and can therefore not be employed in the present context.

The situation is complicated by the fact that even outside any national specific legislation, practice for purposes of security has often taken recourse to contractual or proprietary institutions that had not been designed to be used for purposes of security. Examples are consignment, sale and lease-back, leasing, or – on the proprietary level – security transfer of ownership and security assignment of rights to performance – to mention only a few.

B. Security right and retention of ownership devices

These rules on proprietary security appear to be based upon a fundamental distinction between security rights, on the one hand, and retention of ownership devices, on the other hand. That impression may be nourished by the exposition of these two basic instruments in this and the following Article. Nevertheless, this impression is misleading. It is true that these rules distinguish between security rights proper and retention of ownership devices. However, this distinction is activated for merely two fields: creation (Chapter 2), on the one hand, and enforcement (Chapter 7) on the other hand. For all other aspects – third party effectiveness, priority, pre-default rules and termination – it has turned out that no differentiations are necessary. In these four fields, uniform rules apply to both security rights proper and to retention of ownership devices.

C. Definition of security right (paragraph (1))

The (proprietary) security right is the central institution of Book IX, as its title indicates. Paragraph (1) contains the definition of this core institution. The two essential elements are: first, a security right is a limited proprietary right and second, this right entitles the secured creditor to preferential satisfaction from the encumbered asset.

Limited proprietary right. Paragraph (1) of the Article describes the legal nature of a security right in a movable asset as being a "limited proprietary right" in the asset. This description indicates that a security right as a limited proprietary right is merely an encumbrance of the full right in a movable, i.e. of its ownership. Ownership is normally held by the security provider. It is possible, though, although rather rare, that a third party who is not the owner, may have power or authority to create the encumbrance in the third party's own name (and not merely as a representative in the owner's name).

The security provider is in most cases also the debtor of the obligation covered by the security right. However, such identity is not necessary. A third person may wish, or may be asked, whether or not for a fee, to encumber one of its assets.

Entitlement to preferential satisfaction. The second part of the definition in paragraph (1) circumscribes the substantive contents of the limited proprietary right mentioned in the initial part of the sentence. This limited right must entitle the secured creditor to "preferential satisfaction" of the secured right from the encumbered asset. Of the three elements of this definition, practically the most important one is the first, i.e. preferential satisfaction.

The preference that is claimed here for a security right is the essence of any proprietary security right: A security right only performs its function of providing security to its holder, the secured creditor, if the latter is allowed to satisfy the secured right before any (or at least most) other creditor(s). This is the essence of the secured creditor's "preferential" right of satisfaction. Such preference must be respected in all possible factual situations: whether upon an agreed sale of the encumbered asset, in an execution brought by another creditor of the owner of the encumbered asset or in an insolvency proceeding over all the debtor's assets.

Of course, preference does not necessarily mean "absolute" preference. Primarily, it means preference over unsecured creditors of the debtor. By contrast, as regards the relationship to other secured creditors holding a security right in the same asset, priority is determined by the

rules on priority (cf. Chapter 4). There may also be statutory preferences; however, these are rare for movable assets.

D. Paragraphs (2) and (3)

Against the background of the development of proprietary security in movables briefly sketched in Comment A, paragraphs (2) and (3) of this Article must determine the substantive scope of application of Book IX. This is difficult because – apart from the possessory pledge, which is generally recognised – the national laws widely diverge. Each country has – to a lesser or broader degree – developed rules of its own for coping with the contemporary practical demands for non-possessory security, i.e. security where possession is held by the security provider (the latter may or may not be the debtor of the obligation to be covered by the security).

Apart from the many cases where limited proprietary rights are "generally recognised as designed to serve as proprietary security" (paragraph (2)(a)), for many other rights the classification as security right may be doubtful. Paragraphs (2) and (3) are designed to establish criteria which can be used for solving the doubts as to their correct classification.

The two paragraphs use two criteria, each of which justifies the assumption that there is a proprietary security right. There is either an intention of the parties to create a security right or their arrangements have this effect (paragraph (2)(b) and paragraph (3) main text).

E. Paragraph (2)

Sub-paragraph (b) expressly says that names of (national) institutions are irrelevant for determining their qualification as proprietary security. It is a general principle in this paragraph that only substance counts. Two criteria are established.

Sub-paragraph (a) confirms an obvious criterion: a proprietary right that is of a "type which is generally recognised as designed to serve as proprietary security". The example expressly indicated, that of the pledge, is obvious. In fact, the pledge appears to be recognised throughout Europe as a security right – at least the possessory pledge. This may probably be extended to the non-possessory pledge, because use of the term pledge generally indicates the intention of creating a proprietary security.

The same must be true for other comparable institutions developed on a national level. If such institutions in a country are "generally recognised … to serve as proprietary security", this suffices to bring them under the scope of application of these rules. By contrast, it is irrelevant whether such institutions are governed by legislation or any other official regulation or whether they have been developed by business practice, provided they are recognised by the courts.

Sub-paragraph (b) deals with cases which cannot rely on general recognition as a security right. Instead, two formal and two functional criteria are to be employed. The two formal criteria are that a "limited proprietary right" must be created, based upon "a contract for proprietary security". It goes without saying that in the present context these two criteria must not be understood too strictly. A broad understanding of the two legal criteria is confirmed for the first of these criteria. It is expressly said that the name – given by the parties – to the

limited proprietary right created by them is irrelevant. That must carry over to the corresponding contract for proprietary security.

By contrast, the emphasis obviously is on the two alternative substantive functional criteria: either the subjective intention of the parties to create a security right; or the objective effect of that agreement of the parties.

> *Illustration*
> A, a good friend of B, has proudly been told by the latter that he has recently inherited from his uncle a considerable number of shares in a thriving enterprise. Knowing that A plans to build a family home and is negotiating a loan from a private lender, B offers to make available to him for the purpose of security, if need be, one third of the inherited securities. A and B set this down in writing, and this document is sent to the lender. Can the lender, if A fails to repay the loan, enforce its claim against B's securities? An affirmative answer can be based both upon the parties' intention and the effect of the agreement.

Sub-paragraph (c) uses still another criterion for delimiting the scope of application of Book IX: express recognition as a security right by Book IX. The rights covered by paragraph (3) are expressly mentioned and will be commented upon below (see under Comment F).

The "right of retention of possession" is mentioned separately. These rules regard it as a security right (cf. IX.–2:114 (Right of retention of possession)); this is an innovation for many countries. For details, cf. the Comments on that Article.

F. Paragraph (3)

Paragraph (3) deals with the issue under which criteria a transfer of ownership agreed upon by the parties must be converted to a proprietary security right.

As under paragraph (2)(b), either the parties' intentions or the effects of their transaction are decisive for the classification of the transfer of ownership as giving rise to a security right. The parties must intend to use the transfer of ownership in order to secure performance of a secured right or this must be the effect of their transaction.

Paragraph (3) enumerates four transactions where the intended or implied transfer of ownership typically pursues a security purpose, so that they may be re-characterised as a creation of a security right (as a limited proprietary right) only.

Sub-paragraph (a) refers to a security transfer of ownership of corporeal assets. The initial term "security" indicates already the intention of the parties. The transfer of ownership of specific corporeal assets to the secured creditor is to serve a security purpose. This intention is in practice usually confirmed by two further clauses. First, possession of the transferred corporeal assets is usually left with the "seller". Second, the parties usually agree upon a corresponding clause of reversion. After payment of the obligation covered by the security transfer, the secured creditor is usually obliged, by contract or law, to re-transfer the corporeal assets to the security provider. In effect, then, the security transfer of ownership amounts to a non-possessory security right.

Sub-paragraph (b) refers to a security assignment. An assignment of an intangible, especially of a right to payment, has the same structure and the same function as a security transfer of ownership.

Sub-paragraph (c) refers to a sale and lease-back. This usually achieves the same purpose as a security transfer of ownership. The sale as such involves a transfer of ownership to the "buyer". The "lease-back" to the seller means that the latter retains possession of the sold goods. The leasing rates paid by the seller correspond to the rateable repayment of a credit granted by the buyer–lessor to the seller–lessee. After complete repayment of the credit in the form of the leasing rates, the lease terminates and the buyer is usually obliged to retransfer the "bought" assets to the original "seller-lessee", *i.e.* the debtor.

Sub-paragraph (d) refers to a sale and resale. This is the simpler basic pattern of the sale and lease-back . Reference can therefore be made to the preceding comment.

IX.–1:103: Retention of ownership devices: scope

(1) There is a retention of ownership device when ownership is retained by the owner of supplied assets in order to secure a right to performance of an obligation.

(2) The term retention of ownership device includes:

(a) retention of ownership by a seller under a contract of sale;
(b) ownership of the supplier under a contract of hire-purchase;
(c) ownership of the leased assets under a contract of leasing, provided that according to the terms of the contract the lessee at the expiration of the lease period has an option to acquire ownership of, or a right to continue to use, the leased asset without payment or for merely nominal payment (financial leasing); and
(d) ownership of the supplier under a contract of consignment with the intention or the effect of fulfilling a security purpose.

COMMENTS

A. Introductory remarks

The retention of ownership devices dealt with in this Article represent the most typical security device which is being used in Europe in order to secure the financing of acquisitions (acquisition financing).

There is broad international agreement that acquisition financing deserves special, favourable treatment because of its general benefit for economic development. The more people and enterprises can buy, the more general welfare and economic, especially industrial, development are promoted. A rough survey of international developments in this field shows that on the legal level two methods for realising the generally accepted desire of granting special protection to security for acquisition financing are available and have been chosen in legislation and court practice.

One solution is based upon using the ordinary security right. If used for securing acquisition finance, it is granted a special priority. Apart from this aspect, however, the ordinary rules on security rights apply. These rules are predicated on the debtor/security provider *granting* or the secured creditor *retaining* a *security right* in encumbered assets. If applied to securing acquisition finance by encumbering goods bought by the buyer, the latter must therefore be owner of these goods. This means that the seller has to transfer ownership of the sold goods to the buyer in order to enable the latter to grant a security right for the unpaid purchase price to the seller (or a third person).

An alternative solution is based upon the technique of the seller *retaining ownership* of the sold assets, while possession of the latter is transferred to the buyer. This technique of retention of ownership is widely accepted and practised in Europe, as distinct from the practice in other continents. It should be added that the basic technique of retention of ownership extends – beyond retention of ownership in sales contracts – to three related transactions, namely to:

- ownership of the supplier under a contract of hire-purchase;
- to a contract of financial leasing;

- ownership of a supplier under a contract of consignment, if the parties intend, or their contract has the effect of, creating a security for the consignor.

The two techniques – either using a security right or a retention of ownership – in a wider sense can co-exist. Both can be used, as the parties prefer. However, it must be noted that the broader effects – beyond the technical field of proprietary security – differ. Especially in executions brought by other creditors of the buyer; in the buyer's insolvency proceedings as well as upon the buyer's default, a retention of ownership grants considerably stronger protection to the seller than a "mere" security right.

B. Retention of ownership devices and security rights

As noted above, there is broad agreement on the economic justification for the special protection of proprietary security that is used as securing for financing acquisitions. The traditional way pursued in most European countries is to have recourse to full title. In the basic situation, the seller, in spite of delivery of the sold goods to the buyer, may retain (or reserve) ownership in the sold goods until payment of the full purchase price. In the buyer's bankruptcy or where other creditors bring executions against the buyer, the seller may invoke this right of ownership, which provides full protection. The seller may repossess the sold assets from the bankruptcy estate, subject to due accounting for any payments made by the buyer and counter-claims by the seller for use and wear of the sold goods. A corresponding rule applies in executions brought against the sold assets.

Sweden and perhaps one or two other member states of the EU have chosen another, more direct, route to achieve the same result. Instead of relying on the special status of ownership, the seller may retain a security right which enjoys a special priority, a super-priority, that achieves the same effect in the buyer's bankruptcy.

At first sight, the results reached by this special way appear to be the same as those achieved by the traditional recourse to ownership. It is true that the technique used is more straight-forward and therefore more elegant and less complicated than recourse to ownership. However, this modern approach has not yet been adopted by most of the member states. And there are decisive disadvantages of the "mere" security right as compared to the ownership approach. In the buyer's bankruptcy, the secured creditor no longer enjoys the special privileges of an owner; the creditor cannot repossess the goods from the bankruptcy estate. The same applies to executions brought by other creditors of the buyer – unless the relevant bankruptcy or execution rules have been adapted to confer special protection to creditors of purchase money. So far, such special protection is lacking in most member states.

Faced with these two approaches, the Study Group has decided to draft its basic text by both following the traditional approach of the retention of ownership and allowing the use of the more modern concept of the security right for acquisition finance. Adoption only of the modern approach in these rules on substantive law would create a clear risk. As long as the bankruptcy laws, the rules on execution and those on enforcement of the member states do not adopt the new approach of granting a super-priority to a security right securing acquisition finance, use of the new rules would decisively diminish the protection of acquisition finance in the most critical situations, *i.e.* in the security provider's bankruptcy, in execution proceedings brought against the sold assets and in enforcing the security right. It is more important to achieve these relevant substantive purposes and also more in line with present

European law and practice than to present an elegant one-track solution predicated on the security right – but without the assurance of achieving similar practical results.

Another reason militating for this twofold approach is the treatment of financial leasing. The economic function of the latter is the same as that of retention of ownership. It is a modern form of securing acquisition finance, although with a somewhat different legal structure. On the initiative and mandate of a customer, the latter as the future lessee instructs a future lessor to acquire goods from a manufacturer. These goods are leased to the customer who, as lessee, pays the agreed leasing rates to the lessor. If the value of the purchase price has been paid, the lessee has an option, either to continue paying leasing rates – although only of a nominal amount – or to acquire the leased goods for no or a merely nominal amount. It is obvious that in spite of certain minor deviations financial leasing has the same legal structure as retention of ownership. The preservation of this legal similarity which reflects the economic correspondence between the two institutions, also speaks for retaining retention of ownership in its original conception.

On the other hand, the regime of retention of ownership does not differ in every respect from that of security rights. On the contrary, there are extensive similarities and for the benefit of ease of application the present rules attempt as far as possible to offer unified rules. Most of the rules on security rights also apply to retention of ownership devices. The general rule is the unity of the two systems; exceptions for retention of ownership devices must be explicitly set up.

C. Details

Paragraph (1) sets out the basic legal structure of all four retention of ownership devices which are specified in paragraph (2). The owner of assets who is engaged in transferring assets to one of the categories of persons mentioned in paragraph (2) and who finances the acquisition of these assets by their holders (and future owners) can retain ownership as security for payment of the price for those assets.

The term *retention* of ownership implies that the assets for which ownership is retained are delivered to the person acquiring them (or, if this person so instructs the owner, to a third person). These persons obtain possession and may use the acquired assets. The owner may prescribe any conditions or limits for such use.

Depending upon the circumstances, the owner may even allow the assets to be disposed of. In particular, the resale of the transferred assets may be permitted, especially if merchandise is involved, because resale may often be the only realistic way for a merchant to raise the money for payment of the price credited by the original seller/owner. Such a power of disposition will usually be limited to dispositions “in the ordinary course of business”; for a merchant, the ordinary course of business would usually be strictly limited to sales for cash or equivalent forms of immediate satisfaction (against a credit card, bank transfer or a cheque).

Paragraph (2) enumerates four types of contracts for which retention of ownership actually is being used. However, while these four types of contracts are presently typical contractual bases for retention of ownership, the enumeration in paragraph (2) is not exclusive, as the word “includes” indicates. Indeed, new types of contracts may be developed in future which would fit under the broad scheme laid out in this Article.

Sub-paragraph (a) refers to contracts of sale, for which the pattern of retention of ownership devices was originally developed. The seller, while transferring possession of the sold goods to the buyer, retained ownership in the sold goods as security until the buyer later at an agreed time paid the purchase price.

In many countries, in practice the seller's "retention" of ownership must be slightly qualified. In order to economise handling and save on proceedings and bureaucracy, the seller often transfers immediately upon delivery a form of ownership to the buyer – however, under the suspensive condition of full payment of the purchase price. This means that the buyer obtains not only possession, but also ownership – though merely *conditional* ownership. This technique is indicated by the term "conditional sale" which, although imprecise, is known and used in some jurisdictions. This technique implies that the buyer nominally obtains ownership already upon delivery of the sold goods; however, that ownership is merely conditional – it turns into full ownership only upon payment of the full purchase price for the bought assets.

Sub-paragraph (b) covers a related form of security for acquisition finance, i.e. hire-purchase. This appears to be used today primarily in the European Anglophone countries. As the double name indicates, this contract consists of two phases, first a hiring which is followed, after the hirer has paid all the instalments of rent (which in sum amount to the purchase price), by an option of the hirer to acquire the hired asset for no or a merely nominal amount. Functionally, this is a full equivalent of a retention of ownership.

Sub-paragraph (c) deals with financial leasing, a commercial contract that has been developed in the past decades and has become very popular all over Europe and beyond. It is described in Comment B above. Although the business background differs to some degree, it is structurally closely related to hire-purchase and therefore is also a retention of ownership device.

Sub-paragraph (d) covers certain consignments. The structure of this type of contract differs from all the preceding types of retention of ownership devices. This difference is not accidental, but can be explained by the historical background of this institution which, generally speaking, is a special method of commercial distribution. However, in the Scandinavian countries it is also being used for security purposes because in those countries a retention of ownership allowing the buyer to sell the goods to third persons is regarded as void. In order to overcome this legal obstacle, sellers have had recourse to consignment contracts. If this type of contract has been drafted with the intention of achieving a security for the consignor; or if the effect of the parties' agreement is to achieve a security purpose, then that intention or this effect prevails. This formula corresponds to that used in a more general way in IX.–1:102 (Security right in movable asset) paragraph (3) and is therefore in keeping with a basic guideline of Book IX.

IX.–1:104: Retention of ownership devices: applicable rules

(1) Retention of ownership devices are subject to the following rules on security rights, unless specifically provided otherwise:

(a) IX.–2:104 (Specific issues of transferability, existence and specification) paragraphs (2) to (4);
(b) Chapter 2, Sections 3 and 4;
(c) Chapters 3 to 6; and
(d) Chapter 7, Section 1.

(2) When applying rules on security rights to retention of ownership devices, the following adaptations apply:

(a) references to the encumbered assets refer to the assets supplied under a contract of sale, hire-purchase, leasing or consignment, respectively;
(b) in retention of ownership under contracts of sale , references to the secured creditor are to be understood as referring to the seller, and references to the security provider as referring to the buyer;
(c) in retention of ownership devices under contracts of hire-purchase , references to the secured creditor are to be understood as referring to the supplier, and references to the security provider as referring to the hire-purchaser;
(d) in retention of ownership devices under contracts of financial leasing , references to the secured creditor are to be understood as referring to the lessor, and references to the security provider as referring to the lessee; and
(e) in retention of ownership devices under contracts of consignment , references to the secured creditor are to be understood as referring to the supplier, and references to the security provider as referring to the consignee.

COMMENTS

A. Retention of ownership devices and rules on security rights

Paragraph (1) enunciates the general principle that the regime of retention of ownership devices, while partly autonomous, is in most respects identical with that for security rights. In the Sections and Chapters mentioned in paragraph (1), those rules that deviate from the corresponding rules for security rights, are set out explicitly. Retention of ownership devices are subject to the rules on security rights, unless otherwise provided. The main reason why in the area of secured credit for acquisition finance and similar transactions both possible approaches are recognised has already been pointed out in the Comment B to the preceding Article: the traditional concept of retention of ownership devices was upheld in order to accommodate concerns that most national insolvency, execution and enforcement regimes do not recognise for mere security rights securing acquisition finance a status equivalent to ownership.

Apart from these practically highly important issues, the legal construction of retention of ownership devices does not deviate in the result from the rules on ordinary secured transactions based on the proprietary security right, which commend themselves as a model regime for secured transactions. While the concept of mere security rights for acquisition finance, *e.g.*, allows the use of the idea of priority itself as key for the solution of the competition between several proprietary security rights, the application of the traditional concept of a retention of ownership is more complicated: Primarily, the relationship vis-à-vis third parties asserting proprietary rights in the sold or leased assets is based upon the principle

of *nemo dat quod non habet*, since the buyer or lessee is regarded as non-owner and cannot normally pass title to the encumbered assets to a third party.

In practice, the distinction between retention of ownership and a simple security right *seems* to be slightly weakened in the field of sales by the practice of many sellers to transfer ownership to the buyer at once, however under the suspensive condition of full payment of the purchase price. However, in effect that does not change the result. Since the suspensive condition is not met until full payment of the purchase price, the buyer does not obtain ownership until that payment has been effected. Even without the conditional transfer of ownership, the buyer has the same status since the buyer may dispose of the future right of ownership under the condition of full payment of the purchase price.

Instead of attempting to formulate on the level of common European principles specific rules on the legal construction of retention of ownership devices and on their relationship to competing proprietary rights, it was therefore preferred to formulate the solutions for these issues primarily with a view to mere security rights. Nevertheless, in line with the general functional approach of these rules retention of ownership devices are covered by most of the relevant rules as well; for details see the enumeration in paragraph (1). However, the focus of rules such as IX.–3:107 (Registration of acquisition finance devices) and IX–4:102 (Superpriority) paragraph (1) is more on the effects of these legal instruments than on their specific legal construction. It is ensured that retention of ownership devices achieve for all practical purposes in relation to priority and competing proprietary rights the same outcome as mere security rights for acquisition finance.

B. Specific remarks

It is not necessary to comment specifically on the enumeration in paragraph (1) of the generally applicable rules that apply also to retention of ownership devices. It merely deserves mention that even those Chapters and Sections which apply generally to retention of ownership devices may contain some special rules for these devices.

Paragraph (2) does not require comment; it contains merely a catalogue for adaptation of the key terms for those parts and individual rules on security rights that apply to retention of ownership devices. The adaptations mentioned in paragraph (2) are merely terminological.

IX.–1:105: Exclusions

(1) This Book does not apply to security rights for micro-credits, if and in so far as national legislation of the place where the security provider's business or residence is located contains specific protective rules for the security provider.

(2) The rules of an international Convention dealing with a subject-matter regulated in this Book and binding upon a member state are presumed to have for that member state precedence over the rules of this Book.

COMMENTS

Paragraph (1) deals with a novel economic and social phenomenon, namely a slowly developing new sector of socially inspired financing of non-professional, poor people willing to establish a small business or professional activity. A historical root is the traditional pawnshop which offers small loans, usually to a consumer, securing the loans by accepting small items as possessory pledges. Pawnbrokers are usually strictly regulated, both as to the terms of their loans and as to their dealings with the pledged goods.

Paragraph (1) gives preference to any specific mandatory provisions of a member state that claim application. In the case of cross border transactions, the law at the security provider's place of business or residence should prevail since it is this person who requires greatest protection. This implies that each member state is free to define the notion "micro-credit".

Paragraph (2) is intended to clarify that rules on a special topic of proprietary security which have been agreed upon in an international Convention should have for a member state that has ratified this Convention priority over the present rules. This rule aims at a specific international instrument, *i.e.* the UNIDROIT Convention on security rights in mobile equipment (Cape Town 2001) and its three protocols, dealing with aircrafts, railways and space objects, respectively. Especially, the protocol on security rights in aircrafts has already been ratified by several countries and may soon enter into force for these countries. It provides, *inter alia*, for an international register, which has already been instituted in Dublin. In order to avoid duplication and confusion, it appears preferable to give preference to the international regime over a competing European regime – at any rate for those states that have ratified the Convention.

Since some doubt has been expressed about a general priority of international Conventions over national law, this priority has been expressed in a rather cautious manner. A general rule along these lines may not be appropriate, since in the field of contract law relevant international Conventions usually allow the parties to contract out of the international regime (cf. CISG Article 6).

In specific cases, the general rule of paragraph (2) of this Article may perhaps be derogated from in favour of a specific policy or rule.

Section 2: Definitions

IX.–1:201: Definitions

(1) For the purposes of this Book the following definitions apply.

(2) An "accessory" is a corporeal asset that is or becomes closely connected with or part of a movable or an immovable, provided it is possible and economically reasonable to separate the accessory without damage from the movable or immovable.

(3) "Acquisition finance devices" cover:

(a) retention of ownership devices;

(b) where ownership of the sold assets has been transferred to the buyer, those security rights in the sold asset which secure the right:

(i) of the seller to payment of the purchase price for the encumbered asset under a contract of sale;

(ii) of a lender to repayment of a loan granted to the buyer for payment of the purchase price for the encumbered asset, if and in so far as this payment is actually made to the seller; and

(c) rights of third persons to whom any of the rights under sub-paragraph (a) or (b) has been transferred as security for a credit covered by sub-paragraph (a) or (b).

(4) A "contract for proprietary security" is a contract under which:

(a) a security provider undertakes to grant a security right to the secured creditor;

(b) a secured creditor is entitled to retain a security right when transferring ownership to the transferee who is regarded as security provider; or

(c) a seller, lessor or other supplier of assets is entitled to retain ownership of the supplied assets in order to secure its rights to performance.

(5) "Default" means:

(a) any non-performance by the debtor of the obligation covered by the security; and

(b) any other event or set of circumstances agreed by the secured creditor and the security provider as entitling the secured creditor to have recourse to the security.

(6) "Financial assets" are financial instruments and rights to the payment of money.

(7) "Financial instruments" are:

(a) share certificates and equivalent securities as well as bonds and equivalent debt instruments, if these are negotiable;

(b) any other securities which are dealt in and which give the right to acquire any such financial instruments or which give rise to cash settlements, except instruments of payment;

(c) share rights in collective investment undertakings;

(d) money market instruments; and

(e) rights in or relating to the instruments covered by sub-paragraph (a) to (d).

(8) "Intangibles" means incorporeal assets and includes uncertificated and indirectly held securities and the undivided share of a co-owner in corporeal assets or in a bulk or a fund.

(9) "Ownership" for the purposes of these rules covers ownership in movable corporeal assets and of intangible assets.

(10) A "possessory security right" is a security right that requires possession of the encumbered corporeal asset by the secured creditor or another person (except the debtor) holding for the secured creditor.

(11) "Proceeds" is every value derived from an encumbered asset, such as:

(a) value realised by sale or other disposition or by collection;
(b) damages or insurance payments in respect of defects, damage or loss;
(c) civil and natural fruits, including distributions; and
(d) proceeds of proceeds.

(12) The "secured creditor" may be the creditor of the secured right or a third person who may hold the security right in that person's own name for the creditor, especially as a trustee.

(13) The "security provider" may be the debtor of the obligation to be covered by the security right or a third person.

COMMENTS

Paragraph (2): accessory. The term "accessory" is not generally used in English legal terminology; an equivalent, frequently used, term is trade fixture. Standard examples are the engines of a motor-car, an aeroplane or a ship or the heating equipment of a house – provided they can relatively easily be removed (as may be necessary for repair or inspection) without damage to the vehicles or the building. Both the accessory and the vehicle or the building must not suffer damage which it would be uneconomical to avoid or to repair. The definition of accessory draws the line between two corporeal assets, especially where one thing is attached to another thing. As long as a thing is merely an accessory to a main thing, the accessory is legally separate from the main thing to which it is attached: the rights existing in or burdening the main thing do not extend to the accessory, and vice versa.

Paragraph (3): acquisition finance devices. As was explained in Comment A on IX.–1:103 (Retention of ownership devices: scope), for general economic reasons, security for acquisition finance deserves special legal protection. This privileged position is not limited to retention of ownership devices. Rather, all legal forms of such security must be treated alike since all of them perform the same economic function; the specific legal method or construction used is irrelevant.

Paragraph (3) deals in essence with five different cases of security for acquisition finance. The first case covers retention of ownership devices. The second case is where, on transferring ownership in the sold goods to the buyer, the seller retains a (mere) security right (paragraph (3)(b)(i), first alternative). The third and fourth cases are where after ownership in the sold goods has been transferred to the buyer, the latter grants a security right in the sold goods either to the seller (paragraph (3)(b)(i), second alternative) or to a third party financer (paragraph (3)(b)(ii)), provided the borrowed money is used by the buyer for payment of the purchase price. The fifth case is where a third party financer in the first to the third cases grants a loan to the seller in the first and the second case for refinancing the seller's or the buyer's credit, respectively. The third party is subrogated to:

in the first case, the seller's retained ownership;
in the second case (first alternative), the seller's retained security right;
in the third case, to the security right granted by the buyer, if and in so far as the credit is used to pay the purchase price to the seller.

If the third party financer refinances itself from a fourth party, the latter is subrogated to the rights acquired by the third party, provided the credit is actually used for payment of the

credited purchase price. It is irrelevant for this subrogation, whether the third party's acquired right is the ownership in the sold goods or a mere security right.

Paragraph (4): "contract for proprietary security". In general, security rights covered by these rules are based upon a contract. This security contract usually is part of a broader instrument, especially of a credit contract in which both the terms of the credit to be secured and the terms of the pertinent security right are regulated. Even if the security contract is a separate contract, it has as such no proprietary effect and is open to party autonomy: the parties are free to fix all the details of the proprietary security right to be created.

At this point, the distinction between the two basic kinds of security becomes relevant and is reflected in the different sub-paragraphs of paragraph (4).

Sub-paragraph (a) describes a security provider's obligation to grant a proprietary security right. This is mentioned first since it describes the case most frequently occurring in practice.

By contrast, sub-paragraph (b) deals with a relatively rare situation which factually, but not legally, is close to that also regulated in sub-paragraph (c). The owner of assets who sells these on credit, may secure the credit, i.e. the purchase price, by retaining either a security right (sub-paragraph (b)) or ownership (sub-paragraph (c)) by a retention of ownership device. The retention of a mere security right is rare, but is possible, especially if an economically strong buyer insists on this in order to have a stronger legal position.

Finally, sub-paragraph (c) describes the standard situation of all retention of ownership devices: the seller, hire-purchaser, financial lessor or consignor retains full ownership of assets, possession of which is transferred to the buyer, hirer, lessee or consignee.

The parties to a contract for the creation of a security right are usually the creditor of the right to be secured and the debtor of the corresponding obligation. However, since a security right need not be provided by the debtor, the security provider may also be a third person. In the case of retention of ownership devices, the parties are the owner of the asset to be sold, leased etc. and the buyer or lessee. In both cases, a third party financer may take part from the beginning or may intervene later (see under "security provider", below).

Paragraph (5): "default". Paragraph (5)(a) declares in essence that "default" is a case of non-performance of the obligation covered by the security right. Some of the reasons for distinguishing between non-performance and default are the following. Most importantly, "default" is the current term used by all professionals in the credit market. In addition, there is a peculiar feature frequently used in practice: by a so-called cross-default clause in the credit agreement, the parties frequently agree that a default occurring under another credit contract also constitutes default under the present credit agreement. While in essence there is no difference between default and non-performance, the term "default" is so deeply ingrained in English and therefore in international practice, that any departure from this terminology would create bewilderment or even confusion.

Paragraph (6): "financial assets". This definition of "financial assets" corresponds in substance to Article 2 paragraph (1)(e) of the EU-Directive on financial collateral arrangements of 2002 (FCD). The first part of the definition, i.e. "financial instruments", is

further defined in paragraph (7); the second part on the right to the payment of money does not require comment, except that security rights in cash are expressly excluded (FCD Article 2 paragraph (1)(e) and explicitly Consideration 18 *in fine*).

Paragraph (7): "financial instruments". This corresponds to the definition in Article 2 paragraph (1)(e) of the FCD.

Paragraph (8): "intangibles". "Intangibles" (or incorporeals) are all assets that are not "corporeals". A right to the payment of money as such is an intangible. The same is true for uncertificated securities, i.e. securities that are not incorporated into negotiable instruments . Indirectly held securities are instruments held by a bank or another intermediary and represented by book entries.

Paragraph (9): "ownership". This takes a practical approach in order to facilitate the use of one term for designating the most comprehensive right a person can have over both corporeal and incorporeal assets. This corresponds to the approach taken elsewhere in the DCFR, cf. the combined definitions of "Ownership" and "Property" in the Annex of definitions. However, immovable property is in principle excluded from the present rules; it may be affected only marginally, e.g. by rules on accessories.

Paragraph (10): "possessory security right". This defines the traditional possessory security right, the pledge, which for economic reasons plays in contemporary practice only a secondary role; however, it is still an important element of security practice. Note that the secured creditor (or a third person holding for the secured creditor) is not merely entitled to hold the encumbered assets, but is required to do so. The secured creditor's security right is only effective vis-à-vis third persons if and as long as the secured creditor preserves (direct or indirect) possession of the encumbered asset (IX.–3:102 (Methods of achieving effectiveness) paragraph (2) lit. (a)).

Paragraph (11): "proceeds". For purposes of illustration, the following examples may be given.

Sub-paragraph (a). The right to payment of the sales price is a primary example of the first item; the right to rental income from leasing out a corporeal asset is an example of the second item; and money received in cash or credited to a bank account exemplifies the third item;.

Sub-paragraph (b). If an encumbered corporeal asset is damaged, defective or is lost due to acts or omissions for which a person other than the owner is responsible, the latter's claims are (involuntary) "proceeds"; since such kinds of damage diminish the secured creditor's economic position, it is justified to extend the security right to these proceeds. The same is true for insurance proceeds that may arise on the basis of such events. It may be added that such proceeds, since their object is a liquid monetary asset rather than rights for damage as under the preceding heads, are economically more valuable.

Sub-paragraph (c). While natural fruits are a clear category, civil fruits are a somewhat artificial transposition of the "natural" idea to a modern economic category. Interest on rights to payment such as a loan or a bank account are obvious examples. Distributions arise if assets are sold, e.g. company assets upon the (partial or complete) dissolution of a company.

Sub-paragraph (d). It is consistent to extend the term "proceeds" to "proceeds from proceeds" since the latter share the qualification of the former.

Paragraph (12): "secured creditor". The "secured creditor" as the holder of the security right does not require any explanation. The typical example of a third person holding a security right in its own name for the secured creditors is the trustee of bondholders. Very frequently the number of bondholders is very great, and, if the bonds have been issued to the public, may also be subject to frequent change. Since it is not practical to act in the names of all those who hold bonds at a specific point of time, the issuers of publicly traded bonds generally appoint a trustee who can act for all those who are bondholders at any point in time.

Paragraph (13): "security provider". Normally it is the debtor who, by encumbering one or more of its assets, provides proprietary security to the creditor. However, this need not be so. Not infrequently, the debtor is unable to furnish the security demanded by the creditor. If this occurs, a third person may be asked by the debtor to assist by providing the security demanded by the creditor. The third person security provider may be a relative, friend or colleague of the debtor. However, the third person may also be a business, especially a bank or other financial institution, or even the debtor's employer. The identity of the third person will usually require the creditor's consent. Whether the service of supplying a security for the debtor to the creditor is rendered gratuitously (as frequently occurs among relatives or friends) or for a fee (especially by a bank or an insurer), is a matter of the internal relationship between debtor and security provider and is irrelevant to the proprietary aspects.

CHAPTER 2: CREATION AND COVERAGE

Section 1: Creation of security rights

Subsection 1: General provisions

IX.–2:101: Methods of creation of security rights

A security right in a movable asset may be created:

(a) by the security provider granting the security right to the secured creditor;
(b) by the secured creditor retaining the security right when transferring ownership of the asset to the security provider ; or
(c) by the secured creditor relying on a right of retention of possession .

COMMENTS

A. Creation and third party effectiveness

The rules on proprietary security in movables are based upon the fundamental distinction between the creation of a security right or a retention of ownership device and its effectiveness as against third parties in general (i.e. the third parties enumerated in IX.–3:101 (Effectiveness as against third persons) paragraph (1)).

The rules on creation contained in Chapter 2 cover only the requirements that have to be met as between the two immediately involved parties, i.e. the security provider and the secured creditor (for the parties to a contract for proprietary security providing for a retention of ownership device, see IX.–1:103 (Retention of ownership devices: scope) paragraph (2)). No additional conditions have to be fulfilled in order to give the secured creditor a legal position which in the event of default allows the satisfaction of the secured right from the encumbered assets, as long as no third persons enumerated in IX.–3:101 (Effectiveness as against third persons) paragraph (1) are involved.

Against these third persons, the security right or retention of ownership device is effective only if the additional criteria set out in Chapter 3 are fulfilled. Technically, the requirements under Chapter 3 (in general: possession, control or registration) are distinct from those for the creation of the security right or retention of ownership device under Chapter 2. They are more directed at the outside world than at the relationship between secured creditor and security provider. In fact, however, very often creation and third party effectiveness are achieved contemporaneously.

B. Proper role and effects of creation

Traditionally, proprietary rights – as distinct from contractual rights or rights corresponding to non-contractual obligations (such as non-contractual liability arising out of damage caused to another (Book VI) or the obligation to reverse an unjustified enrichment (Book VII)) – are

thought to be limited to rights that are effective against third persons in general (more poetically, against all the world). If one proceeds from this assumption, it may not be entirely certain, whether the creation of a security device according to the rules of this Chapter should be regarded as giving rise to a proprietary right in this traditional sense, if the conditions for effectiveness against third persons in general as set out in Chapter 3 are not fulfilled. A consequence of this logic could be that rules on creation, strictly speaking, should not be covered in this Book, but should form part of the rules on contractual relationships.

That, however, would be too narrow a view. The general approach of this Book is that even if only the requirements of this Chapter are fulfilled, but not the requirements of Chapter 3, there is already a valid proprietary right which is not only a contractual relationship between secured creditor and security provider. As opposed to the traditional approach, the concept of a proprietary right is no longer restricted to rights that are effective against every third person; for proprietary security, there is instead a distinction between proprietary rights that are effective against secured creditor and security provider and *some* third persons and proprietary rights that are effective against third persons *in general*.

This general approach is reflected by the fact that even a security right or retention of ownership device which only fulfils the requirements of Chapter 2 but not those of Chapter 3 has effects under these rules which go beyond the scope of a merely contractual position. One example is that some types of proprietary security are exempted from any specific requirements under Chapter 3 (see, *e.g.*, the security rights mentioned in IX.–3:101 (Effectiveness as against third persons) paragraph (2) or acquisition finance devices in assets supplied to a consumer, IX.–3:107 (Registration of acquisition finance devices)). Also that a person who acquires ownership of the encumbered assets assumes the position of a security provider vis-à-vis the secured creditor (provided there is not exceptionally a good faith acquisition free from the earlier security right or retention of ownership device) shows that the fulfilment of the requirements of Chapter 2 already gives rise to a proprietary right. A third example is the relationship between several holders of security rights or retention of ownership devices none of which is effective according to Chapter 3. Their proprietary rights are regarded as effective against each other, the one created earlier enjoys priority, *i.e.* ranks better (IX.–4:101 (Priority: general rules) paragraph (4)). A last example, which is not specifically dealt with in these rules, is the relationship to third persons such as persons accountable under Book VI. The holder of a retention of ownership device can claim damages from a third person for damage done to the supplied assets; this right to payment of damages should not depend upon registration or other requirements, if necessary, for the retention of ownership device under Chapter 3.

C. Survey of contents of Chapter 2

Apart from the last provision of this Chapter, all the others deal with creation. While Section 1 covers the creation of security rights, Section 2 deals with the other major type of security devices under this Book, i.e. retention of ownership devices. Section 3 contains rules on specific assets that can be encumbered (or that may be subject to a retention of ownership device) and covers also the issue whether and how security rights are created in new goods arising from the production, combination and commingling of encumbered assets; the final Section 4 consisting of a single Article determines the obligations that are covered by a security right.

D. General and specific provisions on creation of security rights

Section 1 of Chapter 2 is sub-divided into four Subsections. While this first Subsection contains general provisions that apply to the creation of security rights in general, Subsections 2 to 4 cover specific requirements and issues that are peculiar to the different methods of creation of security rights.

In addition to the issues dealt with in this Section, Section 3 deals with the creation of security rights in specific assets, for which some adaptations of the normal rules on the creation of security rights in Section 1 are necessary.

E. Methods of creation of security rights

This Article enumerates the three methods for the creation of security rights within the context of this Book

Creation of security right by granting (sub-paragraph (a)): This method of creation of a security right, which is dealt with in more detail in Subsection 2, can be regarded as the classical method by which a security right is created. The secured creditor, who did not have any rights in the collateral before, obtains a proprietary security in the encumbered asset from the security provider.

Creation of security right by retention (sub-paragraph (b)): Where a security right is created by retention, the secured creditor already owns the assets to be encumbered. These assets are both transferred to the other party to the transaction (who is to be regarded as a security provider not because of a granting of a security right, but because of the acceptance of encumbered ownership only) and serve as security for the secured creditor. Instead of transferring ownership to the security provider and then being granted a security right from the latter in two separate transactions, the secured creditor can under these rules simply transfer ownership to the security provider and at the same time retain a security right in the transferred assets, so that the security provider acquires only encumbered rights in the assets (see Subsection 3). While under a retention of ownership device it is the retained ownership itself which serves as a security device, here it is the newly created security right as a limited proprietary right only which the secured creditor retains under the method of sub-paragraph (b); the security provider becomes owner of the encumbered assets, while under a retention of ownership device the buyer, hire-purchaser, lessee or consignee would not obtain more than conditional ownership, if any.

Right of retention of possession as basis for security right (sub-paragraph (c)): The third method of creation of a security right applies where the secured creditor is entitled to retain possession of an asset; this right of retention of possession is regarded as a security right under this Book (see Subsection 4, IX.–2:114 (Right of retention of possession)).

F. Transfers of ownership for security purposes

Even though this type of transaction is not expressly mentioned in this Chapter, transfers of ownership for security purposes also give rise to a security right in favour of the transferee (see IX.–1:102 (Security right in movable asset) paragraph (3)). Since the transferee, i.e. the secured creditor, did not hold any proprietary rights in the assets to be encumbered before the purported transfer of ownership, these transactions constitute a case of creation of a security right by granting; therefore, a security right is created on the basis of such an agreement to

transfer ownership only if the other requirements for this method of creation of a security right under Subsection 1 and Subsection 2 are fulfilled; for specific assets, also the rules in Section 3 have to be applied.

G. Retention of ownership devices

The creation of retention of ownership devices, on the other hand, is dealt with separately in Section 2. The only provision of Section 1 that is (partly) applicable to retention of ownership devices is IX.–2:104 (Specific issues of transferability, existence and specification) (see IX.–1:104 (Retention of ownership devices: applicable rules) paragraph (1)(a)).

IX.–2:102: Requirements for creation of security rights in general

The creation of a security right in a movable asset requires that:

(a) the asset exists;
(b) the asset is transferable;
(c) the secured right exists; and
(d) the additional requirements for the creation of a security right by granting, by retention or on the basis of a right of retention of possession are fulfilled.

COMMENTS

A. General

This Article covers general requirements which have to be fulfilled whenever a security right is to be created according to the rules of this Chapter, regardless of the method of creation. Additional requirements are contained in the three Subsections covering the individual methods of creation; Section 3 deals with some further issues arising in relation to the creation of security rights in specific types of assets.

B. Existence of asset

Sub-paragraph (a) provides that a security right can only be created in an asset which exists. This is obviously a general principle of property law whose application is self-understood. Since there is – as yet – no general Book on property law within the Principles of European Law, it needs to be stated here; similar provisions can also be found in other Books on specific matters of property law, cf. VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(a).

The rule in sub-paragraph (a) is not to be misunderstood as preventing an agreement to create a security right in an asset which does not yet exist from being effective at all. As is clarified by IX.–2:103 (Possessory and non-possessory security rights) paragraph (3), the agreement may not have any proprietary effects as long as the asset concerned does not exist; however, a security right is created as soon as the asset to be encumbered comes into existence.

It should be emphasised that this delayed creation of the security right does not necessarily affect its priority. If the security right is made effective by registration, it is the time of registration which determines the priority of this security right (see IX.–4:101 (Priority: general rules) paragraph (2)(a)); this time of registration may well precede the actual creation of the security right.

C. Transferability of asset

According to sub-paragraph (b) a security right can only be created in an asset which is transferable, i.e. ownership of which can be transferred. The reason is obvious. Without such transferability, there would be in general hardly any possibility for enforcement of a security right in this asset (apart from the possibility of collecting income). Some specifications of the requirement of transferability of the asset are contained in IX.–2:104 (Specific issues of transferability, existence and specification) paragraphs (1) to (3), see the Comments on that provision.

D. Existence of secured right

Since security rights in movables under this Book are dependent security rights only, the existence of a secured right is another general requirement for the creation of security rights enumerated in this Article (see sub-paragraph (c)).

As with the creation of security rights in future assets, the parties may agree on the creation of security rights as security for rights which are not yet in existence (or which are only conditional); IX.–2:104 (Specific issues of transferability, existence and specification) paragraph (5) provides that such security rights are created at the time the rights to be secured come into existence or become unconditional.

E. Additional requirements of the different methods of creation

Sub-paragraph (d) provides that a security right can only be created if the additional requirements for the creation of a security right by granting (Subsection 2), by retention (Subsection 3) or on the basis of a right of retention of possession (Subsection 4) are fulfilled. The content of these requirements depends upon the different methods of creation. While under Subsections 2 and 3 there are different requirements concerning the agreements between the parties, the creation of a security right on the basis of a right of retention of possession only depends upon the additional requirement of the secured creditor being entitled to the retention of possession of an asset as security (IX.–2:114 (Right of retention of possession)).

IX.–2:103: Possessory and non-possessory security rights

Unless otherwise agreed by the parties, the creation of a security right by contract does not require possession of the encumbered asset by the secured creditor.

COMMENTS

This Article serves clarification purposes. While historically national regimes of proprietary security in movables tended to recognise security rights as valid proprietary rights only if the secured creditor was in possession of the encumbered assets (possessory pledge), these rules adopt the contrary approach: Non-possessory security allows the security provider to continue to use the collateral even after creation of a security right (see also IX.–5:202 (Rights in general) and the Comments on that provision under A). In commercial practice, it is therefore only non-possessory security which allows the encumbrance of machines required for production by the security provider or of merchandise (inventory) to be sold by shop-owners or other merchants. In the context of the rules on effectiveness as against third parties in Chapter 3, this position is confirmed by the existence of three alternative methods of achieving effectiveness, especially of the possibility of registration of security rights.

Even though the creation of security rights which are based upon a contract for proprietary security does not in general depend upon possession of the encumbered asset by the secured creditor, the parties are of course free to agree otherwise. Where the parties have so agreed, no proprietary right is created as long as the secured creditor does not hold possession of the collateral.

The scope of application of this Article is limited to security rights created by contract. For ex lege security rights within the scope of this Book (such as the right of retention of possession if this right arises by law) it would not appear to be appropriate to dispense with any requirement of possession by the secured creditor. These ex lege security rights are still typically regarded as being dependent upon possession by the secured creditor (notable exceptions are the proprietary security rights according to VIII.–5:101 (Party autonomy and relation to other provisions) paragraph (4)); this position should not generally be reversed by these rules on contractual proprietary security rights.

IX.–2:104: Specific issues of transferability, existence and specification

(1) A security right can be created in a right to performance other than a right to the payment of money, even if this right is not transferable, provided that it can be transformed into a right to the payment of money.

(2) A security right can be created in an asset, even if its owner had agreed not to transfer or to encumber the asset. This rule applies also to a right to performance, whether contractual or not, unless it is non-assignable by virtue of III.–5:109 (Assignability: rights personal to the creditor) paragraph (1)).

(3) If the parties purport to create a security right in a future, generic or untransferable asset, the security right arises only if and when the asset comes into existence, is specified or becomes transferable. Paragraph (2) remains unaffected.

(4) Paragraph (3) sentence 1 applies with appropriate adaptations to the creation of security rights in a conditional right, including the rights covered by that paragraph. A security right may be created in a present conditional right, especially in the right of a transferee under a conditional transfer of ownership.

(5) Paragraph (3) sentence 1 applies with appropriate adaptations to the creation of security rights for secured rights which are future or only conditional.

COMMENTS

A. Transferability of asset to be encumbered

Paragraphs (1) to (3) deal with specific issues of the transferability of the asset in which a security right is to be created and qualify the general requirement that security rights may only be created in assets that are transferable.

Paragraph (1) allows the creation of security rights even in such rights to performance other than for payment of money which are not transferable, provided that these rights can be transformed into a right to payment of money. An example of the transformation of a non-monetary obligation into a monetary one would be an obligation arising from a promise of non-competition, if a non-performance of this obligation is sanctioned by a stipulated payment for non-performance (provided the agreement is valid). Even in the absence of an agreed monetary sanction, a right to payment of damages for non-performance would qualify.

According to paragraph (2) a right is transferable even if the owner or holder of the right had agreed with a third person not to transfer or to encumber the asset. An example is a negative pledge clause which the owner or holder of the right may have established with a creditor in order to assure the latter that no other secured creditor can intervene by obtaining a security right in the asset concerned. Even though the owner may become liable towards the creditor for non-performance of the obligation, such a negative pledge clause does not prevent the creation of a security right, *i.e.* a secured creditor may obtain a proprietary right even if the security provider had promised to another creditor not to create such an encumbrance. By contrast, if the non-transferability does not follow from an agreement, but is provided by law, a security right cannot be created in the asset concerned; for such cases there is no exception from the general rule laid down in IX.–2:102 (Requirements for creation of security rights in general) sub-paragraph (b). These rules also apply to rights to performance. An agreement that these rights cannot be transferred does not prevent the creditor from creating a security right in such a right, unless the right is of a highly personal character (see the exception at the end of sentence 2 of paragraph (2)).

Finally, paragraph (3) provides that where the parties agree on the creation of a security right in an asset which at the time of the contract for proprietary security is not yet transferable, a security right arises in this asset once the asset becomes transferable. This rule does not affect the ineffectiveness of agreed prohibitions of transfers of the assets under paragraph (2) (see paragraph (3) sentence 2).

B. Existence of asset to be encumbered

Issues of the existence of the asset to be encumbered (see the general requirement in IX.–2:102 (Requirements for creation of security rights in general) sub-paragraph (a)) are dealt with in paragraphs (3) and (4) of the present Article. While paragraph (3) provides that a contract for proprietary security in which the parties purport to create a security right in an asset which is not yet in existence at the time of the agreement, gives rise to a valid security right as soon as the asset concerned comes into existence, paragraph (4) deals with the creation of a security right where the rights of the security provider are only conditional.

Paragraph (4) sentence 1 makes paragraph (3) applicable also to the creation of a security right in a conditional right. If, *e.g.*, the security provider holds as against a third party debtor a right to performance which is conditional only, an encumbrance granted to a secured creditor arises in this right only if it becomes unconditional, *i.e.* if the event occurs or any other condition is fulfilled upon which the existence of this right to performance depends. These principles also apply to the creation of a security right in a conditional right which is future, generic or non-transferable (see the second half-sentence of paragraph (4) sentence 1). The security right arises if the right becomes unconditional and is also no longer future, generic or non-transferable.

Paragraph (4) sentence 2, however, qualifies the rule in sentence 1. While in general a security right can only arise if the rights to be encumbered are unconditional, a security right may be created in a *present* conditional right. In some situations, a transfer which is subject to a suspensive condition creates a conditional right of ownership which is existent even before fulfilment of this condition. If, *e.g.*, ownership is transferred subject to the payment of the purchase price, the transferee does not immediately acquire ownership, but obtains a present conditional right (or contingent right, see VIII.–2:307 (Use of encumbered goods for production or combination). This present conditional right may even be encumbered. However, if the condition is not fulfilled and especially if the seller terminates the contractual relationship with the buyer because the purchase price is not paid, the conditional right of the transferee is extinguished and so are any encumbrances created by the transferee.

C. Specification of asset to be encumbered

The rule in paragraph (3) sentence 1 applies also to the specification of the asset to be encumbered. This general requirement for the creation of a proprietary right on the basis of a party agreement is established in IX.–2:105 (Requirements for granting of security right) sub-paragraph (a) (see the Comment B on that Article); in the case of a retention of a security right it follows indirectly from IX.–2:113 (Requirements for retention of security right) sub-paragraph (b): The transfer of ownership of the asset in which a security right is to be retained requires specification of this asset, see VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (3) sentence 1. If the parties purport to create a security right in an asset of the security provider without identifying this asset in the contract for proprietary security, a security right arises only if the asset is subsequently specified. For the creation of a

security right in an asset which forms part of a bulk at the moment the security right is to be created, IX.–2:112 (General matters of property law) refers to VIII.–2:305 (Transfer of goods forming part of a bulk) and VIII.–2:306 (Delivery out of the bulk).

D. Existence of secured right

While IX.–2:102 (Requirements for creation of security rights in general) sub-paragraph (c) provides that no security right can be created if there is no secured right, the present Article paragraph (5) read with paragraph (3) sentence 1 qualifies this rule by stating that an agreement purporting to create a security right for a secured right which at the time of the agreement is only future or conditional gives rise to a security right as soon as the secured right becomes present or unconditional.

Such a delayed creation does not necessarily affect the order of priority. If the security right is registered, it is the time of registration which is decisive, not the time of creation (IX.–4:101 (Priority: general rules) paragraph (2)(a)).

Subsection 2: Granting of security right

IX.–2:105: Requirements for granting of security right

In addition to the requirements under Subsection 1, the creation of a security right in a movable asset by granting requires that:

(a) the asset to be encumbered is specified by the parties;
(b) the security provider has the right or authority to grant a security right in the asset;
(c) the secured creditor is entitled as against the security provider to the granting of a security right on the basis of the contract for proprietary security; and
(d) the secured creditor and the security provider agree on the granting of a security right to the secured creditor.

COMMENTS

A. General

The general concept of the granting of a security right as the classical method of creation of such an encumbrance has already been described. On the basis of an agreement with the security provider (the contract for proprietary security), the secured creditor obtains a security right as limited proprietary right in the asset ownership of which does not pass to the secured creditor.

In addition to the requirements for the creation of such a security right under this Article, the general requirements that apply for the creation of a security right regardless of the method of creation according to IX.–2:102 (Requirements for creation of security rights in general) must be fulfilled; for the creation of security rights in special types of assets, there are also further specific provisions in Section 3 of this Chapter 2.

B. Specification of asset to be encumbered – sub-paragraph (a)

The requirement that the asset to be encumbered must be specified by the parties (sub-paragraph (a)) expresses a general principle of property law. Unlike rights that are of an obligatory nature only, proprietary rights must refer to specific assets. Parties cannot create proprietary rights or dispose of such rights if it is not specified which rights in which assets are meant. This specification does not necessarily have to follow from the content of the contract for proprietary security alone, the assets to be encumbered may also be specified at a later stage. A similar principle is laid down in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (3) sentence 1.If generic assets in which security rights are to be created are specified only after the conclusion of the contract for proprietary security, the security right arises as soon as the assets are specified (see IX.–2:104 (Specific issues of transferability, existence and specification) paragraph (3) sentence 1).

A special situation concerning the specification of collateral is dealt with by IX.–2:112 (General matters of property law) which refers to VIII.–2:305 (Transfer of goods forming part of a bulk) and VIII.–2:306 (Delivery out of the bulk). Where security rights are to be created in a specified quantity of assets of a bulk without specific assets out of the bulk being identified, the transaction is not wholly ineffective. Even though the security rights cannot be created in specific assets out of the bulk since there is no specification, a security right arises

in an undivided share of the bulk (for the calculation of this share see VIII.–2:305 (Transfer of goods forming part of a bulk) paragraph (3)).

C. Security provider's right or authority to grant security right – sub-paragraph (b)

Sub-paragraph (b) of the Article expresses a general principle of law and applies it to security rights. Generally, no person can dispose of a right, *i.e.* especially transfer, release or encumber this right, unless that person has the right or authority to do so (*nemo dat quod non habet*, see the equivalent requirements in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(c) and, for assignment, III.–5:104 (Basic requirements) paragraph (1)(d)).

Such a right or authority may derive, in the first place, from law. In particular the owner of an asset that is to be encumbered may generally freely dispose of this asset. Exceptionally, however, even the owner's authority to dispose of assets may be restricted, most notably where the owner is insolvent.

On the other hand, a person other than the owner may be entitled to encumber an asset, provided authority to do so has been conferred on this person. Such an authority may arise by law (*e.g.*, in the case of the insolvency administrator) or may be granted by the actual owner.

Where the security provider acts without authority, a security right may nevertheless be created on the basis of IX.–2:108 (Good faith acquisition of security right) and IX.–2:111 **(**Security right in cash, negotiable instruments and documents) *i.e.* the provisions on good faith acquisition of a security right.

Assets subject to a security device. Some specific issues arise concerning the right or authority to create a security right in an asset which is already subject to a security device. These issues are dealt with in the following paragraphs.

Security provider not prevented from creating additional encumbrances. The fact that an asset is already encumbered by a security right does not affect the security provider's authority to create an additional encumbrance that is subject to the earlier right. Generally, several competing security rights may exist in the same asset; the relationship between them is determined according to the rules on priority contained in Chapter 4. The security provider is normally not, however, entitled to grant another security right in disregard of the earlier encumbrance. Whether the second secured creditor may nevertheless acquire a security right free from an earlier security right is decided by IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset).

Secured creditor in general not entitled to create additional encumbrances. The secured creditor, on the other hand, is generally not entitled to create additional encumbrances in the collateral. A secured creditor to whom a security right (i.e. a limited proprietary right as defined in IX.–1:102 (Security right in movable asset) paragraph (1)) in a certain asset has been granted may not by virtue of this proprietary right create an additional encumbrance in the same asset, even if of a lower rank. Otherwise the security provider, who has granted a security right in assets as security for a certain secured right, would incur the risk that those assets might additionally be held liable also for the performance of another obligation. Instead

of creating an additional security right in the encumbered asset, the secured creditor may, however, indirectly use the proprietary rights as collateral by encumbering the secured right in favour of creditors. On the basis of IX.–2:301 (Encumbrance of right to payment of money) sub-paragraph (c), a security right in a right to payment entitles the secured creditor to exercise also any security rights securing performance of this right to payment.

Creation of security right in asset subject to retention of ownership devices. With respect to the creation of security rights in assets which are subject to retention of ownership devices, several different constellations have to be distinguished.

(i) Generally, the buyer, hire-purchaser, consignee or lessee does not acquire ownership and is therefore not entitled by law to dispose of the asset concerned. That the holder of the retention of ownership device had authorised the buyer, hire-purchaser, consignee or lessee to encumber the former's retained ownership, will be a rather unusual case.

However, there may be situations, especially for a buyer under a retention of ownership agreement, where a present conditional right in the asset is acquired. While the buyer is not authorised to encumber the retained ownership of the holder of the retention of ownership device, the buyer may as holder of this present conditional right encumber this right in favour of a creditor. This is expressly permitted by IX.–2:104 (Specific issues of transferability, existence and specification) paragraph (4) sentence 2. If the buyer pays the purchase price, the buyer's secured creditors then automatically acquire a security right in the buyer's (no longer only conditional) ownership of the supplied assets. If, however, the holder of the retention of ownership device exercises the rights under Chapter 7, any rights created by the buyer in favour of third parties are lost (IX.–7:301 (Consequences of default under retention of ownership devices) paragraph (2)).

Even if there is no present conditional right for the buyer, hire-purchaser, consignee or lessee under the transaction concerned, a security right in the assets which are still owned by the holder of the retention of ownership device may be validly created by the buyer, hire-purchaser, consignee or lessee if these persons subsequently acquire ownership of the supplied assets. This is a case where the requirement of IX.–2:105 (Requirements for granting of security right) sub-paragraph (b) is fulfilled only after the conclusion of the contract for proprietary security; the security right is created as soon as the buyer, hire-purchaser, consignee or lessee obtains ownership in the supplied asset and is therefore authorised to grant a security right (see IX.–2:106 (Time when security right is created by granting)).

(ii) The holder of a retention of ownership device, *i.e.* the seller, supplier or lessor, is still the owner of the supplied assets. Even though this may be a non-performance of obligations under the underlying contract of sale, hire-purchase, consignment or lease, the holder of a retention of ownership device therefore has the authority to grant a security right in the supplied assets.

D. Secured creditor's entitlement to security right – sub-paragraph (c)

In sub-paragraph (c) it is provided that a security right can only be created if the secured creditor is entitled as against the security provider to the granting of a security right on the basis of the contract for proprietary security. This provision corresponds to the general position of the DCFR concerning the transfer or creation of proprietary rights which is most

prominently expressed in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e) (for the transfer of ownership in goods) and III.–5:104 (Basic requirements) paragraph (1)(d) (for the assignment of rights). The DCFR follows a causal approach; as opposed to legal systems governed by the principle of abstraction, the existence of the obligatory right to obtain the proprietary right concerned, *i.e.* the *causa*, is indispensable for the proprietary right to be transferred or created.

E. Agreement on granting of security right – sub-paragraph (d)

Even though the creation of a security right follows a causal approach (see under D above), there is still a need to distinguish between the contract for proprietary security and the act of granting a security itself. The same differentiation is expressed in III.–5:104 (Basic requirements) paragraph (1)(d) and (e) in relation to the assignment of rights. The causal approach does not necessarily negate any distinction between, on the one hand, the contract which entitles the transferee to obtain the proprietary right and, on the other hand, the agreement by virtue of which the transferee actually obtains this proprietary position, even though this agreement may be effective only if there is a valid *causa*.

Obviously, however, this theoretical distinction need not be reflected in the separation of the contract for proprietary security and the agreement on granting a security right in practice. While it is possible that the parties in the contract for proprietary security only agree on the secured creditor's entitlement to a security right, which is created only at a later stage, both agreements may be contained in a single transaction. A similar principle is expressly spelled out in the context of the assignment of rights in III.–5:104 (Basic requirements) paragraph (3).

Sub-paragraph (d) differs to some extent from VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e) which contains the element of delivery as an alternative to an agreement which determines when ownership is to pass. Delivery could be an appropriate criterion only in the context of creating possessory security rights, whereas these rules are intended to promote the use of non-possessory security rights where there is no delivery or equivalent to delivery according to VIII.–2:104 (Delivery) and VIII.–2:105 (Equivalents to delivery). Nevertheless, an actual delivery of the assets to be encumbered may serve as *prima facie* evidence of the fact that the parties have not only agreed on the conclusion of a contract for proprietary security, but also have actually agreed on the granting of the security right itself.

IX.–2:106: Time when security right is created by granting

Subject to IX.–2:110 (Delayed creation), the security right is created by granting at the time when the requirements set out in the preceding Article are fulfilled, unless the parties have agreed on another time of creation.

COMMENTS

The general idea underlying this Article is that a security right can only be created if all the requirements set out in the preceding Article are fulfilled (including the requirements under Subsection 1, especially IX.–2:102 (Requirements for creation of security rights in general), to which the preceding Article refers). It is not necessary, however, that this must be the case already at the time the contract for proprietary security is concluded. If one or several requirements are fulfilled only at a later point of time, the transaction is not wholly ineffective; instead, the security right is created at the time when the missing requirements are fulfilled. For the requirements set out in Subsection 1, a similar rule is laid down in IX.–2:104 (Specific issues of transferability, existence and specification) paragraph (3).

The reference to IX.–2:110 (Delayed creation) covers the granting of security rights which are subject to the additional requirements set out in IX.–2:107 (Granting of security right by consumer) or to the alternative requirements set out in IX.–2:108 (Good faith acquisition of security right) (where the security provider does not have the right or authority to grant a security right, so that the requirements of IX.–2:105 (Requirements for granting of security right) sub-paragraph (b) are not even subsequently fulfilled). In these cases, a security right can only be created if and when also these additional (IX.–2:107) or alternative (IX.–2:108) requirements are fulfilled.

The last part of the present Article expressly provides for the possibility of a party agreement on the time of creation. This allows the parties in particular to agree that the security right is to be created only when additional conditions are fulfilled or that the security right is not to be created immediately when the contract for proprietary security is concluded, but at a later time. Similar rules can be found in the context of the transfer of ownership of goods in VIII.–2:103 (Agreement as to the time ownership is to pass) and VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (1) (e). Since it is, however, not in the interests of the secured creditor to delay the creation of a security right, this possibility will serve the interests of the parties only in exceptional cases, such as where a third party security provider offers security only conditionally upon the provision of counter-security.

IX.–2:107: Granting of security right by consumer

(1) The creation of a security right by a consumer security provider by granting is only valid within the following limits:

(a) the assets to be encumbered must be identified individually; and

(b) an asset not yet owned by the consumer upon conclusion of the contract for proprietary security (apart from the rights to payment covered by paragraph (2)) can only be encumbered as security for a credit to be used for the acquisition of the asset by the consumer.

(2) Rights to payment of future salary, pensions or equivalent income cannot be encumbered in so far as they serve the satisfaction of the living expenses of the consumer security provider and his or her family.

COMMENTS

A. General remarks

A whole Chapter has been devoted to the protection of a consumer who provides personal security (Book IV.G., Chapter 4); this indicates the great risk which any provider of personal security incurs, since the obligation to the creditor, although only conditional, may threaten the economic existence of the grantor of the personal security. As compared to this high risk, the obligation of the provider of proprietary security is, in effect, limited to the value of the property which the security provider has encumbered with the proprietary security right. The different degree of risk is also reflected by the fact that very few, if any, complaints have been heard by consumer providers of proprietary security in movables.

In addition to the lower level of risk which is connected with a proprietary security in comparison to personal security, it also has to be taken into consideration that personal security is assumed by a security provider as security for an obligation which by definition is owed by a debtor different from the security provider. In the area of proprietary security in movables, however, the security provider is more often than not identical with the debtor. A consumer security provider will therefore already, in the capacity of the debtor, be entitled to consumer protection without a general need for additional protection based upon the qualification as security provider.

These observations are confirmed by the developments on the European level. Neither the first nor the second version of the EU Directive on consumer credits of 1987 and 2008, respectively include protective rules on proprietary security.

B. Reasons for action

Nevertheless, it was thought necessary to take into account the evident temptations to which a vulnerable individual may be exposed by applying for a general credit or in purchasing on credit a major piece of household equipment, a new car or other item of some value.

C. Three aspects requiring protective action

The first aspect is the sufficient identification of the consumer's assets that are to be encumbered. In order to prevent global descriptions (such as "all household items", "all securities" etc.), paragraph (1)(a) requires an individualised enumeration of each item that is to be encumbered. While this requirement in certain cases may be time-consuming and

therefore may even increase the expenses of contracting, still it is a useful way of avoiding surprise and raising awareness of the risks which the consumer security provider may incur in case of non-performance of the obligation to the secured creditor.

Another risk to which consumers are often exposed is to offer future assets which the consumer hopes to acquire or may even have contracted for, as collateral. This risk should be limited to those future assets, which are to serve as security for the purchase money (sub-paragraph (b)).

Finally, paragraph (2) deals with another aspect of borrowing against a future asset, i.e. future regular payments, such as salary, pensions, social security payments etc. Paragraph (2) intends to ensure that a minimum amount of such regular payments cannot be disposed of, but is to remain reserved for the living expenses of the consumer security provider and his or her family. Admittedly, it will frequently be difficult and rather time-consuming to determine that reserved amount. But while this may increase the expenses of contracting, it is in the consumer's interest to become aware of the risks which will be incurred by offering this sensitive kind of security to the creditor.

D. Other rules on consumer protection

Other rules for consumers are few, since an urgent general need has not yet become apparent. A few protective rules are contained in Chapter 7 on enforcement (e.g., IX.–7:103 (Extra-judicial and judicial enforcement) paragraph (3), IX.–7:105 (Predefault agreement on appropriation of encumbered assets) paragraph (3), IX.–7:107 (Enforcement notice to consumer)). Security for micro-credits, which will frequently be assumed by consumers, may be subject to special national legislation (IX.–1:105 (Exclusions) paragraph (1)). Finally, IX.–3:107 (Registration of acquisition finance devices) paragraph (3) exempts acquisition finance devices by consumer security providers from the requirement of registration which otherwise would apply.

IX.–2:108: Good faith acquisition of security right

(1) Even where the security provider has no right or authority to dispose of a corporeal asset, the secured creditor nevertheless acquires a security right in it, provided that:

(a) the asset or a negotiable document to bearer on the asset is in the security provider's possession or, if so required, the asset is registered in an international or national register of ownership as owned by the security provider at the time the security right is to be created; and

(b) the secured creditor does not know and cannot reasonably be expected to know that the security provider has no right or authority to grant a security right in the asset at the time the security right is to be created.

(2) For the purposes of paragraph (1)(b), a secured creditor acquiring a security right in an asset that is subject to a retention of ownership device which is registered under Chapter 3 Section 3 against the security provider is regarded as knowing that the latter has no right or authority to grant a security right in the asset.

(3) Good faith acquisition of a security right is excluded for an asset that was stolen from the owner or the person holding for the owner.

COMMENTS

A. General

The principle of good faith acquisition allows the acquisition of a right even if the transferor does not have a right or authority to dispose of the right. While normally a person who is not the holder of a right cannot pass a good title to a transferee unless the transferor is specifically authorised to do so, the principle of good faith acquisition protects the transferee's confidence in the transaction with the transferor. This protection is granted in the interests both of the transferee individually and of commerce in general; the efficiency of any market is enhanced if participants may rely on certain assumptions concerning their counterparties' rights to dispose of the assets concerned.

It has to be emphasised that there is also another side to the effects of the operation of the principle of good faith acquisition. While the transferee acquires the right which the transferor was not entitled to dispose of, there will also be a true owner (or, where the transferor is actually the owner, but is nevertheless barred from disposing of the assets concerned, a person in whose interests the transferor's power to dispose of the asset is restricted) who suffers – either by losing rights or by an encumbrance being created in the assets concerned.

Obviously, such protection for the transferee, the mirror-image of which is the detriment to the true owner, cannot be based merely on the fact that a transferee actually trusts in the transferor's right or authority; there can be a legal protection of these expectations only under additional clearly-defined objective conditions which let the transferee's confidence appear reasonable in the eyes of the law.

The basis for such protection which is traditionally accepted is the transferor's possession of the asset concerned. If the transferor is in possession, third parties are reasonably entitled to believe that the transferor may also dispose of the asset concerned. This reasoning, which effectively implies that the application of the principle of good faith acquisition is restricted to corporeal assets, also constitutes a basis for the rules on good faith acquisition in Chapter 3 of

Book VIII. Within the Principles of European Law, these provisions on the acquisition of ownership in movable assets define the core of the principles of good faith acquisition and constitute the point of reference also for the more specific applications of these principles including those in the present Book.

Due to a number of differences, however, the rules of Chapter 3 of Book VIII cannot be applied directly and without qualifications in the context of proprietary security. First, the present rules are concerned not with the acquisition of outright ownership, but of proprietary security rights. The acquisition of a limited proprietary right by the transferee does not deprive the owner of the asset concerned of all rights in the latter. Second, the acquisition of a security right in an asset is not regularly connected with the acquisition of possession by the secured creditor. This suggests that the good faith acquisition of a security right should not depend upon delivery or an equivalent to it. Third, the system of publicity for security rights by registration gives rise to some specific issues of the protection of the transferee's confidence in the transferor's authority.

B. Survey of provisions on good faith acquisition in proprietary security law

Since there are in this Book on proprietary security in movables a number of provisions each covering different aspects of the principle of good faith acquisition, a short survey will be useful setting out the core content of each of these Articles.

IX.–2:108 (Good faith acquisition of security right). This provision deals with the acquisition of a security right in cases where the security provider did not have the right or authority to dispose of the asset concerned, i.e. typically cases where the security provider is not the owner of the asset to be encumbered. This includes cases where the security provider attempts to create a security right in an asset that is subject to a retention of ownership device. This Article bears close resemblance to the basic rule in VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership), the major distinction being that the latter provision covers the acquisition of ownership, not merely of a limited proprietary right such as a security right.

IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset). Paragraph (1) of this Article covers the good faith acquisition of a security right in a situation where the security provider is the owner of the asset concerned which is, however, already subject to an encumbrance in favour of a third party. The transferee can under IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset) paragraph (1) acquire a security right in the asset concerned in disregard of the earlier encumbrance.

IX.–2:111 (Security right in cash, negotiable instruments and documents. This provision extends for certain assets the protection of the efficiency of the market beyond situations where the secured creditor actually believed that the security provider was entitled to dispose of the assets concerned. For cash, negotiable instruments and documents, direct possession of which is transferred to the secured creditor, the latter need not be concerned about the security provider's entitlement to dispose.

IX.–3:101 (Effectiveness as against third persons) paragraph (3). This provision merely spells out a consequence of the other rules on good faith acquisition in so far as they allow the

acquisition of a security right in an asset which is already subject to a security right or a retention of ownership device. The security right which is acquired in disregard of the earlier proprietary security is effective against the latter without any requirements under Chapter 3 being fulfilled.

IX.–3:321 et seq.: Some additional rules on good faith acquisition are also to be found in the Section on registration. IX.–3:321 paragraph (2) contains a restriction of this principle by further limiting the possibility for a transferee to acquire a proprietary right in an asset free from an earlier encumbrance if the transferee had been informed of its existence by the holder of this encumbrance. IX.–3:322 paragraph (1) and IX.–3:323, on the other hand, extend the principle of good faith acquisition by allowing a transferee – even in respect of intangible assets – to rely on the registered secured creditor's information that the asset concerned is not encumbered and to acquire a security right free of the registered secured creditor's rights.

IX.–4:101 paragraph (5): Like IX.–3:101 (Effectiveness as against third persons) paragraph (3), this provision covers another consequence of the other rules on good faith acquisition of a security right in an asset which is already subject to a security right or a retention of ownership device. The security right acquired on the basis of a good faith acquisition enjoys priority over the earlier rights in the same assets in disregard of which the security right has been acquired.

IX.–6:102: This provision qualifies to some degree the rules in Chapter 3 of Book VIII concerning the good faith acquisition of ownership free of earlier rights when these earlier rights are security rights or retention of ownership devices. In the context of the present Book, such situations are of specific relevance since they lead to the termination of the proprietary security devices in the assets concerned.

C. Good faith acquisition of a security right according to IX.–2:108

Other requirements under IX.–2:105. The principle of good faith acquisition replaces only the requirement that the security provider must have a right or authority to dispose of the asset concerned; the other requirements for the acquisition of a security right under this Subsection remain unaffected, e.g. the existence of a contract for proprietary security specifying the asset to be encumbered and of an entitlement of the secured creditor to the granting of the security right (see IX.–2:105 sub-paragraph (a) and (c)).

Corporeal asset. A good faith acquisition is possible under IX.–2:108 (Good faith acquisition of security right) paragraph (1) only with regard to corporeal assets. This restriction follows the scope of application of the corresponding provision of VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership) and is based upon the ground that only for corporeal assets there can be possession by the transferor which constitutes the basis for the legal protection of the acquirer's expectations.

Security provider has no right or authority to dispose of asset. There is no need for rules on good faith acquisition if the security provider is entitled to dispose of the asset concerned.

It has to be emphasised that the mere fact that the asset concerned is already encumbered with a security right (in the sense of a limited proprietary right as defined in IX.–1:102) does not

deprive the security provider of the right to dispose of the asset (see Comment C on IX.–2:105).

The situation is different if the asset concerned is subject to a retention of ownership device. In this case, the buyer, hire-purchaser, consignee or lessee is not the owner of the supplied assets and – as is confirmed by paragraph (2) – also does not have authority to grant a security right in these assets. The attempt to create a proprietary security right in the bought or leased assets in favour of another secured creditor would therefore be a case in which IX.–2:108 (Good faith acquisition of security right) could be applicable. Therefore, the good faith acquisition of a security right in an asset which is already encumbered by a limited proprietary right is covered by another provision (IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset)) than the one on good faith acquisition of a security right in an asset which is subject to a retention of ownership device. There is, however, no conflict with IX.–1:104 paragraph (1) since the provisions of this Subsection 2 of Chapter 1, Section 1 are not mentioned in that Article as rules on security rights which are also applicable to retention of ownership devices. Moreover, it has to be emphasised that IX.–2:108 (Good faith acquisition of security right) and IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset) are largely identical so that the treatment of the good faith acquisition of a security right in an asset that is subject to a retention of ownership device under the former or the latter provision would not lead to different results. The treatment of retention of ownership devices and (normal) security rights by two different provisions, which follows the traditional understanding of the legal construction of retention of ownership devices, is therefore justified on the basis of the reasoning in the preceding sentences, even though these security devices are to a large extent functionally equivalent.

Two exceptional situations in which the buyer, hire-purchaser, consignee or lessee acts with authority in relation to the creation of a security right in an asset which is subject to a retention of ownership device have already been mentioned in Comment C on IX.–2:105. If there is at least a conditional transfer of ownership, a buyer may encumber the present, but conditional right in the supplied assets; moreover, even if there is not a present conditional right at the time when the contract for proprietary security is concluded, the creation of a security right might be validated if the buyer, hire-purchaser, consignee or lessee subsequently acquires ownership (the security right is created as soon as the requirements of IX.–2:105 sub-paragraph (b) are fulfilled, see IX.–2:106).

Acquisition of a security right by granting. IX.–2:108 (Good faith acquisition of security right) is placed in Subsection 2 of Section 1 of Chapter 2; therefore this provision is only intended to apply to the acquisition of security rights in the sense of a limited proprietary right as defined in IX.–1:102 by granting; this provision allows neither the acquisition of a security right by retention nor the acquisition of a retention of ownership device under which the holder of the latter would be regarded as owner of the assets concerned. The reason for this restriction is obvious. Only a person who according to the agreement of the parties obtains a right from the other party may be worthy of being granted protection for having confidence in the assumption that these rights are actually obtained. There is no justification for protecting a person who according to the content of the agreement merely retains rights assumed to be already held.

Possession or registration of the security provider as owner. The good faith of the secured creditor enjoys legal protection only in two situations, in which on the basis of objective criteria such confidence can be regarded as reasonable and justified.

In the first situation, the security provider is in possession of the asset concerned or of a negotiable document to bearer on the asset. Concerning the meaning of possession for the purposes of provisions on good faith acquisition, reference must be made to the rules in Book VIII (see the definition of possession VIII.–1:205). In fact, the rules on good faith acquisition in Book VIII go beyond a mere requirement of possession by demanding delivery of the assets concerned (VIII.–3:101 paragraph (1)(b); for the definition of the term delivery see VIII.–2:104, equivalents to delivery are covered by VIII.–2:105). For the good faith acquisition of a security right, however, such a requirement would not be appropriate. For a person attempting to acquire ownership in an asset, taking possession can of course be regarded as a precondition for the protection of this person's good faith in the transaction. The present rules, however, are intended to support the use of non-possessory security rights (see IX.–2:103); putting such security transactions at a disadvantage in comparison with possessory security rights would clearly contravene these intentions. Since taking possession of the encumbered asset is no longer the normal way of taking security, the protection of the secured creditor's confidence in the security provider's entitlement to dispose of the assets concerned should not be limited to cases where the secured creditor actually takes possession.

The absence of a requirement of delivery to the secured creditor, however, opens the way to the possibility that several security rights are created in the same asset. For the way in which this problem is dealt with under these rules see Comment B on IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset).

The second situation in which the confidence of the secured creditor in the security provider's entitlement to dispose of the assets concerned is protected is the case of a registration of the security provider as owner of these assets in an international or national register of ownership. In VIII.–3:101 paragraph (1), registration of the transferor is not specifically mentioned as a situation in which a good faith acquisition could be possible. However, Book VIII contains a general reference to national systems of registration of ownership, providing in VIII.–1:102 paragraph (2) that the effects of the relevant national rules on registration have priority over the rules in Book VIII which would include the operation of a registration as the basis for the transferee's good faith in the registered owner's entitlement to dispose. In IX.–2:108 (Good faith acquisition of security right) paragraph (1)(a), the protection of good faith acquisition on the basis of a registration of the transferee is recognised without qualification, *i.e.* a good faith acquisition may in the absence of the security provider's possession be based upon the security provider being registered as the owner of the assets concerned, regardless of whether the law governing this registration so provides. Making a good faith acquisition even of a proprietary security right dependent upon the position of the national law would make it necessary for the parties to find out whether or not such protection is actually recognised under national law. In view of the fact that registration as owner should in general be a fact which any transferee should be entitled to rely on, these rules have therefore decided in favour of autonomously recognising this registration as a basis for a good faith acquisition of a proprietary security right. Such a deviation from the treatment of registration of ownership under the rules of Book VIII appears to be permitted on the basis of VIII.–1:103 paragraph (1), which spells out a general preference of the rules of Book IX over Book VIII in relation to the transfer or retention of ownership for purposes of security. It should be emphasised, however, that it can only be a registration as owner which can be relevant under IX.–2:108 (Good faith acquisition of security right) paragraph (1)(a) no. (ii). By contrast, the registration as holder of a security right (under Chapter 3, Section 3 of these rules) is not covered by paragraph (1)(a) no. (ii); the registration of a third party as holder of a retention of ownership

device may be relevant in so far as this registration may prevent the secured creditor from being able to claim to be in good faith according to paragraph (1)(b) (see paragraph (2)).

Good faith according to paragraph (1) in general. The central requirement for a good faith acquisition under this provision is contained in paragraph (1)(b). There can be a good faith acquisition only if the secured creditor does not know and cannot reasonably be expected to know that the security provider has no right or authority to grant a security right in the asset concerned. In so far as the security provider's lack of right or authority is not due to the fact that the assets concerned are subject to a retention of ownership device, but follows, e.g., from the fact that (outright) ownership is still held by a third party who has supplied the assets to the security provider under an ineffective contract of sale, this requirement is identical with the criterion of good faith according to VIII.–3:101 paragraph (1)(d); reference can be made to the Comments on that provision.

Good faith according to paragraphs (1)(b) and (2) in case of assets subject to a retention of ownership device. As has already been explained, a buyer, hire-purchaser, consignee or lessee is not authorised to create an encumbrance in the ownership retained by the holder of the retention of ownership device (exceptions apply where the buyer merely encumbers a conditional ownership, see Comment C on IX.–2:105; the situation is different if the asset is merely encumbered with a security right as a limited proprietary right, see Comment C. on IX.–2:105). A secured creditor therefore acquires a security right only if the creditor does not know nor can be reasonably expected to know that the asset to be encumbered is subject to a retention of ownership device.

This situation differs from the good faith requirement as it is generally applied since retention of ownership devices – contrary to ownership as such – are, generally speaking, subject to a requirement of registration under these rules (see IX.–3:107). This registration provides publicity for the rights of the holder of a retention of ownership device and even if a creditor who intends to acquire a security right in the asset concerned does not have actual knowledge of this retention of ownership device, the secured creditor at least can be expected to know that the security provider has no right or authority to grant a security right in the asset concerned; paragraph (2) even provides for a fiction that the secured creditor can be regarded as having (constructive) knowledge of the security provider's lack of right or authority.

These issues with respect to the relevance of the registration of earlier security devices in the encumbered assets are dealt with in more detail in the Comments on IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset). As has been explained above, the only reason for the separate treatment of the good faith acquisition of security rights in assets that are subject to retention of ownership devices is the traditional legal construction of the latter type of security devices; no difference concerning substance or results is intended. See also the Comments on IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset) for the issue of a registration of the earlier security device against a person different from the security provider.

No requirement of acquisition for value. Differing from VIII.–3:101 paragraph (1)(c), the acquisition of the asset concerned for value is not required for the good faith acquisition of a security right under this provision. The criterion of an acquisition for value has not been expressly adapted for the acquisition of security rights. Security rights are always created to

secure a payment or a credit furnished by the secured creditor to the security provider; that purpose is at least an equivalent of value.

Exclusion of stolen goods according to paragraph (3). According to paragraph (3), there can be no good faith acquisition of a security right with regard to stolen goods. This exception corresponds to the similar rule in VIII.–3:101 paragraph (3); in the present context there is no need, however, for the special provision in VIII.–3:101 paragraph (3) sentence 1 last half-sentence for dispositions of stolen goods in the ordinary course of the transferor's business**.** This sub-rule is intended to protect especially sales transactions in everyday commercial practice; the acquisition of a proprietary security right, by contrast, cannot be regarded as an event in the ordinary course of the security provider's business. For the creation of security rights in cash, negotiable instruments and negotiable documents to bearer, however, there is a special rule in IX.–2:111 (Security right in cash, negotiable instruments and documents), according to which a security right may be acquired by the secured creditor even if the requirements of IX.–2:108 (Good faith acquisition of security right) are not fulfilled, i.e. even if these assets were stolen from their owner.

Irrelevance of registration of security right to be acquired. A registration under Section 3 of Chapter 3 of the security right which is to be acquired on the basis of good faith acquisition is irrelevant in the present context. The mere fact that a secured creditor has filed an entry in the register of security rights does not entitle this secured creditor to have confidence in the security provider's entitlement to dispose of the assets concerned.

The existence of an entry in the register of security rights is also irrelevant when there is actually no security right and the registered secured creditor nevertheless attempts to transfer not only the (purportedly secured) right but also the actually non-existing security right. The existence of an entry in the register of security rights is no sufficient basis for the protection of a third person's confidence in the actual existence of the security right mentioned in this entry. As a consequence, IX.–5:301 does not contain any references to a good faith acquisition of the security right by the transferee.

Finally, it should be noted that – as opposed to the registration of a retention of ownership device – not even the existence of a registered security right in the assets concerned constitutes an obstacle to the good faith acquisition under this Article. It is the secured creditor's confidence in the security provider's entitlement to dispose of the asset concerned that is decisive, not the question of good faith concerning the existence of prior encumbrances. See also IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset) paragraph (3).

D. Position of the owner after good faith acquisition by secured creditor

Owner and secured creditor. On the basis of a good faith acquisition the secured creditor obtains a security right in the owner's assets. If the assets concerned had been subject to a retention of ownership device, the rights which the secured creditor acquires under IX.–2:108 (Good faith acquisition of security right) can no longer be extinguished by the holder of the retention of ownership device who exercises the rights under Chapter 7 (see IX.–7:301 paragraph (2)(b)). The priority between the original retention of ownership device and the subsequent security right acquired in good faith is governed by IX.–4:101 paragraph (5), i.e. the latter security right enjoys priority.

However, the true owner is not regarded as the security provider for the purposes of the provisions on effectiveness and priority. Hence, the secured creditor will only be able to rely on the security right vis-à-vis the owner who is regarded as a third party within the meaning of IX.–3:101 paragraph (1)(a), if the requirements for effectiveness under Chapter 3 are fulfilled. The position is different only in relation to an owner who is holder of a retention of ownership device.

In relation to this owner a security right acquired in good faith is effective according to IX.–3:101 paragraph (3), *i.e.* without fulfilment of any requirements under Chapter 3.

If the security right is to be registered, it will have to be registered against the security provider and it is the security provider's, not the owner's consent that is necessary for the registration. The reason for this is that the secured creditor would not obtain the true owner's consent. This, however, leads to the result that the security right might be registered against a person other than the actual owner of the encumbered asset. If the latter then creates another security right in the same asset, the true owner's secured creditors will not be able to find out about the prior encumbrance from the register. This problem, which also arises in cases of a transfer of the encumbered asset prior to the creation of additional security rights by the transferee, is dealt with in IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset) paragraph (2).

Owner and security provider. That the secured creditor enjoys protection under this provision does not prevent the security provider from being liable towards the owner for any losses resulting from the creation of the encumbrance.

IX.–2:109: Good faith acquisition of security right in encumbered corporeal asset

(1) Where a corporeal asset is encumbered with a security right or another limited proprietary right and the security provider has no right or authority to dispose of the asset free from the third person's limited proprietary right, a secured creditor nevertheless acquires a security right free from that other right, provided that:

(a) the requirements of paragraph (1)(a) of the preceding Article are met; and

(b) the secured creditor does not know nor can reasonably be expected to know that the security provider has no right or authority to grant a security right in disregard of the third person's limited proprietary right at the time the security right is to be created.

(2) For the purposes of paragraph (1)(b), a secured creditor acquiring a security right in the encumbered asset is regarded as knowing that the security provider has no right or authority to grant a security right in the asset in disregard of the existing security right if this right is registered under Chapter 3, Section 3 against the security provider.

(3) Where the requirements of paragraph (1) are not met but the requirements of the preceding Article are met, the secured creditor obtains a security right in the encumbered assets. The priority between this security right and the prior encumbrance is determined according to the general provisions.

COMMENTS

A. General

This Article deals with the good faith acquisition of a security right in an asset that is already encumbered with a limited proprietary right, whether a security right as defined in IX.–1:102 or another limited proprietary right (the good faith acquisition of a security right in an asset which is subject to a retention of ownership device is covered by IX.–2:108 **(**Good faith acquisition of security right)). If the secured creditor is in good faith concerning the existence of the earlier encumbrance, the secured creditor acquires a security right in the assets free of the earlier encumbrance. The holder of the earlier security right must then give precedence to the new secured creditor, *i.e.* the rights of the new secured creditor, which need not fulfil any requirements under Chapter 3 in order to be effective as against the earlier secured creditor (see IX.–3:101 paragraph (3)), enjoy priority over the earlier security rights (see IX.–4:101 paragraph (5)).

As will be shown below, however, in the end the scope of application for a good faith acquisition of a security right in disregard of an earlier encumbrance is rather limited. Only rarely will it be possible on the basis of this provision to create a new security right in the same asset in disregard of earlier security rights that fulfil the requirements for effectiveness under Chapter 3. The publicity achieved by the registration of the earlier security right protects its holder against good faith acquisition by another secured creditor. One important situation in which exceptionally such good faith acquisition is possible is where the earlier security right is registered against another person than the security provider who attempts to grant the new security right (see Comment B). Even if there is no good faith acquisition, the creation of a new (additional) security right in the same asset will still be possible; the earlier and the subsequent security right will then be regarded as competing security rights, the relationship between them being determined by the rules on priority (see Chapter 4).

Like IX.–2:108 (Good faith acquisition of security right), the present Article only allows the acquisition of a security right by granting, not of a security right created by any other method

and not of a retention of ownership device. This follows already from the fact that this Subsection 2 of Chapter 1 Section 1 applies to the creation of security rights by granting only; see also the reasoning in Comment C on IX.–2:108 (Good faith acquisition of security right).

B. Good faith acquisition of a security right according to IX.–2:109 paragraph (1)

Other requirements under IX.–2:105. As in the case of IX.–2:108 (Good faith acquisition of security right), the principle of good faith acquisition under the present Article applies only where – apart from the right or authority to create a security right free of the earlier encumbrances – all the other requirements of IX.–2:105 are fulfilled.

Corporeal asset. As under IX.–2:108 (Good faith acquisition of security right), a good faith acquisition under paragraph (1) of the present Article is possible only with regard to corporeal assets. See Comment C on IX.–2:108 (Good faith acquisition of security right).

Security provider's lack of right or authority to dispose of the asset free of the earlier encumbrance. The existence of a security right in the assets owned by the security provider does not deprive the latter of authority as owner to dispose of the asset concerned or to create additional security rights in this asset if this is done subject to the earlier encumbrance. In the case of transfer of ownership, the transferee assumes the position of the security provider as new owner of the encumbered asset (IX.–5:303 paragraph (1)); where an additional security right is created subject to the earlier encumbrance in the same asset, the relationship between both encumbrances is governed by the rules on priority (see Chapter 4).

However, if an asset is encumbered with a security right the security provider usually no longer has the right or authority to dispose of the asset free of the earlier encumbrance (including the creation of a security right in disregard of the earlier encumbrance). If no authority to dispose of the encumbered asset free of the earlier encumbrance has been conferred on the security provider on the basis of an agreement or by law (see, *e.g.*, IX.–5:204 paragraph (1)), another creditor may therefore acquire a security right in disregard of the earlier encumbrance in the same asset only if by relying on the principle of good faith acquisition.

Possession or registration of the security provider. The reference in paragraph (1) (a) to IX.–2:108 (Good faith acquisition of security right) paragraph (1)(a) introduces the alternative requirement of possession or registration of the security provider into the present Article.

As within the original scope of application of IX.–2:108 (Good faith acquisition of security right) paragraph (1)(a), it is only a registration of the security provider's ownership that may be relevant for the secured creditor's ability to rely on the principles of good faith acquisition. A registration in the register of security rights according to Section 3 of Chapter 3 of this Book is irrelevant for this provision.

Also for the alternative requirement of possession reference can be made to the identical requirement under IX.–2:108 (Good faith acquisition of security right) paragraph (1)(a), see Comment C on that Article. Again, possession by the security provider is sufficient; it is not necessary that there is a delivery of the encumbered asset to the secured creditor in order for the latter to enjoy protection under this provision.

That there is no requirement of delivery to the new secured creditor neither creates too much risk for the original secured creditor nor gives rise to problems that the security provider could be enabled to create several security rights in favour of different secured creditors. As long as the secured creditors concerned ensure that their security rights are made effective by fulfilling the requirements of Chapter 3, the possibilities for a good faith acquisition of a security right by a third party under paragraph (1) of the present Article are limited. This is obvious for security rights made effective by the exercise of possession; in such cases there is no possession of the asset concerned by the security provider and hence – in the absence of the rather rare case of registration of the security provider's ownership – no good faith acquisition under paragraph (1) of the present Article. If the security right is registered, the requirements of paragraph (1)(a) read with IX.–2:108 (Good faith acquisition of security right) paragraph (1)(a) might be fulfilled; however, the publicity of the original security right which is achieved by registration of this encumbrance in the European register of security rights will normally prevent any new security provider from being able to claim to be in good faith concerning the earlier encumbrance.

Good faith according to paragraph (1)(b). A secured creditor can only acquire a security right free of an earlier encumbrance on the basis of this provision if the secured creditor is in good faith, i.e. if the secured creditor does not know and cannot reasonably be expected to know that the security provider has no right or authority to grant a security right in disregard of the third person's limited proprietary right (paragraph (1)(b)). As has been explained in Comment C on IX.–2:108 (Good faith acquisition of security right), the following Comments are also relevant for the situation of a good faith acquisition of a security right in an asset that is subject to a retention of ownership device.

The main practical problem in this context is to decide whether a secured creditor can reasonably be expected to know that the security provider does not have the right or authority to dispose of the asset free of the earlier security right or retention of ownership device. In general, much will depend upon the circumstances of each individual case. If it is a practice of general application in certain sectors of the economy that items of inventory are bought under a retention of ownership agreement, then third parties could for example reasonably be expected to know that the security provider is not entitled to create another security right in these assets in disregard of the suppliers' retained ownership. A secured creditor will also more likely be expected to know that the assets concerned are already encumbered if the secured creditor knows that the security provider is in financial dire straits and has struggled to obtain credit in the past.

Generally, it is the burden of the secured creditor who wants to rely on good faith acquisition according to the present Article, *i.e.* the secured creditor who attempted to acquire a security right in disregard of the earlier right, to prove that it did not know and could not reasonably be expected to know that the security provider did not have the right or authority to dispose of the asset free from the earlier right (see the wording of paragraph (1)(b): "provided that… the secured creditor does not know nor can reasonably be expected to know that…"). An identical rule concerning the burden of proof applies in the context of the acquisition of unencumbered ownership of goods (see VIII.–3:102 paragraph (1) (d) sentence 2).

Good faith and registration - paragraph (2). A highly important factor for answering the question whether the secured creditor can reasonably be expected to know that the security provider does not have the right or authority to grant a security right in the assets concerned in

disregard of an earlier security right or retention of ownership device is the registration of this earlier proprietary right under the provisions of Section 3 of Chapter 3.

Paragraph (2) provides that the secured creditor is regarded as knowing of the security provider's lack of right or authority to grant a security right in the assets concerned in disregard of an earlier security device, *i.e.* every secured creditor will be regarded as having constructive notice of every security right or retention of ownership device that is registered against the security provider. No actual knowledge is required and nothing more needs to be shown in order to prevent the secured creditor from relying on the present Article than that the asset concerned is subject to a security device registered against the security provider.

In effect, this principle, which is in line with virtually all systems of registration for security rights, requires a creditor who is about to acquire a proprietary security right in an asset to investigate whether any security rights or retention of ownership devices are registered in that asset against the security provider. If the asset concerned is actually already subject to a registered security right or retention of ownership device, the intending secured creditor could not acquire a security right in disregard of the earlier right and would not be protected by the rule on good faith acquisition in paragraph (1) of the present Article, even if this earlier right was actually unknown to the intending secured creditor. Since, however, the register under this Book is electronically accessible in an online format and open to everyone (IX.–3:302, IX.–3:317), the consultation of the register does not constitute too much of a burden for the intending secured creditor and for the creation of security rights in general.

No general restriction of this principle would be justified on the basis of the facts that under the system of registration according to Chapter 3, Section 3 of this Book entries in the register may be filed by the parties themselves and that these entries need not individualise specific assets. Even though the information that can be obtained directly from the register might be less reliable and less detailed in comparison to the information that is available under more traditional systems of registration involving a public registrar, these rules provide for specific possibilities to obtain more precise information from the registered secured creditor (IX.–3:319 ss.). Intending secured creditors can be expected to use these possibilities even if the existing entry against the security provider is drafted in the widest and least precise terms possible; after all, as secured creditors they stand to profit from the publicity effects of the system of registration under these rules as well. It is only in very exceptional circumstances, where the content of the registration or other declarations of the registered secured creditor actually allow the acquirer of another security right in the same asset to assume that this asset was not already subject to a security device, that a restriction of the rule in paragraph (2) on general grounds (as opposed to the limitation discussed in the following paragraph) could be justified. One specific exception is expressly laid down in IX.–3:322 paragraph (1). Good faith acquisition is not excluded even though the earlier security right is registered where the registered secured creditor had informed the acquirer that the asset concerned is not encumbered. This specific provision applies only in the context of requests for information according to Subsection 5 of Chapter 3, Section 3; similar results, however, can be achieved for comparable situations – *e.g.* where the registered secured creditor had publicly declared that the secured right had ceased to exist – on the basis of the application of the general principle of good faith which underlies the whole Principles (see, *e.g.*, III.–1:103). It would be contrary to this principle if the registered secured creditor was not bound by its declarations and the reasonable assumptions which other persons made on the basis of these declarations even if they were in conflict with the content of the register.

Good faith and registration against person different from the security provider. The rule in paragraph (2) that a secured creditor is regarded as knowing that a security provider has no right or authority to grant a security right in an asset that is already encumbered in disregard of this encumbrance is restricted to security rights that are registered against the security provider (a corresponding limitation applies according to IX.–2:108 (Good faith acquisition of security right) paragraph (2) for registered retention of ownership devices). Where this registration is not filed against the security provider who is to create a security in favour of the intending secured creditor, the latter is not regarded as knowing that the transferor has no right or authority to grant a security right in the asset in disregard of the existing security right merely by reason of the fact that this right is registered. This means that in such situations, unless the intending secured creditor has actual knowledge of the earlier security right or if there are other circumstances on the basis of which the secured creditor can be expected to know that the assets concerned might have been acquired by the security provider subject to an existing encumbrance, a good faith acquisition of a security right in disregard of the earlier encumbrance according to paragraph (1) of the present Article is possible.

The main example of a situation where the security right is not registered against the actual owner of the encumbered asset who may then as security provider create another security right in the same asset is the following case. Prior to the creation of the second security right, ownership in the already encumbered asset has been transferred subject to the existing encumbrance and without an additional declaration of transfer being filed (see IX.–3:330 and IX.–3:331). This issue is more fully explained in the Comments on the provisions on the registration system, cf. Comment B on IX.–3:330 . For present purposes, it suffices to say that since the European register of security rights is not intended to operate as a real folio system, the possibilities to search for specific assets rather than for individual security providers are rather limited. In the interest of avoiding unreasonable burdens in connection with the creation of security rights, intending secured creditors should not be obliged to search the register for entries filed against the persons from whom the security provider has acquired the assets concerned.

The same reasoning also applies to cases where a security right has been created by a non-owner under IX.–2:108 (Good faith acquisition of security right) and then the true owner intends to create another security right in the same asset (see Comment D on IX.–2:108 (Good faith acquisition of security right)). In such cases, paragraph (2) of the present Article is not applicable, *i.e.* the intending secured creditor may acquire the rights in disregard of the earlier security right in the same asset since this security right is not registered against the true owner who is now the intending security provider.

No special rules for transactions in the ordinary course of business. IX.–6:102 paragraph (2)(a) provides that, if the transferor acts in the ordinary course of its business, a third person intending to acquire ownership in the encumbered assets is not regarded as knowing that the transferor has no right or authority to dispose of the assets concerned in disregard of the earlier encumbrance merely by reason of the fact that this encumbrance is registered. There is no corresponding rule for transactions in the ordinary course of the security provider's business in the present Article. The reason is that this provision deals with the acquisition of a security right only; there is no need here for a specific rule directed at the protection especially of sales transactions in the interests of commerce in general; the creation of a security right cannot and should not be understood as forming part of anyone's ordinary course of business.

C. Good faith acquisition of a security right according to IX.–2:109 paragraph (3)

Paragraph (3) deals with special situations in which a security provider attempts to create a security right in an asset which the security provider is not entitled to dispose of and which is already encumbered. If the intending secured creditor is in bad faith concerning the prior encumbrance, but not in bad faith concerning the security provider's lack of entitlement to dispose of this asset, then, provided that the other requirements of IX.–2:108 (Good faith acquisition of security right) are fulfilled as well, the secured creditor acquires a security right in the asset concerned without the other encumbrance being lost. Both security rights exist as competing security rights in the same asset; the priority between them is determined according to the general rules, cf. Chapter 4.

D. Effects of good faith acquisition of a security right in disregard of earlier security right

The main effects of the good faith acquisition of a security right in disregard of an earlier encumbrance of the same asset have already been alluded to in Comment A. The new secured creditor is treated as if the earlier encumbrance was not in existence, *i.e.* the new security right need not fulfil any requirements under Chapter 3 in order to be effective as against the earlier secured creditor (see IX.–3:101 paragraph (3)); it enjoys priority over the earlier security right on the basis of IX.–4:101 paragraph (5).

As against other secured creditors or other third persons, however, the position of the secured creditor who has acquired a security right on the basis of the present Article in disregard of an earlier encumbrance, does not differ from the normal position. Against such other third persons, the security right acquired on the basis of the present Article must fulfil the normal requirements of Chapter 3 and its priority status is determined according to the normal rules of Chapter 4.

The security right in disregard of which a new security right has been acquired is neither entirely terminated nor does it lose its effectiveness against the security provider or other secured creditors in general. It is only the secured creditor who has acquired the rights in disregard of the earlier encumbrance on the basis of the present Article against whom the earlier security right is to be treated as non-existent; this security right can still be enforced against the security provider and remains valid against other secured creditors.

IX.–2:110: Delayed creation

In assets for which at the time when the security right would have been created according to IX.–2:106 (Time when security right is created by granting) the requirements of IX.–2:107 (Granting of security right by consumer) and IX.–2:108 (Good faith acquisition of security right) have not yet been met, a security right automatically arises as soon as the events indicated in the preceding provisions have occurred.

COMMENTS

This Article supplements the general rule laid down in IX.–2:106 according to which a security right is to be created by granting, if and when the requirements set out in IX.–2:105 are fulfilled. IX.–2:105 covers only the general requirements for the creation of a security right by granting, but not the additional requirements set out in IX.–2:107 for consumer security providers or the alternative requirements set out in IX.–2:108 (Good faith acquisition of security right) for a good faith acquisition of a security right where the security provider does not have the right or authority to grant a security right. Therefore, this additional rule is necessary. It provides that, if and in so far as the fulfilment of the requirements of IX.–2:107 or IX.–2:108 (Good faith acquisition of security right) is necessary for the creation of a security right by granting, this security right does not arise at the time indicated by IX.–2:106, but at the time when also these additional or alternative requirements are fulfilled.

IX.–2:111: Security right in cash, negotiable instruments and documents

A security right in cash, negotiable instruments and documents to bearer may be created free from any earlier rights, even if the requirements of IX.–2:105 (Requirements for granting of security right) sub-paragraph (b), IX.–2:108 (Good faith acquisition of security right) and IX.–2:109 (Good faith acquisition of security right in an encumbered corporeal asset) are not met, provided that direct possession of these assets is transferred to the secured creditor.

COMMENTS

This Article contains a special rule for the creation of security rights in three items of negotiable assets: first, cash(whether domestic or foreign); negotiable instruments to bearer (such as a bill of exchange or a cheque to bearer); and negotiable documents to bearer (such as a bill of lading or a warehouse receipt, if issued to bearer). The documentary form is essential, since the provision requires that direct possession of the encumbered asset be transferred to the secured creditor.

The creation of a security right in these assets is exempted from some of the general requirements of this Subsection concerning the security provider's right or authority to grant a security right in these assets. Even if the security provider does not have a right or authority to grant such a right in the assets concerned (*i.e.* where the requirement of IX.-2:105(b) is not met), a security right may be created in these assets even if the secured creditor cannot rely on the principle of good faith acquisition as laid down in IX.-2:108 (Good faith acquisition of security right). This means that the creation of a security right is possible even where the secured creditor knows that the security provider does not have a right or authority to grant a security right in the cash, negotiable instrument or documents or where these assets have been stolen from their owner.

The policy of this rule relies on the negotiability of the instruments mentioned. The negotiability of these instruments is extended to the creation of security rights in these instruments: secured creditors are relieved from any need to inquire into the security provider's right or authority to grant a security right in these assets; even if they have doubts in this respect, they can obtain a valid proprietary security right. Moreover, in the case of cash, it is close to impossible to identify the origin of specific pieces of cash or any former owner and to inquire into the course which cash has taken.

The only requirement for this exception to apply is that direct possession must be transferred to the secured creditor. Generally, these rules do not require a transfer of possession for the creation of a security right, not even where the creation is to be based upon the principle of good faith acquisition (see Comment C on IX.-2:108 **(**Good faith acquisition of security right)). However, under the present Article, such a restriction is necessary because the application of this rule needs to be limited; direct possession of the collateral is necessary to justify the protection of a secured creditor since this Article also applies where the latter is not in good faith or where the assets were stolen from their owner. This requirement, of course, effectively limits the scope of application of the Article. It cannot apply to the creation of security rights in modern forms of monetary bank accounts and – generally speaking – electronic "instruments" or "documents".

If a security right is acquired according to this Article in disregard of an earlier security right in the asset concerned, the new (possessory) security right enjoys priority over the earlier right by virtue of IX.-4:101 paragraph (5). Theoretically this rule would also apply to an earlier created retention of ownership device; however, this form of security is unlikely to be created in the assets covered by the present Article. For security rights in financial assets, a similar priority consequence results also from IX.-4:102 paragraph (2); this rule, on the basis of which a secured creditor in possession or control of financial assets enjoys priority over competing earlier security rights (especially registered security rights), applies also to intangible financial assets to which the present Article cannot apply, since the secured creditor cannot “possess” them.

IX.–2:112: General matters of property law

Rules on general matters of property law in Book VIII, Chapter 2 apply for the purposes of this Book with appropriate adaptations.

COMMENTS

Even though there is not – as yet – a separate Book on general issues of property law in the DCFR, a number of legal issues that might arise in the context of the creation of a proprietary security right by granting are essentially to be regarded as general matters of property law which are common to various situations relating to the creation or transfer of proprietary rights. At least in so far as these issues are related to, but do not touch directly upon, the core characteristics of the creation of security rights by granting, it is not necessary to repeat more or less identical rules for such general matters of property law in this Chapter; instead a reference to a detailed codification of these principles in another context is possible.

Following this general approach, the present Article refers for general issues of property law to the rules in Chapter 2 of Book VIII on the transfer of ownership of goods; these provisions can with appropriate adaptations be applied also in relation to the creation of security rights by granting.

This reference especially covers VIII.–2:305 and VIII.–2:306 which deal with the transfer of goods forming part of a bulk. The principles laid down in those Articles (which can be regarded as a special issue concerning the requirement of specification, see IX.–2:105 sub-paragraph (a) and Comment B on that provision) are applicable with appropriate adaptations also where a security right is to be created in a specified quantity of an identified bulk. For the case of assets being commingled in a bulk after a security right had been created in these assets, see IX.–2:309.

Subsection 3: Retention of security right

IX.–2:113: Requirements for retention of security right

(1) In addition to the requirements under Subsection 1, the creation of a security right in a movable asset by retention requires that:

(a) the secured creditor is entitled as against the transferee to the retention of a security right by virtue of the contract for proprietary security; and

(b) the secured creditor transfers its ownership in the asset to be encumbered by the retained security right to the transferee.

(2) The security right is created by retention at the time when all the requirements set out in the preceding paragraph are fulfilled.

(3) The transferee is regarded as the security provider for the purposes of the application of the rules of this Book.

COMMENTS

A. General

These rules allow as an alternative method to the creation of a security right by granting also the creation of such a limited proprietary right by retention. In the case of creation of a security right by granting, the security provider grants a limited proprietary right to the secured creditor, while there is in general no transfer of ownership. Where a security right is created by retention, the secured creditor transfers ownership of the collateral, but retains a security right. The transferee obtains only encumbered ownership even though the secured creditor had held unencumbered ownership before the transfer.

In practice, such a method of creation of a security right can be of relevance for instance where an asset is to be sold and the seller intends to use this asset as collateral for payment of the purchase price. As an alternative to a retention of ownership, under which the buyer does not become the (unconditional) owner of the sold asset, seller and buyer may also agree on a transfer of ownership to the latter and a retention of a mere security right by the seller. While both under a retention of ownership and a retention of a security right, the seller has a secured position which also enjoys preferred treatment for purposes of priority vis-à-vis other secured creditors, the seller's rights in the event of default are more limited. In the case of a retention of ownership device, the seller is entitled to reclaim the supplied assets after termination of the contractual relationship under the sales contract (IX.–6:101 paragraph (4) sentence 2, and IX.–7:301); as holder of a mere security right, the seller may only enforce this right in order to seek satisfaction of the secured right; any surplus must go to the buyer (or to other secured creditors), see IX.–7:215.

Even without the possibility to create a security right by retention, similar results could be achieved through a two-step procedure. The secured creditor could transfer unencumbered ownership to the security provider and then the latter could subsequently grant a security right to the secured creditor. The advantage of allowing the creation of a security right by retention is that this solution requires only a single transaction; moreover, the secured creditor is better protected against the risk, *e.g.*, that the transferee becomes insolvent before re-transferring a security right or that the security right to be re-transferred by the transferee to the secured

creditor would be second-ranking only due to the prior creation of a security right in the same asset by the transferee in favour of another secured creditor.

B. Requirements for creation of security right by retention

This Article deals only with the requirements that are specific to the method of creation of a security right by retention. In addition to the requirements under this Article, the general conditions under Subsection 1 must also fulfilled in order to create a security right by retention; for the creation of security rights in specific types of assets, special rules are contained in Section 3 of this Chapter.

Entitlement of secured creditor to retention of security right. According to paragraph (1)(a) of the Article, the secured creditor must be entitled to retain the security right. This requirement corresponds to the rule that a security right may be created by granting only if the secured creditor is entitled to obtain the security right (IX.–2:105 sub-paragraph (c)); a security right can only be created if this has been agreed upon in the contract for proprietary security.

It has to be pointed out that these rules do not allow the unilateral creation of a contractual security right by the secured creditor by retention. Differing from the case of a retention of ownership device, the secured creditor does not retain ownership; instead, a security right is created and retained at the same time at which there is a transfer of ownership. This transfer requires an agreement by the parties and is valid – following the causal approach – only if the transferee is entitled to acquire ownership. The same requirements apply *mutatis mutandis* for the retention of a security right in favour of the secured creditor in the course of this transfer of ownership to the transferee.

Transfer of ownership by secured creditor to transferee. Paragraph (1)(b) contains the core difference between a retention of ownership device and the creation of a security right by retention. While under a retention of ownership device the seller, supplier or lessor retains ownership (either by not transferring ownership at all or by transferring ownership only under the suspensive condition of performance of the obligation corresponding to the secured right, i.e. payment of the purchase price), the secured creditor in the present situation transfers ownership and retains a security right only, i.e. a limited proprietary right in the collateral.

Since a security right may be created by retention both in corporeal and in intangible assets, the transfer of ownership according to paragraph (1)(b) includes both a transfer of ownership of corporeal assets and the assignment of other rights; this is in line with the general approach of the DCFR (see the definition of ownership and property in the Annex) and with the definitions used throughout this Book (see IX.–1:201 paragraph (9)).

The requirement of a transfer of ownership by the secured creditor indirectly imports the relevant additional conditions laid down in Book VIII (in case of a transfer of ownership of corporeal assets) or Book III, Chapter 5 (in case of an assignment of a right to performance). Even though these conditions are not expressly mentioned in IX.–2:112 (as opposed to IX.–2:105), the creation of a security right by retention is possible only if the asset to be encumbered is specified by the parties (see VIII.–2:101 paragraph (3)) and if the parties agree on the transfer (see III.–5:104 paragraph (3)), even if subject to the creation of an encumbrance.

It is expressly provided in paragraph (1)(b) that a security right may only be created by retention if the secured creditor transfers *its* ownership. If the creditor is not the owner, it cannot retain a proprietary right in the asset when transferring ownership to the transferee.

Illustration 1
A holds a right to payment against B. A and B agree on a transfer of ownership of an asset which is owned by C to B and A purports to retain a security right under this transaction. Whatever the outcome concerning the acquisition of ownership by B, A cannot retain a security right since A was not the owner of the asset concerned.

Even though the transferee may acquire ownership although the creditor is not the owner (if the creditor has been authorised by the true owner or if the other party can rely on the principles of good faith acquisition), no security right can be retained by the creditor under such circumstances. The creditor also cannot claim to acquire a security right by retention on the basis of the principles of good faith acquisition (see Comment C on IX.–2:108 (Good faith acquisition of security right)). If the creditor acts with authorisation by the owner, however, this agreement between the creditor and the owner could be regarded as creation of a security right by granting to which the rules of Subsection 2 apply.

Illustration 2
The facts are the same as in illustration 1; however, A acts with authority of owner C. Since A has authority to transfer C's asset, B acquires ownership. A still cannot retain a security right, but the agreement between A and C can be interpreted as an agreement to create a security right by granting. At the same time at which A transfers C's ownership to B, C as third party security provider grants a security right to A.

C. Time when security right is created by retention

Paragraph (2) contains the same principle that is expressed by IX.–2:106. When a security right is created by retention, the security right arises only if and when all the relevant requirements are fulfilled; this may occur, however, after the contract for proprietary security had been concluded.

D. Transferee regarded as security provider

According to paragraph (3), the transferee is regarded as security provider for the purposes of the application of the rules of this Book. In the context of the creation of a security right by retention, it is hardly possible to regard the person obtaining encumbered ownership from the secured creditor as a security provider; therefore this person is called transferee in the present Article. However, for the purposes of the other rules of this Book, *i.e.* especially rules on effectiveness, pre-default rules and rules on consequences of default, the transferee is regarded as a normal security provider.

E. Priority of retained security right

Even though the category of security rights created by retention does not as such enjoy a preferred position in the context of the rules on priority, a secured creditor holding a security right created by retention will nevertheless typically enjoy priority over competing secured

creditors. This is due to the fact that security rights created by retention will typically be acquisition finance devices. If a seller retains a security right as security for the purchase price when transferring ownership to the buyer, this security right falls under IX.–1:201 paragraph (3)(b) no. (i). As an acquisition finance device, this security right enjoys superpriority according to IX.–4:102 paragraph (1). This superpriority is generally not affected by a transfer of the security right, *i.e.* if the retained security right is transferred to another secured creditor the latter also enjoys superpriority (see IX.–5:301 paragraph (4)).

If, however, the acquisition finance device exceptionally does not enjoy superpriority (especially if the agreement is that the retained security right is to serve as security for a secured right other than a right to payment of the purchase price or if registration took place outside the 35 days period of IX.–3:107), no equivalent protection of the secured creditor can be deduced from IX.–5:303 paragraph (3). This provision applies to the transfer of ownership of assets that were already encumbered before the transfer; in the case of a creation of a security right by retention the retained security right arises at the same time at which ownership is transferred.

Subsection 4: Right of retention of possession

IX.–2:114: Right of retention of possession

Where under a contract or rule of law a person is entitled as against the owner of an asset to retain possession of the asset as security for a right to performance, this right of retention of possession gives rise to a possessory security right.

COMMENTS

A. General

Apart from the creation by granting (Subsection 2) or retention (Subsection 3), a security right, *i.e.* a limited proprietary right entitling the secured creditor to preferential satisfaction from the encumbered asset, can also be created on the basis of a right to retention of possession.

If there is a right to retention of possession, the secured creditor is regarded as holding a security right even if this had not been specifically agreed by the parties. In fact, a security right may come into being on the basis of a right to retention of possession even in the absence of any agreement between the parties. The present Article is expressly declared to apply regardless of whether the right of retention of possession arises under a contract or rule of law.

B. Policy

A right of retention exists where a person who is obliged to restore an asset to another (usually the owner) is entitled to retain that asset until certain conditions are fulfilled, *e.g.* performance of a reciprocal obligation. Rights of retention can be agreed by the parties; more often, however, they are implied by law. One example would be a repairer who might be entitled to retain possession of an asset until payment of the price for the repair (an alternative solution under national law would be to provide for a security right arising *ex lege*). Such a right of retention of possession should not be confused with a right to withhold performance of an obligation (see III.–3:401). If, *e.g.*, a seller transfers neither ownership nor possession of the sold assets and instead withholds performance until payment of the purchase price, the seller is still the owner – assuming the seller sells its own assets – and the right to withhold performance is not regarded as a security right under this Book. It follows that the exercise of the right to withhold performance is not affected by the rules of this Book.

By elevating a mere right of retention of possession to a security right, *i.e.* a limited proprietary right in the asset possession of which may be retained, this Article strengthens rights of retention which have arisen pursuant to a contract or rule of law. The Article does not deal with the conditions under which such rights of possession arise, but regulates their effects only. An important consequence flowing from this provision is that the secured creditor may in the event of default have recourse to the remedies under Chapter 7. In this way the deadlock is solved that otherwise often arises. While the creditor is always entitled to retain the asset, many national laws do not permit enforcement of the “secured” right against the retained asset. Those creditors retaining possession are in a deadlock if the debtor refuses

to make payment. By elevating the right of retention of possession to a possessory security right, this problem can be resolved in a quick and efficient manner.

Moreover, the principle laid down in the Article is intended to achieve uniformity throughout the member states even outside the area of security rights based upon a contract. While there is typically some protection available for repairers, warehouse-keepers, inn-keepers and similar persons which allows them to use the assets of their counterparty as security for their own rights to payment, this protection is partly achieved by the use of *ex lege* security rights, partly by rights of retention of possession. By elevating the latter rights to security rights, this distinction becomes irrelevant and secured creditors can avail themselves of identical remedies regardless of the position under national law.

C. Requirements for creation of security right on the basis of right of retention of possession

The only requirement mentioned in the Article for the creation of a security right on the basis of a right of retention of possession is that the secured creditor must be entitled as against the owner to retain possession of an asset as security for a right to performance.

While it is not a matter to be decided by this provision whether and under which conditions a right of retention of possession arises, the requirement that there must be such a right of retention of possession indirectly confirms that in case of a creation of a security right by this method, the general requirements set out in Subsection 1 must be fulfilled, especially the existence of the collateral, its transferability and the existence of the secured right.

The Article does not directly answer the question whether a security right may arise on the basis of a right of retention of possession if the asset to be encumbered is not owned by the security provider; it is required by this provision, however, that the person relying on the right of retention of possession, *i.e.* the secured creditor, must be entitled to retain possession as against the owner of the assets concerned. In relation to a right of retention of possession that is based upon an agreement, this effectively means that only a right of retention of possession agreed with the owner or with a representative of the owner can give rise to a security right. Other agreements would not bind the owner. Concerning a right of retention of possession that arises by operation of law it is a question to be decided by the national law providing for this right of retention of possession whether, *e.g.*, a repairer is entitled as against the owner of the repaired asset to retain possession if the repair had been ordered by a person different from the owner. In any event, it is not possible to invoke the protection under the rules of this Book on good faith acquisition of a security right, especially IX.–2:108 (Good faith acquisition of security right), in the context of the creation of a security right on the basis of a right of retention of possession.

D. Effectiveness and priority of right of retention of possession

Security rights based upon a right of retention of possession are possessory security rights and as such they are made effective for the purposes of Chapter 3 by the exercise of possession by the secured creditor.

They enjoy superpriority under IX.–4:102 paragraph (3), *i.e.* a secured creditor holding a security right on the basis of a right of retention of possession prevails over any other secured creditor claiming a security right in the asset concerned.

Section 2: Creation of retention of ownership devices

IX.–2:201: Retention of ownership devices

(1) A retention of ownership device arises in the cases set out in IX.–1:103 (Retention of ownership devices: scope) paragraph (2) if:

(a) the seller, supplier or lessor is the owner of the supplied asset or acts with authority in relation to this asset;

(b) the asset is specified in the contract for proprietary security;

(c) the secured right exists; and

(d) the seller, supplier or lessor retains ownership.

(2) Ownership is also retained for the purposes of paragraph (1)(d) where there is a transfer subject to the suspensive condition that the obligation covered is performed.

COMMENTS

A. General

The general distinction underlying these rules on proprietary security, *i.e.* the difference between security rights and retention of ownership devices, has already been described in Comments A and B to IX.–1:103.

While IX.–1:103 primarily defines a retention of ownership device, the conditions under which this type of proprietary security arises are set out in the present Article. The rules in the preceding Sections of Chapter 2, which cover the creation of a security right, *i.e.* a limited proprietary right as defined in IX.–1:102 paragraph (1), are not applicable to retention of ownership devices (with the exception of IX.–2:104 paragraphs (2) to (4)). Some of the main differences between security rights and retention of ownership devices are due to the very different methods of creation. Therefore the general principle of applying rules on security rights also to retention of ownership devices (see IX.–1:104 paragraph (1)) cannot apply in the present context.

For retention of ownership devices in specific types of assets, additional rules are to be found in Section 3 of this Chapter (for the applicability of these rules to retention of ownership devices see IX.–1:104 paragraph (1)(b)).

B. Requirements for retention of ownership devices

A retention of ownership device arises according to this provision if the requirements mentioned in the following paragraphs are fulfilled.

Supply of assets under contract for sale, hire-purchase, financial lease or consignment. The Article is applicable only to cases where assets are supplied under contracts for sale, hire-purchase, financial lease or consignment. This requirement already follows from the first half-sentence of paragraph (1) which contains a reference to the cases set out in IX.–1:103 paragraph (2); references to contracts for sale, hire-purchase, financial lease or consignment are also contained in paragraph (1)(a) and (d).

The great majority of cases in which retention of ownership devices are used will fall under these four classes of contracts; throughout these rules, only these contracts are expressly mentioned as examples of cases where retention of ownership devices might be used. Nevertheless, the definition of retention of ownership devices in IX.–1:103 paragraph (1) is not limited to security in the context of these contracts and would allow the use of retention of ownership devices also in other transactions. This possibility is, however, at least not directly covered by the present Article. Instead, the question whether a retention of ownership device arises under any other transaction will have to be answered primarily on the basis of the criteria set out in IX.–1:103 paragraph (1) alone; as a clarification of these criteria, however, the more detailed provisions in paragraph (1)(a) to (d) of the present Article may still be useful.

Ownership of supplied assets or authorisation by owner. Paragraph (1)(a) requires that the assets that are supplied under contracts for sale, hire-purchase, financial lease or consignment must be owned by the seller, supplier or lessor or that the latter must act with authority of the owner.

If the seller, supplier or lessor supplies assets which it neither owns nor is authorised by the owner to supply, there can be no creation of a retention of ownership device at all. The (true) owner's rights are not affected and are not turned into a retention of ownership device; nor does the seller, supplier or lessor acquire such a type of proprietary security:

> *Illustration 1*
> A agrees on a contract for financial leasing of a car with B. The car supplied by A to B, however, is actually owned by C who is unaware of the transaction between A and B. No proprietary security arises in favour of A and C remains the outright owner (subject, however, to the possibility of a good faith acquisition by B if and when the latter exercises an option to acquire ownership). Therefore, C's rights in the supplied car remain effective against third parties even without registration.

The situation is different if the seller, supplier or lessor is not the owner, but acts with authority of the owner in relation to the supplied asset. Since the owner (who does not intend to become a party to the contract of sale, hire-purchase, financial leasing or consignment: this is not a case of representation according to Chapter 6 of Book II) has authorised the seller, supplier or lessor, the agreement on a retention of ownership reduces the owner's ownership to a retention of ownership device, *i.e.* a security device under this Book. Its effectiveness against third parties depends upon registration. It should be noted, however, that even though it is the (true) owner who retains a proprietary right in the sold asset, it is the seller, supplier or lessor, *i.e.* the person concluding the contract of sale, hire-purchase, financial leasing or consignment as supplier in its own name, who is to be regarded as secured creditor for the purposes of this Book (see IX.–1:104 paragraph (2)). Where the true owner authorises the seller, supplier or lessor to reduce its ownership into a retention of ownership device securing a right to payment owed under the contract of sale, hire-purchase, financial leasing or consignment to the seller, supplier or lessor, this authorisation also allows the seller, supplier or lessor to exercise vis-à-vis the buyer, hire-purchaser, lessee or consignee the rights deriving from the true owner's retained ownership under this Book.

Illustration 2
A, a car dealer, agrees on a contract for financial leasing of a car with B. The car supplied by A to B, however, is actually owned by A's customer C who has authorised A to supply the car under a retention of ownership device to B. A concludes the contract of financial leasing with B in its own name; C is not a party to this transaction between A and B. However, on the basis of this transaction and especially on the basis of the authorisation granted by C to A, C's former outright ownership is reduced to a mere retention of ownership device which is effective against third parties only if registered. A, however, is the lessor, therefore A is regarded as secured creditor for the purposes of this Book and is authorised to rely on the retention of ownership device, e.g. by asserting the rights of a secured creditor under IX.–5:201 (pre-default) or IX.–7:301 (after default).

Specification of supplied asset in contract for proprietary security. Paragraph (1)(b) requires that the asset which is to be subject to a retention of ownership device is specified in the contract for proprietary security, i.e. the contract for sale, hire-purchase, financial lease or consignment (see IX.–1:103 paragraph (2)). In general, every contract for sale, hire-purchase, financial lease or consignment under which assets are to be supplied will already contain a clause specifying or allowing the specification of the assets to be supplied, so that paragraph (1)(b) could be thought not to contain an additional requirement. If, however, only some of several supplied assets are to be subject to a retention of ownership device, while ownership of the others is to pass, an additional specification of these supplied assets which are to be subject to a retention of ownership device is necessary.

Existence of secured right. Paragraph (1)(c) provides that there can be a retention of ownership device only if there is a secured right, i.e. a right to performance which is to be secured by the retained ownership. If there is initially such a secured right, e.g. the right to payment of the purchase price, which subsequently ceases to exist because payment is made by the debtor, the retention of ownership device terminates (see IX.–6:101 paragraph (1)(f)). Whether or not the buyer, hire-purchaser, lessee or consignee acquires unencumbered ownership after termination of the retention of ownership device due to satisfaction of the secured right, depends upon the terms of the agreements of the parties (see IX.–6:104 paragraph (5)). In case of a retained ownership under a contract of sale, the buyer will become the owner once the purchase price is paid. If, however, the parties to a contract of financial leasing merely have agreed that the lessee shall be entitled to continue to use the leased assets without any further payment or for merely nominal payment (see the last alternative of IX.–1:103 paragraph (2)(c)), the lessor remains the owner even after full payment of the secured right, i.e. the right to payment of rent.

Ownership is retained. Finally, a retention of ownership device arises only if the seller, supplier or lessor actually retains ownership in the context of the relevant transaction (see paragraph (1)(d). This requirement is obviously the core characteristic of a retention of ownership device and as such it forms a central part of the definition of this type of proprietary security in IX.–1:103 paragraph (1). Paragraph (2) clarifies this requirement by providing that a retention of ownership device is also created if there is a transfer of ownership which is only conditional upon performance of the obligation corresponding to the secured right. For example, a buyer under a retention of title agreement can agree with the seller on a transfer of ownership which is to take effect only upon payment of the purchase price. The fact that this transfer is conditional upon performance of the secured right means that the (unconditional) ownership does not pass before the secured right is satisfied and until

that time the retained ownership can serve as security for the right to payment of the purchase price.

C. Retention of ownership devices as acquisition finance devices

While security rights as limited proprietary rights are regarded as acquisition finance devices only if additional criteria are fulfilled, retention of ownership devices are always covered by the definition of acquisition finance devices (see IX.–1:201 paragraph (3)). This does not have any bearing on the creation of retention of ownership devices, but it is the basis under these rules for the preferred treatment for retention of ownership devices for purposes of priority (see IX.–4:102 paragraph (1)). Moreover, it should be added, retention of ownership devices are as acquisition finance devices subject to the requirement of registration according to IX.–3:107. Contrary to the legal practice in a number of member states, a retention of ownership is therefore effective as against third parties only if in addition to the requirements of creation under IX.–2:201 there is also a registration of the retention of ownership device under Section 3 of Chapter 3.

Section 3: Creation of security rights in specific types of assets

IX.–2:301: Encumbrance of right to payment of money

(1) The encumbrance of a right to payment of money is also subject to the following special rules.

(2) The provisions of Book III, Chapter 5 apply with appropriate adaptations, except III.–5:108 (Assignability: effect of contractual prohibitions) paragraphs (2) and (3) and III.–5:121 (Competition between successive assignees).

(3) A right to payment held by the security provider against the secured creditor may be encumbered by the security provider also in favour of the secured creditor.

(4) A security right encumbering a right to payment extends to any personal or proprietary security right securing this right to payment.

COMMENTS

A. General

While Sections 1 and 2 of this Chapter 2 cover the creation of security rights and retention of ownership devices in general, the rules in this Section 3 contain special provisions covering the creation of security devices in specific assets; these rules supplement the provisions in the preceding Sections.

B. Scope of application

The present Article is applicable in every case in which a right to payment is used as collateral. The most common type of security in a right to payment will be a security right, *i.e.* a limited proprietary right encumbering the right to payment, created by granting; this covers also cases in which the parties purport to assign a right to payment for security purposes. Such a transaction is regarded under these rules as creating a security right only (see IX.–1:102 paragraph (3)). There will hardly ever be a practical need to agree that a right to payment should be subject to a retention of ownership device. The separation of ownership and possession – which characterises this type of security and constitutes its raison d'être – cannot apply to rights to payment. Moreover, a retention of ownership in a right to payment contradicts the economic rationale behind the recognition of that technique of security since the trading of rights to payment does not deserve the same encouragement as the acquisition of corporeal assets.

C. Application of provisions on assignment

The rules on assignment of a right to payment in Book III Chapter 5 are expressly declared to be applicable “with appropriate adaptations” (paragraph (2)). The reason for a merely “with adaptations” application is that in the case of a security right in a right to payment this right is merely encumbered and not transferred as in the case of an assignment. On the other hand, applying the rules of Book III, Chapter 5 is in line with the general rule that the encumbering of a right is a partial transfer of a limited right (of security) to the secured creditor.

Certain provisions of Book III Chapter 5 have been excepted from application. This exception applies in particular to III.–5:108 (Assignability: effect of contractual prohibitions)

paragraphs (2) and (3). These paragraphs run counter to the policy of this Book to disregard any restriction on transferability, in so far as it prevents or limits the possibility to create security rights – cf. IX.–2:201. However paragraph (4) of III.–5:108 on the assignor's liability to the debtor for any breach of a prohibition or restriction of assignment does apply in the present context and is a sufficient sanction.

III.–5:121 (Competition between successive assignees) is excepted since this provision runs counter to the rules on priority and also is not reconcilable with the rules on registration in Book IX.

D. Encumbrance of security provider's right against secured creditor

Paragraph (3) clarifies a point on which doubts had arisen in some countries. It is clarified that a security provider's right to payment against the secured creditor can be encumbered in favour of the latter. The analogy to assignment helps to confirm this hypothesis. Certainly the security provider can assign a right to payment which it holds against the secured creditor to the latter. While an assignment may appear to be somewhat artificial, a mere encumbrance which may even be provisional, makes good sense.

E. Extension of encumbrance to security rights

Paragraph (4) expresses a general rule. Dependent personal and proprietary security rights fall by virtue of their dependency under the scope of a proprietary encumbrance of the right to payment, *i.e.* the secured creditor may in the event of default not only enforce its security right in the right to payment but may also exercise the security rights securing this right to payment in order to obtain satisfaction of the secured right. At least partly, this result follows already from the application of the rules on assignment. III.–5:115 paragraph (1) expressly extends the effects of an assignment to all "accessory rights and transferable supporting security rights". Paragraph (4) of the present Article is confirmed by IX.–7:214 paragraph (4).

IX.–2:302: Security rights in shares of a company

(1) Possession of negotiable certificates of shares of a company which are directly held is regarded as possession of the shares.

(2) Shares of companies which do not meet the requirements of paragraph (1), whether or not they are registered, cannot be subject to a possessory security right.

(3) Security rights in shares of companies extend to dividends, bonus shares and other assets which the shareholder derives from the shares but are limited to the financial value of the shares and such assets.

COMMENTS

A. Scope of application of possessory security rights

One issue that traditionally causes some problems in the context of the creation of possessory security rights is to determine the types of assets that may be subject to possessory security rights. Doubts may arise, in particular, with respect to assets which essentially are intangible rights, but which are evidenced by, or embodied in, a document.

These rules do not intend to classify these assets as corporeal (and therefore possibly subject to the exercise of possession) or intangible (which would rule out the possibility of possession of the asset concerned) in general. Instead, it appears to be preferable merely to state that certain consequences which traditionally are connected with this classification are applicable to these assets, *i.e.* whether possession of the relevant documents can be regarded as sufficient for the creation of a possessory security right and for achieving effectiveness of a security right in these assets as against third parties. The last-mentioned issue is to be dealt with in IX.–3:202 and IX.–3:203. By contrast, IX.–2:302 to IX.–2:304 deal with the preliminary issue of whether possession of a relevant document can be sufficient for the creation of a possessory security right in shares of a company (IX.–2:302 paragraphs (1) and (2)), bonds (IX.–2:303) and negotiable documents of title and negotiable instruments (IX.–2:304 paragraph (3))

B. Possessory security rights in shares of a company

Concerning the question whether possession of a share certificate can be regarded as sufficient for the creation of a possessory security right in the share itself, paragraphs (1) and (2) distinguish between two different types of holding shares. This reflects relatively recent developments that have occurred in the "certification" of participations in companies. While until recently shares in companies traded in the capital markets typically were embodied in negotiable share certificates, the trend for dematerialisation has radically changed the picture. IX.–2:302 must fit both the old system of negotiable share certificates as well as the modern and radically expanding systems of indirectly held certificates, global certificates and uncertificated book-entries.

Only if shares are certificated in the traditional form and where these certificates are held *directly* by the shareholder, does the latter have possession so that a possessory security right can be created in the share certificates and therefore in the shares themselves. The number of these situations is very limited. Primarily, there is a direct holding only if the shareholder keeps the share certificates personally. Alternatively, the certificates may be kept by a third party, especially a bank or other financial institution, in a separate safe for the customer to

which only the shareholder – with or without the assistance of the holding institution – has access.

Shares of companies that do not meet the requirements of paragraph (1), whether or not they are registered, cannot be subject to a possessory security right (paragraph (2)). This applies, *e.g.*, to shares the certificates for which are held by a bank in a fund and where the individual shareholder's rights are merely represented by a book entry in that customer's favour. The same result is achieved if the company has issued merely one global share which is deposited with a bank and where, again, the individual shareholders' rights are merely represented by book entries in their name. And finally, the preceding rules equally apply, where a company has not issued even a single global share, but all entitlements of shareholders are merely certified by book entries.

C. Scope of security rights in shares of a company

Paragraph (3) deals with a different issue. Irrespective of whether a security right in shares of a company is to be regarded as possessory or non-possessory, a question arises as to the scope of such a security right. A share of a company entitles the shareholder typically not only to a share in the capital (*i.e.*, the value to be received as distributions in the event of a dissolution of the company) and fruits (*i.e.*, dividends), but also to a participation in decisions on major issues of the company's affairs.

Paragraph (3) provides as a default rule that security rights in shares of companies are limited to the financial value of the shares. This means that the secured creditor is not entitled to exercise, *e.g.*, the shareholder's voting rights. The financial value of the shares, so long as they are *cum dividend*, will of course include any accrued right to dividends.

IX.–2:303: Security rights in bonds

Paragraphs (1) and (2) of the preceding Article apply also to bonds.

COMMENTS

For bonds, the same issues arise and the same solutions apply concerning the creation of possessory security rights as for shares (see Comments A and B on the preceding Article. Here also, the possession of directly held bond certificates is sufficient for the creation of a possessory security right in the bonds. Where there are no directly held bond certificates, however, the bonds cannot be subject to a possessory security right.

IX.–2:304: Negotiable documents of title and negotiable instruments

(1) If and as long as a negotiable document of title covers goods, a security right in the document covers also the goods.

(2) For negotiable instruments, a security right in the instrument covers also the right embodied in the instrument.

(3) Possession of a negotiable document of title or a negotiable instrument is regarded as possession of the goods covered by the document of title or the right embodied in the instrument.

COMMENTS

A. Negotiable documents and negotiable instruments

This Article deals with the creation of a security right in negotiable documents of title as well as negotiable instruments. The common denominator of both kinds of negotiable "papers" is obviously their negotiability, *i.e.* their transferability. Both kinds of "papers" represent values. Negotiable documents represent corporeal assets (especially merchandise); negotiable instruments intangibles, more particularly rights to payment embodied in bills of exchange, cheques and promissory notes (cf. I.–1:101 paragraph (2)(d)).

Negotiable documents of title are, in particular, bills of lading and warehouse receipts. For the rules in IX.–2:304 to apply it is assumed that a paper document has in fact been issued; it cannot apply to electronic bills of lading which have started to be used, but so far are not yet generally recognised.

B. Scope of security rights in negotiable documents of title

Paragraph (1) draws the conclusion from the negotiability of "genuine" documents of title that a security right created in the document of title also creates a security right in the corporeal assets represented by the document, as long as the negotiable document in fact covers the assets.

C. Scope of security rights in negotiable instruments

Paragraph (2) corresponds to the rule in paragraph (1) and confirms a general principle of the law of negotiable instruments. The creation of a security right in the paper creates a security right in the embodied right; *i.e.* the right to payment of a sum of money.

D. Possessory security rights in negotiable documents and instruments

The question may also arise whether there can be a *possessory* security right in negotiable documents of title and negotiable instruments (see generally Comment A on IX.–2:302). Paragraph (3) answers this question in the affirmative and provides that possession of the document or instrument, *i.e.* the paper, suffices for the creation of a possessory security right in the goods covered by the document of title or in the right embodied in the instrument.

IX.–2:305: Security right in an accessory

(1) A security right may be created in an asset that, at the time of creation, is an accessory to a movable or an immovable. If the rules applicable to immovable property so provide, the security right may also be created according to the rules governing immovable property.

(2) A security right in goods continues even if the encumbered asset subsequently becomes an accessory to a movable or an immovable.

COMMENTS

A. "Accessory"

The legal meaning of the term "accessory" (see the definition in IX.–1:201 paragraph (2)) does not seem to be generally known and understood.

The best way of clarifying the term is by contrasting it to the related notion of "part and parcel" (*partie integrante*), such as the bricks and other material used for the construction of a building. After integration, any security (or other) right existing in the bricks or similar building material is extinguished by virtue of the practically irreversible integration into the building.

By contrast, accessories do not lose their identity, if they can be separated without any or any appreciable damage to either the accessory itself or the unit with which they are connected. Practical examples are the engines of most vehicles, especially cars, aeroplanes or ships; the windows of a building or the boiler of a heating system and similar machinery – provided it is economically feasible and sensible to separate these accessories from the main asset.

B. Legal consequences

If the technical criteria of an accessory are fulfilled, the accessory preserves its legal identity. Two consequences are set out by the present Article. First, an asset that is an accessory, whether of a movable or an immovable, can be encumbered separately from that movable or immovable by a security right that is governed by the rules of Book IX. This implies that after separation from the movable or immovable the security right continues to exist as before.

Secondly, a security right created in a corporeal asset that afterwards becomes an accessory to a movable or an immovable, continues to exist thereafter. Sometimes it is even possible to achieve public notice by a corresponding notation in the land register of the immovable (cf. IX.–3:105).

IX.–2:306: Proceeds of the originally encumbered assets

(1) A security right extends to rights to payment due to a defect in, damage to, or loss of the originally encumbered asset, including insurance proceeds.

(2) A possessory security right extends to civil and natural fruits of the originally encumbered assets unless the parties agree otherwise.

(3) Other proceeds of the originally encumbered assets are covered only if the parties so agree.

COMMENTS

A. Basic idea

The three paragraphs of the provision deal with three separate approaches to the extension of a security right to the proceeds of the originally encumbered asset. The basic idea underlying this provision is that in general a security right does *not* extend beyond the originally encumbered asset into its proceeds, such as in particular a right to payment of the sales price of that asset. The reason for this limitation is that other providers of credit should have a fair chance of securing their rights to payment by encumbering the proceeds in the course of financing the general dealings of the buyer.

The term "proceeds" is defined in IX.–1:201 paragraph (11). It does not cover new assets resulting from the use of the original goods for production, combination or commingling; whether these new products or combined or commingled assets are covered by the original security rights is regulated separately in IX.–2:307 to IX.–2:309.

The present Article applies not only where the original assets were subject to a security right, but covers also the extension of the seller's, supplier's or lessor's rights into the proceeds of the supplied assets where these assets were subject to a retention of ownership device. It should be emphasised, however, that even where there is such an extension, the seller, supplier or lessor can only have a security right in the proceeds, not retained ownership. As opposed to the supplied assets, these proceeds had not originally been owned by the seller, supplier or lessor.

B. Exceptions

The three paragraphs of the Article establish three exceptions from the general principle underlying this provision, *i.e.* the rule that in general a security right does *not* extend beyond the originally encumbered asset into its proceeds. Each of these exceptions has a rationale and scope of its own.

Paragraph (1) contains an exception which applies automatically without specific agreement. The provision enumerates events most of which occur without the agreement and even against the will of the owner of an encumbered asset. However, this exception also covers cases in which the events mentioned may be due to acts of the security provider or its agents or employees. The reason justifying the automatic extension of the security right to the proceeds is the diminution of the value or total loss of the encumbered asset. In order to protect the secured creditor, its security right is extended to the rights to payment arising upon the occurrence of the events mentioned and events similar to these.

Paragraph (2) establishes a default rule that, in the case of a possessory security right, the security right extends to civil and natural fruits of the encumbered assets. This rule will apply unless the parties agree otherwise. The default rule is based upon the fact that in the case of a possessory security right the secured creditor has possession of the encumbered assets. Therefore, the secured creditor will first notice whether and which fruits the object possessed by it will produce. Further, the secured creditor will of necessity be the person who, as possessor of the encumbered asset, will best be able to collect any fruits.

The meaning of the term "natural fruits" (see IX.–1:201 paragraph (11)(c)) need not be explained. A typical example is the offspring of animals. Transplanted to assets other than animals, the less obvious term "civil" fruits is used. Typical examples are interest on money or dividends on company shares.

In the case of civil and natural fruits an additional issue arises, *i.e.* who becomes the owner of the fruits? This issue is not explicitly solved by the text; but the answer is implied. It is only the security right that is extended to the fruits. This implies that the fruits are owned by the owner of the encumbered assets, and that ownership is encumbered by the security right which encumbers the fruit-bearing main asset.

Paragraph (3) provides that proceeds other than those covered by paragraphs (1) and (2) are encumbered in favour of the secured creditor holding a security right in the asset from which these proceeds are derived only if there is an agreement of the parties, *i.e.* of secured creditor and security provider. The initiative to conclude such an agreement will usually be taken by the secured creditor, since the latter will be interested in preserving its security right in order to remain secured as long as possible. However, the creditor's interest will often coincide with that of the debtor, who will wish to offer security in order to prolong the covered credit as long as possible at a favourable interest rate. On the other hand, where the debtor/security provider has access to a cheaper supplier of credit, a switch to that other creditor will often only be feasible if the debtor can dispose of the proceeds as security for the new creditor.

C. Effectiveness and priority

Security rights in the proceeds covered by paragraph (1), *i.e.* security rights in rights to payment due to a defect in, damage to, or loss of the encumbered assets, are effective without fulfilment of any requirement under Chapter 3 (see IX.–3:101 paragraph (2)). Security rights in this type of proceeds continue to enjoy the priority of the security rights in the original encumbered assets (IX.–4:104 paragraph (1)(b)). Also any superpriority enjoyed by the security right in the originally encumbered assets is preserved (see IX.–4:105 paragraph (2)(a)). Therefore, even if a retention of ownership device in the original assets is replaced by a mere security right in proceeds of this type, the latter enjoy the same priority as the security in the original asset.

Security rights in civil or natural fruits into which the rights of the secured creditor are extended according to paragraph (2) are also covered by IX.–3:101 paragraph (2). Security rights in other proceeds, however, into which the rights of the secured creditor are extended only if there is a party agreement to this effect according to paragraph (3), are not exempted from the requirements of Chapter 3, *i.e.* these security rights are effective only if they are registered or if the encumbered assets are in the possession or control of the secured creditor.

Under the conditions set out in IX.–4:104 and IX.–4:105, however, also these security rights can continue to enjoy the priority of the original security rights; for details reference is made to the Comments on those provisions.

IX.–2:307: Use of encumbered goods for production or combination

(1) Where encumbered materials owned by the security provider are used for the production of new goods, the secured creditor's security right may be extended by party agreement:

(a) to the products; and

(b) to the right to payment to which the security provider as former owner of the material is entitled by virtue of the production against the producer according to VIII.–5:201 (Production).

(2) The preceding paragraph applies accordingly if goods are combined in such a way that separation would be impossible or economically unreasonable for the purposes of VIII.–5:203 (Combination).

(3) The issue whether a former owner of material other than the holder of a retention of ownership device acquires a security right by operation of law as the result of production or combination involving the material, and the effectiveness and priority of this security right are governed by Book VIII, Chapter 5. If these security rights are created by party agreement, they are subject to the provisions of Book IX, but enjoy superpriority according to VIII.–5:204 (Additional provisions as to proprietary security rights) paragraph (3).

(4) In the case of paragraph (1)(b), the right of the secured creditor, as the former holder of an encumbrance in the material, extends to the security rights mentioned in paragraph (3).

COMMENTS

A. General

Chapter 5 of Book VIII contains extensive rules on production, combination and commingling of goods. Concerning the issues of production and combination, these provisions focus on: (i) the distribution of ownership of new goods that have been produced or combined using material owned by different persons; (ii) rights to payment owed by the owner of the new goods to former owners of material who have lost their ownership as a consequence of the production and combination; (iii) security rights in the new goods securing these rights to payment of the value of the lost assets.

The questions of the consequences of production and combination on security rights in the material that is used for production and combination are, however, not covered by Chapter 5 of Book VIII. These issues are dealt with in paragraphs (1) to (2) of this Article. Paragraphs (3) and (4) cover some questions of the delimitation between Book VIII and Book IX concerning the former material owner's security rights, see Comments E and F below.

If the material that is used for production or combination had not been subject to a security right, but to a retention of ownership device, the following Article applies instead of this Article.

B. Use of encumbered assets for production of new goods

Where encumbered assets are used for the production of new goods, these products cannot be regarded merely as replacements of the assets that were originally encumbered without any value being added. Instead, the products are the result not only of the original encumbered material used in the process of the production, but also of work by the producer and possibly of other assets that have been used for the production as well. Therefore, it would be

inequitable vis-à-vis both the security provider and its other creditors to extend the original security right in assets that were used for the production of new goods into these products. In this respect it is irrelevant whether or not the production as such was permitted by the secured creditor.

It is true that the provisions in Book VIII automatically extend the proprietary rights of a former owner of material that has been used for the production into these new products, either by awarding ownership (if the owner is the producer) or by granting a security right in these products. However, the holder of merely a security right in those materials is obviously in a weaker position that does not justify an automatic extension of the security right into the products.

Paragraph (1) mentions two types of assets into which the original security right might be extended on the basis of an agreement between the security provider and the secured creditor if the collateral had been used for the production of new goods. Sub-paragraph (a) covers the new products themselves. If the security provider becomes the owner of the new goods that have been produced using the encumbered material (which according to the provisions of Chapter 5 of Book VIII will be the case where the security provider is the producer), then a security right in these new products may be created instead of the security right in the material which no longer exists.

> *Illustration 1*
> A owns some cloth in which she creates a non-possessory security right in favour of B. If A then produces garments using the encumbered cloth, A will become the owner of the garments; B's security right in the cloth, however, will cease to exist because the cloth no longer exists as an individual asset. If A and B have so agreed, however, B might acquire a security right in the garments instead.

Sub-paragraph (b) deals with a right to payment to which the security provider as former owner of the (encumbered) material is entitled by virtue of the production against the producer according to VIII.–5:201. If the security provider does not become the owner of the products, then the security provider cannot create a security right in these products in favour of the secured creditor because the security provider is not entitled to dispose of these products. As a substitute for losing ownership of the material, however, the security provider normally acquires a right to the payment of the monetary value of the material against the producer (see VIII.–5:201). This right to payment may be encumbered on the basis of an agreement with the original secured creditor.

> *Illustration 2*
> As in illustration 1, A owns some cloth in which she creates a non-possessory security right in favour of B. If then C produces garments using A's cloth which is encumbered in favour of B, C will become the owner of the garments. A's ownership of the cloth is lost and so is B's security right in the cloth. However, A has now a right to payment against C for the monetary value of the cloth. If A and B have so agreed, B might acquire a security right in this right against C instead of the original security right in the cloth.

Concerning the latter case, it should be added that the security provider who is the former owner of the material that has been used for the production and whose ownership has been lost by virtue of the production also acquires a security right in the new goods according to the rules of Chapter 5 of Book VIII (see also paragraph (3) sentence 1). This security right secures the security provider's right to payment against the owner of the product. If the latter right to payment is encumbered in favour of the secured creditor, *i.e.* the former holder of an encumbrance in the material that had been used for the production, then this security right in the right to payment extends also to the security right in the products securing the right to payment (see specifically for this situation paragraph (4); the general rule covering the extension of encumbrances of rights to payment into security rights for these rights is laid down in IX.–2:301 paragraph (4).

Illustration 3
The facts are identical to those in illustration 2. In addition to the right to payment against C, A acquires as the result of the production and in replacement of the lost ownership of the cloth a security right in the garments owned by C. This security right serves as security for A's right to payment against C. B, in favour of whom A and B have encumbered A's right to payment against C, is therefore entitled to A's security right in the garments as well.

C. Combination of encumbered assets with other assets

According to paragraph (2) the same principles as laid down in paragraph (1) apply also to situations where encumbered assets have been combined with other assets in such a way that separation would be impossible or economically unreasonable (see VIII.–5:203). Also in this situation, value has been added to the original collateral so that it would be inequitable to extend the original security in the assets that were used for the combination into the new combined goods or into the secured right to payment for the value of the lost material if there is no party agreement to this effect.

D. Effectiveness and priority

Security rights in the new products or combined assets or in the security provider's right to payment against the owner of these assets are not exempted from the requirements of Chapter 3. Therefore there must be either possession, control or registration in order for these security rights of the former holder of an encumbrance in the material that was used for the production or combination to become effective.

If these security rights are effective, they preserve the priority of the security rights in the material (see IX.–4:103 paragraph (1)(a)); this includes the continuation of a superpriority of the original security right (see Comment A to IX.–4:103).

E. Paragraph (3): Delimitation between Books VIII and IX

It has already been noted that the provisions on production and combination in Chapter 5 of Book VIII also deal with security rights in favour of the former owner of material who has lost ownership in the course of the production or combination. The question whether such security rights are governed by Book VIII or Book IX is a rather complicated matter which is primarily to be determined on the basis of VIII.–5:101. In order to give a complete picture in the present context, paragraph (3) summarises this position as follows.

Sentence 1: Security rights arising by operation of law. If the security rights of the former owner of material have been acquired by the latter by operation of law, then the rules of Book VIII have priority over Book IX (see VIII.–5:101 paragraph (1) sentence 2 and paragraph (4) sentence 1). This covers especially the creation, the effectiveness and the priority of such security rights. Concerning other issues not covered by Book VIII, however, such as the enforcement of the security right, the provisions of Book IX remain applicable.

Paragraph (3) sentence 1 is expressly made inapplicable where the former owner of the material used for production or combination had been a holder of a retention of ownership device in the material. For assets subject to a retention of ownership device, the rules of Chapter 5 of Book VIII are not directly applicable (see the express exception in VIII.–5:101 paragraph (3)); instead, the consequences of production or combination of goods subject to a retention of ownership device are governed by IX.–2:308 paragraph (1), which in turn provides for a modified application of the rules of Chapter 5 of Book VIII.

Sentence 2: Security rights created by party agreement. Production and combination may also take place on the basis of an agreement of the parties. Such an agreement may then also provide for the creation of security rights similar to the ex lege security rights created by the provisions of Chapter 5 of Book VIII. VIII.–5:101 paragraph (4) sentence 2 provides that such security rights which are based upon a party agreement are subject to the provisions of Book IX. If material owner A agrees with producer B that the latter may produce new goods out of A's material and that, while B will be the owner of the products, A will have a right to payment for the value of the goods, secured by a security right in the products, then this security right is subject to the provisions of Book IX. The only exception laid down in VIII.–5:101 paragraph (4) sentence 2 is that VIII.–5:204 paragraph (3) is applicable, i.e. the former material owner's security right enjoys superpriority in the same manner as a purchase money security right or a retention of ownership device.

F. Paragraph (4): Security rights of former holder of encumbrance in material extend to security rights of former owner of material

Paragraph (4) covers the situation which has already been dealt with in Illustration 3. Two security rights are here involved. On the one hand, the (typically *ex lege*) security right of a security provider who has lost ownership in the material as a result of the production or combination; and on the other hand, the consensual security rights of the secured creditor who originally held a security right in the material that was used for the production or combination. If the latter secured creditor acquires a security right in the rights of the security provider as former material owner against the new owner of the products or combined goods, then this security rights extends also to the security provider's security right in these new products or combined goods.

IX.–2:308: Use of goods subject to a retention of ownership device for production or combination

(1) The rules of Book VIII, Chapter 5 (Production, combination and commingling) apply to the consequences of production or combination of goods subject to a retention of ownership device; references to the owner of these goods are to be understood as references to the buyer, hire-purchaser, lessee or consignee.

(2) Where materials subject to a retention of ownership device are used for the production of new goods, the seller, supplier or lessor may acquire a security right by party agreement:

(a) in the products; and

(b) in the right to payment to which the buyer, hire-purchaser, lessee or consignee is entitled against the producer according to VIII.–5:201 (Production) on the basis of being regarded as the former owner of the material according to paragraph (1).

(3) The preceding paragraph applies accordingly if the goods are combined.

(4) In the case of paragraph (2)(b), the right of the seller, supplier or lessor extends to the security rights in the products or combined goods acquired by the buyer, hire-purchaser, lessee or consignee as a result of the production or combination.

COMMENTS

A. General

This Article covers production or combination involving assets subject to a retention of ownership device. It deals with two different aspects of such a production or combination:

First, there is the question of the distribution of ownership and of rights to reimbursement of value as between the producer, other owners of material used for the production or combination and the buyer, hire-purchaser, lessee or consignee to whom the assets that were used for the production or combination had been supplied subject to a retention of ownership device. This issue is covered by paragraph (1) which provides for a modified application of the rules of Chapter 5 of Book VIII.

Second, there is the issue of whether the rights of the holder of the retention of ownership device continue in any rights acquired by the buyer, hire-purchaser, lessee or consignee after the production or combination. This issue, which resembles the matters dealt with in paragraphs (1), (2) and (4) of the preceding Article for the case of a production or combination involving assets subject to a security right, is covered by paragraphs (2) to (4) of the present Article.

B. Modified application of Chapter 5 of Book VIII (paragraph (1))

The starting point for the rule in paragraph (1) is that the provisions of Chapter 5 of Book VIII do not apply to the production or commingling of assets that are subject to a retention of ownership device (see VIII.–5:101 paragraph (3)). The reason for this exemption is that the security purpose of retention of ownership devices distinguishes this type of proprietary right from ownership in general. While in general it is appropriate to extend the proprietary position of an (outright) owner of material into the products or combined assets resulting from a production or combination according to the rules of Chapter 5 of Book VIII, the situation is different in relation to the proprietary position of a person, whose ownership merely fulfils a security purpose under a contract of sale, hire-purchase, financial leasing or consignment. At

least if its extension into assets different from the original property is at issue, this proprietary position is weaker and cannot be treated as favourably as ownership in general under Chapter 5 of Book VIII.

This exemption of assets subject to retention of ownership devices from the rules of Chapter 5 of Book VIII makes it necessary that these issues are covered by the relevant rules in Book IX. Contrary to the cases of production or combination involving assets that are subject to a security right (IX.–2:308), Book IX has to deal in relation to the cases of production or combination involving assets that are subject to a retention of ownership device not only with the extension of this type of proprietary security, but also with the distribution of ownership of the products or combined assets.

Paragraph (1) of the present Article solves this issue by a modified reference to the rules of Book VIII. Referring to the rules of Book VIII ensures that issues of the distribution of ownership in cases of production or combination involving assets subject to a retention of ownership device do not follow entirely different rules than the same issues involving assets that are not subject to this type of proprietary security. This is especially relevant for the position of persons involved in the production or combination other than the holder of the retention of ownership device on the one hand or the buyer, hire-purchaser, lessee or consignee on the other hand. The legal position of a third party producer or an owner of another asset involved in the same act of production or combination should not be affected by the question whether some assets used in this production or combination were subject to a retention of ownership device or merely encumbered with a security right. The reference in IX.–2:308 paragraph (1) avoids the need to reiterate the differentiated and detailed solution spelt out in Chapter 5 of Book VIII in the present Chapter.

However, this reference to the rules of Chapter 5 of Book VIII is made subject to an important proviso. For the purposes of the application of these provisions to cases of production or combination involving assets that are subject to a retention of ownership device, it is not the holder of the retention of ownership device who is to be regarded as the owner of these assets, but the buyer, hire-purchaser, lessee or consignee, *i.e.* the person to whom the assets that are subject to a retention of ownership device and which are subsequently used for purposes of production or combination were supplied by their owner. This proviso emphasises the security function of the retention of ownership device and gives effect to the intentions of the parties to the contract of sale, hire-purchase, financial leasing and consignment. The buyer, hire-purchaser, lessee or consignee is the person who is able to use and benefit from the supplied assets; ownership is retained by the seller, supplier or lessor only for the purpose of securing the payment of the purchase price. An unqualified application of the rules of Chapter 5 of Book VIII would be in conflict with the principles of Book IX. According to the rules of this Book, there is in general no automatic extension of proprietary security into assets different from the assets originally serving as security. The result of an unqualified application of the rules of Chapter 5 of Book VIII, however, would be precisely such an automatic extension of the rights of the holder of a retention of ownership device into new products and combined assets. This outcome is avoided if any rights in the new products or in the combined assets or rights for reimbursement of value which would normally be awarded to the owner of the material used for production or combination according to the rules of Chapter 5 of Book VIII go to the buyer, hire-purchaser, lessee or consignee instead.

In order to clarify this concept, the main constellations of the modified application of the rules of Chapter 5 of Book VIII to a production or combination involving assets subject to a

retention of ownership device are set out in the following four illustrations. The same illustrations will be used in Comment C for the explanation of the rights of the holder of the retention of ownership device after production or combination according to paragraphs (2) to (4) of IX.–2:309.

Illustration 1
A sells iron ore under a retention of ownership clause to B. B produces steel out of this raw material. B is both producer and regarded as the owner of the material for the purposes of the application of Chapter 5 of Book VIII, therefore B becomes the owner of the steel.

Illustration 2
The iron ore supplied by A to B under a retention of ownership clause is mistakenly used by C to make steel. In the absence of an agreement between B and C, C becomes the owner of the steel; B, who is regarded as the owner of the material on the basis of IX.–2:308 paragraph (1) is entitled as against C to payment equal to the value of the steel, this right to payment is secured by a security right in B's favour in the steel (VIII.–5:201 paragraph (1)).

Illustration 3
A supplies paint under a retention of ownership clause to B. This paint is used for painting C's car. This is a case of combination (paint plus car), C's car is to be regarded as the principal part of the two components, therefore IX.–2:308 paragraph (1) read with VIII.–5:203 paragraph (2) provides that C becomes the sole owner of the whole. B is regarded as the owner of the paint for the purposes of the application of Chapter 5 of Book VIII, therefore B acquires a right to payment for the paint, secured by a proprietary security right in the combined asset (VIII.–5:203 paragraph (2)).

Illustration 4
A produces a special and expensive varnish used for musical instruments. This varnish is supplied under a retention of ownership clause to B. Some finish is applied to an industry-manufactured half-finished violin owned by C. Neither the varnish nor the violin can be regarded as principal part, therefore C as owner of a component becomes co-owner of the combined asset (violin plus varnish), see VIII.–5:203 paragraph (3) sentence 1. Since B is regarded as the owner of the varnish for the purposes of the application of Chapter 5 of Book VIII, also B becomes a co-owner of the combined asset (IX.–2:308 paragraph (1) read with VIII.–5:203 paragraph (3) sentence 1.

C. Rights of holder of retention of ownership device after production or combination

The rights of the holder of a retention of ownership device in assets that are used for production or combination are regulated in IX.–2:308 paragraphs (2) to (4) in parallel to the rights of a holder of a security right in assets that are used for production or combination according to IX.–2:307 paragraphs (1), (2) and (4). The general principle underlying IX.–2:308 paragraph (2) is that the rights of the holder of a retention of ownership device do not extend beyond the original supplied assets after these assets were used for production or

combination, unless there is an agreement to this effect between the parties, *i.e.* between the seller, supplier or lessor and the buyer, hire-purchaser, lessee or consignee.

If there is such an agreement, the rights which the holder of the retention of ownership device may acquire as a result of the production or combination depend upon the rights which the buyer, hire-purchaser, lessee or consignee, *i.e.* the other party to the contract for proprietary security, acquires. Only rights acquired by the latter can be encumbered in favour of the holder of the retention of ownership device (see the general principle in IX.–2:105 sub-paragraph (a)). This can be illustrated by reference to the examples used in Comment B above.

Illustration 5
If buyer B becomes the owner of the steel produced using the iron ore supplied by A subject to a retention of ownership device, A may acquire, if this is so agreed by the parties, a security right in the steel (IX.–2:308 paragraph (2) (a)).

Illustration 6
If buyer B does not become the owner of the steel produced using the iron ore supplied by A subject to a retention of ownership device, but merely acquires a right to payment against C which is secured by a security right in the steel owned by C, A may acquire on the basis of an agreement with B a security right in this right to payment against C (IX.–2:308 paragraph (2)(b)). On the basis of IX.–2:308 paragraph (4), A may also exercise B's security right in the steel which secures this right to payment encumbered in A's favour.

Illustration 7
Also in the case of a combination rather than a production involving assets that are subject to a retention of ownership device, buyer B acquires a right to payment for the value of the supplied paint against C, who is the owner of the combined asset, secured by a security right in the combined asset. If supplier A and B had agreed on the extension of A's rights beyond the original assets subject to a retention of ownership device, B's right to payment against C is encumbered in favour of A (IX.–2:308 paragraph (2)(b)) read with paragraph (3)); A may also exercise B's security right in the combined asset securing this right to payment (see IX.–2:308 paragraph (4) read with paragraph (3)).

Illustration 8
Where an asset supplied by A to B subject to a retention of ownership device is combined with another asset so that buyer B becomes co-owner of the combined asset, seller A may acquire, if this is so agreed by the parties, a security right in B's co-ownership share of the combined asset (IX.–2:308 paragraph (2)(a) read with paragraph (3)).

Any security rights which the holder of the retention of ownership device acquires in the new products or combined assets or in the buyer's, hire-purchaser's, lessee's or consignee's right to payment against the owner of these assets must fulfil the requirements of Chapter 3 in order to be effective as against third persons. If these security rights are effective, they preserve the

priority of the original retention of ownership device (see IX.–4:103 paragraph (1)(a)) including its superpriority (see Comment A to IX.–4:103).

IX.–2:309: Commingling of assets subject to proprietary security

(1) Where encumbered goods are commingled in such a way that it is impossible or economically unreasonable to separate the resulting mass or mixture into its original constituents, but it is possible and economically reasonable to separate the mass or mixture into proportionate quantities, the security rights that had encumbered the goods continue as encumbrances of the rights which the former owners of the goods have in the resulting mass or mixture by virtue of VIII.–5:202 (Commingling) paragraph (1)); this encumbrance is limited to a share proportionate to the value of the respective goods at the moment of commingling.

(2) Where the goods that are commingled as set out in the preceding paragraph were subject to a retention of ownership device, VIII.–5:202 (Commingling) paragraph (1) applies with the proviso that the rights of the holder of the retention of ownership device are continued in a share of the resulting mass or mixture proportionate to the value of the respective goods at the moment of commingling.

(3) Any secured creditor is entitled to exercise the security provider's right to separate a quantity equivalent to that co-owner's undivided share out of the mass or mixture (VIII.–5:202 (Commingling) paragraph (2)).

(4) If encumbered financial assets held by the secured creditor are commingled by the latter in a fund, the security provider is entitled to a share in the fund. Paragraph (1) applies with appropriate adaptations.

(5) If in the cases covered by paragraphs (1), (2) and (4) the assets of the mass or fund do not suffice to satisfy all co-owners, VIII.–2:305 (Transfer of goods forming part of a bulk) paragraphs (4) and (5) apply accordingly.

COMMENTS

A. Commingling of goods subject to a security right

Paragraph (1) of this Article deals with the effects of commingling of goods that are encumbered with a security right. This provision covers various alternatives for the commingling of encumbered goods, without distinguishing between them. Only one of the several parts, or several of them, or all commingled parts may be encumbered by a security right or by security rights of one or several secured creditors.

The basic consequences of commingling are laid down in VIII.–5:202 paragraph (1). The owners of the different commingled assets become co-owners of the resulting mass or mixture, each for a share proportionate to the value of its respective asset at the moment of the commingling. For the details of the calculation of this share and for an explanation of the requirements for a commingling in the sense of VIII.–5:202 paragraph (1), reference can be made to the Comments on that provision.

VIII.–5:202 does not, however, address the issue whether security rights that had encumbered the goods before commingling remain in existence and extend to the commingled mass or mixture. Paragraph (1) of the present Article provides that a security right that had encumbered a specific part that has been integrated into the resulting mass or mixture is preserved.

This result is justified by the fact that despite the changed form (from asset to share), in essence there is full identity of the encumbered objects before and after commingling. This identity of the objects justifies the identity of the legal status before and after commingling.

Two additional consequences of this identity are (1) that the effectiveness of the security right in the part, which had been achieved before commingling, is automatically extended to the respective share in the resulting mass or mixture (IX.–3:101 paragraph (2) and IX.–3:106); and (2) that consequently the priority, including any superpriority, of the security rights encumbering the various shares is not affected by the commingling (IX.–4:103 paragraph (1)(b)).

B. Commingling of goods subject to a retention of ownership device

The commingling of goods that are subject to a retention of ownership device is exempted from the direct scope of application of the rules of Chapter 5 of Book VIII (see VIII.–5:101 paragraph (3)). However, paragraph (2) of the present Article declares these provisions to be applicable with only a slight proviso. The rights which the owner, *i.e.* the holder of the retention of ownership device, acquires in a share of the resulting mass or mixture are not regarded as (outright) ownership, but as a continuation of the original retention of ownership device and thus as generally subject to the rules of this Book. It should be pointed out, however, that the rights in the share of the resulting mass or mixture acquired by the holder of the retention of ownership device are exempted from any requirements for effectiveness against third persons under Chapter 3 (see IX.–3:101 paragraph (2) and IX.–3:106). Also any superpriority of the original retention of ownership device is not affected (see IX.–4:103 paragraph (1)(b)).

As in relation to the extension of security rights in assets that are commingled (see Comment A), this result is justified by the fact that the objects that were subject to a retention of ownership device before the commingling can still be regarded as being represented by the shares in the commingled mass or mixture.

C. Financial assets

Paragraph (4) covers slightly different issues of commingling. First, the assets that are commingled under this paragraph are financial assets; therefore, VIII.–5:202 is not applicable since this provision is limited to the commingling of goods. Second, paragraph (4) is concerned not only with the question whether the secured creditor obtains a security right in the commingled assets but also (in sentence 1) with the question whether the security provider holds any entitlement (even if encumbered in favour of the secured creditor, see sentence 2) in the commingled fund. Technically, the issue dealt with in paragraph (4) sentence 1, *i.e.* the commingling of financial assets by a person holding these assets for the owner, could be regarded as a matter outside the scope of the rules since it arises also where the assets are not encumbered in favour of the holder. However, since it is not dealt with in any other Book of the DCFR and since it is of specific importance in the context of these rules, it is covered by this Article as an annex to the other rules on commingling.

The first issue is whether and under which conditions a secured creditor might be allowed to commingle encumbered financial assets. While the duty to keep the encumbered assets identifiable under IX.–5:201 paragraph (1) is not directly applicable to the present situation since the secured creditor is not in possession of the intangible encumbered assets, it would

seem that a similar rule must apply also to (intangible) financial assets under the secured creditor's control on the basis of the general requirement of good faith (see also Comment A on IX.–5:201). Consequently, the commingling of encumbered financial assets in a fund by a secured creditor in control which results in the individual assets being no longer identifiable will only be allowed if agreed by the parties.

Once the encumbered financial assets have been commingled by the secured creditor, which may be, but need not be, a bank or equivalent financial institution, with other financial assets of the same kind owned by other security providers, other clients or by the secured creditor itself, there can no longer be individual entitlements of the original owners to the specific assets originally contributed by them. Obviously, this is a general problem which also arises outside the area of proprietary security, *i.e.* if a client's financial assets held by a bank are not encumbered in favour of the latter.

The solution provided for by paragraph (4) sentence 1 conforms to that provided for the commingling of tangible assets by VIII.–5:202. The security provider, *i.e.* the owner of the assets, is entitled to a proportionate share in the fund. This share is proportionate to the value of its contribution (see paragraph (4) sentence 2 read with paragraph (1) sentence 2); moreover, this share is encumbered in favour of the secured creditor (see paragraph (4) sentence 2 read with paragraph (1) sentence 1).

As for the cases covered by paragraphs (1) and (2), if the fund due to events that occur later is no longer able to cover all justified claims of the holders of shares, paragraph (5) applies.

Section 4: Coverage of security

IX.–2:401: Secured rights

(1) The security covers, within its maximum amount, if any, not only the principal secured right, but also the ancillary rights of the creditor against the debtor, especially rights to payment of:

(a) contractual and default interest;

(b) damages, a penalty or an agreed sum for non-performance by the debtor; and

(c) the reasonable costs of extra-judicial recovery of those items.

(2) The right to payment of the reasonable costs of legal proceedings and enforcement proceedings against the security provider and against the debtor, if different from the security provider, is covered, provided the security provider had been informed about the creditor's intention to undertake such proceedings in sufficient time to enable the security provider to avert those costs.

(3) A global security covers only rights which originated in contracts between the debtor and the creditor.

COMMENTS

See Comments A to F on the corresponding rule in IV.G.–2:104.

CHAPTER 3: EFFECTIVENESS AS AGAINST THIRD PERSONS

Section 1: General rules

IX.–3:101: Effectiveness as against third persons

(1) A security right created according to Chapter 2 has no effects against the following classes of third persons:

(a) holders of proprietary rights, including effective security rights, in the encumbered asset;

(b) a creditor who has started to bring execution against those assets and who, under the applicable law, has obtained a position providing protection against a subsequent execution; and

(c) the insolvency administrator of the security provider,

unless, subject to exceptions, the requirements of this Chapter are met.

(2) Where a security right that is effective against third persons according to the provisions of this Chapter is extended by virtue of the provisions of this Book without a need for an agreement to this effect to assets other than the assets that were originally encumbered, the extension of the security right is not subject to the requirements of this Chapter.

(3) A security right that had been acquired by a good faith acquisition in disregard of a retention of ownership device or an earlier security right in the asset to be encumbered is effective against the holder of the retention of ownership device or the holder of the earlier security right even if the requirements of this Chapter are not met. The effectiveness of the security right that had been acquired by a good faith acquisition against other third persons remains subject to the other rules of this Chapter.

COMMENTS

A. Chapter 3 in general

According to the general idea on which these rules are based, there is a basic distinction between the creation of a security right on the one hand (cf. Chapter 2) and its effectiveness as against third persons on the other hand; the latter aspect is dealt with in the present Chapter. The importance of this topic is also illustrated by the fact that Chapter 3 is by far the most comprehensive Chapter containing 44 rules; no fewer than 33 of these rules deal with registration. The distinction between creation and effectiveness – in Anglo-American law, "perfection" – is shared by all modern legislation the world over. The present rules have adopted it. They also strengthen it by the introduction of a modern and sophisticated registration system for all types of proprietary security, especially the – roughly said – non-possessory ones.

For economic reasons, the importance of the classical traditional possessory security rights has radically shrunk. The main reason for this phenomenon is the fact that in our times industrial or artisanal equipment and products as well as inventory are in practice the most important assets that are used as security rather than jewellery or objects of art. While the latter type of asset can be easily moved, those involved in industry and commerce cannot

dispense with possession of their equipment or merchandise, lest they would have to stop the economic activity by which they expect to earn the money for payment of the obligations covered by the security.

A true newcomer has appeared in the (almost) new field of security rights in intangibles. It is control. The creditor's control exercised over the debtor's intangible assets – a growing field – is a true equivalent of possession of the debtor's corporeal assets by the secured creditor. In fact, possession can be conceived as a corporeal means of control.

Registration of the security provider as well as possession and control by the secured creditor is the modern triad for making a security right effective against third persons.

This scheme also provides the criteria for the subdivision of the Chapter: Section 1 contains a few general rules. Sections 2 and 3 deal with the means of achieving effectiveness, *i.e.* possession and control (Section 2) and registration (Section 3).

One final issue that deserves to be emphasised is that these rules on effectiveness as against third persons are applicable not only to security rights as limited proprietary rights, but also to retention of ownership devices. In general, the latter type of security device is effective as against third persons not by virtue of its creation according to the rules of Chapter 2, but only if the requirements of Chapter 3 (*i.e.* registration, see IX–3:107) are also fulfilled.

B. Three classes of third persons - paragraph (1)

This paragraph is the opening gate for the comprehensive Chapter 3. It sets out clearly the distinction between Chapters 2 and 3. In the enumeration of the three classes of third persons (sub-paragraphs (a) to (c)) one class is omitted, *i.e.* the security provider. This is an indirect confirmation of the basis on which the preceding Chapter 2 rests. A security right validly created according to Chapter 2 binds (only) the security provider and the secured creditor. However, unless it fulfils the requirements of Chapter 3, it does not bind the three classes of persons enumerated in sub-paragraphs (a) to (c). In other words, a security right merely created according to Chapter 2 is not a fully effective property right.

The negative formula used in paragraph (1) – used for pedagogical reasons – can be converted to a positive formula. The three classes of holders of rights against whom a security right created under Chapter 2 but not fulfilling the requirements of Chapter 3 *cannot* be asserted are identical with the persons against whom a security right can only be asserted if it is effective under the terms of Chapter 3. A brief explanation of each of the three classes of persons mentioned is useful.

Class (a): The class of holders of proprietary rights in the encumbered assets comprises especially the owner of the encumbered asset who is not the security provider (for such a constellation see Comment D on IX.–2:108 (Good faith acquisition of security right)), a holder of a non-security proprietary right and the holder of an effective security right, including the holder of a retention of ownership device (cf. IX.–1:104 paragraph (1)(c)) which covers a seller under a retention of ownership, a supplier under a contract for hire-purchase, a lessor under a contract of financial leasing and a supplier under a contract of consignment (see IX.–1:103 paragraph (2)).

Class (b): Since there are no uniform rules on judicial executions, the exact time when a creditor who has started to bring an execution against the assets of a debtor becomes an execution creditor against whom a security right is effective only if fulfilling the requirements of this Chapter must be left to the national law of the place where the execution is instituted. In some countries, the moment at which a judicial lien in favour of the execution creditor arises may serve as a criterion, since this is roughly equivalent to a private law proprietary right and fixes the rank of the execution creditor.

Class (c): Once an insolvency administrator is appointed, the security provider loses the power to dispose of the assets and security rights are effective against the insolvency administrator only if they fulfil the requirements of this Chapter. Again, there are no uniform rules as to when there is an appointment of an insolvency administrator, the exact point of time must be determined by the national law of the place where insolvency proceedings have been opened.

The three general methods of achieving effectiveness are set out in the following Article. Some of the exceptions which are announced at the end of paragraph (1) are established by paragraphs (2) and (3); another is to be found in IX.–3:107 paragraph (4).

As has already been pointed out in Comment A, the rules of Chapter 3 are applicable to retention of ownership devices as well. Generally, a retention of ownership device is effective as against the three classes of persons mentioned in paragraph (1) only if it is registered (see IX.–3:107).

C. Exempted cases - paragraph (2)

This paragraph establishes an exception to the general rules contained in paragraph (1). The exception is limited – as is required by the general idea on which Chapter 3 is based – to those special cases where on the basis of the provisions of this Book, which generally requires a contract for proprietary security as a basis for the creation of security rights, security rights are extended to assets other than the original collateral without a need for an agreement to this effect.

Two examples of such extensions may be given. First, this rule covers cases where a security right is lost due to a defect of, damage to or loss of the encumbered asset (IX.–2:306 paragraph (1)). In these cases, the security is extended to rights to payment that have come into being on the basis of these events, especially a right to damages against the person that has caused the damage or defect to, or loss of, the encumbered asset, as well as insurance proceeds. In these cases of an involuntary loss of the originally encumbered asset the lost security is compensated by the rights to payment replacing the lost encumbered asset. The special nature of these events justifies an automatic extension of the security right to the substitute asset and also the waiver of publicity. However, the secured creditors may, especially if rights to payment of high value are involved, wish to establish the otherwise required publicity in order to be warned against risks that may be triggered by ignorant third persons.

Second, this rule applies to cases governed by IX.–2:309 paragraphs (1) and (2). This provision deals with the commingling of encumbered assets of the same kind, where the originally encumbered assets are replaced by a share in the mass resulting from the

commingling. Both in law and virtually in fact, the encumbered assets as such do not change; their legal identification has just become more difficult. Because of the unchanged identity of the encumbered assets there could be doubts as to whether this is actually a case of an extension of the original security right to other assets; in order to clarify the position, a specific rule dealing with this case has been included in IX.–3:106.

The exception in paragraph (2) applies to the listed security rights subject to an important condition. The security rights in the assets that were originally encumbered must have been effective against third persons according to the rules of this Chapter in order for the security rights based upon an *ex lege* extension of the secured creditor's rights to be exempted from the requirements of Chapter 3. It would be odd if the secured creditor actually benefited, *e.g.*, from the destruction of the original collateral and the resulting extension of the security right into the insurance proceeds, if these extended security rights could be effective against third persons while for the original security rights the relevant conditions under Chapter 3 had not been met.

D. Good faith acquisition and effectiveness - paragraph (3)

This paragraph contains another exception. Security rights covered by paragraph (3), *i.e.* security rights acquired on the basis of a good faith acquisition in disregard of an already existing proprietary security, are not exempted from the requirements of Chapter 3 altogether. Rather, it is only against the other persons mentioned in paragraph (3) sentence 1 that these security rights are effective without meeting the requirements of this Chapter in order to be regarded as effective. Paragraph (3) sentence 2 expressly provides that as against other third persons, the effectiveness of the security right that is covered by paragraph (3) remains subject to the other rules of this Chapter, *i.e.* there has to be possession or control by the secured creditor or a registration in order for this security right to be effective against third persons in general. This rule can be explained as follows. On the basis of the good faith acquisition, the new secured creditor is protected in its good faith reliance on the non-existence of any prior encumbrance of the asset in which this secured creditor has acquired a security right. In so far as other third persons are involved, however, the fact that the security right had been acquired on the basis of a good faith acquisition is irrelevant.

Where a security right had been acquired in an asset that was subject to a retention of ownership device because the secured creditor was in good faith and was able to rely on IX.–2:108 (Good faith acquisition of security right), no registration of the security right or fulfilment of any other requirement of Chapter 3 is necessary against the owner of this asset, *i.e.* the holder of the retention of ownership device. In case the holder of the new security right wants to enforce this right against the security provider and no other person except the holder of the earlier retention of ownership device is involved, it is not necessary that the new security right fulfils the requirements of this Chapter. If other third persons are involved as well, however, such as the insolvency administrator or holders of other security rights which were not affected by the good faith acquisition, the security right acquired on the basis of IX.–2:108 (Good faith acquisition of security right) is effective against them only if the requirements of Chapter 3 are fulfilled.

If the security right had been acquired in disregard of an earlier encumbrance in the same asset on the basis of a good faith acquisition allowed by IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset), this security right need not fulfil any requirements under this Chapter in order to be effective against the holder of the earlier

encumbrance in disregard of which the security right had been acquired. The good faith acquisition allows the secured creditor to be treated as if the earlier security right did not exist. Again, the requirements of this Chapter must be fulfilled if the holder of the new security rights wants to achieve effectiveness of this security right against other third persons as well.

It should be emphasised, however, that paragraph (3) of the present Article has a rather limited scope of application. As has been pointed out in the Comment A on IX.–2:108 (Good faith acquisition of security right), at least if the earlier security right or retention of ownership device fulfils the requirements of Chapter 3 there will be only rarely the possibility for another secured creditor to acquire a security right in the collateral in disregard of the earlier proprietary security.

IX.–3:102: Methods of achieving effectiveness

(1) For security rights in all types of assets, effectiveness may be achieved by registration of the security right pursuant to Section 3.

(2) Effectiveness can also be achieved pursuant to Section 2:

(a) in the case of corporeal assets, by the secured creditor holding possession of the encumbered assets; or

(b) in the case of certain intangible assets, by the secured creditor exercising control over the encumbered assets.

COMMENTS

This Article enumerates the three main ways of achieving effectiveness of a security right.

A. Paragraph (1): registration

The broadest, most general way is registration pursuant to Section 3 of this Chapter. This paragraph is applicable to *all* types of assets – and not only to specific types such as those enumerated in paragraph (2) for the purposes of that provision.

In fact, it is quite possible and may under certain circumstances even be advisable to register a security right although the latter is effective also under one of the criteria of paragraph (2). Registration may be especially advisable where the actual exercise of possession by the secured creditor might be disputed by competing creditors or could be easily lost. Also the exercise of control could be in danger where the financial institution administering the book account might decline to follow the secured creditor's instructions.

For cases in which effectiveness is created in two ways, *e.g.* by possession as well as by registration, the question of the relationship between the two methods arises. That issue is settled by IX.–3:103. The possibility of a change of the method for effectiveness is addressed by IX.–3:104.

Registration according to paragraph (1) is especially important for retention of ownership devices and other acquisition finance devices. For these types of proprietary security, IX.–3:107 provides that registration is the mandatory method of achieving effectiveness.

B. Paragraph (2): possession and control

This paragraph presents two methods of achieving effectiveness in sub-paragraphs (a) and (b). The first of these, possession of the encumbered assets by the secured creditor, is in the long-standing tradition of the possessory pledge. Although largely outmoded today, there are still situations in which this form of security can be useful, and not only for luxury goods or pieces of art. For economically relevant situations, recourse is often taken to so-called field warehousing.

Illustration

A part of the supply of producer P is stored in a separate (part of a) building, which is locked. The lock may be opened only by a combination of two keys. One such key is

held by A, the security provider, the other by F, acting for the field warehouse, who must not be an employee of A or otherwise be subject to A's instructions (limited-right possessor or possession-agent, cf. VIII.–1:207, VIII.–1:208).

By contrast, the second alternative covered by IX.–3:102 paragraph (1)(b) is of very recent origin and has been developed for a specific type of modern intangible, *i.e.* "control". It is of primary importance for establishing a security over modern types of intangible financial assets. For details, reference is made to IX.–3:204.

IX.–3:103: Security right made effective by several methods

(1) If a security right has been made effective by registration, possession or control, it may be made effective also by any of the other methods. Where the effects diverge, the stronger effects of a chosen method prevail.

(2) The preceding rules also apply if a security right that is exempted from the requirements of this Chapter is also made effective by registration, possession or control .

COMMENTS

A. Factual alternatives of applying more than one method to achieve effectiveness

The preceding Article enumerated three main methods by which a security right can be made effective as against third persons, *scil.* by registration, possession and control. Possession and control are alternatives which can only apply to corporeal assets and intangibles, respectively. The only method that can be applied to any object whatsoever, whether corporeal or intangible or even only intellectual (*i.e.*, knowledge) is registration.

In practice, therefore a cumulation of methods will only occur between possession or control on the one hand, and registration, on the other hand. Especially in marginal situations where the secured creditor may regard its possession or control of the encumbered corporeal or intangible assets as being not beyond any doubt, a careful and well-advised creditor may wish to achieve effectiveness by a second, broadly accessible method, such as registration.

B. Legal issues

The first sentence of paragraph (1) makes it clear that it is always possible to cumulate the means of achieving effectiveness.

Wherever the parties in fact have used several methods of publicity for a specific security right, the question arises which effects attach to such a duplication of means. According to the second sentence, the “stronger effects” of one of the chosen methods prevail. However, under the rules of Book IX, generally speaking, the effectiveness of a security right does not differ according to the method chosen for achieving it. Still, this may be different in fields outside the rules on proprietary security proper, such as execution or insolvency proceedings.

Nevertheless, there is one point where there is a factual difference, which may have important practical consequences, and that is the time element. Under the present rules, effectiveness commences at the time when it has been achieved. The term “stronger effect”, therefore, as applied to the rules of Book IX means that a security right has become effective at the earlier of the times at which it became effective by one of the means of effectiveness.

Paragraph (2) broadens the scope of application of the Article to cases where – exceptionally – a security right is effective although none of the usual methods of achieving effectiveness has been employed. One such exemption is found in IX.–3:101 paragraph (2). For an explanation, cf. Comment C to that provision. An exemption of a certain class of persons for a limited type of security rights is laid down in IX.–3:107 paragraph (3). For an explanation, reference is made to the Comments to that provision.

Although in all of the these cases effectiveness exceptionally does not depend upon any form of publicity, the parties and especially the secured creditor may wish to insist on the voluntary observation of publicity; usually registration may be chosen because it allows the security provider under a security right or the buyer, hire-purchaser, lessee or consignee under a retention of ownership device to preserve possession in the encumbered asset. In all these cases, then, paragraph (2) declares paragraph (1) to be applicable.

IX.–3:104: Change of method

If the method for achieving effectiveness is changed, effectiveness is continuous, provided the requirements of the new method are met immediately upon termination of the preceding method.

COMMENTS

This Article addresses a different aspect of the plurality of possible methods of achieving effectiveness. Its purpose is clear from its text and requires hardly any explanation. If a secured creditor wishes to change the method of publicity, an uninterrupted temporal continuity must be observed between the former and the new method. For example, if the parties decide to convert a possessory into a non-possessory security right, continuity of publicity and therefore of effectiveness is only preserved if registration of the non-possessory security right is effected before the secured creditor returns possession of the encumbered asset to the security provider.

IX.–3:105: Security right in an accessory to an immovable

A security right in an accessory to an immovable may upon accession also be made effective by registration or annotation in a land register, provided this is authorised by the law governing the land register.

COMMENTS

This Article deals with an issue which arises at the borderline between the laws on movables and on immovables. It deals with accessories (as defined in IX.–1:201 paragraph (2)) that are attached to an immovable (cf. the examples given in the Comments to the cited rule). Since the scope of the present provisions is limited to movables, the present Article can merely refer to the law governing the immovable and must leave it entirely to that law whether indeed a registration or at least annotation is possible or not. Of course, it would be desirable for that possibility to exist, since it may allow the protection of the secured creditor to be extended to cover the accessory to the immovable; in particular, an annotation may ensure effectiveness of the security right in an accessory as against creditors holding mortgages over the immovable.

IX.–3:106: Security right in commingled assets

(1) Where a corporeal asset, which is encumbered with an effective security right, is commingled, the security right in the corresponding share of the bulk according to IX.–2:309 (Commingling of assets subject to proprietary security) remains effective.

(2) The preceding paragraph applies with appropriate adaptations if financial assets are commingled in a fund.

COMMENTS

A. General remark

This Article is based upon IX.–2:309. It can be understood as a specific application of the general principle laid down in IX.–3:101 paragraph (2) and extends the effects of IX.–2:309 to effectiveness. It embodies the basic idea that there is legal continuity between the rights in the individual parts which by commingling have been integrated into the resulting mass or fund.

B. Paragraph (1)

Paragraph (1) draws a consequence for the issue of effectiveness. The effectiveness which may have been achieved for one, several or all of the individual contributions to the mass or bulk is continued individually for each of the respective shares in the bulk or mass which correspond, respectively, to the respective contribution.

C. Paragraph (2)

The same considerations apply if financial assets (IX.–1:201 paragraph (6)) are merged into a fund (IX.–2:309 paragraph (4)).

IX.–3:107: Registration of acquisition finance devices

(1) An acquisition finance device is effective only if registered.

(2) If registration is effected within 35 days after delivery of the supplied asset, the acquisition finance device is effective from the date of creation.

(3) If registration takes place later than 35 days after delivery, the acquisition finance device becomes effective only at the time of registration and does not enjoy superpriority under IX.–4:102 (Superpriority).

(4) Where a credit for assets supplied to a consumer is secured by an acquisition finance device, this proprietary security is effective without registration. This exception does not apply to security rights in proceeds and other assets different from the supplied asset.

COMMENTS

A. General remark

This Article contains several rules with respect to effectiveness which underline the privileged regime of acquisition finance devices, *i.e.* retention of ownership devices and (normal) security rights securing acquisition financing (IX.–1:201 paragraph (3)). The relevant rules deal with the special conditions under which these devices can become effective, which deviate in several respects from the ordinary regime that is established for security rights which are not acquisition finance devices.

B. Starting point

Paragraph (1) marks the starting point, and this corresponds to the general rules on effectiveness that form the basis of this chapter. Both types of acquisition finance devices, *i.e.* retention of ownership devices and security rights fulfilling the requirements of IX.–1:201 paragraph (3), are types of non-possessory security and therefore require registration in order to become effective (cp. IX.–3:102). This is supported by the point in time at which the grace period of 35 days starts to run. This is the date of delivery of the supplied asset. The delivery need not be to the buyer, hire-purchaser, lessee or consignee but can also be to a third person to whom according to the instruction of the former the bought assets have to be delivered. Only upon delivery of the supplied asset, does the proprietary security in this asset become "non-possessory". Any acquisition finance devices, whether retention of ownership devices or security rights as limited proprietary rights, therefore cannot be effective, unless and until another kind of effectiveness has been created. The only practical alternative in the circumstances is registration.

C. Special aspects: Non-consumer buyers, hire-purchasers, lessors or consignees

Registration within 35 days after delivery. If registration of the seller's, supplier's, lessor's or other secured creditor's acquisition finance device is achieved within 35 days after delivery (as defined in B), the security has retroactive effect from the date of creation (paragraph (2)).

Why has the grace period been fixed at 35 days? This is not an arbitrary decision but takes into account a wide-spread commercial practice. Buyers are very often given a period of 30 days to effect payment; only payments after the expiration of this period, except if agreed upon, trigger an obligation to pay interest for delayed payment.

If a seller, supplier, lessor or other secured creditor wishes to be on the safe side, especially if the buyer, hire-purchaser, lessor or consignee (*i.e.* the security provider) is in financial straits, it may wish to register before expiration of the 35 days, on the day of delivery or even any time before delivery.

Whenever registration has taken place within the 35 days period, an important effect is achieved. The acquisition finance device becomes retroactively effective from the date of its creation and enjoys superpriority according to IX.–4:102 paragraph (1).

Effects of retroactivity on rights created in the interim. Three kinds of "inimical" rights may have to be distinguished.

A competing security right. The relationship between an acquisition finance device and a competing security right created and made effective in the interim period is determined by IX.–4:102 paragraph (1). Retroactivity and the superpriority of the acquisition finance device prescribed by the latter provision prevail over the ordinary time sequence of several registrations. This does not mean that the security right that had become effective in the interim period is invalid or ineffective. It merely means that the secured creditor holding an acquisition finance device can rely on the grace period and thereby set aside the ordinary sequence. In other words, the security made effective in the interim period remains effective; however, it ranks below the privileged security of the seller, supplier, lessor or other secured creditor holding an acquisition finance device.

Rights of an execution creditor of the buyer, hire-purchaser, lessor or consignee: Under these rules, it would appear that an execution creditor of the buyer, hire-purchaser, lessor or consignee who has brought an execution in the 35 days period would also be bound by the rule in paragraph (2). That ought to be the result at least in those member states which regard the execution creditor as holding a security right with a priority status corresponding to the time at which the execution proceedings were brought (cp. IX.–4:107). Since public authorities are bound to respect the private law relations into which they intervene, also the very limited retroactivity laid down by paragraph (2) ought to be respected.

Involvement of an insolvency administrator for the buyer's, hire-purchaser's, lessor's or consignee's assets. In principle, the secured creditor should be able to rely upon the retroactivity provided for by paragraph (2) also against an insolvency administrator who is appointed in the interim period. However, this solution is even less certain, since this administrator represents the interests of all creditors of the buyer, hire-purchaser, lessor or consignee and usually exercises public authority.

Conclusion: What practical conclusion must be drawn from the preceding considerations? Generally, the retroactivity provided for by paragraph (2) gives the holder of an acquisition finance device effective protection. However, in order to avoid disputes and legal risks, and especially if the buyer, hire-purchaser, lessor or consignee is financially weak and there are many unpaid creditors, it is advisable not to rely too much on the 35 days grace period, but to register as soon as possible.

Superpriority. Acquisition finance devices, *i.e.* retention of ownership devices and security rights securing acquisition financing (IX.–1:201 paragraph (3)), which are registered within the 35 days period of paragraph (2) enjoy superpriority. This is expressly laid down by IX.–4:102 paragraph (1). It can also negatively be deduced from paragraph (3).

Paragraph (3) confirms, although in a negative way, the positive features which attach to a registration before expiry of the 35 days limit. First, a "late" registration triggers the "normal" effects of a registration. It has no retroactive effect. Even more important is a second consequence, and that is the loss of the superpriority awarded to a "quick" registration within the 35 days period. This reduction of status is due to the fact that the prompt action rewarded by paragraph (2) is lacking here. The delay creates perhaps even the suspicion that a credit secured late is more in the nature of general credit than of true acquisition finance.

D. Special aspects: consumer buyers, hire-purchasers or lessees

Paragraph (4) establishes an exception from the preceding paragraphs. Again, this is also a deviation from the normal pattern. Exceptionally, security rights and retention of ownership devices in assets supplied to a consumer as security provider (especially as buyer, hire-purchaser or lessee) are effective without registration.

First, it is clear from the context that the privilege of non-registration is strictly limited to credit acquisitions of consumers; the most relevant types of acquisition finances will be sales under retention of ownership agreements and contracts of financial leasing.

Second, there is no requirement to register the security right or retention of ownership device in order to achieve effectiveness of the proprietary security in the consumer's acquired assets. Of course, as always in cases of such privileges, the secured creditor, *i.e.* especially the seller, lessor or other supplier, will nevertheless have to ascertain whether, if the consumer is financially weak, use of this privilege should or should not be made. The number of potentially competing creditors may also be relevant here, as may be the secured creditor's wish to avoid disputes and legal uncertainty which can easily be avoided by (voluntary) registration.

Third, although unregistered, the effectiveness of the security right or retention of ownership device is strengthened by IX.–4:102 paragraph (1). The proprietary security enjoys a superpriority. In effect, it has priority over security and other proprietary rights that may have been created earlier. Since the consumer security provider's possibility of creating security rights in future assets is already limited on the basis of IX.–2:107 paragraph (1)(b), however, the relevance of this superpriority is limited to other proprietary rights.

Fourth, the exception is limited to the primary objects supplied to the consumer and does not extend to proceeds and other assets. This limitation is dictated by the purpose of the Article – to protect *acquisitions* of consumers. It is not intended to establish a general privilege for all assets of consumers.

IX.–3:108: Importation of encumbered asset

If an encumbered asset is brought from a country outside the European Union into this area, any pre-existing security right which is effective remains effective if the requirements laid down in this Chapter are fulfilled within three months.

COMMENTS

A. Issue

The European internal market is integrated into world trade; the internal market is in a broader, but very real, sense part of the world market. The European economy depends upon imports from the world market. Since imports have to be financed and may be financed by extra-European sources, it is necessary to envisage the fact that frequently imported goods may have been encumbered abroad with security rights as coverage for credits financing the foreign exporter or perhaps even the European importer. How should such imported security rights be treated in Europe?

B. Solution

This Article offers the basic solution by providing that upon the crossing of the border of the European Union a security right (as well as a retention of ownership device, cf. IX.–1:104 paragraph (1)(c)) that had been effective before entry into Europe remains effective upon one condition. It must be made effective according to these rules within three months.

This rule leaves some questions open – consciously, since there is little experience in this broad field.

First, must "importation" be strictly understood as a trade between a foreign exporter and a European importer? While this will probably cover most cases, it certainly would not cover all. Intended to be covered are all factual or legal/economic transports over the border of Europe: private removals; luggage and belongings of tourists, soldiers, diplomats, immigrants, etc.

Second, how can it be found out whether there had been – on crossing the border to Europe – an "effective" security right or retention of ownership device in the encumbered asset? These rules do not establish a conflicts rule which would be able to give a reply, since for the great variety of corporeal things and incorporeal rights probably no simple formula (such as *lex rei sitae*) would suffice. By leaving this issue open, flexibility is increased.

Third, the proprietary status of the imported goods during the three months grace period is also left open. It would seem to be preferable to assume that the effectiveness which the security right or retention of ownership device had achieved according to the applicable foreign law survives during this transitory period until either effectiveness according to these rules is established or the grace period has expired. Thereafter, effectiveness can only be achieved by complying with the present rules. This assumption is also in keeping with the similar rule in IX.–3:107 paragraph (2).

On the issue of the priority of the proprietary security in an imported asset, cf. IX.–4:106.

Section 2: Possession or control by creditor

IX.–3:201: Possession

Security rights in encumbered corporeal assets can be made effective by the secured creditor holding possession:

(a) if the secured creditor or an agent (other than the security provider) acting for the secured creditor exercises direct physical control over the encumbered assets;
(b) where the encumbered assets are held by a third person (other than the security provider), if the third person has agreed with the secured creditor to hold the encumbered assets only for the latter; or
(c) where the encumbered assets are jointly held by the secured creditor and the security provider or where a third person holds the encumbered assets for both parties, if in either case the security provider has no access to the encumbered assets without the secured creditor's express consent.

COMMENTS

A. Possession and control

"Possession" is one of the basic concepts of property law which is familiar to all legal systems in Europe. In the context of Chapter 3 on effectiveness, possession fulfils the function of being one of the three means of achieving effectiveness. In fact, in the context of the traditional pledge, possession by the pledgee was and still is the central requirement to bestow proprietary effect, *i.e.* effect against all the world on the pledge. In modern terms, the pledgee's possession of the pledged corporeal asset bestows effectiveness upon the pledge. This traditional function is confirmed by IX.–3:102 paragraph (2)(a); thus it continues to have the same function as formerly.

"Control"**,** by contrast, is a novel term. It applies to intangibles as objects of security rights – a category of rapidly increasing importance – especially in the field of intellectual property law (which, however, cannot be further pursued here) and uncertificated financial assets (cf. IX.–1:201 paragraph (6)). See further IX.–3:204.

The functions of possession and control are the same; only their respective fields of application differ. It might therefore have been considered appropriate to merge the two concepts and institutions into one, *i.e.* into the more neutral one of control. Nevertheless, this idea has not been adopted because:

- its application to corporeal assets would introduce an element of uncertainty;
- the shades of meaning of possession as applied to the typical fact situations occurring in the context of a possessory pledge are well settled in most European countries and should not be placed in doubt by using a novel terminology; and
- Book VIII has preserved the term possession (especially VIII.–1:205 to VIII.–1:208).

In relation to this last point, it would be confusing if this Book deviated on such a central term, particularly as this Book refers in several places Book VIII.

B. The scheme of the Article

The present Article contains the central rules on possession as *the* means for achieving effectiveness for a security right, where the encumbered corporeal assets are held by the secured creditor. In traditional parlance, this is a possessory pledge. In the context of the present rules which have only one security right, possession has merely the function of being one of the three means to establish the effectiveness of a security right. This particular means is used to establish effectiveness for precisely the same fact patterns for which the possessory pledge has been used.

The essential elements of a possessory security right are expressed in the opening part of the Article. The secured creditor must hold possession of the encumbered corporeal assets. This main rule is then specified by three sub-rules. These reflect the most typical fact patterns that have been evolved in European practice over centuries and are still being used today.

The basic rule is to be found in sub-paragraph (a). The following sub-paragraphs (b) and (c) are variations of this basic rule and cover rather special fact patterns.

C. The three fact patterns

Sub-paragraph (a). The basic and typical fact pattern of a possessory security right made effective by virtue of the secured creditor's possession is specified by sub-paragraph (a). This contains two aspects, a personal and a technical. As to the personal element, it is required that the secured creditor must hold possession personally or through an agent. However, the security provider is disqualified as agent, since this would amount in fact – although perhaps not in law – to a non-possessory security right. An agent is a person who is authorised to act for another (see the Annex of definitions). Since the agent is a kind of "*alter ego*" of the principal, one can say that the latter acts through the agent; indirectly it is the creditor as principal who acts by means of the agent.

To exclude the security provider from the function of the agent is easily explicable. The security provider, who usually is the owner of the encumbered asset is not a disinterested third person acting as agent; rather, this person as owner of the encumbered asset has obvious personal interests which are as a rule opposed to those of the secured creditor. This justifies the exclusion of the security provider when acting as the secured creditor's agent.

Sub-paragraph (b). Sub-paragraph (b) allows a third person – again except the security provider – to hold the encumbered asset, provided this third person holds the encumbered asset only for the secured creditor. If a third person holds the encumbered assets exclusively for the secured creditor, this amounts in effect to an *ad hoc* agency. It is appropriate to regard this situation as a holding of the encumbered assets by the secured creditor. Practical examples are a warehousekeeper or an artisan who is charged by the secured creditor with doing some repair work on the encumbered asset. Again, as in sub-paragraph (a) and for the same reason, the pledged assets may not be held by the security provider acting as "agent" for the secured creditor.

Sub-paragraph (c). A typical example for such a two-keys arrangement is a store room which is equipped with corresponding slots; cf. also the example of field warehousing mentioned Comment B on IX.–3:102. In all these cases the decisive criterion is laid down in the final clause of sub-paragraph (c). The security provider must not have access to the encumbered assets without the express consent of the secured creditor.

D. Special types of possessory security rights

While IX.–3:201 applies to possessory security rights in corporeal assets only, IX.–3:202 and IX.–3:203 extend the scope of the use of possession for achieving effectiveness of security rights to certain constellations of encumbrances in intangible assets. For details, see the Comments on these last two Articles.

IX.–3:202: Negotiable documents of title and negotiable instruments

(1) Possession of a negotiable document of title or negotiable instrument is also sufficient for the effectiveness of a security right in the goods covered by the document of title or in the right embodied in the instrument.

(2) The security right in the goods covered by the document of title according to paragraph (1) is not affected if the covered assets are relinquished to the security provider or another person for a period of up to ten days against a duly dated formal trust receipt and for the purpose of loading or unloading, sale or exchange or other dealing with the goods except the creation of a competing security right.

COMMENTS

A. Possession of negotiable documents and negotiable instruments

As has already been explained in Comment A on IX.–2:302, the question whether possession can be of legal significance is somewhat problematic concerning assets that by their nature are not corporeals themselves or which are not themselves subject to the exercise of direct possession, but which are evidenced or embodied by these assets. Without intending to interfere with the general classification of the assets covered, this Article and the following Article provide, in relation to several types of such assets, that possession of the relevant document or certificate is sufficient also for achieving effectiveness of a security right in the asset evidenced or embodied by the document.

Paragraph (1) of this Article deals with the significance of possession of a negotiable document of title or negotiable instrument: IX.-2:304 paragraph (3) already states that possession of these documents or instruments is sufficient for creation of a possessory security right in the goods covered by the document of title or in the right embodied in the instrument. On this basis, paragraph (1) of the present Article provides that possession of such documents or instruments also suffices to achieve effectiveness against third persons for a security right in the goods covered by the document of title or in the right embodied in the instrument

B. Possession of negotiable documents and negotiable instruments

Paragraph (2) confirms on the level of effectiveness an exception which is accepted in international commercial practice. A short interruption of the secured creditor’s holding of the goods covered by a bill of lading does not destroy a validly and effectively established security right, provided the goods are handed over to the security provider or its agent:

- for a strictly limited period of time, i.e. for 10 days at most;
- against the issue of a subsidiary instrument, i.e. a formal trust receipt; and
- only for the enumerated purposes of loading or unloading, sale or exchange or other dealing with the goods represented by the bill of lading other than the creation of a competing security right.

IX.–3:203: Certificated shares and bonds

Paragraph (1) of the preceding Article applies with appropriate adaptations to possession of directly held certificates of shares of companies, if negotiable, and directly held bond certificates.

COMMENTS

For directly held certificated shares of companies, if negotiable, and directly held bonds embodied in a bond certificate, this Article declares applicable the principle contained in paragraph (1) of the preceding Article. This means that the possession of the paper certificate is sufficient for the effectiveness of a security right in the embodied right. This limited extension of the rule contained in paragraph (1) of the preceding Article to shares and bonds is in line with the approach followed in IX.–2:302 and IX.–2:303. Also the principle that possession of the paper is sufficient for the creation of a possessory security right is limited to these types of shares and bonds.

On the meaning of “directly held certificates or shares of companies”, see Comment B to IX.–2:302.

IX.–3:204: Control over financial assets

(1) Security rights can be made effective by the secured creditor exercising control over:

(a) financial assets which are entered into book accounts held by a financial institution (intermediated financial assets); and

(b) non-intermediated financial instruments registered in a register maintained by or for the issuer or which under national law is determinative of title.

(2) The secured creditor exercises control over the assets mentioned in paragraph (1)(a), if:

(a) the secured creditor with the assent of the security provider has instructed the financial institution administering the book account not to admit dispositions by the security provider without the secured creditor's consent;

(b) the assets are held by the financial institution for the secured creditor in a special account; or

(c) the financial institution is the secured creditor.

(3) The preceding paragraph applies with appropriate adaptations to the exercise of control by the secured creditor over the assets mentioned in paragraph (1)(b).

(4) The satisfaction of the requirements of paragraphs (2) and (3) must be evidenced in writing or recording by electronic means or any other durable medium.

COMMENTS

A. General remark

This Article aims at shaping a system of making effective security rights in intangible assets. Obviously, the means for achieving effectiveness for corporeal assets, i.e. possession by the secured creditor, cannot be extended to intangible assets in general. On the other hand, the increasing practical importance of intangible values, especially financial assets, calls for an alternative means of publicity which – unlike registration, which of course remains possible – practically is as efficient and clearly visible as is possession for corporeal assets. Following the model of American-Canadian practice and law and, in particular, the more recent example of the EU-Directive on Financial Collateral Arrangements of 2002 (FCD), the present Article adopts the criterion of "control" for making security rights in financial assets (as defined in IX.–1:201 paragraphs (6) and (7)) effective.

In all cases not covered by the present Article, intangibles are subject to the alternative technique of achieving effectiveness for security rights in intangibles, *i.e.* registration.

B. Scope of application of the concept of control

Paragraph (1) delimits the scope of application of control. The objective scope of control as resulting from this paragraph (1) are financial assets entered into book accounts. According to IX.–1:201 paragraph (6), financial assets are rights to payment and financial instruments; the latter term is defined in IX.–1:201 paragraph (7). This definition corresponds to that in the FCD Article 1 paragraph (4)(a) and in Article 2 paragraph (1)(d) and (e).

By contrast, the subjective scope of application of the present Article differs both in approach and extent from that of the FCD. Paragraph (1)(a) of the present Article merely demands that the financial assets be held by a financial institution. This criterion was adopted since financial institutions are subject to public supervision, and – if properly conducted – this

provides some assurance of solidity and reliability. Assets meeting these criteria are "intermediated financial assets". Another category is "non-intermediated financial instruments", provided they are registered in a register maintained by or for the issuer. Examples are registers of shareholders of share companies, either held by the issuing company or by a neutral institution specialising in the registration of shares for other companies or where such registration under national law is determinative of title (such as CREST in the United Kingdom).

C. Methods of control over intermediated financial assets

Paragraph (2) deals with the methods by which the secured creditor can exercise "control", *i.e.* the means to achieve effectiveness. Three alternatives are provided for the exercise of control over intermediated financial assets.

(a) An instruction by the secured creditor with the security provider's assent to the financial institution not to allow dispositions by the security provider without the secured creditor's consent. This rule presupposes that the encumbered financial assets are still held in the name of the security provider, but its power to dispose of the assets is restricted.

(b) In order to avoid any remaining risk under solution (a) that the restriction of the security provider's power to dispose may be overlooked or disregarded, it is safer for the secured creditor to demand transfer of the encumbered assets to a special account of the secured creditor. A *special* account has the effect of keeping the encumbered assets not only separate from the security provider's general assets, but also from those of the secured creditor.

(c) There is a special situation, if the financial institution holding the security provider's assets is at the same time the secured creditor (sub-paragraph (c)). Basically, the two alternatives under sub-paragraphs (a) and (b) remain applicable, although slight adaptations are necessary. In the case of sub-paragraph (a), an instruction by the secured creditor is no longer necessary; rather, the financial institution as the secured creditor can by internal order achieve the same result. Likewise, in the case of method (b), a separate account instituted at the financial institution may increase the factual protection of the financial institution as secured creditor.

D. Methods of control over non-intermediated financial instruments

Paragraph (3) provides for the corresponding application of paragraph (2) to the assets mentioned in paragraph (1)(b). This provision does not require any comment.

E. Requirements of form

Paragraph (4) establishes formal requirements for the substantive requirements established by paragraphs (2) and (3). In view of the far-reaching effects that are achieved by control, on the one hand, and the lack of external factors that would be comparable to possession or registration, it is necessary to require some formality in order to achieve effectiveness by control. The alternative requirements of a writing, recording by electronic means or any other durable medium correspond to those of FCD Article 1 paragraph (5) and Article 2 paragraph (3); no explanation is necessary.

F. Control by different secured creditors

If control has been established successively for different secured creditors, the relationship between these several secured creditors is governed by the general rules on priority. According to IX.–4:101 paragraph (2)(a) second alternative, the time sequence at which the security rights have become effective is decisive for priority.

G. Superpriority

Of particular relevance is that control enjoys superpriority (IX.–4:102 paragraph (2)). That means that control prevails over any other security right or limited property right, even if these have been created or made effective earlier. However, as between several secured creditors, each exercising control over the same assets, the ordinary rules on the determination of priority are to be applied (see IX.–4:102 paragraph (2) sentence 2 and Comment F).

Section 3: Registration

Subsection 1: Operation of the register of proprietary security

IX.–3:301: European register of proprietary security; other systems of registration or notation

(1) A registration that is required or allowed for any security right or retention of ownership device under the rules of this Book is to be effected in a European register of proprietary security, subject to paragraph (2).

(2) Where systems of registration or notation on title certificates for security rights in specific types of assets exist, the effectiveness of a security right to be registered or noted in these systems depends upon compliance with any mandatory rules applicable for these systems. For systems established under the national law of a member state, this rule is subject to IX.–3:312 (Transitional provision in relation to entries in other systems of registration or notation under national law).

(3) An entry of security rights in financial instruments into a register maintained by or for the issuer of financial instruments or which under national law is determinative of title is not regarded as registration for the purposes of this Section but may constitute control if the requirements of IX.–3:204 (Control over financial assets) paragraph (3) are complied with.

COMMENTS

A. Publicity by registration as standard in modern proprietary security legislation

A number of member states have adopted systems of publicity by registration for their regimes of proprietary security in movables; also modern international conventions and model laws on matters of proprietary security such as the Cape Town Convention or the European Bank for Reconstruction and Development's Model Law on Secured Transactions operate on the basis of a system of registration of proprietary security in movables. Only a few national legal systems, notably the German and Austrian systems, have not yet introduced such a system of publicity by registration; also here, however, the modern legal development already appears to be directed to an approach that is more in line with international standards.

Publicity by registration for security in movables can therefore with sufficient justification be regarded as a principle of European private law and this principle constitutes the general basis of the approach followed in this Section.

The details of such registration systems, however, vary to a considerable extent between the individual member states. Firstly, there are differing general approaches as to the precise manner of the operation of the registration systems; the overall concept followed by the rules in this Section and the policy considerations underlying it will be explained in greater detail in Comment C and in the Comments to the following provisions of this Section. Secondly, the role of the registration itself is not identical in all member states. For the present rules, it must

be emphasised that registration is not necessary in order to let a proprietary security right come into existence, *i.e.* the registration does not have a constitutive effect in relation to the creation of a security right or of a retention of ownership device. Security rights and retention of ownership devices come into being already when the requirements of Chapter 2 are fulfilled. Chapter 3 deals only with the effects against third persons, and these effects can be achieved by methods other than registration as well (*i.e.* by possession or control) or exceptionally do not require the fulfilment of any additional conditions (see IX.–3:101 paragraph (2), 3:107 paragraph (4)). Moreover, registration is not sufficient to let a security right or a retention of ownership device come into existence. If the requirements of Chapter 2 are not fulfilled, *e.g.* if a security provider does not have authority to create a security right in the assets concerned, the secured creditor does not acquire any rights merely on the basis of the registration.

B. Objectives of a system of publicity by registration

The publicity provided for proprietary security in movables by a registration in a public register is not an end in itself but serves several distinct objectives which can be briefly summarised.

Information for prospective creditors and other third persons dealing with the security provider. The main objective of a system of publicity by registration is to provide information for prospective creditors and other third persons dealing with the security provider. While a security provider may appear wealthy, persons intending to grant unsecured credit can access the register in order to obtain information as to whether assets held by the security provider would in fact be available to satisfy their claims in the event of the latter's default or whether these assets are already encumbered in favour of other creditors. Perhaps even more importantly, persons intending to acquire a proprietary right in the assets of the security provider (whether a security right or even full ownership) can obtain reliable information as to whether they could acquire their rights only subject to earlier encumbrances in the same assets. This possibility of obtaining information obviously also works to the advantage of the security provider. By being able to show that no security rights or retention of ownership devices are registered in relation to certain assets owned by the security provider, the latter can assure the parties it is dealing with that they will be able to acquire unencumbered rights in these assets (whether security rights or ownership) and on this basis the security provider will be likely to obtain a better price or at least better conditions for a secured credit.

Protection of the registered secured creditor. The secured creditor also benefits from the registration of its security rights. Publicity by registration gives notice to third persons of the existence of the encumbrance or retention of ownership device in the secured creditor's favour. Third persons can then be regarded as having actual or constructive notice preventing them from acquiring the collateral free of the original secured creditor's rights on the basis of a good faith acquisition.

Prevention of fraud. The registration of a security right or a retention of ownership device is an event that can both be precisely determined and easily proven. This allows a system of registration to function as a useful mechanism for the prevention of fraud. As between competing creditors priority of their relative security rights will generally be dependent upon some order in time. The registration could then serve as a means of proof of the time as from which the security is effective.

It also works as between the secured creditor and a security provider who attempts to obstruct execution against its assets by the secured creditor by claiming that the assets concerned are actually subject to an earlier security right created in favour of another creditor (who participates in the security provider's fraudulent conduct). A requirement of publicity by registration could give protection against the backdating of a security.

Basis for the operation of the rules on priority. A final and very important purpose that has already been alluded to and that to a large degree can be said to form the basis for achieving the objectives already mentioned is that the system of publicity by registration of proprietary security in movables can be used as a basis for the operation of the rules on priority. At least in so far as no other method of achieving effectiveness (especially control) or other exceptional rule (especially for acquisition finance devices) applies, the priority as between competing security rights encumbering the same assets is determined by the order of registration of the different encumbrances (see IX.–4:101 paragraph (2)(a)). The system of registration can deliver exact results and the order of priority is at least in general ascertainable directly from the register without the need for an investigation into the content and the order of any agreements concluded between the security provider and secured creditors.

C. General characteristics of the system of registration under these rules

The main characteristics of the system of registration under the provisions of this Section can be summarised as follows. It is a notice filing system; it is a direct entry system where entries can be made without the involvement of a public registrar; it operates electronically so that it is accessible online; and it covers all types of proprietary security.

Notice filing system. The notice filing system used here differs in an important respect from the traditional systems of (full) registration. In the latter form of publicity, all the essential particulars of a security right or retention of ownership device are registered, clearly setting out the precise content and scope of a security right or retention of ownership device. By contrast, in a notice filing system, the information to be made accessible directly from the register can effectively be limited to a notice that a security right or retention of ownership device might be in existence. Whether the proprietary security has in fact been created, has not ceased to exist and which assets exactly are used as collateral are questions which any interested person might be able to ascertain only by making further inquiries. It is true that the need for such inquiries might lead to an increase in transaction costs arising after the registration. However, it appears to be the generally accepted view that these costs are more than outweighed by the core advantages of a notice filing system, *i.e.* that filings can be made much more easily and quickly and that the reduction of necessary details and formalities makes filing less error-prone. The details that are missing from the content of the registration can later be obtained, if desired, by inquiries directed at the secured creditor (see Subsection 5).

Direct entry system. The system of registration as provided for by these rules can be described as a direct entry system, *i.e.* a system of publicity by registration in which, differing from more traditional models, entries into the register can be effected directly by the parties themselves without any need for an involvement of a public registrar who might have to check the particulars of the security device and the content of the registration. Again, a system of the former type can be expected to operate much more efficiently than a public registrar-

based model, fulfilling the demands of the markets for a system of registration that operates swiftly and does not impede the creation of effective proprietary security. If the system of registration gave rise to unnecessary obstacles, it could not be suggested as a model rule of general application for all member states, particularly not for those (albeit few) member states which so far do not require publicity by registration for proprietary security in movables. In most systems which follow the public registrar-based model, there will be backlogs of applications for registrations which the public registrar has not yet had the time to process; this results in security rights or retention of ownership devices whose existence is not visible from the content of the register, thereby failing the objectives of a system of publicity by registration. Moreover, the introduction of a public body operating as a registrar for a pan-European register of proprietary security in movables would create enormous costs. This rather bold proposal can therefore have any prospects of realisation only if the involvement of a public body is kept to a minimum (see IX.–3:316).

Electronic register that is accessible online. While traditional models of registers for proprietary security typically are paper-based, their modern counterparts make use of the latest communication technology and tend to be accessible in an online format. Again, the main policy choice behind the decision to follow the latter approach in the present rules is the aim to reduce costs; the possibility of online access seeks to maximise the efficiency gains to be derived from a direct entry system in general. On the other hand, it is true that online access creates specific problems concerning the authentication and identification of the register's users, see the Comments on IX.–3:304.

Register including all security rights and retention of ownership devices. The register as provided by the rules in this Section is intended to cover all types of proprietary security that are not made effective by any other method allowed by this Chapter (i.e. possession, control) or that are not exempted from any such requirements altogether (see, e.g., IX.–3:101 paragraph (2)). This applies not only to security rights as limited proprietary rights, whether enjoying superpriority as acquisition finance devices or not, but to retention of ownership devices as well (see IX.–3:303). The main advantage of such an all-encompassing system is that inquirers do not have to search several registers; some deviations from this general rule, however, must be made in relation to specialist registers (see IX.–3:301 paragraph (2), IX.–3:312).

D. Deviations from other notice filing systems

The system of registration as laid down in this Section necessarily differs not only from more traditional systems of registration where the information supplied by the parties is checked by the public registrar before the particulars of the security right are entered into the register. There are also a number of differences in comparison to other notice filing systems used especially in the Common Law or Anglo-American world, which will only briefly be mentioned here and which will be explained more fully in the Comments to the relevant provisions: (i) the requirement of consent, which is regarded as central for the protection of the security provider against all sorts of unwanted entries into the register (see IX.–3:306 paragraph (1)(d), IX.–3:309); (ii) the principles of good faith acquisition, which might in some respects lead to results that differ from the content of the register (see Comments on IX.–3:322, IX.–3:330); (iii) a legal environment in some member states, especially in relation to the duration of court proceedings, which would make it impracticable to grant protection to security providers and other users of the register only via court proceedings and rights to payment of damages (see Comment A on IX.–3:309 and IX.–3:319).

E. Establishment of a European register of proprietary security

Subject to some exceptions (see F below), the publicity by registration required by these rules can only be achieved if a security right or retention of ownership device is registered in the European register of security rights. A registration in any register already established under national law for proprietary security in general (such as the English register for company charges) is not sufficient for the purpose of achieving effectiveness of the security right concerned under these rules. Due to the differences between the various national positions as to the details of a registration, its requirements and effects, these rules could not opt for a solution on the basis of the continuing operation of these registers only. Moreover, these rules are intended to describe a register for proprietary security which would achieve the objectives of a requirement of publicity by registration in a most efficient way; this aim makes it necessary to introduce a completely new register specifically designed for the purposes of these rules. Even if national registers could be adapted along the lines of these provisions, a fragmentation of the system of registration under these rules into 25 or more separate units on member state level does not appear to be compatible with the objectives of these rules in general.

F. Other registers or systems of notation

For some situations, paragraphs (2) and (3) of the present Article expressly spell out that entries in other registers can be sufficient to achieve effectiveness of the security right concerned.

First, where systems of registration or notation on title certificates exist which also cover security rights (as well as retention of ownership devices) in specific types of assets, a registration or notation of a security device in any such system that has been established under European or international law can replace a registration in the European register of proprietary security. Effectively, precedence is thus given to these European or international regimes; in respect of the latter, the effect of paragraph (2) sentence 1 corresponds to the precedence spelt out in IX.–1:105 paragraph (2). The position is different, however, for such systems which have been established under the national law of a member state. As a counter-exception to the rule in paragraph (2) sentence 1, a parallel registration in both registers is necessary (see IX.–3:312).

Second, paragraph (3) contains a special rule covering registers for financial instruments, especially shares in companies, whether operated by or for the issuer itself, *i.e.* the company, or by certain bodies independent from the issuer if this register is determinative of title as in the case of the English CREST register. If such registers allow the registration of a security device (whether a security right or a retention of ownership device) in the financial instruments covered by this register, then this registration is not be subject to any additional requirements under this Section. Instead, such a registration might constitute control (IX.–3:204); this method of effectiveness would trump registration of a competing security right in the same assets (IX.–4:102 paragraph (2)). Effectively, registers covering security devices in financial instruments and operated by or for the issuer (or by a settlement operator) thus enjoy precedence over the European register of proprietary security, even if they have not been established under international or European law. The reason for this position is that these rules are intended to interfere as little as possible with the national rules on transactions in company shares; moreover, it would be inconsistent with the Financial Collateral Directive to subject the creation of effective proprietary security in financial assets to additional requirements.

IX.–3:302: Structure and operation of the register

(1) The European register of proprietary security is to operate as a personal folio system, allowing entries concerning security rights to be filed against identified security providers.

(2) The register is to operate electronically and to be directly accessible for its users in an online format.

COMMENTS

In a personal folio system, entries are filed against certain persons, while in a real folio system entries would be filed against certain assets. The European register of proprietary security in movables is to operate in the former manner, *i.e.* all security devices of a single security provider, whether security rights or retention of ownership devices, are registered against this person. A real folio system would hardly appear to be feasible for proprietary security in movables given the fact that an exact specification and identification of certain assets that might serve as security would always be possible for some classes of assets only. However, the possibility of searching the register for descriptions of the collateral (see IX.–3:318) allows the register to some extent to be used like a real folio system.

By operating electronically and being accessible online, the European register of proprietary security will work more swiftly and at less cost than traditional paper-based systems of registration (see Comment C to the preceding Article).

IX.–3:303: Retention of ownership devices and security rights

(1) For the purposes of the European register of proprietary security no distinction is made between retention of ownership devices and security rights.

(2) Any reference in this Section to security rights includes retention of ownership devices.

COMMENTS

It has already been described as a basic feature of the European register of proprietary security suggested by this Section that it should be all-encompassing, *i.e.* include all types of proprietary security in movables. This Article follows this general principle by stating that the European register of proprietary security does not distinguish between security rights (whether or not enjoying superpriority as an acquisition finance device) and retention of ownership devices. Both types of proprietary security would be covered by the register and the operation of the register would be identical for both.

This extension of the scope of application of this register to retention of ownership devices is in line with the general approach of these rules concerning the identical treatment of retention of ownership devices and security rights (cf. IX.–1:104 paragraph (1)) and is also a consequence of the registration requirement for all types of acquisition finance devices including retention of ownership devices according to IX.–3:107 paragraph (1).

The uniform treatment, for purposes of registration, of security rights and retention of ownership devices covers, of course, only the operation of the register, not the substantive issues. Even though there are differences between these types of proprietary security, however, it was decided not to distinguish between them for purposes of registration. For the parties, it might be difficult to decide whether collateral is subject to a security right or a retention of ownership device. Any indication that could be demanded from a secured creditor when registering the rights would therefore not be very reliable. Moreover, the most important issue for intending secured creditors is whether an asset is subject to prior rights of a secured creditor; in this context the distinction between the effects of security rights and retention of ownership devices will be of lesser importance.

The specific relevance of paragraph (2) of the Article lies then in emphasising that the general approach applies in the context of this Section without any qualifications. Whenever the rules of this Section refer to security rights, this reference includes retention of ownership devices as well. For necessary terminological adaptations, see IX.–1:104 paragraph (2). Exceptionally, retention of ownership devices are expressly mentioned in the rules of this Section alongside security rights (see especially IX.–3:301 paragraph (1)); this is for clarification purposes only.

IX.–3:304: Authentication as requirement for declarations to the register

(1) Any declaration to the online register, such as filing, amending or deleting an entry in the register or a declaration of consent, requires authentication by the person making the declaration.

(2) Authentication requires:

(a) the use of log-in information which is issued to individual users of the online register after an initial enrolment in the register during which the identity and the contact details of the user are verified; or

(b) the use of secure online identity verification systems of general application, if such systems are brought into operation at a European or member state level.

COMMENTS

The operation of the register of proprietary security as a personal folio system and in an online format involves a number of issues concerning the authentication and identification of its users. These rules are based upon a distinction between the following main concepts:

A. Authentication

Whenever declarations of any kind are made to the online register, it is necessary that they are authenticated by the person by whom these declarations purport to be made. The requirement of authentication is used as a safeguard against declarations fraudulently being made by other persons.

B. Enrolment or use of online identity verification systems of general application

Any reliable method of online authentication requires that the user's identity has been checked during some prior procedure of identification. In some member states, there are tendencies to bring into operation online identity verification systems of general application; wherever such systems are available, it is envisaged that they could be used also as the basis for the online authentication of declarations to the register under this Section.

As long as such systems are not generally available, however, it appears to be necessary that a special system of enrolment would have to be maintained for this European register of proprietary security. Before users can make their first declaration to the register, they have to undergo a procedure during which their identities and contact details are verified. Any user is then supplied with log-in information which allows it to authenticate any declarations to the register which it might want to make in the future.

C. Consent

In a number of situations, a declaration to the register by one person can be made only with the consent of another. The most notable example is the filing of an entry in the register by a secured creditor which requires consent by the security provider (see IX.–3:306 sub-paragraph (d), IX.–3:309). Such a consent is another type of declaration to the register, *i.e.* there must be an authentication by the secured creditor.

D. Identification

Whenever a declaration made by one user of the register refers to another person, *e.g.* when a secured creditor makes an entry in the register that security rights have been created over the assets of a certain security provider, that other person has to be exactly identified in this declaration. The requirement of identification is to be understood as being very strict under this Section. Since the identification of a security provider in an entry filed by the secured creditor must be exact enough to allow the online system to ascertain which person's consent is necessary, this identification must exactly match a personal identification number or other identification details of the security provider lodged with the register in the process of enrolment or used in the respective general system of online identification. However, since there will normally be a co-operation between the secured creditor and the security provider before the secured creditor makes an entry in the register, this requirement which is intrinsic to the operation of an online register requiring a consent by the other party as a condition for registration does not seem to give rise to insurmountable problems.

Subsection 2: Entries in the register

IX.–3:305: Entries to be made by secured creditor and advance filing

(1) Entries in the register can be made directly by the secured creditor.

(2) Entries can be made before or after the security right referred to has been created or the contract for proprietary security has been concluded.

COMMENTS

Paragraph (1) states that it is the secured creditor who may file entries rather than the security provider. In some national systems of registration, filings can be made by the security provider. These rules have opted against this alternative on the assumption that it will be the secured creditor who has a greater interest in the registration than the security provider. The former risks losing (or not acquiring effectively) its position as a secured creditor, while the latter would only be affected in so far as the creation of an effective security right could be made a condition for the granting of additional credit by the secured creditor.

Paragraph (2) deals with the time at which entries may be filed. It is expressly provided that entries may be made before or after the security right referred to has been created or the contract for proprietary security has been concluded. To file before creation of the security right or before conclusion of the contract for proprietary security is often called “advance filing”. That such a possibility exists under the present rules follows to some extent already from the fact that under a direct entry system the content of the entry in the register is not subject to any requirement of verification by a public registrar. Hence, the secured creditor is under no restrictions whatsoever in relation to the security covered by the registration, whether already in existence or only to be created in the future. Paragraph (2) confirms this position and makes it clear that filings will not be regarded as being effective for the purposes of priority only once the security right concerned has come into existence. Effective advance filing allows the secured creditor to secure a priority position *e.g.* already during the course of negotiations with the security provider concerning the provision of secured credit or in relation to security rights in assets which the security provider has not yet acquired; under paragraph (1)(d) of the following Article it is, however, necessary that the security provider has already at this earlier stage consented to the filing of an entry in the register.

Filing an entry is of course still possible after the security right has been created. It has to be noted, however, that effectiveness is only achieved once the registration is completed; and for priority purposes it is the time of registration rather than the time of creation that is relevant (see IX.–4:101 paragraph (2)(a)).

IX.–3:306: Minimum content of the entry in the register

(1) An entry can be entered into the register only if:

(a) it is made in respect of an identified security provider;

(b) it contains a minimum declaration as to the encumbered assets;

(c) it is indicated by one or several references to a list of categories of assets to which category the encumbered assets belong;

(d) the requirements of consent are fulfilled ; and

(e) it is accompanied by a declaration of the creditor that the latter assumes liability for damages caused to the security provider or third persons by a wrongful registration.

(2) For the purposes of paragraph (1)(b) a declaration that the creditor is to take security over the security provider's assets or is to retain ownership as security is sufficient.

COMMENTS

This Article covers the minimum content of an entry that is to be filed in the register. It is envisaged that the secured creditor makes an entry in the register by completing an online form and by submitting this data to the online register. If an entry does not include the minimum content set out here the secured creditor will not be able to submit it to the register.

There can be no entry in the register if it is not filed against an identified security provider (see paragraph (1)(a); for the meaning of identification see Comment D on IX.–3:304) and if it does not describe the encumbered assets (see paragraph (1)(b)). Without meeting these requirements it would not be possible to determine whether a secured creditor's security right in assets of a security provider is actually covered by the entry in question (see also IX.–3:310 paragraph (1)).

According to paragraph (1)(b) read with paragraph (2) the secured creditor has to give only a minimum declaration as to the encumbered assets, not a detailed description of them. The system of publicity by registration under these rules is a system of notice filing only. The secured creditor is not bound to identify specific assets that are subject to encumbrances in its favour; instead, it is sufficient that third persons can obtain from the register a warning that such a security right might be in existence, additional information might be obtained by further inquiries. However, entries in the register that are not limited to specific assets also carry some specific burdens for the secured creditor. First, there might be less situations in which the secured creditor is not obliged to answer requests for information under IX.–3:320 paragraph (4)(a). Second, the secured creditor is under a duty to restrict overly broad entries in the register to the actual extent of existing security rights under IX.–3:315.

In addition, the secured creditor has to indicate by one or several references to a list of categories of assets to which category the encumbered assets belong (see paragraph (1)(c)). This requirement (which would involve the use of a list of tick-boxes) is intended to allow other users to see at a glance whether assets of the security provider belonging to specific categories of assets might or might not already be subject to security rights or retention of ownership devices. This is thought to be necessary since entries in the register might be in a language not readily understandable for prospective creditors searching for information about proprietary security created in the security provider's assets. At the same time, it has to be ensured that this requirement does not operate as an obstacle in the process of achieving effectiveness for the secured creditor's proprietary security. The danger must be minimised

that proprietary security is regarded as ineffective because the secured creditor indicated the wrong category. To some extent, this problem will have to be taken care of by the way the list of categories mentioned in paragraph (1)(b) is drafted. This is, however, not an issue to be dealt with in these Comments. At least some difficulties for the secured creditor are solved under the present Article by allowing the entry to include several references to different categories of assets. If the secured creditor is uncertain concerning the correct classification, it may simply – with the security provider's consent – tick more than one box in the online registration form.

An entry in the register requires that the security provider has declared its consent (paragraph (1)(d)). For the policy of this requirement, see Comment A to IX.–3:309.

The name and address of the secured creditor are not listed as parts of the mandatory information to be given when filing an entry. The reason is that this information is already available to the registration system on the basis of the secured creditor's prior enrolment or use of other online identity verification system which is necessary for the authentication of the secured creditor's declaration (see IX.–3:304).

These rules apply not only to entries which are intended to cover assets that are subject to a security right, but also to entries referring to retention of ownership devices. As follows from IX.–3:303 paragraph (1) the minimum content necessary for entering these two types of entries is identical. As always, however, terminological adaptations are necessary when applying IX.–3:306, which is drafted in terms of a security right, to a retention of ownership device. The entry is to be made in respect of an identified buyer, hire-purchaser, lessee or consignee as security provider (paragraph (1)(a)); there has to be a minimum declaration as to the supplied assets as encumbered assets (paragraph (1)(b)). For these terminological adaptations in general, see IX.–1:104 paragraph (2).

IX.–3:307: Additional content of the entry

An entry in the register may include the following additional content:

(a) additional information provided by the creditor in relation to the encumbered assets or the content of the security right;

(b) a date at which the entry is to expire provided that it is before the end of the regular period of expiry of five years; and

(c) a maximum amount of the security.

COMMENTS

This Article covers additional content of the entry, *i.e.* content that is not mandatory but may be added to the entry by the secured creditor.

Generally speaking, the secured creditor may add information of any kind in relation to the assets that are subject to a security right or a retention of ownership device or the content of the proprietary security, such as the terms of the contract for proprietary security or the terms of default as agreed with the security provider (cf. sub-paragraph (a)). It should, however, be emphasised that sub-paragraph (a) is only intended to ensure that the secured creditor has the technical possibility to enter such additional content into the register. If the secured creditor is contractually prohibited from making such information public or if its publication amounts to a case of extra-contractual liability, then the secured creditor's liability towards the security provider (for damages, for deletion of the wrongful content) is not affected by this provision.

Two types of additional information are specifically mentioned in the Article, since this information might also be used in the course of the operation of the online register. According to sub-paragraph (b), the secured creditor may specify a date at which the entry is to expire and under sub-paragraph (c) the secured creditor may indicate a maximum amount of the security in the entry.

IX.–3:308: Information appearing on the register

In respect of each entry the following information appears on the register and is accessible to any user:

(a) the name and contact details of the security provider;
(b) the name and contact details of the creditor;
(c) the date of the entry;
(d) the minimum content of the entry under IX.–3:306 (Minimum content of the entry in the register) paragraph (1)(b) and (c); and
(e) any additional content of the entry under IX.–3:307 (Additional content of the entry) sub-paragraph (a) to (c).

COMMENTS

This Article lists the information that appears on the register once an entry has been successfully entered into the register according to the two preceding Articles.

IX.–3:309: Required consent of the security provider

(1) An entry in the register can be made only if the security provider has consented to it by declaration to the register. Any such consent can be freely terminated by the security provider by declaration to the register. A termination of consent does not affect entries that have been entered before the termination of the consent is declared to the register.

(2) The secured creditor may demand from the security provider a declaration of consent to an entry to the extent that such a consent is necessary to cover the security rights created in the contract for proprietary security.

(3) This Article does not affect the validity, terms and effects of any of the security provider's agreements with the secured creditor other than the declaration of consent to the register.

COMMENTS

A. The requirement of consent of the security provider in general

While there can be no doubt that in general proprietary security based upon a contract for proprietary security can be created only on the basis of a consensus between the parties, it is less obvious that the registration of such a security right or retention of ownership device by the secured creditor necessarily requires the consent of the security provider.

At least under a notice filing system as developed under these rules, the registration is irrelevant for the creation of a security right or retention of ownership device as between the secured creditor and the security provider. From a conceptual point of view, this could make it conceivable to argue that the secured creditor should be allowed to make an entry in the register unilaterally. Such a solution is often favoured in order to ensure the efficiency of the operation of the register. Any additional requirement of prior interaction between the secured creditor and the security provider in relation to the entry would slow down the process of registration; if there have to be declarations by the two parties, there might be additional transaction costs if their content has to be matched.

On the other hand, the possibility to file entries against a security provider without the latter's consent would bring with it considerable risks. First, there is the danger that entries are filed purely in order to inflict damage to the security provider's interests. Even though the registration in itself does not create a proprietary security in favour of the person named as secured creditor, the security provider's ability to obtain further secured credit might be negatively affected. Prospective secured creditors might shy away from taking security rights in the security provider's assets in respect of which entries have already been filed for fear that they could obtain only second-ranking security. In other situations the content of the entry might be defamatory or in breach of duties of confidentiality. Even if a security right or retention of ownership device has actually been created, the content of the entry might be drafted in overly broad terms; in this way, the secured creditor could obtain for itself a secured position also in respect of possible future security rights, thereby excluding other potential lenders and, at least indirectly, harming the security provider's business interests.

In a number of jurisdictions in which notice filing systems are in operation (especially in North America), experience shows that these dangers in fact might be not too relevant. Even though these systems allow a registration to be made without the security provider's consent, the latter is protected by the possibility to ask for the court's assistance in the removal of

entries and by a right to claim damages for entries wrongfully filed. In so far as the substantive law is concerned, the position of the security provider is similar under the present rules (see especially IX.–3:315). It appears, however, that these alternative methods of protection of the security provider against frivolous, oppressive or otherwise wrongful entries can replace the need for a requirement of consent only if it is sufficiently certain that the security provider can rely on an efficient enforcement of its position before the courts. Regrettably, the duration and effectiveness of court proceedings do not yet meet these standards in all member states. Some preventive protection of the security provider is necessary which works independently of court proceedings; this solution is to be found in the requirement of consent.

At the same time, it must be ensured that this requirement to prove the security provider's consent does not unduly impede the speed and efficiency of the operation of the register. The methods designed to achieve this objective are described in the remainder of these Comments.

B. 'Formal' declaration of consent and 'substantive' consent distinguished

The register being operated in an electronic online format, the possible methods of ascertaining whether the security provider has consented to the entry are limited. It does not appear to be feasible to check whether such a consent follows from the content of the contract for proprietary security (in fact, paragraph (2) provides as a default position for a right based upon the contract for proprietary security to have such a consent declared) or has been declared by the security provider in any other document. Neither will an electronic system be able to verify the legal consequences of any agreement of the parties nor will this agreement be made accessible to the register at all; on the other hand, the mere declaration (or guarantee) by the secured creditor that the security provider has consented to the registration cannot be sufficient. Therefore, these rules have opted for a solution according to which the security provider must have consented to the entry by a separate declaration to the register. Even if the contract for proprietary security itself in substance contains a consent by the security provider to any filings to be made by the secured creditor, this consent will not be effective for the present purposes if it is not specifically declared to the register. This distinction between a 'substantive' consent and the 'formal' consent for the purposes of these rules is expressed in paragraph (3).

This distinction is especially relevant for the security provider's possibility to terminate the consent to the entry. On the basis of the content of the parties' agreement, the security provider might well be bound by its 'substantive' declaration of consent, *i.e.* once the parties have agreed to create a security right to be made effective by registration, the security provider might not be allowed to step back from this agreement by terminating its declaration of consent. In other cases, however, especially where the parties have concluded an agreement covering the creation of security rights in the future, it might be possible for the security provider to terminate this agreement. Since it is not possible for the electronic register to determine whether or not the security provider's 'substantive' consent is binding, these rules allow the security provider to terminate its 'formal' consent declared to the register at will. This termination does not affect the underlying agreements, *i.e.* the security provider might be in breach of these agreements, and nevertheless it seems that in order to protect the security provider, this termination of the 'formal' consent must be technically possible. This termination of consent does not, however, have a retroactive effect; if on the basis of this

declaration of consent entries had already been entered into the register when the consent is terminated, these entries remain effective (paragraph (1) sentences 2 and 3).

C. Possible types of declarations of consent

It is envisaged that there will be various types of declaration of consent to the register. For purposes of illustration, some conceivable forms of consent which could be allowed by the online system of registration will be briefly described.

Unlimited consent in favour of a specified secured creditor. In situations where the parties are in a close business relationship the security provider might have strong confidence in the secured creditor, so that the latter could enjoy liberty in drafting entries to be made in the register. Thus, the security provider could declare an unlimited consent in favour of a specified secured creditor who then might freely file entries against this security provider without the need to secure an additional declaration of consent for every specific entry (subject only to the security provider's possibility to terminate the consent).

Consent to an entry with a specified content. If the security provider is more interested in protection against entries that are oppressive or unduly widely drafted, it might prefer an option to declare its consent to an entry with a specified content only. Only an entry exactly complying with the security provider's consent can be entered into the register. The question of compliance with the terms of the consent will have to be determined on a formalistic basis, since the system cannot evaluate whether a different content of the entry might be substantially equivalent to the content consented by the security provider.

Partially limited consent. It should also be possible to provide for more limited types of consent for situations where a specific consent would be impracticable but where the security provider still deems it too risky to declare an unlimited consent, which would give the secured creditor the possibility to enter oppressive entries into the register. These limited types of consent could use such criteria as can be ascertained even by an electronic system, i.e. whether the entry includes a maximum amount or whether it indicates the encumbered assets by reference to specific categories of assets only. It would then appear to be helpful if, should a secured creditor not be able to file an entry in the register for example because the maximum amount indicated in that entry would let the total maximum amount exceed the maximum amount consented by the security provider, the system would automatically inform the secured creditor what the remaining amount would be.

IX.–3:310: Identity of security provider, description of encumbered assets and effectiveness of registration

(1) If under the rules in this Book the effectiveness or priority of a security right encumbering assets of a certain security provider depends upon registration, an entry in the register according to this Subsection suffices only if:

(a) the entry is filed against the correct security provider;

(b) the creditor's declaration as to the encumbered assets as appearing on the register covers the assets encumbered by the security right;

(c) the encumbered assets actually belong to the category or categories of assets indicated in the entry; and

(d) the creditor's declaration is in an official language of the European Union. The creditor may add translations.

(2) For the purposes of paragraph (1)(b):

(a) the entry is effective in respect of fruits, products, proceeds and any other assets different from the original assets serving as security only if these assets are also covered by the creditor's declaration as to the encumbered assets; and

(b) a description identifying individual assets is not necessary.

(3) The creditor making the entry bears the risk that:

(a) the description of the encumbered assets, the translation of this description or the indication of the category or categories of encumbered assets is wrong; and

(b) the entry is filed against a wrong person.

COMMENTS

The general idea underlying this Article is that a security right is made effective by registration only if the assets in which the security right is created are covered by the content of the entry. On the basis of IX.–3:303 paragraph (2), this principle is applicable also to retention of ownership devices.

In order to avoid unnecessary burdens and risks for the secured creditor, it is sufficient that the content of the entry is drafted broadly enough to cover the assets that have actually been encumbered or that are subject to a retention of ownership device. It is not necessary that the description in the entry individualises specific assets. On the basis of general principles of property law, proprietary security can of course only be created in specified assets (see for the creation by granting as the main method of creation of security rights IX.–2:105 sub-paragraph (a)). However, a distinction has to be made between the creation of the proprietary security and the registration under the rules in this Section. In order not to impose unnecessary burdens on the secured creditor, the latter should not incur the risk that a security right or a retention of ownership device might not be effective merely by reason of the fact that the description of assets in the entry does not properly individualise specific assets. Other prospective creditors can get a warning that a security right or a retention of ownership device might be in existence already from a less specific entry, any further information could then be obtained by making an inquiry from the secured creditor.

However, it is still regarded as necessary that the declaration contained in the entry expressly covers proceeds of the original encumbered assets etc. if the rights of the secured creditor are to be extended to additional assets of this kind (see paragraph (2)). This position, *i.e.* that proceeds are not automatically included, is in line with IX.–2:306 paragraph (3), according to

which proceeds of the original assets are encumbered only if the parties so agreed (the security rights covered by IX.–2:306 paragraphs (1) and (2) and IX.–2:309 paragraphs (1) and (2) are exempted from the requirements of Chapter 3 altogether, see IX.–3:101 paragraph (2) and IX.–3:106).

IX.–3:311: Amendments of entries

(1) The creditor may amend any of the creditor's entries after filing.

(2) An amendment to an entry can only be entered into the register if:

(a) it is made in respect of a specific entry;

(b) it contains a declaration as to the content of the amendment; and

(c) it is accompanied by a declaration of the creditor that the latter assumes liability for damages caused to the security provider or third persons by a wrongful amendment to the original entry.

(3) In case of an amendment, the register preserves and shows both the original text and the amendment as such, including the date of the amendment.

(4) An amendment to an entry is effective only if it does not extend the creditor's rights. In particular, an amendment can have the effect of limiting the creditor's rights, especially by subordinating the creditor's rights to another creditor's rights, by indicating a transfer of the security right to another creditor, by limiting the scope of assets covered according to the content of the creditor's declaration as to the encumbered assets or by setting or predating a date of expiry of the entry.

(5) An extension of the creditor's rights is effective only if contained in a new entry.

COMMENTS

The secured creditor may amend the entries that it has entered into the register; in that case both the original and the amended version of the entry will appear on the register.

It is important to note that an amendment cannot have the effect of extending the secured creditor's rights. Therefore, there is no need for a requirement of consent as the position of the security provider cannot be negatively affected by a mere amendment. Amendments purporting to extend the secured creditor's rights are ineffective; this effect can only be achieved by a new registration and not by a mere amendment to an existing entry.

This solution appears to be preferable in comparison to the suggestion to allow also the extension of the secured creditor's rights by amendment of the original entry if there is a consent of the security provider. (i) It would be impossible for the online system of registration to ascertain whether an amendment would effectively lead to an extension or a restriction of the secured creditor's rights. Under the approach followed by this Article, the secured creditor may still file an amendment purporting to extend the rights; however, this amendment would not be given legal effect. (ii) An extension of the secured creditor's rights does not affect the security provider alone, but possibly also third persons. Security provider and secured creditor may agree to extend the scope of the latter's rights including the coverage of the entry; such an extension, however, can be effective vis-à-vis other creditors only from the date of a declaration to the register to this effect and cannot enjoy the priority position that is based upon the date of the original entry.

IX.–3:312: Transitional provision in relation to entries in other systems of registration or notation under national law

(1) Where a security right is registered or noted in another system of registration or notation on title certificates under the national law of a member state, as long as such systems are still in operation for security rights in specific types of assets, an entry reiterating the content of that registration or notation, including the date of registration or notation, is to be entered into the European register of proprietary security against the security provider by the body operating the other register. An entry in the European register of proprietary security is required for the effectiveness of the registration or notation under this Book.

(2) For purposes of priority according to Chapter 4, the time of registration or notation in the national system is decisive.

COMMENTS

In relation to specific registers established under the national law of a member state, the general concept is that the creation of the European register of proprietary security should not necessarily replace these systems. If for certain segments of the market for secured credit these specific registers are regarded by the national legislator as being more efficient than the register, *e.g.* because these specific registers contain more reliable information on the basis of the involvement of a public registrar, registrations may continue to be effected in these specific registers (see IX.–3:301 paragraph (2)).

In the interest of the efficiency of the system of publicity based upon a European register, however, a parallel registration is necessary (paragraph (1) sentence 2). Security rights and retention of ownership devices will be effective only if registered in both the specific national system and the general European register – otherwise any prospective creditor could not rely on the content of the latter register but would have to check whether under national law any additional registers or systems of notation exist, in which the security right might be registered.

This rule applies to registers established under the national law of a member state only since its application to registers established under international law would be in conflict with the latter. Public authorities operating a specific system of registration or notation established under national law, however, are bound by paragraph (1) to file an entry against the security provider in the European register; this provision does not, of course, affect the secured creditor's possibility to file an entry itself. Moreover, even if the entry is filed by the public authority, the position of the secured creditor is the same as in relation to other entries under this Book, *i.e.* the secured creditor has to answer inquiries and is entitled to amend or delete the entry.

Since this Article requires a double registration, an additional rule is necessary determining which registration or notation is to be decisive for the order of priority. Paragraph (2) provides that the time of registration or notation in the specific system of registration or notation established under national law is the relevant time for the purposes of IX.–4:101.

IX.–3:313: Automated certification of entry to creditor and security provider

After an entry or an amendment to an entry has been filed, a certificate to that effect is to be communicated automatically to the creditor and the security provider.

COMMENTS

The use of an electronic online register allows an automated communication. Certificates can be sent automatically by the system and can then serve the purposes of both information and proof.

IX.–3:314: Third person acting as agent of the creditor

(1) As an additional content of the entry made by the secured creditor, the latter may identify a third person acting as agent of the creditor, whose name and contact details will appear on the register instead of those of the creditor. In such a situation, the entry can be entered into the register only if in addition to the requirements of the preceding Articles being satisfied this third person has also consented to it according to IX.–3:309 (Required consent of the security provider) paragraphs (1) and (3), applied with appropriate adaptations.

(2) By a declaration to the register that is subject to IX.–3:309 (Required consent of the security provider) paragraphs (1) and (3), applied with appropriate adaptations, a secured creditor may authorise a third person to make declarations to the register on the secured creditor's behalf.

(3) Where a third person acting as agent for the secured creditor is identified in the entry, the secured creditor and the third person are liable as solidary debtors for all obligations of secured creditors under this Section.

COMMENTS

Paragraph (1) sentence 1 allows the secured creditor to nominate a third person acting as agent of the creditor. Generally, after filing an entry the name of the secured creditor will appear on the register (see IX.–3:308 sub-paragraph (b)) in order to allow prospective creditors to contact the secured creditor and inquire whether specific assets are actually encumbered or subject to a retention of ownership device in favour of the secured creditor (see Subsection 5). In some situations, however, a secured creditor might prefer that its role in financing the security provider does not become visible to the public. This is achieved by nominating a third person acting as agent of the creditor whose name and contact details will then appear on the register instead of those of the creditor.

This situation, *i.e.* the nomination of a third person who appears on the register instead of the secured creditor as the latter's agent, has to be distinguished from cases where security devices are held by someone who is not itself the creditor but who holds the proprietary security for the creditor(s). In such cases, the holder of the security devices, despite not being the creditor of the secured right, is regarded as the secured creditor for the purposes of these rules (see IX.–1:201 paragraph (12)),

If a third person is to appear on the register instead of the creditor, this third person will be subject to all the obligations of a secured creditor under this Section (paragraph (3)). If a secured creditor prefers that its name is not apparent from the entry, inquirers for example must be able to turn towards the third person nominated as agent for the secured creditor for information. The third person does not become a secured creditor itself, but has to answer requests for information as if it was the secured creditor. Moreover, the third person is not only under a duty to answer requests on the secured creditor's behalf, but the third person can also owe the inquirer or the secured creditor damages for a violation of the information duties under Subsection 5. Additionally, the secured creditor is also itself liable in damages for any non-performance by the third person and IX.–3:321 to IX.–3:323 are applicable as well.

Since the secured creditor's option to nominate a third person acting as its agent gives rise to such liabilities of the latter as have been described in the preceding paragraph, it is necessary

that – in addition to any other relevant requirements under this Section –this third person agent has consented to the entry (paragraph (1) sentence 2). This consent is subject to the rules set out in IX.–3:309 paragraphs (1) and (3), *i.e.* there has to be a declaration to the register, this declaration of consent can be freely terminated and this 'formal' consent has to be distinguished from any 'substantial' agreements that might exist between the parties.

Often it will be more practicable for the secured creditors to let the third persons acting as their agent file the entry instead of entering it into the register themselves. Paragraph (2) provides for such a possibility, subject, however, to a requirement that the third person must have been authorised by the secured creditor. As with the declaration of consent according to paragraph (1) sentence 2, this authorisation is subject to the rules laid down in IX.–3:309 paragraphs (1) and (3), applied with appropriate adaptations.

Subsection 3: Protection of the security provider

IX.–3:315: Security provider's right to deletion or amendment of entry

The security provider is entitled against the secured creditor to deletion or amendment of an entry if and in so far as no corresponding security right exists.

COMMENTS

Entries can be entered, amended and deleted only by the secured creditor. There can be no possibility for the security provider to delete an entry unilaterally. However, the security provider can demand that the secured creditor deletes or amends entries, *e.g.* if these are drafted too broadly or if the underlying security right or retention of ownership device has ceased to exist.

The normal method of enforcement of such a demand will be proceedings in a competent court; an additional possibility is offered by the following Article.

IX.–3:316: Review of contested entries by registration office

(1) The security provider may apply for the assistance of the registration office in the assertion of the right to demand deletion or amendment of an entry from the secured creditor.

(2) On the security provider's application, the registration office asks the secured creditor whether the latter agrees to the security provider's demand.

(3) If the secured creditor does not object within two months of being asked by the registration office according to paragraph (2), the entry is deleted or amended according to the security provider's demand.

(4) If the secured creditor objects within the time limit of paragraph (3), the entry is marked as contested to the extent of the security provider's demand.

(5) The entry remains marked as contested until:

(a) the security provider withdraws the application by notice to the registration office;
(b) the secured creditor agrees to the security provider's demand by declaration made to the registration office;
(c) the secured creditor deletes the entry; or
(d) a final decision is rendered on the security provider's demand by a competent court.

COMMENTS

By virtue of this Article the security provider enjoys some protection by being able to apply for assistance by the registration office in the assertion of any demands under the preceding Article against a secured creditor.

Since the registration office is not intended to operate as an additional quasi-judiciary body, its powers are limited. According to paragraph (3), it may delete or amend an entry along the lines of the security provider's application if the secured creditor agrees (or at least does not object within two months). If the secured creditor objects to the security provider's demands, the registration office does not delete the entry, but marks it as contested (paragraph (4)). A decision as to the substance of the security provider's demands then has to be sought in the courts.

The fact that an entry is marked as contested does not mean that the entry becomes ineffective; instead this is merely regarded as a way by which the security provider can give some publicity to the fact that the existence of a corresponding security right is disputed.

Subsection 4: Accessing and searching the register

IX.–3:317: Access to the register for searching purposes

Access to the register for searching purposes is open to anyone, subject to the payment of fees; it does not depend upon a consent by the security provider or the secured creditor.

COMMENTS

Anyone may access the register for searching purposes; it is not intended that any information may only be obtained via a public authority that controls the access to the register. Also the payment of fees is not intended to restrict that access; rather, the payment of fees is mentioned only as it will be necessary for the maintenance of the register.

Neither is there a requirement of consent by the security provider or the secured creditor for the access to the register. By making an entry in the register and by consenting to this registration, the security provider and the secured creditor allow the information contained in the entry to be accessible to everyone.

IX.–3:318: Searching the register

The register can be searched for entries filed against individual security providers or for entries containing specified descriptions of the encumbered assets.

COMMENTS

A. Methods of searching the register

Operating as a personal folio system, the register can be searched for entries filed against specified security providers. *I.e.* after choosing a certain security provider, a user of the register can browse through all entries filed against that security provider.

In order to take full advantage of the possibilities offered by the fact that secured creditors may enter also a detailed description of the encumbered assets, the register will also allow searches to be made within these descriptions. *I.e.* if a secured creditor enters the unique serial number of an asset that is subject to a security right or a retention of ownership device, other users will be able to find the relevant entry even though they might not know against which security provider this entry has been filed.

B. Searching possibilities and third persons' constructive notice

The different methods in which the register can be searched are closely connected to the question whether it follows already from the registration of a security right or a retention of ownership device in certain assets that third persons can reasonably be expected to know that these assets are encumbered or subject to a retention of ownership device, *i.e.* that third persons have constructive notice of the proprietary security. This is relevant for the possibility of good faith acquisition. Even if the third person does not have actual knowledge of the existence of the earlier right of another secured creditor, it can no longer acquire proprietary rights in the assets concerned free of that other secured creditor's right on the basis of the principles of good faith acquisition if it at least can reasonably be expected to know of the earlier right.

Since it is always possible to look up all security rights and retention of ownership devices registered against a certain security provider, a third person can always be expected to have notice of any earlier security right or retention of ownership device in assets in which this third person is about to acquire a proprietary security if the earlier security device is registered against the transferor. The situation is different, however, if the third person is to acquire not a security right but outright ownership in the ordinary course of the transferor's business (see IX.–6:102 paragraph (2)). In such a case, the third person – who is not itself a secured creditor – cannot be expected to care about any possible entries in the register for proprietary security.

Searching for descriptions of the assets serving as security, on the other hand, is also always possible, but not as certain to yield conclusive results as the possibility to search for certain security providers. This has the effect that since under these rules the secured creditor is not bound to give a detailed description of the assets serving as security, third persons cannot be expected to search the register for descriptions of these assets. Thus, even if a secured creditor has entered a detailed description of the collateral into the register, a third person cannot be expected to have notice of the security rights or retention of ownership devices in these assets if they are not registered against the person from whom the third person is about to acquire a

proprietary right in those assets. (Such a situation might occur if the collateral is transferred by the security provider subject to the existing security right or retention of ownership device to another person who thus assumes the position of a security provider without the proprietary security being registered against this transferee, see IX.–3:330 and IX.–3:331).

Subsection 5: Registered creditors' duty to answer requests for information

IX.–3:319: Duty to give information

(1) Any registered secured creditor has a duty to answer requests for information by inquirers concerning the security right covered by the entry and the encumbered assets if these requests are made with the security provider's approval.

(2) The request must be in an official language of the member state of the European Union where the place of business or incorporation or the residence of the secured creditor is situated or in English.

(3) The request must be answered within fourteen days after the request, including the security provider's approval, has been received by the secured creditor.

(4) The secured creditor's duty to answer requests for information by inquirers according to the preceding paragraphs is owed both to the inquirer and to the security provider. To both parties, the secured creditor is liable in damages for any loss caused by breach of the duty.

COMMENTS

A. General

This Article is based upon the consideration that the information directly accessible from the register under a direct entry system as suggested in these rules might be somewhat limited and unreliable. Information contained in an entry might be outdated, *e.g.* if the security right or retention of ownership device concerned has ceased to exist, but the entry has not been deleted. In other cases the description of the assets serving as security contained in the entry might have been too broad from the outset or too unspecific to individualise specific assets. The register therefore fulfils a warning function only, merely stating that a security right or retention of ownership device *might* be in existence. More specific and concrete information can only be obtained on the basis of an inquiry motivated by this warning.

Since inquiries and the information to be obtained in this way are central to the functioning of the register, they cannot be regarded as a matter to be left for the parties to regulate themselves. Persons holding the information concerning the existence of security rights or retention of ownership devices in the security provider's assets (*i.e.* registered secured creditors) might be tempted to delay answers to requests for information or not to answer them at all. Rules must exist which force them to give accurate information without undue delay.

The Article imposes a duty rather than an obligation because the consequences of non-compliance are regulated in a specific way in the following Articles. The difference is not significant, however, given the liability for damages imposed by paragraph (4) second sentence of this Article.

B. Parties involved

These rules have opted for placing a duty on the registered secured creditor to answer any request for information, *i.e.* the secured creditor whose name appears on the register in respect

of a specific entry (for the situation in case of a transfer of the security right, see Comment B on IX.–3:328). Any prospective creditor or other interested party might as a matter of course also inquire from the security provider whether certain assets are encumbered with a security right or subject to a retention of ownership device or not. However, especially if the security provider is identical with the debtor of the obligation covered by the security, any declaration as to whether its assets are or are not already subject to security rights or retention of ownership devices might not be very reliable. Moreover, any prospective creditor might end up with nothing more than a personal right against the security provider if the information given by the latter turns out to be wrong. The only person who might give reliable information and whose liability might protect the prospective creditor therefore is the secured creditor.

Not only prospective secured creditors (*i.e.* persons intending to acquire a proprietary security right over the security provider's assets) will have a right to demand further information concerning the existence of a security right or a retention of ownership device in specific assets, but also other interested parties, especially persons intending to acquire (full) ownership in assets held by the security provider. Good faith acquisition does not protect such acquirers under all circumstances; therefore they need a possibility to obtain reliable information as to whether or not the asset to be acquired is subject to a security right or a retention of ownership device.

A requirement that the request for information must be made with the security provider's approval has been introduced in order to avoid the secured creditor being approached for information concerning its proprietary security by persons who do not have any legitimate interest in this information. On the other hand, it does not appear that the fact that the inquirer has to seek the security provider's approval would unduly limit the inquirer's chances of obtaining the information concerned. If the security provider does not give its approval, then a prospective creditor should simply refrain from granting credit. Similar possibilities would exist for a person intending to acquire full ownership in the security provider's assets in a situation where any prior proprietary security in these assets would not cease to exist by reason of the transfer.

For the technicalities of this approval, see the Comments on IX.–3:324.

C. Particulars of the duty to give information

Generally, the duty to give information arises only if the inquiry is in a language which the secured creditor can be expected to understand. In the first place, this will apply for an official language of the member state of the European Union where the place of business or incorporation or the residence of the secured creditor is situated. Since a strict requirement to communicate in that language might, however, create an unnecessary burden for the inquirer, the latter's request for information may also be in English (paragraph (2)).

The duty to answer a request for information is owed not only to the inquirer, but also to the security provider. The latter has an interest in the secured creditor answering such requests, since without reliable information being provided to the prospective creditors, the security provider might have difficulties in obtaining further credit (paragraph (4) sentence 1).

The basic remedy for any breach of the secured creditor's duty to answer requests for information is a liability for damages. This remedy can be of specific importance for the

security provider if the latter is identical with the debtor of the obligation covered by the security. Should the secured creditor's conduct make it impossible for the security provider to obtain further secured credit, so that the latter can only obtain unsecured credit at higher interest rates, then the security provider could claim the difference as damages. For an inquirer who intended to assume the position of a secured creditor, however, damages are not the only conceivable remedy. Even though in cases of wrong or misleading information damages might put the inquirer into a position as good as that of a secured creditor, it is preferable that remedies actually attempt to give the inquirer the intended position. This objective is at least partly achieved by IX.–3:321 to IX.–3:323, which provide some more specific protection to the inquirer in addition to the foundations laid by general rules and principles, such as especially good faith acquisition.

Paragraph (3) provides for a period of two weeks which is allowed to the secured creditor to answer the request for information. This time limit does not rule out the possibility of a later answer, but the remedies against the secured creditor under paragraph (4) and IX.–3:323 will be available should the latter fail to answer the request for information within this period.

For the content of the information to be given and the remedies for a failure to comply with the duty to give information see the following Articles.

IX.–3:320: Content of the information

(1) Requests for information under the preceding Article must be answered by the secured creditor giving information concerning the existence of a security right in specific assets at the time when the information is given.

(2) The information may be given by:

(a) stating specifically whether the assets concerned are encumbered in favour of the secured creditor; or

(b) forwarding the relevant parts of the agreements between security provider and secured creditor covering the providing or retention of proprietary security.

(3) Where the security right has been transferred, the secured creditor must disclose the name and contact details of the transferee.

(4) The information must be given in an official language of the member state of the European Union where the place of business or incorporation or the residence of the secured creditor is situated or in English.

(5) No information needs to be given:

(a) if it is apparent directly from the entry that the asset concerned is not encumbered, provided that the entry complies with the requirements of paragraph (4); or

(b) if the secured creditor had already answered a request for information by the same inquirer in relation to the same asset within the past three months and the information given is still correct.

(6) These provisions do not affect the secured creditor's obligation to give information concerning the obligation covered by the security under IX.–5:401 (Secured creditor's obligation to give information about secured right) or any equivalent obligation owed to the debtor of the obligation covered by the security and the consequences of a non-performance of these obligations.

COMMENTS

A. Content of the information

The basic principle concerning the content of the information to be given by the secured creditor as an answer to a request under the preceding Article is that the secured creditor is only required to state whether or not the specific assets mentioned in the inquiry are encumbered or subject to a retention of ownership device. (Again, the rules of this Section do not distinguish between security rights and retention of ownership devices.) The secured creditor is not bound to give a complete overview of all the security provider's assets serving as collateral for the secured creditor nor does the secured creditor have to set out details of the contract for proprietary security with the security provider if it is preferred that these details are kept confidential.

This standard way of answering a request for information is laid down in paragraph (2) (a). Alternatively, the secured creditor might also forward the relevant parts of the agreements between security provider and secured creditor covering the providing or retention of proprietary security (paragraph (2)(b)). If the secured creditor is in doubt whether a specific asset is subject to a security right or a retention of ownership device or wishes to avoid having to state in respect of an extensive list of assets whether or not they are subject to a security right or a retention of ownership device it might seem preferable for the secured creditor to send, not necessarily the whole of the contract for proprietary security, but at least those parts

of the agreement with the security provider by which proprietary security is created. Since the security provider has given its approval to the inquirer's request for information, such a method of answering the request does not appear to raise issues of confidentiality.

Specific rules apply where the security device has been transferred so that the secured creditor indicated in the entry – even though the transfer might not yet be mentioned in the register – is no longer the holder of the security device. According to paragraph (3), the registered secured creditor does not have to give any information whether or not the security right or retention of ownership device still exists: instead, the inquirer only has to be informed of the transfer so that the inquirer can turn to the transferee as the new secured creditor for further information.

B. Language of the information - paragraph (4)

Since it cannot necessarily be assumed that the inquirer and the secured creditor speak the same language, it had to be decided whether the former or the latter should bear the burden of a translation. By allowing the secured creditor to answer in the language of the member state where its place of business or incorporation or residence is located, this question was decided in the secured creditor's favour. There is already a contract for proprietary security between the secured creditor and the security provider, while this is not necessarily so between the latter and the inquirer; therefore it seems that the secured creditor should enjoy the better position in relation to the language of the information to be given. For the possibility to answer in English, see Comment C on IX.–3:319.

C. Exceptions - paragraph (5)

Paragraph (5) contains two exceptions where no information needs to be given by the secured creditor:

According to sub-paragraph (a) no information needs to be given if it is apparent from the content of the entry itself that the asset which the inquiry relates to is not subject to a security right or a retention of ownership device. If a secured creditor has made an entry in the register stating that asset A is encumbered, no answer needs to be given to an inquiry concerning the existence of a security right in asset B. On the other hand, even if the description of the collateral in the entry individualises a specific asset as being encumbered in favour of the secured creditor, the secured creditor still has to answer a request for information concerning that asset. The security right might have ceased to exist and the inquirer cannot ascertain whether the information contained in the entry has become outdated.

The second exception in sub-paragraph (b) is intended to protect the secured creditor against repeated requests.

D. Information concerning the obligation covered by the security

Paragraph (6) provides that the rules of Subsection 5 do not affect any obligation of the secured creditor to give information concerning the obligation covered by the security and the consequences of a failure to comply with this obligation. Such an obligation owed by the secured creditor to the security provider is laid down in IX.–5:401; similar obligations might arise from the underlying secured transaction between the secured creditor and the debtor.

The consequences of a non-performance of these obligations will be different from those set out in this Subsection. Certainly the secured creditor must be bound by any answers given to requests under these obligations. However, since the amount of the secured right will more often than not be fluctuating or even not exactly known to the secured creditor, it would seem inappropriate to apply the strict regime laid down in this Subsection in relation to inquiries concerning the existence of a security right or a retention of ownership device to these inquiries concerning the scope and content of the secured right. Therefore, it seems to be preferable to leave inquiries of the latter kind out of the operation of the very specific and formalistic rules of Subsection 5 and to apply the general principles instead. To regulate such general principles in the context of this Section, it should be added, would be inconsistent with the fact that obligations to give information of this kind would not be limited to situations of registered proprietary security, but could be applicable also where the secured creditor exercises possession or control.

IX.–3:321: Consequences of correct information given by secured creditor

(1) If the secured creditor correctly informs the inquirer under this Subsection that the assets concerned are not encumbered, a security right in these assets which is subsequently created in favour of the secured creditor cannot enjoy priority conferred by the original entry over security rights of the inquirer. This rule applies only if the security rights of the inquirer are acquired by the latter within three months after the request for information had been made.

(2) If the secured creditor correctly informs the inquirer under this Subsection that the assets concerned are encumbered, the inquirer cannot acquire a proprietary right in the encumbered assets free of the encumbrance in favour of the secured creditor even if that would otherwise be possible under the principles of good faith acquisition.

COMMENTS

A. General survey

The specific consequences of performance or non-performance of the information duties under this Subsection are to be found in this and the next two Articles. This Article covers situations where the information given by the secured creditor is correct. The next Article deals with cases where the information given is not correct. And the third of the three Articles sets out the consequences of a complete failure or a delay in answering the inquirer's request for information.

B. Correct information that assets are not encumbered – paragraph (1)

Paragraph (1) deals with the situation where the secured creditor correctly informs the inquirer that the assets concerned are not subject to a security right or a retention of ownership device. (Again, the rules of this Section do not distinguish between these two kinds of security.) If the inquirer subsequently acquires a proprietary right, the result should be that the inquirer can rely on the information given by the secured creditor and that the right acquired by the inquirer is not of a lower rank than the secured creditor's rights.

The result described in the preceding paragraph will be achieved without any difficulties in situations in which, after the information is given by the secured creditor, only the inquirer acquires any security right. However, the operation of IX.–4:101 causes some problems in cases where the secured creditor also acquires additional security rights. Since the priority of competing security rights is determined by the order of their registration, which might predate the actual creation, the secured creditor might on the basis of IX.–4:101 claim priority by virtue of the original entry over security rights created in favour of the inquirer, even if these security rights were actually created *after* the secured creditor had informed the inquirer that the assets concerned were not encumbered in its favour and *before* the security rights of the secured creditor were created.

Paragraph (1) is intended to remedy this specific problem. A secured creditor who informs an inquirer that an asset is not subject to a security right or a retention of ownership device in its favour will not be able to rely on priority conferred by the original entry over proprietary security created in favour of the inquirer. This does not, however, constitute a limit to the effectiveness of the security rights or retention of ownership devices and the entry filed by the secured creditor in other respects.

The solution suggested in this provision is rather a novelty, but it appears to be preferable in comparison to the available other alternatives. (i) Demanding the removal of the original secured creditor's entry would surely go too far. The secured creditor enjoys a priority position against any other potential secured creditor and should not be made to lose this position. Moreover, the scope of the entry might often be broader than the collateral to which the inquiry relates. (ii) To make the priority position of the inquirer dependent upon a subordination agreement appears to be unduly burdensome for the inquirer (and, indirectly, also for the debtor whose access to additional credits might be delayed). The inquirer should be able to obtain a security right with a secure priority position immediately after having received an answer by the secured creditor without the need for the conclusion of a subordination agreement in favour of the inquirer's rights.

The operation of paragraph (1) is limited in three respects. Firstly, the inquirer is protected for a period of three months only. If the rights are created more than three months after the request for information has been made, the inquirer can no longer rely on the assumption that the assets concerned are not encumbered in favour of the secured creditor.

Secondly, even during this period of time, the original secured creditor can create security rights that enjoy priority over rights to be acquired by the inquirer if the secured creditor enters a new entry into the register. The effect of paragraph (1) is limited to priority to be conferred by virtue of the original entry only.

Thirdly, paragraph (1) deals with proprietary *security* rights of the inquirer only, while paragraph (2) and also IX.–3:322 cover the acquisition of proprietary rights in general. The reason is that it is thought that in cases where the inquirer acquires full ownership in the assets concerned, the problems described above do not arise. Once the inquirer acquires ownership, the security provider can no longer validly create another security right in the asset concerned in favour of the secured creditor.

C. Correct information that assets are encumbered – paragraph (2)

Paragraph (2) covers situations where the secured creditor has correctly informed the inquirer that the assets concerned are subject to a security right or a retention of ownership device. If the inquirer subsequently acquires a proprietary right, the result must be that this proprietary right is subject to the secured creditor's prior rights.

In most cases, this effect follows already from the application of general principles. The secured creditor's rights have been created and made effective before the creation of the inquirer's rights and therefore enjoy priority over the latter. Some exceptions, however, could apply in situations where the inquirer could rely on principles of good faith acquisition. IX.–6:102 expressly allows the acquisition of ownership free of the prior registered security right or a retention of ownership device on the basis of a good faith acquisition if the security provider acts in the ordinary course of its business. Paragraph (2) makes sure that even in such situations the inquirer cannot acquire ownership in the collateral on the basis of a good faith acquisition if the secured creditor had informed the inquirer that these goods were actually subject to a security right or a retention of ownership device.

It should be noted that, while most provisions in this Subsection constitute a burden for the secured creditor, paragraph (2) creates an incentive for the latter to answer inquiries by giving the secured creditor additional protection.

D. Relative effects of the Article

In most cases, only the constellation of two competing creditors will have to be considered. In rare situations, however, the security provider might have created effective proprietary security in favour of three or more secured creditors. While this does not cause any specific problems as long as for example the application of this Article is identical towards all security providers, there might be exceptional situations where this is not the case. In these situations, the question of priority might be affected by circumstances that are effective only between some, but not all security providers. Similar problems, however, might arise in situations of a good faith acquisition (*e.g.* a secured creditor might be in good faith in respect of earlier security rights held by one other secured creditor, but might have notice of the rights of a third secured creditor). No detailed discussion of the rather complicated problems arising in this respect will be attempted here since the outcome will depend upon the individual circumstances of each case. It suffices to say that in the context of the present Article, the position of each secured creditor will largely depend upon whether this secured creditor can be regarded as having assumed the risk of being a second or lower-ranking secured creditor only.

IX.–3:322: Consequences of incorrect information given by secured creditor

(1) If the secured creditor incorrectly informs the inquirer under this Subsection that the assets concerned are not encumbered, the inquirer may within three months acquire a proprietary right in these assets free of any encumbrance in favour of the secured creditor on the basis of a good faith acquisition in spite of the entry in the register covering the secured creditor's rights.

(2) If the secured creditor incorrectly informs the inquirer under this Subsection that the assets concerned are encumbered, and the inquirer nevertheless acquires a proprietary security right in the assets concerned from the security provider, IX.–3:321 (Consequences of correct information given by secured creditor) paragraph (1) first sentence applies with appropriate adaptations.

COMMENTS

A. Incorrect information that assets are not encumbered - paragraph (1)

If for whatever reason the secured creditor incorrectly informs the inquirer that the assets concerned are not subject to a security right or a retention of ownership device (the rules of this Section drawing no distinction between retention of ownership devices and security rights), the inquirer should be able to rely on this information, *i.e.* the inquirer should be able to acquire proprietary rights in the assets concerned that are not subject to prior rights of the secured creditor.

It is not entirely clear, however, that this result would always flow from the application of the general rules. Even the outright acquisition of ownership of goods free of the earlier registered proprietary security on the basis of a good faith acquisition seems to be barred if the security provider does not act in the ordinary course of its business; for intangibles there is under the general principles no good faith acquisition of the full title or a security right at all. Therefore it seems that an additional provision might be necessary.

The application of IX.–3:321 paragraph (1) would not be sufficient. It is not the relationship of the inquirer's rights vis-à-vis subsequently created rights of the secured creditor that has to be dealt with but the relationship towards earlier rights. The solution suggested by paragraph (1) of the present Article is that for a period of three months the existence of an entry in the register covering the secured creditor's rights will not affect the inquirer's possibility to acquire proprietary rights in the assets concerned free of the prior rights of the secured creditor.

This acquisition is, however, still based upon the inquirer's good faith. Should the latter have notice of the existence of the secured creditor's rights from any other source, then there can be no good faith acquisition.

B. Incorrect information that assets are encumbered – paragraph (2)

In situations where the secured creditor – even if incorrectly – informs the inquirer that the assets concerned are subject to a security right or a retention of ownership device, the inquirer will typically refrain from the transaction. Thus, primarily only the security provider's right to damages will be of any importance. However, if the inquirer nevertheless acquires a security right (presumably because of its confidence in the security provider who can truthfully declare

that the assets concerned are not subject to a security right or a retention of ownership device), the secured creditor should not have any advantage from having given wrong information.

The position should therefore not be better for the secured creditor than if the latter had informed the inquirer that the assets concerned are not already serving as security, *i.e.* the inquirer should be able to acquire proprietary rights in the assets concerned that are not subject to any prior rights of the secured creditor.

This result will in most situations already follow from general rules. The acquisition of proprietary rights by the inquirer is not barred merely by reason of the fact that an entry has been registered in relation to the assets concerned; the inquirer can therefore acquire a proprietary interest, whether a security right or ownership, from the holder of these rights, which in fact are not subject to a security right or a retention of ownership device in favour of the (alleged) secured creditor.

A specific provision is necessary only in respect of the situation set out in the Comment A on the preceding Article, *i.e.* where not only the inquirer but also the secured creditor subsequently acquire security rights in the assets concerned. According to paragraph (2) of the present Article, the rule in paragraph (1) of the preceding Article applies with appropriate adaptations, *i.e.* the secured creditor's subsequently acquired security right cannot enjoy priority conferred by the original entry.

Paragraph (2) goes a step further than paragraph (1) of the preceding Article by limiting the reference to sentence 1 of that provision. This can be regarded as an element of punishment of the secured creditor.

Concerning the situation of the inquirer acquiring not a proprietary security right but full ownership, see Comment A, last paragraph on the preceding Article.

IX.–3:323: Consequences of failure to give information

(1) If the secured creditor fails to answer the request for information under IX.–3:319 (Duty to give information) and IX.–3:320 (Content of the information) or incorrectly answers that its security rights in the assets concerned have been transferred, the inquirer is to be treated as if the secured creditor had given the information that the assets concerned are not encumbered. IX.–3:321 (Consequences of correct information given by secured creditor) paragraph (1) or IX.–3:322 (Consequences of incorrect information given by secured creditor) paragraph (1), respectively, apply with appropriate adaptations.

(2) If the secured creditor delays in answering the request for information under IX.–3:319 (Duty to give information) and IX.–3:320 (Content of the information), the preceding paragraph applies if a proprietary right is created in favour of or acquired by the inquirer before the secured creditor answers the request for information.

COMMENTS

Obtaining further information from the secured creditor is essential for the inquirer; therefore there must be protection against the secured creditor's refusal to answer requests for information under this Subsection.

A. Paragraph (1): failure to give information

If the secured creditor does not react to the inquirer's request for information, a mere liability for damages does not provide sufficient protection for the inquirer. In order not to let the secured creditor benefit from its inaction, the inquirer is to be treated in the most favourable way, *i.e.* as if the secured creditor had – correctly or not – stated that the assets concerned are not subject to a security right or a retention of ownership device. (Paragraph (1) refers to security rights only, but this reference covers retention of ownership devices as well, see IX.–3:303 paragraph (2)).

This objective is achieved by declaring applicable IX.–3:321 paragraph (1) (in situations where the assets concerned are actually not subject to a security right or a retention of ownership device in favour of the secured creditor) and IX.–3:322 paragraph (1) (in situations where a security right or a retention of ownership device in favour of the secured creditor exists).

Paragraph (1) applies not only in situations of a complete failure to answer a request for information concerning specific assets, but also where the secured creditor incorrectly states that its security rights or retention of ownership devices have been transferred.

B. Paragraph (2): delayed answer

According to paragraph (2), the consequences set out in paragraph (1) apply as soon as the answer period of two weeks (see IX.–3:319 paragraph (3)) has elapsed without the secured creditor having answered the request for information. However, the inquirer cannot rely on the specific protection derived from the application of the present Article read with IX.–3:321 paragraph (1) and IX.–3:322 paragraph (1) if proprietary rights in the assets concerned are acquired by the inquirer only after the secured creditor actually had answered the request, even if delayed.

IX.–3:324: Form of requests and information

The request for information under this Subsection and the answer must be in textual form. Both may be made via an electronic means of communication provided by the register, in which case a certification of the inquiry or the answer is to be communicated by the register to the inquirer or the secured creditor, respectively, serving as proof of receipt of the information or the answer by the other party.

COMMENTS

As in IX.–3:313, the electronic online register can also be used as a means of communication. Since the times of receipt of a request for information or an answer are of specific importance for the operation of the provisions of this Subsection, there is a need for proof of such receipts which can be fulfilled by using the online register as a communication platform, similar to an internet e-mail provider.

If an inquiry is made by use of means of communication provided by the online register, it is assumed that the approval by the security provider could be effected in a manner similar to the security provider's consent to the registration.

Subsection 6: Duration, renewal and deletion of entries

IX.–3:325: Duration

(1) An entry expires five years after it has been entered into the register or at the date of expiry indicated in the entry.

(2) Once an entry expires, it no longer appears on the register and is no longer directly accessible for any user. It ceases to have any effect under this Section. The content of the entry is kept for reference purposes in the archives of the registration office.

COMMENTS

As a general position, it must be ensured that the register is not overloaded with entries that do not correspond to security rights or retention of ownership devices that are actually in existence. There is a danger that the register might become difficult to search. Moreover, each entry filed against a security provider might make it more difficult for the latter to obtain additional secured credit.

Paragraph (1) provides that entries do not remain on the register any longer after the date of expiry if such a date had been included in the entry by the secured creditor as additional content according to IX.–3:307 sub-paragraph (b). If there is no such expiry date, an entry expires five years after it has been filed.

After expiry of an entry, it ceases to have any effect under this Section, *i.e.* security rights or retention of ownership devices covered by this entry are no longer regarded as being made effective against third persons by virtue of this registration. The content of the entry is no longer directly accessible from the register. It will, however, still be kept in the archives in case the entry might become relevant in order to determine the legal position before its expiry.

IX.–3:326: Renewal

(1) Unless a date of expiry has been included in the entry, an entry may be renewed before the end of the regular period of expiry for an additional period of five years.

(2) The renewal of an entry is effected by a declaration of the secured creditor to the register.

COMMENTS

In most cases, the regular duration of an entry of five years will cover the whole lifespan of a security right or a retention of ownership device and the secured right will be satisfied or the security right be enforced before the expiry of this period. For exceptional cases, in which proprietary security in movables exists for a longer period (or in which the secured creditor repeatedly acquires proprietary security in the same type of assets which continue to be covered by the original entry) this Article allows the secured creditor to renew the entry for an additional period of five years. This renewal can be repeated. The renewal is to be effected by a unilateral declaration of the secured creditor (see paragraph (2)) and is not dependent upon a separate declaration of consent by the security provider. This position is in line with the recent Austrian draft proposal on a register of non-possessory security rights and seems to be preferable in comparison with a solution requiring the security provider's consent. This would effectively force the secured creditor to enforce the security right before expiration of the period of five years or to seek an arrangement with the security provider. Under the present rules, the latter appears to be sufficiently protected by the rights under IX.–3:315.

If an expiry date has been indicated in the entry, the possibility of renewal under the present Article does not apply. The secured creditor is bound by the content of its own declaration.

IX.–3:327: Deletion

(1) The secured creditor may at any time delete the entry by declaration to the register.

(2) For the consequences of a declaration according to the preceding paragraph, IX.–3:325 (Duration) paragraph (2) is applicable with appropriate adaptations.

COMMENTS

Only the secured creditor may delete the entry. (The security provider, however, might be entitled to demand a deletion of the entry according to IX.–3:315). If the security provider could delete entries itself, it could unilaterally destroy the secured position of the secured creditor vis-à-vis third persons.

Subsection 7: Transfer of the security right or of the encumbered asset

IX.–3:328: Transfer of the security right: general rules

(1) Where the security right is transferred, it remains effective by virtue of the original entry.

(2) Even if there is no declaration indicating the transfer under IX.–3:329 (Transfer of the security right: declaration indicating the transfer), the transferee is bound under Subsection 5 in the same way as a secured creditor from the moment of the transfer.

(3) The transferor is liable towards the transferee for any damage caused by its conduct in relation to the entry, as well as to amendments and deletions thereof from the moment of the transfer of the security right until a declaration indicating the transfer is filed or until the transferor declares its consent to such a declaration under IX.–3:329 (Transfer of the security right: declaration indicating the transfer) paragraph (4)).

COMMENTS

A. General rules

As a general rule, the transfer of a security device that had been made effective by registration does not affect the effectiveness of this security device, whether a security right or a retention of ownership device. It remains effective even without an additional entry being filed by the original or the new secured creditor (paragraph (1); see also IX.–5:301 paragraph (3)(a)). The parties may, however, make such an entry in the register in order to obtain additional protection; the details of this declaration indicating the transfer are dealt with in IX.–3:329.

These rules have consciously decided against the option of making the continuing effectiveness of the security right or retention of ownership device dependent upon registration of the new secured creditor on the basis of the assumption that interests of other existing secured creditors (see Comment B) and prospective creditors (see Comment C), of the security provider (see Comment D) and the secured creditor (see Comment E) can be adequately protected without such a rule. Moreover such a rule would be rather harsh for the new secured creditor.

B. Other secured creditors

The position of other secured creditors who already hold proprietary security in the same encumbered assets should not be affected by a transfer of the security right. If these secured creditors' rights were of a lower rank than the transferor's proprietary security, then these other secured creditors should not obtain a windfall by enjoying a higher priority position after the transfer of the security right concerned.

C. Prospective creditors

As long as the transfer is not registered, third persons cannot determine from the register who the holder of the security right or retention of ownership device concerned is. It could therefore be assumed that most inquiries concerning that registered proprietary security would be directed at the transferor who is still registered, not at the transferee.

However, the prospective creditors still enjoy sufficient protection. (i) The transferor is under a duty to disclose the transfer of a security device to the inquirer (IX.–3:320 paragraph (3)); (ii) the transferee, even if not yet registered, is also bound to answer requests for information (IX.–3:328 paragraph (2)); (iii) answers given by the transferor in relation to security rights or retention of ownership devices that had already be transferred are binding against the transferee as well (IX.–3:328 paragraph (2)).

D. Security provider

In general, the position of the security provider is not affected by a change in the person of the secured creditor.

However, since security providers might prefer that all entries filed against them show the actual secured creditor in order to spare any prospective creditors the inconvenience of not being able to determine the actual holder of the security device concerned from the register, a security provider is entitled to demand that an entry is filed indicating the transfer of the proprietary security (IX.–3:329 paragraph (5)).

E. Secured creditor (transferee)

Obviously it constitutes an advantage for the new secured creditor that the transfer of the security right does not affect the effectiveness and priority of the security device. This is especially important since the transfer of a security right or retention of ownership device often is not specifically agreed upon by the parties but flows as an automatic consequence from the transfer of the secured right, so that the parties need not always be aware of a transfer of a security device.

However, as long as the transferee is not registered as the new secured creditor in the register, the transferee runs the risk that the transferor might delete the entry or give wrong information to inquirers. Protection against these risks is provided by several provisions. (i) There is a duty to inform the transferee of the existence of proprietary security on the basis of IX.–5:301 paragraph (2); (ii) from paragraph (3) of the present Article follows a liability of the transferor in damages for its conduct in relation to the entry (*e.g.* by deleting it or by informing inquirers that the security rights or retention of ownership devices covered by the entry do no longer exist); (iii) the transferee has a right to demand a consent by the transferor to the filing of a declaration indicating the transfer under paragraph (5) of the following Article.

IX.–3:329: Transfer of the security right: declaration indicating the transfer

(1) Where the security right is transferred, the original entry may be amended by a declaration indicating the transfer.

(2) The declaration indicating the transfer is subject to IX.–3:311 (Amendments of entries) and any additional rules as laid down in this Article.

(3) The declaration indicating the transfer can be entered into the register only if:

(a) it is made in respect of a specific entry;
(b) it indicates the security rights to be transferred;
(c) it identifies the transferee; and
(d) it is accompanied by a declaration of the person making the amendment that the latter assumes liability for damage caused to the secured creditor or third persons by a wrongful entry.

(4) The declaration indicating the transfer may be filed by the transferor or, with the transferor's consent, by the transferee.

(5) On the basis and to the extent of the transfer of the security right, the security provider is entitled as against the transferor to the filing of a declaration indicating the transfer and the transferee is entitled to a declaration of consent by the transferor according to the preceding paragraph. IX.–3:316 (Review of contested entries by registration office) applies with appropriate adaptations to the assertion of these rights.

(6) Once the declaration indicating the transfer is filed, the original entry is amended accordingly and is no longer regarded as covering the security rights indicated as having been transferred.

(7) Once the declaration indicating the transfer is filed, a new entry is automatically filed against the security provider reiterating the content of the original entry and stating that the security rights indicated are transferred to the transferee.

(8) The transferee assumes the position of the secured creditor in respect of the new entry for all purposes under this Section. In respect of the security rights indicated as transferred, the new entry preserves the priority conferred by the original entry.

COMMENTS

This Article spells out the details of the declaration indicating the transfer of a security device (whether a security right or a retention of ownership device, see IX.–3:303). These rules are somewhat complicated since in many cases the transferor will not transfer all security rights or retention of ownership devices covered by a single entry, but rather only some of them. This makes it necessary to create two separate entries, one still in favour of the transferor for its remaining rights, the other in favour of the transferee covering the security device that had been transferred.

A. Amendment of the original entry

In order to indicate the transfer, the original entry is amended; this amendment includes a declaration stating which assets have been transferred (paragraph (3)(b)). The effect of this amendment is that the original entry no longer covers the assets declared as having been transferred (paragraph (6)).

The amendment may be filed by the original secured creditor or, with the transferor's consent, by the transferee (paragraph (4)). A consent by the security provider is not necessary since

such an amendment which is limited to security rights or a retention of ownership devices for which an entry already existed is less dangerous for the security provider than the registration of a new entry.

The transferor continues to be regarded as the secured creditor in relation to the (amended) original entry in its remaining (limited) scope. The transferor is responsible for answering demands for information and may decide to delete this entry.

B. New entry indicating the transfer

The amendment to the original entry has the additional effect of creating a new entry that is filed against the security provider and that indicates the new secured creditor as transferee of the security devices concerned (paragraph (7)).

This new entry preserves the priority of the original entry in relation to the security devices that had been transferred (cf. paragraph (8) sentence 2, which is a specific application of the general rule laid down in IX.–5:301 paragraph (4)). In respect of this new entry, only the transferee is regarded as the secured creditor for the purposes of this Section, *i.e.* the transferee has to answer demands for information and is the only person entitled to delete this entry.

IX.–3:330: Transfer of the encumbered asset: general rules

(1) Ownership of the encumbered asset may be transferred subject to the existing security right without a new entry being filed in the register.

(2) The continuation of effectiveness and the priority of the security right in the encumbered asset by virtue of the original entry in the register are governed by IX.–5:303 (Transfer of encumbered asset).

(3) For the purposes of this Section, the transferee assumes the position of the security provider in respect of the security right in the transferred assets from the moment of the transfer.

(4) The preceding paragraphs apply with appropriate adaptations where the rights of a buyer, hire-purchaser, lessee or consignee in or relating to the supplied assets are transferred subject to an existing retention of ownership device.

COMMENTS

While preceding two Articles cover the situation of a transfer of the encumbrance, this Article and the following Article deal with the transfer of ownership of the encumbered asset or the transfer by a buyer, hire-purchaser, lessee or consignee of the rights in or relating to the supplied assets where the rights are transferred subject to an existing retention of ownership device. Whereas the transfer in itself does not give rise to any difficulties concerning the operation of the register (paragraphs (1) and (3), see Comment C), there might be specific problems in relation to possible conflicts between the original secured creditor and secured creditors of the acquirer of the encumbered asset or other persons acquiring proprietary rights in this asset from the latter. These problems are dealt with primarily in IX.–5:303, to which paragraph (2) of the present Article refers. To some extent, such conflicts are also solved on the basis of the principles of good faith acquisition, which are laid down in IX.–2:108 (Good faith acquisition of security right), IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset) and IX.–6:102 which all contain specific rules concerning the application of these principles in the situation of a good faith acquisition subsequent to a transfer of ownership of an asset that is subject to a security right or a retention of ownership device. The fact that even after a transfer of ownership of the encumbered asset (or after the transfer of the buyer's, hire-purchaser's, lessee's or consignee's rights in the situation of a retention of ownership device) the security device might still be registered against the transferor only, not against the transferee as the new security provider, has specific consequences concerning the question whether parties dealing with the transferee can be expected to know that the assets concerned are encumbered or subject to a retention of ownership device and that the transferee has no right or authority to transfer proprietary rights in these assets free of that earlier right.

In relation to the situations covered by the present Article, the general rule contained in IX.–3:303 applies that the European register of proprietary security does not distinguish between security rights and retention of ownership devices. However, the issues of substantive law are slightly different. Therefore, it was thought to be preferable to flag up these differences by the separate provision in paragraph (4). And in these Comments, the two situations will be treated separately. The transfer of ownership of an encumbered asset is dealt with in Comments A to C; the transfer by a buyer, hire-purchaser, lessee or consignee of the rights in or relating to the supplied assets subject to an existing retention of ownership device is dealt with in Comment D.

A. Transfer of ownership of encumbered asset does not necessarily affect effectiveness of security right

Paragraph (2) read with IX.–5:303 paragraph (1) is based upon the assumption that the security provider may transfer ownership of the encumbered asset subject to the existing security right. The transferee acquires the rights without any need for a registration of this transfer (paragraph (1)).

According to paragraph (2) read with IX.–5:303, not even a new entry filed against the transferee is necessary for the continuation of the effectiveness of the secured creditor's rights in the transferred assets. The security right remains effective against the transferee and all unsecured (and some secured, see Comments B and C) creditors of the transferee by virtue of the original entry against the original security provider.

The preceding paragraphs do not apply, however, where the transferee acquires ownership of the assets concerned free of the earlier encumbrance. This might happen if the transferor security provider is entitled to make such transfers or if the transferee acquires ownership free of the earlier encumbrance on the basis of a good faith acquisition according to IX.–6:102 read with VIII.–3:102. In such cases, the transferee acquires the asset free of the security right and the secured creditor's security right can no longer be effective after the transfer (see also IX.–5:303 paragraphs (1) and (2).

B. Conflicts between original secured creditor and persons acquiring proprietary rights (including security rights) from transferee

In situations where the security right remains effective even though ownership of the encumbered asset has been transferred by the original security provider to a transferee, there might be conflicts between the original secured creditor and secured creditors of the transferee who might have acquired a security right in the encumbered asset from the latter or other persons who acquired other proprietary rights, especially ownership, in the assets concerned from the transferee.

(a) Secured creditor of transferee with security right acquired before transfer. The general rule on priority contained in IX.–4:101 has to be slightly adapted in relation to situations of a transfer of the encumbered asset. In situations where the events take place in the following order, the order of registration cannot be decisive. Firstly, secured creditor A acquires and registers security rights in (future) assets of type X of the security provider B; secondly, secured creditor C acquires and registers a security right in a (present) asset of type X of security provider D; thirdly, transferee B acquires the encumbered asset subject to the existing security right from transferor D. If the order of registration were decisive, the rights of secured creditor A would have priority over the rights of secured creditor C. Thus, the priority position of secured creditor C would be lost merely by reason of the asset serving as security being transferred to B.

Such a solution would be obviously untenable. Therefore, according to paragraph (2) read with IX.–5:303 paragraph (3) the rights encumbering the assets at the time of the transfer (*i.e.* the security rights of the transferor's secured creditor C) have priority over security rights created in favour of secured creditors of the transferee before the transfer of ownership of the encumbered asset (*i.e.* the security rights of the transferee's secured creditor A).

Questions of a good faith acquisition will in such cases normally not be relevant since the transferee is not yet in possession of the assets when these are encumbered in favour of its creditors (see IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset) paragraph (1)(a) read with IX.–2:108 (Good faith acquisition of security right) paragraph (1)(b).

(b) Secured creditor of transferee with security right acquired after transfer. A different problem arises in relation to secured creditors of the transferee who acquire their security right after the transfer of the encumbered asset. As long as an entry in the register concerning a security right in the asset in question has been filed only against the original security provider (transferor), the security right is invisible for the secured creditors of the transferee. Therefore, it has to be considered whether and under which requirements the original security right in the transferred asset can be effective even against these secured creditors of the transferee acquiring a security right in the same asset.

The solution is straightforward if the secured creditors acquired and registered their security rights only after an additional entry in the register had been filed against the transferee indicating that the latter had acquired the assets concerned subject to security rights created by the transferor. In such cases, the secured creditors of the transferee can acquire only a security right that is subject to the original secured creditor's prior rights in the same assets. The same result applies in cases in which the secured creditors of the transferee had notice of the security right of the original secured creditor. There is no reason not to uphold the priority of the original secured creditor's security rights.

The situation is different, however, if the secured creditors of the transferee acquire their rights before an entry has been filed against the transferee and without knowledge of the prior encumbrance. It must be assumed that the fact that a security right is registered against the transferor should not in every case exclude the possibility that another creditor who wants to acquire a security right in the same asset after it had been transferred might be worthy of protection. To which extent and under which circumstances such protection should be available can be regarded as an application of the principles of good faith acquisition, taking into account also any constructive rather than actual notice which might be based upon the existence of an entry in the register covering the security right concerned.

While the rules on good faith acquisition under IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset) do not apply to intangibles, the possibility for a secured creditor, who wants to acquire a security right in goods free of any earlier encumbrance, to rely on the principle of good faith acquisition is not entirely ruled out merely by reason of the fact that the security right has been registered. IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset) paragraph (1)(b) only requires that the creditor does not know and has no reason to assume that the transferor has no right or authority to grant a security right in disregard of any third person's limited proprietary right in the movable concerned. It will not be in every case that the mere existence of an entry in the European register of proprietary security would be decisive regardless of the content of the entry and other relevant circumstances of the case. Apart from the argument that entries are filed by the parties themselves and that these entries therefore are somewhat unreliable, it has to be kept in mind that the description of the encumbered assets contained in the entry might be unspecific. Searching the register not for entries filed against a specific security provider but for entries

filed in relation to specific assets might therefore prove to be impossible. If the security right has not been registered against the transferee, the latter's secured creditors would – if the register does not contain any entry filed against the transferee – have to find out from whom the transferee has acquired ownership of the asset concerned and afterwards they might have to contact the transferor's secured creditor and inquire whether the asset concerned was actually encumbered in its favour. While it certainly can be said that prospective secured creditors are under stricter requirements than prospective acquirers of full title in relation to their duty to ascertain whether the assets concerned are already encumbered, it seems that such broad duties would go a step too far. The effectiveness of the system of publicity by registration would be greatly endangered if prospective secured creditors would always have to undertake research concerning the origins of the assets to be encumbered instead of merely having to check whether there is any relevant entry filed against the security provider.

On the basis of these considerations, IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset) paragraph (2) expressly provides for a limitation of the effects of registration in the situation of a transfer of ownership of the encumbered assets, effectively allowing a good faith acquisition even if the security right is registered. As long as the entry covering the security rights in the assets concerned is not filed against the transferee, the fact that such an entry is filed against the transferor will not have the effect that a good faith acquisition of a proprietary security right from the transferee free of the earlier encumbrance is excluded. Unless the transferee's secured creditors have actual knowledge of the fact that the transferee has no right or authority to transfer a proprietary right in the asset concerned free of the earlier encumbrance, they are not required to search the register for entries filed against persons other than the transferee with whom they are dealing.

It has thus become evident that under the direct entry system suggested in these rules the original secured creditor cannot always rely on its original entry as a protection against secured creditors of the transferee of the encumbered asset acquiring a security right in these assets free of the original secured creditor's rights. These considerations show that there might be a practical need for an entry against the transferee which would provide protection against the loss of the original secured creditor's rights. This declaration of transfer is dealt with in the following Article.

(c) Persons who acquire other proprietary rights from transferee. Similar reasoning applies to persons who do not acquire proprietary security rights in the transferred assets from the transferee, but other proprietary rights, such as outright ownership.

IX.–6:102 paragraph (2) shows that the mere existence of an entry covering the security right concerned does not rule out all possibility of a good faith acquisition of ownership. While sub-paragraph (a) of that provision is limited to dispositions in the ordinary course of business, sub-paragraph (b) is applicable regardless of whether the disposition did or did not take place in the ordinary course of business. If after a transfer of ownership of the encumbered asset the security right is not registered against the transferee, the mere fact that the security right is registered against the transferor does not rule out a good faith acquisition of ownership free of the security right under IX.–6:102 read with VIII.–3:102.ZZZ

C. Transferee as security provider

The system of registration as suggested in this Section is highly formalised For this reason it could be assumed that the transferee can be regarded as the security provider only once a declaration indicating this transfer has been filed. Similarly to IX.–3:328 paragraph (2) in relation to the secured creditor, paragraph (3) therefore expressly provides that the transferee is to be regarded as security provider from the moment of transfer (even without a declaration of transfer according to IX.–3:331), thus allowing the transferee *e.g.* to make use of the means of protection under Subsection 3.

D. Transfer of assets subject to an existing retention of ownership device

According to paragraph (4), the rules laid down in paragraphs (1) to (3) are applicable with appropriate adaptations even if there is no transfer of ownership in encumbered assets but a transfer by a buyer, hire-purchaser, lessee or consignee of the rights in or relating to the supplied assets subject to an existing retention of ownership device.

While the operation of the register is not affected by the question whether there is a transfer of ownership or of the rights of a buyer, hire-purchaser, lessee or consignee in or relating to the collateral, the issues of substantive law are different so that a separate treatment of these constellations appears to be preferable.

A buyer, hire-purchaser, lessee or consignee of assets supplied subject to a retention of ownership device is not the owner of these assets. Instead of ownership, these persons therefore can in general transfer only the rights in or relating to the supplied assets which arise on the basis of the respective contract of sale, hire-purchase, financial leasing or consignment. Even though a transferee therefore in general does not become the owner, but merely the assignee, *e.g.*, of the buyer's rights against the seller under the contract of sale, the transferee assumes the position formerly held by the buyer, hire-purchaser, lessee or consignee. Paragraphs (1) and (3) are applicable with appropriate adaptations, *i.e.* no registration etc. is necessary in order for the transferee to assume this position for the purposes of the rules in this Section as from the moment of the transfer.

(a) Retention of ownership device in general not affected by this transfer. The reasoning set out in Comment A applies mutatis mutandis to the transfer by a buyer, hire-purchaser, lessee or consignee of the rights in or relating to the supplied assets subject to an existing retention of ownership device. Such a transfer in general does not affect the retention of ownership device; IX.–5:303 paragraph (1) (which is applicable also to this situation, cf. IX.–5:303 paragraph (4)) confirms that not even a new entry filed against the transferee is necessary for the continuation of the effectiveness of the retention of ownership device.

The holder of the retention of ownership device loses the rights, however, if the buyer, hire-purchaser, lessee or consignee agrees on a transfer of ownership to the transferee and the latter acquires the rights free from the earlier retention of ownership device on the basis of the principles of good faith acquisition, see IX.–6:102 paragraph (3) read with VIII.–3:101, or if the (true) owner had granted authority to the transferor.

(b) Conflicts between original secured creditor and persons acquiring proprietary rights (including security rights) from transferee. As long as the transfer of the rights held by the buyer, hire-purchaser, lessee or consignee is subject to the existing retention of

ownership device, the transferee does not become the owner of the assets subject to the retention of ownership device. Therefore, any persons purporting to acquire proprietary rights (including security rights) from the transferee do not acquire any rights in the assets concerned, unless they can rely on the principle of good faith acquisition.

Therefore, the solution to the situations dealt with in Comment B (a) is straightforward. No proprietary rights are acquired at all by a person who claims to be a secured creditor of the transferee on the basis of an alleged acquisition of a security right in these assets taking place before the transfer of the rights of the original buyer, hire-purchaser, lessee or consignee to the transferee. Since there is no good faith acquisition in such a situation, the transferee who was not and is not the owner of the assets concerned (as long as the original retention of ownership device is not lost) cannot create a proprietary right in these assets. This conflict is solved in favour of the holder of the retention of ownership device.

In the situation dealt with in Comment B (b) and (c), the results depend on whether the persons claiming to have acquired proprietary rights in the assets concerned from the transferee can rely on the principles of good faith acquisition. Where these rules do not apply, the transferee as a non-owner cannot create proprietary rights in the assets concerned. Where, however, IX.–2:108 (Good faith acquisition of security right) (for the acquisition of a security right) or IX.–6:102 read with VIII.–3:101 (for the acquisition of outright ownership) apply, the holder of the retention of ownership device must give precedence to the rights acquired by virtue of these provisions. The reasoning set out in B (b) concerning the relevance of a registration of an earlier security right is applicable in the present context as well. A registration of a retention of ownership device can prevent a third person from claiming to be in good faith only if this third person acquires the rights from the person against whom the security device is registered. If the retention of ownership device is registered only against the original buyer, hire-purchaser, lessee or consignee, but not against the transferee who has assumed the position of the former, a good faith acquisition by persons acquiring proprietary rights in the assets concerned from the transferee is no longer excluded.

IX.–3:331: Transfer of the encumbered asset: declaration of transfer

(1) A transferee acquiring ownership of an encumbered asset subject to an existing security right has a duty to enter in the register an entry against itself indicating the transfer, unless such a declaration has already been entered by the secured creditor.

(2) The transferee is liable towards the secured creditor holding a security right in the transferred asset for damage resulting from a breach of the duty under the preceding paragraph.

(3) The declaration of transfer can be entered by the transferee or the secured creditor if:

(a) it is made in respect of an identified security provider as transferee;
(b) it indicates the identity of an identified security provider as transferor;
(c) it contains a minimum declaration as to the transferred asset;
(d) it is indicated by one or several references to a list of categories of assets to which category the transferred asset belongs; and
(e) it is accompanied by a declaration of the person making the declaration of transfer that the latter assumes liability for any damage caused to the transferee, the secured creditor or third persons by a wrongful entry.

(4) The preceding paragraphs apply with appropriate adaptations where the rights of a buyer, hire-purchaser, lessee or consignee in or relating to the supplied assets are transferred subject to an existing retention of ownership device.

COMMENTS

For the reasons why a declaration of transfer might be of interest for the secured creditor, see Comment B (b) on the preceding Article. In general, the transferee and its unsecured creditors are bound even on the basis of the original entry filed against the original security provider (transferor); an entry filed against the transferee can provide additional protection for the original secured creditor against the transferee's secured creditors and other persons acquiring security rights or other proprietary rights free of a prior interest of the original secured creditor on the basis of the principles of good faith acquisition.

Often the secured creditor will not be informed of a transfer of ownership of the encumbered asset by the original security provider. In such cases the original secured creditor will not be able to file a declaration of transfer preventing a good faith acquisition in the above-mentioned sense on the basis of dispositions by the transferee; on the other hand, it would be inconsistent with the principles of good faith acquisition, which are applicable also in the area of proprietary security, to let the transferee's secured creditors (or other acquirers of proprietary rights in the assets concerned) bear the risk of liability towards the original secured creditor. Therefore these rules have opted for a duty on the transferee to enter an entry in the register against itself indicating the transfer.

While at first sight it might appear counter-intuitive to put the transferee under such a duty, this solution (which has been inspired by the Austrian draft proposal on a register of non-possessory security rights) is in fact very much in line with positions to be derived from general principles of property law and extra-contractual liability for an infringement of another's proprietary rights.

Firstly, the transferee can be bound only in situations where the transfer itself does not result in the loss of the proprietary security of the transferor's secured creditor. This is expressed in paragraph (1) in the requirement that the encumbered asset must be transferred subject to the existing security right in order for this provision to apply. In effect, the obligation to file a declaration will thus apply only in cases where the transferor does not have authority to dispose of the assets free of the encumbrance and the transferee is not in good faith. Hence the obligation under paragraph (1) cannot be said to be entirely unforeseeable for the transferee.

Secondly, the most important effect of the transferee's duty to file a declaration indicating the transfer is that the transferee is liable for damages under paragraph (2). Such damages can arise from the non-registration of the transfer only in cases where third persons acquire proprietary (security) rights in the transferred encumbered assets from the transferee in circumstances which lead to a loss of the priority position or of the entire rights of the original secured creditor, *i.e.* the third persons must be able to rely on the principles of good faith acquisition as has been described in the Comments on IX.–3:330. This will only be the case if the transferee has not informed the third persons of its knowledge (or reason to assume) that the asset concerned is already encumbered with security rights or subject to a retention of ownership device in favour of the original secured creditor. In such a situation, a liability of the transferee cannot be regarded as anomalous. It appears to be plain law that person A who knows or has reason to know that certain assets are subject to proprietary rights of another (B) is liable towards the latter if the former person (A) deals with these assets in a way that leads to the loss of the priority position of B's proprietary rights or to a complete loss of these rights, in this case by creating proprietary security rights or transferring other proprietary rights in the assets concerned without informing the acquirers of the existence or possible existence of the prior rights.

It might still be argued that the mere personal liability of the transferee is not sufficient for the protection of the original security provider who loses its proprietary security right. However, apart from the fact that it is also necessary to protect the persons acquiring proprietary rights from the transferee, it has to be considered that the transferee is not necessarily in as bad a financial position as the original security provider/debtor. Moreover, a secured creditor who leaves assets in possession of the original security provider can be regarded as accepting an increased risk of a loss of its proprietary position.

Paragraphs (1) and (3) expressly allow the declaration indicating the transfer to be filed by the secured creditor as well. This should provide additional protection for the latter in situations where the transferee does not perform its duty under paragraph (1).

Even if the declaration indicating the transfer is filed by the secured creditor, there is no requirement of consent by the transferee as new security provider. Such a declaration indicating the transfer is less dangerous for the security provider than an original entry might be since the latter can always point out to prospective secured creditors that certain assets were not acquired from the transferor and thus cannot be subject to the security right claimed by the secured creditor in a declaration wrongfully indicating a transfer of an encumbered asset.

The principles set out in paragraphs (1) to (3) for the transfer of ownership of encumbered assets are applicable according to paragraph (4) also to cases where the rights of a buyer, hire-purchaser, lessee or consignee in or relating to the supplied assets are transferred subject to an existing retention of ownership device. As has been explained in the Comment D on IX.–

3:331, in such cases also an additional entry in the register, even though not necessary for the transfer itself and the continuation of the validity and effectiveness of the retention of ownership device, can provide additional protection for the holder of the retention of ownership device against a good faith acquisition by a third person.

Subsection 8: Costs

IX.–3:332: Distribution of costs

(1) As between the parties:

(a) each party has to bear the costs of its enrolment or admission to a secure online identity verification system ; and

(b) the security provider has to bear any other costs reasonably incurred by the secured creditor in connection with the registration.

(2) The costs of inquiries and of answers to such inquires are to be borne by the inquirer.

COMMENTS

In general, the operation of the register will require the payment of fees by its users. These fees will be directly payable by the user to the register office whenever a declaration is made or any other action undertaken; there is no need to spell out these details here. This Article, however, covers the question whether a party might be entitled to reimbursement for these fees from any other person involved.

Subsection 9: Security rights created before establishment of register

IX.–3:333: Security rights created before establishment of register

(1) Security rights that were effective before the establishment of the European register of security rights do not require registration under this Section in order to remain effective thereafter.

(2) If the security rights were registered or noted in any system of registration or notation on title certificates under the national law of a member state, an entry reiterating the content of that registration or notation, including the date of registration or notation, is to be entered in the European register of proprietary security against the security provider by the body operating the other register once this register is established.

COMMENTS

This Article contains a transitional provision. While IX.–3:312 covers systems of registration or notation for security rights in specific assets which remain in operation even after establishment of the European register of security rights, the present Article deals with security rights or retention of ownership devices (the reference to security rights covering retention of ownership devices as well, see IX.–3:303) which have been created and made effective earlier.

According to this provision, security rights and retention of ownership devices which were effective earlier remain effective even after establishment of the European register of proprietary security without any need for an entry being made in this register. For proprietary security that had been registered in a national register, this position is in line with the prevailing approach in modern legal thinking, see the English Law Commission's proposals and the Austrian draft proposal on a register of non-possessory security rights.

For security rights and retention of ownership devices which were not registered before establishment of the new register it is often thought that there should be a requirement to register, at least after expiry of a certain transitional period. These rules, however, have opted against such a solution in order to protect the secured creditor. Since the secured creditor cannot make an entry in the register under this Section without the security provider's consent, its secured position vis-à-vis third persons would be at the latter's mercy.

The requirement of consent is dispensable if the entry is not entered by the secured creditor but by the body operating the system in which the security right had been registered or noted before establishment of the European register of proprietary security. Paragraph (2) requires these bodies to enter entries into the new European register reiterating the content of any registration or notation in the former national systems. The secured creditor may of course, if it obtains the security provider's consent, still make its own entry in the register against the security provider.

It has to be emphasised that – differing from the position under IX.–3:312 – the entry according to paragraph (2) is not a requirement for the continuation of the effectiveness of the

security right. This follows already from paragraph (1) and from the fact that there is no equivalent to IX.–3:312 paragraph (1) sentence 2 in this provision.

CHAPTER 4: PRIORITY

IX.–4:101: Priority: general rules

(1) Subject to exceptions, the priority between several security rights and between a security right and other limited proprietary rights in the same asset is determined according to the order of the relevant time.

(2) The relevant time is:

(a) for security rights, the time of registration according to Chapter 3, Section 3, if any, or the time at which the security right has otherwise become effective according to the other rules of Chapter 3, whichever is earlier;

(b) for other limited proprietary rights, the time of creation.

(3) An effective security right has priority over an ineffective security right, even if the latter was created earlier.

(4) The ranking of two or more security rights which are ineffective is determined by the time of their creation.

(5) Subject to IX.–4:108 (Change of ranking), a security right that had been acquired by a good faith acquisition in an asset subject to a retention of ownership device or in disregard of an earlier encumbrance in the same asset always has priority over the retention of ownership device or earlier security right.

COMMENTS

A. Priority in general

The rules on priority deal with the question whether one person's rights in a specific asset have precedence over another person's competing rights in the same asset.

Often the starting point for the solution of problems of such conflicting proprietary rights is that one person's proprietary right, by virtue of its exclusive nature or the circumstances of its acquisition, excludes rights held by others. The acquisition of ownership by B is normally inconsistent with the continuation of ownership by A in the same asset; if a proprietary right in an asset is acquired in good faith concerning the non-existence of prior encumbrances held by other persons, the transferee acquires the rights free of these earlier rights (see, *e.g.*, IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset), IX.–6:102). Security rights as defined under IX.–1:102 paragraph (1) of these rules, however, are limited proprietary rights only which are not exclusive. The creation of additional security rights in an already encumbered asset is possible and does not infringe the proprietary right of the holder of an earlier encumbrance; a security provider does not lose its authority to dispose of the asset concerned and may still create another valid and effective encumbrance (cf. Comment C on IX.–2:105).

Since conflicting security rights in the same asset are possible and valid, the issue arises as to their mutual relationship. This issue, which is relevant for the possibility to actually satisfy the secured right from the security right concerned, is solved by the rules on priority. A junior secured creditor will only participate in the proceeds from an enforcement proceeding brought by a senior secured creditor if these proceeds surpass the amount of the right to performance

secured by the senior secured creditor's security right (IX.–7:215 paragraph (3). Even though in theory there can be an unlimited number of competing valid proprietary security rights in any asset, it will therefore normally only be the security right with the highest ranking in priority which is of real value to a secured creditor.

B. Rules on conflicting proprietary interests outside this Chapter

The provisions on good faith acquisition, especially IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset) and IX.–6:102, have already been referred to as examples of rules governing the relationship between conflicting proprietary rights which operate outside the scope of this Chapter (which, however, refers to some of these rules in IX.–4:101 paragraph (5)). The most important rule of this type, however, is the principle of *nemo dat quod non habet* (see IX.–2:105 sub-paragraph (c)). Security providers cannot grant a security right if they are not entitled to dispose of the right to be encumbered. A prior transfer of ownership takes precedence over a subsequent attempt of the transferor to create a security right in favour of another person as secured creditor.

This principle also determines the relationship between outright transfers of a right to performance (*e.g.*, where B sells the right to payment against A to C, see Book III, Chapter 5) and security assignments (*e.g.*, where B transfers the right to payment against A to C as security for a credit granted by C). If B's right to performance against A is assigned by B to C only after there has been between B and D a security transfer of the right to performance which is effective against third persons, then assignee C can only acquire the right subject to D's security right. At the moment of the transfer from B to C, B's right to performance against A is already encumbered, therefore B cannot pass a better right to C. The result is different if the outright assignment precedes the purported security transfer of the same right to performance. Once the assignment is effective, the former holder of the right to performance in question no longer has any authority to create an encumbrance in that right in favour of its creditors. The latter therefore obtain nothing at all from the purported security transfer of the right to performance.

C. Priority and limited proprietary rights other than security rights

Chapter 4 also governs the priority between proprietary security rights and other limited proprietary rights, *e.g.* the usufruct, which is of importance in case of an enforcement of the security right. If the collateral is sold to a third person in the course of such enforcement proceedings, other lower-ranking limited proprietary rights are also lost (IX.–7:213 paragraph (1)(d).

D. Retention of ownership devices

On the basis of IX.–1:104 paragraph (1)(c), the priority rules in this Chapter on security rights cover retention of ownership as well. The general idea of subjecting retention of ownership devices in many, although not in all, respects to the same provisions as security rights, which has important consequences especially in the context of the rules on priority, has already been explained in Comment A on IX.–1:104.

E. Order of priority under this Article

The order of priority between competing proprietary rights in the same asset is under the present Article primarily governed by a single principle, *i.e.* the principle that the priority follows the order of the relevant time (paragraph (1)). This basic rule, however, is subject to a

number of exceptions and specifications as to what amounts to the relevant time (paragraphs (2) to (5), IX.–4:102.

F. Order of relevant time as general rule

That the priority between conflicting proprietary security rights in the same asset is to be determined by reference to an order of time of these security rights is a general position that is universally accepted throughout the legal systems of the member states. In effect, this position also has some similarities to the results of the application of the principle of *nemo dat quod non habet*. Once the transferor has transferred ownership of one asset to one transferee, no other person can acquire ownership from the transferor, unless some exceptional rule applies. One important difference between the operation of this traditional principle and the priority rules of this Chapter is that the time that is relevant for the determination of the order of priority in the present context is only in exceptional cases the time of the transfer or the creation of the proprietary rights concerned.

G. Relevant time for registered security rights

For registered security rights, the relevant time is in general (exceptions apply where the security right has already earlier been made effective by some other method, see the following Comment) the point of time at which the security right is registered (paragraph (2)(a)). That the security right has already been created at this time is neither a prerequisite for registration nor relevant for the determination of the order of priority. Of course, the order of priority will only ever become relevant for any security right if it is validly created. The secured creditor does not obtain any proprietary right by virtue of the fulfilment of the conditions for effectiveness under Chapter 3 only; a participation as secured creditor in the distribution of proceeds from the enforcement of a proprietary security right in the security provider's assets depends upon the existence of such a proprietary security right in favour of the creditor.

The advantages of such a determination of priority by reference to the order of registration only are obvious. As opposed to the time of creation, which might not be apparent for third persons or which might even be disputed between the secured creditor and the security provider, the time of registration is easily ascertainable from the register. The European register of proprietary security is intended to provide publicity for proprietary security in movables; this objective is achieved most efficiently if third persons can rely on the content of the register for the determination of the order of priority, *i.e.* if they do not have to consider the possibility that for these registered security rights other factors (such as the date of creation) might have to be taken into consideration as well.

That the security right need not have been created at the time of registration for the latter to be decisive for the determination of the order of priority is of central importance for the practice of advance filing. The secured creditor can arrange with the security provider to register future security rights; the secured creditor is then protected against the risk of not obtaining a first-ranking priority position concerning its security rights if these are created at a later stage. Effectively, secured creditor A who had registered first enjoys priority over secured creditor B who has registered its security rights later even if B's security rights were created before the security rights of secured creditor A.

In cases of revolving proprietary security, especially where the security provider's inventory is encumbered in favour of the secured creditor (and where new items of inventory are always

subject to security rights, replacing the original security rights that were terminated when the earlier items of inventory had been sold on to the security provider's customers), the priority of the secured creditor's security rights in the inventory can be determined on the basis of a single registration. If the secured creditor files an entry in the register of security rights which is drafted broadly enough to cover future security rights in the items of inventory as well, the priority of security rights in future items of inventory, which are actually acquired and encumbered at a later point of time, will be determined by reference to the original date of registration.

A negative consequence of determining priority by reference to the time of registration may follow from delayed registration. If a secured creditor fails to register its security rights immediately after creation, another secured creditor might obtain a higher-ranking priority position by registering a security right in the same assets before the first secured creditor eventually registers the rights. Even though its security right was validly created and could have been enforced against the security provider from the outset, this secured creditor must then give preference to the competing creditor.

H. Relevant time for security rights made effective by other means

Where security rights have been made effective by means other than by virtue of a registration, *e.g.* by the exercise of control or possession by the secured creditor, the relevant time for the determination of the order of priority is the time at which the security right became effective (paragraph (2)(a)). In essence, the principle dealt with in the preceding paragraphs, *i.e.* that for security rights made effective by registration the time of registration is decisive, appears as no more than a specific application of the general rule in the preceding sentence. Its prominent treatment in paragraph (2)(a), however, is justified on the basis of the assumption that it will be especially in relation to registered security rights that the existence of several security rights in the same assets might create problems of priority.

Whenever there is both possession by the secured creditor and a registration of the security right or any other situation in which the effectiveness of a security right can be based upon several grounds, the decisive moment of time is the earliest moment at which one of the relevant requirements for achieving effectiveness has been fulfilled (see IX.–3:103).

If a security right is made effective by possession, the time at which the secured creditor acquires possession is decisive. Where a security right made effective by possession is transferred, the new secured creditor must acquire possession or the transferor must agree to hold possession for the transferee (IX.–5:301 paragraph (3)(c)); if either of these requirements is fulfilled, the priority of the security right remains unaffected, *i.e.* the time at which the transferor has acquired possession remains decisive for the determination of the order of priority (see IX.–5:301 paragraph (4)). For a security right based upon a right of retention of possession according to IX.–2:114, a specific rule on priority is laid down in IX.–4:102 paragraph (3).

Where security rights in intangibles are made effective by the exercise of control by the secured creditor, the time at which the secured creditor obtains control over the encumbered assets is decisive for the determination of priority. For a transfer of the encumbrance to another secured creditor, the same rules apply as explained in the preceding paragraph for cases of possessory security rights, see IX.–5:301 paragraphs (3)(c) and (4). It is important to note, however, that security rights made effective by the exercise of control enjoy a

superpriority in relation to other security rights on the basis of IX.–4:102 paragraph (2) sentence 1. The rules in IX.–4:101 therefore apply in relation to security rights made effective by control only for the relationship between several security rights that are all made effective by the exercise of control by the several secured creditors (see IX.–4:102 paragraph (2) sentence 2).

For security rights that are effective without any additional requirements having to be fulfilled (see for example the security rights covered by IX.–3:101 paragraph (2)) the relevant time is the time of their creation. These security rights are effective from the moment they come into existence. Therefore their priority has to be determined according to IX.–4:101 paragraph (2)(a) by reference to that time.

I. Relevant time for other limited proprietary rights

Paragraph (2)(b) provides for limited proprietary rights other than security rights that the time of creation is the relevant time which determines the order of priority. The distinction underlying this Book between the creation (Chapter 2) and the effectiveness against third persons (Chapter 3) is applicable only to proprietary security rights. Other limited proprietary rights generally become effective at the moment of their creation; this point of time is therefore relevant for the determination of their priority as well.

J. Priority between non-effective security rights

As between several security rights, all of which are not effective, according to paragraph (4) their priority is determined by the order of creation of these security rights, *i.e.* the moment all the requirements of Chapter 2 for the creation of a security right are fulfilled (see IX.–2:106, IX.–2:113 paragraph (2)). That a security right has not been made effective according to Chapter 3 does not necessarily deprive it of all effects against competing secured creditors. If also these other competing secured creditors failed to achieve effectiveness for their security rights or retention of ownership devices, all these security devices are effective as between the different secured creditors, in so far as they rely on their position as holders of proprietary security only. This might especially be the case where the security provider is not also the debtor of the obligation covered by the security, so that a competing secured creditor can take action against the security provider only on the basis of its security rights, which had not been made effective according to the rules of Chapter 3; an ineffective security right cannot, however, be raised against individual execution proceedings brought by a creditor, whether secured or not, on the basis of a right to performance against the security provider (see IX.–3:101 paragraph (1)(b)).

K. Priority for security right acquired by good faith acquisition

Paragraph (5) spells out a specific priority rule overriding the other principles of priority in this provision. Where a security right has been acquired on the basis of a good faith acquisition in disregard of a proprietary security in the same asset which had been created earlier, this security right enjoys priority over the earlier proprietary security, regardless of the order of registration or the other general rules of this Chapter. This rule is obviously the core of the principle of good faith acquisition in the area of proprietary security. If the secured creditor in good faith is to be protected on the basis of its good faith, this secured creditor must be treated as if the earlier proprietary security did not exist, *i.e.* the rights of the secured creditor who is protected on the basis of the provisions on good faith acquisition must have priority over the earlier proprietary security. However, the priority status of this earlier

proprietary security towards other secured creditors or its effectiveness against the security provider or against other third persons are not affected. On the other hand, as a second-ranking security, the chances of participating in the distribution of the proceeds from a realisation of the encumbered assets are reduced. Paragraph (5) also does not affect the priority status of the (new) security right, *i.e.* the security right acquired on the basis of a good faith acquisition in relation to other security rights, if any, that are not affected by the good faith acquisition.

Paragraph (5) applies to all cases of a good faith acquisition of a security right on the basis of the provisions of this Book. This reference covers the acquisition of a security right in an asset that is subject to a retention of ownership device (IX.–2:108 (Good faith acquisition of security right)), the acquisition of a security right in disregard of an earlier security right in the same asset on the basis of IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset) or IX.–2:111 (Security right in cash, negotiable instruments and documents) as well as a good faith acquisition of a security right on the basis of IX.–3:322 paragraph (1) and IX.–3:323. Paragraph (5) does not apply, however, to the acquisition of ownership (see IX.–6:102). The good faith acquisition of ownership of the collateral involves the termination of earlier encumbrances or retention of ownership devices in the same assets (see IX.–6:101 paragraph (1)(e)).

The priority rule in paragraph (5) overrides all the other priority rules in this Chapter ("always has priority"); the only exception, which is expressly mentioned in paragraph (5), is IX.–4:108. A subordination agreement remains possible.

L. Exceptions for specific types of security rights

For some types of security rights, these general rules are subject to the exceptions laid down in IX.-4:102. For these specific rules on the superpriority for acquisition finance devices, security rights in financial assets made effective by the exercise of control or possession and for the right of retention of possession see the Comments on that provision.

M. Priority between effective and ineffective security rights

As between effective and ineffective security rights, the order of priority is determined by paragraph (3). Effective security rights have priority over ineffective security rights regardless of the order of creation.

The same rule applies as between an effective security right and a competing retention of ownership device which does not fulfil the requirements for effectiveness against third persons under Chapter 3 (IX.–3:107). Since the seller or lessor cannot rely on the retention of ownership device vis-à-vis third persons, the holder of an effective security right in the same asset prevails.

The relationship between limited proprietary rights other than security rights and ineffective security rights follows identical principles. Even though this case is not expressly mentioned in this Article – since, because of the scarcity of other limited proprietary rights in movables, it will rarely occur – it is clear from paragraph (2)(a) that an ineffective security right can never enjoy priority over another limited proprietary right since the requirements for the security right to become effective have never been fulfilled.

Finally, the general principle that ineffective security rights always have to respect the priority of effective security rights is not subject to the exceptional rules laid down in IX.–4:102. These specific provisions confer a superpriority on some types of security rights only, in respect of which the conditions for effectiveness are fulfilled. No security right that is not effective can therefore enjoy superpriority under IX.–4:102.

IX.–4:102: Superpriority

(1) An acquisition finance device that is effective against third persons according to the rules of Chapter 3 takes priority over any security right or other limited proprietary right created by the security provider.

(2) A security right in financial assets made effective by control according to IX.–3:204 (Control over financial assets) or by possession takes priority over any other security right or other limited proprietary right in the same asset. If control is created for different secured creditors, IX.–4:101 (Priority: general rules) paragraphs (1) and (2)(a) apply.

(3) A security right based upon a right of retention of possession according to IX.–2:114 (Right of retention of possession) takes priority over any other right in the retained asset.

(4) The preceding paragraphs are subject to IX.–4:101 (Priority: general rules) paragraph (5) and IX.–4:108 (Change of ranking).

COMMENTS

A. Superpriority in general

This Article contains exceptions to the general rules on priority laid down in the preceding Article. Some types of security rights enjoy superpriority on the basis of their nature as either acquisition finance devices, security rights in financial assets made effective by control or possession or right of retention of possession. Superpriority means that these security rights enjoy priority over any other security rights, irrespective of the order of the relevant time. Even if competing security rights had become effective earlier, security rights with superpriority take precedence. The only exceptions to these rules are covered by paragraph (4) (see Comment F).

B. Security rights as acquisition finance devices

Paragraph (1) covers security devices which are classified under these rules as acquisition finance devices. This term includes retention of ownership devices and security rights (*i.e.* limited proprietary rights) which fulfil the requirements of IX.–1:201 paragraph (3)(b). Both types of acquisition finance devices enjoy a special preferential position vis-à-vis competing and conflicting proprietary rights. Retention of ownership devices, however, may in effect confer on their holder such a preferential position on the basis of the application of rules other than the principles of priority covered by this Chapter. Therefore, these Comments deal with security rights as acquisition finance devices first, retention of ownership devices will be covered in Comment C.

The priority conferred by paragraph (1) on acquisition finance devices operates both against proprietary security rights and against other limited proprietary rights in the same assets. It is restricted, however, to proprietary rights created by the security provider, *i.e.* the person who has bought the encumbered asset if the credit for its acquisition is secured by the security right as an acquisition finance device. Should the assets concerned have been encumbered already before the sale, *e.g.* by the seller who has created a security right in these assets, these security rights continue to enjoy priority over the subsequently created acquisition finance device in favour of the seller or a third person financier.

The main effects of the rule in paragraph (1) can be illustrated by the following example. A, owner of a haulage firm, creates a security right in all his present and future lorries in favour

of bank B, which is giving credit to A on a regular basis, on January 1. C, also an owner of a lorry, creates a non-possessory security right in it in favour of D on March 1. Afterwards, C sells his lorry to A on May 1, but retains a security right which qualifies as an acquisition finance device. All the security rights in this situation have been made effective immediately after the conclusion of the relevant agreement by registration. The lorry is caught by the terms of the agreement to create a security right in future assets between A and B. Therefore, it is encumbered with a security right in favour of B. However, even though B's security right in the lorry has been made effective prior to C's retained security right, the latter security right enjoys priority as an acquisition finance device over B's right by virtue of paragraph (1). This does not affect the position of D. Since D's security right has not been created by A (who is to be regarded as the security provider in relation to the acquisition finance device in this case), paragraph (1) does not apply and D's rights enjoy priority over C's security rights since they have been registered earlier.

This rule is based upon the following policy. Security for the financing of acquisitions (here, credit is typically given by sellers) deserves higher protection than security for general non-acquisition financing because acquisitions are particularly useful for the economy. Moreover, there is a specific reason for the protection of credit extended by sellers. Banks as financiers that are typically in a long-standing relationship with the debtor are better placed to secure encumbrances over the debtor's future property for themselves, just as bank B did in the example in the preceding paragraph. Sellers, on the other hand, normally do not have such a possibility. If their security rights in assets sold to the buyer enjoyed only normal priority, they would presumably be only second-ranking creditors with a low likelihood of obtaining satisfaction from the enforcement of their security rights. In addition to the obvious unfairness of such a solution which would invariably favour banks, there are also some specific reasons for giving priority to the sellers' security rights instead. By selling and transferring the assets concerned to the buyer, the seller has made a direct contribution to the pool of assets that are eventually available for the buyer's creditors, one of whom is also the seller as the creditor of the purchase price. Since without this contribution of the seller no other creditor of the buyer, whether secured or not, would be able to obtain satisfaction from the sold assets, it seems just and fair that the seller should enjoy priority over all other secured creditors in respect of any security rights in these assets.

It has to be noted, however, that security rights can enjoy the special priority as an acquisition finance device under this provision only under two conditions. First, they must be effective against third persons. If the conditions of Chapter 3 are not fulfilled, the priority of a purchase money security right is determined not by IX.–4:102 paragraph (1), but by IX.–4:101 paragraphs (3) and (4).

Second, if the security right as an acquisition finance device has to be registered according to IX.–3:107 paragraph (1), it can enjoy superpriority under IX.–4:102 paragraph (1) only if the registration is effected within the period of 35 days laid down in that provision. If this condition is not met, the security right is treated according to the general rules of IX.–4:101, especially paragraph (2)(a).

C. Retention of ownership devices

The preferential position conferred on a holder of a retention of ownership device is identical with the priority position of a secured creditor who holds a security right which qualifies as an acquisition finance device. While the underlying legal construction may be different and may

involve the application of other legal concepts, the rules on priority in this Chapter and especially IX.–4:102 paragraph (1) therefore can be regarded as a restatement of the legal position for a retention of ownership device as well. The main constellations will be briefly described.

(a) Effective retention of ownership device prevails over competing proprietary rights. Provided that IX.–4:102 paragraph (1) applies – *i.e.* if the retention of ownership device is effective against third persons and if the registration, if necessary, has not been effected outside the 35 days period of IX.–3:107 paragraph (1) – the retention of ownership device prevails over all competing security rights or other limited proprietary rights in the same asset created by the buyer, hire-purchaser, lessee or consignee (who is regarded as the security provider in the context of IX.–4:102, see IX.–1:104 paragraph (2)). For the policy behind this position and also for the restriction of the operation of this rule to competing proprietary rights created by the buyer, hire-purchaser, lessee or consignee or other security provider, see Comment B above.

The superpriority laid down in IX.–4:102 paragraph (1) achieves the same protection that is awarded to the seller, supplier or lessor on the basis of the traditional conception of retention of ownership devices. Since the buyer, hire-purchaser, lessee or consignee does not acquire ownership in the supplied assets, a third person normally cannot acquire a better title from the buyer, hire-purchaser, lessee or consignee in these assets, unless the latter had been authorised to dispose of them or the rules on good faith acquisition apply. Regardless of whether the purported transfer of a proprietary right to the third person took place before or after the acquisition of the asset subject to a retention of ownership device, the seller's, supplier's or lessor's rights prevail over rights in the same asset claimed by a third person who claims to have acquired these rights from the buyer, hire-purchaser, lessee or consignee.

Of course, the outcome is different if the latter was authorised to dispose of the supplied assets or to create security rights in these assets or if the third person can rely on the provisions on good faith acquisition. If the concurrent security rights had been created and made effective by the seller, supplier or lessor before the retention of ownership transaction, these security rights constitute encumbrances of the seller's, supplier's or lessor's (retained) ownership. Even under the traditional construction the seller, supplier or lessor and everyone else (including the buyer, hire-purchaser, lessee or consignee) who derives title from the latter would have to respect these security rights.

(b) Retention of ownership device that is not effective. If a retention of ownership device is not effective, IX.–4:102 paragraph (1) does not apply. Instead, as in the case of ineffective security rights, the priority position of the retention of ownership device is determined by IX.–4:101 paragraphs (3) and (4). Any secured creditor with an effective security right or even an ineffective security right that had been created earlier prevails over the holder of the retention of ownership device.

These results deviate from the traditional construction of retention of ownership devices. This is a consequence of the general decision in favour of a requirement of registration even for retention of ownership devices under IX.–3:107 of these rules. Without registration, the retention of ownership device does not fulfil the requirements for effectiveness vis-à-vis third persons; therefore the holder of an unregistered retention of ownership device must give precedence to the holders of security rights which are effective against third persons.

(c) Retention of ownership device registered after 35 days period of IX.–3:107. A retention of ownership that has been registered only after the expiry of the period of 35 days under IX.–3:107 is effective, but does not enjoy the superpriority under IX.–4:102 paragraph (1) (see IX.–3:107 paragraph (2)).

Such a retention of ownership device still enjoys priority over security rights that have become effective later; this resembles the traditional understanding of retention of ownership devices and their effects vis-à-vis third persons where an equivalent result follows from the principle of *nemo dat quod non habet*.

If, however, the competing security right has become effective earlier than the retention of ownership device, the holder of the latter cannot claim priority over the rights of the other secured creditor. Claiming priority over earlier security rights is the core content of superpriority under IX.–4:102; IX.–3:107 paragraph (2) expressly provides that this superpriority is not applicable for retention of ownership devices that have been registered after the expiry of the 35 days period. Instead, whether or not the holder of the retention of ownership device can claim preference over third persons and their proprietary rights in the asset concerned must then be determined on the basis of the general principles in IX.–4:101, especially paragraphs (1) and (2). The retention of ownership device is regarded as effective against third persons; as for security rights, this effectiveness, however, is limited in so far as the retention of ownership device cannot prevail over other security rights in the same asset which enjoy a higher-ranking priority position.

D. Security rights in financial assets made effective by control or possession

Paragraph (2) confers superpriority on all security rights in financial assets that are made effective by control according to IX.-3:204 or by possession (see esp. IX.-3:202 and IX.-3:203). This superpriority applies in relation to any other security right in the same assets, regardless of who created it and when it became effective (again, subject to exceptions under paragraph (4)). Moreover, the superpriority according to paragraph (2) also gives the security rights covered by this provision precedence over acquisition finance devices; paragraph (2) is an exception to the more general rule in paragraph (1): *lex specialis derogat legi generali*. Only if there are several security rights made effective by control is the priority of such security rights to be determined according to IX.-4:101 by reference to the order of the relevant time, *i.e.* the time at which the security rights became effective (see the reference in IX.-4:102 paragraph (2) sentence 2).

The main purpose of the rule explained in the preceding paragraph is that a security right in financial assets that has been made effective by the exercise of control or possession enjoys priority over a security right in the same asset that is only registered in the European register of proprietary security (it should be noted that a registration in registers which are operated by or for the issuer of financial instruments or which under national law are determinative of title and which cover also security rights in these assets is regarded as the exercise of control within the meaning of IX.-3:204, not as registration under the rules of Chapter 3, Section 3, see IX.-3:301 paragraph (3)). Control or possession of financial assets even trumps an earlier registration of a competing security right.

This preferred treatment of security rights in financial assets that have been made effective by the exercise of control or possession by the secured creditor is in line with common practice in modern proprietary security regimes. The same principle can be found in the US-American UCC Art. 9 (revised version 1999, Sec. 9-328) and in the English Law Commission's proposals for a revision of English company securities law (report no. 296 of 2005, draft reg. 39 paragraph (2)). Most importantly, this approach also reflects the position under the Financial Collateral Directive. Article 3 paragraph (1) read with Article 2 paragraph (2) of this Community legislation provides that taking control or possession of certain financial assets should suffice in order to acquire a security right in these assets (see also recital 9). In theory, it could be argued that these rules would already be in compliance with the FCD if the exercise of control or possession of financial assets could create a security right, even though this encumbrance could still have to give preference to any earlier security rights in the same assets that had been made effective by registration. However, such a line of reasoning would clearly contravene the spirit, though not the wording, of the FCD. A security right in financial assets would most likely be worthless for the secured creditor if it was only a second-ranking security. In order to give effect to the FCD, it must therefore be ensured that a secured creditor who acquires a security right in financial assets enjoys a first-ranking priority position.

The reference to the FCD in the preceding paragraph sheds light on the policy of this rule. Taking security over financial collateral is to be encouraged; secured creditors should not be obliged to consult the register in order to find out whether the assets concerned might already be encumbered in favour of another creditor. Even though this might correspondingly in effect limit the protection to be obtained by virtue of the registration of a security right, this disadvantage for registered creditors does not appear to give rise to grave concerns. The financial assets covered by IX.-3:204 are all easily disposed of; therefore every secured creditor would be ill-advised to rely on the registration of a security right in these assets alone since the creditor would run a considerable risk of an unauthorised disposition of these assets by the security provider if the secured creditor does not also exercise control or, where applicable, possession of these assets.

A similar preferential treatment specifically for possessory security rights in cash, negotiable instruments and documents to bearer (not, however, for security rights made effective by control) also follows from IX.-2:111 (Security right in cash, negotiable instruments and documents) read with IX.-4:101 paragraph (5). By virtue of these provisions, a secured creditor in possession of these assets always enjoys priority over earlier security rights in the same assets.

E. Right of retention of possession according to IX.–2:114

The superpriority according to paragraph (3) does not apply generally to all security rights made effective by possession within the meaning of IX.–3:201, but is limited to the rights of retention of possession covered by IX.–2:114.

The policy behind this rule can be explained as follows. A right of retention of possession which is regarded as giving rise to a proprietary security right is typically available in situations in which the secured creditor's efforts (for which the creditor is to be reimbursed by the other party) were spent for the repair or improvement or similar of the encumbered assets in the creditor's possession (see, *e.g.*, the liens of repairers, warehousekeepers or

transporters). Recognising a superpriority for this security right corresponds to some extent to the grounds justifying a superpriority for acquisition finance devices (see Comment B).

F. Exceptions – paragraph (4)

Paragraph (4) lays down exceptions that apply to all three types of superpriority covered by paragraphs (1) to (3). A security right or retention of ownership device does not enjoy superpriority conferred by paragraphs (1) to (3) if and in so far as IX.–4:101 paragraph (5) and IX.–4:108 apply. Where there is a subordination agreement, this agreement affects also superpriority under the present Article; if a security right is acquired on the basis of good faith acquisition in an asset subject to a security right or retention of ownership device enjoying superpriority, the latter security right or retention of ownership device does not enjoy priority over the rights of the secured creditor who can rely on the protection of the provisions on good faith acquisition.

G. Superpriority outside this Book

The present Article is not the only rule within these Principles providing for a superpriority of security rights. VIII.–5:204 paragraph (3) contains a similar rule for security rights arising in favour of the former owner of material in the context of production or combination. These security rights in the new products or combined assets enjoy priority over any other security right created by the producer or owner of the principal part, *i.e.* the owner of the new products or combined assets. VIII.–5:204 paragraph (3) is applicable to two cases. First, where there has been no agreement between the owner of the material and the producer or owner of the principal part concerning the production or combination (in such cases, the security rights created according to the rules of Chapter 5 of Book VIII can be regarded as *ex lege* security rights). Secondly, where there has been such an agreement, if this agreement provides for security rights equivalent to those arising under the rules of Chapter 5 of Book VIII (see VIII.–5:101 paragraph (4)). In both cases, the superpriority of these security rights of the former owner of the material can be regarded as being functionally equivalent to the superpriority for acquisition finance devices.

IX.–4:103: Continuation of priority

(1) Priority is not affected if the encumbered asset:

(a) becomes an accessory to a movable asset; or

(b) is used for the production of new goods, or is commingled or combined with other assets, provided that the security right extends to the security provider's rights in the asset resulting from the production, commingling or combination.

(2) Paragraph (1)(a) also applies if a movable asset becomes an accessory to an immovable, unless the law governing the immovable determines otherwise.

COMMENTS

A. Continuation of priority and individual determination of priority distinguished

The two preceding Articles are based upon the concept that the priority of each security right or retention of ownership device is to be determined individually, *i.e.* that priority depends upon the actual compliance with the relevant requirements in respect of the specific proprietary security in the assets concerned. This Article and the following one take a different approach. The priority of security devices covered by these special provisions is determined either by reference to the priority of security devices in some other asset (such as the principal asset from which fruits and proceeds are derived, or the assets that are commingled, combined or used for the production of new goods) or to the priority of the security devices in the same assets, but before an alteration of their status, such as the encumbered assets becoming an accessory to some other asset . This might be of specific importance especially if the other security device whose priority is decisive for the determination also of the priority of the security right in question enjoys superpriority. This special priority too might be continued. (For fruits and proceeds of the assets in which a security right or retention of ownership device with superpriority existed, however, this rule is subject to the restrictions laid down in IX.–4:105).

It follows already from the general ideas underlying IX.–4:101 and IX.–4:102 on the one hand and IX.–4:103 to IX.–4:105 on the other hand that, even if the latter provisions are not applicable in any given case, the security device in question is not without any protection. Rather, the priority of such a security device will have to be determined by applying the general rules of IX.–4:101 and IX.–4:102 (this is specifically spelt out in the case of IX.–4:104 paragraph (2)). These provisions, however, might result in a lower priority as compared to the results achieved by applying IX.–4:103 to IX.–4:105.

B. Continuation of priority as exception

Especially if they are in the possession of the security provider, the assets subject to a security right or a retention of ownership device might not remain unaltered. Rather, the assets, especially raw material, semi-finished goods or similar items, will often be used or applied in the course of the security provider's (or any other person's in possession of the assets) business. The extension of the original proprietary security to such situations as well as the continuation of effectiveness and priority of the original security devices is not self-evident. On the contrary, the general approach of these rules is that the creation of proprietary security in movable assets depends upon a party agreement specifying the assets concerned; also the effectiveness of a security right or a retention of ownership device is in general dependent

upon some requirements under Chapter 3 (*i.e.* possession, control or registration) being fulfilled in relation to the collateral. In other words, the status of a secured creditor is not awarded on the basis of a general weighing of each secured creditor's relative worthiness of protection or contribution to the available pool of assets, but on the basis of rather restrictive criteria such as the parties' agreements. This excludes the possible argument that even after substantial alterations of the assets subject to a security right or a retention of ownership device, the security devices should in general remain in existence, remain effective and preserve the original priority already on the basis that the original assets could still be traced or followed into their present state. Instead, security devices remain in existence, remain effective and preserve the original priority following such substantial alterations only if and in so far as this is specifically provided for by these rules. For the continuation of the existence and the conditions of effectiveness, cf. the provisions in Chapters 2 and 3; IX.–4:103 deals with the question whether, if the proprietary security in question remains in existence and remains effective, there is also a continuation of priority, *i.e.* the question whether the priority remains unaffected, even though the collateral becomes an accessory or is used for production, commingling or combination.

C. Encumbered asset becomes an accessory

Paragraph (1)(a) and paragraph (2) deal with the case of an encumbered asset becoming an accessory to another asset. For the term "accessory" see IX.–1:201 paragraph (2); on the basis of the rule in IX.–1:104 paragraph (1)(c), the reference to an "encumbered asset" in IX.–4:103 covers assets subject to a retention of ownership device as well.

In fact, the asset subject to a security right or a retention of ownership device usually undergoes no change in substance even though it has become an accessory. Additionally, it is already part of the definition of the term "accessory" that it must be possible to sever the connection to the principal asset without damage being done to the substance of either asset. Therefore, in addition to the position that any security devices in the collateral remain in existence (see IX.–2:305 paragraph (2)), the general rule is that the priority of these security devices is also not affected by the fact that the collateral has become an accessory (see paragraph (1)(a) if the principal assets are movable assets and – subject to an exception – paragraph (2) for immovable assets as principal assets).

Some reservations must be made in relation to the effects of the law on immovable property, which these rules are not intended to touch upon. For collateral that becomes an accessory to immovable assets paragraph (2) provides that the security devices in these assets continue to enjoy the original priority only if this not incompatible with the law governing the immovable.

D. Production, commingling and combination

Production, commingling and combination are concepts that are defined in Book VIII on the transfer of ownership in goods (Book VIII, Chapter 5). In these cases, rights in the products, combined goods or masses or mixtures (in the case of commingling) replace the former proprietary rights in the (original) assets that were commingled, combined or used for the production. Security rights and retention of ownership devices that had existed in the original assets do not necessarily remain in existence in the results of the production, commingling or combination. These resulting new goods might be quite different in their nature from the original assets. Accepting that the original security device could extend to the resulting assets without any further requirements would be to the detriment of the other creditors for whom

this might not be apparent. Concerning the existence of the security rights and retention of ownership devices after production, commingling or combination, this problem is solved on the basis of IX.–2:307 to IX.–2:309. The present Article follows that general position and does not contain any additional requirements for the continuation of priority; if the security devices remain in existence after production, commingling or combination, also their priority remains unaffected, *i.e.* the priority is identical to the priority position of the security devices in the assets that were used for the production, commingling or combination.

IX.–4:104: Fruits and proceeds: general rules

(1) Security rights in fruits and proceeds of the following types of assets preserve the priority of the security right in the encumbered original assets:

(a) fruits and proceeds of the same kind as the assets that were originally encumbered;

(b) rights to payment due to defects in, damage to, or loss of the assets that were originally encumbered, including insurance proceeds; and

(c) fruits and proceeds that are covered by the registration of the security right in the assets that were originally encumbered.

(2) In cases not covered by paragraph (1), the priority of security rights in fruits and proceeds is determined according to the general rules laid down in IX.–4:101 (Priority: general rules) and IX.–4:102 (Superpriority).

COMMENTS

A. General

The distinction between an individual determination of priority and the continuation of priority has already been explained in Comment A on the preceding Article. IX.–4:104 (Fruits and proceeds: general rules) and IX.–4:105 (Fruits and proceeds: exceptions) deal with cases of fruits and proceeds that have been derived from the assets that were originally encumbered or subject to a retention of ownership device (on the basis of the general rule in IX.–1:104 paragraph (1)(c)). While the security rights in these fruits and proceeds are not identical with the security devices in the assets that were originally encumbered, IX.–4:104 and IX.–4:105 contain the rule that to the limited extent provided for by these provisions the security rights in the fruits and proceeds can continue to enjoy the priority of the original security devices.

Both IX.–4:104 and IX.–4:105 are based upon the assumptions that the secured creditor's proprietary rights extend to the fruits and proceeds and that these encumbrances are as effective against third persons as the original security devices were; these precedential matters are dealt with in Chapters 2 and 3, respectively. The main importance of IX.–4:104 lies in the possibility that the security devices in the assets that were originally encumbered might enjoy a better priority position than that which would be applicable for the security devices in the fruits and proceeds, if their priority had to be determined individually. Even if the secured creditor holds a proprietary entitlement to the fruits and proceeds of the assets that were originally encumbered or subject to a retention of ownership device, this security right might have arisen or become effective only later than the original security rights. If this later point of time were to be relevant for the determination of priority, then the security rights in the fruits and proceeds could be in a lesser priority position in relation to competing secured creditors' rights. The continuation of priority might be of even greater importance if the security devices in the assets that were originally encumbered enjoyed superpriority according to IX.–4:102; the continuation of superpriority in fruits and proceeds, however, is subject to the additional rules in IX.–4:105.

It has to be emphasised, however, that even if there is no continuation of priority under IX.–4:104, the security rights concerned can still be regarded as effective and their priority is determined according to the general rules, *i.e.* especially IX.–4:101 (see IX.–4:104 paragraph (2)).

B. Fruits and proceeds of the same kind as the original assets

The present Article covers three categories of fruits and proceeds. First, according to paragraph (1)(a) security rights in fruits and proceeds of the same kind as the assets that were originally encumbered or subject to a retention of ownership device preserve the priority of the security devices in the latter assets. One example would be the lambs born in a flock of sheep encumbered with a non-possessory security right. If fruits and proceeds are of the same kind as the original assets, it would not be reasonable to treat them differently for priority purposes, should the fruits and proceeds be encumbered as well.

It has to be noted, however, that the relevance of this category is rather limited since there are broad overlaps with the situation covered by sub-paragraph (c). If the fruits and proceeds are of the same kind as the assets that were originally encumbered or subject to a retention of ownership device, they will typically also be covered by the description in the entry in the register, unless this entry is limited to the individual original collateral only.

C. Rights to payment due to defects in, damage to, or loss of the original assets

The second category of fruits and proceeds mentioned in IX.–4:104 are rights to payment due to defects in, damage to, or loss of the original assets (paragraph (1)(b)). The reason why security rights in this type of proceeds preserve the priority of the security devices in the original collateral is the same as that which justifies the automatic extension of the security devices to this type of proceeds (IX.–2:306 paragraph (1)). These rights to payment are mere replacements of the original assets which have been damaged or lost. For the protection of the secured creditor it is necessary that its proprietary security extends to these proceeds without any change of priority (if the priority of a proprietary security in these proceeds had to be determined individually, priority would be determined from the time at which these rights to payment arose, see IX.–4:101 paragraph (2)(a) read with IX.–3:101 paragraph (2)). Since the amount of these rights to payment is equivalent to the loss in value of the original collateral and since these proceeds do not involve any addition of value, the interests of the other secured creditors are not affected.

D. Fruits and proceeds covered by the original registration

The last category of fruits and proceeds dealt with in the Article are fruits and proceeds that are covered by the original registration, *i.e.* the entry in the European register of proprietary security covering the security rights or retention of ownership devices in the original collateral.

To a large extent, the express mentioning of this category of fruits and proceeds in paragraph (1)(c) is declaratory only. If the original registration covers fruits and proceeds as well (security rights in the fruits and proceeds will in general be effective only if this condition is fulfilled, see IX.–3:310 paragraph (1)(b) sentence 2), then the priority of the security rights in the fruits and proceeds would be determined by the date of the original registration according to IX.–4:101 paragraph (2)(a), even if this was not specifically provided in IX.–4:104 paragraph (1)(c). However, since an extension of the original registration to fruits and proceeds of the original collateral will be the most important constellations where security rights in the fruits and proceeds share the same priority status as the original security rights or retention of ownership devices, this express provision might at least serve as a useful clarification.

Moreover, even for fruits and proceeds that are covered by the original registration the continuation of the priority of the original security device is of particular importance in cases where the original security device enjoys superpriority according to IX.–4:102. If covered by the original registration, creditor A's security rights in proceeds from the sale of an asset that was subject to an acquisition finance device in favour of A therefore have priority over security rights in these proceeds created by the buyer or lessee B in favour of secured creditor C (see IX.–4:105 paragraph (2)(b) and the Comments on that provision).

IX.–4:105: Fruits and proceeds: exceptions

(1) Security rights in fruits and proceeds of assets that are subject to an acquisition finance device or are covered by VIII.–5:204 (Additional provisions as to proprietary security rights) paragraph (3) do not enjoy the superpriority of the security right in the assets that were originally encumbered.

(2) The preceding paragraph does not affect the superpriority of security rights in:

(a) rights to payment due to defects in, damage to, or loss of the assets that were originally encumbered, including insurance proceeds; and

(b) proceeds of the sale of the assets that were originally encumbered.

COMMENTS

A. General

It has already been indicated (see Comments A on the preceding Article) that the continuation of priority is at least potentially of greatest importance in situations where the original security device, whose priority is preserved, enjoys superpriority under IX.–4:102. If, for example, the secured creditor originally held a retention of ownership device or a security right which qualified as an acquisition finance device, a security right in the proceeds itself will not be regarded as one of these special types of proprietary security. Therefore, this security right can only enjoy superpriority under IX.–4:102 (*i.e.* have priority even over earlier security rights in the same proceeds created in favour of other secured creditors) if it preserves the superpriority of the original retention of ownership device or other acquisition finance device.

The preceding Article establishes the basic rule on the continuation of priority, which also applies for security rights in fruits and proceeds of the assets that were originally encumbered or subject to a retention of ownership device. For fruits and proceeds of assets that were subject to an acquisition finance device or a security right covered by VIII.–5:204 paragraph (3), however, the preceding Article applies only subject to the special rules in the present Article. Paragraph (1) of this Article establishes the general rule that security rights in fruits and proceeds of this type do not enjoy superpriority; this restriction is, however, partly reversed by paragraph (2).

The exceptional rules in the present Article do not cover all types of security rights enjoying superpriority. For fruits and proceeds of financial assets subject to a security right made effective by control or possession or of assets subject to a security right based upon a right of retention of possession, the general rule on the continuation of priority in IX.-4:104 is not affected. This is due to the fact that the fruits and proceeds to which the security right might be extended will be typically only those which would be exempted from the restrictions of paragraph (1) of the present Article on the basis of its paragraph (2). Fruits and proceeds that do not fall under the categories covered by paragraph (2) will be of any relevance only for security rights where the encumbered assets may remain in the possession of the security provider.

B. General rule: no continuation of superpriority for security rights in fruits and proceeds – paragraph (1)

In general, security rights in fruits and proceeds of assets that were subject to an acquisition finance device or a security right covered by VIII.–5:204 paragraph (3) do not enjoy superpriority.

If, for example, an asset that is subject to an acquisition finance device is rented out by the security provider and the security right extends to civil proceeds of the asset that was originally encumbered, the security right in the proceeds (*i.e.* the right to payment of rent) is a security right with standard priority only, *i.e.* it ranks subject to security rights in the same assets in favour of other secured creditors which have been made effective earlier.

The justification for restricting the superpriority to the original security right is the following. Retention of ownership devices and security rights which qualify as an acquisition finance device enjoy superpriority because the assets that are subject to these instruments of security would not have been acquired by the security provider but for the credit given by the respective holders of these instruments of security. The situation is similar for assets that are subject to a security right covered by VIII.–5:204 paragraph (3). Since, however, typically additional expenses by the security provider, such as marketing costs or the general expenses of its business, are necessary to derive fruits and proceeds from these assets, security rights in these fruits and proceeds do not in general deserve the same privileged priority position.

C. Exceptions – paragraph (2)

Two exceptions to the rule in paragraph (1) are established by paragraph (2). Security rights in two types of fruits and proceeds of assets that are subject to an acquisition finance device or a security right covered by VIII.–5:204 paragraph (3) may continue to enjoy superpriority, if this is so provided by the preceding Article.

According to sub-paragraph (a), rights to payment due to defects in, damage to, or loss of the assets that were originally encumbered or subject to a retention of ownership device (the reference to the encumbrance in paragraph (2) covering retention of ownership devices as well, see IX.–1:104 paragraph (1)(c)), including insurance proceeds, are exempted from the application of paragraph (1), *i.e.* security rights in this type of proceeds may preserve the superpriority of the original security devices. This exception is based upon the fact that rights to payment due to defects in, damage to, or loss of the assets that were originally encumbered or subject to a retention of ownership device can be regarded as replacements of the original assets which are no longer available as security for the secured creditor. No value is added by the security provider; and the secured creditor would be put at a disadvantage if its security rights in these proceeds were not treated in the same way as the security devices in the original collateral. This result corresponds with the automatic extension of the original security devices to this type of proceeds under IX.–2:306 paragraph (1).

Sub-paragraph (b) covers proceeds of the sale of assets that were originally encumbered or subject to a retention of ownership device. Unlike the proceeds dealt with in sub-paragraph (a), these proceeds of a sale are not automatically covered by the original proprietary security according to IX.–2:306 paragraph (1); instead, a party agreement to this effect is necessary; moreover, these security rights must be registered (see IX.–3:310 paragraph (2)(a) sentence 2). This distinction is due to the fact that proceeds of a sale will often include elements of

profit which derive from marketing efforts of the seller. It would be unfair in relation to other creditors, whether secured or not, to automatically extend the original proprietary security to these proceeds. If, however, there is a party agreement to this effect, then the secured creditor, whose rights in the original collateral that has been sold to a third person will be lost or at least difficult to exercise, should be protected by preserving the priority of the secured creditor's original rights. Thus, if the seller's rights under a retention of ownership device or a security right which qualifies as an acquisition finance are extended to the proceeds of the sale of the original collateral, this security right in the proceeds of the sale has priority over a security right in the same proceeds created in favour of another secured creditor even if the latter security right had been registered first. This result corresponds to the result which some national systems, notably German law, achieve for such a conflict between an extended retention of ownership and a prior security assignment of the proceeds also on the basis of the traditional understanding of retention of ownership devices. The use of the concept of priority, however, allows this to be done without reference to general, but probably not generally shared principles such as *bona mores*, which would be necessary under the traditional approach to achieve this economically reasonable result.

IX.–4:106: Importation of encumbered asset

If an encumbered asset is brought from a country outside the European Union into this area, the priority of a security right which was effective before removal of the encumbered asset into the European Union and which fulfils the conditions of IX.–3:108 (Importation of encumbered asset) is preserved.

COMMENTS

This provision is not to be mistaken as a rule of private international law. How and by the application of which law the effectiveness of a security right (or a retention of ownership device, see IX.–1:104 paragraph (1)(c)) before the removal of the collateral into the European Union is to be determined, is not a question that is covered by this Article. The only requirement is that the security device in the asset brought into the area of the European Union had been effective.

This Article merely determines on the level of substantive law the priority consequences that arise after importation in the broadest sense of this term. If (because the relevant conditions for effectiveness under Chapter 3 are fulfilled within the three months period of IX.–3:108), a security device continues to be regarded as effective after importation according to IX.–3:108, the priority position of this proprietary security under these rules will be the same as it was before importation. In essence, the time at which a security right originally became effective will continue to be decisive for the determination of the order of priority; if a security right or a retention of ownership device enjoyed superpriority before the importation of the encumbered asset, this preferred treatment will be upheld under these rules.

If, on the contrary, the security device had not been effective under the applicable law before importation of the encumbered asset into the European Union, or if the conditions of IX.–3:108 are not fulfilled (*e.g.* because the registration is effected only after the three months period prescribed by this provision has expired), the security right or retention of ownership device may still be regarded as effective under these rules as soon as the requirements of Chapter 3 are fulfilled. The priority of this security device, which will be relevant if after the importation other secured creditors also claim to hold competing security rights in the same asset, will then be determined according to the general rules of this Chapter, *i.e.* at least in general the time at which the security device has been made effective after importation will be decisive for the determination of the order of priority of competing proprietary security in the same asset (see the general principle of IX.–4:101 paragraph (2)(a)).

IX.–4:107: Priority of execution creditor

For the purpose of determining priority, an execution creditor is regarded as holding an effective security right as from the moment of bringing an execution against specific assets if all preconditions for execution proceedings against these assets according to the procedural rules of the place of execution are fulfilled.

COMMENTS

This Article deals with the priority status of an execution creditor, *i.e.* a creditor of the security provider who brings execution proceedings on the basis of a right to payment against the security provider. According to IX.–3:101 paragraph (1)(b) a security right that does not fulfil the requirements of Chapter 3 is not effective against a creditor who has started to bring execution proceedings against those assets. This rule, however, leaves open the question of the relationship of an effective security device vis-à-vis an execution creditor. In particular, it has to be decided under which conditions an execution creditor can prevail over a secured creditor holding an effective security device and *vice versa*.

While it appears to be universally accepted that the execution creditor should only under certain restrictive conditions be able to prevail over an effective proprietary security created on the basis of an agreement, there is no unanimity as to the way this result should be achieved. One approach followed in some member states is to provide that execution proceedings brought by an unsecured creditor give rise to a security right in favour of the latter. This concept, however, cannot be regarded as constituting a common European principle and, given the fact that there is no harmonisation of procedural law, it would also be difficult to reconcile it with the general rules on enforcement laid down in Chapter 7.

These rules have therefore opted for the less far-reaching solution contained in the present Article. For the purposes of priority, *i.e.* for the determination of the relationship to security rights and other limited proprietary rights in the same asset , the execution creditor is regarded as holding an effective security right if all preconditions for bringing execution proceedings against specific assets according to the procedural rules of the place of execution are fulfilled. This security right is regarded as having become effective at the moment the execution proceedings are brought against the assets in question. This time at which effectiveness is regarded as having been achieved will then determine the priority status of this fictive security right (see the general principle in IX.–4:101 paragraph (2)). If competing security rights have become effective before execution proceedings were brought, the execution creditor will have to give preference to these security rights.

The Article does not specify at which moment exactly execution proceedings are to be regarded as being brought and which conditions have to be fulfilled for the execution proceedings against specified assets. For the last-mentioned conditions, it is expressly provided that the procedural law of the place of execution is decisive. While it is to be assumed that the mere fact that a judgment for the payment of a sum of money has been obtained cannot suffice, this deference in favour of national procedural law also applies for the determination of the moment at which execution proceedings are to be regarded as being brought. National procedural rules might differ concerning the requirements to be fulfilled by the judgment creditor in order to commence execution proceedings. Therefore no exact

conditions can be laid down here apart from the fact that the execution proceedings must already be directed to specific assets.

IX.–4:108: Change of ranking

(1) The priority between a security right and other security rights as well as other limited proprietary rights in the same asset may be changed by an agreement in textual form between the holders of all rights that would be affected by the change of ranking.

(2) A third person acquiring a security right or a limited proprietary right that has been negatively affected by a change of ranking is bound only if the entry for the security right in the European register of proprietary security has been amended accordingly or if the third person at the time of the transfer knew or had reason to know of the change of ranking.

COMMENTS

While according to IX.–4:101 to IX.–4:107 the priority between different security devices (as well as limited proprietary rights other than security rights) is determined by law, paragraph (1) of this Article gives effect to the principle of party autonomy in the area of priority. If all relevant parties, *i.e.* the holders of the proprietary rights that would be affected, agree, the order of priority may be changed by an agreement in textual form. On the meaning of "textual form", see I.–1:106 ("In writing" and similar expressions").

In general, such an agreement is effective without registration. However, paragraph (2) provides that a transferee of a proprietary right (whether a retention of ownership device, a security right or another limited proprietary right) that has been negatively affected by the change of ranking may under certain conditions not be bound by this change of ranking, *i.e.* may acquire the proprietary right under its original priority position as it stood before the change of ranking. The third party transferee will only be bound if it had actual or constructive knowledge of the agreement on a change of ranking or if this change of ranking was registered, *i.e.* if the transferee acquired a registered security right or retention of ownership device which was negatively affected by this change of ranking and if the entry covering this proprietary security in the European register of proprietary security had been amended indicating the change of ranking (cf. IX.–3:311). This registration will normally also be regarded as creating constructive notice by the transferee of the change of ranking; this is expressly spelled out in paragraph (2) because it will constitute the most frequent way of binding the third party transferee to this agreement.

The restricted effectiveness of the agreement on a change of ranking in relation to third party transferees of the relevant rights under paragraph (2) is justified on the ground that the agreement itself does not contain an element of publicity which is normally central to the third party effectiveness (and hence, the order of priority) of proprietary rights. Third party transferees therefore should in general be entitled to rely on the order of priority that is apparent especially from the content of the register.

CHAPTER 5: PREDEFAULT RULES

Section 1: General principles

IX.–5:101: General principles

(1) The security provider and the secured creditor are free to determine their mutual relationship with respect to the encumbered asset, except as otherwise provided in these rules.

(2) Any agreement concluded before default and providing for the appropriation of the encumbered assets by the secured creditor or having this effect, is void, unless expressly provided otherwise. This paragraph does not apply to retention of ownership devices.

COMMENTS

A. Predefault stage

Chapter 5 contains rules governing proprietary security and the rights and obligations connected with it before an event of default. Once there is a default (see IX.–1:201 paragraph (5)), the secured creditor's rights and remedies are governed by Chapter 7.

The rules in the present Chapter are applicable whether or not later on there may or may not be a default. The predefault stage is nothing but the more or less extended period between the creation of a security device according to Chapter 2 and its termination – either through due performance of the obligation covered by the security or other events according to Chapter 6 – or else its extra-judicial enforcement according to Chapter 7.

B. Predefault rules: creation and effectiveness of security right

The main focus of the predefault rules of this Chapter is on the internal relationship between the secured creditor and the security provider (see esp. Sections 1, 2 and 4). Therefore, only the valid creation of a security right or a retention of ownership device is required; effectiveness against third persons according to the requirements of Chapter 3 is in general not necessary for the application of these provisions.

Section 3 of this Chapter covers the change of parties. That the transferee of the proprietary security or the transferee of the asset serving as security are bound by the original security device follows from the fact that in both cases an individual proprietary position is transferred to the transferee (for a transfer of the asset subject to a security right or a retention of ownership device see IX.–5:301 paragraph (2)). This does not presuppose that the transferred security must have been effective against third persons according to Chapter 3. But Section 3 also governs the continuation of effectiveness after the transfer. This special consequence obviously is only applicable if the security device concerned had already been effective against third persons according to the provisions of Chapter 3 before the transfer of the security device or of the asset subject to a security right or a retention of ownership device.

C. Retention of ownership devices

In general, all provisions of this Chapter are applicable not only to security rights, but also to retention of ownership devices (see IX.–1:104 paragraph (1)(c)).

This holds true without any reservations for the general principles contained in Section 1 and in IX.–5:201. The rights and duties of the security provider under Subsection 1 of Section 2 are applicable to buyers, hire-purchasers, lessees or consignees under retention of ownership devices as well; for factual reasons, however, there will be no scope for the application of Subsection 2 of Section 2 to holders of retention of ownership devices, since the seller, supplier or lessor will only rarely, if ever, be in possession of the supplied assets. Sections 3 and 4, finally, are fully applicable to retention of ownership devices with some adaptations, however, in IX.–5:303. For details of the application of the individual Articles to retention of ownership devices see the Comments on the relevant provisions.

D. Parties' freedom to determine their relationship concerning the encumbered asset

Paragraph (1) of the present Article espouses the principle that the parties are free to determine their mutual relationship with respect to the encumbered asset. The principle of freedom of contract, of course, is already enshrined in II.–1:102 paragraph (1). However, it is not at all clear that the parties enjoy such a freedom also in the area of property law which explains why it was thought to be necessary to confirm this principle here.

As between the secured creditor and the security provider, two different bases for their mutual relationship have to be distinguished. The first is the contract for proprietary security, *i.e.* a purely contractual relationship. This specific type of contract is not primarily covered by this Book and it goes without saying that it is subject to the general principles of contract law including the principle of freedom of contract. In addition, the relationship between secured creditor and security provider is governed also by the property law-based rules based upon the security right itself. While these rules are normally mandatory in so far as the consequences of an event of default are concerned (see Chapter 7), the parties may in general freely determine the terms of the security right for the predefault stage, arranging, amongst others, for rights of the secured creditor or the security provider to use the assets, for duties of preservation of the encumbered assets or for other rights and obligations with respect to the security right and the encumbered assets before default.

It has to be emphasised that these rights and obligations should not be characterised merely as part of the contract for proprietary security. The terms regulating the mutual relationship between secured creditor and security provider are binding also against and in favour of third persons who might acquire the encumbered assets or the security right itself from the original parties (see Section 3 of this Chapter). This extension of the binding force of the security right cannot be explained as the consequence of an assignment of contractual rights or as a transfer of a contractual position, especially since the transfer of a security right or of the encumbered asset might lead to a substitution of the person owing the obligations concerned under this Chapter without the approval of the other party.

Even in the predefault stage, however, the principle that the parties are free to determine their relationship with respect to the encumbered asset is not without limitations and exceptions (see paragraph (1) *in fine*). Some exceptions are expressly laid down in Chapter 5, most

notably in paragraph (2) of the present Article. Also cases in which deviations from the default rules of this Chapter are possible only on the basis of an express agreement to the contrary can be regarded as examples of such limitations by excluding such agreements which have been concluded only impliedly.

E. No appropriation before or at default

Paragraph (2) contains a principle that was already known in Roman law (*lex commissoria*) and that – even if subject to a growing number of exceptions – still is universally accepted throughout the member states. The security provider is not to be deprived of its assets on the basis of an agreement concluded before default that provides for an appropriation of the encumbered assets by the secured creditor. Paragraph (2) prohibits such agreements if they purport to transfer ownership to the secured creditor before or at default; agreements that would have effect after default are covered by IX.–7:105.

The reason justifying this prohibition is that an agreement for the appropriation of the encumbered assets, *i.e.* the transfer of unencumbered ownership to the secured creditor in exchange for the extinction of the obligation covered by the security, contains grave risks for the security provider. The value of the encumbered assets might well surpass the amount of the secured right; by agreeing before default on an appropriation, the security provider would lose all the protection which attempts to protect the security provider against the loss of its assets for less than their value and which is available against the secured creditor's normal rights and remedies in the post-default stage.

Paragraph (2) *in fine* refers to exceptions from this rule. One exception can be found in IX.–5:208 (civil fruits which are covered by the security right in the principal asset may be used for the satisfaction of the secured right to performance even before default). Another apparent exception is found in IX.–5:207 which allows banks to dispose of and to appropriate encumbered financial assets, if expressly so agreed by the parties. However, this is merely a temporary permission since the bank is obliged to re-transfer equivalent assets under paragraph (2) of IX.–5:207.

Finally, it should be made clear that paragraph (2) in no way invalidates security transfers of ownership and of sale-and-lease-back arrangements. Even though the parties might purport to transfer ownership to the secured creditor, these are transfers for security purposes only and not an appropriation within the meaning of this provision. Consequently, both these forms of transactions are regarded under this Book as creating a security right as a limited proprietary right only (see IX.–1:102 paragraph (4)), *i.e.* the security provider continues to be regarded as the owner of the assets concerned. Additionally, it should be pointed out that in the case of an agreement for a security transfer of ownership or a sale-and-lease-back the assets concerned are not yet encumbered at the moment of the conclusion of the agreement as would be required by paragraph (2).

F. Retention of ownership devices

As provided by IX.–1:104 paragraph (1)(c), paragraph (1) of the present Article is applicable not only to security rights, but to retention of ownership devices as well. Historically, retention of ownership devices have been developed by legal practice, making use of the freedom of contract in order to overcome certain limitations of the traditionally recognised

security rights. Therefore, in general the parties should enjoy such freedom under these rules as well.

Section 2: Encumbered assets

IX.–5:201: Care and insurance of the encumbered assets

(1) The party who is in possession of the encumbered assets has an obligation to keep them identifiable from assets owned by others and must preserve and maintain them with reasonable care.

(2) The other party is entitled to inspect the encumbered assets at any reasonable time.

(3) The security provider has an obligation to insure the encumbered assets against such risks as are usually insured against by a prudent owner at the location of the assets. Upon request of the secured creditor, the security provider must furnish proof of the insurance coverage. If there is no or only insufficient insurance coverage or no proof of it, the secured creditor is entitled to take out sufficient insurance and to add any expenses to the obligation covered by the security.

COMMENTS

A. Specific application of the principle of good faith

This Article contains obligations of care binding whichever party is in possession of the collateral, *i.e.* the secured creditor in case of a possessory security right and the security provider in case of a non-possessory security right. Ownership of the encumbered asset is not relevant. A security provider who has created a non-possessory security right over its assets can be bound in the same way as a buyer, hire-purchaser, lessee or consignee in possession of assets subject to a retention of ownership device (see IX.–1:104 paragraph (1)(c)).

These obligations of care can be understood as applications of the principle of good faith. If the security provider is left in possession of the collateral, it follows from the general purpose of the security right (*i.e.* to use the value of the collateral for the satisfaction of the right to performance covered by the security) that the security provider must ensure that the assets that are subject to a security right or a retention of ownership device are preserved in a good condition in order to protect the secured creditor's security from becoming worthless.

In the case of a possessory security, the result that the secured creditor is under an obligation of care owed to the security provider is based upon the fact that the encumbered assets are still owned by the security provider (retention of ownership devices will normally not involve possession of the supplied asset by the secured creditor). The secured creditor is entitled to the encumbered assets only for the limited purpose of security. Therefore the secured creditor should be under an obligation to the security provider to care for the latter's property which is out of its owner's reach.

B. Preservation and maintenance

The obligations of preservation and maintenance constitute the core content of the obligation under paragraph (1). The party in possession of the collateral is not under a strict liability for the usual depreciation in value of the encumbered assets but is only liable if damage arises from any omission to apply reasonable care in the preservation and maintenance of these assets.

C. Obligation to keep assets identifiable

Additionally, the party in possession of the collateral is obliged under paragraph (1) to keep the assets that are subject to a security right or a retention of ownership device identifiable. The objective of this obligation is to prevent the other party's proprietary rights in the collateral from becoming lost due to a commingling of these items with other assets of the same type owned by the holder or third persons. It is not necessary to keep the assets that are subject to a security right or a retention of ownership device separately, as long as they remain identifiable even if stored alongside other assets.

D. Right to inspection

Since only the party in possession of the collateral will have (physical) control over the latter, there is always the need for the other party to inspect the collateral from time to time in order to investigate the state of the assets concerned. As a default rule, IX.–5:201 paragraph (2) gives this other party the right to inspect the collateral at any reasonable time. The parties are free, of course, to agree on any other time or specific mode of inspection.

E. Insurance

According to paragraph (3) sentence 1, the security provider is obliged to insure the assets that are subject to a security right or a retention of ownership device. Differing from paragraph (1), the security provider is bound to insure even if the collateral is in the possession of the secured creditor. The security right in the encumbered asset is intended to give the secured creditor the possibility to satisfy the secured right from the collateral. In case the assets that are subject to a security right or a retention of ownership device are damaged or lost, there should at least be a right to payment under an insurance policy to cover the secured creditor's interest; this position is also in line with IX.–2:306 paragraph (1) which extends the proprietary security to such insurance proceeds.

The obligation to take out insurance is limited to insurance against those risks that would usually be insured against by a prudent owner at the location of the assets.

The possibility to request proof of the insurance coverage (paragraph (3) sentence 2) allows the secured creditor to verify whether the security provider has in fact performed the obligation under paragraph (3) sentence 1. While the secured creditor may always take out insurance cover for the collateral at its own cost, the secured creditor may do so at the security provider's cost if the latter has not itself sufficiently insured the collateral or has not provided proof of it.

F. Sanctions

The non-performance of any of the obligations under this provision will give rise to the usual remedies for non-performance of an obligation under Book III, Chapter 3. The most usual remedy would be damages. If the secured creditor fails to meet the standards required by paragraph (1), it will be liable for any resulting losses suffered by the security provider. When determining the amount of damages owed, however, it will have to be taken into account that the secured creditor could have enforced its proprietary security against the assets concerned. The security provider will be liable for any losses resulting from a reduction of the amount which the secured creditor can realise from the proprietary security. See also Comment A on

IX.–5:205 for a more detailed description of the calculation of the secured creditor's right to damages.

G. Exceptions and agreements to the contrary

Since this Article contains a default rule only, the parties are free to agree to the contrary (see also IX.–5:101 paragraph (1)). Moreover, the following Subsections contain a number of provisions allowing the holder of the collateral to use or dispose of the latter. Both possibilities, of course, are not compatible with and override the duties of preservation, of maintenance and of keeping the assets identifiable.

Subsection 1: Security provider's rights and obligations

IX.–5:202: Rights in general

If and as long as the security provider is entitled to possession of the encumbered assets, the security provider is entitled to make use of them in a reasonable manner.

COMMENTS

A. General

This Article and the other provisions of this Subsection 1 deal with non-possessory security devices. Historically, the practical purpose of the development of this type of proprietary security was to enable the security provider to continue to use the encumbered assets. Collateral that had to be in the possession of the secured creditor (as was the case in the traditional possessory security) could no longer be applied for its economic purposes and would have to be regarded as unproductive dead capital. As a default rule, this Article therefore provides that in the case of non-possessory security devices the security provider is entitled to make use of the collateral in a reasonable manner.

As provided by IX.–1:104 paragraph (1)(c), the present Article is applicable not only to security rights, but to retention of ownership devices as well. Under this type of security, the buyer, hire-purchaser, lessee or consignee is regularly in possession of the supplied assets so that the restriction of the right to use to a use in a reasonable manner is particularly relevant.

B. Use in a reasonable manner

What is allowed as a use in a reasonable manner depends upon the circumstances of the case and the nature of the collateral. An encumbered car might continue to be used for daily transportation (presumably not for trans-continental journeys); a stationary machine may continue to be used *in situ* for the security provider's production (but may not – without the secured creditor's consent – be dismantled and reassembled at another site); vehicles of a car-rental company may continue to be rented out to customers. Such types of use might within reasonable limits lead to some wear and tear of the assets that are subject to a security right or a retention of ownership device. Neither the exploitation of the substance nor dispositions of the collateral, however, can be regarded as use in a reasonable manner within the meaning of the present Article, as follows *e contrario* from the more specific rules in the following two Articles.

C. Sanctions

If the security provider acts outside the limits of using the collateral in a reasonable manner, the secured creditor may be able to obtain an injunction prohibiting such use; if agreed, an unauthorised use may also constitute an event of default (see IX.–1:201 paragraph (5)(b)). Additionally, the secured creditor may claim damages if the security provider's conduct causes depreciation in value of the collateral which results in a loss for the secured creditor. For more details on the security provider's liability towards the secured creditor see the Comments on IX.–5:205.

IX.–5:203: Use of encumbered industrial material

A security provider in possession of encumbered industrial material, such as raw material or semi-finished products, may apply such material for production, unless expressly prohibited.

COMMENTS

This Article covers the specific case of industrial material as collateral which is in the possession of the security provider and constitutes an exception to the rules in the two preceding Articles. Like the rules of this Chapter in general, the Article is applicable both where the industrial material is subject to a security right and where these assets are subject to a retention of ownership device (IX.–1:104 paragraph (1)(c)).

Again, one objective of a non-possessory security device is that the assets that are subject to a security right or a retention of ownership device may continue to be used for their economic purposes. The economic purpose of the assets covered by this Article is being used for production by the security provider. Such a use would not be allowed under IX.–5:202 because it would usually involve the destruction of the original collateral and hence the loss of the secured creditor's proprietary security. Since, however, it is self-understood, economically reasonable and to some degree in the secured creditor's own interest that a security provider in possession of encumbered industrial material should be allowed to use these assets for production in the course of its business, this Article confers such a right on the security provider as a default position, *i.e.* without requiring an agreement of the parties to this effect.

The parties may agree to the contrary; such agreements, however, must be concluded expressly. It cannot be deduced merely from the circumstances of the agreement that the parties' true intention was to prohibit the use of encumbered industrial material for production.

It is obvious that, even after having applied the collateral for production, the security provider – if identical with the debtor – remains liable towards the secured creditor for performance of the obligation covered by the security. Whether or not after an authorised production the secured creditor's rights extend to the product is an issue solved by the rules in Chapter 2. There is under these rules no automatic extension of the security device into the products of the original collateral in general even in the case of an unauthorised production (Cf. IX.–2:307 and IX.–2:308. The position is different under Book VIII Chapter 5 where the former *owner* of material used for production automatically acquires a proprietary right in the product, cf. VIII.–5:201). The liability of the security provider for unauthorised dispositions is governed by IX.–5:205. See also Comment A on that provision for a description of the security provider's liability for damages in case of an unauthorised production.

IX.–5:204: Dispositions of encumbered assets by traders and manufacturers

(1) A security provider acting in the ordinary course of its business as a trader or manufacturer may dispose of the following types of encumbered assets free of any security right if they are in the security provider's possession:

(a) assets designated for sale and lease and industrial material (inventory); and

(b) products of industrial material.

(2) A trader or manufacturer may not dispose of items of its encumbered equipment, unless expressly so authorized by the secured creditor.

COMMENTS

A. General

This Article covers another specific situation of collateral left in the possession of the security provider. In the situation dealt with by this Article, the economic purpose of the non-possessory security (as opposed to a possessory security) requires that the security provider is allowed to dispose of the collateral. While under IX.–5:202 the security provider may – in order to protect the secured creditor's interests – only make use of the assets that are subject to a security right or a retention of ownership device in a reasonable manner, this Article authorises the security provider to sell the collateral covered by this provision even if this involves the loss of the secured creditor's rights in these assets.

This Article is only applicable if the security provider in possession of the collateral is a trader or manufacturer. For these persons, it is particularly evident that there can be an assumption that encumbered items of inventory left in their possession as well as products of industrial material are intended to be disposed of in order to generate revenue from the sale so that this Article may confer such an authority as a default position.

In theory, there could be a distinction between the question whether the security provider is entitled as against the secured creditor to dispose of the collateral and the question whether a transferee can acquire a valid title from such a disposition as against the secured creditor. Normally, however, the relationship between the secured creditor and the security provider will also determine the security provider's authority in relation to third persons; the present Article is intended to cover both aspects and to subject them to identical rules.

As a final general issue, it should be pointed out that, even though the wording of the Article refers to security rights and encumbrances only, this provision is applicable also where the assets concerned are subject to a retention of ownership device (IX.–1:104 paragraph (1)(c)).

B. Dispositions of inventory or products – paragraph (1)

Paragraph (1) allows the trader or manufacturer to dispose of encumbered inventory (sub-paragraph (a)) and products of industrial material (sub-paragraph (b)). By "inventory" is meant defined assets held for sale and lease and industrial material, which covers raw material and semi-finished products (see the preceding Article). Additionally, the security provider may also dispose of the products of industrial material. If the security provider may use industrial material for production in spite of the secured creditor's rights in these assets (as allowed by the preceding Article), it is only natural that such items may be disposed of as well. The products of industrial material, finally, are produced by the manufacturer exactly for

the purpose of being sold; therefore the security provider can reasonably be assumed to be authorised to dispose of these assets.

Again, agreements to the contrary are possible, *i.e.* the parties may agree that even a manufacturer is not entitled to dispose of encumbered inventory or the products of industrial material. However, paragraph (1) does not require an express agreement in order to deviate from the default rule.

C. Prohibition of dispositions of equipment – paragraph (2)

While a trader or manufacturer may dispose of its encumbered inventory under paragraph (1), paragraph (2) of this Article limits this right by prohibiting dispositions of encumbered equipment. The reason is not only that individual items of equipment will often be more valuable than inventory; the decisive factor is that even for traders and manufacturers it cannot be assumed that the sale of these assets is the typical manner of applying items of equipment within the course of their business. A secured creditor in whose favour a security right or a retention of ownership device over equipment is created therefore should be entitled to rely on the assumption that these assets will not be disposed of by the security provider.

This reasoning, however, should not be interpreted as excluding any possibility that a security provider could ever be entitled to dispose of equipment that is subject to a security right or a retention of ownership device. Often such a sale will have to be regarded as economically reasonable or even necessary. This will especially be the case where outworn or outdated equipment is sold and replaced by new assets. Giving the security provider a broad discretion, however, to dispose even of equipment would create an intolerable risk for the secured creditor. The latter could never be sure that its proprietary security does not risk being lost by way of a disposition by the security provider based on the ground that the assets in question are no longer complying with the latest technological standards. Especially since equipment such as high value factory machines, aircraft or industrial engines is used over a longer period of time, the vague criterion of being outdated could apply to nearly every case except for proprietary security in brand new equipment. Instead, such dispositions by the security provider are allowed only if and in so far as they are expressly authorised by the secured creditor. This means that the security provider has to seek the secured creditor's approval for any disposition of an item of equipment which is subject to a security right or a retention of ownership device in favour of the secured creditor. A mere implied agreement would not suffice; in the interests of the protection of the secured creditor an express authorisation is necessary.

D. Position of the transferee

If either by paragraph (1) or on the basis of an authorisation by the secured creditor the security provider is authorised to dispose of the collateral free of the encumbrance, the transferee can acquire proprietary rights in the assets (especially ownership) free of the secured creditor's rights. It has to be noted, however, that proprietary rights of other third persons, if any, could remain unaffected. If neither this Article nor an agreement of the parties authorises the security provider to dispose of the collateral free of the secured creditor's rights, the transferee could acquire unencumbered ownership of the assets concerned on the basis of a good faith acquisition, see IX.–6:102 and Book VIII, Chapter 3. If the security rights or retention of ownership devices in the assets concerned are registered, however, a good faith acquisition under these provisions will only rarely be possible for items of

equipment, since a disposition of equipment (as opposed to inventory) is not likely to be regarded as occurring within the security provider's ordinary course of business.

E. Position of the security provider after disposition

If the security provider was authorised by this provision or by an agreement with the secured creditor to dispose of the collateral, no personal liability of the security provider arises from the disposition. If identical with the debtor, the security provider will still be liable for the obligation covered by the security. Whether or not the security right that had existed in the assets that were originally encumbered is extended to the proceeds of the disposition, is a matter to be decided on the basis of the rules in Chapter 2.

For the security provider's liability towards the secured creditor arising from an unauthorised disposition, see the following Article.

IX.–5:205: Unauthorised use or disposition

(1) A security provider in possession of the encumbered assets has an obligation to the secured creditor not to use or dispose of them in breach of the limits imposed by the preceding Articles of this Subsection.

(2) In addition to liability for damages for non-performance of the obligation referred to in paragraph (1), the security provider who is in breach of those limits is obliged to account to the secured creditor for the value derived from the use or the proceeds of the disposition and to pay the resulting amount, but only up to the amount of the secured right that would otherwise remain unsatisfied.

COMMENTS

A. Liability for damages

The present Article covers consequences as between the security provider in possession and the secured creditor of an unauthorised use or disposition of assets that are subject to a security right or a retention of ownership device (for the application of this Article to this type of security see IX.–1:104 paragraph (1)(c)) by the security provider.

Paragraph (1) imposes an obligation on the security provider not to use or dispose of the assets in breach of the limits established by the preceding Articles of this Subsection. Non-performance of the obligation will give rise to the usual remedies under Book III, Chapter 3. The most usual remedy will be damages for any loss caused by the unauthorised use or disposal.

The liability for damages is a liability to pay the creditor such sum as will put the creditor as nearly as possible into the position in which the creditor would have been if there had not been a breach of duty (see III.–3:702). In the present situation, the secured creditor may claim compensation for the loss of the rights in the collateral (whether security rights or retention of ownership devices) or for losses suffered as a result of depreciation in value of the encumbered assets by reason of the unauthorised use.

For security rights as limited proprietary rights, the following rules apply for the determination of the amount of damages. Since the secured creditor is affected only in its security right, the relevant losses must be calculated by reference to the difference between the value that could hypothetically have been realised by way of an enforcement of the security rights in the encumbered assets in their original state, on the one hand, and any payments actually received by the secured creditor under the secured right or from the remaining collateral or other security rights securing this right to performance, on the other hand. If the secured creditor is fully paid by the debtor or can be satisfied from the enforcement of any other security right, or if the remaining value of the encumbered assets which were used by the security provider in an unauthorised manner suffices for the satisfaction of the secured creditor, there is no right to damages.

In case of an unauthorised use or disposition of assets subject to retention of ownership devices, the amount of damages to which the holder of a retention of ownership device may be entitled is generally identical, even though the seller, supplier or lessor loses, or is affected in, its retained ownership and not only a mere security right. This is due to the fact that the

seller, supplier or lessor is contractually bound to supply the asset concerned to the buyer, hire-purchaser, lessee or consignee. Even if the asset is worth more, the seller, supplier or lessor is thus entitled to payment of the agreed price only, *i.e.* the secured right. The right to payment of damages should put the seller, supplier or lessor into the position in which the latter would have been if there had not have been a non-performance of the obligation. Therefore the seller, supplier or lessor can claim as losses suffered due to the unauthorised use or disposition only a resulting shortfall in the payment of the agreed price. This result is not affected by the facts that the seller, supplier or lessor would be entitled in the event of the buyer's, hire-purchaser's, lessee's or consignee's default to any surplus to be realised from the supplied assets and that this entitlement would not be limited to the amount of the secured right. As long as there has not actually been a termination of the underlying contractual relationship before the unauthorised use or disposition, the seller, supplier or lessor should not be able to profit from the buyer's, hire-purchaser's, lessee's or consignee's unauthorised use or disposition by being awarded more than the payment due under the contract of sale, hire-purchase, financial leasing or consignment, *i.e.* the payment which the seller, supplier or lessor could legitimately expect under the underlying contract.

B. Obligation to account

In addition to the right to damages described above, paragraph (2) of the Article provides that an unauthorised use or disposition of the collateral by the security provider triggers a liability of the latter to account for any value derived from the unauthorised use or for proceeds from the unauthorised disposition and to pay the resulting amount to the secured creditor. This is a personal obligation only. Paragraph (2) does not create any proprietary entitlement of the secured creditor to such value or proceeds received by the security provider.

Since the purpose of the secured creditor's security rights is the satisfaction of the secured right only, the secured creditor's remedies for an unauthorised use or disposition of the collateral cannot go further than is necessary for this objective; the resulting amount to be paid over is therefore limited to the amount of the secured right that would otherwise remain unsatisfied. For the reasons set out in Comment A, the possibility of the holder of a retention of ownership device to claim the surplus under IX.–7:301 paragraph (3) after default of the buyer or lessee does not justify any different treatment for this special type of proprietary security.

While there are some similarities between the liability to account and pay under paragraph (2) and the security provider's liability for damages, the former differs from the latter by not being limited to the amount that could have been realised by enforcement of the secured creditor's security rights in the assets concerned. Instead, if necessary for the satisfaction of the secured right, the security provider can be liable for the full amount of the value or proceeds derived from the unauthorised use or disposition. By stripping the security provider at least partly of its unlawful profits, paragraph (2) fulfils – as a secondary purpose – also a preventive function.

C. Position of the transferee

Whether or not the transferee may acquire unencumbered rights as a result of an unauthorised disposition of the collateral by the security provider is not a matter that is covered by this Article. See Comment D on IX.–5:204 for further details.

Subsection 2: Secured creditor's rights and obligations

IX.–5:206: Limited right of use

A secured creditor who is in possession or control of the encumbered assets is not entitled to use the assets, unless and in so far as proper use is indispensable for their up-keep and preservation.

COMMENTS

A. General

This Subsection deals with the secured creditor's rights and consequential obligations before default. This Article covers the very limited right of use of the encumbered assets by the secured creditor. Even these limited rights of use apply only in situations in which the secured creditor is in possession or control of the encumbered assets. Without possession or control, it would not be practicable for the secured creditor to exercise a right of use.

From this it follows that in practice, the provisions in this Subsection will apply to security rights only, not to retention of ownership devices. The latter form of security will rarely be used in cases where the buyer, hire-purchaser, lessee or consignee (*i.e.* the person who is regarded as the security provider, see IX.–1:104 paragraph (2)) is not intended to hold the collateral.

B. Limited right of use

While the security provider who is in possession of the assets that are subject to a security right or a retention of ownership device enjoys broad rights to use and even to dispose of the collateral under the preceding Subsection, the secured creditor's rights are much more limited. The latter is entitled to use the encumbered assets under this provision only if such proper use is indispensable for the up-keep and preservation of the encumbered assets. A notable example would be a horse that needs to be worked. The right of use provided for by this Article is thus rather a more special type of the general duty of care under IX.–5:201 than a right to use the encumbered assets in the secured creditor's own interest. The reason for this distinction between the positions of the security provider under Subsection 1 and of the secured creditor under Subsection 2 is that the secured creditor does not exercise possession over the encumbered asset in order to be able to exploit its economic value, but in order to protect its position as a secured creditor. Since the security right's primary purpose is to secure the satisfaction of the secured right only, there is no reason to allow the secured creditor the use of the encumbered assets in general which would inevitably create the risk of a depreciation in value of the encumbered assets which are (at least in the case of a security right as a mere limited proprietary right) still owned by the security provider.

The position is different after default. Once the security right becomes enforceable, the secured creditor may – under the conditions set out in Chapter 7 – use the encumbered asset in order to apply any income so received for the satisfaction of the secured right, cf. IX.–7:207 paragraph (1)(b).

C. Exceptions and sanctions

Within the limits of IX.–5:101 paragraph (2) (*i.e.* as long as they do not allow the secured creditor to appropriate the encumbered assets), the parties may deviate from the default position under this Article; some exceptions to this rule are also to be found in IX.–5:207 and IX.–5:208.

In case of an unauthorised use by the secured creditor the sanctions available for the security provider comprise injunctions restraining the unauthorised use and rights to payment of damages, especially if the encumbered assets have lost value or were disposed of by the secured creditor. In calculating damages, however, it has to be considered that the secured creditor could have enforced the security right against the asset concerned; in addition, there might be – if the security provider is identical with the debtor of the obligation covered by the security – the possibility to set off the latter obligation against the security provider's right to damages.

In addition, the secured creditor might be accountable for any value received without authorisation from the use of the security provider's assets under the rules of Book VII on unjustified enrichment

IX.–5:207: Banks entitled to dispose of financial assets

(1) Banks and equivalent financial institutions holding financial assets as secured creditors are entitled to use, appropriate and dispose of the encumbered assets, provided this is expressly agreed.

(2) Upon satisfaction of the secured right, the secured creditor is only obliged to transfer financial assets of the same kind, quality and value to the security provider.

COMMENTS

A. Banks' and equivalent financial institutions' right of use, appropriation and disposition of encumbered assets – paragraph (1)

Paragraph (1) allows the parties to agree by way of an express agreement that banks and equivalent financial institutions as secured creditors may use, appropriate and dispose of financial assets (see IX.–1:201 paragraphs (6) and (7)) which are held by them as collateral. While it is generally permissible that the secured creditor and the security provider agree that the former may use the encumbered assets in deviation from the default rule of IX.–5:206 (see Comment C on that provision), paragraph (1) of the present Article goes a step further by creating an exception to IX.–5:101 paragraph (2). Contrary to the general rule contained in that provision, paragraph (1) provides for a limited possibility of an agreement by the parties on an appropriation of the collateral by the secured creditor.

Paragraph (1) covers financial assets only, *i.e.* financial instruments and rights to payment of money, which are held by banks and equivalent financial institutions. If expressly so agreed by the parties, these secured creditors may dispose of the financial assets held by them as collateral or may acquire ownership of these assets free of any rights of the security provider without any requirement of a prior default. The policy behind this rule is that it should be possible for the parties to arrange that financial assets need not be kept as dead capital by the secured creditor, but may be applied within the ordinary course of the latter's business. Banks and equivalent financial institutions routinely deal in such assets, and therefore it appears economically reasonable that they should not always be prohibited from using also financial assets held by them as collateral for their business purposes. No overriding interests of the security provider are concerned. Financial assets are fungible; no specific interest of the security provider in particular items of this sort is apparent, so that instead of a continuing proprietary right in the original assets, the secured creditor's obligation to retransfer financial assets of the same kind, quality and value to the security provider (paragraph (2)) is sufficient. Moreover, banks and financial institutions are subject to regulatory supervision and can therefore be regarded as being more trustworthy than other secured creditors.

B. Secured creditor's obligations after satisfaction of the security right

Where the secured creditor has appropriated or disposed of financial assets held as collateral on the basis of an express party agreement under paragraph (1), upon satisfaction of the secured right an obligation arises to return equivalent assets to the security provider according to paragraph (2).

Paragraph (1) does not require a preceding event of default and if the secured right is satisfied subsequent to the appropriation or disposition, *e.g.* by payment by the security provider, then the security provider must be able to demand the return of financial assets that are of the same

kind, quality and value as its original financial assets. The duty to return cannot arise, of course, if the secured right has been satisfied after default by appropriation or if the secured creditor, *i.e.* the bank, had enforced its proprietary security against the financial assets. Not only would such a position be manifestly unsound; in addition, such situations are outside the scope of application of this Chapter which is restricted to the predefault stage, so that the obligation under paragraph (2) can no longer arise.

As is expressed by the word "only" in paragraph (2), the secured creditor is – deviating from the general rule in IX.–6:105 – not obliged to account for any fruits or profits derived from dispositions of the collateral. The possibility of obtaining such benefits is precisely the objective of the exceptional permission of appropriation under paragraph (1). Of course, however, the security provider should be entitled to any interest and similar payments payable on the financial assets held as collateral, but this is a matter for the bank-client agreement.

C. Consequences of commingling of financial assets by secured creditor

One special aspect of the banks' rights of disposition is their right to commingle financial assets of their clients which they hold as secured creditors. The consequences of such commingling are covered by IX.–2:309 paragraphs (4) and (5) in the context of other rules dealing with the consequences of commingling.

IX.–5:208: Appropriation of civil fruits

If the security right extends to civil fruits of the assets that were originally encumbered, the secured creditor is entitled to collect and to apply money received as civil fruits to reduce the secured right even before it has become due.

COMMENTS

A. Security right extending to civil fruits

This Article is applicable only where the security right (or retention of ownership device, see IX.–1:104 paragraph (1)(c)) extends to civil fruits (*i.e.* fruits such as rent payments which are obtained only by way of a contractual agreement allowing a third person to use the encumbered assets) of the original collateral. Whether civil fruits are covered by the security right or retention of ownership device depends upon the provisions of Chapter 2. While in general a party agreement is necessary for the extension of the proprietary security beyond the assets that were originally subject to a security right or retention of ownership device (IX.–2:306 paragraph (3)), there is a presumption for the extension of possessory proprietary security to both civil and natural fruits of the original collateral (IX.–2:306 paragraph (2)).

B. Secured creditor's right to collect and appropriate civil fruits

If the rights of the secured creditor extend to civil fruits (see Comment A), the secured creditor may not only collect but also appropriate these fruits by using money received as civil fruits for the reduction of the secured right even before default or even before the right to performance has become due. This exception to the rule that an appropriation before default is not permissible (see IX.–5:101 paragraph (2)) is based upon the argument that the security provider will be less interested in the fruits than in the principal assets, so that the protective rules concerning the former may be less stringent. Moreover, since only money may be used for the reduction of the secured right under this provision, there is no danger that this possibility of appropriation is abused by the secured creditor to the effect that the collateral is acquired free of the security provider's rights at an undervalue. This reasoning even justifies the adoption of this exceptional provision as a default position, *i.e.* while the parties obviously may agree to the contrary, no agreement of the parties is necessary in order to confer on the secured creditor this limited right of appropriation.

For the secured creditor's similar right to lease the encumbered asset after default to a third person in order to use the income for the satisfaction of the secured right see IX.–7:207 paragraph (1)(b).

Section 3: Change of parties

IX.–5:301: Transfer of the secured right

(1) If a secured right is transferred to another creditor, the security right also passes to that creditor.

(2) The transferor is obliged to inform the transferee of any security right securing the transferred right.

(3) Effectiveness of the security right against third persons is achieved:

(a) by virtue of the original registration according to IX.–3:328 (Transfer of the security right: general rules) paragraph (1);

(b) if either possession or control of the encumbered asset is transferred to the transferee;

(c) if the transferor agrees to hold possession or control for the transferee; or

(d) if the security right had been effective without observation of any requirements under Chapter 3.

(4) If the security right remains effective, its priority is not affected by the transfer.

COMMENTS

A. Security right follows the secured right

Paragraph (1) contains the generally accepted principle that proprietary security devices as accessory rights follow the secured right if the latter is transferred to another creditor (see also III.–5:115 paragraph (1)).

This principle applies both to security rights as limited proprietary rights and to retention of ownership devices , to which the reference to security rights extends on the basis of IX.–1:104 paragraph (1)(c). Under several national legal systems, especially ownership transferred for security purposes and ownership retained for security purposes is often regarded as being transferable only on the basis of the rules on the transfer of ownership, which may involve additional criteria. The present rules do not follow this traditional approach and extend the principle that security rights follow the secured rights also to these types of security. The accessory nature of these security rights under these rules justifies this solution. Moreover, the essentially agreement-based rules on the transfer of ownership under the DCFR allow a simplification of the traditional understanding of the transfer of a retention of ownership device and of ownership that had been transferred for security purposes (the latter transaction is recharacterised as a creation of a security right under these rules according to IX.–1:102 paragraph (4)).

Effectiveness is not required for the transfer of the security right; even an ineffective security right can be transferred together with the secured right. Paragraph (3) only covers the question whether a security right is effective after the transfer.

B. Transferor’s obligation of information

Paragraph (2) imposes an obligation on the transferor to inform the transferee of the existence of a security right (or a retention of ownership device, see IX.–1:104 paragraph (1)(c)). Often

the transferor will give such information in its own interest (where rights to performance against third persons are sold, the transferee will be likely to pay a better price for a secured right to performance as compared to an unsecured right) but the obligation laid down in this provision might fulfil a gap-filling function in other cases.

C. Effectiveness of security right after transfer

Since these rules distinguish between the creation of the security device according to Chapter 2 and the effectiveness against third persons according to Chapter 3, another issue is whether the transferee has to undertake some additional steps in order to ensure that the security device remains effective after the transfer. This problem arises especially in view of the fact that the methods of achieving effectiveness under Chapter 3 typically focus on the position of the secured creditor, *i.e.* the latter has to hold possession or exercise control or the security right or retention of ownership device has to be registered in its favour.

Paragraph (3) provides that if the security device has been made effective by possession or control, it remains effective only if possession or control is transferred to the transferee or if the transferor agrees to hold possession or control for the transferee (see paragraph (3) sub-paragraphs (b) and (c)).

If, however, the transferred security device had originally been made effective by registration, *i.e.* by an entry in the register of proprietary security filed by the transferor as the original secured creditor, there is no need for an additional entry or a declaration to the register indicating the transfer of the security device; the security remains effective by virtue of the original entry (see paragraph (3)(a) and IX.–3:328 paragraph (1)). For an explanation of this position see the Comments on IX.–3:328.

Another obvious situation where the security device remains effective after the transfer without any additional requirements concerns security rights or retention of ownership devices that had been effective before the transfer without any requirements under Chapter 3 having to be fulfilled (see paragraph (3)(d)). Some security rights of this kind are covered by IX.–3:301 paragraph (2); other examples include acquisition finance devices in the assets of a consumer (IX.–3:107 paragraph (4)), *ex lege* security rights and security rights created before establishment of the European register of proprietary security (IX.–3:333 paragraph (1)).

D. Priority of security right after transfer

A final issue is the priority of the security device after its transfer. As long as the security right or retention of ownership device remains effective, *i.e.* if it was effective before the transfer and if continuation of its effectiveness is achieved according to paragraph (3), paragraph (4) makes clear that its priority is not affected by the transfer. This is in line with the general principle set out in Comment A that the transferee can rely on accessory security rights and retention of ownership devices just as the transferor could.

Outside the scope of application of paragraph (4), *i.e.* in cases where the security device was not effective before the transfer or where the conditions of paragraph (3) are not fulfilled, the priority of the security device after the transfer is to be determined according to the general rules of Chapter 4. If a security right is no longer effective after the transfer, it has to give precedence to all effective security rights (IX.–4:101 paragraph (3)); its priority in relation to other ineffective security rights is determined by the date of its (original) creation (IX.–4:101

paragraph (4)). If a security right has become effective only after the transfer, the point in time when the conditions for effectiveness were fulfilled is decisive for the application of IX.–4:101 paragraph (2).

IX.–5:302: Partial transfer of the secured right

If the secured right is divided into parts held by different persons as the result of a transfer of a part of the secured right or of a transfer of the whole secured right to different transferees each acquiring a part only:

(a) each holder of a part of the secured right is entitled to a part of the security right in proportion to the nominal amount of its part of the secured right; and

(b) the effectiveness of the security rights of each holder of a part of the secured right is to be determined individually; possession or control of the encumbered asset may be held by one holder of a part of the secured right for the others also.

COMMENTS

A. General

This Article is applicable in situations in which the secured right has been divided into different parts held by different secured creditors. Such a result may follow from either a transfer of a part of the secured right only or from a transfer of the entire secured right to different transferees who each acquire a part of the original secured right only. Neither III.–5:115 paragraph (1) nor IX.–5:301 covers the specific consequences which such partial transfers of the secured right have for the corresponding proprietary security devices (whether security rights or retention of ownership devices, see IX.–1:104 paragraph (1)(c)) securing satisfaction of this right to performance.

B. *Pro rata* entitlement to security right

Since each secured creditor holds a part of the secured right only, the entitlement of each secured creditor to the accessory proprietary security must be divided up. It is not apparent that any of the several secured creditors, including the transferor if the latter still holds a part of the secured right, should have a better right to the security than any other. So these rules have opted for a *pro rata* entitlement of each secured creditor to the security rights or retention of ownership devices. Each secured creditor's share is determined in proportion to the nominal amount of this secured creditor's part of the secured right in relation to the whole of the original secured right. Of course, the parties can agree on shares differing from a *pro rata* division.

C. Effectiveness of each secured creditor's rights

Sub-paragraph (b) provides that the effectiveness of each part of the security devices held by the different secured creditors has to be determined individually. The consequences of this rule, however, are somewhat ameliorated by the second half-sentence of sub-paragraph (b). Any individual secured creditor may hold possession or control of the encumbered asset not only for itself, but also for the other secured creditors. For registered security rights, the original registration is sufficient to ensure effectiveness of the transferred right on the basis of the general rules in paragraph (3)(a) of the preceding Article and IX.–3:328 paragraph (1).

D. Priority

This Article does not contain any specific rules on priority. Here the general rule in IX.–5:301 paragraph (4) applies, *i.e.* provided that the security device remains effective, priority is not affected by the transfer of the security right or retention of ownership device, even if based upon a partial transfer of the secured right.

IX.–5:303: Transfer of encumbered asset

(1) Where ownership of an encumbered asset is transferred to another person, neither the existence nor the effectiveness against third persons of a security right in the asset is affected. As of the time of the transfer, the transferee is regarded as the security provider.

(2) The preceding paragraph does not apply if the transferor acted with authority to dispose of the encumbered asset free of the encumbrance or if the transferee acquires the asset free of the encumbrance on the basis of a good faith acquisition.

(3) Security rights which before transfer of ownership of the encumbered asset had been created for secured creditors in future assets of the new owner do not have priority over security rights encumbering the transferred asset at the time of the transfer.

(4) The preceding paragraphs apply with appropriate adaptations where there is a transfer of the rights of a buyer, hire-purchaser, lessee or consignee in or relating to the supplied assets subject to an existing retention of ownership device.

COMMENTS

A. Existence of security right not affected by transfer of encumbered asset

The rule in the first sentence of paragraph (1) is a direct consequence of the proprietary nature of the security rights dealt with in this Book. The encumbrance binds not only the original security provider (as a party to the contract for proprietary security), but also every subsequent owner of the encumbered asset. The security provider may be (and usually is) the owner of the encumbered assets and may transfer ownership to another person. Being the owner of the encumbered assets does not, however, confer on the security provider authority to dispose of the collateral free of the security rights. This principle applies both to the transfer of ownership of encumbered corporeal assets and to an assignment of an encumbered right to performance.

Two exceptions to this rule are mentioned in paragraph (2). First, the security provider may transfer unencumbered ownership of the collateral if authorised to do so. The transferor, *i.e.* the security provider, may be authorised either on the basis of an agreement with the secured creditor or by law. One example of an authorisation of the latter type is provided by IX.–5:204 paragraph (1). Second, the transferee may acquire unencumbered ownership even if no authority has been conferred on the security provider to dispose of the collateral free of the secured creditor's rights if the transferee can rely on the provisions on good faith acquisition. According to IX.–6:102 read with VIII.–3:102 the security right can be lost even if the security right had been registered.

B. Transferee assumes position of security provider

Paragraph (1), second sentence, provides that the transferee assumes the position of the security provider for the purposes of this Book. This is a consequence of the proprietary nature of the security right. By virtue of the transfer of ownership of the encumbered asset, the new owner is the person who is under the obligations of a security provider and against whose property, *i.e.* the transferred encumbered asset, enforcement of the security right is to be sought. This rule is also qualified by the exceptions in paragraph (2).

C. Effectiveness of security right after transfer of encumbered asset

Another consequence of the transfer mentioned in paragraph (1) is that, again provided that the security right has not been lost as a result of the transfer of ownership of the encumbered assets, the effectiveness of the security right is not affected by the transfer of ownership of the encumbered asset.

For security rights made effective by possession or control, of course, it has to be pointed out that if the transfer of ownership has only been made possible by the secured creditor losing possession or control, the security right may indeed cease to be effective. But then the reason is not the transfer in itself but the fact that the conditions for effectiveness under Chapter 3 are no longer fulfilled.

For registered security rights, these rules have opted against a requirement of a new registration against the new owner of the encumbered assets who assumes the position of a security provider replacing the original security provider. Even though the publicity of the security right might be limited (only a search of the register against the original security provider might yield any results, while the security right cannot be found by searching entries filed against the new security provider), the secured creditor should not be burdened with the danger of an automatic loss of its secured position in general or with a duty to re-register against the new security provider. Under the present solution, the interests of other persons, especially other secured creditors of the transferee, are to some extent, however, protected on the basis of the rules on good faith acquisition (see Comment B on IX.–3:330). An additional entry in the register indicating the transfer is nevertheless possible and may provide additional protection for the secured creditor (see IX.–3:331).

D. Priority of security rights created by transferee before transfer

Paragraph (3) deals with a specific problem of priority which might arise in relation to registered security rights if the transferee had created security rights in its future assets (*i.e.* in the encumbered assets which are subsequently acquired by the transferee) and if this security right had been registered before the security right which encumbers the collateral at the moment of its transfer. Since this problem concerns registered security rights only, it is dealt with in the context of the provisions on registration, see Comment B(b) on IX.–3:330 .

E. Retention of ownership devices

Paragraph (4) provides that paragraphs (1) to (3) are applicable with appropriate adaptations also to cases where there is a transfer of the rights of a buyer, hire-purchaser, lessee or consignee in or relating to the supplied assets subject to an existing retention of ownership device. While the position concerning the legal consequences laid down in paragraphs (1) to (3) is similar, the underlying situation as well as the legal construction is rather different so that it appeared to be necessary to include a separate provision for retention of ownership devices.

The main differences stem from the fact that in the case of a retention of ownership device the buyer, hire-purchaser, lessee or consignee does not become the owner of the supplied asset but rather, if at all, the holder of a contingent right (VIII.–2:307). Hence, the buyer, hire-purchaser, lessee or consignee can transfer the rights in or relating to the supplied assets derived from the respective transaction only.

Since the buyer, hire-purchaser, lessee or consignee does not have the authority to transfer ownership to a third person because of the principle of *nemo dat quod non habet*, the seller's, supplier's or lessor's retained ownership is in general not affected by the transfer of the buyer's, hire-purchaser's, lessee's or consignee's rights. If the retention of ownership device is effective against third persons, a person to whom the buyer, hire-purchaser, lessee or consignee has purported to transfer ownership therefore cannot become owner and must respect the seller's, supplier's or lessor's retained ownership in the assets concerned. This corresponds to the consequences of a transfer of the collateral spelt out in paragraph (1); also for retention of ownership devices, the effectiveness of the security device should not be affected by reason of the transfer. Again, the outcome is different if the buyer, hire-purchaser, lessee or consignee acted with authorisation or if the transferee is protected by the rules on good faith acquisition: the rule laid down paragraph (2) applies also to the transfer of assets subject to a retention of ownership device. In such situations, the transferee may become the owner of the assets concerned and the rights of the holder of the retention of ownership device are lost.

Provided that this is not the case, however, the transferee, *i.e.* the person acquiring the rights in or relating to the supplied assets from the buyer, hire-purchaser, lessee or consignee assumes the position of the latter for the purposes of these rules on proprietary security (see the principle laid down in paragraph (1) second sentence). The transferee is bound by the obligations set out in Subsection 1 of Section 2 of this Chapter; the holder of the retention of ownership device may reclaim possession from the transferee after default under IX.–7:301.

The rule in paragraph (3) can be applied on the basis of paragraph (4) to situations of a transfer of assets subject to a retention of ownership device as well; however, there will only be a need for the application of this provision if the retention of ownership device does not enjoy superpriority according to IX.–4:102 paragraph (1).

Section 4: Secured creditor's obligation to give information about secured right

IX.–5:401: Secured creditor's obligation to give information about secured right

(1) The security provider has a right to, and the secured creditor has an obligation to provide on request by the security provider, information concerning the amount of the obligation covered by the security. The security provider can require this information to be given to a third person.

(2) If the security provider is not the debtor of the obligation covered by the security, the security provider's right under the preceding Article depends upon the debtor's approval.

COMMENTS

A. Security provider's right to information about secured right

Subsection 5 of Chapter 3 Section 3 (IX.–3:319 ss.) contains a duty of information owed by the secured creditor specifically for the situation of a registered proprietary security. That duty of information, however, is limited to the question whether specific assets are encumbered by the registered security. The secured creditor's obligation of information under this Article, on the other hand, refers to the amount of the obligation covered by the security (whether a security right or a retention of ownership device, see IX.–1:104 paragraph (1)(a)). For the reasons why these duties of information are dealt with separately, and why they are expressed as duties and not obligations, see Comment A to IX.–3:319 and Comment D to IX.–3:320.

The information required under this Article is of particular interest primarily not for the security provider itself, but for third persons who might consider giving further secured credit to the security provider or who might want to acquire proprietary rights in the assets concerned subject to the existing security devices. The remaining value of these assets can only be determined after deduction of the amount of the obligation secured by a proprietary security in these assets. Therefore, the security provider may demand that the information is given to any third person who might be interested.

B. Participation of the debtor

In general, the debtor will also be entitled as against the secured creditor on the basis of the underlying agreement to information about the outstanding amount of its obligation. If the debtor is identical with the security provider, then these information duties are concurrent; only the duty of information arising from the proprietary security, however, is covered by this Article. For cases in which the debtor is not identical with the security provider, paragraph (2) provides that the duty of information under this provision depends upon the debtor's approval. This rule serves to protect the confidentiality of the debtor's affairs. A security provider would therefore be well advised to seek an advance consent of the debtor in which the latter irrevocably authorises the security provider to demand information from the secured creditor about the amount of the obligation covered by the security.

C. Sanctions

The sanctions for a failure to comply with the obligation of information laid down in this Article and any other consequences of such a statement by the secured creditor need not, and

indeed should not, be spelt out here, but are left to the general rules. One of the most relevant consequences of any information given will be that the secured creditor will be bound by it and will not be able to claim vis-à-vis the recipient of the information that the proprietary security concerned is liable for a greater amount. However, the exact operation of these effects will depend upon the circumstances of the individual case. The secured creditor might have given information that is expressly stated as being subject to developments beyond its control; therefore the harsh consequences applicable for the more formalised duty of information under Subsection 5 of Chapter 3 Section 3 cannot apply to the present constellation.

CHAPTER 6: TERMINATION

IX.–6:101: Instances of termination of proprietary security

(1) A security right is terminated if, and in so far as:

(a) the security provider and secured creditor so agree;

(b) the secured creditor waives the security right, such a waiver being presumed where the secured creditor returns possession of the encumbered asset to the security provider;

(c) the encumbered asset ceases to exist;

(d) ownership of the encumbered asset is acquired by the secured creditor;

(e) ownership in the encumbered asset is acquired by a third person free from the security right; or

(f) any other provision so provides or this consequence is implied, such as where the debtor and creditor of the secured right become identical, especially by inheritance or merger.

(2) A security right is also terminated if the secured right ceases to exist entirely, especially if a right to payment is fully satisfied by payment to the secured creditor, unless the security right with the secured right passes to another person who has made payment to the secured creditor;

(3) Paragraph (1) Sub-paragraphs (a) to (c), (e) and (f) and paragraph (2) apply with appropriate adaptations to the termination of a retention of ownership device. A retention of ownership device is also terminated if the rights of the buyer, hire-purchaser, lessee or consignee in or relating to the supplied assets under the contract of sale, hire-purchase, financial leasing or consignment cease to exist.

COMMENTS

A. General

Termination of a security right is treated before the consequences of default (Chapter 7), since in reality it is the most frequent cause for bringing a security to an end. Apart from satisfaction of the secured right, voluntary acts by one or both of the parties aiming at, or involving, the extinction of the security right are in practice the most frequent examples. However, termination may also be the consequence of legal events (cf. IX.–6:101 paragraph (1) sub-paragraphs (d), to (f)).

B. Meaning of termination

Termination of a security right means its complete extinction. Not only are its effects vis-à-vis third persons extinguished, but also its effects between the parties are brought to an end, *i.e.* the secured creditor is no longer entitled against the security provider to possession of assets formerly subject to a possessory security right and may not bring execution proceedings in the event of default. Further details of the consequences of termination in respect of proprietary security are spelt out in IX.–6:104.

The mere loss of effectiveness against third parties does not in general mean that the security right is terminated. Just as there can be a creation of a security right without the fulfilment of the requirements for effectiveness against third persons under Chapter 3, so can a security

right cease to be effective against third persons without being terminated. This rule is, however, subject to a slight qualification dealt with in paragraph (1)(b) second half-sentence.

C. Instances of termination of a security right

Paragraphs (1) and (2) enumerate seven specific instances of termination. This enumeration is exhaustive; however, paragraph (1)(f) is deliberately formulated in open terms in order to allow the termination of a security right as an implied consequence of other provisions (see (f) below).

In cases covered by sub-paragraphs (a) to (f) of paragraph (1) termination of the security right may be either complete or merely partial, as is indicated in the main sentence. It depends on the individual circumstances in each of these cases whether complete or merely partial termination is intended and, in the latter case, which part or proportion of the security is to be terminated.

(a) Agreement by secured creditor and security provider – paragraph (1)(a). Paragraph (1)(a) provides as one instance of the termination of a security right an agreement by the secured creditor and the security provider to this effect. A security right is created by agreement and it may be terminated by agreement. No additional requirements are necessary for the termination by agreement other than that the secured creditor and the security provider validly agree to this effect. In particular, there is no need for a transfer of possession of the encumbered asset (the secured creditor may, however, be obliged to retransfer possession as a consequence of the termination, see IX.–6:104 paragraph (2)).

(b) Waiver by the secured creditor – paragraph (1)(b). Following the traditional position concerning the termination of a limited proprietary right, paragraph (1)(b) provides for the possibility of a unilateral waiver of the security right by the secured creditor. Such a waiver of a security right may be express or implied; only the latter case requires brief explanation. An implied waiver is not easily to be assumed, since that would run counter to the interests of the secured creditor. However, the circumstances may be so obvious as to allow an unambiguous conclusion. One example is if, in the case of a possessory security, the secured creditor returns the encumbered asset to the security provider. Under such circumstances, a waiver by the secured creditor can be presumed and the latter is under a heavy burden to discharge this presumption by showing that there was no intention to waive the security right. At any rate, the effectiveness of that possessory security right is terminated by return of possession to the security provider.

(c) Encumbered asset no longer in existence – paragraph (1)(c). Since there can be no creation of a security right unless the asset to be encumbered is in existence (see IX.–2:102 sub-paragraph (a)), it is self-explanatory that a security right is terminated if the encumbered asset is no longer in existence. That an encumbered asset is no longer in existence may be due to reasons of fact (*e.g.* an encumbered car is destroyed in an accident) or reasons of law (*e.g.* the contract from which an encumbered right to payment arises is avoided). Even if the original collateral no longer exists, however, the secured creditor's rights may not be entirely lost if the security right extends to proceeds or other assets replacing the original collateral, see IX.–2:306 ss.

(d) Secured creditor acquires ownership of encumbered asset – paragraph (1) (d). Paragraph (1)(d) provides that the security right is terminated if and in so far as the secured creditor acquires ownership of the encumbered asset. At least for proprietary security in movables, there does not appear to be a point in distinguishing between a security right and ownership in the same asset held by the same person. Such an acquisition of ownership of the encumbered asset may occur in two sets of circumstances. First, the secured creditor may have purchased the asset from the security provider who is the owner of the encumbered asset; second, the secured creditor may have exercised an exceptional possibility for an appropriation of the collateral.

A similar constellation is covered by paragraph (1)(f). While under paragraph (1)(d), the secured creditor and the owner of the encumbered asset are identical, paragraph (1)(f) covers the subsequent identity of the creditor and the debtor of the secured right due to a later event, such as succession or merger.

(e) Acquisition of ownership by third person free from security right – paragraph (1)(e). A security right may be terminated by an acquisition of ownership of the encumbered asset by a third person free from a security. This may occur in various circumstances. First, the person transferring ownership in the encumbered asset may have been authorised by the secured creditor to dispose of the asset free from the security right. Even in the absence of an agreement, the security provider has such an authority to dispose of encumbered *inventory* free of any security right (see IX.–5:204). Second, the person acquiring ownership in the encumbered asset may be able to rely on the principles of good faith acquisition. A detailed rule for such a good faith acquisition of ownership free from a security right is contained in IX.–6:102.

(f) Other instances of termination – paragraph (1)(f). Paragraph (1)(f) reserves other provisions which may expressly provide for, or may have the implied effect of, a termination of a proprietary security right. One example is expressly mentioned – where debtor and creditor of the secured right become identical, especially by inheritance or merger. This corresponds to the idea of merger of obligations (III.–6:201).

(g) Secured right no longer in existence – paragraph (2). Proprietary security rights under the rules of this Book are accessory, or dependent, security rights. The existence of a secured right is necessary for the creation of these security rights, and if the secured right no longer exists, the security right is terminated.

However, paragraph (2) contains an important exception from the general scheme of paragraph (1) which explains why this instance of termination is dealt with separately. Paragraph (2) proceeds from the generally accepted rule that a partial extinction of the secured right, *e.g.* by part payment to the secured creditor, *per se* does not extinguish a corresponding portion of the security right; rather, the latter remains fully effective. Of course, the parties may agree otherwise (such an agreement on a partial termination as consequence of part payment would fall under paragraph (1)(a)). Concerning the specific – and important – example of payment of the secured right, paragraph (2) clarifies that there is no termination of the security right if a person other than the debtor has made payment to the creditor, so that the security together with the secured right passes to the payer (for payment by a third party security provider see IX.–6:106 read with IV.G.–2:113: other security rights pass to the third party security provider).

C. Instances of termination of a retention of ownership device

For retention of ownership devices, most of the instances of termination contained in paragraphs (1) and (2) are applicable as well; therefore paragraph (3) sentence 1 contains a broad reference to these provisions. The only exception is paragraph (1)(d). Since the holder of a retention of ownership device is still the owner of the supplied assets, this provision cannot apply to retention of ownership devices. Instead, it is the extinction of the rights of the buyer, hire-purchaser, lessee or consignee in or relating to the supplied assets under the contract of sale, hire-purchase, financial leasing or consignment which constitutes an additional instance of termination of a retention of ownership device (paragraph (3) sentence 2). Partly, this covers situations in which, *e.g.* by termination of the underlying contractual relationship, the right to payment of the holder of a retention of ownership device is also brought to an end, so that this situation resembles paragraph (2). If only the rights of the buyer, hire-purchaser, lessee or consignee cease to exist (*e.g.* on the basis of a waiver), the retained ownership also no longer fulfils a security function since the supplier can reclaim the assets regardless of whether the rights to payment are fulfilled or not. It should be pointed out that the termination of a retention of ownership device does not necessarily have the consequence that the buyer, hire-purchaser, lessee or consignee becomes the owner of the supplied assets, for details see IX.–6:104 paragraph (5) sentence 2.

IX.–6:102: Loss of proprietary security due to good faith acquisition of ownership

(1) Whether a security right is lost due to good faith acquisition of ownership of the encumbered asset by a third person free from a security right is determined by VIII.–3:102 (Good faith acquisition of ownership free of limited proprietary rights).

(2) For the purposes of VIII.–3:102 (Good faith acquisition of ownership free of limited proprietary rights) paragraph (1)(d) sentence 1, a transferee is regarded as knowing that the transferor has no right or authority to transfer ownership free from the security right if this right is registered under Chapter 3, Section 3 unless:

(a) the transferor acts in the ordinary course of its business; or

(b) the entry is filed against a security provider different from the transferor.

(3) Whether a retention of ownership device is lost due to good faith acquisition of ownership of the supplied asset by a third person is determined by VIII.–3:101 (Good faith acquisition through a person without right or authority to transfer ownership). Paragraph (2) above applies with appropriate adaptations.

COMMENTS

A. General

A security right and a retention of ownership device may be lost if another person acquires ownership of the collateral free of earlier security devices. Such an acquisition of the assets concerned free of any existing security rights and retention of ownership devices may occur on the basis of the principle of good faith acquisition.

Book VIII contains in its Chapter 3 two provisions on the good faith acquisition of ownership. While VIII.–3:101 deals with the good faith acquisition of ownership through a person not entitled to transfer ownership, *i.e.* typically the good faith acquisition from a non-owner, VIII.–3:102 covers the good faith acquisition of ownership free of limited proprietary rights, *i.e.* situations in which the transferor transfers ownership in its assets in disregard of earlier limited proprietary rights.

A security right under this Book as defined in IX.–1:102 paragraph (1) is a prime example of such a limited proprietary right; the acquisition of ownership by the acquirer free of an earlier security right is therefore governed by VIII.–3:102, to which paragraph (1) of the present Article refers.

In the case of a retention of ownership device, however, the buyer, hire-purchaser, consignee or lessee (cf. IX.–1:103 paragraph (2)) is according to the traditional understanding of this legal instrument regarded as a non-owner. The acquisition of ownership by a third party on the basis of a good faith acquisition in disregard of the rights of the holder of the retention of ownership device is therefore to be dealt with by VIII.–3:101 (see the present Article paragraph (3) sentence 1). Apart from the fact that different provisions of Book VIII are applicable, however, the legal issues to be dealt with in the situations of security rights on the one hand and retention of ownership devices on the other hand are largely identical. Therefore, paragraph (3) sentence 2 of this Article provides that paragraph (2) – which covers the loss of security rights due to a good faith acquisition of ownership – is applicable to cases of a loss of retention of ownership device as well. In the following Comments both cases can be dealt with together.

B. Registration and good faith acquisition in general

While the requirements and the scope of a good faith acquisition of ownership in general are outside the scope of this Book, the effects of a registration in the European register of security rights (Chapter 3, Section 3) on a possible good faith acquisition are to be dealt with here. A good faith acquisition cannot take place where the acquirer knows that the transferor had no right or authority to transfer proprietary rights in the assets concerned free of the earlier rights. The same applies where the acquirer could reasonably be expected to have notice of that lack of right or authority by the transferor (see VIII.–3:102 paragraph (1)(d) sentence 1 (security rights) and VIII.–3:101 paragraph (1)(d) sentence 1 (retention of ownership devices)).

As a general rule, it is especially the fact that a security device is registered which gives publicity to this security right or retention of ownership device and on the basis of which any acquirer could be expected to know that the transferor has no right or authority to transfer ownership free from the security right. In order to avoid disputes concerning the effect of a registration and whether it actually would be reasonable under the concrete circumstances of the case to expect the acquirer to know of the transferor's lack of right or authority, paragraph (2) applies a legal fiction. Subject to exceptions (see Comments C to E), any acquirer is regarded as knowing that the transferor has no right or authority to transfer ownership free from a security right or retention of ownership device if this right is registered under Chapter 3 Section 3. The same legal technique of a legal fiction which excludes any attempt of the other party to show that it did not know and could not be expected to know of the transferor's lack of right or authority is also applied in IX.–2: (Good faith acquisition of security right) paragraph (2) and IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset) paragraph (2).

C. Registration and good faith acquisition of ownership in the ordinary course of business – paragraph (2)(a)

While creditors who want to acquire a proprietary security right in the asset concerned are subject to stricter rules as to whether they can be expected to search the register for the existence of earlier competing security rights and retention of ownership devices (or whether they can be regarded as having – constructive – knowledge of such security devices), the rules must be more lenient in relation to persons who want to acquire ownership in the assets concerned. Transactions conducted in the ordinary course of the transferor's business should be protected; it would constitute a major obstacle for commerce in general if parties could no longer have confidence in the possession of the goods by the transferor and if it were necessary to investigate whether any registered security rights and retention of ownership devices existed in these assets.

Therefore, paragraph (2)(a) expressly provides that the mere fact that there is an entry in the European register of security rights covering the security rights or retention of ownership devices in the assets concerned does not have the effect that a person who wants to acquire ownership in these assets is to be regarded as knowing that the transferor does not have a right or authority to transfer ownership free of the earlier encumbrance, provided that the transferor acts in the ordinary course of its business.

If, on the other hand, the transferor acted outside the ordinary course of its business, the exception contained in paragraph (2)(a) does not apply and the registration of the security

right gives rise to the legal fiction that the acquirer can be regarded as knowing that the transferor does not have a right or authority to transfer ownership free of the earlier encumbrance, which excludes a possible good faith acquisition. The same result applies even if the transferor acted within the ordinary course of its business, provided that the acquirer positively knew or could be expected to know from any other source that the transferor lacked this right or authority. The legal fiction contained in paragraph (2) does not apply, but the acquirer cannot show that it is in good faith as required by VIII.–3:102 paragraph (1)(d) sentence 1 or VIII.–3:101 paragraph (1)(d) sentence 1.

A specific situation where good faith acquisition may be excluded even where the transferor acted in the ordinary course of its business is regulated in IX.–2:108 (Good faith acquisition of security right) paragraph (2): where the acquirer had been informed by the registered secured creditor that the asset concerned is subject to a security device, the acquirer cannot claim to be in good faith.

D. Registration against person different from transferor – paragraph (2)(b)

Another limitation of the effects of a registration in the European register of security rights is laid down in paragraph (2)(b). A person who wants to acquire a proprietary right in an asset is not required to search the register for entries concerning security rights or retention of ownership devices in that asset that are not filed against the transferor but against the person from whom the transferor had acquired the asset in question. In such situations the transferee is not regarded as knowing that the transferor has no right or authority to transfer ownership in disregard of the earlier right; thus, a good faith acquisition is possible even though the security right or retention of ownership device is registered. See Comment B (b) and (c) on IX.–3:330.

E. Other exceptions to the rule in paragraph (2)

As in the case of IX.–2:108 (Good faith acquisition of security right) and IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset), the rule that the registration of a security right or retention of ownership device gives rise to (constructive) knowledge of the transferor's lack of right or authority is subject to some exceptions based upon other rules, which, however, have only a very limited scope of application. One exception is expressly laid down in IX.–3:322 paragraph (1). Where the holder of a security right had incorrectly informed the acquirer of a proprietary right in the encumbered asset that this asset is not subject to an encumbrance, the acquirer may acquire the rights free from this encumbrance even if it was registered. A second exception may follow from the general principle of good faith and fair dealing, see for the operation of this principle in the present context Comment B on IX.–2:109 (Good faith acquisition of security right in encumbered corporeal asset).

F. Systems of registration or notation other than the European register of security rights

The principles explained in the preceding paragraphs do not necessarily apply, however, to the effects of registrations or notations of security devices in systems of registration or notation other than the European register of security rights. IX.–3:301 paragraph (2) and IX.–3:312 allow the continued operation of such systems even if these specialist systems are established under the national law of a member state. The more specialised these other registers or systems of notation are, the more likely it is that it would be more in line with the

objectives of the relevant (national) legislation to impute constructive knowledge on the basis of a registration or notation in these systems even if the assets concerned were acquired in the ordinary course of the transferor’s business.

IX.–6:103: Prescription of the secured right

A security right can be enforced even if the secured right is prescribed and up to two years after the debtor of the secured right has invoked this prescription as against its creditor.

COMMENTS

This provision deals with a very controversial issue which must first be clarified.

A. Effect of prescription in general

The periods of prescription and other details are laid down by III.–7:201 ss. Relevant in the present context, however, are only the effects of the prescription of a secured right on the possibility to enforce a security right.

According to III.–7:501, after the expiry of the period of prescription the debtor is entitled to refuse performance. However, any performance made by the debtor after expiry of the period may not be reclaimed merely because the period of prescription had expired. These two rules demonstrate that the expiry of the period of prescription of a right to performance does not extinguish the prescribed right, but merely affords the debtor the right to refuse performance of the corresponding obligation.

B. Effect of prescription on proprietary security

Countries in Europe are divided on the issue of the effect produced if the debtor has invoked prescription of the secured right. Most countries appear to negate any effect on the secured creditor's right to assert its security. But several other countries, especially the Romanic countries, allow the security provider to invoke prescription if the debtor of the secured right to payment had successfully invoked prescription.

The main reason relied upon for this latter solution is the idea that the proprietary security is an accessory to the secured right and therefore shares the fate of the latter (For personal security, cf. references in *Drobnig*, Personal Security 214, 222 f.).

By contrast, the opposite opinion of the majority of European countries regards proprietary security as a strengthening confirmation of the secured right which, since typically granted by the debtor itself, prevails over the accessory nature of the security. The latter reason is more convincing than the more theoretical argument based on accessority.

Nevertheless, it appears desirable to accommodate to some degree also the other view. Therefore, the last part of the present Article sets a time limit of two years after the debtor of the secured right had invoked the expiry of the period of prescription. Admittedly, this time limitation is arbitrary. However, it leaves enough time for the secured creditor to determine its future course of action after the debtor had raised this defence.

IX.–6:104: Consequences of termination

(1) The full or partial termination of a security right implies the corresponding termination of the encumbrance of the asset concerned.

(2) If and in so far as a security right is terminated, the secured creditor is no longer entitled to possession or control of the asset that was encumbered as against its owner. For the right to deletion of an entry in the European register of proprietary security, IX.–3:315 ((Security provider's right to have entry deleted or amended) applies.

(3) The secured creditor is obliged to inform any third person holding the encumbered assets of the removal of the encumbrance and, if the third person holds the assets for the secured creditor's account, to ask the security provider for instructions.

(4) Where in the case of an encumbered right to payment notice of the encumbrance had been given to the third party debtor, the secured creditor is obliged to notify the debtor of the removal of the encumbrance.

(5) If and in so far as a retention of ownership device is terminated, the seller's, supplier's or lessor's ownership of the supplied assets is no longer subject to the rules of this Book. An acquisition of ownership of the supplied assets by the buyer, hire-purchaser, lessee or consignee or the latter's right to use the supplied assets is subject to an agreement of the parties. For the right to deletion of an entry in the European register of proprietary security, paragraph (2) second sentence applies.

COMMENTS

A. Security right automatically extinguished

Termination of a security right implies that this proprietary right as an encumbrance of the collateral is automatically extinguished (paragraph (1)). While this is an obvious consequence for typical security rights such as the pledge, national legal systems sometimes do not provide for an automatic extinction of proprietary security but oblige the secured creditor to re-transfer its proprietary position in the assets serving as collateral to the security provider instead. These rules do not follow this approach. There does not appear to be a justification to provide for an automatic extinction of the security right as a proprietary right in only some cases, while in other cases the security provider would merely have a (personal) entitlement as against the secured creditor to have the encumbrance released or removed.

Obviously, this distinction is irrelevant if the encumbered assets are lost, or where the latter had been acquired by the secured creditor or a third party (IX.–6:101 paragraph (1) (c) to (e)); in these cases a reversal of the encumbrance by an act of the secured creditor is even under the traditional position outlined in the preceding paragraph not necessary nor even possible. Whether there is any liability as between the secured creditor and the security provider in such a situation (for the loss of the former's security right or the latter's ownership) depends upon the circumstances of the case, *i.e.* primarily on the question whether one party is in breach of any of the obligations under Chapter 5.

It should be pointed out that this Article provides for the consequences of a "full or partial" termination of a security right (paragraph (1)) or provides such consequences "if and in so far" as the security right is terminated (paragraph (2)). This is due to the fact that IX.–6:101 paragraph (1) allows for some instances of termination, *e.g.* waiver of the security right, a partial termination of a security right if these events relate to a part of the security right only. Termination of the security right by payment, however, can be complete only, *i.e.* only after

full payment of the secured right (see IX.–6:101 paragraph (2)). Therefore, the consequences of the present Article do not apply in cases of a merely partial payment towards satisfaction of the secured right.

B. Possession, control and registration

While the security right itself is terminated automatically, the secured creditor may in fact still exercise possession or control of the encumbered assets or there may be an entry in the European register of proprietary security covering this security right.

Paragraph (2) sentence 1 provides that the secured creditor is after termination no longer entitled to possession of the formerly encumbered assets. Obviously, if the secured creditor has a right to possession on any other basis, it can still reject any claim for repossession. If this is not the case, the secured creditor – if holding possession – must return the formerly encumbered assets to the security provider as the owner of these assets. Where fungible encumbered assets held by the secured creditor had been commingled by the secured creditor (see IX.–2:309), the secured creditor's duty to return possession of the encumbered assets under paragraph (1) refers to the security provider's undivided share of the mixture or bulk that had resulted from the commingling.

The same principles apply to control exercised by the secured creditor. The secured creditor is no longer entitled to the exercise of control over the formerly encumbered financial assets as against their owner. Since control is typically exercised through a third person holding the encumbered assets, the secured creditor has to instruct the third person to lift the control. Details of the secured creditor's obligation upon termination of the security right are spelt out in paragraph (3) (see Comment C).

The secured creditor's obligation to delete an entry in the European register of proprietary security if this entry does not correspond (or no longer corresponds) to an existing security right, follows from the general rule in IX.–3:315 to which paragraph (2) sentence 2 of the present Article refers.

C. Assets held by third person

In many cases, encumbered assets are not held by the secured creditor or the security provider, but by a third person. A typical example is a control arrangement according to IX.–3:204. For this case, paragraph (3) provides that the secured creditor must inform the bank holding the encumbered financial assets that it waives its control and that the security provider's original powers are to be re-established. The security provider is to be allowed to dispose of its "blocked" account (IX.–3:204 paragraph (2)(a)). In the case of a special account according to IX.–3:204 paragraph (2)(b), the secured creditor will have to ask the security provider for instructions.

D. Reversal of notice in case of notification of account debtor

A specific issue concerning the removal of an encumbrance is regulated in paragraph (4). Where a right to payment is encumbered, notice of the security right can be given to the third party debtor, although this is not necessary for the security right to be created or to become effective. Nevertheless, in practice notification is frequent. If this has occurred, the secured creditor is obliged to inform the third party debtor about the reversal of the assignment.

Otherwise the third party debtor will be – to say the least – in doubt as to the person to whom it can validly perform.

E. Retention of ownership devices

Paragraph (5) contains separate rules for the consequences of a termination of a retention of ownership device.

As for a security right, termination means that there is no longer a proprietary right fulfilling a security function. However, since there has not necessarily been between the parties an agreement on the transfer of ownership (such an agreement is notably absent in many cases of financial leasing, where the acquisition of ownership by the lessee, if envisaged at all, is often subject to the exercise of an option to this effect by the lessee) it would certainly go too far to provide that in every case of a termination of a retention of ownership device ownership of the supplied assets should automatically pass from the seller, supplier or lessor to the buyer, hire-purchaser, lessee or consignee. Instead, it is preferable to follow a more differentiated approach. A termination of a retention of ownership device generally has the effect that the secured creditor's rights, *i.e.* the retained ownership, if not affected by the events leading to the termination, are no longer subject to the rules of this Book (paragraph (5) sentence 1). If, *e.g.*, the secured right is fully paid, the ownership no longer fulfils a security purpose and in the absence of a duty of registration for leases in general (apart from finance leases) there does not appear to be any longer a basis to demand compliance with any publicity requirements under this Book as a condition for the effectiveness of this proprietary right against third persons.

Whether, however, the buyer, hire-purchaser, lessee or consignee is entitled to use the supplied assets after the event leading to the termination or whether these persons may even acquire ownership in the supplied assets depends entirely upon the content of the underlying agreement of the parties and upon the event leading to the termination of the security right in question.

This position, which is expressed in paragraph (5) sentence 2, can be explained by a closer look at the possible acquisition of ownership as a consequence of payment of the secured right. It depends upon the arrangements between the parties, whether a buyer or a hire-purchaser will automatically acquire ownership of the supplied assets. This will occur if the parties had agreed upon a transfer of ownership under the suspensive condition of full payment of the purchase price; if this condition is fulfilled, the buyer will automatically become owner. The same result will be achieved under a hire-purchase since full payment of the hire rates opens the way to the purchase, i.e. the transfer of ownership. If these clauses for an automatic transfer of ownership upon full payment of the purchase price are missing, the seller, supplier or lessor (usually) is obliged to transfer ownership to the buyer, hire-purchaser, lessee or consignee. In the case of non-payment, the proprietary position of the seller, supplier or lessor will remain unchanged.

The arrangements of the parties also cover the question whether after the event leading to the termination the former holder of the retention of ownership device is entitled to possession of the supplied assets; therefore there is no equivalent to paragraph (2) sentence 1 in paragraph (5). Paragraph (5) sentence 2 contains the same reference to IX.–3:315 as paragraph (2) sentence 2.

IX.–6:105: Secured creditor liable to account for proceeds

Upon termination of the security right, the secured creditor is liable to account for any proceeds from the encumbered assets, whether or not it has received, used or consumed them, and to transfer them to the security provider.

COMMENTS

This and the following article deal with indirect consequences of the termination of a proprietary security. Both provisions are concerned with such consequences outside the area of enforcement after default. The rules on the distribution of value realised from the enforcement of a security right are to be found in IX.–7:215.

The secured creditor's liability to account for and to return proceeds according to the present Article presupposes, of course, that the secured creditor had obtained proceeds of the encumbered assets. Primarily this will only have occurred if the secured creditor had been in possession or control of the encumbered assets.

The general conditions for extending a security right into proceeds of the original collateral are fixed by IX.–2:306. In the cases covered by paragraph (1) of this provision, the proceeds practically replace the originally encumbered assets. Although they do not constitute an additional value, the secured creditor is bound to account for them and return them, since they have replaced the original collateral.

The same is true for proceeds to which the security right had been extended by party agreement according to IX.–2:306 paragraph (2) and for civil and natural fruits (paragraph (3)).

One exception to this rule is spelt out in IX.–5:207 for proceeds of financial assets held by a bank as secured creditor; in general, the secured creditor is not obliged to account for any proceeds, if and in so far as these proceeds have been used for the satisfaction of the secured right, whether by way of appropriation or set-off.

IX.–6:106: Recourse of third party security provider

(1) If a security provider who is not the debtor of the secured right (a third party security provider), pays the outstanding amount of the obligation covered by the security, IV.G.–2:113 (Security provider's rights after performance), IV.G.–1:106 (Several security providers: internal recourse) and IV.G.–1:107 (Several security providers: recourse against debtor) apply with appropriate adaptations.

(2) A security provider other than the debtor has as against the debtor the same position as a person who has provided dependent personal security.

COMMENTS

This Article deals with a special case. Instead of the debtor, a third party had assumed a proprietary security in favour of the secured creditor; and this third party has satisfied the secured creditor by payment of the outstanding amount of the obligation covered by the security (where satisfaction of the secured creditor is by enforcement into a third party security provider's assets, IX.–7:109 applies).

In such situations, the third party security provider will usually wish to be reimbursed by the debtor. If so, the situation resembles that of a provider of personal security who, on the creditor's demand, has made payment to the creditor. It is appropriate to apply to this case the rule of IV.G.–2:113.

If there are several proprietary security providers and/or personal security providers, the mutual rights and obligations of recourse between these persons among themselves and towards the debtor are governed by IV.G.–1:106 and IV.G.–1:107. Again, the similarity of this situation to personal security justifies the reference to the rules of Book IV.G., the same principle is already contained in IV.G.–1:105 paragraph (2).

Paragraph (2) of the Article contains an additional broad reference to the law of personal security by stating that a third party security provider has as against the debtor the position of a provider of dependent security. In addition to IV.G.–2:113, which is applicable to the third party security provider already on the basis of the reference in IX.–6:106 paragraph (1), this allows the application of rules such as IV.G.–2:111 and IV.G.–2:112, in so far as applicable, as between the debtor and the provider of proprietary security.

CHAPTER 7: DEFAULT AND ENFORCEMENT

Section 1: General rules

IX.–7:101: Secured creditor's rights after default

(1) After an event of default, and provided that any additional conditions agreed by the parties are fulfilled, a secured creditor may exercise the rights under this Chapter.

(2) If a third person listed in IX.–3:101 (Effectiveness as against third persons) paragraph (1) and fulfilling the requirements of that provision is involved, a secured creditor may exercise the rights under this Chapter only if the security right is effective according to the rules of Book IX Chapter 3. If no such third person is involved, it is sufficient that the security right has been validly created. The provisions on priority remain unaffected.

COMMENTS

A. General remarks on Chapter 7

This Chapter is the important final piece of Book IX on proprietary security in movables. The Chapter deals only marginally with default, *i.e.* non-performance of the secured right, which in practice is mostly a right to payment (IX.–7:101). This is a matter of the law of obligations, especially of contract law. The emphasis is on the consequences which are triggered by a non-performance or, as it is customarily called in this field, a default of the debtor of the obligation covered by the security.

Extra-judicial and judicial enforcement. Rules on the substantive aspects of security in movables would be toothless, or would fail to achieve the goal of harmonising proprietary security in movable assets in Europe, if they left enforcement of those rights entirely to the – diverging – procedural laws and rules of the member states. On the other hand, these rules do not intend to cover judicial execution of proprietary security since this is a field essentially reserved to the member states.

Therefore, the rules in this Chapter essentially focus on a small sector of enforcement, namely extra-judicial enforcement. However, quite apart from the formal "jurisdictional" limitations which in the present project demand to be respected, there is also a valid substantive consideration which justifies this limitation. It appears that in many European countries there is an increasing movement seeking an alternative to the traditional method of enforcing security rights because of its delays, costs and often disappointing results.

It is therefore hoped that the rules of this Chapter may not only serve the immediate needs of Book IX, but may also be useful beyond.

Enforcement of security rights and of retention of ownership devices. It is remarkable that for enforcement – as for creation but not for the purposes of Chapters 3 to 6 – the basic difference between security rights and retention of ownership becomes visible and relevant

again. The great majority of the rules on enforcement – even for extra-judicial enforcement – deal with the enforcement of security rights. The reason is obvious. The encumbered assets are owned by the security provider; the rights must be respected, even if – and especially if and because – enforcement involves the loss of the security provider's encumbered asset, fully or at the very least partly.

By contrast, the enforcement of a retention of ownership device is relatively easy. Basically, the secured creditor as owner merely needs to regain possession of the affected assets. Only possession had been transferred to the debtor, *i.e.* the buyer, hire-purchaser, lessee or consignee. These persons have to return only possession of the goods which they had bought, hired or leased – in exchange for those payments which they had made to the owner of the assets which they had obtained with a view to future acquisition. It goes without saying that this mere return of possession of the other party's goods is less complicated than the recovery of assets that are already owned by their present possessors. If the buyer has obtained ownership under the suspensive condition of full payment in a sale under retention of ownership, this conditional ownership is automatically terminated if the seller terminates the buyer/seller relationship.

Mandatory rules. It goes without saying that the rules of this Chapter are mandatory, unless expressly provided otherwise (see IX.–7:102).

Special rules for consumer security providers. The rules of this Chapter also apply to enforcement of a security right against a consumer. There are, however, within this Chapter several exceptions where it is necessary to take into account the special condition of most consumers as debtors or as security providers.

By contrast, any national special rules that may exist for the enforcement of security for micro–credits, as circumscribed by IX.–1:105 paragraph (1), remain unaffected by the provisions of this Chapter.

B. Event of default

Paragraph (1) of the present Article refers to the event of default as the central requirement which triggers the availability of the rights and which is the starting point of the obligations under this Chapter in general. Before an event of default, the secured creditor only holds the collateral as security, but may not actually realise it in order to satisfy the obligations covered by the security right. (One exception to this rule is to be found in IX.–5:208).

The definition of the event of default in IX.–1:201 paragraph (5) refers to elements that are outside the scope of this Book. Primarily, it is the non-performance of the obligation covered by the security (IX.–1:201 paragraph (5)(a)) which is regarded as an event of default; the creation, conditions and maturity of this obligation and other elements of non-performance are subject to the rules applicable for the obligation concerned. Even if there is no non-performance of this obligation, the secured creditor may have agreed with the security provider on additional events or sets of circumstances which are to be regarded as default (IX.–1:201 paragraph (5)(b)), *e.g.* under a cross-default clause (see Comments on IX.–1:201 paragraph (5)).

C. Additional conditions agreed by the parties

While IX.–1:201 paragraph (5)(b) allows the parties to agree on additional events or sets of circumstances which shall be regarded as events of default, paragraph (1) of the present Article refers to *additional conditions* agreed by the parties. In other words, the security provider and the secured creditor may agree on additional requirements which must be fulfilled before the latter may exercise the rights under this Chapter. Examples of such additional conditions are time restrictions (*i.e.* if the rights under this Chapter may only be exercised before or after an agreed time) or a requirement that the secured creditor must have undertaken attempts to obtain satisfaction from the debtor, if the latter is not the security provider (for similar concepts in the context of personal security cf. IV.G.–2:108 and IV.G.–2:106).

D. Exercise of the rights under this Chapter

Paragraph (1) refers to the exercise of the rights under this Chapter in general. In other words, after default, the secured creditor may exercise all the rights of preservation and realisation and similar rights which are provided under this Chapter, whether in the course of judicial enforcement proceedings or without the assistance of a court or other competent authority. A default under a valid and effective security right will not suffice for all of these rules; as to these additional requirements for some of the rights of a secured creditor under this Chapter see the Comments on the relevant Articles.

E. Creation and effectiveness of security right

Paragraph (2) deals with the issue whether it is sufficient that the security right which is sought to be enforced has been validly created according to Chapter 2 (and not been terminated under Chapter 6) or whether a secured creditor may exercise the rights under this Chapter only if the security right is also effective according to Chapter 3. The answer depends upon whether third persons are involved (paragraph (2) sentence 1) or not (paragraph (2) sentence 2).

(a) Third persons involved: effectiveness required. IX.–7:101 paragraph (2) sentence 1 establishes the connection between the requirements for effectiveness against third parties under Chapter 3 and the present Chapter on the secured creditor's rights after default. According to this provision, if any third person listed in IX.–3:101 paragraph (1) is involved, a secured creditor may exercise the rights under this Chapter only if – in addition to having been validly created and not having been terminated – its security right is also effective according to the provisions of Chapter 3.

Third persons listed in IX.–3:101 paragraph (1) are involved in the following situations:

(i) whenever the secured creditor attempts to exercise the rights based upon a security right in an asset in which also other third parties (apart from the security provider itself, see (b) below) have a proprietary right, especially an effective security right (IX.–3:101 paragraph (1)(a));

(ii) where the secured creditor attempts to exercise the rights based upon a security right in an asset if another creditor has already started to bring execution against those

assets and has obtained under the applicable law a position protecting it against a subsequent execution (IX.–3:101 paragraph (1)(b)); and

(iii) where the security provider is insolvent and a formal insolvency proceeding has been opened, so that the enforcement of a security right in the security provider's asset involves the insolvency administrator (IX.–3:101 paragraph (1)(c)).

If one of these third persons is involved and the qualifying facts are present, a secured creditor may not exercise rights as an enforcing secured creditor under this Chapter, unless its security right is effective.

However, even if the enforcing secured creditor's rights are effective, its chances of actually obtaining satisfaction will depend upon its priority position vis-à-vis any other secured creditors holding effective competing security rights (see paragraph (2) sentence 3). This issue must be solved by the criteria established in Chapter 4.

(b) No third persons involved: creation sufficient. If no third persons listed in IX.–3:101 paragraph (2) sentence 2 are involved it is sufficient that the enforcing secured creditor's security right has been validly created and has not already been terminated; it is not necessary that the requirements for effectiveness against third persons under Chapter 3 are fulfilled (IX.–7:101 paragraph (2) sentence 1). As long as no third person is involved, the secured creditor may therefore enforce its security right against the security provider even if this security right is not registered or the encumbered assets are not in the secured creditor's possession or control. Nor is the secured creditor in such situations limited to enforcing the obligation covered by the security right.

Neither is the effectiveness of the enforcing secured creditor's security right required where the only third persons involved are competing secured creditors whose security rights also are not effective. (Such holders of ineffective security rights are not covered by IX.–3:101 paragraph (1)(a)). It has to be pointed out, however, that if both the enforcing secured creditor's and the competing secured creditors' security rights are not effective, there is still the issue of priority between these security rights which is determined according to the order of their creation (see IX.–4:101 paragraph (4)).

IX.–7:102: Mandatory rules

As between the enforcing secured creditor and the security provider, the rules of this Chapter are mandatory, unless otherwise provided.

COMMENTS

This Article expressly spells out the mandatory nature of the rules of this Chapter.

While other Chapters of this Book – in line with the general approach of the DCFR – follow the principle of party autonomy, even though this Book covers matters of property law, the position must be different under this Chapter. In the context of the consequences of default, the different policies underlying the rules of this Chapter (especially the protection of the security provider and the general objective of ensuring the availability of efficient enforcement procedures) require that there is scope for a party agreement between the secured creditor and the security provider only if this is expressly so provided under this Chapter.

Such exceptions are to be found in a number of provisions of this Chapter. Partly, it is the security provider who may waive in an agreement with the secured creditor the protection to which the former would be entitled under the default provisions of this Chapter; partly it is the secured creditor who may agree to additional requirements or forms of enforcement which are more protective for the security provider.

This Article limits the possibility of agreements between the secured creditor and the security provider only; inter-creditor agreements, *i.e.* agreements between several secured creditors, are not prohibited by this Article.

IX.–7:103: Extra-judicial and judicial enforcement

(1) Unless otherwise agreed, the secured creditor may carry out extra-judicial enforcement of the security right.

(2) A security right in an asset of a consumer can only be enforced by a court or other competent authority, unless after default the consumer security provider has agreed to extra-judicial enforcement.

(3) In the case of retention of ownership devices the parties may not agree to exclude extra-judicial enforcement and paragraph (2) does not apply.

(4) Enforcement is to be undertaken by the secured creditor in a commercially reasonable way and as far as possible in cooperation with the security provider and, where applicable, any third person involved.

COMMENTS

A. General

This Article deals with the main alternative with which the parties are confronted if a default occurs under these rules. Enforcement of a security right may either be undertaken by the secured creditor applying for enforcement by a court or other competent authority (judicial enforcement) or by the secured creditor taking enforcement into its own hands (extra-judicial enforcement). While the former method of enforcement is traditionally more accepted than the latter (mostly due to its perceived greater degree of protection of the security provider), it is extra-judicial enforcement which can be expected to operate in a faster and less costly way. For this reason it is the main rule under these Principles, unless consumer security providers are involved.

B. Extra-judicial enforcement

While traditionally extra-judicial enforcement tended to be allowed under national law only if specifically agreed by the parties, paragraph (1) of this Article allows enforcement proceedings to be undertaken by the secured creditor without any need for an agreement to this effect (unless the security provider is a consumer, see paragraph (2)). There is no right of extra-judicial enforcement, if the parties have agreed otherwise. The agreement can be made from the very beginning, *e.g.* in the contract for proprietary security; or it can be made later, before enforcement is commenced or even thereafter.

The policy behind the main rule is not adopted primarily to confer an advantage specifically upon the secured creditor. Since it is in the end the security provider who will – as against the secured creditor – have to bear the costs of enforcement proceedings, the security provider also has an interest in the reduction of the costs of realising the security right in the encumbered assets which is to be expected by allowing the secured creditor to undertake the enforcement itself.

At the same time, safeguards must exist which ensure that the gains in efficiency to be derived from extra-judicial enforcement do not come at the expense of a lack of protection of the security provider and other interested persons. Specific provisions ensure, *e.g.*, that the security provider's assets are not sold at an undervalue or without the security provider and other interested parties being informed in due time. While these specific provisions are to be found in Subsections 1 and 2 of Section 2, paragraph (4) of the present Article contains the

general principles that the secured creditor has to undertake enforcement as far as possible in cooperation with the security provider and in a commercially reasonable way. Extra-judicial enforcement may not be abused in order to harass the security provider; the security provider may not be burdened by the enforcement more than is necessary for the satisfaction of the secured creditor's secured rights; economic waste of the collateral must be avoided. The general duty of cooperation also extends to those cases where a third party is involved, especially where a right to payment is to be enforced which the security provider has against a third person.

Finally, the fact that the secured creditor may enforce its security right extra-judicially does not deprive the secured creditor of the possibility of invoking the assistance of a court or other competent authority under the following Article. It is unnecessary to say this expressly here as it follows in any event. The precise content of this assistance and the relevant procedural provisions are to be found in the applicable national law, *i.e.* the law of the member state where assistance of the court or other competent authority is sought.

C. Judicial enforcement

While it is always possible for the secured creditor to seek judicial enforcement, *i.e.* an enforcement of the security right through the courts or other competent authorities, paragraph (1) implies that the *parties* may agree on the exclusion of extra-judicial enforcement. If the security provider and the secured creditor have so agreed, enforcement of a security right may only be undertaken by a court or other competent authority. For some indications with respect to this form of enforcement, see Subsection 3 of Section 2.

D. Consumer security providers

For consumer security providers, the relationship between extra-judicial enforcement and judicial enforcement, which has been described in Comments B and C for security providers in general, is different. Extra-judicial enforcement of security rights against the assets of a consumer security provider is possible only if there is an agreement to this effect between the secured creditor and the consumer security provider; moreover, this agreement is effective only if concluded after default (paragraph (2).

The policy behind this preference for judicial enforcement against consumer security providers is the need for the protection of the latter. Typically being less experienced in matters of finance and security, consumer security providers are better protected if enforcement proceedings are in the hands of a court or other competent authority. On the other hand, non-judicial enforcement is less formal and therefore less expensive. This may be a reason even for a consumer to accept this procedure, at least in simple cases.

E. Retention of ownership devices

While the rules in paragraph (4) apply to retention of ownership devices as well (see the general rule in IX.–1:104 paragraph (1)(d)), an exception must be made for the opening words of paragraph (1) (Unless otherwise agreed") and paragraph (2). According to Section 3, the holder of a retention of ownership device does not have to realise the collateral by sale or any other method; instead it is sufficient that the holder of a retention of ownership device terminates the legal relationship resulting from the underlying contract of sale, hire-purchase, financial leasing or consignment with security purpose and takes back possession of the supplied goods. The holder of the retention of ownership device may, however, ask for the

assistance of the court in obtaining possession of the supplied goods (see Comment B above and IX.–7:302 combined with IX.–7:203).

IX.–7:104: Right to seek court assistance and damages

Any party or third person whose rights are violated by enforcement measures or by resistance to justified enforcement measures may:

(a) call upon a competent court or other authority, which must decide expeditiously, to order the party responsible to act in accordance with the provisions of this Chapter; and
(b) claim damages from the party responsible.

COMMENTS

A. Violation of rights by enforcement measures or resistance

This Article contains a general statement of the remedies available if there is a violation of a person's rights by either unlawful enforcement measures or by a resistance to justified enforcement measures. Enforcement measures (or the resistance to them) may occur both in the context of judicial as well as extra-judicial enforcement proceedings. Concerning the latter, there is, however, also a more specific provision on the right to ask for the intervention of a court or other authority in IX.–7:203.

Protection under the present Article may be claimed by the secured creditor who may be affected by resistance to justified enforcement measures. Protection may also be invoked by the security provider and by any third person, *i.e.* other persons whose legally protected interests are affected by enforcement measures.

B. Right to call upon a competent court or other authority

Sub-paragraph (a) makes it clear that a person whose rights are violated by either unlawful enforcement measures or by resistance to justified enforcement measures always must have the right to call upon a competent court or other authority, in both judicial and extra-judicial enforcement, to order the party responsible to act in accordance with the provisions of this Chapter. The secured creditor may be ordered to stop its enforcement measures and the security provider or other holder of the encumbered asset may be ordered to stop its resistance.

Which court or other authority is competent to decide on the application of the person seeking assistance has to be determined by national law; the same applies to the rules of procedure of this court or other authority. The only slight intrusion into this field of procedural law provided by this Article is that the party whose rights are violated should have the possibility to make use of procedures which allow an expeditious decision.

C. Right to damages

The person whose rights are violated by either unlawful enforcement measures or by resistance to justified enforcement measures is under IX.–7:104 sub-paragraph (b) also entitled to claim damages from the party responsible, *i.e.* from the security provider or from the secured creditor, as the case may be. It should be noted that both parties are not only responsible for their own actions but may also be regarded as responsible for the actions of third persons acting on their behalf in relation to enforcement proceedings. The legal basis for the right to payment of damages is VI.–2:206 (Loss upon infringement of property or lawful possession); details are governed by the rules in Book VI.

IX.–7:105: Predefault agreement on appropriation of encumbered assets

(1) Any agreement concluded before default providing for the transfer of ownership of the encumbered assets to the secured creditor after default, or having this effect, is void.

(2) Paragraph (1) does not apply:

(a) if the encumbered asset is a fungible asset that is traded on a recognised market with published prices; or

(b) if the parties agree in advance on some other method which allows a ready determination of a reasonable market price.

(3) Paragraph (2)(b) does not apply to a consumer security provider.

(4) Where appropriation is allowed, the secured creditor is entitled to appropriate encumbered assets only for the value of their recognised or agreed market price at the date of appropriation. The security provider is entitled to any surplus over the obligations covered by the security right. The debtor remains liable for any deficit.

(5) This Article does not apply to retention of ownership devices.

COMMENTS

A. No predefault agreement on appropriation after default

The first paragraph of this Article contains the time-honoured and generally accepted principle that no agreement is effective that is concluded between the secured creditor and the security provider before default and that is intended to transfer (or would have the effect of transferring) ownership of the encumbered assets to the secured creditor, thereby depriving the security provider of its assets.

While paragraph (1) deals with such agreements on appropriation that would be effective after default, this issue is covered in relation to agreements that would be effective before default by IX.–5:101 paragraph (2). The policy behind both rules is identical; therefore, reference can be made to Comment B on IX.–5:101.

After default, the encumbered assets may be appropriated by the secured creditor under the conditions set out in IX.–7:216.

B. Exceptions – paragraph (2)

As in IX.–5:101 paragraph (2), the prohibition against agreements on appropriation concluded before default is also under the present Article subject to some exceptions that are expressly (and exhaustively) enumerated in paragraph (2).

First, the security provider may agree with the secured creditor before default on an appropriation that is to take effect after default if the encumbered asset is a fungible asset that is traded on a recognised market with published prices (paragraph (2)(a)). The policy behind this rule is that in such cases, *e.g.*, where the encumbered assets are shares that are publicly traded on a stock exchange, there is less risk that the encumbered assets are appropriated by the secured creditor at an undervalue. If the secured creditor – in exchange for the acquisition of ownership of the encumbered assets – credits the security provider with the published market price of the collateral as of the date at which appropriation is to take effect (or accepts ownership of the encumbered assets in full or partial satisfaction of the obligation covered by

the security, depending on the published market price of the encumbered assets), no disadvantage is caused to the security provider.

The second situation where a pre-default agreement on the appropriation of the encumbered assets after default is allowed is where the parties agree in advance on any other method which allows a ready determination of a reasonable market price (paragraph (2)(b)). Again, the decisive element of this exception is that – even though there might be no published market price for the encumbered asset – there is another possibility which allows the determination of the value of the collateral so that the security provider is protected against the loss of its assets at an undervalue. One example of such a situation could be where the secured creditor and the security provider agree that for an encumbered used car the prices listed in a specific used car guide will be decisive.

C. Consumer security providers

Consumer security providers are only partly exempted from the possibility of agreeing on the appropriation of the encumbered assets. If the encumbered asset is a fungible asset that is traded on a recognised market with published prices, a consumer security provider may agree with the secured creditor before default on an appropriation of the encumbered assets that is to take effect after default. In substance, this position resembles the situation concerning appropriation that is to take effect before default. A bank holding as secured creditor the security provider's encumbered financial assets, *i.e.* the typical example of fungible assets traded on a recognised market with published prices, may appropriate these assets before default even if the security provider is a consumer (no consumer protection exception is included in IX.–5:207).

The broader exception to the prohibition of agreements on appropriation of the encumbered assets under paragraph (2)(b) of the present Article, however, does not apply to consumer security providers (see paragraph (3)). Since consumer security providers typically are not experienced in financial matters, they will often be unable to make an informed decision concerning any method for the determination of the value of the encumbered assets.

D. Valuation of appropriated asset

An important aspect of appropriation is the valuation of the appropriated asset. Only a valuation according to an objective yardstick avoids the risk that the security provider may be disadvantaged.

The yardsticks are set out in paragraph (2). The common denominator of the two methods set out in (a) and (b) is that both look at objective yardsticks. Sub-paragraph (a) refers to a recognised market with published prices. The "recognition" of the market may be an official one, *e.g.* by some authority, or one that is rooted in general public opinion. Moreover, published prices are a certain guarantee of general public control. Sub-paragraph (b) establishes a somewhat lower demand; however, where the conditions of sub-paragraph (a) are not available, a method allowing the determination of a "reasonable market price" is the only reasonable alternative. However, due to this lower degree of objective certainty, a strict and narrow interpretation of this criterion is called for.

E. Retention of ownership devices

It goes almost without saying that IX.–7:105 cannot apply to retention of ownership devices since in these cases the secured creditor already is and remains the owner.

IX.–7:106: Security provider's right of redemption

(1) Even after default, if the outstanding amount of the obligation covered by the security right is paid, the security provider may require the secured creditor to terminate the exercise of the rights under this Chapter and to return possession of the encumbered asset.

(2) The security provider's rights under paragraph (1) may no longer be exercised if:

(a) in the case of an enforcement under Section 2, the encumbered asset has been appropriated or sold or the secured creditor has concluded a binding contract to sell the asset to a third person; or

(b) in the case of exercising the rights under Section 3, the holder of the retention of ownership device has terminated the relationship arising under the contract of sale, hire-purchase, financial leasing or consignment.

COMMENTS

A. Security provider's right of redemption (paragraph (1))

The security provider may at any time after maturity of the obligation covered by the security and also after the secured creditor has commenced enforcement pay the outstanding amount of its obligation to the secured creditor. The main issue dealt with in this Article is whether and until when payment by the security provider has the effect that the secured creditor must stop enforcement proceedings and return possession of the encumbered assets.

This right to redeem is spelt out by paragraph (1). If the security provider fully satisfies the obligation covered by the security (partial payment not being sufficient), the secured creditor may no longer exercise the rights under this Chapter, *i.e.* the secured creditor must return possession of the encumbered assets to the security provider and may no longer continue enforcement proceedings. This includes, *e.g.*, the cancellation of planned auctions of the encumbered assets and the termination of any agreement to lease the encumbered asset to a third party according to Book IV.B. for the purposes of generating income. If, however, the secured creditor has already sold the encumbered asset or is bound by a contract to sell, paragraph (2)(a) applies and the security provider's right under paragraph (1) may no longer be exercised.

The basis of the security provider's right to redeem under these rules is the following. If the security provider satisfies the obligation secured by a security right by payment, the security right is terminated (IX.–6:101). The secured creditor thus loses its position and is no longer entitled to exercise the rights under this Chapter. The results are similar for retention of ownership devices, even though in this context traditionally a different terminology and legal technique is applied. In case of a sale under a retention of ownership clause, the seller usually transfers its ownership under the suspensive condition of full payment of the purchase price. Once this price is paid, the buyer becomes unconditional owner and the seller has no longer any rights in the sold asset. If this abbreviated route has not been used, the seller is obliged to transfer the ownership which it had retained to the buyer.

B. Limitations of the right to redeem (paragraph (2))

Paragraph (2) contains limitations of the right to redeem. The mere fact that the secured creditor has commenced enforcement proceedings under this Chapter does not have the effect that the security provider may no longer demand return of the encumbered assets after full

payment of the obligation covered by the security right. However, once the secured creditor has in the course of the exercise of the rights under this Chapter undertaken the steps enumerated in sub-paragraphs (a) and (b), the security provider will not obtain the collateral back, even if the security provider subsequently pays the obligation covered by the security.

Sub-paragraph (a) covers situations where the encumbered asset has been appropriated or sold by the secured creditor or where the latter is bound by an agreement to sell the encumbered asset to a third party. Typically the fulfilment of these conditions will go hand in hand with a satisfaction of the secured right – and the extinction of the obligation covered by the security – from the proceeds of the sale (or on the basis of the fact that the secured creditor in the case of an appropriation of the encumbered assets according to IX.–7:105 accepts them in full or partial extinction of the obligation covered by the security right). If this obligation has already been extinguished following the realisation of the encumbered assets, a subsequent payment by the security provider can no longer have any of the effects described in comment A. Sub-paragraph (a) clarifies this position by expressly providing that the security provider's rights under paragraph (1) may no longer be exercised once the encumbered asset has been appropriated or sold by the secured creditor or once the latter is under an unconditional obligation to sell the asset to a third party. On the basis of this express provision, it is also made clear that it is irrelevant whether the secured creditor has already received proceeds from the realisation of the encumbered asset; the security provider's right of redemption therefore is lost even if the obligation covered by the security right might not yet be extinguished.

The policy behind this rule is obvious. If the secured creditor has already disposed of the encumbered asset, appropriated it or has at least undertaken a commitment to sell the encumbered asset, the secured creditor would at least potentially be put at a severe disadvantage if it was still under an obligation to return possession of the encumbered asset to the security provider after payment by the latter. Obviously, however, the secured creditor may not keep both the proceeds from the realisation of the collateral and the payment from the security provider, if the total amount exceeds the amount or value of the obligation covered by the security. The secured creditor's liability for restitution of the overpayment by the security provider is, however, outside the scope of these rules on proprietary security, see instead Book VII on Unjustified Enrichment.

Sub-paragraph (b) deals with retention of ownership devices. After default, the holder of such a legal instrument only needs to terminate the relationship arising from the underlying contract of sale, hire-purchase, financial leasing or consignment in order to reclaim possession of the supplied assets without any need for additional enforcement measures, *e.g.*, an appropriation in the normal sense or a sale of the assets concerned. Therefore, sub-paragraph (a) cannot apply in this context. Instead, sub-paragraph (b) provides that in such situations it is the termination of the relationship arising from the contract of sale, hire-purchase, financial leasing or consignment which marks the end of the buyer's, hire-purchaser's, lessee's or consignee's rights according to paragraph (1). Once this relationship has been terminated, the buyer's, hire-purchaser's, lessee's or consignee's outstanding obligations come to an end (III.–3:509 paragraph (1)); performance of these obligations is no longer possible and the buyer, hire-purchaser, lessee or consignee is no longer entitled to possession of the supplied assets vis-à-vis the seller, supplier or lessor.

IX.–7:107: Enforcement notice to consumer

(1) A secured creditor may exercise the rights under this Chapter against a consumer security provider only if the secured creditor delivers at least ten days before enforcement is to begin an enforcement notice in textual form to the security provider and, if the latter is not the debtor, also to the debtor, if the debtor also is a consumer.

(2) The enforcement notice must:

(a) unequivocally designate the obligation covered by the security right and state the amount that is due by the end of the day before the notice is sent;

(b) state that any other condition for enforcement agreed by the parties has been fulfilled;

(c) state that the secured creditor intends to enforce the security and identify those encumbered assets against which the secured creditor intends to enforce it; and

(d) be signed by or on behalf of the secured creditor.

(3) The notice must be in an official language of the consumer's place of residence.

COMMENTS

A. Brief survey of rules on notices

This Chapter provides for a number of different notices to be given by the secured creditor. In order to aid understanding, the following paragraphs present a short survey of these notices, apart from the **e**nforcement notice to a consumer security provider as regulated by the present Article**.**

Other notices must be given at the following occasions:

- A *third party debtor* has to be notified where a security right in a right to payment is to be enforced. The third party debtor has to be informed about the fact that its obligation is to be paid to another person instead of the original creditor (IX.–7:204).

- A notice of *extra-judicial disposition* has to be given before the secured creditor is allowed to dispose of the encumbered asset (IX.–7:208 to IX.–7:210).

- If the secured creditor intends to *appropriate the encumbered assets* it must give advance notice of this intention (IX.–7:216).

B. Enforcement notice to consumer security provider

The enforcement notice according to IX.–7:107 must be given in every case in which a secured creditor intends to exercise the rights under this Chapter against a consumer security provider. This notice is intended as a warning that the secured creditor is about to commence enforcement. Depending on the type of realisation chosen by the secured creditor, additional notices may also be necessary (*cf.* the survey in Comment A) in the case of a consumer security provider, effectively giving the latter a second warning. Ten days before any enforcement measure under this Chapter may be undertaken (including protective measures of realisation), such a notice must be delivered by the secured creditor to the consumer security provider. In this way, the consumer security provider has an additional ten days time for

payment of the obligation secured by the security in order to avoid enforcement against his or her assets.

Addressees. If the security provider is a consumer, an enforcement notice must be sent to this person. If the security provider is not identical with the debtor and the latter is a consumer, this person must also receive an enforcement notice. If, on the contrary, only the debtor is a consumer, but not the third party security provider, there is no need for an enforcement notice under this Article.

In the case of an enforcement with respect to a right to payment held by the consumer security provider, the third party debtor must receive a copy of the enforcement notice as well (see IX.–7:204 paragraph (1)(a) no. (i)); this information to be given to the third party debtor, however, is not in itself subject to the rules of the present Article and need not be given ten days before the secured creditor may commence enforcement.

Time of notice. The notice must be delivered to its addressees at least ten days before enforcement is to begin. It is the time at which the notice reaches its addressees which is decisive, not the time at which it is sent by the secured creditor.

Indication of secured obligation. According to paragraph (2)(a) the secured creditor has to make several statements concerning the secured obligation. The objective of these requirements is to provide information to the consumer security provider. The latter should be enabled to evaluate whether there is any merit in the secured creditor's claim to be entitled to enforcement into the consumer security provider's assets.

Indication of agreed conditions for enforcement. Paragraph (2)(b) requires that the secured creditor states in the enforcement notice that any condition for enforcement that may have been agreed by the parties (see IX.–7:101 paragraph (1)) has been fulfilled.

Intention of enforcement and indication of collateral. Concerning the information required by paragraph (2)(c), it is the function of the enforcement notice as a last warning for the consumer security provider which justifies the imposition of this requirement. The consumer security provider must be informed that the secured creditor actually intends to commence enforcement proceedings and against which of the security provider's assets encumbered in favour of the secured creditor the security right is to be enforced.

Textual form and signature. The enforcement notice must be in textual form (paragraph (1)) and must be signed by the secured creditor or on its behalf (paragraph (2)(d)). These requirements serve purposes of proof and also strengthen the warning function of the enforcement notice.

Language. Paragraph (3) provides that the notice must be in an official language of the consumer's place of residence. This requirement can be expected to provide the highest level of protection for consumers, even if the member state where their place of residence is located has several official languages for different regions.

C. Retention of ownership devices

The requirements described in Comment B also apply to the exercise of the rights of which the holder of a retention of ownership device disposes (IX.–1:104 paragraph (1)(d)). Where goods have been supplied under a retention of ownership device to a consumer buyer, hire-purchaser or lessee, the holder of the retention of ownership device, *i.e.* the seller, supplier or lessor, therefore may terminate the relationship arising from the contract of sale, hire-purchase or financial leasing and claim back its goods only if the consumer buyer, hire-purchaser or lessee has received an enforcement notice by the holder of the retention of ownership device ten days before the exercise of the rights under IX.–7:301. Also in this situation, the consumer is to have an additional last chance to pay the outstanding amounts to the seller, supplier or lessor.

D. Security provider's remedies

If the secured creditor fails to comply with the requirements for the enforcement notice according to this Article, or if the secured creditor commences enforcement against a consumer security provider without having given such a notice or without ten days having passed between the delivery of the notice and the commencement of enforcement, the security provider is entitled to the remedies stated in IX.–7:104. The security provider may call upon a competent court or other authority in order to obtain an injunction preventing the secured creditor from proceeding with enforcement under this Chapter without giving a proper enforcement notice; in addition or alternatively, the security provider may claim damages.

Should the secured creditor already have disposed of the encumbered asset, however, the position of the third party transferee is not affected by any failure of the secured creditor to comply with the requirements of this Article (see IX.–7:213). The security provider may only exercise remedies against the secured creditor.

In the case of a retention of ownership device, the consumer buyer, hire-purchaser or lessee of the supplied assets is entitled to the same remedies as the security provider under a security right.

IX.–7:108: Solidary liability of several security providers

(1) To the extent that several proprietary security rights have been created covering the same obligation or the same part of an obligation, the creditor may seek satisfaction from any, several or all of these security rights. IV.G.–1:105 (Several security providers: solidary liability towards creditor) applies accordingly.

(2) Paragraph (1) applies with appropriate adaptations if, in addition to one or more proprietary security rights, personal security has been granted by one or more persons.

COMMENTS

A. Solidary proprietary liability

This Article is modelled on IV.G.–1:105, as the express reference to that provision indicates. It transposes the general rule to which it refers to the special case that several proprietary security rights have been created as security for the same obligation (or the same part of an obligation). The underlying factual situation may be that apart from the debtor one or more other persons (or only several persons other than the debtor) have created proprietary security rights for the same (part of an) obligation. Alternatively, only several persons, but not the debtor, may have granted security rights for the same obligation (or part of it). In all such cases, the secured creditor may proceed – according to choice – against one, several or all of these security providers. Their proprietary liabilities are solidary.

B. Solidary mixed proprietary and personal liability

The basic rules of IV.G.–1:105 also apply if there is a combination of one or more proprietary security(ies) with one or more personal security(ies), cf. IV.G.–1:105 paragraph (2).

IX.–7:109: Rights of recourse of third party security provider

If the obligation covered by the security right is satisfied by enforcement against the assets of a security provider who is not the debtor, the rights of recourse between several providers of proprietary security or between providers of proprietary security and personal security as well as recourse against the debtor are governed by IV.G.–2:113 (Security provider's rights after performance), IV.G.–1:106 (Several security providers: internal recourse) and IV.G.–1:107 (Several security providers: recourse against debtor), applied with appropriate adaptations.

COMMENTS

This Article covers the rights of recourse that arise if an obligation covered by a security right is satisfied by enforcement against the assets of a security provider who is not the debtor, but a third party security provider. The effect of the references in the Article to Book IV.G. is that the rights of recourse are the same as for providers of personal security.

A third party security provider may have recourse against the debtor (see the reference to IV.G.–2:113). If there are several providers of proprietary security or both providers of personal and of proprietary security, the third party security provider(s) against whose assets the secured creditor had enforced the security right may also seek internal recourse from the security providers who are solidarily liable according to the preceding Article.

Section 2: Enforcement of security rights

Subsection 1: Extra-judicial enforcement: rules preparatory to realisation

IX.–7:201: Creditor's right to possession of corporeal asset

(1) The secured creditor is not entitled to take possession of an encumbered corporeal asset, unless:

(a) the security provider consents at the time when the secured creditor exercises this right; or

(b) the security provider had agreed to the secured creditor's right to take possession and neither the security provider nor the actual holder objects at the time when the secured creditor exercises this right.

(2) In enforcements against a consumer, the right to take possession according to paragraph (1) does not arise until ten days have elapsed since an enforcement notice has been served.

(3) Unless it indicates otherwise, a consent or agreement to the taking of possession according to paragraph (1) covers the right to enter the security provider's or other holder's premises for the purpose of exercising the right to take possession.

COMMENTS

A. Scope of application of Section 2

Section 2 deals, as its title indicates, only with the enforcement of security rights. It does not apply to the "enforcement" of retention of ownership devices; this topic is dealt with separately in Section 3. However, some of the rules in Section 3 refer back to rules in Section 2.

Where an owner exceptionally has transferred ownership to a buyer and merely retained a security right securing the seller's right to payment of the (remaining) purchase price, the rules of Section 2 apply. Due to the transfer of ownership to the buyer the seller is in the same position as any other security provider who has granted a security right to a secured creditor. The former owner has merely retained the position of a secured creditor.

B. Summary of contents of Section 2

Section 2 deals broadly with extra-judicial and briefly also with judicial enforcement of security rights. The two first Subsections of Section 2 are devoted to extra-judicial enforcement. Subsection 1 deals essentially with the means by which the secured creditor may enforce the right to take possession of the encumbered corporeal assets or at least to immobilise them as well as with the creditor's right to preserve them. The second topic covered is the "freezing" of rights for the payment of money, whether or not embodied in negotiable instruments. Subsection 2 is entirely devoted to the realisation of the encumbered assets. Subsection 3 contains a single Article only. It covers judicial enforcement by merely

referring to national procedural law. This reference is supplemented by enumerating a few substantive rules contained in the preceding Subsections on extra-judicial enforcement.

C. Scope of Article and issue at stake

The present Article applies only to corporeal encumbered assets and more precisely only to those corporeal assets which the secured creditor does not already hold in its possession. In other words, the rule applies to the practically most important category of non-possessory security rights in corporeal assets. In order to remove this kind of asset from the reach of the security provider and avoid the risk of unjustified dispositions, obtaining possession is of primary importance as a first step towards realisation.

The dilemma for the secured creditor arises if, as happens frequently, the security provider who is in possession of the encumbered assets and who may need them urgently for the continuation of its production or sales or other commercial activity, refuses or attempts to delay the transfer of possession. This Article is designed to solve this dilemma. Without saying so expressly, self-help by the secured creditor is clearly excluded.

Enforcement of a security right in a negotiable instrument and a negotiable document is also subject to this and the next two Articles.

D. Solutions

The rules of the Article proceed on the basis that the secured creditor may proceed against a holder of the encumbered assets only in a peaceful way. Therefore, the latter's present or a past consent is necessary.

Paragraph (1)(a) allows the secured creditor to proceed when the security provider agrees to the taking of possession by the secured creditor at the time of the demand for possession.

Sub-paragraph (b) deals with the situation where after a preceding agreement (especially in the contract for proprietary security concluded by the parties) the "actual holder" does not object when the secured creditor requires handing over or unilaterally takes possession of the assets. Even without a consent at the time possession is taken by the secured creditor, the actual holder, who need not be the original security provider, is bound by its own or by the original security provider's former agreement.

Paragraph (2) increases the requirements for enforcement against a consumer security provider or consumer holder of an encumbered asset: the secured creditor's right to demand possession of the encumbered assets arises only if at least ten days have passed since service of a formal enforcement notice according to IX.–7:107 . In addition, paragraph (1) remains applicable.

This rule also applies if the first security provider had sold or otherwise disposed of the encumbered asset: if the encumbrance had remained effective, the present holder who has acquired the encumbered asset is now regarded as the security provider.

Paragraph (3) extends the security provider's consent according to paragraph (1). Unless it indicates otherwise, such consent is regarded as covering also consent to the secured creditor

entering the premises (e.g. the house, business premises or factory) of the security provider or of a third person holding the encumbered assets for the security provider.

IX.–7:202: Creditor's right to immobilise and to preserve encumbered asset

(1) The secured creditor is entitled to take any steps necessary to immobilise the encumbered asset, to prevent unauthorised use or disposition of it, and to protect it physically. Paragraphs (1) to (3) of the preceding Article apply with appropriate adaptations.

(2) The secured creditor is entitled:

(a) to take reasonable steps to preserve, maintain and insure the encumbered asset and to obtain reimbursement for such actions from the security provider;

(b) to lease the encumbered asset to a third party for the purpose of preserving its value; or

(c) to take any other protective measures agreed with the security provider.

COMMENTS

General. This Article deals with alternatives to the preceding provision on the creditor's right to obtain possession of the encumbered corporeal asset. There may be objective or subjective reasons for the secured creditor not to wish to obtain possession of the encumbered assets. These may physically be too big or too heavy to be easily moved. Or the secured creditor may have subjective reasons for not moving the encumbered assets, such as the discomfort of moving the assets or excessive expenses for moving or preserving the asset.

Paragraph (1). Paragraph (1) mentions some measures which the secured creditor may wish to undertake to secure the collateral, if it is not taken back. This list is merely illustrative and is intended to assist the creditor in arriving at an informed decision. The reference to paragraphs (1) to (3) of the preceding Article is intended to ensure respect for the agreement of the security provider to all steps that are necessary to obtain access to the encumbered assets held by the security provider.

Paragraph (2**)** exemplifies some of the major alternatives between which the secured creditor may choose for its protection. Since such steps are also taken in the security provider's interest in its assets, it is only reasonable that the latter is to bear the expenses that will be incurred.

Another option for the parties is to lease the encumbered asset to a third party (see Book IV.B.). At this point there is no intention to gain a profit for the secured creditor by leasing (such as in the case envisaged by IX.–7:207 paragraph (1)(b)). Rather, the lease is for the purpose of preserving the value of the encumbered asset. Typical cases were formerly horses which had to be exercised, lest their health suffered. Today, similar considerations may apply to certain technical equipment.

Negotiable instrument. Although this Article applies to the enforcement of security rights in rights embodied in a negotiable instrument (see IX.–7:205 (Negotiable instrument)), the physical difficulties addressed by it will hardly ever arise in the case of a negotiable instrument. Therefore the Article will hardly ever become an issue for this kind of encumbered asset.

IX.–7:203: Intervention of court or other authority

(1) The secured creditor may apply to the competent court or other authority for an order to obtain possession of or access to the encumbered asset, if the security provider or a third person in possession of the asset refuses delivery to or access by the secured creditor.

(2) Upon application by either party, a court or other authority may order the taking of any of the protective measures mentioned in the preceding Article.

COMMENTS

The two preceding Articles deal with *extra*-judicial enforcement which is based upon an agreement of the parties. However, if there is a deadlock because the parties cannot reach an agreement, a secured creditor is entitled to an ultimate remedy by calling upon a court or another competent authority.

The first paragraph of the present Article envisages court intervention, where necessary, in order to vindicate the secured creditor's rights of access to, and taking away of, the encumbered assets according to IX.–7:201.

By contrast, the second paragraph, by allowing the imposition of protective measures, is geared towards IX.–7:202.

IX.–7:204: Encumbrance of a right to payment

(1) Where the encumbered asset is a right entitling the security provider to payment from a third party debtor, the secured creditor may exercise the rights under this Chapter only if the secured creditor:

(a) sends to the third party debtor:

(i) where the security provider is a consumer, a copy of an enforcement notice complying with all the requirements of IX.–7:107 (Enforcement notice to consumer); and

(ii) in other cases, an enforcement notice complying with paragraph (2)(a) and (d) of that Article; and

(b) informs the third party debtor as precisely as possible in the circumstances of the nature, amount and maturity of the security provider's right to payment against the third party debtor.

(2) The third party debtor is obliged to inform the enforcing secured creditor about the amount and maturity of competing rights of other secured creditors known to the third party debtor.

COMMENTS

Introductory remark. This Article deals with the enforcement of a security over a very important economic asset. Money is the most liquid asset and for this reason much more preferred and useful than the great variety of corporeal assets which, more often than not, have to be converted to money by selling them. This difference is vividly reflected by contrasting the short rule on the collection of a right to payment (IX.–7:214) with the complicated rules on realisation of encumbered corporeals (IX.–7:207 to IX.–7:213).

A slight price, though, must be paid in order to benefit from an enforcement in a right to payment, as the rules of the present Article show.

It should be noted that this Article does not apply to negotiable instruments (cf. IX.–7:205 second sentence).

Paragraph (1) deals with the essential peculiarities distinguishing enforcement against a right to payment from enforcement against corporeal assets. The object of enforcement against a right to payment is not a physical object held by the creditor of this right to payment as security provider, but a value located in a relationship between the security provider and the latter's debtor, *i.e.* the third party debtor.

The introductory half-sentence states the elements of the factual situation covered. The object of encumbrance and therefore of the enforcement is a right to payment of the security provider against a third party debtor. Its essential elements are binding upon the enforcing creditor.

Sub-paragraph (a) requires the enforcing secured creditor to convey to the enforcement debtor one of two kinds of document, depending on whether the holder of the right to payment, against which enforcement is brought, *i.e.* the security provider, is a consumer or not.

If the holder of the right to payment (the security provider) is a consumer, the enforcing secured creditor is already required by virtue of IX.–7:107 to send before commencement of enforcement to the consumer an enforcement notice (sub-paragraph (a)(i)). In this case, the enforcing creditor has to send a copy of this enforcement notice to the third party debtor.

If the holder of the right to payment (the security provider) is not a consumer, the creditor is required to send to the third party debtor an enforcement notice that must comply with some, but not all of the requirements of IX.–7:107 paragraph (2). The application of the requirements established by sub-paragraphs. (a) and (d) of that paragraph does not require justification or explanation.

In addition, according to sub-paragraph (b) the security provider's right to payment against which the enforcing creditor intends to bring execution must be identified as clearly as "possible in the circumstances." This requirement obviously is a compromise. On the one hand, the third party debtor must know which of possibly many (in the case of a business, possibly thousands) of its obligations owed to third parties the execution creditor's enforcement aims at; on the other hand, the enforcing creditor does not know the security provider's books and therefore would have difficulty in fully specifying the intended right to payment. The minimum information that must be required is the name of the security provider.

Paragraph (2) obliges the third party debtor to inform the enforcing secured creditor about the amount and maturity of competing rights of other secured creditors known to the third party debtor. The information about other competing secured creditors, including details about the amounts of the secured rights and their maturity, is relevant for the secured creditor in order to estimate the existence and especially the value of prior ranking rights of competing creditors. Since prior ranking rights precede, the remaining economic value of the right to payment may determine the factual value of the right to payment covered by the security right.

Any wrong information intentionally or negligently provided by the third party debtor will give rise to a right to payment of damages according to VI.–1:101 paragraph (1).

IX.–7:205: Negotiable instrument

(1) IX.–7:201 (Creditor's right to possession of corporeal asset), IX.–7:202 (Creditor's right to immobilise and to preserve encumbered asset) and IX.–7:203 (Intervention of court or other authority) apply to the taking of possession of a negotiable instrument as such.

(2) IX.–7:204 (Encumbrance of a right to payment) does not apply to negotiable instruments.

COMMENTS

This provision deals with the enforcement of a security right established in a negotiable instrument. Two phases of enforcement have to be distinguished:

In the first phase, which is addressed by paragraph (1), the apprehension of the negotiable instrument as a document is at issue. This route is dictated by the fact that the enforcing creditor's access to the right to payment incorporated in the instrument is only possible via the instrument. Since the negotiable instrument is a corporeal, the rules dealing with the apprehension of general corporeals in IX.–7:201 and IX.–7:203 apply. IX.–7:202 will hardly ever become relevant since the handing over of only a document is at issue; therefore the special reasons that may motivate a secured creditor to immobilise and preserve encumbered assets in the hands of the security provider usually will not be present.

In the second phase, the enforcement of the rights embodied in the negotiable instrument by the secured creditor is at issue. Here, the general rules on enforcement of a security right in a right to payment apply (IX.–7:214). However, there is less protection for the rights of the third-party debtor: paragraph (2) of the Article disapplies the provisions of the preceding Article.

IX.–7:206: Negotiable document of title

The preceding Article applies also to the taking of possession of a negotiable document of title.

COMMENTS

This Article deals with the enforcement of a security right in a document of title. The issues and their solutions closely resemble those with respect to the enforcement of a security right in a negotiable instrument. This justifies the application of the provisions of the preceding Article.

Subsection 2: Extra-judicial enforcement: realisation of encumbered asset

IX.–7:207: General rule on realisation

(1) The secured creditor is entitled to realise the encumbered asset in order to apply the proceeds towards satisfaction of the secured right:

(a) by sale of the encumbered asset according to IX.–7:211 (Sale by public or private auction or by private sale), unless agreed otherwise by the parties;

(b) by leasing the encumbered asset to a third person and collecting the fruits;

(c) by appropriation according to IX.–7:216 (Appropriation of encumbered asset by secured creditor); or

(d) by exercising the methods of realisation (collection, sale or appropriation) for rights to payment and negotiable instruments according to IX.–7:214 (Realisation of security in right to payment or in negotiable instrument).

(2) Where an enforcement notice is required under IX.–7:107 (Enforcement notice to consumer), paragraph (1) applies only if ten days have elapsed since the delivery of that notice.

(3) The secured creditor may appoint a private agent or apply to a competent court officer to undertake all or some of the steps for realisation of the encumbered assets.

COMMENTS

A. General

The provisions on the extra-judicial enforcement of security rights in Section 2 of Chapter 7 are divided into two Subsections. Subsection 1 deals with protective measures. Obtaining possession of the encumbered assets or immobilising them and notifications to the security provider and third persons. All these steps precede realisation, Subsection 2 covers the actual realisation of the encumbered assets and includes rules on the different possibilities for realisation as well as their conditions and consequences.

B. Realisation of encumbered asset

Introductory remark. In general, the realisation of the encumbered asset is the process by virtue of which the enforcing secured creditor on the basis of its proprietary right in these assets uses them or the income to be derived from them in order to obtain satisfaction of the secured right.

The method by which the secured creditor may obtain satisfaction by virtue of the realisation depends upon the method of realisation chosen. If the collateral is appropriated by the secured creditor, ownership of the encumbered asset itself is accepted in (partial) satisfaction of the secured right or the security provider is credited with the value of the assets (this credit would be set off against the obligation covered by the security). If money is received by the secured creditor (by virtue of a sale of the collateral, of a collection of an encumbered right to payment or by leasing the collateral to a third party according to Book IV.B.), these payments may be accepted by the secured creditor in satisfaction of the secured right. Any surplus is to be distributed according to the principles laid down in IX.–7:215.

Paragraph (1) of the present Article enumerates the four main methods of realisation which are recognised under these rules. For most of these methods of realisation, paragraph (1) merely refers to the specific relevant provisions; however, there are also some substantive rules in this paragraph.

Sale of the encumbered assets. The most important method of realisation is the sale of the encumbered assets, which is dealt with in IX.–7:211. Paragraph (1)(a) of the present Article provides that the secured creditor has in every case of an extra-judicial enforcement at least the possibility of a sale of the encumbered asset; this method of realisation is excluded only if so agreed by the parties. However, this does not necessarily mean that the secured creditor is able to exercise every possible method of a sale under these rules if there is no agreement to this effect. A realisation of the encumbered asset by sale may be by public or private auction or by a private sale of the collateral. The latter possibility, however, is open to the secured creditor only if this has been agreed by the parties or if there is a published market price for the collateral (see IX.–7:211 paragraph (2)).

Should the parties, *i.e.* the secured creditor and the security provider, have agreed on an exclusion of the secured creditor's right to sell the encumbered asset, then the secured creditor may still exercise the other options for a realisation of the collateral enumerated in this Article. Moreover, the secured creditor is of course free to apply for judicial enforcement in the course of which there may be a sale of the encumbered asset administered by the court or other competent authority.

Leasing the encumbered assets. While IX.–7:202 paragraph (2)(b) covers the secured creditor's right to lease the encumbered assets to a third person according to Book IV.B. for the purpose of the preservation of their value, paragraph (1)(b) of the present Article provides that the secured creditor may also lease the encumbered assets in order to generate income. Before default, a similar possibility exists for the secured creditor under IX.–5:208. Paragraph (1)(b), however, goes beyond the scope of that provision by allowing the secured creditor to lease the encumbered assets to a third person after default even if the security right has not been extended to civil fruits of the assets that were originally encumbered.

The realisation of the encumbered assets by leasing them to a third person is a rather simple process which – unlike the other methods of realisation under this Subsection – does not necessitate any additional specific provisions. The main elements of this type of realisation are the following.

Contrary to the other methods of realisation, leasing the encumbered assets to a third person does not require a previous notice of extra-judicial disposition (IX.–7:208) or advance notice of acquisition (IX.–7:216). No equivalent notice would be required under IX.–7:202 paragraph (2)(b) and since it will often be difficult to decide whether the preservation of the encumbered asset or the generation of income is the main purpose of leasing the encumbered asset to a third person, there should not be different requirements of notice. Moreover, leasing the encumbered asset to a third person does not lead to a permanent and irreversible loss of the security provider's rights so that there is less need for a notice in these situations than in cases of a sale or appropriation of the encumbered assets where an advance notice is required. If the security provider is a consumer, however, the rights to lease the encumbered asset may be exercised by the secured creditor only if a notice had been given to the consumer security provider according to IX.–7:107.

Even though there is no specific provision equivalent to the requirement of a commercially reasonable price according to IX.–7:212 that would be applicable where the secured creditor realises the encumbered assets by leasing them to third persons, similar principles are applicable on the basis of the general rule in IX.–7:103 paragraph (4). Extra-judicial enforcement (including realisation by leasing the collateral to a third person) must be undertaken in a commercially reasonable way, *i.e.* the secured creditor must not lease the collateral at an undervalue and the preservation of the encumbered assets must be ensured.

Civil fruits derived by this method of realisation, *i.e.* the payments of rent, may be directly applied by the enforcing secured creditor to the satisfaction of the secured right; any surplus must of course be paid out to the security provider. Other secured creditors are not affected; their rights in the encumbered assets are not lost by reason of the encumbered assets being leased to a third party.

Appropriation. Thirdly, paragraph (1)(c) mentions the possibility of realising the encumbered asset by appropriation according to IX.–7:216. This method of appropriation, which is arranged after default, must be distinguished from a predefault agreement on appropriation which is generally prohibited by IX.–7:105 paragraph (1) (subject to the exceptions laid down in paragraph (2) of that provision). A number of safeguards which are contained in IX.–7:216 ensure that the risks normally connected with a predefault agreement on appropriation are avoided.

Collection of an encumbered right to payment. Finally, paragraph (1)(d) provides that for rights to payment, realisation may be by all the three methods mentioned in IX.–7:214. While sale and appropriation apply to encumbered rights to payment as for other encumbered assets, there is also an additional method of realisation. Collection, i.e. obtaining payment from the third party debtor, will be the usual method of realisation of a security right in a right to payment.

C. Enforcement notice against consumer security provider

For clarification purposes, paragraph (2) reiterates the principle already stated in IX.–7:107 paragraph (1) that enforcement against a consumer security provider is possible only if the secured creditor has delivered an enforcement notice ten days before enforcement is to commence. For the details of this notice and the consequences of a failure to comply with this requirement of an enforcement notice, see the Comments B and D on IX.–7:107.

D. Appointment of private agent or application to court officer

Paragraph (3) allows the secured creditor to appoint a private agent or apply to a competent court officer to undertake all or some of the steps for realisation of the encumbered assets. The secured creditor does not have to act in person, but may, *e.g.*, use the professional expertise and services of a private auction house to conduct a sale by private auction. In addition, even though the rules on extra-judicial enforcement allow the secured creditor to take enforcement into its own hands, the secured creditor may always ask for the assistance of a court in this context, *e.g.*, in the course of a public auction.

E. Realisation in the course of extra-judicial and judicial enforcement

While IX.–7:201 forms part of the rules on extra-judicial enforcement, the different methods for the realisation of the encumbered assets mentioned in this provision are relevant in the context of judicial enforcement as well. IX.–7:217 paragraph (2) sentence 1 provides that in the course of judicial enforcement, the secured creditor may apply to the court or other competent authority to exercise any of the rights which according to these rules are available in extra-judicial enforcement. Whether or not there is an agreement to this effect between the secured creditor and the security provider, is irrelevant (see IX.–7:217 paragraph (2) sentence 2); therefore there may be a sale of the encumbered assets in the course of judicial enforcement even if the parties had excluded such a possibility which would prevent the secured creditor from using this method of realisation in the context of extra-judicial enforcement.

IX.–7:208: Notice of extra-judicial disposition

(1) A secured creditor may exercise its right to dispose of the encumbered asset only if the secured creditor gives notice of its intention to do sot.

(2) Paragraph (1) does not apply if the encumbered asset is perishable or may otherwise speedily decline in value or is a fungible asset that is traded on a recognised market with published prices.

COMMENTS

A. Notice of extra-judicial disposition

This Article requires the enforcing secured creditor to give notice if the creditor intends to dispose of the encumbered asset. The notice ensures that the addressees will receive a last warning before their rights in the encumbered asset might be lost due to the disposition. Being informed of the secured creditor's intentions they can consider whether they should avert enforcement by paying the outstanding amount of the obligation covered by the security or whether they should participate in the realisation, *i.e.* whether they should acquire the encumbered asset for themselves.

The notice under this Article has to be given even if the secured creditor had already delivered an enforcement notice to a consumer security provider according to IX.–7:107. The notices under this Chapter are in general not mutually exclusive; moreover, the notice according to this Article has to be sent to a larger group of addressees (see IX.–7:209) than the enforcement notice according to IX.–7:107.

Scope of application. The notice requirement under this Article applies whenever a secured creditor has the intention to dispose of the encumbered assets in the course of extra-judicial enforcement. Whether the disposition, i.e. the sale of the encumbered asset, is to be by public or private auction or by private sale is irrelevant for the application of this Article. The same holds true for the type of encumbered assets. The Article applies both to corporeal assets and to encumbered rights to payment.

No notice, however, needs to be given where the secured creditor merely intends to lease the encumbered asset to a third party (see Comment B on the preceding Article) or where the secured creditor intends to appropriate the collateral according to IX.–7:216, since the latter provision contains a separate requirement of notification by the secured creditor.

This provision is also not applicable in the course of judicial enforcement. IX.–7:217 paragraph (2) sentence 1 provides that the secured creditor may apply to the court or other competent authority to exercise any of the rights spelt out in the Subsections on extra-judicial enforcement; this reference does not include procedural provisions such as the present Article.

Addressees, time and content of the notice. These matters are governed by the following two Articles.

Remedies for and consequences of failure to make notification. For the remedies in case of a failure by the secured creditor to comply with the notification requirement in this Article, as supplemented by the following two Articles, reference can be made to the Comment D on

IX.–7:107. While every party concerned may seek an injunction against the secured creditor and claim damages, the position of a third party buyer of the collateral is not affected by any violation of the procedural provisions of these Articles.

An indirect, but not insignificant consequence of a failure to notify the security provider and the debtor relates to the costs of the enforcement proceeding. According to IX.–2:401 paragraph (2) the right to payment of "reasonable costs" is covered by the security right, provided the security provider had been informed of the secured creditor's intention to undertake such proceedings in sufficient time to enable the security provider to avert these costs by performing the outstanding obligations.

B. Excluded cases

Paragraph (2) of the Article mentions two situations in which no notification is necessary under this provision. First, the secured creditor need not give such notice if the encumbered assets are perishable or may otherwise speedily decline in value. The reason for this exception is obvious. The notification would delay the disposition and that may result in depreciation of the encumbered asset and, hence, reduce the proceeds to be derived from the disposition. Since this would be manifestly commercially unreasonable and to the detriment of all parties concerned, it would be in conflict with IX.–7:103 paragraph (4).

Second, notification is not required where the encumbered asset is a fungible asset that is traded on a recognised market with published prices. This exception is based upon a similar ground as the exception to the prohibition of predefault agreements on appropriation for the same category of assets (see Comment B on IX.–7:105). If the encumbered asset is fungible and if its price can be easily and objectively determined by reference to a published market price, then the security provider and the other holders of proprietary interests in the encumbered asset are not likely to be disadvantaged by the secured creditor's disposition of this asset since the result achieved ought to correspond to the market price.

IX.–7:209: Addressees of the notice

The notice required by the preceding Article must be given:

(a) to the security provider, the debtor (if different from the security provider) and other persons who, to the knowledge of the secured creditor, are liable for the obligation covered by the security; and

(b) to the following persons with rights in the encumbered asset:

(i) other secured creditors who have registered such rights;

(ii) persons who were in possession or control of the encumbered asset when enforcement commenced; and

(iii) other persons who were actually known to the secured creditor to have a right in the encumbered asset.

COMMENTS

This Article enumerates the persons to whom notice of the secured creditor's intention to dispose of the encumbered assets must be given.

According to sub-paragraph (a), the notice must be given to the security provider, the debtor (if not identical with the security provider, *i.e.* if the latter is a third party security provider) and to other persons who, as known to the secured creditor, are liable for the obligation covered by the security. The last-mentioned category covers especially providers of personal security. These persons might be interested in the possibility of averting enforcement by payment of the secured obligation since they could be subject to a claim for recourse brought by a third party security provider. The secured creditor is not under an absolute obligation to inform these persons; rather, the requirement of notification is limited to those addressees whose liability for the obligation covered by the security is actually known to the secured creditor. Notification might actually, however, prove to be beneficial for the secured creditor, since some third person might be willing to voluntarily pay the outstanding amount of the obligation covered by the security in order to be subrogated to the secured creditor's security right because that may strengthen the third person's position in seeking recourse.

The list of persons to whom notice is to be given is further extended by sub-paragraph (b) which covers other persons holding rights (in the widest sense) in the encumbered assets. This sub-paragraph mentions registered secured creditors as well as other persons holding proprietary rights in the encumbered assets. While the enforcing secured creditor is under an absolute obligation to inform the former, notice must be given to the latter only if the enforcing secured creditor actually has knowledge of their proprietary rights. These persons have to be notified because their proprietary rights in the encumbered asset might be affected by the disposition and therefore they should be enabled to evaluate especially whether they should acquire the encumbered asset for themselves. Finally, notice must also be given to persons in possession of the encumbered asset at commencement of enforcement (sub-paragraph (b)(ii)). Even though these persons do not necessarily hold proprietary rights in the assets concerned, they might prefer to acquire them for themselves in order to be able to continue to exercise possession.

IX.–7:210: Time and contents of notice

(1) The notice required by IX.–7:208 (Notice of extra-judicial disposition) must be given in due time. A notice that reaches its addressees at least ten days before the disposition is regarded as given in due time.

(2) The notice must indicate:

(a) the place and time of the planned disposition;
(b) a reasonable description of the encumbered asset to be disposed of;
(c) any minimum price for the disposition of the encumbered asset and payment terms; and
(d) the right of the security provider, of the debtor and of other interested persons to avert disposition of the encumbered asset by payment of the outstanding amount of the obligation covered by the security.

(3) The notice must be in a language that can be expected to inform its addressees.

COMMENTS

A. Notice to be given in due time

Paragraph (1) sentence 1 stipulates that the notice of extra-judicial disposition must be given in due time. If the notice reaches its addressees only shortly before the disposition, it will fail to achieve its purpose (see Comment A on IX.–7:208).

In order to avoid disputes and uncertainties as to when a notice is to be regarded as being given in due time, sentence 2 provides that a notice that reaches its addressees at least ten days before the disposition is regarded as given in due time. The secured creditor may of course give the notice even earlier. In order to be able to prove the time of receipt, a registered letter or delivery by messenger may be advisable.

B. Content of notice

Paragraph (2) enumerates several items of information which have to be included in the secured creditor's notice of extra-judicial disposition These are largely self-explanatory and do not require further comment. All the information required under paragraph (2) is intended to ensure that the addressees of the notice are informed about the circumstances of the disposition intended by the secured creditor and about the possibility of averting enforcement by payment of the outstanding amount of the obligation covered by the security.

C. Language

Under a pan-European regime of proprietary security the problem of different languages arises, especially if – as is the case under this notice of extra-judicial disposition – notifications are required between persons who had not necessarily already dealt with each other. Paragraph (3) attempts to solve this language problem by requiring the secured creditor to draft the notice in a language which can be expected to inform its addressees. Effectively, this puts the secured creditor under an obligation to provide translations, if required by the addressees. It has to be emphasised, however, that the secured creditor will not always have to use the language of the member state where the addressee concerned has its place of residence or incorporation. At least in the commercial sphere, a secured creditor will normally be entitled to expect that a notice in English will be understood by its recipients.

IX.–7:211: Sale by public or private auction or by private sale

(1) Realisation of all or parts of the encumbered assets by sale may be by an officially supervised auction (public auction) or by an auction to which the public is invited (private auction).

(2) Realisation of all or parts of the encumbered assets by sale may be by private sale, if so agreed by the parties or if there is a published market price for the encumbered asset.

(3) The details of the arrangements to be made under the preceding paragraphs can be fixed by the secured creditor.

(4) If the transfer is subject to pre-existing prior rights and upon demand, the secured creditor must disclose to the purchaser the relevant details.

(5) If the secured creditor acquires the encumbered asset in a sale by public or private auction, the sale may be set aside by the security provider within a period of ten days after the auction.

(6) Where the owner of the encumbered asset participates as buyer in a realisation of the encumbered asset according to this Article, the sale operates as an agreement to release encumbrances of the asset.

COMMENTS

A. General remarks

At least for encumbered assets other than rights to payment (for which there is also the possibility of collection according to IX.–7:214), the most important method of realisation is the sale of the collateral. A purchaser acquires ownership of the encumbered assets and the purchase price may be applied by the enforcing secured creditor for the satisfaction of the secured right.

Also the secured creditor may acquire the collateral in a public or private auction. The acquisition of ownership of the collateral by the secured creditor in the course of extra-judicial enforcement outside such an auction would not be regarded as an acquisition by private sale, but by appropriation according to IX.–7:216. The legal idea which in general underlies the purchase of the encumbered assets by the secured creditor in the course of extra-judicial enforcement is that the secured creditor is authorised by virtue of law to dispose of the security provider's assets. Only the secured creditor is the party to the contract of sale concluded with a third party purchaser; there is no contractual relationship between the security provider and the third party who acquires the collateral; payment of the purchase price is owed by the latter only to the secured creditor.

B. Sale by public or private auction

Paragraphs (1) and (2) distinguish between two methods of a realisation of the encumbered assets by sale. While paragraph (2) covers the private sale (see Comment C), paragraph (1) deals with the sale by auction, which may be either by public or by private auction.

A public auction is defined by paragraph (1) as an auction which is officially supervised. This supervision by an official does not affect the character of the enforcement as extra-judicial enforcement in the hands of the secured creditor; it is already provided by IX.–7:207

paragraph (3) that in the course of extra-judicial enforcement proceedings the secured creditor may seek official assistance in the process of the realisation of the encumbered assets.

In a private auction, there is no official supervision; it is required, however, that the public is invited to this auction. This requirement distinguishes a private auction from a private sale; the secured creditor must advertise the intended private auction in a reasonable manner (possibly using the assistance of the court) and all members of the public must be given sufficient access to the tendering process.

C. Private sale

As opposed to a sale by public or private auction, realisation of an encumbered asset by private sale is possible only where this had been agreed upon by the secured creditor and the security provider (whether or not this agreement had been concluded before or after default) or where there is a published market price for the encumbered asset. These requirements are based upon the following considerations. A realisation of the encumbered asset by private sale might give rise to the risk that the secured creditor sells the collateral at an undervalue. The secured creditor might be tempted to do so because of collusion with the buyer or simply because it might be easier to find a buyer if the secured creditor sets a lower asking price. Even though this would be in breach of the obligation to achieve a commercially reasonable price according to IX.–7:212 (and of the general requirement of commercial reasonableness according to IX.–7:103 paragraph (4)), such a misconduct might be difficult to prove and therefore the secured creditor might not be deterred by the possibility of a liability in damages according to IX.–7:104 sub-paragraph (b). If the sale is by auction, whether public or private, the participation of the public provides some protection against these risks and the sale price can be expected to be nearer to the market value of the encumbered assets.

On the other hand, an auction is both time-consuming and costly; therefore, there is no need for a sale by auction where the parties have agreed on a private sale or where there is a published market price for the encumbered assets. In both situations there is sufficient protection for the security provider. In the first situation, the security provider can have recourse to the procedure set out in IX.–7:212 paragraph (4). In the second situation, the existence of a published market price allows the reasonableness of the secured creditor's conduct in a private sale to be evaluated more easily.

D. Details of the realisation by sale

In addition to these general provisions distinguishing between a sale by auction and a private sale, the present Article contains two rules concerning the details of the realisation of the encumbered assets by sale that are applicable whether there is an auction or a private sale:

Paragraph (4) stipulates that the secured creditor must inform the purchaser, if so demanded by the latter, whether the purchase is subject to any pre-existing prior rights. The general position under these rules is that a sale in the course of extra-judicial enforcement does not affect security rights that enjoy priority over the enforcing secured creditor's rights (see IX.–7:213 paragraph (2)(a)). If the asset concerned is encumbered with such senior security rights in addition to the enforcing secured creditor's rights, the purchaser can acquire ownership in the asset concerned only subject to the senior security rights. If contrary to paragraph (4) the purchaser is not informed by the secured creditor, the latter will be liable to the former.

As a general rule, however, paragraph (3) provides that the secured creditor is free to determine the details of the disposition, *i.e.* place and time and other conditions. This freedom, of course, is subject to the general requirement of commercial reasonableness according to IX.–7:103 paragraph (4) and to the specific requirement of obtaining a commercially reasonable price according to IX.–7:212. In practice the secured creditor will often act through an agent (see IX.–7:207 (General rules on realisation) paragraph (3)).

E. Acquisition by secured creditor

If the secured creditor acquires the encumbered asset for itself by being the highest bidder in a public or private auction, paragraph (5) provides that this sale may be set aside by the security provider within a period of ten days after the auction. No reason needs to be given and no violation of any procedural or substantive law provision proven; this possibility to set aside the sale follows a strict and prophylactic approach. The consequence of such a setting aside is that a new realisation of the encumbered assets becomes necessary.

F. Acquisition by security provider

The possibility of a realisation of the encumbered asset by sale is not limited to a purchase by a third party. The security provider may participate as buyer in this sale as well. This is expressly provided for by paragraph (6). At first impression, it may appear absurd that the owner of the encumbered asset might wish to acquire its own asset. However, this is a practice which is at least firmly rooted in auctions of encumbered land and can be easily transposed to encumbered movables. Surely, the security provider's interest in retaining its encumbered good by participating in the auction deserves to be protected; there is no legitimate reason for barring the security provider from defending its interests in competition with other interested people. If the security provider offers the highest price, under the rules governing auctions it must be accepted that it may in this way preserve (by re-acquisition) its property. If the price to be paid by it is lower than the valuation of that asset by the secured creditor, the latter must bear the consequences of having misjudged the market value of the encumbered asset. Cf. also IX.–7:213 paragraph (4).

According to paragraph (6), a sale of the encumbered assets to the owner is to be regarded as a (*pro tanto*) release of the secured creditor's security right (cf. also IX.–7:213 paragraph (1)(b)). Of course, the secured creditor's right to payment is also correspondingly reduced (IX.–7:215 paragraph (2)).

IX.–7:212: Commercially reasonable price

(1) The secured creditor must realise a commercially reasonable price for the encumbered asset.

(2) If there is a recognised market which is easily accessible for the secured creditor, a price is commercially reasonable if it corresponds to the market price at the time of the sale, having due regard to any special features of the encumbered asset.

(3) If the preceding paragraph does not apply, a price is commercially reasonable if the secured creditor took such steps as could be expected to be taken in the circumstances.

(4) If the sale is by private sale, the security provider may demand that the creditor communicates to the security provider the expected price or price range. If the security provider can show that it is likely that this price range is significantly below what might reasonably be achieved at a private or public auction, the security provider may demand that the secured creditor arrange for a private or a public auction. Subject to paragraph (5) of the preceding Article, a price achieved in this way is binding upon the parties.

COMMENTS

A. Commercially reasonable price

Paragraph (1) of this Article requires the secured creditor to realise a commercially reasonable price on the sale of the encumbered asset. This rule is a specific application of the general requirement of commercial reasonableness according to IX.–7:103 paragraph (4). Its policy can be explained as follows. The sale is conducted by the secured creditor for the purpose of obtaining satisfaction of the secured right only. The security provider is still owner of the encumbered assets and as such entitled to receive any surplus from the realisation (see IX.–7:215 paragraph (4). Therefore it is not sufficient that the secured creditor realises by the sale a price equivalent to the outstanding amount of the obligation covered by the security; instead, it is necessary that the proceeds of the sale are equivalent to the actual value of the rights in the collateral acquired by the buyer.

This does not necessarily mean that a price realised by the secured creditor can never be commercially reasonable where it is not equal to the actual value of the assets concerned. This may partly be the case where paragraphs (2) and (3) apply (see Comment B). Moreover a sale might be subject to existing encumbrances of senior secured creditors (see IX.–7:213 paragraph (2). Naturally, any third party buyer will in such situations pay only the actual value of the encumbered asset minus the amount for which the asset is still liable (and which is not easily retrievable from the actual debtor or a co-security) under this security right.

B. Specific instances where price regarded as commercially reasonable

The absolute requirement to realise a commercially reasonable price according to paragraph (1) constitutes a substantial risk for the secured creditor. If this requirement is not fulfilled, the secured creditor might incur a liability in damages to the security provider according to IX.–7:104 sub-paragraph (b). In order to avoid disputes concerning the commercial reasonableness of concrete prices realised by the secured creditor, paragraphs (2) and (3) provide that if the secured creditor complies with the requirements laid down in these rules, the prices obtained will be regarded as commercially reasonable.

C. Right to demand auction instead of private sale where expected price insufficient

Paragraph (4) covers a specific possibility for the security provider to demand an auction where the expected price to be realised by virtue of a private sale is insufficient. Even if there is the possibility of a private sale, i.e. where the secured creditor and the security provider had so agreed or where there is a published market price for the asset concerned, the security provider may still demand that the secured creditor communicates the expected price or price range. If the security provider deems this price to be insufficient and can show that it is likely that this price is significantly below what might reasonably be achieved at an auction, the secured creditor can be required to realise the encumbered asset by auction instead of by private sale. If the price realised in the auction turns out to be insufficient for the security provider as well, however, this price must be accepted by the latter (see paragraph (4) sentence 3). The only exception would be if in this auction the secured creditor acquires the encumbered asset for itself. The security provider could then exercise the rights under IX.–7:211 paragraph (5), i.e. set aside the sale within a period of ten days after the auction.

D. Remedies

Where the secured creditor fails to comply with the requirements of this Article and sells the encumbered asset to a purchaser for a price which is below what would be regarded as commercially reasonable, the security provider (and the holders of junior proprietary rights that are affected by this sale because of the loss of their rights according to IX.–7:213 paragraph (1)(c) can exercise the rights generally stated in IX.–7:104, i.e. demand from the secured creditor that the intended sale is aborted, if it has not yet been completed, and claim damages for any losses suffered as a result.

If the sale has already taken place, however, the position of the buyer is not affected by any violation of the requirements of this Article, see IX.–7:213 paragraph (3). An exception applies where the secured creditor itself has acquired the encumbered assets. In such cases, the court may order a return of ownership on the basis of IX.–7:104 sub-paragraph (a) if the sale was not for a commercially reasonable price. This right can be exercised even after the expiry of the period of ten days which is applicable for the right to set aside the sale according to IX.–7:211 paragraph (5).

IX.–7:213: Buyer's rights in the assets after realisation by sale

(1) The buyer acquires rights in the sold assets free of the rights of:

(a) the security provider;

(b) the enforcing secured creditor;

(c) junior secured creditors, whether holders of security rights or retention of ownership devices; and

(d) holders of other limited proprietary rights with lower priority than the enforcing secured creditor's rights.

(2) The following rights in the sold assets remain in existence after the transfer, unless the enforcing secured creditor acted with authority to dispose of the encumbered assets free of these rights or the buyer acquires in good faith according to IX.–6:102 (Loss of proprietary security due to good faith acquisition of ownership):

(a) rights of senior secured creditors, whether holders of security rights or retention of ownership devices; and

(b) other limited proprietary rights with higher priority.

(3) The buyer's position is not affected by any failure to comply with notice requirements under this Chapter or by any other violation of procedural provisions under this Chapter for the auction or private sale.

(4) If the secured creditor or the security provider participate in the realisation by sale as buyers, the preceding paragraphs apply with appropriate adaptations with respect to the effects of the sale.

COMMENTS

A. Effects of a realisation by sale in general

It has already been noted that the realisation by sale in the course of extra-judicial enforcement is based upon a contract of sale between the secured creditor and the buyer (see Comment A on IX.–7:211). Payment is owed to the secured creditor, who has to apply the purchase price according to the rules laid down in IX.–7:215. The present Article regulates the proprietary position of a buyer by virtue of a sale of an encumbered asset in the course of extra-judicial enforcement against the security provider.

B. Acquisition of ownership free of the secured creditor's rights

According to paragraph (1)(a) the buyer acquires rights in the sold assets free of the security provider's rights. Usually, this means that the buyer may acquire ownership. Even though the security provider is not a party to the contract of sale between the buyer and the secured creditor, the latter is authorised by law to transfer the security provider's ownership to the buyer. The position is different, however, if the encumbered assets are not actually owned by the security provider but by a third person. In such an exceptional case, the buyer can become the owner only if the secured creditor had been authorised by this third person, which will be rather unlikely, or if the buyer can rely on the principles on good faith acquisition contained in VIII.–3:101. Since this specific constellation is rather a problem of the acquisition of ownership in general, it is not specifically dealt with in paragraphs (1) and (2). According to VIII.–1:101 paragraph (3) first sentence, the rules of Book VIII on the acquisition and loss of ownership of goods apply also in the framework of the acquisition and loss of ownership by extrajudicial enforcement.

The enforcing secured creditor's rights cease to exist upon the enforcement (paragraph (1)(b)). The buyer therefore can acquire the rights in the bought assets free of the security rights whose enforcement was the basis of the sale.

C. Junior proprietary rights are lost

Paragraph (1)(c) and (d) provide that the buyer acquires the rights in the sold asset free of proprietary security rights with a lower priority than the enforcing secured creditor's rights and free of other limited proprietary rights ranking below the enforcing secured creditor's rights. The junior proprietary security rights which may be lost according to this provision can be both security rights and retention of ownership devices, if the latter exceptionally do not enjoy priority over any other security right in the same asset (this may occur where the retention of ownership devices have not been registered at all or only after expiration of the 35 days period of IX.–3:107, if there is a subordination agreement to this effect or if another security right in the same asset has been acquired by virtue of good faith (see IX.–4:101 paragraph (5)). An example of another limited proprietary right which ceases to exist after the transfer, if it is of a lower rank than the enforcing secured creditor's rights, is the usufruct (for the determination of the order of priority between proprietary security rights and other limited proprietary rights see the rules of Chapter 4, especially IX.–4:101 paragraph (2)(b)).

The reasons justifying this loss of junior-ranking proprietary rights are the following. By virtue of its position as senior creditor, the enforcing secured creditor acts with authority conferred by operation of law to dispose of the encumbered assets free of the proprietary rights with a lower rank. When selling the encumbered assets in the course of extra-judicial enforcement, the secured creditor may therefore convey to the buyer rights in the sold assets that are no longer encumbered with the junior proprietary rights.

Holders of these lower-ranking proprietary rights, whether security rights or not, are to some extent compensated for their losses by virtue of their participation in the distribution of the proceeds of the realisation of the encumbered assets according to IX.–7:215 paragraph (3). However, if the proceeds are not sufficient to meet the outstanding amounts of the obligations covered by the lower-ranking security rights or the value of the other limited proprietary rights, the holders of these rights do not obtain anything. This result cannot be regarded as unfair since it is merely a consequence of the risk which these creditors incurred when they accepted the lower priority of their proprietary rights. Usually they will have, and will use, the opportunity of minimising their increased commercial risk by requiring a higher rate of interest for the credit secured by the lower ranking security right.

D. Senior proprietary rights generally not affected

Senior-ranking proprietary rights, i.e. especially proprietary security rights that enjoy priority over the enforcing secured creditor's rights, are not mentioned among the rights that are lost according to paragraph (1); instead, paragraph (2)(a) and (b) provide that in general these rights remain in existence after the transfer. Unless the exceptions stated in paragraph (2) apply, the buyer acquires rights in the assets that are sold in the course of extra-judicial enforcement only subject to these senior encumbrances.

This result corresponds to the general approach under this Chapter that a secured creditor is not prevented from enforcing its security rights by reason of the fact that there are security rights of other secured creditors which enjoy priority over the rights of the creditor who wants

to enforce the rights. The only exception to this rule is contained in IX.–7:214 paragraph (2). A junior secured creditor may not collect an encumbered right to payment. If in general a junior secured creditor may proceed with enforcement, then the senior secured creditor's rights should not be affected. This is why paragraph (2) of the present Article provides that these rights should in general continue to exist even after the transfer. Correspondingly, the holders of these senior proprietary rights do not participate in the distribution of proceeds according to IX.–7:215 since they may still enforce their rights against the encumbered assets. For these holders of senior proprietary rights, the situation is no different from cases of transfer of ownership of the encumbered assets by the security provider to a third party subject to the existing encumbrances (see IX.–5:303).

Of course, the fact that encumbrances that enjoy priority over the enforcing secured creditor's rights continue to exist may constitute a major obstacle for the sale of the encumbered asset. Buyers will prefer to obtain unencumbered rights; at least the price to be realised will be substantially lower than what could be realised if the assets could be acquired by the buyer free of any encumbrances. Therefore, enforcing secured creditors whose rights are only junior security rights are well-advised to seek an arrangement with the holders of the senior security rights (such inter-creditor agreements are generally possible under this Chapter, see the final Comments on IX.–7:102). The enforcing secured creditor could be granted authority by a senior secured creditor to dispose of the encumbered assets free of the secured creditor's rights and thus the buyer would acquire the rights free of these senior encumbrances (see IX.–7:213 paragraph (2)). In exchange, the senior secured creditor would be given by its agreement with the enforcing secured creditor a right to participate in the proceeds in accordance with its rank of priority. For the senior secured creditor, such an agreement would provide the opportunity of obtaining preferential satisfaction of its secured right without itself having to enforce its security rights against the security provider.

Apart from such an authorisation of the enforcing secured creditor to dispose of the encumbered assets free of senior encumbrances, paragraph (2) mentions a second possible situation where the buyer acquires the rights in the encumbered assets free of these encumbrances: the buyer can rely on the principles of good faith acquisition. Specifically, the buyer might be protected by IX.–6:102 which covers the good faith acquisition of ownership free of earlier security devices. Whether or not the buyer can rely on this provision will depend upon the circumstances of the case. If it is not apparent to the buyer that the secured creditor sells the encumbered asset in the exercise of rights of extra-judicial enforcement, the sale might be regarded as taking place in the ordinary course of business of the seller; therefore, even a registration of the senior secured creditors' security rights might not have the result that the buyer is to be regarded as being in bad faith (see IX.–6:102 paragraph (2)). In the case of a sale by auction, however, it is not likely that the buyer will be able to invoke the protection offered by IX.–6:102 paragraph (2) for sales taking place in the ordinary course of business. The buyer will then be expected to have knowledge of security rights that are registered against the security provider whose assets are sold by auction.

If a senior secured creditor's rights are lost by virtue of a good faith acquisition of ownership by the buyer according to the principles stated in the preceding paragraph, it is not envisaged that this senior secured creditor can claim to participate in the distribution of the proceeds of the sale according to IX.–7:215. However, the enforcing secured creditor might be liable towards the senior secured creditor in damages according to the general provision in IX.–7:104 sub-paragraph (b) and might possibly be liable also on the basis of Book VII on Unjustified Enrichment, if the enforcing secured creditor has actually obtained a higher price

for the encumbered asset due to the fact that the buyer assumed that the rights were unencumbered (and actually acquired unencumbered rights).

E. Participation of secured creditor or security provider as buyers

The principles stated in the preceding paragraphs generally apply also to cases where the secured creditor or the security provider participate as buyers in the realisation of the collateral (see paragraph (4)). If the security provider acquires the collateral, i.e. agrees with the secured creditor on the release of the latter's security rights (cf. IX.–7:211 paragraph (6)), the enforcing secured creditor's rights in these assets are lost. Conversely, if the secured creditor buys the collateral in an auction, the rights of the security provider are lost. Moreover, both the secured creditor and the security provider will in such circumstances acquire rights in the encumbered assets free of any junior-ranking encumbrances.

Encumbrances which enjoy priority over the enforcing secured creditor's rights, on the other hand, will remain in existence. Neither the secured creditor nor the enforcing security provider will be able to rely on the principle of good faith acquisition in order to acquire rights free of these senior-ranking encumbrances.

F. Violation of procedural provisions irrelevant

Paragraph (3) provides that a mere violation of procedural provisions under this Chapter for the sale or auction does not affect the buyer's position. The buyer acquires the rights according to the rules described in the preceding paragraphs even if, e.g., the enforcing secured creditor did not comply with notice requirements under this Chapter or did not realise a commercially reasonable price.

An exception to this rule can be based upon the application of IX.–7:104 sub-paragraph (b). Where the secured creditor itself acquires the encumbered assets in an auction conducted in violation of the procedural provisions of this Chapter, the secured creditor may be ordered to return ownership of the collateral, provided the secured creditor has not in the meantime passed ownership to a third party; in the latter case, the secured creditor may, however, be liable extra-contractually (VI.–2:101 paragraph (1)(b)).

IX.–7:214: Realisation of security in right to payment or in negotiable instrument

(1) Where the encumbered asset is a right to payment or a negotiable instrument, the secured creditor may collect the outstanding performance from the third party debtor or may sell and assign or appropriate the right to payment or to the negotiable instrument.

(2) If there are other security rights in the encumbered right to payment or the negotiable instrument which enjoy priority, the secured creditor is not entitled as against these senior secured creditors to collect the encumbered right to payment or to the negotiable instrument.

(3) The third party debtor, except a debtor under a negotiable instrument, may refuse to pay unless the secured creditor sends a notice indicating the amount duet, supported by adequate proof.

(4) The secured creditor may also collect or otherwise enforce any personal or proprietary security right to which the security in the right to payment extends according to IX.–2:301 (Encumbrance of right to payment of money) paragraph (4).

COMMENTS

This provision deals with the special features of realising a security right in an encumbered right to payment or negotiable instrument.

Paragraph (1) offers three alternative ways which may be chosen by a secured creditor, if its security right encumbers a right to payment or a negotiable instrument. The creditor may collect or it may sell or appropriate the right to payment or the negotiable instrument. Collection is mentioned first since, generally speaking, in practice it is the more efficient method since the secured creditor can quickly obtain cash, provided the third party debtor is solvent. Usually this route is also faster.

The collection of a right to payment is also governed by IX.–7:204. The collection of a negotiable instrument is primarily subject to the rules applicable to the specific kind of negotiable instrument that is in issue and subsidiarily to IX.–7:214.

Alternatively, the secured creditor may sell or appropriate the right to payment or the negotiable instrument. The sale is subject to the involved procedure according to IX.–7:207 to IX.–7:213; for appropriation, IX.–7:216 applies.

Paragraph (2) draws the practical consequence from the rules on priority established by Chapter 4 of Book IX. If another secured creditor or holder of a limited proprietary right enjoys priority, this prevents a creditor with lower priority from proceeding to enforcement by collection.

Paragraph (3) is designed to protect the third party debtor. The debtor need not make payment, unless and until the secured creditor sends a notice to the third party debtor. The notice must indicate the amount which the secured creditor claims as being due to it under the obligation covered by the security. The amount must be supported by adequate proof. Adequate proof is a copy of a bill or of a current account showing the debt balance of the debtor of the obligation covered by the security.

As a matter of course, the third party debtor may decline payment also if it disputes the existence of the encumbered right to payment or its maturity or other conditions for its enforceability. The position of the third party debtor towards the secured creditor who claims collection of the encumbered right to payment does not differ from that towards an assignee of the right to performance in the case of an outright assignment.

If enforcement is brought before maturity, the enforcement debtor cannot be forced to pay at once. In such a case, collection of the right to payment is excluded for the time being. The secured creditor may wish to wait until maturity or, if it wants to realise the security quickly, to sell and transfer the right to payment; in this case, the enforcing creditor's right of election does not operate.

That paragraph (3) cannot apply to negotiable instruments is due to the fact that these instruments establish a stricter liability.

Paragraph (4) refers to IX.–2:301 paragraph (4) which extends the secured creditor's rights of enforcement to personal or proprietary security rights which are accessory to the right to payment. These accessory rights may consist of the various forms of personal or proprietary security (IV.G.–2:113 paragraph (3) first sentence).

IX.–7:215: Distribution of proceeds

(1) The proceeds of any extra-judicial enforcement of an encumbered asset according to the preceding provisions are to be distributed by the secured creditor in the following order.

(2) First, the secured creditor who has enforced may apply the proceeds for the satisfaction of the secured right including the expenses incurred for enforcement.

(3) Second, any secured creditor whose proprietary security has a lower priority than the enforcing secured creditor's right is entitled to receive any remaining proceeds after any deductions according to paragraph (2) up to the amount of the obligation covered by this secured creditor's security. If there are several junior secured creditors, the remaining proceeds are distributed in accordance with the order of priority between their rights. The preceding sentences apply with appropriate adaptations to holders of other limited proprietary rights with lower priority than the enforcing secured creditor's rights; instead of an obligation covered by the security, the value of these limited proprietary rights is decisive.

(4) Third, any remaining proceeds after any deductions according to paragraphs (2) and (3) must be repaid to the security provider.

(5) No secured creditor may receive more than any maximum amount that has been agreed or registered for that creditor's security right. This limit does not apply to reasonable expenses incurred for enforcement.

COMMENTS

The rules on distribution of the proceeds of an enforcement must, of course, take into account the relative ranking and priorities of the security and other property rights of all the parties who are involved in, or may be affected by, the process of enforcement.

Paragraph (2) proceeds on the basis of the rule that the existence of secured creditors with lower ranking security rights in the asset does not prevent the secured creditor from proceeding with the enforcement of its security right. This is affirmed by the rules in paragraph (3) which describe broadly the enforcing secured creditor's post-enforcement obligations.

The Article does not mention senior security rights that may exist in the encumbered asset. This silence impliedly means that these security rights which have priority over the security of the enforcing secured creditor are not affected by the sale of the encumbered asset. Rather, they continue to encumber the sold asset. A good faith and therefore unencumbered acquisition of the assets will normally be excluded if the security rights are registered, cf. Comment D on IX.–7:213.

As far as the satisfaction of the enforcing creditor's rights is concerned, it may use the enforcement proceeds to satisfy the obligations covered by the security. These obligations are enumerated in IX.–2:401.

Paragraph (3) contains no fewer than three rules, expressing and affirming the general rules on priority. The secured creditors mentioned in the first and second sentences are competing secured creditors, but with a lower ranking according to the rules of Chapter 4 of this Book IX. The secured rights of these post-ranking secured creditors are satisfied from that part of

the proceeds that may remain after the enforcing creditor's secured rights have been satisfied according to paragraph (2). If there are several such junior ranking secured creditors with differing priorities – an unlikely event in the case of security rights in a movable – each of them is entitled to satisfaction after any prior ranking secured creditors have been satisfied.

The third sentence of paragraph (3) deals with the rights to which holders of any other limited proprietary rights are entitled to share in the proceeds of an execution. The circle and number of any such limited proprietary rights is uncertain since they are not covered by the present rules; they are rooted in the national laws. However, if under the applicable national law they are attributed a ranking, that must be respected by these rules. One example is a usufruct in movables.

For ranking and satisfaction of these rights, a specific rule is provided by IX.–4:101 paragraph (2)(b), according to which the time of the creation of these rights determines their ranking. This is applicable not only for the possible ranking inter se of several rights of this kind but also for the ranking of these rights vis-à-vis proprietary security rights, as can be deduced from the position of the cited provision in the context of the general priority rules of Chapter 4.

The second peculiarity is due to the fact that these rights do not secure a right to payment. Therefore their extent has to be determined differently. The nearest equivalent to a secured right is the monetary value of such rights. This is laid down by the second half-sentence of sentence 3.

Paragraph (4) expresses the general rule that any sum of money that remains after satisfaction of the preceding creditors must be paid to the security provider. This amount represents the net value of the encumbered asset owned by the security provider. Therefore, the latter is entitled to this part of the proceeds resulting from the liquidation of the encumbered asset.

Paragraph (5) affirms and underlines the principle embodied by paragraph (2): it is important to underline that the enforcing secured creditor must not be enriched by way of the enforcement of its security right.

IX.–7:216: Appropriation of encumbered asset by secured creditor

The secured creditor may accept the encumbered assets in total or partial satisfaction of the secured right under the following conditions:

(a) the secured creditor must give advance notice of the intention to acquire all or parts of the encumbered assets in total or partial satisfaction of the secured right, specifying the relevant details;

(b) the proposal must be sent to the persons specified in IX.–7:209 (Addressees of the notice);

(c) the conditions of IX.–7:210 (Time and contents of notice) paragraphs (1), (2) (b) and (d) and (3) and IX.–7:212 (Commercially reasonable price) paragraph (1), applied with appropriate adaptations, must be fulfilled;

(d) the proposal must indicate the secured amount owed as of the end of business on the day before the proposal is sent and the amount of the right that is proposed to be satisfied by accepting the encumbered asset; and

(e) no addressee objects to this proposal in writing within ten days after the proposal has been received by every addressee.

COMMENTS

Introduction. The appropriation of the encumbered asset in practice plays a modest role. A secured creditor will only be interested in taking over a corporeal asset if it can either make use of it for its own purposes or has an opportunity to resell it for a profit.

Nevertheless, this alternative has been accepted because in some situations it may be very useful. Instead of waiting for payment from a security provider who probably is in financial distress, the secured creditor may save money by acquiring the encumbered asset for its own purposes at a reduced price or by obtaining cash by reselling it to a third party.

On the other hand, allowing appropriation opens up a certain risk for the security provider since the secured creditor naturally pursues its own interests. That means that the law must also protect the legitimate interests of the security provider. This is the reason for the conditions imposed upon the secured creditor by the present Article.

Opening words of Article. The secured creditor has the choice of appropriating the encumbered asset(s) either completely or partly only, depending upon its intentions. This is not spelt out, but is implied in the text. The choice may, but need not, coincide with the alternative of the text between total or partial satisfaction of the secured right. If the value of the encumbered assets easily covers the secured right, appropriating them will lead to full satisfaction of the secured creditor. If, by contrast, the encumbered assets have lost much of their value, their appropriation may result in only partial satisfaction.

The preceding considerations may also determine the secured creditor's decision whether or not it should decide for appropriation.

Sub-paragraph (a). This paragraph requires an advance notice by the secured creditor of its intention to appropriate, i.e. to acquire the encumbered assets. In terms of contract law, this is an offer by the secured creditor to the persons indirectly mentioned in sub-paragraph (b). This

offer needs to be quantified with respect to the two elements mentioned in sub-paragraph (a) and also in the preceding comments on the opening words of the Article. Firstly, the secured creditor must indicate whether it proposes to acquire all or merely parts of the encumbered assets; in the latter case, of course, specification of the desired parts is necessary. Secondly, the secured creditor must indicate whether the proposed appropriation is to be in full or merely in part satisfaction of the secured right; in the latter case, again, which percentage or part amount of the right to payment the secured creditor intends to cover by the appropriation.

In terms of a contract of sale, the first element specifies the asset to be bought and the second element the purchase price offered for the acquisition.

Sub-paragraph (b). This specifies the addressees of the secured creditor's notice of intention: these are the persons enumerated in IX.–7:209, i.e. the addressees of the notice of extra-judicial disposition. The list is, roughly speaking:

- all persons liable for the obligation covered by the security right (IX.–7:209 sub-paragraph (a)); and
- all persons having rights in the encumbered asset (IX.–7:209 sub-paragraph (b)).

It is obvious that these two classes of persons would be directly affected by the secured creditor's proposal to purchase all or part of the collateral and the price offered for this acquisition.

Sub-paragraph (c). This enumerates indirectly – by referring to various provisions – six additional conditions that have to be fulfilled. These conditions may here briefly be summarised.

(i) The notice must be given in due time, i.e. it must reach the addressees ten days before the intended disposition (IX.–7:210 paragraph (1)).

(ii) The notice must reasonably describe the encumbered asset to be disposed of (IX.–7:210 paragraph (2)(b). Transposed to the case covered here this means that the secured creditor must specify exactly – unless it proposes to appropriate all the assets encumbered in its favour – which of the encumbered assets it wishes to acquire.

(iii) The notice must indicate the option of the persons mentioned in IX.–7:210 paragraph (2)(d) – who are also the receivers of the notice – to avert the proposed disposition of the encumbered assets by payment of the outstanding amount of the obligation covered by the security.

(iv) "The notice must be in a language that can be expected to inform the addressee" As required by IX.–7:210 paragraph (3); on this requirement see Comment C on that Article.

(v) The price offered by the secured creditor must be "commercially reasonable" (IX.–7:212 paragraph (1)). This yardstick is a general principle that informs all the methods of extra-judicial enforcement.

Sub-paragraph (d). In order to obtain a full and precise picture of the actual amount of the monetary obligation covered by the security, the secured creditor must communicate the exact amount which is still open "as of the end of business on the day" before the proposal is sent. Further, the secured creditor must indicate the amount of the obligation that the secured creditor proposes to cover by appropriating the encumbered assets or part of these assets (IX.–7:216 sub-paragraph (d)).

Sub-paragraph (e). According to the final important sub-paragraph, the secured creditor's proposal is regarded as accepted, if none of the addressees objects in writing to the secured creditor's proposal. The time for objecting to the proposal is limited to ten days after the proposal has been received by every addressee. Proving the time of receipt will be difficult for the secured creditor. However, that difficulty can be surmounted by sending the notice by registered letter or by messengers against dated receipts.

Subsection 3: Judicial enforcement

IX.–7:217: Applicable rules

(1) Judicial enforcement is to be undertaken according to the procedural rules of the member state where enforcement by a court or other competent authority is sought by the secured creditor.

(2) The secured creditor may apply to the court or other competent authority to exercise any of the rights under the preceding Subsections. These rights may be exercised by the court or other competent authority regardless of whether they are under the preceding Subsections dependent upon or excluded by a party agreement or a consent or the absence of an objection of the security provider or other persons.

COMMENTS

A. Judicial enforcement

A secured creditor may always apply to the courts or other competent authorities for judicial enforcement of its security rights. Regardless of whether the parties have or have not agreed on the possibility of extra-judicial enforcement or whether the secured creditor would be free to commence extra-judicial enforcement under the default position of the rules of this Chapter, the secured creditor can never be deprived of the right to seek enforcement of its security right through an action before a court or other competent authority.

In practice, the secured creditor will seek judicial enforcement especially in the following sets of circumstances. First, where the possibility of extra-judicial enforcement has been excluded by party agreement according to IX.–7:103 paragraph (1). Second, in the case of consumer security providers: where extra-judicial enforcement has not been agreed upon after default, see IX.–7:103 paragraph (2)). Third, even where extra-judicial enforcement would be possible, the secured creditor might prefer judicial enforcement because it is to be expected that the security provider would show too much resistance (so that even in the context of extra-judicial enforcement proceedings, the secured creditor would have to ask for the assistance of the court or other competent authority anyway) or because the legal situation is too complicated so that the secured creditor prefers not take enforcement into its own hands in order to avoid potential liability arising from wrongful enforcement measures (cf. the liability in damages provided by IX.–7:104 sub-paragraph (b)).

B. Applicable procedural rules

Whenever the secured creditor applies to a court or other competent authority for judicial enforcement of its security right, the court or other competent authority will apply its own procedural law (see paragraph (1)). Judicial enforcement of a security right under these rules is subject to the national procedural provisions of the member state where judicial enforcement is sought, including this member state’s provisions on jurisdiction.

Procedural safeguards established in the preceding Subsections for extra-judicial enforcement do not apply to judicial enforcement. Instead, notification requirements and similar issues are governed exclusively by the applicable national procedural law.

C. Available remedies

While these rules must not interfere with national procedural law, they may regulate issues of substantive law even in so far as these issues may arise in the context of judicial enforcement of a security right. Paragraph (2) sentence 1 therefore stipulates that the secured creditor should be able to enjoy the same rights as are provided in the preceding Subsections (i.e. in the rules on extra-judicial enforcement). The secured creditor is as a matter of substantive law entitled to a sale or an appropriation of the encumbered asset or to the proceeds of a lease of the collateral to a third party; all these rights of the secured creditor may be enforced in judicial proceedings against the security provider. The collection of an encumbered asset has to be enforced through proceedings brought against the third party debtor. Whenever such enforcement measures are administered by a court or another competent authority, the rules on the distribution of proceeds described in the preceding Subsection (which essentially qualify the secured creditor's rights) are also applicable.

Since the exercise of these rights of the secured creditor by a court or other competent authority is subject to the procedural safeguards existing under national procedural law, there is no need to require an agreement between the secured creditor and the security provider or a consent (or the absence of an objection) of the former or of other persons (paragraph (2) sentence 2). The court or other competent authority may seize possession from the security provider regardless of whether the latter had consented or objected; protective measures of any kind may be ordered even if there was no agreement to this effect; an agreement between the secured creditor and the security provider excluding a sale of the encumbered asset is ineffective in the context of judicial enforcement; an appropriation of the encumbered asset administered by a court is not dependent upon the absence of any objections by a person mentioned in IX.–7:209.

For the rights of the security provider and other persons who might be affected by the enforcement, the general rule in IX.–7:104 applies. However, whether these rights can be brought in an independent action or whether they merely can be raised as defences within the main enforcement proceedings is a matter left for the national procedural law to decide.

Section 3: Rules for retention of ownership devices

IX.–7:301: Consequences of default under retention of ownership devices

(1) The holder of a retention of ownership device exercises the rights under the retention of ownership device by termination of the contractual relationship under a contract of sale, hire-purchase, financial leasing or consignment according to the general rules of Book III, Chapter 3, Section 5.

(2) Any rights in the supplied asset that were transferred or created by the buyer, hire-purchaser, lessee or consignee will terminate, unless:

(a) the latter had been authorised to create or transfer such rights;
(b) the transferee is protected by IX.–2:108 (Good faith acquisition of security right) to IX.–2:111 (Security right in cash, negotiable instruments and documents) or IX.–6:102 (Loss of proprietary security due to good faith acquisition of ownership); or
(c) the rights of the transferee exceptionally enjoy priority over the rights of the holder of the retention of ownership device.

(3) On resale or re-leasing, the holder of the retention of ownership device is entitled to any surplus over the original price for the supplied assets which may be realised.

(4) A third party to whom the retention of ownership device has been transferred by agreement or by law is entitled to the rights under paragraphs (1) to (3).

COMMENTS

A. Starting point

Most of the rules of Book IX apply not only to ordinary security rights, but also to retention of ownership devices (IX.–1:104 paragraph (1)). However, one of the major exceptions relates to the consequences of the debtor's default and the closely connected area of enforcement. The chief reason why the special features of retention of ownership become relevant in this area is that, since the seller, supplier or lessor as secured creditor had retained ownership, it had remained the owner of the supplied asset. Consequently, the creditor need not proceed to obtain ownership of the encumbered asset from the debtor or a third-party security provider. Rather, it must merely seek to obtain possession from the buyer, hire-purchaser, lessee, consignee or other holder of the asset.

Consequently, the main function of the present Article is to re-establish the owner's possession of the supplied asset. Incidental to this is to re-establish, as far as possible, the situation of the parties, as it existed before the conclusion of the contract of sale, hire-purchase, financial lease or consignment.

B. Obtaining possession

Although the main function of paragraph (1) is to enable the holder of a retention of ownership device to regain possession of the supplied asset, that aim cannot be achieved without paying due regard to the buyer's, hire-purchaser's, lessee's or consignee's acquired rights.

The first step that must be taken by the seller, supplier or lessor is to terminate the contractual relationship arising from the underlying contract of sale, hire-purchase, financial leasing or consignment which entitles the buyer, hire-purchaser, lessee or consignee to possession of the supplied asset. Termination of this relationship will under general contract law be possible if the buyer, hire-purchaser, lessee or consignee has defaulted on the payments due to the seller, supplier or lessor (cf., in general, Book III, Chapter 3, Section 5). If it is impossible to return the supplied assets (e.g. if they do no longer exist or have been disposed of to a third party), their value has to be paid to the seller, supplier or lessor (cf. III.–3:513).

On the owner's steps for regaining possession of the supplied assets, cf. IX.–7:302.

On the other hand, the seller, supplier or lessor is obliged to return any payments received for the supplied assets, e.g. as purchase price or rent, including interest (see III.–3:511 paragraphs (2) and (5)).

C. Compensation for use and diminution of value of assets

The seller, supplier and lessor are also entitled as against the buyer, hire-purchaser, lessee and consignee to fair compensation for the use and any diminution of value of the supplied assets. This rule is derived from the general principles established by III.–3:513 to III.–3:515.

D. Extinction of rights created by buyer, hire-purchaser, lessor or consignee – paragraph (2)

Basic position. While they were in possession of the supplied goods, the buyer, hire-purchaser, lessee or consignee, respectively, may have created rights in the supplied assets which they held. They may have resold or re-leased those assets or encumbered them with security rights.

Generally speaking, all such rights will be extinguished, because they were obtained from a person who, generally speaking, had no authority to create or transfer such rights. The buyer, hire-purchaser, lessee or consignee was not the owner or – at most – merely owner under a suspensive condition. If the seller, supplier or lessor had transferred any ownership, it was conditional ownership – the condition being the full payment of the purchase price or of all the leasing rates; and this condition did not occur.

Exceptions. There are, however, three exceptions to this basic position.

First, exceptionally the seller, supplier or lessor may have authorised the buyer, hire-purchaser, lessee or consignee to transfer ownership in the supplied assets (sub-paragraph (a)). This corresponds to commercial practice under retention of ownership sales, under which the buyer is entitled to sell the bought goods in the ordinary course of its business (in exchange for an encumbrance being created in any proceeds). Some other cases of an authority of the security provider to sell the encumbered assets are mentioned in IX.–5:204 paragraph (1).

Second, the transferee may be protected by good faith acquisition of ownership or of a limited proprietary right, especially a security right; cf. the rules of IX.–2:108 (Good faith acquisition of security right) to IX.–2:111 (Security right in cash, negotiable instruments and documents)

and IX.–6:102 (Loss of proprietary security due to good faith acquisition of ownership) (see sub-paragraph (b)).

Third, even if neither one of the two preceding alternatives applies, a transferee may prevail over the owner, provided it enjoys priority over the rights of the seller, supplier or lessor (sub-paragraph (c)). This will be the case only in exceptional circumstances. One example is where the holder of a retention of ownership device has concluded a subordination agreement with another secured creditor. A second situation where the retention of ownership device has a lower priority rank than other security rights occurs where the retention of ownership device has been registered only after expiry of the 35 days period of IX.–3:107 paragraph (2). In such a situation the retention of ownership device does not enjoy superpriority; therefore, a security right in the supplied asset that has been made effective earlier takes precedence over the retention of ownership device. A third situation is where other security rights in the same asset were acquired on the basis of a good faith acquisition (see IX–4:101 paragraph (5)). This situation overlaps with the cases covered by sub-paragraph (b). It is appropriate to mention these cases separately because sub-paragraph (b) covers also the good faith acquisition of ownership which would not fall under sub-paragraph (c).

E. Resale or releasing

Paragraph (3) solves a controversy which has arisen in practice. In order to avoid unnecessary controversy the factual situation must be clarified. The provision addresses the situation which arises after a contractual relationship arising from a contract of sale, hire-purchase, financial leasing or consignment has been terminated and the supplied asset has been duly returned to the seller, supplier or lessor. If now the seller, supplier or lessor concludes a new contract of sale or financial leasing with another buyer or lessee and exceptionally realises a higher price – due to changed market conditions or more intensive personal efforts – the issue is whether any surplus over the originally agreed price may be retained by the seller or lessor or whether it is due to the other party under the original contract of sale, hire-purchase, financial leasing or consignment.

The solution chosen by the text attributes the additional profit to the seller, supplier or lessor. The new contract has been concluded separately and independently of the original contract. The original buyer, hire-purchaser, lessee or consignee has not contributed in any way to achieving the additional profit – except indirectly by its default. How could such a non-performance justify a reward?

F. Position of third person transferee of retention of ownership device

Paragraph (4) addresses the position of a third person to whom a retention of ownership device has been transferred, particularly on the basis of a transfer of the secured right which includes a transfer of the security right, including a retention of ownership device (IX.–5:301).

Such a transferee of the retention of ownership device assumes the same position as the original seller, supplier or lessor. Consequently, paragraphs (1) to (3) apply to these persons as well.

IX.–7:302: Possession, immobilisation and preservation

IX.–7:201 (Creditor's right to possession of corporeal asset), IX.–7:202 (Creditor's right to immobilise and to preserve encumbered asset) and IX.–7:203 (Intervention of court or other authority) apply in relation to retention of ownership devices with the adaptations set out in IX.–1:104 (Retention of ownership devices: applicable rules) paragraph (2).

COMMENTS

This Article has the purpose of making the rules of this Chapter on regaining possession by the secured creditor and on protective measures after the debtor's default applicable also to retention of ownership devices. The relevant rules are IX.–7:201 to IX.–7:203.

BOOK X

TRUSTS

CHAPTER 1: FUNDAMENTAL PROVISIONS

Section 1: Scope of application and relation to other rules

X.–1:101: Trusts to which this Book applies

(1) This Book applies to trusts created under Chapter 2 (Constitution of trusts).

(2) With appropriate modifications this Book also applies to trusts:

(a) constituted by:

(i) a declaration to that effect set out in an enactment; or

(ii) a court order with prospective effect; or

(b) arising by operation of law set out in an enactment relating to a matter not determined by these rules.

(3) In this Book, "court" includes a public officer or body, if authorised to act under the applicable national law, but does not include an arbitral tribunal.

X.–1:102: Priority of the law of proprietary securities

In relation to trusts for security purposes, this Book is subject to the application of the rules in Book IX (Proprietary security in movable assets).

Section 2: Definition, special legal effects and parties

X.–1:201: Definition of a trust

A trust is a legal relationship in which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accordance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes.

X.–1:202: Special legal effects of a trust

(1) A trust takes effect in accordance with the rules in Chapter 10 (Relations to third parties) with the effect that the trust fund is to be regarded as a patrimony distinct from the personal patrimony of the trustee and any other patrimonies vested in or managed by the trustee.

(2) In particular (and except for some reason other than merely that the trust fund is vested in the trustee):

(a) the personal creditors of the trustee may not have recourse to the trust fund, whether by execution or by means of insolvency proceedings;

(b) the trust fund is not subject to rules allocating property rights on the basis of matrimonial or family relationships; and

(c) the trustee's successors are not entitled to benefit from the trust fund on the trustee's death.

X.–1:203: Parties to a trust

(1) The truster is a person who constitutes or intends to constitute a trust by juridical act.

(2) The trustee is the person in whom the trust fund becomes or remains vested when the trust is created or subsequently on or after appointment and who has the obligation set out in X.–1:201 (Definition of a trust).

(3) A beneficiary is a person who, according to the trust terms, has either a right to benefit or an eligibility for benefit from the trust fund.

(4) A trust auxiliary is a person who, according to the trust terms, has a power to appoint or remove a trustee or to consent to a trustee's resignation.

(5) Except as otherwise provided for by this Book:

(a) a truster may also be a trustee or a beneficiary;

(b) a trustee may also be a beneficiary; and

(c) any of those parties to a trust may also be a trust auxiliary.

(6) In this Book a person's "successor" is the heir or representative who under the law of succession becomes entitled to that person's personal patrimony on that person's death. Where the context permits, a reference to a party (or former party) to a trust is a reference to that person's successor if that person has died.

X.–1:204: Plurality of trustees

(1) Where there are several trustees, the trust is solidary.

(2) Where trust assets are vested in several trustees together, their co-ownership is joint.

X.–1:205: Persons entitled to enforce performance of trustee's obligations

(1) A beneficiary has a right to performance of the trustee's obligations so far as they relate to that beneficiary's right to benefit or eligibility for benefit.

(2) The persons who may enforce performance of the trustee's obligations under a trust to advance public benefit purposes are:

(a) any public officer or body having that function; and

(b) any other person having sufficient interest in the performance of the obligations.

(3) A trustee may enforce performance of the obligations of a co-trustee.

X.–1:206: Right to benefit and eligibility for benefit

(1) A person has a right to benefit if the trust terms require the trustee in given circumstances to dispose of all or part of the trust fund so as to confer a benefit on that person.

(2) A person has an eligibility for benefit if the trust terms permit the trustee in given circumstances to dispose of all or part of the trust fund so as to confer a benefit on that person, but whether or not that person is to obtain a benefit depends on an exercise of discretion by the trustee or another.

(3) A beneficiary's eligibility for benefit becomes a right to benefit if the trustee gives the beneficiary notice of a decision to confer benefit on that beneficiary in accordance with the trust terms governing that eligibility.

(4) In this Book "benefit" does not include the exercise by a trustee of a right of recourse to the trust fund.

Section 3: Modifications of and additions to general rules

X.–1:301: Extended meaning of gratuitous

(1) In this Book "gratuitous" means done or provided without reward.

(2) A juridical act or a benefit is also regarded as gratuitous in this Book if, considering the value of the rights created by the juridical act or the benefit provided, the value of the reward is so trivial that fairness requires it to be disregarded.

X.–1:302: Notice

(1) Where this Book requires notice to be given to a person, but it is not reasonably practical to do so, notice may be given instead to the court.

(2) Where there are several trustees, a requirement to give notice to the trustees is satisfied by giving notice to any one of them, but a notice relating to a change in trustees must be given to a trustee who will continue to be a trustee after the change takes effect.

X.–1:303: Mandatory nature of rules

The rules of this Book are mandatory, except as otherwise provided.

CHAPTER 2: CONSTITUTION OF TRUSTS

Section 1: Basic rules on constitution by juridical act

X.–2:101: Requirements for constitution

A trust is constituted in relation to a fund vested in the truster, without any further requirement, if:

(a) the truster declares an intention to constitute a trust in relation to that fund;

(b) the declaration satisfies the requirements set out in X.–2:201 (Requirements for a declaration); and

(c) either X.–2:102 (Constitution by transfer) or X.–2:103 (Constitution without transfer) applies.

X.–2:102: Constitution by transfer

(1) If the other requirements for constitution are satisfied, a trust is constituted when in implementation of the declaration the fund is transferred to a person who agrees to be a trustee or is identified in the declaration as a person who is or is to be a trustee.

(2) The rules on contracts for donation apply analogously to an agreement between truster and intended trustee for the transfer of the fund in the truster's lifetime.

(3) Where the truster has made a binding unilateral undertaking to constitute a trust to a person who is intended to be a trustee of the fund, that person is a trustee of the right to performance of the obligation created by the underaking, unless that right is rejected.

X.–2:103: Constitution without transfer

(1) If the other requirements for constitution are satisfied, a trust is constituted by the declaration alone, without a transfer, if:

(a) the declaration indicates that the truster is to be a sole trustee;

(b) the declaration is testamentary and does not provide for a trustee; or

(c) (i) the truster does all of the acts required of the truster to transfer the fund to the intended trustee,

(ii) the intended trustee does not or cannot accept the fund, and

(iii) the declaration does not provide otherwise.

(2) When a trust is constituted under paragraph (1), the truster becomes a trustee.

Section 2: Declaration

X.–2:201: Requirements for a declaration

(1) The requirements referred to in Section 1 (Basic rules on constitution by juridical act) for a declaration of an intention to constitute a trust are that:

(a) the declaration is made by the truster or a person who has authority to make it on the truster's behalf; and

(b) the declaration complies with any requirement as to form set out in X.–2:203 (Formal requirements for declaration).

(2) No notice or publication of the declaration to any party is required.

X.–2:202: Mode of declaration

(1) A person declares an intention to constitute a trust when that person by statements or conduct indicates an intention that the person in whom the fund is or is to be vested is to be legally bound as a trustee.

(2) In determining whether one or more statements contained in a testamentary or other instrument determining rights over an asset amount to a declaration of an intention to

constitute a trust in relation to that asset, an interpretation of those statements which gives effect to their entirety is to be preferred.

X.–2:203: Formal requirements for declaration

(1) Where the transfer of a fund requires the making of an instrument by the transferor, the declaration of an intention to constitute a trust is of no effect unless contained in the instrument of transfer or made in the same or an equivalent form.

(2) A declaration that the truster is to be the sole trustee is of no effect unless made in the same form as a unilateral undertaking to donate.

(3) Where the trust is to be created on the death of the maker of the declaration, the declaration is of no effect unless made by testamentary instrument.

X.–2:204: Revocation or variation of declaration

(1) The maker of a declaration may revoke or vary the declaration or a term of the declaration at any time before the trust is constituted.

(2) A revocation or variation is of no effect unless it satisfies the formality requirements, if any, which applied to the declaration.

(3) However, a declaration or term set out in an instrument may be revoked by substantially destroying or defacing that instrument, so far as it relates to that declaration or term, if the applicable national rules permit a statement intended to have legal effect contained in such an instrument to be revoked by that means.

X.–2:205: Effects when declaration does not satisfy requirements

If the fund is transferred to the intended trustee in implementation of a declaration which does not satisfy the requirements of X.–2:201 (Requirements for a declaration), the transferee takes the fund on the terms of a trust to re-transfer the fund to the truster.

Section 3: Refusal of trust and rejection of right to benefit

X.–2:301: Right of trustee to refuse the trust

(1) If a person has become a trustee without agreeing to act when a trust is constituted, that person may refuse to act as a trustee by notice to:

(a) the truster; or

(b) any co-trustee who has full legal capacity and agrees to act as a trustee.

(2) Refusal may take the form of either a rejection of all the rights which have vested or a disclaimer of the whole trust, but operates as both a rejection and a disclaimer.

(3) A refusal may not be revoked.

(4) Where a person reasonably incurs costs in order to refuse, that person has a right to be reimbursed by any co-trustees who accept the trust fund and agree to act or, if there are no such co-trustees, the truster.

(5) Where a sole trustee refuses or there is no co-trustee who accepts the trust fund and agrees to act, the truster becomes a trustee of the fund in accordance with X.–2:103 (Constitution without transfer) paragraph (1)(c), unless the declaration of the intention to constitute a trust provides otherwise.

(6) Subject to the previous paragraphs of this Article, the requirements for a refusal and its effects are determined by the application or analogous application of II.–4:303 (Right or benefit may be rejected).

X.–2:302: Rejection of right to benefit or eligibility for benefit

A beneficiary's right under II.–4:303 (Right or benefit may be rejected) to reject a right to benefit or an eligibility for benefit is exercised by giving notice to the trustees.

Section 4: Additional rules for particular instances

X.–2:401: Whether donation or trust

(1) Where a person transfers an asset to another gratuitously and it is uncertain whether or to what extent the transferor intends to donate the asset or to constitute a trust in respect of it for the benefit of the transferor, it is presumed that the transferor intends:

(a) to donate to the transferee, if this would be consistent with the relationship between the parties and past or concurrent dealings of the transferor;

(b) in any other case, that the transferee be a trustee for the benefit of the transferor.

(2) A presumption in paragraph (1) may be rebutted (and the alternative intention in paragraph (1) established) by showing that at the time of transfer the transferor did not or, as the case may be, did intend to dispose of the asset for the exclusive benefit of the transferee.

(3) Paragraphs (1) and (2) apply correspondingly where the transfer is to several transferees (including where the transfer is to the transferor and another).

(4) Where it is shown or presumed that the transferor intends to dispose of the fund for the benefit of a transferee only in part, or for the benefit of one transferee, but not a co–transferee, the transferor is to be regarded as intending to constitute a trust for the benefit of the transferee to that extent.

X.–2:402: Priority of rules of succession law

Where the trust is to take effect on the truster's death, the trust is subject to the prior application of those rules of succession law which determine:

(a) how the deceased's estate is to be disposed of in satisfaction of the funeral costs and debts of the deceased; and

(b) (i) whether the truster was free to dispose of any part of the fund,

(ii) whether any person has a claim in respect of any part of the fund by reason of a family or other connection to the deceased, and

(iii) how such claims are to be satisfied.

X.–2:403: Trust in respect of right to legacy pending transfer of legacy

Where a truster declares that a legatee is to be a trustee in relation to a legacy from the truster and that declaration satisfies the requirements set out in X.–2:201 (Requirements for a declaration), but the legacy has not yet been transferred, the legatee is a trustee of the right against the truster's successor which arises in respect of the legacy on the truster's death.

CHAPTER 3: TRUST FUND

Section 1: Requirements for the initial trust fund

X.–3:101: Trust fund

(1) Trust assets, whether or not of the same kind, form a single trust fund if they are vested in the same trustees and either:

(a) the trust terms relating to the assets indicate that they form a single fund or require them to be administered together; or

(b) separate trusts relating to the assets are merged in performance of the obligations under those trusts.

(2) Where trusts are constituted at the same time, on the same terms, and with the same trustees, the trust assets form a single trust fund unless the trust terms provide otherwise.

(3) In this Book "part of the trust fund" means a share of the trust fund, a specific asset or share of an asset in the fund, or a specific amount to be provided out of the fund.

X.–3:102: Permissible trust assets

Trust assets may consist of proprietary or other rights, so far as these are transferable.

X.–3:103: Ascertainability and segregation of the trust fund

(1) A trust is only created in relation to a fund in so far as, at the time the trust is to come into effect,

(a) the fund is sufficiently defined in the trust terms or the assets forming the fund are otherwise ascertainable; and

(b) the fund is segregated from other assets.

(2) A declaration of intention to create a trust in relation to an unsegregated fund is to be regarded, so far as the other terms of the declaration permit, as a declaration of an intention to create a trust of the entire mixture containing the fund on the terms that:

(a) the trustee is obliged to segregate the intended trust fund; and

(b) until the fund is segregated, the rights and obligations envisaged by the terms of the declaration apply in relation to a corresponding part of the mixture.

Section 2: Changes to the trust fund

X.–3:201: Additions to the trust fund

(1) After a trust is created, an asset which is capable of being a trust asset becomes part of the trust fund if it is acquired by a trustee:

(a) in performance of the obligations under the trust;
(b) as an addition to or by making use of the trust fund;
(c) by making use of information or an opportunity obtained in the capacity of trustee, if the use is not in accordance with the terms of the trust; or
(d) when or after the trustee disposed of that asset otherwise than in accordance with the terms of the trust.

(2) Where there are several trustees, an asset may become part of the trust fund in accordance with this Article without being acquired by all of them.

X.–3:202: Subtractions from the trust fund

(1) An asset ceases to be part of the trust fund when it ceases to be vested in a person who is under the obligation set out in X.–1:201 (Definition of a trust).

(2) Where there are several trustees, an asset remains part of the trust fund so long as it is vested in at least one of the trustees in that capacity.

X.–3:203: Mixing of the trust fund with other assets

(1) If trust assets are mixed with other assets vested in the trustee in such a way that the trust assets cease to be identifiable, a trust arises in respect of the mixture and VIII.–5:202 (Commingling) applies analogously, as if each patrimony had a different owner, so as to determine the share of the mixture which is to be administered and disposed of in accordance with the original trust.

(2) If the other assets are the personal patrimony of the trustee, any diminution in the mixture is to be allocated to the trustee's personal share.

X.–3:204: Loss or exhaustion of trust fund

(1) A trust ends when the trust fund has been completely disposed of in performance of the obligations under the trust or for any other reason there ceases to be a trust fund.

(2) Where the trustee is liable to reinstate the trust fund as a result of non-performance of obligations under the trust, the trust revives if the trust fund is reinstated.

CHAPTER 4: TRUST TERMS AND INVALIDITY

Section 1: Trust terms

X.–4:101: Interpretation

Without prejudice to the other rules on the interpretation of unilateral juridical acts, if the meaning of a trust term cannot otherwise be established, interpretations to be preferred are those which:

(a) give effect to the entirety of the words and expressions used;

(b) prevent reasonable conduct of a trustee from amounting to a non-performance;

(c) prevent or best reduce any incompleteness in provision for disposal of the trust fund; and

(d) confer on the truster a right to benefit or enlarge such right, if the trust is constituted gratuitously in the truster's lifetime and the truster has or may have reserved such a right.

X.–4:102: Incomplete disposal of the trust fund

(1) To the extent that the trust terms and the rules of this Book do not otherwise dispose of the trust fund in circumstances which have arisen, the trust fund is to be disposed of for the benefit of the truster.

(2) However, if the incomplete disposal of the trust fund arises because effect cannot be given to a trust for advancement of a public benefit purpose or because performance of the obligations under such a trust does not exhaust the trust fund, the trust fund is to be disposed of for the advancement of the public benefit purpose which most closely resembles the original purpose.

X.–4:103: Ascertainability of beneficiaries

(1) A trust term which purports to confer a right to benefit is valid only if the beneficiary is sufficiently identified by the truster or is otherwise ascertainable at the time the benefit is due.

(2) A trust term which permits a trustee to benefit those members of a class of persons which the trustee or a third person selects is valid only if, at the time the selection is permitted, it can be determined with reasonable certainty whether any given person is a member of that class.

(3) A person may be a beneficiary notwithstanding that that person comes into existence only after the trust is created.

X.–4:104: Ascertainability of right to benefit or eligibility for benefit

(1) A right to benefit or eligibility for benefit is valid only in so far as the benefit is sufficiently defined in the trust terms or is otherwise ascertainable at the time the benefit is due or to be conferred.

(2) If the benefit to be conferred is not ascertainable only because a third party cannot or does not make a choice, the trustees may make that choice unless the trust terms provide otherwise.

X.–4:105: Trusts to pay creditors

A trust for the purpose of paying a debt, or for the benefit of a creditor as such, takes effect as a trust to benefit the debtor by a performance of the debtor's obligation discharging the debtor.

Section 2: Invalidity

X.–4:201: Avoidance by the truster

Without prejudice to other necessary adaptations, Book II Chapter 7 (Grounds of invalidity) is modified as follows in its application to trusts constituted gratuitously in the truster's lifetime:

(a) the truster may avoid the trust or a trust term if the trust was constituted or the term included because of a mistake of fact or law, regardless of whether the requirements of II.–7:201 (Mistake) paragraph (1)(b) are satisfied;

(b) a truster who was dependent on, or was the more vulnerable party in a relationship of trust with, a beneficiary may avoid the trust or a trust term in so far as it provides for benefit to that beneficiary unless that beneficiary proves that the beneficiary did not exploit the truster's situation by taking an excessive benefit or grossly unfair advantage;

(c) the reasonable time for giving notice of avoidance (II.–7:210 (Time)) does not commence so long as:

(i) the truster exercises an exclusive right to benefit from the income; or

(ii) the trust fund consists of one or more rights to benefit which are not yet due; and

(d) where sub-paragraph (c)(i) applies, acceptance of benefit is not to be regarded as an implied confirmation of the trust

X.–4:202: Protection of trustees and third parties after avoidance

(1) The trustee's title to the trust fund is unaffected by avoidance.

(2) Unless the trustee knew or could reasonably be expected to know that the trust or trust term might be avoided:

(a) a trustee is not liable in respect of any administration or disposition of the trust fund which was in accordance with the terms of the trust before the trust was avoided;

(b) a trustee may invoke against the person entitled to benefit as a result of avoidance defences which the trustee could have invoked against the beneficiary who had a right to that benefit before avoidance; and

(c) a trustee retains any right of recourse to the trust fund which arose before avoidance.

(3) Avoidance of the trust does not affect the rights of a third party who before avoidance acquired a beneficiary's right to benefit, or a security right or other limited right in that right to benefit, if:

(a) the third party neither knew nor had reason to know that the trust or trust term could be avoided; and
(b) the disposition is not gratuitous.

X.–4:203: Unenforceable trust purposes

(1) A trust which is for a purpose other than to benefit beneficiaries or to advance public benefit purposes takes effect as a trust for the truster.

(2) The trustee has a revocable authority to dispose of the trust fund in accordance with the original trust for the advancement of the unenforceable purpose in so far as:

(a) advancement of that purpose does not infringe a fundamental principle or mandatory rule and is not contrary to the public interest;
(b) it can be determined with reasonable certainty whether any given disposal of the trust fund is or is not for its advancement; and
(c) the disposal is not manifestly disproportionate to any likely benefit from that disposal.

CHAPTER 5: TRUSTEE DECISION-MAKING AND POWERS

Section 1: Trustee decision–making

X.–5:101: Trustee discretion

(1) Subject to the obligations of a trustee under this Book and exceptions provided for by other rules, the trustees are free to determine whether, when and how the exercise of their powers and discretions is best suited to performing their obligations under the trust.

(2) Except in so far as the trust terms or other rules provide otherwise, the trustees are not bound by, and are not to regard themselves as bound by, any directions or wishes of any of the parties to the trust or other persons.

(3) The trustees are not obliged to disclose the reasons for the exercise of their discretion unless the trust is for the advancement of a public benefit purpose or the trust terms provide otherwise.

X.–5:102: Decision-making by several trustees

If there are several trustees, their powers and discretions are exercised by simple majority decision unless the trust terms or other rules of this Book provide otherwise.

X.–5:103: Conflict of interest in exercise of power or discretion

Unless the trust terms provide otherwise, a trustee may not participate in a decision to exercise or not to exercise a power or discretion if the effect of the decision is to confer, confirm, or enlarge a right to benefit or eligibility for benefit in favour of the trustee.

Section 2: Powers of a trustee

Sub-section 1: General rules

X.–5:201: Powers in general

(1) Except where restricted by the trust terms or other rules of this Book, a trustee may do any act in performance of the obligations under the trust which:

(a) an owner of the fund might lawfully do; or

(b) a person might be authorised to do on behalf of another.

(2) Subject to restrictions or modifications in the trust terms, the other Articles of this Section provide for the powers of a trustee in particular cases.

X.–5:202: Restriction in case of minimum number of trustees

(1) Where there are fewer trustees than a minimum required by the trust terms or these rules, the trustees may only exercise:

(a) a power to appoint trustees;

(b) the right to apply to court for assistance;

(c) a right under X.–6:201 (Right of reimbursement and indemnification out of the trust fund); and

(d) any other right or power of a trustee to the extent that its exercise is:

(i) expressly provided for in the circumstances by the trust terms;

(ii) necessary for the preservation of the trust fund; or

(iii) necessary for the satisfaction of trust debts whose performance is due or impending.

(2) If the trust is constituted by a transfer to at least two trustees the minimum number of trustees is two, unless the trust terms provide otherwise.

Sub-section 2: Particular powers of a trustee

X.–5:203: Power to authorise agent

(1) The trustees may authorise an agent to act on behalf of the trustees and, subject to the restrictions set out in the following Articles of this Section, may entrust to another performance of obligations under the trust.

(2) Several trustees may authorise one of them to act on their behalf.

(3) However, personal performance by a trustee is required for decisions as to whether or how to exercise:

(a) a discretion to confer benefit on a beneficiary or to choose a public benefit purpose to be advanced or its manner of advancement;

(b) a power to change the trustees; or

(c) a power to delegate performance of obligations under the trust.

(4) A person to whom performance of an obligation is entrusted has the same obligations as a trustee, so far as they relate to that performance.

(5) A trustee is obliged not to conclude, without good reason, a contract of mandate which is not in writing or which includes the following terms:

(a) a term conferring an irrevocable mandate;

(b) terms excluding the obligations of an agent set out in Book IV.D., Chapter 3, Section 1 (Main obligations of agent) or modifying them to the detriment of the principal;

(c) a term permitting the agent to subcontract;

(d) terms permitting a conflict of interest on the part of the agent;

(e) a term excluding or restricting the agent's liability to the principal for non-performance.

(6) The trustees are obliged to keep the performance of the agent under review and, if required in the circumstances, give a direction to the agent or terminate the mandate relationship.

X.–5:204: Power to transfer title to person undertaking to be a trustee

(1) The trustees may transfer trust assets to a person who undertakes to be a trustee in relation to the assets and to dispose of them as the original trustees direct and in default of any such direction to transfer them back to the original trustees on demand.

(2) The recipient must be:

(a) a person who gives such undertakings in the course of business;

(b) a legal person controlled by the trustees; or

(c) a legal person designated in an enactment as eligible to carry out such a trust obligation or satisfying requirements set out therein for this purpose

(3) X.–5:203 (Power to authorise agent) paragraphs (5) and (6) apply correspondingly.

X.–5:205: Power to transfer physical control to a storer

(1) The trustees may place trust assets and documents relating to those assets in the physical control of a person who undertakes to keep the trust assets safe and to deliver them back to the trustees on demand.

(2) X.–5:204 (Power to transfer title to person undertaking to be a trustee) paragraphs (2) and (3) apply correspondingly.

X.–5:206: Power to delegate

A trustee may entrust to another the performance of any of the trustee's obligations under the trust and the exercise of any of the trustee's powers, including the exercise of a discretion, authority to dispose of trust assets and the power to delegate, but remains responsible for performance in accordance with III.–2:106 (Performance entrusted to another).

X.–5:207: Power to select investments

In so far as the trustees are obliged to invest the trust fund, the trustees may invest in any form of investment and determine the particular manner of investment which is best suited to fulfil that obligation.

X.–5:208: Power to submit trust accounts for audit

Where appropriate, a trustee may submit the trust accounts for an audit by an independent and competent auditor.

CHAPTER 6: OBLIGATIONS AND RIGHTS OF TRUSTEES AND TRUST AUXILIARIES

Section 1: Obligations of a trustee

Sub-section 1: General rules

X.–6:101: General obligation of a trustee

(1) A trustee is obliged to administer the trust fund and exercise any power to dispose of the fund as a prudent manager of another's affairs for the benefit of the beneficiaries or the advancement of the public benefit purposes, in accordance with the law and the trust terms.

(2) In particular, a trustee is obliged to act with the required care and skill, fairly and in good faith.

(3) Except in so far as the trust terms provide otherwise:

(a) these obligations include the particular obligations set out in X.–6:102 (Required care and skill) and the following sub-section; and

(b) an administration or disposal of the trust fund is of benefit to a beneficiary only if it is for that person's economic benefit.

X.–6:102: Required care and skill

(1) A trustee is required to act with the care and skill which can be expected of a reasonably competent and careful person managing another's affairs, having regard to whether the trustee has a right to remuneration.

(2) If the trustee is acting in the course of a profession, the trustee must act with the care and skill that is expected of a member of that profession.

Sub-section 2: Particular obligations of a trustee

X.–6:103: Obligations to segregate, safeguard and insure

(1) A trustee is obliged to keep the trust fund segregated from other patrimony and to keep the trust assets safe.

(2) In particular, a trustee may not invest in assets which are especially at risk of misappropriation unless particular care is taken for their safekeeping. Where the asset is a document embodying a right to a performance which is owed to whoever is the holder of the document, such care is taken if the document is placed in a storer's safekeeping in accordance with X.–5:205 (Power to transfer physical control to a storer).

(3) So far as it is possible and appropriate to do so, the trustee is obliged to insure the trust assets against loss.

X.–6:104: Obligation to inform and report

(1) A trustee is obliged to inform a beneficiary who has a right to benefit of the existence of the trust and that beneficiary's right.

(2) A trustee is obliged to make reasonable efforts to inform a beneficiary who has an eligibility for benefit of the existence of the trust and that beneficiary's eligibility.

(3) In determining what efforts are reasonable for the purposes of paragraph (2), regard is to be had to:

- ***(a) whether the expense required is proportionate to the value of the benefit which might be conferred on that beneficiary;***
- ***(b) whether the beneficiary is a member of a class whose members the trustee is required to benefit; and***
- ***(c) the practicalities of identifying and communicating with the beneficiary.***

(4) So far as appropriate, a trustee is obliged to make available information about the state and investment of the trust fund, trust debts, and disposals of trust assets and their proceeds.

X.–6:105: Obligation to keep trust accounts

A trustee is obliged to keep accounts in respect of the trust funds (trust accounts).

X.–6:106: Obligation to permit inspection and copying of trust documents

(1) A trustee must permit a beneficiary or other person entitled to enforce performance of the obligations under the trust to inspect the trust documents and to make copies of them at that person's own expense.

(2) Paragraph (1) does not apply to:

- ***(a) the opinions of a legal adviser relating to actual or contemplated legal proceedings by the trustees in that capacity against the person seeking inspection; and evidence gathered for such proceedings;***
- ***(b) communications between the trustees and other beneficiaries and any other communications whose disclosure would result in a breach of confidence owed by the trustees in that capacity to another.***

(3) The trustees may refuse inspection and copying of trust documents so far as these relate to information which is confidential to the trustees in that capacity if the beneficiary does not provide adequate assurance that the confidentiality will be maintained.

(4) Unless the trust is for the advancement of public benefit purposes, the trustees may also refuse inspection and copying of documents so far as the documents disclose the reasons for the trustees' decision to exercise or not to exercise a discretion, the deliberations of the trustees which preceded that decision, and material relevant to the deliberations.

(5) The trust terms may enlarge the rights of inspection and copying which are provided for by this Article.

(6) In this Book "trust documents" are:

(a) any documents containing the truster's declaration of intentions relating to the trust (whether or not intended to be binding) and any juridical act or court order varying the trust terms;

(b) minutes of meetings of the trustees;

(c) records made and notices and other communications in writing received by a trustee in that capacity, including the opinions of a legal adviser engaged by a trustee at the trust fund's expense;

(d) any documents containing juridical acts concluded or made by the trustees;

(e) receipts for disposal of trust assets; and

(f) the trust accounts.

X.–6:107: Obligation to invest

(1) A trustee is obliged to invest the trust fund, so far as available for investment, and in particular:

(a) to dispose of assets which ordinarily neither produce income nor increase in value and to invest the proceeds;

(b) to take professional advice on investment of the fund, if the trustees lack the expertise required for the efficient and prudent investment of funds of the size and nature of the trust fund;

(c) to make a spread of investments in which overall:

(i) the risks of failure or loss of particular investments are diversified; and

(ii) the expected gain significantly outweighs the potential failure or loss;

unless the trust fund is so small that a spread of investments is inappropriate; and

(d) to review at appropriate intervals the suitableness of retaining or changing the investments.

(2) A trustee is not obliged to invest assets:

(a) which are imminently required for transfer to or use by a beneficiary or for satisfaction of a trust debt; or

(b) whose investment would otherwise impede the trustees in carrying out their other obligations under this Book.

(3) The obligation to invest does not authorise a trustee to dispose of trust assets which according to the trust terms are to be retained by the trustees or transferred in kind to a beneficiary.

X.–6:108: Obligation not to acquire trust assets or trust creditors' rights

(1) A trustee is obliged not to purchase a trust asset or the right of a trust creditor against the trustees, whether personally or by means of an agent.

(2) A contract for the sale of a trust asset which is concluded as a result of non-performance of this obligation may be avoided by any other party to the trust or any person entitled to enforce performance of the obligations under the trust.

(3) The right to avoid is in addition to any remedy for non-performance.

(4) This Article applies with appropriate modifications to other contracts for the acquisition or use of a trust asset or a right corresponding to a trust debt.

X.–6:109: Obligation not to obtain unauthorised enrichment or advantage

(1) A trustee is obliged not to make use of the trust fund, or information or an opportunity obtained in the capacity of trustee, to obtain an enrichment unless that use is authorised by the trust terms.

(2) A trustee may not set off a right to performance from a beneficiary, which is owed to the trustee in a personal capacity, against that beneficiary's right to benefit.

X.–6:110: Obligations regarding co-trustees

A trustee is obliged to:

- ***(a) cooperate with co-trustees in performing the obligations under the trust; and***
- ***(b) take appropriate action if a trustee knows or has reason to suspect that:***
  - ***(i) a co-trustee has failed to perform any obligation under, or arising out of, the trust, or such non-performance is impending; and***
  - ***(ii) the non-performance is likely to result or have resulted in loss to the trust fund.***

Section 2: Rights of a trustee

X.–6:201: Right to reimbursement and indemnification out of the trust fund

A trustee has a right to reimbursement or indemnification out of the trust fund in respect of expenditure and trust debts which the trustee incurs in performance of the obligations under the trust.

X.–6:202: Right to remuneration out of the trust fund

(1) A trustee has a right to such remuneration out of the trust fund as is provided for by the trust terms.

(2) Unless this is inconsistent with the trust terms, a trustee who acts as a trustee in the course of a profession has a right to reasonable remuneration out of the trust fund for work done in performance of the obligations under the trust.

(3) Paragraph (2) does not apply if:

- ***(a) the trustee, in the capacity of beneficiary, is entitled to significant benefit from the trust fund; or***

(b) the trust was created as a result of a contract between the trustee and the truster; or

(c) the trust is for the advancement of public benefit purposes.

X.–6:203: Rights in respect of unauthorised acquisitions

(1) This Article applies where:

(a) a trustee acquires an asset or other enrichment as a result of a non-performance of an obligation under the trust; and

(b) the asset becomes part of the trust fund or the enrichment is added to the trust fund in performance of an obligation to disgorge.

(2) The trustee has a right to reimbursement or indemnification for any expenditure or obligation which it was necessary to incur to make the acquisition. If the trustee previously satisfied in full or in part a liability under X.–7:201 (Liability of trustee to reinstate the trust fund), the trustee has a right to reimbursement from the trust fund to the extent that after the acquisition the trust fund is more than reinstated.

(3) The trustee also has a right to reasonable remuneration if:

(a) the acquisition was made in good faith to increase the trust fund; and

(b) the trustee would be entitled to remuneration under X.–6:202 (Right to remuneration out of the trust fund) paragraph (2)(b) if the acquisition had been in performance of an obligation under the trust.

(4) If the acquisition resulted from a non-performance of the obligation under X.–6:109 (Obligation not to obtain unauthorised enrichment or advantage) to which a beneficiary validly consented, the trustee may waive the rights under paragraphs (2) and (3) and take over the consenting beneficiary's right to benefit from the acquisition.

(5) A trustee is not entitled under this Article to more than the value of the acquisition.

X.–6:204: Corresponding rights against beneficiaries

(1) Where the right of a trustee under X.–6:201 (Right to reimbursement and indemnification out of the trust fund) exceeds the trust fund, the trustee may recover the excess from the beneficiaries.

(2) The liability of a beneficiary under paragraph (1) is:

(a) limited to the enrichment which that beneficiary has obtained in accordance with the trust terms; and

(b) subject to the defence of disenrichment, VII.–6:101 (Disenrichment) applying with appropriate adaptations.

(3) The right to recover under paragraph (1) ends six months after the right to reimbursement or indemnification has arisen.

X.–6:205: Right to insure against personal liability at trust fund's expense

(1) A trustee has a right to reimbursement or indemnification out of the trust fund in respect of expenditure or a debt which the trustee reasonably incurs to obtain insurance against liability under X.–7:201 (Liability of trustee to reinstate the trust fund).

(2) Paragraph (1) does not apply in so far as:

(a) the trustee has a right to remuneration for performing the obligations under the trust; or

(b) the insurance is against liability arising out of a non-performance which is intentional or grossly negligent.

Section 3: Obligations of a trust auxiliary

X.–6:301: Obligations of a trust auxiliary

(1) A trust auxiliary is obliged to disclose the identity of the trustees if this information is known to the trust auxiliary and is not otherwise apparent.

(2) In deciding whether to exercise a power a trust auxiliary is obliged:

(a) to act in good faith; and

(b) not to obtain an enrichment which is not authorised by the trust terms.

CHAPTER 7: REMEDIES FOR NON-PERFORMANCE

Section 1: Specific performance, judicial review and ancillary remedies

X.–7:101: Specific performance

(1) The enforcement of specific performance of an obligation under the trust includes the prevention of a trustee from disposing of or otherwise dealing with a trust asset otherwise than in accordance with the terms of the trust.

(2) Specific performance cannot be enforced if performance requires a trustee to exercise a discretion.

X.–7:102: Judicial review

(1) On the application of a party to the trust or a person entitled to enforce performance of an obligation under the trust, a court may review a decision of the trustees or a trust auxiliary whether or how to exercise a power or discretion conferred on them by the trust terms or this Book.

(2) A former trustee who has been removed by the trustees or a trust auxiliary without the trustee's consent has a corresponding right to judicial review of that decision.

(3) A court may avoid a decision of the trustees or a trust auxiliary which is irrational or grossly unreasonable, motivated by irrelevant or improper considerations, or otherwise an abuse of power or outside the powers of the trustees or the trust auxiliary.

X.–7:103: Further remedies

Other rules may provide for:

(a) accounts and inquiries concerning the trust fund and its administration and disposal, as directed by court order;

(b) payment or transfer into court of money or other assets in the trust fund;
(c) the appointment by court order of a receiver to administer a trust fund;
(d) the exercise of rights and powers of a trustee by a public officer or body, in particular in relation to trusts to advance public benefit purposes;
(e) suspension of the rights and powers of the trustees to administer and dispose of the fund;

in cases of actual or suspected non-performance of the obligations under the trust.

Section 2: Reparation and disgorgement of unauthorised enrichment

X.–7:201: Liability of trustee to reinstate the trust fund

(1) A trustee is liable to reinstate the trust fund in respect of loss caused to the trust fund by non-performance of any obligation under, or arising out of, the trust, if the non-performance:

(a) is not excused; and
(b) results from the trustee's failure to exercise the required care and skill.

(2) However, a person is liable under paragraph (1) only if that person knew, or it was manifest, that that person was a trustee.

(3) A trustee is not liable merely because a co-trustee, an agent or other person entrusted with performance, or an authorised recipient of trust assets has caused loss to the trust fund.

(4) Paragraph (3) does not prejudice any liability of the trustee arising:

(a) under paragraph (1) out of the trustee's own non-performance of an obligation under the trust, in particular:

(i) an obligation to act with the required care and skill when choosing to appoint or engage that person and agreeing the terms of the engagement; or
(ii) the obligation to keep the performance of that person under review and, if required in the circumstances, to take measures to protect the trust fund; or

(b) out of delegation of performance (X.–5:206 (Power to delegate));

(c) under VI.–3:201 (Accountability for damage caused by employees and representatives); or

(d) because the trustee induced, assisted or collaborated in that person's non-performance.

(5) III.–3:702 (General measure of damages) applies with appropriate adaptations to determine the measure of reinstatement.

(6) The following rights of a trustee are suspended until the trustee has completely reinstated the trust fund:

(a) any right of recourse to the trust fund; and
(b) any right to benefit which the trustee has in the capacity of beneficiary.

(7) This Article is subject to the trust terms.

X.–7:202: Liability of trustee to compensate a beneficiary

(1) A trustee who is liable under X.–7:201 (Liability of trustee to reinstate the trust fund) is also obliged to compensate a beneficiary who, despite reinstatement of the trust fund, does not obtain a benefit to which that beneficiary was entitled or, if there had been no failure of performance, would have been entitled under the trust terms.

(2) The beneficiary has the same right to compensation as arises from non-performance of a contractual obligation.

(3) This Article is subject to the trust terms.

X.–7:203: Disgorgement of unauthorised enrichment

Where a trustee obtains an enrichment as a result of non-performance of the obligation under X.–6:109 (Obligation not to obtain unauthorised enrichment or advantage) and that enrichment does not become part of the trust fund under X.–3:201 (Additions to the trust fund), the trustee is obliged to add the enrichment to the trust fund or, if that is not possible, to add its monetary value.

Section 3: Defences

X.–7:301: Consent of beneficiary to non-performance

(1) A trustee has a defence to liability to the extent that reinstatement, compensation or disgorgement would benefit a beneficiary who validly consented to the non-performance.

(2) A beneficiary consents to a non-performance when that beneficiary agrees to conduct of the trustee which amounts to a non-performance and either:

- ***(a) the beneficiary knew that such conduct would amount to a non-performance; or***
- ***(b) it was manifest that such conduct would amount to a non-performance.***

(3) Paragraph (1) applies whether or not the non-performance enriched or disadvantaged the beneficiary who consented.

(4) Where a beneficiary participates in the non-performance in the capacity of trustee, paragraph (1) applies in relation to any co-trustees who are liable. A right of recourse between the solidary debtors as regards any residual liability to reinstate the trust fund or compensate a beneficiary is unaffected.

(5) A consent is not valid if it results from a mistake which was caused by false information given by the trustee or the trustee's non-performance of an obligation to inform.

X.–7:302: Prescription

The general period of prescription for a right to performance of an obligation under a trust does not begin to run against a beneficiary until benefit to that beneficiary is due.

X.–7:303 Protection of the trustee

(1) A trustee is discharged by performing to a person who, after reasonable inquiry, appears to be entitled to the benefit conferred.

(2) The right of the beneficiary who was entitled to the benefit against the recipient of the benefit arising under Book VII (Unjustified enrichment) is unaffected.

Section 4: Solidary liability and forfeiture

X.–7:401: Solidary liability

(1) Where several trustees are liable in respect of the same non-performance, their liability is solidary.

(2) As between the solidary debtors themselves, the shares of liability are in proportion to each debtor's relative responsibility for the non-performance, having regard to each debtor's skills and experience as a trustee.

(3) A debtor's relative responsibility for a non-performance to which that debtor consented is not reduced merely because that debtor took no active part in bringing it about.

X.–7:402: Forfeiture of collaborating beneficiary's right to benefit

(1) Where a beneficiary collaborated in a trustee's non-performance, a court may order on the application of that trustee or another beneficiary that the right to benefit of the beneficiary who collaborated be forfeited.

(2) The right to benefit of a beneficiary who validly consented to the non-performance, but did not collaborate in it, may be forfeited only to the extent that the beneficiary has been enriched by the non-performance.

(3) To the extent that a beneficiary's right to benefit is forfeited under this Article, benefit which is otherwise due to that beneficiary is to be applied so as to satisfy the trustee's liability until either the liability is extinguished or the right to benefit is exhausted.

CHAPTER 8: CHANGE OF TRUSTEES OR TRUST AUXILIARY

Section 1: General rules on change of trustees

X.–8:101: Powers to change trustees in general

(1) After the creation of a trust, a person may be appointed a trustee and a trustee may resign or be removed:

(a) in accordance with a power:

(i) under the trust terms or

(ii) conferred on the trustees by this Section; or

(b) by court order under this Section.

(2) The exercise of a power within paragraph (1)(a) is of no effect unless it is in writing. The same applies to a binding direction to trustees regarding the exercise of such a power.

(3) An exercise of a power under the trust terms by a person who is not also a continuing trustee does not take effect until notice is given to the continuing trustees.

(4) The resignation or removal of a sole trustee is effective only if a substitute trustee is appointed at the same time.

X.–8:102: Powers to change trustees conferred on trustees

(1) The powers conferred by this Section on trustees may only be exercised:

(a) by unanimous decision; and

(b) if in the circumstances a trust auxiliary does not have a corresponding power or the trust auxiliary cannot or does not exercise such a power within a reasonable period after a request to do so by the trustees.

(2) Subject to paragraph (1), the trustees are obliged to exercise their powers under this Section in accordance with any joint direction by the beneficiaries if the beneficiaries have a joint right to terminate the trust in respect of the whole fund.

(3) The trust terms may modify or exclude the powers conferred by this Section on trustees.

Section 2: Appointment of trustees

X.–8:201: General restrictions on appointments

(1) An appointment of a person as trustee is of no effect if:

(a) it is manifest that the co-trustees would have power to remove that person, if appointed, on grounds of that person's inability, refusal to act, or unsuitability;

(b) the person appointed does not agree to act as trustee; or

(c) the appointment exceeds a maximum number of trustees provided for by the trust terms.

(2) A provision in the trust terms that there is to be only one trustee takes effect as a maximum of two.

X.–8:202: Appointment by trust auxiliary or trustees

(1) The trustees may appoint one or more additional trustees.

(2) The continuing trustees may appoint a substitute trustee for a person who has ceased to be a trustee.

(3) Unless the trust terms provide otherwise, a self-appointment by a trust auxiliary is of no effect.

X.–8:203: Appointment by court order

On the application of any party to the trust or any person entitled to enforce performance of an obligation under the trust, a court may appoint:

(a) a substitute trustee for a person who has ceased to be a trustee, or

(b) one or more additional trustees,

if in the circumstances:

(i) no one else is able and willing to exercise a power to appoint; and

(ii) the appointment is likely to promote the efficient and prudent administration and disposal of the trust fund in accordance with the trust terms.

Section 3: Resignation of trustees

X.–8:301: Resignation with consent of trust auxiliary or co-trustees

(1) A trust auxiliary who may appoint a substitute trustee in the event of the trustee's resignation may consent to a resignation.

(2) A trust auxiliary may consent to a resignation without the consent of the continuing trustees only if a substitute trustee is appointed at the same time.

(3) The continuing trustees may consent to a resignation.

(4) A trustee may only resign with the consent of a trust auxiliary or co-trustees if after resignation there will be at least two continuing trustees or a special trustee.

(5) Special trustees, for the purposes of this Book, are:

(a) any public officer or body having the function of acting as a trustee; and

(b) any legal persons designated as such in an enactment or satisfying requirements set out in an enactment for this purpose.

X.–8:302: Resignation with approval of court

A court may approve the resignation of a trustee who cannot otherwise resign if it is fair to release the trustee from obligations under the trust, having regard in particular to whether after resignation an efficient and prudent administration and disposal of the trust fund in accordance with the trust terms can be secured.

Section 4: Removal of trustees

X.–8:401: Removal by trust auxiliary or co-trustees

(1) Where a court might remove a trustee on grounds of inability, refusal to act, or unsuitability, the continuing trustees may remove that trustee.

(2) The removal of a trustee by a trust auxiliary or the trustees does not take effect until notice of the removal is given to the trustee who is to be removed.

X.–8:402: Removal by court order

(1) On the application of any party to the trust, a court may remove a trustee without that trustee's consent and regardless of the trust terms if it is inappropriate for the trustee to remain a trustee, in particular on grounds of the trustee's:

(a) inability;

(b) actual or anticipated material non-performance of any obligation under, or arising out of, the trust;
(c) unsuitability;
(d) permanent or recurrent fundamental disagreement with co-trustees on a matter requiring a unanimous decision of the trustees; or
(e) other interests which substantially conflict with performance of the obligations under, or arising out of, the trust.

Section 5: Effect of change of trustees

X.–8:501: Effect on trustees' obligations and rights

(1) A person who is appointed a trustee becomes bound by the trust and acquires the corresponding rights and powers. Subject to the following paragraphs of this Article, a trustee who resigns or is removed is released from the trust and loses those rights and powers.

(2) The obligation to cooperate with co-trustees does not end until the expiry of a reasonable period after resignation or removal.

(3) A former trustee's right of recourse to the trust fund takes effect as a right against the continuing trustees. A right to reimbursement, indemnification or remuneration by a beneficiary is unaffected.

(4) A former trustee remains bound by:

(a) the obligation in X.–6:109 (Obligation not to obtain unauthorised enrichment or advantage);
(b) trust debts; and
(c) obligations arising from non-performance.

X.–8:502: Vesting and divesting of trust assets

(1) Title to a trust asset vests in a person on appointment as a trustee, without a court order to that effect, if that title is:

(a) capable of transfer by agreement between a transferor and a transferee without the necessity for any further act of transfer or formality; or
(b) regarded under the applicable national law as vested in the trustees as a body.

(2) The vesting of an asset in a person who is appointed a trustee does not divest any continuing trustees.

(3) A person who resigns or is removed as a trustee is divested correspondingly.

X.–8:503: Transmission of trust documents

A continuing or substitute trustee is entitled to the delivery up of trust documents in the possession of a former trustee. The person in possession has the right to make and retain copies at that person's own expense.

X.–8:504: Effect of death or dissolution of trustee

(1) Where one of several trustees dies or a corporate trustee is dissolved, the trust fund remains vested in the continuing trustees. This applies to the exclusion of any person succeeding to a deceased or dissolved trustee's other patrimony.

(2) Where a sole trustee dies, the deceased trustee's successors become trustees and accordingly:

(a) the trustee's successors become subject to the trust and acquire the corresponding rights and powers;

(b) the trustee's successors become liable for trust debts incurred by the deceased trustee to the extent of the deceased trustee's estate; and

(c) the trust fund vests in the trustee's successors,

but the trustee's successors may only exercise the powers set out in X.–5:202 (Restriction in case of minimum number of trustees) paragraph (1), of regardless of the number of successors.

(3) A trustee's testamentary disposition of the trust fund is of no effect, but. the trust terms may confer a testamentary power to appoint a trustee.

(4) Obligations arising from non-performance devolve on the deceased trustee's successor.

Section 6: Death or dissolution of trust auxiliary

X.–8:601: Effect of death or dissolution of trust auxiliary

A power of a trust auxiliary ends when the trust auxiliary dies or is dissolved, but the trust terms may permit a testamentary exercise of the power.

CHAPTER 9: TERMINATION AND VARIATION OF TRUSTS AND TRANSFER OF RIGHTS TO BENEFIT

Section 1: Termination

Sub-section 1: General rules on termination

X.–9:101: Modes of termination

(1) A trust in respect of a fund or part of a fund may be terminated:

(a) by a truster or beneficiaries in accordance with a right provided for by the trust terms;

(b) by a truster in accordance with X.–9:103 (Right of truster to terminate a gratuitous trust);

(c) by a beneficiary in accordance with X.–9:104 (Right of beneficiaries to terminate);

(d) by a trustee under X.–9:108 (Termination by trustee);

(e) by merger of rights and obligations under X.–9:109 (Merger of right and obligation)

X.–9:102: Effect of termination on trustee liabilities

(1) To the extent that the trust is terminated the trustee is discharged.

(2) Unless the parties concerned agree otherwise, termination of the trust does not release a trustee from liability:

(a) to a beneficiary arising out of the trustee's non-performance of any obligation under, or arising out of, the trust; or

(b) to a trust creditor.

Sub-section 2: Termination by truster or beneficiaries

X.–9:103: Right of truster to terminate a gratuitous trust

(1) Except as provided for by paragraphs (2) and (3), a truster has no implied right to terminate a trust or a trust term merely because the trust was constituted gratuitously, irrespective of whether:

(a) the trust was constituted without a transfer by the truster;

(b) the truster reserved a right to benefit during the truster's lifetime.

(2) A truster may terminate a gratuitously constituted trust, or a term of such a trust, which is for the benefit of a person who does not yet exist.

(3) A truster may terminate a gratuitously constituted trust for the benefit of another to the same extent that the truster might have revoked a donation to that beneficiary if the benefit had been conferred by way of donation.

X.–9:104: Right of beneficiaries to terminate

(1) A beneficiary of full legal capacity may terminate the trust in respect of a fund or part of the fund which is for that beneficiary's exclusive benefit.

(2) If each is of full legal capacity, several beneficiaries have a corresponding joint right to terminate the trust in respect of a fund or part of the fund which is for the exclusive benefit of those beneficiaries.

(3) A trust may not be terminated in respect of part of the fund if this would adversely affect the trust in respect of the rest of the fund for the benefit of other beneficiaries or for the advancement of public benefit purposes.

X.–9:105: Meaning of "exclusive benefit"

(1) A fund or part of a fund is to be regarded as for a beneficiary's exclusive benefit if all of that capital and all of the future income from that capital can only be disposed of in accordance with the trust terms for the benefit of that beneficiary or that beneficiary's estate.

(2) For the purposes of paragraph (1) the possibility that the beneficiary might give a consent, or might fail to exercise a right adverse to that beneficiary's own benefit, is to be disregarded.

X.–9:106: Notice of termination and its effects

(1) A truster or beneficiary exercises a right to terminate by giving notice in writing to the trustees.

(2) A trust or part of a trust which is terminated by the truster takes effect from that time as a trust for the benefit of the truster.

(3) Where a beneficiary, exercising a right to terminate, instructs the trustee to transfer to someone other than the beneficiary, notice of termination vests in that person the right to benefit from the fund or part of the fund which is to be transferred.

(4) Unless the transfer is impossible or unlawful, the trustee is obliged to transfer the fund or part of the fund in accordance with the notice of termination and without delay. The obligation to transfer supersedes the obligation to administer and dispose of the fund or part in accordance with the trust terms.

(5) If a transfer is impossible because it would require the grant of an undivided share in an asset for which undivided shares are not allowed, the trustee is obliged:

(a) to divide the asset and transfer the divided share, so far as this is possible and reasonable; and otherwise

(b) to sell the asset, if this is possible, and transfer the corresponding share of the proceeds.

(5) The trust is terminated when and to the extent that the required transfer is made.

X.–9:107: Trustee's right to withhold

(1) A trustee may withhold such part of the fund which is to be transferred as is needed to satisfy:

(a) trust debts;

(b) the trustee's accrued rights of recourse to the fund; and

(c) the costs of transfer and of any required division or sale of an asset,

so far as those debts, rights and costs are allocated to the part of the fund which is to be transferred.

(2) The right to withhold ends if the person exercising the right to terminate pays compensation for the debts, rights and costs allocated to the part of the fund which is to be transferred.

Sub-section 3: Other modes of termination

X.–9:108: Termination by trustee

(1) Where a beneficiary has a right to terminate a trust under X.–9:104 (Right of beneficiaries to terminate) paragraph (1), a trustee may give a notice to that beneficiary requiring that beneficiary to exercise that right within a period of reasonable length fixed

by the notice. If the beneficiary fails to do so within that period, the trustee may terminate the trust by a transfer to that beneficiary. The beneficiary is obliged to accept the transfer.

(2) A trustee may also terminate the trust by payment of money or transfer of other assets of the trust fund into court where other rules so provide.

X.–9:109: Merger of right and obligation

(1) A trust ends when the sole trustee is also the sole beneficiary and the trust fund is for that beneficiary's exclusive benefit.

(2) Where there are several trustees, paragraph (1) applies correspondingly only if they have a joint right to benefit.

(3) If a trust subsists in relation to the beneficiary's right to benefit or the right to benefit is encumbered with a security right or other limited right, the trustee remains bound by that trust or encumbrance.

Section 2: Variation

X.–9:201: Variation by truster or beneficiary

(1) The trust terms may be varied by a truster or beneficiary in accordance with:

(a) a right provided for by the trust terms;
(b) the right provided for by paragraph (2).

(2) A truster or beneficiary who has a right to terminate a trust has a corresponding right to vary the trust terms so far as they relate to the fund or part of the fund in respect of which the trust might be terminated.

(3) The exercise by several beneficiaries of a joint right to vary the trust terms requires their agreement to that effect.

(4) A variation which is to take effect from the death of the person exercising the right to vary is of no effect unless it is made by testamentary instrument.

(5) A variation does not take effect until notice in writing is given to the trustees.

X.–9:202: Variation by court order of administrative trust terms

(1) On the application of any party to the trust or any person entitled to enforce performance of obligations under the trust, a court may vary a trust term relating to the administration of the trust fund if the variation is likely to promote a more efficient and prudent administration of the fund.

(2) A variation under paragraph (1) may not significantly affect the operation of the trust terms governing its disposal unless the court also has power to vary those terms under one of the following Articles.

X.–9:203: Variation by court order of trusts for beneficiaries

(1) On the application of any party to the trust or any person who would benefit if the term to be varied were removed, a court may vary a trust term which confers a right to benefit or eligibility for benefit on a person who:

(a) does not yet exist; or

(b) does not presently conform to a description, such as membership of a class, on which the right depends.

(2) The same applies where the trust term confers a right to benefit or eligibility for benefit at a remote time in the future or which is conditional on the occurrence of an improbable event.

X.–9:204: Variation by court order of trusts for public benefit purposes

(1) On the application of any party to the trust or any person entitled to enforce performance of obligations under the trust, a court may vary a trust term which provides for the advancement of a public benefit purpose if, as a result of a change of circumstances, the advancement of the particular purpose provided for by the trust term cannot be regarded as a suitable and effective use of resources.

(2) A variation under paragraph (2) must be in favour of such general or particular public benefit purposes as the truster would probably have chosen if the truster had constituted the trust after the change in circumstances.

Section 3: Transfer of right to benefit

X.–9:301: Transfer by juridical act of right to benefit

(1) Subject to the other paragraphs of this Article, the transfer by juridical act of a right to benefit is governed by Book III Chapter 5 Section 1 (Assignment of rights).

(2) A gratuitous transfer is of no effect unless it is made in writing.

(3) A transfer which is to take effect on the death of the transferor takes effect only in accordance with the applicable law of succession.

CHAPTER 10: RELATIONS TO THIRD PARTIES

Section 1: General provisions on creditors

X.–10:101: Basic rule on creditors

(1) A person to whom a trustee owes a trust debt (a trust creditor) may satisfy that person's right out of the trust fund (in accordance with X.–10:202 (Rights of trust creditors in relation to the trust fund)), but other creditors may not except in so far as these rules provide otherwise.

(2) Paragraph (1) does not affect any right of a creditor of a party to a trust to invoke a right of that party relating to the trust fund.

X.–10:102: Definition of trust debt

(1) An obligation is a trust debt if it is incurred by the trustee:

(a) as the owner for the time being of a trust asset;

(b) for the purposes of, and in accordance with the terms of, the trust;

(c) in the capacity of trustee and by a contract or other juridical act which is not gratuitous, unless the creditor knew or could reasonably be expected to know that the obligation was not incurred in accordance with the terms of the trust;

(d) as a result of an act or omission in the administration or disposition of the trust fund or the performance of a trust debt; or

(e) otherwise materially in connection with the trust patrimony.

(2) The obligations of trustees to reimburse, indemnify or remunerate a former trustee or an intended trustee who has exercised a right of refusal are also trust debts.

(3) Other obligations of a trustee are not trust debts.

Section 2: Trust creditors

X.–10:201: Rights of trust creditors against the trustee

(1) A trustee is personally liable to satisfy trust debts.

(2) Unless the trustee and the trust creditor agree otherwise:

(a) liability is not limited to the value of the trust fund at the time the trust creditor's right to performance is enforced; and

(b) subject to the rules on change of trustees, liability does not end if the trust fund ceases to be vested in the trustee.

(3) A party to a contract is not to be treated as agreeing to exclude or limit liability merely because the other party discloses that that other party is concluding the contract in the capacity of trustee.

X.–10:202: Rights of trust creditors in relation to the trust fund

A trust creditor may satisfy a right out of the trust fund:

(a) to enforce performance of a trustee's personal liability under X.–10:201 (Rights of trust creditors against the trustee); or

(b) in the exercise of a security right in trust assets.

X.–10:203: Protection of the truster and beneficiaries

A truster or beneficiary is not in that capacity liable to a trust creditor.

Section 3: Trust debtors

X.–10:301: Right to enforce performance of trust debtor's obligation

(1) Where a trustee has a right to performance and that right is a trust asset, the right to enforce performance of the obligation of the debtor (the trust debtor) accrues to the trustee.

(2) Paragraph (1) does not affect:

(a) a beneficiary's right to performance by the trustee of obligations under the trust in respect of the right against the trust debtor; or

(b) procedural rules which allow a beneficiary to be a party to legal proceedings against the trust debtor to which the trustee is also a party.

X.–10:302: Set-off

A trustee's right against a trust debtor may only be set off against:

(a) a right corresponding to a trust debt; or

(b) a beneficiary's right to benefit out of the trust fund.

X.–10:303: Discharge of trust debtor

The discharge of a trust debtor by a trustee is of no effect if:

(a) the discharge is not in performance of the trustee's obligations under the trust; and

(b) (i) the discharge is gratuitous; or

(ii) the debtor knows or has reason to know that the discharge is not in performance of the trustee's obligations under the trust.

Section 4: Acquirers of trust assets and rights encumbering trust assets

X.–10:401: Liability of donees and bad faith acquirers

(1) Where a trustee transfers a trust asset to another and the transfer is not in accordance with the terms of the trust, the transferee takes the asset subject to the trust if:

(a) the transfer is gratuitous; or

(b) the transferee knows or could reasonably be expected to know that the transfer is by a trustee and is not in accordance with the terms of the trust.

(2) A transferee on whom a trust is imposed under paragraph (1) has a corresponding right to a return of any benefit conferred in exchange.

(3) The trust imposed under paragraph (1) is extinguished if:

(a) benefit which was provided by the transferee in exchange is disposed of in performance of an obligation under the trust; or

(b) the trustee or a third party satisfies an obligation to reinstate the trust fund.

(4) A transferee can reasonably be expected to know a matter if:

(a) it would have been apparent from a reasonably careful investigation; and

(b) having regard to the nature and value of the asset, the nature and costs of such investigation, and commercial practice, it is fair and reasonable to expect a transferee in the circumstances to make that investigation.

(5) This Article applies correspondingly where a trustee creates a security right or other limited right in a trust asset in favour of another.

Section 5: Other rules on liability and protection of third parties

X.–10:501: Liability for inducing or assisting misapplication of the trust fund

(1) Non–contractual liability arising out of damage caused to another by virtue of VI.–2:211 (Loss upon inducement of non-performance of obligation) is modified as provided for by paragraph (2).

(2) A person who intentionally induces a trustee's non-performance of an obligation under the trust, or intentionally assists such non-performance, is solidarily liable with that trustee, if the trustee is liable to reinstate the trust fund.

X.–10:502: Protection of third parties dealing with trustees

(1) A contract which a trustee concludes as a result of a non-performance of an obligation under the trust with a person who is not a party to a trust is not void or avoidable for that reason.

(2) In favour of a person who is not a party to the trust and as against a trustee, a person who has no knowledge of the true facts may rely on the apparent effect of a trust document and the truth of a statement contained in it.

ANNEX

DEFINITIONS

(**General notes.** These definitions are introduced by I.–1:108 (Definitions in Annex) which provides that they apply for all the purposes of these rules unless the context otherwise requires and that, where a word is defined, other grammatical forms of the word have a corresponding meaning. For the convenience of the user, where a definition is taken from or derived from a particular Article a reference to that Article is added in brackets after the definition. The list also includes some terms which are frequently used in the rules but which are not defined in any Article. It does not include definitions which do not contain any legal concept but which are only drafting devices for the purposes of a particular Article or group of Articles.)

Accessory

An "accessory", in relation to proprietary security, is a corporeal asset that is or becomes closely connected with, or part of, a movable or an immovable, provided it is possible and economically reasonable to separate the accessory without damage from the movable or immovable. (IX.–1:201)

Acquisition finance device

An "acquisition finance device" is (a) a retention of ownership device; (b) where ownership of a sold asset has been transferred to the buyer, those security rights in the asset which secure the right (i) of the seller to payment of the purchase price or (ii) of a lender to repayment of a loan granted to the buyer for payment of the purchase price, if and in so far as this payment is actually made to the seller and (c) a right of a third person to whom any of the rights under (a) or (b) has been transferred as security for a credit covered by (a) or (b). (IX.–1:201(3))

Advanced electronic signature

An "advanced electronic signature" is an electronic signature which is (a) uniquely linked to the signatory (b) capable of identifying the signatory (c) created using means which can be maintained under the signatory's sole control; and (d) linked to the data to which it relates in such a manner that any subsequent change of the data is detectable. (I.–1:108(4)).

Act of assignment

An "act of assignment" of a right is a contract or other juridical act which is intended to effect a transfer of the right. (III.–5:102(2))

Agent

An "agent" is a person who is authorised to act for another.

Assets

"Assets" means anything of economic value, including property; rights having a monetary value; and goodwill.

Assignment

"Assignment", in relation to a right, means the transfer of the right by one person, the "assignor", to another, "the assignee". (III.–5:102(1))

Authorisation

"Authorisation" is the granting or maintaining of authority. (II.–6:102(3))

Authority

"Authority", in relation to a representative acting for a principal, is the power to affect the principal's legal position. (II.–6:102(2))

Avoidance

"Avoidance" of a juridical act or legal relationship is the process whereby a party or, as the case may be, a court invokes a ground of invalidity so as to make the act or relationship, which has been valid until that point, retrospectively ineffective from the beginning.

Barter, contract for

A contract for the "barter" of goods is a contract under which each party undertakes to transfer the ownership of goods, either immediately on conclusion of the contract or at some future time, in return for the transfer of ownership of other goods. (IV.A.–1:203)

Beneficiary

A "beneficiary", in relation to a trust, is a person who, according to the trust terms, has either a right to benefit or an eligibility for benefit from the trust fund. (X.–1:203(3))

Benevolent intervention in another's affairs

"Benevolent intervention in another's affairs" is the process whereby a person, the intervener, acts with the predominant intention of benefiting another, the principal, but without being authorised or bound to do so. (V.–1:101)

Business

"Business" means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person's self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity. (I.–1:106(2))

Claim

A "claim" is a demand for something based on the assertion of a right.

Claimant

A "claimant" is a person who makes, or who has grounds for making, a claim.

Co-debtorship for security purposes

A “co-debtorship for security purposes” is an obligation owed by two or more debtors in which one of the debtors, the security provider, assumes the obligation primarily for purposes of security towards the creditor. (IV.G.–1:101(e))

Commercial agency

A “commercial agency” is the legal relationship arising from a contract under which one party, the commercial agent, agrees to act on a continuing basis as a self-employed intermediary to negotiate or to conclude contracts on behalf of another party, the principal, and the principal agrees to remunerate the agent for those activities. (IV.E.–3:101)

Compensation

“Compensation” means reparation in money. (VI.–6:101(2))

Complete substitution of debtor

There is complete substitution of a debtor when a third person is substituted as debtor with the effect that the original debtor is discharged. (III.–5:203)

Condition

A “condition” is a provision which makes a legal relationship or effect depend on the occurrence or non-occurrence of an uncertain future event. A condition may be suspensive or resolutive. (III.–1:106)

Conduct

“Conduct” means voluntary behaviour of any kind, verbal or non-verbal: it includes a single act or a number of acts, behaviour of a negative or passive nature (such as accepting something without protest or not doing something) and behaviour of a continuing or intermittent nature (such as exercising control over something).

Confidential information

“Confidential information” means information which, either from its nature or the circumstances in which it was obtained, the party receiving the information knows or could reasonably be expected to know is confidential to the other party. (II.–2:302(2))

Construction, contract for

A contract for construction is a contract under which one party, the constructor, undertakes to construct something for another party, the client, or to materially alter an existing building or other immovable structure for a client. (IV.C–3:101)

Consumer

A “consumer” means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession. (I.–1:106(1))

Consumer contract for sale

A “consumer contract for sale” is a contract for sale in which the seller is a business and the buyer is a consumer. (IV.A.–1:204)

Contract

A “contract” is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act. (II.–1:101(1))

Contractual obligation

A “contractual obligation” is an obligation which arises from a contract, whether from an express term or an implied term or by operation of a rule of law imposing an obligation on a contracting party as such.

Contractual relationship

A “contractual relationship” is a legal relationship resulting from a contract.

Co-ownership

“Co-ownership”, when created under Book VIII, means that two or more co-owners own undivided shares in the whole and each co-owner can dispose of that co-owner’s share by acting alone, unless otherwise provided by the parties. (Cf. VIII.–1:203)

Corporeal

“Corporeal”, in relation to property, means having a physical existence in solid, liquid or gaseous form.

Costs

“Costs” includes expenses.

Counter-performance

A “counter-performance” is a performance which is due in exchange for another performance.

Court

“Court” includes an arbitral tribunal.

Creditor

A “creditor” is a person who has a right to performance of an obligation, whether monetary or non-monetary, by another person, the debtor.

Damage

“Damage” means any type of detrimental effect.

Damages

“Damages” means a sum of money to which a person may be entitled, or which a person may be awarded by a court, as compensation for some specified type of damage.

Debtor

A “debtor” is a person who has an obligation, whether monetary or non-monetary, to another person, the creditor.

Default

“Default”, in relation to proprietary security, means any non-performance by the debtor of the obligation covered by the security; and any other event or set of circumstances agreed by the secured creditor and the security provider as entitling the secured creditor to have recourse to the security. (IX.–1:201(5))

Defence

A “defence” to a claim is a legal objection or a factual argument, other than a mere denial of an element which the claimant has to prove which, if well-founded, defeats the claim in whole or in part.

Delivery

“Delivery” to a person, for the purposes of any obligation to deliver goods, means transferring possession of the goods to that person or taking such steps to transfer possession as are required by the terms regulating the obligation. For the purposes of Book VIII (Acquisition and loss of ownership of goods) delivery of the goods takes place only when the transferor gives up and the transferee obtains possession of the goods: if the contract or other juridical act, court order or rule of law under which the transferee is entitled to the transfer of ownership involves carriage of the goods by a carrier or a series of carriers, delivery of the goods takes place when the transferor’s obligation to deliver is fulfilled and the carrier or the transferee obtains possession of the goods. (VIII.–2:104)

Dependent personal security

A “dependent personal security” is an obligation by a security provider which is assumed in favour of a creditor in order to secure a present or future obligation of the debtor owed to the creditor and performance of which is due only if, and to the extent that, performance of the latter obligation is due. (IV.G.–1:101(a))

Design, contract for

A contract for design is a contract under which one party, the designer, undertakes to design for another party, the client, an immovable structure which is to be constructed by or on behalf of the client or a movable or incorporeal thing or service which is to be constructed or performed by or on behalf of the client. (IV.C.-6:101)

Direct physical control

Direct physical control is physical control which is exercised by the possessor personally or through a possession-agent exercising such control on behalf of the possessor (direct possession). (VIII.–1:205)

Discrimination

“Discrimination” means any conduct whereby, or situation where, on grounds such as sex or ethnic or racial origin, (a) one person is treated less favourably than another person is, has been or would be treated in a comparable situation; or (b) an apparently neutral provision,

criterion or practice would place one group of persons at a particular disadvantage when compared to a different group of persons. (II.–2:102(1))

Distribution contract

A "distribution contract" is a contract under which one party, the supplier, agrees to supply the other party, the distributor, with products on a continuing basis and the distributor agrees to purchase them, or to take and pay for them, and to supply them to others in the distributor's name and on the distributor's behalf. (IV.E.–5:101(1))

Distributorship

A "distributorship" is the legal relationship arising from a distribution contract.

Divided obligation

An obligation owed by two or more debtors is a "divided obligation" when each debtor is bound to render only part of the performance and the creditor may require from each debtor only that debtor's part. (III.–4:102(2))

Divided right

A right to performance held by two or more creditors is a "divided right" when the debtor owes each creditor only that creditor's share and each creditor may require performance only of that creditor's share. (III.–4:202(2))

Donation, contract for

A contract for the donation of goods is a contract under which one party, the donor, gratuitously undertakes to transfer the ownership of goods to another party, the donee, and does so with an intention to benefit the donee. (IV.H.–1:101)

Durable medium

A "durable medium" means any material on which information is stored so that it is accessible for future reference for a period of time adequate to the purposes of the information, and which allows the unchanged reproduction of this information. (I.–1:107(3))

Duty

A person has a "duty" to do something if the person is bound to do it or expected to do it according to an applicable normative standard of conduct. A duty may or may not be owed to a specific creditor. A duty is not necessarily an aspect of a legal relationship. There is not necessarily a sanction for breach of a duty. All obligations are duties, but not all duties are obligations.

Economic loss

See "Loss".

Electronic

"Electronic" means relating to technology with electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

Electronic signature

An “electronic signature” means data in electronic form which are attached to, or logically associated with, other data and which serve as a method of authentication. (I.–1:108(3))

Financial assets

“Financial assets” are financial instruments and rights to the payment of money. (IX.–1:201(6))

Financial instruments

“Financial instruments” are (a) share certificates and equivalent securities as well as bonds and equivalent debt instruments, if these are negotiable (b) any other securities which are dealt in and which give the right to acquire any such financial instruments or which give rise to cash settlements, except instruments of payment (c) share rights in collective investment undertakings (d) money market instruments and (e) rights in or relating to the foregoing instruments. (IX.–1:201(7))

Franchise

A “franchise” is the legal relationship arising from a contract under which one party, the franchisor, grants the other party, the franchisee, in exchange for remuneration, the right to conduct a business (franchise business) within the franchisor’s network for the purposes of supplying certain products on the franchisee's behalf and in the franchisee's name, and whereby the franchisee has the right and the obligation to use the franchisor’s trade name or trademark or other intellectual property rights, know-how and business method. (IV.E.–4:101)

Fraudulent

A misrepresentation is fraudulent if it is made with knowledge or belief that it is false and is intended to induce the recipient to make a mistake to the recipient’s prejudice. A non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake to that person’s prejudice. (II.–7:205(2))

Fundamental non-performance

A non-performance of a contractual obligation is fundamental if (a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result or (b) it is intentional or reckless and gives the creditor reason to believe that the debtor’s future performance cannot be relied on. (III.–3:502(2))

Global security

A “global security” is a security which is assumed in order to secure all the debtor’s obligations towards the creditor or the debit balance of a current account or a security of a similar extent. (IV.G.–1:101(f)

Good faith

“Good faith” is a subjective mental attitude characterised by honesty and an absence of knowledge that an apparent situation is not the true situation.

Good faith and fair dealing

"Good faith and fair dealing" is a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question. (I.–1:103)

Goods

"Goods" means corporeal movables. It includes ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases. See also "movables".

Gross negligence

There is "gross negligence" if a person is guilty of a profound failure to take such care as is self-evidently required in the circumstances.

Handwritten signature

A "handwritten signature" means the name of, or sign representing, a person written by that person's own hand for the purpose of authentication. (I.–1:108(2))

Harassment

"Harassment" means unwanted conduct (including conduct of a sexual nature) which violates a person's dignity, particularly when such conduct creates an intimidating, hostile, degrading, humiliating or offensive environment, or which aims to do so. (II.–2:102(2))

Immovable property

"Immovable property" means land and anything so attached to land as not to be subject to change of place by usual human action.

Incomplete substitution of debtor

There is incomplete substitution of a debtor when a third person is substituted as debtor with the effect that the original debtor is retained as a debtor in case the original debtor does not perform properly. III.–5:205

Incorporeal

"Incorporeal", in relation to property, means not having a physical existence in solid, liquid or gaseous form.

Indemnify

To "indemnify" means to make such payment to a person as will ensure that that person suffers no loss.

Independent personal security

An "independent personal security" is an obligation by a security provider which is assumed in favour of a creditor for the purposes of security and which is expressly or impliedly declared not to depend upon another person's obligation owed to the creditor. (IV.G.–1:101(b))

Indirect physical control

Indirect physical control is physical control which is exercised by means of another person, a limited-right-possessor (indirect possession). (VIII.–1:205)

Individually negotiated

See "not individually negotiated" and II.–1:110.

Ineffective

"Ineffective" in relation to a contract or other juridical act means having no effect, whether that state of affairs is temporary or permanent, general or restricted.

Insolvency proceeding

An "insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of a person who is, or who is believed to be, insolvent are subject to control or supervision by a court or other competent authority for the purpose of reorganisation or liquidation.

Intangibles

"Intangibles", in relation to proprietary security, means incorporeal assets and includes uncertificated and indirectly held securities and the undivided share of a co-owner in corporeal assets or in a bulk or a fund. (IX.–1:201(8))

Interest

"Interest" means simple interest without any assumption that it will be capitalised from time to time.

Invalid

"Invalid" in relation to a juridical act or legal relationship means that the act or relationship is void or has been avoided.

Joint obligation

An obligation owed by two or more debtors is a "joint obligation" when all the debtors are bound to render the performance together and the creditor may require it only from all of them. (III.–4:102(3))

Joint right

A right to performance held by two or more creditors is a "joint right" when the debtor must perform to all the creditors and any creditor may require performance only for the benefit of all. (III.–4:202(3))

Juridical act

A "juridical act" is any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral. (II.–1:101(2))

Keeper

A keeper, in relation to an animal, vehicle or substance, is the person who has the beneficial use or physical control of it for that person's own benefit and who exercises the right to control it or its use.

Lease

A "lease" is the legal relationship arising from a contract under which one party, the lessor, undertakes to provide the other party, the lessee, with a temporary right of use in exchange for rent. (IV.B.–1:101)

Limited proprietary rights

Limited proprietary rights are such rights of the following character as are characterised or treated as proprietary rights by any provision of these model rules or by national law:– (a) security rights (b) rights to use (c) rights to acquire (including a right to acquire in the sense of VIII.–2:307 (Contingent right of transferee under retention of ownership)) and (d) trust-related rights. (VIII.–1:204)

Limited-right-possessor

A "limited-right-possessor", in relation to goods, is a person who exercises physical control over the goods either (a) with the intention of doing so in that person's own interest, and under a specific legal relationship with the owner-possessor which gives the limited-right-possessor the right to possess the goods or (b) with the intention of doing so to the order of the owner-possessor, and under a specific contractual relationship with the owner-possessor which gives the limited-right-possessor a right to retain the goods until any charges or costs have been paid by the owner-possessor. (VIII.–1:207)

Loan contract

A loan contract is a contract by which one party, the lender, is obliged to provide the other party, the borrower, with credit of any amount for a definite or indefinite period (the loan period), in the form of a monetary loan or of an overdraft and by which the borrower is obliged to repay the money obtained under the credit, whether or not the borrower is obliged to pay interest or any other kind of remuneration the parties have agreed upon. (IV.F.–1:101(2))

Loss

"Loss" includes economic and non-economic loss. "Economic loss" includes loss of income or profit, burdens incurred and a reduction in the value of property. "Non-economic loss" includes pain and suffering and impairment of the quality of life. (III.–3:701(3) and VI.–2:101(4))

Mandate

The "mandate" of an agent is the authorisation and instruction given by the principal, as modified by any subsequent direction, in relation to the facilitation, negotiation or conclusion of a contract or other juridical act with a third party. (IV.D.–1:102(1)(a))

Mandate for direct representation

A “mandate for direct representation” is a mandate under which the agent is to act in the name of the principal, or otherwise in such a way as to indicate an intention to affect the principal’s legal position directly. (IV.D.–1:102(1)(d))

Mandate for indirect representation

A “mandate for indirect representation” is a mandate under which the agent is to act in the agent’s own name or otherwise in such a way as not to indicate an intention to affect the principal’s legal position directly. (IV.D.–1:102(1)(e))

Merger of debts

A “merger of debts” means that the attributes of debtor and creditor are united in the same person in the same capacity.

Merger clause

A “merger clause” is a term in a contract document stating that the document embodies all the terms of the contract. (II.–4:104)

Monetary loan

A monetary loan is a fixed sum of money which is lent to the borrower and which the borrower agrees to repay either by fixed instalments or by paying the whole sum at the end of the loan period. (IV.F.–1:101(3))

Motor vehicle

“Motor vehicle” means any vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled. (VI.–3:205(2))

Movables

“Movables” means corporeal and incorporeal property other than immovable property.

Negligence

There is “negligence” if a person does not meet the standard of care which could reasonably be expected in the circumstances.

Non-economic loss

See “Loss”.

Non-performance

“Non-performance”, in relation to an obligation, means any failure to perform the obligation, whether or not excused. It includes delayed performance and defective performance. (III.–1:101(3))

Notice

“Notice” includes the communication of information or of a juridical act. (I.–1:105)

Not individually negotiated

A term supplied by one party is not individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms. (II.–1:110)

Obligation

An obligation is a duty to perform which one party to a legal relationship, the debtor, owes to another party, the creditor. (III.–1:101(1))

Overdraft facility

An overdraft facility is an agreement whereby a fluctuating, limited credit is made available on an account. (IV.F.–1:101(4))

Owner-possessor

An "owner-possessor", in relation to goods, is a person who exercises physical control over the goods with the intention of doing so as, or as if, an owner. ((VIII.–1:206)

Ownership

"Ownership" is the most comprehensive right a person, the owner, can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property. ((VIII.–1:202)

Performance

"Performance", in relation to an obligation, is the doing by the debtor of what is to be done under the obligation or the not doing by the debtor of what is not to be done. (III.–1:101(2))

Person

"Person" means a natural or legal person.

Physical control

"Physical control", in relation to goods, means direct physical control or indirect physical control. (Cf. VIII.–1:205)

Possession

Possession, in relation to goods, means having physical control over the goods. (VIII.–1:205)

Possession-agent

A "possession-agent", in relation to goods, is a person (such as an employee) who exercises direct physical control over the goods on behalf of an owner-possessor or limited-right-possessor (without the intention and specific legal relationship required for that person to be a limited-right-possessor); and to whom the owner-possessor or limited-right-possessor may give binding instructions as to the use of the goods in the interest of the owner-possessor or limited-right-possessor. A person is also a possession-agent where that person is accidentally in a position to exercise, and does exercise, direct physical control over the goods for an owner-possessor or limited-right-possessor. (VIII.–1:208)

Possessory security right

A “possessory security right” is a security right that requires possession of the encumbered corporeal asset by the secured creditor or another person (except the debtor) holding for the secured creditor. (IX.–1:201(10))

Prescription

“Prescription”, in relation to the right to performance of an obligation, is the legal effect whereby the lapse of a prescribed period of time entitles the debtor to refuse performance.

Presumption

A “presumption” means that the existence of a known fact or state of affairs allows the deduction that something else should be held true, until the contrary is demonstrated.

Price

The “price” is what is due by the debtor under a monetary obligation, in exchange for something supplied or provided, expressed in a currency which the law recognises as such.

Proceeds

“Proceeds”, in relation to proprietary security, is every value derived from an encumbered asset, such as value realised by sale, collection or other disposition; damages or insurance payments in respect of defects, damage or loss; civil and natural fruits, including distributions; and proceeds of proceeds. (IX.–1:201(11))

Processing, contract for

A contract for processing is a contract under which one party, the processor, undertakes to perform a service on an existing movable or incorporeal thing or to an immovable structure for another party, the client (except where the service is construction work on an existing building or other immovable structure). (IV.C.–4:101)

Producer

“Producer” includes, in the case of something made, the maker or manufacturer; in the case of raw material, the person who abstracts or wins it; and in the case of something grown, bred or raised, the grower, breeder or raiser. A special definition applies for the purposes of VI.–3:204.

Property

“Property” means anything which can be owned: it may be movable or immovable, corporeal or incorporeal.

Proprietary security

A “proprietary security” covers security rights in all kinds of assets, whether movable or immovable, corporeal or incorporeal. (IV.G.–1:101(g))

Proprietary security, contract for

A “contract for proprietary security” is a contract under which a security provider undertakes to grant a security right to the secured creditor; or a secured creditor is entitled to retain a security right when transferring ownership; or a seller, lessor or other supplier of assets is entitled to retain ownership of the supplied assets in order to secure its rights to performance. (IX.–1:201(4))

Public holiday

A “public holiday” with reference to a member state, or part of a member state, of the European Union means any day designated as such for that state or part in a list published in the official journal. (I.–1:110(9))

Ratify

“Ratify” means confirm with legal effect.

Reasonable

What is “reasonable” is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices. (I.–1:104)

Reciprocal

An obligation is reciprocal in relation to another obligation if (a) performance of the obligation is due in exchange for performance of the other obligation; (b) it is an obligation to facilitate or accept performance of the other obligation; or (c) it is so clearly connected to the other obligation or its subject matter that performance of the one can reasonably be regarded as dependent on performance of the other. (III.–1:101(4))

Recklessness

A person is “reckless” if the person knows of an obvious and serious risk of proceeding in a certain way but nonetheless voluntarily proceeds without caring whether or not the risk materialises.

Rent

“Rent” is the money or other value which is due in exchange for a temporary right of use. (IV.B.–1:101)

Reparation

“Reparation” means compensation or another appropriate measure to reinstate the person suffering damage in the position that person would have been in had the damage not occurred. (VI.–6:101)

Representative

A “representative” is a person who has authority to affect the legal position of another person, the principal, in relation to a third party by acting in the name of the principal or otherwise in such a way as to indicate an intention to affect the principal’s legal position directly. (II.–6:102(1))

Requirement

A “requirement” is something which is needed before a particular result follows or a particular right can be exercised.

Resolutive

A condition is “resolutive” if it causes a legal relationship or effect to come to an end when the condition is satisfied. (III.–1:106)

Retention of ownership device

There is a retention of ownership device when ownership is retained by the owner of supplied assets in order to secure a right to performance of an obligation. (IX.–1:103)

Revocation

“Revocation”, means (a) in relation to a juridical act, its recall by a person or persons having the power to recall it, so that it no longer has effect and (b) in relation to something conferred or transferred, its recall, by a person or persons having power to recall it, so that it comes back or must be returned to the person who conferred it or transferred it.

Right

“Right”, depending on the context, may mean (a) the correlative of an obligation or liability (as in “a significant imbalance in the parties' rights and obligations arising under the contract”); (b) a proprietary right (such as the right of ownership); (c) a personality right (as in a right to respect for dignity, or a right to liberty and privacy); (d) a legally conferred power to bring about a particular result (as in “the right to avoid” a contract); (e) an entitlement to a particular remedy (as in a right to have performance of a contractual obligation judicially ordered) or (f) an entitlement to do or not to do something affecting another person’s legal position without exposure to adverse consequences (as in a “right to withhold performance of the reciprocal obligation”).

Sale, contract for

A contract for the “sale” of goods or other assets is a contract under which one party, the seller, undertakes to another party, the buyer, to transfer the ownership of the goods or other assets to the buyer, or to a third person, either immediately on conclusion of the contract or at some future time, and the buyer undertakes to pay the price. (IV.A.–1:202)

Security right in movable asset

A security right in a movable asset is any limited proprietary right in the asset which entitles the secured creditor to preferential satisfaction of the secured right from the encumbered asset. (IX.–1:102(1))

Services, contract for

A contract for services is a contract under which one party, the service provider, undertakes to supply a service to the other party, the client. (IV.C.–1:101)

Set-off

"Set-off" is the process by which a person may use a right to performance held against another person to extinguish in whole or in part an obligation owed to that person. (III.–6:101)

Signature

"Signature" includes a handwritten signature, an electronic signature or an advanced electronic signature. (I.–1:108(2))

Solidary obligation

An obligation owed by two or more debtors is a "solidary obligation" when all the debtors are bound to render one and the same performance and the creditor may require it from any one of them until there has been full performance. (III.–4:102(1))

Solidary right

A right to performance held by two or more creditors is a "solidary right" when any of the creditors may require full performance from the debtor and the debtor may render performance to any of the creditors. (III.–4:202(1))

Standard terms

"Standard terms" are terms which have been formulated in advance for several transactions involving different parties, and which have not been individually negotiated by the parties. (II.–1:109)

Storage, contract for

A contract for storage is a contract under which one party, the storer, undertakes to store a movable or incorporeal thing for another party, the client. (IV.C.–5:101)

Subrogation

"Subrogation", in relation to rights, is the process by which a person who has made a payment or other performance to another person acquires by operation of law that person's rights against a third person.

Substitution of debtor

"Substitution" of a debtor is the process whereby, with the agreement of the creditor, a third party is substituted completely or incompletely for the debtor, the contract remaining in force. (III.–5:202) See also "complete substitution of debtor" and "incomplete substitution of debtor".

Supply

To "supply" goods or other assets means to make them available to another person, whether by sale, gift, barter, lease or other means: to "supply" services means to provide them to another person, whether or not for a price. Unless otherwise stated, "supply" covers the supply of goods, other assets and services.

Suspensive

A condition is “suspensive” if it prevents a legal relationship or effect from coming into existence until the condition is satisfied. (III.–1:106)

Tacit prolongation

“Tacit prolongation” is the process whereby, when a contract provides for continuous or repeated performance of obligations for a definite period and the obligations continue to be performed by both parties after that period has expired, the contract becomes a contract for an indefinite period, unless the circumstances are inconsistent with the tacit consent of the parties to such prolongation. (III.–1:111)

Term

“Term” means any provision, express or implied, of a contract or other juridical act, of a law, of a court order or of a legally binding usage or practice: it includes a condition.

Termination

“Termination”, in relation to an existing right, obligation or legal relationship, means bringing it to an end with prospective effect except in so far as otherwise provided.

Textual form

In “textual form”, in relation to a statement, means expressed in alphabetical or other intelligible characters by means of any support which permits reading, recording of the information contained in the statement and its reproduction in tangible form. (I.–1:107(2))

Transfer of contractual position

“Transfer of contractual position” is the process whereby, with the agreement of all three parties, a new party replaces an existing party to a contract, taking over the rights, obligations and entire contractual position of that party. (III.–5:302)

Treatment, contract for

A contract for treatment is a contract under which one party, the treatment provider, undertakes to provide medical treatment for another party, the patient, or to provide any other service in order to change the physical or mental condition of a person. (IV.C.–8:101)

Trust

A “trust” is a legal relationship in which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accordance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes. (X.–1:201)

Trustee

A “trustee” is a person in whom a trust fund becomes or remains vested when the trust is created or subsequently on or after appointment and who has the obligation set out in the definition of “trust” above. (X.–1:203(2))

Truster

A “truster” is a person who constitutes or intends to constitute a trust by juridical act. (X.–1:203(1))

Unjustified enrichment

An “unjustified enrichment” is an enrichment which is not legally justified.

Valid

“Valid”, in relation to a juridical act or legal relationship, means that the act or relationship is not void and has not been avoided.

Void

“Void”, in relation to a juridical act or legal relationship, means that the act or relationship is automatically of no effect from the beginning.

Voidable

“Voidable”, in relation to a juridical act or legal relationship, means that the act or relationship is subject to a defect which renders it liable to be avoided and hence rendered retrospectively of no effect.

Withdraw

A right to “withdraw” from a contract or other juridical act is a right, exercisable only within a limited period, to terminate the legal relationship arising from the contract or other juridical act, without having to give any reason for so doing and without incurring any liability for non-performance of the obligations arising from that contract or juridical act. (II.–5:101 to II.–5:105)

Withholding performance

“Withholding performance”, as a remedy for non-performance of a contractual obligation, means that one party to a contract may decline to render due counter-performance until the other party has tendered performance or has performed. (III.–3:401)

Working days

“Working days” means all days other than Saturdays, Sundays and public holidays. (I.–1:110(9)(b))

Writing

In “writing” means in textual form, on paper or another durable medium and in directly legible characters. (I.–1:107(1)